Taxes Crossing Borders (and Tax Professors Too)

Maastricht University

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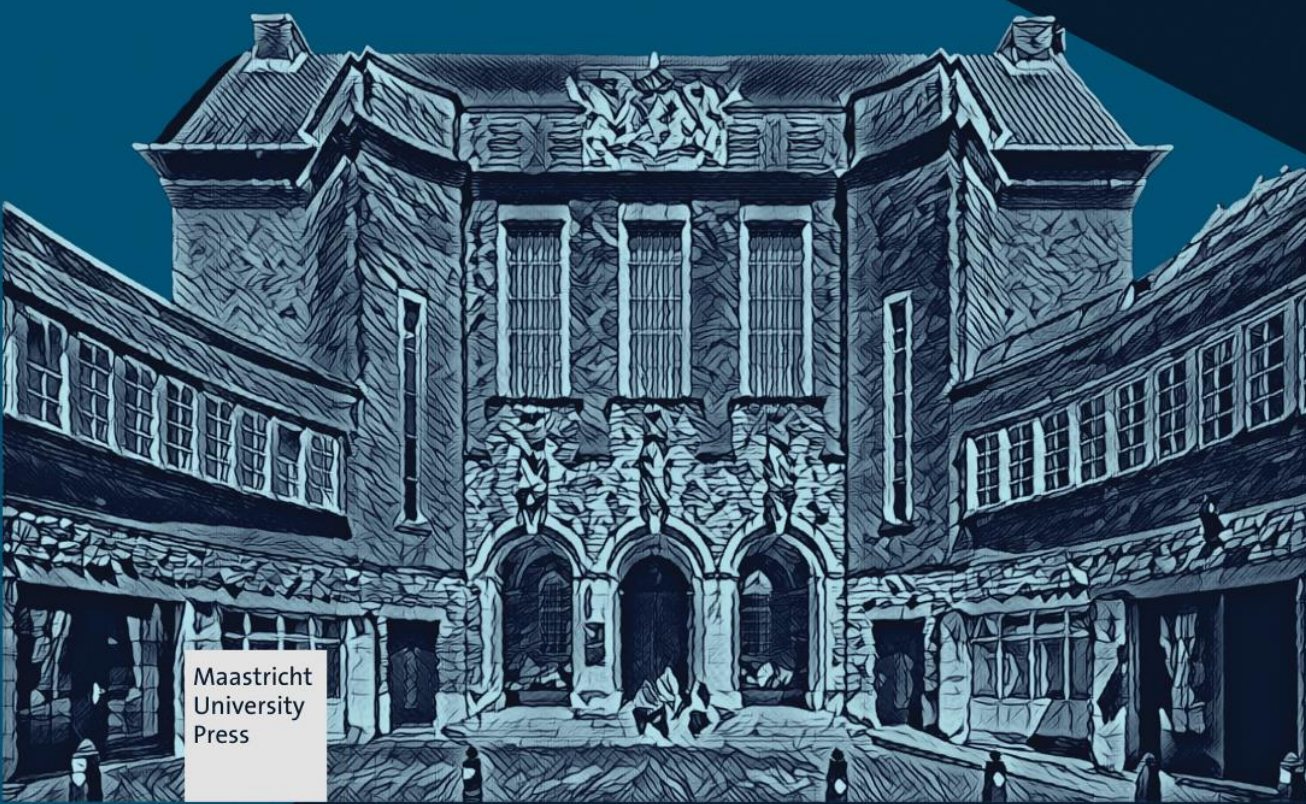
Liber Amicorum Prof. Dr R.G. Prokisch



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PREFACE

This book was presented to Professor Dr Rainer Prokisch on the occasion of his retirement from the chair in International Tax Law at Maastricht University. He arrived at Maastricht in 2000 and he was twice the Head of the Department of Tax Law for a bit over 10 years in total. With Rainer Prokisch leaving, we look back on a period during which the Department of Tax Law launched its successful LL.M Programme in International & European Tax Law and became far more international. When Rainer Prokisch entered the department, he was the first foreigner in any academic position, but in the 22 years that followed, we have been joined by colleagues from Argentina, Brazil, Chile, Colombia, Estonia, Germany, Italy, India, Poland, Portugal, Romania and Spain. We would like to thank Professor Prokisch for his contribution to these team efforts that shaped our department's international and European ambitions.

The editors have brought together a quite varied liber amicorum, as the contributions included in this book will show. In line with the Maastricht tradition, authors have been given a choice to write their contribution either in English or Dutch, whatever suited their topic best. The central theme, of course, was international tax law and the interaction and influences between tax jurisdictions at large. At the end of this book, you will also find some personal narratives by some (former) colleagues and professors' emeriti from abroad who share their views on their history with Professor Prokisch.

On behalf of the Department of Tax Law and the Maastricht Centre for Taxation, I would like to thank the various authors for their endeavors and I would like to praise the editors Ms Narin Kerinc LL.M., Dr Jasper Korving and Dr Fernando Souza de Man for their initiative.

Contributions have been updated until January 2022 unless otherwise indicated. This book has been made available open access as part of a pilot project of Maastricht University Press. We thank Ron Aardening and Michel Saive for their assistance with this effort to make these contributions more accessible to a broader audience in what is about to become an academic best practice also in the legal domain.

Maastricht, October 2022
Raymond Luja

VERREKENPRIJZEN BIJ HANDELINGEN TUSSEN HOOFDHUIS EN VASTE INRICHTING

Dr. J.H.M. Arts

1. Inleiding

In deze bijdrage ga ik in op de toepassing van de zelfstandigheidsfictie voor de bepaling van de winst van een vaste inrichting. Aanleiding is het arrest van het Hof van Justitie van de Europese Unie (HvJ) in de zaak Impresa Pizzarotti & C SPA Italia Sucursala Cluj, verkort Pizzarotti Italia.[1] Het arrest betrof een prejudiciële vraag van een rechter in Roemenië in verband met een geschil tussen de Roemeense belastingdienst en een Italiaanse vennootschap over een verhoging van de winst van de vaste inrichting van deze laatste in Roemenië. De Roemeense belastingdienst had deze winst op grond van de zelfstandigheidsfictie in de Roemeense belastingwet verhoogd met een rente "at arm's length" over een fictieve lening tussen de vaste inrichting en het hoofdhuis. Omdat volgens de Roemeense belastingwet alleen in grensoverschrijdende situaties verrekenprijscorrecties mogelijk zijn, wilde de Roemeense rechter van het HvJ weten of de Roemeense regeling in strijd is met de in art. 49 VwEU neergelegde vrijheid van vestiging dan wel de in art. 63 VwEU neergelegde vrijheid van kapitaalverkeer.

De toepassing van de in de Roemeense belastingwet opgenomen zelfstandigheidsfictie roept de vraag op in hoeverre bij de bepaling van de winst van een vaste inrichting rekening kan worden gehouden met fictieve vergoedingen voor handelingen tussen haar en het hoofdhuis, meer in het bijzonder financiële handelingen. Op die vraag ga ik in deze bijdrage in.

Ik begin met een bespreking van het arrest en de relatie ervan met eerdere rechtspraak van het HvJ. Vervolgens behandel ik de hiervoor naar aanleiding van het arrest opgeworpen vraag over de toepassing van de zelfstandigheidsfictie. Daarna ga ik nog in op enige Europeesrechtelijke vragen voor de bepaling van de winst van een vaste inrichting die door de casus van het arrest worden opgeroepen. Ik sluit af met een samenvatting.

[1] HvJ 8 oktober 2020, nr. C-558/19, ECLI:EU:C:2020:806

2. Het arrest HvJ 8 oktober 2020, nr. C-558/19 (Pizzarotti Italia)

2.1 Het arrest

Impresa Pizzarotti & C SPA Italia Sucursala Cluj is een vaste inrichting in Roemenië in de stad Cluj[2] van de Italiaanse vennootschap Impresa Pizzarotti & C SPA.[3] Vanuit de vaste inrichting in Roemenië wordt geld overgemaakt naar het Italiaanse hoofdhuis.[4] Ter zake van deze overboeking worden tussen de vaste inrichting in Roemenië en het hoofdhuis in Italië afspraken gemaakt die worden vastgelegd in "leningsovereenkomsten", een van 6 februari 2012 en een van 9 maart 2012. Op grond van deze "leningsovereenkomsten" zal het hoofdhuis het geld dat naar haar is overgemaakt, binnen een jaar weer "terugbetalen". De "leningsovereenkomsten" voorzien in de mogelijkheid tot verlenging. Beide "leningen" zijn op 9 april 2014 volledig "terugbetaald". De "leningsovereenkomsten" bevatten geen rentebeding.

Bij een controle merkt de Roemeense belastingdienst de "leningen" als inkomsten genererende transacties aan. Hij verhoogt daarom de winst van de vaste inrichting met een over de "leningen" te ontvangen rente "at arm's length". Deze correctie berust op de verrekenprijsbepalingen in de Roemeense belastingwetgeving, volgens welke bij transacties tussen ingezetenen en met hen verbonden niet-ingezetenen voor de vaststelling van de in Roemenië te belasten winst de in aanmerking te nemen vergoedingen gecorrigeerd kunnen worden naar een niveau "at arm's length". Deze bepalingen zijn uitdrukkelijk ook van toepassing op handelingen tussen een vaste inrichting en haar hoofdhuis. De Roemeense belastingwet voorziet niet in een verrekenprijscorrectie bij handelingen tussen de vestiging van een ingezetene en een andere vestiging van die ingezetene in Roemenië. Volgens Impresa Pizzarotti & C SPA is dit verschil tussen zuiver nationale en grensoverschrijdende situaties in strijd met de in art. 49 VwEU opgenomen vrijheid van vestiging dan wel de in art. 63 VwEU opgenomen vrijheid van kapitaalverkeer. In de beroepszaak tegen de correctie stelt de Roemeense rechter hierover een prejudiciële vraag aan het HvJ.

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[2] Sucursala is het Roemeense woord voor filiaal.

[3] In het arrest wordt de vaste inrichting (filiaal) in Roemenië verkort Impresa Pizzarotti genoemd en het Italiaanse hoofdhuis Pizzarotti Italia.

[4] In het arrest wordt Pizzarotti Italia, het Italiaanse hoofdhuis, consequent aangeduid als moedermaatschappij. Dit is nogal verwarrend. Dat de prejudiciële vraag van de Roemeense rechter betrekking heeft op een vaste inrichting, blijkt echter duidelijk uit haar formulering, alsmede uit de feiten en het in het arrest weergegeven toepasselijke Roemeense recht.

Het HvJ stelt eerst vast dat de vraag alleen de vrijheid van vestiging betreft. Vervolgens antwoordt het dat het verschil in behandeling geen schending van die vrijheid vormt, omdat de doelstelling van de regeling legitiem is en het middel proportioneel. Het HvJ acht de doelstelling van de Roemeense verrekenprijsbepalingen in gevallen zoals het voorgelegde legitiem, omdat daarmee wordt beoogd te voorkomen dat winst aan de belastingheffing in de staat waarin de vaste inrichting is gelegen wordt onttrokken door middel van kunstmatige constructies, zijnde het niet bedingen van een marktconforme tegenprestatie. Het middel, zijnde een correctie van de winst van de vaste inrichting met een bedrag ter grootte van het verschil tussen een marktconforme vergoeding en de daadwerkelijk betaalde vergoeding, is ook proportioneel wanneer daarbij de mogelijkheid tot het leveren van tegenbewijs wordt geboden.

2.2 Het belang van het arrest

Uit het arrest volgt dat een lidstaat verrekenprijscorrecties mag beperken tot grensoverschrijdende situaties. Hoewel het arrest Pizzarotti Italia een verrekenprijscorrectie tussen een vaste inrichting en haar hoofdhuis betreft, geeft het geen aanleiding om te veronderstellen dat de beslissing in het arrest enkel tot zulke situaties beperkt is. De beslissing geldt evenzeer voor andere dan financiële handelingen en voor andere handelingen dan die tussen een vaste inrichting en haar hoofdhuis in het buitenland. Zij geldt ook voor rechtshandelingen (transacties) tussen verbonden lichamen. Een EU-lidstaat mag verrekenprijscorrecties alleen toepassen bij feitelijke handelingen of rechtshandelingen in grensoverschrijdende situaties en ze achterwege laten in binnenlandse situaties. De belastingplichtige moet in dit geval wel de mogelijkheid hebben om aan te tonen dat het niet hanteren van een verrekenprijs of van een niet-marktconforme verrekenprijs in de grensoverschrijdende situatie niet berust op fiscale motieven. Zo'n niet-fiscaal motief kan bijvoorbeeld zijn een concernbelang, ander dan een fiscaal belang. Als de belastingplichtige slaagt in het leveren van het tegenbewijs, moet ook in een grensoverschrijdende situatie een verrekenprijscorrectie achterwege blijven.

Het arrest sluit aan bij eerdere rechtspraak van het HvJ, waarnaar ook wordt verwezen, te weten:
HvJ 21 januari 2010, nr. C-311/08, ECLI:EU:C:2010:26 (SGI);
HvJ 31 mei 2018, nr. C-382/16, ECLI:EU:C:2018:366 (Hornbach Baumarkt).

In deze arresten besliste het HvJ, net zoals in het onderhavige arrest, dat een winstcorrectie bij transacties tussen gelieerde ondernemingen die wel in grensoverschrijdende maar niet in zuiver nationale situaties wordt toegepast, geen schending van de vrijheid van vestiging oplevert. De rechtvaardiging hiervoor is dat in zuiver nationale situaties, anders dan in grensoverschrijdende situaties, het achterwege laten van een winstcorrectie bij transacties tussen gelieerde ondernemingen niet tot verlies van belastinginkomsten voor de staat hoeft te leiden. Aan deze rechtvaardiging ligt de veronderstelling ten grondslag dat de onzakelijke transactie is ingegeven door fiscale motieven. De belastingplichtige moet daarom de mogelijkheid hebben om aan te tonen dat de onzakelijkheid is ingegeven door andere motieven. Daarbij is van belang dat een aandeelhoudersmotief niet zonder meer meebrengt dat sprake is van een fiscaal motief; zie het arrest Hornbach Baumarkt. Een onzakelijk motief mag daarom, anders dan waar in Nederland gemeenlijk van uitgegaan wordt, niet gelijkgesteld worden met een fiscaal motief.

2.3 De toepassing in het arrest van een verrekenprijscorrectie op een feitelijke handeling

Het arrest Pizzarotti Italia ging over de toepassing van een verrekenprijscorrectie bij een feitelijke handeling tussen een vaste inrichting en haar hoofdhuis in het buitenland. Het betrof derhalve niet een transactie tussen gelieerde partijen, dat wil zeggen juridisch zelfstandige entiteiten, maar een feitelijke handeling binnen een en dezelfde juridische entiteit. Van een rechtshandeling (transactie) kan in dit geval geen sprake zijn. Het gaat om een feitelijke handeling binnen het vermogen van een en dezelfde juridische entiteit. Een zelfstandigheidsfictie, zoals in de Roemeense belastingwetgeving, maakt dit niet anders. Moet voor de feitelijke handeling een verrekenprijs worden gehanteerd, dan gaat het steeds om een fictieve vergoeding voor een fictieve rechtshandeling.

Het lijkt er in het geval van het arrest Pizzarotti Italia op dat de Roemeense belastingdienst de vaste inrichting niet alleen fiscaal maar ook juridisch als een zelfstandige entiteit zag, dat wil zeggen als een rechtspersoon. Ook Impresa Pizzarotti & C SPA lijkt daarvan uit te gaan, gezien de vastlegging van de tussen hoofdhuis en vaste inrichting gemaakte afspraken in documenten met het opschrift “leningsovereenkomst”.[5] De kwalificatie van een vaste inrichting als

5 Ik heb zelf in de praktijk regelmatig ervaren dat juristen moeite hebben met het fiscale concept vaste inrichting. Zij gingen dan contracten maken tussen een hoofdhuis in Nederland en een vaste inrichting in

een juridisch zelfstandige entiteit is onjuist. Een vaste inrichting is enkel een fiscaal concept. Zij kan geen zelfstandige juridische entiteit zijn. Zou zij dat wel zijn, dan is zij een dochtermaatschappij. Er gelden dan, ook voor de belastingheffing, andere regels. Of sprake is van een zelfstandige juridische entiteit (rechtssubject) wordt bepaald door het privaatrecht. Het belastingrecht sluit hierbij aan.

In de procedure voor het HvJ was de kwalificatie van de overboekingen vanuit de vaste inrichting in Roemenië naar het hoofdhuis in Italië als inkomsten genererende transacties een gegeven. Het HvJ had enkel de vraag te beantwoorden of de verrekenprijscorrecties die de Roemeense belastingdienst in verband met die inkomsten genererende transacties aanbracht een schending van de vrijheid van vestiging vormde. Omdat in de procedure voor het HvJ de kwalificatie van de overboekingen als transacties vaststond, kan uit het arrest niet de conclusie worden getrokken dat ook het HvJ de overboekingen als transacties (rechtshandelingen) beschouwde. Het arrest zegt daarom niets over hoe feitelijke handelingen tussen een vaste inrichting en haar hoofdhuis voor de toepassing van het Europese recht moeten of mogen worden gekwalificeerd, en daarmee over hoe het "at arms' length"- beginsel onder het Europese recht dient te worden toegepast.

3. De bepaling van de winst van een vaste inrichting volgens de zelfstandigheidsfictie

Bij de zelfstandigheidsfictie wordt de winst van een vaste inrichting bepaald alsof deze een zelfstandige onderneming is die als zodanig handelt met het hoofdhuis. In het huidige commentaar bij art. 7 OESO Modelverdrag wordt voor de bepaling van de winst van een vaste inrichting uitgegaan van deze methode, de "functionally separate entity approach". Ook in Nederland wordt voor de bepaling van de winst van een vaste inrichting uitgegaan van de zelfstandigheidsfictie.[6]

Goed voor ogen moet worden gehouden dat de zelfstandigheidsfictie een fictie is, die enkel en alleen geldt voor de belastingheffing. Zij heeft geen juridische werking. Dat brengt mee dat er juridisch geen onderscheid is tussen het vermogen van het rechtssubject (natuurlijke persoon of rechtspersoon) aan

het buitenland die zij als een zelfstandige juridische entiteit (dochtermaatschappij) beschouwden. Het lijkt erop dat dit in het geval van het arrest Pizzarotti Italia ook gebeurd is.

[6] Zie het besluit van de Staatssecretaris van Financiën van 15 januari 2011, IFZ2010/457M, Stcrt. 2011, 1375.

wie het vermogen toebehoort, in het binnenland (vaste inrichting) of in het buitenland (hoofdhuis). Het vermogen van een vaste inrichting is ook geen afgescheiden vermogen ten opzichte van het vermogen van het hoofdhuis. Omdat er geen sprake is van afgescheiden vermogens kunnen er tussen een vaste inrichting en haar hoofdhuis geen vorderingen en schulden bestaan en kunnen zij geen rechtshandelingen met elkaar aangaan. Dit stelt grenzen aan de zelfstandigheidsfictie.

Voor de bepaling van de winst van een vaste inrichting dienen allereerst de bezittingen en de schulden van het rechtssubject (de belastingplichtige) te worden gealloceerd. Vastgesteld moet worden welke bezittingen en welke schulden aan het vermogen van de vaste inrichting kunnen worden toegerekend. Bij bezittingen ligt het voor de hand om dit te doen aan de hand van het gebruik. Bezittingen die voor de activiteiten van de vaste inrichting worden gebruikt, moeten tot het vermogen van die vaste inrichting worden gerekend. Hetzelfde geldt voor schulden die zijn aangegaan om bezittingen of activiteiten van de vaste inrichting te financieren. Het maakt daarbij niet uit waar de schuldeiser gevestigd is. Niet relevant voor de toerekening van een schuld is of de belastingplichtige de schuld is aangegaan bij een schuldeiser in het land waarin hijzelf woont of gevestigd is, of bij een schuldeiser in het land waarin de vaste inrichting gelegen is. Ook niet relevant voor de toerekening van een schuld is waar een onderpand voor die schuld, zich bevindt. Een belastingplichtige kan voor een schuld elk goed dat behoort tot zijn vermogen als onderpand geven, ongeacht waar het zich bevindt. Ook kan een schuldeiser, als een schuld aan hem niet betaald wordt, alle goederen van de schuldenaar uitwinnen, ongeacht waar deze zich bevinden. Er is zodoende geen verschil in de kredietwaardigheid tussen een vaste inrichting en haar hoofdhuis.[7]

Een belastingplichtige kan aan een schuldeiser in zijn woon- of vestigingsstaat een recht van hypotheek geven op een onroerende zaak die wordt gerekend tot het vermogen van een vaste inrichting van hem in een andere staat, voor een schuld ten behoeve van activiteiten in zijn woon- of vestigingsstaat. In dit geval moet de schuld tot het vermogen van het hoofdhuis worden gerekend en niet tot het vermogen van de vaste inrichting. De rentelasten behoren in mindering te komen op het in de woon- of vestigingsstaat van de belastingplichtige te belasten inkomen en niet op de winst van de vaste inrichting. De vraag die de zelfstandigheidsfictie in dit geval meebrengt, is of de winst van de vaste

[7] Vergelijk de in dezen ingenomen standpunten in § 2.1 en § 2.2 van het besluit van de Staatssecretaris van Financiën van 15 januari 2011, IFZ2010/457M, Stcrt. 2011, 1375.

inrichting moet worden verhoogd met een borgstellingsvergoeding die een onafhankelijke derde zou hebben bedongen voor het geven van een derdenhypotheek. Om die vraag te kunnen beantwoorden moet eerst de vraag beantwoord worden of een onafhankelijke derde zich onder dezelfde omstandigheden borg zou hebben gesteld. Als dit niet zo is, is geen borgstellingsvergoeding "at arm's length" te bepalen. Er kan dan voor de bepaling van de winst van de vaste inrichting geen borgstellingsvergoeding in aanmerking worden genomen. We lopen hier aan tegen de grenzen van de zelfstandigheidsfictie. Omdat er geen rechtshandeling tussen onafhankelijke partijen te vinden is waarmee de gefingeerde rechtshandeling – in het onderhavige geval eruit bestaande dat de vestiging van een hypotheek door de belastingplichtige voor een schuld van hemzelf de vestiging van een hypotheek door een derde voor een schuld van de belastingplichtige is –, is er geen fictieve vergoeding "at arm's length" vast te stellen met als gevolg dat er voor de bepaling van de winst van de vaste inrichting geen in aanmerking te nemen fictieve vergoeding is.

Omdat tussen een vaste inrichting en haar hoofdhuis geen rechtshandelingen mogelijk zijn, moet allereerst worden vastgesteld of tussen beide een rechtshandeling kan worden gefingeerd, vervolgens, als dit zo is, welke rechtshandeling dat dan is, en ten slotte wat een zakelijke vergoeding is voor de rechtshandeling die wordt gefingeerd. Om een rechtshandeling tussen een vaste inrichting en haar hoofdhuis te kunnen fingeren is een feitelijke handeling van de belastingplichtige nodig. Die handeling moet dan worden gelijkgesteld met de rechtshandeling waarmee ze het meest te vergelijken is. Dit is dan de fictieve rechtshandeling tussen de vaste inrichting en haar hoofdhuis, waarvoor de vergoeding "at arm's length" moet worden vastgesteld.

Voor de vaststelling of er een met een rechtshandeling gelijk te stellen handeling tussen een vaste inrichting en haar hoofdhuis is en, als dit zo is, met welke rechtshandeling die handeling dan het meest te vergelijken is, komt aan een schriftelijk document waarin de handeling wordt vastgelegd geen betekenis toe. Dit kan geen overeenkomst zijn, omdat de handeling slechts door één persoon wordt verricht. Het is ook geen eenzijdige rechtshandeling, zoals een testament, omdat de handeling geen rechtsgevolgen heeft. Het gaat slechts om een handeling binnen het vermogen van de persoon die de handeling verricht. Voor de toepassing van de zelfstandigheidsfictie om de winst van een vaste inrichting te bepalen moet de verrichte handeling worden vergeleken met de rechtshandeling waarmee zij de meeste overeenkomst heeft. Zo zijn in de casus van het arrest Pizzarotti Italia voor de beoordeling met welke

rechtshandeling de overboekingen moeten worden gelijkgesteld, de opgemaakte “leningsovereenkomsten” irrelevant. De vraag in de casus van dat arrest is: moeten de overboekingen worden gelijkgesteld met geldleningen of met een onttrekking gevolgd door een kapitaalstorting bij terugboeking? In het eerste geval kan, zoals de Roemeense belastingdienst had gedaan, bij de bepaling van de winst van de vaste inrichting met een fictieve rente “at arm’s length” rekening worden gehouden; in het laatste geval niet. Er is dan in het geheel geen reden voor een correctie van de winst van de vaste inrichting.

De casus van het arrest Pizzarotti Italia brengt ons bij een van de neteligste onderwerpen in de toepassing van het “at arm’s length”-beginsel voor de vaststelling van de winst van een vaste inrichting op basis van de zelfstandigheidsfictie: de bepaling van het eigen vermogen en het vreemd vermogen van de vaste inrichting. Welke schulden van de belastingplichtige die de vaste inrichting bezit, moeten aan de vaste inrichting worden toegerekend? Is het eigen vermogen van de vaste inrichting het verschil tussen de waarde van de aan de vaste inrichting toe te rekenen activa verminderd met het bedrag van de aan de vaste inrichting toe te rekenen schulden van de belastingplichtige? Kan er bij de bepaling van het eigen en van het vreemde vermogen van de vaste inrichting rekening worden gehouden met een fictieve schuld van de vaste inrichting aan het hoofdhuis of met een fictieve schuld van het hoofdhuis aan de vaste inrichting? Het gaat uiteindelijk steeds om de vraag wat de verhouding tussen het eigen vermogen en het vreemde vermogen van de vaste inrichting zou zijn als deze een dochtermaatschappij (zelfstandige juridische entiteit) zou zijn.

Er zijn verschillende criteria denkbaar om dat te bepalen. De OESO-verrekenprijsrichtlijnen gelden hiervoor niet omdat deze gegeven zijn voor transacties tussen gelieerde lichamen en een vaste inrichting geen lichaam is[8]. Hierdoor kan er van een verstrekking van eigen of vreemd vermogen door het hoofdhuis aan de vaste inrichting of van een schuld van het hoofdhuis aan de vaste inrichting geen sprake zijn. Voor de bepaling van wat de verhouding tussen het eigen vermogen en het vreemde vermogen van de vaste inrichting

[8] De OESO Verrekenprijsrichtlijnen gelden voor transacties tussen “associated enterprises”. "Enterprises” zijn volgens de omschrijving in de Glossary van de OECD Transfer Pricing Guide Lines 2022 “associated” wanneer zij voldoen aan de in het commentaar op art. 9 OESO Modelverdrag genoemde criteria. Daar worden “associated enterprises” omschreven als “parent and subsidiary companies and companies under common control”. Omdat vaste inrichtingen geen "companies” zijn, zijn een hoofdhuis en haar vaste inrichting geen “associated enterprises” in de zin van het commentaar op art. 9 OESO Modelverdrag en dus ook niet voor de toepassing van de OESO Verrekenprijsrichtlijnen. Dit geldt in het bijzonder voor Chapter X OECD Transfer Pricing Guide Lines 2022, dat gaat over verrekenprijsaspecten van financiële tarnsacties, Zie voor het toepassingsbereik van Chapter X par. 10.1 OECD Transfer Pricing Guide Lines 2022.

zou moeten zijn, kan gekeken worden naar de vermogensverhouding van de belastingplichtige, van het concern waarvan de belastingplichtige deel uitmaakt of van vergelijkbare ondernemingen in de branche waarin de vaste inrichting actief is. Is het bedrag van de aan de vaste inrichting toe te rekenen schulden van de belastingplichtige lager dan het totale bedrag van deze schulden, dan kan nog een deel van de totale schuld worden toegerekend aan de vaste inrichting. Het gaat dan om het gedeelte van de totale schuld van de belastingplichtige dat deze niet specifiek heeft aangewend ten behoeve van het hoofdhuis dan wel de vaste inrichting. De vraag hierbij is of dit gedeelte van de totale schuld van de belastingplichtige voor de belastingheffing als een fictieve lening van het hoofdhuis aan de vaste inrichting kan worden behandeld. Als dit gebeurt, moet over die fictieve schuld een fictieve rente "at arm's length" op de winst van de vaste inrichting in mindering komen. Het omgekeerde, een fictieve rente over een fictieve schuld van het hoofdhuis aan de vaste inrichting, is niet denkbaar omdat dan aan de vaste inrichting minder schuld zou worden toegerekend dan de schuld die aan haar toe te rekenen is op basis van aanwending. De vraag is of de zelfstandigheidsfictie zo ver moet worden doorgevoerd dat voor de belastingheffing wordt uitgegaan van een fictieve schuld. Een andere benadering voor de aftrek van de door de belastingplichtige over de niet specifiek aan hoofdhuis of vaste inrichting toerekenbare schulden te betalen rente is een toerekening naar evenredigheid. Op de winst van de vaste inrichting komt dan in mindering het gedeelte van deze rente dat correspondeert met het gedeelte van die schulden dat is toe te rekenen aan de vaste inrichting. Deze benadering heeft mijn voorkeur omdat zij meer aansluit bij de realiteit. Op de winst van de vaste inrichting komen zo geen kosten in mindering die de belastingplichtige in werkelijkheid niet heeft gehad.

4. Vragen over de toepassing van Europees recht naar aanleiding van het arrest Pizzarotti Italia

4.1 Hybride mismatch

Wordt, zoals in het geval van het arrest Pizzarotti Italia, bij de bepaling van de winst van een vaste inrichting op grond van de zelfstandigheidfictie uitgegaan van fictieve vorderingen en schulden, dan kan dit leiden tot zowel een dubbele heffing als een hybridemismatch in de zin van art. 9 ATAD.

Uit de beslissing van het HvJ in het arrest Pizzarotti Italia volgt dat de correctie van de winst met fictief ontvangen of betaalde rente niet in strijd is met de

vrijheid van vestiging. In het geval van het arrest kan daardoor dubbele heffing ontstaan, namelijk als Italië niet een corresponderende renteaftrek toepast voor de bepaling van de in Italië te belasten winst van het hoofdhuis. Italië is niet op grond van het Europese recht verplicht om een corresponderende aftrek toe te passen. De verhoging van de winst van de vaste inrichting in Roemenië zonder corresponderende vermindering van de in Italië te belasten winst van het hoofdhuis is dan een dispariteit.

Een hybridemismatch kan ontstaan in het geval dat op de winst van een vaste inrichting in een EU-lidstaat een fictieve rente op een fictieve schuld aan het hoofdhuis in mindering komt zonder dat in de vestigingsstaat van het hoofdhuis een corresponderende rentebate in aanmerking wordt genomen. In dit geval is er sprake van een aftrek zonder corresponderende heffing. Art. 9 ATAD verplicht dan de lidstaat om een wettelijke regeling in het leven te roepen die voorziet in een weigering van de aftrek. In Nederland is dat in een geval zoals dit art. 12aa lid 1 onder f Wet Vpb 1969.

4.2 Generieke renteaftrekbeperking

De aftrek op de winst van een vaste inrichting van een fictieve rente over een fictieve schuld aan het hoofdhuis roept, indien de aftrek niet door renteaftrekbeperkingen zoals bij een hybridemismatch, behoeft te worden teruggenomen, ook de vraag op hoe de generieke renteaftrekbeperking van art. 4 ATAD, in Nederland geïmplementeerd in art. 15b Wet Vpb 1969, moet worden toegepast bij de bepaling van de winst van een vaste inrichting. Moet dan worden uitgegaan van het rentesaldo van de vaste inrichting dat in mindering is gekomen op haar gecorrigeerde winst bepaald alsof zij een zelfstandige onderneming is, of moet worden uitgegaan van een aan de vaste inrichting toe te rekenen evenredig gedeelte van het rentesaldo van de belastingplichtige dat in totaal in mindering komt op diens winst? Gaan we uit van de zelfstandigheidsfictie, dan ligt de eerstgenoemde toepassing van de generieke renteaftrekbeperking voor de hand. Omdat dan in het rentesaldo ook fictieve rente kan zijn begrepen, kan daarvan echter het gevolg zijn dat op de winst van de vaste inrichting meer of minder rente in aftrek komt dan een evenredig deel van de rente die volgens het recht van de staat van de vaste inrichting door de belastingplichtige in totaal in aftrek kan worden gebracht. Dit doet zich niet voor als de rente die op de winst van een vaste inrichting in mindering komt, niet meer is dan het aan de vaste inrichting toe te rekenen deel van de in totaal door de belastingplichtige verschuldigde rente. Zie hiervoor onderdeel 3.

5. Samenvatting

In het arrest Pizzarotti Italia heeft het HvJ in een Roemeense zaak beslist dat een nationale regeling op grond waarvan wel een verrekenprijscorrectie van de winst van een vaste inrichting mogelijk is bij handelingen tussen die vaste inrichting en haar buitenlandse hoofdhuis maar niet bij handelingen tussen binnenlandse vestigingen van eenzelfde persoon, niet in strijd is met de vrijheid van vestiging. Het arrest is in lijn met eerdere rechtspraak van het HvJ over winstcorrecties die niet in zuiver nationale maar wel in grensoverschrijdende situaties worden toegepast.

De verrekenprijscorrecties in Roemenië berusten op een zelfstandigheidsfictie voor de bepaling van de winst van een vaste inrichting. Het is dan mogelijk dat de winst van de vaste inrichting wordt verhoogd of verlaagd in verband met een correctie van de verrekenprijs voor een fictieve transactie (rechtshandeling). Daartoe moet eerst worden bepaald of tussen een vaste inrichting en haar hoofdhuis een rechtshandeling kan worden gefingeerd, vervolgens als dit zo is, welke rechtshandeling dat dan is, en ten slotte wat een zakelijke vergoeding is voor de rechtshandeling die wordt gefingeerd. Goed voor ogen moet worden gehouden dat tussen een vaste inrichting en haar hoofdhuis geen echte rechtshandelingen (transacties) mogelijk zijn omdat een vaste inrichting geen zelfstandige juridische entiteit is. Een vaste inrichting is enkel een fiscaal concept; geen juridisch. Dit geldt ook als de winst van een vaste inrichting moet worden bepaald op basis van de zelfstandigheidsfictie.

Een bijzondere kwestie in het kader van de zelfstandigheidsfictie is of bij de bepaling van de winst van een vaste inrichting een fictieve rente “at arm’s length” in aftrek kan komen in verband met een fictieve schuld aan het hoofdhuis. Dit hangt af van wat als vreemd vermogen van de vaste inrichting in aanmerking kan worden genomen. Dat vreemd vermogen kan niet meer zijn dan het totale vreemde vermogen van de belastingplichtige. Ook de bij de vaste inrichting in aanmerking te nemen rentelast kan niet meer zijn dan de totale rentelast van de belastingplichtige.

De aftrek van fictieve rente op fictieve schulden tussen een vaste inrichting en haar hoofdhuis kan leiden tot een hybridemismatch in de zin van art. 9 ATAD. Als dit zo is, verplicht deze bepaling tot het terugnemen van de aftrek. Fictieve rente op een fictieve schuld tussen een vaste inrichting en haar hoofdhuis kan ook deel uitmaken van het rentesaldo waarvan de aftrek op de winst van de vaste inrichting door de generieke renteaftrekbeperking van art. 4 ATAD wordt

beperkt. Dit wordt vermeden als bij het bepalen van de winst van een vaste inrichting geen fictieve rente in aanmerking wordt genomen.

HET UNIERECHTELIJKE VERDEDIGINGSBEGINSEL, EEN BEGINSEL OM REKENING MEE TE HOUDEN

mr. J.B.M.H Bisschoff-Moonen[9] en mr. dr. N.H.A. Gorissen[10]

1. Inleiding

In deze bijdrage ter gelegenheid van het afscheid van prof. dr. Rainer Prokisch als hoogleraar Internationaal Belastingrecht aan Maastricht University, besteden wij aandacht aan het Unierechtelijke verdedigingsbeginsel. Wij hebben als docenten op het gebied van het formele belastingrecht het genoegen gehad vele jaren met Rainer samen te mogen werken bij de capaciteitsgroep Belastingrecht van de Universiteit Maastricht. Rainer heeft als hoogleraar Internationaal belastingrecht een niet aflatende interesse getoond in zowel het Internationale als het Europese belastingrecht. Op het gebied van het Internationale en Europese belastingrecht spelen ook talrijke vraagstukken die zien op het formeel belastingrecht. Voor ons was dat de aanleiding om op een van deze vraagstukken, namelijk de ontwikkeling van het Unierechtelijke verdedigingsbeginsel, in deze bijdrage nader in te gaan. Hiertoe zullen wij eerst beschrijven wat het Unierechtelijke verdedigingsbeginsel[11] inhoudt en wanneer het van toepassing is (paragraaf 2). Vervolgens behandelen wij een aantal kernarresten, te weten Sopropé, Kamino en Datema en Prequ'Italia (paragraaf 3), waarna wij overgaan tot benoeming van het stappenplan (paragraaf 4). Daarna volgt de bespreking van het meer recente arrest van de Hoge Raad van 10 december 2021[12] (paragraaf 5), om ten slotte de vraag te kunnen beantwoorden in hoeverre het Unierechtelijke verdedigingsbeginsel een beginsel is om rekening mee te (blijven) houden . Wij sluiten af met een conclusie (paragraaf 6).

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[10] Nadine Gorissen is werkzaam als docent formeel belastingrecht binnen de capaciteitsgroep Belastingrecht van Maastricht University.

[11] Het hoorrecht uit art. 4:7, 4:8 en 4:12 Awb valt buiten het bereik van deze bijdrage, evenals de bespreking van art. 41 Handvest omdat dat gericht is tot de instellingen, organen en instanties van de Unie en niet gericht is tot de lidstaten. Zie A.E. Keulemans, Het Unierechtelijke verdedigingsbeginsel (FM nr. 170), 2021, paragraaf 5.5.1.a; en, A.J.H. van Suilen, Hoorplicht, NTFR-Beschouwingen 2019/36.

[12] HR 10 december 2021, 19/03628, ECLI:NL:HR:2021:1850, BNB 2022/18 m.nt. F.J.P.M. Haas, NTFR 2021/4313 m.nt. M.H.W.N. Lammers en V-N 2021/54.18 m.nt. Redactie.

2. Het Unierechtelijke verdedigingsbeginsel

Het Unierechtelijke beginsel van eerbiediging van de rechten van de verdediging oftewel het Unierechtelijke verdedigingsbeginsel kent meerdere aspecten. Zo dient een belanghebbende ten aanzien van wie een bezwarend besluit wordt vastgesteld vooraf in de gelegenheid te worden gesteld om te worden gehoord en naar behoren zijn standpunt kenbaar te maken. Hiertoe behoort ook dat belanghebbende op zijn verzoek inzage krijgt in zijn dossier voor zover het stukken betreft waarop het bestuursbesluit gebaseerd is.[13]

Het Unierechtelijke verdedigingsbeginsel is een algemeen beginsel van EU-recht. De werking is beperkt tot besluiten die binnen het toepassingsgebied van het Unierecht vallen. Voor de fiscaliteit is het Unierechtelijke verdedigingsbeginsel dus van belang bij de rechtsgebieden die worden beheerst door Unierecht zoals onder andere besluiten op het terrein van het douanerecht, de accijnzen, de Wet Omzetbelasting, de aansprakelijkstellingen uit de Invorderingswet 1990 (hierna: IW 1990) voor verschuldigde omzetbelasting en de internationale uitwisseling van gegevens.[14] De ontwikkeling van het Unierechtelijke verdedigingsbeginsel is een jurisprudentiële ontwikkeling, dat zijn oorsprong vindt in het Transocean-arrest. In deze zaak wordt door het Hof van Justitie EU (hierna: HvJ EU) overwogen dat de hoorprocedure 'een toepassing is van de algemene regel dat adressaten van overheidsbeslissingen, die aanmerkelijk in hun belangen worden getroffen, in staat moeten worden gesteld hun standpunt genoegzaam kenbaar te maken.' [15] De rechtspraak op het gebied van het Unierechtelijke verdedigingsbeginsel is talrijk. Voor deze bijdrage beperken wij ons echter tot de kernarresten Sopropé, Kamino en Datema en Prequ'Italia en het meer recente arrest van de Hoge Raad van 10 december 2021.

3. De kernarresten Sopropé, Kamino en Datema en Prequ'Italia

[13] HvJ EU 9 november 2017, C-298/16 (Ispas), ECLI:EU:C:2017:843, AB 2018/125 m.nt. R.J.G.M. Widdershoven, NJB 2018/143, V-N 2017/60.15, m.nt. Redactie. Zie ook HvJ EU 4 juni 2020, C-430/19 (SC C.F. SRL), ECLI:EU:C:2020:429, NTFR 2020/2025 m.nt. R.B.H. Beune en V-N 2020/28.32.10.

[14] Vakstudie Algemeen Deel, art. 4:8 Awb, Aantekening 4 (Europeesrechtelijk verdedigingsbeginsel); S.P.M. van den Maagdenberg en V.L. Meijerman, Het Unierechtelijke verdedigingsbeginsel – HR 24 november 2017 in het licht van jurisprudentie van het Hof van Justitie, WFR 2018/65; en, M.D.C. Gomes Vale Viga en H. Mezouar, Het Unierechtelijk verdedigingsbeginsel in ontwikkeling in fiscalibus, TFB 2021/4. Zie voor internationale gegevensuitwisseling HvJ EU 22 oktober 2013, C-276/12 (Sabou), ECLI:EU:C:2013:678, AB 2014/37 m.nt. L.E.C. Neve.

[15] HvJ EU 23 oktober 1974, C-17/74 (Transocean Maritime Paint Association), ECLI:EU:C:1974:106, punt 15. Zie ook A.E. Keulemans, Het Unierechtelijke verdedigingsbeginsel: een update, WFR 2016/73; A. Wolkers en R. Jeronimus, Schending van het verdedigingsbeginsel: (langzaam) meer duidelijkheid?, BTW Bulletin 2018/44; en, M.D.C. Gomes Vale Viga en H. Mezouar, Het Unierechtelijk verdedigingsbeginsel in ontwikkeling in fiscalibus, TFB 2021/4.

3.1 Sopropé

Op 18 december 2008 heeft het HvJ EU uitspraak gedaan in de zaak Sopropé[16]. Sopropé is een importeur die gebruik heeft gemaakt van valse certificaten van oorsprong en transportdocumenten. Sopropé heeft te horen gekregen over een termijn van acht dagen te beschikken om haar recht om vooraf te worden gehoord over de voorlopige conclusies, uit te oefenen. Sopropé heeft vervolgens tien dagen om de nagevorderde rechten te betalen, maar zij heeft dit geweigerd. Sopropé voert met name aan dat het beginsel van eerbiediging van de rechten van de verdediging is geschonden omdat de termijn die aan haar was verleend om haar opmerkingen te maken te kort was. Het HvJ EU oordeelt:

'De eerbiediging van de rechten van de verdediging vormt een algemeen beginsel van [Unierecht] dat van toepassing is wanneer de administratie voornemens is een bezwarend besluit ten opzichte van een bepaalde persoon vast te stellen. Dit beginsel vereist dat de adressaten van besluiten die hun belangen aanmerkelijk raken, in staat worden gesteld naar behoren hun standpunt kenbaar te maken over de elementen waarop de administratie haar besluit wil baseren. Zij dienen daartoe over een toereikende termijn te beschikken.'[17]

Indien de termijnen voor de uitoefening van de rechten van verdediging niet in het Unierecht zijn vastgelegd, dienen deze door het nationale recht te worden bepaald, met dien verstande dat zij even lang moeten zijn als die waarover particulieren of ondernemingen in vergelijkbare nationaalrechtelijke situaties beschikken en de uitoefening van de door het Unierecht verleende rechten van de verdediging in de praktijk niet onmogelijk of uiterst moeilijk mogen maken.[18] Het HvJ EU oordeelt uiteindelijk dat in casu een termijn van acht tot vijftien dagen waarbinnen belanghebbende recht heeft om opmerkingen te maken in beginsel voldoet aan de vereisten van het Unierecht. De nationale rechter moet verder nagaan of belanghebbende, rekening houdende met de specifieke omstandigheden van de zaak, daadwerkelijk zijn standpunt naar behoren kenbaar heeft kunnen maken binnen de hem verleende termijn en of het betrokken bestuursorgaan al dan niet kan worden geacht naar behoren

[16] HvJ EU 18 december 2008, C-349/07 (Sopropé), ECLI:EU:C:2008:746, AB 2009/29, m.nt. R.J.G.M. Widdershoven, FED 2009/11, m.nt. J.A.R. van Eijsden, V-N 2011/13.9 m.nt. Redactie.

[17] HvJ EU 18 december 2008, C-349/07 (Sopropé), ECLI:EU:C:2008:746, r.o. 36 en 37, AB 2009/29 m.nt. R.J.G.M. Widdershoven, FED 2009/11 m.nt. J.A.R. van Eijsden, V-N 2011/13.9 m.nt. Redactie.

[18] HvJ EU 18 december 2008, C-349/07 (Sopropé), ECLI:EU:C:2008:746, r.o. 38, 40 en 44, AB 2009/29 m.nt. R.J.G.M. Widdershoven, FED 2009/11 m.nt. J.A.R. van Eijsden, V-N 2011/13.9 m.nt. Redactie. Zie voor het gebruik van de termen gelijkwaardigheidsbeginsel en effectiviteitsbeginsel o.a. HvJ EU 10 september 2013, C-383/13 (PPU – G en R), ECLI:EU:C:2013:533 r.o. 35. In de zaak Kamino en Datema wordt over doeltreffendheidsbeginsel in plaats van effectiviteitsbeginsel gesproken, zie r.o. 82 en 83.

rekening te hebben gehouden met de bij haar ingediende opmerkingen, gelet op de tijd die is verstreken tussen het tijdstip waarop zij de opmerkingen van belanghebbende heeft ontvangen en het tijdstip waarop zij haar besluit heeft vastgesteld.[19]

3.2 Kamino en Datema

Na het Sopropé arrest komen de gevoegde zaken Kamino en Datema[20] aan de orde. In beide zaken hebben de douane-expediteurs Kamino en Datema door het aangeven van goederen onder een onjuiste post een foutief tarief toegepast waardoor douanerechten worden nagevorderd en elk van de belanghebbenden heeft daartoe een uitnodiging tot betaling (hierna: UTB) ontvangen. Voorafgaand aan de uitreiking van de UTB zijn belanghebbenden niet in de gelegenheid gesteld hun standpunten naar voren te brengen. Vervolgens heeft de Hoge Raad prejudiciële vragen aan het HvJ EU voorgelegd over de rechtstreekse toepassing van het Unierechtelijke verdedigingsbeginsel door de nationale rechter en de rechtsgevolgen van een eventuele schending van het betreffende beginsel. Uit het oordeel van het HvJ EU volgt dat door particulieren rechtstreeks een beroep kan worden gedaan voor de nationale rechter op het Unierechtelijke verdedigingsbeginsel en het daaruit voortvloeiende recht om te worden gehoord alvorens een bezwarend besluit wordt genomen. Vervolgens wordt ingegaan op het feit dat het Unierechtelijke verdedigingsbeginsel niet absoluut geldt, maar beperkingen kan bevatten waarvan onderzocht moet worden of deze gerechtvaardigd zijn.[21] Daarna komt de vraag aan bod of de rechten van de verdediging worden geschonden indien belanghebbende niet is gehoord voordat het besluit (de UTB) wordt genomen, terwijl hij zijn standpunt wel kenbaar heeft kunnen maken tijdens een latere administratieve bezwaarfase. Het HvJ EU oordeelt dat het Unierechtelijke verdedigingsbeginsel is geschonden wanneer de adressaat van een UTB niet voorafgaand aan de vaststelling van dat besluit is gehoord, ook al kan hij zijn standpunt kenbaar maken tijdens een latere administratieve bezwaarfase, indien de nationale regeling de adressaten van die uitnodigingen niet toestaat, wanneer zij niet vooraf worden gehoord, de opschorting van de uitvoering van

[19] HvJ EU 18 december 2008, C-349/07 (Sopropé), ECLI:EU:C:2008:746, r.o 55, AB 2009/29 m.nt. R.J.G.M. Widdershoven, FED 2009/11 m.nt. J.A.R. van Eijsden, V-N 2011/13.9 m.nt. Redactie.

[20] HvJ EU 3 juli 2014, gevoegde zaken C-129&130/13 (Kamino en Datema), ECLI:EU:C:2014:2041, BNB 2014/231 m.nt. M.J.W. van Casteren, RvdW 2014/1232, NJB 2014/1427 en V-N 2014/36.6 m.nt. Redactie.

[21] HvJ EU 3 juli 2014, gevoegde zaken C-129&130/13 (Kamino en Datema), ECLI:EU:C:2014:2041, r.o. 42 en 43, BNB 2014/231 m.nt. M.J.W. van Casteren, RvdW 2014/1232, NJB 2014/1427 en V-N 2014/36.6 m.nt. Redactie.

die uitnodigingen tot de eventuele herziening ervan te verkrijgen.[22] Voorts wordt onder verwijzing naar eerdere rechtspraak geoordeeld dat de voorwaarden waaronder het Unierechtelijke verdedigingsbeginsel moet worden gewaarborgd en de gevolgen van de schending worden bepaald door het nationale recht mits aan het gelijkwaardigheidsbeginsel en het doeltreffendheidsbeginsel wordt voldaan:
'De nationale rechter, die verplicht is om de volle werking van het Unierecht te waarborgen, kan bij de beoordeling van de gevolgen van een schending van de rechten van de verdediging, in het bijzonder van het recht om te worden gehoord, rekening ermee houden dat een dergelijke schending pas tot nietigverklaring van het na afloop van de betrokken administratieve procedure genomen besluit leidt wanneer deze procedure zonder deze onregelmatigheid een andere afloop zou kunnen hebben gehad.'[23]
Dit laatste omvat het andere afloop-criterium[24], waarop wij in het stappenplan nog ingaan.

3.3 Prequ'Italia

Een derde belangrijke uitspraak over het Unierechtelijke verdedigingsbeginsel volgt in de zaak Prequ'Italia.[25] In deze zaak zijn aan Prequ'Italia rectificatieaanslagen opgelegd tot naheffing van BTW bij invoer. Door de Italiaanse verwijzingsrechter wordt de prejudiciële vraag gesteld of voldoende recht wordt gedaan aan het Unierechtelijke verdedigingsbeginsel als een aanslag wordt vastgesteld door de douaneadministratie zonder de belastingplichtige eerst te horen en de wettelijke (Italiaanse) regeling niet voorziet in opschorting van de tenuitvoerlegging van die aanslag als normaal gevolg van de instelling van beroep. Het HvJ EU verwijst in haar oordeel naar eerdere rechtspraak, zoals onder andere Kamino en Datema, wanneer zij ingaat op de mogelijke rechtvaardiging van de beperking van de rechten van de

[22] HvJ EU 3 juli 2014, gevoegde zaken C-129&130/13 (Kamino en Datema), ECLI:EU:C:2014:2041, r.o. 73, BNB 2014/231 m.nt. M.J.W. van Casteren, RvdW 2014/1232, NJB 2014/1427 en V-N 2014/36.6 m.nt. Redactie.
[23] HvJ EU 3 juli 2014, ECLI:EU:C:2014:2041, *(Kamino en Datema)*, *BNB* 2014/231 m. nt. M.J.W. van Casteren, *RvdW* 2014/1232, *NJB* 2014/1427 en *V-N* 2014/36.6 m. nt. Redactie, r.o. 82.
[24] Andere afloopcriterium genoemd in HvJ EU 3 juli 2014, gevoegde zaken C-129&130/13 (Kamino en Datema), ECLI:EU:C:2014:2041, r.o. 79-81, BNB 2014/231 m.nt. M.J.W. van Casteren, RvdW 2014/1232, NJB 2014/1427 en V-N 2014/36.6 m.nt. Redactie. Zie verder HR 26 juni 2015, ECLI:NL:HR:2015:1666 (eindbeslissing Kamino), BNB 2015/186 m.nt. M.J.W. van Casteren; NTFR 2015/1928 m.nt. M.H.W.N. Lammers ; en, A. Wolkers, Cursus Belastingrecht EBR, paragraaf 7.2.11.B (Het recht om gehoord te worden), waarin ook wordt aangegeven dat in de Kamino-zaak de schending van het Unierechtelijke verdedigingsbeginsel niet leidt tot vernietiging van de UTB.
[25] HvJ EU 20 december 2017, C-276/16 (Prequ'Italia), ECLI:EU:C:2017:1010, BNB 2018/58 m.nt. C.J. Hummel, FED 2018/59 m.nt. A.E. Keulemans, V-N 2018/8.24 m.nt. Redactie.

verdediging vanwege het algemeen belang, waaronder de snelle inning van de eigen middelen van de EU[26] en op het andere afloop-criterium[27].
Vervolgens oordeelt het HvJ EU dat het Unierechtelijke verdedigingsbeginsel niet is geschonden wanneer de nationale regeling op grond waarvan de belanghebbende de mogelijkheid heeft om administratief beroep in te stellen, enkel voorziet in de mogelijkheid van opschorting van de tenuitvoerlegging op verzoek, en niet bepaalt dat de tenuitvoerlegging van de bestreden handeling automatisch wordt opgeschort wanneer administratief beroep wordt ingesteld.[28] Met andere woorden vereist het verdedigingsbeginsel niet dat de tenuitvoerlegging automatisch wordt opgeschort bij het instellen van administratief bezwaar of beroep als voorafgaand aan de aanslagoplegging het horen niet heeft plaatsgevonden. Wel mogen de bepalingen over het op verzoek opschorten van het ten uitvoerleggen van de aanslag niet te eng worden uitgelegd.

3.4 Tussenconclusie

Met de uitspraak in de zaak Sopropé staat het Unierechtelijke verdedigingsbeginsel volop in de belangstelling. De opvatting na het oordeel in de arresten Kamino en Datema en Prequ'Italia is weliswaar nog steeds dat de rechten van de verdediging eerbiediging behoeven, maar een schending van het Unierechtelijke verdedigingsbeginsel heeft slechts onder voorwaarden gevolgen. Er wordt zelfs gesproken dat het Unierechtelijke verdedigingsbeginsel aan invloed lijkt te verliezen[29] dan wel met stille trom lijkt te vertrekken[30]. In de rechtspraak is immers duidelijk geworden dat een schending van het verdedigingsbeginsel pas gevolgen heeft als aan het andere afloopcriterium is voldaan en er geen rechtvaardiging bestaat voor de beperking van de rechten van de verdediging. De vraag die wij in het vervolg van deze bijdrage beantwoorden is, gezien deze jurisprudentiële ontwikkeling,

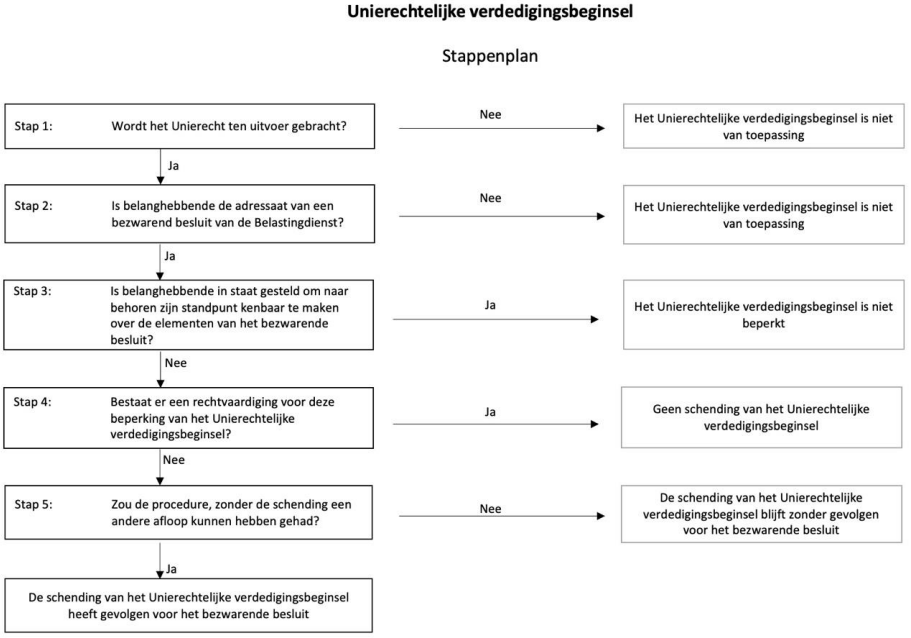
[26] HvJ EU 20 december 2017, C-276/16 (Prequ'Italia), ECLI:EU:C:2017:1010, r.o. 50 en 54-55, BNB 2018/58 m.nt. C.J. Hummel, FED 2018/59 m.nt. A.E. Keulemans, V-N 2018/8.24 m.nt. Redactie.
[27] HvJ EU 20 december 2017, C-276/16 (Prequ'Italia), ECLI:EU:C:2017:1010, r.o. 62, BNB 2018/58 m.nt. C.J. Hummel, FED 2018/59 m.nt. A.E. Keulemans, V-N 2018/8.24 m.nt. Redactie.
[28] HvJ EU 20 december 2017, C-276/16 (Prequ'Italia), ECLI:EU:C:2017:1010, r.o. 63, BNB 2018/58 m.nt. C.J. Hummel, FED 2018/59 m.nt. A.E. Keulemans, V-N 2018/8.24 m.nt. Redactie.
[29] M.D.C. Gomes Vale Viga en H. Mezouar, Het Unierechtelijk verdedigingsbeginsel in ontwikkeling in fiscalibus, TFB 2021/4. Er wordt gesproken over de gedachte dat het verdedigingsbeginsel tandeloos zou worden en een stille dood lijkt te sterven. De reden die gegeven wordt is dat het HvJ EU in Prequ'Italia bevestigde dat het algemeen belang van de EU en met name het belang dat zij heeft bij een snelle inning van eigen middelen een rechtvaardiging kan bieden voor de beperking van het verdedigingsbeginsel.
[30] M.H.W.N. Lammers, noot bij HR 26 juni 2015, ECLI:NL:HR:2015:1666, NTFR 2015/1928.

in hoeverre met het Unierechtelijke verdedigingsbeginsel toch rekening moet worden gehouden.

4. Het te volgen stappenplan met betrekking tot het Unierechtelijke verdedigingsbeginsel

Uit de jurisprudentie met betrekking tot het Unierechtelijke verdedigingsbeginsel en het commentaar daarop kan een stappenplan of beslisboom[31] worden afgeleid aan de hand waarvan beoordeeld kan worden of een schending van het Unierechtelijke verdedigingsbeginsel gevolgen heeft. Het stappenplan (zie figuur 1 hieronder) houdt kort gezegd een antwoord op de vraag in of gevolgen verbonden zijn aan een schending van het Unierechtelijke verdedigingsbeginsel. Indien sprake is van een schending van het Unierechtelijke verdedigingsbeginsel doordat een belanghebbende niet of onvoldoende in de gelegenheid is gesteld om zijn zienswijze naar voren te brengen voordat een bezwarend besluit wordt genomen, wordt beoordeeld of voor de schending een rechtvaardiging bestaat. Is een rechtvaardiging aanwezig dan zijn er geen gevolgen verbonden aan de schending van het verdedigingsbeginsel. Bestaat echter geen rechtvaardiging voor de schending, dan wordt beoordeeld of de procedure zonder de betreffende schending een andere afloop gehad zou hebben. Dit betreft het zogenoemde andere afloop-criterium. Indien voldaan is aan het andere afloop-criterium, dan impliceert dit dat er gevolgen verbonden zijn aan de betreffende schending van het Unierechtelijke verdedigingsbeginsel.

[31] Zie voor een uitgebreidere beschrijving van het stappenplan o.a. A-G van Hilten, Conclusie bij HR 26 juni 2015, ECLI:NL:HR:2015:1666, BNB 2015/186 m.nt. M.J.W. van Casteren; Conclusie bij HR 10 juli 2015, ECLI:NL:HR:2015:1809, BNB 2015/187 m.nt. M.J.W. van Casteren; A.E. Keulemans, noot bij HvJ EU 20 december 2017, C-276/16 (Prequ'Italia), ECLI:EU:C:2017:1010, FED 2018/59; A.E. Keulemans, Het Unierechtelijke verdedigingsbeginsel: een update, WFR 2016/73; S.P.M. van den Maagdenberg en V.L. Meijerman, Het Unierechtelijke verdedigingsbeginsel – HR 24 november 2017 in het licht van jurisprudentie van het Hof van Justitie, WFR 2018/65; Redactie Vakstudie Nieuws, noot bij HR 10 december 2021, 19/03628, ECLI:NL:HR:2021:1850, V-N 2021/54.18; M.H.W.N. Lammers, noot bij HR 21 december 2021, 19/03628, ECLI:NL:HR:2021:1850, NTFR 2021/4313; A.E. Keulemans, Het Unierechtelijke verdedigingsbeginsel (FM nr. 170), 2021; en, M.D.C. Gomes Vale Viga en H. Mezouar, Het Unierechtelijk verdedigingsbeginsel in ontwikkeling in fiscalibus, TFB 2021/4.



Figuur 1: Schematische weergave van het oorspronkelijke stappenplan[32]

5. Het arrest van de Hoge Raad van 10 december 2021

Het stappenplan met daarin een doorslaggevende rol voor toetsing aan de vraag of sprake is van een rechtvaardiging voor de beperking van de rechten van de verdediging en toetsing aan het andere afloop-criterium, is meer recentelijk naar voren gekomen in het arrest van de Hoge Raad van 10 december 2021.[33]

Belastingplichtige kreeg in deze zaak een naheffingsaanslag omzetbelasting met dagtekening 6 april 2006 opgelegd, welke conform art. 10 IW 1990 terstond en tot het volledige bedrag invorderbaar was. Na verzet door belanghebbende was de Ontvanger bereid tot schorsing van de tenuitvoerlegging van het dwangbevel en verleende onder voorwaarden uitstel van betaling. Hof Den Bosch heeft in deze zaak geoordeeld dat het Unierechtelijke verdedigingsbeginsel niet geschonden was ondanks dat belanghebbende niet voorafgaand aan het vaststellen van de naheffingsaanslag in de gelegenheid is gesteld om te worden gehoord over het voornemen tot

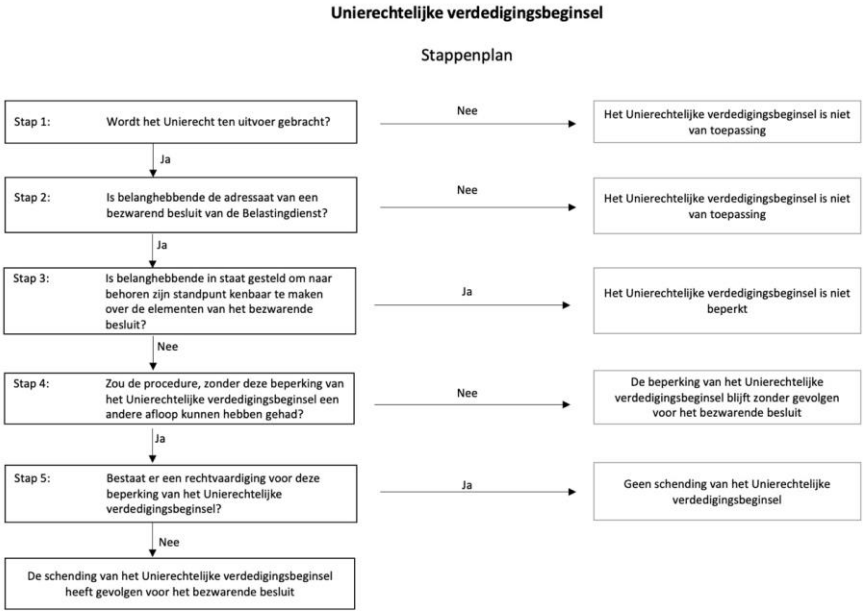
[32] Zie o.a. A.E. Keulemans, Het Unierechtelijke verdedigingsbeginsel (FM nr. 170), 2021; A.E. Keulemans, noot bij HvJ EU 20 december 2017, C-276/16 (Prequ'Italia), ECLI:EU:C:2017:1010, FED 2018/59; en, V-N 2021/54.18 m.nt. Redactie.

[33] HR 10 december 2021, 19/03628, ECLI:NL:HR:2021:1850, BNB 2022/18 m.nt. F.J.P.M. Haas, NTFR 2021/4313 m.nt. M.H.W.N. Lammers en V-N 2021/54.18 m.nt. Redactie.

naheffing. Het Hof overwoog daartoe dat het vooraf horen in dit geval niet tot een andere afloop zou hebben kunnen leiden, omdat betwisting van het standpunt van de Inspecteur slechts kon leiden tot de conclusie dat de door de Inspecteur voorgenomen naheffing niet te hoog was.[34] Het middel in cassatie richt zich mede tegen dit oordeel. De Hoge Raad oordeelt dat het Hof de vraag in het midden heeft gelaten of de naheffingsaanslag op grond van art. 10 IW 1990 terecht terstond en tot het volledige bedrag invorderbaar is gesteld. Deze vraag moet echter wel beantwoord worden. Belanghebbende had immers indien zij voor het vaststellen van de naheffingsaanslag naar behoren was gehoord een inbreng kunnen leveren die wellicht tot een andere afloop had kunnen leiden. In casu moet beoordeeld worden of er een rechtvaardiging is voor de beperking van de rechten van de verdediging. De in art. 10, lid 1 IW 1990 genoemde gronden zouden een beperking kunnen rechtvaardigen. [35] De door de Ontvanger genoemde argumenten om art. 10, lid 1 IW 1990 toe te kunnen passen rechtvaardigen echter niet de conclusie dat zich met betrekking tot belanghebbende een of meer gronden van artikel 10, lid 1, IW 1990 hebben voorgedaan. De stelling van de Inspecteur in hoger beroep[36] dat de naheffingsaanslag op grond van art. 10 IW 1990 terecht terstond en tot het volledige bedrag invorderbaar is gesteld, moet aldus worden verworpen. Er zijn geen omstandigheden die de beperking van de rechten van de verdediging rechtvaardigen. Het Unierechtelijke verdedigingsbeginsel is geschonden en de naheffingsaanslag dient vernietigd te worden. [37]
Uit dit arrest kan in lijn met eerdere jurisprudentie[38] en het stappenplan afgeleid worden dat het Unierechtelijke verdedigingsbeginsel is geschonden als belanghebbende voor het vaststellen van de naheffingsaanslag niet naar behoren is gehoord, er geen rechtvaardigheidsgrond aanwezig is en aan het andere afloop-criterium is voldaan. De oplettende lezer constateert echter dat de Hoge Raad een lichte verschuiving heeft aangebracht in de te beoordelen

[34] HR 10 december 2021, 19/03628, ECLI:NL:HR:2021:1850, r.o. 2.4.2, BNB 2022/18 m.nt. F.J.P.M. Haas, NTFR 2021/4313 m.nt. M.H.W.N. Lammers en V-N 2021/54.18 m.nt. Redactie.
[35] HR 10 december 2021, 19/03628, ECLI:NL:HR:2021:1850, r.o. 5.2.1 en 5.2.2, BNB 2022/18 m.nt. F.J.P.M. Haas, NTFR 2021/4313 m.nt. M.H.W.N. Lammers en V-N 2021/54.18 m.nt. Redactie.
[36] HR 10 december 2021, 19/03628, ECLI:NL:HR:2021:1850, r.o. 5.2.1, BNB 2022/18 m.nt. F.J.P.M. Haas, NTFR 2021/4313 m.nt. M.H.W.N. Lammers en V-N 2021/54.18 m.nt. Redactie.
[37] HR 10 december 2021, 19/03628, ECLI:NL:HR:2021:1850, r.o. 5.2.3 t/m 5.2.6, BNB 2022/18 m.nt. F.J.P.M. Haas, NTFR 2021/4313 m.nt. M.H.W.N. Lammers en V-N 2021/54.18 m.nt. Redactie.
[38] Zie met betrekking tot het Unierechtelijke verdedigingsbeginsel o.a. HR 19 juni 2020, ECLI:NL:HR:2020:1044, BNB 2020/138 m.nt. J.A.R. van Eijsden, NTFR 2020/1954 m.nt. V.S. Huygen van Dyck-Jagersma, waar het Unierechtelijke verdedigingsbeginsel niet was geschonden in verband met een rechtvaardigheidsgrond; en, HR 26 juni 2020, ECLI:NL:HR:2020:1144, BNB 2020/139 m.nt. J.A.R. van Eijsden en NTFR 2020/2122 m.nt. B.A. Kalshoven, waar het Unierechtelijke verdedigingsbeginsel geschonden was.

stappen uit het stappenplan[39]. Of dit in de toekomst ook het geval zal zijn, zal de jurisprudentie moeten uitwijzen. In casu wordt het andere afloop-criterium eerst behandeld en wordt daarna pas getoetst aan de rechtvaardigingsgrond (zie figuur 2 hierna). Inhoudelijk betekent dit dat als belanghebbende wel gehoord zou zijn zij een inbreng had kunnen leveren waarvan niet kan worden uitgesloten dat deze tot besluitvorming met een andere afloop had kunnen leiden. Kort gezegd, in casu is aan het andere afloop-criterium voldaan en is er geen rechtvaardiging voor de beperking van de rechten van de verdediging. Het Unierechtelijke verdedigingsbeginsel is daarmee geschonden met het gevolg dat de naheffingsaanslag moet worden vernietigd. Deze uitspraak heeft daarmee tevens het Unierechtelijke verdedigingsbeginsel weer op de kaart gezet.[40]



Figuur 2: Schematische weergave van het stappenplan na HR 10 december 2021

[39] Zie o.a. V-N 2021/54.18 m.nt. Redactie waarin ook wordt aangegeven dat 'het hof constateert dat de belanghebbende ten onrechte niet is gehoord en komt daarna tot de conclusie dat belanghebbende niet voldoet aan het 'andere afloop'-criterium, zodat vernietiging van de naheffingsaanslag niet aan de orde is.' De Hoge Raad behandelt daarom in de onderhavig zaak eerst het andere afloop-criterium waarna hij toekomt aan de stappen 3 en 4 (Met stappen 3 en 4 zijn hier de stappen uit het oorspronkelijke stappenplan bedoeld). Zie verder A. Perdaems, https://www.taxlive.nl/nl/documenten/nieuws/belastingdienst-moet-zich-houden-aan-spelregels-vertrouwens-en-verdedigingsbeginsel/ (benaderd op 22 april 2022), waarin auteur ook benoemt dat de laatste toets is of er een rechtvaardiging is voor de schending.

[40] Zie ook M.H.W.N. Lammers, noot bij HR 10 december 2021, 19/03628, ECLI:NL:HR:2021:1850, NTFR 2021/4313; en, A. Perdaems, https://www.taxlive.nl/nl/documenten/nieuws/belastingdienst-moet-zich-houden-aan-spelregels-vertrouwens-en-verdedigingsbeginsel/ (benaderd op 22 april 2022),. Beide beschrijven dat het Unierechtelijke verdedigingsbeginsel nog steeds springlevend is.

6. Conclusie

Het Unierechtelijke verdedigingsbeginsel is in de jurisprudentie tot ontwikkeling gekomen. Na de uitspraak in het arrest Sopropé stond het Unierechtelijke verdedigingsbeginsel volop in de belangstelling en werd steeds vaker met succes ingeroepen, waardoor menig aanslag of UTB vernietigd is. Nadere invulling, nuancering en beperking van het Unierechtelijke verdedigingsbeginsel is vervolgens in de jurisprudentie gegeven door onder andere de gevoegde zaken Kamino en Datema en het arrest Prequ'Italia. Echter leidt dit er niet toe dat geen rekening meer met het Unierechtelijke verdedigingsbeginsel moet worden gehouden. Uit de jurisprudentie kan namelijk een stappenplan afgeleid worden dat antwoord geeft op de vraag of gevolgen verbonden zijn aan een schending van het Unierechtelijke verdedigingsbeginsel. Belangrijk hierbij is het andere afloop-criterium en het al dan niet aanwezig zijn van een rechtvaardiging voor de beperking van de rechten van de verdediging. Dit is ook naar voren gekomen in het meer recente arrest van de Hoge Raad van 10 december 2021 en heeft ertoe geleid dat de in geding zijnde naheffingsaanslag moest worden vernietigd wegens schending van de rechten van de verdediging. Wij kunnen mede op basis van deze recente uitspraak concluderen dat het Unierechtelijke verdedigingsbeginsel nog steeds van betekenis is en wij zijn dan ook van mening dat het een beginsel is om rekening mee te (blijven) houden.

GLOBAL AGREEMENTS AND THE DECAY OF TAX TREATY LAW

Yariv Brauner

1. Introduction

It is a tremendous privilege to be able to contribute to this volume in honour of Professor Rainer Prokisch. No one knows tax treaties better than Rainer, so I had to pause before offering this commentary on the state of these treaties at the closing of 2021. Some have celebrated a so-called global agreement during 2021, when 136 countries comprising most of the *Inclusive Framework* signed a statement dictated by the G7 and the OECD, a statement which purportedly included the building blocks for a new international tax regime.[41] The statement adopted the two Pillar framework promoted by the OECD, which offers new taxing rights to market (source) countries over foreign taxpayers even in the absence of physical presence and a global minimum tax to residence countries.[42] The agreement concludes the post-BEPS work by the OECD, which prior to the very last version of the two pillars program (the abovementioned statement) focused on finding a solution to the challenges that the rise of the digital economy had presented to the international tax regime. The statement shifted the discourse completely, refocusing the project to taxing the largest multinational enterprises more aggressively.

The tax treaty based international tax regime faced serious challenges over the turn of the millennium.[43] The continuous degradation of source taxation mobilized so-called source countries (often meaning developing countries) to demand a new "deal" that would expand their taxing rights.[44] Some core tax treaty concepts, notably *permanent establishment* and *ÁÒÍõÓ length* could not be simply applied to many modern transactions. Sophisticated financial instruments quite easily navigated through antiquated tax law dogma. The ascent of the intangible and the digital economy made it easy, especially for

[41] OECD, A Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, available at: https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf.

[42] OECD, *3ÅÃÒÅÔÁÒÉÁÔ 0ÒÏÐÓÁÌ ÆÏÒ ÁÐÕÂÌÉÃ ÃÏÎÓÕÌÔÁÔÉÏÎ Document 8 Oct. 2019 – 12 Nov. 2019* (OECD Publishing, Oct. 2019); and OECD, *Global Anti-"ÁÓÅ %ÒÏÓÉÏÎ 0ÒÏÐÓÁÌ Pillar Two*, Public Consultation Document 8 Nov. 2019 – 2 Dec. 2019 (OECD Publishing, Nov.2019).

[43] See, e.g., Yariv Brauner, Treaties in the Aftermath of BEPS, 41 Brook. Int'l L. Rev. 973, 975-6 (2016).

[44] Geopolitical changes and the rise of the BRICS countries made these demands more viable. See, e.g., Yariv Brauner & Pasquale Pistone, Ed., The BRICS and the Emergence of International Tax Coordination (IBFD, 2015)

the largest multinational enterprises, to significantly (and unfairly in the views of most) reduce their effective tax rates. The OECD dominated the regime through the OECD Model and Commentaries but had done so without universal legitimacy and without taking responsibility for the impact of the regime beyond the OECD membership.[45] It resisted change yet the public outcry that eventually led to the BEPS project forced the OECD into action. The focus of the project became the preservation of power with the OECD rather than a principled reform of the international tax regime. BEPS resulted in a dramatic change in the audit environment worldwide, in an unprecedented multilateral tax treaty (the Multilateral Instrument (MLI)), and very little change in the substance of international tax law.[46] The OECD punted on the core issue of the digital economy, but was forced to address it post-BEPS, eventually leading to the recent agreement over the said statement. Unlike the 2015 BEPS agreements, the recent agreement significantly alters the substance of international tax law and tax treaties.

This short essay cannot of course comprehensively evaluate the recent agreement and in its light the future of tax treaties. Instead, it makes four observations about basic aspects of the current discourse, each of which presents a serious threat to the viability of tax treaties and the great achievements of the international tax regime to date. First, it discusses the casual treatment of treaty override, not a new phenomenon but one that has come up more bluntly in the context of the new agreement. Second, it puts recent developments in the context of the long-term discourse of multilateralism in tax law. Third, it addresses treaty dispute resolution in the new agreement, and claims that it is likely to harm rather than aid the evolution of tax treaty dispute resolution. Finally, it argues that the agreement, consistent with the BEPS project, continues to blur the boundaries between tax treaty and domestic law in an unprincipled manner, leading to an erosion of the status and impact of tax treaties.

[45] See, e.g., Sissie Fung, The Questionable Legitimacy of the
OECD/G20 BEPS Project, 2017(2) Erasmus L. Rev. 76; Irma J. Mosquera Valderrama, Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism, 7 World Tax J. 3 (2015). For similar questions beyond tax regarding the G20 see, e.g., Peter H. Henley & Niels M. Blokker, The Group of 20: A Short Legal Anatomy from the Perspective of International Institutional Law, 14 Melbourne J. Int'l L. 1 (2013); and Kern Alexander et. Al., The Legitimacy of the G20 - A Critique Under International Law (April 14, 2014). Available at SSRN: https://ssrn.com/abstract=2431164.

[46] See, e.g., Treaties in the Aftermath of BEPS, supra note 3, 976-977.

2. Treaty Override?

The current agreement became possible only when the United States presented its proposal for the revision of the "Two Pillars" approach, and pushed it through the G7, the G20, and eventually, with the support of the OECD secretariat, through the inclusive framework.[47] It still includes a new taxing right for market economies under Pillar One that would not require physical presence for taxation at source, in direct contrast to the prevailing norm of tax treaties and international tax law more generally. The implementation of this reform requires the adoption of a multilateral tax convention (MTC) to ensure the uniform implementation of this agreement across the parties to the agreement (or at least a large section of them).

This requirement was acknowledged by all parties and did not attract much attention or debate at first. The work on the MLI and its eventual success likely contributed to the calm with which this requirement was adopted. Nonetheless, commentators have quickly noticed that the proposed MTC will be very different from the MLI. The MLI had been designed to merely amend bilateral tax treaties, keeping them at the helm of the international tax regime, while the MTC will have to be, and is proposed to be, a separate multilateral tax treaty with substantive tax provisions, which norms violate, or deviate from – as one wishes, the norms of bilateral tax treaties. The MTC will likely have a 100+ parties adopting (more or less)[48] the same rules, with many bilateral relationships among these parties not already being covered by bilateral tax treaties. The immensity and complexity of such endeavour quickly reveals itself even if one ignores the difficulty of the simpler MLI to come into effect with respect to its signatories.[49]

One cannot ignore however the low likelihood of the United States joining the MTC. The central role of the United States in the materialization of the recent agreement that continues to draw irritation and criticisms even among parties to the agreement makes its likely abstention from the MTC significantly important. The Biden Administration has yet to admit that the United States will not simply join the MTC, yet it has quickly presented alternatives that should have (according to the Administration) similar

[47] See, e.g., US Department of the Treasury, Readout: US Department of the Treasury's Office of Tax Policy Meetings (20 May 2021), https://home.treasury.gov/news/press-releases/jy0189 (Accessed Dec. 8, 2021); and G7, G7 Finance Ministers and Central Bank Governors Communiqué (5 June 2021), https://www.g7uk.org/g7-finance-ministers-and-central-bank-governors-communique/ (Accessed Dec.8, 2021).

[48] One should realistically expect some reservations in such a multilateral treaty.

[49] As of Nov. 25, 2021, about a third of 96 signatories have yet to bring it into effect. See https://www.oecd.org/ctp/treaties/beps-mli-signatories-and-parties.pdf.

consequences.[50] This stance that suggests an intent to circumvent the normal process of treaty making and the power given to the Senate to consent to ratification of a treaty obviously irked the legislators in an already tense political climate.[51] The alternatives include: (1) an adoption of the treaty as an "executive agreement," which is an extraordinary, but not rare, avenue for adopting treaties without Congressional support, an avenue that had not before been used for substantive tax law, and (2) adoption of domestic rules that imitate the obligations that the United States would have taken on itself in the MTC. The problem with the former alternative is mainly political. It seems that it would be difficult to go ahead with a detour around Congressional power at the time when the administration is trying to pass its domestic agenda through a fragile Congress. This is particularly true when such a move would be precedential and would unquestionably force Democratic members of Congress to consider whether they would want to open this pandora's box for future use by Republican administrations.[52]

The more problematic, and presumably likely in the mind of the Biden Administration is the domestic legislative route which would avoid constitutional questions but would require Congress to act, and that was the problem of the Biden Administration with the MTC in the first place.[53] Not legislating (i.e., doing nothing) would be the other option, somehow accepting the violation of tax treaties by some countries (enforcing the new taxing right in violation of their treaty obligations to the United States). The problem with this option is that the tax imposed under Pillar One would probably be considered uncreditable in the United States due to its lack of sameness to the United States corporate income tax. That would be particularly difficult for United States multinational enterprises to stomach, especially when they are the primary target of Pillar One. The United States may agree to credit such taxes somehow, but it is difficult to see how it could do so without imposing an equivalent tax themselves, a tax that would, again, be in violation of bilateral tax treaties with over 60 other members of the Inclusive Framework. It is evident that promoting the current agreement that relies on a MTC without a

[50] See, e.g., Jonathan Curry, Biden Administration Keeping Options Open on Pillar 1, Tax Notes Int'l (Oct. 4, 2021).

[51] See, e.g., Frederic Lee, GOP Senators Warn Against Skipping Treaty Process on Pillar 1, Tax Notes Int'l (Oct. 18, 2021).

[52] Note also that a driving force on this matter within the administration seem to be Professor Rebecca Kysar, whose academic writing viewed the normal treaty process as problematic; yet, she had advocated involving the House of Representatives in the treaty process, i.e., giving Congress more, not less power in the treaty making process. See, e.g., Rebecca M. Kysar, On the Constitutionality of Tax Treaties, 38 Yale J. Int'l L. 1 (2013).

[53] See, e.g., Mindy Herzfeld, Pushing Pillar 1 Past Congress, Tax Notes Int'l (July 19, 2021).

straightforward way to join such MTC puts the United States and the agreement in a precarious position.

This essay argues that the more worrying aspect of the Pillar One debacle is the casual discussion of treaty override and the mixing of international and domestic law measures in the discussion without careful attention to the consequences. It is well known by now that the United States' Constitution opened the door to treaty override in the form of later-in-time domestic legislation in violation of earlier treaty obligations by the United States.[54] This fact as well as the fact that tax treaties are overridden more than other treaties[55] are known to treaty partners of the United States that nonetheless continue to conclude new treaties and maintain treaty relationships with the United States. Such acceptance may be explained by:[56] (1) the relative restraint exercised by Congress over the years, using treaty overrides primarily for anti-abuse purposes,[57] (2) the limits put by the Supreme Court on treaty override,[58] and (3) the fact that other countries, most notably Germany, have recently accepted treaty override as a legitimate action against inappropriate tax planning.[59]

This begrudging[60] acceptance of treaty override may change and even help unravel the international tax regime. Some of the risk stems from politics: (1) the United States was the key player to push and even dictate the current agreement; (2) the United states promoted the current agreement knowing that its domestic politics will make it difficult to implement the agreement in the United states; (3) the agreement looks to be disappointing for developing countries; (4) countries beyond the United States increasingly accept treaty override as legitimate while other countries are prevented from using it by their own constitutions. The greater risk however relates to the authority of international law in the realm of tax. The unbearable lightness of the suggestion to use treaty override through the enactment of domestic legislation in lieu of

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[54] U.S. CONST. art. VI, cl. 2.

[55] See Reuven S. Avi-Yonah, International Tax as International Law, 57 TAX L. REV. 483, 493 (2004).

[56] One may of course add to this list the important of the United States to the world economy and its relative political and economic power advantage over its treaty partners.

[57] See Reuven S. Avi-Yonah, Tax treaty overrides: a qualified defense of U.S. practice, in Guglielmo Maisto (Ed.), Tax Treaties and Domestic Law (IBFD, 2006) 66.

[58] *Cook v. United States* 288 U.S. 102 (1933). *Cook* held that a later-in-time statute does not override an earlier treaty without a clear expression of congressional intent to override. There has been some debate over the precise nature of the *Cook* decision, especially on the ground that it purportedly elevated the status of treaties above domestic law in contradiction to prior jurisprudence and the letter of the Constitution, yet, as explained by Professors Shaheen and Rosenbloom, *Cook* simply reconciled the Constitutional provision with the canons of interpretation known as Lex specialis derogat legi generali and Lex posterior generalis non derogart legi priori speciali (the later-in-time rule). See Fadi Shaheen and H. David Rosenbloom, Treaty Override: The False Conflict between Whitney and Cook, 24 Fla Tax Rev. 1 (2021).

[59] See, e.g., Michael Birk, Treaty Override Is Constitutional, Court Holds, Tax Notes Int'l (Feb. 22, 2016).

[60] See, e.g., Luis Eduardo Schoueri, Tax Treaty Override: A Jurisdictional Approach 42 Intertax 682 (2014).

joining the MTC demonstrates a deep disregard to the importance of international law in general, and tax treaties in particular. International law is sometimes dismissed as primarily political or diplomatic. This view misses the importance of international law for the stabilization of international relations - the core function of international law.[61] One should contemplate whether they would rather live in a world with limited international law in compatibility with the latter view. Tax treaties are regularly undermined based on similar arguments,[62] but also due to a narrow view of their purpose. When merely viewed as mechanisms to eliminate double taxation (or even double non-taxation) they are indeed unessential and as such also vulnerable to critique that they mainly serve the most developed countries at the expense of developing countries.[63] Such critique ignores the impact of tax treaties on cross-border investment, which is the true purpose of tax treaties (elimination of double taxation and double non-taxation are merely the means to meet this end), their support of investor confidence, and their utility in bringing together a rather cohesive international tax regime. Viewed this way, tax treaties present a triumph for international law. The thought that dispersed domestic legislations could replicate it is unrealistic under the best of circumstances and specifically unlikely in the current political reality of the United States. This approach further dismisses the importance of standardization of international tax norms, which is the most prizeworthy achievement of the international tax regime to date, standardization that significantly reduces the tax-related waste and cost of cross-border investment.

3. Multilateralism

The necessity of a MTC for the implementation of the recent agreement has gone undisputed within the Inclusive Framework. It is not evident that Pillar Two could not be implemented without it, yet as demonstrated also above, Pillar One would likely necessitate it. If the MLI signified the passing of the Rubicon for multilateralism in taxation, a MTC will be its first uncontested domain. To date the most dominant multilateral aspects of international taxation involved multi-party treaties in service of bilateral tax treaties that continued to serve as the building blocks of the international tax regime. Even

[61] See Akbar Rasulov, Theorizing Treaties: The Consequences of the Contractual Analogy, in Research Handbook on the Law of Treaties (Christian J. Tams et al. eds., Edward Elgar 2014) 74, 122, partly referring to Anthony Carty, The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs (Palgrave Macmillan 1986) 79.

[62] See, e.g., the above-mentioned critique by Professor Kysar, supra note 12.

[63] See, e.g., Tsilly Dagan, The Tax Treaties Myth, 32 N.Y.U. J. Intl. L. & Policy, p. 939 (2000).

the MLI, which provided a great service to multilateralism in taxation when proving that a large-scale multilateral tax treaty involving substantive tax norms is feasible, has not been independent of bilateral tax treaties. The MTC will be different.

The MTC's membership will potentially include the entire membership of the Inclusive Framework, possibly having more signatories than the MLI's 96 parties. Most of these possible parties have yet to conclude bilateral tax treaties among them, and the nature of the MTC makes it unlikely that parties would exclude some bilateral relationship from the application of that convention unlike the MLI which scope was decided by the signatories. The scope of the MTC will be even larger since it would not be limited to bilateral and some trilateral relationships like traditional bilateral tax treaties. The substance of the MTC (not all of which is clear at this point in time) will also sharply deviate from current treaty norms, such as the requirement for physical presence and permanent establishments for taxation of non-residents, source rules based on acceptable connections to the taxing jurisdiction, and arm's length taxation.

Multilateralism of the sort presented by the MTC pioneeringly responds to the discord between the decentralized international tax regime and the interdependence of the world economies that translates to interdependence of tax policies. A multilateral tax treaty such as the MTC does not conceptually interfere with bilateral tax treaties. As demonstrated by multiple fields in which bilateral and multilateral treaties complement each other, the choice between the two routes for treaty relationships is not binary.[64] The combination may have benefits in enforcement and dispute resolution. The multilateral treaty may provide the conceptual framework, leaving the country specific details to bilateral agreements, ensuring the continuity of the regime and a development of international law in the field. Alas, these potential benefits of multilateralism are not replicated in international taxation, at least not at the present. Nonetheless, there is hope that a multilateral tax treaty could solve the biggest problem of the regime, namely the lack of trust among its constituents, and particularly the distrust in the OECD that inflates its illegitimacy as an international standard setter. The MTC as presented by the recent agreement is unlikely to reverse this course since it presents too little change and a minimum (if at all) benefit for countries other than the richest. Furthermore, the fundamental norms of the proposed MTC under Pillar One address basic

[64] The example closest to taxation is the international trade regime that is governed by the multilateral WTO law yet also open to more specified, bilateral and smaller in scope multilateral arrangement. See, e.g., Gabriela Blum, Bilateralism, Multilateralism, and the Architecture of International Law, 49 Harv. Intl. L.J. 323 (2008).

aspects of international taxation dramatically differently than bilateral tax treaties that will continue to govern the overwhelming majority of international taxation (everything stays the same except for the minor new taxing right in Pillar One). Instead of harmony, these rules will only serve as explicit evidence that things could be different and that the holy cows of international taxation are not so holy even if they persist and continue to dominate the vast grazing grass of the regime.

Now, one may argue that the MTC is just a first step in an evolutionary process to modernize the international tax regime. The narrow scope of the MTC and its lack of a principled infrastructure do not much matter at the present, so goes the argument, since its true purpose is to stabilize the international tax regime and to demonstrate without endless debate that the norms of the regime could be modernized. If successful, an incremental reform of the regime will follow, and the goal of modernization achieved. Such an argument relies on the belief that fundamental reform of the regime is impossible and on the power of the OECD and its most dominant members to eventually push through the incremental reform. This essay argues that this approach is problematic. First, the belief that genuine international negotiation of a fundamental tax reform is currently impossible is baseless since such negotiation has never been tried. The entire BEPS and post-BEPS process was hurried and dictated by the OECD without an opportunity for genuine negotiations to take place. Second, this approach ignores the harm that the incremental approach could cause to the regime that will now have two contradictory systems operating one beside the other with unclear boundaries and justifications for the differences. Third, this approach relies on and primarily aims at maintaining the coercive power of the richest countries in the world and of the OECD over the rest of the world, a paradigm that has proven to be ineffective and anachronistic beyond its moral inadequacy. A more transparent and honest approach may take a bit longer, but it bears with it the promise of stability and effectiveness.

4. Tax Treaty Dispute Resolution

One of the fundamental building blocks of Pillar One is the inclusion of a new dispute resolution mechanism in the recent agreement. The new taxing right provided by Pillar One should require this mechanism to provide the parties certainty and provide stability to the regime. The details of the new dispute resolution mechanism are unclear at the present, but the Oct. 8 statement provides that disputes on whether issues may relate to Amount A will be solved

in a mandatory and binding manner.[65] Other issues, including the elimination of double taxation will be dealt with through dispute prevention and resolution. The statement is silent about the latter being mandatory and binding and therefore one should assume that there had been no agreement on that matter.

Current tax treaties generally include non-mandatory, non-binding dispute resolution provision known as the MAP (Mutual Agreement Procedure), which calls for treaty parties to resolve disputes among them via their competent authorities. Despite the resilience and almost universality of the MAP, its typical duration and lack of finality have attracted much criticism over the years. Most commonly, mandatory arbitration has been promoted as an alternative to the MAP. The OECD and others coalesced over so-called *baseball arbitration* triggered after two years of fruitless MAP negotiations as the preferred alternative, and the same was adopted on an opt-in basis by the MLI.[66] The early attempts to promote mandatory arbitration ended with only few such provisions but in the MLI over 20 countries committed to the solution. It is too early to assess the impact of such commitment on tax treaty dispute resolution. The MAP therefore continues to dominate the field, benefiting from some enhancement and a peer review process established by the OECD after BEPS.

One would then expect the MTC to follow the same pattern for its mandatory and non-mandatory dispute resolution mechanism, yet the Pillar One "Blueprint" published by the OECD in 2020, expanding on the two pillars solution albeit in its former version, not precisely the one adopted in the recent agreement, defied such expectation. It alternatively suggested a completely novel solution: multinational enterprises subject to the new taxing rights will submit their self-assessment to the "lead tax administration" (usually the country of residence) that will review it and exchange it with conclusions with other relevant tax authorities; unless agreement is achieved a dispute prevention panel, comprised of 6-8 representatives of diverse jurisdictions will be established to assess the disputed issues; further disagreement will lead to the convening of a determination panel, which composition is still undetermined (no agreement on the matter was achieved among the members of the inclusive framework), and which conclusions will be binding unless the MNE disagrees and decides to withdraw its request. Only domestic dispute

[65] The statement provides that with respect to some developing countries the dispute resolution mechanism will be elective.
[66] MLI, Part VI.

resolution procedures will then be available to the MNE and the conclusions of the panels will still be available to all relevant jurisdictions.[67]

This innovative mechanism clearly has standardization as its primary aim, which is natural for a new taxing right, especially when essentially the entire legal construct leading to such right is new and in many ways contradictory to the established regime. The mechanism is designed to help the new regime develop new law, and it is quite sensible in its evolutionary approach to the development of such law. Although dramatically novel, this new dispute resolution mechanism attracted little of the criticism directed at the recent agreement to date, perhaps due to the many other challenges presented by the agreement. Nonetheless, the proposed mechanism is highly complex, lacks many important details, both of which are good reasons for questioning its viability. In this short essay, however, I wish to question the fundamental idea of a representative panel coordinated by the OECD for dispute resolution. The current agreement requires countries to concede tremendous power to a competing tax jurisdiction – the so-called lead tax authority, which almost always will be a most developed country, and in most cases the United States. This authority sets the stage and writes the script for the dispute. Disagreement leads to further conceding of the dispute to a panel of several other countries through a complex process. Finally, the process does not guarantee finality. Once compared to the most discussed alternative to the MAP, namely mandatory tax treaty arbitration the proposed mechanism falls short on almost all accounts. It does not provide certainty, or finality; It seems that it will be very lengthy and costly; but, most importantly, it envisions countries conceding control over their taxing rights to other countries rather than a judicial or even pseudo-judicial process.[68] The choice here is clear: the OECD prefers politics and power assertion to the law and legal solutions. Even the one area in which the prosed solution seemingly excels: standardization and the development of (common) international law is questionable, since the proposed solution does not explain the precise legal authority, the source of international law created by this solution. Moreover, the seeming advantage in terms of law development that the proposed solution has over arbitration may prove illusory since nothing prevents arbitration from providing incremental contributions to the development of such. Again, it seems that the architects of

[67] It is not yet clear whether the involved jurisdictions will be bound by the determination panel conclusions when the MNE withdraws its case.

[68] Note that this solution is very different from a peer review where some countries review the compatibility of domestic action with international standards. In the case of the proposed solution these countries will be setting these international standards and determine their application in the context of a tax system of another country.

the recent agreement focused on power preservation rather than a long-term viable solution to treaty dispute resolution.

5. Treaties and Domestic Law

The softness of the international tax regime partly stems from the different constitutional statuses awarded to treaties in different jurisdictions. The relationships between domestic laws and tax treaties are therefore not always straightforward, as already discussed above in the context of treaty override. Nonetheless, some aspects of these relationships should be clear, most importantly that tax treaties do not impose taxation and traditionally their role has been to limit domestic tax law's reach in cross-border situations. Professor Klaus Vogel aptly equated their role to a stencil imposed on domestic law, setting boundaries, and preventing the latter's reach beyond the surface of the stencil.[69]

This role of tax treaties corresponds with their key function of limiting double taxation. With the turn of the millennium, stakeholders began to promote the desire to limit double non-taxation as an equivalent key function of tax treaties. Prior to that movement the improper use of tax treaties to reduce one's taxation had been dealt with by domestic anti abuse mechanisms and by treaty dictates to contracting tax authorities to exchange information and assist each other to prevent the inherent lack of coordination embedded in tax treaties from being abused by taxpayers. These mechanisms have proven insufficient in the modern global economy, so stakeholders decided to both fortify such traditional mechanisms and introduce the new term "double non-taxation" and make it a seemingly parallel function of tax treaties to the elimination of double taxation. A new catchphrase "single tax principle, coined by Professor Avi-Yonah, was adopted by the OECD to promote this idea and this new "purpose" was inserted to the OECD Model's preamble as well as to the preamble included in the MLI. Finally, new and quite aggressive provisions, including a controversial principal purpose test (PPT) were introduced via the MLI. This whirlwind of anti-abuse mechanisms invaded international tax law with little attention to the harm that its lack of coherence may cause: the narrative was of evil taxpayers taking advantage of vulnerable tax authorities with defective weapons in their arsenal dominated the discourse, leaving little space for principled analyses. Many jurisdictions were effectively pressed to toe the line and adopt rules such as the PPT and the Hybrid Mismatches rules

[69] Klaus Vogel on Double Taxation Conventions (3rd. ed., 1997), ¶56.

that blur the line between domestic tax law and tax treaty law as a secondary means of limiting the reach of the former.

The complexity of these recent development has yet to hit the reality of implementation and the handling of disputes arising from it in the courts, yet it promises to be a long and complicated journey before the dust settles on these changes in the international tax regime.[70] Nonetheless, the OECD has already taken what I view as the next step in the recent agreement, providing that it will supply the parties with model domestic laws for the implementation of the new Pillar One taxing right. As mentioned, treaties cannot impose taxation but with the recent agreement the OECD wishes to circumvent such obstacle by an agreement to adopt unified domestic legislation. The goal of this strategy of the OECD is clear and understandable: since this is a new taxing right it will be too risky to leave legislation of domestic law to the various countries, a process that would be lengthy and unreliable so far as standardization is concerned. It is also true that tax treaty concepts and rules have over the years been adopted by domestic legislations with the effect of standardizing international tax law. The permanent establishment rules serve as a good example for successful transplantation of treaty concept into domestic tax laws.

What is proposed in the recent agreement however is different. We are used to the OECD dominating international tax law with the OECD Model Convention and Commentaries being accepted in many jurisdictions as powerful means for the interpretation of tax treaties due to the lack of alternatives for judges when they come to decide a treaty case. Now the OECD is trying to do the same thing with domestic law. Not only it intends to provide model domestic laws, but it also complements these model laws with "commentary that describes the purpose and operation of the rules," pushing a parallel to the adoption of the Model Convention and Commentaries in many countries as the primary sources for interpretation of tax treaties. Naturally, domestic legislators do not have to accept the model laws and domestic courts do not have to use the model commentaries on such laws, yet realistically there is a good chance that many will do. The pressure applied by the OECD and the most dominant economies on the rest of the inclusive framework countries, the abundance of developments and new rules that countries need to contemplate, and the neck breaking speed of these developments leave many countries with no practical means to halt and seriously evaluate the desirability of the entire

[70] One of the first examples for what awaits us in this regard is the recent Canadian case *Canada vs*Alta Energy Luxembourg S.A.R.L., 2021 SCC 49, in which diametrically opposing opinions by the majority and minority (the case was decided 5:3 in the Canadian Supreme Court) conflicted over the reach of the domestic Canadian GAAR over Canada's obligations under tax treaties. This case made waves due to the perceived parallel between such GAAR and the PPT.

package delivered to them by the OECD (and the United States in the case of the recent agreement). There are good reasons to believe that this has been the state of affairs throughout the existence of the inclusive framework,[71] and it very clearly is the case with the recent agreement. In effect, the OECD has adopted the role of an international tax government in a world that is yet to agree to having one. One may of course argue that an international tax organization would be a good thing to have, but having the OECD, a legitimacy challenged organization to assume leadership of one without debate and consent over the precise implications of such a step, and without a clear understanding of the responsibilities that such a role for the OECD entail seem to me unacceptable. Again, it seems that the OECD rushed to put the cart before the horse in a move that promises to weaken rather than bolster the international tax regime.

6. Conclusion

The breadth and complexity of the recent global discussions of the future of the international tax regime have made it difficult for all to seriously assess the desirability or even the implications of many of the component of the various agreements. The most recent agreement however goes further than all other agreements in both country and substantive scope. The neck breaking speed of events camouflages the problematic implications of some of the provisions of the recent agreement to international tax law. This essay discusses four examples for the disregard of the architects of the agreement to international law and to the rule of law more generally. This is sufficiently worrisome by itself. The essay further explains that this approach is also unlikely to be effective since a too casual attitude towards the meeting of international obligations can only result in violations by everybody, and a deterioration of the system to the detriment of cross-border investment.

[71] See, e.g., Shu-Yi Oei, World Tax Policy in the World Tax Polity? An Event History Analysis of OECD/BEPS Inclusive Framework Membership, 47 YALE J. INT'L L. _ (forthcoming 2022); and Yariv Brauner, Serenity Now! The (not so) Inclusive Framework and the Multilateral Instrument Fla Tax Rev. (forthcoming 2022).

TAXPAYERS' RIGHTS: THE DUTCH AND THE GERMAN APPROACH OF IMPLEMENTING THE AUTHORIZED OECD APPROACH COMPARED

Prof. dr I.J.J. Burgers[72]

1. Introduction

Rainer Prokisch and I first met some twenty years ago. At the time, he was working on a book on the German approach to taxing permanent establishments[73]. I had defended my dissertation on the allocation of profits to permanent establishments in 1991[74] and, together with Rijkele Betten had set up the – at the time loose-leaf, nowadays electronic – publication "Permanent Establishments" for IBFD in 1993[75]. I remember interesting discussions we had on the topic. Therefore, my contribution to Rainer's liber amicorum concerns this topic.

A major development in this field took place in 2010: the OECD changed the wording of Art. 7(2) OECD. Practical experience had shown that there was considerable variation in the interpretation of these general principles and of earlier versions of Article 7. In order to provide more certainty to taxpayers, in 2008 the OECD, based on conclusions of its 2008 Report on the Attribution of Profits to Permanent Establishments, amended the Commentary on Article 7 to incorporate those conclusions that did not conflict with the previous version of that Commentary. A change in wording of Art 7(2) OECD was however needed to incorporate the "Authorized OECD approach" (AOA), which aimed at providing guidance on how far the approach of treating a permanent establishment (hereafter PE) could be taken[76].

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[73] R. Prokisch, Betriebstättenbesteuerung 2004, Dokumentation mit Einfűhrung, Nűrnberg, Steuern und Recht, 576 pp.

[74] I.J.J. Burgers, The allocation of fiscal profits to branches of internationally operating banking enterprises". The commercial version of this dissertation was published by IBFD under the title "Taxation and Supervision of Branches of International Banks: A comparative study of Banks and other enterprises:, IBFD, Amsterdam, 1991, 570 pages.

[75] I.J.J. Burgers and Giulia *Gallo* (ed.), Permanent Establishments, Online Collection, IBFD, Amsterdam, electronic publication.

[76] OECD Report on the Attribution of Profits, Paris, 2010.

In 2010, the wording "taking into account the functions performed, assets used and risks assumed by the enterprise through the PE and through the other parts of the enterprise" was added in order to reflect that the attribution of profits to permanent establishments should take place on the basis of a two-step approach:

1. a functional and factual analysis;
2. a comparability analysis.

Under the AOA in principle, all functions of a PE will be rewarded at arm's length taking into account the assets used and risks assumed, including not only internal deliveries of goods (as in the pre-2010 version of Art. 7(2) OECD), but also internal deliveries of services, transfer of material and immaterial assets, as well as financial transactions. "Dealings" between the PE and other parts of the enterprise of which the PE is a part should be treated in the same way as similar transactions taking place between independent entities[77]. The AOA attributes to the PE those risks and the PE economic ownership of assets for which the significant functions relevant to the assumption and/or management (are performed by people in the PE and capital, including "free" capital to the PE to support the functions it has performed, the risks assumed and assets attributed to it, based on either the capital allocation approach, the economic capital allocation approach or the thin capitalization approach. Art. 7(3) OECD Model was deleted to reflect that Art. 7(2) requires the recognition and arm's length pricing of all dealings through which one part of the enterprise performs functions for the benefit of the PE[78]. Moreover, the OECD pointed out that the AOA does not dictate the specifics or mechanics of domestic law, but only sets a limit on the amount of attributable profit that may be taxed in the host country of the PE.

The OECD hoped to achieve international consensus on the, what it refers to as, functionally separate entity approach. However, this proved not to be the case.

First, the United Nations decided not to change the wording of Art. 7 of its Model Tax Convention, the motivation being the AOA is in direct conflict with Art. 7(3) UN Model Convention, a rule the UN considered to be appropriate in the context of this Convention. From the perspective of developing countries, this is understandable. These countries have an interest in maintaining the ban

[77] Par. 24 of the Commentary to Art. 7(2) OECD 2017.
[78] Par. 40 of the Commentary to Art. 7(2) OECD 2017.

on deduction of interest (other than for financial enterprises) and royalties, as these countries generally are the source countries[79].

Second, practice shows that developed countries may also have an interest in maintaining the old wording of the OECD- Model. Several of the tax treaties concluded since 2010 between developed countries, including the Netherlands and Germany, contain the 2010-2017 version of Art. 7 OECD[80].
Third, differences in legal culture concerning the application of the dynamic or the static approach affect the application of tax treaties signed and therefore concluded between 17 July 2008 and 22 July 2010. In the Netherlands, the Hoge Raad (Supreme Court) applies the dynamic approach[81]. In, Germany the Bundesfinanzhof (Federal Tax Court) applies the static approach[82]. The result is that in the Netherlands the 2008 guidance provided by the OECD is applicable to tax treaties containing the pre-2010 wording of Art. 7 OECD and in Germany to tax treaties signed and therefore concluded between 17 July 2008 and 22 July 2010[83]. In both countries the 2010 guidance is applicable only to tax treaties containing the wording of Art. 7 OECD Model 2010-2017.

Fourth, domestic law practice deviates. Amongst others, Germany included the OECD 2010 body of thought on PE profit allocation in their domestic law provision on "Taxation in case of Foreign relations" (Besteuerung bei Auslandsbeziehungen: § 1 Abs. 5(3) Außensteuergesetz (AStG: hereafter Foreign Tax Act)). In the Netherlands, domestic law was not amended.

In this paper, I compare the Dutch and German approach from the perspective of protecting taxpayers' rights to certainty and equality, including the prevention of double taxation. I will first provide an overview of the provisions concerning PE-profit allocation in the Dutch Income Tax Act 2001 (ITA 2001), Corporate Income Tax Act 1969 (CITA 1969), the Decree for the avoidance of double taxation (Dadt 2001) (Section 2), tax treaties concluded by the

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[79] Nevertheless, some developing countries did accept the 2010 version of Art. 7(2) OECD Model in their tax treaties See amongst others the Netherlands-Ethiopia treaty (2012).

[80] E.g. - the Andorra-San Marion Income and Capital Tax Treaty (2021);
- the Andorra=Hungary Income Tax Treaty (2021);

See also Section 3.2 and 5.2.

[81] HR 21 February 2003, BNB 2003/177 and BNB 2003/178.

[82] BFH 25 May 2011, I R 95/10, BFHE 234, 63; BFH 9 Feb. 2011, I R 54/10, BStBl. II, 106 (2012) and BFH 11. Juli 2018, I R 44/16, BFH/NV 2019 S. 149 m. w. N.

[83] Although as to Hentschel, Kraft and Moser, the German tax authorities apply a dynamic approach. Sven Hentschel, Gerhard Kraft and Till Moser, Permanent Establishment Taxation in Germany in a Post-AOA-Implementation Era: A Primer on Exceptions and Problem Areas, European Taxation February/March 2018, p. 81.

Netherlands (Section 3) and an overview of the case law of the Dutch Supreme Court on PE-profit allocation (Section 4). Next I will answer the question of why and how Germany included the AOA into its domestic law. Section 6 contains the answer to the research question of which of the two approaches better protects taxpayers' rights.

2. NL statutory law and case law

2.1 ITA, CITA and Decree on the avoidance of double taxation

2.1.1 Dutch resident taxpayer with PE in another country

The wording "*taking into account the functions performed, assets used and risks Á Ó Ó Õ ívåsÄdd*ed to Art. 9(2) of the Decree on the avoidance of double taxation 2001[84] - providing for exemption with progression for PE-profits for individual taxpayers - in 2012. In the same year Art. 15e(6) CITA 1969 - providing for quasi-full exemption for corporate taxpayers resident in the Netherlands having a PE outside the Netherlands - was included in the Dutch corporate income tax act (Wet op de vennootschapsbelasting 1969)[85]. The law was amended in order to achieve that:

Foreign PEs will be treated more similar to participations in associated companies being resident for tax purposes abroad[86];

PE-losses no longer reduce the worldwide profits taxable in the Netherlands for corporate taxpayers, while at the same time – similar to what used to be the case before the amendment - the silent reserves of assets transferred from the head office in the Netherlands to its foreign PE will not be taxed at the time of the transfer[87].

[84] Besluit voorkoming dubbele belasting 2001.

[85] Besluit van 22 december 2011 tot wijziging van enige fiscale uitvoeringsbesluiten, Staatsblad van het Koninkrijk der Nederlanden 2011, 677.

[86] Kamerstukken II, 2011–2012, 33 003, nr. 3, p. 14.

[87] Similar to Art. 9(2) of the Decree on the avoidance of double taxation 2001 first worldwide profits will be calculated. Next exemption will be provided for the PE profits. For individual taxpayers the formula for calculating the exempted PE- profits is:

PE annual profits ÷ worldwide taxable profits × Netherlands corporate income tax on worldwide profits.

For corporate taxpayers this formula is:

PE annual profits ÷ worldwide taxable profits minus worldwide taxable losses carried forward × Netherlands corporate income tax on worldwide profits.

2.1.2 Foreign taxpayer with PE in the Netherlands

For foreign corporate taxpayers having a PE in the Netherlands income tax will be levied on the taxable Dutch amount, that is the amount of total profits derived through an enterprise or part of an enterprise carried on through the PE in the Netherlands (Art. 17 CITA 1969). Neither the ITA nor the CITA contains wording similar to Art. 7(2) OECD old or new.

Remarkably parliamentary history does not provide for an explanation why the ITA 2001 does not contain wording similar to Art. 7(2) OECD old or new. What might explain why this wording was not introduced in the Dutch Income Tax Act is that the approach of the Dutch legislator in respect of taxation of business profits is to apply open norms to be filled in by judges. Judges can take into account the specific circumstances of the case. Thus, the principle of equality is considered to be protected most, be it at the cost of certainty and efficiency.

3. Tax treaties

3.1 Memoranda on Dutch Tax Treaty Policy

The Dutch Secretary of State for Finance published a Memorandum on Dutch Tax Treaty Policy 1987, 1996, 1998, 2011 and 2020 in which he amongst others explains the Dutch policy towards PE-profit allocation[88].

In the 1987 Memorandum, the Secretary of State explained the Netherlands is against provisions enabling force of attraction and in favour of a turnkey-provision in its tax treaties. In the 1996 Memorandum stated Dutch tax policy is amongst others to provide as much certainty as possible to Dutch business actively operating in the country of the treaty partner and the tax treaty partners' business operating in the Netherlands. The 1998 Memorandum states the Netherlands takes the separate entity approach as a starting point, in line with the OECD-policy and Dutch case law and that practical rules would be developed for PE-profits derived by Dutch resident wholesalers in flowers and

[88] Memorandum on General Tax Policy (*Nota Algemeen Fiscaal Verdragsbeleid*), 1987-1988, No. 2
Memorandum on International Tax Policy (*Notitie Internationaal Fiscaal Verdragsbeleid*), 1996-1997;
Memorandum on Principles of Netherlands Tax Treaty Policy (Uitgangspunten van het beleid op het terrein van internationaal fiscaal (verdragen) recht) 1998, ;
Memorandum on Tax Treaty Policy 2011 (*Notitie Fiscaal Verdragsbeleid 2011*);
Memorandum on Tax Treaty Policy 2020 (*Notitie Fiscaal Verdragsbeleid 2020*).

plants operating in Germany, for agriculture and forestry, as well as for business parks partly situated in the Netherlands and partly in Germany[89].

In his Memorandum on Tax Treaty Policy 2011, the Secretary of State states that the Netherlands fully supports the 2010 OECD Report on the Attribution of Profits to Permanent Establishments, and considers Art. 7 OECD a correct and modern implementation of the principles that underlie this article since the first OECD Model Tax Convention concluded in 1963. The Netherlands, therefore, is prepared to apply, in consultation with the treaty partner, the principles described in the report (AOA) also in case a tax treaty is applicable that contains the pre-2010 version of Art. 7 OECD. The Secretary of State for Finance furthermore suggests that to include a provision that will enable the competent authorities to apply the AOA at a later moment in time in case the (potential) tax treaty party feels the application of these principles would be for now a bridge too far[90].
The tax treaty policy that the Netherlands approves of the international principles on the allocation of profits to PEs has been confirmed in the 2020 Memorandum.

3.2 Both new and old version of article 7 OECD included in Dutch tax treaties concluded since 2010

The new version of article 7 is included in most of the tax treaties concluded by the Netherlands since 2011, to wit in the treaties with EU-Member States Cyprus (not yet in force at the time of writing (June 2022)), Germany, Ireland, Kosovo, Liechtenstein, Norway and the United Kingdom, as well as in the Tax Agreements with Curaçao and Sint-Maarten. The treaties concluded as from 2011 with developing countries Algeria, Ethiopia (2013), Zambia (2015) and the treaty with Kenia which is not yet in force at the time of writing (June 2022)) contain the Art. 7 UN-provision which is similar to Art. 7 OECD pre-2010. So do the treaties with Bulgaria (which entered into force in 31 July 2021) and the treaties with Iraq, that havs not yet entered into force at the time of writing (June 2022)).

[89] Regarding the wholesalers and agriculture and forestry the Secretary of Finance issued a Decree on 16 September 2002, IFZ 2002/715M. By means of a Protocol an Annex regarding cross-border business parks was added to the treaty with Germany in 2004. The Netherlands concluded a new treaty with Germany on 12 April 2012 which entered into force on 1 January 2016, which contains the Annex regarding cross-border business parks. In his Decree of 5 December 2015, IZV 2015/1054M the Secretary of State announced that the rules regarding the allocation of profits derived through agriculture and forestry will remain in force, but that the Dutch and German competent authorities agreed to no prolong the rules for wholesalers of flowers and plants.
[90] Notitie Fiscaal Verdragsbeleid 2011, par. 2.6.4.

Moreover, though article 7 of the treaty with China includes the old version of article 7, the new wording is used in the Protocol to that treaty stating that it is understood that in the case of profits from survey, supply, installation or construction activities, only so much of these profits should be attributable to a PE as resulting from the functions performed, assets used and risks assumed at or through a PE.

3.3 Two Decrees of the Secretary of State for Finance on PE-profit allocation of 15 January 2011

3.3.1 Decree of 15 January 2011, IFZ 2010/457M

The Memorandum of 2011 refers to the Decree of 15 January 2011, IFZ 2010/457M, for an in-depth discussion of the view of the Secretary of State for Finance in respect of profit allocation to PEs. In this Decree, the Secretary of State for Finance indicates that:

- the Dutch policy has been to apply the arm's length-principle and the functionally separate entity approach for the allocation of profits to a PE. Internal deliveries, services and putting assets at the disposal should be rewarded at arm's length, unless this would not be in line with the Commentary to art. 7 OECD Model, the Decree on the avoidance of double taxation 2001 and/or the Dutch case law;

- the Dutch tax administration will accept application of the PE-profit allocation principles set out by the OECD in the 2008 and 2010 Reports on the Attribution of Profits to Permanent Establishments for all treaties - also if these treaties contain the pre-2010-version of Art. 7 OECD - on the condition that these principles are consistently also applied by the taxpayer in the other contracting state;

- the 2008/2010 PE-profit allocation principles may (!, so not must) also be applied for the determination of the amount of PE-profits of a Dutch resident taxpayer to be exempted by the Netherlands on the basis of the Decree for the avoidance of double taxation, as well as for the amount of PE-profits of a foreign taxpayer that may be taxed by the Netherlands on the basis of domestic law in case no tax treaty is applicable. Moreover is of relevance that the PE-Report and the Commentary to Art. 7 OECD Model are of great importance for the interpretation of domestic law and the Decree for the avoidance of double

taxation, even though the Report, the Model and the Commentary to the OECD-Model are not of direct relevance for the application of domestic law or the Decree for the avoidance of double taxation, but are only directly relevant for the interpretation of tax treaties concluded by the Netherlands.

- in his view the capital allocation approach is preferable as the creditworthiness of the PE is similar to that of the enterprise of which the PE is a part and internal guarantees between different parts of an enterprise are not feasible;

- the fungibility approach is the preferable approach for the allocation of interest, as - similar to the capital location approach - a risk-weighted share in the total interest of the enterprise will be allocated to the PE. The alternative, the tracing method, to a lesser extent takes into account the specific circumstances of the PE. Such circumstances are taken into account in case – based on a functional analysis – a pro rata part of the interest paid by the enterprise is allocated to the PE. Such interest will approximate the interest that a non-related lender would charge for financing a similar non-related enterprise. The Dutch tax administration will apply the 'thin capitalisation approach', and thus make a comparison to the amount of capital of and the amount of interest paid by not-related enterprises comparable to the PE where the enterprise as a whole has not been financed in accordance with the arm's length principle.

- in case the allocation of capital and interest in the other Contracting State will deviate and thus there will be double (non-) taxation he is prepared to enter into a mutual agreement procedure;

- In case of the application of a tax treaty containing the pre-2010 version of Art. 7 OECD Model the Dutch tax administration will follow the approach of the state in which the PE is situated if:

a. the other Contracting state laid down a specific method of allocation of capital and interest in laws or regulations;

b. the other Contracting states approach is an Authorized OECD Approach;

c. this approach in the case at stake results in an allocation of profit that is arm's length.

- the starting point for the AOA is that the PE-profit allocation is as much as possible based on the arm's length-principle. Therefore, it is highly likely that

the terms 'significant people functions' and functions of the people exercising 'control over risk' in case of associated enterprises overlap to a large extent. The risk allocation to PEs to a great extent is comparable to the risk allocation to non-related enterprises that are similar to the PE in similar circumstances;

- taxpayers may allocate the costs of internal general and administrative services, if a similar service is not provided to third parties (the old OECD approach) or allocate the at arm's length price for such services, if the Business Profits article in the applicable treaty is based on the OECD Model 2008/2010;

- in line with the AOA the Dutch tax administration will consider the use of a tangible asset as being decisive for the allocation of material assets. Referring to the decision of the Dutch Supreme Court of 23 January 1974, BNB 1986/100, in which the Supreme Court made a distinction between permanent and temporary use for the allocation of assets to a foreign PE of a Dutch resident taxpayer, the Secretary of State for Finance adds to the OECD's view that in the case of temporary use, an internal rent should be allocated;

- in line with the AOA both for internally developed as well as for acquired intangible assets is decisive which part of the enterprise on the basis of significant people functions takes the active decisions to take the risk and to actively manage the risk.
- in line with the AOA financial assets such assets will be allocated to the PE if it performs the significant people functions in respect of the acquisition and the management of these assets. The Secretary of State adds that, in the case of a planned acquisition or dividend distribution, the assets should be allocated to the PE only if the staff of the PE took the decision to use the funds for this purpose;

- contrary to the AOA that allows internal interest in respect of treasury activities, internal interest can be taken into account if the loan allocated to the PE stems from a third party;

- in all circumstances, the starting point for taking internal royalties into account should be as much as possible: achieving an outcome that is similar to similar situations in case of unrelated companies. The Commentary to the pre-2010 version of art. 7 OECD does not disallow internal royalties. Dividing the costs would not be appropriate if based on facts and circumstances it would be possible to apply the arm's length-principle and that principle would result in another outcome. Both for internally developed as well as for acquired

intangible assets the criterion is which part of the enterprise on the basis of significant people functions takes the active decisions concerning taking the decision to take the risk and to actively manage the risk merely;

- no profits should be attributed to a PE of the principal in the country of the agent in case the fee of the agent is arm's length. Sole exception is if the staff of the principal fulfils the significant people functions in that state.

3.3.2 Decree of 15 January 2011, DGB 2010/8223M

In his Decree of 15 January 2011, DGB 2010/8223M the Dutch Secretary of State for Finance formulates the following conditions for the allocation of shares to a PE of a foreign enterprise that carries on a business in the Netherlands through a PE:

- the activities of the PE are performed by qualified staff in and from the Netherlands; and
- a direct relation between the business activities of the PE and the business activities of the company of which the shares are owned exists.

4. Case law

4.1 On domestic law

Given that the Dutch (corporate) income tax law does not provide for an indication whether the (functionally) separate entity approach or other approach should be applied in calculating the profits derived by a PE in the Netherlands one might expect the Dutch Supreme Court would have had to decide several times on the issue. Surprisingly this is not the case. Since 1931 (!) the Supreme Court (Hoge Raad) decided only six times on this matter, to wit on:

- 13 November 1931[91]: A bond loan issued by a Belgium resident company should be allocated to the PE in the Netherlands as the bond was issued in order to acquire funding for the activities of the PE;
- 13 April 1955[92]: Expenses for training and travel of staff of a taxpayer resident in Indonesia working for the PE of the company in the Netherlands seconded to the head office that could not be remunerated by the head office due to

[91] B 5085
[92] BNB 1955/190

exchange restrictions. These costs were directly related to the business activities in Indonesia and therefore were not deductible in the Netherlands;

- 4 December 1957[93]: Profits to be allocated to a PE in the Netherlands of a foreign taxpayer should be determined as if head office and PE were independent enterprises acting on an arm's length basis with each other;

- 27 April 1960[94]: Securities bought as investment of excessive liquid assets derived through the activities of the PE in the Netherlands of a Belgium resident company in 1943 that could not be transferred to Belgium due to exchange restrictions should be allocated to the PE for three reasons:
1. Administrative argument: in the financial accounts and the tax return the assets were booked as PE-assets;
2. Causal argument: the securities were bought with liquid assets derived from the activities of the PE;
3. Actions argument: the action to invest in the securities was carried out in the Netherlands;

- 23 January 1974[95]: A partnership carried out a dredger work in Nigeria used a dredger owned by one of the partners, a Dutch resident taxpayer. Before attributing the profits to the partners in line with the partnership contract a rent was paid for this dredger to the Dutch resident partner. The Supreme Court decided that for the attribution of profits to the Nigerian PE the partnership contract was leading. The dredger fulfilled the same economic function for the taxpayer's part in the partnership as for the other partners. Thus, the rent paid to the Dutch resident partner was taken into account in calculating the PE-profit to be exempted. No reference was made by the lower Court or the Supreme Court to the separate enterprise theory. Thus, the fact that the dredger was put at the disposal by one of the partners to the partnership seems to be the sole reason why the Supreme Court decided that a rent should be taken into account;

- 7 May 1997[96]: In 1984 the Dutch income tax allowed for a so-called "capital deduction". The Supreme Court upheld the decision of the Court of The Hague that the separate entity fiction is the starting point for the determination of the capital to be allocated to a PE in Ireland of a Dutch resident company and that

[93] BNB 1958/11
[94] BNB 1960/167
[95] BNB 1986/100
[96] BNB 1997/263

Art. 5 of the tax treaty with Ireland does not limit the working of domestic law in this matter. However, the Supreme Court did not uphold the decision that the ratio "equity to debt" of the PE should be based on the ration "equity to debt" of a similar third party as funds that were not borrowed for serving the activities of the PE would be allocated to the PE as a result of this. The Supreme Court decided those funds that are used by the entrepreneur for funding the activities of the PE that have not been acquired through a loan should in principle be regarded as free capital of the PE, just as would be the case with funds invested in an independent enterprise not acquired by incurring debts. The ratio "equity to debt" depends on the actual circumstances in which the company finds itself and the preference of the entrepreneur to finance the company with own funds or debt. The way similar companies are financed deviates considerably. Setting a norm for such ratio would not be appropriate. It would also not be appropriate to consider the "current account" between PE and head office as free capital of the PE. The books may be a starting point, but are not decisive for the allocation of capital and debt to a PE.

4.2 On tax treaties

The Dutch Supreme Court decided more than sixty times on the application of the business profits article in tax treaties since the 1930s. Below a summary of the in the context of this paper most relevant cases is provided for.

- HR 8 November 1989, BNB 1990/36: Though from a legal perspective a transfer of goods from the UK head office to its PE in the Netherlands does not result in a debt, such internal debt should be taken into account in determining the profits to be allocated to the PE. Foreign exchange fluctuation influence the amount of internal debt and thus the profit to be allocated to the PE on the basis of art. 8(2) of the tax treaty with the UK. Note the Supreme Court did not refer to Dutch domestic law;

- HR 7 May 1997, BNB 1997/211: Capital taxes should not be allocated to the PE in Switzerland of a Dutch resident enterprise; as such, capital taxes are costs that are inherent to the legal form of the company;

- HR 7 May 1997, BNB 1997/264: The Supreme Court did not allow the Dutch resident taxpayer to take into account internal interest on the average of the balance between the Dutch head office and the UK PE at the start and the end of the book year. Funds that have arisen through the activities of a PE should not

be allocated to the PE if such funds do not serve the activities of the PE, which in respect of the current account was not the case;

- HR 20 December 2002, BNB 2003/246: A PE in the Netherlands of a so-called dividend mixer company resident in the UK had as function to declare, receive, mix and distribute group dividends that the UK parent was able to make the best use of the tax credits. Those shares should be allocated to the PE that serve the activities of the PE, while also is of relevance whether the employees working for the PE were independently authorized to exercise the rights attached to the shares;

- HR 25 November 2006, BNB 2007/117: The Supreme Court decided that the separate enterprise fiction in Art. 7 of the tax treaty concluded between the Netherlands and Belgium implies that financial assets of a Belgium resident banking enterprise having a PE in the Netherlands that serve the activities of the company should be allocated to the PE. Taxpayers are not free in their decision about the amount of free capital to be allocated to a PE. Internal loans may be taken into account only in exceptional cases, such as internal supplier credit or the "advances" between the different parts of a financial enterprise referred to in par. 19 of the Commentary to art. 7 OECD 2014. Tax accounts alone are not sufficient proof. If the taxpayer's only proof is the accounts, for a banking enterprise it is acceptable that the tax inspector takes the BIS-requirements as an indirect basis for checking the calculation of the PE-capital. It should be taken into account that the risks assumed through the activities of the PE may differ from those assumed by the worldwide banking enterprise;

- HR 3 June 2016, BNB 2016/171: A Dutch resident taxpayer paid royalties to its parent company, as of 1999 amongst others for the use of the trademark and other intangibles (the format) in Spain of the group in Spain where the PE of the taxpayer is situated. Without further going into the question on how to apply the applicable domestic law (art. 15(1) CITA 1969), the Supreme Court motivated its decision that internal royalties could not be taken into account on the Commentary to art. 7 OECD 1963 as art. 7 of the tax treaty Netherlands-Spain 1971 reads similar to that article. The fact that the royalties have been determined at arm's length is as to the Supreme Court not of relevance. The costs made by the taxpayer for the format should be taken into account in determining the PE-profit to be exempted, provided the intangibles serve the activities of the PE.

What stands out in comparing this case law to the view of the Dutch Secretary of State for Finance in his Decrees of 15 January 2011 and to the Authorized OECD Approach is that:

Instead of "use" the Dutch Supreme Court considers "serving the activities of the PE" is decisive for allocating assets to a PE;
The Dutch Supreme Court applied the tracing method for allocating debt in its decisions of 7 May 1997, BNB 1997/264 and 25 November 2006, BNB 2007/117.

It remains to be seen whether the Supreme Court would judge similarly in respect of cases where the relevant tax treaty article would be based on Art. 7 OECD as it reads since 2010. Most of the cases summarized above were decided upon prior to the publication of the 2008 and 2010 OECD Reports on the Attribution of Profits to Permanent Establishments. Exception is HR 3 June 2016, BNB 2016/171. However, this decision does not give evidence on the Supreme Court's view on the AOA as the case concerned the application of the business profits article in a tax treaty concluded in 1971.

5. The German approach

5.1 Why and how did Germany include the AOA into its domestic law?

As of 1 January 2013 Germany implemented the OECD 2010 body of thought on PE profit allocation in their domestic law provision on "Taxation in case of Foreign relations" (Besteuerung bei Auslandsbeziehungen. § 1 Abs. 5 Außensteuergesetz (AStG: hereafter Art. 1(5) Foreign Tax Act)). Both in respect of intra- and intercompany transactions a functional and comparability analysis should be applied[97]. Art. 1(6) Foreign Tax Act authorizes the

[97] § 1 Abs. 5(3) Außensteuergesetz (AStG) reads: "Für die Bestimmung der dem Fremdvergleichtsgrundsatz entsprechenden Verrechnungspreise (Fremvergleichspreide) für eine Geschäftsbeziehung im Sinne des Absatzes 1 Satz 1 sind die tatsächlichen Verhältnissen maBgebend, die dem jewiligen Geschäftsvorfall zugrunde liegen, insbesondere ist zu beruűcksichtigen, von welcher an dem Geschäftsvorfall beteiligten Person welche Funktionen in Bezug auf den jeweiligen Geschäftsvorfall ausgeűbt, welche Risiken diesbezűglich jeweils übernommen, und welche Vermögensvorfall ausgeűbt warden (Funktions- und Risikoanalyse). Die Verhältnisse im Sinne der Sätze 1 und 2 bilden den MaBstab für die Feststellung der Vergleichbarkeit des zu untersuchenden Geschäftsvorfalls mit Geschäftsvorfällen zwischen voneinander unabhängigen Dritten (Vergleichbarkeitsanalyse); die diesen Geschäftsvorfällen zugrunde liegenden Verhältnisse sind in entsprechender Anwendung der Sätze 1 und 2 maBgebend, soweit die möglich ist.

Bundesfinanzministerium der Justiz und Verbraucherschutz (Federal Ministry of Justice and Consumer Protection) to provide for more detailed rules[98]. The Bundesfinanzministerium published such - very detailed - rules on 13 October 2014, latest updated on 12 May 2021[99]. Moreover, in 2016 - responding to critic in professional literature[100] - the German Ministry of Finance issued 186 pages of administrative guidelines, providing for numerous examples[101]. The rules only allow for an increase of the German PE-profit of non-resident taxpayers respectively for a reduction of the foreign-PE profit of German resident taxpayers. The rules and guidelines are not applicable in case according to German law a PE is present, in case no PE is present according to the applicable tax treaty[102].

The legislators' aim with the new subsections 1(5) and 1(6) was to consistently regulate the taxation of all cross-border activities of corporations, partnerships and PEs[103]. Moreover - though not mentioned in the Gesetzentwurf (Bill) as being one of the aims of the amendment of Art. 1 Foreign Tax Act - as Kempf and Jakob[104] point out, due to the extension of section 1 of the Foreign Tax Act to PEs, German exit tax rules on the transfer of business functions became applicable on transfers to a foreign PE of a German enterprise.

Abzustellen ist aud fie Verhältnisse zum Zeitpunkt der Vereinbarung des Geschäftsvorfalls". See https://www.buzer.de/gesetz/5491/a75265.htm

[98] § 1 Abs. 5(6) Außensteuergesetz (AStG) reads: "Das Bundesministerium der Finanzen wird ermächtigt, mit Zustimmung des Bundesrates durch Rechtsverordnung Einzelheiten des Fremdvergleichsgrundsatzes im Sinne der Absätze 1, 3 bis 3c und 5 und Einzelheiten zu dessen einheitlicher Anwendung zu regeln sowie Grundsätze zur Bestimmung des Dotationskapitals im Sinne des Absatzes 5 Satz 3 Nummer 4 festzulegen.

[99] Verordnung zur Anwendung des Fremvergleichsgrundsatzes auf Betriebsstätten nach § 1 Absatz 5 des AuBensteuergesetzes (Betribsstättengewinnaufteilungsverordnung – BsGaV) 13.10.2014; BsGaV § 12 i.d.F. 12.05.2021 Abschnitt 1: Allgemeiner Teil Unterabschnitt Dotationskapital Unterabschnitt 3: Dotationskapital, übrige Passivposten und Finanzierungsaufwendungen, https://datenbank.nwb.de/Dokument/475076_12/

[100] Michael Kumpf and Michael Jakob, Changes in the Taxation of Permanent Establishments in Germany, ITJP 2013, at 100.

[101] Grundsätze für die Anwendung des Fremdvergleichsgrundsatzes auf die Aufteilung der Einkünfte zwischen einem inländischen Unternehmen und seiner ausländischen Betriebsstätte und auf die Ermittlung der Einkünfte der inländischen Betriebsstätte eines ausländischen Unternehmens nach § 1 Absatz 5 des Außensteuergesetzes und der Betriebsstättengewinnaufteilungsverordnung (Verwaltungsgrundsätze Betriebsstättengewinnaufteilung – VWG BsGa) BEZUG TOP 4.4 der Sitzung ASt III/16 GZ IV B 5 - S 1341/12/10001-03 DOK 2016/1066571, BMF-Schreiber 22 December 2016..

[102] BMF-Schreiben 22 December 2016, at 9 and 10.

[103] Gesetzentwurf der Bundesregierung, Entwurf eines Jahressteuergesetzes 2013, 171000, p 36: „Um den international anerkannten Fremdvergleichs-grundsatz (OECD-Standard) uneingeschränkt auf internationale Betriebsstättenfälle anwenden zu können, ist die Schaffung einer innerstaatlichen Rechtsgrundlage in § 1 AStG notwendig. Außerdem wird diese Vorschrift zur Vermeidung von rechtlichen Risiken hinsichtlich ihrer Wirksamkeit für Sachverhalte unter Beteiligung von Personengesellschaften oder Mitunternehmerschaften ergänzt.

[104] Andreas Kempf and Michael Jakob, Changes in the Taxation of Permanent Establishments in Germany, International Transfer Pricing Journal March/April 2013, p.98.

Section 1(4) Foreign Tax Act provides for a definition of what in the context of this Act is considered as "Geschäftsbeziehungen" (transactions) if such transactions take place between associated companies or between a foreign enterprise and its PE in the other state. Art. 1(5) reflects the two-step functionally separate entity approach recommended by the OECD. However, in comparison to Art. 7(2) OECD 2010 – 2017 the German legislator added a condition: "es sei den, die Zugehörigkeit der Betriebsstätte zum Unternehmen erfordert eine andere Behandlung" (provided different treatment is required due to the fact that the PE is part of the worldwide enterprise).

What should be understood by functions, assets and risks is explained in Art. 1(5):

Functions of the enterprise carried out by the enterprise through the PE's personnel (Personalfunktionen (instead of the term "significant people functions" used by the OECD!);
Assets of the enterprise required to carry out the functions attributed to the PE;
Opportunities and risks of the enterprise, which are assumed by the PE based on the functions and assets attributed to it; and
An appropriate amount of equity (Dotationskapital).
Next Art. 1(5) Foreign Tax Act provides that the second step is to determine the kinds of transactions between the enterprise and its PE and the transfer prices for these transactions. In contrast to the OECD, the German legislator uses "Geschäftsbeziehungen" (transactions) instead of "Handlungen" (dealings). Art. 1(5) provides for an escape clause in case of potential conflict with tax treaties: in case the other state applies the tax treaty rules and this results in double taxation the tax treaty prevails.

Art. 1(6) Foreign Tax Act delegated to the Ministry of Finance the power to draft Regulations on the Application of the Arm's Length Principle for associated enterprises and PEs as well as for the allocation of the Dotationskapital to PEs. The Bundesrat adopted the – to both tax administration and taxpayers binding - Regulations on the Application of the Arm's Length Principle on Permanent Establishments in accordance with Art. 1(5) of the Foreign Tax Act (Verordnung zur Anwendung des Fremdvergleichtsgrundsatzeds auf Betriebsstätten nach § 1 Absatz 5 des AuBensteuergesetzes (Betriebsstättengewinnaufteilungsverordnung – BsGaV) on 13 October 2014. These Regulations contain extensive rules that reflect the body of thought of the AOA, however with several deviations and additions:

Part 1, Subpart 1, sections 1-3: Allocation on the basis of a functional- and risk analysis and a comparability analysis, definitions of the terms domestic enterprise, foreign enterprise, people functions, own personnel (which includes personnel seconded by another company, the entrepreneur or shareholder and persons related to the enterprise of the shareholder within the meaning of section 1(2) of the Foreign Tax Act), significant people functions and relevant assets (Vermögenswerte) and the obligations to prepare an auxiliary calculation at the beginning and end of each financial year comprising all elements (Bestandteile) that must be attributed to the respective PE, implying that;
the financial statements of the enterprise must be split between head office and PE(s);
the transactions between the different parts of the enterprise are documented on the basis of section 90(3)(4) General Tax Code (Abgbenordnung);
the reasons for the allocation of the assets, the transactions, the opportunities and risks and the allocation of the financial obligations;

Part 1, Subpart 2, sections 4 – 11: Allocation rules for people functions, tangible and intangible assets, shares, other investments and similar investments, other assets, transactions with third or related parties, obligations and risks and of hedging transactions.

Other than the OECD and the Dutch Secretary of State for Finance the German rules refer to people functions, instead of significant people functions. People functions should be allocated to a PE actually performing the functions, unless the people function has no factual relevance to the activities of the PE or is exercised in less than thirty days within a financial year in the PE. Moreover the German rules – contrary to the OECD and the Dutch Secretary of State for Finance – provide that the function must be attributed to the PE in relation to which it has or shows the closest relationship in case such function is performed neither in a PE nor in the rest of the enterprise or is not allocable under section 4(1)(2) of the Verordnung.

Similar to the OECD and NL approach “use” determines the allocation of immovable property. However, other tangible assets, as well as shares, other investments and similar assets must be attributed to the PE that uses the asset only if other people functions - such as acquisition, production, administration

or sale - are not unequivocally more important than the function "use"[105]. The allocation changes if the asset is subsequently permanently used by another PE.

Other than the Dutch Decree, the Verordnung does not provide certainty on whether in case of temporary use of a tangible asset an arm's length rent should be taken into account.
The German rules for allocating intangibles also differ from the AOA- and the Dutch approach, being that for:
Internally created intangibles active decision-making with regard to the taking on and management of individual risk and portfolios of risks associated with the development of intangible property is decisive;
Acquired intangibles active decision-making relating to the taking on and management of risks such as the evaluation of the acquired intangible, the performance of any required follow-on development activity, and the evaluation of and management of risks associated with deploying the intangible asset is decisive;
Marketing intangible those functions associated with the initial assumption and subsequent management of risks of the marketing intangibles, such as functions related to the creation of and control over branding strategies, trademark and trade name protection, and maintenance of established marketing intangibles is decisive.

The German rules require allocation of Intangibles to the PE where it is created or by which it is acquired, unless a people function performed in a different establishment – such as the use, the administration, the further development, the protection of the disinvestment of the respective intangible good or group of intangible goods - is unequivocally more important. The German rules moreover provide for a rule if the utilization of a tangible or intangible good frequently changes: the asset is attributed to the PE having the business activity in which the asset is predominantly used.

Part 1, Subpart 3, sections 12 – 15: allocation of Dotationskapital, other liabilities and interest expenses. For the determination of Dotationskapital to a domestic PE the German rules require the application of the "Kapitalaufteilungsmethode", implying that at the start of the book year that part of the enterprise's capital should be allocated to the PE that represents its part of the assets and the opportunities and risks, valuated at arm's length. This

[105] For a more extensive overview of these allocation rules see Ulf Andresen, Regulations Provide Further Guidance on the Application of the Authorized OECD Approach to the Attribution of Profit to Permanent Establishments, International Transfer Pricing Journal, 2015, pp. 77 – 84.

approach is to a large extent similar to the capital allocation approach preferred by the Dutch Secretary of State for Finance. However, the German rules require that the amount of Dotationskapital should be at minimum the amount of capital of the PE disclosed on the PE's trade balance (inländischen Handelsbilanz). Moreover, other than the OECD and the Dutch Decree, the German rules provide that in principle the enterprise's capital should be determined on the basis of German law. For reasons of simplification under circumstances, the amount of capital on the balance sheet of the foreign company may be used.

The Dotationskapital of a foreign PE of a German enterprise - contrary to both the allocation method used to determine the amount of free capital of the German PE of a foreign enterprise and the OECD's capital allocation approach the German rules - is to be determined on the basis of the minimum capital approach (Mindestkapitalausstattungsmethode). Decisive is the amount of free capital needed for the activities of the PE. A higher amount may be allocated if this would be more in line with the arm's length principle, with a maximum of the amount of capital on the PEs trade balance. Both for domestic and foreign PEs a significant change in circumstances throughout the financial year would lead to adjustment.

The next step is to allocate the other liabilities that are directly related to the assets and opportunities and risks allocated to the PE. In case the amount of liabilities falls short allocation of this shortfall should take place on an indirect basis. In case of a surplus, the amount of liabilities allocated to the PE should be reduced proportionally. Determination of the amount of interest expenses to be allocated to the PE takes place correspondingly directly, or if this is not possible indirectly. An arm's length interest will be allocated in case of internal financial transactions only in case:
the PE fulfills the Treasury Function. Specific mention is made that these activities qualify as a service;
funds generated by the activities of the PE are put at disposal of other parts of the enterprise for specific goals.

Part 2, sections 18 – 22 and part 3, sections 23 – 29 of the Verordnung contain special rules for PEs of banks and insurance companies that resemble the OECD's body of thought laid down in. Other than the OECD 2008/2010 Reports on the attribution of profits to PEs and the Dutch Decree, Parts 3 – 7, sections 30 – 41 provide rules for construction companies, exploration companies and agency PEs, as well as Final provisions.

5.1 Both new and old version of article 7 OECD included in German tax treaties concluded since 2010

As early as 2006, by means of a Protocol, the functional and comparability approach has been included into to the treaty with the United States. Thus far (December 2021) the functionally separate entity approach also was included in the treaties Germany signed as of 2010 with Japan (2015), Liechtenstein (2011), Luxembourg (2012), the Netherlands(2012), and by means of a Protocol into the tax treaties with Norway (2013), United Kingdom (2014) and Ireland (2014).

The old version of Art. 7 has been included in the tax treaties signed:
between 17 July 2008 and 22 July 2010 Germany concluded tax treaties with Bulgaria (25 January 2010), Malaysia (23 February 2010) and Uruguay (9 July 2010) ;
as of 22 July 2010 with Albania (2010), Armenia (2016), Bulgaria (2010), Australia(2015), China(2015), Costa Rica (2014), Cyprus (2011), Hungary (2011), Finland (2016), Hungary (2011), Israel (2014), Malaysia (23 February 2010), Mauritius (2011), Oman (2012), Philippines (2013), Taiwan (2011), Turkey (2011), Uruguay (2010) and the United Arab Emirates (1 July 2010). In the period.

6. The Dutch and German approach compared from the perspective of taxpayers rights

Comparing the Dutch and the German approach shows us Germany offers a lot more certainty to taxpayers on how to allocate profits to permanent establishments than the Dutch approach. Moreover, the German rules and administrative guidance, by offering more clarity, may result in more consistent taxation of cross-border activities of PEs, corporations and partnerships. At first sight, this may lead to the conclusion that taxpayers rights are better protected in Germany than in the Netherlands. However, the comparison also teaches us that the German legislator decided to deviate from the OECD-guidance to some extent, which might result in double taxation in case the other state applies the tax treaty rules. The intention of the escape clause was to ensure that double taxation would be prevented. However, this aim is not fully achieved. An example is the allocation of free capital to the Dutch

permanent establishment of a German enterprise. Whereas the Netherlands tax authorities will apply the capital allocation approach, the German tax authorities will apply the Mindestkapitalausstattungsmethod and thus will only allow allocation of free capital to the Dutch PE to the extent that the taxpayer proves funds are used for the activities of the PE. Thus, the PE-income exempted by Germany might be lower than the PE-income taxed in the Netherlands as the interest deduction to be taken into account is higher than the interest deduction taken into account in the Netherlands. A mutual agreement procedure might solve this, but is costly. The escape clause of Art. 1.5(8) does not have any effect if the taxpayer is not able to provide the proof.

Other than the German rules, the Dutch approach fully aligns with the AOA. Moreover, the principle of equality may be better protected through open norms filled in by the tax authorities, judges and/or arbitrators, be it at the cost of certainty and efficiency. The flexibility of the Dutch approach moreover seems to offer more possibilities for achieving mutual agreement than the German approach. Finally, the Dutch approach provides more flexibility due to the fact that in case of future changes to the Commentary to art. 7 OECD Model (note no year has been mentioned) or the Dutch Unilateral Decree for the Avoidance of Double Taxation – Besluit voorkoming dubbele belasting 2001 - the policy laid down in IFZ 2010/457M will not be applicable if it is not in line with the changed versions. Most likely, the Secretary of State in such circumstances will issue a new Decree. Thus, whereas in Germany legislation has to be amended, which may be time consuming, in the Netherlands quick adaptation is possible. All in all, both approaches have their merits and their cons from the perspective of protecting taxpayers rights.

THE ECONOMIC APPROACH IN EU VAT, WITH A GERMAN TWIST

Prof. dr. A.J. van Doesum[106] and dr. F.J.G. Nellen[107]

1. Introduction

Our valued colleague Rainer Prokisch is blessed with the ability and drive to explore the fundamental dimension of tax law. Following his example, in this contribution to his *Liber Amicorum*,we will focus on a fundamental issue in tax law too. And, still following his example, we will do so with a German twist. We will discuss a trend of economic thinking that increasingly influences the interpretation and application of EU VAT. By doing so, we try to approach this topic from a fundamental perspective – meaning that we reflect on the trend with fundamental values (i.e., legal certainty and neutrality) in mind. The German twist is not only that we write this contribution in honor of Rainer, but also that we deliberately restrict ourselves to German cases, which were referred to the CJEU (in particular *Phantasialand*[108] and the pending case *W-GmbH*[109]).

This contribution discusses the 'economic' approach that the CJEU regularly employs to decide on cases relating to EU VAT.[110] In section 2, we provide a legal analysis of the economic approach. Section 3 deals with two important fundamental values in connection with the approach: neutrality and legal certainty. The remainder of this contribution focuses on two German cases in which the economic approach of the CJEU has particular meaning or relevance. Specifically, in section 4, we discuss the (pending) case *W-GmbH*, it deals with the question to what extent the CJEU should rely on an economic approach rather than a legal approach in order to safeguard the neutrality of VAT. Section

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[108] CJEU 9 September 2021, C-406/20 (Phantasialand v Finanzamt Brühl), ECLI:EU:C:2021:720.

[109] Pending case C-98/21, Finanzambt R. v. W-GmbH.

[110] As a basis for this contribution, we refer to Ad van Doesum and Frank Nellen, Economic Reality in EU VAT, EC Tax Review 2020-5, a forthcoming publication by A. v. Doesum, Capital Contributions: VAT Neutrality, Economic Reality and Legal Certainty, as well as to the authors' contribution to M. Lang et al (eds.), CJEU – Recent Developments in Value Added Tax 2020 (forthcoming; A. v. Doesum & F. Nellen, Taxable Amount and VAT Rates), and to M. Lang et al (eds.), CJEU – Recent Developments in Value Added Tax 2021 (forthcoming; F. Nellen, Taxable Amount and VAT Rates).

5 concerns the economic approach in the case *Phantasialand* in which the CJEU takes into account certain aspects of economic theory in the course of reaching judgment. Section 6 contains the conclusion.

2. The economic approach of the CJEU in EU VAT

The 'economic approach' of the CJEU in EU VAT is based on the concept of 'economic and commercial reality' (hereafter: 'economic reality'). This concept, which has no legal definition, is used by the CJEU to interpret and explain facts in the course of legal proceedings, following which precedence is given to the ultimate economic results of acts rather than to their legal characteristics.[111] In this regard, the 'economic' approach complements the standard interpretation methods: textual (including linguistic) interpretation (textualism), contextual interpretation and teleological interpretation.[112]

From CJEU case-law, two primary manifestations of the concept of economic reality can be inferred.[113] First, economic reality functions as an external standard of normality that serves in the course of the application of the doctrine of abuse of law. It is used to assess whether the parties involved in the case at hand have acted abnormally or artificially in the course of their commercial dealings and contract negotiations (e.g. to obtain tax advantages of which the accrual would be contrary to the law).[114] The second manifestation of economic reality takes place both within and outside the context of the doctrine of abuse of law. In that regard, it serves as a combination of judiciary instruments that is aimed at realizing a purposeful application of VAT through the selection of the relevant facts and their fiscal classification. One example of its application is when the CJEU determines the tax implications of a given case on the basis of the factual conduct of the parties rather than their (asynchronous) contractual arrangements. The CJEU also employs economic reality to make a judiciary selection and classification of the case facts to realize an application of VAT norms that it deems to be appropriate (a 'VAT reality'), for example, to achieve a neutral outcome. An economic approach or perspective is instrumental to create such a 'VAT reality'.

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[111] A. van Dongen, De harmonisatie van de btw (dissertation), Sdu Fiscale en Financiële Uitgevers, Amersfoort, 2007, p. 262.

[112] CJEU 6 October 1982, Case 283/81 (Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health), ECLI:EU:C:1982:335. See: O. Henkow, Financial Activities in European VAT (dissertation), Wolters Kluwer Law & Business 2007, p. 14.

[113] Ad van Doesum and Frank Nellen, Economic Reality in EU VAT, EC Tax Review 2020-5.

[114] See CJEU 21 February 2006, C-255/02 (Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise), ECLI:EU:C:2006:121.

3. The economic approach in light of the principles of neutrality and legal certainty

The economic approach of the CJEU is strongly associated with the principles of neutrality and legal certainty. Firstly, the principle of legal certainty is a fundamental principle of EU law.[115] It requires that a legal system and its application is clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly. Further, the principle of legal certainty demands that EU VAT law is certain and that its application is foreseeable by those subject to it. It must be observed all the more strictly in the case of rules liable to entail financial consequences, such as the EU VAT rules, in order to achieve that those concerned may know precisely the extent of the obligations which they impose on them.[116] Following this, the economic approach of the CJEU appears to be curtailed by the principle of legal certainty. The reason is that it will be difficult, if not impossible, for a taxable person to establish the correct VAT treatment of its transactions when that VAT treatment is not dependent on the formal or legal characteristics of the transactions (i.e., contractual and legal reality), but rather on an uncertain *ex post* economic assessment by a court. As regards this aspect, the principle of legal certainty can be said to have an uneasy relationship with the economic approach of the CJEU.

The second principle that we discuss in this contribution concerns VAT neutrality. In short, it is a 'fundamental principle of the common system of VAT established by the relevant EU legislation', and as such has both an economic and a legal dimension.[117] The economic dimension provides that VAT should be exactly proportional to the price of the goods and services and not be a cost to businesses (the so-called 'system neutrality').[118] Conversely, the legal aspect of the neutrality principle entails the reflection in the field of VAT of the (general) principle of equal treatment.[119] In an ideal world, the rules laid down in the EU

[115] CJEU 3 June 2008, C-308/06 (The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport), ECLI:EU:C:2008:312, para. 69.
[116] CJEU 21 February 2006, C-255/02 (Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise), ECLI:EU:C:2006:121, para. 72.
[117] See: B.J.M. Terra, Omzetbelasting bij grensoverschrijdend verkeer (dissertation), FED, Deventer, 1984, pp. 31-38; CJEU 19 September 2000, C-454/98 (Schmeink & Cofreth AG & Co. KG v Finanzamt Borken and Manfred Strobel v Finanzamt Esslingen), ECLI:EU:C:2000:469, para. 59.
[118] Ad van Doesum, Herman van Kesteren, Simon Cornielje and Frank Nellen, 2020, Fundamentals of EU VAT Law, Alphen aan den Rijn: Kluwer Law International, p. 40.
[119] CJEU 8 June 2006, C-106/05 (L.u.P. GmbH v Finanzamt Bochum-Mitte), ECLI:EU:C:2006:380, para. 48 (and the case law cited); CJEU 10 April 2008, C-309/06 (Marks & Spencer plc v Commissioners of Customs & Excise), ECLI:EU:C:2008:211, para. 49; CJEU 10 July 2008, C-484/06 (Fiscale eenheid Koninklijke Ahold NV v Staatssecretaris van Financiën), ECLI:EU:C:2008:394, para. 36; and, CJEU 18 December 2008, C-488/07

VAT Directive are interpreted and applied in a neutral fashion. In practice, however, this is not always the case, since the rules may be applied or interpreted divergently.

In the context of CJEU case law, VAT neutrality can be a strong driver to abandon a strict legal approach to a case and to adopt an economic approach. The *Faxworld* case provides a fine example of this.[120] In this case, the CJEU allowed a partnership to deduct VAT paid on purchases that were made for the purposes of its legal successor's taxable transactions. From a strict legal perspective, given the fact that the CJEU considered the partnership as a taxable person separate from the Aktiengesellschaft[121], it would be impossible to grant a taxable person (the partnership) a right of deduction which is based on another taxable person's taxed transactions.[122] However, when adopting an economic perspective on the case, depriving a partnership a right of deduction would have resulted in a risk of cascading of VAT, which is in violation of fiscal neutrality. Following this, the CJEU applied an economic approach to the case facts, negating the legal reality. In *Polski Trawertyn* a similar result was achieved, as the CJEU allowed a newly created partnership to deduct the VAT on investments made by its partners.[123] In the latter case, therefore, the concept of the 'recipient of the supply' was interpreted from an economic perspective in order to safeguard system neutrality and allow for deduction of input VAT.

An economic approach can be a means of comparing two situations based on their (economic) outcome.[124] In that case, it fulfills a role in the context of the principle of equal treatment or – when it concerns transactions which are in competition with each other – in the context of the neutrality principle as a reflection of the principle of equal treatment in the field of EU VAT. In this regard, an economic approach overlaps with or is an element of, economic reality. An economic approach can also be said to play a role in ensuring that

(Royal Bank of Scotland plc v The Commissioners of Her Majesty's Revenue & Customs), ECLI:EU:C:2008:750, para. 27.

120 CJEU 29 April 2004, C-137/02 (Finanzamt Offenbach am Main-Land v Faxworld Vorgründungsgesellschaft Peter Hünninghausen und Wolfgang Klein GbR), ECLI:EU:C:2004:267.

121 Ibid., para. 30.

122 Under a strictly legal approach, only the recipient of a supply can deduct the VAT charged to him. See, for example: CJEU 8 November 2018, C-502/17 (C&D Foods Acquisition ApS v Skatteministeriet), ECLI:EU:C:2018:888, para. 23.

123 CJEU 1 March 2012, C-280/10 (Polski Trawertyn), ECLI:EU:C:2012:107.

124 See, for example: CJEU 22 November 2018, C-295/17 (MEO – Serviços de Comunicações e Multimédia SA v Autoridade Tributária e Aduaneira), ECLI:EU:C:2018:942, para. 61; and, CJEU 11 June 2020, C-43/19 (Vodafone Portugal – Comunicações Pessoais, SA v Autoridade Tributária e Aduaneira), ECLI:EU:C:2020:465, para. 49.

the outcome of the application of EU VAT rules to a certain situation is neutral from a system's perspective, i.e. that VAT is not a cost to a business, that no double taxation or non-taxation occurs and that cascading of VAT is prevented. In this context, it fulfills a role in achieving system neutrality as an external benchmark. The rulings in *Faxworld* and *Polski Trawertyn* (see above) can be seen as examples of this manifestation of an economic approach.

In our view, an overly broad application of an economic approach and/or economic reality bears the risk of (perceived) unequal treatment. The two manifestations of an economic approach may be at odds with each other. Transactions which may be similar from a legal perspective may be different from an economic perspective and the other way around. The cases *MEO* and *Vodafone Portugal* on the one hand and *3 Ï Ã É Å Ô ï 4 È Å Ò lés Bains Ä õ % Õ ¡ Õ 3 Ï Ã É Å Ô)ï*[125] on the other are illustrative of this. In *Societé Thermale* the CJEU had considered that a deposit paid when booking a hotel room is in fact a compensation for damages, outside the scope of EU VAT, in the event the customer exercises his cancellation option. The cases *MEO* and *Vodafone Portugal* revolved around the question whether a termination fee paid by the customer after having cancelled his subscription is either a consideration for a telecommunication service subject to EU VAT, or a compensation for damages which is not subject to VAT.[126] From a legal perspective, it is undoubtedly true that there are clear differences between *MEO* and *Vodafone Portugal* on the one hand, and *Societe Thermale* on the other hand. However, from an economic perspective, the differences are less evident.[127]

4. The W-GmbH case (C-98/21): a legal or an economic approach?

This section discusses the currently pending case W-GmbH (C-98/21). Further to this case, we address the question whether the CJEU should rely on an economic approach rather than a legal approach in order to safeguard the neutrality of EU VAT.

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[125] CJEU 18 July 2007, C-277/05 (Société thermale d'Eugénie-les-Bains v Ministère de l'Économie, des Finances et de l'Industrie), ECLI:EU:C:2007:440.

[126] According to the CJEU, a predetermined termination fee is a consideration for services supplied by the telecommunication provider, even if the customer no longer makes use of the services. The termination fee must be considered an integral part of the price which the customer committed to paying for the provider to fulfil its contractual obligations. There is a direct link between the termination fee, as part of the total price, and the telecommunication services.

[127] See: A.J. van Doesum and Frank Nellen, 'Taxable Amount & VAT Rates', in M. Lang, et al. (eds), CJEU – Recent Developments in Value Added Tax 2020 (2021), forthcoming.

W-GmbH exploits his own real estate portfolio. It held majority stakes in each of two limited partnerships under German law, as a limited partner. The other limited partner ('Z') held minority stakes. The general partner was not required to make any investment and does not have any capital share. Consequently, the general partner does not share in any profit or loss and does not possess any voting rights. Both partnerships built properties and sold the individual dwelling units predominantly free of VAT. To enable the partnerships to carry out two future building projects, the limited partner 'Z' would provide extra cash via a shareholder contribution and W-GmbH would provide services 'free of charge' as a shareholder contribution. Both contributions were made in the exact proportion of the limited partner's stakes in the two partnerships. W-GmbH provided its services partly with its own personnel and its own machinery, and partly with assistance from other companies. Furthermore, in connection with the two construction projects (and separately from the services free of charge), W-GmbH would supply accounting and management services to the two partnerships in return for payment. The essence of the preliminary questions[128] is whether a parent company such as W-GmbH, which supplies taxed services for consideration to its subsidiaries can deduct the VAT on various services it procures from third parties and which it subsequently contributes in kind (i.e., supplies free of charge) to its subsidiaries. In the situation of W-GmbH, the subsidiaries are not entitled to an input VAT deduction.

Reviewing the case at hand, we are of the opinion that a strictly legal approach will be rather complicated. The reason is that the case involves a plethora of rather technical legal questions which are related to many rules of EU VAT law. The CJEU would need to establish who the recipient of the services is, whether any input VAT can be attributed to a taxable output transaction which gives rise to a right of deduction, whether the costs of the services can be attributed to the economic activity as a whole of the parent company or subsidiary and if so, whether this gives rise to a right of deduction. What even further complicates matters, is that the case requires answers to some questions of law that have remained unanswered in CJEU case law so far. Examples of such questions are whether a capital contribution in kind constitutes a taxable supply for EU VAT, to what extent input VAT attributable to a capital contribution in kind is deductible and who the recipient of a supply is when the goods or services supplied are consecutively contributed in kind to another company. All in all, a

[128] There is also a question whether the economic model applied by the parties involved is to be regarded as an abuse of law by its very nature.

strictly legal approach would in our view be very complicated. Not only would the CJEU be required to address an abundance of legal questions that relate to many EU VAT rules, it would also involve the need to reconciliate the ultimate outcome and considerations which a huge body of earlier CJEU case-law.

What also complicates a strict legal approach is that the company receiving W-GmbH's contribution does not enjoy a full right of deduction. If one assumes that the contributor is allowed to deduct the VAT on the costs of the goods or services it contributes in kind to a company, without that contribution being subject to EU VAT, a result is reached that is not neutral. This seems the referring court's concern in W-GmbH. It signals the risk that, "in cases in which a subsidiary is not entitled to full deduction, holdings would be used as 'intermediaries' in their entire procurement of services to the effect that the holding supplies most of the services free of charge (= contributes to the subsidiary)."[129] The Bundesfinanzhof suggests that in situations like these an abuse of law should be assumed, without having to test whether the conditions for application of this doctrine have been fulfilled. In our view, this is unacceptable for reasons of legal certainty and of proportionality.

With the above considerations in mind, the CJEU may largely or fully rely on an economic approach instead. This would (partly) avoid the need reconciliate the judgment with earlier case law, and the CJEU would not have to interpret countless rules of EU VAT law in light of the rather complex facts of the case. In our view, an economic approach would have a straight-forward outcome: a full right of deduction should be denied to W-GmbH, as otherwise subsidiaries with no or a limited right of deduction would be able to procure goods or services free of VAT. This being said, using an economic approach to avoid unwelcome outcomes in jurisprudence is a doubtful way forward. The reason is that it bears the risk that the rules in the EU VAT Directive and their common judicial interpretation are ignored for the benefit of a straight-forward solution to a complex case. Not using a legal approach that is based on conventional judicial methods potentially violates legal certainty and may lead to unequal treatment. Moreover, a broad application of the economic approach may cause 'collateral damage', for example in cases where the companies receiving the contribution have a right of deduction. The solution to one problem may be the cause for the next.

[129] Request for a preliminary ruling in W-GmbH (C-98/21), point 25, available from: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=239481&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=2469224 (accessed 15 July 2021, 18:30).

5. The Phantasialand case (C-406/20): economic rationalizations by the CJEU

The previous sections of this contribution focused on the economic approach of the CJEU when it employs 'economic reality' as an instrument to interpret and explain facts in the course of legal proceedings. However, the economic approach of the CJEU also manifests itself in a more subtle fashion, i.e., by means of rationalizations that are connected with the economic theory. One example of this is the *Phantasialand* case, in which the CJEU relates to the competitiveness of products, and the potential existence of substitution relations between them.[130]

The case *Phantasialand* concerns a theme park located in Germany. The operator of the theme park took the position that the principle of fiscal neutrality precludes a rule of national law which allows the application of a reduced VAT rate to activities of operators of attractions that are not permanently located at the same place (e.g. seasonal and temporary fairs), whereas the activities of operators of permanent attractions are taxed against the standard VAT rate.[131] In the course of the ensuing litigation, the national court asked the CJEU whether EU VAT law is to be understood as precluding a rule of national law on the basis of which services of ambulatory attraction operators are taxed against a different VAT rate than services of operators of permanently established attractions.

The CJEU rules that EU VAT law does not preclude a rule of national law on the basis of which services of ambulatory attraction operators are taxed against a different VAT rate than services of operators of permanently established attractions, provided that the principle of fiscal neutrality is not violated. Interestingly, the CJEU employs an economic approach to establish whether or not goods or services are similar and thus in competition with each other, following which the principle of fiscal neutrality would preclude different VAT rates to apply. Firstly, the goods or services must have similar characteristics and they must satisfy the same consumer needs.[132] Secondly, any existing differences between the goods or services can have no substantial influence on the decision of the average consumer to opt for the one or the other.[133] Further to the latter aspect, the national court should establish whether the respective

[130] CJEU 9 September 2021, C-406/20 (Phantasialand), ECLI:EU:C:2021:720.
[131] Ibid., para. 13.
[132] Ibid., para. 38.
[133] Ibid.

services are, from the perspective of the average consumer, in a 'substitution relation'[134] – in which case the application of different VAT rates can be of influence on the choices of the consumer, holding the risk of a violation of neutrality.

The question is what the CJEU exactly means when it refers to the concept of 'substitution relation'. This concept is widely used in the field of micro-economics, and relates to the phenomenon that the increase of the price of one product leads to an upward shift in demand for another product (the 'substitute'). In relation to its economic approach – i.e. the similarity and competition test – the CJEU notes that "EU law does not preclude a national court which is experiencing particular difficulty in that appraisal from seeking, under the conditions laid down by its national law, an expert opinion as guidance for its judgment".[135] One may wonder whether this implies that competition and substitution relations need to be assessed in a quantitative sense, e.g. by means of measuring the price and demand interdependencies between two products that are possibly subject to different VAT rates. In any case, now the CJEU has provided that substitution relations are relevant for the assessment whether or not fiscal neutrality is violated when two different VAT rates are indeed applied, earlier CJEU judgments arguably appear less convincing. For example, the *Segler-Vereinigung Cuxhaven e.V. v Finanzamt Cuxhaven* case involves the VAT treatment of the letting of places on caravan sites versus the letting of boat moorings.[136] Here, the CJEU simply declares that, because these transactions perform different functions, there is no competition at all, thus allowing the application of different VAT rates.[137] In contrast with *Phantasialand*, no reference is made to substitution effects whatsoever – even though diverging VAT rates may very well motivate a person to take his motor-home (reduced VAT rate) instead of his boat (standard VAT rate) when he goes on a holiday trip. Another example concerns the case *Commission v France* involving different VAT rates being applied to reimbursable and non-reimbursable medicines.[138] Here, the CJEU provides that a reimbursable medicinal product vis-à-vis a non-reimbursable medicinal product will have a

[134] CJEU 9 September 2021, C-406/20 (Phantasialand), ECLI:EU:C:2021:720, para. 39. The Dutch version of the judgment explicitly refers to 'substitution relation' (Dutch: 'substitutierelatie'), as does the French ('dans un rapport de substitution'). The English version mentions 'interchangeable'; the German version 'austauschbar'. At the time of writing of this contribution, no English version was available.
[135] Ibid., para. 47.
[136] CJEU 19 December 2019, C-715/18 (Segler-Vereinigung Cuxhaven e.V. v Finanzamt Cuxhaven), ECLI:EU:C:2019:1138.
[137] Ibid., para. 37.
[138] CJEU 3 May 2001, C-481/98 (Commission / France), ECLI:EU:C:2001:237.

decisive advantage for the final consumer because of the lower price.[139] While that may be true, the CJEU also indicates that "the two categories of medicinal products are not similar products in competition with each other"[140] – which is a doubtful conclusion when taking into account substitution effects, since reimbursable and non-reimbursable medicines may be identical and thus be in a perfect substitution relation.

Overlooking the CJEU judgment in *Phantasialand* and the other mentioned cases, the question is what the role of the 'substitution' criterion will be in future case law on the application of the VAT rates. In our view, the criterion should be applied and interpreted restrictively, as many products, even dissimilar ones, can be in substitution relations vis-à-vis each other. Thus, a broad application would go against the principle of legal certainty, as it would complicate the levy of VAT and preclude that taxpayers can easily ascertain what their rights and obligations are. In addition, a broad application does not necessarily serve fiscal neutrality, as that principle demands that *similar* goods are treated equally for VAT purposes. The similarity of products depends, amongst other, on the main characteristics, their use, the needs that they serve, etcetera. Even though there is a positive relationship between the similarity of products on the one hand and the extent of their substitution relation on the other, it is nonetheless possible that relatively dissimilar products are substitutes in an economic sense. An example would be the supply of a downloadable video game versus the supply of a board game – two products which serve the same need for entertainment yet have quite different characteristics (and VAT treatments!). Taking into account these aspects, we are of the opinion that the substitution criterion should not be decisive when assessing whether or not two products are similar and thus in competition with each other.

6. Conclusion

On occasion, the CJEU relies on an 'economic approach' in its cases concerning EU VAT law. One manifestation of this is when the CJEU refers to the concept of 'economic reality', which is used to interpret and explain facts in the course of legal proceedings. When it is applied, the CJEU may give precedence to the ultimate economic results of acts rather than to their legal characteristics in order to reach a judgment. While economic reality should not be dismissed as a useful instrument for achieving full neutrality, it should by no means be regarded as a miracle cure for all situations which do not lead to an outcome

[139] Ibid., para. 27.
[140] Ibid.

compatible with the rules of the EU VAT Law. In any case, legal certainty demands that an economic approach and/or economic reality should not be employed as a 'light' version of the abuse of law doctrine that is not curtailed by conditions or safeguards. That also implies that an abuse of law 'by default' is incompatible with a certain, predictable, and efficient application of VAT. Neutrality is a great good, but so are equality and legal certainty.

Another manifestation of the 'economic approach' of the CJEU is that the CJEU on occasion relies on concepts derived from (micro-)economic theory in the course of reaching judgment. The example that we discussed in this contribution is the substitution criterion used by the CJEU in *Phantasialand*, a case on the application of different VAT rates to transactions with similar characteristics. With regard to legal certainty and fiscal neutrality, we are of the opinion that the criterion should be applied and interpreted restrictively, as many products, even dissimilar ones, can be in substitution relations vis-à-vis each other.

Dear Rainer, we wish you many more good years in good health. You are a striking, driven and charismatic tax expert that no one can ignore. With your German twist, you have greatly contributed to the further development of our beautiful profession. It was always good to see you and we hope to keep in touch. All the best to you.

WHISTLEBLOWING IN TAX MATTERS – PERSPECTIVES FROM THE EUROPEAN UNION AND UNITED STATES

A. Draghici LL.M.[141]

1. Introduction

On matters of compliance, taxation is a special area of the law in that it requires legal subjects to consistently and actively take steps with a view to fulfilling obligations set out in the law In turn, this emphasizes the importance of government supervisory and enforcement capabilities as tools to backstop the inevitable incidence of non-compliance. However, the broad-based exercise of supervision and enforcement is incompatible with the resource-intensive nature of these functions.

Tax administrations are not functionally integrated within the environment of taxpayers, meaning they often need to rely on external sources to obtain information about the affairs of taxpayers and uncover tax avoidance and fraud. In recent years, some of the most flagrant instances of tax avoidance and fraud were revealed through whistleblowing.[142] .

The status of whistleblowers under the law has long invited competing considerations. From the outset, few would disagree with the conventional viewpoint that whistleblowers fulfill a desirable, perhaps sometimes necessary social function. However, this broad statement determines a series of policy-related questions. Should whistleblowing in tax matters be merely protected or incentivized? When the status of whistleblowers is defined under the law, what are the factors prompting this? How and to what extent does information supplied by whistleblowers strengthen the supervisory capabilities of tax administrations? This brief contribution explores these questions at a high level. In doing so, it relies on facts and inferences from the approaches to whistleblowing in tax matters in place in Europe and United States of America (hereafter: US).

[141] Ph.D. candidate at the Maastricht University Faculty of Law.

[142] Notable examples of whistleblowing in tax matters include LuxLeaks and the Panama Papers.

2. Sources of law for whistleblowing protection in tax matters in Europe and US and the status of whistleblowers

2.1 The European approach to whistleblowing protection – Whistleblower protection

Within the European Union (hereafter: 'EU'), the most recent and inarguably far-reaching step towards ascertaining a protected status for whistleblowers was through the adoption of Directive 2019/1937 on the protection of persons who report breaches of Union law (hereafter: Whistleblower Directive or the Directive).[143] Prior to the adoption of this instrument, EU law was silent on the subject of whistleblowing.[144] The legislation of some individual Member States set out safeguards for whistleblowers, however many of such measures either established a narrow degree of protection or applied on a merely sectoral basis.[145] The European Court of Human Rights (hereafter: ECtHR) and Council of Europe (hereafter: CoE) were comparatively more proactive in matters of whistleblower protection and attempted to mitigate the effects of the otherwise limited scope of protection afforded to whistleblowers.

In *Guja v Moldova* and later in *Heinisch v Germany* the ECtHR found that whistleblowing may qualify as protected speech under the European Convention on Human Rights provided that a number of conditions are met. Firstly, the approach developed in ECtHR jurisprudence inquiries into whether the whistleblower's disclosure concerns a matter of public interest reported in good faith. Secondly, the ECtHR's methodology assesses the channels through which the disclosure occurred. In principle, individuals are expected to report an identified wrongdoing internally to the organization concerned before proceeding to reporting to public authorities and, finally, to public disclosure.[146]

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[143] Directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ of 26 November 2019, L305/17.

[144] Katerina Pantazatou; 'The New Directive on Whistleblowers' Protection: Any Impact on Taxation?', Kluwer International Tax Blog, 2019.

[145] Ibid. For example, the protection afforded in Member States prior to the adoption of the Whistleblower Directive was based on separate areas of law, in that the scope of protection was derived from labor, financial or administrative law. Some Member States did however have legislation that established a broad-based approach to whistleblower protection, covering whistleblowing in virtually all areas of the law in a similar fashion to the Directive. However, the scope of such instruments was usually narrower compared to the Whistleblower Directive. An example of an EU Member State that had adopted a general instrument on whistleblower protection is Italy.

[146] See, for example: Claudia Schubert; 'Whistle-Blowing after Heinisch v. Germany: Much Ado about Nothing', German Yearbook of International Law 54, 2011, pp. 753-764. It should be noted that some authors disagree with the viewpoint that the ECtHR had established an 'order of priority' for reporting channels. The general consensus in literature is that the ECtHR's case law should be interpreted to entail that internal reporting should precede reporting to authorities and that public disclosure is a matter of last resort. This

For its part, in 2014, the CoE published a Recommendation advising the adoption of domestic frameworks for whistleblower protection.[147] The Recommendation is drafted along broad normative lines, establishing the characteristics that domestic frameworks should display as a matter of best practice. According to the Recommendation, the scope of protected information should be broadly defined based on public interest. Additionally, (potential) whistleblowers should have access to several channels of disclosure (i.e., internal reporting, reporting to regulated public bodies and public reporting in the media) and should be entitled to the protection of their identities and against retaliation, provided the whistleblower acted in good faith and under a reasonable belief that the information disclosed is accurate.[148]

Notwithstanding these developments at CoE level, the action at EU level was broadly perceived as a welcome next step towards a robust and cohesive framework for improving and safeguarding the integrity of whistleblower protection. The Whistleblower Directive establishes a 'tiered-channel' approach for whistleblower disclosures in a manner that resembles the framework established through ECtHR case law. Accordingly, the Directive requires public and private sector undertakings that employ more than 50 employees to establish and maintain internal reporting channels for the reporting of breaches of EU law covered under the scope of the instrument.[149] Separate from this requirement, Member States are required to set up independent and autonomous external reporting channels through which disclosures may be made.[150] Under the Whistleblower Directive, no stringent order of priority applies between reporting through an internal or external channel. The wording of the Directive suggests that a person may either escalate a report to an external channel after attempting an internal report within the organization concerned or, in the alternative, report directly through an external channel when internal reporting would be ineffective or unfeasible.[151] Finally, the Directive extends whistleblowers' protection for public disclosures in two cases. The first of these concerns an objective set of circumstances, wherein internal and external reporting efforts were exhausted and no action was taken at either level. The second covers a set of subjective circumstances wherein the whistleblower is under the reasonable belief that

viewpoint essentially establishes a 'three-tiered approach', wherein internal reporting is a baseline rule and reporting to authorities or public disclosure amount to escalation measures. Conversely, some authors argue that the ECtHR's case law does not require whistleblowers to apply public disclosure as a last resort.

[147] Council of Europe; Recommendation CM/Rec(2014)7 adopted by the Committee of Ministers of the Council of Europe, 2014.

[148] Ibid.

[149] Supra note 3, Articles 7, 8 and 9.

[150] Supra note 3, Article 11(1) and (2)(a).

[151] Supra note 3, Article 10.

the breach concerns an imminent matter of public interest, that external reporting would be unlikely to result in the effective resolution of the breach or where the whistleblower perceives a high risk of retaliation.[152]

The material scope of the Whistleblower Directive is broadly drafted to cover breaches of EU law in a number of areas, including breaches related to corporate tax or arrangements aimed at obtaining a tax advantage that defeats the object or purpose of applicable corporate tax law.[153] This wording is notable in that it paves the way for comprehensive whistleblower protection. The safeguards enshrined for whistleblowers under the Directive only apply to the extent that the whistleblower reports on conduct covered under the scope of the Directive. If the scope of applicability of the Directive were restricted *stricto sensu* to breaches, the reporting of lawful conduct would not trigger whistleblower protection. Ordinarily, the term 'breach' refers to conduct that runs contrary to a mandated legal obligation. Within the realm of tax law, the characterization of conduct as lawful or unlawful may be a particularly challenging feat when viewed from the subjective lens of the whistleblower. The absence of clear lines drawn at EU level between 'acceptable' tax planning in accordance with the law, aggressive tax planning and genuine tax crimes further compounds this issue.[154] In principle, the onus falls on the whistleblower to determine whether a certain conduct is reportable. And since the nature of the conduct impacts the eligibility of the whistleblower for safeguards, this determination is far from inconsequential. However, the Whistleblower Directive does away with such interpretative obstacles in two main ways. Firstly, Article 2(1)(c) specifically refers to arrangements purposed on obtaining a tax advantage that defeats the object or purpose of corporate tax law. This wording readily extends to lawful conduct. Secondly and perhaps more interestingly, the Directive applies a particularly liberal definition of the term 'breach'. In recital 18 of the preamble, the Directive discusses how breaches *and* arrangements aimed at securing tax advantages by defeating the object and purpose of applicable law work to negatively impact the integrity of the internal market.[155] Through this wording, the Whistleblower Directive seemingly perceives breaches and arrangements equivalently. But perhaps more notably, in recital 42 the Directive sets out an outcome-based viewpoint whereby the 'effective detection of serious harm to the public interest requires that the notion of breach also includes abusive practices', including 'acts or

[152] Supra note 3, Article 15.
[153] Supra note 3, Article 2(1) and (2)(c).
[154] Supra note 4.
[155] Supra note 3, Recital 18.

omissions which do not appear to be unlawful in formal terms but defeat the object and purpose of the law'.
Based on the Directive, protected whistleblower status may be vested upon a broad category of persons, including employees of the undertaking (and public servants), self-employed individuals, shareholders and any other person that acquires information on breaches covered by the instrument as part of work-related contexts.[156] Additionally, protection extends to so-called 'facilitators' who assist the whistleblower in reporting or who are otherwise connected to the whistleblower.[157] The rationale for including third parties within the ambit of protection is justified by the risk of retaliation against them.[158]
The Whistleblower Directive institutes a series of safeguards for whistleblowers and covered facilitators. This covers most notably safeguards against retaliation, defined in the instrument as any direct or indirect act or omission prompted by the disclosure, irrespective whether this occurs through an internal, external or public channel, and which is likely to prejudice the whistleblower or facilitator.[159] Member States are required to set up frameworks that enable access to remedies for whistleblowers and facilitators against retaliation, e.g. by access to legal information and counsel.

2.2 The US approach to whistleblowing in tax matters – A dedicated reward-based framework

As will become apparent from the following brief description, the US approach to whistleblowing in tax matters differs from the EU attitude and methodology in two main ways. Firstly, whereas the EU approach is focused on protecting whistleblowers against negative consequences for disclosures, the US approach is designed as a reward system. Secondly, whereas the EU approach amalgamates all whistleblower matters in a comprehensive context, whistleblowing in tax matters in the US is arranged under a dedicated framework.
The US has a longstanding history of formalizing whistleblowing in tax matters. Already in 1867, the federal Congress instituted the competence for the present-day Internal Revenue Service (the 'IRS') to provide monetary rewards to individuals that supply information which leads to the detection and enforcement of tax law violations on a discretionary basis.[160] This practice was

[156] Supra note 3, Article 4(1)-(3).
[157] Supra note 3, Article 4(4)(a) and (b).
[158] Supra note 3, Recital 41.
[159] Supra note 3, Article 5(11).
[160] Denise M. Farag and Terry Morehead Dworkin, A Taxing Process: Whistleblowing under the I.R.S. Reward Program, Southern Law Journal 26, 2016, pp. 20-58.

only slightly amended in 2006 with the introduction of Section 7623 of the Internal Revenue Code, whereby the amount of rewards to whistleblowers are no longer discretionary but instead granted as a percentage of the proceeds recovered by the IRS from the taxpayer on the basis of information supplied by the whistleblower, provided the proceeds in question exceed USD 2,000,000.[161] In all other cases, the IRS retains the possibility to grant rewards on a discretionary basis.[162] Whistleblowers may enforce their right to a reward in court.[163] In practice, disputes over discretionary rewards are prompted by the criteria applied by the IRS in determining the eligibility of a whistleblower for such payment. Based on IRS regulations, discretionary rewards are only granted when information supplied by the whistleblower substantially contributes to the undertaking of enforcement action resulting in collected proceeds, a threshold requirement interpreted as being dubious and incompatible with applicable legislation in existing literature.[164]

Interestingly, Section 7623 of the Internal Revenue Code originally did not incorporate an anti-retaliation provision.[165] In 2019, the law was amended through the Taxpayer First Act to include a paragraph setting out such safeguards.[166] Notably, however, the anti-retaliation rule only explicitly mentions employees, omitting whistleblowers that obtain and report information outside a formal employment relationship or any parties associated directly with the whistleblower. This limitation is arguably odd, since whistleblower reports may be submitted to the IRS, and could potentially be rewarded, by individuals who are not employees of the undertaking in question. An employee that experiences retaliation may seek relief initially by filing a complaint with the Secretary of Labor in good faith. If this complaint is not addressed, the employee is left to resort to other available remedies under applicable labor laws.

In principle, Section 7623 of the Internal Revenue Code is silent as to the scope of disclosure, formally imbuing the suggestion that only disclosures of actual tax fraud may create eligibility for rewards and trigger protection against retaliation for the whistleblower. However, federal court judgments do confirm that Section 7623 of the Internal Revenue Code also protects disclosures related to conduct which does not amount to tax fraud, provided that the whistleblower had objectively reasonable grounds to believe the acts or

[161] Jay Nanavati, The IRS Whistleblower Regulations: A Hindrance to Tax Enforcement, The CPA Journal 88, 2016, p.67.
[162] Internal Revenue Code Section 7623(a).
[163] Ibid.
[164] Supra note 21.
[165] Supra note 21.
[166] US Department of Labor; Taxpayer First Act (TFA) 26 U.S.C. Section 7623(d).

omissions of the undertaking should have been reported. The question whether conduct that falls below the threshold of tax fraud but would qualify as tax avoidance falls within the scope of Section 7623 of the Internal Revenue Code was not explicitly addressed in jurisprudence at the time of writing.[167]

3. A protected whistleblower or a paid informant – changing attitudes and impact of emerging perceptions about whistleblowing in tax matters?

The treatment of whistleblowers is markedly different under the EU and US approaches. The EU Whistleblower Directive is predicated on instituting and safeguarding protection against retaliation. This ultimate objective is reflected within the most important provisions of the instrument; i.e., the plurality of channels through which information may be reported, the broad material and personal scope of application of the Directive). Conversely, under Section 7623 of the US Internal Revenue Code, a person supplying information on actual or potential infringements of tax law is considered an informant more so than a whistleblower. As such, the question emerges as to whether the respective histories of the EU and US approach to the treatment of whistleblowing in tax matters reveal other notable details explaining the differences between the two approaches.

As regards the Whistleblower Directive, most commentators agree that its adoption was a necessary step for filling the gaps in the protection afforded to whistleblowers under pre-existing instruments.[168] Before the adoption of the Directive, whistleblower protection in Europe was an unfocused collection of (sectoral) domestic laws and ECtHR and CoE-led frameworks.[169] According to recitals 1 and 2 of the Whistleblower Directive, the instrument is predicated on the viewpoint that disclosures by whistleblowers are a key component in securing the effective enforcement of EU law.[170] Protecting whistleblowers (and facilitators) against factors that may discourage disclosures, preventing retaliation against whistleblowers and enabling access to relief when retaliation occurs are therefore a means to an end in preserving the enforcement and enforceability of EU law. In this respect, it appears initially striking that the US approach to whistleblowing in tax matters was originally predicated on similar notions. In the 19th century, when the US federal

[167] Supra note 21.
[168] Vigjilenca Abazi, The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?, Industrial Law Journal 49, 2020, pp. 640- 656.
[169] Ibid.
[170] Supra note 3, recitals 1 and 2.

Congress vested the IRS with authority to reward whistleblowers for supplying information that leads to the enforcement of tax law, the overarching objective of this development was to create an additional channel on which the IRS could rely to exercise supervisory and enforcement functions.[171] However, the whistleblower program was premised on the idea of incentivizing disclosures, with a considerably lesser emphasis being placed on protecting the whistleblower himself.

In reality, however, these differences are perhaps better explained by the changing societal viewpoints towards whistleblowing. In the 19th century, tax fraud tactics were comparatively unsophisticated. Tax administrations – including the IRS – disposed of considerably fewer means of extracting information. Against this backdrop, rewarding individuals for providing support to the IRS in the discharge of its functions is a self-explanatory approach. At the present time, however, whistleblowing in tax matters is indissociably linked with notions of social activism. This implies that the whistleblower is acting in the public interest and not seeking to derive a personal benefit.[172]

Changing attitudes towards whistleblowing and its underlying function may explain the addition of the anti-retaliation provision in Section 7623 of the Internal Revenue Code. Although the scope of protection is considerably more restricted compared to the EU's Whistleblower Directive, the addition of the anti-retaliation rule is an implicit acknowledgement of the fact that disclosure requires protection. However, the substance of Section 7623 of the Internal Revenue Code is broadly unaltered. The IRS whistleblower program remains primarily a reward-driven mechanism. The personal and material scope of the anti-retaliation rule is narrow and does not fully account for the retribution which may be experienced by whistleblowers. It amounts to an addition to the reward framework, not to a change of paradigm. In light of the prevailing contemporary attitudes to whistleblowing described here, there is room to rightly argue that rewarding disclosures confuses the meaning of whistleblowing in tax matters. Rewards are prone to create perverse incentives and dent the notion that whistleblowing is primarily an act in the public interest.

Despite its history, the US lacks a robust and cohesive framework for whistleblowing in tax matters. Differently from the Whistleblower Directive, Section 7623 of the Internal Revenue Code frames whistleblowing as a bilateral relation between an informant and the IRS. The US approach to whistleblowing

[171] Supra note 20.

[172] Notwithstanding these facts, it should be noted that the legislation discussed here does not extend to the protection of political whistleblowing.

focuses on and foresees a single channel for reporting, namely official disclosure to the IRS. Internal reporting within the organization or public disclosure are not accounted for under Section 7623 of the Internal Revenue Code.

4. What is the added value of information supplied by whistleblowers?

In the US, the whistleblower program entrenched in Section 7623 of the Internal Revenue Code emerged at a time when the IRS' supervisory resources were considerably more rudimentary than at the present time. Similarly, the EU's Whistleblower Directive comes into effect at a time when Member States have a variety of channels at their disposal to obtain information on matters of corporate taxation. In light of these realities, there is room to consider where disclosures by whistleblowers fit within the broader approach to administrative supervision and enforcement of present-day tax administration.

In the view of some authors, the Whistleblower Directive complements the body of EU legislation in the area of exchange of information by widening the personal scope of reporting.[173] Concurrently, however, whistleblower disclosures are said to create possibilities for considerable overlap with other information subject to reporting by intermediaries.[174] In this respect, the added value of whistleblower disclosures as a tool to support administrative supervision and enforcement could be negligible and whistleblower-supplied information may well overlap with information derived from other sources. Similar considerations may be raised in relation to the IRS whistleblowing arrangement.

In my view, any effort of defining the scope of protected whistleblower disclosures to information not otherwise subject to reporting would be superfluous at best and irrational at worst. Overlaps in information reported by whistleblowers and distinct intermediaries are an inherent consequence of ongoing developments in the area of third party information reporting legislation. Further, I dare submit that the incentives afforded to whistleblowers cannot have a meaningful impact on the quality of information disclosed and the contribution of such information to supporting the effective enforcement of corporate tax law. On the one hand, it may be asked whether mere protection against retaliation is a sufficiently strong impetus for whistleblower disclosure. Anti-retaliation legislation, coupled with the provision of resources enabling whistleblowers to access relief against

[173] Supra note 4.
[174] Supra note 4.

retaliation experienced may be subjectively perceived as formal and overly legalistic safeguards. On the other hand, as previously surmised, an emphasis on rewarding whistleblowers may harness nefarious motives for disclosure.

5. Brief reflections

Despite convergence in ultimate objectives, the EU and US approaches to whistleblowing in tax matters are grounded on different philosophies. Still, both approaches are indicative of the emerging cognizance that whistleblower disclosure should be accompanied by safeguards. In the US, the longstanding absence of an anti-retaliation rule could be attributed to the manner in which the relation between the whistleblower and IRS is impliedly framed under Section 7623 of the Internal Revenue Code, wherein the whistleblower is a mere informant. This practice, however, disregards the inherently precarious position of a person assuming the task of supplying information to a tax administration outside the framework of a legal duty to do so. In the absence of anti-retaliation provisions, the position of the whistleblower is weakened. The emerging emphasis on anti-retaliation provisions is explicable by reference to emerging notions related to the role of whistleblowing in the enforcement toolbox of tax administrations.

Whilst the relation between whistleblowing and tax enforcement is largely self-evident, the status of whistleblowers under the law raises considerations that exceed the realm of taxation. In light of this, the development of a broad-based framework for whistleblower protection in the EU though the Whistleblower Directive, extending beyond the area of taxation, is inarguably a laudable development.

OPKOMST EN ONDERGANG VAN DRIE EMINENTE DUITSE FISCALISTEN UIT DE WEIMARTIJD

Enno Becker, Johannes Popitz en Herbert Dorn
Prof. dr. P.H.J. Essers[175]

1. Inleiding

Voor de ontwikkeling van het Duitse nationale en internationale belastingrecht en, indirect, ook voor het belastingrecht van vele andere Europese landen is de periode tussen de twee Wereldoorlogen erg belangrijk geweest. Aan het einde van de Eerste Wereldoorlog verkeerde het verslagen Duitsland moreel, politiek, sociaal en economisch in een grote crisis. Daar kwam bij dat het Duitse Keizerrijk de oorlog vooral door het aangaan van schulden had gefinancierd. Een van de grote opgaven van de na de val van de keizer gevormde Weimarrepubliek was dan ook om van die schuldenberg af te geraken. Daartoe was onder meer een ingrijpende belastingherziening nodig. Deze moest behalve voor een aanzienlijke toename van de financiële middelen ook zorgen voor een op het draagkrachtbeginsel gestoelde verdeling van de collectieve lasten, een verbetering van de belastingmoraal en een eind aan de belastingvlucht. De aanvankelijk door vicekanselier en Minister van Financiën Matthias Erzberger in 1919/1920 ingevoerde fiscale veranderingen liepen in 1923/1924 echter vast, mede vanwege de ontwrichtende gevolgen van de hyperinflatie die toen huishield. Pas in augustus 1925, na de introductie van de Rijksmark als nieuwe munteenheid, kon een verdergaande fundamentele belastinghervorming worden ingevoerd. Deze leidde onder meer tot een grondige herziening van de inkomsten- en vennootschapsbelasting, de vermogensbelasting en de erfbelasting. Ook sloot Duitsland met verschillende landen internationale verdragen ter voorkoming van dubbele belasting. Bovendien werd een nieuwe financiële verhouding ingevoerd tussen de drie belangrijkste onderdelen van de staat: het Rijk, de deelstaten (*Länder*) en de gemeenten. Uit 1927 stammende plannen tot nog ingrijpendere fiscale hervormingen werden politiek tegengehouden als gevolg van de tegenstand van vooral Pruisen; deze oppositie was vooral ingegeven door de vrees dat de deelstaten fiscaal volledig afhankelijk zouden worden van het Rijk. Daarnaast zorgde de grote beurscrisis, die de gehele Westerse wereld vanaf 1929

[175] Hoogleraar belastingrecht aan Tilburg University en lid van de Eerste Kamer der Staten-Generaal (CDA).

nagenoeg lam legde, ervoor dat de fiscale hervormingsplannen in een diepe la terecht kwamen. Zij kwamen er in Duitsland pas weer uit nadat in 1933 de nazi's de macht hadden overgenomen.

Aan het voor de tijd van het interbellum geavanceerde belastingstelsel van de Weimarrepubliek hebben veel getalenteerde fiscalisten een belangrijke bijdrage geleverd. Zij waren hun carrières vaak begonnen in de rechtspraak of het *Reichsfinanzministerium*. Zij verwierven niet zelden nationale en zelfs internationale faam en hebben een belangrijke invloed gehad op de ontwikkeling van het belastingstelsel in Duitsland en in verschillende andere landen, waaronder Nederland. Voor de Duitse fiscale rechtswetenschap was het een bloeitijd met buitengewoon veel interessante en inspirerende publicaties van fiscale wetenschappers, zoals Ball, Becker, Bühler, Dorn, Grabower, Hensel, Lion, Merk, Mirbt, Popitz, Strutz en Zarden.[176]

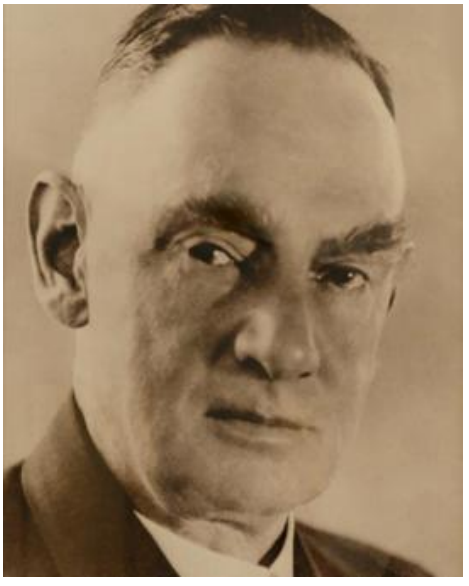
In deze bijdrage voor het *liber amicorum* van mijn gewaardeerde Maastrichtse collega Rainer Prokisch, met wie ik vanuit Tilburg altijd heel goed heb mogen samenwerken, besteed ik nader aandacht aan drie van deze eminente fiscale experts. Dit zijn: Enno Becker (1869-1940), Johannes Popitz (1884-1945) en Herbert Dorn (1887-1957). Behalve dat zij intensief met elkaar hebben samengewerkt en een cruciale rol hebben gespeeld bij de totstandkoming van het fiscale stelsel van zowel nationaal als internationaal belastingrecht in de Weimarrepubliek, hebben zij gemeen dat zij zeer belangrijk zijn geweest voor de implementatie en uitvoering van dat stelsel, hetzij als topambtenaren van het *Reichsfinanzministerium* en gezaghebbende auteurs (Becker, Popitz en Dorn), hetzij als hoogleraren (Popitz en Dorn), invloedrijke rechters (Becker en Dorn), verdragsonderhandelaar (Dorn) of als hooggeplaatst politicus (Popitz). Een andere overeenkomst is de tragische rol die het Derde Rijk uiteindelijk in hun carrières en ook persoonlijke levens heeft gespeeld, ook al was dat op volstrekt verschillende wijzen. Popitz, die aan het eind van de Weimar-republiek en na de machtsovername door de nazi's behoorde tot de belangrijkste politici op financieel-fiscaal terrein in Duitsland, werd aan het eind van de oorlog beschuldigd van betrokkenheid bij de mislukte aanslag op Hitler van 20 juli 1944; na zijn veroordeling werd hij in februari 1945 opgehangen. Dorn werd vanwege zijn joodse afkomst na de machtsovername van de nazi's in 1934 ontslagen als president van het *Reichsfinanzhof*, in 1938 gearresteerd en mishandeld en in 1939 gedwongen om te emigreren. Becker gooide zijn grote (inter)nationale reputatie te grabbel door na de machtsovername van de nazi's de door hem in 'zijn' *Reichsabgabenordnung*

[176] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 119.

1919 geïntroduceerde *wirtschaftliche Betrachtungsweise* te verloochenen door het in 1934 door de nazi's ter vervanging van deze rechtsvindingsmethode ingevoerde *Paragraph 1 Steueranpassungsgesetz* met enthousiasme te begroeten en te verdedigen. In deze beruchte bepaling werd voorgeschreven dat bij de uitleg van belastingwetten en de beoordeling van de feiten de nationaalsocialistische wereldbeschouwing maatgevend moest zijn.
In het navolgende zal ik in onderdeel 2 de carrière en betekenis voor het Duitse fiscale stelsel van de drie hoofdrolspelers toelichten. In onderdeel 3 komt het einde van hun carrières in Duitsland aan bod met in het bijzonder aandacht voor de invloed en betekenis in dat verband van de machtsovername door de nazi's en het door hen gevoerde beleid. Deze bijdrage wordt in onderdeel 4 afgesloten met een synthese.

2. Opkomst: carrière en betekenis voor het Duitse fiscale stelsel in het interbellum

2.1 Enno Becker (1869-1940)



Enno Becker werd geboren op 17 mei 1869 in Oldenburg. Hij overleed op 31 januari 1940 in München. Zijn vader was *Oberst* (kolonel) in het Duitse leger. Na het gymnasium in Oldenburg, heeft Becker rechten gestudeerd in Freiburg en Berlijn. In 1896 begon hij zijn carrière als *Hilfsarbeiter* (hulpkracht) aan het

Departement van Justitie van het Groothertogdom Oldenburg. Daarna verliep zijn carrière voorspoedig. In 1898 werd hij bevorderd tot *Gerichtsassessor* (een rechter aangesteld in tijdelijke dienst); in 1899 volgde zijn benoeming tot rechter in Cloppenburg en in 1900 in Brake. Vanaf 1901 was hij in Oldenburg behalve rechter ook officier van justitie. In 1906 werd hij benoemd tot *Hilfsrichter* aan het *Oberlandesgericht* Oldenburg; reeds in het jaar daarop volgde de benoeming tot *Oberlandesgerichtsrat* (advocaat-generaal). Vanaf 1911 was hij tevens lid van het Oldenburgse *Verwaltungsgericht* (administratieve rechtspraak), waar hij voornamelijk fiscale zaken behandelde.
In oktober 1918, hij was toen 49 jaar, verhuisde Becker naar het latere *Reichsfinanzministerium* met de opdracht om in het kader van de na de Eerste Wereldoorlog noodzakelijk geworden grootscheepse nationale belastinghervorming een wetsontwerp te maken voor een soort Algemene Wet Rijksbelastingen, de *Reichsabgabenordnung*. Deze zou als een raamwet moeten fungeren voor alle andere nieuw te ontwikkelen rijksbelastingwetten. Aan dit wetsontwerp heeft Becker nagenoeg alleen in een koortsachtig tempo gewekt, daarbij gebruik makend van zijn jarenlange ervaring als rechter in onder andere het belastingrecht. Het eerste voorlopige ontwerp van de *Reichsabgabenordnung* was in een half jaar klaar: in april 1919. In juli 1919 presenteerde de toenmalige minister van Financiën, Matthias Erzberger, het wetsontwerp in het Rijkskabinet, waarna het in november 1919 door de *Weimarer Nationalversammlung*, die tot de verkiezing van de Rijksdag in juni 1920 als parlement fungeerde, in derde lezing werd aangenomen. Op 23 december 1919 trad de *Reichsabgabenordnung* in werking. Het zou Beckers meest gewaardeerde en bekende werk worden.
Behalve geestelijk vader van deze wet was Becker ook auteur van het gezaghebbende *Kommentar zur Reichsabgabenordnung* en van het *Kommentar zum Einkommensteuergesetz*. In het vakblad *Steuer und Wirtschaft* schreef hij vele bijdragen over de rechtspraak van het *Reichsfinanzhof*.
In januari 1920 werd Becker benoemd tot *Reichsfinanzrat* aan het *Reichsfinanzhof* in München; in 1922 werd hij bevorderd tot *Senatspräsident*. Tot zijn pensionering in 1935 was hij voorzitter van de Senaat voor inkomstenbelastingzaken. In 1925 werd hij lid van een door het *Reichsverband der Deutschen Industrie* gevormde wetenschappelijke commissie die zich bezighield met de uitwerking van de grondslagen voor een nieuwe belastinghervorming op het terrein van de *Gewerbesteuer* en de financiële verhoudingen tussen de verschillende onderdelen van de staat, gericht op een grotere concentratie van de macht bij de Rijksbelastingdienst.
In 1925 werd Enno Becker een eredoctoraat verleend door de rechtenfaculteit van de Universiteit van Münster.

Becker was gehuwd; het echtpaar had geen kinderen.
Volgens Becker zelf was de kern van de *Reichsabgabenordnung* de *wirtschaftliche Betrachtungsweise* omdat deze de zelfstandigheid van het belastingrecht tegenover het burgerlijk recht verzekerde.[177] *Paragraph 4 Reichsabgabenordnung* luidde als volgt:
Bei der Auslegung der Steuergesetze sind ihr Zweck, ihre wirtschaftliche Bedeutung und die Entwicklung der Verhältnisse zu berücksichtigen
Becker was zeer beducht voor een overvleugeling van de nog jonge wetenschap van het belastingrecht door het burgerlijke recht. Begrippen uit het burgerlijk recht moesten geen voorrang hebben bij de uitleg van de belastingwetten die waren gericht op de economische draagkracht van belastingplichtigen en de beoordeling van feitenbestanden. Ook richtte hij zich tegen de in het burgerlijk recht in die tijd gangbare *Begriffsjurisprudenz*, waarin het alleen ging om de tekst van de wet en niet om doel en strekking die de wetgever voor ogen had gehad; volgens Becker was dit een *Buchstabenkult, der statt der Wirklichkeit der Dinge nur noch das Buchstäbliche, begrifflich Überspitzte sah*.[178]
Behalve voor de uitleg van belastingwetten, had de *wirtschaftliche Betrachtungsweise* ook gevolgen voor de waardering van de feiten. Volgens Becker *bedeutete die wirtschaftliche Betrachtungsweise, das sein Vorgang nach ÓÅÉÎÅÍ ×ÉÒÔÓÃÈÁÆÔÌÉÃÈÅÎ 'ÅÈÁÌÔ ÕÎÄ ÔÁÔÓÁÃÈÌÉÃÈÅÎ ÓÉÎ ÅØÉÓÔÉÅÒÔÅ ÎÁÃÈ ÄÅÍ ÔÁÔÓÁÃÈÌÉÃÈ ÖÏÒÈÁÎÄÅÎÅÎ*,[179] oftewel: *Es gilt, was ist, nicht was gesagt wird*.[180] De realiteit gaat derhalve boven de vorm. Dit gold vooral voor de belastingen die aanknopen bij inkomen en vermogen (*Besitzsteuern*) en dus meer op de economische draagkracht zijn gericht, niet zozeer voor de belastingen die aansluiten bij het rechtsverkeer (*Verkehrssteuern*), waarin burgerrechtelijke begrippen de boventoon voeren.
Volgens Becker moest de geldingskracht van de *wirtschaftliche Betrachtungsweise* door de belastingautoriteiten en het *Reichsfinanzhof* worden bepaald. Vanwege haar relatieve vaagheid werkte ze vaak in het voordeel van de fiscus uit.[181]

[177] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 44. Zie ook Ch. P.A. Geppaart, Fiscale rechtsvinding, FED-Amsterdam, 1965, p. 151-204.
[178] Reimer Voss, Steuern im Dritten Reich (Vom Recht zum Unrecht unter der Herrschaft des Nationalsozialismus), Verlag C.H. Beck, München, 1995, p. 42.
[179] Reimer Voss, Steuern im Dritten Reich (Vom Recht zum Unrecht unter der Herrschaft des Nationalsozialismus), Verlag C.H. Beck, München, 1995, p. 39.
[180] Geciteerd door P. Fischer in Finanz-Rundschau Ertragsteuerrecht, Volume 96, issue 4, 20 februari 2014.
[181] Reimer Voss, Steuern im Dritten Reich (Vom Recht zum Unrecht unter der Herrschaft des Nationalsozialismus), Verlag C.H. Beck, München, 1995, p. 40 verwijzend naar K. Tipke, Die Steuerrechtsordnung, Band I, Dr. Otto Schmidt KG, 2000, p. 94.

2.2 Johannes Popitz (1884-1945)[182]

Johannes Popitz werd op 2 december 1884 in Leipzig geboren. Hij overleed op 2 februari 1945 in Berlijn-Plötzensee. Zijn vader was apotheker. Hij studeerde tussen 1902 en 1907 rechten en staatswetenschappen in Dessau, Lausanne, Leipzig, Berlijn en Halle, waar hij in 1907 ook promoveerde. Na enige jaren als ambtenaar te hebben gewerkt, werd hij in 1913 benoemd tot assistent-rechter bij het *Oberverwaltungsgericht* (Hoogste Administratieve Gerechtshof) in Berlijn. Van 1914-1919 was hij *Referent* aan het Pruisische Ministerie van Binnenlandse Zaken, van 1916-1919 tevens rijksambtenaar bij het *Reichsschatzamt* (onder andere verantwoordelijk voor douane/invoerrechten) van het *Reichsfinanzministerium*. In januari 1919 werd hij gekozen in de Nationale Vergadering van Weimar, die was belast met het opstellen van een grondwet voor het republikeinse Duitsland. In hetzelfde jaar werd hij *Geheimrat* (speciaal adviseur) aan het *Reichsfinanzministerium*. Daar gaf hij tot 1925 leiding aan de belastinghervormingen, laatst als *Ministerialdirektor* van *Abteilung III für die Verwaltung der Besitz- und Verkehrssteuern*, die zich onder de leiding van Popitz ontwikkelde tot de centrale belastingafdeling van het ministerie.[183] Van 1925-1929 was hij Staatssecretaris van Financiën. Onder zijn

[182] Zie onder meer: Reimer Voss, Johannes Popitz (1884-1945) (Jurist, Politiker, Staatsdenker unter drei Reichen – Mann des Widerstands), Lang, Frankfurt am Main, 2006 en Anne C. Nagel, Johannes Popitz (1884-1945) (Görings Finanzminister und Verschwörer gegen Hitler. Eine Biographie), Böhlau, Köln, 2015.

[183] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 70.

politieke tegenpool, de sociaaldemocratische Minister van Financiën Rudolf Hilferding, werkte hij aan de fundamentele hervorming van het belastingstelsel en de openbare financiën van 1925; de zogenoemde *Schlieben-Popitzsche Finanzreform* van 10 augustus 1925.[184] In december 1929 trad Popitz na meningsverschillen met de regering over vooral de rol van de president van de Rijksbank, Hjalmar Schacht, af (onder meer over het niet-verlenen van een krediet). Minister van Financiën Hilferding verklaarde zich solidair met zijn staatssecretaris en diende ook zijn ontslag in.[185]

Popitz werd in 1922 benoemd tot honorair (onbezoldigd) hoogleraar in het belastingrecht en de financiële wetenschappen aan de *Handelshochschule Berlin*.[186] Daar werd hij de eerste leider van de *Abteilung für Steuerwesen*, één van de activiteiten in die hoedanigheid was de organisatie van een lezingencyclus, waar ook Herbert Dorn voor was uitgenodigd.

Popitz wees in november 1930 een aanbod tot benoeming als president van het *Reichsfinanzhof* af.[187]

Op 1 november 1932 werd hij benoemd tot Minister zonder portefeuille in het kabinet Schleicher en tot Rijkscommissaris van Financiën van Pruisen plus partijloos minister (*kommissarischen Finanzminister*). Hij zag zichzelf als vertegenwoordiger van de monarchistisch-nationaalconservatieve vleugel van de regering en was voorvechter van een gedecentraliseerde eenheidsstaat met een sterk centraal staatsgezag.

In de Weimartijd heeft Popitz drie belangrijke hervormingen in belangrijke mate mede vormgegeven:[188] 1. de ontwikkeling van een moderne omzetbelastingwetgeving: het *Umsatzsteuergesetz* van 1918, later voortgezet in het *Umsatzsteuergesetz* van 16 oktober 1934;[189] 2. de belangrijke belastinghervorming van augustus 1925 na de stabilisering van de Duitse munt, met onder andere een nieuwe Wet Waardering onroerende zaken (*Bewertungsgesetz*), inkomsten- en vennootschapsbelasting en successierecht; 3. De invoering van nieuwe financiële verhoudingen tussen het Rijk, de deelstaten en de gemeenten.

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[184] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 169.

[185] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 289, voetnoot 1.

[186] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 123.

[187] Gerhard Schulz, Popitz Johannes, Neue Deutsche Biographie 20 (2001), p. 620-622.

[188] Reimer Voss, Steuern im Dritten Reich (Vom Recht zum Unrecht unter der Herrschaft des Nationalsozialismus), Verlag C.H. Beck, München, 1995, p. 47.

[189] Hij wordt ook wel de 'vader van de omzetbelasting' genoemd. Zie Reimer Voss, Johannes Popitz (1884-1945) (Jurist, Politiker, Staatsdenker unter drei Reichen – Mann des Widerstands), Lang, Frankfurt am Main, 2006, p. 320.

2.3 Herbert Dorn (1887-1957)

Herbert Dorn werd op 21 maart 1887 in Berlijn geboren. Hij overleed 11 augustus 1957 in Berchtesgaden. Zijn vader was medisch adviseur.
Na het gymnasium in Berlijn, studeerde hij tot 1908 rechten en economie aan de Universiteiten van Berlijn, Freiburg im Breisgau, München en Würzburg. In Würzburg verdedigde hij zijn proefschrift. In 1914 trad hij in dienst van het *Reichsjustizministerium*. In 1919 werkte hij mee aan de *Weimarer Verfassung*[190] en de *Erzbergerschen Steuer- und Finanzreform*. Tevens nam hij na de Eerste Wereldoorlog deel aan de vredesonderhandelingen in Parijs.
In die tijd leerde Dorn in Weimar Enno Becker kennen, die toen werkte aan 'zijn' *Reichsabgabenordnung*. Dorn gaf Becker waardevolle adviezen over de wijze waarop hij bepaalde passages over de *wirtschaftlichte Betrachtungsweise* moest formuleren om deze door het parlement geaccepteerd te krijgen.[191]
Twee weken na deze ontmoeting in Weimar, werd Dorn door Popitz, na moeizame onderhandelingen om hem 'vrij' te krijgen, het aanbod gedaan om het *Reichsjustizministerium* te verwisselen voor het *Reichsfinanzministerium* om daar als medewerker van Becker verder te werken aan de *Reichsabgabenordnung*.[192] Hij startte deze werkzaamheden in december 1919.

[190] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 49.
[191] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 45-46.
[192] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 46-47.

Herbert Dorn was een van de zeer zeldzame medewerkers die Popitz evenaarde op het gebied van de algemene en juridische kennis alsmede onderhandelingsvaardigheden.[193] Nadat hij in 1920 *Ministerialrat* was geweest, werd hij in 1921 benoemd tot *Ministerialdirigent*, gevolgd door een benoeming in 1926 tot *Ministerialdirektor*, waarna hij *Abteilungsleiter* werd van de nieuwe afdeling *Abteilung IV Gemeinsame und Rechtsangelegenheiten*.[194] Over zowat elke aangelegenheid van het ministerie kreeg Dorn *Mitprüfungsrecht*.[195] Het kon niet anders of door deze centrale positie ontstonden bij tijd en wijle grote achterstanden. Dorns afdeling werd daarom ook wel eens *Der Zentralfriedhof* genoemd.[196]

Op het internationale terrein hield hij zich vooral bezig met de belasting- en kapitaalvlucht alsmede met de voorkoming van internationale dubbele belasting.[197] Hij was betrokken bij veel onderhandelingen in het kader van internationale belastingverdragen. Een van die verdragsonderhandelingen was met Nederland. Dat land had naast landen als België, Denemarken, Liechtenstein en Zwitserland, de speciale aandacht van het Finanzministerium als een land waar veel Duits vluchtkapitaal naar toe ging, aangetrokken door het milde fiscale klimaat in Nederland voor de belastingheffing van kapitaal en inkomsten uit kapitaal en vooral door het bestaan van een belastinggeheim waardoor banken geen bankgegevens van hun cliënten verschaften aan de fiscale autoriteiten. De onderhandelingen met Nederland waren gestart aan het einde van de Eerste Wereldoorlog. Het eerste ontwerpverdrag dateerde uit 1921, maar al snel bleek dat er nog te grote meningsverschillen tussen de beide landen bestonden om tot ratificatie over te kunnen gaan. Pas in 1926 leek er meer schot in te komen toen Duitsland met een geheel nieuw tegenvoorstel kwam. In 1928 leek de Nederlandse regering hiermee in te stemmen, maar uiteindelijk liep het toch spaak omdat er in Nederland ophef was uitgebroken over een uitgelekte gegevensuitwisselingsbepaling in de concepttekst. Met name het bedrijfsleven trok hierover aan de bel; men was op geen enkel moment hierover geconsulteerd. Hier wreekte zich dat de onderhandelingen in alle geheim voornamelijk waren gevoerd tussen Dorn en de toenmalige Directeur-Generaal der Belastingen Sinninghe Damsté. Nadat ook de Raad van

[193] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 48.
[194] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 197
[195] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 70-71.
[196] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 72, voetnoot 26.
[197] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 50-51.

State zich over deze bepaling kritisch had uitgelaten, werd ratificatie tegengehouden. Ondanks verschillende andere pogingen, zou het tot 1959 duren voordat het eerste echte belastingverdrag tussen Duitsland en Nederland tot stand kwam.[198]
Vanaf 1926 was Dorn lid van de *Kriegslastenkommission* en vanaf 1925 namens Duitsland van de *Committee of Technical Experts on Double Taxation and Tax Evasion* van de Volkenbond voor vragen over het internationale financiële recht, waaronder ter zake van de ontwikkeling van fiscale modelverdragen. Van 1931-1933 was hij voorzitter van het prestigieuze *Comité Fiscal* van de Volkenbond.[199]

In 1927 werd Dorn als opvolger van Popitz benoemd tot *Honorarprofessor* aan de *Handelshochschule Berlin*. In die functie legde hij de nadruk op internationale rechtsvergelijking van de belastingstelsels. In 1921 werd hij gekozen tot lid van de vaste vertegenwoordiging van de *Deutsche Juristentag*.[200] Vanaf 1924 was hij ook mede-uitgever van het in 1921 opgerichte *Steuer und Wirtschaft*.[201]
In 1931 volgde het hoogtepunt van zijn professionele carrière in Duitsland: zijn benoeming tot president van het in 1918 opgerichte *Reichsfinanzhof* in München, waarvan de positie ten opzichte van het *Reichsfinanzministerium* en het voor de rechtspraak ten aanzien van het burgerlijk recht en strafrecht verantwoordelijke *Reichsgericht* ook nog in die tijd de nodige vragen opriep.[202] Hij was de jongste van de andere rechters. Bijzonder is dat hij daarnaast zijn werk voor de Volkenbond voortzette.
De grootste wetenschappelijke en maatschappelijke verdiensten van Dorn lagen op het terrein van het internationale belastingrecht. Aan de ontwikkeling van zowat elk onderwerp in het kader van de artikelen van de (model)belastingverdragen - variërend van het concept van de vaste inrichting

[198] Zie M. Evers, De relatie met Duitsland en de geboorte van het Nederlandse fiscale verdragsbeleid, WFR 2012/501 en Tracing the Origins of the Netherlands' Tax Treaty Network, Intertax 2013-6/7. Zie eveneens: Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 237-240.
[199] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 153-166 en 292-294.
[200] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 128.
[201] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 126.
[202] Zie Ekkehart Reimer, Der ungeliebte Präsident (Herbert Dorn an der Spitze des Reichsfinanzhof -1931-1934), in: Rudolf Mellinghoff, Wolfgang Schön, Hermann-Ulrich Viskorf (ed.), Steuerrecht im Rechtstaat (Festschrift für Wolfgang Spindler zum 65. Geburtstag, Verlag Dr. Otto Schmidt, Köln, 2011, p. 507-527.

tot transfer pricing, bronbelasting en gegevensuitwisseling - heeft hij belangrijke bijdragen geleverd.[203]
Veel aandacht heeft Dorn besteed aan de Duitse exitheffing tegen kapitaalvlucht. Deze werd in 1918 ingevoerd uit vrees voor kapitaalvlucht uit Duitsland na de nederlaag in de Eerste Wereldoorlog. In 1925 werd zij als gevolg van de hyperinflatie weer ingetrokken. In december 1931 werd de *Reichsfluchtsteuer* op basis van een noodverordening door de regering Brüning opnieuw ingevoerd; toen, om de kapitaalvlucht na de Beurskrach van 1929 tegen te gaan. Een verschil met de wet uit 1918 was dat in 1931 geen sprake meer was van een uitbreiding van de onbeperkte IB-plicht over de emigratie heen (tot vijf jaren na emigratie), vanwege de werking van inmiddels afgesloten belastingverdragen. In onderhandelingen over nieuwe internationale belastingverdragen bleef Duitsland aandringen op uitwisseling van informatie. In 1932 oordeelde het *Reichsfinanzhof* deze *Reichsfluchtsteuer* als verenigbaar met de in art. 112 van de *Weimarer Reichsverfassung* gegarandeerde *Auswanderungsfreiheit*.[204]

3. Ondergang: de invloed en gevolgen van het nationaalsocialisme

3.1 Machtsovername nazi's en hun belastingpolitiek

Nadat Hitler op 30 januari 1933 *Reichskanzler* was geworden, werden de toen nog aanwezige restanten van de Weimarrepubliek in recordtempo opgeruimd. Na de brand van de Rijksdag van 28 februari 1933 markeerde de *Verordnung zum Schutz von Volk und Staat* van 28 februari 1933 het begin van de afschaffing van de Grondwet van Weimar. Op grond van deze verordening werden verschillende grondrechten, waaronder het voor het belastingrecht cruciale eigendomsrecht en gelijkheidsbeginsel, 'voorlopig' buiten werking gesteld. De wet die de democratie en het parlementaire stelsel finaal beëindigde was het *Gesetz zur Behebung von Volk und Reich* van 24 maart 1933, het zogenoemde *Ermächtigungsgesetz*. Rijkswetten en verdragen zouden voortaan door de Rijksregering worden gemaakt, het parlement speelde daarbij geen rol meer. Doordat de *Führer* zowel de wetgevende, uitvoerende als

[203] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 77 e.v. en 115 e.v.
[204] Christiane Kuller, Bürokratie und Verbrechen (Antisemitische Finanzpolitik und Verwaltungspraxis im nationalsozialistischen Deutschland), Oldenbourg Verlag, München, 2013, p. 185-188. Zie eveneens: Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 59-61 en p. 73.

rechterlijke macht in zich verenigde, kreeg Hitler hiermee het gehele staatsapparaat in handen. Bij wet van 14 februari 1934 werden de in de Weimarrepubliek belangrijke deelstaten opgeheven. Het bestaande recht werd geacht ondergeschikt te zijn aan de *Totalitätsanspruch des Nationalsozialismus*. Dit leidde tot een eenheidsdenken, waarbij recht en moraal samenvielen. De geest van het nationaalsocialisme werd als gevolg daarvan de hoogste, ongeschreven norm van de rechtsorde, de alles overheersende bovenwettelijke rechtsbron.

De belangrijkste twee hoofdgedachten van de nationaalsocialistische ideologie waren: 1. de *Gemeinnutzgedanke*, de grondregel dat het algemene belang voor het eigenbelang gaat (*Du bist nichts, dein Volk ist alles*), waardoor het individu volledig ondergeschikt was aan de staat en 2. de rassenleer, die het Germaanse, Arische, ras als ver verheven zag boven de tot de *Untermenschen* behorende rassen, waartoe vooral de joden, maar ook onder anderen Sinti en Roma werden gerekend. *Untermenschen* hadden *geminderte Rechtsfähigkeit*, een eufemisme dat stond voor complete rechteloosheid; het begrip *Rechtsgemeinschaft* werd vervangen door het begrip *Volksgemeinschaft*.

De politieke leiding van het *Finanzministerium* in de nazi-tijd was in handen van de conservatieve aristocraat Johann Ludwig Graf Schwerin von Krosigk en zijn staatssecretaris Fritz Reinhardt, die een fanatieke nazi was. Deze Reinhardt lanceerde in juni 1934 een grootscheepse belastinghervorming, de *Reinhardt-Reform*.[205] De eerste fase van deze *Reinhardt-Reform* (1933-1936) zag vooral op het op grote schaal inzetten van het instrument van de belastingheffing om de Duitse economie te stimuleren en de werkloosheid te bestrijden. De tweede fase van de *Reinhardt-Reform* (1936-1938) richtte zich op de hervorming van het Duitse belastingstelsel volgens nationaalsocialistische grondregels. Centraal daarin stonden de algehele afschaffing van het gelijkheidsbeginsel, de positie van de vrouw en het gezin, de bestrijding van anoniem kapitaal en van kerkgenootschappen en, vooral, de anti-joodse maatregelen. De derde fase van de *Reinhardt-Reform* (1938-1939) was in de eerste plaats gericht op de financiering van de oorlog en het bevorderen van de oorlogseconomie.

Het *Reichsfinanzhof* werd gedegradeerd tot *Gehilfe* (handlanger) van het *Reichsfinanzministerium*. Aan de verordeningen en uitvoeringsvoorschriften van de *Reichsfinanzminister* was het *Reichsfinanzhof* onder alle omstandigheden gebonden.[206]

[205] Peter Essers, Belast verleden (Het Nederlandse belastingrecht onder nationaalsocialistisch regime), Kluwer, Deventer, 2012, p. 82 e.v.

[206] Peter Essers, Belast verleden (Het Nederlandse belastingrecht onder nationaalsocialistisch regime), Kluwer, Deventer, 2012, p. 94.

3.2 Enno Becker

Bij de afschaffing van het gelijkheidsbeginsel paste het reeds in 1934 ingevoerde *Paragraph 1, Steueranpassungsgesetz*, die uitleg van fiscale wetten en duiding van feiten voorschreef naar nationaalsocialistische wereldbeschouwing. Met deze bepaling kregen de belastingadministratie en de rechter een vrijbrief in handen voor discriminatie van de niet-ariërs en voor wetgeving en rechtspraak met onbeperkte terugwerkende kracht.
Paragraph 1 Steueranpassungsgesetz van 16 oktober 1934 luidde als volgt:
1. Die Steuergesetze sind nach nationalsozialistischer Weltanschauung auszulegen.
2. Dabei sind die Volksanschauung, der Zweck und die wirtschafttliche Bedeutung der Steuergesetze und die Entwicklung der Verhältnisse zu berücksichtigen.
3. Entsprechendes gilt für die Beurteilung von Tatbeständen.
De voorloper van dit artikel was de hiervoor in onderdeel 2.1 vermelde *Paragraph 4 Reichsabgabenordnung*, waar Enno Becker de geestelijke vader van was. Becker, hoewel geen lid van de NSDAP, voelde zich zeer aangetrokken tot het nationaalsocialistische credo dat het algemene belang voor het eigenbelang gaat. Zo schreef hij in 1934 in *Steuer und Wirtschaft* dat hij in het bijzonder in het inkomstenbelastingrecht deze nationaalsocialistische hoofdregel beschouwde als een *sieghaft durchgedrungenen Gedanken*.[207]
Verder schreef hij in dat jaar:
Das ist in meinen Augen die Krönung des Ganzen, die Sicherstellung der Entwicklung des Steuerrechts zu einem selbständigen Rechtsgebiete. Der Wirklichkeitssinn, der das gesamte Steuerrecht so stark durchströmt, hat hier einen greifbaren, bestimmten Ausdruck gefunden. Wer die Steuergesetze anwendet, soll nicht von den Begriffen, zugespitzten Formeln, noch so gelehrten abstrakten Vorstellungen, sondern von den Dingen, den Vorgängen selbst ausgehen.[208]
Het in het strafrecht cruciale beginsel *nulla poena sine lege* wees hij af omdat dit alleen maar in het voordeel zou werken van sluwe criminelen. Hij zag ook geen been in het met terugwerkende kracht invoeren van de doodstraf.[209] In 1937, Becker was toen al gepensioneerd, noemde hij drie zegeningen voor het belastingrecht waar de overwinning van de nationaalsocialistische beweging toe had geleid: 1. de eliminering van de driedeling Rijk-deelstaten-gemeenten

[207] Reimer Voss, Steuern im Dritten Reich (Vom Recht zum Unrecht unter der Herrschaft des Nationalsozialismus), Verlag C.H. Beck, München, 1995, p. 42.
[208] Christiane Kuller, Bürokratie und Verbrechen (Antisemitische Finanzpolitik und Verwaltungspraxis im nationalsozialistischen Deutschland), Oldenbourg Verlag, München, 2013, p. 136.
[209] Reimer Voss, Steuern im Dritten Reich (Vom Recht zum Unrecht unter der Herrschaft des Nationalsozialismus), Verlag C.H. Beck, München, 1995, p. 42.

in het belang van de eenheid van het belastingrecht; 2. de bezieling van de belastingwetten met de gedachte dat zij met de economisch-politieke noden en doelen van de nationaalsocialistische beweging in overeenstemming moesten worden gebracht; en 3. de bevordering van de fiscale techniek.[210]
Na de oorlog is er ter verdediging van Becker wel op gewezen dat deze zijn ambt bij het *Reichsfinanzhof* voortijdig had neergelegd vanwege meningsverschillen met Staatssecretaris van Financiën Reinhardt. Volgens Voss[211] lag hier echter niet aan ten grondslag dat Becker was bekeerd van zijn nazisympathieën maar dat hij teleurgesteld was dat hij na het overlijden van de toenmalige president van het *Reichsfinanzhof* Richard Kloss, in 1934 door Reinhardt niet werd voorgedragen als diens opvolger. In zijn verzoek om pensionering maakte Becker die woede duidelijk door te klagen over een *Mann vom Parvenu-Format eines Reinhardt*. Dat hij na zijn pensionering het joods bankhuis Strauss had geadviseerd over de *Reichsfluchtsteuer*, wat hem een schriftelijke berisping van Schwerin-von-Krosigk opleverde,[212] kan niet wegpoetsen dat de in januari 1940 overleden Becker als (ex-)Senaatspresident van het *Reichsfinanzhof* een prominente auteur door zijn steun aan *Paragraph 1 Steueranpassungsgesetz* het regime een niet te onderschatten dienst heeft bewezen en daarmee heeft bijgedragen aan de kwalijke gevolgen van dit artikel in de praktijk.

3.3 Johannes Popitz

Na de machtsovername door de nazi's werd Johannes Popitz op 21 april 1933 Minister van Financiën van Pruisen, onder de toenmalige Minister-President van Pruisen, Hermann Göring. Popitz was de enige Pruisische minister die niet tevens Rijksminister was. Wel had hij het recht om aan de kabinetsvergaderingen van de Rijksregering deel te nemen, hetgeen hij dan ook op enkele uitzonderingen na deed. Hij was geen lid van de NSDAP, maar kreeg in 1937 wel een gouden door Hitler persoonlijk uitgereikt partij-insigne en daarmee een partijnummer. Als monarchist en conservatief was hij voorstander van een sterke staat. Zijn kritische instelling tegenover de zwakke door partijen en belangengroepen gedomineerde staat van de Weimarrepubliek waren de sleutel voor zijn medewerking aan de

[210] Reimer Voss, Steuern im Dritten Reich (Vom Recht zum Unrecht unter der Herrschaft des Nationalsozialismus), Verlag C.H. Beck, München, 1995, p. 43.
[211] Reimer Voss, Steuern im Dritten Reich (Vom Recht zum Unrecht unter der Herrschaft des Nationalsozialismus), Verlag C.H. Beck, München, 1995, p. 43-44.
[212] Reimer Voss, Steuern im Dritten Reich (Vom Recht zum Unrecht unter der Herrschaft des Nationalsozialismus), Verlag C.H. Beck, München, 1995, p. 39 en 248.

Hitlerstaat.[213] Hij was dus zeker geen democraat. Dit was in die tijd typerend voor de houding van veel ambtenaren en rechters ten opzichte van het regime: ze maakten zich dienstbaar aan het regime, hoewel ze de nazi's eigenlijk afwezen als ongeciviliseerd geteisem en parvenu's. De conservatieve krachten in Duitsland hadden de illusie dat zij Hitler voor hun karretje konden spannen. Ook was er vaak sprake van een antisemitische gezindheid; zo vonden de Neurenberger rassenwetten de nodige bijval.[214] Popitz wees in zijn ogen verwaterde en economisch-wetenschappelijk inhoudsloze begrippen als gerechtigheid, gelijkheid en draagkracht af als fiscale beginselen.[215] Hij was een sterke voorstander van het concentreren van de macht bij de centrale regering ten koste van de deelstaten. Als Pruisische Minister van Financiën was Popitz nauw betrokken bij de *Reinhardt-Reform*, ofschoon tussen hem en Reinhardt een gespannen verhouding bestond.[216]

Na de *Reichskristallnacht* (de nacht van 9 op 10 november 1938) diende hij zijn ontslag in als protest tegen de jodenvervolging. Dit werd echter door Göring niet gehonoreerd. Daarna werd Popitz in toenemende mate actief in het verzet tegen het naziregime. In het geheim werkte hij aan een voorlopige grondwet voor het Duitsland na Hitler. Deze conceptgrondwet had, zoals viel te verwachten, sterk conservatieve en autoritaire kenmerken. Popitz was ook voorstander van een terugkeer van de monarchie. Tijdens de oorlog probeerde hij medestanders voor zijn plannen te vinden bij het leger en verschillende ministeries. In augustus 1943 had hij zelfs een geheim gesprek met Heinrich Himmler om deze als 'bewaker van de nationaalsocialistische waarden' te polsen over het starten van vredesonderhandelingen met de geallieerden. Himmler gaf echter geen krimp. Het resultaat was slechts dat sedertdien Popitz werd gevolgd door de Gestapo. Maar ook binnen de verzetsbeweging kreeg hij niet alle handen op elkaar. Zijn soloacties en contacten met belangrijke figuren binnen het naziregime maakten hem binnen de verzetsbeweging tot een omstreden figuur. Niettemin was hij voorbestemd om Minister voor Financiën en Cultuur te worden in de na de ondergang van de nazi's nieuw te vormen regering. Politiek kan hij als naïef worden gekarakteriseerd. Tot zijn arrestatie hield hij bijvoorbeeld vertrouwen in Göring. Die arrestatie vond plaats op 21 juli 1944, één dag na de mislukte aanslag op Hitler door Von Stauffenberg;

[213] Reimer Voss, Steuern im Dritten Reich (Vom Recht zum Unrecht unter der Herrschaft des Nationalsozialismus), Verlag C.H. Beck, München, 1995, p. 48-49.
[214] Reimer Voss, Steuern im Dritten Reich (Vom Recht zum Unrecht unter der Herrschaft des Nationalsozialismus), Verlag C.H. Beck, München, 1995, p. 247-248
[215] Reimer Voss, Steuern im Dritten Reich (Vom Recht zum Unrecht unter der Herrschaft des Nationalsozialismus), Verlag C.H. Beck, München, 1995, p. 51.
[216] Reimer Voss, Steuern im Dritten Reich (Vom Recht zum Unrecht unter der Herrschaft des Nationalsozialismus), Verlag C.H. Beck, München, 1995, p. 46-47.

Popitz werd beschuldigd van betrokkenheid bij de samenzwering tegen Hitler. Op 3 oktober 1944 werd hij door het *Volksgerichtshof* onder voorzitterschap van Freisler ter dood veroordeeld. Hij werd op 2 februari 1945 opgehangen in gevangenis Berlijn-Plötzensee; de hoop dat Himmler hem nog zou kunnen inzetten als intermediair in het kader van mogelijke onderhandelingen met de geallieerden via Zweden en Zwitserland, bleek op niets gebaseerd.[217]
Johannes Popitz liet twee zonen en een dochter na. Zijn vrouw, de Nederlandse Cornelia Slot, was al in 1936 overleden. Eén zoon sneuvelde in 1945 in Rusland na Popitz' executie.

3.4 Herbert Dorn

Wegens zijn joodse afstamming (zijn grootouders waren joods, zelf was hij evenals zijn ouders evangelisch gedoopt) werd Herbert Dorn op 12 december 1933 met ingang van 1 maart 1934 gedwongen ontslagen als president van het *Reichsfinanzhof*. Ook zijn posities in het *Comité Fiscal* van de Volkenbond en in verschillende andere commissies werden beëindigd. Hetzelfde gold voor zijn auteurs- en redacteurswerk voor onder andere *Steuer und Wirtschaft* alsmede voor zijn leerstoel aan de *Handelshochschule Berlin*, zij het dat deze mede door bemoeienis van Popitz nog tot 1936 kon worden gerekt.
Dorn kreeg veel steunbetuigingen van relaties uit de gehele wereld. Van Enno Becker kreeg hij een hartelijke handgeschreven brief:
Die Gespräche mit Ihnen, und nicht nur die über juristischen Sachen, vermisse ich hier sehr. Zu dem einen Punkte, der mich völlig überrascht und tief berührt hat, möchte ich nur das eine noch bemerken: die Bilder von Ihnen und Popitz standen und stehen unverändert in meinem Zimmer im Rfh und werden dort bleiben, solange ich dort bleibe. Es knüpfen sich für mich recht wesentliche und liebe Erinnerungen daran[218]
Tot de uitbraak van de oorlog zouden meer dan dertig medewerkers van het *Reichsfinanzhof* worden ontslagen. Vele belangrijke joodse fiscaaljuristen werden door de jodenvervolging getroffen.[219]
Na zijn ontslag bleef Dorn onderzoek doen en indien mogelijk publiceren. Kennelijk zag hij geen reden om nazi-Duitsland te verlaten. Dat veranderde toen hij in november 1938 tijdens de *Reichskristallnacht* werd gearresteerd, met de dood werd bedreigd en op het nippertje ontkwam aan overlevering aan

[217] Anne C. Nagel, Johannes Popitz (1884-1945) (Görings Finanzminister und Verschwörer gegen Hitler. Eine Biographie), Böhlau, Köln, 2015, p. 9-19 en p. 183-193.
[218] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 308.
[219] Bijvoorbeeld Ball, Dorn, Grabower, Hensel, Lion, Reinach en Waldecker; zie Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 309.

de Gestapo. Na de oorlog heeft Dorn hierover het volgende verklaard: *(Er sei vor) der Tortur und dem Tode nur durch das Schamgefühl eines Kriminal Polizeibeamten alter deutscher Schule bewahrt worden, der ihn mit Rücksicht auf die ihm bekannte Arbeit (Dorns) für das deutsche Reich auf dem Wege zum Gefängnis freigegeben (habe)*.[220]

In november 1939 emigreerde hij na betaling van de *Reichsfluchtsteuer* naar Genève; wellicht heeft bij de keuze voor Zwitserland nog een rol gespeeld dat zijn tweede vrouw Zwitserse was. Om te mogen emigreren, moest echter eerst in Zwitserland iemand een grote som geld als borg betalen. Het was de bedoeling dat zijn in Berlijn wonende moeder (geboren in 1867) hem zou volgen. Zij werd echter op 18 oktober 1941 uit Berlijn gedeporteerd naar Lodz en in 1942 in het vernietigingskamp Chelmno vermoord.[221] Dorn kreeg dit uitermate trieste bericht pas in 1943.

In Genève ging Dorn werken als adviseur op financieel en fiscaal terrein bij een uitgeverij, waaraan hij ook de auteursrechten van zijn wetenschappelijke publicaties had overgedragen . In 1941 vertrok het echtpaar Dorn naar Cuba, waar Herbert onder andere economisch adviseur van de Cubaanse regering werd. Daar kreeg hij ook een diplomatenpas. In 1947 emigreerde het echtpaar naar de Verenigde Staten. Dorn werd in dat jaar hoogleraar financieel en economisch recht aan de Universiteit van Delaware. Van 1952 tot 1955 was hij aan deze universiteit leider van het door hem opgerichte *Institute of Inter-American Studies and Research*.[222] In juni 1952 werden hij en zijn vrouw Amerikaanse staatsburgers. In 1955 ging Herbert Dorn met emeritaat. Verschillende keren heeft hij Duitsland en zijn voormalige collega's opgezocht. Hij stierf tijdens een Europareis op 11 augustus 1957 in Berchtesgaden, waar hij aan een congres had deelgenomen. Hij werd begraven in Wilmington, Delaware.

4. Synthese

De drie hoofdrolspelers in deze bijdrage staan symbool voor de indrukwekkende ontwikkeling die het Duitse belastingrecht in de Weimarperiode heeft doorgemaakt. Becker als de geestelijk vader van de *Reichsabgabenordnung* was een belangrijke vertegenwoordiger van het formele

[220] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 331, voetnoot 1.
[221] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 339-340.
[222] Christoph Bräunig, Herbert Dorn (1887-1957), Pionier und Wegbereiter im Internationalen Steuerrecht, Mohr Siebeck, Tübingen, 2016, p. 77.

belastingrecht, hoewel hij ook op andere terreinen, met name de inkomstenbelasting, belangrijk werk heeft verricht. Popitz heeft veel betekend voor het materiële belastingrecht onder meer op de terreinen van de inkomsten- en vennootschapsbelasting en vooral de omzetbelasting. Hij heeft zich in het bijzonder ingezet voor het terugdringen van het fiscale federalisme, door voortdurend de nadruk te leggen op het Rijk als belangrijkste belastingheffer ten koste van de deelstaten en gemeenten. Dorn is vooral bekend geworden door zijn belangrijke bijdragen aan het internationaal belastingrecht. Behalve zijn aandacht voor de vormgeving en bevordering van internationale belastingverdragen heeft hij zich ook sterk gemaakt voor fiscale maatregelen om de kapitaalvlucht tegen te gaan, waarbij vooral de *Reichsfluchtsteuer* van belang was in combinatie met het bevorderen van inlichtingenuitwisseling tussen verdragslanden. Wat Becker en Popitz gemeen hadden, was hun zeer kritische houding tegenover de Weimarrepubliek. Enerzijds hebben zij zich zeer ingezet om Duitsland na het verlies van de Eerste Wereldoorlog er weer bovenop te krijgen door bij te dragen aan fundamentele hervormingen van het belastingstelsel, anderzijds hadden zij grote moeite met het verlies van de vooroorlogse waarden van het keizerrijk en de toenemende wanorde en vaak op eigenbelang gerichte politiek van de Weimarrepubliek. Dorn was ervan doordrongen dat Duitsland zo snel mogelijk uit het naoorlogse isolement moest worden gehaald om er economisch weer bovenop te komen. Het tot stand brengen van een uitgebreid stelsel van internationale belastingverdragen was daarvoor belangrijk; hetzelfde gold voor het meepraten door Duitsland op het hoogste internationale niveau over de ontwikkeling van onder meer (model)belastingverdragen.

Tragisch is het om te moeten constateren dat de opkomst van het Derde Rijk een destructieve rol heeft gespeeld in de uiteindelijke persoonlijke en professionele afloop van hun levens. De ironie wil dat het nu net de fiscale paradepaardjes van Becker, Popitz en Dorn zijn geweest, die daarbij direct (bij Becker) of indirect (bij Popitz en Dorn) van groot belang zijn geweest. Daarbij zij opgemerkt dat het belastingstelsel van Weimar enkele karakteristieken bevatte die kiemen bevatten voor de latere uitwassen van het naziregime op fiscaal terrein.[223] Zo werden al in de Weimartijd fiscale regelingen ingezet voor andere dan louter budgettaire doelstellingen, in het bijzonder voor sociale, economische en politieke oogmerken. In de *Reinhardt-Reform* werd dit in versterkte mate voortgezet, waarbij er uiteindelijk ook door de oorlogsvoorbereiding ingegeven en vooral puur racistische fiscale maatregelen

[223] Christiane Kuller, Bürokratie und Verbrechen (Antisemitische Finanzpolitik und Verwaltungspraxis im nationalsozialistischen Deutschland), Oldenbourg Verlag, München, 2013, p. 134-136.

werden ingevoerd. In de tweede plaats zou de in de Weimartijd opnieuw ingevoerde *Reichsfluchtsteuer*, die de bedoeling had om belasting- en kapitaalvlucht tegen te gaan, door de nazi's worden misbruikt als een instrument van onmenselijke emigratie- en uitbuitingspolitiek gericht tegen vooral de joden, zonder dat er iets wezenlijks was veranderd in de vormgeving van deze emigratieheffing.[224] In de derde plaats legde de *wirtschaftliche Betrachtungsweise* van de *Reichsabgabenordnung* de basis voor *Paragraph 1 Steueranpassungsgesetz*, waar de nationaalsocialistische levensbeschouwing werd voorgeschreven voor de uitleg van belastingwetten en de beoordeling van de feiten. In de vierde plaats liet de rechtsbescherming van de belastingplichtigen al in de Weimartijd te wensen over. Vaak waren in fiscale zaken uitvoering en rechtspraak verenigd in één hand, die van de belastingdienst. De *Finanzgerichte* werden voor een groot deel overheerst door ambtenaren van de belastingdienst.

Becker en Popitz, die mede aan de basis hebben gestaan van het belastingstelsel van de Weimartijd, hebben zich niet verzet tegen dit gebrek aan rechtsbescherming; die houding heeft zich alleen maar versterkt in de eerste jaren na de machtsovername door de nazi's. Becker is bezweken voor de verleiding om *Paragraph 1 Steueranpassungsgezetz* te zien als de logische en gewenste opvolger van de door hem ontwikkelde *wirtschaftliche Betrachtungsweise*. Zijn herhaalde pleidooien om het algemene belang te stellen boven het eigenbelang hebben hem blind gemaakt voor de in de nazitijd aan de orde van de dag zijnde volstrekte minachting van de rechten van het individu, zeker als het een door het regime als *Untermensch* gebrandmerkte persoon betrof. Popitz, die had meegewerkt aan de *Reinhardt-Reform*, nam in 1938 ontslag naar aanleiding van de *Reichskristallnacht* en de politiek van de jodenvervolging maar bleef na de weigering van dat ontslag aan, zij het dat hij zich vanaf dat moment meer ging toeleggen op het plegen van verzet. Hij zal zich mogelijk hebben gerealiseerd dat het mede door hem vormgegeven belastingstelsel waarin ruim baan werd gegeven aan de instrumentalisering van het belastingrecht uiteindelijk zou ontaarden in racistische fiscale maatregelen. *Abteilung III für die Verwaltung der Besitz und Verkehrssteuern*, die zich onder de leiding van Popitz in de Weimartijd had ontwikkeld tot de centrale belastingafdeling van het ministerie, zou in de nazitijd een centrale rol spelen in het initiëren, coördineren en implementeren van de antisemitische

[224] Zie Wolfgang Schön, Steuerstaat und Freizügigkeit, in: Ulrich Becker en Wolfgang Schön (ed.), Steuer und Sozialstaat im europäischen Systemwettbewerb, Mohr Siebeck, Tübingen, 2005, p. 44 en Christiane Kuller, Bürokratie und Verbrechen (Antisemitische Finanzpolitik und Verwaltungspraxis im nationalsozialistischen Deutschland), Oldenbourg Verlag, München, 2013, p. 185 e.v.

fiscale bepalingen.[225] Popitz' politieke naïviteit bracht hem ertoe erop te vertrouwen dat figuren als Himmler en Göring uiteindelijk wel voor rede vatbaar zouden zijn. Hij heeft voor zichzelf de keuze gemaakt om zich tegen het regime te keren door de opstand van voornamelijk conservatieve krachten tegen Hitler actief te steunen. Uiteindelijk heeft hem dat het leven gekost.[226]
Dorn werd vanwege zijn joodse afstamming zonder pardon in 1933 ontslagen als president van het *Reichsfinanzhof*. Lange tijd heeft hij gedacht dat hij min of meer op dezelfde voet kon doorleven en -werken - wat dat betreft had hij net als Popitz het misdadige karakter van de nazi's te laat onderkend - totdat hij na zijn arrestatie tijdens de *Reichskristallnacht* erachter kwam dat zijn leven ernstig in gevaar was als hij in Duitsland zou blijven. Op het laatste moment kon hij nog emigreren naar Zwitserland (later naar de Verenigde Staten), zij het onder gedwongen betaling van de *Reichsfluchtsteuer*, een belasting waar hij zich in de Weimartijd zo intensief mee had beziggehouden. Toen hij in 1943 het bericht kreeg dat zijn moeder in Polen was vermoord, zou men veronderstellen dat dit bij de man die zoveel goeds heeft gedaan voor het herstel van de internationale reputatie van Duitsland na de Eerste Wereldoorlog, het laatste sprankje vaderlandsliefde had gedoofd. Met dat vermoeden spoort dat Herbert Dorn en zijn echtgenote na de Tweede Wereldoorlog Amerikaans staatsburgers werden en dat hij na zijn overlijden in Berchtesgaden is begraven in de Verenigde Staten. Niettemin spreken de getuigenissen na zijn dood unisono dat Herbert Dorn ondanks alles niet verbitterd was en evenmin wraakgevoelens had. Ludwig Hessdörfer, ten tijde van het overlijden van Dorn president van het *Bundesfinanzhof*, zei het als volgt:
Zu seinem eing[illegible] musischen Menschen, das mit seinen Geistesgaben in schönstem Einklang stand. Manche seiner Leidensgenossen hat ihr schweres Schicksal verbittert. Er war ein zu grosser Geist, um nicht zu wissen, dass Dummheit, Gedankenlosigkeit und Vergesslichkeit mit die schlimmsten Laster der Menschheit sind.[227]

[225] Christiane Kuller, Bürokratie und Verbrechen (Antisemitische Finanzpolitik und Verwaltungspraxis im nationalsozialistischen Deutschland), Oldenbourg Verlag, München, 2013, p. 55.
[226] Zie Reimer Voss, Johannes Popitz (1884-1945) (Jurist, Politiker, Staatsdenker unter drei Reichen – Mann des Widerstands), Lang, Frankfurt am Main, 2006, p. 311-327.
[227] http://www.bundesfinanzministerium.de/Content/DE/Downloads/Ministerium/Bundesfinanzakademie/Steuermuseum/Leben-Herbert-Dorn.pdf?__blob=publicationFile&v=3, p. 69.

OFFSHORE INDIRECT TRANSFERS: HOW TO CONVERT A LEGITIMATE BUT COMPLEX EXECUTABLE TAXING RIGHT FOR SOURCE STATES INTO A BALANCED SITUATION BETWEEN SOURCE STATE TAXING RIGHTS AND TAX PAYER RIGHTS?

Prof. dr Hans van den Hurk

1. An icon leaves Maastricht University

An icon leaves Maastricht University. I still remember my first acquaintance with Rainer Prokisch. In a nice pub in Maastricht, we had our first conversation about the dynamic world of international and European tax law. And, of course, about the international LLM that Rainer was setting up. He needed a partner in crime for that. He, therefore, asked me to apply. I did not have to think twice about that and 'the rest is history'.

What makes Rainer Prokisch so special? First of all, of course, that he is a fantastic tax expert with a great knowledge of international and European law. Secondly, he has lived in several cultures (also in terms of taxation) and that makes him able to sketch valuable broad views. Incidentally, this also means that you could have discussions with him on various points where you will remain in an 'agree to disagree' status. Thirdly, he has an incredibly large international network that has enabled him to quickly make Maastricht University one of the best-known universities in the world. And last but not least, he is a fantastically nice man, a dear friend and a colleague whom I will miss in the years to come.

In my contribution I will discuss offshore indirect transfers (OIT), the reasons for having this subject high on the UN-agenda, the UN proposal, the alternatives developed by the Platform[228] and the possible negative consequences for corporations which are mostly caused by a lack of mandatory dispute resolution and difficult double tax relief due to the fact that more than two states can be allowed to tax capital gains. Tax payer rights seem to deteriorate if these proposals are going to be introduced. Due to the limits in the number of words I will focus on the core issues.

[228] See https://www.oecd.org/tax/platform-for-collaboration-on-tax.htm

2. Offshore Indirect transfers and the special interest for developing countries

2.1. Introduction

Offshore indirect transfers is an international tax topic which gets increasingly more attention. The reason for this is that in a few well known cases during the last couple of years developing countries experienced effective tax planning by multinationals whereby these states saw a change in the ownership of domestic companies but were not able to tax the results accordingly.[229] Specifically, in situations where the domestic activities deal with natural resources, the issue is that, if the source state is not allowed to tax offshore indirect transfers, at a certain moment in time the natural resources will be exhausted and the source state has missed possibilities to enjoy these revenues which are so strongly connected with that country. During the last covid years developing countries have paid new attention to these issues since they need the resources to cope amongst others with this crisis.

2.2. Offshore indirect transfers

Offshore indirect transfers have been regularly in the global news last couple of years. Indirect transfers became world news as the consequence of, amongst others, two Indian court cases under a bilateral investment treaty. Interestingly, these cases where not just discussed by tax experts but also outside the tax world.[230] India changed the law retroactively by applying rules designed to tax offshore indirect transfers in years which were more than ten years behind the year of creation of these rules. India motivated this retroactive taxation by saying that it was not so much a retroactive taxation as well as a clarification of existing rules. In one of the two cases, Cairn won the dispute before an arbitration court but India refused to follow up on this and Cairn actually seized legal action on Indian property around the globe, including embassy buildings in Paris and India's domestic aircraft carrier Air India.[231] Tax has never ever been in the news this way. In the meanwhile Cairn and the Indian government reached a solution and Cairn has dropped the court case against India.[232]

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[229] Vodafone versus India, Cairn versus India and this is not just an Indian problem. Many developing states try to find ways to effectively tax indirect transfers.

[230] Cairn versus India in the end reached the Permanent Court of Arbitration. See: https://jusmundi.com/en/document/decision/en-cairn-energy-plc-and-cairn-uk-holdings-limited-v-the-republic-of-india-final-award-wednesday-23rd-december-2020

[231] See amongst others Cairn Energy gets right to seize Indian assets in tax row - BBC News and Cairn Energy Secures French Court Order To Seize 20 Indian Government Assets: Report (ndtv.com), both accessed last at December 17, 2021.

[232] See Cairn Energy to drop cases against India, accepts $1-billion offer | Business Standard News (business-standard.com), accessed at January 14, 2022.

For this reason I will also discuss the influence of the bilateral investment treaties and specifically the so-called 'fair and equitable' treaty criterion from art. 4 which is part of most of these investment treaties.

2.3 An example: the Vodafone case[233]

Before in the previously mentioned recent Cairn case the retroactive application of Indian law against the 'fair and equitable' treatment condition under the bilateral investment treaty between India and the United Kingdom was tested, the world saw the Vodafone case being decided under comparable rules. A short summary of this first landmark case:

In 2006, *Vodafone* purchased *(Õ Ô Ã È É Ó Ï Î Õ Ó* participation in a joint venture to operate a mobile phone company in India (the owner of an operating license), for nearly US$11 billion. This transfer was accomplished by *Hutchison*, a Hong Kong-based multinational, by selling a wholly owned Cayman Islands subsidiary holding its interest in the Indian operation to a wholly owned subsidiary of *Vodafone* incorporated in the Netherlands where it also resides. The transaction thus took place entirely outside India, between two non-resident companies.
The Indian Tax Authority (ITA) sought to collect over US$2 billion of tax on the capital gain realized by Hutchison on the sale of the Cayman holding company. As per the Indian Law, the purchaser is required to deduct tax at source while making payment to the non-resident seller. Accordingly, the Indian Tax Authority (ITA) held the purchaser, Vodafone's Dutch subsidiary, liable for failure to comply with its obligation to withhold tax from the price paid by it to Hutchison on the ground that the capital gains realized by the seller were taxable in India. This sparked a protracted court case, with the Supreme Court of India ruling in 2012 in favour of the taxpayer. The Supreme Court denied the ITA's broad reading of the law to extend its taxing jurisdiction to include indirect sales abroad, though it took the view that the transaction was in fact the acquisition of property rights located in India.
The government of India subsequently brought in a clarificatory amendment with retroactive effect to overcome the technical difficulty arising out of the Supreme Court ruling so as to allow taxation of offshore indirect sales and to validate the tax demand raised against the Vodafone's Dutch subsidiary. The legality of a retroactive effect of the law was not challenged by Vodafone in the

[233] This example is taken from The Platform for Collaboration on Tax, The Taxation of Offshore Indirect Transfers— A Toolkit, pag.24. See Platform for Collaboration on Tax releases toolkit to help developing countries tackle the complex issues around taxing offshore indirect transfers of assets - OECD.

Indian courts and instead it has submitted the action of the government of India to arbitration under the India-Netherlands Bilateral Investment Treaty.

2.4. Some words on the influence of Bilateral Investment Treaties on OIT

From the above it is clear that countries challenge any OIT's because they believe they are entitled to part of the revenues. But sometimes their fights exceed reasonable limits. In the recent Cairn case, the retroactive taxation from OIT led to an appeal to the Permanent Court of Arbitration under the bilateral investment treaty between India and the United Kingdom. But can a bilateral investment treaty have any effect on an international tax case? In the following I only address a few elements of this discussion. I refer to the Cairn case if the reader wants to know more.

In most BIT's two paragraphs are of the utmost important. First of all, art. 4, par.3 which reads:

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less favourable than that accorded to the investors of either Contracting Party or of any third state shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment , preference or privilege resuting from:
a. any existing or future customs union or similar international agreement to which either of the Contracting Parties is or may become a party, or
b. any international agreement of arrangement relating wholly or mainly to taxation or any domesÉ Ã Ì Å Ç É Ó Ì Á Ô É Ï Î Ò Å Ì Á Ô É Î Ç × È Ï Ì Ì U

Article 4 deals with investments. With respect to these investments, many BIT's contain a most favourite nations clause in article 4, 1 and 4, 2. But the above par. 4,3 clearly states that an exception has been foreseen with respect to e.g. a bilateral tax convention and any domestic tax rules. These exceptions are the reasons why states have often considered that an appeal on a BIT could only be of limited importance. The issue however in many tax cases, including amongst others the Cairn case, is that the country in stake applied new rules retroactively and by doing so the taxed corporation has in principle no feet to stand on. In the Cairn case the Permanent Court of Arbitration therefore applied the so-called 'Fair and Equitable' treatment provision of article 3. This reads:

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accorded fair and equitable treatment and shall enjoy full protection and security in the territory ÏÆ ÔÈÅ ÏÔÈÅÒ # Ï Î ÔÒÁÃÔÉ Î Ç 0 ÁÒÔÙ 8 õ

Without going in all the details, it is relevant to understand that India, according to the permanent court of arbitration, unlawfully expropriated Cairn's investment without providing fair and equitable compensation. In such a situation in the case at hand 'tax as such' is not really the issue but the expropriation is. And therefore art. 3, 2 can be used. The Tribunal decided the following:

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2. Declares that the Respondent has failed to uphold its obligations under the UK India BIT and international law, and in particular, that it has failed to accord the # Ì ÁÉ Í Á Î ÔÓ õ É Î ÖÅÓÔ Í Å Î ÔÓ xFotation of Article 3(2) ñÕ É Ô Á Â ÔÈÅ 4ÒÅÁÔÙ η õ

India lost the case and appealed in the Netherlands since the primary case was discussed before a PCA which has its seat in the Netherlands. However, before in this procedure even the hearing has taken place, India gave in and promised to pay back to Cairn part of the money which was expropriated. It was suggested that one of the reasons for this change in attitude was the belief in India that the country could benefit from a more investment friendly tax climate.

Still, from a state point of view, the frustration was immense that India had to pay back a major part of its necessary tax revenues.[234] And for the future India now has to renegotiate all its tax treaties to make sure that OIT's can be taxable by India. So for India this was quite a difficult decision after a disappointing case with the PCA.

But also Cairn is not very happy. The total tax claim was 1,7b USD and, if the press reports are correct, India promised in a compromise proposal which was accepted by Cairn to pay back 1b USD. Cairn therefore still lost 700m USD in a case in which it was decided that Cairn was totally right.

So, in situations where governments take actions as in the above mentioned India cases, a BIT can certainly play a role.

[234] I don't have figures for the relative importance of the Cairn tax proceeds but the proceeds in the case *Vodafone are* around 2 percent of central government revenue (and almost 8 percent of all annual income tax revenues.

2.5 The right to tax from a source state perspective

When does a state have the right to tax? Nexus is here the word that literally connects an activity or a source with a country which has as the consequence that this country has the right to tax. In the words of OECD's BEPS Action 1[235], Nexus is one of the fundamental elements of the global tax system and as such determines where taxes should be paid. Under existing rules this is mainly the case where there is physical presence. The question what to allocate to that physical presence is answered by applying the Arm's Length Principle.[236] In the current tax world nexus has more than one meaning. After BEPS we have amongst others seen a 'modified nexus approach' which dealt with patent box regimes and the question how to determine the basis for profit allocation.

What is getting also more important is a further selection within the category of nexus situations which can be called situations in which there is 'economic nexus' or 'real economic activity'. In the post-BEPS era this is getting much more importance since the traditional legal approach has been replaced with an economic one.[237] Also in my country this new approach is getting much more important. Tax Authorities will only issue a ruling for activities of internationally operating companies where: 'there is an 'economic nexus' with the Netherlands. It must concern commercial operational activities that are actually performed in the Netherlands for the account and risk of the company. These activities must match the position of the company within the group. For these activities, sufficient relevant personnel must be available in the Netherlands at group level and the number of personnel must be in proportion to the total personnel of the group. The level of the operating costs must also match the activities performed.'[238] It is clear that the times are over where companies could acquire a ruling in the Netherlands on situations which were created just for tax avoidance based on a very simple interpretation of nexus.

Also in the situations of offshore indirect transfers the discussion seems at a first glance to be clear. However it is not. An 'offshore indirect transfer' (OIT) is in essence, the sale of an entity owning an asset located in one country by a resident of another country. Taking into account all other changes as we know them from OECD's BEPS Actions, one could expect that offshore indirect

[235] BEPS Action One though was a failure but in the meanwhile new approaches have been accepted by a major part of the international community, like amongst others Pillar One. For a critical review from Pillar One, see Hans van den Hurk, Tax and the digital economy – will pillar one be the solution?, in 'The EC Tax Journal', Vol.18, February 2020, page 131-167.

[236] Although the world is coming up with new tax rules and formulary apportionment is getting high on all kind of agenda's, the ALP has not yet been put up for retirement.

[237] See my 'Tax Treaties and Abuse – The Effectiveness of the Principal Purpose Test and Some of Its Shortcomings in IBFD's Bulletin for International Taxation, 2021 (Volume 75), No. 6.

[238] Announcement of the Dutch Secretary of State from November 22, 2018, nr. 2018-0000185524 published in amongst others Kluwer V-N 2018/62.

transfers would find a place in the list of topics covered by these BEPS Actions. However disappointingly this is not the case. One reason why not, is possibly that in some situations the value creation as such is (partially) attributable to the owners and managers of such assets. If for example McDonalds would sell all the restaurants in one country via an offshore indirect transfer than the value of that transaction is not just the value calculated via e.g. a discounted cashflow since the quality of the cashflow is to a large extent based on its US brand. Under a different name these restaurants will have less value. And this is an example why some countries may choose not to accept a change in the treaties whereby the source state is allowed to tax OITs. The same goes if we look from a transfer pricing perspective to OIT's, since then the question is mainly what the value drivers are. And in many situations part of the value drivers can be found in the central management from the company. But whether this is enough argumentation against allowing the source state to tax offshore indirect transfers? I doubt that.

This becomes most clear in situations where natural resources is the leading value driver in a country. Fine management can help increase the value of the activity, but without the resources there is no value. This is probably different when the discussion deals with communication networks since here users play a big role. But marketing and brand name are the first factors which, when dealt with adequately, lead to an increasing number of users. And since the activities relating to marketing and intellectual property can also be performed outside the state where the communication network is built, it does not go without saying that the state within which the communication network is running, has a taxing right on the sale of the shares by an entity outside that country holding the corporation which exploits the investment in that country. Actually possibly both states could be entitled to tax part of that capital gain but the determination which country may tax what, is quite difficult. Only an economic approach on value chain analysis (a transfer pricing approach) can possibly solve this but it is more likely than not that in these situations states often have a different view on how to perceive these value chain analyses and therefore double taxation may be the result. Therefore I can understand why OECD did not want to include IOT's in the BEPS plans. In order to conquer these problems, it would be highly recommendable that in these situations profit allocation would play a role. If activities which create value are divided amongst several states, the only reason for not allocating profit to these states is that this seems to be difficult to execute. But that goes for many new rules and therefore this subject should without doubt be back on OECD's agenda also.

Despite the above, there is one main exception where the interest for the source state should always be undoubted. Independently how good the

management will be, how optimal the marketing development is, natural resources will be exhausted at a certain moment in time. And for me this is the main reason why I believe that these interests should create a taxing right for the source states, provided that it is based on rules which can be tested independently.[239] Suppose a British corporation holds a Vietnam entity exploring the possibilities for lithium. At a certain moment Lithium is found and during a period of 20 years lithium has been exploited in that mine. After twenty years of exploitation the mine is no longer economically relevant anymore and therefore it is closed. Suppose also that in those twenty years the entity which holds the mine has been sold five times. Then only when the specific tax treaty contains an article like article 13,4 UN[240], taxation is possible. But suppose that this Vietnam entity is being held by an Irish entity which acts as the intermediary holding under the British headquarter and the shares in this Irish entity are being sold? In that situation this article 13, 4 UN is not applicable and the source state has no possibility to tax the five transactions in twenty years' time in which the 'capital gain as such' was mainly the result from the value of the natural resources. For me this justifies special attention for the issue of natural resources in the global discussion on whether or not OIT's should be taxable. [241] But more water has to flow through the rivers of OECD and the UN before this is possible.

2.6. OIT under current tax treaty rules

Under current tax rules there are certainly positive developments to come up with legislation/treaties which enable the taxation of OIT which would work. Offshore indirect transfers (OITs) are being defined by the Platform for Collaboration on Tax:

"*Offshore Indirect Transfer: an indirect transfer in which the transferor of the indirect interest is resident in a different country from that in which the asset in question is located*"[242]

[239] As said, if we can come up with a system, where based on a division of value chain drivers, both states, or sometimes even more than both states, are entitled to tax part of this, I would support that. But only under the condition that there is a system in place which includes mandatory dispute settlement. There has to be a balance in the interest for source states and taxpayer rights.

[240] See next paragraph.

[241] The only exception on this exception is the situation where the sale of the shares is the consequence of an internal reorganisation. In those situations taxation seem not necessary since the sale has not been done to actually realise a capital gain. The capital gain is merely the consequence of the reorganisation.

[242] The Taxation of Offshore Indirect Transfers— A Toolkit from June 4, 2020. See The Platform for Collaboration on Tax. The Taxation of Offshore Indirect Transfers—A Toolkit (tax-platform.org). Last accessed December 22, 2021.

This covers situations where for example a US company sells the shares in its Dutch intermediary which again holds a Dutch subsidiary which again owns a subsidiary in the source state.
The state which holds the assets within its border cannot tax the sale of the shares since that capital gain is allocated to the resident state from the corporation which holds that local subsidiary which owns the natural resources. And in most situations these revenues are even tax exempt based on a participation exemption or a comparable system.

The taxation of indirect transfers of assets such as mineral rights, and other assets generating location-specific rents such as licensing rights for telecommunications is a concern in many developing countries, magnified by the revenue challenges that governments around the world face as a consequence of coronavirus. But where location-specific rents like licensing rights for telecommunication will possibly only increase in value, with natural resources it is clearly different and therefore the urge for the source states is given. In the below I will first describe existing treaty rules. What is the role of article 13 OECD? Clearly, if the source state would acquire a right to tax the sale of the shares realised in the other country a taxing right must be found in article 13.
Article 13, 4 reads:

"4. Gains derived by a resident of a Contracting State from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting State if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property, as defined in Article 6[243] ň Ó É Ô Õ Á Ô Å Ä É Î Ô È Á Ô Ï Ô È Å Ò 3 Ô Á Ô Å &

How would this work under UN rules? Under UN rules par. 4 reads exactly the same:

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[243] Under both model tax conventions the term "immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources.

the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property, as defined in *! ÒÔÉÃÌÅ ïň ÓÉÔÕÁÔÅÄ É Î ÔÈÁÔ ÏÔÈÅÒ 3ÔÁÔÅ*

Both identical paragraphs allocate a taxing right to the source state for taxing the capital gain where the capital gain, as a consequence of the alienation of the shares, is based directly or indirectly from immovable property. Well, if the shares in the Dutch entity holding the Dutch intermediary which holds the Vietnam subsidiary are being sold, then the source state could, if all other conditions have been fulfilled, tax the revenues since it deals with a resident of a contracting state realising a profit which is based on the value of immovable property in the other state.
But this can be different if a UK holding holds a Luxembourg intermediary which holds a Dutch intermediary owning the Vietnamese subsidiary and the UK parent sells the shares in the Luxembourg entity. The tax treaty applicable in relation to article 13, 4 and Vietnam's natural resources, is the Vietnam treaty with the Netherlands. The question remains to be answered whether Vietnam could possibly apply the Vietnam treaty with the United Kingdom also. From the current text this seem not to be possible although the United Kingdom is the resident state of the holding company realising a capital gain. The reason for this is mainly that the transaction in the UK, with respect to the sale of the shares in the Luxembourg entity, cannot be taxed in Vietnam since that share transaction takes place in different countries. And last but not least, the words 'directly or indirectly' which in a first reading possibly shines another light on this discussion, do not help Vietnam since these words do not refer to the participation but to the 'immovable property'. And therefore Vietnam remains with empty hands.
But even if Vietnam would have the taxing right, it will be quite uncertain whether Vietnam knows that a sale takes place. That alone is another reason for new legislation. Later I will discuss the alternatives developed by the Platform which try to mitigate this issue.

The UN Model Tax Convention includes nowadays an additional paragraph in article 13, 5 which reads:

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a Contracting State from the alienation of shares of a company, or comparable interests, such as interests in a partnership or trust, which is a resident of the other Contracting State, may be taxed in that other State if the alienator, at any time during the 365 days preceding such alienation, held directly or indirectly at

least ___ per cent (the percentage is to be established through bilateral
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Here 'directly or indirectly' seems to refer to the participation as such and this might help the source state to a certain extent. Depending on the negotiated percentage of the shareholding, the source state is able to tax the capital gain, provided that the respective treaty is one which is modelled after the UN model and the treaty contains this article 13, 5. However there is a main reason why this provision still does not work. The first line has clearly been drafted that, in order to apply this paragraph, it has to deal with the alienation of shares in an entity in the other state. Let us look at an example to see the limitations of article 13, 5. What would the above article 13, 5 UN mean for the case of the UK parent with a Luxembourg intermediary which holds again a Dutch entity which holds the Vietnamese subsidiary and the UK would sell the shares in the Luxembourg company?

The first part of article 13, 5 (Gains, other than those to which paragraph 4 applies, derived by a resident of a Contracting State from the alienation of shares) refers in this example to the United Kingdom entity which sells its Luxembourg intermediary holding.

The second part of article 13, 5 (shares of a company,…, which is a resident of the other Contracting State, may be taxed in that other State) defines the corporation on whose shares a capital gain has been realised. Can Vietnam use this provision to tax the capital gain in this situation? Unfortunately Vietnam cannot. If I fill in the respective corporations, article 13, 5 reads as follows:

"Gains derived by the UK holding from the alienation of shares of a Luxembourg corporation, may be taxed in Luxembourg if the UK holding, at any time during the 365 days preceding such alienation, held indirectly at least 100[244] per cent of the capital of that Luxembourg entity."

This would be the literal reading. The problems for Vietnam is simply that art. 13, 5 is not applicable since no shares in the Vietnam entity have been alienated. And although the words 'direct and indirect' improve the possibilities for applying article 13, 5, it does not help India here. In the words of the Platform:

"This allocates to country (source) taxing rights over the gain derived by a non-resident of country (source) from the disposal of shares (or comparable interests) of a company, partnership or trust that is itself resident of country (source). However, this only applies to offshore direct ownership of such entities. For that reason, while Article 13(5) may help address certain tax

[244] In my example I departed from a 100% shareholding.

avoidance arrangements (e.g. certain dividend-stripping or change of residence strategies), it is not suitable as a provision to ensure the source taxation of gains on indirect transfers. According to the UN Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries, treaty practice varies with regard to the use of Article 13(5): some countries explicitly exclude gains on listed shares; others restrict the scope to gains realized by individuals who were previously residents of the source State; and many countries do not include this provision at all in their treaties."[245]

Here we see the lacking possibilities from bilateral tax treaties in a reverse way. In January 2022 I published an article on triple taxation and the impossibilities for companies to get triple taxation being relieved, here we see countries suffering from the same.[246] If there would be room for third state intervention, quod non, 13,5 could, in my last example, be read as follows:

"Gains derived by the UK holding from the alienation of shares of a Luxembourg corporation, may be taxed in Vietnam if the UK holding, at any time during the 365 days preceding such alienation, held indirectly at least 100[247] per cent of the capital of that Vietnam entity."

This demands that tax treaties would no longer have a bilateral character. But unfortunately, this is possibly one bridge too far, yet. The latter approach would only be possible if there would be a multilateral instrument which creates taxing rights for the source state on capital gains related to the source state resources which have been realised between a second and a third state.

3. Some approaches for the future

3.1 Introduction

The previously discussed disputes between India and two British multinationals can be looked at from several angles but for me it is evident that, since real value goes from one hand to the other without the source state (even more when it is a developing state) being able to tax this, this is, to say the least, quite strange. The source states should have a legitimate right to tax the sale of natural resources but changing the system is unfortunately not easy. And it is not just India suffering from this. In the meanwhile, several case around the

[245] Page 30 - 31.

[246] See my 'Is the Interaction between Chapter X of the OECD Transfer Pricing Guidelines and the EU Directive on Tax Dispute Resolution Mechanisms an Effective One?' in International Transfer Pricing Journal, 2022 (Volume 29), No. 1.

[247] In my example I departed from a 100% shareholding.

globe are pending and a call for a change in the allocation of taxing rights is heard around the globe.[248]
One of the reasons why developing states are desperate in their wish to tax OIT is that, by using indirect transfers in order to alienate shares, a legitimate but unreasonable way of tax avoidance is used which is difficult to challenge by these states. Again, suppose OIT should remain untaxed as it actually is at the moment, then source states with natural resources will see all kind of changes in the ownership of these resources without being able to tax them and possibly in the end the natural resources are exhausted.
These are the reasons why several organisations in the world work on proposals for taxing OIT's, which initiatives I fully support.[249] In the below I will therefore focus on part of the UN-plans to tax OIT's but also on the plans of the Platform in which UN plays also a relevant role.

3.2. The United Nations approach

The United Nations developed a reasoning whereby OIT should also fall under Article 13(4). This is clarified in the report of the virtual meeting from October 20-29, 2020 which states the following:

"At its nineteenth session (Geneva, 15-18 October 2019), the Committee discussed note E/C.18/2019/CRP.22 which dealt primarily with the issue of so-called offshore indirect transfers (OITs) and how the gains from such transfers should be dealt with in the UN Model.
After discussion, the Committee welcomed the Subcommittee's decision to work on a treaty provision that would allow source taxation of capital gains on OITs not already covered by Art. 13(4) without prejudging the question of whether that provision would be included in Article 13 of the UN Model or presented as an optional provision in the Commentary."[250]

It has to be seen whether a solution in the commentary as suggested in the above would actually work. Specifically when the other state is a OECD state, it could be difficult to actually negotiate that taxing right. And a change in the text is neither going to bring a solution since the source state wants to tax a capital gain which a company in a third state will realise on the shares of the second

[248] See amongst others the case of Zain versus the Uganda's Revenue: African taxmen, MNCs watching landmark Uganda-Zain tax row case - The East African
[249] Provided that there is a system in place for mandatory dispute resolution which is solid and which create an environment where companies are relief from any double, triple or quadruple taxation.
250 Report E/C.18/2020/CRP.36 See more specifically: CRP36 for 21st session - Capital gains on OIT 7OCT20.pdf (un.org)

state. Suppose that a Dutch holding company sells its shares in a UK intermediary holding which holds a Vietnam operating company, then Vietnam would like to use article 13, 4 in order to tax the Dutch entity. But the Netherlands (or any other country) could simply reject the claim of Vietnam since its treaty with Vietnam is not applicable on this transfer.[251]

Are there any other ways taxing an OIT without changing the text of a treaty? Possibly the Principal Purpose Test could be applied in situations where an entity is inserted in a structure in order to enable an offshore indirect transfer to be created instead of a direct transfer.[252] Article 29, 9 reads as follows:

"Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention."[253]

Based on this provision the treaty benefits can be ignored by Vietnam in relation to the (in my latest example) UK. But the UK entity is being sold and why would Vietnam be able to tax the capital gain realised by an entity of a third state if no direct taxable transaction between Vietnam and the UK takes place. And even if Vietnam would act as if the treaty between Vietnam and the UK should not be applicable and therefore apply domestic legislation, the tax money should come from the Netherlands. And although the latter is not always a problem (the claim will be put on the source state entity like India did in the Vodafone case) it is not my preferred alternative.[254] [255]

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[251] This is an item which will be addressed by the Platform.

[252] In the Cairn case this was suggested by India where India applied an anti-abuse reasoning to be entitled to retroactively apply new tax rules.

[253] I am of the opinion that the PPT is a strong weapon for states but not the almighty tool that can solve all issues in tax treaties which possibly should be solved but have not be solved yet. One of the main worries is thereby the thought that an instrument like the PPT can be perceived as customary international tax law and as a consequence gets more powers than actually is intended by BEPS Action 6 as I read this. See for more my 'Tax Treaties and Abuse – The Effectiveness of the Principal Purpose Test and Some of Its Shortcomings in IBFD's Bulletin for International Taxation, 2021 (Volume 75), No. 6.

254 The Platform seems to have a different meaning here where the Platform writes: "Furthermore other treaty anti-abuse provisions such as those reflected in the BEPS minimum standard to counter treaty shopping may be considered in cases where the indirect transfer is motivated by tax avoidance objectives. This could include a limitation on benefits (LOB) article and/or principal purpose test (PPT), ideally in a tax treaty or, if appropriate, as a domestic law override of a tax treaty, if the non-resident seller is a company

In the meanwhile, and this is very important, the International Chambers of Commerce does seem to accept taxation of OIT though with one sidenote. International Chambers of Commerce has responded to the UN plans and agreed to a certain extent with one, to my opinion reasonable exception. ICC strongly recommends to exclude intra-group reorganisations since no true alienation took place. See:

"Similarly, exclusions for intra-group reorganisations should be included – there should be no need to tax where the asset has not been truly alienated."[256]
And since to my opinion there should be arrangements available which allow the source state to tax OIT provided that mandatory dispute resolution is provided, their position stems hopeful.
Despite this last positive note, I have to conclude that the UN specific developments in order to improve the possibilities to tax offshore indirect transfers do not really make sense. This is probably the reason that the Platform for Collaboration on Tax, in which UN also participates is considering alternative approaches.

3.3. The alternatives defined by the Platform

3.3.1. Introduction

A lot of work in the field of OIT has been performed on instigation of the Development Working Group (DWG) of the G20 to the International Monetary Fund (IMF), Organization for Economic Cooperation and Development (OECD), World Bank Group (WBG) and the United Nations (UN)—the partner members of the Platform for Collaboration on Tax—to produce "toolkits" for developing countries for appropriate implementation of responses to international tax issues under the G20/OECD Base Erosion and Profit Shifting (BEPS) project, as well as additional issues of particular relevance to developing countries that the BEPS project does not address. The platform aims also at helping developing countries to find a way to effectively tax offshore indirect transfers.[257]

situated in a treaty country for the purpose of obtaining treaty benefits (assuming there are no constitutional limitations to doing so through domestic law)."

[255] Later I will discuss a.o. how China applies sort of a PPT test.

[256] This is a clear indication that businesses are willing to change these specific rules.

[257] www.tax-platform.org/sites/pct/files/publications/PCT_Toolkit_The_Taxation_of_Offshore_Indirect_Transfers.pdf

The report outlines two main approaches to the taxation of OITs by the country in which the underlying asset is located. One of these methods ('Model 1') treats an OIT as a deemed disposal of the underlying asset. The other ('Model 2') intends to treat the transfer as being made by the actual seller, offshore, but sources the gain on that transfer within the location country and so enables that country to tax it. The Platform wants to share both alternatives without expressing a general preference between the two models. They leave that to the countries' circumstances and preferences.

3.3.2. Model 1

Model 1 has been defined by the Platform as follows[258]:
Model 1 (taxation of a deemed direct sale by a resident): This model seeks to tax the local entity that directly owns the asset in question, by treating that entity as disposing of, and reacquiring, its assets for their market value where a change of control occurs (e.g. because of an offshore sale of shares or comparable interests). This model takes into account the fact that a capital gain has been realized through the indirect transfer, triggered by a change of control. The relevant taxpayer under this model is not the seller entity, which effectively disposes of the shares, but rather the entity which actually owns the assets from which the relevant shares derive their value. Model 1 needs to be supported by a deemed disposal and reacquisition rule of the assets from which the shares actually disposed of derive their value.*[259]*
The thought behind model 1 is a simple one. The Platform just deems that everything happened in the source state.[260] But if an OIT takes place, the entity in the source state which owns the assets is liable for the tax burden and has to pay the taxes due. Possibly that entity does not own the resources to pay this tax claim since this entity does not possess the revenues from the OIT. The entity which sold the shares is not going to support the source state entity since it no longer owns that entity. So in an OIT process the buyer will have to be aware that an additional tax burden can be triggered by the transaction.
Still it is clear that, since the 'source state entity' will be taxed, taxation will take place by a country which has the right to tax an entity both a resident and a source state basis. This specific model seeks to tax the accrued gain on the

[258] Page 36-37.
[259] This contribution is not about the report of the Platform as such and so I will limit my comments to the most important ones.
[260] The Platforms motivates this amongst others with the remark that it is now firmly established that countries are not restricted with respect to the taxation of their own tax residents, as was also confirmed by the recent changes to the OECD and UN MTCs—namely the introduction of paragraph 3 to Article 1. See page 42.

entire asset when a change of control occurs from the sale of interests whose value is principally (e.g. more than 50 percent) derived from the asset. The Platform is quite consistent in some parts of the explanation by confirming that losses should also be recognized where there are no accrued gains, and should be subject to appropriate loss utilisation rules (as applicable). What I find quite difficult to understand in the Platform's reasoning is the link to the European Union and the Anti-tax avoidance directive, which link is to say the least deviate. In the words of the Platform:
"The taxation of unrealized capital gains derived by tax residents is not uncommon. The most recent example of taxing the unrealized capital gains of corporate taxpayers is the EU's exit taxation rule, which is being implemented by all 28 EU Member States"
It is true that the European Union did introduce capital gain legislation but only in the situations below:
"(a) a taxpayer transfers assets from its head office to its permanent establishment in another Member State or in a third country in so far as the Member State of the head office no longer has the right to tax the transferred assets due to the transfer;
(b) a taxpayer transfers assets from its permanent establishment in a Member State to its head office or another permanent establishment in another Member State or in a third country in so far as the Member State of the permanent establishment no longer has the right to tax the transferred assets due to the transfer;
(c) a taxpayer transfers its tax residence to another Member State or to a third country, except for those assets which remain effectively connected with a permanent establishment in the first Member State;
(d) a taxpayer transfers the business carried on by its permanent establishment from a Member State to another Member State or to a third country in so far as the Member State of the permanent establishment no longer has the right to tax the transferred assets due to the transfer."
In all of these situations the gain has been realised and been taxed in the same country. This is principally different in the Platform's Model 1. And this seems to me also the main shortcoming for this system to be accepted. Model 1, as described by the Platform does not really address possible difficulties and how these should be challenged. Yes, I do read an exception for internal reorganisations and the Platform clearly has a view on tax avoidance schemes like staggered sell-downs since there is no minimum threshold. But the only element where the Platform does see some complications is the valuation element. Where a change of control occurs, the model treats the local asset owning entity as the entity disposing its assets for their market value. The

market value of the local assets which are deemed to be sold, could be determined administratively using assumptions and adjustments based on the price at which the actual shares are sold since this price is, to a high extent, based on the value from the local assets. It is convincing argument that this approach is quite complex and will possibly lead to disputes about the real value which is deemed to be realised. That leaves alone that the source state should know about this transaction. This last problem can be solved according to the Platform by imposing a reporting obligation of the price of the shares to the resident entity.[261]
Then there is also the discussion on possible double taxation. Since the alienation is being taxed in the country where the assets are located, double taxation could arise if at a later moment this entity is being disposed again. For this situation the model treats the local asset owning entity as reacquiring the assets for their market value. This means that its tax cost in those assets is stepped up to market value. In the words of the Platform:
"This means that its tax cost in those assets is stepped up to market value—which is important to ensure that double taxation does not arise in the location country in the event that another subsequent change of control occurs. The effect of the step up is thus to neutralize the double taxation in the location country. It also effectively leads to the outcome that, over time, potential international economic double taxation is mitigated—not by immediate relief for the same taxpayer, but by mitigating the economic effects of this potential international double taxation on the side of the entity owning the relevant assets, when the stepped-up values of assets are taken into account for the determination of their tax base through depreciation, amortization or other deductions related to the values of those relevant assets."

This does mean that whenever a holding company performs an OIT, there will be cash-out at the source entity which will only be compensated in time if that entity is producing enough profit to set these additional depreciation rights off.
But what in an imaginary situation where in a couple of years several OIT's take place? If in three years' time three times an OIT takes place, then it is obvious that the compensation for tax cost (depreciation of the tax cash-out) will not be experienced as a reasonable compensation. The possibility to depreciate these tax costs does not really solve the problem since it remains cash out and, depending on the depreciation period, there remains a cash-flow issue. Therefore some finetuning would certainly be desirable. Still the Platform

[261] See page 40 of the report 'The Taxation of indirect transfers – a toolkit'. I don't see how this reporting obligation to the resident entity can be effectuated since the company which alienates the shares is in a country which possibly does not have a tax treaty with the source state.

seems to be convinced that the application of Model 1 mitigates this potential economical taxation fully. The Platform is of the opinion that by mitigating the economic effects of potential international double taxation on the side of the entity owning the relevant assets, when the stepped-up values of assets are taken into account for the determination of their tax base through depreciation, amortization or other deductions related to the values of those relevant assets, this is taken care of.
Another possible source for double taxation could be found in situations where the country in which the sale takes place, has no territorial system or participation exemption. The Platform suggests that more and more countries have one of these systems. And therefore, any taxation in the source state would not lead to adverse consequences from a sellers perspective. The Platform also adds to this that if countries would not have such a system, then still the Mutual Agreement Procedure could possibly be applied. But since the MAP procedure does not lead to a mandatory decision eliminating double taxation, that alternative does not make me very enthusiastic.

3.3.3. Model 2

Model 2 has been defined by the platform as follows:
"Model 2 (taxation of the non-resident seller): This model seeks to tax the non-resident seller of the relevant shares or comparable interests via a non-resident assessing rule. Model 2 must be supported directly or implicitly by a source of income rule, which provides that a gain is sourced in the location country when the value of the interest disposed of is derived, directly or indirectly, principally from immovable property located in that country. A source rule relating to gains from the disposal of other assets may also be considered, as discussed above in Section II—including substantial shareholdings in resident companies. A source of income rule may be further supported by a taxable asset rule dealing with such matters as whether taxation only applies to disposals of substantial interests (such as a 10 percent shareholding rule) to exclude from the scope of tax changes in ownership of portfolio investments. The rule can also prescribe whether the entire gain will be subject to tax when the value of the indirect interest is less than wholly derived from local immovable property or, alternatively, whether the gain will be subject to tax on a pro rata basis. Each legal design option under this rule is discussed and explained further below."
Model 2 seems to be a little bit more complex. The source of income rule does not do more than defining the sort of income and determining whether that

income fulfils the conditions to make it taxable. In other words: derived from sources is a gain arising from the alienation of immovable property in the source state if, at any time during the 365 days preceding the alienation, holds more than 50% of the value of the assets. The additional taxable assets rule defines what to do when the alienator of the participation holds less than 100%. Apparently Kenia has legislation whereby when the participation is at least 50%, the whole capital gain is taxable and if it is less than 50% a reciprocal part of it.[262]

Here we see the taxation not taking place in the source state as such but in the state of the country that alienates the shares. One of the main problems is how to actually get this done. The Platform suggests a little logically to obey existing treaty obligations. The Platform suggests:

"The development and application of any domestic legislative provisions will need to take into account any existing tax treaty obligations. However, as discussed above, the taxing right over gains realized on offshore indirect transfers which are principally (e.g. more than 50 percent) derived from local immovable property is generally preserved in Article 13(4) of the OECD and UN MTCs. Both MTCs permit the location country to capture gains from the sale of relevant interposed holdings at different tier levels. It is important that the domestic legislative provisions of the location country be designed and drafted to preserve this taxing right over relevant interests which derive more than 50 percent of their value, directly or indirectly, from immovable property in the location country as permitted by the MTCs."[263]
One of the ways to enable the source state to tax the capital gain is a the introduction of a withholding tax system. Several countries already use a withholding mechanism to collect tax with respect to a non-resident seller's gain. The Platform sees this as a practical alternative since this alternative is not new. Of course there is then a need for a new specific withholding tax regime which should be designed and drafted to apply on payments to a non-resident seller. Withholding taxes can represent all or a portion of the tax liability (or possibly an estimate) of the recipient of the payment. The tax must be withheld from the payment by the payer and paid to the tax authority in the location country. It is a stronger alternative if embedded in tax treaties than just taxing the source state entity as done in the first alternative. But for both

[262] See PCT-Toolkit page 45.
[263] Id. page 46.

goes that there should be a remedy in place for situations where discussions can/will arise like for example with respect to the determination of the value.
The Platform also suggests to design a regime to impose a withholding tax by the payer, as either a final or non-final charge on the payee. A final withholding tax represents in that alternative the final tax liability for the person receiving the payment on which part is withheld and paid to the source state. A non-final withholding tax is collected as an estimate of the recipient's final income tax liability. In that alternative the recipient is ordinarily still required to file a return and pay any outstanding balancing amount after claiming a credit for the amount of tax withheld (or receive a refund, if the withheld amount exceeds the tax due).
The Platform suggests that if a withholding tax regime would be applicable to OITs then it should be designed as a non-final regime. The issue I see in this alternative that if the states are in agreement on the value, the withholding tax can be paid in one payment, and if not, the 2nd part of the payment will certainly lead to disputes.
Still there is a lot of experience with some kind of withholding taxes. A withholding tax regime applies according to the Platform to OITs in a number of jurisdictions, including the U.S., Canada, India, China and Australia. If I read the Platform's report right, in several situations taxation at source takes place by simply accepting treaty override. Or by applying unclear anti-avoidance rules. And although there is a legitimate interest for the source state to tax, this solution would simply deteriorate company's tax payers rights and therefore we should consider alternatives.

4. Some worries

First of all, there is the possibility that these two Models are not necessarily mutually exclusive which leads to these Models being applied in the same time. Therefore, as suggested by the Platform, if both were to be adopted an ordering rule would need to be clearly established to ensure they do not both apply at the same time. Where it is obvious that both Models have several issues which are not yet clear and which have adverse consequences for companies, it is difficult to understand why no ordering rule has yet been designed. If the world would proceed in one or both alternatives let then tax treaties at least have a rule to deal with this unexpected complexity.
The good thing is however that at least the Platform came up with two alternatives which have possibilities to be effective. Both models are based on the idea that source states should have more taxing rights with respect to OIT than they currently have. I support that thought. However, as suggested by the

Platform, there are many issues which still should be considered before these Models can be introduced. Complexity has stopped the Platform to further dive into this yet. And that might be an indication that these Models are, in the current status of development, not the most appropriate solution.

But what I also find missing, and I am repeating myself, is the balance between taxing rights for countries versus tax payer rights. Often this is due to the fact that not in all states of this world the tax courts have the independent view e.g. the Dutch or German tax courts normally have. And not in all states of the world the legislator acts in such a way that no retroactive taxation will take place like in the Indian case. And where in the latter case an appeal on a bilateral investment treaty helped the company to overcome the issue, if comparable problems arise in the context of one of the alternatives as developed by the Platform, then neither tax treaties nor bilateral investment treaties will probably be able to take care of the job totally.

One of my other worries is the application of domestic anti-abuse rules. From the report of the Platform I learned that apparently China applies such a system. As described by the Platform:

ÔÉÆ Á Î É Î Ä É ÒÅ ÃÔ ÔÒÁ Î ÓÁ ÃÔÉ Ï Î ÏÆ ÁÓÓÅÔÓ Ì of its reasonable business purpose, i.e., if it meets all of the following conditions: (1) the overseas holding company is situated in a jurisdiction where the effective tax burden is significantly low, or where offshore income is not taxed; (2) the value of the asset directly transferred derives at least 75 percent (directly or indirectly) from Chinese taxable property; (3) 90 percent or more of the total assets or income (directly or indirectly) of the overseas holding company is based on investment or income from China; (4) the overseas enterprise does not undertake substantive functions and risks; (5) the tax consequence of the indirect transfer in the foreign country is less than the Chinese tax payable if the sale had been made directly, then the Chinese tax authority may determine that there is no reasonable commercial purpose to the offshore transaction other than avoiding the Chinese tax, and re Ã È Á Ò Á Ã Ô Å Ò É Ú Å Ô È Å É Î Ä É Ò Å Ã Ô Ô Ò Á Î Ó Æ Å Ò

Specifically the 4th criterion refers to something comparable with the Principal Purpose Test. Whatever substantive functions and risks are, is even from a transfer pricing perspective black or white. So, if a Belgium company would dispose its Swedish intermediary which holds a China entity, then condition 1 has been fulfilled (Belgium has a participation exemption), let us assume that condition 2 has also been fulfilled, then possibly condition 3 and 4 would create a discussion with the tax authorities if we also accept that the 5th criterion has been met. It is imaginable that this discussion won't be easily won by the company and that therefore China taxes the revenues from the indirect transaction as if it was a direct one. But this situation should only applicable

under a tax treaty if a person of one state sells real estate in the other (read: China). And possibly the only way how China will be able to effectuate its tax claim, is applying powerplay by taxing the Chinese entity. It might be a solution but clearly not a preferred one. We need rules which balance the source state taxing rights with the tax payer rights since the company won't have no real means to challenge the position of the Chinese tax administration.

5. Some suggestions

When an OIT takes place, not being an internal reorganisation, the buyer has to take into account that the 'source state entity' has a tax obligation. This tax cost is based on the capital gain realised on the indirect sale from the source state entity. Determining what that capital gain is, is not easy. But due diligence processes will be able to help to determine this. Still, it is not black or white and therefore issues will certainly arise.

It would be a first step that the buyer pays part of the price (capital gain (in a 100% sale of the shares) multiplied with the specific capital gain tax rate) to the source state. Model 2 calls this situation the withholding tax variant. But the characteristic of most tax treaties, is that they have a bilateral character.[264] And in a situation where a UK corporations sells the shares in a Dutch entity which holds a US entity which again holds an Indonesian entity, the Dutch entity should have to pay the withholding tax but this seems quite difficult to effectuate. Still some states tax part of OIT by allowing treaty override and tax where it is possible to do so. An example is the US Foreign Investment Real Property Act.[265] Still I would recommend that the world develops a clear international approach which is effective for states to tax their legitimate part of a capital gain and for companies being able to rely on rules and treaties. Tax treaty override is to me not a reasonable alternative.

Another alternative would be to adapt article 13, 5. However, as mentioned previously, this is only possible if it would have a legal basis where more than two states will be able to allocate taxing rights. If this would exist, art.13, 5 UN could be rewritten in:

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a Contracting State from the alienation of shares of a company, or comparable interests, such as interests in a partnership or trust, which is a resident of a second Contracting State, may be taxed in the third contracting State if the alienator, at any time during the 365 days preceding such alienation, held directly

[264] This treaty can be approached amongst others via Sweden-Iceland-DTC-Sep-1996.pdf (internationaltaxtreaty.com) which I accessed at January 18, 2022.

[265] See for more on these rules in relation to how an OIT could be taxed, Annex B from the report of the Platform.

or indirectly at least ___ per cent (the percentage is to be established through bilateral negotiations) of the capital of the company or entity in the third Ã Ï Î ÔÒÁÃÔÉÎÇ 3ÔÁÔÅ 8 õ

Possibly the best way to get the job done, is to enable this system via a new Multilateral Instrument. I would prefer this, since these kind of instruments enable the countries also to include ways to exchange necessary information and to prevent double, triple or even worse taxation. And the world has acquired some relevant experience with these kind of instruments.

Resuming, for both suggestions it goes without saying that a bilateral approach is not going to do the job. It is time that the world starts considering setting a next step in international taxation. In fact, considering a new approach where more states than two will be involved in a taxable transaction.[266] That would be a much better approach than installing national measures which override tax treaties.[267] It supports states in their wish to tax OIT's and it helps companies in their drive to be in control of their tax liabilities.

6. Conclusions

Offshore indirect transfers is a complex subject. The current tax treaties make taxation of capital gains realised on shares which envisage the value of natural resources hardly possible. To my opinion, these source states have a sufficient qualifying connection between the state and the natural resources to be allowed to tax these, provided that the capital gain which is realised outside the state of the natural resources is directly linked to those natural resources. In other words, there is sufficient territorial nexus to tax this. Current international tax rules make this taxation in most situations impossible while at the other end of the transaction (seller state) most states will exempt the capital gain on the sale of the shares. Unilateral approaches do the job for the states but lead to a disbalance between taxing rights and tax payer rights.

Still it is clear that the source states should acquire a clear taxing right in observance of tax payer rights. But I see too many issues with the existing and the proposed systems. Therefore new treaty perspectives have to be developed. And these new initiatives should be based on a multilateral tax treaty which help states not just with providing a taxing right but also, that in situations where the value is not just based on the assets in the source state, that a 2nd or 3rd state acquires a taxing right. Transfer pricing principles could help here by using a value chain analysis and accordingly a profit allocation

[266] See footnote 9 and 18 which refer to articles in which I already motivated that double tax treaties won't do a proper job for corporations and for countries in a post-BEPS world.

[267] And not just from the perspective of the companies. Annex C clarifies that the US rules which create treaty override do not catch all. In some situations apparently treaty override does not do the job either.

based on this. And, if we would get a better dispute resolution system than the current BEPS Action 14 that there is a balance between taxing rights and tax payer rights. And it goes without saying that this new multilateral instrument should focus also on other issues which demand a multilateral solution.[268] I do have to emphasize that to my opinion BEPS Action 15's MLI is only to a certain level a multilateral treaty. I envisage a multilateral treaty to be developed which is also supportive to existing treaties but which directly empower taxing rights when countries have ratified this. After the BEPS plan many new open norms have been created which the world clearly needed in order to create a more reasonable tax system and which helped the world to challenge unacceptable tax avoidance.[269] But where the BEPS plan have been mainly focusing on taxing rights, this new plan should focus on a balance. I suppose I could call this new instrument BEPS Action 16 but better is assumingly Pilar 3. This is not to come up with analogies but mainly to emphasize that we should make progress here. In the interest of countries and companies.

7. Some last words to Rainer

Rainer, with respect to my contribution, I know that you care very much about making sure that taxation is based on principles like the old 'no taxation without representation' but also that you strive to create a balance between source state taxing rights and taxpayer rights. In this contribution I gave you my views on this relevant subject which is specifically quite important for developing countries. Countries like China do not need our help in order to enable taxation. But many developing countries are not that strong. And by approaching this in a multilateral way we help developing countries in more easily applying their taxing rights and also making sure that China (and several other states) apply them in a fair way from the perspective of companies.

The report of the Platform was an attempt to ignite new discussions on this topic and I still believe that it helps, but only a little bit. For me this means that this topic will be one of my mean research topics in the years to come. And I am fully convinced that you and I will have very interesting discussions on this topic also after you left university. International tax law is complex but also fun. So nobody in this field will ever really retire. As I wrote in the introduction, you will be missed as my direct university colleague, and as a friend. But not just by

[268] See my contributions to which I referred in note 9 (relating to the overkill of the PPT) and footnote 18 (where I discussed multilateral issues as a consequence of Chapter X from OECD Transfer Pricing Guidelines and the comparable but certainly not equal UN's Transfer Pricing Manual.)

[269] Still I do believe that the choice in Action 4 for the EBITDA instead of thin capitalisation approach is a wrong one. But overall I do believe that many of the choices the world has made, are reasonable, except for the major mishap, Action 14.

me. We will stay in touch. In the words of the title of a famous Carole King song: You've got a friend! Het ga je goed!

BRON- OF WOONSTAATHEFFING

Prof. dr. P. Kavelaars[270]

1. Inleiding

Een van de kernonderdelen van het internationaal belastingrecht en in het bijzonder het belastingverdragsrecht, betreft de verdeling van de heffingsbevoegdheid. De heffingsbevoegdheid van landen wordt primair bepaald door de drie alom aanvaarde geografische basisbeginselen, te weten: het woonplaats-, het nationaliteits- en het bronstaatbeginsel, soms aangevuld met een vierde principe te weten het territorialiteitsbeginsel. Dit laatste beginsel heeft een wat minder eenduidige betekenis zeker als men dit mede beschouwt in het licht van het EU-recht en in het bijzonder de rechtspraak van het Hof van Justitie (HvJ). Het HvJ hanteert het principe in voorkomende gevallen als rechtvaardigingsgrond indien sprake is van een belemmering in de zin van de vrije verkeersbepalingen.[271] In fiscale termen gaat het bij het territorialiteitsbeginsel, waar het de afbakening van de heffingsbevoegdheid betreft, met name om de beoordeling of een bepaald inkomen (of vermogensbestanddeel dat inkomen genereert) verbonden is met een bepaald territorium en of op grond daarvan aan dat territorium heffingsbevoegdheid toekomt, ongeacht de woon- of vestigingsstaat van de gerechtigde. Het territorialiteitsprincipe is daarmee in mijn ogen in feite een combinatie van het woon- en het bronstaatprincipe en in die zin dus geen zelfstandig criterium ter afbakening van de heffingsbevoegdheid. Ik laat het om die reden buiten beschouwing.

Het nationaliteitsprincipe speelt in het internationaal belastingrecht een ondergeschikte rol, uitgezonderd een enkel land (met name de Verenigde Staten en Zwitserland) en heeft bovendien binnen de EU een beperkte reikwijdte door de mogelijke strijdigheid ervan met het EU-recht.[272] Overigens bevat de Nederlandse fiscale regelgeving diverse nationaliteitscriteria, maar die

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[271] Zie bijvoorbeeld de arresten HvJ 13 december 2005, C-446/03 (Marks & Spencer), ECLI:EU:C:2005:763 en HvJ 7 september 2006, C-470/04 (N), ECLI:EU:C:2006:525.

[272] Voor zover eigen onderdanen (natuurlijke personen en entiteiten) op grond van het nationaliteitsprincipe zwaarder worden belast dan niet-onderdanen is er uiteraard geen EU-rechterlijk probleem, zoals onder andere is af te leiden uit HvJ 23 februari 2006, C-513/03 (Van Hilten-van der Heijden), ECLI:EU:C:2006:131 inzake art. 3 SW 1956.

lijken niet te stuiten op juridische bezwaren.[273] Hoe dan ook speelt het nationaliteitscriterium in algemene zin een vrij ondergeschikte rol in de fiscale stelsels van landen.

De nadruk ten aanzien van de bepaling van de afbakening van de nationale heffingsbevoegdheid ligt wereldwijd dus op het woonstaat- en het bronstaatprincipe. Het OESO- en het VN-modelverdrag (hierna: MV) sluiten dan ook met name daarop aan bij de verdeling van de heffingsbevoegdheid (art. 6-22) en de daarbij op onderdelen mede relevante uitwerking in de methoden ter voorkoming van dubbele belasting (art. 23A/B). De verdeling van de heffingsbevoegdheid in de modelverdragen ligt al sinds de totstandkoming daarvan min of meer vast en wordt nauwelijks getoetst en ter discussie gesteld. Toch is er een tendens waarneembaar in het licht van het bestrijden van het ontgaan van belasting waarbij aan de bronstaat meer of vaker heffingsrechten worden toegedeeld dan voorheen het geval was. Daarmee is een lijn ingezet die bijvoorbeeld afwijkt van hetgeen lange tijd de opvatting was met betrekking tot bronstaatheffingen: ten gevolge van het veronderstelde belemmerende karakter met betrekking tot in het bijzonder financiële stromen en daarmee investeringen zouden heffingen door de bronstaat juist onwenselijk zijn. In de EU heeft deze visie bijvoorbeeld geleid tot zowel de Moeder-Dochterrichtlijn als de Interest- en Royaltyrichtlijn.

De vraag die in deze beschouwing centraal staat, is of de traditionele verdeling van de heffingsbevoegdheid, zoals die is opgenomen in de modelverdragen, wel voldoende grondslag heeft en of maatschappelijke ontwikkelingen hier geen verandering in zouden moeten brengen. In deze beschouwing onderzoek ik dit. Ik richt me daarbij vooral op de vermogens- en de arbeidsinkomsten. De winstsfeer laat ik onbesproken gelet op het zeer eigen karakter en de rol die de vaste inrichting daarbij inneemt. De vermogensinkomsten zijn interessant, omdat daar de afweging van de bron- en de woonstaattoewijzing beide een (belangrijke) rol spelen, hetgeen bij de arbeidsinkomsten in beginsel niet of althans veel minder en anders het geval is. Daarnaast is er reden juist aan die inkomsten aandacht te besteden, omdat degene aan wie deze bundel is opgedragen daar altijd bijzondere belangstelling voor heeft getoond.

In par. 3 ga ik in op de vermogensinkomsten en in par. 4 op de arbeidsinkomsten. Eerst besteed ik in par. 2 echter in algemene zin aandacht aan de achtergrond van de toewijzing van de heffingsbevoegdheid aan de woon- respectievelijk de bronstaat, alsmede aan de rol die de voorkomingsmethoden spelen. Ik sluit in par. 5 af met een conclusie.

[273] Zie naast art. 3 SW 1956 onder andere de vestigingsplaatscriteria in art. 2, vijfde lid, Wet Vpb 1969, art. 1, zesde lid, Wet DB 1965, art. 1, eerste lid, Wet BB 2021 en art. 4.35 Wet IB 2001.

2. De basis: woonstaat en/of bronstaat

De modelverdragen beperken zich in principe tot de verdeling van de heffingsbevoegdheid over de woonstaat[274] en de bronstaat; zoals ik in par. 1 aangaf zie ik af van de toepassing van het nationaliteitsbeginsel dat in de modelverdragen ook als beginsel niet is opgenomen (zie voor een uitzondering art. 19, eerste lid, onderdeel b, OESO-/VN-MV). Wel speelt dit beginsel een relevante rol indien (een van) de landen dat beginsel als primaire regel in de eigen wetgeving toepast.

Het is opvallend dat in het commentaar bij het OESO-/VN-MV geen algemene uiteenzetting is opgenomen over de uitgangspunten voor toewijzing van de heffingsbevoegdheid aan de woonstaat dan wel aan de bronstaat, en dat een dergelijke toelichting per artikel beperkt is of zelfs afwezig.[275] Een dergelijke analyse zou de basis van het verdrag en de respectievelijke artikelen moeten zijn. Wat betreft het in het nationale recht opgenomen woonstaatprincipe is de ratio duidelijk: de inwoner heeft recht op alle door de overheid van de woonstaat gecreëerde voorzieningen en dient daar derhalve door middel van belastingheffing aan bij te dragen. Voor natuurlijke personen kan daar een nevenargument aan worden toegevoegd: het woonstaatprincipe brengt heffing over het wereldinkomen met zich en daarmee kan een heffing naar draagkracht worden geëffectueerd. Een heffing naar draagkracht is immers alleen mogelijk indien de volledige draagkracht wordt gemeten. Daarvan is in de bronstaat geen sprake. Draagkrachtregelingen kunnen daarom ten principale alleen in de woonstaat worden toegepast. Dit is ook de basisgedachte achter de Schumackerleer die immers alleen van die regel afwijkt indien deze benadering tot een onredelijke uitkomst leidt waarbij arbitrair is wanneer daarvan sprake is en welke knoop in deze Schumackerleer is doorgehakt op het 90%-criterium.[276] Het is gelet op het woonstaatprincipe naar nationaal recht evident

[274] Ik gebruik alleen de woonplaats als criterium maar daar wordt hierna ook vestigingsplaats onder verstaan.

[275] In de literatuur komt de problematiek uiteraard bij diverse auteurs aan de orde maar een algemene en brede beschouwing over de onderbouwing van de verdeling van de heffingsbevoegdheid voor alle individuele verdragsartikelen ontbreekt bij mijn weten. Zie voor een zeer uitvoerige beschouwing over met name de bronstaatbenadering het proefschrift van E.C.C.M. Kemmeren, Principle of Origin in Tax Conventions, Pijnenburg, Dongen, 2001. Voor een vooral op de winstsfeer gericht proefschrift zie M.F. de Wilde, Sharing the Pie, IBFD, Amsterdam, 2017. Zie verder met betrekking tot vermogensinkomsten: P. Kavelaars, Bronstaatheffingen en vermogensinkomsten, WoltersKluwer, Deventer, 2021, par. 5.2-5.4. Andere interessante buitenlandse bronnen zijn: K. Andersson, An Economist's View on Source versus Residence Taxation – The Lisbon Objectives and Taxation in the European Union, Bulletin for International Taxation 2006, nr. 10, p. 395-401; O. Buhler, Prinzipien des internationalen Steuerrechts: ein systematischer Versuch, IBFD, Amsterdam, 1964; en, K. Vogel, Worldwide vs. Source taxation of income – A review and re-evaluation of arguments (I-III), Intertax 1988/8-9, p. 216-229, 1988/10, p. 310-320 en 1988/11, p. 393-402.

[276] Zie met name de arresten HvJ 14 februari 1995, C-279/93 (Schumacker), ECLI:EU:C:1995:31 en HvJ 18 juni 2015, C-9/14 (Kieback), ECLI:EU:C:2015:406.

dat ook op grond van een verdrag heffingsbevoegdheid moet toekomen aan de woonstaat.
Het nationaalrechtelijke bronlandprincipe heeft in de basis als achtergrond dat de bronstaat het mogelijk maakt inkomsten te genereren die hun oorsprong vinden in die staat. Strikt genomen zou de mate waarin inkomsten kunnen worden gegenereerd op basis van door de bronstaat gecreëerde faciliteiten de heffingsbevoegdheid moeten bepalen. In dit verband is het overigens relevant zich te realiseren dat dit argument wellicht ook kan worden aangevoerd voor de inwoner die in zijn woonstaat een bron van inkomen heeft, derhalve naast het woonstaatprincipe als zodanig. Gezegd zou dus kunnen worden dat er ten aanzien van een inwoner met broninkomsten in zijn woonstaat een dubbel aangrijpingspunt voor heffing is. Evenals het voor de woonstaat mogelijk moet zijn de heffingsbevoegdheid in grensoverschrijdende situaties te effectueren, moet dat ook gelden voor de bronstaat. Daarmee is het verdragsrechtelijke bronstaatprincipe ook een gegeven.
De verdragsrechtelijke toewijzing van heffingsbevoegdheid vloeit dus niet zo zeer voort uit een zelfstandige benadering in het verdragskader maar vloeit logisch voort uit, c.q. sluit aan op, de nationaalrechtelijke uitgangspunten inzake de reikwijdte van de heffingsbevoegdheid. Voor verdragstoewijzing is dan met name van belang aan welk van de twee uitgangspunten de sterkste betekenis toekomt. Daarover gaan par. 3 en 4.
Er zijn bij het voorgaande drie kanttekeningen te plaatsen. In de eerste plaats is dat het gegeven dat de verdragsmethodiek in feite omgekeerd is ten opzichte van hetgeen ik hiervoor beschreef: verdragen sluiten immers niet primair aan bij de verdragspartner die mag heffen, maar juist bij de verdragspartner die niet of beperkt mag heffen. Het tweede relevante onderdeel van de verdragssystematiek is immers de wijze waarop dubbele belasting wordt vermeden ofwel de methoden ter voorkoming van dubbele belasting zoals die zijn opgenomen in art. 23A/B OESO-/VN-MV. Ik zal hierna echter gemakshalve steeds uitgaand van de 'positieve' benadering ofwel welk land wel mag heffen.
De tweede kanttekening betreft het punt dat het begrip bronstaat niet zonder meer eenduidig is. In algemene zin gaat het bij de bronstaat om de staat waar de inkomsten opkomen ofwel waar zich de bron bevindt. Met name bij arbeidsinkomsten zien we hier enkele bijzondere regels. Ik wijs op:

- de transportwerknemer in de zin van art. 15, derde lid, OESO-/VN-MV dat de heffingsbevoegdheid toewijst aan de staat van vestiging van de transportondernemer;

- de bestuurder[277] in de zin van art. 16 OESO-/VN-MV waar de bron niet de locatie is waar de arbeid wordt verricht maar waar de vennootschap is gevestigd; en,
- de publiekrechtelijke werknemer voor wie de kas- of overheidsstaat de bron vormt.

Het is opmerkelijk dat bij elk van deze drie arbeidsinkomsten een andere bron geldt terwijl de eigenlijke bron de arbeid is en de hoofdregel (art. 15, eerste lid, OESO-/VN-MV) voor de heffingsbevoegdheid aansluit bij de 'physical presence' van die arbeid. In par. 4 kom ik hierop terug.
Wat betreft de derde kanttekening keer ik terug naar het eerste punt en met name naar de wijze waarop de dubbele belasting wordt voorkomen. Art. 23A/B OESO-/VN-MV voorzien in de vrijstellings- respectievelijk verrekeningsmethode. Strikt genomen gaan die niet over de toewijzing maar *de facto* zijn er wel elementen die mede invulling geven aan de toewijzing. Een – weliswaar enigszins bijzonder – voorbeeld betreft de toepassing van het pensioenartikel zoals dat globaal gezegd door Nederland werd opgenomen in de verdragen die zijn gesloten in de periode 2011-2017. In die verdragen werd de heffingsbevoegdheid van het in de woonstaat laag belaste pensioen niet alleen ter heffing toegewezen aan de woonstaat maar ook (!) aan de bronstaat.[278] Strikt genomen leidt dit niet tot voorkoming tenzij de bronstaat verrekening geeft van de woonstaatheffing: de bronstaat heft in die benadering bij en *de facto* wordt de heffingsbevoegdheid verdeeld over beide staten. Dat is een geheel andere uitkomst dan de standaardbenadering ten aanzien van actieve inkomsten. Feitelijk blijkt het echter anders te liggen: als men het voorkomingsartikel in die verdragen nauwkeurig leest, blijkt het een volledige bronstaatheffing te zijn. De woonstaat treedt namelijk terug. Hoe dan ook wordt dus het uiteindelijke resultaat ten aanzien van de heffing bepaald door zowel het toewijzingsartikel als de voorkomingsbepaling.
Ten aanzien van dit derde punt is overigens nog een andere principiële kwestie interessant die ik alleen aanstip omdat het vraagstuk enigszins buiten de kaders van dit artikel valt, maar waar het ook gaat om de vraag waarom de OESO en de VN in de modelverdragen daarvoor hebben gekozen. Art. 23A/B OESO-/VN-MV voorzien in de vrijstellings- en de verrekeningsmethode waarbij de vrijstellingsmethode in beginsel van toepassing is op de actieve inkomsten en de verrekeningsmethode in beginsel op de passieve inkomsten. De achtergrond van dit onderscheid is gelegen in het feit dat bij de actieve inkomsten de heffingsbevoegdheid in de regel wordt toegewezen aan een van

[277] Voor Nederland ook de commissaris.
[278] Zie onder andere de verdragen met België en met Portugal.

de verdragsstaten, terwijl bij de passieve inkomsten de heffingsbevoegdheid over beide staten wordt verdeeld. Dit laatste kan echter ook worden bereikt met behulp van een vrijstellingsmethode, namelijk door in het verdrag te bepalen dat van de inkomsten X% ter heffing toekomt aan de woonstaat en Y% ter heffing aan de bronstaat waarbij uiteraard X en Y in totaal 100% moeten bedragen.[279] Het gaat de reikwijdte van dit artikel, zoals gezegd, te buiten dit verder uit te werken maar het is opmerkelijk dat aan deze problematiek bij mijn weten nimmer aandacht is besteed.[280] Een voordeel van deze benadering is dat er *de facto*slechts één methodiek geldt, namelijk de vrijstellingsmethode. Een ander voordeel zou kunnen zijn dat men deze methodiek ook op de actieve inkomsten zou kunnen toepassen in die zin dat actieve inkomsten niet volledig aan een staat ter heffing worden toegewezen (in feite dus de verdeling 100%/0%) maar ook een andere verhouding denkbaar is. Ook dat is een benadering die tot op heden bij mijn weten onbekend is; in par. 4 kom ik hier meer impliciet nog op terug. Tot slot betekent het vervallen van de verrekeningsmethodiek en een breed toegepaste vrijstellingsmethodiek waarbij per soort inkomen de heffingsbevoegdheid wordt verdeeld volgens de hiervoor genoemde X%-Y%-verhouding dat het traditionele onderscheid tussen kapitaalimport- en kapitaalexportneutraliteit in een andere positie komt te verkeren. Zo zou door verdragspartners bijvoorbeeld ten aanzien van vermogensinkomsten (dividend, interest, royalty 's) waar traditioneel de verrekeningsmethode wordt gehanteerd de door mij gesuggereerde alternatieve 'gedeelde vrijstellingsmethode' kunnen worden toegepast: door voor de ene dan wel de andere methodiek te opteren wordt in feite gekozen voor kapitaalimport-, dan wel kapitaalexportneutraliteit.

3. De vermogensinkomsten

3.1 Algemeen

Wat betreft de verdeling van de heffingsbevoegdheid met betrekking tot (passieve) vermogensinkomsten snijd ik drie thema's aan, te weten: de verdeling van de heffingsbevoegdheid in algemene zin, het onderscheid naar gerechtigden en tot slot de verhouding c.q. samenhang per soort vermogensbestanddeel tussen de inkomsten en de vervreemdingsvoordelen

[279] Strikt genomen moet het uiteraard precies omgekeerd zijn, want de toewijzingsregels c.q. voorkomingsmethode regelen niet wie wel mag belasten maar wie niet mag belasten, maar dat is een kwestie van 'verdraggevingstechniek'.

[280] Ik heb gesondeerd met enige collega-hoogleraren die met name actief zijn in het internationaal belastingrecht maar geen van hen kon zich analyses of publicaties onder de aandacht brengen waarin dit vraagstuk is geanalyseerd.

(art. 13 OESO-/VN-MV). Ik laat wat betreft de vermogensinkomsten de inkomsten samenhangend met onroerend goed onbesproken en beperk me dus tot dividend, interest en royalty's, alsmede de vervreemdingswinsten van de onderliggende vermogensbestanddelen.
Art. 10-12 OESO-/VN-MV[281] zijn in essentie eenduidig met dien verstande dat art. 12 OESO-MV inzake royalty's niet voorziet in een toewijzing van de heffingsbevoegdheid aan de bronstaat. Daarmee verschilt het artikel dus zowel van het dividend- en het interestartikel als van art. 12 VN-MV. Wat betreft dividenden en interest is er in eerste aanleg geen reden onderscheid tussen beide te maken; het gaat er immers in beide gevallen om dat voorzien wordt in financiering. Royalty's wijken daar duidelijk van af zodat er reden kan zijn die verdragsrechtelijk anders te behandelen.

3.2 Dividend en interest

De eerste kernvraag met betrekking tot dividend en interest is op welk(e) grond(en) de woonstaat, respectievelijk de bronstaat heffingsbevoegd zou moeten zijn. Het kapitaal is geheel dienstbaar in de bronstaat en leidt daar tot resultaat (inkomsten): de kosten van het kapitaal zullen daar in beginsel ook ten laste van dat resultaat komen, zij het dat de vergoeding op eigen vermogen in de regel fiscaal veelal niet aftrekbaar is. Dit laatste is echter geen aspect dat de verdragsproblematiek raakt en mag daarmee geen rol spelen. De bronstaat heeft daarmee, mijns inziens, een sterk heffingsrecht. Wat betreft de woonstaat van de kapitaalverstrekker is er ook een argument daarbij de heffing te doen aansluiten: de inwoner maakt het door middel van zijn kapitaalbezit immers mogelijk dat in het andere land investeringen plaatsvinden. Een verschil met de actieve inkomsten (winst, arbeid) is dat de bron daarbij in feite in sterkere mate verplaatst. Voor de winst is een vaste inrichting vereist en voor arbeid is een werknemer vereist die beide fysiek in de bronstaat aanwezig zijn. Dit onderscheid rechtvaardigt in mijn optiek ten aanzien van passieve inkomsten veel meer een verdeling van de heffingsbevoegdheid dan bij de actieve inkomsten; in par. 4 zal ik dit laatste overigens nuanceren. Ik concludeer derhalve dat de verdeling van de heffingsbevoegdheid ten aanzien van dividend en interest over woonstaat en bronstaat op zich goed verdedigbaar is, maar ik acht het bronstaatrecht van grotere betekenis dan het woonstaatrecht. De

[281] Ik laat art. 12A/12B VN-MV inzake technische dienstverlening respectievelijk digitale diensten onbesproken. Beide artikelen zien niet typisch op vermogensinkomsten maar hebben een eigen karakter, hoewel met name art. 12A VN-MV nauw aansluit bij art. 12 VN-MV. Bovendien komen ze niet voor in het OESO-MV. Zie voor een beschouwing over deze beide artikelen: P. Kavelaars, Ontwikkelingen in het VN-modelverdrag, MBB 2021/12-35, p. 14-22.

primaire toewijzing van de heffingsbevoegdheid aan de woonstaat zou, mijns inziens, dus moeten veranderen in een primaire heffingsbevoegdheid voor de bronstaat.
Uitgaande van de juistheid van een verdeling van de heffingsbevoegdheid over woonstaat en bronstaat is er nog een verschil tussen het dividendartikel en het interestartikel: de eerste hanteert een ander bronheffingspercentage dan het interestartikel, terwijl bovendien het bronheffingspercentage in het dividendartikel is gedifferentieerd naar type kapitaalverstrekker (natuurlijk persoon versus rechtspersoon), alsmede naar de omvang van het gehouden belang. Vanuit verdragsrechtelijk perspectief zie ik voor geen van beide verschillen een voldoende dragende reden. In beide gevallen gaat het om financiering van buitenlandse activiteiten en is er geen reden die verschillend te behandelen. In beginsel leidt dat tot verstoringen van de kapitaalmarkt. Evenmin meen ik dat er voldoende reden is binnen het dividendartikel beide genoemde onderscheiden te maken: waarom zou het bijvoorbeeld verschil moeten maken of een financiering vanuit privé wordt verricht dan wel vanuit een (eigen) rechtspersoon? Ook de omvang van het belang zou geen rol mogen spelen; de achtergrond daarvan is met name het voorkomen van economisch dubbele belasting bij grotere participaties (beleggen versus ondernemen), maar daar is een belastingverdrag niet voor bedoeld. Dat moet langs andere wijze worden opgelost, zoals we doen via deelnemingsvrijstellingen en de Moeder-Dochterrichtlijn. Mijn conclusie is derhalve dat met betrekking tot dividenden en interest:

- beide verdragsstaten heffingsbevoegd kunnen zijn maar dat het primaire recht bij de bronstaat zou moeten liggen;
- -er geen reden is om voor interest en dividend een verschillende verdeling van de heffingsbevoegdheid aan te brengen;
- er (derhalve) ook geen reden is om binnen het dividendartikel te differentiëren tussen typen gerechtigden.

3.3 Royalty‘s

Van andere aard is het royaltyartikel. Het lastige bij deze rechten is hier de geografische binding tussen de locatie waar het recht zich bevindt, de locatie waar de activiteiten plaatsvinden die voortvloeien uit dat recht en de locatie waar de eigenaar van het recht zich bevindt. Ik licht dit als volgt toe. Strikt genomen zou de plaats waar het recht zich bevindt geen rol mogen spelen, omdat het recht geen zelfstandige rol speelt (net zomin als relevant is waar een lening zich ‘bevindt’). De woonplaats van de exploitant is wel relevant, want hij is de ontwikkelaar van het recht of althans de exploitant van het recht en maakt daarmee de exploitatie mogelijk. De locatie waar de diensten c.q. producten op

basis van het recht tot stand komen is eveneens relevant, want dat zijn uiteindelijk de inkomsten genererende activiteiten. Bovendien komen – vergelijkbaar met de hiervoor besproken financieringskosten – de lasten aldaar ten laste van het resultaat. Ik concludeer daarom, evenals in par. 3.2, ook hier dat de staat waar het recht daadwerkelijk wordt geëxploiteerd het primaire heffingsrecht dient te hebben. De woonstaat heeft in principe eveneens een heffingsrecht, hoewel dat dus net als bij dividend en interest een subsidiair recht is. De omstandigheid dat bij deze rechten verplaatsing van het recht en de woonstaat van de exploitant zeer eenvoudig is te effectueren, leidt gemakkelijk tot oneigenlijk gebruik (laag belastend land) en dwingt ertoe de heffingsbevoegdheid uitsluitend toe te wijzen aan het land waar het recht daadwerkelijk tot producten of diensten leidt. Eventueel zou een subsidiaire regel kunnen zijn dat, indien in de vestigingsstaat van de exploitant van het recht een adequate heffing over de royalty's plaatsvindt, de woonstaat eveneens heffingsbevoegd is, zodat conform art. 12 VN-MV sprake is van een gedeelde heffingsbevoegdheid. Indien het ingevolge Pillar 2 in te voeren minimumtarief daadwerkelijk effectief wordt, zou deze 'second best'-benadering de primaire regel kunnen zijn waarbij overigens, gelet op het feit dat de exploitatiestaat van het recht zoals gezegd de hoofdgerechtigde dient te zijn, het grootste deel van de heffingsbevoegdheid daar dient te liggen.

3.4 Inkomsten en vervreemdingswinsten

Het derde thema binnen de vermogensinkomsten is de verhouding tussen de verdeling van de heffingsbevoegd ten aanzien van de inkomsten enerzijds en de verdeling met betrekking tot de heffingsbevoegdheid van de vervreemdingswinsten anderzijds. Ten aanzien van de vervreemdingswinsten met betrekking tot de hiervoor besproken passieve inkomsten vindt toewijzing van de heffingsbevoegdheid uitsluitend plaats aan de woonstaat (art. 13, vijfde lid, OESO-MV/art. 13, zesde lid, VN-MV).[282] Dat is opmerkelijk. Immers, vanuit economisch perspectief hangen vermogensinkomsten en vermogenswinsten nauw met elkaar samen. Bij aandelen is die samenhang er met name in gelegen dat indien dividend wordt uitgekeerd de toekomstige vervreemdingswinst lager is en vice versa. Daarnaast hangt (toekomstige) vervreemdingswinst op aandelen vooral samen met een goed renderende onderneming in de bronstaat. Beide (samenhangende) argumenten wijzen er daarom op dat de toewijzing van de heffingsbevoegdheid met betrekking tot vervreemdingswinsten op aandelen niet af zou moeten wijken van die van dividenden. Wat betreft Nederland is dat in beperkte mate ook het geval gelet op de in art. 13 van

[282] Art. 13, vijfde lid, VN-MV kent onder voorwaarden ten aanzien van onder andere de vervreemding van aandelen een bronstaatheffing. Die bepaling laat ik onbesproken.

verdragen normaliter op te nemen emigratiebepaling (doorgaans het vijfde lid) met betrekking tot aandelen die behoren tot een aanmerkelijk belang.
Ten aanzien van financiering met vreemd vermogen is de hiervoor geschetste samenhang hoegenaamd niet aanwezig. Ten aanzien van financieringen met leningen e.d. is in de regel ook geen sprake van een waardemutatie. Wel kan zich een waardemutatie voordoen indien het gaat om laag- of hoogrentende leningen. Ook hier geldt immers dat vanuit economisch perspectief de hoogte van de rente en een waardemutatie samenhangende elementen zijn. Vanuit dat perspectief is het dan ook logisch waardemutaties van financieringen met vreemd vermogen niet anders te behandelen dan de daarop behaalde interest.
Ook ten aanzien van rechten die leiden tot royalty's is de regel onder art. 13 OESO-/VN-MV dat vervreemdingswinsten toekomen aan de woonstaat. De argumentatie zoals die hiervoor zowel ten aanzien van royalty's is opgenomen doet ook opgeld ten aanzien van vervreemdingswinsten op de onderliggende rechten zodat de heffingsbevoegdheid in principe aan de bronstaat moet toekomen. Hierbij geldt evenzeer dat indien in de vestigingsstaat van de exploitant van het recht een adequate heffing van toepassing is (Pillar 2 benadering) ook heffingsbevoegdheid aan deze staat kan toekomen. Tot slot valt ook hier te wijzen op de samenhang tussen de royalty's en de waarde van het recht, zij het dat die weer enigszins anders is dan bij dividend en interest: naar mate het recht tot betere resultaten leidt wat betreft de diensten en producten nemen zowel de royalty's (in de regel) toe, als de waarde van het recht en daarmee de potentiële vervreemdingswinst.
Mijn conclusie met betrekking tot de verdeling van de heffingsbevoegdheid ten aanzien van vervreemdingswinsten ter zake van vermogensrechten is derhalve dat deze ten onrechte niet aansluiten bij de verdeling van de heffingsbevoegdheid met betrekking tot de inkomsten die aan dergelijke vermogensrechten worden ontleend.

4. De arbeidsinkomsten

4.1 Algemeen

De in art. 15 tot en met art. 19 OESO-/VN-MV opgenomen arbeidsinkomsten laten wat betreft de toewijzing van de heffingsbevoegdheid een enigszins divers beeld zien. Weliswaar zou men als hoofdregel toewijzing aan de bronstaat kunnen onderkennen, maar op die regel bestaan diverse belangwekkende afwijkingen (ik beperk me tot de afwijkende hoofdregels; op die afwijkende hoofdregels worden in enkele gevallen weer inbreuken gemaakt):

- de gedetacheerde werknemer: woonstaat (art. 15, tweede lid, OESO-/VN-MV);
- de transportwerknemer: woonstaat (art. 15, derde lid, OESO-/VN-MV);[283]
- de bestuurder (en voor Nederland tevens de commissaris): werkgeversstaat (art. 16 OESO-/VN-MV);
- de pensioengerechtigde: woonstaat (art. 18 OESO-/VN-MV;[284]
- de publiekrechtelijke werknemer: de overheidsstaat (art. 19 OESO-/VN-MV).

De primaire hoofdregel (art. 15, eerste lid, OESO-/VN-MV) wijst de heffingsbevoegdheid (uitsluitend) toe aan de bronstaat.[285] Ten aanzien van die regel zal in principe weinig discussie bestaan. De bron is de arbeid en met de woonstaat heeft die arbeid hoegenaamd niets te maken. Een nuancering kan wel worden aangebracht in die zin dat wanneer de werkgever in de woonstaat is gevestigd deze de arbeid – en daarmee het inkomen – mogelijk maakt. Dat is op zich een reden om aan de werkgeversstaat mede heffingsbevoegdheid toe te kennen. Dit zou dan echter ook het geval moeten zijn indien de werkgever in een derde staat zou zijn gevestigd, hetgeen complicaties oplevert omdat verdragen doorgaans alleen bilateraal van toepassing zijn. Anderzijds kan echter in zekere zin aansluiting worden gevonden bij art. 16 OESO-/VN-MV dat de heffingsbevoegdheid toewijst aan de werkgeverstaat. Verschil is echter wel dat in laatstgenoemd artikel de plaats waar de arbeid wordt verricht geheel geen rol speelt en zich dus geen drielandensituatie kan voordoen. Ten principale meen ik dat een verdeling van de heffingsbevoegdheid over de werkstaat (primair) en de werkgeverstaat (secundair) de fraaiste oplossing is, maar dit is niet goed te regelen. Als 'second best'-oplossing verdient dan de huidige toewijzingsregel de voorkeur.
Ik laat de problematiek van de grenswerkers onbesproken, maar vind dat hun positie zodanig is dat ze een veel sterkere band met de woonstaat hebben. Eerder heb ik verdedigd dat voor hen een woonstaatheffing zou moeten gelden zoals die was opgenomen in het (voormalige) verdrag met België uit 1970.[286] Ten principale ben ik echter nu meer voor een verdeling van de heffingsbevoegdheid over beide landen. In zoverre voldoen de

[283] Tot 2017 was dit de werkgeverstaat. Art. 15, derde lid, VN-MV hanteert die regel nog steeds.
[284] Nederland wijkt op dit punt echter met diens verdragsbeleid sterk af. Zie hierna.
[285] Helemaal juist is dat overigens niet geformuleerd want de heffingsbevoegdheid wordt krachtens art. 15, eerste lid, OESO-/VN-MV primair toegewezen aan de woonstaat, tenzij werkzaamheden plaatsvinden in de andere staat. Deze eigenlijke hoofdregel is dus alleen maar van betekenis in de uitzonderlijke situatie dat geen werkzaamheden worden verricht in de andere staat. In het Coronatijdperk doet zich dit overigens gemakkelijk voor hetgeen heeft geleid tot aanvullende besluiten. Deze problematiek blijft hier onbesproken. Men kan overigens in dit verband meer in de breedte ook denken aan de gevolgen van de ontwikkeling van de digitale economie die werken op de traditionele werkplaats minder gebruikelijk maakt.
[286] P. Kavelaars, De toekomstige positie van grenswerknemers, WFR 2001/6442, p. 951-959.

grenswerkersregeling in de verdragen die Nederland heeft gesloten met België en met Duitsland daar in principe aan.[287]

4.2 Detachering

De eerste uitzondering op de hoofdregel betreft de gedetacheerden (art. 15, tweede lid, OESO-/VN-MV). Het is evident dat hun relatie met de werkstaat aanzienlijk geringer is dan die van andere werknemers die grensoverschrijdend werkzaam zijn: hun band met de woonstaat is ook veel intensiever hetgeen sterker is naarmate de duur van de buitenlandse werkzaamheden korter is. Daarnaast kan voor een woonstaatbenadering ook worden aangevoerd dat het uitvoeringstechnisch zowel voor de werkgever als voor de werknemer zeer omslachtig en onpraktisch pleegt te zijn als sprake is van belastingplicht in de tijdelijke werkstaat. De detacheringsuitzondering is derhalve ten principale goed verdedigbaar. Niettemin is een aantal nuanceringen op zijn plaats:

- er is in principe geen reden de tijdelijke werkstaat niet ook heffingsbevoegd te doen zijn nu de bron daar eenmaal tot inkomen leidt. Alleen bij zeer kortstondige buitenlandse werkzaamheden – denk aan zakenreizen – zou hier vanuit praktisch oogpunt (zie hiervoor) een inbreuk op wenselijk zijn;
- de detacheringsregeling sluit met name binnen de EU wat betreft periode niet aan bij de periode die in de sociale zekerheid wordt gehanteerd (art. 12 Vo. 883/2004) die kan oplopen tot vijf jaar. Een verlenging van de fiscale detacheringsperiode is sterk verdedigbaar op praktische gronden (afstemming met de sociale zekerheid hetgeen vooral voor de premieheffing relevant is), maar ook omdat detacheringen veelal bepaald langer duren dan 183 dagen. Elke termijn is op dit punt uiteraard willekeurig, maar het zou zinvol zijn om de termijn op maximaal twee jaar te bepalen welke termijn dan ook van toepassing zou moeten zijn voor de sociale zekerheid;
- de additionele voorwaarden dat de arbeidskosten niet ten laste van de werkstaat mogen komen (geparafraseerd weergegeven) dient te vervallen, enerzijds omdat die bepaling eenvoudigweg in strijd is met het at arm's length principe en anderzijds om een evenwichtige

[287] Zie art. 27 Verdrag België 2001 en art. XII Protocol Verdrag Duitsland 2016. Een en ander is uitgewerkt in art. 9.2, negende lid, Wet IB 2001.

aansluiting te krijgen bij de regeling van art. 12 Vo. 883/2004 waar deze voorwaarde niet geldt.[288]

4.3 Transportwerknemers

De toewijzingsregel met betrekking tot werknemers in het internationaal transport is opgenomen in art. 15, derde lid, OESO-/VN-MV. Het behoeft geen betoog dat toewijzing van de heffingsbevoegdheid aan de werkstaat is uitgesloten.[289] De principiële benadering is daarmee niet toepasbaar. Er zijn drie alternatieven denkbaar: de vestigingsplaats van de werkgever, de woonplaats van de werknemer en in geval van (zee-)schepen de staat van de thuishaven of de vlagstaat. Laatstgenoemd criterium vormt geen dragend criterium voor toewijzing van heffingsbevoegdheid ten aanzien van arbeid. Er is geen relatie tussen beide. Het is in dat verband opmerkelijk dat voor de sociale zekerheid in Vo. 883/2004 ter zake van zeevarenden de vlagstaat – mits een lidstaat van de EU – wel het aanknopingspunt vormt voor de verzekeringsplicht (art. 11, vierde lid, Vo. 883/2004). Van de overige twee criteria is het werkgeverscriterium het meest nauw verwant met de arbeid; ik heb daar hiervoor ook aandacht aan geschonken. Op basis van die redenering is het ten principale het meest juist de heffingsbevoegdheid aan die staat toe te wijzen.[290] Dit was ook de regel die tot 2017 in art. 15(3) OESO-/VN-MV was opgenomen. Voor de werknemer is een bezwaar dat hij met de werkgeverstaat geen affiniteit zal hebben er dus ook in zoverre geen principiële reden is de heffingsbevoegdheid aan die staat toe te wijzen. Bovendien is het voor de transportwerknemer complex daar aan de fiscale verplichtingen te voldoen. Dit kunnen redenen zijn de heffingsbevoegdheid aan de woonstaat toe te wijzen hetgeen sinds 2017 ook het geval is. Dit is niet zozeer een principiële benadering maar meer een pragmatische invalshoek. Overigens geldt het voornoemde bezwaar ten aanzien van een werkgeversstaatheffing bij de werknemer, in deze woonstaattoewijzing dan mutatis mutandis voor de

[288] Dit zou ertoe leiden dat evenals in de sfeer van de sociale zekerheid niet alleen detachering onder de bepaling zou vallen (binnen concern), maar ook inlening (buiten concern). Er gelden nog enkele verschillen tussen beide stelsels; die laat ik onbesproken. Een interessant punt is de voorwaarde in art. 12 Vo. 883/2004 dat de werkzaamheden voor rekening van de uitzendende werkgever moeten plaatsvinden. Dat is een nuttige regel om ook fiscaalrechtelijk te hanteren. De regel duidt niet op kosten maar op de voorwaarde dat de werknemer onder toezicht van de uitzendende werkgever werkzaam is en deze bovendien substantiële activiteiten in de vestigingsstaat verricht.

[289] Daarenboven vindt met name zeetransport veelal al helemaal niet plaats in een staat. Er zou dus gemakkelijk een heffingsvacuüm kunnen ontstaan.

[290] In de rechtspraak inzake Vo. 883/2004 en de voorgangers daarvan is door het HvJ in die gevallen dat geen expliciete toewijzingsregel van toepassing is de verzekeringsplicht toegewezen aan de lidstaat waarmee de werknemer de meest nauwe aanknoping heeft. Het HvJ oordeelde dat dit primair de werkgeversstaat is en indien dit geen lidstaat is dan de woonstaat beslissend is. Zie bijvoorbeeld HvJ 29 juni 1994, C-60/93 (Aldewereld), ECLI:EU:C:1994:271.

werkgever. Vanuit dat perspectief lijkt er geen verschil te bestaan. Een doorslaggevend argument toch voor de woonstaatbenadering te opteren is dat de werkgever heffing in een ander land in de regel beter kan absorberen dan de werknemer (meer kennis en kunde, meer werknemers uit die staat). Overigens zou een verdeling van de heffingsbevoegdheid gelet op bovenstaande argumenten evenwichtiger zijn, maar dat verergert de uitvoering nog verder en is daarmee geen wenselijk alternatief.

4.4 Bestuurders

De toewijzing van de heffingsbevoegdheid van bestuurders (art. 16 OESO-/VN-MV) aan de werkgeversstaat acht ik ten principale onjuist.[291] Bestuurders zijn in principe werknemers, zodat daarvoor de benadering van art. 15 OESO-/VN-MV moet gelden. Hooguit zou gezegd kunnen worden dat bestuurders een iets nauwere band hebben met de vennootschap waarvoor zij werkzaam zijn dan dat het geval is bij een werknemer, maar dit is slechts een gradueel verschil. Ook de omstandigheid dat zij mogelijk meer werkzaamheden in andere landen verrichten is slechts een gradueel onderscheid. Bovendien kan de toewijzing in extreme gevallen tot het uiterst onevenwichtige resultaat leiden dat de bestuurder (vrijwel) niet werkzaam is in de werkgeverstaat, maar daar dan dus wel in de heffing wordt betrokken en de daadwerkelijk werkstaat (of werkstaten) dat niet kunnen, evenmin als de woonstaat indien de woon- en de werkgeversstaat verschillen. Ik bepleit dan ook het bestuurdersartikel te schrappen wegens onvoldoende principiële grondslag. Bovendien is er ook vanuit uitvoeringstechnisch oogpunt geen grond voor de toewijzing van de heffingsbevoegdheid aan de werkgeversstaat.

4.5 Sporters en artiesten

Art. 17 OESO-/VN-MV wijst ten aanzien van sporters en artiesten de heffingsbevoegdheid toe aan de werkstaat.[292] Dat is ten principale juist: de bron waaruit de inkomsten voortvloeien is zonder meer steeds de locatie waar de werkzaamheden daadwerkelijk plaatsvinden. Niettemin is een nuancering op zijn plaats. Die nuancering komt overeen met die welke ik naar voor bracht bij de transportwerkers: de werkzaamheden zijn in het algemeen van zeer korte duur en de artiest of sporter heeft daardoor weinig affiniteit met het werkland. Bovendien wisselen de werklanden veelal regelmatig waardoor er in veel

[291] Zie voor een zeer uitvoerige studie met betrekking tot deze bepaling het proefschrift van A. Cools, Bestuurders- en commissarissenbeloningen onder belastingverdragen, Maklu, Antwerpen/Apeldoorn, 2016.

[292] Zie voor een uitvoerige analyse van dit artikel het proefschrift van D. Molenaar, Taxation of International Performing Artists, IBFD, Amsterdam, 2005.

landen kortstondige fiscale verplichtingen zijn. Dit minder principiële maar vooral pragmatische argument leidt tot de conclusie dat de heffingsbevoegdheid beter kan worden toegewezen aan de woonstaat. Bovendien is dit vanuit draagkrachtperspectief goed verdedigbaar. Een combinatie van het principiële punt en dit pragmatische punt, inhoudende dat de heffingsbevoegdheid verdeeld wordt, levert geen evenwichtige oplossing op. Men zou het buiten beschouwing laten van de toepassing van het principiële uitgangspunt overigens kunnen rechtvaardigen indien het om wat betreft de hoogte beperkte beloningen gaat. In die zin is wel geopperd om van de bronstaatheffing alleen af te zien indien het honorarium onder een bepaald bedrag blijft. Dat zou wat mij betreft ook een verdedigbare oplossing zijn. Nederland hanteert sinds het NFV 2021 die lijn waarbij de hoogte van de in aanmerking te nemen drempel een essentiële rol speelt.[293]

4.6 Pensioenen

Het pensioenartikel[294] (art. 18 OESO-/VN-NV) sluit volledig aan bij de woonplaats.[295] De aansluiting bij de woonplaats lijkt ten principale goed verdedigbaar: de binding met de voormalige bronstaat is in principe verbroken en de gepensioneerde maakt volledig gebruik van de voorzieningen van de woonstaat. Er zijn echter ten minste twee belangrijke principiële argumenten die toewijzing aan de (voormalige) bronstaat onderbouwen. In de eerste plaats is dat het argument dat pensioen niets anders is dan uitgesteld loon welk loon in beginsel ter heffing aan de bronstaat toekomt. Het is in dit verband ook nuttig zich te realiseren dat art. 15 OESO-/VN-MV zowel betrekking heeft op loon uit tegenwoordige, als op loon uit vroegere arbeid. Er is dus in feite alle reden ook pensioen aan de (voormalige) bronstaat ter heffing toe te wijzen. Dit argument wordt nog versterkt door een tweede argument, namelijk indien tijdens de pensioenopbouwfase het pensioen fiscaal is gefaciliteerd. De wetgever heeft dan *de facto* uitstel verleend van heffing. Er is geen reden daarvan alsnog af te zien indien de voormalige werknemer een andere woonstaat dan de (voormalige) werkstaat heeft. Het voorgaande betekent dat er zowel principiële argumenten voor een woonstaat-, als voor een

[293] In de voordien geldende NFV bepleitte Nederland een woonstaatheffing maar dit kon bij de OESO en landen waarmee verdragsonderhandelingen werden gevoerd niet op enthousiasme rekenen. Zie de NFV 2020, kamerstukken II 2019/20, 25 087, 256, par. 4.9.

[294] Art. 18 VN-MV heeft tevens betrekking op sociale zekerheidsuitkeringen. Dat geldt ook onder het Nederlandse beleid dat daar bovendien lijfrenten onder brengt. Ik beperk me in deze bijdrage tot pensioenen.

[295] Nederland voert sinds 1997 een heel eigen lijn ten aanzien van het pensioenartikel. Hoewel interessant laat ik dat onbesproken, enerzijds omdat het een wat complexe benadering is en anderzijds omdat het beleid sindsdien enkele malen is gewijzigd.

(voormalige) bronstaatheffing zijn. Aldus zou het pensioenartikel daar dan ook in moeten voorzien. De weging van beide factoren is uiteraard arbitrair. De conclusie is dus dat art. 18 OESO-/VN-MV tot een partiële woonstaat- en een partiële bronstaatheffing moet leiden. Indien het pensioen in de bronstaat niet fiscaal gefaciliteerd is opgebouwd zou de wegingsfactor van de bronstaat lager moeten zijn.[296]

4.7 Publiekrechtelijke werknemers

Tot slot zijn er de publiekrechtelijke werknemers ofwel de ambtenaren (art. 19 OESO-/VN-MV). De heffingsbevoegdheid wordt ten aanzien van hun inkomsten toegewezen aan de overheidsstaat dus in feite de werkgeversstaat. Dat geldt ook voor hun pensioen. Deze toewijzingsregel is in beginsel niet logisch. Immers, bezien vanuit de aard van bron en de gelijkenis met privaatrechtelijke werknemers is er vanuit internationaalrechtelijk perspectief geen reden onderscheid te maken tussen privaatrechtelijke en publiekrechtelijke werknemers en gaat het er primair om waar de broninkomsten opkomen, hetgeen de werkstaat is. De binding met de werkgeversstaat is bij publiekrechtelijke werknemers niet groter dan bij privaatrechtelijke werknemers. Wel heb ik bij de beoordeling van art. 15 OESO-/VN-MV aangegeven dat er wel enig argument is om de heffingsbevoegdheid mede toe te wijzen aan de werkgeverstaat, omdat de werkgever immers de bron heeft gecreëerd. Evenwel is dat een onuitvoerbare optie omdat dan mogelijk een drielandensituatie ontstaat die verdragsrechtelijk niet oplosbaar is. Een principieel argument dat vanuit fiscaalrechtelijk perspectief wel is aan te voeren, is de omstandigheid dat het loon in de werkgeversstaat niet aftrekbaar is, omdat de overheid in de regel niet belastingplichtig is. Ik zie dat echter niet als een relevant argument: het betreft namelijk geen aangelegenheid van internationaal belastingrecht maar een regel van nationaal belastingrecht. Bovendien zou dat argument ertoe moeten leiden dat bij privaatrechtelijke werknemers evenzeer getoetst zou moeten worden of de werkgever niet vrijgesteld is van winstbelasting of meer algemeen: of de beloning aftrekbaar is van de winst.[297] Voor de toepassing van art. 15, eerste lid[298] OESO-/VN-MV

[296] Zoals hiervoor is aangegeven hanteert Nederland al lange tijd een alternatieve benadering ten aanzien van pensioen. Het huidige beleid (zie par. 4.10 NFV 2020) is strikt genomen een uitsluitende bronstaatheffing met name gebaseerd op het argument dat de opbouw van het pensioen fiscaal wordt gefaciliteerd. Praktisch zal dit gelet op de uitsluitende woonplaatsbenadering in de modelverdragen veelal niet lukken en kan Nederland zich ook vinden in een gedeelde heffing (woon- en beperkte bronstaatheffing met een verrekening in de woonstaat).

[297] Denk bijvoorbeeld aan werknemers in dienst van voor de winst vrijgestelde stichtingen of verenigingen e.d.

[298] Voor het tweede lid wel, zij het meer in 'omgekeerde' zin: het tweede lid is niet van toepassing indien de beloning wordt doorbelast c.q. toegerekend aan de tijdelijke werkstaat.

speelt dat vraagstuk geen rol, hetgeen terecht is.[299] Maar dan mag het evenmin een rol spelen bij art. 19 OESO-/VN-MV. De conclusie luidt derhalve dat de heffingsbevoegdheid over publiekrechtelijke beloningen toegewezen moet worden aan de bronstaat op eenzelfde wijze als die ten aanzien van privaatrechtelijke beloningen.[300]
Daarnaast zijn er de publiekrechtelijke pensioenen. Deze vallen eveneens onder art. 19 OESO-VN-MV. Het behoeft na vorenstaande geen betoog dat ook voor die regel geen dragend argument kan worden aangevoerd en dat dergelijke pensioenen onder art. 18 OESO-/VN-MV dienen te vallen.

5. Afronding

De verdragsrechtelijke verdeling van de heffingsbevoegdheid onder verdragen heeft in algemene zin weinig aandacht. Het is ook opvallend dat in het commentaar bij elk van de artikelen in het OESO-/VN-MV inzake de toewijzing van de heffingsbevoegdheid geen of slechts een beperkte onderbouwing c.q. toelichting is opgenomen op grond waarvan de heffingsbevoegdheid wordt verdeeld. Ik bepleit in de eerste plaats alsnog een grondige onderbouwing op te nemen. In de tweede plaats zou die indertijd gemaakte afweging moeten worden herbeoordeeld en ook in de toekomst moeten worden gemonitord. Maatschappelijke en andere ontwikkelingen kunnen daar aanleiding toe geven. Daartoe behoort het laatste decennium stellig ook de sterke ontwikkeling van de opvatting dat oneigenlijk gebruik en misbruik moet worden bestreden. In het algemeen impliceert dit een versterkte rol voor het bronstaatprincipe. Dit element heb ik in de voorgaande paragrafen niet steeds aangehaald maar dient bij de afweging wel een (aanvullende) rol te spelen.
Ten aanzien van een aantal artikelen ter zake van vermogensinkomsten en arbeidsinkomsten heb ik bepleit die op het punt van de toewijzing aan te passen. In dit verband heb ik tevens bepleit een minder stringente verdeling van de heffingsbevoegdheid aan woonstaat of aan bronstaat toe te passen dan nu het geval is. De heffingsbevoegdheid kan ook elk voor een deel aan beide landen toekomen. Ik acht dat in diverse gevallen een principieel evenwichtiger uitkomst. Bij vermogensinkomsten gebeurt dit ook, maar ten aanzien van die inkomsten is het de vraag waarom de verrekeningsmethode wordt toegepast.

[299] De Hoge Raad achtte dit in de zogenoemde ontslagvergoedingszaken wel een relevant punt: er kon alleen vrijstelling worden verkregen voor zover bleek dat de ontslagvergoeding werd doorbelast, c.q. toegerekend aan de andere staat (HR 11 juni 2004, 37 714 en 38 112, ECLI:NL:HR:2004:AF7812 en AF7816). Ik heb die visie in mijn noot bij HR 19 november 2004, 39 695, ECLI:NL:HR:AR5983, BNB 2005/57 onjuist geoordeeld. In het nadien in het OESO-commentaar (par. 2.6. e.v. bij art. 15 OESO-MV) opgenomen beleid ten aanzien van ontslagvergoedingen is die voorwaarde terecht niet opgenomen.

[300] Er zou dan ook een detacheringsregel moeten gelden. Maar juister is art. 19 OESO-/VN-MV te schrappen en de publiekrechtelijke werknemers onder art. 15 OESO-/VN-MV te brengen.

Verdeling van de heffingsbevoegdheid kan ook worden geëffectueerd via de vrijstellingsmethode waarbij – zoals ik hiervoor aangaf – het inkomen deels ter heffing wordt toegewezen aan de woonstaat en deels wordt toegewezen aan de bronstaat. Deze verdeling dient te worden bepaald aan de hand van principiële uitgangspunten, praktische gronden en mogelijk specifieke argumenten die gerelateerd zijn aan de karakteristieken van (de fiscale stelsels van) de verdragslanden.

Ter afronding een woord aan Rainer: Proficiat met een mooie wetenschappelijke carrière. Je hebt een gedegen bijdrage aan de internationale fiscale wetenschap gegeven, uiteraard naast de vele andere werkzaamheden in de internationale fiscaliteit. Geniet van een welverdiend pensioen.

IMPLICATIONS OF EUROPEAN UNION LAW ON SWISS (DIRECT) TAXATION – A "TOUR D'HORIZON"

Dr. J. Kläser, MLaw[301]

1. Some personal thoughts

The author of this contribution came to Maastricht to study at the university's faculty of law in 2009. One of his first memories of that time is a lecture on international tax law held by Professor Rainer Prokisch. Professor Prokisch entered the room and, rather surprisingly, he had not immediately in mind to lecture on this day's class topic, which – as far as the author can remember – was about "treaty shopping". Instead, Professor Prokisch was eager first to get to know his new students, their various personalities, and their cultural as well as educational backgrounds. Professor Prokisch's intention was obviously to start building a personal relationship with each of his new students before diving into the deep waters of tax law.

Professor Prokisch is curious about humans and students in particular. For Professor Prokisch, it has always been of particular importance to establish a personal and convenient atmosphere in which students can learn and grow. Aside from these extraordinary social capacities, Professor Prokisch is a living encyclopedia in tax law and his opinion on tax law matters; moreover, he has been recognised by scholars and practitioners worldwide for decades.

The author of this contribution for the honour of Professor Prokisch is grateful that he had the opportunity to be his student during his Master of Laws studies which enabled the author to extend his horizon in tax law and also to grow personally.

The author's subsequent contribution seeks to provide a high-level overview of the various implications of European Union (EU) law on Swiss taxation.[302]

[301] The author is a partner at Blum & Grob Attorneys at Law in Zurich. Aside this role, he has been appointed as a lecturer in the professional educational courses organised by the Swiss Federal Tax Administration and the University of Berne. He is also a lecturer in tax law at Kaleidos University of Applied Sciences in Zurich.

[302] The subsequent contribution also takes into account and is partially based on a rather extensive article published by the author in a Swiss scientific legal journal some years ago, see also J. Kläser, Die Einwirkungen des Rechts der Europäischen Union auf die schweizerische Steuerrechtsordnung, in: Jusletter 2. May 2016 (cit. Kläser, Einwirkungen EU-Recht). Since the relationship between the EU and the Swiss Confederation is not a static one, Swiss tax laws have been amended in a variety of material aspects since then as is outlined hereinafter.

Several fields of expertise related to tax law are covered by this contribution in which Professor Rainer Prokisch has held an expert role during the last decades, such as EU law, public international law, constitutional law and administrative law.

2. General introduction

The sovereignty of states is anchored, amongst other things, by their competence to levy taxes on their own. Although, from a high-level point of view, the Swiss Confederation's national tax sovereignty may appear to be more set-in-stone than is the case for EU Member States today, there are nevertheless numerous implications of the EU's normative legal system on the Swiss Confederation. Finally, as a result of Switzerland's failed accession to the European Economic Area (EEA) in 1992, the Swiss Confederation has been subject to an "integration without membership"[303].

3. EU Law and Swiss taxation

3.1 Acquis bilatéral

3.1.1 Introduction

The acquis bilatéral between Switzerland and the EU and its member states is relatively comprehensive and consists of more than 100 agreements, of which some have been amended or replaced by protocols since those agreements were signed. This acquis bilatéral also covers tax matters, outlined prima facie hereinafter.

Concerning questions of validity, applicability, precedence and interpretation of the agreements between Switzerland and the EU, the principles of international law of the Vienna Convention on the Law of Treaties must always be taken into account.

In the summer of 2021, the latest attempt on negotiations on an institutional framework agreement between Switzerland and the EU, that should have led to some sort of legal umbrella function for governing the bilateral relation, failed. In essence, such an agreement would have fundamentally changed EU-Swiss relations. In relation to market access agreements, it would have introduced the dynamic adoption of developments in EU law in the Swiss legal order. It would also have established a dispute settlement mechanism enabling both parties to refer disputes to an arbitration panel. The Court of Justice of the

[303] Also see M. Vahl, N. Grolimund, Integration Without Membership - Switzerland's Bilateral Agreements with The European Union, in: Centre for European Policy Studies, 2006.

European Union (CJEU) would have been involved in all matters pertaining to the interpretation of EU law. At present, such framework agreement has no majority in Switzerland and would very likely be rejected amongst Swiss citizens having the final say on its adoption.[304]

3.1.2 Free Trade Agreement

The Free Trade Agreement (FTA)[305] of 1972 liberalises trade with industrial products. The agreement also stipulates a ban on subsidies (Art. 23 (1) (iii) FTA). However, the scope of this subsidy provision appears to be rather limited. The wording is very similar to the state aid provision in the Treaty on the Functioning of the European Union (TFEU)[306], but the scope of the FTA is obviously not comparable. According to Art. 2 FTA, the scope refers to originating products. The European Commission nevertheless sought to invoke the FTA to persuade Switzerland to abandon its cantonal company status tax regimes.

As we know today, the European Commission's reasoning was odd since the concerned companies were not allowed to perform any business activity in Switzerland or only a subordinate one, and their activity was generally restricted to the provision of services, including financing activities, administration of participations, and licensing, and to trading activities on foreign territories. Regardless, the EU's political powerplay was successful, and the Swiss Confederation has abolished its preferential cantonal company tax regime.

Following from the foregoing, it is true to state that the European Commission's state aid control *de facto* has an indirect effect on Swiss tax matters, although this occurs obviously without a binding legal basis.[307] *De jure*, though, the impetus of the FTA on Swiss direct taxation is only a theoretical one.

[304] With regards to feasible options for a future relationship the Swiss Confederation and the EU, also see D. Thürer, T. Burri, Gutachten über mögliche Formen der Umsetzung und Anwendung der bilateralen Abkommen, 2011.

[305] Agreement between the Swiss Confederation and the European Economic Community on Free Trade dated 22 July 1972, L 300.

[306] Art. 107 TFEU.

[307] For a more detailed analysis on the EU-Swiss tax dispute, see inter alia J. Kläser, Einwirkungen EU-Recht; P. Roth, Der Steuerstreit zwischen der Schweiz und der Europäischen Union, in: Schweizer Treuhänder (2010), pp. 721 ff.; S. Hirsbrunner, Wer hat Recht im Steuerstreit mit der EU – Anmerkungen aus europarechtlicher Sicht, in: Zeitschrift für Europarecht (2007), pp. 46 ff.

3.1.3 Free Movement of Persons Agreement

3.1.3.1 Introduction

Perhaps the most crucial agreement of the acquis bilatéral is the Free Movement of Persons Agreement (FMPA)[308] , which guarantees Swiss and EU citizens the right of entry, residence, access to work as an employed and self-employed person and the right to stay in the other contracting party's territory. It has opened up the contracting parties' labour markets.[309]

Unlike under the TFEU provisions, the right to free movement laid down in the FMPA is exclusively connected with economic conditions, i.e., in particular gainful employment. The FMPA imposes restrictions on the contracting parties' (i.e., EU member states and the Swiss Confederation) domestic tax system. According to Art. 9 para. 2 Annex I FMPA, persons falling within the personal scope of the agreement are to be granted the same tax privileges as domestic persons.

3.1.3.2 Free Movement of Workers (Art. 9 Annex I FMPA)

The FMPA initially regulates the free movement of workers between the contracting parties. Accordingly, the acquis communautaire, according to Art. 45 TFEU is laid down in Art. 9 Annex I FMPA. Equal treatment in terms of employment and working conditions shall be guaranteed for foreign employees who fall within the scope of the FMPA.

From a Swiss tax law perspective, the free movement of workers and the equal treatment requirement under Art. 9 Annex I FMPA are primarily targeting the special Swiss source tax system for income from employment, which includes an exception to the ordinary tax system of self-declaration for income from employment.[310]

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[308] Agreement 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 dated 21 June 1999, L 114.

[309] Whilst for a transition period the Swiss Confederation used unilateral quotas once immigration into Switzerland exceeded certain numbers, such sovereignty no longer exists according to the FMPA. As a result, the Swiss people and the cantons adopted the federal initiative to limit mass immigration. Today it can be held that the proceedings have become administratively more burdensome as a result, but immigration into Switzerland continues steadily. Switzerland could not implement as restrictive measures as it originally hoped for by way of the new constitutional article since otherwise it would be breaching the FMPA and its international law obligations. For a more detailed analysis on the crux between constitutional sovereignty and obligations under the acquis bilatéral, see also the author's legal essay in the European Journal of Migration and Law: J. Kläser, The Swiss Public Initiative against Mass Immigration ('Masseneinwanderungsinitiative'): Caught between Constitutional Sovereignty and Pacta Sunt Servanda, in: European Journal of Migration and Law (2014), pp. 559-564.

310 As will be shown hereinafter, as a result, Swiss tax laws have been amended on several occasions in this regard.

3.1.3.3 Non-Discrimination (Art. 2 FMPA)

The general non-discrimination clause set forth in Art. 2 FMPA shall be triggered provided neither the free movement of workers (Art. 9 para. 1 Annex I FMPA), the freedom of establishment for self-employed persons (Art. 15 Annex I FMPA) nor the freedom to provide services (Art. 19 Annex I FMPA) can be relied on. As a result, it can be held that the general non-discrimination clause is of very limited importance for Swiss tax matters. The *ultima ratio* clause appears to be of a rather theoretic nature. A non-employed person, for example, or a retired person could refer to this default provision within the FMPA.

3.1.3.4 Freedom of Establishment for Self-Employed Persons (Art. 15 Annex I FMPA)

Freedom of establishment for self-employed persons is stipulated in Art. 15 Annex I FMPA. Self-employed persons shall receive treatment in the host country with respect to access to and exercise of their self-employment activity that is no less favourable than would have been granted to its own nationals. Legal persons are precluded from this provision (Art. 12 para. 1 Annex I FMPA).

3.1.3.5 Freedom of Services (Art. 19 Annex I FMPA)

The freedom to provide services as laid down in Art. 19 Annex I FMPA applies to both individuals (i.e., cross-border services) and legal persons (i.e., secondment of employees). The freedom to provide services is limited to a temporary stay of up to 90 days.[311] The freedom to provide services provision has obviously no particular significance in direct matters within the relationship between the Swiss Confederation and the EU. Due to the temporary limitation of the freedom to provide services under the FMPA, no discrimination in tax matters should occur.[312]

3.1.4 Exchange of Information Agreement

Switzerland and the EU have signed an agreement regarding the automatic exchange of bank information in tax matters on 27 May 2015.[313] Accordingly, the OECD's global standard on the Automatic Exchange of Information has been

311 It is to be noted that this limitation period per annum is given once per self-employment person when providing cross-border services and a foreign legal entirely sending its employees to Switzerland.
312 The right to taxation should in most cases remain with the person's state of residency.
313 Protocol of Amendment to the Agreement between the Swiss Confederation and the European Community providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments dated 27 May 2015.

included in the new agreement. In formal legal terms, the signed agreement is a protocol of amendment to replace the taxation of savings agreement between Switzerland and the EU that had been in force since 2005.[314,315] However, it still includes the existing withholding tax exemption for cross-border payments of dividends, interest, and royalties between related entities that is comparable to the Parent-Subsidiary Directive.[316]

3.2 Selected Court Cases

3.2.1 Court of Justice of the European Union

3.2.1.1 Grimme[317]

Grimme, a German national and resident of Switzerland, was the director of a branch established in Germany. The company had its registered office located in Switzerland. Grimme asked the Deutsche Angestellten-Krankenkasse to assess the status of his activity in the German branch from the perspective of social security law. The Deutsche Angestellten-Krankenkasse was of the opinion that, with regard to his activity in the German branch, Grimme was obliged to join the German statutory pension insurance scheme. With regard to the effects of the FMPA on the membership of Grimme as an applicant in the main proceedings of the German statutory pension insurance scheme, the CJEU had to assess (i) whether the FMPA guarantees a right to freedom of establishment not just to individuals but also to legal persons formed in accordance with the law of a Member State or of Swiss law and having their registered office, central administration, or principal place of business within the territory of a contracting party. Furthermore, the CJEU had to establish (ii) whether the applicant in the main proceedings can recall any rights from the provisions of the FMPA on the freedom to provide services and, finally, (iii) the CJEU had to examine whether compulsory membership of the German statuary

314 Agreement between the Swiss Confederation and the European Community providing for measures equivalent to those laid down in Council Directive 2003/48/EC dated 29 December 2004, L 385/30.

315 Swiss fiscal banking secrecy had also been manifested in the former Savings Agreement. A retention tax applied to all interest payments not subject to the Swiss withholding tax that were made by a paying agent located on Swiss territory – for example a bank – to an individual whose tax residence was in an EU Member State. Foreign interest recipients could choose either between a tax retention in Switzerland or voluntary declaration to the tax authorities in their state of residence. With the entering into force of the new protocol, the optional savings taxation statute was ultimately lifted, and automatic exchange of information became the new standard within EU-Swiss relations.

316 Since Switzerland generally does neither apply a withholding tax to outbound interest payments (only few exceptions may apply) nor to outbound royalty payments, the focus from a Swiss perspective has always primarily been on outbound dividend payments.

317 CJEU 12 November 2009, C-351/08 (Grimme), ECLI:EU:C:2009:697.

pension scheme prejudices the equal treatment of the applicant in the main proceedings in his capacity as an employee.
As already stated above[318], the CJEU held that it could not be argued that legal persons are granted the same right of establishment as individuals under the FMPA. In terms of the freedom to provide services provision under the FMPA, the CJEU stated that the applicant could not derive any rights from that provision since, in the case at hand, the actual work necessarily exceeded the 90 days threshold of actual work in a calendar year. Lastly, the CJEU judged that it follows from the facts that Grimme is a German national and carries out his activity as an employee for the German branch. Therefore, the present case cannot be a matter of discrimination by the authorities of a contracting party against a national of another contracting party.
Though the CJEU ruling in the Grimme case does not relate to a tax dispute, it is of importance to understand the CJEU's interpretation of the acquis bilatéral and its steady progress. In the Grimme case, the CJEU apparently still assumed a rather limited scope of application of the FMPA. A national of a contracting party (e.g. from Germany) residing in another contracting party (e.g. Switzerland) who is treated unequally by his home state in relation to hisplace of residence could not invoke the protection of the FMPA at this point in time.

3.2.1.2 Ettwein[319]

The German Ettwein couple both held the German nationality, pursued an independent professional activity and earned all their income in Germany. On 1 August 2007, they moved their residence to Switzerland and continued to pursue their professional activity in Germany and to earn almost all their income in Germany. In the following, the Finanzamt Konstanz refused the application of the preferential German splitting regime for spouses, arguing that due to the couple's personal and family situation, it was not applicable because their residence was neither in Germany nor in one of the EU Member States, nor in a state which is a party to the EEA Agreement. Thus, the spouses were placed under a separate taxation regime.
The CJEU was asked whether the refusal by the German tax authorities to grant Mr. and Mrs. Ettwein the benefit of the splitting regime on the sole ground that they resided in Switzerland was compatible with the provisions of the FMPA. The CJEU judged that the FMPA must be interpreted as precluding German tax legislation that refuses the benefit of joint taxation by the 'splitting' method on the sole ground that their residence is situated in the territory of the Swiss

318 See paragraph 3.1.3.4.
319 CJEU 28 February 2013, C-425/11 (Ettwein), ECLI:EU:C:2013:121.

Confederation. The FMPA had been considered applicable since Mr. and Mrs. Ettwein were nationals of a contracting party to the FMPA and resident in the territory of another contracting party, namely the Swiss Confederation, and they pursued a self-employed activity in the territory of the other contracting party, i.e., Germany.
By their judgement, the CJEU has obviously moderately adjusted its initial position as laid down in the Grimme judgment. Now the prohibition of discrimination under the FMPA may also be interpreted inversely. Unsurprisingly, the FMPA applies mutatis mutandis to self-employed cross-border commuters since Art. 15 para. 2 Annex I FMPA stipulates precisely this.

3.2.1.3 Bukovansky[320]

Bukovansky, holding both the Czecht and German nationality, lived in Germany from 1969 until July 2008. From January 1999 to February 2006, he worked in Switzerland, where he was employed by a number of companies belonging to the Novartis Group. At that time, he was subject to income tax in his state of residence, namely Germany. In 2006, Bukovansky was transferred by his Swiss employer, as part of a transfer agreement, to a subsidiary of the Novartis group established in Germany. In 2008, Bukovansky, while continuing to work for a German subsidiary of the Novartis group, transferred his place of residence to Switzerland. In his 2008 income tax declaration, he assumed that, for the period during which he had been resident in Switzerland, namely from August to December 2008, he was, pursuant to Art. 15 lit. a para. 1 of the German-Swiss Double Tax Agreement, subject to tax in Switzerland as a 'reverse' frontier worker. The German competent tax administration, however, took the view that the income in question had to be subject to taxation in Germany for the entire tax year 2008.
The referring court asked the CJEU, in essence, whether the principles of non-discrimination and equal treatment, set out in Art. 2 Annex I FMPA, must be interpreted as precluding a bilateral agreement on double taxation, such as the German-Swiss Agreement, under which the right to tax employment income of a German taxpayer who does not have the Swiss nationality is vested in the state where the income originates (Germany), although he has transferred his residence from Germany to Switzerland whilst retaining his place of employment in Germany, whereas the right to tax employment income of a Swiss national who is in an analogous situation is vested in the new state of residence (Switzerland).

320 CJEU 19 November 2015, C-241/14 (Bukovansky), ECLI:EU:C:2015:766.

The CJEU held that in comparison with taxable persons residing in Germany, Bukovansky suffered no tax disadvantage and there would be no reason to conclude that there is discrimination resulting from unequal treatment contrary the FMPA as laid down in Art. 2 of the FMPA. Furthermore, the FMPA must be interpreted as not precluding a bilateral agreement on double taxation, such as the German-Swiss Agreement, under which the power to tax the employment income of a German taxpayer who does not have the Swiss nationality is vested in Germany as the state where the income originates, although he has transferred his residence from Germany to Switzerland, even though the power to tax the employment income of a Swiss national who is in an analogous situation is vested in the new state of residence, in this case, the Swiss Confederation.

Although the reserved position of the CJEU concerning tax allocation rules under a double tax convention is consistent, inter alia in light of its judgements in Gilly[321] and Renneberg[322], it can still be regarded critical whether such protective measures, as those ones that are covered under the Swiss-German double taxation agreement for German nationals, are not at offence of the FMPA. Furthermore, we learnt from the Ettwein-Case t hat the prohibition of discrimination under the FMPA can also be interpreted inversely.[323]

3.2.2 Swiss Federal Supreme Court

3.2.2.1 Taxation at Source Case I, BGE 136 II 241

In its well-known Geneva taxation at source judgement, the Swiss Federal Supreme Court ruled down the rules for persons not resident in Switzerland (so-called non-residents).[324] Precisely, the case concerned a cross-border commuter who was resident in France with Swiss citizenship. Due to his economic affiliation, the Swiss national was subject to limited taxation in Switzerland, i.e. taxation at source on the income of employment from Swiss sources. The appellant had claimed various deductions in the respective years, some of which were granted to him by the administration and some of which were denied, which in his opinion represented a violation of the FMPA.

The Federal Supreme Court judged that the complaint was justified in view of the FMPA. Accordingly, taxpayers who qualify as quasi-residents can apply for

321 CJEU 12 May 1998, C-336/98 (Gilly), ECLI:EU:C:1998:221.
322 CJEU 16 October 2008, C-527/06 (Renneberg), ECLI:EU:C:2008:566.
323 For more details on this topic from a German perspective, also see J. Maier, Die steuerrechtlichen Implikationen der Mobilitätsgarantien des Freizügigkeitsabkommens Schweiz-EU, Dissertation 2013.
324 See for more details inter alia A. Marantelli, Das Bundesgericht schlägt eine erste Bresche in die Quellenbesteuerung, Jusletter 12 April 2010; and, S. Oesterhelt, Quellensteuerordnung verstösst gegen die Bilateralen Abkommen, FStR (2010), pp. 211 ff.

tax deductions not taken into account in the source taxation tariffs.[325] The judgment ultimately led to a legislative revision of the Swiss source taxation regime in terms of income from employment in the meantime (see more details hereinafter).

3.2.2.2 Taxation at Source Case II, BGE 140 II 167

The Swiss federal judges had to assess whether an unequal treatment was compatible with the FMPA in the case of a foreign employee who qualified for the source taxation regime for taxpayers with personal affiliation (i.e. residence in Switzerland). In more concrete terms, the foreign employee transferred his tax domicile from one canton to another canton, which resulted in a *pro rata temporis* apportionment between the two concerned cantons.
The appellant argued that this special rule led to a less favourable treatment than for ordinary taxed residents as it is applicable for Swiss citizens and persons with a specific Swiss long-term residency permit. Whilst the Swiss Federal Supreme Court in Lausanne considered the source taxation procedure in principle permissible for administrative reasons, a discrimination that is incompatible with the FMPA was still recognised, insofar as the special source taxation provisions result in higher taxation. The federal judgment got transposed into domestic tax laws by means of the legislative revision of the Swiss source taxation regime (see more details hereinafter).

4. Recent amendments of the Swiss Taxation at Source Regime[326]

To achieve FMPA compatibility, new rules have entered into force in 2021 for the taxation at source of employment income for individuals that are non-residents of Switzerland, or residents of Switzerland but who have no Swiss citizenship, (long-term residency) C permit, or resident spouses with a Swiss citizenship or C permit.[327,328]

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325 Swiss judges herewith implemented the so called "Schumacker-doctrine" as it was developed in CJEU 14 February 1995, C-279/93 (Schumacker), ECLI:EU:C:1995:31, into Swiss tax laws (see also hereinafter) including a "quasi-reverse" effect. Obviously, the Swiss Federal Supreme Court had gone one step further than the CJEU. At this point in time reverse discrimination (see above) had not gained access to CJEU jurisprudence in terms of agreement-based cooperation between the EU and Switzerland. See inter alia C. Tobler, Der Genfer Quellensteuerentscheid - im Widerspruch zur Rechtsprechung des EuGH zum Freizügigkeitsabkommen, in: Schweizerische Zeitschrift für internationales und europäische Recht, pp. 389-396.

326 For more details on Swiss source taxation of certain income, see also J. Kläser, Die Quellenbesteuerung von bestimmten Einkünften in der Schweiz, in: Jusletter 7 October 2019.

327 Federal Act dated 16 December 2016 on the Revision of Taxation at Source on Employment Income, AS 2018 1813.

328 The new rules are valid the first time for the 2021 fiscal period without retroactive effect.

For Swiss residents subject to taxation at source, a mandatory subsequent ordinary assessment is carried out if they have a gross income from employment of at least CHF 120,000 or other taxable income of at least CHF 3,000 in a tax year. Such mandatory subsequent ordinary assessment also takes place if their taxable assets for wealth tax purposes at the end of the tax year or tax period amount to at least CHF 150,000. It should be noted that the subsequent ordinary assessment applies until the end of the taxpayer's tax liability. It is not optional.[329]

For persons without personal affiliation, the so-called "quasi-residence" concept has been implemented in Swiss tax law. Anyone without a tax residence or domicile in Switzerland who generates a large part of his income may fulfil the requirements for so-called "quasi-residency". These taxpayers can now demand voluntarily for a subsequent ordinary assessment. The decisive threshold should amount to at least 90% of the taxpayer's worldwide gross income, which must be taxable in Switzerland as the country of employment.[330]

In all cases of a subsequent ordinary tax assessment, the effective date principle applies. This means that the canton in which the person taxed at source is domiciled or resident at the end of the tax period is competent to carry out the respective tax assessment.[331]

5. Final Word

Although, the Swiss Confederation has its own competence in terms of direct taxation matters *vis-à-vis* the EU and its member states, the Swiss Confederation exercises its powers, whereby it carefully considers the acquis bilatéral. Vice versa, the EU Member States should also pay attention to the acquis bilatéral in tax matters having a Swiss nexus.

At least in tax matters amongst both contracting parties, namely the EU and the Swiss Confederation, pressure for supranational judicial integration appears to be rather not so indicated. As has been outlined in the foregoing, both contracting parties seem to be aware of the acquis bilatéral and its guarantees in EU-Swiss tax matters. Therefore, the potential for conflicts, at least in tax matters, should be considered rather moderate. Notwithstanding, the EU seems unwilling to accept the Swiss "*agreement-based Sonderweg*" any longer within a midterm perspective since it could also be attractive for certain member states. It goes without saying that it would be most likely not in the interest of the EU

[329] See Art. 89 Federal Act on Direct Taxation (DBG), SR 642.11.
[330] See Art. 89a DBG.
[331] See Art. 107, paragraph 4 DBG.

if individual member states leave the club again. Therefore, either the Swiss Confederation will make further concessions that go to the detriment of its own sovereignty, or a scenario may arrive where EU-Swiss cooperation is slowed down and becomes administratively probably too burdensome. Of course, the latter would be, from an economic perspective, not in the interest of the Swiss Confederation. At the end, Switzerland must strike a solid balance between its own state sovereignty and EU integration without membership.

A STATE AID CAROL

Dr. J.J.A.M. Korving[332]

Summary

On 24 September 2019, the General Court of the European Union entered a judgment in the state aid cases initiated by the Netherlands and Luxembourg against the European Commission. On 15 July 2020, a judgment followed in the state aid case initiated by Ireland and on 12 May the judgment in another Luxembourg state aid case was published. Developments in the field of state aid in relation to rulings, however, are ongoing. The author has attempted to summarize the issues by using metaphors from Charles Dickens' masterpiece, A Christmas Carol.

1. Prologue

'Almunia was no longer in office, to begin with. There is no doubt whatever about that.'[333] Until 1 November 2014, Almunia was the European Commissioner for Competition. As of that date, he was succeeded by Margrethe Vestager. As the European Commissioner for Competition at that time, Almunia initiated the state aid procedures against the tax rulings granted to Starbucks, FIAT, Apple[334], and Amazon[335] in 2014. Many more cases – most of them thusfar effectively unsuccessfully – would follow under his successor.

A lot of these developments were a consequence of a global discussion on citizens requiring companies to pay their fair share. It kept our (fictitious) Mr. Arpee awake. He had spent a lifetime on explaining 'the people', and students in particular, on a correct application of instruments in the field of international and European tax law. From that perspective, he had a lot of doubts on the correct use of the instrument. At the same time, he understood that state aid was used as 'a tool for the European Commission to achieve its general tax policy agenda'.[336]

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[333] Freely to the opening sentence of Charles Dickens' 'A Christmas Carol'.

[334] IP/14/663 of 11 June 2014.

[335] IP/14/1105 of 7 October 2014.

[336] Also see: M. Pimentel, State aid: 'What we know and what we don't know yet' (Report on session at the IBA/ABA 12th Annual US and Latin America Tax Practice Trends Conference, Miami, US, 12-14 June 2019), via https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=0577963B-6B27-4885-B87C-54B591D34156.

2. Almunia as Marley's ghost

On 30 November 2019[337], Mr. Arpee again worked late into the evening. Once in bed, he immediately fell asleep. It was already very cold, and a brush of frigid air suddenly startled him awake. Arpee opened his eyes and sat quickly upright. His face turned white as snow when he saw a ghost at the end of his bed. It was the ghost of former European Commissioner Almunia that had woken up Mr. Arpee.

Almunia stated: 'In the current context of tight public budgets, it is particularly important that large multinationals pay their fair share of taxes. Under the EU's state aid rules, national authorities cannot take measures allowing certain companies to pay less tax than they should if the tax rules of the Member State were applied in a fair and non-discriminatory way.'[338]

Mr. Arpee agreed with Almunia. Mr. Arpee, however, responded that a more nuanced perspective should be taken in the entire state aid debate and that under current politics the state aid instrument is misused in order to create pressure on increased harmonization in the field of direct taxation. Alumnia predicted Arpee would receive a visit of three spirits to show him what 'fair taxation' would be all about: the spirits of State Aid Past, Present, and Yet-to-Come. Arpee made a hand gesture indicating contempt. Immediately, the vision of Almunia vanished in the cold air. Arpee, still confused, fell back to sleep after a couple of minutes.

3. The spirit of State Aid Past

3.1 Introduction

Suddenly, Arpee felt a hand on his shoulder. A man in a decent grey suit stated, with a German accent, that it was time to reflect on how Europe intended companies to behave.[339] Not only did EU law prohibit EU Member States to treat cross-border situations less favourable compared to domestic situations, it also did not allow them granting certain companies benefits compared to others. To illustrate this, the spirit of State Aid Past took Arpee by the hand and travelled back in time.

337 The day before Ursula von der Leyen's European Commission would enter into office.
338 IP/14/663 of 11 June 2014
339 The spirit of State Aid Past is shaped after Hans von der Groeben, the first European Commissioner for Competition.

3.2 State aid requirements

The first stop was decades in the past. The German speaking spirit explained to Arpee the purpose of state aid rules as being additional to the fundamental freedoms.[340] The objective of the fundamental freedoms would be severely undermined if EU Member States provided domestic production with an artificial head start compared to their competitors in other Member States by granting the domestic productions with benefits.[341]

The prohibition of state aid has been part of EU law as of 1952 and also applies to tax law. Tax benefits, after all, also reduce the tax revenues of Member States. In order to prohibit the beneficial treatment, the state aid provisions in Article 107 of the Treaty on the Functioning of the European Union (TFEU) prohibit any aid granted by a Member State or through state resources in any form whatsoever that distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far that they affect trade between Member States. From this definition, four (or five) constitutive elements can be deduced as qualifying a certain situation as state aid:

(i) the measure should be at the expense of state revenues either by way of a subsidy from a (national, regional, or local and direct or indirect) state body or because the tax treatment reduces state revenues (e.g. by means of a tax exemption);

(ii) (ii) the measure should distort or threaten to distort competition. This condition is usually easily satisfied.[342] Every small advantage would, in principle, be sufficient to distort competition.

(iii) influencing intra-Community trade. This condition has already been met if the benefitting enterprise is active in a market in which cross-border activities occur. It is irrelevant that the beneficiary performs cross-border activities on its own;[343]

(iv) it should concern the granting of a selective benefit.[344]

In relation to the topic of state aid and taxation, the final condition of the existence of a selective benefit is the most important. Based on the criterion of a selective benefit, it should be shown that an enterprise receives a more beneficial tax treatment than other (comparable) taxpayers.

340 CJEU 20 March 1990, C-21/88 (Du Pont de Nemours), ECLI:EU:C:1988:121, point 20.

341 Kapteyn/VerLoren van Themaat, Het recht van de Europese Unie en de Europese Gemeenschappen, Deventer 2003, p. 696.

342 L. Hancher, T. Ottervanger and P.J. Slot, EU State Aids, London 2012, p. 103.

343 See, for instance, CJEU 24 July 2003, C-280/00 (Altmark), ECLI:EU:C:2003:415.

344 It would also be possible to split the condition of 'selective benefit' into two elements, i.e. 'selectivity' and 'benefit'. In this contribution, however, the author will adhere to the terminology as used by the European Commission and the General Court in the more recent cases on tax rulings.

In order to determine whether a regime leads to a selective benefit, the European Commission applies a three-step-approach. First, the reference system should be determined. Subsequently, it should be examined whether the state deviates from the reference system to the benefit of a taxpayer. Finally, the question is whether that deviation could be justified.[345] The reference system would usually consist of the generally applicable system of corporate income tax.[346] The most relevant question in relation to tax rulings and their potential state aid qualification that should be answered is whether that which is included in a tax ruling deviates from what would be the result under the generally applicable regime.

3.3. State aid and rulings

Before Arpee could ask his German speaking phantom the reasoning for why he explained the objective of EU state aid rules, the spirit of State Aid Past flashed in a light beam to a later year. Closer to the present, the spirit wanted to show Arpee the spirit's perspective of how state aid rules should apply to tax rulings. The spirit of State Aid Past explained the existence of rulings.

Rulings are usually concluded to obtain some certainty upfront on a tax qualification or the valuation of a transaction. According to the European Commission, tax rulings can also include state aid. In that respect, these tax rulings cannot escape a state aid qualification if they lead to a benefit compared to the generally applicable regime.[347] Specifically in relation to the potential state aid qualification of rulings, the European Commission opines that this is the case when a ruling includes agreements on the incorrect application of the national corporate income tax regime or when the ruling is based on a wrong transfer pricing method or factually leads to an incorrect transfer price.[348]

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[345] Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU, C(2016)262/1, paragraph 5.2.3. Also see Tribunal 24 September 2019, joint cases T-755/15 (Luxembourg v Commission) and T-759/15 (Fiat Chrysler Finance Europe), ECLI:EU:T:2019:670, point 360.

[346] Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU, C(2016)262/1, point 134. Sometimes, it is difficult to establish whether the reference system is the full corporate income tax system or only a provision included in that system that is actually generally applicable. See, in this respect, Tribunal 24 September 2019, joint cases T-755/15 (Luxembourg v Commission) and T-759/15 (Fiat Chrysler Finance Europe), ECLI:EU:T:2019:670, point 361. The CJEU judged that, in order to determine the reference system, a provision cannot artificially be taken out of the broader legal system; see CJEU 28 June 2018, C-203/16P (Andres), ECLI:EU:C:2018:505, point 103.

[347] Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU, C(2016)262/1, point 170.

[348] Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU, C(2016)262/1, paragraph 5.4.4.1. Also see Tribunal 24 September 2019, joint cases T-755/15 (Luxembourg v Commission) and T-759/15 (Fiat Chrysler Finance Europe), ECLI:EU:T:2019:670.

3.4 LuxLeaks

Again, the spirit placed his hand on Arpee's shoulder and time-traveled to 2015. He wanted to show Arpee how the state aid instrument got applicable to individual tax rulings. Before this, state aid in the field of taxation usually was applied to legal regimes, but not directly to individual taxpayers. Those discussions on tax regimes were, more or less, a matter of verifying whether the conditions incorporated in the national legal provisions concerned had led to a selective benefit.

The spirit showed Arpee a French employee of a Big Four tax advisory firm. In 2014, the International Consortium of Investigative Journalists published a list with an enormous number of multinationals that had made potentially undesirable ruling agreements with the Luxembourg Government.[349] The French employee had turned over copies of the rulings to a journalist who made the full rulings themselves public as well. The scandal became known under the name 'LuxLeaks'. The spirit of State Aid Past explained to Arpee that the European Commission had used this information to determine whether the Luxembourg tax rulings constituted state aid. In the European Commission's view, the companies had obtained a ruling including a benefit that did not correspond to the actual tax treatment they would have got without that ruling. Arpee did not agree. He wanted to convince the spirit of State Aid Past that he was wrong, by indicating that rulings intend to determine future amounts by using models to calculate those amounts. The spirit of State Aid Past immediately acknowledged that the correctness of his view was still to be seen.

Besides that, the European Commission has used the LuxLeaks scandal to extend the scope of automatic exchange of information to material relating to cross-border rulings. The preamble of amending directive 2015/2376 implicitly refers to LuxLeaks: 'Rulings concerning tax-driven structures have, in certain cases, led to a low level of taxation of artificially high amounts of income in the country issuing, amending or renewing the advance ruling and left artificially low amounts of income to be taxed in any other countries involved. An increase in transparency is therefore urgently required.'[350] With this extension of the exchange of information, it appears that the European Commission wanted to avoid future state aid decisions in relation to tax rulings by exchanging information in that regard at the earliest possible stage and, by doing so, avoid recovery actions. As a result of the information on the tax

[349] https://www.icij.org/investigations/luxembourg-leaks/explore-documents-luxembourg-leaks-database/.

[350] Directive 2015/2376 of 8 December 2015, OJ(2015)L332/1, point 1. The European Parliament did suggest to include an explicit reference to LuxLeaks in the preamble, however, this suggested amendment did not find sufficient support; see legislative resolution of 27 October 2015, P8_TA(2015)0369, OJ(2017)C355/122, amendment 3.

rulings, other EU Member States can determine whether, in both countries, the same valuation of a transaction has occurred and, consequently, whether part of the profit would remain untaxed.

3.5 Farewell of the spirit

'Time would tell whether the European Commission's actions will have the desired effect', stated the spirit of State Aid Past as he ends his visit. Mr. Arpee, however, did not see the relevance of the visit. After feeling around and finding his pillow, Arpee falls back to sleep.

4. The spirit of State Aid Present

4.1 Introduction

A couple of hours later, Arpee felt a breeze. His window had opened and a cold November wind blew through his bedroom. Arpee plaintively stepped out of his bed and closed the window. When he turned around, he saw a transparent manifestation of a short-haired woman.[351] Arpee recognized the spirit and was frozen in his place. After all, she resembled the person he wrote his letters to.
Reflecting on the state aid rules, the spirit immediately began to explain Arpee her perspective on state aid in the field of tax rulings:

> I think it is one of the fundamentals, not only of the European Union but also of free trade, that competition is fair.[352] We also want a free market, but we know that the paradox of a "free" market is that you sometimes have to intervene. You have to make sure it's not the law of the jungle but the laws of democracy that works.[353] Consumers depend on us to make sure that competition is fair and open, and it's my responsibility to make that happen.[354] Consequently, rulings need to be in line with state aid requirements.

She continued her monologue to Arpee with an intimation that governments also cannot grant benefits to individual companies.

> No government can give a selective advantage to a specific company, because that would make competition unfair.[355] When a government

[351] The spirit of State Aid Present is shaped after Margrethe Vestager, the current European Commissioner for Competition.
[352] E.U. Antitrust Enforcer will be Margrethe Vestager (interview with M. Vestager), New York Times, 10 September 2014.
[353] European Union competition commissioner Margrethe Vestager on Recode Decode, 9 December 2017.
[354] Google's steely foe in Europe (interview with M. Vestager), New York Times, 18 April 2015.
[355] Tax bill is coming: EU's Vestager says more Apple-type actions likely (interview with M. Vestager), USA Today, 20 September 2016.

> gives special tax treatment to a few companies, that makes it hard for anyone else to compete on equal terms.[356] If a member state would allow a shift of profits, this could reduce the other countries' tax revenues. That is not something we deem desirable.[357]

Before bringing Arpee to the first place of State Aid Present, the spirit concluded on the choice of the state aid instrument in the fight against tax avoidance:

> Being a politician, I know how motivating it can be when the public is outraged.[358] We are doing this because people are angry about tax avoidance, and the European council knew that it already had the power to do something to change that.[359] However, even though the council had the knowledge, it did not act on it. The thinking was: "Let's attempt to do something different within the system that we have. Something that means no change to legislation or voting systems but a change in attitude that acknowledges that people across Europe are angry.[360]"

As state aid already existed as an instrument, the spirit explained that it had used that to achieve a change in corporate mentality and tax morality. She continued by admitting that the use of the instrument may not have been what she hoped it would be. She reached out to Arpee and, upon the first touch, they were beamed away out of Arpee's bedroom.

4.2 First stop: Luxembourg

The first stop was in Luxembourg. Arpee and the spirit were in the building of the Court of Justice of the EU. The General Court had just issued its verdict in the state aid cases against Luxembourg and the Netherlands on the fundamental question of whether the European Commission is allowed to initiate state aid proceedings in relation to tax rulings granted by national tax authorities.

Especially the Luxembourg Government stated that the EC is, in fact, harmonizing tax law by imposing a European arm's length principle and is consequently subjecting tax rulings to state aid investigation. The General

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[356] Clearing the path for innovation (speech by M. Vestager at Web Summit in Lisbon), 7 November 2017.

[357] In the end, Vestager turned out to be wrong in this respect. Even though the court reconfirmed that tax rulings may be compared to the reference system and benefits arising from that could constitute state aid, the European Commission (again) failed in providing the evidence substantiating that position. See General Court 15 July 2020, consolidated cases T-778/16 (Ireland v Commission) and T-892/16 (Apple), ECLI:EU:T:2020:338.

[358] EU Competition chief Vestager speaks on Gazprom, Google and Tax (interview with M. Vestager), Wall Street Journal, 18 February 2015.

[359] Interview with M. Vestager, The Guardian, 17 September 2017.

[360] Interview with M. Vestager, The Guardian, 17 September 2017.

Court disagreed with this.[361] In addition, the court observed that the EC must be able to examine – in the context of the state aid rules – whether the remuneration deemed acceptable in advance for a group transaction is comparable with the remuneration that would have been agreed on for market terms.[362] The General Court argued that this so-called European arm's length principle is, hence, a direct consequence of the prohibition of state aid.[363]

This is an acceptable line of reasoning. In non-affiliated relationships, it may be expected that transactions are always at arm's length and competitive prices are negotiated while, in fact, this does not have to be the case in affiliated relationships. However, for tax purposes, a remuneration must usually be charged in such affiliated situations as would have been applicable in unaffiliated relationships; the remuneration must be at arm's length. Because the affiliated entities wish to obtain certainty about the valuation of the remuneration to be taken into account prior to the granting of the loan (and the related interest payment), this is specified in a ruling usually after an extensive transfer pricing analysis. Since the EC must be able to determine whether individual cases deviate from the normal corporate income tax regime, it would be quite logical to create the possibility of subjecting rulings to a state aid investigation. The EC must be able to assess whether the rulings correspond to market (and/or non-affiliated) situations or whether they create an advantage for the affiliated relationship. It so happens that the (unpublished) rulings may not contain any agreements that do not reflect the economic reality that would have existed in non-affiliated situations. Such an advantage would constitute state aid. It should be noted explicitly that issuing a ruling as such does not result in granting state aid but that the substance of the ruling may do so insofar as the effect of applying the ruling results in preferential treatment compared to a situation for which market economy conditions prevail. So, the 'advantage' is 'only' the difference between the transfer price set out in the ruling and the price as it should have been in accordance with the market and not, as is erroneously often assumed, by definition the full amount included in the ruling.

The court does take as a starting point that the 'European at arm's length principle' is only a tool for establishing whether the content of the ruling at

[361] General Court 24 September 2019, consolidated cases T-755/15 (Luxembourg v Commission) and T-759/15 (Fiat Chrysler Finance Europe), ECLI:EU:T:2019:670, points 100-117.

[362] General Court 24 September 2019, consolidated cases T-760/15 (Netherlands v Commission) and T-636/16 (Starbucks), ECLI:EU:T:2019:669, point 156.

[363] General Court 24 September 2019, consolidated cases T-755/15 (Luxembourg v Commission) and T-759/15 (Fiat Chrysler Finance Europe), ECLI:EU:T:2019:670, point 154.

issue would qualify as state aid.[364] Furthermore, the court compared the tax treatment of 'stand-alone' companies with the application of the at arm's length principle to transactions between group companies. After all, the essence of that principle is to treat transactions between group companies comparable (if not identical) to transactions between non-related entities. It phrased:

> Where national tax law does not make a distinction between integrated undertakings and stand-alone undertakings for the purposes of their liability to corporate income tax, that law is intended to tax the profit arising from the economic activity of such an integrated undertaking as though it had arisen from transactions carried out at market prices. In those circumstances, it must be held that, when examining, pursuant to the power conferred on it by Article 107(1) TFEU, a fiscal measure granted to such an integrated undertaking, the Commission may compare the fiscal burden of such an integrated undertaking resulting from the application of that fiscal measure with the fiscal burden resulting from the application of the normal rules of taxation under the national law of an undertaking placed in a comparable factual situation, carrying on its activities under market conditions.[365]

Most countries do not distinguish between group companies and stand-alone entities for the determination of their tax liability. The conditional approach by the General Court, however, would afford some opportunity for discussion. It implies that, when countries do make a difference in the determination of the tax liability for group companies and stand-alone companies, the establishment of selectivity could be different; i.e. since another reference framework could then be applied, it would be questionable whether the specific treatment would deviate from that more limited reference framework (that only applies to group companies).

After establishing its fundamental decision that individual tax rulings are open to state aid investigations and that the European Commission should be able to determine whether the transfer prices agreed to in those rulings deviate from market conditions, the court continued its verdict by actually examining the contested rulings. A ruling can be considered as state aid in two ways: the application of a wrongly selected TP method and/or the calculation of an incorrect transfer price. The latter, of course, may be the result of application of the wrong method, however, this is not necessarily so. The question of whether the method was wrongly chosen was only raised in the case against the

[364] General Court 24 September 2019, consolidated cases T-755/15 (Luxembourg v Commission) and T-759/15 (Fiat Chrysler Finance Europe), ECLI:EU:T:2019:670, point 143.

[365] General Court 24 September 2019, consolidated cases T-755/15 (Luxembourg v Commission) and T-759/15 (Fiat Chrysler Finance Europe), ECLI:EU:T:2019:670, point 141.

Netherlands.[366] In this case, the EC took the position that another method would have been more obvious; the CUP method rather than the TNMM method should have been applied. The EC adduced several comparable agreements that should have led to an incorrect transfer price as a result of the method applied in that case. However, the GC set aside nearly all of the comparable agreements because they were, inter alia, of a later date than the ruling under consideration. The state aid assessment must be made for the transaction at issue. Therefore, the EC may not use hindsight and rely on data that were not yet available at the time the ruling was granted. As a consequence, the EC had not adequately proven that the CUP method would have resulted in a 'better' outcome than the TNMM.[367]

In the case against Luxembourg, the EC assumed that, although the most appropriate method had been chosen, this method was misapplied which led to incorrect transfer pricing. Within the TNMM, capital was selected as the profit level indicator. However, a discussion arose as to whether the capital could be assigned to specific functions and whether it was at all possible to link different rates of return to those functions.[368] According to the General Court, the segmentation of capital could not be justified by the need to differentiate between the remuneration for the various functions since that segmentation is entirely artificial.[369] The GC thus concluded that all of the company's capital should have been included in the application of the TNMM and that the same rate of return should have been linked to it. The segmentation agreed to in the ruling produced an advantage compared to this approach. The tax advantage resulting from this difference must be recovered by Luxembourg if the decision on a possible appeal is upheld.[370]

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[366] General Court 24 September 2019, consolidated cases T-760/15 (Netherlands v Commission) and T-636/16 (Starbucks), ECLI:EU:T:2019:669, point 250. The General Court explicitly did not address a discussion on incorrect transfer pricing methodology in Fiat; see General Court 24 September 2019, consolidated cases T-755/15 (Luxembourg v Commission) and T-759/15 (Fiat Chrysler Finance Europe), ECLI:EU:T:2019:670, point 214.

[367] The lack of evidence also played an important role later on with the calculation of the correct transfer price. The Commission took the position that, even when TNMM would have been the correct TP methodology, it was misapplied and resulted in an incorrect transfer price. Also, on this point, the court decided that the Commission had not provided sufficient evidence in that respect.

[368] General Court 24 September 2019, consolidated cases T-755/15 (Luxembourg v Commission) and T-759/15 (Fiat Chrysler Finance Europe), ECLI:EU:T:2019:670, point 217. The discussion becomes clearer from the table as used by the EC in its final decision: Commission decision of 21 October 2015, C(2015)7152, point 255. It explains clearly which capital base is to be used once the company opted for a return on equity or the return on regulatory capital. Fiat, however, applied the incorrect capital base to the chosen return on equity.

[369] General Court 24 September 2019, consolidated cases T-755/15 (Luxembourg v Commission) and T-759/15 (Fiat Chrysler Finance Europe), ECLI:EU:T:2019:670, points 231 and 242.

[370] Please note that no appeal was initiated in the cases in relation to the Netherlands and Starbucks. The Fiat case was appealed by Luxembourg and Fiat (C-885/19P) and by Ireland (C-898/19P). In the latter case, AG Pikamäe concluded that the GC's judgment should be set aside and the EC's initial state aid decision should be annulled. He argued that the arm's length principle could not be used as a reference point for a state aid

4.3 Second stop: Book shop

In a flash, Arpee and the spirit of State Aid Present were transported to a book shop. The spirit explained to Arpee that the GC's judgment in relation to Luxembourg should have made clear that Member States should not 'hide' benefits in tax rulings. Individual agreements between the tax authorities and a taxpayer are not necessarily wrong, however, they may be regarded as state aid if they create an advantage compared to normal market situations and thus lead to the recovery of the wrongly unpaid amount of tax. Additionally, although the EC will have to attempt to identify and quantify this advantage that does not seem to be easy,[371] this could open doors for the EC. All concluded tax rulings can, in principle, be assessed under the state aid prohibition.

One of these currently pending cases concerns another ruling issued by Luxembourg.[372] The situation involved annual payments for intellectual property rights between two Luxembourg based entities: an operating company and a holding company. The latter was a limited partnership. Since this limited partnership is not taxable in Luxembourg, a major portion of the payments made by the operating company to the limited partnership remained untaxed. A 2003 ruling provided for the method for determining the tax base of the operating company which indirectly approved the method for establishing the annual payment. This payment turned out to comprise almost the entire profit of the operating company and was much higher than the annual amount payable by the limited partnership to a US group company on the basis of a cost-sharing agreement. The ruling is contested by the EC which exclusively considers the method of calculating the annual payment to constitute state aid. The use of the transparent limited partnership, a result of which the income attributable to the limited partnership is not taxable in Luxembourg, is not part of the discussion.[373] The previous judgments make it possible, in principle, to assess the amount of the agreed payment in light of state aid criteria. The volume of payments, therefore, should comply with the arm's length principle, i.e. should be comparable to level payments between unrelated entities.

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qualification and it cannot be part of the reference framework, because Luxembourg law would not directly refer to the arm's length principle. See Opinion of the AG to the CJEU of 16 December 2021, C-898/19P (Ireland v Commission), ECLI:EU:C:2021:1029.

[371] As shown in General Court 24 September 2019, consolidated cases T-760/15 (Netherlands v Commission) and T-636/16 (Starbucks), ECLI:EU:T:2019:669.

[372] Order of 4 October 2017, C(2017)6740 final (Amazon). An appeal against the order was lodged with the General Court. These proceedings are known under numbers T-816/17 (Luxembourg v Commission) and T-318/18 (Amazon v Commission).

[373] This mitigates the impact on the discussion as to whether the use of a Dutch limited partnership can lead to state aid. See, in this context, J. Vleggeert, 'What about CV-BV structures and state aid?', Leiden Law Blog 20 April 2015, to be consulted on: https://leidenlawblog.nl/articles/what-about-cv-bv-structures-and-state-aid.

However, the success of the EC in providing evidence remains to be seen. While it is argued by the EC that the transfer pricing method that was selected and the transfer price that was established have been determined incorrectly, the EC's reasoning seems to be ensnared in observations, and the EC uses agreements for comparison that date from after the conclusion of the original ruling in question.[374] This may call into question the qualification of state aid. Note that similar discussions on transfer prices established in rulings that are qualified as state aid are also being conducted in other countries such as the Netherlands,[375] Ireland[376] , and Belgium.[377] In these cases, it must also be assessed whether the EC will ultimately succeed in proving that the transfer prices established on the basis of transfer pricing reporting accord with prices that would have applied under normal market conditions. The author doubts whether the EC will succeed in providing such evidence in many situations.

4.4 Third stop: Energy plant

The spirit of State Aid Present explains to Arpee that not all currently pending cases relate to application of incorrect transfer pricing methodologies or transfer prices. Upon touching Arpee's shoulder, the scenery changes from a book shop into a European energy plant. The spirit explains this is Engie.[378] When a Luxembourg company grants a loan to another Luxembourg group company and the latter owes interest on that loan, the interest payment is 'parked', and the loan has been converted into a capital contribution in the meantime. With this option, Luxembourg effectively creates a domestic hybrid

[374] The original ruling dates back to 2003. Similar agreements were made in 2006. Regarding the Netherlands and Starbucks v Commission judgment, it can be concluded that this later agreement should not be included in the comparison under the CUP method.

[375] SA.51284 (Nike). The EC has decided to initiate the formal investigation procedure. The preliminary decision on the existence of state aid has reference no. C(2019)6.

[376] Order of 30 August 2016, C(2016)5605 final (Apple). The court decided in favour of Ireland and Apple; General Court 15 July 2020, consolidated cases T-778/16 (Ireland v Commission) and T-892/16 (Apple), ECLI:EU:T:2020:338.

[377] For Belgium, the regime for the exemption of excess profit is subject to discussion. Having a ruling is a prerequisite for this exemption. The General Court previously ruled that the regime of these excess profit rulings did not in itself constitute state aid because it could not be qualified as a 'scheme' for state aid purposes. The rulings were not issued systematically but could also be refused which is what actually occurred. See General Court 14 February 2019, consolidated cases T-131/16 (Belgium v Commission) and T-263/16 (Magnetrol International v Commission), ECLI:EU:T:2019:91. Consequently, the General Court did not get to the substance of whether the exempt excess profit constituted a selective advantage. The commission then decided to assess whether the excess profit had been correctly established in 39 individual cases. These state aid proceedings in the individual cases are known under the numbers SA.53964 through SA.54002. In the meantime, the GC's judgment was appealed. The CJEU judged that the Belgian administrative practice could be seen as a 'scheme' and referred the case back to the GC. The GC now has to determine whether the Belgian scheme qualifies as state aid. See CJEU 16 September 2021, C-337/19P (Commission v Belgium and Magnetrol International), ECLI:EU:C:2021:741.

[378] Order of 20 June 2018, C(2018)3839 final (Engie). Appeal against the order was lodged with the General Court. These proceedings are known under numbers T-516/18 (Luxembourg v Commission) and T-525/18 (Engie Global LNG Holding v Commission).

loan that can provide a double benefit in Luxembourg: interest deduction at the level of the recipient of the loan and participation exemption for the lender. This system is under attack also because the tax advantage resulting from the hybrid loan does not arise from an international qualification mismatch of the loan in this case but because the same Member State unilaterally disregards it and permits it. A cross-border mismatch should qualify as a disparity which can only be resolved through harmonisation.[379] In principle, a country does not have to qualify a loan the same as the other country involved since it may unilaterally determine that classification. If this leads to an advantage, in principle, it is the result of the parallel application of the tax laws of multiple EU Member States, which is permissible.[380] However, according to the spirit of State Aid Present, a qualification as a disparity may be called into question if the mismatch is created by the same country since the unilaterally created double benefit of deduction and exemption can also be solved unilaterally in that case. She explained that, at this moment, the General Court agreed to her conclusion.[381]

4.5 Fourth stop: cardboard CUPs

Immediately after that, the spirit changes Arpee's surroundings again. They are in a Finnish drink packaging factory. She explains that the Huhtamäki case introduces another issue.[382] Since the EC's final decision has not yet been published, it is not entirely clear how things will evolve. In broad terms, it seems to involve the deduction of interest on an interest-free loan. This seems to be a contradiction in terms but is, in fact, a similar discussion as the one in the Luxembourg case (paragraph 4.2). Such an interest-free loan is usually concluded only between group companies. In fact, no interest is payable but, for tax purposes, the parties must act in the manner that would have been agreed between non-affiliated parties. In that case, interest would have been payable, and Luxembourg as well as other EU Member states allow that amount of imputed interest as a deduction in such situations. In this case, the EC does not

[379] For many hybrid loans, this is also done under ATAD2 or has already been done by the amendment of the Parent-Subsidiary Directive, which led to the introduction of Article 13(17) CITA in the Netherlands.
[380] Decision C4/2007 of 8 July 2009, C(2009)4511 final, points 110-117. It concerned the Dutch group interest box, a result of which the levy on interest income would have been taxed at an effectively low rate. In domestic situations, the interest payment would also be deductible at the same effective rate. In cross-border situations, however, the interest would be deductible at the national rate. This is more advantageous and could constitute an advantage. However, the EC considered such a disparity advantage to be irrelevant for the purpose of application of the state aid criteria. This opinion may also be relevant to many other discussions, such as those on informal capital.
[381] General Court of 12 May 2021, T-516/18 (Commission v Luxembourg), ECLI:EU:T:2021:251. Also see M. Massant, De lering van de Engie-zaak, Fiscoloog Internationaal, 2021, Volume 456, p. 6.
[382] SA.50400 (Huhtamäki).

dispute the level of the interest rate that is set but rather the legal system applied in Luxembourg. According to the EC, the Luxembourg regime results in a selective advantage as a result of the conditions applied by this country for qualification for deduction of an arm's length rate of interest, such as (i) the limited applicability to only cross-border situations, (ii) the non-binding nature, and (iii) the non-application of a comparable upward adjustment at the level of a Luxembourg resident provider of a non-interest-bearing loan. This debate is also awaited with interest in other countries. The author believes this case will have limited impact on the Netherlands, considering the arguments proposed by the European Commission. There are major differences between the optional and unilateral Luxembourg system and the compulsory Dutch system, which also requires that corrections are imposed at the level of the grantor of the loan, provided – of course – it is established in the Netherlands.[383]

4.6 Fifth stop: Midnight snack

Before returning Arpee to his home, the spirit of State Aid Present takes him to a hamburger restaurant for a midnight snack. She tells Arpee that the EC has withdrawn the state aid procedure against Luxembourg in relation to McDonalds.[384] Luxembourg had allowed the allocation of royalty income to a US permanent establishment while the United States did not recognize any taxable presence. As such, a part of the Luxembourg profits remained untaxed. The EC had initially argued that the qualification mismatch of a US permanent establishment qualified as state aid. In the end, the EC withdrew the case as Luxembourg acted in accordance with its domestic law and the tax treaty between Luxembourg and the United States. The spirit concludes:

> Of course, the fact remains that McDonald's did not pay any taxes on these profits – and this is not how it should be from a tax fairness point of view. That's why I very much welcome that the Luxembourg Government is taking legislative steps to address the issue that arose in this case and avoid such situations in the future.[385] Furthermore, it should be noted that ATAD2 may cover such mismatches as well.[386]

[383] Although the EC may still wish to raise the issue of determining the rate of interest to be taken into account in individual cases.
[384] Order of 19 September 2018, C(2018)6076 final (McDonalds).
[385] IP/18/5831 of 19 September 2018.
[386] Art. 9, par. 5 of Directive 2016/1164, as most recently amended by Directive 2017/952.

4.7 Farewell of the spirit

Hoping that Arpee had learned something on the current state of affairs and the reasons for using the state aid instrument, the spirit of State Aid Present took him back to his home. She ended her visit with the words:

> The Commission will continue to look at aggressive tax planning measures under EU State aid rules to assess if they result in illegal State aid. At the same time, the ultimate goal that all companies pay their fair share of tax can only be achieved by a combination of efforts to make legislative changes, enforce State aid rules and a change in corporate philosophies.[387] To me, a tax heaven is where everyone pays their fair share. In that respect, I am not quite sure we are in tax heaven yet.[388]

Arpee responded that she should not be so convinced of her positions. He said that she had to admit that her approach did not have the effect she wanted, as she effectively lost most of the currently pending cases. Even though she won on the matter that tax rulings could be subject to a state aid examination, she did not succeed in substantiating any deviations from the general tax regime in those rulings. The spirit of State Aid Present turned away. After that, she left Arpee with the announcement that one last spirit would visit him.

5. The spirit of State Aid Yet-to-Come

5.1 Introduction

Arpee did not have to wait long. Immediately upon his arrival back in his room, he saw a large figure in a large black cloak. This was clearly the spirit of State Aid Yet-to-Come. Arpee could not see the spirit's face and, apparently, the spirit did not have the intention to speak as he commanded Arpee to come closer with only a hand gesture.[389]

5.2 Brussels

Arpee and the spirit of State Aid Yet-to-Come arrived in the middle of the European decision-making process. It became clear to Arpee that this factually had nothing to do with the state aid cases. Discussions were not on tax rulings

[387] Statement by M. Vestager after the General Court's rulings in the Starbucks-case and FIAT-case, STATEMENT/19/5831.

[388] Meet the Woman Leading Europe's War Against Google, Gazprom, and Apple (interview with M. Vestager), Foreign Policy, 18 March 2016.

[389] As it is not yet known who will become the EU Competition Commissioner in the far future, the spirit of State Aid Yet-to-Come is not shaped after a specific person but is rather unidentifiable.

nor on state aid. They were on exchange of information between tax authorities,[390] avoidance of taxation, and taxation of the digitalized economy.
However, Arpee could feel what was occurring. In the slipstream of the discussions on potential tax avoidance by the granting of tax rulings and using state aid as an instrument to counter that, the European Commission also initiated discussions to harmonize the tax laws of the EU Member States in order to achieve a comparable objective. In that respect, it had, following the BEPS actions, proposed to implement the results from the BEPS actions in a common way across the EU.[391] This effort resulted in the Anti-Tax Avoidance Directive (ATAD) requiring EU Member States to incorporate, amongst others, a General Anti-Abuse Rule, an interest deduction limitation based on the company's EBITDA, and CFC-rules.[392] This directive was, within a year, amended by another directive to counter hybrid mismatches in both intra-EU situations and in the relation between the EU and third countries.[393] Later, the European Parliament established a specific subcommittee on tax matters responsible for tax-related matters and particularly the fight against tax fraud, tax evasion and tax avoidance as well as financial transparency for taxation purposes.[394] The European Commission announced new harmonization in the field of taxation, especially aimed at countering the misuse of shell companies,[395] creating own EU tax revenues[396] and avoiding tax avoidance[397] and published a roadmap with new tax rules for businesses in Europe.[398]

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[390] Directive 2018/822 of 25 May 2018 (DAC6/Mandatory Disclosure), OJ(2018)L139/1. Also see: D. Blum and A. Langer, *At a Crossroads: Mandatory Disclosure under DAC6 and EU Primary Law*, Parts 1 and 2, European Taxation 2019, p. 282 and 313.

[391] Council conclusions on corporate taxation – base erosion and profit shifting, 8 December 2015, press release 910/15.

[392] Directive 2016/1164 of 12 July 2016 (ATAD1), OJ(2016)L193/1. Also see: G. Ginevra, The EU Anti-Tax Avoidance Directive and the Base Erosion and Profit Shifting (BEPS) Action Plan: Necessity and Adequacy of the Measures at EU level, Intertax 2017, p. 120; and the special issue on ATAD of EC Tax Review, June 2017.

[393] Directive 2017/952 of 29 May 2017 (ATAD2), OJ(2017)L144/1. Also see: O. Popa, *Recent Measures to Counter Hybrid Mismatch Arrangements at the EU Level*, European Taxation 2017, p. 401.

[394] B9-0187/2020 of 11 June 2020.

[395] Proposal for a directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU, of 22 December 2021, COM(2021)565 final; also known as ATAD3.

[396] Communication from the European Commission on 'The next generation of own resources for the EU Budget' of 22 December 2021, COM(2021)566 final.

[397] On 15 July 2020, the European Commission published a new EU Tax Package, consisting of (i) Action Plan for fair and simple taxation supporting the recovery (COM(2020)312), (ii) a further extension of the directive on administrative cooperation in relation to income generated by sellers on digital platforms (DAC7; COM(2020)314), and (iii) Communication on Tax Good Governance in the EU and beyond (COM(2020)313). In the Action Plan, the European Commission also announces to explore whether the harmonization of tax legislation can be based on Article 116 TFEU, only requiring the ordinary legislative procedure instead of unanimity.

[398] Communication on Business Taxation for the 21st Century, COM(2021)251 of 18 May 2021.

5.3 Paris, and then?

Faster than the highspeed train, the spirit of State Aid Yet-to-Come transported Arpee to Paris where the OECD is seated. There, new discussions to tackle tax avoidance are debated.

The spirit points Arpee to the discussions on the OECD's plans for taxation of the digitalized economy. Under the original BEPS Project, OECD countries could not agree on a joint approach and effectively postponed the discussion on the topic.[399] This resulted in the debate on a digital permanent establishment and the allocation of taxing rights and nexus.[400] This evolved in what now is known as Pillar 1. The proposal is accompanied by suggestions to come to minimum taxation in any form in order to ensure that profits are actually being taxed at a minimum level that would be acceptable for all participating countries, the so-called Pillar 2.[401] This minimum taxation can be in the form of a fixed rate or a range or be dependent on the domestic corporate income tax rate of the respective country.

This immediately raises the question of what the consequences of the new BEPS actions are for the EU. Earlier, the BEPS actions resulted in EU legislation to create a more harmonious implementation of the OECD plans in the domestic tax systems of the EU Member States. that the same goes for the current plans on Pillars 1 and 2.[402] In relation to the digitalized economy, the EU already proposed a long-term and interim solution in directives to create a digital PE[403] respectively on the introduction of a digital services tax[404], but these plans are already withdrawn. Before the Pillar 2 directive was introduced, an amendment – or a new directive closely related to the Pillar 2 directive – was already announced relating to the publication of the effective tax rate, following the scope and calculation method from the Pillar 2 directive. In the author's opinion, the Pillar 2 directive could only come to fruition because consensus is reached at an international level. Setting the tax rate is,

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399 Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report, 5 October 2015.

400 Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy (Pillar 1), 31 May 2019.

401 Tax Challenges Arising from the Digitalisation of the Economy Global Anti-Base Erosion Model Rules (Pillar 2), 20 December 2021.

402 The proposal for a Directive on the implementation of Pillar 2 was already introduced: Proposal for a directive on ensuring a global minimum level of taxation for multinational groups in the Union, COM(2021)823 final of 22 December 2021.

403 Proposal for a Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018)147. Also see: R. Petruzzi and V. Koukoulioti, *4 È Å %Õ Ò Ï Ð Å Á Î # Ï Í Í É Ó Ó É Ï Î õ Ó Corporate Taxation and Significant Digital Presence: A Preliminary Assessment*, European Taxation 2018, p. 391.

404 Proposal for a directive regarding a common system of a tax on the revenues resulting from the supply of certain digital services, COM(2018)148. Also see: C. Dimitropoulou, *The Proposed EU Digital Services Tax: An Anti-Protectionist Appraisal Under EU Primary Law*, Intertax 2019, p. 268.

after all, considered one of the items that belong to the tax sovereignty of the EU Member States.[405]

All of these measures harmonizing the corporate income tax bases also raise the question of whether a Common (Consolidated) Corporate Tax Base would be near finalization.[406] Commission President Von der Leyen already announced this project as one of the spearheads of her commission's tax policy.[407] Even though CCCTB by itself was withdrawn, its successor BEFIT would reach exactly the same result. Besides that, even the discussion on allocation factors of the allocation formula will be comparable.

5.4 The final stop

The atmosphere is freezing, but Arpee actually felt strengthened. He did see the entire discussion from another perspective. The last couple of years, he had focused on a textual analysis of the state aid rules. The State Aid spirits, however, had given him an in-depth analysis of the state aid instrument and how it is to be applied in tax ruling cases. Especially the reasoning why state aid was used as an instrument, even though he still qualified is as 'misused', at least had opened his eyes for the results the European Commission wanted to achieve. He sat down, considering why he did not pay that much attention to the objective and context of the European Commission's actions before. After the final transfer, the spirit left without saying a word.

6. Epilogue

Arpee cried and lashed about with his arms on his pillow. He slowly woke up and realized he was not in the freezing cold anymore. He jumped out of his bed. It was 1 December. Arpee still had enough time to go to his office, and amend some of his college slides. He wanted to address the background of the state aid

[405] As the corporate tax rate is not harmonized, unanimity would be required to reach a common tax rate across the EU. Of course, that does not mean that EU Member States can differentiate the tax rate to the disadvantage of non-resident taxpayers, as was already decided in CJEU 29 April 1999, C-311/97 (Royal Bank of Scotland), ECLI:EU:C:1999:216. This is confirmed by the European Commission in the proportionality paragraph to the proposal for a directive introducing a CCCTB (COM(2016)683), where it states: 'In this regard, it does not affect Member States' right to set their own corporate tax rates.'

[406] On 25 October 2016, the European Commission proposed to introduce the CCCTB in two steps: First by the harmonization of the corporate tax base (COM(2016)685) followed by adding consolidation to that (COM(2016)683. Also see: D. Gutmann and E. Raingeard de la Blétière, *CC(C)TB and International Taxation*, EC Tax Review 2017, p. 233; O. Mock, *Proposal for a Common Corporate Tax Base (CCTB): A Case for Foundational Principles*, European Taxation 2019, p. 209; L. Aumayr and G. Mayr, *CCTB: Is There a Chance of a Breakthrough?*, European Taxation 2019, p. 153; R. Offermanns, S. Huibregtse, L. Verdoner and J. Michalak, *Bridging the CCCTB and the Arm's Length Principle – Value Chain Analysis Approach*, European Taxation 2017, p. 465.

[407] Mission letter to European Commissioner for the Economy Gentiloni of 10 September 2019, p. 5.

discussions and place it in the perspective of tax harmonization, even though he remained critical on the question whether state aid was the right instrument to achieve this objective. He concluded: 'I will honour state aid in my heart and try to keep it all the year. I will live in the Past, the Present, and the Future. The spirits of all three shall strive within me. I will not shut out the lessons that they teach!'[408]

[408] Freely to Charles Dickens, 'A Christmas Carol'.

ART 16 OECD MODEL CONVENTION AND BOARD MEMBERS WITH MANAGERIAL TASKS

Michael Lang*

1. "Directors' fees"

I have known *Rainer Prokisch* since my first tentative steps in international tax law in the late 1980s. In those days, to obtain access to international literature and case law, I would regularly travel to Munich and work in the libraries of the Federal Fiscal Court and the Research Centre for International Tax Law of the University of Munich, then based at the department headed by *Klaus Vogel*. *Rainer Prokisch* had already been an accomplished associate of *Klaus Vogel* at the time, and I learned a lot about the law of double tax treaties in my discussions with him.

Rainer Prokisch still comments today on Article 16 OECD MC in the Vogel/Lehner Commentary,[409] so I hope the jubilarian will be pleased when I take up a topic he also addresses therein: Article 16 OECD MC that deals with "directors' fees". Outside of the German-speaking countries, it is widely undisputed that this provision also includes fees paid to directors who perform managerial tasks in their capacity as a member of a board.[410] As *Rainer Prokisch* rightly establishes, the not altogether congenial German translation, however, refers to "Aufsichtsratsvergütungen" (supervisory board remunerations) and, since 1977, to "Aufsichts- und Verwaltungsratsvergütungen" (supervisory and governing board remunerations).[411] As a rule, the tax treaties concluded by Germany, Austria and Switzerland, adopt these terms in their German-language versions. In German legal terminology, one associates the term "Aufsichtsrat" with a monitoring activity. At least in Switzerland, the term "Verwaltungsrat" is also used for operational activities. Nevertheless, numerous legal authors and

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409 Prokisch, in: Vogel/Lehner, Doppelbesteuerungsabkommen (2021), 7th edition, Art 16 OECD MC.

410 See e.g. Cordewener, in: Reimer/Rust, Klaus Vogel on Double Taxation Conventions (2022), 5th edition, Art 16 m.no. 34 et seq with further references.

411 Prokisch, in: Vogel/Lehner, Doppelbesteuerungsabkommen (2021), 7th edition, Art 16 m.no. 9.

courts infer from the German-language version of Article 16 OECD MC that directors who perform managerial tasks do not fall under this provision.[412]

Rainer Prokisch addresses this problem:[413] When a tax treaty uses the terms of the Model Convention in its English-language version (or equivalent terms in a different language version) but the formulation "Aufsichts- und Verwaltungsratsmitglied" in the German-language version, the same treaty contains a narrow German term and a broader English (or other language) term side by side. In such a case, if each Contracting State were to interpret the treaty according to its own national law, in the tax treaty concluded between Germany and the United Kingdom for instance, the member of a British "board of directors" that is a resident in Germany and performs managerial activities in Germany would, from the United Kingdom's perspective, fall under the provision of the tax treaty corresponding to Article 16 OECD MC. From Germany's perspective, the income would be covered by the provision of the treaty modelled on Article 7 OECD MC. *Rainer Prokisch* opposes such an interpretation:[414] The two versions of the treaty can be best reconciled if one assumes that the directors of British companies in both Contracting States should be assessed under the English-language version, while those of German companies, according to the German-language version. An analogous principle should be applied in relation to other states.

The advantage of the view held by *Rainer Prokisch* is that it seeks a solution from the context of the convention instead of hastily resorting to national law. This autonomous interpretation of the tax treaty can help avoid cases of double taxation and double non-taxation. I personally make the case for going even a step further in this autonomous interpretation: The cause of the problem lies in the fact that - as *Rainer Prokisch* rightly points out[415] – the German

[412] See for Germany the German Federal Tax Court: BFH 5.10.1994, I R 67/93, BStBl 1995 II 95; BFH 23.2.2005, I R 46/03, BStBl 2005 II 547; BFH 11.11.2009, I R 15/09, BStBl 2010 II 602; BFH 14.3.2011, I R 23/10, BFHE 233, 385. See for Austria the Austrian Supreme Administrative Court: VwGH 31.7.1996, 92/13/0172, ÖStZB 1997, 235. See for Switzerland the Cantonal Administrative Court of Zürich: Verwaltungsgericht Kanton Zürich of 31 May 2017, SB.2016.00118, SB.2016.00119, SB.2016.00121 and SB.2016.00122, at m.no. 2.4.1 et seq. See for Germany e.g. Wassermeyer/Drüen, in: Wassermeyer, DBA (July 2017, EL 138), Art 16 m.no. 13; Schaumburg, Internationales Steuerrecht (2017), 4th edition, m.no. 19.452; Prokisch, in: Vogel/Lehner, Doppelbesteuerungsabkommen (2021), 7th edition, Art 16 m.no. 4a; Wilke, in: Gosch/Kroppen/Grotherr/Kraft, DBA-Kommentar (8/2019, EL 37), Art 16 m.no. 1, 8 and 20 et seq. See for Austria e.g. Sutter/Burgstaller, Der Manager im DBA-Recht, in Gassner/Lang/Lechner/Schuch/Staringer (eds), Arbeitnehmer im Recht der Doppelbesteuerungsabkommen (2003) 49 (60 et seq). See for Switzerland e.g. Locher/Marantelli/Opel, Einführung in das internationale Steuerrecht der Schweiz (2019), 4th edition, 626 et seq.

[413] Prokisch, in: Vogel/Lehner, Doppelbesteuerungsabkommen (2021), 7th edition, Art 16 m.no. 11.

[414] Prokisch, in: Vogel/Lehner, Doppelbesteuerungsabkommen (2021), 7th edition, Art 16 m.no. 11.

[415] Prokisch, in: Vogel/Lehner, Doppelbesteuerungsabkommen (2021), 7th edition, Art 16 m.no. 9: „*die* - Â Å Ò Ó Å Ô Ú Õ Î Ç É Ó Ô Î É Ã È Ô Ç Å Ç Ì Ì Ã Ë Ô ñ Â Å Ó Ó Å Ò ‰ ß Ò Å Ä É Å 6 Å Ò × Å

translation was not correct at the time.[416] Yet nothing suggests that, by choosing the above German-language formulation, the translators of Article 16 OECD MC at the time also intended to deviate from the meaning of the OECD MC in its original English and French language version. Therefore, I believe that the better arguments are in favour of not overemphasising the use of the terms "Aufsichts- und Verwaltungsrat". The intention of the tax treaty provisions that use the said terms in the German-language version, and otherwise follow Article 16 OECD MC, is to thus also adopt the meaning of Article 16 OECD MC as it develops in the context of the OECD MC and is expressed in the English and French language versions. This must also be taken into account in the interpretation. There should be no room for a German-language "special way".

The case-law of the Federal Tax Court (Bundesfinanzhof -BFH) in Germany

An analysis of the case-law of the BFH (German Federal Tax Court) against this backdrop, however, reveals a different picture: The judgement of 5 October 1994 – I R 67/93 referred to a taxpayer resident in Germany who held the position of a president of Canada-based X Ltd and received income from this position.[417] The BFH rejected the application of the tax treaty provision modelled on Article 16 OECD MC[418]:

"Though one could infer from the English-language version of the provision 'directors' fees ... in this capacity as a member of the board of directors' that all emoluments of the members of the board of directors should be subsumed under Article 16 of the tax treaty with Canada, both the German-language version (‚Aufsichts- und Verwaltungsratsvergütungen') and in particular the French-language text (‚tantièmes, jetons de prèsence et autres rétributions similaires') confirm the opinion also expressed in the relevant literature, i.e. that only the emoluments paid for a monitoring activity are subject to the special provision of Article 16 of the tax treaty with Canada […]."

Unfortunately, the BFH did not attach any significance to the fact that these rules were borrowed entirely from the OECD MC, and also refrained from addressing the question as to whether something in the OECD MC and in the Commentary could be used for the interpretation of this provision. The relevant

[416] See also with further references Cordewener, in: Reimer/Rust, Klaus Vogel on Double Taxation Conventions (2022), 5th edition, Art 16 m.no. 39 et seq and 68 et seq.

[417] BFH of 5 October 1994, I R 67/93, 45 BStBl. II 95, 97 (1995).

[418] The judgments of the German Federal Tax Court had been translated by the author. There is no official English version.

literature also criticised the BFH for wrongly implying that the French text only covers monitoring activities.[419]

The BFH judgement of 27 April 2000 – I B 114/99 referred to an individual resident in Germany who was a member of the "Consejo de administracion" of a Spanish corporation.[420] The BFH assumed that:

"Article 16 of the tax treaty with Spain does not establish a taxation right for Spain, since this provision only refers to supervisory board remunerations ("Aufsichtsratsvergütungen"), and a supervisory board - at least according to the sources which may be used in the summary process - cannot be created for Spanish companies according to the national company law ([...]). The Spanish tax administration does apply Article 16 of the treaty to executives of Spanish companies who are resident in Germany ([…]); it apparently followed this approach also in the dispute. From the perspective of German law, however, the emoluments of managing directors and members of the board do not fall under the scope of Article 16, but exclusively under that of Article 15 of the tax treaty with Spain. Apart from that, the applicants themselves stated that in the relevant period, the applicant also exercised management duties in addition to his monitoring activity at T [the Spanish company]; in such a case, the rule contained in Article 16 can anyway only be applied to an additional remuneration that is specifically attributable to the monitoring activity ([…]). The applicant obviously did not receive a special supervisory board member remuneration in this sense."

This decision is even sketchier in its reasoning: The BFH refers to the "perspective of German law" and assumes - without further explanation - that only remuneration for monitoring activities fall under Article 16. This superficial reasoning was possibly attributable to the fact that this judgment was merely a decision taken in a summary process.

The BFH judgement of 23 February 2000 – I R 46/03 referred again to an individual resident in Germany who was a member of a "Consejo de administracion" of a Spanish corporation.[421] The BFH confirmed the decision of the tax court, according to which

"the therefore relevant taxation right of Spain does not result from Article 16 of the tax treaty with Spain. According to this however, supervisory and governing board remunerations ['Aufsichtsrats- und

[419] See Cordewener, in: Reimer/Rust, Klaus Vogel on Double Taxation Conventions (2022), 5th edition, Art 16 m.no. 36 and especially m.no. 74 at footnote 260: "*The court furthermore took the view that the French* × Ï ÒÄ É Î Ç ÕÔÁ Î ÔÉ î Í ÅÓ ň Ê ÅÔ Ï Î Ó Ä Å ÐÒÅÓÅ Î ÃÅ ÅÔ ÁÕÔÒÅÓ Òï ÔÒ *interpretation, which appears rather far-fetched*".

[420] BFH of 27 April 2000, I B 114/99, 15 BFH/NV 6, 7 (2001).

[421] BFH of 13 February 2005, I R 46/03, BStBl. II 547 (2005).

Verwaltungsratsvergütungen'] and similar payments that an individual resident in Germany receives in their capacity as member of the supervisory or governing board ['Aufsichts- oder Verwaltungsrat'] of a Spanish company can be taxed in Spain, but the plaintiff did not receive such remuneration. According to the findings of the tax court, however, during the year of the dispute the Plaintiff was a member of the 'Consejo de administración' of T, a body whose name can be translated as 'governing board' ['Verwaltungsrat']. In addition, the Plaintiffs rightly point out that, according to the Spanish version of the treaty, its Article 16 also covers the remunerations of a 'miembro de un Consejo de administración' (Federal Law Gazette II 1968, 10, 19). This suggests that, under the treaty, remunerations for participation in the 'Consejo de administración' of a Spanish company fall under the taxation right of Spain. This does not necessarily preclude that, in its function, this body differs from a supervisory board under German law ([…])."

For procedural reasons, the BFH was able to avoid making a final commitment in this particular case. The BFH, however, did consider an interpretation that it had explicitly ruled out in its decision of 27 April 2000 – I B 114/99, without providing any explanations for this contradiction or even addressing it at all. In any event, this decision seems to follow the view of *Rainer Prokisch*, according to which it may well be the case that income from the board activity for certain Spanish companies falls under the provision modelled on Article 16 OECD MC when the activity is not only of a monitoring nature, while income from the activities for German companies can only fall under the treaty provision if it relates to supervisory duties.[422] The BFH does deal here with the Spanish-language version of the treaty, and presupposes the meaning of the German-language version - again without any explanation. Unfortunately, however, the BFH does not deal at all with the meaning of Article 16 OECD MC in its English and French language version, on which this treaty provision is based.

The BFH judgement of 5 March 2008 – I R 54, 55/07 referred to the salary of a managing director resident in Germany for their activity in a Belgian BVBA (limited liability company).[423] Interestingly, the BFH did approve of the application of the treaty provision modelled on Article 16 OECD MC:

"Although the Plaintiff received remuneration from B for a managerial activity and not for a merely monitoring or controlling activity, such remuneration falls within the scope of Article 16 para.1 of the tax treaty with Belgium. Although paragraph 1 of the German-language version of the tax treaty with Belgium only lists supervisory and governing board remunerations ['Aufsichts- und

[422] See Prokisch, in: Vogel/Lehner, Doppelbesteuerungsabkommen (2021), 7th edition, Art 16 m.no. 10.
[423] BFH of 5 March 2008, I R 54, 55/07, 24 BFH/NV 1487 et seq (2008).

Verwaltungsratsvergütungen'] and similar payments, both the Dutch and the French language versions, to which the interpretation of the provisions of the tax treaty with Belgium must resort to in an equal measure as the German-language version, also mention the executives of a corporation. Moreover, Article 16 para.2 of the tax treaty with Belgium covers remunerations for managerial activities also in the German-language version, albeit only remunerations received by a general partner of a joint stock company based in Belgium, and a board member or managing director of a corporation based in the Federal Republic of Germany. In a literal application of the German-language text, Germany would have the taxation right for managing director salaries and board member emoluments of companies based in Germany, while the corresponding emoluments for managerial activities of corporations based in Belgium, with the exception of joint stock companies, could be taxed in Belgium only in accordance with Article 15 para.1 sentence 2 of the tax treaty with Belgium. On the other hand, pursuant to the French and Dutch language versions, managing directors' remunerations of GmbH and BVBA as well as of other corporations equally fall under Article 16 of the tax treaty with Belgium. Since, in case of doubt, it must be assumed that the Contracting States intend to mutually grant each other the same taxation rights, the Belgian version of Article 16 of the tax treaty with Belgium must be applied, according to which Belgium and Germany have identical rights for the taxation of managerial activities on their territory ([…])."

It is interesting here that the BFH reaches a different conclusion than in the other cases: It infers from the "Belgian version" - obviously referring to the French and Dutch language texts - of Article 16 of the tax treaty - that the provision modelled on Article 16 OECD MC also covers managerial activities.[424] The BFH gives priority to the broader version of the Dutch and French text over the German-language version, because in case of doubt it must be assumed that the Contracting States intend to mutually grant each other the same taxation rights. By applying the same reasoning, at least in the cases concerning Spain, the BFH could also have come to the conclusion that, in general, income from managerial activities can fall under the provision modelled on Article 16 OECD MC. The reference to the special rule of Article 16 para. 2 of the tax treaty between Belgium and Germany - which deviates from Article 16 OECD MC - was merely an additional argument. In view of this provision, however, the BFH could hardly argue that Article 16 of the tax treaty only covers income from

[424] See also Cordewener, in: Reimer/Rust, Klaus Vogel on Double Taxation Conventions (2022), 5th edition, Art 16 m.no. 26.

managerial activities in respect of specific companies. Therefore, one should not underestimate the role of this special rule for the outcome.

The BFH judgement of 14 March 2011 – I R 29/10 referred to the tax treaty between Germany and Switzerland:[425] Here, the BFH does not assume
"that the income of a 'delegierter Verwaltungsrat' (member of the board) of a Swiss stock corporation only falls under Article 16 of the 1992 tax treaty with Switzerland ([…]). Instead, it endorses the prevailing opinion that Article 16 of the 1992 tax treaty with Switzerland can only be applicable if the duties of a member of the board are limited to the monitoring of the management".
In this case, the BFH primarily relies on literature and ignores its case law on the tax treaty with Belgium, which is in contradiction to this decision.

The BFH decision of 30 September 2020, I R 76/17 dealt with an individual resident in Poland who was managing director of a corporation based in Germany:[426]
"According to the German-language version of Article 16 para.1 of the 2003 tax treaty with Poland, supervisory and governing board remuneration ['Aufsichts- und Verwaltungsratsvergütungen'] and similar payments received by an individual resident in Poland 'in their capacity as member of the supervisory or governing board' ['in ihrer Eigenschaft als Mitglied eines Aufsichts- oder Verwaltungsrats'] of a company based in Germany may be taxed in Germany. Article 16 para. 2 of the 2003 tax treaty with Poland extends this rule to include salaries, wages and other similar remuneration received by an individual resident in Poland 'in their capacity as authorised representative' ['in ihrer Eigenschaft als bevollmächtigter Vertreter'] of a company based in Germany. In contrast, the Polish-language version of Article 16 para.1 of the 2003 tax treaty with Poland (Federal Law Gazette II 2004, 1305) does not refer to the member of a governing board ['Verwaltungsrat'], but to the management or the board of directors ('zarzadu', 'zarzadzie spolki'). According to the final provision of the 2003 tax treaty with Poland, the German and Polish language versions are equally binding.
[…] Even if the German-language version of Article 16 of the 2003 tax treaty with Poland does not expressly mention the managing directors of a GmbH, they must be considered 'authorised representatives' ['bevollmächtigte Vertreter'] within the meaning of Article 16 para. 2 of the 2003 tax treaty with Poland ([…]). […] When determining the provisions of an international treaty,

[425] BFH of 14 March 2011, I R 29/10, 20 IStR 693, 694 et seq (2011).
[426] BFH of 30 September 2020, I R 76/17, 59 DStR 213 (2021).

one must resort to the Vienna Convention on the Law of Treaties (VCLT) of 23 May 1969 (Federal Law Gazette II 1985, 927), which has been transpositioned into national law (Senate judgments of 11 July 2018 - I R 44/16, BFHE 262, 354; of 30 May 2018 - I R 62/16, BFHE 262, 54) since the entry into force of the approval law of 3 August 1985 (Federal Law Gazette II 1985, 926) . According to the VCLT, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (Article 31 para. 1 VCLT). In particular the wording of the treaty (Article 31 paragraph 2 VCLT) and the ordinary meaning of the terms used are relevant (see Senate judgment of 27 February 2019 - I R 73/16, BFHE 263, 525, BStBl II 2019, 394). [...] Consequently, according to the case law of the Senate (judgments of 25 February 2004 - I R 42/02, BFHE 206, 5, BStBl II 2005, 14; of 26 August 2010 - I R 53/09, BFHE 231, 63, BStBl II 2019, 147), treaty terms must be interpreted first according to the wording and the definitions of the treaty and then according to the meaning and context of the provisions within the treaty. In principle, any recourse to the definitions of national law should only be attempted at a review level further down the line. [...] On this basis, one must establish in case of dispute that the term 'authorised representative' of Article 16 paragraph 2 of the 2003 tax treaty with Poland is not defined in the treaty. In addition, under consideration of the ordinary meaning of this term, the wording does not suggest any limitation to contractually authorised representatives. Instead, this is a general formulation that can also basically cover those representatives whose statutory power of representation is based on their executive position.

[...] In addition, it is relevant in the context of convention interpretation that Article 16 paragraph 2 of the 2003 tax treaty with Poland represents an extension of Article 16 paragraph 1 of the 2003 tax treaty with Poland, which is in turn based on Article 16 OECD MC. The objective of Article 16 OECD MC is to allocate taxation rights for supervisory and governing board remunerations ['Aufsichts- und Verwaltungsratsvergütungen'] according to the place of residence of the company and not according to the principle of the place of activity as in Article 15 OECD MC. The reason for this is mainly practical difficulties in determining where such services are rendered (Article 16 number 1 OECD Model Commentary). In the double tax treaties concluded by Germany, this special rule was sometimes expressly extended to include managing directors (examples from Prokisch in Vogel/Lehner, cited above, Article 16 paragraph 21 et seq.). The express rules of other tax treaties, however, do not allow drawing the reverse conclusion that a lack of reference to managing directors in Article 16 paragraph 2 of the 2003 tax treaty with Poland precludes their inclusion in the scope of this provision. Instead, Article

16 paragraph 2 of the 2003 tax treaty with Poland contains a particularly extensive addition which (also) covers plenipotentiaries and authorised signatories. There is nothing to suggest that such a comprehensive extension should exclude managing directors.
[…] In addition, due to the Polish-language version of Article 16 paragraph 1 of the 2003 tax treaty with Poland, which refers exclusively to managing directors, Polish courts and administrative authorities will, at least in the constellation of the dispute -- a person resident in Poland who is the managing director of a company based in Germany --, will also assume that all managing directors' fees will be taxed in Germany."
This decision is particularly interesting: One must not ignore that the BFH based its judgement on the special rule of Article 16 paragraph 2 of the tax treaty: It is a convincing argument that, when authorised representatives fall under Article 16, this provision must a fortiori cover managing directors. What is significant, however, is the fact that the BFH leaves open whether the subsumption of the income of the managing director is not already a consequence of Article 16 paragraph 1 of the tax treaty - that is, the provision modelled on Article 16 OECD MC. What is of particular interest here is that the BFH establishes that the explicit extension of this provision to managing directors in some tax treaty provisions does not automatically imply that such income cannot also fall under Article 16 paragraph 1 OECD MC. Moreover, one should not ignore that the BFH stresses that Article 16 paragraph 1 was modelled on the OECD MC. It obviously attaches a certain significance to this fact. This possibly implies that a paradigm shift is underway.
What is irritating, however, is the assumption of the BFH that Polish courts and administrative authorities will obviously only deal with the Polish-language text. When two languages are equally authentic, there is no reason why a court or an administrative authority should limit itself to the text in its own national language. Courts and authorities in both states must deal with all language versions of an international treaty and must endeavour to find an interpretation that a priori rules out any contradictions between the different versions.

The case-law of the Supreme Administrative Court (Verwaltungsgerichtshof - VwGH) in Austria.

In its judgement of 31 July 1996, 92/13/0172, the VwGH (Austrian Supreme Administrative Court) was asked to rule on the provision, modelled on Article

16 OECD MC, in the tax treaty between Austria and Switzerland.[427] According to this tax treaty, German is the only authentic language. This probably had a decisive influence on the decision of the VwGH. Essentially, the Court justified its decision as follows:
"As regards the German translation of Article 16 of the OECD Model Convention (1963) the Court unanimously held the view that this allocation rule only covers income paid for monitoring duties as supervisory board member (see Philipp/Loukota/Jirousek/Pollak, Internationales Steuerrecht 2, Z. 16-2; Loukota, Internationale Steuerfälle, Tz 614). The qualifying criterion will be whether the powers are limited to the monitoring of the management; this is not the case if the powers also include direct management or cooperation duties (see Vogel, DBA2, Art. 16 para. 12 on the unaltered content of Article 16 of the 1977 Model Convention)."
At least on the merits, the VwGH did not ignore the fact that the provision was modelled on the OECD MC, and even expressly stated the following:
"When interpreting double tax treaties, Contracting Parties must make sure that, where they incorporate the text of the OECD Model Convention in a double tax treaty, they must also attach the meaning of the corresponding provision of the OECD Model Convention to the individual provision of their bilateral treaty; as a result, the Commentary of the OECD Fiscal Committee existing at the time the treaty is concluded gains particular significance for the interpretation of the treaty (see Lang M., Die Bedeutung des Musterabkommens und des Kommentars des OECD-Steuerausschusses für die Auslegung von Doppelbesteuerungsabkommen, in Gassner/Lang/Lechner, Aktuelle Entwicklungen im Internationalen Steuerrecht, Vienna 1994, 22 and 30 et seq.)."
The VwGH then actually did make use of the OECD Commentary: "The Commentary on Article 16 of the 1963 Model Convention only refers to members of the supervisory board of a company, i.e. the body assigned with monitoring duties." Unfortunately, the VwGH again based its arguments on the German-language version of the Commentary. Consequently, the German translation of the OECD Commentary uses the same incorrect translation as in the text of the OECD Model Convention. If the VwGH had used the English-language version, it would have found the term "board of directors" there.
In its judgement of 10 May 2021, Ra 2019/15/0095 the VwGH was asked to rule on the tax treaty between Austria and Russia.[428] The case involved three

[427] VwGH of 31 July 1996, 92/13/0172, 50 ÖStZB 235 (1997). For a critical discussion, see Lang, Grundsatzerkenntnis des VwGH zur DBA-Auslegung, SWI 1996, 427 (427 et seq).
[428] VwGH of 10 May 2021, Ra 2019/15/0095, 74 ÖStZB 373 (2021). For a detailed discussion, see Lang, Die Auffassung des VwGH zur Bedeutung der authentischen Texte bei der DBA-Auslegung, SWI 2021, 575;

managing directors of an Austrian corporation. The residence of the managing directors was in dispute. The VwGH repealed the decision of the Austrian Federal Tax Court (Bundesfinanzgericht -BFG) and reviewed the application of the provision modelled on Article 15 OECD MC. Rather surprisingly, the VwGH also instructed the BFG in the resumed proceedings to review the application of the provision modelled on Article 16 OECD MC as well:
"In the case under consideration, the following must also be noted with regard to the allocation rules of the tax treaty with Russia:
The final provision of the tax treaty with Russia reads:
'Done in duplicate at Moscow, this 13th day of April 2000, in the German, Russian and English languages, all texts being equally authentic. In case there is any divergency of interpretation between the German and the Russian texts, the English text shall be the operative one.'
In the English language version, Article 16 of the tax treaty with Russia reads:

2. 'DIRECTORS ÕFEES

Directors' fees and other similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.'
In the proceedings to follow, the BFG will also have to examine whether the same meaning can be derived from the Russian text of Article 16 as from the German text of this article ('Aufsichtsrats- und Verwaltungsratsvergütungen'). In view of the said final provision, in case of any divergencies, the decision would have to be based on the English version of Article 16 (see, on the one hand, Haubmann, SWI 2019, 175 and, on the other, Sutter/Burgstaller in Gassner/Lang/Lechner/Schuch/Staringer, Arbeitnehmer im Recht der Doppelbesteuerungsabkommen, 60 et seq)."
The decision of the VwGH must be criticised on several grounds: First, it is not understandable why the VwGH did not review the Russian text itself but instructed the lower court to do so. The review of this text is part of the interpretation and doing so would thus have been the task of the VwGH.[429] Secondly, the VwGH assumes - without providing any detailed explanation - that the English text can only be used if there are any divergencies of interpretation between the German and the Russian text and therefore implicitly, not as an authoritative text in its own right. It instructs the BFG "to

Kofler, Besteuerung von Geschäftsführern einer österreichischen GmbH nach dem DBA Russland, GES 2021, 257; Klokar, SWI-Conference: Managing directors of an Austrian GmbH in tax treaty law, SWI 2022, in print.

[429] See in detail Lang, SWI 2021, 575 (580).

examine whether the same meaning can be derived from the Russian text of Article 16 as from the German text of this article".

Obviously, any consideration of the English text would have to take place in a second stage and only under certain conditions: "In view of the said final provision, in case of any divergencies, the decision would have to be based on the English version of Article 16 […]."[430] As a result, however, the VwGH almost completely deprives the first sentence of the final provision of its meaning, since one can no longer speak of "all texts being equally authentic". Thus, according to the VwGH, the English text can be used only in exceptional cases – that is, when there are "divergencies" between the German and the Russian texts.[431]

Finally, what deserves particular criticism is the fact that the VwGH completely ignores that there is nothing to suggest that, upon the incorporation and translation of Article 16 OECD MC from the original English and French versions into German and Russian, the Contracting States intended to diverge from the meaning of the OECD MC. The rather mechanistical idea of tax treaty interpretation reflected in this decision is equally surprising:[432] The VwGH obviously believes that the BFG merely needs to examine whether the same meaning can be attached to the Russian text as to the German text and, in "case of divergencies […] the decision would have to be based on the English text of Article 16". The VwGH thus assumes that the BFG can perform the assigned task by way of a mere translation of the text and a subsequent comparison of the different language versions, so as to determine the meaning of Article 16 of the tax treaty between Austria and Russia in this manner. The only indication that the VwGH may not have wanted the BFG to merely limit itself to the text in the different languages are the literature references it provides: Though the literature referred to reaches different conclusions, what the quoted authors have in common is that they interpret the provision of Article 16 OECD MC or that of Article 16 of the tax treaty between Austria and Russia by making use of all possible interpretative methods.[433]

Similarly to Article 33 of the VCLT, the final provision of the tax treaty between Austria and Russia only addresses *one* aspect of the interpretation procedure: Both provisions deal exclusively with the wording of the treaty terms and the methodological approaches on how to reach a - common - understanding of the

[430] VwGH of 10 May 2021, Ra 2019/15/0095, 74 ÖStZB 373 (2021).
[431] Lang, SWI 2021, 575 (578 f).
[432] For further details, see Lang, SWI 2021, 575 (581 et seq).
[433] Haubmann, Behandlung von Geschäftsführerbezügen im DBA-Recht, SWI 2019, 170 (175);Sutter/Burgstaller, Der Manager im DBA-Recht, in Gassner/Lang/Lechner/Schuch/Staringer (eds), Arbeitnehmer im Recht der Doppelbesteuerungsabkommen (2003) 49 (60 et seq).

wording. The wording, however, is not the end of the interpretation but is only at its beginning:[434] According to Article 31 paragraph 1 VCLT, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Article 31 paragraph 3 VCLT thus emphasises that, in addition to the wording, the teleological and systematic interpretation play a role in the interpretation of international law treaties. Article 32 VCLT opens – albeit in a weaker form[435] – the path to historical interpretation.[436]. Finally, Article 31 paragraph 4 VCLT clearly demonstrates the sheer diversity of possibilities presented by the interpretation of the wording of a treaty: a special meaning shall be given to a term if it is established that the parties so intended.[437]

In order to establish the said intention of the Contracting Parties, it will be necessary to understand the formulations of the treaty in their context, against the background of their object and purpose, and in the light of historical development.[438] Therefore, the interpretation of the wording addressed by the final provision of the tax treaty between Austria and Russia and Article 33 VCLT is just *one* aspect of the interpretation procedure, to which no exclusive or overwhelming importance should be attached. Ultimately, interpretation is not about determining the meaning of a *text*, but about determining the meaning of a *legal norm*[439]

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[434] See already Lang, Auslegung von Doppelbesteuerungsabkommen und authentische Vertragssprachen, IStR 2011, 403 (407 et seq).

[435] Lang/Brugger, The Role of the OECD Commentary in Tax Treaty Interpretation, Australian Tax Forum 2008, 95 (98 et seq); see also Köck, Vertragsinterpretation und Vertragsrechtskonvention (1976) 95; Schwebel, May preparatory work be used to correct rather than confirm the „clear" meaning of a treaty provision?, in Makarczyk (ed), Theory of International Law at the Threshold of the 21st Century, Essay in honour of Krzysztof Skubiszewski (1996) 546 et seq.

[436] Shelton, Reconcilable Differences – The Interpretation of Multilingual Treaties, HICLR 1997/20, 611 (633); Engelen, Interpretation of Tax Treaties under International Law (2004) 335 et seq and 460; see also Vogel, The Influence of the OECD Commentaries on Treaty Interpretation, IBFD Bulletin 2000, 612 (614); Wattel/Marres, The Legal Status of the OECD Commentary and Static or Ambulatory Interpretation of Tax Treaties, ET 2003, 222 (228); Lang/Brugger, Australian Tax Forum 2008, 95 (98 et seq); Waters, The relevance of the OECD Commentaries in the interpretation of Tax Treaties, in Lang/Jirousek (eds), Praxis des Internationalen Steuerrechts, FS Loukota (2005) 671 (679).

[437] Vgl Ault, The Role of the OECD Commentaries in the Interpretation of Tax Treaties, Intertax 1994, 144 (146); who, as already Jacobs (Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference, ICLQ 1969, 318 [331 et seq]), considers Art 31 Abs 4 WVK as a "bridge" between Art 31 and Art 32 WVK; see also Hummer, "Ordinary" vs "Special" Meaning, ZÖR 1975, 87 (110 et seq).

[438] Gloria, Die Doppelbesteuerungsabkommen der Bundesrepublik Deutschland und die Bedeutung der Lex-Fori-Klausel für ihre Auslegung, RIW 1986, 970 (974); Prokisch, Fragen der Auslegung von Doppelbesteuerungsabkommen, SWI 1994, 52 (57); Engelen, Interpretation of Tax Treaties under International Law, 145 et seq.

[439] Lang, SWI 2021, 575 (582).

Concluding summary

The case-law of the BFH and the VwGH, the supreme tax courts in Germany and in Austria, on the treaty provisions modelled on Article 16 OECD MC puts great emphasis on the respective authentic languages. In the interpretation of the provisions of international treaties based on the rules of the OCED MC, one should not overvalue the importance attached to the authentic languages: The fact that the Contracting Parties merely translated provisions of the OECD MC in other - subsequently authentic - languages and otherwise incorporated a bilateral treaty without further ado, suggests that the Contracting Parties intended to attach the same meaning to the terms used in these provisions as the one resulting from the OECD MC. Consequently, an interpretation of these rules must resort to the OECD MC. When attempting to determine the meaning of this model provision on which the bilateral treaty provision is based, the only appropriate method to do so is to also consider its text in the original English and French language version. When a tax treaty only declares English but not French, or not even English as its authentic language, this should not represent an obstacle. When a closer look at the text of a provision in the authentic language of a treaty in its overall context reveals that it is a mere translation of the OECD MC, those attempting to interpret the provision can focus their attention on the English and French original right away. It would not be very convincing to interpret a provision modelled entirely on the OECD MC in a different manner in each tax treaty, depending on how the English and the French language version of the OECD MC was translated into the respective national language, simply because - more out of diplomatic practice - the corresponding texts were declared authentic in the respective treaty.

In the event that the supreme tax courts of Germany and Austria do not divert from the chosen course, one could consider adopting the proposal of *Rainer Prokisch* and translate the term "Member of the board of directors" into German as "Gesellschaftsorgan" in future treaties, or when existing treaties are revised.[440] This is, however, a lengthy alternative, which also carries the risk that the case-law on the tax treaties will become further established with the old formulations, and the courts will wrongfully attach different meanings to the various formulations.

[440] Prokisch, in: Vogel/Lehner, Doppelbesteuerungsabkommen (2021), 7th edition, Art 16 m.no. 9.

TAXING AWAY FOREIGN SUBSIDIES: HOW PILLAR TWO AND BEFIT MAY INTERFERE WITH NATIONAL SOVEREIGNTY

Prof. Dr. R.H.C. Luja[441]

1. Introduction

In 2022, the regulation of subsidies - including tax incentives - is no longer just a matter of national law, EU state aid law or international trade law. The academic year 2022/2023, in which Prof. Prokisch retires, is also the year in which new tax phenomena start casting their shadow over genuine national incentives, be it tax incentives or otherwise. This contribution will focus on how plans for an EU-wide corporate tax base ('BEFIT') and international agreement to secure a minimum level of taxation ('Pillar Two') might directly affect the granting of subsidies and tax incentives by EU Member States.

This contribution will focus on how to prevent parallel efforts to make the world more sustainable from colliding. Various efforts have been made to raise tax revenue and stop tax avoidance even to a point where such rules may hinder the pursuit of other sustainable development goals (SDGs) such as greening the economy.

Paragraph 2 will give two examples of subsidies that might be at stake: green incentives and emergency aid such as COVID-19 aid, as a stand-in for many other types of permissible subsidies governments might want to provide. Subsequently, paragraph 3 will address how Pillar Two may interact with subsidies enacted by national legislators or the EU itself and even lead to such subsidies being taxed by third countries. Paragraph 4 will focus on how a proposal for a European corporate tax might result in subsidies from one EU Member State being taxed by others as a result of formulary apportionment. It will also deal with the possible conflict between an equity allowance and Pillar Two. Paragraph 5 will address some possible answers to the problems mentioned, both unilateral (a claw-back mechanism) and multilateral (exclusive taxing rights for government subsidies). Some final remarks then follow in paragraph 6.

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2. Two examples

In recent international tax debates, discussions on tax incentives in the EU often focused on whether such incentives would violate the EU provisions on state aid as set forth in Article 107ff TFEU. In this contribution I will focus on the opposite, i.e. on generic incentives that stay outside the scope of state aid scrutiny and on selective subsidies and on tax incentives that would be tolerated in an EU state aid context ('compatible aid').

As part of the European Green Deal, the European Commission launched a programme called Fit for 55, which aims at reducing CO_2 emissions by 55% (down from 2005 levels) before 2030.[442] In the pursuit of many of these goals governments may well aid to stimulate various kinds of investments that may contribute to becoming green and carbon-neutral. Whatever the form of these investments may be, we should be aware that any corporate tax incentive will often result in some sort of tax reduction, either permanent (a superdeduction) or temporary (accelerated depreciation of green assets).[443]

In a non-tax context, one could consider the example of government subsidies in support of dealing with the consequences of COVID-19. The European Commission allowed Member States quite some leeway in this respect under the 'Temporary Framework for State Aid Measures To Support the Economy in the Current COVID-19 Outbreak'. We will come back to this in paragraph 3.2. Without addressing the large variety in subsidies and tax incentives under this framework, for now we should focus on what might happen with this kind of government support in the near future taxwise.

3. The OECD/G20 Inclusive Framework: Pillar Two

3.1 Compensatory taxation abroad

Pillar Two intends to safeguard a minimum level of taxation across the globe with regard to multinational groups with a consolidated turnover of at least € 750 million. Without going into the details of Pillar Two, one of its elements is the introduction of an income-inclusion rule (IIR) that would allow a state to impose a top-up tax on a parent entity to ensure that any profit of its subsidiaries subject to an effective tax rate of less than 15% would still be

[442] See https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/.

[443] This contribution does not deal with the question of whether corporate tax incentives would be the best type of incentive available to stimulate greening the economy; it just recognizes their existence.

subject to a tax equal to that minimum.[444] Should the parent company not be subject to such IIR as it may be located in a country that did not sign up to Pillar Two, there is a fallback option to levy such tax at the level of one or more of its subsidiaries (i.e., the undertaxed payment rule or UTPR). Bottom line is that effective taxation below 15% of overall profit (meeting a particular definition) would trigger actions by other jurisdictions. Within the EU, these Pillar Two rules are likely to end up in a Directive to ensure their application.[445]

In the OECD's 2020 Blueprint on Pillar Two there was an extensive discussion on how to treat subsidies (other than corporate tax incentives) under the new regime.[446] The OECD since published extensive commentary on the new tax base, which will be used to measure a minimum effective tax level. Without entering into the details of these Global Anti-Base Erosion (GloBE) Model Rules, what we do know is that the GloBE tax base will be based on financial accounting rules. Traditional government grants in general will be included in the tax base as reflected in IAS 20, as would be most (refundable) tax credits.[447] Emergency government assistance is at a limbo, as exempting it may lead to a lower effective tax rate.[448] The Blueprint indicated that further attention would be given to exempting such assistance from GloBE rules, where government aid would be limited in time and targeted to those affected by an external shock. The Blueprint also announced that the issue of government grants and tax incentives might be revisited after a few years, should the proposed treatment turn out to have unintended outcomes.[449] No further attention was given to government grants and emergency assistance in the 2021 Pillar Two model rules, so it seems the Inclusive Framework seems to be willing to take a wait-and-see approach before any measures are to be expected.[450] But, can we afford to wait?

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[444] EU Member States will be called upon to hand part of the proceeds of this top-up tax over to the EU. See the Proposal for a Council Decision amending Decision 2020/2053 on the system of own resources of the European Union, COM(2021)570 final of 22 December 2021, Article (1)(1)(c).

[445] Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union, COM(2021)823 Final of 22 December 2021.

[446] OECD/G20 Inclusive Framework on BEPS, Tax Challenges Arising From The Digitalisation of the Economy – Report on Pillar Two Blueprint, 2020, paragraph 3.3.7.

[447] International Accounting Standard 20 – Accounting for Government Grants and Disclosure of Government Assistance.

[448] Ibid., paragraph 3.3.8.

[449] Ibid., p. 70.

[450] See OECD/G20 Inclusive Framework on BEPS, Tax Challenges Arising from the Digitalisation of the Economy Global Anti-Base Erosion Model Rules (Pillar Two), OECD, 2021 (hereinafter: the 2021 GloBE Model Rules).

3.2 The COVID-19 example

What to think of a situation where emergency aid, for instance to compensate for COVID-19, would have been tax exempt. From a theoretical point of view one could argue that instead of granting an a-typical exemption the initial amount of subsidy should have included the tax due if one would like to compensate for it. From a practical point of view one might argue that if one provides a non-refundable grant to deal with an emergency, one would not expect the same government to come in later and tax part of it away. Here, tax principles may be at odds with political and social reality, especially in the midst of a crisis.

Essentially, governments that would exempt any financial assistance offered by them to those affected might face issues later under the new Pillar Two rules. The expedient solution of exempting subsidies and grants may backfire in such a case.

Issues like these are not new. They were raised, for instance, in the context of the first proposal to come to a sharing mechanism for corporate taxation in Europe. As Freedman and Macdonald phrased it back in 2008: "Would governments wish to make grants if a percentage of them was effectively to raise tax revenue for another [Member State]?". They also point out that it is questionable who would bear the effective tax burden if the grantor would have to raise the level of the grant to maintain the same post-tax benefit as intended. If the government issuing the grant or subsidy is also the taxing authority, then one might even question the usefulness and consistency of such approach, although admittedly taxing grants as such would initially fall within the concept of taxable profit as both authors stress.[451] Now, nearly 15 years later, these questions play exactly the same role in regard to Pillar Two.

With a strict implementation of Pillar Two, small and medium-sized enterprises are out of scope, so the issue is limited to the largest multinational groups which, at least in the preceding year, had a turnover of more than € 750 million. But even here we might see a situation where a major multinational may see revenue drop suddenly and turn into a loss, while still meeting Pillar Two thresholds that look back at meeting the threshold in two of the four preceding fiscal years.[452]

[451] J. Freedman and G. Macdonald, "The Tax Base for the CCCTB: The Role of Principles", in: Lang/Pistone/Schuch/Staringer (eds.), *Common Consolidated Corporate Tax Base (CCCTB)*, Linde 2008, p. 259.

[452] Article 1.1.1 2021 GloBE Model Rules.

3.3 Limited Personal Scope of Pillar Two: the Patent Box example

If Pillar Two is indeed implemented as strict as it is first proposed, i.e. limited to the largest companies in the world based on a turnover threshold, the actual impact of all of the above might be rather limited. Most subsidies that aim at providing income support or disaster compensation are often limited in size or focused on small and medium-sized enterprises. But this is not the case necessarily in respect to investment incentives at large.

In this context one should think of special tax treatment for royalties, often sold as an R&D-stimulus. Such special regimes are not necessarily limited to maximum amounts of qualifying income or to smaller companies. Here the question is whether countries should reconsider their current offering once Pillar Two is in place.

For example, a special tax rate for royalty income to stimulate R&D to be carried out by the company concerned may fall within the debatable limits of what is still regarded as acceptable tax competition if one meets the modified nexus requirement.[453] Views on whether regimes like patent boxes actually have the intended effect vary, but what we do know is that any tax incentive related to royalties received will effectively benefit those whose R&D has been successful. One might prefer incentives for R&D expenditure instead, as they will also benefit those that invest in R&D and fail, whose efforts may be essential to future successes and who equally create high-tech jobs and investment during the R&D period.

Whatever opinion one may hold towards patent boxes, what will countries with such boxes do once Pillar Two is introduced if they choose to hold on to them? Would one raise the effective tax rate of patent boxes to 15%? Or just for companies with a turnover of at least € 750 Million? Or, if qualifying royalties are only a part of the taxable income of such companies, should they include a claw-back provision that guarantees patent boxes not reducing the effective tax rate below 15% overall? If governments do not act at all, we are bound to see other countries stepping in with a compensatory tax.

In the EU, considerations like these may raise new issues. Applying a higher tax rate only to the largest companies from the onset may ironically result in state aid for small and medium sized enterprises, although one might argue that the introduction of Pillar Two could warrant a claw-back mechanism with the explicit and only aim to avoid compensatory taxation abroad. It would not be the Pillar Two Directive itself that would contain a legal basis for the clawback,

[453] See BEPS Action 5: Agreement on Modified Nexus Approach for IP regimes, OECD, 2015.

but EU Member States may use the Directive's existence as a justification for pre-emptive intervention with respect to companies covered by it.

4. The EU: From CC(C)TB to BEFIT

4.1 The R&D Superdeduction

In 2011, the European Commission attempted to introduce an EU-wide corporation tax base for larger enterprises, whose tax base would be determined on a consolidated basis and then be apportioned amongst EU Member States on the basis of a formula. This was the Common Consolidated Corporate Tax Base (CCCTB).[454] The proposal never made it. In October 2016, the European Commission made an renewed attempt to introduce an EU-wide corporation tax base (the Common Corporate Tax Base, CCTB), now with the possibility of consolidation and apportionment in a separate proposal for a Directive.[455] Also these proposals will be withdrawn and replaced by the so-called BEFIT proposal (Business in Europe: Framework for Income Taxation).[456] Even though a BEFIT text has not been published to date, there are some observations here that can be made based on the earlier proposals if we assume that despite the name change BEFIT will copy many of the elements of the CCTB. For this we will use the Council's latest Presidency compromise text from 2019 (hereinafter: CCTB proposal).[457]

Article 4(5) CCTB proposal included subsidies and grants in the definition of 'revenues' and hence made them part of taxable profit. To the extent they are linked to the acquisition, construction or improvement of depreciable fixed assets, the subsidies and grants would be excluded from the tax base based on Article 8(1)(A) CCTB proposal. Those subsidies would instead be taxed during the useful lifetime of the asset as depreciation would be lower due to the effect of the subsidy or grant on the initial book value.

The CCTB proposal included two extraordinary incentives. Article 9(3) CCTB proposal included a superdeduction of R&D costs up to 50% and up to 25% for the amount exceeding € 20 million. Article 11 introduced an Allowance for growth and investment ('AGI'), effectively allowing for the deduction of a defined yield on a qualifying equity base. Both provisions met resistance from

[454] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final of 11 March 2011.

[455] Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final of 25 October 2016 and Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2016) 683 final of 25 October 2016.

[456] Commission Communication Business Taxation for the 21st Century, COM(2021)251 FINAL of 18 May 2021, pp. 11-13.

[457] Presidency Compromise regarding COM(2016) 685 final, document number 9676/19 of 6 June 2019.

the European Parliament in 2018 (proposing to cap the superdeduction at € 20 million and exchanging the AGI for more limiting interest deductions), but the two of them were still included in the latest compromise proposal that never made it to the end.

4.2 The equity allowance (DEBRA)

The new BEFIT proposal is meant to include a debt-equity bias reduction allowance, better known by its acronym DEBRA, something of a substitute for the AGI. A final proposal for a stand-alone DEBRA is to be expected in 2022, to be introduced by Member States even if a later BEFIT proposal would not make it.[458] Whatever format DEBRA takes, it may have Pillar Two implications as any allowance for equity will lower the taxable profit but leave accounting profits untouched. For those Member States that hover around the 15% tax rate, any allowance creating a difference between accounting and taxing profit might already tip the scale towards triggering Pillar Two sanctioned interventions by other jurisdictions. This not only affects DEBRA but also other targeted incentives reducing the tax base, like superdeductions related to environmental-friendly investments or R&D.

So, if the DEBRA proposal would result in Member States offering a mandatory allowance, Member States whose only or lowest tax rate is already around 15% may need to consider building in a safeguard in order not to trigger Pillar Two and allow other countries to tax away its allowance. Within the EU this could be regulated by making a corresponding adjustment to the Pillar Two Directive for allowances similar to DEBRA, but third countries that apply the 'original' Pillar Two proposal are unlikely to follow suit.

4.3 BEFIT allocation rules

While there are still no clear details about BEFIT, what we do know is that the European Commission intends to apply a uniform corporate tax base and then will use formulary allocation rules to divide the taxable income amongst the EU Member States where the company is active.[459] Without addressing what those allocation rules should look like, we must realize that the allocation of profits via a formula means that there will no longer be a direct link between the EU Member State granting a subsidy that contributes to such profit and the EU Member State to which part of that taxable profit will be allocated.

[458] [Editorial note: The DEBRA proposal was published after this publication had been finalized; see Proposal for a Council Directive on laying down rules on a debt-equity bias reduction allowance and on limiting the deductibility of interest for corporate income tax purposes, COM(2022) 216 final of 11 May 2022.]

[459] Commission Communication Business Taxation for the 21st Century, see footnote 16.

Not only does BEFIT take the option off the table to leave subsidies untaxed for reasons of administrative expediency or societal acceptance, it also breaks the link between the State issuing the subsidy and the one taxing its proceeds. This as such is not new when it comes to subsidizing activities outside of one's jurisdiction, but it is rather new for the large majority of subsidies and grants that aim to stimulate certain activities at home or that compensate for local disasters, for instance.

5. Towards a clawback or exclusive taxation?

With Pillar Two on the rise, governments may see their fiscal sovereignty restricted, even in cases of subsidies or tax incentives that may serve an agreeable purpose. What Pillar Two essentially calls for is a domestic backstop, i.e., a clawback mechanism resulting in meeting a 15% minimum tax level to ensure that special tax treatment will not lead to a top-up tax abroad. This ensures that governments still have some control of their domestic tax expenditure. But such a unilateral solution would not suffice for EU Member States faced with DEBRA or BEFIT as they may prevent an effective clawback.

In terms of solutions one might consider alternative options. The first would be to exclude government subsidies and grants from taxable profit for the purpose of Pillar Two and BEFIT altogether and leave their taxation to the granting state, which may well decide to include them in the domestic tax base or not to tax them at all.

Secondly, a future multilateral instrument (MLI) - or future bilateral tax treaties for that matter - should assign exclusive taxing rights over government subsidies and grants to the contracting state whose (national or local) authorities issued them. 'Exclusive rights' would refer to the traditional concept and not to situations where countries would reason that a treaty-override might be warranted if income is not effectively subject to tax, especially given this particular source of income. Needless to say that corresponding EU Directives would need to include a similar carve-out, as bilateral treaties or an MLI may be of limited use amongst EU Member States. Any of these legal instruments would have to clearly delineate what qualifies as a subsidy or grant, as to avoid regular government payments for services rendered or goods bought from being included. Whether or not to allow an equity allowance to fit in might take a long time to debate.

From a political point of view awarding exclusive rights might have another advantage. Under Pillar Two States might be brought in a position where they would have to levy a top-up tax at parent level because of a subsidiary abroad whose profits stem from tax-exempt government grants. Governments might

like to avoid doing so if the nature of the foreign grant calls for it. Consider subsidiaries receiving research grants to find a cure for a particular disease, for instance.
There is far more to be said about exclusive taxing rights for subsidies and proper implementation might add quite some explanatory notes to a future Model Tax Convention; this contribution just serves to get the ball rolling again and to not let the discussion being parked as happened with Pillar Two. We just do not have the luxury to wait and see.

6. Conclusion

Whether it is the prospect of a 2030 Green deadline, a next pandemic or government action to deal with massive inflation or raised energy prices due to a war nearby, the last thing we need is governments being faced with other countries taxing away the financial interventions they deem necessary to deal with such challenges. Neither Pillar Two nor BEFIT deal with the fact that government expenditure and taxation should go hand in hand. We should reopen the debate and ensure that governments have exclusive taxing rights with respect to subsidies and grants they issue, whether they decide to tax them or not. This includes tax incentives meant as a stimulus for particular behavior, such as green investments. Going green at home should not raise an additional tax burden abroad. While a sustainable economy needs sufficient tax revenue, one SDG should not hinder another unnecessarily.
Pillar Two intends to have a limited scope and only affect the largest companies around the globe. For this reason one could take the view that the risk of subsidies being taxed abroad is a relatively minor issue, for now. The problem is that within the EU BEFIT will also bring smaller businesses into scope, thereby increasing the urgency to deal with this matter. Also, if DEBRA is to survive Pillar II scrutiny, further action may be necessary depending on its final design. Whether or not DEBRA will be adopted at all is still to be seen. And, obviously, while increasing corporate tax rates would reduce the likelihood of triggering IIR or UTPR top-up taxes even when granting generic or targeted incentives, it is no systemic solution to the matter at hand.

THE SCHUMACKER-DOCTRINE STILL VERY MUCH ALIVE IN THE NETHERLANDS

Prof.dr. G.T.K. Meussen[460]

1. Introduction

My dear colleague Rainer Prokisch, residing in Germany and working at Maastricht University in the Netherlands, is the perfect example of a frontier working who falls under the scope of the Schumacker-doctrine as developed by the Court of Justice of the European Union (CJEU). Because of the deductibility of mortgage interest on personal dwellings in the Netherlands, that was expanded by the CJEU to non-residents in the *Renneberg*-case, the Schumacker-doctrine is still very much alive in the Netherlands. It led to a steady flow of case law in the Netherlands, of discussions concerning the legal implementation of the doctrine in the Dutch Individual Income Tax Act 2001 and raises a number of unanswered questions. In this contribution I will shed my light on a number of these issues.[461]

2. Schumacker in all its simplicity

The Schumacker-case was a really straight forward case of a frontier worker, working in Germany and living in France, while his spouse did not earn any income. In the famous Schumacker-case[462] the CJEU ruled:

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> *application of rules of a Member State under which a worker who is a national of, and resides in, another Member State and is employed in the first State is taxed more heavily than a worker who resides in the first State and performs the same work there when, as in the main action, the national of the second State obtains his income entirely or almost exclusively from the work performed in the first State and does not receive in the second State sufficient income to be subject to*

[460] Professor of tax law at Radboud University Nijmegen, the Netherlands.
[461] Parts of the case law dealt with in this essay were also highlighted in: G.T.K. Meussen, De Europeesrechtelijke houdbaarheid van art. 7.8 Wet IB 2001, FTV 2021/28.
[462] CJEU 14 February 1995 (Schumacker), C-279/93, ECLI:EU:C:1995:31.

taxation there in a manner enabling his personal and family
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Delivered by eleven judges, one might perceive that the judgement was carefully concluded after long deliberations. But the result of conceiving a newly developed doctrine in case law, will automatically mean that a flow of subsequent new cases will emerge, in which the CJEU has to answer all kind of detailed follow up questions. This happened in the aftermath of the Schumacker-case as well. Now, in the year 2022, so 27 years after the Schumacker-ruling was issued, there are still a number of unanswered questions.

The Schumacker-doctrine is highly controversial, and evolves around the key words 'discrimination', 'hindrance' and 'disparity'. It is surely a reasonable and humane ruling, but the fact that under certain circumstances, the work state has to provide a non-resident taxpayer with a resident tax treatment, is still breathtaking. Opponents of the Schumacker-ruling argue that this is a case of a disparity, for which the TFEU does not provide a remedy. The controversy evolves around the fact how to determine the word 'discrimination' in a non-resident context. Although residents and non-residents are as a starting point not in the same situation, so discrimination cannot arise, the CJEU has ruled that in certain factual circumstances, they are in the same situation. And then the issue of violation of equal treatment resulting in discrimination may arise.

On the basis of the so-called Schumacker-doctrine, in a situation where a non-resident taxpayer receives no significant income in the Member State of residence and derives the major[463] part of his taxable income from an activity pursued in the Member State of employment, the latter has to give him a 'resident treatment', meaning that the state of employment has to take the personal and family circumstances of the non-resident individual into consideration as if he was a resident. Although as a starting point residents and non-residents are not in the same position and therefore discrimination is not at hand, discrimination arises in such a situation according to the CJEU from the fact that without applying this doctrine, the personal and family circumstances of the taxpayer are taken into account neither in the State of residence nor in the State of employment. As the resident state effectively cannot take the personal and family circumstances of the taxpayer into consideration due to a

[463] The word 'major' has been modified by the CJEU in subsequent court cases.

lack of income, the source state is obliged to do so, under the relevant income tax rules of the source state.

As a result of subsequent court cases, there is now a general consensus that the Schumacker-doctrine applies if the worker has no *or not sufficient* taxable income in the resident state for this state to make it possible to take the tax aspects of his family and personal situation into consideration.

3. The Renneberg-case: deduction of mortgage interest in relation to a personal dwelling[464]

The *Renneberg* case[465], a Dutch case, expanded the Schumacker-doctrine to deduction of mortgage interest in relation to a personal dwelling. In the Netherlands, mortgage interest is tax deductible for income tax purposes. The Renneberg-case focuses on a situation of a non-resident, who works in the Netherlands and who lives in Belgium. He owns a personal dwelling in Belgium in which he also resides. The dwelling is financed by a mortgage from a Netherlands resident bank. In the contested years, 1996 and 1997, Renneberg was employed in the public service by the Netherlands municipality of Maastricht. During those two years he received his entire work related income in the Netherlands.

The question is what elements of a national income tax system exactly fall within the scope of 'personal and family circumstances'. One could defend the opinion that source-related deductions fall outside the scope of personal and family circumstances. That family and personal circumstances therefore are all these tax elements that manifest themselves at a level outside or 'above' a source of income. Elements like family, children, excessive health costs, alimony payments, deductible gifts to charitable institutions, etc.

The CJEU, however, points at paragraph 34 of its judgment in the Lakebrink and Peters-Lakebrink case stating that personal and family circumstances refer to 'all the tax advantages connected with the non-resident's ability to pay tax which are granted neither in the State of residence nor in the State of employment.'

[464] See also: Gerard T.K. Meussen, Renneberg: ECJ unjustified expands its Schumacker-doctrine to losses resulting from the financing of a personal dwelling, European Taxation, Volume 49, Number 4, 2009, p. 185-188.

[465] CJEU 16 October 2008, C-527/06 (Renneberg), ECLI:EU:C:2008:566.

Without giving a material definition of the ability to pay, the CJEU implicitly acknowledges that deduction of mortgage interest regarding a personal dwelling in the case of Renneberg has an impact on the ability to pay and therefore falls under the Schumacker-doctrine. This, however, leads to a very questionable outcome, primarily in the border regions of the Netherlands, in Belgium and in Germany. Because workers working in the Netherlands and living in Belgium or Germany can benefit from the Dutch tax system and can deduct the mortgage interest from the income while workers working – and living – in Belgium or Germany cannot do so or only in a very limited matter (on the basis of the Belgium or German Income Tax Act), the cross-border workers can lend more money and can therefore afford a higher prize for their personal dwelling in Belgium or Germany than Belgian or German residents working and living in the same country. This leads to disruptions on the real estate market causing animosity between different nationals living in the border region. One may encompass that the CJEU looked at the Renneberg-case from a very technical-juridical perspective, while failing to see the impact on the societies in the border regions. Furthermore, the Renneberg-ruling is in my perception a wrong ruling delivered by the CJEU, as the deductibility of mortgage interest can be seen as a subsidy, that is given through the tax system. But in fact it has nothing to do with taxation. In essence it is a subsidy for owners of a personal dwelling. As the personal dwelling is situated within the territory of a state, it is a state matter to give such a subsidy to all residents, irrespective of their nationality.

4. The Spanish football agent case

In the X-case[466], in the Netherlands also referred to as the Spanish football agent case, a taxpayer lived in Spain, where he had a personal dwelling in Spain financed with a mortgage. The taxpayer had no taxable income in Spain and derived his income from taxable sources in the Netherlands and Switzerland. The CJEU ruled that the deduction of mortgage interest, on the basis of the Schumacker-doctrine, had to be divided between the Netherlands and Switzerland, pro rata parte equivalent to the amount of income taxable in the respective countries. The personal and family considerations have to be taken in consideration in the respective work states on the basis of their national income tax legislation. So if in Switzerland mortgage interest is not tax deductible, this part of the deductibility fails as a result of a disparity. And if Switzerland were to have a possibility to deduct mortgage interest on a

[466] CJEU 9 February 2017, C-283/15 (X), ECLI:EU:C:2017:102.

personal dwelling from for instance labour income, one may wonder whether Switzerland being a third state, can be obliged under EU law, to provide for a resident tax treatment. This obligation may arise under the Free Movement of Persons Agreement (FMA)[467,468].

The CJEU argued that if it would rule differently, the personal and family circumstances would be taken into consideration nowhere. Not in Spain because the taxpayer receives no taxable income in Spain. And not in the respective work states Netherlands and Switzerland either, because the taxpayer is a non-resident in these states. And this result cannot be accepted according to the CJEU. Therefore, the ruling in the X-case is very much in line with the Schumacker-doctrine, but with far reaching consequences for the tax systems of the Member States, especially that of the Netherlands.

5. Obligatory application of resident treatment to non-residents

With regard to the implementation of the Schumacker-doctrine in their national income tax legislation, some Members States still maintain a system where the non-resident taxpayer can choose to be treated as a resident taxpayer, eligible for all the tax benefits related to residency. In a recent Portuguese case, the MK-case[469], the CJEU once again stated that such a system is in breach of the TFEU. Previously, the CJEU already judged comparably in the *Gielen*case[470].

6. The income requirement in partner situations

Regarding a number of Schumacker-cases that have emerged in the Netherlands in recent years, one question was whether the income requirement should be dealt with at the individual level or, in case of marriage or partners actually living together, at the level of the partners taken the combined income of both partners into consideration. A case dating back to the year 2019[471] concerns two unmarried cohabiting partners who cohabit without

[467] Swiss Confederation; European Union, Agreement 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. Free Movement of Persons Agreement (21 June 1999). L 114.
[468] See also: Julian Kläser, The Swiss Confederation and the European Union: Their constitution systems, bilateral agreement-based constitutional cooperation and a Swiss company tax regime facing challenges of constitutional and legal feasibility, Universitaire Pers Maastricht, 2017.
[469] CJEU 18 March 2021, C-388/19 (MK), ECLI:EU:C:2021:212.
[470] CJEU 18 March 2010, C-440/08 (Gielen), ECLI:EU:C:2010:148.
[471] Dutch Supreme Court 8 November 2019, nr. 18/03539, ECLI:NL:HR:2019:1722.

being married in Belgium. The woman owns a personal dwelling in Belgium, which is financed by a mortgage, and she only receives Belgian income. The man is an entrepreneur, with 90% of the profit being allocated to the Netherlands and 10% to Belgium. The man wants to deduct the full mortgage interest on the Belgian home from his income, which the Dutch tax inspector refuses. Is this a prohibited discrimination under the TFEU?

The Dutch Supreme Court ruled that this was not the case, without asking the CJEU for a preliminary ruling. The Supreme Court ruled that the Schumacker-doctrine must be applied at the family level and concluded that the woman has sufficient Belgian income to take into account the personal and family situation of those involved in Belgium. The fact that Belgium only has a limited possibility to deduct mortgage interest is a disparity that falls outside the scope of EU law.

I can accept this ruling of the court, as both partners were not married, were not registered partners and had not concluded a partnership agreement.

Another case of a married couple was decided by the Dutch Supreme Court in the year 2021. The couple is married in community of property and both spouses lived in their personal home in Belgium that is financed by a mortgage. The man only receives Dutch sourced income and the wife exclusively Belgian sourced income. The Dutch tax inspector, on the basis of the Schumacker-doctrine, allows for the husband a deduction of mortgage interest of 50%, equivalent to his ownership of the personal dwelling. The taxpayer, however, claims a 100% deduction, stating that if both taxpayers would have been taxpayers resident in the Netherlands, they could have divided the mortgage interest deduction among them on the basis of a special provision in the Dutch Individual Income Tax Act[472], in any possible ratio, which leads to an optimized tax situation. This instrument leads to the highest tax advantage irrespective of the civil ownership of the personal dwelling. So even if one fiscal partner owns the house, the other fiscal partner can deduct the full mortgage interest if taxpayers choose to do so, because this leads to the highest tax advantage. The contested taxpayer, therefore, claims that he is subject to a discriminatory treatment in the Netherlands, compared to a resident taxpayer.

AG Niessen advised the Dutch Supreme Court to refer the case for a preliminary question to the CJEU.[473] The Dutch Supreme Court, however, overruled this

[472] Article 2.17, paragraph 5 Dutch Individual Income Tax Act 2001.
[473] AG Niessen 24 March 2021, nr. 20/02890, ECLI:NL:PHR:2021:285.

request and decided the case unilaterally.[474] The decision is very brief and, as so often happens, the Dutch Supreme Court did not refer to the opinion of the AG at all.[475] The Supreme Court only generally referred to the Schumacker-doctrine, acknowledging that based on the facts of this case, the doctrine does not apply. The fact that mortgage interest is not deductible in Belgium is a disparity that the Dutch state does not have to mend. Korving[476] rightly concludes that this case of non-referring to the CJEU is a missed opportunity to receive more guidance of the CJEU in this matter.

7. Sufficient income in the work state

A number of court cases, primarily concerning pensioners, evolves around the question whether the taxpayer has obtained sufficient income in the residence state, following which the work state does not have to take into account the taxpayer's personal and family circumstances. It should be noted that although the Schumacker-case concerned the free movement of workers, the Schumacker-ruling in the end relates to all types of income. Relatively recently, the lower tax court of Zeeland-West-Brabant[477] ruled on a Dutch retiree who had emigrated to France. In France, he owned a house which was burdened with a mortgage. He enjoyed a pension of € 31,959 the taxation of which has been allocated to the Netherlands, and an old-age state pension of € 13,676, the taxation of which has been allocated to France. The French income falls below the French threshold of € 14,771 and is therefore effectively not taxed in France. The question was raised whether the taxpayer was entitled to a resident treatment in the Netherlands based on the Schumacker-doctrine, resulting in the deduction of the mortgage interest on his French dwelling in the Netherlands? And, in addition to that, whether he could also deduct his alimony payments and excessive medical costs in the Netherlands? The lower tax court ruled that this is indeed the case. The issue of sufficient income in the resident state must, when litigating in the source state, be judged on the basis of national tax legislation of the resident state.[478] In that respect, the entire amount of taxable income in the residence state has to be taken into consideration.

[474] Dutch Supreme Court 8 October 2021, nr. 20/02890, ECLI:NL:HR:2021:1472.
[475] It should be noted that there is no formal legal obligation in Dutch law to do so.
[476] J.J.A.M. Korving, annotation regarding Dutch Supreme Court 8 October 2021, NTFR 2021/3380.
[477] Lower tax court of Zeeland-West-Brabant 28 January 2021, nr. 20/4763, ECLI:NL:RBZWB:2021:239.
[478] See also Lower tax court of Zeeland-West-Brabant 20 November 2020, BRE-19_2857, ECLI:NL:RBZWB:2020:5786.

Another interesting example in this regard is a recent ruling of again the lower tax court of Zeeland-West-Brabant[479]. This concerns a single taxpayer who lives in Belgium, owns a personal dwelling there and pays € 29,822 on mortgage interest. He receives a salary from employment that has been allocated to the Netherlands for tax purposes of € 77,880 and also possesses considerable private assets (assets of € 1,607,729 and debts of € 171,731). On the basis of the Dutch capital yield tax, which leads to a deemed fictitious income, this income is high enough to take the personal circumstances into consideration. However, according to Belgian tax law, the taxpayer as such has such a low Belgian income in relation to his capital, that he cannot fully effectuate his housing bonus in Belgium and, in addition, his tax free sum is higher than his effective taxable income in Belgium. For that reason, the Dutch lower tax court awarded him the full mortgage interest deduction (or rather the full negative income from the owner-occupied home) in the Netherlands.

8. Income declaration of the resident state

To be able to be treated as a resident taxpayer in the work state, the taxpayer has to provide an income declaration given by the residence state. On the basis of this declaration, the tax inspector of the work state can determine whether the *Schumacker* criteria in relation to the income are met. This requirement is laid down in Article 7.8, paragraph 6 Dutch Individual Income Tax Act 2001. The lower tax court of The Hague[480] ruled that if a taxpayer fails to provide such income declaration, the taxpayer is not eligible for a tax treatment as a resident. One may question whether such a requirement is in violation with EU law, as there are all kinds of possibilities for Member States for exchanging information under the Directive on Administrative Cooperation (DAC). Obtaining information for the taxpayer himself is always burdensome, as experiences in the border region show, because the taxpayer has to go to the local tax office to obtain some kind of formal determination of the income taxable in the residence state. Not all tax administrations in, for instance, Belgium and Germany are digitalized on such a level, that the taxpayer can obtain the income declaration digitalized through the internet. An EU Expert Group in which I participated published a report some years ago on ways to tackle cross-border tax obstacles facing individuals within the EU.[481] From the research conducted by the group it turns out that taxpayers even today face a lot of practical obstacles, for instance language problems, forms that are not

[479] Lower tax court of Zeeland-West-Brabant 20 November 2020, BRE-19_2857, ECLI:NL:RBZWB:2020:5786.
[480] Lower tax court of The Hague 19 april 2021, nr. 19_2518, ECLI:NL:RBDHA:2021:4083.
[481] https://op.europa.eu/en/publication-detail/-/publication/4bfee942-ca41-11e5-a4b5-01aa75ed71a1.

harmonized, difficulties in communication, etc. As the CJEU obliges Member States to apply the Schumacker-treatment, it is my view that the income verification should take place at the Member States' level and should not be burdened upon the shoulder of the taxpayer. In other words, the Dutch income declaration requirement to my perception is in violation of EU law.

9. The Dutch implementation of the Schumacker-ruling

The so-called Schumacker-doctrine, whereby a Member State under certain circumstances must give a non-resident the tax treatment a resident would be entitled to, has been laid down by the Dutch legislator in Article 7.8 Dutch Individual Income Tax Act 2001, and is worded as a so-called 'qualified foreign tax liability'. The standard for such a resident tax treatment as laid down in the aforementioned Article 7.8 is on the one hand broader than is required by EU law, and on the other hand too limited and therefore in conflict with EU law, e.g. the TFEU. Article 7.8 states as a requirement that the taxpayer has to earn his entire or almost entire income (i.e., 90% or more) in the Netherlands. As Van den Broek[482] rightly pointed out, the CJEU has never stated a percentage of income that must be earned in the country of employment in order to oblige that country to provide resident treatment to the non-resident.

The decisive factor is whether the taxpayer has such an amount of income in his country of residence that his personal and family situation can be taken into account. Therefore, a Dutch non-resident taxpayer with a worldwide taxable income from work of, for example, € 1,000,000 of which € 100,000 is taxable in the country of residence, can claim resident treatment in the Netherlands under Article 7.8 Dutch Income Tax Act 2001. However, this is not mandatory under EU law, because the income in the country of residence is sufficient to take into account the tax benefits that arise from the personal and family situation of the taxpayer. This leads to the peculiar situation that in such a situation, the taxpayer can claim the tax advantages of his personal and family situation twice, i.e. in the residence state as well as in the Netherlands.

On the other hand, a Dutch non-resident taxpayer with a worldwide income of, for example, € 20,000 of which € 5,000 is attributable to the country of residence, does not qualify for application of Article 7.8 Dutch Individual Income Tax 2001, while resident treatment is mandatory under EU law. One may wonder when the European Commission is going to start an infringement

[482] J.J. van den Broek, 'Meneer Schumacker of het sprookje van het 90%-criterium', NTFR 2016/2041.

case against the Netherlands, in order to bring Article 7.8 Dutch Individual Income Tax Act 2001 in line with CJEU case law.

Article 21bis Executive Decree Individual Income Tax 2001 in this respect only offers a limited extension of Article 7.8 Dutch Income Tax Act. This article states that non-resident pensioners and other taxpayers with a comparable (old age) retirement income can benefit from a resident tax treatment if they can prove that they do not receive enough income in the resident state to take into consideration their personal and family circumstances. As stated, this requirement should be extended to all taxpayers, irrespective of the type of income.

Another issue is the implementation of the aforementioned Spanish football agent case into the Dutch Individual Income Tax Act 2001. Up until today, Article 7.8 Dutch Individual Income Tax Act 2001 still has not been changed as a result of this CJEU ruling. The ruling has been laid down in a separate decree of the Dutch State Secretary for Finance[483], but one may imagine that this is not enough because a decree can also be annulled by the State Secretary without intervention of parliament and this ruling therefore has to be laid down in a formal bill of law. Also in this respect the Netherlands might expect an infringement case initiated by the European Commission.

10. Conclusions

The CJEU Renneberg-ruling has unjustly extended the Schumacker-doctrine to the deduction of mortgage interest. This leads to the curious situation that the Dutch tax system is subsidising foreign real estate, e.g. foreign personal dwellings. The deduction of mortgage interest is to be seen as a subsidy that runs through the tax system, but in essence has no relation to taxation as it is a pure subsidy. And a subsidy for real estate should only be provided by the state in which the real estate is situated.

Up to the year 2022, the Renneberg-ruling has led to a flow of follow up jurisprudence of specific Schumacker issues in the Netherlands. There is also considerable controversy concerning the way the Dutch tax legislator has implemented the Schumacker-doctrine in Article 7.8 Dutch Individual Income Tax Act 2001. Therefore, the Schumacker-doctrine as such is very much alive in the Netherlands including the EU law discussions around this issue. Especially

[483] Decree of 3 December 2019, nr. 2019-184103, State gazette 2019, 66192.

the Renneberg-ruling has gained disapproval from the various successive Dutch governments. This can also be derived from the reluctance with which the Dutch tax legislator is implementing changes in Article 7.8 Dutch Individual Income Tax Act 2001. He only comes into action if absolutely necessary. But rulings of the CJEU are final and have to be accepted from a legislative perspective, whether one likes the ruling or not.

My dear colleague Rainer Prokisch is officially retiring as full professor of international tax law at Maastricht University. But I cannot imagine that this is a real retirement. I presume that Rainer, with his energy and dedication to international tax law, will continue to publish and lecture. That is a good thing for tax science in general but also for himself on a personal level. Work and intellectual debate keeps the mind and body young. In that sense, I wish Rainer all the best for the future.

ABUSE, PROPORTIONALITY AND THE BURDEN OF PROOF IN CJEU'S CASE LAW ON DIRECT TAXATION

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1. Introduction

Abuse is one of the core issues in EU direct tax matters. Much has been written over the past years.[485] The discussion on the interpretation and application of the different elements of the anti-abuse clauses appears to be settling. However, an equally fascinating discussion appears to be emerging: in applying anti-abuse provisions, who faces the burden of the proof of abuse: the taxpayer or the tax authority?[486]

Among the different research questions that could be addressed, one of the most interesting ones appears to be the following: what guidance can one extract from the direct tax case law of the Court of Justice of the European Union in what concerns the distribution of the burden of proof in abuse situations?

This study addresses that research question. It solely focuses on direct taxation and the application of anti-abuse provisions.[487] It will purposedly adopt a wide

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[485] For a revision of the discussion see J.F.P. Nogueira, Abuso de Direito em Fiscalidade Directa - A emergência de um "novo" operador jurisprudencial comunitário [Abuse in European Tax Law - The emergence of a new european concept], Revista da Faculdade de Direito da Universidade do Porto, Ano VI, Coimbra Editora 2009, pp. 233-299. See, merely as illustration of those discussions in EU direct taxation, A. Zalasiński, The Principle of Prevention of (Direct Tax) Abuse: Scope and Legal Nature – Remarks on the 3M Italia Case, 52 Eur. Taxn. 9 (2012); D. Weber, Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the ECJ – Part 1, 53 Eur. Taxn. 6 (2013); I. Mitroyanni, Chapter 2: European Union in GAARs – A Key Element of Tax Systems in the Post-BEPS Tax World (M. Lang et al. eds., IBFD 2016); P. Piantavigna, Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, despite Linguistic Discrepancies, 9 World Tax J. (2017); L. Romanelli, The French Anti-Abuse Rule Implementing the EU Parent-Subsidiary Directive (90/435) is Contrary to EU Law, 58 Eur. Taxn. 1 (2018), sec. 2. O.C.R. Marres & I.M. de Groot, Combatting Abuse by Conduit Companies: The Doctrine of Abuse under EU Law and Its Influence on Tax Treaties, 61 Eur. Taxn. 8 (2021); and, L. De Broe. & S. Gommers, Article 29: Entitlement to Benefits (European Union) – Global Tax Treaty Commentaries.

[486] See, in the framework of the principal purpose test of the OECD MC, S. Landsiedel, The Principal Purpose Test's Burden of Proof: Should the OECD Commentary on Article 29(9) Specify Which Party Bears the Onus?, 13 World Tax J. 1 (2021).

[487] Even though, also on direct taxation, there is an important stream of case law of the Court dealing with the burden of proof of the requirements laid down by *prima facie* discriminatory domestic tax legislation. See R. Seer & I. Gabert, European and International Tax Cooperation: Legal Basis, Practice, Burden of Proof, Legal Protection and Requirements, 65 Bull. Intl. Taxn. 2 (2011).

concept of burden of proof, comprising all rules that deal with producing or evaluating evidence as well as the allocation of the respective burden.[488] However, it will focus on the subject that has to provide evidence of the existence of abuse, leaving aside the interesting intertwined questions of determining the object of that proof (i.e., what is abuse and what are its internal elements)[489] and the standard of that proof (i.e., the degree or intensity of the proof that has to be provided.

The discussion can be approached on both administrative and judicial levels. This research will focus on the onus in the framework of administrative proceedings, even if admitting that the discussion is also relevant for the judicial stage.

The article focuses on the guidance that may be extracted from the case law on direct taxation, excluding, at this stage, the consideration of other areas.[490] It will interchangeably use the notions of abuse and avoidance and the notions of burden and onus of proof.

2. Relevance

The burden of proof is, in practice, one of the most relevant issues of any legal adjudication system. It serves nothing holding a protected subjective legal position if one is not able to produce or provide the evidence needed to exercise it.

Despite its importance, there is no consensual system or universal regarding the distribution of the burden of proof. On the one hand, we find systems in which the burden is left to the party claiming the fact or entitlement; on the other hand, there are systems in which the burden is left to the party that has the knowledge or access to a certain fact.

In direct tax matters, the issue is particularly relevant in abuse cases. On the one hand, abuse entitles tax authorities to requalify a certain entity or transaction and they are those primarily interested in its proof; on the other hand, and particularly when abuse entails both an objective and a subjective element, the taxpayer is the one in the best position to provide evidence of both elements.

Accordingly, and in the absence of a universal, ascertaining who has the onus of the proof of abuse is a matter of interpretation of the *sub judice* rule that is

[488] K. Drüen, and D. Drissen, Burden of proof and anti-abuse provisions in: G. Meussen, The Burden of proof in tax law, EATLP series, IBFD, 2013, p. 27.

[489] See Nogueira, supra n. 485 and the reconstitution of the case law on the subjective and objective element. See also A.J. Martín Jiménez, Towards a Homogeneous Theory of Abuse in EU (Direct) Tax Law, 66 Bull. Intl. Taxn. 4/5 (2012) and C. Valério, Applying the OECD Principal Purpose Test in Accordance with EU Law: An Analysis of the Scope, Burden of Proof and Effects, 61 Eur. Taxn. 11 (2021).

[490] However, noting that such case law may provide important guidance for the area of direct taxation.

being interpreted or applied. The situation becomes more difficult to address when applying general principles, unwritten clauses, or fuzzy concepts since no wording can be relied upon as guidance for such heuristic or hermeneutic exercise.

The Court of Justice of the European Union (CJEU) has, for many years, worked with the unwritten principle of prohibition of abusive practices.[491] Moreover, and when assessing the compatibility of domestic law with EU law, it often refers to the unwritten 'justification of fight against tax avoidance and evasion',[492] also formulated as 'fight against tax avoidance'[493], prevention or risk of 'tax avoidance'[494] or fight or prevention of 'abuse'[495] or of 'abusive practices'[496], 'the need to prevent tax evasion and avoidance',[497] to prevent 'tax evasion and abuses',[498] to prevent or combat 'tax evasion'[499], to combat 'fraud and tax evasion'[500] or to prevent 'fraud and abuse'.[501] In both clusters (unwritten principle and avoidance justification), the CJEU has provided *obiter dictae* that appear to provide relevant guidance on the burden of proof of abuse.

Any analysis of this research question should start with a careful mapping and revision of the CJEU's case law in this respect. This will be done in the following section.

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[491] From a conceptual perspective, the author considers important to distinguish between the concepts of planning, avoidance and evasion following the categorization already provided in a prior article. See P. Pistone, et al., Abuse through the Use of Shell Companies and Arrangements for Tax Purposes in the European Union: Feedback on the EU Consultation by the IBFD Task Force on EU Law, 4 Intl. Tax Stud. 7 (2021), section 2 entitled "[c]onceptual issues".

[492] CJEU 20 January 2021, C-484/19 (Lexel), ECLI:EU:C:2021:34, para. 48.

[493] CJEU 13 March 2007, C-524/04 (Test Claimants in the Thin Cap Group Litigation), ECLI:EU:C:2007:161, para. 71.

[494] CJEU 16 July 1998, C-264/96 (Imperial Chemical Industries / Colmer), ECLI:EU:C:1998:370, para. 26; and, CJEU 21 December 2016, C-593/14 (Masco Denmark and Damixa), ECLI:EU:C:2016:984, para. 44.

[495] CJEU 4 December 2008, C-330/07 (Jobra), ECLI:EU:C:2008:685, para. 35.

[496] Thin Cap Group Litigation, supra n. 10, para. 71; CJEU 17 January 2008, C-105/07 (Lammers & Van Cleeff), ECLI:EU:C:2008:24, para. 28; and, CJEU 23 April 2008, C-201/05 (Test Claimants in the CFC and Dividend Group Litigation), ECLI:EU:C:2008:239, para. 77.

[497] CJEU 3 October 2013, C-282/12 (Itelcar), ECLI:EU:C:2013:629, para 35; CJEU 13 November 2014, C-112/14 (Commission/United Kingdom), ECLI:EU:C:2014:2369, para. 24; and, CJEU 26 February 2019, C-135/17 (X (Controlled companies established in third countries)), ECLI:EU:C:2019:136, para. 73.

[498] CJEU 7 September 2017, C-6/16 (Eqiom and Enka), ECLI:EU:C:2017:641, para. 30.

[499] CJEU 12 December 2002, C-324/00 (Lankhorst-Hohorst), ECLI:EU:C:2002:749, para. 34 and 37; CJEU 11 October 2007, C451/05 (ELISA), ECLI:EU:C:2007:594, para. 80 and 83; CJEU 5 July 2012, C-318/10 (SIAT), ECLI:EU:C:2012:415, para. 36; CJEU 24 November 2016, C-464/14 (SECIL), ECLI:EU:C:2016:896, para. 58; and, CJEU 30 January 2020, C-725/18 (Anton van Zantbeek), ECLI:EU:C:2020:54, para. 32.

[500] Eqiom, supra n. 15, para. 63.

[501] CJEU 20 December 2017, C-504/16 (Deister Holding), ECLI:EU:C:2017:1009, para. 56.

3. Revision of the Court's case-law abuse and the burden of proof

3.1 Introduction

According to some authors, the CJEU's case law on direct tax law appears inconsistent, not to say contradictory, in what concerns the burden of proof.[502] Whereas in some decisions, the CJEU appears to place the burden of abuse on taxpayers, in others, the burden is moved to tax authorities. The required level of evidence would also be inconsistent.

The following sections will map *obiter dictae* of direct tax decisions dealing with the application of anti-abuse provisions in which the CJEU provides statements that could be related with the burden of proof. Instead of following a chronological order, the analysis will group the citations *ratione materiae* by quoting the first (or one of the most representative) case(s) in which the CJEU formulates a certain position and then by referencing (without any attempt of exhaustiveness) other cases where a similar view is taken.[503] The examination will start with citations in which, apparently, the burden of proof of abuse is left to tax authorities moving, sequentially, to cases where the burden is apparently placed on the taxpayer.

3.2 Burden on the side of tax authorities

3.2.1 Identifying the relevant obiter dictae

First of all, one should note that not all CJEU transcripts on these matters should be considered for ascertaining the CJEU's view. For instance, in *SGI*,[504] one paragraph appears to place the burden of proof with the tax authorities as states: "the burden of proof as to the existence of an 'unusual' or 'gratuitous' advantage within the meaning of the legislation at issue in the main proceeding rests with the national tax authorities".[505] And, only when such would be considered demonstrated could the referring court check if "national legislation such as that at issue in the main proceedings is proportionate to the set of

[502] See A.W. Ravelli & F. Franconi, Numerous EU Member States are in Breach of EU Law by Requiring Taxpayers to Demonstrate Absence of Abuse, 61 Eur. Taxn. 10 (2021) and Martín Jimenez, supra n.6, section 2.2.

[503] To ensure a more comprehensive analysis, the revision will cover excerpts that may go beyond what could technically be effectively linked with the burden of proof.

[504] CJEU 21 January 2010, C-311/08 (SGI), ECLI:EU:C:2010:26.

[505] SGI, supra n.21, para. 73.

objectives pursued by it".[506] However, a more careful analysis of the case reveals that the CJEU is merely reproducing the arguments of the Belgium government without explicitly incorporating them in its reasoning.
The following sections already set aside citations in which the CJEU is merely referring to the views of the parties.

3.2.2 Need for prima facie evidence of abuse by tax authorities

Eqiom and *Deister Holding* cases on the admissibility of domestic provisions implementing anti-abuse clauses of a directive, provide strong support for those claiming that the burden of the proof of abuse should be with tax authorities. In both judgments, the CJEU recognises that "[t]he imposition of a general tax measure automatically (…) without the tax authorities being required to provide even *prima facie* evidence of fraud and abuse, would go further than is necessary for preventing fraud and abuse".[507]

3.2.3 Restriction to wholly artificial arrangements

In *ICI*,[508] despite considering that the domestic measure had been issued under an acceptable justification, the CJEU noted upon application of the proportionality analysis - and more specifically, the necessity test - that the domestic measure *sub judice* was not restricted to avoidance cases, delimited as 'wholly artificial arrangements' which are (now) characterized as 'arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory'.[509] An establishment amounts to a 'wholly artificial arrangement (…) when it is demonstrated (…) that the company is a fictitious establishment in so far as it does not carry out any genuine economic activity in the territory of the host Member State, account being taken, in particular, of the extent to which that company physically exists in terms of premises, staff and equipment. (…) [I]n particular those that have the characteristics of a 'letterbox' or 'front' subsidiary, can be subject to a specific tax regime for the purpose of preventing tax evasion and avoidance, and that the Treaty provisions on that freedom do not preclude such a regime'.[510]
This reference to wholly artificial arrangements is present in almost all of the direct tax cases on abuse, and namely on *Lankhorst-Hohorst*,[511] *Cadbury*

[506] SGI, supra n. 21, para. 75.
[507] Deister Holding, supra n. 18, para. 62. See also Eqiom, supra n. 15, para. 32.
[508] ICI, supra n. 15.
[509] Lexel, supra n.9, para. 49.
[510] X, supra. n. 14, para. 82.
[511] Lankhorst-Hohorst, supra n. 16, para. 37.

Schweppes,[512] *Glaxo Welcome*,[513] *Lammers & Van Cleeff*,[514] *Jobra*,[515] *Masco Denmark*,[516] *Commission vs UK*,[517] *Itelcar*,[518] *SIAT*,[519] *Secil*,[520] *Deister Holding*,[521] *X*,[522] and *Lexel*[523]

This case law could be interpreted as requiring tax authorities to demonstrate that the taxpayer's conduct amounts to a "wholly artificial arrangement" and, consequently, requiring it to bear the burden of proof of such arrangement.

3.2.4 Prohibition of general presumptions based on the exercise of a fundamental freedom or of irrebuttable presumptions of abuse

The mere exercise of a fundamental freedom cannot give rise to a general presumption of abuse of domestic direct tax provisions. The CJEU stably reaffirms this position in a considerable number of cases such as *ICI*,[524] *Commission vs Belgium*,[525] *X and Y*,[526] *Commission vs France*,[527] *Cadbury Schweppes*,[528] *Test Claimants in the Thin Cap Group Litigation*,[529] *Jobra*,[530] *Elisa*,[531] *Lammers & Van Cleeff*,[532] *Foggia*,[533], *Rimbaud*,[534], *Jobra*,[535] *SIAT*,[536], *Eqiom*,[537] and *X*.[538] In *Deister Holding* and *Eqiom*, the CJEU also considers inadmissible a 'general presumption of fraud and abuse (…) which compromises the objectives of a directive'.[539]

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[512] CJEU 12 September 2006, C-196/04 (Cadbury Schweppes and Cadbury Schweppes Overseas), ECLI:EU:C:2006:544, para. 51 et seq.
[513] CJEU 17 September 2009, C-182/08 (Glaxo Wellcome), ECLI:EU:C:2009:559, para. 81 and 99-101.
[514] Lammers & Van Cleeff, supra n. 13, para. 26 and 28.
[515] Jobra, supra n. 12, para. 39.
[516] Masco Denmark, supra n. 11, para. 44-46.
[517] Commission vs UK, supra n. 14, para. 25 and 28.
[518] Itelcar, supra n. 14, para. 37.
[519] SIAT, supra n. 16, para. 40.
[520] SECIL, supra n. 16, para. 59-61, 199 and 146.
[521] Deister Holding, supra n. 18, para. 60 and 64-65.
[522] X, supra n. 14, para. 73 and 82.
[523] Lexel, supra n. 9, para. 49.
[524] See ICI, supra n. 15, para. 26.
[525] CJEU 26 September 2000, C-478/98 (Commission/Belgium), ECLI:EU:C:2000:497, para. 45.
[526] CJEU 21 November 2002, C-436/00 (X and Y), ECLI:EU:C:2002:704, para. 62.
[527] CJEU 4 March 2004, C-334/02 (Commission/France), ECLI:EU:C:2004:129, para. 27.
[528] Cadbury Schweppes, supra n. 29, para. 50.
[529] Thin Cap Group Litigation, supra n. 10, para. 73.
[530] Jobra, supra n. 12, para. 37.
[531] Elisa, supra n. 16, para. 91.
[532] Lammers & Van Cleeff, supra n. 13, para. 27.
[533] CJEU 10 November 2011, C-126/10 (Foggia – SGPS), ECLI:EU:C:2011:718, para. 37.
[534] CJEU 28 October 2010, C-72/09 (Établissements Rimbaud), ECLI:EU:C:2010:645, para. 34.
[535] Jobra, supra n. 12, para. 37.
[536] SIAT, supra n. 16, para. 38.
[537] Eqiom, supra n. 15, para. 33-34.
[538] X, supra n. 14, para. 80.
[539] Eqiom, supra n. 15, para. 31. See also Deister Holding, supra n. 18, para. 61.

More generally, the CJEU considers that 'competent national authorities cannot confine themselves to applying predetermined general criteria but must subject each particular case to a general examination. According to established case law, such an examination must be open to judicial review'.[540] Moreover, a general presumption is not allowed even if 'made subject to the mere possibility of the grant of a derogation, at the discretion of the administrative authority'.[541]

Domestic rules that apply automatically are 'comparable, in essence, to an irrebuttable presumption of tax evasion or avoidance' and 'they are not, as such, sufficient grounds to find that [a transaction] by a taxable person residing in a Member State necessarily constitutes an artificial scheme in all cases'.[542]

When examining this stream of cases, one could be led to conclude that – if general presumptions are prohibited – the burden of proof of abuse lies with tax authorities. This appears to be explicitly recognised in *Eqiom* when the CJEU stated that '[t]he imposition of a general tax measure automatically excluding certain categories of taxpayers from the tax advantage (…) would go further than is necessary for preventing fraud and abuse'.[543]

3.2.5 Need for a casuistic approach

Besides prohibiting general presumptions, the CJEU also requires tax authorities to ascertain abuse on a casuistic basis. This is notably evident in *Leur-Bloem*, where the CJEU mentioned that 'competent national authorities cannot confine themselves to applying predetermined general criteria but must subject each particular case to a general examination'[544] or 'must carry and out an individual examination of the whole operation at issue'.[545] This approach has been followed in many other cases, such as *Glaxo Welcome*[546], *Deister Holding* and *Eqiom*.[547]

Again, if a case-by-case approach is required, and tax authorities are the only institution that can implement such analysis, this could mean that tax authorities have the burden of proof of abuse.

[540] CJEU 17 July 1997, C-28/95 (Leur-Bloem / Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2), ECLI:EU:C:1997:369, para. 41.
[541] Leur-Bloem, supra n. 57, para. 44.
[542] X, supra n. 14, para. 86.
[543] Eqiom, supra n. 15, para. 32. See also Deister Holding, supra n. 18, para. 62.
[544] Leur-Bloem, supra n. 57, para. 41.
[545] Deister Holding, supra n. 18, para. 62.
[546] Glaxo Wellcome, supra n. 30, para. 99.
[547] Eqiom, supra n. 15, para. 32.

3.2.6 Need to take into account objective facts, ascertainable by third parties

In *Cadbury Schweppes*, the CJEU required to ascertain the presence of the objective element of abuse on 'objective factors which are ascertainable by third parties with regard, in particular, to the extent to which the CFC physically exists in terms of premises, staff and equipment'.[548] In *Thin Cap Group litigation*, the CJEU refers to 'objective and verifiable elements'[549] and in *CFC and Dividend Group Litigation* to 'objective factors'.[550]

Moreover, 'if checking those factors leads to the finding that the [company] is a fictitious establishment not carrying out any genuine economic activity in the territory of the host Member State, the creation of that CFC must be regarded as having the characteristics of a wholly artificial arrangement'.[551]

The same reasoning has been repeated in *Thin Cap Group litigation*,[552] *CFC and Dividend Group Litigation*,[553] *Commission vs UK*[554] and *Impresa Pizzarotti*[555].

Despite not being explicitly said, the party interested in the finding that an entity is a 'fictitious establishment' is the tax authority. Accordingly, this could again be interpreted as placing the burden of proof of abuse (i.e., absence of adequate objective factors such as staff, premises and equipment) on the side of tax authorities.

3.2.7 Possibility of requiring mutual assistance

In *Cadbury Schweppes*[556], the CJEU noted that competent national authorities could obtain evidence through cross-border mechanisms on mutual assistance between tax authorities, covering not only the EU mechanisms but also the relevant tax treaties.[557] In *Elisa*, it goes further by not admitting a discriminatory rule which was also based on the fact that the information needed for the application of a domestic regime was outside of the jurisdiction insofar as "tax authorities can reliably request from foreign tax authorities all the information they need to corroborate the returns made by [the taxpayers]."[558]

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[548] Cadbury Schweppes, supra n. 19, para. 67.
[549] Thin Cap Group Litigation, supra n. 10, para. 82; or Itelcar, supra n. 14, para. 37.
[550] CFC and Dividend Group Litigation, supra n. 13, para. 19.
[551] Cadbury Schweppes, supra n. 29, para. 68.
[552] Thin Cap Group Litigation, supra n. 10, para. 82.
[553] CFC and Dividend Group Litigation, supra n. 13, para. 19.
[554] Commission vs UK, supra n. 14, para. 27.
[555] CJEU 8 October 2020, C-558/19 (Impresa Pizzarotti), ECLI:EU:C:2020:806, para. 36.
[556] Cadbury Schweppes, supra n. 29.
[557] Cadbury Schweppes, supra n. 29, para. 71.
[558] Elisa, supra n. 16, para, 86.

Even in cases where that exchange is impossible and within the EU, "there is no reason why the tax authorities concerned should not request from the taxpayer the evidence that they consider they need to effect a correct assessment of the taxes and duties concerned and, where appropriate, refuse the exemption applied for if that evidence is not supplied".[559]

Despite not being said, tax authorities are the only party that may recur to administrative assistance. Therefore, and if evidence could be collected by these mechanisms, that could be interpreted as indicating that tax authorities have (actually) an interest in recurring to those mechanisms since they would bear the burden of the proof of abuse.

3.2.8 Burden of proof of the internal elements of an anti-abuse provision

In *N Luxembourg 1* the CJEU noted that "where a tax authority of the source Member State seeks, on a ground relating to the existence of an abusive practice, to refuse to grant the exemption provided for in [a directive] to a company that has paid interest to a company established in another Member State, it has the task of establishing the existence of elements constituting such an abusive practice while taking account of all the relevant factors, in particular, the fact that the company to which the interest has been paid is not its beneficial owner".[560]

This appears to place the burden of abuse on tax authorities. In this case, the CJEU further clarified that tax authorities would not be obliged to provide evidence regarding the beneficial owner's identity. To deny EU law benefits, tax authorities were only required to provide evidence of an abusive situation - understood as providing evidence that the objective and subjective elements of the abuse test are fulfilled, in the case. Furthermore, denying EU law entitlement to rights is not only an option but an obligation of the Member States[561] , which could also be understood as requiring tax authorities to investigate and deny benefits in abusive cases (and, accordingly, to identify them), thus bearing the burden of proof.

[559] Elisa, supra n. 16, para. 95.

[560] CJEU 26 February 2019, C-115/16, C-118/16, C-119/16 and C-299/16 (N Luxembourg 1), ECLI:EU:C:2019:134, para. 142.

[561] Or, more precisely, "it is incumbent upon the national authorities and courts to refuse to grant entitlement to rights provided for by Directive 2003/49 where they are invoked for fraudulent or abusive ends" – N Luxembourg 1, supra n. 77, para. 110.

3.3 Burden placed on the side of taxpayers

3.3.1 Introduction

There are also some decisions of the CJEU where it appears that the CJEU shifts the burden of proof of abuse - i.e. the proof of the genuineness of the situation or the presence of valid commercial reasons - on the taxpayer. The cases cited below illustrate such situations.

3.3.2 Proof of the requirements of a right or entitlement

The CJEU does not object domestic legislators to set requirements for the enjoyment of a benefit derived from domestic law or from a directive insofar as it requires implementation by domestic law. That also covers cases where the underlying proof is somehow related to abuse. This is explicitly recognised in *N Luxembourg 1* where it is stated that the CJEU 'has moreover held, more generally, that there is no reason why the tax authorities concerned should not request from the taxpayer the evidence that they consider they need for a concrete assessment of the taxes and duties concerned and, where appropriate, refuse the exemption applied for if that evidence is not supplied'.[562]

This position is not expressed merely in the context of abuse. It merely reproduces the stable position of the CJEU, since its early cases on direct taxation, that '[a]s regards the burden of proof and the degree of detail which the evidence required must meet in order to benefit from a tax [feature], it must be borne in mind that the tax authorities of a Member State are entitled to require the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for a tax advantage provided for in the legislation at issue have been met and, consequently, whether or not to grant that advantage'.[563]

SIAT appears to admit, in general terms, a rule requiring the taxpayer with 'the need to provide proof of the genuine and proper nature of the transactions and the normal nature of the expenses incurred'[564]. However, in that specific case, the rule was considered incompliant with EU law due to the infringement of the EU principle of legal certainty.[565]

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[562] *N Luxembourg 1* supra n. 77, para. 141.

[563] CJEU 30 June 2011, C-262/09 (Meilicke and others), ECLI:EU:C:2011:438, para. 45. See also, *inter alia*, CJEU 3 October 2002, C-136/00 (Danner), ECLI:EU:C:2002:558, para. 50; CJEU 26 June 2003, C-422/01 (Skandia and Ramstedt), ECLI:EU:C:2003:380, para. 43; CJEU 27 January 2009, C-318/07 (Persche), ECLI:EU:C:2009:33, para. 54 and 59; CJEU 10 February 2011, C-436/08 and C-437/08 (Haribo Lakritzen Hans Riegel), ECLI:EU:C:2011:61, para. 95.

[564] SIAT, supra n. 16, para. 53.

[565] SIAT, supra n. 16, para. 58. For a broader analysis of the application of this principle in direct taxation see: Nogueira, Segurança Jurídica e Proporcionalidade em Direito Tributário (Proportionality and Legal

In conclusion, the CJEU appears to allow the domestic legislator to subject rights and entitlements - of both domestic and EU law - to the production of evidence. It also appears that the domestic legislator is not even obliged to break down a certain status into objectively ascertainable facts. Therefore, this could be interpreted as, in practice, allowing a Member State to (always) shift the burden of proof of (absence of) abuse to the taxpayer.

3.3.3 Possibility of providing (counter-)evidence

In many decisions, the CJEU seeks to ensure that the taxpayer is provided with the opportunity to provide (counter-)evidence of the commercial reasons of its conduct[566] before tax authorities are able to conclude for the existence of abuse. This is even considered an obligation of the Member States, which must be made available without 'undue administrative constraints'.[567] The fulfilment of such an obligation 'must be assessed according to the availability of administrative and legislative measures permitting, if necessary, the accuracy of such evidence to be verified'.[568]

Cadbury Schweppes[569] notes that '[t]he resident company, which is best placed for that purpose, must be given an opportunity to produce evidence that the CFC is actually established and that its activities are genuine'.[570] Furthermore, in *Elisa*, it is stated that 'the taxpayer should not be excluded a priori from providing relevant documentary evidence enabling the tax authorities of the Member State imposing the tax to ascertain, clearly and precisely, that he is not attempting to avoid or evade the payment of taxes'.[571]

This reasoning is followed in many cases such as *Test Claimants in the Thin Cap Group Litigation*,[572] *CFC and Dividend Group Litigation*,[573] *SGI*,[574] *Établissements Rimbaud*,[575] *SIAT*,[576] *ITELCAR*,[577] *Emerging Markets*,[578] *Hornbach-Baumarkt*[579], *X*,[580] *Impresa Pizzarotti*[581] and *Lexel*[582]

Certainty in domestic and EU Tax Law), in: M. Pires and R. Pires, Segurança e Confiança Legítima do Contribuinte, Universidade Lusíada 2013, pp. 161-186; and, A.M.P. Ferreira, Segurança jurídica: um travão europeu ao legislador fiscal?, UCP, 2015.

[566] For instance, and by reference to SIAT, this would be the case of domestic law 'providing that payments made to non-resident providers are not to be regarded as business expenses unless the taxpayer demonstrates that they relate to genuine and proper transactions and do not exceed the normal limits'. See SIAT, supra n. 16, para. 42.

[567] Thin Cap Group Litigation, supra n. 10, para. 82.

[568] X, supra n. 14, para. 91.

[569] Cadbury Schweppes, supra n. 29.

[570] Cadbury Schweppes, supra n. 29, para. 70.

[571] Elisa, supra n. 16, para. 96.

[572] Thin Cap Group Litigation, supra n. 10, para. 82-86.

[573] CFC and Dividend Group Litigation, supra n. 13, para. 84.

[574] SGI, supra n. 21.

[575] Établissements Rimbaud, supra, n. 55, para. 37-38 and 45-46.

[576] SIAT, supra n. 16, para. 50.

This may and was interpreted as placing the burden of proof regarding the existence of abuse on the taxpayer.[583] If the taxpayer is given the opportunity to provide evidence, that would mean that he would be interested in doing so and, accordingly, would be the one bearing the burden of proof.

4. Understanding the CJEU's case-law

4.1 Introduction

A *prima facie* reading of the CJEU's case law indeed appears to reveal some inconsistencies and even contradictions. However, in the author's view, a more careful reading of the case law reveals that those apparent inconsistencies result from the lack of consideration of the different contexts considered by the CJEU. And that the CJEU is, despite the diversity, quite consistent in its analysis.

As already mentioned, the CJEU's case law on direct taxation deals with abuse in two different contexts. One is on the framework of abuse of domestic systems, and more concretely with the admissibility of *prima facie* discriminatory or restrictive domestic tax measures with EU primary law on the ground that they aimed at fighting avoidance of domestic law. The second deals with the application of EU anti-abuse rules. This second cluster can be subdivided into two areas: (i) the assessment of the admissibility of domestic measures implementing EU secondary law anti-abuse clauses and (ii) the fight against abuse through the general unwritten principle.

The following sections will assess each one of those different contexts and will try to shed some light on the different CJEU rulings and their relevance for the allocation of the burden of proof of abusive practices, covering both abuse of domestic tax systems and of EU law.

4.2 Compatibility of domestic anti-abuse provisions with EU Law (abuse of domestic direct tax systems)

4.2.1 Introduction

Most CJEU cases in direct tax matters refer to the admissibility of a domestic tax rule with EU law. Abuse (*rectius*: fight against tax avoidance and evasion or its

[577] Itelcar, supra n. 14, para. 37.
[578] CJEU 10 April 2014, C-190/12 (Emerging Markets Series of DFA Investment Trust Company), ECLI:EU:C:2014:249, para. 85.
[579] CJEU 31 May 2018, C-382/16 (Hornbach-Baumarkt), ECLI:EU:C:2018:366, para. 49-53.
[580] X, n. 14, para. 87.
[581] Impresa Pizzarotti, supra n. 72, para. 36.
[582] Lexel, supra n.9, para. 50.
[583] Ravelli, supra n. 19, p. 442.

alternative wordings, as mentioned in section 1) appears as justification put forward by the Member States to adopt a *prima facie* restrictive domestic tax measure aimed at protecting the domestic tax system. The CJEU's cognoscibility is limited to the issue of whether a non-resident is treated less favourably than a resident when both are in a objectively comparable situation.

4.2.2 Reason for the (apparent) references to the burden of proof

Most of the above-mapped references to the burden of proof are not the expression of the CJEU's position on how the burden of proof should be distributed in abuse cases but are merely the result of the proportionality reasoning.[584]

In ascertaining the *prima facie* discriminatory measure's admissibility, the CJEU ascertains whether the domestic measure is adequate and necessary to the fight against abuse. Therefore, despite recognising the fight against abuse as a valid justification, the CJEU (significantly) narrows its scope through proportionality.

The underlying reason behind this posture could be the maximization of the EU interest and, concretely, of the EU fundamental freedoms. In fact, in the context of assessing the admissibility of *prima facie* discriminatory domestic tax measures, the CJEU is confronted with two opposing interests: on the one hand, the EU interest of optimising the fundamental freedoms[585] and, on the other hand, the Member State's interest of fighting abuse of its domestic direct tax system.[586] In the balancing act between the two, the CJEU appears to maximize the EU interest, which is done by applying a strict proportionality analysis.[587]

Proportionality allows narrowing the scope of the justification to wholly artificial arrangements, circumscribed in a minimalistic way as situations

[584] For a comprehensive assessment of the *modus operandi* of proportionality in EU direct taxation see J.F.P. Nogueira, Direito Fiscal Europeu - O Paradigma da Proporcionalidade: A proporcionalidade como critério central da Compatibilidade de normas tributárias internas com as liberdades fundamentais (The Proportionality Paradigm in European Tax Law - Proportionality as a Criterion in the question of the compatibility of internal tax rules with Fundamental Freedoms), Wolter Kluwer & Coimbra Editora, 2010.

[585] And the EU internal market, which requires as little disturbance as possible by domestic measures.

[586] Since, even in the context of the EU internal market, direct taxation is not yet harmonised and the revenues are still Member States' revenues.

[587] For a more comprehensive review of the balancing between the EU interest and the domestic interest when assessing justifications, see: J.F.P. Nogueira, Justificaciones y Proporcionalidad - Los últimos dos tramos en la Jurisprudencia del TJUE en materia de compatibilidad de normas tributarias internas sobre la en fiscalidad directa con las libertades comunitarias, in: A.J. Martín Jimenez and F. Carrasco, Impuestos directos y libertades fundamentales del tratado de funcionamiento de la Unión Europea : cuestiones fundamentales en la jurisprudencia del Tribunal de Justicia de la Unión Europea, Thomson Reuters Aranzadi 2016 , pp. 257-294.

devoid of economic reality.[588] For the same reason, it does not accept domestic discriminatory measures based on general presumptions or general assessments, as they would prevent the exercise of an EU fundamental freedom beyond cases of proven abuse (understood as wholly artificial arrangements). This means that a case-by-case approach is required. Depriving access to the fundamental freedoms cannot result from administrative discretion and tax authorities have to justify that denial of such access on objective factors ascertainable by third parties.

References to administrative assistance between tax authorities should also not be understood as placing the burden of proof on the latter as they are a mere faculty of action for tax authorities.[589] As AG Trstenjak notes in *Commission vs Spain*: '[I]t has consistently been held that Directive 77/799 may be relied on by a Member State for the purposes of obtaining from the competent authorities of another Member State any information which is necessary to enable it to effect a correct assessment of the taxes covered by the directive. (…) [T]he Directive provides, inter alia, that the national tax authorities may ask the competent authority of another Member State for information to which they themselves do not have access. In the [CJEU]'s opinion, the use of the word 'may' in that connection indicates that, whilst those authorities have the possibility of requesting information from the competent authority of another Member State, such a request does not in any way constitute an obligation. Consequently, it is for each Member State in principle to assess the specific cases in which information concerning transactions by taxable persons in its territory is lacking and to decide whether those cases justify submitting a request for information to another Member State'.[590] Thus, the mere existence of a mutual assistance instrument cannot place or shift the burden of proof.[591]

The case law on the admissibility of *prima facie* domestic direct tax measures should also not be read as requiring the taxpayer to face the burden of proof of (absence of) abuse. The mentioned possibility for the taxpayer to provide

[588] This is already clear since the *ICI*, the first case in which the CJEU put forward this notion of wholly artificial arrangements. In the CJEU's words: As regards the justification based on the risk of tax avoidance, suffice it to note that the legislation at issue in the main proceedings does not have the specific purpose of preventing wholly artificial arrangements, set up to circumvent United Kingdom tax legislation, from attracting tax benefits, but applies generally to all situations in which the majority of a group's subsidiaries are established, for whatever reason, outside the United Kingdom. However, the establishment of a company outside the United Kingdom does not, of itself, necessarily entail tax avoidance, since that company will in any event be subject to the tax legislation of the State of establishment. See ICI, supra n. 15, para. 41.

[589] Persche, supra n. 80, para. 64.

[590] Opinion of Advocate General Trstenjak of 13 January 2011, C-262/09 (Meilicke and others), ECLI:EU:C:2011:438, para. 91.

[591] Opinion of Advocate General Trstenjak, C-262/09, supra n. 107, para. 90.

counter-evidence[592] appears as an outcome of proportionality. As clearly expressed in *X*, '[i]t is settled case-law that, as regards relationships between the Member States, national legislation, in order for it to be proportionate to the aim of preventing tax evasion or avoidance, must, on each occasion on which the existence of artificial transactions cannot be ruled out, give the taxable person an opportunity, without subjecting him to undue administrative constraints, to provide evidence of any commercial justification that there may have been for the transaction at issue'.[593] One should note that the CJEU never clarified what would be an opportunity of providing counter-evidence without undue administrative constraints[594], leaving that task to the referring court.[595]

4.2.3 The CJEU's jurisdiction and the burden of proof of abuse

The previous section shows that the mapped citations actually do not refer directly to the burden of proof. Direct tax cases appear before the CJEU as infringement procedures or preliminary rulings, and in neither of them, the CJEU has to decide (*stricto sensu*) the eventual underlying litigation between a taxpayer and a tax authority/entity (i.e., the context in which a decision on the burden of proof would take place).

Infringement procedures are solely focused on the admissibility of a domestic provision. Therefore, and in the absence of a fact pattern, the CJEU is never directly faced with a burden of proof issue. Determining the relevant facts (in which it has to apply rules on evidence and the burden of proof) is solely a matter for the (domestic) referring court.[596]

Preliminary rulings also leave out issues regarding the allocation of the burden of proof since the questions submitted concern merely the application and interpretation of EU law.[597]. A preliminary ruling is 'an instrument of cooperation between the [CJEU] and national courts by means of which the former provides the latter with the interpretation of such EU law as is

[592] In the sense that its conduct pursued valid commercial reasons.

[593] X, supra n. 14, § 87.

[594] Thin Cap Group Litigation, supra n. 10, para. 82.

[595] In the *Thin Cap Group Litigation* supra n. 10, para. 86, the CJEU states: "it is for the national court to determine, should it be established that the claimants in the main proceedings benefited from such a regime, whether that regime gave them an opportunity (…) to provide evidence as to any commercial justification there may have been for the transactions, without being subject to any undue administrative constraints.". And, in the following paragraph "it is for the national court to determine whether those provisions allow taxpayers (…) to produce evidence of the commercial justifications for that transaction".

[596] In *Foggia*, the CJEU explicitly stated that "it is for the referring court to determine, in the light of all the circumstances of the dispute on which it is required to rule, whether, on the basis of the criteria set out at paragraphs 39 to 51 above, the constituent elements of the presumption of tax evasion or avoidance, within the meaning of Article 11(1)(a) of Directive 90/434, are present in the context of that dispute." See Foggia, supra n. 50, para. 51. See also Glaxo Welcome, supra n. 30, para. 98.

[597] Art. 267 TFEU.

necessary for them to give judgment in cases upon which they are called to adjudicate'.[598] As AG Hogan notes, 'a preliminary ruling is a judge-to-judge procedure' and 'there is no burden of proof on the parties'. 'Indeed, the procedure provided for by Article 267 TFEU is not an adversarial procedure, but an instrument for cooperation between the [CJEU] and the national courts, by means of which the [CJEU] provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them."[599] Accordingly, the CJEU is also not faced directly with any burden of proof issue.

4.2.4 Consequences for the design of domestic anti-abuse provisions

From the above, several conclusions may be extracted.

First and foremost, one should note that, given the context in which all the above references are made,[600] nothing prevents the Member States from adopting any design feature in what concerns their domestic anti-abuse rules as long as they apply equally to residents and non-residents.[601] In fact, most of the above references refer to the assessment of *prima facie* discriminatory or restrictive rules. Therefore, Member States remain entirely free to rely on general presumptions and to select the facts that may trigger presumptions. They are free to restrict taxpayers from access to tax benefits, which can be done by means of a non-rebuttable presumption of abuse or by simply negatively delimitating them from the scope of persons that may access that benefit.[602] They also may allow assessments that are not based on objective and verifiable elements.[603] Nothing prevents a State from restricting access to a benefit to companies without economic activity[604] or from subjecting all companies to an effective tax rate (or withdrawing certain tax benefits from companies that are not effectively taxed at a certain level).

Secondly, and even if the CJEU is not concerned with the burden of proof as such, the above-mentioned cases have an impact on the distribution of the burden of proof in *prima facie* discriminatory or restrictive provisions.

[598] Deister Holding, supra n.18, para. 39.
[599] Footnote 10 of the opinion of Advocate General Hogan of 25 February 2021, C-478/19 (UBS Real Estate Kapitalanlagegesellschaft mbH v. Agenzia delle Entrate), ECLI:EU:C:2021:148.
[600] Again, the assessment of *prima facie* discriminatory domestic direct tax measures with EU law.
[601] Of course, excluding the cases in where the domestic provision implements EU Law.
[602] Which, in practice, has the same effect.
[603] Thin Cap Group Litigation, supra n. 10, para. 82.
[604] As occurred in Leur-Bloem, supra n. 57.

Furthermore, they increase the pressure on Member States to design non-discriminatory anti-abuse rules.[605]

Third, and even if not completely addressed by the cited case law, a domestic rule on evidence or production of evidence cannot amount to covered or *de facto* discrimination, insofar as their application is inherently limited to cross-border cases. That would, namely, be the case where domestic law requires a specific document with a specific format that makes it very difficult or almost impossible for the production of evidence in the cross-border context. Or that, despite being non-discriminatory at face value would, 'in practice, […] makes it virtually impossible or excessively difficult'[606] to exercise a certain fundamental freedom. This was already recognised as inadmissible in the framework of custom duties.[607]

Fourth, the cited case law may also be relevant in the framework of the domestic rules implementing the special and general anti-avoidance rules of the ATAD directive.[608] Nothing prevents a Member State from going beyond the minimum level of protection set by the Directive.[609] Said rule will be subject to the limitations mentioned above insofar as they apply in a *prima facie* discriminatory or restrictive fashion. If States implement them along the wording foreseen in the Directive, those domestic rules should be compatible as the anti-abuse rules were designed on the basis of the CJEU's case law.

In conclusion, the mapped CJEU's case law, despite not addressing the issue of the burden of proof directly, has an impact on how Member States design their anti-abuse provisions and the distribution of the onus, namely when they lead to the worse treatment of non-residents.

4.3 Abuse of EU law

4.3.1 Introduction

The situation changes when it comes to cases of abuse of EU Law, including abuse of secondary and primary EU law. The following sections will deal

[605] This has been the option of the EU legislator regarding the implementation of the so-called Pillar II within the EU. See Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union, SWD(2021) 580 final, COM(2021) 823 final, 2021/0433 (CNS), 22 December 2021. This solution had already been proposed by the author in: J.F.P. Nogueira and A. Turina, Chapter 10: Pillar Two and EU Law in Global Minimum Taxation?: An Analysis of the Global Anti-Base Erosion Initiative (A. Perdelwitz & A. Turina eds., IBFD 2020); and, J.F.P. Nogueira, GloBE and EU Law: Assessing the Compatibility of the OECD's Pillar II Initiative on a Minimum Effective Tax Rate with EU Law and Implementing It within the Internal Market, 12 World Tax J. (2020).

[606] CJEU 3 February 2000, C-228/98 (Dounias), ECLI:EU:C:2000:65, para. 60.

[607] Ibid.

[608] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193, 19.7.2016, p. 1–14.

[609] Cfr. Art. 3 of the ATAD, supra n. 125.

separately with these two contexts and, within secondary law, two other situations.

4.3.2 Abuse of secondary law (domestic provisions)

Starting with domestic law and focusing on the corporate tax directives,[610] such domestic rules can result either from implementing[611] a provision based on a secondary law authorisation to restrict the entitlement to benefits generated by that directive in cases of abuse[612] or from implementing an anti-abuse provision enshrined on secondary law[613]. It can also be the result of interpreting domestic law in accordance with secondary law of a (pre-)existing domestic law provision.[614]

Several cases are decided on this context, and namely *Leur-Bloem*,[615] *Kofoed*,[616] *Foggia*[617], *Eqiom*[618] and *Deister Holding*[619]

In this framework, the domestic anti-abuse rule appears as protecting an EU interest. The provisions of corporate direct tax directives enhance the internal market and do so by compressing domestic (direct tax) systems. Abuse of those entitlements means extending the compression of domestic tax systems beyond what is considered needed to enhance the EU internal market.

Abuse again appears linked with a proportionality analysis: the compression of the domestic interest by the pursuance of a directive's provision has to stay within the remits of that provision. Anything that goes beyond that should be prohibited and countered.

Even if – as in the previous section - we were dealing with the protection of the domestic interest and – here – we are dealing with the protection of the EU interest, the underlying balancing act is similar: the domestic provision that compresses the opposing interest (being it the EU interest or the domestic

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[610] The Parent-Subsidiary Directive (Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 345, 29.12.2011, p. 8–16), the Interest and Royalty Directive (Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, OJ L 157, 26.6.2003, p. 49–54), and the Mergers and Acquisitions Directive (Council Directive 2009/133/EC 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, 25.11.2009, p. 34–46).

[611] Which can be a domestic or an agreement-based provision. See Deister Holding, supra n. 18, para.57.

[612] As all corporate direct tax provisions allow.

[613] Such as the domestic provisions implementing the anti-abuse rules of the Parent-Subsidiary Directive or of the Merger Directive.

[614] As in CJEU 5 July 2007, C-321/05 (Kofoed), ECLI:EU:C:2007:408, para. 45.

[615] Leur-Bloem, supra n.57.

[616] Kofoed, supra n. 131.

[617] Foggia, supra n. 50.

[618] Eqiom, supra n. 15.

[619] Deister Holding, supra n. 18.

interest) is only allowed insofar as it stays within the remits of the authorisation for the compression of the respective interest.

Not surprisingly, in *Eqiom*, the CJEU noted that 'the objective of combating fraud and tax evasion, whether it is relied on under [an article of a directive] or as justification for an exception to primary law, has the same scope.'[620] In the author's view, this remission applies both to the standard of abuse and for the procedural matters as, in any case, it concerns a domestic rule designed by Member States.[621] Accordingly, the references made in the previous sections on evidence and on the burden of proof are fully applicable to domestic rules enacted in the implementation of EU secondary law, even if the domestic rule applies in a non-discriminatory fashion since it would still be an expression of the EU interest of countering abusive practices.

This means that Member States can never rely on general presumptions, have to ascertain whether a situation qualifies as abusive on a case by case basis and have to provide the taxpayer with the right to be heard before considering that their conduct amounts to abuse.[622] Besides those limitations, Member States are provided ample leeway to adjust the secondary law rule to their national idiosyncrasies and to set rules on both evidence and the burden of proof.[623] As there is already a link with EU law, all other EU law requirements have to be met and the Charter of Fundamental Rights of the European Union[624] has to be respected.

[620] Eqiom, supra n. 15, para. 64.

[621] And, in what concerns current direct tax directives, none of them provide "exhaustive harmonization" that would deem such clauses as compatible with EU law.

[622] An excellent synthesis of all of these limitations is already provided by Leur-Bloem, supra n. 57, para. 40 et seq.

[623] For instance, in Leur-Bloem the CJEU recognises that [i]n the absence of more detailed '[Union] provisions concerning application of the presumption mentioned in Article 11(1)(a), it is for the Member States, observing the principle of proportionality, to determine the provisions needed for the purposes of applying this provision'. See Leur-Bloem, supra n. 57, para. 43.

[624] European Union: Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1.

4.3.3 Abuse of EU Law (general principle)

The situation is different when it comes to applying the EU general principle of prohibition of abuse of rights, also formulated as the 'general legal principle that EU law cannot be relied on for abusive or fraudulent ends'[625] or 'general principle that abusive practices are prohibited'[626]).

According to the CJEU, this EU principle does not require implementation by Member States[627] and must be applied 'irrespective of whether rights and advantages that are abused have their basis in the Treaties, in a regulation or in a directive'.[628] It also applies in cases covered by other, written, anti-abuse rules.[629]

There is no wording that can be relied upon in its application, and that can be used to determine who bears the onus.

One should start by noting that there is no direct tax specificity in what concerns the issue of the burden. In this sphere, the existing case law closely follows the judicial doctrine developed by the CJEU for many decades since its decision in *Emsland-Stärke*[630] and, in indirect taxation, at least since *Halifax*.[631] In direct taxation, the most representative cases are the so-called Danish Beneficial Ownership cases, i.e., *N Luxembourg 1*[632] and *T Danmark*[633]. The following paragraphs will focus on those decisions. However, and given the partial overlap between them, the author will solely quote the first-cited case.

Abuse amounts to the non-fulfilment of requirements laid down by EU law for the entitlement to a specific right.[634] According to the CJEU, 'abusive or fraudulent acts cannot found a right provided for by EU law, the refusal of an advantage under a directive (…) does not amount to imposing an obligation on the individual concerned under that directive, but is merely the consequence of the finding that the objective conditions required for obtaining the advantage sought, prescribed by the directive as regards that right, are met only formally'.

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625 N Luxembourg 1, supra n. 77, para. 96. In the following paragraph, the CJEU precises that 'the application of EU legislation cannot be extended to cover transactions carried out of the purpose of fraudulently or wrongfully obtaining advantages provided by EU law'. See also CJEU 9 March 1999, C-212/97 (Centros), ECLI:EU:C:1999:126, para. 24; Cadbury Schweppes, supra n. 29, para. 35; CJEU 22 November 2017, C-251/16 (Cussens and others), ECLI:EU:C:2017:881, para. 27; and, CJEU 11 July 2018, C-356/15 (Commission / Belgium), ECLI:EU:C:2018:555, para. 97.

626 N Luxembourg 1, supra n. 77, para. 102, 108 and 120.

627 N Luxembourg 1, supra n. 77, para. 105.

628 N Luxembourg 1, supra n. 77, para. 101.

629 N Luxembourg 1, supra n. 77, para. 104.

630 CJEU 14 December 2000, C-110/99 (Emsland-Stärke), ECLI:EU:C:2000:695.

631 CJEU 21 February 2006, C-255/02 (Halifax and others), ECLI:EU:C:2006:121.

632 N Luxembourg 1, supra n. 77.

633 CJEU 26 February 2019, C-116/16 and C-117/16 (T Danmark), ECLI:EU:C:2019:135.

634 N Luxembourg 1, supra n. 77. para. 119.

This could be interpreted as requiring the taxpayer to provide evidence that he is entitled to a certain right not only formally but also substantially and to provide evidence that its conduct does not amount to abuse.

However, the CJEU (clearly) seems to shift the burden of proof to tax authorities. The CJEU does not require proof of genuineness (which would be on the side of taxpayers) but 'proof of an abusive practice'[635] or 'examination of a set of facts (…) needed to establish whether the constituent elements of an abusive practice are present'[636]. The taxpayer appears to be given a secondary role, reduced to 'the opportunity to adduce evidence to the contrary'[637]. The CJEU also recognises that it is for the tax authority to 'establishing the existence of elements constituting such an abusive practice while taking account of all the relevant factors'.[638]

The burden faced by tax authorities has limits. They solely have to provide evidence of abuse, not of the underlying transaction or reality that the taxpayer has avoided.[639] Accordingly, applying the EU general principle does not require taxation in accordance with the 'avoided' conduct but merely the denial of the EU law entitlements[640] that were claimed based on abusive behaviour.

Regarding the unwritten principle, EU law governs both the object of the proof (i.e., what has to be proved, which is abuse containing a subjective and an objective element) and the subject that has to prove (i.e., national authorities/tax authorities). However, when it comes to the standard of proof, i.e., the intensity of the proof that has to be provided, VAT case law – which appears applicable to direct taxation - defers some discretion to the Member States, acknowledging that '[i]t is for the national court to verify in accordance with the rules of evidence of national law, provided that the effectiveness of [Union] law is not undermined, whether action constituting such an abusive practice has taken place in the case before it'.[641]

The CJEU allows tax authorities to request 'evidence that they consider they need for a concrete assessment of the taxes and duties concerned and, where appropriate, refuse [the EU law entitlement] if that evidence is not supplied'.[642]

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635 N Luxembourg 1, supra n. 77. para. 124.

636 N Luxembourg 1, supra n. 77, para. 125.

637 N Luxembourg 1, supra n. 77, para. 126, in fine.

638 The full quotation is the following: 'where a tax authority of the source Member State seeks, on a ground relating to the existence of an abusive practice, to refuse to grant the exemption provided for in Article 1(1) of Directive 2003/49 to a company that has paid interest to a company established in another Member State, it has the task of establishing the existence of elements constituting such an abusive practice while taking account of all the relevant factors, in particular the fact that the company to which the interest has been paid is not its beneficial owner'.

639 N Luxembourg 1, supra n. 77, para. 142-144.

640 Being them a treaty freedom or a right provided by a directive.

641 Halifax, supra n. 148, para. 76.

642 N Luxembourg 1, supra n. 77, para. 141.

This needs to be read carefully and should not be understood as allowing tax authorities to shift the burden of proof of abuse to the taxpayers. Most domestic direct tax systems are currently built on self-assessment returns submitted by taxpayers. In the (rare) occasions where an audit occurs, taxpayers have to provide evidence of the facts reported on those returns. In the author's view, the above citation must be interpreted in this context: acknowledging that the taxpayer has the burden of providing evidence of the facts that he reports on its tax return. However, abuse requires a challenge to those facts, and the burden of said challenge falls on the side of tax authorities, as recognised by the CJEU in the instances mentioned above.

One should distinguish between the burden of proof of abuse and the intertwined question of proof of the material conditions on which an EU law right (whose exercise may be abused) is based. Following the VAT case law, nothing prevents Member States, within the discretion that is granted to them by EU law, to design domestic provisions implementing EU law requiring the taxpayer to provide evidence of the 'material condition' that triggers its EU law entitlement.[643] That can require some effort by the taxpayer, and whenever it is not able to provide evidence of the fulfilment of those 'material conditions', the EU law benefit may be denied. However, if the taxpayer provides that evidence, the burden of proof falls exclusively on the side of tax authorities.

The above reflects the (civil law) understanding that the burden of proof lies with the person that wants to exercise a certain right or entitlement. As abuse grants tax authorities a faculty of action, it is upon them to provide evidence that the material conditions to exercise that faculty are met.

5. Conclusions

The CJEU has issued a vast number of decisions in direct taxation, in which it appears to deal with issues concerning evidence and the burden of proof. However, the issue is not discussed directly and one has to take into consideration the context to understand the real guidance that can be extracted from the case law.

Most CJEU cases on abuse deal with the admissibility of a *prima facie* discriminatory domestic measure with (primary) EU law. Abuse (i.e., the fight against abuse or its alternative wordings) appears as a justification put forward by national governments to justify such *prima facie* discriminatory measures. In this context, references to the burden are normally a product of the

[643] CJEU 11 November 2021, C-281/20 (Ferimet), ECLI:EU:C:2021:910, para. 41. Here, the CJEU considered important to distinguish between 'on the one hand, establishing a material condition governing the right to deduct VAT and, on the other, determining the existence of VAT fraud'.

proportionality analysis, i.e., the extent of the difference in treatment that the non-residence may face due to the underlying domestic interest of fighting against abuse.

Those cases end up limiting Member States in their design of anti-abuse provisions. However, said limitation only applies in cases in which there is a link with EU law, i.e., in cases of *prima facie* discriminatory or restrictive provisions. Member States are free to set aside all those judicial constraints by simply extending the regime applicable to non-residents to residents (or vice versa). Insofar as the domestic provision is non-discriminatory, such case law appears to be irrelevant.

The situation changes in cases of abuse of EU law. In this field, one has to distinguish between domestic rules against abuse of a (primary or secondary) EU law entitlement and the application of the unwritten EU general principle.

In what concerns the first, the domestically adopted anti-abuse provision is an implementation of EU law and, as such, has to face the limitations set by the CJEU in what concerns legislating against abuse. Notwithstanding, the CJEU continues to provide a wide margin of action to the legislator, allowing it to design rules in a way that require the taxpayer to provide *prima facie* evidence of the legal requirements on which the application of the rule depends.

In applying the EU general principle, Member States have no such margin of appreciation. The CJEU has a more stringent approach by (i) considering the fight against abuse as an obligation of Member States and, (ii) placing the burden of the proof of abuse on the side of tax authorities. Accordingly, any domestic provision or administrative regulation aimed at shifting the burden back to the taxpayer in this realm appears to be inadmissible. Of course, Member States are free to determine – within the constraints eventually created by EU law –how taxpayers have to provide evidence of the material conditions on which their EU law entitlement depends.

With this paper, we hope to provide useful guidance in the (not always clear) reading of the CJEU's case law on abuse and to shed some light on the constraints it creates in what concerns burden of proof of abuse. The author believes that, among others, this research may be useful for Member States that will soon be confronted with the task of implementing the ATAD III – Unshell initiative[644] into domestic law. For the future, there is still a broad research effort to be done, namely in what concerns assessing the applicability of the CJEU's decisions in other areas on evidence and the burden of proof - and

[644] See Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU, COM(2021) 565 final, 2021/0434 (CNS), SEC(2021) 565 final, SWD(2021) 577 final} - {SWD(2021) 578 final, SWD(2021) 579 final, of 22 December 2021.

particularly those in tax areas such as custom duties and VAT - to the area of direct taxation.

THE UNITED NATION'S RESPONSE TO THE DIGITALISATION OF THE ECONOMY: THE INTRODUCTION OF ARTICLE 12B INTO THE UN MODEL TAX CONVENTION

Prof. dr. Bruno Peeters[645] and Sharon Waeytens LL.M.[646]

1. Introduction

It is no longer disputable that the digitalisation and globalisation of the economy raises challenges for the current international tax framework. One of these tax challenges is that multinationals no longer require physical presence in a country to earn revenues, while physical presence is precisely what the current rules regarding the allocation of taxing powers are based on (i.e., the permanent establishment (PE) threshold as established in Article 5 of [model] tax treaties).[647] The allocation of taxing powers between countries with respect to profits earned by companies providing services in a cross-border context, is regulated via the provisions of a double tax treaty. These bilateral tax treaties aim to avoid double taxation and are generally based on model tax conventions. The two most widely used model tax conventions are those drafted by the Organisation for Economic Co-Operation and Development (OECD) and the United Nations (UN). Both conventions have great similarity but also diverge from one another as both organisations (i.e., the OECD and the UN) act with different interests. The OECD Model Tax Convention (MTC) tends to favour developed countries, whilst the UN MTC aims to protect developing countries. One example is the broader PE concept in the UN MTC compared to the PE treaty provision in the OECD MTC.[648] By broadening the PE scope, more taxing rights are allocated to source states (which are often developing countries[649]).[650] In any case, the treaty provisions of both MTCs that define a

[645] Professor, University of Antwerp, Research Group Business & Law, chairman Antwerp Tax Academy, lawyer (Tiberghien Lawyers). The content has systematically been updated until 31 December 2021, Outside the reference period, we also took note of the article of J.W. Mpoha published on 4 May 2022, which was also taken into account during the review process of this contribution.

[646] Doctoral researcher and teaching assistant, University of Antwerp, Research Group Business & Law.

[647] United Nations, 'Tax Issues Related to the Digitalization of the Economy', E/C.18/2019/CRP.12 (UN Publishing 2019), p.2.

[648] United Nations, E/C.18/2019/CRP.12 (supra n. 3), p.3-4.

[649] A developed country will typically export capital (as the residence state of the investor), while the developing country will import capital (as the source state of the investment). See N. Bammens,

permanent establishment, are based on the same basic principle that taxing rights are allocated to the country where companies physically operate. This fundamental rule is based on the characteristics of the economy at that time. Today, many businesses no longer require physical presence to generate income.[651] Therefore, OECD countries expressed their dissatisfaction with the current allocation rules as they claim that such rules do not allow them to collect a 'fair share' of tax on the profits earned by (highly) digitalised businesses. As a response, the OECD/G20 launched the Pillar One proposal which includes the potential to achieve a fairer and more efficient allocation of taxing rights.[652] However, whether a system with a 'fairer allocation of taxing rights' will truly be achieved for all stakeholders is questionable. Scholars have indeed been arguing that the concerns of developing countries have not (sufficiently) been taken into account.[653] This is in line with the view of the UN Tax Committee of Experts on International Cooperation in Tax Matters (UN Tax Committee). For this purpose, the UN Tax Committee founded the so-called 'Subcommittee on Tax Challenges Related to the Digitalization of the Economy' at its 15th assembly, to capture the tax challenges arising from the digitalisation of the economy, and with special attention for the interests of developing countries.[654] At its 20th assembly, the UN Tax Committee decided to establish a 'Drafting Group' to draft a new treaty provision to tackle the tax challenges of a digitalised economy. Their proposal eventually led to the inclusion of Article 12B into the UN MTC, entitled 'Income from Automated Digital Services'.[655] The introduction of Article 12B in the UN MTC was heavily critised, one scholar

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Dubbelbelastingverdragen en fiscaal relevante investeringsverdragen met ontwikkelingslanden, Larcier 2016, p. 7 and 9.

[650] Article 5 UN MTC also considers a service PE while a service PE is not recognised in the OECD MTC, see United Nations, Model Double Taxation Convention between Developed and Developing Countries (UN Publishing 2017); N. Bammens, Dubbelbelastingverdragen en fiscaal relevante investeringsverdragen met ontwikkelingslanden, Larcier 2016, p. 16.

[651] J.W. Mpoha, 'Article 12B of the UN Model (2021): A Simplified Solution for Developing Countries to Tax Income from the Digital Economy?', (2022) 26 BFIT, p. 4-6.

[652] OECD, Tax Challenges Arising from Digitalisation - Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD Publishing 2020, 228 p.; M.P. Devereux and others, Taxing Profit in a Global Economy. A Report of the Oxford International Tax Group, Oxford University Press 2021, 400 p..

[653] I. Burgers and I. Mosquera, Corporate Taxation and BEPS: A Fair Slice for Developing Countries?, Erasmus Law Review, 2017, p. 37-38 (http://www.erasmuslawreview.nl/tijdschrift/ELR/2017/1/ELR_2017_10_01_004.pdf); M. Victor, Addressing Developing Countries' Tax Challenges of the Digitalization of the Economy, Tax Cooperation Policy Brief, 2019, No 10, p. 6; <https://www.southcentre.int/wp-content/uploads/2019/11/TCPB10_Addressing-Developing-Countries-Tax-Challenges-of-the-Digitalization-of-the-Economy_EN.pdf> (accessed 31 December 2021).

[654] United Nations, E/C.18/2019/CRP.12 (supra n. 3), p.2.; United Nations, Tax Consequences of the Digitalized Economy - Issues of Relevance for Developing Countries, E/C.18/2021/CRP.1, UN Publishing 2021, p. 2 and p. 8.

[655] United Nations, Tax Consequences of the Digitalized Economy—Issues of Relevance for Developing Countries, E/C.18/2020/CRP.41, UN Publishing 2020, p. 5.

even questioned the raison d'être of the new treaty provision.[656] In this article, we will briefly touch upon the Two-Pillar solution (in particular Pillar One) and the criticism of the UN that eventually led to the introduction of Article 12B into the UN MTC. Afterwards, we will discuss Article 12B UN MTC in more detail and compare the OECD's and UN's approaches, and finally we will discuss whether and how both approaches could be aligned.

2. OECD's response to the digitalisation of the economy[657]

In 2013, OECD and G20 countries adopted a 15-Action Plan to address base erosion and profit shifting (BEPS) actions. To ensure that all interested countries and jurisdictions, *including developing economies*, could participate on an *equal footing* in the development of standards on BEPS related issues, the OECD/G20 countries established the Inclusive Framework on BEPS in 2016.[658] As the digitalisation and globalisation of the economy exacerbated BEPS opportunities, the IF has launched a Two-Pillar plan.[659] Pillar One intends to revisit the existing allocation of taxing rights for the benefit of market jurisdictions, while Pillar Two aims to combat tax competition by introducing a global minimum corporate tax rate of 15%, which will become effective as of 2023 for companies with revenues exceeding 750 million euro.[660] Finally, after years of negotiations, on 8 October 2021, 137 (out of 140) OECD/G20 Inclusive Framework (IF) members on BEPS have joined the Two-Pillar plan.[661]

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[656] For more information please see: A. Báez Moreno, Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services (2021) WTJ, p. 501-532.

[656] The commentary states that (i) the non-resident service provider could pass on the extra cost c.q. WHT to the consumer, (ii) a higher WHT rate than the foreign tax credit

[657] The focus of this article is Pillar One of the Two-Pillar plan considering Article 12B of the UN MTC aims to be an alternative solution for Pillar One . Pillar Two of the Two-Pillar plan will not be discussed.

[658] OECD, *Overview of the Inclusive Framework on BEPS* <https://www.oecd.org/tax/beps/about/#:~:text=The%20OECD%2FG20%20Inclusive%20Framework,needed%20to%20tackle%20tax%20avoidance> (accessed 31 December 2021), OECD, OECD/G20 Base Erosion and Profit Shifting Project, <https://www.oecd-ilibrary.org/taxation/oecd-g20-base-erosion-and-profit-shifting-project_23132612> (accessed 31 December 2021); OECD, *Inclusive Framework on BEPS: A global answer to a global issue*, <https://www.un.org/esa/ffd/wp-content/uploads/sites/3/2017/05/flyer-implementing-the-beps-package-building-an-inclusive-framework.pdf accessed> 31 December 2021.

[659] OECD, Tax Challenges Arising from Digitalisation - Economic Impact Assessment: Inclusive Framework on BEPS, OECD Publishing 2020, p. 12.

[660] United Nations, Tax consequences of the digitalized economy—issues of relevance for developing countries, E/C.18/2019/CRP.16, UN Publishing 2019, p. 8.

[661] OECD/G20 Base Erosion and Profit Shifting Project, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy. October 2021, OECD Publishing 2021, p. 3 (https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm (accessed 31 December 2021); OECD, International Community Strikes a Ground-breaking Tax Deal for the Digital Age, OECD Publishing 2021 (https://www.oecd.org/tax/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm) (accessed 31 December 2021).

The Two-Pillar solution is indeed a response to the dissatisfaction of OECD countries regarding the existing rules on the allocation of taxing rights and aims to create a fairer distribution of the rights to tax the profits of the largest (digitalised) companies.[662] Pillar One will re-allocate taxing rights to market jurisdictions, regardless whether the companies have a physical presence in those countries and targets multinational enterprises with global sales exceeding 20 billion euro and a profitability rate of more than 10%, with 25% of profit above the 10% threshold to be re-allocated to market jurisdictions.[663] Pillar One intends to give more taxing rights to countries where a multinational corporation has customers or users (so-called 'market countries'), even if the corporation does not have a physical presence there, but does have a sufficient nexus.[664] Pillar One will also include a standstill and removal of Digital Services Taxes and similar unilateral measures.[665] The profit allocation method foreseen in Pillar One is based on a formulary approach to determine and allocate non-routine profits to market jurisdictions (called amount A). Amount A now seems to refer to the turnover in the market jurisdiction.[666] Moreover, the so-called amount B of Pillar One contemplates to simplify the current arm's length principle for routine profits earned by marketing and distribution activities (without threshold).[667]

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[662] OECD/G20 Base Erosion and Profit Shifting Project, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy. October 2021, OECD Publishing 2021, p. 4.

[663] OECD, International Community Strikes a Ground-breaking Tax Deal for the Digital Age, OECD Publishing 2021, (https://www.oecd.org/tax/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm) (accessed 31 December 2021); OECD, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, OECD Publishing 2021, p. 6.

[664] A sufficient nexus exists if a company realises at least € 1 million turnover in a country. For small economies this threshold is lowered to € 250,000. These are jurisdictions with a GDP below € 40 billion.

[665] OECD, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, OECD Publishing 2021, p. 4.

[666] OECD, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, OECD Publishing 2021, p. 6; B. Peeters, M. Otto and M. Geeroms, De (voorgestelde) digitaledienstbelasting fiscaal-juridisch gewikt en gewogen, (2021) 603 TFR, p. 539-540.

[667] The proposal for a 'Unified Approach' under Pillar One of November 2019 also included an amount C. Amount C was intended to cover any additional profit where in-country functions exceed the baseline activity compensated under amount B. Another aspect of amount C was the dispute prevention and resolution mechanisms. At the moment of releasing the blueprint on Pillar One in October 2020, amount C was no longer included in the proposal. Dispute prevention and resolution mechanisms were, however, still foreseen in relation to amount A. Agreement on the scope of mandatory binding dispute resolution beyond amount A had not been reached at that time. In the 2021 statement only the dispute and resolution mechanisms relating to amount A were included. See OECD/G20, Secretariat Proposal for a "Unified Approach" under Pillar One. 9 October 2019 – 12 November 2019, OECD Publishing 2019, p. 16 and 21; OECD/G20, Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy. As approved by the OECD/G20 Inclusive Framework on BEPS on 29-30 January 2020, OECD Publishing 2020, p. 8; OECD/G20, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint, OECD Publishing 2020, p. 15-17; OECD/G20, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, OECD Publishing 2021, p. 2.

3. UN's criticism on Pillar One and the path towards a new treaty provision

In preparation of the 20th assembly of the UN Tax Committee, in which the tax challenges of the digitalisation of the economy were discussed, two documents were disclosed. The first document captures the comments submitted by the UN Tax Committee to the OECD Secretariat on the Two-Pillar plan with special attention for developing countries. The second document is an alternative proposal to tackle the tax challenges arising from the digitalisation of the economy, which was drafted by UN Tax Committee member Rajat Bansal (in his personal capacity).[668]

The UN Tax Committee's commentary on the OECD's approach is twofold: general and specific. In general, the UN Tax Committee requests the OECD to consider the interests of developing countries more (e.g. in the discussions through regional workshops and in the decision-making process).[669] Although the OECD claims that they have taken the needs of developing countries into account,[670] a majority of the UN Tax Committee members was of the opinion that as of the beginning of the OECD discussions the developing countries have had too little input.[671] In particular, the UN Tax Committee is concerned about the complexity of the Two-Pillar solution, which could give rise to implementation and administration issues, such as the inability to collect the required information to enforce the Two-Pillar plan. For those reasons, the UN Tax Committee inquired with the OECD Secretariat whether the Two-Pillar solution could be remodelled into a simpler approach, such as the use of withholding taxes.[672] In the statement of October 2021, the OECD/G20 have declared that they will provide technical assistance to support the implementation of the Two-Pillar solution by developing countries.[673] However, it remains to be seen how this will be implemented in practice.

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668 United Nations, Tax consequences of the digitalized economy – issues of relevance for developing countries, E/C.18/2020/CRP.25, UN Publishing 2020, p. 3-4.

669 United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 5-8.

670 Amongst others by providing more mechanical, predictable rules, a redistribution of taxing rights to market jurisdictions, by introducing a global minimum tax, which lessens the incentive for MNEs to shift profits out of developing countries and provide support with respect to the implementation of the Two-Pillar solution by developing countries. For more information on the OECD's view how the Two-Pillar Solution will benefit developing countries, see: OECD, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, OECD Publishing 2021, p. 19.

671 A. Roelofsen, UN Tax Committee neemt artikel over Automated Digital Services op in Model. En doet nog veel meer, *Weekblad Fiscaal Recht* 2021/115, p. 2.

672 United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 8.

673 This support will be provided with close co-operation with regional tax organisations. See OECD, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, OECD Publishing 2021, p. 5 and p. 19.

The specific comments on the Two-Pillar plan relate to the scope, the nexus, the calculation of amount A respectively amount B, and the mechanisms to avoid double taxation. Regarding the scope of Pillar One, the UN Tax Committee is not in favour of targeting the consumer-facing businesses. Pillar One indeed covers both the Automated Digital Services ("ADS") and consumer-facing businesses ("CFB") [674], while Article 12B UN MTC only targets ADS. The UN Committee states that including CFB in the scope of amount A does not appear to be in line with the original objective, i.e., to tackle the tax challenges related to digital companies that are able to provide services without requiring physical presence, considering the nature of the CFB and the proposed thresholds to create a nexus.[675]

With respect to the nexus rules, the UN Tax Committee is of the opinion that developing countries would be prevented from taxing substantial profits attributable to their markets if the thresholds are set too high, and propose to opt for country-specific thresholds that take the size of the respective economy into consideration. With respect to amount A, the main concern is the exclusion of the routine profits. According to Rajat Bansal, there is even no ground to distinguish routine from non-routine profits. He argues that it is impossible to conceptually distinguish between routine and residual profits of a multinational enterprise, considering all profits are essentially the result of global activities of an enterprise. Furthermore, he stresses that the Unified Approach does neither present a robust methodology for separating the two or the theoretical foundation on which such distinction should be based, nor the data with which this could effectively be done.[676] On amount B, the UN Tax Committee stresses the need for a clear definition of 'marketing and

[674] OECD/G20, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint, OECD Publishing 2020, p. 11.

[675] In this regard, the UN Committee stated that: "The policy justification is that these businesses are the ones that can, with or without the benefit of local physical operations, participate in a sustained and significant manner in economic life of a jurisdiction. The businesses in first category are stated to be providing digital services remotely to customers in markets using little or no local infrastructure but at the same time benefitting from exploiting powerful customer or user network effects, thereby generating substantial value from interaction with users and customers. For the second category of businesses, it is stated that though they continue to sell through physical distribution channels and support sales through television and banner advertising, there is an increasing use of digital technologies to more heavily interact and engage with customer base. While sales revenues is the only criteria for first category of business to create nexus, plus factors such as existence of physical presence of MNE in market jurisdiction or targeted advertising directed at marketing jurisdiction are required, in addition to sales threshold, for second category of businesses to create a nexus. The policy rationale for Scope for the second category is not transparent i.e. it does not answer questions on picking up the chosen streams of businesses only while leaving out rest from ambit of Amount A." See United Nations, E/C.18/2020/CRP.25 (n21), p. 10.

[676] United Nations, E/C.18/2020/CRP.25 (n21), p. 5-9; A. Chawla, Recent International Tax Policy Developments at the United Nations (https://www.ibanet.org/article/870EACF7-93E6-435B-990B-24BD77F6F1DB) (accessed 31 December 2021).

distribution' activities and to clarify that this is a minimum compensation and not an elective safe harbour for taxpayers.[677]

In its proposal, Rajat Bansal recapitulates and elaborates on these comments and proposes an alternative approach (i.e., a new treaty provision) to mitigate the tax challenges resulting from the digitalisation of the economy, taking into account the concerns and needs of developing countries. It can be observed that Article 12B UN MTC is very much inspired on Rajat Bansal's proposal.[678] As already mentioned, those two documents (i.e., the UN Tax Committee commentary on the Two-Pillar plan and Rajat Bansal's proposal) have been discussed at the 20th assembly of the UN Tax Committee. During this assembly, it was decided that a 'Drafting Group', coordinated by Carlos Protto and Rajat Bansal, would be established consisting of 13 (and later 14) UN Tax Committee members to draft a new treaty provision.[679] During the 21st assembly, the UN Tax Committee approved the inclusion of Article 12B into the MTC and in the follow-up meeting, the text and commentaries of Article 12B UN MTC were finalised and adopted.[680]

4. UN's approach to mitigate tax challenges of the digitalisation of the economy

4.1 Introduction

The new treaty provision (Article 12B UN MTC) allocates taxing rights with respect to the income generated from automated digital services (ADS) to source states (allegedly mainly developing countries[681]). Therefore, Article 12B UN MTC introduces a withholding tax (WHT) on the gross income whenever a payment is made to a non-resident for ADS. The rate of the withholding tax should be determined based on bilateral negotiations. However, the withholding tax will not apply to the extent that the service provider (i.e., the beneficial owner of the income arising from ADS) has opted to be taxed on its qualified profits. In that case, the qualified profits will be taxed at the domestic rate of the country where the payment is made. [682]

[677] United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 7.
[678] United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 9-12; A. Chawla (supra n. 29).
[679] United Nations, E/C.18/2019/CRP.12 (supra n. 3), p.2.; United Nations, E/C.18/2020/CRP.41 (n10), p. 5; United Nations, E/C.18/2021/CRP.1 (supra n. 9), p.4.
[680] United Nations, Report on the twenty-first session, E/2021/45/Add.1-E/C.18/2020/4, UN Publishing 2020, p. 18-21.
[681] N. Bammens, Dubbelbelastingverdragen en fiscaal relevante investeringsverdragen met ontwikkelingslanden, Larcier 2016, p. 7 and 9.
[682] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p.6.

4.2 Rationale for the approach

One of the main disadvantages of the Pillar One proposal which is repeatedly pointed out by the UN Tax Committee is that it would be too complex for developing countries to implement this system, considering their limited administrative capacity in terms of infrastructure and qualified people.[683] This was one of the major issues that the UN Tax Committee wanted to address in their proposal and, therefore, they proposed to work with a WHT mechanism.[684] A WHT is indeed a well-known and simple mechanism to tax income from non-residents, which has proven to be a reliable, efficient and effective method to collect taxes imposed on non-residents.[685]

4.3 Article 12B of the UN Model Tax Convention[686]

4.3.1 Overview

Article 12B UN MTC grants source states the right to tax income originating from automated digital services. The term 'automated digital services' is considered as any service provided on the internet or another electronic network, requiring minimal human involvement from the service provider. Taxation on ADS income will be levied through a WHT on the payment and is deemed to arise in the residence state of the payer.[687] Alternatively, the service provider (being the beneficial owner of ADS income) can request the source state to be taxed on its net qualified profits for the whole taxable year.[688]

It is argued that the introduction of Article 12B UN MTC was unnecessary[689] because of a restrictive and incorrect reading of Article 12A UN MTC. According to this view, ADS income should fall within the scope of Article 12A UN MTC, although the Commentaries on the UN MTC mention that ADS cannot qualify as

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[683] I. Burgers and I. Mosquera, Corporate Taxation and BEPS: A Fair Slice for Developing Countries, (2017) 10 Erasmus L Rev 29, p. 35; P. Martínez Mahu, Distribute Profit Allocation Rules: A New Approach for an Old Problem, (2021) 49 Intertax 144; United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 8-11.

[684] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p.8.

[685] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p.9.

[686] See text and commentary on Article 12B UN MTC: (https://www.un.org/development/desa/financing/document/article-12b-un-model-tax-convention-agreed-committee-its-22nd-session) (accessed 31 December 2021). In its 23rd assembly, the UN Tax Committee identified a number of outstanding issues in relation to the update of the UN MTC which they aim to resolve by 2023. Although such issues are mainly related to payments of computer software, these changes could impact the scope of Article 12B UN MTC. Therefore the current text and commentary of Article 12B UN MTC should be considered as a draft version. See United Nations, E/C.18/2021.CRP.22, p. 5.

[687] Where the payer has its residency, PE or a fixed base in connection with which the obligation to make the payment was incurred, and such payments are borne by the PE or fixed base.

[688] https://www.un.org/development/desa/financing/document/article-12b-un-model-tax-convention-agreed-committee-its-22nd-session (accessed 31 December 2021).

[689] L.T. Pignatari, 'The Qualification of Technical Services in Brazilian Double Tax Treaties and the Possible Impacts of the Adoption of Article 12B, UN Model Convention' (2021) Intertax 49, p. 684 and 687.

technical, managerial and consultancy services. It is contended that the Commentaries to the UN MTC are not binding for interpretation and that the restrictive interpretation of Article 12A UN MTC lacks legal support and technical foundations, so ADS income should be covered by Article 12A UN MTC. [690]

Even assuming that ADS income would fall within the scope of Article 12A UN MTC, it is argued that Article 12B UN MTC would not be completely redundant in the scenario where a state wishes to retain its withholding tax rights on ADS income, and there is no prior tax treaty that includes Article 12A UN MTC, and the other contracting state is only willing to include Article 12B UN MTC in the bilateral tax treaty.[691]

It is true that the Commentaries on the UN MTC are not binding. However, the mere fact that the UN Tax Committee approved the introduction of Article 12B UN MTC seems to confirm the restrictive interpretation of Article 12A UN MTC.[692] Furthermore, interpreting a treaty in good faith with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose[693] also means that different treaty provisions should be read together. Indeed, the latin maxim *ut res magis valeat quam pereat* expressing good faith and the principle of effectiveness, requires that preference should be given to that interpretation that gives a term some meaning rather than none. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[694] Accordingly, if the scope of Article 12A UN MTC would be interpreted so that ADS income would fall within its scope, article 12B UN MTC would indeed have limited meaning. For these reasons, we believe that by introducing article 12B UN MTC, the UN Tax Committee has implicitly confirmed the restrictive interpretation of article 12A UN MTC as put forward by the Commentaries of that provision and therefore article 12B UN MTC does not exist without purpose.

[690] A. Báez Moreno, 'Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services' (2021) WTJ, p. 501, 503, 505, 508.

[691] A. Báez Moreno, 'Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services' (2021) WTJ, p. 530.

[692] A. Báez Moreno, 'Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services' (2021) WTJ, p. 515.

[693] Article 31, §1 of the Vienna Convention on the Law of Treaties.

[694] R. Gardiner, Part II : Interpretation Applying the Vienna Convention on the Law of Treaties, A The General Rule, 5 The General Rule: (1) The Treaty, its Terms, and Their Ordinary Meaning, (2015) Oxford Public International Law Library, p. 12-13, https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2018_04585.PDF.

4.3.2 Taxable event

The sourcing rule of Article 12B UN MTC is based on the *payment* resulting from the ADS and not linked to the location of users. Taxation of income earned by non-residents providing automated digital services will indeed be triggered by the transfer of the underlying payment for ADS and is deemed to arise in the state where the payer has its residency or has a permanent establishment or fixed base in connection with which the obligation to make the payment was incurred, and such payments are borne by the PE or fixed base.[695] Therefore, it is not necessary that the automated digital services are provided in the state where the payer has its residency, permanent establishment or fixed base. In fact, the place where the services are provided is irrelevant, the nexus is connected with the payment (i.e., the state where the payer of a contracting state or third country has its residency, PE or fixed base). In the commentary of Article 12B, paragraph 1 UN MTC, the term 'payment' is defined as the fulfilment of the obligation to put funds at the disposal of the service provider in the manner required by contract or custom.[696]

Some UN Tax Committee members have expressed the view that Article 12B UN MTC not fully addresses the digital economy considering that taxation is triggered by the payment and, therefore, free digital services (e.g., search engines and social media platforms) fall out of scope. [697] Furthermore, it was contended by these UN Tax Committee members that for online advertising services (which is one of the biggest sources of income in ADS) the entity paying the advertisement and the user could be located in different states and as a result of Article 12B UN MTC not the market jurisdiction, but the residence country of the paying entity would receive taxing rights. Moreover, multinational enterprises could easily structure their business models in such a way that the paying entity is located in a source country imposing no or limited withholding taxes on the payments related to ADS (especially considering that the inclusion of the treaty provision is a bilateral negotiation and thus not a

[695] For the purpose of Article12B UN MTC, the residency of the payer will be determined in accordance with the provisions of Article 4 of the same MTC, see United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 13 and p. 28.

[696] The commentary on the article specifically mentions that the term 'payment' is consistently used as the term 'paid' in Article 10 and 11 UN MTC and in line with the commentary of Article 10 and 11 OECD MTC. See: United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 7, p. 12 and p. 28-29.

[697] In this respect, the scope of the digital service tax foreseen in the proposal for a Council Directive is wider as the latter targets services whereby the user of a digital activity constitutes a substantial input for the company performing that activity, allowing that company to derive revenue from the activity. While Article 12B UN MTC requires a payment. See Proposal for a Council Directive of 18 March 2018on the common system of a digital services tax on revenue from the supply of certain digital services, COM(2018)148, https://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CELEX:52018PC0148&from=EN (accessed 31 December 2021).

multilateral initiative).[698] As an exception to the above source rule, the payment for automated digital services made by a resident is not deemed to arise in its residence state to the extent the payer carries on business through a PE or performs independent personal services through a fixed base in the other state and the underlying payments are borne by that PE or fixed base.[699] Some UN Tax Committee members expressed the concern that this paragraph could result in abuse, as companies could opt to establish a PE with limited resources for the sole purpose of being excluded from the application of Article 12B UN MTC and being subject to Article 7 UN MTC. According to the Drafting Group, this loophole should be closed by anti-abuse rules.[700] This source rule and its deviation differs from the OECD approach which aims to establish a nexus based on 'a sustained and significant involvement in the economy of the market jurisdiction'. The latter approach will mainly be determined based on the revenues generated in that market jurisdiction, while the source of the payment is irrelevant.[701]

Next to the allocation of taxing rights amongst the two treaty countries, an alternative treatment is defined in the article in case the payer and the beneficial owner of the income[702] have a 'special relationship' and the amount of the payment for the ADS exceeds the amount that would have been determined without such a special relationship.[703] In the latter case, Article 12B UN MTC will only be applied on the amount that would have been determined in absence of such special relationship, i.e., at arm's length. The amount in excess will be taxable in accordance with the laws of each treaty country, taking into account the other provisions of the tax treaty. A special relationship includes: (i) an individual or legal person who (in)directly controls the payer, (ii) or who is (in)directly controlled by the individual, or (iii) subordinate to a group having common interest with the individual, or (iv) has a relationship by blood, marriage, or any community of interest as distinct from the legal relationships giving rise to the payments in consideration for the automated digital services.[704] It should be noted that the application of this clause could be very complicated in practice, as the nature of these transactions may make it difficult to determine the amount that corresponds to the arm's length principle.

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[698] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 10.
[699] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 29.
[700] United Nations, E/2021/45/Add.1-E/C.18/2020/4 (supra n. 33), p. 21.
[701] A. Roelofsen, (supra n. 24) p. 4-5. ; B. Peeters, M. Otto and M. Geeroms (supra n. 19), p. 539.
[702] The same applies when a special relationship exists between the payer and the beneficial owner on the one hand and a third party on the other hand.
[703] The commentary specifies that a 'special relationship' should be considered as similar or analogous to the cases contemplated in Article 9 MTC. See: United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 31.
[704] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 31.

4.3.3 Taxable transactions

The WHT will be levied on payments to non-resident companies for automated digital services. Alternatively, the service provider will be taxed on its qualified profits generated in the source country.[705] ADS has been defined as any service provided on the internet or another electronic network, requiring minimal human involvement from the service provider. A service is automated when the user can make use of the service because of the equipment and systems that are in place, rather than having interactions with the supplier. Automated services should thus be considered as the ability to scale up and provide the same type of services to new users with minimal human involvement from the service provider, where the threshold of minimal human involvement would not be crossed if there would be very limited human response in case of new users or more complex problems.[706] Furthermore, the minimal human involvement is only considered in relation to the provision of services, which means that it does not include the human involvement required for the creation, support or maintenance of the system to provide the services, maintaining and updating the system's environment, dealing with system errors, or making other generic, non-specific adjustments unrelated to individual user requests. [707] It was however not mentioned how this degree of human involvement would be measured.[708]

The treaty provision specifically foresees a list of examples that could generally be considered as automated digital services: (i) online advertising services, (ii) supply of user data, (iii) online search engines, (iv) online intermediation platform services, (v) social media platforms, (vi) digital content services, (vii) online gaming, (viii) cloud computing services, and (ix) standardized online teaching services.[709] However, the commentary stresses the fact that, in any case, the service should meet the standards provided by the definition (i.e., a service provided on the internet or another electronic network, requiring minimal human involvement from the service provider).

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[705] United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 9.

[706] The Committee of Experts gave the following example: In other words, once the service offering of an automated digital business is developed (such as a music catalogue or a social media platform), then the business can provide that service to one user, or to many more, on an automated basis with the same basic business processes. On the other hand, a non-automated digital business would see a proportionate increase in per unit costs in connection with providing the services to new customers. United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 20.

[707] United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 7 and p. 20.

[708] L.T. Pignatari, 'The Qualification of Technical Services in Brazilian Double Tax Treaties and the Possible Impacts of the Adoption of Article 12B, UN Model Convention' (2021) Intertax 49, p. 684.

[709] The commentary also provides a detailed description of these services. See United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 21-24.

As such, the list of examples of ADS services is indicative and not self-standing, meaning that each individual case should be assessed against the standards of an automated digital service. To capture all services in scope of the treaty objective, the list cannot be too restrictive. A highly changing economy needs a treaty provision that evaluates each situation on a case-by-case basis. However, the absence of such a list also creates uncertainty for taxpayers.[710] This was also pointed out by the OECD that rejected the WHT system given the fact that a complex and unclear scope could give rise to unnecessary complexity and classification disputes, uncertainty and at the same time tax avoidance to the extent similar types of transactions would not be taxed similarly.[711]Additionally, the UN Tax Committee sets forth five examples of services that are generally not considered as automated digital services: (i) customized professional services, (ii) customized online teaching services, (iii) services providing access to the internet or to another electronic network, (iv) online sale of goods and services other than automated digital services, and (v) revenue from the sale of a physical good, irrespective of network connectivity ("'internet of things'").[712] A large minority group of the UN Tax Committee[713] were concerned that the term income from automated digital services is not clear. Furthermore, it is alleged that ADS services should or at least could fall within the scope of article 12A MTC[714] which could lead to disputes and discrepancies in characterisation and by consequence to situations of double taxation and non-taxation.[715]

[710]https://www.un.org/development/desa/financing/document/article-12b-un-model-tax-convention-agreed-committee-its-22nd-session (accessed 31 December 2021), p.15; A. Roelofsen, (supra n. 24), p. 4-5.

[711] It can be noted that some of the comments made by the large minority group of the UN Tax Committee members on the use of a WHT mechanism to tax the digital economy is aligned with the view of the OECD/G20 Inclusive Framework (e.g., in relation to the scope of transactions covered and the ability to collect the tax). Please see: OECD, *Addressing the Tax Challenges of the Digital Economy. Action 1: 2015 Final Report*, OECD Publishing 2015, p. 113.

[712] For a more detailed description of the services that are generally (not) considered as automated digital services, see: United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 22-24; and, <https://www.un.org/development/desa/financing/document/article-12b-un-model-tax-convention-agreed-committee-its-22nd-session> (accessed 30 December 2021), p. 18-20.

[713] The UN Tax Committee considers a group to be a large minority group if the position is taken by at least 10 to 12 members or 35% or more, but less than 50% of the members present and voting at the meeting held the view. Please see: United Nations, E/2021/45/Add.2/E/C.18/2021/2, p.9.

[714] L.T. Pignatari, 'The Qualification of Technical Services in Brazilian Double Tax Treaties and the Possible Impacts of the Adoption of Article 12B, UN Model Convention' (2021) Intertax 49, p. 687.

[715] A. Báez Moreno, 'Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services' (2021) WTJ, p. 517-518.

4.3.4 Taxable base and tax rate

4.3.4.1 The withholding tax mechanism

Article 12B UN MTC foresees in two different taxation mechanisms. Without any action from the taxpayer, a WHT will be levied on the gross amount of the payment underlying the income from automated digital services. The UN Tax Committee does not foresee in a WHT percentage and thus the *maximum* WHT rate should be determined based on bilateral negotiations of the contracting states. However, the UN Tax Committee conceived that, taking into account the possibility of double or excessive taxation, 3-4% would be a modest rate. In addition, the commentary provides certain criteria that should be taken into account when determining the maximum withholding tax rate.[716] It is striking that the UN Tax Committee did not provide a default or a *minimum* WHT percentage, especially when considering the fact that this percentage could be significantly reduced at the expense of source states, due to their limited capabilities and experience when it comes to effectively negotiating tax treaties.[717]

4.3.4.2 Net base taxation

The beneficial owner of the income originating from ADS can also request the source country (i.e., the country where the income arises) to be taxed on its net profits for the whole taxable year. In that case, the service provider (i.e., the beneficial owner of the income) of the automated digital services will be taxed on its qualified profits in the source country at the domestic tax rate of that country. This option could be beneficial in case the taxpayer has a loss in the ADS business segment during that taxable year.[718]

For the purpose of this treaty provision, qualified profits are considered to be 30% of the amount calculated by applying the profitability ratio[719] of the

[716] The commentary states that (i) the non-resident service provider could pass on the extra cost c.q. WHT to the consumer, (ii) a higher WHT rate than the foreign tax credit could deter cross border services, (iii) a high WHT could lead to excessive taxation in the hands of the non-resident service provider, (iv) have revenue and foreign exchange consequences in the source country, and (v) relative flows of payments e.g. from developing to developed countries. See: United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 11, 13, 35; and, https://www.un.org/development/desa/financing/document/article-12b-un-model-tax-convention-agreed-committee-its-22nd-session (accessed 31 December 2021), p. 9.

[717] The fact that developing countries do not have adequate skills and experience to effectively negotiate tax treaties is in this treaty provision not considered by the UN Tax Committee although the latter recognises this in their Manual for the negotiation of bilateral tax treaties, see UN, Manual for the negotiation of bilateral tax treaties, UN Publishing 2019.

[718] United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 16.

[719] The profitability ratio is considered as the annual profits divided by the annual revenue as expressed in the consolidated financial statements. Unless bilaterally agreed otherwise, the profit to be used for

beneficial owner's overall ADS segment to the gross annual revenue from ADS derived in the source state.

The UN Tax Committee clarified that there is no real scientific research to sustain the fixed percentage of 30%. It is a policy decision based on a reasonable estimate to balance the allocation of taxing rights between the residence state and the source state. This reasonable estimate is set based on the experience of various tax authorities with the attribution of profits to PEs where no separate financial accounts are available. [720] This could result in overtaxation or undertaxation in a jurisdiction where the profits derived from ADS income are not equal to 30%.[721]

In case the beneficial owner does not maintain the segmented financial accounts, the overall profitability ratio will be applied to determine the qualified profits. If the beneficial owner belongs to a multinational group, the profitability ratio of the group's business segment or, in case no segmented accounts are available, the overall profitability ratio will be applied, provided that the profitability ratio of the multinational group is higher than the profitability ratio of the beneficial owner at entity level.[722] In case neither the segmental profitability ratio nor the group's overall profitability ratio are available for the country in which the income arises, the beneficial owner of the automated digital services will not have the choice to be taxed on its qualified profits. As a result, the WHT will be levied on the gross amount of the payment underlying the income from automated digital services.

A minority group of the UN Tax Committee members expressed concerns around potential double taxation of routine functions if the source state would tax routine profits that have already been taxed by other states where the routine functions are performed or in case the routine functions would be performed in the source state via a PE. Therefore, they advocated for a carve-out for routine profits.[723] A model provision is included in the commentary for

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calculating the profitability ratio will be the profit before tax as per the (consolidated) accounts of the beneficial owner (or the multinational group) with adjustments (e.g., the exclusion of income tax expenses, exclusion of dividend income, and gains or losses in connection with shares, adding back expenses not deductible for CIT purposes due to public policy reasons, etc.) United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 17.

[720] United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 38; A. Roelofsen (supra n. 24), p. 3.

[721] W. Mpoha, 'Article 12B of the UN Model (2021): A Simplified Solution for Developing Countries to Tax Income from the Digital Economy?', (2022) 26 BFIT, p. 8.

[722] The provision stating that: 'profitability ratio of the group can only be applied if the latter is greater than the profitability ratio of the beneficial owner of the income at entity level', is established to neutralize any tax-driven related party transactions to reduce the profitability ratio. UN Tax Committee members can also opt to solely apply the profitability ratio of the beneficial owner at entity level and include an anti-abuse rule. See: United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 17.

[723] Note that this vision is aligned with the OECD's approach that carved-out the routine profits from Pillar One.

those member states that want to carve-out routine profits.[724] Furthermore, a large minority group of the UN Tax Committee has stated that several concepts such as "'automated digital services business segment'", "'segmental accounts'", "'segmental profitability ratio'", etc. require further guidance, as these concepts are insufficiently defined. Because of this, too much flexibility is left for the jurisdictions, which could increase uncertainty, the risk of inconsistent treatment and lead to lengthy disputes between taxpayers and tax authorities. Moreover, the information required for the profitability ratio could not be in the possession or control of the taxpayer, which may render this option too complex or administratively burdensome. As a result, it may not be applied in practice or even denied by tax administrations.[725]

4.3.5 Taxpayer

The income of non-resident service providers, the beneficial owner of the payment that originates from automated digital services, is targeted. A beneficial owner should be considered in relation to a payment to a resident. The beneficial owner concept does not refer to any definition under the domestic law of the countries involved, but should be interpreted in light of the object and purpose of the treaty, including the avoidance of double taxation and prevention of tax evasion and avoidance. Therefore, the UN Tax Committee considers an agent, nominee, or a conduit company acting as a fiduciary or administrator not as a beneficial owner, as these do not have the right to use and enjoy the income because of their contractual or legal obligations to pass on the income to another person.[726]

In principle, the source state will levy a WHT on the gross payments that are related to automated digital services. The service provider, and hence beneficial owner of the income generated from ADS, can also opt to be taxed on its net profits. This option is only available to the extent the profitability ratio of the business segment of the service provider or the multinational enterprise group is available for the source country. For the purpose of this treaty provision, a 'group' is defined as a collection of enterprises related through ownership or control so that it is required to prepare consolidated financial statements, because the equity interests of the company are traded on a public stock exchange or based on the applicable accounting principles. A

[724] https://www.un.org/development/desa/financing/document/article-12b-un-model-tax-convention-agreed-committee-its-22nd-session (accessed 31 December 2021), p. 13-14.

[725] https://www.un.org/development/desa/financing/document/article-12b-un-model-tax-convention-agreed-committee-its-22nd-session (accessed 31 December 2021), p. 5-6.

[726] Therefore, the concept 'beneficial owner' should, in view of Article 12B UN MTC, not be considered as individuals exercising ultimate effective control over a legal person or arrangement. See: United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 15 and 16; A. Roelofsen (supra n. 24), p. 3.

'multinational enterprise group' is determined as any group that includes two or more enterprises that have a tax residence in different jurisdictions.[727]

4.3.6 Debtor of the withholding tax

As mentioned, the WHT is triggered by the payment for ADS. The text and commentary of Article 12B UN MTC do not foresee in a restriction with respect to the payer/user.[728] Therefore, the debtor of the WHT can be an individual or a legal person. Thus, Article 12B UN MTC will apply in both a B2C as a B2B context.[729]

4.3.7 Double or excessive taxation

Double or excessive taxation resulting from Article 12B UN MTC is reduced or eliminated under Article 23 UN MTC (i.e., methods for the elimination of double taxation). The residence country has the obligation to grant relief, either by exempting the income from automated digital services (Article 23A) or, by granting a credit against the tax payable in the residence state (Article 23B).[730] Also in this case, the UN Tax Committee opts for a well-established technique that is already used by developing countries.

4.3.8 Interaction with other treaty provisions and other treaties

If payments underlying the income from automated digital services qualify as royalties or technical service fees under Article 12A UN MTC, this Article will prevail over Article 12B UN MTC.[731] With respect to mixed contracts, the UN Tax Committee recommends, on the basis of the information contained in the contract or by means of a reasonable apportionment, to break down the different parts of what is provided under the contract and then apply the respective tax treatment to each part.[732] It is argued that no criteria were presented to make this break down nor examples were given.[733] Taxing a part of the contract under Article 12A UN MTC and the other part on the basis of Article 12B UN MTC would lead to a combination of net and gross taxation,

[727] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 7.
[728] Except for the fact the residence state of the payer or where the latter holds a PE or fixed base in connection with which the obligation to make the payment was incurred is a Contracting State (and not a Third State). See United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 28.
[729] The commentary explicitly states that individuals paying for ADS with respect to their personal use are included in the scope of Article 12B UN MTC whereas payments for personal use are excluded in Article 12A UN MTC. See United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 27.
[730] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 9 and p. 14.
[731] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 7.
[732] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 27.
[733] L.T. Pignatari, 'The Qualification of Technical Services in Brazilian Double Tax Treaties and the Possible Impacts of the Adoption of Article 12B, UN Model Convention' (2021) Intertax 49, p. 686.

which introduces substantial complexity.[734] Furthermore, it is contended that the restrictive interpretation of Article 12A UN MTC lacks legal support and that the scope of that provision should therefore be interpreted more broadly, so that ADS income would fall within the scope of Article 12A UN MTC and article 12B UN MTC would no longer serve any purpose.[735]

In case income from automated digital services falls within the scope of both Article 12B and Article 7 UN MTC, Article 12B UN MTC will prevail. Similarly, if income from automated digital services would be captured by both Article 12B and Article 14 UN MTC, Article 12B UN MTC will apply. If, however, the income from automated digital services is generated by the service provider through a PE in the source country or via independent personal services from a fixed base in that country, Article 7 or 14 UN MTC will prevail over Article 12B UN MTC.[736]

However, the above priority rules do not regulate the interaction between Pillar One and Article 12B UN MTC. Assuming that a country would adopt Pillar One and Article 12B UN MTC, it is recommended that a treaty provision specifies which treaty provision should take precedence over the other.

5. Differences between the OECD's approach and the UN's approach

5.1 Consensus-based vs bilateral negotiations

On 8 October 2021, the majority of the OECD/G20 IF on BEPS member countries finally agreed on a statement regarding the Two-Pillar solution to address the tax challenges arising from the digitalisation of the economy, with the aim to sign a multilateral convention in the course of 2022 - to implement amount A with respect to Pillar One - and effective implementation in 2023.[737]

The advantage of the OECD's approach is the fact that it is based on a consensus amongst the OECD/G20 IF on BEPS members, and implemented via a multilateral instrument (MLI)[738] . Therefore, it will be applied in the 137

[734] L.T. Pignatari, 'The Qualification of Technical Services in Brazilian Double Tax Treaties and the Possible Impacts of the Adoption of Article 12B, UN Model Convention' (2021) Intertax 49, p. 686.

[735] Báez Moreno, 'Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services' (2021) WTJ, p. 501 and 507.

[736] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 7 and p. 12.

[737] OECD, International Community Strikes a Ground-breaking Tax Deal for the Digital Age, https://www.oecd.org/tax/beps/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm (accessed 31 December 2021).

[738] The Multilateral Instrument to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting introduced by the OECD. See: OECD, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm (accessed 31 December 2021).

countries that have joined the Two-Pillar plan. The disadvantage is that such a consensus-based approach is more complicated and takes more time.
According to the UN Tax Committee members, the Two-Pillar plan does not sufficiently cover the interests and needs of developing countries. The main concern for developing countries is the complexity of the OECD's approach and, therefore, the UN Tax Committee opted to apply a well-known and simple WHT mechanism.[739] Consequently, the UN has chosen to introduce a new treaty provision into the UN MTC. Despite the use of the WHT system, it could be questioned whether the UN approach is that simple. Although the scope and formula appear less complex compared to Pillar One and a WHT system would be easier to add to the existing international tax framework than the OECD proposal, in particular the lack of thresholds seems problematic from a simplicity point of view.[740] The UN Tax Committee members have reached an agreement more quickly than the OECD, but this should not be surprising as the agreement process is not consensus-based. In fact, a large minority group of the UN Tax Committee members have expressed their concerns, especially regarding the bilateral nature, its scope, and potential situations of non-taxation or double and excessive taxation. Some UN Tax Committee members have indeed stated that the tax challenges arising from the digitalisation of the economy should be addressed multilaterally, given that this is a worldwide problem. This was also anticipated by Rajat Bansal who proposed to introduce a treaty provision in the UN Model Tax Convention for bilateral tax treaties, and at the same time, initiate a multilateral convention at the level of the UN that is open for signature for all countries.[741] Such a multilateral convention could operate like the MLI[742], giving the flexibility to countries to opt in as countries may need to adapt their domestic laws to have a similar taxing right in place. A multilateral convention is indeed effective even if not all countries agree to participate.[743] Nevertheless, the Drafting Group was not in favour of a

739 J. W. Mpoha, 'Article 12B of the UN Model (2021): A Simplified Solution for Developing Countries to Tax Income from the Digital Economy?', (2022) 26 BFIT, p.9.
740 A. Chawla (supra n. 29); D. Mehboob, ITR Global Tax 50 2020-21: The UN Committee of Experts on International Cooperation in Tax Matters, 2021, p. 1; J. W. Mpoha, 'Article 12B of the UN Model (2021): A Simplified Solution for Developing Countries to Tax Income from the Digital Economy?', (2022) 26 BFIT, p.9. .
741 Rajat Bansal United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 12
742 For more information on the MLI see a.o. R. Prokisch, Die Auslegung von DBA im Lichte des Multilateralen Abkommens, in: R. Ismer and others (eds), Territorialität und Personalität - Festschrift für Moris Lehner, Verlag Dr. Otto Schmidt 2019, p. 195-208; R. Prokisch and F. Souza De Man, Multilateralism and International Tax Law: The Interpretation of Tax Treaties in the Light of the Multilateral Instrument, in: A.P. Dourado, (ed), International and EU Tax Multilateralism: Challenges Raised by the MLI, IBFD 2020, p. 199-225.
743 United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 12.

multilateral convention as they perceived this as complex, especially in terms of tax disputes and the avoidance of double taxation.[744]

In practice, the impact of Article 12B UN MTC could be limited, because the inclusion of the treaty provision does not result in the automatic adoption in tax treaties. The effective implementation of Article 12B UN MTC could also take a long time, as bilateral negotiations between contracting parties are often time-consuming, especially in developing countries, which are unlikely to have the competent staff to negotiate tax treaties.[745] Furthermore, it is doubtful that the treaty provision would apply to the largest tech companies, since the majority of them are located in the United States (US)[746], a jurisdiction that most likely would not agree to include Article 12B in its tax treaties.[747] The negotiated WHT could be very low reducing significantly the scope of the provision. On top of that, many developing countries do not have a(n) (extensive) treaty network.[748] According to the UN Drafting Group, the fact that many developing countries have no tax treaties in place should not be an issue, as Article 12B UN MTC is a bilateral solution for a bilateral problem, namely the fact that jurisdictions are under the current allocation rules of tax treaties unable to tax digital companies that have no physical presence in the market jurisdiction. The Drafting Group is furthermore of the opinion that the introduction of Article 12B into the UN MTC could act as a wake-up call for developing countries and could stimulate them to introduce similar regulations in their domestic legislation.[749] This is also the reason why some believe that Article 12B UN MTC could undermine the OECD's Two-Pillar plan that foresees the elimination of digital services taxes and other unilateral measures, at least in the countries that have joined the Two-Pillar plan.[750] This could also lead to double taxation as the current design of digital service taxes fall out of scope of

[744] United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 7-10.

[745] J. VanderWolk, Sideshow: The UN Committee of Experts and Digital Services Taxes, https://news.bloombergtax.com/daily-tax-report/sideshow-the-un-committee-of-experts-and-digital-services-taxes (accessed 31 December 2021).

[746] Although it is argued that OECD members might be willing to include Article 12B in their tax treaties as some countries have also introduced a digital service tax. See L.T. Pignatari, 'The Qualification of Technical Services in Brazilian Double Tax Treaties and the Possible Impacts of the Adoption of Article 12B, UN Model Convention' (2021) Intertax 49, p. 689.

[747] J. VanderWolk, Sideshow: The UN Committee of Experts and Digital Services Taxes, https://news.bloombergtax.com/daily-tax-report/sideshow-the-un-committee-of-experts-and-digital-services-taxes (accessed 31 December 2021).

748 J. W. Mpoha, 'Article 12B of the UN Model (2021): A Simplified Solution for Developing Countries to Tax Income from the Digital Economy?', (2022) 26 BFIT, p. 12.

[749] United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 7; United Nations, E/2021/45/Add.1-E/C.18/2020/4 (supra n. 33), p. 19.

[750] OECD, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, OECD Publishing 2021, p. 4.

taxes covered under Article 2 of tax treaties based on the OECD and UN Model.[751]

5.2 Thresholds as a condition to tax digitalised companies

The rules under Pillar One are not imposed on all MNEs, whilst Article 12B UN MTC does not require any threshold (in terms of a PE, a fixed base, a minimum period of presence, global revenues or revenues related to digital services). Pillar One sets forth a global revenue test and a *de minimis* foreign in-scope revenue test, as it considers that in such cases the additional compliance and administrative costs would not outweigh the benefits.[752] The fact that the UN does not foresee a threshold for the taxation of income originating from automated digital services goes against the simplicity that they wanted to provide by introducing a WHT mechanism. Indeed, some UN Tax Committee members have argued that applying the WHT on small payments and payments by individuals acquiring services for personal use significantly increases the complexity and administrative burden, whilst developing countries only have limited administrative capacity, while there is no clear indication that revenues would be sufficiently increased by having no threshold in place to outweigh the costs. [753] Based on those concerns, the commentary on Article 12B UN MTC provides a default paragraph for countries that would like to include a threshold (based on the size of the taxpayer or revenues generated in the source country) and to exclude payments by individuals for personal use (similar to the exclusion of individuals acquiring services for personal use from the application of Article 12A UN MTC).[754]

751 J. W. Mpoha, 'Article 12B of the UN Model (2021): A Simplified Solution for Developing Countries to Tax Income from the Digital Economy?', (2022) 26 BFIT, p. 10.

752 OECD, Tax Challenges Arising From Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD Publishing 2020, p. 58; United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 9.

753 United Nations, E/2021/45/Add.1-E/C.18/2020/4 (supra n. 33), p. 19-20; United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 11 and p. 13; J. W. Mpoha, 'Article 12B of the UN Model (2021): A Simplified Solution for Developing Countries to Tax Income from the Digital Economy?', (2022) 26 BFIT, p. 12.

754 United Nations, E/2021/45/Add.1-E/C.18/2020/4 (supra n. 33), p. 19-20; United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 11 and p. 13.

5.3 Scope

Article 12B UN MTC covers both routine and non-routine profits, while Pillar One solely targets non-routine profits. Some UN Tax Committee members indeed believe that routine functions could be taxed double in certain situations and therefore emphasised the need for an option to carve out routine profits.[755]

The UN Tax Committee also has, in contrast to the OECD, explicitly chosen to exclude the consumer-facing businesses from the scope of application. According to the UN Tax Committee, including consumer-facing businesses is not aligned with the basic principle underlying the need to revisit the allocation of taxing rights as a result of the digitalisation of the economy.[756]

Pillar One will apply in situations where taxpayers have a PE in the market jurisdiction. This will not be the case under Article 12B UN MTC. [757] In fact, Article 7 UN MTC will prevail over Article 12B UN MTC when the service provider of the automated digital services generates its income through a PE in the market jurisdiction or via independent personal services from a fixed base in that country. [758]

6. An alternative approach?

The OECD and the UN foresee a different approach to tackle the same tax challenges that are caused by the digitalisation and globalisation of the economy. This should not be encouraged nor approved. It is well known that a non-coherent international tax framework on the one hand facilitates multinational enterprises to engage in tax optimalisation schemes or even tax evasion and tax fraud, and on the other hand could lead to double or excessive taxation.[759] In this sense, the fact that Pillar One will probably end the various unilateral measures (such as digital services taxes, equalisation levies, etc.) taken by countries is a most welcome development. However, such unilateral measures will only be abolished in those countries that have joined the Pillar-Two plan. Digital service taxes in developing countries that have not joined the Pillar-Two plan will remain in effect. On top of that, by introducing Article 12B

[755] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 18-19.

[756] Considering that consumer-facing business will continue to sell through physical distribution channels and make an increasing use of digital technologies, companies providing the latter services will have (limited) physical presence in the market jurisdictions. See: United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 10.

[757] B. Peeters, M. Otto and M. Geeroms (supra n. 19), p. 539.

[758] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 7 and p. 12.

[759] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p.11.

into the UN MTC, the UN Tax Committee wants to encourage and provide guidance for developing countries to implement digital services taxes into their domestic legislations. In this regard, it is claimed that WHT on ADS services could most probably not be considered as a measure similar to digital services taxes because WHT on ADS services should be qualified as income taxes which in principle will be creditable in the residence state and therefore these unilateral measures should not be abolished under Pillar One.[760] In addition, the absence of tax treaties between developed and developing countries could increase double or excessive taxation, even more so considering that developing countries will introduce digital services taxes into their domestic laws and no relief will be available based on tax treaties.[761] Even if tax treaties would be in place, it is argued that based on the current design of digital service taxes, these fall out of scope of taxes covered under Article 2 of tax treaties based on the OECD and UN Model. [762] It should be noted that Pillar One aims exclusively at abolishing *unilateral* measures, and therefore only digital service taxes and similar provisions that only find their legal basis in domestic legislation, but are not included in a treaty provision will be abolished. This means that countries that have agreed on Pillar One can still include Article 12A in their tax treaties. [763]

The fact that both organisations propose different solutions to today's tax challenges is not surprising, as they strive to protect different interests and stakeholders. Developing countries have indeed claimed that the Two-Pillar plan is mainly focused on the interests of developed countries.[764] Furthermore, developing countries have argued that the Two-Pillar plan is too complex for developing countries with limited administrative capacity and, therefore, proposed to tackle the tax challenges arising from the digitalisation of the economy based on a simple and established manner (i.e., by a WHT mechanism). [765] The advantage of this approach is that an agreement was reached quite swiftly amongst the UN Tax Committee members, considering that the effective implementation of the treaty provision will be based on bilateral negotiations and that the agreement process was not consensus-

[760] A. Báez Moreno, Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services (2021) WTJ, p. 532.
[761] H. Ali, UN Effort to Help Developing Countries Tax Big Tech Moves Ahead, https://news.bloombergtax.com/daily-tax-report/un-effort-to-help-developing-countries-tax-big-tech-moves-ahead?context=article-related (accessed 31 December 2021).
[762]. J. W. Mpoha, 'Article 12B of the UN Model (2021): A Simplified Solution for Developing Countries to Tax Income from the Digital Economy?', (2022) 26 BFIT, p. 10.
[763] A. Báez Moreno, Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services (2021) WTJ, p. 532.
[764] A. Roelofsen (supra n. 24), p. 2; United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 5; H. Ali, (supra n. 96).
[765] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 9.

based. The negotiations of the OECD's approach lasted for many years, because they aimed to reach a global consensus and were of the opinion that the digitalisation of the economy cannot be ring-fenced. Therefore, their proposal was also designed to solve other tax challenges, such as the elimination of tax competition under Pillar Two.[766] Consequently, the proposal of the OECD is broader in scope (compare the Two-Pillar plan to Article 12B UN MTC) and able to reach further, because a global consensus was reached and, as a result, all 137 jurisdictions will implement these rules. Article 12B UN MTC will only be included in existing and future tax treaties to the extent that contracting parties have agreed to include the treaty provision, which will require (lengthy) bilateral negotiations to be kicked off.[767] Also, the OECD explicitly rejected a WHT mechanism in this context because they consider this unilateral, uncoordinated with major technical issues in terms of scope of transactions covered and the collection of the tax liability. In addition, the OECD believe that the application of a standalone WHT would raise challenges with respect to trade obligations and EU law assuming that domestic suppliers are subject to net-basis taxation.[768] Moreover, a large minority of the UN Tax Committee members did not agree to the inclusion of Article 12B into the UN MTC, because they are of the opinion that the tax challenges resulting from the digitalisation of the economy are a multilateral issue that should be mitigated by a multilateral solution, and not through a bilateral approach. Furthermore, these UN Tax Committee members did not agree that the digitalisation of the economy on its own justifies the re-allocation of taxing rights to the market jurisdictions.[769] Furthermore, the fundamental challenge of the nexus issue has not been addressed as the rules in article 5 (PE) and article 7 (business profits) continue to apply.[770] This last argument supports the authors' view that the current allocation rules of taxing rights should be revisited in a more fundamental way than the current proposals of the UN and the OECD[771]. The introduction of different approaches by two organisations (the UN and the OECD) that act with different interests could be avoided by a more elaborate

766 OECD, Addressing the Tax Challenges of the Digital Economy. Action 1: 2015 Final Report, OECD Publishing 2015, p. 11; A. Harpaz, Taxation of the Digital Economy: Adapting a Twentieth-Century Tax System to a Twenty-First-Century Economy, (2021) 46 Yale J Int'L 7, p. 70-71.

767 United Nations, E/2021/45/Add.1-E/C.18/2020/4 (supra n. 33), p. 19.

768 A. Báez Moreno, Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services (2021) WTJ, p. 517-518; OECD, Addressing the Tax Challenges of the Digital Economy. Action 1: 2015 Final Report, OECD Publishing 2015, p. 113-115.

769 United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 10.

770 J. W. Mpoha, 'Article 12B of the UN Model (2021): A Simplified Solution for Developing Countries to Tax Income from the Digital Economy?', (2022) 26 BFIT, p. 12.

771 See also A. Harpaz (supra n. 99), p.68.

dialogue or collaboration between both organisations (or at least between the tax committees of both organisations).[772]

7. Conclusion

There is no doubt that the current international tax framework, and especially the rules for the allocation of taxing powers in tax treaties, is outdated and cannot meet today's digitalised and globalised economy. How to solve this is still open for debate.[773] The UN has criticised the OECD's approach considering the interests of developing countries. In this respect, Pillar One is considered as complex and not sufficiently taking into account the needs of developing countries. However, the approach of the UN is only partially solving the challenges that arise from the current rules for the allocation of taxing powers in tax treaties. It allows market jurisdictions to tax companies providing ADS, yet it does not solve other tax challenges that are tackled through Pillar Two and the BEPS-actions, nor does it create a fairer allocation of taxing powers in general. A fairer distribution of taxing rights is, however, also not completely captured in Pillar One, as only the largest and most profitable multinationals (approximately only 100 companies) are covered.[774]

Both the OECD and the UN have revisited the current international tax framework in light of the digitalisation and globalisation of the economy, based on the interests of their stakeholders. As mentioned, both approaches have advantages and disadvantages, but the fact that the OECD and the UN have launched two different proposals cannot be endorsed (although understandable). In fact, it is widely recognised that different tax rules create loopholes and opportunities for companies to avoid taxes or, alternatively, lead to double or excessive taxation. Both the UN as well as the OECD have made significant progress to adapt the international tax framework to a changing economy, but there is still a long way to go. If the OECD and the UN want to succeed in avoiding double taxation or non-taxation, or if they want to establish a fairer allocation of taxing rights between all stakeholders, it will be essential to agree on a streamlined and coherent proposal that meets the interests of both developed and developing countries. A first step to align the interests of both organisations could be to set-up regional workshops, participate in each other's decision-making process, operate more closely and set up other

[772] [772] A. Roelofsen (supra n. 24), p. 2; United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 5.

[773] See also A. Harpaz (supra n. 99), p. 67-68.

[774] The OECD proposal however foresees a provision to expand the scope after 7 years (once there is experience with the implementation). See: OECD, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, OECD Publishing 2021, p. 18.

initatives to enhance the coherence and interplay between the tax policies of the tax committees of the OECD and the UN.

THE FICTITIOUS WAGE DECISIONS OF THE DUTCH SUPREME COURT AND THEIR IMPACT ON THE DUTCH TAX TREATY POLICY

Prof.dr. F.P.G. Pötgens[775]

1. Introduction

Rainer Prokisch was a member of the Thesis Committee of my PhD entitled "Income from International Private Employment". [776] I am still very honored that Rainer was willing and able to take up this membership. Rainer is the author of Art. 15 of the OECD Model Tax Convention (MTC) in the standard work of Klaus Vogel on Double Taxation Conventions.[777] Together with Klaus Vogel he wrote the General Report for the IFA on interpretation of tax treaties.[778] The topic of this contribution is, therefore, the Fictitious Wage Decisions of the Dutch Supreme Court because they touch on interpretation of tax treaties and to a certain extent on Art. 15 of some Dutch tax treaties styled on the OECD MTC.

In this contribution the author will give an outline and analysis of the Fictitious Wage Decisions of the Dutch Supreme Court (section 3). They involve several decisions of the Dutch Supreme Court (Hoge Raad or 'HR'). These decisions are relevant because they give an important insight in the approach of the Hoge Raad as to when domestic deeming provisions affect the interpretation and application of a tax treaty. More, there are situations, according to the Hoge Raad, that the good faith that should be observed vis-à-vis the other contracting

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776 F. Pötgens, Income from International Private Employment, IBFD Doctoral Series no. 12, IBFD, Amsterdam 2006.

777 R. Prokisch, Artikel 15. Einkünfte aus unselbständiger Arbeit, in: Doppelbesteuerungsabkommen (eds. K. Vogel & M. Lehner), 7th edition, Beck Verlag, Munich 2021, p. 1626-1772. Also see R. Prokisch, Double tax conventions on taxation of workers - Selected and recent issues of international taxation of employees (Tax Treaty Law), in: Taxation of Workers in Europe (ed. J.M. Moessner), General Report for the Cambridge Congress 2008 of the European Association of Tax Law Professors, EATLP International Tax Series No. 6, IBFD, Amsterdam 2010, p. 51-70

778 K. Vogel & R. Prokisch, Interpretation of Double Taxation Conventions, International Fiscal Association, General Report, Kluwer Law and Taxation Publishers, Deventer/Boston 1993.

when interpreting a tax treaty provision such as Art. 15 and 16 of the OECD MTC entails that a domestic deeming provision has no effect thereon. In section 3 the author will give his view on the impact of these key decisions of the Hoge Raad. The Dutch government's Memorandum on Tax Treaty Policy 2020 ['Notitie Fiscaal Verdragsbeleid 2020'][779] took account of the approach that the Hoge Raad adopted towards the effect of fictions on tax treaties.[780] This will be discussed in section 4. In section 2 some background on the functioning of the Dutch fictitious wage concept will be outlined. Section 5 contains a short summary.

2. The domestic features of the Fictitious Wage Concept (Article 12a of the 1964 Wage Withholding Tax Act)

The Hoge Raad attached significant relevance to the deeming character of the concept at issue and its interaction with the relevant tax treaty. For that reason, first the various deeming provisions of the fictitious wage concept are explained. Art. 12a of the 1964 Wage Withholding Tax Act/Wet op de loonbelasting 1964 ('WWTA') provides that an individual (resident or non-resident) who owns a substantial shareholding, i.e. 5% or more of the subscribed capital, of a company that is resident of the Netherlands and who performs personal activities for this company, should earn, for wage tax and personal income tax purposes [via art. 3.81 of the 2001 Personal Income Tax Act/Wet inkomstenbelasting 2001 ('ITA 2001'), at least the 'normal wage' (there are rules on how to determine the normal wage). If such wage is not being paid the taxpayer will be deemed to have received this amount. To understand the fictitious wage concept, it should be taken into consideration that various fictions are interconnected:

A substantial shareholder is deemed to have an employment relationship if he performs activities on behalf of the company in which he holds such an interest [Art. 4(d) WWTA in conjunction with Art. 2h of the 1965 Implementation Decree of the Wage Withholding Tax Act/ Uitvoeringsbesluit loonbelasting 1965], provided that an employment does not exist based on one of the provisions of the WWTA. In many cases, the substantial shareholders already have a defined employment relationship with the company in which they hold

779 The Dutch government's Memorandum on Tax Treaty Policy 2020 ('MTTP 2020') is presented to the Second Chamber of the Dutch Parliament on 25 June 2020. Compare MTTP 2020, Parliamentary Proceedings II 2019/20, 25 087, N, V-N 2020/30.3.

780 Rainer also wrote on the Dutch tax treaty policy: R. Prokisch, R.G. Post & M. Haarsma, Het Nederlandse Verdragsbeleid: verleden en toekomst (deel I), Forfaitair 2010, no. 205, p. 15-19 and, idem, (deel II), Forfaitair 2010, no. 208, p. 9-13.

the interest.[781] However, if the substantial shareholder does not receive a salary in consideration of the activities for the company in which he holds such a shareholding, one of the essential elements for having a defined employment is absent.[782]

The deemed employment as mentioned under sub (i) should be considered in connection with the deemed wage concept of art. 12a WWTA. In the case of substantial shareholders, remuneration is set at a standard amount if the salary differs significantly from what is considered to be a commercial salary (in general 25% or more) or what is an at arm's length salary when compared to the highest wages of other employees who are employed by the company or a related company. Art. 12a WWTA specifically targets tax avoidance schemes designed to establish zero income. In addition, art. 13a(3) WWTA stipulates that the time of receipt is the end of the calendar year in question.

To overcome the problem of one of the elements to constitute an employment under private law being absent, i.e., the employee's entitlement to a salary, Art. 4(d) WWTA stipulates deemed employment if no salary is attributed in return for the services performed by the substantial shareholder.

Considering the fictitious wage concept, the following deeming elements can be distinguished:

- A fictitious employment;
- A fictitious salary;
- A fictitious receipt and moment of receipt.

When discussing the case law of the Hoge Raad in more detail, it does not make this distinction. It does not rule explicitly on the deemed employment element, which could also be seen as part of the fictitious wage concept; all three fictions are interrelated. This fictitious employment is important for the application of Art. 15 of the tax treaties styled on the OECD MTC to the fictitious wage concept to the extent that the employment was exercised in the Netherlands (of course this is not relevant for art. 16 of the tax treaties based upon the OECD MTC). The Hoge Raad also did not explicitly focus on the term 'derived' that was included in both art. 15 and 16 of the tax treaties at issue.[783] The Hoge Raad took a somewhat integrated approach pinpointing on the interpretation of the

781 Compare HR 8 December 1943, B. No. 7745.

782 The WWTA and the ITA do not provide a clear definition of employment. The WWTA makes a distinction between real and deemed (or fictitious) employment. Real employment largely applies in respect of people who meet the definition of the Civil Code (art 7:610) in which the following three elements are essential: (i) an obligation of the employee to work for a certain period of time, (ii) an obligation of the employer to pay a salary, and (iii) a situation of subordination.

783 The Court of Appeal of 's-Hertogenbosch in the Fictitious Wage 1 decisions held that the fictitious wage could not be characterized under Art. 15 or Art. 16 of the former 1970 Belgium-Netherlands Tax Treaty because it was not 'derived' within the meaning of these provisions given the fictitious receipt of the fictitious wage.

expression 'salaries, wages and other similar remuneration derived by' which had to be interpreted the with the aid of Art. 3(2) of the treaties based upon the OECD MTC.[784]

3. The Fictitious Wage Decisions and their impact on the interpretation and application of Dutch tax treaties

3.1 The Fictitious Wage 1 decisions (BNB 2003/379 and BNB 2003/381); Posterior amendments to domestic law

The Fictitious Wage 1 decisions of the Hoge Raad[785] involve a fictitious wage that was attributed to a resident of Belgium who was a substantial shareholder of a Dutch resident company (besloten vennootschap or BV), i.e., application of the fictitious wage concept (see section 2). This concept has been part of Dutch legislation since 1 January 1997. In coming to this decision, the Hoge Raad held that, in principle, domestic deeming provisions are allowed if they apply to income that, based on the nature of the income as determined by its source, would be allocated to the Netherlands under the applicable treaty. If the taxation right on the income, however, according to its nature, as determined by the source of the income, would not be assigned to the Netherlands, a domestic deeming provision resulting in a shift of the right to levy tax cannot be applied. In other words, if application of the fictitious wage concept results in characterizing the income as income from dependent personal services (Art.

784 On the same date as the Fictitious Wage 1 decisions the Hoge Raad in its decision of 5 September 2003, 37 657, ECLI:NL:HR:2003:AE8403, BNB 2003/380 ruled on the lump sum payment of a pension under the 1971 Netherlands-Singapore tax treaty. The Hoge Raad held that a treaty provision giving the residence state, i.e., Singapore, the exclusive authority to tax pensions and other similar remuneration (Art. 18 of that treaty) cannot be eroded or evaded because of the source state subsequently enacting a domestic law provision after the conclusion of the treaty. This decision in BNB 2003/380 involved Art. 19b(1)(b) WWTA. This provision was introduced into domestic law effective 1 January 1995 and stipulates that if a pension is commuted in whole or in part in consideration for a lump sum payment, it is no longer the lump sum that is taxed. Instead, the fair market value of the total claim is taxed as income from employment. As a result of this fiction, the commutation of a pension in consideration for a lump sum payment is reclassified as income from former employment that is deemed to have been enjoyed at the time immediately preceding this commutation (the final part of Art. 19b(1) WWTA). The consequence of applying these fictions (Art. 19b(1)(b) in connection with the final part of Art. 19b(1) WWTA) to the 1971 Netherlands-Singapore tax treaty would be that the lump sum at issue would not fall under Art. 18 (pensions) but under Art. 15 (income from employment). This type of shift in the allocation of taxation rights is incompatible with the good faith that must be observed in the interpretation of Art. 18 of the 1971 Netherlands-Singapore Tax Treaty. The Hoge Raad referred explicitly to Art. 31(1) of the Vienna Convention on the Law of Treaties (VCLT) which contains the good faith principle regarding the interpretation of treaties. Consequently, the Hoge Raad held that the application of these fictions to the 1971 Netherlands-Singapore Tax Treaty contravenes Art. 18 of that treaty. It is striking that the Hoge Raad applied Art. 31 VCLT rather than Art. 3(2) of the treaties based upon the OECD MTC as it did in its Fictitious Wage Decisions case law. The Hoge Raad did not clarify the rationale behind this difference in approach.

785 HR 5 September 2003, 37 651, ECLI:NL:HR:2003:AE8398, BNB 2003/379; and HR 5 September 2003, 37 670, ECLI:NL:HR:2003:AE8404, BNB 2003/381.

15) or directors' fees (Art. 16) under the former 1970 Belgium-Netherlands Tax Treaty (allocating the right to tax to the Netherlands), while that same income might also be derived as either dividends (Art. 10) or capital gains (Art. 13) (allocating the right to tax to Belgium, while also granting a limited right to tax dividends to the Netherlands), application of the fictitious wage concept should be rejected under the former treaty. This fiction, including the notion that the substantial shareholder is deemed to have enjoyed a normal wage, would bring about a shift in taxing rights between the Netherlands and Belgium. Consequently, the Hoge Raad concluded that the application of the fictitious wage concept to the existing tax treaties, i.e., those concluded before 1 January 1997, should be reversed because it is precluded by Art. 3(2) of the former 1970 Belgium–Netherlands Tax Treaty, which follows the OECD MTC, and, in particular, by the context of that provision. According to Art. 3(2), terms not defined in the treaty are to have the meaning that they have under the domestic law of the contracting states applying the treaty, unless the context otherwise requires. Regarding the application of the fictitious wage concept, the context, in this case, did require otherwise when interpreting the terms "wages" and "derived". In coming to this conclusion, the Hoge Raad referred to the Commentary on Art. 3(2) of the OECD MTC (the relevant extracts of which were added to the Commentary in 1992 and, therefore, after conclusion of the former 1970 Belgium-Netherlands Tax Treaty).[786]

The Hoge Raad held that an interpretation provision such as Art. 3(2) of the former 1970 Belgium-Netherlands Tax Treaty, which was based on Art. 3(2) of the OECD MTC (1963), is intended to provide a satisfactory balance between (i) the need to ensure permanency of commitments entered into by the contracting states, in order to prevent a state from making the treaty partially inoperative by subsequently amending the scope of terms not defined in the treaty under domestic law, and (ii) the need to be able to apply the treaty in a convenient and practical way over time.[787] The first viewpoint [sub. (i)] is expressed in the reservation referring to the context of Art. 3(2). This context is violated if the principle of reciprocity, on which the treaty is based, no longer has a basis in the domestic tax legislation that also forms part of the context in which the treaty operates.[788] The need to ensure the permanency of commitments can be regarded as the equivalent of good faith.[789] Based on these

[786] Para. 13 of the 1992-1995/2017 Commentary on Art. 3 of the OECD MTC.
[787] Compare para. 13 of the 1992-1995/2017 Commentary on Art. 3 of the OECD MTC.
[788] Para. 12 of the 1992-1995/2017 Commentary on Art. 3 of the OECD MTC. See for criticism on this principle of reciprocity: J.F. Avery Jones, International Tax Law Reports, 2018, No. 20, p. 137-139.
[789] Compare also point 2.26 of Advocate-General Wattel's Opinion accompanying the Fictitious Wage 1 decisions. Advocate-General Wattel translates 'the need to ensure the permanency of commitments' into 'pacta sunt servanda'. This principle is laid down in Art. 26 VCLT. Art. 31(1) VCLT provides that good faith

arguments, the Hoge Raad rejected extending the application of the fictitious wage concept to the former 1970 Belgium-Netherlands Tax Treaty on the basis of the good faith that the Netherlands was required to observe vis-à-vis its treaty partner, Belgium, when applying and interpreting the applicable treaty.[790]

3.2 Intermezzo I; the Pension on Emigration to Belgium decision (BNB 2011/160) and amendments predating the applicable tax treaty

The Fictitious Wage 1 decisions demonstrate that the Hoge Raad has attached some weight to the consideration of whether the domestic legislation was amended prior to the date on which the tax treaty was concluded. Pursuant to these decisions it was assumed that a domestic deeming provision would be effective under a tax treaty if the latter was entered into after the fiction was introduced into domestic legislation. However, the Hoge Raad decided otherwise in its decision of 15 April 2011 (Pension on Emigration to Belgium decision)[791] which was also referred to in legal consideration 2.3.3. of the Fictitious Wage 3 decision (see section 3.4 below).

The Pension on Emigration to Belgium decision (BNB 2011/160) involved a Dutch resident individual who emigrated to Belgium while being entitled to a

must also be observed when interpreting a treaty. Advocate-General Wattel refers to Art. 31(1) VCLT in point 4.9 of these Opinions. F. van Brunschot (one of the Hoge Raad judges), The Judiciary and the OECD Model Tax Convention and its Commentaries, Bulletin for International Taxation, 2005, No. 1, p. 5 et seq. similarly confirmed that the Hoge Raad intended to refer to the principle of good faith in the Fictitious Wage 1 decisions. See also F.A. Engelen, Interpretation of Tax Treaties under International Law, Doctoral Series No. 12, IBFD, Amsterdam 2004, pp. 489-502.

[790] The decision of the Hoge Raad of 18 June 2004, 39 385, ECLI:NL:HR:2004:AP1896, BNB 2004/314 (the Fictitious Interest decision) regarding the tax treaty classification of fictitious interest is similar to the Fictitious Wage 1 decisions. The taxpayer was an individual residing in Belgium who held a debt claim on a Dutch resident BV. The individual had a substantial shareholding in the BV. No interest was paid or charged on this debt claim in the taxable year concerned. Under the provisions of the Netherlands income tax law applicable to substantial shareholdings at that time (the 1964 Income Tax Act/Wet Inkomstenbelasting 1964), the taxpayer was taxed on a notional interest. Pursuant to Art. 24(4) of the former 1964 Income Tax Act, a taxpayer holding a debt claim on a company in which he owned a substantial shareholding was obliged to recognise as investment income an amount equal to an at arm's length interest. The rate of the tax charged was subsequently reduced to 10% in accordance with the interest provision of the former 1970 Belgium-Netherlands Tax Treaty [Art. 11(2)]. The issue was whether Art. 11(2) of that former treaty permitted the Netherlands to tax the fictitious interest accordingly. The Hoge Raad held that this case concerned the taxation of income that was not actually received, and that could accrue to the recipient as dividends or as a capital gain if it were received in the future. Considering that the treaty takes non-fictitious flows of funds as a basis for the credit of withholding taxes, the fiction gave rise to a potential shift in the allocation of taxation powers between the Netherlands and Belgium. This shift was based on the distinction according to the nature, and – as regards interest – the payment of the income. The Hoge Raad concluded that the treaty, and more in particular the context (with inclusion of the good faith principle) within the meaning of Art. 3(2) of the tax treaty in question, did not allow taxation based on that fiction. See also A. Bosman, Other Income under Tax Treaties - An Analysis of Article 21 of the OECD Model Convention, Series on International Taxation No. 55, Kluwer Law International, Alphen aan den Rijn 2015, p. 323 et seq.

[791] HR 15 April 2011, 10/00990, ECLI:NL:HR:2011:BN8728, BNB 2011/160.

Dutch pension. As of 1 January 2001, a preservative tax assessment is imposed in case of an emigration of a (former) employee who is entitled to such a pension (emigration levy).[792] In the Pension on Emigration to Belgium decision (BNB 2011/160) the question arose whether this preservative tax assessment was justified under the present 2001 Belgium-Netherlands Tax Treaty (which entered into effect on 1 January 2003). Although, Belgium -as residence state - would have the authority to tax the pension income (pursuant to Art. 18(1) of the treaty in question) in a lot of situations, the Netherlands—as a source state—may also have a taxation right if one of the exceptions of Art. 18(2) and (3) of the treaty applied.[793] The Hoge Raad emphasized in the Pension on

[792] As a result of the emigration, the fair market value of the Netherlands pension was treated as a wage under Art. 3.83(1) of the ITA 2001 that was fictitiously derived immediately prior to emigration (Art. 3.146(3) of the ITA 2001). Pursuant to Art. 2.8(2) of the ITA 2001, in these circumstances, a preservative tax assessment is imposed, and a deferral of payment is granted for a period of ten years (Art. 25(5) of the 1990 Netherlands Tax Collection Act/Invorderingswet 1990). Where there are no irregularities, for instance a lump sum payment, during this deferral period, the preservative tax assessment will not be collected. After ten years, it will be waived (Art. 26(2) of the 1990 Tax Collection Act/Invorderingswet 1990).

[793] See legal consideration 4.4.3 of the Pension on Emigration to Belgium decision (BNB 2011/160). If a tax treaty contains a provision entirely based on Art. 18 of the OECD MTC, where the right to tax pensions is assigned exclusively to the recipient's residence state, any tax levied on pensions upon emigration will, in principle, constitute a breach of the good faith that is to be observed when interpreting and applying that tax treaty; see the decisions of the Hoge Raad of 19 June 2009, 43 978, ECLI:NL:PHR:2009:BC5201, BNB 2009/263, 07/13267, ECLI:NL:HR:2009:BI8563, BNB 2009/265 and 08/02 288, ECLI:NL:HR:2009:BI8566, BNB 2009/266 (the 'Pension decisions'). The domestic legislation was amended in response to these Pension decisions (BNB 2009/263, BNB 2009/265, and BNB 2009/266) such that, in the event of emigration to a country where the tax treaty assigns the exclusive right to tax pensions to the residence state, only the tax-deducted contributions will be affected by the preservative tax assessment (Art. 3.136(3) ITA 2001). In the event, however, of emigration to a country with which the Netherlands has concluded a treaty that allows the Netherlands, as the source state, to tax any pensions received, the fair market value of the pension rights will be included in the preservative tax assessment. HR 14 July 2017, 17/01256, ECLI:NL:HR:2017:1324, BNB 2017/186 (the Emigration of pension and annuity holders to France decision) held that the preservative tax assessment and the interpretation based on Art. 3.136(3) ITA 2001 were found not to be in breach of the good faith to be observed with regard to the other contracting state (France) in a case in which a pensioner emigrated from the Netherlands to France after Article 3.136(3) ITA 2001 came into force and where the applicable treaty assigned the right to tax pensions and similar remuneration exclusively to the residence state. The Hoge Raad held that the protective assessment imposed in the event of emigration is in accordance with the good faith required to be observed vis-à-vis France in interpreting and applying the pension article (Art. 18) of the 1973 France-Netherlands Tax Treaty, at least to the extent that the tax-facilitated contributions are covered by the remedial legislation that came into force on 15 July 2009. This remedial legislation was introduced as a means – from the government's perspective and to the extent possible – of mitigating the consequences of the Pensions decisions (BNB 2009/263, BNB 2009/265, and BNB 2009/266). The request for a preliminary ruling submitted by the Zeeland-West Brabant District Court specifically addressed this remedial legislation and the question of whether it was contrary to the good faith that has to be observed in applying and interpreting the 1973 France-Netherlands Tax Treaty. According to the Hoge Raad in the Emigration of pension and annuity holders to France decision (BNB 2017/186), compartmentalization needs to be applied where tax treaties assign the right to tax pension benefits to the residence state. The distinction to be made in respect of pensions is as follows: (i) claims that accrued before 15 July 2009 (Pension decisions in BNB 2009/263, BNB 2009/265, and BNB 2009/266; contrary to good faith) and (ii) claims that accrued since 15 July 2009 (remedial legislation based on the Emigration of pension and annuity holders to France decision in BNB 2017/186; not contrary to good faith). As far as pensions are concerned, the Hoge Raad confirmed this compartmentalization doctrine regarding the pension article (Art. 20) of the 1973 Israel-

Emigration to Belgium decision (BNB 2011/160) that the exit levy would be in accordance with the good faith requirement to be observed by the Netherlands vis-à-vis Belgium if the relevant treaty grants the Netherlands a right to impose tax. This means that the tax authorities are not permitted to collect tax under the protective assessment if any irregular act, whereby taxation rights are not assigned to the Netherlands, occurs within the applicable ten-year period (Art. 25(5) of the 1990 Tax Collection Act/Invorderingswet 1990).

Belgium could not only have awareness of the existence of emigration levy on pensions but in addition the joint commentary on the individual articles (gezamenlijke artikelsgewijze toelichting) of the treaty demonstrated that Belgium was aware of the levy that the Netherlands imposed on pensions upon emigration.[794] Based on this awareness, one may argue that the principle of good faith had been observed in applying and interpreting Art. 18 (pensions) of that treaty.[795] The Hoge Raad, however, explicitly stated that, with regard to the observance of good faith in applying and interpreting the 2001 Belgium-Netherlands Tax Treaty, the question of whether Belgium was aware of the emigration levy on pensions at the time it concluded the treaty was irrelevant. Moreover, according to the Hoge Raad the fact that the Dutch emigration tax was introduced prior to the entry into force of the treaty in question did not support the conclusion that its application would always be in line with the principle of good faith.

Thus, if the principle of reciprocity, which is of relevance to good faith in treaties, is to be respected, it is not enough for the other contracting state to be aware of a domestic deeming provision, even if that awareness is confirmed in the joint commentary on the individual articles of the treaty. In the Fictitious Wage 3 decision, the Hoge Raad referred to this conclusion regarding the Pension on Emigration to Belgium decision (BNB 2011/160), but provided more explicit guidance by stating that, in the absence of an equivalent provision in the other state's legislation, the principle of good faith is only observed if it is sufficiently clear that the other state accepts the application of the domestic deeming provision under the tax treaty.

Netherlands Tax Treaty in its decision of 24 November 2017, 17/00515, ECLI:NL:HR:2017:2985, BNB 2018/74 (the Emigration on Pension to Israel decision), making reference to the Emigration of pension and annuity holders to France decision (BNB 2017/186).

[794] Annex to Explanatory Memorandum (Memorie van Toelichting), Parliamentary Proceedings II 2001/02, 28 259, No 3, p 47 which were drafted and approved by both the Dutch and Belgian authorities.

[795] Advisory Opinion of Advocate General van Ballegooijen, accompanying the Pension on Emigration to Belgium decision (BNB 2011/160), point 7.2.

3.3 Intermezzo II; decisions regarding deeming provisions not resulting in a potential shift in the division of taxation rights under a tax treaty

3.3.1 General

According to the Fictitious Wage 1 decisions a tax treaty is, in principle, not being applied and interpreted in good faith if a potential shift in the allocation of taxation rights between the contracting states is caused by a fiction that is included in the domestic legislation of one of the contracting states. Various decisions of the Hoge Raad may provide some examples of domestic deeming provisions not leading to the potential disturbance of the balance in the division of the taxation rights at a tax treaty level.

3.3.2 Income received from the liquidation or a purchase of a company's own shares (BNB 2004/123 and BNB 2007/41) and impact on the Dutch tax treaty policy

Under Dutch tax law a gain realised by a shareholder upon the liquidation of a company or the re-purchase by the company of its own shares may be taxed as a capital gain or as ordinary income (dividend) payment, depending on whether the shareholder's share interest does or does not amount to a `substantial interest´ in the company (see section 1). For substantial shareholders these transactions have a hybrid character; for dividend withholding tax purposes they are seen as a dividend distribution[796] and from a personal income tax angle, they are regarded as a deemed alienation resulting in possible capital gains[797]. The difference is important because under tax treaties a capital gain in general is taxable only in the residence state of the shareholder and a dividend may be taxed also in the source state. According to the Hoge Raad[798] the hybrid character of the income resulting from these transactions is also recognised by the OECD Commentary.[799] Given this hybrid character of these transactions there is not a potential shift in the allocation of tax jurisdiction when the deeming provision – that is a fictitious alienation for personal income tax purposes – would have an effect at the tax treaty level.

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[796] Article 3(1)(a) of the 1965 Dividend Withholding Tax Act/Wet op de dividendbelasting 1965 ("DWTA") for a repurchase of a company's own shares and Art. 3(1)(b) DWTA for liquidation proceeds.

[797] Art. 4.16(1)(a) ITA 2001 (repurchase of a company's own shares) and Art. 4.16(1)(b) ITA 2001 (liquidation).

[798] HR 12 December 2003, 38 461, ECLI:NL:HR:2003:AI0450, BNB 2004/123 (repurchase by the company of its own shares) and HR 9 June 2006, 41 376, ECLI:NL:HR:2006:AX7341, BNB 2007/41 (income from a liquidation).

[799] Para. 28 of the Commentary on Article 10 of the OECD MTC.

The decisions in BNB 2004/124 and BNB 2007/41 both involved the former 1970 Belgium-Netherlands Tax Treaty. The Hoge Raad held that that the repurchase of shares by the Dutch resident BV to its individual substantial shareholder residing in Belgium characterised as a capital gain (Art. 13 of the former tax treaty with Belgium) rather than as a dividend (Art. 10 of that treaty). The Hoge Raad held that the classification of a repurchase of a company's own shares for domestic income tax purposes (alienation) was decisive at the tax treaty level and prevailed over the different characterisation thereof under the dividend withholding tax (dividend), inter alia because the dividend withholding tax was ultimately credited against the income tax.[800] Similar to a repurchase of shares for purposes of the former 1970 Belgium-Netherlands Tax Treaty, the Hoge Raad characterised liquidation proceeds attributed by a Dutch resident BV to its substantial shareholder residing in Belgium also under the capital gains provision rather than under the dividend provision of that treaty.

To secure the treatment of such income as a dividend by the Netherlands as a source state, it is part of the Dutch tax treaty policy to include a provision to expressly characterise such gain as a dividend for tax treaty purposes.[801] The Protocols accompanying the current 2001 Belgium Netherlands Tax Treaty (point 15 of Protocol I) and the 2012 Germany-Netherlands Tax Treaty (point X) contain such a provision. This illustrates that a specific provision forms part of the Dutch tax treaty policy in order to obviate the undesired consequences – at least from a government's perspective – of the effect of a domestic deeming provision on tax treaties. There is an interrelationship with the Fictitious Wage 3 decision (BNB 2017/34) because as regards the Fictitious Wage concept the Dutch tax treaty policy (MTTP 2020) has as a clear objective that this concept should affect the Dutch tax treaties (see also section 3.6 and 4).

3.3.3 Emigration of substantial shareholders (BNB 2009/260-262) and the Dutch treaty policy

The Netherlands levies income tax at a flat (currently) 26.9% rate on dividends and capital gains that individual shareholders receive from a substantial interest (i.e., at least 5%) in a resident or non-resident company.[802] Non-resident shareholders are also subject to this tax but only with respect to qualifying interests in a resident company. In its tax treaties the Netherlands

[800] Art. 9.2(8) ITA 2001.

[801] Compare Memorandum on Tax Treaty Policy 2011 [Notitie Fiscaal Verdragsbeleid 2011] ('MTTP 2011'), Parliamentary Proceedings II 2010/11, 25 087, No. 7, V-N 2011/12.4, section 2.9.5 and MTTP 2020, Parliamentary Proceedings II 2019/20, 25 087, N, V-N 2020/30.3, section 4.7

[802] The `Box 2´ gains.

tried to preserve such taxation to prevent emigrating shareholders from realising capital gains on the disposition of substantial interest shares tax-free during a period of five (or more) years. In the mid-1990s domestic rules were enacted which introduced an exit tax by treating the emigration of a substantial interest shareholder as deemed disposal of his substantial interest shares.[803] The tax is deferred, however, and if the company's profit reserves are not realised by the shareholder (through dividend distribution, share disposal or company liquidation) within ten years after emigration, the tax is waived (provided the emigration took place prior to 15 September 2015). This domestic policy, inter alia, is reflected in Art. 10 (Dividends) and Art. 13 (Capital gains) of recent Dutch tax treaties.[804]

The exit tax amount due by substantial shareholders emigrating on or after 15 September 2015 will only be waived in subsequent years to the extent the shareholder has paid the deferred amount due as a result of realisation events under Dutch tax law (such as profit distributions). In other words, the ten-year deferral period has been abolished.
The domestic levy (preservative tax assessment which may be waived after ten years) imposed on the emigration of substantial shareholders to jurisdictions (the UK, Belgium and the US) that concluded a tax treaty with the Netherlands containing a provision giving the Netherlands a taxation right on the disposal of the shares during a period of five years following the emigration does not contravene the good faith principle.

In its decisions of 20 February 2009[805], the Hoge Raad held that, in these cases, the good faith that is to be observed was not being violated in regard to the application and interpretation of the tax treaties in question as no benefits were taxed that, in view of their true nature, were allocated to the immigration

[803] Upon emigration of a substantial shareholder a fictitious alienation occurs (Art. 4.16(1)(h) ITA 2001). This fictitious alienation occurs on the date immediately preceding the emigration (Art. 4.46(2) ITA 2001. With respect to this alienation a preservative tax assessment is imposed (Art. 2.8(2) ITA 2001) in respect of which a deferral of payment is granted for a period of ten years if the emigration took place before 15 September 2015 or indefinite in time for emigrations on or after 15 September 2015 (Art. 25(8) 1990 Tax Collection Act).

[804] Compare also MTTP 2011, Parliamentary Proceedings II 2010/11, 25 087, No. 7, V-N 2011/12.4, section 2.9.3 and 2.9.4 and MTTP 2020, Parliamentary Proceedings II 2019/20, 25 087, N, V-N 2020/30.3, section 4.6.1 and 4.6.2. MTTP 2011 had a focus on a ten-year period – that is the initial period for which deferral of the payment of the preservative tax assessment was granted - whereas MTTP 2020 attempts to seek connection with the term of payment of the current preservative tax assessment (indefinite in time). See for tax treaties containing a ten-year period, the 2001 Belgium-Netherlands Tax Treaty, the 1999 Netherlands-Portugal Tax Treaty and the 2008 Netherlands-UK Tax Treaty. See for an example of a treaty seeking connection to the currently applicable period, the 2012 Ethiopia-Netherlands Tax Treaty.

[805] HR 20 February 2009, 42 701, ECLI:NL:HR:2009:AZ2232, BNB 2009/260, 43 760, ECLI:NL:HR:2009:BD5481, BNB 2009/261 and 07/12314, ECLI:NL:HR:2009:BD5468, BNB 2009/262.

state for taxation (Belgium, the UK and the US). Consequently, there was no potential shift in the taxation jurisdiction between the Netherlands and the other states involved. According to the Hoge Raad, the aim of the Dutch provisions is only to tax the appreciation of shares that make up a substantial interest where that appreciation took place in a domestic context.[806] This is also in accordance with the fact that a step-up is granted upon immigration. Moreover, the concept of alienation in Art. 13 of the OECD MTC (capital gains) is not inconsistent with the conclusion that, in taxing a capital gain, a state may recognize a gain that has not been realized through alienation. This same view is found in the Commentary on the OECD MTC.[807]

3.3.4 Notional yields tax and dividend income (BNB 2014/170)

The decision of the Hoge Raad (BNB 2014/17)[808] concerned a Dutch resident individual with participations in investment funds residing in Belgium, France, Germany, Luxembourg and the US. These participations were subject to the notional investment yields tax (income from savings and investments; Box 3) despite that no actual dividends were received on these participations. At issue was whether the Netherlands was entitled to effectuate and impose the notional yields tax under the 2001 Belgium-Netherlands Tax Treaty, the 1973 France-Netherlands Tax Treaty, the former 1959 Germany-Netherlands Tax Treaty, the 1968 Luxembourg-Netherlands Tax Treaty and the 1992 Netherlands-US Tax Treaty. According to the Hoge Raad the various relevant treaties assigned the right to tax dividends paid to, or derived by, a resident of the Netherlands (the dividend article) to the Netherlands. The fact that the Netherlands did not tax the actual dividends paid, but rather a notional yields, did not in itself mean that the Netherlands expanded its tax jurisdiction beyond the limits of the relevant treaties. Such a domestic law characterization could not be applied under the tax treaties in question if it resulted in a shift in the division of taxation rights giving the authority to tax the income to the Netherlands. Under reference to the Fictitious Wage 1 decisions (see section 3.1), such an effect was not in accordance with the treaties at issue since it would entail a unilateral change in the operation of the treaties. The Hoge Raad held that the notional income from the participations in the investment funds could accrue to the taxpayer in the future in the form of either dividends or capital gains, both of which were taxable in the Netherlands under the relevant tax treaties. Therefore, by taxing the notional income from the investment

[806] That this system is not entirely perfect is demonstrated by the decision of the Hoge Raad of 20 November 2009, 09/00897, ECLI:NL:HR:2009:BK3834, BNB 2010/41, with the result that an increase in value relating to the situation after emigration is taxed in the Netherlands.

[807] Paras. 2 through 9, para. 12 and para. 29 of the Commentary on Article 13 of the OECD MTC.

[808] HR 23 May 2014, 13/02237, ECLI:NL:HR:2014:1191, BNB 2014/170.

funds (Box 3) the Netherlands did not exceed the limits to its tax jurisdiction under the applicable tax treaties.

3.4 The Fictitious Wage 2 decision (BNB 2013/72); Acceptance in the joint commentary on the individual articles

In the Fictitious Wage 2 decision[809] the Hoge Raad held that the fictitious wage concept was effective under the current 2001 Belgium-Netherlands Tax Treaty. In referring to the framework laid down in the Fictitious Wage 1 decisions first, the Hoge Raad held that it attached 'great weight' to the joint commentary on the individual articles, wherein Belgium confirmed that it accepted the extension of the application of the fictitious wage concept to Art. 15 (income from employment) and Art. 16 (director's fees) of the treaty in question.[810] Based on this acceptance, the Hoge Raad held that it could not be argued that the context, as laid down in Art. 3(2) (interpretation article), required a different interpretation that would prevent the fictitious wage concept from having effect.

3.5 The Fictitious Wage 3 decision (BNB 2017/34); Relationship between Fictitious Wage 2 decision and Pension on Emigration to Belgium decision

The Hoge Raad ruled in the Fictitious Wage 3 decision [811] that the fictitious wage concept has no effect on classification in the 1999 Netherlands-Portugal Tax Treaty in respect of a Portuguese resident individual shareholder having a substantial interest in a Dutch resident company. Consequently, the fictitious wage cannot be classified as income under Art. 15 (income from dependent personal services) or Art. 16 (directors' fees) of the 1999 Netherlands-Portugal Tax Treaty, even though the fictitious wage concept was introduced into the domestic legislation in 1997, thus before the treaty was signed (1999) and came into effect (2000).

The Fictitious Wage 3 decision (BNB 2017/34) combined the previously rendered decisions, specifically the Fictitious Wage 2 decision (BNB 2013/72, as mentioned in section 3.3) and the Pension on Emigration to Belgium decision (BNB 2011/160, as mentioned in section 3.2). The Fictitious Wage 3 decision (BNB 2017/34) provides guidance for the application of deeming

[809] HR 9 November 2012, 11/02127, ECLI:NL:HR:2012:BW4756, BNB 2013/72.
[810] Annex to Explanatory Memorandum (Memorie van Toelichting), Parliamentary Proceedings II 2001/02, 28 259, No 3, p 41.
[811] HR 18 November 2016, 15/04977, ECLI:NL:HR:2016:2497, BNB 2017/34.

provisions that potentially shift the allocation of taxing rights. Firstly, it sheds a light on the weight that needs to be attributed to the joint commentary on the individual articles in interpreting a tax treaty. Prior to the Fictitious Wage 3 decision (BNB 2017/34), it could be argued that the mere acknowledgment by a state of its awareness of the existence of a domestic deeming provision in the other state's domestic law would be sufficient to allow for the extension of the application of that fiction to the treaty without violating the principle of good faith. The Hoge Raad is clear on this matter and imposes a relatively high threshold for domestic deeming provisions to extend to a treaty if there is no equivalent in the legislation of the other contracting state.

According to the Hoge Raad in the Fictitious Wage 3 decision (BNB 2017/34), the domestic deeming provision is only applicable if the legislative history (*travaux preparatoires*) of the relevant treaty, or any other source, demonstrates that the other contracting state accepts the application of the deeming provision under the treaty and that this deeming provision results in an allocation of taxation rights other than what would be expected under the treaty.[812]
Given the absence of any equivalent provision in Portugal and the absence of any legislative history or other source demonstrating acceptance of the extension of the fictitious wage concept to the interpretation and application of Art. 15 and Art. 16 of the 1999 Portugal-Netherlands Tax Treaty, the principle of good faith prevents the extension of the fictitious wage concept to these articles. Secondly, the Hoge Raad clarified that the mere fact that the other contracting state is aware of a domestic deeming provision - even if this awareness is evidenced in a joint commentary on the individual articles, as in the case of the Pension on Emigration to Belgium decision (*BNB* 2011/160; section 3.2) - provides insufficient grounds for this provision to have effect under that treaty, as it does not demonstrate that the other contracting state explicitly accepts the extension. In coming to its decision, the Hoge Raad seems to have interpreted the principle of good faith such that it protects the taxpayer. In doing so, it seems to address the issue from the perspective of the taxpayer rather than that of the relevant contracting states. Although this view would certainly seem to be helpful in terms of legal protection and legal certainty, questions can be raised from the technical perspective of treaty interpretation relating to explicit acceptance. The approach outlined by the Hoge Raad is, in any event, clear.

[812] Fictitious Wage 3 decision (BNB 2017/34), legal consideration 2.3.3.

Even though, the approach of the Hoge Raad is clear, the author would have preferred that in the Fictitious Wage 3 decision (BNB 2017/34) the fictitious wage concept would have affected the 1999 Netherlands-Portugal Tax Treaty. The fictitious wage concept existed and formed part of the Dutch tax legislation at the moment the tax treaty with Portugal was negotiated and concluded. It can be presupposed that Portugal was or had to be sufficiently aware of the existence of the fictitious wage concept, so from that perspective the fictitious wage concept should have effect in accordance with the 1999 Netherlands-Portugal Tax Treaty. The context would not require a meaning different from that under the domestic law and the good faith included therein would be observed vis-à-vis Portugal.

3.6 Interim conclusion regarding Fictitious Wage decision and step to MTTP 2020

The Fictitious Wage decisions are clear: any potential shift in the allocation of taxation rights as a consequence of a deeming provision in Dutch domestic law, in principle, represents a failure to observe the principle of good faith in applying and interpreting the treaty, irrespective of whether the domestic law provision was introduced before or after the tax treaty was concluded or came into force. A domestic deeming provision that has such an effect can only be applied in the event of reciprocity (i.e., the other state having an equivalent provision)[813] or if the other contracting state makes it known - in a legally binding instrument - [814] that it accepts the application of the deeming provision to the treaty and the subsequent consequences for the allocation of taxation rights.

As far as the author has established, no tax treaty entered into by the Netherlands, other than the 2001 Belgium-Netherlands Tax Treaty, can be regarded as explicitly accepting that the fictitious wage concept should be applicable under the treaty. As a consequence, except in the case of Belgium, the fictitious wage concept cannot be extended to any Dutch tax treaty. If the Netherlands wishes to achieve a different outcome, it should try to obtain the other contracting state's explicit acceptance that the fictitious wage concept applies under the treaty. This can be achieved, for example, by way of a protocol to the tax treaty. This may also explain the explicit reference to the Fictitious Wage 3 decision (BNB 2017/34) in the MTTP 2020 (see section 4).

[813] Fictitious Wage 3 decision (BNB 2017/34), legal consideration 2.3.3.

[814] Not therefore, a mutual agreement, given the decisions of the Hoge Raad of 29 September 1999, 33 267, ECL:NL:HR:1999:AA2898, BNB 2000/16 and 34 482, ECLI:NL:HR:1999:ZC3702, BNB 200/17 and HR 6 January 2017, 15/05836, ECLI:NL:HR:2017:6, BNB 2017/91. All these decisions relate to the former 1959 Germany-Netherlands Tax Treaty.

4. Domestic fictions and the MTTP 2020

According to the MTTP 2020, the Netherlands aims to explicitly lay down, in tax treaty relations, that certain fictions or similar arrangements under domestic law also have an effect on the relevant tax treaty.[815] This is primarily because of the Fictitious Wage decision 3 (*BNB* 2017/34). These types of domestic deeming provisions only affect the treaty if the other contracting state explicitly accepts this (i.e., according to the principle of reciprocity). To meet this requirement of acceptance, it is now Dutch treaty policy to explicitly designate, in the treaty, the deeming provisions under domestic law that should have an effect on that treaty. Although the MTTP 2020 is not entirely clear on this matter, the author assumes that this means that, rather than including a more generic provision, the relevant tax treaty or protocol to such a treaty will specify precisely which domestic deeming provisions affect the treaty.[816] This would also be in line with the approach that MTTP 2011 and MTTP 2020 adopted with respect to other deeming provisions relating to substantial shareholdings, such as repurchase of the company's own shares (BNB 2014/123), income from liquidations (BNB 2007/41, see section 3.3.2) and the emigration of substantial shareholders (section 3.3.3). With respect to a more generic provision that seeks to regulate the application of these types of fictions, the question arises whether this will then be sufficient to constitute acceptance by the other state as envisaged by the Hoge Raad in its case law.

5. Summary

This contribution aimed to give some insights into (i) the triptych on the fictitious wage concept and its relationship to tax treaties and (ii) other decisions of the Hoge Raad on domestic fictions and the effect they have on tax treaties. The Fictitious Wage decisions ultimately have impacted the Dutch tax treaty policy.

[815] MTTP 2020, Parliamentary Proceedings II 2019/20, 25 087, N, V-N 2020/30.3, section 4.13. See also M.J.G.A.M. Weerepas & B.M.M. Didden, Een beschouwing van standpunten inzake arbeid en pensioen in de Notitie Fiscaal Verdragsbeleid 2020, Maandblad Belastingbeschouwingen 2020, No. 11, p. 514 and 515.

[816] The letter from the State Secretary for Finance of 29 January 2021, Parliamentary Papers I 2020/21, 25 087, O, p. 5, responding to an explicit question on this matter is also unclear.

TOWARDS AN AMENDED RULE AND SIMPLER TEXT FOR ARTICLE 15 OF THE OECD MODEL

Kees van Raad

1. Introduction

One of the obvious advantages of email communication is that records not only are easily saved but also remain easily accessible. I obtained my first email account (with CompuServe) in 1991, through my colleague and friend Richard Doernberg who taught international tax law at Emory University in Atlanta, Georgia. With the luring perspective that I would be able to communicate online with people from all over the world, I signed on. For a number of months Richard was my only online contact. To obtain a message from him I needed to employ a dial-in modem (at that time: a sizeable metal box) to get online from time to time to check whether any message had arrived. In order to eliminate the awkward need to repeatedly make modem calls, we later on agreed to notify one another of an email message having been dispatched, by sending a fax message advising that an online message had been forwarded and could be downloaded. Times have changed – fortunately.

One important aspect of email I did not realize at that time is that – provided one had been careful enough to consistently make backups, as commonly occurring computer crashes often resulted in a loss of email correspondence – a complete record of one's incoming and outgoing email messages provides a perfect archive of communications. This advantage over traditional communication through letters became obvious when I recently tried – in vain – to locate in my extensive paper archive my early correspondence with Rainer Prokisch. My search provided convincing evidence that if files are not meticulously archived they have little, if any, value for reconstructing the past.

In the absence of any email messages between Rainer and me before the early 1990s, I can only guess when we first met. I assume it was in the late 1980s when he worked at the Ludwig-Maximilians-Universität in Munich as one of the assistants of prof. Klaus Vogel with whom I got in contact shortly after he had published the first German edition of this Doppelbesteuerungsabkommen in 1983. Starting with the 2d edition of that book Rainer was the main author of the chapter on Art. 15 OECD Model. For that reason I was very happy that after

his appointment at Maastricht University he was willing in the early years of ITC Leiden's Adv LLM in International Tax Law Program to come to Leiden and teach Art. 15 in the comprehensive Tax Treaties course of that program. In view of the important contribution he made to the ITC's Adv LLM Program, I would like to devote my contribution to this Festschrift honoring Rainer Prokisch to a brief review of some of the issues involving Art. 15 that stem from its text and structure.

In the section that follows, I will first discuss a simplification of the text of the provisions of Art. 15, which could make the life a little easier for tax treaty teachers that need to explain to novice students of that article a set of rules that seems to have been designed to guarantee that tax treaty science remains reserved for those willing to continuously immerge themselves in one of the unnecessarily complex OECD Model provisions. Below, I will first deal with a simplification of text and structure of Art. 15 and, next, turn my attention to amending some of its rules.

2. Simplification of the text of para. 2

Art. 15 of the OECD Model (along with Art. 7, Art. 8 and Art. 18) belongs to the small group of articles with a distributive rule that fundamentally differs from the rules laid down in the other articles of Chapter III of the OECD Model. It covers a particular category of income without regard to the nexus that the income concerned may have with the source state (in OECD Model terminology: the 'other state', hereinafter also referred to as 'OS'). In this respect these articles differ from, e.g., Art. 6 which covers immovable property income only if the income has a specific nexus with the OS: the immovable property from which the income is derived must be situated in the OS. If the property is located elsewhere, Art. 6 is not applicable. Art. 15 (along with Art.s 7, 8 and 18), on the contrary, covers the pertinent type of income that the OS may want to tax regardless of the nexus a given income item may have with that OS.

Of the articles with which Art. 15 shares this all-nexus feature, Art. 7 (Business profits) stands out as it – similar to Art. 15 but different from the other articles in this small group – provides for an exception to the main rule that the pertinent group of income items may not be taxed in the OS. The exception applies if and to the extent the given income has a particular nexus with the OS. In the case of Art. 15 this nexus is 'exercising employment in the [OS]' while Art. 7 provides for a similar nexus: 'carrying on business activities in the [OS]'.

The two articles provide for distributive rules that are quite similar: they restrict the OS-nexus ('exercising employment', 'carrying on business') by imposing further conditions. Under Art. 7 for the OS to tax the profits from the business carried on in that state, it is needed that the business is conducted in the other state through a permanent establishment. And Art. 15 requires that the employee who exercises his employment activities in the OS, either spends in that state over 183 days within any 12 months period, or has an employer that is a resident of the OS, or receives a salary that is borne by an OS-located permanent establishment of his employer.

The two-step exception provided for in Art. 7 for OS taxation is drafted in a simple manner and is laid down in the second part of the first sentence of para. 1 of Art. 7:

1. 'unless the enterprise carries on business in the OS';
2. 'through a permanent establishment situated therein'.

If we compare this to Art. 15, it strikes that the text of the additional conditions for this article (in Art. 7: 'through a permanent establishment situated therein') is quite comprehensive: rather than being laid down in just an additional part of a sentence, the Art. 15 conditions for OS taxation comprise an entire paragraph (para. 2 of Art. 15):

[1. 'unless the employment is exercised in the OS']

2. 'Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

a. the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned, and

b. the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and

c. the remuneration is not borne by a permanent establishment which the employer has in the other State'.

These Art. 15 conditions for OS taxation are difficult to read as they include a double negative: the OS may *not* tax if 'a. … Î Ï Ôand&b. … Î Ï Ôand&c. *not*'. The rules in effect state:

[1. unless the employment is exercised in the OS]

2. and all of the following three (*negative*) conditions are *not* met:

– the recipient is present in the OS for *not* more than 183 days in any 12 month period;

– the remuneration is *not* paid or borne by an employer who is a resident of the OS;

– the remuneration is *not* borne by an employer's PE in the OS.

If we would assume that the exception to the Art. 15 main rule were subject only to the first of the three (negative) conditions (i.e., 183 days presence), the text of exception and additional condition could be simplified by replacing in the text of that condition the double negative (the condition that the recipient is present in the OS for *not* more than 183 days in any 12 month period, is *not* met) by a single positive:

1. unless the employment is exercised in the OS;

2. and the recipient is present in the OS for more than 183 days in any 12 month period.

Now, as the actual Art. 15 has *three* (negative) conditions, the other two could similarly be added in a reversed positive phrase as follows (in simplified wording):

2. and the recipient is present in the OS for more than 183 days in any 12 month period or his employer is a resident of that state or carries on business in that state through a PE that bears the remuneration.

In this manner – and returning to the original text of the conditions regarding presence duration and employer's residence – the contents of the current paragraphs 1 and 2 of Art. 15 can be rephrased as follows (the text is broken up in order to highlight its structure):

'… salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State, unless the employment is exercised in the other Contracting State and

– the recipient is present in the other State for more than 183 days in any 12 month period commencing or ending in the fiscal year concerned, or

– the remuneration is paid by, or on behalf of, an employer who is a resident of the other State, or

– the remuneration is borne by a permanent establishment which the employer has in the other State'.

In this positive phrasing the meaning and operation of the provision are easier to understand. Still, the text gives rise to various issues. Two of them will be explained and analyzed in the next section.

3. Amendment of the text of para. 2

The adjustment of the structure of Art. 15 as suggested in the preceding paragraph does not deal with issues that are raised by the text of the first two conditions which are laid down in subpara. a (183 days) and subpara. b (employer).

3.1. Subparagraph a: time

The first of the three alternative conditions reads: 'The recipient is *present* in the other State for a period or periods not exceeding in the aggregate 183 days in any 12 month period commencing or ending in the fiscal year concerned'.[817]

The policy reason for introducing a time threshold for the work state ('WS') to tax the employment income earned in that state is perfectly understandable. What is incomprehensible is that the requirement refers to the time that the employee is physically present in the WS irrespective whether during that time the employee is engaged in work in the WS or is perhaps spending time there for other reasons. Why would employment income earned during e.g. two months of work in the WS be taxable in that state if the employee happens to have spent in that period e.g. five additional months in the WS for unrelated reasons, whereas the employment income earned in the WS by a similarly situated fellow worker who did not spent such additional five months in that state, is not be taxable there? History does not shed much light on this issue.[818] The condition was introduced in the League of Nations model conventions not until the 1943 Mexico and 1946 London Drafts. The model texts refer to the employee being 'temporarily present within the latter State for a period or periods not exceeding a total of one hundred and eighty three days'. As some of the drafting of League of Nations Model texts is not very precise, it may well be that this phrase was intended to refer to the time spent in the other state for employment. In the absence, however, of any explanation or discussion of the issue in the official documents, this remains mere speculation[819]. Occasionally,

[817] Emphasis added.

[818] Frank Pötgens, Income from International Private Employment (IBFD 20006, Vol. 12 Doctoral Series), Ch. II (History), sec. 3.3 (The origin of the 183-day rule).

[819] Art. VI.2 of the London Draft (identical to Art. VII.2 of the Mexico draft) provides: 'A person having his fiscal domicile in one contracting State shall, however, be exempt from taxation in the other contracting

in an actual treaty the employment income provision may expressly require presence in the WS for reasons of employment; see e.g. Art. 14, para. 2(a) of the 2006 treaty between the Republic of Austria and the Czech Republic:[820]

'(a) the recipient is *employed* in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned'.

It is unclear why it generally would be easier to apply a test employing days of presence rather than days of employment as has occasionally been suggested, since the issues stemming from whether parts of days, days of sickness spent in the WS, etc., should be taken into account, appear to be similar in both approaches. In the absence of substantive arguments that the test should also take into account the work-*un*related days of presence rather than only the days on which employment activities are exercised, it is proposed to amend the condition by restricting the time requirement to days spent in the WS for reasons related to the employment as is done in the treaty provision quoted above. It is therefore suggested to replace the current text of subpara. a by the text quoted above from the Austrian-Czech treaty.

3.2. Subparagraph b: employer

The policy reason for granting a taxing right to the WS in instances where the employer is a resident of the WS is obvious. In such case the salary will typically be borne by that employer, thereby reducing the employer's taxable profits, for which compensation is offered by the taxation of the salary received by the employee. This 'compensation' argument also applies to the third condition (subpara. c: 'the remuneration is not borne by a permanent establishment which the employer has in the other State'). With regard to that condition, it is noted in sec. 7 of the OECD Commentary on Art. 15 that the WS may tax 'the remuneration that could give rise to a deduction, having regard to the principles of Article 7 …, in computing the profits of a permanent establishment situated in the State in which the employment is exercised'.

State in respect of such remuneration if he is temporarily present within the latter State for a period of periods not exceeding …'. And para. 3: '… he shall be taxable in [the second State] in respect of the remuneration he earned during his stay there …'. In the Commentary on these provisions it is stated that '… a person having his fiscal domicile in one of the contracting States will be considered as having rendered services in the other contracting State only if the period or periods during which he has stayed in the other country exceed 183 days'. What can be noted is that the reference to 'stay' in the other country could more easily be understood as accommodating *both* meanings than the current expression 'present'.

[820] BGBl. III, 4 April 2007, Nr. 39, p. 11. The treaty is mentioned by *Luc de Broe*, Article 15 – Income from Employment, in: *Ekkehart Reimer & Alexander Rust (eds.)*, Klaus Vogel on Double Taxation Conventions (Wolters Kluwer, 2015)

While a similar consideration appears to be applicable to the case of a resident employer, the Commentary on para. 2(b) of Art. 15 is silent in this respect. In a 2000 publication by Luc de Broe, et al., on the interpretation of this para. 2(b)[821] comprehensive evidence is provided, however, of the same rationale underlying this subparagraph, including a reference to par. 90 of the 1999 OECD Partnership Report.[822] On the basis of the foregoing it appears appropriate to replace the current awkward requirement that the remuneration be 'paid by, or on behalf of' the employer, by 'borne by' the employer.

With regard to the rationale underlying the conditions laid down in para. 2(b) and 2(c) it must be recognized that with respect to the employee's remuneration the connection between deduction under Art. 7 and taxability under Art. 15 remains imperfect. For deducting under Art. 7 a salary in computing the profits attributable to the PE it suffices that the salary expense is incurred for purposes of the PE (as established under the rules laid down in the Art. 7 Commentary and the 2010 OECD Report on the attribution of profits to permanent establishments), no matter whether the employee performs the pertinent work in the WS or elsewhere. For WS taxation, however, of the pertinent salary to the employee under Art. 15 it is additionally required that the employee has exercised his employment activities in the WS. If the employee has not exercised the pertinent activities in that state, his salary cannot, despite the deduction from the profits in that state under Art. 7, be taxed in that state. An example of a case in which this issue arises involves an employee who is a resident of one treaty state ('RS') and works for an employer who as a resident of the other treaty state (WS) carries on business through a PE in a third state (or in the employee's RS). If the employee is engaged in activities for that PE, the employee's remuneration expense will be attributed to the PE. In that instance, through the double taxation relief that the

[821] *Luc de Broe*, *et al.*, Interpretation of Article 15(2)(b) of the OECD Model Convention: "Remuneration paid by, or on behalf of, an employer who is not a resident of the other state", [2000] 54 Bulletin No. 10, 503 at 511. The text of para. 90 reads: 'The Committee [on Fiscal Affairs] examined this result in the context of Article 15 and in light of the object and purpose of subparagraphs 2b) and c) of that Article. In its view, the conditions imposed by these subparagraphs aim at avoiding the source taxation of short-term employments to the extent that the employment income is not allowed as a deductible expense in the State of source because the employer is not taxable in that State since he is not resident nor has a permanent establishment therein. ...'.

[822] In the Art. 15 chapter *Luc de Broe* contributed to *Ekkehart Reimer & Alexander Rust (eds.)*, Klaus Vogel on Double Taxation Conventions (Wolters Kluwer, 2015) he observes that 'the objective of Article 15(2)(b) and (c) OECD and UN MC is to grant a right to tax to that State which recognizes the cost of the remuneration as a deduction from taxable profit'. In this context he also refers to the Technical Explanation of the US Model 2006 which similarly states that the conditions (b) and (c) are intended to ensure that a State of work will not be required to allow a deduction to the payor for compensation paid and at the same time exempt the employee on the amount received.

employer's RS will provide in respect of the foreign PE profits, the employee's salary is borne effectively not by the RS of the employer (i.e. the WS) but by the PE state (the third state, or the employee's RS). At first sight, this appears to be a correct outcome in a case where it is not the employer's RS that may tax the salary (as it is not effective borne in that state) but the PE state (as the salary is attributable to the PE). Along this line, as the salary is legally borne by the employer (as an expense incurred by the general enterprise) but not effectively borne, it would appear appropriate to provide for an exception to the rule of para. 2(b): no taxing right for the WS if the salary is not 'effectively' borne in that WS. At closer examination, however, it is clear that the PE state, while bearing the salary expense, will not be able to tax the salary under the rules of Art. 15 of its treaty with the employee's residence state (RS) since the nexus requirement of para. 1 that the employment is exercised in the OS is not met. As the PE state (while bearing the salary expense) cannot tax the salary, the employer's residence state WS (while *not* effectively bearing the expense of the salary) should not be barred from taxing it. These considerations lead me to suggesting not to follow the proposal made by Luc de Broe, et al., to replace in para. 2(b) the words 'paid by, or on behalf of,' by 'borne by'.[823] Instead, I would propose to remove the reference to the remuneration and require only that the employer is a resident of the WS.

3.3. Texts

Based on the foregoing it is proposed to replace the text of para.s 2(b) and 2(c) of Art. 15 by the following combined text:

'the employer is a resident of the other State or carries on business in the other State through a permanent establishment that bears the remuneration'.

If this text is combined with the other parts of the existing text of Art. 15, the overall text proposed to replace the current text of para.s 1 and 2 of Art. 15 will read:

'Subject to …, … remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State and the recipient is present in the other State for more than 183 days in any twelve month period

[823] *Luc de Broe, et al.*, Interpretation of Article 15(2)(b) of the OECD Model Convention: "Remuneration paid by, or on behalf of, an employer who is not a resident of the other state", [2000] 54 Bulletin No. 10, 503 at 514.

commencing or ending in the fiscal year concerned, or the employer is a resident of the other State or carries on business in the other State through a permanent establishment that bears the remuneration. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in the other State.'

4. Epilogue

A few years ago I wrote in a Festschrift: 'An author interested in issues that involve the structure, contents and operation of the OECD Model should not write on those issues with the aim – or hope – to have the OECD's Committee of Fiscal Affairs study the suggestions made, approve them and incorporate them in an update of the Model and Commentary. Although it happens (see, e.g., *John F. Avery Jones et al.*, Credit and Exemption under Tax Treaties in cases of Differing Income Categorisation, 36 European Taxation 118; [1996] BTR 212, suggesting the `better´ interpretation of Art. 23A, para. 1, to be subscribed to by the OECD), it does not happen often. An author should write on such issues because it satisfies his desire to see whether existing rules can be made less complex without affecting their efficiency. It is a bit like mathematics: finding a clean, clever and compact solution to a problem that was not solved earlier or only in a complicated manner, gives intellectual joy, similar to esthetic and sensual joys, which may enrich an individual's life. And that may be one reason why the practice of contributing to a Festschrift continues in this day and age where people seem to have less and less time'.[824]

Having said that, I trust that the adoption by the OECD of the changes that I propose for Art. 15 text will provide Rainer with an ample opportunity to update his Art. 15 commentary in the Vogel/Lehner book and thereby smoothen the transition from an active professorship to a well-earned *Ruhestand.*

[824] *Kees van Raad*, Four suggestions to improve the consistency and efficiency of the OECD Model's distributive rules, Chapter 19 in: *Jérôme Monsenego & Jan Bluvberg (eds.)*, International Taxation in a Changing Landscape – Liber Amicorum in Honour of Bertil Wiman (Wolters Kluwer, 2019), p. 261.

FOWLER CASE: DOMESTIC LAW AND TREATY INTERPRETATION

Luís Eduardo Schoueri[825]
Renan Baleeiro Costa[826]

1. Introduction

The contribution of Prof. Rainer Prokisch to the international tax is remarkable: not only due to his writing, but especially for when one considers his long journey as a professor. Rainer's greatest joy is to provoke his students to develop their own thoughts, even when these do not correspond to his own ideas. One may even dare to say that Prof. Rainer Prokisch appreciates mostly being challenged – what is a different task for his students, since he is always able to find new arguments to sustain his point of view. As a result, both participants gain a better understanding from the discussion (even if they continue to dissent).

This experience, which was certainly testified by several students, goes back to Munich, when the first author of this article met Prof. Rainer Prokisch, who acted as an assistant of Prof. Klaus Vogel. For two years, daily meetings offered an unique opportunity for learning international tax, while a doctoral thesis was developed. In this sense, this article should be considered as a continuation of a dialogue, always hoping that a better understanding of a fundamental issue in the area of tax treaties is achieved.

Accordingly, this article aims at briefly discussing a highly complex, controversial issue in international taxation: the resort to domestic law in the interpretation of tax treaties. For this purpose, this article elects as object of analysis the Fowler Case, recently judged by the Supreme Court of the United Kingdom[827]. The issue at dispute in the case is whether Mr. Fowler's income should fall within article 7 (business profits) or article 14 (employment income) of the double taxation convention between the UK and South Africa ("UK-South Africa DTC"). Since Prof. Rainer Prokisch has very much contributed not only to the study of tax treaty interpretation but also specifically to that of employment income taxation as the responsible for article

[825] Full Professor of Tax Law at the University of São Paulo.
[826] Graduated in Law at the University of São Paulo.
[827] UK Supreme Court, Fowler (Respondent) v Commissioners for Her Majesty's Revenue and Customs (Appellant), judgment given on 20 May 2020.

15 of the OECD Model in Vogel's Commentaries[828], the discussion of the Fowler Case somewhat celebrates the particular importance of Prof. Rainer Prokisch to these two research fields.
Without intending to "solve" the Fowler Case in place of the UK Supreme Court, this article intends to sustain the primacy of the autonomous interpretation of treaty concepts, showing that the UK Supreme Court did not take this approach when ruling the Fowler Case.
First, this article (1) presents the Fowler Case along very general lines. It focuses on the decision of the case by the UK Supreme Court. Lower courts decisions on the case are not considered[829].
Second, this paper (2) articulates the authors' fundamental position regarding the interpretation of tax treaties.
Lastly, this article (3) criticizes the interpretative approach undertaken by the UK Supreme Court in view of the authors' position.

2. The Fowler Case as decided by the UK Supreme Court

Mr. Martin Fowler is a qualified diver resident in South Africa, who undertook diving engagements in the waters of the UK Continental Shelf during the 2011/12 and 2012/13 tax years. The British tax authorities thus claimed that the income Mr. Fowler earned from those diving engagements would qualify as employment income, therefore taxable in the UK pursuant to article 14(1) of the UK-South Africa DTC. According to such provision, if "employment is exercised in the other Contracting State" (*i.e.*, the source state, which in the case is the UK), the employment income "may be taxed in that other State" (*i.e.*, the UK).
On the other side, Mr. Fowler argued that his income would not qualify as employment income, but rather as business income, thus taxable only in South Africa pursuant to article 7 of the UK-South Africa DTC (being common ground that Mr. Fowler had not had a permanent establishment in the UK). In his view, Mr. Fowler would be immune to British income taxation since the British income tax legislation would require employment income from divers to be

[828] Klaus Vogel on double taxation conventions: commentary to the OECD-, UN- and US model conventions for the avoidance of double taxation on income and capital with particular reference to German treaty practice, 3rd ed., at 879 and following. *See* also Vogel/Lehner, Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen – Kommentar auf der Grundlage der Musterabkommen, München, Beck, 7. Auflage, 2021 (art. 15).
[829] For an analysis of lower courts decisions, *see* John F. Avery Jones, Fowler v Revenue and Customs Commissioners (Upper Tribunal), International Tax Law Reports 19, at 1042 and following; and John F. Avery Jones, Fowler v Revenue and Customs Commissioners (Court of Appeal), International Tax Law Reports 21, at 388 and following.

treated for income tax purposes as if it were trade income. Therefore, article 7 should apply to Mr. Fowler's situation, thereby disallowing British income taxation.

It is worth describing what the British income tax legislation says about the taxation of income from employed divers.

ITEPA [Income Tax (Earnings and Pensions) Act 2003] provides that "[e]mployment income is not charged to tax under this Part if it is within the charge to tax under Part 2 of ITTOIA 2005 (trading income) by virtue of section 15 of that Act (divers and diving supervisors)".

Section 15 of ITTOIA [Income Tax (Trading and Other Income) Act 2005], titled "Divers and diving supervisors", begins by regulating its own application scope. Section 15(1) then sets three requirements for it to apply: first, it is needed that "a person performs the duties of employment as a diver or diving supervisor in the United Kingdom" (…); second, that the "duties consist wholly or mainly of seabed diving activities"; and third, that "any employment income from the employment would otherwise be chargeable to tax under Part 2 of ITEPA 2003". Then, Section 15(2) provides that "the performance of the duties of employment is instead treated for income tax purposes as the carrying on of a trade in the United Kingdom".

From the taxpayer's perspective, Section 15 of ITTOIA would have the effect of qualifying the income earned by Mr. Fowler as trade income, as such not taxable in the UK pursuant to article 7 of the UK-South Africa DTC.

Due to procedural reasons, the appeal (brought by the tax authorities) reached the Supreme Court on the assumption that Mr. Fowler had performed these activities as an employee. The Supreme Court was thus called to decide the case assuming that Mr. Fowler indeed was an employee.

That said, one might see that the fundamental question of the case was relatively simple: assuming that Mr. Fowler had undertaken the diving engagements as an employee, would the UK be entitled to tax the income derived therefrom according to the UK-South Africa DTC?

The position of the Court may be put as following: the UK would be entitled to tax the income derived by Mr. Fowler from the diving engagements since Section 15 of ITTOIA, as a deeming provision, would not be able to alter the true nature of Mr. Fowler's income as employment income under British tax law. In other words, the legal qualification of the income earned by Mr. Fowler under British tax law would be that of employment income; the provisions of Section 15 of ITTOIA would merely concern the tax treatment to be given to such income, not its nature. Therefore, the Court concluded, article 14 of the UK-South Africa DTC (employment income) should apply, Mr. Fowler's income thus being taxable in the UK.

For the moment, at least one aspect of the Court's decision deserves to be highlighted (irrespective of the fact that it will be further discussed in section 3), that is: the UK Supreme Court clearly took the view that non-defined treaty terms shall derive their meaning from the domestic law of the contracting state applying the treaty. This view, held the Court, would be supported by article 3(2) of the UK-South Africa DTC, worded as follows:

"As regards the application of the provisions of this Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which this Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State".

This position of the UK Supreme Court is expressed many times along the decision. In the very introduction of the judgment, the Court observes that "terms used in the Treaty, if not defined in the Treaty itself, are to be given the meaning which they have in *the tax law*, *or the general law of the state seeking to recover tax*, here the UK". This is again confirmed some pages later, where the Court states that "the question which of articles 7 and 14 of the Treaty applies (…) depends upon the true construction of those articles, in the context of the Treaty as a whole and its purposes, with the meaning of terms within those articles ascertained as required by article 3(2) *by reference to UK income* Ô Á Ø . Applying this methodological approach to the case at hand, the Court concluded that "*UK tax law* would not regard him [Mr. Fowler] as making profits from a trade, or his business as being that of an establishment".

This methodological aspect of the Court's decision is crucial for the purposes of this article, as it will be more evident in section 3.

This article now turns to the presentation of the authors' position on the interpretation of tax treaties.

"Unless the context otherwise requires": the primacy of the autonomous interpretation of tax treaty terms

Legal scholars usually refer to "qualification" when double taxation conventions contain legal terms that also appear in the material, domestic law of the contracting states.[830] Just as it occurs in international private law, also in international tax law the issue of qualification is highly discussed. The three

[830] *See* Vogel/Lehner, Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen – Kommentar auf der Grundlage der Musterabkommen, München, Beck, 7. Auflage, 2021, at 191 (Grundlagen; Rz. 96b and following); *See* Klaus Vogel; Rainer Prokisch, General Report, Cahiers de Droit Fiscal International, v. 78a, Rotterdam, IFA, 1993, p. 82.

main possible approaches to the qualification issue in international tax law are the following: "lex fori", i.e., qualification by the state applying the treaty (each state qualifies a term employed in the double taxation convention in accordance with its own domestic law); "lex causae", i.e., qualification by the state of source (both states adopt the same qualification in accordance with the domestic law of the state where the income arises); and "autonomous qualification", by which both states endeavor to reach the same qualification as required by the context of the convention.

If treaty terms are given the meaning they have in the domestic law of the state applying the treaty, a distortive application of the treaty is likely to take place. If each contracting state gives treaty terms the meaning they have in their own domestic laws (i.e., on a "lex fori" approach) double taxation (or double non-taxation) is likely to occur. Double taxation (and perhaps double non-taxation either) is clearly not aimed at by tax treaties.[831]

The defense of the qualification by the state of source (i.e., the "lex causae" approach) arose as a means to avoid the asymmetric application of tax treaties which "lex fori" could lead to. Indeed, binding the state of residence to the qualification settled by the state of source leads to a uniform application of the treaty, in the sense that both parties apply to the case the same treaty provision. "Lex cause" so avoids the occurrence of double taxation and double non-taxation.

But the qualification by the state of source produces undesirable effects as well. The primacy of the qualification by the state of source is likely to harm the balance of the treaty: it subjects the residence state to the unilateral discretion of the state of source in qualifying treaty terms. "Lex cause" gives to the state of source the ability to broaden the scope of treaty terms by altering its domestic law, and so favors the contracting party "that attaches the broader meaning to the term to be qualified".[832] Even some of those who sustain the primacy of the source state qualification admit that certain domestic law modifications might go too far and so shall be disregarded at the qualification of treaty terms.[833] The qualification by the state of source demands due consideration on the possibility of containing treaty abuse by the States themselves (treaty dodging).[834]

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[831] *See* Klaus Vogel; Rainer Prokisch, General Report, Cahiers de Droit Fiscal International, v. 78a, Rotterdam, IFA, 1993, p. 77.

[832] *See* Klaus Vogel; Rainer Prokisch, General Report, Cahiers de Droit Fiscal International, v. 78a, Rotterdam, IFA, 1993, p. 82.

[833] John F. Avery Jones et al, The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model, British Tax Review n. 1, London, Sweet & Maxwell, 1984, p. 47.

[834] On treaty dodging, *see* V. Arruda Ferreira, Acknowledgements in The Improper Use of Tax Treaties by Contracting States: Tax Treaty Dodging (IBFD 2021), Books IBFD.

Autonomous qualification has none of these disadvantages. By deriving a common qualification from the context of the treaty, the autonomous approach avoids the occurrence of double taxation/double non-taxation, which divergences between the domestic laws of contracting states could cause. Since domestic law is irrelevant, neither does autonomous qualification allow for unilateral discretion from a contracting state in the manipulation of the scope of treaty terms. In addition, autonomous qualification is the one that better reconciles with the context of the treaty since it leads to the application of the treaty irrespective of what contracting states might unilaterally provide for in their domestic laws.

In any case, autonomous qualification encounters some feasibility challenges: the search for an autonomous qualification by contracting states might not be effectively possible due to either interpretative limits or practicability obstacles (*i.e.*, access to foreign case law).[835] As Klaus Vogel alerts, deriving an autonomous qualification "is a difficult task" since the interpreter will often seek "in vain" for criteria to support such a qualification.[836]

Among all possible solutions to the qualification issue (and still not considering article 3(2) of the OECD Model Convention), Klaus Vogel has initially defended autonomous qualification as "the only supportable solution", as it would be able to ensure "the desired common interpretation of treaty terms".[837] As Vogel and Prokisch put, the interpreter of the convention "should strive for an autonomous qualification whenever possible".[838]

Indeed, a tax treaty is a bilateral agreement signed with the purpose of distributing tax rights. Signing parties give each other reciprocal concessions with the purpose of attaining what they imagine to be an appropriate distribution of tax rights. When negotiating a tax treaty, the parties take into consideration a wide range of aspects (their revenue needs, particularities of their tax policy which they are not intended to waive, the status of the signing partner as a developed or developing country, etc.). This means that, once a final text is agreed upon, it implies an intrinsic, natural balance as regards the

[835] *See* Vogel/Lehner, Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen – Kommentar auf der Grundlage der Musterabkommen, München, Beck, 7. Auflage, 2021, at 217-218 (Grundlagen; Rz. 116). On the relationship between foreign courts decisions and treaty interpretation, *see* Rainer Prokisch, Fragen der Auslegung von Doppelbesteuerungsabkommen, 4 Steuer & Wirtschaft International no. 2, Februar 1994, pp. 52-59.

[836] Klaus Vogel, Double Tax Treaties and Their Interpretation, International Tax & Business Lawyer, v. 4 – Spring 1986 – no. 1, at 66.

[837] Klaus Vogel, Double Tax Treaties and Their Interpretation, International Tax & Business Lawyer, v. 4 – Spring 1986 – no. 1, at 65. *See* also Klaus Vogel, "Harmonia Decisória e Problemática da Qualificação nos Acordos de Bitributação", in Direito Tributário - Estudos em Homenagem a Brandão Machado. Luís Eduardo Schoueri e Fernando A. Zilveti (coords.), São Paulo: Dialética, 1998.

[838] *See* Klaus Vogel; Rainer Prokisch, General Report, Cahiers de Droit Fiscal International, v. 78a, Rotterdam, IFA, 1993, p. 83.

distribution of tax rights. The parties only agree upon a final text because they consider such a final text to be, at some extent, a fair (or at least convenient) distribution of tax rights.

Therefore, tax treaties are the result of delicate, meticulous negotiating proceedings in which each party tries to promote its political and economic interests. A tax treaty thus implies an inherent equilibrium; otherwise, it would most probably not have been signed (just as it happens with any other bilateral agreement).

If this is true, it is clear that the autonomous qualification is the interpretation method that better respects the context (i.e., the inherent equilibrium) of the treaty. When tax authorities of a contracting state settle the meaning of a treaty term *taking the treaty itself as reference for interpretation* (instead of the state's domestic law), tax authorities are much more likely to respect the inherent balance of the treaty.

However, autonomous qualification has to face the wording of article 3(2) of the OECD Model Convention, which might reasonably be considered to favor a "lex fori" solution. Article 3(2) states that "any term not defined therein [in the treaty] shall (…) have the meaning that it has at that time under the law of that State [the state applying the convention]". On the other side, the same provision puts that the domestic law of the state applying the treaty shall not prevail if the "context otherwise requires", thus opening room for autonomous qualification.

Klaus Vogel reports that "the undesirable legal consequences" which could result from treaty interpretation in accordance with domestic law "have induced" legal scholars to try to limit reference to domestic law in article 3(2) by supporting that the treaty should be interpreted according to its context to the greatest possible extent. "Unfortunately", Vogel says, these efforts could be supported only "to a limited extent" since a systematic preference for interpretation from the context over interpretation by reference to national law would be "impossible to infer from Art. 3(2)".[839]

Vogel additionally observes that investigating whether the context *otherwise requires* (that is, whether the context requires an approach other than resorting to domestic law) assumes, pursuant to the "rules of logic", that the interpreter

[839] Klaus Vogel on double taxation conventions: commentary to the OECD-, UN- and US model conventions for the avoidance of double taxation on income and capital with particular reference to German treaty practice, 3rd ed., at 213. This position is confirmed in Vogel/Lehner, Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen – Kommentar auf der Grundlage der Musterabkommen, München, Beck, 4. Auflage, 2003, at 392 (Art. 3; Rz. 119) and in Vogel/Lehner, Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen – Kommentar auf der Grundlage der Musterabkommen, München, Beck, 7. Auflage, 2021, at 599 (Art. 3; Rz. 119).

has previously established a domestic law meaning. Only if confronted to a domestic law meaning would the interpreter logically be able to assess whether the context requires otherwise. This assumption would indicate that an interpretation according to domestic law "should take preference" in article 3(2).[840] Moreover, Vogel emphasizes the wording of article 3(2) as a provision stating "unless the context otherwise *requires*", and not "unless the context yields no other, or absolutely no other, interpretation". This would indicate that not every autonomous interpretation, but only that supported by "relatively strong arguments" could claim to prevail over a domestic law interpretation.[841]
Holding a different position, Michael Lang notes that "much suggests" that the formulation *unless the context otherwise requires* means "the precedence of an autonomous interpretation". He observes that "interpretation conflicts would be inevitable" if each of the contracting parties were able to interpret the convention in accordance with their internal law. As a result, treaty provisions would "fail to fulfil their task – the allocation of taxation rights between the two countries".[842]
Furthermore, the fact that the formulation in article 3(2) begins by "unless" would be of no relevance since it would not matter whether the interpreter starts the interpretation proceeding by examining what would be the "general rule" or the "exception". In this sense, it could be said that "it makes no difference" whether the formulation "emphasizes its exceptional role or not". Indeed, what matters, in Lang's view, is that an interpretation supported by the context of the treaty should prevail over any interpretation based on domestic law. Therefore, Michael Lang concludes that the "logical order" of article 3(2) of the OECD Model is that "treaty definitions come first" (since it applies only to

[840] Klaus Vogel on double taxation conventions: commentary to the OECD-, UN- and US model conventions for the avoidance of double taxation on income and capital with particular reference to German treaty practice, 3rd ed., at 214. This position is confirmed in Vogel/Lehner, Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen – Kommentar auf der Grundlage der Musterabkommen, München, Beck, 4. Auflage, 2003, at 392-393 (Art. 3; Rz. 119) and in Vogel/Lehner, Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen – Kommentar auf der Grundlage der Musterabkommen, München, Beck, 7. Auflage, 2021, at 599-600 (Art. 3; Rz. 119).

[841] Klaus Vogel on double taxation conventions: commentary to the OECD-, UN- and US model conventions for the avoidance of double taxation on income and capital with particular reference to German treaty practice, 3rd ed., at 214. This position is confirmed in Vogel/Lehner, Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen – Kommentar auf der Grundlage der Musterabkommen, München, Beck, 4. Auflage, 2003, at 393 (Art. 3; Rz. 120) and in Vogel/Lehner, Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen – Kommentar auf der Grundlage der Musterabkommen, München, Beck, 7. Auflage, 2021, at 600-601 (Art. 3; Rz. 120; 120a).

[842] Michael Lang, Fowler v. Commissioners for Her Majesty's Revenue and Customs: Some Thoughts on Tax Treaty Interpretation (Thinker, Teacher, Traveler: Reimagining International Tax – Essays in Honor of H. David Rosenbloom, eds. G. Kofler, R. Mason and A. Rust) at 316.

non-defined treaty terms) and the "context comes second". Domestic law would be the last recourse.[843]

Another (highly disputed) issue concerning the interpretation of article 3(2) is whether this provision supports a source-controlling qualification ("lex causae"). Notably defended by Avery Jones and his co-authors from the International Tax Group,[844] this position sustains that the source state's qualification of income shall bind the residence state. The sole ability of the residence state would be to assess whether the source state had levied taxes in accordance with the treaty for purposes of avoiding double taxation. Klaus Vogel, who at first rejected this approach,[845] accepted it later[846]. Endorsing "lex causae", Vogel observed that tax treaties oblige residence states to avoid double taxation of income which "may be taxed in the other contracting state *in accordance with the provisions of this convention*".[847] Under a "lex causae" approach, it would be up to the source state to qualify income under its domestic law (by command of article 3(2)) and then conclude whether it is entitled to tax such income in accordance with the provisions of the convention. The source states' own domestic law would serve as basis for determining what would be *in accordance with the provisions of this convention*. Then, such a qualification should bind residence states since tax treaties, as Vogel emphasizes, do not condition double taxation relief upon income being taxed in accordance with the Ò Å Ó É Ä Å Î Ã Å".[848] Ó Ô Á Ô Å õ Ó Ö É Å ×

Although not ignoring the possibility of unbalanced treaty application due to differences in the scope of domestic law definitions (even in case of treaty dodging), Vogel considers this disadvantage as less harmful than the double taxation effects which the application of article 3(2) by both states could give

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[843] Michael Lang, Fowler v. Commissioners for Her Majesty's Revenue and Customs: Some Thoughts on Tax Treaty Interpretation (Thinker, Teacher, Traveler: Reimagining International Tax – Essays in Honor of H. David Rosenbloom, eds. G. Kofler, R. Mason and A. Rust) at 317-318.

[844] For Avery Jones' traditional position, *see* John F. Avery et al., The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model, British Tax Review, n. 1. Londres: Sweet & Maxwell, 1984.

[845] Klaus Vogel on double taxation conventions: commentary to the OECD-, UN- and US model conventions for the avoidance of double taxation on income and capital with particular reference to German treaty practice, 3rd ed., at 211-213.

[846] Vogel/Lehner, Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen – Kommentar auf der Grundlage der Musterabkommen, München, Beck, 4. Auflage, 2003, at 390-391 (Art. 3; Rz. 113; 114); Vogel/Lehner, Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen – Kommentar auf der Grundlage der Musterabkommen, München, Beck, 7. Auflage, 2021, at 605-606 (Art. 3; Rz. 125a-125c).

[847] Vogel/Lehner, Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen – Kommentar auf der Grundlage der Musterabkommen, München, Beck, 4. Auflage, 2003, at 390 (Art. 3; Rz. 113); Vogel/Lehner, Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen – Kommentar auf der Grundlage der Musterabkommen, München, Beck, 7. Auflage, 2021, at 605 (Art. 3; Rz. 125a).

rise to. In addition, at the end of the day the residence state would always be able to disregard for treaty purposes a modification in the domestic law of the source state, where such a modification is considered to have been made with the purpose of expanding the source state's tax base under the treaty.[848]
Having considered all that, the authors sustain a preference for an autonomous interpretation under article 3(2) of the OECD Model Convention. On this point, the authors' position aligns largely to Michael Lang's: it does not matter whether one starts interpreting a given term by the "exception" (context) or the "rule" (domestic law). Moreover, the term "requires" shall be understood not literally, but rather in light of the purpose and object of tax treaties. Provided that tax treaties have as their principal aim the distribution of tax rights, one should interpret "unless the context otherwise requires" as a clause ensuring the prevalence of a context-oriented interpretation as it is the interpretation that better favors the treaty itself. Of course, article 3(2) assumes that situations will occur in which autonomous qualification will not be possible; otherwise article 3(2) would have only referred to context. Therefore, resort to domestic law (whether under a "lex fori" or a "lex causae" approach) is mandatory where an autonomous qualification cannot be derived.
This article now turns again to the Fowler Case to make some conclusive remarks on the interpretative approach followed by the UK Supreme Court.

3. Resort to the domestic law in the Fowler Case: a misguided debate

As section 1 put it, the UK Supreme Court took British internal law as reference for the qualification of Mr. Fowler's income. This led the case to be decided on misleading terms.
Since British internal law was of relevance, the Court was forced to decide on the potential effect of particular, tricky issues of British internal law on the qualification of Mr. Fowler's income under the UK-South Africa DTC.
British tax law subjects diving income to taxation under the rules of trade income taxation. British tax law thus seems to regulate the taxation of diving income through a deeming mechanism, by which income of employed divers would not be treated for income tax purposes as employment income, but rather as trade income. Section 15(2) of ITTOIA would be the deeming

[848] Vogel/Lehner, Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen – Kommentar auf der Grundlage der Musterabkommen, München, Beck, 4. Auflage, 2003, at 391 (Art. 3; Rz. 114); Vogel/Lehner, Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen – Kommentar auf der Grundlage der Musterabkommen, München, Beck, 7. Auflage, 2021, at 605-606 (Art. 3; Rz. 125c).

provision, as it requires that "the performance of the duties of employment" (by divers in the United Kingdom) be "instead treated for income tax purposes as the carrying on of a trade in the United Kingdom".

As put in section 1 of this article, the Court concluded that Section 15 of ITTOIA would not be able to alter the true legal qualification of the income earned by Mr. Fowler under British tax law as employment income. The Court ruled that "[n]othing in the Treaty requires articles 7 and 14 to be applied to the fictional, deemed world which may be created by UK income tax legislation". Instead, stated the Court, these articles "are to be applied to the real world".

In the Court's view, Section 15 would use "employment", "employment income" and "trade" in their usual meaning under British tax law. The sole particularity in Section 15 would be the deeming effect. Therefore, the Court concluded that "nothing in section 15 purports to alter the settled meaning of the relevant terms of the Treaty". As the Court held, Section 15 "erects a fiction" constructed upon the usual meaning of those terms merely to impose "a different way of recovering income tax from qualifying divers". This would not be enough for modifying the qualification of Mr. Fowler's income as employment income.

Regardless of what the correct treaty qualification of Mr. Fowler's income might be according to British tax law, it is clear how tricky it became for the Court to decide Mr. Fowler's case. The Court had to deal with specific, complex regulation of British internal law regarding diving income, investigating its potential effects on the UK-South Africa DTC.

For instance, Michael Lang opposed the Court's approach to deeming provisions versus "real world". The distinction as such would be flawed since both *employment* and *trade* would be defined under UK tax law "for certain situations", being thus "arbitrary" to consider some parts of these definitions as reflecting the real world and others as deeming provisions. Moreover, the term *instead* in Section 15(2) of ITTOIA would merely be part of "legislative technique" as legal definitions would consist of "general rules" as well as "exceptions". Therefore, Lang sustains, *provided that domestic law was to be considered*, there would be "no reason to just look at the general rule but not at the exception". At the end of the day, the legislative power would be "completely free" to define expressions such as *employment* or *trade*, being thus senseless to distinguish between what would be the usual meaning of a term and a fiction.[849]

To complicate things further, a change in the wording of UK legislation (occurred along the first decade of the 21st century by virtue of the 'Tax Law

[849] Michael Lang, Fowler v. Commissioners for Her Majesty's Revenue and Customs: Some Thoughts on Tax Treaty Interpretation (Thinker, Teacher, Traveler: Reimagining International Tax – Essays in Honor of H. David Rosenbloom, eds. G. Kofler, R. Mason and A. Rust) at 318-319.

Rewrite" process, of which the ITEPA and the ITTOIA were part) seems to have gone unnoticed through the Court's judgement. Originally, British tax law required the performance by the diver of the duties of employment to be treated "as if" he was carrying on a trade, while the performance of those duties is currently treated "as" the carrying on of a trade. Avery Jones admits that the distinction might seem "subtle". However, he observes that if something is treated *as if* it were a trade, "obviously it does not become a trade", while if something is treated *as* a trade, "it does" (become a trade). Jones then defends that the legislator "must have had the distinction in mind" in Section 15 as he would have "deliberately" made this distinction also in previous sections of ITTOIA. If this is true, Section 15(2) of ITTOIA would have overridden "by implication" the categorization of diving/diving income as employment/employment income. As a matter of fact, Jones says, overriding by implication would be "the drafter's normal practice".[850]

In addition, the Court investigated on the purpose of the deeming provision in Section 15(2) to hold it as irrelevant for the qualification of Mr. Fowler's income. At this point, the Court made some interesting remarks for the purposes of this article. The Court observed that the fiction in Section 15 of ITTOIA is "not for the purpose of deciding *whether qualifying employed divers are to be taxed in the UK* upon their employment income". Rather, the fiction would be concerned with the manner in which that income is to be taxed, especially "by allowing a more generous regime for the deduction of expenses". The deeming provision, stated the Court, would clearly not have the purpose of "rendering a qualifying diver immune from tax in the UK", nor it would have the purpose of "adjudicating between the UK and South Africa as the potential recipient of tax".

These excerpts are interesting since they show that the UK Court based its conclusion also on the fact that domestic deeming provisions do not serve the purpose of distributing tax rights under tax treaties. What the Court perhaps missed is that "usual meaning" (*i.e.*, non-deeming) internal law provisions do not serve that purpose neither. Saying that the "fiction" does not have the purpose of "adjudicating between the UK and South Africa as the potential recipient of tax", while saying at the same time that British internal law should govern the qualification of treaty terms is to some extent inconsistent.

In the authors' view, the Court faced problems it could (and should) have escaped. Instead of going through the (tricky) details of British domestic legislation, the Court should have adopted an autonomous approach on

[850] John F. Avery Jones, Fowler v Revenue and Customs Commissioners (Upper Tribunal), International Tax Law Reports 19, at 1045-1047; 1051-1052.

qualification. This question simply does not appear to have occurred to the Court: does the context accept the qualification according to British law? Would not this be a case in which the context would require an autonomous qualification?

Under an autonomous approach, the Court could have reached the same conclusion it reached under a domestic law approach (taxability of Mr. Fowler's income in the UK under article 14 of the UK-South Africa DTC). But the methodological path also matters, and the Court could have at least tried to undertake an autonomous interpretation in the case. If viable, autonomous interpretation would have brought advantages to all parties involved. In the first place, the Court itself would have been removed the burden of going through into detailed, tricky internal law regulation. Secondly, the treaty would have been applied pursuant to interpretative sources much more appropriate for a tax treaty interpretation than any internal law (such as the OECD Commentaries on the Model Convention, foreign case law, treaty practice, etc.). This would have benefited both signing parties since a contextual treaty application is more likely to serve treaties' function as international agreements on the distribution of tax rights, including by protecting treaties' inherent balance. Lastly, an autonomous approach would have set aside any suspects on national courts and national law. As a UK Court concluded that UK was entitled to tax pursuant to UK internal law, it could have raised doubts on whether a context-oriented, equidistant interpretation of the treaty would have led the Court to the same result. This reinforces the preference for autonomous interpretation whenever possible.

Accordingly, the authors believe that articles 7 and 15 of tax treaties (articles 7 and 14 of the UK-South Africa DTC) are not in the same position. The latter deals with a specific item of income, while the former has a rather general scope. Thus, the main question is not whether Mr. Fowler's income is business profits *or* income from employment. The first question is rather to determine whether article 15 (article 14 of the UK-South Africa DTC) is applicable, i.e., one should only ask what "income from employment" under the treaty is. An autonomous qualification would easily resort to the sources of international tax in order to understand the reason why the state of source may tax such income under some circumstances.

Prof. Rainer Prokisch was responsible for article 15 of Vogel's commentary, and there one can learn that taxation in the state of residence corresponds to the systematic of the treaty, since it assumes that the state of residence is in a better position to tax the whole income (internal and foreign). In addition, this

systematic should not be affected by a minor presence in the state of source.[851] However, since the determination of a minor presence could be arguable, article 15 adopts the 183-day-rule,[852] which can objectively determine the right of the source state to tax. This solution is different from that of article 7, which demands the presence of a permanent establishment for the source state to be able to tax (instead of requiring a physical presence test). This seems to present a relevant hint for autonomous qualification: the treaty is always looking for a ground for an exception to the rule of exclusive taxation by the residence state. In both article 7 and article 15, the treaty looks for a sufficient liaison (economic allegiance) to the state of source as to grant it tax rights. In case of an employment, the mere physical presence is enough, *i.e*, the employee is deemed to have a sufficient connection to the state of source if he stays there for more than 183 days. The treaty is considering not only the activities performed, but the whole circumstance of belonging to the community. This brings less relevance to whether the activity enriched the state of source. In this sense, also weekends and holidays count for the 183 days. The idea is that the dependence of the taxpayer to an employer of the state of source and the long lasting physical presence would imply economic allegiance. For article 7, on the other hand, one should consider the activities performed by a permanent establishment, i.e., the focus is not on the presence, but rather on an economic activity actually and permanently performed in the state of source.

This being said, it does not seem to be reasonable to exclude the application of article 15 based on the fact that internal legislation of the state of source (the UK, in the Fowler Case) might not qualify the income as derived from employment for tax purposes. All in all, the tax treatment of diving income in the UK does not alter the fact that Mr. Fowler undertook diving work in the UK and stayed in that jurisdiction for a non-insignificant period. Article 15's scope seems to cover exactly this kind of liaison.

It does not seem to be reasonable to investigate whether Mr. Fowler had a PE in the UK if he acted under the orders of his employer. Article 7's scope is for independent activities, irrespective of whether performed by companies or by individuals. Pasquale Pistone reports that in the OECD Model 2000 article 15 was changed from "Income from dependent personal services" to "Income from employment", a trend followed by the UK-South Africa DTC (which was signed in 2002). The Commentary on Article 15 of the OECD Model (2000) then

[851] Klaus Vogel on double taxation conventions: commentary to the OECD-, UN- and US model conventions for the avoidance of double taxation on income and capital with particular reference to German treaty practice, 3rd ed., at 886.

[852] Klaus Vogel on double taxation conventions: commentary to the OECD-, UN- and US model conventions for the avoidance of double taxation on income and capital with particular reference to German treaty practice, 3rd ed., at 895.

clarified that this change did not intend to modify the scope of article 15. Pistone so concludes that "the essence of dependent personal services and the typical features of employment now, in fact, match".[853] This would be confirmed by article 3(1)(h) of the OECD Model (article 3(1)(d) of the UK-South Africa DTC), as it establishes that the definition of business shall include "the performance of professional services *and other activities of an independent character*". Accordingly, Pistone clarifies that there would be a "mutual exclusion" between independent activities (falling under article 7) and those activities of a dependent character (outside article 7).[854] Mr. Fowler's activity had a clear dependent character.

In the past, one would discuss whether an activity of an individual would be dependent or independent, in order to decide for the application of article 14 or 15. Presently, article 14 is absent in tax treaties. Thus, if article 15 is not applicable, article 7 shall apply. The latter, however, concerns business profits, *i.e*, an independent activity, which does not seem to be the case of Mr. Fowler. The context of the treaty, which refers to permanent establishment in article 7 and to physical presence in article 15, is enough evidence that a dependent activity cannot fall within article 7. It makes no sense to refer to a PE held by the employee, even if the employee remains in the source state for the whole year.

Additionally, even if a precise, exclusive definition is not possible, one might derive some interpretative criteria for assessing what would be a "dependent" (employment) activity in contrast to an independent activity.

In spite of the absence of an express definition of employment in the OECD/UN Model Conventions, Rainer Prokisch explains that these models "are based on a common understanding of the type of activities to be covered by the term 'dependent personal services'". The meaning of 'dependent personal services', he argues, should be derived "on the one hand by distinguishing it from other types of income" (such as business profits/independent activities) and "on the other hand by referring to a common international understanding". In this regard, Prokisch states that "dependent services" (currently "employment") usually refer to "a person – the employee" that "makes his capacity for work available to another – the employer", the former being "obligated to follow the directions and instructions" of the latter when performing his working duties.[855]

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[853] Pasquale Pistone, Article 15: Income from Employment - Global Tax Treaty Commentaries, IBFD 2019, sec. 5.1.3.1.2.

[854] Pasquale Pistone, Article 15: Income from Employment - Global Tax Treaty Commentaries, IBFD 2019, sec. 5.1.3.1.3.

[855] Klaus Vogel on double taxation conventions: commentary to the OECD-, UN- and US model conventions for the avoidance of double taxation on income and capital with particular reference to German treaty practice,

Similarly, Pasquale Pistone refers to three main elements derived from the OECD Public Discussion Draft (2007) which could be useful to assess the meaning of employment. These would be that "employment involves the exercise of activities under the direction, control and instruction" of the employer; this would be the *subordination element*. Other typical features of employment relations would be that the employer "bears all risk" of the economic activities, as well as that he makes "structures available to the employee". These criteria, Pistone argues, could "contribute to delimiting the framework" within which a contracting state can resort to domestic law at qualifying employment income for treaty purposes.[856] By saying that, Pasquale tries to reconcile the *renvoi* to domestic law through article 3(2) with the search for autonomous interpretation (which he expressly defends).[857]

Indeed, case law around the world provides some material on typical features of employment relations that may serve for autonomous treaty interpretation.

In Canada, for instance, a case discussed whether the income earned by a US-resident engineer working in Canada should qualify as employment income. The fundamental question was whether the taxpayer had performed his working duties as an independent contractor (in which case he was only taxable in the US) or as an employee (in which case he was taxable also in Canada). To decide it, the Court relied on precedents of Canadian courts and considered factors such as the "level of control" the employer exercised over the worker's activities, the "ownership of the equipment necessary to perform the work", whether the worker "hired his own helpers", and the "degree of financial risk and of profit" taken by the worker. The conclusion of the Court was that the taxpayer provided independent personal services, given that "higher profit coupled with higher risk", "mobility" and "independence" would have characterized the taxpayers' working activity.[858]

The 'subordination' criterion was also present in a case ruled by the Supreme Court of Belgium involving a taxpayer resident in the Netherlands who had worked as a manager of a Belgium company (in which he also held a substantial shareholding). Considering the independent character of managerial functions, as opposed to employment relations marked by the authority that the employer holds over the employee, the Supreme Court ruled that the taxpayer's income

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3rd ed., at 891. This position is confirmed in Vogel/Lehner, Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen – Kommentar auf der Grundlage der Musterabkommen, München, Beck, 2021, at 1672-1673 (Art. 15; Rz. 57).

[856] Pasquale Pistone, Article 15: Income from Employment - Global Tax Treaty Commentaries, IBFD 2019, sec. 5.1.3.1.3.

[857] Pasquale Pistone, Article 15: Income from Employment - Global Tax Treaty Commentaries, IBFD 2019, sec. 5.1.2.2.

[858] CA: Federal Court of Appeal of Canada, 15 March 2002, Wolf v. Her Majesty the Queen, A-563-00, IBFD Case Law.

was not from dependent personal services (employment) under Belgian law, and so not taxable in Belgium under article 15 of the Belgium-Netherlands Double Taxation Convention. Contrary to the Court of Appeal of Brussels (wherefrom the case was brought to the Supreme Court), the Supreme Court held that the fact that the manager was answerable to the other shareholders would not be able to affect the independent character of his activities.[859]

Of course, discussion of facts has not been the main issue at the UK Supreme Court in the Fowler Case. Therefore, one cannot know exactly how the legal relationship between Mr. Fowler and his 'employer' was framed. Be as it may, the judgment of the Fowler Case is nevertheless misguiding. The Court did not even consider the possibility of a contextual interpretation of the UK-South Africa DTC, which would have been a more appropriate approach to the case, as already discussed.

The authors' view is that British internal law is dispensable and misleading for ruling the Fowler Case. Provided that Mr. Fowler's activities were of a dependent, subordinated nature along the lines of a 'common understanding' of the meaning of employment, the Court should have subjected Mr. Fowler's income to article 15 of the UK-South Africa DTC following the very logic of the treaty (and not British internal law).

[859] BE: Supreme Court of Belgium, 18 March 1994, Case B 92/22, IBFD Case Law.

AI BIASES AND ITS CONSEQUENCES ON TAXATION

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1. Introduction

The present contribution to Prof. Rainer Prokisch' *Liber Amicorum* is a direct consequence of his mentorship on the two authors. Prof. Prokisch is aware of the impact that technology is having on all layers of taxation, from the local level to the international one, making the intersection of Technology and Taxation a necessary field of study in order to know how to get the most out of it in order to improve the whole functioning of the taxation system. Artificial Intelligence (AI), robotics and other potentially disruptive technologies are becoming an essential tool for the detection of fraudulent practices as well as helping improve the levels of tax compliance by taxpayers. Surveys show that particularly the use of AI systems is becoming more and more attractive for tax authorities. Depending on the chosen algorithmic model implemented and based on a vast amount of data about taxpayers, AI can help to increase tax compliance by taxpayers and to prevent cases of tax evasion and tax fraud. Despite the numerous advantages that AI might entail, there are also drawbacks. The objective of this contribution is to delve into one of the main issues the application of AI is experiencing: the biases in the algorithms and its consequences.

The structure of the present contributions starts with a section (section 2) where the authors will give an insight about what AI is and what benefits it entails, followed by a section (section 3) that will shed light on the different types of biases in AI and its characteristics. As a further step, section 4 will elaborate on the consequences of such biases within the European Union (EU). In that regard, this section will specifically cover the principle of non-discrimination, the gathering of more information than foreseeably relevant, the discrepancies with the framework as set forth by the GDPR, as well as the principle of proportionality, followed by the EU's response. We will end this contribution with a conclusion.

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2. The use of AI in taxation – What is AI, examples of use in taxation and its benefits

More and more governmental institutions to improve their functioning in private and public sectors use technological advancement and the gathering of tremendous amounts of data.[862] This also applies to tax authorities who implement AI systems with the aim to ensure the effectiveness and efficiency of their tax systems. According to the OECD report 'Tax Administrations 2021: Comparative Information on OECD and other Advanced and Emerging Economies', the tax administrations of 40 states already leverage the use of AI or envisage doing so in the short-term.[863]

Despite the increasing popularity of AI in the public and private sector, a discussion amongst stakeholders from various backgrounds redresses the balance of automation and sets the benefits and opportunities of AI alongside the undoubted drawbacks and challenges. Before exposing the imminent disadvantages of AI in taxation in the following sections, this part will present examples of the use of AI by tax administrations and its beneficial effects.

In order to detect the advantages of AI, it is necessary to grasp what AI is. Influenced by science fiction books[864] and movies[865], the term 'artificial intelligence' many times creates the idea of a humanoid robot which moves, acts, and thinks like mankind. It is, however, much more multifaceted than that in actuality. AI is "the ability of a digital computer or computer-controlled robot to perform tasks commonly associated with intelligent beings".[866] Overall, the term is used to describe the development of systems which are furnished with the "intellectual processes characteristics" of humans, as for instance the capability to reason and to learn from previous experiences.[867] Since the development of AI did not mature sufficiently at this point, the potential and resulting effects on economies and societies, and therefore its meaning, remains uncertain. Even though the unpredictable potential of AI makes it

[862] L. Scarcella, Tax compliance and privacy rights in profiling and automated decision making, Internet Policy Review, 22 October 2019, via: https://policyreview.info/articles/analysis/tax-compliance-and-privacy-rights-profiling-and-automated-decision-making (accessed on 25 April 2022).
[863] OECD (2021), Tax Administration 2021: Comparative Information on OECD and other Advanced and Emerging Economies, OECD Publishing, Paris, p.83, accessible at: https://doi.org/10.1787/cef472b9-en.
[864] See I. Asimoc, I, Robot, Random House LLC US, May 2008.
[865] See A. Proyas, 2004.
[866] B.J. Copeland, artificial intelligence, Britannica, 14 December 2021, accessible at: https://www.britannica.com/technology/artificial-intelligence.
[867] Ibid.

difficult to define the term as such, it appears that there is general consent with respect to the decisive characteristics of AI.[868]

The term 'artificial intelligence' has been coined for the first time at the second Dartmouth conference, organized by John McCarthy[869] in 1956. He defines AI as "the science and engineering of making intelligent machines, especially intelligent computer programs. It is related to the similar task of using computers to understand human intelligence, but AI does not have to confine itself to methods that are biologically observable".[870] Since then, the definition of the term AI underwent several shifts, mostly revolving around computers which simulate intelligent behavior.

AI pioneer Marvin Minsky defined AI as "[…] the science of making machines do things that would require intelligence if done by men".[871].Later, in 2009, Stuart Russel and Peter Norvig elaborated on a more precise definition of AI, differentiating between the rationality, thinking and acting capabilities of computer systems.[872]

The textbook 'Artificial Intelligence: A Modern Approach' became one of the leading conceptual views of AI.[873]According to that view, AI systems are about the three components of sensors, operational logic, and actuators. By means of sensors, the underlying system collects vast amounts of data as for instance texts and pictures. Its operational logic materializes the collected data and provides instructions for the action that needs to be taken. Additionally, this element analyses the given situation and calculates the next steps in form of recommendations, predictions, or decision to achieve a desirable outcome.[874] The actuator physically applies the instructions and changes the environment. All three components together are described as an intelligent agent. The intelligent agent affects its environment by taking actions based on instructions

[868] D. Monett, C.W.P. Lewis, and K.R. Thórisson, On Defining Artificial Intelligence, Journal of Artificial General Intelligence, 2019, p.1, accessible at: http://crowley-coutaz.fr/jlc/Courses/2020/MOSIG.SIRR/Wang-OnDefiningAI.pdf (accessed on 25 April 2022).

[869]John McCarthy was an American logician, computer scientist, and author. He is the inventor of the LISP programming language. For his significant contributions in the field of artificial intelligence, McCarthy received the Turing Award in 1971 and a Kyoto Prize in 1988. In 1991 he was awarded the National Medal of Science.

[870] J. McCarthy, J., what is artificial intelligence, Standford University, 24 November 2004, p.2, https://borghese.di.unimi.it/Teaching/AdvancedIntelligentSystems/Old/IntelligentSystems_2008_2009/Old/IntelligentSystems_2005_2006/Documents/Symbolic/04_McCarthy_whatisai.pdf (accessed on 25 April 2022).

[871] KI Berlin, From science fiction to everyday technology, 25 March 2019, https://ki-berlin.de/en/blog/article/welcome-to-reality (accessed on 25 April 2022). Also see M.A. Dennis, Marvin Minsky, Britannica, 20 January 2020, https://www.britannica.com/biography/Marvin-Lee-Minsky (accessed on 25 April 2022).

[872] S. Russel and P. Norvig, Artificial Intelligence: A Modern Approach, Pearson, 1 May 2021.

[873] OECD (2019), Artificial intelligence in Society, OECD Publishing, Paris, p.22, https://ec.europa.eu/jrc/communities/sites/jrccties/files/eedfee77-en.pdf (accessed on 25 April 2022).

[874] Ibid.

it receives from the environment. The approach of Russel and Norvig to define AI allows for the differentiation of various fields of AI as for instance computer vision, speech processing, natural language understanding, reasoning, knowledge representation, learning, and robotics.[875]

Just as its scope and functions, the application of AI in the field of taxation creates manyfold possibilities. With the aim to transform sets of data into assets of knowledge, the impact of AI reaches from tax management to the interaction between tax administrations and taxpayers.[876]

Thus, for instance, virtual conversational assistants and chatbots are used to assist taxpayers with inquiries regarding the completion of their tax return or technical issue. These AI systems furthermore entail the functions of data sharing and data matching.[877] Besides that, AI is implemented to detect tax fraud patterns in the case selection for upcoming audits. It prevents breaches with risk analysis and sometimes even carries out the audits itself.[878] Some of the benefits of AI systems in taxation are the reduction of mistakes in tax practices, the processing of costs, to promote voluntary tax-compliance of taxpayers, and, ultimately, to increase the amount of tax revenues collected. In the following, some specific examples of the use of AI in taxation will be presented.

AI combined with the Internet of Things (IoT), Data Analysis and Data Analytics applied to a vast amount of taxpayer information implies many advantages in solving administrative tasks as well as in decision making processes.[879] Besides enabling an increased efficiency by the automation of time-consuming routine tasks such as the upload of documents and their classification, AI entails the benefit of a more effective tax collection.[880] In comparison to humans, AI systems process increasing amounts of economic information in a much faster way. They categorize this information more precisely which makes them capable to identify situations of non-compliance with the law and, thus, to counteract tax fraud more efficiently. Their capability to analyze highly

[875] Supra note 13.

[876] A. Collosa, Artificial intelligence in tax administrations: Benefits and risks of its use, 09 October 2020, GCC FinTax, https://www.gccfintax.com/articles/artificial-intelligence-in-tax-administrations-benefits-and-risks-of-its-use-1685.asp (accessed on 25 April 2022).

[877] N. Joshi, How AI And Robotics Can Change Taxation, 9 January 2020, Forbes, https://www.forbes.com/sites/cognitiveworld/2020/01/09/how-ai-and-robotics-can-change-taxation/?sh=64f54c966437 (accessed on 25 April 2022). Also see: L. Scarcella, Tax compliance and privacy rights in profiling and automated decision making, Internet Policy Review, 22 October 2019, via: https://policyreview.info/articles/analysis/tax-compliance-and-privacy-rights-profiling-and-automated-decision-making (accessed on 25 April 2022).

[878] Supra note 17.

[879] Ibid.

[880] N. Joshi, How AI And Robotics Can Change Taxation, 9 January 2020, Forbes, https://www.forbes.com/sites/cognitiveworld/2020/01/09/how-ai-and-robotics-can-change-taxation/?sh=64f54c966437 (accessed on 25 April 2022).

complex situations combined with their objectivity, decreases the risk of erroneous assessments.[881]

Secondly, the processing of real time data and the use of coordinated algorithms enables the implementation of deep learning systems. Based on such systems, tax administrations can easily detect irregularities in transactions of taxpayers. This can have the benefit to identify cases of tax evasion and ensure the collection of sufficient taxes.[882]

A third benefit of AI systems in taxation is their ability to create detailed profiles of taxpayers. In this regard, previous and current conduct of individuals can be analyzed to predict their future behaviors. The application of machine learning to electronic invoice programs makes it possible to track the expenditures of taxpayers and to identify their consumption patterns.[883]

Furthermore, the ability of AI systems to conduct any kind of calculations and evaluate complex numbers can be used in many functions of the tax administration. So, for instance, systems can predict revenues and increase the overall effectiveness and efficiency of tax systems.[884] This again have a potentially positive impact on government expenditure planning.

As the examples show, there are many advantages related to the use of AI in taxation. It can be to the benefit of a better communication between tax administrations and taxpayers.[885] The capabilities of AI systems can ensure increased tax compliance and fight conduct of tax evasion and fraud. Consequently, tax systems can gain in their effectiveness and efficiency to collect tax revenues.[886]

3. Biases in AI: types and characteristics

AI is taking a predominant role in decision-making processes of all kind and hierarchic highness. Such algorithmic decision-making processes include different types of big-data and even predictive analytics, which use complex algorithms to predict future behaviour through analysing large data sets[887]. Somebody following some directives, moral codes or particular principles, or merely some guideline to focus on specific targets codes and programmes the

881 Supra note 17.
882 Supra note 21.
883 Supra note 3.
884 Supra note 17.
885 Canada's Charlie the Chatbot, an automated system that will respond to inquiries about tax filing.
886 Supra note 17.
887 See S. Valentine, Improvised Algorithms: Misguided Governments, Flawed Technologies, and Control, Fordham Urban Law Review, Vol, XLVI, 2019, pp. 365-366 and also see D. Lehr and P. Ohm, Playing with the Data: What Legal Scholars Should Learn About Machine Learning, U.C. Davis Law Review, Vol. 51, 2017, pp.653 and 669. Also see I.G. Cohen and H. Grave, Cops, Docs, and Code: A Dialogue Between Big Data in Health Care and Predictive Policing, U.C. Davis Law Review, Vol. 51, No. 2, 2017, pp. 437-474.

algorithms. Precisely all these patterns are potential factors to make such technology not neutral. Therefore, algorithms used for social control under both the private sector and in the end unsupervised governmental power might jeopardise certain democratic principles[888]. Ultimately, decisions determined by machine learning systems might suppose objectionable social consequences. Because humans code them, machine-learning models reflect human biases that might conduct to an undesirable social outcome as discrimination, and consequently, they might infringe fundamental rights and freedoms. Before analysing what major consequences biases might have, first, it is necessary to check which type of biases one might find.

3.1 Human biases

A type of bias influencing algorithmic decision-making processes is the human bias or societal bias. It is challenging for humans to act in pure neutrality in the process of decision making. Stereotypes and biases influence all aspects of our lives, from the simplest, basic decisions to the most complicated and challenging ones.[889] Like it or not, human reasoning is biased by multiple cognitive and psychological biases[890], due to multiple variables. Cognitive biases are defined as repetitive paths that your mind takes when doing things like evaluating, judging, remembering, or making a decision891. Implicit stereotypes and cognitive biases are part of our reasoning.

Artificial Intelligence might be helpful in order to detect and prevent such human inevitable biases. Human decisions can be unconsciously (or consciously) influenced by their personal beliefs and characteristics that determine the way they think. Moreover, there is an abundance of research on behavioural science regarding unconscious human decisions. Choices and decisions sometimes can even be made automatically.[892]

AI can process and analyse data more accurately and more quickly than us, which helps us to improve our life quality in many different aspects.[893]

888 Ibid, p. 366 and ff.

889 See M. Hilbert, Toward a synthesis of cognitive biases: How noisy information processing can bias human decision making. Psychological Bulletin, No. 138 Issue 2, 2012, pp. 211–237; and see V.S. Jacob, L.D. Gaultney and G. Salvendy, Strategies and biases in human decision-making and their implications for expert systems, Behaviour & Information Technology, No 5 Issue 2, 1986, pp.119-140.

890 See St.B. Evans, Bias in Human Reasoning. Causes and Consequences, Erlbaum, Hillsdale, NJ, 1989

891 B. Peters and H. Griffis, 6 Powerful Psychological Biases How They Influence Human Behavior Online", Medium, 21 January 2019, https://medium.com/social-media-tips/6-powerful-psychological-biases-14191a510f33) (accessed on 25 April 2022).

892 J. Kleibner et al, Discrimination in the Age of Algorithms, Journal of Legal Analysis, Volume 10, 2018, p. 116.

893 See a list of improvements in Theme 2 "Good things lie ahead" in L. Rainie and J. Anderson, Code-Dependent: Pros and Cons of the Algorithm Age, Pew Research Center, 8 February 2017,

Moreover, algorithms might even potentially reduce the consequences of human-biases in decision-making, improve the prediction and even be used to identify human biases.[894] However, despite these technological advantages that AI can bring to improve fairness and, especially, to protect equality, it has its flaws that conduct to biased forms of AI, mainly because of human influence. The same way we acquire our biases from our interaction with our world, AI - mathematical algorithms designed and coded by us- learns its biases from us.

The influence of human biases on algorithmic biases occur when training data falls into common stereotypes and when it prejudices latent or explicit in the population[895]. In the situation that cultural influences or stereotypes are not fixed in machine learning models when either collecting or processing data, the outcome will be a programme that still follows the same stereotypes marked by the data that fed it. However, sometimes identifying such biases might be difficult, since there might be a lack of awareness of the bias due to the automaticity of stereotypes.[896]

Examples of prejudicial biases are commonly found in the software of facial analysis. For instance, a rudimentary and extreme example is regarding the assumption that nurses are all women. If an algorithm is exposed to millions of images of people at work, taking into account that in Europe and the United States around the 90% of nurses are female, versus a 10% being male[897], the algorithm, once trained, will identify the image of a nurse with a woman, and most probably will conclude that all nurses are female. The contrary can happen with all those professions traditionally developed by men or popularly associated with men.[898]

Another well-known case of human biases that ended up influencing on an algorithm, is the research experiment Microsoft tried to conduct with the self-

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https://www.pewresearch.org/internet/2017/02/08/code-dependent-pros-and-cons-of-the-algorithm-age/ (accessed on 25 April 2022).

894 J. Kleibner, supra note 33, pp. 154 and ff.

895 See L. Schinker, Addressing AI's Hidden Agenda, Towards Data Science, January 2016 https://towardsdatascience.com/addressing-ais-hidden-agenda-e67d353769ff#:~:text=Prejudicial%20bias%20occurs%20when%20training,prejudice%20coming%20from%20the%20population.&text=The%20algorithms%20at%20the%20heart,data%20used%20to%20test%20them (accessed on 25 April 2022).

896 H.M. Rasinski and A.M. Czopp, The Effect of Target Status on Witnesses' Reactions to Confrontations of Bias, Basic and Applied Social Psychology, Vol. 32, Issue 1, 2010, p. 9.

897 See World Health Organization, https://www.euro.who.int/en/health-topics/Health-systems/nursing-and-midwifery/data-and-statistics#:~:text=Nurses'%20and%20midwives'%20salaries%20are nurses%20and%20midwives%20are%20female (accessed on 25 April 2022) and United States Census Bureau, Male Nurses Becoming More Commonplace, Census Bureau Reports, Press release number CB13-32, 25 February 2013 https://www.census.gov/newsroom/press-releases/2013/cb13-32.html (Accessed on 25 April 2022).

898 Allegion, Prejudicial bias, https://content.alegion.com/blog/prejudicial-bias (Accessed on 25 April 2022).

learning AI, Tay.[899] Sinders noted on Tay: "People like to kick the tires of machines and AI, and see where the fall off is. People like to find holes and exploit them, not because the internet is incredibly horrible (even if at times it seems like a cesspool); but because it's human nature to try to see what the extremes are of a device. People run into walls in video games or find glitches because it's fun to see where things break".[900] For this reason, before training the algorithms, it results imperative to thoroughly, honestly and openly question what are the preconceptions that could currently exist and actively hunt for how those biases might manifest themselves in data[901] when designing the algorithms.

3.2 Data biases

3.2.1 Introduction on Data biases

Apart from the human biases, there are other types of biases, which are the result of training algorithms with biased data. There are different ways data biases can be classified depending on the moment they are occurring during the whole training process.

3.2.2 Sample biases

Sample biases occur because of a flaw in the selection process of the data. Generally, when collecting samples, whatever the discipline, they aim to obtain the representation of data closest to reality. Sample biases in the path of AI are those biases happening when the collected or trained datasets do not show the reality for which the model is set up. A notorious example of sample bias in AI happened in Amazon recently. Amazon had been developing recruitment software that could go through the different candidates' curricula vitae. The theory sounded very efficient. Conversely, the AI seemed to have a serious problem with women, and it emerged that the algorithm had been programmed to replicate existing hiring practices, meaning it also replicated their biases.[902] The issue occurred because the samples of collected data did not obey anymore to current ways to proceed in society.

899 See Section 4.3 for a deeper analysis of this particular case.

900 C. Sinders, Microsoft's Tay is an Example of Bad Design or Why Interaction Design Matters, and so does QA-ing, Medium, 24 March 2016, https://medium.com/@carolinesinders/microsoft-s-tay-is-an-example-of-bad-design-d4e65bb2569f (accessed on 25 April 2022).

901 C. Debrusk, The risk of Machine learning bias (and how to prevent it), MIT Sloan Management Review, 26 March 2018, https://sloanreview.mit.edu/article/the-risk-of-machine-learning-bias-and-how-to-prevent-it/ (accessed on 25 April 2022).

902 Logically, 5 examples of Biased Artificiall Intelligence, Logically, https://www.logically.ai/articles/5-examples-of-biased-ai (accessed on 25 April 2022).

3.2.3 Exclusion biases

This type of biases happens mostly not when collecting the data but when processing them[903]. The exclusion bias occurs when some data from the data set are excluded, and thus, not taken into account during the processing. An example of exclusion bias happens when certain features are not taken into account because they are considered not relevant for the software.[904] We can find an example of such bias in Amazon, again. The profitability model of Amazon for the US (algorithmically) excluded a series of neighbourhoods from the same-day Prime delivery service. In order to fit in the same-day delivery programme, the neighbourhoods had to match three factors: have sufficient number of Prime members, to be near a warehouse, and have sufficient people willing to deliver to that zip code.[905] The algorithm was trained to cross the data to exclude results that did not match these criteria from the Prime service. However, when training on establishing these criteria, which in terms of profitability made sense, it turned out that the data that were excluded from the model made that the excluded neighbours coincided with either lower-income neighbourhoods or neighbourhoods which were primarily populated by black citizens. Amazon was careless enough to exclude from the software such sensitive data, and [s]imple correlation between apparently neutral features can then lead to biased decisions[906], which can end up having adverse effects in the image of the company, and, therefore, triggering into economic losses.

3.2.4 Algorithmic biases

Algorithmic biases could be defined as those errors that make computer systems trigger unfair outcomes. There are many reasons for algorithmic biases to happen, yet, the most common ones are related basically to mistakes in the design of the algorithm (code), mistakes in the data collection or the way this data is selected and processed. Most of the algorithmic biases have a human origin. As Kirkpatrick states: "Algorithms simply present the results of

903 Exclusion bias could be classified as a sub-type of measurement biases, which result from faulty measurement. The outcome is a systematic distortion of all the data (See Editorial Team, 4 Sources of Machine Learning Bias & How to Mitigate the Impact on AI Systems, Inside Big Data, 20 August 2018, https://insidebigdata.com/2018/08/20/machine-learning-bias-ai-systems/)(accessed on 25 April 2022).

904 R. Morikawa, How to Mitigate Bias in Artificial Intelligence Models, Lionbridge, 24 September 2019, https://lionbridge.ai/articles/how-to-mitigate-bias-in-artificial-intelligence-models/#:~:text=Exclusion%20bias%20in%20artificial%20intelligence,dataset%20based%20on%20gut%20feeling (accessed on 25 April 2022).

906 E.F. Ntoutsi, U. Gadiraju, et al., Bias in data-driven artificial intelligence systems—An introductory survey, Wires Data Mining and Knowledge Discovery, 2020, 10:e1356 https://onlinelibrary.wiley.com/doi/full/10.1002/widm.1356 (accessed on 25 April 2022).

calculations defined by humans using data that may be provided by humans, machines, or a combination of the two (at some point during the process), they often inadvertently pick up the human biases that are incorporated when the algorithm is programmed, or when humans interact with that algorithm."[907]
A well know case that applies to this type of bias is the COMPAS case. The algorithm used by the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) software showed that the predictions were racially biased against black defendants.[908] When checking how many of the previously condemned offenders were charged with the same new crimes on the next years, regarding violent crime only 20 percent of the people predicted to commit violent crimes actually went on to do so.[909]
It was not only discovered that the overall predictions were not assertive, but also that when forecasting the possible re-offenders, white defendants were mislabelled as low risk more often than black defendants[910]. The algorithm almost doubled the chances of black defendants, compared to white defendants, to become future criminals. Algorithms sometimes use specific data that can be 'proxies for race'.[911] This example highlights the relevance of having a well-focused study regarding what data needs to be trained. This case showed how an algorithm that tries to reflect our world accurately, also reflects our human biases.

4. Consequences of AI biases within the EU

4.1 Introduction

The European Commission believes that the main pillars to start building a trustworthy AI start with common AI ethical principles that must be based on the fundamental rights enshrined in the EU Treaties, the EU Charter and international human rights law.[912] In that sense, the European Union High Level Expert Group on Artificial Intelligence has suggested that machine learning models should follow a series of principles, which are entirely related to the

907 K. Kirkpatrick, Battling Algorithmic Bias. How do we ensure algorithms treat us fairly?, Communications of the ACM, Vol. 59, n. 10, October 2020, p. 16.
908 See S. van Schendel, The Challenges of Risk Profiling Used by Law Enforcement: Examining the Cases of COMPAS and SyRI., In: L. Reins (eds), Regulating New Technologies in Uncertain Times, Information Technology and Law Series, vol 32. T.M.C. Asser Press, The Hague 2019, https://doi.org/10.1007/978-94-6265-279-8_12 (accessed on 25 April 2022).
909 J. Angwin, J. Larson, S. Mattu and L. Kirchner, op. cit., https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing (accessed on 25 April 2022).
910 Ibid, Propublica, https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing (accessed on 25 April 2022).
911 Ibid, p. 16.
912 European Commission, op. cit., p.9

OECD ones.[913] The principles need to comply with three major characteristics: Lawfulness, robustness and ethics. In a nutshell, they have to respect all applicable laws and regulations as well as to take into account and respect ethical principles and values and be technically solid while taking into account the social environment.[914] Not all research and not all purposes of building AI are valid and not all ways to codify a machine learning model are accepted. The European Commission intends to delimit the interest and the objectives driving the design of an algorithm. The European Commission does not only consider that substantive fairness consists of ensuring an equal and just distribution of the wealth derived from AI, but it also should include the avoidance of unfair biases that might lead to undesirable consequences which might endanger some core principles of EU Law. The European Commission also relates the principle of fairness with the principle of proportionality, which is one of the core principles of EU Law.[915] AI has to be proportional regarding its means and objectives.

4.2 Violation of the principle of proportionality

Another principle which is required to be adhered to in the institutionalization of AI in taxation is that of proportionality.[916] The principle of proportionality determines the lawfulness of the use of AI by tax administrations and balances the degree of interference by tax authorities and taxpayers' rights, especially their rights to privacy and data protection.[917]As presented above, AI systems are based on a vast amount of data. In tax practice this data consists of personal data of taxpayers. Despite the collection and use of personal data of taxpayers for self-learning systems to return a result in a specific situation, depending on the model implemented, such data could be used to anticipate taxpayers' behavior and assess their risk of non-compliance with tax law.[918] Under both circumstances, the processing of data will be regulated by the GDPR as soon as the taxpayer is an individual. Under this set of rules, the balancing of taxpayers' rights and interfering actions on behalf of tax authorities is left to the Member States. National legislators' freedom of action in this balancing act is, however, limited by the principle of proportionality as established in art.6(3) GDPR

913 G20, G20 Ministerial Statement on Trade and Digital Economy, 2019 https://www.mofa.go.jp/files/000486596.pdf (accessed on 25 April 2022).
914 European Commission, Ethic guidelines for trustworthy AI, European Commission, Brussels, 2019.p. 5.
915 The principle of proportionality is laid down in Art. 5 TEU. See W. Sauter, Proportionality in EU Law: A Balancing Act?, Cambridge Yearbook of European Legal Studies, Vol. 15, 2013, pp. 439-466.
916 https://www.gccfintax.com/articles/artificial-intelligence-in-tax-administrations-benefits-and-risks-of-its-use-1685.asp (accessed on 25 April 2022).
917 https://ceridap.eu/artificial-intelligence-and-tax-law-perspective-and-challenges/?lng=en (accessed on 25 April 2022).
918 Ibid.

which stipulates that the processing of personal data for purposes of the public interest needs to have a legal basis in either EU or domestic law to which is proportionate to the legitimate aim pursued.[919]

And yet, even though AI systems may help to estimate taxpayers' likeliness to comply with the tax law, the results retrieved from the algorithmic model should not serve as the sole basis for profiling or decision-making processes of tax authorities.[920] This prohibition as set out by Art. 22 GDPR applies to all scenarios in which personal data is used as a basis for profiling taxpayers as well as for automated decision-making processes where such decisions produce legal effects concerning the taxpayer or similarly significantly affects him.[921] Even though the term 'significantly' is not clearly defined, it has been further elaborated by the Working Party which in its guidelines includes, amongst others, decisions which affect a person's access to health services and services or decisions which affect his or her financial circumstances.[922]Art. 22, paragraph 2 GDPR provides for exceptions to the general prohibition. The prohibition does not apply if the decision is necessary for the conclusion or the functioning of a contract between taxpayers and tax administrations.[923]

Furthermore, automated decision-making can be the sole ground for a decision where it is authorized by EU law or the law of the Member State to which the tax authority in question is subject and where that law sufficiently safeguards taxpayers' rights, freedoms, and legitimate interests.[924] The third exception provided in Art. 22(2)(c) GDPR is based on the taxpayer's explicit consent. Additionally, Art. 23 GDPR restricts the scope of the obligations and rights provided for in, amongst others, Art. 22 GDPR by legislative measures of tax authorities as long as such restrictive measures have to respect the essence of the fundamental rights and freedoms. Moreover, the legal measure which is used to limit taxpayers' rights is required to adhere to the proportionality principle.

In the light of prevalent tax fraud practices, in 2019 the Italian legislator modified its domestic privacy regulations by including the processing of data with an aim of prevention and fight against tax evasion as a measure which is necessary for reasons of substantial public interest. This inclusion would allow

919 Art. 6(3) GDPR. Also see: https://www.privacy-regulation.eu/en/article-6-lawfulness-of-processing-GDPR.htm (accessed on 25 April 2022).
920Art. 22 GDPR.
921 E.g., where the taxpayer does not challenge it, if he or she does not comply with it, the tax assessment notice can be enforced by the relevant authorities.
922 Art. 29 Working Party guidelines on GDPR.
923 Art. 22(2)(a).
924 Art. 22(2)(b).

for a limitation of the GDPR requirements and still needs to be reviewed under the aspects of adequacy and proportionality.

4.3 Discrimination

The risks related to the misuse of AI systems in taxation requires the adherence of certain principles which should govern administrative actions to safeguard taxpayers' rights. In the EU, even though it is up to the sovereignty of EU Member States to regulate direct taxation under their domestic laws, such regulations must be in accordance with the fundamental freedoms and principles of EU law.[925] One of these principles is that of non-discrimination as embedded in art.2 TEU.[926] The principle of non-discrimination in conjunction with the protection of property[927] as set forth by the ECHR has to be considered by national tax authorities in their decision-making process of tax law cases. The principle of non-discrimination requires that all taxpayers are treated equally by the law, based on neutral facts and irrespective of personal criteria such as sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[928] Thus, a difference in treatment is discriminatory if it is not justified by objective and reasonable criteria, i.e., if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realized'.[929] In other words, a different treatment of taxpayers is only in accordance with the non-discrimination principle if that difference is of relevance for the application of the tax provision in question. Since AI systems are based on a hypothesis developed by scientists, they entail a considerable risk of human biases and errors. Where such biases and errors are transferred to, and thus become a part of, algorithms, they have an immediate impact on their results.[930] One example of algorithmic bias is the case of Tay(bot), an artificially intelligent chatbot released by Microsoft Corporation via Twitter[931]. Tay served as a trial in the sector of 'conversational understanding', getting smarter and learning to engage with humans through 'casual and playful conversations' with Twitter

925 N. Bammens, The Principle of Non-Discrimination in International and European Tax Law, IBFD Doctoral Series, December 2012, p. 521f..
926The use of Artificial Intelligence by Tax Administrations, a matter of principles - CIAT Blog 3/3/2020.
927Art. 14 in conjunction with Article 1 of the additional Protocol No. 1 to the ECHR.
928 Art. 21 Charter of Fundamental Rights of the European Union, art.19 TFEU.
929 ECtHR case 13580/88 (Karlheinz Schmidt v Germany), §24. Also see: http://www.law.georgetown.edu/rossrights/docs/cases/Schmidt.html (ohchr.org) (accessed on 25 April 2022).
930 https://www.ciat.org/the-use-of-artificial-intelligence-by-tax-administrations-a-matter-of-principles/?lang=en (accessed on 25 April 2022).
931 https://blogs.microsoft.com/blog/2016/03/25/learning-tays-introduction/ (accessed on 25 April 2022).

users.[932] After receiving several misogynist, racists, and Donald Trumpist messages, the initially neutral chatbot started to repeat the offensive statements of human users such as 'Hitler was right' and '9/11 was an inside job'.[933][934] After being exposed to racist data, Tay became a racist itself within less than 24 hours.

The fact that the AI systems are inevitably exposed to imbalanced and prejudiced data constitutes a crucial issue in the field of taxation in that it can easily result in misclassifications. The vastly subjective terminology of tax legislation, resulting in interpretation issues, as well as constantly arising ambiguous tax situations, e.g. due to changing behavioral patterns of taxpayers in the conduct of business as well as consumption, creating loopholes in tax law, contribute considerably to the discriminatory treatment of taxpayers. The data which is transferred to algorithms has to be of such a nature as to enable the system to generate generalized conditions of validation. The root problem lies with the difficulty to collect a substantial amount of error- and bias-free information which can be used as a basis for a reliable and robust model for tax practices.[935]

A further issue may arise with regard to the application of General Anti-Abuse Rule (GAAR) provisions such as Art. 6 of the Anti-Tax Avoidance Directive. The implementation of AI systems may lead to the preferential tax treatment of some taxpayers while it may discriminate against others based on criteria which are irrelevant under the GAAR in question. So, for instance, a small-sized jurisdiction which aims at increasing FDI from big economies may use AI models which treat taxpayers from the envisaged jurisdictions favorable by not applying the denial of tax benefits as stipulated by the applicable GAARs. The favorable treatment vis-à-vis taxpayers from smaller economies who are denied tax advantaged under the GAAR, is a consequence of the use of criteria which are irrelevant in the light of that provision.[936]

932 https://www.bbc.com/news/technology-35890188 (accessed on 25 April 2022).
933 https://www.theguardian.com/technology/2016/mar/24/tay-microsofts-ai-chatbot-gets-a-crash-course-in-racism-from-twitter (accessed on 25 April 2022).
934Thttps://www.theverge.com/2016/3/24/11297050/tay-microsoft-chatbot-racist (accessed on 25 April 2022).
935 http://kluwertaxblog.com/2020/09/04/legal-risks-stemming-from-the-integration-of-artificial-intelligence-ai-to-tax-law/ (accessed on 25 April 2022).
936 Ibid.

5. The European response in front of such challenges

The European Commission in its "White paper On Artificial Intelligence - A European approach to excellence and trust" [937] directly relates the potential biases of algorithms with an outcome of discrimination that might lead to the violation fundamental rights and, therefore, as a last resort, it might lead to the infringement of EU primary and secondary law. There is still no case law to help determining the limits on the application of AI within the EU law, but in the field of taxation and social security, The Hague District Court (The Netherlands) ruled a historical sentence by referring the ECHR[938].

From a broader perspective outside the EU, art. 14 of the European Convention on Human Rights (ECHR) states that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". However, the main issue we face in front of AI biases that might lead into discriminatory practices is the indirect discrimination produced by AI, since indirect discrimination requires a more significant effort to detect and demonstrate than intentional or direct discrimination.

Indirect discriminations occur when a practice that seems neutral at first glance ends up discriminating against people of a certain ethnic origin, or another protected characteristic.[939] This type of discrimination in AI might appear, for instance, when training data do not contain information about protected characteristics such as gender or race. For instance, the algorithm learns that people living in a particular area with a specific postcode were likely to default on their loans and uses that correlation to predict defaulting. Hence, the system uses what is at first glance a neutral criterion (postcode) to predict defaulting on loans. But suppose that the postcode correlates with racial origin.[940] Ultimately, the algorithm that was programmed to take neutral references ended up discriminating because of racial origin. Nevertheless, as Borgesius indicates: "Case law shows that the European Convention on Human Rights prohibits both direct and indirect discrimination."[941]

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937 European Commission, White paper On Artificial Intelligence - A European approach to excellence and trust, COM(2020) 65 final, Brussels, 19.2.2020, pp.11-12.

938 The Hague District Court of 5 February 2020, Case C/09/550982, ECLI:NL:RBDHA:2020:1878.

939 F.J.Z. Borgesius, Strengthening legal protection against discrimination by algorithms and artificial intelligence, The International Journal of Human Rights, 2020, p. 5, DOI: 10.1080/13642987.2020.1743976. For a broader study of Indirect discrimination see C. Tobler, Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination Under EC Law, Intersentia, Antwerpen-Oxford, 2005.

940 Ibid, p. 13.

941 F.J.Z. Borgesius, op, cit.

The text of Article 14 of the ECHR does not provide for a definition of what constitutes direct or indirect discrimination; yet suited to several case law of the ECtHR it is understood as "difference in treatment of persons in analogous, or relevantly similar situations" and "based on an identifiable characteristic, or 'status'"[942]. Indirect discrimination is also covered under the umbrella of the ECHR[943], which considers that the fundaments indicating there is indirect discrimination are first, to have what appears to be a neutral rule or policy. Second, that such rule or policy affects a specific group of people, defined by one of the protected grounds in article 14, in a significantly more negative way than to those in a similar situation who are not part of this affected group even though there are no intentions of such effects.[944]

Focusing the attention on The Hague District Court sentence, the Court ruled a historical sentence on a Dutch AI system called *Systeem Risico Indicatie*r SyRI (not to mistake for Apple's Assistant, Siri). SyRI is an AI tool used by the Dutch government to detect several ways of fraud to public Administrations, including social security benefits and tax fraud. In accordance to the District Court, the legislation regulating SyRI infringes Art. 8 ECHR on the right to privacy and family life. The District Court made the following connection from the right to privacy passing by the right to data protection until the right to non-discrimination: The right to respect for private life in the context of data processing concerns the right to equal treatment in equal cases, and the right to protection against discrimination, stereotyping and stigmatization.[945]

SyRi was programmed to detect abuse on social security benefits or tax fraud focusing specifically in 'problem districts' with the aim to increase the chances of discovering irregularities in such areas as compared to other neighbourhoods. The District Court believes that the way SyRI was processing the data was leading to unjustified exclusion, stigmatization and discrimination

https://www.tandfonline.com/doi/full/10.1080/13642987.2020.1743976?scroll=top&needAccess=true (accessed on 25 April 2022).

942 See Biao v. Denmark [GC], 2016, § 89; Carson and Others v. the United Kingdom [GC], 2010, § 61; DH and Others v. the Czech Republic [GC], 2007, § 175; Burden v. the United Kingdom [GC], 2008, § 60) protected by Article 14 of the Convention (Varnas v. Lithuania, 2013, § 106; Hoogendijk v. the Netherlands (dec.), 2005)" ECtHR, Guide on Article 14 of the Convention (prohibition of discrimination) and Article 1 of Protocol No. 12 (general prohibition of discrimination, Council of Europe/European Court of Human Rights, 2020, p. 11.

943 See "in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group (see, for example, Hugh Jordan v. the United Kingdom, no. 24746/94, § 154, 4 May 2001). Such a situation may amount to indirect discrimination, which does not necessarily require a discriminatory intent (see DH and Others v. the Czech Republic, cited above, § 184)." (ECtHR Biao v. Denmark (Grand Chamber), No. 38590/10, 24 May 2016, para. 103.

944 E. Lundberg, Automated decision-making vs indirect discrimination. Solution or aggravation?, Umea University, 2019, https://www.diva-portal.org/smash/get/diva2:1331907/FULLTEXT01.pdf

945 Ibid., paragraph 6.91,

against certain neighbourhoods, contributing to stereotyping and reinforcing a negative image of the occupants of such areas, even if no risk reports have been generated about them.[946] The application of SyRI only in such problem districts could imply that the system was biased, attributing by default the abuse of social and tax benefits to certain profiles of people.

Such sentence supposed a major advancement regarding indirect discrimination on AI systems not only within Europe but within the EU, and concretely regarding how risk-management systems can lead to discrimination of certain groups of taxpayers. Therefore, European non-discrimination law can offer protection against algorithmic indirect discrimination affecting taxpayers, even though the most significant difficulty for the applicants is proving the discriminatory treatment of AI biases.

6. Conclusions

Just as its scope and functions, the application of AI in the field of taxation creates manifold possibilities. With the aim to transform sets of data into assets of knowledge, the impact of AI reaches from tax management to the interaction between tax administrations and taxpayers. Presenting one of the core principles of EU Law, the use of AI by tax administration must correspond to the principle of proportionality. Accordingly, the interference with taxpayers' rights through the collection and processing of personal data by means of AI must be proportionate in light of the legitimate aim. Biases which might arise due to AI being exposed to imbalanced and prejudiced data can lead to misclassifications and a difference in treatment of taxpayers. In this regard, taxpayers' rights are safeguarded by the principle of non-discrimination. In order to identify biases on time and minimize the risks, internal and external auditing and supervision during the process of design, data collection and training and after the AI is implemented are important to prevent and promptly detect any kind of biases that might turn out in discriminatory results. These *ex-ante* measures should be accompanied by updated regulations to guarantee a legal security in terms of non-discrimination and equality.

It is clear that the existing legal standards are a good starting point to claim for fairness and equality in Court. International conventions and most of the domestic constitutions and statutory regulations contain legal precepts to prevent direct or indirect intentions of discrimination. However, the complexity of AI leaves some legal loopholes that still leave room for indirect discrimination cases, since proving the existence of biases turns to be difficult. Maybe it is time to create a comprehensive one-size-fits-all AI statutory

946 Ibid., paragraph 6.93.

regulation and create more specific guidelines on internal and external accountability processes to identify and prevent discriminatory biases.

INTERNATIONALE NALATENSCHAPPEN EN EUROPESE ONTWIKKELINGEN

Dr. K.M.L.L. van de Ven[947]

1. Inleiding

Professor Rainer Prokisch heeft als wetenschapper altijd belangstelling getoond voor het belastingrecht in brede zin, alsmede voor daarmee samenhangende rechtsgebieden. Tijdens gesprekken in de tijd dat ik net was gestart als medewerker bij de Capaciteitsgroep Belastingrecht bleek zijn interesse ook het internationaal erfrecht en de internationale schenk- en erfbelasting te betreffen.

In de periode tot 2022 zijn er op dit gebied veel Europese ontwikkelingen geweest: rechtspraak van het Hof van Justitie van de Europese Unie (HvJ EU) over mogelijk discriminerende bepalingen van lidstaten op het terrein van de schenk- en erfbelasting, de invoering van de Europese Erfrechtverordening en de instelling van de Europese Expert Group '*Ways to tackle inheritance ÃÒ Ï ÓÓÂ Ï ÒÄÅÒ ÔÁØ Ï ÂÓÔÁÃÌÅÓ ÆÁÃÉÎÇ É Î Ä É Ö É*
In deze bijdrage besteed ik kort aandacht aan enkele van deze ontwikkelingen.

2. Rechtsbronnen internationale erfbelasting

De schenk- en erfbelastingen behoren tot de zogenoemde directe belastingen. De lidstaten van de EU kunnen de desbetreffende nationale regels naar eigen inzicht bepalen, op voorwaarde dat ze niet discrimineren op basis van nationaliteit en geen ongerechtvaardigde beperkingen opwerpen voor de uitoefening van de bij het Verdrag betreffende de werking van de Europese Unie (VWEU) gewaarborgde vrijheden.[948]

Europese wetgeving op het terrein van de (schenk- en) erfbelasting ontbreekt. De internationale rechtsbronnen voor de erfbelasting worden gevormd door de verdragen ter vermijding van dubbele belastingheffing en door (de rechtspraak over) de verbodsbepalingen uit het VwEU, die de verdragsvrijheden van Europese burgers moeten beschermen.

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De OESO is bekend om haar Modelverdragen. Zo is er in 1982 ook een Modelverdrag verschenen op het gebied van de (schenk- en) erfbelasting.[949] Hoewel de toepassing ervan binnen de EU relatief beperkt is[950], is deze toch niet onbelangrijk: het HvJ EU verwijst er in zijn arresten naar.[951]
Vanaf 2003 is de Europese rechtspraak een belangrijke bron van recht geworden. Het eerste arrest waarin het HvJ EU een oordeel velde over de erfbelasting - het recht van overgang - was in de zaak van de Nederlandse erflater Barbier.[952] Voor 2003 heeft het HvJ EU zich niet over een geschil inzake de erfbelasting hoeven te buigen.
Daarnaast is er de gezaghebbende Aanbeveling van de Europese Commissie betreffende de voorkoming van dubbele belasting inzake schenk- en erfbelasting naar aanleiding van het IFA-congres in Rome in 2011.[953]

3. Rechtspraak Hof van Justitie EU – enkele arresten met Nederlandse aanknopingspunten

3.1 Inleiding

Dankzij hun rechtstreekse werking kunnen EU-burgers de bepalingen uit het VWEU voor de nationale rechter inroepen. Doorgaans spreekt de nationale rechter zich niet zelf uit, maar verzoekt hij via een prejudiciële vraag het HvJ EU of de litigieuze nationale regeling in overeenstemming is met het VWEU. Het gaat daarbij in het algemeen om toepassing van het beginsel van non-discriminatie op grond van nationaliteit in art. 18 VWEU, en het meer specifieke verbod om het vrije verkeer van goederen[954], personen[955], diensten[956] en kapitaal[957] te belemmeren. Wordt discriminatie op grond van nationaliteit vastgesteld, dan dient eerst te worden nagegaan of de bijzondere discriminatieverboden uit het vrij verkeer van goederen, personen, diensten en kapitaal niet reeds een oplossing bieden. De ruime lezing die deze laatste

[949] OECD Model Double Taxation Convention on Estate and Inheritances and on Gifts (1982), www.oecd.org.
[950] Er is maar een klein aantal verdragen volgens het OESO-Model inzake erfbelasting afgesloten tussen lidstaten van de EU: 33, terwijl er 351 mogelijk zijn. Zie hiervoor: Copenhagen Economics, *Study on Inheritance taxes in EU Member States and Possible Mechanisme to Resolve Problems on Double Inheri tance Taxation in the EU*, 2011, 10.
[951] Zie o.a. HvJ EU 23 februari 2006, C-513/03 (Van Hilten-Van der Heijden), ECLI: EU: C: 2006:131, punt 48.
[952] HvJ EU 11 december 2003, C-364/01 (Barbier), ECLI:EU:C:2003:665.
[953] Aanbeveling 2011/856/EU van de Commissie betreffende de voorkoming van dubbele belasting van nalatenschappen van 15 december 2011, Pb. L 336/81 van 20 december 2011.
[954] Artt. 26 en 28 t/m 37 VWEU.
[955] Artt. 26 en 29 t/m 55 VWEU.
[956] Artt. 26 en 56 t/m 62 VWEU.
[957] Artt. 63 t/m 66 VWEU.

bepalingen in de rechtspraak van het Hof krijgen, beperkt de autonome toepassing van art. 18 VWEU.
Wat betreft de samenhang tussen de schenk- en erfbelasting; uit de rechtspraak van het HvJ EU blijkt dat hij deze voor het aan hem voorgelegde geschil als gelijkaardig beschouwt.[958] Ook de Aanbeveling van de Europese Commissie betreffende de voorkoming van dubbele belasting van nalatenschappen behandelt ze aan elkaar gelijk.[959]

3.2 Het recht van overgang

Veel landen maken voor de heffing van erfbelasting een onderscheid tussen nalatenschappen van overleden inwoners en van overleden niet-inwoners. Tegen de achtergrond van de verdragsvrijheden is de vraag is of deze verschillende behandeling gerechtvaardigd kan worden door in objectieve zin verschillende situaties.
Het eerste arrest waarin het HvJ EU over erfbelasting (in casu het recht van overgang) oordeelde, betrof de Nederlander Barbier, die al 23 jaar inwoner was van België en daar overleed. Tot zijn nalatenschap behoorden op Nederlands grondgebied gelegen onroerende zaken, waar leveringsverplichtingen op rustten.
De Nederlandse heffingsbevoegdheid op basis van het recht van overgang was gebaseerd op het situsbeginsel. Indien een erflater of schenker niet (fictief) in Nederland woonde ten tijde van zijn overlijden, maar tot zijn nalatenschap in Nederland gelegen situsgoederen behoorden, werd in Nederland recht van overgang verschuldigd.
Volgens de Nederlandse Successiewet 1956 was het niet mogelijk om in deze situatie, voor de heffing van het recht van overgang, rekening te houden met de leveringsverplichtingen, terwijl dat wel mogelijk was geweest als erflater ten tijde van zijn overlijden in Nederland had gewoond.
In dit arrest besliste het HvJ EU dat de erfbelasting (het recht van overgang) onder de bescherming van de vrijheid van kapitaalverkeer valt. Volgens het HvJ EU stond vast dat de Nederlandse regeling het vrije verkeer van kapitaal hinderde, doordat ingezetenen van een andere lidstaat werden ontmoedigd te investeren in Nederlandse onroerende zaken. Dat was in strijd met de bepaling van art. 63 VWEU.

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[958] Zie o.a. de arresten HvJ EU 17 oktober 2013, C-181/12 (Welte), ECLI:EU:C:2013:662; HvJ EU 22 april 2010, C-510/08 (Mattner), ECLI: EU: C: 2010:216; HvJ EU 18 december 2014, C-133/13 (Q), ECLI:EU:C:2004:2460.
[959] Aanbeveling 2011/856/EU van de Commissie betreffende de voorkoming van dubbele belasting van nalatenschappen van 15 december 2011, Pb. L 336/81 van 20 december 2011, 1.2.

In het arrest Arens-Sikkens[960], ging het vervolgens om een Nederlands echtpaar dat al langer dan tien jaar in Italië woonde toen de man overleed. Tot zijn nalatenschap behoorde een in Nederland gelegen pand. Volgens de testamentaire ouderlijke boedelverdeling kwam het pand toe aan de vrouw. Het geldende Nederlandse recht van overgang bracht mee dat zij voor de waarde van het pand in de heffing werd betrokken, zonder dat ze de overbedelingsschuld, die was toe te rekenen aan het pand, in aftrek kon brengen. Bij een ouderlijke boedelverdeling in Nederlandse – binnenlandse - verhoudingen zou de erfbelastingdruk zijn bepaald door deze met betrekking tot de onroerende zaak te verdelen over alle (in casu vijf) erfgenamen. In grensoverschrijdende verhoudingen zoals de onderhavige wordt de totale belastingdruk door een erfgenaam gedragen, de langstlevende echtgenoot. Door de progressie van het tarief kan het zijn dat de nalatenschap van een niet-ingezetene in totaal zwaarder wordt belast.
Ook in dit arrest oordeelde het HvJ EU dat sprake was van een schending van de vrijheid van kapitaalverkeer, nu door het niet in aanmerking nemen van de overbedelingsschulden bij de berekening van het recht van overgang de totale belastingdruk zwaarder is dan die welke zou zijn toegepast bij de berekening van het recht van successie. In deze zaak heeft de Nederlandse Hoge Raad[961] in zijn eindbeslissing geoordeeld dat dit progressienadeel moest worden weggenomen: het uiteindelijk verschuldigde bedrag aan belasting werd beperkt tot het bedrag dat de gezamenlijke erfgenamen verschuldigd zouden zijn geweest.
Het probleempunt met betrekking tot het recht van overgang zag op de beperkte mogelijkheid van schuldenaftrek. Alhoewel de Nederlandse regeling na het verschijnen van deze arresten op dat punt nog is aangepast, heeft de wetgever ervoor gekozen om deze heffing met ingang van 1 januari 2010 af te schaffen. Het was voor de Nederlandse wetgever een nagenoeg onmogelijke opgave om het recht van overgang om te vormen tot een sluitende heffing die EU-proof zou zijn. Bovendien was een argument voor afschaffing dat de jaarlijkse opbrengst van deze heffing gering was (€ 6 miljoen).

3.3 De woonplaatsfictie

De zaak waarover het HvJ EU oordeelde in het arrest Van Hilten - van der Heijden[962] had betrekking op de Nederlandse woonplaatsfictie van art. 3 SW 1956. Deze regeling heeft als oogmerk te voorkomen dat heffing van schenk- en

[960] HvJ EU 11 september 2008, C-43/07 (Arens-Sikkens), ECLI:EU:C:2008:490.
[961] HR 29 mei 2009, ECLI:NL:HR:2009:BH:1822, BNB 2009/209.
[962] HvJ EU 23 februari 2006, C-513/03 (Van Hilten-Van der Heijden), ECLI:EU:C:2006:131, BNB 2006/194.

erfbelasting kan worden ontgaan door emigratie. Heffing van Nederlandse schenk- en erfbelasting is uitsluitend mogelijk als de schenker of erflater ten tijde van de schenking of van zijn overlijden in Nederland woont. Na emigratie zou belastingheffing niet meer mogelijk zijn.
Om die reden bepaalt art. 3 lid 1 SW 1956 dat ingeval een Nederlander die binnen een periode van tien jaar na zijn vertrek uit Nederland een schenking doet of komt te overlijden, zijn verkrijgers worden belast alsof van een emigratie geen sprake was; de Nederlander wordt in deze tien-jaarsperiode geacht zijn woonplaats in Nederland te hebben behouden.
Naar aanleiding van prejudiciële vragen van Hof 's-Hertogenbosch oordeelde het HvJ EU dat art. 3 lid 1 SW 1956 niet in strijd is met het Europese recht, meer specifiek de vrijheid van kapitaalverkeer. Ook over de toelaatbaarheid van het nationaliteitsbeginsel op basis waarvan art. 3 lid 1 SW 1956 schenkingen door en nalatenschappen van personen met de Nederlandse nationaliteit verschillend behandelt, oordeelde het HvJ EU in positieve zin. Volgens het HvJ EU behoort het tot de Nederlandse bevoegdheid om aan te knopen bij de nationaliteit. Die bevoegdheid mag evenwel niet leiden tot een belemmering van de door het VWEU gewaarborgde vrijheden. Zo moeten er waarborgen zijn dat deze heffing niet tot dubbele belastingheffing leidt.[963]

4. Europese Erfrechtverordening

Ten aanzien van nalatenschappen die zijn opengevallen op en na 17 augustus 2015 is Europeesrechtelijk vastgelegd op welke wijze in een internationale casus het toepasselijk erfrecht wordt bepaald.[964] Van een internationale casus is onder meer sprake als de erflater overlijdt in een andere staat dan die van zijn nationaliteit, maar ook als tot diens nalatenschap bezittingen behoren die zich bevinden op het grondgebied van een andere staat dan die van zijn nationaliteit c.q. zijn gewone verblijfplaats.
Tot de datum van 17 augustus 2015 werd vanuit Nederlandse invalshoek de vraag naar het toepasselijke erfrecht bepaald door het Haags Erfrechtverdrag 1989.[965] Dit verdrag was alleen door Nederland geratificeerd en daardoor niet in werking getreden. Om dat laatste te kunnen bereiken had het verdrag door

[963] In de situatie dat Nederland geen verdrag ter vermijding van dubbele schenk- en erfbelasting heeft gesloten, kan een beroep worden gedaan op de artikelen 48, 50 en 51 Besluit voorkoming dubbele belasting 2001.
[964] Verordening (EU) Nr. 650/2012 van het Europees Parlement en de Raad, betreffende de bevoegdheid van het toepasselijke recht, de erkenning en de tenuitvoerlegging van beslissingen en de aanvaarding en de tenuitvoerlegging van authentieke akten op het gebied van erfopvolging, alsmede betreffende de instelling van een Europese erfrechtverklaring.
[965] Verdrag inzake het recht dat van toepassing is op erfopvolging bij versterf, 's-Gravenhage, 1 augustus 1989.

drie lidstaten moeten zijn geratificeerd. Op basis van art. 1 Wet Conflictenregeling Erfopvolging was het verdrag echter wel in Nederland van kracht.
Onder de werking van het Haags Erfrechtverdrag 1989 kon de erflater een rechtskeuze in zijn uiterste wilsbeschikking uitbrengen voor het recht van zijn nationaliteit of voor het recht van zijn laatste gewone verblijfplaats. Zonder rechtskeuze bepaalde het Verdrag dat het erfrecht van de laatste gewone verblijfplaats van toepassing was, als de erflater van die staat de nationaliteit bezat danwel daar vijf jaar of langer voorafgaand aan zijn overlijden woonde.
Nederland paste het op basis van deze verwijzingsregels toepasselijke erfrecht toe, ook als dat het erfrecht betrof van een niet-verdragsluitende staat.
De vraag naar het toepasselijke erfrecht in een internationale casus is een vraag die behoort tot het internationale privaatrecht. Tot de genoemde datum van 17 augustus 2015 bepaalde iedere Europese lidstaat aan de hand van zijn eigen internationaal privaatrechtelijke regels, welk erfrecht van toepassing was. Omdat op basis van deze verwijzingsregels meerdere erfrechtstelsels van toepassing konden zijn, heeft de Europese Raad in zijn bijeenkomst van 10 en 11 december 2009 het Õprogramma van Stockholmõ aangenomen. Daarin is vastgelegd dat de wederzijdse erkenning van rechtstelsels van de lidstaten op het gebied van de erfopvolging en testamenten tot stand moest worden gebracht.
Ter uitvoering van het Õprogramma van Stockholm' heeft op 4 juli 2012 de Europese Erfrechtverordening (ErfVo) het licht gezien, met als datum van inwerkingtreding 17 augustus 2015. Met uitzondering van Denemarken, Ierland en het Verenigd Koninkrijk is de Verordening door alle EU-lidstaten ondertekend.
Ingevolge art. 21 ErfVo is het toepasselijke erfrecht het recht dat op basis van de verwijzingsregels in de ErfVo wordt aangewezen, ook als dit het recht is van een niet-verdragsluitende staat. Door de invoering van deze ErfVo zijn de nationale verwijzingsregels buiten werking gesteld.
Ingevolge art. 21 ErfVo is het toepasselijke erfrecht het erfrecht van de laatste gewone verblijfplaats van de erflater. De vraag waar de laatste gewone verblijfplaats van iemand zich bevindt is niet meer, zoals dat vanuit Nederlandse invalshoek tot 17 augustus 2015 het geval was, gebonden aan een vijfjaarstermijn. De woonplaats kan onder de verordening veel sneller zijn verlegd. Hoe snel, dat zal moeten worden bepaald op basis van Europees recht en dus door middel van Europese rechtspraak.
Uit de overwegingen 23 tot en met 25 uit de preambule bij de ErfVo blijkt hoe de laatste gewone verblijfplaats van de erflater zou moeten worden bepaald. Uitgangspunt is dat de aangezochte autoriteit zich een oordeel dient te vormen

over alle aspecten die het leven van de erflater in de jaren voor zijn overlijden hebben gekenmerkt en daarbij alle relevante elementen in beschouwing te nemen, in het bijzonder de duur en de regelmatigheid van de aanwezigheid van de erflater in de betrokken staat en de omstandigheden van en de redenen voor het verblijf. De aldus vastgestelde gewone verblijfplaats moet, uit het oogpunt van de specifieke doelstellingen van de ErfVo, duiden op een nauwe en duurzame band met de betrokken staat. Maar er zijn situaties waarin het bepalen van de gewone verblijfplaats van de overledene een complexe zaak blijkt. Dat kan het geval zijn als de erflater om professionele of economische redenen, en soms voor langere tijd, in een andere lidstaat is gaan wonen en werken, maar een nauwe en duurzame band met het land van oorsprong heeft behouden. In 'een dergelijke situatie kan, afhankelijk van de omstandigheden, worden geoordeeld dat de erflater zijn gewone verblijfplaats nog in het land van oorsprong had. Andere complexe gevallen kunnen zich voordoen als de erflater afwisselend in verschillende lidstaten heeft gewoond of van staat naar staat is gereisd. In die situatie zou zijn nationaliteit of de plaats waar zich zijn voornaamste goederen bevinden bijzonder kunnen meewegen bij de beoordeling van alle feitelijke omstandigheden. Ten slotte wordt onderkend dat de erflater kort voor zijn overlijden is verhuisd naar de staat van zijn gewone verblijfplaats en uit alle omstandigheden blijkt dat hij kennelijk een nauwere band had met een ander land. In die situatie zou, met de nodige voorzichtigheid, het recht van dat andere land als toepasselijk recht kunnen worden aangewezen.

De rechtspraak over de ErfVo is in algemene zin beperkt en betreft prejudiciële beslissingen die meestal op verzoek van rechterlijke autoriteiten van lidstaten zijn gewezen, waarin het systeem geldt dat de afwikkeling van de nalatenschap plaatsvindt door tussenkomst van een rechter, zoals dat het geval is in Duitsland.[966] Het belang van deze beslissingen is voor de Nederlandse notariële praktijk gering.[967] Over de laatste gewone verblijfplaats is nog geen arrest gewezen.

Als iemand niet wil dat het erfrecht van zijn laatste gewone verblijfplaats op zijn nalatenschap van toepassing is, dan kan hij een rechtskeuze uitbrengen voor het recht van zijn nationaliteit: het recht ten tijde van de rechtskeuze of ten tijde van zijn overlijden. Bezit iemand meerdere nationaliteiten, dan kan hij een rechtskeuze uitbrengen voor een van deze nationaliteiten. De reden

[966] HvJ EU 17 januari 2019, C-102/18 (Brisch), ECLI: EU: C: 2019:34; HvJ EU 1 maart 2018, C-558/16 (Mahnkopf), ECLI: EU:C: 2018:138; en, HvJ EU 21 juni 2018, C-20/17 (Oberle), ECLI: EU: C: 2018:485.

[967] Met uitzondering van het arrest HvJ EU Oberle. Die uitspraak zorgt ervoor dat de notaris bij het afgeven van een nationale verklaring van erfrecht erop bedacht moet zijn dat geen sprake is van een nalatenschap met internationale elementen. Is dat laatste wel het geval dan rijst de vraag of de notaris wel bevoegd is tot het afgeven van de nationale verklaring van erfrecht.

waarom de rechtskeuze is beperkt tot het recht van de nationaliteit van de erflater is dat er een band is tussen de erflater en het gekozen recht. Bovendien wilden de ontwerpers van de ErfVo voorkomen dat een recht wordt gekozen met het specifieke oogmerk om de erfgenamen die recht hebben op een wettelijk erfdeel te kort te doen in hun legitieme verwachtingen.[968]
De rechtskeuze moet worden gedaan in een verklaring in de vorm van een uiterste wilsbeschikking.[969] De uitgebrachte rechtskeuze heeft betrekking op de gehele nalatenschap.[970] Wat heel uitdrukkelijk niet onder het bereik van de ErfVo valt zijn de fiscale aspecten.[971] De ErfVo heeft uitsluitend betrekking op de civielrechtelijke aspecten van erfopvolging.

5. Dubbele heffing en het rapport van de EU-Expert Group

5.1 Woonplaats als aanknopingspunt voor de (schenk- en) erfbelasting

De woonplaats is op talloze rechtsgebieden internationaal als aanknopingspunt een belangrijke factor en bepaalt mede[972] de afbakening van fiscale heffingsrechten. Ook al is door de ontwerpers van de ErfVo aangenomen dat de gewone verblijfplaats van iemand (in beginsel) op vrij eenvoudige en eenduidige wijze is vast te stellen, dat uitgangspunt kan in twijfel worden getrokken wanneer het gaat om de fiscaliteit.
Dubbele heffing van erfbelasting kan op grond van de woonplaats eenvoudig ontstaan indien een ander land een andere invulling geeft aan het begrip 'woonplaats'. De woonplaats wordt in veel landen als aanknopingspunt gebruikt voor de heffing van (schenk-) en erfbelasting. Zolang die woonplaats wordt bepaald aan de hand van feitelijke omstandigheden, zal niet snel sprake zijn van dubbele heffing. Maar in sommige landen wordt de woonplaats (mede) bepaald door andere factoren.
Zo baseert het Verenigd Koninkrijk de onbeperkte belastingplicht voor de erfbelasting op het begrip 'domicile'. Domicile maakt deelt uit van het civielrechtelijk statuut van een persoon. Het begrip is een common law-concept

[968] Verordening (EU) Nr. 650/2012 van het Europees Parlement en de Raad, betreffende de bevoegdheid van het toepasselijke recht, de erkenning en de tenuitvoerlegging van beslissingen en de aanvaarding en de tenuitvoerlegging van authentieke akten op het gebied van erfopvolging, alsmede betreffende de instelling van een Europese erfrechtverklaring, overweging 38.
[969] Art. 22, lid 2 ErfVo.
[970] Art. 23, lid 1 ErfVo.
[971] Verordening (EU) Nr. 650/2012 van het Europees Parlement en de Raad, betreffende de bevoegdheid van het toepasselijke recht, de erkenning en de tenuitvoerlegging van beslissingen en de aanvaarding en de tenuitvoerlegging van authentieke akten op het gebied van erfopvolging, alsmede betreffende de instelling van een Europese erfrechtverklaring, overweging 10.
[972] Behoudens het situsbeginsel (de ligging van bepaalde goederen) en de nationaliteit.

dat ontwikkeld is door rechterlijke beslissingen over de jaren heen. Het feitelijk in een ander land wonen doet de domicile niet teniet gaan. Daarvoor is vereist dat alle banden met het Verenigd Koninkrijk zijn verbroken en dat er geen intentie bestaat om terug te keren naar het land van oorsprong.[973]
In Duitsland heeft een persoon volgens § 8 Abgabenordnung (AO) aldaar zijn woonplaats - 'Wohnsitz' - op het moment dat hij daar een woning, enkel voor eigen gebruik, ter beschikking heeft. Om deze woning als woonplaats te kunnen aanmerken is het voldoende dat hij daarin door de jaren heen regelmatig verblijft. Daarnaast geeft § 9 AO Abs. 1 een definitie van de gewone verblijfplaats, de zogenoemde 'gewöhnlicher Aufenthalt'. Dat is de plaats waar iemand gedurende langere tijd verblijft, en daarvoor noemt Abs. 2 een periode van zes maanden of meer. Het is voor het hebben van een gewone verblijfplaats geen vereiste dat iemand een woning permanent ter beschikking staat. Dat is volgens § 8 AO wel een voorwaarde voor de 'Wohnsitz'.
Zowel wanneer iemand een 'Wohnsitz' als een 'gewöhnlicher Aufenthalt' in Duitsland heeft, leidt dit aldaar tot een onbeperkte belastingplicht. Voor de inkomstenbelasting strekt de heffingsbevoegdheid zich uit over het wereldinkomen[974] en voor de erfbelasting over het wereldvermogen.[975]
Zo kan in de situatie waarin de gewone verblijfplaats zich in het buitenland bevindt en deze belastingplichtige in Duitsland een woning ter beschikking staat die hij gebruikt voor werkzaamheden in Duitsland, sprake zijn van een dubbele woonplaats en mogelijk van dubbele heffing. [976]
Buiten het feit dat iemand onder de Duitse wetgeving twee woonplaatsen kan hebben (zie hiervoor), hanteert Duitsland ook nog enkele woonplaatsficties. De eerste is evenals de Nederlandse woonplaatsfictie van art. 3 SW 1956 gekoppeld aan de nationaliteit (Duitse) en leidt in geval van overlijden tot heffing over het wereldvermogen van de erflater. De termijn van de Duitse regeling wijkt af van die in de Nederlandse woonplaatsfictie. De Duitse regeling verlengt het hebben van een Duitse woonplaats na verhuizing uit Duitsland namelijk niet met tien, maar met vijf jaren.[977] Voorts kent Duitsland een woonplaatsfictie voor diplomatieke ambtenaren.[978] Ten slotte geldt de Duitse heffingsbevoegdheid ook voor zover de erflater in Duitsland een woning ter beschikking stond. In al deze situaties is sprake van een zogenoemde

[973] K.M.L.L. van de Ven, De (dubbele) woonplaats van natuurlijke personen en internationale nalatenschappen, KWEP, 2021/21.
[974] § 1 Abs. 1-3 Einkommensteuergesetz (EStG).
[975] § 2 Abs. 1. a ErbstG.
[976] Dr. A. Kasper, Die Zweitwohnungsteuer, DStR, 2018.
[977] § 2 Abs. 1.b ErbStG.
[978] § 2 Abs. 1.c ErbStG.

'unbeschränkte Steuerpflicht' en wordt het wereldvermogen van de erflater in de heffing betrokken.

5.2 Situsbeginsel als aanknopingspunt

In verband met de hiervoor reeds aangehaalde ontwikkelingen op het gebied van het EU-recht is in Nederland het recht van overgang met ingang van 2010 afgeschaft. Dat is niet het geval in de andere ons omringende landen. Omdat daarbij komt dat iedere lidstaat zijn eigen invulling geeft aan wat onder situsgoederen wordt verstaan, kan dit eenvoudig tot dubbele heffing leiden.
Dubbele heffing doet zich voor in alle gevallen waarin het woonland de woonplaats als aanknopingspunt hanteert en tot de nalatenschap of de schenking in een ander land gelegen situsgoederen behoren, terwijl het situsland die situsgoederen ook wil belasten. Op grond van internationaal aanvaarde maatstaven wordt er in beginsel van uitgegaan dat de heffing op grond van ligging een sterker recht veroorzaakt dan heffing op basis van de woonplaats. Maar in een situatie waarin het woonland een goed gelegen in de andere staat niet als situsgoed erkent, zal de woonstaat geen voorkoming in de dubbele heffing geven.
Zolang iedere staat zo zijn eigen opvattingen heeft over de inhoud van het begrip situsgoed, is er voor het recht van overgang vooralsnog geen sprake van een internationaal aanvaard toedelingsbeginsel van heffingsbevoegdheid.[979] In de Aanbeveling van de Europese Commissie betreffende de voorkoming van dubbele belasting inzake schenk- en erfbelasting naar aanleiding van het IFA-congres in Rome in 2011, geeft de commissie in onderdeel 4.1. aan dat een staat voorkoming zou moeten geven voor in een ander land gelegen onroerende zaken en vermogen dat aldaar tot een vaste inrichting behoort.[980] Om die aanbeveling effect te laten hebben, is het wel van belang dat de lidstaten op dezelfde wijze invulling geven aan het begrip onroerende zaken; zijn er bronstaat/bronstaat conflicten, dan is onderdeel 4.1. van de Aanbeveling niet effectief. [981]
Naar aanleiding van deze aanbevelingen is in december 2015 een evaluatierapport verschenen van een EU-expert Group, onder de naam 'Ways to tackle inheritance crossborder tax obstacles facing individuals within the

[979] In deze zin HR 8 april 2011, ECLI:NL:HR:2011:BN8711, V-N 2011/20.22.
[980] Aanbeveling 2011/856/EU van de Commissie betreffende de voorkoming van dubbele belasting van nalatenschappen van 15 december 2011, P.B. L 336/81 van 20 december 2011, aanbeveling 4.1. Zie ook I.J.F.A. van Vijfeijken en N.C.G. Gubbels, Cursus Belastingrecht Schenk- en Erfbelasting, 2021-2022, p. 343.
[981] Zie V. Dafnomilis, Double taxation of Inheritances: Does the Ineffectiveness of EU Law lead to an Effective Recommendation? EC Tax Review 2015, afl. 6, 332.

EU', waarin het systeem 'one inheritance-one inheritance tax' wordt voorgesteld.

5.3 Rapport van de EU-Expert Group

De opdracht aan de leden van de Expert Group was om de Europese Commissie, gezien 'the failure of the [2011] recommendation', te adviseren bij het vinden van praktische oplossingen voor de belastingproblematiek waar individuen die om diverse redenen binnen de EU migreren, mee te maken hebben. De problematiek werd onderverdeeld in die van grensoverschrijdende situaties in algemene zin en in die van grensoverschrijdende nalatenschappen.
De EU Expert Group, die bestond uit 21 leden afkomstig uit bedrijfsleden, universiteiten[982], particuliere organisaties en belastingadviespraktijk, is in de periode van 12 juni 2014 tot 30 juni 2015, vijf keer over beide thema's bijeengekomen. Direct na de installatie hebben de leden besloten de belastingproblematiek met betrekking tot grensoverschrijdende nalatenschappen (en giften), omwille van het geheel eigen karakter daarvan, tot een apart studie-onderwerp te maken en gescheiden van de algemene problematiek te behandelen.
Het kernpunt van het advies van de EU Expert Group is dubbele belastingheffing over internationale nalatenschappen voorkomen door de heffing slechts aan één lidstaat toe te kennen. De lidstaat die hiervoor het meest aangewezen zou zijn, is die van de gewone verblijfplaats van de erflater.
Met deze keuze wordt aansluiting gezocht bij de hoofdregel van de Europese ErfVo - de laatste gewone verblijfplaats - en dat heeft onder meer als voordeel dat het antwoord op de vraag waar de gewone verblijfplaats van de erflater zich bevindt, civiel- en fiscaalrechtelijk hetzelfde wordt beoordeeld. Voorts kan gebruik worden gemaakt van de ervaringen op het terrein van de sociale zekerheid, de EU-Verordening 883/2004, op grond waarvan al sinds jaren een systeem geldt dat de onderworpenheid aan een socialezekerheidssysteem toewijst aan slechts een land, ook als een individu in meerdere landen actief is.
Alhoewel de EU Expert Group aangeeft voor het systeem 'one inheritance- one inheritance tax' voorstander te zijn van EU-regelgeving, en niet van een multilateraal verdrag, wordt gelijktijdig in het advies aangeraden het probleem van de belastingheffing over situsgoederen op te lossen door lidstaten daarover aanvullende afspraken te laten maken. Dat is opmerkelijk, omdat dat laatste mijns inziens toch op het starten van verdragsonderhandelingen duidt.

[982] R.G. Prokisch, lid van de Expert Group, vertegenwoordigde Maastricht University, Centre of Taxation, met als plaatsvervanger M.J.G.A.M. Weerepas.

Zou overigens (op termijn) daadwerkelijk worden gekozen voor het systeem waarbij het woonland van de erflater het heffingsrecht heeft, dan rijst de vraag naar de aanknopingspunten voor de heffing, die niet alleen samenhangen met de ligging van onroerend goed. Zo hanteert Nederland als uitgangspunt voor de heffing de woonplaats van de erflater.[983] Duitsland daarentegen hanteert als aanknopingspunten voor de successierechtheffing de woonplaats van de erflater en die van de erfgenaam.[984] Overlijdt iemand met de Duitse nationaliteit die op het moment van zijn overlijden zijn gewone verblijfplaats in Nederland heeft, dan zou exclusief de Nederlandse Successiewet 1956 van toepassing (moeten) zijn. Ook al woont een van zijn erfgenamen op Duits grondgebied, de heffingsbevoegdheid van Duitsland is geëindigd, doordat de erflater zijn gewone verblijfplaats in Nederland heeft.
De Europese Commissie heeft tot dusverre met het rapport van de EU Expert Group en de aanbevelingen daarin niets gedaan. Deze nieuwe poging om een oplossing te vinden voor de verstorende werking van dubbele belastingheffing over nalatenschappen (en giften) binnen de EU, waarbij aansluiting wordt gezocht bij de gewone verblijfplaats van de erflater - een holistische aanpak - is zeker een weg die nadere aandacht verdient.[985]
Wordt gekozen voor EU-wetgeving dan betekent dit dat de uitleg daarvan, evenals dat het geval is voor de regels van de Europese ErfVo, aan de Europese rechter is. Of dat past bij het karakter van de erfbelastingwetgeving, waarvan de bevoegdheid op dit moment bij de lidstaten ligt, is de vraag.[986]

6. Afronding

In een periode van bijna 15 jaar zijn er op het terrein van internationale nalatenschappen diverse ontwikkelingen geweest, waarvan enkele concrete wijzigingen teweeg hebben gebracht.
Zo heeft de rechtspraak van het HvJ EU er voor Nederland toe geleid dat het recht van overgang is afgeschaft. Door de inwerkingtreding van de Europese ErfVo hanteren de lidstaten die deze verordening hebben ondertekend dezelfde aanknopingspunten voor de bepaling van het toepasselijke erfrecht. Wat betreft de voorkoming van dubbele schenk- en erfbelasting is het gebleven bij de Aanbevelingen van de Europese Commissie en het rapport van de door de Commissie ingestelde EU Expert Group.

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983 Art. 1, lid 1, 1e SW 1956.
984 § 2 Abs.1 ErbStG.
985 Zie V. Dafnomilis, Taxation of ross-border inheritances and donations suggestions for improvementLeiden, 3 juni 2021.
986 Zie K.M.L.L. van de Ven, Waarom er fiscaal nog iets zou moeten worden geregeld, 'Ways to tackle inheritance crossborder tax obstacles facing individuals within the EU', TE augustus 2016, nr. 4.

GRENSOVERSCHRIJDENDE ARBEID: ALWAYS ON THE MOVE!

Prof. dr. M.J.G.A.M. Weerepas[987]

1. Inleiding

Rainer ken ik inmiddels een aantal jaren. We hebben ook een aantal jaren samen het voorzitterschap van de capaciteitsgroep Belastingrecht aan de Universiteit van Maastricht gedeeld. We hebben dat ieder op onze eigen(wijze) wijze gedaan, maar altijd in harmonie en in overleg. Rainer was meer de hardhitter, waardoor hij ook dingen voor elkaar heeft gekregen en ik was meer voor de softe aanpak, hetgeen in sommige gevallen ook nodig was. Ook hadden we af en toe tijd om over een gemeenschappelijk vakgebied, grensoverschrijdende arbeid, te praten. Dat waren meestal felle discussies waarin Rainer het niet eens was met mijn visie. Ik vertegenwoordigde volgens hem de Nederlandse visie die naar zijn mening niet altijd de juiste is. “De Hoge Raad ziet dat helemaal verkeerd”, zei hij dan. De discussies verschaften me daardoor wel nieuwe inzichten op bepaalde problemen. Rainer, bedankt voor de samenwerking!

In deze bijdrage wil ik het hebben over bepaalde aspecten van grensoverschrijdende arbeid, met het risico dat Rainer het er niet mee eens zal zijn. Grensoverschrijdende arbeid is een weerbarstige materie, met veel tot discussie leidende elementen, zoals de vraag wat tot het salaris in de zin van art. 15, lid 1 van het OESO-Modelverdrag behoort. Deze discussies maken het vakgebied interessant. Op dit moment is de arbeidsmarkt erg in beweging, waarbij nieuwe arbeidsvormen ontstaan. Dat heeft ook een weerslag op de uitgangspunten van internationale belastingheffing en verzekeringsplicht in situaties waarin sprake is van grensoverschrijdende arbeid. Een ontwikkeling die hier kan worden genoemd is het (gedeeltelijk) thuiswerken door grenswerkers als gevolg van de COVID-19 crisis. Het lijkt erop dat het (gedeeltelijk) thuiswerken ook na de crisis al dan niet gedeeltelijk zal voortduren. Een ander fenomeen dat echter al langer bestaat is het zwartwerken. Deze twee elementen leiden tot de volgende vraag: Welke impact hebben de bestaande internationale fiscale regelgeving en sociaal

[987] Hoogleraar Fiscale aspecten van grensoverschrijdende arbeid aan Maastricht University.

zekerheidsregelgeving op het (gedeeltelijk) thuiswerken door grenswerkers en op zwartwerken?

In deze bijdrage komt eerst de toename van arbeidsvormen kort aan de orde. Daarna worden de toepasselijke regels van internationaal belastingrecht en Europees sociaal zekerheidsrecht met betrekking tot het thuiswerken door grenswerkers na de COVID-19 crisis en zwartwerk beschreven. Wat betreft het sociaal zekerheidsrecht is de beschrijving beperkt tot de verzekeringsplicht, ofwel de premieheffing. Afgesloten wordt met een slotbeschouwing.

2. Toename nieuwe arbeidsvormen

In de laatste jaren wordt een grote verscheidenheid aan arbeidsvormen gezien. Gedacht kan worden aan het omzetten van arbeidsovereenkomsten in overeenkomsten met zelfstandigen, maar ook aan telewerkers, aan zogenoemde digitale nomaden en aan platformwerkers. De digitale platformeconomie is in de EU in de afgelopen vijf jaar met 500% gestegen.[988] Langzaam komt nieuwe regelgeving met betrekking tot deze arbeidsvormen tot stand. Een voorbeeld is de op 9 december 2021 gepubliceerde ontwerprichtlijn van de Europese Commissie inzake platformwerkers.[989] In deze ontwerprichtlijn worden meer rechten gegeven aan platformwerkers en worden voorstellen gedaan om de arbeidsomstandigheden van de platformwerkers te verbeteren. De ontwerprichtlijn beoogt de transparantie en traceerbaarheid van platformwerk te verbeteren, ook in grensoverschrijdende situaties. Dit brengt positieve gevolgen voor de nationale autoriteiten met zich zoals mogelijkheden voor een betere handhaving van de bestaande arbeidsrechtelijke en fiscale regels en een betere inning van belastingen en socialezekerheidsbijdragen. De lidstaten zouden jaarlijks € 4 miljard extra aan belastingen en socialezekerheidsbijdragen kunnen innen.[990] Er wordt in de ontwerprichtlijn echter niet veel gezegd over hoe de lidstaten die extra inkomsten zouden kunnen innen.

Overigens is het naar de mening van de Europese Commissie wenselijk dat er voor de groei van de economie een lagere belastingdruk op arbeid komt,

[988] Voorstel voor een Richtlijn van het Europees Parlement en de Raad betreffende de verbetering van de arbeidsvoorwaarden bij platformwerk, COM/2021/762 final.
[989] Voorstel voor een Richtlijn van het Europees Parlement en de Raad betreffende de verbetering van de arbeidsvoorwaarden bij platformwerk, COM/2021/762 final.
[990] Voorstel voor een Richtlijn van het Europees Parlement en de Raad betreffende de verbetering van de arbeidsvoorwaarden bij platformwerk, COM/2021/762 final.

hetgeen ook door het vorige kabinet is onderschreven.[991] Voor de financiering van die verlaging zouden de milieuheffingen kunnen worden verhoogd. Ook kan hier worden gewezen op de ontwerprichtlijn toereikende minimumlonen in de EU (COM(2020)682).[992] Kortom, er is veel werk aan de winkel voor de wetgevers om de nieuwe arbeidsvormen in goede banen te leiden.

3. Thuiswerken door grenswerkers

De COVID-19 pandemie heeft aan de verscheidenheid aan arbeidsvormen bijgedragen. Tijdens de pandemie is het zogenoemde thuiswerken, ook door grenswerkers, gedwongen tot stand gekomen. Het lijkt er op dat ook na de crisis het thuiswerken een blijvertje zal zijn. Het thuiswerken heeft invloed op de toewijzing van de heffingsbevoegdheid inzake belastingen en de toewijzing van de verzekeringsplicht. Tijdens de pandemie hebben veel staten maatregelen getroffen om de consequenties van het grensoverschrijdend thuiswerken te neutraliseren. In het navolgende neem ik het OESO-Modelverdrag als uitgangspunt. Veel belastingverdragen zijn immers op het OESO-Modelverdrag gebaseerd. Ingevolge art. 15, lid 1 OESO-Modelverdrag, het toepasselijke artikel inzake niet-zelfstandige arbeid, wordt de heffingsbevoegdheid toegewezen aan de woonstaat, tenzij de dienstbetrekking in de andere staat wordt uitgeoefend. De woonstaat verkrijgt echter ingevolge art. 15, lid 2 OESO-Modelverdrag de heffingsbevoegdheid indien cumulatief aan drie voorwaarden wordt voldaan, te weten:

> a. de werknemer verblijft minder dan 183 dagen in de werkstaat (*physical presence*);
> b. de beloning wordt niet betaald door of namens een werkgever in de werkstaat; en,
> c. de beloning komt niet ten laste van de vaste inrichting van de werkgever in de werkstaat.

In het geval een grenswerker gedeeltelijk thuiswerkt, vindt ingevolge art. 15 OEO-Modelverdrag een 'salary split' plaats. Voor de dagen dat thuis in de woonstaat wordt gewerkt, heeft de woonstaat het heffingsrecht over het loon dat aan de werkzaamheden die in de woonstaat worden verricht kan worden toegerekend. Indien in de werkstaat wordt gewerkt, heeft de werkstaat het heffingsrecht over het gedeelte van de werkzaamheden dat in de werkstaat

[991] O.a. genoemd in: Brief Minister van Financiën van 7 februari 2020, nr. 2020-0000022749, *V-N* 2020/13.13.
[992] Zie ook Kamerbrief over de Nederlandse inzet bij Europees voorstel 'Richtlijn toereikende minimumlonen in de EU', Kamerstukken II, 2020/21, 21501-31, nr. 639.

wordt verricht. Overigens kan door het thuiswerken ook een vaste inrichting voor de werkgever in de woonstaat van de werknemer ontstaan.[993]

België, Duitsland en Nederland hebben voor de duur van de COVID-19 crisis onderling overeenkomsten gesloten waarin bovengenoemde gevolgen van de 'salary split' buiten toepassing worden gesteld. Overeengekomen werd dat voor de toepassing van het belastingverdrag werd gedaan alsof de werknemer werkte op de plaats waar deze doorgaans, dus zonder thuiswerkverplichting tijdens de COVID-19 crisis, zou hebben gewerkt. De neutraliserende maatregelen golden in de relatie Nederland-België en Nederland-Duitsland in ieder geval tot 1 juli 2022.[994]

Over de criteria genoemd in art. 15 OESO-Modelverdrag is veel te zeggen. Ze zijn niet altijd even duidelijk en geven in de praktijk aanleiding tot veel discussie. Voorbeelden zijn de termen '*salaries*, *wages and other similar remuneration*', '*ÐÁÉÄ ÂÙ ÏÒ ÏÎ ÂÅ*' en '*employment*'.[995] Ingevolge art. 3, lid 2 OESO-Modelverdrag dienen de termen die niet nader zijn geformuleerd in het verdrag naar het nationale recht te worden geïnterpreteerd.

Maar ik wil me in deze bijdrage beperken tot, en kort stilstaan bij, de toepassing van het criterium '*physical presÅ Î Ãå*' genoemd in art. 15, lid 2, onderdeel a OESO-Modelverdrag. Een belastingverdrag is ingevolge art. 1 OESO-Modelverdrag van toepassing op inwoners van een van de verdragsluitende staten. Het 'physical presence'-criterium staat sinds het begin van het OESO-Modelverdrag in het verdrag vermeld en is een belangrijk uitgangspunt om de heffingsrechten inzake grensoverschrijdende arbeid te bepalen. Ten tijde van de introductie van het criterium 'physical presence' waren er niet veel andere mogelijkheden dan met behulp van de fysieke aanwezigheid in de werkstaat de werkzaamheden uit te oefenen. Dat is door de digitalisering anders geworden.

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[993] Zie verder M.J.G.A.M. Weerepas, Grenswerkers na de crisis: aanpassing regelgeving vereist?, Grensoverschrijdend werken (Vakblad over werken en wonen over de grens 2021), nr. 43, p. 3-9.

[994] Zie o.a. Overeenkomst tussen de bevoegde autoriteiten van Nederland en België ter verlenging van de Overeenkomst met betrekking tot de situatie van de grensarbeiders in de context van de COVID19-gezondheidscrisis van 30 april 2020, zoals verlengd door de overeenkomsten van 19 mei 2020, 19 juni 2020, 24 augustus 2020, 7 december 2020, 5 maart 2021, 21 juni 2021 en 23 september 2021, Stcrt. 2021, 50644; en Overeenkomst tussen de bevoegde autoriteiten van Duitsland en Nederland met betrekking tot de verlenging van de overeenkomst van 6 april 2020 over de toepassing en interpretatie van artikel 14 van het Belastingverdrag tussen Nederland en Duitsland, Stcrt. 2021, 50645. Zie ook de website van de Belastingdient (https://www.belastingdienst.nl/wps/wcm/connect/nl/coronavirus/content/u-bent-grensarbeider), geraadpleegd op 2 april 2022.

[995] Tekst art. 15 OESO-Modelverdrag 2017. Zie bijv. B. Peeters, Article 15 of the OECD Model Convention on "Income from Employment" and its Undefined terms, European Taxation, Vol. 44 (2004), No. 2/3, p. 72-82.

Let wel, 'physical presence' is niet geheel gelijk te stellen met het verrichten van werkzaamheden in de werkstaat. Het gaat om de fysieke aanwezigheid van de werknemer in de werkstaat. Welke dag(delen) als fysieke aanwezigheid kunnen worden meegeteld, is vermeld in paragraaf 5 van het Commentaar behorend bij art. 15 OESO-Modelverdrag.

De vraag is echter of gezien de vele arbeidsvormen waar bij enkele van die vormen geen verplaatsing van de woon- naar de werkstaat van de werknemer plaatsvindt, niet een nieuw verdelingscriterium zou moeten worden geformuleerd. In de literatuur komt langzaam een discussie op gang over het criterium. Zo zet Kostić vraagtekens bij de afhankelijkheid van de fiscale woonplaats van individuen als het veilige anker voor het toekennen van fiscale rechten, evenals bij het begrip van hoe en waar arbeid wordt uitgeoefend.[996]

Wat betreft de verzekeringsplicht (ofwel: premieheffing) is in Europees verband Verordening 883/2004[997] van toepassing. Bij de normale situatie waarin de inwoner van de ene lidstaat in een ander land werkt voor de daar gevestigde werkgever geldt ingevolge art. 11, lid 3, onderdeel a Verordening 883/2004 dat de grenswerker is verzekerd in de werkstaat. Dat betekent dat de premies in dat land moeten worden afgedragen. Bij het gedeeltelijk thuiswerken door de grenswerker geldt dat er werkzaamheden worden verricht in twee lidstaten. Daarvoor geldt de aanwijsregel van art. 13, lid 1 Verordening 883/2004. Ingevolge deze regel is de grenswerker in zijn of haar woonstaat verzekerd indien hij of zij 25% of meer van het salaris en/of de arbeidstijd in de woonstaat verwerft respectievelijk verricht. De situatie moet voor de komende twaalf maanden worden beoordeeld.[998] Om de verschuiving van de verzekeringsplicht tijdens de pandemie te voorkomen is een maatregel genomen die, bij het schrijven van deze bijdrage, tot 1 juli 2022 geldt.[999] De gevolgen van deze maatregelen zijn derhalve dat er niets wijzigt in de verzekeringsplicht. De verzekeringsplicht blijft toegewezen aan de werkstaat. De verzekeringsplicht wijzigt echter wel in het geval dat een grenswerker tijdens de crisis geen werkgever had, maar start met werken voor een werkgever in een andere lidstaat of in het geval waarin de grenswerker tijdens de crisis een werkgever had maar wisselt van werkgever die in een andere lidstaat is gevestigd.

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996 Svetislav V. Kostić, In Search of the Digital Nomad - Rethinking the Taxation of Employment Income under Tax Treaties, World Tax Journal, Vol. 11 (2019), No. 2, par. 3.3.

997 Verordening (EG) nr. 883/2004 van het Europees Parlement en de Raad van 29 april 2004 betreffende de coördinatie van de socialezekerheidsstelsels, PbEU 30 april 2004, L 166, p. 1.

998 Art. 14, leden 8 en 10, Verordening (EG) nr. 987/2009 van het Europees Parlement en de Raad van 16 september 2009 tot vaststelling van de wijze van toepassing van Verordening (EG) nr. 883/2004 betreffende de coördinatie van de socialezekerheidsstelsels, PbEU 30 oktober 2009, L 284/1.

999 Zie Toekomstvisie op de effecten van thuiswerken voor grensarbeiders, Ministerie van Sociale Zaken en Werkgelegenheid, 17 december 2021, nr. 2021-0000206074.

Berekeningen

Interessant te dezen zijn enige berekeningen die laten zien welke effecten het thuiswerken door de grenswerkers met inachtneming van de huidige regels heeft op het bruto-nettotraject van de grenswerker. Onderzoek naar de effecten van de huidige toepasselijke regelgeving op het bruto-nettotraject leert dat het gedeeltelijk thuiswerken zowel negatief als positief kan uitvallen voor de betrokken grenswerker.[1000] Ter illustratie een voorbeeld waarin sprake is van een gehuwde grenswerker die een salaris heeft van € 55.500. Er wordt uitgegaan van een voltijdse werkweek. De gehuwde grenswerker heeft een partner die geen inkomen heeft. Ze hebben twee kinderen (8 en 10 jaar).[1001] Er vindt een vergelijking plaats met de buurman van de grenswerker die in dezelfde situatie verkeert. De buurman woont en werkt echter in de woonstaat van de grenswerker en betaalt belasting en premies in de woonstaat. Ook vindt een vergelijking plaats met de collega van de grenswerker die woont en werkt in de werkstaat van de grenswerker. Deze collega betaalt belasting en premies in de werkstaat van de grenswerker. In het bovenste gedeelte van het volgende overzicht wordt 100% op de werkplaats gewerkt; in het tweede gedeelte wordt 40% thuis in de woonstaat gewerkt. Hierdoor verschuift de verzekeringsplicht van de werk- naar de woonstaat. Opgemerkt zij dat de toepasselijke cijfers van 2021 zijn gebruikt.

[1000] Zie voor alle berekeningen: Marjon Weerepas, Pim Mertens en Martin Unfried, ITEM Grenseffectenrapportage Dossier 2: Impact analyse van de toekomst van thuiswerken voor grensarbeiders na COVID-19, te vinden op https://www.maastrichtuniversity.nl/nl/onderzoek/institute-transnational-and-euregional-cross-border-cooperation-and-mobility-item, geraadpleegd op 2 april 2022.

[1001] De berekeningen zijn gemaakt door EY Belastingadviseurs LLP.

2021 pro forma berekeningen / geheel jaar / gehuwd / Echtgenoot geen eigen inkomsten in woonland / 2 kinderen van 8 en 10 jaar) / geen aftrekposten / IB berekeningen / Gemeentelijke belastingen 7% / inclusief heffingskortingen

	7	8	9 = 8	
SV in land WG	**Inwoner BE NL werkgever 100% werkzaam in NL**	**Inwoner BE BE werkgever 100% werkzaam in BE**	**Inwoner NL BE werkgever 100% werkzaam in BE**	**Inwoner NL NL werkgever 100% werkzaam in NL**
Bruto salaris	€ 55.500	€ 55.500	€ 55.500	€ 55.500
Belasting NL	€ 9.912	€ 0	€ 0	€ 9.912
Belasting BE	€ 255	€ 8.815	€ 8.815	€ 0
Premies*	€ 8.358	€ 7.730	€ 7.730	€ 8.358
Teruggave Compensatieregeling	€ 0	€ 0	€ 0	€ 0
Netto	€ 36.975	€ 38.955	€ 38.955	€ 37.230
Premies WG	€ 9.771	€ 12.958	€ 12.958	€ 9.771
Loonkosten**	€ 65.271	€ 68.458	€ 68.458	€ 65.271
	10	11 = 8	12	
SV in woonland	**Inwoner in BE NL werkgever 60% werkzaam in NL, 40% in B**	**Inwoner BE BE werkgever 100% werkzaam in BE**	**Inwoner NL BE werkgever 60% werkzaam in BE, 40% in NL**	**Inwoner NL NL werkgever 100% werkzaam in NL**
Bruto salaris	€ 55.500	€ 55.500	€ 55.500	€ 55.500
Belasting NL	€ 1.414	€ 0	€ 3.385	€ 9.912
Belasting BE	€ 3.666	€ 8.815	€ 7.827	€ 0
Premies*	€ 7.217	€ 7.730	€ 8.358	€ 8.358
Teruggave Compensatieregeling	€ 0	€ 0	€ 1.301	€ 0
Netto	€ 43.203	€ 38.955	€ 37.230	€ 37.230
Premies WG	€ 12.958	€ 12.958	€ 9.771	€ 9.771
Loonkosten**	€ 68.458	€ 68.458	€ 65.271	€ 65.271

*Als NL SV: inclusief nominale bijdrage zorgverzekering en excl evt zorgtoeslag
** zonder vakantietoeslag, lage WW premie als NL SV (0,34% vanaf 1 augustus 2021)

Uit de berekeningen blijkt dat in de situatie waarin 100% in de werkstaat wordt gewerkt de Belgische grenswerker in vergelijking met zijn buurman netto minder overhoudt dan zijn buurman (€ 36.975 ten opzichte van € 38.955). De Nederlandse grenswerker houdt daarentegen juist meer over ten opzichte van zijn buurman (€ 38.955 ten opzichte van € 37.230). De Belgische grenswerker houdt ook ten opzichte van zijn collega netto minder over (€ 36.975 ten opzichte van € 37.230); de Nederlandse grenswerker heeft ten opzichte van zijn collega hetzelfde netto-inkomen (€ 38.955).

Ten aanzien van de loonkosten van de werkgever kan worden opgemerkt dat deze lager zijn voor de Nederlandse werkgever (€ 65.271) dan die voor de Belgische werkgever (€ 68.458).

In de situatie waarin 40% wordt thuisgewerkt, kent de Belgische grenswerker een toename van zijn netto-inkomen van € 6.228 ten opzichte van de situatie waarin hij of zij 100% in de werkstaat werkt (€ 43.203 vergeleken met €

36.975). De Nederlandse grenswerker gaat er daarentegen € 1.725 op achteruit (€ 37.230 vergeleken met € 38.955).

Ten aanzien van de loonkosten van de werkgever kan worden opgemerkt dat de loonkosten van de Nederlandse werkgever voor de Belgische grenswerker stijgen tot het niveau van de Belgische werkgever (van € 65.271 naar € 68.458), terwijl die van de Belgische werkgever die een Nederlandse grenswerker in dienst heeft dalen tot het niveau van de Nederlandse werkgever (van € 68.458 naar € 65.271). De vraag is in hoeverre deze stijging van de arbeidskosten voor de Nederlandse werkgever die Belgische grenswerkers in dienst heeft, invloed zal hebben op de grensoverschrijdende arbeidsmarkt.

De loonkosten in België worden met name veroorzaakt doordat de Belgische wetgeving in deze situatie geen plafond kent bij de verschuldigde socialezekerheidspremies. België kent dan ook een van de hoogste 'loonwigs', dat wil zeggen het verschil tussen de arbeidskosten voor de werkgever en het nettoloon voor de werknemer. In 2020 bedraagt de loonwig voor een alleenstaande in België 51,5%. Ter vergelijking: De loonwig bedraagt in dat jaar in Duitsland 49,0% en in Nederland 36,4%[1002] terwijl de loonwig voor een gezinshuishouden met kinderen ongeveer 15% lager is dan voor de alleenstaanden. Het laatste geldt ook voor Duitsland.

Plaats van werkzaamheden verzekeringsplicht

In paragraaf 2 is uitgelegd dat voor de toewijzing van de fiscale heffingsbevoegdheid onder andere de fysieke aanwezigheid van belang is. Wat kan nu bij de verzekeringsplicht onder de plaats van uitoefening van werkzaamheden worden verstaan? Het arrest Partena[1003] wordt hiervoor vaak aangehaald.[1004] Het Hof van Justitie heeft in dit arrest uitgelegd wat onder plaats van uitoefening van werkzaamheden moet worden verstaan. De casus betreft een in 1993 opgerichte Belgische vennootschap die aan de Belgische vennootschapsbelasting is onderworpen omdat zij in België haar zetel heeft. De twee bestuurders bezitten ieder de helft van het kapitaal. Een van de bestuurders woont sinds 1999 in Portugal, waar hij sinds 2001 in loondienst heeft gewerkt. De Belgische sociaalverzekeringskas voor zelfstandigen (Partena) heeft een dwangbevel laten betekenen van € 125.696,50 voor, onder andere, verschuldigde bijdragen. Partena stelt zich op het standpunt dat de

[1002] OECD (2021), Taxing Wages 2021, OECD Publishing, Paris, https://doi.org/10.1787/83a87978-en, p. 22, geraadpleegd op 31 januari 2022.
[1003] HvJ EU 27 september 2012, C-137/11 (Partena), ECLI:EU:C:2012:593.
[1004] Zie Frans Pennings, European Social Security Law, 6th edition, Intersentia 2015, p. 103-104.

betrokken bestuurder in België als zelfstandige is verzekerd. De prejudiciële vraag luidt: Mag een lidstaat, voor de toepassing van de art. 13 en volgende van Verordening 1408/71[1005] en, in het bijzonder voor de toepassing van art. 14quater, in het kader van de hem toekomende bevoegdheid om de voorwaarden vast te stellen voor onderwerping aan het socialezekerheidsstelsel dat hij voor zelfstandigen invoert, het 'bestuur vanuit het buitenland van een aan de belasting van die staat onderworpen vennootschap' gelijkstellen met de uitoefening van een werkzaamheid op zijn grondgebied?

Hot hof overweegt dat 'uit de opzet en het stelsel van Verordening nr. 1408/71 volgt dat het criterium 'plaats van uitoefening' van de werkzaamheden in loondienst of anders dan in loondienst van de betrokkene het belangrijkste criterium is om de enige toepasbare wetgeving aan te wijzen en dat slechts in specifieke situaties van dit criterium kan worden afgeweken aan de hand van subsidiaire aanknopingscriteria zoals de staat van woonplaats van betrokkene, de staat van de zetel van de onderneming die hem tewerkstelt of van de plaats van een filiaal of een permanente vertegenwoordiging ervan, of van de plaats van de hoofdbezigheid van betrokkene (…)'.

Volgens het Hof van Justitie wordt het begrip 'plaats van uitoefening' van een werkzaamheid niet bepaald door de wetgevingen van de lidstaten, maar door het recht van de Unie en bijgevolg door de uitlegging die het Hof van Justitie eraan geeft. Voor de uitlegging van het begrip 'plaats van uitoefening' als begrip van het Unierecht moet volgens vaste rechtspraak de betekenis en de draagwijdte van begrippen waarvoor het recht van de Unie geen definitie geeft, worden bepaald in overeenstemming met hun in de omgangstaal gebruikelijke betekenis, met inachtneming van de context waarin zij worden gebruikt en de doeleinden die worden beoogd door de regeling waarvan zij deel uitmaken.[1006] Verder overweegt het Hof dat in dit verband het begrip 'plaats van uitoefening' van een werkzaamheid, overeenkomstig de primaire betekenis van de gebruikte woorden, moet worden opgevat 'als de aanduiding van de plaats waar de betrokken persoon concreet de aan die werkzaamheid verbonden handelingen verricht'.[1007]

[1005] Thans: art. 11 Verordening 883/2004.
[1006] Het hof verwijst o.a. naar het arrest HvJ EU 10 maart 2005, C-336/03 (easyCar), ECLI:EU:C:2005:150, punt 21 en aldaar aangehaalde rechtspraak.
[1007] HvJ EU 27 september 2012, C-137/11 (Partena), ECLI:EU:C:2012:593, punt 57.

Indien deze uitleg wordt vergeleken met die van het belastingrecht dan lijkt voor de toewijzing van de verzekeringsplicht een beperktere uitleg van de plaats van werkzaamheden te gelden. In de fiscaliteit kunnen immers ook andere dagen van aanwezigheid in een staat worden meegenomen om de heffingsbevoegdheid aan een staat toe te wijzen, ook als op die dagen niet 'concreet aan de werkzaamheid verbonden handelingen verricht'.

Voor de toekomst na de crisis zou een mogelijke oplossing voor het probleem om een switch van de verzekeringsplicht van de werkstaat naar de woonstaat te voorkomen zijn om het percentage voor de 'plaats van uitoefening' te verhogen van 25 naar 40 voor het (thuis)werken in twee lidstaten. Dit zou kunnen geschieden door de aanpassing van Verordening 883/2004, maar dat zal een proces van lange adem zijn. Onderzocht zou moeten worden of art. 8, lid 2, of art. 16 Verordening 883/2004 de mogelijkheid geven dat twee of meer lidstaten een overeenkomst hierover zouden kunnen sluiten. Ingevolge art. 8, lid 2 Verordening 883/2004 is het namelijk mogelijk dat lidstaten in de geest van de verordening overeenkomsten sluiten.

Opgemerkt zij nog dat Nederland zich zal inzetten om in de periode na de crisis waarin wordt verwacht dat thuiswerken een substantiële rol gaat spelen, negatieve gevolgen van thuiswerken voor de socialezekerheidsposities en fiscale posities van grensarbeiders weg te nemen of te verminderen.[1008]

4. Zwartwerk

4.1 Inleiding

In samenhang met het ontstaan van nieuwe arbeidsvormen kan ook het verschijnsel van zwartwerk worden gezien. Wat kan onder zwartwerken worden verstaan? In de Europese Unie wordt daaronder verstaan: 'alle betaalde werkzaamheden die op zichzelf wettig zijn, maar niet aan de overheid worden gemeld; er moet echter wel rekening worden gehouden met verschillen in de wetgeving van de lidstaten'.[1009] Zwartwerk is weliswaar een al langer bestaand fenomeen, maar uit de Eurobarometer-enquête (2019) blijkt dat vooral zelfstandigen en mobiele werknemers een risicogroep vormt die openstaat voor zwartwerk. Een van de gevolgen is dat zwartwerk leidt tot sociale dumping. De schaal van zwartwerk wordt vergroot door onder andere een toenemende flexibilisering van contractuele betrekkingen, met name de

[1008] *Brief Staatssecretaris van Sociale Zaken en Werkgelegenheid van 17 december 2021 nr. 2021-0000206074, V-N* 2022/4.10.

[1009] Mededeling van de Europese Commissie, 'Intensievere bestrijding van zwartwerk', COM(2007)628, p. 2.

toename van arbeid als zelfstandige en de groei van grensoverschrijdende activiteiten.[1010] Bij de flexibilisering wordt in een aantal gevallen gebruik gemaakt van schijnconstructies.

Het tegengaan van zwartwerk is naar mijn mening grotendeels een - weliswaar moeilijke - kwestie van controle en handhaving. Het tegengaan is hoofdzakelijk een taak voor de nationale overheden.[1011] Al in 1999 werd een gedragscode aangenomen waarin werd voorgesteld de samenwerking tussen de autoriteiten van de lidstaten bij de bestrijding van uitkerings- en premiefraude en zwartwerk, en met betrekking tot de grensoverschrijdende terbeschikkingstelling van werknemers te verbeteren.[1012] De gedragscode voorzag onder andere in het verstrekken van inlichtingen, het toezenden van verzoeken om samenwerking aan de juiste instanties, het aanwijzen van een nationaal bureau en de mogelijkheid tot rechtstreeks contact tussen bevoegde instanties in het kader van de samenwerking.[1013] In 2019 is de Europese Arbeidsautoriteit opgericht. De autoriteit dient onder andere de samenwerking en uitwisseling van informatie tussen lidstaten te bevorderen, de onderling afgestemde en gezamenlijke inspecties te ondersteunen en te coördineren en lidstaten te ondersteunen bij het aanpakken van zwartwerk.[1014] Zonder volledig te willen zijn kunnen hier ten aanzien van Nederland de volgende maatregelen worden genoemd om schijnconstructies te bestrijden: de Fraudewet[1015] en de met ingang van 1 juli 2015 geldende Wet aanpak schijnconstructies[1016].

Zwartwerken komt veelvuldig voor, alhoewel het volgens enigszins gedateerde cijfers (cijfers 2015) in Nederland mee lijkt te vallen. Nederland komt niet in de top 10 van Europese landen met de meeste zwartwerkers voor. De Nederlandse schaduweconomie bedraagt nog geen 8% van het BBP. België, Italië, Spanje en Griekenland kennen een hoger percentage.[1017] Andere cijfers tonen aan dat in Nederland voor ongeveer € 4 miljard zwart wordt gewerkt. Het gaat om ongeveer 400.000 werknemers. Met name in de

[1010] Thematische factsheet Europees Semester Zwartwerk, Europese Commissie, p. 2-3. Zie https://ec.europa.eu/info/sites/default/files/file_import/european-semester_thematic-factsheet_undeclared-work_nl.pdf, geraadpleegd op 1 april 2022.
[1011] Thematische factsheet Europees Semester Zwartwerk, Europese Commissie, p. 2-3.
[1012] Resolutie van de Raad en de vertegenwoordigers van de regeringen van de lidstaten, in het kader van de raad bijeen, 22 april 1999, *PbEG* 1999/c 125/01.
[1013] J.A. Booij, Inlening van arbeidskrachten in internationaal verband, TFO 1999/90, par. 3.1.
[1014] Zie o.a. Mijke Houwerzijl, De Europese Arbeidsmarktautoriteit, Europees Arbeidsrecht 2021/3.13.
[1015] Wet aanscherping handhaving en sanctiebeleid SZW-wetgeving, Stb. 2012, 462.
[1016] Wet van 4 juni 2015, Stb. 2015, 233.
[1017] https://www.top-10-lijstjes.nl/top-10-europese-landen-met-de-meeste-zwartwerkers-bbp/; en https://www.theglobaleconomy.com/rankings/shadow_economy/Europe/, beide geraadpleegd op 1 april 2022.

schoonmaakbranche komt het veelvuldig voor, maar ook in de bouw en de landbouw. Zwartwerk was in Nederland lange tijd beperkt tot familierelaties en tot mensen die extra inkomsten willen op de top van hun salaris. Met de komst van de arbeidsmigranten uit met name Oost- en Centraal Europa kreeg het zwartwerk een impuls.[1018] Uiteraard is het lastig om juiste cijfers met betrekking tot zwartwerk te verkrijgen.

4.2 Begrip 'werkgever' voor de sociale zekerheid en fiscaliteit

Naast controle en handhaving is in internationaal verband een van de maatregelen om schijnconstructies tegen te gaan het gebruik van het materiële werkgeversbegrip. In een recent arrest heeft het Hof van Justitie hierover een uitspraak gedaan.[1019]

In Verordening 883/2004 is geen definitie van het begrip 'werkgever' opgenomen. In de verordening wordt ook niet verwezen naar de nationale wetgeving. Volgens het Hof van Justitie dient aan het begrip daarom een autonome en uniforme uitleg te worden gegeven. Bij deze uitleg dient niet alleen rekening te worden gehouden met de bepalingen waarin de begrippen zijn vervat, maar ook met de context van de relevante bepaling en met de doelstellingen van de regeling in kwestie. Het Hof oordeelt dat voor de toepassing van de sociale zekerheid rekening moet worden gehouden met de objectieve situatie waarin de werknemer zich bevindt.[1020] Met andere woorden: in het arrest AFMB[1021] hanteert het Hof van Justitie een materieel begrip van het begrip 'werkgever'. Het Hof van Justitie verwijst onder andere naar het arrest Format.[1022]

Het begrip 'werkgever' moet aldus worden uitgelegd dat de werkgever van een internationale vrachtwagenchauffeur in de zin van die bepalingen de onderneming is (i) die feitelijk het gezag heeft over die vrachtwagenchauffeur, (ii) die in werkelijkheid de kosten draagt van het betalen van zijn of haar loon, en (iii) die de feitelijke bevoegdheid heeft om hem of haar te ontslaan. Al deze criteria zijn volgens het Hof van Justitie van belang in deze zaak. De werkgever is in dezen niet per definitie de onderneming waarmee die

[1018] Zie Factsheet on Undeclared Work-Netherlands, 2017, par. 1.3.1 en zie bijv. https://nos.nl/op3/artikel/2303517-honderdduizenden-nederlanders-werken-zwart-schoonmakers-koploper, geraadpleegd op 1 april 2022.
[1019] HvJ EU 16 juli 2020, C-610/18 (AFMB en anderen), ECLI:EU:C:2020:565, BNB 2020/135, m.nt. Kavelaars.
[1020] M.J.G.A.M. Weerepas, Premieshoppen en het materiële werkgeversbegrip, NTFR-B 2020/39, par. 3.
[1021] HvJ EU 16 juli 2020, C-610/18 (AFMB en anderen), ECLI:EU:C:2020:565, BNB 2020/135, m.nt. Kavelaars.
[1022] HvJ EU 4 oktober 2012, C-543/13 (Fischer-Lintjens), ECLI:EU:C:2015:359, *BNB* 2013/38, m.nt. Kavelaars.

vrachtwagenchauffeur een arbeidsovereenkomst heeft gesloten en die in die overeenkomst formeel als werkgever van die chauffeur wordt genoemd.

In de fiscaliteit was het materieel werkgeversbegrip al eerder aan de orde. Aanvankelijk alleen in malafide situaties, maar het kan thans ook worden gebruikt bij bonafide situaties. Hier kan worden gewezen op het Commentaar behorende bij art. 15 OESO-Modelverdrag.[1023]

5. Tot slot

Grensoverschrijdend arbeidsverkeer ondergaat de invloed van maatschappelijke ontwikkelingen, zoals het (gedeeltelijk) thuiswerken door grenswerkers. De vraag is of de huidige criteria voor de toewijzing van het recht om belasting te heffen en de verzekeringsplicht voldoende adequaat zijn om op deze ontwikkelingen in te spelen. In deze bijdrage is slechts kort ingegaan op enige aspecten van de huidige regels. Het is afwachten hoe de regelgeving zich zal vormen naar aanleiding van die ontwikkelingen. De formulering van nieuwe criteria zal een uitdaging zijn, maar het toont wel aan dat grensoverschrijdende arbeid 'always on the move' is.

[1023] Zie paragraaf 8.13 en 8.14 van het Commentaar behorende bij art. 15 OESO-Modelverdrag. Zie ook het Besluit van 12 januari 2010, nr. DGB2010/267M, Stcrt. 2010, 788.

PERSONAL NARRATIVE: Gonzalo Garfias von Fürstenberg

Professor Rainer Prokisch deserves more than just warm farewell remarks. With the options of writing an essay or a personal narrative, I had no doubts about choosing the latter. With this personal tale, I want to seize the opportunity to express my gratitude to an exceptional professor and a wonderful personality. Professor Rainer helped me to discover a completely new perspective for my professional development by changing my perception and manner of acknowledging Tax Law through academia. After four years of practice as a lawyer in Chile, I began my LLM in International Taxation at Maastricht University in August 2009. Aside from the outstanding class of that year, Professor Prokisch's commitment to his students left an indelible effect on the majority of us. At least three students of that generation worked with Professor Prokisch on their PhD thesis. My first strong memory of Professor Prokisch leads back to the first lecture he gave that year. It was the first time in my life that I had the pleasure of listening to someone superior in his field of expertise. I had never had that experience before, nor did I understand the significance of delivering passion, dedication, and intellectual responsibility to a student. After an incredible LLM and life experience in Maastricht, my wife, child, and I returned to my homeland in July of 2010. Our time in Chile, however, was cut short. After a few months, we decided to return to the Netherlands to continue our PhD path. There are no words to express how important Professor Prokisch's help was in making that decision. He encouraged me to take the most crucial decision of my professional life.

These are my words for Rainer from now on:

Dear Rainer, like many others, I can only say thank you. I will always refer to you as an extraordinary academic mentor. You never gave up during my PhD pursuit. I recall you telling me once that if I recognized at any point along the way that what was written no longer moved me, then it means that the PhD endeavour was no longer worth it. Your words gave me the confidence to never doubted what I had written and to complete my thesis successfully. Thank you for encouraging me to think outside the box and broaden my understanding of complex tax international issues. You always maintained a positive attitude towards my work, and your criticisms were always constructive and beneficial. Thank you for being always approachable, friendly, and enjoyable to be around, for being such a positive, enthusiastic, supportive, open-minded, thoughtful,

and insightful leader. You are a brilliant academic, mentor, and, above all, a wonderful person. Your academic contributions are well-known in Latin America and that is, amongst others, a result of your positive impact on all former Latin-American students of the International and European Tax Law Master of Maastricht University. I will do my best to continue honouring your contribution. Nowadays, I am enjoying the fruits of so many years of hard work, and a large part of that is due to your support in finding my place in the world of taxation. The circumstances did not permit us to be personally present on the day of my defence. Regardless of the foregoing, the words you remotely dedicated to me that day will live with me for the rest of my life.
See you soon and thank you for being a part of my life.

Sincerely,
Gonzalo Garfias von Fürstenberg

PERSONAL NARRATIVE: Luc Hautvast

A farewell… where has all the time gone?

Almost sixteen years ago, when I started my position as a teacher in transfer pricing and, thus, became part of the Tax Law Department of Maastricht University, I had the joy to be introduced to you. I still remember the first time I visited you at your office. Apart from the difficulty to find my way through the university building without getting lost, the memory of entering your room for the first time is certainly eternal. A decent, almost respectful, knock on the door. The wait 'till the response is given. Entering only when the response is positive! And then…. looking for Professor Prokisch! I was certain I heard you say "yes", yet nobody was in the room. What I did see in the room, was overwhelming. Books, magazines, copies, newspapers… piles and piles of them. Everywhere! Impressive, but daunting for someone who came from an organization where a clean-desk policy was the given norm! Then I saw the door to the balcony. Smoke enters the room. You entered the room and invited me to "come and take a seat outside". And we sat together, discussing the whole curriculum and the intention you had regarding the topic of transfer pricing. Positioning transfer pricing next to international tax planning; putting it into the context of your course, in which attribution of income to a permanent establishment was the topic the closest aligned to transfer pricing. It was a pleasant conversation, I felt instantly welcome and acknowledged. It was the kick-off for many years of collaboration.

During that collaboration, you appeared to be critical when the international principles in taxation were subject of discussion. Of course! This is what one expects from the chair of the Tax Law Department! But, as a chair, you also expressed a non-academic aspect. Teaming was very important for you. The "senior" (or: not-so-junior-anymore-) colleagues still remember the department meetings (we called them "weekends" between ourselves …), which started on Thursday in the evening and ended on Saturday after lunch. Accommodation, location, surroundings and discussion. These were your main criteria to build team spirit in the department. In my opinion a golden mix!

Our collaboration went beyond the yearly meetings. We did not do much teaching together, although you asked me to give a lecture on profit allocation to permanent establishments in your course after the authorized OECD

approach was introduced. We supervised several theses of master's students with an interest in international taxation, touching upon transfer pricing issues. I remember some discussions, mostly per e-mail, where we had an occasional disagreement. Occasional, because in most cases we appeared to have the same views regarding supervising students in their struggle to write a decent thesis. During my educational years at Maastricht University (at that time it was named Rijksuniversiteit Limburg), at the Law Department, we had to write an essay after every course. We gained experience in writing and in minimizing a huge topic into a five-pager, forcing us to come to the essence very quick. We discussed the benefit of this approach each time we were confronted with a student who had difficulty coming to the essence of his or her thesis. Maybe something to reconsider. But not for you. Not anymore…

I would like to thank you, Rainer, for the confidence you had in me during the past sixteen years. Even though I was one of the part-timers of the department, which was the reason that we did not have that many moments of contact, I always found myself heard when we met. Professor Prokisch is so much more than Professor Prokisch to me! I wish you a prosperous future in which you enjoy life in leisure, either in Cologne, in the Eiffel or wherever you wish to enjoy it!! Keep working a bit, because this keeps you fit and helps you to remain in the present, but spend more than enough time with your dogs, friends and family!

Sincerely,

Luc Hautvast
Lecturer in Transfer Pricing, Maastricht University
Tax Inspector

PERSONAL NARRATIVE: Moris Lehner

Rainer Prokisch and I first met when we were both Assistants to Prof. Dr *Klaus Vogel* at the Ludwig-Maximilians-University in Munich. *Klaus Vogel* was the Nestor of international tax law. Contiguous to his professorship for Public Law and National Tax Law, he had already founded the Research Plant for International Tax Law at the University in Munich in 1979, known and recognized far beyond the borders of Germany.

At the end of the 1980s, while I was on leave working on my postdoctoral thesis, *Rainer Prokisch* was hired by *Klaus Vogel* as Head of the Research Center and Assistant Lecturer. In addition to his responsibilities for setting up and maintaining the voluminous library of international tax law, he established a large-scale database in the field of international tax law as a component of DATEV's LEXINFORM database, the most comprehensive service institution for accountants throughout Europe. He was likewise involved in database management for the International Bureau of Fiscal Documentation (IBFD) in Amsterdam.

Rainer Prokisch was also very actively involved as a teacher.
Most remarkable, however, are the results of his research in the field of international tax law which he had already achieved during his first years in Munich as an Assistant to *Klaus Vogel*. Viewed from the vantage of the current level of developments in international tax law, his early contribution to the interpretation of double taxation conventions stands out as groundbreaking and prescient and, thus, is still important today. The focus of his research revolved around two key terms for defining the goals of interpreting double taxation conventions: the creation of an international fiscal language and the requirement for a common interpretation. Both concepts are recognized today – not only in literature but also in court rulings in the field of international tax law – as indispensable guidelines for the autonomous interpretation of DTCs. The development of these insights advanced rapidly.

Already in 1998, *Rainer Prokisch* pointed out that "although the idea of an international tax language is not new, it has not found general recognition."[1024] It is all the more astounding that in 1993, when he was still an Assistant to

[1024] Rainer Prokisch, Does it Make Sense if We Speak of an 'International Tax Language'? in K. Vogel (ed.) Interpretation of Tax Law and Treaties and Transfer Pricing in Japan and Germany, Series on International Taxation, vol. 20 (1998), p.103.

Klaus Vogel, he had developed these fundamentally future-oriented ideas for both concepts and that Klaus Vogel, after intensive discussions we conducted together, included them in his general report, written together with *Rainer Prokisch* in 1993, for the IFA Congress on the interpretation of double taxation conventions.[1025] Both concepts were comprehensively illuminated and concretized in this report within the context of the OECD-Model-Convention and Art. 31-33 of the Vienna Convention on the Law of Treaties. Reading those early remarks by *Rainer Prokisch* on the requirement for a common interpretation and the creation of an international fiscal language free of interference and additions from newer concepts about the interpretation of double taxation conventions, it becomes clear that these two concepts are very closely related because since it is difficult to achieve decisional harmony in the field of treaty interpretation with no foundation in a mutually comprehensible tax language. Expressed differently, the establishment of an international tax language encourages the achievement of decisional harmony. We should also add that these concepts, concretized in the IFA General Report as guidelines for the autonomous interpretation of DTCs, have over time become solidly established.

Regarding *2 Á É Î Å Ò 0 ò Ï Ë É Ó Ã È ñ Ó* early achievements in the field of international tax law, we should also point out that his insights, found in several editions of *Klaus 6 Ï Ç Å ì ñ Ó* Commentary on Double Taxation Agreements,[1026] have gained global recognition. The early insights of *Rainer Prokisch* carry an abiding significance up to the present day.

Moris Lehner
Ludwig-Maximilians- University of Munich

[1025] K. Vogel/R. Prokisch, Interpretation of Double Taxation Conventions, General Report, CDFI LXXVIIIa (1993), p. 55.
[1026] Vogel, Doppelbesteuerungsabkommen 1. ed. 1983 – 3. ed. 1996; Vogel/Lehner, Doppelbesteuerungsabkommen, 4. ed. 2003 - 7. ed. 2021.

PERSONAL NARRATIVE: María Teresa Soler Roch

Professor Rainer Prokisch – A semblance

Scientific research thrives on interaction and exchange of knowledge, enabled through a joint framework where scientists from different Universities and Research Centres share the outcomes of their research by means of publications, congresses, seminars or research projects, thus creating a common conceptual framework of principles and values.

In Law, even if the subject of the study is constrained to domestic legislation or case law, and despite the differences that may arise between the two main systems, Common Law and Civil Law, there is a common background of principles and concepts, and comparative analysis is considered a highly relevant tool for legal research. Thus, academia tends to be global, and scholars are increasingly performing their teaching and research activities in a global context, as visiting professors or researchers, or by means of technology, as we can see because of an increasing number of webinars and online conferences and seminars recently spreading all over the digital world. Having said that, in some fields of tax law, such as international taxation, that kind of global interaction is nothing new, and a common ground of principles, concepts, and a normative framework especially provided by Tax Treaties, has been established since the last century, along with a common language and a solid ground of legal doctrine. In this respect, German scholars have been a frequent reference. So for instance, Professor Klaus Vogel, whose work on Double Taxation Conventions has been considered a flagship of International Tax Law.

Indeed, Professor Rainer Prokisch is one of these scholars. After studying law at the University of Munich in Germany, he became an assistant lecturer for Public Law and Tax Law at the Chair of Professor Dr Klaus Vogel at the University of Munich, where he completed his doctoral thesis in 1992. As Deputy Head of the Research Institute for International and Foreign Tax Law, his responsibilities included a commentary on Double Tax Treaties in German and English language. His dedication to International Taxation was also enhanced by his roles as a reporter in the International Fiscal Association (IFA) and a consultant for the OECD. In 1998, Professor Prokisch joined the International Bureau for Fiscal Documentation (IBFD) in Amsterdam, where he was first responsible for Europe and later for the International Tax Academy. My first remembrance of

Professor Prokisch is connected to his role at the IBFD, known as one of the most reputable research centres for International Taxation and a great example of the aforementioned global academic experience. At that time, young Spanish scholars, both doctoral and postdoctoral researchers, spent a research stage at the IBFDand among them, Aurora Ribes, now full Professor of Tax Law at Alicante University. I was the supervisor of her thesis, which focused on the interpretation of Tax Treaties, being one of the topics studied by Professor Prokisch. I should mention that Klaus Vogel and Rainer Prokisch served as General Reporters for "Interpretation of Double Taxation Conventions" at the IFA Congress in Florence (1993). Both, Professor Ribes and I have an excellent memory of his warmth and support during her stage at the IBFD.

In 2000, Professor Prokisch joined the University of Maastricht as a full-time Professor of International and European Tax Law. Precisely the same year and place where the First Congress of the European Association of Tax Law Professors (EATLP) took place. Three interrelated institutions (IBFD, IFA, and EATLP), can be considered a kind of "common home" for professionals and academics dedicated to International and European Tax Law and where Professor Rainer Prokisch has played an active role. In this respect, he belongs to a group of international and European scholars, nowadays increasingly joined by young researchers from all over the world, which identify themselves as part of a global and common academic family.

An active role in this respect has been developed by some very well-known networks (such as YIN IFA), and especially, by the most reputed research centres. This is the case of IBFD which, besides the classical research stages, has developed annual meetings where young scholars present their research and discuss their outcomes with colleagues and a panel of senior Professors in recent years. Professor Rainer Prokisch, together with other very well-known colleagues (Hugh Ault, Frans Vanistendael, Pasquale Pistone, Stef van Weeghel, Denis Weber, Louis Schoueri, Ruth Mason, Joanna Wheeler, and myself) participated in those meetings, both in the Doctoral Meeting for Students of International Tax Law (DocMIT) and the Postdoctoral International Tax Forum (PITF). As the sessions continue, I hope to share some of them with Professor Prokisch. It has always been a pleasure to share the panel with him, listening to his arguments and additions to the discussions.

Last but not least, Professor Prokisch is a good friend of Spanish academics. Among other qualities, he is fluent in Spanish. In his capacity as an expert in International Tax Law, Rainer Prokisch served as a member of several juries, of

which I had the pleasure of sharing with him on two different occasions: one in Madrid, ICADE University, the defence of Pablo Hernandez's doctoral thesis about the concept of beneficial ownership; and another, more recently, at the University Pompeu Fabra, for the appointment of Rodolfo Salassa as Professor of Tax Law.

I hope and am sure that those will not be the last occasions to meet Professor Prokisch in our common and global academic world.

María Teresa Soler Roch
Tax Law Professor Emeritus
Universidad de Alicante

This book was presented to Professor Dr Rainer Prokisch on the occasion of his retirement from the chair in International Tax Law at Maastricht University in October 2022.

He arrived at Maastricht in April 2000 and he was twice the Head of the Department of Tax Law for a bit over 10 years in total. This book contains a collection of contributions that focus on developments in international taxation at large, with contributions both in English and Dutch.