

Non-Discrimination in European and Tax Treaty Law: An Overview

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I. Introduction

Non-discrimination plays an important, if not crucial, role in many areas of law, such as constitutional law, human rights law, world trade law, EU law as well as tax treaty law. Both direct and indirect taxation are affected by the various types of non-discrimination provisions. From a practical point of view, the non-discrimination provisions within the EU legal framework and the non-discrimination concept under Article 24 of the OECD Model are important examples in this respect. In both areas of non-discrimination law, there are many open issues which have been debated for a long time; these issues have become the evergreens of non-discrimination in the area of taxation, examples being the meaning of the ECJ's case law on the "finality" of losses or the compatibility of group regimes with Article 24 of the OECD Model. Other problems have emerged only recently because of current developments at the OECD level, notably the BEPS project. Therefore, non-discrimination suggested itself as a general topic for the Master's theses of the full-time LL.M. program in 2014/2015.

The aim of this book is to focus on and deal with selected issues in depth. For that purpose and as an overview, this contribution will briefly describe the main challenges which the other contributions deal with, and it will provide background information on the relationship between these contributions, on their context, and on their underlying ideas.

II. Non-Discrimination under the EU Legal Framework

The power to tax is an essential requirement to guarantee the internal sovereignty and external independence of a state.¹ Without the ability to dispose over public funds generated through the imposition of taxes, modern states' governments would not be able to achieve their political and economic objectives.² It is therefore unsurprising that the limitation of the national power of taxation by EU law is a sensitive subject for Member States. With regard to indirect taxation, it has nevertheless been possible to achieve extensive harmonization through positive integration. This is mainly due to the immediate repercussions of indirect taxes, especially customs duties and excises, on cross-border movement and trade.³ Taking the internal market concept seriously means, therefore, accepting harmonization in this respect.⁴ Concerning VAT/GST, it also has to be kept in mind that

1 See M. Lehner, Limitation of the national power of taxation by the fundamental freedoms and non-discrimination clauses of the EC Treaty, *EC Tax Review* 2000, p. 5 (p. 5); F. Vanistendael, The European Tax Paradox: How Less Begets More, *Bulletin for International Fiscal Documentation* 1996, p. 531 (p. 531).

2 See C. Seiler, Das Steuerrecht unter dem Einfluss der Marktfreiheiten, *Steuer und Wirtschaft* 2005, p. 25 (p. 25).

3 See B.J.M. Terra/P.J. Wattel, *European Tax Law*, 6th edition (Kluwer, 2012), pp. 4-5.

4 Cf. Completing the Internal Market, White Paper from the Commission to the European Council, COM(85) 310 final (14 June 1985), pp. 41-43.

the first steps toward harmonization were taken at a time when the importance of this kind of tax for Member States' budgets was still quite minor.⁵ Presumably political agreement was hence easier to achieve. At any rate, the high degree of positive integration not only strongly limits the Member States' tax sovereignty, but also reduces the relevance of the fundamental freedoms in the area of indirect taxes. Consequently, the ECJ's case law on indirect taxes mainly concerns questions of how to interpret the detailed and technical rules of secondary EU law and whether the Member States have correctly implemented these requirements domestically.⁶ The few decisions that concern the impact of the fundamental freedoms on VAT have not yet gained much attention in the literature. The contribution by Joseph Michael Kennedy⁷ intends to close this gap.

Unlike indirect taxes, direct taxes have remained unaffected by positive integration to a large extent. Due to the unanimity requirement,⁸ harmonization of direct taxes is in fact difficult to achieve.⁹ This does not mean that direct taxes are unaffected by EU law at all. Rather, the integration of direct taxes is greatly influenced by the ECJ's jurisprudence on conflicts between the fundamental freedoms and non-harmonized domestic tax legislation. This is emphasized by the ECJ regularly pointing out that "[a]lthough [...] direct taxation does not as such fall within the purview of the [EU], the powers retained by the Member States must nevertheless be exercised consistently with [EU] law".¹⁰ The relevance of the fundamental freedoms for direct taxation was addressed by the ECJ for the first time in the *Avoir Fiscal* case.¹¹ Since then, the case law on direct taxation has rapidly evolved¹² and has had a tremendous effect on traditional pillars of domestic legislation on cross-border situations.¹³ This is particularly due to the fact that a different treatment of domestic and cross-border situations is virtually inherent to

5 In fact, only a few Member States even had a modern VAT/GST in the form of a non-cumulative value added tax based on the credit invoice method at that time. Cf. R. de la Feria, *The EU VAT System and the Internal Market* (IBFD, 2009), p. 49.

6 See B.J.M. Terra/P.J. Wattel, *European Tax Law*⁶, pp. 36-37.

7 J.M. Kennedy, Influence of the Fundamental Freedoms on the VAT Directive, in this volume.

8 See B.J.M. Terra/P.J. Wattel, *European Tax Law*⁶, pp. 19 and 23-24.

9 See B.J.M. Terra/P.J. Wattel, *European Tax Law*⁶, p. 209.

10 See, for example, Judgment in *Schumacker*, C-279/93, EU:C:1995:31, para. 21; Judgment in *Safir*, C-118/96, EU:C:1998:170, para. 21; Judgment in *Eurowings*, C-294/97, EU:C:1999:524, para. 32; Judgment in *Vestergaard*, C-55/98, EU:C:1999:533, para. 15; Judgment in *De Coster*, C-17/00, EU:C:2001:651, para. 25; Judgment in *FKP Scorpio Konzertproduktionen*, C-290/04, EU:C:2006:630, para. 30; Judgment in *Lakebrink and Peters-Lakebrink*, C-182/06, EU:C:2007:452, para. 14; Judgment in *Strojirny Prostějov*, C-53/13, EU:C:2014:2011, para. 23.

11 Judgment in *Commission/France*, 270/83, EU:C:1986:37.

12 The 2014 edition of the IBFD's ECJ Direct Tax Compass, for example, lists 244 judgments that are considered to be relevant for direct taxation (see *ECJ Direct Tax Compass 2014* [IBFD, 2014]); for an overview of the ECJ cases in the area of, or of particular interest for, direct taxation see also http://ec.europa.eu/taxation_customs/resources/documents/common/infringements/case_law/court_cases_direct_taxation_en.pdf (last accessed: 24. 6. 2015).

13 See G. Kofler, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Linde, 2007), p. 37; B.J.M. Terra/P.J. Wattel, *European Tax Law*⁶, p. 881 et seq.

direct taxation. Whereas residents are typically taxed on their worldwide income (universality principle), the income of non-residents is usually taxed only if it is earned in or derives from sources in the respective state (principle of territoriality).¹⁴ This fundamental differentiation is respected by the ECJ as it regularly points out that “[i]n relation to direct taxes, the situations of residents and non-residents are not, as a rule, comparable”.¹⁵ The heavily criticized jurisprudence, according to which certain factual circumstances nevertheless lead to a comparability of resident and non-resident individuals, is described in the contribution of Barbara Hagen.¹⁶

Whereas resident and non-resident individuals are assumed, as a rule, not to be comparable, legal entities which are resident in different Member States are typically considered to be comparable by the ECJ. The striking difference in the Court’s approach to individuals and corporations has in recent years especially crystallized in the jurisprudence on “exit taxes”: In the *N* case, the Court held, with regard to individuals, that an exit tax regime can be justified by reason of a balanced allocation of the power to tax between the Member States, but in order to be regarded as proportionate, such a system would have to take full account of reductions in value capable of arising after the transfer of residence by the taxpayer concerned, “unless such reductions have already been taken into account in the host Member State”.¹⁷ The ECJ obviously wants to make sure that a reduction in value cannot be taken into account in two different Member States. In the *National Grid Indus* case, on the other hand, the Court reasons that in the case of a company transferring its place of effective management it is up to the new residence state of the company “to take account in its tax system of fluctuations in the value of the assets of that company which occur after the date on which the Member State of origin loses all fiscal connection with the company”.¹⁸ Therefore, it cannot be regarded as disproportionate if the Member State of origin does not take into account decreases in value occurring after the transfer of the place of effective management. This is only one of several examples which illustrate that the ECJ’s approach concerning exit tax regimes is different depending on whether it applies to individuals or corporations. The contribution by Jean Glodas¹⁹ provides further examples and, moreover, deals with what the reason for this difference is and whether the arguments of the ECJ are convincing.

The *National Grid Indus* case is also interesting from another point of view, since the ECJ held that “national legislation offering a company transferring its place of

14 See B.J.M. Terra/P.J. Wattel, *European Tax Law*⁶, pp. 881-884.

15 See, for example, Judgment in *Schumacker*, C-279/93, EU:C:1995:31, para. 31.

16 B. Hagen, *Schumacker Comparability – the Conditions of the Schumacker Doctrine*, in this volume.

17 Judgment in *N*, C-470/04, EU:C:2006:525, para. 54.

18 Judgment in *National Grid Indus*, C-371/10, EU:C:2011:785, para. 58.

19 J. Glodas, *Difference Between Individuals and Corporations in Exit Tax Cases*, in this volume.

effective management to another Member State the choice between, first, immediate payment of the amount of tax, which creates a disadvantage for that company in terms of cash flow but frees it from subsequent administrative burdens, and, secondly, deferred payment of the amount of tax, possibly together with interest in accordance with the applicable national legislation, which necessarily involves an administrative burden for the company in connection with tracing the transferred assets, would constitute a measure which, while being appropriate for ensuring the balanced allocation of powers of taxation between the Member States, would be less harmful to freedom of establishment than [a measure which only provides for immediate taxation upon the transfer of a company's place of management]. If a company were to consider that the administrative burden in connection with deferred recovery was excessive, it could opt for immediate payment of the tax".²⁰ This is particularly striking insofar as another line of case law suggests that "[t]he existence of an option which would possibly render a situation compatible with European Union law does not, in itself, correct the illegal nature of a system, such as the system provided for by the contested rules, which comprises a mechanism of taxation not compatible with that law".²¹ The contribution by Carla Elizabeth Tovar Palomo²² examines this apparent contradiction in the ECJ's case law and explains why in some cases optional regimes cannot render discriminatory rules compatible with EU law, while in other cases the ECJ itself suggests optional regimes as an EU-compatible solution for cross-border situations.

The few cases mentioned previously already show that the comparability assessment is of major importance in the ECJ's direct tax jurisprudence. Thereby, the cross-border transaction is in general compared to a purely domestic transaction. Whereas such a "vertical comparison" is generally accepted as a tenable benchmark in order to establish whether a national measure leads to discrimination or not, it is disputed whether EU law also asks for "horizontal comparability", i.e. a comparison between two cross-border situations.²³ In the literature, it is, for example, assumed that the fundamental freedoms require Member States to provide for equal treatment of non-residents with domestic subsidiaries and non-residents with domestic PEs.²⁴ In *CLT-UFA*, the ECJ in fact held that from a host state

20 Judgment in *National Grid Indus*, C-371/10, EU:C:2011:785, para. 58.

21 Judgment in *Beker*, C-168/11, EU:C:2013:117, para. 62; see also Judgment in *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, at para. 162; Judgment in *Gielen*, C-440/08, EU:C:2010:148, para. 53.

22 C.E. Tovar Palomo, *Optional Regimes as a Remedy to Discriminatory Treatment*, in this volume.

23 For detailed references with regard to the effect of "horizontal comparability" as a most-favoured nation treatment, see, for example, G. Kofler, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht*, at pp. 764-808 (with regard to "inbound most-favoured nation treatment"; see especially FN 29-31) and at pp. 808-816 (with regard to "outbound most-favoured nation treatment").

24 See, for example, N. Dautzenberg, *Unternehmensbesteuerung im EG-Binnenmarkt*, 1. Halbband (Josef Eul Verlag, 1997), p. 60.

perspective “German subsidiaries and branches of companies having their seat in Luxembourg are in a situation in which they can be compared objectively”.²⁵ However, with regard to the home state perspective, the Court has made it unmistakably clear that “the Member States are at liberty to determine the conditions and the level of taxation for different types of establishments chosen by national companies or partnerships operating abroad, on condition that those companies or partnerships are not treated in a manner that is discriminatory in comparison with comparable national establishments”.²⁶ This apparent discrepancy is addressed by Andressa Pegoraro in her contribution.²⁷

However, not only is the spectrum of the ECJ’s comparability analysis unclear; it is also difficult to establish comparability in certain cases. In the *Deutsche Shell* case, for example, a currency loss arose in a foreign PE that was not deductible under the tax law of the residence state.²⁸ In a purely domestic situation, arguably such a currency loss would never arise and would therefore not be deductible. This case shows that it is sometimes quite burdensome to determine the right comparator.²⁹ Similar difficulties arise in the case of hybrid mismatch arrangements, which are currently being focused on by the OECD.³⁰ A hybrid mismatch may, for example, occur in the case of hybrid financial instruments, which incorporate elements of both equity and debt. As such instruments usually cannot be clearly classified as either equity or debt, the classification may vary in different jurisdictions. From a tax planning perspective, this mismatch in treatment can be exploited by using a hybrid instrument that is treated as debt in the source state and as equity in the residence state. Thereby, it is possible to obtain a “double benefit”, since the amount paid by the debtor is deductible as interest in the source state and might be exempt as a dividend at the level of the creditor in the residence state due to a dividend exemption system. In order to prevent such tax planning structures, a number of countries have already seized upon suggestions made by the OECD and the European Commission and have introduced rules according to which the domestic tax treatment of an entity, instrument or transfer involving a foreign country is linked to the tax treatment in the foreign country, thus eliminating the possibility for mismatches.³¹ Due to the fact that such structures require a cross-border situation, the result of such rules is that benefits which are granted in purely domestic situations are

25 Judgment in *CLT-UFA*, C-253/03, EU:C:2006:129, para. 30.

26 Judgment in *Columbus Container Services*, C-298/05, EU:C:2007:754, para. 53; see also in *KBC Bank and Beleggen, Risicokapitaal, Beheer*, C-439/07 and C-499/07, EU:C:2009:339, para. 80; Judgment in *X Holding*, C-337/08, EU:C:2010:89, para. 40.

27 A. Pegoraro, Non-Discrimination under EU Law: Comparability of Corporations and Permanent Establishments, in this volume.

28 Judgment in *Deutsche Shell*, C-293/06, EU:C:2008:129.

29 See M. Lang, Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions, and Contradictions, *EC Tax Review* 2009, p. 98 (p. 99).

30 OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements* (2014); see also OECD, *Hybrid Mismatch Arrangements: Policy and Compliance Issues* (2012).

31 See OECD, *Hybrid Mismatch Arrangements*, at p. 14.

denied in a cross-border situation. This leads to the question whether such a different treatment of domestic and cross-border situations constitutes discrimination incompatible with the fundamental freedoms. However, since hybrid mismatches cannot occur in a purely domestic situation, it is questionable whether the cross-border situation is actually comparable to a purely domestic situation. This issue is addressed by the contribution by Jessica Di Maria.³²

If the ECJ asserts that comparable situations are treated differently – or, although less frequently, if different situations are treated alike –, discrimination may still be compatible with the fundamental freedoms, provided that it is justified by an overriding reason in the public interest.³³ Even though the case law suggests that comparability and justification analysis are two separate steps in the Court’s analysis, arguments raised at the level of comparability and justification are in fact interchangeable.³⁴ Concerning hybrid mismatches, it therefore also has to be determined whether the different treatment of potentially comparable situations can be justified. This question is addressed by Ramon Tomazela Santos³⁵ in his contribution. However, even if a justification were available, it would have to be examined whether or not the legislation in question is in accordance with the principle of proportionality. Therefore, the contribution by Lucas Ebram Vilhena de Moraes³⁶ deals with this issue using the example of deduction and non-inclusion schemes. He specifically addresses the question whether an underlying tax credit is a more proportionate means to counter such tax planning structures as compared to completely refusing to grant relief from economic double taxation. However, if a Member State provides for the exemption method in purely domestic situations, the question arises whether applying the indirect credit method in cross-border situations is in line with the fundamental freedoms at all. The ECJ has held that Member States are not precluded from exempting dividends a resident company receives from another resident company while at the same time granting a tax credit in case of dividends a resident company receives from a non-resident company, “provided that the rate of tax applied to foreign-sourced dividends is no higher than the rate of tax applied to nationally-sourced dividends and that the tax credit is at least equal to the amount paid in the Member State of the company making the distribution, up to the limit of the amount of the tax charged in the Member State of the company receiving the distribution”.³⁷ If a

32 J. Di Maria, Comparability in the case of Hybrid Mismatch: In Search of an Approach Suitable for the Current European Landscape, in this volume.

33 See, for example, Judgment in *Verkooijen*, C-35/98, EU:C:2000:294, para. 43; Judgment in *Manninen*, C-319/02, EU:C:2004:484, para. 29; Judgment in *Blanckaert*, C-512/03, EU:C:2005:516, para. 42.

34 See M. Lang, *EC Tax Review* 2009, p. 100; also cf. A. Cordewener, *Europäische Grundfreiheiten und nationales Steuerrecht* (Dr. Otto Schmidt, 2002), pp. 162-174.

35 R. Tomazela Santos, Prevention of Hybrid Mismatches as a Justification?, in this volume.

36 L. Ebram Vilhena de Moraes, Underlying Tax Credit in the Case of a Deduction and Non-Inclusion Scheme?, in this volume.

37 Judgment in *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, para. 73; also cf. Judgment in *Test Claimants in the FII Group Litigation II*, C-35/11, EU:C:2012:70, paras. 43-50.

Member State wanted to apply the indirect credit method to cross-border distributions of profits while applying the exemption method in the case of domestic profit distributions, the ECJ's guidelines – which are illustrated in Giulia Gallo's contribution on the issue of whether the exemption and the indirect credit methods are in fact equivalent³⁸ – would have to be followed.

Whereas hybrid mismatch arrangements are a novel issue from an EU law perspective, there are other topics which have already kept the ECJ busy for a number of years. Since 2005 when *Marks & Spencer* was decided, for example, the objective of preserving a balanced allocation of taxing powers has become an important justification ground. Essentially, the ECJ regards the non-deductibility of foreign losses as a restriction, but considers it to be justified due to the fact that foreign profits were not taxed as well. If the Member States do not tax foreign profits, they do not need to consider foreign losses. This is also described by the ECJ as symmetry between the right to tax profits and the right to deduct losses. However, when the foreign losses become final, an obligation to asymmetrically consider those losses may arise. Whereas Lenka Horváthová's contribution deals with the essence of the symmetry between the right to tax profits and the right to deduct losses,³⁹ Lidija Živković examines recent case law, which sheds more light on the issue of "final losses".⁴⁰

The fundamental freedoms as well as the free movement right of EU citizens prevent Member States from enacting or maintaining laws or administrative practices that impede free movement within the internal market.⁴¹ However, to ensure an efficient allocation of resources, a level playing field within the internal market also has to be provided for.⁴² Therefore, the competition aspect of the internal market concept intends to avoid distortions induced by the market participants,⁴³ by the Member States,⁴⁴ or by differences between the Member States' legal systems.⁴⁵ From a tax perspective, the State aid rules are the most relevant means to implement this aspect of the internal market.⁴⁶ Thus, tax

38 G. Gallo, Equivalence of a Dividend Exemption and an Underlying Tax Credit, in this volume.

39 L. Horváthová, Symmetry between Profits and Losses as a Justification under EU Law (or the Two Sides of the Same Coin), in this volume.

40 L. Živković, Finality of Losses and their Different or Preferential Treatment, in this volume.

41 See B.J.M. Terra/P.J. Wattel, *European Tax Law*⁶, at p. 36.

42 See, for example, W. Schön, Der „Wettbewerb“ der europäischen Steuerordnungen als Rechtsproblem, in J. Pelka (ed.), *Europa- und verfassungsrechtliche Grenzen der Unternehmensbesteuerung*, DStjG 30 (Dr. Otto Schmidt, 2000), p. 191 (p. 194).

43 Articles 101-102 TFEU.

44 Articles 106-107 TFEU.

45 Article 116 TFEU.

46 According to the ECJ's case law, the concept of aid includes "not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect" (see, for example, Judgment in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, EU:C:2001:598, para. 38; Judgment in *Enirisorse*, C-237/04, EU:C:2006:197, para. 42; see also Judgment in *Paint Graphos and others*, C-78/08 to C-80/08, EU:C:2011:550, para. 44).

measures favouring certain undertakings or the production of certain goods are, in so far as trade between Member States is affected, incompatible with the internal market, if competition is thereby distorted or threatens to be distorted.⁴⁷ According to the ECJ's more recent case law, it is thereby to be determined "whether, under a particular statutory scheme, a State measure is such as to favour certain undertakings or the production of certain goods within the meaning of [Article 107(1) TFEU] in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question".⁴⁸ This approach is similar to the one the ECJ applies to determine whether a different treatment under two different rules constitutes an infringement of the fundamental freedoms.⁴⁹ In the literature, it is even argued that in tax matters the criteria for establishing State aid and impediments to free movement converge.⁵⁰ The contribution by Michalis Kalogirou⁵¹ therefore addresses the question whether the State aid rules in fact require an analysis similar to the approach taken by the ECJ with regard to the fundamental freedoms.

III. Non-Discrimination under Article 24 of the OECD Model

Article 24 of the OECD Model contains provisions dealing with the elimination of tax discrimination. It provides certain specific grounds that a state may not use to discriminate for purposes of taxation. In relation to *nationals* of the treaty partner state, Article 24 prohibits discrimination by reason of nationality (para. 1) and contains similar protection for stateless persons (para. 2). In relation to *residents* of the treaty partner state, Article 24 prohibits discrimination in cases of PEs belonging to treaty partner residents (para. 3), deductions of certain pay-

47 See, for example and with further references, R. Szudoczky, *Selectivity, Derogation, Comparison: How To Put Together the Pieces of the Puzzle in the State Aid Review of National Tax Measures?*, in D. Weber (ed.), *EU Income Tax Law: Issues for the Years Ahead* (IBFD, 2013), p. 163 (p. 164).

48 Judgment in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, EU:C:2001:598, para. 41; see also Judgment in *GIL Insurance and others*, C-308/01, EU:C:2004:252, para. 68; Judgment in *Spain/Commission*, C-409/00, EU:C:2003:92, at para. 47; Judgment in *Heiser*, C-172/03, EU:C:2005:130, para. 40; Judgment in *Portugal/Commission*, C-88/03, EU:C:2006:511, para. 54; Judgment in *Unión General de Trabajadores de la Rioja*, C-428/06 to C-434/06, EU:C:2008:488, para. 46; Judgment in *British Aggregates/Commission*, C-487/06 P, EU:C:2008:757, para. 82; Judgment in *Presidente del Consiglio dei Ministri*, C-169/08, EU:C:2009:709, para. 61.

49 See, for example, M. Lang, *Selectivity as a Criterion to Determine Whether a Tax Measure Constitutes State Aid*, in P. Pistone (ed.), *Legal Remedies in European Tax Law* (IBFD, 2009), p. 269 (p. 270); M. Lang, *State Aid and Taxation: Recent Trends in the Case Law of the ECJ*, *ESStAL* 2012, p. 411 (p. 418).

50 See P.J. Wattel, *Forum: Interaction of State Aid, Free Movement, Policy Competition and Abuse Control in Direct Tax Matters*, *World Tax Journal* 2013, p. 128 (pp. 129-135).

51 M. Kalogirou, *Selectivity of State Aid: a Rule/Exception Test or a Comparability Analysis?*, in this volume.

ments and debts to treaty partner residents (para. 4), and enterprises owned by treaty partner residents (para. 5).⁵²

For various reasons, but especially because bilateral tax treaties aim at a lower level of integration compared to, for instance, the framework of the European Union, Article 24 of the OECD Model is regarded as covering only direct (i.e. overt or *de jure*) discrimination.⁵³ In order to establish such discrimination, a strict comparability test is applied. Only when everything is the same between taxpayers and their circumstances except for nationality (para. 1 and 2) or residence (para. 3, 4 and 5), is the sole remaining explanation for different treatment nationality or residence, respectively.⁵⁴ By following this strict comparability test, indirect (i.e. covert, hidden, disguised or *de facto*) discrimination is excluded.⁵⁵ All laws or regulations which do not directly link disadvantages to nationality (para. 1 and 2) or residence (para. 3, 4 and 5) are simply not differentiating solely because of nationality or residence, respectively, or so is the general assumption. Therefore, for instance, residence is a relevant comparability criterion under Article 24(1) of the OECD Model because everything in the circumstances, except for nationality, must be the same.⁵⁶ With this strict comparability approach every single and potentially relevant difference in circumstances is considered at the level of comparability, namely by preventing comparability. As a consequence, there is no need, or even possibility, for justifications.⁵⁷

52 J.F. Avery Jones/H.-R. Depret/M. van de Wiele/M.J. Ellis/K. van Raad/P. Fontaneau/P.-M. Fontaneau/R. Lenz/H. Torrione/T.W. Magney/T. Miyatake/S.I. Roberts/S.H. Goldberg/J. Strobl/J. Killius/V. Uckmar/G. Maisto/D.A. Ward, *The Non-Discrimination Article in Tax Treaties, European Taxation* 1991, p. 311.

53 See, for example, A. Rust in E. Reimer & A. Rust (eds.) *Klaus Vogel on Double Taxation Conventions*, 4th edition (Kluwer, 2015) Art. 24, m.nos. 5 and 16.

54 See, for example, A. Rust in E. Reimer & A. Rust (eds.) *Klaus Vogel on Double Taxation Conventions*⁴, Art. 24, m.no. 35, according to whom “[d]ifferences of another kind than nationality lead to dissimilar circumstances” under Article 24(1). Although Alexander Rust qualifies this statement by noting that “other differences than nationality allow discrimination only if these other differences are *relevant* for the distinction”, the relevance of differences is tested by deeming the taxpayer a national of the respective state and leaving “*all* other circumstances the same” (emphasis added). If in that case the taxpayer were entitled to the tax benefit, the discrimination is based on nationality. A similar test is applied in relation to discrimination based on residence under Article 24(3) and (5) (see m.nos. 61-62 and 109). In effect, it appears that all the criteria which are used by the domestic law in order to provide for different treatment are relevant and prevent comparability unless the law directly uses the criterion of nationality or residence (or possibly a substitute for nationality or residence if “*all* other circumstances” should not include certain criteria which are closely linked, or fully correspond to, nationality or residence, respectively).

55 See, for example, A. Rust in E. Reimer & A. Rust (eds.) *Klaus Vogel on Double Taxation Conventions*⁴, Art. 24, m.nos. 5 and 35.

56 Since 1992, Article 24(1) explicitly requires that the nationals of each contracting state must be “in the same circumstances, *in particular with respect to residence*” (emphasis added). See also Commentary on Article 24 of the 2008-2014 OECD MC, para. 7 et seq.

57 See, for example, A. Rust in E. Reimer & A. Rust (eds.) *Klaus Vogel on Double Taxation Conventions*⁴, Art. 24, m.nos. 4 and 132.