

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT
ECONOMIC AND SCIENTIFIC POLICY **A**



Economic and Monetary Affairs

Employment and Social Affairs

Environment, Public Health and Food Safety

Industry, Research and Energy

Internal Market and Consumer Protection

**Workshop on Double
Taxation in the
European Union**

ECON



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

DOUBLE TAXATION IN THE EUROPEAN UNION

WORKSHOP

8 DECEMBER 2011, BRUSSELS

Abstract

Business and citizens risk being taxed by more than one Member State on the same revenue as soon as they cross an internal border within the Single Market even almost 20 years since its creation (according to the European Commission's recent Communication on Double Taxation COM(2011)712). A year before, the Commission outlined the most serious tax problems that EU citizens face in cross-border situations (e.g. discrimination, double taxation, difficulties in claiming tax refunds and in obtaining information on foreign tax rules) and it announced plans to ensure that tax rules do not discourage individuals from benefiting from the Internal Market (COM(2010)769). But Member States' tax systems remain to be un-coordinated and double taxation is far from being removed. The ECON Committee has thus put double taxation on its agenda and is discussing the draft Annual Tax Report (Rapporteur Olle Schmidt). This workshop seeks to facilitate the Report's discussion by introducing the subject and addressing important issues, such as the context of double taxation, implications for citizens, and the role of the Commission, the Council, the OECD (developing double taxation conventions) and the Court of Justice in driving changes of the present set-up.

This document was requested by the European Parliament's Committee on Economic and Monetary Affairs.

CONTRIBUTING EXPERTS

Georg KOFLER, University of Linz
Philip KERMODE, DG Taxation and Customs Union (European Commission)
Grace PEREZ-NAVARRO, OECD
Isabelle RICHELLE, HEC-Business School of the University of Liège
Volker HEYDT, Confédération fiscale européenne
Andreas STRUB, Head of Tax Policy Division (Council of the European Union)

RESPONSIBLE ADMINISTRATOR

Doris KOLASSA
Policy Department Economic and Scientific Policy
European Parliament
B-1047 Brussels
E-mail: Poldep-Economy-Science@europarl.europa.eu

ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its newsletter please write to:
Poldep-Economy-Science@europarl.europa.eu

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PROGRAMME OF THE DOUBLE TAXATION WORKSHOP



DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

WORKSHOP Programme: Double Taxation in the European Union

8 December 2011, European Parliament, Brussels

Room ASP 3E2; 10.30 - 13.00 hrs, Interpretation: DE, EN, FR

Chaired by Olle SCHMIDT (MEP), ECON Rapporteur

10.30 - 10.45 h Introduction and Opening remarks by Olle SCHMIDT, ECON Rapporteur (Annual Tax Report)

10.45 - 12.15 h Presentation Session:
Why does double taxation still exist in the EU? What are the effects? How to eliminate double taxation?

Presentations and Guest Speakers:

- *General overview on double taxation within the European Union (income tax, capital gains tax, inheritance tax)*
Georg KOFLER, Professor, University of Linz, Institut für Finanzrecht, Steuerrecht und Steuerpolitik
- *Double Taxation: Does the Internal Market tolerate it and the (possible) role of the European Commission in promoting Member States' approaches to eliminate it*
Philip KERMODE, Director, Directorate D: Direct taxation, Tax coordination, Economic analysis and Evaluation; European Commission, Directorate General Taxation and Customs Union
- *The purpose of double taxation treaties and the role of the OECD in their development*
Grace PEREZ-NAVARRO, Deputy Director Centre for Tax Policy and Administration, OECD, Paris
- *Approaches of the Court of Justice of the European Union on double taxation: effects and limitations*
Isabelle RICHELLE, Professor at the HEC-Business School of the University of Liège, co-president of the Tax Institute of the University of Liège and Member of the Brussels Bar Liedekerke Waelbroeck Kirkpatrick
- *Double Taxation of the citizen - a case of discrimination in the Internal Market*
Volker HEYDT, Rechtsanwalt (member of the Hamburg bar), member of the ECJ Task force of the CFE (Confédération Fiscale Européenne), retired Head of Unit TAXUD E3 (European Commission)

12.15 12.50 h Discussion: Questions & Answers with the Guest Speakers and
Andreas STRUB, Head of Tax Policy Division, Council of the European Union

12.50 13.00 h Closing remarks and close of the Workshop by Olle SCHMIDT, ECON Rapporteur

CURRICULA VITAE OF SPEAKERS

Georg KOFLER

Georg Kofler (1977) is Professor of Tax Law at Johannes Kepler University Linz, Austria. He has earned a doctorate in law as well as a doctorate in business administration in 2002 and 2003 respectively and an LL.M. in International Taxation from New York University in 2004. In 2006 he gained his postdoctoral lecturing qualification with a thesis on „Double Taxation Conventions and European Community Law“. He has worked with the International Department of the Austrian Federal Ministry of Finance (2002-2003 and 2009), as an Assistant Professor at the University of Linz (2001-2002 and 2004-2006) and at New York University (2006-2008). He is a member of several professional organizations and serves as head of the EU tax law group of the scientific council of the Austrian chamber of tax advisors and as a deputy member to the direct tax committee of the Confederation Fiscale Européenne. He is also a member of the academic staff or correspondent of several business and tax law journals and has published and lectured widely on issues of Austrian, International and European taxation. Detailed information is available at www.steuerrecht.jku.at/gwk.

Philip KERMODE

Philip Kermode is a graduate of Trinity College Dublin and a member of the Institute of Taxation in Ireland. He has worked in different functions in the Commission's Taxation and Customs Union Directorate General and in the Commission's Anti-Fraud Service (OLAF). Since November 2008 he has been Director responsible for 'Direct taxation, Tax coordination, Economic analysis and Evaluation' where his main responsibilities are in relation to direct taxation policy.

Grace PEREZ-NAVARRO

Grace Perez-Navarro is the Deputy Director of the OECD's Centre for Tax Policy and Administration. Since joining the OECD in 1997, she has held several key positions, including having led the OECD's work on bank secrecy, tax and e-commerce, harmful tax practices, money laundering and tax crimes, the tax aspects of countering bribery of foreign officials, and strengthening all forms of administrative cooperation between tax authorities.

Prior to joining the OECD, Ms. Perez-Navarro was a Special Counsel at the IRS Office of the Associate Chief Counsel (International) where she was responsible for coordinating guidance provided to field offices on international tax issues, overseeing litigation of international tax issues, negotiating TIEAs, overseeing the drafting of regulations, rulings and other policy advice and participating in treaty negotiations. In 1993, she was seconded by the IRS to the OECD to launch the revision of the OECD's Transfer Pricing Guidelines.

Isabelle RICHELLE

Isabelle Richelle specialises in tax law and, in particular, in corporate taxation, European and international taxation, and environmental taxation. Her practice encompasses restructurings, real estate and wealth planning. She joined Liedekerke as a Lawyer in 2006 after having spent several years working as a Senior Manager for an international consulting firm.

She is a member of several scientific organisations (IFA, EATLP), expert on the Tax Committee of the Confédération Fiscale Européenne (CFE), member of the ECJ Task Force of the CFE, and member of the Editorial Board of the European Tax Case Tracker (LexisNexis). She is the author of many publications and speaks regularly at conferences. She is also a Deputy Judge at the Namur Court of First Instance. Isabelle Richelle was an Assistant Lecturer at ULg and ULB and Senior Lecturer for the Masters on Tax Management at the Solvay Business School. She is a Professor on taxation at the HEC - Business School of the University of Liège since 1987 and at the Ecole Supérieure des Sciences Fiscales in Brussels. She is also the co-president of the Tax Institute of the University of Liège. She has a degree in law and a specialised degree in tax law. Her doctoral thesis was entitled "Concept and treatment of losses in tax law – national and international aspects".

Volker HEYDT

Volker HEYDT practices since 2009 as a lawyer (member of the Hamburg Bar) in Brussels. He started his legal studies in Hamburg and Münster and passed the second state examination 1968 in Berlin and continued to work as assistant to Prof. Bülck at the Speyer Postgraduate School of Public Administration until 1972. From 1972 to 1973 he was second secretary to the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe in Strasbourg, followed by the position of director of studies at the Gustav Stresemann Institute which he held until 1977. From 1978 until his retirement in 2007, he served as official of the European Commission in Brussels, dealing in different units with taxation and financial institutions. As of 1983 he was seconded to the Federal German Ministry of Economics in Bonn for three years. He was appointed as Head of unit (TAXUD E 3) in the European Commission in 2004, in charge of monitoring the application of Union law in the field of direct taxation.


Andreas STRUB

Andreas Strub is an official at the Council of the European Union since 1991. He started his career in the DG C Internal Market (Desk Officer for company law, internal market legislation). Since 1993, he has been mainly dealing with European Foreign and Security Policy (Balkans, former Soviet Union countries). In 1997, he became a Member of the Private Office of the Secretary- General (Adviser for CFSP). In October 1999, he became a Member of the Policy Unit reporting to Dr. Javier Solana (Secretary-General of the Council of the EU and High Representative for the CFSP), Adviser for Middle East Peace Process. Between 2004 and 2010, he acted as a Deputy/Personal Representative to HR Solana for non-proliferation.

He has been appointed Head of Unit within DG G (Economic and Social Affairs) of the GSC in June 2010. He is in charge of Tax Policy (e.g. Energy taxation, Financial Transaction Tax, Savings Directive, negotiations with third countries, VAT Strategy, Tax Policy Coordination under Euro Plus Pact) and Export Credits (EU coordination in advance of OECD meetings; transformation into EU legislation).

1. PRESENTATION BY GEORG KOFLER

University of Linz, Institut für Finanzrecht, Steuerrecht und Steuerpolitik.

 JOHANNES KEPLER
UNIVERSITY LINZ | JKU


Univ.-Prof. DDr. Georg Kofler, LL.M. (NYU)

General Overview on Double Taxation within the European Union

Workshop “Double Taxation within the European Union”

European Parliament
Brussels, 8 December 2011

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 JOHANNES KEPLER
UNIVERSITY LINZ | JKU

Double Taxation

- **Double Taxation**
- Double or Multiple Inclusion of Income, Capital Gains or Wealth
- “Juridical Double Taxation”
- “Economic Double Taxation”
- Non-Deductibility of Costs, Losses or Debt
- **Double Non-Taxation and Beyond**
- Non-Taxation of Income, Capital Gains or Wealth
- Double or Multiple Deductions of Costs, Losses or Debt
- Combinations of Non-Taxation and Deductions

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Juridical Double Taxation: Framework

	Tax Treaties	EU Law
Income Taxation		▪ —
Corporate Taxation	▪ 341 out of 351 bilateral relations between EU MS covered	▪ Parent-Subsidiary-Directive (Recast) ▪ Interest-Royalties-Directive (→ recast proposal in COM(2011)714)
Inheritance Taxation	▪ 30 (16) out of 351 (153) bilateral relations between EU MS covered	▪ —
Gift Taxation	▪ 12 (7) out of 351 (153) bilateral relations between EU MS covered	▪ —

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Juridical Double Taxation: Problems

	Tax Treaties	EU Law
Conflicts of Qualification	<ul style="list-style-type: none"> ▪ Art 23 and Art 3(2) OECD MC and Art 23 Paras 32.1-32.7 OECD MC Comm (avoidance of double taxation is based on differences in domestic law) ▪ Art 23A(4) OECD MC and Art 23 Paras 56.1-56.3 OECD MC Comm. (avoidance of certain double non-taxation) ▪ Art 1 Paras 2-6.7, Art 4 Para 8.7, Art 23 Paras 69.1-69.3 OECD MC Comm (conflicts based on different entity qualification) 	<ul style="list-style-type: none"> ▪ Parent-Subsidiary-Directive (Recast) ▪ Interest-Royalties-Directive (→ recast proposal in COM(2011)714)
Triangular Situations	<ul style="list-style-type: none"> ▪ Art 4(2) and (3) and Art 4 Para 8.2 OECD MC Comm (tie-breaker rules for dual residency situations) ▪ Art 24(3) OECD MC and Art 24 Paras 48 et seq. OECD MC Comm (non-discrimination for dividends received by permanent establishments) 	<ul style="list-style-type: none"> ▪ Parent-Subsidiary-Directive (Recast) ▪ Interest-Royalties-Directive (→ recast proposal in COM(2011)714)
Administrative Burdens	▪ —	▪ Recommendation on withholding tax relief procedures, C(2009)7924
Binding Solution?	▪ Art 25(5) OECD MC	<ul style="list-style-type: none"> ▪ Arbitration Convention and Revised Code of Conduct, [2009] OJ (C 322), 1 (also applies to profit attribution to permanent establishments) ▪ "Initiative to address double taxation within the EU, including an arbitration mechanism for double taxation disputes" (announced for 2013)

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Economic Double Taxation: Problems

	Tax Treaties	EU Law
Transfer Pricing	<ul style="list-style-type: none"> Art 9 OECD MC and OECD TPG (effectively extended to the attribution of profits to permanent establishments through the "Authorized OECD Approach" in the 2008 Update to the OECD MC Comm and the new version of Art 7 in the OECD MC Update 2010) 	<ul style="list-style-type: none"> Arbitration Convention and Revised Code of Conduct, [2009] OJ (C 322), 1 (also applies to profit attribution to permanent establishments) Other work of the JTPF, e.g., Code of conduct on transfer pricing documentation (EU TPD), [2006] OJ (C 176), 1, and Guidelines for Advance Pricing Agreements within the EU, COM(2007)71 Proposal for a Common Consolidated Corporate Tax Base, COM(2011)121
Cross-Border Dividends	<ul style="list-style-type: none"> Generally, only avoidance of juridical double taxation (Art 10 and 23 OECD MC) 	<ul style="list-style-type: none"> Parent-Subsidiary-Directive (Recast) (10% ownership requirement) Case Law of the ECJ (e.g., <i>Lenz</i>, <i>Manninen</i>, <i>ACT GLO</i>, <i>FII GLO</i>, <i>Amurta</i>, <i>Haribo and Salinen</i> etc) Communication on "Dividend taxation of individuals in the Internal Market", COM(2003)810, and Initiative on "Tackling discrimination and double taxation of dividends paid across borders" (announced for 2nd half of 2012)
Exit Taxation	<ul style="list-style-type: none"> — 	<ul style="list-style-type: none"> Case Law of the ECJ (e.g., <i>du Saillant</i>, <i>N</i>, <i>National Grid Indus</i>) Communication on "Exit taxation and the need for co-ordination of Member States' tax policies", COM(2006)825, and Council Resolution on co-ordinating exit taxation, 2911th ECOFIN (Dec. 2, 2008)

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Non-Deductibility: Problems

- Non-Deductibility of Costs or Losses
- Non-Deductibility of Costs incurred in Relation to (Exempt) Foreign Income or Allocation of Costs to Foreign Income
- Non-Deductibility → Case Law of the ECJ (e.g., *Bosal*, *Keller Holding*)
- Allocation → Case Law of the ECJ (e.g., *De Groot*) and the EFTA Court (*Seabrokers*)
- Non-Deductibility of Losses incurred in (Exempt) Foreign Permanent Establishments or Foreign Subsidiaries
- Communication on "Tax Treatment of Losses in Cross-Border Situations", COM(2006)824 (see also the withdrawn Proposal COM(90)595, [1991] OJ (C 53), 30)
- Permanent Establishments → Case Law of the ECJ (e.g., *Lidl Belgium*)
- Subsidiaries → Case Law of the ECJ (e.g., *Marks & Spencer*, *Oy AA*, *X Holding*)

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Conclusions

- Broad Solutions for “Positive Double Taxation” in the OECD MC and OECD MC Comm, however
 - Divergent Application of Tax Treaties by Member States
 - Lack of Binding Solutions (e.g., Arbitration)
 - Incomplete Treaty Network and Unilateral Relief for Inheritance and Gift Taxes
- Juridical Double Taxation not addressed by EU Fundamental Freedoms (e.g., *Kerckhaert-Morres*, *Block*, *Damseaux*) and Limited Scope of Existing EU Directives
- Non-Deductibility and Non-Discrimination
- Double Taxation created by
 - Anti-Avoidance Provisions
 - Anti-Arbitrage Provisions

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Thank you!

- Univ.-Prof. DDr. Georg Kofler, LL.M. (NYU)
Institute for Fiscal Law, Tax Law and Tax Policy
Johannes Kepler University Linz
Altenberger Str. 69, 4040 Linz, Austria
Tel: +43/732/2468-8205
Mail: georg.kofler@jku.at
Web: www.steuerverrecht.jku.at/gwk

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2. PRESENTATION BY PHILIP KERMODE

Director, Directorate D: Direct taxation, Tax coordination, Economic analysis and Evaluation; European Commission, Directorate General Taxation and Customs Union.



European Commission
Taxation and Customs Union

EUROPEAN PARLIAMENT
Directorate General for Internal Policies
Workshop "Double Taxation in the European Union"
Brussels, 8 December 2011




Double Taxation

Philip Kermode

**Director, Directorate D: Direct Taxation, Tax
Coordination, Economic Analysis and Evaluation
DG Taxation and Customs Union
European Commission**

WHAT IS DOUBLE TAXATION ?

- *Cross-border relationships*
- *Unresolved «overlap» of tax sovereignty or uncoordinated tax policies (e.g.: dual residences)*
- *Effects:*
 - *barrier for cross-border establishment in the Single Market (Monti Report)*



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CJEU CURRENT INTERPRETATION OF EU LAW

Margarete Block (C-67/08)

Judgement 12 February 2009



Inheritance taxes

*«...in the current stage of the development of Community law, the Member States enjoy a certain autonomy in this area provided they comply with Community law, and **are not obliged** therefore to adapt their own tax systems to the different systems of tax of the other Member States in order, inter alia, to eliminate the double taxation arising from the exercise in parallel by those Member States of their fiscal sovereignty.»*



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WHY LEGISLATE/ACT TO REMOVE DOUBLE TAXATION ?

Existing Legislation at EU Level:

- **Parent/Subsidiary (90/435/EEC)**
- **Interest & Royalties (2003/49/EC)**
- **Mergers (90/434/EEC)**

Logic based on
Internal Market

Double taxation can
undermine Internal Market



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WHY LEGISLATE/ACT TO REMOVE DOUBLE TAXATION ?

Other current responses at EU Level ...

- ***Arbitration Convention***
- ***Joint Transfer Pricing Forum***

... and at Bilateral or Unilateral Level

- ***Double Tax Conventions***
- ***Domestic measures***



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WHY LEGISLATE/ACT TO REMOVE DOUBLE TAXATION ?

CONSULTATIONS/ STUDIES /STATEMENTS

- ***Company Tax Study*** (2001): double tax an issue
- Confirmed in ***Monti Report*** (2010)
- Commission **Public consultation** in 2010 confirms public perception of damage:
(*significant cases detected*)
 - ***>20% = 1 million € for enterprises***
 - ***>35% = 100.000 € for individuals***



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WHY LEGISLATE/ACT TO REMOVE DOUBLE TAXATION ?

CONSULTATIONS/ STUDIES /STATEMENTS



*«...The harmful effects on the exchange of goods and services and movements of capital, technology and persons are so well known that **it is scarcely necessary to stress the importance of removing the obstacles that double taxation presents to the development of economic relations** between countries. »*
(OECD, MTC introduction)



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CAN ACTIONS OTHER THAN LEGISLATION SUCCEED IN REMOVING DOUBLE TAXATION?

THE "COORDINATION APPROACH" : COM (2006)823



➤ Key principles:

- ❖ *Removing discrimination and double taxation*
- ❖ *Preventing inadvertent non-taxation and abuse*
- ❖ *Reducing compliance costs associated with being subject to more than one tax system*

➤ Identification of the mismatch/disparity issues in relation to qualification of debt/equity and hybrid companies



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CAN CURRENT INITIATIVES SUCCEED IN MAKING PROGRESS ?

Coordination follow-up: current initiatives

- **Removing cross-border tax obstacles for EU citizens** COM(2010)769 + SEC(2010)1576)
 - ✓ *More pro-active approach to taking and pursuing infringements*
- **Double Taxation in the Single Market** COM(2011)712
 - ✓ *Tackling double taxation for a stronger Single Market*



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CAN CURRENT INITIATIVES SUCCEED IN MAKING PROGRESS ?

Coordination follow-up: current initiatives

Double Taxation in the Single Market

- **Dispute resolution** *potentially a key issue*
 - ✓ *proposal for an efficient dispute resolution mechanism*
- **EU Forum** *on double taxation*
 - ✓ *promote (for subjects purely EU or EU Law related) a more consistent interpretation and application of DTC provisions between EU MS*
- *Extension of the coverage and/or the scope of double tax conventions*
 - ✓ *need to complete the framework of DTC*
 - ✓ *solution of some existing problem (eg. DK/FR/SP)*



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CAN CURRENT INITIATIVES SUCCEED IN MAKING PROGRESS ?

Coordination follow-up: next initiatives

- **Inheritance tax**
 - ✓ *Coming soon: initiative targeting double taxation aspects and discrimination: recommendations to the Member States*
 - **Cross-border “portfolio” dividends**
 - ✓ *Initiative in 2012 on the use of withholding taxes in the case of portfolio investments*
- and double non-tax?**



CAN LEGISLATION HELP ?

- **Interest & Royalties proposal**
COM(2011)714 (recast of the directive)
 - ✓ *Reduce withholding tax on payments when same payments are taxed in another Member State*
 - ✓ *Update and alignment on Parent / Subsidiary thresholds*
- **Common Consolidated Corporate Tax Base (CCCTB) - COM(2011)121**
 - ✓ *Technical discussions in Council, potential to solve many corporate tax issues, **THE legislative solution***



Optional system will leave questions to be answered !



THANK YOU FOR YOUR ATTENTION !!

For more information on double taxation and the Single Market, please consult our communication:

[http://ec.europa.eu/taxation_customs/resources/documents/common/whats_new/com\(2011\)712_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/common/whats_new/com(2011)712_en.pdf)

or visit our website:

http://ec.europa.eu/taxation_customs/common/about/welcome/index_en.htm



3. PRESENTATION BY GRACE PEREZ-NAVARRO

Deputy Director Centre for Tax Policy and Administration, OECD, Paris.

The Purposes of Tax Treaties and the Role of the OECD in their Development

8 December 2011

Grace Perez-Navarro
Deputy Director, OECD CTPA



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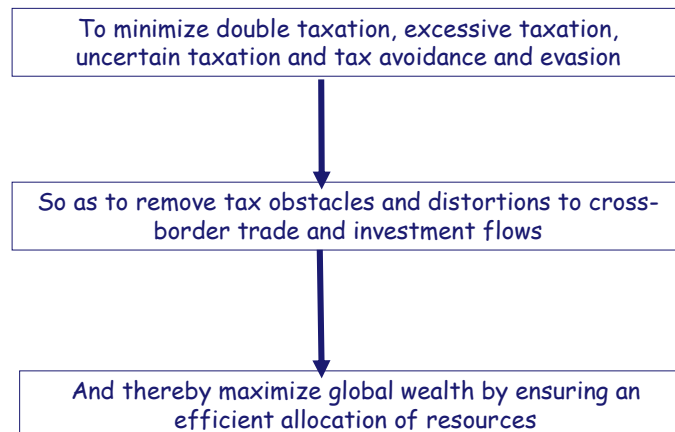
Tax Treaties

- There are currently around 3600 bilateral tax treaties
- These are part of the infrastructure of our global economy in the same way as
 - the WTO agreements that regulate cross-border trade
 - the bilateral investment agreements that regulate cross-border investment



2

Objectives of Tax Treaties



3

How Do Treaties Achieve these Objectives?

Tax Treaties:

1. Eliminate the most common forms of juridical and economic double taxation
2. Eliminate or reduce some taxes that would otherwise be payable by foreign investors
3. Eliminate some forms of tax discrimination
4. Provide a standardized set of rules for dividing tax revenues between countries



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How Do Treaties Achieve these Objectives? (cont.)

Tax Treaties:

5. Address tax evasion and avoidance
6. Provide a framework for settling tax disputes
7. Provide a stable tax environment to foreign investors



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1. Eliminate the Most Common Forms of Double Taxation

- The majority of tax systems provide for taxation on both residence and source basis
- Countries have different rules to trigger worldwide taxation and a person may therefore be subject to worldwide taxation in more than one State
- Countries have different source rules so a person may be subject to source taxation in more than one State



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Do We Need Tax Treaties to Eliminate Double Taxation?

- Most systems have unilateral rules for eliminating double taxation of residents earning foreign income BUT
 - These rules do not address cases where both States consider the same person to be a resident (treaties deal with that)
 - These rules depend on each country own source rules, which do differ (treaties provide common source rules)



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2. Eliminate or Reduce Some Taxes that Would Otherwise be Payable

- Domestic tax law of most countries impose withholding taxes, frequently at high rates, on payments of dividends, interest, royalties and/or services to foreigners
- These are usually taxes on payments, not on income, and can therefore result in taxation that exceeds the net profit derived from a transaction
- These tariff-like taxes create economic distortions, particularly for financial sector
- Tax treaties provide for a bilateral reduction / elimination of these taxes, which parallels the objectives pursued by WTO agreements as regards tariff
- The negotiation of these reductions is often the main topic of discussion during negotiations



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3. Eliminate Some Forms of Tax Discrimination

- “Trade without discrimination” is a fundamental principle of the WTO agreements that guide our multilateral trading system
- There is a need to balance this fundamental principle with the need to allow legitimate distinctions that take account of the different compliance situation of local and foreign taxpayers
- This difficult balancing act is the role of the non-discrimination provisions of tax treaties



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The Non-Discrimination Provisions of Tax Treaties

- These carefully drafted rules seek to prevent tax measures that are disguised forms of protectionism while taking into account the different compliance positions of local and foreign taxpayers



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4. Provide Standardized Rules for Dividing Tax Revenues between Countries

- Tax treaties provide a clear set of international standards for the allocation of taxing rights
- Many of these rules take account of the compliance and administrative considerations that arise from the source taxation of foreigners, thereby facilitating cross-border trade
- For example
 - Subject to some specific exceptions, only the business profits of a foreign enterprise that are attributable to a permanent establishment situated in a country may be taxed in that country
 - If the business activities of a foreign enterprise that are carried on at a given location that would otherwise be a permanent establishment are only preparatory or auxiliary, the country will have no taxing right on the profits from these activities



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Standardized Rules for Dividing Tax Revenues

- These rules also provide that source taxation, where allowed by treaty, has priority over residence taxation (through the credit or exemption method)
- These rules therefore eliminate a number of disputes that would otherwise arise between countries as to which country should have the right to tax particular items of income
- They also allow foreign enterprises that have limited business interaction with a country (e.g. merely exporting to that country or only carrying on preparatory or auxiliary activities) to escape the burden of having to comply with the different tax systems of two countries



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5. Address Tax Evasion and Avoidance

- Tax treaties play a crucial role in the prevention of tax evasion and avoidance
- The OECD continues to be at the forefront of the efforts to develop comprehensive exchanges of tax information



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Common Transfer Pricing Rules Reduce Double Taxation Risks

- Treaty rules recognize the right of countries to adjust conditions between associated enterprises where these do not reflect what independent parties would have done, BUT
- They do so on the basis of the internationally-agreed arm's length standard AND
- They provide for a mechanism to avoid the double taxation that could result from unilateral adjustments



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6. Provide a Framework for Solving Cross-Border Tax Disputes

- The rules of bilateral tax treaties are incorporated into domestic law so that they are directly enforceable by courts
- Using domestic courts to resolve cross-border disputes faces, however, a fundamental difficulty: different decisions in different countries may result in unrelieved double taxation or non-taxation



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6. Provide a Framework for Solving Cross-Border Tax Disputes

- The mutual agreement procedure provided for in tax treaties allows a taxpayer resident of one State to seek the assistance of its domestic tax administration and make it possible for tax administrations to agree on a common solution to a particular dispute
- The OECD Model now recognizes that arbitration is a crucial component of the mutual agreement procedure and is necessary to ensure a solution of each case
- Unlike the EU Arbitration Convention, the arbitration procedure of the OECD Model is not restricted to issues related to the allocation of profits between associated enterprises



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7. Provide a Stable Tax Environment to Foreign Investors

- Treaties are intended to prevail over domestic law
- Unlike domestic tax laws, treaties remain unchanged for long periods of time: on average, treaties of OECD countries have remained unchanged for 15 years



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Provide a Stable Tax Environment to Foreign Investors

- Large investments are based on multi-year projections of revenues and expenses
- Unexpected changes in a tax system may affect the expected ROI that justified a particular investment
- Treaty rules prevent some types of changes that would dramatically change the tax environment (e.g. prohibitive withholding taxes that would prevent repatriation of profits)
- Treaties also signal the willingness of a country to submit its tax sovereignty to some limitations, thereby providing more certainty to investors



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The OECD contribution to the development of tax treaties

1. Historical background: from the 1920s to now
2. The current role of the OECD in the development of tax treaties



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A short history of tax treaties

- Tax treaties: go back to 19th century
- 1921: League of Nations undertakes study of economic aspects of double taxation
- 1921: Austria, Hungary, Italy, Poland, Romania, and the Kingdom of the Serbs, Croats, and Slovenes signed a multilateral convention in Rome (only Italy and Austria ratified)



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Financial Committee of the League of Nations

- 1923 Report to the Financial Committee by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp:
 - Where should different types of income be taxed?
 - "the experience of more advanced countries in these matters could profitably be collected and collated and used as the basis of conventions for countries to whom they are more or less novel."
- Work of tax officials at the League of Nations resulted in the development of a number of models from 1927 to 1946



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The first model

- The 1927 report of the League of Nations Committee of Technical Experts included a model for a bilateral treaty

"the fiscal systems of the various countries are so fundamentally different that it seems at present practically impossible to draft a collective convention, unless it were worded in such general terms as to be of no practical value..."



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The 1928 models

- League of Nations organized a General Meeting of Government Experts to discuss the 1927 report
- In 1928, that General Meeting recommended certain changes and developed three versions of the text to accommodate differences in tax systems (the "1928 Model Conventions")



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The 1933 and 1935 conventions

- In 1933, the Fiscal Committee of the League of Nations approved the text of a multilateral convention for the attribution of profits between associated enterprises and parts of the same enterprise (sent to governments to see if they would sign)
- 1935 report of the Committee
 - Thirty-three governments replied
 - Only a small number of governments wished to enter into a multilateral convention based on the 1933 Draft
 - "progress is more likely to be achieved by means of bilateral agreements"



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Final models of the League of Nations

- 1943 Mexico Model (source based)
- 1946 London Model (more residence-based)

“...the conclusion by an increasing number of States of bilateral treaties along the lines of the Model Conventions of London and Mexico constitutes the most adequate means of removing the existing serious tax obstructions to the international flow of capital and foreign trade.”



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The OEEC-OECD

- First task of the OEEC Fiscal Committee set up in 1956 was to encourage European countries to conclude tax treaties and to develop a standard model for doing so
- The draft Articles are released in four reports between 1958 and 1961
- In the first report, the Committee recommended the elaboration of a new model bilateral convention acceptable to all OEEC member states and envisages replacing the existing bilateral conventions with one multilateral convention



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The 1963 Draft Convention and 1977 Double Taxation Convention Model

- In 1961, the OEEC becomes the OECD (Canada and the United States join)
- In 1963, four OEEC reports are consolidated and published as a single “entitled "Draft Double Taxation Convention on Income and Capital" (the Draft includes “reservations”)
- By 1963, the Fiscal Committee has abandoned the idea of a multilateral convention as it would have been too difficult give differences in domestic law
- Work of various working groups continued between 1963-1977; resulted in the publication in 1977 of the *Model Double Taxation Convention on Income and on Capital*
- The 1963 and 1977 Models have been very influential in the development of bilateral treaties



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Modern Tax Treaties

- Follow a standard format
- Based on the OECD Model (and UN Model but UN Model published in 1980 and revised once in 2001 is itself based on the OECD Model)
- The Model is now used not only for the negotiation of treaties but (maybe primarily) for the application and interpretation of tax treaties



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Importance of OECD Commentary

- Facilitates uniformity of interpretation
- Illustrates and interprets provisions
- Widely followed
- Primary secondary source
- Often referred to by courts



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How are changes made to the OECD Model?

- The consultation process
- The CFA and Council approval process
- The consensus rule and the role of observations, reservations and positions
 - Nature of observations
 - Nature of reservations
 - Nature of NOEs' positions



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Resolving international tax disputes

- Example of the role of the OECD in the development of tax treaties
- Treaty disputes are a major concern for business and government
- Disputes have increased in number and complexity... this trend will continue
- Problems of existing dispute resolution mechanisms
- There was a need for a more effective procedure to resolve disputes



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OECD Efforts to Improve Dispute Resolution Procedures

- Established Joint Working Group (JWG) on Dispute Resolution
- Consultations, surveys, research
- 2004 Progress Report discussed 30+ proposals
- Public consultations in Paris (2003) and Washington (2005)
- February 2006 Public Discussion Draft and draft MEMAP
- March 2006 public consultation in Tokyo
- Approval of the final report in January 2007
- Inclusion of changes in 2008 update



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Results of the work

- Supplementary Dispute Resolution – mandatory, binding arbitration of Article 25(1) cases unresolved after 2 years of MAP
- Changes to the OECD's Model Tax Convention's Article 25 Commentary -- to incorporate proposals for improved MAP operation
- Manual on Effective Mutual Agreement Procedures (MEMAP) -- to explain MAP and describe best practices for tax authorities and taxpayers



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Supplementary Dispute Resolution Proposal

- Mandatory, binding arbitration of unresolved issues in Article 25(1) cases after 2 years of MAP
- Flexible - mode of application left to mutual agreement of Contracting States
- Sample mutual agreement on procedures included in proposal
- Proposal recognises not all countries are in a position to include this procedure
- Development as a result of consultation – no requirement to waive domestic remedies to access arbitration



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4. PRESENTATION BY ISABELLE RICHELLE

Professor at the HEC-Business School of the University of Liège, co-president of the Tax Institute of the University of Liège and Member of the Brussels Bar Liedekerke Waelbroeck Kirkpatrick.

DOUBLE TAXATION IN THE EUROPEAN UNION

APPROACHES OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON DOUBLE TAXATION: EFFECTS AND LIMITATIONS

European Parliament
December 8, 2011
Prof. Dr. Isabelle RICHELLE
Tax Institute – University of Liège
Attorney (Brussels Bar – Liedekerke)

1

1. INTRODUCTION

- ✗ «Double taxation»
 - ✗ Direct /indirect taxes
 - + VAT: double taxation >< principle of neutrality / Internal Market
 - ✗ Fundamental freedoms / tax Directives
 - ✗ DTC or no DTC
- ➔ Focus on direct tax case-law

2

2. THE CASE-LAW OF THE ECJ

- ✗ No specific jurisdiction of the Court as regards international double taxation
- ✗ However, when applying the fundamental freedoms, the ECJ takes the concept of «double taxation» into consideration
- ✗ But no definition of the concept of (international) «double taxation»
 - + Double taxation results «*from the exercise in parallel by two Member States of their fiscal sovereignty* »
- ✗ Differentiation made between economic double taxation and juridical double taxation: double taxation prohibited?

3

2. THE CASE-LAW OF THE ECJ

- ✗ Methods for eliminating double taxation:
 - + Exemption / tax credit
 - + Equivalent?

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2. THE CASE-LAW OF THE ECJ

- Double taxation and tax Directives
 - ✗ The Parent-Subsidiary Directive and the Cobelfret and Verger du Vieux Tauve cases
 - ✗ The I&R Directive and the Scheuten Solar case
 - ✗ Conclusions
 - ✗ Limitation of the scope of the I&R Directive to the juridical double taxation
 - ✗ Cobelfret: interpretation in line with the objectives of the PS Directive / Vergers: literal (restrictive) interpretation

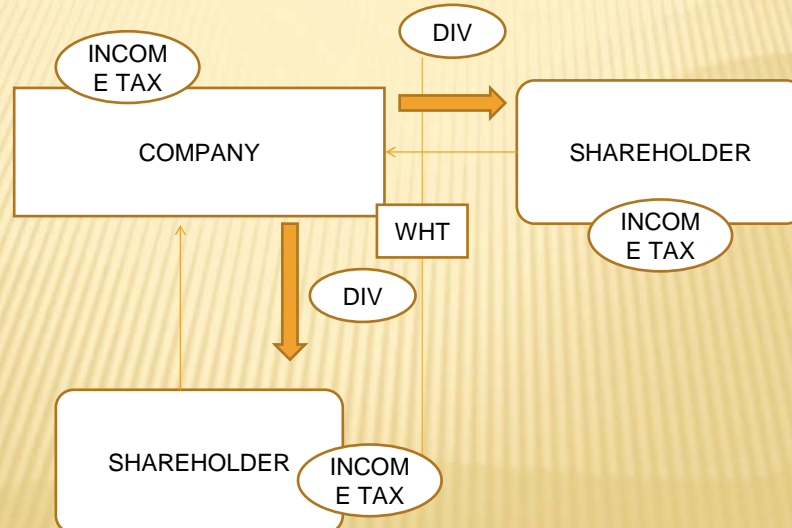
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2. THE CASE-LAW OF THE ECJ

- ✗ Double taxation and fundamental freedoms case-law
 - + Taxation of dividends
 - ✗ Inbound dividends
 - ✗ Outbound dividends
 - + Loss compensation

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2. THE CASE-LAW OF THE ECJ: TAXATION OF DIVIDENDS



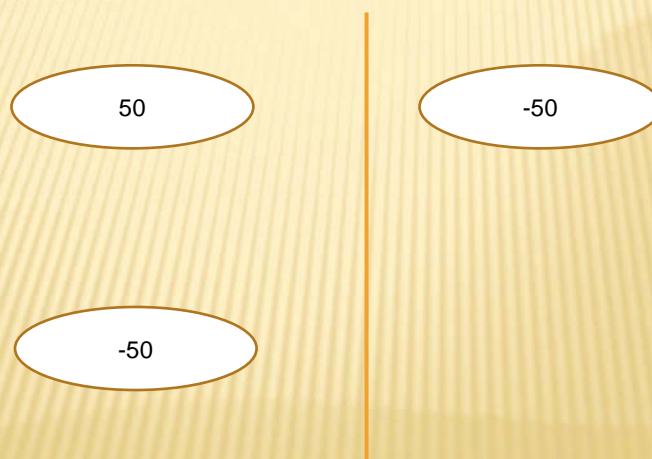
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2. THE CASE-LAW OF THE ECJ: TAXATION OF DIVIDENDS

- ✗ Inbound dividends:
 - + Verkooijen, Manninen, Meilicke I, Meilicke II
 - + Kerckaert Morres, Damseaux
- ✗ Outbound dividends:
 - + Denkavit International, ACT Group Litigation, Amurta

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2. THE CASE-LAW OF THE ECJ: LOSS COMPENSATION



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2. THE CASE-LAW OF THE ECJ: LOSS COMPENSATION

	result		tax basis		total	tax 40%		total
	SR	SS	SR	SS		SR	SS	
year 1	50	-50	0	(-50)	0	0	0	0
year 2	0	50	0	0	0	0	0	0
total	50	0	0	0	0	0	0	0
sol: recapture year 2								
year 1	-50	50	0	50	50	0	20	20
year 2	50	0	50	0	50	20	0	20
total	0	50	50	50	100	20	20	40
sol: ECJ Amid								

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2. THE CASE-LAW OF THE ECJ: LOSS COMPENSATION

- ✗ Loss compensation: double taxation resulting from timing differences and from the existence of borders
- ✗ Amid (2000):
 - + losses in the State of residence
 - + exemption and «formal» off-setting of losses
- ✗ M&S (2005): timing
 - + Group taxation
 - + «final losses»
- ✗ Lidl Belgium (2008)

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3. CONCLUSIONS

- ✗ VAT/direct taxes:
 - + VAT: Internal Market
 - + Direct taxes: does double taxation compromise Internal Market? (+ abrogation of Art. 293 EC)
- ✗ Economic/juridical double taxation
 - + VAT: double taxation seems to be prohibited
 - + Direct taxes: economic v. juridical double taxation
- ✗ Methods for eliminating double taxation
 - + Exemption
 - + Tax credit

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THANK YOU FOR YOUR ATTENTION

Isabelle.richelle@ulg.ac.be

i.richelle@liedekerke.com

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5. PRESENTATION BY VOLKER HEYDT

Rechtsanwalt (member of the Hamburg bar), member of the ECJ Task force of the CFE (Confédération Fiscale Européenne), retired Head of Unit TAXUD E3 (European Commission).

Double Taxation of citizens – a case of discrimination in the Internal Market

by

Volker Heydt, Brussels

Rechtsanwalt (member of the Hamburg Bar),
member of the ECJ Task Force of the CFE (Confédération
fiscale européenne)

1

Overview

- Juridical double taxation - an attack on the fundamental freedoms
- Situations where double taxation takes place
- Combating double taxation *de lege lata*
- Desirable measures *de lege ferenda*

2

Taxation in general

- Taxes imply a restriction in any domestic situation – in principle justified
- In a cross-border situation, taxation can constitute an obstacle to making use of the different fundamental freedoms, if taxes are higher than in a purely domestic situation

3

EU law does not guarantee tax neutrality of intra-EU situations

- Member States' sovereign rights to design their tax systems are limited by the EU freedoms
- But a change of residence or an engagement in a cross-border activity is not tax neutral due to disparities between the national tax systems

4

Disparities between different tax systems do not imply double taxation

- Double taxation has its origin in overlapping connecting factors of national tax laws, not in disparities
- Double taxation is an **additional** tax burden for citizens beyond disparities and may well deter them from cross-border operations

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Double taxation under the EU Treaties as felt by taxpayers and MS

- Double taxation is felt by the taxpayer as a restriction of the fundamental freedoms beyond the restriction inherent in any taxation
- By contrast, the Member State exercising their tax jurisdictions just apply their rules without distinction as compared to purely domestic situations

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Unrelieved double taxation – a negation of the rule of law

- Civilised States agree that double taxation should not take place
- Double taxation consists of **relative over-taxation** of the persons/transactions concerned compared to purely domestic ones
- To be assessed under the aspect of fiscal justice: priority for citizens' rights or for budgetary revenue?

7

Double taxation – avoided uni- or bilaterally

- States have adopted – at their budgetary cost – some **unilateral** rules in order to take into account foreign taxes paid (or even not paid – tax sparing)
- A more systematic and organised avoidance of double taxation is achieved by bilateral conventions (Double Taxation Conventions, DTC), mainly following the OECD model convention
- DTCs imply reciprocal and balanced abandon of taxing powers for agreed items

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Remaining cases of Double Taxation

Potentially all situations where the overlap of jurisdictions has not been removed or is difficult to overcome

- Absence of double taxation conventions, a situation affecting most **cross-border inheritances** (increasing with mobility)
- Taxation of **foreign dividends**: administrative procedures for restitution claims prohibitively costly and therefore not used
- Different **qualification divergences**— e.g. interest by one State, dividend by another

9

ECJ: no violation of EU law

- Although recognising the economically and psychologically negative impact of double taxation, the ECJ – and also the COM - has so far not considered double taxation to be prohibited under the EU Treaties
- ECJ in *Kerckhaert-Morres*: double taxation results from the exercise in parallel by two Member States of their fiscal sovereignty

10

ECJ : no priority criteria for the order of taxing powers between MS

- ECJ: no rules allowing to give priority to the taxing power of one MS over that of the other
- ECJ feels bound to respect the *balanced allocation* of taxing powers in DTCs
- Result: *budgetary satisfaction* of involved MS, *frustration* of the taxpayer who remains subject to unrelieved double taxation

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A different approach: Joint responsibility of MS

- Member States have agreed to the legal concept of the Internal Market (Art. 26 TFEU), and are bound to respect it in view of their loyalty obligation (Art. 4 TEU)
- They are jointly and severally liable to deliver → joint creditorship
- Such joint taxing powers cannot result in more than the higher of two individual tax claims

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Double taxation = discrimination

- Conceptually wrong to *cumulate* taxes of two countries – as in many other fields, public acts of other States must be recognised
- To apply the same tax to different situations – purely domestic and cross-border ones – means discrimination
- Comparison to be made: juridical double taxation within one country (obviously unlawful and therefore not existing)

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Discriminatory tax rules

- In the remaining double taxation cases, the tax rule applied only appears to be the same for domestic and cross-border situations
- It is a matter of legal drafting to make the tax rule appear the same or different (e.g. unilateral relief measures and imputations under DTCs are not consolidated with the general rule)

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Violation of EU law/freedoms

- Double taxation is considered discriminatory and thus violating EU law on the basis of a comparison
- The higher tax burden resulting from double taxation may in addition constitute a substantive violation of the fundamental freedoms when it has deterring effects

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Consequences *de lege lata*

- Any tax paid to one State (often as withholding tax) must be considered to have been made on the tax claim of the other as well
- Second State bound to grant imputation (of tax)
- Member States (MS) can beforehand or later on freely agree on how to share collected taxes
- Allocation of revenue loss resulting from prohibited double taxation must be negotiated between MS, but does not involve the taxpayer

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Action *de lege ferenda*

- COM initiative for binding arbitration is welcome
- Way forward: necessary rules should not be left to MS to include in their DTCs, but be made by EU legislation
- EU legislation could contain detailed uniform procedural rules (see the *Berlinguer* initiative in the Legal Committee)

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Conclusions

- Disparities exist, but do not justify double taxation
- Contrary to the ECJ, juridical double taxation is a discrimination in the cross-border exercise of the fundamental freedoms
- Double taxation can be overcome *de lege lata* by applying the existing Treaty rules
- *De lege ferenda* legislation for obligatory arbitration would be desirable at EU level

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