

## Chapter IV

# The European Court of Justice and the Free Movement of Tax Treaty Judgments

*How the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters may become a model to create uniform tax treaty interpretation within the EC*

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### 1. Introduction

In 1979, Jenard used the term “free movement of judgments” in his Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Criminal Matters (hereafter: the Brussels Convention)<sup>390</sup>, connecting the mutual recognition of judgments in civil and commercial matters to the fundamental principles of free movement of the Treaty of the European Community<sup>391</sup>. Thus, he indicated the importance of this matter for achieving the objectives of the EC Treaty. But this convention is not only interesting for its implications on international private law in the Community. It was also the first time<sup>392</sup> that a sophisticated system of discretionary and compulsory referrals by courts of the Member States to the European Court of Justice (ECJ), including an advisory jurisdiction, was established under art. 239 EC Treaty<sup>393</sup> for a subject matter referred to in art. 293 EC Treaty<sup>394</sup>. The

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<sup>390</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Criminal Matters of 27 September 1968, OJ 1972 L299/32. This Convention has entered into force since 1 February 1973, and is supplemented with a Protocol dated 3 June 1971, which has entered into force on 1 September 1975 (further discussed below). The (official) Jenard Report on the Convention was published in 1979 (OJ 1979 C59/3). The Jenard’s phrase was also adopted by the European Court of Justice (Case 145/86 *Hoffman v. Krieg* [1988] ECR 645, 666)

<sup>391</sup> Titles I and III of the EC Treaty

<sup>392</sup> Earlier, in 1965, the Protocol on Privileges and Immunities of the European Communities explicitly confers jurisdiction on the ECJ, but simply by stating that property of the Communities shall not be the subject of any administrative or legal measure of constraint without the authorization of the ECJ. This Protocol was signed on 8 April 1965, OJ 1967 No. 152, 13 July 1967. Other, later examples of conventional establishment of the jurisdiction of the ECJ for multilateral treaties concluded under art. 293 EC Treaty are found below.

<sup>393</sup> This article (ex art. 182) reads as follows: “The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of this Treaty if the dispute is submitted to it under a special agreement between the parties”.

<sup>394</sup> This article (ex art. 220) reads as follows: “Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the

Member States' objective of conferring upon the ECJ the jurisdiction to interpret the Brussels Convention was "to create uniform rules of international jurisdiction throughout the Community"<sup>395</sup>, with reference to art. 293 EC Treaty.

Another EC objective which currently only takes the form of a qualified duty in art. 293 EC Treaty, is the avoidance of double taxation throughout the Community. At this point in time, the avoidance of double taxation with respect to income within the EC is mainly achieved by means of bilateral tax treaties and, with respect to a particular kind of double taxation, by means of the Arbitration Convention. Although the ECJ is certainly playing an increasing role in proofing those tax treaty provisions to the basic freedoms of the EC Treaty<sup>396</sup>, it is not contributing much to the uniform interpretation of tax treaty provisions throughout the EC.

This article is a brief inquiry into the possibility of using a system of preliminary questions to the ECJ, as did the Brussels Convention, to achieve uniform tax treaty interpretation throughout the EC. In other words, to do for international tax law what the Brussels Convention did for international private law. The possibility of creating uniformity of tax treaty interpretation by means of the ECJ can be seen in the context of the present attention amongst academics and international organizations for the resolution of tax treaty disputes and the uniformity of tax treaty interpretation<sup>397</sup>.

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benefit of their nationals: [...] – the abolition of double taxation within the Community [...] – the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards”.

<sup>395</sup> 145/86 *Hoffman v. Krieg* [1988] ECR 645, 666.

<sup>396</sup> Hinnekens, L., "Compatibility of bilateral tax treaties with EC law – The Rules", *EC Tax Review*, 1994, p. 146.; Hinnekens, L., "Compatibility of bilateral tax treaties with EC law – Application of the Rules", *EC Tax Review*, 1995, p. 202.; Eicker, K., "Tax treaties and EC Law: Comment on the Gilly Case", *E.T.*, 1998, p. 325.; Avery Jones, J., "What is the difference between Schumacker and Gilly?", *E.T.*, 1999, p. 2.; Gassner/Lang/Lechner (ed.), *Tax Treaties and EC Law*, Kluwer, 1997.; Herzig/Deutzenberg, "Der EWG-Vertrag und die Doppelbesteuerungsabkommen", *D.B.*, 1992, p. 2523.; Rainer, "Doppelbesteuerungsabkommen und die EuGH-Rechtsprechung zu den direkten Steuern", *IstR*, 1995, p. 475.

<sup>397</sup> Bricker, M.P., "Arbitration Procedures in Tax Treaties", *Intertax*, 1998, p. 97. See also Avery Jones, J.F. et al, *The Legal Nature of the Mutual Agreement Procedure under the OECD-Model Convention*, *B.T.R.*, 1979, p. 333 and 1980, p. 13.; AZZI, J. "Time to Think about an International Tax Court", *B.I.F.D.*, 1998, p. 344.; International Chamber of Commerce, *Resolution of International Conflicts*, 16 June 1984 (quoted by Bricker, *ibid*, 105); Tanzi, V., "Forces that Shape Tax Policy", in Stein, H., (editor) *Tax Policy in the 21<sup>st</sup> Century*, New York, John Wiley & Sons,

Questions on international resolution of tax treaty disputes and interpretation are no longer of a mostly academic nature as more and more countries adopt some kind of an arbitration clause in their tax treaties<sup>398</sup>. It is particularly relevant for the subject of this article that a referral to the ECJ was already included in the new German-Austrian tax treaty<sup>399</sup>. The merits of that referral will be discussed first, as well as the legal basis of such referral, art. 239 of the EC Treaty itself. Then, a suggestion is formulated to pursue uniform international tax treaty interpretation throughout the Community, along the lines of the Brussels Convention.

## **2. Reference under 239 of the EC Treaty to the ECJ in the Tax Treaty Between Austria and Germany.**

In the following part of this article, the jurisdiction of the ECJ as established by the Austrian-German DTC is considered. More specifically, that referral to the ECJ is examined to be compared with another reference made to the ECJ in a treaty, also under art. 293 and 239 EC Treaty; the Brussels Convention.

The Austrian-German DTC<sup>400</sup> has, for the first time<sup>401</sup>, included a reference to the ECJ. Art 25 (5) of that tax treaty reads as follows:

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1988.; Edwardes Ker, *Tax Treaty Interpretation*, In Depth Publishing, 1994, Chapter 2, 2.03.; IFA Resolutions 291 of the 1981 Congress.; IFA, Vicchi, *Interpretation of Double Taxation Conventions*, 1993, Cahiers de Droit Fiscal International, vol. 78a, , p. 175.; Weizman, L., *The Continental Shelf in Danish Income Tax Treaties*, *E.T.*, 1993, p. 269.; Zuger, M., “ICC Proposes Arbitration in International Tax Matters”, *E.T.*, 2001, 221; Zuger, M., “The ECJ as Arbitration Court for the New Austria-Germany Tax Treaty”, *E.T.*, 2000, p. 101.; Van Raad, K., “Interpretation of Tax Treaties by Tax Courts”, *E.T.*, 1996, p. 6.; Van Raad, K., “International Coordination of Tax Treaty Interpretation and Application”, *Intertax*, 2001, p. 212.; Lindencrona, G and Mattson, N, *Arbitration in Taxation*, Kluwer, 1983.; Lindencrona, G and Mattson, N., “How to resolve international tax disputes? New approaches to an old problem”, *Intertax*, 1990, p. 266 (with further references).; Van Der Bruggen, E., “Compulsory Jurisdiction of the International Court of Justice in Tax Cases: Do We Already Have an International Tax Court?”, *Intertax*, 2001, p. 250.

<sup>398</sup> For a recent overview, see Zuger, M. “ICC Proposes Arbitration in International Tax Matters”, *ibid*, ft.397, p. 222.

<sup>399</sup> Art. 25 (5).; Further discussed below.

<sup>400</sup> Convention between the Federal Republic of Germany and the Republic of Austria for the Avoidance of Double Taxation with respect to Taxes on Income and Capital, (signed) 24 August 2000.

<sup>401</sup> Arbitration clauses in different shapes and wordings have already figured in tax treaties, but it is the first time the ECJ is appointed as final resort. An earlier reference

“If any difficulty or doubt arising as to the interpretation or application of this Convention cannot be resolved by the competent authorities in a mutual agreement procedure within a period of three years after the question was raised pursuant to the previous paragraphs of this article, at the request of the person identified in Paragraph 1, the States shall be under obligation to submit the case to arbitration as defined by Article [239] of the EC Convention with the Court of the European Communities”<sup>402</sup>.

The jurisdiction the ECJ has been attributed by this “special agreement” is not established for all difficulties or doubts arising to the interpretation or application<sup>403</sup> of the treaty. A referral to the ECJ is subordinated to a chain of conditions that have to be fulfilled cumulatively and which are discussed below.

### 2.1. First condition: the mutual agreement procedure was followed

The ECJ will not have jurisdiction pursuant to art 25 (5) of the Austria-German treaty, unless the mutual agreement procedure of the treaty was followed first. This is clear from the text of the paragraph (“raised pursuant to the previous paragraphs of this Article”). If the difficulty or doubt is never raised in the context of a mutual agreement procedure, for example because the three years described in par. 1 of art. 25 had already

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to the ICJ can be found in the tax treaty between Germany and Sweden. The treaty refers to the European Convention for the Peaceful Settlement of Disputes of 1957, and establishes the jurisdiction of the ICJ. The wording of the article in that treaty is as follows: “For the settlement of international disputes resulting from this Convention, the provisions of Chapter I, II and IV of the European Convention, dated April 29, 1957, for the Peaceful Settlement of Disputes shall apply. The Contracting States may, however, agree to order in place of the proceedings set forth therein a court of arbitration whose decision shall be binding for them. This court of arbitration should consist of professional judges from the Contracting States or other States or international organizations. Its proceeding shall be regulated according to the internationally recognized principles for arbitration proceedings. The affected parties shall be granted due process of law and the right to file their own motions. The decision shall be based on the conventions in force between the Contracting States and of general international law; a decision *ex aequo et bono* is not to be allowed. As long as an agreement concerning the calling and composition of the court of arbitration as well as concerning its rules of procedure has not been reached, then each Contracting State is at liberty to proceed according to Clause 1”.

<sup>402</sup> This translation is adopted from the article of M. Zuger, *ibid*, ft.397.

<sup>403</sup> A “difficulty or doubt arising as to the interpretation or application of this Convention” means both questions of law (interpretation) and matters that primarily arise in connection with determining the decisive facts of a case (application); Vogel, K., *On Double Taxation Conventions*, 3rd ed., Kluwer, 1997, p. 1379.

lapsed when the taxpayer raised the issue, the jurisdiction of the ECJ cannot be established.

The question whether the same reasoning would apply if the mutual agreement was not started on the behest of the taxpayer, but by the authorities themselves (who are not limited by addressing a specific case within three years) or under art. 25 (3), remains a purely academic one because the jurisdiction can only be established “on the request of the person mentioned in par. 1” (see below).

It is uncertain what would happen if the taxpayer would request a mutual agreement procedure, but the contracting state *refuses* to initiate such a procedure. With particular reference to Austria and Germany this is perhaps not very likely, since both countries have to some extent acknowledged that tax authorities usually do not have a right to refuse entering into the procedure<sup>404</sup>. Tax authorities in other countries may take a more strict position on the matter<sup>405</sup>, for example because they consider that there is little chance of success anyway<sup>406</sup>.

If the procedure was never followed, one could argue that the difficulty or doubt can obviously never be solved by a mutual agreement procedure, and therefore the conditions of art. 25 (5) would be fulfilled. The context of the provision, however, seems to indicate that the contracting states did not have the intention to submit to arbitration any disputes they themselves did not wish to submit to arbitration, except in the case where a mutual agreement procedure did not produce a solution within three years. That can be concluded from the reference to the requirement of the mutual agreement procedure being followed during three years. In the opinion of the present author, therefore, it must be assumed that if the mutual agreement procedure is never set in motion, for whatever reason, the jurisdiction of the ECJ can never be established under art. 25 (5) of the Austrian-German tax treaty.

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<sup>404</sup> In a case before the German federal tax court, the court pointed out that usually the taxpayers’ request must be complied with, although in that particular situation (the issue concerned German domestic law) the refusal by German tax authorities to initiate the mutual agreement procedure was justified; BFH, 26 May 1982, I.R 16/78, 1982, BStBl., II, 583.

<sup>405</sup> As was pointed out by Baker, there may be circumstances where the competent authority indeed has such a right: Baker, Ph., *Double Taxation Conventions and International Tax Law*, 2 nd ed, Sweet & Maxwell, London, 1994, p. 416-417. ; IFA General Report, Cahiers 1981, p. 109-112.

<sup>406</sup> IFA General Report, Cahiers 1981, p. 109-112.

Furthermore, when par. 5 is read in conjunction with par. 1 of art. 25, it is clear that all other requirements for applying the mutual agreement procedure under par. 1 need to be respected (see below).

### 2.2. Second condition: no solution through mutual agreement for three years

In order for the ECJ to have jurisdiction under the treaty, it is required that the mutual agreement procedure was carried on for three years since the question was first raised without reaching a solution.

ZUGER has noted criticism on the length of this three-year period<sup>407</sup>. Indeed, when compared to other arbitration clauses (such as in bilateral investment protection treaties), three year does seem quite long<sup>408</sup>.

With respect to this second condition, the requirement of “a solution” does not mean “a solution which is satisfactory to the taxpayer”. In other words, when the competent authorities do agree with each other, but do not agree with the taxpayer’s opinion, the ECJ’s jurisdiction cannot be established under art 25 (5) of the Austria-German tax treaty, highlighting the difference between a legal proceeding before the national court and this arbitration procedure. Such a situation could for example develop when the taxpayer is taxed, according to him contrary to the provisions of the tax treaty, under a CFC-type tax statute in the other state. His state of residence, possibly required to do so, starts a mutual agreement procedure, but actually agrees with the other state that CFC rules do not conflict with the treaty. The taxpayer may not agree with this “solution”, but he cannot, in the opinion of the present author, “force” the contracting states to submit the case to the ECJ. There is, after all, agreement between the contracting states and therefore a “dispute between the Member States” as provided by art. 239 EC Treaty, does (no longer) exist.

### 2.3. Third condition: on request of the taxpayer

The mention in art. 25 (5) of the Austrian-German tax treaty of the request of the taxpayer creates some uncertainty as to the exact scope of the arbitration. The text reads that the difficulty or doubt arising as to the interpretation or application of the treaty, the case shall be submitted to

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<sup>407</sup> Zacherl, SWI 1999 at. 57 (quoted by Zuger, *ibid*, ft.397.)

<sup>408</sup> 6 months is the usual length (Dolzer and Stevens, *Bilateral Investment Treaties*, Martinus Nijhof, 1995, p. 119)

the ECJ “*at the request of the person identified in Paragraph 1*”. In par. 1, that person is identified as follows:

“Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under Paragraph 1 of Article 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention”.

A “person” has been defined in art. 3 (general definitions) and refers to “any individual or company or group of people”<sup>409</sup>. It does *not* include the “Contracting States” nor does it include the “Competent Authorities”<sup>410</sup>.

What is the precise nature of the mention “at the request of the person identified in Par. 1”, particularly in view of interpretative mutual agreement procedures that are carried out between the contracting states themselves, without the direct involvement of a particular taxpayer<sup>411</sup>? Does this mean that such interpretative mutual agreement procedures cannot lead to a compulsory referral to the ECJ, because there is no taxpayer to formulate the request? Or does it mean that *if* a particular taxpayer is involved, he must agree to submit the matter to the ECJ?

It is fair to say that it remains unclear if the ECJ may be asked to adjudicate disputes that do not involve at least one taxpayer. Perhaps, difficulties or doubts arising as to the interpretation or application of the treaty that are not raised in the context of a specific case, cannot find their way to the ECJ under art. 25 (5) of the tax treaty<sup>412</sup>. It is also relevant to

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<sup>409</sup> Art. 3 d) Austrian-Germany tax treaty

<sup>410</sup> In 1992, the text of art. 4 (1) (“resident”) of the OECD Model was changed to add “and also includes that State and any political subdivision or local authority thereof”. The definition of “person” remained unchanged.

<sup>411</sup> Baker, Ph., *ibid*, ft.405, p. 420.

<sup>412</sup> It is true that most if not all (potential) disputes between contracting states become apparent in the context of a particular case, including cases submitted for a mutual agreement procedure. This does not change the fact that a mutual agreement achieved under art. 25 (or even an arbitral award under art. 25 (5) of the Austrian-German tax treaty, so will the conclusion of this author be) only concerns one taxpayers’ case, and in order for the same agreement to be applied to all taxpayers in similar circumstances

note in this respect that art. 25 par. 5 mentions “a mutual agreement procedure pursuant to the previous *paragraphs*” – plural. That would normally include also procedures under par. 3 of art. 25, those that are carried out between competent authorities without reference to a specific taxpayer’s case. However, if such an interpretative difficulty would arise, who would be the taxpayer whose “request” is necessary to establish the jurisdiction of the ECJ?

To a certain extent, this difficulty in interpretation loses its practical importance when we consider that most conflicts in interpretation between two contracting states will arise at the occasion of a particular case, and the condition “at the request of the person identified in Par. 1”, if it indeed is a condition, can be fulfilled. However, there is of course no guarantee that the taxpayer will indeed cooperate in a procedure which is important in the eyes of one contracting state.

#### 2.4. Critical notes on the referral to the ECJ by the Austria-Germany tax treaty

The reference to the ECJ under art. 25 (5) of the Austria-Germany tax treaty is subject to severe practical and legal restrictions. Since the jurisdiction of the ECJ can only be established after three years of fruitless mutual agreement procedure *and* upon request by a taxpayer, it will only play a role in specific cases (which are not necessarily questions of law) where the taxpayer has the courage to face proceedings that may drag on for years and years. After all, the docket of the ECJ is quite full as it is, and a decision from that court may also take several years, in addition to the three years already “lost”.

Art. 25 (5) of the Austria-Germany is not an ideal mechanism to obtain answers to questions of law, or tax treaty interpretations relevant for all taxpayers. By placing it after three years of mutual agreement procedure, and by creating uncertainties about the access to the ECJ in cases where there is no particular taxpayer that requests for it, the potential role the ECJ can play is significantly curtailed. The commendable intention of the drafters of the arbitration clause is that the actual reference to the ECJ or, rather, the fact that such reference is binding after three years, that some solution would be found. The mechanism provides in a form of diplomatic protection which is guaranteed under tax treaty law, where a state promises to act before an international court on behalf of one of its

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in a manner binding upon the tax authorities of both states, a larger, interpretative agreement is necessary.

subjects. The mere possibility of the ECJ gaining jurisdiction over the matter might induce the competent authorities to reach an agreement, and reduce the possibility of a state simply refusing to cooperate in a mutual agreement procedure. On the other hand, it might also induce competent authorities not to make any “concessions” in a mutual agreement procedure, or spend considerable resources trying to reach an agreement because the arbitration procedure will provide an answer anyway.

What would the result be if every bilateral tax treaty between Member States of the EC contained such a clause? Would this create more uniformity in international tax law throughout the Community, as the Brussels Convention did for international private law? In my opinion, it would not. True uniformity can only mean that those who have the authority to interpret the tax treaty in last instance will do so in a homogeneous manner, irrespective of the forum where the question is raised. In other words, when tax treaty questions receive similar answers, wherever they arise. It has to be noted that in most countries the courts have the last say on legal interpretation of tax treaties, and not the tax authorities<sup>413</sup>. As long as mutual agreements are under the internal law of most countries not legally binding on the courts<sup>414</sup>, imposing uniformity upon tax authorities by means of adding arbitration alone (and, what is more, only in very limited cases) will not bring about the desired result. All this is of course not to say that the mutual agreement procedure, with or without arbitration attached to it, is not fulfilling an absolutely crucial role in solving disputes in the application of tax treaties. The generally satisfactory experience noted by the OECD is probably justified<sup>415</sup> but its contributions to uniform tax treaty interpretation (questions of law) and the development of international tax law as a whole, can however be doubted, and has been doubted for quite some time<sup>416</sup>. It is unlikely that adding an arbitration clause after the mutual agreement procedure will change the limited contribution the mutual agreement is currently making to international uniform tax treaty interpretation, which was also not the

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<sup>413</sup> The OECD Commentary on art. 25 (3) suggests a strict interpretation of the text of the paragraph; Commentary 25 par 32.

<sup>414</sup> Avery Jones, J., “The relationship between the mutual agreement procedure and internal law”, *EC Tax Review*, 1999, p. 4.

<sup>415</sup> OECD Commentary, art. 25/45.

<sup>416</sup> Avery Jones, J., et al., “The legal nature of the mutual agreement procedure –II”, *B.T.R.*, 1980, p. 20. Vogel, K., *On Double Taxation Conventions*, 3d ed., Kluwer, 1997, p. 1379 (par. 105); See also the interesting comments Frowein makes on the mutual agreement procedure in (German) double taxation conventions from the perspective of uniform interpretation of treaties by domestic courts in Jacobs, F. and Roberts, S., (eds) *The Effect of Treaties in Domestic Law*, Sweet & Maxwell, 1987, p. 84-86.

objective the drafting parties of this particular arbitration clause had in mind.

### **3. Jurisdiction of the ECJ under Art. 239 EC Treaty<sup>417</sup>**

#### **3.1. General remarks**

Art 239 of the EC Treaty reads:

“The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of this Treaty if the dispute is submitted to it under a special agreement between the parties”

This article of the EC Treaty allows the Member States to confer upon the ECJ adjudicatory authority in cases where the Member States otherwise would not have one<sup>418</sup>. The practical effect of art. 239 EC Treaty is restricted by the main, compulsory head of jurisdiction of the EC Treaty, art. [ ex art. 170].<sup>419</sup>

It may be added that, once established, the competence of the ECJ is exclusive because it falls within the scope of art. 292 EC Treaty<sup>420</sup>. In other words, Member States are then no longer free to seek adjudication by other bodies, such as the International Court of Justice (ICJ). It may be pointed out however, that this does not impede states from providing other means of settlement *prior* to the establishment of the jurisdiction of the ECJ. Since no obligation exists in the EC Treaty to submit these cases to the ECJ, parties may in mutual agreement withdraw the case from the jurisdiction of the Court even after having submitted the dispute to the

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<sup>417</sup> Campbell, D. (ed.), *The Law of the European Community*, Matthew Bender, (looseleaf), Art. 182; Ehle, D., *Klage- und Prozessrecht des EWG-Vertrages*, Art. 182 (looseleaf), Craig, P. and De Burca, G., *EC Law*, Clarendon Press, 1995, p. 70-80. ; Weatherhill, S. and Beaumont, P., *EU Law*, 3 rd. ed, Penguin Group, 1999, p. 380-387;

<sup>418</sup> See also art.89 par. 2 European Coal and Steel Community and art. 154 Euratom; Campbell, *ibid*, ft.417, 182.03.; Kapteyn, P.J.G. and Verloren Van Themaat, P., *Introduction to the Law of the EC*, (2<sup>nd</sup> ed), p. 153.

<sup>419</sup> Parry, A. and Dinnage, J., *EEC Law*, Sweet & Maxwell, 1981, p. 135-136.

<sup>420</sup> Art. 292 (ex art. 219) reads: “Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein”. Ehle, D., *ibid*, ft.417.; I.; Campbell, *ibid*, ft.417, 182.05.

court before<sup>421</sup>. Referring, even exclusively, to the ECJ and not to the ICJ for disputes which do not necessarily fall under the jurisdiction of the ECJ, does not constitute a conflict with international law, nor with the jurisdiction of the ICJ. The UN Charter explicitly mentions that Members of the UN may entrust the solution of their differences to other tribunals<sup>422</sup>.

Before reviewing how “special agreements” of the Member States may refer to the ECJ, it is useful to remind some of the foundations of the ECJ’s authority<sup>423</sup>. First of all, it is the EC Treaty that attributes and restricts the authority of the ECJ and, although the ECJ’s authority varies in scope considerably depending on the nature of the case (appeal court, constitutional court, international court, etc.)<sup>424</sup>, any adjudicatory authority under a special agreement can only be exercised within the context of that EC Treaty<sup>425</sup>. Secondly, it is the ECJ which has the jurisdiction to determine whether or not it has jurisdiction, as became apparent in the *Foglia Case*<sup>426</sup>. In addition, the ECJ can make “any assessment inherent in the performance of its own duties in particular in order to check, as all courts must, whether it has jurisdiction”<sup>427</sup>. Thirdly, the ECJ has in the past been quite reluctant to issue rulings on matters which are “not a genuine dispute”, an issue also raised in the *Foglia Case*<sup>428</sup> which is discussed in more detail below.

The constituting elements of article 239 EC Treaty are:

- ✓ There is any dispute
- ✓ Between Member States
- ✓ The dispute relates to the subject matter of the EC Treaty

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<sup>421</sup> Calliess, C. and Ruffert, M., *Kommentar des EUV/EGV*, 1831

<sup>422</sup> Art. 95 Charter of the United Nations; The matter was i.e. brought up by von der Groeben, H., *Kommentar zum EU/EG-Vertrag*, 5<sup>th</sup> ed., 4/669.

<sup>423</sup> On the function of the ECJ and its role in the European legal order in general see: Maduro, M., *We the Court*, Hart, Oxford, 1998; Arnulf, A., *The European Union and its Court of Justice*, Oxford UP, 1999.

<sup>424</sup> Vanistendael, F., *The role of the ECJ as the supreme judge in tax cases*, *EC Tax Review*, 1996, p. 114-115; Kapteyn, P.J.G. and Verloren Van Themaat, P., *Introduction to the Law of the EC*, (2<sup>nd</sup> ed), Kluwer, 1998, p. 153.

<sup>425</sup> Campbell, *ibid*, ft.417, 5-315.

<sup>426</sup> Case 104/79, *Pasquale Foglia v. Mariella Novello* [1980] ECR 745.

<sup>427</sup> *Foglia No. 2*, [1982] 7 ELRev. 186, 187-8, p. 190.

<sup>428</sup> Case 104/79, *Pasquale Foglia v. Mariella Novello* [1980] ECR 745. (10); Bebr, G., “The existence of a genuine dispute: an indispensable precondition for the jurisdiction of the Court under art. 177 EEC Treaty?”, 1980, 17 CML Rev., 525, 530-2.

- ✓ The dispute is submitted to the ECJ under a special agreement between the parties

### 3.2. “Any dispute”

Art. 239 requires that the matter submitted to the ECJ is a “dispute”. This requirement is not to be interpreted too strictly, by assuming for example that a conflict must have arisen that cannot be solved in any other way than through international adjudication. The International Court of Justice’s definition of a dispute is “a disagreement on a point of law or fact, a conflict of legal views or interests between two persons”<sup>429</sup>. In the *German Interests in Polish Upper Silesia Case*, the Court’s predecessor pointed out that “a difference of opinion exists as soon as one of the governments concerned points out that the attitude adopted by the other conflicts with its own views”<sup>430</sup>. It is clear that the level of disagreement necessary to fulfill the “dispute”-requirement is not that the conflict can never be resolved in any other way. This is illustrated by the *UN Headquarters Case*<sup>431</sup>. The US Congress had passed a bill aimed at having the PLO observers-office at the UN closed, contrary to the UN admission of the PLO as an observer to the UN. The US suggested that there was definitely a problem, but no “dispute” in the sense of art. 36 (2) of the Statute, since the mission had not yet been ordered closed. The ICJ, in its advisory opinion, found that a dispute did exist<sup>432</sup>.

The requirement of “dispute” means that the jurisdiction awarded by the Member States’ special agreement may not be merely advisory. Although a certain advisory authority is provided in the Brussels Convention (also containing a “special agreement”), it is very limited, and doubtful whether it would be judged admissible by the ECJ<sup>433</sup>. After all, one of the foundations of Community law is that decisions of the ECJ are of a *binding nature*, and the ECJ itself has been vigilant to safeguard this principle<sup>434</sup>. Therefore, it seems at best uncertain whether a special

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<sup>429</sup> *Mavrommantis Case*, 1924, *PCIJ*, Ser. A, no. 2, p. 11.

<sup>430</sup> *German Interests in Polish Upper Silesia Case*, 1925, *PCIJ*, Ser. A, No. 6 at 14.

<sup>431</sup> *UN Headquarters Case*, Advisory Opinion, *ICJ Reports*, 1988, 12. The necessity of negotiations was also a point of attention of the ICJ in this case.

<sup>432</sup> Confirmation can also be found in the following cases of the International Court: *Chorzow Factory Case*, P.C.I.J., Ser. A, No. 2 at 11 (1924); *South West Africa Cases*, *ICJ Reports*, 1962, 319, 328. ; *Peace Treaties (Advisory Opinion)*, *ICJ*, 1950, 74.

<sup>433</sup> Art. 4 of the Protocol to the Brussels Convention has only rarely been used in practice.

<sup>434</sup> Weatherhill and Beaumont, *ibid*, ft.417, p. 38.; Opinion 1/91.

agreement (such as a bilateral tax treaty or a “multi-protocol”<sup>435</sup>) providing in a purely non-binding advisory authority for courts of Member States, would be acceptable under art. 239. The ECJ has no general power to give advisory opinions, although it has limited powers under the Community Treaties to give advisory opinions in very few particular cases<sup>436</sup>.

### 3.3. “Between Member States”

A possible crucial factor is the requirement that the dispute submitted must be a dispute *between Member States*. A dispute between a Member State and an individual, is *prima facie*, not susceptible of being submitted to the ECJ under art. 239. As a matter of fact, individuals do not have direct access to the ECJ. It is, in other words, not possible to use art. 239 to confer upon the ECJ the jurisdiction of adjudicating a dispute between a taxpayer on the one hand, and the tax authorities of a Member State, on the other hand.

Campbell is quick to point out that this requirement should not be interpreted restrictively<sup>437</sup>. Through diplomatic protection, a Member State can make the grievance of one of its subjects its own. States are expected to act on behalf of aggrieved subjects such as natural persons or juristic persons. As Starke notes: “A state is deemed to be injured through its subjects, or to be asserting its right to ensure respect for the rules of international law vis-à-vis its own nationals, and once the intervention is made or the claim is laid, the matter becomes one that concerns the two states alone. The subject’s only right is to claim through his state as against the state responsible”<sup>438</sup>. Such situations, where states act as a party before international courts on behalf of one of its subjects, are more the rule than the exception<sup>439</sup>. Whether or not a state is required to

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<sup>435</sup> Discussed below

<sup>436</sup> Art. 95 of the ECSC Treaty (opinion by the ECJ on amendments); 228 EEC Treaty (opinion by the ECJ on international agreements by the EC institutions); Art. 103 Euratom Treaty (external relations); See also Gray, C., “Judicial Remedies in International Law”, p. 131 who also reviews the few decisions that were made under these articles. The cases under art. 228 EEC were all referred to the ECJ by the Commission.

<sup>437</sup> Campbell, *ibid*, ft.417 182.07, d).

<sup>438</sup> Starke, J.G., *Introduction to International Law*, Butterworths, 1994, p. 314.; *Paneveys-Saldutiskis Rly Case* (1939) Pub *PCIJ* Series A/B No 76.

<sup>439</sup> *Norwegian Loans Case*, ICJ Reports, 1957, p. 9 (France brought a claim against Norway on behalf of French holders of Norwegian government bonds); *Interhandel Case*, ICJ Reports, 1959, p. 6 (Switzerland brought a claim against the US on behalf

sponsor a subjects' claim is a matter of municipal law. Usually, it is a discretionary decision by the government. International law imposes no duty upon a state to protect its nationals against violations of international law by other states<sup>440</sup>. It is clear that states have the right to act on behalf of their nationals, but in practice may decline to do so.

The “between Member States”-requirement of art. 239 must be understood to mean that there is no direct access for individuals to the ECJ. The intermediation of a national court, or some form of diplomatic protection will therefore always be necessary. In the Austrian-German tax treaty, this problem is given a novel solution: the contracting states both oblige themselves (under international law) to give such diplomatic protection to a taxpayer upon request<sup>441</sup>. Also in the Brussels Convention, there is no direct access for subjects of the concluding states to the ECJ, as the courts of the Member States will always be the ones raising the preliminary question before the Court of Justice, and a “court of a member state” means that the public authorities of the State are automatically involved<sup>442</sup>.

Furthermore, “Between Member States” must be understood to exclude disputes between (a) Member State(s) on the one hand and (a) non-Member State(s) on the other hand<sup>443</sup>.

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of a Swiss company whose assets had been confiscated by the US during World War II); *Chorzow Factory Case*, 1928, *PCIJ*, Series A, no 17, p. 25.; *Panevezys-Saldutiskis Railway Case*, 1939, Series A/B, no 76, p. 17.; *Barcelona Traction Case*, *ICJ Reports*, 1970, p. 4 (Belgium acts on behalf of a Belgian company that is the shareholder of a Canadian holding with interests in Spain that have been declared bankrupt); *Ambatielos Case*, *ICJ Reports*, 1953, p. 10 (A Greek ship owner sold a ship to the UK government who failed to execute the contract. Having been dismissed by the UK courts, the Greek government started an international proceeding on behalf of its subject); *Anglo-Iranian Oil Company Case*, *ICJ Reports*, 1952, p. 93. (UK acts on behalf of its subject whose interests were nationalized by Iran)

<sup>440</sup> Van Der Bruggen, E., *ibid*, ft.397, p. 253.; Jennings, R., and WATTS, A, *Oppenheim's International Law*, 9<sup>th</sup> ed., Longman, Essex, 1992, vol. I, parts 2-4, par. 410 and vol I, Introduction and part 1, par. 150.; *Barcelona Traction Case*, *ICJ Reports*, 1970, p. 44.

<sup>441</sup> Van Der Bruggen, E., *ibid*, ft.397, p. 254.

<sup>442</sup> Plender, R., and Wilderspin, M., *The European Contracts Convention*, 2<sup>nd</sup> ed. Sweet & Maxwell, London, 2001, p. 2-21. An arbitral tribunal, this author also points out, to which the parties were under no obligation to submit disputes, is not “a court or tribunal of a member state”.

<sup>443</sup> Ehle, D., *ibid*, ft.417, 182, II, 3.;

### 3.4. “Relate to the subject matter of the treaty”

The dispute submitted must *relate to the subject matter of the EC Treaty*. It has been suggested that whether this requirement is fulfilled, is best left to the Member States’ judgment and not to the ECJ. “In any event, if it were to create such a [objective] standard [for the competence of the court], it should be given a most liberal interpretation...”<sup>444</sup>. In any event, as is clearly illustrated by the reference to the ECJ under the Protocol to the Rome Convention –which is not based on art. 293 EC Treaty<sup>445</sup>- a matter can be considered a subject matter of the EC Treaty in the sense of 239 EC Treaty without being mentioned in art. 293 or in any other article of the EC Treaty.

Zuger argues correctly that the avoidance of double taxation, being mentioned in art. 293 EC Treaty, may *ipso facto* be deemed to qualify as related to a subject matter of the Treaty<sup>446</sup>. The fact that there is at present no harmonization of income tax rules between the Member States does not mean that bilateral income tax treaties do not “relate to the subject matter of the treaty”. What is more, there is no reason to assume that with this specification, the Member States wished to restrict the jurisdiction of the ECJ pursuant to “special agreements”. Having the ECJ adjudicate or interpret bilateral or multilateral treaties in order to promote uniformity, in itself contributes to the establishment of a common market, and the terms “subject matter that relates to the treaty” must therefore not be understood to restrict Member States who voluntarily choose to submit disputes to the ECJ in any practical way. This point is well illustrated by the Rome Convention on the Law Applicable to Contractual Obligations of 19 June 1980<sup>447</sup>. This convention also includes a reference to the ECJ, but commentators agree that its subject matter is hardly related to the EC Treaty, not even being mentioned in art. 293<sup>448</sup>. In fact, the member states simply point out that the Convention is based on the desire “to continue

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<sup>444</sup> Campbell, *ibid.*, ft.417, 182.07, c.); Ehle, D., *ibid.*, ft.417, 182, II, 3; Parry, A. and Dinnage, J., *ibid.*, ft.419, p. 135.; Kruck, H., in Van Der Groeben, 4/670; Grabitz, *Kommentar*, a.a.O., art. 18, Rn. 6.

<sup>445</sup> Guiliano-Lagarde Report on the [Rome] Convention on the Law Applicable to Contractual Obligations, p. 5.

<sup>446</sup> Zuger, M., “The ECJ as Arbitration...”, *ibid.*, ft.397, p. 102.; In the same vane Lasok and Bridge note that: “If they [the conventions between member states] are within the scope of art. [293] no question will arise for the conventions should be regarded as an instrument of harmonization or approximation of national laws” in: Lasok, D., and Bridge, J.W., *Law and Institutions of the EC*, 5<sup>th</sup> edition, Butterworths, London, 1991, p. 121.

<sup>447</sup> OJ 1980 L266.

<sup>448</sup> Waetherhill, S. and Beaumont, P., *ibid.*, ft.417, p.381.; See also below.

in the field of international private law the work of unification of law which has already been done within the Community”<sup>449</sup>

The question concerning the legal basis of Community measures for the avoidance of double taxation was to a certain extent pertinent when the Council decided that instead of an “Arbitration Directive”, an “Arbitration Convention” was the more appropriate way of proceeding<sup>450</sup>. The question has been raised in the tax literature why the Commission has not opposed this, because avoiding double taxation as a consequence of transfer-pricing adjustments can be argued to fall within the scope of art. 94 (ex art. 100)<sup>451</sup>, as was the Commission’s original idea. From this perspective, not engaging the ECJ in the supervision of the interpretation and application of the Arbitration Convention, is even more surprising, according to some tax literature<sup>452</sup>.

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<sup>449</sup> OJ 1980 L266.; Stone, P., *Civil Jurisdiction and Judgments in Europe*, Longman, London, 1998, p. 2.

<sup>450</sup> Note that recently, the EC Commission proposed to convert the Arbitration Convention into a directive: Communication “Towards an Internal Market without Tax Obstacles”, COM (2001) 582 final 23 October 2001, p. 14. If that would happen, the ECJ would gain jurisdiction on the interpretation of that directive. Given the fact that many terms of the Arbitration Convention were drawn from the OECD Model Tax Convention article 9, it follows that the ECJ will, indirectly, have an opportunity to interpret tax treaty rules.

<sup>451</sup> Hinnekens, L., “The tax arbitration convention. Its significance for the EC based enterprise, the EC itself, and for Belgian and international law”, *EC Tax Review*, 1992, p.70.; Farmer, P. and Lyal, R., *EC Tax Law*, p. 307.; An answer is provided by Schelpe, D., “The Arbitration Convention: Its origin, its opportunities and its weaknesses”, *EC Tax Review*, 1995, p.68 (pointing out that “only the result counts”). Closely related to that question, is the suggestion noted by De Witte that perhaps, because art. 293 imposes negotiations between *all* member states, partial agreements should not be permitted, and bilateral double taxation conventions should be replaced with an “EC tax convention”. The author indicates himself, however, that the member states clearly do not adopt that interpretation: De Witte, B., “International Agreements between Member States of the EU” in De Burca, G., Scott, (ed.) *Constitutional Change in the EU*, Hart, 2000, p. 43.

<sup>452</sup> Thommes, O. et al, Chapter 7 “Commentary on the EC Arbitration Convention”, in *EC Corporate Tax Law*, *IBFD*, loose leaf, par. 68-71.; Martin Jimenez, A., *Towards Corporate Tax Harmonization in the European Community*, Kluwer, 1999, p. 198-199. For problems of interpretation and potential divergences, see Hinnekens, L., “The European Arbitration Convention. Its significance for the EC based Enterprise, the EC itself and for Belgian and international tax law”, *BTR*, 3/1996, p. 272.

### 3.5. “Submitted by special agreement”

Contrary to when the jurisdiction of the ECJ is established under art. 238, which mentions an “arbitration clause”, art. 239 speaks of a “special agreement”. Versions in other languages more closely resemble the “arbitration clause” of art. 238: “compromis”, “Schiedsvertrag”, “compromesso”, “compromis”. The Rules of Procedure of the ECJ mention both “arbitration clause” and “special agreement”<sup>453</sup>.

The exact nature of the instrument establishing the jurisdiction of the ECJ for a dispute is not relevant, as long as the consent of both Member States is assured, and the instrument is legally valid<sup>454</sup>. The Rules of Procedure of the Court do require the “special agreement” to be submitted in writing, a fact from which some have deduced that the agreement must be in written form<sup>455</sup>. It may be submitted, however, that the Member States concerned can also comply with the Rules of Procedure by writing down an oral agreement at the latest at the time of submitting the dispute. Most importantly, the ECJ must be deemed the most suitable tribunal<sup>456</sup>, so it seems. It is noteworthy that before the ICJ, the consent from the states is not subject to any requirement of form, and may be established by a mere communication to the Court<sup>457</sup>.

The agreement to submit the case to the ECJ must at the latest exist at the time of submission<sup>458</sup>. The nature of the agreement does not have to be on an *ad hoc* basis, notwithstanding the use of the word “special” with reference to “agreement” in art 239. It is, in other words, not contrary to art. 239 to provide in the jurisdiction of the ECJ for all questions that might arise in the future. As a matter of fact, such jurisdiction has already been established in the Brussels Convention and other conventions under art. 293 (see below). Furthermore, the word “special” may not be understood to mean that only agreements and treaties that have the establishing of the jurisdiction of the ECJ as their only purpose. A clause establishing the jurisdiction of the ECJ on a treaty or agreement with

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<sup>453</sup> Art. 38 (6) Rules of Procedure of the Court of Justice of the EC of 19 June 1991, OJ 1991, No. L 176/7.

<sup>454</sup> Kruck, H., in Van Der Groeben, 4/670.

<sup>455</sup> Kruck, H., in Van Der Groeben, 4/670.

<sup>456</sup> Art. 292 ECJ Treaty, Campbell, *ibid*, ft.417, 182.08.

<sup>457</sup> *Corfu Channel Case*, (Prelim. Obj.) ICJ Reports, 1948, 27. (“While the consent of the parties confers jurisdiction on the Court, neither the Statute nor the Rules require that this consent should be expressed in any particular form”)

<sup>458</sup> Calliess, C. and Ruffert, M., *Kommentar des EUV/EGV*, 1831.

otherwise substantive rules, is perfectly possible<sup>459</sup>, as is illustrated by the Austrian-German tax treaty.

Art. 239 does not specify whether the agreement should be made on a bilateral or on a multilateral basis, although in practice almost all references to the ECJ in this respect have been made in multilateral conventions. As a principle, there should be no problem in referring through bilateral treaties to the ECJ under art. 239 EC Treaty<sup>460</sup>.

### 3.6. Consequences of submitting a dispute to the ECJ under art. 239

Scholars agree that if a dispute is referred to the ECJ, the court will adjudicate the dispute as the judicial body of the EC, and not i.e. as an arbiter or a mediator<sup>461</sup>. The ECJ, as judicial body of the EC, assumes however the judicial functions of different kinds of courts: it is i.e. at once a constitutional court, a supreme court and an international court<sup>462</sup>. If jurisdiction is established by means of a “special agreement” under art. 239 EC Treaty, the ECJ is acting as an international court<sup>463</sup>.

On the question of the applicable law to disputes referred to the ECJ under art. 239 and/or 293 EC Treaty, see point 4.3. and 5.4. below in this article.

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<sup>459</sup> Calliess, C. and Ruffert, M., *Kommentar des EUV/EGV*, 1831.

<sup>460</sup> Kruck, H., in Van Der Groeben, 4/671

<sup>461</sup> Callies, C. and Ruffert, M., *Kommentar des EUV/EGV*, 1831; Kruck, H., in Van Der Groeben, 4/671; Campbell, 182.07, c). *ibid.*, ft.417.; Ehle, D., *ibid.*, ft. 417, 182, II, 3.

<sup>462</sup> Vanistendael F., *The role of the ECJ as the supreme judge in tax cases*, *EC Tax Review*, 1996, 114-115; Kapteyn, P.J.G. and Verloren Van Themaat, P., *Introduction to the Law of the EC*, (2<sup>nd</sup> ed), p. 153.

<sup>463</sup> An international court adjudicates disputes between subjects of international law, in this case the states that refer the dispute to the Court under a special agreement. The comparison can be made with the International Court of Justice in this respect (Van Der Bruggen, E., “Compulsory jurisdiction ...”, *ibid.*, ft.397, p. 250.) The actual legal difference between an arbitration and an adjudication has become mostly a matter of semantics in the last fifty years. One of the distinguishing features between them is the existence of judges and a court before the dispute is submitted for adjudication, a feature that is mostly associated with an international court; Brownlie, I., *Principles of Public International Law*, 5<sup>th</sup> ed., Oxford University Press, 2002, p. 704.

## 4. Reference under Art. 239 to the ECJ in the 1968 Brussels Convention

### 4.1. Some general remarks on the 1968 Brussels Convention

In 1968, the original six Member States signed a convention to ensure uniform rules with respect to jurisdiction and enforcement of judgments. The Member States' objective of conferring upon the ECJ the jurisdiction to interpret the Brussels Convention was "to create uniform rules of international jurisdiction throughout the Community"<sup>464</sup>. It has been said that the Brussels Convention actually significantly surpassed what was required under art. 293 EC Treaty<sup>465</sup>. It is further to be noted that after the entry into force of the Treaty of Amsterdam of 2 October 1997, judicial cooperation in civil matters, including the harmonization of conflict rules, will no longer fall within Title VI on the Treaty on the European Union, but under art. 65 within a new Title IV in the EC Treaty<sup>466</sup>. Art. 293 EC Treaty has, however, not been repealed by the Treaty of Amsterdam, so that there is now some uncertainty as to whether 293, 65 or both form the exact legal basis for the Brussels Convention<sup>467</sup>.

Title I defines the material scope of the Brussels Convention. In broad terms, it applies to civil and commercial matters, with certain exceptions (matrimonial property, bankruptcy, etc). Public matters (including taxation<sup>468</sup>) and criminal matters are excluded from the scope of the Brussels Convention.

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<sup>464</sup> Case 145/86 Hoffman v. Krieg [1988] ECR 645, 666; The consideration for creating uniformity was also emphasized by the Report of the Reflection Group (Westendorp Report) of December 1995, par. 120; See also Hunnings, N. M., *The European Courts*, Catermill Publ., 1996, p. 173-174.

<sup>465</sup> Dahwood, A., Hacon, R., and White, R., *A Guide to the Civil Jurisdiction and Judgements Convention*, Kluwer, 1987, p. 6-7.

<sup>466</sup> Stone, P., *ibid*, ft.449, p. 3.

<sup>467</sup> Plender, R., and Wilderspin, M., *The European Contracts Convention*, *ibid*, ft.442, 14-04.

<sup>468</sup> FOIS has noted that, because art. 293 of the EC Treaty not only speaks of judgments in civil and commercial matters, the Member States still have the obligation to ensure recognition of judgments in this field; FOIS, Quadri, 3, 1612 as quoted by Campbell, 6-210, who supports that contention.; The exclusion of tax matters was made expressly because in common law systems, the distinction between private law and public law is less obvious as in civil law systems. The ECJ has held that a "Community meaning" has to be given to the notion "civil and commercial matters" in *LTU v. Eurocontrol* (1976) ECR 1541 which in that case excluded a public authority acting within its powers.

Title II deals with direct jurisdiction. It lays down rules which have to be applied by the courts of the Member States for the purpose of deciding whether it has jurisdiction. For example, the courts of a the Member State where a defendant is domiciled have the jurisdiction to hear a case, not the courts of the Member State where the plaintiff is domiciled<sup>469</sup>. The Brussels Convention also provides cases of special jurisdiction, such as the place of performance of the contract<sup>470</sup>.

Title III concerns the recognition and enforcement in each Member State of judgments given by courts of the other Member States. Recognition must be granted unless one of a few limited grounds for refusal is satisfied, e.g. public policy, lack of due and timely service or irreconcilability with another judgment<sup>471</sup>.

Title IV provides for the enforcement of authentic instrument that were drawn up or registered, and court settlements approved, in other Member States. Title V lays down rules for the choice of law when determining domicile. Other titles deal with territories, entry into force, and transitional matters.

#### 4.2. Referral to the ECJ

The referral to the ECJ is established in the 1971 Protocol to the Brussels Convention: “The Court of Justice of the European Communities shall have jurisdiction to give rulings on the interpretation of the Convention”<sup>472</sup>. What is more, the authority is conferred upon the ECJ to decide upon its own jurisdiction with respect to the Brussels Convention: “and also on the interpretation of the present Protocol”<sup>473</sup>.

The referral to the ECJ in the Protocol is of course inspired by art. 234 of the EC Treaty. As under art. 234, the uniformity of the interpretation of provisions of the Brussels Convention is assured through a mechanism of preliminary questions. All courts of the Member States sitting in an appellate capacity may request the ECJ to give a preliminary ruling on questions of interpretation<sup>474</sup>. It is noteworthy that, unlike in art. 234 of the EC Treaty, not all the courts of the Member States may ask

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<sup>469</sup> Art. 2 Brussels Convention

<sup>470</sup> Art. 5 (1) Brussels Convention

<sup>471</sup> Art. 26-29 Brussels Convention

<sup>472</sup> Art. 1 Protocol Brussels Convention

<sup>473</sup> Art. 1 Protocol Brussels Convention

<sup>474</sup> Art. 2 (2) Protocol Brussels Convention

preliminary questions. Only appellate courts may do so, and courts of last instance have a qualified duty to do so. In the JENARD Report, the concern was expressed that allowing more courts to ask preliminary rulings would open the door too much for possible delaying tactics<sup>475</sup>. Furthermore, the courts of the Member States (listed in the Protocol<sup>476</sup>) deciding in last resort over a case shall request the ECJ to give a ruling, but only if the court considers that a decision on the question is necessary to enable it to give judgment. It may also be noted that there is no *locus standi* for individuals. Such would by the way not be consistent with art. 239.

Besides the possibility for certain courts of the Member States to put preliminary questions to the ECJ, the Protocol to the Brussels Convention allows for the possibility of a competent authority in a state asking the ECJ for a ruling on the interpretation of the Brussels Convention in relation to a case that is already *res judicata*. Such an interpretation would provide guidance for future cases<sup>477</sup>. This provision has not been used. Weatherhill and Beaumont have noted that the ECJ may not look favorably upon its jurisdiction under art. 4 of the Protocol because it concerns merely an advisory nature<sup>478</sup>.

#### 4.3. Purpose and effectiveness of the referral to the ECJ

This approach has resulted in a substantial body of decisions by the ECJ (more than 150 decisions so far) that is generally viewed as uniform, consistent and of considerable importance for the development of international private law within the EC<sup>479</sup>. It is also noteworthy that in interpreting the Brussels Convention, as a means to assuring that uniformity, the ECJ has often given a “Community meaning” to the terms

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<sup>475</sup> Second Jenard Report, [1979] O.J. C59/66 at par. 8; Lasok, D. and Stone, P.A. (Conflict of Laws in the EC, 1987, p. 160) have criticized this, arguing that one should have confidence in the determination of the court whether it is indeed necessary to address such a question to the ECJ.

<sup>476</sup> Cour de Cassation and Conseil d’Etat; House of Lords, Hoge Raad.

<sup>477</sup> Art. 4 Protocol Brussels Convention

<sup>478</sup> Waetherhill, S. and Beaumont, P., *ibid*, ft. 417, p.381.

<sup>479</sup> Waetherhill, S. and Beaumont, P., *ibid*, ft.417, p.381.; North, P.M., Text, Cases, and Materials on International Private Law, p. 95.; North, P.M., and Fawcett, J.J., Private International Law, (12<sup>th</sup> ed), p. 280-37.; Lasok, D. and Stone, P.A., Conflict of Laws in the EC, 1987, *ibid*, ft. 475, p. 159.

of the Brussels Convention and made only sparely reference to national law, except where specifically provided for in the Brussels Convention<sup>480</sup>.

In this respect it is important to recall a dictum of the Court in the *Tessili vs. Dunlop case*<sup>481</sup>, which specifically addressed this issue in the context of the Brussels Convention, and therefore is likely to be to be the Court's position on all treaties associated with art. 239 and 293 EC Treaty.

[Par. 9] Article 220 of the EEC Treaty provides that Member States shall, so far as necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals the establishment of rules intended to facilitate the achievement of the common markets in the various spheres listed in that provision. The Convention was established to implement Article 220 and was intended according to the express terms of its preamble to implement the provisions of that article on the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and to strengthen in the Community the legal protection of persons therein established. In order to eliminate obstacles to legal relations and to settle disputes within the sphere of intra-Community relations in civil and commercial matters the Convention contains, *inter alia*, rules enabling the jurisdiction in these matter of courts of Member States to be determined and facilitating the recognition and execution of courts' judgments. Accordingly the Convention must be interpreted having regard both to its principles and objectives and to its relationship with the Treaty.

[Par. 10] The convention frequently uses words and legal concepts drawn from civil, commercial and procedural law and capable of a different meaning from one Member State to another. The question therefore arises whether these words and concepts must be regarded as having their own independent meaning and as being thus common to all the member States or as referring to substantive rules of the law applicable in each case under the rules of conflict of laws of the court before which the matter is first brought.

[Par. 11] Neither of these two options rules out the other since the appropriate choice can only be made in respect of each of the

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<sup>480</sup> See below, point 5.4.; North, P.M. and Fawcett, J.J., *Private International Law*, 12<sup>th</sup> ed., 1992, p. 282.

<sup>481</sup> *Tessili vs Dunlop*, 1976 ECR 1473. This case was the first that was submitted to the ECJ under the Brussels Convention

provisions of the Convention to ensure that it is fully effective having regard to the objectives of Article 220 of the Treaty. In any event it should be stressed that the interpretation of the said words and concepts for the purpose of the Convention does not prejudice the question of the substantive rule applicable to the particular case.

In the words of North and Fawcett:

“Many of the concepts in the Convention have different meanings under the separate national laws of the Contracting States, and reference to national law inevitably leads to a lack of uniformity in interpretation. The objectives of the Convention require that it should be given a uniform application throughout the Community; accordingly the ECJ has generally given its provisions a community meaning”<sup>482</sup>.

The international tax lawyer will not fail to spot the striking similarity with what scholars have often perceived to be the need for uniformity of tax treaty interpretation within the community<sup>483</sup>. And uniform interpretation is what the referral to the ECJ in the Protocol of the Brussels Convention is all about. Even though the Convention often still refers to national law, for example with respect to the definition of domicile<sup>484</sup>, it was considered essential that the rather general terms of the Convention be given a uniform interpretation<sup>485</sup>.

#### 4.4. Other EC Conventions with similar reference to the ECJ

Not only the Brussels Convention establishes the jurisdiction of the ECJ under art. 239 EC Treaty, although it is certainly the most famous one, and one of the few currently in force. A convention on the mutual recognition of legal persons was signed by the original six members of the Community on 29 February 1968. On 3 June 1971 the same states signed a protocol giving jurisdiction to the ECJ to give preliminary

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<sup>482</sup> North, P.M. and Fawcett, J.J., *Private International Law*, 12<sup>th</sup> ed., 1992, p. 282; Also Giardana, *ICLQ*, 1978, 263.

<sup>483</sup> Vogel, K., *Interpretation of tax treaties*, IFA Cahiers, *ibid*, ft.

<sup>484</sup> The ECJ will, however, examine provisions of national law for the purpose of deciding how they must be characterized for the purposes of the Conventions; Lasok, D., and Stone, P.A., *Conflict of Laws in the EC*, 1987, p. 161.

<sup>485</sup> Second Jenard Report, [1979] O.J. C59/66.

rulings on the interpretation of the convention. The convention did not enter into force.

A similar reference to the ECJ was also included in the Bankruptcy Convention (that did not yet enter into force)<sup>486</sup>, the Convention of 29 February 1968 on the Mutual Recognition of Companies (not yet in force)<sup>487</sup>, and several initiatives that are currently still in the drafting stage<sup>488</sup>.

It is also possible to give the ECJ a jurisdiction that goes *further* than art. 293 EC Treaty. The terms “subject matter that relates to the Treaty” of art. 239 EC Treaty must indeed not be interpreted restrictively, as was pointed out above. A good example to that effect is the Rome Convention on the Law Applicable to Contractual Obligations of 19 June 1980<sup>489</sup>. This Convention has no direct legal basis in the EC Treaty (unlike the avoidance of double taxation) but in its preamble the Member States simply refer to the work that has been done within the Community with respect to the unification of international private law. As under the Brussels Convention, also under the Rome Convention, the ECJ has jurisdiction to interpret the terms of the treaty<sup>490</sup>. Another example along the same lines is the Community Patent Convention of 15 December 1989<sup>491</sup>, which embodies a provision that establishes jurisdiction for the ECJ to interpret it<sup>492</sup>.

It is furthermore to be noted that the Council of Europe has also resorted to creating a special tribunal to ensure uniformity in the application and interpretation of treaties. Besides the well-known example of the

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<sup>486</sup> Tizzano Report, OJ 1990 C219/I, at p. 4.

<sup>487</sup> Dieu, “La reconnaissance mutuelle des sociétés et personnes morales dans les Communautés Européennes, 4 C.D.E., 1968, 532.

<sup>488</sup> See *inter alia* Hartley, T, “Conventions under art. 220 EEC, 2 *Eur. L. Rev.*, 1977, 143; Campbell, loose-leaf; 220.01-220.09.

<sup>489</sup> OJ 1980 L266

<sup>490</sup> The Rome Convention came into force on 1 April 1991; OJ 1980 C282. Two Protocols were signed on 19 December 1988 with different ways of establishing the jurisdiction of the ECJ, by means of giving preliminary rulings on the interpretation of the Rome Convention, its Convention of Accession and the Protocols themselves to certain courts of the contracting states.

<sup>491</sup> OJ 1989 L401

<sup>492</sup> Art. 73 Community Patent Convention of 15 December 1989; The Rome Convention has subsequently been modified, in particular by providing in a Common Appeal Court, without eliminating the possibility of that court to ask preliminary rulings from the ECJ. ; Tizzano Report, *ibid*, p. 4-5.; Waetherhill, S. and Beaumont, *ibid*, ft. 417, P., p.382.

European Court of Human Rights, there is also the example of the European Tribunal in Matters of State Immunity<sup>493</sup>.

## **5. A Multi-Protocol to Achieve the Free Movement of Tax Treaty Judgments?**

### **5.1. General remarks**

At a future point in time, the Member States may agree that a more uniform interpretation of international tax rules throughout the EC, particularly of bilateral income tax treaty rules, is appropriate to further the objective of a common market.

It is the contention of this article that if and when that agreement is reached, one of the possible means of achievement worth considering is what I will call a “Multi-Protocol” to existing bilateral tax treaties. Rather than rescinding all existing bilateral tax treaties, which would be an effort of biblical proportions<sup>494</sup>, the Member States could opt for installing more guarantees for uniform tax treaty interpretation throughout the EC. It is submitted here that this would be a very significant step in rendering cross-border tax rules more consistent and in reducing their possible impediments to the furthering of the common market, although it still falls short of actually harmonizing bilateral tax treaty rules completely.

This Multi-Protocol could take the form of a multilateral treaty concluded by all member states, ancillary to all bilateral income between the contracting states of the Multi-Protocol. Following the example of the Brussels Convention, another instrument issued under art. 293 of the EC Treaty, the Multi-Protocol would stipulate that the courts of the contracting states, under conditions discussed below, can ask the ECJ for a ruling on the interpretation of the bilateral tax treaties referred to in the Multi-Protocol.

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<sup>493</sup> Created by the Protocol of 16 May 1972 (E.T.S. No. 74) to the European Convention on State Immunity, also of 16 May 1972.

<sup>494</sup> Wassermeyer, F., “Does the EC Treaty force the Member States to conclude a multilateral tax treaty?”, in Lang, Loukota, et al, *Multilateral Tax Treaties*, Kluwer, 1998, p. 15.

## 5.2. Legal basis and purpose of the Multi-Protocol.

Art. 293 EC Treaty imposes a qualified duty upon the Member States to, *inter alia*, avoid double taxation. Double taxation can be the consequence of the *application* of national and international tax rules. To a certain extent, namely insofar double taxation is the consequence of profit corrections between associated enterprises, this is already addressed in the Arbitration Convention. It is however clear that double taxation can just as well be the consequence of conflicting *interpretation* (mostly questions of law) of international tax rules as of conflicting *application* (mostly questions of fact) of international tax rules. Art. 293 EC Treaty is therefore just as well the legal basis for the Multi-Protocol as it was for the Arbitration Convention.

Of course, most Member States have already concluded bilateral tax treaties to mitigate the excesses of international double income taxation in this respect. Can it therefore not be said that the qualified duty of the Member States has already been fulfilled, and reference to the ECJ is no longer appropriate? In this context the words of Campbell are in my view useful to answer that question in the negative:

“Numerous bilateral and multilateral treaties concerning the subjects mentioned in art. [293] are in force among the Member States. They do not meet the objective of art. [293] in satisfactory measure, since their coverage is incomplete and since the bilateral treaties are partially obsolete and inconsistent with each other and have not been concluded with a view toward furthering the attainment of a common market with the characteristics of a national market. While art. [293] does not specifically require the conclusion of multilateral agreements among all Member States, the conclusion of such agreements, *uniformly interpreted and applied*, is necessary to make the free movement of persons, goods, services and capital fully effective and to ensure equality of competitive conditions (emphasis added)”<sup>495</sup>

It can be suggested that as long as there are no guarantees that tax treaty interpretation will be uniform throughout the EC, there is a clear potential for these differences to affect the common market. It can therefore be said that under art. 293 of the EC Treaty, to some extent, the Member States have a qualified duty (“as far as is necessary”) to eliminate double taxation that is the consequence of conflicts in tax treaty interpretation

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<sup>495</sup> Campbell, loose-leaf; 220.03.

throughout the EC. The conditions of art. 239 combined with those of 293 EC Treaty, are therefore met.

Furthermore, it may be noted that EC law does not exclude establishing the jurisdiction of the ECJ in matters that go much further than what is, even in qualified terms, required under Community law. The Rome Convention cited above serves as a good example to that effect. In any event, the legal basis for establishing the jurisdiction of the ECJ with such a Multi-Protocol seems in my view secure.

### 5.3. Referral to the ECJ in the Multi-Protocol

Basically, a system similar to that of art. 234 of the EC Treaty is used, just as was adopted in the Brussels Convention. It allows the courts of the contracting states (Member States) to ask the ECJ for a preliminary ruling. The diversity of jurisdictional clauses in the other conventions pursuant to art. 293 EC Treaty cited above shows that the Member States can choose exactly how they wish to organize the access to the ECJ in this respect. Even in the event that not all Member States would agree simultaneously on the jurisdiction of the ECJ to interpret the tax treaties between them, those willing could still proceed, as illustrated by the double protocols of the Rome Convention. Because it seems appropriate to exclude the (quasi-) administrative phase most Member States have in tax cases, only courts deciding in an appellate capacity may ask the ECJ for a ruling. Courts of the Member States deciding in last resort, however, have a duty to ask the ECJ for a preliminary ruling if the court considers that a decision on the question is necessary to enable it to give judgment. In addition, it can be considered to give the competent authority a right to ask rulings as well, but the experience of the Brussels Convention with this kind of jurisdiction for the ECJ was not satisfactory.

### 5.4. Law to be applied by the ECJ

An interesting question is whether in its capacity awarded under the Multi-Protocol, the ECJ would be entitled to apply general international law, EC law, and/or domestic law of the Member States. The question on the law to be applied by the ECJ to a dispute referred to it under art. 239 EC Treaty is of considerable importance. If a tax treaty dispute would be submitted to the ECJ, would the Court then apply general international law, or EC law? In this respect it is worth reminding that the whole purpose and consequence of getting the ECJ involved, is creating a uniform tax treaty interpretation throughout the Community, as it were to

create a “Community meaning” of the tax treaty terms<sup>496</sup>. It is both obvious and necessary that the ECJ would not disregard EC law in interpreting bilateral tax treaties between Member States, even if most of the substantive law to be applied will be international law and domestic law. It seems that Community law would be applied before general international public rules<sup>497</sup>. The finding of the ECJ in the *Tessili v. Dunlop* case, which was discussed above<sup>498</sup>, indicates furthermore that the Court will bear the objective of the Multi-Protocol in mind, and will develop independent, autonomous tax treaty interpretations common to the Member States for as much as possible, even when tax treaties refer to domestic laws.

The ECJ did not go so far as to disregard the significance of the internal laws of the Member States in favor of interpreting the Brussels Convention under EC law alone, nor would that have been feasible<sup>499</sup>. But it is important to note that the Court is likely to give the objectives stated in art. 293 EC Treaty great weight in its evaluations, which is a matter to be kept in mind when considering the effect of referrals to the ECJ to achieve more uniformity in tax treaty judgments throughout Europe.

#### 5.5. Effect of the preliminary decision

The decisions of the ECJ on requests for preliminary rulings should be legally binding upon the courts of the Member States. The contrary would not be reconcilable with art. 239 EC Treaty.

#### 5.6. Core-text of the Multi-Protocol

The text of the crucial articles in the Multi-Protocol could be as follows<sup>500</sup>:

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<sup>496</sup> *LTU v. Eurocontrol* (1976) ECR 1541 (relating to the interpretation of the Brussels Convention).

<sup>497</sup> Kruck, H., in Van Der Groeben, 4/671 par. 13; Campbell, 182.09, *ibid*, ft. 417.; Ehle, D., *ibid*, ft.417, p. 182, II, 3.

<sup>498</sup> See point 4.3.

<sup>499</sup> Kohler, C., “The case law of the European Court on the judgments convention, part I”, *European Law Review.*, 1982, p. 7-8.

<sup>500</sup> The text is inspired on the Brussels Convention

### Article 1

The Court of Justice of the European Communities shall have jurisdiction to give rulings on the interpretation of all treaties and instruments designated in art. 2 of present Protocol, and also on the interpretation of the present Protocol. The Court of Justice of the European Communities shall also have jurisdiction to give rulings on the interpretation of the instruments of accession to present Protocol by any new contracting states.

### Article 2

This Protocol shall apply to the bilateral and multilateral treaties for the avoidance of double taxation on income and capital, including all instruments ancillary to those treaties, whatever their designation, currently in force between the contracting states of the present Protocol. This Protocol shall also apply to said treaties and instruments between the contracting states of the present Protocol which are concluded while the present Protocol is in force.

### Article 3

The following courts may request the Court of Justice to give preliminary rulings on questions of interpretation:

(1)

[list of countries, mentioning per country the name of the court in last instance/ supreme court];

(2)

The courts of the contracting states when they are sitting in an appellate capacity;

### Article 4

(1)

Where a question of interpretation of all treaties and instruments designated in art. 2 of the present Protocol is raised in a case pending before one of the courts listed in art. 3 (1), that court shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

(2)

Where such a question is raised before any court referred to in art. 3 (2), that court may, under the conditions laid down of paragraph (1), request the Court of Justice to give a ruling thereon.

## 6. Concluding Remarks: Back to Reality...

In the current status of harmonization of direct taxation in the Community, it is unlikely that Member States would see the need nor the advantages of uniform interpretation of tax treaty rules throughout the EC. Still, there is little doubt that both from a practical point of view (to avoid unintentional double taxation or double non-taxation) and from a doctrinal point of view (for the development of the science of international tax law), such uniformity is desirable on the international playing field.

That international playing field has however little to offer in terms of a sound, legally binding basis to create such uniformity. Of course, “consent” is the ultimate and only real legal factor of importance in this respect, but it cannot be denied that Europe has a head-start. Community law potentially does have a legal basis for creating uniformity (as a matter of fact, probably more than one), and the practical experience of several successful achievements on creating uniform interpretation of international rules throughout the EC. *If and when* steps will be taken towards the international uniform interpretation of tax treaties, it is easier to find a legal basis for such an initiative in the EC than in any other supra-national context. The road that the Brussels Convention has followed, using the EC Treaty as a compass, led to the ECJ, and the Court has by all accounts certainly fulfilled the expectations of the member states to safeguard and further develop a uniform approach to private international law throughout the Community. Without wishing to engage the debate on supra-national mechanisms for creating international uniformity in the interpretation and application of tax treaties in depth, it is safe to say that judicial (preliminary) adjudication on the European level is just one of the possibilities that deserves attention. Note also that, according to Rabel, no progress in the unification of law is possible without the contribution of an international judiciary<sup>501</sup>.

However, as is so often the case when considering mechanisms for achieving uniformity in tax treaties, the problem is not finding a mechanism. As a matter of fact, many possibilities may present itself and have been pointed out by scholars, including arbitration, independent experts, intensified documentation of foreign tax treaty judgments, existing international courts or tribunals and new tax courts or organizations<sup>502</sup>. How can be determined which mechanism offers the

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<sup>501</sup> Rabel, E., *Festgabe für Erich Kaufmann*, Stuttgart, 1950, p. 310.

<sup>502</sup> See footnote 398

best chances to actually work in practice, and can bring about the uniformity many scholars have in mind? How would the ECJ stand up to such a comparison? In the course of this brief article, such comparison can of course not be undertaken, but it is safe to say that practical aspects will not be overlooked. It has been observed that the case-load of the Court is already quite heavy, for example, and that until now the ECJ has had only very limited encounters and experience with double taxation conventions<sup>503</sup>. After all, in most countries, tax disputes are handled by specialized courts or specialized chambers of courts, which suggests that some organizational changes may perhaps be in order if the member states would ever wish to entrust the ECJ with the specialized task of supervising tax treaty interpretation throughout the Community, along the lines of the Brussels Convention.

Most fundamentally, however, it is as clear as the light of day that in international law, where even compulsory jurisdiction is voluntary, attributing competence to a supra-national body is much more a question of political will than of legal norms. But putting those considerations aside for a moment, and I have little illusions about their importance, the fact remains that if and when the EC Member States are considering to take these steps, the system first successfully tried in the Brussels Convention is worth considering, although that is certainly not the only option. Therefore, one remains hopeful that perhaps one day, we may do for international tax law what the Brussels Convention did for international private law...

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<sup>503</sup> The tax expertise of the ECJ was for example somewhat doubted by Vermeend, "The Court of Justice of the EC and direct taxes", *ECTR*, 1996, p. 54.