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CJEU – Recent Developments in Direct Taxation 2017

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CJEU – Recent Developments in Direct Taxation 2017

edited by

Michael Lang
Pasquale Pistone
Alexander Rust
Josef Schuch
Claus Staringer
Alfred Storck

Linde

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Preface

In the last few years, the Court of Justice of the European Union (CJEU) has had to deal with more and more cases concerning direct taxation and the fundamental freedoms. This is also due to the fact that the European Commission seems to be more and more willing to criticize national tax law systems and initiate infringement procedures against EU Member States. As all these cases are of great interest for academics as well as practitioners, they need to be analysed carefully.

From 16 to 18 November 2017, the conference "Recent and Pending Cases at the CJEU on Direct Taxation" took place in Vienna. A great number of experts on European and international tax law accepted our invitation to attend the conference and took part in the discussions. At the conference, cases in the field of direct taxation now pending before or recently decided by the CJEU were presented by experts from the respective countries. These national reporters provided insights into the national as well as the European background of the cases. These presentations were the basis for further lively discussions among the international participants. Possible consequences of these cases, the likely future CJEU decisions in the CJEU case law were discussed and analysed in detail. The results of the conference are published in this book.

The conference would not have been possible without the City of Vienna to whom we would like to express our thanks. In addition, we would like to express our sincere thanks to the authors who contributed to the conference by presenting the cases from their countries at the conference and getting actively involved in the discussions. Furthermore, they supported the entire project and the publication of this book by committing themselves to a strict time schedule. We are also grateful to the Linde publishing house for the co-operation and the quick realization of the publication of this book. Linde has generously agreed to include this book in its catalogue.

Our particular thanks go to *Renée Pestuka* and *Julia Macrory* for the smooth organization of the conference, to *Eleanor Campbell*, who edited and polished the texts of the authors, and to *Robin Damberger* and *Nadine Oberbauer*, who supported us in deciding on the structure of the conference and in the preparation and publication of this book.

Michael Lang
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Josef Schuch
Alfred Storck

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List of Authors

Philip Baker

Philip Baker is a barrister and Queen's Counsel practising from Field Court Tax Chambers in Gray's Inn. He was called to the bar in 1979, began practising in 1987, and took silk in 2002. He specializes in international tax issues, with a particular emphasis on double tax conventions, and on European Union law and taxation. He is a visiting professor at Oxford University and a visiting fellow at the Institute of Advanced Legal Studies, London University, and is the author of *Double Taxation Conventions* and the editor of the International Tax Law Reports.

Søren Friis Hansen

Søren Friis Hansen is professor of international company law at the Copenhagen Business School and was a member of the Committee that prepared the Danish Companies Act of 2009. His research deals with Danish company and tax law as well as European company law and tax law.

Marie Hemery

Marie Hemery is a Phd student at the Marchés, Institutions, Libertés research centre of Paris-Est Créteil University, under supervision of Professor Alexandre Maitrot de la Motte. Her interest lies in tax law and citizenship issues, especially within the European Union.

Roland Ismer

Roland Ismer holds the chair of Tax Law and Public Law at Friedrich-Alexander-University Erlangen-Nürnberg. He studied law and economics at the universities of Constance, Geneva and Munich as well as the London School of Economics and completed his PhD and habilitation thesis on tax law at the Ludwig-Maximilians-University of Munich. His research focuses on domestic and international tax law as well as VAT.

Eric C.C.M. Kemmeren

Eric C.C.M. Kemmeren is Professor of international tax law and international taxation at the Fiscal Institute Tilburg of Tilburg University, the Netherlands. He is also a member of the board of the European Tax College, Deputy Justice of the Arnhem Court of Appeals (Tax Division), and Of Counsel to Ernst & Young Belastingadviseurs LLP, Rotterdam, the Netherlands.

Guglielmo Maisto

Guglielmo Maisto founded Maisto e Associati in 1991. He is a Professor of international and comparative tax law at the Università Cattolica di Piacenza. He is President of the Italian Branch of the International Fiscal Association (IFA), a member of the Board of Trustees of the International Bureau of Fiscal Documentation (IBFD) in Amsterdam, a member of the Advisory Board of the Master of Advanced Studies in International Taxation of the Lausanne University and a member of the Board of the American Chamber of Commerce in Italy. He represents the Italian Association of Industries (Confindustria) at the OECD Business Industry Advisory Committee in Paris. He has acted as a consultant to the Ministry for European Community Affairs and was a member of the EU Joint Transfer Pricing Forum. He is a member of several law societies and of the editorial board of various Italian and foreign tax legal journals. He usually participates as a speaker at several annual tax conferences.

Alexandre Maitrot De La Motte

Alexandre Maitrot de la Motte is Professor of Tax Law at Paris-Est Créteil University, where he is associate Vice President (in charge of legal affairs & communication). He is Vice Dean of the Law Faculty and Head of the Public Law department and he is Director of the Master program Droit Fiscal, spécialité fiscalité appliquée. Specialized in European and International Tax Law, he directs the Revue de Droit Fiscal (LexisNexis) and the Juris-Classeur Fiscal International (LexisNexis). He is the author of numerous books and articles, including Droit Fiscal de l'Union européenne (Bruylant, 2nd edition, 2016, 867 p.). He has been provided services as an expert for the European Commission and the European Parliament (PANA Committee). More information on https://univ-droit.fr/universitaires/5807-maitrot-de-la-motte-alexandre.

Katerina Pantazatou

Katerina Pantazatou is Associate Professor in Tax law at the Faculty of Law, Economics and Finance, University of Luxembourg. She has been a visiting researcher at Harvard Law School and at the Institute for Austrian and International Tax law (WU) as an Ernst Mach scholar.

Ricardo Reigada Pereira

Ricardo Reigada Pereira is currently the managing partner of RRP Advogados and a lecturer at the Lisbon University School of Law. His experience includes advising on EU tax matters, public and private M&A deals, corporate reorganizations, real estate investments, structured and hybrid finance, restructuring of indebtedness and general tax disputes. He has an extensive list of cases where EU Law matters have been raised. He was also Secil's lawyer in the land mark case decided by the Court of Justice of the European Union. Ricardo has written several

academic papers and is a regular speaker at conferences. He has also become an arbitrator and since 2008 has been noted as a leading individual by Chambers Europe and recommended for his work in the Legal 500.

Fabrice Pezet

Fabrice Pezet was born in 1987. He has completed studies in Public Law and Tax Law and holds a PhD degree in European Tax Law. His works mainly focus on the impact of internal market objectives (primarily undistorted competition) on national tax principles and policies. His main research topics are: the complementarity between national tax principles and internal market objectives; and the scope of the concept of ability-to-pay in the European Court of Justice's legal reasoning.

Matthieu Possoz

Matthieu Possoz is a teaching assistant in tax law at the University of Louvain and a lawyer registered with the Brussels Bar. He holds a in master's degree in philosophy, a master's degree in law and a complementary master's in tax law. He works in the Brussels tax group Linklaters LLP and has extensive knowledge in Belgian and international tax law with particular emphasis on domestic and cross-border transactions and reorganizations, international tax planning, and the structuring of real estate transactions. His practice includes tax audit and tax litigation work.

Alexander Rust

Alexander Rust is Professor of Tax Law at the Institute for Austrian and International Tax Law of WU (Vienna University of Economics and Business). He has previously worked as: Professor of Tax Law and Director of the Master Program in European and International Tax Law at the University of Luxembourg; Acting Assistant Professor at New York University; assistant at the University of Munich; assistant judge and public prosecutor at the High Court of Munich; law clerk at the Ministry of Finance; and as a tax adviser in private practice.

Lauren Silberman

Lauren Silberman is a PhD Student at Paris Est Créteil University under supervision of Professor Alexandre Maitrot de la Motte. Her work concerns the theory of abuse of rights in national and international tax law.

Daniel S. Smit

Daniel Smit is a professor in taxation at the Fiscal Institute Tilburg, Tilburg University and is the author of more than 100 national and international publications in the field of European and international tax law. In June 2012, his PhD thesis was awarded the prestigious European Academic Tax Thesis Award 2012. Professor Smit has furthermore acted as a speaker at various national and international seminars and conferences and as a guest lecturer at various universities in the

Netherlands and abroad. In addition, he has been employed at EY since 2002 and is currently part of the International Tax Services team in Amsterdam.

Claus Staringer

Claus Staringer is a professor of tax law at the Vienna University of Economics and Business (WU) and a tax partner in the Vienna office of the international law firm Freshfields Bruckhaus Deringer.

Edoardo Traversa

Edoardo Traversa is a professor at the Université Catholique de Louvain (UCL) and a visiting professor at the KU Leuven and at the WU Vienna, where he spent the academic year 2013-2014. He has also taught in other European universities (Münster, Milano Bocconi, Valencia, Bologna). His research areas mainly cover constitutional tax law, fiscal and financial federalism, the interaction between taxation and public policies, and the development of the European tax integration and international aspects of the taxation of companies and individuals. He has also been consulted on taxation and public finance issues by public authorities at European Union, Belgian federal and regional levels. He is also a lawyer Of Counsel at the Brussels Bar (Liedekerke).

Austria:
CJEU Recent Case from Austria – Austria / Germany (C-648/15)

Claus Staringer

1. Overview

On 12 September 2017, the CJEU handed down its judgment in *Republic of Austria v Federal Republic of Germany* (C-648/15). This case is rather special: it concerns a dispute over the interpretation of a particular rule in the Austria-Germany tax treaty. This dispute is now resolved by the CJEU's judgment, the Court having acted, in effect, as an arbitration tribunal. The CJEU was given the competence to do this by the two contracting states in their bilateral tax treaty: when the Austria-Germany tax treaty established arbitration as the ultimate resolution mechanism over tax treaty disputes (in its Article 25 para. 5), the CJEU was explicitly chosen as the (exclusive) court of arbitration.

In this respect, the present case is absolutely unique: since the Austria-Germany tax treaty (which was negotiated around the year 2000), no other bilateral (or multilateral) tax treaty has given the CJEU such a role. For many years, there was no practical experience of any kind of arbitration under the Austria-Germany tax treaty itself. The present case is actually the first case ever for a dispute between the two states to have escalated to the CJEU for arbitration, after an unsuccessful mutual agreement procedure (MAP).

It is not surprising therefore, that several of the issues in case C-648/15, as discussed below, are (at least so far) unchartered territory. In this regard, the CJEU's judgment has given some answers to what have thus far been open questions.[1] The author has already speculated on some of these answers when discussing the case while it was still pending before the CJEU.[2] Hence, the analysis below provides an opportunity to verify whether the author's earlier speculations were correct.

2. The Dispute and the CJEU's Decision

A brief summary of the underlying dispute:[3]

The issue in dispute was whether Germany is allowed to levy a withholding tax on certain cross-border interest payments under Article 11 of the Austria-Germany tax treaty. Under the treaty the general rule for allocating taxing rights over cross-border interest payments is that the residence state of the recipient of the interest has the exclusive right to tax such interest. There is in general no right for the source state to levy tax (e.g. by withholding) on the interest payments (Article 11

1 See also J. Luts & C. Kempeneers, *Case C-648/15 Austria v. Germany: Jurisdiction and Powers of the CJ to Settle Tax Treaty Disputes Under Article 273 TFEU*, EC Tax Review 2018, p. 5; I. Kerschner, *Deutsche Genussscheinerträge: Debut des EuGH als DBA-Schiedsrichter*, ecolex 2017, p. 1102; H. Jirousek, *EuGH entscheidet im Schiedsverfahren zugunsten Österreichs*, SWK 2017 p. 1186.

2 See C. Staringer, *Austria,* in: M. Lang et al. (eds.), *CJEU Recent Developments in Direct Taxation 2016* (Vienna: Linde Verlag, 2017) p. 1.

3 See also C. Staringer, in *CJEU Recent Developments in Direct Taxation 2016*, p. 2 et seq.

para. 1 of the treaty). By way of exception, the source state is however allowed to levy a tax (with no percentage cap) on interest payments on debt instruments which have a profit participation (in the authentic German language: *Gewinnbeteiligung*).

The disputed issue was now whether a particular kind of interest payment is covered by Article 11 para. 2 of the treaty so that the source state (here Germany) may levy a source tax. The relevant facts of the case are as follows: A German issuer has issued profit participation rights (PPR) (in German: *Genussscheine*) to Austrian investors. The PPR had a fixed coupon, i.e. payments to investors under the PPR where calculated as a fixed percentage of invested capital. However, interest payments were only due where the issuer had sufficient profits to satisfy the coupon. If not, unpaid coupons were cumulated (i.e. carried forward) until the issuer became profitable enough to pay the accumulated coupons out of his profits.

The core question was therefore whether the PPR described above generated interest payments that could be classified as stemming "*from debt instruments with a profit participation*". If this was the case, Germany would be entitled to levy a source tax under Article 11 para. 2 of the treaty, leading to a credit obligation for Austria in respect of such German source tax. Otherwise (i.e. if no "*debt instrument with a profit participation*" was found to exist), Germany would not be entitled to levy any source tax and Austria consequently would not face any credit obligation under the treaty.

The CJEU has given a clear answer to this question in its judgment: tit has interpreted Article 11 para. 2 of the Austria-Germany treaty in such way that there is no right for Germany to levy a source tax on a PPR structured in the manner that it was in the present case. In other words, Austria has "won" the case.

Indeed, the outcome of the case is exactly consistent with the argument submitted by Austria in the proceedings: for the Austrian government, it was always very clear that a PPR such as in the case at hand cannot be a "*profit participating*" instrument because it has a fixed coupon (i.e. there is no percentage entitlement in the issuer's profit). The only "profit related" element in the PPR concerned is that the issuer is not required to make any interest payments in loss years (or less than the full payment in years where profit is not sufficient to meet the full coupon), but is allowed to carry forward the payment obligation into future profitable years. However, this mechanism is not a "*profit participation*", but at best a "condition of profitability" which is not covered by Article 11 para. 2 of the treaty.[4] The CJEU followed the substance of this argument, i.e. that instruments cannot fall under Article 11 para. 2 of the treaty if they are only *profit dependent*, but not *profit related*.

4 See I. Kerschner/ F. Koppensteiner/ C. Seydl, *Österreich erhebt aufgrund einer DBA-Streitigkeit erstmals Klage beim EuGH*, SWI 2016, p. 134 (134 et seq).

3. The Reasoning of the CJEU

While the CJEU's ultimate result is, in the author's view, convincing, the underlying reasoning it has employed to arrive at such result is more difficult to follow.

3.1. The Irrelevance of Domestic Law

The CJEU starts its analysis of the case with a reference to Article 3 para. 2 of the Austria-Germany tax treaty (which corresponds to Article 3 para. 2 of the OECD Model Convention), where it is stated that items not defined in the treaty should be given the meaning they have under the contracting states' domestic law.[5] This reference to Article 3 para. 2 is unfortunate as it could be seen as an indication that the CJEU indeed has looked, at least as a starting point, into domestic law to get an understanding of the term "*profit participation*" in Art 11 para. 2 of the Austria-Germany tax treaty. However, this creates the wrong impression. The CJEU's further reasoning clearly shows that in reality it rejects domestic law as the guiding source of interpretation in the present dispute.[6]

The CJEU arrives at this result through an elaborated interpretation of Article 25 para. 5 of the Austria-Germany tax treaty, i.e. of the treaty's arbitration clause. This clause would be ineffective if undefined terms (like "*profit participation*") were governed by the contracting states' domestic laws, as different domestic law backgrounds would then necessarily lead to a dispute that it could not resolve. There would simply be two "correct" interpretations of "*profit participation*", each following a different domestic law concept. This would deprive the arbitration clause of all practical effect. Therefore, the CJEU concludes that Article 11 para. 2 must be interpreted according to the methods of International Law (i.e. the Vienna Convention on the Law of Treaties) by its ordinary meaning, object and purpose.[7]

The whole analysis of the CJEU on the "interpretation by domestic or international law issue" is long and indeed is not even necessary. A quick answer to this issue could have been found in Article 3 para. 2 of the Austria-Germany tax treaty itself, where it is stated that domestic law can only be used for interpretation "*unless the context otherwise requires*". Actually, it seems that the CJEU has overlooked (or underestimated) this important part of Article 3 para. 2. Giving proper relevance to "*unless the context otherwise requires*" would have avoided the CJEU having to reinvent the wheel on tax treaty interpretation in this judgment.

5 CJEU 12 September 2017, C-648/15, *Republic of Austria v Federal Republic of Germany*, EU:C:2017:664, m.no. 35.

6 M. Lang, *DBA-Interpretation durch den EuGH*, SWI 2017, p. 507 (510 et seq.).

7 CJEU 12 September 2017, C-648/15, *Republic of Austria v Federal Republic of Germany*, EU:C:2017:664, para. 39.

3.2. The "Ordinary Meaning"

In the next step, the CJEU looks for the "*ordinary meaning*" of "*profit participation*" in Article 11 para. 2 of the Austria-Germany tax treaty. For such purposes, the court refers to "*everyday language*" which would understand a profit participation as meaning "*receiving a share in the positive income of the annual operations of an undertaking*". From this starting point, the CJEU concludes that it is the "*inherent variability and unpredictability of the annual income of any high-risk economic activity*" that is in the nature of a "*profit participation*", which is "*uncertain at the beginning of the financial year, liable to vary from one year to another, indeed capable of being zero*".[8]

By creating such definitions, the Court indeed gives a very precise verbal explanation of what an entitlement to a share in profits is. However, the CJEU should have been honest in disclosing that all this is more its *own* understanding of "*profit participation*" rather than the meaning of the term in "*everyday language*". In reality, it is rather unlikely that "*everyday language*" will contain a precise understanding of a technical term such as "profit participation".

3.3. The Contextual Analysis

Further, the CJEU wants to have its result on the "*ordinary meaning*" confirmed by a contextual analysis of Article 11 para. 2 of the Austria-Germany tax treaty. This treaty rule mentions "*profit participation*" next to "*profit sharing bonds*", "profit participating loans" and "silent partner". The CJEU's argument, which, as such, certainly makes good sense, is that this list of instruments must have a common element as to the required nature of profit entitlement in order for it to qualify under Article 11 para. 2 of the Austria-Germany tax treaty. In the CJEU's view, this common element is the varying remuneration of all these instruments, which, it considers to confirm the "*ordinary meaning*" found earlier.[9]

The CJEU has certainly good reasons for its view. However, it is interesting to see that the German *Bundesfinanzhof* (BFH) has also made this contextual argument (i.e. what is the common element in the listed instruments?) in its earlier jurisprudence, but arrived at the opposite result (i.e. that for a "*profit participation*" it is enough that a profit merely exists, even if the coupon itself is fixed, as this was seen by the BFH as the common element in Art 11 para. 2 of the treaty).[10] In fact, this BFH case law was actually the reason why Germany insisted on its position in the now decided case for so many years (notably, the case was brought to the

8 CJEU 12 September 2017, C-648/15, *Republic of Austria v Federal Republic of Germany*, EU:C:2017:664, para. 40 et seq.

9 CJEU 12 September 2017, C-648/15, *Republic of Austria v Federal Republic of Germany*, EU:C:2017:664, para. 44.

10 See BFH 26 August 2010, I R 53/09.

CJEU only after years of the unsuccessful MAP between the Competent Authorities of Austria and Germany). Obviously, Germany (i.e. the German Competent Authority) felt that it had to follow the longstanding view of the jurisprudence of the BFH as to the interpretation of the term "*profit participation*".[11]

The lesson to be learned from this "contextual analysis" exercise is that one has to be careful with a contextual (or systematic) interpretation.[12] Such interpretation necessarily has to presuppose what the "context" (in the present case: the common element of the instruments mentioned in Art 11 para. 2 of the treaty) really is. Depending on the presupposed "context", one may easily arrive at different outcomes which all claim to be based in the "context" of the term in question.

3.4. Rule versus Exception?

The most difficult part of the CJEU's reasoning is where the Court is going deeper into core concepts of tax treaty law.

According to the CJEU, Art 11 para. 2, providing for taxation in the source state, is to be seen as a derogation from the general principle of the tax treaty expressed in Art 11 para. 1 of the treaty, whereby interest is generally taxed in the residence state.[13] From this structure of Article 11 of the treaty, the CJEU concludes that that a "*criterion allowing for derogation from the agreed principle of taxation must be given a strict interpretation*".[14] Therefore, the term "*profit participation*" must be given a narrow meaning as such "*profit participation*" would create source taxation, which goes against residence taxation as the "*agreed principle of taxation*".

This approach of the CJEU is dangerous. It is nothing other than a "rule versus exception" logic, which is, from a methodological point of view, unacceptable.[15] A "rule versus exception" argument pre-empts what the "rule" and what the "exception" is, with the CJEU thinking that source taxation is exceptional (and therefore secondary) in nature. However, there is no such primary or secondary taxation right under a tax treaty. Rather, residence or source states are on an equal footing when it comes to the allocation of taxing rights by a tax treaty. It is true that the wording of many tax treaty allocation rules (like Art 11 para. 2 of the Austria-Germany tax treaty) mention residence taxation first, and then carve out cases of

11 See in detail H. Jirousek, *Schiedsverfahren nach Art 25 Abs 5 DBA Deutschland vor dem EuGH*, SWI 2017, p. 36 (40).

12 M. Lang, *DBA-Interpretation durch den EuGH*, SWI 2017, p. 507 (511 et seq.).

13 CJEU 12 September 2017, C-648/15, *Republic of Austria v Federal Republic of Germany*, EU:C:2017:664, para. 48.

14 CJEU 12 September 2017, C-648/15, *Republic of Austria v Federal Republic of Germany*, EU:C:2017:664, para. 49.

15 M. Lang, *DBA-Interpretation durch den EuGH*, SWI 2017, p. 507 (513.); Kerschner, *Deutsche Genussscheinerträge: Debut des EuGH als DBA-Schiedsrichter*, ecolex 2017, p. 1102 (1005).

source taxation. But by no means can this drafting technique downgrade source taxation to an exceptional or secondary allocation of taxing rights.[16]

3.5. Exemption over Credit Method?

Nonetheless, the CJEU has gone even further: the CJEU continues that Article 11 para. 2 of the Austria-Germany tax treaty has to be narrowed down (by interpreting "*profit participation*" narrowly), as otherwise the resulting source taxation would imply double taxation, "*the detrimental effects of which on the proper functioning of the internal market are only mitigated by the offsetting rule laid down in Article 23 paragraph 1 (b) and paragraph 2 (b) of the Austria-Germany tax treaty*".[17]

Obviously, the CJEU looks at the credit method (as prescribed for interest under the Austria-Germany tax treaty) as a mere "*mitigation of double taxation*", inferior to exclusive taxation in the residence state when it comes to the proper functioning of the internal market. This openly assumes that European Law would prefer the exemption over the credit method for the avoidance of double taxation, which is not evidenced by the CJEU's case law so far.[18]

More generally, it is not even clear what role "European values" (like the proper functioning of the internal market) should actually have for the interpretation of a bilateral tax treaty between two Member States. Absent any conflict with EU Fundamental Freedoms (which not even the CJEU assumes), there is no reason why a bilateral tax treaty should be interpreted in a way that is (at least in the CJEU's view) more in line with the internal market.[19] It seems that the CJEU has not been able to fully separate its conventional role as a court for issues of European Law from its present role as a tax treaty arbitrator.

4. The CJEU's Jurisdiction under Article 273 TFEU

As the present case C-648/15 is the first case ever to be decided by the CJEU as a tax treaty arbitrator, it was the perfect opportunity for the CJEU to clarify the requirements for its jurisdiction over tax treaty matters submitted for arbitration.

The main concept of Article 273 of the TFEU, where such jurisdiction has its legal basis, has already been outlined in the report the author previously provided on

16 M. Lang, *DBA-Interpretation durch den EuGH*, SWI 2017, p. 507 (513.); Kerschner, *Deutsche Genussscheinerträge: Debut des EuGH als DBA-Schiedsrichter*, ecolex 2017, p. 1102 (1005).

17 CJEU 12 September 2017, C-648/15, *Republic of Austria v Federal Republic of Germany*, EU:C:2017:664, para. 50.

18 M. Lang, *DBA-Interpretation durch den EuGH*, SWI 2017, p. 507 (515).

19 For a different view see J. Luts & C. Kempeneers, *Case C-648/15 Austria v. Germany: Jurisdiction and Powers of the CJ to Settle Tax Treaty Disputes Under Article 273 TFEU*, EC Tax Review 2018, p. 16.

case C-648/15 while it was still pending.[20] In the following paragraphs, the focus will be on the answers given by the CJEU to the main questions under Article 273 TFEU[21]:

- Is there a "*dispute between Member States*"?

This was "beyond doubt" in the eyes of the CJEU. Indeed it is the nature of tax treaty arbitration that the dispute is a "state-to-state" dispute, in this case between Member States.

- Does the dispute "*relate to the subject matter of the Treaties*"?

The CJEU clarified that for the purposes of being "related to" the subject matter of the Treaties, an objectively identifiable link to the subject matter of the Treaties is required. It is, however, not necessary that the dispute actually is on a subject matter covered by the Treaties.

For the CJEU, it was fairly clear that mitigation of double taxation manifestly has such a "*link to the subject matter of the Treaties*". In the Court's view, it was irrelevant in this respect that the earlier Article 293 EC (on removal of double taxation in the European Union) is no longer included in the TFEU.

In fact, before the present judgment this was seen as the most uncertain of the requirements of Article 273 of the TFEU and consequently Austria, in particular developed a rather detailed argument on this point in the proceedings[22]. It should now be clear that tax treaty disputes, if parties have agreed in a tax treaty that they be so submitted, are indeed within the CJEU's jurisdiction under Article 273 of the TFEU.[23]

- Is the disputed submitted to the CJEU "*under a special agreement between the parties*"?

The CJEU confirmed that Art. 25 para. 5 of the Austria-Germany tax treaty is such a special agreement. In its analysis, the CJEU noted that this provision of the tax treaty was not an arbitration clause specifically adopted with a view to resolving a concrete dispute. Nonetheless, it was sufficient for the CJEU that Article 25 para. 5 of the Austria-Germany tax treaty subjected to arbitration "*any potential dispute in predefined circumstances*". On this basis, Article 25 para. 5 of the Austria-Germany tax treaty was accepted as a "*special agreement between the parties*".

20 See C. Staringer, *Austria,* in: M. Lang et al. (eds.), *CJEU Recent Developments* in Direct Taxation 2016 (Vienna: Linde Verlag, 2017) p. 1.

21 See in detail the analysis of I. Kerschner/ F. Koppensteiner/ C. Seydl, *Österreich erhebt aufgrund einer DBA-Streitigkeit erstmals Klage beim EuGH*, SWI 2016, p. 134 (137).

22 See again I. Kerschner/ F. Koppensteiner/ C. Seydl, *Österreich erhebt aufgrund einer DBA-Streitigkeit erstmals Klage beim EuGH*, SWI 2016, p. 134 (137).

23 See in detail J. Luts & C. Kempeneers, *Case C-648/15 Austria v. Germany: Jurisdiction and Powers of the CJ to Settle Tax Treaty Disputes Under Article 273 TFEU*, EC Tax Review 2018, p. 5 (9 et seq).

5. The Effects of the CJEU Decision

Much was expected from the present case as to the legal effects of a CJEU arbitration judgement under Art. 273 of the TFEU. In particular, both Austria and Germany did claim in the proceedings that the CJEU should *order* the other state to refrain from levying a tax in the case (or refund an already collected tax), such order even being enforceable under Art. 280 of the TFEU. This would have been a significant departure from the import of a CJEU judgement in a conventional preliminary ruling case, where the CJEU would only give its interpretation on a legal issue, technically leaving the decision on the underlying case to the domestic courts.

However, the CJEU did not accede to this motion (but ordered Germany only to pay the costs of the proceedings). The CJEU was of the view that a reply on the legal question submitted was sufficient, so it provided only an answer to the interpretation issue presented by the parties. The Court explicitly refused to order Germany to refrain from taxing or even to reimburse taxes wrongfully levied.[24] Rather, it noted, softly, that "*it is therefore for Austria and Germany to draw the proper inference from the present judgment, by cooperating to that end in good faith*".[25]

The judgment is not entirely clear as to the reasoning behind this position.[26] The only explanation given is that the CJEU "*has no information available that would allow it to adopt a position in that regard*".[27] It seems that the CJEU wanted to avoid interference with existing domestic procedures potentially pending before courts of either of the two states.[28]

6. Conclusion and Outlook

The first ever tax treaty arbitration decision rendered by the CJEU has clarified many open issues. A long disputed interpretation issue of the Austria-Germany tax treaty is now successfully solved. Whether the parties (i.e. Austria and Germany) will be happy with the judgment, is, as always, a matter of perspective. Other observers of the case will not be entirely satisfied with the quality of the CJEU's reasoning, which is debatable in some aspects. Some of the question

24 CJEU 12 September 2017, C-648/15, *Republic of Austria v Federal Republic of Germany*, EU:C:2017:664, para. 55.

25 CJEU 12 September 2017, C-648/15, *Republic of Austria v Federal Republic of Germany*, EU:C:2017:664, para. 58.

26 See also J. Luts & C. Kempeneers, *Case C-648/15 Austria v. Germany: Jurisdiction and Powers of the CJ to Settle Tax Treaty Disputes Under Article 273 TFEU*, EC Tax Review 2018, p. 12.

27 CJEU 12 September 2017, C-648/15, *Republic of Austria v Federal Republic of Germany*, EU:C:2017:664, para. 57.

28 CJEU 12 September 2017, C-648/15, *Republic of Austria v Federal Republic of Germany*, EU:C:2017:664, para. 57.

marks behind the reasoning of the judgment may have their background in the CJEU's lack of experience in tax treaty matters, but this is not unusual for courts that are, by their design, not specialized in specific fields of law.

The real achievement of this case is that it is now firmly established that Member States can nominate the CJEU as a court of arbitration for a tax treaty dispute under Art 273 of the TFEU. This is not a small step. Given the significant importance of effective dispute resolution in today's international tax matters, it would indeed be an option to use the CJEU as a tax treaty arbitration court.

However, it seems that real life has moved away from such idea. So far, no other bilateral tax treaty between Member States has nominated the CJEU for arbitration. Even the European Union itself was sceptical about the use of the CJEU for such purpose. The recently adopted EU Directive on Tax Disputes Resolution Mechanisms[29], which mandates arbitration for treaty disputes between Member States from 1 July 2019, has chosen a different path. Although it was considered when the Directive was being developed,[30] the final version does not appoint the CJEU for arbitration. Whether this would have been different if *Republic of Austria v Federal Republic of Germany* (C-648/15) had been decided earlier is impossible to say but it now seems unlikely, given that the Member States are already preparing its implementation, that the European Union will replace the Directive's current arbitration system with the CJEU as a "European tax treaty arbitration court".

29 Council Directive (EU) 20017/1852 of 10 October 2017, OJ L 265, 14 October 2017.

30 See J. Luts & C. Kempeneers, *Case C-648/15 Austria v. Germany: Jurisdiction and Powers of the CJ to Settle Tax Treaty Disputes Under Article 273 TFEU*, EC Tax Review 2018, p. 5 (16).

Belgium: CJEU Recent Cases: Wereldhave (C-448/15), Fairness Tax (C-68/15), Argenta Spaarbank (C-39/16) and Van der Weegen and Others (C-580/15)

Edoardo Traversa/Matthieu Possoz

1. The Wereldhave Case (C-448/15)

1.1. Introduction[1]

In its judgment of 8 March 2017, the Court of justice decided on a request for preliminary ruling lodged by the Brussels Court of Appeal concerning the application of the Parent-Subsidiary Directive – and the application of the treaty freedoms. The case concerned a dividend distribution by a Belgian real estate investment fund (*société d'investissement à capital fixe immobilière, SICAFI/ vastgoed beleggingsvennootschap met vast kapitaal*) to its shareholders, two Dutch Real Estate Investment Trusts (REITs) that benefitted from the so-called FBI-regime (*Fiscale Beleggingsinstellingen*) for Dutch income tax purposes.

1.2. Facts and legislation

1.2.1. The Belgian withholding tax exemption on dividends

Article 106, § 5 of the Royal Decree implementing the Belgian Income Tax Code (RD/BITC) as applicable at the relevant time (1999) provides that no withholding tax is levied on dividends distributed by a Belgian subsidiary to its parent company resident in another Member State. This exemption is subject to two cumulative conditions:

i. The shareholding must represent at least 25% of the share capital of the subsidiary and must have been held or is to be held for an uninterrupted period of at least one year;
ii. Both the distributing subsidiary and the parent company must be companies as defined in Article 2c of the Parent-Subsidiary Directive i.e. "*a company that without the possibility of an option or of being exempt is subject to corporate income tax*".

However, the distribution of dividends between two Belgian companies is subject to a less onerous provision which provides for a full exemption of withholding tax subject to (i) a 25% participation threshold and (ii) a holding period of at least one year.

1.2.2. Facts

Wereldhave Belgium is a SICAFI established in Belgium. Its two main shareholders are Wereldhave International (35%) and Wereldhave (45%), two companies established in the Netherlands in the form of public limited companies.

1 The descriptions of the cases presented in this contribution are partly based on the following articles: N. Bammens, *Belgium: CJEU Recent Cases*, in: M. Lang et al. (eds.), CJEU – Recent Developments in Direct Taxation 2016, (Vienna: 2017), pp. 11-32 and E. Traversa, K. Van de Velden, *Belgium: Pending cases*, in: M. Lang et al. (eds.), CJEU – Recent Developments in Direct Taxation 2015, (Vienna: 2016), pp. 11-31.