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Cross Border Inheritances and European Community Law

Juridical double taxation of inheritances and the free movement of capital

Master's thesis within Tax Law

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Abstract

Double taxation is known as restricting the free flow of capital and accordingly results in a limited access of the internal market. Although, not many Member States have entered into double taxation conventions in order to avoid juridical double taxation of inheritances. The question then arises whether this failure to eliminate juridical double taxation is restricting the free movement of capital. The ECJ's case law regarding inheritance taxes are very varying. In its initial case law, the ECJ stated that national measures which reduce the value of the inheritance are in breach of EC law. Even measures which could restrict investors in one Member State from investing in other Member States are considered to be a breach of EC law. The ECJ also stated that discriminating situations could not be justified with the argument that these situations arise due to the co-existence of national tax systems. Given these facts, it seems like juridical double taxation is likely to constitute a breach of EC law. The ECJ has however only concentrated on which effect the national provisions in a single Member State may have and have not given concern to which effect these provisions may have in connection with the tax provisions in other Member States. The author believes that the Court takes this approach because of a respect of the Member States fiscal sovereignty.

This respect also shows in the Block case. In this case the ECJ made it clear that juridical double taxation, caused by the co-existence of national tax systems, is not considered to be a breach of EC law. The ECJ also stated that when the Member States develops their tax systems, due to the lack of harmonised Community rules regarding direct taxation, they are not obliged to adapt to the tax systems of other Member States in order to avoid double taxation. The ECJ also made it clear that the citizens are not guaranteed a neutral tax situation when transferring their place of residence. In this thesis a comparison has also been made to judgements where the ECJ considers economic double taxation to be a breach of EC law. After studying all these cases it seems like the ECJ considers juridical double taxation to be an undesirable restriction of the free flow of capital. But even though the ECJ encourages the Member States to enter into double taxation conventions, there are no consequences when the Member States fail to do this. The difference between cases regarding economic double taxation and juridical double taxation could be that the ECJ considers it to be too far reaching to judge juridical double taxation as a breach of EC law and do not want to regulate how this restriction shall be avoided and thereby take the role of the Community legislator or breach the fiscal sovereignty of the Member States. The author believes that it would be more beneficial for the internal market if juridical double taxation was avoided and that it would not be harmful if the ECJ would give the Member States some incentives for entering into double taxation conventions in order to eliminate or alleviate situations where juridical double taxation occurs.

List of Abbreviations

EC	European Community
ECJ	European Court of Justice
EC Treaty	1957 Treaty Establishing the European Economic Community
EU	European Union
OECD	Organisation for the Economic Co-operation and Development
OECD Model Convention	2005 OECD Model Convention on Income and on Capital.

Table of Contents

1 Introduction

In this chapter, the subject of the thesis is initially dealt with in the background chapter. The purpose, method, delimitations and the outline of the thesis will thereafter follow.

1.1 Background

The internal market that is to be established within the European Community shall constitute an 'area without internal frontiers in which the free movement of goods, persons, services and capital is ensured' in accordance with the provisions of the EC Treaty.[1] The free movement of capital between Member States of the European Community and between Member States and third countries is ensured by Article 56 of the EC Treaty.

In the Verkooijen case[2] the European Court of Justice (ECJ) made it clear that even direct taxation within the Member States, falls within the area of the free movement of capital. Direct taxation is not harmonised within the EU and is mainly considered as an area of law that should be regulated on a national level by the Member States. When establishing their national tax systems, the Member States still needs to consider Community law.[3]

Double taxation is known as having a harmful effect on movements of capital,[4] and it could result in a limited access of the internal market.[5] It is therefore desirable that the Member States enter into double taxation conventions with each other in order to eliminate or alleviate such double taxation.[6]

Double taxation of cross-border dividends have been thoroughly dealt with by the ECJ. Economic double taxation has been considered as restricting the free movements that are ensured by the EC Treaty.[7] Double taxation of dividends is also often eliminated through double taxation conventions.[8]

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[1] Articles 2, 3(1)(c) and 14(2) of the 1957 Treaty Establishing the European Economic Community (EC Treaty).

[2] ECJ 6 June 2000, C-35/98 *Staatssecretaris van Financiën* v *B.G.M. Verkooijen* [2000] ECR I-04071.

[3] See section 2.2.

[4] Commentaries on the articles of the OECD Model Convention on Income and on Capital, 2005, Introduction, paragraph 1. [3].

[5] See section 2.3.2.

[6] Article 293 of the EC Treaty.

[7] See for example ECJ 7 September 2004, C-319/02 *Petri Manninen* [2004] ECR I-07477, 12 December 2006, C-446/04 *Test Claimants in the FII Group Litigation* v *Commissioners of Inland Revenue* [2006] ECR I-11753 and 8 November 2007, C-379/05 *Amurta SGPS* v *Inspecteur van de Belastingdienst/Amsterdam* [2007] ECR I-09569.

[8] Dividends are for example regulated in Article 10 in the 2005 OECD Model Convention on Income and on Capital (OECD Model Convention).

This is hence not the case with inheritances. Not many Member States have entered into double taxation conventions regarding inheritance taxes.[9] Judgements from the ECJ have been given in some cases regarding these taxes.[10] The signals from the ECJ in these cases are however varying and surprising when compared to the judgements regarding for example economic double taxation.

1.2 Purpose

Since the case law of the ECJ concerning inheritance taxes are very varying, the purpose of this thesis is to report the evolution of ECJ's case law regarding inheritance taxes. Are all disadvantages arising from cross border investments restrictions of the free movement of capital?

1.3 Method

1.3.1 European Community law

Since the European Community relies on the Treaty of Rome, also known as the EC Treaty, this primary source of EC law will constitute the starting-point of the studies.[11] Secondary EC law,[12] consisting of regulations,[13] directives[14] and decisions[15] will not be used in this thesis. The ECJ is the principal interpreter of EC law,[16] and this thesis will mainly study and interpret case law from the ECJ. This is done in order to find out the view of the ECJ regarding the relationship between the free movement of capital, inheritances and double taxation. The case law concerning inheritance taxes will be presented in a chronological order in order to show the ECJ's development of these cases.

Even though relevant research and doctrine does not have a particular substantial value as a legal source,[17] this shall also be treated throughout the thesis in order to take part of the discussions about the rulings of the ECJ. Doctrine hence plays an important role in this thesis when the case law from the ECJ is analysed. The case law regarding inheritance taxes will further be compared with other cases from the ECJ where the Court deals with matters concerning income taxation. This is done in order to get a fuller

[9] Silfverberg, Christer, *Internationell arvs- och gåvobeskattning: utifrån svensk rätt*, 1. ed., Norstedts juridik, Stockholm, 2002, page 74.

[10] These judgements will be treated in chapters 3-6.

[11] Bernitz, Ulf, Heuman, Lars, Leijonhufvud, Madeleine, Siepel, Peter, Warnling-Nerep, Wiweka, Vogel, Hans-Heinrich, *Finna rätt: juristens källmaterial och arbetsmetoder*, 9. ed., Norstedts juridik, Stockholm, 2006, pages 55 and 59.

[12] Bernitz, Ulf, Heuman, Lars, Leijonhufvud, Madeleine, Siepel, Peter, Warnling-Nerep, Wiweka, Vogel, Hans-Heinrich, *Finna rätt: juristens källmaterial och arbetsmetoder*, page 59.

[13] Article 249(2) of the EC Treaty.

[14] Article 249(3) of the EC Treaty.

[15] Article 249(4) of the EC Treaty.

[16] Article 220 of the EC Treaty.

[17] Bernitz, Ulf, Heuman, Lars, Leijonhufvud, Madeleine, Siepel, Peter, Warnling-Nerep, Wiweka, Vogel, Hans-Heinrich, *Finna rätt: juristens källmaterial och arbetsmetoder*, pages 62-63.

overview of the intentions of the ECJ. After analysing cases regarding inheritances and comparing these with some of the ECJ's judgements in other cases regarding income taxation and after taking part of the discussions in relevant doctrine, the author will draw conclusions.

Further, EC law shall primarily be interpreted in 'the scope of the wording as it is' and be given 'a meaning based on a literal and logical interpretation'.[18] The provisions of EC law shall further be interpreted in accordance with the view of the ECJ in the CILFIT-case:

> 'Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.'[19]

When interpreting the case law from the ECJ, the author has the ambition to follow these guidelines.

Further it shall be noted that since the Lisbon Treaty came into force late in the process of writing this thesis, references will mainly be made to the Treaty of Rome. References to the Lisbon Treaty will only be made when this Treaty causes changes that are of relevance to the thesis.

1.3.2 The OECD Model Conventions

The OECD Model Convention on Income and on Capital (OECD Model Convention) is briefly mentioned in this thesis. To find out whether this Model Convention also applies to inheritance taxes, the Commentaries on the Articles of the OECD Model Convention will be applied.[20] These Commentaries will be used, even if they are not binding in international tax law,[21] in order to further understand the Articles in the OECD Model Convention.

The author will also briefly be using the OECD Model Double Taxation Convention on Estates and Inheritances and on Gifts. This model convention includes methods for the elimination of juridical double taxation of inheritances and is therefore of some importance to this thesis.[22]

1.4 Delimitations

This thesis will mainly study case law from the ECJ regarding inheritance taxes in relation to the free movement of capital. National measures regarding inheritance taxes

[18] ECJ 1 June 1961, *Gabriel Simon* v *Court of Justice of the European Communities* [1961] ECR 115, paragraph 7.

[19] ECJ 29 February 1984, 77/83 *Srl CILFIT and others and Lanificio di Gavardo SpA* v *Ministero della sanità* [1984] ECR 1257, paragraph 20.

[20] Commentaries on the articles of the OECD Model Convention on Income and on Capital, 2005.

[21] Ward, David A., The *Role of the Commentaries on the OECD Model in the Tax Treaty Interpretation Process*, Bulletin – Tax Treaty Monitor, March, 2006, page 99.

[22] 1982 OECD Model Double Taxation Convention on Estates and Inheritances and on Gifts.

could also be in breach of the other freedoms that are established in the EC Treaty. The ECJ has for example recently given its judgment in the Geurts and Vogten case.[23] Since this case however concerns inheritance taxes in relation to the freedom of establishment, it will not be a part of the case law study in this thesis. The author does neither intend to deal with the freedom of establishment and the other freedoms that are established in the EC Treaty in relation to inheritance taxes. In case of inheritance taxes, the author thinks that it is most important to address the relation to the free movement of capital.

Cases regarding the free movement of capital in relation to other capital movements than inheritances will neither be a part of this thesis except when such cases assists in the understanding of the cases regarding inheritance taxes. The cases regarding income taxation that are used in order to analyse the cases regarding inheritance taxes could however also relate to the other freedoms that are established in the EC Treaty.

When analysing the case law from the ECJ, only the relevant background and conclusions will be treated. Conclusions from the ECJ that are not of relevance to this thesis will therefore not be dealt with. Methods for the elimination or alleviation of double taxation will not be thoroughly treated in the thesis. Material from 1st of December 2009 and on, will not be taken into account.

1.5 Outline

Chapter two provides with general information regarding direct taxation within the Member States, double taxation and the problems with double taxation in relation to free movement of capital. This chapter is only intended to serve as a basis for the following study of the case law from the ECJ and it will therefore not include any new discussions or conclusions.

Chapter three studies and analyses the initial case law from the ECJ regarding cross border inheritances and the free movement of capital. These cases provides with general principles that are to be applied in latter case law from the ECJ. Based on these principles, the author will also try to draw conclusions whether juridical double taxation of inheritances constitutes a restriction on the free movement of capital or not in the view of the ECJ.

Chapter four studies the Eckelkamp and Arens-Sikken cases. The possibility to deduct for debts relating to the inherited property was dealt with in these cases. Even if the cases does not deal with double taxation per se, the national provisions in these cases could as likely result in a double taxation situation and the judgements are therefore of relevance for this thesis.

Chapter five analyses the Block case. This case was the first case where the ECJ actually addressed the problems with juridical double taxation of inheritances. The ruling will therefore be thoroughly studied and analysed. The analysis of this case also contains comparisons with the ECJ's judgements in certain other cases concerning juridical and economic double taxation as well as it contains the author's own opinions.

Chapter six will provide with the conclusions that can be drawn from earlier chapters in the thesis.

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[23] ECJ 25 October 2007, C-464/05 *Maria Geurts and Dennis Vogten* v *Administratie van de BTW, registratie en domeinen and Belgische Staat* [2007] ECR I-09325.

2 General provisions

In this chapter, the author intends to give a short introduction concerning direct taxation within the Member States and which principles that are used in order to gain jurisdiction to tax. The author will also shortly present the problems with double taxation and the conflict between double taxation and the free movement of capital that is established in Article 56 of the EC Treaty. The chapter is intended to serve as a foundation for the following analysis of the ECJ's case law concerning inheritance taxes and juridical double taxation within the European Union (EU).

2.1 Direct taxation within the Member States

Within the EU, direct taxation is mainly considered as an area which is regulated by the individual Member States. This is considered as an appropriate approach since direct taxation is of great importance for the financing of the welfare systems.[24] There is neither any overall harmonising EC legislation regulating this area of law since unanimity is required in order for the EU to achieve a valid decision regarding direct taxation.[25] The Member States are therefore basically free to regulate this area of law as they wish.[26] But even if direct taxation falls within the competence of the Member States, Community law shall still be considered.[27]

2.1.1 Principles of jurisdiction to tax

The increased possibility for persons and capital to move cross borders results in the fact that more citizens of the EU may have property or heirs in more than one Member State at the time of death. The question that arises is which Member State or States that could have tax claims with regards to the deceased person's property.[28] There are various principles that can serve as a basis for states' tax claims. The two main principles are however the residence principle and the source principle. The residence principle means that the taxpayer is fully liable to pay tax in the state where he or she is resident. The taxpayer is hence liable to pay tax in that state for its worldwide income. The source principle however is applied when the income has a particularly strong connection to a certain state. The income will therefore be taxed in that state even if the taxpayer is not fully liable to pay tax. Normally, a state uses both these principles as basis

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[24] Dahlberg, Mattias, *Direct Taxation in Relation to the Freedom of Establishment and the Free Movement of Capital,* Kluwer law international, The Hague, 2005, page 1.

[25] Article 93 of the EC Treaty. Dahlberg, Mattias, *Direct Taxation in Relation to the Freedom of Establishment and the Free Movement of Capital,* page 9. Within certain areas of direct taxation there are however some directives in order to facilitate cross-border movements such as cross-border dividends between parent companies and subsidiaries, mergers, interest and royalty payments between associated companies and taxation and savings income in the form of interest payments.

[26] Terra, Ben J. M. & Wattel, Peter Jacob, *European Tax Law,* 5. ed., Kluwer Law International, Alphen aan den Rijn, 2008, page 29.

[27] ECJ 14 February 1995, C-279/93 *Finanzamt Köln-Altstadt* v *Roland Schumacker* [1995] ECR I-00225, paragraph 21; and 11 August 1995, C-80/94 *G. H. E. J. Wielockx* v *Inspecteur der Directe Belastingen* [1995] ECR I-02493, paragraph 16; and 14 September 1999 *Frans Gschwind* v *Finanzamt Aachen-Außenstadt* [1999] ECR I-05451, paragraph 20; and C-35/98 *Staatssecretaris van Financiën* v *B.G.M. Verkooijen,* paragraph 32.

[28] Silfverberg, Christer, *Internationell arvs- och gåvobeskattning: utifrån svensk rätt,* pages 13-14.

for their tax claims.[29] Another recognised principle of jurisdiction to tax is the citizenship principle. The taxation is then based on citizenship, regardless of the residence of the taxable person. When applying the citizenship principle, the worldwide income of the citizen is subject to tax.[30]

2.1.2 Juridical double taxation

The residence principle and the citizenship principle often lead to an extraterritorial jurisdiction to tax.[31] Hence, when the use of the principles of jurisdiction to tax collides, international juridical double taxation arises. The taxpayer will then be taxed for the same taxable entity in two different states during the same period of time.[32]

Since taxes within one state often are high enough, the consequences of being liable to tax in more than one state for the same income during the same period of time could be severe and greatly discouraging for example investors dealing with cross border investments.[33] In the Introduction to the OECD Model Convention it is stated that double taxation needs to be removed since this phenomenon is preventing '... the economic relations between countries' and it is also stated that double taxation has harmful effects on, for example, the movements of capital between states.[34]

2.2 The free movement of capital

Within the European Community, the free movement of capital and payments are ensured through Article 56 of the EC Treaty. The article, which has direct effect,[35] prohibits all restrictions on the free movement of capital and payments between Member States as well as between Member States and third countries. "Restrictions" includes both direct and indirect discrimination but non-discriminatory measures could also be considered as such restrictions.[36] Since this thesis focuses primarily on the free movement of capital, I will not discuss the free movement of payments in more detail.

2.2.1 The definition of capital

There is no clear definition of the meaning of "capital" in the EC Treaty, there are however some guidelines in Article 57 of the EC Treaty. This article states that capital

[29] Dahlberg, Mattias, *Internationell beskattning*, 2. ed., Studentlitteratur, Lund, 2007, pages 23-25.

[30] Panayi, Christiana H. J. I., *Double Taxation, Tax Treaties, Treaty-Shopping and the European Community*, Kluwer Law International, Alphen aan den Rijn, 2007, page 4.

[31] Panayi, Christiana H. J. I., *Double Taxation, Tax Treaties, Treaty-Shopping and the European Community*, page 13.

[32] Dahlberg, Mattias, *Internationell beskattning*, pages 23-25.

[33] Panayi, Christiana H. J. I., *Double Taxation, Tax Treaties, Treaty-Shopping and the European Community*, pages 15-16.

[34] Commentaries on the articles of the OECD Model Convention on Income and on Capital, 2005, Introduction, paragraph 1. [3].

[35] See for example, ECJ 18 December 2007, C-101/05 *Skatteverket* v *A* [2007] ECR I-11531, paragraph 21.

[36] Dahlberg, Mattias, *Direct Taxation in Relation to the Freedom of Establishment and the Free Movement of Capital*, page 279.

movements, for instance, includes direct investment – including in real estate – establishment, the provision of financial services and the admission of securities to capital markets. Since Article 56 of the EC Treaty largely resembles Article 1 in Directive 88/361 of 24 June 1988 for the implementation of Article 67 of the Treaty, Annex no 1 of this Directive which contains a fuller, but non-exhaustive list of what is included in capital movements, can be used.[37] In the Annex, the capital movements are listed and divided under various headings, one of the headings being 'Personal Capital Movements'. This heading covers inheritances and legacies. Since inheritances are listed in the Annex, Member States are, according to Article 56 of the EC Treaty, prohibited from having or taking measures, legislative or not, that restricts this capital movement.[38]

2.2.2 Double taxation as a restriction on the free movement of capital

As already mentioned in section 2.2 both direct and indirect discrimination could be considered as a restriction on the free movement of capital. Non-discriminatory measures could also lead to a restriction of this freedom.[39] The ECJ has recognised non-discriminatory measures as being restricting through case law.[40] Even if the measures taken by the two Member States are not discriminatory, double taxation still cause a restriction on the movement of capital,[41] since it results in a limited access of the internal market.[42] A reference can be made to the Opinion of the Advocate General in the D case[43] which stated that: 'the fact that a taxable event might be taxed twice is the most serious obstacle there can be to people and their capital crossing internal borders'.[44]

This fact is not in accordance with Article 10 of the EC Treaty which states that the Member States are obliged to ensure the fulfillment of the obligations arising from the

[37] For a fuller resoning, see ECJ 16 March 1999, C-222/97 *Manfred Trummer and Peter Mayer* [1999] ECR I-01661, paragraph 21; and 5 March 2002, joined cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Hans Reisch and Others* v *Bürgermeister der Landeshauptstadt Salzburg and Grundverkehrsbeauftragter des Landes Salzburg and Anton Lassacher and Others* v *Grundverkehrsbeauftragter des Landes Salzburg and Grundverkehrslandeskommission des Landes Salzburg* [2002] ECR I-02157, paragraph 30; and 23 February 2006, C-513/03 *Heirs of M. E A. van Hilten-van der Heijden* v *Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* [2006] ECR I-01957, paragraph 39.

[38] Dahlberg, Mattias, *Direct Taxation in Relation to the Freedom of Establishment and the Free Movement of Capital*, page 277.

[39] Dahlberg, Mattias, *Direct Taxation in Relation to the Freedom of Establishment and the Free Movement of Capital*, page 279.

[40] ECJ 14 October 1999, C-439/97 *Sandoz GmbH* v *Finanzlandesdirektion für Wien, Niederösterreich und Burgenland* [1999] ECR I-07041 and 26 September 2000, C-478/98 *Commission of the European Communities* v *Kingdom of Belgium* [2000] ECR I-07587.

[41] Lang, Michael, Schuch, Josef & Staringer, Claus (red.), *Tax Treaty Law and EC Law*, Linde Verlag Wien, Wien, 2007, page 16.

[42] Lang, Michael, Schuch, Josef & Staringer, Claus (red.), *Tax Treaty Law and EC Law*, page 19.

[43] ECJ 5 July 2005, C- 376/03 *D.* v *Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* [2005] ECR I-05821.

[44] Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 26 October 2004 in Case C-376/03 *D.* v *Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* [2005] ECR I-05821.

EC Treaty such as the fundamental freedoms. Double taxation can be avoided through national provisions in the tax laws of the Member States or through double taxation conventions.[45] Hence, Article 293 of the EC Treaty states that in order to benefit their nationals, the Member States shall enter into negotiations with each other in order to avoid double taxation within the European Community. The Member States are obliged to enter into these negotiations as far as it is necessary since double taxation restricts the free movement of goods, persons, services and capital.[46]

When entering into these bilateral double taxation conventions, the OECD Model Convention has a particular impact on many Member States. The Member States often draw up their bilateral double taxation agreements in accordance with the OECD Model Convention.[47] These international standards have further been approved by the ECJ through case law.[48]

Article 22 of the OECD Model Convention concerns the taxation of capital. Taxation of inheritances is not included in paragraphs 1-3. Paragraph 4 although concerns ‘all other elements of capital’. When reading the Commentaries on Article 22 of the OECD Model Convention it clearly states that taxes on inheritances are excluded.

The OECD has however drafted a model convention that includes inheritances.[49] When Member States enters into this model convention it shall apply to inheritance taxes when the deceased was resident in one or both of the contracting states.[50] According to Article 5 of this model convention, immovable property situated in a contracting state other than the state where the deceased was resident at the time of death, may be subject of taxation in the first state. Article 6 of this model convention further states that movable property of a permanent establishment or a fixed base situated in a contracting state which forms part of the estate of a resident in the other contracting state, may also be taxed in the first state. Property that forms part of the estate of a resident in a contracting state and that is not regulated in Articles 5-6 shall be taxable only in this state.[51]

The OECD Model Double Taxation Convention on Estates and Inheritances and on Gifts also contains methods for eliminating double taxation. These methods are the exemption method and the credit method.[52] The exemption method has as a result that the residence state of the deceased shall exempt from tax ‘… any property which, in rela-

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[45] Silfverberg, Christer, *Internationell arvs- och gåvobeskattning: utifrån svensk rätt*, page 74.

[46] Lang, Michael, Schuch, Josef & Staringer, Claus (red.), *Tax Treaty Law and EC Law*, page 13.

[47] ECJ 12 May 1998, C-336/96 *Mr and Mrs Robert Gilly* v *Directeur des services fiscaux du Bas-Rhin* [1998] ECR I-02793, paragraph 24.

[48] C-336/96 *Mr and Mrs Robert Gilly* v *Directeur des services fiscaux du Bas-Rhin*, paragraph 30; and 21 September 1999, C-307/97 *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland* v *Finanzamt Aachen-Innenstadt* [1999] ECR I-06161, paragraph 56.

[49] 1982 OECD Model Double Taxation Convention on Estates and Inheritances and on Gifts.

[50] 1982 OECD Model Double Taxation Convention on Estates and Inheritances and on Gifts, Articles 1(a) and 2.

[51] 1982 OECD Model Double Taxation Convention on Estates and Inheritances and on Gifts, Article 7.

[52] 1982 OECD Model Double Taxation Convention on Estates and Inheritances and on Gifts, Articles 9A-9B.

tion to the same event and in accordance with the provisions of this Convention, may be taxed in the other Contracting State'.[53] The credit method means that the residence state shall allow an amount equal to the tax paid in the source state to be deducted from the tax in the residence state when the property, in accordance with the model convention, may be taxed in the source state.[54] The deduction may however not exceed the tax that would have been levied in the residence state, in regards to the inherited property, if a deduction would not have been made.[55]

However, apart from double taxation conventions regarding double taxation of incomes, not many Member States have entered into double taxation conventions regarding the avoidance of double taxation of inheritances.[56] Since not many Member States eliminate or alleviate double taxation of inheritances it can be questionable whether a restriction of the freedoms provided for in the EC Treaty arises when such double taxation emerges.

2.2.3 Limitations of Article 56 of the EC Treaty

Before analysing the case law from the ECJ concerning inheritance taxes, it shall be made clear that there are however some specified situations where the provisions of Article 56 of the EC Treaty shall not apply. Article 58 of the EC Treaty states:

> '1. The provisions of Article 56 shall be without prejudice to the right of Member States:
>
> (a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;
>
> (b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.
>
> 2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with this Treaty.

[53] 1982 OECD Model Double Taxation Convention on Estates and Inheritances and on Gifts, Article 9A(1).

[54] 1982 OECD Model Double Taxation Convention on Estates and Inheritances and on Gifts, Article 9B(1).

[55] 1982 OECD Model Double Taxation Convention on Estates and Inheritances and on Gifts, Article 9B(3).

[56] Silfverberg, Christer, *Internationell arvs- och gåvobeskattning: utifrån svensk rätt*, page 74. Moll, Heinz, Raventós Calvo, Stella, *Case Study: On Possible Double Taxation and Other Problems affecting the Free Movement of Persons and Capital within Europé resulting from Inheritance Tax, illustrated by the Example Germany/Spain,* European taxation, 2005, Vol. 45, No. 9/10, page 452.

> 3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56.’

Article 59 of the EC Treaty concerns the possibility for the Council to take safeguard measures in exceptional cases and further Article 60 of the EC Treaty concerns the possibility to impose sanctions against third countries.

3 Initial Case Law from the ECJ Regarding Taxation of Cross Border Inheritances

In this chapter the author will present and analyse the Barbier, van Hilten-van der Heijden and Jäger cases which were the first ECJ cases dealing with taxes on cross border inheritances within the EU. In these cases the ECJ laid the founding provisions regarding inheritance taxes and they are therefore of great importance for understanding later case law.

3.1 The Barbier case[57]

3.1.1 Background

This case was the first case from the ECJ regarding inheritance taxes in connection with the free movement of capital. Parties were the heirs of H. Barbier and Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen. H. Barbier was a Netherlands national who moved to Belgium. In Belgium, he continued his activities as a director of a private company established in the Netherlands. While Mr Barbier was resident in Belgium, he purchased real estates situated in the Netherlands. The rents from these real estates were a part of his gross domestic income. The debts belonging to the real estates were secured by mortgages.

H. Barbier used the possibility, given in Netherlands law, to separate the legal title to immovable property from the "financial" ownership. Mr Barbier controlled some private Netherlands companies to which he transferred the financial ownership of the real estates. These companies also took over the mortgage debts but Mr Barbier were still formally considered to be the mortgager. Mr Barbier then undertook to transfer the legal ownership of the properties to these companies and in the meantime he gave up any relating rights to them. From these transactions, Mr Barbier earned some tax advantages.[58]

After the death of Mr Barbier, his lawyer did not declare the value of the properties of which Mr Barbier had transferred the financial ownership for the purpose of paying transfer duty. The Inspector afterward added this value without making deductions for the obligation to transfer the legal ownership.[59]

Such a deduction would have been made if Mr Barbier was resident in the Netherlands at the time of death.[60] The heirs of H. Barbier appealed the decision of the Inspector but the Inspector nevertheless rejected the appeal. The heirs then appealed to the Gerechtshof te 's-Hertogenbosch and claimed that the national legislation was in breach of

[57] ECJ 11 December 2003, C-364/01 *The heirs of H. Barbier* v *Inspecteur van de Belastingdienst Particulieren/ondernemingen buitenland te Heerlen* [2003] ECR I-15013.

[58] C-364/01 *The heirs of H. Barbier* v *Inspecteur van de Belastingdienst Particulieren/ondernemingen buitenland te Heerlen*, paragraphs 21-22.

[59] C-364/01 *The heirs of H. Barbier* v *Inspecteur van de Belastingdienst Particulieren/ondernemingen buitenland te Heerlen*, paragraphs 23-24.

[60] C-364/01 *The heirs of H. Barbier* v *Inspecteur van de Belastingdienst Particulieren/ondernemingen buitenland te Heerlen*, paragraphs 17.

Community law.[61] The national court then referred the case to the ECJ for a preliminary ruling.

3.1.2 The judgement of the ECJ

The heirs of H. Barbier claimed that the Netherlands law constituted a covert form of discrimination based on nationality. The Netherlands Government on the other hand claimed that even though there was a difference in treatment on grounds of nationality this difference did not apply to identical situations. The difference of treatment was due to the separation of the legal title from the financial ownership of the immovable property. The obligation to transfer the legal title at a certain point of time was according to Netherlands law a personal obligation and not a burden on the property. The Netherlands Government therefore claimed that according to the general principle of international tax law, personal obligations shall be considered by the state of residence. Obligations relating to the property shall, according to this principle, be considered in the state where the property is situated. The Netherlands Government therefore considered that their refusal to allow a deduction for the obligation to transfer the title of the property was justified.[62]

Through its judgement, the ECJ made it clear that the freedom of capital also includes inheritance taxes. It also stated that restrictions like those in Netherlands law have a prohibitive impact on the EU citizen who likes to make investments in that state when he or she is a resident of another Member State. These national measures will also result in reducing the value of the inherited property (the Barbier criterion) when the deceased was a resident of a Member State other than the state in which the property is situated.[63]

The ECJ further emphasises that the principle of allocating the right to tax that the Netherlands Government wants to apply, can not be applied since the possibility to separate the legal title from the financial ownership is unknown in certain other legal systems. A bilateral double taxation convention concerning inheritances must then be entered in order to secure that the obligation to transfer the legal title is considered as a tax deduction in the state of residence. Such an agreement did not exist between the Netherlands and the Kingdom of Belgium at the time of the judgement.[64] The ECJ concluded that the Netherlands' measures were restricting the fundamental freedoms and therefore in breach of EC law.[65]

[61] C-364/01 *The heirs of H. Barbier* v *Inspecteur van de Belastingdienst Particulieren/ondernemingen buitenland te Heerlen*, paragraph 25.

[62] C-364/01 *The heirs of H. Barbier* v *Inspecteur van de Belastingdienst Particulieren/ondernemingen buitenland te Heerlen*, paragraphs 29-34.

[63] C-364/01 *The heirs of H. Barbier* v *Inspecteur van de Belastingdienst Particulieren/ondernemingen buitenland te Heerlen*, paragraphs 62-63.

[64] C-364/01 *The heirs of H. Barbier* v *Inspecteur van de Belastingdienst Particulieren/ondernemingen buitenland te Heerlen*, paragraphs 66-67.

[65] C-364/01 *The heirs of H. Barbier* v *Inspecteur van de Belastingdienst Particulieren/ondernemingen buitenland te Heerlen*, paragraph 76.

3.1.3 Analysis

The judgement focused on the Netherlands tax law and the different treatment of residents and non-residents. Consequently the Court did not explain the taxation of the property in Belgium and it can therefore not be determined whether the property was subject of double taxation.[66] Hence, the most important thing in this case is that "the Barbier criterion" is put forward. This means that according to the ECJ, a national measure which results in a reduced value of the inheritance is restricting the free movement of capital. When reflecting over this statement it seems obvious that national measures which results in a juridical double taxation of the inheritance would be considered as a restriction of the free movement of capital. Since tax rates in one Member State often are relatively high, being liable to pay tax in two Member States likely results in a large decrease of the value of the inheritance.

The ECJ further stressed that the Member States at issue had not entered into a double taxation convention regarding inheritances with each other and the Netherlands had accordingly not ascertained that a deduction was made in the deceased's state of residence. The question then arises whether a double taxation convention regulating inheritance taxes could justify a national provision which in itself constitutes a restriction of the free movement of capital? Since EC law rises above bilateral conventions the answer to this question (in the author's view) must be negative. If the answer to that question however would be positive it would result in an obligation for the Member State at issue to enter into such double taxation conventions with all Member States as well as with third countries.[67] It therefore seems more reasonable to change the restricting national provision.

The ECJ's judgement in this case could further be compared with a similar reasoning in the Verkooijen case.[68] This ruling concerned Netherlands law which did not grant a Netherlands national (Mr Verkooijen) an exemption from income tax on share dividends which he had received from a company that was established in another Member State.[69] Such an exemption would have been granted if the company, in which Mr Verkooijen had shares, was established in the Netherlands.[70] The ECJ stated that the national provisions at issue discouraged Netherlands residents from investing in companies that are established in other Member States. The provisions also made it more difficult for companies established in other Member States to raise capital in the Netherlands. Since the Netherlands law resulted in a more beneficial taxation for share dividends from a company that was established in the Netherlands and hence resulted in a less beneficial taxation for such dividends that was received from a company that was established in another Member State, it restricted the free movement of capital.[71]

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[66] It is however likely that the property is taxed in Belgium if the state applies the residence princle.

[67] This is a result from Article 56 of the EC Treaty which ensures the free movement of capital between Member States as well as between Member States and third countries.

[68] C-35/98 *Staatssecretaris van Financiën* v *B.G.M. Verkooijen*.

[69] C-35/98 *Staatssecretaris van Financiën* v *B.G.M. Verkooijen*, paragraph 2.

[70] C-35/98 *Staatssecretaris van Financiën* v *B.G.M. Verkooijen*, paragraph 25.

[71] C-35/98 *Staatssecretaris van Financiën* v *B.G.M. Verkooijen*, paragraphs 34-36.

The Barbier case and the Verkooijen case are similar in some ways. In both cases, national provisions resulted in a difference in taxation due to the state of residence of the deceased/the company. Besides the discouraging effect of these provisions they also resulted in a reduced value of the inheritance/the dividend when the source of income[72] resided in another Member State. It remains however to be seen if the case law regarding inheritance taxes develops in the same direction as the cases regarding dividends.

3.2 The van Hilten-van der Heijden case[73]

3.2.1 Background

The case law of the ECJ was then developed further by the ruling in the van Hilten-van der Heijden case. E.A. van Hilten-van der Heijden was a Netherlands resident and lived in the Netherlands until the beginning of 1988. She later moved to Belgium and in 1991 she moved to Switzerland where she lived until her death in 1997.[74]

Her property then consisted of real estates in the Netherlands, Belgium and Switzerland and investments in quoted securities in the Netherlands, Germany, Switzerland and the USA. She had also opened bank accounts at Netherlands and Belgian branches of banking institutions established in the EU. The bank accounts where also managed by these branches.[75]

When it comes to inheritances, the Netherlands taxes the entire estate of their nationals. The entire estate will though not be taxed if the deceased was a non-resident. Then, only immovable property and enterprises situated in the Netherlands will be subject of inheritance taxes. However, this case was referred to the ECJ for a preliminary ruling because if a Netherlands national is deceased within ten years of his or hers ceasing to reside in the Netherlands, the national is still taxed as if he or she still was a resident in this state. A relief is however given for inheritance tax levied abroad if this tax is lower than the inheritance tax in the Netherlands. The Netherlands does however not allow a refund if more inheritance tax is levied abroad than in the Netherlands. The question was then whether such national measures as stated in Netherlands law where permitted according to Article 73b of the EC Treaty (now Article 56 of the EC Treaty).[76]

3.2.2 The judgement of the ECJ

The ECJ noted that inheritances are considered as capital movements within the meaning of Article 73b of the EC Treaty (now Article 56 of the EC Treaty) besides when all

[72] The term ”source of income” aims at the deceased in the Barbier case and the company in the Verkooijen case.

[73] C-513/03 *Heirs of M. E. A. van Hilten-van der Heijden* v *Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*.

[74] C-513/03 *Heirs of M. E. A. van Hilten-van der Heijden* v *Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, paragraph 14.

[75] C-513/03 *Heirs of M. E. A. van Hilten-van der Heijden* v *Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, paragraph 15.

[76] C-513/03 *Heirs of M. E. A. van Hilten-van der Heijden* v *Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, paragraphs 6-13 and 27.

aspects of the inheritance are confined within a single Member State.[77] The ECJ ruled that national measures, like the "ten year provision" in Netherlands law do not constitute a restriction for capital movements since even though the Netherlands national is taxed as if he or she still was a Netherlands resident within ten years of the ceasing to reside, relief is given for the inheritance tax levied in other states. Double taxation will therefore not take place and a reduction of the value of the inheritance will not occur. The fact that the terms apply equally to nationals that are residents of other states and nationals that are residents of the Netherlands seems to have affected the judgement of the ECJ. The national measures did not seem to restrict the nationals which were residents of another Member State to invest in the Netherlands nor did it restrict nationals and residents of the Netherlands to invest in other states.[78]

There was however a difference in treatment between residents that also are nationals in the Netherlands and those who are residents in the Netherlands but are nationals in other Member States. This was however due to the nonexistence of harmonised Community provisions regarding direct taxation and due to the fact that the Member States allocate the right to tax between themselves.[79] The ECJ further emphasised that the Member States may take impression of the OECD model conventions when they allocate the right to tax and that the provision in question correspond with the provisions in the OECD Model Double Taxation Convention on Estates and Inheritances and on Gifts. The mentioned approach is according to the ECJ motivated by the prevention of tax fraud.[80]

The ECJ further states that a regular emigration is not considered to be a capital movement and the fact that a national who wishes to be a resident in another state is discouraged to be so and therefore is restricted to use the freedoms established in the EC Treaty can solely not be considered as a restriction of the movement of capital according to Article 56 EC.[81]

3.2.3 Analysis

The ECJ's judgement resulted in an approval for the Netherlands to tax the heirs of their nationals ten years after the deceased had ceased to reside in the Netherlands. The ECJ came to the conclusion that the Netherlands law did not result in a reduction of the value of the inheritance and therefore the national measures did not restrict the movement of capital within the European Community. The ECJ hereby confirmed the Barbier criterion and stated that since the inheritance was not subject to double taxation (due to the fact that the inheritance tax levied abroad was relieved from the inheritance tax that

[77] C-513/03 *Heirs of M. E. A. van Hilten-van der Heijden* v *Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, paragraph 42.

[78] C-513/03 *Heirs of M. E. A. van Hilten-van der Heijden* v *Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, paragraphs 45-46.

[79] C-513/03 *Heirs of M. E. A. van Hilten-van der Heijden* v *Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, paragraph 47.

[80] C-513/03 *Heirs of M. E. A. van Hilten-van der Heijden* v *Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, paragraph 48.

[81] C-513/03 *Heirs of M. E. A. van Hilten-van der Heijden* v *Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, paragraphs 49-50.

were to be paid in the Netherlands), the value of the inheritance did not decrease and the provisions in Netherlands law did therefore not constitute a restriction on the free movement of capital. When reading this judgement and in accordance with the ruling in the Barbier case, it seems like double taxation of inheritances, without a doubt, is contrary to EC law.

It shall however also be mentioned that the judgement has been questioned. Since two states have claims of inheritance tax, double taxation arises and, according to some, this double taxation is avoided inconsistently in the credit method that shall be used according to Netherlands law.[82] If the tax rate levied abroad is lower than the rate in the Netherlands, a relief is given for the inheritance tax levied abroad. If the rate however is lower in the Netherlands, no refund is given. Others claim that this procedure is a manifestation of the principle of mutual recognition: '… you recognize the taxation of the other state by giving a credit for it, but you may still levy your own tax'. And by granting a refund when the tax rate abroad is higher than the one within the specific Member State, you would not only prevent double taxation, you would also give up your entire right to tax.[83]

Further van den Broek and Wildeboer have observed that the Dutch provisions lead to double taxation in some cases.[84] Like for instance in a case decided by the 's-Hertogenbosch Regional Court of Appeal on 12 December 2002.[85] In this case a Dutch national moved to Belgium in 1993 where he lived until he died in 1997. He had a wife and four children who inherited equal shares of the estate. This estate consisted of investment property in Belgium, valued at NLG 1,695,930. The inheritance was, due to the ten year legal fiction in Netherlands law, subject of both Belgian and Dutch inheritance tax. In their article, van den Broek and Wildeboer have put together the following table to illustrate the taxation of the inheritance in Belgium and in the Netherlands as well as the total tax liability.

[82] Weber, Dennis, *Pending Cases Filed by Dutch Courts II*, *ECJ-Recent Developments in Direct Taxation*, Ed. Lang, Michael et al, Kluwer Law International, The Hague, 2006, page 268.

[83] Weber, Dennis, *Pending Cases Filed by Dutch Courts II*, *ECJ-Recent Developments in Direct Taxation*, page 270.

[84] Van den Broek, J.J. ; Wildeboer, M.R.: *European Court of Justice Permits Inheritance Tax Based on Nationality in van Hilten-van der Heijden*, Bulletin for International Taxation, Volume 61, 2007, No. 5, pages 214-219

[85] Court of 's-Hertogenbosch, MK I, 12 December 2002, No. 00/1796, *V-N* 2003/5.22 retold by: Van den Broek, J.J. ; Wildeboer, M.R.: *European Court of Justice Permits Inheritance Tax Based on Nationality in van Hilten-van der Heijden*, page 217.

Inheritance tax (NLG)	(a) Belgium	(b) Netherlands	(c) Relief by the Netherlands	Total tax liability (a) + (b) – (c)
Spouse	34,720	29,051	29,051	34,720
Child 1	15,369	45,002	15,369	45,002
Child 2	15,369	45,002	15,369	45,002
Child 3	15,369	45,002	15,369	45,002
Child 4	15,369	45,002	15,369	45,002
Total	96,196	209,059	90,527	214,728

The table shows that the total tax burden of the inheritance is 214,728 which is higher than both the Belgian and the Dutch inheritance tax. Due to the Dutch tax provisions, the inheritance is subject to double taxation and hence the value of the inheritance is decreased. According to the Barbier criterion, the Dutch provisions should therefore be considered as a restriction of the free movement of capital. When the case was referred to the Netherlands Supreme Court, the court made a reference to the ruling in the van Hilten-van der Heijden case and stated that the provision was compatible with EC Law.[86]

Double taxation was however avoided in the van Hilten-van der Heijden case and was therefore, according to the ECJ, not in breach of EC Law. It is hence in the author's opinion that this latter case is restricting the free movement of capital since it leads to double taxation and a reduced value of the inheritance and consequently the judgement of the Netherlands Supreme Court seems very strange.

3.3 The Jäger case[87]

3.3.1 Background

Theodor Jäger was a resident in France and was the sole heir of his mother who was a resident in Germany at the time of her death.[88] The inheritance included assets in Germany and property in France. The property consisted of agricultural land and forestry. The case was referred to the ECJ for a preliminary ruling regarding the calculation of the inheritance tax and the valuation of these assets.[89]

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86 Van den Broek, J.J. ; Wildeboer, M.R.: *European Court of Justice Permits Inheritance Tax Based on Nationality in van Hilten-van der Heijden*, page 217.

87 ECJ 17 January 2008, C-256/06 *Theodor Jäger* v *Finanzamt Kusel-Landstuhl* [2008] ECR I-00123.

88 ECJ 17 January 2008, C-256/06 *Theodor Jäger* v *Finanzamt Kusel-Landstuhl* [2008] ECR I-00123, paragraph 14.

89 ECJ 17 January 2008, C-256/06 *Theodor Jäger* v *Finanzamt Kusel-Landstuhl* [2008] ECR I-00123, paragraph 2.

At the time of the judgement, German law stated that the entire estate of the devisor should be included when calculating the inheritance tax. Even assets situated abroad should therefore be included. If the assets were situated in a state, which had not entered into a double taxation agreement regarding inheritance taxes with Germany, German law stated that if property that is taxed in Germany also is taxable abroad, the inheritance tax levied abroad may be offset against the German inheritance tax.[90]

However, the German provisions further stated that property consisting of agricultural land and forestry situated abroad should be valued at a market-value while such property situated within the German territory is given a value corresponding to ten per cent of the market value. The assessment of this last mentioned property is also given a special tax-free amount and the remaining value is therefore assessed merely at 60 per cent. The question was therefore whether these provisions were in breach of the free movement of capital since property situated abroad is valued higher than property situated in Germany.

3.3.2 The judgement of the ECJ

The inheritance in this case is considered as a cross border capital movement that is covered by Article 73b of the EC Treaty (now Article 56 of the EC Treaty) since the devisor is a national of one Member State and the receiver of the inheritance is a national of another Member State and because the inheritance includes assets situated in both Member States.[91]

The ECJ confirmed the ruling in Barbier where the Court stated that national measures are restricting the free movement of capital not only when they restrain the residents from investing in property in other Member States but also when the value of the inheritance from a resident in a Member State is decreased because the property is situated in another Member State.[92]

The German government claimed that their legislation should not be considered as a restriction on the free movement of capital since the reduction of the value of the inheritance was an inevitable consequence of the co-existence of national tax systems. The ECJ rejected this claim and noted that this fact was irrelevant when the value of the inheritance was reduced. The court also pointed out that this reduction only was a result of the German legislation.

3.3.3 Analysis

German law did not lead to any double taxation since the inheritance tax that was levied abroad was offset against the German inheritance tax. The German provisions did however constitute a restriction on the free movement of capital since agricultural land and forestry situated abroad was valued higher than such property that was situated in Germany. In accordance with earlier case law, the ECJ claimed that since the value of the

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[90] C-256/06 *Theodor Jäger* v *Finanzamt Kusel-Landstuhl*, paragraphs 5-6.

[91] C-256/06 *Theodor Jäger* v *Finanzamt Kusel-Landstuhl*, paragraphs 26-27.

[92] C-256/06 *Theodor Jäger* v *Finanzamt Kusel-Landstuhl*, paragraph 30.

inherited property was reduced, due to the place where the property is situated, the free movement of capital was restricted.

The ECJ also claimed that regard can not be taken to whether this is due to the Member States exercise of their fiscal sovereignty in parallel. This is contradicting the statement in the van Hilten-van der Heijden case where the ECJ stated that the difference in treatment between residents in the Netherlands that also are Netherlands nationals and residents that are nationals in other Member States only was due to the fact that there are no harmonised Community provisions that regulates this area of law. The question remains whether regard shall be taken to the fact that a reduction of the value of the inheritance is due to the Member States exercise of their fiscal sovereignty in parallel or if this fact is insignificant.

3.4 Conclusions from the Barbier, van Hilten-van der Heijden and Jäger cases

From this initial case law concerning inheritance taxes in connection with the free movement of capital it seems likely that double taxation is incompatible with EC Law. This is partly concluded from the statement in the Barbier case where national provisions, which results in a reduced value of the inheritance when the deceased was a resident of a Member State other than that state in which the inherited property is situated, is considered as restrictions on the free movement of capital. Since double taxation obviously reduces the value of an inheritance it is in the author’s view contrary to EC Law.

This conclusion is strengthened by the fact that the ECJ stated that the national provisions in the van Hilten-van der Heijden case were not in breach of the free movement of capital since double taxation was avoided through a tax relief corresponding to the tax levied in the state where the deceased was resident at the time of death. The judgement in the Jäger case also confirms that EC law is breached when the value of an inheritance is reduced due to the place where the inherited property is situated.

There was however a lack of uniformity between the van Hilten-van der Heijden and the Jäger cases. In the van Hilten-van der Heijden case, the ECJ seems to be considerate of the differences in treatment that arise when the Member States use their fiscal sovereignty in parallel due to the lack of harmonised rules regulating direct taxation within the EC. However in the Jäger case the ECJ stated that the co-existence of national tax systems is not a valid argument when the value of the inheritance is reduced.

4 Cases regarding the possibility to deduct for debts relating to the inherited property

The case law from the ECJ was further developed by the rulings in the Eckelkamp and the Arens-Sikken cases. These cases concerned the possibility to deduct for debts which were related to the inherited property when the property was situated in another Member State than the state where the deceased was resident at the time of death. The ECJ do not deal with double taxation per se in these cases but since the national provisions in these cases as likely could result in double taxation they are still of importance for this thesis.

4.1 The Eckelkamp case[93]

4.1.1 Background

Reintges Hildegard Eckelkamp was a resident in Germany at the time of her death. She had immovable property in Belgium and when calculating the transfer duty of this property, the FOD Financiën, Administratie van de BTW, registratie en domeinen (Federal Public Finance Service, Administration of VAT, Registration and Public Property) refused to make a deduction for the related debts.[94]

The Belgian tax legislation that was to be applied in this case stated that when a person was resident in Belgium at the time of death, the inheritance tax should be based on the value of the deceased's property after a deduction of the debts. The debts are however not deducted when calculating the transfer duty of the property when the deceased was a non-resident.[95] At the time of the judgement there was also no agreement concerning the prevention of double taxation concerning succession duties between Belgium and Germany.[96]

The issue was referred to the ECJ for a preliminary ruling and the question was whether these national provisions that, when calculating the succession duties, granted a deduction for the debts when the deceased was a resident but not when he or she was a non-resident, was in breach of EC law.[97]

4.1.2 The judgement of the ECJ

The ECJ came to the conclusion that the national rules constituted a restriction on the free movement of capital. The Court based their decision on the fact that an inheritance of property situated in Belgium is subject to higher transfer duties than the inheritance

93 C-11/07 *Hans Eckelkamp, Natalie Eckelkamp, Monica Eckelkamp, Saskia Eckelkamp, Thomas Eckelkamp, Jessica Eckelkamp, Joris Eckelkamp* v *Belgische Staat.*

94 C-11/07 *Hans Eckelkamp, Natalie Eckelkamp, Monica Eckelkamp, Saskia Eckelkamp, Thomas Eckelkamp, Jessica Eckelkamp, Joris Eckelkamp* v *Belgische Staat*, paragraph 2.

95 C-11/07 *Hans Eckelkamp, Natalie Eckelkamp, Monica Eckelkamp, Saskia Eckelkamp, Thomas Eckelkamp, Jessica Eckelkamp, Joris Eckelkamp* v *Belgische Staat*, paragraphs 5-8.

96 C-11/07 *Hans Eckelkamp, Natalie Eckelkamp, Monica Eckelkamp, Saskia Eckelkamp, Thomas Eckelkamp, Jessica Eckelkamp, Joris Eckelkamp* v *Belgische Staat*, paragraph 13.

97 C-11/07 *Hans Eckelkamp, Natalie Eckelkamp, Monica Eckelkamp, Saskia Eckelkamp, Thomas Eckelkamp, Jessica Eckelkamp, Joris Eckelkamp* v *Belgische Staat*, paragraph 24.

tax that would have been levied if the deceased was a resident in Belgium at the time of death. Due to the fact that the debts were not deductable when calculating the transfer duty, in contrast to the inheritance tax, the value of the inheritance was reduced.[98] The fact, brought forward by the Belgian government, that only the state where the deceased was resident at the time of death has the possibility to consider all aspects of the inheritance consisting of assets, debts, movable and immovable property, was rejected as indifferent by the ECJ.[99] The ECJ also stated that the difference in treatment could not be justified with a claim that the situations are not objectively comparable. Situations where the deceased is a resident in Belgium as well as when the deceased is a non-resident is subject to succession duties. These situations are only separated when it concerns the possibility to deduct for debts.[100]

The debts relating to the property could though be deducted according to German tax legislation. Hence, the Belgian Government also stated that their legislation was justified since the debts could be subject to double deductions and that such a situation should be avoided in accordance with the ruling in the Marks & Spencer case[101] The ECJ nevertheless made a reference to the ruling in Barbier and claimed that a citizen can not loose the possibility to rely on the provisions of the EC Treaty simply because a Member State other than his or hers state of residence legally provides him or her with tax advantages that could compensate the damage caused by the national provisions.[102] The ECJ did not find it necessary to answer the questions regarding the interpretation of Articles 12, 17 and 18 of the EC Treaty.[103]

4.1.3 Analysis

In the view of the author it is not surprising that the Belgian tax provision constituted a restriction on the free movement of capital since it clearly gave residents tax advantages in comparison with non-residents. The non-residents were however given a higher tax burden solely based on the Belgian tax legislation, the higher tax burden were thus not imposed due to double taxation. The Belgian provisions, as they were at the time of the judgement, could however also as likely result in double taxation if the state of residence did not allow a deduction for the relating debts. Since the ECJ rejected the reason for justification, brought forward by the Belgian Government, concerning the possibility of a double deduction of the debts it seems likely that the ECJ considered double taxa-

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[98] C-11/07 *Hans Eckelkamp, Natalie Eckelkamp, Monica Eckelkamp, Saskia Eckelkamp, Thomas Eckelkamp, Jessica Eckelkamp, Joris Eckelkamp* v *Belgische Staat*, paragraphs 43-46. The ECJ made a reference to the judgements in the Barbier, Jäger and van Hilten-van der Heijden cases.

[99] C-11/07 *Hans Eckelkamp, Natalie Eckelkamp, Monica Eckelkamp, Saskia Eckelkamp, Thomas Eckelkamp, Jessica Eckelkamp, Joris Eckelkamp* v *Belgische Staat*, paragraph 47.

[100] C-11/07 *Hans Eckelkamp, Natalie Eckelkamp, Monica Eckelkamp, Saskia Eckelkamp, Thomas Eckelkamp, Jessica Eckelkamp, Joris Eckelkamp* v *Belgische Staat*, paragraphs 60-63.

[101] ECJ 13 December 2005, C-446/03 *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECR I-10837.

[102] C-11/07 *Hans Eckelkamp, Natalie Eckelkamp, Monica Eckelkamp, Saskia Eckelkamp, Thomas Eckelkamp, Jessica Eckelkamp, Joris Eckelkamp* v *Belgische Staat*, paragraphs 66 and 68.

[103] C-11/07 *Hans Eckelkamp, Natalie Eckelkamp, Monica Eckelkamp, Saskia Eckelkamp, Thomas Eckelkamp, Jessica Eckelkamp, Joris Eckelkamp* v *Belgische Staat*, paragraph 72.

tion as more harmful than double deductions. This is however only the authors speculation which can not be fully supported. What can however be concluded from this judgement is that when there are no binding double taxation convention regarding inheritances, a Member State can not rely on tax credits given in the legislation of other Member States.

4.2 The Arens-Sikken case[104]

4.2.1 Background

A case that is very much similar to the Eckelkamp case is the Arens-Sikken case. The parties in this case were Ms Arens-Sikken, the wife of a Netherlands national who had died in Italy, and Staatsecretaris van Financiën. The case was referred to the ECJ for a preliminary ruling concerning the calculation of transfer duties regarding a real estate situated in the Netherlands.[105] This property should according to the will of the deceased be divided in five equal shares which should be inherited by Ms Arens-Sikken together with the four children of their marriage. There was however a testamentary parental partition inter vivos which had as a result that Ms Arens-Sikken, as the surviving spouse, inherited all assets and liabilities related to the property.[106] In the end, the children only inherited an overendowment debt and Ms Arens-Sikken had to pay the children in cash for their part of the inheritance.

According to Netherlands law, the whole estate of the deceased was subject to inheritance tax. A distinction was however made if the deceased was a Netherlands resident or not.[107] Netherlands law allowed a deduction for overendowment debts when calculating the inheritance duties and transfer duties payable in respect of real estates. These deductions were however only allowed if the deceased was a resident in the Netherlands at the time of death. In Ms Arens-Sikken's case, such a deduction was therefore not allowed since Mr Arens-Sikken was resident in Italy at the time of death.[108] If Mr Arens-Sikken had been a resident in the Netherlands at the time of death, the inheritance tax would then have been calculated on an amount of 95 000 NLG since regard then would have been taken to the overendowment debts. But since he was not a resident in the Netherlands, the transfer duty was calculated on an amount of 475 000 NLG.[109] The question was then whether this approach was precluding the free movement of capital.[110] If the answer to that question was yes, the national court wanted to know which method to use when comparing whether the inheritance tax levied on a Netherlands resident is lower than the transfer duty.[111]

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[104] ECJ 11 September 2008, C-43/07 *D. M. M. A. Arens-Sikken* v *Staatssecretaris van Financiën* [2008] ECR I-06887.

[105] C-43/07 *D. M. M. A. Arens-Sikken* v *Staatssecretaris van Financiën*, paragraphs 1-2.

[106] C-43/07 *D. M. M. A. Arens-Sikken* v *Staatssecretaris van Financiën*, paragraphs 14-15.

[107] C-43/07 *D. M. M. A. Arens-Sikken* v *Staatssecretaris van Financiën*, paragraph 5.

[108] C-43/07 *D. M. M. A. Arens-Sikken* v *Staatssecretaris van Financiën*, paragraph 26.

[109] C-43/07 *D. M. M. A. Arens-Sikken* v *Staatssecretaris van Financiën*, paragraphs 34-35.

[110] C-43/07 *D. M. M. A. Arens-Sikken* v *Staatssecretaris van Financiën*, paragraph 26.

[111] C-43/07 *D. M. M. A. Arens-Sikken* v *Staatssecretaris van Financiën*, paragraph 27.

4.2.2 The judgement of the ECJ

The ECJ began by confirming that the inheritance is considered as a capital movement within the meaning of Article 56 of the EC Treaty since the inheritance does not only concern domestic circumstances.[112] The ECJ then made it clear that the progressive nature of the taxation in Netherlands law could result in a higher taxation of inheritances from a person that is not resident in the Netherlands.[113] The Court also made a reference to the judgements in the Barbier, Jäger and van Hilten-van der Heijden cases and declared that when national measures restrain persons from investing in real estates in other Member States or reduces the value of the inheritance when a person is resident in a Member State other than the state where the property is situated, it does not matter whether this is a result of the co-existence of national tax provisions. Besides, the ECJ considered the fact that the overendowment debts are not considered when the deceased is a non-resident, was only due to the Netherlands law.[114]

Since the national legislation lead to a difference in tax burden between Netherlands residents and non-residents, the ECJ came to the conclusion that the tax provisions were restricting the free movement of capital.[115] The ECJ was neither of the opinion that the national treatment could be justified since the difference of treatment was not due to dissimilar situations.[116]

The national court also wanted to know if the answer would be different if the residence state of the deceased allowed a deduction for inheritance duties levied in another Member State on property situated within the territory of that Member State. Since the abolition of double taxation is one of the aims of the European Community, the Member States are free to enter into bilateral agreements in order to establish the connecting factors for the allocation of fiscal jurisdiction. Community rules must however be regarded when these agreements are established. The ECJ did however not answer the question whether such an agreement which neutralised the effects on the free movement of capital would change the answer in the first question. The ECJ was satisfied by ascertain that there were no agreement between the Netherlands and Italy for the prevention of double taxation of succession duties. Even if taxes levied in the Netherlands can be deducted in Italy (due to unilateral provisions in Italy), it does not justify the restriction on the free movement of capital constituted by the provisions in Netherlands law.[117]

4.2.3 Analysis

In this case the ECJ also confirmed the rulings in the Barbier, Jäger and van Hilten-van der Heijden cases and stated that measures which have the consequence of restraining persons from investing in property situated in another Member State than the state of residence constitutes a restriction of the free movement of capital. The Court, once

[112] C-43/07 *D. M. M. A. Arens-Sikken* v *Staatssecretaris van Financiën*, paragraphs 31-32.

[113] C-43/07 *D. M. M. A. Arens-Sikken* v *Staatssecretaris van Financiën*, paragraph 40.

[114] C-43/07 *D. M. M. A. Arens-Sikken* v *Staatssecretaris van Financiën*, paragraph 41.

[115] C-43/07 *D. M. M. A. Arens-Sikken* v *Staatssecretaris van Financiën*, paragraph 6.

[116] C-43/07 *D. M. M. A. Arens-Sikken* v *Staatssecretaris van Financiën*, paragraph 54.

[117] C-43/07 *D. M. M. A. Arens-Sikken* v *Staatssecretaris van Financiën*, paragraphs 61-66.

again, also confirmed that those measures which reduce the value of the inherited property when this property is situated in a Member State other than the deceased's state of residence, is in breach of EC Law. Therefore it still seems very likely that double taxation is in breach of EC Law in the view of the ECJ. The Dutch provisions was however not restricting on the grounds that they caused double taxation but because they made a clear distinction between residents and non-residents when it came to the calculation of succession duties.

It would however be interesting if the ECJ had answered the question whether a double taxation convention which neutralised the effects that the discriminating provision had on the free movement of capital, could justify this provision. The Court however made it clear that when national provisions restricts the freedoms that are provided in the EC Treaty it does not matter whether the restriction is a result of the Member States using their fiscal sovereignty in parallel. The questions that arose after the ECJ's contradicting statement in the van Hilten-van der Hilten and Jäger cases therefore seems to be resolved.

4.3 Conclusions from the Eckelkamp and Arens-Sikken cases

Both the Eckelkamp and Arens-Sikken cases concerned the possibility to deduct for debts related to the inherited property. The national measures were however only found to be discriminating because they made a difference between residents and non-residents when calculating the inheritance tax. Since there was no applicable double taxation convention in any of these cases, the national provisions in the source state could however as likely result in a double taxation situation if the state of residence did not allow a deduction for the related debts.

According to the author it seems strange that the ECJ does not clearly bring up the fact the discriminating provisions could lead to juridical double taxation. It is also strange that the Court does not answer the question brought forward in the Arens-Sikken case whether a double taxation convention could justify the discriminating provision or not. The ECJ did however made it clear that even if double taxation is avoided through *unilateral* provisions in the deceased's state of residence, it does not justify discriminating measures in the legislation of the source state. It is hence clear that the ECJ focuses on the effect of the discriminating provision in the single Member State opposed to the effect that the provision may have in connection to the tax provisions in the other Member State.

In the author's view and with reference to the ECJ's confirmation of the rulings in the earlier cases regarding inheritance taxes and the free movement of capital it however still seems likely that juridical double taxation is in breach of EC Law. Double taxation is known as restricting persons from investing in other Member States as well as it reduces the value of the inherited property and therefore it restricts the free movement of capital.

In these cases, the ECJ however gives guidance regarding the confusion that arose after the contradicting statements in the van Hilten-van der Heijden and Jäger cases. The Court hereby states that the discriminating situation that results from the national measures at hand could not be justified on the grounds that it is a result of the co-existence of national tax provisions.

5 The Block case[118]

The Block case is the first case where the ECJ actually addressed the problems with juridical double taxation of inheritances. The judgement will therefore be thoroughly studied and analysed in this chapter of the thesis.

5.1 Background

Margarete Block was the sole heir of a deceased German resident. The deceased had capital claims of which the main part was invested in financial institutions in Spain meanwhile a smaller part was invested in Germany. For the capital assets in Spain, Margarete Block (who also was a German resident) levied inheritance tax in Spain.[119] When the Finanzamt calculated the inheritance tax that was to be levied in Germany, no regard was taken to the inheritance tax that was levied in Spain. Ms Block requested a review of the notice of assessment and wanted the inheritance tax levied in Spain to be credited against the inheritance tax that were to be paid in Germany and that the excess amount should be repaid to her.[120]

The notice of assessment was reviewed and the inheritance tax levied in Spain was credited, as a liability of the estate, from the basis of assessment of inheritance tax that was to be paid in Germany. Ms Block appealed the decision to the Finanzgericht (Finance Court).[121] According to German law, acquisitions due to a person's event of death are taxable.[122] The liability to tax includes the entire estate when the deceased at the time of death, or the acquirer at the time when the tax arises, is a resident in Germany.[123] If the deceased German resident had assets situated abroad at the time of death and if these assets are subject of both German and foreign inheritance tax, the foreign tax may be offset against the German inheritance tax. This is however only possible if the foreign tax levied by the acquirer is not eligible for reduction and if there is no applicable double taxation convention. This possibility is however only given regarding certain foreign assets.[124]

Capital claims against foreign financial institutions was only considered as foreign assets if the deceased was a non-resident and did not constitute foreign assets when it came to German residents. Non-residents were accordingly given more favourable offsetting rules in German law. Since capital claims was not considered as foreign assets when it came to German residents, the Finanzgericht found that the inheritance tax that Ms Block had levied in Spain could not be offset against the German inheritance tax. The Finanzgericht also noted that these capital claims could be subject to double taxa-

[118] ECJ 12 February 2009, C-67/08 *Margarete Block* v *Finanzamt Kaufbeuren* [2009], not yet reported in ECR.

[119] C-67/08 *Margarete Block* v *Finanzamt Kaufbeuren*, paragraph 9.

[120] C-67/08 *Margarete Block* v *Finanzamt Kaufbeuren*, paragraph 10.

[121] C-67/08 *Margarete Block* v *Finanzamt Kaufbeuren*, paragraphs 11-12.

[122] C-67/08 *Margarete Block* v *Finanzamt Kaufbeuren*, paragraph 5.

[123] C-67/08 *Margarete Block* v *Finanzamt Kaufbeuren*, paragraph 6.

[124] C-67/08 *Margarete Block* v *Finanzamt Kaufbeuren*, paragraph 7.

tion but that it was not for the German tax authorities to subsidise other Member States.[125]

This decision was appealed by Ms Block to the Bundesfinanzhof (Federal Finance Court). The Bundesfinanzhof came to the conclusion that the capital claims was subject of double taxation since there is no harmonisation of the term ‘foreign assets’ within the Community and since Germany and Spain uses different criteria when they determine the inheritance tax. Germany applies the criterion of the residence of the creditor when determining the inheritance tax meanwhile Spain determines their inheritance tax based on where the debtor has its base of operations. The question was then whether this double taxation was contrary to Community law. If the double taxation was to be considered as a restriction of the free movement of capital, the question was whether it could be justified according to Article 58(1)(a) of the EC Treaty. Hence, the ECJ should finally give its opinion on whether juridical double taxation constitutes a restriction on the free movement of capital or not.[126]

5.2 The judgement of the ECJ

This judgement was decided without an Opinion from the Advocate General. The ECJ began by stating that the German tax provisions provided identical rules regarding inheritance taxes regardless of where the debtor financial institution of those claims was situated.[127] According to Ms Block the German legislation was a restriction of the free movement of capital since not all of the deceased’s assets that are situated abroad can give rise to a right to credit for the inheritance tax levied abroad. The right to credit for tax levied on foreign assets does not include capital claims when it concerns German residents. Ms Block was also of the opinion that the risk of double taxation might restrain investors from investing in certain Member States since the national provisions results in a higher tax burden when the debtor financial institution is situated in another Member State than Germany.[128]

The ECJ however claimed that this is a result of the two Member States exercising their fiscal sovereignty in parallel. Germany taxes capital claims when the creditor is resident in Germany and Spain taxes the same capital claims when the debtor is established in Spain. The Court also noted that it is the function of double taxation conventions to eliminate or alleviate the restricting affects that these national measures may have on the internal market.[129] When it comes to the avoidance of double taxation, Community law does not (apart from some specific regulated areas) contain any provisions regarding the attribution of areas of competence between the Member States.[130]

The Member States therefore has the possibility to set their own rules within this area of law provided that they comply with Community law. The Member States are then not

[125] C-67/08 *Margarete Block* v *Finanzamt Kaufbeuren*, paragraphs 7-8 and 11-12.

[126] C-67/08 *Margarete Block* v *Finanzamt Kaufbeuren*, paragraphs 13-16.

[127] C-67/08 *Margarete Block* v *Finanzamt Kaufbeuren*, paragraph 25.

[128] C-67/08 *Margarete Block* v *Finanzamt Kaufbeuren*, paragraphs 26-27.

[129] C-67/08 *Margarete Block* v *Finanzamt Kaufbeuren*, paragraphs 28-29.

[130] C-67/08 *Margarete Block* v *Finanzamt Kaufbeuren*, paragraph 30.

obliged to adapt their own tax systems to the tax systems of other Member States in order to prevent double taxation. These considerations are, according to the ECJ, not affected by the fact that according to German law, German heirs of persons that were residents in other Member States at the time of death are given greater possibilities to deduct than German heirs of persons that were residents in Germany at the time of death since the definition of 'foreign assets' are dissimilar.[131] The difference in treatment is, according to the ECJ, due to the national choices made concerning the German exercise of its fiscal sovereignty.[132] There are according to the Court neither any guarantees for the citizens that a transfer of residence could be done without any tax consequences, this is due to the different tax legislations of the Member States.[133] The ECJ came to the conclusion that the German provisions was in accordance with Articles 56 and 58 of the EC Treaty.[134]

5.3 Analysis

5.3.1 Is there a restriction on the free movement of capital?

In this judgement it is made clear that the ECJ is of the opinion that juridical double taxation of inheritances, resulting from the co-existence of national tax systems, is compatible with Community law. The judgement of the ECJ is in line with the judgement in Gilly[135] where the ECJ made it clear that no help will be given to the citizens when they are subject to juridical double taxation.

However, since double taxation reduces the value of the inheritance (the Barbier criterion) it would seem probable that juridical double taxation constitutes a restriction of the free movement of capital. It is hence in the author's opinion that the ECJ, in the Block case, contradict its earlier case law. The ECJ approve of the double taxation since it is a result of the two Member States exercising their fiscal sovereignty in parallel. The Court also stated that in the absence of harmonised Community law regarding the attribution of areas of competence between Member States, the Member States are not obliged to adapt to the tax systems of other Member States when elaborating their own tax systems. This contradicts the judgement in the Arens-Sikken case where the ECJ did not think of the Member States exercise of their fiscal sovereignty in parallel as a valid reason for restricting the free movement of capital.

In its judgement, the Court further stated that it is the function of double taxation conventions to eliminate situations where double taxation arises due to this co-existence of national tax legislations. Accordingly, the ECJ seems to support the idea to eliminate double taxation through double taxation conventions. Since the judgement however also leaves it open for the Member States to avoid such double taxation conventions, it is not likely that any Member States will enter into these agreements and thereby loose tax revenues. Some of the opinions given in Block can also be found in the ECJ's judge-

[131] C-67/08 *Margarete Block* v *Finanzamt Kaufbeuren*, paragraphs 31-33.

[132] C-67/08 *Margarete Block* v *Finanzamt Kaufbeuren*, paragraph 34.

[133] C-67/08 *Margarete Block* v *Finanzamt Kaufbeuren*, paragraph 35.

[134] C-67/08 *Margarete Block* v *Finanzamt Kaufbeuren*, paragraph 36.

[135] C-336/96 *Mr and Mrs Robert Gilly* v *Directeur des services fiscaux du Bas-Rhin.*

ment in the Kerckhaert and Morres case which concerned taxation of received dividends.

5.3.1.1 The Kerckhaert and Morres case[136]

Mr and Mrs Kerckhaert-Morres were Belgian residents who received dividends from the French company Eurofers during 1995 and 1996.[137] The French tax authorities granted, in accordance with the applicable double taxation convention between France and Belgium, an imputation credit which amounted to 50% of the received dividends. This credit and the dividends were together subject to a withholding tax of 15% in France.[138]

Mr and Mrs Kerckhaert were also liable to pay tax in Belgium (the state of residence) for the received dividends. In Belgium, the dividends were accordingly subject to a tax rate of 25%. In accordance with the provisions in the double taxation convention, the couple claimed a tax credit for the French withholding tax. This claim was however rejected since the Belgian legislator had revoked the possibility of the tax credit.[139]

Mr and Mrs Kerckhaert-Morres claimed that they were subject to a less favourable taxation when comparing to a situation where they had received dividends from a company established in Belgium. The case was hence referred to the ECJ in order to find out whether the Belgian provisions constituted a restriction on the free movement of capital.[140]

The ECJ began by noting that the Belgian legislation did not treat residents and non-residents differently when it comes to taxation of received dividends. The Court also argued that the fact that Belgian residents are in dissimilar situations whether they receive dividends from Belgian companies or companies that are established in other Member States could not be considered as a restriction because these dividends were taxed in the same manner in Belgium.[141] The differences in taxation are according to the ECJ due to the fact that Belgium and France exercise their fiscal sovereignty in parallel. Due to the fact that there are no harmonising provisions regarding the attribution of the right to tax within the Community, such negative effects could be avoided through double taxation conventions. The ECJ further highlighted the fact that Belgium and France *essentially* had apportioned the right to tax between them in the double taxation convention and that this convention was not at issue in the preliminary ruling.[142] The ECJ did not consider the Belgian provisions to be a restriction of the free movement of capital.[143]

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[136] ECJ 14 November 2006, C-513/04 *Mark Kerckhaert and Bernadette Morres* v *Belgische Staat* [2006] ECR I-10967.

[137] C-513/04 *Mark Kerckhaert and Bernadette Morres* v *Belgische Staat*, paragraph 9.

[138] C-513/04 *Mark Kerckhaert and Bernadette Morres* v *Belgische Staat*, paragraph 10.

[139] C-513/04 *Mark Kerckhaert and Bernadette Morres* v *Belgische Staat*, paragraphs 11-12.

[140] C-513/04 *Mark Kerckhaert and Bernadette Morres* v *Belgische Staat*, paragraphs 13-14.

[141] C-513/04 *Mark Kerckhaert and Bernadette Morres* v *Belgische Staat*, paragraphs 17-18.

[142] C-513/04 *Mark Kerckhaert and Bernadette Morres* v *Belgische Staat*, paragraphs 20-23.

[143] C-513/04 *Mark Kerckhaert and Bernadette Morres* v *Belgische Staat*, paragraph 24.

Similar to the ruling in the Block case, the difference in treatment was due to the Member States exercise of their fiscal sovereignty in parallel and these differences should according to the ECJ be avoided through double taxation conventions. Double taxation occurred in both the Block and Kerckhaert and Morres cases and when reading these cases it seems like the ECJ encourages the Member States to enter into double taxation conventions. However since there will be no consequences if the Member States do not succeed to eliminate situations where double taxation occurs, the Member States will probably not enter into these agreements as previously mentioned in section 5.3.1. The ruling in the Kerckhaert and Morres case has accordingly, in doctrine, been argued to encourage the inactivity of the Member States when it concerns the elimination of juridical double taxation.[144]

Further the ECJ's ruling in the Kerckhaert and Morres case differed somewhat from the Opinion of the Advocate General. As already mentioned, the ECJ stated that since there was no harmonising Community provisions regarding the allocation of the right to tax between the Member States, it is for the Member States to eliminate potential double taxation through double taxation conventions. The Advocate General, on the other hand, stated that since juridical double taxation constitutes a 'quasi-restriction' it could only be eliminated by the EC legislator.[145] Hence, it does not seem like the ECJ agree with this part of the reasoning done by the Advocate General.

Cerioni is of the opinion that the Kerckhaert and Morres case should be read together with the Block case and that the ECJ expresses the same opinion in both these cases. The only difference is that the ECJ in Kerckhaert and Morres presented what the Member States are expected to do (prevent double taxation through double taxation conventions) while in the Block case, the ECJ expressed what the Member States are not obliged to do (adapt their own tax systems to the tax legislation in the other Member States in order to prevent double taxation).[146] This argument also seems reasonable in the author's view.

5.3.2 Residents and non-residents

Further it is interesting that the ECJ in the Block case notes that the German provisions do not make a difference between capital claims against foreign financial institutions and German financial institutions when the provisions caused a difference between German residents and non-residents.

It is also obvious that the German provisions will restrain investors resident in Germany from investing in other Member States since such an investment is likely to result in a higher tax burden than investments within the German territory. This situation can be compared with the situation in the Bouanich case.

[144] Kofler, Georg W., Mason, Ruth, *Double Taxation: A European "Switch in Time?"*, The Columbia Journal of European Law, winter 2007/2008, Vol. 14, No. 1, page 81.

[145] Opinion of Mr Advocate General Geelhoed delivered on 6 April 2006 in case C-513/04 *Mark Kaerckhaert and Bernadette Morres* v *Belgische Staat* [2006] ECR I-10967, paragraph 38.

[146] Cerioni, Luca, *Double Taxation and the Internal Market: Reflections on the ECJ's Decisions in Block and Damseaux and the Potential Implications*, Bulletin for international taxation, 2009, Vol. 63, No. 11.

5.3.2.1 The Bouanich case[147]

The parties in the Bouanich case were the French resident Margaretha Bouanich and the Swedish Tax Agency, Skatteverket. Ms Bouanich had shares in a Swedish company but the company repurchased these shares in December 1998. Due to Swedish tax legislation and the applicable double taxation convention between Sweden and France, a tax rate of 15% of the payment was withheld.[148] Concerning repurchases of shares, the Swedish legislation made a difference between residents and non-residents. In the event of a repurchase of shares, residents had the possibility to deduct for the acquisition costs and the gain was thereafter subject to a taxation of 30%. Non-residents could not deduct for the acquisition costs and the payment for the shares was then taxed with the same tax rate. The tax rate for non-residents could however be reduced in accordance with applicable tax treaty.[149] According to the double taxation convention, payments for repurchases of shares to non-residents like Ms Bouanich was subject of a withholding tax of 15% and a deduction could be made for the nominal value of the repurchased shares.[150]

Margaretha Bouanich wanted a refund of the withholding tax and appealed the decision made by Skatteverket. Eventually the case was referred to the ECJ in order to find out whether the Swedish tax legislation was in breach of the freedoms provided in the EC Treaty.[151]

According to the Swedish legislation, tax advantages were given to resident shareholders in contrast to non-resident shareholders. The legislation at hand restrained non-residents from investing in shares in companies established in Sweden and hence also resulted in a limited possibility for the Swedish companies to raise capital from non-resident investors. The ECJ therefore came to the conclusion that the Swedish tax provisions constituted a restriction on the free movement of capital.[152] The restriction was neither considered justified since the difference in treatment concerned objectively comparable situations.[153]

If this reasoning would have been applied in the Block case it is indisputable that the German provisions would have constituted a restriction of the free movement of capital. In the Block case, residents as well as non-resident are subject to tax for inherited capital claims and the situations seem to be objectively comparable. There is only a difference when it concerns the definition of the term “foreign assets” which leads to a higher taxation for the German resident. These provisions are as mentioned likely to restrain German investors from investing in other Member States and therefore, according to the ECJ in the Bouanich case, constituting a restriction on the free movement of capital. Confusion arise when comparing these judgements with each other and the author tends

[147] ECJ 19 January 2006, C-265/04 *Margaretha Bouanich* v *Skatteverket* [2006] ECR I-00923.

[148] C-265/04 *Margaretha Bouanich* v *Skatteverket*, paragraphs 2 and 17.

[149] C-265/04 *Margaretha Bouanich* v *Skatteverket*, paragraphs 3 and 6-7.

[150] C-265/04 *Margaretha Bouanich* v *Skatteverket*, paragraph 16.

[151] C-265/04 *Margaretha Bouanich* v *Skatteverket*, paragraphs 18-21.

[152] C-265/04 *Margaretha Bouanich* v *Skatteverket*, paragraphs 33-35.

[153] C-265/04 *Margaretha Bouanich* v *Skatteverket*, paragraphs 40-41.

to be more confused when reading the ECJ's judgements in the Denkavit and Amurta cases.

5.3.2.2 The Denkavit case[154]

This case concerned the Dutch company Denkavit Internationaal which owned 50% of the capital in Denkavit France and 99,9% of the capital in Agro Finances. Agro Finances also owned 50% of the capital in Denkavit France. Both Denkavit France and Agro Finances were established in France. During the years 1987-1989, Denkavit Internationaal received dividends from both these companies.[155]

Due to the double taxation convention between France and the Netherlands, the withholding tax on the dividends was reduced to 5%. Denkavit Internationaal and Denkavit France[156] brought actions in order to get a refund of this withholding tax and stated that the French tax legislation was restricting the freedom of establishment. This breach was according to the companies caused by the difference in treatment of resident and non-resident companies. If the dividends would have been given to a French company, this company would not have been affected by the withholding tax that affected Denkavit Internationaal. The French legislation also resulted in almost a full exemption from corporation tax when parent companies, established in France received dividends from their subsidiaries.[157]

The questions in this case were therefore whether this difference in treatment constituted a restriction of the freedom of establishment and whether the answer to this question would be different if the tax levied in France could be credited against the taxes that were to be levied in the Netherlands due to a provision in the applicable double taxation convention between these Member States.[158]

The ECJ stated that a difference in treatment on grounds of nationality constitutes a restriction on the freedom of establishment when the situations at hand are objectively comparable.[159] Such a difference was caused by the French legislation irrespective of the applicable double taxation convention.[160] The ECJ also argued that the situations of residents and non-residents becomes comparable when a Member State, through double taxation conventions or unilateral provisions, levies income taxes on received dividends

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[154] ECJ 14 December 2006, C-170/05 *Denkavit Internationaal BV and Denkavit France SARL* v *Ministre de l'Économie, des Finances et de l'Industrie* [2006] ECR I-11949.

[155] C-170/05 *Denkavit Internationaal BV and Denkavit France SARL* v *Ministre de l'Économie, des Finances et de l'Industrie*, paragraphs 2 and 7-8.

[156] Denkavit France and Agro Finances were subsequently merged.

[157] C-170/05 *Denkavit Internationaal BV and Denkavit France SARL* v *Ministre de l'Économie, des Finances et de l'Industrie*, paragraphs 8-9 and 11-12.

[158] C-170/05 *Denkavit Internationaal BV and Denkavit France SARL* v *Ministre de l'Économie, des Finances et de l'Industrie*, paragraph 16.

[159] C-170/05 *Denkavit Internationaal BV and Denkavit France SARL* v *Ministre de l'Économie, des Finances et de l'Industrie*, paragraphs 23-25.

[160] C-170/05 *Denkavit Internationaal BV and Denkavit France SARL* v *Ministre de l'Économie, des Finances et de l'Industrie*, paragraph 26.

in both situations.[161] Although the situations are comparable, France only imposed a withholding tax when a non-resident parent company received dividends from its subsidiaries in contrast to resident companies that received such dividends.[162] Hence, the French tax legislation constituted a restriction of the freedom of establishment since these provisions '…makes it less attractive for companies established in other Member States to exercise freedom of establishment and they may, in consequence, refrain from acquiring, creating or maintaining a subsidiary in the State which adopts that measure'.[163]

Regarding the second question the ECJ affirmed that in the absence of harmonised Community rules, the Member States are in principle free to regulate this area of law through unilateral provisions or to allocate the right to tax between them through bilateral double taxation conventions. Community law must however still be regarded.[164] The ECJ however found that the applicable double taxation convention did not neutralise the effect of the discriminating tax legislation in France.[165] The ECJ further stated that even a small restriction of the freedom of establishment is in breach of EC law. The argument laid down by the French government that it is for the residence state to eliminate the effects of double taxation was further considered as irrelevant by the ECJ.[166] In this case, the French legislation was hence considered as a restriction of the freedom of establishment.[167] A comparison of this judgement, the judgement in the Amurta case and the Block case will be done in section 5.3.2.4 of the thesis.

5.3.2.3 The Amurta case[168]

This case concerned a Portuguese company Amurta which owned 14% of the shares in the Dutch company Retailbox. Amurta received dividends from this company and this dividend was subject of a 25% withholding tax.[169] Amurta wanted a refund of this withholding tax from the tax authorities in the Netherlands. Such a refund was thus not granted according to the tax provisions in the Netherlands and the Parent-Subsidiary Directive. The dividends would however not have been subject of this withholding tax if

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[161] C-170/05 *Denkavit Internationaal BV and Denkavit France SARL* v *Ministre de l'Économie, des Finances et de l'Industrie*, paragraph 35.

[162] C-170/05 *Denkavit Internationaal BV and Denkavit France SARL* v *Ministre de l'Économie, des Finances et de l'Industrie*, paragraph 39.

[163] C-170/05 *Denkavit Internationaal BV and Denkavit France SARL* v *Ministre de l'Économie, des Finances et de l'Industrie*, paragraph 30.

[164] C-170/05 *Denkavit Internationaal BV and Denkavit France SARL* v *Ministre de l'Économie, des Finances et de l'Industrie*, paragraphs 43-44.

[165] C-170/05 *Denkavit Internationaal BV and Denkavit France SARL* v *Ministre de l'Économie, des Finances et de l'Industrie*, paragraphs 46-47.

[166] C-170/05 *Denkavit Internationaal BV and Denkavit France SARL* v *Ministre de l'Économie, des Finances et de l'Industrie*, paragraphs 49-51.

[167] C-170/05 *Denkavit Internationaal BV and Denkavit France SARL* v *Ministre de l'Économie, des Finances et de l'Industrie*, paragraph 56.

[168] C-379/05 *Amurta SGPS* v *Inspecteur van de Belastingdienst/Amsterdam.*

[169] C-379/05 *Amurta SGPS* v *Inspecteur van de Belastingdienst/Amsterdam*, paragraphs 2 and 11-12.

Amurta would have been established in the Netherlands. The question was whether this difference between resident and non-resident companies was restricting the free movement of capital. Another question was whether this first question was affected if a full credit for the Dutch withholding tax was granted in Portugal.[170]

The ECJ made some statements that are of relevance when analysing the Block case. For example the ECJ stated that it is for the Member States to decide if and how double taxation of distribution profits shall be avoided when it concerns shareholdings that are not covered by the Parent-Subsidiary Directive. The Member States can accordingly avoid double taxation through double taxation conventions or unilateral provisions. When doing so, Community law must however be regarded.[171]

The provisions at hand resulted in an economic double taxation for the Portuguese companies while a Dutch company would not have been subject to this double taxation. The national legislation could therefore result in a situation where investors in another Member State are restrained from investing in the Netherlands and accordingly constituted a restriction on the free movement of capital.[172]

The Court further stated that there could be a difference in treatment of residents and non-residents when it concerns situations which are dissimilar and not comparable. When a Member State however charges income tax, in respect of dividends from a resident company, on residents as well as non-residents due to a unilateral provision or a double taxation convention, these situations become comparable. The restriction of the free movement of capital was only caused by the Netherlands law and due to the decision of the Dutch legislator to prevent economic double taxation for resident companies but not for non-resident companies.[173] The ECJ also pointed out that a Member State can not rely on a double taxation convention in order to avoid ensuring the free movement of capital.[174] The restricting provisions could not be justified with the need to safeguard the cohesion of the national taxation system nor by the need to safeguard the allocation of the power to tax between the Member States.[175]

Regarding the second question, the Court answered that restricting provisions could not be justified through tax advantages that are given unilaterally in the legislation of another Member State.[176] However the ECJ states that a restricting provision may be in compliance with the fundamental freedoms if the Member State at question neutralises this restriction by entering into a double taxation convention with another Member State. This could however not be a reason for justification in the Amurta case since the national court had not referred to the relevant provisions of the double taxation convention

[170] C-379/05 *Amurta SGPS* v *Inspecteur van de Belastingdienst/Amsterdam*, paragraphs 12-15.

[171] C-379/05 *Amurta SGPS* v *Inspecteur van de Belastingdienst/Amsterdam*, paragraph 24.

[172] C-379/05 *Amurta SGPS* v *Inspecteur van de Belastingdienst/Amsterdam*, paragraphs 27-28.

[173] C-379/05 *Amurta SGPS* v *Inspecteur van de Belastingdienst/Amsterdam*, paragraphs 37-40.

[174] C-379/05 *Amurta SGPS* v *Inspecteur van de Belastingdienst/Amsterdam*, paragraph 55.

[175] C-379/05 *Amurta SGPS* v *Inspecteur van de Belastingdienst/Amsterdam*, paragraph 60.

[176] C-379/05 *Amurta SGPS* v *Inspecteur van de Belastingdienst/Amsterdam*, paragraphs 75-78.

that were to be applied.[177] Accordingly, the Dutch provisions constituted a restriction of the free movement of capital which could not be justified.

5.3.2.4 Comparison with judgements regarding economic double taxation

When comparing the judgements in the Block and Kerckhaert and Morres cases with the judgements in the Bouanich and Amurta cases it is clear that the ECJ makes a difference between economic and juridical double taxation. These ECJ opinions are also shown in the Gilly and Denkavit cases when it concerns restrictions on the free movement of workers and the freedom of establishment. When there are no harmonised Community measures, it is made clear that it is for the Member States to eliminate both economic and juridical double taxation through unilateral provisions or by entering into double taxation conventions with other Member States. There are however differences in the ECJ's rulings.

When reading the cases regarding economic double taxation it is clear that provisions that are likely to restrain investors in one Member State from investing in other Member States, constitute a restriction on the free movement of capital. Differences in treatment of residents and non-residents are also considered as restrictions on the freedoms provided in the EC Treaty when the situations are objectively comparable. Situations are considered to become objectively comparable when a Member States levies taxes on residents as well as non-residents. Further, even if the double taxation only constitutes a small restriction on the freedom of establishment it is in breach of the EC Treaty, as was stressed in the Denkavit case. In these cases it is also made sure that if economic double taxation arises in objectively comparable situations, the breach of EC law cannot be justified with the need to safeguard the cohesion of the national taxation system or the need to safeguard the allocation of the power to tax between the Member States.

When reading these judgements it is obvious that when it comes to economic double taxation, the ECJ is not very tolerating of restricting measures and even the smallest double taxation constitutes a breach of the EC Treaty which could not likely be justified. Hence, these judgements are almost completely different from the judgements concerning juridical double taxation. The question then arises why the rulings in cases of economic double taxation differ so much from those regarding juridical double taxation. Both situations results in an obligation for the exposed citizen to pay "too much" tax and it therefore seems strange that the same principles do not apply to these similar situations.

5.3.3 The ECJ v. the Community legislator and the fiscal sovereignty of the Member States

Jérôme Monsenego is of the opinion that even if the ECJ is of the opinion that juridical double taxation of inheritances restricts the free movement of capital the Court may consider it to be too far-reaching to proclaim such double taxation as a breach of Community law. The ECJ would then have to determine which state, the residence or source state, which should have the taxing rights of the inheritance. He also brings forward the

[177] C-379/05 *Amurta SGPS* v *Inspecteur van de Belastingdienst/Amsterdam*, paragraphs 79-83.

possibility, given in Article 227 of the EC Treaty, for the Member States to bring actions against each other.[178]

Concerning the opinion that it may be too far-reaching for the ECJ to state that juridical double taxation is restricting the free movement of capital, the fact have been put forward that there may be situations where the ECJ can not prevent double taxation from arising. According to Professor Dr. Michael Lang, the ECJ shall not replace the Community legislator but shall only make sure that EC law is followed and if double taxation still arises, action shall be taken by either the Member States or the Community legislator. Lang further states that such actions will be taken since double taxation and tax planning, in the long run, is not beneficial for the Member States or the Community legislator.[179]

Perhaps Monsenego and Lang have a point in their arguments concerning the ECJ's approval of juridical double taxation. The ECJ maybe think of juridical double taxation as a restriction on the free movement of capital but do not know how to solve this problem without taking the role of the EC legislator or breaching the fiscal sovereignty of the Member States. But if the ECJ finds juridical double taxation to be in breach of EC law, could this opinion not be expressed in their judgements? Is it really necessary for the ECJ to decide which Member State that has the right to tax the inheritance? Is it not sufficient that the ECJ claims that juridical double taxation as such constitutes a restriction on the free movement of capital? Such statements have been done, as we have seen in cases concerning economic double taxation and it could be important in order to give the Member States incentives to enter into double taxation conventions with the intention to avoid situations where this double taxation occurs. Such incentives could also be of special importance since Article 293 of the EC Treaty is repealed by the Lisbon Treaty.[180]

5.3.4 Good luck or bad luck

However, regard must also be taken to the statement in Block where the Court expressed that the EC Treaty does not guarantee that a citizen's transfer of residence could be done without any tax consequences. This statement is similar to the ruling in the Schempp case.[181] The Schempp case concerned a dispute between Mr Schempp and Finanzamt München V. The German resident Mr Schempp paid alimony to his ex-wife who was resident in Austria. The Finanzamt did not find this alimony to be such a special expenditure that could be deducted in respect of income tax since the alimony was not subject to tax in Austria.[182]

[178] Monsenego, Jérôme, *Double Taxation in the EU: The Future After Block*, Tax Notes International 2009 vol 54, nº 3, page 216.

[179] Lang, Michael, *Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions and Contradictions*, EC Tax Review, 2009, Vol. 18, Issue 3, page 110.

[180] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, C 306/01.

[181] ECJ 12 July 2005, C-403/03 *Egon Schempp* v *Finanzamt München V* [2005] ECR I-06421.

[182] C-403/03 *Egon Schempp* v *Finanzamt München V*, paragraphs 2 and 7-9.

The question in this case was whether this treatment was in breach of Articles 12 and 18 of the EC Treaty.[183] Article 12 concerns the prohibition to discriminate on grounds of nationality and Article 18 gives the EU-residents the right to move freely within the Community.

The ECJ did not consider the German provisions to be in breach of Articles 12 and 18 of the EC Treaty. If Mr Schempp's ex-wife would have been a resident in Germany, the alimony would have been deductible since the former Mrs Schempp then would have been liable to pay tax for this income. The Court did not find these different situations to be comparable since the different situations are subject to different tax legislations. Article 12 of the EC Treaty does not concern situations where the difference in treatment is due to the differences in the legislation of the Member States. Hence, the German provisions were not in breach of Article 12.[184]

The provisions at hand were neither found to be in breach of Article 18 of the EC Treaty since the citizens are not guaranteed to gain a neutral tax situation when the citizen transfers his or hers activities to another Member State. Since the legislations in the different Member States are dissimilar, the consequences for the citizen may be advantageous or not.[185] This possibility of good or bad "luck" was also brought forward by the Advocate General in the Kerckhaert and Morres case.[186]

These potential positive or negative consequences are due to the fact that the Member States uses their fiscal sovereignty in parallel and have different criteria for taxation. In earlier case law regarding taxation of inheritances (Barbier etc.) it could also be seen that the ECJ to some extent have respected this fiscal sovereignty by acting according to the "one-country" approach.

5.3.5 One-country approach or two-country approach

The one-country approach, which is generally supported by those who does not want the ECJ to interfere with juridical double taxation, implies that the ECJ shall only focus on whether the national provisions in one Member State are in breach of the fundamental freedoms. The two-country approach, on the other hand, means that the ECJ in its analysis also should take into account the national provisions in the other Member State that is involved in the current cross border situation as well as relevant tax treaties.[187] In its earlier case law the ECJ has, as has been questioned by the author,[188] only taken into account the national provision in question and has not taken into account whether or not this provision, when co-existing with the provisions in the other Member State, causes double taxation.

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[183] C-403/03 *Egon Schempp* v *Finanzamt München V*, paragraph 11.

[184] C-403/03 *Egon Schempp* v *Finanzamt München V*, paragraphs 32-36.

[185] C-403/03 *Egon Schempp* v *Finanzamt München V*, paragraphs 44-45.

[186] Opinion of Mr Advocate General Geelhoed delivered on 6 April 2006 in case C-513/04 *Mark Kaerckhaert and Bernadette Morres* v *Belgische Staat*, paragraph 36.

[187] Cerioni, Luca, *Double Taxation and the Internal Market: Reflections on the ECJ's Decisions in Block and Damseaux and the Potential Implications*, Bulletin for international taxation, 2009, Vol. 63, No. 11.

[188] See for example section 4.3.

5.3.6 Is the elimination of double taxation still one of the aims within the Community?

However, another question that arises after the abolition of Article 293 of the EC Treaty is whether the elimination or alleviation of double taxation still is one of the aims within the Community. Some states that the avoidance of double taxation still is one of the aims of the Community in accordance with Articles 94 and 96 of the EC Treaty. Article 94 of the EC Treaty gives the Council a possibility to unanimously issue directives for the approximation of the laws in a Member State which may affect the functioning of the common market. In accordance with Article 96 of the EC Treaty, the Commission shall consult the Member States when it finds a difference in the legislation of a Member State which has the effect of distorting the conditions of competition within the European Community. If this distortion is not abolished after the consultation, the Council (acting by a qualified majority) shall issue the required directives. Even if the Member States have fiscal sovereignty, taxation is not excluded from Articles 94 and 96 of the EC Treaty. Hence this fiscal sovereignty is not exclusive. Professor em. dr. Frans Vanistendael states that these Articles show that the intention was to grant the Community legislative power in the area of direct taxation when it is essential for the internal market to function appropriately. According to Vanistendael, Article 293 of the EC Treaty is only a supplementary provision which gives the Member States the right to regulate questions regarding double taxation in bilateral tax treaties.[189]

5.3.7 The author's resolution

Given all the facts and after comparing the judgement in the Block case with other cases concerning income taxation it seems reasonable, in the view of the author, that the ECJ actually would consider juridical double taxation to be a restriction of the free movement of capital. Such taxation clearly reduces the value of the inheritance as well as it restrain investors from investing their capital in other Member States. Given that juridical double taxation clearly restricts the free flow of capital in the internal market and the fact that the Member States can not avoid to follow the provisions in the EC Treaty when exercising their fiscal sovereignty due to the fact Community law rises above the national legislation, it does not seem reasonable that such situations which restrain the freedoms provided in the EC Treaty actually could be approved by the ECJ.

The fact that the ECJ, in it's earlier case law, has acted in accordance with a one-country approach and has not considered the fact that the national provisions actually have caused situations where double taxation arises could be explained by the Courts respect of the Member States fiscal sovereignty. This could also explain why the ECJ in fact have accepted situations where juridical double taxation arises due to the co-existence of the tax legislations of the Member States. The ECJ could also find difficulties with solving the problems with juridical double taxation without infringing the Member States fiscal sovereignty or taking the role of the Community legislator.

Since the ECJ have encouraged the Member States to enter into double taxation conventions in order to eliminate situations where double taxation arises, it is in the author's view that the ECJ also could state that juridical double taxation as such, constitutes a breach of EC law but still leave it for the Member States to solve this problem through

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[189] Vanistendael, Frans, *Does the ECJ have the power of interpretation to build a tax system compatible with the fundamental freedoms?*, EC Tax Review, 2008, Vol. 17, Issue 2, pages 54-55.

double taxation conventions. At present there are no incentives for the Member States to enter into these agreements when the ECJ approves of situations were double taxation occurs. This is even more important given the fact that Article 293 of the EC Treaty is repealed by the Lisbon Treaty.

Even if actions are taken in order to prevent juridical double taxation, there may however still be situations where juridical double taxation occurs. In the author's view it is however better for the internal market if these situations occur more seldom than often. Even if the EC Treaty does not grant the citizens a neutral situation, concerning taxation, when the citizens transfers their place of residence it seems to be more beneficial for the internal market if the citizens do not become subjects of a higher taxation when doing this transfer.

6 Conclusions

Not many Member States have entered into double taxation conventions which regulate juridical double taxation of inheritances. The ECJ's case law regarding double taxation of inheritances has also been very varying. The aim of this thesis is therefore to analyse these cases in order to find out if the ECJ considers juridical double taxation to be a restriction on the free movement of capital. The purpose of this thesis is hence to investigate if all disadvantages (concerning inheritance taxes) arising from cross border investments are restrictions of the free movement of capital according to the ECJ.

When analysing the initial case law regarding inheritance taxes it seems like the ECJ is of the opinion that juridical double taxation constitutes a restriction on the free movement of capital. In the Barbier case, the ECJ for example stated that national measures, which have the effect of prohibiting residents in one Member State from investing in other Member States, are considered as such measures which restrict the free movement of capital. Even those measures which result in a reduced value of the inheritance constitute a breach of Article 56 of the EC Treaty.

Further the national provisions in the van Hilten-van der Heijden case were not considered as a breach of Article 56 of the EC Treaty. If the Netherlands national was taxed as if still resident in the Netherlands within ten years of the ceasing to reside, the Netherlands granted a relief for the inheritance taxes that were levied in other states. Double taxation and a reduction of the value did thus not occur.

In the Jäger case the ECJ stated that the co-existence of national tax systems is not a valid argument when the value of the inheritance is reduced and this was also confirmed in the Arens-Sikken case. In the Barbier, van Hilten-van der Heijden, Jäger, Eckelkamp and Arens-Sikken cases, the ECJ however focuses only on the possible discriminating effect that the tax provisions may have in a single Member State. A one-country approach is applied by the ECJ. By reading these cases one could however get the impression that the ECJ is of the opinion that juridical double taxation constitutes a restriction of the free movement of capital since it clearly restricts persons from investing in other Member States as well as it reduces the value of the inherited property.

In the Block case, the ECJ however made it clear that juridical double taxation of inheritances resulting from the Member States exercise of their fiscal sovereignty in parallel is not in breach of Article 56 of the EC Treaty. The ECJ further states that when there are no harmonising provisions within the Community, the Member States could in principle regulate this area of law as they wish provided that the national provisions comply with Community law. When setting their rules regarding taxation of inheritances, the Member States are not according to the ECJ obliged to adapt their own tax systems to the tax systems of other Member States. The ECJ also declared that there are no guarantees given the citizens in the EC Treaty regarding a neutral tax situation when transferring their place of residence.

In the Block case, as well as in earlier case law, the ECJ encourages the Member States to enter into double taxation conventions with each other in order to eliminate or alleviate juridical double taxation. After a study of these cases it seems like the ECJ considers juridical double taxation as an undesirable restriction of the internal market. But since there are no consequences when the Member States do not succeed to enter into these agreements, the author is of the opinion that the Member States are not likely to conclude double taxation conventions and thereby lose tax revenues.

When comparing the cases concerning juridical double taxation with the cases regarding economic double taxation it becomes clear that the ECJ makes a difference between these two types of double taxation. In both situations the ECJ states that it is for the Member States to eliminate double taxation through double taxation conventions. However, in the Block and Kerckhaert and Morres cases the ECJ does not find situations where juridical double taxation still occurs to be a breach of Article 56 of the EC Treaty. While in the cases regarding economic double taxation, the Court states that even a small restriction on the free movement of capital, constitutes a breach of EC law. As has been seen in sections 5.3.1-5.3.2 of this thesis, the ECJ treats economic and juridical double taxation very differently.

In the doctrine the possible reasons for this approach have been put forward. Some consider it to be too far reaching for the ECJ to declare juridical double taxation as a restriction on the free movement of capital since the ECJ then would have to determine which state that has the right to tax, the source state or the residence state. And even if the ECJ would proclaim such double taxation to be in breach of EC law, there may still be situations where the ECJ can not prevent juridical double taxation from arising. Since the ECJ has applied a one-country approach when ruling in the first cases regarding inheritance taxes, and given the ruling in Block, it seems like the Court does not want to breach the Member States fiscal sovereignty. The ECJ is according to its judgements neither of the opinion that the EC Treaty ensures the citizens that they will be treated neutrally concerning tax matters when they transfer their place of residence. When the Member States use their fiscal sovereignty in parallel it could result in “good luck” as well as “bad luck”.

The author is however of the opinion that it would be more beneficial for the internal market to avoid juridical double taxation. It clearly reduces the value of the inheritance as well as it restrains investors in one Member State from investing in other Member States and the free flow of capital within the Community is hence restricted. Perhaps the Community legislator or the Member States will take action against juridical double taxation in order to prevent tax planning and because double taxation is not beneficial for the Member States and the Community in the long run. It is hard for the Community to regulate this area of law since unanimity is required in order to achieve a valid decision and since the different Member States use different criteria in order to form a basis for their tax claims. It could also be appropriate if this area of law is regulated by the Member States since direct taxes are financing the national welfare systems.

In the view of the author there are not many incentives for the Member States to actually enter into these double taxation conventions at present. Since there are no consequences for the Member States when they do not succeed to abolish juridical double taxation and since Article 293 of the EC Treaty is repealed by the Lisbon Treaty it is not clear if the Member States actually *have* to avoid such double taxation. The answer to this question is more likely negative than positive. The author can hence not see the harm in a statement from the ECJ regarding the negative effects on the internal market of juridical double taxation. Is it not possible to for the ECJ to give such a statement but leave it to the Member States to eliminate or alleviate this restriction? Hence the fiscal sovereignty of the Member States would not be infringed.

To conclude, after this study it becomes obvious that the ECJ applies a one-country approach and national measures in one Member State which clearly restricts the free flow of capital are considered to be in breach of EC law. Hence, the ECJ does not apply a two-country approach and national measures in one Member State, that are not in itself discriminatory, but when co-existing with national provisions in the other Member State that is involved in the current cross border situation results in juridical double taxation, do not constitute a breach of EC law.

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