Consistently consistent

Brief appraisal of the ECJ's case-law in respect of direct tax law[1]

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Sumário

Neste artigo, o autor examina sucintamente a forma como o Tribunal de Justiça das Comunidades Europeias ("**TJCE**") analisa a eventual incompatibilidade de normas de tributação directa dos Estados-Membros com o Direito Comunitário. Identifica a comparabilidade, os obstáculos e as justificações como os três instrumentos fundamentais da análise do TJCE e procurar demonstrar que os mesmos têm sido, de modo geral, aplicados de forma coerente pelo tribunal ao longo dos anos.

Conclui, por conseguinte, que a alegada inconsistência das decisões do TJCE neste domínio decorre do prisma de observação: se é verdade que algumas decisões se podem afigurar incongruentes numa óptica estritamente fiscal, certo é que o TJCE é um tribunal de "mercado interno", não um tribunal tributário. Como tal, é por referência aos princípios e regras do mercado interno que a consistência tem de ser mantida e o autor conclui que o desempenho do TJCE, a essa luz, tem sido assinalável.

[1] The author would like to thank Prof. Tom O'Shea for invaluable comments but obviously takes full responsibility for the paper's shortcomings.

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Contents

I. Introduction

The case-law of the European Court of Justice ("**ECJ**") on direct tax issues has drawn a "*venerable tradition*" [3] of criticism, from virulent allegories to its inability[4] and volatility[5] to lighter comments on lesser shortcomings such as lack of clarity[6] or pardonable inconsistency[7]. An example of such inconsistency would be the apparent acceptance of juridical double taxation, in contrast to repeated incursions against economic double taxation, or the lack of technical expertise on specific concepts such as "permanent establishment" ("**PE**")[8].

[3] Vanistendael, Frans, "*In Defence of the European Court of Justice*", Bulletin for International Taxation – March 2008, IBFD, p. 90.

[4] "*The Court has been performing a balancing act in this area for almost two decades now... it is a breathtaking spectacle, but one keeps wondering what the act would have looked like if the indisputably gifted free-stylists would have rehearsed beforehand.*" (Wattel, Peter, *apud* Weber, Dennis (editor), "*The Influence of European Law on Direct Taxation*", Kluwer Law, The Netherlands, 2007, pp. vii-viii).

[5] "*Most of the time, the outcome of a case is unpredictable…*" (Brokelind, Cécile, "*The* acte clair *doctrine arising from the ECJ's direct tax case law from a Swedish perspective: Use or misuse*", apud Dourado, Ana Paula, and da Palma Borges, Ricardo (editors), "*The Acte Clair in EC Direct Tax Law*", IBFD, The Netherlands, 2008, p. 466).

[6] E.g., "*the Court does so in a rather unclear manner*" (O'Shea, Tom, "*The ECJ, the `D' case, double tax conventions and most-favoured nations: comparability and reciprocity*", EC Tax Review, 2005-4, p. 193).

[7] Van Thiel, Servaas, "*Why the European Court of Justice should Interpret Directly Applicable Community Law as a Right to Most-Favoured Nation Treatment and a Prohibition of Double Taxation*", apud Weber, cit., pp. 83 et seq.

[8] See Confédération Fiscal Européene ("**CFE**"), *Opinion Statement of the CFE ECJ Taskforce on Lidl Belgium GmbH & Co KG v. Finanzamt Heilbronn* (Case C-414/06), §8 ff.

Irrespective of its technical quality, remarkable for some[9] or irregular for others[10], its impact is undisputable. Since it cannot act *ex officio*, its reach has been unsystematically driven by infringement and preliminary ruling proceedings. Nonetheless, although its role is that of interpreting EC law, not deciding cases, the ECJ's case-law has virtually impacted every single element of a direct tax system, even though "*the direct tax issues brought before the Court are not so much* tax *law as they are* Community *law*"[11]. Several direct tax cases are pending and many more will continue to emerge, but it seems fair to conclude that in the domain of direct taxation there are no areas of uncharted territory anymore. This is not surprising since "*a direct tax measure, as a general rule, always sufficiently relates to one of the EC Treaty freedoms*"[12]. This may explain why there are few, if any, areas of EC law where the role of ECJ has attracted more criticism than that of direct tax.

This paper assesses the fairness of the above criticism in light of the specific role of the ECJ. According to article 220 of the Treaty establishing the European Community ("**ECT**"), it is for the ECJ to "*ensure that in the interpretation and application of this Treaty the law is observed*". This means the ECJ is primarily an "internal market court" – not a tax court – entrusted with the responsibility of guiding the interpretation and application by every single national court of the freedoms and principles that constitute the fabric of the common purposes set out in

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[9] "[E]*ven though it is not a 'tax court' it is highly capable of reaching the correct result when an interpretation of the fundamental freedoms is at stake whether that is in the tax arena or in any other field of activity*" (O'Shea, Tom, "*Limitation on Benefit (LoB) clauses and the EU*", part II, International Tax Report, November 2008, p. 6). "[T]*he Court… has taken it upon itself to defend the fundamental principles of the Common Market and has done so with remarkable skill and convincing authority*" (Mutén, Leif, "*The effects of ECJ rulings on Member States' direct tax law*", *apud* Brokelind, Cécile, "*Towards a Homogeneous EC Direct Tax Law*", IBFD, The Netherlands, 2007, p. 31).

[10] See, e.g., Pistone, Pasquale, "*Ups and Downs in the Case Law of the European Court of Justice and the Swinging Pendulum of Direct Taxation*", Intertax, Vol. 36, Issue 4, 2008, p. 146. An author even suggests that a particular standing of the ECJ may be unique to cases involving a certain Advocate-General (Panayi, Christiana, "*Double Taxation, Tax Treaties, Treaty Shopping and the European Community*", Kluwer Law International, The Netherlands, 2007, p. 153).

[11] Terra, Ben, and Wattel, Peter, "*European Tax Law*", 5th edition, Kluwer Law International, The Netherlands, 2008, p. 30.

[12] Smit, Daniel S., and Kiekebeld, Ben J., "*EC Free Movement of Capital, Income Taxation and Third Countries: Four Selected Issues*", Kluwer Law International, The Netherlands, 2008, p. 43.

article 2 and the pillars of European Community ("**EC**") law. Safe for exceptional circumstances provided for in the ECT, such freedoms and principles are irreducible, even if to the detriment of tax law principles. The concern of the ECJ must be the consistency of the interpretation of EC law freedoms and principles and this paper tries to evidence that the Court has followed the appropriate route.

II. The consistent application of structural concepts

a. Structural concepts

The jurisprudence of the ECJ is built upon common blocks – hereinafter, the "**structural concepts**" – and its decisions, based on a precedential model which secures an easier congregation of opinions from the various judges, are usually painstakingly drafted with a view to evidence the origin and consistency of the application of such structural concepts, which apply across all areas and subjects.

Apart from the principles of EC law and the ECT freedoms in particular[13], the most fundamental concepts for a judgment regarding the compliance of a domestic tax rule with EC law appear to be:

i. Comparability;
ii. Obstacles; and
iii. Justifications.

The analysis of the understanding of the Court in respect of each of these concepts provides the appropriate background for the scrutiny of the degree of consistency permeating the decisions built upon them.

[13] Consistency is also patent in the way the ECJ decides which freedom applies, with a purposive approach being consistently applied in cases such as C‑196/04 *Cadbury Schweppes*, §31 to 33 and C-157/05 *Holböck*, §22 ff. An extensive list is provided by the ECJ itself in C-492/04 *Lasertec*, §19. See, for some historical background, O'Shea, Tom, "*Thin Cap GLO and Third-Country Rights: Which Freedom Applies?*", Tax Notes International, April 23, 2007, pp. 372 ff.

b. Comparability

i. General remarks

Where an issue of possible non-compliance of domestic direct tax rules with EC law arises, a cross-border element is usually involved[14]. Therefore, the ECJ first needs to assess whether the situation at issue is comparable to a purely domestic situation and examine them for a possible difference in treatment and for a possible restriction in the exercise of any of the ECT freedoms[15].

Ascertaining whether a situation is comparable, or not, is perhaps the most difficult of all the technical steps that need to be taken by the ECJ. The ECJ has throughout the years established comparability between domestic and cross-border situations in respect of almost all elements that form a direct tax system, including rules on computation of the taxable basis (e.g., C-484/93 *Svensson* and C-290/04 *Scorpio*), tax rates (C-107/94 *Asscher* and C-520/04 *Turpeinen*) and limitations on the exercise of freedoms (e.g., C-28/95 *Leur-Bloem* and C-330/07 *Jobra*).

Conversely, one of the reasons for the complexity of the exercise of identifying the appropriate comparator is that neither the ECT nor any other source of law provide guidance on what features or circumstances may be considered. In any given scenario, inevitably comprising a multitude of components and perspectives, determining which element is necessary and/or sufficient to establish comparability is a tantalising task.

[14] Although the ECJ may also be asked to interpret EC law pertinent to domestic cases (e.g., C-48/07 *Les Vergers*).

[15] In cases of absolute prohibitions, no difference in treatment exists, because the rule, *per se*, directly prevents the exercise of an ECT freedom (e.g., C-415/93 *Bosman*). This is entirely consistent with the thinking of the Court that "*all measures which prohibit, impede or render less attractive the exercise of* [a] *freedom must be regarded as obstacles*" (C- 293/06 *Deutsche Shell*, §28).

ii. Comparability level

Comparability is established at the level of the taxpayer and not of other elements of the situation, e.g., subsidiaries (C-168/01 *Bosal*, §39, C-446/03 *Marks & Spencer*, §36 ff., C-347/04 *Rewe*, §33). In *Marks & Spencer*, the United Kingdom ("**UK")** Special Commissioners did not detect a breach of EC law because they compared the position of a foreign subsidiary and a foreign branch of a UK company when they should have compared two UK parent companies, one with foreign subsidiaries and the other with UK subsidiaries. Although the point is undoubtedly complex, it is fair to say that this should have come as no surprise, since several years before the ECJ had made this point clear in C-264/96 *ICI*, particularly §§ 22 and 23.

iii. Substance over form

Secondly, comparability is established in substance, not in form[16]. The ECJ disregards superficial differences and is thus able to detect, from a host State standpoint, the similarity between a resident and a non-resident who "*obtains the major part of his taxable income from an activity performed in the State of employment*" (C-279/93 *Schumacker*, §36)[17] and, for instance, between residents and non-residents as regards the cost of acquisition of shares (C-265/04 *Bouanich*, §40). The thinking of the Court appears to have developed

[16] It does not appear that the ECJ sometimes uses a factual comparability approach and in other cases a legal comparability approach (see Lang, Michael, "*Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions, and Contradictions*", EC Tax Review, 2009-3, pp. 101 ff.). With all due respect, the ECJ does not appear to privilege legal comparability when it says that "*By treating the inheritances of those two categories of persons in the same way… the national legislature has in fact admitted that there is no objective difference between them*" (C‑43/07 *Arens-Sikkens*, §57). Instead, it is making proof that the Member State whose legislation is at issue actually acknowledges the comparability in substance.

[17] And rejecting it otherwise (C-391/97 *Gschwind*, §28).

into the conclusion that, despite the usual statement that "*the situations of residents and of non-residents are not, as a rule, comparable*" (C-279/93 *Schumacker*, §36), "*this is not a significant restriction on the application of the non-discrimination principle as between resident and non-resident taxpayers*"[18] and in practice almost only personal circumstances can prevent comparability between resident and non-resident individuals[19].

Since no personal circumstances apply to companies[20], comparability between them is almost inevitable whenever the host State exercises its taxing powers over a migrant taxpayer, with (e.g., C-270/83 "*Avoir Fiscal*", §20; C-311/97 *RBS*, §30 and C-253/03 *CLT-UFA*, demonstrating ECJ's consistency spanning over two decades) or without a PE (e.g., C-234/01 *Gerritse*, §27; C-374/04 *ACT IV GLO*, §68). Consistently with the reasoning developed by Advocate-General Geelhoed and adopted in C-374/04 *ACT IV GLO*, §68, comparability requires that the State whose legislation is at issue imposes the same charge to tax on both residents and non-residents. In C-282/07 *Truck Center*, the charges to tax were different[21] and therefore situations were not objectively comparable, because while it is true that residents were not subject to withholding tax, it may also be pointed out that non-residents were not subject to corporate income tax either[22]. However, this does not mean that

[18] Gammie, Malcolm, "*The Role of the European Court of Justice in the Development of Direct Taxation in the European Union*", IBFD Bulletin, March 2003, p. 88.

[19] Comparability may fail to be established in situations where residence is essential to the purpose of the rule (C-182/83 *Fearon*) or in cases where mutual benefits arise from a Double Tax Convention – "**DTC**" (C-376/03 *D.*).

[20] See Dahlberg, Mattias, "*Direct Taxation in Relation to the Freedom of Establishment and the Free Movement of Capital*", Kluwer Law International, The Netherlands, 2005, pp. 100 to 107).

[21] See O'Shea, Tom, "*Truck Center: A Lesson in Source vs. Residence Obligations in the EU*", Tax Notes International, Volume 53, Number 7 February 16, 2009, p. 597.

[22] Therefore, although this decision is arguably not one of the Court's finest moments, since it is scarcely justified, it does not seem fair to claim that the ECJ is "*saying that residents and non-.residents are different because residents and non-residents are different*" (CFE, *Opinion Statement of the CFE ECJ Taskforce on Truck Center* (Case C-282/07), §16). Similarly,

Belgium could use this fact to impose a detrimental tax treatment on the foreign lender[23].

The same reasoning applies from an origin State standpoint to residents acting in a purely domestic context *vis-à-vis* residents engaging some of the ECT freedoms. Therefore, the Court found that "*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*" (C-319/02 *Manninen*, §36), reflecting the reasoning of, *inter alia*, C-251/98 *Baars*, §§29 ff.

The Court is also relentlessly consistent regarding allegations of non-comparability by Member States in the absence of objective and admissible criteria. More than twenty years apart, the conclusions that "*by treating the two forms of establishment in the same way for the purposes of taxing their profits, the French legislature has in fact admitted that there is no objective difference between their positions*" (C-270/83 *"Avoir Fiscal"*) and that "*the differences between a SICAV governed by Luxembourg law and a share company governed by Finnish law… are not sufficient to create an objective distinction with respect to exemption from withholding tax on dividends received*" (C-303/07 *Aberdeen*, §55) showcase the ECJ's relentless defence of an objective analysis of comparability.

iv. Impact of DTCs

see De Broe and Bammens, cit., p. 135. "Style" is sometimes a critical factor when assessing the consistency of the ECJ's case-law (see Vanistendael, Frans, "*The ECJ at the Crossroads: Balancing Tax Sovereignty against the Imperatives of the Single Market*", European Taxation, September 2006, pp. 416 and 417).

[23] In §49 the ECJ clarifies that, although there is no discrimination because the situations are not comparable, there might have been a restriction if there were a detrimental impact to the migrant taxpayer, which implies comparing tax rates and the tax collection procedures: the "*Court determined that there was no such restriction on the freedom of establishment and, for the same reasons, on the free movement of capital. This had to be on the basis that the ''headline'' rate of tax charged under the Belgian corporation tax rules was significantly higher than the headline rate of tax charged under the withholding mechanism* (O'Shea, "*Truck Center…*", p. 601 – emphasis added).

Finally, comparability depends on the taxpayers being on the same footing whenever a DTC is at play. Therefore, and following non-tax jurisprudence (C-235/87 *Matteucci*), the ECJ did not find a German resident to be in a situation comparable to that of Belgian residents with regard to the rights arising to the latter under the Dutch-Belgian DTC (C-376/03 *D.*, §§58 and ff.), thus rejecting the application of the most-favoured nation principle in an ECT context.

c. Obstacles

i. Discrimination and restriction

In respect of direct taxation matters, the ECJ has to ascertain whether a certain direct tax treatment represents an obstacle to the exercise of the ECT freedoms or, more broadly, a breach of the EC law principles in general. The "negative integration" effect of its decisions[24] consists in the removal of such obstacles, which can emerge as *discrimination* or *restriction*.

There is discrimination proper whenever a member State treats non-nationals less favourably than nationals (i.e., not granting "national treatment") in a comparable position[25]. The relevance of comparability is emphasised by the fact that, ultimately, "*the decision as to whether there is discriminatory treatment depends on the choice of comparator*"[26]. In the vast

[24] See Gammie, cit., p. 98.

[25] There can also be discrimination when different situations are treated equally, in such a fashion that it has a detrimental impact for the migrant taxpayer, as noted by the ECJ in C-80/94 *Wielockx*, §17, and C-298/05 *Columbus*, §41, among many others. It has been argued that an example is C-293/06 *Deutsche Shell* (see Lang, "*Recent…*", p. 99), although the Court appears to have adopted a restriction approach (see O'Shea, Tom, "*German Currency Loss Rules Incompatible With EU Law, ECJ Says*", Tax Notes International, March 5, 2008).

[26] Lang, "*Recent…*", p. 99.

majority of the cases, however, the breach of EC law is not so blatant and a discriminatory treatment applies on the ground of residence, not nationality (sometimes prompting "covert discrimination").

Discrimination on the grounds of residence is perhaps more correctly classified as a restriction. The ECJ has consistently held that both overt and covert discrimination are prohibited by the ECT. Since the concept of residence is a cornerstone of tax systems, failure to identify indirect discrimination in rules treating comparable residents and non-residents differently would seriously undermine ECT freedoms and principles. The consistency of the ECJ over a decade may be illustrated by C-279/93 *Schumacker*, §28 ff., and C-346/04 *Conijn*, §25.

In any case, once comparability has been established, any differing treatment in a host State to the detriment of a migrant taxpayer leads inevitably to a finding of an obstacle. In such scenario, the ECJ finds the migrant "*placed at a disadvantage by comparison*" with the non-migrant (C-330/91 *Commerzbank*, §18) or "*subject to a tax which is higher than that applied to residents and… consequently in a less favourable position than the latter*" (C-443/06 *Hollmann*, §37).

Finally, a non-discriminatory treatment can be restrictive, as was found in C-250/95 *Futura*, §§24 to 26, where the obligation of a Luxembourg PE of a French company to keep separate accounts complying with Luxembourg's tax accounting rules could not be held discriminatory *vis-à-vis* Luxembourg companies but was deemed as constituting a restriction of the freedom of establishment of the French company, already subject to equivalent obligations in France. A restriction approach was also present in the recent C-282/07 *Truck Center*[27], where, having concluded there was no

[27] Oppositely, sustaining that "*there is as yet no clear evidence of a 'non-discriminatory restriction approach' in the direct tax case law*", see Zalasinski, Adam, "*The Limits of the EC Concept of 'Direct Tax Restriction on Free Movement Rights', the Principles of Equality and Ability to Pay, and the Interstate Fiscal Equity*", Intertax, Volume 37, Issue 5, p. 288.

comparability – and therefore no discrimination –, the Court proceeded with a succinct restriction analysis in §49. If "*the difference in treatment resulting from the tax legislation at issue in the main proceedings… procure*[d] *an advantage for resident recipient companies*", the ECJ would in all likelihood have found a restriction to exist.

From an origin State perspective, once comparability between purely domestic and cross-border income has been established, a restriction on the exercise of the ECT freedoms is also inevitable where the latter is subject to a less favourable treatment (e.g., C-35/98 *Verkooijen*, §36, and C-471/04 *Keller Holding*, §37).

ii. Acceptance of disparities[28]

The ECJ only finds an obstacle where the detrimental impact to the migrant taxpayer (be it inbound or outbound) results from the exercise of taxing powers by a single Member State. Disparities arising "*from the exercise in parallel by two Member States of their fiscal sovereignty*" (C-513/04 *Kerckhaert-Morres*, §20)[29] do not represent obstacles forbidden by the ECT, as the ECJ

[28] Despite his elegant defence, the ECJ has never accepted the concept of "dislocation". See Wattel, Peter, "*Corporate tax jurisdiction in the EU with respect to branches and subsidiaries; dislocation distinguished from discrimination and disparity; a plea for territoriality*", EC Tax Review, 2003-4, pp. 194 ff.

[29] This decision is not inconsistent with C-292/04 *Meilicke*, where allegedly the ECJ held that "*the shareholder's Member State of residence must recognize the (level of) taxation applied in the company's source Member State (the principle of mutual recognition)*" (Bizioli, Gianluigi, "*Balancing the Fundamental Freedoms and Tax Sovereignty: Some Thoughts on Recent ECJ Case Law on Direct Taxation*", European Taxation, March 2008, p. 136. Member States must only take into consideration the tax status of a company distributing dividends from another Member State when such status is also taken into consideration in a domestic situation (as not only in *Melicke* but also C-319/02 *Manninen*). If in a domestic context that element is not relevant, it is not relevant in a cross-border situation either, as was the case in C-513/04

would reiterate in C‑194/06 *OESF*, §37, and it is irrelevant whether they assume the form of juridical or economic double taxation, if the Member State in question does not treat migrant and non-migrant taxpayers differently. Therefore, "*the overall approach of looking at double burdens in two jurisdictions in order to decide which jurisdiction is responsible for removing the restriction seems to be a road that has been closed*"[30].

The consistency is emphasised by the application of the reasoning that "*the Treaty offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security*" (Joined Cases C-393/99 and C-394/99 *Hervein and others*, §51) to the tax arena (C‑365/02 *Lindfors*, §34 and C-403/03 *Schempp*, §45). In this light, it is understandable that the Court accepts cross-border double juridical taxation where a country does not eliminate it domestically (C-128/08 *Damseaux*, upholding C-513/04 *Kerckhaert-Morres*) but rejects cross-border double economic taxation "*where a Member State has a system for preventing or mitigating… economic double taxation for dividends paid to residents by resident companies*" (C-374/04 *ACT IV GLO*, §55), consistently with C-319/02 *Manninen*, §33, before, but also with C-48/07 *Les Vergers*, §47, more recently.

This reasoning also explains why it is not correct to state that "*cash-flow disadvantages seem to no longer be of concern to the Court*"[31]. Cash-flow disadvantages such as those found in joined cases C-397/98 *Metallgesellschaft* and C-410/98 *Hoechst* arise due to the legislation of one Member State alone and are therefore unacceptable. Conversely, those stemming from the inability to immediately deduct losses which may ultimately be deducted in the host State derive from the interplay of origin and host State rules and the

Kerckhaert-Morres.

[30] Vanistendael, Frans, "*Denkavit Internationaal: The Balance between Fiscal Sovereignty and the Fundamental Freedoms?*", European Taxation, May 2007, p. 213.

[31] Lang, "*Recent…*", p. 112.

Court implicitly accepted them in C-446/03 *Marks & Spencer* and C-414/06 *Lidl Belgium* as a tolerable consequence of the exercise of the ECT freedoms, since, as mentioned above, none of the Member States involved can ensure neutrality of such exercise[32].

iii. Minimal breach

Additionally, it is not necessary that the taxpayer is actually or significantly hindered in the legitimate exercise of ECT freedoms. Any harmful consequence of the application of the tax legislation at issue, even if merely potential (as noted in C-141/99 *AMID*, §27) or minimal (C-270/83 "*Avoir Fiscal*", §21, and C-9/02 *Lasteyrie du Saillant*, §43), suffices for these purposes.

iv. Impact of DTCs

Finally, the ECJ has developed the consistent view that DTCs form part of the domestic framework and that, as such, whereas a Member State "*cannot rely on the existence of a tax advantage granted unilaterally by another Member State in order to escape its obligations under the Treaty*" (C- 379/05 *Amurta*, §78), it may overcome an obstacle triggered by its own domestic law by negotiating appropriate remedies in a DTC. Contrary to what has been argued, this does not mean "*that the object of comparison should be transferred from the domestic legal order to the Community legal order or to the Internal Market legal order*" [33], but instead that a restriction can be healed vicariously by the treatment provided for by another Member State as a result of a DTC that the

[32] See O'Shea, Tom, "*ECJ Rejects Advocate General's Advice in Case on German Loss Relief*", World Tax Daily, 123-2, June 25, 2008.

[33] Bizioli, cit., p. 136.

Member State creating the restriction was able to secure: "*a Member State may succeed in ensuring compliance with its obligations under the Treaty through the conclusion of a convention for the avoidance of double taxation with another Member State*" (C- 379/05 *Amurta*, §79, which had been made clear in C-265/04 *Bouanich*, §§50 ff., and reiterated, among others, in C-374/04 *ACT IV GLO*, §71).

However, the application of the DTC has in practice to effectively "*overcome the effects of the restriction*" (C-170/05 *Denkavit Internationaal*, §47) and therefore it is necessary "*to determine whether it enables the effects of the restriction… to be neutralised*" (C- 379/05 *Amurta*, §84).

d. Justifications

i. General remarks

A discriminatory treatment on the grounds of nationality can very exceptionally be justified, under the ECT, by public security, health and policy reasons, with virtually no impact in the tax field[34].

On the other hand, discrimination on the grounds of residence or, in broader terms, a restriction may potentially be justified, provided that it meets a general interest objective, such as "*professional rules justified by the general good*", and that their "*application is effected without discrimination*" (both C-71/76 *Thieffry*, §12). It is further required that "*the interests which such rules are designed to safeguard are protected*" (C-205/84 *Commission v. Germany*, §27) and "*that the same result cannot be achieved by less restrictive rules*" (C-106/91 *Ramrath*, §31), so they should not go beyond what is strictly necessary. These

[34] This does not mean that Member States do not try to claim such defence, as in C-76/05 *Schwarz*, where Germany unsuccessfully employed education policy arguments, among others (§50 ff.).

requirements were consistently developed throughout the years by the ECJ in several decisions and finally compiled in C-19/92 *Kraus*, §32[35].

Therefore, a restriction is only justifiable if pursuing a general interest purpose and applied in a non-discriminatory (with respect to nationality), appropriate and proportional manner. In this regard, the first and last criteria deserve further analysis.

ii. Grounds for justification

With respect to the first, "*the Court has accepted a number of public interests not listed in the Treaty as sufficiently vital*"[36], including some purely economic reasons (e.g., preservation of jobs in C-464/05 *Geurts and Vogten*, §26, and C-256/06 *Jäger*, §50).

With respect to tax-specific grounds, although they may be classified and organised in several different ways, it appears possible to reduce them in the direct tax field to a common denominator[37], the *integrity of the tax system*, covering, and again citing examples of case-law over a decade or more:

- its intrinsic structuring and coherence (C-300/90 *Commission v. Belgium*, §14 and ff., and C‑157/07 *Krankenheim*, §§40 and ff.);
- its territorial application in the form of fiscal territoriality or balanced allocation of taxing powers (C-250/95 *Futura*, §18 and ff., and C-446/03 *Marks & Spencer*, §§43 and ff.);

[35] Curiously, it became known as the *Gebhard formula* (C-55/94 *Gebhard*, §37), although the Kraus decision precedes it by almost three years.

[36] Terra, Ben, and Wattel, Peter, "*European Tax Law*", 5th edition, Kluwer Law International, The Netherlands, 2008, p. 50.

[37] A common denominator was instead found in the concept of "*national fiscal interest*" in Bizioli, cit., pp. 139 and 140.

- its pre-emptive approach translated in the need to prevent tax avoidance in one or more of its several forms (C-264/96 *ICI*, §26, *a contrario sensu*, C-446/03 *Marks & Spencer*, §57, and C-231/05 *Oy AA*, §60), but only if the rules in question have the "*specific purpose of preventing wholly artificial arrangements, designed to circumvent... tax legislation*" (C-324/00 *Lankhorst-Hohorst*, §37, with similar language in, for instance, C-451/05 *ELISA*, §91, or C-105/07 *Lammers & Van Cleef*, §33); and,
- from a surveillance and control perspective, its "fiscal supervision" manifestation, present at least in indirect taxation since C-120/78 *Rewe Zentral* (Cassis de Dijon), §8, and increasingly irrelevant due to the increasing scope of mutual assistance in the recovery of debt (particularly since Directive 2001/44/EC, of 15 June) except for when third countries are involved (C-101/05 *A.*, §63) and in any case with a recent example being the decision in joined cases C-155/08 *X* and C-157/08 E.H.A. *Passenheim-van Schoot*).

iii. Proportionality

As regards proportionality, the ECJ has also applied this general EC law principle in direct taxation matters with striking consistency. One of the reasons may be that the ECJ applies the proportionality test in a very objective manner, as a simple comparison of degrees of restrictiveness, with a view to ensure that the restriction "*does not to go beyond what is necessary*" (C-19/92 *Kraus*, §32). Therefore, the ECJ does not refrain itself from ruling that, for instance, fiscal supervision may be ensured by means other than those provided for by the law of a certain Member State (C-250/95 *Futura*, §40). Conversely, certain restrictions may be deemed proportional if no less restrictive alternatives appear to be available (C-231/05 *Oy AA*, §65).

Proportionality is particularly relevant in respect of restrictions allegedly aimed at combating tax avoidance. In most cases where Member States have claimed that a certain restriction to ECT freedoms was necessary to prevent abusive conducts, the ECJ did not refrain from finding a rule to "*greatly exceed[…] what is necessary in order to achieve the aim which it pursues*" (C-9/02 *Lasteyrie du Saillant*, §52) and from considering a rule to be in breach of EC law if, "*despite the absence of objective evidence such as to indicate the existence of an arrangement of that nature*" (C-196/04 *Cadbury Schweppes*, §72), a certain domestic rule operates as if a wholly artificial arrangement were in place in a certain cross-border structure[38].

[38]Another example being that a transaction with a non-resident party (e.g., a loan) "*cannot be the basis of a general presumption of abusive practices and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty*" (C-524/04 *Thin Cap Group*, §73, and consistently reiterated in C‑105/07 *Lammers & Van Cleef*, §27, and C-330/07 *Jobra*, §37).

III. Conclusions

Most ECJ judgments on direct taxation matters rely on criteria and reasoning developed in previous decisions on both tax and non-tax related matters and those where an original piece of thinking is required are nonetheless aligned with prior decisions. Whenever authors believe to have identified new trends[39] or eloquent silences in a number of judgments, the ECJ surprises by… being consistent[40].

A prosaic reason that may help explaining the consistency of the jurisprudence of the ECJ may be that by transposing full sentences and even paragraphs to new judgments, the *rapporteurs* reduce the scope for discussion while simultaneously enhancing the consistency of the Court's thinking on the most fundamental subjects. In practice, the ECJ adopts a *de facto* precedent rule and consistency has been perhaps its most valuable by-product.

However, the crux of the consistency of the jurisprudence of the ECJ is that the Court does not try to be consistent regarding direct taxation matters, but instead considering the internal market objectives and the fulfilment of ECT freedoms. Trying to analyse them as tax cases or even discern, for instance, "*a policy for dividend taxation*"[41] is in all likelihood an ineffectual exercise. From such vantage point, it will be inevitable to conclude that "*Some judgments on intra-Community situations give the impression that the Court today is willing to give Member States more room to implement national tax policies than it did a few years ago. Other judgments, however, give a different impression*"[42]. In fact, the ECJ is not willing to give any more or any less

[39] With due respect, it is not that "*the ECJ has recently been more willing to accept justifications for different treatment*" (Lang, "*Recent…*", p. 110), but that the most blatant manifestations of discriminatory treatment are increasingly rare, notably due to the work of the ECJ. Therefore, modern cases are evermore complex and nuanced, with justifications playing a role of rising importance.

[40] A recent example being Verdoner, Louan, "*The Coherence Principle under EC Tax Law*", European Taxation, May 2009, where the author concludes that "*instances where it is accepted are diminishing as the ECJ becomes more concerned with the discriminatory behaviour of Member States*" (p. 274) and that "*In time, the coherence exception will weaken*" (p. 282). Surprisingly, or not, the ECJ has recently accepted coherence again in C‑157/07 *Krankenheim*.

[41] Lang, Michael, "*ECJ case law on cross-border dividend taxation – recent developments*", EC Tax Review 2008-2, p. 77.

[42] *Idem*.

room, but simply to continue providing a solid and consistent opposition to any unjustified obstacles to the exercise of ECT freedoms. It is by reference to those freedoms that the Court needs to be consistent and it appears it has been doing a fine job at that[43].

[43] Those claiming otherwise may find an interesting list of suggestions of amendments to the ECJ's case law in Lang, "*Recent…*", p. 113.