The CFC Regime in Germany[1]

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1. General remarks

The German CFC legislation is found in sec. 7 to 14 of the German Act on External Tax Relations 1972 ("Außensteuergesetz" or "Foreign Tax Act", hereinafter "FTA"). The last update of the CFC regime took place in 2013. The existence of the CFC legislation can be explained by the fact that legal entities that have neither their registered office nor their place of management in Germany are not subject to comprehensive taxation in Germany. This provision made it attractive to transfer assets from German to foreign companies and thereby escape comprehensive taxation in Germany, and this "shielding effect" means that profits made by the foreign entity are only taxable at the level of the shareholder who is subject to comprehensive taxation in Germany if the shareholder receives dividends from the foreign entity. Sec. 7 to 14 FTA address such asset-transfer constructions that take advantage of intergovernmental tax differentials and lead to a distortion of competition (see "Steueroasenbericht"[3], "report on tax havens") and an

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[3] Bericht der Bundesregierung an den Deutschen Bundestag vom 23.06.1964 über die Wettbewerbsverfälschung, die sich aus Sitzverlagerungen und aus dem zwischenstaatlichen Steuergefälle ergeben können, Bundestags-Drucksache IV/2412; *Protzen* in: Kraft (ed.), Außensteuergesetz (Munich: C.H. Beck, 2009), § 7 m. no. 2.

avoidance of the taxation of income at the (comparatively high) German tax rates.[4]

2. How the system works

2.1. *Deemed Distribution System*

The underlying idea of the German CFC regime is quite simple: it assumes that comprehensive taxpayers shift profits to a foreign legal entity and refrain from distributing those profits to the German-based shareholder. Consequently, under certain circumstances, the CFC regime deems that there is a distribution of profits.[5] The rules are primarily applicable in the case of a passive-income-generating foreign company (non-German entity) that is controlled by a domestic individual or corporate shareholder (German resident). Due to the German CFC rules, the passive income of the foreign company is deemed to be distributed to domestic shareholders in proportion to their share (sec. 7 para. 1 FTA). This attribution of income takes place irrespective of whether the foreign company actually distributes the profits or not. As a result, the certain amount of income – the so-called inclusion amount ("Hinzurechnungsbetrag") – is included in the taxable income of the German resident and consequently subject to taxation in the form of German income tax, corporate tax and trade tax.[6] According to sec. 10 para. 2 s. 1 FTA, the distribution is simulated immediately after the closure of the relevant fiscal year of the foreign company.[7]

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[4] Taxation of corporate entities consists of Corporate Income Tax ("Körperschaftsteuer"; 15%), Local Business Tax ("Gewerbesteuer"; up to 17% in major cities, minimum rate of 7%) and Solidarity Surcharge ("Solidaritätszuschlag"; 5.5% on assessed taxes); taxation of individuals (including partners of a partnership) consist of Personal Income Tax ("Einkommensteuer", hereinafter "PIT"; up to 43-45%) plus Solidarity Surcharge; the Local Business Tax is mostly deductible against PIT.

[5] *Schönfeld* in: Flick/Wassermeyer/Baumhoff/Schönfeld (eds.), Außensteuerrecht (Munich: C.H. Beck, loose-leaf, § 7 AStG m. no. 4.2.

[6] *Protzen* in: Kraft (ed.), Außensteuergesetz, § 7 m. no. 6.

[7] *Reiche* in: Haase, Außensteuergesetz/Doppelbesteuerungsabkommen, Heidelberg: C.F. Müller: 2012, § 10 AStG m. no. 38.

Double taxation resulting from the income tax provisions modified by the CFC rules can be almost completely avoided by the exemption in sec. 3 No. 41 ITA.[8] Pursuant to this provision the inclusion amount that has actually been distributed is entirely tax-exempt when the taxation according to CFC rules took place in the year of distribution or in the previous seven years.

2.2. *Application Conditions*

In order to apply German CFC rules, it is necessary to satisfy three conditions according to sec. 7 para. 1 and sec. 8 para. 3 FTA. First, there has to be an individual or corporate German resident taxpayer with unlimited German tax liability who is required to hold more than 50% of the share capital of a foreign corporation (known as the controlled foreign company).[9] Second, the foreign entity must earn passive income. All revenues that are not included in the exhaustive enumeration of active income in sec. 8 FTA are classified as passive income.[10] Third, this passive income needs to be subject to an effective income tax burden of less than 25% (sec. 8 para. 3 FTA).[11]

2.2.1. *Relevant Participation in the Foreign Company*

2.2.1.1. *General rule*

The definition of a foreign company is provided in sec. 7 para. 1 FTA and sec. 1 CITA[12]. According to these rules, the CFC provisions are only applicable in the case of an entity whose registered office and place of effective management and control is in a foreign country. In addition, the entity needs to have a structure that leads to a classification as a corporation in accordance with the German entity-characterization rules (so-called

[8] *Köhler* in: Strunk/Kaminski/Köhler (eds.), Außensteuergesetz – Doppelbesteuerungsabkommen, Bonn: Stollfuß, loose-leaf, § 7 AStG m. no. 27.
[9] In cases in which the foreign company engages in certain financial transactions, this threshold is reduced to 1%; see below.
[10] *Schönfeld* in: Flick/Wassermeyer/Baumhoff/Schönfeld (eds.), § 8 AStG m. no. 1.
[11] *Köhler* in: Strunk/Kaminski/Köhler (eds.), § 7 AStG m. no. 26.
[12] Corporate Income Tax Act ("Körperschaftsteuergesetz").

"Typenvergleich").[13]

The foreign company is controlled by a shareholder (group of shareholders) if he (they) hold(s) at least 50% plus one vote of the shares of the foreign corporation or of the voting rights (sec. 7 para. 1, 2 FTA). In the case that the foreign entity does not have nominal capital or any voting rights, the proportion of the assets of the corporation is decisive (sec. 7 para. 2 s. 3 FTA).[14] In the calculation of the 50% threshold, even shares and voting rights of a mediating entity have to be considered proportional to the holding of the domestic shareholder in the mediating company (sec. 7 para. 2 s. 2 FTA).

A similar consideration of holdings is applicable in the case of intermediate partnerships (sec. 7 para. 3 FTA) as partnerships are not regarded as taxable entities with regard to corporate or personal income tax.

Thus, all shares that are at least indirectly held by domestic shareholders have to be taken into account, irrespective of the size of the stake or the number of interconnected entities.

2.2.1.2. *Income of an Investment Nature*

The CFC regime usually only applies if domestic taxpayers hold more than 50% of the shares of a controlled foreign company. However, if the company generates passive income of an investment nature[15] according to sec. 7 para. 6, 6a FTA, a 1% share is sufficient for the CFC regime to be applied with respect to this type of income. The provision offers a *de minimis* limit in sec. 7 para. 6 s. 2 FTA. The threshold is not applicable, and thus the shareholder is not subject to the CFC rules according to this provision if the passive income of an investment nature represents a maximum of 10% of

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[13] *Haun* in: Wöhrle/Schelle/Gross (eds.), Außensteuergesetz, Stuttgart: Schäffer-Poeschel (2005), § 7 m. no. 9 et seq.
[14] Ibid., § 7 m. no. 59.
[15] Income derived by the CFC from the holding or administration of cash, receivables, securities, participations.

the gross passive income of the foreign company *and* if this excluded amount does not exceed 80,000 euros.[16]

However, a stake that does not reach the threshold of 1% also leads to an application of the CFC provisions pursuant to sec. 7 para. 6 s. 3 FTA if the foreign entity generates almost exclusively passive income (about 90%) of an investment nature.[17]

2.2.2. *Determination of Passive and Active Income*

Sec. 8 FTA contains an exhaustive enumeration of revenues that can be qualified as active ("good" or "harmless") income and are therefore not subject to the CFC regime. All revenue that cannot be subsumed under one of these categories must be classified as passive ("bad" or "harmful") income.[18] Referring to the application of sec. 8 FTA, each economic activity of the foreign company has to be investigated separately.[19] The determination takes place by way of a functional approach.[20]

According to sec. 8 FTA, revenues are active, subject to certain exemptions, if they derive from agriculture and forestry, the manufacturing of property, the generation of energy, exploration and exploitation of natural resources or if they refer to the operation of a banking or insurance business for which commercial business establishments are pursued.[21] The same applies to income that is generated by trading, the provision of services, letting and leasing, and the borrowing and lending of capital under certain further conditions.[22] Finally, also classified as active income are dividends distributed

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[16] *Reiche* in: Haase (ed.), § 7 AStG m. no. 119, 124.
[17] *Bundesfinanzministerium* (Federal Ministry of Finance), 14.05.2005; Bundessteuerblatt I 2004, p. 3; *Lehfeldt* in: Strunk/Kaminski/Köhler (eds.), § 8 AStG m. no. 154.
[18] *Reiche* in: Haase (ed.), § 8 AStG m. no. 1; *Rödel* in: Kraft (ed.), § 8 m. no. 2.
[19] *Haun* in: Wörhle/Schelle/Gross (eds.), § 8 MN 3.
[20] *Schönfeld* in: Flick/Wassermeyer/Baumhoff/Schönfeld (eds.), § 8 AStG m. no. 31; *Reiche* in: Haase (ed.), § 8 AStG m. no. 13.
[21] Sec. 8 para. 1 No. 1-3 FTA.
[22] Sec. 8 para. 1 No. 4-7 FTA.

by corporations, gains from corporate shares and revenue resulting from corporate reorganization.[23]

In the decision of the Court of Justice of the European Union (CJEU) in the *Cadbury-Schweppes* case,[24] the British CFC rules were declared to be not in line with the freedom of establishment. According to the Court such anti-avoidance rules could be justified; however the taxpayer must be granted the option to refute the charge of tax evasion by proving the pursuit of an economic activity. German authorities quickly realized the relevance of this decision for the German CFC provisions. The German Federal Ministry of Finance reacted promptly and issued a circular[25] that restricted the taxation to such cases that were solely artificial by allowing the taxpayer to provide counterevidence. Later in 2008 the German legislator introduced a complementary *activity test* in sec. 8 par. 2 FTA.[26] According to this test, a company that has its registered office or place of effective management or control in a member state of the European Union or the EEA that provides administrative assistance is excluded from the German CFC rules if the pursuit of an economic activity can be proven.[27]

According to the explanatory memorandum of the provision, several criteria have to be taken into account to produce evidence that an economic activity exists.[28] One indication is a fixed establishment set up for an indefinite period in the foreign state. Also of significance are actual commercial operations and the presence of business premises and staff. Equally a continuous participation in general economic transactions leads to the assumption of an economic activity. However, occasional capital investments as well as mere-

[23] Sec. 8 para. 1 No. 8-10 FTA.
[24] ECJ, 02.05.2006, C-196-05 (Cadbury/Schweppes), ECR 2006, I-7995.
[25] Bundessteuerblatt I 2007, 99.
[26] *Schönfeld* in: Flick/Wassermeyer/Baumhoff/Schönfeld (eds.), Vor §§ 7-14 AStG m. no. 202 et seq.; *Lehfeldt* in: Strunk/Kaminski/Köhler (eds.), § 8 AStG m. no. 182.13 et seq.
[27] *Reiche* in: Haase (ed.), § 8 AStG m. no. 122 et seq.
[28] Explanatory memorandum of the Jahressteuergesetz 2008; see *Protzen* in: Kraft (ed.), § 7 m. no. 4.

ly administrative shareholdings without any executive functions do not provide sufficient evidence.[29]

In 2013 the application of sec. 8 para. 2 FTA was broadened.[30] The option to disprove an actual economic activity is now also available for investments as defined by sec. 7 para. 6, 6a FTA (corporations of an investment nature). According to the preamble, the provision was altered to eliminate any remaining conflict with regard to European law.[31]

2.2.3. *Low-taxed Income*

Sec. 8 para. 1 and 3 FTA state that low taxation has to be assumed in the case of an effective income tax burden of less than 25%. Sec. 8 para. 3 s. 3 FTA amends this rule in that in the case of a theoretical income tax burden of at least 25%, there is also a low taxation in cases in which these taxes are not actually levied.

To determine the tax liability, all income taxes that are levied on the passive income of the foreign company have to be taken into account, irrespective of which state levies the taxes. Even voluntary tax payments have to be considered.[32] According to sec. 8 para. 3 s. 2 FTA, claims for reimbursements that refer to income tax paid also need to be included.

The exact determination of the effective income tax liability takes place according to the actual residual tax rate. As a result, even if the foreign company is actually subject to a tax rate of 25%, there is still low taxation according to sec. 8 FTA if this rate decreases because of special reductions or exemptions.[33] In addition, the taxable passive income that has been generated by the foreign company has to be included in the tax base for the

[29] *Kraft* in: Kraft (ed.), § 8 m. no. 740.
[30] "Amtshilferichtlinie-Umsetzungsgesetz", Bundesgesetzblatt I 2013, 1809.
[31] Bundestags-Drucksache 17/13033, p. 170.
[32] Bundesfinanzhof, 3 May 2006, I R 124/04, BFH/NV 2006, p. 1729; Bundesfinanzministerium, 13 April 2007, BStBl. I 2007, p. 440; *Lehfeldt* in: Strunk et al. (eds.), § 8 AStG m. no. 186.1.
[33] *Schönfeld* in: Flick/Wassermeyer/Baumhoff/Schönfeld (eds.), § 8 AStG m. no. 706.

same amount that would be the case according to the rules of the German tax regime.[34]

2.3. *Legal consequences – comparison with non-deemed dividends*

Due to the deemed distribution system of the German CFC regime, the generation of passive income by a foreign entity leads to an increase in the domestic shareholder's tax base and thus becomes subject to German income tax. According to sec. 10 para. 2 s. 1 FTA, these deemed distributed revenues are – like "regular" (non-deemed) dividends – classified as income from capital investment (sec. 20 para. 1 No. 1 ITA). The distribution is simulated immediately after the close of the relevant fiscal year of the foreign company.[35] To avoid double taxation, taxes already paid abroad are considered in this computation of the taxable inclusion amount and are deducted.

Unlike regular dividends, the inclusion amount is not subject to the lower flat tax rate of 25% for gains resulting from private assets.[36] In addition the so-called "Teileinkünfteverfahren"[37] as well as the extensive participation exemptions stipulated in sec. 8b para. 1 CITA are not applicable.[38]

3. CFC rules and double tax conventions

3.1. *General remarks*

As in other jurisdictions, the compatibility of CFC rules with DTC law is disputed in Germany. As an extensive debate on this question would go beyond the scope of this article, we would like to offer some basic remarks.

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[34] Ibid., § 8 AStG m. no. 708.
[35] *Reiche* in: Haase (ed.), § 10 AStG m. no. 38.
[36] Sec. 10 para. 2 s. 3 FTA and sec. 32d ITA.
[37] If a participation is part of an individual´s (or partnership´s) business assets, dividends are taxed at the personal income tax rate of the taxpayer (no flat tax). To mitigate economic double taxation of the revenue, 40% of received dividends are tax-free pursuant to sec. 3 No. 40 s. 1 lit. d PITA.
[38] Sec. 10 para. 2 s. 3 FTA.

First of all it can be stated that some double tax conventions (DTC) contain proviso clauses for CFC legislation. If this is the case, a precedence of the CFC legislation over treaty law is ensured. It is part of German treaty policy to include a reference to the CFC rules in recently concluded treaties.[39]

As regards the opinion that German CFC legislation constitutes a treaty override,[40] the question arose of whether CFC rules were applicable without a clear statement by the legislator. The German legislator tried to settle any doubt in 1992 by introducing sec. 20 para. 1 FTA, which states that the provisions of the German CFC legislation will not be affected by tax treaties. For the German legislator, sec. 20 para. 1 FTA was seen as purely declaratory; they therefore took the view that the pre-eminence of German CFC legislation was also applicable to assessment periods before 1992. While in the 1990s it was generally accepted that the legislator had the right to "override" tax treaties, in recent years doubts have increasingly arisen. Indeed, the German Federal Constitutional Court has not yet decided on a treaty override in tax law, but due to a request by the Federal Finance Court[41], it is likely that the Constitutional Court will state its position on this matter in the near future.

Moreover, it is worth mentioning that numerous DTCs concluded by Germany provide for a switch-over clause by which tax exemption is only granted with respect to income from active businesses. With respect to these activities, more recent DTCs explicitly refer to sec. 8 para 1 FTA.[42]

3.2. *"Shielding effect" of tax-exempt income derived from foreign partnerships*

In cases in which the foreign entity generating passive income is not a corporation within the meaning of the CFC rules but a partnership, there is ba-

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[39] See e.g. Art. 23 and No. XV of the Protocol of the DTC Germany-Netherlands of 2012.

[40] Cf. *Wassermeyer/Schönfeld* in: Flick/Wassermeyer/Baumhoff/Schönfeld (eds.), § 20 AStG m. no. 22.

[41] Bundesfinanzhof, 10 January 2012, I R 66/09, BFHE 236, 304.

[42] See e.g. in the recent past Art. 23 para. 1 lit. c DTC Germany-Great Britain of 2010; Art. 22 para. 1 lit. c DTC Germany-Netherlands of 2012.

sically no "shielding effect" due to the transparency principle. As a result, CFC rules are not applicable. However, a kind of "shielding effect" might be caused by tax exemptions in double taxation treaties that may lead to non-taxation of passive income in Germany. These cases are captured by sec. 20 para. 2 FTA. This provision includes a switch-over clause providing for an application of the credit method.[43] This construction gives rise to similar effects to those of an interposed foreign subsidiary company which is regarded as a legal entity.[44]

4. Remaining sets of problems in German CFC legislation

4.1. *Compatibility with constitutional law*

4.1.1. *Low taxation in terms of sec. 8 para. 3 FTA*

The current applicable tax rate of 25% was introduced in 2002.[45] The original point of reference was half the tax burden of retained profits of corporations in Germany. The German corporate income tax is today levied at 15%: if the solidarity surcharge ("Solidaritätszuschlag") and the average local business tax ("Gewerbesteuer") are added, the average total burden in Germany is around 30%.[46] The legislator should therefore reduce the low taxation threshold to a level that deserves the denomination "low taxation" – such as a tax burden of 15%, which would again be around half of the burden for a capital company applicable to retained profits including trade taxes and solidarity surcharge.[47] Lowering the threshold to 15% would have an additional effect: although the average tax burden is currently around 30%, it is possible that – when the minimum local business tax rate of 7%

[43] The switch-over clause was tested against Community Law in the case Columbus Container Services by the ECJ (ECJ, 06.12.2007, C-298-05, ECR 2007, I-10451; see *Lampert* in: Kellersmann/Treisch/Lampert/Heinemann (eds.), Europäische Unternehmensbesteuerung I, 2nd edition, Wiesbaden: Springer/Gabler, 2013, p. 135 et seq.
[44] Bundestags-Drucksache 12/1506.
[45] Unternehmenssteuerfortentwicklungsgesetz, Bundesgesetzblatt I, p. 3858.
[46] See above footnote 2.
[47] *Kraft*, Konzeptionelle und strukturelle Defizite der Hinzurechnungsbesteuerung – Reformbedarf und Reformnotwendigkeit, Internationales Steuerrecht (IStR) 19, no.11 (2010), 377 (378).

is applied – the tax burden in Germany is only 22.825%.[48] If the foreign tax burden is between 22.825% and 25%, a breach of the rule of equality under Art. 3 para. 1 of the German constitution is likely, as investments abroad are sanctioned, while the same conditions are applied in Germany with no consequences.

4.1.2. *Structural enforcement deficit*

In German tax law the "ability-to-pay principle" derives from Art. 3 para. 1 of the German constitution; as a special form of this principle it also demands equality when levying taxes.[49] The error rate of tax assessments within the German CFC legislation is estimated at around 90%.[50] As a result the uneven burden on outbound investments is subject to a structural enforcement deficit and thus possibly not in accordance with the German Constitution.

Additionally, even the assessment of the information required to determine whether or not the CFC rules are to be applied demands tremendous operational resources. These assessments might be possible for large companies with in-house tax departments, but it is difficult to see how the tax authorities – poorly staffed and financed – will be able to fulfill their constitutional duty of verification.[51]

According to sec. 7 para. 6 s. 3 FTA, one single share can be enough to trigger the CFC taxation. This means that taxpayers have to provide information they simply cannot access: they do not have the right under company law to search for any relevant documents.[52] They cannot fulfill the obli-

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[48] *Haarmann,* Wirksamkeit, Rechtmäßigkeit, Bedeutung und Notwendigkeit der Hinzurechnungsbesteuerung im AStG, Internationales Steuerrecht (IStR) 20, no.15 (2011), 565 (571).
[49] *Waldhoff*, Verfassungsrechtlich relevante Vollzugsdefizite bei Steuerfällen mit Auslandsbezug am Beispiel von §§ 7 ff. AStG, Steuer und Wirtschaft (StuW) 90, no.1 (2013), 121 (123 et seq.).
[50] *Wassermeyer*, Die Fortentwicklung der Besteuerung von Auslandsbeziehungen Anmerkungen zu den derzeitigen Überlegungen zur Reform des Außensteuerrechts, IStR 20, no. 4 (2011), 113, citing the then responsible head of division for the CFC department in the Federal Ministry of Finance.
[51] *Waldhoff*, StuW 2013, 121 (141).
[52] *Kraft*, IStR 2010, 377 (383).

gation to co-operate, which is punishable by law.[53] The CFC provisions are therefore subject to a deficit in information search and execution.[54]

4.1.3. *The constitutional principle of clarity for legal rules*

Sec. 8 para. 1 FTA does not define active income, but lists exhaustively what constitutes passive income. The wording of the law does not provide an informative basis for the treatment of mixed activities that cannot be subsumed under any of the existing *corpus delicti*.[55] Even the legislator has seen the need for reform in this area, without having reacted thus far.[56] In an ever-evolving globalized world, changing business models are not recognized by the income catalogue: this becomes especially evident in the area of e-commerce and e-business.[57]

The term "income" within the meaning of sec. 8 para. 3 FTA might seem clear with regard to the tax scale, but it is not obvious which tax base the legislator intends to apply: the wording only refers to "income". A tax provision is however only clear when both the tax scale and tax base are included.[58] Furthermore, in sec. 7 para. 1 FTA it is not crystal clear whether the term "resident taxpayers" also embraces a single taxpayer; moreover, difficulties can arise with respect to company successions. As a result sec. 7-14 of the FTA are in need of amendment and clarification; however, it is doubtful whether this lack of clarity has to be regarded as a breach of the Constitution.

[53] Ibid.
[54] *Haarmann*, IStR 2011, 565 (572).
[55] *Wassermeyer* in: Flick/Wassermeyer/Baumhoff/Schönfeld (eds.), § 8 AStG m. no. 11 et seq.
[56] Cf. *Waldhoff/Grefrath,* Normenklarheit und Bestimmtheit der Vorschriften über die Hinzurechnungsbesteuerung als Problem des Steuervollzugs, Internationales Steuerrecht (IStR) 22, no. 13 (2013) 477 (481); Bericht der Bundesregierung zur Fortentwicklung des Unternehmenssteuerrechts, supplement of Finanzrundschau (FR) 83, no. 11 (2001), 33.
[57] *Kraft*, IStR 2010, 377 (379).
[58] *Waldhoff/Grefrath*, IStR 2013, 477 (481).

4.2. *Compatibility with EU Law*

The German CFC regime's compliance with EU law is also doubtful. The fundamental freedoms particularly the freedom of establishment (Art. 49 TFEU) and the freedom of movement of capital (Art. 63 TFEU) are to be considered.[59] An interference with the fundamental freedoms can be made out in different places. The CFC regime only applies to foreign companies and not to those in Germany, which is obviously problematic in light of the freedom of establishment.

According to the judgment of the Court of Justice of the European Union (CJEU) in the *Cadbury Schweppes* case, CFC rules are justified only to the extent that they prevent wholly artificial arrangements intended to escape the national tax normally payable.[60] In its judgment the Court considered that the resident company must be given an opportunity to produce evidence that the CFC is actually established and that its activities are genuine.[61] Sec. 8 para. 2 FTA is obviously based on this consideration when it stipulates that the taxpayer may prove that the company pursues actual economic purposes. However, some German legal scholars criticize the fact that the burden of proof for this economic activity falls on the taxpayer, at least when there are no objective facts providing for the absence of an actual economic operation.[62] In this case, according to this opinion, the fiscal authorities should assume the burden of proof. Indeed, the obligation to co-operate is more comprehensive for foreign tax structures according to sec. 90 para. 2 Abgabenordnung (fiscal code), but as long as this obligation to co-operate is fulfilled, the burden of proof should fall on the fiscal authorities.[63]

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[59] According to *Haarmann*, IStR 2011, 565 (568), the stand-still provision for the freedom of capital movement does not apply, as the provisions containing German CFC legislation have been elementarily altered in the past decade and now contain a de-facto new framework of regulations.
[60] ECJ, 02.05.2006, C-196-05 (Cadbury/Schweppes), m. no. 57.
[61] Ibid., m. no. 70.
[62] *Haarmann*, IStR 2011, 565 (570).
[63] Ibid.

Moreover, according to the Court of Justice of the European Union, determining an artificial structure requires a subjective element: sec. 8 para. 2 FTA does not provide for such an element.[64] Due to these deficiencies the German CFC regime may still be in breach of the freedom of establishment.

After the latest amendment of sec. 8 para. 2 FTA in 2013 it now also provides the possibility to prove the contrary to the CFC taxation in cases of "income of an investment nature"[65] from sec. 7 para. 6, 6a FTA. Although this provision was introduced in order to comply with EU law, its success is still debatable. According to Art. 63 TFEU, the freedom of capital movement also applies to investments from third states. As the new sec. 8 para. 2 FTA excludes base companies in third countries, it is still possible for the CFC regime to be in breach of the freedom of capital movement.

5. Conclusion

The German CFC regime is still in dire need of reform. In addition to structural problems, the CFC legislation may well be in breach of German constitutional law. In spite of the myriad changes made to the CFC provisions in sec. 7-14 FTA, there are still numerous problems concerning EU law.

[64] Ibid.
[65] See above 2.2.2.1.