

**A new aspect of the competences of the CJEU in the field of direct taxation: case Austria v. Germany of 12 September 2017 (C-648/15)\***

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*According to article 273 TFUE a litigation related to the interpretation of a bilateral treaty against double taxation of revenues is connected to the object of the European Treaties and, hence, it can be subjected to the Court by virtue of a clause that attributes to the latter the solution of interpretative issues arising from the Convention.*

The principles that govern international and European tax law in the field of direct taxation have been ably traced by the case law of the Court of Justice. In the four hundred cases adopted since 1992, the Court has outlined and justified its role, bearing in mind that, if direct taxation is competence of the member States, they exercise it in compliance with the freedoms provided for by the Treaty. Relying on the second affirmation, the Court has been capable of imposing, through negative integration, to the member States a *corpus* related to their domain of competence: non-discrimination, free movement of workers, freedom of establishment, free movement of services and European citizenship have permitted to qualify prohibited national law as incompatible. In such evolutive context, the case of 12 September 2017, represents a new step. The case has been adopted on the basis of article 273 TFUE, that finds in this decision its first application not only in the fiscal field. The text provides that *“the Court is competent to adopt decisions on all the controversies connected with the*

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*object of the treaties, if the controversy is submitted by virtue of a compromise”.*

The Republic of Austria referred to the Court in the course of a controversy that saw it against the Federal Republic of Germany and had, as an object, the interpretation of an article of the convention that binds them in order to avoid double taxation in the field of revenues and estate. The controversy concerns the determination of the competent State to exercise its taxing rights on the interests deriving from securities emitted by a German company and held by an Austrian company. Austria considers that these securities do not grant any right to participate in the profits, as defined by article 11, paragraph 2, of the Convention, as a consequence it has the exclusive right to the interests, as the State of residence of the beneficial owner. Germany pretended they were credits with participation to profits, accordingly it had the exclusive right to tax the interests, as State of source of the revenues.

The essential issue, arising from the case, concerns the competence of the Court. In fact, article 273 requires three conditions to be fulfilled. If the existence of a controversy between the member States is not dubious, it is necessary to establish a connexion between the controversy and the object of the treaties. According to the Court, a convention against double taxation has the aim of mitigating double taxation and this phenomenon has beneficial effects on the functioning of the internal market, as it avoids the restrictions and the dissuasion from the use of the freedoms provided by the Treaty. The third condition to be satisfied is the existence of an agreement between the two States to refer the issue to the Court. Article 25, paragraph 5, of the convention between Austria and Germany provides that *“in case of difficulties or doubts on the interpretation or application of the present convention that does not have solution in the framework of a conciliation procedure [...] and this within three years from the opening of the mentioned procedure, the States have to refer the litigation to the Court of Justice within the framework of the arbitrage procedure provided by article 273 TFUE.”* The Court has considered (pt. 39) that, being the objective pursued by article 273 that of granting to the member States a

means to solve their controversies in connection with the objective of the Treaties, an agreement on the referral could validly be put in place between the parties before the birth of a possible controversy.

Once assured its competence, the Court has examined the merits of the controversy. Relying on the rules of Vienna convention, of which the two States are parties and which gives priority to the good faith interpretation of the Treaties, the Court has investigated the aim of the clauses within which we find the expression "credits with participation to the benefits", that attributes the taxing power to the State of source of the revenue. The Court has considered that the titles at stake in this case do not belong to this category, agreeing with Austria, State of residence of the shareholder, and not with Germany, State of source of the revenues. The interpretation of the Court privileged a functional perspective which takes into account all the elements of the context in order to decide. The argumentative path followed is not astonishing neither as to the merits nor on the procedural ground. The Court limits itself to the role of interpreter and does not answer any of the questions formulated by the parties, being content with relying on loyal cooperation in order to draw the practical conclusions of the decision (pt 58). In fact, the Court considers not to have competence to order to a country to reimburse those taxes that have been unduly paid, as its role is limited to the interpretation of the text which is the object of the decision, and the Court *"cannot dispose of the elements necessary in order to take a position in this respect, especially as far as possible interference with potential ongoing procedures by the courts of one or the other State"* (pt 57). This is, for the Court, a constant position (CJUE, 12 September 2006, Cadbury Schweppes, C-196/04).

With an inedited use of article 273, this case contributes to the development of jurisdictional rules before the European courts. The decision, adopted in the field of direct taxation to solve a litigation between two member States, accepts to interpret the text object of the case but leaves to the competent States the duty to draw the practical consequences of such interpretation. Acting in such a way, it incontestably reinforces the role of the european institutions and, singularly, of the Court of Justice in the domain of direct

taxation, subject that the Treaties reserve to the member States. In such circumstances, the decision is taken in a coherent context, marked by two recent phenomenons. Firstly, the adoption, by the Council, on October 10, 2017, of the European Directive n. 2017/1852, concerning the mechanisms to rule the tax misalignments within the Union. The text aims at settling the controversies concerning interpretation and application of bilateral conventions and the European arbitration convention of July 23, 1990, any time these misalignments bring to double taxation, being the latter either economic or juridical, of revenues or estate. This is a small revolution since the institutions of the Union receive, from that moment on, competence to solve the misalignments in a domain that the Court formerly considered as an intangible domain by the Union and, consequently, left to the sole intervention of the conventions inspired by the OECD model (CJEU, May 12, 1998, *Epoux Gilly*, C-336/96, pt. 23-24). In other words, from the birth of misalignments concerning the interpretation and application of a convention on international tax law, the solution of the Court followed the path traced by the Directive, whose superiority is evident. This is, first of all, an amicable solution limited to two years after an arbitral phase concluded in a term of nine months. The second coherent event is a decision by the Court, initiated with the preliminary ruling of the French Conseil d'Etat, of March 15, 2018 (*Picart*, C-355/16), within which the Court interprets the agreement between, from the one side, the European Union and the member States and, on the other side, the European Union and the Swiss Confederation, concerning the free movement of persons. Here, the role of interpreter, which is left to the Court, proves essential to determine the field of application of the French tax on the unrealized gains of a resident who transfers its residence in another member State. In other words, the role of the Union in the management of direct taxation within the member States becomes more and more important, as a result of the same will of the latter ones. Nobody doubts that this evolution is part of the preoccupation to promote the good fiscal government and the prevention of tax evasion and fraud, it is the joint result of the pressure of the public opinion, substituted by its electors, and the result of the investigations conducted by informers.

The Union proves essential to ensure a more fluid management of taxation of transnational revenue.

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