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The European Court of Justice as Court of Arbitration for Disputes under DTA's (Case C-648/15, Austria v Federal Republic of Germany)

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On 12 September 2017, the CJEU confirmed that it has jurisdiction over a dispute between Austria and Germany regarding the interpretation of a double tax convention entered into between the two Member States under article 273 TFEU.[1] The case was the first occasion in which a Member State had brought before the CJEU a dispute on the interpretation of a bilateral tax convention, between itself and another Member State, pursuant to article 273 TFEU.

Although the decision of the CJEU can be welcomed as it eliminates double taxation within the European Union as a result of the parallel exercise of taxing rights by two Member States, the question is whether the CJEU has not stretched its jurisdiction too far. In addition, the decision seems to confirm that the draft Directive for Double Taxation Resolution Mechanisms[2] is a missed opportunity when it comes to enhancing uniformity in the interpretation of double tax conventions between Member States.

The Dispute Arisen between Austria and Germany

The dispute related to the interpretation and application of article 11 of the Convention for the avoidance of double taxation between the two states (hereafter: Convention) for the purposes of the taxation of interest from registered certificates known as 'Genusscheine'. In short, Austria considered that, as the Member State of residence of the beneficial owner of the interest paid, it was solely entitled to tax the income. Germany, on the other hand, also claimed the exclusive right to tax that income because the interest must be classified as 'income from the rights or debt-claims with participation in profits. Under article 25(5) of that same Convention, the States are obliged to submit the dispute to the CJEU under an arbitration procedure pursuant to article 239 EC (now article 273 TFEU) in case no solution can be found within three years from the opening of the procedure. Hence, following a request of the taxpayer, the Republic of Austria had brought the dispute before the CJEU pursuant to article 25(5) of the Convention.

The CJEU as Court of Arbitration under Article 273 TFEU

Given the consensus between the two Member States on the appointment of the CJEU as court of arbitration, one could question whether it would be of any importance to assess the CJEU's competence in this matter. Nevertheless, in my view the extensive analysis of the AG and the

considerations set out hereafter indicate that the CJEU's jurisdiction under article 273 TFEU should not be assumed too easily as the impact of the decision may have wider implications than just the dispute itself.

Article 273 TFEU reads as follows:

> "The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties."

As such, three conditions need to be fulfilled, i.e.

1. The dispute brought before the Court must be exclusively between 'Member States';
2. The dispute must be brought before the Court under a 'special agreement'; and
3. The dispute must 'relate to the subject matter of the Treaties'.

Bilateral Conventions for the Avoidance of Double Taxation Relate Sufficiently to the Subject Matter of the Treaties

In relation to the dispute at hand, particularly the third criterion was of importance, i.e. whether resolving a dispute arisen under a Convention for the avoidance of double taxation relates to the subject matter of the Treaties. Referring to the AG's opinion and the Commission Notice on Double Taxation in the internal market,[3] the CJEU held that the elimination of double taxation relates indeed sufficiently enough to the subject matter of the Treaties, given the beneficial effect of the mitigation of double taxation on the functioning of the internal market under article 3 par. 3 TEU and 26 TFEU.

Interestingly, the CJEU did not refer at all to existing case law,[4] where the CJEU has consistently held that,

> "the Court does not have jurisdiction, **under Article 234 EC**, to rule on a possible infringement, by a contracting Member State, of provisions of bilateral conventions entered into by the Member States designed to eliminate or to mitigate the negative effects of the coexistence of national tax regimes."

Admittedly, article 239 EC (now 273 TFEU) allows the CJEU to declare its jurisdiction over a wider range of possible matters, but still it would have been good if the CJEU would have addressed the differences between the two procedures in more detail as well as how its decision in the current case relates to the existing case law under article 234 EC (267 TFEU). This goes all the more since the CJEU held in view of proceedings under article 234 EC

> "that it is not for the Court to interpret Article 19A of the France-Belgium Convention and **to establish the obligations** which arise under it, as such an interpretation is within the jurisdiction of the national courts."

In its current decision, the CJEU merely stated that it **did not have sufficient information** to decide on the reciprocal claims from both States to order that the other state should reimburse the wrongfully levied taxes.[5] Does this observation imply that the CJEU considers that it does have jurisdiction to compel one or the other state to act in a certain way?

The Impact of the Decision on the Application and Interpretation of Double Tax Conventions

Let there be no mistake, I do not mean to advocate that double taxation as a consequence of the parallel exercise of tax sovereignty by Member States is a good thing, on the contrary. In addition, I do not challenge the CJEU's approach, i.e. adhering to 'proper international law' requiring an interpretation in good faith in accordance with the ordinary meaning in the light of its object and purpose as follows from the Vienna Convention. Nevertheless, I still have concerns as to whether the CJEU has not stretched its jurisdiction too far / did not adequately limit the scope to the interpretation of this specific convention.

At least, the following questions come into mind:

1. Do national courts have to adhere to the interpretation given by the CJEU for similar matters under other Conventions for the avoidance of double taxation?
2. Does this decision pave the way for a harmonized interpretation of Conventions for the avoidance of double taxation within the European Union?
3. Does the interpretation of the CJEU apply to the interpretation of double tax conventions between Member States only, or does it affect double tax conventions with third countries as well?
4. Would refraining from taxation, in spite of the interpretation of the CJEU allowing thereto, qualify as State aid?[6]

The Council Directive on Double Taxation Dispute Resolution Mechanisms – A Missed Opportunity?

It is noted that the Convention between Germany and Austria is the only convention which appoints the CJEU as court of arbitration, even though it has been in place for more than 15 years. Apparently, other Member States did not have much appetite to follow this example. In addition, the Commission had its doubts too, as to whether or not the CJEU would have jurisdiction over such disputes as indicated in the Impact Assessment[7] regarding the draft directive.

Given the approach now taken by the CJEU, one could question whether it would not have been in the interest of taxpayers if the draft directive would have opted for the CJEU has court of arbitration. In my view, this would have enhanced a consistent approach of dispute resolution for double tax disputes between Member States due to a uniform interpretation of double tax conventions. The key issue, however, is that appointing the CJEU as court of arbitration on all disputes arising between Member States under bilateral tax conventions may be perceived by many as a further threat to the sovereignty of Member States in the area of direct taxation.

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