EUROPEAN UNION

"Dancing with Mr D": The ECJ's Denial of Most-Favoured-Nation Treatment in the "*D*" case

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1. INTRODUCTION

The "*D*"[1] case concerned not only the issue of national treatment in respect of the tax-free allowance with regard to Netherlands wealth taxation, but also the question of whether or not horizontal discrimination between non-residents due to different tax treaties is prohibited by the fundamental freedoms contained in the EC Treaty. A positive conclusion regarding the latter would inevitably have led to a situation that is commonly referred to as "inbound most-favoured-nation treatment". Under this, a non-resident taxpayer could have invoked the most favourable tax treaty that the source Member State had concluded with any other Member State. Despite the Advocate General's sympathetic approach[2] in the "*D*" case, the much-anticipated decision of the Grand Chamber of the European Court of Justice (ECJ),[3] given on 5 July 2005, aborted such an obligation with regard to comparability. Specifically, the ECJ concluded that bilateral tax treaties by their nature only cover residents of the two contracting states and that non-residents residing in different Member States are generally not in comparable situations from the perspective of the source Member State for the purposes of the discrimination test under EC law. As a result, not unlike the 1972 Rolling Stones song "Dancing with Mr D", the "*D*" case unleashed the "grave digging" power of the ECJ with regard to EU most-favoured-nation (MFN) treatment. This article is intended to provide an initial analysis of the

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1. ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*.

2. ECJ, Advocate General Ruiz-Jarabo Colomer's Opinion, 26 October 2004, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*. For discussion of the Advocate General's opinion, see Gerald T.K. Meussen, "The Advocate General's Opinion in the '*D*' Case: Most-Favoured-Nation Treatment and the Free Movement of Capital", 45 *European Taxation* 2 (2005), p. 52 et seq.; Georg W. Kofler, "Most-Favoured-Nation Treatment in Direct Taxation: Does EC Law Provide for Community MFN in Bilateral Double Taxation Treaties?", 5 *Houston Business and Tax Law Journal* (2005), p. 52 et seq.; Philip Martin, "D v. Rijksbelastingdienst: Case C-376/03: A Review", *Tax Planning International*, EU Focus, November 2004; Peter Cussons, "The 'D' Case: D v Rijksbelastingdienst (C-376/03)", *Tax Planning International Review* (December 2004); Georg W. Kofler, "Generalanwalt zur Kapitalverkehrsfreiheit und Meistbegünstigung bei DBA-Anwendung", 57 *Österreichische Steuerzeitung* 23 (2004), p. 558 et seq.; Ines Hofbauer, "Erfordern die Grundfreiheiten des EG-V eine innereuropäische Meistbegünstigung? – Erste Erkenntnisse aus dem 'D'-Fall", 14 *Steuer und Wirtschaft International* (2004), p. 586 et seq.; and Arne Schnitger, "Vermögensteuer-Freibeträge in Holland, weil keine Vermögensteuer in Deutschland", 13 *Internationales Steuerrecht* 22 (2004), p. 801 et seq. See also the contributions delivered at the CFE Forum on 28 April 2005 by Stella Raventós-Calvo, "The Most-Favoured-Nation Clause and the Outcome of the '*D*' and *Bujura* Cases in the European Court of Justice: Introduction", 45 *European Taxation* 8 (2005), p. 336 et seq.; Dennis Weber, "Differences between Tax Treaties: Prohibited Discrimination?", 45 *European Taxation* 8 (2005), p. 339 et seq.; Richard Lyal, "The Position Taken by the Commission in Case C-376/03 *D. v. Belastingdienst*", 45 *European Taxation* 8 (2005), p. 340 et seq.; Otmar Thömmes, "A Tax Treaty for Europe: An Independent View under EU Law", 45 *European Taxation* 8 (2005), p. 343 et seq.; and Mike Waters, "A Tax Treaty for Europe? Most-Favoured Nation and the Outcome of the '*D*' and *Bujura* Cases in the European Court of Justice, 45 *European Taxation* 8 (2005), p. 347 et seq.

3. For initial reactions, see Lee A. Sheppard, "The ECJ's Common Sense in the D Case", 39 *Tax Notes International*, 18 July 2005, p. 203 et seq.; Pasquale Pistone, "National treatment for all non-resident EU nationals: looking beyond the D decision", 33 *Intertax* 10 (2005), p. 412 et seq.; Dennis Weber, "Most-Favoured-Nation Treatment under Tax Treaties Rejected in the European Community: Background and Analysis of the *D* Case", 33 *Intertax* 10 (2005), p. 420 et seq.; Servaas van Thiel, "A Slip of the European Court in the D case (C-376/03): Denial of the Most-Favoured-Nation Treatment because of Absence of Similarity", 33 *Intertax* 10 (2005), p. 454 et seq.; Otmar Thömmes and Katja Nakhai, "ECJ rejects most-favoured nation argument in D Case", 33 *Intertax* 10 (2005), p. 479 et seq.; Otmar Thömmes, "EG-Recht und Meistbegünstigung", *Internationale Wirtschafts-Briefe*, Sec. 11a (2005), p. 888; Michael Lang, "Das EuGH-Urteil in der Rechtssache D. – Gerät der Motor der Steuerharmonisierung ins Stottern?", 15 *Steuer und Wirtschaft International* 8 (2005), p. 365 et seq.; Thomas Rödder and Jens Schönfeld, "Meistbegünstigung und EG Recht", 14 *Internationales Steuerrecht* 15 (2005), p. 523 et seq.; Michael Petritz, "EuGH: Keine Meistbegünstigung im DBA-Recht", 16 *ecolex* 8 (2005), p. 642 et seq.; Georg W. Kofler, "Das Ende vom Anfang der gemeinschaftsrechtlichen Meistbegünstigung", 58 *Österreichische Steuerzeitung* 19 (2005), p. 432 et seq.; Hans R. Weggenmann, "Keine Meistbegünstigung aus Doppelbesteuerungsabkommen in der EU", 51 *Recht der Internationalen Wirtschaft* (2005), p. 717 et seq.; Clemens Philipp Schindler, "EuGH-Urteil in der Rechtssache D – Kann sich die Meistbegünstigung von diesem Schock erholen?", 1 *taxlex* 8 (2005), p.459 et seq.; and Peter Haunold, Michael Tumpel and Christian Widhalm, "EuGH: Das Ende der Meistbegünstigung?", 15 *Steuer und Wirtschaft International* 10 (2005).

ECJ's decision, and a consideration of its likely effects on pending cases and the possible future developments.[4]

2. BACKGROUND TO THE "*D*" CASE

Despite of the lack of the harmonization of direct taxation in the European Union, several landmark decisions of the ECJ in recent years have clearly put the focus on the far-reaching effect of the fundamental freedoms of the EC Treaty with regard to direct taxation. This is because, in the absence of political solutions, taxpayers have been compelled to make recourse to the ECJ to overcome discriminatory rules and other obstacles. Consequently, the ECJ has developed a large body of case law on the compatibility of national tax rules with the EC Treaty. The basis of this case law is that, although the Member States retain their competence in direct tax matters, they must exercise this power consistently within EC law and avoid any overt or covert discrimination on the grounds of nationality.[5] The four fundamental freedoms (i.e. the free movement of persons, goods and capital and the freedom to provide services) cover all forms of cross-border economic activity and investment and, in conjunction with another principle central to the *acquis communautaire*, that of equal treatment, prohibit tax provisions that may create discriminatory obstacles to cross-border economic activities. Based on these principles of non-discrimination, the ECJ has consistently held that the disadvantageous unequal treatment of resident and non-resident taxpayers in comparable situations is a violation of EC law, unless the treatment is justified by the "rule of reason". Whilst such cases of *vertical* discrimination between a non-resident and a resident taxpayer have frequently been decided by the ECJ, an open issue was, and still is, whether or not the EC Treaty also prohibits *horizontal* discrimination between non-residents, which may arise from different tax treaties. The latter is usually referred to as the question of "most-favoured-nation treatment" within the European Union.

In the absence of a multilateral tax treaty under Art. 293 of the EC Treaty,[6] the Member States have concluded a multitude of different bilateral tax treaties between each other and with third countries. Inter alia, these tax treaties basically distribute taxing rights between the tax treaty partners and grant mutual benefits for the residents of the contracting states. It is the rule rather than the exception that these benefits vary from tax treaty to tax treaty. This may, of course, result in a situation in which one Member State grants a certain beneficial treatment to a resident of another Member State, but, due to a different tax treaty, not to a resident of a third Member State. Accordingly, a highly disputed issue is whether or not an EU Member State is required under EC law to treat non-resident taxpayers equally. In other words, whether or not an EU taxpayer is eligible for the benefit of the most favourable tax treaty concluded by the Member State from which he derives income.[7] This notion may be categorized as "inbound most-favoured-nation-treatment". Until the "*D*" case, the ECJ had, due to judicial self-restraint or hesitation, left this issue open in several cases.[8]

As a result of its potentially very significant effects, the issue of MFN treatment has been the subject of intense discussion in legal writing. At the outset, a conflict of principles is clear. Specifically, the judicial application of the MFN doctrine to tax treaties would undoubtedly ensure full compatibility with EC law and the concept of a Single Market, although, conversely, it would clearly impair the reciprocity of tax treaties and domestic law. From a policy perspective, it has been argued that "such a most favoured nation effect would really ruffle settled international tax law",[9] that MFN treatment "would result in the abolition of the principle of reciprocity which, however, forms the backbone of bilateral agreements",[10] or that, as a result of MFN treatment, "one of the pillars of tax treaty law, the reciprocity principle, would have been demolished".[11] Those supporting an MFN doctrine argue that the judicial application of MFN treatment, and, therefore, a loss in revenue, would be a powerful motivation for the Community and the Member States to harmonize international tax law on the EC level.[12] Although it may be true that the judicial imposition of MFN treatment, and, therefore, "negative harmonization", cannot be a surrogate for the positive Community harmonization of tax treaties, it should nevertheless be noted that, to date, the ECJ has not hesitated to challenge long-standing principles of internal tax systems or the international tax policies of the Member States[13] and is clearly not impressed by the fiscal consequences of a judgment.[14] An analysis of the scholarship on the MFN issue, however, reveals that opinions range from those in favour of an obligation of the Member States for

4. For comprehensive coverage of the MFN issue, see the forthcoming article to be published in *European Taxation* by Axel Cordewener and Frank Engelen, "'Most-Favoured-Nation' Treatment in EC Tax (Treaty) Law after D-Day – Did the ECJ Pull the Emergency Brake without Real Need?"

5. See, for example, ECJ, 14 February 1995, Case C-279/93, *Finanzamt Köln-Altstadt v. Roland Schumacker* [1995] ECR I-225, Para. 21.

6. See, for example, Clemens Philipp Schindler, "Ist ein Multilaterales Doppelbesteuerungsabkommen eine Lösung für Europa?", in Axel Cordewener et al. (eds.), *Meistbegünstigung im Steuerrecht der EU-Staaten* (Munich: C.H. Beck, 2005) [in print] for further references.

7. See "Company Taxation in the Internal Market: Working Paper from the Commission of the European Communities" (hereinafter: "Company Taxation in the Internal Market"), COM(01)582 final, p. 359.

8. For an analysis of the existing case law and the opinions in academic writing, see Georg W. Kofler, "Most-Favoured-Nation Treatment in Direct Taxation: Does EC Law Provide for Community MFN in Bilateral Double Taxation Treaties?", 5 *Houston Business and Tax Law Journal* (2005), p. 34 et seq.

9. Peter J. Wattel, "The EC Court's Attempts to Reconcile the Treaty Freedoms with International Tax Law", 33 *Common Market Law Review* (1996), p. 252.

10. Moris M. Lehner, "The Influence of EU Law on Tax Treaties from a German Perspective", 54 *Bulletin for International Fiscal Documentation* 8/9 (2000), p. 470.

11. Eric C.C.M. Kemmeren, "The termination of the 'most favoured nation clause' dispute in tax treaty law and the necessity of a Euro Model Tax Convention", 6 *EC Tax Review* (1997), p. 148.

12. See, for example, Michael Lang, "Doppelbesteuerungsabkommen und Gemeinschaftsrecht", in Gottfried E. Breuninger et al. (eds.), *Steuerrecht und Europäische Integration* (Munich: C.H. Beck, 1999), p. 435.

13. See ECJ, 12 June 2003, Case C-234/01, *Arnoud Gerritse v. Finanzamt Neukölln-Nord* [2003] ECR I-5933 for a recent example.

14. See ECJ, 31 March 1992, Case C-200/90 *Dansk Denkavit ApS and P. Poulsen Trading ApS, supported by Monsanto-Searle A/S v. Skatteministeriet* [1992] ECR I-2217, Paras. 20 and 21, in which the ECJ struck down a Danish levy that yielded approximately 4% of Denmark's tax revenue.

such treatment in their bilateral tax treaties,[15] through sympathetic views[16], neutral[17] and antipathetic[18] statements, to the vehement rejection of such a conclusion.[19] The arguments of both sides of the spectrum of opinions are, at first glance, equally persuasive.

Briefly, those against MFN treatment rely on the textual argument that the EC Treaty prohibits "any discrimination on grounds of nationality", but does not explicitly provide for MFN treatment. The opponents also invoke the avoidance of a "free-rider course" (including the prevention of multiple non-taxation),[20] the "sovereignty" of the Member States in direct tax matters, the "reciprocity" of bilateral tax treaties[21] and the "chaos" that MFN treatment could

15. See, with different nuances towards a possible justification, Servaas van Thiel, *Free Movement of Persons and Income Tax Law: the European Court in Search of Principles* (Amsterdam: IBFD, 2002), p. 486 et seq.; Stefaan De Ceulaer, "Community Most-Favoured-Nation Treatment: One Step Closer to the Multilateralization of Income Tax Treaties in the European Union?", 57 *Bulletin for International Fiscal Documentation* 10 (2003), p. 494; Albert J. Rädler, "Tax treaties and the Internal Market (Annex 6)", in *Report of the Committee of Independent Experts on Company Taxation* (the Ruding Report) (Brussels: Commission of the European Communities, 1992), p. 378; Albert J. Rädler, "Most-favoured-nation Clause in European Tax Law?", 4 *EC Tax Review* (1995), p. 67; Malcolm Gammie and Guy Brannan, "EC Law Strikes at the UK Corporation Tax – The Death Knell of UK Imputation?", 23 *Intertax* (1995), p. 402; Paul Farmer, "EC Law and Direct Taxation – Some Thoughts on Recent Issues", 1 *EC Tax Journal* (1995), p. 101; Josef Schuch, "'Most favoured nation clause' in Tax Treaty Law", 5 *EC Tax Review* (1996), p. 161 et seq.; Paul Farmer, "EC Law and Direct Taxation – Some Thoughts on Recent Issues", 1 *EC Tax Journal* (1995), p. 101; Josef Schuch, "'Most favoured nation clause' in Tax Treaty Law", 5 *EC Tax Review* (1996), p. 161 et seq.; Josef Schuch, "Will EC Law Transform Tax Treaties into Most Favoured-Nation Clauses?", in Wolfgang Gassner et al. (eds.), *Tax Treaties and EC Law* (Vienna: Linde, 1996), p. 89 et seq.; Josef Schuch, "EC Law Requires Multilateral Tax Treaty", 7 *EC Tax Review* (1998), p. 36; Gerald Toifl, "Austria", in Peter H.J. Essers et al. (eds.), *The Compatibility of Anti-Abuse-Provisions in Tax Treaties with EC Law* (The Hague: Kluwer Law International, 1998), p. 60; Albert J. Rädler, "Most Favoured Nation Concept in Tax Treaties", in Michael Lang et al. (eds.), *Multilateral Tax Treaties* (Vienna: Linde, 1998), p. 3; Franz Wassermeyer, "Does the EC-Treaty Force the EU Member States to Conclude a Multilateral Tax Treaty?", in Michael Lang et al. (eds.), *Multilateral Tax Treaties* (Vienna: Linde, 1998), p. 21; Josef Schuch, "Bilateral Tax Treaties Multilateralized by the EC Treaty", in Michael Lang et al. (eds.), *Multilateral Tax Treaties* (Vienna: Linde, 1998), p. 35; Paul Farmer, "EC Law and Double Taxation Agreements, 4 *EC Tax Journal* (1999), p. 152; Albert J. Rädler, "Most-Favourite-Nation-Treatment in Direct Taxation – Some New Aspects", 13 *Steuer und Wirtschaft International* (2003), p. 360 et seq.; Ruud van der Linde, "Some thoughts on most-favoured-nation treatment within the European Community legal order in pursuance of the *D* case", 13 *EC Tax Review* (2004), p. 10 et seq.; Norbert Herzig and Norbert Dautzenberg, "Der EWG-Vertrag und die Doppelbesteuerungsabkommen – Rechtsfragen im Verhältnis zwischen Doppelbesteuerungsabkommen und den Diskriminierungsverboten des EWGV", *Der Betrieb* (1992), p. 2521; Christian Tietje, "Die Meistbegünstigungsverpflichtung im Gemeinschaftsrecht", 30 *Europarecht* (1995), p. 406; Josef Schuch, "Verpflichtet das EU-Recht zur DBA-rechtlichen Meistbegünstigung?", 6 *Steuer und Wirtschaft International* (1996), p. 267 et seq.; Franz Wassermeyer, "Die Vermeidung der Doppelbesteuerung im Europäischen Binnenmarkt", in Moris Lehner (ed.), *Steuerrecht im Europäischen Binnenmarkt*, *Veröffentlichungen der Deutschen Steuerjuristischen Gesellschaft*, Volume 19 (Cologne: Schmidt, 1996), p. 162; Norbert Herzig and Norbert Dautzenberg, "Die Einwirkungen des EG-Rechts auf das deutsche Unternehmenssteuerrecht", *Der Betrieb* (1997), p. 16; Norbert Dautzenberg, "Die Kapitalverkehrsfreiheit des EG-Vertrages, der Steuervorbehalt des Art 73d EGV und die Folgen für die Besteuerung", 44 *Recht der Internationalen Wirschaft* (1998), p. 544; and Michael Lang, "Die Zukunft des Internationalen Steuerrechts in Europa", in Wolfgang Gassner et al. (eds.), *Die Zukunft des Internationalen Steuerrechts* (Vienna: Linde, 1999), p. 78.

16. See, for example, Y. Kergall, "Aspects of Treaty Overriding", 21 *Intertax* (1993), p. 459; Michael Lang, "Doppelbesteuerungsabkommen und Gemeinschaftsrecht", in Gottfried E. Breuninger et al. (eds.), *Steuerrecht und Europäische Integration* (Munich: C.H. Beck, 1999), p. 432; Mario Züger, "Neue Internationale Steuerfälle vor dem EuGH", *Steuer und Wirtschaft International* (2000), p. 137; and Thomas Scherer, "Verhältnis zum Recht der Europäischen Union", in Helmut Debatin and Franz Wassermeyer (eds.), *Doppelbesteuerung Vor*, Art. 1, MA (loose-leaf service), Para. 124.

17. See, for example, Kees van Raad, "The Impact of the EC Treaty's Fundamental Freedoms Provisions on EU Member States' Taxation in Border-crossing Situations – Current State of Affairs", 3 *EC Tax Review* (1994), p. 201. See also Pasquale Pistone, "An EU Model Tax Convention", 11 *EC Tax Review* (2002), p. 130; and Pasquale Pistone, *The Impact of Community Law on Tax Treaties* (The Hague: Kluwer Law International, 2002), p. 211 et seq. In addition, see the neutral comments by the "designers" of the "*D*" case, Dennis Weber and Etienne Spierts, "The '*D* Case': Most-Favoured-Nation Treatment and Compensation of Legal Costs before the European Court of Justice", 44 *European Taxation* 2/3 (2004), p. 65 et seq.

18. See the brief statements to the negative by Peter J. Wattel, "The EC Court's Attempts to Reconcile the Treaty Freedoms with International Tax Law", 33 *Common Market Law Review* (1996), p. 252; and Klaus Vogel, "Some Observations Regarding 'Gilly'", 7 *EC Tax Review* (1998), p. 150 et seq. In general, see René Offermanns and Carlo Romano, "Treaty Benefits for Permanent Establishments: The *Saint-Gobain* Case", 40 *European Taxation* 5 (2000), p. 188; Moris M. Lehner, "The Influence of EU Law on Tax Treaties from a German Perspective", 54 *Bulletin for International Fiscal Documentation* 8/9 (2000), p. 470; Malcom Gammie, "Double taxation, bilateral treaties and the fundamental freedoms of the EC Treaty", in Henk van Arendonk, Frank Engelen and Sjaak Janes (eds.), *A Tax Globalist – Essays in honour of Maarten J. Ellis*, (Amsterdam: IBFD, 2005), p. 280; Hans van den Hurk, "The European Court of Justice knows its limits – A discussion inspired by the *Gilly* and *ICI* cases", 8 *EC Tax Review* (1999), p. 216; and Moris M. Lehner, "Doppelbesteuerungsabkommen und europäisches Recht", in Klaus Vogel and Moris Lehner (eds.), fourth edition, *Doppelbesteuerungsabkommen Einl.* (Munich: C.H. Beck, 2003), Paras. 263 and 268.

19. See, for example, Luc Hinnekens, "Non-Discrimination in EC Income Tax Law: Painting in the Colours of a Chameleon-Like Principle", 36 *European Taxation* 9 (1996), p. 297; David Hughes, "Withholding Taxes and The Most Favoured Nation Clause", 51 *Bulletin for International Fiscal Documentation* 3 (1997), p. 126 et seq.; David Hughes, "*Gilly* and the Big Picture", 52 *Bulletin for International Fiscal Documentation* 8/9 (1998), p. 332; Moris Lehner, "Annotations on the Judgment of the European Court of Justice, Case 336/96 – The *Gilly* Case – of 12 May 1988", 52 *Bulletin for International Fiscal Documentation* 8/9 (1998), p. 335; Adolfo J. Martín-Jiménez, F. Alfredo Garcia Prats and José M. Calderón, "Triangular Cases, Tax Treaties and EC Law: The *Saint-Gobain* Decision of the ECJ", 55 *Bulletin for International Fiscal Documentation* 6 (2001), p. 250; Luc Hinnekens, "Compatibility of Bilateral Tax Treaties with European Community Law – The Rules", 3 *EC Tax Review* (1994), p. 152; Luc Hinnekens, "Compatibility of Bilateral Tax Treaties with European Community Law – Application of the Rules", 4 *EC Tax Review* (1995), p. 209; Klaus Vogel, "Problems of a Most-Favoured-Nation Clause in Intra-EU Treaty Law", 4 *EC Tax Review* (1995), p. 264; Eric C.C.M. Kemmeren, "The termination of the 'most favoured nation clause' dispute in tax treaty law and the necessity of a Euro Model Tax Convention", 6 *EC Tax Review* (1997), p. 147; Eric C.C.M. Kemmeren, "EC Law: Specific Observations", in Peter H.J. Essers et al. (eds.), *The Compatibility of Anti-Abuse-Provisions in Tax Treaties with EC Law* (The Hague: Kluwer Law International, 1998), p. 22; John F. Avery Jones, "Flows of capital between the EU and third countries and the consequences of disharmony in European international tax law", 7 *EC Tax Review* (1998), p. 97; and Ana Paula Dourado, "From the *Saint-Gobain* to the *Metallgesellschaft* case: scope of non-discrimination of permanent establishments in the EC Treaty and the most-favoured-nation clause in EC Member States tax treaties", 11 *EC Tax Review* (2002), p. 151. See also Luc Hinnekens, "The search for the framework conditions of the fundamental EC Treaty principles as applied by the European Court to Member States' direct taxation", 11 *EC Tax Review* (2002), p. 114.

20. See, for example, Luc Hinnekens, "Compatibility of Bilateral Tax Treaties with European Community Law – Application of the Rules", 4 *EC Tax Review* (1995), p. 213; and against, Stefaan De Ceulaer, "Community Most-Favoured-Nation Treatment: One Step Closer to the Multilateralization of Income Tax Treaties in the European Union?", 57 *Bulletin for International Fiscal Documentation* 10 (2003), p. 495.

21. See Moris M. Lehner, "The Influence of EU Law on Tax Treaties from a German Perspective", 54 *Bulletin for International Fiscal Documentation* 8/9 (2000), p. 470; Luc Hinnekens, "Compatibility of Bilateral Tax Treaties with European Community Law – Application of the Rules", 4 *EC Tax Review* (1995), p. 213; Eric C.C.M. Kemmeren, "The termination of the 'most favoured nation clause' dispute in tax treaty law and the necessity of a Euro Model Tax Convention", 6 *EC Tax Review* (1997), p. 147; Eric C.C.M. Kemmeren, "EC Law: Specific Observations", in Peter H.J. Essers et al. (eds.), *The Compatibility of Anti-Abuse-Provisions in Tax Treaties with EC Law* (The Hague: Kluwer Law International, 1998), p. 23; and Luc Hinnekens, "The search for the frame-

create. This conclusion has also been reached by a number of national courts that have dealt with the issue.[22] Conversely, the proponents of MFN treatment cite Art. 14 of the EC Treaty, which foresees an Internal Market that functions as a national market, and Art. 12, which prohibits "any discrimination on grounds of nationality", including discrimination between non-residents. The proponents also argue against the "sovereignty" contention in respect of the obligation to exercise powers in compliance with EC law and reason that EC obligations are unconditional and do not depend on "reciprocity".

Recent scholarship has favoured a differentiated view based on the *Gilly*[23] case, by taking into account the specific tax treaty rule in question, and has concluded that only provisions conferring a "unilateral" benefit, and not those providing for an allocation of taxing rights, result in horizontal discrimination and thereby require MFN treatment.[24] The Commission also supports this position and, as a result, has put the focus on whether or not a tax treaty provision is allocative in nature.[25] Consequently, in most recent discussions, the pivotal question has been whether or not a specific tax treaty rule can be considered to be a mere allocation of taxing powers.

3. THE "*D*" CASE

3.1. The facts

On 24 July 2003, the Court of Appeal of 's-Hertogenbosch, the Netherlands, put various questions (see 3.2.) to the ECJ in a case regarding, inter alia, the unequal treatment of non-resident taxpayers within the European Union and, therefore, in respect of the differences in tax treaties in the Union.[26] The facts of this MFN case are straightforward. A resident and national of Germany, for privacy reasons referred to as Mr D, who owned property in the Netherlands appealed against the refusal of the Netherlands tax authorities to grant him a tax benefit. The base case concerned an assessment in respect of wealth tax for the year 1998, in which it was assumed that 10% of Mr D's property consisted of immovable property in the Netherlands and that 90% of the property was invested in Germany.

For the year 1998, Mr D, under the Netherlands Law on Wealth Tax 1964 (*Wet op de vermogensbelasting* 1964), was subject to wealth tax as a non-resident taxpayer. According to this law, resident taxpayers have always had the right to deduct the basic allowance. Non-resident taxpayers are not entitled to do so, unless 90% or more of their capital is invested in the Netherlands. Non-resident taxpayers, who are resident in Belgium, have, however, had the right to deduct the basic allowance under Art. 25(3) of the 1970 Belgium–Netherlands tax treaty, without reference to the property actually invested in the Netherlands. The Germany–Netherlands tax treaty does not provide for this. Accordingly, Mr D did not qualify for a basic allowance either under Netherlands national tax law or under the Germany–Netherlands tax treaty. In 1998, neither Germany nor Belgium imposed a wealth tax.

3.2. The questions

Based on the facts in 3.1. it was, inter alia, argued that taxpayers were treated unequally within the European Union,

work conditions of the fundamental EC Treaty principles as applied by the European Court to Member States' direct taxation", 11 *EC Tax Review* (2002), p. 114. See also Peter J. Wattel, "The EC Court's Attempts to Reconcile the Treaty Freedoms with International Tax Law", 33 *Common Market Law Review* (1996), p. 252 et seq. In general, see Hans van den Hurk, "The European Court of Justice knows its limits – A discussion inspired by the *Gilly* and *ICI* cases", 8 *EC Tax Review* (1999), p. 216.

22. See the German *Bundesfinanzhof*, 31 October 1990, II R 176/87, BFHE 162, 374, BStBl 1991 II 161 (regarding the wealth taxation of an Italian corporation in Germany); and the German *Bundesfinanzhof*, 26 May 2004, I R 54/03, BFHE 206, 332, BStBl 2004 II 767 (concerning the German dividend withholding tax on profit distributions paid to a Russian parent company in light of the free movement of capital). More recently, an Austrian Tax Court has denied MFN treatment in a case regarding royalty payments made by an Austrian to a Netherlands corporation, as the Austrian withholding tax did not create a disadvantage and the Netherlands had to credit the Austrian tax. See UFS Wien, 23 June 2005, RV/1799-W/03 and the discussion of this case by Ines Hofbauer, "UFS verneint die Geltung der Meistbegünstigung im Europarecht", 15 *Steuer und Wirtschaft International* 8 (2005), p. 376 et seq. In two other reported cases, two Netherlands courts denied the application of MFN treatment with regard to a certain tax benefit for individuals without posing preliminary questions to the ECJ. See R. Betten, "Lower Courts Deny Application of Most-Favoured-Nation Clause: A Lost Opportunity?", 37 *European Taxation* 11 (1997), p. 417 et seq.

23. ECJ, 12 May 1998, Case C-336/96, *Mr and Mrs Robert Gilly v. Directeur des services fiscaux du Bas-Rhin* [1998] ECR I-2793.

24. See Servaas van Thiel, *Free Movement of Persons and Income Tax Law: the European Court in Search of Principles* (Amsterdam: IBFD, 2002), p. 486 et seq.; Ruud van der Linde, "Some thoughts on most-favoured-nation treatment within the European Community legal order in pursuance of the *D* case", 13 *EC Tax Review* (2004), p. 14 et seq.; Georg W. Kofler, "Most-Favoured-Nation Treatment in Direct Taxation: Does EC Law Provide for Community MFN in Bilateral Double Taxation Treaties?", 5 *Houston Business and Tax Law Journal* (2005), p. 68 et seq.; Axel Cordewener, *Europäische Grundfreiheiten und nationales Steuerrecht* (Cologne: Otto Schmidt, 2002), p. 836 et seq.; Otto H. Jacobs, *Internationale Unternehmensbesteuerung*, fifth edition (Munich: C.H. Beck, 2005), p. 262 et seq.; Hans Weggenmann, "EG-rechtliche Aspekte steuerlicher Meistbegünstigung im Abkommensrecht", 12 *Internationales Steuerrecht* 19 (2003), p. 681 et seq.; and Wolfgang Schön, "Meistbegünstigung und Doppelbesteuerungsabkommen", in Karina Grundmann and Klaus-Dieter Drüen (eds.), *Jahrbuch der Fachanwälte für Steuerrecht 2005/06* (Berlin: Verlag Neue Wirtschafts-Briefe, 2005) [in print].

25. Richard Lyal, "The Position Taken by the Commission in Case C-376/03 *D. v. Belastingdienst*", 45 *European Taxation* 8 (2005), p. 340 et seq. See also the Working Paper "Company Taxation in the Internal Market", COM(01)582 final, p. 316, in which the Commission stated that it "remains unclear whether all differences between tax treaties will be incompatible with the equal treatment principle. In particular it is arguable that the equal treatment principle does not allow reciprocal concessions which go beyond mere allocation of taxing rights, such as differences in concessions to avoid economic double taxation (refunds of imputation credits)". It should also be noted that the Commission had, some years ago, already taken measures regarding an MFN case in respect of the previous French branch profits tax. See the European Commission Press Release, "Company taxation: European Commission Pursues Infringement Proceedings against France and Greece", IP/97/730, 31 July 1997. See also Nigel Tutt, "European Commission Threatens Legal Action Regarding French Taxation of Profits", 15 *Tax Notes International*, 11 August 1997, p. 433; Deloitte & Touche, "Challenge to French Branch Tax", 24 *Tax Planning International Review* (November 1997), p. 27; Josef Schuch, "EC Law Requires Multilateral Tax Treaty", 7 *EC Tax Review* (1998), p. 29 et seq.; and D. Berlin and V. Chaulin, "Legislation: France", 7 *EC Tax Review* (1998), p. 296 et seq. Conversely, MFN treatment in respect of withholding taxes was rejected by the Commission when it stated that "current community law does not oblige a Member State to grant automatically the withholding tax rate of its most favourable bilateral agreement to taxpayers of another Member State which is not covered by that agreement". Regarding this, see the answer given by Mrs Scrivener on behalf of the Commission, Official Journal (EC), 1993, C 40/13.

26. Official Journal (EC), 2003, C 289/12. See also Dennis Weber and Etienne Spierts, "The '*D* Case': Most-Favoured-Nation Treatment and Compensation of Legal Costs before the European Court of Justice", 44 *European Taxation* 2/3 (2004), p. 65 et seq.

as, under the 1970 Belgium–Netherlands tax treaty, residents of Belgium who own property in the Netherlands are granted tax benefits[27] that are not available under the Germany–Netherlands tax treaty. This would create an impermissible difference in treatment between Belgians and Germans. The Court of Appeal of 's-Hertogenbosch, however, primarily asked the ECJ a question on the national treatment, i.e. whether or not EC law, and, in particular, Arts. 56 et seq. of the EC Treaty,

> preclude legislation ... under which a domestic taxpayer is always entitled to deduction of a tax allowance in respect of wealth tax, whereas a non-resident taxpayer has no such entitlement in the case where the assets in question are situated predominantly in the taxpayer's State of residence (in which no wealth tax is levied)?[28]

If this question was answered by the ECJ in the negative, the Court of Appeal of 's-Hertogenbosch asked a second question, regarding MFN treatment, i.e. whether it makes a difference in this case

> that the Netherlands has, under a bilateral treaty, granted to residents of Belgium, who in all other respects are in comparable circumstances, entitlement to the tax allowance (no wealth tax being levied in Belgium either)?[29]

The third question, which was not answered by the ECJ and is not discussed in this article,[30] was posed if either of the first two questions was answered affirmatively and asked whether or not Community law precludes a legal costs scheme

> under which, in principle, only a limited contribution is made towards legal costs where a citizen is successful in proceedings brought before the national courts for breach of Community law by a Member State?[31]

4. ANALYSIS OF THE ECJ'S DECISION IN THE "*D*" CASE

4.1. Tax-free allowances and national treatment: vertical discrimination between non-residents and residents

The first question (see 3.2.) as to whether or not the Netherlands wealth tax entails *vertical* discrimination against a non-resident taxpayer that is prohibited by Art. 56 and Art. 58 of the EC Treaty has its obvious root in the fact that, if wealth of an equal amount (being less than 90%) is held in the Netherlands, only residents are entitled to an allowance against wealth tax. Mr D, therefore, argued that this discriminatory treatment constituted an impediment to the free movement of capital that was contrary to Art. 56 of the EC Treaty and was not justified by Art. 58. Mr D also suggested that the wealth tax should be distinguished from income tax and, therefore, the reasoning in the *Schumacker* case should not be adopted.[32] Conversely, the Netherlands, Belgian, French and German governments, as well as the Commission, relied on the *Schumacker* case. These bodies argued that residents and non-residents are not, as a rule, in a comparable situation in relation to direct taxes and that the difference in treatment contested by Mr D was compatible with the EC Treaty rules. The ECJ followed the latter line of reasoning.[33]

After concluding that the real estate investment of Mr D in question fell within the scope of the rules relating to the free movement of capital set out in Arts. 56 et seq of the EC Treaty,[34] the ECJ moved on to state that Art. 56 prohibits restrictions on the movement of capital, subject to Art. 58. From this it is clear that the Member States may, in their tax law, distinguish between resident and non-resident taxpayers insofar as the distinction drawn does not constitute an arbitrary discrimination or a disguised restriction on the free movement of capital. Based on this, the ECJ restated its line of reasoning in the *Schumacker* case regarding income taxation. In this, the ECJ accepted that the situations of residents and of non-residents are not, as a rule, comparable.[35] Accordingly, a Member State that withholds from a non-resident certain tax benefits that it grants to residents is not, as a rule, discriminatory, as the two categories of taxpayer are not in a comparable situation.[36] The ECJ, nevertheless, held that the position could be different if the non-resident receives no significant income in the Member State of residence and derives the major part of his taxable income from an activity performed in the Member State of employment. The result is that the Member State of residence is not in a position to

27. Under this non-discrimination provision of the Belgium–Netherlands tax treaty (Art. 25(3)) "[i]ndividuals who are residents of one of the States shall benefit in the other State from the same personal allowances, reliefs and deductions on account of civil status or family responsibilities which the last-mentioned State grants to its own residents". (Unofficial translation, IBFD *Tax Treaties Database*.)

28. ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Para. 19(1).

29. Id., Para. 19(2).

30. On this issue, see Dennis Weber and Etienne Spierts, "The '*D* Case': Most-Favoured-Nation Treatment and Compensation of Legal Costs before the European Court of Justice", 44 *European Taxation* 2/3 (2004), p. 70.

31. ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Para. 19(3).

32. See ECJ, 14 February 1995, Case C-279/93, *Finanzamt Köln-Altstadt v. Roland Schumacker* [1995] ECR I-225, Para. 31 et seq. See also ECJ, 11 August 1995, Case C-80/94, *G.H.E.J. Wielockx v. Inspecteur der Directe Belastingen* [1995] ECR I-2493, Para. 18; ECJ, 27 June 1996, Case C-107/94, *P.H. Asscher v. Staatssecretaris van Financiën* [1996] ECR I-3089, Para. 41; ECJ, 12 May 1998, Case C-336/96, *Mr and Mrs Robert Gilly v. Directeur des services fiscaux du Bas-Rhin* [1998] ECR I-2793 Para. 49 et seq.; ECJ, 14 September 1999. Case C-391/97, *Frans Gschwind v. Finanzamt Aachen-Außenstadt* [1999] ECR I-5451, Para. 23 et seq.; ECJ, 16 May 2000, Case C-87/99, *Patrick Zurstrassen v. Administration des contributions directes* [2000] ECR I-3337, Para. 21; and ECJ, 1 July 2004, Case C-169/03, *Florian W. Wallentin v. Riksskatteverket* [2004] ECR I-6443. Compare also ECJ, 12 December 2002, Case C-385/00, *F.W.L. de Groot v. Staatssecretaris van Financiën* [2002] ECR I-11819 regarding the application of this case law to the Member State of residence.

33. ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Paras. 24-43.

34. Id., Para. 24. The ECJ argued that Mr D's investments constituted a capital movement as referred to in Art. 1 of Council Directive 88/361/EEC of 24 June 1988 in respect of the implementation of Art. 67 of the EC Treaty (Official Journal (EC), 1988, L 178/5) and in the nomenclature of capital movements in Annex I to the Directive and in that of capital movements in Annex I to the Directive. This nomenclature still has the same indicative value for the purposes of defining the concept of capital movements. (See ECJ, 23 September 2003. Case C-452/01, *Margarethe Ospelt and Schlössle Weissenberg Familienstiftung* [2003] ECR I-9743, Para. 7.)

35. ECJ, 14 February 1995, Case C-279/93, *Finanzamt Köln-Altstadt v. Roland Schumacker* [1995] ECR I-225, Para. 31.

36. ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Para. 28.

grant him the benefits derived from the taking into account of his personal and family circumstances. There is then no objective difference between this non-resident and a resident engaged in comparable employment so as to justify different treatment regarding the taking into account of the taxpayer's personal and family circumstance for taxation purposes.[37] The ECJ has, therefore, allowed a Member State to make the granting of a benefit to non-residents subject to the condition that at least 90% of their worldwide income must be taxable in that Member State.[38]

In contrast to speculation in legal writing,[39] in the "*D*" case, the ECJ transposed its case law on income taxation to the wealth taxation in question.[40] Specifically, "the situation of a person liable to wealth tax and that of a person liable to income tax are similar in several respects". With regard to this, the ECJ pointed out that wealth tax is "a direct tax based on the taxpayer's ability to pay" and is often "regarded as a complement to income tax". The ECJ also reasoned that a person liable to wealth tax has, as a rule, the greater part of his assets in the Member State in which he is resident, which is usually where the taxpayer's personal and financial interests are centred.[41] After reaching this conclusion, the ECJ moved on to examine whether or not, as with income tax, the situation of a resident and that of a non-resident are generally not comparable in the context of wealth tax. Based on the worldwide wealth taxation that Netherlands residents are subjected to, as opposed to the source-based wealth taxation of non-residents,[42] the ECJ answered this question in the affirmative, i.e.:

> It follows that a taxpayer who holds only a minor part of his wealth in a Member State other than the State where he is resident is not, as a rule, in a situation comparable to that of residents of that other Member State and the refusal of the authorities concerned to grant him the allowance to which residents are entitled does not discriminate against him.[43]

This, however, left unresolved the tricky question of whether or not the fact that Germany did not impose wealth tax in the tax year in question influenced the analysis of the (potential) discrimination. Whilst the Advocate General thought so, the ECJ rightly did not follow this line of reasoning.

The taxpayer's argument for comparability was straightforward. As Germany did not levy wealth tax and, therefore, did not take into account Mr D's personal and family circumstances, all of the relevant taxable wealth of Mr D was located in the Netherlands, which, consequently, appeared to be under the *Schumacker* obligation. Advocate General Ruiz-Jarabo Colomer sympathized with this conclusion and found it decisive

> that no tax of that kind was levied in Germany because, as regards his assets in the Netherlands, D. is in the same position as a resident since, in reality, 100% of his taxable wealth is located in the latter country, because the property he owns in his country of domicile is irrelevant for tax purposes.[44]

In support of his view, the Advocate General referred to the *Wallentin*[45] case. In this case, the ECJ, with reference to income tax, treated the situation of a taxpayer who received only tax-free income in his Member State of origin in the same way as that of a person with no income. Accordingly, the ECJ held that the *Schumacker* doctrine applied to him, thereby leaving the Member State of employment the obligation of taking his personal and family circumstances into account. The ECJ did not, however, follow this line of reasoning in the "*D*" case, i.e.:

> The different treatment of residents and non-residents by the Member State in which the person concerned holds only 10% of his wealth and the lack of an allowance in that case can be explained by the fact that the person concerned holds only a minor part of his wealth in that State and that he is accordingly not in a situation comparable to that of residents. The circumstance that that person's State of residence has abolished wealth tax has no bearing on this factual situation. Since he holds the major part of his wealth in the State where he is resident, the Member State in which he holds only a proportion of his wealth is not required to grant him the benefits which it grants to its own residents.[46]

Consequently, the ECJ attempted to distinguish the *Wallentin* case, i.e.:

> sums such as the subsistence allowance paid to Mr Wallentin by his parents and the grant which he received from the German State did not of their nature constitute taxable income under German tax legislation. Accordingly, the sums received by Mr Wallentin in Germany and the wealth held by Mr D. there cannot be regarded as comparable for the purpose of determining whether, with regard to taxation of the wealth possessed by him in the Netherlands, Mr D. must be eligible for the allowance provided for by Netherlands legislation.[47]

The authors submit that the ECJ was right to conclude that Art. 56 and Art. 58 of the EC Treaty do not preclude legislation, under which a Member State denies non-resident taxpayers, who hold the major part of their wealth in the Member State in which they are resident, the entitlement to the allowances that it grants to resident taxpayers.[48] If

37. See ECJ, 14 February 1995, Case C-279/93, *Finanzamt Köln-Altstadt v. Roland Schumacker* [1995] ECR I-225, Paras. 36 and 37; and ECJ, 1 July 2004, Case C-169/03, *Florian W. Wallentin v. Riksskatteverket* [2004] ECR I-6443, Para. 17.
38. ECJ, 14 September 1999. Case C-391/97, *Frans Gschwind v. Finanzamt Aachen-Außenstadt* [1999] ECR I-5451, Para. 32.
39. In this respect, an inheritance tax case (ECJ, 11 December 2003, Case C-364/01, *The heirs of H. Barbier v. Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen* [2003] ECR I-15013) has led to speculation as to whether or not the *Schumacker* line of case law only applies to income taxation. Regarding this, see Georg W. Kofler, "Most-Favoured-Nation Treatment in Direct Taxation: Does EC Law Provide for Community MFN in Bilateral Double Taxation Treaties?", 5 *Houston Business and Tax Law Journal* (2005), p. 53 et seq.; and Eva Burgstaller and Katharina Haslinger, "Erbschaftssteuer und Gemeinschaftsrecht – Neue Entwicklungen in der europäischen Rechtsprechung", 14 *Steuer und Wirtschaft International* (2004), p. 110 et seq.
40. ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Paras. 31-38.
41. See ECJ, 12 June 2003, Case C-234/01, *Arnoud Gerritse v. Finanzamt Neukölln-Nord* [2003] ECR I-5933, Para. 43.
42. ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Para. 35 et seq.
43. Id., Para. 38.
44. ECJ, Advocate General Ruiz-Jarabo Colomer's Opinion, 26 October 2004, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Para. 64.
45. ECJ, 1 July 2004, Case C-169/03, *Florian W. Wallentin v. Riksskatteverket* [2004] ECR I-6443.
46. ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Para. 41.
47. Id., Para. 42.
48. Id., Para. 43.

the ECJ had found that the non-imposition of wealth tax in Germany was of decisive importance, the borderline between prohibited discrimination and allowed disparities between the tax systems of the Member States would be completely blurred. At the outset, it is necessary to be aware that the ECJ has frequently dealt with and accepted disparities between existing tax systems[49] and has already concluded so in the *Schumacker*[50] case, insofar as it acknowledged differences in the consideration by the Member States of family and personal circumstances. Accordingly, if the disadvantage to the taxpayer disappears where hypothetically identical tax systems in the Member States involved in the particular cross-border tax case are assumed, a mere disparity is at issue. This cannot be dealt with under the non-discrimination clauses of the EC Treaty.[51] From this, it can be concluded that every Member State is free to establish its own tax system as it wishes without being bound by the systems of other Member States. As a result, differences in tax rates, the calculation of the tax base and the like are outside the scope of the fundamental freedoms.[52] In addition, the mere existence of a particular tax in one Member State, which does not exist in another Member State, cannot have any effect on evaluating the tax system of the latter Member State in the light of the fundamental freedoms.[53] Conversely, the non-existence of a tax in one Member State cannot influence a discrimination analysis of the tax system of another Member State, in which such a tax exists.

This clear conclusion was, however, questioned by the Advocate General in the "*D*" case. The Advocate General's finding that the refusal of the tax-free allowance in the Netherlands in the tax year 1998 was discriminatory, as the taxpayer could not obtain a similar tax-free allowance in Germany because Germany had abolished its wealth tax in 1997,[54] would, however, conversely lead to the conclusion that, if Germany had imposed wealth tax in the tax year in question, the refusal of the tax-free allowance in the Netherlands would not have been discriminatory. The ECJ correctly rejected this conclusion.[55] The Court, thereby, avoided creating a paradox in its case law on mere disparities.[56] This said, it may be speculated as to what is the real difference between the *Wallentin* and the "*D*" cases. In the *Wallentin* case, the ECJ disregarded amounts that Mr *Wallentin* received in his residence Member State, Germany, that were not included in the German tax base in deciding whether or not he had reached the 90% *Schumacker* threshold in Sweden, his Member State of employment. Conversely, and in contrast to the Advocate General,[57] in the "*D*" case, the ECJ rightly did not disregard property held in Germany in respect of the 90% *Schumacker* threshold for the purposes of Netherlands wealth taxation. This was despite the fact that the German wealth was not taxed in Germany. The apparent inconsistency between the two decisions has already given rise to criticism.[58] As the ECJ did not overrule, but rather distinguished, its highly questionable *Wallentin* decision,[59] the difference may at first sight only be explained by the mere existence of the tax in the Member State of residence. It will, however, have to be seen in future case law whether the ECJ employs the *Wallentin* or the "*D*" case type of reasoning in respect of the *Schumacker* threshold, if the taxpayer's Member State of residence chooses not to tax the relevant income or wealth.

4.2. Most-favoured-nation treatment: horizontal discrimination between non-residents by the source Member State

In answering the first question in the negative, the ECJ opened the way to deal with the MFN issue. Before, however, considering to the ECJ's findings on the second question (see 3.2.), the contrary arguments of Mr D, on the one hand, and those of both the Member States and the Commission, on the other hand, are summarized below.

Mr D argued that the difference, resulting from the application of the Belgium–Netherlands tax treaty between his situation and that of a Belgian resident in an equivalent situation amounted to discrimination prohibited by the EC Treaty.[60] First, whilst it is true that the ECJ has accepted differences in treatment between Community citizens resulting from the allocation of taxing powers, the granting of the allowance to residents of Belgium alone was not the result of such an allocation. Second, the treatment accorded by the Netherlands to Belgian residents did not reflect reciprocal treatment accorded to residents of the

49. ECJ, 15 May 1997, Case C-250/95, *Futura Participations SA and Singer v. Administration des contributions* [1997] ECR I-2471, Para. 33; ECJ, 12 May 1998, Case C-336/96, *Mr and Mrs Robert Gilly v. Directeur des services fiscaux du Bas-Rhin* [1998] ECR I-2793, Para.47; and ECJ, 12 December 2002, Case C-385/00, *F.W.L. de Groot v. Staatssecretaris van Financiën* [2002] ECR I-11819, Para. 86.

50. See ECJ, 14 February 1995, Case C-279/93, *Finanzamt Köln-Altstadt v. Roland Schumacker* [1995] ECR I-225.

51. See Ben Terra and Peter J. Wattel, *European Tax Law*, fourth edition (The Hague: Kluwer Law International, 2005), p. 57 et seq.

52. See, for example, ECJ, 12 December 2002, Case C-385/00, *F.W.L. de Groot v. Staatssecretaris van Financiën* [2002] ECR I-11819, Para. 85.

53. See, however, ECJ, 14 October 1999, Case C-439/97, *Sandoz GmbH v. Finanzlandesdirektion für Wien, Niederösterreich und Burgenland* [1999] ECR I-7041, Para. 19, and the critical statements by Axel Cordewener, *Europäische Grundfreiheiten und nationales Steuerrecht* (Cologne: Schmidt, 2002), p. 845 et seq.

54. ECJ, Advocate General Ruiz-Jarabo Colomer's Opinion, 26 October 2004, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Para. 63 et seq. Approving this, see Arne Schnitger, "Vermögensteuer-Freibeträge in Holland, weil keine Vermögensteuer in Deutschland", 13 *Internationales Steuerrecht* 22 (2004), p. 801.

55. ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Para. 41 et seq. See also the critical statement by Axel Cordewener, "Körperschaftsteueranrechnung für Gebietsfremde versus Kapitalverkehrsfreiheit – Zum Gutachten des EFTA-Gerichtshofs in Sachen Fokus Bank ASA", *Finanz-Rundschau* (2005), p. 352 and note 47.

56. For this, see Georg W. Kofler, "Das Ende vom Anfang der gemeinschaftsrechtlichen Meistbegünstigung", 58 *Österreichische Steuerzeitung* 19 (2005), p. 433 et seq.

57. ECJ, Advocate General Ruiz-Jarabo Colomer's Opinion, 26 October 2004, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Para. 63 et seq.

58. See Michael Lang, "Das EuGH-Urteil in der Rechtssache D. – Gerät der Motor der Steuerharmonisierung ins Stottern?", 15 *Steuer und Wirtschaft International* 8 (2005), p. 367 et seq.; and Georg W. Kofler, "Das Ende vom Anfang der gemeinschaftsrechtlichen Meistbegünstigung", 58 *Österreichische Steuerzeitung* 19 (2005), p. 433 et seq.

59. ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Para. 42.

60. For a detailed description of the taxpayer's arguments, see Dennis Weber and Etienne Spierts, "The '*D* Case': Most-Favoured-Nation Treatment and Compensation of Legal Costs before the European Court of Justice", 44 *European Taxation* 2/3 (2004), p. 66 et seq.

Netherlands by Belgium, as Belgium does not impose a wealth tax and, therefore, does not grant an allowance to residents of the Netherlands who own property in its territory.

Conversely, the Member States[61] and the Commission[62] argued that the different treatment of a person, such as Mr D, and a Belgian resident was not discriminatory. This followed from the concept that a Member State that is a party to a bilateral convention is not in any way required, by virtue of the EC Treaty, to extend to all Community residents the benefits that it grants to residents of the other contracting Member State. Reference was also made to the danger that extending the benefits provided for by a bilateral convention to all Community residents would have regarding the application of existing bilateral conventions and those which the Member States might conclude in the future, as well as to the legal uncertainty that this would cause.

The ECJ noted that, apart from Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of the profits of associated enterprises,[63] no unifying or harmonizing measure for the elimination of double taxation has been adopted at Community level. The Court also noted that the Member States have not concluded any multilateral convention to this effect under Art. 293 of the EC Treaty.[64] Instead, the ECJ restated its former judicature, under which the Member States are at liberty to determine the connecting factors for the purposes of allocating powers of taxation in tax treaties[65] and that a difference in treatment between nationals of the two contracting states that results from that allocation cannot constitute discrimination contrary to Art. 39 of the EC Treaty.[66,67] Thereafter, the ECJ pointed out that the "*D*" case does not, however,

> relate to the consequences of allocating powers of taxation in relation to nationals or residents of Member States that are party to a convention, but [is] concerned with drawing a comparison between the situation of a person resident in a State not party to such a convention and that of a person covered by the convention.[68]

This is, therefore, a question of *horizontal* comparability between non-residents of different Member States[69] in a situation in which the source Member State grants more favourable tax treaty provisions to residents of Member State A compared to residents of Member State B.

The ECJ denied this very comparability, a limine,[70] by stating that "the scope of a bilateral tax convention is limited to the natural or legal persons referred to in it" [and that the] "reciprocal rights and obligations" [granted herein] "apply only to persons resident in one of the two contracting Member States." The latter is "an inherent consequence of bilateral double taxation conventions" according to the ECJ's reasoning. From this it follows that

> a taxable person resident in Belgium is not in the same situation as a taxable person resident outside Belgium so far as concerns wealth tax on real property situated in the Netherlands,

leading to the concluding answer to the second question

> that Articles 56 EC and 58 EC do not preclude a rule laid down by a bilateral convention for the avoidance of double taxation such as the rule at issue in the main proceedings from not being extended, in a situation and in circumstances such as those in the main proceedings, to nationals of a Member State which is not party to that convention.[71]

The ECJ's initial statement that the MFN doctrine at issue must be analysed using the concept of *horizontal* comparability between non-residents, rather than being a result of the allocation of taxing powers that, as a matter of law, falls outside the scope of the fundamental freedoms,[72] was, indeed, a good start.[73] To deny comparability because of the existence of a tax treaty should, however, be criticized, as this is a circular reasoning[74] that terminates the ECJ's

61. On the observations submitted by the Member States, see Dennis Weber, "Differences between Tax Treaties: Prohibited Discrimination?", 45 *European Taxation* 8 (2005), p. 339.

62. On the observations submitted by the Commission, see Richard Lyal, "The Position Taken by the Commission in Case C-376/03 *D. v. Belastingdienst*", 45 *European Taxation* 8 (2005), p. 340 et seq.

63. Official Journal (EC), 1990, L 225/10.

64. In this context, doubts had been raised in legal writing as to whether or not the lack of reference to other Directives (also) dealing with the elimination of double taxation, such as the EC Parent-Subsidiary Directive or the EC Merger Directive, can result in the conclusion that Art. 293 of the EC Treaty is limited in scope to multi-or bilateral treaties. (Regarding this, see Peter Fischer, "Europa macht mobil – bleibt der Verfassungstaat auf der Strecke?", *Finanz-Rundschau* (2005), p. 461.) The existence of the EC Parent-Subsidiary Directive, however, appears to clarify this point negatively. (See Michael Lang, "Das EuGH-Urteil in der Rechtssache D. – Gerät der Motor der Steuerharmonisierung ins Stottern?", 15 *Steuer und Wirtschaft International* 8 (2005) p. 374.) In other words, multi- or bilateral treaties, on the one hand, and Directives (or Regulations as the case may be), on the other hand, are concurrent means to achieve this objective of the EC Treaty. See, for example, Clemens Philipp Schindler, "Ist ein Multilaterales Doppelbesteuerungsabkommen eine Lösung für Europa?", in Axel Cordewener et al. (eds.), *Meistbegünstigung im Steuerrecht der EU-Staaten* (Munich: C.H. Beck, 2005) [in print].

65. ECJ, 21 September 1999, Case C-307/97, *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen-Innenstadt* [1999] ECR I-6161, Para. 57.

66. ECJ, 12 May 1998, Case C-336/96, *Mr and Mrs Robert Gilly v. Directeur des services fiscaux du Bas-Rhin* [1998] ECR I-2793, Para. 30.

67. ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Para. 50 et seq.

68. Id., Para. 53.

69. See, for example, Josef Schuch, "'Most favoured nation clause' in Tax Treaty Law", 5 *EC Tax Review* (1996), p. 162 et seq.

70. With reference to ECJ, 21 September 1999, Case C-307/97, *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen-Innenstadt* [1999] ECR I-6161, Para. 59, the ECJ clearly accepted that situations may occur, in which the benefits of a bilateral tax treaty must be extended to persons not directly falling within the personal scope of a specific tax treaty. Nevertheless, it should be noted that the national treatment principle relevant in the *Saint-Gobain* case that deals with a problem of vertical comparability between a resident and a non-resident is fundamentally different from the situation in the "*D*" case, which deals with the horizontal comparability of non-residents. Advocate General *Ruiz-Jarabo Colomer*, however, distinguished the two cases only by the fact that the *Saint-Gobain* case dealt with a tax treaty concluded with a third state that was not a Member State of the European Union. (See ECJ, Advocate General Ruiz-Jarabo Colomer's Opinion, 26 October 2004, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Para. 91.) On this point, see Georg W. Kofler, "Generalanwalt zur Kapitalverkehrsfreiheit und Meistbegünstigung bei DBA-Anwendung", 57 *Österreichische Steuerzeitung* 23 (2004), p. 562.

71. ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Para. 61 et seq.

72. See Axel Cordewener, *Europäische Grundfreiheiten und nationales Steuerrecht* (Cologne: Otto Schmidt, 2002), p. 837.

73. See, for example, Georg W. Kofler, "Das Ende vom Anfang der gemeinschaftsrechtlichen Meistbegünstigung," 58 *Österreichische Steuerzeitung* 19 (2005), p. 435 et seq.

74. Servaas van Thiel, "A Slip of the European Court in the D case (C-376/03): Denial of the Most-Favoured-Nation Treatment because of Absence of Similarity", 33 *Intertax* 10 (2005), p. 455.

examination before it has actually begun.[75] It also does not explicitly consider the inherent preliminary issue, i.e. whether or not discrimination between non-residents in similar circumstances is prohibited by EC law. In addition, the ECJ held that the granting of a tax-free allowance to Belgians must be considered, not as a unilateral benefit, but, rather, as part of the tax treaty's overall balance and reciprocity. It is unclear whether or not this balance and reciprocity is to be considered as an element of comparability or as an *obiter dictum* laying the ground for future decisions. The ECJ has, however, by this put a hold on the prevailing opinion in legal writing that questioned such a notion as being a successful justification.[76]

The ECJ based its comparability examination only on the legal circumstances, whilst the factual circumstances were not considered. In legal writing, it has been established that the former judicature of the ECJ is inconsistent with regard to this.[77] In some cases, the ECJ has followed the approach taken in the "*D*" case.[78] In the *Schumacker*[79] case, however, only the factual circumstances were taken into account by the ECJ. In other cases, the ECJ has mixed both approaches and decided cases on the basis of an overall view as to whether or not taxpayers are in a comparable situation.[80] In the authors' opinion, the latter appears to be the most appropriate approach, although greater attention must be paid to the legal circumstances.[81] A further criticism is that only tax treaty provisions were taken into account in the comparability examination, whereas national rules, especially those on the wealth tax, were completely disregarded.[82] To deny the comparability only by reference to the nature of a bilateral convention, in the case in question in the form of a tax treaty, is a very unsatisfying result for such a highly debated issue as the MFN doctrine.[83]

As previously stated, the ECJ expressly accepted the argument that bilateral tax treaties are reciprocal in their nature and, therefore, individual tax treaty rules "cannot be regarded as a benefit separable from the remainder of the Convention, but [are] an integral part thereof and contribute to its overall balance".[84] This line of reasoning, based on the overall reciprocity of tax treaties, mirrors, in addition to the argument that no legal basis is available, the primary objection of those scholars who deny an MFN doctrine. The ECJ's decision also steals the thunder from those authorities in recent scholarship who favoured a differentiated view, based on the ECJ's decision in the *Gilly*[85] case, by taking into account the specific tax treaty rule in question and concluding that only provisions conferring a "unilateral" benefit, and not those providing for an allocation of taxing rights, may result in horizontal discrimination and thereby require MFN treatment.[86] This differentiated view would have also been very reasonable in terms of achieving the true objective of a tax treaty, i.e. the avoidance of double taxation and double non-taxation.[87] The granting of non-reciprocal benefits does not contribute to this objective at all. At least for the inbound situation, however, this prospect appears to have been lost. This is because the view that the ECJ's decision in the "*D*" case can, by analogy to the development initiated by the *Schumacker* case, be limited to personal tax concessions[88] lacks any basis in the decision in question. Although it must be admitted that the ECJ has given the Member States leeway to derogate from the 90% *Schumacker* threshold by way of bilateral tax treaties,[89] the reasoning of the Court in the "*D*" case appears to be sufficiently broad to exclude not only rules regarding personal and

75. See Hans R. Weggenmann, "Keine Meistbegünstigung aus Doppelbesteuerungsabkommen in der EU", 51 *Recht der Internationalen Wirtschaft* (2005), p. 717 et seq.

76. See, for example, Axel Cordewener, *Europäische Grundfreiheiten und nationales Steuerrecht* (Cologne: Otto Schmidt, 2002), p. 840. See also Clemens Philipp Schindler, "EuGH-Urteil in der Rechtssache D – Kann sich die Meistbegünstigung von diesem Schock erholen?", 1 *taxlex* 8 (2005), p. 463.

77. See Michael Lang, "Das EuGH-Urteil in der Rechtssache D. – Gerät der Motor der Steuerharmonisierung ins Stottern?", 15 *Steuer und Wirtschaft International* 8 (2005), p. 370.

78. See, for example, ECJ, 29 April 1999, Case C-311/97, *Royal Bank of Scotland plc v. Elliniko Dimosio (Greek State)* [1999] ECR I-2651, Para. 24.

79. See ECJ, 14 February 1995, Case C-279/93, *Finanzamt Köln-Altstadt v. Roland Schumacker* [1995] ECR I-225.

80. See, for example, ECJ, 12 September 2002, Case C-431/01, *Philippe Mertens v. Belgian State* [2002] ECR I-7073, Para. 32.

81. Similarly, see Michael Lang, "Ist die Schumacker-Rechtsprechung am Ende?", 51 *Recht der internationalen Wirtschaft* (2005), p. 344; and Michael Lang, "Das EuGH-Urteil in der Rechtssache D. – Gerät der Motor der Steuerharmonisierung ins Stottern?", 15 *Steuer und Wirtschaft International* 8 (2005), p. 369 et seq. Dissenting, see Daniel Gutmann, "The Marks & Spencer Case: proposals for an alternative way of reasoning", 12 *EC Tax Review* (2003), p. 155, who, as with the ECJ in the "*D*" case, only finds the legal circumstances to be relevant.

82. See, for example, Michael Lang, "Das EuGH-Urteil in der Rechtssache D. – Gerät der Motor der Steuerharmonisierung ins Stottern?", 15 *Steuer und Wirtschaft International* 8 (2005), p. 370; and Georg W. Kofler, "Das Ende vom Anfang der gemeinschaftsrechtlichen Meistbegünstigung", 58 *Österreichische Steuerzeitung* 19 (2005), p. 435 et seq.

83. Clemens Philipp Schindler, "EuGH-Urteil in der Rechtssache D – Kann sich die Meistbegünstigung von diesem Schock erholen?", 1 *taxlex* 8 (2005), p. 463. Similarly, see Michael Lang, "Das EuGH-Urteil in der Rechtssache D.– Gerät der Motor der Steuerharmonisierung ins Stottern?", 15 *Steuer und Wirtschaft International* 8 (2005), p. 371 et seq., who analyses this questionable reasoning in respect of the former judicature of the ECJ; and Hans R. Weggenmann, "Keine Meistbegünstigung aus Doppelbesteuerungsabkommen in der EU", 51 *Recht der Internationalen Wirtschaft* (2005), p. 718 et seq.

84. ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Para. 62. A different view was taken by the Advocate General. (See ECJ, Advocate General Ruiz-Jarabo Colomer's Opinion, 26 October 2004, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Para. 82 et seq.) Regarding this, see Otmar Thömmes, "EG-Recht und Meistbegünstigung", *Internationale Wirtschafts-Briefe*, Sec. 11a (2005), p. 888.

85 ECJ, 12 May 1998, Case C-336/96, *Mr and Mrs Robert Gilly v. Directeur des services fiscaux du Bas-Rhin* [1998] ECR I-2793

86. See Servaas van Thiel, *Free Movement of Persons and Income Tax Law: the European Court in Search of Principles* (Amsterdam: IBFD, 2002), p. 486 et seq.; Ruud van der Linde, "Some thoughts on most-favoured-nation treatment within the European Community legal order in pursuance of the *D* case", 13 *EC Tax Review* (2004), p. 14 et seq.; Georg W. Kofler, "Most-Favoured-Nation Treatment in Direct Taxation: Does EC Law Provide for Community MFN in Bilateral Double Taxation Treaties?", 5 *Houston Business and Tax Law Journal* (2005), p. 68 et seq.; Axel Cordewener, *Europäische Grundfreiheiten und nationales Steuerrecht* (Cologne: Schmidt, 2002), p. 836 et seq.; Otto H. Jacobs, *Internationale Unternehmensbesteuerung*, fifth edition, (Munich: C.H. Beck, 2005), p. 262 et seq.; Hans Weggenmann,"EG-rechtliche Aspekte steuerlicher Meistbegünstigung im Abkommensrecht", 12 *Internationales Steuerrecht* 19 (2003), p. 681 et seq.; and Wolfgang Schön, "Meistbegünstigung und Doppelbesteuerungsabkommen", in Karina Grundmann and Klaus-Dieter Drüen (eds.), *Jahrbuch der Fachanwälte für Steuerrecht 2005/06* (Berlin: Verlag Neue Wirtschafts-Briefe, 2005) [in print].

87. Similarly, see Dennis Weber, "Differences between Tax Treaties: Prohibited Discrimination?", 45 *European Taxation* 8 (2005), p. 339.

88. In this respect, see Peter Haunold, Michael Tumpel and Christian Widhalm, "EuGH: Das Ende der Meistbegünstigung?", 15 *Steuer und Wirtschaft International* 10 (2005).

89. See ECJ, 12 December 2002, Case C-385/00, *F.W.L. de Groot v. Staatssecretaris van Financiën* [2002] ECR I-11819, Para. 99.

family circumstances, but rather all tax treaty rules from MFN treatment.[90] Consequently, the authors submit that the ECJ has already set out its reasoning for the other pending inbound MFN cases, i.e. the *Bujura*[91] and *ACT Group Litigation*[92] cases. Some scholars, however, still have doubts as to whether or not the final word on inbound MFN situations has been given, especially with regard to different withholding rates.[93]

It should also be noted that, in recent legal writing, a growing fear has been expressed that the Member States may be induced by the decision in the "*D*" case to "hide" discriminatory provisions in tax treaties and thereby to immunize them from the ECJ's scrutiny.[94] This is due to the fact that a literal interpretation of the ECJ's decision would exclude tax treaty rules from the scope of the protection granted by EC law, as reciprocity is not determined on a stand-alone basis, but, rather, from an overall perspective. According to some scholars, this should not be the case for rules that are atypical for tax treaties.[95] For the sake of completeness, it should, however, be remembered that such "immunization" is at its most valid in cases of horizontal discrimination, whereas the issue of vertical discrimination in purely bilateral cases remains within the ECJ's scrutiny.[96,97]

5. CONCLUSIONS AND FUTURE PROSPECTS

It can only be speculated what has led the ECJ to its increasingly reluctant approach in direct tax cases. Not so long ago "[i]t would be a brave gambler who bet against the taxpayer before the European Court of Justice these days".[98] Recent decisions against the taxpayer, such as in the "*D*", *Schempp*[99] and *Blanckaert*[100] cases, have, however, resulted in hard times for gamblers. There seems to be agreement amongst observers of EC tax law that the decision in the "*D*" case was, as its meagre reasoning implies, heavily disputed within the ECJ's Grand Chamber and that political pressure from Member States may have given the judicature a Member State-friendly spin. The decision in the "*D*" case, however, leaves the impression that the ECJ wanted to keep Pandora's box shut at all costs, although a differentiated view based on the decision in the *Gilly*[101] case could have revealed that the implications of an MFN obligation should not be overestimated, as allocatory provisions would have been carved out from such an obligation.[102] It is still, however, an open question as to whether or not there are concepts such as "outbound most favoured nation treatment" within the European Union or "Community preference"[103] with regard to third countries, both of which would require the most favourable treatment from the perspective of the residence Member State.[104] Specifically, can a resident of Member State A who derives income from Member State B invoke the more favourable tax treaty between Member State A and country C, whereby country C may either be another Member State or a third country?

The MFN issues pending in the *Bujura* and *ACT Group Litigation* cases also affect inbound situations. This is especially so with regard to the first case that very much resembles the facts in the "*D*" case, but which deals with income taxation. In its decision in the "*D*" case, the ECJ, however, stressed the similarities between income tax, on

90. See Georg W. Kofler, "Das Ende vom Anfang der gemeinschaftsrechtlichen Meistbegünstigung", 58 *Österreichische Steuerzeitung* 19 (2005), p. 436; and Clemens Philipp Schindler, "EuGH-Urteil in der Rechtssache D – Kann sich die Meistbegünstigung von diesem Schock erholen?", 1 *taxlex* 8 (2005), p. 464.

91. ECJ, Pending, Case C-8/04, *Bujara*, Official Journal (EC), 2004, C 59/17.

92. ECJ, Pending, Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation*, Official Journal (EC), 2004, C 273/17 et seq.

93. See Hans R. Weggenmann, "Keine Meistbegünstigung aus Doppelbesteuerungsabkommen in der EU", 51 *Recht der Internationalen Wirtschaft* (2005), p. 720; and Peter Haunold, Michael Tumpel and Christian Widhalm, "EuGH: Das Ende der Meistbegünstigung?", 15 *Steuer und Wirtschaft International* 10 (2005).

94. See Michael Lang, "Das EuGH-Urteil in der Rechtssache D. – Gerät der Motor der Steuerharmonisierung ins Stottern?", 15 *Steuer und Wirtschaft International* 8 (2005), p. 370 et seq. See also the extensive discussion by Dennis Weber, "Most-Favoured-Nation Treatment under Tax Treaties Rejected in the European Community: Background and Analysis f the *D* Case", 33 *Intertax* 10 (2005), p. 440 et seq.; and Servaas van Thiel, "A Slip of the European Court in the D case (C-376/03): Denial of the Most-Favoured-Nation Treatment because of Absence of Similarity", 33 *Intertax* 10 (2005), p. 455.

95. See, for example, Otmar Thömmes, "EG-Recht und Meistbegünstigung", *Internationale Wirtschafts-Briefe*, Sec. 11a (2005), p. 887.

96. See, for example, ECJ, 12 December 2002, Case C-385/00, *F.W.L. de Groot v. Staatssecretaris van Financiën* [2002] ECR I-11819, Para. 110.

97. See Clemens Philipp Schindler, "EuGH-Urteil in der Rechtssache D – Kann sich die Meistbegünstigung von diesem Schock erholen?", 1 *taxlex* 8 (2005), p. 464.

98. Simon Whitehead, "The Debate: The Influence of the European Court of Justice", *Accountancy Age*, 16 January 2003.

99. ECJ, 12 July 2005, Case C-403/03, *Egon Schempp v. Finanzamt München V*. See especially the critical remarks by Michael Lang, "Das EuGH-Urteil in der Rechtssache Schempp – Wächst der steuerpolitische Spielraum der Mitgliedstaaten?", 15 *Steuer und Wirtschaft Internation* 9 (2005), p. 411 et seq.

100. ECJ, 8 September 2005, Case C-512/03, *J.E.J. Blanckaert v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*.

101. ECJ, 12 May 1998, Case C-336/96, *Mr and Mrs Robert Gilly v. Directeur des services fiscaux du Bas-Rhin* [1998] ECR I-2793

102. For an extensive discussion of these issues, see Georg W. Kofler, "Most-Favoured-Nation Treatment in Direct Taxation: Does EC Law Provide for Community MFN in Bilateral Double Taxation Treaties?", 5 *Houston Business and Tax Law Journal* (2005), p. 68 et seq.

103. See, for example, Servaas van Thiel, *Free Movement of Persons and Income Tax Law: the European Court in Search of Principles* (Amsterdam: IBFD, 2002), p. 520 et seq.; Stefaan De Ceulaer, "Community Most-Favoured-Nation Treatment: One Step Closer to the Multilateralization of Income Tax Treaties in the European Union?", 57 *Bulletin for International Fiscal Documentation* 10 (2003), p. 493 et seq.; Albert J. Rädler, "Most Favoured Nation Concept in Tax Treaties", in Michael Lang et al. (eds.)., *Multilateral Tax Treaties* (Vienna: Linde, 1998), p. 13 et seq.; and Juliane Kokott, "Die Bedeutung der europarechtlichen Diskriminierungsverbote und Grundfreiheiten für das Steuerrecht der EU-Mitgliedstaaten", in Moris Lehner (ed.), *Grundfreiheiten im Steuerrecht der EU-Staaten* (Munich: C.H. Beck, 2000), p. 8 et seq. See also recently, in the same direction, Michael Lang, "Wohin geht das Internationale Steuerrecht", 14 *Internationales Steuerrecht* (2005), p. 295; Jürgen Lüdicke, "Darf im internationalen Steuerrecht noch differenziert werden?", in Rudolf Gocke et al. (eds.), *Festschrift für Franz Wassermeyer* (Munich: C.H. Beck, 2005), p. 483 et seq.; and Wolfgang Schön, "Meistbegünstigung und Doppelbesteuerungsabkommen", in Karina Grundmann and Klaus-Dieter Drüen (eds.), *Jahrbuch der Fachanwälte für Steuerrecht 2005/06* (Berlin: Verlag Neue Wirtschafts-Briefe, 2005) [in print]. Dissenting views are expressed by Moris M. Lehner, "Doppelbesteuerungsabkommen und europäisches Recht", in Klaus Vogel and Moris Lehner (eds.), fourth edition, *Doppelbesteuerungsabkommen Einl*. (Munich: C.H. Beck, 2003), Para. 268.

104. See Josef Schuch, "Will EC Law Transform Tax Treaties into Most Favoured-Nation Clauses?", in Wolfgang Gassner et al. (eds.), *Tax Treaties and EC Law* (Vienna: Linde, 1996), p. 101; and Hans van den Hurk, "The European Court of Justice knows its limits – A discussion inspired by the *Gilly* and *ICI* cases", 8 *EC Tax Review* (1999), p. 216. See also Klaus Vogel, "Problems of a Most-Favoured-Nation Clause in Intra-EU Treaty Law", 4 *EC Tax Review* (1995), p. 264; extensively, Servaas van Thiel, *Free Movement of Persons and Income Tax Law: the European Court in Search of Principles* (Amsterdam: IBFD, 2002), p. 520 et seq.; and, most recently, Thomas Rödder and Jens Schönfeld, "Meistbegünstigung und EG Recht", 14 *Internationales Steuerrecht* 15 (2005), p. 525 et seq.

the one hand, and wealth tax, on the other hand.[105] Accordingly, the "*D*" case is very likely to predict the outcome in the *Bujura* case.[106] In fact, it seems that the ECJ has closed the door for other inbound situations too, or at least it would require a more in-depth reasoning to distinguish a case, such as the *ACT Group Litigation* case, from the "*D*" case.[107]

Accordingly, the issue of horizontal discrimination between non-residents may have revealed another limit on the capability of the fundamental freedoms to enhance the (negative) harmonization of direct taxation in the Community. This does not, in the authors' opinion, necessarily mean that MFN as an EU idea has been buried, since

> it is absolutely unacceptable in the single market that bilateral tax treaties between Member States give preferential tax treatment to enterprises in one or several Member States and not to enterprises resident in the remaining Member States.[108]

Finally, the "*D*" case places an additional focus on the MFN clauses already embedded in bilateral tax treaties[109] and in other sources of law, such as the General Agreement on Tariffs and Trade.[110]

105. ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Para. 31 et seq.

106. See Clemens Philipp Schindler, "EuGH-Urteil in der Rechtssache D – Kann sich die Meistbegünstigung von diesem Schock erholen?", 1 *taxlex* 8 (2005), p. 464. See also Georg W. Kofler, "Das Ende vom Anfang der gemeinschaftsrechtlichen Meistbegünstigung", 58 *Österreichische Steuerzeitung* 19 (2005), p. 437 et seq.

107. See also Otmar Thömmes and Katja Nakhai, "ECJ rejects most-favoured nation argument in D Case", 33 *Intertax* 10 (2005), p. 479.

108. Albert J. Rädler, "Tax treaties and the Internal Market (Annex 6)", in *Report of the Committee of Independent Experts on Company Taxation* (the Ruding Report) (Brussels: Commission of the European Communities, 1992), p. 378.

109. For this, see the extensive analysis by Ines Hofbauer, *Das Prinzip der Meistbegünstigung im grenzüberschreitenden Ertragsteuerrecht* (Vienna: Linde, 2005); and Ines Hofbauer, "Most-Favoured-Nation Clauses in Double Taxation Conventions – A Worldwide Overview", 22 *Intertax* 10 (2005), p. 445 et seq.

110. For this, see Wolfgang Schön, "WTO und Steuerrecht", 50 *Recht der Internationalen Wirtschaft* (2004), p. 50 et seq.; and Ines Hofbauer, "Die Anwendbarkeit des Art I GATT auf direkte Steuern", 16 *ecolex* (2005), p. 467 et seq.