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Editorial

After repeal of Article 293 EC Treaty under the Lisbon Treaty: the EU objective of eliminating double taxation can be applied more widely

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1. Lisbon Treaty: to be continued

12 June 2008 was a sad day for Europe. Ireland blocked the Lisbon Treaty. That is more than a pity, because I feel that the Lisbon Treaty contributes to a better and better functioning Europe. Looking back at more than fifty years of European Community, I believe that we may conclude that with the establishment of it, a firm contribution has been made to a rather peaceful Europe since World War II. Peace in Europe has never lasted for such a long period as the one we now currently enjoy. Prosperity in Europe has increased over the decades and the introduction and enlargement of the European Community has certainly played an important role in this respect. In this process, the introduction and further development of the internal market is a very important element. The level of integration of the national economies of the Member States has increased over the years. As a consequence, the level of national prosperity of Member States depends largely on the integration of its economy with the economies of other Member States.[2] As a result, Member States can no longer afford to make war with each other, because that would jeopardize their level of prosperity. Therefore, the establishment of the European Community and its enlargement (including an internal market), is one of the best guarantees for a peaceful and prosperous Europe. Consequently, I welcome the initiative of the European Council of promoting to conclude the ratification of the Lisbon Treaty and to revisit the reasons behind the Irish rejection and to consider the way forward at the Council's meeting on 15 October 2008.[3] I assume that the Council will then come to terms with Ireland to carry on with the Lisbon Treaty. It is still, therefore, more than worthwhile to look at potential consequences of the Lisbon Treaty in the field of direct taxation, more specifically: what will be the consequence of the repeal of the current Article 293 EC under the Lisbon Treaty?

2. Eliminating Double Taxation is an EU Objective

I believe that the aim of establishing the internal market should be taken as a leading argument for eliminating double taxation. I feel that this position is evidenced by the ECJ's case law. It is true that this case law points out that the fundamental freedoms allow the Member States to determine the structural elements of their own tax system. A Member State may fundamentally select its level of taxation and may grant special tax incentives in accordance with the EC Treaty. However, I believe that it is also true that the Court's main concern within the internal market is the avoidance of double taxation. If domestic tax rules avoid double taxation in respect of internal situations, the fundamental freedoms require the same treatment in respect of comparable transnational situations. This follows from, inter alia, *Manninen*, *FII GLO*, *Denkavit Internationaal*, *Thin Cap GLO*, and *Amurta*.[4] Avoidance of double taxation is not only a concern in the context of domestic tax provisions, but also in the context of double tax conventions (DTC). Although Article 293 EC does not have direct effect,[5] it seems

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[2] Compare, e.g., Sociaal en Cultureel Planbureau and Centraal Planbureau, *Marktplaats Europa, Vijftig jaar publieke opinie en marktintegratie in de Europese Unie*, Europese Verkenning 5, Sociaal en Cultureel Planbureau/Centraal Planbureau, The Hague, The Netherlands, 2007, pp. 7, 9-10, 39-40, 49-57, 68-71, 75-78, 94-95, 105-116, 126.

[3] See Presidency Conclusions of European Council of 19 and 20 June 2008, Brussels, 20 June 2008, no. 11018/08, p. 1.

[4] See ECJ 7 September 2004, Case C-319/02 (*Manninen*), ECJ 12 December 2006, Case C-446/04 (*Test Claimants in the FII Group Litigation*), ECJ 14 December 2006, Case C-170/05 (*Denkavit Internationaal*), ECJ 13 March 2007, Case C-524/04 (*Test Claimants in the Thin Cap Group Litigation*), and ECJ 8 November 2007, Case C-379/05 (*Amurta*).

[5] See ECJ, 12 May 1998, Case C-336/96 (*Gilly*), paras 14-17. See also ECJ 27 September 1988, Case 81/87 (*Daily Mail*), paras 21-24. However, Advocate General Maduro in his opinion of 22 May 2008, Case C-210/06 (*Cartesio*) argues that the real seat theory is inconsistent with the Articles 43 EC and 48 EC, because it makes it impossible for a company constituted under a national law based on this theory to transfer its operational headquarters to another Member State. I believe that this opinion is not

that in the context of DTCs actually concluded, [italics added]

> the *abolition of double taxation* within the Community is [...] included among the *objectives of the Treaty* [...].[6]

Saint-Gobain confirms this position [italics added]:

> In this regard, it must be observed first of all that, in the absence of unifying or harmonizing measures adopted in the Community, in particular under the second indent of Article 220 of the EC Treaty (now the second indent of Article 293 EC), the Member States remain competent to determine the criteria for taxation of income and wealth *with a view to eliminating double taxation by means*, inter alia, of *international agreements*. *In this context*, the Member States are at liberty, *in the framework of bilateral agreements* concluded *in order to prevent double taxation*, to determine the connecting factors for the purposes of allocating powers of taxation as between themselves [...].[7]

Further evidence is found in *Kerckhaert-Morres* and *Columbus Container Services*, in which the ECJ ruled [italics added]

> that conventions *preventing double taxation* [...] are designed *to eliminate or mitigate the negative effects on the functioning of the internal market* resulting from the coexistence of national tax systems.[8]

Elimination or mitigation of double taxation is not only realized under the exemption method, but also under the ordinary tax credit method. The *Gilly* and *Saint-Gobain* cases show that the Member States are free to choose their own system for relieving double taxation.[9] The Court accepts both mechanisms and they may also be applied next to each other in respect of a single class of income like dividend, as follows from *FII GLO*.[10] From *Columbus Container Services*, it follows that a Member State may also switch over from the exemption method to an ordinary credit method in respect of permanent establishment income from another Member State as long as double taxation is prevented and the taxation is not higher than in respect of purely domestic situations.[11] Such choices must basically be respected by other Member States. I believe that this reasoning is also consistent with *Eurowings*,[12] because the non-deductibility of half of the lease payment in Germany led to double taxation within the internal market, because the entire lease payment was (likely to be) taxable in Ireland. The lessee was only taxable in Germany and the lessor only in Ireland. Consequently, the lessee was not compensated in Ireland. *Eurowings* was not a case of international juridical double taxation. In substance, this position was affirmed by *Columbus Container Services*.[13]

3. Repeal of Article 293 EC under Lisbon Treaty

A provision similar to Article. 293 EC is no longer included in the Treaty on European Union (TEU) or Treaty on the Functioning of the European Union (TFEU; the successor of the EC Treaty). It has been repealed.[14] It is not directly clear what the reasons are for this change. I did not find a good explanation in the European materials on which the Treaty of Lisbon has been based. It has been argued that the repeal should remove the potential jamming working of Article. 293 EC in relation to Artoc;e. 94 EC (that will be moved to Article. 115 TFEU).[15] It is not clear either what the impact is of this repeal. Does it mean that the abolition of double taxation is no longer an objective under European law? I do not think so. *Gilly*, inter alia, shows that Article. 293 EC Treaty merely prevents direct effect [italics added]:

> Although the abolition of double taxation within the Community is thus included among the objectives of the Treaty, it is clear from *the wording of that provision* that it *cannot itself confer* on individuals *any rights* on which they might be able to rely before their national courts.[16]

Therefore, it can be argued that, in absence of a DTC, the provision of Art. 293 EC Treaty only contains an explicit restriction on the possibilities for individuals to claim directly before the national courts the realization of one of the objectives of the EC Treaty:

cont.

consistent with ECJ 27 September 1988, Case 81/87 (*Daily Mail*). In his analysis, the Advocate General does not address Article 293 EC. I believe that this is truly an omission, because this provision is leading in the Court's reasoning and its conclusion that the Articles 43 and 48 EC confer no right on a company incorporated under the legislation of a Member State and having its registered office there, i.e. legislation based on the real seat theory, to transfer its central management and control to another Member State. See *Daily Mail,* paras. 20-25. The reasoning and conclusion has not been superseded by ECJ 9 March 1999, Case C-212/97 (*Centros*) and ECJ 30 September 2003, Case C-167/01 (*Inspire Art*) either.

6 See ECJ, 12 May 1998, Case C-336/96 (*Gilly*), para. 16.

7 See ECJ 21 September 1999, Case C-307/97 (*Saint-Gobain*), para. 56. See also, e.g., ECJ 12 December 2002, Case C-385/00 (*De Groot*), paras 99-102, ECJ 8 November 2007, Case C-379/05 (*Amurta*), para. 17, and ECJ 6 December 2007, Case C-298/05 (*Columbus Container Services*), paras 27, 45, and 51.

8 See ECJ 14 November 2006, Case C-513/04 (*Kerckhaert-Morres*), para. 21 and ECJ 6 December 2007, Case C-298/05 (*Columbus Container Services*), para. 44. See further, e.g., Eric C.C.M. Kemmeren, *Principle of Origin in Tax Conventions, A Rethinking of Models*, diss., Katholieke Universiteit Brabant, Tilburg, The Netherlands, 2001, pp. 117-131.

9 See ECJ, 12 May 1998, Case C-336/96 (*Gilly*) and ECJ, 21 September 1999, Case C-307/97 (*Saint-Gobain*). See also, e.g., ECJ 12 December 2002, Case C-385/00 (*De Groot*) and ECJ 23 February 2006, Case C-513/03 (*Van Hilten*).

10 See ECJ 12 December 2006, Case C-446/04 (*Test Claimants in the FII Group Litigation*).

11 See ECJ 6 December 2007, Case C-298/05 (*Columbus Container Services*).

12 See ECJ 26 October 1999, Case C-294/97 (*Eurowings*).

13 See ECJ 6 December 2007, Case C-298/05 (*Columbus Container Services*), paras 48-49.

14 See Article. 2,280) Treaty of Lisbon.

15 See, e.g,. G. Straetmans and S. Castelain, Capita Sselecta van materieelrechtelijke wijzigingen door de Europese Grondwet, in: Johan Meeusen and Gert Straetmans, De Europese Grondwet: Troeven en Tekorten, Intersentia, Antwerpen-Oxford, 2005, pp. 181-182.

16 See ECJ, 12 May 1998, Case C-336/96 (*Gilly*), para. 16.

the abolition of double taxation. The ECJ cannot disregard this restriction since it is part of the legislative system under current European law. It has to take into account that, in absence of a European legislative instrument or a DTC, Member States are not obliged to eliminate double taxation. However, it is also clear that the abolition of double taxation is part of goals of European law. This is evidenced by the case law discussed above. Since the restriction on direct effect is taken away by repealing Article. 293 EC Treaty, it can be firmly argued that it is consistent with the aim of realizing an internal market and the ECJ's case law, which remains relevant in this context, that abolition of double taxation can be applied more widely under the TEU and TFEU than under the EC Treaty.[17]

[17] Dissenting, e.g., A.C.G.A.C. de Graaf, De invloed van het EG-recht op het internationaal belastingrecht: beleids- en marktintegratie, Kluwer, Deventer 2004, pp. 76 and 97.