Departures from the OECD Model and Commentaries

Reservations, observations and positions in EU law and tax treaties

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Chapter 4

Union Law and OECD Model Concepts: What Can We Learn from the Comparison?

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4.1. Similarities and differences

At first sight the function of Union law provisions and tax treaties is completely different. First of all, the application of Union law goes far beyond tax law, whereas the scope of tax treaties is limited to certain taxes. Moreover, many of the relevant Union law provisions provide the framework for the establishment of an internal market within the European Union. This is true for certain provisions of primary Union law, like the freedoms and the state aid rules, and of secondary Union law, like the Parent-Subsidiary and Merger Directives. Tax treaties do not have this ambitious goal: they are just dealing with the allocation of taxing rights between the contracting states.

However, it is still worthwhile to look at both areas and compare them. Both Union law and tax treaties are relevant for cross-border situations and the origin of these rules are international as well. Some of the rules we find in Union law and tax treaties look quite similar and it might make at least sense to ask why we approach such rules differently and whether these different approaches are justified. The freedoms and non-discrimination clauses of tax treaties are such an example: article 24(1) of the OECD Model forbids discrimination on the grounds of nationality and some of the freedoms also contain similar references to nationality. However, the approaches of courts towards these rules are quite different. The European Court of Justice (ECJ) prefers a purposive interpretation and assumes that domestic provisions that do not distinguish on the grounds of nationality but on the grounds of residence might be affected by the freedoms, since residence and citizenship coincides very often.[2] Contrary to this approach, most tax administrations

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2. *See* ECJ, 14 Feb. 1995, Case C-279/93, *Finanzamt Köln-Altstadt v. Roland Schumacker* [1995] ECR I-225, para. 28; ECJ, 27 June 1996, Case C-107/94, *P.H. Asscher v. Staatssecretaris van Financiën* [1996] ECR I-3089, para. 38; A. Cordewener, *Europäische Grundfreiheiten und nationales Steuerrecht: „Konvergenz" des Gemeinschaftsrechts und „Kohärenz" der direkten Steuern in der Rechtsprechung des EuGH* p. 120 et seq. (O. Schmidt 2002).

and domestic courts apply article 24(1) of the OECD Model in a very formal way: tax rules that do not explicitly discriminate on the grounds of citizenship are not covered by this discrimination clause.[3] This interpretation makes these rules in many countries practically meaningless. Quite often, these different approaches are explained by the fact that the purpose of the freedoms is the establishment of an internal market, whereas tax treaties do not have this goal.[4] However, this author wonders why only rules that are connected with the internal market may be interpreted purposively. My suspicion has always been that these differences have more to do with the fact that domestic courts tend to protect the tax base of their own countries and therefore interpret these provisions narrowly, whereas the ECJ does not have any loyalty with any specific EU Member State but only with the European Union as such and therefore does not feel prevented to understand these provisions according to their object and purpose, even if this means that these may affect the tax base of Member States.

The ECJ distinguishes between the comparability test, justification test and the proportionality test when interpreting the freedoms in tax cases. The Court has developed a set of justifications which are not explicitly mentioned in the Treaty on the Functioning of the European Union (TFEU). The wording of the non-discrimination clauses does not explicitly mention justifications. Many scholars conclude from this that under article 24 of the OECD Model, every different treatment of a comparable situation, which is covered by one of the clauses of article 24, constitutes discrimination and cannot be justified. The case law of the ECJ shows that it is possible to develop grounds of justifications even if the wording of the non-discrimination provision does not indicate this interpretation. Moreover, ECJ case law teaches us also how interrelated comparability and justification tests are. Sometimes, the Court uses arguments already at the level of comparability which it uses usually as part of the justification analysis, and vice versa. This raises the question whether we are really prevented from using similar justification arguments in the context of article 24 of the OECD Model as

3. *See* J. Fischer-Zernin in *DBA-Kommentar* Art. 24 OECD-MA m.no. 10 (D. Gosch, H. Kroppen & S. Grotherr eds., NWB 1997).
4. *See* C. Peters & M. Snellaars, *Non-Discrimination and Tax Law: Structure and Comparison of the Various Non-Discrimination Clauses*, 10 EC Tax Review 1, p. 15 et seq. (2001); P. Hinnekens, *Non-Discrimination Article in OECD Model Convention Needs Fundamental Review*, 17 EC Tax Review 6, p. 249 (2008); B. Garrido, *Interaction Between the Interpretation of the Non-Discrimination Provisions in Tax Treaties and in the EC Treaty: An Apparent Rather than Real Conflict*, 18 EC Tax Review 4, p. 169 et seq. (2009); critical: N. Bammens, *The Interaction between the Interpretation of Article 24 OECD Model and the Non-Discrimination Standard Developed by the CJEU*, 22 EC Tax Review 4, p. 183 (2013).

the ones that had been developed by the ECJ. In particular, if we take into account that arguments at the level of comparability and justification are at least to a large extent exchangeable, it should be possible to ask whether a different treatment is justified under the scope of article 24 of the OECD Model as well, either at the level of comparison or justification.

Union law and tax treaty law are also linked to each other in other ways: directives like the Parent-Subsidiary Directive use terminology that had been inspired by Union law. Terms like "beneficial owner" and "permanent establishment" illustrate this. However, unfortunately, the drafters of the directives almost never just copied and pasted but modified the terms and definitions slightly. For interpretation purposes, this is quite a challenge. However, undoubtedly the OECD Model has to be the starting point for all attempts to interpret such terms. Another example of the influence of tax treaties on at least Union law-inspired provisions is the Arbitration Convention: this convention not only contains procedural provisions but repeats, again in a slightly modified version, the rules which are known as article 7(1) and (2) and article 9 of the OECD Model. In particular, the fact that article 7 of the OECD Model has been changed to implement the applied OECD approach (AOA), whereas the substantive provisions of the Arbitration Convention still remain the same, raises interesting interpretation issues.[5]

Union law and tax treaties are overlapping each other to a certain extent: both the OECD Model and secondary Union law provide a legal basis for mutual assistance in the area of exchange of information and the recovery of tax claims. Although the object and purpose of these rules are similar, the details differ, and this might raise questions which of these clauses prevail if their scope is different.

These are just some examples for the connection between Union law and tax treaties, and each of them would deserve a specific analysis. This is also true for many other issues not mentioned here. However, this is not what this contribution can provide. The focus here is on two main issues that are closely related: first, an examination of the interpretation and application issues. If we manage in practice to deal with these issues in a satisfactory manner, we can avoid conflicts of interpretation between authorities in different contracting and Member States. For those conflicts which remain we

5. *See* M. Lang, *Rechtsquellen und Prinzipien des Internationalen Steuerrechts*, in *Internationales Steuerrecht* p. 17 (M. Achatz ed., O. Schmidt 2013).

have to take a closer look at dispute settlement mechanism in Union law and tax treaty law. The aim of this contribution is to find out what we can learn from Union law for tax treaty issues and vice versa.

4.2. Interpretation and application

4.2.1. Relevance of domestic law

Union law terms are often identical or at least similar with legal terms used in tax and other codes of some Member States. The ECJ had to deal quite often with the attempt to interpret these rules in accordance with the understanding these rules have in the legal system of one or more Member States. The Court has continuously rejected such an approach:[6] "[R]eference must not be made to the law of one of the states concerned but, first, to the objectives and the scheme of the convention and, secondly, to the general principles which stem from the corpus of the national legal systems." This is completely convincing: any other approach would have led to a different interpretation of the same Union law provision in different Member States and the goal of Union law to provide for a common framework throughout the European Union would have been endangered.

In tax treaty law, similar issues arise: tax treaty terms are quite often identical with terms used in domestic tax systems. Taxpayers and tax authorities may be tempted to interpret the tax treaty provisions which are not explicitly defined in the treaty in accordance with their domestic tax law, which, of course, is familiar to them. However, the object of tax treaties to allocate taxation rights between the two contracting states is endangered if a tax treaty provision may be understood differently in both contracting states. Double taxation or non- taxation might be the consequence. It is therefore surprising that domestic courts do not reject the attempts to interpret treaty provisions in accordance with domestic law as consequently as the ECJ does in the context of Union law.

In tax treaty law, article 3(2) of the OECD Model is sometimes used as a pretext not to interpret tax treaty provisions autonomously and independently from domestic law of the contracting states. Article 3(2) of the OECD Model indeed refers for the interpretation of undefined tax treaty terms to

6. ECJ, 14 Oct. 1976, Case 29-76, *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol* [1976] ECR 1541, para. 5; *see also* ECJ, 16 Dec. 1980, Case 814/79, *Netherlands State v. Reinhold Rüffer* [1980] ECR 3807, para. 7.

the domestic law of the contracting states "unless the context otherwise requires". However, this is the important phrase contained in article 3(2) of the OECD Model since the object and the purpose of a treaty requires interpreting treaty terms equally in both contracting states.[7] If the context of the treaty would not be taken into account, this goal could not be achieved. Therefore, article 3(2) of the OECD Model, if understood in the light of the object and purpose of the treaty, does not prevent taxpayers, tax administrations and courts from interpreting treaty provisions autonomously, but even emphasizes the necessity to do so.

However, it is also true that article 3(2) of the OECD Model may be misleading. For certain experts it is difficult to understand that such a clause merely confirms the autonomous treaty interpretation, a result one could already derive from the interpretation rules of the Vienna Convention on the Law of Treaties (VCLT). Vogel & Prokisch have therefore suggested deleting article 3(2) of the OECD Model from the Model Convention.[8] Today, it seems to be too late for such a step since tax treaties all around the world contain this clause. We therefore have to create more awareness that article 3(2) of the OECD Model in no way requires courts to apply a different approach when interpreting tax treaties than the ECJ applies when interpreting Union law.

4.2.2. Authentic languages

Union law and tax treaties have in common that usually both types of provisions have to be interpreted in more than one language. Most of the official languages used in EU Member States also have the status as authentic languages of Union primary and secondary law. Not only the judgments of the ECJ and most of the Opinions of Advocates General are published in these languages, the Court has a routine in looking at the various languages. The fact that the internal language of the Court is French and first drafts of judgments are usually written in French does not prevent the Court from discussing language differences. The Court is careful enough to acknowledge that

7. *See* M. Lang, *Art. 3 Abs. 2 OECD-MA und die Auslegung von Doppelbesteuerungsabkommen*, IWB 2011, 281 (288); M. Lang, *Die autonome Interpretation von Doppelbesteuerungsabkommen*, in *Cahiers de droit fiscal international*, vol. LXXVIIIa, *Interpretation of double taxation conventions* p. 202 et seq. (IFA 1993).
8. *See* K. Vogel & R. Prokisch, *General Report*, in *Cahiers de droit fiscal international*, vol. LXXVIIIa, *Interpretation of double taxation conventions* p. 55 et seq. (IFA 1993).

all the official languages are on equal footing and that a convincing interpretation requires the Court to analyse different language versions of the rules at stakes and drawing conclusions from differences and similarities.

There are fewer authentic languages in treaty law. Usually, the official languages of the contracting states are declared to be authentic, sometimes the English and occasionally the French language versions of a treaty shall prevail if the other language versions differ from each other.[9] However, it is also a fact that many courts look only at the language version of their own country. This has less to do with ignorance than with language skills. Therefore, contrary to Union law, domestic courts often cannot keep up to the promise given in the provision of authentic language. If courts in different contracting states only look at their language version, different results of the interpretation can be the consequence.

How to overcome this problem? The ECJ, according to the rules of the TFEU, is composed of judges from different Member States. Moreover, the ECJ is supported by legions of interpreters and translators. Domestic courts lack both such composition and support. Therefore, it is unrealistic that domestic courts really take into account thoroughly all the authentic language versions. As long as a tax treaty provision is identical with its parallel provision in the OECD Model, the problem is not so severe because these provisions should be mainly understood in their English and French versions, which are the original languages of the OECD Model, irrespective of the languages declared to be authentic in the treaty itself.[10] For all other cases it would be preferable if treaty negotiators overcome chauvinistic feelings and refrain from insisting on their own language as one of the authentic languages. If English and maybe French are declared to be authentic languages, one could reasonably expect from domestic courts to interpret the treaty in these language versions.

4.2.3. Equivalence and effectiveness

Union law and tax treaties also have in common that there is a need to make use of domestic procedural law, since neither the relevant rules of primary and secondary Union law nor of tax treaties contain a comprehensive set of procedural rules. However, legal experience in many areas of law shows

9. For examples, *see* M. Lang, *The Interpretation of Tax Treaties and Authentic Languages*, in *Essays on Tax Treaties: A Tribute to David A. Ward* p. 15 et seq. (G. Maisto, A. Nikolakakis & J. Ulmer eds., IBFD 2013).
10. Id.

how closely related substantive and procedural provisions are.[11] Very often, it is almost impossible to draw a clear borderline between substance and procedure:[12] if somebody is entitled to a certain right under substantive law, he can only make use of his right if he meets the criteria under procedural law to do so. If it is not possible to enforce it, entitlement to a right is completely meaningless.

The problems just described are not unique. The ECJ started to deal with this problem in 1976.[13] Since then, there is well-established ECJ case law, which had been described by the court in the following way:[14]

> This diversity between national systems derives mainly from the lack of Community rules on the refund of national charges levied though not due. In such circumstances, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence)

11. *See* M. Lang, *The Procedural Conditions for the Implementation of Tax Treaty Obligations under Domestic Law*, 35 Intertax 3, p. 147 (2007).
12. J. Schuch & A. Stieglitz, *DBA- und EU-Diskriminierungsverbote und Verfahrensrecht*, in *Die Diskriminierungsverbote im Recht der Doppelbesteuerungsabkommen* p. 407 (M. Lang, J. Schuch & C. Staringer eds., Linde 2006).
13. *See* ECJ, 16 Dec. 1976, Case 33/76, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989; ECJ, 16 Dec. 1976, Case 45/76, *Comet BV v. Produktschap voor Siergewassen* [1976] ECR 2043.
14. *See* ECJ, 10 July 1980, Case 826/79, *Amministrazione delle finanze dello Stato v. Sas Mediterranea importazione, rappresentanze, esportazione, commercio (MIRECO)* [1980] ECR 2559, para. 4; ECJ, 10 July 1980, Case 811/79, *Amministrazione delle finanze dello Stato v. Ariete SpA* [1980] ECR 2545, para. 4; ECJ, 27 Mar. 1980, Case 61/79, *Amministrazione delle finanze dello Stato v. Denkavit italiana Srl* [1980] ECR 1205, para. 25; ECJ, 9 Nov. 1983, Case 199/82, *Amministrazione delle Finanze dello Stato v. SpA San Giorgio* [1983] ECR 3595, para. 12; ECJ, 15 Sept. 1998, Case C-260/96, *Ministero delle Finanze v. Spac SpA* [1998] ECR I-4997, para. 18; ECJ, 15 Sept. 1998, Case C-231/96, *Edilizia Industriale Siderurgica Srl (Edis) v. Ministero delle Finanze* [1998] ECR I-4951, para. 34; ECJ, 17 Nov. 1998, Case C-228/96, *Aprile Srl, in liquidation, v. Amministrazione delle Finanze dello Stato* [1998] ECR I-07141, para. 18; ECJ, 9 Feb. 1999, Case C-343/96, *Dilexport Srl v. Amministrazione delle Finanze dello Stato* [1999] ECR I-579, para. 25; ECJ, 7 Dec. 2000, Case C-482/98, *Italy v. Commission*, [2000] ECR I-10861, para. 33; ECJ, 11 Nov. 2002, Case C-62/00, *Marks & Spencer plc v. Commissioners of Customs & Excise* [2002] ECR I-6325, para. 34; ECJ, 6 Oct. 2005, Case C-291/03, *My Travel plc v. Commissioners of Customs & Excise*, para. 17; ECJ, 2 Oct. 2003, Case C-147/01, *Weber's Wine World Handels-GmbH, Ernestine Rathgeber, Karl Schlosser, Beta-Leasing GmbH v. Abgabenberufungskommission Wien* [2003] ECR I-11365, para. 103; ECJ, 17 June 2004, Case C-30/02, *Recheio – Cash & Carry SA and Fazenda Pública v. Registo Nacional de Pessoas Colectivas* [2004] ECR I-6051, para. 17.

and, second, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, in particular, Case C-231/96 Edis [1998] ECR I-4951, paragraph 34).

The ECJ did not seem to be much concerned about the legal basis for this line of case law. The only provision of the EC Treaty it referred to is today's article 4(3) of the Treaty on European Union (TEU), at that time article 5. This provision is very general:

> The Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Article 4(3) of the TEU summarizes what is self-evident: it is clear that a state (as it would be true for any individual in the case of a civil law contract that is a party to a treaty) is obliged to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaties. Thus, it is no coincidence that 4(3) of the TEU serves as a provision to which the ECJ refers when the Court develops principles it cannot derive from any other provision of the Treaties.[15] Other examples of case law the Court has developed by referring to article. 4(3) of the TEU are the judgments on state liability[16] or on granting interim relief.[17] Article 4(3) of the TEU is therefore considered to have a kind of supplementary effect:[18] here the true legal basis for such case law is the Union law as a whole and its object and

15. *See* Lang, *supra* n. 11, at 147; W. Kahl in *EUV/EGV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* Art. 10, m.no. 15, attributes a loophole-closing function to article 10. (C. Callies & M. Ruffert eds., Beck 2002).
16. ECJ, 19 Nov. 1991, Cases C-6/90 and C-9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357, para. 35; ECJ, 5 Mar. 1996, Case C-46/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029, para. 31; ECJ, 26 Mar. 1996, Case C-5/94, *The Queen v. H.M. Treasury, ex parte British Telecommunications plc.* [1996] ECR I-1631, para. 38; ECJ, 23 May 1996, Case C-5/94, *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd.* [1996] ECR I-2553, para. 24; ECJ, 8 Oct. 1996, Case C-178/94, *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v. Bundesrepublik Deutschland* [1996] ECR I-4845, para. 20; ECJ, 10 July 1997, Case C-261/95, *Rosalba Palmisani v. Istituto nazionale della previdenza sociale (INPS)* [1997] ECR I-4025, para. 24.
17. ECJ, 19 June 1990, Case C-213/89, *The Queen v. Secretary of State for Transport, ex parte Factortame* [1990] ECR I-2433, para. 21.
18. *See* T. Ehrke-Rabel, *Gemeinschaftsrecht und österreichisches Abgabenverfahren* p. 68 (Manz 2006). On these lines, A. Bogdandy & S. Schill in *Das Recht der Europäischen Union* Art. 4 EUV, m.no. 68 et seq. (E. Grabitz, M. Hilf & M. Nettesheim eds., Beck 2012).

purpose, which requires *effet utile*. Authors have convincingly pointed out that article 4(3) of the TEU is an expression of the principle pacta sunt servanda,[19] which is well established in international public law and explicitly mentioned in article 26 of the VCLT: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Although courts tend to refer to article 26 of the VCLT quite often, the influence of this provision on the outcome of court decisions or more generally on the content of treaty obligations is slight. If article 26 of the VCLT had not been included in the Vienna Convention, treaties under international law would probably not be interpreted differently. It is quite evident that a state that has concluded an agreement with another state and thus has accepted obligations must fulfil these obligations. Article 26 of the VCLT is not needed in order to ensure this. There are good reasons to believe that similar considerations apply for article 4(3) of the TEU. Having accepted this premise, one has to conclude that the reason why the ECJ developed its case law on the principles of equivalence and effectiveness is not the specific wording of article 4(3) of the TEU and its predecessors, but the idea that Member States should not be able to excuse themselves from their EU law obligations by introducing domestic procedural provisions which limit the entitlement to the rights conferred by EU law to taxpayers.[20]

The ECJ refrained from focussing on subjective criteria. It is wise that the ECJ does not examine whether the intention of the Member State was to limit access to the EU Treaties when its legislature introduced a certain procedural provision. Such criteria are always unsatisfactory. Like taxpayers who have to prove that they did not have the intention of circumventing a certain tax obligation, Member States would always try to hide their true intentions and their success would depend on the quality of their "cover-up". Once somebody looks for objective criteria to determine the amount of room a Member State has in which to manoeuvre, it is quite obvious to require that "the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of community law, ... cannot be less favourable than those relating to similar actions of a domestic nature." However, a Member State can still try to avoid granting rights conferred to its citizens under EU law by imposing restrictive procedural conditions on "actions of a domestic nature" as

19. F. Althuber, *Gemeinschaftsrechtliche Anforderungen an das nationale Abgabenverfahrensrecht*, in *Rückforderung rechtswidrig erhobener Abgaben* p. 37 (F. Althuber & G. Toifl eds., Verl. Österreich 2005). On these lines, P. Fischer, H. Köck & M. Karollus (eds.), *Europarecht* para. 1490 (Linde 2002); W. Kahl *supra* n. 15, at Art. 10, m.no. 3.
20. *See* Lang, *supra* n. 11, at 148 et seq.

well. From this point of view it is understandable to require in addition that "the conditions and time limits" must not make "it impossible in practice to exercise the rights which national courts are obliged to protect." If one has to accept that Union law does not contain procedural provisions and that it is therefore up to the Member States "to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of community law", it is convincing to require that these domestic provisions are both effective and equivalent to "actions of a domestic nature".[21]

Neither Union law nor tax treaties provide for detailed procedural provisions. Union law leaves it to the Member States and tax treaties to the contracting states to determine the procedural conditions under which the rights conferred on citizens or taxpayers under these rules may be exercised. Both Member States and contracting states may feel tempted to determine these conditions in a very restrictive way if they are not interested in granting the rights they have to grant to citizens or taxpayers under Union law or a tax treaty. If it were impossible to derive any principles from Union law and the tax treaties which have to be followed by states when they determine the procedural provisions, both the obligations under Union law and the obligations under bilateral treaties would be meaningless: if states were not limited at all in this respect, the application of Union law or tax treaty law would ultimately be voluntary on the side of the states. Thus, if one accepts the competence of the states to determine the procedural conditions and at the same time seeks to avoid that fulfilment of treaty law obligations becomes completely voluntary for the states, it is not surprising to arrive at similar results as the ECJ did: to require that the principles of equivalence and effectiveness are followed by domestic legislators and administrative authorities is quite convincing, especially if one takes into account that the idea of *effet utile* plays an important role in international public law. Of course, one could argue that article 4(3) of the TEU provides a legal basis for the case law developed by the ECJ while there seems to be no legal basis in tax treaty law to derive these principles from the OECD Model and from those tax treaties drafted along the lines of the OECD Model. However, two responses can be given: first, the phrase "irrespective of the remedies provided by the domestic law of those States" in article 25(1) of the OECD Model seems to imply that "remedies provided by the domestic law" exist and that they are relevant for the application of tax treaties. The term "remedies" is not defined and therefore has to be interpreted in the

21. Id. at 149.

light of the context in which it is used.[22] It is not impossible to assume that the standard of legal protection is relevant which had been developed in the contracting state for similar actions of domestic nature and that the term "remedies" has to be understood in such a way that these remedies, and the system of legal protection as a whole, are effective. One cannot assume that the drafters of the OECD Model had remedies in mind which were not effective. Secondly, one may question whether article 4(3) of the TEU is the true real basis for this case law of the ECJ, as has been pointed out already. There are good reasons to believe that the legal basis for the ECJ case law on equivalence and effectiveness is the object and purpose of Union law as a whole. If one goes this far, one could argue as well that the legal basis for the application on these criteria in the context of tax treaty law is also the OECD Model and the bilateral treaties following the Model, as a whole. And if one looks for an explicit legal basis, article 26 of the VCLT can serve this purpose for tax treaties as well as the ECJ is continuously referring to article 4(3) of the TEU.[23]

4.2.4. Anti-abuse-concepts

Union law and tax treaty law have in common that in both areas the role of anti-abuse rules is unclear, controversial and a work in progress. The ECJ has in its case law in VAT started to develop anti-abuse concepts also in the area of taxation, referring to judgments in other areas.[24] In the area of direct taxation, the Court has held since its judgment in *ICI* (Case C-264/96) that the prevention of abuse could serve as a justification under the freedoms if the domestic rule is limited to "wholly artificial arrangements".[25] In

22. For the autonomous interpretation of tax treaties, which is supported by article 3(2) of the OECD Model, *see* M. Lang, *Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen (Art 3 Abs 2 OECD-Musterabkommen)*, in *Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis: FS für Helmut Debatin* p. 283 (G. Burmester-Endres ed., Beck 1997).
23. *See* Lang, *supra* n. 11, at 149 et seq.
24. *See* M. Lang & S. Heidenbauer, *Wholly Artificial Arrangements*, in *A Vision of Taxes Within and Outside European Borders* p. 600 et seq. (L. Hinnekens & P. Hinnekens eds., Kluwer Law Internat. 2008).
25. *See* ECJ, 16 July 1998, Case C-264/96, *Imperial Chemical Industries plc (ICI) v. Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)* [1998] ECR I-4695, para. 26; ECJ, 12 Dec. 2002, Case C-324/00, *Lankhorst-Hohorst GmbH v. Finanzamt Steinfurt* [2002] ECR I-11779, para. 37; ECJ, 21 Nov. 2002, Case C-436/00, *X and Y v. Riksskatteverket* [2002] ECR I-10829, para. 61; ECJ, 11 Mar. 2004, Case C-9/02, *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-2409, para. 50; ECJ, 13 Dec. 2005, Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECR I-10837, para. 57; ECJ, 12 Sept. 2006, Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners*

Cadbury Schweppes (Case C-196/04), the Court defined this phrase by building upon its already-mentioned case law in VAT.[26] The Court assumed that a wholly artificial arrangement requires objective and subjective elements.

The ECJ has also used this approach to interpret the anti-abuse provision of the directives in the area of direct taxation.[27] The Commission included an anti-abuse provision in its proposal for the CCCTB directive and took the concept of the wholly artificial arrangement as a starting point, but modified it slightly.[28] On 6 December 2012, the Commission developed this concept further and included it in a recommendation to the Member States to introduce a GAAR in their tax system.[29] According to recent proposals of the Commission from November 2013, the introduction of GAARs shall become mandatory for Member States when implementing the Parent-Subsidiary Directive.[30]

The OECD Commentaries have taken the view that tax treaties do not prevent the application of domestic anti-abuse rules.[31] Such a statement is in this author's view only partly correct: to the extent that domestic anti-abuse rules change the allocation of income from one person to another, tax treaties do not prevent such effects but have to accept them. Tax treaties protect those persons who are liable to tax in respect of certain income under

of Inland Revenue [2006] ECR I-07995, para. 51; ECJ, 13 Mar. 2007, Case C-524/04, *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue* [2007] ECR I-2107, para. 72; ECJ, 17 Jan. 2008, Case C-105/07, *Lammers & Van Cleeff NV v. Belgische Staat*, [2008] ECR I-173, para. 26; ECJ; 23 Apr. 2008, Case C-201/05, *The Test Claimants in the CFC and Dividend Group Litigation v. Commissioners of Inland Revenue* [2008] ECR I-2875, para. 76; ECJ, 4 Dec. 2008, Case C-330/07, *Jobra Vermögensverwaltungs-Gesellschaft mbH v. Finanzamt Amstetten Melk Scheibbs* [2008] ECR I-9099; ECJ, 17 Sept. 2009, Case C-182/08, *Glaxo Wellcome GmbH & Co. KG v. Finanzamt München II* [2009] ECR I-8591 para. 89; PT: ECJ, 3 Oct. 2013, Case C-282/12, *Itelcar – Automóveis de Aluguer Lda v. Fazenda Pública* para. 34, ECJ Case Law IBFD.

26. *See Cadbury Schweppes* (C-196/04) para. 64 et seq.; Lang & Heidenbauer, *supra* n. 24, at 602 et seq.

27. *See* ECJ, 5 July 2007, Case C-321/05, *Hans Markus Kofoed v. Skatteministeriet* [2007] ECR I-5795, para. 38.

28. *See* Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), Art. 80, COM(2011) 121/4; M. Lang, *The General Anti-Abuse Rule of Article 80 of the Draft Proposal for a Council Directive on a Common Consolidated Corporate Tax Base*, 51 Eur. Taxn. 6, p. 223 et seq. (2011), Journals IBFD.

29. *See* Commission Recommendation of 6 December 2012 on aggressive tax planning, OJ L338/41 (12 Dec. 2012).

30. *See* Proposal for a Council Directive amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, Art. 1, COM(2013) 814 final, 25 Nov. 2013.

31. *See OECD Model Tax Convention on Income and on Capital: Commentary on Article 1* para. 22 (22 July 2010).

domestic law. If, as the result of the application of an anti-abuse provision, a contracting state allocates certain items of income to a different taxpayer, treaty entitlement is granted to the one to whom the income is allocated and only to this person and not the other one. In this regard, the statement is correct. However, a domestic anti-abuse provision which requires the application of a different treaty rule, e.g. business profits instead of interest, cannot be applied on the treaty level.[32] The treaty interpretation has to be shielded from such domestic interference.

It seems to be the case that the OECD is also moving in the direction to request from its member countries and even third countries the application of GAARs in cross-border situations.[33] This could be a shift in policy: the OECD would not only tolerate the application of GAARs domestically but require countries to introduce such rules.

In the present author's view, this development is deplorable.[34] The application of GAARs is always arbitrary due to the inherent subjective criterion.[35] The real intention of a human being can never be proven. Which party ever has to bear the burden of proof has automatically lost its case. GAARs are used by tax administrators and judges to levy taxes in situations which may have a "strange smell".[36] GAARs should help to cover situations under the tax rules that are not covered under the letter of the law but which should be covered according to the spirit of the law. What would tax administrators and judges do in such situations in the absence of GAARs? They would just apply the provision that is endangered to be circumvented by the taxpayer. Of course they would not limit themselves to the letter of the law but take into account the object and the purpose. And this should be the regular approach: the letter of the law is only the starting point but not the end of the interpretation.[37] Taking into account the object and purpose, the context or the history of the provision might lead to a result beyond the mere letter of the law. If a purposive interpretation leads to the result that a certain situation is covered under the tax rule, then tax should be levied, otherwise

32. *See* M. Lang, *"Treaty Shopping" – Der Mißbrauch von Doppelbesteuerungsabkommen*, SWI 1991, 58.

33. OECD, Addressing Base Erosion and Profit Shifting p. 10 (OECD 2013).

34. *See* M. Lang, *"Aggressive Steuerplanung" – Eine Analyse der Empfehlung der Europäischen Kommission*, SWI 2013, p. 66 et seq.

35. *See* M. Lang, *Direkte Steuern und EU-Steuerpolitik – Wo bleiben die Visionen?* 22 IStR 10 p. 366 (2013).

36. *See* M. Lang & C. Massoner, *Die Grenzen steuerlicher Gestaltung in der österreichischen Rechtsprechung*, in *Die Grenzen der Gestaltungsmöglichkeiten im internationalen Steuerrecht* p. 47 (M. Lang, J. Schuch & C. Staringer eds., Linde 2009).

37. *See* M. Lang, *Der Normgehalt des § 22 BAO*, ÖStZ 4 p. 68 (2001).

not. The intention of the taxpayer should not play any role. The existence of a GAAR seems to make life easier for tax administrators and judges who just want to apply the "smell test". They do not need to go the more burdensome route to determine the object and purpose, the context and the history of a provision. They may limit themselves to the letter of the law, unless they apply the GAARs. The spirit of the law is then typically ignored. Such an approach deteriorates the interpretation and application of the law and therefore leads us back to the Stone Age of legal methods. In a healthy legal culture, there should be no room for any GAAR.[38]

4.3. Dispute settlement

4.3.1. Mutual agreements

In the area of tax treaties the mutual agreement procedure (MAP) described in article 25 of the OECD Model has been for generations the instrument to resolve conflicts between the competent authorities of the two contracting states. The defaults of this system are obvious:[39] in many countries it is even under dispute whether the taxpayer can enforce the initiation of a MAP. If a MAP is initiated, the taxpayer does not have any standing. The MAP is a procedure only between the competent authorities. Taxpayers are usually not even invited to present their views or to listen to the discussions between the competent authorities.

In case an agreement is reached between the competent authorities, there is no guarantee that this agreement is in line with what the taxpayer had been arguing for. The competent authorities might agree to allocate most of the taxing rights to state A which applies the higher tax rate whereas the taxpayer would have wished he will be taxed by state B. Cases are sometimes not decided on the basis of legal arguments but as a result of horse trading: competent authorities of two countries might have ten open cases to settle and one authority compromises in five cases and the other one in the other five cases. The taxpayer does not have any remedies against the agreement. If he torpedoes the implementation of the agreement, he has to expect that double taxation remains.

38. *See* Lang, *supra* n. 35, at 366.
39. *See* M. Züger, *Conflict Resolution in Tax Treaty Law*, 30 Intertax 10 p. 344 (2002); Koppensteiner, *Der Status des Einzelnen im Rahmen des Verständigungsverfahrens nach Art 25 OECD-MA*, ÖStZ 2009, p. 549 et seq.

Even worse is that taxpayers do not have any entitlement that the dispute is settled at all. It might be the case that a MAP is conducted for many years and finally the competent authorities agree to disagree.[40] There is no pressure on tax authorities to reach a solution. If the competent authorities for whatever reason are not able to convince each other or find a compromise on any other basis, there is nothing the taxpayer can do about it.

4.3.2. Arbitration Convention

Arbitration is the obvious solution to ensure that an agreement is reached. Many countries have included arbitration clauses in their treaties and a few years ago the OECD amended its Model and added an arbitration clause as well. Although not all countries and not even all OECD member countries have consequently included these clauses in their treaties, their number is at least growing.

The European Union has been a pioneer in this area since the Arbitration Convention was presented already in 1990, together with the Parent-Subsidiary and Merger Directives.[41] The bitter pill to swallow was that this set of rules has been just part of a treaty under international public law between the EU Member States, but has never become formally part of Union law. The interpretation of these provisions is therefore beyond the competence of the ECJ. Another weakness of this convention is that it is not applicable on intra-Union tax treaties in general but only on the interpretation of the dealing at arm's length principle in relations between permanent establishments on the one hand and between associated enterprises on the other hand. However, the Convention still covers very important tax treaty rules.

The Convention also provides interesting procedures how arbitrators can be appointed. The contracting states have to provide a list of potential arbitrators and the competent authorities can select members of the "advisory commission" from the list. The chairman himself also has to be chosen from this list by the other members of this advisory commission.

40. *See* M. Lang, *Der Rechtsanspruch auf Einleitung des "Verständigungsverfahrens"*, 111 JBl 6 p. 373 (1989).
41. Arbitration Convention (1990): Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of transfers of profits between associated undertakings, OJ L225 (1990).

This is a system which could be adopted for arbitration under tax treaties as well. The OECD could, either on the basis of a mutual agreement or a specific recommendation to the Member States to make use of arbitration in their tax treaty relations, invite Member States and even other states to suggest names of experts for a list which is administered by the OECD itself. This would enable states to include a clause in their tax treaties that is similar to article 9 of the Arbitration Convention. Whenever arbitrators are needed, the competent authorities could select independent persons from this OECD list and the so-appointed members of the arbitration board could select a chairperson from this list as well. Even if contracting states have just agreed on arbitration in their tax treaties and left procedural issues open, the competent authorities could agree to make use of this list when arbitrators are appointed.

If contracting states or competent authorities agree to make use of this list, the OECD could offer to them additional services upon request; e.g. the OECD Secretariat could provide infrastructure for the arbitration procedures, support the arbitrators, store the files, keep evidence of all the statistics and publish, upon the approval of the competent authorities and the taxpayers, the arbitration panel's final decision or parts of it, in order to make it easier that precedence is created to which other arbitration boards or even courts could refer. If some OECD member countries or even multinationals or individuals are willing to provide additional funding for tax arbitration in general, but not for a specific case, these funds can be put in a trust used by the OECD Secretariat to remunerate the arbitrators and reimburse their travel expenses in cases where the OECD finds it necessary. Thus, arbitration could be become more attractive for less-developed countries, which often refrain from arbitration because they are concerned about the costs. Even if funds to support arbitration given to the OECD were provided by multinationals, they would not have any influence on the procedure, since both the list of arbitrators and the concrete composition of the arbitration boards is exclusively decided by the competent authorities.

It goes without saying that not only the OECD could take over such a role. Although the OECD has been the most active international organization in the area of taxation so far, it is obvious that the UN is the more global organization. Membership includes both developed and developing countries. Therefore developing countries that are UN members but not OECD members might particularly feel even more comfortable to pick their arbitrators from a list that had been put together under the auspices of the UN than of the OECD. Providing such a list of persons and also the necessary infrastructure to administer arbitration procedures could help the UN to

play in the future a more prominent role in the area of international tax. A multilateral convention drafted by the UN could provide a legal framework, if found necessary.

4.3.3. ECJ competence

Of course, arbitration is always only a second best solution. The jurisdiction of a court is for several reasons preferable: an already existing court has usually built up a reputation as an independent body and a court which is to be established will have the chance to build up this reputation as well. An arbitration board, on the contrary, has no permanence and is usually put together on an ad hoc basis. Courts usually have the necessary infrastructure and it can therefore be cost saving if a court can be made competent for tax treaty disputes, in particular if the court already exists. The ECJ is an existing independent supranational body that has experience in the area of tax. Experts from time to time challenge judgments of the ECJ in the tax area; however, in this respect, judgments of the ECJ are in no way different from other judgments of other courts around the world: judgments of every court will always be criticized by academics and practitioners and courts deserve and need this criticism to develop their case law further.

The ECJ is already vested with the authority to interpret DTCs.[42] According to the convention signed between Austria and Germany, the jurisdiction of the ECJ for the resolution of DTC interpretation conflicts is part of their legislation in force.[43] The two states availed themselves of the opportunity to refer to the ECJ to resolve conflicts between Member States: they amended the rules on the MAP to the extent that the ECJ can settle the conflict between the authorities if these fail to reach a mutually agreed solution. The fact that the ECJ was never referred to in the first 10 years since this convention entered into force shows that such provisions do not necessarily lead to an excessive workload for the Court. At the same time, this demonstrates the preventive impact of such court jurisdiction: apparently, the mere possibility created for taxpayers to enforce a referral to the ECJ was, as a rule,

42. M. Lang, *ECJ and Mutual Agreement Procedures*, 42 Intertax 3 (2014).
43. *See* M. Züger, *Der EuGH als Schiedsgericht im neuen DBA Österreich – Deutschland*, SWI 1999, p. 21; M. Lang, Überlegungen zur österreichischen DBA-Politik, SWI 2012, p. 111.

sufficient to motivate the responsible authorities in both contracting states to resolve open interpretation issues themselves in a satisfactory manner within a reasonable time.[44]

At least EU Member States should seriously consider following the example of Austria and Germany. In those rare cases which would have to be decided by the ECJ, the judgments would get a lot of attention within the European Union and even beyond. Although its competence is still regional, the ECJ is the only supranational court which can decide on tax treaty cases. Member States must not fear that the ECJ decisions might not be well founded. Both the taxpayer and the competent authorities of the two contracting states, whose treaty is at stake, would have standing and the opportunity to present all legal arguments for their positions to the Court. Even governments of other Member States could be invited to contribute.

4.3.4. Combining ECJ competence and MAP?

Although the existing MAP has its visible disadvantages, one should not deny the merits of this system. It often makes sense to give the competent authorities of two contracting states the opportunity to reach a settlement before a case goes to court. For competent authorities, it is often easier to assess the facts of a case and not infrequently they have an undisputed expertise in the area of tax law. In most domestic settings they can give orders to local authorities and thus ensure that a mutual agreement is quickly and correctly implemented. No MAP as such is problematic, if the procedure is embedded in a legal environment that ensures that the parties have legal standing. The MAP is only problematic if it is the only legal remedy available to taxpayers. Therefore Union law could benefit from tax treaty instruments if it were possible to conduct a MAP before a case is put forward to the ECJ. In particular, if the substance of tax treaty law is beyond the scope of the Parent-Subsidiary Directive, further harmonized within the European Union and other tax treaties rules or treaties between EU Member States as such are transformed into directives, the question could come up more often whether it is possible to allow a MAP before the case is referred to the ECJ.

It is questionable, however, whether comprehensive rules for the avoidance of double taxation in a directive do not generally rule out the implementation

44. *See* Lang, *supra* n. 35, at 370; M. Lang, *Die Vermeidung der Doppelbesteuerung in der EU – Jüngste Initiativen der EU-Kommission*, SWI 2013, p. 211; Lang, *supra* n. 42.

of such a MAP, or whether there are admissible possibilities under EU law to implement a MAP prior to the introduction of a preliminary ruling procedure. From a legal policy perspective, it would definitely make sense to leave room for the implementation of a MAP:[45] this could ensure that the domestic courts refer only those cases to the ECJ which cannot be resolved between the administrative authorities on a bilateral level. As a result, the ECJ would not have to be bothered with cases in which the authorities agree on a solution that is also approved by the taxpayer. Only those legal questions that remain contentious even after efforts to reach an agreement have been undertaken would then be referred to the ECJ. This "filter effect" would ensure that procedures before the ECJ remain the exception. Moreover, as previously shown in the relationship between Austria and Germany, the preventive effect may continue to apply: the authorities of the states involved have an additional incentive to reach a solution before the ECJ reaches a final decision, possibly arriving at a conclusion that is not satisfactory for any of the two authorities. Of course, there can be no guarantee that the ECJ will not resolve the same contentious legal issue in a subsequent case, which is actually referred to it, in a different manner than the authorities of two states had done in a MAP. The reason is that the ECJ is not bound to a mutual agreement. After all, however, the ECJ would also benefit from the fact that two authorities using experts in DTC law have already reached a presumably well-founded solution, which the ECJ will probably use for guidance if it finds it convincing. In this respect, the solutions reached in a MAP can also serve as a model for the ECJ. In addition, legal issues and issues of fact are often difficult to separate and authorities in MAPs are able to reach consent on both levels. Therefore, the risk of double taxation can often be warded off more effectively by means of a MAP rather than by having the ECJ provide the solution to a legal issue that, although binding, would then have to be applied by national courts in the two states to the case before them. If the facts established by the authorities and courts in the two states diverge even slightly, double taxation may continue to persist despite the binding solution to the legal issue by the ECJ.[46]

If a question relating to the interpretation of EU law is pending before a national court – and a directive on the avoidance of double taxation would be part of EU law – the ECJ has the monopoly on interpretation. Each national court can refer to the ECJ by way of a preliminary ruling procedure

45. Lang, *supra* n. 42.
46. Id.

and even a court of final appeal must do so when there are doubts as to the interpretation of a provision in EU law. The national legislator must not limit this power – which is an obligation for the court of last instance.[47]

This was clearly expressed by the ECJ in *Aziz Melki and Selim Abdeli* (Joined Cases C-188/10 and 189/10).[48] In this decision, the referring court asked:

> Whether article 267 of the TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, requiring the courts of that Member State to rule as a matter of priority on whether to refer, to the national court responsible for reviewing the constitutionality of laws, a question on whether a provision of national law is consistent with the Constitution, when at the same time the conflict of that provision with EU law is at issue.[49]

The ECJ established:

> [T]hat while it might be convenient, in certain circumstances, for questions of purely national law to be settled at the time the reference is made to the Court ..., national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of EU law, or consideration of their validity, necessitating a decision on their part.... The lower court must be free, in particular if it considers that a higher court's legal ruling could lead it to give a judgment contrary to EU law, to refer to the Court questions which concern it.... Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent European Union rules from having full force and effect are incompatible with those requirements which are the very essence of EU law.... This would be the case in the event of a conflict between a provision of EU law and a national law, if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply EU law, even if such an impediment to the full effectiveness of EU law were only temporary....[50]

47. Lang, *supra* n. 42, at n. 41.
48. ECJ, 22 June 2010, Joined Cases C-188/10 and C-189/10, *Aziz Melki and Sélim Abdeli* [2010] ECR I-5667.
49. Id. at para. 22.
50. *Aziz Melki and Sélim Abdeli* (C-188/10 and C-189/10), at para. 41 et seq.

Finally, the ECJ established that:

> Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority nature of that procedure prevents – both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question – all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling. On the other hand, Article 267 TFEU does not preclude such national legislation, in so far as the other national courts or tribunals remain free,
>
> – to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary,
> – to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and
> – to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to European Union law.[51]

The primacy of EU law is an obstacle to the application of a national provision that is not in conformity with these principles:[52]

> In accordance with settled case-law, a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.

According to these principles, it is evident that any national regulation stipulating that a MAP must necessarily take place prior to a referral to the ECJ would be in violation of EU law and should be disapplied. The power of the national court to refer to the ECJ for the interpretation of EU law – in this case, of a directive – at any stage of a case pending before it, must not be compromised. According to the ECJ case law quoted above, even if the national court were only temporarily – i.e. until the conclusion of the MAP

51. Id. at para. 57.
52. ECJ, 19 Nov. 2009, Case C-314/08, *Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu* [2009] ECR I-11049, para. 81.

– prevented from introducing a preliminary ruling procedure and could do so any time after conclusion of the MAP, this would be a violation of EU law.[53]

As long as the national court, however, is free to agree to the introduction of a MAP or refer to the ECJ outright, these concerns do not apply: There would be no issue, for instance, if the responsible authority of the respective Member State must be informed that the question on the interpretation of a national provision based on the Directive on the avoidance of double taxation is pending before a national court, and the national court is considering the reference for a preliminary ruling, and the responsible authority subsequently has the possibility to request from the national court to wait until a MAP is introduced and concluded. The decisive factor here is that the national court is not obliged to comply with this request. It must be equally inadmissible to enforce a suspension of the proceedings through judicial remedies so as to obtain a MAP. Therefore, a decision on this request must not be subject to a re-examination by the next higher court, since this would limit the court entitled to request a preliminary ruling in its powers granted by EU law all the more.[54]

The national court will only refrain from applying for a preliminary ruling procedure if it expects that the introduction of a MAP is the more appropriate form of legal protection in a given case. This will apply, for instance, if it offers the possibility of a quick agreement that is also acceptable to the taxpayer. The advantage of a MAP, however, may lie in precipitating a concordant view of the facts of the case on both sides. A hearing of the taxpayer by the court can facilitate this assessment. The court, however, will also have to consider whether the sole intention of the national authority is to prevent or at least delay a decision by the ECJ.[55]

The ECJ will eventually be referred to if the MAP fails to reach a positive outcome within the period granted by the national court. Even in the case of a mutual agreement, however, it is possible that the national court will nevertheless decide to refer to the ECJ. This will be particularly the case when the national court does not view the solution reached through the MAP as convincing. In so far as this is admissible under national law, a

53. Lang, *supra* n. 42.
54. Id.
55. Id.

taxpayer who is content with the mutual agreement will be able to deny the court the possibility to request a preliminary ruling by withdrawing the legal remedy, thus revoking the court's jurisdiction to decide on the case.[56]

It may be disputable whether it is also possible in the case of a court of last instance to await the completion of the MAP before requesting a preliminary ruling. After all, the court is bound by an obligation to make a reference. This, however, does not mean that in such cases the court must immediately request a preliminary ruling procedure in a specific case after its jurisdiction has been established. After all, a Supreme Court is usually master of its own procedure and can itself determine the sequence of procedural steps to take. It is, however, essential that a preliminary ruling is obtained before reaching a final decision where there is a dispute over the interpretation of EU law. Yet the Supreme Court will allow for a MAP only if it anticipates that the taxpayer will then withdraw his legal remedy after a mutual agreement is achieved. Should the proceedings remain pending before the court, the Supreme Court will still have no other choice but to request a preliminary ruling. As a result, the MAP would prove to have been unnecessary and the proceedings as a whole would have lasted longer.[57]

4.4. Conclusion

This short analysis illustrates that it is worthwhile to compare developments in Union law and in the tax treaty area. There is a lot to learn for the development of tax treaty law from Union law experience and vice versa. This author has chosen the interpretation and application of Union law and treaty law, and the dispute settlement issues as examples. The selection of these examples seems to be arbitrary, since there are many other parallels between those areas of law as well. However, if we apply methods in both areas of law which make it more likely that the results of the interpretation are easier to accept in contracting states and Member States, we can avoid conflicts already before they arise. For the remaining situations we need effective dispute settlement mechanisms in particular in areas where authorities of more than one state are involved. This is both true in the area of Union law and tax treaty law. It is therefore not really arbitrary to select these issues, but it would be very important if efforts are made to develop these ideas further.

56. Id.
57. Id.