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CJEU – Recent Developments in Direct Taxation 2016

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Preface

In recent years, the Court of Justice of the European Union (CJEU) has had to deal with more and more cases concerning direct taxation. This growing amount of case law is driven by the increased willingness of national courts to approach the CJEU through preliminary rulings as well as by the fact that the European Commission seems to be more and more willing to initiate infringement procedures against EU Member States. As all these cases are of great interest for academics as well as practitioners, they need to be analyzed carefully.

The conference, "Recent and Pending Cases at the CJEU on Direct Taxation" was held in Vienna on 17 to 18 October 2016. A large number of experts on European and international tax law accepted our invitation to attend the conference and took part in the discussions. At the conference, cases in the field of direct taxation now pending before or recently decided by the CJEU were presented by experts from the respective countries. These national reporters provided insights into the national as well as the European background of the cases. Their presentations were the basis for further lively discussions among the international participants. Possible consequences of the pending cases, future CJEU decisions and future trends in the CJEU's case law were discussed and analyzed in detail. The results of the conference are published in this book.

The conference would not have been possible without the City of Vienna to whom we would like to express our thanks. In addition, we would like to warmly thank the authors who contributed to the conference by presenting cases from their countries and actively participating in the discussions. Furthermore, these individuals supported the entire project and the publication of this book by committing themselves to a strict time schedule. We are also grateful to the Linde publishing house for its cooperation and the quick realization of the book's publication. Linde has generously agreed to include this book in its catalogue.

Our particular thanks go to *Renée Pestuka* for the smooth organization of the conference, to *Eleanor Campbell*, who edited and polished the texts of the authors, and to *Nadine Oberbauer* and *Matthias Mayer*, who supported us in deciding on the structure of the conference and in the preparation and publication of this book.

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Austria: CJEU Pending Case from Austria – Austria / Germany (C-648/15)

Claus Staringer

1. Overview

There is currently one Austrian case pending before the CJEU. It is a case that is not a truly "Austrian" case but rather a bilateral dispute between two Member States of the European Union, i.e. Austria and Germany. Consequently, the case is registered under the unusual case name *"Republic of Austria v Federal Republic of Germany"* (C-648/15). It is a case concerning a dispute over the interpretation of a particular rule in the Austria-Germany tax treaty. The dispute concerns whether Germany is allowed to levy a withholding tax on certain cross-border interest payments under Article 11 of the tax treaty. The details regarding this treaty issue are set out below.[1]

The interesting aspect of this case, however, is not so much the underlying tax treaty issue. Rather, what makes the case interesting from a European law perspective is the dispute resolution mechanism set out in the Austria-Germany tax treaty that has ultimately brought the case to the CJEU. Article 25 paragraph 5 of the Treaty includes an arbitration clause for disputes that cannot be successfully resolved through the traditional mutual agreement procedure (MAP) between the contracting states. This might in itself not be really unusual (there are indeed a growing number of tax treaties that include an arbitration clause) but what makes this case so special is that Austria and Germany have agreed that the CJEU should be the court of arbitration for any unresolved disputes under their bilateral treaty. Indeed this is a singularity in the international tax world, as, at least to the knowledge of the author, there is no other bilateral tax treaty where the CJEU has been given this role.

This case is also unique for Austria (and Germany): It is the first and only arbitration case that has ever been submitted to the CJEU under the Austria-Germany tax treaty, although this treaty has now been in force for more than 15 years. It is therefore "unknown territory" for both contracting states (and also the taxpayer involved). The taxpayer is an Austrian resident who initiated the arbitration provided for in Article 25 paragraph 5 of the treaty, by requesting Austria to make a claim against Germany before the CJEU. To this extent, case C-648/15 can be seen as an "Austrian" case.

2. The Dispute

The dispute, which is now before the CJEU, can be summarized as follows:

Under the Austria-Germany tax treaty the general rule for allocating taxing rights over cross-border interest payments is that the residence state of the recipient of the interest has the exclusive right to tax such interest. There is in general no right

1 See below Chapter 2.

for the source state to levy tax (e.g. by withholding) on the interest payments (Article 11 paragraph 1 of the Treaty). By way of exception, the source state is however allowed to levy a tax (with no percentage cap) on interest payments on debt instruments which have a profit participation (in the authentic German language: *Gewinnbeteiligung*).

In the case at hand, the disputed issue is whether a particular kind of interest payment is covered by Article 11 paragraph 2 of the treaty so that the source state (here Germany) may levy a source tax. The relevant facts of the case are as follows: A German issuer has issued profit participation rights (PPR) (in German: *Genussscheine*) to Austrian investors. The PPR had a fixed coupon, i.e. payments to investors under the PPR where calculated as a fixed percentage of invested capital. However, interest payments were only due where the issuer had sufficient profits to satisfy the coupon. If not, unpaid coupons were cumulated (i.e. carried forward) until the issuer became profitable enough to pay the accumulated coupons out of his profits.

The core issue of the dispute is therefore whether the PPR described above generated interest payments that can be classified as stemming "from debt instruments with a profit participation". If this is the case, Germany will be entitled to levy a source tax under Article 11 paragraph 2 of the treaty, leading to a credit obligation for Austria in respect of such German source tax. Otherwise (i.e. if no "debt instrument with a profit participation" is found to exist), Germany will not be entitled to levy any source tax and Austria consequently will not face any credit obligation under the treaty.

In the end, this is an ordinary tax treaty dispute on the interpretation of a treaty rule that allocates taxing rights. The positions of the two contracting states are well established: For Austria, it is very clear that a PPR such as that in the case at hand is not a "profit participating" instrument because it has a fixed coupon, so there is no percentage entitlement in the issuer's profit. The only "profit related" element in the case is that the issuer is not required to make any interest payments in loss years (or less than the full payment in years where profit is not sufficient to meet the full coupon), but is allowed to carry forward the payment obligation into future profitable years. However, in the view of the Austrian authorities, this is not a "profit participation", but at best a "condition of profitability" which is not covered by Article 11 paragraph 2 of the treaty.[2] On the other hand, the German position is that even a fixed coupon PPR is "profit participating" if the coupon payment is dependent on the existence of sufficient profits. This is the longstanding view of the jurisprudence of the German supreme tax court on domestic Ger-

2 See I. Kerschner/F. Koppensteiner/C. Seydl, *Österreich erhebt aufgrund einer DBA-Streitigkeit erstmals Klage beim EuGH*, SWI 2016, p. 134 (134 et seq).

man tax law.[3] In essence, the German position translates the doctrine developed by German courts for German domestic law to the Austria-Germany tax treaty as regards the interpretation of the term "profit participation".[4]

It will certainly be interesting to see what the CJEU's decision on this treaty interpretation issue is. However, from a European law perspective the treaty issue is not what is most notable about the case. What is really interesting in *Austria v Germany* is the role of the CJEU as the court of arbitration. This will be looked at in more detail below.

3. Arbitration for Tax Treaty Issues

3.1. Current Status of Dispute Resolution in Tax Treaties

Dispute resolution in tax treaty matters is one of the hottest topics in the international tax world today. If it is true that there will be a "tsunami of disputes" coming from international tax cases as a product of the tectonic "BEPS shift" of the general tax climate, then the effectiveness of dispute resolution mechanisms for such disputes will be of paramount importance.[5]

The traditional mechanism for solving tax treaty disputes is the mutual agreement procedure (MAP). The weaknesses of the MAP have been well known for a long time; it is a traditional intergovernmental consultation process only, with little if any involvement of the taxpayer and, most crucially, no legal requirement to actually solve the dispute. A conventional MAP gives the taxpayer no guarantee that double taxation is actually avoided, rather it allows the two contracting states to insist on their contradicting positions. Therefore, it is, in short, not a reliable dispute "resolution" mechanism.

There is an ongoing debate about whether the deficiencies of the MAP can be overcome merely by improvements to the existing procedure or whether MAP is fundamentally broken as a mechanism for effective dispute resolution.[6] Since 2008, the OECD has included in its Model Convention an arbitration clause to solve tax treaty disputes. However, the Model Convention cannot be viewed as any more than a proposal to contracting states. The practice of double tax treaty negotiation has shown that there is no international consensus among states on whether to include arbitration clauses in their bilateral tax treaties or not. There

3 See BFH 26 August 2010, I R 53/09.

4 This recourse to domestic law is doubtful, see H. Jirousek, *Schiedsverfahren nach Art 25 Abs 5 DBA Deutschland vor dem EuGH*, SWI 2017, p. 36 (40).

5 See in general the contributions in M. Lang/J. Owens (eds), *International Arbitration in Tax Matters* (The Netherlands: IBFD, 2016).

6 See the report on the conference "Arbitration in Tax Matters" held at WU on 19th and 20th January 2015 by J. Kollmann/P. Koch/A. Majdanska/L. Turcan, *Workshop Report: Arbitration in International Tax Matters*, Tax Notes International 2015, p. 189.

seems to be a pattern that some states obviously do favour arbitration as a dispute resolution mechanism (if conventional MAP is not successful), but other states seem to reject arbitration as a matter of principle. Given this mixed view among states, it is not surprising that arbitration is not proposed as a minimum standard of the multilateral instrument currently developed by the OECD,[7] although the deficiencies of conventional MAP have been clearly identified in the OECD BEPS project.[8]

3.2. The Austria-Germany Tax Treaty

Austria and Germany identified the weaknesses of conventional MAP very early on. When the bilateral treaty was negotiated in around1999/2000, the two states had already realized that an arbitration clause would make the resolution of any future disputes under the new tax treaty more effective. This view was doubtless influenced by a research project on arbitration in tax matters that was conducted in Austria right at the time when the treaty was negotiated.[9] That research project proved that arbitration could indeed be a reliable way of solving tax treaty disputes among states. Although it would be difficult to trace the idea of arbitration in the new treaty back to this research project, it is obvious that around the year 2000 there would have been a positive climate for the idea of arbitration in tax treaties. As a result, Austria and Germany obviously felt comfortable enough to include an arbitration clause in their new treaty.

The main concept of this arbitration clause under the Austria-Germany treaty is that the taxpayer, after three years of unsuccessful MAP between the competent authorities of the two states, may submit the dispute to arbitration. As court of arbitration, the treaty appoints the CJEU (at time of its conclusion, the ECJ). This may sound extraordinary and highly unusual (which it certainly was and still is), because the CJEU usually has no authority to decide on tax treaty disputes among the contracting states. However, Austria and Germany realized that there was a clear legal basis in the European Treaties (today in Article 273 TFEU) whereby the CJEU is offered to the Member States as a forum for dispute resolution. Article 273 TFEU makes this possible provided certain requirements are met:[10]

7 See Art 18 of the Multilateral Convention to implement Tax Treaty related Measures to prevent Base Erosion and Profit Shifting, which allows states to apply its Part VI (Arbitration) on an optional basis only.

8 See OECD, *Making Dispute Resolution Mechanisms More Effective – Action 14: 2015 Final Report* (the "OECD BEPS Report" on BEPS Action 14).

9 With the main product M. Züger, *Arbitration under Tax Treaties* (The Netherlands: IBFD, 2001), awarded with the Mitchell B. Carroll Prize of IFA.

10 See in detail the analysis of I. Kerschner/F. Koppensteiner/C. Seydl, SWI 2016, p. 137.

- First it has to be a "dispute between Member States". This is certainly the case for tax treaty disputes, as it is the Member States who are disputing the allocation of taxing rights between them.
- Second, the dispute has to be submitted to the CJEU under a *"special agreement between the parties"*. This is also the case here: Article 25 paragraph 5 of the Austria-Germany tax treaty certainly is such a *"special agreement"* whereby a dispute can be submitted to the CJEU.
- Third, and most critical, disputes have to *"relate to the subject matter of the (European) Treaties"* in order to be eligible for submission to the CJEU. The question therefore is whether the avoidance of double taxation can be said to be *"relating to the subject matter of the Treaties"* in the sense of Article 273 TFEU. There is no explicit answer to this question in the current TFEU, as the former Article 293 EC is no longer included in the TFEU, where it was clearly stated that Member States should enter into negotiations with each other with a view to the abolition of double taxation. In *Austria v Germany* it is Austria's position that the removal of double taxation is indeed still a goal of the EU even under the TFEU (in other words that the old Article 293 EC in essence had only a declaratory meaning).[11] This position, which is obviously a key requirement of eligibility for submission to the CJEU, was not contested by Germany in the proceedings. Moreover, the CJEU itself does not appear to have questioned its competence in the case thus far. Indeed, there are valid arguments in favour of the CJEU having competence: This requirement of Article 273 TFEU is drafted in a rather broad way; it is sufficient that the dispute relates to a *"subject matter of the Treaties"*. Clearly this does not require that the avoidance of double taxation by the Member States is a strict legal obligation under European law. In order to safeguard such strict obligations of European law, there are other proceedings available before the CJEU (e.g. infringement proceedings against Member States under Article 259 TFEU), so this cannot be the threshold for Article 273 TFEU. Rather, in order to be considered a *"subject matter of the Treaties"* it will be enough that the subject concerned is in the policy interests of the European Union. There is evidence in CJEU case law that the avoidance of double taxation is a policy goal of the Union (although this does not necessarily mean that any existing double taxation is automatically a violation of European law).[12] Moreover, there is secondary EU law in place that explicitly targets the avoidance of double taxation and thereby confirms it as a policy interest of the European Union.[13]

11 See again I. Kerschner/F. Koppensteiner/C. Seydl, SWI 2016, p. 137.

12 CJEU, 12 May 1998, C-336/96, *Gilly*, ECLI:EU:C:1998:221, para. 18; 16 July 2009, C-128/08, *Damseaux*, ECLI:EU:C:2009:471, para. 28.

13 E.g. The Parent/Subsisdiary Directive, the Interest/Royalties Directive and the Arbitration Convention (although technically not being secondary EU law).

In any event, the CJEU has so far accepted that it is competent to deal with the case. There was a hearing before its Grand Chamber on 6 December 2016,[14] the opinion of Advocate General *Mengozzi* is expected on 9 March 2017 and the CJEU's ruling may therefore be expected in due course after that.

4. CJEU as Court of Arbitration: Pros and Cons

As already stated, the choice of the CJEU as court of arbitration in the Austria-Germany tax treaty is certainly unusual. So far, this tax treaty is the only one which specifies the CJEU as court of arbitration. Given the fact that the Austria-Germany treaty has now been in place for more than 15 years and no other tax treaty between EU Member States has followed its example since, one may conclude that there is obviously not much of an appetite among the Member States for appointing the CJEU as arbiter in tax treaty matters. It might even be that at the Austria-Germany example will remain a one-off event in tax treaty history.

Nonetheless, the present case *Austria v Germany* provides a good opportunity to go through some arguments that may speak for or against the choice of the CJEU as a court of arbitration in tax matters. As the analysis below will show, many of the arguments are two-sided as they can each, depending on perspective, be seen either as a "pro" or a "con" for CJEU tax treaty arbitration. In any event, a pros and cons analysis may give a better understanding of what the difference between arbitration proceedings before the CJEU and a conventional tax treaty arbitration (e.g. following the OECD Model Convention) might be.

4.1. Lack of Expertise

An obvious point is the lack of expertise of the CJEU in tax treaty matters. It would not be unfair to say that most CJEU judges are not tax treaty experts. Although it is certainly true that the CJEU deals with tax treaties from time to time, this is usually in the context of the fundamental freedoms or other aspects of European law. However, core tax treaty matters will typically be unfamiliar to the CJEU and its judges.

The real question, however, is whether this lack of expertise in tax treaty law really matters. This is an example of the fundamental question of any court system, that is, whether a court should be composed by expert or generalist judges, the latter being used to deal with a variety of areas of law. The generalist approach is actually the way the CJEU is set up, as it routinely deals with a broad range of areas of law (and from different Member States). Therefore, flexibility in dealing with new

14 See the hearing report in H. Jirousek, SWI 2017, pp. 36 et seq.

areas of law is not unknown to the CJEU. It might be true that tax treaties may to some extent be in a world of their own and therefore not easy to understand for newcomers. However, in proceedings before a higher court it should, in the end, always be up to the parties to make sure that the court really understands the issue. Excellent lawyers, as the CJEU judges certainly are, have no problems in reaching decisions even in unknown territories.

All this is not a theoretical situation, but happens frequently in the practice of a court. There are even tax treaty cases currently on their way to the European courts in Luxembourg. As widely known, the Commission has initiated several high profile cases where transfer pricing is challenged as being a State aid. Technically, these cases are often tax treaty cases as the arm's-length principle (which is at the core of those cases) is typically regulated by tax treaties. The European courts will therefore have to verify whether such a tax treaty arm's-length principle has been applied properly and whether it is in compliance with EU State aid rules.

4.2. Selection of Arbitrators

A further point is the selection of arbitrators. In a conventional arbitration case (for example, under an arbitration clause following the OECD Model), arbitrators are selected ad hoc, in many cases from an existing panel of possible arbitrators. This is different when the CJEU is appointed as court of arbitration. Then an arbitration case is assigned by the CJEU to its judges or chambers in the usual way prescribed by the CJEU's internal rules. This means that the CJEU will hand over the case to judges who are most likely not "experts on the matter". A hand-selected arbitrator in a conventional arbitration would, on the contrary, be most likely a well-known expert in the type of case. However, this is not necessarily an advantage: Experts often have a predetermined mindset towards a certain issue and, if so, they will likely also follow that way of thinking in the arbitration decision. Accordingly, there might be a better chance of getting a "fresh look" at the legal issue of a case if the arbitrators are non-experts.

Further, in conventional arbitrations, arbitrators are usually selected by the parties or countries involved, so in some sense there is a representation of the disputing parties on the arbitration panel (although this does not necessarily mean that these arbitrators will follow the view of the party that has selected them). The CJEU would not have such party or Member State representation for an individual case. Indeed, if judges from the Member States involved are acting in the relevant chamber of the CJEU it would be a pure coincidence. An even if this were to happen, it would be no different than what always happens in CJEU cases and there is no reason to believe that there is such thing as "home Member State bias" for CJEU judges.

4.3. Procedural Rules

If the CJEU is appointed as court of arbitration, the existing procedural rules of the CJEU would apply. Therefore, there is a reliable procedural framework available for the arbitration, which is well known and offers certainty for the parties. More generally, an arbitration before the CJEU would make use of the court's infrastructure for the handling of the case. Put simply, the CJEU is an existing and well-functioning court and an arbitration case submitted to it will benefit from this.

On the other hand, the use of existing procedural rules will also mean that no "tailoring" of procedures will be possible. In conventional arbitrations, one can at least think about adapting the procedure as required by a specific case, e.g. through applying a fast-track or streamlined procedure where appropriate.

4.4. Effects of Decisions

There are also clear rules as to the enforcement of CJEU judgments. There is no doubt that a judgment of the CJEU can be enforced against a Member State under Article 280 TFEU (unless it is of a declaratory nature only, which is the exception). This is clearly shown by the present *Austria v Germany* case as Austria is claiming that the CJEU should **order** Germany to refrain from levying a tax in the case (or refund an already collected tax). This could be a significant difference from the situation in a conventional arbitration, where enforcement of the arbitration decision may often be much less clearly regulated than is the case for CJEU rulings.

Similarly, another advantage of using the CJEU as an arbitrator could be that there is clarity on the binding effect of the CJEU judgment on the Member States as well as the taxpayer. As shown by the example of the Austria-Germany tax treaty, a taxpayer cannot refuse to accept the implementation of the CJEU arbitration judgment. This is different from the OECD Model Convention, where a taxpayer may still opt not to accept the outcome of an arbitration, if there is hope of a better result in a MAP.[15] Of course, this is not necessarily a disadvantage of conventional arbitration, as a tax treaty would be free to give such binding effect also to a conventional arbitration decision.

A further difference might be in the hierarchy of decisions: A CJEU judgment may overrule domestic court decisions, while this is not possible under an arbitration following the OECD Model Convention. In practice, this means that pro-

15 Art 25 para 5 third sentence OECD MC: *"Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States […]"*.

ceedings before the CJEU may be invoked even if a domestic court has already decided on the issue. This is not possible under the OECD Model Convention.[16]

5. Conclusion

It is difficult to draw any final conclusion on whether it was a good idea for the Austria-Germany tax treaty to appoint the CJEU as a court of arbitration. Given the absence of any experience with CJEU tax treaty arbitration, this is to a large extent unchartered territory. In so far, the pending case *Austria v Germany* (C-648/15) will tell us more.

But there is one important point that can be made already today. Everybody will agree that the quality of a dispute resolution mechanism will be measured by its effectiveness. Such effectiveness, however, does not necessarily mean that a dispute resolution mechanism must be able to deal effectively (or efficiently) with cases that are actually submitted to it. Rather, if a dispute resolution mechanism incentivizes the parties to avoid a potential dispute from the outset, this might be even stronger evidence of its effectiveness. From this perspective, the Austria-Germany tax treaty has a very good track record indeed: not even one case has gone to the CJEU for arbitration in more than 15 years. Obviously, there is a strong incentive for the contracting states to resolve their treaty disputes through a MAP, rather than escalating disputes to the CJEU. In other words, the potential for CJEU arbitration seems to have a strong preventive effect that has indirectly contributed significantly to effective dispute resolution at lower levels.[17] This shows that it is not necessarily the number (or the content) of arbitration judgments that makes an arbitration system powerful, but that it might also (if not in the first place) be the lack of such judgments that demonstrates the effectiveness of the system. In that sense, the appointment of the CJEU under the Austria-Germany tax treaty should be considered to have been very successful.

16 Art 25 para 5 second sentence OECD MC: *"These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State."*

17 This was precisely predicted when the Austria/Germany Tax Treaty was negotiated. See M. Züger, *Der EuGH als Schiedsgericht im neuen DBA Österreich – Deutschland*, SWI 1999, p. 19 (25).

Belgium: CJEU Recent Cases

Niels Bammens

1. Van der Weegen and Pot (C-580/15)

1.1. Introduction

On 9 November 2015, the court of first instance of Bruges submitted a request for a preliminary ruling to the CJEU regarding the compatibility of the Belgian regime for the taxation of interest on certain savings deposits with the freedom to provide services and the free movement of capital.

1.2. Background

1.2.1. Applicable legislation

Article 21, 5° of the Belgian Income Tax Code (hereafter "BITC") provides that the first tranche of EUR 1,250[1] of interest on savings deposits does not qualify as taxable income, provided that a number of strict conditions are met. These conditions are set out in Article 2 of the Royal Decree implementing the BITC (hereafter "RD/BITC").

Article 2 RD/BITC requires, first of all, that the deposit is denominated in euros. Moreover, withdrawals (either directly or through a transfer to a current account) are only possible for a number of exhaustively listed transactions[2] and the bank is not allowed to charge debit interest on an overdrawn account. The bank should furthermore reserve the right to impose a notice period of five calendar days on withdrawals exceeding EUR 1,250 and to limit withdrawals to EUR 2,500 per fortnight. Finally, the return on the savings deposit consists of a basic interest rate and a loyalty premium.[3] Detailed rules apply to the calculation and payment of the basic interest and the loyalty premium.

Until 2014, Article 21, 5° BITC provided that the exemption only applied to savings deposits held with Belgian banks. Following an infringement procedure brought by the Commission, the CJEU held on 6 June 2013 that Belgium had failed to fulfil its obligations under the freedom to provide services and the free movement of capital by restricting the scope of application of the exemption to interest payments by resident banks.[4]

1 This is a basic amount which is subject to annual indexation. The exempt amount for income year 2016 is EUR 1,880. Interest on qualifying savings deposits exceeding the exempt amount is moreover subject to a reduced tax rate of 15 % (as opposed to the standard rate of 27 %). For the sake of clarity, the remainder of the text only refers to the exemption of the basic amount, it being understood that the potential infringement also concerns the favourable tax rate applicable to the interest exceeding the threshold.

2 I.e. cash repayments; transfers (other than by a standing order) to an account held in the name of the holder of the savings deposit; transfers to a savings deposit held with the same bank in the name of the account holder's spouse or a first- or second-degree relative of the account holder; the payment of outstanding amounts owed by the account holder as a result of loans granted by the bank; or the payment to the bank of insurance premiums and costs relating to the savings deposit in question.

3 The loyalty premium entails that the account holder is entitled to additional interest for amounts held on the same account for twelve subsequent months.

4 CJEU, 6 June 2013, C-383/10, *Commission v Belgium*, EU:C:2013:364.

In order to remedy the infringement, the Belgian legislature amended the applicable regime by a law of 25 April 2014.[5] That law extended the scope of application of the exemption to deposits held with banks established in other EEA Member States and it changed the wording of Article 21, 5° BITC concerning the requirements that must be met for the exemption to apply. Prior to this amendment, Article 21, 5° BITC provided that a deposit had to

> satisfy the criteria laid down by Royal Decree after approval by the National Bank of Belgium and the Banking, Financial and Insurance Commission, regarding the currency in which they are denominated, the conditions and methods of withdrawals and deductions and regarding the structure, the level and the method for calculating their remuneration.[6]

The law of 25 April 2014 added the following clause to that provision: *"or, for deposits with banks established in another EEA Member State, satisfy analogous requirements as established by the equivalent competent authorities in the other Member State"*.[7] It is up to the taxpayer to establish that the savings deposit is regulated by the competent authorities of the EEA Member State in question and that it meets requirements that are analogous to those provided for in Article 2 RD/BITC.[8] If no such requirements apply in the other EEA Member State, the exemption is not applicable.[9]

In response to a parliamentary question, the Minister of Finance clarified the requirement that a deposit with a foreign bank should meet requirements that are *"analogous"* to those of Article 2 RD/ITC.[10] The Minister pointed out that savings deposits with a bank established in another EU or EEA Member State should meet requirements which, without being identical, are of a similar nature as the requirements of Article 2 RD/ITC, concerning the currency in which the account is denominated, the withdrawal conditions, as well as the level and calculation of the yield. Furthermore, the applicable requirements should be established by the competent authorities of the other Member State which are equivalent to the National Bank of Belgium and the Belgian financial regulator. As regards the currency of the account, the Minister of Finance has specifically pointed out that savings deposits not denominated in euros can also qualify for the exemption, provided that they are denominated in the official currency of the other Member State (e.g. pounds sterling in the UK).[11]

5 Law of 25 April 2014 containing various provisions, Official Gazette 7 May 2014.
6 Author's translation.
7 Author's translation. These amendments entered into force (retroactively) on 1 January 2012.
8 Circular letter of 12 June 2014 (AAFisc 22/2014, Ci.RH.231/633.479).
9 Documents of the Chamber of Representatives (2014-2015), No. 53, 3413/001, p. 41.
10 Question no. 231 of 27 April 2015, published in Parliamentary Questions and Responses, QRVA 54/022, p. 59.
11 A circular letter of 27 February 2015 had already confirmed this possibility (AAFisc 10/2015, Ci.RH.231/636.245).

Case law illustrates that despite the 2014 amendment, interest on foreign savings accounts will often not qualify for the exemption. For instance, a Belgian resident individual held a savings account with a bank established in the Netherlands. As the account did not provide a loyalty premium, the court of first instance held that it was not subject to requirements analogous to those provided for in Article 2 RD/BITC. As a result, the court dismissed the taxpayer's claim that the exemption should be applied.[12]

1.2.2. Facts and procedure

In the case giving rise to the preliminary ruling request at hand, a married couple resident in Belgium held a savings deposit with a non-Belgian bank. Because the deposit did not meet the requirements of Article 2 RD/BITC, the taxpayers were not entitled to the exemption in Belgium and were therefore assessed to tax on the interest earned on their deposit. The taxpayers challenged that assessment before the court of first instance of Bruges, arguing that – despite the 2014 amendment – the Belgian regime still infringed the freedom to provide services and the free movement of capital.

In particular, the taxpayers took the position that the extension of the exemption to deposits held with foreign banks had no practical impact because the requirements of Article 2 RD/BITC still had to be met for the exemption to apply. As those requirements were specific to the Belgian market, they were unlikely to be met by deposits held with non-Belgian banks.[13] Consequently, the Belgian regime could dissuade Belgian residents from holding a savings deposit with a bank established in another EU or EEA Member State.

The court of first instance decided to stay the proceedings and refer the following question to the CJEU for a preliminary ruling:

> Does Article 21(5) of the 1992 Belgian Income Tax Code (WIB 1992), as amended by Article 170 of the Law of 25 April 2014 laying down various provisions, infringe the provisions of Articles 56 TFEU and 63 TFEU and Articles 36 and 40 of the EEA Agreement, inasmuch as the provision in question, although applicable without distinction to domestic and foreign service providers, requires compliance with conditions similar to those included in Article [2] of the Royal Decree implementing the 1992 Income Tax Code (KB/WIB 1992) which are de facto specific to the Belgian market and consequently amount to a serious obstacle to foreign service providers offering their services in Belgium?

12 Hasselt court of first instance 4 December 2014, *Fiscale Actualiteit* (2015), 19, p. 4.

13 Even before the law of 25 April 2014 was passed, it had been suggested in legal literature that merely extending the scope of the exemption to savings deposits held with foreign banks would shift the question to the compatibility of the stringent conditions of Art. 2 RD/ITC with the fundamental freedoms (e.g. R. Neyt, *Comments on C-383/10, Commission v Belgium*, Highlights & Insights on European Taxation 2013, p. 62).