Despite the complexities inherent in practical and procedural application of the arm’s-length principle, issues may arise regarding the relationship of this generally accepted standard, as set forth in Article 9 of the OECD Model Treaty, and the principle of nondiscrimination under the EC Treaty and applicable secondary EC law, such as directives, since profit adjustments under the arm’s-length principle are typically applied only in cross-border situations.

THE RELATIONSHIP

BETWEEN THE ARM’S-LENGTH PRINCIPLE IN THE OECD MODEL TREATY AND EC TAX LAW (PART 1)
It is generally recognized in international tax law that tax authorities of affiliated companies conducting cross-border business must adopt market conventions as if the business were being conduct- ed between independent parties. The price charged for goods and services— the transfer price—therefore must be in accordance with the “arm’s-length principle.” Although without criticism due to the practical problems of its application, the arm’s-length principle is globally accepted in international taxation. This is reflected not only in Article 9 of the OECD Model Income Tax Convention (“OECD Model Convention”), but also in Article 9 of the UN Model Convention, Article 9 of the U.S. Model Convention, and Article 4 of the EC Arbitration Convention. Its importance is also maintained and developed in the OECD Transfer Pricing Guidelines (“OECD Guidelines”), and was recently confirmed by the Commission of the European Communities. Part 1 of this article below starts with the premise that the arm’s-length principle is globally accepted when determining the price charged for goods and services between affiliated companies conducting cross-border business, though the principle is not without criticism due to the practical problems of its application. It covers background on the internal market and transfer pricing in the EU, the arm’s-length principle in Article 9 of the OECD Model Income Tax Convention and Article 4 of the EC Arbitration Convention, and begins a discussion of the “Lankhorst-Hohorst case” and the incompatibility of the German thin capitalization rules with EC law and the relevance of Article 9 OECD Model in the case. Part 2 in a future issue of JOIT will pick up with conclusions from Lankhorst-Hohorst regarding arm’s-length adjustments; analyze potential application of the EC Parent-Subsidiary and Interest and Royalties Directives.

Internal Market and Transfer Pricing in the EU

With regard to the European Union (EU), the Commission identified the increasing importance of transfer pricing tax problems as an internal market issue in its study on “Company Taxation in the Internal Market,” noting that transfer pricing issues often give rise to double taxation, which in turn is a serious obstacle for the internal market. In this respect, the Commission strongly believes that double taxation created by transfer pricing rules (even if legal) should be avoided in principle. If this is not possible in prac-
tice, it is imperative to have appropri-
ate dispute settlement mechanisms that relieve double taxation as quickly and efficiently as possible, and with the lowest costs possible for business and tax administrations.

Such double taxation generally arises in two settings. First, when a tax administration makes an income adjustment (“primary adjustment”), the multinational enterprise is immediately subject to double taxation. This double taxation can be relieved if the tax authorities of the other state accept a converse income adjustment (“corresponding adjustment”), or if the tax authorities making the primary adjustment subsequently reverse that adjustment. Second, to make an actual allocation of profits consistent with the primary adjustment, some tax legislation might assert a constructive transac-
tion, which may take the form of dividends, loans, or equity contri-
butions. This “secondary transaction” might lead to source taxation or affect the availability of loss relief claims, and the other tax jurisdiction involved might not accept it. Therefore, although all EU member states apply and recognize the merits of the OECD Guidelines, the different interpretations of the Guidelines often give rise to double taxation disputes that are detrimental to the smooth functioning of the internal market and create additional costs both for business and national tax administrations.

Based on these considerations, the Commission has concluded that many of the problems in transfer pricing could be addressed through closer coopera-
tion between tax administrations and business. Thus, in a 2001 communica-
tion paper, it proposed the establish-
ment of the “EU Joint Transfer Pricing Forum” (JTPF) with member states and business representatives, the overall objective of which is a more uniform application of transfer pricing tax rules within the EU. The Council Conclu-
sions of the General Affairs Council of March 11, 2002, welcomed this pro-
posal. The first meeting of the JTPF was in 2002, and a working program has been established through 2004. An intermediate report by the JTPF on its activ-
ities and recommendations contains conclusions and recommendations in the form of a draft Code of Conduct, which is intended to ensure a more uniform application by member states’ tax administrations of the EC Arbitration Convention and the mutual agreement procedures in double taxation con-
ventions between the states. The JTPF’s future work will focus on doc-
umentation requirements and possi-
bility of preventative measures to avoid double taxation in transfer pricing (“advance pricing agreements”). Apart from these attempts at harmonizing cross-border transfer pricing, the fundamental freedoms laid down in the EC Treaty may also play a central role in evaluating transfer pricing issues within the EU. Despite the com-
plexities inherent in practical and pro-
cedural application of the arm’s-length principle, issues may arise regarding the relationship of this generally accepted standard, as set forth in the OECD Model Conven-
tion, and the OECD Model, and the principle of nondiscrimination under the EC Treaty and applicable secondary EC law, such as directives, since profit adjustments under the arm’s-length principle are in many instances applied (only) in cross-bor-
ders. The European Court of Justice (ECJ) recently addressed these issues in Lankhorst-Hohorst (discussed below), which dealt with German thin capitalization rules. In that decision, the ECJ held that thin capitalization rules that apply only in a cross-border setting are not in com-
pliance with the freedom of establish-
ment in Articles 43, 48 EC.

The court mentioned Article 9 OECD Model but rejected the Ger-
man government’s argument that basic ideas underlying this provision may justify reclassification of interest payments on cross-border loans to thinly capitalized subsidiaries. Even assuming that the German thin capi-
talization rules comply with Article 9 OECD Model, the Advocate General pointed out that “the fact that the rules are consistent with the provisions of the OECD model convention does not alter the fact that the other Article 43 EC. Neither the provisions nor the objectives of the OECD model convention, on the one hand, or of the EC Treaty, on the other, are in fact the same.” Article 43 EC forbids member states from exercising their remaining power in the field of direct taxation in a discriminatory way, “irrespective of anything which the provisions of the OECD model convention may per-
mit.” Moreover, the Advocate General suggested that if interest payments were reclassified as profit distributions, the rules, the Parent-Subsidiary Directive should apply, which would lead to pro-
hibiting the imposition of withholding tax on the constructive distributions. Although Lankhorst-Hohorst con-
cerned thin capitalization rules and not classical transfer pricing issues, the case raised two general questions with regard to the relationship between EC law and profit adjustments under Arti-
cle 9 OECD Model. One is whether Article 9 OECD Model as an embod-

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Arm’s-Length Principle in OECD Model and EC Arbitration Convention

Discussed below is the principle under Article 9 of the OECD Model and Article 9 (1) of the EC Arbitration Convention.

Article 9 OECD Model. Article 9 OECD Model (“Associated Enterprises”)

defines enterprises related to each other by means of a relationship of dependency which exists where the two enterprises have taken place on normal open-market commercial terms, i.e., at arm’s-length.12 The issues addressed by Article 9 (1) of the OECD Model are the “primary adjustments.” Article 9 (2) OECD Model deals with “corresponding adjustments” in the intertax jurisdiction. Not covered are “secondary adjustments,” which usually take the form of constructive dividends, constructive equity contributions, or constructive loans.13 However, primary adjustments may give rise to economic double taxation, that is, taxation of the same income in the hands of different persons, insofar as an enterprise of one jurisdiction whose profits are revised upwards will be liable for tax on profits that have already been taxed in the hands of its associated enterprise in the other taxing jurisdiction. Article 9 (2) OECD Model provides that, in these circumstances, the second taxing jurisdiction will make an appropriate adjustment to relieve the double taxation if it agrees with the primary adjustment. Unraveling the complex language of Article 9 (2) OECD Model, where State A includes in the profits of its enterprise profits on which State B has been subject to tax in State B, and the profits so included are profits that would have accrued to the enterprise of State A if the conditions made between the two enterprises had been at arm’s length,14 State B will make an appropriate adjustment to the tax charged therein on those profits. Article 9 (2) OECD Model further provides that in “determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other.”15 Article 9 (2) OECD Model does not necessarily lead to a relief of economic double taxation. Authorities from different taxing jurisdictions often do not share each other’s views on the arm’s-length price, or even on the method to determine that price.16 Although Article 25 OECD Model requires the authorities to “endeavor to solve the problem by mutual agreement, there is neither a time limit nor an obligation to reach a solution eliminating double taxation.17 The situation may be frustrating since in many instances the states have no financial interest in settling the dispute. Thus, corresponding adjustments may be of the OECD Model are not mandatory, mirroring Article 25 OECD Model, under which tax administrations are not required to identify arm’s-length prices by reaching mutual agreement procedure.18 However, the situation improves for the taxpayer when treaties provide for an arbitration clause for situations in which the authorities do not reach mutual agreement.19 A clear example is the Austria-Germany income tax treaty, which provides for mandatory referral of a dispute to the ECJ based on Article 25 OECD Model.20 To reach agreement within three years.21

Thin cap rules. As mentioned above, Lankhorst-Hoborst dealt with German thin capitalization rules. The application of whether thin capitalization may be considered a transfer pricing issue, and before analyzing the implications of the so-called German anti-abuse provisions generally beneficial to take a brief look at the


2. On the alternative approach of formulary apportionment, see Hamaekers, supra note 1, at 38 et seq.


4. The latest version is the 2002 Model.


8. The OECD Guidelines include the conclusions of the OECD Committee, its consequences, and the various methodologies that may be used to test and audit profits where transactions have been entered into between related parties. The Guidelines are periodically updated to reflect the Committee’s progress in this area and are considered to represent internationally agreed standards and provide guidance for application of the arm’s-Length principle to transactions involving an associated enterprise to a second tax jurisdiction. OECD Guidelines G.2

9. See also OECD Guidelines B.6.


15. Opinion of AG Nachos, September 26, 2002, C-420/00, and C-421/00 final, para 93.

16. Id.


19. OECD, Commentary to the Model Tax Convention on Income and on Capital 2003 (2003), Article 9(1).

20. Id., para 2.

21. See also OECD Guidelines IV.32, para. 4.67 et seq.

22. See Commentaries, supra note 24, para. 5.


25. See OECD Guidelines IV.12 para. 4.35.

26. For a comprehensive survey, see Groen, “Arbitration Convention,” supra note 9 (1990), at 245 et seq.

27. See supra note 11, supra note 15; supra note 21.

28. See supra note 11, supra note 15; supra note 21.

29. See supra note 11, supra note 15; supra note 21.

30. See supra note 11, supra note 15; supra note 21.
thin capitalization rules within the framework of Article 9 OECD Model. The OECD Committee on Fiscal Affairs took a quite generous approach in its 1986 report on thin capitalization.24 The basic positions of this report are also reflected in the Commentary to Article 9 OECD Model.25 The Commentary explicitly states that there is an interplay between tax treaties and domestic rules on thin capitalization within the scope of Article 9, and that Article 9 does not prevent the application of national rules on thin capitalization insofar as they are intended to assimilate the profits of a borrower to an amount corresponding to the profits that would have accrued in an arm’s-length situation.26 Further, Article 9 is considered relevant not only “in determining whether the rate of interest provided for in a loan contract is an arm’s length rate, but also whether a prima facie loan can be established whether a loan should be or should be regarded as some other kind of payment, in particular a contribution to equity capital.”27 Finally, finding a compromise solution between the different approaches of the OECD member states,28 the application of rules designed to deal with thin capitalization should normally not have the effect of increasing the taxable profits of the relevant domestic enterprise to more than the arm’s length profit, and this principle should be followed in applying existing tax treaties.29 There has been some criticism of the generous approach of the OECD Commentary and in thin capitalization situations, the interest rate is usually at arm’s length.30

**Article 4 EC Arbitration Convention**

Following the pattern of Article 9(1) OECD Model, Article 4(1) of the EC Arbitration Convention provides the arm’s-length principle in identical words. The Convention clearly shows that the arm’s-length principle is intended to conclude international taxation within the EU. The aim of the EC Arbitration Convention is to eliminate double taxation arising when tax authorities of one or more member states adjust the profits of associated enterprises (see Article 10). This Convention had to rely on the dispute settlement provisions in double taxation conventions that, unlike the Convention, mostly do not impose a binding obligation to eliminate double taxation. Further, member states differ in their practical application of the Arbitration Convention and the mutual agreement procedures in their double tax conventions. Thus, the ECJ’s first report contains conclusions and recommendations in the form of a draft Code of Conduct to ensure more effective action by member states’ tax administrations of the EC Arbitration Convention and the mutual agreement procedures in double tax conventions. The draft Code of Conduct that the Commission has proposed to the Council for adoption therefore aims to establish common procedures.31 The proposed Code of Conduct should ensure that EU dispute settlement procedures operate more efficiently so as to avoid unnecessary double taxation of company profits within the Internal Market,32 stated Taxation Commissioner Scholten.33

In connection with Lankshott-Holhorst (discussed below), it is not clear whether the EC Arbitration Convention might be applied where thin capitalization rules lead to double taxation. The prevailing opinion seems to hold that double taxation resulting from causes other than arm’s-length adjustments is not covered by the EC Arbitration Convention. However, others argue that the EC Arbitration Convention where thin capitalization rules lead to double taxation.

**The EC Arbitration Convention**

The “Arbitration Convention” has quite a history. In 1976, the Commission proposed a draft EC Council Directive, the “Proposed Council Directive concerning the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises,” which was submitted to the Council on November 29, 1976 (OJ C 301/4, December 21, 1976). However, for political reasons, the member states chose to conclude a multilateral convention, since there was collective hesitation to surrender a significant part of their legal sovereignty in matters of transfer pricing where there had not been any common or uniform systems of taxation. Nearly 15 years later, on July 23, 1990, the then 12 EC member states signed in Brussels the “Convention 90/463/EEC of 23 July 1990 on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises” (OJ L 285/10, August 20, 1990). The Arbitration Convention, according to its preamble, was based on Article 293 EC, under which the member states, where necessary, will enter into negotiations with each other with a view to securing, for the benefit of the states concerned, a uniform system of taxation within the Community. Following lengthy ratification procedures in the relevant member states, the Arbitration Convention entered into force on January 1, 1995, initially for a period of five years. On December 21, 1995, another convention entered into force with the accession of Austria, Finland, and Sweden to the Arbitration Convention (OJ C 4, 10 January 1995, page 48).** Hence, the EC Arbitration Convention will soon fully re-enter into force after a transition period that lasted more than three years. Portugal, the last EU member state to ratify the protocol, did so on June 7, 2004. The protocol will enter into force on the first day of the third month following that in which the instrument of ratification is deposited, by the last signatory state to take that step, at the office of the Secretary-General of the Council of the European Communities. According to the latest information, neither Italy (which ratified the protocol shortly before Portugal) nor Portugal has carried out this formal step. As a result, the new member states that joined the EU on May 1, 2004 (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia) are not automatically “contracting” states with respect to the Arbitration Convention. For the Convention to apply in these countries, it is, in principle, necessary to conclude an Accession Convention. The European Commission has urged all member states to commit themselves to concluding Accession Conventions with the new member states within two years.**


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24 Commentaries, supra note 24, para. 3; OECD, supra note 33, para. 50.
28 See note 16, supra. These procedures concern the starting point of the three-year period that is the deadline for a company incurring double taxation as a result of a transfer pricing adjustment. See also OECD, supra note 36, page 58.
29 For the starting date of the three-year period, see Article 78 (1) a) TFC Treaty. By the starting date of the three-year period, a member state must attempt to reach mutual agreement. If the member state determines the double taxation, the subject of the complaint; arrangements to be made by both member states (see Article 78 (1) a) TFC Treaty). The member state will be able to conclude (the practical operation of the procedure, see Article 78 (3)) the decision in a period of 12 months or extended to 24 months, if the member state requests it. If the second stage of the procedure is not successful, the member states will enter into negotiations (see Article 78 (6)) for the purpose of concluding the arbitration agreement. In July 1999, 28 member states entered into negotiations with each other. This resulted in the conclusion of the “Draft Code of Conduct,” which is expected to enter into force in late 2000.**


41 See Article 78 (4) TFC Treaty. As to the vernier member states, the draft Code of Con- duct recommends that member states should endeavor to prepare, sign, and notify a legal instrument applying the Arbitration Convention to new member states’ accessions to the EU, and in any event no later than two years after the new member states’ accession to the EU. Moreover, the Commission recommends that the Council should provide in this instrument for the immediate bilateral application of the Arbi- tration Convention between those member states (new and present) that have completed the accession process.**


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ARM’S-LENGTH PRINCIPLE
lead to a result that is identical to that derived from denying the deductibility of costs exceeding the arm’s-length standard. Recently, the JTFP and the majority of representatives of EU member states, as well as the Commission, have taken the view that the application of the Arbitration Convention and the proposed Code of Conduct should not be limited to transfer pricing cases, but should also cover all other cases of tax evasion, resulting, for example, from a member state’s application of its domestic thin capitalization rules.

Lankhorst-Hohorst

The conduct of multinationals enterprises from avoiding source taxation by excessively leveraging subsidiaries, which results in deductible interest payments that erode the subsidiaries’ tax base, the source country may enact “thin capitalization” legislation.46 If a corporation’s debt ratio differs significantly from that of a normal company according to a state’s legislation, all or part of the interest paid is not deductible or is recharacterized as a dividend payment.47

The methods to measure whether a company is thinly capitalized for tax purposes have varied widely across Europe. The subjective method poses a problem in qualification conflicts and a risk of discrimination. Therefore, it was only a matter of time before a fitting case—Lankhorst-Hohorst—reached the ECJ.

Facts of the case. Lankhorst-Hohorst GmbH, a German company, made a large indirect subsidiary of a Dutch company, Lankhorst-Hohorst, which in turn was owned by another Dutch company, Lankhorst Taseaer BV (“LTBV”). In the mid-1990s, Lankhorst-Hohorst GmbH had an outstanding debt to a bank that was refinanced by a subordinated loan from a Luxembourg bank. The subordinated loan bore interest at a rate lower than the bank loan, and Lankhorst-Hohorst GmbH paid interest to LTBV. The German tax authorities reclassified the interest payments as hidden distributions under section 8a(1)(2) KStG as they did not follow the reclassification by the source state under its domestic thin capitalization rules by applying “corresponding adjustments,” and economic double taxation to date is the rule rather than the exception. Obviously, the aim of thin capitalization rules is to prevent shifting profits with the cost of a subsidiary’s country of residence. This cross-border horizon of activities guarantees the continuance of these rules with the nondiscrimination principle of EC law. Thus, it was only a matter of time before a fitting case—Lankhorst-Hohorst—reached the ECJ.

The German corporate law requires the parent company making the loan to be considered a creditor of the subsidiary and for subsidiaries resident in other member states, or in compliance with EC law. See, e.g., “Vrouwenvelder and Van Casteren,” Netherland Introduces Post-Boas Thin Capitalization Rules, 32 Tax Notes Int’l 365 (January 26, 2004) at 367; c.f., Noul, “French Court Holds Thin Capitalization Applicable” 41 European Tax 167 (August 1992), para. 21; see also, “ECJ Rulings (Valid-Decision on Revision Art. 15 EC Law 10829, para. 50.”

In two earlier cases concerning Belgian tax rules, the ECJ had already held that the薄薄资本ization in the Netherlands: A Response to Halmind and Bjornholm, “Denmark Enacts New Thin Capitalization Legislation,” 28 Tax Notes Int’l 109 (February 2000).

However, Lankhorst-Hohorst is a good example of a situation in which there are valid business reasons that the subsidiary is thinly capitalized. The case, therefore, was a landmark case, which sets the stage for future developments in the area of thin capitalization.

46 The French Conseil d’Etat recently held that the French thin capitalization rules prevent the deduction of all financial costs, i.e., interest payments on debt due to parent companies to be reclassified as “hidden distributions” when the subsidiary paying the interest would be thinly capitalized, as evidenced by a fixed debt-equity ratio of 3:1, subject to limited exceptions. 47 One of those exceptions was that the subsidiary could have obtained the loan from a third party under otherwise similar circumstances; unfortunately for Lankhorst-Hohorst, for Lankhorst-Hohorst GmbH it was established that it could not have obtained the loan from an unrelated party due to its situation, over-dividend interest payments, and the usual tax burden on profit distributions, among other things. Thus, the loan and its interest payments was liable to tax on the interest payments. 48 New Thinking About Rules on Thin Capitalization. 49 The methods to measure whether a company is thinly capitalized for tax purposes have varied widely across Europe. The subjective method poses a problem in qualification conflicts and a risk of discrimination. Therefore, it was only a matter of time before a fitting case—Lankhorst-Hohorst—reached the ECJ.

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The德国公司法要求贷款的母公司被认为是子公司的债权人。在其他成员国，或在符合CE的法律。见，“Vrouwenvelder和Van Casteren,”荷兰引入后Boas薄资本化规则，32税税国际’的109（2000年1月26日）。

在两个较早的案件中涉及比利时税法，ECJ已经持有，薄薄资本化在荷兰：对Halmind和Bjornholm，“丹麦新薄资本化立法。”28税税国际’的109(2000年2月)。

然而，Lankhorst-Hohorst是一个例子的情况，在其中是有效的业务原因的子公司是薄薄资本化。因此，这个案例是一个里程碑的案例，这为未来的发展设定了舞台在薄资本化领域。

46的法国Conseil d’Etat最近持有，法国薄资本化规则防止所有财务成本，即利息支付上的债务支付的母公司，重新分类为“隐藏的股息”当支付利息的子公司支付的利息和所有的其他原因支付利息时。”47根据Lankhorst-Hohorst，对Lankhorst-Hohorst GmbH，成立，它不可能从一个无关的第三方获得贷款，然后，超股息利率支付，以及支付的通常税负利润分配，还有一部分。因此，支付利息的贷款和利息支付是支付税的利息支付。48新思维关于规则薄资本化。49的方法测量一个公司稀薄资本化的目的税法目的有两个例外。其中一个例外是该子公司可以以从第三方获得的贷款，然后，同样情况下其他相同的相似的原因；不幸的是Lankhorst-Hohorst，对Lankhorst-Hohorst GmbH，成立，它不可能从一个无关的第三方获得贷款，由于它的这种情况，过度的股息利率支付和正常税务负担的利润分配，其中还有其他事宜。因此，贷款和利息支付是支付税的利息支付。
also apply to restrictions on the set-
up of agencies, branches or sub-
sidaries by nationals of any Member
State established in the territory of
any other Member State. Based on this 

under the tight prerequisites for a jus-
tification based on the fiscal coherence of a member state’s tax system, applicability of the coherence defense is limited to situations where a dis-

Many countries have, in fact, examined the thin cap-
italization rules or are considering adap-
ting-up of agencies, branches or sub-
diaries by nationals of any Member
State. This has been especially relevant for member states
which may take great pains to then demon-

66. Under the light prerequisites for a justification based on the fiscal coherence of a member state’s tax system, applicability of the coherence defense is limited to situations where a dis-

67. In German legal writing, however, it is ques-
tioned whether section 21a(1) KStG was com-
plicable with Article 9(1) OECD Model. First-
to-date measure on the grounds of “fiscal coher-
ence” in the sense of Article 9(1) OECD Model.
68. First, and especially interesting. As a reaction to
the revenue loss resulting from the ECJ’s decision in Rosal, the Nether-
lands recently introduced new thin capitalization rules, which—in recogni-
tion of the Advocate General’s position—are irrespective of whether the loan has been taken out by a Dutch or for-
gen-related company. Further, pres-
ure to shift the burden of proof to the corporation, which may take great pains to then demon-
strate that it would have received the loan under equal terms from an unrelated third-party. Thus, it is argued that section 21a(1) KStG may exceed the limits of Article 9(1) OECD Model.
69. See Minch, supra note 20, para. 82.
70. As the ECJ case law on the fiscal coherence rules
there is a strict contrast between
deductions and benefits, and even less so if
tax treaties are considered (see EJC, August 11, 1985, C-289/84, ECR 1985, L-1499, Winlock, paras. 24).
71. The Advocate General, however—finding that
the thin capitalization rules do not constitute a tax-

72. Since Article 9 was unsuccessfully cit-
ized as a possible justification for the discrimination effectuated by section 8a KStG. The German government made a twofold argument in this regard. First, section 8a(2)(1) KStG should be seen as the embodiment of the principle of Article 9 OECD Model, which provides for the add-back of profits for tax pur-
poses when transactions take place between associated enterprises on oth-
er than arm’s-length terms. Thus, the basic concepts underlying Article 9 OECD Model should justify reclassifi-
cation of interest payments on cross-

73. The Advocate General, however, rejected these contents, arguing that the “real purpose” of the thin capital-
ization rule in section 8a(1)(1) KStG was to prevent Germany from losing a portion of its tax revenue through a taxpayer’s (or its shareholder’s) use of a financing mechanism that is not in itself prohibited. Since it is settled ECJ case law that diminution of tax rev-

cision of Article 9 OECD Model, the Advocate General re-
jected the German government’s argument based on the principle of Article 9 OECD Model, which states that a measure that is contrary to a fundamental freedom, the Advocate Gen-
eral concluded that the objective of maintai-
ning the tax base did not rep-
resent an overriding requirement of
general interest. The Advocate Gener-
also rejected the German govern-
ment’s argument based on the principle of Article 9 OECD Model, which states that a measure that is contrary to a