Tax Treaty “Neutralization” of Source State Discrimination under the EU Fundamental Freedoms?

This article considers an issue discussed at the 2011 IFA Congress as to whether or not a source state may retain an apparently discriminatory dividend withholding tax and not eliminate domestic economic double taxation if its second layer of taxation is "neutralized" by the shareholder’s residence state via a treaty credit.

1. Source State Discrimination of Dividend Distributions

The case law of the European Court of Justice (ECJ) clearly demonstrates that non-extension of the source state’s relief system to cross-border outbound distributions tends to restrict inbound investments in domestic capital-seeking companies and is, therefore, subject to scrutiny under the fundamental freedoms. Accordingly, a source state that chooses to relieve the domestic economic double taxation of distributed profits for its residents must extend this relief to non-residents to the extent that similar domestic double economic taxation arises from the exercise of its tax jurisdiction over these non-residents, for example, where the source state subjects company profits first to corporation tax and then to a withholding tax on distribution and, therefore, places non-residents in an objectively comparable situation. This obligation to provide relief, for example, to exempt from or refund withholding tax, exists with regard to individual as well as corporate shareholders and is neither dependent on taxation in the shareholder’s residence state nor called into question by the fact that the source state may not tax subsequent distributions by the foreign parent company in its residence state. However, the source state is not required to do more than provide relief from domestic economic double taxation. It does not have to forego part of the corporate tax levied on the profits of the distributing company, as this “would mean in point of fact that that State would be obliged to abandon its right to tax a profit generated through an economic activity undertaken on its territory”.

In evaluating whether or not a discriminatory restriction exists, the ECJ, in principle, does not take into account the tax treatment in another country. This approach is logical, as discrimination is the different treatment of similar situations by one Member State consistent with the prohibition of compensatory taxation. Such a single-country-oriented perspective of comparability disregards collateral effects or the alternative (hypothetical) policy options of Member States. Accordingly, each Member State must apply non-discriminatory treatment in its legal system, irrespective of the legal circumstances of the same taxable activity in other Member States. This perspective is often described as aiming for the “equality in a box” (“Kästchengleichheit”), thereby indicating the right of a
taxpayer to non-discriminatory treatment in each partial market of the Internal Market.11

The ECJ, therefore, generally does not proceed on the basis of an “overall approach”, the “pan-European approach”12 or “Internal Market approach”,13 which would take an integrated view of the taxpayer’s overall situation, thereby combining the treatment in the source and the residence states.14 Indeed, it is true that the ECJ’s case law sometimes “takes a look” across the border to determine a factual situation, for example, when it comes to the overall income of a taxpayer to determine comparability in the source state.15 so as to avoid “double dips”16 or when the amount of taxes levied is relevant.17 Nevertheless, the ECJ has implicitly18 and explicitly19 rejected an approach that would, for example, take into account the factual removal of a disadvantage created by the source state as a result of unilateral action by the residence state.

However, a well discussed (and highly relevant) issue is whether or not, and to what extent, treaty relief from international juridical double taxation in the shareholder’s residence state might relieve the source state from the obligation to extend its domestic relief system to non-residents because such discrimination, i.e. the non-mitigation of domestic economic double taxation, is effectively neutralized.20 Whilst the ECJ strongly favours a focus on only one Member State, it has, beginning with Denkavit Internationaal BV v. Ministre de l’Economie (Case C-170/05) and Amurta v. Inspecteur van de Belastingdienst (Case C-379/05),21 introduced a “treaty-based overall approach” to allow for the neutralization of a discriminatory withholding tax in the source state through a treaty-based tax credit in the taxpayer’s residence state. This means that an apparently discriminatory second level of taxation, for example, a withholding tax, which gives rise to economic double taxation in the source state and, at the same time, results in juridical double taxation if the taxpayer’s residence state also taxes the distribution, may be in line with the freedoms if the disadvantage is “neutralized” by a treaty credit in the taxpayer’s residence state. Accordingly, the removal of international juridical double taxation by the residence state may permit the source state to retain its domestic economic double taxation.

2. Treaty-Based Overall Approach: Treaty “Neutralization” of Source State Discrimination

2.1. Overview

The ECJ’s case law on treaty “neutralization” or “compensation” is basically concerned with the question whether or not treaty relief in the shareholder’s residence state under a tax treaty might relieve the source state from discrimination. In other words, and in the context of dividend taxation, can treaty relief from the source state taxation of the shareholder, i.e. relieve from juridical double taxation from the residence state’s perspective, “neutralize” the discriminatory effects of a non-extension of source state relief, i.e. relief from domestic economic double taxation from the source state’s perspective? If the answer to this question is “yes”, there would be no discrimination in the first place and possible arguments for justifications would, therefore, not have be considered to uphold the source state’s taxation.22

It should first be noted that, outside treaty situations, in Amurta, ECJ has forcefully rejected a general “overall approach” regarding the issue of cross-border dividends case, in stating that:23 a Member State may not rely on the existence of a full tax credit granted unilaterally by another Member State to a recipient company established in the latter Member State in order to escape the

14. This issue was first raised after DE: ECJ, 14 Feb. 1995, Case C-279/93, Finanzamt Köln-Alststadt v. Roland Schumacker, ECJ Case Law IBFD, as it remained unclear if this decision has an effect on countries that do not exempt foreign-source wages, but, rather, provide a foreign tax credit. On this discussion, see, for example, G. Toifl, Can a discrimination in the state of residence be justified by the taxable situation in the state of source?, 5 EC Tax Rev. 4, p. 165 (1996); P. Farmer, EC law and national rules on direct taxation: a phoney war?, 7 EC Tax Rev. 1, p. 15 et seq. (1998); S. Eden, Some awfully big questions on tax sovereignty v level playing field, 4 EC Tax J., p. 36 (1999); and J.F. Avery Jones, A Comment on “Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances”, 40 Eur. Taxn. 8 (2000), Journals IBFD, in response to P. Wattel, Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances Why Schumacker, Asscher, Gilly and Gschwind Do Not Suffice, 40 Eur. Taxn. 6 (2000), Journals IBFD. See also Kemmeren, supra n. 13, at p. 555 et seq.
15. Schumacker (C-279/93).
16. D.A. Groot (C-385/08) at para. 100 and FI: ECJ, 18 July 2007, Case C-231/05, Oy AA, para. 37, ECJ Case Law IBFD. See also J. Englisch, Taxation of cross-border dividends and EC fundamental freedoms, 38 Intertax 4, p. 218 (2010).
18. GR: ECJ, 29 Apr. 1999, Case C-311/97, Royal Bank of Scotland plc v. Elliniko Dimosio (Greek State), ECJ Case Law IBFD (no consideration of potential credit in the home state in case of discretionary taxation of a branch in the source state) and DE: ECJ, 15 Feb. 2007, Case C-345/04, Centro Equestre de Leziria Grande Lda v. Bundesamt fur Finanzen, ECJ Case Law IBFD (no consideration of potential credit in the home state in case of discriminatory denial of cost deductions in the source state).
20. For an extensive analysis of this discussion up to 2007 see G. Kofler, Doppelbesteuerungsaufkommen und Europäisches Gemeinschaftsrecht pp. 564-604 (Linde 2007).
21. Denkavit International (C-170/05), at para. 45 et seq.; Amurta (C-379/05), at para. 79 et seq.; Commission v. Italy (C-540/07), at para. 36 et seq.; Commission v. Spain (C-487/08), at para. 58 et seq. and; Šesticar (C-199/10), at para. 40.
22. Commission v. Italy (C-340/07), at para. 55 and Šesticar (C-199/10), at paras. 41-42.
obligation to prevent economic double taxation of dividends resulting from the exercise of its power to tax in a situation where the first Member State prevents economic double taxation of dividends distributed to companies established in its territory.

Implicitly rejecting the EFTA Court’s ruling in *Fokus Bank v. The Norwegian State* (Case E-1/04), the ECJ has, however, adopted an approach that can be described as a “treaty-based overall approach” by acknowledging that Member States may transfer their obligations under EU law by way of bilateral treaties (typically tax treaties). In line with its decisions in *Gilly v. Directeur des Services Fiscaux du Bas-Rhin Case* (Case C-336/96), *De Groot v. Staatssecretaris van Financiën* (Case C-385/00), and based on the insight that bilateral tax treaties are part of both the legal systems of the concluding states and may, therefore, influence a taxpayer’s position, the ECJ has constantly held that the effect of tax treaties must be considered in determining discrimination. Although the ECJ has not yet made a positive application of the “neutralization” argument, the Court, nevertheless, made it clear in *Amurta* and subsequent case law that it cannot be excluded that a Member State may succeed in ensuring compliance with its obligations under the Treaty through the conclusion of a convention for the avoidance of double taxation with another Member State. [It is hence] for the national court to establish whether account should be taken, in the main proceedings, of the DTC, and, if so, to determine whether that convention enables the effects of the restriction on the free movement of capital... to be neutralised.

Such “neutralization” depends on whether the application of the double taxation convention allow the effects of the difference in treatment under national legislation to be compensated for. The difference in treatment between dividends distributed to companies established in other Member States and those distributed to resident companies does not totally disappear unless the tax withheld at source under national legislation can be set off against the tax due in the other Member State in the full amount of the difference in treatment arising under the national legislation.

In so holding, the ECJ is obviously not concerned with the (potential) liquidity disadvantages resulting from the time delay between the application of the (discriminatory) withholding taxation and the availability of the credit.

### 2.2. Theoretical foundation

The ECJ’s “treaty-based overall approach” can be underpinned by various dogmatic considerations. First, “the Member States are free to apportion between themselves not only tax jurisdiction but also priority to taxation”. It already follows from this that it is open to the source state, which imposes double economic taxation on dividends, to ensure that, by way of a tax treaty, such taxation is relieved by the home state. Second, “if the effect of the DTC in an individual case were not taken into account, this would ignore the economic reality of that taxable subject’s activity and incentives in a cross-border context. Put otherwise, it could distort the real effect on that taxpayer of the combination of home and source State obligations”. Conversely, however, it “would be no defense, for example, to argue that the home State had been in breach of its DTC obligations by failing to relieve the relevant economic double taxation”. This is exactly the ECJ’s approach, which focuses on the effects of a tax treaty and finds that, through such a treaty, the effects of the restriction on the free movement of capital may be neutralized. The ECJ has, therefore, also rejected the contrary view of the EFTA Court in *Fokus Bank*, which had adhered to a “single-country approach”. As already implied in *De Groot*, a treaty obligation to grant relief, for example, via a credit, is an obligation under international public law. It is, therefore, part of the legal systems of both the contracting states and, as such, provides a relevant link between the two systems.

The ECJ does not clearly reveal why its recent jurisprudence on neutralization requires a compensatory mechanism, i.e. a tax credit, to be agreed bilaterally. However, Advocate General Mengozzi had reasoned that, under a general overall approach, the discrimination verdict for the source state would effectively depend on another state’s tax system. This, in turn, would give rise to friction...
with the existing tax sovereignty of the Member States.\(^{41}\) Indeed, an “overall approach” that would also take into account unilateral relief in deciding on the discriminatory effects of the source state’s taxation would make the compatibility of one Member State’s tax system with EU law dependent on which tax system another Member State has adopted. This, in turn, would clearly restrict the fiscal sovereignty of Member States, as each Member State would be required to adjust its system to the systems of its fellow Member States.\(^{42}\) The limitation of considering the compensatory effects to those negotiated in binding agreements, such as tax treaties, has found support in the literature,\(^{43}\) as it avoids an overt contradiction with the general prohibition of counterbalancing tax disadvantages with unrelated tax advantages in other jurisdictions.\(^{44}\)

However, some scholars argue that unilateral compensation should also be sufficient as long as the discrimination is undone,\(^{45}\) as, in both scenarios, there is eventually only a budgetary transfer between the two states involved, thereby leaving the absolute tax position of the taxpayer unchanged, i.e. not disadvantaged. Whilst this is true from the taxpayer’s perspective, the ECJ’s focus is obviously more on the legal framework in the source state, thereby noting that a tax treaty forms part of the applicable legal framework and binds both of the states involved.\(^{46}\) Only if the tax systems of the two states are linked through a binding international agreement does this have an effect on the analysis of whether or not the source state’s restriction can be “neutralized”. Put differently, only where two states are linked through a tax treaty, under which the residence state has accepted an obligation to credit source state taxes, can the source state succeed in “transferring” its obligations under EU law to the other state. If the case law is accepted as it stands, the ECJ’s approach in\(^\text{Anurta}\) and subsequent case law may be distinguished from\(^\text{De Groot}\), where the Court had conceded that Member States may take into account allowances granted unilaterally in another Member State and limit the deductions for personal and family benefits in their own systems accordingly.\(^{47}\) As Englisch (2010) correctly notes,\(^{48}\) “\text{De Groot}“ dealt with a constellation where an equal treatment in both jurisdictions might lead to ‘double dips’\(^{49}\), whereas the dividend cases are concerned with the compensation for seemingly discriminatory treatment in one Member State by specific tax privileges or a lower-than-normal level of taxation in another Member State”.\(^{50}\)

Despite this discussion, a “treaty-based” approach of neutralization is, in any event, perfectly aligned with the ECJ’s decision in\(^\text{Gilly}\), according to which the Member States remain at liberty to determine the connecting factors for the inter-se allocation of fiscal jurisdiction by way of bilateral agreements. If, however, the source state were prohibited from levying a tax on outbound dividends despite the fact that it had required the residence state to credit such tax, this would result in a transfer of taxing jurisdiction, as the residence state would be relieved from granting a credit without improving the overall position of the taxpayer. Such an outcome would clearly conflict with\(^\text{Gilly},\) as it would undermine the bilateral allocation of taxing jurisdiction (and tax revenue).\(^{51}\)

The inclusion of a tax treaty’s effects in the discrimination analysis under the fundamental freedoms may effectively provide a “tie-breaker rule” by accepting the agreed taxing priorities between the states involved, thereby avoiding a circular argument to the detriment of the taxpayer. Assume that a residence state only regards a foreign tax as a creditable compulsory charge if the taxpayer has exhausted all of the legal means of reducing the source state tax, including challenges against discriminatory source state taxation under the fundamental freedoms.\(^{52}\)

42. For support of the ECJ’s position see, for example, Weber, supra n. 41, at pp. 590-591. See also Lang, supra n. 32, at pp. 70-72; F. Vanisten- dael, Does the ECJ have the power of interpretation to build a tax system compatible with the fundamental freedoms?, 17 EC Tax Rev. 2, pp. 60-61 (2008) and Englisch, supra n. 16, Compare, AG Opinion in Compensation v. Italy (C-540/07), at para. 50.
43. See, for example, Lang, supra n. 32, at p. 71 et seq.; J. Bellingswout, Amurta: A Tribute to (the Late) Advocate General Geelhoed, 48 Eur. Taxn. 3 sec. 4.5. (2008), Journals IBFD, D. E. van Sprundel, An Analysis of the Netherlands. Dividend Withholding Tax on Shares – No Need to Abolish This Tax Yet?, 48 Eur. Taxn. 12, sec. 4.7. (2008), Journals IBFD; and Englisch, supra n. 16, with further references.
44. Englisch, supra n. 16, with further references.
45. Terra & Waltel, supra n. 23 and Kemmer, supra nos. 13 and 23. See also AG Opinion in Denkavit International (C-170/03), at para. 52 ("whether pursuant to the applicable DTC or otherwise.")
46. For instance, Denkavit International (C-170/03), at para. 45.
47. De Groot (C-385/00), at para. 100.
48. According to Schaal (supra C-279/93) and De Groot (C-385/00), it is either the source or the residence state that must grant all of its domestic personal and family benefits. If, however, the source state voluntarily and unilaterally was to provide (part of) its personal and family benefits to non-resident taxpayers and the residence state still had to provide all of its benefits, this result would be double benefits. So what\text{De Groot} (C-385/00) implies is that the residence state may reduce its benefits to take into account the benefits already received by the taxpayer in the source state. For detailed criticism of\text{De Groot} (C-385/00), see Terra & Waltel, supra n. 23, at pp. 733-737.
49. Englisch, supra n. 16. For a different position, see Terra & Waltel, supra n. 23.
50. See, in this direction, also H. Loukota, Ist § 94a ESStG wirklich europarechtswidrig?, 16 Steuer & Wirtschaft International 1. l. p. 16 (2006); J. Bellingswout & S. Baranger, The Advocate General’s Opinion in Denkavit II, 46 Eur. Taxn. 9 (2006), Journals IBFD. See also Opinion of AG in\text{Commission v. Italy (C-540/07)}, at para. 53. However, Weber, supra n. 41, at pp. 598-600, tries to separate the budgetary effects and the allocation of taxing jurisdiction, but seems to neglect the bilateral effect of tax treaties and the reciprocal obligations. With regard to the latter, see SE: Opinion of Advocate General Kokott, 14 July 2005, Case C-265/04, Margaretha Bounich, para. 68 with footnote 54, ECJ Case Law IBFD. In a tax treaty, the contracting states are ultimately only “demarcating their respective tax jurisdictions, thereby governing the division of the tax revenues between themselves”.
51. For this discussion in light of DE: Income Tax Law (Einkommensteuer- gesetz), sec. 34c(1), National Legislation IBFD and DE: Corporate Income Tax Law (Körperschaftsteuergesetz), sec. 26(1), National Legislation IBFD, see A. Cordewener & A. Schmitz, Europarechtliche Vorgaben für die Vermeidung der internationalen Doppelbesteuerung im Wege der Anrechnungsmethode, 83 Steuer und Wirtschaft, p. 66 et seq. (2006) and A. Schmitz, Germany, in Key practical issues to eliminate double taxation of business income, cahiers de droit fiscal international, Vol. 96/2, p. 362 (Sdu Utigevers 2011), Online Books IBFD. See also F. Roser, in KStG, 2nd ed. § 26 m no. 996 (D Goch ed., C. H. Beck 2009), who argues that, under the principle of\text{ventre contra factum proprum}, as long as Germany violates its corresponding obligations under EU law, it cannot rely on taxation in violation of EU law in the source state in determining a tax credit.
The residence state, from this perspective, does not credit a discriminatory dividend withholding tax. Conversely, the source state might, nevertheless, rely on the obligation of the residence state to grant a credit under the tax treaty and, in arguing that the residence state must credit such tax under the tax treaty, would not refrain from taxation at source. The ECJ in Denkavit Internationalaal and Amurta has implicitly resolved this potential conflict between the source and residence states and between treaty law and the fundamental freedoms to the benefit of the source state. If the residence state has accepted an obligation to grant a tax credit in a tax treaty, it must accept a source state withholding tax that complies with the tax treaty as a creditable compulsory charge, irrespective of whether or not, in isolation, the withholding tax may be regarded as discriminatory. Of course, the “neutralization” under EU law eventually depends on whether or not such a credit is given. This might again be an issue of the interpretation of the tax treaty or of domestic law, which is not within the ECJ’s competence. As noted, however, the EU law perspective reflects on treaty interpretation insofar as the residence state must not interpret the tax treaty so as to not be obligated to grant a credit merely based on the argument that the source state’s withholding tax is discriminatory.

2.3. Requirements for “neutralization”

Many details of such a “treaty-based overall approach” remain unclear. For one, a number of scholars and the Commission take the position that “neutralization” requires that the tax treaty envisions a “full credit”, including a refund of uncreditable tax by shareholder’s residence state, which, of course, is neither required by the OECD Model (2010) nor included in any tax treaty between the Member States. The argument behind this position appears to be that only when a full credit is envisaged in the tax treaty, has the source state, in any event, succeeded in transferring its obligation to remove discrimination to the residence state. A more natural understanding of the ECJ’s case law, however, leads to a result-oriented approach that takes into account the dogmatic underpinning of a “treaty-based overall approach” and asks if the credit “enables the effects of the restriction on the free movement of capital to be neutralized”. Whilst it appears to be understandable that the ECJ has rejected the “neutralization” argument in infringement cases, i.e. in Commission of the European Communities v. Italian Republic (Case C-540/07) and European Commission v. Kingdom of Spain (Case C-487/08), where no factual situation was on the table and the typical “ordinary credit” provisions had the potential for discrimination, Amurta and Scilpar v. Facenda Publica (Case C-199/10) clearly indicate that “neutralization” depends on the factual neutralization of a discriminatory withholding tax. Such neutralization can also result from an “ordinary credit” (with a credit limitation), if the dividends are sufficiently taxed sec. 3.3. (2008), Journals IBFD; A. Cordewener, EG-rechtlicher Grundfreiheitsschutz in der Praxis – Auswirkungen auf die Quellenbesteuerung Nachbarstaaten, Internationale Wirtschaftsbriefe 8, Fachgr. 11 Gr. 2, pp. 977-978 (2009); D. Weber, Commission v. Italy, supra Internal International Taxation, at para. 209; and, E. Rainegeard, supra cross-border dividend not compensated by ordinary credit in tax treaty, under EEA Agreement, supra general anti-abuse rule justified by the fight against tax evasion, 3 Highlights & Insights Eur. Taxn. 2, p. 52 (2010); and, A. Fortuin, Commission’s Spain, Failure to fulfill obligations. Dividends distributed to resident and non-resident companies. Court of Justice, 3 Highlights & Insights Eur. Taxn. 9, pp. 61-62 (2010). See also M. Lang, Voorziet het Gemeenschapsschrift de Erhebung von Quellensteuer? 18 Internationales Steuerrecht 15, pp. 343-344 (2009).

53. See the Commission’s arguments in pending ECI. Pending Case C-284/09, Commission v. the European Communities v. Federal Republic of Germany, OJ, C 256, 8 (2009), where it states that: “Where the relevant Member State has also, as in the present case, concluded a double taxation convention with the other Member States, that Member State may rely on that convention only if its rules concerning offsetting fully compensate the possible economic multiple taxation of shareholders from other Member States or EEA States, and in the same way as is guaranteed to domestic shareholders by its own tax system. That is not, however, the case with the conventions concluded by Germany with the other Member States, in order to prevent double taxation, these conventions provide, indeed, for rules concerning offsetting the German withholding tax against the tax burden in the Member State of the parent company, however, the amount to be taken into account may not exceed the part of the tax assessed prior to the offset, which is imposed on income from Germany on the basis of the offset is consequently restricted. EEA Report, supra Key practical issues to eliminate double taxation of business income, supra n. 51 at para. 76. Indeed, the ECJ has rejected the “neutralization” argument in the infringement cases noting that, as the credit limitation depends on the level of taxation in other states, tax treaties do not “in all cases” allow for the difference in treatment arising from the application of national legislation to be neutralized (Commission v. Italy (C-540/07), at para. 39 and Commission v. Spain (C-487/08), at para. 64). This, of course, implies that, where factually all of the discriminatory withholding tax is credited “neutralization” indeed takes place.


55. Amurta (C-379/05) at para. 84. See also J. Englisch, Quellensteuerabzug bei Dividenden, die an eine ausländische Empfänger Gesellschaft ausgeschüttet werden, 16 Internationales Steuerrecht 23, p. 859 (2007) and Vanisten-dael, supra n. 42 at p. 60 (“effective impact of a tax treaty”).

56. See also English, supra n. 16, p. 219 and, J. Englisch, Quellensteuerabzug bei Dividenden, die an eine ausländische Empfänger Gesellschaft ausgeschüttet werden, 16 Internationales Steuerrecht 23, p. 859 (2007) and Vanisten-dael, supra n. 42 at p. 60 (“effective impact of a tax treaty”).

57. See also English, supra n. 16, p. 219 and, J. Englisch, Quellensteuerabzug bei Dividenden, die an eine ausländische Empfänger Gesellschaft ausgeschüttet werden, 16 Internationales Steuerrecht 23, p. 859 (2007) and Vanisten-dael, supra n. 42 at p. 60 (“effective impact of a tax treaty”).

58. See also English, supra n. 16, p. 219 and, J. Englisch, Quellensteuerabzug bei Dividenden, die an eine ausländische Empfänger Gesellschaft ausgeschüttet werden, 16 Internationales Steuerrecht 23, p. 859 (2007) and Vanisten-dael, supra n. 42 at p. 60 (“effective impact of a tax treaty”).

59. Amurta (C-379/05) at para. 83.

60. Scilpar (C-199-10) at para. 40.

61. See also, for example, Van Sprundel, supra n. 43. A. P. Dourado, Scilpar v. Facenda Publica: Parent-Subsidiary Directive. Double taxation convention Portugal-Spain, Supreme Tribunal Administrative, Supremo Tribunal Administrativo, 3 Highlights & Insights on Eur. Taxn. 10, pp. 88-89 (2010) and Rainegeard de la Blériote, supra n. 58. This approach has also been taken by domestic courts. For Austria, see the decisions of AT VwGH, 23 Sept. 2010, 2008/15/0086, Tax Treaty Case Law IBFD and AT UFS, 13 July 2011, RV 1271-L/10 (both taking into account the tax treaty credit actually given), and, for the Netherlands, the “dividendmixer” decision of NL: HR: 8 Aug. 2008, No. 40.586, BNB 2008/255 (holding that an ordinary credit can neutralize a restriction if it in fact leads to a set-off).

As the ECJ is not competent to interpret tax treaties or domestic law, it remains unclear what weight should be attached to the fact that the ECJ in Amurta (C-379/05) was fully aware of the “ordinary credit” provision in the tax treaty in question, but, nevertheless, left it to the domestic court “to determine whether that convention enables the effects of the restriction on the free movement of capital… to be neutralised” (paras. 10 and 83).
in the Member State of the shareholder and that, therefore, effectively a full credit results. Conversely, however, the mere fact that the residence state has "allowed" the source state to levy a (withholding) tax in a tax treaty does not relieve the latter from scrutiny under the fundamental freedoms.

From this it also becomes clear that a "neutralization" argument is in vain if a treaty-based credit limitation, which also forms part of both jurisdictions that are linked through a tax treaty, has effect and does not require the residence state to grant any further relief. If, therefore, a credit is, either legally or factually, not available in the residence state, the source state is still under an obligation to tax the shareholder in a non-discriminatory manner. A credit limitation may exclude the crediting of a withholding tax and, therefore, "neutralization" in a number of factual or legal situations, for example, because of a participation exemption depending on tax rates because of net-taxation of the dividend on which a gross-withholding tax is levied; or where the residence state provides, in principle, both an indirect tax credit for underlying corporate tax and a treaty-based direct credit for withholding tax, but the indirect tax credit has already "sucked up" the residence state's tax on the dividends. It is, however, unclear as to whether or not and when "neutralization" can occur if the residence state grants a carry-forward of any excess credit. Another substantive issue is whether or not "partial neutralization" is possible. For instance, in 2009, Austria amended its corporate tax act to comply with Denkavit Internationaal and Anmuta and provide for a refund of (discriminatory) Austrian dividend withholding tax to certain non-resident corporate recipients "insofar as" no treaty credit for the withholding tax is available in the other state. If, depending on the foreign level of taxation, only part of the withholding tax may be credited in the shareholder's residence state, Austria (only) refunds the remaining portion. This approach was also adopted by the Austrian Supreme Administrative Court (Verwaltungsgerichtshof). In addition, this position is supported in parts of the literature and appears to be sensible, as the disadvantage to the taxpayer is removed through a combination of a treaty credit in the residence state and a refund in the source state. The ECJ and the Commission, however, appear to require a "full neutralization", i.e. a set-off in the full amount of the disadvantage, and, therefore, adopt an "all-or-nothing" approach. Indeed, not only in infringement cases, but also in respect of the facts in Secilpar, has the ECJ stated that the difference in treatment "does not disappear unless the tax withheld at source under national legislation can be set off against the tax due in the other Member State in the full amount of the difference in treatment arising under the national legislation".

It is not immediately clear why the ECJ would favour such "all-or-nothing" approach, given that, from an overall perspective, the disadvantage is also removed in cases of "partial neutralization" combined with a source state refund. Just as with the "all-or-nothing" approach regarding personal and family benefits in Schumacker and De Groot, where it is either the source or the residence state that must grant all of its domestic personal and family benefits, the ECJ might have taken this position under the impression of (supposed) simplicity.

Finally, from a procedural perspective, it is unclear as to whether the taxpayer or the source state should bear the burden of proof as to whether "neutralization" has (not) occurred via a treaty credit in the residence state. As the source state's tax is, in principle, discriminatory, it has been argued that the source state should bear that
burden and prove that the disadvantage is neutralized.\textsuperscript{78} This would, however, be very impracticable, as the taxpayer is much closer to the relevant information\textsuperscript{79} and it also appears that the ECJ, for example, in \textit{Haribo and Salinen v. Finanzamt Linz} (Joined Cases C-436/08 and C-437/08),\textsuperscript{80} and \textit{Meilicke v. Finanzamt Bonn-Innenstadt} (Case C-262/09),\textsuperscript{81} has no objections to reasonable procedural burdens on taxpayers in cross-border situations.

\section*{3. Conclusions}

Beginning with \textit{Denkavit Internationaal} and \textit{Amurta}, the ECJ has introduced a "treaty-based overall approach" to allow for the neutralization of an apparently discriminatory dividend withholding tax in the source state via a treaty-based tax credit in the taxpayer’s residence state. This perspective is sensible for a number of reasons, for example, because it honours the treaty allocation of taxing powers between the Member States and it provides for an effective tie breaker that prevents the residence state from denying a credit based on the argument that the source state’s withholding tax violates EU law and is, therefore, not compulsory. Whether or not such "neutralization" exists depends on the full neutralization of a discriminatory withholding tax, which can also occur under an "ordinary credit" (with a credit limitation) system, depending, of course, on the fact that dividends are sufficiently taxed in the other Member State. The ECJ also appears to take an "all-or-nothing" approach so that a (potential) "partial neutralization" does not remove the source state’s obligation to grant exemption from, or a refund of, the full amount of the discriminatory withholding tax. However, this is the much bigger issue and it is as yet unclear as to whether or not the ECJ is willing to extend the "treaty-based overall approach" beyond dividend withholding taxes to all other income.\textsuperscript{82}

\begin{itemize}
\item \textsuperscript{78} See, for this position, \textit{Fortuin, supra} n. 52, at p. 62.
\item \textsuperscript{79} This appears to be the approach of Austria (see \textit{supra} n. 71), under which the taxpayer must prove that no credit was available to receive a refund of dividends withholding tax that is, in principle, discriminatory.
\item \textsuperscript{80} AT: ECJ, 10 Feb. 2011, \textit{Joined Cases C-436/08 and C-437/08, Haribo Lakritzen Hans Riegel BetriebsgmbH, Österreichische Salinen AG v. Finanzamt Linz}, ECJ Case Law IBFD.
\item \textsuperscript{81} DE: ECJ, 30 June 2011, Case C-262/09, \textit{Wienand Meilicke, Heidi Christa Weyde, Marina Stöffler v. Finanzamt Bonn-Innenstadt}, ECJ Case Law IBFD.
\item \textsuperscript{82} For instance, the potential effect of a tax treaty was not even referred to in \textit{Royal Bank of Scotland} (C-311/97) (concerning a tax rate discrimination of a Greek branch of a UK bank). Likewise, in \textit{Centro Equestre} (C-345/04), at paras. 33-35, the ECJ did not evaluate whether or not a discriminatory disallowance of deductions in the source state may be neutralized by a treaty credit in the home state, but, rather, noted (at para. 35) that the credit method is "appropriate for preventing the double counting of costs since, where it is applied by the first State, that State can check the operating expenses that have been taken into account in calculating the tax paid in the second State".
\end{itemize}