ARTICLE

Double Taxation Conventions in the Case Law of the CJEU

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This Essay analyzes the jurisdiction of the CJEU regarding the interpretation of Double Taxation Conventions, by examining the relevant case law of the CJEU. It further investigates the interplay between the Fundamental Freedoms and the Double Tax Conventions.

1 Double taxation and EU law

Until a few years ago, primary legislation expressly addressed the avoidance of double taxation. Article 293 EC Treaty reads as follows: 'Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: […] – the abolition of double taxation within the Community.' The CJEU, however, did not infer a prohibition of double taxation under EU law from this provision, nor from the fundamental freedoms or other rules of primary legislation.

The CJEU summed up its opinion in *Block*:[1]

> Community law, in the current stage of its development and in a situation such as that in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Community. Consequently, apart from Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), the Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ 1990 L 225, p. 10) and Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (OJ 2003 L 157, p. 38), no uniform or harmonisation measure designed to eliminate double taxation has as yet been adopted at Community law level (see Kerckhaert and Morres, paragraph 22, and Columbus Container Services, paragraph 45). […] It follows from this that, in the current stage of the development of Community law, the Member States enjoy a certain autonomy in this area provided they comply with Community law, and are not obliged therefore to adapt their own tax systems to the different systems of tax of the other Member States in order, inter alia, to eliminate the double taxation arising from the exercise in parallel by those Member States of their fiscal sovereignty and, in consequence thereof, to allow the inheritance tax paid in a Member State other than that in which the heir is resident to be deducted in a case such as that of the main proceedings (see, to that effect, Columbus Container Services, paragraph 51).

The CJEU[2] – wrongly in my view[3] – has often been criticized for this position: Double taxation results from

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1 CJEU 12 Feb. 2009, *Block*, C-67/08, ECLI:EU:C:2009:92, paras 30 et seq.

2 *See* Kofler, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* 232 et seq. (2007); Kofler & Metzler, *Block: Kein Verbot der juristischen Doppelbesteuerung im Binnenmarkt*, ÖStZ 219, 222 et seq. (2009); Kühbacher, *Die Rs Damseaux: Ist juristische Doppelbesteuerung im Gemeinschaftsrecht nun endgültig erlaubt?*, ÖStZ 496 (2009); Kühbacher, *Doppelbesteuerung und Unionsrecht: letzter Akt einer (un)endlichen Geschichte?*, SWI 308, 312 (2010); Pistone & Massoner, *Verpflichtung zur Anrechnung von Quellensteuern im Ansässigkeitsstaat*, in *Quellensteuern* 133, 136 et seq. (Lang, Schuch & Staringer eds, 2010); Kofler, *Double Taxation and European Law: Analysis of the Jurisprudence*, in *Double Taxation Within the European Union* 97, 133 et seq. (Rust ed., 2011); Lehner, in *Doppelbesteuerungsabkommen*, 6th issue , Grundlagen paras 264 et seq. (Vogel & Lehner eds, 2015)

3 *See also* Blokland, Inaugural Lecture by D. Weber, *In Search of a New Equilibrium Between Tax Sovereignty and the Freedom of Movement Within the EC*, Eur. Tax'n 69, 70 et seq. (2007); Lang, *Recent Case-Law of the ECJ in Direct Taxation: Trends, Tensions, and Contradictions*, EC Tax Rev. 98 et seq. (2009); Lang, *Treaty Override und Gemeinschaftsrecht*, in *Reden zum Andenken an Klaus Vogel* 59, 75 et seq. (Lehner ed., 2010); Lang, *Direkte Steuern und EU-Steuerpolitik – Wo bleiben die Visionen?*, IStR 365, 369 (2013).

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the interaction of at least two legal systems. One can therefore assume a violation of the fundamental freedoms if one is willing to include the legislation of the other Member State in the legal examination of the fundamental freedoms in cross-border situations. Though the CJEU is reproached for being inconsistent in its Case Law on this matter,[4] it is ultimately the Case Law that applies the legal examination of the fundamental freedoms only on the basis of the legal system of one Member State which is convincing. Those who also take into account the legislation issued by the legislators of another contracting state must accept that a violation of the fundamental freedoms no longer lies in the sole responsibility of the legislator of one Member State. It would then be in the hands of the legislator of the other Member State to determine – either by issuing specific rules or waiving these – whether or not the rule of the first-mentioned state violates the fundamental freedoms. Those who do not infer a prohibition of double taxation from the fundamental freedoms, however, should not imply either that the intention of the fundamental freedoms was to avoid double non-taxation.[5] In this regard, the CJEU is not completely consistent as well.[6]

2 The interpretation of DTCs in the Case Law of the CJEU

2.1 *The CJEU's Lack of Jurisdiction for the Interpretation of DTCs*

If the prohibition of double taxation is not a precept under EU law, it is then also clear that, by concluding double taxation conventions, the Member States are not complying with any obligations under EU law. Double Taxation Conventions (DTCs) therefore do not enjoy a 'higher regard under EU law' than other international treaties or other provisions which form part of national legislation. What applies to all these rules is that they must comply with the guidelines of EU law.

This also means that, in a preliminary ruling procedure, the CJEU must not decide on the interpretation of DTCs either. The national courts do not refer any specific legal provisions to the CJEU but describe the legal situation and, based on these explanations, the CJEU must assess whether a provision with the content described by the national court complies with a specific rule of EU law. It is not the CJEU's duty to assess whether the content of the provision is actually the one attributed to it by the referring court.[7] Only in extreme situations – when the CJEU gains the impression that a hypothetical legal dispute is involved – the CJEU considers itself entitled to reject the preliminary ruling request.[8]

In those rare cases in which the CJEU was not consistent with this line and was unable to resist the temptation to interpret DTC rules, it did not exactly covered itself in glory.[9] In *Schumacker* for instance, it was tempted to make the following statement:[10] 'Accordingly, international tax law, and in particular the Model Double Taxation Treaty of the Organization for Economic Cooperation and Development (OECD), recognizes that in principle the overall taxation of taxpayers, taking account of their personal and family circumstances, is a matter for the State of residence.' The OECD MC does not instruct the state of residence to tax taxpayers in full. Instead, the DTCs modelled on the OECD MC merely have a barrier effect. Nor does the OECD MC advise the state of residence to take into account the taxpayer's personal and family circumstances.[11]

Another example is the judgment in *Lidl Belgium*, in which the CJEU elevated permanent establishments to 'autonomous entities':[12]

> Indeed, and as is shown by the provisions of the Convention, a permanent establishment constitutes,

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4 *See* for instance, Beiser, *Doppelbesteuerungsabkommen im Gemeinschaftsrecht*, ÖStZ 211, 218 (2009); Kofler & Metzler, *supra* n. 2, at 219, 224; Kühbacher (2009), *supra* n. 2, at 496, 500; Beiser, *Sind Doppelbesteuerungen gemeinschaftsrechtskonform?*, RdW 55, 58 (2010).

5 *See* Lang, *Die gemeinschaftsrechtlichen Rahmenbedingungen für 'Exit Taxes' im Lichte der Schlussanträge von GA Kokott in der Rechtssache N.*, SWI 213, 220 (2006); Lang, *Doppelte Verlustberücksichtigung und Gemeinschaftsrecht – am Beispiel der Betriebsstättengewinnermittlung*, IStR 554, 550 (2006); Lang (2013), *supra* n. 3, at 365, 369; similar views in Kühbacher (2010), *supra* n. 2, at 308, 312; *see also* Hohenwarter, *Verlustverwertung im Konzern* 131 (2010).

6 *See* CJEU 13 Dec. 2005, *Marks & Spencer*, C-446/03, ECLI:EU:C:2005:763, para. 47; CJEU 29 Mar. 2007, *Rewe Zentralfinanz*, C-347/04, ECLI:EU:C:2007:194, paras 45 et seq.; EuGH 15 May 2008, *Lidl Belgium*, C-414/06, ECLI:EU:C:2008:278, para. 35; *see* in contrast, CJEU 6 Sept. 2012, *Philips Electronics*, C-18/11, ECLI:EU:C:2012:532, para. 28; regarding the contradictions to previous case law in judgment *Marks & Spencer*, *see* Lang, *Marks & Spencer – A first Analysis of the Judgement of the ECJ*, SWI 3 et seq. (2006).

7 *See* CJEU 16 Dec. 2007, *Columbus Container Services*, C-298/05, ECLI:EU:C:2007:754, paras 46 et seq.; Forsthoff, *Treaty Override und Europarecht*, IStR 509 (2006); Beiser, *Verrechnungspreise im Gemeinschaftsrecht*, IStR 588, 590 (2008); Lang, *Zukunft der Doppelbesteuerungsabkommen im Lichte von Columbus Container*, in *FS Wolfram Reiss* 679, 681 (Kirchhof & Nieskens eds, 2008); Beiser (2010), *supra* n. 4, at 55, 56 et seq.; Lang, *Der EuGH als Interpret von Doppelbesteuerungsabkommen*, in *Das Steuerrecht der Unternehmen – Festschrift für Gerrit Frotscher* 365, 367 et seq. (Lüdicke, Mössner & Hummel eds), 2013).

8 *See* CJEU 16 Dec. 1981, *Foglia/Novello II*, C-244/80, ECLI:EU:C:1981:302, paras 18 et seq.; CJEU 3 Feb. 1983, *Robards*, C-149/82, ECLI:EU:C:1983:26, para. 19; CJEU 16 July 1992, *Meilicke*, C-83/91, ECLI:EU:C:1992:332, para. 25.

9 *See* already in this regard, Lang, *Double Taxation and EC Law*, in *Comparative Fiscal Federalism* 11, 16 et seq. (Avi-Yonah, Hines & Lang eds, 2007); Lang (2010), *supra* n. 3, at 59, 69 et seq.; Lang (2013), *supra* n. 7, at 365, 370 et seq.

10 CJEU 27 June 1996, *Schumacker*, C-279/93, ECLI:EU:C:1995:31, para. 32.

11 Criticism already voiced by Lang (2007), *supra* n. 9, at 11, 15 et seq.; Lang (2013), *supra* n. 7, at 365, 370 et seq.

12 CJEU 15 May 2008, *Lidl Belgium*, C-414/06, ECLI:EU:C:2008:278, paras 21 et seq.

> under tax convention law, an autonomous entity. Thus, those to whom the Convention applies comprise, in accordance with Article 2 of the Convention, not only natural and legal persons, but also all those types of permanent establishment which are listed in the second subparagraph, point (a), of the first paragraph of Article 2, in a manner which distinguishes them from other categories of entity listed in the second subparagraph, point (b), of that article, which are excluded from the definition of permanent establishment under the Convention. […] That definition of a permanent establishment as an autonomous fiscal entity is consonant with international legal practice as reflected in the model tax convention drawn up by the Organisation for Economic Cooperation and Development (OECD), in particular Articles 5 and 7 thereof. The Court has already held that, for the purposes of the allocation of fiscal competence, it is not unreasonable for the Member States to draw guidance from international practice and, particularly, the model conventions drawn up by the OECD (see Case C336/96 Gilly [1998] ECR I-2793, paragraph 31, and Case C-513/03 van Hilten-van der Heijden [2006] ECR I-1957, paragraph 48).

Vice versa, the CJEU was often chided – albeit wrongly[13] – for establishing conditions in *Amurta* which the DTC between the Netherlands and Portugal would have to meet in order to prevent a provision of national Dutch tax legislation from violating the fundamental freedoms.[14] These conditions – i.e. crediting of taxes in the residence state and, if necessary, repayment by the residence state of the tax levied in the source state[15] – are not included in this DTC and presumably not in any other DTC either. It is not, however, the task of the CJEU to interpret the specific DTC. For this reason, the CJEU correctly declined to examine itself whether the DTC Netherlands – Portugal complies with these guidelines.[16] The referring Dutch court is solely responsible for this.

There are possible constellations, however, in which the CJEU is not only entitled but even obliged to interpret a DTC: Article 25 of the DTC Austria-Germany designates the CJEU as the arbitration body for interpretation conflicts between the Austrian and the German tax administrations.[17] On 12 September 2017, the CJEU issued a judgment on the basis of this provision for the first time. It involved the interpretation of the term 'participation in profits' in Article 11(2) of the DTC.[18] The CJEU took the opportunity to take a stance in the controversy over the meaning of the interpretation provision modelled on the interpretation provision of Article 3(2) OECD MC. The Court came to the convincing conclusion that the rule does not constitute a derogation from, but instead confirms the principle according to which DTCs must be interpreted autonomously, i.e. from within themselves.[19] Other statements in this judgment, however, are questionable:[20] For instance, the CJEU obviously considers the admissibility of levying a withholding tax problematic under EU law, despite the fact that double taxation is avoided as a result of the crediting of the tax in the state of residence as provided for in the convention. The CJEU refused to deal with the content of the Bundesfinanzhof (German Federal Fiscal Court) judgment issued in connection with the same provision of the convention. Unfortunately, in its justification the CJEU once again invoked that long-forgotten principle from the stone age of methodology according to which derogations must be given a narrow interpretation.[21] With the exception of the welcome statements on Article 3 (2) OECD MC, the judgment will not be of particular significance for the administration of justice by other courts, due to the weaknesses described above. This thus represents a missed opportunity to establish the

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[13] *See* Lang (2009), *supra* n. 3, at 98, 110; Lang (2010), *supra* n. 3, at 59, 71; Lang (2013), *supra* n. 7, at 365, 370.

[14] Criticism of this case law, e.g. Opinion of Advocate General *Mengozzi* in Amurta 7 June 2007, C-379/05, ECLI:EU:C:2007:323, no. 78; *see also* Kemmeren, *ECJ Should Not Unbundle Integrated Tax Systems!*, EC Tax Rev. 4, 8 et seq. (2008).

[15] For more detail on this, CJEU 20 Oct. 2011, *Commission/Germany*, C-284/09, ECLI:EU:C:2011:670.

[16] CJEU 8 Nov. 2007, *Amurta*, C-379/05, ECLI:EU:C:2007:655, paras 82 et seq.

[17] As regards this provision, *see* Züger, *Der EuGH als Schiedsgericht im neuen DBA Österreich – Deutschland*, SWI 19 (1999); *Züger*, *Der Einfluss des Schiedsverfahrens vor dem EuGH auf das Abgabenrecht*, in *EuGH-Verfahren in Steuersachen* 301, 303 (Holoubek & Lang eds, 2000); similarly, Lang, *Überlegungen zur österreichischen DBA-Politik*, SWI 108, 109 (2012).

[18] CJEU 12 Sept. 2017, *Republic of Austria v. Federal Republic of Germany*, C-648/15, ECLI:EU:C:2017:664; *see* in this regard, Lang, *DBA-Interpretation durch den EuGH*, SWI 507 et seq. (2017); Jirousek, *EuGH entscheidet im Schiedsverfahren zugunsten Österreichs*, SWK 1186 et seq. (2017); as regards the Opinion of the Advocate General, *see* Jirousek, *Schiedsverfahren nach Art 25 Abs 5 DBA Deutschland – Schlussanträge des Generalanwalts*, SWI 300, 301 (2017); *see also* Kerschner, Koppensteiner & Seydl, *Österreich erhebt aufgrund einer DBA-Streitigkeit erstmals Klage beim EuGH*, SWI 135 et seq. (2016).

[19] For more detail, *see* Lang, *supra* n. 18, at 507 et seq.

[20] More on this by *ibid.*

[21] Criticism on the opinion according to which derogations must be given a strict interpretation was already expressed by Ruppe, *Die Ausnahmebestimmungen des Einkommensteuergesetzes* 28 et seq. (1971); Stoll, *Das Steuerschuldverhältnis in seiner grundlegenden Bedeutung für die steuerliche Rechtsfindung* 104 (1972); Lang, *Doppelbesteuerungsabkommen und innerstaatliches Recht* 75 (1992).

CJEU as the supranational court that sets the standards in DTC interpretation.

2.2 *No EU Law Protection Against Treaty Override*

The CJEU has already repeatedly ruled that EU law does not protect against treaty override. The Court justified this in *Columbus Container* as follows:[22]

> Although the Member States have, within the framework of their powers referred to in paragraph 27 of this judgment, entered into numerous bilateral conventions designed to eliminate or to mitigate those negative effects, the fact nonetheless remains that the Court has no jurisdiction, under Article 234 EC, to rule on the possible infringement of the provisions of such conventions by a contracting Member State. […] As the Advocate General noted in point 46 of his Opinion, the Court may not examine the relationship between a national measure, such as that in issue in the main proceedings, and the provisions of a double taxation convention, such as the Bilateral Tax Convention, since that question does not fall within the scope of Community law (see, to that effect, Case C-141/99 AMID [2000] ECR I-11619, paragraph 18).

The explanations of the CJEU in *Damseaux*[23] are equally clear:

> It follows from the Case Law that the Court does not have jurisdiction, under Article 234 EC, to rule on a possible infringement, by a contracting Member State, of provisions of bilateral conventions entered into by the Member States designed to eliminate or to mitigate the negative effects of the coexistence of national tax regimes (see, to that effect, Case C-298/05 Columbus Container Services [2007] ECR I-10451, paragraph 46). Nor may the Court examine the relationship between a national measure and the provisions of a double taxation convention, such as the bilateral tax convention at issue in the main proceedings, since that question does not fall within the scope of the interpretation of Community law (see, to that effect, Case C-141/99 AMID [2000] ECR I-11619, paragraph 18, and Columbus Container Services, paragraph 47).

This opinion is convincing:[24] If, from the perspective of EU law, DTC provisions are on the same level as other provisions of national law, the same applies to a conflict between convention law and other provisions of national tax law as for a conflict between two provisions of national law, none of which originated in international law: In the case of a contradiction to the rules, the referring court must assess which provision takes precedence and then present the resulting legal situation to the CJEU. It is not for the CJEU itself to assess the legal situation resulting from the laws of the Member State – and thus the relationship between two contradicting provisions of national law – or to examine the decision of the referring court. Therefore, it is not for the CJEU to rule whether the provision of the national tax law actually takes precedence over the convention provision.

2.3 *The Importance of the OECD Model Convention and the Commentary*

The judgments of the CJEU often contain references to the OECD MC. The corresponding passages in *Schumacker* and *Lidl Belgium* have already been quoted above.[25] Formulations such as the one in *Gilly* can also be found in other CJEU judgments:[26]

> Nor, in the allocation of fiscal jurisdiction, is it unreasonable for the Member States to base their agreements on international practice and the model convention drawn up by the OECD, Article 19(1)(a) of the 1994 version of which in particular provides for recourse to the paying State principle. According to the commentary on that article, that principle is justified by 'the rules of international courtesy and mutual respect between sovereign States' and 'is contained in so many of the existing conventions between OECD member countries that it can be said to be already internationally accepted'.

In *van Hilten*, the CJEU deemed it important to emphasize that, although the relevant DTC provision was not

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[22] *See* CJEU 6 Dezember 2007, *Columbus Container Services*, C-298/05, ECLI:EU:C:2007:754, para. 46; on the case Columbus Container, *see also* Lang (2008), *supra* n. 7, at 679 et seq.

[23] *See* CJEU 16 July 2009, *Damseaux*, C-128/08, ECLI:EU:C:2009:471, para. 22; *see also* Cerioni, *Double Taxation and the Internal Market: Reflections on the ECJ's Decisions in Block and Damseaux and the Potential Implications*, Bull. Int'l Tax'n 543, 550 et seq. (2009) and Kühbacher (2009), *supra* n. 2, at 496 et seq.

[24] *See* already in this regard Lang (2010), *supra* n. 3, at 59, 86 et seq.; similarly Lang, *supra* n. 7, at 365, 369 and Lang (2008), *supra* n. 7, at 679, 681.

[25] CJEU 14 Feb. 1995, *Schumacker*, C-279/93, ECLI:EU:C:1995:31, para. 32; CJEU 15 May 2008, *Lidl Belgium*, C-414/06, ECLI:EU:C:2008:278, para. 21; *see also* Dubut, *The Court of Justice and the OECD Model Tax Conventions or the Uncertainties of the Distinction Between Hard Law, Soft Law, and No Law in the European Case-Law*, Intertax 2, 5 et seq. (2012).

[26] *See* CJEU 12 May 1988, *Gilly*, C-336/96, ECLI:EU:C:1998:221, para. 31; *see also* Lang (2010), *supra* n. 3, at 59, 69 et seq.; similarly Kokott, *Chapter 5 – European Court of Justice*, in *Courts and Tax Treaty Law* 1, 2 (Maisto ed., 2007).

contained in the OECD MC itself, it is explicitly mentioned by the OECD Commentary as a possible alternative:[27]

> Moreover, the Court has already had occasion to decide that, for the purposes of the allocation of powers of taxation, it is not unreasonable for the Member States to find inspiration in international practice and, particularly, the model conventions drawn up by the Organisation for Economic Cooperation and Development (OECD) (see Gilly, paragraph 31). As the Netherlands Government observed, the legislation in question in the main proceedings complies with the commentaries in the Model Double Taxation Convention concerning Inheritances and Gifts (Report of the Fiscal Affairs Committee of the OECD, 1982). It is clear from the commentaries on Articles 4, 7, 9A and 9B of that model that that type of legislation is justified by the concern to prevent a form of tax evasion whereby a national of a State, in contemplation of his death, transfers his residence to another State where the tax is lower. The commentaries state that double taxation is avoided by a system of tax credits and that, since prevention of tax evasion is justified only if the death occurs only a short time after the transfer of residence, the maximum permitted period is 10 years. The same commentaries state also that the scope can be extended to cover not only nationals of the State concerned but also residents who are not nationals of that State.

In all these cases, the CJEU never went so far so as to conclude that a rule was in accordance with EU law based solely on its acceptance by the OECD MC or the OECD Commentary. Instead, references to the OECD MC or the Commentary are used to round off the Court's reasoning. They show that the CJEU attaches great significance to the work of the OECD. The references to the OECD M Cs or the Commentaries occasionally create the impression that, in those cases in which a rule corresponding to the OECD MC was incorporated in a DTC, special arguments are required to demonstrate a violation of EU law.[28] Though the CJEU does not expressly state this, the conformity of a DTC rule with the OECD M C may justify the – nevertheless rebuttable – presumption of its conformity with EU law.

From the perspective of EU law, however, the great respect shown by the CJEU for the work of the OECD is not convincing: The MCs of the OECD and the relevant Commentaries are nothing more than legally non-binding recommendations of the OECD's Committee on Fiscal Affairs. These are prepared by the representatives of the tax administrations of the OECD Member States and are also regularly amended by these experts. As a rule, these decisions are not approved by the legislative bodies of the Member States. Therefore, they have not been endorsed by the legislators of the Member States of the EU – which are also members of the OECD – let alone by EU institutions. The CJEU, however, subjects legislative acts of the Member States to its usual strict control. The Court does not even hesitate to regard national rules as in violation of EU law even if they form part of the legal systems of all Member States.[29] Therefore, it is even less advisable to handle rules with kid gloves simply because they are based on a recommendation of the OECD Committee on Fiscal Affairs.

A question referred, to which the CJEU was asked to rule in its judgment of 16 May 2017 in *Berlioz Investment Fund*, is of interest here. It concerned the interpretation of the 'Mutual Assistance Directive', and the referring Court emphasized the parallel to Article 26 OECD MC:[30]

> In the event that it is established that the Charter is applicable to the present case, are Articles 1(1) and 5 of Directive 2011/16, in the light, on the one hand, of the parallels with the standard of foreseeable relevance arising out of the Organisation for Economic Cooperation and Development's Model Tax Convention on Income and on Capital and, on the other, of the principle of sincere cooperation laid down in Article 4 TEU, together forming the objective of Directive 2011/16, to be interpreted as meaning that the foreseeable relevance, in relation to the tax case referred to and to the stated fiscal purpose, of the information sought by one Member State from another Member State constitutes a condition which the request for information must satisfy in order to trigger an obligation on the part of the competent authority of the requested Member State to act on that request, and in order to justify an information order issued to a third party by that authority?

The CJEU held that the reference to the OECD MC was relevant:[31]

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[27] *See* in this regard, CJEU 23 Feb. 2006, *Van Hilten-van der Heijden*, C-513/03, ECLI:EU:C:2006:131, para. 48; *see also* Dubut, *supra* n. 25, at 2, 8 et seq.

[28] Already expressed by Dubut, *supra* n. 25, at 2, 10 et seq.; similarly Lang (2008), *supra* n. 7, at 679, 684 and Lang (2007), *supra* n. 9, at 11, 33.

[29] Lang (2008), *supra* n. 7, at 679, 684.

[30] CJEU 16 May 2017, *Berlioz Investment Fund*, C-682/15, ECLI:EU:C:2017:373, para. 31; as regards the case *Berlioz Investment, see also* Wöhrer, *Berlioz versus* Sabou*: Grundrechtsschutz im Amtshilfeverfahren*, SWI 402, 403 et seq. (2017).

[31] CJEU 16 May 2017, *Berlioz Investment Fund*, C-682/15, ECLI:EU:C:2017:373, para. 67; in this regard, *see* the Opinion of Advocate General Wathelet in *Berlioz Investment Fund*, C-682/15, ECLI:EU:C:2017:2, no. 102; *see also* paragraph 570 of the explanatory memorandum to the proposal for a Council Directive COM (2009) 29 final of 2 Feb. 2009 on administrative cooperation in the field of taxation. The Court has already justified the fact that the Member States are guided by an OECD Model Convention. *See* for instance – with regard to the model double taxation convention – CJEU 14 Feb. 1995, *Schumacker*, C-279/93, ECLI:EU:C:1995:31, para. 32.

> As a number of governments and the Commission argued, this concept of foreseeable relevance reflects that used in Article 26 of the OECD Model Tax Convention, both because of the similarity between the concepts used and given the reference to OECD conventions in the explanatory memorandum to the proposal for a Council Directive COM(2009) 29 final of 2 February 2009 on administrative cooperation in the field of taxation, which led to the adoption of Directive 2011/16. According to the commentary on that article adopted by the OECD Council on 17 July 2012, Contracting States are not at liberty 'to engage in fishing expeditions', nor to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. On the contrary, there must be a reasonable possibility that the requested information will be relevant.

In this case, the CJEU rightly attributed significance to the OECD MC: The rule of Article 26 OECD MC was obviously the inspiration for the provision of the directive. Therefore, it is definitely justified as part of historical interpretation that the CJEU reverts to the work of the OECD, since it served as the basis for the provision of the Directive. A cause for concern, however, is the fact that the CJEU also considers those Commentaries relevant, which were adopted as recently as 17 July 2012, although the proposal for the Directive dates back to 2009 and the Directive was adopted in 2011. One can hardly claim that the authors of the Directive had already predicted these later developments.[32] Therefore, the Court should not have taken the work of the OECD from 2012 into account.

3 DTCs and Fundamental Freedoms

3.1 *Comparability Test*

At least in the area of direct taxation, the Case Law on the fundamental freedoms still dominates to this day. Therefore, DTCs play a major role in particular in judicature on fundamental freedoms, and the Case Law on the fundamental freedoms offers the largest repository for assessing the importance of DTCs with regard to a specific provision of EU law. As a result, judicature on the fundamental freedoms deserves, by way of example, a more in-depth examination.

An interesting question in this context is whether it is compatible with the fundamental freedoms when different DTC rules are applicable in relation to different states. The reply to this question will primarily depend on whether, in addition to the vertical comparability test, there is also room for the horizontal comparability test. Doubts have often been voiced in literature in this regard, fuelled by the fact that the CJEU established a violation of fundamental freedoms in cases of horizontal comparability especially when a vertically comparable situation could be found in connection with the same rule, based on which the various legal consequences had already proven in violation of EU law.[33] On the other hand, it would make little sense if the CJEU had carried out the horizontal comparability test without having considered even possible a violation of the fundamental freedoms solely because of that reason.[34] Finally, the differential treatment of different cross-border situations can have an equally detrimental effect on the Common Market as the differential treatment of domestic and foreign situations.[35] The judgment in *Sopora* finally allayed the last doubts: The CJEU made it clear that different cross-border situations can also be seen as comparable and, in case of a differential treatment, a justification test and, if necessary, a proportionality test is required.[36]

In the case of a differential treatment of cross-border constellations on the basis of different DTCs, however, the CJEU already indicated in 2005 that it does not see any possibility for the assumption of comparable situations. The leading case was the judgment in D:[37]

> Similar treatment with regard to wealth tax in the Netherlands of a taxable person, such as Mr D., resident in Germany and a taxable person resident in Belgium presupposes that those two taxable persons are regarded as being in the same situation. [...] It is to be remembered that, in order to avoid the same

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[32] As regards the similar problem of using later OECD commentaries for the interpretation of earlier DTCs, *see* Lang, *Later Commentaries of the OECD Committee on Fiscal Affairs, Not to Affect the Interpretation of Previously Concluded Tax Treaties*, Intertax 7 et seq. (1997); similarly, Lang, *Art. 3 Abs. 2 OECD-MA und die Auslegung von Doppelbesteuerungsabkommen*, IWB 281, 286 (2008).

[33] As to the horizontal comparison pairing in CJEU case law, *see also* Lang, *Die Rechtsprechung des EUGH zu den direkten Steuern* 33 et seq. (2007); Schmidtmann, *Zur vertikalen und horizontalen Vergleichspaarbildung des EuGH aus ökonomischer Sicht*, IWB 937 et seq. (2008); Lang (2009), *supra* n. 3, at 98, 104 et seq.; Calderón & Baez, *The Columbus Container Services ECJ Case and Its Consequences: A Lost Opportunity to Shed Light on the Scope of the Non-Discrimination Principle*, Intertax 212, 213 et seq. (2009); *see also* Hohenwarter, *supra* n. 5, at 94 et seq. and 579 et seq.

[34] *See* Lang, *Jüngste Tendenzen* zur *'horizontalen' Vergleichbarkeitsprüfung* in der *steuerlichen Rechtsprechung* des *EuGH* zu den Grundfreiheiten, SWI 154, 159 (2011). *See also* Lang, *Totgesagte leben länger: Horizontale Vergleichbarkeit und die Verwirklichung des Binnenmarkts*, SWI 118, 119 (2016).

[35] *See also* CJEU 20 Jan. 2011, *Commission/Greece,* C-155/09, ECLI:EU:C:2011:22, para. 8; similarly Lang, *Direct Taxation: Is the ECJ Heading in a New Direction?*, Eur. Tax'n 421, 423 (2006); Lang (2009), *supra* n. 3, at 98, 104 and Lang (2016), *supra* n. 34, at 118, 119.

[36] CJEU 24 Feb. 2015, *Sopora*, C-512/13, ECLI:EU:C:2015:108, paras 25 et seq.; more details by Lang, *There is Life in the Old Dog Yet: Horizontal Comparability and the Establishment of the Internal Market*, in *Comparative Fiscal Federalism*, 2d issue 27 et seq. (Avi-Yonah & Lang eds, 2016); Lang, *supra* n. 34, at 118 et seq.

[37] CJEU 5 July 2005, *D.*, C-376/03, ECLI:EU:C:2005:424, paras 59 et seq.

> income and assets being taxed in both the Netherlands and Belgium, Article 24 of the Belgium-Netherlands Convention allocates powers of taxation between those two Member States and Article 25(3) lays down a rule under which natural persons resident in one of those two States are entitled in the other to the personal allowances which are granted by it to its own residents. […] The fact that those reciprocal rights and obligations apply only to persons resident in one of the two Contracting Member States is an inherent consequence of bilateral double taxation conventions. It follows that a taxable person resident in Belgium is not in the same situation as a taxable person resident outside Belgium so far as concerns wealth tax on real property situated in the Netherlands. […] A rule such as that laid down in Article 25(3) of the Belgium-Netherlands Convention cannot be regarded as a benefit separable from the remainder of the Convention, but is an integral part thereof and contributes to its overall balance.

The CJEU was – quite rightly – met with strong criticism for this judgment:[38] The justification chosen by the CJEU means that, in certain cases, the conformity of a rule with EU law may depend on the type of the legal instrument in which the legislator integrates the rules. A Member State may immunize otherwise inadmissible discriminations under EU law by 'packaging' these in a DTC – possibly in a tacit agreement with the other Member State, which attempts to elude the control of 'its own' discriminations under EU law in this manner.[39]

The CJEU, however, was not impressed by this criticism and confirmed its Case Law in *ACT Group Litigation*:[40]

> The fact that those reciprocal rights and obligations apply only to persons resident in one of the two Contracting Member States is an inherent consequence of bilateral double taxation conventions. It follows, as regards the taxation of dividends paid by a company resident in the United Kingdom, that a company resident in a Member State which has concluded a DTC with the United Kingdom which does not provide for such a tax credit is not in the same situation as a company resident in a Member State which has concluded a DTC which does provide for one (see, to that effect, D., paragraph 61). […] It follows that the Treaty provisions on freedom of establishment do not preclude a situation in which the entitlement to a tax credit laid down in a DTC concluded by a Member State with another Member State for companies resident in the second State which receive dividends from a company resident in the first State does not extend to companies resident in a third Member State with which the first State has concluded a DTC which does not provide for such an entitlement.

In *Orange European Smallcap Fund NV*, the CJEU stood by this Case Law:[41]

> As regards the bilateral tax conventions concluded by the Member States, the Court has previously noted that the scope of such a convention is limited to the natural or legal persons referred to in it (see D., paragraph 54, and Test Claimants in Class IV of the ACT Group Litigation, paragraph 84). […] In those judgments, the Court held that, where a benefit granted by a bilateral tax convention cannot be classified as a benefit that is separable from that convention, but contributes to its overall balance (the fact that the reciprocal rights and obligations arising under that convention apply only to persons resident in one of the two contracting Member States being an inherent consequence of bilateral conventions), Community law does not preclude the benefit in question from not being conferred on the resident of a third Member State, in so far as that resident is not in a situation comparable to that of residents covered by the convention in question (see, to that effect, D., paragraphs 59 to 63, and Test Claimants in Class IV of the ACT Group Litigation, paragraphs 88 to 93).

Because the mentioned judgments affected non-residents, the hope was voiced in legal literature that the CJEU would rule differently in case of residents.[42] The *Riskin and Timmermans* case involved a constellation in which not non-residents but residents were subjected to different DTC rules. In addition, a DTC concluded with a non-Member State provided for more favourable rules for the residents falling under this convention than the DTC concluded with another Member State. Nevertheless, the CJEU

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[38] Lang, *Das EuGH-Urteil in der Rechtssache D. – Gerät der Motor der Steuerharmonisierungins Stottern?*, SWI 365, 370 et seq. (2005); Weber, *Most-Favoured-Nation Treatment Under Tax Treaties Rejected in the European Community: Background and Analysis of the D Case*, Intertax 429, 441 et seq. (2005); Fuchs, *Status quo der Meistbegünstigung im Europäischen Steuerrecht*, ÖStZ 33, 35 (2007); Earlier criticism on the legislation as reasoning by Lang, *Die Bindung der Doppelbesteuerungsabkommen an die Grundfreiheiten des EU-Rechts*, in *Doppelbesteuerungsabkommen und EU-Recht: Auswirkungen auf die Abkommenspraxis* 25, 30 et seq. (Gassner, Lang & Lechner eds, 1996).

[39] *See* already in this regard Lang (2005), *supra* n. 38, at 365, 370 et seq.

[40] CJEU 12 Dec. 2006, *ACT Group Litigation*, C-374/04, ECLI:EU:C:2006:773, paras 91 et seq.

[41] CJEU 20 May 2008, *Orange European Smallcap Fund NV*, C-194/06, ECLI:EU:C:2008:289, paras 50 et seq.

[42] Lang (2005), *supra* n. 38, at 365, 373; Lang, *Wohin geht das internationale Steuerrecht?*, IStR 289, 295 (2005).

considered its above-mentioned Case Law line relevant in these cases too:[43]

> In the context of bilateral tax conventions, it follows from the Case Law of the Court that the scope of such a convention is limited to the natural or legal persons defined by it. Likewise, the benefits granted by it are an integral part of all the rules under the convention and contribute to the overall balance of mutual relations between the two contracting States (see, to that effect, judgments of 5 July 2005 in D., C-376/03, EU:C:2005:424, paragraphs 54 and 61 to 62, and of 20 May 2008 in Orange European Smallcap Fund, C-194/06, EU:C:2008:289, paragraphs 50 to 51). As Advocate General stated in paragraph 43 of her Opinion, this situation similarly exists in double taxations conventions with Member States as in those with non-Member States. […] As regards the case in the main proceedings, it must be noted that the situations in which the benefit of an unconditional set-off is granted are those in which the Kingdom of Belgium is committed, in the context of bilateral double taxation conventions concluded with certain third States deducting tax from dividends at source, to enabling Belgian residents to have that deduction allowed as a credit against tax payable in Belgium. […] It follows from this that the scope of such a convention is limited to Belgian residents receiving dividends from such a third State and having had tax deducted at source by that third State. The fact that the benefit in question is granted only to Belgian residents falling within the scope of that convention cannot be classified as a benefit that is separable from that convention, given that, as has been mentioned in paragraph 31 of the present judgment, that benefit is an integral part of the convention rules and contributes to the overall balance of mutual relations between the two contracting States to that convention In those circumstances, Belgian residents, such as those involved in the main proceedings, who receive dividends from Member States, such as the Republic of Poland, and who, in order to benefit from tax deducted at source being allowed as a credit against Belgian tax, must satisfy the condition laid down in Article 285 of the CIR 1992, are not in a situation that is objectively comparable to that of Belgian residents who receive dividends from a third State with which the Kingdom of Belgium has concluded a bilateral double taxation convention providing for an unconditional right to such a set-off.

It is unfortunate that the CJEU has given Member States a carte blanche for the conclusion of DTCs. In any event, DTC rules are thus beyond judicial control from the legal perspective of the fundamental freedoms. Since the CJEU already denied comparability in such cases, it also surrendered the opportunity to examine the differentiation at least with regard to its proportionality, something it would have been able to do if it had affirmed comparability but had considered regulation by DTCs merely as a justification. Advocate General Kokott would have at least proposed to the CJEU to decide the case on the level of justification, though she did not see any room for a proportionality test either – due to the particularities of the free movement of capital.[44]

3.2 *Justification Test*

Further particularities become evident especially with regard to the consideration of foreign losses. It began with the judgment in *Marks & Spencer*, in which the CJEU postulated that, in case of a national rule providing for an offsetting between positive and negative incomes of two resident group companies, losses of foreign subsidiaries need not be taken into account at home, unless they are final losses.[45] Initially, the CJEU extended this case law to foreign permanent establishments exempted under DTCs.[46] Yet it defined the term of final losses stricter and stricter over time, so that it eventually became almost or entirely irrelevant.[47] At the same time, the CJEU developed a Case Law line postulating the requirement to safeguard a balanced distribution of taxation powers between the Member States.[48] This is – as the CJEU stressed in *Timac Agro*Deutschland [49] – 'a legitimate objective recognised by the Court, which may make it necessary to apply to the economic activities of companies established in one of those Member States only the tax rules of that State in respect of both profits and losses

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[43] CJEU 30 June 2016, *Riskin und Timmermans*, C-176/15, ECLI:EU:C:2016:488, paras 31 et seq.

[44] Opinion of Advocate General Kokott, in *Riskin and Timmermans*, C-176/15, ECLI:EU:C:2016:246, no. 31 et seq.

[45] CJEU 13 Dec. 2005, *Marks & Spencer*, C-446/03, ECLI:EU:C:2005:763, para. 59.

[46] *See* CJEU 15 May 2008, *Lidl Belgium*, C-414/06, ECLI:EU:C:2008:278; Lang, *Ist die Rechtsprechung des EuGH zu den finalen Verlusten am Ende?*, in *Grundfragen des Europäischen Steuerrechts* 63, 65 et seq. (Schön & Heber eds, 2015).

[47] More by Lang, *supra* n. 46, at 63, 74 seq.

[48] *See* Lang, *supra* n. 35, at 421, 430; *see also* Lang, *Marks & Spencer – Eine erste Analyse des EuGH-Urteils*, SWI 3, 11 et seq. (2006); Lang, *The Marks & Spencer Case – The Open Issues Following the ECJ's Final Word*, Eur. Tax'n 54, 66 et seq. (2006); Lang, *supra* n. 46, at 83 et seq.

[49] CJEU 17 Dec. 2015, *Timac Agro*Deutschland, C-388/14, ECLI:EU:C:2015:829, para. 34.

(judgment in K, C-322/11, EU:C:2013:716, paragraph 50 and the Case Law cited)'.

Ultimately, the objective of the CJEU is now apparently to treat profits and losses symmetrically and, as a rule, to no longer demand the deduction of the losses when profits may not be taxed either, due to a DTC exemption or for other reasons. For that reason, it no longer distinguishes between the different justifications – as demonstrated by its observations in *Timac Agro*Deutschland:[50]

> It must, as a preliminary point, be noted that the requirements of the balanced allocation of powers of taxation and coherence of the tax system coincide (judgment in National Grid Indus, C-371/10, EU:C:2011:785, paragraph 80). Furthermore, the objectives of safeguarding the balanced allocation of the power to impose taxes between Member States and the prevention of tax avoidance are linked (judgment in Oy AA, C-231/05, EU:C:2007:439, paragraph 62 and the Case Law cited). [...] As regards the proportionality of the tax regime at issue in the main proceedings, it should be recalled that the balanced allocation of the power to impose taxes has the objective of safeguarding the symmetry between the right to tax profits and the right to deduct losses. The need to safeguard that symmetry means that the losses deducted in respect of the permanent establishment must be capable of being offset by taxation of the profits made by it under the tax jurisdiction of the Member State in question, that is to say, both the profits made throughout the period when the permanent establishment belonged to the resident company and those made at the time of the permanent establishment's transfer (judgment in Nordea Bank Danmark, C-48/13, EU:C:2014:2087, paragraphs 32 and 33). [...] Such offsetting is, moreover, capable of ensuring fiscal coherence since that offsetting is the indissociable complement of the losses having previously been taken into account (see, to that effect, judgment in Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt, C-157/07, EU:C:2008:588, paragraph 54). [...] Furthermore, it must be noted that that offsetting can also prevent tax avoidance since it removes the risk of conduct aimed at escaping the tax normally due in the State of residence of the company to which the permanent establishment belongs.

In *Timac Agro*Deutschland, the CJEU went so far as to only require a justification test when the state of residence allows the deduction of the losses of the permanent establishment situated in the other Member State although the DTC provides for exemption and, as a result, the convention relieves the State of residence from the obligation to take the foreign losses into account.[51] According to the Court's opinion, only then is the situation of a resident company with a permanent establishment situated in the other Member State comparable to that of a resident company with a permanent establishment situated in the State of residence. Otherwise, 'permanent establishments situated in a Member State other than the Member State concerned are not in a situation comparable to that of resident permanent establishments in relation to measures laid down by that Member State in order to prevent or mitigate the double taxation of a resident company's profits (judgment in Nordea Bank Danmark, C-48/13, EU:C:2014:2087, paragraph 24)'.[52]

The judgment of 22 June 2017 in *Bechtel*, however, again points into a different direction:[53] The case dealt with the deductibility of contributions to the French old-age and health insurance by a worker resident in Germany and working in France. As a result of the DTC, the salaries of the worker had to be exempted from the assessment basis in Germany, and the German tax administration thus rejected the deduction of the contributions as special expenditure, since they stood in a direct economic connection with tax-free income. Initially, the CJEU regarded the rule as a tax advantage linked to the personal and family situation of the taxpayer and saw the Schumacker Case Law as relevant. Since Germany was able to grant her these advantages – as a result of the joint assessment of the plaintiffs of the main proceedings – the plaintiff found herself in a situation comparable to that of a resident taxpayer who receives his income in the Member State of residence. Contrary to *Timac Agro*Deutschland, it was necessary to proceed to the justification test.

The considerations presented by the CJEU on this are interesting:[54]

> It must be observed in the first place that it is true that the preservation of the allocation of powers to impose taxes between Member States may constitute an overriding reason in the public interest justifying a restriction on the exercise of freedom of movement within the European Union [...]. [...] In accordance with settled Case Law, although the Member States are free to determine the connecting factors for the

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[50] CJEU 17 Dec. 2015, *Timac Agro Deutschland*, C-388/14, ECLI:EU:C:2015:829, paras 47 et seq.

[51] CJEU 17 Dec. 2015, *Timac Agro*Deutschland, C-388/14, ECLI:EU:C:2015:829, para. 28.

[52] CJEU 20 Oct. 2011, *Commission/Germany*, C-284/09, ECLI:EU:C:2011:670, para. 30.

[53] CJEU 22 Oct. 2017, *Bechtel*, C-20/16, ECLI:EU:C:2017:488, para. 52.

[54] CJEU 22 Oct. 2017, *Bechtel*, C-20/16, ECLI:EU:C:2017:488, paras 64 et seq.

allocation of fiscal jurisdiction in bilateral conventions for the avoidance of double taxation, that allocation of fiscal jurisdiction does not allow them to apply measures contrary to the freedoms of movement guaranteed by the Treaty. As far as concerns the exercise of the power of taxation so allocated by bilateral conventions to prevent double taxation, the Member States must comply with EU rules ([…]). […] In the present case, the issue of the allocation of powers to impose taxes between the French Republic and the Federal Republic of Germany was dealt with in the Franco-German Convention, according to which, first of all, salaries, wages and similar remuneration, paid by one of the Contracting States, by a Land or by a legal person of that State or Land governed by public law to natural persons resident in the other State in consideration for present or past administrative services is to be taxable only in the first State. Finally, the convention does not impose an obligation for the State which is the source of the income to take full account of the personal and family circumstances of taxpayers carrying on their economic activity in that Member State and residing in the other Member State. […] The Federal Republic of Germany has therefore freely accepted the allocation of powers of taxation that results from the terms of the Franco-German Convention, by waiving the right to tax wages, such as those received by Mrs Bechtel, without being discharged, under the convention, from its obligation to take full account of the personal and family circumstances of taxpayers residing in its territory and carrying on their economic activity in France. […] That mechanism for allocating powers of taxation cannot be relied upon in order to justify the refusal to grant a resident taxpayer the advantages arising from his or her personal and family circumstances being taken into account. […] First, the fact that the Federal Republic of Germany allows the deduction of pension and health insurance contributions, such as those at issue in the main proceedings, does not undermine the allocation of powers of taxation, as agreed in the Franco-German Convention. By allowing the deduction of those contributions, the Federal Republic of Germany does not surrender part of its tax jurisdiction to other Member States and that does not affect its power to tax activities carried out on its territory. […] Secondly, the Court has already held that a justification based on a balanced allocation of powers to impose taxes cannot be invoked by a taxpayer's State of residence in order to evade its responsibility in principle to grant to the taxpayer the personal and family allowances to which he is entitled, unless that State is released by way of an international agreement from its obligation to take full account of the personal and family circumstances of taxpayers residing in its territory who work partially in another Member State or it finds that, even in the absence of such an agreement, one or more of the States of employment, with respect to the income taxed by them, grant advantages based on the personal and family circumstances of taxpayers who do not reside in the territory of those States but earn taxable income there ([…]). […] As was pointed out in paragraphs 67 and 68 above, by virtue of the Franco-German Convention, the Federal Republic of Germany is not discharged from its obligation to take full account of the personal and family circumstances of taxpayers residing in its territory. […] In any event, the tax legislation at issue in the main proceedings does not establish any correlation between the tax advantages granted to residents of the Member State concerned and the tax advantages for which those residents may qualify in their Member State of employment (see, by analogy, judgment of 12 December 2013, Imfeld and Garcet, C-303/12, EU:C:2013:822, paragraph 73).

An assessment of the present judgment is made more difficult by the fact that the CJEU regards the special expenditure element for the contributions to the old-age and health insurance as a tax advantage taking into account the personal and family situation and, accordingly – also – subjects it to its *Schumacker* Case Law. The *Schumacker* Case Law, however, is already highly problematic in itself.[55] The same applies to its scope of application. Attributing such expenditure to the personal and family situation is anything but self-evident.[56] This aspect aside, one may ask the question why the CJEU approved the comparability of taxpayers with domestic and foreign expenditure in this case – in contrast to *Timac Agro Deutschland* for cases of permanent establishments exempted under a DTC. The CJEU then distinguishes between the distribution of the power of taxation and its exercise, where the Member States would be obliged to comply with the EU rules. Moreover, the CJEU emphasizes that Germany as the state of residence 'voluntarily' waived the right to tax wages received in France. Were the Court to use these formulations in cases like *Timac Agro Deutschland*, it would be easily possible to justify the necessity of

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[55] *See* in this regard Rödder & Schönfeld, *Meistbegünstigung und EG-Recht, Anmerkung zu EuGH vom 25.7.2005*, IStR 523, 524 et seq. (2005); Lang (2007), *supra* n. 9, at 11, 16 et seq.; Lang, *Ist die Schumacker-Rechtsprechung am Ende?*, RIW 336, 344 (2005); Lang, *Marks & Spencer und die Auswirkungen auf das Steuerrecht der Mitgliedstaaten*, SWI 255, 266 et seq. (2006); Lang (2010), *supra* n. 3, at 59, 69 et seq.

[56] *See* in this regard, Lang & Jettmar, *Steuerrecht und Sozial(versicherungs)recht – Anmerkungen zum Schlussantrag in der Rechtssache Blanckaert*, IWB 741, 744 et seq. (2005).

deductibility of foreign losses despite a DTC exemption.

This makes it difficult to draw the line between cases like *Timac Agro Deutschland* and *Bechtel.* The CJEU was presumably impressed by the fact that the deductibility of the contributions to the old-age and health insurance is regulated as part of special expenditure and not as part of income assessment. One can only speculate as to whether the CJEU would have reached a different conclusion if such payments were already deductible as income-related expenses. In any event, it should not depend on the national methodology.

3.3 *Proportionality Test*

At the level of the proportionality tests, too, DTCs occasionally play a special role: In accordance with settled case-law, the need to safeguard the effectiveness of tax controls is one of the overriding reasons that can justify a limitation of the fundamental freedoms guaranteed by the Treaty.[57] According to the Court's case law, however, – and this is where the proportionality test comes into play:

> in relations between Member States of the European Union, it cannot be excluded, a priori, that a taxpayer may be able to provide relevant documentary evidence enabling the tax authorities of the Member State of taxation to ascertain, clearly and precisely, that he meets equivalent requirements to those laid down by the national law at issue in his State of residence (see, to that effect, A, paragraph 59, and Commission v Portugal, paragraph 46).[58]

As the CJEU made clear in *Emerging Markets Series of DFA Investment Trust Company*, however, something else applies with respect to non-Member States:[59]

> However, that case-law cannot be transposed in its entirety to movements of capital between Member States and non-member States, since such movements take place in a different legal context (A, paragraph 60; Case C-540/07 Commission v Italy [2009] ECR I-10983, paragraph 69; Case C-72/09 Établissements Rimbaud [2010] ECR I-10659, paragraph 40; and Haribo Lakritzen Hans Riegel and Österreichische Salinen, paragraph 65). […] It must be observed that the framework established by Directive 77/799 for cooperation between the competent authorities of the Member States does not exist between those authorities and the competent authorities of a non-Member State where that State has not entered into any undertaking of mutual assistance (Commission v Italy, paragraph 70; Établissements Rimbaud, paragraph 41; and Haribo Lakritzen Hans Riegel and Österreichische Salinen, paragraph. 66). […] It follows from the foregoing that the justification based on the need to maintain the effectiveness of fiscal supervision can only be accepted where the legislation of a Member State makes entitlement to a tax advantage dependent on the satisfaction of conditions compliance with which can be verified only by obtaining information from the competent authorities of a non-Member State and where, because that non-Member State is not bound under an agreement to provide information, it proves impossible to obtain that information from it (see Haribo Lakritzen Hans Riegel and Österreichische Salinen, paragraph 67 and the case-law cited). […] However, unlike the cases which gave rise to the judgments cited in paragraph 82 of this judgment, where there was no obligation under an agreement on the non-Member State concerned to provide information, with the result that the Court ruled out the possibility that the taxpayer himself could provide the evidence required for the correct determination of the taxes concerned, in so far as concerns the main proceedings, there does exist a regulatory framework of mutual administrative assistance established between the Republic of Poland and the United States of America which permits the exchange of information which may be required for the application of the tax legislation. […] More specifically, that framework of cooperation stems from Article 23 of the double taxation convention and from Article 4 of the convention of the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe, signed in Strasbourg on 25 January 1988, on mutual administrative assistance in tax matters.

The fact that the CJEU does not distinguish according to whether the administrative assistance is provided on the basis of international treaties or EU law fails to convince,[60] since the 'legal framework' created by such an international law treaty is not comparable to administrative assistance provisions under EU law: When a Member State fails to comply with its obligation to provide administrative assistance under EU law, the other Member State may ultimately take action against this State before the CJEU and thus enforce compliance

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[57] CJEU 18 Dec. 2007, *Skatteverket v. A.*, C-101/05, EU:C:2007:804, para. 54; Lang (2010), *supra* n. 3, at 59, 67 et seq.

[58] CJEU 10 Apr. 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, ECLI:EU:C:2014:249, para. 81.

[59] CJEU 10 Apr. 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, ECLI:EU:C:2014:249, paras 82 et seq.

[60] Already, in this regard, Lang (2009), *supra* n. 3, at 98, 113 et seq.; Lang (2010), *supra* n. 3, at 59, 67 et seq.

with this obligation. In comparison, international law treaties between a Member State and a non-Member State are toothless. If a non-Member State ignores its commitment, the Member State can only protest against this. Ultimately, it can terminate the treaty, but administrative assistance cannot be enforced in this manner. On the contrary: The international law obligation will then even cease to apply. Moreover, the Member State will have to think twice before terminating, since the State and its taxpayers will have to expect considerable disadvantages as a result.[61]

One should not, however, ignore the political context: Through this case law, the CJEU created an incentive for non-Member States to comply with the expectations of the EU States in the area of administrative assistance: Virtually at the same time when the EU, the OECD and the G-20 States built up considerable political pressure to develop the intergovernmental exchange of information worldwide, the case law of the CJEU was sending signals that discriminating rules of the EU Member States from the perspective of the fundamental freedoms must be accepted with regard to those non-Member States that are not willing to enter contractual obligations for the exchange of information. Therefore, the political zeitgeist received support by the case law.

These consequences, however, are also problematic: Many non-Member States have a significantly greater interest in concluding tax conventions with EU Member States which also or exclusively govern administrative assistance than vice versa. States that did not have any problem with their image as tax havens in the past are now introducing a tax system in compliance with the international standard. As a sign of international acceptance, they are keen on being part of a comprehensive network of bilateral or multilateral treaties. EU Member States now do see the opportunity to expand administrative assistance instruments and thus prevent tax evasion more effectively than in the past, and make the relocation of income sources to low-tax countries less attractive. The required equal treatment of non-Member State constellations with domestic or internal EU situations may, however, result in lower tax revenues. Several EU States do not necessarily want to lose the protectionist effect of numerous limiting tax rules, which may only apply in relation to States with which they do not have any administrative assistance rules. Therefore, one cannot by any means rule out that, in some cases, it is not the non-Member State but the EU State to blame for the failure to conclude bilateral conventions. Therefore, the case law of the CJEU grants every Member State the power to decide whether tax discrimination of transactions in relation to a non-Member State will be maintained by refusing to conclude a bilateral administrative assistance agreement with this State. This is problematic not only from a political but also from a legal perspective with regard to European Economic Area (EEA) States which, according to this case law, are also considered non-Member States: After all, the fundamental freedoms are also applicable with regard to these States.[62] If an EU Member State refuses to conclude a bilateral administrative assistance agreement with an EEA State, it thus maintains discrimination with regard to this State, even if the latter is willing to accept the conditions of the CJEU.

The judgment in *Amurta*, already mentioned in a different context, is another example of a constellation in which DTCs touch on the proportionality test:[63] In this case, the CJEU recognized that the granting of a full tax credit by the recipient state of the dividends is sufficient to neutralize the discrimination suffered in the source state with respect to their payment – as a result of the higher withholding tax – and can thus be used as justification. The CJEU, however, restricted this to those constellations in which this commitment to neutralization can be found in a DTC between the source state and the recipient state.[64] The CJEU held that the Kingdom of the Netherlands – i.e. the source state causing the discrimination – 'is under a duty to ensure that, under the procedures laid down by its national law to prevent or mitigate a series of liabilities to tax or economic double taxation, recipient companies established in another Member State are subject to the same treatment as recipient companies established in the Netherlands'. In this particular case, it is therefore convincing to make conformity with the fundamental freedoms dependent on a DTC rule according to which the recipient must grant the 'full tax credit', and not on a mere provision under the law of the recipient state. The decisive factor is that the source state itself brings about the neutralization. If the rule can also be found in a DTC concluded by the source state, it was the source state that succeeded in ensuring this neutralization, e.g. by partly or fully crediting the recipient state any required repayments of the withholding tax or compensating the recipient state by granting it other

Notes

[61] *See* Lang, *Die Rechtsprechung des EuGH zur internationalen Amtshilfe im rechtlichen und politischen Kontext*, SWI 67, 72 et seq. (2012).

[62] *See ibid.*, at 67, 70 et seq.

[63] CJEU 8 Nov. 2007, *Amurta*, C-379/05, EU:C:2007:655, paras 63 et seq.; *see also* Opinion of Advocate General Mengozzi in *Amurta*, C-379/05, EU:C:2007:323, no. 80 and Opinion of Advocate General Geelhoed in *Denkavit Internationaal and Denkavit France*, C-170/05, ECLI:EU:C:2006:266, no. 42.

[64] In this regard and for specification of the criteria cited by the CJEU, *see* CJEU 17 Sept. 2015, *Miljoen*, C-10/14, ECLI:EU:C:2015:608, 75 et seq.; *see also* Beiser, *Eine konsistente Einmalerfassung grenzüberschreitender Dividenden im Licht der Rechtsprechung des EuGH*, SWI 30, 31 et seq. (2016).

benefits.[65] This is different from a merely unilateral measure of the recipient state, which the CJEU rightly rejected because of the responsibility of the source state for the discrimination.

Similar considerations must have been behind the CJEU's recently issued aforementioned judgment in *Bechtel*: In this judgment, the CJEU considered possible that the State admonished by the *Schumacker* Case Law to do so 'is released by way of an international agreement from its obligation to take full account of the personal and family circumstances of taxpayers residing in its territory who work partially in another Member State'.[66] Again, the point must be that the Member Stated obliged under EU law to grant an advantage either meets this obligation itself or must make sure that the taxpayer is granted this advantage in the other State. For this reason, it is decisive whether this is regulated 'by way of an international agreement' – and thus through an initiative or at least the participation of the State actually obliged – or only unilaterally. This has nothing to do with a special status of double taxation convention DTCs or other international law treaties.

4 Concluding summary

The above analysis has shown that a special status of double taxation convention DTCs under EU law as compared to other national law is not justifiable. The Case Law of the CJEU also often reflects this stipulation. Nonetheless, there are some critical areas in which the CJEU does differentiate according to the nature of the legal instrument. For instance, it still refuses to regard as comparable taxpayers who are subject to different DTCs concluded by a state. The Court thus gives Member States a carte blanche to design their conventions as they wish, and allows them to take an inconsistent approach in their convention policy. This is unfortunate against the background of the objectives of a Single Market.

Notes

65 Lang (2009), *supra* n. 3, at 98, 111 et seq.; Lang (2010), *supra* n. 3, at 59, 75 et seq.

66 CJEU 22 Oct. 2017, *Bechtel*, C-20/16, ECLI:EU:C:2017:488, para. 68.