

## The relationship between Double Tax Conventions, European Tax Law and domestic legal order: the case of Spain\*

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“A lot of people think international relations is like a game of chess. But it's not a game of chess, where people sit quietly, thinking out their strategy, taking their time between moves. It's more like a game of billiards, with a bunch of balls clustered together”

*Madeleine Albright – United States Secretary of State (1997-2001)*

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### 1. Introduction

In the Spanish Constitution there are no specific references neither to Double Tax Conventions (hereinafter DTCs) nor to European Union law (hereinafter EU law). However, article 96 states that “all validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order”. Given that, once in the internal legal order, their provisions “may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law<sup>2</sup>”. This way, we can admit that both DTCs and EU law occupy, in practice, a position over the Spanish law in our legal system. Although, we have no

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<sup>2</sup> [Spanish Constitution](#), art. 96.

initial references, clarifying the hierarchy between DTCs and EU law within the Spanish legal system is the main goal of this paper.

The absence of regulation and the very few judgments in our country regarding this relationship might be an obstacle at first glance. However, in order to achieve this objective we will focus first on the independent relationship between these elements (DTCs and EU law) and the Spanish legal system. After this analysis is done we will be in a position to explain this complex connection.

The paper is divided in four main parts; the first two parts consist in a separate study on the position of both DTCs and EU law inside the Spanish law.

The third part will focus on the relation between DTCs and EU law. Lastly, in the final conclusions we will try to explain how they fit in our system and how the potential conflicts should be solved.

## **2. DTCs and the Spanish legal system**

Becoming a member of the OECD and the signing of many DTCs was a landmark that demonstrated the incorporation of Spain to the international scenario after the stabilization plan of 1959<sup>3</sup>. Until now, Spain has signed more than 100 DTCs with countries all around the world, such as all the EU members, most South American countries and many Africans too<sup>4</sup>.

### **2.1 The evolution of DTCs in Spain**

Spain is a member of the OECD since its creation in 1961. During the dictatorship (until 1975), given the inexistence of democracy, the participation in the OECD was limited to the reception of ideas of rationalization and modernization. Nowadays, our participation in this organisation is much more active.

One of the most important documents produced within the OECD, beginning in 1963, is the Model Convention (hereinafter MC) to avoid the double taxation in the field of taxation on personal income and on capital. This first version of the MC was soon transformed into the MC to avoid double taxation

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<sup>3</sup> Galán Ruíz, J. & Rodríguez Ondarza, J. A. *Convenios de doble imposición internacional. Análisis del caso español*, Instituto de Estudios Fiscales, 19/2010, p. 5.

<sup>4</sup> [List of DTCs signed by Spain](#) (last visit 03/12/2016).

of 1977. Since then, the OECD MC, as well as the extensive Commentary by the OECD Committee on Fiscal Affairs, have been updated frequently, especially after 2000. The goal of these revisions is to adapt them to the evolution of international taxation.

The main objective of a DTC is the elimination of the double taxation, therefore its role distributing tax powers between countries and controlling legal and economic effects of their interrelation is essential. In the last years, the MC, and DTCs consequently, have evolved into a broader coordination instrument, incorporating further procedural and material clauses<sup>5</sup>. The structure and principles of the Spanish DTC followed the MC of the OECD with small differences regarding the taxation of specific incomes, mechanisms to correct double taxation or anti-abuse measures.

## 2.2 Position of DTCs in the Spanish legal order

The process of approval of a DTC in Spain is driven by the Government, who shall "agree the negotiation and signature of international treaties" (art. 5.1 d) of the Spanish law 50/1997). According to art. 94.1 of the Spanish Constitution, after its signature, a DTC must be approved in the *Cortes Generales*, which comprises two houses: the Congress of Deputies and the Senate.

Once here, there is no scope for negotiation for the *Cortes Generales*: is 'take or leave it'. After receiving the approval, the formal consent to be bound by the DTC depends on the King's signature and, generally, on the exchange of instruments of ratification, following the provisions of art. 30 of the MC. This exchange sets the data for the entry into force of the DTC. The full effect of the DTC requires, however, its formal publication in the *B.O.E.* (Spanish Official Gazette), after that, it becomes part of the legal system and can be invoked before the domestic courts.

Article 96 of the Spanish Constitution places international treaties (DTCs among them) in a position over the internal law: "all validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order".

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<sup>5</sup> Calderón Carrero, J.M & Martín Jiménez, A. *Los tratados internacionales. Los Convenios de doble imposición en el ordenamiento español: naturaleza, efectos e interpretación* in *Convenios Fiscales Internacionales y Fiscalidad de la Unión Europea*, Néstor Carmona Fernandez (ed), Wolters Kluwer, 2014, p. 41.

This prevalence can be easily verified in a specific and recurring article across different Spanish income taxes laws: art. 5 of the Spanish law 35/2006, on the *Impuesto sobre la Renta de las Personas Físicas* (Personal Income Tax); art. 3 of the Spanish law 27/2014, on the *Impuesto sobre Sociedades* (Corporate Income Tax) and art. 4 of the Spanish Royal Decree 5/2004, on the *Impuesto sobre la Renta de no Residentes* (Income Tax of Non-Residents). This article reads as follows:

“The provisions of this law shall be understood without prejudice to the dispositions of treaties and international conventions that are part of the domestic legal system, according to article 96 of the Spanish Constitution”

This prevalence is also in accordance with article 27 of the Vienna Convention on the Law of Treaties, fully in force in Spain since the day of its publication in the *B.O.E.* on the 13<sup>th</sup> of June 1980: “a party shall not invoke the provisions of its internal law to justify its failure to comply with a treaty (...)”<sup>6</sup>.

In fact, most of the authors consider that the priority of international law over internal law is not based on its constitutional recognition but on the binding effects of the international commitment itself<sup>7</sup>.

In spite of this prevalence, most times DTCs cannot be applied in an isolated way and require of the internal rules for their interpretation. Therefore, the Spanish legal principles are still fully in force when applying DTCs. A great example is the recent judgment of the Spanish Supreme Court (hereinafter TS) of 12<sup>th</sup> February 2015 (no. 614/2015) in which the court admits that the internal rule against tax avoidance (art. 15 of Spanish law 58/2003, *General Tributaria* [General tax law]) may be used to re-qualify the transfer pricing of some activities between two companies acting under a DTC between Spain and the United Kingdom.

Some other times, however, the domestic Spanish law might play a role over the DTC in a different level, on a “vertical” position<sup>8</sup>.

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<sup>6</sup> Art. 27 [Vienna Convention on the Law of the Treaties](#).

<sup>7</sup> Marín López, J. *Orden jurídico internacional y Constitución Española*, Revista de Derecho Político, 45/1999, p. 38.

<sup>8</sup> Calderón Carrero, J.M & Martín Jiménez, A. *Los tratados internacionales*, *op. cit.* p. 44.

The best examples are the rules that set the taxable event of the different taxes. DTCs main aim is to decide which state may tax each type of income, indicating the taxes included in the DTC, harmonizing tax terms and eliminating double taxation. However, it is the domestic law's duty to set the taxable events of the different taxes, by doing so it defines the scope of the DTC itself. Only after the taxable event has been set up, the DTC will decide whether it would be taxed by one state or the other and to what extent.

The relation between DTCs and internal law is then clear. Much more conflictive is the relation between international treaties and the Spanish Constitution itself, since its article 95.1 states that "the conclusion of an international treaty containing stipulations that are contrary to the Constitution shall require prior constitutional amendment"<sup>9</sup>.

From this article we may infer that international treaties play a role over the Spanish Constitution. Some authors support this conclusion admitting that the Spanish Constitution authorises its own revision when it is contrary to an international treaty<sup>10</sup>.

On the other hand, another group of authors, whom we support, have interpreted this text in the way that the Spanish Constitution prevails to international treaties such as DTCs. If the conclusion of an international treaty is contrary to the Spanish Constitution, and therefore demands a previous revision of the latter, it means that treaties cannot modify the Spanish Constitution<sup>11</sup>.

Hence, as long as the Spanish Constitution is not amended, no international treaty might be concluded with such content, and if done, it would be against the Spanish Constitution and would not be applicable internally, although Spain may incur in international responsibilities for its non-application<sup>12</sup>.

The truth is that, in practice, the Spanish TS places all the DTCs under the Spanish Constitution, giving them the status of law. Precisely, in the

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<sup>9</sup> [Spanish Constitution](#)., art. 95.

<sup>10</sup> Marín López, J. Orden jurídico internacional y Constitución Española, *op. cit.* p. 46.

<sup>11</sup> Santaolalla López, F. *Los tratados como fuente del derecho en la Constitución*, in La Constitución española y las fuentes del derecho, vol. III, Instituto de Estudios Fiscales, Madrid, 1979, p. 1924.

<sup>12</sup> Torres del Moral, A. *Principios de Derecho Constitucional*, Servicio de Publicaciones de la Facultad de Derecho, Universidad Complutense de Madrid, 1992, p. 316-317.

judgment of the Spanish TS from 18<sup>th</sup> May 2005 (no. 3204/2005) the court lists the characteristics of DTCs and, among them, it underlines that they are international treaties with status of law, subject to the regime of article 96 of the Spanish Constitution. Also, the Spanish TS highlights that the provisions of a DTC are not options that can be chosen or not by the parties. Finally, the judgment contains a few important points regarding its interpretation, which will require some of the following nuances:

- They cannot be interpreted with internal rules.
- Their interpretation must follow their text and the intention of the parties.
- The Commentaries that accompany the Models are helpful.
- The interpretation has to be preferably dynamic and autonomous for each DTC.

### **2.3 The interpretation of DTCs in the Spanish legal system**

Without a doubt, interpretation is one of the most controversial issues in the field of DTCs. Problems regarding interpretation may lead to double taxation (or double non-taxation) situations which may even worsen the starting situation without a DTC<sup>13</sup>.

Although the Spanish courts and the Spanish tax administration had historically ignored international tools and used to apply domestic rules when interpreting DTCs, the truth is that nowadays both the courts and the tax administration use, when necessary, international interpretation rules efficiently<sup>14</sup>.

One of the most internationally recognised interpretation tools are the rules included in articles 31 to 33 of the Vienna Convention on the Law of Treaties. A good example of their application is the binding consultation of the Spanish tax administration from 7<sup>th</sup> July 2008 (V-1410-08) in which admits that the application and interpretation of DTCs must comply with the principles established in article 31.1 of the Vienna Convention on the Law of Treaties: "a treaty shall be interpreted in good faith in accordance with the ordinary

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<sup>13</sup> Pires, M. *International juridical double taxation*, Kluwer Law and Taxation Publishers, 1999, p. 229.

<sup>14</sup> Ribes Ribes, A. *Relatoría nacional de España*, in *Fiscalidad y Globalización*, Fernando Serrano Antón, Eugenio Simón Acosta & Heleno Taveira Torres (eds.), Aranzadi, 2012, p. 393.

meaning to be given to the terms of the treaty in their context and on the light of its object and purpose<sup>15</sup>”.

In any case, the truth is that the Spanish tax administration usually uses interpretation tools in its own interest. At this consultation, for example, the application of the Spain-Brazil DTC through a permanent establishment located on a third country was denied alleging the existence of contrived operations in order to enjoy from the benefits of the DTC. Apart from these situations, the Spanish tax administration and the courts have not used the Vienna Convention very often, as these international principles are not useful when interpreting DTCs<sup>16</sup>.

The need of a more specific method of interpretation between internal and international rules is evident given the particularities of the DTCs. In this regard, all Spanish DTCs on income and on capital have followed quite accurately, with slight nuances, the different MCs of the OECD<sup>17</sup>, and were negotiated in accordance with it and with the Commentaries to the MC in force each time.

Then, it is obvious that the MC and the Commentaries are essential for the interpretation of DTCs that are inspired on them, without needing any specific reference in the DTC itself<sup>18</sup>. Further still, Spain has included in the Protocol of recent DTCs (Spain-Croatia or Spain-Costa Rica, for example) a specific interpretation clause regarding the MC and its Commentaries:

“It is understood that provisions of the Convention which are drafted according to the corresponding provisions of the OECD Model Convention on income and on capital shall generally be expected to have the same meaning as expressed in the OECD Commentaries thereon. The Commentaries –as they may be revised from time to time—constitute a means of interpretation in the sense of the Vienna Convention of 23 May 1969 on the Law of Treaties”<sup>19</sup>

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<sup>15</sup> Art. 31.1 [Vienna Convention on the Law of the Treaties](#).

<sup>16</sup> Calderón Carrero, J.M & Martín Jiménez, A. Los tratados internacionales, *op. cit.* p. 55.

<sup>17</sup> Galán Ruíz, J. & Rodríguez Ondarza, J. A. Convenios de doble imposición, *op. cit.* p. 6.

<sup>18</sup> Chico de la Cámara, P. Interpretación y calificación de los convenios de doble imposición internacional, in *Fiscalidad internacional*, Fernando Serrano Antón (ed.), CEF, 2010, p. 301.

<sup>19</sup> [DTC Spain-Croatia](#), 2006, Protocol, VII.

Article 3 of the MC contains two different rules of interpretation. First of all, article 3.1 includes a list of definitions that can be seen as a “special rule” that prevails “unless the context otherwise requires” over any general rule of interpretation of treaties (Vienna Convention) and any other internal national rule<sup>20</sup>. The more definitions included in the DTC, the less problems of interpretation would arise in its application.

Article 3.2 instead contains a “general rule” applied when an interpretation conflict arises regarding any term that is not defined in the DTC. In this case that term would have, “unless the context otherwise requires”, the “meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies”<sup>21</sup>.

This clause has been strictly interpreted by the Spanish courts in many judgments (*Audiencia Nacional* [hereinafter AN], 19<sup>th</sup> December 2013, no. 115/2011; or TS, 19<sup>th</sup> March 2013, no. 3732/2010), and they considered that it operates almost automatically to redirect to the internal legislation when the term is not defined in the DTC.

We have to express our opinion against this exegesis of article 3.2, since the redirection to internal rules may create further interpretation differences between the states involved. In contrast, the use of other international instruments, such as the Commentaries, can bring positions closer working as a common ground.

While the MC and the Commentaries are commonly identified as *soft law*, the Spanish TS has almost always admitted their relevance when interpreting the Spanish DTCs (e.g. TS 18<sup>th</sup> June 2014, no. 2680/2014). Even further, in several controversial judgments, the TS raised the MC Commentaries to the category of “authentic interpretation” agreed within the OECD and, therefore, “unquestionably binding” for the Spanish tax administration, as it did not express any reservations at the time (e.g. TS 8<sup>th</sup> April 2000, no. 2920/2000). This position has been softened afterwards by other judgments that, acknowledging the importance of the Commentaries, exclude them from the category of “legal rule”, whose infringement could lead to an appeal before the TS (12<sup>th</sup> February 2003, no. 887/2003).

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<sup>20</sup> Calderón Carrero, J.M & Martín Jiménez, A. Los tratados internacionales, *op. cit.* p. 57.

<sup>21</sup> Art. 3.2 [MC of the OECD](#) with respect to taxes on income and on capital.

In fact, some authors consider that the high frequency of changes in the MC and its Commentaries may undermine their usefulness as an interpretation tool for a specific DTC, since there could be many different versions over time, some of them even approved after the DTC itself was concluded<sup>22</sup>.

To solve this problem, the OECD Tax Affairs Committee supports the idea of the so-called "dynamic interpretation", recommending the application of the updated Commentaries even to the DTCs that entered into force before the revisions.

This option has been criticized because it erodes the principle of legality required to modify any international treaty and produces legal uncertainty<sup>23</sup>.

We accept the choice of a dynamic interpretation of DTCs with updated MC and Commentaries when the objective is merely to clarify the content or the wording of the MC, not when the interpreter pretends to extend the terms further than the parties could have agreed<sup>24</sup>.

Until 2000 the Spanish tax administration used to support a static interpretation. However, the resolution of the *Tribunal Económico Administrativo Central*, of 8<sup>th</sup> September 2000 (no. 1847/2000) extended the anti-abuse clause of article 17.2 of the MC to an older DTC (Spain-Netherlands) that did not include it.

Although at first the Spanish courts refused this dynamic interpretation (AN, 3<sup>rd</sup> October 2002, no. 5430/2002), later, both the AN (10<sup>th</sup> May 2006, no. 2235/2006) and the TS (11<sup>th</sup> June 2008, no. 5265/2008), have aligned themselves with the dynamic interpretation. The reason given for this change of direction in the jurisprudence is that the 1992's MC stated, in its preamble, that is the will of the signatory states that the interpretation of the treaties in force follows the Commentaries, even when the DTC does not contain all the elements derived from the continuous updates of the MC.

Finally, we would like to empathize the position of the Spanish TS in the judgment of 12<sup>th</sup> February 2015 (no. 614/2015) cited above, regarding the interpretation of the DTC. In it, the TS assures that nothing prevents the

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<sup>22</sup> Lang, M. & Brugger, F. *The role of the OECD Commentary in tax treaty interpretation*, Australian Tax Forum, 23/2008, p. 108.

<sup>23</sup> Chico de la Cámara, P. Interpretación y calificación de los convenios de doble imposición internacional, *op. cit.* p. 304.

<sup>24</sup> Ribes Ribes, A. Relatoría nacional de España, *op. cit.* p. 394.

significance and function of international treaties to be interpreted in conjunction with article 31 of the Spanish Constitution (duty to contribute) and the procedural guaranties of article 24.2 of the same text. According to the court, the priority application of (tax) treaties may not exclude a systematic interpretation of the legal system, which includes the constitutional principles.

In other words, the application of a DTC cannot constitute an instrument to legitimize behaviours that seek to evade the duty to contribute or to override the powers of the tax administration in order to achieve that objective, as it is the case with the possibilities of re-qualification in the case of tax fraud.

### **3. European Union law in the Spanish tax system**

When the Spanish Constitution was approved, the European Economic Community already had a long trail. For this reason, with the hope of becoming part of it soon, article 93 of the Spanish Constitution allows the Spanish Parliament to attribute the exercise of competences derived from the Constitution to an international organization or institution. The Spanish Council of State in its opinion of 16<sup>th</sup> October 1997 on the Treaty of Amsterdam (no. 5072/1997) confirmed that this article 93 seemed to be the qualified and suitable way for Spain to cover the different stages of the European construction, a process of which the constitutional power was plenty aware.

As we underlined earlier, to ensure that the conclusion of an international treaty would not include stipulations that are contrary to the Spanish Constitution, its article 95 includes a prior constitutional revision: any chamber (Parliament or Senate) or the Government could request the Constitutional Court of Spain (hereinafter TC) to declare whether or not such a contradiction exists. It is rare that a DTC cause constitutional problems but the inclusion of Spain in the EU in 1986 certainly did.

Spain joined the EU after the European Court of Justice (hereinafter ECJ) had already settled the precedence of EU law over national legal systems through the Costa-ENEL case<sup>25</sup>:

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<sup>25</sup> ECJ, 15<sup>th</sup> July 1964, Costa-ENEL, [C-6/64](#).

“(t)he law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question. The transfer by the States from their domestic legal system to the community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights”.

The practical effects of this judgment, confirmed in the latter case law of the ECJ, are the following<sup>26</sup>:

- The European Union law prevails absolutely over the internal legal system.

In case of collision between European and internal regulations, the former must be applied, regardless of the provision that passed first and no matter their range.

- The national courts shall not apply any internal provision against the European Union law.

According to the ruling of the judgment of the ECJ of 9<sup>th</sup> March 1978, *Simmenthal-II*, C-106/1977, the national courts that are called upon to apply the provisions of the Community law are “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<sup>27</sup>”. To do so the court does not need to “request or await the prior setting aside of such provisions by legislative or other constitutional means”.

- National laws may not be taken in so far as they were incompatible with the Community rules.

Again at *Simmenthal-II* the ECJ understands that according to the principle of the precedence of Community law, the relationship between the European provisions and the national law of the Member States “preclude the valid

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<sup>26</sup> Teruel Lozano, G. *El Tribunal Constitucional ante el principio de primacía del Derecho Comunitario*, Anales de Derecho, Universidad de Murcia, 2006, p. 331.

<sup>27</sup> ECJ, 9<sup>th</sup> March 1978, *Simmenthal II*, [C-106/1977](#), para. 24.

adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions<sup>28</sup>”.

Once the initial doubts were allayed, this jurisprudence was clearly received by the Spanish courts with regard to the prevalence of EU law over domestic “non-constitutional” law. Especially after the declaration of the Plenary Session of the Spanish TC 1/2004 of 13<sup>th</sup> December 2004, concerning the compatibility between the treaty establishing a Constitution for Europe and the Spanish Constitution<sup>29</sup>.

Long before this declaration, although supporting the primacy of the EU law over the internal law, the Spanish TC considered the EU law as “infra-constitutional law” (TC, 28/1991, 14<sup>th</sup> February 1991)<sup>30</sup>.

From the point of view of the Spanish TC, at that moment, art. 93 only allowed the *Cortes Generales* to attribute competences derived from the Constitution. Therefore, no contradictory dispositions from an international treaty were able to modify or contradict its content, since the only way to perform a constitutional revision was the one prescribed in Title X of the Spanish Constitution. At that point, the EU law and any other international treaties (including DTCs) received the same treatment. Nowadays, however, the position of the EU law has improved.

The evolution of the EU integration process has led the Spanish TC to make a change in its jurisprudence. Correcting the unfortunate and unnecessary use of the words “infra-constitutional”, even contrary to the Spanish international commitments<sup>31</sup>, the declaration of 2004 admits, beyond doubt, the primacy of the EU law. Not only over the Spanish non-constitutional law, but even over the Constitution itself regarding the competences attributed to the EU through art.93.

As the Spanish TC states in 2004’s declaration, the adherence to the EU implied the integration, in the Spanish legal system, of a full autonomous regulatory system based on the prevalence of its own dispositions over any

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<sup>28</sup> ECJ, 9<sup>th</sup> March 1978, Simmenthal II, [C-106/1977](#), para. 17.

<sup>29</sup> [TC, Declaration 1/2004](#), 13<sup>th</sup> December 2004.

<sup>30</sup> [TC, 28/1991](#), 14<sup>th</sup> February 1991.

<sup>31</sup> Mangas Martín, A. La Constitución y la Ley ante el Derecho Comunitario, *Revista de Instituciones Europeas*, Vol. 18, nº 2, 1991, pp. 618-619.

internal contradictory rules. A clear example of this primacy is that the Spanish Constitution is no longer used as a validity parameter of the EU law. The main consequence is that the EU law is not subject to any constitutional control. The only blurred line drawn by the Spanish TC is that the EU law has to be compatible with “constitutional principles and core values”. In any case, the Spanish doctrine is divided between those who support the integration with a few limitations<sup>32</sup> (López Castillo, 1996; Pérez Tremps, 1994) and those who have concerns about the broad interpretation of art. 93<sup>33</sup>.

#### **4. Interpretation and application problems between the EU law and the DTC in the Spanish legal system**

Once the relative positions of DTCs and EU law in the Spanish legal system have been analysed, we can come to a first main conclusion: EU law prevails over any DTC. DTCs cannot content any disposition against EU law, and if that happens, the ECJ would intervene to put things in place.

Nor in the Spanish laws, neither in the internal jurisprudence there are any references to this primacy. The reason is simple: in the areas where Spain has attributed competences to the EU, the internal order has nothing to say, the position of the EU law is not built by the Spanish legal system anymore. As the Spanish TC has admitted, the EU law is an autonomous system with its own mechanisms. Consequently, to solve any questions regarding its relation with the DTC we will not need the Spanish internal law but only the EU law. The EU law is the “master of its own destiny”.

At first glance we may conclude that DTCs and EU law do regulate different aspects of taxation. While DTCs main objective is the elimination of the double taxation, the EU law does not contain a specific obligation to eliminate it<sup>34</sup>. Also, DTCs focus on direct taxation while the EU law harmonisation has been mainly focused in the indirect taxation.

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<sup>32</sup> López Castillo, A. *Constitución e integración: el fundamento constitucional de la integración supranacional europea en España y en la RFA*, Centro de Estudios Constitucionales, 1996; Pérez Tremps, P. *Constitución española y Comunidad Europea*, Civitas, 1994.

<sup>33</sup> Teruel Lozano, G. *El Tribunal Constitucional ante el principio de primacía del Derecho Comunitario*, *op. cit.*

<sup>34</sup> Article 293 of the previous Treaty did contain the abolition of double taxation as a Treaty objective but as long as no general measure was adopted it was Member States duty to eliminate double taxation through DTCs. See. ECJ, 14<sup>th</sup> November 2006, Kerckhaert and Morres, [C-513/04](#), para. 30. After the elimination of this article in the TFEU some authors

In spite of these assumptions, we can verify the existence of many areas of common ground between the EU law and DTCs, and a strong mutual influence in both directions.

The influence of DTCs in the EU law can be checked when a DTC eliminates the double taxation, since this elimination helps to remove tax obstacles to the exercise of fundamental freedoms.

Also, the EU law has benefited from the advances in international taxation through the DTCs and the development of common principles and concepts. Moreover, despite being a bilateral instrument, a DTC constitute a suitable instrument of "second-degree harmonisation" which may contribute to a better coordination of the Member States' legal orders. Finally we should not forget that the competence of the EU in the field of direct taxation is subject to the principle of subsidiarity, so the EU can only intervene when national measures (including bilateral DTCs) do not contribute enough to the EU objectives<sup>35</sup>.

In any case the EU law has even a greater (and hierarchical) influence towards DTCs of Member States giving rise to a phenomenon known as "communitisation of DTCs"<sup>36</sup>. A clear example of the subjugation of DTCs to the EU law is the fact that the parent-subsidiary directives<sup>37</sup> have eliminated the withholding tax at source between Member States, and it applies even above any previously signed DTC that contained it, without having to modify these conventions. In this context when DTCs and EU law regulate the same situation, the latter must prevail, unless the solution of the former enables a better achievement of the EU goals.

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support the idea that the elimination of double taxation is still between the objectives of the EU as it is harmful to the internal market. See. Kemmeren, E. *The Netherlands: What Are the Right Comparators under Article 63 TFEU When Assessing a Dividend Withholding Tax Refund Claim?*, in Michael Lang (ed.), *ECJ-Recent Developments in Direct Taxation 2014*, Linde, 2015, p. 155-156.

<sup>35</sup> Calderón Carrero, J.M & Martín Jiménez, A. Los tratados internacionales, *op. cit.* p. 46.

<sup>36</sup> Calderón Carrero, J. M. *Algunas consideraciones en torno a la interrelación entre los convenios de doble imposición y el derecho comunitario europeo: ¿hacia la "comunitarización" de los CDIs?*, Documentos del Instituto de Estudios fiscales, 4/2002, p. 5. The author considers that the real "comunitarization" of DTC has its origins in the jurisprudence of the ECJ but the Commission has also contribute through different proposals to institutionalise it.

<sup>37</sup> Council Directive [90/435/EEC](#) of 23<sup>rd</sup> July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States and the Council Directive [2003/123/EC](#) of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

Nevertheless, the ECJ has recognized the existence of a specific space for DTCs in the absence of unifying or harmonising measures, admitting that "Member States are competent to determine the criteria for taxation on income and wealth with a view to eliminating double taxation by means, inter alia, of international agreements"<sup>38</sup>.

In practice, this respect for the internal working rules of DTCs is also visible in the ECJ case law. One of the best examples is the *D* case, in which the ECJ blocks any chance to apply the most favoured nation clause (MNF) in the field of DTCs. EU citizens cannot ask for the application of the best treatment choosing among all the DTCs signed by the Member States alleging some sort of discrimination. As the ECJ clarified, the reciprocal rights and obligations of a DTC "apply only to persons resident in one of the two Contracting Member States", a taxable person resident of a third state is not in the same situation as a taxable person resident of the Member States<sup>39</sup>.

Despite the announced "communitisation" of DTCs, the independent operation of DTCs was confirmed by the ECJ in the *Columbus Container* case. The main conclusion is that the court acknowledges its lack of jurisdiction to rule on the possible infringement of the provisions of DTCs by a contracting Member State (treaty override) through a national measure<sup>40</sup>.

This autonomy of DTCs is, in any case, restricted when it clashes with fundamental freedoms and non-discrimination. As the ECJ had already pointed out in the *Saint-Gobain* case: "as far as the exercise of the power of taxation so allocated is concerned, the Member States nevertheless may not disregard Community rules"<sup>41</sup>.

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<sup>38</sup> ECJ, 12<sup>th</sup> May 1998, Gilly, [C-336/96](#), para. 24.

<sup>39</sup> ECJ, 5<sup>th</sup> July 2005, D, [C-376/03](#), para. 61 Case D. ECJ continues in para. 62 pointing out that benefits in a DTC "cannot be regarded as a benefit separable from the remainder of the Convention, but is an integral part thereof and contributes to its overall balance".

<sup>40</sup> ECJ, 6<sup>th</sup> December 2007, *Columbus Container*, [C-298/05](#), paras. 46, 51. Again, e.g. ECJ, 16<sup>th</sup> July 2009, *Damseux*, [C-128/08](#), paras. 19-22. In this point Kemmeren considers that at *Bouanich* case, the Court implicitly forbids treaty override when assumes that the relevant DTC must be taken into account for the interpretation of EU law. ECJ, 19<sup>th</sup> January 2006, *Bouanich*, [C-265/04](#), par. 51. See. Kemmeren, E. The Netherlands: What Are the Right Comparators under Article 63 TFEU When Assessing a Dividend Withholding Tax Refund Claim?, *op.cit.* p. 156.

<sup>41</sup> ECJ, 21<sup>st</sup> September 1999, *Saint-Gobain*, [C-307/97](#), para. 57. "Also, we should not forget that, according to its constant case law, although direct taxation is a matter for the Member States, they must nevertheless exercise their taxation powers consistently with Community law".

Afterwards, this position has been confirmed, for example, in the *Bouanich* case in which the court remarks that the existence of a DTC (France-Sweden) cannot justify a discrimination against non-residents<sup>42</sup>. In this judgment the court acknowledges the DTC as a part of the legal background to analyse whether the national rule, in conjunction with the application of the DTC, is causing any discrimination or not. Then, the advantages from DTCs may compensate potential discriminatory disadvantages<sup>43</sup>.

Finally, we will focus on the application and interpretation problems that must be faced due to the coexistence of both systems, EU law and DTCs. Regarding the internal application problems, the Spanish courts are used to apply DTCs as elements of the internal law, since this international system of treaties has already been in force for decades. On the contrary, although the EU law has a greater influence in the Spanish legal system, judges are less prompt to use it as the main tool to solve a legal conflict. Of course, in the last few years, the EU law is gaining importance and the courts are every day more aware of its position over the Spanish law. Due to this delay in the application of the EU law it might happen that a DTC would be applied in the first place, even against the EU law.

In any case, it is a matter of time that the training of new judges in EU law will help to confirm what is obvious: the EU law is in the top part of the pyramid of the Spanish legal system.

## 5. Concluding remarks

1- The first conclusion reached is that the Spanish legal system accepts that DTCs, as international treaties, have an usual position over the internal law. The Spanish courts and tax administration have progressively accepted this prevalence and have applied it (often after a slight reminder) with fewer doubts. Any properly voted and published change in the DTCs is then automatically applied instead of the internal law.

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<sup>42</sup> ECJ, 19<sup>th</sup> January 2006, *Bouanich*, [C-265/04](#), paras. 52-53. Similar comments were made by the Court in ECJ, 8<sup>th</sup> November 2007, *Amurta*, [C-379/05](#).

<sup>43</sup> Kokott, J. *European Court of Justice in Courts and Tax Treaty Law*, Guglielmo Maisto (ed.), IBFD, 2007, p. 111.

2- DTCs cannot contain any dispositions against the Spanish Constitution. If that happens, this clause will not be in force until one of them (DTCs or the Spanish Constitution, preferably the first one) change. The principles of the Spanish Constitution, such as the duty to contribute or the equality of all citizens, might inform the application of DTCs.

3- Spain has faithfully followed the OECD's MC in their DTCs and has also assumed its Commentaries with just a few reservations, even through specific clauses in more recent DTCs. Then, it is obvious that both (MC and Commentaries) are fundamental instruments of the DTC interpretation in Spain; a reasoning that is being increasingly accepted by the Spanish tax administration and the Spanish courts.

4- The dynamic interpretation of previous DTCs with the new MCs and their Commentaries has been admitted by the Spanish courts and tax administration, but in a biased way towards the protection of the administration's interests. Although we support this option as a tool for flexibility, the interpretation shall be used only to adapt the content of previous DTCs to the new terms and approaches; and never as an instrument to create new clauses.

5- Since Spain accessed the EU, the primacy of the EU law over the Spanish internal law is (increasingly) out of the question. Changes in the EU law affecting the Spanish internal legal system (forcing its change) have been endless. Too frequently, Spain has been condemned for its negligent attitude integrating this primacy in the internal order. Recently, the Spanish TC has even admitted, given the evolution of the EU integration project, the precedence of the EU law over the Spanish Constitution in those competences assumed by EU treaties.

6- The relation between DTCs and EU law is not clearly settled in the Spanish internal order. In any case, the EU law is an autonomous system that regulates its own affairs. Its relation with DTCs is then strictly a question of EU law. The result is clear: since the EU law considers DTCs as a part of the

internal legal systems, and the EU law takes precedence over any internal rule, the EU law has primacy also over DTCs in the Spanish legal system.

7- Any change in the EU law may apply directly to DTCs without needing specific changes. In any event, the truth is that both, EU treaties and secondary EU legislation, have barely interfered in the DTCs according to the subsidiarity principle.

8- In absence of a formal regulation, the ECJ has developed an important case law regarding the relationship between DTCs and EU law. First of all, the ECJ has recognised that DTCs have their own sphere of activity regarding the abolition of double taxation and the redistribution of tax powers. But even so, the respect of the EU freedoms is always the limit of the DTC application, now and forever, and in all Member States (Spain, obviously, included).