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Legislative Tax Treaty Overrides in Austrian, German, and EU Law

Georg Kofler*

More than 30 years ago, in 1989, the OECD issued its report on "Tax Treaty Override".[1] It defined a "treaty override" as a "situation where the domestic legislation of a State overrules provisions of either a single treaty or all treaties hitherto having had effect in that State", and recommended that States "avoid enacting legislation which is intended to have effects in clear contradiction to international treaty obligations".[2] The discussion has become quite nuanced and sophisticated in many countries since then. Apart from the political and economic dimension of treaty overrides,[3] the discussion has centred around the potential limits imposed by domestic (constitutional) law and remedies under international law. At the outset, one typically encounters discussions about the "grand" theories concerning the relationship between the international and the national legal order (monist or dualist),[4] but neither theory has normative significance, as it will always be the national legal framework that precisely determines if, how, and at which rank in the hierarchy of norms an international treaty will be incorporated. This article aims at tracing the issue of treaty overrides in two continental European countries, Austria and Germany (Chapter II), as well as in the legal order of the EU (Chapter III), and will draw some general conclusions (Chapter IV).

I. Introduction

The identification of a "treaty override" might not be as easy a task as the OECD's definition seems to imply. First, and especially in light of the 2003 and 2017[5] Updates to the Commentary on the OECD Model Tax Convention (OECD MC Comm.) regarding the relationship between domestic anti-abuse provisions and tax treaties as well as the recent developments following the G20/OECD Base Erosion and Profit Shifting (BEPS) Project in the area of tax treaties, it might be hard to identify whether a domestic provision overrides or merely (correctly) interprets a tax

* DDr. Georg Kofler, LL.M. (NYU), is Professor of International Tax Law at the Vienna University of Economics and Business (WU Vienna), Austria.

[1] Report of the Committee on Fiscal Affairs of 29 June 1989 on Tax Treaty Override [DAFFE/CFA/89.13(2nd Revision)] (Report on Tax Treaty Override) (adopted by the OECD Council in "Recommendation of the Council concerning Tax Treaty Override" OECD/LEGAL/0253 on 2 October 1989) (1989 Recommendation of the Council concerning Tax Treaty Override).

[2] 1989 Recommendation of the OECD Council concerning Tax Treaty Override.

[3] See, e.g., OECD, Report on Tax Treaty Override (1989), para.17.

[4] See OECD, Report on Tax Treaty Override (1989), para.14 and for a study of the approach of various States to treaty overrides in light of the monist and dualist theories see Sachin Sachdeva, "Tax Treaty Overrides: A Comparative Study of the Monist and the Dualist Approaches" (2013) 41(4) Intertax 180–207.

[5] OECD, *The 2017 Update to the OECD Model Tax Convention*, 21 November 2017.

treaty.[6] Indeed, (potential) treaty overrides are frequently[7] employed to address anti-abuse concerns, to prevent double non-taxation or to (merely) protect the tax base. This dichotomy is also clearly visible in German practice where (potential) treaty overrides are frequently[8] employed to address anti-abuse concerns, to aim at preventing double non-taxation or (merely) to protect the tax base: while the legislature views the domestic provisions as being in line with treaty law and OECD guidance, courts have subsequently found them to be treaty overrides.[9] Likewise, some domestic provisions are put in place to rectify case law which had interpreted tax treaties in a way that was contrary to what the legislature believed to be the correct reading.[10] The OECD

[6] Take, for example, anti-abuse provisions: while the 1989 OECD Report on Treaty Shopping included domestic legislation according to which "treaty provisions are to be disregarded in certain circumstances (e.g. in cases of treaty shopping or other forms of abuse)" in its definition of a treaty override (OECD, *Report on Tax Treaty Override* (1989), para.2), it also acknowledges that in cases "where there is abuse of tax treaties" the situation could be redressed through domestic legislation, but "the State concerned should first ensure that there is a broad consensus that the intended legislation does not injure international tax relations" (OECD, *Report on Tax Treaty Override* (1989), para.38). Moreover, in the time after the *Report on Tax Treaty Override* (1989) the OECD's attitude towards abuse and treaty shopping has clearly shifted, and that was made explicit in the 2003 and 2017 Updates to the OECD MC Comm. (OECD MC Comm. 2017 art.1 Nos 54 et seq.), including the position that treaties contain an implicit anti-abuse reservation, of which the Principal Purposes Test (OECD MC 2017 art.29(9)) is a mere explicit expression (OECD MC Comm. 2017 art 1 Nos 76–80 and art.29 No.169). For doubts, however, as to whether the OECD's unwritten anti-abuse reservation (OECD MC Comm. 2017 art.1 Nos 54 et seq., as first addressed by the 2003 Update) might even be implemented by a general statute instead of a case-by-case decision, see Reuven S. Avi-Yonah, "Tax Treaty Overrides: A Qualified Defence of U.S. Practice" (Ch.4) in Guglielmo Maisto (ed.), *Tax Treaties and Domestic Law* (Amsterdam: IBFD, 2006), pp.65–79, and Roland Ismer and Stefanie Baur, "Verfassungsmäßigkeit von Treaty Overrides" (2014) 23(12) *Internationales Steuerrecht* 421, 423.

[7] For comprehensive overviews of (potential) treaty overrides in German tax law see, e.g., Dietmar Gosch, "Über das Treaty Overriding — Bestandsaufnahme — Verfassungsrecht — Europarecht" (2008) 17(12) *Internationales Steuerrecht* 413, 414–418; Moris Lehner, "Treaty Override im Anwendungsbereich des § 50d EStG" (2012) 21(11) *Internationales Steuerrecht* 389, 390–397; Christian Kahlenberg, "German Treaty Override Violates Constitutional Law" (2014) 68(9) *Bulletin for International Taxation* 480, 483–487.

[8] For comprehensive overviews of (potential) treaty overrides in German tax law see, e.g., Dietmar Gosch, "Über das Treaty Overriding — Bestandsaufnahme — Verfassungsrecht — Europarecht" (2008) 17(12) *Internationales Steuerrecht* 413, 414–418; Moris Lehner, "Treaty Override im Anwendungsbereich des § 50d EStG" (2012) 21(11) *Internationales Steuerrecht* 389, 390–397; Christian Kahlenberg, "German Treaty Override Violates Constitutional Law" (2014) 68(9) *Bulletin for International Taxation* 480, 483–487.

[9] See e.g., (1) regarding the switch-over from treaty exemption to credit regarding foreign permanent establishments (to supplement CFC rules) in the German Foreign Transaction Tax Act (AStG) s.20(2) on the one hand BT-Drs 12/1506, 181 (which relied on an unwritten anti-abuse reservation) and on the other BFH, 10 January 2012, I R 66/09, BFHE 236, 304 (qualifying this as a treaty override); (2) regarding the granting of reduced treaty withholding rates only under certain conditions in the German Income Tax Act (EStG) s.50d(3) on the one hand BT-Drs 12/5630, 65 (which considered domestic law to be in line with OECD guidance) and on the other BFH, 20 March 2002, I R 38/00, BStBl II 2002, 819 (finding a treaty override); (3) regarding the denial of treaty exemption for foreign employment income if foreign exemption or taxation is not proven by the taxpayer in German Income Tax Act (EStG) s.50d(8) on the one hand BR-Drs 630/03, 66 (possibly viewed as permissible under treaty law as a measure to avoid double non-taxation) and on the other BFH, 10 January 2012, I R 66/09, BFHE 236, 304 (finding a treaty override); and (4) the denial of treaty exemption of foreign income in certain cases of conflicts of qualification by the EStG s.50d(9)(2) on the one hand BT-Drs 16/2712, 61 (viewing this provision as aligned with OECD guidance) and on the other BFH, 20 August 2014, I R 86/13, BFHE 246, 486, BStBl II 2015, 18 (pending before the BVerfG as 2 BvL 21/14) and BFH, 18 November 2015, I B 121/15, BFH/NV 2016, 376 (finding a treaty override).

[10] See, e.g., (1) the specific rule for a conflict of attribution regarding interest paid to a partner by a partnership in the EStG s.50d(10), which was viewed as a mere legislative "correction" of case law that simply defined the term "business profits" by the legislature (BT-Drs 16/11108, 23), but was subsequently held to be a treaty override by the German Federal Tax Court (BFH 11 December 2013, I R 4/13, BFHE 244, 1, BStBl II 2014, 791, pending before the BVerfG as 2 BvL 15/14; see also for the previous interpretation that the override aimed at "correcting" BFH, 9 August 2006,

does not consider such a situation to be a treaty override "if the competent legislative and administrative organs of the States concerned are in agreement that the court decision is contrary to their intentions".[11] Also, secondly, it has been suggested that to distinguish between "genuine" ("real") and "pseudo" treaty overrides, a dynamic interpretation of treaties and international developments to identify whether a treaty is effectively violated or not should be focused upon (for example with regard to an implicit anti-abuse reservation, subsequent changes to the OECD MC Comm., the prevention of double non-taxation, and /or acquiescence by the other State);[12] some of those arguments seem to align with the criteria others have employed to identify a "middle way" of "justified" overrides.[13] Thirdly, one could debate if legislative technique could play a role in determining whether a treaty override has taken place. Take for example the German rule that deems 5 per cent of a dividend to be a non-deductible expense,[14] which also applies to treaty-exempt dividends and has the effect that only 95 per cent of the dividends remain untaxed. The German Federal Tax Court found that rule not to be a treaty override,[15] whereas a rule that would openly stipulate that only 95 per cent of a dividend is exempt would probably qualify as such. The author will come back to some of these questions later.

II. Treaty overrides and their limits in domestic law

A. Tax treaties, domestic law and overrides

Typically, the Austrian system, which is highly influenced by the monist theories of *Hans Kelsen*[16] and *Alfred Verdross*,[17] is characterised as moderate monist, whereas the German system, which is highly influenced by the dualist perspective of *Heinrich Triepel*,[18] is characterised as moderate dualist.[19] In both countries, however, the precise understanding of the constitutional framework

II R 59/05, BFHE 214, 518, BStBl II 2009, 758: BFH, 17 October 2007, I R 5/06, BFHE 219, 518, BStBl II 2009, 356); and (2) the provision of the EStG s.50d(12), which deems severance payments as employment income relating to a past activity, which was viewed as a mere legislative "correction" of case law to conform treaty application with the OECD guidance and existing bilateral consultation agreements (BT-Drs 18/10506, 78; for the previous different interpretations by the BFH in the past see, e.g., BFH 24 July 2013, I R 8/13, BStBl II 2014, 929; BFH, 10 June 2014, I R 79/13, BStBl II 2016, 326).

[11] 1989 OECD Report on Tax Treaty Override para.4(b).

[12] See Matthias Valta and Robert Stendel, *Dynamik des Völkervertragsrechts und Treaty Override — Perspektiven des offenen Verfassungsstaates* (MPIL Research Paper Series No.2019-18).

[13] Avi-Yonah, "Tax Treaty Overrides: A Qualified Defence of U.S. Practice" (Ch.4) in Guglielmo Maisto (ed.), *Tax Treaties and Domestic Law* (2006), pp.65–79.

[14] German Corporate Tax Act (KStG) s.8b(5).

[15] BFH, 29 August 2012, I R 7/12, BFHE 239, 45, BStBl II 2013, 89.

[16] See, e.g., Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen: J.C.B. Mohr, 1920), and Hans Kelsen, *Allgemeine Staatslehre* (Berlin: Springer, 1925), pp.119 et seq.

[17] See, e.g., Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna: Springer, 1926).

[18] Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig: C. L. Hirschfeld, 1899).

[19] Lando Kirchmair, "Ist Art 59 Abs 2 GG tatsächlich dualistisch?" (2017) 72(3) *Zeitschrift für öffentliches Recht* 515, 518–521. See for Germany also, e.g., BVerfG, 14 October 2004, 2 BvR 1481/04, BVerfGE 111, 307 ("Das Völkervertragsrecht ist innerstaatlich nicht unmittelbar, das heißt ohne Zustimmungsgesetz nach Art.59 Abs.2 GG, als geltendes Recht zu behandeln und - wie auch das Völkergewohnheitsrecht (vgl. Art.25 GG) - nicht mit dem Rang des Verfassungsrechts ausgestattet. Dem Grundgesetz liegt deutlich die klassische Vorstellung zu Grunde, dass es sich bei dem Verhältnis des Völkerrechts zum nationalen Recht um ein Verhältnis zweier unterschiedlicher Rechtskreise handelt und dass die Natur dieses Verhältnisses aus der Sicht des nationalen Rechts nur durch das nationale Recht selbst bestimmt werden kann; dies zeigen die Existenz und der Wortlaut von Art.25 und Art.59 Abs.2 GG.").

as it relates to monism or dualism is highly debated.[20] Both systems require parliamentary approval prior to the conclusion of an international treaty by the executive, though the form of such approval differs between Austria and Germany: in Austria, international treaties are negotiated by the executive branch and then—depending on a monist or dualist world view—are "adopted" or "generally transformed" into domestic law through "approval" by the National Council as a measure of "participation" by the legislature in the executive branch,[21] before ratification.[22] A treaty will only be applicable to the domestic legal order once it has been formally published in the Federal Gazette, but it will not have domestic effect if it either does not begin to exist or ceases to exist under international law;[23] moreover, it has to be interpreted according to the rules of international law, for example Article 31 of the Vienna Convention on the Law of Treaties 1969 (VCLT).[24] In Germany, incorporation of an international treaty requires a federal law (Act of Assent[25]) as a measure of "participation" by the legislature (through authorisation) in the executive branch,[26] before ratification;[27] this Act of Assent is typically characterised as an act of "transformation" of international law into the domestic legal order (as a genuine domestic statute that is the "mirror image" of the international treaty),[28] but likewise it is viewed as a mere "execution order" to apply international law ("*Rechtsanwendungsbefehl*").[29] However, the Act of Assent is not a "normal" federal statute, as it is generally undisputed that the existence, entry into force and interpretation[30] of the Act of Assent are linked to and based on international law for purposes of its domestic application.[31]

Despite that difference in the form of the legislature's approval, both countries reach very similar conclusions on the relationship between tax treaties and domestic laws and the issue of treaty overrides: in both countries, tax treaties have the same rank as federal laws, that is, such

[20] See for Austria, e.g., Theo Öhlinger and Andreas T. Müller, "Artikel 50 B-VG", in Karl Korinek and Michael Holoubek (eds), *Österreichisches Bun-desverfassungsrecht* (14. Lfg. 2018), m.nos 32–43.
[21] The relevant parts of the Austrian Federal Constitutional Law (Bundes-Verfassungsgesetz, B-VG) art.50(1) read: "The conclusion of […] political-state treaties and state treaties the contents of which modify or complement existent laws […] requires the approval of the National Council."
[22] Austrian Federal Constitutional Law (B-VG) Art.67.
[23] See, e.g., VfGH, 1 March 1985, B 630/80, VfSlg 10.372/1985.
[24] VwGH 3.9.1987, 87/16/0071, VwSlg 6244 F/1987; see also VfGH, 11 March 1998, G 363/97, VfSlg 15.129/1998; VfGH, 16 March 2013, SV2/1219.750/2013.
[25] Basic Law for the Federal Republic of Germany (Grundgesetz, GG) art.59(2), 1st sentence reads: "Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law." The "federal law" that Art.59(2) 1st sentence GG refers to is the so-called "Act of Accession" ("Vertragsgesetz" or "Zustimmungsgesetz"; see for this terminology, e.g., BVerfG, 22 October 1986, 2 BvR 197/83, BVerfGE 73, 339).
[26] See, e.g., BVerfG, 12 July 1994, 2 BvE 3/92, 2 BvE 5/93, 2 BvE 7/93, 2 BvE 8/93, BVerfGE 90, 286.
[27] See Basic Law for the Federal Republic of Germany (GG) art.59(1).
[28] See for a critical analysis Klaus Vogel, "New Europe Bids Farewell to Treaty Override" (2004) 58(1) *Bulletin for International Fiscal Documentation* 5, 8, who also points out the obvious problem of that perspective, i.e. that the Act of Assent happens before ratification by the executive, so that the theory leaves unsolved what "becomes of the domestic 'mirror statute'" "[i]f a treaty approved by the legislative bodies of Germany is never concluded afterwards or if the treaty is terminated".
[29] See, with further references, Lando Kirchmair, "Ist Art 59 Abs 2 GG tatsächlich dualistisch?", (2017) 72(3) *Zeitschrift für öffentliches Recht* 515, 523–529.
[30] BVerfG, 4 May 1955, 1 BvF 1/55, BVerfGE 4, 157.
[31] See, e.g., Lando Kirchmair, "Ist Art 59 Abs 2 GG tatsächlich dualistisch?" (2017) 72(3) *Zeitschrift für öffentliches Recht* 515, 523–529.

treaties are "below" constitutional law.[32] The question of rank is likewise not impacted by section 2(1) of the German Federal Fiscal Code (AO),[33] which states that treaties "shall take precedence over tax legislation insofar as they have become directly applicable domestic law", as the Federal Fiscal Code is itself (just) federal and not constitutional law.[34] That also means that the treaty or the Act of Assent, respectively, must comply with domestic constitutional provisions: in Austria, treaties are subject to review by the Austrian Constitutional Court (Verfassungsgrichtshof, VfGH)[35] (and in case of conflict a treaty, or part of it,[36] must not be applied), while in Germany the domestic Act of Assent is subject to—also *a priori*[37]—review by the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) (and in case of conflict the Act of Assent, or part of it, is void).[38] Also, in both countries, the concept of *pacta sunt servanda*[39] is seen as a general rule of international law (with the rank of federal law in Austria,[40] but above federal and below constitutional law in Germany[41]), but in neither country does that concept elevate international treaties above federal law.[42]

[32] See Austria art.140a 2nd sentence B-VG and, e.g., Georg Kofler in Dietmar Aigner, Georg Kofler and Michael Tumpel (eds.), *Doppelbesteuerungsabkommen*, 2nd edn (Vienna: Linde, 2021), Einleitung Rz 37. Until the amendment of the B-VG in Federal Gazette (BGBl) I 2008/2, international treaties were also able to alter or create constitutional law. For Germany see, e.g., BVerfG, 15 December 2015, 2 BvL 1/12, BVerfGE 141, 1; see also, e.g., BVerfG, 9 June 1971, 2 BvR 225/69, BVerfGE 31, 145; BFH, 13 July 1994, I R 120/93, BFHE 175, 351, BStBl II 1995, 129; BFH, 19 May 2010, I B 191/09, BFHE 229, 322, BStBl II 2011, 156; BFH, 10 January 2012, I R 66/09, BFHE 236, 304.

[33] The Fiscal Code of Germany s.2(1) (Abgabenordnung, AO) can be translated as: "Agreements on taxation concluded with other countries within the meaning of Article 59(2), first sentence of the Basic Law, shall take precedence over tax legislation insofar as they have become directly applicable domestic law."

[34] See, e.g., BVerfG 15 December 2015, 2 BvL 1/12, BVerfGE 141, 1.

[35] See, e.g., VfGH, 23 June 2014, SV 2/2013, VfSlg 19.889/2014. Austrian Federal Constitutional Law (Bundes-Verfassungsgesetz, B-VG) art.140a(1), which was introduced by Federal Gazette (BGBl) 1964/59 to address if and how international treaties are subject to constitutional scrutiny, reads: "The Constitutional Court pronounces whether state treaties are contrary to law. Art. 140 shall apply to political, to law-modifying and to law-amending state treaties and to state treaties modifying the Treaty basis of the European Union, Art. 139 to all other state treaties with the following proviso, […] 1. A state treaty of which the Constitutional Court establishes, that it is contrary to law or unconstitutional shall not be applied any more by the authorities competent for its execution from the expiry of the day of the judgment's publication unless the Constitutional Court determines a deadline prior to which the treaty shall continue to be applied; such deadline must not exceed two years for the political, law-modifying and law-amending treaties and the treaties modifying the contractual bases of the European Union and one year in the case of all other treaties." It should be noted that there is no constitutional review before publication in the Federal Gazette; VfGH, 30 September 2008, SV 2/08, VfSlg 18.576/2008; VfGH, 11 March 2009, G 149/08, VfSlg 18.740/2009.

[36] This is made explicit in the Austrian Constitutional Court Act 1953 s.66(2) (Verfassungsgerichtshofgesetz, VfGG), according to which the decision of the Constitutional Court "shall specify whether because of being contrary to the law the full contents of the treaty or certain parts shall not be applied by the organs in charge of implementing it."

[37] See, e.g., BVerfG, 23 June 2021, 2 BvR 2216/20, 2 BvR 2217/20, with further references.

[38] See, e.g., BVerfG, 14 May 1986, 2 BvL 2/83, BVerfGE 72, 200.

[39] VCLT art.26.

[40] VfGH, 24 June 1954, B 16, 17/54, VfSlg 2680/1954; VwGH, 18 October 1999, 98/17/0333; for the intense discussion in Austrian literature about whether general rules of international law should be accorded a rank between federal and constitutional law, see, e.g., Theo Öhlinger and Andreas T. Müller, "Artikel 9 Abs 1 B-VG", in Karl Korinek and Michael Holoubek (eds.), *Österreichisches Bundesverfassungsrecht* (14. Lfg. 2018), m.nos 22–29.

[41] See, e.g., BVerfG, 26 March 1957, 2 BvG 1/55, BVerfGE 6, 309; BVerfG, 29 May 1974, 2 BvL 52/71, BVerfGE 37, 271; BVerfG, 14 October 2004, 2 BvR 1481/04, BVerfGE 111, 307; BVerfG, 26 October 2004, 2 BvR 955/00, 1038/01, BVerfGE 112, 1.

[42] See for Germany, e.g., BVerfG, 15 December 2015, 2 BvL 1/12, BVerfGE 141, 1; see also, e.g., BVerfG, 9 June 1971, 2 BvR 225/69, BVerfGE 31, 145; BFH, 13 July 1994, I R 120/93, BFHE 175, 351, BStBl II 1995, 129; BFH, 10 January 2012, I R 66/09, BFHE 236, 304.

Now, as treaties and federal tax law have the same rank, it *prima facie* becomes a question of interpretation which will take precedence. Generally, provisions of tax treaties are seen as *leges speciales* in both Austria[43] and Germany.[44] This idea also finds explicit expression in section 2(1) of the German Federal Fiscal Code (Abgabenordnung, AO), which can either be understood as expressing the precedence of tax treaties over domestic federal law or as normative confirmation of the State's so-called "openness to international law" ("*Völkerrechtsfreundlichkeit*").[45] In that light, one must always choose an interpretation that is favourable to international law,[46] and it is not to be assumed that a subsequent federal law (*lex posterior*) is intended to violate an international treaty.[47] Indeed, German case law has, for example, held that *specific* anti-abuse provisions in a tax treaty take precedence over (later) domestic anti-abuse rules[48] (a judicial position that has subsequently been "overridden" by the German legislature[49]). What is obvious, though, is that the special nature of tax treaties as restrictions of (already existing) domestic taxing rights makes the interpretative determination of precedence of one rule over the other complex, and it has been argued that the suggested qualification of tax treaties as *leges speciales*

[43] VwGH, 28 June 1963, 2312/61; VwGH, 7 September 1989, 89/16/0085; see also, e.g., Nikolaus Zorn, "Doppelbesteuerungsabkommen und Grundrechtsschutz" (2017) 35(5b) *Recht der Wirtschaft* 389, 398; Georg Kofler in Dietmar Aigner, Georg Kofler and Michael Tumpel (eds.), *Doppelbesteuerungsabkommen*, 2nd edn (Vienna: Linde: 2021), Einleitung Rz 37.

[44] See, with further references, e.g., Gerrit Frotscher, "Treaty Override — causa finita?" (2016) 25(14) *Internationales Steuerrecht* 561, pp.562–563; Moris Lehner in Klaus Vogel and Moris Lehner *(eds), Doppelbesteuerungsabkomme*n, 7th edn (Munich: C.H. Beck, 2021), Grundlagen m.no. 200; see also BVerfG, 4 May 1955, 1 BvF 1/55, BVerfGE 4, 157; BVerfG, 30 March 2004, 2 BvK 1/01, BVerfGE 110, 199; BVerfG, 15 December 2015, 2 BvL 1/12, BVerfGE 141, 1.

[45] See for the various opinions regarding the meaning and interpretation of AO s.2, e.g., Klaus-Dieter Drüen, "Einfachgesetzlicher, genereller Anwendungsvorrang von Doppelbesteuerungsabkommen", in: Dietmar Gosch, Arne Schnitger and Wolfgang Schön (eds), *Festschrift für Jürgen Lüdicke* (Munich: C.H. Beck, 2019), p.103, pp.108–110.

[46] BVerfG, 4 May 1955, 1 BvF 1/55, BVerfGE 4, 157 ("Solange die Auslegung eines völkerrechtlichen Vertrages noch offen ist, muß bei der verfassungsrechtlichen Prüfung des Vertragsgesetzes unter mehreren Auslegungsmöglichkeiten derjenigen der Vorzug gegeben werden, bei der der Vertrag vor dem Grundgesetz bestehen kann."); BVerfG, 26 March 1987, 2 BvR 589/79, 2 BvR 740/81, 2 BvR 284/85, BVerfGE 74, 358 ("Auch Gesetze - hier die Strafprozeßordnung - sind im Einklang mit den völkerrechtlichen Verpflichtungen der Bundesrepublik Deutschland auszulegen und anzuwenden, selbst wenn sie zeitlich später erlassen worden sind als ein geltender Völkerrechtlicher Vertrag; denn es ist nicht anzunehmen, daß der Gesetzgeber, sofern er dies nicht klar bekundet hat, von völkerrechtlichen Verpflichtungen der Bundesrepublik Deutschland abweichen oder die Verletzung solcher Verpflichtungen ermöglichen will."); BVerfG, 15 December 2015, 2 BvL 1/12, BVerfGE 141, 1 ("Zwar ist grundsätzlich nicht anzunehmen, dass der Gesetzgeber, sofern er dies nicht klar bekundet hat, von völkerrechtlichen Verpflichtungen der Bundesrepublik Deutschland abweichen oder die Verletzung solcher Verpflichtungen ermöglichen will […]. Eine Auslegung entgegen eindeutig entgegenstehendem Gesetzes- oder Verfassungsrecht ist jedoch methodisch nicht vertretbar […]").

[47] See, e.g., BVerfG, 26 March 1987, 2 BvR 589/79, 740/81, 284/85, BVerfGE 74, 358; BVerfG, 15 December 2015, 2 BvL 1/12, BVerfGE 141, 1; see also, e.g., BFH, 13 July 1994, I R 120/93, BFHE 175, 351, BStBl II 1995, 129.

[48] BFH, 19 December 2007, I R 21/07, BFHE 220, 244, BStBl II 2008, 619.

[49] See the amendment of the EStG s.50d(3) by the "Abzugssteuerentlastungsmodernisierungsgesetz" in 2021 (Federal Gazette (BGBl) I 2021, 2159), and the explanation in BT-Drs 19/27632, 58, where it is noted that, in light of Art.6 of the EU Anti-Tax Avoidance Directive (see below Pt III.C.), the anti-abuse provision in the EStG s.50d must be applied even if tax treaties contain specific anti-abuse provisions, whether or not those would permit the application of domestic anti-abuse provisions. The parliamentary materials argue that the (intended) treaty override has been made explicit in that the provision refers to withholding tax refunds "based on a tax treaty" ("auf der Grundlage eines Abkommens"), which are denied if the conditions of the EStG s.50d(3) are met (see BT-Drs 19/27632, 58).

might not fully capture that relationship.[50] That said, in Germany (and Austria[51]) this interpretative issue is typically resolved by an explicit indication of the legislature's intention to deviate from tax treaty obligations through a so-called "Melford clause"[52] (for example "…notwithstanding the provisions of a convention…"). It is, however, debatable if this explicitness is a mere political convention or a (constitutional) requirement, as possibly implied in Germany by section 2 AO.[53] The German Federal Tax Court's case law has traditionally argued that the intention of the legislature to override must be made explicit in the wording of the provision itself,[54] but the Federal Tax Court has recently also acknowledged "hidden" overrides if they can be determined, through interpretation, without doubt.[55] This resonates with the case law of the German Constitutional Court, which holds that federal laws have to be interpreted, (but only) as far as methodologically possible,[56] in conformity with international obligations, unless the legislature has "clearly manifested" that it wishes to deviate from those obligations.[57] The German Constitutional Court has, moreover, recently referred to the fact that the legislature has explicitly expressed its intention to override a tax treaty.[58] In Austria, where (potential) treaty overrides

[50] See in that direction Luis Eduardo Schoueri, "Tax Treaty Override: A Jurisdictional Approach" (2014) 42(11) *Intertax* 682, 693–694. For a detailed argument against qualifying tax treaties as *lex aliud* (which would render the *lex specialis*-rule inapplicable), see Gerrit Frotscher, "Treaty Override — causa finita?" (2016) 25(14) *Internationales Steuerrecht* 561, 563–564. See, moreover, on the question if "tax treaties" are "special" the discussion by Craig Elliffe in this Issue.

[51] See, e.g., the application of domestic CFC rules to foreign permanent establishments in the Austrian Corporate Tax Act (KStG) s.10a(6)(2), which is mandated by EU law (see below Pt III) and applies "even if a tax treaty provides for an exemption" ("*auch wenn das Doppelbesteuerungsabkommen eine Befreiung vorsieht*"); the intention to override tax treaties was also made explicit in the legislative materials (ErlRV 190 BlgNR XXVI. GP, 26).

[52] Named for the reaction of the Canadian legislature in the Income Tax Conventions Interpretation Act, R.S.C., 1985, c. I-4, to the decision of the Supreme Court of Canada, 28 September 1982, *R. v Melford Developments Inc* [1982] 2 SCR 504.

[53] So, e.g., Klaus-Dieter Drüen, "Einfachgesetzlicher, genereller Anwendungsvorrang von Doppelbesteuerungsabkommen", in Dietmar Gosch, Arne Schnitger and Wolfgang Schön (eds), *Festschrift für Jürgen Lüdicke* (Munich: C.H. Beck, 2019), p.103, pp.109–110; for a contrary position see, e.g., Michael Schwenke, "Treaty Override im Lichte des Demokratieprinzips — Offenes und verdecktes Treaty Override: Was ist geklärt, was offen?" (2018) 56(44) *Deutsches Steuerrecht* 2310, 2313–2314.

[54] So, e.g., BFH, 20 March 2002, I R 38/00, BStBl II 2002, 819; BFH, 14 January 2009, I R 47/08, BFHE 224, 126, BStBl II 2011, 131; BFH, 23 Juni 2010, I R 71/09, BFHE 230, 177, BStBl II 2011, 129; see also BFH, 25 May 2016, I R 64/13, BFHE 254, 33, BStBl II 2017, 1185.

[55] BFH, 3 September 2020, I R 80/16 ("durch Auslegung zweifelsfrei zu ermitteln ist"); see also BFH, 11 December 2013, I R 4/13, BFHE 244, 1, BStBl II 2014, 791 (explicitly addressing a "hidden override").

[56] BVerfG, 15 December 2015, 2 BvL 1/12, BVerfGE 141, 1 ("Zwar ist grundsätzlich nicht anzunehmen, dass der Gesetzgeber, sofern er dies nicht klar bekundet hat, von völkerrechtlichen Verpflichtungen der Bundesrepublik Deutschland abweichen oder die Verletzung solcher Verpflichtungen ermöglichen will […]. Eine Auslegung entgegen eindeutig entgegenstehendem Gesetzes- oder Verfassungsrecht ist jedoch methodisch nicht vertretbar […]").

[57] See, e.g., BVerfG, 26 March 1987, 2 BvR 589/79, 2 BvR 740/81, 2 BvR 284/85, BVerfGE 74, 358 ("Auch Gesetze […] sind im Einklang mit den völkerrechtlichen Verpflichtungen der Bundesrepublik Deutschland auszulegen und anzuwenden, selbst wenn sie zeitlich später erlassen worden sind als ein geltender Völkerrechtlicher Vertrag; denn es ist nicht anzunehmen, daß der Gesetzgeber, sofern er dies nicht klar bekundet hat, von völkerrechtlichen Verpflichtungen der Bundesrepublik Deutschland abweichen oder die Verletzung solcher Verpflichtungen ermöglichen will.").

[58] See BVerfG, 15 December 2015, 2 BvL 1/12, BVerfGE 141, 1 ("seinen Willen zur Abkommensüberschreibung (Treaty Override) eindeutig zum Ausdruck gebracht hat").

are much less commonplace and less debated than in Germany,[59] it is likewise argued that the legislature has to clearly express the intention to override a treaty,[60] and that treaty overrides should only be used as *ultima ratio*.[61]

What then, one might ask, happens if a treaty override has been enacted *before* the conclusion of a tax treaty, that is, in situations where a tax treaty is the *lex posterior*? This again is, in the end, a question of interpretation. If a treaty override is explicit (for example, "… notwithstanding the provisions of a convention …"), German case law gives precedence to the (older) overriding federal law, that is, it views it as *lex specialis*.[62] According to German case law, this conclusion also holds if other subsequent tax treaties concluded by Germany have addressed the issue directly (for example, by including a subject-to-tax clause), hence rejecting an *argumentum e contrario* based on the provisions in those other treaties.[63] While one can only imagine the odd position for treaty negotiators in such situation, that result is widely accepted in legal scholarship.[64]

B. Constitutionality of treaty overrides

That all said, in both Austria and Germany (explicit) treaty overrides with effect in the domestic legal order are clearly possible, and there was a sophisticated discussion in Germany on whether the constitution would impose limits on an "unfiltered" application of the *lex posterior* rule. Indeed, for a long time it was argued—in case law[65] and literature[66]—that treaty overrides are "unfortunate" from a policy perspective and might violate international law, but that they do not violate the constitution. However, since the 1990s doubts have arisen in relation to whether or not the mere equal rank of (transformed) tax treaties and (posterior, explicit) federal law fully seizes the constitutional complexity of the question. Is (approved or transformed) treaty law really just "normal" federal law or is a more nuanced application of the rules of collision between norms required? *Klaus Vogel*, who initiated this discussion (and famously noted that a breach of promise should not be an option for the constitutional State[67]), emphasised the need to strike

[59] See also the few examples mentioned by Daniela Hohenwarter, "Austria" (Ch.7) in Guglielmo Maisto (ed.), *Tax Treaties and Domestic Law* (Amsterdam: IBFD, 2006), pp.161–207, and Georg Kofler in Dietmar Aigner, Georg Kofler and Michael Tumpel (eds), *Doppelbesteuerungsabkommen*, 2nd edn (Vienna: Linde, 2021), Einleitung Rz 38.
[60] See, e.g., Nikolaus Zorn, "Doppelbesteuerungsabkommen und Grundrechtsschutz" (2017) 35(5b) *Recht der Wirtschaft* 389, 398.
[61] Zorn, "Doppelbesteuerungsabkommen und Grundrechtsschutz" (2017) 35(5b) *Recht der Wirtschaft* 389, 400.
[62] BFH, 25 May 2016, I R 64/13, BFHE 254, 33, BStBl II 2017, 118, contra FG Hamburg, 21 August 2013, 1 K 87/12; also in this direction BVerfG, 15 December 2015, 2 BvL 1/12, BVerfGE 141, 1, para.88.
[63] BFH, 25 May 2016, I R 64/13, BFHE 254, 33, BStBl II 2017, 118.
[64] See, with further references, e.g., Gerrit Frotscher, "Treaty Override — causa finita?" (2016) 25(14) *Internationales Steuerrecht* 561, 565–566; Alexander Rust, "Germany: Consequences of a Treaty Override?" in Michael Lang et al (eds), *Tax Treaty Case Law around the Globe 2017* (Vienna: Linde, 2018), p.3 (p.11); for a critical perspective see Klaus-Dieter Drüen, "Einfachgesetzlicher, genereller Anwendungsvorrang von Doppelbesteuerungsabkommen", in Dietmar Gosch, Arne Schnitger and Wolfgang Schön (eds), *Festschrift für Jürgen Lüdicke* (Munich: C.H. Beck, 2019), p.103, pp.110–113.
[65] See, e.g., BFH, 13 July 1994, I R 120/93, BFHE 175, 351, BStBl II 1995, 129; BFH 17 May 1995, I B 183/94, BFHE 178, 59, BStBl II 1995, 781.
[66] For earlier extensive analysis see, e.g., Andreas Musil, *Deutsches Treaty Overriding und seine Vereinbarkeit mit Europäischem Gemeinschaftsrecht* (Berlin: Duncker & Humblot, 2000), and Ronald Gebhardt, *Deutsches Tax Treaty Overriding* (Wiesbaden: Springer Gabler, 2013); for a bibliography of the (older) scholarship in Germany see Mirela Mikic, "Selective Bibliography on Tax Treaty Override" (2013) 53(9) *European Taxation* 475, 477–478.
[67] Klaus Vogel, "Wortbruch im Verfassungsrecht" (1997) 52(4) *JuristenZeitung* 161–167.

a constitutional balance, in light of *pacta sunt servanda*, between the principles of democracy (that is, the ability of the current legislature to change the law) on the one hand and the "openness to international law" ("*Völkerrechtsfreundlichkeit*") and the rule of law (that is the respect for the law in light of the constitutional decision for international cooperation) on the other.[68] This balancing, it has been argued, would typically accord international treaties precedence over prior and later federal law and would render treaty overrides unconstitutional, unless they can be justified.[69] In light of intense discussions in German scholarship and evolving constitutional case law in the area of fundamental rights treaties,[70] the German Federal Tax Court eventually adopted that position in the early 2010s and made a number of references to the German Federal Constitutional Court (BVerfG).[71] The question was finally settled by a 2015 decision of the BVerfG, which concluded that treaty overrides by national statutory law are permissible under the German Constitution.[72] (Likewise, there is little doubt in Austria that treaty overrides do not infringe on the Austrian Constitution either.[73])

[68] See, e.g., Vogel, "Abkommensbindung und Missbrauchsabwehr" in Francis Cagianut and Klaus A. Vallender (eds.), *Steuerrecht — Ausgewählte Probleme am Ende des 20. Jahrhunderts, Festschrift zum 65. Geburtstag von Ernst Höhn* (Bern: Paul Haupt, 1995), p.461 (pp.462–467); Klaus Vogel, "Wortbruch im Verfassungsrecht" (1997) 52(4) *JuristenZeitung* 161–167; Klaus Vogel, "Keine Bindung an völkervertragswidrige Gesetze im offenen Verfassungsstaat. Europäisches Gemeinrecht in der Entwicklung" in Alexander Blankenagel, Ingolf Pernice and Helmuth Schulze-Fielitz (eds), *Verfassung im Diskurs der Welt, Liber Amicorum für Peter Häberle zum siebzigsten Geburtstag* (Tübingen: Mohr Siebeck, 2004), pp.481–500; see also Vogel, "New Europe Bids Farewell to Treaty Override" (2004) 58(1) *Bulletin for International Fiscal Documentation* 5–8.

[69] See for that balancing, e.g., Alexander Rust and Ekkehart Reimer, "Treaty Override im deutschen Internationalen Steuerrecht" (2005) 14(24) *Internationales Steuerrecht* 843–849; Alexander Rust, *Die Hinzurechnungsbesteuerung* (Munich: C.H. Beck, 2007) pp.104–111; Dietmar Gosch, "Über das Treaty Overriding — Bestandsaufnahme — Verfassungsrecht — Europarecht" (2008) 17(12) *Internationales Steuerrecht* 413–421.

[70] See, e.g., with numerous further references the various positions taken in Alexander Rust and Ekkehart Reimer, "Treaty Override im deutschen Internationalen Steuerrecht" (2005) 14(24) *Internationales Steuerrecht* 843–849; Alexander Rust, "Germany" in Guglielmo Maisto (ed.), *Tax Treaties and Domestic Law* (Amsterdam: IBFD, 2006), pp.23–243; Alexander Rust, *Die Hinzurechnungsbesteuerung* (Munich: C.H. Beck: 2007) pp.104–111; Dietmar Gosch, "Über das Treaty Overriding — Bestandsaufnahme — Verfassungsrecht — Europarecht" (2008) 17(12) *Internationales Steuerrecht* 413–421; Lothar Jansen and Matthias Weidmann, "Treaty Overriding und Verfassungsrecht — Beurteilung der verfassungsrechtlichen Zulässigkeit von Treaty Overrides am Beispiel des § 50d EStG" (2010) 19(16) *Internationales Steuerrecht* 596–605; Wolfgang Mitschke, "Das Treaty Override zur Verhinderung einer Keinmalbesteuerung aus Sicht der Finanzverwaltung" (2011) 4(47) *Deutsches Steuerrecht* 2221–2229; Moris Lehner, "Treaty Override im Anwendungsbereich des § 50d EStG" (2012) 21(11) *Internationales Steuerrecht* 389–404; Marcel Krumm, "Legislativer Völkervertragsbruch im demokratischen Rechtsstaat", (2013) 138(3) *Archiv des öffentlichen Rechts* 363–410; Roland Ismer and Stefanie Baur, "Verfassungsmäßigkeit von Treaty Overrides" (2014) 23(12) *Internationales Steuerrecht* 421–427.

[71] See BFH, 10 January 2012, I R 66/09, BFHE 236, 304, decided by the BVerfG as 2 BvL 1/12; see also BFH, 11 December 2013, I R 4/13, BFHE 244, 1, BStBl II 2014, 791, pending as 2 BvL 15/14; BFH, 20 August 2014, I R 86/13, BFHE 246, 486, BStBl II 2015, 18, pending before the BVerfG as 2 BvL 21/14); already before that, the BFG has expressed doubts as to the constitutionality of treaty overrides (e.g. BFH 19 May 2010, I B 191/09, BFHE 229, 322, BStBl II 2011, 156; BFH, 11 January 2012, I R 27/11, BFHE 236, 327).

[72] Majority opinion of the German Federal Constitutional Court (BVerfG, 15 December 2015, 2 BvL 1/12, BVerfGE 141, 1 — Offical, abridged English version, upon reference by the Federal Tax Court, BFH, 10 January 2012, I R 66/09, BFHE 236, 304, amended by BFH, 10 June 2015, I R 66/09) (with a Separate Opinion of Justice König).

[73] See, e.g., Nikolaus Zorn, "Doppelbesteuerungsabkommen und Grundrechtsschutz" (2017) 35(5b) *Recht der Wirtschaft* 389, 397–401; Georg Kofler in Dietmar Aigner, Georg Kofler and Michael Tumpel (eds), *Doppelbesteuerungsabkommen*, 2nd edn. (Vienna: Linde, 2021), Einleitung Rz 37; see also Hohenwarter, "Austria" (Ch.7) in Guglielmo Maisto (ed.), *Tax Treaties and Domestic Law* (2006), pp.161–207.

The provision at issue before the BVerfG concerned a treaty override that aimed, inter alia, at the prevention of double non-taxation[74] of employment income in the Germany-Turkey relationship. Generally, the relevant tax treaty foresees an unconditional exemption in Germany for labour income that Turkey may tax, and hence also avoids so-called "virtual" double taxation.[75] The German legislature has, however, subsequently provided for a generally applicable, explicit deviation from that unconditional treaty exemption for foreign employment income if neither foreign exemption nor taxation is shown by the taxpayer (section 50d(8) of the German Income Tax Act (EStG)). If the taxpayer cannot prove that the other State has either (intentionally) exempted the relevant labour income or that the labour income has indeed been taxed by the other State, the taxing right will "fall back" to Germany. As such, the provision largely targets "dishonesty" on the part of taxpayers and is intended to address situations where the taxpayer fails to declare labour income in the other State.[76] The German Federal Tax Court (BFH) viewed this federal provision as a treaty override that could not be justified and suggested that it should be declared unconstitutional and void (which is a prerogative of the German Constitutional Court[77]). Simplified, the Federal Tax Court explained that the tax treaty in issue was clearly aimed at also preventing "virtual" double taxation, irrespective of any reasons why the other State did not exercise the taxing right it had under the treaty, and that the treaty override was not only intended to prevent double non-taxation, but was also put in place by the legislature for mere fiscal reasons.[78] Also, the override was neither justified by a necessity to prevent double non-taxation[79] (which, for the BFH, is an inherent feature of the exemption method) nor was there any pressing reason for the German legislature to quickly react to any urgent nuisance or a rapidly emerging tax deficit from foreign employment income; and even if there was such need, the BFH argued, there would be the less intrusive means of terminating the treaty, as foreseen in its Article 30 (a measure Germany has taken subsequently with effect from 1 January 2011, with the renegotiated treaty[80] containing some switch-over clauses, but still not addressing the situation covered by section 50d(8) EStG).

[74] The Federal Tax Court also focused on the fact that the EStG s.50d(8) also serves to protect the tax base (BFH, 10 January 2012, I R 66/09, BFHE 236, 304), and, in a supplementary decision, made a clear distinction between measures against abuse and—as in that case measures against double non-taxation (BFH, 10 June 2015, I R 66/09).
[75] See OECD MC Comm. 2017 art.23 Nos 34-35; BFH, 10 January 2012, I R 66/09, BFHE 236, 304.
[76] See BT-Drs 15/1562, 39-40, and BR-Drs 630/03, 66 ("Damit soll verhindert werden, dass die Einkünfte nicht besteuert werden, weil der Steuerpflichtige die Einkünfte im Tätigkeitsstaat pflichtwidrig nicht erklärt und dieser Staat deshalb häufig seinen Steueranspruch nicht mehr durchsetzen kann, wenn er von dem Sachverhalt erfährt, z.B. weil dann keine Vollstreckungsmöglichkeiten gegen den Steuerpflichtigen mehr bestehen").
[77] See Basic Law for the Federal Republic of Germany (Grundgesetz, GG) art.100.
[78] i.e. Germany would not tax based on the EStG s.50d(9) if the foreign State merely has an extremely low rate, and Germany would not likewise remit the tax collected from a dishonest taxpayer to the other State.
[79] For a different position see, e.g., Wolfgang Mitschke, "Das Treaty Override zur Verhinderung einer Keinmalbesteuerung aus Sicht der Finanzverwaltung" (2011) 49(47) *Deutsches Steuerrecht* 2221–2229.
[80] See German Federal Gazette (BGBl) II 2012, 526.

The majority opinion of the German Federal Constitutional Court (BVerfG), in a highly expected[81] and commented upon[82] decision, did not share the Federal Tax Court's concerns and found the (explicit) treaty override in section 50d(8) EStG to be permissible under constitutional law (albeit not irrelevant under international law). At its core, the BVerfG confirmed that tax treaties have the same rank as statutory federal law and can therefore be superseded by later federal statutes that contradict them (*lex posterior derogat legi priori*), and that this possibility is not limited to the protection of fundamental constitutional principles (which would generally not be the case for tax treaties). Also, the principle of democracy and parliamentary discontinuity generally requires that later legislatures be able to revoke legal acts of previous legislatures ("Power in democracy is but temporary"[83]). As the legislature is not competent to denounce international treaties under the German constitution,[84] it must be able to deviate from international treaties, that is, the denunciation of the treaty is not available as a less intrusive means of satisfying the principle of democracy (also, the BVerfG argued, a termination would generally affect the treaty in its entirety and would create full exposure of taxpayers to double taxation, unless eliminated by domestic law).[85] Moreover, neither the rule of law nor the principle of the

[81] See, e.g., Andreas Perdelwitz, "Treaty Override — Revival of the Debate over the Constitutionality of Domestic Treaty Override Provisions in Germany" (2013) 53(9) *European Taxation* 445–450; Roland Ismer and Stefanie Baur, "Verfassungsmäßigkeit von Treaty Overrides" (2014) 23(12) *Internationales Steuerrecht* 421–427; Adrian Cloer and Tobias Hagemann, "Federal Tax Court Holds Treaty Override Unconstitutional" (2014) 54(11) *European Taxation* 510–516; Andreas Musil, "Treaty Override als Dauerproblem des Internationalen Steuerrechts" (2014) 23(6) *Internationales Steuerrecht* 192–196; Christian Kahlenberg, "German Treaty Override Violates Constitutional Law" (2014) 68(9) *Bulletin for International Taxation* 480–487; Tobias Hagemann and Christian Kahlenberg, "German Federal Tax Court Again Questions Constitutionality of Treaty Override" (2015) 69(2) *Bulletin for International Taxation* 186–188.

[82] See, e.g., Georg Kofler and Alexander Rust, "Deutsches BVerfG zur Verfassungskonformität von 'Treaty Overrides'" (2016) 26(3) *Steuer und Wirtschaft International* 144–150; Andreas Musil, "Treaty Override nach der Entscheidung des BVerfG" (2016) 98(7) *FinanzRundschau* 297–302; Gerrit Frotscher, "Treaty Override — causa finita?" (2016) 25(14) *Internationales Steuerrecht* 561–567; Adrian Cloer and Tobias Hagemann, "Constitutionality of Treaty Override" (2016) 56(7) *European Taxation* 306–310; Michael Stöber, "Zur verfassungs- und europarechtlichen (Un-)Zulässigkeit von Treaty Overrides" (2016) 54(33) *Deutsches Steuerrecht* 1889–1895; Alexander Rust, "Germany: Consequences of a Treaty Override?" in Michael Lang et al (eds), *Tax Treaty Case Law around the Globe 2017* (Vienna: Linde, 2018), pp.3–12; Nikolaus Zorn, "Doppelbesteuerungsabkommen und Grundrechtsschutz" (2017) 35(5b) *Recht der Wirtschaft* 389–401; Lando Kirchmair, "Ist Art 59 Abs 2 GG tatsächlich dualistisch?" (2017) 72(3) *Zeitschrift für öffentliches Recht* 515–547; Michael Schwenke, "Treaty Override im Lichte des Demokratieprinzips — Offenes und verdecktes Treaty Override: Was ist geklärt, was offen?" (2018) 56(44) *Deutsches Steuerrecht* 2310–2314.

[83] See the official English translation of BVerfG 15 December 2015, 2 BvL 1/12, BVerfGE 141, 1, where the Federal Constitutional Court explained: "Power in democracy is but temporary. It would be irreconcilable with this concept if Parliament could bind its successors and limit their ability to rescind or correct past legislative decisions. This would set political views in stone. Moreover, the legislature is not competent for denouncing international treaties. Hence, Parliament must be able to deviate from international treaties at least within the scope of its competences."

[84] Indeed, in Germany the executive alone has the competence to terminate a treaty (BVerfGE 68, 1 (83 f); BVerfGE II 90, 286, (358); BVerfGE 141, 1 (23)). The situation is slightly different in Austria: it is also the executive that terminates a treaty, but it needs parliamentary consent to do so (see Theo Öhlinger and Andreas T. Müller, "Artikel 50 B-VG", in Karl Korinek and Michael Holoubek (eds), *Österreichisches Bundesverfassungsrecht* (14. Lfg. 2018), m.no.18).

[85] For a critical perspective, as an international treaty involves (at least) two States and hence not only the democracy of one State, see Lando Kirchmair, "Ist Art 59 Abs 2 GG tatsächlich dualistisch?" (2017) 72(3) *Zeitschrift für öffentliches Recht* 515, 540 ("Völkerrecht, wie der Plural so schön betont, ist nicht nur das Recht eines Volkes, sondern eben der Zusammenschluss mehrerer Völker. Ein demokratisches Argument beruhend auf der Stimme nur eines der beteiligten Völker kann kein wahrhaft demokratisches Argument sein.").

Constitution's openness to international law yield a different result. Specifically, and while one must always choose an interpretation that is favourable to international law, that does not apply in a way that is absolute and independent of the methodical limits of statutory interpretation (especially where a treaty override is explicit).

It is generally expected that the BVerfG will maintain this broad reasoning in the (still) pending treaty override cases, and the Federal Tax Court has since followed along the lines set by the BVerfG without raising the issue again.[86] However, the debate is ongoing: there is a lively discussion regarding the breadth and limits of the BVerfG's holdings on the *lex posterior*-rule in practical cases.[87] Moreover, it is argued—along the lines set by the separate opinion of Justice König—that a balancing test between the principle of democracy and the rule of law principle in conjunction with the principle of openness to international law based on multiple considerations would be a "better" and more consistent solution.[88] That said, the BVerfG has made it clear that an explicit domestic treaty override prevails in the domestic legal order. As the OECD notes, "such derogation is internally perfectly valid, and binding on a State's organs and citizens", but "[i]t does not, however, alter the obligations of the State towards other States under international law".[89]

C. Violation of international law

What was also made clear by the German Federal Constitutional Court (BVerfG) in its 2015 decision is that a treaty override is not irrelevant on the international plane, as States have an obligation to perform the treaties they have entered into in good faith.[90] However, according to the BVerfG, public international law leaves it to the States to determine, in accordance with national rules governing the relationship between international and national law as well as those governing the conflict of laws, the consequences, on the national level, of collisions between international treaties and national laws. Hence, States may accord their national law precedence in cases of conflict.[91] This, in turn, would result in a breach of public international law that may yield consequences: minor infractions generally entitle other States only to denounce the treaty in the cases and under the conditions envisaged in Article 56 VCLT, to demand that the treaty be properly performed, or—as a subsidiary measure—to demand pecuniary reparation.[92] In cases of major infractions, however, other States may be entitled to terminate the treaty or to suspend

[86] e.g., BFH, 12 May 2016, I B 139/11, BFH/NV 2016, 1453; BFH, 25 May 2016, I R 64/13, BFHE 254, 33, BStBl II 2017, 1185.

[87] See, with further references, e.g., Klaus-Dieter Drüen, "Einfachgesetzlicher, genereller Anwendungsvorrang von Doppelbesteuerungsabkommen", in Dietmar Gosch, Arne Schnitger and Wolfgang Schön (eds), *Festschrift für Jürgen Lüdicke* (Munich: C.H. Beck, 2019), p.103 (p.107), who argues that treaty overrides are only constitutionally permissible as ultima ratio.

[88] This includes the question whether the legislature would have to express its political intentions and demand that the executive take corresponding external steps before enacting a unilateral treaty override. See, e.g., with regard to so-called "real" treaty overrides Matthias Valta and Robert Stendel, *Dynamik des Völkervertragsrechts und Treaty Override — Perspektiven des offenen Verfassungsstaates*, (MPIL Research Paper Series No.2019-18), pp.19–23.

[89] See 1989 OECD Report on Tax Treaty Override para.18.

[90] VCLT art.26.

[91] For a critical assessment of that commonly held perspective on the relationship between domestic and international law as well as further references see, e.g., Lando Kirchmair, "Ist Art 59 Abs 2 GG tatsächlich dualistisch?" (2017) 7(3) *Zeitschrift für öffentliches Recht* 515, 535–541.

[92] See the Articles on Responsibility of States for Internationally Wrongful Acts (2001) Art.34 et seq.

its operation, irrespective of whether the treaty provides for a right of denunciation (Article 60 VCLT).

The German Federal Constitutional Court did not draw any concrete conclusions from its discussion of international law for the specific case of tax treaties nor did it provide guidance as to the severity of the infraction. There is, however, some OECD guidance. The 1989 OECD Report on Tax Treaty Override provides two examples of "major" infractions ("outright material breaches"): if a State either simply overrides its obligation to exempt interest and royalties from source taxation or deems the sale of shares in real estate companies to be a sale of immovable property in violation of an exclusive taxation right of the other State (that is, Article 13 OECD MC before the 2003 Update, which introduced a new Article 13(4) addressing shares in real estate companies).[93] The OECD naturally cautions that a termination of a treaty "could do even more harm economically and endanger the possibility of finding an acceptable solution in the future",[94] and that partial suspension, although perhaps "an adequate response", "would only leave things as they are".[95] Generally, however, Articles 57 and 60 VCTL have not gained practical relevance with regard to tax treaties, likely because such treaties can generally be terminated following Article 32 OECD MC, without any reasons being given.[96] The preferred course of action certainly is to find bilateral solutions,[97] either through renegotiation of the treaty or consultation agreements.[98] However, there is intensive discussion in German scholarship as to: which treaty overrides would amount to "material breaches" within the meaning of Article 60 VCLT (and some argue that domestic rules against abuse and double non-taxation would generally not amount to such breaches[99]); under what circumstances treaty overrides could be justified (for example, to prevent massive tax fraud);[100] regarding the correct application of the procedure provided in Articles 65–68 VCLT; and the impact of acquiescence by the other State.[101] Indeed, if the other State does not object to or take action for a long period against the first State's treaty override and hence acquiesces,[102] could that also change the content of the treaty in light of Article

[93] OECD, *Report on Tax Treaty Override* (1989), paras 27–33.
[94] OECD, *Report on Tax Treaty Override* (1989), para.30.
[95] OECD, *Report on Tax Treaty Override* (1989), para.33.
[96] While not a frequent occurrence, States from time to time terminate tax treaties if a change in policy or other concerns cannot be remedied through prompt renegotiation. Sweden, for example, has recently terminated its treaties with Greece and Portugal with effect from 2022 (as for Greece see Swedish Law No.2021-573, as for Portugal see Law No.2021-574) to address concerns regarding the taxation of pension income (in the case of Portugal) and tax evasion (in the case of Greece). It should be noted that the termination of a tax treaty is sometimes restricted by standstill clauses that would not permit a termination within a certain timeframe after a treaty's entry into force (see also OECD MC Comm. 2017 Art.31/32 No.5).
[97] See also *Report on Tax Treaty Override* (1989), paras 36–37.
[98] OECD MC Art.25.
[99] See Moris Lehner, "Treaty Override im Anwendungsbereich des § 50d EStG" (2012) 21(11) *Internationales Steuerrecht* 389, 398–399.
[100] See generally for that discussion already Jan Wouters and Maarten Vida, "The international law perspective" in Guglielmo Maisto (ed.), *Tax Treaties and Domestic Law* (Amsterdam: IBFD, 2006), p.13 (pp.25–29), and specifically in the context of the German constitutional discussion Moris Lehner, "Treaty Override im Anwendungsbereich des § 50d EStG", (2012) 21(11) *Internationales Steuerrecht* 389, 403–404.
[101] VCLT art.45(b). See, e.g., Alexander Rust, "Germany" in Guglielmo Maisto (ed.), Tax Treaties and Domestic Law (Amsterdam: IBFD, 2006), p.233 (pp.242–243).
[102] VCLT art.45(b).

31(3)(b) VCLT so as to validate the override on the international plane, especially if the other State has been properly informed?[103]

In any event, and as noted before, it is difficult to identify treaty overrides in the first place, and to draw conclusions on the international level. Indeed, one might argue that it is, eventually, for the domestic courts to decide if a treaty override exists (in the context of domestic law), but their perspective might differ from the common understanding of the Contracting States. That, in turn, can and must have implications on the international plane. This author will give three examples: can, from the perspective of international law, the other State claim in good faith[104] the irrelevance of subsequent changes to the OECD MC Comm., for example, regarding (unintended) double non taxation or the unwritten anti-abuse reservation,[105] if those changes are implemented by (unilateral) legislation in the first State,[106] even if that first State's courts have a static understanding of the OECD MC Comm.[107] and consider the corresponding domestic legislation to be treaty overrides? Also, can the other State, in good faith, argue against legislative implementation of the outcome of a consultation procedure by the first State[108], even if that first State's domestic courts have not shared the Mutual Agreement Procedure's (MAP) outcome and did not feel bound by it?[109] Generally, the OECD would likely not consider either instance as an "injury done to the basis of international tax relations if the competent legislative and administrative organs of the States concerned are in agreement that the court decision is contrary to their intentions";[110] it even goes so far as to note that "it is the Court's decision in the first place which may be seen as overriding the treaty".[111] Finally, there are "objective" violations of tax treaty law, that would perhaps not even be considered a breach of international obligations. One might consider, for example, unilateral switch-over clauses that undermine the exemption

[103] OECD MC art.2(4). See for that argument, e.g., Alexander Rust, "Germany" in Guglielmo Maisto (ed.), *Tax Treaties and Domestic Law* (Amsterdam: IBFD, 2006), p.233 (pp.242–243); Roland Ismer and Stefanie Baur, "Verfassungsmäßigkeit von Treaty Overrides", (2014) 23(12) *Internationales Steuerrecht* 421 (p.423); Matthias Valta and Robert Stendel, *Dynamik des Völkervertragsrechts und Treaty Override — Perspektiven des offenen Verfassungsstaates* (MPIL Research Paper Series No.2019-18), pp.13–16.

[104] VCLT art.26.

[105] See specifically Intro Nos 54 et seq. OECD MC Comm. 2017.

[106] For a dynamic reading of the OECD MC Comm., i.e. the use of the version of the OECD MC Comm. at the time the relevant OECD-patterned tax treaty is applied ("ambulatory approach"), see, e.g., Intro No.3 and Nos 33–36.1 OECD MC Comm. 2017, and the Recommendation of the OECD Council concerning the Model Tax Convention on Income and on Capital, OECD/LEGAL/0292 (1997) Pt I(3).

[107] For such static understanding that refers to the OECD MC Comm. as it stood at the time of the conclusion of the relevant OECD-patterned tax treaty, see, e.g., VwGH, 31 July 1996, 92/13/0172 (for Austria), and BFH, 8 December 2010, I R 92/09, BFHE 232, 137, BStBl II 2011, 488, and BFH, 6 July 2015, I R 79/13, BFHE 250, 110, BStBl II 2016, 326 (for Germany).

[108] OECD MC art.3(2) and art.25(3).

[109] See for that understanding, e.g., VwGH 20 September 2001, 2000/15/0116, and VwGH, 30 March 2006, 2002/15/0098 (for Austria), and BFH ,18 January 2001, I R 26/01, BFHE 196, 135, BStBl II 2002, 410, BFH 2 September 2009, I R 111/08, BFHE 226, 276, BStBl II 2010, 387, and BFH, 10 June 2015, I R 79/13, BFHE 250, 110, BStBl II 2016, 326 (for Germany).

[110] 1989 OECD Report on Tax Treaty Override para.4(a). The OECD also (in para.38 of this Report) cautions that where a court's "interpretation reverses the intended effect of a specific treaty provision", "swift action should be taken to redress the situation. This could be achieved through domestic legislation but the State concerned should first ensure that there is a broad consensus that the intended legislation does not injure international tax relations. In the event that there is no such consensus, the Committee considers that only renegotiation of the relevant tax treaties is acceptable".

[111] 1989 OECD Report on Tax Treaty Override para.4(a).

method foreseen in tax treaties with the goal of preventing double non-taxation. While those might be clear treaty overrides, it has indeed been argued that relief for the taxpayer in the residence State might not even be an "obligation" "owed to" the source State.[112]

D. "Indirect" treaty overrides?

There is one last issue to mention: one should not overlook that explicit treaty overrides and other changes to domestic law, that have an impact on tax treaties, are somewhat related. Indeed, a legislature might put a domestic provision in place to rectify case law which had interpreted tax treaties in a way that was contrary to what the legislature believed to be the correct reading.[113] Such rectification can take the form of a definition of a treaty-undefined term for purposes of Article 3(2) OECD. Also, tax treaties contain a number of explicit references to domestic law (for example, Articles 2(4), 4(1), 6(2), and 10(3) OECD MC), so that changes in domestic legislation may also alter the meaning of terms in tax treaties. As for Article 3(2) OECD, which contains a general interpretation rule for undefined treaty terms that defers to domestic (tax) law, unless the context otherwise requires or the competent authorities agree to a different meaning (lex fori clause), it is commonly understood that the reference to domestic (tax) law is to be understood in an "ambulatory" manner: what is decisive is the domestic law at the time the treaty is applied (and not at the time the treaty was concluded). This has been made explicit in the 1995 Update of the language of Article 3(2) OECD MC ("… at that time …"), and was also the common reading before that.[114]

As such, Article 3(2) OECD MC strikes a balance between the need to ensure the permanency of commitments entered into by States when signing a tax treaty and the need to be able to apply the tax treaty in a convenient and practical way over time (for example, outdated concepts).[115] This is why the OECD considers subsequent changes to domestic law that "feed back" into treaties via Article 3(2) OECD MC not to be treaty overrides.[116] There must, however, be limits

[112] See Articles on Responsibility of States for Internationally Wrongful Acts arts 2 and 42 and Matthias Valta and Robert Stendel, *Dynamik des Völkervertragsrechts und Treaty Override—Perspektiven des offenen Verfassungsstaates* (MPIL Research Paper Series No.2019-18), p.16 with fn.98.

[113] See, e.g., (1) the specific rule for a conflict of attribution regarding interest paid to a partner by a partnership in the EStG s.50d(10), which was viewed as a mere legislative "correction" of case law that simply defined the term "business profits" by the legislature (BT-Drs 16/11108, 23), but was subsequently held to be a treaty override by the German Federal Tax Court (BFH 11 December 2013, I R 4/13, BFHE 244, 1, BStBl II 2014, 791, pending before the BVerfG as 2 BvL 15/14; see also for the previous interpretation that the override aimed at "correcting" BFH, 9 August 2006, II R 59/05, BFHE 214, 518, BStBl II 2009, 758: BFH, 17 October 2007, I R 5/06, BFHE 219, 518, BStBl II 2009, 356); and (2) the provision of the EStG s.50d(12), which deems severance payments as employment income relating to a past activity, which was viewed as a mere legislative "correction" of case law to conform treaty application with the OECD guidance and existing bilateral consultation agreements (BT-Drs 18/10506, 78; for the previous different interpretations by the BFH in the past see, e.g., BFH 24 July 2013, I R 8/13, BStBl II 2014, 929; BFH, 10 June 2014, I R 79/13, BStBl II 2016, 326).

[114] See, e.g., OECD MC Comm. art.3 no. 11 (noting that the 1995 Update merely made that interpretation explicit), and Australian Federal Court, 10 October 2008, *Virgin Holdings SA v Federal Commissioner of Taxation* [2008] FCA 1503. For a "static approach" ("frozen meaning") before the 1995 Update see, e.g., Supreme Court of Canada, 28 September 1982, *R. v Melford Developments Inc* [1982] 2 SCR 504, and for an *e contrario* reading for pre-1995 treaties see Austrian VwGH, 19 December 2016, 2005/15/0158, and VwGH, 28 November 2017, 2006/14/0057.

[115] See OECD MC Comm. art 3 No.13.

[116] 1989 OECD Report on Tax Treaty Override para.4(b); see also, e.g., Andreas Musil, "Treaty Override als Dauerproblem des Internationalen Steuerrechts" (2014) 23(6) *Internationales Steuerrecht* 192, 193. For a contrary

on how far a State can go in (re)defining terms, both under Article 3(2) OECD MC and other provisions that refer to domestic law, without violating the treaty (and committing a treaty override).[117] Assume, for example, that a State wishes to tax the rental income received from foreign producers of gaming machines that lease those machines to local operators, but is unable to do so under its current tax treaties.[118] Could it simply change its domestic law so as to define gaming machines as immovable property in order to bring those payments into the scope of Article 6 OECD MC without violating international law? One must be hesitant in accepting such balance-impairing reallocation of income from one treaty article to another,[119] and focus instead, in the interpretation of the tax treaty, on whether such changes are "compatible with the context of the treaty",[120] which might "require" a different interpretation under Article 3(2) OECD MC, and in line with the requirements of good faith imposed by Article 31(1) VCLT.[121]

position see Supreme Court of Canada, 28 September 1982, *R. v Melford Developments Inc* [1982] 2 SCR 504 (rejecting the "assertion that Canada can simply amend the Agreement by the device of redefining the term interest"), which was subsequently "overruled" by the Canadian legislature in s.3 of the Income Tax Conventions Interpretation Act, R.S.C., 1985, c.I-4 (according to which an undefined term has "the meaning it has for the purposes of the Income Tax Act, as amended from time to time, and not the meaning it had for the purposes of the Income Tax Act on the date the convention was entered into or given the force of law in Canada if, after that date, its meaning for the purposes of the Income Tax Act has changed").

[117] For a detailed discussion see also, Craig Elliffe, "Preventing Unacceptable Tax Treaty Overrides" [2022] B.T.R. 38.

[118] It is assumed that the relevant tax treaty in this example is based on the OECD MC, that gaming machines do not constitute a permanent establishment for the foreign enterprise under OECD MC Art.5 (Art.5 m.no.41 OECD MC Comm.) and that the rental payments are not royalties under OECD MC Art.12 (even though they might well be "commercial equipment" under UN MC Art.12(3); see, e.g., US Tax Court, 22 July 1966, *London Displays Company v Commissioner*, 46 T.C. 511, concerning payments for wax figures by Madame Tussauds Wax Museums).

[119] It is unclear whether a distinction must be made, for purposes of OECD MC art.3(2), between domestic "deeming" rules and "definitions" (the "real world"). The UK Supreme Court recently took the view that deeming provisions must not be taken into account (UK Supreme Court, 20 May 2020, *Fowler v HMRC* [2020] UKSC 22; [2020] S.T.C. 1476 at [30]), but that is a conceptually hard argument to make (see, e.g., Michael Lang, "Fowler v. Commissioners for Her Majesty's Revenue and Customs: Some Thoughts on Tax Treaty Interpretation" in Georg Kofler, Ruth Mason and Alexander Rust (eds), *Thinker, Teacher, Traveler — Reimagining International Tax, Essays in Honor of H. David Rosenbloom* (Amsterdam: IBFD, 2021), p.313 (pp.318–319)). Indeed, deeming rules could well be used to modify the meaning and interpretation of treaty terms (see, e.g., Angelo Nikolakakis, Peter Blessing, Guglielmo Maisto, Johann Hattingh, and John F. Avery Jones, "Fowler v HMRC (UK Supreme Court): Neither Fish nor Fowler: Tax Treaty Implications of Domestic Deeming Rules" [2020] B.T.R. 537, 543).

[120] See, e.g., 1989 OECD Report on Tax Treaty Override para.4(b) ("provided that such changes [in domestic law] were compatible with the context of the treaty"), and in this direction also OECD MC Comm. 2017 Art.15 No.8.11. See also Volker Langbein, "The overriding of tax treaties by national legislation or: The Melford Case revisited — A German view" (1987) 15(1) *Intertax* 4, pp.6-7).

[121] See specifically also UK First Tier Tribunal, 12 April 2016, *Fowler v HMRC* [2016] UKFTT 234 (TC); [2016] S.F.T.D. 535 at [115], and the corresponding discussion by Angelo Nikolakakis, Peter Blessing, Guglielmo Maisto, Johann Hattingh, and John F. Avery Jones, "Fowler v HMRC (UK Supreme Court): Neither Fish nor Fowler: Tax Treaty Implications of Domestic Deeming Rules" [2020] B.T.R. 537, 543, and Johann Hattingh and John F. Avery Jones, "Fowler v Revenue and Customs Commissioners [2020] UKSC 22" (2020) 22 *International Tax Law Reports* 679, 686 with fn.16. See also, e.g., Jan Wouters and Maarten Vida, "The international law perspective" in Guglielmo Maisto (ed.), *Tax Treaties and Domestic Law* (Amsterdam: IBFD, 2006), p.13 (pp.16–18).

III. Treaty Overrides and EU Law

A. Introduction

Tax treaties between the EU Member States have a close connection to the EU's concept of an internal market, which "shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties".[122] Indeed, double taxation has been viewed as "the most serious obstacle there can be to people and their capital crossing internal borders".[123] Outside the limited scope of the European company tax Directives,[124] however, EU law neither provides for explicit substantive mechanisms to avoid juridical double taxation of income or capital between Member States, nor has the European Court of Justice (CJEU) so far found that the fundamental freedoms offer taxpayers protection against juridical double taxation.[125] It is nevertheless common ground that the abolition of double taxation is, still,[126] an objective of the Treaty on the Functioning of the European Union (TFEU), as the overlap of taxing jurisdictions may result in distortions of the internal market.[127] From that perspective, the internal market and tax treaties follow the same goal of avoiding double taxation, so that "[d]ouble tax conventions and the [TFEU] are natural friends, because they pursue mutual objectives".[128] Against this background, treaty overrides within the EU not only distort the balance of a specific tax treaty (which the CJEU has accepted as a standard under EU law[129]), but may also be characterised as a "step back" in European economic integration. Therefore, briefly, three issues should be addressed: first, is a treaty override by a Member State a violation of primary EU law, for example, the fundamental freedoms or the principle of Union loyalty? (No.) Secondly, can the EU legislature require Member States to implement treaty overrides, either of treaties between the Member States or with third countries,

[122] Consolidated version of the Treaty on the Functioning of the European Union Art.26.

[123] Opinion of Advocate General Colomer, 26 October 2004, in *D. v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* (C-376/03) EU:C:2004:663, (D) at [85].

[124] Such as the avoidance of juridical double taxation of inter-company dividends under the Parent-Subsidiary Directive (Council Directive 2011/96/EU) and of inter-company interest and royalty payments under the Interest-Royalties-Directive (Council Directive 2003/49/EC). Also, the step-up provided in the ATAD (Council Directive (EU) 2016/1164) Art.5(5) is a measure to avoid—time delayed—double taxation of the same capital gain, as are the provisions of ATAD Art.8(5) and (6) with regard to CFC rules.

[125] See III.B below.

[126] See CJEU, 12 September 2017, *Austria v Germany* (C-648/15) EU:C:2017:664; (2017) 20 I.T.L. Rep. 385 at [26], noting the "the beneficial effect of the mitigation of double taxation on the functioning of the internal market that the EU seeks to establish in accordance with Article 3(3) TEU and Article 26 TFEU". In the past, the ECJ specifically referred to—now repealed—the EC Treaty Art.293(2) to establish that "the abolition of double taxation is one of the objectives of the Community to be attained by the Member States" (see, e.g., CJEU, 12 May 1998, *Gilly* (C-336/96), EU:C:1998:221; [1998] S.T.C. 1014 at [16], and ECJ, 19 January 2006, *Bouanich* (C-265/04) EU:C:2006:51; [2008] S.T.C. 2020 at [49]).

[127] Discussion paper for the Informal Meeting of Economic and Financial Affairs Council (ECOFIN) Ministers, *Taxation in the European Union*, SEC(96)487 final, 7 (20 March 1996).

[128] Eric C.C.M. Kemmeren, *Principle of Origin in Tax Conventions* (Pijnenburg, 2001), 246.

[129] See, e.g., CJEU, 5 July 2005, *D* (C-376/03) EU:C:2005:424; [2005] S.T.C. 1211 at [60]–[62], noting that a treaty creates "reciprocal rights and obligations" that apply only to persons resident in one of the two Contracting Member States, which "is an inherent consequence of bilateral double taxation conventions" and makes persons covered by different tax treaties inherently dissimilar, so that any beneficial treatment under the tax treaty "cannot be regarded as a benefit separable from the remainder of the Convention, but is an integral part thereof and contributes to its overall balance".

if those are deemed to "directly affect the establishment or functioning of the internal market"? (Largely yes.) Thirdly, and finally, can a taxpayer bring a case of double taxation that results from one State's treaty override to arbitration under the 2017 Tax Dispute Resolution Directive (TDRD)?[130] (Probably.)

B. "Treaty Overrides" and EU Fundamental Freedoms

The EU's fundamental freedoms for cross-border establishment, provision of services, movement of workers, and movement of capital provide far-reaching protection against discriminatory tax measures by the Member States.[131] The case law of the CJEU has dealt frequently with the interaction between the fundamental freedoms and Member States' tax treaties,[132] including situations where (potential) treaty overrides to the taxpayers' disadvantage were in issue.[133] Two core situations have emerged,[134] that is first, situations where a treaty override has a non-discriminatory outcome (*Columbus Container Services*[135]) and, secondly, situations where a treaty override leads to double taxation that the respective tax treaty aimed to abolish (for example *Kerckhaert and Morres*,[136] *Damseaux*,[137] and *Levy and Sebbag*[138]). There are also situations where a domestic provision not only overrides a treaty but also has discriminatory effects,[139] but

[130] Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, [2017] OJ L265/1.

[131] For a brief introduction see, e.g., Peter J. Wattel, Otto Marres and Hein Vermeulen (eds), *European Tax Law*, 7th edn (2018).

[132] See, e.g., Pasquale Pistone, *The Impact of Community Law on Tax Treaties — Issues and Solutions* (Kluwer Law International, 2002), Georg Kofler, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Vienna: Linde, 2007), and for a recent overview Michael Lang, "Double Taxation Conventions in the Case Law of the CJEU" (2018) 46(3) *Intertax* 181–193.

[133] Conversely, the CJEU has "overriden" Member States' tax treaties to the taxpayers' benefit by ruling that "final" losses must be taken into account in the taxpayer's residence Member State, even if those losses ("negative income") accrue in a foreign permanent establishment and would otherwise be exempt under a tax treaty under that State's interpretation of treaty law (see, e.g., CJEU, 15 May 2008, *Lidl Belgium GmbH & Co KG* (C-414/06) EU:C:2008:278; [2008] S.T.C. 3229, and the reference by BFG 28 June 2006, I R 84/04, BStBl II 2006, 861).

[134] It should be noted in passing that treaty overrides are, of course, relevant under EU law if a Directive is implemented through a tax treaty (e.g. a withholding tax exemption mandated by the EU Parent-Subsidiary-Directive or the Interest-Royalties-Directive); in that case a treaty override would clearly be contrary to EU (secondary) law, unless justified by the need to prevent abuse. See generally Alexander Rust, "Germany" in Guglielmo Maisto (eds), *Tax Treaties and Domestic Law* (Amsterdam: IBFD, 2006), p.233 (pp.240–241), and for a discussion of the (implicit) anti-abuse justification and its scope CFE ECJ Task Force, "Opinion Statement ECJ-TF 2/2019 on the CJEU decisions of 26 February 2019 in Cases C-115/16, C-118/16, C-119/16 and C-299/16, N Luxembourg I et al, and Cases C-116/16 and C-117/17, T Danmark et al, concerning the 'beneficial ownership' requirement and the anti-abuse principle in the company tax directives" (2019) 59(10) *European Taxation* 487–502.

[135] CJEU, 6 December 2007, *Columbus Container Services BVBA & Co v Finanzamt Bielefeld-Innenstadt (Columbus)* (C-298/05) EU:C:2007:754; [2008] S.T.C. 2554.

[136] CJEU, 14 November 2006, *Mark Kerckhaert and Bernadette Morres v Belgische Staat (Kerckhaert)* (C-513/04) EU:C:2006:713; [2007] S.T.C. 1349.

[137] CJEU, 16 July 2009, *Jacques Damseaux v Belgian State (Jacques Damseaux)* (C-128/08) EU:C:2009:471; [2009] S.T.C. 2689.

[138] CJEU, 19 September 2012, *Daniel Levy and Carine Sebbag, v État belge - SPF Finances (Levy and Sebbag)* (C-540/11) EU:C:2012:581.

[139] See Dietmar Gosch, "Über das Treaty Overriding — Bestandsaufnahme — Verfassungsrecht — Europarecht" (2008) 17(12) *Internationales Steuerrecht* 413, 420–421. One example is the German anti-abuse rule for outbound payments in the EStG s.50d(3), which is generally characterised as a treaty (and directive) override (see BFH, 20 March 2002, I R 38/00, BStBl II 2002, 819), and has independently been found to infringe on EU law (CJEU, 20

in such a case the violation of EU law—either of the fundamental freedoms or a Directive—has its basis solely in domestic law, whether or not a treaty override exists.[140]

As for the first situation, *Columbus Container Services*[141] concerned the unilateral German switch-over from the exemption provided for in the tax treaty between Germany and Belgium[142] to a credit system regarding foreign permanent establishments, including partnerships (to prevent circumvention of its domestic Controlled Foreign Company (CFC) rules by creating a foreign branch or a transparent partnership instead of a controlled foreign corporation). This domestic switch-over, which is (still) foreseen in section 20(2) of the German Foreign Transaction Tax Act (AStG),[143] is generally considered a treaty override,[144] and the provision itself explicitly states that it is "not affected by agreements for the avoidance of double taxation". Confronted with the question whether such switch-over infringed upon the freedom of establishment of the German partners of *Columbus Container Services*, a limited partnership governed by Belgian law, the CJEU did not rule on the treaty override as such, but rather noted that it "may not examine the relationship between a national measure […] and the provisions of a double taxation convention […], since that question does not fall within the scope of Community law".[145] From this perspective it becomes obvious that the "fact that a Member State's legislation may be in accordance with, or required by, the terms of the applicable [tax treaty] does not in itself mean that such conduct accords with the Treaty free movement provisions",[146] and neither does a treaty override necessarily mean that a Member State has infringed on the taxpayers' freedoms. What was decisive for the CJEU was the fact that the switch-over did, in effect, not discriminate against cross-border establishments: by applying the credit method to foreign partnerships (instead of the exemption method), "that legislation merely subjects, in Germany, the profits made by such partnerships to the same tax rate as profits made by partnerships established in Germany".[147] This led the

December 2017, *Deister Holding AG and Juhler Holding A/S* (C-504/16 and C-613/16) EU:C:2017:1009, and ECJ, 14 June 2018 *GS* (C-440/17) EU:C:2018:437).

[140] See also Andreas Musil, "Treaty Override als Dauerproblem des Internationalen Steuerrechts" (2014) 23(6) *Internationales Steuerrecht* 192, 195.

[141] CJEU, 6 December 2007, *Columbus* (C-298/05) EU:C:2007:754. For detailed analysis of this decision and the CJEU's reluctance to scrutinize treaty overrides, see Gerard T.K. Meussen, "Columbus Container Services — A Victory for the Member States' Fiscal Autonomy" (2008) 48(4) *European Taxation* 169–173.

[142] The Convention for the avoidance of double taxation and for the settling of certain other questions with respect to taxes on income and wealth, signed in Brussels on 11 April 1967 between the Kingdom of Belgium and the Federal Republic of Germany, Federal Gazette (BGBl) II 1969, p.18, as amended (the Bilateral Tax Convention).

[143] The Foreign Transaction Tax Law (Gesetz über die Besteuerung bei Auslandsbeziehungen, Außensteuergesetz), Federal Gazette (BGBl) I 1972, p.1713.

[144] So explicitly the reference by the domestic court in *Columbus* ("entgegen dem Doppelbesteuerungsabkommen zwischen der Bundesrepublik Deutschland und dem Königreich Belgien"); see FG Münster, 5 July 2005, 15 K 1114/99 F, EW, EFG 2005, 1512. See also, e.g., BFH, 10 January 2012, I R 66/09, BFHE 236, 304. The German legislative materials, however, viewed that switch-over as permitted by the unwritten anti-abuse clause inherent in tax treaties (see BT-Drs 12/1506, 181).

[145] CJEU, 6 December 2007, *Columbus* (C-298/05) EU:C:2007:754 at [47]. See also the Opinion of Advocate General Geehoed, 6 April 2006, *Kerckhaert* (C-513/04) EU:C:2006:242 at [37], who noted that "the fact that Belgium may or may not be in breach of its obligations under the France-Belgium DTC in failing to allow imputation of the 15% French withholding tax makes, in my view, no difference to the above conclusion. Assessment of the compatibility of the Belgian provisions with this DTC, and the potential effects of a breach under national law, is purely a matter for the national court".

[146] See, e.g., Opinion of Advocate General Geehoed, 6 April 2006, *Kerckhaert* (C-513/04) EU:C:2006:242 at [37].

[147] CJEU, 6 December 2007, *Columbus* (C-298/05) EU:C:2007:754 at [39].

CJEU to conclude that, "[s]ince partnerships such as Columbus do not suffer any tax disadvantage in comparison with partnerships established in Germany, there is no discrimination resulting from a difference in treatment between those two categories of partnerships".[148]

As for the second situation, the issue becomes more nuanced and depends on which perspective one takes on juridical double taxation caused by the interaction of the tax systems of two Member States. At the outset, juridical double taxation as such cannot easily be categorised within the traditional fundamental freedoms doctrine, as it is effectively caused by the interaction of the tax systems of two Member States. Since juridical double taxation would prevail even if all Member States (hypothetically) had the same tax system (each with source-based and residence-based taxation demonstrating that the disadvantage is created solely by the interaction of the two taxing States and not by discriminatory taxation in either State),[149] it can neither be (clearly) qualified as a discriminatory restriction nor as a mere disparity between the Member States' tax systems. While the EU Commission[150] had historically taken the view that double taxation should be prohibited by the fundamental freedoms, the CJEU's Grand Chamber in its 2006 decision in *Kerckhaert and Morres*[151] did not share this view. This case raised the simple question of whether the residence State of a dividend recipient (Belgium) may tax both domestic and cross-border dividends at the same rate, while allowing in the case of a cross-border dividend only a deduction of the foreign (French) withholding tax rather than granting a credit.[152] That situation arose because the applicable tax treaty, on the one hand, confirmed France's right to tax the dividends at source (at a rate of 15 per cent), but, on the other hand, was understood as referring to domestic law regarding Belgium's obligation to grant a credit.[153] Belgium, however, had previously abolished that mechanism by way of a legislative amendment, which had the effect of reintroducing double taxation.[154] The CJEU rejected the notion that the same treatment

[148] CJEU, 6 December 2007, *Columbus* (C-298/05) EU:C:2007:754 at [40]. While the switch-over under the German Foreign Transaction Tax Act (AStG) s.20(2) did not infringe on the freedoms as such, it might be noted that subsequently the German Federal Tax Court found that the (then) general CFC rules that triggered the switch-over violated the EU freedom of establishment, so that the switch-over could not be applied either (BFH, 21 October 2009, I R 114/08, BFHE 227, 64, BStBl II 2010, 774).

[149] Opinion of A.G. Geelhoed, 23 February 2006, *ACT Group Litigation* (C-374/04) EU:C:2006:139 at [48].

[150] See the Answer given by Mr Bolkestein on behalf of the Commission to Written Question E-2287/99 by Karin Riis-Jørgensen (ELDR) concerning "Right to freedom of movement and Danish tax rules" [2000] OJ C225 E/87, and the Position taken by the Commission concerning Petition 626/2000 by Mr Klaus Schuler (German), concerning the dual taxation of an inheritance (25 January 2007), 4.

[151] CJEU, 14 November 2006, *Kerckhaert* (C-513/04) EU:C:2006:713.

[152] Clearly, if there is no credit available, the after-tax result for the taxpayer will be better in the case of a purely domestic distribution, while in the cross-border setting double taxation would occur, reducing the net dividend in comparison to a purely internal situation.

[153] The Convention of 10 March 1964 between Belgium and France seeking to avoid double taxation and to establish mutual administrative and legal rules of assistance in the field of income tax, as amended by the supplementary agreement signed on 15 February 1971 (the France-Belgium Convention), art.15(3).

[154] While not particularly relevant for the CJEU's assessment from an EU law perspective, it should be noted that subsequent decisions by the Belgian Supreme Court have established that taxpayers were still entitled to a tax credit, also after the changes to Belgian domestic law: while the credit provision in the tax treaty between Belgium and France indeed refers to "the conditions laid down in Belgian law", it also states that, "however, that lump-sum amount may not be less than 15% of the amount of the income after deduction of the French tax". The latter clause is understood as providing for a credit of no less than 15% under treaty law, even if the credit rules under domestic law have been abolished or amended. See Belgian Cour de Cassation (Supreme Court), 16 June 2017, No. F.15.0102.N., and Belgian Cour de Cassation (Supreme Court), 15 October 2020, F.19.0015.F.

of all—domestic and foreign—dividends by Belgium was discriminatory, as the situation of the shareholders whose dividends had already been taxed was dissimilar to those whose dividends had not been taxed.[155] The CJEU moreover acknowledged that the disadvantage at issue in *Kerckhaert and Morres* resulted from the parallel exercise of fiscal sovereignty by two Member States, noted the importance of tax treaties to eliminate or mitigate the negative effects on the functioning of the Internal Market resulting from the co-existence of national tax systems, but then moved on to state that

> "Community law, in its current state and in a situation such as that in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the Community".[156]

Hence, "it is for the Member States to take the measures necessary to prevent situations such as that at issue in the main proceedings by applying, in particular, the apportionment criteria followed in international tax practice".[157] Also, the CJEU made it quite clear that it would not even be able to decide which Member State would have to refrain from taxation as EU law does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the EU,[158] emphasising that no one Member State has natural priority as far as taxation is concerned.[159] This approach is now established case law and has been confirmed in numerous judgments.[160]

Even though the CJEU has reminded the Member States of the (political) necessity "to take the measures necessary to prevent situations of double taxation by applying, in particular, the criteria followed in international tax practice",[161] it is clear that juridical double taxation as such does not violate the fundamental freedoms.[162] This non-prohibition of juridical double taxation

[155] The CJEU accepted that, in principle, the application of the same rule to different circumstances could amount to a prohibited discrimination, but then stated that "in respect of the tax legislation of his State of residence, the position of a shareholder receiving dividends is not necessarily altered, in terms of that case-law, merely by the fact that he receives those dividends from a company established in another Member State, which, in exercising its fiscal sovereignty, makes those dividends subject to a deduction at source by way of income tax." See CJEU, 14 November 2006, *Kerckhaert* (C-513/04) EU:C:2006:713 at [19].

[156] CJEU, 14 November 2006, *Kerckhaert* (C-513/04) EU:C:2006:713 at [22].

[157] CJEU, 14 November 2006, *Kerckhaert* (C-513/04) EU:C:2006:713 at [23].

[158] CJEU, 12 February 2009, *Margarete Block (Margarete)* (C-67/08) EU:C:2009:92; [2009] 2 C.M.L.R. 39 at [30]; see also, e.g., CJEU, 14 November 2006, *Kerckhaert* (C-513/04) EU:C:2006:713 at [22], and CJEU, 16 July 2009, *Jacques Damseaux* (C-128/08) EU:C:2009:471 at [33].

[159] CJEU, 16 July 2009, *Jacques Damseaux* (C-128/08) EU:C:2009:471 at [32]–[34].

[160] CJEU, 12 February 2009, *Margarete* (C-67/08) EU:C:2009:92 at [28] et seq.; CJEU, 16 July 2009 *Jacques Damseaux* (C-128/08) EU:C:2009:471 at [27] et seq.; CJEU, 20 May 2008, *Orange European Smallcap Fund NV* (C-194/06) EU:C:2008:289; [2011] B.T.C. 473 at [42]; CJEU, 15 April 2010, *CIBA* (C-96/08) EU:C:2010:185; [2010] S.T.C. 1680; CJEU, 10 February 2011, *Haribo and Salinen* (C-436/08 and C-437/08) EU:C:2011:61; [2011] S.T.C. 917 at [170]; CJEU, 19 September 2012, *Levy and Sebbag* (C-540/11), EU:C:2012:581 at [18] et seq.; CJEU, 4 February 2016, *Baudinet* (C-194/15) EU:C:2016:81 at [30] et seq.; CJEU, 25 February 2021, *Société Générale* (C-403/19) EU:C:2021:136; [2021] B.T.C. 11 at [29]. See also EFTA-Court, 7 May 2008, *Seabrokers AS* (E-7/07) [2008] EFTA Court Report 172 at [49] et seq.

[161] CJEU, 16 July 2009, *Jacques Damseaux* (C-128/08) EU:C:2009:471 at [30].

[162] CJEU, 16 July 2009, *Jacques Damseaux* (C-128/08) EU:C:2009:471 at [22]. See, however, the Opinion of AG Kokott, 15 February 2007, *Maria Geurts and Dennis Vogten* (C-464/05) EU:C:2007:108 at [60] with fn.37, stating for the case of dual unlimited inheritance tax liability that it "remains to be seen" "[w]hether the Court of Justice, in

by the fundamental freedoms (though heavily criticised in scholarship[163]) might not be an overwhelming problem in daily life. Indeed, it is generally addressed by tax treaties between Member States, and out of the 351 possible bilateral income tax treaty relationships between the 27 Member States, nearly all are currently covered by a tax treaty.[164] This broad treaty network, conversely, puts the focus back on treaty overrides, where double taxation might occur exactly because domestic legislation of one Member State has overridden existing tax treaties. In that respect it is indeed unfortunate that the CJEU has completely refrained from considering if criteria for dividing taxing powers under EU law could, for example, be derived from an "overridden" tax treaty itself. In such cases it would be relatively easy to identify the Member State that is to "blame" for a resulting double taxation: if a Member State has waived its taxing rights in favour of the taxing rights of the other Member State, EU law could simply defer to that (initially agreed) allocation in a (now overridden) tax treaty.[165] *Kerckhaert and Morres* might have been a good "test case" for such a solution (although no clear treaty override was at issue), as Belgium had accepted France's right to levy a withholding tax in a tax treaty, so that responsibility for the avoidance of double taxation would have been allocable to Belgium.[166] The CJEU did not take that route: it noted that it is not competent to deal with issues of tax treaty interpretation or treaty overrides, as it neither has jurisdiction to rule on a State's possible

accordance with the findings in *Kerckhaert and Morres*, would actually accept this consequence, even in the case of a very high burden of inheritance tax".

[163] See, with further references, Georg Kofler and Ruth Mason, "Double Taxation: A European 'Switch in Time'?" (2007) 14(1) *Columbia Journal of European Law* 63, 67–83; Georg Kofler, "Double Taxation and European Law: Analysis of the Jurisprudence" in Alexander Rust (ed.), *Double Taxation Within the European Union* (Kluwer Law International, 2011), pp.97–136; anticritical, e.g., Michael Lang, "Double Taxation Conventions in the Case Law of the CJEU" (2018) 46(3) *Intertax* 181 (pp.181–182).

[164] As of October 2021, out of 351 possible bilateral tax treaty relationships between the 27 Member States only 5 are not covered. The missing relationships are between Cyprus and Croatia (the 1985 treaty was terminated), Cyprus and the Netherlands (a treaty was initialled in 2019 but is not yet in force), Denmark and France (the 1957 treaty was terminated effective 1 January 2009, and a new treaty is currently under negotiation), Denmark and Spain (the 1972 treaty was terminated effective 1 January 2009), and Finland and Portugal (the 1970 treaty was terminated effective 1 January 2019, and the 2016 treaty is not yet in force). However, Sweden has terminated its treaties with Greece and Portugal with effect from 2022 (as for Greece see Swedish Law No.2021-573, as for Portugal see Law No.2021-574). It might be noted that the number of bilateral treaties on inheritance and gift taxes, which are not levied by all Member States, is much smaller (see also the Commission's Recommendation of 15 December 2011 regarding relief for double taxation of inheritances, [2011] OJ L336/81).

[165] Axel Cordewener, *Europäische Grundfreiheiten und nationales Steuerrecht* (Cologne: O. Schmidt, 2002), pp.882–888; Joachim Englisch, Dividendenbesteuerung (O. Schmidt: Cologne, 2005), pp.256–262; Ulrich Forsthoff, "Treaty Override und Europarecht" (2006) *Internationales Steuerrecht* 509, 511–512; Georg Kofler and Ruth Mason, "Double Taxation: A European 'Switch in Time'?" (2007) Columbia Journal of European Law 63–98; Georg Kofler, "Treaty Override, juristische Doppelbesteuerung und Gemeinschaftsrecht" (2006) *Steuer und Wirtschaft International* 62, 69–74; Arne Schnitger, *Die Grenzen der Einwirkungen der Grundfreiheiten des EG-Vertrages auf das Ertragsteuerrecht* (IDW Verlag: Düsseldorf, 2006), pp.263–264; Georg Kofler, Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht (Linde: Vienna, 2007), pp.235–264; Alexander Rust, "How European Law Could Solve Double Taxation" in Alexander Rust (ed.), *Double Taxation Within the European Union* (Kluwer Law International, 2011), p.137 (pp.150–151); see also René Offermanns, "Restrictions on Treaty Override Resulting from EU Law" (2013) 53(9) *European Taxation* 430–438. This position is also implied by CJEU, 16 September 2004, *Merida* (C-400/02) EU:C:2004:537, in which the CJEU relied on the allocation of taxing powers under a tax treaty to determine responsibility.

[166] Georg Kofler, "Treaty Override, juristische Doppelbesteuerung und Gemeinschaftsrecht" (2006) 16(2) *Steuer und Wirtschaft International* 62, 69–74; see in this direction also the Commission's Communication on "Dividend taxation of individuals in the Internal Market," COM(2003) 810 final, 18.

infringement of tax treaty provisions, nor to examine the relationship between a national measure and the provisions of a tax treaty.[167]

That outcome is, moreover, not changed by the principle of loyal cooperation set out in article 4(3) of the Consolidated version of the Treaty on European Union (TEU) (previously: article 10 EC). Indeed, in *Levy and Sebbag*[168] the CJEU again considered the domestic legislative amendment in Belgium that abolished the credit mechanism in the tax treaty with France (and thereby reintroduced double taxation). It found that Article 4(3) TEU only sets out a general obligation on the part of the Member States that did not, in the specific case, give rise to an independent obligation on Belgium that went beyond those imposed by the fundamental freedoms.[169]

C. Treaty overrides mandated by EU law?

The competence in direct taxation within the EU (an "internal market" matter) is shared between the EU and the Member States.[170] Indeed, the general internal market competence that allows the issuance of "directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market" under (now) Article 115 TFEU (ex-Article 94 EC) has been used as the legal basis for a number of directives in the area of direct taxation, especially with regard to corporate taxation.

The direct tax Directives issued on that basis are addressed to all Member States and are "binding, as to the result to be achieved", "but shall leave to the national authorities the choice of form and methods".[171] EU legislation alone can, therefore, create conflicts with existing *inter-se* tax treaties between the Member States. The EU's competence under Article 4(2)(a) and Article 115 TFEU, however, not only covers purely internal situations, but the EU can also use its internal competence to specify the treatment of non-EU taxpayers or third-country investments or activities.[172] Regulating the treatment of third-country situations may create further conflicts with existing bilateral tax treaties between the Member States and third countries (for example,

[167] CJEU, 16 July 2009, *Jacques Damseaux* (C-128/08) EU:C:2009:471 at [22]; CJEU, 6 December 2007, *Columbus* (C-298/05) EU:C:2007:754 at [46]; CJEU, 19 September 2012, *Levy and Sebbag* (C-540/11) EU:C:2012:581 at [18] et seq. See also Michael Lang, "Treaty Override und Gemeinschaftsrecht", in Moris Lehner (ed.), *Reden zum Andenken an Klaus Vogel* (Munich: C.H. Beck, 2010), 59–88; Michael Lang, "Double Taxation Conventions in the Case Law of the CJEU" (2018) 46(3) *Intertax* 181, 184.

[168] CJEU, 19 September 2012, *Levy and Sebbag* (C-540/11) EU:C:2012:581 at [25]–[28].

[169] For analysis see, e.g., Katharina Daxkobler and Eline Huisman, "Levy & Sebbag: The ECJ Has Once Again Been Asked To Deliver Its Opinion on Juridical Double Taxation in the Internal Market" (2013) 53(8) *European Taxation* 400, 404–405; see also Ulrich Forsthoff, "Treaty Override und Europarecht" (2006) 15(15) *Internationales Steuerrecht* 509, 509–510. The CJEU in *Levy and Sebbag* also referred to former Art.293(2) of the EC Treaty (ex-Art.220 EEC Treaty), which urged the Member States, "so far as is necessary, [to] enter into negotiations with each other with a view to securing for the benefit of their nationals…the abolition of double taxation within the Community". That provision was not directly applicable to the benefit of taxpayers (CJEU, 12 May 1998, *Gilly* (C-336/96) EU:C:1998:221 at [15]) and was also subject to intense debate with regard to its interpretation. Article 293 of the EC Treaty was repealed by the Treaty of Lisbon (Point 280, [2007] OJ C306/1) and speculation as to the reasons for its repeal and its effect are ongoing.

[170] TFEU Art.4(2)(a).

[171] TFEU Art.288(3).

[172] Georg Kofler, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Vienna: Linde, 2007), pp.322–323; Daniel S. Smit, "The Influence of EU Tax Law on the EU Member States' External Relations" in Werner Haslehner, Georg Kofler and Alexander Rust (eds), *EU Tax Law and Policy in the 21st Century* (Alphen aan den Rijn: Kluwer, 2017), p.215 (pp.221 and 223–224).

where a Directive would ask for taxation where a treaty would foresee exemption). This potential conflict becomes evident, for example, with regard to the scope of application and a number of substantive provisions of the EU Anti-Tax Avoidance Directive (ATAD I[173] and II[174]) (and in the former proposals for a Common (Consolidated) Corporate Tax Base, (C(C)CTB)[175]).[176] Possible conflicts between EU legislation and tax treaties are also discussed with regard to the possible implementation of the OECD's Pillar Two through a Directive.[177] While the EU is generally careful not to interfere with tax treaties,[178] one example of such potential conflict is the income inclusion rules under the CFC regime of Articles 7 and 8 ATAD. These also apply to a "permanent establishment of which the profits are not subject to tax or are exempt from tax in that Member State", that is, to a low-taxed permanent establishment either located in another Member State or a third country. By referring to profits that "are not subject to tax or are exempt from tax" in a taxpayer's Member State, the ATAD might be viewed as obliging Member States to effectuate a "treaty override" where a specific tax treaty would otherwise foresee an exemption (for example,

[173] According to its Art.1, the ATAD (Council Directive (EU) 2016/1164, [2016] OJ L193/1) "applies to all taxpayers that are subject to corporate tax in one or more Member States, including permanent establishments in one or more Member States of entities resident for tax purposes in a third country", i.e. also to third-country corporations with EU permanent establishments.

[174] See Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, [2017] OJ L144/1, which explicitly covers third-country situations.

[175] That concerns the scope of application as well as substantive provisions. Under Article 2(2) of the Commission's proposal for a CCTB COM(2016) 685, that Directive would, under certain conditions, also "apply to a company that is established under the laws of a third country in respect of its permanent establishments situated in one or more Member State". Likewise, third-country situations are, e.g., addressed in the area of anti-abuse provisions under Arts 59 and 61 of the Commission's proposal with regard to CFC rules and hybrid mismatches.

[176] The C(C)CTB has now been replaced by the idea of "Business in Europe: Framework for Income Taxation" (BEFIT), for which a legislative proposal has been announced for 2023. See the European Commission's Communication on "Business Taxation for the 21st Century", COM(2021) 251 final (18 May 2021), 11–13.

[177] See the European Commission's Communication on "Business Taxation for the 21st Century", COM(2021) 251 final (18 May 2021), 8, where it notes that "the principal method for implementing Pillar 2 will be an EU Directive that will reflect the OECD Model Rules with the necessary adjustments", and for a discussion of the potential interaction with tax treaties see Joachim Englisch and Johannes Becker, "Implementing an International Effective Minimum Tax in the EU" (2021) 224 *Materialien zu Wirtschaft und Gesellschaft* 58–66.

[178] See, e.g., Art.53 of the Commission's proposal for a CCTB, COM(2016) 685, under which the switch-over clause will "not apply where a convention for the avoidance of double taxation between the Member State in which the taxpayer is resident for tax purposes and the third country where that entity is resident for tax purposes does not allow switching over from a tax exemption to taxing the designated categories of foreign income". Another example is, e.g., the Commission's proposal for a significant digital presence (COM(2018) 147), where Article 2 specifies that the Directive would, "in the case of entities that are resident for corporate tax purposes in a third country with which the particular Member State in question has a convention for the avoidance of double taxation", only apply "if that convention includes provisions similar to Articles 4 and 5 of this Directive in relation to the third country and those provisions are in force". Complementing this delimitation of the Directive's scope, the Commission has simultaneously issued a recommendation to Member States to (bilaterally) amend their tax treaties with third countries and to include provisions on significant digital presences (see the Commission's Recommendation of 21.3.2018 relating to the corporate taxation of a significant digital presence, C(2018)1650). Another example is Art.9(5) ATAD 2 (Council Directive (EU) 2017/952, [2017] OJ L144/1), which generally provides that, "[t]o the extent that a hybrid mismatch involves disregarded permanent establishment income which is not subject to tax in the Member State in which the taxpayer is resident for tax purposes, that Member State shall require the taxpayer to include the income that would otherwise be attributed to the disregarded permanent establishment", but also postulates that this does not apply if "the Member State is required to exempt the income under a double taxation treaty entered into by the Member State with a third country".

based on Article 23A OECD MC) without a switch-over clause[179] (and indeed this provision is implemented in Germany in section 20(2) of the German Foreign Transaction Tax Act (AStG) and in Austria in section 10a(6)(2) of the Corporate Tax Act (KStG) as explicit treaty overrides). Other examples can be found in the ATAD's rules on hybrid mismatches (which might, for example, conflict with the exemption method in tax treaties)[180] and its general anti-abuse rule (which might go beyond tax treaty law).[181] An explicit treaty override is also foreseen in article 11(1) of the Commission's recent "Unshell Proposal",[182] according to which a Member State shall, under certain conditions, "disregard any agreements and conventions that provide for the elimination of double taxation of income, and where applicable, capital, in force" with the shell company's Member State.

In any event, EU law has supremacy and thus prevails over domestic (constitutional[183]) law and tax treaties[184]—*lex superior derogat de lege inferiori*. This is also true for Directives under Article 288(3) TFEU, which are addressed to the Member States and must be implemented by them.[185] Domestic law implementing Directives (for example, the ATAD) might therefore arguably take precedence over (pre- and post-accession[186]) tax treaties between the Member States (and "override" them),[187] even if that implementation is detrimental to taxpayers and irrespective of whether the specific tax treaty was concluded before or after a provision of a Directive entered

[179] See, e.g., Isabella M. de Groot, "Implementation of the Controlled Foreign Company Rules in the Netherlands" (2019) 47(8) *Intertax* 770, 781–782); Alexander Rust, "Controlled Foreign Company Rule (Articles 7 and 8 ATAD)" in Werner Haslehner, Katerina Pantazatou, Georg Kofler and Alexander Rust (eds), *A Guide to the Anti-Tax Avoidance Directive* (Cheltenham: Edward Elgar, 2020), p.174 (pp.182–183).

[180] See, e.g., Konstantin Karaianov, "The ATAD 2 Anti-Hybrid Rules versus EU Member State Tax Treaties with Third States: Is Override Possible" (2019) 59(2/3) *European Taxation* 52–59.

[181] See, with regard to the ATAD's general anti-abuse rule (GAAR) and its implementation into German law, specifically also BT-Drs 19/27632, 58 ("Da die zusätzlichen Bedingungen des [§ 50d] Absatzes 3 Satz 1 [of the German Income Tax Act] für das Entstehen eines Entlastungsanspruchs allerdings auf den unionsrechtlichen Vorgaben des Artikels 6 ATAD beruhen, müssen sie aufgrund des Vorrangs des Unionsrechts unabhängig davon gelten, ob ihnen im Einzelfall die Regelungen eines DBA entgegenstehen.").

[182] Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU COM(2021) 565 final (22 December 2021).

[183] CJEU, 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (11/70) [1970] E.C.R. 1125.

[184] CJEU, 5 February 1963, *van Gend & Loos* (26/62) EU:C:1963:1.

[185] CJEU, 17 December 1970, *Internationale Handelsgesellschaft* (11/70) EU:C:1970:114.

[186] CJEU, 8 September 2009, *Budějovický Budvar* (C-478/07) EU:C:2009:521; [2009] E.T.M.R. 65 at [98].

[187] See, e.g., CJEU, 14 February 1984, 278/82, *Rewe* (278/82) EU:C:1984:59; [1985] 2 C.M.L.R. 719 at [29]; CJEU, 27 September 1988, *Matteuccci* (235/87) EU:C:1988:412 at [14] and [20]–[21]; CJEU, 8 September 2009, *Budějovický Budvar* (C-478/07) EU:C:2009:521 at [98]; for recent analyses with further references see, e.g., Isabella M. de Groot, "Implementation of the Controlled Foreign Company Rules in the Netherlands" (2019) 47(8) *Intertax* 770, 782; Werner Haslehner, "The General Scope of the ATAD and Its Position in the EU Legal Order" in Werner Haslehner, Katerina Pantazatou, Georg Kofler and Alexander Rust (eds), *A Guide to the Anti-Tax Avoidance Directive* (Cheltenham: Edward Elgar, 2020), p.32 (p.60); Ilaria Panzeri, "Tax Treaties versus EU Law: Which Should Prevail?" (2021) 61(4) *European Taxation* 147, 147–149. It should be noted, however, that an intensive discussion exists about whether taxpayers can rely on tax treaties (e.g. with regard to a reduced withholding tax rate) notwithstanding the fact that the more beneficial reduction under domestic implementing law (e.g. implementing the withholding tax exemption of the Parent-Subsidiary-Directive) is not granted because of abuse; the Dutch Supreme Court recently held so and granted the reduced treaty withholding rate despite denying the withholding tax exemption under the Dutch implementation of the Parent-Subsidiary-Directive (see Dutch Hoge Raad, 10 January 2020, 18/00219, NL:HR:2020:21).

into force.[188] As for Member States' tax treaties with third countries, however, the TFEU contains a differentiating rule: Article 351 TFEU (ex-Article 307 EC) grandfathers (only) Member States' treaties with third countries, including tax treaties[189] that a Member State concluded before 1 January 1958 or, for States that acceded to the EU thereafter, before the date of their accession. Under Article 351 TFEU, the "rights and obligations" arising from such agreements "shall not be affected by the provisions of the Treaties". This, *a fortiori*, means that EU law takes precedence over post-accession tax treaties with third countries and, therefore, may directly affect the relevant Member State's (but of course not the third country's) tax system. Indeed, Article 351 TFEU aims merely at protecting the rights of third states (and, *vice versa*, the obligations of Member States) in compliance with international law.[190] However, it also calls on Member States to "take all appropriate steps to eliminate the incompatibilities established", including, where necessary, by denouncing the bilateral agreement.

The CJEU applies Article 351 TFEU not only to situations where provisions of a pre-accession tax treaty between a Member State and a third country are incompatible with the "provisions of the Treaties", that is, primary law,[191] but also when provisions of such a pre-accession tax treaty become incompatible with a subsequent Directive.[192] It remains, however, unclear if and under what conditions a Member State's post-accession tax treaties with third countries would be covered through an analogous application of Article 351 TFEU if those bilateral tax treaties have been compliant with EU law at the time of conclusion, but became substantively incompatible with a subsequent Directive.[193] Given those uncertainties and also the unclear scope of potential consequences, the EU should (and often does) take tax treaties with third States into account in its legislation.[194]

[188] See, e.g., CJEU, 10 November 1992, *Exportur* (C-3/91) EU:C:1992:420 at [8], and, with further references, Georg Kofler, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Vienna: Linde, 2007), p.72. However, it is not fully clear if States whose constitutional framework prohibits "treaty overrides" would rather be obligated to additionally amend or terminate their tax treaties to give full effect to the Directive's implementation into domestic law. See for that perspective Eric C.C.M. Kemmeren, *Principle of Origin in Tax Conventions* (Pijnenburg, 2001), pp.233–234.

[189] See, e.g., the Commission's Working Paper on "EC Law and Tax Treaties", DOC(05) 2306 (9 June 2005), paras 15–19.

[190] See, e.g., CJEU, 11 March 1986, *Conegate* (121/85) EU:C:1986:114, [24]–[25]; CJEU, 10 March 1998, *T. Port GmbH & Co* (C-364/95 and C-365/95) EU:C:1998:95 at [60]; CJEU, 16 May 2017, *Opinion 2/15 ("Singapore")* EU:C:2017:376 at [254].

[191] See, e.g., CJEU, 14 January 1997, *Centro-Com* (C-124/95) EU:C:1997:8 at [56]–[61].

[192] CJEU, 2 August 1993, *Jean-Claude Levy* (C-158/91) EU:C:1993:332.

[193] That issue was, e.g., explicitly left open in the Opinion of AG J. Kokott, 13 March 2008, *Total France* (C-188/07) EU:C:2008:174 at [94]–[98]. Favouring such an analogy with regard to the ATAD, e.g., Alexander Rust, "Controlled Foreign Company Rule (Articles 7 and 8 ATAD)" in Werner Haslehner, Katerina Pantazatou, Georg Kofler and Alexander Rust (eds), *A Guide to the Anti-Tax Avoidance Directive* (Cheltenham: Edward Elgar, 2020), p.174 (pp.182–183). For a discussion of the various arguments for and against precedence of tax treaties in scholarship see Paolo Arginelli, "The ATAD and Third Countries" in Adolfo Martín Jiménez (ed.), *The External Tax Strategy of the EU in a Post-BEPS Environment* (Amsterdam: IBFD, 2019), p.187 (pp.199–214); Isabella M. de Groot, "Implementation of the Controlled Foreign Company Rules in the Netherlands" (2019) 47(8) *Intertax* 770, 782; Werner Haslehner, "The General Scope of the ATAD and Its Position in the EU Legal Order" in Werner Haslehner, Katerina Pantazatou, Georg Kofler and Alexander Rust (eds), *A Guide to the Anti-Tax Avoidance Directive* (Cheltenham: Edward Elgar, 2020), p.32 (pp.61-62); Ilaria Panzeri, "Tax Treaties versus EU Law: Which Should Prevail?" (2021) 61(4) *European Taxation* 147, 150–155.

[194] The EU Commission is aware of this issue and generally does not intend to interfere with tax treaties between Member States and third countries that have been concluded before a conflicting Directive was put in place. See, e.g.,

D. "Treaty Overrides" and the EU Dispute Resolution Directive

From an EU perspective, the Commission has long viewed the lack of an overall binding dispute resolution procedure for intra-EU situations as an issue to be addressed for both internal market reasons and global competitiveness. Having announced further work in this area in the early 2010s,[195] the Commission in 2016 made a proposal for a Directive on dispute resolution,[196] which was swiftly adopted by the Council. This 2017 Tax Dispute Resolution Directive (TDRD)[197] provides a binding procedural mechanism for resolving "disputes" between Member States regarding EU resident taxpayers[198] when those disputes arise "from the interpretation and application" of agreements and conventions (that is, tax treaties between Member States and the EU Arbitration Convention[199]) that provide for the elimination of double taxation of income and, where applicable, capital,[200] which is especially important for "disputes leading to double taxation".[201] The notion of "double taxation" is specifically defined in Article 2(1)(c) TDRD,[202] and has a specific relevance: Member States may exclude arbitration (but not access to the MAP) on a case-by-case basis if a dispute does not involve "double taxation".[203] The notions of "dispute"

concerning the work on the Common Consolidated Corporate Tax Base (CCCTB) para. 9 of the EU Commission's workshop document on "Transactions and dealings between the group and entities outside the group" (CCCTB\RD\003\doc\en, 1 September 2010), where it is noted that "agreements between Member States and third countries concluded before the CCCTB enters into force shall not be affected by conflicting common rules, ie existing DTCs with third countries will take precedence over any conflicting CCCTB rules. For example, if switch over from exemption to credit is not foreseen under a DTC with a third country (because double taxation is relieved by exemption) then this 'CCCTB' rule will not be applied in the context of that DTC. Member States would be expected to undertake the necessary steps to generally align their existing international agreements with the Directive to remove these differences".

[195] See, e.g., the Commission's Communication on "Double Taxation in the Single Market", COM(2011) 712 final (11 November 2011), at p.11, where it is stated that the "Commission sees a need to analyze the improvements that can be made to the procedures for the resolution of double taxation disputes within the EU. In particular, the possibility of a mechanism to effectively and swiftly resolve these disputes in all areas of direct taxation should be explored".

[196] Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union, COM(2016) 686 (25 October 2016).

[197] Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, [2017] OJ L265/1.

[198] TDRD 2017 Art.2(1)(d)).

[199] Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, [1990] OJ L225/10, as amended. See also the Revised Code of Conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, [2009] OJ C322/1.

[200] See, e.g., the comprehensive analysis by Harm Mark Pit, *Dispute Resolution in the EU* (Amsterdam: IBFD, 2018).

[201] See Pt 1 of the Preamble of Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union [2017] OJ L265/1.

[202] TDRD art.2(1)(c specifically defines "double taxation" as "the imposition by two or more Member States of taxes covered by an agreement or convention referred to in Article 1 in respect of the same taxable income or capital when it gives rise to either: (i) an additional tax charge; (ii) an increase in tax liabilities; or (iii) the cancellation or reduction of losses that could be used to offset taxable profits". It is not entirely clear what those three prongs encompass and how they relate to each other, but they have the same "general theme" of addressing the situation that a taxpayer's current or future tax position is adversely affected as a result of multiple taxation (see Filip Debelva and Joris Luts, "The European Commission's Proposal for Double Taxation Dispute Resolution: Turing the Tide?" (2017) 71:5 *Bulletin for International Taxation* Ch.3.2.4.2; Harm Mark Pit, *Dispute Resolution in the EU* (Amsterdam: IBFD, 2018), Ch.26.3.3.; R. Roland Ismer, "Was ist internationale Doppelbesteuerung?" in Roland Ismer, Ekkehart Reimer, Aleaxnader Rust and Christian Waldhoff (eds.), *Territorialität und Personalität, Festschrift für Moris Lehner* (Cologne: O. Schmidt, 2019), p.27 (pp.42–43)).

[203] TDRD 2017 Art.16(7).

and "double taxation" hence overlap, but are not used interchangeably.[204] For example, the Directive's notion of "double taxation" clearly does not cover situations of so-called "virtual double taxation", where, for example, a tax treaty would, in principle, require exemption even if the other State does not tax the income (for example, because of an exemption or a zero rating under domestic law or an unresolved negative conflict of qualification);[205] nevertheless, such non-exemption would very well be a "dispute" under Article 1 TDRD.[206]

In the framework of the TDRD, the issue of treaty overrides (especially those that result in "double taxation" under Article 2(1)(c) TDRD) becomes quite interesting. In such cases the involved Member States might well agree on the "correct" interpretation and application of their tax treaty, but one of the States has willfully implemented overriding national legislation (for example, specific domestic anti-avoidance provisions).[207] While one might easily conclude that the application of domestic rules in violation of treaty obligations indeed creates a "dispute"[208] (and oftentimes also "double taxation"[209]), some have cautioned that such cases might not even be viewed as a "dispute" over the interpretation or application of a tax treaty.[210] Moreover, both the Advisory Commission and the Alternative Dispute Resolution Commission "shall base its opinion" not only "on the provisions of the applicable agreement or convention referred to in Article 1" but "as well as on any applicable national rules"),[211] which "raises questions about

[204] For an extensive analysis of those notions and their interaction see Georg Kofler, "The EU Tax Dispute Resolution Directive: What is a 'Dispute'? What is 'Double Taxation'?", in: Gordana Ilic-Popov (ed.), *Essays in Honor of Professor Emiritus Dejan Popovic — Liber Amicorum* (University Belgrad, 2021), pp.213–229, with further references.
[205] See also Filip Debelva and Joris Luts, "The European Commission's Proposal for Double Taxation Dispute Resolution: Turing the Tide?" (2017) 71(5) *Bulletin for International Taxation* Ch.3.2.4.2. This corresponds, at least with regard to access to arbitration, with the explicit rule in art.1 of the Commission's proposal ("This Directive does not apply to any income or capital within the scope of a tax exemption or to which a zero tax rate applies under national rules").
[206] See Filip Debelva and Joris Luts, "Directive on Tax Dispute Resolution Mechanisms in the EU" (2018) 89 *Tax Notes International* 71, 73 with fn.14. Such situations are also covered by OECD MC Art.25(1), as the "mutual agreement procedure is also applicable in the absence of any double taxation contrary to the Convention, once the taxation in dispute is in direct contravention of a rule in the Convention. Such is the case when one State taxes a particular class of income in respect of which the Convention gives an exclusive right to tax to the other State even though the latter is unable to exercise it owing to a gap in its domestic laws" (see OECD MC Comm. 2017 Art.25 No.13).
[207] See, from the perspective of OECD MC Art.25(1), also OECD MC Comm. 2017 Art.25 No.14, where it is noted that "if a change to a Contracting State's tax law would result in a person deriving a particular type of income being subjected to taxation not in accordance with the Convention, that person could set the mutual agreement procedure in motion as soon as the law has been amended and that person has derived the relevant income or it becomes probable that the person will derive that income".
[208] See also, e.g., Karsten Flüchter, "Streitbeilegungs-Richtlinie", in Harald Schaumburg and Joachim Englisch (eds.) *Europäisches Steuerrecht*, 2nd edn. (Cologne: O. Schmidt, 2020), m.no. 24.29.
[209] See, however, also the Statement by the Commission in Doc. 9643/17 ECOFIN 457 (9 June 2017), according to which the case-by-case exclusion under TDRD Art.16(7) "is to be understood as including cases not involving double taxation where domestic or treaty anti-abuse provisions were applied".
[210] So, e.g., Gerrit Groen, "Why the Revised EU Arbitration Directive Is a Big Step in the Right Direction" (2017) 87 *Tax Notes International* 475, 477; Giuseppe A. Corciulo, "Arbitration under the Dispute Resolution Directive — Does the Directive solve the problems encountered with the EU Arbitration Convention?" in Alicja Majdanska and Laura Turcan (eds) *OECD Arbitration in Tax Treaty Law* (Vienna: Linde, 2018), p.447 (p.454); see also Gerrit Groen, "The Scope of the Proposed EU Arbitration Directive" (2017) 86 *Tax Notes International* 243, 250–251.
[211] TDRD Art.14(2).

how a commission should deal with cases of treaty override".[212] However, excluding straightforward treaty overrides from the scope of the Directive would clearly undermine its useful effect, the so-called *effet utile* of EU law: not including treaty overrides in the Directive's scope would, in the extreme, permit a Member State to avoid all arbitration by simply issuing domestic legislation that neglects its tax treaty obligations.

IV. Conclusions

In 2015, the German Federal Constitutional Court brought to a conclusion a decade-long, passionate, and sophisticated discussion about the constitutional permissibility of treaty overrides in Germany: the principle of democracy and parliamentary discontinuity generally requires that later legislatures be able to revoke legal acts of previous legislatures ("Power in democracy is but temporary"). As the legislature is not competent to denounce international treaties under the German constitution,[213] it must be able to deviate from international treaties through treaty overrides. Neither the rule of law nor the principle of the Constitution's openness to international law yield a different result. While confirming the *lex posterior*-principle, the German Federal Constitutional Court also made it clear that one must always choose an interpretation that is favourable to international law, up to the methodical limits of statutory interpretation. If, therefore, a treaty override has been made explicit by the legislature (for example, "…notwithstanding the provisions of a convention…"), the later domestic law prevails, and it is moreover *lex specialis* in relation to subsequently concluded tax treaties. Conversely, a tax treaty would prevail over subsequent domestic law as *lex specialis* if a treaty override is neither made explicit nor can be inferred, through interpretation, without doubt.

This German constitutional perspective (which is shared also in Austria), sharpens the focus back not only on the policy and economic implications of treaty overrides, but also on the level of international law. Treaty overrides are, as was also acknowledged by the German Federal Constitutional Court, not irrelevant on the international plane, as States have the obligation to perform the treaties they have entered into in good faith.[214] Major infractions would even entitle other States to terminate the treaty or to suspend its operation, irrespective of whether the treaty provides for a right of denunciation,[215] while minor infractions generally entitle other States only to denounce the treaty in the cases and under the conditions envisaged in Article 56 VCLT, to demand that the treaty be properly performed, or—as a subsidiary measure—to demand pecuniary reparation. While these remedies have not gained much practical relevance in the world of international taxation, they nevertheless invite a discussion about what treaty overrides really are, and who decides that a treaty override is indeed a treaty override. Numerous examples from German case law show that courts have found a treaty override to exist (on the level of domestic

[212] See Jonathan Schwarz, *Schwarz on Tax Treaties*, 5th edn (Kluwer Law International, 2018), para.28-025, noting that this "raises questions about how a commission should deal with cases of treaty override or underride".
[213] Indeed, in Germany the executive alone has the competence to terminate a treaty (BVerfGE 68, 1 (83 f); BVerfGE II 90, 286, (358); BVerfGE 141, 1 (23)). The situation is slightly different in Austria: It is also the executive that terminates a treaty, but it needs parliamentary consent to do so (see Theo Öhlinger and Andreas T. Müller, "Artikel 50 B-VG", in Karl Korinek and Michael Holoubek (eds), *Österreichisches Bundesverfassungsrecht* (14. Lfg. 2018), m.no. 18).
[214] VCLT Art.26.
[215] VCLT Art.60.

application), while arguably the treaty was not violated when viewed through the lenses of the OECD or the treaty partners in their consultations. Also, international law has some "pressure valves" to release potential tensions. For example, if the other State does not object to or take action for a long period against the first State's treaty override and hence acquiesces,[216] one could argue that the treaty override was validated under international law,[217] especially if the other State has been properly informed.[218] Finally, treaty overrides may sometimes be viewed as being merely transitory (if domestic legislation "foreruns" later changes in the OECD MC Comm.), and it might even be argued that their practical relevance will decrease over time because of progressive changes in domestic treaty policy (for example, the use of subject-to-tax rules, anti-abuse rules, activity clauses, switch-over clauses, etc.) and, specifically, because the Multilateral Instrument (MLI) has addressed a number of anti-abuse concerns.

The law of the EU adds an additional layer of complexity to the issue of treaty overrides. The vast bilateral treaty network between the 27 EU Member States is still the main legal framework to avoid double taxation in the EU, and as such supports the realisation of the European internal market. Indeed, the abolition of double taxation is an objective of EU law, as the overlap of taxing jurisdictions may result in distortions of the internal market, and treaty overrides may hence be viewed as a "step back" in European economic integration. That said, treaty overrides as such are not prohibited by the EU fundamental freedoms or the principle of EU loyalty, even if they result in double taxation. The CJEU does not see itself as being in a position to interfere with the division of taxing powers between the Member States, and so it has refrained from accepting an overridden tax treaty as a benchmark to identify the Member State which caused double taxation. Conversely, EU law can even have the effect of mandating treaty overrides: recent EU Directives, for example, the ATAD, contain provisions that possibly cause conflicts with tax treaties between the Member States and between Member States and third countries. While EU law (and its implementation into the domestic laws of the Member States) clearly prevails over *inter-se* tax treaties between the Member States, the EU legal framework provides only rudimentary answers as to the relationship between Member States' treaties and third countries. These issues are not fully resolved by either Article 351 TFEU or the CJEU's case law, and indeed EU legislation oftentimes takes these potential conflicts into account. Finally, and quite importantly, EU law might even provide a procedural tool against treaty overrides: the 2017 TDRD provides for mandatory arbitration for disputes arising "from the interpretation and application" of tax treaties if such dispute leads to "double taxation". In light of the *effet utile* of EU law, double taxation caused by a treaty override could arguably be considered such a "dispute" and be resolved through arbitration. As the TDRD is a new tool, however, it remains to be seen how it will be applied in practice and if it will turn out to be the death blow for domestic treaty overrides in the EU.

[216] VCLT Art.45(b).
[217] VCLT Art.31(3)(b).
[218] OECD MC Art.2(4).