ISSN 1594-199X

MAGGIO - AGOSTO PUBBLICAZIONE QUADRIMESTRALE Vol. VI - N. 2

DIRITTO E PRATICA TRIBUTARIA INTERNAZIONALE

CASA EDITRICE DOTT. ANTONIO MILANI
CEDAM
CASA EDITRICE DOTT. ANTONIO MILANI
2009

THE RELATIONSHIP BETWEEN THE FUNDAMENTAL FREEDOMS AND DIRECTIVES IN THE AREA OF DIRECT TAXATION

Abstract: En este tema, el Autor se enfoca en la relación entre las libertades fundamentales de la normativa tributaria de la CE y las directivas fiscales que implementan medidas domésticas, en casos tales como *Bosal* y *Keller Holding*.

Si la ley Comunitaria secundaria, como lo es la directiva, creara efectos restrictivos a las libertades fundamentales, entonces sería necesario examinar, si la directiva misma infringe las libertades fundamentales consagradas en el Tratado de la CE. La CEJ sostuvo que las reglas nacionales que correctamente implementan una directiva impositiva directa sin embargo debe superar el análisis bajo la luz de las libertades fundamentales. Más aún, ha sostenido que estas directivas no infringen el tratado del CE si dejan a los Estados Miembro un margen lo suficientemente amplio que les permita elevar las directivas a ley nacional de forma coherente con el Tratado del CE.

Los estándares en la prueba de una directiva a la luz de las leyes Comunitarias primarias son, no obstante, diferentes de aquellos aplicados en el análisis de las disposiciones tributarias domésticas de un Estado Miembro, respecto de dichas libertades. El legislador Comunitario goza de un cierto grado de discrecionalidad al sopesar diferentes factores aparte del objetivo de un Mercado Único, tales como los intereses de las Administraciones Tributarias domésticas. El mensaje de la Corte, por lo tanto, parece ser en la medida que los Estados Miembro armonicen, o al menos coordinen, sus sistemas impositivos domésticos al nivel Comunitario. Los estándares de revisión serán menos estrictos que aquellos aplicados en el test de reglas puramente domesticas contra las mencionadas libertades.

De hecho, las directivas impositivas conceden opciones a los Estados Miembro. Para nombrar algunas, bajo el Parent-Subsidiary-Directive Member, los Estados pueden prever un mínimo período de espera, pueden optar por disminuir la doble imposición económica ya sea exencionando rentas de dividendos o concediendo un crédito indirecto. Más aún, tienen la opción de excluir costos y pérdidas de la filial de deducciones a nivel de la controlante. Tales opciones, de hecho, plantean la pregunta de si tal vez se podrían "inmunizar" las legislaciones domésticas que ejerciten tales opciones, aún cuando se discrimine a situaciones internacionales, o cuando los Estados Miembros sean inclusive forzados a ejercitar tales opciones a la luz de las libertades fundamentales.

En conclusión, según el Autor, una directiva es compatible con el tratado del CE siempre y cuando deje a los Estados Miembro un margen lo suficientemente amplio como para incorporar dichas directivas como ley nacional de forma consecuente con los requisitos del Tratado de la CE. Más aún, la Corte ha fijado jurisprudencia según la cual las libertades fundamentales se aplican a medidas domésticas si la situación de hecho no está cubierta por el fin objetivo o subjetivo de la directiva, o si los Estados Miembro han ejercitado opciones generales habilitadas bajo una directiva de impuesto directo de manera discriminatoria. Similares consideraciones tienen aplicación en situaciones donde una directiva nada dice respecto de las consecuencias impositivas de transacciones, donde los requisitos previos explícitos para la aplicación de una directiva no son

conocidos. Lo que no queda claro, sin embargo, es qué ocurre con aquellas situaciones donde las directivas contienen permisos expresos para determinados Estados Miembro, así la jurisprudencia de la Corte podría sostener que los Estados Miembro podrían aún contar con permisos explícitos en la legislación Comunitaria secundaria para adoptar los cambios a las luz de las libertades fundamentales.

I. – *Introduction*

The relationship between the fundamental freedoms on the one hand and direct tax directives and implementing domestic measures on the other has entered the limelight in cases such as *Bosal*[1] and *Keller Holding*,[2] where the ECJ found that national rules that correctly implement a direct tax directive nevertheless face scrutiny under the fundamental freedoms. The Court's approach, according to which domestic measures that exercise an option granted in a direct tax directive have to comply not only with the directive itself but also with the fundamental freedoms, already can be found in numerous cases outside the area of direct taxation[3] and has been anticipated[4] and broadly supported in legal writing[5] and domestic courts[6]. From this per-

[1] Case C-168/01, *Bosal*, [2003] ECR I- 9409.

[2] Case C-471/04, *Keller Holding*, [2006] ECR I-2107.

[3] See, e.g., Case 15/81, *Schul*, [1982] ECR 1409, paras. 23-44; Case C-120/95, *Decker*, [1998] ECR I-1831, para. 27; Case C-158/96, *Kohll*, [1998] ECR I-1931, para. 25; Case C-238/98, *Hocsman*, [2000] ECR I-6623, paras. 31-34.

[4] See, e.g., N. VAN DER GELD and KLEEMANS, *The Dutch participation exemption in a European perspective*, 10 EC Tax Review (2001), p. 72, 78; W. SCHÖN, *Die Abzugsschranken des § 3c EStG zwischen Verfassungs- und Europarecht*, 83 Finanz-Rundschau (2001), p. 381, 391; F. P. J. SNEL, *Non-Deductibility of Expenses Relating to the Holding of Foreign Participations: Preliminary Ruling Requested from ECJ*, 41 European Taxation (2001), p. 403, 406; O. F. KERSSENBROCK, *§ 8b Abs. 5 KStG nach der 'Lankhorst-Hohorst'-Entscheidung des EuGH*, 58 Betriebs-Berater (2003), p. 2148, 2153.

[5] See, e.g., G. T. K. MEUSSEN, *Bosal Holding Case and the Freedom of Establishment: A Dutch Perspective*, 44 European Taxation (2004), p. 59, 59-60; G. W. KOFLER AND G. TOIFL, *Austria's Differential Treatment of Domestic and Foreign Intercompany Dividends Infringes the EU's Free Movement of Capital*, 45 European Taxation (2005), p. 232, 236-238; J. LÜDICKE AND L. HUMMEL, *Zum Primat des primären Gemeinschaftsrechts*, 15 Internationales Steuerrecht (2006), p. 694-698; H. REHM and J. NAGLER, *Verbietet die Kapitalverkehrsfreiheit nach 1993 eingeführte*

spective, domestic direct tax measures that infringe the fundamental freedoms may not be applied even if they correctly implement a direct tax directive or exercise an option granted in such directive[7]; Member States acting in concert, it is argued, should not have the possibility to undermine the fundamental freedoms by agreeing on secondary Community law that falls behind the aims of the Single Market and the protection offered to taxpayers under the freedoms[8]. Critics, however, have remarked that the Court's approach disregards the political fact that Member States would not have agreed to far-reaching harmonizing measures had they foreseen that the fundamental freedoms could render certain parts of implementing domestic provisions void[9]. The very notion that a Member State could not possibly and unrestrictedly rely on options or choices made available in a directive

Ausländerungleichbehandlung?, 15 Internationales Steuerrecht (2006), p. 859, 860; G. W. KOFLER and M. TUMPEL, *Double Taxation Conventions and European Directives in the Direct Tax Area*, in LANG, SCHUCH and STARINGER (Eds.), *Tax Treaty Law and EC Law* (Linde, 2007), p. 191, 199-210; G. W. KOFLER, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Linde, 2007), p. 830-840; see also Confédération Fiscale Européenne, *CFE Opinion Statement on the Decision of the European Court of Justice Bosal Holding BV, Case C-168/01*, 44 European Taxation (2004), p. 506, 507.

[6] See, e.g., BFH, 9 August 2006, I R 95/05, BFHE 214, 504, BStBl 2007 II 279, and BFH, 9 August 2006, I R 50/05, BFHE 215, 93, BStBl 2008 II 823 (concerning cost deduction); see also BFH, 20 December 2006, I R 13/06, BStBl 2007 II 616, and BFH, 5. March 2008, I B 171/07, BFHE 220, 463 (concerning withholding taxation).

[7] See in this direction, e.g., W. SCHÖN, *Die Abzugsschranken des § 3c EStG zwischen Verfassungs- und Europarecht*, 83 Finanz-Rundschau (2001), p. 381, 391; W. SCHÖN, *Besteuerung im Binnenmarkt – die Rechtsprechung des EuGH zu den direkten Steuern*, 13 Internationales Steuerrecht (2004), p. 289, 297; W. SCHÖN, *Tax Issues and Constraints on Reorganizations and Reincorporations in the European Union*, 34 Tax Notes International 197, 202 (Apr. 12, 2004); J. ENGLISCH, *Dividendenbesteuerung* (O. Schmidt, 2005), 314-315; D. DÜRRSCHMIDT, *Nachbetrachtung zu EuGH, EuZW 2004, 729 – Kommission/Griechenland (Ouzo)*, 16 Europäische Zeitschrift für Wirtschaftsrecht (2005), p. 229-230; RÖDDER, *Gründung und Sitzverlegung der Europäischen Aktiengesellschaft (SE) – Ertragsteuerlicher Status quo* und erforderliche Gesetzesänderungen, 43 Deutsches Steuerrecht (2005), p. 893, 895-896.

[8] See W. SCHÖN, *Tax Issues and Constraints on Reorganizations and Reincorporations in the European Union*, 34 Tax Notes International p. 197, 202 (Apr. 12, 2004); D. Englisch, *Aufteilung der Besteuerungsbefugnisse – Ein Rechfertigungsgrund für die Einschränkung von EG-Grundfreiheiten* (IFSt, 2008), p. 89-90.

[9] See especially U. FORSTHOFF, *EuGH versus Europäischer Gesetzgeber – oder Freiheiten über alles?*, 15 Internationales Steuerrecht (2006), p. 222, 223-224, and U. FORSTHOFF, *Die eigenständige Bedeutung des sekundären Gemeinschaftsrechts*, 15 Internationales Steuerrecht (2006), p. 698, 699 and 701.

was considered to be contrary to the aim of secondary Community law[10] and would potentially raise "extremely serious and legitimate concerns" as it would "inevitably introduce a substantial element of uncertainty, even destabilisation, into the system, since addressees of an act of Community law could no longer have confidence in the legal effects of the act and in particular the rights conferred by that act."[11] It might also be argued against the background of the Community legislator's discretionary power[12] and the general presumption that secondary Community law is in line with primary Community law[13] that it is "not for the Member States to determine the legality of Community provisions authorising certain conduct on their part"[14]. This perspective would in its extreme lead to the conclusion that, if a domestic measure correctly implements a directive or exercises an option granted in such directive, only the directive itself, but not the domestic implementation, is to be tested against the fundamental freedoms[15].

Before these conflicting perspectives can be approached and systematized in more detail and with specific regard to secondary Community law in the area of direct taxation, it has to be remembered at the outset that primary Community law is hierarchically superior to secondary Community law, as

[10] U. FORSTHOFF, *Die eigenständige Bedeutung des sekundären Gemeinschaftsrechts*, 15 Internationales Steuerrecht (2006), p. 698, 699; see in this direction also U. EVERLING, *Das Niederlassungsrecht in der EG als Beschränkungsverbot*, in SCHÖN (Ed.), *Gedächtnisschrift für Knobbe-Keuk* (O. Schmidt, 1997), p. 607, 623-624; J. THIEL, *Europäisierung des Umwandlungssteuerrechts: Grundprobleme der Verschmelzung*, 57 Der Betrieb (2005), 2316, 2318; and M. SCHWENKE, *Europarechtliche Vorgaben und deren Umsetzung durch das SEStEG*, 94 Deutsche Steuerzeitung (2007), p. 235, 246.

[11] See U. FORSTHOFF, *Die eigenständige Bedeutung des sekundären Gemeinschaftsrechts*, 15 Internationales Steuerrecht (2006), p. 698, 699, who refers to the Opinion of A.G. TIZZANO, 15 January 2004, Case C-475/01, *Commission v. Greece* ("Ouzo"), [2004] ECR I-8923, para. 64.

[12] Case C-233/94, *Germany v. Parliament and Council*, [1997] ECR I-2405, paras. 16 et seq.; Case C-168/98, *Luxemburg v. Parliament and Council*, [2000] ECR I-9131, para. 32.

[13] See also Case C-249/04, *Allard*, [2005] ECR I-4535, para. 32 et seq.; Case C-322/01, *DocMorris*, [2003] ECR I-14887, paras. 52-53; Case C-387/99, *Commission v. Germany*, [2004] ECR I-3751, paras. 50.

[14] See Opinion A.G. Tizzano, 15 January 2004, Case C-475/01, *Commission v. Greece* ("Ouzo"), [2004] ECR I-8923, para. 57.

[15] U. FORSTHOFF, *EuGH versus Europäischer Gesetzgeber – oder Freiheiten über alles?*, 15 Internationales Steuerrecht (2006), p. 222, 223; U. FORSTHOFF, *Internationale Verschmelzungsrichtlinie: Verhältnis zur Niederlassungsfreiheit und Vorwirkung; Handlungszwang für Mitbestimmungsform*, 44 Deutsches Steuerrecht (2006), p. 613, 617; in this direction also J. THIEL, *Europäisierung des Umwandlungssteuerrechts: Grundprobleme der Verschmelzung*, 57 Der Betrieb (2005), p. 2316, 2318.

the latter is derived from the former under Art. 249(1) EC. Procedurally, however, the Court has established the general presumption that secondary Community law is in line with primary Community law[16]. Measures of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, declared void in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality[17]. From a substantive perspective, legal doctrine is basically concerned with the question whether the Community legislature is at all bound by the fundamental freedoms and, if so, which consequences the fundamental freedoms have for its conduct. Prevailing opinion quite correctly asserts that, even though the Community institutions are not formally addressees of the freedoms, the Community legislature is nevertheless bound by the fundamental freedoms or at least the principles enshrined in them, including the goal of the Internal Market[18]. This approach is clearly visible in the Court's case law in the area of free movement of goods[19]. but it equally applies to all freedoms[20] and is certainly relevant in

[16] See Case C-249/04, *Allard*, [2005] ECR I-4535, paras. 32-33; Case C-322/01, *DocMorris* [2003] ECR I-14887, paras. 52-53; Case C-387/99, *Commission v. Germany*, [2004] ECR I-3751, para. 50; Case C-475/01, *Commission v. Greece* ("Ouzo"), [2004] ECR I-8923, para. 18.

[17] See, e.g., Case 101/78, *Granaria*, [1979] ECR 623, paras. 4-5; Case 11/81, *Dürbeck*, [1982] ECR 1251, para. 17; Case 15/85, *Consorzio Cooperativo d'Abbruzo*, [1987] ECR 1005, para. 10; Case C-137/92 P, *BASF*, [1994] ECR I-2555, para. 48; Case C-245/92 P, *Chemie Linz*, [1999] ECR I-4643, para. 93; Case C-475/01, *Commission v. Greece* ("Ouzo"), [2004] ECR I-8923, para. 18. However, and only relevant in quite extreme situations, measures tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, i.e., such measure must be regarded as non-existent; see, e.g., Case C-475/01, *Commission v. Greece* ("Ouzo"), [2004] ECR I-8923, paras. 18-20.

[18] See especially P. OLIVER, *Free Movement of Goods in the European Community* (Sweet & Maxwell, 3rd edition 1996), 45-56; R. SCHWEMER, *Die Bindung des Gemeinschaftsgesetzgebers an die Grundfreiheiten* (Lang, 1995); U. SCHEFFER, *Die Marktfreiheiten des EG-Vertrages als Ermessensgrenze des Gemeinschaftsgesetzgebers* (Lang, 1996); W. ROTH, *Case C-233/94, Federal Republic of Germany v. European Parliament and Council of the European Union*, Judgment of 13 May 1997, [1997] ECR I-2405", 35 Common Market Law Review (1998), p. 459, 476-478; M. MÖSTL*, Grenzen der Rechtsangleichung im europäischen Binnenmarkt – Kompetenzielle, grundfreiheitliche und grundrechtliche Schranken des Gemeinschaftsgesetzgebers*, 36 Europarecht (2002), 318-350; J. K. M. MORTELMANS, *The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning of the Internal Market – Towards a Concordance Rule*, 39 Common Market Law Review (2002), 1303-1346.

[19] See in the area of free movement of goods, for example*,* Case 80/77 and 81/77, *Ramel*, [1978] ECR 927, para. 35; Case 37/83, *Rewe-Zentral AG*, [1984] ECR 1229, para. 18; Case 15/83, *Denkavit Nederland BV*, [1984] ECR 2171, paras. 15; Case C-

the area of direct tax harmonization[21]. However, the Community legislature enjoys a certain margin of discretion, since secondary Community law is issued in the Community's general interest[22]. The Court has ensured that the

51/93 *Meyhui NV*, [1994] ECR I-3879, para. 11; Case C-114/96, *René Kieffer and Romain Thill*, [1997] ECR I-3629, para. 27; Case C-284/95, *Safety Hi-Tech Srl*, [1998] ECR I-4301, para. 63; Case C-169/99, *Hans Schwarzkopf GmbH & Co.*, [2001] ECR I-5901, para. 37; Case C-469/00, *Ravil SARL*, [2003] ECR I-5053, para. 86; for a detailed analysis see OLIVER, *Free Movement of Goods in the European Community* (Sweet & Maxwell, 3rd edition 1996), 45-56; see also W. ROTH, *Case C-233/94, Federal Republic of Germany v. European Parliament and Council of the European Union*, *Judgment of 13 May 1997, [1997] ECR I-2405*", 35 Common Market Law Review (1998), p. 459, 476-478.

[20] See Opinion of A.G. Kokott, 16 March 2006, C-452/04, *Fidium Finanz*, [2006] ECR I-9521, para. 67, noting that a directive is not "capable of restricting the scope of [a] fundamental freedom"; see also, e.g., JARASS, "Elemente einer Dogmatik der Grundfreiheiten", 29 *Europarecht* (1995), 202, 211; KINGREEN and STÖRMER, "Die subjektiv-öffentlichen Rechte des primären Gemeinschaftsrechts", 32 *Europarecht* (1998), 263, 277; JARASS, "Elemente einer Dogmatik der Grundfreiheiten II", 34 *Europarecht* (2000), 705, 715; MORTELMANS, "The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning of the Internal Market – Towards a Concordance Rule", 39 *Common Market Law Review* (2002), 1303, 1316; for an extensive analysis see MÖSTL, "Grenzen der Rechtsangleichung im europäischen Binnenmarkt – Kompetenzielle, grundfreiheitliche und grundrechtliche Schranken des Gemeinschaftsgesetzgebers", 36 *Europarecht* (2002), 318-350

[21] See, e.g., W. SCHÖN and C. SCHINDLER, *Zur Besteuerung der grenzüberschreitenden Sitzverlegung einer Europäischen Aktiengesellschaft*, 13 Internationales Steuerrecht (2004), p. 571, 575-576; J. LÜDICKE and L. HUMMEL, *Zum Primat Des Primären Gemeinschaftsrechts*, 15 Internationales Steuerrecht (2006), p. 694, 695-696; G. W. KOFLER, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Linde, 2007), 830-831; J. ENGLISCH, *Aufteilung der Besteuerungsbefugnisse – Ein Rechfertigungsgrund für die Einschränkung von EG-Grundfreiheiten* (IFSt, 2008), 8 and 88-89; W. SCHÖN and C. SCHINDLER, *Die SE im Steuerrecht* (O. Schmidt, 2008), para. 30.

[22] See for this conclusion, e.g., P. OLIVER, *Free Movement of Goods in the European Community* (Sweet & Maxwell, 3rd edition 1996), p. 45-56; R. SCHWEMER, *Die Bindung des Gemeinschaftsgesetzgebers an die Grundfreiheiten* (Lang, 1995), p. 37, 45-61, 64, 209; U. SCHEFFER, *Die Marktfreiheiten des EG-Vertrages als Ermessensgrenze des Gemeinschaftsgesetzgebers* (Lang, 1996), p. 57, 180; RANDELZHOFER and FORSTHOFF, "Vor Art. 39–45 EGV", in GRABITZ and HILF (Eds.), *Das Recht der Europäischen Union* (C. H. Beck, May 2001), para. 49; F. MÖSTL, *Grenzen der Rechtsangleichung im europäischen Binnenmarkt – Kompetenzielle, grundfreiheitliche und grundrechtliche Schranken des Gemeinschaftsgesetzgebers*, 36 Europarecht (2002), p. 318, 333; J. K. M. MORTELMANS, *The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning of the Internal Market – Towards a Concordance Rule*", 39 Common Market Law Review (2002), p. 1303, 1315;

Community legislature has a greater freedom "than that permitted to Member states in view of the special tasks which the Community is called upon to perform"[23]. Hence, harmonization measures, including the ones taken under Art 94 EC[24]. are to be intended to advance the Single Market and the fundamental freedoms and not to contravene or restrict their application[25], while the Community legislator may nevertheless weigh different factors, including public interest aims[26]. If, however, secondary Community law such as a

D. BEUTEL, *Der neue rechtliche Rahmen grenzüberschreitender Verschmelzungen in der EU* (Utz, 2008), p. 112.

[23] P. OLIVER, *Free Movement of Goods in the European Community* (Sweet & Maxwell, 3rd edition 1996), 56; see also M. MORTELMANS, *The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning of the Internal Market – Towards a Concordance Rule*, 39 Common Market Law Review (2002), p. 1303, 1334-1336.

[24] W. SCHÖN and C. SCHINDLER, *Zur Besteuerung der grenzüberschreitenden Sitzverlegung einer Europäischen Aktiengesellschaft*, 13 Internationales Steuerrecht (2004), p. 571, 576.

[25] See generally Case C-376/98, *Germany v. Parliament and Council*, [2000] ECR I-8419, paras. 81-88; see also, e.g., W. FRENZ, *Handbuch Europarecht – Europäische Grundfreiheiten* (Springer, 2004), 123-124. At the specific level of the directives in the tax area, this supplementary character is clear from the preambles to these directives. For example, the Parent-Subsidiary Directive, as stated in its preamble, is intended to introduce a common system and to eliminate the disadvantage arising from the application of tax provisions governing relations between parent companies and subsidiaries of the different Member States that are less advantageous than those applying to parent companies and subsidiaries of the same Member State. The Parent-Subsidiary Directive was, therefore, created in the interest of the Internal Market, which covers the freedom of establishment, to promote the grouping together of the companies of different Member States (see Case C-294/99, *Athinaïki Zythopoiia AE*, [2001] ECR I-6797, para. 25). The principal function of the Parent-Subsidiary Directive is to supplement and substantiate the principle of the Internal Market and fundamental freedoms. Accordingly, it may not provide for a derogation from the fundamental freedoms. See also SCHÖN and SCHINDLER, "Zur Besteuerung der grenzüberschreitenden Sitzverlegung einer Europäischen Aktiengesellschaft", 13 *Internationales Steuerrecht* (2004), 571, 576; SCHINDLER, "Steuerrecht", in Kalss and Hügel (Eds.), *SE-Kommentar* (Linde, 2004), Part III, para. 31; ENGLISCH, *Dividendenbesteuerung* (O. Schmidt, 2005), 314-315.

[26] See, e.g., Case C-233/94, *Germany v. Parliament and Council*, [1997] ECR I-2405, paras. 16-17; Case C-168/98, *Luxemburg v. Parliament and Council*, [2000] ECR I-9131, para. 32; see for the question of proporationality also Case C-51/93, *Meyhui*, [1994] ECR I-3879, paras. 20-21. For a detailed analysis see, e.g., J. CASPAR, *Das europäische Tabakwerbeverbot und das Gemeinschaftsrecht*, 11 Europäische Zeitschrift für Wirtschaftsrecht (2000), p. 237, 240-241; L. MORTELMANS, *The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning of the Internal Market – Towards a Concordance Rule*, 39 Common Market Law Review (2002), p. 1303, 1332-1336.

directive were to create an effect that restricts the freedoms, it would then be necessary to examine whether or not the directive itself infringed on the fundamental freedoms enshrined in the EC Treaty[27]. In this respect, however, the ECJ has consistently held that directives do not infringe the EC Treaty if they leave the Member States a sufficiently wide margin to enable the Member States to transpose the directives into national law in a manner consistent with the requirements of the EC Treaty[28], which, in turn, is consistent with the ECJ's approach of adopting a reconciling interpretation of directives in light of primary Community law. In other words, if the secondary Community law is open to more than one interpretation, preference should be given to an interpretation that renders the provision consistent with the EC Treaty, rather than an interpretation that leads to a directive being incompatible with the EC Treaty[29].

In the field of directives, which need to be implemented by domestic measures under Art 249(3) EC, the question remains which yardstick has to be applied in testing an implementing domestic measure against Community law. The importance of a differentiation whether secondary Community law or the domestic implementation measure is to be tested against the freedoms is also reflected in procedural aspects; while it is for the domestic court to give effect to the primacy of the directly applicable freedoms, it is only for the ECJ to rule on the validity of a Community act[30]. In this respect the Court has principally taken an approach that reflects the degree of harmonization: If secondary Community law has lead to full harmonization of a given area of law[31], domestic measures have to be tested only in relation to such secondary Community law, which might be interpreted in light of the freedoms, and not directly against the fundamental freedoms themselves[32];

---

[27] Opinion A.G. Alber, 24 September 2002, Case C-168/01, *Bosal*, [2003] ECR I-9409, para. 58; see also Case 15/81, *Schul*, [1982] ECR 1409, paras. 41-44.

[28] See Case 5/88 *Hubert Wachauf*, [1989] ECR 2609, para. 22; Case C-166/98, *Socridis*, [1999] ECR I-3791, paras. 19-20.

[29] See, for example, Case 15/81, *Schul*, [1982] ECR 1409, paras. 41-44; Case 218/82 *Commission v. Council*, [1983] ECR 4063, para. 15; Case 205/84, *Commission v. Germany*, [1986] ECR 3755, para. 62. For the area of tax law see also M. LANG, *ECJ case law on cross-border dividend taxation – recent developments*, 17 EC Tax Review (2008), p. 67, 73.

[30] See also D. BEUTEL, *Der neue rechtliche Rahmen grenzüberschreitender Verschmelzungen in der EU* (Utz, 2008), p. 116.

[31] For details see, e.g., W. FRENZ, *Handbuch Europarecht – Europäische Grundfreiheiten* (Springer, 2004), p. 139-140 and the references therein.

[32] See, e.g., see also Case 5/77, *Tedeschi*, [1977] ECR 1555, para. 33/35 (directive); Case 148/78, *Ratti*, [1979] ECR 1629, para. 36 (directive); Case 251/78, *Denkavit Futtermittel*, [1979] ECR 3369, para. 13 (directive); Case 190/87, *Moormann*, [1988] ECR

hence, and although such secondary Community law has to comply with primary Community law, the latter does not directly apply to Member States' implementing measures. Conversely, however, if secondary Community law has not lead to complete harmonization of a given area of law,

> "that fact that a national measure may be consistent with a provision of secondary law […] does not have the effect of removing that measure from the scope of the provisions of the Treaty"[33].

The case law, however, leaves a blurred picture as to whether or not a concrete domestic measure is to be tested solely against secondary Community law or whether the fundamental freedoms constitute an additional hurdle for domestic law to comply with Community law. In principle, and simplifying, three situations may be distinguished[34]: First, if a certain domestic measure is dictated by secondary Community law, this implies that such domestic measure is not prohibited by the fundamental freedoms[35]. Second,

---

4689, paras. 10-11 (directive); Case C-37/92, *Vanacker and Lesage*, [1993] ECR I-4947, para. 9 (directive); Case C-324/99, *DaimlerChrysler AG*, [2001] ECR I-9897, paras. 32, 43-45 (regulation); Case C-99/01, *Linhart and Biffl*, [2002] ECR I-9375, para. 18 (directive); Case C-221/00, *Commission v. Austria*, [2003] ECR I-1007, para. 42 (directive). See for the nuances of this case law especially L. MORTELMANS, *The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning of the Internal Market – Towards a Concordance Rule*, 39 Common Market Law Review (2002) p. 1303, 1327-1331; see also U. SCHEFFER, *Die Marktfreiheiten des EG-Vertrages als Ermessensgrenze des Gemeinschaftsgesetzgebers* (Lang, 1996), 129; for possible inconsistencies in the case law see the Opinion of A.G. Geelhoed, 4 July 2002, Case C-221/00, *Commission v. Austria*, [2003] ECR I-1007, paras. 44-46.

[33] Case C-120/95, *Decker*, [1998] ECR I-1831, para. 27; Case C-158/96, *Kohll*, [1998] ECR I-1931, para. 25; Case C-238/98, *Hocsman*, [2000] ECR I-6623, paras. 31-34; see in substance als Case 241/86, *Bodin*, [1987] ECR 2574, paras. 8-13. See also Case C-249/04, *Allard*, [2005] ECR I-4535, para. 32-33, where the Court noted that the regulation at issue is not liable to hamper or render less attrictive the exercise of the fundamental freedoms, and it therefore concluded that the implementing domestic measures do not contitute restrictions on the freedom of establishment. This argumentation implies that the Court indeed applied the fundamental freedoms in testing the compatibility of a domestic measure with Community law; see in this direction also, e.g., Case C-453/04, *innoventif Limited*, [2006] ECR I-4929, para. 38-40. For an analysis see U. SCHEFFER, *Die Marktfreiheiten des EG-Vertrages als Ermessensgrenze des Gemeinschaftsgesetzgebers* (Lang, 1996), p. 129-130.

[34] See also RANDELZHOFER AND FORSTHOFF, "Vor Art. 39–45 EGV", in Grabitz and Hilf (Eds.), *Das Recht der Europäischen Union* (C. H. Beck, May 2001), paras. 148-152; also in this direction U. SCHEFFER, *Die Marktfreiheiten des EG-Vertrages als Ermessensgrenze des Gemeinschaftsgesetzgebers* (Lang, 1996), p. 121-133.

[35] Case C-246/98, *Berendse-Koenen*, [2000] ECR I-1777, paras. 24-25; Case C-322/01, *DocMorris*, [2003] ECR I-14887, paras. 52-53; Case C-387/99, *Commission v.*

and conversely, if a domestic measure is prohibited by secondary Community law, a Member State may not rely on a more far-reaching justification available under the freedoms to introduce deviations from such prohibition[36]. Third, and less clear, are situations where secondary Community law leaves the Member States latitude by permitting or tolerating certain domestic measures[37]. Although it seems to be general consensus that Member States are not relieved from their obligations under the freedoms because of the mere existence of an act of secondary Community law[38], recourse has to be made to the purpose and intention of such Community legislation. Should, for example, a directive explicitly leave certain aspects outside its scope, the fundamental freedoms fully apply to domestic measures in such area[39]. The same holds true if a concrete factual situation is not covered by the objective[40] or subjective[41] scope of a directive[42], although the Community act

Germany, [2004] ECR I-3751, para. 50; see also U. EVERLING, *Das Niederlassungsrecht in der EG als Beschränkungsverbot*, in Schön (Ed.), *Gedächtnisschrift für Knobbe-Keuk* (O. Schmidt, 1997), p. 607, 623-624; RANDELZHOFER AND FORSTHOFF, "Vor Art. 39–45 EGV", in GRABITZ and HILF (Eds.), *Das Recht der Europäischen Union* (C. H. Beck, May 2001), para. 148.

[36] Case 148/78, *Ratti*, [1979] ECR 1629, para. 36; Case 251/78, *Denkavit Futtermittel*, [1979] ECR 3369, para. 13; Case 190/87, *Moormann*, [1988] ECR 4689, paras. 10-11; Case C-112/97, *Commission v. Italy*, [1999] ECR I-1821, para. 54; Case C-421/98, *Commission v. Spain*, [2000] ECR I-10375, para. 42; for a different approach see, however, Case 72/83, *Campus Oil*, [1984] ECR 2727, where the Court allowed the invocation of Art 30 EC even though an act of secondary Community law had already covered the issue in question. For a crtical position see, e.g., A. BLECKMANN, *Probleme bei der Auslegung von EWG-Richtlinien*, 33 Recht der Internationalen Wirtschaft (1987), p. 929, 933.

[37] For the specific situation of "minimum harmonization", where Member States are permitted to maintain or introduce more stringent regulatory standards, see M. DOUGAN, *Minimum Harmonization and the Internal Market*, 37 Common Market Law Review (2000), p. 853-885.

[38] Possibly different, however, U. EVERLING, *Das Niederlassungsrecht in der EG als Beschränkungsverbot*, in Schön (Ed.), *Gedächtnisschrift für Knobbe-Keuk* (O. Schmidt, 1997), p. 607, 623-624, who argues that domestic measures that serve the implementation of directives or that stay within the framework set out in such directives do not constitute a restriction and therefore need not be justified in the light of the freedoms.

[39] Case 53/80, *Eyssen*, [1980] ECR 409, para. 15.

[40] Case C-379/05, *Amurta*, [2007] ECR I-9569, paras. 18-24; Case C-374/04, *ACT Group Litigation*, [2006] ECR I-11673, paras. 53-54; Case C-446/04, *FII Group Litigation*, [2006] ECR I-11753, paras. 44-46 and 67-68; see also Opinion A.G. Mengozzi, 7 June 2007, Case C-379/05, *Amurta*, [2007] ECR I-9569, para. 27 with note 10.

[41] Opinion A.G. Mazák, 18 December 2008, Case C-303/07, *Aberdeen Property Fininvest Alpha*, para. 23.

might provide guidance as to the value judgments of the Community legislator that could be considered at the level of justification[43]. In cases, however, where an act of secondary Community law permits or tolerates certain domestic measures within its scope of application, it needs to be determined whether such option may nevertheless only be exercised in compliance with the fundamental provisions of the Treaty[44]. In the tax area, this was the case, for example, in *Bosal*[45] and *Keller Holding*[46].

The situation might, however, be different if a directive contains an explicit permission for a specific Member State. In this respect it is generally argued that "the Community can neither empower nor oblige the Member States to pursue objectives that the Member States for themselves are forbidden to pursue"[47]. The question here is, however, different as one needs to establish not primarily whether secondary Community law infringes primary Community law[48] but rather whether domestic implementing measures are to be tested against the freedoms directly. In the heavily criticized[49] *Ouzo* case[50], for example, the directive on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages[51] granted Greece the option

[42] See, e.g., W. SCHÖN and C. SCHINDLER, *Die SE im Steuerrecht* (O. Schmidt, 2008), para. 26; for a detailed analysis see *infra* Chapter II.B.

[43] See in this direction U. FORSTHOFF, *Die eigenständige Bedeutung des sekundären Gemeinschaftsrechts*, 15 Internationales Steuerrecht (2006), p. 613, 617; see also W. SCHÖN and C. SCHINDLER, *Die SE im Steuerrecht* (O. Schmidt, 2008), para. 28.

[44] See in this respect, e.g., Case 241/86, *Bodin*, [1987] ECR 2574, paras. 8-13; Case C-39/90, *Denkavit Futtermittel*, [1991] ECR I-3069, paras. 17-25.

[45] Case C-168/01, *Bosal*, [2003] ECR I- 9409, paras. 21-28.

[46] Case C-471/04, *Keller Holding*, [2006] ECR I-2107, para. 45.

[47] See Roth, "Case C-233/94, *Federal Republic of Germany v. European Parliament and Council of the European Union*, Judgment of 13 May 1997, [1997] ECR I-2405", 35 *Common Market Law Review* (1998), 459, 478-479.

[48] See for such situations, e.g., Joined Cases 80/77 and 81/77, *Ramel*, [1978] ECR 927, para. 35; Case 41/84, *Pinna*, [1986] ECR 1.

[49] See, e.g., D. DÜRRSCHMIDT, *Nachbetrachtung zu EuGH, EuZW 2004, 729 – Kommission/Griechenland (Ouzo)*, 16 Europäische Zeitschrift für Wirtschaftsrecht (2005), p. 229-230; S. WEINZIERL, *Die Ouzo-Entscheidung des EuGH (Rs. C-475/01) – Eine ungenutzte Möglichkeit zur Bereinigung der Gemeinschaftsrechtsordnung von Widersprüchen*, 39 Europarecht (2005), 759-769; J. LÜDICKE and L. HUMMEL, *Zum Primat Des Primären Gemeinschaftsrechts*, 15 Internationales Steuerrecht (2006), p. 694, 697; D. V. TSIROS, *The 'Ouzo' Case: Towards a New Assessment of Member State Obligations under the Treaty and the Commission's Discretion in the Exercise of Public Enforcement*, 12 Columbia Journal of European Law (2006), p. 809-826.

[50] Case C-475/01, *Commission v. Greece* ("Ouzo"), [2004] ECR I-8923.

[51] Art 23(2) of the Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages, [1992] OJ (L 316), 21,

to reduce its tax on Ouzo, which Greece did in compliance with the directive[52]. After the time frame for an action for annulment had passed, the Commission challenged the Greek implementation on the ground that it infringed on Art 90 EC as foreign products such as whisky, gin or rum face higher taxation than domestically produced Ouzo[53]. Advocate General *Tizzano*, however, went on to demonstrate that Greece's alternatives were to either implement the option granted by the directive or not to do so[54], which implied that the Commission's action "indirectly but necessarily amounts to a challenge to the lawfulness of that provision"[55]. In such case, however, a provision of a valid directive is presumably in compliance with the fundamental freedoms[56], which lead the Court to the conclusion that, since Greece

> "has done no more than maintain in force national rules adopted on the basis of [the explicit permission in the directive] and which comply with that provision, it has not failed to fulfill its obligations under Community law"[57].

It not yet clear whether the Court's decision in *Ouzo* is a singulary "abberation" based on the procedural particularities of the case[58], as the validity of a Community act may be challenged in an action for annulment under Art 230 EC or in a request for a preliminary ruling under Art 234 EC, but not in an infringement proceeding under Art 226 EC, or whether the Court has intended to open the door for Member States to rely on explicit permissions in secondary Community law to deflect challenges under the freedoms[59],

---

in conjunction with Art 1(4)(o)(3) of Council Regulation (EEC) No 1576/89 of 29 May 1989 laying down general rules on the definition, description and presentation of spirit drinks, [1989] OJ (L 160), 1.

[52] This was not challenged by the Commission; see Opinion A.G. Tizzano, 15 January 2004, Case C-475/01, *Commission v. Greece* ("Ouzo"), [2004] ECR I-8923, para. 59 with note 16.

[53] See already Case C-230/89, *Commission v. Greece*, [1991] ECR I-1909, where the Court found that a reduced VAT rate on Ouzo as compared to the rate applicable for imported spirits infringes on (now) Art 90 EC, and for a detailed analysis S. WEINZIERL, *Die Ouzo-Entscheidung des EuGH (Rs. C-475/01) – Eine ungenutzte Möglichkeit zur Bereinigung der Gemeinschaftsrechtsordnung von Widersprüchen*, 39 Europarecht (2005), p. 759-769.

[54] Opinion A.G. Tizzano, 15 January 2004, Case C-475/01, *Commission v. Greece* ("Ouzo"), [2004] ECR I-8923, paras. 51-70.

[55] Case C-475/01, *Commission v. Greece* ("Ouzo"), [2004] ECR I-8923, para. 17.

[56] Case C-475/01, *Commission v. Greece* ("Ouzo"), [2004] ECR I-8923, para. 18.

[57] Case C-475/01, *Commission v. Greece* ("Ouzo"), [2004] ECR I-8923, para. 24.

[58] See for this assessment J. LÜDICKE and L. HUMMEL, *Zum Primat Des Primären Gemeinschaftsrechts*, 15 Internationales Steuerrecht (2006), 694, 697.

[59] For this conclusion also in the area of direct taxation see U. FORSTHOFF, *Die eigenständige Bedeutung des sekundären Gemeinschaftsrechts*, 15 Internationales

even if such deficiency in secondary Community law may result in a restriction of the freedoms. Both perspectives have arguments on their side, and Advocate General *Tizzano* has indeed passionately argued that Greece could indeed rely on the explicit permission based on the consideration that the Community legislature cleary had already determined the compatibility with primary Community law, that the Commission itself had failed to challenge the directive within the specified time, and that the meaning of the provision was perfectly clear[60]. What speaks against this perspective is, of course, the character of a directive as a bargain between Member States, where Member States may also act in their own interests[61]. AG *Tizzano's* and the Court's conclusions in *Ouzo* hence seem to restrict the full force of the freedoms and open the door for Member States to pack their own interests in secondary Community legislation. It therefore seems that a consistent conclusion would indeed have required Greece to refrain from availing itself of the concession granted under in the directive to guarantee compliance with primary Community law[62].

II. – *Fundamental Freedoms, Direct Tax Directives and National Implementation*

A. – *Overview*

Harmonization in the field of direct taxation is still limited to some directives confined to discrete areas of particular relevance to cross-border

---

Steuerrecht (2006), p. 698, 699, and U. FORSTHOFF, *Die eigenständige Bedeutung des sekundären Gemeinschaftsrechts*, 15 Internationales Steuerrecht (2006), p. 698, 701. See, however, also the critizicm voiced by D. DÜRRSCHMIDT, *Nachbetrachtung zu EuGH, EuZW 2004, 729 – Kommission/Griechenland (Ouzo)*, 16 Europäische Zeitschrift für Wirtschaftsrecht (2005), p. 229, 230.

[60] Opinion A.G. Tizzano, 15 January 2004, Case C-475/01, *Commission v. Greece* ("Ouzo"), [2004] ECR I-8923, para. 52.

[61] See also *infra* Chapter II.B. Quite clearly so in the directive at issue in the *Ouzo* case, as AG Tizzano had noted that "other Member States (such as France) had been authorised by the same instrument and in precisely similar terms to avail themselves of identical concessions"; see Opinion A.G. Tizzano, 15 January 2004, Case C-475/01, *Commission v. Greece* ("Ouzo"), [2004] ECR I-8923, para. 52.

[62] See for the Commission's approach Opinion A.G. Tizzano, 15 January 2004, Case C-475/01, *Commission v. Greece* ("Ouzo"), [2004] ECR I-8923, para. 51. See for this conclusion also D. DÜRRSCHMIDT, *Nachbetrachtung zu EuGH, EuZW 2004, 729 – Kommission/Griechenland (Ouzo)*, 16 Europäische Zeitschrift für Wirtschaftsrecht (2005), p. 229, 230.

situations[63]. These directives aim at creating common systems in their respective fields to do away with disadvantages of cross-border transactions as compared with purely domestic transactions within a Member State and hence to advance the Single Market and the fundamental freedoms[64]. It is hence consequent for the Court to hold that Member States cannot unilaterally introduce measures that restrict the application of a directive[65]. Moreover, and conversely, a Member State may also not deviate from a directive even if the deviation would be non-discriminatory[66].

[63] See the Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [1990] OJ (L 225) 6, as amended (aiming at eliminating double taxation of dividends paid by a subsidiary in one Member State to a parent company in another Member State); Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, [1990] OJ (L 225) 1, as amended (aiming at facilitating cross-border reorganizations); Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, [2003] OJ (L 157) 49, as amended (aiming at ensuring that interest and royalty payments are subject to tax only once in the EU). One should also mention Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, [2003] OJ (L 157), 38 (aiming at effective taxation of savings income), which, however, serves a different purpose than the directives mentioned before and will not be addressed in the follwing chapters.

[64] The Preamble to the Parent-Subsidiary-Directive acknowledges that, because of the different domestic approaches "cooperation between companies of different Member States is […] disadvantaged in comparison with cooperation between companies of the same Member State", so that "it is necessary to eliminate this disadvantage by the introduction of a common system in order to facilitate the grouping together of companies" (see also, e.g., Case C-294/99, *Athinaïki Zithopiïa*, [2001] ECR I-6797, para. 25; Case C-446/04, *FII Group Litigation*, [2006] ECR I-11753, para. 103; Case C-379/05, *Amurta*, [2007] ECR I-9569, paras. 18; Case C-27/07, *Banque Fédérative du Crédit Mutuel*, [2008] ECR I-0000, para. 23; C-138/07, *Cobelfret*, [2009] ECR I-0000, para. 28). Likewise, the Preamble to the Merger Directive points out that domestic tax provisions on reorganizations "disadvantage such operations, in comparison with those concerning companies of the same Member State", so that it is "necessary to remove such disadvantages". Finally, the Preamble to the Interest-Royalties-Directive notes that, "[i]n a Single Market having the characteristics of a domestic market, transactions between companies of different Member States should not be subject to less favourable tax conditions than those applicable to the same transactions carried out between companies of the same Member State."

[65] See Joined Cases C-283/94, C-291/94 and C-292/94, *Denkavit*, [1996] ECR I-5063, para. 26.

[66] See Case C-138/07, *Cobelfret*, [2009] ECR I-0000, para. 46: "Accordingly, even though, in applying that system to the dividends distributed by both resident subsidiaries

Given the requirement of unanimity in the Council under Art 94 EC, directives in the direct tax area are the – almost inevitably imperfect – result of a compromise between the Member States; as a consequence of this bargaining process, their respective objective and subjective scopes are limited, they grant general options to the Member States, and they even contain express permissions for specific Member States to deviate from the directive's provisions to take into account budgetary concerns. It is hence no surprise that the implementation of direct tax directives into domestic law may cause tensions with the fundamental freedoms. This is because the relationship between domestic implementation measures, direct tax directives and the fundamental freedoms is dynamic in the sense that the impact of the fundamental freedoms depends on the national treatment of similar domestic situations[67]. The fundamental freedoms in the direct tax area primarily operate to relieve taxpayers of restrictions, which, in turn, can only be identified by comparing the cross-border situation with the domestic situation, whereas the direct tax directives aim at advancing the Single Market but, of course, cannot take account of each single Member State's domestic rules on comparable internal situations. If, however, a directive leaves the Member States a sufficiently wide margin to enable them to transpose the directives into national law in a manner consistent with the requirements of the EC Treaty, such directive itself is supposed to comply with primary EC law[68]. As will be shown below, this is the case with most, if not all, provisions in the direct tax directives[69]. It will then, in a first step, be a question whether the domestic legislator has exercised the leeway in transposing the directive in a manner that is consistent with the fundamental freedoms, and, in a next step, whether the directive's provisions may help a Member State to justify a discriminatory restriction in light of the freedoms.

---

and those established in other Member States, the Kingdom of Belgium seeks to eliminate all penalisation of cooperation between companies of different Member States as compared with cooperation between companies of the same Member State, that does not justify the application of a system which is not compatible with the system for preventing economic double taxation set out in the first indent of Article 4(1) of Directive 90/435."

[67] See also H. REHM and J. NAGLER, *Verbietet die Kapitalverkehrsfreiheit nach 1993 eingeführte Ausländerungleichbehandlung?*, 15 Internationales Steuerrecht (2006), p. 859, 860; H. REHM and J. NAGLER, *Anwendung der Mutter-Tochter-Richtlinie auf französische Einfache Aktiengesellschaft vor dem Jahr 2005?*, 17 Internationales Steuerrecht (2008), p. 595, 598-599.

[68] See Case 5/88 *Hubert Wachauf*, [1989] ECR 2609, para. 22; Case C-166/98, *Socridis*, [1999] ECR I-3791, paras. 19-20.

[69] *Infra* Chapters II.B., II.C. and II.D.

One might, however, encounter provisions in direct tax directives that resemble the option at issue in the *Ouzo* case[70] in the sense that they, first, address a single Member State and, second, grant a specific permission to such Member State[71]. If one were to conclude that in such cases a Member State may rely on an explicit permission to deflect challenges under the freedoms[72], nevertheless the validity of a directive in light of primary Community law may be challenged in a reference for a preliminary ruling[73]. The recent references in *Puffer*[74] and *Gaz de France*[75] clearly imply that domestic courts are willing to ask the ECJ whether certain provisions in indirect and direct tax directives may infringe on the Community-law principle of equal treatment or the fundamental freedoms[76]. If, however, a directive, or even a

[70] See Case C-475/01, *Commission v. Greece* ("Ouzo"), [2004] ECR I-8923, and the criticism *supra* Chapter I.

[71] *Infra* Chapter II.D.

[72] For this conclusion see U. FORSTHOFF, *Die eigenständige Bedeutung des sekundären Gemeinschaftsrechts*, 15 Internationales Steuerrecht (2006), p. 698, 699, and U. FORSTHOFF, *Die eigenständige Bedeutung des sekundären Gemeinschaftsrechts*, 15 Internationales Steuerrecht (2006), p. 698, 701; for a critical assessment see *supra* Chapter I.

[73] See, e.g., Case 15/81, *Schul*, [1982] ECR 1409, paras. 41-44; Case C-212/91, *Angelopharm*, [1994] ECR I-171.

[74] Case C-460/07, *Puffer*, concern the question of whether the 6th VAT directive infringes on the principle of equal treatment that a taxable person is entitled to full and immediate deduction of input tax on property which he acquires and allocates to his business, then paying output tax progressively on his private use of that property, even if he thus enjoys an identifiable financial advantage over another person acquiring similar property in a private capacity and thus unable to deduct any input tax. See the reference by the Austrian Supreme Administrative Court (VwGH), 24 September 2007, 2006/15/006, reprinted in 16 *Internationales Steuerrecht* (2007), p. 781, and the Opinion of A.G. Sharpston, 11 December 2008, Case C-460/07, *Puffer*, paras. 58-64, infringement. For a detailed analysis of the issues underlying the reference see N. ZORN and B. TWARDOSZ, *Gemeinschaftsgrundrechte und Verfassungsgrundrechte im Steuerrecht*, 45 Deutsches Steuerrecht (2007), p. 2185-2194.

[75] Pending as Case C-247/08, *Gaz de France*, concerning the question whether Art 2(a), (f) of the Annex to the Parent-Subsidiary-Directive infringe on Art 43, 48 EC and Art 58 EC as the directive establishes an exemption from withholding tax in favour of French parent companies taking the legal form of a "société anonyme", "société en commandite par actions" or "société à responsabilite limitee" but not, however, for French parent companies taking the legal form of a "société par actions simplifiée". The request by the Finanzgericht Köln, 23 May 2008, 2 K 3527/02, is reprinted in 17 *Internationales Steuerrecht* (2008), 595, with comments by REHM and NAGLER and by JOREWITZ.

[76] See also, e.g., Case 15/81, *Schul*, [1982] ECR 1409, paras. 41-44 (concerning the validity of an indirect tax provision in light of (now) Art 90 EC), and Case 58/01, *Océ van der Grinten*, [2003] ECR I-9809, paras. 90-103 (concerning the validity of Art 7(2)

single provision of a directive, were to be found invalid, the domestic implementation measure would not necessarily be equally invalid[77], but it would certainly stand to be measured against the freedoms directly. The standards of probing a directive in light of primary Community law are, however, different from those applied in scrutinizing domestic tax provisions of a Member State in light of the freedoms, as the Community legislator enjoys a certain degree of discretion in weighing different factors apart from the goal of a Single Market[78], such as interests of domestic fiscs[79]. The Court's message therefore seems to be that to the extent the Member States harmonize or at least coordinate their domestic tax systems at the Community level, the standards of review will be less strict than those applied in testing purely domestic rules against the freedoms[80]. It may nevertheless be doubted whether the necessity of a political compromise suffices to justify restrictive measures introduced through Community legislation, as especially in the area of taxation the restraint of a natural conflict of interests between the Member States is lacking and Member States may moreover aim at using Community law to push forward purely domestic interests[81].

---

of the Parent-Subsidiary-Directive in light of a lack of reasoning and for failure to consult the Economic and Social Committee and the European Parliament).

[77] See genereally RÖTTINGER, *Bedeutung der Rechtsgrundlage einer EG-Richtlinie und Folgen der Nichtigkeit*, 4 Europäische Zeitschrift für Wirtschaftsrecht (1993), 117-121.

[78] See, e.g., Case C-233/94, *Germany v. Parliament and Council*, [1997] ECR I-2405, paras. 16-17; Case C-168/98, *Luxemburg v. Parliament and Council*, [2000] ECR I-9131, para. 32; see for the question of proporationality also Case C-51/93, *Meyhui*, [1994] ECR I-3879, paras. 20-21. For a detailed analysis see, e.g., Caspar, "Das europäische Tabakwerbeverbot und das Gemeinschaftsrecht", 11 *Europäische Zeitschrift für Wirtschaftsrecht* (2000), 237, 240-241

[79] J. ENGLISCH, *Aufteilung der Besteuerungsbefugnisse – Ein Rechfertigungsgrund für die Einschränkung von EG-Grundfreiheiten* (IFSt, 2008), p. 89; W. SCHÖN and C. SCHINDLER, *Die SE im Steuerrecht* (O. Schmidt, 2008), para. 32; see also D. BEUTEL, *Der neue rechtliche Rahmen grenzüberschreitender Verschmelzungen in der EU* (Utz, 2008), p. 114.

[80] M. LANG, *ECJ case law on cross-border dividend taxation – recent developments*, 17 EC Tax Review (2008), p. 67, 73.

[81] See W. SCHÖN, *Tax Issues and Constraints on Reorganizations and Reincorporations in the European Union*, 34 Tax Notes International 197, p. 202 (Apr. 12, 2004); J. ENGLISCH, *Aufteilung der Besteuerungsbefugnisse – Ein Rechfertigungsgrund für die Einschränkung von EG-Grundfreiheiten* (IFSt, 2008), p. 89-90; W. SCHÖN and C. SCHINDLER, *Die SE im Steuerrecht* (O. Schmidt, 2008) para. 32.

B. – *Situations Outside the Subjective or Objective Scope of a Directive*

The first and foremost question is whether or not the fundamental freedoms also give protection to taxpayers who are not covered by the objective or subjective scope of a directive. Taken to the extreme, it may be argued that a directive represents the consensus between the Member States in Council and, therefore, prevents certain situations from being scrutinized under the freedoms. Such reasoning may consequently be put forward in defense of domestic discriminatory regimes. Indeed, in the area of the Parent-Subsidiary-Directive, which establishes the existence of a qualifying shareholding as a prerequisite for its application, Member States have argued that where a situation is not within the objective scope of the directive

> "a levy is permitted […], with the consequence that any difference in treatment in relations between parent and subsidiary companies established in different Member States should be attributed solely to the coexistence of different tax regimes"[82].

It is quite clear that the Court is not willing to accept such arguments, which aim at carving out domestic measures from the impact of the freedoms just because the existence of directive in the specific field of law, even if the concrete factual situation is not covered by the objective[83] or subjective[84] scope of such directive, even though there might be a tendency of the Court to follow the path set by the policy decisions in secondary Community law when interpretating the freedoms[85]. This being so, there is no doubt in

[82] See for this argument of the Member States Opinion A.G. Mengozzi, 7 June 2007, Case C-379/05, *Amurta*, [2007] ECR I-9569, para. 27 with note 10, and Case C-379/05, *Amurta*, [2007] ECR I-9569, paras. 21-23.

[83] Case C-379/05, *Amurta*, [2007] ECR I-9569, paras. 18-24; Case C-374/04, *ACT Group Litigation*, [2006] ECR I-11673, paras. 53-54; Case C-446/04, *FII Group Litigation*, [2006] ECR I-11753, paras. 44-46 and 67-68; Case C-48/07, *Les Vergers du Vieux Tauves*, [2008] ECR I-0000, para. 46; see also Opinion A.G. Mengozzi, 7 June 2007, Case C-379/05, *Amurta*, [2007] ECR I-9569, para. 27 with note 10.

[84] Opinion A.G. Mazák, 18 December 2008, Case C-303/07, *Aberdeen Property Fininvest Alpha*, [2009] ECR I-0000, para. 23.

[85] In this respect one might think of the Court's approach not to interfere with the taxation of the subsidiary in analyzing discriminatory effects of an imputation system in the source country; this approach stronlgy relied on the principle enshrined in Art 4 and 5 of the Parent-Subsidiary-Directive, which leaves the source State's right to tax the distributing company's profits untouched. See Case C-374/04, *ACT Group Litigation*, [2006] ECR I-11673, para. 60, and for a critical position, e.g., FARMER and ZALINSKI, "General Report", in XENOPOULOS (Ed.), *Direct tax rules and the EU fundamental freedoms: origin and scope of the problem; National and Community responses and solutions* (FIDE Congress, 2006), 399, 406; see also M. J. GRAETZ and A. WARREN, *Dividend Taxation in Europe: When the ECJ Makes Tax Policy*, 44 Common

the academic literature that the fundamental freedoms fully apply to situations outside the scope of a direct tax directive, as direct tax directives generally only contain minimum standards or requirements and may, therefore, not give rise to limitations in the scope of the fundamental freedoms[86]. This is inherently logical for several reasons: First, Member States are without doubt entitled to provide for more lenient treatment than that prescribed by a direct tax directive[87]; from this perspective, however, there is no dogmatic

Market Law Review (2007), p. 1577, 1620, and M. LANG, *ECJ case law on cross-border dividend taxation – recent developments*, 17 EC Tax Review (2008), p. 67, 73. For the Court's approach of a parallel interpretation of secondary Community law and the freedoms in the area of social security see, e.g., a. CORDEWENER, *Europäische Grundfreiheiten und nationales Steuerrecht* (O. Schmidt, 2002), p. 868-871.

[86] M. TUMPEL, *Europarechtliche Besteuerungsmaßstäbe für die grenzüberschreitende Organisation und Finanzierung von Unternehmen*, in Pelka (Ed.), *Europa- und verfassungsrechtliche Grenzen der Unternehmensbesteuerung, DStJG Vol. 23* (O. Schmidt, 2000), p. 322, 358-359; C. STARINGER, *Auslandsdividenden und Kapitalverkehrsfreiheit*, 53 Österreichische Steuerzeitung (2000), p. 26, 31; C. STARINGER, *Dividendenbesteuerung und Kapitalverkehrsfreiheit*, in Lechner, Staringer and Tumpel (Eds.), *Kapitalverkehrsfreiheit und Steuerrecht* (Linde, 2000), p. 93, 101-102; G. W. KOFLER and G. TOIFL, *Austria's Differential Treatment of Domestic and Foreign Intercompany Dividends Infringes the EU's Free Movement of Capital*, 45 European Taxation (2005), p. 232, 236-238; G. W. KOFLER and M. TUMPEL, *Double Taxation Conventions and European Directives in the Direct Tax Area*, in Lang, Schuch and Staringer (Eds.), *Tax Treaty Law and EC Law* (Linde, 2007), p. 191, 204-210; G. W. KOFLER, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Linde, 2007) p. 834-840; V. ZORN, *EG-Grundfreiheiten und dritte Länder*, in Quantschnigg, Wiesner and Mayr (Eds.), *Steuern im Gemeinschaftsrecht, Festschrift for Wolfgang Nolz* (LexisNexis, 2008), p. 211, 233-236; H. REHM and J. NAGLER, *Anwendung der Mutter-Tochter-Richtlinie auf französische Einfache Aktiengesellschaft vor dem Jahr 2005?*, 17 Internationales Steuerrecht (2008), p. 595, 599. See also VwGH, 17 April 2008, 2008/15/0064, *ÖStZB* 2009/5, 5, and for a detailed analysis of this decision T. BIEBER, W. HASLEHNER, G. W. KOFLER and C. P. SCHINDLER, *Taxation of Cross-Border Portfolio Dividends in Austria: The Austrian Supreme Administrative Court Interprets EC Law*, 48 European Taxation (2008), p. 583-589, with further references.

[87] See, e.g., the term "at least" in Art 3 of the Parent-Subsidiary-Directive; see also the Report of the European Parliament on the proposal for a Council directive amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, A5-0472/2003 (5 December 2003), 6 and 10-11, which noted that "[o]ut of the 15 current Member States, 7 of them do not apply any threshold at all for the beneficial tax treatment of dividend payments for domestic situations, and a further three use a relatively low threshold of 5%, whereas 2 Member States apply a 10% threshold, and a further 3 apply a 25% threshold." Against this background, the Parliament suggested to establish a participation threshold of 5%, which was considered "an acceptable compromise" with the goal to "avoid tax induced distortions of trade" and to "ensure that there is as little difference as possible between

objection to the conclusion that they might also be forced to do so under the fundamental freedoms[88]. Second, a different perspective would "have the onus to prove that a cartel of member states agreeing on a directive will be able to reduce the scope of the fundamental freedoms in the tax area"[89]. Third, if Member States were indeed allowed to "immunize" discriminatory domestic rules by agreeing on a directive[90], this would raise the serious issue that domestic rules might have violated the freedoms before a directive was issued but would comply with them thereafter[91].

The consequences of this approach may be easily demonstrated with respect to the Parent-Subsidiary-Directive, which requires exemption of dividends and profit shares paid by a subsidiary of one EU Member State to its parent company in another EU Member State from withholding taxation on the one hand (Art 5) and the avoidance of economic double taxation of the distributed profits by granting an exemption or an indirect credit at the level of the parent company and its permanent establishment on the other (Art 4). The scope of application of this directive is, however, limited in a subjective

---

doing business in several Member States as opposed in only the home Member State". The Parliament, however, did not enter a discussion on the impact of the freedoms for those Member States whose threshold in domestic situations is lower than that provided by the Parent-Subsidiary-Directive.

[88] See, e.g., G. W. KOFLER and M. TUMPEL, *Double Taxation Conventions and European Directives in the Direct Tax Area*, in Lang, Schuch and Staringer (Eds.), *Tax Treaty Law and EC Law* (Linde, 2007) p. 191, 202-210; G. W. KOFLER, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Linde, 2007), p. 834-840.

[89] W. SCHÖN, *Tax Issues and Constraints on Reorganizations and Reincorporations in the European Union*, 34 Tax Notes International, p. 197, 202 (Apr. 12, 2004).

[90] However, even if it were to become clear that the Member States intended to use a directive to immunize a discrimination or restriction from being approached as such under the EC Treaty, it is apparent that the ECJ would not consider such historical arguments as decisive. See Joined Cases C-283/94, C-291/94 and C-292/94, *Denkavit*, [1996] ECR I-5063, para. 29: "Expressions of intent on the part of Member States in the Council, such as those on which the Governments rely in their observations, have no legal status if they are not actually expressed in the legislation."

[91] It might be noted that, in principle, the interpretation the ECJ gives to a rule of Community law is limited to clarifying and defining the meaning and scope of that rule as it ought to have been understood and applied from the time of its coming into force, i.e., 1 January 1970 in the cases of now Art 39, 43 and 49 EC and 1 January 1994 (1 July 1990) in the case of now Art 56 EC. It follows that such interpretation must be applied by the national courts even to legal relationships arising and established before the respective ECJ's judgment (see, e.g., Case C-209/03, *Bidar*, [2005] ECR I-2119, paras. 66 et seq). Only in very exceptional cases does the Court restrict such "retroactive" or – more precisely – *ex tunc* effects (see, e.g., Case 24/86, *Blaizot*, [1988] ECR 379, paras. 28 and 30; Case C-209/03, *Bidar*, [2005] ECR I-2119, paras. 66 et seq.).

and an objective manner: To qualify subjectively, both companies must take one of the legal forms listed in the Annex to the Parent-Subsidiary Directive, be resident in the European Union for tax purposes and not be resident in a non-EU country in accordance with a tie-breaker clause in a tax treaty with that country, and be subject to corporation taxation without the possibility of an option to be exempt (Art 2). To qualify objectively, the parent company must have a qualified holding[92] in the capital[93] of the subsidiary (Art 3). When the question arose whether a company may rely on the fundamental freedoms if the concrete factual situation was outside the objective scope of the directive, the Court in *ACT Group Litigation*, *FII Group Litigation* and *Amurta* did not hesitate to note that

> "[t]he mere fact that, for holdings to which [the Parent-Subsidiary-Directive] does not apply, it is for the Member States to determine whether, and to what extent, a series of charges to tax and economic double taxation are to be avoided and, for that purpose, to establish, either unilaterally or through DTCs concluded with other Member States, procedures intended to prevent or mitigate such a series of charges to tax and that economic double taxation, does not of itself mean that the Member States are entitled to impose measures that contravene the freedoms of movement guaranteed by the Treaty"[94].

Hence, situations outside the objective scope of the Parent-Subsidiary-Directive are subject to full scrutiny under the fundamental freedoms. Therefore, the domestic taxation of inbound and outbound dividends in such situations has to comply with the requirements of non-discriminatory treatment under the freedoms[95]. As the Court has demonstrated in *Les Vergers du Vieux Tauves*, the same holds true if a specific form of relationship between the parent company and the subsidiary is not covered by the directive, such

[92] 20% from 1 January 2005, 15% from 1 January 2007, and 10% from 1 January 2009.

[93] However, under the first intend of Art 3(2) Member States have the option of "replacing, by means of bilateral agreement, the criterion of a holding in the capital by that of a holding of voting rights".

[94] Case C-374/04, *ACT Group Litigation*, [2006] ECR I-11673, para. 54; see to that effect also Case C-446/04, *FII Group Litigation*, [2006] ECR I-11753, para. 68; Case C-379/05, *Amurta*, [2007] ECR I-9569, paras. 21-23; see also Case C-201/05, *CFC and Dividend Group Litigation*, [2008] ECR I-0000, para. 61; Case C-48/07, *Les Vergers du Vieux Tauves*, [2008] ECR I-0000, para. 46.

[95] See also Opinion A.G. Mengozzi, 7 June 2007, Case C-379/05, *Amurta*, [2007] ECR I-9569, para. 27 with note 10.

as a usufruct in shares[96]. Nevertheless, the domestic legislation has to comply with the freedoms:

> "[T]he concept of a holding in the capital of a company of another Member State, within the meaning of Article 3 of [the Parent-Subsidiary-Directive], does not include the holding of shares in usufruct. However, in compliance with the freedoms of movement guaranteed by the EC Treaty, applicable to cross-border situations, when a Member State, in order to avoid double taxation of received dividends, exempts from tax both the dividends which a resident company receives from another resident company in which it holds shares with full title and those which a resident company receives from another resident company in which it holds shares in usufruct, that Member State must apply, for the purpose of exempting received dividends, the same treatment to dividends received from a company established in another Member State by a resident company holding shares with full title as that which it applies to such dividends received by a resident company which holds shares in usufruct"[97].

Likewise, the application of the fundamental freedoms is not impeded by the mere existence of a directive where a concrete factual situation is not covered by the *subjective* scope of the directive[98]. From this perspective, the reference for a preliminary ruling in *Gaz de France*[99], which concerns a situation outside the subjective scope of the Parent-Subsidiary-Directive, probably asks the wrong questions[100], as it seems quite clear that not the validity of

---

[96] See Case C-48/07, *Les Vergers du Vieux Tauves*, [2008] ECR I-0000, para. 30-44; for a different perspective see the Opinion of A.G. Sharpston, 3 July 2008, Case C-48/07, *Les Vergers du Vieux Tauves*, [2008] ECR I-0000, paras. 43-60, who considered an usufruct to be covered by the directive; see also the analysis of this opinion by Kofler, "Fruchtgenuss und internationales Schachtelprivileg", 18 *Steuer und Wirtschaft International* (2008), 513-518.

[97] Case C-48/07, *Les Vergers du Vieux Tauves*, [2008] ECR I-0000, para. 49.

[98] Opinion A.G. Mazák, 18 December 2008, Case C-303/07, *Aberdeen Property Fininvest Alpha*, [2009] ECR I-0000, para. 23 (concerning distributions to a company that is not covered by the annex to the Parent-Subsidiary-Directive).

[99] Pending as Case C-247/08, *Gaz de France*.

[100] The German domestic court wishes to inquire whether Art 5 of the Parent-Subsidiary-Directive is to be interpreted in a fashion that also distributions to a French parent companies taking the legal form of a "société par actions simplifiée", which was not listed in the annex to the directive before the 2003 amendments, are covered, or alternatively, whether the directive itself infringes on on Art 43, 48 EC and Art 58 EC as the directive establishes an exemption from withholding tax in favour of French parent companies taking the legal form of a "société anonyme", "société en commandite par actions" or "société à responsabilite limitee" but not, however, for French parent companies taking the legal form of a "société par actions simplifiée". The request was made by

the directive is at issue, but rather the compatibility with the fundamental freedoms of the German domestic tax rules that discriminate between foreign and domestic parent companies[101].

It is also noteworthy that the Court's approach was reflected in the 2003 amendments to the Parent-Subsidiary-Directive in respect of situations involving permanent establishments[102]. While such situations have not been explicitly dealt with in the original 1990 directive, many had argued that the freedom of establishment under Art 43, 48 EC, as interpreted by the Court in *Avoir Fiscal*[103] and *Saint-Gobain*[104], nevertheless puts an obligation on the State where the permanent establishment is situated to treat it no less favorably than a resident company receiving dividends from its subsidiary[105]. The

---

the Finanzgericht Köln, 23 May 2008, 2 K 3527/02, and is reprinted in 17 *Internationales Steuerrecht* (2008), 595, with comments by REHM and NAGLER and by JOREWITZ.

[101] For a detailed analysis of the German legislation see H. REHM and J. NAGLER, *Anwendung der Mutter-Tochter-Richtlinie auf französische Einfache Aktiengesellschaft vor dem Jahr 2005?*, 17 Internationales Steuerrecht (2008), p. 597, 599-600; see also J. JOREWITZ, *Anwendung der Mutter-Tochter-Richtlinie auf französische Einfache Aktiengesellschaft vor dem Jahr 2005*?, 17 Internationales Steuerrecht (2008), 600. It has, however, also been argued in legal writing that the incomplete coverage of Member States' entities in the annex to the Parent-Subsidiary-Directive "may amount to discrimination" and that the directive "may thus be invalid with respect to other legal forms that those listed" in the annex; see B. H. ter KUILE, *Taxation, Discrimination and the Internal Market*, 32 European Taxation (1992), p. 402, 403, and C. M. HARRIS, *The European Community's Parent-Subsidiary Directive*, 9 Florida Journal of International Law (1994), 111, 133.

[102] Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [2004] OJ (L 7), 41.

[103] Case 270/83, *Commission v. France* ("*Avoir Fiscal*"), [1986] ECR 273.

[104] Case C-307/97, *Saint-Gobain*, [1999] ECR I-6161.

[105] See, e.g., P. FARMER and R. LYAL, *EC Tax Law* (Clarendon Press, 1994) p. 266-267; M. TUMPEL, *Harmonisierung der direkten Unternehmensbesteuerung in der EU* (Österreichische Staatsdruckerei, 1994), p. 264; A. J. MARTÍN JIMÉNEZ, F. A. GARCÍA PRATS and J. M. CALDERÓN CARRERO, *Triangular Cases, Tax Treaties and EC Law: The Saint-Gobain Decision of the ECJ*, 55 Bulletin For International Fiscal Documentation (2001), p. 241, 253; G. MAISTO, *The 2003 amendments to the EC Parent-Subsidiary Directive: what's next?*, 13 EC Tax Review (2004), p. 164, 165 and 166-167; H. KOFLER and G. W. KOFLER, *Betriebsstätten in der Mutter-Tochter-Richtlinie*, in Quantschnigg, Wiesner and Mayr (Eds.), *Steuern im Gemeinschaftsrecht, Festschrift for Wolfgang Nolz* (LexisNexis, 2008), p. 53-82; B. TERRA and P. WATTEL, *European Tax Law* (Kluwer, 5th edition 2008), p. 482; for a detailed analysis of triangular situations in light of the freedoms see G. W. KOFLER, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Linde, 2007) p. 451-493.

Commission has supported this analysis and noted in its proposal for the 2003 amendment that

> "[t]he Parent-Subsidiary Directive does not deal explicitly with the situation where profits distributed are received by a permanent establishment in respect of shares effectively connected with it. The coverage of these situations is among the aims of the Directive. In addition, the European Court of Justice jurisprudence states that permanent establishments may not be discriminated against in relation to subsidiary companies when both are subject to a similar tax regime. It is appropriate to clarify the text of the Directive concerning this issue"[106].

Based on these considerations, the directive was clarified to also cover triangular situations with the parent company, the subsidiary and the dividend-receiving permanent establishment of the parent company being situated in different Member States[107]. In that respect, the Preamble to the 2005 amendment observes that

> "[t]he payment of profit distributions to, and their receipt by, a permanent establishment of a parent company should give rise to the same treatment as that applying between a subsidiary and its parent. This should include the situation where a parent company and its subsidiary are in the same Member State and the permanent establishment is in another Member State"[108].

What was, however, not implemented was the Commission's proposal to include situations where the subsidiary and the dividend-receiving permanent establishment of the parent company are situated in the same Member State[109]. Member States in the Council's Group on Tax Questions[110] and the

---

[106] Point 19 of the Explanatory Memorandum of the Commission's Proposal for a Council Directive amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, COM(2003)462 final, 5 (footnote to *Avoir Fiscal* and *Saint-Gobain* omitted).

[107] See the third intend of Art 1 of the amended Parent-Subsidiary-Directive.

[108] Point 8 of the Preamble to Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [2004] OJ (L 7), 41.

[109] For details see H. KOFLER and G. W. KOFLER, *Betriebsstätten in der Mutter-Tochter-Richtlinie*, in QUANTSCHNIGG, WIESNER and MAYR (Eds.), *Steuern im Gemeinschaftsrecht, Festschrift for Wolfgang Nolz* (LexisNexis, 2008), p. 53, 58-59 and 79-80.

[110] See, e.g., the Note from the Presidency to the Working Party on Tax Questions: Direct Taxation, 12740/03 (22 September 2003), 13.

European Parliament[111] considered this to be a domestic rather than an actual cross-border transaction, which should therefore be left out of the directive's scope. Based on this perspective, the 2005 amendment does indeed not include same-country situations, although the delegations of some Member States had noted that this "may raise potential problems in the light of the ECJ jurisprudence"[112]. Indeed, it is quite undisputed that the freedom of establishment requires the State where the permanent establishment is situated to grant such permanent establishment the same tax treatment on dividends received as it would extend to domestic parent companies[113]. It seems to be against this background that the Preamble to the 2005 directive states that

> "it appears that situations where the permanent establishment and the subsidiary are situated in the same Member State, can, without prejudice to the application of the Treaty principles, be dealt with on the basis of national legislation by the Member State concerned"[114].

This reference to the "application of the Treaty principles" clearly demonstrates that the Council was aware of potential problems that could arise in light of the impact of the freedom of establishment on Member States' domestic tax systems. This means, conversely, that the Council itself considered the exclusion of the same-country situation from the directive's scope not as immunizing such situation from the freedom's impact[115].

---

[111] See the Report on the proposal for a Council directive amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, A5-0472/2003 (5 December 2003), 6, and Amendment 2 of the European Parliament's legislative resolution on the proposal for a Council directive amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, P5_TA(2003)0567.

[112] See the Note from the Presidency to the Working Party on Tax Questions – Direct Taxation, 13793/03 (21 October 2003), 6 with note 1.

[113] See, e.g,. P. BULLINGER, *Änderungen der Mutter-Tochter-Richtlinie ab 2005: Erweiterung des Anwendungsbereiches und verbleibende Probleme*, 13 Internationales Steuerrecht (2004), p. 406, 408; H. KOFLER and G. W. KOFLER, *Betriebsstätten in der Mutter-Tochter-Richtlinie*, in QUANTSCHNIGG, WIESNER and MAYR (Eds.), Steuern im Gemeinschaftsrecht, Festschrift for Wolfgang Nolz (LexisNexis, 2008), p. 53, 79-80; B. TERRA and P. WATTEL, *European Tax Law* (Kluwer, 5th edition 2008), p. 483.

[114] Point 8 of the Preamble to Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [2004] OJ (L 7), 41.

[115] See also H. KOFLER and G. W. KOFLER, *Betriebsstätten in der Mutter-Tochter-Richtlinie*, in QUANTSCHNIGG, WIESNER and MAYR (Eds.), *Steuern im Gemeinschaftsrecht, Festschrift for Wolfgang Nolz* (LexisNexis, 2008), p. 53, 79-80.

C. – *Substantial Prerequisites for the Application of a Directive*

Quite similar to situations concerning the objective or subjective scope of secondary Community law, tax directives may provide for certain prerequisites for a taxpayer's entitlement to a tax advantage. This issue is best illustrated with reference to the Merger Directive, the current version of which states in its Art 4 and 10b that certain reorganizations and the transfer of an SE's or SCE's seat "shall not give rise to any taxation of capital gains", but links this tax deferral to the condition that the assets remain effectively connected with a permanent establishment in the State of the transferring company or in the State from which the registered seat of an SE or SCE has been transferred, respectively[116]. Already the preamble to the 1990 Merger Directive had noted that

> "the system of deferral of the taxation of the capital gains relating to the assets transferred until their actual disposal, applied to such of those assets as are transferred to that permanent establishment, permits exemption from taxation of the corresponding capital gains, while at the same time ensuring their ultimate taxation by the State of the transferring company at the date of their disposal"[117].

This "permanent establishment requirement" was already included in the Commission's 1969 proposal[118], found its way into the 1990 directive, and has not been changed by the 2005 amendment, which moreover states that the objective of the Merger Directive is "that taxation of the income, profits and capital gains from business reorganisations should be deferred and Member States taxing rights safeguarded"[119]. Hence, the obvious purpose of this "requirement that the assets transferred remain under the same tax jurisdiction" is to "safeguard the financial interests of the Member

[116] See also the Proposal for a Council Directive amending Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, COM(2003)613 final, 13 (concerning Art 10a)

[117] Preamble to Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, [1990] OJ (L 225) 1.

[118] See Art 4 and the accompanying Explanatory Notes of the Commission's 1969 proposal (COM(69)5 final, 3 and 20).

[119] See Point 2 of the Preamble to Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, [2005] OJ (L 58), 19.

States"[120], implying that the Member States should have the ability to continue to exercise taxing jurisdiction over hidden reserves in assets involved in such transaction. Conversely, assets not remaining in a permanent establishment are not covered by the wording of Art 4 and 10b of the Merger Directive and hence do not qualify for tax deferral under these provisions; this is especially relevant for intangible assets, shareholdings in other companies, and real estate that cannot be attributed to a permanent establishment that remains in the exit State. Against this background, it seems to be fair conclusion that the intention of the Member States acting unanimously in Council was to immunize their domestic exit tax systems in cases outside the coverage of the Merger Directive, as at the time of issuing the amending 2005 directive all Member States had foreseen regimes of deferred taxation for purely domestic situations[121].

What remains doubtful, therefore, is the impact of the Merger Directive's "permanent establishment requirement" on domestic exit tax rules that impose an immediate charge on cross-border restructurings if the requirement under Art 4 or Art 10b is not fulfilled, whereas no such immediate taxation would take place in a purely domestic setting. In light of the Court's decisions in *X and Y*[122]*, du Saillant*[123] and *N*[124], where the ECJ accepted that under the fundamental freedoms the exit State may tax an appreciation in value that occurred while the taxpayer was a resident, if and insofar such taxation is deferred until the eventual alienation of such assets[125], many have argued that a

[120] See the Impact Assessment Form attached to the Proposal for a Council Directive amending Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, COM(2003)613 final, p. 13, 28.

[121] J. ENGLISCH, *Aufteilung der Besteuerungsbefugnisse – Ein Rechfertigungsgrund für die Einschränkung von EG-Grundfreiheiten* (IFSt, 2008), p. 88.

[122] Case C-436/00, *X and Y*, [2002] ECR I-10829 (unfavorable tax treatment of the transferor based on the residence of the transferee).

[123] Case C-9/02, *de Lasteyrie du Saillant*, [2004] ECR I-2409 (exit tax on substantial shareholdings of an individual).

[124] Case C-470/04, *N*, [2006] ECR I-7409 (exit tax on substantial shareholdings of an individual).

[125] For general analyses of problems concerning the EC compatibility of exit taxation regimes see, e.g, K. MALMER, *Emigration Taxes and EC Law*, in IFA (Ed.), *The tax treatment of transfer of residence by individuals*, CDFI 87b (2002), p. 49, 79; H. VAN ARENDONK, *Hughes de Lasteyrie du Saillant: crossing borders?* in van Arendonk, Engelen and Jansen (Eds.), *A Tax Globalist, Essays in honour of Maarten J. Ellis* (IBFD, 2005), p. 181; L. DE BROE, *Hard times for emigration taxes in the EC*, in van ARENDONK, ENGELEN and JANSEN (Eds.), *A Tax Globalist, Essays in honour of Maarten J. Ellis* (IBFD, 2005), p. 210; H. VAN DEN HURK and J. KORVING, *The ECJ's Judgment in the N Case against the Netherlands and its Consequences for Exit*

similar reasoning should apply when it comes to corporate reorganizations[126] or the transfer of a company's seat, at least when an SEs or an SCEs is involved[127]. If one assumes, at least for sake of the argument[128], that the fundamental freedoms also apply to and would prohibit exit tax rules that lead to immediate taxation in cases of cross-border corporate reorganizations or mi-

---

Taxes in the European Union, 61 Bulletin For International Fiscal Documentation (2007), p. 150; G. FÜHRICH, *Exit Taxation and ECJ Case Law*, 48 European Taxation (2008), p. 10; B. TERRA and P. WATTEL, *European Tax Law* (Kluwer, 5th edition 2008), p. 780-790.

[126] See Case C-411/03, *SEVIC*, [2005] ECR I-10805 (concerning the possibility of a cross-border merger based on the freedom of establishment).

[127] It might be noted in passing that the ECJ views companies as creations of national law, which implies that it is for national law to determine the legal existence of a company; if, therefore, Member States are at liberty to restrict emigration of companies incorporated under their laws by depriving them or their existence as legal entities (see in this regard Case 81/87, *Daily Mail*, [1988] ECR 5483, which was found to be good law in Case C-210/06, *CARTESIO*, [2008] ECR I-0000), then, so it is argued, *a fortiori* they must also be permitted to levy an immediate exit tax. See, e.g., G. FROTSCHER, *Zur Vereinbarkeit der 'Betriebsstättenbedingung' bei Sitzverlegung und grenzüberschreitender Umwandlung mit den Grundfreiheiten*, 15 Internationales Steuerrecht (2006), p. 65-72, and for a critical review B. TERRA and P. WATTEL, *European Tax Law* (Kluwer, 5th edition 2008), p. 786-790. Even if one were to agree with that line of reasoning, it could probably not be applied in relation to SEs and SCEs, which are creations of Community law and may freely transfer their seats. See the Commission's Communication on Exit taxation and the need for co-ordination of Member States' tax policies, COM(2006)825 final, 5; see also, e.g., D. WEBER, *Exit Taxes on the Transfer of Seat and the Applicability of the Freedom of Establishment after Überseering*, 43 European Taxation (2003), p. 350, 353; W. SCHÖN, *Besteuerung im Binnenmarkt – die Rechtsprechung des EuGH zu den direkten Steuern*, 13 Internationales Steuerrecht (2004), p. 289, 297; W. SCHÖN and C. SCHINDLER, *Zur Besteuerung der grenzüberschreitenden Sitzverlegung einer Europäischen Aktiengesellschaft*, 13 Internationales Steuerrecht (2004) p. 571, 575; C. SCHINDLER, *Steuerrecht*, in Kalss and Hügel (Eds.), *SE-Kommentar* (Linde, 2004), Part III, para. 26; W. SCHÖN, *Grenzüberschreitende Sitzverlegung und Verschmelzung im Steuerrecht*, Jahrbuch der Fachanwälte für Steuerrecht (2006/2007), p. 81-92; B. TERRA and P. WATTEL, *European Tax Law* (Kluwer, 5th edition 2008), 540; W. SCHÖN and C. SCHINDLER, *Die SE im Steuerrecht* (O. Schmidt, 2008) para. 152.

[128] It should, however, be mentioned that even if the fundamental freedoms apply, Member States may find valid justifications in this area, especially in respect of the obstacles to a deferred taxation of hidden reserves in intangible assets and short-term assets; see, e.g., J. THIEL, *Europäisierung des Umwandlungssteuerrechts: Grundprobleme der Verschmelzung*, 57 Der Betrieb (2005), p. 2316, 2318; M. SCHWENKE, *Europarechtliche Vorgaben und deren Umsetzung durch das SEStEG*, 94 Deutsche Steuerzeitung (2007), p. 235, 246-247; see also J. ENGLISCH, *Aufteilung der Besteuerungsbefugnisse – Ein Rechfertigungsgrund für die Einschränkung von EG-Grundfreiheiten* (IFSt, 2008), p. 89-92.

grations of companies, the questions is raised whether Member States may nevertheless argue their entitlement to immediate taxation where the "permanent establishment requirement" of Art 4 and 10a of the Merger Directive is not met. Nevertheless, and while the approaches to this question in academia differ in detail, the prevailing opinion in legal writing clearly considers that domestic rules to that effect must be measured against and comply with the fundamental freedoms[129]. Therefore, for assets not connected with a perma-

[129] See W. SCHÖN, *Besteuerung im Binnenmarkt – die Rechtsprechung des EuGH zu den direkten Steuern*, 13 Internationales Steuerrecht (2004) p. 289, 297; W. SCHÖN, *Tax Issues and Constraints on Reorganizations and Reincorporations in the European Union*, 34 Tax Notes International, p. 197, 202 (Apr. 12, 2004), T. RÖDDER, *Deutsche Unternehmensbesteuerung im Visier des EuGH*, 42 Deutsches Steuerrecht (2004), p. 1629, 1633; W. SCHÖN and C. SCHINDLER, *Zur Besteuerung der grenzüberschreitenden Sitzverlegung einer Europäischen Aktiengesellschaft*, 13 Internationales Steuerrecht (2004) p. 571, 575-576; C. SCHINDLER, *Steuerrechtliche Folgen der Sitzverlegung einer Europäischen Aktiengesellschaft*, 15 Ecolex (2004), p. 770, 771; C. SCHINDLER, *Steuerrecht*, in Kalss and Hügel (Eds.), *SE-Kommentar* (Linde, 2004), Part III, paras. 27-28; H. F. Hügel, *Grenzüberschreitende Umgründungen, Sitzverlegung und Wegzug im Lichte der Änderung der Fusionsrichtlinie und der neueren EuGH-Judikatur*, in König and Schwarzinger (Eds.), *Körperschaften im Steuerrecht, Festschrift for Werner Wiesner* (Linde, 2004), p. 177, 196-197; T. RÖDDER, *Gründung und Sitzverlegung der Europäischen Aktiengesellschaft (SE) – Ertragsteuerlicher Status quo* und erforderliche Gesetzesänderungen, 43 Deutsches Steuerrecht (2005), 893, 895-896; U. KINZL, *Grenzüberschreitende Verschmelzung: Soviel Steuerneutralität wie nötig oder nur soviel wie fiskalisch möglich?*, 50 Die Aktiengesellschaft (2005), p. 842, 844-845; D. KLINGBERG and I. VAN LISHAUT, *Die Internationalisierung des Umwandlungssteuerrechts*, 3 Der Konzern 2005, p. 698, 705-707, 714; G. W. KOFLER and C. SCHINDLER, *Grenzüberschreitende Umgründungen: Änderungen der steuerlichen Fusionsrichtlinie und Anpassungsbedarf in Österreich*, 1 taxlex (2005), p. 496, 501, and 1 taxlex (2005), p. 559, 563-564; M. ACHATZ and G. W. KOFLER, *Internationale Verschmelzungen*, in Achatz, Aigner, Kofler and Tumpel (Eds.), *Internationale Umgründungen* (Linde, 2005), 23, 41-42; C. SCHINDLER, *EU Report*, in IFA (Ed.), *Tax Treatment of International Acquisitions of Businesses*, CDFI 90b (2005), 49, 66-67; A. KÖRNER, *Europarecht und Umwandlungssteuerrecht*, 15 Internationales Steuerrecht (2006), p. 109, 110-111; W. SCHÖN, *Grenzüberschreitende Sitzverlegung und Verschmelzung im Steuerrecht*, *Jahrbuch der Fachanwälte für Steuerrecht* (2006/2007), 90-92; W. SCHÖN and C. SCHINDLER, *Die SE im Steuerrecht* (O. Schmidt, 2008), paras. 25-34, 157 (transfer of seat of a SE) and 240 (merger); B. TERRA and P. WATTEL, *European Tax Law* (Kluwer, 5th edition 2008), 540; M. HOFSTÄTTER and D. HOHENWARTER, *The Merger Directive*, in Lang, Pistone, Schuch and Staringer (Eds.), *Introduction to European Tax Law on Direct Taxation* (Linde, 2008), p. 111, 121-122. In this direction also C. LOUVEN, M. DETTMEIER, M. PÖSCHKE and A. WENG, *Optionen grenzüberschreitender Verschmelzungen innerhalb der EU – gesellschafts- und steuerrechtliche Grundlagen*, Betriebs-Berater Special No 3 (2006), p. 1, 6-7; GAMMIE, *EU Taxation of the Societas Europaea – Harmless Creature or Trojan Horse?*, 44 Euro-

nent establishment in the former state of residence, Art 4 or Art 10b of the Merger Directive may simply be considered "a nonrule, which leaves it to the application of primary EC law whether exit taxation is possible or not"[130]. This position is also supported by the Commission:

> "The European Company Statute became available for use on 8 October 2004, making it possible for a company organised in the form of an SE (Societas Europaea) to transfer its registered office to another MS, without this resulting in the winding up of the company or the creation of a new legal person. The 2005 amendments to the Merger Directive (90/434/EEC) ensure that, provided certain conditions are met, the transfer of the registered office of an SE or of a European Co-operative Society from one MS to another will not result in immediate taxation of unrealised gains on assets remaining in the MS from which the office is transferred. The amendments are silent on those assets which do not remain connected to a PE in the MS from which the registered office is transferred. However, the Commission considers that the principles of *de Lasteyrie* apply to such 'transferred' assets"[131].

---

pean Taxation (2004), 35, 42; A. FISCHER, *Europarecht und Körperschaftsteuerrecht*, 44 Deutsches Steuerrecht (2006), p. 2281, 2285-2286; R. RUSSO and R. OFFERMANNS, *The 2005 Amendments to the EC Merger Directive*, 46 European Taxation (2006), p. 250, 253-254 and 257; H. HAHN, *Kritische Erläuterungen und Überlegungen zum Entwurf des SEStEG*, 15 *Internationales Steuerrecht* (2006), p. 797, 802-804. Possibly contra O. THÖMMES, *EC Law Aspects of the Transfer of Seat of an SE*, 44 European Taxation (2004), p. 22, 27; for a critical position see G. FÖRSTER and C. LANGE, *Grenzüberschreitende Sitzverlegung der Europäischen Aktiengesellschaft aus ertragsteuerlicher Sicht*, 48 Recht der Internationalen Wirtschaft (2002), p. 585, 587; M. SCHWENKE, *Europarechtliche Vorgaben und deren Umsetzung durch das SEStEG*, 94 Deutsche Steuerzeitung (2007), 235, 246-247. For a different approach see J. ENGLISCH, *Aufteilung der Besteuerungsbefugnisse – Ein Rechfertigungsgrund für die Einschränkung von EG-Grundfreiheiten* (IFSt, 2008), p. 89-92, who suggests not to scrutinize the domestic implementation but rather the directive itself, and concludes that an immediate taxation may be justified for most assets in light of the difficulties of obtaining pertinent information.

[130] See, e.g., W. SCHÖN, *Tax Issues and Constraints on Reorganizations and Reincorporations in the European Union*, 34 Tax Notes International, p. 197, 202 (Apr. 12, 2004); W. SCHÖN and C. SCHINDLER, *Zur Besteuerung der grenzüberschreitenden Sitzverlegung einer Europäischen Aktiengesellschaft*, 13 Internationales Steuerrecht (2004) p. 571, 575-576; W. SCHÖN and C. SCHINDLER, *Die SE im Steuerrecht* (O. Schmidt, 2008) para. 33; see in this direction also P. SCHÄFER-ELMAYER, *Besteuerung einer in Deutschland ansässigen Holding in der Rechtsform SE (Societas Europaea)* (Lang, 2006), p. 141-142.

[131] Commission's Communication on Exit taxation and the need for co-ordination of Member States' tax policies, COM(2006)825 final, 5 (footnotes omitted).

D. – *Member States' Exercise of Options Granted in a Directive*

The tax directives, in one way or the other, grant options to the Member States. To name just a few, under the Parent-Subsidiary-Directive Member States may foresee a minimum holding period[132], they may choose to provide relief from economic double taxation either by exempting incoming dividends or by granting an indirect credit[133], and they have the option to exclude costs and losses relating to the subsidiary from deductibility at the parent level[134]. Such options, of course, raise the question whether they might immunize domestic law that exercises such option, even if it discriminates against cross-border situations[135], or whether Member States are indeed forced to exercise such options in light of the fundamental freedoms[136]. The question, therefore, is not so much whether or not primary and secondary Community law are in compliance, but, rather, whether or not secondary Community law may immunize or at least serve as a justification for national legislation that infringes primary Community law.

The Court first dealt with these issues in *Bosal*[137]. In this case, the Netherlands granted a deduction to Dutch parent companies in respect of financing costs relating to a holding owned by it only insofar as the subsidiary's profits were subject to Dutch taxation. The ECJ conceded that the Dutch rules, insofar as they merely implemented the possibility offered by Art 4(2)

---

[132] Art 3(2) of the Parent-Subsidiary-Directive.

[133] Art 4(1) of the Parent-Subsidiary-Directive.

[134] Art 4(2) of the Parent-Subsidiary-Directive.

[135] For this approach see U. Forsthoff, *EuGH versus Europäischer Gesetzgeber – oder Freiheiten über alles?*, 14 Internationales Steuerrecht (2006), p. 222-224; U. Forsthoff, *Die eigenständige Bedeutung des sekundären Gemeinschaftsrechts*, 14 Internationales Steuerrecht (2006), p. 698-701.

[136] For this perspective see, e.g., J. VAN DER GELD and N. KLEEMANS, *The Dutch participation exemption in a European perspective*, 10 EC Tax Review (2001), p. 72, 78; W. SCHÖN, *Die Abzugsschranken des § 3c EStG zwischen Verfassungs- und Europarecht*, 83 Finanz-Rundschau (2001), p. 381, 391; G. T. K. MEUSSEN, Bosal Holding Case and the Freedom of Establishment: A Dutch Perspective, 44 European Taxation (2004), p. 59, 59-60; J. ENGLISCH, *Dividendenbesteuerung* (O. Schmidt, 2005), 314-315; J. LÜDICKE and L. HUMMEL, *Zum Primat Des Primären Gemeinschaftsrechts*, 15 Internationales Steuerrecht (2006) p. 694-698; G. W. KOFLER and M. TUMPEL, *Double Taxation Conventions and European Directives in the Direct Tax Area*, in Lang, Schuch and Staringer (Eds.), *Tax Treaty Law and EC Law* (Linde, 2007) p. 191, 199-210; G. W. KOFLER, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Linde, 2007) p. 830-840; see also CONFÉDÉRATION FISCALE EUROPÉENNE, *CFE Opinion Statement on the Decision of the European Court of Justice Bosal Holding BV, Case C-168/01*", 44 *European Taxation* (2004), p. 506, 507.

[137] Case C-168/01, *Bosal*, [2003] ECR I-9409.

of the Parent-Subsidiary Directive to refuse the deduction of costs incurred by parent companies in connection with holdings in the capital of their subsidiaries, were compatible with the Directive[138], as Art 4(2) clearly states that "each Member State shall retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company". Member States therefore took the view that, since they

> "are entitled under the Parent-Subsidiary Directive categorically to disallow deduction of holding costs, […] that provision in itself justifies the Netherlands rules"[139].

Nevertheless, the ECJ did not regard Art 4(2) of the Parent-Subsidiary Directive as unconditional and definitive permission for the Netherlands implementation of its restrictive measure, but rather found that the Netherlands rules infringed the freedom of establishment. In so holding, the ECJ had to overcome the hurdle that the Parent-Subsidiary Directive offers an option that may put parent companies with subsidiaries in other Member States in a position less advantageous than that of purely domestic holdings. In these circumstances, the ECJ simply stated that the possibility under Art 4(2) of the Parent-Subsidiary Directive

> "may be exercised only in compliance with the fundamental provisions of the Treaty, in this case Article [43] thereof. It is therefore in relation to that provision that it is necessary to examine the question whether the directive authorises a Member State only partially to allow […] the deductibility of costs in relation to holdings"[140]. The Dutch limitation "of the deductibility of costs incurred by the parent company established in the Netherlands in connection with the capital of subsidiaries established in other Member States to cases where the latter generate, even if only indirectly, profits which are taxable in the Netherlands constitutes a hindrance to the establishment of subsidiaries in other Member States. In the light of that limitation, a parent company might be dissuaded from carrying on its activities through the intermediary of a subsidiary established in another Member State since, normally, such subsidiaries do not generate profits that are taxable in the Netherlands."[141] "Moreover, such a limitation goes against the objective set forth by the directive, spelt out in the third recital of its preamble, according to which it is necessary to introduce a common system and eliminate the disadvantage

[138] Case C-168/01, *Bosal*, [2003] ECR I-9409, para. 25.

[139] See Opinion A.G. Alber, 24 September 2002, Case C-168/01, *Bosal*, [2003] ECR I-9409, para. 54.

[140] Case C-168/01, *Bosal*, [2003] ECR I-9409, para. 26.

[141] Case C-168/01, *Bosal*, [2003] ECR I-9409, para. 27.

> due to the application of tax provisions governing relations between parent companies and subsidiaries of different Member States which are less advantageous than those applicable to parent companies and subsidiaries of the same Member State"[142].

This principle was subsequently reinforced in *Keller Holding*, where the Court found that a Member State is not entitled

> "in order to justify the national legislation at issue in the main proceedings, to rely on the fact that the legislation merely implements a taxing power provided for in Article 4(2) of [the Parent-Subsidiary-Directive], which affords to each Member State the option of providing, where a parent company receives profits distributed by a subsidiary established in another Member State – profits which the first Member State refrains from taxing or taxes while authorising that parent company to deduct from the amount of tax due that fraction of the corporation tax paid by the subsidiary which relates to those profits –, that charges relating to that holding may not be deducted from the taxable profits of that parent company. Irrespective of the question whether that directive applies to the present case, such an option can be exercised only in compliance with the fundamental provisions of the Treaty, in this case Article [43] thereof"[143].

Bosal and *Keller Holding* hence imply that the Member States must exercise the options granted to them in directives in accordance with, *inter alia*, the fundamental freedoms, thereby avoiding any discrimination in respect of cross-border situations compared to domestic settings[144]. Unsurprisingly, this approach has readily been accepted in legal writing[145] and by do-

---

[142] Case C-168/01, *Bosal*, [2003] ECR I-9409, para. 28.

[143] Case C-471/04, *Keller Holding*, [2006] ECR I-2107, para. 45.

[144] See also CONFÉDÉRATION FISCALE EUROPÉENNE, *CFE Opinion Statement on the Decision of the European Court of Justice Bosal Holding BV, Case C-168/01*, 44 European Taxation (2004), p. 506, 507.

[145] See, e.g., J. VAN DER GELD and N. KLEEMANS, *The Dutch participation exemption in a European perspective*, 10 EC Tax Review (2001), p. 72, 78; W. SCHÖN, *Die Abzugsschranken des § 3c EStG zwischen Verfassungs- und Europarecht*, 83 Finanz-Rundschau (2001), p. 381, 391; F. P. J. SNEL, *Non-Deductibility of Expenses Relating to the Holding of Foreign Participations: Preliminary Ruling Requested from ECJ*, 41 European Taxation (2001), p. 403, 406; A. KÖRNER, *Das 'Bosal'-Urteil des EuGH – Vorgaben für die Abzugsfähigkeit der Finanzierungsaufwendungen des Beteiligungserwerbs*, 57 Betriebs-Berater (2003), p. 2436, 2439; O. KERSSENBROCK, *§ 8b Abs. 5 KStG nach der 'Lankhorst-Hohorst'-Entscheidung des EuGH*, 58 Betriebs-Berater (2003), 2148, 2153; G. T. K. MEUSSEN, Bosal Holding Case and the Freedom of Establishment: A Dutch Perspective, 44 European Taxation (2004), p. 59, 59-60; G. W. KOFLER and G. TOIFL, *Austria's Differential Treatment of Domestic and Foreign Intercompany Dividends Infringes the EU's Free Movement of Capital*, 45 European Taxation (2005) p. 232, 236-238; J. LÜDICKE and L. HUMMEL, *Zum Primat Des Primären*

mestic courts[146]. Again, it would be puzzling if discriminatory rules in respect of cost-deduction relating to shareholdings could be "immunized" by a mere option granted in a directive, as the Member States would then be able to render discriminatory provisions compatible with the freedoms by merely issuing a directive that would not even have to change the *status quo*[147].

The Court has continued its approach towards domestic measures that exercise options and the fundamental freedoms in *FII Group Litigation*[148], where the UK provided an exemption for domestic situations and an indirect credit for cross-border situations, which, of course, may lead to different results[149]. Nevertheless, the exemption and the indirect tax credit methods provided for in Art 4(1) of the Parent-Subsidiary Directive are considered to be equivalent and it is left to the discretion of the Member States to decide which method should apply. It is also almost undisputed that the wording of Art 4 grants a Member State leeway to provide for the application of both methods simultaneously, one method to apply in its relations with some Member States and the other method in its relations with other Member States[150], based, for example, on the method chosen in a particular tax treaty.

Gemeinschaftsrechts, 15 Internationales Steuerrecht (2006), p. 694-698; H. REHM and J. NAGLER, *Verbietet die Kapitalverkehrsfreiheit nach 1993 eingeführte Ausländerungleichbehandlung?*, 15 Internationales Steuerrecht (2006) p. 859, 860; G. W. KOFLER and M. TUMPEL, *Double Taxation Conventions and European Directives in the Direct Tax Area*, in Lang, Schuch and Staringer (Eds.), *Tax Treaty Law and EC Law* (Linde, 2007), p. 191, 199-210; G. W. KOFLER, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Linde, 2007) p. 830-840; M. TENORE, *The Parent-Subsidiary Directive*, in LANG, PISTONE, SCHUCH and STARINGER (Eds.), *Introduction to European Tax Law on Direct Taxation* (Linde, 2008), 95, 104. For a different position see explicitly U. FORSTHOFF, *EuGH versus Europäischer Gesetzgeber – oder Freiheiten über alles?*, 15 Internationales Steuerrecht (2006), p. 222, 223-224, and U. FORSTHOFF, *Die eigenständige Bedeutung des sekundären Gemeinschaftsrechts*, 15 Internationales Steuerrecht (2006) p. 698, 699 and 701, who argues that that the option granted by Art 4(2) of the Parent-Subsidiary-Directive permits Member States to implement rules that differentiate between domestic and cross-border situations.

[146] See, e.g., BFH, 9 August 2006, I R 95/05, BFHE 214, 504, BStBl 2007 II 279, and BFH, 9 August 2006, I R 50/05, BFHE 215, 93, BStBl 2008 II 823 (concerning cost deduction); see along the same lines also Hessisches Finanzgericht, 10 December 2002, 4 K 1044/99, *EFG* 2003, 1120, and Finanzgericht Hamburg, 29 April 2004, VI 53/02, *EFG* 2004, 1639.

[147] See in this direction also J. LÜDICKE and L. HUMMEL, *Zum Primat Des Primären Gemeinschaftsrechts*, 15 Internationales Steuerrecht (2006), p. 694, 698.

[148] Case C-446/04, *FII Group Litigation* [2006] ECR I-11753.

[149] Case C-446/04, *FII Group Litigation* [2006] ECR I-11753, paras. 43-44; Case C-138/07, *Cobelfret*, [2009] ECR I-0000, para. 31.

[150] See F. C. DE HOSSON, *The Parent-Subsidiary Directive*, 18 Intertax (1990), p. 414, 432-433; M. TUMPEL, *Harmonisierung der direkten Unternehmensbesteuerung in*

In addition, it is even considered to be permissible to provide for the application of both methods in relation with one and the same Member State, the method to be applied being determined according to specified conditions, such as the level of foreign taxation[151]. The fundamental freedoms, however, may restrict a Member State's choice of method[152]. In *FII Group Litigation*, the Court first referred to the choice offered by Art 4(1) of the Parent-Subsidiary Directive, but nevertheless continued to state:

> "However, in structuring their tax system and, in particular, when they establish a mechanism for preventing or mitigating the imposition of a series of charges to tax or economic double taxation, Member States must comply with the requirements of Community law and especially those imposed by the Treaty provisions on free movement."[153] And further: "It is thus clear from case-law that, whatever the mechanism adopted for preventing or mitigating the imposition of a series of charges to tax or economic double taxation, the freedoms of movement guaranteed by the Treaty preclude a Member State from treating foreign-sourced dividends less favourably than nationally-sourced dividends, unless such a difference in treatment concerns situations which are not objectively comparable or is justified by overriding reasons in the general interest […]. Likewise, as regards the decisions which [the Parent-Subsidiary-Directive] leaves in the hands of the Member States, the Court has pointed out that these may be exercised only in compliance with the fundamental provisions of the Treaty, in particular those relating to freedom of establishment […]"[154].

---

der EU (Österreichische Staatsdruckerei, 1994), p. 270; E. DEUTSCH, *Internationales Schachtelprivileg und Quellenbesteuerung nach der Mutter-Tochter-Richtlinie*, 48 Österreichische Steuerzeitung (1995), p. 458, 459; O. THÖMMES and K. NAKHAI, *Commentary on the Parent/Subsidiary Directive*, in Thömmes and Fuks (Eds.), *EC Corporate Tax Law* (2007), Article 4 paras. 122-123; B. TERRA and P. WATTEL, *European Tax Law* (Kluwer, 5th edition 2008), p. 488.

[151] For a discussion see O. THÖMMES and K. NAKHAI, *Commentary on the Parent/Subsidiary Directive*, in Thömmes and Fuks (Eds.), *EC Corporate Tax Law* (2007), Article 4 para. 122.

[152] See, e.g., B. TERRA and P. WATTEL, *European Tax Law* (Kluwer, 5th edition 2008), 488; M..TENORE, *The Parent-Subsidiary Directive*, in Lang, Pistone, Schuch and Staringer (Eds.), *Introduction to European Tax Law on Direct Taxation* (Linde, 2008), p. 95, 102-103; contra U. FORSTHOFF, *Die eigenständige Bedeutung des sekundären Gemeinschaftsrechts*, 15 Internationales Steuerrecht (2006)p. 698, 791.

[153] Case C-446/04, *FII Group Litigation* [2006] ECR I-11753, para. 45.

[154] Case C-446/04, *FII Group Litigation* [2006] ECR I-11753, para. 46, with reference to Case C-471/04, *Keller Holding*, [2006] ECR I-2107, para. 45.

The Court then went on to state that it is, in principle, permissible that "nationally-sourced dividends are subject to an exemption system and foreign-sourced dividends are subject to an imputation system", "provided that the tax rate applied to foreign-sourced dividends is not higher than the rate applied to nationally-sourced dividends" and an indirect tax credit – up to the limitation – is granted[155]. This approach may be easily justified, as, in principle, a residual taxation of inbound dividends is the result of a mere disparity, as the disadvantage to the cross-border transaction would disappear were the tax systems of all Member States hypothetically identical[156]. As in *Columbus Container Services*[157], the Court therefore seems to have accepted the basic idea that both methods could in principle have the same impact in absolute terms (i.e., no residual taxation in the parent's residence State) were the tax systems of all Member States hypothetically identical[158]. The Court, however, also implicitly accepted the argument that the determination of whether an exemption and credit are in fact equivalent in light of the freedoms obviously also requires a determination of the cumulative tax burden of both the subsidiary and the parent company[159]. Indeed, conceptually, one cannot compare just the tax burdens of the parent company under an exemption system with the tax burden of such company under a credit system, since, after all, the "tax rate" on dividends at the level the receiving parent company under an exemption system always has to be zero, while under a credit system the normal tax rate applies and the residual tax burden in the parent's State depends on the amount of creditable

[155] Case C-446/04, *FII Group Litigation*, [2006] ECR I-11753, paras. 47-57; see in this direction also Case C-284/06, *Burda*, [2008] ECR I-0000, paras. 90-92.

[156] For this rule of thumb see W. SCHÖN, *Der 'Wettbewerb' der europäischen Steuerordnungen als Rechtsproblem*, in Pelka (Ed.), *Europa- und verfassungsrechtliche Grenzen der Unternehmensbesteuerung, DStJG Vol. 23* (O. Schmidt, 2000), 191, 211; W. SCHÖN, *Tax Competition in Europe – the legal perspective*, 9 EC Tax Review (2000), p. 90, 98-99; G. W. KOFLER, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Linde, 2007), p. 124-125; see also J. BELLINGWOUT, *Amurta: A Tribute to (the Late) Advocate General Geelhoed*, 48 European Taxation (2008), p. 124-125.

[157] Case C-298/05, *Columbus Container Services*, [2007] ECR I-10451.

[158] See also VwGH, 17 April 2008, 2008/15/0064, *ÖStZB* 2009/5, 5 (invoking the indirect credit method to cure a discrimination caused by non-application of the domestically employed exemption method to foreign-source inter-company dividends), and for a detailed analysis of this decision T. BIEBER, W. HASLEHNER, G. KOFLER and C. SCHINDLER, *Taxation of Cross-Border Portfolio Dividends in Austria: The Austrian Supreme Administrative Court Interprets EC Law*, 48 European Taxation (2008), p. 583-589, with further references.

[159] Case C-446/04, *FII Group Litigation* [2006] ECR I-11753, para. 56; see also H. VAN DEN HURK, A. RAINER, J. ROELS, O. THOEMMES, E. TOMSETT AND G. WEENING, *ECJ Rules On UK Corporate Taxation Of Foreign Source Dividends*, 35 Intertax (2007), p. 137, 139.

tax imposed by the subsidiary's State. If, therefore, the tax actually to be paid by the dividend distributing subsidiary in a domestic setting would be lower than the standard tax rate because of certain tax reliefs, the application of a credit system in the cross-border situation could be discriminatory if the foreign jurisdiction employs the same or similar tax reliefs as the residence country of the parent company. In such a situation, the foreign tax advantage would be eliminated under the credit system, whereas the exemption would prevail in a domestic setting, even though both countries would employ identical or at least similar tax systems. In such situation it might therefore be doubted whether the exemption and the credit method are indeed equally permissible in light of the fundamental freedoms[160]. If this interpretation of *FII Group Litigation* is correct, however, it would also imply that Member States could not simply rely on the choices offered by Art 4(1) of the Parent-Subsidiary-Directive, but that rather the choice of method would have to comply with the fundamental freedoms in the sense that in applying the indirect credit method Member States would at least have to take into account discriminatory effects that would arise in comparison with a domestically applied exemption method[161].

Another option the Parent-Subsidiary-Directive offers can be found in the second intend of Art 3(2), which provides that, by "way of derogation" from the basic conditions of the directive's subjective scope, Member States shall have the option of "not applying this Directive to companies of that Member State which do not maintain for an uninterrupted period of at least two years holdings qualifying them as parent companies or to those of their companies in which a company of another Member State does not maintain such a holding for an uninterrupted period of at least two years." A similar provision was included in the Commission's 1969 proposal. Against the background of the various domestic rules at that time and the fear of some Member States that "the privileged treatment might be abused through the quick resale of shares in subsidiaries", the Commission proposed, "without making a firm rule", "to authorize Member States to cease (with retroactive effect) to treat as a parent corporation a corporation which would otherwise

[160] This has impressively been negated by the UK High Court, 27 November 2008, *Test Claimants In the FII Group Litigation v HM Revenue & Customs*, [2008] EWHC 2893 (Ch), paras. 39-66.

[161] This conclusion can be inferred from Case C-446/04, *FII Group Litigation* [2006] ECR I-11753, para. 46, where the Court notes that "the decisions which Directive 90/435 leaves in the hands of the Member States […] may be exercised only in compliance with the fundamental provisions of the Treaty". See in this direction also M. TENORE, *The Parent-Subsidiary Directive*, in Lang, Pistone, Schuch and Staringer (Eds.), *Introduction to European Tax Law on Direct Taxation* (Linde, 2008), p. 95, 102-103.

qualify as such, if that corporation gives up its participation less than two years after having acquired it"[162]. Neither the preamble nor subsequent documents reveal much about the purpose of this provision, but it is generally viewed as a specific enunciation of the anti-abuse provision in Art 1(2); Art 3(2) is therefore "aimed in particular at counteracting abuse whereby holdings are taken in the capital of companies for the sole purpose of benefiting from the tax advantages available and which are not intended to be lasting"[163]. What remains questionable, however, is whether Member States may implement such minimum holding period for cross-border situations, even if they do not employ such requirement in a purely domestic setting. Invoking the Court's approach laid out in *Bosal*[164] and *Keller Holding*[165], it seems reasonable to conclude that the Member States are in any event bound by the fundamental freedoms when making use of the option offered in Art 3(2) of the Parent-Subsidiary-Directive[166]; consequently, and if discrimination is indeed established, a subsequent analysis would be required to determine whether the domestic rule may be justified as a measure to prevent tax avoidance[167].

---

[162] See the Explanatory Notes to Art 3 of the Commission's 1969 proposal (COM(69)6 final, 5-6), with an unofficial English translation in 9 European Taxation, Supplement No 7 (July 1969), 3; see for this consideration also Joined Cases C-283/94, C-291/94 and C-292/94, *Denkavit*, [1996] ECR I-5063, para. 20.

[163] Joined Cases C-283/94, C-291/94 and C-292/94, *Denkavit*, [1996] ECR I-5063, para. 31; see also M. TUMPEL, *Harmonisierung der direkten Unternehmensbesteuerung in der EU* (Österreichische Staatsdruckerei, 1994), p. 264-265; O. THÖMMES and K. NAKHAI, *Commentary on the Parent/Subsidiary Directive*, in Thömmes and Fuks (Eds.), EC Corporate Tax Law (2007), Article 3 para. 73; for a critical position in light of Art 1(2) see HARRIS, *The European Community's Parent-Subsidiary Directive*, 9 Florida Journal of International Law (1994), p. 111, 135-136.

[164] Case C-168/01, *Bosal*, [2003] ECR I- 9409.

[165] Case C-471/04, *Keller Holding*, [2006] ECR I-2107.

[166] See, e.g., K. HASLINGER, *Die Besteuerung von Dividenden – EuGH bestätigt Kritik an geltender Rechtslage*, 17 Steuer und Wirtschaft International (2007), p. 175, 181-182; R. BEISER, *Die Beteiligungsertragsbefreiung im Gemeinschaftsrecht*, 26 Recht der Wirtschaft (2008), p. 305, 305-306. This approach is explicitly shared by the Austrian Courts and is clearly visible in the references for preliminary rulings in Case C-436/08, *Haribo*, and in Case C-437/08, *Österreichische Salinen*, which have been referred by the Tax Senate of Linz (see UFS Linz, 29 September 2008, RV/0611-L/05, and UFS Linz, 29 September 2008, RV/0493-L/08).

[167] For this ground of justification see, e.g., Case C-28/95, *Leur-Bloem*, [1997] ECR I-4161; Case C-196/04 *Cadbury Schweppes*, [2006] ECR I-7995; Case C-524/04, *Thin Cap Group Litigation*, [2007] ECR I-2107; for a review of the development of the ECJ's jurisprudence see, e.g., A. ZALASINSKI, *Proportionality of Anti-Avoidance and Anti-Abuse Measures in the ECJ's Direct Tax Case Law*, 35 Intertax (2007), p. 310; B. TERRA and P. WATTEL, *European Tax Law* (Kluwer, 5th edition 2008), p. 746-759; W.

Finally, direct tax directives sometimes contain explicit permissions for certain Member States to deviate from their obligations, at least for a limited period of time. Such clauses can be found in Art 6 of the Interest-Royalties-Directive[168] and were also enshrined in Art 5 of the Parent-Subsidiary-Directive before its 2003 amendments[169]. Both sets of provisions found their justification in the particularities of domestic tax systems or in budgetary concerns of "old" Member States[170], whereas the provisions in the Interest-

SCHÖN, *Rechtsmissbrauch und Europäisches Steuerrecht*, in Kirchhof and Nieskens (Eds.), *Festschrift für Wolfram Reiß* (Schmidt, 2008), p. 571, 593-594; R. DE LA FERIA, *Prohibition of Abuse of (Community) Law: The Creation of a New General Principle or EC Law through Tax*, 45 Common Market Law Review (2008), p. 395, 428-429; see also the Commission's Communication on The application of anti-abuse measures in the area of direct taxation – within the EU and in relation to third countries, COM(2007)785 final.

[168] Art 6 of the Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, [2003] OJ (L 157) 49, as amended by Council Directive 2004/76/EC [2004] OJ (L 195), 33, contains transitional rules for the Czech Republic, Greece, Spain, Latvia, Lithuania, Poland, Portugal and Slovakia.

[169] See Art 5 of the Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [1990] OJ (L 225) 6, which contained deviations from the prohibition of taxation at source for Greece, Germany and Portugal. These provisions have been deleted in the 2003 amendment, "as they [were] no longer applicable"; see the Proposal for a Council Directive amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, COM(2003)462 final, 8, and Point 11 of the Preamble to Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [2004] OJ (L 7), 41.

[170] For the permission for Greece, Germany and Portugal in the 1990 Parent-Subsidiary-Directive see the Preamble of the Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [1990] OJ (L 225) 6, which noted that "the Federal Republic of Germany and the Hellenic Republic, by reason of the particular nature of their corporate tax systems, and the Portuguese Republic, for budgetary reasons, should be authorized to maintain temporarily a withholding tax". For the transitional periods for Greece, Portugal and Spain in the 2003 Interest-Royalties-Directive see Points 7 and 8 of the Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, [2003] OJ (L 157) 49, stating that "Greece and Portugal should, for budgetary reasons, be allowed a transitional period in order that they can gradually decrease the taxes, whether collected by deduction at source or by assessment, on interest and royalty payments, until they are able to apply the provisions of Article 1", and that "Spain, which has launched a plan for boosting the Spanish technological poten-

Royalties-Directive additionally accommodate the budgetary needs of the "new" Member States[171]. Although not necessarily likely, also these provisions could potentially give rise to conflicts with the fundamental freedoms. This problem has already drawn some attention with respect to the transitional provision for Germany in the 1990 Parent-Subsidiary-Directive, which provided in its Art 5(3) that

> "[n]otwithstanding [the obligation to refrain from taxation at source], the Federal Republic of Germany may, for as long as it charges corporation tax on distributed profits at a rate at least 11 points lower than the rate applicable to retained profits, and at the latest until mid-1996, impose a compensatory withholding tax of 5 % on profits distributed by its subsidiary companies."

The basic idea of Art 5(3) was in principle already anticipated in the Commission's 1969 proposal and rested on the particularities of the old German split-rate system, which was in place from 1953 until the adoption of an imputation system in 1977[172]: A distribution from a German subsidiary to a German parent company was not subject to (withholding) tax, but rather subject to an adjusting tax ("Nachsteuer") at the parent's level if the profits were not further distributed to the parent's shareholders. The adjusting tax was levied in the amount of the difference between the two rates applicable to retained and distributed profits, so that the combined taxation at the subsidiary's and the parent's level amounted to the higher rate that applied to retained profits. Since such adjusting taxation at the level of a foreign parent company could not take place in case of a cross-border distribution by a German subsidiary, Germany feared that without a withholding tax, foreign parent companies would ensure that German subsidiaries distributed virtually all profits and enjoyed the reduced rate and would then reinvest the prof-

---

tial, for budgetary reasons should be allowed during a transitional period not to apply the provisions of Article 1 on royalty payments".

[171] See Point 8 of the Explanatory Memorandum of the Proposal for a Council Directive amending Directive 2003/49/EC as regards the possibility for certain Member States to apply transitional periods for the application of a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, COM(2004)243 final, 3.

[172] See the Explanatory Notes to Art 5 of the Commission's 1969 proposal (COM(69)6 final, 7-8), with an unofficial English translation in 9 *European Taxation*, Supplement No 7 (July 1969), 3; see also B. SCHWERIN, *Richtlinienvorschläge der Kommission zur direkten Besteuerung internationaler Zusammenschlüsse in der EWG*, 14 Die Aktiengesellschaft (1969), p. 344, 347, U. ANSCHÜTZ, *Harmonization of Direct Taxes in the European Economic Community*, 13 Harvard International Law Journal (1972), p. 1, 34-35.

its in the form of equity or debt[173]. Against this background, the Commission considered a withholding tax "justified when the dividends from a subsidiary are not immediately redistributed by the parent company"; in the converse case of an immediate redistribution, however, a withholding tax would not be justified, "since in such case the 'Nachsteuer' would not have been imposed if the parent corporation had been German". Based on these considerations, the Commission's 1969 proposal included a permission to tax at source, but only if the difference between the split rates was at least 10% and the withholding tax was not higher than such difference but 25% at most, however conditional on a refund of such withholding tax to the foreign parent company in the amount that it made a redistribution of such profits to its shareholders in the same taxable year[174]. Between the Commission's 1969 proposal and the final adoption of the Parent-Subsidiary-Directive in 1990, Germany had, in 1977, switched to a split-rate imputation system, which was in force until its repeal as of 1 January 2001. Under this system, undistributed income of a corporation was in principle subject to a higher tax rate, but the corporate tax was decreased to the lower rate when profits were distributed[175]. Although the problems under this system were similar to those arising under the pre-1977 split-rate system, the final version of Art 5(3) of the Parent-Subsidiary-Directive did not adopt the Commission's approach but after lengthy negotiationsrather simply granted Germany a temporal permission to levy a withholding tax[176].

---

[173] See also F. DE HOSSON, *The Parent-Subsidiary Directive*, 18 Intertax (1990), p. 414, 421-422.

[174] See Art 5 of the Commission's 1969 proposal (COM(69)6 final, 14-15), with an unofficial English translation in 9 *European Taxation*, Supplement No 7 (July 1969), 6. For critical positions on such refund procedure see, e.g., H. DEBATIN, *Die Steuerharmonisierung in der EWG in Form der Konzern-Besteuerungs-Richtlinie*, 57 Deutsche Steuerzeitung (1969), p. 146, 151-152; Saß, *Zu den steuerlichen EWG-Richtlinienentwürfen für Mutter-Tochtergesellschaften und für internationale Fusion im gemeinsamen Markt*, 16 Recht der Internationalen Wirtschaft (1970), p. 533, 536-537; and Saß, *Körperschaftsteuerreform und Mutter-/Tochter-Richtlinie der EG*, 41 Betriebs-Berater (1986), p. 1195, 1196.

[175] This system had two forms of application: Taking the rates applicable, for example, in the mid-1990s, if corporate income was subject to full corporation tax, the 45% rate was *decreased* to 30% when income was distributed to the shareholders, or, in other words, only a 30% corporate tax was levied on distributed income. If, on the other hand, the corporate income was taxed at a low or a zero rate, for example because of tax exemptions, the corporation tax was *increased* to 30%, which equalized the German tax burden on every domestic profit distribution in order to finance the imputation credit granted to sharholders.

[176] For background information on this compromise see J. KREBS, *Die Harmonisierung der direkten Steuern für Unternehmen in der EG*, 45 Betriebs-Berater (1990), p.

Based on this permission, Germany taxed distributions by German subsidiaries to European parent companies at the reduced rate of 5% until mid-1996, while in purely domestic settings resident parent companies were entitled to fully credit the tax withheld on distribution or to receive a refund[177]. This, of course, raises the question whether such withholding tax on cross-border distributions was in line with the fundamental freedoms. While the ECJ did not touch on this issue in *CLT-UFA*[178], the German Bundesfinanzhof has already expressed doubts as to the compatibility of such taxation with the freedoms[179]. Notably, in light of *ACT Group Litigation*[180], *Denkavit Internationaal*[181] and *Amurta*[182], the Bundesfinanzhof did not consider the express permission of Art 5(3) of the Parent-Subsidiary-Directive as excluding the domestic provisions from scrutiny under the freedoms[183], although it did not consider this issue to be entirely clear[184]. What certainly speaks in favor of this result would be an otherwise odd differentiation between parent companies resident in EU Member States and those resident in EEA Member States: The EC Treaty and the EEA-Agreement contain similar fundamental freedoms, which are interpreted consistently by the ECJ and the EFTA-Court; especially with regard to taxation of outbound dividends, both courts have more or less created similar standards, the EFTA-Court in *Fokus Bank*[185] and the ECJ espe-

---

1945, 1946, and M. TUMPEL, *Harmonisierung der direkten Unternehmensbesteuerung in der EU* (Österreichische Staatsdruckerei, 1994), p. 284-285

[177] See, e.g., BFH, 20 December 2006, I R 13/06, BStBl 2007 II 616.

[178] Case C-253/03, *CLT-UFA*, [2006] ECR I-1831.

[179] See BFH, 20 December 2006, I R 13/06, *BStBl* 2007 II 616, and BFH, 5. March 2008, I B 171/07, *BFHE* 220, 463; see, however,the follow up decision in the *CLT-UFA* proceedings by the BFH 9 August 2006, I R 31/01, *BFHE* 214, 496 (holding that the inclusion fictitious withholding tax for the determination of a non-discriminatory tax rate on permanent establishments might raise concerns in light of the freedoms, but did not see the necessity to refer such question to the ECJ again).

[180] Case C-374/04, *ACT Group Litigation*, [2006] ECR I-11673.

[181] Case C-170/05, *Denkavit Internationaal*, [2006] ECR I-11949.

[182] Case C-379/05, *Amurta*, [2007] ECR I-9569.

[183] See BFH, 5 March 2008, I B 171/07, *BFHE* 220, 463, with reference to J. LÜDICKE and L. HUMMEL, *Zum Primat Des Primären Gemeinschaftsrechts*, 15 Internationales Steuerrecht (2006), p. 694, and A. RAINER, *Steuersatz für Gewinne EU/EWR-ausländischer Kapitalgesellschaften nach dem Körperschaftsteuer-Anrechnungsverfahren: Folgen aus der EuGH-Entscheidung in Sachen 'CLT-UFA'*, 16 Internationales Steuerrecht (2007), p. 829, 830.

[184] See also H. REHM and J. NAGLER, *Steuersatz für Gewinne EU/EWRausländischer Kapitalgesellschaften nach dem Körperschaftsteuer-Anrechnungsverfahren: Folgen aus der EuGH-Entscheidung in Sachen 'CLT-UFA'*, 16 Internationales Steuerrecht (2007),830, 831.

[185] Case E-1/04, *Fokus Bank*, [2004] EFTA Court Report 11 (imputation system and withholding taxation).

cially in *Denkavit Internationaal*[186] and *Amurta*[187], although the approaches differ in respect of the relevance of a tax credit for a (discriminatory) withholding tax in the parent's State[188]. This specific issue left aside, a reading of Art 5(3) of the Parent-Subsidiary-Directive as carving out a potentially discriminatory German withholding tax until mid-1996 in EU-situations would lead to the counterintuitive result that such tax might nevertheless be considered discriminatory in EEA-situations, where the Parent-Subsidiary-Directive does not apply[189]. Nevertheless, one may argue that the express permission in Art 5(3) of the Parent-Subsidiary-Directive very much resembles the situation at issue in the *Ouzo* case[190], which seems to imply that a Member State may rely on explicit permissions under secondary Community law to deflect challenges under the freedoms[191], even though such deficiency in secondary Community law may result in a restriction of the freedoms[192].

---

[186] Case C-170/05, *Denkavit Internationaal*, [2006] ECR I-11949.

[187] Case C-379/05, *Amurta*, [2007] ECR I-9569.

[188] While the EFTA-Court has attributed no relevance to the availabilty of a tax credit under a tax treaty in the parent's State for testing the discriminatory effects of a withholding tax that applies only to non-resident shareholders (Case E-1/04, *Fokus Bank*, [2004] EFTA Court Report 11), the ECJ has chosen an approach that can be described as a "treaty-based overall approach" by acknowledging that Member States may shift their obligations under EC law by way of bilateral treaties and hence that a discriminatory withholding tax can be "neutralized" by a tax credit in the other treaty country (see Case C-170/05, *Denkavit Internationaal*, [2006] ECR I-11949, paras. 45-55; Case C-379/05, *Amurta*, [2007] ECR I-9569, paras. 79-83; see also Case C-374/04, *ACT Group Litigation*, [2006] ECR I-11673, para. 71). For a discussion see, e.g., T. PONS, *The Denkavit Internationaal Case and Its Consequences: The Limit between Distortion and Discrimination?*, 47 European Taxation (2007), p. 214-220; G. T. K. Meussen, *Denkavit Internationaal: The Practical Issues*, 47 European Taxation (2007), p. 244, 245-246; G. W. KOFLER, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Linde, 2007), p. 564-604. For a broader approach see Kemmeren, "ECJ should not unbundle integrated tax systems!", 17 *EC Tax Review* (2008), p. 4, 9, and Kemmeren, "The Internal Market Approach Should Prevail over the Single Country Approach", in Hinnekens and Hinnekens (Eds.), *A Vision of Taxes within and outside European Borders – Festschrift in honor of Frans Vanistendael* (Kluwer, 2008), p. 555, 561-564 (arguing to consider also unilateral relief).

[189] See also H. REHM and J. NAGLER, *Steuersatz für Gewinne EU/EWR-ausländischer Kapitalgesellschaften nach dem Körperschaftsteuer-Anrechnungsverfahren: Folgen aus der EuGH-Entscheidung in Sachen 'CLT-UFA'*, 16 Internationales Steuerrecht (2007), p. 830, 831.

[190] See Case C-475/01, *Commission v. Greece* ("Ouzo"), [2004] ECR I-8923, and the criticism *supra* Chapter I.

[191] For this conclusion see U. FORSTHOFF, *Die eigenständige Bedeutung des sekundären Gemeinschaftsrechts*, 15 Internationales Steuerrecht (2006), p. 698, 699, and U. FORSTHOFF, *Die eigenständige Bedeutung des sekundären Gemeinschaftsrechts*, 15

III. – *Conclusions*

The relationship between domestic implementation measures, direct tax directives and the fundamental freedoms is dynamic in the sense that the impact of the fundamental freedoms depends on the national treatment of similar domestic situations. Conversely, a directive is compatible with the EC Treaty as long as it leaves the Member States a sufficiently wide margin to enable them to transpose the directives into national law in a manner consistent with the requirements of the EC Treaty[193]. On this basis, the Court has established consistent case law according to which the fundamental freedoms apply to domestic measures if either the factual situation is not covered by the objective or subjective scope of the directive[194] or if Member States have exercised general options available under a direct tax directive in a discriminatory fashion.[195] Similar considerations apply to situations where a directive is silent on the tax consequences of transactions where explicit prerequisites for the application of a directive are not met[196]. What remains unclear, however, are situations where directives contain express permissions for specific Member States, as the Court's case law may imply that Member States could indeed rely on explicit permissions in secondary Community law to deflect challenges under the freedoms[197].

PROF. GEORG KOFLER
Johannes Kepler University of Linz

Internationales Steuerrecht (2006), p. 698, 701; for a critical position see D. DÜRR-SCHMIDT, *Nachbetrachtung zu EuGH, EuZW 2004, 729 – Kommission/Griechenland (Ouzo)*, 16 Europäische Zeitschrift für Wirtschaftsrecht (2005), p. 229, 230.

[192] For the legal ramifications of such conlusion see *supra* Chapter II.A.

[193] See *supra* Chapters I and II.A.

[194] *Supra* Chapter II.B., and Case C-379/05, *Amurta*, [2007] ECR I-9569, paras. 18-24; Case C-374/04, *ACT Group Litigation*, [2006] ECR I-11673, paras. 53-54; Case C-446/04, *FII Group Litigation*, [2006] ECR I-11753, paras. 44-46 and 67-68; Case C-201/05, *CFC and Dividend Group Litigation*, [2008] ECR I-0000, para. 61; Case C-48/07, *Les Vergers du Vieux Tauves*, [2008] ECR I-0000, para. 46; see also Opinion A.G. Mengozzi, 7 June 2007, Case C-379/05, *Amurta*, [2007] ECR I-9569, para. 27 with note 10; Opinion A.G. Mazák, 18 December 2008, Case C-303/07, *Aberdeen Property Fininvest Alpha*, [2009] ECR I-0000, para. 23.

[195] *Supra* Chapter II.D., and Case C-168/01, *Bosal*, [2003] ECR I-9409, paras. 25-28; Case C-471/04, *Keller Holding*, [2006] ECR I-2107, para. 45; Case C-446/04, *FII Group Litigation* [2006] ECR I-11753, para. 45-57.

[196] *Supra* Chapter II.C.

[197] *Supra* Chapter II.D.; for such a situation see especially Case C-475/01, *Commission v. Greece* ("Ouzo"), [2004] ECR I-8923.