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Financing Costs and Overhead Deduction in Cross-Border Transaction

– A Requirement of EU Law?

by

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Summary

This Master thesis explores the EU law requirements for the taxation of the provision of cross-border services by the source state. As often the field of direct taxation, this is a delicate area where tension exists between the tax sovereignty of the Member States and the EU's aim of the realization of an internal market. The CJEU has ruled several times on different tax legislation of different Member States in connection to the freedom to provide services. Now it is confronted with another pending case – C-18/15 *Brisal* – in which, on the one hand, the technique of charging the tax and, on the other hand, the computation of the tax payable by non-resident service providers is questioned. By comparing precedent case law to the first issue the analysis reveals that the CJEU has always accepted the taxation in form of withholding tax for the cross-border taxation of services, even though it did not allow the same in other direct tax areas such as dividend taxation and exit taxation. In addition, the analysis demonstrates that the EU has improved the mutual assistance for the recovery of tax claims by implementing new Directives, which were not subject of discussion in the precedent case law yet. However, the newest Directive is not applicable in the case *Brisal*, which is why it can be concluded, that the CJEU will not change its line of reasoning in that case, although withholding taxes hinder the realization of the internal market.

The second problematic feature of the Portuguese legislation at issue is the calculation of the taxable amount. Residents pay taxes on interest income on the net amount at a rate of 25%, whereas the tax of non-residents is levied on the gross amount at a rate of 20% or less, depending on the applicable double tax agreement. Gross taxation leads to a higher taxation when the costs for providing the services are higher than the compensation by the lower flat rate and it always induces taxation even when losses occur. The CJEU has ruled several times in this area, that the non-deduction of directly linked costs infringes EU law. However, the facts of the pending case are more complicated as one of the plaintiffs is a bank which demands the deduction of financing-overhead costs. The analysis in this Master thesis reveals that no distinct ruling exists for the deduction of financing costs and none is existent for the deduction of a proportional part of overheads. Consequently a deductive approach is applied, which analysed the issue in the light of two principles underlying EU law in the area of direct taxation – the fiscal principle of territoriality and the principle of neutrality. This approach demonstrates that the principle of neutrality requires the deductibility of costs at issue and that a deviation from that is not justified by the principle of territoriality.

In a final step, several justification grounds are analysed and it is concluded, that the technique of taxation may be justified by the need for an efficient tax collection, but no justification ground is found adequate to legitimate the infringement of EU law by the computation system. Therefore, it is concluded that the CJEU should make the deduction of a proportion of financing-overhead costs a requirement of EU law in order to promote the realization of the internal market.

Abbreviation List

AG	-	Advocate Generale
BFH	-	Bundesfinanzhof, German Federal Fiscal Court
BStBl.	-	Bundessteuerblatt
CJEU	-	Court of Justice of the European Union
EC	-	European Community
ECJ	-	European Court of Justice
ECR	-	European Court Reports
Ed	-	Editor
EU	-	European Union
f.	-	folio (latin) – on the next page/paragraph
ff.	-	folio (latin) – on the next pages/paragraphs (f. in plural)
Fn.	-	Footnote
Ibid	-	Ibidem (latin) – in the same place
MTC	-	Model Tax Convention
OECD	-	The Organisation for Economic Co-operation and Development
p.	-	Page
para.	-	Paragraph
TEU	-	Treaty of the European Union
TFEU	-	Treaty of the Functioning of the European Union
VAT	-	Value Added Tax

1 Introduction

1.1 Background

The beginnings of the European Union were created after the Second World War in order to establish and to ensure an end to the wars between the neighbour states through the creation of a common market.¹ Nowadays, the European Union is often described from a legal perspective as a “*novel and complex supra-national legal phenomena*”.² This is due to the fact, that EU law has a bi-dimensional character. Even after attaching a supremacy declaration to the Lisbon Treaty³, Member States reject the supremacy of EU law in specific areas.⁴ In addition, Member States are free in certain legislative areas, such as tax laws⁵, to shape their own system, but those powers retained, have to be consistent with EU law.⁶ Whenever national Courts are unsure about the consistency of national law with EU law they are obliged to refer their questions to the CJEU.⁷

So, the Portuguese Court, Supremo Tribunal Administrativo, referred a question to the CJEU, asking to rule upon a source taxation rule. This national legislation for the taxation of interest income treats resident financial institutions differently than non-residents.⁸ The Case is still pending, but AG Kokott has delivered her opinion on the 17 March 2016.⁹ In this opinion and in the referred questions it becomes evident, that the case raises the special question, on whether or not financing-overhead costs are deductible for calculating the tax burden of financial services. The economic sectors of services and especially financial services are the least integrated markets within the European Union. The website of the European Union does not give any indication for

¹ Iris Glockner and Berthold Rittberger, ‘The European Coal and Steel Community (ECSC) and European Defence Community (EDC) Treaties’ in Finn Laursen (ed), *Designing the European Union* (Palgrave Macmillan 2012) p. 16, ‘The History of the European Union’ (*European Union*, 9. May 2016) <http://europa.eu/about-eu/eu-history/index_en.htm> accessed 9. May 2016.

² Julie Dickson, ‘Towards a Theory of European Union Legal Systems’ in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012), p. 25, similar Paul Craig and Gráinne de Búrca, *EU Law - Text, Cases and Materials* (6th edn, Oxford University Press 2015), p. 1, Suzanne Kingston, ‘A Light in the Darkness: Recent Developments in the ECJ’s Direct Tax Jurisprudence’ (2007) 44 *Common Law Market Review*, p. 1321-1359, p. 1321 .

³ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (2007/C 306/01), published in the Official Journal of the European Union (C 306/1), Declaration 17.

⁴ Craig and Búrca, p. 278-309, Fabian Amtenbrink and Helena Raulus, ‘Contribution to: Fiscal Policy in the European Union Context - The Semi-detached Sovereignty of Member States in the European Union’ in Sjaak J. J. M. Jansen (ed), *Fiscal Sovereignty of the Member States in an Internal Market: Past and Future*, vol 28 (Kluwer Law International BV 2011), p. 27.

⁵ ‘One Market without borders’ (*European Union*, 9. May 2016) <http://europa.eu/pol/singl/index_en.htm>

⁶ C-270/83 *Commission v. France* ECR 273 (CJEU), para. 13, C-279/93 *Roland Schumacker* ECR I-249 (CJEU), para. 21, C-264/96 *Imperial Chemical Industries* ECR I-4711 (CJEU), para. 19, C-307/97 *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland* ECR I-6181 (CJEU), para. 57.

⁷ Article 267 TFEU.

⁸ *Brisal - Request for a preliminary ruling* lodged on the 19 January 2015 (CJEU).

⁹ C-18/15 *Brisal Auto Estradas do Litoral SA KBC Finance Ireland - AG Opinion* not published in ECR, ECLI:EU:C:2016:182 (CJEU).

any reasons.¹⁰ However, it can be expected that inter alia national tax rules such as the one at issue, can hinder the trade of cross-border services to a high extent. Therefore it can be expected, that the decision in the case of *Brisal* will have a great influence on the realization of the internal market, as it basically decides whether enterprises and especially financial institutions, will be able to expand their cross-border services.

1.2 Aim

There are a number of cases, in which the CJEU decided on withholding taxes and cost-deduction for the purpose of source taxation. However, only a few of them had the deductibility of financing costs, and none¹¹ had the deductibility of overhead at issue. Therefore the following question, which is raised in this Master thesis is still unclear: Does EU law implementing the internal market require the deductibility of financing costs and overheads in cross-border transaction? In order to answer this question, the aim of this Master thesis is to analyse, on the one hand, the consistency of previous case law on withholding taxes and cost-deduction in order to determine whether they can provide for an adequate solution in the Case of *Brisal*. And on the other hand, the objective of this paper is to find answers to those issues, which have never been raised before by the CJEU. For this purpose two of the main principles underlying EU law – the principle of neutrality and the principle of territoriality – are defined and applied to the issue of overhead cost deductibility in order to find an adequate balance between the tax sovereignty of Member States and the fundamental freedoms.

1.3 Method and Material

This Master thesis is about the conflict of two diverging principles, how they are interpreted and given priority in the CJEU's case law and whether this case law is consistent. For this reason, the legal dogmatic approach is applied in the thesis. This approach follows an internal perspective¹², which has the aim of improving coherence

¹⁰ 'One Market without borders', supra fn. 5. However the EU tries to counteract that by implementing several directives such as the service directive: Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, published in the Official Journal of the European Union (L 376/36) and in the area of banks especially the bank directives: First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions published in the Official Journal of the European Union (L 322/30), replaced by, Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC published in the Official Journal of the European Union (L386/1), replaced by Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, published in the Official Journal of the European Union (L 126/1). For further information on the banking directive see Apostolos Gkoutzini, 'Free Movement of Services in the EC Treaty and the Law of Contractual Obligations relating to Banking and Financial Services' (2004) 41 *Common Market Law Review*, p. 119-175. However those directives do not solve any tax issues, which may arise due to cross-border transactions.

¹¹ Indeed a similar question was raised in the case C-345/04 *Centro Equestre da Lezíria Grande Lda* ECR I-1442 (CJEU), however an analysis in chapter 4.2.3.3 reveals that it was not answered sufficiently.

¹² Sjoerd Douma, *Legal Research in International and EU Tax Law* (Kluwer 2014), p. 17.

and consistency through systemization of positive law as it stands.¹³ For that purpose, the sources of law are to be identified firstly in order to analyse, to interpret, to systemize and to be confronted with each other in a second step.¹⁴

The leading question of this Master thesis is, on the one hand, how the conflict between two diverging principles should be solved in a specific, pending CJEU case and, on the other hand, what consequences it could have for the realization of the internal market. Therefore, in a first step the relevant provisions of the Treaties of the European Union¹⁵ and their derived principles, which are important in the area of direct taxation, are identified. These legal sources set boundaries to domestic legislation in form of positive integration¹⁶ and form the legal basis for the CJEU to rule upon.¹⁷ Thereupon, the facts of the pending case *Brisal*¹⁸ will be explained by referring to the published AG opinion in that case. Additionally, another case¹⁹, in which the same Portuguese legislation was at issue, will be used in order to support the presentation of the legal context.

The analysis part is divided in two sub-chapters. Within those sub-chapters a two-step approach is applied to several different issues, which arise in the pending case *Brisal*. For each issue, relevant material such as earlier case law, which had raised similar questions of law, are identified firstly. In a second step this case law is analysed of consistency and compared to the principles underlying EU law, which are introduced in chapter 2. Case law of the CJEU forms part of primary EU law by means of negative integration.²⁰ The starting point for the selection of case law for a subsequent analysis is a similar legal question. An additional criterion is that the cases chosen were scrutinized under the same fundamental freedom – the freedom to provide services²¹. However, the more the specification and the complexity of the legal issue in the analysis of the case *Brisal* increase, the more important the first criterion becomes. Consequently not all the cases discussed in this thesis are decided in the light of the freedom to provide services. Furthermore, the author uses different AG opinions in order to provide for a deeper and more detailed insight into the different legal question examined in the different cases chosen.

Whenever there is no adequate case law available or the case law does not lead to a clear and appropriate solution, the inductive approach is abandoned and, instead, a deductive

¹³ Jan M. Smits, *The Mind and the Method of the Legal Academic* (Edward Elgar 2012), p. 3, Martijn Hesselink, 'A European Legal Method? On European Private Law and Scientific Method' (2009) 15 *European Law Journal*, p. 20-45, p. 21.

¹⁴ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review*, p. 83-119, p. 110-113, Douma, *supra* n. 12, p. 20.

¹⁵ Treaty on the European Union (TEU) and Treaty on the Functioning of the European Union (TFEU)

¹⁶ Lukasz Adamczyk, 'The Sources of EU Law Relevant for Direct Taxation' in Michael Lang and others (eds), *Introduction to European Tax Law on Direct Taxation* (3rd edn, Linde 2013), p. 24.

¹⁷ Article 267 TFEU.

¹⁸ *Brisal - AG Opinion*, *supra* fn. 9.

¹⁹ C-105/08 *Commission. v. Portugal* ECR I-5331 (CJEU).

²⁰ Adamczyk, *supra* fn. 16, p. 25.

²¹ Article 56 TFEU.

approach²² is applied. This approach analyses the legal questions of the Case *Brisal* in the light of the basic principles. In order to provide for a theoretical background and enhance the academic value of the analysis, this thesis also considers doctrinal debates, books and commentaries either supporting the Courts decisions or criticising them. This is especially significant for the purpose of identifying unsolved issues, uncertainties and opposing arguments in order to give the reader an objective insight into different EU law problems explored in the thesis.

1.4 Delimitation

This thesis analyses certain issues of taxation in the perspective of the source state. It is however limited to those issues, which arise in the case of *Brisal*. In addition, special issues, which arise for the residence state due to the parallel taxation in the source state and worldwide taxation by the residence state, is not subject of the analysis in this thesis. Therefore, rulings on loss deduction²³, which are closely related to deduction of costs²⁴, decisions on cost deduction²⁵, which seem to have implemented an *always-somewhere approach*²⁶, are not subject of this thesis.

In addition this Master thesis analyses the law as it stands until the 1st June 2016. Consequently cases such as the recent decision of *Pensioenfonds Metaal en Techniek*²⁷, published the 2nd June 2016, and upcoming decisions such as *Brisal* itself or *Prospector Offshore Drilling and Others*²⁸, in which the CJEU is asked to rule upon certain limitation of cost deduction, are not subject of this Master thesis.

1.5 Outlines

The thesis starts by demonstrating the clash between the tax sovereignty of member states and the fundamental freedoms of the European Union law (chapter 2.1). This clash, out of which two general principles can be deduced, is the underlying subject of many CJEU cases. A short analysis will show how the Court usually embraces those two diverging principles (Chapter 2.2). This is important for a following analysis of the case *Brisal*, which is presented in a following part of this thesis (chapter 3). Thereafter the legal issues arising from *Brisal* are divided into the technique of taxation (chapter 4.1)

²² See for a description of that approach: Wolfgang Schön, 'Neutrality and Territoriality – Competing or Converging Concepts in European Tax Law?' [2015] *Bulletin for International Taxation*, p. 271-293, p. 271.

²³ Such as: C-446/03 *Marks & Spencer plc* ECR I-10866 (CJEU).

²⁴ Jérôme Monsenego, *Taxation of Foreign Business Income within the European Internal Market* (2011), p. 310.

²⁵ Inter alia cases such as: C-385/00 *F. W. L. de Groot* ECR I-11838 (CJEU), C-168/01 *Bosal Holding BV* ECR I-9430 (CJEU).

²⁶ Luca Cerioni, 'The Never-Ending Issue of Cross-Border Loss Compensation within the EU: Reconciling Balanced Allocation of Taxing Rights and Cross-Border Ability-to-Pay' [2015] *EC Tax Review*, p. 268-280, p. 272, Otto Marres, 'The Principle of Territoriality and Cross-Border Loss Compensation' (2011) 9 *Intertax*, p. 112-125, p. 119, Ben J. M. Terra and Peter J. Wattel, *European Tax Law* (sixth edition edn, Wolters Kluwer 2012), p. 900, Alfonso Rivolta, 'Transfer of Residence within the European Union: The Treatment of Pre-Existing Losses – Part 2' [2010] *European Taxation*, p. 66-78, p. 69.

²⁷ C-252/14 *Pensioenfonds Metaal en Techniek* not published in ECR, ECLI:EU:C:2016:402 (CJEU).

²⁸ *Prospector Offshore Drilling and Others - Request for a preliminary ruling* lodged on the 10 February 2016 (CJEU).

and the method of calculation the tax burden (chapter 4.2), in which an infringement of the freedom to provide services is found. Therefore, several justification grounds, submitted by the defending party, are analysed in chapter 5. The Master thesis ends by giving a conclusion for the case *Brisal* and an outlook on how this case could affect, on the one hand, the future of CJEU's case law and, on the other hand, the economic integration of the internal market (chapter 6).

2 General Conceptual Aspects of EU Law

2.1 Basic Principles underlying EU Law in the Sphere of Direct Taxation

One of the aims for founding the former European Communities, now European Union is economic integration through the realization of an internal market.²⁹ This aim finds its specification in Article 26(2) TFEU and demands “*an area without internal frontiers, in which the free movement of goods, services and capital is ensured*”. This demand is further detailed in the separated Articles of the fundamental freedoms, which all forbid any obstacle to their freedom.³⁰ As a consequence, the full realization of the internal market requires a concept of tax neutrality.³¹ This concept of tax neutrality does not require neutrality in all possible ways.³² So are differences due to disparities between the national systems and double taxation not seen as a breach of neutrality by the CJEU.³³ The principle rather requires the abolition of any cross-border obstacles by each Member State (per-country approach).³⁴ This purely unilateral approach of the TFEU was abandoned by the CJEU ten years ago.³⁵ Instead the CJEU expanded its perspective to an overall view, which includes not only the tax effects of Member State, which legislation is at issue, but also effects of the other Member State.³⁶ Through the application of the

²⁹ Article 3(3) TEU.

³⁰ Terra and Wattel, *supra* fn. 19, p. 35.

³¹ Schön, *supra* fn. 22, p. 272.

³² Sjoerd Douma, ‘The Three Ds of Direct Tax Jurisdiction: Disparity, Discrimination and Double Taxation’ [2006] *European Taxation*, p. 522-533, p. 528.

³³ Terra and Wattel, *supra* fn. 19, p. 93, Dennis Weber, ‘In Search of a (New) Equilibrium Between Tax Sovereignty and the Freedom of Movement Within the EC’ (2006) 34 *Intertax*, p. 585-616, p. 588, for disparities see inter alia Christiana HJI Panayi, ‘The Schempp Case: EU Citizenship, Rights and Taxes – A New Leaf in ECJ Jurisprudence or Just a Fig Leaf?’ [2005] *European Law Journal*, p. 482-487, p. 485, AG Geelhoed describes the phenomenon of disparities “*quasi-restrictions*” C-374/04 *Test Claimants in Class IV of the ACT Group Litigation - AG Opinion* ECR I-11676 (CJEU), para 38-41. For case law on disparities see inter alia: C-403/03 *Egon Schempp* ECR I-6435 (CJEU), for double taxation see C-336/96 *Mr and Mrs Gilly* ECR I-2823 (CJEU), C-241/14 *Roman Bukowansky* not published in ECR, ECLI:EU:C:2015:766 (CJEU).

³⁴ Schön, *supra* fn. 22, p. 276, Terra and Wattel, *supra* fn. 19, p. 892, Weber, *supra* fn. 33, p. 601, René Barents, ‘The Single Market and National Tax Sovereignty’ in Sjaak J. J. M. Jansen (ed), *Fiscal Sovereignty of the Member States in an Internal Market: Past and Future*, vol 28 (Kluwer Law International BV 2011), p. 57.

³⁵ Frans Vanistendael, ‘The ECJ at the Crossroads: Balancing Tax Sovereignty against the Imperatives of the Single Market’ [2006] *European Taxation*, p. 413-420, p. 413.

³⁶ Schön, *supra* fn. 22, p. 277, Gianluigi Bizioli, ‘Balancing the Fundamental Freedoms and Tax Sovereignty: Some Thoughts on Recent ECJ Case Law on Direct Taxation’ [2008] *European Taxation*, p. 133-140, p. 135, Weber, *supra* fn. 33, p. 599.

overall approach the CJEU also seems to have adapted an “always-somewhere” approach.³⁷

However, the principle of neutrality, which was created in order to realize an internal market, is limited by the tax sovereignty of each Member State in the field of direct taxation.³⁸ This sovereignty is reflected by the fiscal principle of territoriality, which takes into account Member States limitations of the power to tax.³⁹

2.2 General Aspects of the CJEU’s Case Law on those Principles

The two diverging principles find their expression in the CJEU case law⁴⁰ by the general statement that *direct taxation does not fall under the purview of the European Union, the powers retained by the Member States must nevertheless be exercised consistently with EU law*.⁴¹ When the CJEU comes to the conclusion that the sovereignty of a MS prevails over the fundamental freedoms, it accepts the discrimination to be justified and to be proportionate.⁴² According to Schön⁴³ the best way in order to link the two diverging principles is the concept of coherence, which is represented in several, accepted justification grounds.

The CJEU has tried to draw a line between the principle of tax neutrality and the principle of territoriality in many of the more than two hundred cases having direct taxation at issue.⁴⁴ In the beginning of that case law, the CJEU made a clear and strong statement that residents and non-residents are generally not in a comparable situation and consequently a disadvantageous treatment of the non-resident is not necessarily leading

³⁷ Cerioni, supra fn. 26, p. 272, Marres, supra fn. 26, p. 119, Terra and Wattel, supra fn. 19, p. 900, Rivolta, supra fn. 26, p. 69.

³⁸ Article 5 TEU. For more information see Sjoerd Douma, *Optimization of Tax Sovereignty and Free Movement*, vol 21 (IBFD Doctoral Series 2011), chapter 5. However the unilateral approach can also lead to unsatisfactory results, see Frans Vanistendael, ‘Ability to Pay in European Community Law’ [2014] EC Tax Review, p. 121-134, Hannah L. Buxbaum, ‘Territory, Territoriality, and the Resolution of Jurisdictional Conflict’ (2009) 57 *The American Journal of Comparative Law*, p. 631-676, p. 632

³⁹ Schön, supra fn. 22, p. 272 and 283, Terra and Wattel, supra fn. 19, p. 99, Douma, *Optimization of Tax Sovereignty and Free Movement*, supra fn. 38, p. 84-85, Monsenego, supra fn. 24, p. 32, Adam Becker, ‘The Principle of Territoriality and Corporate Income Taxation – Part 1’ [2016] *Bulletin for International Taxation*, p. 190-201, p. 190.

⁴⁰ Terra and Wattel, supra fn. 19, p. 37, Weber, supra fn. 33, p. 586, Douma, *Optimization of Tax Sovereignty and Free Movement*, supra fn. 38, p. 4, the same rivalry exists not only in tax law see Keith Culver and Michael Giudice, ‘Not a System but an Order - An Inter-Institutional View of the European Union’ in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012).

⁴¹ *Commission v. France*, supra fn. 6, para. 13, Schumacker, supra fn. 6, para. 21, *ICI*, supra fn. 6, para. 19, *Saint-Gobain*, supra fn. 6, para. 57.

⁴² Terra and Wattel, supra fn. 19, p. 892, Schön, supra fn. 22, p. 284.

⁴³ Schön, supra fn. 22, p. 285, also Wattel comes to the conclusion that the notion of the principle of territoriality is basically the same as the notion of the concept of coherence. Peter J. Wattel, ‘Red Herrings in Direct Tax Cases before the ECJ’ (2004) 31 *Legal Issues of Economic Integration*, p. 81-95, p. 89 and chapter 3.2.1.

⁴⁴ Schön, supra fn. 22, p. 271, Weber, supra fn. 33, p. 585, Edoardo Traversa and Alice Pirlot, ‘Chapter 6 - Tax Sovereignty and Territoriality under Siege: How Far Should the EU Freedoms of Movement Impact on the Territorial Allocation of Taxing Powers between Member States?’ in Cécile Broklind (ed), *Principles of Law: Function, Status and Impact in EU Tax Law* (IBFD 2014), p. 125, Frans Vanistendael, ‘In Defence of the European Court of Justice’ [2008] *Bulletin for International Taxation*, p. 90-98, p. 95.

to a violation of the fundamental freedoms.⁴⁵ However, non-residents and residents are usually found to be in a comparable situation, when both derive similar income from a national source⁴⁶, over which the member state assumes jurisdiction.⁴⁷

Until the early years of the 21st-century, the CJEU saw more and more comparable situations, which led to a stronger integration of national tax system into the concept of an internal market.⁴⁸ Now the CJEU has clearly receded the line of tax neutrality, especially in the tax areas of exit taxation and loss compensation, and gives more room to the sovereignty of the member states by allowing the discriminating legislations to be justified and proportionate.⁴⁹

Summarizing the approach by the CJEU, it first refuses any comparability of residents and non-residents, which leads to a full decline of the principle of neutrality. Then it allows the comparability in certain situations and therefore accepting the neutrality principle. The territoriality principle in the form of overriding public interests, however, can neutralize this acceptance. On the other hand, the priority of the principle of neutrality can be restored by disproportionate measures. This concept has some similarities with the children's game Jenga, which will be used as a Metaphor in order to illustrate the general approach of the Court. So the CJEU pulls out a wooden block of the general statement of non-comparability between residents and non-residents, when it finds a comparable situation. If the difference in treatment, however, is justified by overriding reasons, it puts the block back on the tower. This creates a progressively taller, but at the same time a less stable tower, representing the sovereignty. As a consequence, this concept makes the CJEU's ruling less clear and predictable, which is why decisions of the Court are highly criticised by many.⁵⁰

⁴⁵ Vanistendael, 'The ECJ at the Crossroads: Balancing Tax Sovereignty against the Imperatives of the Single Market', supra fn. 35, p. 414, Marres, supra fn. 26, p. 123.

⁴⁶ Schön, supra fn. 22, p. 283, for case law see inter alia: *Commission v. France*, supra fn. 6, para. 19, *Saint-Gobain*, supra fn. 6, para. 47-48.

⁴⁷ Terra and Wattel, supra fn. 19, p. 892, Marres, supra fn. 26, p. 124, Douma, *Optimization of Tax Sovereignty and Free Movement*, supra fn. 38, p. 163. A recent decided case of the CJEU illustrates this statement perfectly. In *Timac Agro*, the CJEU did not find a comparable situation of a resident PE and a non-resident PE due to the fact, that the Member State did not assume tax jurisdiction over the foreign PE. All the PE income was tax exempt in that Member State and consequently the Court ruled that the Member State did not have to consider the losses either. C-388/14 *Timac Agro Deutschland GmbH* not published in ECR, ECLI:EU:C:2015:829 (CJEU).

⁴⁸ Vanistendael, 'The ECJ at the Crossroads: Balancing Tax Sovereignty against the Imperatives of the Single Market', supra fn. 35, p. 413, Schön, supra fn. 22, p. 283.

⁴⁹ Vanistendael, 'The ECJ at the Crossroads: Balancing Tax Sovereignty against the Imperatives of the Single Market', supra fn. 35, p. 413, Schön, supra fn. 22, p. 283, Panayi, supra fn. 33, p. 486.

⁵⁰ Schön, supra fn. 22, Willem Vermeend, 'The Court of Justice of the European Communities and direct taxes: "Est-ce que la justice est de ce monde?"' (1996) 5 EC Tax Review, p. 54-55, p. 55 calls the decisions of the CJEU as a story of "Alice in Wonderland", Peter J. Wattel, 'Non-Discrimination à la Cour: The ECJ's (Lack of) Comparability Analysis in Direct Tax Cases' [2015] European Taxation, p. 542-553, Maikel Evers, 'Report EC Tax Review's Twentieth Anniversary Seminar 31 May 2012 'Fiscal Autonomy in a Changing EU'' [2012] EC Tax Review, p. 324-330, p. 329, Ruth Mason, 'Flunking the EUCJ's Tax Discrimination Test' 46 Columbia Journal of Transnational Law, p. 72, Ruth Mason and Michael S. Knoll, 'What is a Discrimination?' (2012) 121 Yale Law Journal, p. 1014-1117.

It seems that the Court still tries to find out, which approach is the most suitable to rule upon. The case law thus evolved from a strict application of the discrimination approach to a restriction approach, under which it was argued that no comparability analysis was needed⁵¹, and has now returned back to a more nuanced discrimination approach.⁵² However, this “new” approach, which consists of three steps, the comparability, the justification and the proportionality analysis,⁵³ is still subject of criticism, especially the first step the comparability analysis. So Schön argues, that the CJEU should reject the concept of the general non-comparability and should just rule, whether there are reasons, which justify the disadvantageous difference in treatment.⁵⁴ AG Kokott comes to a same result in her criticism of the comparability analysis in *Nordea Bank*. In that case she stated, that the CJEU should abandon the objective comparability analysis and instead put the discrimination analysis in the justification part.⁵⁵

It seems that this criticism reached the ruling of the CJEU due to the fact that it has begun to separate the discrimination analysis (objective comparability analysis) from the comparability analysis (prima facie comparison) in more recent decisions.⁵⁶ This makes the decisions of the CJEU clearer and it may be the first step towards an abandonment of the objective comparison.

The impact of that change in reasoning was inter alia seen in the Court’s ruling in *Timac Agro*⁵⁷, where it revised its decision from *Lidl Belgium*⁵⁸. In contrast to *Lidl Belgium*, the CJEU did not find a comparable situation in *Timac Agro* due to the fact that the legislation at issue did not make foreign PE income subject to tax as it made resident PE income.⁵⁹ In *Lidl Belgium*, the Court found an objective comparable situation.⁶⁰ The legislation at issue however was justified by the need to preserve the allocation of the power to tax.⁶¹ As a consequence, the result was the same; in *Lidl Belgium* and in *Timac Agro* both legislation at issue, were seen as not being precluded by the fundamental freedoms, only the reasoning was different.

⁵¹ Vanessa E. Englmaier, ‘The Relevance of the Fundamental Freedoms of Direct Taxation’ in Michael Lang and others (eds), *Introduction to European Tax Law on Direct Taxation* (3rd edn, Linde 2013), p. 56.

⁵² Terra and Wattel, supra fn. 19, p. 87, Niels Bammens, *The Principle of Non-Discrimination in International and European Tax Law*, vol 24 (IBFD Doctoral Series 2011), p. 534, see for a case by case Analysis of the changes in the CJEU’s approach Suzanne Kingston, ‘The Boundaries of Sovereignty: The ECJ’s Controversial Role applying Internal Market Law to Direct Tax Measures’ in Catherine Barnard (ed), *The Cambridge Yearbook of European Legal Studies* (Hart Publishing 2007), p. 297-310.

⁵³ Terra and Wattel, supra fn. 19, p. 892, Bammens, supra fn. 52, p. 542, Englmaier, supra fn. 51, p. 56

⁵⁴ Schön, supra fn. 22, p. 284, Vanistendael comes to the same conclusion in a seminar on the occasion of the 20th anniversary of EC Tax Review. See for that Evers, supra fn. 50, p. 330.

⁵⁵ C-48/13 *Nordea Bank Danmark A/S - AG Opinion* not published in ECR, ECLI:EU:C:2014:153 (CJEU), para. 27.

⁵⁶ Anders Nørgaard Laursen, ‘The *Nordea Bank Denmark* Case (C-48/13)’ [2014] *Nordic Tax Journal*, p. 231-242, p. 234.

⁵⁷ *Timac Agro*, supra fn. 47.

⁵⁸ C-414/06 *Lidl Belgium GmbH & Co. KG* ECR I-3601 (CJEU).

⁵⁹ *Timac Agro*, supra fn. 47, para. 65.

⁶⁰ *Lidl Belgium*, supra fn. 49, para. 25.

⁶¹ *Ibid*, para. 52.

It is to be analysed whether those changes in the comparability analysis could influence the judgment in the *Brisal* case. And in how far the CJEU will respect the two diverging principles of neutrality and territoriality in that case.

3 Legal Context

3.1 Facts of the Case *Brisal*

In the case of *Brisal*, which is still pending before the CJEU, the Portuguese company *Brisal* received a loan from the Irish financial Institution KBC. Between 2005 and 2007 *Brisal* had to pay 350.806 EUR, from which it withheld 59.386 EUR in accordance with the Portuguese law and paid it to the tax authorities on behalf of KBC.⁶² The Portuguese legislation applicable in this case, however, differs between purely domestic situation and cross-border situations. The national rule prescribes, that services provided by non-resident financial institution are taxed at source at the gross amount, whereas services of resident banks are taxable through corporation tax on the net amount. However, the tax rate applicable for the taxation of non-residents is lower (20%), than the tax rate for residents (25%).⁶³ In the specific case of *Brisal* the tax rate is 15%, due to a double taxation agreement.⁶⁴ Both companies protested against the obligation to withhold taxes, by stating that the Portuguese law jeopardizes EU law, because it discriminates non-resident financial institutions.⁶⁵

The same legislation was already at issue in an infringement procedure versus Portugal, on which the Commission asked the CJEU to rule upon.⁶⁶ However the Court decided, that the Commission was not able to prove an infringement of Article 56 TFEU⁶⁷ – Freedom to provide Services, because it did not provide the Court with actual facts, but only with a hypothetical, arithmetical example.⁶⁸ As a consequence the Portuguese Court, which had to decide in the matter of *Brisal* and KBC, could not rely on an *acte éclairé*⁶⁹ and consequently asked the CJEU again to rule on the Portuguese legislation.

3.2 EU Law – Applicable Freedom

In the questions referred by the Portuguese Court, it asks essentially whether the national legislation at issue restricts Article 56 TFEU. AG Kokott, however, states in her opinion, that the law in force between 2005 and 2007, when the circumstances in the case took place, is Article 49 EC.⁷⁰ Furthermore, she refers to the AG opinion in *Commission v. Portugal* in order to explain why the freedom to provide services is applicable and not the

⁶² *Brisal - AG Opinion*, supra fn. 9, para. 10.

⁶³ *Ibid*, para. 7-8.

⁶⁴ *Ibid*, , para. 7.

⁶⁵ *Ibid*, para. 11.

⁶⁶ *Comm. v. Portugal*, supra fn. 19.

⁶⁷ The Article in force in the proceeding of *Commission v. Portugal* was Article 49 EC, now Article 56 TFEU.

⁶⁸ *Comm. v. Portugal*, supra fn. 19, para. 30.

⁶⁹ Established in *C-77/83 SRL CILFIT* ECR 3415 (CJEU).

⁷⁰ *Brisal - AG Opinion*, supra fn. 9, para. 15.

free movement of capital.⁷¹ In this opinion, which is also from AG Kokott, she concludes, that a restriction of the free movement of capital is only the “inevitable consequence” of a restriction of the freedom to provide services and consequently the primary freedom – the freedom to provide services – is to be analysed.⁷²

It is settled case law that the CJEU finds an infringement of the freedom to provide services, if a national rule prohibits, impedes or renders the exertion of them less attractive.⁷³ In addition, the freedom to provide services does not only protect the service provider, but also the service recipient.⁷⁴

In this case two different causes for a possible restriction occur: On the one hand the Recipient of the service can rely on the freedom, because he may suffer from a disadvantageous treatment, because he has to deduct tax at source and pay it to the tax authorities. Through this treatment, the service provider also suffers from a disadvantage, because service recipients may prefer national provider due to a smaller administrative burden.⁷⁵ On the other hand, the service provider can be discriminated, because he is not able to deduct his operating costs in contrast to resident service provider.⁷⁶

4 Infringement Analysis

4.1 Disadvantageous Treatment of the Service Recipient

Brisal received a loan from the non-resident bank KBC, for which the company had to pay interests to the Irish bank. Due to the cross-border lending, Brisal was obliged by Portuguese law to withhold taxes on his interest payments and to pay them over to the tax authorities. In comparison to a purely national situation, where the borrowing company is not obliged to withhold taxes at source, Brisal had an additional administrative burden. This treatment may also amount to a disadvantage for the Service provider, because residents may be restricted to buy services from non-residents. As a consequence the technique of charging the tax can be discriminatory.

The CJEU had to decide at several occasions on the technique of charging taxes through withholding taxes. So the Court ruled in *Scorpio* (decided 2006)⁷⁷ on the legality of the German obligation on the recipient of services to make retention at source on the payments to a non-resident service provider. It concluded, that this obligation is an obstacle of the fundamental freedoms⁷⁸, but this restriction is justified by the need to

⁷¹ Ibid, para. 16.

⁷² *Comm. v. Portugal*, supra fn. 19, para. 18, same approach as in C-452/04 *Fidium Finanz AG* ECR I-9562 (CJEU).

⁷³ *Brisal - AG Opinion*, supra fn. 9, para. 17 *Centro Equestre*, supra fn. 11, para. 20, C-290/04 *FKP Scorpio Konzertproduktion GmbH* ECR I-9494 (CJEU), para. 31, C-76/09 *Manfred Säger* ECR I-4239 (CJEU), para. 12, C-433/04 *Commission v. Belgium* ECR I-10667 (CJEU), para. 33.

⁷⁴ C-294/97 *Eurowings Luftverkehrs AG* ECR I-7463 (CJEU), para. 34, *Scorpio*, supra fn. 73, para. 32.

⁷⁵ *Brisal - AG Opinion*, supra fn. 9, para. 20.

⁷⁶ Ibid, para. 26.

⁷⁷ *Scorpio*, supra fn. 73.

⁷⁸ Ibid, para. 34.

ensure the effective collection of income tax as no directive for the recovery of taxes was available.⁷⁹

Another case, where the CJEU ruled on the technique of charging withholding taxes and where no directive for the recovery of tax was applicable, was in *Truck Center* (decided 2008).⁸⁰ In this case the Court was asked by a Belgian Court to decide, whether the tax authorities' assessment of withholding taxes for interest payments to a non-resident company, while resident recipient of interest payments are exempt from that kind of retention, constituted a restriction of the fundamental freedoms.⁸¹ It concluded, that non-resident and residents are not in a comparable situation in matters of source taxation.⁸² Therefore the retention at source did not constitute a restriction.⁸³

In a third case, *X NV* (decided 2011)⁸⁴, the CJEU had to decide again, whether the obligation to withhold taxes at source for the provision of services of non-residents, whereas this obligation does not exist if the service provider is a resident, constitutes a restriction. The ruling in this case followed an approach similar to *Scorpio*⁸⁵ by concluding, that this difference in treatment constitute a restriction of the freedom to provide services.⁸⁶ However, this restriction is justified by the need to ensure the efficient collection of income tax.⁸⁷ In this case the CJEU has accepted the justification even though a directive on the recovery of taxes⁸⁸ was applicable.⁸⁹ In conclusion of those three cases, it can be said that the CJEU has broadened the tolerance of withholding taxes.⁹⁰

In contrast to those judgments, the CJEU ruled on the issue of withholding taxes on dividend income, that they do constitute an infringement of the fundamental freedoms.⁹¹

⁷⁹ *Ibid*, para. 28.

⁸⁰ C-282/07 *Truck Center SA* ECR I-10767 (CJEU).

⁸¹ *Ibid*, para. 21.

⁸² *Ibid*, para. 49.

⁸³ *Ibid*, para. 50.

⁸⁴ C-498/10 *X NV* not published in ECR, ECLI:EU:C:2012:635 (CJEU).

⁸⁵ *Scorpio*, supra fn. 73.

⁸⁶ *X NV*, supra fn. 84, para. 34.

⁸⁷ *Ibid*, para. 53.

⁸⁸ Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties published in the Official Journal of the European Union (L175/17) and Council Directive of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties (76/308/EEC), published in the Official Journal of the European Union (L073/18). The Council Directive 2001/44/EC was replaced by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, published in the Official Journal of the European Union (L 84), which was, however, not applicable in the case of *X NV*, supra fn. 84.

⁸⁹ *X NV*, supra fn. 84, para 45-52.

⁹⁰ Eric Kemmeren, 'Recovery of Income Taxes: ECJ Tends to Allow Member States more Leeway' [2013] EC Tax Review, p. 2-8, p. 5.

⁹¹ See for example, C-170/05 *Denkavit International BV* ECR I-11968 (CJEU), C-379/05 *Amurta SGPS* ECR-19594 (CJEU), C-10/14, C-14/14 and C-17/14 *Joined Cases Miljoen, X, Société Générale* not published in ECR, ECLI:EU:C:2015:608 (CJEU). For doctrinal debates see: Thierry Pons, 'The Denkavit

The system in those cases was in so far different as they had the purpose to eliminate economic double taxation through tax exemption for resident recipients.⁹² The aim of the withholding tax on interest income, however, is levied in order to ensure the taxation itself for non-resident recipients, just as residents are taxed on that type of income.⁹³

As a consequence it is not probable that the CJEU will change its case law in its result. AG Kokott states in her opinion, that the three above-mentioned cases answer this legal question.⁹⁴ And she does not find any exceptional circumstances that could allow a departure from this case law.⁹⁵

It remains to be seen, whether CJEU will simply follow AG Kokotts opinion by stating that this question was already settled in previous case law or whether it will take the chance to revise its highly criticised decision in *Truck Center*.⁹⁶ In doing so it would find a discriminatory treatment due to a comparable situation of resident and non-resident financial institutions, which is however justified by the need to ensure the efficient tax collection and consequently adapt its *Truck Center* decision to the other two withholding tax cases. On the other hand, it also may change its case law in this area of taxation by continuing to separate the comparable analysis from the discrimination analysis. In this event, the CJEU will still find a comparable situation due to the fact that the interest payments are both taxed, no matter whether they were paid to a resident or a non-resident bank. Only the way of levying tax is different, which constitutes a difference in treatment. Presumably the CJEU will then allow the same justification grounds as in *Scorpio* and *X NV*. This would not change the result itself, but it could have a great impact on how the CJEU may analyse discriminatory situations in the future.

All in all, it can be expected, that the CJEU will not find an infringement of EU law through the application of withholding taxes. However, it must be mentioned, that withholding taxes in general are an obstacle to the realization of the internal market as it jeopardizes the fiscal principle of neutrality.⁹⁷ Instead the Member States should

Internationaal Case and Its Consequences: The Limit between Distortion and Discrimination?' [2007] *European Taxation*, p. 214-220, Marc Dasse, 'Belgian Withholding Taxes on Outbound Dividends and Interest: The Challenge of Community Law' [2008] *Bulletin for International Taxation*, p. 337-345, Han J. Oortwijn, 'EC Law versus Dividend Withholding Tax Imposed on Inbound and Outbound Dividends' [2006] *European Taxation*, p. 506-510.

⁹² C-282/07 *Truck Center SA - AG Opinion* ECR I-10767 (CJEU), para. 61-62.

⁹³ Luc De Broe and Niels Bammens, 'Truck Center Belgian Withholding Tax on Interest Payments to Non-resident Companies Does Not Violate EC Law: A Critical Look at the ECJ's Judgment in *Truck Center*' [2009] *EC Tax Review*, p. 131-137, p. 135.

⁹⁴ *Brisal - AG Opinion*, supra fn. 9, para. 21.

⁹⁵ *Ibid*, para. 23.

⁹⁶ Rens Paternotte, 'Miljoen, X and Société Générale. Determine the final tax burden relating to dividends from portfolios of shares. Court of Justice - Comments' [2015] *H&I - Highlights and Insights on European Taxation*, p. 38-41, p. 41, Michael Lang, 'Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions, and Contradictions' [2009] *EC Tax Review*, p. 98-113, p. 100, CFE ECJ Task Force, 'Comment by the CFE Task Force on ECJ Cases on the Judgment in *Belgium SPF Finance v. Truck Center SA*, Case C-282/07, Judgment of 22 December 2008' (2009) 49 *European Taxation*, Evers, supra fn. 50, p. 329.

⁹⁷ Kemmeren, supra n. 90, p. 5.

cooperate better with each other and use the instruments, such as the Directive on mutual assistance for the recovery of taxes⁹⁸ more efficiently, as demanded by the CJEU *inter alia* in the sphere of exit taxation⁹⁹. Due to the fact, that an adaptation of the reasoning in the field exit taxation to the field of interest taxation, would require a 180 degree turn in the case of *Brisal* it is not likely that the CJEU will respect the principle of neutrality, even though a limitation of it is not justified by the principle of territoriality. However, the newest Directive (2010), which was not applicable in the case of *Brisal*, has reduced the administrative burden and increases the scope of taxes and persons¹⁰⁰, so that one day the CJEU may take that escape in order to adapt its rulings in the interest taxation to other fields of taxation.

4.2 Restriction of the Service Provider

4.2.1 Non Deduction of Operating Costs

4.2.1.1 An Issue supported by the OECD MTC?

Another reason for a possible infringement of the fundamental freedoms is the difference in treatment in the matter of cost deduction. KBC, as a non-resident bank, is not able to deduct any operating costs occurred for the source taxation in Portugal and is consequently taxed on the gross amount. Resident banks, however, are taxed on their net profits.¹⁰¹

The OECD Model Tax Convention, upon which many Double Tax Agreements between the Member States are based on¹⁰², suggests in its Article 11.2, that the source state can tax interest income at a rate of 10% on the gross amount. Gross taxation is not only suggested for the taxation of interest income, but also for all the other types of income where the source state obtained the right to tax.¹⁰³ However, the dimension of the task the OECD was confronted with may explain this approach. So describes Palma the task of

⁹⁸ Directive 2010/24/EU, *supra* fn. 88, successor of Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, published in the Official Journal of the European Union (L150/28) and Council Directive 2001/44/EC and Directive 76/308/EEC, *supra* fn. 88.

⁹⁹ For exit taxation purposes, tax authorities usually require some kind of guarantees, which have the same function as withholding taxes. For case law see C-470/04 *N* ECR I-7445 (CJEU), para. 52-53, C-371/10 *National Grid Indus BV* ECR I-12273 (CJEU), para. 78, also in C-9/02 *Hughes de Lasteyrie du Saillant* ECR I-2431 (CJEU) the CJEU did not accept a justification even though no Directive was applicable. For personal income taxation see C-520/04 *Pirko Marjatta Turpeinen* ECR I-10704 (CJEU), para. 37.

¹⁰⁰ Marius Vasega and Servaas van Thiel, 'Assessment of Taxes in Cross-Border Situations: The New EU Directive on Administrative Cooperation in the Field of Taxation' [2011] *EC Tax Review*, p. 148-154, p. 151, Karoline Spies, 'Influence of International Mutual Assistance on EU Tax Law' (2012) 40 *Intertax*, p. 518-530, p. 527. The efficiency of the older Directives was criticised by AG Kokott in C-498/10 *X NV - AG Opinion* not published in ECR, ECLI:EU:C:2011:870 (CJEU), para. 52-59 and may have let the court to accept the justification of efficient tax collection, even though a Directive for the recovery of taxes was applicable.

¹⁰¹ *Brisal - AG Opinion*, *supra* fn. 9, para. 26.

¹⁰² Camacho Palma, 'The Paradox of Gross Taxation at Source' (2010) 38 *Intertax*, p. 624-642, p. 624.

¹⁰³ Except Article 7 OECD MTC, which is however discussable. Brian J. Arnold, 'The Taxation of Income from Services under Tax Treaties: Cleaning Up the Mess – Expanded Version' (2011) 65 *Bulletin for International Taxation*, section 2.2.8.

the OECD to find tax allocating rules upon which the OECD Member States could agree on, as a “*Herculean task*” and states that the additional setting of rules for the computation of income would have been “*utopian*”.¹⁰⁴ Consequently the OECD MTC is still reflected by the old compromises made in order to please Member States, rather being residence states and Member States, rather being source states.¹⁰⁵

However the OECD recognizes that gross taxation can dissuade cross-border trade and has changed its Commentary to Article 11 in year 2005, which now suggests a tax exemption for interest payments to financial institutions.¹⁰⁶ In the territory of the EU, the CJEU generally sees no jurisdiction to rule upon the mere allocation of taxing rights¹⁰⁷, however it began to tackle the computation method – the gross taxation –, which was and is still used by several Member States.

4.2.1.2 Previous CJEU Case Law

The first time the CJEU had to decide about a difference in treatment due to different rules of cost deduction between resident and non-resident service provider and its admissibility with EU law, was the case of *Gerritse* (decided 2003)¹⁰⁸. Mr Gerritse, a Dutch resident, performed musical services in Germany and received income for that.¹⁰⁹ From those earnings withholding tax was retained at a rate of 25% on the gross amount.¹¹⁰ Resident service providers on the other hand were taxed at a progressive tax rate on the net amount.¹¹¹ Generally, the German legislation led to a more favourable treatment of non-resident, if the income earned was high and the business expenses low. Mr Gerritse, however, was not favoured by this rule.¹¹² The CJEU decided, that even though residents and non-residents are generally not in a comparable situation, that they are placed in a comparable situation in the aspect of the deduction of directly linked business expenses.¹¹³ As a consequence it ruled, that EU precludes rejecting the right of cost deduction of directly linked costs for non-resident service, whereas this right was given to residents.¹¹⁴

¹⁰⁴ Palma, supra fn. 102, p. 625. Also Arnold justifies the absence of computation rules in the OECD MTC. Brian J. Arnold, ‘Fearful Symmetry: The Attribution of Profits “in Each Contracting State”’ [2007] Bulletin for International Taxation, p. 312-337, p. 322-325 and p. 337.

¹⁰⁵ Palma, supra fn. 102, p. 625.

¹⁰⁶ OECD Model Tax Convention - Commentary on Article 11 concerning the Taxation of Interest, p. C(11)-22.

¹⁰⁷ C-513/04 *Mark Kerckhaert and Bernadette Morres* ECR I-10981 (CJEU), para. 22, C-67/08 *Magarete Block* ECR I-883 (CJEU), para 30.

¹⁰⁸ C-234/01 *Arnoud Gerritse* ECR I-5945 (CJEU).

¹⁰⁹ *Ibid*, para. 9.

¹¹⁰ *Ibid*, para. 11.

¹¹¹ *Ibid*, para. 24.

¹¹² *Ibid*, para. 20.

¹¹³ *Ibid*, para. 27, What this comparison means for the allocation of taxing power by DTC see Pasqual Pistone, ‘Towards European international tax law’ [2005] EC Tax Review, p. 4-9, p. 5.

¹¹⁴ *Gerritse*, supra fn. 108, para. 29.

In a following case, *Scorpio*¹¹⁵, which was decided 2006, the CJEU confirmed the ruling of *Gerritse* on the deductibility of costs.¹¹⁶ *Scorpio* had a contract with the natural person, trading under the name of *Europop*, a Dutch resident, for making a music group available.¹¹⁷ For those services *Scorpio* was obliged to make retention at source on the gross amount at a rate of 15%.¹¹⁸ However, German law provided for the possibility to deduct directly linked costs in a procedure following the retention at source.¹¹⁹ The CJEU sees in this procedure an additional administrative burden, which renders the performance of cross-border services less attractive and consequently is precluded by EU law.¹²⁰

The decision of *Gerritse* was applied in year 2007 to the taxation of corporation in the case of *Centro Equestre*.¹²¹ The Portuguese Company *Centro Equestre* performed an artistic show in Germany for which taxes were withheld at source. A year later *Centro Equestre* requested a repayment of taxes for the deduction of directly linked business expenses and overheads.¹²² The German authorities, however, refused the deduction due to the German law prescribing, that directly linked expenditures have to exceed 50% of the income, which was not fulfilled by *Centro Equestre*.¹²³ The CJEU followed its judgment in *Gerritse* and ruled, that resident and non-resident are in a comparable situation in respect to costs having an inextricable link to the services performed.¹²⁴ In addition it stated, that EU law does not preclude national legislation to allow the deduction of overhead. However, it precludes rules, which makes cost deduction dependable on a certain percentage.¹²⁵

Those above-mentioned cases were all examined in the light of the freedom to provide services. However, the CJEU followed the same concept in its case law in which other fundamental freedoms were discussed.¹²⁶

4.2.1.3 Analysis of CJEU Case Law and AG Opinions

All those cases suggest, that the CJEU always finds an infringement of one of the fundamental freedoms when national legislation allows residents to deduct certain

¹¹⁵ C-290/04 *FKP Scorpio Konzertproduktion - AG Opinion* ECR I-9466 (CJEU).

¹¹⁶ *Scorpio*, supra fn. 73, para. 51. For a contrary opinion see Pasqual Pistone, 'Kirchberg 3 October 2006: Three Decisions that Did . . . Not Change the Future of European Taxes' (2006) 34 *Intertax*, p. 582-584, p. 584. Why this opinion cannot be followed will be explained in chapter 4.2.4.

¹¹⁷ *Scorpio - AG Opinion*, supra fn. 115, para. 18.

¹¹⁸ *Ibid*, para. 20.

¹¹⁹ *Ibid*, para. 45.

¹²⁰ *Ibid*, para. 47.

¹²¹ *Centro Equestre*, supra fn. 11.

¹²² *Ibid*, para. 10.

¹²³ *Ibid*, para. 13.

¹²⁴ *Ibid*, para. 25.

¹²⁵ *Ibid*, para. 31.

¹²⁶ Freedom of establishment: C-346/04 *Rober Hans Conijn* ECR I-6151 (CJEU), Free Movement of Capital: C-342/10 *Commision v. Finland* not published in ECR, ECLI:EU:C:2012:688 (CJEU), C-450/09 *Ulrich Schröder* ECR I-2497 (CJEU), C-559/13 *Josef Grünwald* not published in ECR, ECLI:EU:C:2015:109 (CJEU), *Joined Cases Miljoen, X, Société Générale*, supra fn. 91.

directly linked costs, whereas non-residents are not allowed to do the same.¹²⁷ This case law ensures the possibility for an unrestricted traffic of services, capital and goods.¹²⁸ For this reason it is not surprising that AG Kokott finds in her opinion an infringement of the freedom to provide services due to the gross taxation.¹²⁹ Though, the Court has made a recent change in its reasoning, which may change the outcome in *Brisal*. Those changes will be discussed in Chapter 4.2.4.

By analysing the previous case law and its opinion it becomes evident, that AG Kokott has changed her opinion in the matter of cost deduction. In her opinion to *Truck Center* (2008)¹³⁰, the AG quotes and analysis the same cases as she did in her opinion to *Brisal*, but comes to a different conclusion. She stated, that those cases were about types of income where only one tax jurisdiction had the right to tax; the other jurisdiction presumably exempted the income from taxation. She continues by arguing, that the allowance to deduct directly linked costs is in accordance with the principle of symmetry. However, the income of interest, which were at issue in *Truck Center*, is usually subject to tax in two jurisdiction and therefore it is for the resident state to take the operating costs into consideration.¹³¹

This opinion was highly criticised¹³², especially because AG Kokott did not follow the judgement of *Bouanich* (decided year 2006)¹³³, to which she delivered an opinion herself¹³⁴ and which the court wholly followed. The case of *Bouanich* was about the source taxation of dividends. Mrs Bouanich, resident in France, hold shares in a Swedish company and sought to deduct the acquisition costs instead of the nominal value of those shares.¹³⁵ She argued that she suffered from a disadvantage due to the different treatment to residents, who were able to deduct the acquisition costs.¹³⁶ The CJEU and AG Kokott came to the conclusion that for the purposes of the deduction of acquisition costs residents and non-residents are in a comparable situation.¹³⁷ Therefore, the non-deduction constitutes a restriction of the free movement of capital.¹³⁸

¹²⁷ Douma, 'The Three Ds of Direct Tax Jurisdiction: Disparity, Discrimination and Double Taxation', supra fn. 32, p. 527, Vasileios (Vassilis) Dafnomilis, 'A Comprehensive Analysis of ECJ Case Law on Discriminatory Treatment of Cross-Border Inheritances – Part 2' [2015] *European Taxation*, p. 567-577, p. 568, Vanistendael, 'Ability to Pay in European Community Law', supra fn. 38, p. 125.

¹²⁸ Schön, supra fn. 22, p. 286, Chiara Bardini, 'The Ability to Pay in the European Market: An Impossible Sudoku for the ECJ' (2010) 38 *Intertax*, p. 2-20, p. 11, Dick Molenaar and Harald Grams, 'Scorpio and the Netherlands: Major Changes in Artiste and Sportsman Taxation in the European Union' [2007] *European Taxation*, p. 63-68, p. 65.

¹²⁹ *Brisal - AG Opinion*, supra fn. 9, para. 48.

¹³⁰ *Truck Center - AG Opinion*, supra fn. 92.

¹³¹ *Ibid*, para. 70.

¹³² Luc de Broe, 'Are we Heading towards an Internal Market without Dividend Withholding Tax but with Interest and Royalty Withholding Tax? Some Observations on Advocate General's Kokott Opinion in *Truck Center*' [2009] *EC Tax Review*, p. 2-3, p. 3, Schön, supra fn. 22, p. 286.

¹³³ C-265/04 *Magaretha Bouanich* ECR I-945 (CJEU).

¹³⁴ C-265/04 *Magaretha Bouanich - AG Opinion* ECR I-925 (CJEU).

¹³⁵ *Bouanich*, supra fn. 133, para. 17-18.

¹³⁶ *Ibid*, para. 23.

¹³⁷ *Ibid*, para. 40, *Bouanich - AG Opinion*, supra fn. 134, para. 39.

¹³⁸ *Bouanich*, supra fn. 133, para. 43, *Bouanich - AG Opinion*, supra fn. 134, para. 41.

As this case was about dividend taxation and the income was also subject of tax in two jurisdictions, it is very similar to the source taxation of interests in *Truck Center*. There was no reason in *Truck Center* to deviate from the decision of Bouanich. Unfortunately, the question of the admissibility of non-deduction with EU law was not answered by the CJEU in *Truck Center*, because the referring Court asked in its demand for a preliminary ruling only for guidance in respect to the technique of charging the tax.¹³⁹ AG Kokott seems to have distanced herself from her old opinion in *Truck Center* in her opinion to *Brisal*. Consequently it appears that she no longer supports the overall approach in the case of source states discrimination.¹⁴⁰ This can generally be welcomed, because the overall approach does not find discrimination where the residence state grants a full tax credit to the foreign sourced income. However this would mean that the source state is allowed to “hide behind the residence state’s higher tax burden and the relief method it has chosen” and consequently it would never need to grant national treatment or a more favourable treatment to non-residents,¹⁴¹ which is demanded by the fundamental freedoms and the CJEU’s case law. The consequences of an application of the overall approach, where no full tax credit is given by the state of residence will be analysed in chapter 4.2.3.5.

In addition, it is against the principle of neutrality to deny the deductibility of costs in the source state. This denial is also not protected by the principle of territoriality, which will be discussed in Chapter 4.2.3.4 in more detail.

In the case of *Brisal*, however, a decision cannot be found by stating, that the refusal of deductibility of directly linked costs is restricted by the freedom to provide services. Instead the analysis needs to continue, because the costs KBC seeks to deduct are financing costs for the loan given to *Brisal* and it is questionable, whether there is a direct link between interest income and financing costs as the CJEU negated a direct link between dividend income and financing costs in a recent decision.¹⁴²

4.2.2 Financing Costs

4.2.2.1 Previous CJEU Case Law

In the joined cases of *Miljoen, X and Société Générale* (decided year 2015)¹⁴³ the CJEU had to decide whether the different treatment of resident and non-residents for the purposes of the taxation of dividend income in the Dutch legislation is a forbidden restriction. Within this decision the CJEU also had to decide whether transaction costs and financing costs can be directly linked with the dividend income.¹⁴⁴ The AG

¹³⁹ *Truck Center - AG Opinion*, supra fn. 92, para. 71.

¹⁴⁰ For a contrary opinion see AG Geelhoed, who supports the overall approach for source state discrimination cases. *Test Claimants in Class IV of the ACT Group Litigation - AG Opinion*, supra fn. 33, para. 71, *C-170/05 Denavit International BV - AG Opinion* ECR I-11952 (CJEU), para. 33-40.

¹⁴¹ Weber, supra fn. 33, p. 607.

¹⁴² *Joined Cases Miljoen, X, Société Générale*, supra fn. 91.

¹⁴³ *Ibid*,

¹⁴⁴ *Ibid*, para. 55.

Jääskinen answered this question in his opinion by applying the ruling of *Commission v. Finland* (decided year 2012)¹⁴⁵ in analogy. He states, that financing costs should be considered as being directly linked to the income when the national law sees such a direct link within a purely domestic situation and that it is up to the referring court to establish this.¹⁴⁶ In contrast to that opinion, the CJEU ruled that financing costs never have a direct link to the income of dividends, because they concern the ownership of shares and not the creation of income.¹⁴⁷ It is the first time that the CJEU was so clear on the question what directly costs are.¹⁴⁸

With this statement the CJEU narrowed the term of directly linked costs from “*a direct link between expenses and the income-generating activity*”¹⁴⁹ in *Gerritse* (2003)¹⁵⁰ to “*a link between expenses and the income payment*”¹⁵¹ itself in *Société Générale* (2015)^{152, 153}. This new turn in the case law has come rather sudden, as the CJEU tended to broaden the scope of a direct link in earlier judgments. This cannot only be illustrated in the field of direct taxation, which will be done in the following but also in the area of VAT¹⁵⁴, where the CJEU interpreted the direct link first as a link with a particular output transaction and later broadened the scope to a link with a taxable person’s economic activity.¹⁵⁵ Consequently the CJEU did the exact opposite in the field of VAT.

In the field of direct taxation, the CJEU ruled in addition to the above-mentioned cases of *Gerritse* (2003), *Scorpio* (2006) and *Centre Equestre* (2007), in which the denial of the deduction of directly linked business expenses were reviewed with the compatibility of the freedom to provide services, the CJEU ruled on several occasion on a similar issue, but in connection with other fundamental freedoms. Those cases need to be analysed in order to get a clearer understanding on how the CJEU interpreted the term of a direct link prior *Société Générale*.

¹⁴⁵ *Comm. v. Finland*, supra fn. 126, para. 41.

¹⁴⁶ C-10/14, C-14/14 and 17/14 *Joined Cases Miljoen, X, Société Générale - AG Opinion* not published in ECR, ECLI:EU:C:2015:429 (CJEU), para. 98.

¹⁴⁷ *Joined Cases Miljoen, X, Société Générale*, supra fn. 91, para. 60.

¹⁴⁸ Paternotte, supra fn. 96, p. 39.

¹⁴⁹ Karin Spindler-Simader, ‘Dividend Withholding Taxes after *Miljoen, X* and *Société Générale*’ [2016] EC Tax Review, p. 70-76, p. 71.

¹⁵⁰ *Gerritse*, supra fn. 108, para. 27.

¹⁵¹ Spindler-Simader, supra fn. 149, p. 71.

¹⁵² *Joined Cases Miljoen, X, Société Générale*, supra fn. 91, para. 60.

¹⁵³ CFE ECJ Task Force, ‘Opinion Statement ECJ-TF 1:2016 on the Decision of the European Court of Justice in *Joined Cases Miljoen* (Case C-10/14), *X* (Case C-14/14) and *Société Générale* (Case C-17/14) on the Netherlands Dividend Withholding Tax’ (2016) 56 *European Taxation*, point 4.3.

¹⁵⁴ For a more detailed analysis of the comparability of direct taxation issues and VAT issues see chapter 4.2.3.2.

¹⁵⁵ Dennis Ramsdahl Jensen and Henrik Steensgaard, ‘The Distinction between Direct and General Costs with Regard to the Deduction of Input VAT – The Case of Acquisition, Holding and Sale of Shares’ (2012) 4 *World Tax Journal*, p. 1-32, p. 6. C-26/12 *Fiscale eenheid PPG Holdings BV cs te Hoogezand* not published in ECR, ECLI:EU:C:2013:526 (CJEU), C-435/05 *Investrand BV* ECR I-1317 (CJEU), para. 24, C-29/08 *AB SKF* ECR I-10413 (CJEU), para. 58, C-126/14 *Sveda UAB* not published in ECR, ECLI:EU:C:2015:712 (CJEU), para. 27.

So ruled the CJEU, in *Conijn* (decided year 2006)¹⁵⁶ on the compatibility with the freedom of establishment with the denial of deductibility of tax advisory costs for the purpose of source taxation. Mr. Conijn, a Dutch Resident, was limited tax liable for his shareholding income from a limited partnership.¹⁵⁷ For this income Mr. Conijn was obliged to prepare a tax declaration, which he entrusted to a tax advisor. Mr. Conijn sought to deduct those advisory costs.¹⁵⁸ The CJEU ruled on that issue, that due to the complexity of the German tax law residents and non-residents are placed in a comparable situation.¹⁵⁹ As a consequence it is precluded by the freedom of establishment to allow those costs to be deducted by residents, whereas non-residents are not permitted to do so.¹⁶⁰

In the cases of *Schröder* (decided year 2011)¹⁶¹ and *Grünewald* (decided year 2015)¹⁶² the CJEU had to decide whether annuity payments are deductible for the purpose of source taxation. Mr. Schröder and Mr. Grünewald, both limited taxable in Germany, received a donation in form of succession inter vivos, but were obliged to pay annuities to their living parents.¹⁶³ In contrast to resident tax payers the tax authorities refused the deduction of those payments. The CJEU found on that matter, that the commitment to pay the annuity derives directly from the transfer of property, from which the income was earned and therefore resident and non-resident are placed in a comparable situation.¹⁶⁴ Therefore the different treatment of resident and non-residents constitutes a forbidden restriction of the free movement of capital.¹⁶⁵

In the infringement procedure *Commission v. Finland* (2012)¹⁶⁶ the Finish taxation of Pension funds were at issue. The Finish legislation allowed resident funds to treat the transfer to reserves as expenditure for tax purposes. Non-resident funds were not allowed to do so.¹⁶⁷ The CJEU ruled in this case, that even though those transfers are not directly linked expenditures itself, they became the same, when the legislation assimilated them. As a consequence non-resident pension funds are in a comparable situation for the purpose of those fictive directly linked costs.¹⁶⁸

¹⁵⁶ *Conijn*, supra fn. 126.

¹⁵⁷ *Ibid*, para. 7.

¹⁵⁸ *Ibid*, para. 8.

¹⁵⁹ *Ibid*, para. 23.

¹⁶⁰ *Ibid*, para. 24.

¹⁶¹ *Schröder*, supra fn. 126.

¹⁶² *Grünewald*, supra fn. 126.

¹⁶³ *Schröder*, supra fn. 126, para. 8-10, *Grünewald*, supra fn. 126, para. 7.

¹⁶⁴ *Schröder*, supra fn. 126, para. 40 – 43, *Grünewald*, supra fn. 126, para. 33.

¹⁶⁵ *Schröder*, supra fn. 126, para. 49, *Grünewald*, supra fn. 126, para. 54.

¹⁶⁶ *Comm. v. Finland*, supra fn. 126.

¹⁶⁷ *Ibid*, para. 24.

¹⁶⁸ *Ibid*, para. 43.

4.2.2.2 Possible Reasons of the CJEU for deviating from its prior Case Law in the Case of Société Générale

In the light of those judgments, the CJEU has broadened the scope of the existence of a direct link from the link between expenditure and generating income to a link between costs and an obligation connected to the income. As financing costs clearly fall within this definition it is not clear why the CJEU came to a different conclusion in *Société Générale*.

A possible reason may be, that in contrast to the above-mentioned case law, where the costs occurred due to active income, in *Société Générale* (2015) passive income was at issue, which makes the assessment of a direct link more difficult.¹⁶⁹ However, this reasoning is not in line with the case of *Mrs Bouanich* (2006).¹⁷⁰ In this case the CJEU declared the denial of the deduction of acquisition costs for the purposes of the taxation of dividends as a restriction of the free movement of capital. As a consequence the CJEU made a link between the financial burden of the acquisition and the receiving dividend income.

However, the situation in *Société Générale*¹⁷¹ deviates in so far from the case of *Bouanich*¹⁷² as AG Jääskinen illustrated the different jurisdictional power to tax of the different types of income generated by holding and selling of shares.¹⁷³ So the Source State has the right to tax the dividend income, but not income received from capital gains. As non-residents and residents may only be in a comparable situation in the case where the Member States takes tax jurisdiction over the income, they are generally not comparable in regard to the income of capital gains.¹⁷⁴ Consequently a differentiation for cross-border situations is necessary between costs more closely related to capital gains or more closely to dividend income.¹⁷⁵ This is a new aspect, which was not considered in *Bouanich* and which may have led to a different result. Admittedly, it is unclear whether the CJEU considered this part of the opinion while deciding the case due to the fact that

¹⁶⁹ See to that issue already C-105/08 *Commission v. Portugal - AG Opinion* ECR I-5331 (CJEU), para. 54, *Joined Cases Miljoen, X, Société Générale - AG Opinion*, supra fn. 146, para. 89, Spindler-Simader, supra fn. 149, p. 72, Marc Dassesse, 'Cross-Border Retail Lending in the Eurozone? Forget it!' [2011] EC Tax Review, p. 103-107, p. 107.

¹⁷⁰ *Bouanich*, supra fn. 133, see also chapter 4.2.1.

¹⁷¹ *Joined Cases Miljoen, X, Société Générale*, supra fn. 91.

¹⁷² *Bouanich*, supra fn. 133.

¹⁷³ *Joined Cases Miljoen, X, Société Générale - AG Opinion*, supra fn. 146, para. 95-96.

¹⁷⁴ Force, 'Opinion Statement ECJ-TF 1:2016 on the Decision of the European Court of Justice in *Joined Cases Miljoen (Case C-10/14), X (Case C-14/14) and Société Générale (Case C-17/14) on the Netherlands Dividend Withholding Tax*', supra fn. 153, point 4.3. The Case *Pensioenfond Metaal en Techniek* may clarify this aspect. In this case the Swedish system of dividend taxation is at issue, because it differs between the taxation of non-residents and non-residents. However the AG finds no comparable situation, due to the fact that Sweden does not have jurisdiction to tax all capital income of a non-resident fond. C-252/14 *Pensioenfond Metaal en Techniek - AG Opinion* not published in ECR, ECLI:EU:C:2015:571 (CJEU), para 34.

¹⁷⁵ Force, 'Opinion Statement ECJ-TF 1:2016 on the Decision of the European Court of Justice in *Joined Cases Miljoen (Case C-10/14), X (Case C-14/14) and Société Générale (Case C-17/14) on the Netherlands Dividend Withholding Tax*', point 4.3.

the CJEU did not express itself in details. This would have been desirable in order to augment clarity.

4.2.2.3 AG Opinion of the Case Société Générale in Brisal

AG Kokott does not consider this aspect of the case Société Générale. Instead she states, that the CJEU did not mean to change its case law in Société Générale by referring to the above mentioned cases and that the financing costs should be deductible in the case of Brisal. In general AG Kokott seems to have changed her opinion on the importance of the deductibility of financing costs in the source state. In her opinion to the case of Truck Center she opined, that operating costs were to be considered by the state of residence and that there probably were not any significant operating costs.¹⁷⁶ Consequently she did not consider the deductibility of financing costs, which probably were significant.

In the case of Brisal, however, she recognizes the importance and argues, that the statement of non-deductibility of financing costs in Société Générale cannot be generalized and especially, cannot be transferred to the taxation of interest income.¹⁷⁷ She finds support to that statement by referring to the same difference in the case law of VAT. In Régie Dauphinoise (decided year 1996)¹⁷⁸ the CJEU ruled, that interests constitute the consideration for placing capital at the disposition of a third party¹⁷⁹, whereas dividends cannot be regarded as a consideration for lending money.¹⁸⁰ Consequently the CJEU does not see a direct link between the acquisition of shares and the dividend income, in contrast to interest income, which is directly linked between lending money and receiving interest in the area of indirect taxation. However this statement was given against the background that dividend income is generally not considered to be an economic activity for which the right of input deduction exists. As a consequence this statement is not transferable to the sphere of direct taxation.

4.2.2.4 Interim Conclusion

One can only conclude, that the case law as it stands does not give a distinct guidance on whether financing costs are deductible for the purposes of source taxation. It can be expected, that the CJEU will clarify this issue in the case of Brisal. Either it will limit the non-deductibility to the source taxation of dividends or expand it to other types of income.

However, it can be said, that the principle of neutrality requires the deduction of those costs whatever type of income, when residents are allowed to do so and a denial of this demand cannot be justified by the principle of territoriality, if the Source state has

¹⁷⁶ *Truck Center - AG Opinion*, supra fn. 92, para. 71.

¹⁷⁷ *Joined Cases Miljoen, X, Société Générale - AG Opinion*, supra fn. 146, para. 35.

¹⁷⁸ C-306/94 *Régie Dauphinoise* ECR I-3715 (CJEU).

¹⁷⁹ *Ibid*, para. 17.

¹⁸⁰ Rita de la Feria, 'When do dealings in shares fall within the scope of VAT?' [2008] EC Tax Review, p. 24-40, p. 35.

decided to take jurisdiction and to tax the income at issue.¹⁸¹ This issue will be discussed further in chapter 4.2.3.4.

4.2.3 Overhead Costs

4.2.3.1 The special Issue of Cost Deduction for Financial Institutions

In the case of *Brisal* another issue arises within the question of deductibility of costs due to the fact that KBC, as it is common for banks, did not finance the loan given to *Brisal* by taking a loan with the same amount somewhere else. Instead financial institutions borrow money in large scales in order to finance their services. Consequently the financing costs are not directly attributable to an individual loan.¹⁸² This problem has become bigger since the introduction of the Euro. Nowadays, banks, active in the provision of cross-border services within the Eurozone do not need to borrow or to develop their own deposit of a foreign currency. They simply have a big financing deposit in the currency Euro in order to provide services within that currency zone.¹⁸³

The question is whether a share of those overhead-financing costs can have a direct link to the interest income. AG Kokott answers this question in affirmative by stating that one can only establish a fair competition within the European Union in this sector by allowing the deduction of a share of overheads, which can be attributed to the interest income.¹⁸⁴

In *Commission v. Portugal* she stated, that it is “considerably more difficult for foreign banks to enter into a price based competition” in Portugal¹⁸⁵, due to the fact that reducing the interest rate while the costs remain constant does not lead to a proportional reduction of the amount of tax, in contrast to the taxation system of residents. Consequently non-resident financial institutions need a higher profit margin in order to have the same net profit as resident banks.¹⁸⁶ The Commission, however, stated that it is not common for banks to have a higher profit rate than 10%.¹⁸⁷ In those circumstances the profit of a foreign bank would always be completely consumed (if the applicable tax rate through DTC is 10%) or the amount of tax is higher than the actual profit (if the applicable tax rate is through DTC is 15% or 20% without DTC). As a consequence the taxation of foreign financial institutions varies between 100% and 200%, which renders cross-border services completely inefficient.¹⁸⁸

¹⁸¹ The same approach was applied in several dividend cases. Marjaana Helminen, ‘The Future of Source State Dividend Withholding Taxes in Finland and the European Union’ [2008] *European Taxation*, p. 354-360, p. 355.

¹⁸² *Brisal - AG Opinion*, supra fn. 9, para. 38, *Comm. v. Portugal*, supra fn. 19, para. 18, *Comm. v. Portugal - AG Opinion*, supra fn. 169, para. 54.

¹⁸³ Dassesse, ‘Cross-Border Retail Lending in the Eurozone? Forget it!’, supra fn. 169, p. 104.

¹⁸⁴ *Brisal - AG Opinion*, supra fn. 9, para. 40.

¹⁸⁵ *Comm. v. Portugal - AG Opinion*, supra fn. 169, para. 45.

¹⁸⁶ *Ibid*, para. 44.

¹⁸⁷ *Comm. v. Portugal*, supra fn. 19, para. 13.

¹⁸⁸ *Comm. v. Portugal - AG Opinion*, supra fn. 169, para. 31.

4.2.3.2 Application of Case Law of different Tax Areas

AG Kokott supports her argumentation of the unfair competition, by firstly disclaiming a possible counter argument and secondly by showing a similar approach in the sphere of indirect taxation.

In her first argument she considers, that the CJEU's case law does generally not exclude the deduction of a proportion of overheads.¹⁸⁹ She admits, that the CJEU has recently rejected the fractural approach of personal allowances in *Kieback*¹⁹⁰, but she considers expenses of businesses as not comparable to personal expenditures.¹⁹¹ Her opinion is supported by the CJEU's statement in the case *Gielen*, in which the Court found that a certain allowance is not granted due to the personal situation of the taxpayer, but due to its business activity, which made the situation objectively comparable.¹⁹² AG Bot also did the same differentiation in its opinion to *Schröder*.¹⁹³ Therefore it is clear that the CJEU differentiates between expenses connected with the personal situation of a taxpayer and expenses related to the creation of income. According to Panayi¹⁹⁴, this is due to the fact, that the Treaties of the European Union enable the CJEU to protect persons performing economic activities better than individuals, because the same course of action in the sphere of individuals would create a "*political faux pas*". In addition AG Kokott states that it is very doubtful, whether companies can have expenses, which are related to their personal situation¹⁹⁵ at all and consequently she finds that the CJEU's case law on the non-fragmentation of the Schumacker doctrine is not applicable to companies.¹⁹⁶

The second argument in order to support her statement, that a proportion of the financing-overhead should be deductible, is a similar approach in VAT.¹⁹⁷ For the deduction of input VAT of a transaction it is required, that there is a direct and immediate link to a corresponding output transaction.¹⁹⁸ However the right of deduction exists also for expenditures, which form part of the general costs of the service or goods supplied.¹⁹⁹

¹⁸⁹ *Brisal - AG Opinion*, supra fn. 9, para. 39.

¹⁹⁰ C-9/14 *D. G. Kieback* not published in ECR, ECLI:EU:C:2015:406 (CJEU).

¹⁹¹ *Brisal - AG Opinion*, supra fn. 9, para. 41, the same opinion was expressed by the CFE for the *Gielen* case. CFE ECJ Task Force, 'Opinion Statement of the CFE on the *Gielen* Case (C-440/08)' [2010] *European Taxation*, p. 317-318, para. 12.

¹⁹² C-440/08 *F. Gielen* ECR I-2323 (CJEU), para. 45-47.

¹⁹³ C-450/09 *Ulrich Schröder - AG Opinion* ECR I-2497 (CJEU), para. 60.

¹⁹⁴ Panayi, supra fn. 33, p. 487.

¹⁹⁵ Similar *Terra and Wattel*, supra fn. 19, p. 887.

¹⁹⁶ *Brisal - AG Opinion*, supra fn. 9, para. 41.

¹⁹⁷ *Ibid*, para. 42.

¹⁹⁸ Article 168 of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, published in the Official Journal of the European Union (C 347/1) and case law such as C-98/98 *Midland Bank plc* ECR I-4198 (CJEU), C-104/12 *Wolfram Becker* not published in ECR, ECLI:EU:C:2013:99 (CJEU).

¹⁹⁹ *PPG Holdings BV*, supra fn. 155.

They have in so far a direct and immediate link as they are connected to the economic activity of the taxable person as a whole.²⁰⁰

It is to be analysed in how far the deductibility of overheads in VAT supports the argumentation of the same in direct taxation. The tax area of indirect taxation in form of a value added tax is an area of constant harmonization through Directives. It is therefore not comparable to the area of direct taxation, where mainly the CJEU's case law contributes something to a harmonization in direct taxation²⁰¹, which is however far more limited by the sovereignty of the Member States. As a consequence the value of the principle of tax neutrality ensured by the system of VAT is not comparable to the validity of the same in direct taxation. This becomes especially clear by referring to the Case Schempp, in which the CJEU ruled that the use of the fundamental freedoms does not ensure a tax neutral treatment.²⁰² This is due to the fact, that the CJEU does not see any jurisdiction to rule about disparities between different systems of taxation of different Member States.²⁰³ Furthermore the CJEU does not see any jurisdiction for it to rule upon issues of mere double taxation.²⁰⁴ So the CJEU ruled in Damseaux²⁰⁵, that Member States are not obliged to eliminate juridical double taxation due to the fact, that EU law does not provide for a harmonising measure for this issue.²⁰⁶ Consequently the principle of neutrality defined by the CJEU does not require neutrality in all areas even though the above measures constitute an obstacle for the realization of an internal market.²⁰⁷

Therefore the argument that deduction of overheads is allowed in VAT, does not support the same in direct taxation. Instead an argumentation by using the underlying principles

²⁰⁰ *Investrand BV*, supra fn. 155, para. 24, *AB SKF*, supra fn. 155, para. 58, *Sveda*, supra fn. 155, para. 27, see also Jensen and Steensgaard, supra fn. 149, p. 4-8.

²⁰¹ Except Directives in the field of direct taxation such as Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States published in the Official Journal of the European Union (L 225/6), replaced by 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 published in the Official Journal of the European Union (L 007/41), Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States published in the Official Journal of the European Union (L 157/49), Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States published in the Official Journal of the European Union (L 225/1), replaced by Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, published in the Official Journal of the European Union (L 58/19) and Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, published in the Official Journal of the European Union (L 157/28), replaced by Council Directive 2014/48/EU of 24 March 2014 amending Directive 2003/48/EC on taxation of savings income in the form of interest payments, published in the Official Journal of the European Union (L 111/50).

²⁰² *Schempp*, supra fn. 33, para. 45.

²⁰³ Schön, supra fn. 22, p. 275.

²⁰⁴ *Ibid.*, p. 274, Terra and Wattel, supra fn. 19, p. 165, Weber, supra fn. 33, p. 588.

²⁰⁵ C-128/08 *Jacques Damseaux* ECR I-6823 (CJEU).

²⁰⁶ *Ibid.*, para. 34-35 and the following cases: *Mr and Mrs Gilly*, supra fn. 33, para. 46-48, *Magarete Block*, supra fn. 107, para. 30-35.

²⁰⁷ See chapter 2.

of EU law is necessary. Indeed, an analysis made in chapter 4.2.3.4 reveals that the principle of neutrality in the field of direct taxation necessitates the same treatment of overheads as it is required in VAT.

4.2.3.3 Previous Case Law on the same Issue

The CJEU had the chance to define the line between the principle of neutrality in direct taxation and the territoriality principle in the light of the deduction of a proportion of overheads in the case of *Centro Equestre* (2007).²⁰⁸ In this case the Court was asked to rule upon the condition made by German law that expenses incurred have to have a *direct connection* for source taxation purposes in order to be deductible.²⁰⁹

AG Léger argues in his opinion, that this condition makes it impossible to deduct any costs, without such a connection, whereas resident companies or non-resident companies, but limited taxable through the establishment of a branch have the right to deduct the entirety of its operating costs.²¹⁰ This difference in treatment, according to Léger, constitutes an indirect discrimination of nationality.²¹¹ He further states, that the direct link, which was established in *Gerritse*, is not in anyway comparable to the meaning of the direct connection in the German law.²¹²

The CJEU did not exactly follow the AG opinion. Instead it allowed the condition of a direct connection under the condition, that costs inextricably linked to the activity and irrespective of the time or place at which those costs incurred, are deductible under this term.²¹³ And it is up to the national court to decide which costs fulfil the above-mentioned condition.²¹⁴

One could interpret the statement of the Court as a refusal of the AG Opinion.²¹⁵ However, the Court may have meant the same with this statement as the AG, but was forced to reformulate it, because it has no jurisdiction to interpret national law as the AG did in his opinion. This interpretation is supported by the fact that the CJEU did not exclude the deduction of overheads explicitly.²¹⁶ In addition, it described the direct link as being connected to the “*activity*”²¹⁷ and as a “*direct economic connection*”²¹⁸. This wording is very similar to the definition of a direct link in the area of VAT, which allows

²⁰⁸ *Centro Equestre*, supra fn. 11.

²⁰⁹ *Ibid*, para. 18.

²¹⁰ C-345/04 *Centro Equestre da Lezíria Grande Lda- AG Opinion* ECR I-1427 (CJEU), para. 41-43.

²¹¹ *Ibid*, para. 53.

²¹² *Ibid*, para. 56.

²¹³ *Centro Equestre*, supra fn. 11, para. 27.

²¹⁴ *Ibid*, para. 26. The BFH, made use of its room of interpretation and decided, that only individual costs are deductible. *BFH Urteil vom 24.4.2007* (I R 93/03) BStBl 2008 II, p. 132.

²¹⁵ Monsenego, supra fn. 24, p. 312, Marjaana Helminen, ‘The Finnish Dividend Withholding Tax System and the Principle of the Free Movement of Capital: A Never-Ending Story?’ [2010] *European Taxation*, p. 402-408, p. 404.

²¹⁶ *Centro Equestre*, supra fn. 11, para. 26-27.

²¹⁷ *Ibid*, para. 27.

²¹⁸ *Ibid*, para. 25.

the deduction of input-VAT of overheads, if it is connected to the *economic activity* as a whole.²¹⁹

As a consequence the *Centro Equestre* case can be interpreted in a way that the CJEU has not declined the deductibility of overheads, but has neither expressly supported it.²²⁰ Therefore, there is no precedent case law, in which one could find a solution for this issue.

4.2.3.4 Deductive Approach

Due to the fact, that there is no case law directly applicable the inductive approach, which analyses the existing case law and which was used to find answers to the previous issues, cannot be applied anymore. Instead only the application of the deductive approach, which analyses the issue in the light of the basic principles underlying EU law²²¹ leads to a reasonable analysis, which may provide a possible solution.

The fundamental freedoms do not require Member States to extend their jurisdiction to the whole territory of the European Union and to tax cross-border transaction alike as domestic situations. So Member States are in general free to allocate their taxing powers and decline the taxation of certain foreign sourced income. However the resulting powers must be exercised in a non-discriminatory way. This means, that it is prohibited to treat domestic situations more advantageously than cross-border situations, whereas a treatment vice versa – reverse discrimination – is not prohibited.²²²

In the case of the non-deductibility of overheads, there is a disadvantageous difference in treatment between non-residents offering cross-border services and resident financial institutions. The question however is whether this difference in treatment can be protected by the principle of territoriality. As stated in chapter 2 of this thesis, the best concept in order to reconcile the demands of the principle of neutrality and the principle of territoriality is the concept of coherence.²²³ This concept is in line with the principle of neutrality as it prevents taxpayers from cherry picking.²²⁴

²¹⁹ *Investrand BV*, supra fn. 200, para. 24, *AB SKF*, supra fn. 200, para. 58, *Sveda*, supra fn. 200, para. 27, see also Jensen and Steensgaard, supra fn. 149, p. 4-8.

²²⁰ *Brisal - AG Opinion*, supra fn. 9, para. 39, Helminen, ‘The Finnish Dividend Withholding Tax System and the Principle of the Free Movement of Capital: A Never-Ending Story?’, supra fn. 215, p. 404, with respect to the case *Gerritse*, supra fn. 108: Luc Hinnekens, ‘European Court challenges flat rate withholding taxation of non-resident artist: comment on the Gerritse decision’ [2003] EC Tax Review, p. 207-213, p. 211.

²²¹ See Chapter 2.

²²² Wolfgang Schön, ‘Tax competition in Europe - the legal perspective’ [2000] EC Tax Review, p. 90-105, p. 99, for detailed analysis see Daniela Garcia, ‘Are There Reasons to Convert Reverse Discrimination into a Prohibited Measure?’ [2009] EC Tax Review, p. 179-191, who argues, that the CJEU could target reverse discrimination through a different interpretation of Article 18 TFEU (former Article 12 EC).

²²³ Schön, ‘Neutrality and Territoriality – Competing or Converging Concepts in European Tax Law?’, supra fn. 22, p. 285, Terra and Wattel, supra fn. 19, p. 61.

²²⁴ Schön, ‘Neutrality and Territoriality – Competing or Converging Concepts in European Tax Law?’, supra fn. 22, p. 285.

This concept allows on the one hand the denial of deductibility when the Member State did not take jurisdiction and consequently did not levy any kind of tax on the income.²²⁵ On the other hand, however, it demands the deduction of costs whenever the corresponding income is taxed.²²⁶ The principle of neutrality requires the same treatment of residents and non-residents for the purposes of cost deduction, no matter whether those costs are considered to be individual costs or overheads. It is questionable whether the fact that two Member States have divided the right to tax among each other, whereupon the Source State has limited its tax amount to a certain percentage, legitimates the non-deductibility of overheads in the source state, because this approach conflicts to the general statement that EU law is indifferent to the allocation of taxing rights.²²⁷ Consequently both Member States are in general obliged to consider overheads in order to calculate the taxable income.

Certainly, it is line with the principle of territoriality and the concept of coherence when the Source State limits the deductibility of overheads to that proportion which is related to the income it levies tax upon.

4.2.3.5 Reasons for a Rejection of Deductibility of Overheads

The CJEU may reject such a far-reaching step towards an assimilation of residents and non-residents. This assumption is based on the general trend, which is shown in many doctrinal debates²²⁸, that the CJEU has shifted from a rather aggressive approach in order to harmonize the direct tax system within the European Union towards an approach, which rather protects – justified or not – the sovereignty of the Member States.²²⁹ The case of *Brisal* could follow this approach, because making the deduction of financing-overhead costs obligatory would be a big limitation to the sovereignty of Member States and a big step towards a harmonized internal market.

A possible rejection of the deductibility of overheads could either take place within the comparability or the justification analysis²³⁰. In all the cases discussed above, in which the deductibility of certain costs for source taxation purposes was at issue, the CJEU found a comparable situation of non-residents and residents in respect for the deduction of directly linked costs.²³¹ This direct link of costs was defined as a link between the

²²⁵ See inter alia *Timac Agro*, supra fn. 47.

²²⁶ Paolo Arginelli, 'The Discriminatory Taxation of Permanent Establishments by the Host State in the European Union: a Too Much Separate Entity Approach' (2007) 35 *Intertax*, p. 82-116, p. 94.

²²⁷ Schön, 'Neutrality and Territoriality – Competing or Converging Concepts in European Tax Law?', supra fn. 22, p. 286.

²²⁸ Vanistendael, 'The ECJ at the Crossroads: Balancing Tax Sovereignty against the Imperatives of the Single Market', supra fn. 35, p. 414, Schön, 'Neutrality and Territoriality – Competing or Converging Concepts in European Tax Law?', supra fn. 22, p. 293.

²²⁹ Weber, supra fn. 33, p. 616.

²³⁰ This part of the thesis only discusses the comparability analysis. Possible Justifications are discussed in Chapter 4.

²³¹ *Gerritse*, supra fn. 108, para. 27, *Scorpio*, supra fn. 73, para. 47, *Centro Equestre*, supra fn. 11, para. 25, *Conijn*, supra fn. 126, para. 22, *Comm. v. Finland*, supra fn. 126, para. 37, *Schröder*, supra fn. 126, para. 41, *Grünwald*, supra fn. 126, para. 31, *Joined Cases Miljoen, X, Société Générale*, supra fn. 91, para. 60.

income and inextricably costs.²³² It is, however, questionable, whether overheads can have such an inextricable link, due to the fact that a part of them has to be separated through a proportion calculation. As a consequence the entirety of overhead costs is never inextricably linked to the income. Therefore the Court could simply argue, that those costs can never have a direct link and for this reason there cannot be found any objective comparable situation.

However, in doing so, the CJEU would reject its *new* approach, in which it separates the comparability analysis from the discrimination analysis. In its new comparability analysis, it would only do a superficial comparability analysis, in which it compares the income and whether non-resident and residents are both subject to tax. Following this approach, it must conclude in the case of *Brisal*, that there is a comparable situation as the interest income received by non-residents and residents are taxed by Portugal.

Furthermore, the CJEU may apply an overall approach within its comparability analysis. For this approach, the CJEU analyses not only the legislation of the source state Portugal, but also the legislation of the residence state Ireland, which could hide the discrimination of source state.²³³ The overall approach was applied in several cases²³⁴, which was appreciated by many scholars.²³⁵ Though, this approach was especially welcomed because it was applied in order to strengthen the concept of the ability to pay.²³⁶ An application of the overall approach in the case of *Brisal*, however, could lead to an opposite result. This is in particular the case when it is simply stated that the overheads are deductible in the state of residence and that this state is responsible of preventing double taxation.²³⁷

This is in general a correct determination, but in order to eliminate the discrimination completely it would be necessary for the residence state to credit the whole amount of tax paid in the source state. However, the residence state is only obliged by the OECD MTC to provide for elimination to the amount of the corresponding net amount. Hence, the disadvantage of levying taxes on the gross amount remains untouched. Only if the residence state waived its own tax revenue, the discrimination would not occur.²³⁸

It can therefore be concluded, that even by applying the overall approach, the CJEU should find a discriminatory treatment, as it should by applying its *new* comparability analysis, because the legislation at issue renders the cross-border provision of services

²³² *Centro Equestre*, supra fn. 11, para. 25.

²³³ Georg Kofler, 'Tax Treaty "Neutralization" of Source State Discrimination under the EU Fundamental Freedoms?' [2011] *Bulletin for International Taxation*, p. 684-690, p. 686. Kofler calls the overall approach with application of a DTC a „treaty-based overall approach“.

²³⁴ See inter alia: *Schumacker*, supra fn. 6, *Bosal Holding BV*, supra fn. 25, C-319/02 *Petri Manninen* ECR I-7498 (CJEU), *Marks & Spencer*, supra fn. 23, *Schempp*, supra fn. 33.

²³⁵ María Cruz Barreiro Carril, 'National Tax Sovereignty and EC Fundamental Freedoms: The Impact of Tax Obstacles on the Internal Market' (2010) 38 *Intertax*, p. 105-113, p. 110.

²³⁶ Vanistendael, 'Ability to Pay in European Community Law', supra fn. 38, p. 134, Cerioni, supra fn. 26, p. 272.

²³⁷ This statement was made by AG Kokott in *Truck Center - AG Opinion*, supra fn. 92, para. 70.

²³⁸ Palma, supra fn. 102, p 640.

less attractive. Whether or not that discrimination could be justified by overriding reasons for the public interest will be analysed in Chapter 5. However, before possible grounds for a justification can be evaluated, it is to be analysed, whether the lower tax rate is able to compensate the refusal of deduction of financing-overheads.

4.2.4 Compensation through lower Tax Rate

4.2.4.1 Previous Case Law and AG Opinion

Portugal taxes interest income of a non-resident at a tax rate of 20% or at a lower rate according to an applicable double taxation agreement, whereas residents are subject to a tax rate of 25% CIT. This lower tax rate is no different than a cost deduction flat rate of 20% of the gross income. Consequently the scheme of taxation for non-residents is always more advantageous if the actual costs incurred are lower than 20% of the gross income. This, however, would require a profit margin of more 80% and it is very doubtful that such profit margins can be achieved by providing a bank loan. In the case of *Brisal* the applicable tax rate was 15%. The profit margin of KBC must therefore be 60% in order to profit from the non-resident tax regime.

In the case of *Hirvonen* (decided 2015)²³⁹, the CJEU accepted the compensation of the non-deductibility of interest costs through a lower tax rate. Ms *Hirvonen* moved from Sweden to Finland in order to enjoy her retirement there. She received all her Pension income from Sweden, where she worked her whole working life.²⁴⁰ This income was taxable only in Sweden according to the DTC between Sweden and Finland. Ms *Hirvonen* has chosen to be taxed under the non-resident tax regime, under which the interest cost occurred were not deductible.²⁴¹ This treatment, however, was still more advantageous than a treatment as a resident, for which the tax amount was calculated by deducting the interest costs and several other allowances at a progressive tax rate.²⁴² Therefore, the CJEU denied the cherry picking of Ms *Hirvonen* by stating that the non-deductibility is inherent in such a system of non-resident taxation and declared the national legislation as not being precluded by EU law.²⁴³

In this case, the CJEU followed an approach, under which the ultimate tax burden is the relevant factor to find an infringement of EU law (factual consideration). AG *Kokott*, however, states in her opinion, that this approach should be rejected, due to the fact, that it is not consistent with the “*rest of the case law*”.²⁴⁴ Instead, a legal approach should be followed, through which already the non-deduction constitutes an infringement of EU law.²⁴⁵

²³⁹ C-632/13 *Hillka Hirvonen* not published in ECR, ECLI:EU:C:2015:765 (CJEU).

²⁴⁰ *Ibid*, para. 13.

²⁴¹ *Ibid*, para. 14.

²⁴² *Ibid*, para. 45.

²⁴³ *Ibid*, para. 48.

²⁴⁴ *Brisal - AG Opinion*, supra fn. 9, para. 47.

²⁴⁵ *Ibid*, para. 49.

She finds support for her argumentation *inter alia*²⁴⁶ in the case of *Gerritse* (2003)²⁴⁷, in which the CJEU clearly distinguished between the issue of cost deductibility and the applicable tax rate. In this case the CJEU separated the single question referred by the national court into two.²⁴⁸ It separated on the one hand the question, whether the non-deductibility infringes EU law and on the other hand whether the same applies to the different tax rates (fixed tax rate versus progressive tax rate). Only for the second question the CJEU made the overall tax burden subject of the comparison.²⁴⁹ In the case of *Brisal* however, this calculation is unnecessary, because residents and non-residents are subject to a fixed tax rate, whereas the tax rate of non-residents is lower.²⁵⁰ This interpretation of *Gerritse* is supported by several AGs²⁵¹ and by other decisions of the CJEU.²⁵² Following this legal approach, it is clear that the disadvantageous treatment – the non-deduction – cannot be justified by other tax advantages.²⁵³

However, AG Jääskinen interprets the case of *Gerritse* (2003) in his opinion to the joined cases *Miljoen, X and Société Générale* (2015) as making the final tax burden subject of comparison.²⁵⁴ The same approach was followed in the case *Hirvonen* (2015).²⁵⁵ Consequently it is not clear anymore, whether the factual or the legal approach should be followed in order to assess a disadvantageous treatment of non-deductibility of costs.²⁵⁶

4.2.4.2 Factual or Legal Approach? – Both lead to the same Result in *Brisal*

The CJEU has the opportunity to bring clarity into that issue by either comparing the ultimate tax burden or by following the legal approach in the case of *Brisal*. The result of that analysis, however, is very likely to be the same. The legal approach, which is preferred by AG Kokott, does not require an analysis whether the lower tax rate could compensate the disadvantage of the non-deductibility. The factual approach on the other

²⁴⁶ See also, C-169/03 *Florian W. Wallentin* ECR I-6458 (CJEU), para. 17.

²⁴⁷ *Gerritse*, supra fn. 108, this case is also quoted in the judgment of *Hirvonen*, supra fn. 239, para. 44. However, it is interpreted completely different than in earlier judgments.

²⁴⁸ *Gerritse*, supra fn. 108, para. 24, Hinnekens, supra fn. 220, p. 208, Axel Cordewener, 'Das EuGH Urteil "Gerritse" und seine Umsetzung durch das BMF Schreiben vom 3.11.2003 - Steine statt Brot für die Besteuerungspraxis!' [2004] Internationales Steuerrecht, p. 109-117, p. 112.

²⁴⁹ *Brisal - AG Opinion*, supra fn. 9, para. 48 for an opposite interpretation see Marjaana Helminen, *EU Tax Law - Direct Taxation* (4th edn, IBFD Online Books 2015), chapter 2.1.3.2.

²⁵⁰ *Brisal - AG Opinion*, supra fn. 9, para. 49.

²⁵¹ AG Léger in: *Centro Equestre - AG Opinion*, supra fn. 210, para. 54 AG Mazák in: C-43/07 *D. M. M. A. Arens-Sikken - AG Opinion* ECR I-6887 (CJEU), para. 79, AG Colomer in: C-440/08 *F. Gielen - AG Opinion* ECR I-2323 (CJEU), para. 34, AG Sharpston in: C-342/10 *Commission v. Finland - AG Opinion* not published in ECR, ECLI:EU:C:2012:474 (CJEU), para. 50 and AG Bot in: *Schröder - AG Opinion*, supra fn. 193, para. 47.

²⁵² C-600/10 *Commission v. Germany* not published in ECR, ECLI:EU:C:2012:737 (CJEU), para. 11, *Schröder*, supra fn. 126, para. 40, C-43/07 *D. M. M. A. Arens-Sikken* ECR I-6887 (CJEU), para. 44-45, C-11/07 *Hans Eckelkamp et al.* ECR I-6845 (CJEU), para. 50, *Bouanich*, supra fn. 133, para. 40.

²⁵³ *Commission v. France*, supra fn. 6, para. 21, *de Groot*, supra fn. 25, para. 97.

²⁵⁴ *Joined Cases Miljoen, X, Société Générale - AG Opinion*, supra fn. 146, para. 64, similar interpreted by Monsenego, supra fn. 24, p. 312 and Helminen, 'The Finnish Dividend Withholding Tax System and the Principle of the Free Movement of Capital: A Never-Ending Story?', supra fn. 215, p. 404.

²⁵⁵ *Hirvonen*, supra fn. 239, para. 44.

²⁵⁶ Cécile Broklind, 'Three New Swedish Direct Taxation Cases on Their Way to the ECJ' [2014] *European Taxation*, p. 385-391, p. 388.

hand requires that analysis. Though, it is likely that the CJEU is going to conclude, that the lower tax rate is not able to compensate the disadvantage, due to the fact that KBC presumably has not a higher profit margin than 60%. Only in those circumstances is the lower tax rate able to compensate the disadvantage of the non-deduction of interest costs.²⁵⁷ As a consequence, the approach the CJEU will take is not likely to change the result of the case in this point. However, in order to establish legal certainty²⁵⁸, it is important to follow one approach for the same legal issue.

Generally, the legal approach can be considered to be preferable due to several reasons.²⁵⁹ Firstly, the Court has followed this approach for years and consequently it could have been seen as settled case law prior *Hirvonen*.²⁶⁰ Secondly, the application of the legal approach is more general. This leads, on the one hand, to an avoidance of a very distinct case-by-case approach²⁶¹, which is not desirable for the principle of legal certainty. And on the other hand, the legal approach also comprises cases of losses. The legislation at issue leads always to a disadvantage, which cannot be compensated by a lower tax rate, when the cross-border service constitutes a loss.²⁶² In the case of a loss making transaction of non-residents the service is still taxed at the gross amount, whereas residents are not taxed at all in the same situation.

Another way for a possible compensation – the option to be taxed as a resident²⁶³ – was not available for KBC at the period. Portugal made this option available a few years later. Therefore, there is no need to analyse whether the choice of being taxed as a resident could compensate the disadvantageous treatment of non-residents.²⁶⁴

4.3 Interim Conclusion

This chapter analysed certain aspects of the Portuguese legislation, which could infringe EU law. The analysis has shown that according to settled case law, EU law does not preclude the technique of levying the tax in form of a withholding tax, even though it is criticised by doctrinal debates.²⁶⁵ For the issue of cost-deduction, on the other hand, no

²⁵⁷ See chapter 4.2.4.1.

²⁵⁸ For more information see Dennis Weber and Thidaporn Siritharporn, ‘Chapter 11 - Legal Certainty, Geitimate Expectations, Legislative Drafting, Harmonization and Legal Enforcement in EU Law’ in Cécile Broklind (ed), *Principles of EU Law: Function, Status and Impact in EU Tax Law* (IBFD 2014).

²⁵⁹ *Brisal - AG Opinion*, supra fn. 9, para. 54.

²⁶⁰ *Ibid*, para. 47.

²⁶¹ Cécile Broklind, ‘*Hirvonen*. Income tax. No discrimination. Non-resident taxpayer is not subject to an overall tax burden greater than that placed on a resident taxpayer. Court of Justice - Comments’ [2016] *H&I - Highlights and Insights on European Taxation*, p. 52-53, p. 53.

²⁶² This leads to a systematic disadvantage of the system of flat rates, which is contrary to EU law. C-512/13 *C. G. Sopora* not published in ECR, ECLI:EU:C:2015:108 (CJEU), para. 35.

²⁶³ Established through the case *Schumacker*, supra fn. 6 and subsequent case law.

²⁶⁴ However, it is likely that the CJEU does not accept such compensation, because it did not accept the same in the case *Gielen*, supra fn. 192. For more information see: Force, ‘Opinion Statement of the CFE on the *Gielen* Case (C-440/08)’, supra fn. 191, para. 13, Maarten F. de Wilde, ‘What if Member States Subjected Non-Resident Taxpayers to Unlimited Income Taxation whilst Granting Double Tax Relief under a Netherlands-Style Tax Exemption?’ (2011) 65 *Bulletin for International Taxation*,

²⁶⁵ Kemmeren, supra n. 90, p. 5, Broe, supra fn. 132, p. 2, Dick Molenaar and Harald Grams, ‘The ECJ X Case (Football Club Feyenoord)’ [2011] *European Taxation*, p. 358-363, Dick Molenaar and Mario Tenore, ‘Music and Taxation’ (2015) 43 *Intertax*, p. 209-215, p. 215.

clear answer could be found in precedent case law. The CJEU has ruled several times, that directly linked costs have to be deductible for source taxation purposes in order to be not precluded by EU law. However the analysis has demonstrated, that the CJEU has recently shifted from a legal approach to a factual computation. As a consequence, the current case law has become opaque in respect to how the CJEU will rule on that issue. Will the CJEU declare the non-deductibility as incompatible with EU law simply by stating, that this is a disadvantageous difference in treatment or must that difference in treatment lead to a more burdensome taxation for non-residents in order to be precluded by EU law?

The situation of KBC and Brisal becomes more difficult to assess due to the fact, that KBC has no direct expenses, but overheads. The analysis in this part has shown that there is no earlier case law on that issue and that the case law of other fields of taxation is not directly applicable. Therefore a deductive approach was applied, which revealed, that overheads should be deductible in a certain proportion in order to further advance the realization of the internal market.

However a restriction or a discrimination can still be found as compatible with EU law in the case, where the national legislation is to be found justified and proportionate, which will be analysed in the following chapter.

5 Justification Analysis

5.1 Allocation of the Power to Tax

The first justification reason brought forward is the need to preserve the balanced allocation of taxing rights.²⁶⁶ This justification was accepted the first time in combination with other justifications in *Marks & Spencer*²⁶⁷.²⁶⁸ In the case of *X Holding*, the CJEU accepted this justification as a single ground in order to allow Member States to implement legislation, which aim to prevent structures that are capable of jeopardizing the right to tax of the Member States within their territory.²⁶⁹ However it was never accepted for justifying a difference in treatment of the source taxation of non-resident compared to residents.²⁷⁰

Even though Member states are free to allocate their taxing powers among each other unilaterally or through concluding double tax agreements,²⁷¹ they cannot rely on their content in order to justify an infringement of EU law.²⁷²

²⁶⁶ *Brisal - AG Opinion*, supra fn. 9, para. 56.

²⁶⁷ *Marks & Spencer*, supra fn. 23, para. 45.

²⁶⁸ *Englmair*, supra fn. 51, p. 78.

²⁶⁹ *C-337/08 X Holding BV* ECR I-1215 (CJEU), para. 40.

²⁷⁰ *Englmair*, supra fn. 51, p. 79.

²⁷¹ *Mr and Mrs Gilly*, supra fn. 33, para. 30, *Saint-Gobain*, supra fn. 6, para. 57.

²⁷² *de Groot*, supra fn. 25, para. 94, *Bouanich*, supra fn. 133, para. 50, *Test Claimants in Class IV of the ACT Group Litigation - AG Opinion*, supra fn. 33, para. 54, *Amurta SGPS*, supra fn. 91, para. 24, *C-527/06 R. H. H. Renneberg* EU:C:2008:566 (CJEU), para. 50, *Roman Bukowansky*, supra fn. 33, para. 37.

In addition it is questionable, whether the Portuguese legislation complies with the recent interpretation of the OECD MTC, on which the double tax agreement between Portugal and Ireland is based upon. This Model prescribes a gross taxation of interests in its Article 11. However, the Commentary to Article 11 discusses the special issues of interest payments to financial institutions and states that for that reason many States may want to exempt those payments from source taxation.²⁷³

Also a neutralization of the disadvantage by the residence state²⁷⁴ is not possible, for the same reasons, as the overall approach does not lead to a different result than the unilateral approach.²⁷⁵ Due to the fact that the methods of relieving double taxation in Article 23A and 23B limit the amount of tax deduction to the corresponding net amount of the residence state.²⁷⁶ As a consequence the disadvantages of gross taxation remain unaffected, except the residence state would waive its own tax revenue.²⁷⁷

To conclude, the justification of allocating the power to tax cannot be accepted in the case of *Brisal*, because on the one hand, the CJEU has never accepted a national legislation to prevail over EU law, simply because it complies with international tax law and on the other hand, the legislation at issue is not in line with the most recent interpretation of the OECD MTC.

5.2 Double Deduction of Costs

Another justification ground, which was put forward, is that costs could be deducted twice –in the state of residence and the source state.²⁷⁸ AG Kokott does not find this argument convincing, because for income, which is taxed twice, the corresponding costs should also be deductible twice.²⁷⁹ With this argumentation she dissents from her own opinion in *Truck Center*, in which she stated, that the costs should only be deductible in the state of residence.²⁸⁰ In addition, she also deviates from the CJEU's decision in *Centro Equestre*, in which the Court generally accepted the need to prevent double counting of costs, but came to the conclusion, that the Member State at issue was sufficiently equipped with a procedure, which could prevent that.²⁸¹

The general acceptance of such a justification leads to a strengthening of the tax sovereignty which is neither in line with the principle of territoriality nor with principle of territoriality as defined in Chapter 2.1. Instead it would allow Member States in the

²⁷³ OECD Model Tax Convention - Commentary on Article 11 concerning the Taxation of Interest, para. 7.7.

²⁷⁴ Kofler, supra fn. 233, p. 685 and for case law see inter alia *Joined Cases Miljoen, X, Société Générale*, supra fn. 91, para. 80, *Amurta SGPS*, supra fn. 91.

²⁷⁵ See chapter 4.2.3.5.

²⁷⁶ Roland Ismer, 'Abschnitt 5 - Methoden zur Vermeidung der Doppelbesteuerung (Artikel 23A. - Artikel 23B.)' in Klaus Vogel and Moris Lehner (eds), *Doppelbesteuerungsabkommen: DBA* (6th Edition edn, C. H. Beck 2015), para. 147.

²⁷⁷ Palma, supra fn. 102, p. 640.

²⁷⁸ *Brisal - AG Opinion*, supra fn. 9, para. 64.

²⁷⁹ *Ibid*, para. 65.

²⁸⁰ *Truck Center - AG Opinion*, supra fn. 92, para. 70.

²⁸¹ *Centro Equestre*, supra fn. 11, para. 36.

sphere of source taxation to raise their tax revenue without the obligation to consider the ability-to-pay of taxpayers.²⁸²

5.3 Efficient Tax Collection

The third ground submitted by the Portuguese Government in order to justify the national legislation is the need to collect tax efficiently.²⁸³ As stated in chapter 4.1, this justification was accepted in *Scorpio*²⁸⁴ and *X NV*²⁸⁵ and prevented that the technique of taxation was found as being precluded by EU law.

The same argument however was also submitted in order to justify the denial of cost deduction. Therefore it is to be analysed whether this argument is able to justify the legislation at issue. The obligation to take operating costs into account for the source taxation will probably increase the administrative costs of tax authorities of the Member State at issue.²⁸⁶ However this burden does not deviate from the expenses spend for the tax assessment of resident taxpayers, who are allowed to deduct the operating costs.²⁸⁷

The administrative burden also increases for the service recipient when costs are to be considered. Preventing that by simplifying the tax system for source taxation may justify the legislation at issue. In the case of *Hirvonen* the CJEU accepted a similar argumentation of the Swedish Government, who claimed, that the non-deductibility is inherent in the system of source taxation, because it seeks to minimize the administrative burden of taxpayers.²⁸⁸ However, the Court may have only accepted this argument, because it found later that the non-deduction is “irrelevant” in the case where the overall tax burden of non-residents is not greater than the one of residents.²⁸⁹

Besides, the additional burden of the service recipient could be simply avoided by allowing the service provider to claim the deduction in a subsequent procedure.²⁹⁰ Such a procedure would on the one hand ensure, that the business secrets are kept²⁹¹ and on the other hand the service provider can choose himself by declaring or not declaring the costs, whether the administrative burden is actually higher than the tax savings through the deduction of costs.²⁹² However, it is questionable whether such a procedure is to be found as compatible with EU law, due to the fact that the CJEU has declared a similar system in *Scorpio* as being precluded by EU law.²⁹³

²⁸² For more information to the concept of the ability to pay see: Vanistendael, ‘Ability to Pay in European Community Law’, supra fn. 38, Bardini, supra fn. 128, Joachim Englisch, ‘Chapter 19 - Ability to Pay’ in Cécile Broklind (ed), *Principles of Law: Function, Status and Impact in EU Tax Law* (IBFD 2014),

²⁸³ *Brisal - AG Opinion*, supra fn. 9, para. 66.

²⁸⁴ *Scorpio*, supra fn. 73.

²⁸⁵ *X NV*, supra fn. 84.

²⁸⁶ *Brisal - AG Opinion*, supra fn. 9, para. 68.

²⁸⁷ *Ibid*, para. 70.

²⁸⁸ *Hirvonen*, supra fn. 239, para. 46.

²⁸⁹ *Ibid*, para. 48.

²⁹⁰ *Brisal - AG Opinion*, supra fn. 9, para. 71.

²⁹¹ The same issue was already discussed by AG Léger in: *Scorpio - AG Opinion*, supra fn. 115, para. 30.

²⁹² *Brisal - AG Opinion*, supra fn. 9, para. 72.

²⁹³ *Scorpio*, supra fn. 73.

However, AG Kokott rightfully concludes, that an additional administrative burden cannot justify the non-deductibility of costs. The burden of the tax authorities for non-resident taxation would simply be assimilated to the one of residence taxation. And there are other, more appropriate means in order to avoid a higher administrative burden for the service recipient. Consequently the justification ground of an efficient tax collection can only justify the technique of taxation through withholding taxes.

5.4 Tax Supervision

The last ground brought forward in order to justify the Portuguese legislation is that there are no sufficient means to check the operating costs claimed by the non-resident taxpayer. This justification is generally accepted by the CJEU, however it is interpreted rather strict.²⁹⁴ Usually the Court rejects this argument by referring to the Directive²⁹⁵ on mutual assistance in the exchange of information.²⁹⁶ Hemels deduced by doing a systematic study of all the CJEU case law, in which this justification ground was submitted, that the CJEU only permits this justification if no provision is available between a Member State and a Third State. Is no directive applicable in an intra-Union situation, practical issues cannot justify a disadvantageous treatment.²⁹⁷

On those grounds it is doubtful that the CJEU will accept this justification ground in order to legitimate the legislation at issue.

6 Conclusion

6.1 Conclusion of the Case Brisal

The analysis in this thesis has revealed that there are several aspects of the Portuguese legislation at issue in the case of Brisal, which are likely to infringe EU law. On the one hand, the technique of levying the tax in form of a withholding tax for the taxation of non-residents, whereas residents are taxed through corporate income tax assessment, can constitute an obstacle itself. This issue was raised before by several cases, in which the CJEU did either not find a comparable situation at all or by considering this procedure to be justified by the need to ensure the efficient tax collection. Thereby, no difference was made, whether a directive for recovery of tax was available or not. An analysis has illustrated, that this reasoning is not in line with other cases in different tax fields. Therefore it was concluded, that the CJEU might take the newer directives for recovery

²⁹⁴ See inter alia: C-120/78 *Rewe-Zentral AG* ECR 650 (CJEU), para. 8, C-250/95 *Futura Participation SA* ECR I-2492 (CJEU), para. 31 ff., C-386/04 *Centro di Musicologia Walter Stauffer* ECR I-8234 (CJEU), para. 49, C-318/07 *Hein Persche* ECR I-359 (CJEU), para. 35, C-418/07 *Société Papillon* ECR I-8947 (CJEU), para. 55 ff., C-190/12 *Emerging Markets Series of DFA Investment Trust Company* not published in ECR, ECLI:EU:C:2014:249 (CJEU), para. 71 ff.

²⁹⁵ Council Directive 77/799/EEC Concerning Mutual Assistance by the Competent Authorities of the Member States in the Field of Direct Taxation, , repealed by Council Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EC, published in the Official Journal of the European Union (L 64/1).

²⁹⁶ Englmair, supra fn. 51, p. 80.

²⁹⁷ Sigrid J.C. Hemels, 'References to the Mutual Assistance Directive in the Case Law of the ECJ: A Systematic Approach' European Taxation accessed 8. May 2016.

of tax as an escape way to adapt its rulings to the field of exit taxation. However, the same directive for recovery of tax was applicable in the case of *Brisal* as in the case of *X NV*²⁹⁸, which makes it unlikely, that the CJEU is willing to change its case law in this case.

In addition, another aspect of the Portuguese legislation was analysed in this thesis. The Portuguese law treats non-residents and resident financial institutions differently in the field of cost deduction. Residents are taxed on the net amount at a rate of 25%, whereas non-residents are taxed on the gross amount at a rate of 20%. A deeper analysis, which divided this issue into four different aspects, has revealed in the first part (Non Deduction of Operating Costs), that it is settled case law, that gross taxation constitutes discrimination. The second and third part (Financing Costs and Overhead Costs) examined the peculiarity of the costs occurred by the bank KBC. It was shown, that the case law for the first type of costs is not really distinct and that there was no case law at all for the deductibility of overheads. Consequently a deductive approach was applied, which analysed the issue in the light of two important principles of EU law in direct taxation – the fiscal principle of territoriality and the principle of neutrality. This part of the thesis has demonstrated that the principle of neutrality requires the deductibility of the costs at issue and that a deviation from that is not justified by the principle of territoriality. Also, several justification grounds were analysed, which, however, were found as not being sufficient enough to legitimate the discrimination of the non-deductibility. Therefore, the answer to the legal question raised in this thesis, is that the deduction of financing-overheads in cross-border transaction is an EU law requirement, in order to promote the realization of the internal market – the major reason for founding the European Union. Consequently the author expects the CJEU to follow the AG Opinion.

6.2 General Conclusion of the CJEU Case Law and Final Remarks

„Achieving justice in the EU is problematic“²⁹⁹, because every Member State has its own legal systems, which deviate a lot from each other in many different aspects. This problem of the European Union becomes especially severe if justice is sought in the field of taxation, as it concerns one of the most important domains of the Member States sovereignty – the budget!

So, the Netherland's Government decided to end the taxation of artists and sportsmen within the EU, because the taxation became inefficient due to the higher administrative burden for net taxation and the resulting low tax income.³⁰⁰ Consequently, every

²⁹⁸ *X NV*, supra fn. 84.

²⁹⁹ Sionaidh Douglas-Scott, 'The Problem of Justice in the European Union - Values, Pluralism, and Critical Legal Justice' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundation of the European Union Law* (Oxford University Press 2012), p. 412.

³⁰⁰ Molenaar and Grams, 'Scorpio and the Netherlands: Major Changes in Artiste and Sportsman Taxation in the European Union', supra fn. 128, p. 67, compare also Dick Molenaar and Harald Grams, 'Die Illusion der gerechten und ertragreichen Besteuerung von international tätigen Künstlern und Sportlern' [2005] *Internationales Steuerrecht*, p. 762-767, p. 766, in which the authors make a calculation on the tax revenue in other States.

judgment of the CJEU “*can be compared to an attack by a cruise missile launched from a base in Luxembourg, punching deep craters into carefully constructed national tax buildings, leading to desperate attempts to seek protection and calls for armed resistance*³⁰¹” in the view of the Member States.³⁰² It is therefore, why the CJEU has applied a rather cautious approach in harmonizing the internal market in the recent years.

However, the sovereignty States is not only *under attack* by the European Union, but also by globalization itself. This phenomenon has created worldwide markets on which individual States have little or no influence at all.³⁰³ It is therefore why the author holds the opinion that the CJEU would do right to follow an approach, which ensures the realization of the internal market and that concept demands the disappearance of the concept of national territory in a distant future.³⁰⁴

However the author also admits that it is a difficult task for the Court to fill in the lack of clear rules in the area of direct taxation, by on the one hand, only being able to rely on four fundamental freedoms³⁰⁵ and on the other hand, being caught in the middle of individual Member States’ interests and the interests of the European Union.³⁰⁶ This is the reason why there are many doctrinal debates, which rightfully accuse the Court of inconsistency and no matter how the Court will rule in the case of *Brisal*, there will always be found a case, which cannot be reconciled with earlier decisions.

However giving in to the individual Member States’ interests by applying a too cautious approach will not serve this ambiguous goal. Consequently the author pleads for the same treatment of residence and non-residence for cost deduction, even though it is likely that this constitutes a huge cut in the Member States budget. The author also wants to remind the reader and the CJEU of an old quote from John Marshall.

He said 1819 in *McCulloch v. Maryland*: “*An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which non institution and property can bear taxation.*” Applied to the case *Brisal*, it must be said, that the Portuguese Legislation at issue is able to prevent any trade of cross-border services. And applied to the concept of the European Union the CJEU should not forget, that a strong power to tax – tax sovereignty of the Member States – is able to destroy the dream of an economical integrated Europe, the realization of an internal market!

³⁰¹ So has Portugal simply not changed its tax rules after the cases of *Gerritse*, supra fn. 108, *Scorpio*, supra fn. 73, which clearly state that only net taxation is compatible with EU law. Molenaar and Grams, ‘The ECJ X Case (Football Club Feyenoord)’, supra fn. 265, p. 360

³⁰² Barents, supra fn. 34, p. 51-52.

³⁰³ Sjaak J. J. M. Jansen, ‘Preface’ in Sjaak J. J. M. Jansen (ed), *Fiscal Sovereignty of the Member States in an Internal Market* (Kluwer Law International 2011), p. 1.

³⁰⁴ Sjaak J. J. M. Jansen, ‘The Future of Fiscal Sovereignty: Some Closing Thoughts’ in Sjaak J. J. M. Jansen (ed), *Fiscal Sovereignty of the Member States in an Internal Market: Past and Future* (Kluwer Law International 2011), p. 237.

³⁰⁵ Free Movement of Goods (Article 30 TFEU), Services (freedom of establishment (Article 49 TFEU) and freedom to provide services (Article 56 TFEU)), Workers (Article 45 TFEU) and Capital (Article 63 TFEU).

³⁰⁶ Similar Vanistendael, ‘In Defence of the European Court of Justice’, supra fn. 44, p. 98.

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