

# National Report Greece

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## I. Introduction

Each EU Member State has three kinds of tax rules, determining the tax regime of cross-border relationships:

- A) "Regular" tax legislation, determining if and how much an economic fact will be taxed. Such provisions are mainly domestic rules, but also, exceptionally, there are also DTC provisions regulating the subject-matter and secondary EC law.
- B) Rules on the avoidance of double taxation. They are mainly DTC rules, but there are also some secondary EC law and also many domestic avoidance rules.
- C) Rules of constitutional or quasi-constitutional nature setting up a framework restricting the authority of the states to legislate rules of type "A" and "B". Such rules are mainly primary EC law (especially the fundamental freedoms) and, of course, domestic constitutional rules.

Thus, in order to examine how Greece's quality as an EU country affects the taxation of cross-border relationships with third countries, it must first be examined to what extent EC rules apply also to such relationships and not only to intra-Community relationships.

The European Court of Justice (ECJ) has significantly restricted certain aspects of domestic international tax law. These restrictions applied to domestic laws that tended to close loopholes in domestic tax systems (anti-avoidance rules), such as thin capitalization rules, CFC legislation and exit taxation.

Taking into account that most EC rules on taxation explicitly concern intra-Community relationships, it is obvious that rules related to taxation of relationships involving third countries will be found mainly in the domestic law of the Member States, as well as in the DTCs that the Member States sign with third countries. Thus, it seems that "Direct taxation in the EU of relationships involving third countries" and "EU law on direct taxation of relationships involving third countries" are two different subjects, which have only very little to do with each other.

Keeping in mind that the core of the subject-matter is how the EU rules on taxation apply when third countries are involved, the Greek view in this report will, consequently, consist in an attempt to examine how Greece treats the questions posed by EC law on taxation in its domestic law and in its DTCs with third countries.

## II. The direct impact of Art. 56 EC Treaty in relations with third states

### 2.1 The legal framework of Art. 56 EC Treaty

Art. 56 EC Treaty refers to both the freedom of movement of capital and the freedom of payments under the same terms and using identical wording. This means that the treaty-makers sought at least the same degree of liberalization in both



cases: the movement of capital and the payments within the Community as well as in relation to third states.

The freedom of movement of capital was subject to substantial reform by the Treaty of Maastricht, giving it an *erga omnes* effect and thus making it the most advanced Community freedom, of which very limited exceptions are recognized<sup>1</sup>. However, since no definition of "capital movements" is contained in the Treaty itself, it is submitted that, as has been suggested by the ECJ, guidance may be derived by the relevant secondary legislation, namely Directive 88/361/EEC, for the implementation of Art. 67 of the Treaty.<sup>2</sup> This instrument contains a very wide definition of capital movements that has the consequence that certain cases may fall under both the freedom of capital movement and the freedom of establishment or the freedom of capital movement and the freedom to provide services.

The interaction of Art. 43 (2) and Art. 58 (2) EC Treaty seems a little problematic. The reservation "subject to the provisions of the Chapter relating to capital" that is contained in Art. 43 (2), regarding the freedom of establishment, indicates that the scope of the freedom of establishment finds a limit where the provisions of the free movement of capital apply. In other words, it seems that if a national measure is tested against the provisions regarding the right of establishment and found not compatible with the Treaty (i.e. there is discrimination), then a second test must be carried out: whether this measure can be saved under the provisions of the free movement of capital. Article 58 (2), on the other hand, contains a reservation in the opposite direction: "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". It follows from this provision that restrictions to the right of establishment are not to be saved by their possible compatibility with the free movement of capital. Ståhl<sup>3</sup> submits that the interaction of the two provisions should lead to the conclusion that if a transaction falls within the scope of both the right of establishment and the free movement of capital, then compatibility of a specific tax measure with either freedom could be enough to save the national measure. She admits, however, that the ECJ case law, although it has not directly dealt with the interaction of those two provisions, in fact points to the other direction. Indeed, it seems that the Court aims at the greatest possible protection under EC law and therefore if a measure that applies to a transaction falling within the realm of both freedoms is found incompatible with either of them, then it is this incompatibility that prevails and no further test is carried out.<sup>4</sup>

<sup>1</sup> Pistone, *The impact of community law on tax treaties* (2002), p. 37.

<sup>2</sup> See more in detail Ståhl, *Free movement of capital between member states and third countries*, *EC Tax Review* 2004, p. 48.

<sup>3</sup> Ståhl, *EC Tax Review* 2004, p. 48.

<sup>4</sup> Ståhl, *EC Tax Review* 2004, pp. 47–48 and footnote 16, where further reference to related case law is to be found. See also footnote 17 where case law regarding the interaction between the freedom to provide services and the free movement of capital is concerned. Ståhl points out that the ECJ case law is a little more ambiguous in the latter case, compared to the former.



The wording of Art. 56 (1) EC Treaty, creating an obligation of the EU Member States to abolish all restrictions on the free movement of capital not only within the Community but also to and from third states, gives rise to certain questions. First of all, is the scope of the two rules contained in this provision identical? Or, can it be identical, given the fact that by definition their purpose and their practical application are different?

It must be pointed out that the purpose of the two rules varies significantly: the free movement of capital within the Community aims at creating an internal market, whereas the liberalization of capital movement to and from third countries aims at making that internal market an open and competitive one in relation to external parties. Another suggestion is that the wording of Art. 56 (1), having in regard especially the timing that Art. 56 was inserted in the EC Treaty,<sup>5</sup> refers strictly only to the abolishment of exchange restrictions and not to restrictions in other fields of legislation. Prohibition of the latter restrictions has been developed by the ECJ having in view not of the wording, but a principally integrated view of all fundamental EC freedoms on free movement.<sup>6</sup>

However, as regards the free movement of capital the relevant provisions of the EC Treaty could also be interpreted that they are indeed a means to create a "level playing field" not only for Community players but also for external players, in the sense that all Member States are put in an equal footing as regards third parties. In a different case there would be harmful competition between Member States regarding the adoption of measures for attracting and keeping foreign investment in their territory.<sup>7</sup>

It follows that despite the wording of the provision not the same, restrictions that are prohibited in the relations between Member States are prohibited in relation to third countries as well<sup>8</sup>. The fact that this abolition of all restrictions is, in principle, unilateral (on the part of European Union and not on the part of third countries too)<sup>9</sup> makes the differentiation even more necessary.

<sup>5</sup> Art. 56 (1) was inserted in 1991 with the Treaty of Maastricht, only three years after the EEC had created for the first time rules on the free movement of capital with Directive 88/361/EEC and direct restrictions of the cross-border movement of capital were still applicable in many member states. Moreover in 1991, the ECJ had not yet extended its case law on prohibition of restrictions to the other fundamental freedoms, except the free movement of goods and services.

<sup>6</sup> See also Matsos, *Investitionen deutscher Steuersubjekte in griechische Kapitalgesellschaften*, (2001) pp. 6 et seq., 18 et seq.; Plötscher, *Der Begriff der Diskriminierung im Europäischen Gemeinschaftsrecht*, (2003) pp. 294 et seq.

<sup>7</sup> As a matter of fact, such competition in tax law regarding third states is currently allowed on the basis of the 7th declaration attached to the Treaty of Maastricht (Declaration on Article 73d [now 58] of the Treaty establishing the European Community).

<sup>8</sup> The ECJ has not, however, followed this reasoning in its judgment in the *Sanz de Lera* case (joined cases C-163/94, C-165/94 and C-250/94), involving capital movement to third countries, but instead it followed the same line of arguments as in the *Bordessa* case (joined cases C-358/93 and C-416/93), indirectly involving movement of capital within the EU.

<sup>9</sup> *Pistone* talks about asymmetrical application.



Especially as far as tax obstacles are concerned, a further argument may be derived from the fact that the Community deals with tax measures and tests them as to their compatibility with the freedoms only in so far as they are necessary for the establishment of the common market. Since no such competence may be undertaken by the Community institutions in relation to third countries, there seems to be no justification for the testing (and prohibition) of tax measures relating to the free movement of capital to and from third countries. This would be the case only in so far as a specific measure also relates to an intra-Community case.

Article 56 EC Treaty contains no special provisions as to persons who have the right to invoke this treaty freedom. Therefore, it seems that both EU and non-EU citizens may avail themselves of this provision.<sup>10</sup>

## **2.2 The comparability in relations with third states**

Under the view that the prohibition of restrictions in the free movement of capital towards third countries concerns only exchange restrictions, there are no grounds to research comparability of domestic or intra-EU situations and situations involving third countries, since the rules of non-discrimination and general prohibition of restrictions, as interpreted by the ECJ on intra-EU situations would simply not apply at all in situations involving third countries.

On the contrary, under the view that the ECJ case law on the fundamental freedoms would apply, fully or partially, in a way similar to intra-EU situations, there is no obvious reason to treat the question of comparability in a way different than intra-EU situations.

## **2.3 Possible justifications in relations with third states**

In view of the above analysis, it follows that since the relations of a Member State with other Member States and with third states are not governed by the same rules, the justifications used by the Court in order to save tax measures from being incompatible with the Treaty provisions cannot be used as such in relation to third countries. This could be supported only in the cases where the relevant legislative environment is substantially similar to the one under which an intra-Community justification has been declared valid (and vice versa).

Therefore, arguments that the ECJ has repeatedly used in order to strike down restrictive measures may not be valid in relation to third states. For example, the Court has overruled justifications such as the ascertaining of the factual situation of the taxpayer in the other state or the difficulties in collecting taxes in another jurisdiction and relies on the fact that secondary Community legislation exists on this matter (namely the Mutual Assistance Directive on the exchange of information and the Mutual Assistance Directive on the recovery of claims). Since those

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<sup>10</sup> Ståhl, *EC Tax Review* 2004, p. 47.



directives are not applicable towards third countries, such arguments may be held valid by the Court, should they be invoked by a Member State in order to justify a restriction. However, based on the wording of the Treaty provision, and the objective that has been articulated in an absolute way ("all prohibitions"), it could be possible that if the third country has entered into a tax or other treaty with the respective Member States that contains a provision having the same practical effect as the two directives mentioned above, the ECJ might also reject the justification.

In general, it can be concluded that if the same justifications are to be accepted by the Court in relation to third states, a stricter approach might be necessary, in the sense that an actual (and not merely legal) equivalence with the respective Community rules should be established.

## 2.4 The principle of proportionality in relations with third states

Taxation of non-residents in Greece has been traditionally closely linked to the taxation of residents.<sup>11</sup> Non-residents are, thus, in most cases taxed at the same rates and under the same rules as residents. Only exceptionally are there provisions on the taxation of non-residents that regulate the tax treatment of non-residents differently than that of residents. As a consequence, the question of a discriminatory treatment of non-residents was hardly raised, before the discussion on the application of the EC fundamental freedoms in the field of direct taxation was opened in the '90s. It was, obviously, more or less a given that the different, discriminatory treatment of cross-border relations under Greek domestic and international tax law was not questioned.

With regard on the above-mentioned thoughts, since the question of prohibited discrimination has been posed on a theoretical,<sup>12</sup> as well as on a practical level only within the framework of the effect of EC law on direct taxation, any application of the principle of proportionality in a possible attempt to justify or deny justification of restrictions of a fiscal character towards relationships involving third countries is expected to be discussed only to the extent the application of this principle is discussed. Consequently, in Greece there will be no application of the fundamental freedoms at all, rather than a justification on a case-per-case basis why the rules set by those freedoms should not be applied.

An application of the rules set by the fundamental freedoms and, consequently, also of the principle of proportionality on the level of justification should be expected only to the extent that EC tax law is or will be explicitly applied in cross-

<sup>11</sup> See details in Barbas, *Forologia Eisodimatos* [Income Taxation] (2003) pp. 175 and 343; Finokaliotis, *Forologiko Dikaio* [Tax Law], 3rd ed. (2005) p. 240; Anastopoulos/Fortsakis, *Forologiko Dikaio* [Tax Law], 2nd ed. (2003) p. 157.

<sup>12</sup> The non-discrimination clause of Art. 21 OECD Model, contained in most Greek DTCs has hardly been used in the past by Greek courts.



border relations involving third countries. This will be the case mostly in indirect taxation, but also in direct taxation, where such rules exist.

One should expect that Greece will have a stronger incentive to apply the principle of proportionality since the ECJ decision on the *Louloudakis* case,<sup>13</sup> issued on a case of taxation of cars, where the ECJ ruled that the Greek legislation concerning taxes, fines and penalties on the special consumer tax imposed on temporarily imported cars, measured at flat rates, had to be examined under a proportionality test.<sup>14</sup>

The outcome of the *Louloudakis* case has not been yet applied to taxes other than the special consumer car tax.<sup>15</sup> It is true, however, that the Greek legislation and practice on fines and penalties, both in direct and indirect taxation matters, urgently needs extensive revision on the basis of the proportionality test. Thus, the application of the *Louloudakis* case also in other areas of taxation is currently being discussed in Greece together with the case law of the European Court of Human Rights (ECHR) on the proportionality principle.<sup>16</sup>

Following this discussion and, thus, extending in the future the proportionality principle as set out in the *Louloudakis* case at least to all those areas of Greek tax law having cross-border aspects related to European law, especially if the jurisprudence of the ECHR also plays a role, the tax impediments to free movement involving third countries could possibly be also subject to a proportionality test similar to that performed in the intra-Community situations.

## 2.5 Practical examples

1. One aspect of the more general idea that dominates Greek international tax law, namely the idea that in Greece the taxation of non-residents is closely linked to that of residents,<sup>17</sup> is the fact that in Greece there are hardly any rules of international tax law tending to close the loopholes inherent in the tax systems of developed countries, which are typical and well known in most other OECD countries. Thus, no CFC legislation, no exit taxation and no thin capitalization rules exist in Greece.<sup>18</sup> In addition, since no group taxation

<sup>13</sup> Decision of 12 July 2001, case C-262/99, *Paraskevas Louloudakis vs. Republic of Greece*, ECR 2001, p. I-5547.

<sup>14</sup> See the detailed presentation of Barbas, *Eidikoi foroi katanalosis* [Special consumer taxes] (2001) pp. 274 et seq. and pp. 280 et seq.

<sup>15</sup> See especially the decision 2797/2004 of the Supreme Administrative and Tax Court (Symvoulío tis Epikrateias – [State Council]), published at DFN 2005, pp. 795 et seq., again on a special consumer car tax matter.

<sup>16</sup> See Finokaliotis, *Forologiko dikaio* [Tax Law], 3rd edition (2005) pp. 31 and 411 f.

<sup>17</sup> See above section 2.4.

<sup>18</sup> It is typical for most Greek subsidiaries of foreign multinational companies to expatriate profits through thin capitalization. Cf. Matsos, *Investitionen deutscher Steuersubjekte in griechische Kapitalgesellschaften* (2001) p. 123.



regime exists at all in Greece, none of the special problems that this particular kind of corporate tax treatment poses are found in the case of Greece.

Treatment of losses arising from third countries is no different compared to the treatment of losses arising in EU countries. In both cases, losses may be recognized and set off only against earnings abroad (Art. 4 para. 4 Income Tax Code – Law no. 2238/1994). There is no possibility to set off foreign losses against income arising in Greece. The literal (but also the teleological) interpretation of the law suggests that losses from foreign sources should be set off against income from different countries, i.e. against income arising everywhere abroad and not only in the specific country where the losses arise. However, it seems that there are divergent practices on the part of the Greek authorities.

The impossibility of setting off losses arising within the EU against domestic income has been criticized by Greek scholars as an infringement of the non-discrimination principle contained in the EC fundamental freedoms.<sup>19</sup> The same approach should be followed towards third countries, to the extent that any aspects of the fundamental freedoms will be judged as applicable to relationships involving third countries as well.

2. Credit method vs. exemption method: Greece applies in general the credit method in its DTCs as well as in the implementation provisions of the EC directives on the avoidance of double taxation. There are, however, some examples of tax treaties in which Greece has applied the exemption method, as a result of temporary changes in the government policy on the conclusion of tax treaties. Treaties containing a general application of the exemption method for income of Greek residents arising outside Greece are the DTC with India (concluded in 1965)<sup>20</sup> and the DTC with Austria (concluded in 1970).<sup>21</sup> Also, there are two other tax treaties with only a partial application of the exemption method, namely the treaties with Albania (1995)<sup>22</sup> and Uzbekistan (1997), with regard to business profits.<sup>23</sup> The Greek Ministry of Finance currently intends to negotiate amendment of those treaties with the contracting states and avoid application of the exemption method to any cross-border relationships.

Thus, there is no standard policy in Greek tax treaties favouring EU countries or third states. In the past there have been merely temporary policy changes, which have affected, by chance, EU (Austria) as well as third countries (India, Albania, Uzbekistan).

<sup>19</sup> See Karakitis, *Amesi forologia: Ochi pleon terra incognita gia to Evropaiko Koinotiko Dikaio – Koinotikes eleftheries kai forologia eisodimatos* [Direct taxation: no more *terra incognita* for EC Law – EC freedoms on movement and income taxation], *DFN* 1997, pp. 1110, 1126.

<sup>20</sup> Art. XVII (3) of the treaty, ratified in Greece by Leg. Decree no. 4580/1966.

<sup>21</sup> Art. 23 (1) of the treaty, ratified in Greece by Leg. Decree no. 994/1971.

<sup>22</sup> Art. 23 (2) (b) of the treaty, ratified in Greece by Law no. 2755/1999.

<sup>23</sup> Art. 23 (2) of the treaty, ratified in Greece by Law no. 2659/1998.



All the above-mentioned examples are true also in the case of EEA countries. Greek scholars tend to treat EEA countries in the same way as EU countries and to interpret the provisions of the EEA Agreement in the same way as the EC fundamental freedoms. However, it is a common belief in Greece that the involvement of the EFTA Court and not the ECJ could render the treatment of similar EC and EEA cases different in practice.<sup>24</sup>

### III. Indirect impact of the fundamental freedoms in relations with third states

#### 3.1 “Passive” aspects of fundamental freedoms: Protecting third-state residents/nationals

An ECJ case directly illustrating that the freedom to provide services is a “consumer freedom”<sup>25</sup>, i.e. a freedom independent of the status of the consumer of services, is the ECJ’s *Svensson-Gustavsson* decision<sup>26</sup>. This involved two Swedish nationals, in the period in which when Sweden was not yet an EU member (1992), who resided in Luxembourg and got a loan from a Belgian bank without any Luxembourg permanent establishment (PE). Luxembourg denied an interest rate subsidy to the third-state nationals on the grounds that the borrower was not a credit institute approved in Luxembourg. The ECJ held that the subsidy should be granted regardless of the fact that the two final beneficiaries were not entitled to avail themselves of the EC fundamental freedoms.

However, in order to enable the recipient of services to claim application of Art. 49 EC Treaty (freedom to provide services) a violation of that freedom at the EC level must occur. If the services recipient in the *Bent Vestergaard* case<sup>27</sup> had been a US and not a Danish firm, then no breach of Art. 49 EC Treaty would have occurred, since the discrimination would affect only a non-EU national. The Treaty does not apply in such cases. In contrast, in the *Svensson Gustavsson* case the discrimination concerned Belgian banks rendering services in Luxembourg. The ECJ held that the Belgian banks were discriminated against when they provided services in Luxembourg. There was a clear intra-Community cross-border element, which was in violation of the Treaty.

Thus, the “*Bent Vestergaard*” principle laid down in para. 19 of the judgment cannot concern relationships between an EU service-provider and a third country

<sup>24</sup> Cf. Stagkos/Sachpekidou, *Dikaio ton Evropaikon Koinotiton kai tis Evropaikis Enosis* [EC and EU Law], (2000) pp. 16 et seq.

<sup>25</sup> Cf. Dassesse, The Wielockx and the Svensson Judgments: “Fiscal Cohesion” with a Different Flavour?, *The EC Tax Journal* 1995-96, pp. 181 et seq.

<sup>26</sup> Judgment of 14 November 1995, Case C-484/93 *Svensson and Gustavsson vs. Ministre du Logement et de l’Urbanisme* [1995] ECR I-3955.

<sup>27</sup> Case C-55/98, Decision of 28 October 1999, ECR 1999, p. I-7641.



recipient if there is no other intra-Community breach of the freedom to provide services. Consequently, Greek tax law cases in which the freedom to provide services is affected only with regard to third countries and not with regard to another EU country are not covered by the protection of Art. 49 EC Treaty.

A typical case in the Greek legislation providing for worse treatment of third countries is the absolute non-deductibility of expenses for goods and services provided by off-shore companies to Greek taxpayers. An "off-shore" company is, according to Art. 31 (1) (6) Income Tax Code *"a company which has its seat in a country abroad and, according to the laws of that country, acts only outside that country and enjoys a particularly advantageous tax treatment."* According to the provisions of Art. 31 (1) (6) and (14) Income Tax Code, royalties paid to such companies are not deductible and neither is amortization or depreciation allowed for fixed assets obtained by "off-shore" companies.

Though no legal provision explicitly states that "off-shore" companies may be only non-EU companies, the general practice of the Greek authorities is that they apply those provisions only to companies having their seat outside the EU. An exception is made only for overseas countries and dependent territories belonging to EU countries, but having a special status like the Channel Islands and other territories belonging to the UK, as well as territories belonging to the Netherlands (Antilles and Aruba). The guidelines issued by the Ministry of Finance<sup>28</sup> make explicit reference to the list of "tax havens" issued by the OECD<sup>29</sup> and contain a full list of the countries mentioned as "tax havens" by the OECD.

This different tax treatment of non-EU tax havens does not seem to be affected in any way by the fundamental freedoms or EC secondary law. However, to the extent that EC law applies to overseas countries and dependent territories forming part of EU countries like the UK and the Netherlands, the conformity of such regulations will have to be proven in the light of the freedom to provide services and the free movement of goods.

### **3.2 Acknowledging the right of a third State to discriminate against residents of EU Member States**

The *Open Skies* doctrine developed by the ECJ imposes on the Member States that conclude treaties with third countries the obligation to conclude their treaties in such a way that a third country does not have the right to provide a more favourable treatment to their EU-Member-State contracting partner. Limitations on benefits (LOB) clauses contained in DTCs seem to be typical examples of

<sup>28</sup> Document no. 101764/10217/B00012/pol. 1041/5-3-2003 on the interpretation of Law 3091/2002, amending the Income Tax Code on matters of expenses paid to off-shore companies.

<sup>29</sup> The reference contained in the document cited in footnote no. 28 is to an OECD document DAF/FE/CFA/FHP/ (2000)/REV1/CONF.



clauses that, according to the *Open Skies* doctrine, are discriminatory clauses contrary to the fundamental freedoms.

Greece does not make often use of LOB clauses in its DTCs. Even the DTC with the US does not contain any such clause – though this is probably due the fact that the DTC with the US is a very old one, concluded on 20 February 1950 and amended on 20 April 1953.<sup>30</sup> However, an example of a Greek DTC containing an LOB clause is the DTC with Turkey, concluded in 2003.<sup>31</sup> Art. 23 (2) provides that no tax credit is granted if any tax benefit arises or can arise for persons who are non-residents of Greece or Turkey.

One should, however, take into consideration whether some contracting partners of the EU Member States – especially powerful countries like the US – will be willing to conclude any DTC without an LOB clause. In addition, enforcement of the *Open Skies* doctrine is not always easy, since it is usually the Commission that has to act on a European level – since the discrimination in the third country will not be brought before a court that can refer to the ECJ – and even the Commission can act only on a European level and cannot directly prevent discrimination in the territory of the third country. It can only force the Member State indirectly through enforcement of the ECJ judgment as is the case with any other judgment on infringement (especially Art. 228 (2) EC Treaty).

The problems posed by bilateral instruments of an “Open Skies”-type are not comparable to situations of a “most-favoured-nation clause” type<sup>32</sup>, which involve reliance on another bilateral (tax) treaty that has nothing to do with the situation that is at issue, but which simply contains more favourable rules for similar situations involving other Member States. Situations of an “Open Skies”-type directly concern the applicability of the Treaty in question, when it comes to subjects falling into the jurisdiction of other Member States.

The situation described in the *ACT Test Claimant* case<sup>33</sup> is of a “most favoured nation clause”-type and not an “Open Skies”-type. According to the ECJ jurisprudence in the *D* case, such MFN-situations do not constitute a violation of the fundamental freedoms.

### 3.3 Protecting income sourced in third states

Greece has not yet applied the doctrine developed by the ECJ in the *Saint-Gobain* case,<sup>34</sup> which dealt with the applicability of the DTCs to taxpayers not resident in one of the contracting countries.

<sup>30</sup> Ratified by Legislative Decree no. 2548/1953.

<sup>31</sup> Ratified by Law no. 3228/2004.

<sup>32</sup> Cf. the ECJ judgment in the *D*. case. Judgment of 5 July 2005, case C-376/03 [2005] ECR I-5821. See below.

<sup>33</sup> Case C-374/04, cf. the Opinion of Advocate General Geelhoed delivered on 23 February 2006.

<sup>34</sup> ECJ 21 September 1999, case C-307/97 [1999] ECR I-6161.



### 3.4 Tax treaty provisions with third states as a benchmark

After the ECJ judgment in the *D* case, tax treaty provisions may not be used as a benchmark in order to improve the level of protection of other DTCs within the EU.

## IV. Fundamental freedoms in relation to EEA States under the EEA agreement

### 4.1 Specific features of the EEA Agreement<sup>35</sup>

The European Economic Area Agreement (EEA Agreement or the Agreement) was signed on 2 May 1992 between the EC and its Member States, on the one hand, and Austria, Finland, Iceland, Norway, Sweden and Switzerland, on the other hand. The Agreement entered into force on 1 January 1994 (without Switzerland) and in 1995 Liechtenstein entered the Agreement while Austria, Finland and Sweden withdrew and became EC Members. As a result, the EEA Members today are all the EU Member States plus three EFTA States (Norway, Iceland and Liechtenstein).

The aim of the agreement is to extend the internal market. The means used is, *inter alia*, the extension of the applicability of the basic EC Treaty freedoms to the whole EEA. To this effect, the Agreement contains parallel rules to the ones contained in the EC Treaty both as regards the fundamental freedoms and the monitoring institutions.

The EEA Agreement is part of the Community legal order and therefore, in principle, the interpretation and application of the EEA fundamental freedoms are identical to the interpretation and application of EC Treaty fundamental freedoms. However, a disparity appears in the field of direct taxation, since tax policy is not included in the EEA Agreement: EEA citizens are protected by the fundamental freedoms but they cannot invoke in their economic relations with EU citizens they may not rely on secondary Community legislation, as it is not part of the EEA Agreement.

It is the very fact that the fundamental freedoms contained in the EEA Agreement follow the wording of the fundamental freedoms as enshrined in the EC Treaty<sup>36</sup> and the fact that the objective is indeed to extend their application to the

<sup>35</sup> Gudmundsson, European Tax Law in the relations with EFTA countries, *Intertax* 2006, pp. 58 et seq.; Oberson/Reitan/Zimmer, The impact of the prohibition of discrimination and restriction granted under the EC Treaty in non-EU states (Switzerland and Norway), as Chapter VI in Vanistendael (ed.) *EU Freedoms and taxation*, pp. 221 et seq.

<sup>36</sup> "Identical in substance" is the term used by the Agreement, by the EFTA Court and by the ECJ, as reported by Gudmundsson, *Intertax* 2006, p. 61.



EEA that leads us to the conclusion that those provisions must have the same scope in both the EU and the EEA. For example, movements of capital to and from EEA countries must, owing to the provisions of the EEA agreement, be treated in the same way as movements of capital within the EU.<sup>37</sup>

This is also supported by the fact that the EEA agreement is considered to be primary Community law and therefore its primacy over secondary legislation is not disputed; this means that even if the tax directives are not covered by the EEA Agreement, their application may not in any case result in infringement of the EEA Agreement. Could this lead indirectly to the prohibition of discrimination of an EFTA citizen<sup>38</sup> caused by the non-application of a rule that is contained in a tax directive?

However it must be noted that the wording of the fundamental freedoms in the EEA Agreement has not followed the changes made in the EC Treaty after the Treaty of Maastricht. Therefore, the existing differences may create a problem as to the interpretation and application of the former. However, in view of the objective and purpose of the EEA Agreement, one may argue that their function should be the same.<sup>39</sup>

## **4.2 The comparability in relations with EEA States**

Under the view that situations involving EEA States should be treated in the same way as pure intra-EU situations, the question of comparability in the former situations should not be treated in a way different than the same question in the later situations.

## **4.3 Possible justifications in relations with EEA States**

Article 6 of the EEA Agreement provides that the provisions of the Agreement that are identical in substance with the EC Treaty provisions must be interpreted in conformity with the relevant case law of the ECJ prior to the date of signature of the Agreement. Therefore, from a strictly legal point of view, the ECJ case law after 1992 (date of signature of the EEA Agreement) is not binding for the interpretation and application of the EEA Agreement provisions. It seems, however, that in practice the national courts of Norway, for example, as well as the EFTA Court do consider ECJ case law to be a very important source of law. Therefore, in practice, there is little if no differentiation in the way the post-1992 ECJ case law is taken into account in comparison to the pre-1992 case law.

Arguments based on administrative difficulties that have been rejected by the Court on the basis that the Mutual Assistance Directive offers an effective means to overcome such difficulties may not be as easily rejected in an EEA case, since

<sup>37</sup> Ospelt, C-452/01, in Ståhl, *EC Tax Review* 2004, p. 49, footnote 21.

<sup>38</sup> With the exception of Switzerland, to which the EEA Agreement does not apply.

<sup>39</sup> Gudmundsson, *Intertax* 2006, p. 64.



these Directives do not form part of the EEA Agreement. One may argue, however, that such contentions may be rejected in the EEA cases as well.

This is even more so as far as the argument of fiscal supervision is concerned: indeed, it seems that the ECJ is already content if the taxpayer himself proves his case. Since this argument seems to be disconnected from the application of the Administrative Assistance Directive (which is not applicable under the EEA Agreement) it seems that this justification will be equally rejected in the case of EEA citizens as well.

#### **4.4 The principle of proportionality in relations with EEA states**

The above-mentioned *Louloudakis* case law of the ECJ on proportionality could apply in every aspect involving cross-border taxation with EEA States, since the EC rules form more or less integral part of EEA law.

#### **4.5 Practical examples**

As in the case of other third countries, since Greece does not have any complicated regulations attempting to close the loopholes of the international tax system (such as CFC legislation, exit taxation, thin capitalization rules etc.), not many practical examples concerning EEA States can be found. Referral should be made to the examples given in general above on third countries. The only difference is that the treatment of foreign losses under Art. 4 (4) Income Tax Code (Law 2238/1994) should be considered, for EEA countries, to breach EEA (i.e., EC) law.

### **V. Agreements between Switzerland and the European Union**

Greece has ratified the agreement between the EU and Switzerland on the free movement of persons by Law no. 2903/2001.<sup>40</sup> This Agreement does not affect tax matters at all, according to the explicit provisions of Art. 21, although it leaves to the contracting parties a simple possibility to reach new agreements on tax matters (para. 2). The general non-discrimination provision of Art. 2 should not be interpreted by means of the extensive interpretation that non-discrimination on grounds of nationality has received under the EC Treaty and in ECJ case law, but rather like the classic non-discrimination clause on grounds of nationality contained in many treaties of classic international law.

The Savings Agreement with Switzerland was ratified in Greece by Law no. 3363/2005.<sup>41</sup> This agreement explicitly concerns tax matters and supersedes, naturally, bilateral DTCs between Switzerland and Member States (Art. 14).

<sup>40</sup> Published in FEK A 78/12-4-2001.

<sup>41</sup> Published in FEK A 159/23-6-2005.



In Greece there are generally no anti-abuse provisions in tax law.<sup>42</sup> Income tax law and tax law, in general, is strongly oriented to the forms of civil and commercial law. When no specific provision exists in tax law defining a term otherwise, then any term referring to concepts and institutions of other branches of law is to be interpreted according to the meaning that the term has in that other branch of law.<sup>43</sup> Thus, the term "dividends" is to be interpreted in Greece according to the meaning that this term has in Greek company law. And, since under Greek company law the notion of hidden distributions is unknown, this problem simply does not exist in Greek tax law.

If the Swiss authorities consider a payment to be a hidden distribution, while this institution is unknown under Greek law, then the consultation procedure of Art. 12 will have to be launched, in order to resolve the problem, which is typically known in international tax law as a characterisation of a qualification conflict.

## VI. The relations with other third states in the field of direct taxes

Greece seems to have opened tax relations with other third states in its quality as EU Member State only with the ratification of the special Agreements on the taxation of savings. Besides the above-mentioned agreement with Switzerland, four other agreements between the European Community and other states have been ratified as ordinary international conventions, namely the Agreements with the Principality of Liechtenstein (Law no. 3365/2005), the Republic of San Marino (Law no. 3362/2005), the Principality of Monaco (Law no. 3364/2005) and the Principality of Andorra (Law no. 3361/2005) providing for the application of measures equivalent to those contained in Directive 2003/48/EC.

Six other laws ratified bilateral agreements in the form of exchange of letters between Greece and the associated territories of the UK and the Netherlands, i.e. the Netherlands Antilles and Aruba (Law no. 3352/2005), the Turks and Caicos Islands (Law no. 3353/2005), Montserrat (Law no. 3354/2005), the Cayman Islands (Law no. 3355/2005), Guernsey, the Isle of Man and Jersey (Law no. 3358/2005), Anguilla (Law no. 3359/2005) and the British Virgin Islands (Law no. 3360/2005).<sup>44</sup>

<sup>42</sup> Cf. Matsos, Double non-taxation, National report Greece in: *Cahiers de droit fiscal international 2004*, pp. 355 and 359; Perrou, The judicial application of anti-avoidance doctrines in Greece and its impact on international tax law, *Intertax 2006*, pp. 101 et seq.

<sup>43</sup> Cf. Anastopoulos/ Fortsakis, *Forologiko dikaio* [Tax law], 2nd edition (2003) pp. 25 et seq.

<sup>44</sup> List taken from Fortsakis/Savvaidou/Tsourouflis, The implementation of the Savings Directive in Greece, National Report at the EATLP Congress in Budapest (2006) [http://www.eatlp.org/uploads/Public/2006\\_Greece\\_Report.pdf](http://www.eatlp.org/uploads/Public/2006_Greece_Report.pdf), p. 3 et seq.



## VII. The impact of secondary EC law on relations with third States

Greece has implemented the modified provisions of the Parent-Subsidiary Directive without granting any treatment more advantageous than the minimum advantages that the Directive provides for. Thus, one should not expect that the implementation provisions of the Directive will lead to tax advantages related to third states, if they are not explicitly mentioned as minimum protection in the Directive.<sup>45</sup> Currently, there is also no discussion about whether omitting third countries from the advantageous tax treatment of the Directive could be possibly held to be a violation of Arts. 43 and 56 EC Treaty.

- (i) If a parent company resides in a third state with a PE in an EU Member State and Greece is the PE State, then Greece will probably not grant the directive treatment to dividends, interest or royalties paid to the PE, since such treatment will be considered as reserved only to parent companies of other Member States. This interpretation is, in the case of dividends, a literal one, since of the implementation provision (art. 8 (2) Law no. 2578/1998 after its amendment by Law no. 3427/2006) explicitly suggest that EU parent companies are granted the advantageous treatment. In the case of interest and royalties, the requirement of residence for the parent in an EU Member State is explicit as well.

Also where Greece is the subsidiary state, no advantageous tax treatment is granted for third states parent companies (art. 8 (2) Law no. 2578/1998).

- (ii) If both the parent and the subsidiary are located in the EU, but the PE is located in a third country, then the advantageous directive treatment for the PE income distributed to the parent does not apply either. Only as the subsidiary state would Greece grant the PE income the double taxation relief according to Greek domestic law or under the applicable DTC.

The tax treatment under the Interest and Royalties Directive would not be applicable either.

- (iii) Also where the subsidiary is located in a third country, Greece would not grant directive treatment to income passing through this subsidiary in any way.
- (iv) Like in case “(ii)” above, there will be no directive treatment in the case of a Greek subsidiary with a parent situated in another EU country and a PE in a different state, receiving interest or royalties from the PE.

<sup>45</sup> On the implementation of the Directive 2003/123/EC cf. Barbas, *Ekselikseis sti nomothesia tis forologias eisodimatos ton syndedemenon diasynoriakos epicheiriseon* [Developments on the income taxation of cross-border associated enterprises] (2006) pp. 381 et seq.



- (v) If a sub-subsidiary is situated in a third state and both the parent and the subsidiary in different Member States, then Greece would not take into account any indirect tax credits, unless there was a relevant DTC rule providing for the indirect tax credit and Greece was the subsidiary country. Some examples of Greek DTCs with third countries providing for indirect tax credits are the ones with Mexico,<sup>46</sup> and with China.<sup>47</sup> However, those tax credits (for the income of the sub-subsidiary company) will not “pass” through the subsidiary to the parent company.
- (vi) Greece has not made any use of the anti-abuse provisions of Art. 1 (2) of the Parent-Subsidiary Directive, since there are, in general, no anti-abuse provisions in Greek tax law. Thus, the residence of the shareholders of the parent company will be totally indifferent with regard to the tax treatment they receive, at least on a cross-border level.

## VIII. Article 307 EC Treaty

Article 307 EC Treaty provides for the relationship between Community law and international law. According to these provisions, rights and obligations undertaken by treaties that have been concluded by a Member State with third states before the entry into force of the EC Treaty or before their accession to the EU, as the case may be, are to be respected. This follows from the international law principle *pacta sunt servanda*. At the same time, however, EC Member States are also under the obligation to respect their Community commitments<sup>48</sup> and therefore they have undertaken the responsibility, on the one hand, to eliminate existing provisions that contradict their Community obligations and, on the other hand, not to introduce any new provisions.

Since Art. 307 EC Treaty refers to “rights and obligations”<sup>49</sup> arising from existing treaties that are to be respected, the question arises as to what happens if an existing treaty is terminated and replaced by a new one providing for the same “rights and obligations”. Will in this case the new treaty be also covered by Art. 307 EC Treaty? The answer to this question must be in the negative, in so far as such “rights and obligations” are incompatible with the EC Treaty. If this is the case, then the Member State involved has the obligation to try to fix this incompatibility within the existing treaty with a third state. If the treaty providing for

<sup>46</sup> Art. 23 (2) (c) Law no. 3406/2005, FEK A 265/25-10-2005.

<sup>47</sup> Art. 23 (1) (b) Law no. 3331/2005, FEK A 83/6-4-20005.

<sup>48</sup> Arising both by primary and secondary Community legislation; Pistone, *The impact of community law on tax treaties*, p. 86.

<sup>49</sup> This means that the treaty remains valid and intact in general but becomes ineffective within the Community, as far as it is found to be incompatible with Community law. Pistone, *The impact of community law on tax treaties*, p. 86 with further references.



such incompatible "right or obligation" is terminated or renegotiated, then the Member State has no valid justification for insisting on the incompatible provision and for not respecting Community loyalty obligations (Art. 10 EC Treaty).

When this is the case, the next question is, of course, what are the sanctions for such a Member State, what are the consequences for that Member State? Unfortunately, the only obligation that the Member State has is to try to resolve the incompatibility. In addition, as Pistone points out,<sup>50</sup> failure by a Member State to remove treaty measures that are incompatible with the EC Treaty may not be invoked by a taxpayer before a national court, as this provision is addressed to Member States and does not have direct effect. Wattel<sup>51</sup>, on the other hand, argues that the *Frankovich* case law may not be invoked either. Practically, the taxpayer remains unprotected.

This problem gets more serious when it comes to certain anti-abuse provisions that are contained in certain treaties with third countries, especially those with the USA. The US tax treaties usually contain various anti-abuse provisions, with the "limitation on benefits" (LOB) clause being the one that is possibly the most interesting for the subject discussed here.<sup>52</sup>

Under LOB provisions a treaty partner may deny treaty benefits in cases where the taxpayer is an interposed person or a conduit company, and generally in cases where the taxpayer claiming application of the treaty is not a "genuine" resident of the other treaty partner. The application of such a clause leads to the creation of obstacles in the exercise of the basic Treaty freedoms<sup>53</sup> and the question of the compatibility of such clauses with EC law has been raised on many occasions.<sup>54</sup> Of course, these obstacles or even discrimination will arise by the application of the respective clause by the third country and such third country has, of course, no obligation to respect the EC Treaty fundamental freedoms. According to the *Open Skies* doctrine, it is then a violation of the non-discrimination principle not by the third state, but by the Member State, which has allowed to the third state to treat other Member States in a discriminatory way. On the other hand, the Member State, in applying such a provision, will normally apply it to residents of the third country, and therefore to cases not covered by EC law, either. Therefore, it seems that a LOB provision will be incompatible with EC law only in so far as it is a disproportionate anti-abuse clause, the broad application of which also covers cases where no abuse is taking place.<sup>55</sup>

<sup>50</sup> Pistone, *The impact of community law on tax treaties*, p. 89.

<sup>51</sup> Terra/Wattel, *European Tax Law* (2001) p. 114.

<sup>52</sup> Terra/Wattel, *European Tax Law*, p. 113.

<sup>53</sup> Pistone, *The impact of community law on tax treaties*, p. 91 et seq.

<sup>54</sup> Malherbe-Delattre, Compatibility of limitation on benefits provision with EC law, *ET* 1996, pp. 12 et seq, especially p. 16 et seq. with further references in footnote 25.

<sup>55</sup> Similarly, Malherbe-Delattre, *ET* 1996, p. 20.



#### IV. The treaty-making powers of the European Union in relations with third states

The European Union, having its own legal personality (Art. 281 EC Treaty) has been granted a certain competence to negotiate and conclude treaties and/or agreements with third states or international organizations. The procedural rules and the tasks granted to each Community institution regarding this external power of the European Union are laid down in Art. 300 of the EC Treaty. The treaty-making powers of the European Union in the relations with third countries can be either exclusive or shared between the Community and the Member States.<sup>56</sup>

This competence, as is laid down in the EC Treaty itself and as interpreted by ECJ case law, refers to the areas where the European Union has a clear policy, such as the common commercial policy (Arts. 131-134 EC Treaty), environment (Art. 174(5) EC Treaty), or to areas where there are clear obligations under Community law, such as those set by regulations in the areas of international road transport and fishery policy.<sup>57</sup> This has been affirmed already as early as in 1971, in the *AETR* judgment handed down by the ECJ,<sup>58</sup> and has been repeated in subsequent case law. The Court has even gone as far as to hold that in cases where competence has been transferred by the Member States to the Community, the Member States have lost, in favour of the Community, the right to conclude treaties with third countries.<sup>59</sup>

It follows from the principle of "implied powers"<sup>60</sup> that such external powers do exist not only with regard to areas where the European Union has been explicitly granted them but also in areas where these are necessary in order for the Community to carry out effectively its (expressly granted external or internal) powers.<sup>61</sup>

In contrast, the treaty-making powers of the Member States remain intact in the areas where no competence has been transferred to the Community or in cases where even though such competences have been granted to the Community, the latter has, however, not exercised its mission in the respective area.<sup>62</sup>

<sup>56</sup> Terra/Wattel, *European Tax Law*, p. 111.

<sup>57</sup> This follows from the "Community loyalty" obligation that Member States have, arising from Art. 10 EC Treaty; see Terra/Wattel, *European Tax Law*, pp. 110 et seq.; see also Vanistendael, *The limits to the new community Tax Order*, *CML Review* 1994, pp. 293 et seq.

<sup>58</sup> C-22/70, *Commission v. Council of the EC*.

<sup>59</sup> Vanistendael, *CML Review* 1994, p. 301.

<sup>60</sup> Pistone refers to the "parallelism doctrine"; see Pistone, *The impact of community law on tax treaties*, pp. 97 et seq.

<sup>61</sup> Terra/Wattel, *European Tax Law*, p. 111.

<sup>62</sup> This was the issue the ECJ dealt with in the case of fisheries policy. See Vanistendael, *CML Review* 1994, p. 301 and footnotes 19-20. Terra/Wattel, *European Tax Law*, p. 111, submit that even in this case the Community has gained exclusive treaty-making power in relation to third countries.



In order to determine whether the European Union has (and to what extent) any treaty-making powers in relations with third states regarding direct taxation, one must first explore what kind of power the European Union does have in respect to direct taxation. Since direct taxation still remains in the exclusive competence of the Member States, the answer seems easy: the European Union has no treaty-making powers in the field of direct taxation, or, to put it differently, "any possible competence of the Community as regards tax treaties with third states cannot be exclusive".<sup>63</sup>

However, there are two factors that we need to assess:

- First, that direct taxation does fall within the competence of the Community in so far as it is necessary for the functioning of the internal market and
- Second, that there are already certain parts of direct taxation that have been the subject of secondary Community legislation.

The question that arises is whether those two factors and such actual exercise by the Community of its powers could lead us to a different answer. As far as the exclusive external powers of the Community are concerned, the answer is principally still negative: the European Union could only acquire exclusive tax treaty-making powers if there was clear Community internal competence or if the Community action had taken the form of a regulation. But even if the present directives had been adopted in the form of a regulation, the European Union would still have limited exclusive treaty-making powers, as the current direct taxation fields treated by Community are limited (i.e. not extending to the full scope of a tax treaty based on the OECD MC).

Under the above-mentioned general principles, an EC treaty making power would be conceivable for specific DTC provisions falling into the scope of the implied powers doctrine. A good example is the Limitation on Benefits clauses, which regulate the applicability of DTCs with third countries for Member States other than the contracting one and fall, thus, directly under the scope of the non-discrimination principle: According to the Open Skies doctrine, Member States are not allowed to grant, through international conventions, the power to third states, to apply their domestic legislation in a way discriminatory towards other EU Member States.

Certainly, it may be in the interest of the European Community to allow to third states to differentiate the applicability of DTCs among Member States according to acceptable criteria (e.g., avoidance of treaty shopping). Should, however, any exceptions to the non-discrimination principle be allowed, this could happen only on a collective EC level, where the implied powers doctrine would be fully applicable. No Member State is able to alter applicability of the non-discrimination principle. On the other hand, direct applicability of the EC treaty non-discrimination principle could lead only to judicial acceptance or non-acceptance

<sup>63</sup> Terra/Wattel, *European Tax Law*, pp. 111–112.



of LOBs, but could not lead to the direct legislative development of a (formally and substantially) acceptable LOB, when assessed on the basis of the EC treaty standards.

The negotiation of Limitations on Benefits (i.e. Applicability) clauses is, thus, to be regarded as a typical example of application of the implied powers doctrine in the field of the DTCs with third countries. Such clauses in DTCs with third states are partial aspects of the fundamental non-discrimination principle and fall into the exclusive competence of the European Community; they should be concluded by the EC itself and not by the Member States.

To conclude, at the present stage of evolution of EC tax law, it seems that the adoption of coordination measures may have led to the creation of a partially shared tax treaty-making powers of the European Union in the relations with third states.<sup>64</sup>

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<sup>64</sup> To this end, Terra/Wattel, *European Tax Law*, p. 112. See also the analysis by Pistone, *The impact of community law on tax treaties*, pp. 94 et seq.