Part One: The History of Article 24 of the OECD Model and New Frontiers

Chapter 1: The Work of the OEEC and the OECD on Article 24 of the OECD Model

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1.1. The functioning of the OEEC and the OECD

The OECD Model Convention contains various non-discrimination clauses: Neither a taxpayer's nationality nor a taxpayer's residence, to the extent that the income is attributable to a permanent establishment within the domestic territory, nor the residence of the recipient when interest, royalties and other considerations are paid by a domestic enterprise, the payment of interest, license fees and other remuneration to persons resident abroad, nor the residence of owners of a domestic enterprise must be used as a basis for tax discrimination. Most of these clauses can also be found today in the predominantly bilateral contractual practice. This has been significantly influenced by the Organisation for European Economic Co-operation (OEEC) and the Organisation for Economic Co-operation and Development (OECD), which developed these non-discrimination clauses, some of which were very rarely found in treaty practice before 1956.[1]

The development of the OEEC and OECD began with the first meeting of the Fiscal Committee on 23 and 24 May 1956.[2] At this meeting, the Dutch delegate *van den Tempel* was elected Chairman, with the Swedish and French delegates as Vice-Chairmen. The task of the Fiscal Committee consisted – among other things – of "studying the concept of permanent establishment, the concept of fiscal domicile, the listing and definition of taxes on income and capital, tax discrimination on grounds of nationality or similar grounds and the taxation of income and capital of shipping and air transport enterprises and of their crews",[3] as decided in the resolution of the OEEC Council C (56) 49. The Chairman proposed to set up five "Working Parties", each consisting of two members, to discuss individual issues.[4] Working Party 4 (WP4) was tasked with dealing with "Tax Discrimination on Grounds of Nationality or similar Grounds".[5] The delegates for the Netherlands and France were elected as members of this WP4.[6]

WP4 began its work by first drafting a questionnaire, which was sent to the government representatives on the Fiscal Committee.[7] A report was prepared on the basis of this questionnaire, which was then repeatedly amended and supplemented after written comments were received from individual government representatives, which WP4 then dealt with in its reports. The interim results were also discussed at the meetings of the Fiscal Committee, and WP4 took the resolutions of the Fiscal Committee into account – albeit sometimes with considerable restraint – when finalizing its reports.

Following the adoption of the OECD Model Tax Convention in 1963, a similar procedure was chosen for the amendments to the Model Tax Convention and the Commentary on the Model Tax Convention: At its meeting on 23-26 June 1964, the Fiscal Committee of the OECD decided to set up Working Party 4 once again to deal with the issues of non-discrimination.[8] The delegates for France, Japan and Spain were elected as members of this working party.[9] Once again, WP4 began its work by

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1. A first version of this paper was published in the German language: *See* M. Lang, *Die Arbeiten der OEEC und der OECD zur Schaffung der Diskriminierungsverbote*, in M. Lang, J. Schuch and C. Staringer (eds.) *Die Diskriminierungsverbote im Recht der Doppelbesteuerungsabkommen* (2006), p. 31 et seq.
2. *See* OEEC, *Fiscal Committee - Minutes of the 1st Session, held at the Chateau de la Muette, Paris on Wednesday 23rd and Thursday 24th May 1956* [FC/M(56)1(Prov.)], p. 1; *see also* R. Vann & J. Avery Jones, *The OECD Model Tax Convention: Was There a Grand Plan?* in P. Harris and D de Cogan, eds., *Studies in the History of Tax Law* Volume 11, ch. 17 (Hart, 2023) p. 462 et seq.
3. FC/M (56) 1 (Prov.), p. 3.
4. FC/M (56) 1 (Prov.), p. 4.
5. FC/M (56) 1 (Prov.), p. 3.
6. FC/M (56) 1 (Prov.), p. 4.
7. *See also* M. Lang, *Non-discrimination – What does history teach us?*, in *Fiscalité et entreprise: politiques et pratiques, mélanges en l´honneur de Jean-Pierre Le Gall* pp. 103 – 108 (G. Blanluet and Garcia, eds., Dalloz, 2007) p. 104 et seq.
8. OECD, *Working Party No. 4 of the Fiscal Committee (France-Japan-Spain) - Report on possible Amendments to Article 24 of the Draft Convention relating to Non-Discrimination* [FC/WP4(66)1], p. 2.
9. FC/WP4(66)1, p. 2.

first approaching the members of the Fiscal Committee with the help of a questionnaire.[10] A report was then drafted based on the responses. When the Fiscal Committee was replaced by the Committee on Fiscal Affairs in 1971 and a separate Working Party on Double Taxation was set up, the existing Working Parties were continued as sub-groups of the Working Party on Double Taxation.[11]

The OEEC and the OECD have been working on the further development of the non-discrimination clauses for many decades. Amendments to the OECD commentaries have also been made in recent years.[12] Of particular importance, however, was the work of the OEEC from 1956 to 1958, which will be the focus of the following explanations. During these years, the nationality, the permanent establishment and the shareholder non-discrimination clauses, including the OECD commentary, were created, whereby the formulations agreed in 1958 were incorporated into the OECD Model Tax Convention of 1963 with almost no changes. The pace of work, but also the quality of this work, was remarkable, especially when one considers that the government representatives in the OEEC bodies had their primary essential tasks in their national tax administrations: On 23 and 24May 1956, the Fiscal Committee had decided to set up WP4,[13] and apparently immediately afterwards, a questionnaire was sent out to the members of the OEEC states. At the meeting of the Fiscal Committee on 29-31 October 1956, the representative for the Netherlands was able to report that he had already received nine responses to the questionnaires.[14] On 10 January 1957, the first version of WP4's report was made available.[15] Comments were then received from the Belgian, Swedish and Swiss delegations, which WP4 took into account in a "Supplementary Report" submitted on 8 May 1957.[16] At the fourth meeting of the Fiscal Committee on 4-7 June 1957, this report was discussed, and certain preliminary decisions were taken.[17] On 11 September 1957, WP4 submitted a "Second Supplementary Report",[18] which was then discussed at the meeting of the Fiscal Committee from 1-3 October 1957.[19]

On 5 November 1957, a "Third Supplementary Report" was drawn up.[20] The contents of the first four reports of WP4 were taken into account in a comprehensive "Report of the Fiscal Committee on its Work".[21] On 15 July 1958, the OEEC was able to present a press release entitled "OEEC Fights against Double Taxation". This press release contained an article on the ban on discrimination, which was then adopted in 1963.[22]

1.2. The non-discrimination clauses of the OECD Model

1.2.1. The nationality non-discrimination clause

The ban on nationality discrimination was at the forefront of the Fiscal Committee's work. WP4 was tasked with dealing primarily with considerations of nationality and only then with other issues.[23] WP4 was able to build on numerous older provisions that already contained a ban on nationality discrimination.[24] WP4 noted that in recent years, such a ban on discrimination had also

10. FC/WP4(66)1, p. 9.
11. OECD, *Committee on Fiscal Affairs - Organization of Work* [CFA(71)3], p. 1.
12. *See* OEEC, *Fiscal Committee - Draft Report by the Fiscal Committee on its Activities*, [FC(58)2], p.12; also, OEEC, *OEEC Fights Against Double Taxation* [Press/A(58)24, 3.]
13. FC/M(56)1(Prov.), p. 4.
14. *See* OEEC, *Fiscal Committee - Minutes of the 2nd Session held at the Chateau de la Muette, Paris on Monday 29th , Tuesday 30th and Wednesday 31st October 1956* [FC/M(56)2(Prov.)], p. 6.
15. OEEC, *Working Party No. 4 of the Fiscal Committee (Netherlands - France) - Report on Tax Discrimination on Grounds of Nationality or similar Grounds* [FC/WP4(57)1], p. 1.
16. OEEC, *Working Party No. 4 of the Fiscal Committee (Netherlands - France) - Supplementary Report on Tax Discrimination on Grounds of Nationality or similar Grounds* [FC/WP4(57)2], p. 1.
17. OEEC, Fiscal Committee *Minutes of the 4th Session held at the Chateau de la Muette, Paris on Tuesday 4th , Wednesday 5th, Thursday 6th and Friday 7th June 1957* [FC/M(57)2], p. 3.
18. OEEC, *Working Party No. 4 of the Fiscal Committee (Netherlands - France) - Second Supplementary Report on Tax Discrimination on Grounds of Nationality or similar Grounds* [FC/WP4(57)3], p. 1.
19. OEEC, *Fiscal Committee - Minutes of the 5th Session held at the Chateau de la Muette, Paris on Tuesday 1st , Wednesday 2nd and Thursday 3rd October 1957* [FC/M(57)3], p. 5.
20. OEEC, *Working Party No. 4 of the Fiscal Committee (Netherlands - France) - Third Supplementary Report on Tax Discrimination on Grounds of Nationality or Similar Grounds*, [FC/WP4(57)4], p. 1.
21. OEEC, *Fiscal Committee - Draft Report by the Fiscal Committee on Its Activities* [FC(58)2], p. 12.
22. Press/A(58)24, p. 15.
23. FC/M(56)1 (Prov.), p. 3.
24. FC/WP4(57)1, p. 3.

been increasingly included in tax treaties. WP4 paid particular attention to tax treaties concluded by the UK, whose wording and provisions on the prohibition of nationality discrimination became the model for the WP4 drafts.[25]

The concerns expressed by government representatives in their comments on the WP4 draft mostly concerned whether the scope of the draft provisions was too broad. The government representatives had their own country's rules in mind and wanted to ensure that the prohibitions of discrimination did not lead to changes in their domestic law or their national practice. The acceptance of the prohibition of nationality discrimination was secured in principle by the fact that WP4 emphasized that the OEEC member states did not differentiate according to nationality anyway.[26] The inclusion of the prohibition of nationality discrimination in a model agreement of the OEEC was primarily justified by the fact that such a model agreement could have an exemplary effect for the conclusion of agreements with third countries and that some third countries differentiated according to nationality in their tax law and occasionally made this the subject of discrimination.[27]

Nevertheless, some government representatives expressed concerns: The Belgian and Swedish delegates recommended that each state should be able to grant special privileges to its own "public corporations and to certain institutions not for profit"[28] without being obliged to extend this treatment to similar corporations of other states.[29] WP4 considered this view to be justified and, in its report submitted on 8 May 1957, proposed two alternative formulations to exclude such corporations from the scope of the prohibition of nationality discrimination.[30] These formulations read as follows: "a) [...] taxation privileges to public bodies or services or to private institutions not for profits whose activities are performed exclusively in the religious, charitable, artistic or scientific field or in any other field of cultural life, or for social or national defense purposes [...]; b) all partnerships, associations and other legal persons, whether public or private, deriving their status as such from the law in force in any Member country of the OEEC and performing their activities with a view of profit."

However, the Fiscal Committee decided at the meeting of 4-7 June 1957 not to include such wording and instead to address the situation of such entities merely in the commentary.[31] The minutes do not contain any reasons for this decision. It is possible that the members of the Fiscal Committee came to the conclusion that the definitions of public corporations and, above all, that of non-profit organizations (NPOs) were too different in the individual states to be included in an accepted formulation.

However, it remained the case that the intention of the OECD representatives to exclude such entities from the scope of application of the ban on nationality discrimination was only contained in the OECD commentary.[32] WP4 stated in its "Second Supplementary Report", which was submitted to the Fiscal Committee on 11 September 1957, only the following additional justification:[33]

If a State accords a taxation privilege (e. g. exemption) to its own public bodies and services, this privilege is founded not so much on the notion of nationality or legal status as on the fact that such bodies and services are integral parts of the State. From this point of view such bodies and services can never be in comparable circumstances to those of the public bodies and services of another State; their position in relation to the State to which they belong is a unique one. Consequently, paragraph (1) does not imply that a State which accords special favorable taxation treatment to its own public bodies and services must extend the same treatment to the public bodies and services of another. However, the Working Party would make it clear that the bodies and services to be excluded from the field of application of paragraph (1) should not include public corporations insofar as they are carrying on gainful undertakings.

One objection raised by the Swiss delegation concerned the inclusion of stateless persons in the prohibition of discrimination based on nationality.[34] Switzerland's position, which preferred not to include such wording in a bilateral agreement,[35] was declared acceptable by WP4 in its Supplementary Report, which was submitted to the Fiscal Committee on 8 May 1957.[36] At the meeting of 4-7 June 1957, the Fiscal Committee approved the paragraph on stateless persons, but noted that there was a consensus that such wording should only be included in a multilateral agreement.[37] In the following "Second Supplementary

25. FC/WP4(57)1, p. 4.
26. FC/WP4(57)1. p. 3.
27. FC/WP4(57)1, p. 3.
28. FC/WP4(57)2, p. 3.
29. FC/WP4(57)2, p. 3.
30. FC/WP4(57)2, p. 4.
31. FC/M(57)2, p. 4.
32. *See also* Lang, *supra* n. 7, p. 105.
33. FC/WP4(57)3, pp. 9 et seq.
34. FC/WP4(57)2, p. 9.
35. FC/WP4(57)2, p. 9.
36. FC/WP4(57)2, p. 9.
37. FC/M(57)2, p. 4.

Report", submitted on 11 September 1957, WP4 retained the wording on stateless persons, but at the same time mentioned the corresponding decision of the Fiscal Committee.[38] At the meeting of the Fiscal Committee on 2-3 October 1957, this decision was reconfirmed.[39] Nevertheless, the paragraph on stateless persons was also retained in the draft text of the "Third Supplementary Report" of WP4. The provision on stateless persons was then also included in the 1963 OECD Model Convention, remained in the 1977 Model Convention and is still part of the OECD Model Convention today. At first glance, it is difficult to understand why the provision on stateless persons remained in the drafts despite the agreement that such a provision could only be included in a multilateral tax treaty. This becomes easier to understand when one takes into account that the WP4 initially designed the non-discrimination clauses for a multilateral agreement[40] – which will be discussed later – and therefore possibly left the provision on stateless persons in the text proposals during the discussions in 1957 and 1958 as a precautionary measure in case the decision was made to create a multilateral agreement after all.

1.2.2. The permanent establishment non-discrimination clause

The mandate given to WP4 by the Fiscal Committee did not explicitly include the creation of a ban on discrimination against permanent establishments. Rather, the Fiscal Committee's resolution stated that WP4 should primarily deal with issues of nationality and only subsequently with other issues of discrimination.[41] Nevertheless, in the first version of its report, WP4 presented a draft for a permanent establishment non-discrimination clause:[42]

Profits which an operator domiciled or established in a Member country of the OEEC obtains in the territory of some other Member country of the OEEC through a permanent establishment situated therein shall not be less favorably computed by the latter Member country than similar profits obtained by an operator established or domiciled in its own territory.

As a result of the responses to the questionnaires, WP4 first noted that many OEEC states treat residents and non-residents differently in many respects and that it does not consider it to be its task to determine whether and to what extent this difference in treatment should be eliminated.[43] However, it was seen an exception in the determination of the profits of a permanent establishment, as many treaties on business profits contain a rule that the permanent establishment must be treated as an independent enterprise.[44] Consequently, the profits of such a permanent establishment should not be determined differently from the profits of a national company of that state. In its report, WP4 also pointed out that some OEEC member states had similar clauses in their agreements.[45]

There was strong opposition to the proposal to include a permanent establishment non-discrimination clause in the model convention from the outset. In its statement, the Belgian delegation advocated the deletion of such wording without replacement.[46] WP4, in its "Supplementary Report", submitted on 8 May 1957, reacted to this Belgian position, but remained firm on the matter and did not withdraw the wording.[47] It once again pointed out the connection to the fiction of independence in the determination of permanent establishment profits and also explained that discrimination against foreign permanent establishments only rarely occurs in the member states of the OEEC and justified the value of the wording by stating that it can contribute to promoting the principle of non-discrimination in international economic relations.[48] WP4's argumentation also benefited from a Swiss statement in which it was argued that the prohibition of permanent establishment discrimination should not only apply to questions of profit determination.[49] Although WP4 was sympathetic to this proposal, it also stated that it would be wiser to leave the draft in its current form "for the moment" for reasons of acceptance of the provision.[50] The statement of the Swiss delegation gave WP4 the opportunity to describe the two opinions received as "opposing proposals",[51] which made the retention of the provision criticized by Belgium appear almost as a compromise.[52]

38. FC/WP4(57)3, pp. 6 and 11.
39. FC/M(57)3, p. 5.
40. FC/WP4(57)3, p. 6.
41. FC/M(56)1(Prov.), p. 3.
42. FC/WP4(57)1, p. 7.
43. FC/WP4(57)1, p. 6.
44. FC/WP4(57)1, p. 7.
45. FC/WP4(57)1, p. 7.
46. FC/WP4(57)2, p. 5.
47. FC/WP4(57)2, pp. 5-6.
48. FC/WP4(57)2, p. 6.
49. FC/WP4(57)2, p. 6.
50. FC/WP4(57)2, p. 6.
51. FC/WP4(57)2, p. 5.

Interestingly enough, at the meeting of the Fiscal Committee from 1-3 October 1957, the delegate for Switzerland was in favor of formulating the prohibition of discrimination against permanent establishments on the basis of nationality and not on the basis of residence.[53] At this meeting of the Fiscal Committee, no final decision was made on this, but WP4 was instructed to submit an additional proposal, according to which only nationals could be covered under the permanent establishment non-discrimination clause.[54] WP4 in its "Third Supplementary Report" proposed a formulation for a prohibition of discrimination against permanent establishments based on nationality, but emphasized emphatically that the use of nationality as a basis would not be compatible with the usual concepts of permanent establishment non-discrimination.[55] This view of WP4 ultimately prevailed.

WP4 succeeded in enforcing the prohibition of discrimination against permanent establishments as such against considerable resistance.[56] At its meeting on 4-7 June 1957, the Fiscal Committee decided not to limit the application of the prohibition of permanent establishment discrimination solely to the determination of profits, but rather – much more generally – to use the phrase "less favorably assessed".[57] The Fiscal Committee also decided in its meeting of 1-3 October 1957 that WP4 should draft wording – as requested by the German delegate – according to which "the provisions of the Draft Article were not to be construed as obliging a Contracting Party to grant nonresidents the same tax reliefs as to its own residents (without mentioning, however, the question of rates of tax)".[58] WP4 then drafted the following wording in its "Third Supplementary Report":[59]

The taxation levied by any Contracting Party on permanent establishment situated in the territory of that Contracting Party and owned by an entrepreneur domiciled or established in the territory of any other Contracting Party shall not be less favourable than that levied on an entrepreneur domiciled or established in its own territory and carrying on the same activities. This provision shall not be construed as obliging any Contracting Party to grant to individuals residing in the territory of any other Contracting Party any personal allowances, reliefs and reductions for tax purposes on account of civil status or family responsibilities which it grants to individuals residing in its own territory.

Apart from a few deviations, this wording can still be found in the OECD model agreement today.

1.2.3. The shareholder non-discrimination clause

The OECD Model Convention 1963 contained a shareholder non-discrimination clause. The proposal for this was not based on the considerations of WP4 itself, but on the proposal of the Swiss delegate:[60]

The income, profits and capital of an enterprise of one of the States, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more persons domiciled in the other State, shall not be subjected in the first-mentioned State to any taxation which is other, higher or more burdensome than the taxation to which other similar enterprises of that first-mentioned State in the like circumstances are or may be subjected in respect of the like income, profits and capital.

WP4 agreed – with minor modifications – with the Swiss delegate's proposal to include such a provision in the article on the prohibition of discrimination. WP4 pointed out that such discrimination hardly occurs in the OEEC member states the OEEC anyway.[61] On this basis, WP4 assumed that the member states would be more likely to accept the proposed wording.[62] The particular importance of this wording is – as WP4 expressly emphasized – especially in relation to states that do not object to such discrimination.[63]

Although WP4 wanted to ensure the acceptance of the proposed provision from the outset by pointing out the lack of importance of these provisions for the OEEC member states, the Italian delegate nevertheless proposed the deletion of this provision at the meeting of the Fiscal Committee on 4-7 June 1957.[64] WP4 was instructed to revisit the issue of the shareholder non-

52. *See also* R. Vann & J. Avery Jones, *The OECD Model Tax Convention: Was There a Grand Plan?* in P. Harris and D de Cogan, eds., *Studies in the History of Tax Law* Volume 11, ch. 17 (Hart, 2023), p.479 for the emphasis on the active role of Switzerland.
53. FC/M(57)3, p. 7.
54. FC/M(57)3, p. 7.
55. FC/WP4(57)3, p. 11f.
56. *See also* Lang, *supra* n. 7, p. 106.
57. FC/M(57)2, p. 4.
58. FC/M(57)3, pp. 6-7.
59. FC/WP4(57)4, p. 4.
60. FC/WP4(57)2, p. 8.
61. *See also* Lang, *supra* n. 7, p. 107.
62. FC/WP4(57)2, p. 8.
63. FC/WP4(57)2, p. 8.
64. FC/M(57)2, p. 4.

discrimination clause. WP4 retained the wording in its "Second Supplementary Report", submitted on 11 September 1957,[65] and expressly took into account the discussion of the Fiscal Committee of 1 June 1957. WP4 pointed out that this provision referred exclusively to the taxation of companies and not to the taxation of persons controlling the capital.[66] Apparently, this reference allayed the existing concerns so that the wording could be included in the Fiscal Committee's final report without further discussion.[67]

1.2.4. The debtor non-discrimination clause

The ban on debtor discrimination is more recent. It was only included in the 1977 version of the OECD Model Convention. Similar to the prohibition of shareholder discrimination, the prohibition of debtor discrimination is not based on a proposal by the responsible Working Party itself. A formulation proposed by the Belgian delegation for such a prohibition of discrimination was included in the report of the newly composed WP4. WP4 now consisted of representatives from France, Spain and Japan. The report entitled "Report on amendments which might be made to Article 24 of the draft Convention relating to non-discrimination" was submitted on 17 November 1969 and contained the following Belgian drafting proposal:

Except where Articles 9, 11, paragraph 6, and 12, paragraph 4, apply, interest royalties and other disbursements paid by an enterprise of a Contracting State is a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible as if they had been paid to a resident of the first mentioned State. Similarly, any debts of an enterprise of a Contracting State to a resident of the other Contracting State, shall, for the purpose of determining the taxable capital of such enterprise, be deductible as if they had been contracted to a resident of the first-mentioned State.[68]

This draft was largely incorporated into the 1977 OECD Model Tax Convention.

1.3. Common issues relating to the prohibition of discrimination

1.3.1. Multilateral tax agreement

The first drafts submitted by WP4 did not refer to nationals or entrepreneurs of one of the two contracting states, but to each OEEC member state.[69] It was only in the draft version submitted on 11 September 11 1957, as part of the "Second Supplementary Report" that WP4 changed this approach and instead referred to the relationship between the contracting states, as is still the case today in the OECD Model Tax Convention.[70] The change of opinion was preceded by a dispute with the Swiss delegation:

In the "Supplementary Report", submitted on 8 May 1957, WP4, under the heading "most favored nation clause", reflects the Swiss position according to which the place for an article on non-discrimination would be in the existing bilateral agreements and, if so, the aim would merely be to solve the problem of non-discrimination bilaterally between two contracting states, since it is not desirable to extend the application of a most favored nation clause to all member states of the OEEC.[71] WP4 countered that such a provision should be included in a multilateral agreement to avoid tax discrimination between all OEEC member states.[72] WP4 added that, as far as relations between an OEEC member state and another state were concerned, it was irrelevant whether the member state was obliged under a bilateral or a multilateral agreement to treat the nationals of the other member state or indeed those of all other member states in the same way as its own nationals. The question would only be relevant if the first-mentioned OEEC member state and the non-member state had concluded a treaty with a most-favored-nation clause.

Subsequently, however, it became apparent that WP4 had misunderstood Switzerland's concerns, as it expressly acknowledged in its "Second Supplementary Report", submitted on 11 September 11 1957.[73] The original proposal submitted by WP4 would have led to the result that the conclusion of a bilateral tax agreement between two OEEC member states would have meant that nationals of all other OEEC member states would also be protected by this bilaterally agreed non-discrimination clause, without it being ensured that the other OECD member states that are not contracting parties to such a bilateral agreement would also treat the nationals of other member states in the same way as their own nationals. In this context, the Swiss delegation expressed its concerns.

65. FC/WP4(57)3, p. 3.
66. FC/WP4(57)3, pp. 12-13.
67. OEEC, *L'elimination des doubles impositions. Rapport du Comité Fiscal de L'OECE* (1958), p. 59 et seq.
68. OECD, *Working Party No. 4 of the Fiscal Committee (France - Spain - Japan) - Report on Amendments which might be made to Article 24 of the Draft Convention relating to Non-Discrimination*, [FC/WP4(69)1], p. 10.
69. FC/WP4(57)1, p. 4.
70. FC/WP4(57)3, p. 3.
71. FC/WP4(57)2, p. 9.
72. FC/WP4(57)2, p. 9.
73. FC/WP4(57)3, p. 14.

WP4 acknowledged that it had made its proposals with a view to a multilateral agreement.[74] WP4 wanted to leave the question of whether bilateral or multilateral agreement provisions should ultimately be drafted to the decision of the Fiscal Committee.[75] Nevertheless, WP4 accepted the Swiss concerns in principle and decided to change the wording in the draft so that it no longer referred to the member states of the OEEC but to the contracting parties.[76]

However, the original idea of drafting a multilateral agreement continued to have an effect in several respects: For example, the retention of the ban on discrimination against stateless persons, which was repeatedly associated with a multilateral agreement by both WP4 and the Fiscal Committee,[77] was probably due to the fact that the decision had not yet been finalized.[78] Even in the "Draft Report to the Council" on the OECD Model Tax Convention 1963, which was approved by the Fiscal Committee in May 1963,[79] there is an explicit reference to the possibility that some groups of member countries might use the model convention as the basis for a multilateral tax treaty between them.[80]

1.3.2. Scope of the provisions

The first drafts presented by WP4 did not contain a common provision on the scope of the non-discrimination clauses. Instead, the scope was regulated separately in each of the clauses.[81] The draft for the prohibition of discrimination based on nationality stipulated that the provision was to be applied on "taxes on income and capital, taxes on estates and inheritances and gift taxes".[82] The provision on the prohibition of discrimination against permanent establishments, on the other hand, was only to apply to "profits".[83]

There were different opinions on this: The Swedish delegation noted that it would be more correct to delete the reference to gift taxes, as such taxes could not be brought within the scope of a tax treaty.[84] The Swiss delegation argued that the restriction to "taxes on income, on capital, on estates and inheritances and on gifts" should not remain, but that "taxes and contributions in general" should be covered by the first paragraph of the article through the use of the term "taxation".[85] The proposal was to add the following sentence to the first paragraph: "In this Article the term "taxation" means contributions of every kind and description levied by any authority whatsoever.".[86] WP4 was of the opinion that the aim should be to avoid discrimination with regard to all taxes. However, it wanted to leave such a far-reaching formulation to the judgment of the Fiscal Committee.[87] At its meeting on 4-7 June 1957, the Fiscal Committee endorsed the Swiss proposal, which was supported by the Danish delegate.[88] Subsequently, WP4 proposed in its "Second Supplementary Report", submitted on 11 September 1957, that this provision should be included in a separate paragraph for reasons of clarification.[89] This remains the case.

The question of the scope of the non-discrimination clause arose again in the discussions on the model convention in the area of inheritance and gift tax. The prohibition of discrimination contained therein is based on the wording of the prohibition of nationality discrimination in the OECD Model Tax Convention in the area of taxes on income and capital. At the meeting of the Fiscal Committee on 14-17 May 1963, the Swiss delegate suggested that the term "taxation" should be identical to the corresponding provision in the Model Tax Convention in the area of taxes on income and capital.[90] This view then prevailed.

There was a renewed discussion on the scope of the OECD Model Tax Convention's non-discrimination clauses in the area of taxes on income and capital in connection with the discussion on the amendments to the 1963 Model Tax Convention, which were

74. FC/WP4(57)3, p. 14
75. FC/WP4(57)3, p. 14.
76. FC/WP4(57)3, p. 14.
77. FC/WP4(57)3, p. 11.
78. *See* in more detail R. Vann, *Origins of the OEEC Work on Tax Treaties: Continuity or Fresh Start?* 76 Bull. Intl. Taxn. 9 (2020), pp. 433, 442, and 447 et seq.
79. *See* OECD, *Fiscal Committee - Draft Report to the Council on the Draft Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital between the Member Countries of the O.E.C.D.,* [FC(63)4PartI(1st Revision)], p. 13, para. 28.
80. FC(63)4-PartI(1st Revision), p. 28, para. 57.
81. FC/WP4(57)1, p. 6.
82. FC/WP4(57)1, p. 1.
83. FC/WP4(57)1, p. 6.
84. FC/WP4(57)2, p. 2.
85. FC/WP4(57)2, p. 1.
86. FC/WP4(57) 2, p. 1.
87. FC/WP4(57) 2, p. 1 et seq.
88. FC/M(57)2, p. 3.
89. FC/WP4(57)3, p. 3.
90. OECD, *Fiscal Committee - Minutes of the 10th Session held at the Chateau de la Muette, Paris on Tuesday 14th , Wednesday 15th , Thursday 16th , and Friday 17th May 1963* [FC/M(63)4], p. 5.

then to lead to the 1977 OECD Model Tax Convention. This time it was the Austrian delegation that proposed that the scope of article 24 should be limited to the taxes to which the Convention applies, and that the separate paragraph on the scope in article 24 should be deleted accordingly.[91] In contrast, the Spanish delegation advocated clarifying that "taxation" includes taxes of all kinds, including those not otherwise covered by the Convention.[92] The Swedish delegation, on the other hand, suggested that a discussion should be held to determine once and for all which taxes are covered by the term "taxation".[93] WP4, now consisting of France, Spain and Japan, took the view that it was not possible to consider the majority of the proposed amendments in more detail. It became apparent that the member states held divergent views.[94] For this reason, the OECD Model Tax Convention 1977 retained the provision on the broad scope of the clause that had already been included in 1963.

1.3.3. The "different or more burdensome" taxation

In connection with the prohibition of discrimination for nationals and shareholders, the OECD Model Tax Convention continues to state that no taxation may be provided for that is "different from or more burdensome than" the taxation to which nationals or companies of the first-mentioned state are subject. This provision still raises questions of doubt today, as the question of the scope of application of the prohibition of "other ... taxation", since "more burdensome taxation" is prohibited separately.

In the first draft submitted by WP4 on 10 January 1957, it was stated in connection with the prohibition of discrimination between nationals that taxation "which is other, higher or more burdensome" than the taxation and related obligations to which nationals of the other State are subject is prohibited.[95] The Belgian delegation then proposed simplifying this wording and using only the phrase "more burdensome" instead.[96] In its "Supplementary Report", WP4 stuck to its originally proposed text,[97] but noted that it was by no means averse to simplification, but that the Belgian proposal would leave room for different assessments of whether a given taxation is "more burdensome" or nothing more than another taxation. In the event of simplification, the WP4 would therefore propose prohibiting Member States from imposing "taxation which is other than the taxation", as such a formulation should in particular rule out foreign nationals being taxed more heavily than their own nationals.[98] However, WP4 expressly stated in its Supplementary Report that such a clause should in no case preclude a state from granting certain benefits to foreign nationals for special reasons, even if its own nationals are not eligible for them.[99]

The Fiscal Committee dealt with this issue at its meeting on 4-7 June 1957.[100] There it was decided that the wording should be "other or more burdensome". Obviously, the intention was to take into account both the ideas of the Belgian delegation and those of WP4 itself by including both criteria. Compared with the first draft version, the "higher" criterion was omitted. In line with the intention of WP4, the wording ultimately chosen was intended to exclude any higher taxation, even if it does not clearly prove to be "more onerous".[101] Furthermore, the wording should express that more favorable taxation of foreigners is permissible.[102]

In WP4's "Second Supplementary Report" submitted on 11 September 1957, the wording "other or more burdensome" was explained again as follows:[103]

The purpose of the provision that the taxation or any requirements connected therewith must not be other or more burdensome can be explained as follows: Tax may not be in another form (no different tax; no different mode of computing the taxable amount, no different rate, etc.) and the formalities connected with the taxation (returns, payment, prescribed times, etc.) may not be more onerous. In its negative form, and due regard being had to the considerations on which it is founded, this provision does not prevent a State from granting, for special reasons of its own, certain concessions or facilities to foreign nationals which are not available to its own nationals.

91. FC/WP4(69)1, p. 12.
92. FC/WP4(69)1, p. 12.
93. FC/WP4(69)1, p. 12.
94. FC/WP4(69)1, p. 15.
95. FC/WP4(57)1, p. 4.
96. FC/WP4(57)2, p. 2.
97. FC/WP4(57)2, p. 10.
98. FC/WP4(57)2, p. 2.
99. FC/WP4(57)2, p. 2.
100. FC/M(57)2, p. 4.
101. FC/WP4(57)3, p. 7.
102. FC/WP4(57)3, p. 7.
103. FC/WP4(57)3, p. 7.

1.4. Relationship to Community law (EU law)

It is interesting to note that the discussion of the relationship between tax treaties and Community law already played a role on the margins in 1957: In the discussions during the meeting of the Fiscal Committee from 1-3 October 1957, the Italian delegate stated that he would be prepared to accept any formulation as long as the obligations arising from it did not take precedence over the obligations arising from the institution of the European Economic Community in the event of a conflict. These obligations would have priority.[104]

It is not entirely clear what problem the Italian delegate had in mind with these very general formulations in the protocol. In any case, the statement appears in the context of the discussion in which it was proposed that the prohibition of discrimination against permanent establishments should also be restricted to nationals of the other contracting state.[105] Apparently, the Italian delegate saw a problem if the equal treatment of permanent establishments did not generally apply to non-residents, but only to foreign nationals. His statement could be interpreted as meaning that he considered it necessary to apply the prohibition of discrimination against permanent establishments also to nationals of other contracting states and, in the event of a conflict, demanded that Community law take precedence. In view of the sparse reproduction of the Protocol, it would be somewhat speculative to draw such far-reaching conclusions, as they would make the Italian delegate's statements appear almost prophetic with regard to the subsequent case law of the ECJ. In any case, it is interesting to note that the possibility of a conflict between a tax treaty and Community law was already being considered in 1957.

1.5. Conclusions and outlook

The decisions that led to the creation of the non-discrimination clauses that can still be found in bilateral tax treaties today were taken during the OEEC discussions in the years 1956-1958. The speed with which the decisions were prepared, and the arguments weighed up with great care and prudence is impressive.

The documents available from these years impressively demonstrate that it was by no means a foregone conclusion that the 1963 OECD Model Tax Convention would also contain a permanent establishment and a shareholder non-discrimination clause in addition to the nationality non-discrimination clause. In fact, these issues were extremely controversial. The development was probably significantly influenced by the fact that Working Party 4, which was made up of representatives from the Netherlands and France, campaigned for these provisions with great tenacity and resisted any softening.[106] The two members of WP4 either ensured that the WP made far-reaching proposals themselves or readily took up even more far-reaching proposals from other state representatives and subsequently defended them. Anyone studying the available documents gains the impression that the provisions would by no means have offered the same protection if representatives of other states had formed WP4.

We can only speculate as to why the representatives of the Netherlands and France were so committed to progressive provisions. It is possible that they assumed that their countries themselves did not have any discriminatory rules and had little or nothing to fear. But perhaps the commitment of the members of WP4 was also connected to the fact that the Fiscal Committee itself was led by a Dutchman, *van den Tempel*, with great commitment and success over many years. Whether *van den Tempel* himself was also involved in the working group cannot be ascertained from the mere mention of the participating states, but not the persons involved, in the minutes of WP4. As a senior Dutch tax official, he was in any case able to influence the positions that his country represented in WP4. One explanation for the commitment of the Dutch representatives in WP4 could therefore be that *van den Tempel* himself, as chairman of the Fiscal Committee, was interested in the rapid and successful progress of the work. The French representative could also have had a similar institutional interest, especially as *Serre* himself was one of the two deputy chairmen of the Fiscal Committee.[107]

However, if one disregards the positions taken by WP4 and the comments made by a few other states, it is clear that the representatives of the OEEC were primarily interested in ensuring that the provisions on the prohibition of discrimination did not affect the scope of their own legislators. The lowest common denominator usually consisted of finding a rule that – at least in the eyes of the parties involved – had no effect at all, and if it did, then only in relation to third countries. The fact that in an international organization such as the OEEC only government representatives sit in decision-making positions proved to be disadvantageous in terms of legal protection; the interests of taxpayers, who are usually only represented in the approval process when international treaties are concluded – i.e. when the actual decision has already been made – were not taken into account at all. This should give pause for thought when one considers that today it is practically only government representatives considering changes to

104. FC/M(57)3, p. 7.
105. FC/WP4(57)4, p. 1.
106. *See also* Lang, *supra* n. 7, p. 108.
107. However, according to R. Vann & J. Avery Jones, *supra* n. 52, p. 478, the French Vice-chair seemed to have missed quite a few meetings.

the Model Convention, whereby these provisions affect the interests of taxpayers in the same way, but they are not represented institutionally. The fact that the business community is invited to give advice on drafts does not really have a great impact.