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Levy & Sebbag: The ECJ Has Once Again Been Asked To Deliver Its Opinion on Juridical Double Taxation in the Internal Market

In this note, the authors outline the ECJ's decision in *Levy and Sebbag*, wherein the Court confirmed its view that the fundamental freedoms are not capable of solving the problem of juridical double taxation, since they do not provide criteria for the attribution of taxing rights.

1. The ECJ and the Issue of Juridical Double Taxation

In recent years, the Court of Justice of the European Union (ECJ) has consistently held that the fundamental freedoms do not offer any remedy against the problem of juridical double taxation.¹ Although the underlying facts of the relevant cases are quite diverse² – ranging from juridical double taxation on dividend payments,³ to the double levying of inheritance taxes⁴ and the double levying of certain payroll taxes⁵ – the ECJ has always reached the same conclusion, namely that juridical double taxation is the result of the parallel exercise of taxing rights and a consequence of the Member States' fiscal sovereignty.⁶

European Union law, in the current state of its development [...] 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 Union. [Con-

sequently] the Member States enjoy a certain autonomy in this area provided they comply with European Union law, and are not obliged therefore to adapt their own tax systems to the different systems of taxation of the other Member States in order, inter alia, to eliminate the double taxation arising from the exercise in parallel by those States of their fiscal sovereignty.⁷

Thus, as long as there is no action taken by the European Union legislator, "it is for the Member States to take measures necessary to prevent situations [of juridical double taxation] by applying, in particular, the apportionment criteria followed in international tax practice".⁸

The approach of the ECJ has been met with a lot of criticism by academics,⁹ as it seems difficult to accept that

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1. See, for instance: BE: ECJ, 14 Nov. 2006, Case C-513/04, *Mark Kerckhaert and Bernadette Morres v. Belgische Staat*, ECJ Case Law IBFD; and BE: ECJ, 16 July 2009, Case C-128/08, *Jacques Damseaux v. État belge*, ECJ Case Law IBFD.
2. See V. Daurer & N. Tüchler, *Foreign Tax Credit – Is a Carry-Forward Obligatory?* 66 Bull. Intl. Taxn. 10, p. 563 et seq. (2012), Journals IBFD.
3. *Damseaux* (C-128/08); *Kerckhaert-Morres* (C-513/04); NL: ECJ, 20 May 2008, Case C-194/06, *Staatssecretaris van Financiën v. Orange European Smallcap Fund NV*, ECJ Case Law IBFD; and AT: ECJ, 10 Feb. 2011, Joined Cases C-436/08 and C-437/08, *Haribo Lakritzen Hans Riegel Betriebs GmbH and Österreichische Salinen AG v. Finanzamt Linz*, ECJ Case Law IBFD.
4. DE: ECJ, 12 Feb. 2009, Case C-67/08, *Margarete Block v. Finanzamt Kaufbeuren*, ECJ Case Law IBFD.
5. HU: ECJ, 15 Apr. 2010, Case C-96/08, *CIBA Speciality Chemicals Central and Eastern Europe Szolgálató, Tanácsadó és Kereskedelmi Kft. v. Adó- és Pénzügyi Ellenőrzési Hivatal Hatósági Főosztály*, ECJ Case Law IBFD.
6. Daurer & Tüchler, *supra* n. 2, at p. 566.

7. *CIBA* (C-96/08), para 27 et seq.
8. *Kerckhaert-Morres* (C-513/04), para. 21.
9. N. Dautzenberg, *Doppelbesteuerung und EG-Vertrag: Die Anrechnungsmethode als gemeinschaftsrechtlicher Mindeststandard?*, 47 DB 31, p. 1542 at 1543 et seq. (1994); M. Mick, *Steuerharmonisierung und Gemeinsamer Markt* (§24), in *Handbuch des Europäischen Steuer- und Abgabenrechts* §24 Rz 10 D. Birk ed., (NWB, 1995); N. Herzig, *Besteuerung der Unternehmen in Europa – Harmonisierung im Wettbewerb der Systeme*, in *Steuerrecht im Europäischen Binnenmarkt*, DStJG 19, p. 121 at p. 139 et seq. (1996); C.R. Beul, *Beschränkung europäischer Niederlassungsfreiheit und Art. 220 EG – Doppelbesteuerung und Meistbegünstigung*, 6 IStR 1, p. 1 at p. 2 et seq. (1997); W. Schön, *Freie Wahl zwischen Zweigniederlassung und Tochtergesellschaft – ein Grundsatz des Europäischen Unternehmensrechts*, 11 EWS 7, p. 281 at p. 290 (2000); A. Cordewener, *Europäische Grundfreiheiten und nationales Steuerrecht*, p. 876 et seq. (Dr Otto Schmidt 2002); S. Van Thiel, *Removal of income tax barriers to market integration in the European Union: litigation by the community citizen instead of harmonization by the community legislature?* 12 EC Tax Rev. 1, p. 4 at p. 10 (2003); F.C. De Hosson, *The slow and lonesome death of the arbitration convention*, 31 Intertax 2003, p. 482 at p. 483 (2003); *Englisch, zur Dogmatik der Grundfreiheiten des EGV und ihren ertragsteuerlichen Implikationen*, 83StuW 1, p. 88 at p. 93 (2003); V. Heydt, *Einfluss des Gemeinschaftsrecht auf die Doppelbesteuerung*, in *Auslegung und Anwendung von Doppelbesteuerungsabkommen*, p. 32 at pp. 48 and 53 (W. Haarmann (ed.), Dr Otto Schmidt, 2004); H. Obser, *§ 8a KStG im Inbound-Sachverhalt – eine EG-rechtliche Beurteilung*, 14 IStR 23, p. 799 at p. 800 et seq. (2005); J. Schönfeld, *Doppelbesteuerung und EG-Recht – ergänzende Überlegungen zu Cordewener/Schnitger*, 83 StuW 1, p. 79 at p. 80 (2006); S. Enchelmaier, *Meistbegünstigung im EG-Recht – Allgemeine Grundsätze*, in *Meistbegünstigung im Steuerrecht der EU-Staaten*, p. 93 at p. 100 (A. Cordewener, S. Enchelmaier & C.P. Schindler eds, Beck 2006); G. Kofler, *Treaty Override, juristische Doppelbesteuerung und Gemeinschaftsrecht*, 16 SWI 2, p. 62 et seq. (2006); H. Loukota, *Gebiet EU-Recht einen DBA-Anrechnungsvortrag*, 16 SWI 6, p. 250 (2006); F. Vanistendael, *The ECJ at the Crossroads: Balancing Tax Sovereignty against the imperatives of the single market*, 46 Eur. Taxn. 9, p. 413 at p. 418 et seq. (2006) Journals IBFD; A. Schnitger, *Die Grenzen der Einwirkungen der Grundfreiheiten des EG-Vertrages auf das Ertragsteuerrecht*, p. 258 et seq. (IDW 2006); J. Malherbe & M. Wathélet, *Pending Cases filed by Belgian Courts: The Kerckhaert-Morres Case*, in *ECJ-Recent developments in Direct taxation*, p. 29 at p. 55 (M. Lang, J. Schuch, & C. Staringer eds., Linde 2006); M. Lehner, *Avoidance of Double Taxation within the European Union; Is There an Obligation under EC Law?*, in *Tax treaty law and EC law*, p. 11 at p. 20 et seq. (M. Lang, J. Schuch, & C. Staringer eds. Linde 2007); approving the view of the ECJ, however, see M. Lang, *Treaty Override und Gemeinschaftsrecht*, in *Reden zum Andenken an Klaus Vogel*, p. 59 at p. 75 (M. Lehner ed. Beck 2010); M. Lang, *Die jüngsten Empfehlungen der EU-Kommission auf dem Gebiet*

such an obvious obstacle to the functioning of the internal market, which juridical double taxation is, is deemed to be in line with EU law. This opinion of the ECJ is not shared by the European Commission.¹⁰

In view of its consistent line of case law on the issue, it must be accepted that the fundamental freedoms do not offer any remedy against juridical double taxation as such. Therefore, increased attention has been paid to the question of whether or not the ECJ would come to another solution in regard to a unilateral tax treaty override: in this instance, the Member States have taken the necessary measures to prevent juridical double taxation by assigning the taxing rights of the two Member States by means of a tax treaty, but one Member State has unilaterally undermined the treaty provisions. Although the ECJ's case law seemed to suggest otherwise,¹¹ it was frequently argued in the literature that such unilateral action against the aims of the tax treaty would be in contrast to the principle of loyal cooperation laid down in article 4(3) of the Treaty on European Union (TEU) (2007),¹² according to which "[t]he Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives". Given that the elim-

ination of juridical double taxation is an objective of the European Union – and this was conceded by the ECJ –¹³ a unilateral treaty override not only would infringe international treaty law, but also the principle of loyal cooperation in regard to EU law.¹⁴

Against this background, it was not surprising that, in October 2011, the ECJ was once again requested to issue a preliminary ruling on the issue of juridical double taxation of dividends. In this case, the referring Belgian Court of First Instance in Brussels tried to make use of the ideas that had been put forward in the literature.

2. Levy and Sebbag (Case C-540/11)¹⁵

2.1. Facts of the case

A Belgian couple, residing in Belgium, received dividends from a shareholding in France. In accordance with the Belgium-France Income Tax Treaty (1964),¹⁶ France levied a 15% withholding tax on dividends paid to non-resident shareholders. Belgium subsequently levied a 25% tax on incoming dividends and refused to grant a credit for the French withholding tax. The tax treaty provided for relief from double taxation by way of "a tax credit at the rate and in accordance with the detailed rules set out in the Belgian legislation for dividends".¹⁷ The national Belgian rules applicable at the time of conclusion of the tax treaty did indeed provide for elimination of juridical double taxation. However, due to legislative amendments, the legal basis for a credit for individuals was subsequently removed under domestic Belgian law. Instead, the French tax was merely deducted from the tax base in Belgium.¹⁸ Thus, the refusal to credit the French withholding tax resulted in a higher tax burden for the French dividends, which was attributable to the fact that they had (partially) been taxed twice; once in the source state and once in the residence state.

der direkten Steuern – Wo bleiben die Visionen?, IStR, p. 365 at p. 369 (2013); Rädler, *Entspricht unser Außensteuerrecht der Neuordnung unserer Außenwirtschaft im Gemeinsamen Markt?*, 37 *StuW* 27, p. 730 at p. 731 (1960); U. Eyles, *Das Niederlassungsrecht der Kapitalgesellschaften in der Europäischen Gemeinschaft*, p. 3777 et seq. (Nomos, 1990); M. Mössner & D. Kellersmann, *Grenzenlose Steuern – Fiktion oder Wirklichkeit?*, 110 *DVBl* 23, p. 968 at p. 970 (1995); H. Schaumburg, *Internationales Steuerrecht* para. 14.5 (1998); P. Farmer, *EC Law and national rules on direct taxation: A phoney war?*, 7 *EC Tax Rev.* 1, p. 13 at p. 14 (1998); H. Hahn, *Grenzüberschreitende Berücksichtigung von Betriebsstättenverlusten? – Bemerkungen zu einer neu entfachten Diskussion*, 11 *IStR* 20, p. 681 at p. 686 (2002); P. Wattel, *Corporate tax jurisdiction in the EU with respect to branches and subsidiaries: dislocation distinguished from discrimination and disparity; a plea for territoriality*, 12 *EC Tax Rev.* 4, p. 194 at p. 199 (2003); M. Gammie, *Double taxation, bilateral treaties and the fundamental freedoms of the EC Treaty*, in *A Tax globalist – Essays in Honour of Maarten J. Ellis*, p. 266 at p. 276 et seq. (H. van Arendonk, F. Engelen, S. Jansen, eds., (IBFD 2005), Online Books IBFD.

10. See Commission Communication, *Double Taxation in the Single Market*, COM(2011) 712 final (28 Mar. 2012), EU Law IBFD.

11. See, for example, DE: ECJ, 6 Dec. 2007, Case C-298/05, *Columbus Container Services B.V.B.A. & Co. v. Finanzamt Bielefeld-Innenstadt*, Mn. para. 46 et seq., ECJ Case Law IBFD: "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 none the less 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. [...], 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)" and *Damseaux* (C-128/08), para. 22: "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)".

12. Treaty on European Union of 13 December 2007, OJ C 306 (2007), EU Law IBFD.

13. FR: ECJ, 12 May 1998, Case C-336/96, *Gilly v. Directeur des services fiscaux du Bas-Rhin*, para. 16, ECJ Case Law IBFD.

14. See R. Seer, *Grenzen der Zulässigkeit eines treaty overriding am Beispiel der Switch-over-Klausel des § 20 Abs 2 ASiG – Part II*, 6 *IStR* 17, p. 520 at p. 522 et seq. (1997); in this direction see also T. Scheipers & A. Maywald, *Zur Vereinbarkeit des § 20 Abs 2 ASiG mit EG-Recht unter Berücksichtigung der Ausführungen des Generalanwalts Leger in der Rs. Cadbury Schweppes*, 15 *IStR* 14, p. 472 at p. 473 et seq. (2006); A. Schnitger, *§ 20 Abs 2 und 3 ASiG a.F. vor dem EuGH – Meistbegünstigung "Reloaded"*, 87 *FR* 21, p. 1079 at p. 1081 (2005); and J. Englisch, *Dividendenbesteuerung*, p. 258 et seq. (Dr Otto Schmidt 2005).

15. BE: ECJ, 19 Sept. 2012, Case C-540/11, *Daniel Levy and Carine Sebbag v. État Belge, SPF Finances*, ECJ Case Law IBFD.

16. *Convention between Belgium and France for the Avoidance of Double Taxation and the Establishment of Reciprocal Rules of Administrative and Judicial Assistance in Respect of Taxes on Income* (10 Mar. 1964), Treaties IBFD [hereinafter Bel.-Fr. Income Tax Treaty].

17. Art. 19A Bel.-Fr. Income Tax Treaty.

18. P. Smet & H. Laloo, *ECJ to Rule on Taxation of Inbound Dividends in Belgium*, 45 *Eur. Taxn.* 4, p. 158 (2005), *Journals IBFD*; and G. Kofler & R. Mason, *Double Taxation: A European Switch in Time?*, 14 *CJL* 1, p. 63 at p. 75 (2007).

2.2. Preliminary question

The preliminary reference in the *Levy and Sebbag* case represented the third time that a case concerning juridical double taxation of French dividends in the hands of Belgian individual shareholders was submitted to the ECJ for a preliminary ruling. In *Kerckhaert-Morres* (Case C-513/04)¹⁹ the preliminary question focused on the consistency of Belgian national law with the free movement of capital; in *Damseaux* (Case C-128/08)²⁰ the rules of the tax treaty were subjected to the scrutiny of the ECJ. Aware that, in both cases, the ECJ had denied that the free movement of capital had been infringed, the referring Belgian court approached the issue from yet another angle. In *Levy & Sebbag*, the focus was on what is referred to as a “step-back”: juridical double taxation, which had been eliminated at the time of concluding the Belgium-France Income Tax Treaty (1964), arose due to a change in Belgian national law.²¹ Consequently, the referring court expressed doubts as to whether Belgium had acted in accordance with the free movement of capital in conjunction with the principle of loyal cooperation.

According to the referring judge, each tax treaty that serves to eliminate juridical double taxation represents a step towards achieving the goals of the EU Treaty. Following a line of reasoning that had been suggested in the literature,²² the referring judge wondered whether or not Belgium had caused damage to a previously acquired right and had thus gone against the aims of the EU Treaty by changing its national law in such a way that it completely undermined Belgium’s obligations under the tax treaty. Although the change of Belgian national law did not constitute a tax treaty override - the tax treaty did not include an obligation for Belgium to completely eliminate double taxation, but only referred to Belgian national law - the referring judge was of the opinion that such an action could be considered as infringing article 10 of the EC Treaty (now article 4(3) of the TEU), according to which Member States shall abstain from any measures that could jeopardize the attainment of the objectives of the Treaty.

Furthermore, the judge held that, on the basis of articles 56 10, 57(2) and 293 of the EC Treaty (now articles 4 (3) and 64 (2) of the TFEU),²³ one could conclude that when two Member States have agreed to eliminate double taxation, these Member States cannot change this opinion at a later point in time and should ensure the elimination of double taxation.

For this reason, the Belgian Court of First Instance in Brussels referred the following question to the ECJ:

19. *Kerckhaert-Morres* (C-513/04).

20. *Damseaux* (C-128/08).

21. See L. De Broe, *Relief of Double Taxation of Cross-Border Dividends within the Union and the Principle of Loyal Cooperation*, 21 EC Tax Rev. 4, p. 180 (2012).

22. See M. Wathelet & L. de Broe, *Recent and Pending Cases involving Belgium*, in *ECJ – Recent and Pending Cases in Direct Taxation*, p. 33 et seq. (M. Lang, J. Schuch, and C. Staringer eds., Linde 2008); see also De Broe, *supra* n. 21.

23. Article 293, second sentence of the EC treaty was not included in the TFEU.

Is a Member State acting in compliance with Community law, and specifically in compliance with Art 56 EC, read in conjunction with Articles 10 EC, 57(2) EC and 293 EC, if it undertakes, in a double taxation convention with another Member State, to eliminate juridical double taxation of dividends resulting from the division of the power of taxation laid down in that convention but subsequently amends it in such a way that such double taxation is no longer relieved?

In its Order of 19 September 2012, the ECJ deemed this preliminary question to be an *acte éclairé*, simply referring to its previous decisions in *Kerckhaert-Morres* and *Damseaux*.

In this article, the authors analyse whether or not the ECJ could have come to a different conclusion on the grounds of the legal provisions referred to in the preliminary question.

3. Is There an EU Law Obligation To Ensure Double Taxation Is Eliminated?

3.1. Article 57(2) of the EC Treaty (now article 64(3) of the TFEU)

According to article 57(2) of the EC Treaty (now article 64(3) of the TFEU),²⁴ restrictions based on national provisions or provisions of EU law concerning capital movements with third states shall not be affected by the free movement of capital, provided they had already been in existence on 31 December 1993.²⁵ Hence, there is no obligation to eliminate these restrictions.²⁶ Article 57(1) of the EC Treaty (now article 64 (1) of the TFEU), however, precludes a worsening of those restrictions by means of a standstill clause: new restrictions on the free movement of capital may, according to article 57(2) of the EC Treaty (now article 64 (2-3) of the TFEU), only be implemented at the level of the European Union.²⁷ According to the case law of the ECJ, a restrictive provision that is, in principle, admissible may not be reinstated after it has been abolished, as this would be regarded as a step-back in establishing the free movement of capital.²⁸

Levy and Sebbag concerned capital movements between two Member States. Nevertheless, the referring court found it appropriate to refer to the standstill clause of article 57(2) of the EC Treaty. In doing so, the national court probably wanted to express that there is a parallel between article 57(2) of the EC Treaty, which deals with third country situations, and cases between Member States.²⁹ This reasoning seems tempting: if a standstill clause and a prohibition against step-back exists in regard to third states, it should

24. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), EU Law IBFD.

25. In regard to Bulgaria, Estonia and Hungary on 31 December 1999.

26. See M. Sedlaczek & M. Züger, art. 64 TFEU, in *EUV/AEUV-Kommentar*, Mn 10 (R. Streinz, ed. Beck 2012).

27. Since the Lisbon Treaty there is also the possibility for the Member States to pass such restrictive measures after authorization through an order of the commission or the council.

28. AT: ECJ, 11 Feb. 2010, Case C-541/08, *Fokus Invest AG v. Finanzierungsberatung-Immobilientreuhand und Anlageberatung GmbH (FIAG)*, para. 42, ECJ Case Law IBFD; and AT: ECJ, 24 May 2007, Case C-157/05, *Winfried L. Holböck v. Finanzamt Salzburg-Land*, para. 41, ECJ Case Law IBFD.

29. See De Broe, *supra* n. 21.

equally exist for capital movements between Member States.

However, in any event, the application of the standstill clause would require the ECJ to acknowledge a restriction in the specific legal situation. In cases concerning two Member States, a reference to article 57(2) of the EC Treaty (article 64(2-3) of the TFEU) would no longer be necessary, as this would lead to an infringement of article 63 of the TFEU in any event. The inclusion of article 57(2) (article 64(2-3) of the TFEU) alongside article 56 of the EC Treaty (article 63 of the TFEU) is, therefore, superfluous in cases within the European Union. Therefore, the ECJ rightly omitted this article in its decision.³⁰

3.2. Article 293, second sentence of the EC Treaty

Article 293 of the EC Treaty was the only provision that explicitly mentioned the issue of double taxation. The provision, which was deleted in the Lisbon Treaty, stated that, “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 precise meaning of this provision was often the topic of intense scientific discussions, in respect of which a short overview shall be given here.

The phrase “as far as is necessary” caused disagreement in regard to the influence of the provision on the competences of the European Union and its Member States. On the one hand, some opined that taking measures to avoid double taxation was solely within the competence of the Member States;³¹ on the other hand, the view was advanced that article 293 of the EC Treaty was applicable only if the aims mentioned therein were not already dealt with in other provisions of the EU Treaty, whether that be through the exercise of community competences or on

the basis of fundamental freedoms.³² The ECJ seemed to agree with the latter view, as it stated, in its case law, that:³³

[...] it flows, in the absence of any unifying or harmonizing measures, from the contracting parties' competence to define the criteria for allocating their powers of taxation as between themselves, with a view to eliminating double taxation.

So, in the end, article 293 of the EC Treaty did nothing more than confirm the existence of competing legislative competences of the Member States and the European Union in the area of direct taxation.³⁴

Another question raised in the literature was whether the second sentence of article 293(1) encouraged Member States to conclude multilateral rather than bilateral treaties,³⁵ (2) only meant the conclusion of bilateral treaties,³⁶ or (3) included both types of treaties.^{37,38} Only one multilateral convention had been concluded explicitly on the basis of article 293 of the EC Treaty: the EU Arbitration Convention (90/436).³⁹ Since the Arbitration Convention concerned the elimination of economic double taxation in the area of profit allocation for permanent establishments (PEs) and transfer pricing between associated enterprises, it at least showed that article 293 of the EC Treaty was not limited in scope to the elimination of juridical double taxation, but rather envisaged the elimination of all types of double taxation.⁴⁰

The legal content of article 293 was questionable also with regard to the initiation of bilateral and/or multilateral treaties. It is argued that Member States do not need authorization through EU law to conclude such treaties, as this is still a competence solely of the Member States.⁴¹ Further,

30. For a critical view see L. De Broe & T. Gernay, Belgium: the *Imfeld & Garcet* case and the *Levy* case, in ECJ – Recent Developments in Direct Taxation 2012, p. 9 et seq. (M. Lang, J. Schuch, C. Staringer, & P. Pistone eds., Linde 2012).

31. Proponents of this approach relied on the principle of subsidiarity in article 5(2) of the EC Treaty (now article 5(3) of the TFEU). See M. Lehner, *EU-Recht und die Kompetenz zur Beseitigung der Doppelbesteuerung in Doppelbesteuerungsabkommen und EU-Recht*, p. 13 et seq. (W. Gassner, M. Lang & E. Lechner eds., Linde, 1996); M. Lehner, *Annotations on the Judgment of the European Court of Justice, Case 336/96 – The Gilly Case – of 12 May 1988*, 52 Bull. Intl. Taxn. 8/9, p. 334 (1998); M. Lehner, *The Influence of EU Law on Tax Treaties from a German Perspective*, 54 Bull. Intl. Taxn. 8/9, p. 461 at p. 462 (2000); M. Lehner, *Der Einfluss des Europarrechts auf die Doppelbesteuerungsabkommen*, 10 ISTR 11, p. 329 et seq. (2001); M. Lehner, *Beseitigt die neue Verfassung für Europa die Verpflichtung der Mitgliedstaaten zur Vermeidung der Doppelbesteuerung?*, 15 IStR 12, p. 397 at p. 398 (2005); M. Lehner, *A Significant Omission in the Constitution of Europe*, 50 BTR 4, p. 337 at p. 338 et seq. (2005); M. Mössner, *Arbeitnehmerfreizügigkeit und DBA-Recht in Arbeitnehmer im Recht der Doppelbesteuerungsabkommen*, p. 13 at p. 15 et seq. (W. Gassner, M. Lang, J. Schuch, C. Staringer eds., Linde 2003); E. Reimer, *The Abolition of Article 293 EC: Comments on Hofmann's Analysis*, in *Double Taxation within the European Union*, p. 87 at p. 89 A. Rust ed., Wolters Kluwer 2011).

32. See, for example, H. Hofmann, *Double Tax Agreements: Between EU Law and Public International Law*, in Rust, *supra* n. 31, at p. 81 et seq.

33. See, for instance, *Gilly* (C-336/96), paras. 24 and 30; DE: ECJ, 21 Sept. 1999, Case C-307/97, *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen-Innenstadt*, para. 57, ECJ Case Law IBFD; NL: ECJ, 8 Nov. 2007, Case C-379/05, *Amurta SGPS v. Inspecteur van de Belastingdienst/Amsterdam*, para. 17, ECJ Case Law IBFD; *Orange European Smallcap Fund* (C-194/06), para. 32; and *Damseaux* (C-128/08), para. 30.

34. See G. Kofler, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht*, p. 389 (Linde 2007).

35. See for further references Kofler, *supra* n. 34, at p. 389, Mn. 585 with further references.

36. See for further references Kofler, *supra* n. 34, at p. 389, Mn. 586.

37. In this vein, Kofler, *supra* n. 34, at p. 389, Mn. 587 for further references.

38. The case law of the ECJ seems to point in the direction of a multilateral treaty, as the ECJ has often explicitly referred to a “multilateral convention [...] under Article 293 EC” (see, for example, *Gilly* (C-336/96), para. 24; NL: ECJ, 7 Sep. 2006, Case C-470/04, *N v. Inspecteur van de Belastingdienst Oost/kantoor Almelo*, para. 43, ECJ Case Law IBFD; UK: ECJ, 12 Dec. 2006, Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation v. Commissioners of Inland Revenue*, ECJ Case Law IBFD; and NL: ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, paras. 50 and 51, ECJ Case Law IBFD).

39. Arbitration Convention (1990): Convention 90/436/EEC of 23 July 1990 on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises, OJ L 225 (1990), EU Law IBFD.

40. The wording of article 293, second indent of the EC Treaty (not included in the TFEU, see *supra* n. 23), which calls for the “abolition of double taxation” [...] “for the benefit of their nationals”, would also allow for a different interpretation; see, for example, Kofler, *supra* n. 34, at p. 371; and C. Beul, *Wegfall des Art. 293 EG – Nachteil oder Chance?*, 13 Steueranwaltsmagazin 3, p. 87 at p. 90 (2011).

41. See Lang, *supra* n. 9, at p. 73.

article 293 does not preclude, in the event it is aimed only at multilateral treaties, the conclusion of bilateral treaties.⁴²

However, the most important, and in this context the most interesting, legal issue is the precise meaning of the wording of the second sentence of article 293 of the EC Treaty. It was unclear to what extent this sentence included an obligation for Member States to eliminate double taxation.⁴³ Although the exact wording mentions “entering into treaty negotiations”, it did not say “conclusion of double taxation conventions”. Thus, even where the aim of these negotiations is eventually the elimination of double taxation,⁴⁴ the wording of the provision would hinder any *effet-utile* interpretation leading to an obligation to conclude tax treaties.⁴⁵ Particularly with regard to the achievement of this aim, the second sentence of article 293 of the EC Treaty would not have been precise enough; it also did not refer to any time specifications, the taxes concerned or the method to avoid double taxation.⁴⁶

In well-settled case law of the ECJ, article 293 had no direct effect and thus did not grant any rights to taxpayers.⁴⁷ A breach of article 293 of the EC Treaty could not, therefore, be assumed if the treaty negotiations that the Member States had entered into did not lead to the conclusion of a tax treaty.⁴⁸ If, however, article 293 did not include an obligation for Member States to eliminate double taxation, the converse argument would be that a certain setback of the Member States concerned, whether through the termina-

tion of a tax treaty or through a treaty override, could not lead to a breach of article 293 either.⁴⁹ The legal significance of article 293 of the EC Treaty was, therefore, conceivably limited.⁵⁰ In the authors’ opinion, its earlier existence, as well as its deletion, has had little impact from a legal perspective.⁵¹

3.3. Article 10 of the EC Treaty (now article 4(3) of the TFEU)

Article 10 of the EC Treaty (now article 4(3) of the TFEU) states that:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.

Regardless of its general and imprecise wording, the ECJ and the vast majority of the authors in the literature interpret this provision in such a way that it can – independent from any provisions of primary or secondary law – establish autonomous duties for the European Union and its Member States. This may, for instance, happen when the discretionary power has been eliminated.⁵² This means that organs of the European Union or Member States do not have any remaining discretionary powers that could be left untouched by a judicial decision.⁵³ Typical areas for such an approach are procedural law,⁵⁴ as well as standstill obligations.^{55,56} A complementary constitutive effect of article 4(3) of the TFEU is furthermore assumed if the provision is used in combination with other provisions of EU law in order to specify implementation of obligations. In this respect, the more recent practice of the ECJ should be mentioned, which bases the Member States’ obligation to implement directives not only on article 288 of the TFEU and the specific provisions in the Directive, but also article 4(3) of the TFEU.⁵⁷ More specific consideration shows, however, that each of the mentioned results could have been achieved without the use of article 4(3) of the TEU

42. See Lang, *supra* n. 9, at p. 73; see also E. Reimer in Rust, *supra* n. 31, at p. 93.

43. See *Gilly* (C-336/96), para. 15: “[...] Art 220 is not intended to lay down a legal rule directly applicable as such, but merely defines a number of matters on which the Member States are to enter into negotiations with each other [...]”. See also BE: ECJ, 11 July 1985, Case 137/84, *Ministère public v. Mutsch*, para. 11.

44. See *Gilly* (C-336/96), para. 16: “Its second indent merely indicates the abolition of double taxation within the Community as an objective of any such negotiations [...]”.

45. See also R. Geiger, EUV/EGV, (ex-) Art. 220 EGV, Mn. 1 (Beck 2000); T. Scherer in *Handbuch der europäischen Steuer- und Abgabenrechts* § 31, Mn. 96 et seq. (D. Birk ed., Verlag Neue Wirtschafts-Briefe 1995); Kofler, *supra* n. 34, at p. 383 et seq.; for a different view see I. Schwartz & W. Mölls, art. 293 in *EUV/EGV Kommentar*, Mn. 24 et seq. (H. von der Groeben & J. Schwarze eds., Nomos 2004); H. Schneider, art. 293 in *Das Recht der Europäischen Union*, Mn. 5 (E. Grabitz, M. Hilf & M. Nettesheim eds., Beck 2005), with further references; A. Randelzhofer & U. Forsthoff, arts. 39-55 in *Das Recht der Europäischen Union*, Mn. 256 (E. Grabitz, M. Hilf, & M. Nettesheim eds., Beck 2001); C. Vedder, *Einwirkungen des Europarechts auf das innerstaatliche Recht und auf internationale Verträge der Mitgliedstaaten: die Regelung der Doppelbesteuerung*, in *Europarecht und Internationales Steuerrecht*, p. 1 at p. 9 (M. Lehner & O. Thömmes eds., Beck 1994); and F. Wassermeyer, *Die Vermeidung der Doppelbesteuerung im Europäischen Binnenmarkt*, in *Steuerrecht im Europäischen Binnenmarkt*, p. 152 at p. 158 (M. Lehner ed., DStJG Bd. 19 1996).

46. Kofler, *supra* n. 34, at p. 384.

47. *Mutsch* (Case 137/84); *Gilly* (C-336/96), para. 23 et seq. and 30; *Saint-Gobain ZN* (C-307/97), para. 57; NL: ECJ, 12 Dec. 2002, Case C-385/00, *F.W.L. de Groot v. Staatssecretaris van Financiën*, para. 93, ECJ Case Law IBFD; *D* (C-376/03), para. 50; NL: ECJ, 23 Feb. 2006, Case C-513/03, *Heirs of M.E.A. van Hilten-van der Heijden v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, para. 47, ECJ Case Law IBFD; and *N* (C-470/04), para. 43 et seq.

48. An infringement procedure of the commission would be possible if a state arbitrarily refuses to enter into negotiations. See, for example, J. Bröhmer, Art. 293 in EUV/AEUV, Mn. 4 (C. Callies & M. Ruffert eds., Beck 2011); as the conclusion of a tax treaty is not obligatory, however, such a procedure would only serve as a political statement. See *supra* n. 34, at p. 385.

49. See Lang, in Lehner, *supra* n. 9, at p. 73; for a different view see Reimer, in Rust, *supra* n. 31, at p. 94 et seq.

50. See also Lang, in Lehner, *supra* n. 9, at p. 73.

51. See Lang, in Lehner, *supra* n. 9, at p. 74.

52. W. Kahl in Callies & Ruffert, *supra* n. 48, at art. 4 EUV, Mn. 43; Streinz, in Streinz, *supra* n. 26, at art. 4, Mn. 27.

53. See Streinz, in Streinz, *supra* n. 26, at art. 4 EUV Mn. 27.

54. See BE: ECJ, Case 199/82, 9 Nov. 1983, *Amministrazione delle Finanze dello Stato v. SpA San Giorgio*, Mn. 14, ECJ Case Law IBFD; BE: ECJ, 2 Feb. 1988, Case 309/85, *Bruno Barra v. Belgian State and City of Liège*, para. 17 et seq.; UK: ECJ, 19 June 1990, Case C-213/89, *The Queen v. Secretary of State for Transport, ex parte: Factorame Ltd and others*, para. 19, ECJ Case Law IBFD. In this way the ECJ has derived the principles of efficiency and equivalence from article 4(3) of the TEU. See W. Kahl, in Callies & Ruffert, *supra* n. 48, at art. 10 EGV, Mn. 31 with further references.

55. See in detail W. Kahl, in Callies & Ruffert, *supra* n. 48, at art. 10 EGV, Mn. 53 et seq. and Mn. 63 et seq.

56. See W. Kahl, in Callies & Ruffert, *supra* n. 48, at art. 4 EUV Mn. 4 with further references; and R. Streinz, in Streinz, *supra* n. 26, at art. 4 Mn. 27.

57. See, for example, AT: ECJ, 12 July 2007, Case C-507/04, *Commission of the European Communities v. Republic of Austria*, Rn. 344 concerning Directive L 79/409/EWG.

and instead directly through the respective primary or secondary provisions of EU law.⁵⁸ Directives themselves, for instance, contain an implementation obligation connected to a time limit. Furthermore, this obligation can be derived directly from article 288(3) of the TFEU, which emphasizes the binding character of a directive.⁵⁹ Similarly, it is quite unconvincing to argue that the standstill obligations of Member States are not based directly on EU law (which has supremacy), which Member States have to comply with in any event.

What is also unclear is why - under national procedural law - the obligation to treat rights based on provisions of EU law and rights based on provisions of national law in an equal manner should be derived from article 4(3) of the TFEU. This obligation should, instead, be derived from the specific provision of (substantive) EU law itself: if it were up to the national legislator to frustrate an appeal against this provision through a refusal to apply measures of procedural law, the EU law basis for the claim itself would be in vain.⁶⁰

The principle of loyalty, as laid down in article 4(3) of the TFEU should, therefore, not be interpreted as anything other than the general principle of public international law referred to as "*pacta sunt servanda*", which states that Member States have to perform the duties of their agreements. The provision can, therefore - in accordance with its wording - which instructs Member States to "ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union", only have a declaratory or programmatic character.⁶¹

4. Conclusions

In light of its previous case law on the issue of juridical double taxation, the result reached by the ECJ in *Levy and Sebbag* is not surprising. The ECJ confirmed its point of view that the fundamental freedoms are not capable of solving the problem of juridical double taxation, since they do not provide criteria for the attribution of taxing rights.

One should agree with the ECJ that, even with the additional articles referred to in *Levy and Sebbag*, there could be no other result in a case where the free movement of capital was used as the only legal basis for the preliminary question. Article 293 of the EC Treaty and article 10 of the EC Treaty (now

article 4(3) of the TEU) both lack legal significance and article 57(2) of the EC Treaty (article 64(2) and (3) of the TFEU) is not applicable to cases within the European Union.

If one interprets the ECJ's case law such that the existence of juridical double taxation does not constitute an infringement of the fundamental freedoms, for reasons of consistency, the same outcome is to be expected in regard to juridical double taxation that arises due to a unilateral tax treaty override. If juridical double taxation is not considered an infringement of the fundamental freedoms in the first place, there is no obvious reason why this should change in regard to a treaty override.

However, from the wording of the ECJ's rulings, it might also be argued that the ECJ - though acknowledging the restriction - does not feel capable of resolving the issue by means of the fundamental freedoms due to a lack of criteria for attributing taxing rights. If such criteria were provided by means of a tax treaty - which was not the case in *Levy and Sebbag* - there would be no problem in identifying the state responsible for the internal market restriction.⁶²

Regardless of the way one interprets the case law of the ECJ in this respect, the fact remains that the ECJ sees itself as incapable of solving the problem of juridical double taxation on the basis of the fundamental freedoms. At the same time, it is undisputed that the existence of double taxation leads to distortions in the single market. Therefore, it is up to the EU legislator to adopt measures to counter the occurrence of juridical double taxation. The recent efforts of the European Commission⁶³ are a first step in the right direction and should be continued.

58. See B. Biervert, *EU Kommentar*, art. 288 AEUV, Mn. 27 (J. Schwarze ed., Nomos 2012); and Ruffert in Callies & Ruffert, *supra* n. 48, at EGV/EUV, art. 249, Mn. 46.

59. See W. Schroeder, in Streinz, *supra* n. 26, at AEUV, art. 288, Rn. 78; in this vein see also Ruffert in Callies & Ruffert, *supra* n. 48, at EGV, art. 249, Mn. 45; for a different view see Streinz, in Streinz, *supra* n. 26, at AEUV, art. 4 EUV, Mn. 28.

60. See Lang, in Lehner, *supra* n. 9, at p. 83.

61. See Lang, in Lehner, *supra* n. 9, at p. 82 et seq.; in this vein see also C. Vedder, art. 4 EUV, in *Europäisches Unionsrecht, Kommentar*, Rn. 26 (C. Vedder & W. Heintschel von Heinegg eds., Nomos 2011); for a different view, see Streinz, in Streinz, *supra* n. 26, at art. 4., Mn. 27 et seq.

62. As the ECJ is not competent to interpret the relationship between tax treaty law and national law, it would be very difficult to manage the above-mentioned approach. It would require that the referring court identify the treaty override explicitly in the preliminary question. However, the "overriding" state, interpreting the tax treaty differently and, therefore, not seeing itself as at fault, would then not have to regard the result of the ECJ's ruling as relevant. The ECJ's ruling would not lead to any effect at all. A solution to this problem could be the introduction of an arbitration clause, as laid down in article 25(5) of the *Convention between the Republic of Austria and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital and to Trade Tax and Land Tax* (24 Aug. 2000), *Treaties IBFD into the Member States' tax treaties*; see, for example, M. Züger, *Neue internationale Steuerfälle vor dem EuGH*, 10 SWI 3, p. 133 et seq. (2000); Cordewener, *supra* n. 9, at p. 785.

63. Commission Communication, *supra* n. 10; on 12 April 2012, the commission followed up on this communication and raised for discussion measures for the abolition of double taxation. On 12 April 2013 five options for proceeding in the future in respect of this issue were proposed at a "Stakeholder Meeting - Direct Taxation" in Brussels; see, with comments on these proposals, M. Lang, *Die Vermeidung der Doppelbesteuerung in der EU - Jüngste Initiativen der EU-Kommission*, 23 SWI 5, p. 206 et seq. (2013).