DOUBLE TAX CONVENTIONS IN THE CASE LAW OF THE CJEU: SOME COMMENTS*

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Article 293 EC

Professor Lang begins with a comment on Article 293 EC and suggested that the CJEU –

> "did not infer a prohibition of double taxation under EU law from this provision, nor from the fundamental freedoms or other rules of primary legislation".

This statement is not correct.

It is important to make a distinction between economic double taxation and juridical double taxation. Whilst juridical double taxation cannot be resolved under current EU law, in the absence of a double tax convention (DTC) dealing with that matter, the Court has made it clear in its direct tax jurisprudence that economic double taxation, which amounted to a restriction on the exercise of a fundamental freedom, was prohibited.

Manninen

In *Manninen*,[1] for example, a tax credit was granted, when a dividend was paid by a Finnish company to a Finnish resident individual, thus eliminating economic

* In this article, the author responds to Professor Michael Lang's recent article on *Double Tax Conventions in the Case Law of the CJEU*, published in Intertax, 46, 3, 181-193.

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1 *Petri Manninen ("Manninen"),* C-319/02, ECLI:EU:C:2004:484.

double taxation. However, Finland did not grant a similar tax credit when a Finnish resident individual received a dividend from a Swedish company.

The Court stressed, in paragraph 20 of *Manninen,* that –

> "the tax credit under Finnish tax legislation is designed to prevent the double taxation of company profits distributed to shareholders by setting off the corporation tax due from the company distributing dividends against the tax due from the shareholder by way of income tax on revenue from capital. The end result of such a system is that dividends are no longer taxed in the hands of the shareholder. Since the tax credit applies solely in favour of dividends paid by companies established in Finland, that legislation disadvantages fully taxable persons in Finland who receive dividends from companies established in other Member States, who, for their part, are taxed at the rate of 29% by way of income tax on revenue from capital".

The Court, noting that the Nordic Convention did not eliminate that unfavourable tax treatment, concluded that the Finnish rules at issue constituted a restriction on the free movement of capital. The Court explained in paragraphs 22 and 23, that the Finnish rules deterred Finnish residents from investing their capital in companies established in other Member States and also restricted companies established in other Member States from acquiring capital in Finland.

Court highlighted in paragraph 23 that –

> "Since revenue from capital of non-Finnish origin receives less favourable tax treatment than dividends distributed by companies established in Finland, the shares of companies established in other Member States are less attractive to investors residing in Finland than shares in companies which have their seat in that Member State".

The Court went on (in paragraphs 35-37) to point out that –

> "both dividends distributed by a company established in Finland and those paid by a company established in Sweden are, apart from the tax credit, capable of being subjected to double taxation. In both cases, the revenue is first subject to corporation tax and then – in so far as it is distributed in the form of dividends – to income tax in the hands of the beneficiaries …
>
> Where a person fully taxable in Finland invests capital in a company established in Sweden, there is thus no way of escaping double taxation of the profits distributed by the company in which the investment is made. In the face of a tax rule which takes account of the corporation tax owed by a company in order to prevent double taxation of the profits distributed,

> shareholders who are fully taxable in Finland find themselves in a comparable situation, whether they receive dividends from a company established in that Member State or from a company established in Sweden…
>
> It follows that the Finnish tax legislation makes the grant of the tax credit subject to the condition that the dividends be distributed by companies established in Finland, while shareholders fully taxable in Finland find themselves in a comparable situation, whether they receive dividends from companies established in that Member State or from companies established in other Member States".

Meilicke

The Court came to a similar conclusion in its later *Meilicke* judgement,[2] which involved a similar German rule, that granted a tax credit to a German resident individual for a dividend received from a German company but not for dividends received by a German resident from companies established in other Member States.

The Court indicated in paragraph 22 that –

> "Since the tax credit applies solely in respect of dividends paid by companies established in Germany, that legislation disadvantages persons who are fully taxable in that Member State for income tax purposes and receive dividends from companies established in other Member States. Such persons, for their part, are taxed without being entitled to set off the corporation tax payable by those companies in their State of establishment against the tax on the income from capital".

The Court noted that the German tax rules at issue could deter German residents from investing their capital in companies established in other Member States. The Court also indicated that the German legislation constituted an obstacle to companies that were established outside Germany from raising capital in Germany. Consequently, the Court found that the German tax rules at issue constituted a restriction on the free movement of capital.

2 *Wienand Meilicke, Heidi Christa Weyde and Marina Stöffler v Finanzamt Bonn-Innenstadt ("Meilicke")* C-292/04, ECLI:EU:C:2007:132.

FII GLO

Further confirmation is found in paragraphs 63-65 of *FII GLO*,[3] where the Court explained that –

> "While, in the case of a resident company receiving dividends from another resident company, the exemption system that applies eliminates the risk of the distributed profits being subject to a series of charges to tax, the same is not true for profits distributed by non-resident companies. If, in the latter case, the State in which the company receiving the distributed profits is resident grants relief on withholding tax levied in the State in which the company making the distribution is resident, such relief does no more than eliminate a double legal charge to tax in the hands of the company receiving those profits. Conversely, that relief does not extinguish the series of charges to tax which arises when distributed profits are subject to tax, first of all, in the form of corporation tax for which the company making the distribution is liable in the State in which it is resident and, subsequently, in the form of corporation tax for which the company receiving the distribution is liable …
>
> Such a difference in treatment has the effect of discouraging United Kingdom-resident companies from investing their capital in companies established in another Member State. In addition, it also has a restrictive effect as regards companies established in other Member States in that it constitutes an obstacle to their raising of capital in the United Kingdom. In so far as income arising from foreign-sourced capital is treated less favourably from a tax point of view than dividends paid by companies established in the United Kingdom, shares in companies established in other Member States are less attractive to United Kingdom-resident investors than those of companies having their seat in that Member State …
>
> It follows that the difference in treatment arising from legislation such as that at issue in the main proceedings as regards dividends received by resident companies from non-resident companies in which they hold fewer than 10% of the voting rights constitutes a restriction on the free movement of capital which is, in principle, prohibited by Article 56 EC".

Thus, it is apparent from the Court's case law that a distinction must be drawn between juridical double taxation and economic double taxation, since economic

3 *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue ("FII GLO"),* C-446/04, ECLI:EU:C:2006:774. For a detailed analysis by this author, see *Dividend Taxation Post-Manninen: Shifting Sands or Solid Foundations?* Tax Notes International, Mar. 5, 2007, 887-918 at p 888.

double taxation can constitute a restriction on the exercise of a fundamental freedom and is thus prohibited in the same way as other restrictions.

Resident / Non-resident Distinction

Professor Lang continues to struggle with the Court's *Schumacker* judgment.[4]
In his article, Lang takes the Court's reference to the OECD Model out of context and therefore, fails to understand why the Court is referring to the OECD Model Tax Convention in paragraph 32 of the judgment.

In paragraph 32 of *Schumacker*, the Court states –

> "Income received in the territory of a Member State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence. Moreover, a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is more easy to assess at the place where his personal and financial interests are centred. In general, that is the place where he has his usual abode.

There is nothing incorrect about this statement from the Court. It is based clearly on Point 36 of the Opinion of Advocate General Philippe Léger where he merely pointed-out the well-established distinction between residents and non-residents in international tax law. The Advocate General explained that –

> "The logic of the distinction between residents and non-residents is clear: by choosing to reside in a particular State, a person assumes the obligation to contribute to the costs of public administration and the public services made available to him by that State. It is therefore logical that that State should tax the entirety of his income, on a comprehensive basis. It is also that State, where the taxpayer has focused his family life, which will grant him allowances and reliefs".

Accordingly, the Court's reference to the OECD Model Tax Convention in *Schumacker* should be understood in the light of this discussion on the distinction between residents and non-residents and the principle of the ability to pay tax in the first part of the same paragraph. The Court is not "interpreting" the OECD Model Tax Convention. It is merely pointing out that resident States are generally

4 *Finanzamt Köln-Altstadt v Roland Schumacker ("Schumacker"),* C-279/93, ECLI:EU:C:1995:31. See Michael Lang, "*Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions, and Contradictions",* EC Tax Rev. 2009, 3, 98-113 and the author's critical response in *European Tax Controversies – Quis Custodiet Ipsos Custodes?* ECTJ, 1. 2011-12, 39-98 at p 52.

responsible for taxing residents on the entirety of their income and are usually responsible for granting family allowances and reliefs. This is also the approach taken under the OECD Model Tax Convention. Some DTCs will contain a specific provision concerning personal allowances.[5]

OECD Model Tax Convention

Lang submits that –

> "The references to the OECD [Model] … or the Commentaries occasionally create the impression that, in those cases in which a rule corresponding to the OECD [Model] … was incorporated in a DTC, special arguments are required to demonstrate a violation of EU law".

This is not the correct starting point from an EU law perspective.
Lang makes no mention of the *Gottardo* case,[6] where the Court pointed out in paragraph 33 that –

> "when giving effect to commitments assumed under international agreements, be it an agreement between Member States or an agreement between a Member State and one or more non-member countries, Member States are required, subject to the provisions of Article 307 EC, to comply with the obligations that Community law imposes on them. The fact that non-member countries, for their part, are not obliged to comply with any Community-law obligation is of no relevance in this respect".

Thus, the Court makes it clear that all international agreements, subject to the pre-EU agreement exception, must comply fully with EU law. That is the starting point for all double tax conventions whether they are based on the OECD Model Tax Convention or not.

Contrary to Lang's view, there is no assumption that the OECD Model Tax Convention's provisions are compatible with EU law and that special arguments are required to demonstrate a violation of EU law. Member States are simply required to comply with EU law when they conclude a DTC.

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5 For example, see the *D case,* paragraph 13, discussed below.

6 *Elide Gottardo v Istituto nazionale della previdenza sociale (INPS) ("Gottardo"),* C-55/00, ECLI:EU:C:2002:16.

Further support for this argument is found in paragraph 57 of *Saint-Gobain,*[7] where the Court stressed, in relation to DTCs between Germany and certain third countries, that –

> "As far as the exercise of the power of taxation so allocated is concerned, the Member States nevertheless may not disregard Community rules. According to the settled case-law of the Court, although direct taxation is a matter for the Member States, they must nevertheless exercise their taxation powers consistently with Community law".

This merely echoed what the Court stated in paragraph 21 of its earlier *Schumacker* judgment and this same reasoning can be traced back to the earliest case law of the Court.[8]

The Court concluded, in paragraph 58, that –

> "In the case of a double-taxation treaty concluded between a Member State and a non-member country, the national treatment principle requires the Member State which is party to the treaty to grant to permanent establishments of non-resident companies the advantages provided for by that treaty on the same conditions as those which apply to resident companies".

In other words, Germany was obliged to ensure that the French company with a German branch received national treatment there, even though the French company with the branch in Germany was not covered by the DTCs at issue, because the relevant tax advantages were limited to residents of Germany.

Horizontal Comparability Test [9]

One would have expected that the Court's judgments in the *D case*[10] and in *ACT IV GLO* would have put the so-called "horizontal comparability" issue to bed, the Court having made it very clear in paragraph 53 of the *D case* that –

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7 *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt ("Saint-Gobain"),* C-307/97, ECLI:EU:C:1999:438.

8 See, for instance, *Commission v France*, Joined Cases 6 and 11/69, ECLI:EU:C:1969:68, para.17, where the Court stated that – "The exercise of reserved powers cannot therefore permit the unilateral adoption of measures prohibited by the Treaty".

9 This issue has been debated at length by this author with Professor Lang before and is not repeated here. See footnote 4 above, in particular, the author's article, at page 46.

10 *D. v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen ("D case"),* C-376/03, ECLI:EU:C:2005:424. For a detailed analysis by this author, see footnote 11 below.

> "The main proceedings do not, however, relate to the consequences of allocating powers of taxation in relation to nationals or residents of Member States that are party to a convention, but are concerned with drawing a comparison between the situation of a person resident in a State not party to such a convention and that of a person covered by the convention".

The Court stressed that the scope of a bilateral tax convention was limited to the natural or legal persons referred to in it. Therefore, persons not covered by the DTC at issue were not in a comparable situation to those persons who fall within its scope.

In *Saint-Gobain*, the Court explained that the advantages made available to its residents under the double tax convention, might have to be extended to cover non-resident persons who were in a comparable situation to a resident. However, the Court acknowledged that Mr D was not in a comparable situation to a Dutch resident because Mr D resided in Germany. Therefore, DTC benefits did not have to be granted to him under the equal treatment / national treatment principle.
The Court concluded its *D case* judgment by saying, in paragraph 61, that –

> "The fact that those reciprocal rights and obligations apply only to persons resident in one of the two Contracting Member States is an inherent consequence of bilateral double taxation conventions. It follows that a taxable person resident in Belgium is not in the same situation as a taxable person resident outside Belgium so far as concerns wealth tax on real property situated in the Netherlands".

The Court stressed that the tax advantage at issue could not be regarded as a benefit separable from the remainder of the double tax convention but was an integral part of the convention and contributed to its overall balance.

Therefore, the Court did not adopt a horizontal comparability test in such circumstances. The Court did not compare the different treatment of a German resident with a Belgian resident (or a Dutch resident). The Court simply determined that the situations were non-comparable.

Since the situations were non-comparable, Mr D could be treated less favourably than a resident of the Netherlands or a resident of Belgium. However, it is important to acknowledge that if Mr D became a resident of Belgium or the Netherlands, then, he would be entitled to the benefits of the DTC at issue.

Lack of Harmonised Rules

Different double tax conventions between different Member States deliver different results because DTC rules have not been harmonised at the EU law level. Consequently, persons in different situations may be treated differently. That is not the same as saying that the Member States may discriminate directly or indirectly on grounds of nationality via their double tax conventions, as suggested by Professor Lang.

The definition of discrimination, seen in cases like *Schumacker*, states that –

> "discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations".

In other words, if two persons are not in a comparable situation, under a particular double tax convention, they can be treated differently.

It should be recalled that all this had been decided by the Court in its earlier jurisprudence in relation to the other freedoms.[11] Thus, in *Matteucci*,[12] which concerned the free movement of workers and an international cultural agreement between Belgium and Germany, an Italian national, who qualified for national treatment in Belgium because of the free movement of workers, was entitled to access the social advantages contained in that cultural agreement even though the benefits of that agreement were limited by the terms of that agreement to nationals of Belgium and Germany.

The Court indicated, in paragraph 14 of *Matteucci,* that –

> "in so far as refusal to grant access to the benefit of such scholarships may jeopardize the right of Community workers to equal treatment, the application of Community law cannot be precluded on the ground that it would affect the implementation of a cultural agreement between two Member States".

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11 This was pointed out, by this author, in 2005. See *"The ECJ, the 'D' case, double tax conventions and most favoured nations: Comparability and Reciprocity",* [2005] 14(4) EC Tax Review 190-201 and also in S. van Thiel (Editor), The European Union's Prohibition of Discrimination, Most-Favoured-Nation Treatment and Tax Treaties: Opinions and Materials, Berlin: Confederation Fiscale Europeenne, 2006, 57-76.

12 *Annunziata Matteucci v Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium ("Matteucci"),* Case 235/87, ECLI:EU:C:1988:460.

It went on to hold, in paragraph 16, that –

> "where a Member State gives its national workers the opportunity of pursuing training provided in another Member State, that opportunity must be extended to Community workers established in its territory".

Moreover, the Court explained that Germany had to respect the EU law obligations of Belgium in this instance. If an Italian national qualified for national treatment in Belgium, then Belgium was entitled to nominate Matteucci for a scholarship. The Court said that Germany had to respect this EU law obligation, "since another Member State may not prevent the host Member State from fulfilling the obligations imposed on it by Community law".

The Court stressed, in paragraph 19 of *Matteucci,* that if –

> "the application of a provision of Community law is liable to be impeded by a measure adopted pursuant to the implementation of a bilateral agreement, even where the agreement falls outside the field of application of the Treaty, every Member State is under a duty to facilitate the application of the provision and, to that end, to assist every other Member State which is under an obligation under Community law".

Thus, in *Matteucci*, Italians, resident in Belgium, who had acquired national treatment rights under the free movement of workers' provisions, could be treated differently from Italians resident in Italy who had not obtained free movement of workers' rights in Belgium. The former qualified for national treatment in Belgium; the latter did not, because they were not in a comparable situation to a Belgian resident. Since the situations in the latter instance were not comparable, no discrimination in the eyes of EU law exists.

It should be noted that the Court's views on comparability have not changed much since it set out its test, in paragraph 94, of *De Groot*.[13] There, the Court highlighted that –

> "as far as the exercise of the power of taxation so allocated is concerned, the Member States must comply with the Community rules … and, more particularly, respect the principle of national treatment of nationals of other Member States and of their own nationals who exercise the freedoms guaranteed by the Treaty".

13 *F.W.L. de Groot v Staatssecretaris van Financiën ("De Groot"),* C-385/00, ECLI:EU:C:2002:750. For a detailed commentary on the national (equal) treatment principle by this author, see Tom O'Shea, *EU Tax Law and Double Tax Conventions* (Avoir Fiscal, London, 2008) and Tom O'Shea, *European Tax Controversies: A British-Dutch Debate: Back to Basics and Is the ECJ Consistent?* WTJ, 2013, 100-127 at p 119.

In other words, the national treatment principle applies from both the perspective of an origin Member State and from that of a host Member State.

Professor Lang finds support for his "horizontal comparability test" in *Sopora*,[14] but fails to recognise that this case involved two foreign workers, who were working in the host Member State, where each had exercised their free movement of worker rights. The tax rule at issue did not affect Dutch national workers, it merely affected some workers from other Member States who had exercised their free movement rights. Thus, the comparator involved two EU nationals with free movement rights who were entitled to equal treatment in the host Member State under the free movement of workers. The comparator did not include persons who had not exercised free movement of worker rights in the Netherlands.

The Court explained in paragraph 25 of *Sopora* that –

> "having regard to the wording of Article 45(2) TFEU, which seeks to abolish all discrimination based on nationality 'between workers of the Member States', read in the light of Article 26 TFEU, the view must be taken that that freedom also prohibits discrimination between non-resident workers if such discrimination leads to nationals of certain Member States being unduly favoured in comparison with others".

In other words, the comparator in a free movement of workers' situation was extended to include the situation of two foreign nationals who were entitled to receive equal treatment in the host Member State.

This does not imply a "horizontal comparability test" is being undertaken by the Court, rather, it is the free movement of workers' provision which entitled two foreign workers, who were in a comparable situation, in the host Member State, to equal treatment in the light of the Dutch rule which treated them differently.

The Court pointed out that such a rule in itself was not discriminatory. In paragraph 34 of *Sopora,* the Court stated that –

> "The mere fact that limits are set concerning the distance in relation to the workers' place of residence and concerning the ceiling of the exemption granted, taking as the starting point the Netherlands border and the taxable base, respectively, even though, as the referring court states, this is necessarily approximate in nature, cannot therefore, in itself, amount to indirect discrimination or an impediment to the free movement of workers.

14 *C.G. Sopora v Staatssecretaris van Financiën ("Sopora"),* C-512/13, ECLI:EU:C:2015:108. For earlier analysis by this author, see *Dutch Treatment of Two Nonresident Workers May Be Contrary to EU Law*, Tax Notes International 2015 p.863-866.

> This is *a fortiori* so where, as in the present case, the flat-rate rule operates in favour of the workers who benefit from it, in that it reduces significantly the administrative steps which those workers must undertake in order to obtain the exemption for the reimbursement of extraterritorial expenses".

However, the Court held in the following paragraph (35) that –

> "The position would, however, be different if — and this is a matter for the referring court to ascertain — those limits were set in such a way that the flat-rate rule were systematically to give rise to a net overcompensation in respect of the extraterritorial expenses actually incurred".

Clearly, the workers in question have to be in a comparable situation from the host Member State's perspective. The Netherlands did not have to treat all foreign workers in this way, only those non-resident workers who exercised their free movement of workers' rights in the Netherlands, and thus placed themselves in a comparable situation in the host Member State.

This is not a "horizontal comparability test" as suggested by Professor Lang.

Discrimination Using DTCs

Next, Professor Lang argues that –

> "A Member State may immunize otherwise inadmissible discriminations under EU law by 'packaging' these in a DTC – possibly in a tacit agreement with the other Member State, which attempts to elude the control of 'its own' discriminations under EU law in this manner".

This is a complete misunderstanding of the concept of discrimination and the role played by the non-comparability of situations, as discussed above.

Discrimination under the Treaty on the Functioning of the European Union (TFEU) has not changed in recent years.

A perusal of the *Italy v Commission* [15] judgment, shows that the definition of discrimination used by the Court in its direct tax cases equates to the definition used in its non-tax jurisprudence in 1963 –

> "Discrimination in substance would consist in treating either similar situations differently or different situations identically".

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15 See *Italy v Commission,* Case 13/63, ECLI:EU:C:1963:20, section 4(a).

This is almost identical to the definition used by the Court in *Schumacker*, outlined above, and in its subsequent direct tax jurisprudence.

The Court's definition of discrimination clearly opens the door to an argument that the situations in question are not comparable. If situations are not comparable, then they may be treated differently without causing discrimination outlawed by EU law.

Professor Lang fails to accept the Court's approach to the concept of non-comparability in its jurisprudence, even though the Court has made a number of determinations on non-comparability and explained in each case that there was no discrimination under the Treaty.[16]

"Discriminatory" Double Tax Conventions

Professor Lang goes on to suggest that the Member States may use their DTCs to "discriminate". He submits that –

> "It is unfortunate that the CJEU has given Member States a carte blanche for the conclusion of DTCs. In any event, DTC rules are thus beyond judicial control from the legal perspective of the fundamental freedoms".

This view of the Court's jurisprudence is completely flawed.

As pointed out above, in *Gottardo* and *Saint-Gobain*, to name just two cases, the Court has made it clear that all international agreements concluded by the Member States, including double tax conventions, must comply with EU law.

The Court determined that there was no discrimination involved in the *D case* scenario, since Mr D was not in a comparable situation to a Dutch resident. In *Manninen*, discussed above, the Court indicated that comparability existed, therefore, Mr Manninen was entitled to receive a tax credit from Finland in relation to the dividend received from the Swedish company. However, in paragraph 34 of *Manninen*, the Court pointed out that –

16 For examples, see *Frans Gschwind v Finanzamt Aachen-Außenstadt ("Gschwind"),* C-391/97, ECLI:EU:C:1999:409, paras. 26-30 and *Belgian State - SPF Finances v Truck Center SA ("Truck Center"),* C-282/07, ECLI:EU:C:2008:762. For a detailed commentary, see Tom O'Shea, *Truck Center: A Lesson in Source vs. Residence Obligations in the EU,* Tax Notes International, Feb. 16, 2009, 593-601. For a more complicated example, see *Test Claimants in Class IV of the ACT Group Litigation v Commissioners of Inland Revenue ("ACT IV GLO"),* C-374/04, ECLI:EU:C:2006:773. For analysis by this author, see footnote 3 above, *"Shifting Sands"*, at page 903.

> "It is true that, in relation to such legislation, the situation of persons fully taxable in Finland might differ according to the place where they invested their capital. That would be the case in particular where the tax legislation of the Member State in which the investments were made already eliminated the risk of double taxation of company profits distributed in the form of dividends, by, for example, subjecting to corporation tax only such profits by the company concerned as were not distributed".

In other words, there was a possibility of non-comparability.

In the next paragraph (35), the Court explained that that was not the case in *Manninen*.

The Court stressed that -

> "both dividends distributed by a company established in Finland and those paid by a company established in Sweden are, apart from the tax credit, capable of being subjected to double taxation. In both cases, the revenue is first subject to corporation tax and then – in so far as it is distributed in the form of dividends – to income tax in the hands of the beneficiaries".

Carte Blanche!

Professor Lang's comment that it is the Court which has given "carte blanche" to the Member States to conclude DTCs also fails to recognise that the Court does not have the competence to do this. It is the Member States that have the competence under EU law to conclude DTCs, since direct taxation matters are still mainly within their purview. However, the obligation of the Member States, when they enter into such DTCs, is to respect EU law, in particular the national/equal treatment principle highlighted above, and clearly set out by the Court in its jurisprudence, in particular, in paragraph 94 of *De Groot*.[17]

The Court's function is to interpret EU law.

Justifications

One final comment must be made in relation to the "Justifications" section of Professor Lang's article, where he submits that –

> "Ultimately, the objective of the CJEU is now apparently to treat profits and losses symmetrically and, as a rule, to no longer demand the deduction

17 This was explained by this author in 2008. See footnote 13 above.

> of the losses when profits may not be taxed either, due to a DTC exemption or for other reasons. For that reason, it no longer distinguishes between the different justifications".

A quick perusal of recent cases shows that this is a completely mistaken view.

The Court continues to refer to paragraph 55 of the *Marks & Spencer* case [18] when it comes to dealing with "final loss" situations. It has not wavered from that judgment, despite the criticisms of Professor Lang and others.

Whilst the Court has accepted that certain justifications overlap, it has not followed Lang's view that it "no longer distinguishes between" them. Thus, in the recent *Bevola* case,[19] the Court confirmed, in paragraph 53, that –

> "The legislation at issue in the main proceedings can therefore be justified by overriding reasons in the public interest relating to the balanced allocation of powers of taxation between the Member States, the coherence of the Danish tax system, and the need to prevent the risk of double deduction of losses".

In paragraph 61, the Court confirmed its ruling in *Marks & Spencer,* in relation to a "final loss" situation, saying that the taxpayer –

> "must show that the losses in question satisfy the requirements set out by the Court in paragraph 55 of the judgment of … *Marks & Spencer*".

Some Concluding Comments

Professor Lang's article raises a number of other issues each worthy of further research. The above analysis has demonstrated that many of Professor's Lang's opinions are extremely questionable when the jurisprudence of the Court is properly understood, in the light of the Court's consistent approach in the direct tax field.

Simply dismissing non-comparability of situations and labelling it as "discrimination" is unacceptable, given that the Court has applied the concept of

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18 *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes) ("Marks & Spencer"),* C-446/03, ECLI:EU:C:2005:763. For a detailed analysis by this author, see *Marks and Spencer v Halsey (HM Inspector of Taxes): restriction, justification and proportionality,* EC Tax Review 2006 p.66-82.

19 *A/S Bevola and Jens W. Trock ApS v Skatteministeriet ("Bevola"),* C-650/16, ECLI:EU:C:2018:424.

discrimination in its case law, in the same way, since the 1950s. Indeed, the law on discrimination may be described as settled law.

Naturally, new issues, like the ones in *Sopora* and *Truck Center* will come before the Court, but these cases still involve the concepts of discrimination and comparability, which are applied in a very consistent manner by the Court.

All of the Court's cases fit together, not simply the direct tax cases discussed in Lang's article but also its case law concerning non-tax matters. See for example, *Kraus*,[20] *Gebhard*,[21] *Bosman*,[22] *O'Flynn*,[23] *Matteucci* and *Gottardo*. These cases demonstrate that the Court's approach in the non-tax field is exactly the same as its approach in the direct tax area. Indeed, as this author has said before, the CJEU bases its jurisprudence on precedent. Its judgments are, generally speaking, a shining example of how the doctrine precedent is expected to work. Immense respect is paid by the CJEU to its previous jurisprudence.

Without understanding comparability between a non-resident and a resident taxpayer, the *Schumacker* judgment suddenly becomes a judgment where the Court, according to Lang, "interprets DTC rules", whereas the reality is somewhat different, since the Court merely applied the national treatment principle from the perspective of a host Member State and determined whether Mr Schumacker, a non-resident worker in Germany, was in a comparable situation to a German resident doing a similar job in Germany. This was simply an application of the Court's earlier case law seen in cases like *Avoir Fiscal*,[24] *Commerzbank*.[25]

Comparability

Whilst *Avoir Fiscal* and *Commerzbank* concerned the freedom of establishment, the Court had to determine whether non-residents, that had exercised their freedom of establishment rights in the host Member State, were in a comparable situation to

20 *Dieter Kraus v Land Baden-Württemberg ("Kraus"),* C-19/92, ECLI:EU:C:1993:125.

21 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano ("Gebhard"),* C-55/94, ECLI:EU:C:1995:411.

22 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman ("Bosman"),* C-415/93, ECLI:EU:C:1995:463.

23 *John O'Flynn v Adjudication Officer ("O'Flynn"),* C-237/94, ECLI:EU:C:1996:206.

24 *Commission v France ("Avoir Fiscal"),* Case 270/83, ECLI:EU:C:1986:37.

25 *The Queen v Inland Revenue Commissioners, ex parte Commerzbank AG ("Commerzbank"),* C-330/91, ECLI:EU:C:1993:303.

residents of that host State. If they were in a comparable situation, they were entitled to national treatment in the host Member State.

In *Schumacker*, the Court applied the same reasoning in relation to a non-resident worker in the host Member State and determined that Mr Schumacker was in a comparable situation to a German resident worker. Hence, he was entitled to national treatment in Germany, even though he was a non-resident. This was no different to the non-resident companies with branches in France being entitled to the tax credit in the *Avoir Fiscal* case.

In the later case of *Gerritse*,[26] the Court applied similar reasoning in relation to a non-resident service-provider in Germany and in *Bouanich I,* [27] the Court adopted a similar approach in relation to the free movement of capital and a cross-border investment by a French national in the host Member State, Sweden.

In each of these cases, covering all of the fundamental freedoms, the Court applied the national treatment principle from a host Member State perspective and determined that the non-resident person who exercised a fundamental freedom was in a comparable situation to a resident.

Once comparability was established, the non-resident person was entitled to national treatment in the host Member State.

Non-comparability

It is apparent from the Court's jurisprudence, that the Court does not always find that the situations are comparable. Thus, in a re-run of the *Schumacker* case, in *Gschwind*, the Court determined that the non-resident worker was not in a comparable situation to a German resident and consequently, the outcome of that case differed from *Schumacker*.

In conclusion, this discussion has demonstrated that Professor Lang's criticisms of the Court are not substantiated or supported by his analysis of the Court's direct tax jurisprudence. Much of the academic analysis criticising the Court's jurisprudence related to direct taxes requires refinement, re-investigation and reconsideration.

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26 *Arnoud Gerritse v Finanzamt Neukölln-Nord ("Gerritse"),* C-234/01, ECLI:EU:C:2003:340.

27 *Margaretha Bouanich v Skatteverket ("Bouanich I"),* C-265/04, ECLI:EU:C:2006:51.