

Tax Treaty Interpretation in Greece

Ms. Katerina Perrou, LL.M.

- I. Tax treaty law and domestic law**
 1. Constitutional provisions
 2. Applicable rules of interpretation
- II. The relevance of Community law (esp. EC Treaty) for the interpretation of tax treaty law**
 1. Predominance of Community law
 2. Compatibility with Community law
 3. "Permanent Establishment" and "Non-Discrimination" in the light of Community law
 4. Most favoured state clause
- III. The relevance of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT)**
 1. VCLT as part of domestic law
 2. International treaties interpretation rules set forth in VCLT
 - 2.1. Art. 31: set of principles
 - 2.2. "Context"
 3. Historical interpretation method (Art. 31 (1) VCLT)
 4. Interpretation rules of domestic law
- IV. The relevance of the OECD Model and the OECD Commentary**
 1. Introduction
 2. Conformity with the OECD Model
 3. Reservations and Observations
 4. Legal character of the OECD Model and Commentary
 5. Deviation from the wording proposed in the OECD Model
 6. Relevant version of the OECD Model
- V. The relevance of Art. 3 (2) OECD Model**
 1. Conventional definitions
 2. The relevance of Art. 3 (2)
 - 2.1. The term "context"
 - 2.2. The term "application"
 - 2.3. Restricted reference to domestic law
- VI. The relevance of mutual agreements**
- VII. The relevance of the other contracting State's tax authority practice**
 1. The condition of reciprocity; Constitutional provision and Supreme Court's Jurisprudence
 2. Subsequent agreements or practice
- VIII. The relevance of court decisions**

I. Tax treaty law and domestic law

1. Constitutional provisions

Double Tax Conventions (DTCs) are a subcategory of treaties under international law. According to the Greek Constitution, Art. 28 (1), both customary and conventional international law prevails over any other opposing domestic law, except the Constitution itself. In the same way provisions of DTCs prevail over any other domestic law, fiscal or not, previous or subsequent, that may regulate the same matter differently. This does not mean that the domestic law provision is abrogated, but rather that it is only set aside by the provision of the DTC, which is directly applicable.

A DTC, like any other international treaty, needs ratification in order to become part of domestic law. According to the Greek Constitution, the President has the authority to sign all treaties, but for some kinds of them, which explicitly includes fiscal treaties, this is not enough. The approval of the parliament is required.¹ This parliamentary approval has the form of a law.² This law includes the ratification clause³ and the text of the treaty in both its original language and its translation into Greek, if Greek is not an original language. The ratification law is only the form in which the international treaty becomes part of the domestic law. Consequently, the courts will apply the treaty itself and not the ratification law. The provisions of the ratification law can be altered or even abrogated by another law, as long as they do not affect the ratification clause. Reservations or interpretative notifications/statements included in the ratifying law but not included in the Convention itself have no power. On the other hand reservations included in the Convention text but omitted from the ratifying law are still binding for Greece. The Convention is applicable in the international and not in the national form.

DTCs prevail over any other opposing provision of domestic law from the time that they are put into force, according to their own provisions. When and how these Conventions are put into force is determined by the Conventions themselves.

¹ Art. 36 (1) – (2).

² This consensus is only a formality in order to achieve the adoption of international law into domestic law, and does not mean that international law is transformed into domestic law. Roukounas, *International Public Law* (hereafter 'Public Law') (1981) pp 106 et seq; Oikonomidis, in: Ioannou et al., *International Public Law* (hereafter 'International Public Law') (1988) p 117.

³ The ratification clause since 1984 (year of ratification of DTC Greece/Netherlands) reads as follows: "The Convention for the avoidance of double taxation on income and on capital and the elimination of tax evasion signed between the Greek Republic and (other State) is ratified and has the power that grants to it art. 28 par.1 of the Constitution."

2. Applicable rules of interpretation

The fact that DTCs remain international law even after their ratification and entrance into domestic law has consequences as far as to which rules of interpretation are applicable. There are three major opinions.

- According to the first opinion⁴ only the rules of international law are applicable for the interpretation of DTCs. The "autonomous" interpretation of DTC provisions is a substantial prerequisite for the effectiveness of the predominance of the international law over domestic law. In order to reinforce their "autonomous" interpretation, DTCs often use the method of conventional definitions, for the terms that are used in their texts.
- According to the second opinion⁵ the rules of interpretation of international law should be used secondarily, after the application of the interpretation rules used for the domestic law.
- The third opinion⁶ lies somewhere in between the two above-mentioned opinions. According to it, the interpreter of the law should apply the rules used for the interpretation of domestic law but he should not stick to them. He should also use the rules of interpretation set by international law. In doing so, the interpreter will be able to arrive at a uniform interpretation, which is necessary within DTCs, because of their fiscal nature. Any deviation from their uniform interpretation could lead to undesirable results either for taxpayers (double taxation) or for the tax authorities of both of the contracting States (double non-taxation).

When applying DTCs, Greek courts usually use the rule *lex specialis derogat legi generali* in order to establish the predominance of provisions of DTCs over provisions of domestic tax law. DTCs are considered special laws in comparison to domestic tax laws, which are considered to be general. Hence, the subsequent domestic tax law, which is general law, cannot prevail over the previous DTC, as the latter is special (*lex posterior generalis non derogat legi priori speciali*).⁷

⁴ Anastópoulos, *Fiscal Law* (hereafter 'Fiscal Law') (1992) p 152; Finokaliotis, *Fiscal Law* (hereafter 'Law') (1999) p 197.

⁵ Anagnostópoulos, in: Markou, *International Bilateral Conventions for the avoidance of double taxation of income* (hereafter 'Bilateral Conventions') (1997) p 15.

⁶ Yannópoulos/Yannópoulos, The administrative judge in interpreting international bilateral conventions for the avoidance of double taxation, *EDDD* 1995, pp 185 et seq.

⁷ See, *inter alia*, decision no. 998/97 of Administrative Court of Appeals of Thessaloniki, *DFN* 1999, p 77; decision no. 17450/96 of Athens Administrative Court of First Instance, in: Markou, *Bilateral Conventions*, pp 51 et seq; decisions of the State Council: StE 421/89, *DFN* 1990, p 820, StE 2962-3/89, in: Markou, *Bilateral Conventions*, p 123, StE 50/91, in: Markou, *Bilateral Conventions*, p 142, and StE 419-420/96, in: Markou, *Bilateral Conventions*, p 149. See also decisions no. 4239/97 of Athens Administrative Court of First Instance and no. 1107/99 of Athens Administrative Court of Appeals, *DFN* 1999, pp 1513 and 1515 respectively, in which the predominance of DTCs is directly based on Art. 28 (1) of the Constitution and their quality as international law, rather than on the fact that they contain special rules compared to the general tax laws. This recent case-law is in line with the doctrine.

Because they are part of international law applicable in Greece, and because of their high ranking in the norm hierarchy, DTC provisions can not be altered like any other Greek law. The same procedure is required to either alter or to abolish a DTC, and a new DTC is required.⁸ The Greek Constitution leaves no room for treaty override by domestic law.

II. The relevance of Community law (esp. EC Treaty) for the interpretation of tax treaty law

1. Predominance of Community law

Until recently, international tax matters fell in the realm of International Bilateral Conventions for the avoidance of the double taxation. But the development of European Union law resulted in the creation of a European Community tax law, which is expressed through provisions of primary and secondary Community law. These provisions often regard matters that fall already within the scope of application of DTCs, thus leading to a conflict between international tax law (DTCs) and European Community law (mainly EC Treaty).⁹

European Community law prevails over International Law in the relations between the Member States of the EU. According to Art. 10 EC Treaty, Member States are obliged to avoid any measure that could endanger the fulfilment of the aims set in the Treaty. Thus, DTCs concluded by Member States after the Rome Convention should not violate provisions of EC law.¹⁰

Nevertheless, in order to preserve the validity of Conventions concluded by Member States with third States before the Rome Convention according to the international law principle "*pacta sunt servanda*", EC Treaty provides that the Rome Convention does not influence those "pre-Community" Conventions. In case of a conflict between these Conventions and Community law, the Member States should take all necessary measures to remove the incompatibility. This is how Community law prevails over pre-Community DTCs with third States. DTCs concluded between Member States remain in force as long as Community law does not deal with the same matters.¹¹

⁸ This is the case with the DTC Greece/Italy. The first DTC, which was concluded in 1965 and put into force in 1967, was revised in 1987. The revised DTC provides in Art. 30 (4) that the previous DTC expires and is no longer valid as soon as the revised DTC comes into force. The revised DTC Greece/Italy was put into force in 1991.

⁹ Tsourouflis, *European Law and Double Taxation Conventions*, DFN 1999, p. 1572 et seq; Yannopoulos/ Yannopoulos, *EDDD* 1995, p. 198.

¹⁰ Skandamis, *European Community Law I* (1994) p. 226.

¹¹ An example offers Art. 15 of law 2216/94 concerning the "ratification of convention among the Member States of the European Union for the elimination of double taxation in connection with the adjustment of profits of associated enterprises" which provides that this treaty does not affect further obligations of the Member States as far as the elimination of double taxation in connection with the adjustment of profits of associated enterprises is concerned that may arise from other Conventions that contracting Member States have concluded or will conclude, or from the domestic law of these Member States. This treaty has, therefore, a supplementary character, and it is *lex specialis* compared to the DTCs that Member States have concluded or will conclude among them.

The predominance of Community law over DTCs is also evident in the realm of international co-operation for elimination of tax evasion. Even though all DTCs concluded between Member States contain a clause for the co-operation of the contracting States' tax authorities for the exchange of information, these provisions are set aside by the Directive 77/779/EC regarding the co-operation of Member States' tax authorities in the field of direct and indirect taxes.¹²

The European Court of Justice has also confirmed, by its judgement issued in a case regarding the impact of the EC freedoms on national tax law, the predominance of Community law over DTCs between Member States.¹³

2. Compatibility with Community law

All of the above illustrates that within the European Union the provisions of DTCs should be compatible with Community law. This is how Community law and the need for compatibility with it become an important factor in the interpretation of DTCs.

Principles and freedoms enshrined in the EC Treaty affect the way terms and concepts used in DTCs are interpreted. A characteristic example: ECJ case C-311/97, *Royal Bank of Scotland*,¹⁴ (the judgement was issued following a reference for a preliminary ruling made by the Administrative Court of Appeals of Piraeus), in which the ECJ dealt with the matter of freedom of establishment which all Community companies shall enjoy within the territory of any other Member State. The court maintained that the restrictions set by Member States concerning the freedom of establishment of Community companies as well as the discriminations in comparison to domestic companies are not compatible with the freedom of establishment of EC Treaty and they deprive the relevant provision of its essence.¹⁵

3. "Permanent Establishment" and "Non-Discrimination" in the light of Community law

Such established case law will result in the enlargement of the concept of "permanent establishment" (which is protected under Community law) in order to cover as many cases as possible, and so to protect and develop the freedom of establishment as provided in the EC Treaty. Furthermore, according to the above-mentioned ECJ case law, the concept of non-discrimination between nationals and non-nationals is interpreted. In this field as well as in the field of freedom of establishment it seems that the Community law offers a broader protection compared to the one offered under Art. 24 of the OECD Model Tax Convention.¹⁶ The relevant Community law provisions impose on the

¹² Tsourouflis, *DFN* 1999, p 1573.

¹³ C-270/83, *Commission v. France (avoir fiscal)*.

¹⁴ Published in: *DFN* 1999, p 1191.

¹⁵ The ECJ arrived at the same conclusion in the case of *St. Gobain*, C-307/97. See also State Council (plenary assembly) decision no. 2152/86.

¹⁶ Anagnostopoulos, The principle of non-discrimination in the DTCs, *DFN* 1995, pp 562 et seq; Malliou, The Discriminatory treatment of Community banks and insurance

Member States the obligation for equal treatment of nationals and non-nationals within the European Union. They forbid not only direct discrimination based on nationality, but also any other form of indirect discrimination which, even though based on other criteria, it arrives at the same result.¹⁷

4. Most favoured state clause

Based on the principles of Community preference and non-discrimination between nationals and non-nationals one could come to the conclusion and agree that every Member State should grant the more favourable provisions included in a DTC with a Member State or a third State to the nationals of all Member States. While this opinion found a lot of supporters and seems to be theoretically correct, in practice it would cause a lot of problems, as it does not take into account the special character of the bilateral international tax treaties, namely treaties concluded absolutely on the basis of the mutual interests and economic relations of the two contracting States.¹⁸

III. The relevance of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT)

1. VCLT as part of domestic law

The Vienna Convention on the Law of Treaties (VCLT) has been ratified with the legislative decree no. 402/74. As part of international conventional law, the VCLT under Art. 28 (1) of the Greek Constitution enjoys a high rank in the norm hierarchy in Greece, prevailing over any other domestic law which might contain any opposite regulation. It is accepted that the interpretative rules set forth in the VCLT were part of existing international customary law even before their codification in the text of VCLT.¹⁹ According to Art. 28 (1) of the Greek Constitution, recognised rules of international customary law form part of domestic law as such, without any other action, and stand above domestic laws in the norm hierarchy. This means that even before the ratification of the VCLT by Greece, the interpretative rules provided in it were binding for Greece. Now it is binding as a ratified international treaty, which means that courts are bound to apply the interpretative rules provided in it.²⁰

companies in regard to the ones which are residents of Greece, interpretation of Art. 7, 52 and 58 of EC Treaty, *DFN* 1999, pp 1123 et seq; Anagnostopoulos, The clause of non-discrimination in DTCs, *DFN* 1999, pp 1508 et seq.

¹⁷ Athens Administrative Court of First Instance decision no. 12120/98, *DFN* 1999, p 1187.

¹⁸ Tsourouflis, *DFN* 1999, pp 1577 et seq.

¹⁹ Roukounas, *Public Law*, p 64. It is characteristic that even before the VCLT came into force internationally (27 January 1980) the International Court of the Hague used it, maintaining that in the provisions on which the court based his judgement the VCLT was only repeating existing valid customary law.

²⁰ Yannopoulos/Yannopoulos, *EDDD* 1995, p 200; Koufos, *The Vienna Convention on the Law of Treaties* (1985); Roukounas, *Public Law*, pp 64 et seq; Rozakis, in: Ioannou et al, *International Public Law*, p 79; Anastopoulos, *Fiscal Law*, p 152.

2. International treaties interpretation rules set forth in VCLT

Articles 31 and 32 VCLT set forth the rules for the interpretation of international treaties.²¹ Article 31 includes the general interpretation rule while Art. 32 refers to supplementary means of interpretation. Both Articles are laid down in a way that leaves room for broad interpretation choice.

2.1. Art. 31: set of principles

Article 31 VCLT contains a set of principles for the interpretation without ranking them, starting with good faith and then referring to the usual meaning of the terms, which can be conceived both in the general context and under the objective and ratio of the treaty. Two different methods are combined: the method of the usual meaning and the teleological interpretation; the whole text of the treaty, the general context, is regarded as an important interpretative tool, in contrast to the once predominant subjective will of the contracting parties. This preference for the context, rather than the original intention of the contracting parties, set forth in the VCLT does not mean that the use of subjective elements is totally inapplicable in the process of interpretation of a treaty. On the contrary, the original intention of the negotiators is implied when reference is made to the aim of the treaty, which is part of the general interpretative rule of Art. 31 VCLT. This does not mean that the aim of the treaty and the original intention of the parties are the same, as the aim of the treaty refers mainly to the treaty as a whole. Moreover, one should keep in mind the fact that Art. 31 restricts the role of the aim of the treaty to the enlightenment of the terms used in the treaty, which means that it is a dependent tool of interpretation.

2.2. "Context"

According to Art. 31 (2) VCLT, the "context" of a Convention includes all supplementary documents that have been drafted and are related to it. In the case of a DTC such documents are letters or notifications that have been exchanged between the contracting States.²² Subsequent agreements and any practice followed by the contracting States in applying the Convention can also be taken into account, according to Art. 31 (3) VCLT. But if such subsequent agreements or practice alter provisions of the original Convention, then in order to be considered valid interpretation tools they would need to be ratified, according to domestic law.²³ Article 32 VCLT provides supplementary interpretation tools that could be used in not just any case, but only as auxiliary tools of interpretation, when there is still doubt, after applying the rules laid down in Art. 31.

²¹ Yannopoulos/Yannopoulos, *EDDD* 1995, p 200; Roukounas, *Public Law*, p142; Ioannou et al, *International Public Law*, p 181; Anagnostopoulos, in: Markou, *Bilateral Conventions*, p 15.

²² E.g. the notifications that have been exchanged between Greece and the USA on 29 November 1961 and 19 December 1961, concerning the correction of a translation error in the Greek text of the relevant bilateral DTC.

²³ Yannopoulos/Yannopoulos, *EDDD* 1995, p 200.

3. Historical interpretation method (Art. 31 (1) VCLT)

It is understood in the reading of the provisions of the VCLT that the so-called "historical interpretation" is an accepted method for interpreting a Convention. Using the "historical method" for interpretation, means that, in order to reveal the real meaning of a provision, one goes back to the time the Convention was concluded, and uses all relevant materials that will bring the original intention of the negotiators into light. This is what is understood by the phrase "in the light of the object and purpose", used in Art. 31 (1). Besides, it seems that the VCLT recognises the importance of original intentions of negotiators in interpreting a Convention, in providing that preparatory work can be taken into consideration as well as the circumstances. According to Art. 32, these supplementary means of interpretation are very close to the time the Convention was concluded and can show the intention of the negotiators fairly early. Still, they remain only supplementary tools, which means they can be used only if the means of Art. 31 cannot provide a clear interpretation, or in order to support the interpretation provided by applying Art. 31. It is also argued that, in any case, priority must be given to the wording of the provision rather than the subjective intention of the negotiators.

4. Interpretation rules of domestic law

All of the principles and rules of interpretation laid down in Articles 31 and 32 VCLT are also used in Greece for the interpretation of domestic law.²⁴ In interpreting other parts of domestic law all classic methods of interpretation are used, as laid down by law doctrine. However, for the interpretation of taxation laws, special rules are applied as opposed to other parts of domestic law. The interpretation in the field of taxation law is limited to the strict interpretation, based on the wording of the provision. This method is unanimously recognised as the most appropriate,²⁵ both in theory and in practice, and is used by tax authorities as well as courts when interpreting taxation laws. This results from the constitutional provision of Art. 78, which provides that no tax can be levied without a law that describes it in detail. This principle also means that no one can be exempted from a tax without a law that specifies the requirements and the subjects of the exemption. The constitutional provision limits the interpreter to the wording of the tax law, as any deviation from it could be considered as being anti-constitutional. Analogy is totally unacceptable in interpreting taxation law, although it is broadly used in other parts of law. Nevertheless, in some cases it is accepted that a correcting (narrow or broad) method of interpretation can be used in the field of taxation also, when this

²⁴ On interpretation in general see Tsatsos, *On interpretation of law* (1978); Fotopoulos, *Interpretation and application of tax laws*, *DFN* 1977, pp 1126 et seq and pp 1186 et seq; Malliou, *The interpretation of tax laws by the State Council (StE)*, *DFN* 1995, pp 1057 et seq.

²⁵ State Council's (StE) decisions no. 2052/90, no. 2312/92, no. 1305/99, also opinion of State Law-Council (NSK) 191/99; Fotopoulos, *DFN* 1977, pp 1191 et seq; Malliou, *DFN* 1995, pp 1065 et seq; Anastopoulos, *Fiscal Law*, p 115; Finokaliotis, *Law*, pp 85 et seq.

result favours the tax-payer (*in dubio contra fiscum*) or when it regards procedural provisions.²⁶

IV. The relevance of the OECD Model and the OECD Commentary

1. Introduction

Greece is one of the founding States of the OECD. The Model Conventions that have been drafted by the fiscal committee of the OECD, as well as the Commentary that is attached to them, are of significant importance for the interpretation of DTCs and are broadly used when interpreting a DTC.²⁷ Unfortunately, despite their importance, these documents are not yet translated into Greek, so they are taken into account in the English or French version. The Commentary is considered to be a form of authentic interpretation of the provisions included in a DTC, and it is taken into account as such in interpreting a DTC.²⁸

2. Conformity with the OECD Model

All DTCs signed by Greece after 1963,²⁹ when the first OECD Model was published, even with countries that are not members of the OECD, have extensively adopted the propositions of the OECD Model Convention, without considerable variations. This fact makes the OECD Commentary even more important for the interpretation of the relevant provisions. Nevertheless, it is argued that the OECD Commentary can also be used for the interpretation of DTCs that have not followed the OECD Model during the negotiations, because the OECD Model was not published at the time of the conclusion of the DTC. This argument is derived from a provision in the preamble of the 1977 OECD Model, which proposed that the Commentary accompanying it, should be also used for the interpretation of DTCs based on the 1963 OECD Model, even if the wording of a provision in the text of the latter is not identical with the corresponding provision of the former.³⁰

3. Reservations and Observations

In several recommendations, the OECD Council has proposed to the governments of the OECD member countries to follow the Model Tax Convention, as it is interpreted by the attached Commentary, in concluding new DTCs or in reviewing existing ones. These recommendations are not binding for the

²⁶ See State Council (StE) decision no. 3839/85 and Anastopoulos, *Fiscal Law*, pp 115 et seq.

²⁷ See Yannopoulos/Yannopoulos, *EDDD* 1995, pp 202 et seq.

²⁸ Anagnostopoulos, in: Markou, *Bilateral Conventions*, pp 16 et seq.

²⁹ Only two DTCs were signed before 1963, those with the USA and the UK, which follow a different structure and include some provisions that deviate from the OECD Model.

³⁰ See Anagnostopoulos, in: Markou, *Bilateral Conventions*, p 12 and Anagnostopoulos, The Greece-USA DTC. Interpretation and Comparison with the OECD Model, in: *DFN* 1999, pp 803 et seq.

member countries, but even so remain important. They are very important in practice, especially regarding the fact that the OECD members have the opportunity and the possibility during the procedure of the approval of the OECD Commentary to voice reservations and make observations on how the relevant provision is understood or interpreted.

Expressing a reservation signifies that the relevant State is no longer bound by the text of the OECD Model and the authentic interpretation of the OECD Commentary. During the negotiations for the conclusion of a DTC with another State, it may freely propose a completely different way of regulating the specific matter to the other party, or it can ask the other party to totally ignore the provision. Along with reservations, States are also free to make observations. These observations do not express any disagreement with the provisions laid down in the text of the OECD Model. They do, however, provide a useful Commentary about the way the States are willing to apply the provisions, on which they have made observations.³¹ These reservations and observations would be of no importance and use if they were not to be taken into account while interpreting a DTC. The OECD member countries are bound to apply the OECD Model and the attached OECD Commentary, unless they have expressly voiced a reservation.

4. Legal character of the OECD Model and Commentary

Concerning the legal character of the OECD Model and the Commentary in the terms of the VCLT, two opinions are representable. According to the first point of view, these are considered to be agreements concerning the treaty, as described in Art. 31 (2) (a) of the VCLT since they are used by both contracting States as a common base for the negotiations. According to the second one, the OECD Model and Commentary are considered to be preliminary materials for the conclusion of a DTC, under the meaning of Art. 32 VCLT. This second opinion, however, lessens the importance of these documents and qualifies them as supplementary means of interpretation, while it is broadly accepted that they are much more significant.³² In any case both the OECD Model and OECD Commentary are binding for the Greek interpreter of a DTC.³³

5. Deviation from the wording proposed in the OECD Model

Although in most cases DTCs signed by Greece are in line with the OECD Model, there are cases where a different wording was preferred. In this case, the different wording should lead to the conclusion that the contracting States wanted to deviate from the regulation proposed in the OECD Model and opted

³¹ Greece has also voiced reservations and made observations on a number of articles or paragraphs of articles. Reservations included in the text of the Commentary concern Articles 5, 7, 10, 11, 12, 15, 17, 22, 24 and 25 of the OECD Model, while only one observation has been made, on Art. 19.

³² See Anagnostopoulos, The participation of a foreign natural person or legal entity in a Greek partnership or limited partnership or limited liability company, *DFN* 1992, pp 1185 et seq (pp 1192 et seq).

³³ See Malliou, Deducting executive and general administrative expenses regarding the Greek branch of a foreign bank, *DFN* 2000, pp 1138 et seq.

for a different regulation. Even though the OECD Model and OECD Commentary are considered to be binding for the OECD member countries, according to the view previously mentioned, this does not mean that parties can not agree on a different way of regulating a specific matter, which normally appears as a different wording of the relevant provision. Since the contracting parties are familiar with both the OECD Model and the Commentary upon conclusion of the bilateral Convention, there is little room for the interpreter to assume that the different wording has to be interpreted how the Commentary proposes. If this were what the contracting parties intended, they would have no reason to alter the wording, they would stick to the wording of the corresponding provision of the OECD Model. The opposite opinion, which holds that a different wording does not lead to a different meaning, seems to be extremely strict for the States; still, it would be useful for the uniform interpretation of DTC and it would guarantee the safety of law. However, it should always be taken into consideration that DTCs are the product of bilateral negotiations.

6. Relevant version of the OECD Model

In examining the relevance of the OECD Model and the OECD Commentary for the interpretation of a DTC, the following question arises: Which version should be taken into account? Both the OECD Model and the OECD Commentary are products of a continuing process of reviewing the provisions, in which the States have the power to voice reservations and make observations concerning the interpretation of these provisions. It is assumed that the later version published will enjoy the approval of all OECD member countries. This approval is considered to be renewed through this procedure. This leads to the conclusion that the latest material should be used when interpreting DTCs, even those that were concluded in the light of a previous version of the OECD Model and Commentary.³⁴ The provision of Art. 31 (3) VCLT seems to accept this fact and can be used as the legal basis for taking into account the later version incorporated in the reviewed OECD Model and Commentary.

V. The relevance of Art. 3 (2) OECD Model

1. Conventional definitions

In order to ensure the greatest possible autonomous and uniform interpretation, bilateral Double Tax Conventions often use conventional definitions.³⁵ In the

³⁴ The case would be a little different if one or both contracting States are not members of the OECD and have not the opportunity to express their objections or to propose a different interpretation by voicing reservations and observations. For these States, OECD Model and Commentary, in as far as they were used as a basis for the negotiations, can be taken into consideration as being part of the context, according to Art. 31 VCLT.

³⁵ See, among others, StE 117/92 and StE 2629/94, in: Kroba, *StE Jurisprudence 1990-1995* (hereafter 'Jurisprudence'), pp 195 et seq. which stated that the meaning of the terms as it is given in the conventional definition is taken into account. No reference whatsoever is made to the domestic law.

text of the Convention itself, definitions of the most important terms used in the Convention are included. The OECD Model following this practice includes a special article, namely Art. 3 (1), where several definitions, especially general definitions, are listed. Besides, definitions of terms are usually found in the relevant specific articles, for example "permanent establishment" (Art. 5 OECD Model), "dividends" (Art. 10 OECD Model), "interest" (Art. 11 OECD Model) and "royalties" (Art. 12 OECD Model). When a definition is given in the DTC, the interpretation of the corresponding term may not deviate from the conventional definition. The conventional definition may be broader or narrower compared to the meaning of the specific term in the domestic law.³⁶ These conventional definitions, however, are occasionally problematic. This, combined with the special character of the matters covered by DTCs, especially the frequent change of the fiscal legislation, leads to the broad recognition of the possibility for supplementary use of the domestic law.³⁷

2. The relevance of Art. 3 (2)

Article 3 (2) of the OECD Model Tax Convention states that "as regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State". This article contains a general rule for the interpretation of terms used in DTCs without being explained in more detail. Greece adopts this rule too, and so it is included in all DTCs Greece has signed so far.

There is only one deviation from the standard wording of the OECD Model. In the DTC concluded with Poland,³⁸ Art. 3 (2) states that regarding the application of this Convention by a contracting State, any term not defined in it shall have the meaning it has under the laws of that State for the purposes of the taxes to which the Convention applies. The main difference in this provision is that the phrase "unless the context otherwise requires" is excluded, thus leading to the conclusion that for any case in which a term is not expressly defined in the DTC, the domestic law becomes at once the only relevant means for the interpretation of this term. A broader interpretation of this article, in light of the

³⁶ See StE 1371/92 and StE 925/94, in: Kroba, *Jurisprudence*, pp 195 et seq; StE 205/99, DFN 1999, p 715 concerning the term "dividends"; StE 609/93, StE 1932/95, in: Kroba, *Jurisprudence*, pp 195 et seq concerning the term "company"; StE 3702/99, DFN 2000, p 77; StE 3703/99, DFN 2000, p 77; StE 4182/99, DFN 2000, p 795 concerning the term "permanent establishment".

³⁷ See Anastopoulos, *Fiscal Law*, pp 152 et seq and from the rich jurisprudence, the cases StE 1956/89 and StE 709/91, in: Kroba, *Jurisprudence*, pp 152 et seq, which decided, concerning Art. 3 of the Greek-German DTC (deduction of expenses for the permanent establishment) that in the first instance the DTC is applicable and if it doesn't provide for anything specific, then the law of the State of the permanent establishment is applicable.

³⁸ This Convention has been ratified and entered into force with the law 1939/91 (13 March 1991). See the text of the Convention in: Markau, *Bilateral Conventions*, pp 286 et seq.

need for autonomous interpretation of the DTCs, would lead to the conclusion that, even if no direct reference is made to the context of the Convention, it is always relevant for the interpretation of a term used in the Convention, according to Art. 31 of VCLT. In practice, this case has not been encountered so far.

2.1. The term "context"

However, in general, this same phrase of Art. 3 (2), according to which the reference to domestic law can be avoided if the context otherwise requires, has caused several interpretation problems. The term "context" is understood as the entirety of the provisions of the DTC. It is argued³⁹ that it may be a mistake to give so much importance to this exception, whose only goal is – apart from the reference to the domestic law in case that the term in question is not defined in a DTC – to provide the interpreter with a supplementary use of the context of the Convention. A broader interpretation of the term "context" could be applied here, in order to overcome the difficulties arising from the close relation of the terms contained in the Convention with the domestic laws of each of the contracting States, especially in cases of non-uniform interpretation by the contracting States.

On the other hand, it is also argued⁴⁰ that the reference to the "context" of the Convention permits both the narrow (*stricto sensu*) interpretation based on the wording of the text of the Convention, as well as the broad (*lato sensu*) interpretation in light of the purpose of the Convention or by using a comparative method of interpretation.

2.2. The term "application"

Difficulties arise as well in connection with the interpretation of the term "application" of the Convention, contained in the text of Art. 3 (2). Theory discusses a broad interpretation, according to which every decision of the tax authorities or courts of a State to recognise tax benefits that would not be granted in the absence of a DTC is understood as an application of a DTC. On the other hand, it is acceptable to claim a DTC is not applied if a State is simply reading it in order to decide whether it has the right to tax or not. It is applied if and as long as the State is obliged under the DTC not to apply its domestic taxation laws.⁴¹

2.3. Restricted reference to domestic law

In a further analysis of the rule contained in Art. 3 (2) it becomes obvious that the reference to domestic law is subject to two restrictions. First, it pertains only to the terms that are used in the DTC, which means that reference

³⁹ Yannopoulos/Yannopoulos, *EDDD* 1995, pp 206 et seq.

⁴⁰ See Anastopoulos, *Fiscal Law*, pp 152 et seq.

⁴¹ Yannopoulos/Yannopoulos, *EDDD* 1995, p 207.

⁴² Yannopoulos/Yannopoulos, *EDDD* 1995, p 208.

⁴³ See Malliou, The interpretation of taxation laws according to the State Council (StE), *DFN* 1995, pp 1075 et seq (pp 1076 et seq).

to domestic law can be made only when terms or words or phrases actually contained in the DTC are to be interpreted. A general use of domestic law for the interpretation of any part of a DTC that appears not to be clear enough is not permitted. Furthermore, it is recognised that the reference to domestic law is not understood as made to any part of law, not even any part of taxation law. Rather, it is understood as referring only to the taxation law applying to the taxes covered by the DTC. If a term can be interpreted on the basis of a provision of domestic private law or domestic tax law, but concerns a tax other than that covered by the DTC, this must be avoided, because such reference to domestic law is not permitted.⁴²

In case reference is made to domestic law, it is possible for a corresponding term to be taken from another part of domestic law. In this case, the term shall be interpreted in its specific meaning, as it is understood in the field of tax law, and only if there is no such specific meaning will the meaning be used that it has in the other part of law.⁴³

VI. The relevance of mutual agreements

Almost every DTC signed by Greece⁴⁴ includes the provision contained in Art. 25 of the OECD Model, concerning the mutual agreement procedure. The mutual agreement procedure does not prevent a person from invoking protection according to domestic law. The special procedure provided in the DTCs is supplementary to the one provided by domestic law. The relevant case can then be resolved either by the competent authority to which the case was brought, or by mutual agreement by the competent authorities of both contracting States.

Because it is provided in an international bilateral Convention ratified and valid in Greece, this procedure has increased power according to the Greek Constitution, and is ranked above domestic law.⁴⁵ Therefore, the relevant decision of this Mixed Committee will have the character of a "subsequent agreement" between the parties within the meaning of Art. 31 (3) VCLT.

If a person presents his case in Greek courts without having used the option of Art. 25 OECD Model, the Greek court will resolve the case without paying any attention to the special procedure. However, if the person has used both

⁴² Yannopoulos/Yannopoulos, *EDDD* 1995, p 208.

⁴³ See Malliou, The interpretation of taxation laws according to the State Council (StE), *DFN* 1995, pp 1075 et seq (pp 1076 et seq).

⁴⁴ Such a provision is not included at all in the DTCs with the UK. The relevant provisions in other DTCs are in line with Art. 25 of the OECD Model. A similar provision is included in Art. 17 of the DTC between the USA and Greece, which is different from the wording of the OECD Model. See Markou, *Bilateral Conventions*.

⁴⁵ It is argued that because of the similarity between this procedure and the procedure of arbitration the rules concerning arbitration, as interpreted by State Council, can also be applied here too. See Yannopoulos/Yannopoulos, *EDDD* 1995, p 209 with references to jurisprudence and Yannopoulos, The arbitration clause in DTCs, *DFN* 1980, pp 114 et seq.

options available at the same time, the Greek court has to suspend the progress of lawsuit until the Mixed Committee has found a solution.⁴⁶

The decision of this Mixed Committee resolves the case with power of precedent: the given resolution can never be reviewed, neither in courts nor by the same procedure. Furthermore, this decision will also prevail over a domestic court decision that may have resolved the same case in a different manner, thus leaving the court decision unexecuted.

The plenary assembly of the State Law-Council has also dealt with this matter, after a question was referred to it on Art. 26 of the DTC between Greece and France.⁴⁷ In interpreting the relevant provision, the plenary assembly of the State Law-Council stated that this article established a special procedure of extra-judicial compromise for the resolution of a problem raised in interpreting or applying a DTC. The Mixed Committee provided in the same article is the only competent authority to resolve this case; it has the power to resolve the case with a view to the avoidance of double taxation. The decision of the Committee, which is characterised as Arbitrary Committee, before which the case was presented with the agreement of both parties, will have the power granted to DTCs by Art. 28 (1) of the Greek Constitution, and any opposing court ruling will remain unexecuted, since this is the will of the contracting States.⁴⁸

VII. The relevance of the other contracting State's tax authority practice

1. The condition of reciprocity: Constitutional provision and Supreme Court's Jurisprudence

Generally speaking, the other contracting State's tax authority practice is not binding for the Greek tax authorities to interpret a DTC provision in the same way as the foreign authority, the other interpretation can be taken into account by both courts and tax authorities only as supplementary material. What is binding for the Greek courts and the Greek tax authorities is whether the DTC is applied by the other contracting State, a matter which is relevant to the reciprocity⁴⁹ the constitutional provision requires for the application of all international treaties, and subsequently DTCs.⁵⁰

According to the jurisprudence of the State Council (StE),⁵¹ the condition of reciprocity, the fulfilment of which is necessary for the application of the

⁴⁶ Yannopoulos/Yannopoulos, *EDDD* 1995, pp 208 et seq.

⁴⁷ See the full text of the opinion Olom. NSK 507/1980, *DFN* 1981, pp 141 et seq.

⁴⁸ This has as a consequence that any taxes that had been paid in execution of the court decision, before the decision reached by following the procedure of mutual agreement provided in the DTC, must be paid back from the tax authority as undue payment. See opinion of Olom. NSK 507/1980, *DFN* 1981, p 142.

⁴⁹ See in Roukounas, *Public Law*, pp 126 et seq.

⁵⁰ Article 28 (1), second part: "The application of international law and international treaties rules on foreigners is always carried under the condition of reciprocity".

⁵¹ Olom. StE (State Council in plenary assembly) 2280/90 in: Markou, *Bilateral Conventions*, pp 49 et seq and in *EDDD* 1990, p 531, concerning the DTC Greece/UK. Similar

DTC to the nationals of the other contracting State, does not only include the formal (statutory) reciprocity, but also the real (practices) reciprocity. This means that the authorities of the other contracting State, whose national is the foreigner asking for the application of the DTC in Greece, do in practice apply the relevant DTC to Greek nationals.

The fact of whether and how the DTC is applied by the other contracting State is not investigated *ex officio* by the Greek courts; it is the other party's responsibility to establish that real reciprocity does not exist, and that the DTC thus can not be applied in the case under consideration.⁵²

Since such an allegation is proposed, the court has to ask the opposing parties or the Ministry of Foreign Affairs to present the relevant information concerning if and how the specific provision of the DTC is applied in the other contracting State. Based upon this evidence, the court will decide whether or not the condition of reciprocity is fulfilled by the other contracting State. This allegation can only be proposed during first and second instance hearings, it can not be presented before the court of appeal.⁵³

The practice of foreign authorities is significant as far as the application of a DTC is concerned, since the real application of this DTC by the authorities of the other contracting State (the condition of reciprocity) is required, in order for the DTC to be applied in Greece also. This, in turn, means that Greek authorities have to take into account the interpretation given to the relevant provisions by the competent authorities of the other contracting State.

It seems, however, that the condition of reciprocity has been established in order to ensure the protection of Greek nationals against any omission of the other contracting State, and not in order to establish a uniform interpretation of the provisions of a DTC. Nevertheless, one could assert that the condition of reciprocity could be used as the legal basis for taking into account the practice followed by the competent authorities of the other contracting State. It could then be used not only in order not to apply a provision of a DTC if the condition of reciprocity is not fulfilled, but also in order to apply a provision of a DTC in a certain uniform way, provided the condition of reciprocity is fulfilled.

2. Subsequent agreements or practice

When a subsequent agreement or practice, concerning provisions of a DTC is followed by the contracting States, this can also take place according to Art. 31 (3) VCLT, by taking into account the interpretation of the DTC. It is possible for a subsequent practice, followed by both contracting States, demonstrating how they understand a specific provision that is included in a DTC, to be developed in the framework of a valid DTC. This would be a form of supplementary custom. This custom, being one of the sources of international law, will be binding for the Greek courts and authorities without any other formality as

decisions: StE 3540/91, StE 348-350/92, StE 609/93, StE 1836-7/94, StE 3449/95 and the recent StE (7 members) 1015/99 in *DFN* 1999, p 875.

⁵² Anastopoulos, *Fiscal Law*, p 152.

⁵³ Finokaliotis, *Law*, p 196 and Olom. StE 2280/90, *DFN* 1981.

described in Art. 28 (1) of the Greek Constitution.⁵⁴ Such a custom can only be supplementary, so it has to be in conformity with the provisions of the Convention. It can not alter the conventional provisions, as provisions included in an international treaty can only be altered or abolished according to the same procedure used to enact them, as with a new DTC.⁵⁵

VIII. The relevance of court decisions

It is widely held⁵⁶ that courts, in trying to establish a common (uniform) interpretation of DTCs, should take into consideration any foreign jurisprudence that is relevant to the case they are examining. A reference to a foreign case law should not be made in general, but has to be restricted to the identity of the provision that needs interpretation. Reference has to be made to a foreign court decision that has interpreted the same part of the same paragraph of the same article of the same DTC.

There are a lot of foreign court decisions that have confirmed the practical importance of referring to foreign court decisions, sometimes in their use as a basis for their own decisions, sometimes in their use to reach to a different decision. It is generally accepted that foreign court decisions could be used as guidelines for clarifying the true meaning of obscure or disputable provisions included in DTCs. It should be pointed out, however, that even the highest uniformity in the solutions offered by foreign court decisions could never be binding for the domestic court. But it would be desirable that the domestic court decision explicitly outlined the reasons why it deviated from them.

Courts are bound to take into consideration foreign court decisions that opposing parties present them with. Since courts know that this may happen, judges should be as ready as possible for this scenario and should look for foreign court decisions that are relevant to the case they have to deal with. Up to now, there has not been any reference to a foreign court decision in a domestic court decision.

DTCs should contain a clause according to which the contracting States would take responsibility to inform each other on the later court decisions relevant to matters concerning the bilateral DTC.⁵⁷ This seems to be a step into the right direction towards greater uniformity in tax treaty interpretation. However, up to now, this has remained only a proposal.

⁵⁴ According to the doctrine there is no ranking among the sources of international law, which are all considered to be equal. This means that the later custom can prevail over a previous conventional provision, Roukounas, *Public Law*, p 56. See also about the conflict between customary and conventional law Ioannou et al, *International Public Law*, pp 25 et seq. Nevertheless, when the conventional provision contains rules of compulsory law (*ius cogens*), such as most taxation rules, the subsequent customary law can not alter provisions included in a valid Convention.

⁵⁵ See for example the revised DTC Greece/Italy, in: Markou, *Bilateral Conventions*, pp 91 et seq and pp 105 et seq. Negotiations for the review of four DTCs, Greece/Austria, Greece/France, Greece/Germany and Greece/India, are currently in progress.

⁵⁶ Yannopoulos/Yannopoulos, *EDDD* 1995, pp 183 et seq.

⁵⁷ Yannopoulos/Yannopoulos, *EDDD* 1995, p 206.