



## I. No jurisdiction of the CJEU for DTs

### 1. No jurisdiction

"Although the Members States have ... entered into numerous bilateral conventions designed to eliminate or mitigate those negative effects [of double taxation], the fact none the less remains that the Court has no jurisdiction, under Art. 234 EC, to rule on the possible infringement of the provisions of such conventions ..."

(Art. 267 TFEU; e.g. C-298/05, 6.12. 2007, Columbus Containers, § 46)



## I. No jurisdiction of the CJEU for DTs

### 2. Only jurisdiction as a Court of Arbitration

Art. 273 TFEU: "The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties."

#### **advantages of CJEU as court of arbitration:**

decisions public! (MAP no); general court, link with other areas of the law as e.g. trade and investment

#### **disadvantages**

C-648/15 of 12.9.2017 Austria v. Germany - "Genussscheine"



## II. DTs and the Basic Freedoms

### **1. Basic freedoms are no remedy against double taxation**

EU law does not lay down criteria for the attribution of competence between the Member States in relation to the elimination of double taxation;

Member States' autonomy, no obligation to adapt their own tax systems to the different systems of other Member States in order to eliminate the double taxation arising from the exercise in parallel by those Member States of their fiscal sovereignty

(e.g. C- 67/08 of 12.2.2009 - Block - § 30 f.)



## II. DTs and the Basic Freedoms

### **2. Basic freedoms do not lead to most favoured nation treatment**

That reciprocal rights and obligations apply only to persons resident in one of the two Contracting Member States is an inherent consequence of bilateral double taxation conventions.

The favourable rule 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.

(C-376/03 of 5.7.2005 - D - §§ 61 f., 65)



## II. DTs and the Basic Freedoms

### 3. Abuse

Tax Treaty shopping through conduit companies in order to avoid double taxation constitutes abuse

(Joined Cases C-115/16, C-118/16, C-119/16, C-299/16 and C-116/16 and C-117/16 of 26.2.2019 - "Danish cases")

### 4. CJEU applies the OECD Model Conventions and commentaries

"The concept of 'beneficial owner', which appears in the bilateral conventions based on that model, and the successive amendments of that model and of the commentaries relating thereto are, therefore, relevant when interpreting Directive 2003/49." ("Danish cases" - §§ 90 ff.)



## III. Tax and investment arbitration

### 1. The CJEU terminating intra-EU investment arbitration

"an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. ..., under [Art. 344 TFEU] the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties" (C-284/16 of 6.3.2018 - Achmea - § 32)

Termination Agreement 2020, 190 inter-EU BITS terminated: no need for additional protection in view of EU law.

### 2. Relevance for the Settlement of Tax Treaty Disputes/tax disputes under BITs?

national treatment, MFN, fair and equitable taxation, confiscatory taxation, but often tax carve outs; Art. 63 third countries



## IV. Directive 2017/1852 on tax dispute resolution mechanisms in the EU

covering disputes arising from the interpretation and application of DTs

Mutual agreement procedure (Art. 4 et seq.),

possibly followed by a procedure before an advisory commission (Art. 6 et seq.)

or an alternative dispute resolution commission (Art. 10).

“Baseball” or “final offer” arbitration and independent opinion arbitration.

Intergovernmental procedure with only limited participation of taxpayers.



# The Settlement of Tax Treaty Disputes by the European Court of Justice

8

Thank you for your attention!

