Belgium: Recent and Pending CJEU Cases

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1. Introduction

As in previous years, the CJEU has dealt with several Belgian direct tax cases.[1] This Belgian chapter aims firstly to give a short update on two cases discussed in last year's edition, but which were still pending at the time[2, 3] (Sections II and III). Thereafter the authors selected a few cases, one being a sequel to a prior corporate income tax case (Section IV), one an inheritance matter in line with prior well-established precedents such as among others the *Persche* case (Section V) and another a matter relating more to a social security issue (Section VI). Finally, the chapter ends with a peculiar case pertaining to the interpretation of the Charter, but where the analysis of the CJEU is limited to the admissibility of the request for a preliminary ruling (Section VII).

2. Jacob and Lennertz (C-174/18)

2.1. Facts and legal background

The Court of first instance of Liège validly referred the *Jacob and Lennertz* case to the CJEU on 5 March 2018 and the CJEU issued its ruling on 14 March 2019.

In a nutshell, the couple Jacob and Lennertz are Belgian tax residents who filed their 2014 joint tax return with the inclusion of, among other things, their pension income, while part of the latter originated from Luxembourg.

Pursuant to Article 18 (3) of the Belgian-Luxembourg DTC, any Luxembourg sourced pensions and other similar remuneration paid to a Belgian resident are not to be subject to tax in Belgium provided the payments meet certain conditions such as an effective taxation in Luxembourg. With regard to Jacob and Lennertz, the Luxembourg pension income qualified for DTC benefit.

Mr. Jacob and Mrs. Lennertz disputed the tax assessment that they subsequently received on the grounds that their Luxembourg pension income had not been entirely exempted from tax, as a consequence of the application of the so-called "progressivity clause".[4] They contended that the manner in which the Belgian tax authorities ("BTA") calculated the tax liability and the order in which the available tax rebates were applied, led to them losing a portion of aforesaid

1 This contribution has been updated to 29 October 2019.

2 CJEU, 14 March 2019, C-174/18, *Jacob and Lennertz*, ECLI:EU:C:2019:205; for a full analysis see L. De Broe & S. Gommers, *Belgium: Recent and Pending CJEU Cases*, in M. Lang et al. (eds.), CJEU – *Recent Developments in Direct Taxation 2018* (Vienna: Linde, 2019), p. 1. Gommers.

3 CJEU, C-389/18, *Brussel Securities*, request for a preliminary ruling from the Court of first instance of Brussels, lodged on 13 June 2018: for a full analysis see L. De Broe & S. Gommers, *Belgium: Recent and Pending CJEU Cases*, in M. Lang et al. (eds.), *CJEU – Recent Developments in Direct Taxation 2018* (Vienna: Linde, 2019), p. 1.

4 Article 155 BITC provides that income exempted by virtue of a DTC is nevertheless to be taken into account in determining the Belgian tax liability (thus the progressive tax rates).

rebates. Absent any possibility to carry them forward, their loss ultimately leads to a heavier tax burden.

The BTA also denied the applicants the possibility to claim an additional tax rebate for foreign sourced income which was introduced by the BTA[5] precisely to address such discrimination of Belgian tax residents who have earned both Belgian and foreign income, because they cannot fully deduct the tax rebates that relate to their personal and family situations. However, and as the BTA argued in the case at hand, if a taxpayer cannot fully utilize such tax rebates due to non-personal or non-family related matters (i.e. long-term savings, service vouchers, energy-saving investments or charity gifts), he does not qualify for the additional tax rebate.

The applicants therefore contended that the BTA violated Article 18 (pensions) of the Belgian-Luxembourg DTC and filed proceedings with the Court of first instance of Liège. The latter filed the following request for a preliminary ruling with the CJEU: must article 45 of the TFEU (free movement of workers) be interpreted as precluding the application of tax legislation of a Member State, such as that at issue in this case, which has the effect of depriving a couple resident in that State – one of whom receives a pension in another Member State which is tax exempt in the first Member State pursuant to a DTC – of part of the benefit of the tax advantages granted by the State of residence?

2.2. CJEU Ruling

As expected, due to its similarities with the *de Groot* case,[6] and in line with the subsequent *Imfeld-Garcet* case,[7] the CJEU ruled in favour of the taxpayers, notwithstanding the allegations of the BTA, that the contentious tax benefits could neither qualify as personal, nor as family-related.

Indeed, the CJEU reached its conclusion on the basis of the *Lakebrink and Peters-Lakebrink* case[8] where the CJEU extended the scope of its case law on personal and

5 Administrative Circular no. Ci.RH. 331/575.420 of 12 March 2008 subsequent to the infringement procedure lodged by the European Commission against Belgium (8 January 2007, n° IP/07/13) for not amending its tax laws after the *de Groot* case (CJEU, 12 December 2002, C-385/00, *de Groot*, ECLI:EU:C:2002:750).

6 CJEU, 12 December 2002, C-385/00, *de Groot*, ECLI:EU:C:2002:750, para. 99–110: The CJEU ruled that the State of residence cannot cause a taxpayer to forfeit part of his tax-free allowance and his personal advantages because, during the year in question, he also received income in another State, which was taxed in that State without his personal and family circumstances being taken into account.

7 CJEU, 12 December 2013, C-303/12, *Imfeld-Garcet*, ECLI:EU:C:2013:822: which concerned a Belgian married couple who received an additional tax-free allowance for financially dependent children, but which was imputed on tax exempt income, and where the CJEU ruled that Belgian tax law established a difference in tax treatment between EU-citizen couples residing in Belgium, according to the source of their incomes, and that such a difference was liable to discourage those citizens from exercising the freedoms guaranteed by the (EU) Treaty, particularly the free movement of workers enshrined in article 45 of the TFEU.

family-related tax benefits to other types of tax benefits, on the grounds that the State of residence must assess – for the purpose of granting tax advantages – the taxpayer's personal ability to pay tax as a whole. Thus, and according to the CJEU, a restrictive interpretation of personal and family-linked tax advantages, as contended by the BTA, cannot be upheld, as the tax rebates in the case at hand also necessarily have an impact on the ability to pay taxes.

3. Brussels Securities (C-389/18)[9]

3.1. Facts and legal background

This case was discussed last year as well,[10] but it is still pending and the Advocate General Henrik Saugmandsgaard Oe recently issued his opinion,[11] hence the following short update.

The question that has arisen is whether a combined reading and application of the Belgian dividend received deduction ("DRD")[12] with the order of utilization of other tax attributes, i.e. the notional interest deduction ("NID"), is compatible with the Parent-Subsidiary Directive ("PSD").

As applicable at the time of the contentious tax years, the DRD regime allowed for qualifying dividends – received by a Belgian parent company – to benefit from a 95 % tax deduction. *In concreto* the DRD consists firstly of including the tax-exempt dividends in the taxable base of the corporate shareholder. Secondly, and after a series of tax adjustments have been performed (either reducing or increasing said taxable base), 95 % of the received dividends are subsequently deducted.[13] Any excess DRD, absent any sufficient taxable profit, can be carried forward without any time limitation.[14]

The DRD is the fourth operation to determine the taxable base, though numerous others could apply afterwards, in a statutory order, such as the NID – which is a tax deduction of a percentage of the qualifying equity, mainly aiming at tackling the fact that debt interest is tax deductible – or adjustment of the taxable base to take account of carried forward tax losses.

8 CJEU, 18 July 2007, C-182/06, *Lakebrink and Peters-Lakebrink,* ECLI:EU:C:2007:452: pertaining to the effect of negative rental income on progressivity.

9 CJEU, C-389/18, *Brussel Securities*, request for a preliminary ruling from the Court of first instance of Brussels, lodged on 13 June 2018.

10 For a full analysis see L. De Broe & S. Gommers, *Belgium: Recent and Pending CJEU Cases*, in M. Lang et al. (eds.), *CJEU – Recent Developments in Direct Taxation 2018*, (Vienna: Linde, 2019), p. 1.

11 CJEU, C-389/18, *Brussel Securities*, opinion of the Advocate General issued on 5 September 2019, ECLI:EU:C:2019:680.

12 Also commonly referred to as the Belgian participation exemption.

13 Thus only the remaining 5 % could be subjected to corporate income tax.

14 The carry-forward is a consequence of the *Cobelfret* case where the CJEU ruled that not enabling so would infringe the PSD (CJEU, 12 February 2009, C-138/07, *Cobelfret*, ECLI:EU:C:2009:82).

Brussels Securities NV was a DRD qualifying parent company, hence it claimed DRD on its received dividends, besides also claiming NID. Back then the unutilized NID could be carried forward for 7 years. An important factor is that the DRD is to be claimed before the NID (and before the carried forward tax losses).

Brussels Securities argued that the domestic statutory sequencing of the various tax deductions leads to a violation of the PSD because the unused NID was subject to a 7-year statute of limitations, whilst the excess DRD could be carried forward indefinitely, which ultimately resulted in (a portion of) the carried forward NID being lost due to the combination of its loss-making position and the available excess DRD. Brussels Securities, therefore contended that the loss of the carried forward NID *in concreto* led to a taxation of its received dividends, despite them qualifying for the DRD.

The Court of first instance of Brussels decided to stay the proceedings and file a request for a preliminary ruling with the CJEU. In essence the Court is asking whether Article 4 (1) of the PSD[15] precludes a Member State from providing that the DRD must *firstly* be included in the taxable basis of the qualifying parent, and can *then subsequently* be deducted, *in combination* with the fact that any excess DRD can be carried forward *but,* is to be utilized *before* the NID, *whilst* excess NID can *only* be utilized for seven years.

3.2. Analysis of the advocate general

Contrary to the opinion that our Belgian colleagues De Broe and Gommers expressed in last year's edition, the Advocate General ("AG") recently concluded in favour of Brussels Securities.[16]

The *Cobelfret* case[17] leads the AG to conclude that in order to comply with Article 4 (1) of the PSD – and its overall objective of attaining tax neutrality – the Belgian tax legislation may not *de facto* lead to the loss of another domestic tax advantage in the hands of qualifying parent companies, if the latter could have fully claimed the aforesaid tax advantage, had the received dividends not been subjected to the contentious method of inclusion-deduction *in combination with* the application of other tax attributes. Such a loss would thus qualify as a prohibited *indirect* taxation.

The AG is further strengthened in his conclusion by the *KBC* order of the Court which further refined the *Cobelfret* case and ruled that when a Member State allows

15 "*1. Where a parent company* […], *receives distributed profits, the Member State of the parent company* […] *shall,* […] *either: (a)refrain from taxing such profits; or* […]"

16 L. De Broe & S. Gommers, *Belgium: Recent and Pending CJEU Cases*, in M. Lang et al. (eds.), *CJEU – Recent Developments in Direct Taxation 2018*, (Vienna: Linde, 2019), p. 1.

17 CJEU, 12 February 2009, C-138/07, *Cobelfret*, ECLI:EU:C:2009:82: Because the DRD consists of a tax deduction/exemption of the qualifying received dividends (as opposed to the credit method) which could only be claimed if the parent company was in a tax paying position, the CJEU ruled that said deduction should also be available when facing a loss position.

for tax losses to be carried forward, Article 4 (1) and (2) of the PSD precludes domestic tax legislation from allowing a decrease of the tax losses, corresponding to the received dividends.

The AG, as well as the referring Court and the EU Commission all concur with the reasoning of Brussels Securities which is arguing that the combination of (i) the Belgian interpretation of the exemption method *and* (ii) the statutory order in which the relevant tax attributes can be claimed, indirectly leads to a heavier tax burden in the hands of the parent company, in comparison with the situation wherein the qualifying dividends are simply excluded *ab initio* from the taxable basis.

The AG notes that the compatibility with EU law of the (i) Belgian exemption method – *as such* – has so far never been examined by the CJEU. Nevertheless, the AG is of the opinion that the exemption regime provided by Article 4(1) of the PSD does not necessarily require an *ab initio* exclusion of the qualifying received dividends. The PSD only requires that the received dividends are neither taxed directly, nor indirectly. In his opinion (notwithstanding the existence of more simple methods) the Belgian exemption method *as such* is compliant with the PSD, provided its application effectively leads to an exemption, hence it enables the PSD objective of tax neutrality to be attained and to comply with the EU principle of effectiveness.

However, the combination with (ii) the statutory order in which any excess DRD and other domestic tax attributes can be utilized leads the AG to conclude that there is an infringement of the PSD, because it *de facto* results in a heavier tax burden in the hands of the parent company, than would be the case when combined with an *ab initio* exclusion method (and an immediate increase of the tax losses carried forward, as the case may be).

This *in concreto* difference in tax burden due to the loss of another domestic tax advantage,[18] can be equated to prohibited indirect taxation, pursuant to both the *Cobelfret* case and the *KBC* order. Thus, the Belgian measures introduced to comply with the aforesaid cases have led to a new infringement of the overall objective of the PSD, i.e. effective tax neutrality.

In light of the above, the AG thus dissents from the rebuttal of the Belgian government which contends that even though the DRD could lead to the forfeiture of excess NID, it does not amount to prohibited indirect taxation because such taxation would *not necessarily* occur *effectively*. Furthermore, the DRD as well as any excess thereof can still be fully utilized, and no indirect taxation thereof could thus occur subsequently. Finally, the government has submitted that it has

18 i.e. the effective utilisation of excess NID.

exclusive jurisdiction over such matters (i.e. order of utilization and limitation periods).

3.3. Conclusion

The authors dissent from the "economic" approach followed by both the EU Commission and the AG, consisting of comparing the Belgian DRD method with the "basic *ab initio*" method, in combination with the statutory order of utilization, in order to conclude that there is prohibited indirect taxation.

We are inclined to concur with the outcome predicted by our colleagues De Broe and Gommers as the prevalent and exclusive legal argument should be as follows: because the (excess) DRD can be fully utilized without any time-limitation, and because the Belgian DRD method (of inclusion and subsequent deduction) is *as such* not incompatible with (the wording of) Article 4(1) of the PSD, no infringement of the PSD can have occurred. Thus, there should be no need thereafter, to proceed with an analysis of the combination of the said DRD method, with the domestic and statutory order of utilization of the tax attributes.

Consequently, taking the economic impact of the aforesaid order of utilization into consideration would indeed go beyond the scope of the PSD[19] as well as the *KBC* order,[20] as the case solely pertains to the (potential) loss of excess NID after 7 years. It is correct to affirm that the tax burden of a parent company could be heavier, but from a strictly legal viewpoint (as opposed to an economic one), the difference can only consist of forfeited excess NID, rather than (excess) DRD, which is a purely domestic tax issue over which the CJEU has no jurisdiction.[21]

4. Argenta Spaarbank NV (C-459/18)[22]

This case is a sequel to the 2013 *Argenta Spaarbank NV* case[23] and – similarly to the *Brussels Securities* case – it also pertains to the question whether the Belgian statutory amendments aiming to remedy an infringement ruled upon by the CJEU, are compliant with EU law.

19 i.e. effective and full tax exemption pursuant to Article 4 and the overall objective of tax neutrality.

20 Wherein the CJEU further refined its *Cobelfret* ruling and held that pursuant to the PSD it is not mandatory to allow for any resulting loss to be carried forward to a later period. However, if a Member State that has chosen the exemption method also allows a carry-forward of the losses, the PSD precludes a domestic provision that reduces the tax losses by the amount of dividends received?

21 CJEU, C-128/10 and C-129/10, EU:C:2011:163, n°40 and the case law referred therein.

22 CJEU, 17 October 2019, C-459/18, *Argenta Spaarbank NV*, request for a preliminary ruling from the Court of first instance of Antwerp, lodged on 16 July 2018.

23 CJEU, 4 July 2013, C-350/11, *Argenta Spaarbank NV*, ECLI:EU:C:2013:447.

4.1. Facts and legal background – Argenta Spaarbank NV of 4 July 2013 (C-350/11)[24]

In 2013, the CJEU held that Article 49 of the TFEU must be interpreted as precluding domestic legislation under which, for the calculation of a tax benefit granted to a company subject to full tax liability in a Member State, the net asset value of a permanent establishment located in another Member State is excluded from the *calculation basis* when the profits of that permanent establishment are not taxable in the first Member State by virtue of a DTC, as opposed to the situation where the assets allocated to the permanent establishment ("PE") located in the first Member State are taken into account.

The Belgian government contended among other things that the exclusion enshrined in Article 205*ter*, par. 2 BITC would have no impact on the resident company because the NID would have to be applied to the foreign PE income anyway, which was already exempted by virtue of the Belgian-Dutch DTC.

According to the government, even if the net assets of the PE were to be taken into account for the calculation basis, the effective tax rate of the resident company could not be alleviated in any event. Indeed, when the PE is situated in a non-DTC State, the NID-basis is calculated separately with regard to the net assets allocated to said PE, and subsequently, the NID is applied first and foremost to the profit generated by said PE. Thus, if this reasoning were to be applied apply by analogy to a PE situated in another EU Member State, there would be no difference in the end, because then the NID would also have to be applied to the PE's profit, whilst the profit would already be exempt by virtue of a DTC.

Argenta Spaarbank, followed by the EU Commission and Advocate General Mengozzi, refuted this on the grounds that the NID mechanism applicable to foreign PEs in a non-treaty State consists of both calculating the NID on the basis of the worldwide income *and* applying it to all the taxable income of the resident company.

Moreover, the disadvantage does not arise because the Member State of the PE does not provide for a similar NID-mechanism, but solely from the choice of the Belgian tax legislature to exclude the net assets allocated to the PE, from the calculation basis. Also, the fact that a DTC exclusively allocating taxation powers to the Member State where a PE is situated – thus precludes the residence State from taxing said profit – does not entail that the residence State should be entitled to systematically deny any tax benefit to a resident company having such a PE.[25]

24 For a commentary, see E. Traversa, *Tax Incentives and Territoriality within the European Union: Balancing the Internal Market with the Tax Sovereignty of Member States*, Journals IBFD, World Tax Journal 2014, p. 315.

Finally, and most importantly, the CJEU noted that the Belgian government itself acknowledged the lump-sum character of the NID calculated by reference to the net assets of a company, as opposed to the taxable profit generated by its assets.

4.2. Facts and legal background – Argenta Spaarbank NV of 17 October 2019 (C-459/18)

The Belgian Act of 21 December 2013 thus repealed the illicit tax provisions[26] and introduced a new Article 205 *quinquies* into the Belgian Income Tax Code ("BITC") applicable as from tax year 2014, pursuant to which it is the notional interest *deduction itself*[27] that must be reduced when the resident company has a PE located in the EEA. The reduction of the NID must either equate to the portion of the NID pertaining to the PE, or to the positive result generated by the PE, whichever is the *smallest*.

The legislature argued during the preparatory works[28] that this solution would mean that companies with an EEA-located[29] PE will undergo a NID reduction equal to the NID determined on the qualifying net assets of their PE, *only if and insofar* as the aforesaid reduction does not exceed the profit generated by those net assets. Henceforth, such a company would therefore no longer forfeit the portion of the NID pertaining to the EEA-located PE, when the latter is *in a loss-making* position.

During financial year 2014 (tax year 2015), Belgian tax resident Argenta Spaarbank NV carried out activities in the Netherlands through a PE. Pursuant to Article 7 *juncto* 23 of the Belgian-Dutch DTC, the PE-generated income is to be exempted from Belgian corporate income tax ("CIT").

By virtue of the then new Article 205 *quinquies* of the BITC, Argenta Spaarbank had to reduce its applicable NID by approx. € 1.9 million, as it was smaller than the profits generated by its PE, i.e. approx. € 149.1 million *and* because the Dutch PE was in a profit-making position which exceeded the NID pertaining to it.

Argenta Spaarbank NV was prepared to litigate again and disputed this provision before the Court of first instance of Antwerp, on the grounds of a violation of both Article 49 of the TFEU and the first *Argenta Spaarbank NV* decision of 2013.

The Court noted among other things that the contentious NID reduction does not apply to PEs located in Belgium, and that there is no other Belgian provision

25 Denying such a benefit would boil down to allowing different treatment on the sole basis that a company which has developed a cross-border economic activity, has no or limited potential to generate taxable profit in its residence State.
26 Article 205*ter*, par. 1 and 2 BITC.
27 As opposed to the calculation method for determining the tax benefit, as was previously the case in the first *Argenta Spaarbank* case.
28 Memorandum of Understanding, *La Chambre,* 53-3236/001, p. 7–8; www.lachambre.be.
29 And where a DTC with Belgium is in place.

providing for a similar NID reduction in the hands of Belgian establishments. Hence, the scope of application of the NID is narrower when a resident company has a PE in the EEA, particularly when the profit of the PE exceeds the NID it could claim, in comparison with a PE located in Belgium.

In such circumstances, the contentious provision could be found to have almost identical consequences as was the case in the first *Argenta Spaarbank* decision,[30] which concluded there had been a violation of Article 49 of the TFEU.

The court therefore decided to stay the proceedings and to lodge a request for a preliminary ruling with the CJEU. In a nutshell, the court asked whether Article 49 of the TFEU must be construed as precluding domestic legislation such as Article 205 *quinquies* BITC, pursuant to which the net assets allocated to a PE – located in an EEA Member State with whom Belgium has concluded a DTC – are first taken into consideration for the calculation of the NID basis of its Belgian resident company, but which is reduced afterwards by the portion of the NID pertaining to the PE, or the positive result generated by said PE, whichever is the *smallest*, whilst such reduction does not apply to PEs located in Belgium.

4.3. Reasoning and decision of the CJEU

After briefly acknowledging its long standing case law on the freedom of establishment enshrined in Article 49 *juncto* Article 54 of the TFEU, both from the viewpoint of the residence State and the other State where activities are conducted through a PE,[31] the CJEU also acknowledges that the new Article 205 *quinquies* BITC entails the inclusion of the net assets allocated to a foreign qualifying PE in the calculation basis of the NID, hence no difference in treatment can be found on this particular point.

However, the second phase of the effective application of the NID does encompass a reduction of the NID pertaining to the EEA-located PE (and DTC jurisdiction), whilst no NID reduction applies to PEs located in Belgium. The CJEU therefore finds that a difference in treatment occurs at this later stage.

The CJEU then analyses whether this difference in treatment constitutes a disadvantage for a Belgian company having a qualifying PE located in the EEA, which could hinder such a company from carrying on activities in the EEA through a PE.

According to the CJEU, the following three hypotheses could occur in practice:

30 Despite Belgium having remediated the issue by providing that the net assets are henceforth taken into account for the calculation of the NID, at least in a first step.

31 CJEU, 12 June 2018, C-650/16, *Bevola and Jens W. Trock*, ECLI:EU:C:2018:424, para. 15–17; CJEU, 4 July 2013, C-350/11, *Argenta Spaarbank NV*, ECLI:EU:C:2013:447, para. 20-21; CJEU, 15 May 2008, C-414/06, *Lidl Belgium*, ECLI:EU:C:2008:278, para. 20.

1) The qualifying PE has not generated any profit hence the NID can be fully claimed for Belgian CIT purposes, thus no reduction thereof needed and no disadvantage can be found;
2) The qualifying PE has generated profits abroad, but below the amount of NID that is calculated on its net assets, hence the NID claimed for Belgian CIT purposes must be reduced by the amount of said profit (but contrary to situation 3 *infra,* a portion of the NID pertaining to the PE can still be claimed by the Belgian company);
3) The qualifying PE has generated profits abroad, which exceed the amount of NID that is calculated on the PE's net assets, hence the NID claimed for Belgian CIT purposes must be reduced by the entire amount of the NID applicable to the PE.

In light of the above, the CJEU concludes that situations 2 and 3 are the only ones where a NID reduction occurs.

The CJEU then moves to the final leg of its analysis by proceeding with a comparison between a resident company with a qualifying foreign PE (facing situation 2 or 3) and one with a PE located in Belgium. To do so, the CJEU refers to the information made available to it and notes that – all other things being equal – the taxable basis of a resident company having Belgian PEs is however *higher* than a company with a foreign PE, whose income is exempted in Belgium. Indeed, the CJEU understands that profits allocated to PEs located in Belgium form a part of the taxable basis of the resident company they belong to, whilst the profit of PEs situated in DTC-jurisdictions is expressly excluded from the taxable basis of the Belgian company they belong to.

Thus, the CJEU concludes that if a Belgian PE belonging to a resident company were facing either situation 2 or 3, its resulting taxable basis would not be lower than a resident company having PEs in qualifying EEA-jurisdictions.

In light of the above, the CJEU concludes that – subject to verification by the referring Court – a Belgian company with a foreign qualifying PE is not subjected to disadvantageous treatment than one in a purely Belgian situation, despite the *prima facie* difference in treatment, hence it can find no prohibited restriction on the freedom of establishment.

4.4. Comments

Contrary to its reasoning in the first *Argenta* case[32] – where it retained the globalized and lump-sum nature of the NID application as a key element – the

32 See E. Traversa, *Tax Incentives and Territoriality within the European Union: Balancing the Internal Market with the Tax Sovereignty of Member States*, Journals IBFD, World Tax Journal, 2014p. 315: "*More surprisingly, in the Argenta case,the Court refused to admit the connection between a tax advantage and a subject-to-tax clause in a cross-border context. The Court held that a Member State could not deny the application of a tax incentive as regards the capital invested in a foreign permanent*

CJEU now rightfully follows a certain logic by factoring in the taxation of the Belgian PE profits, when performing its comparability test.

It is important to stress that the Court does not attribute any relevance to the fact that the foreign PE's profits are also subject to tax, though not in Belgium, but in the other DTC State, *in casu* in the Netherlands. This is in line with its standing case law, based on a single country approach.[33] However, from an economic viewpoint, setting aside a potential tax rate advantage abroad, the fact that the relevant EEA State also grants an advantage like the domestic one, *in casu* the NID, remains an element to be taken into consideration – though not necessarily a key one – for determining whether a disadvantage occurs.

5. J. Huijbrechts (C-679/17)[34]

5.1. Facts and legal background

Mr. Huijbrechts is a Dutch tax resident who inherited a woodland located in the Netherlands that was subject to Dutch legislation regarding the protection of natural sites and to sustainable management requirements defined by the Dutch authorities.

As the *de cujus* was a Belgian tax resident, the applicable law was the Belgian – more specifically Flemish – inheritance tax code ("FITC"). Article 2.7.6.0.3 of the FITC provides for a tax benefit for qualifying woodlands, to be spread over 30 years, if the woodland is subject to a sustainable management plan compliant with Flemish law and approved by the relevant Flemish authorities. Consequently, Mr. Huijbrechts applied for this tax benefit in Belgium, though it was rejected on the grounds that his woodland was located abroad.

Whilst the Court of first instance concurred with Mr. Huijbrechts' position on the basis of the free movement of capital, the Court of appeal decided to first stay the proceedings and to file a question for a preliminary ruling with the CJEU that basically boiled down to whether Article 63 of the TFEU must be interpreted as precluding domestic legislation – which grants a tax benefit for woodland conditional upon it being subjected to sustainable management as defined by

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establishment of a Belgian company on the sole ground that the profits of this foreign permanent establishment are exempted from Belgian corporate income tax under a double taxation convention.".

33 A comparison with the Court's case law in the area of personal income tax does not appear pertinent, since in those cases the Court in order to determine which Member State has to grant the tax advantage, first analyses where the taxpayer earns all or most of its income, a step that it does not make in the area of corporate taxation (arguably because personal tax advantages cannot be compared with corporate tax incentives). See CJEU 12 December 2002, C-385/00, *de Groot*, ECLI:EU:C:2002:750; CJEU, 18 July 2007, C-182/06, *Lakebrink-Peters-Lakebrink*, ECLI:EU:C:2007:452; CJEU, 12 December 2013, C-303/12, *Imfeld-Garcet*, ECLI:EU:C:2013:822; CJEU, 14 March 2019, C-174/18, *Jacob and Lennertz*, ECLI:EU:C:2019:205.

34 CJEU, 22 November 2018, C-679/17, *Huijbrechts*, ECLI:EU:C:2018:940: request for a preliminary ruling from the Court of appeal of Antwerp lodged on 16 July 2018.

Flemish law – to restrict the aforesaid tax benefit solely to woodlands situated in Belgium (or more precisely, the Flemish region).

5.2. CJEU decision

After acknowledging that the case at hand rightfully falls under the scope of the free movement of capital enshrined in Article 63 of the TFEU, pursuant to its long standing case law[35] the CJEU notes that it is equally settled case law[36] that subjecting the grant of an inheritance tax benefit to the condition that the inherited property be located within the territory of the granting State, constitutes a prohibited restriction on aforesaid fundamental freedom.

However, a combined reading of Articles 63 and 65 of the TFEU[37] leads the CJEU to first proceed with a comparability test of the two situations, prior to deciding whether such unequal treatment is prohibited by the TFEU noting that even if it were to find that both situations are indeed comparable, it would also have to assess whether such prohibited treatment can be justified by overriding reasons in the public interest.

In line with the *Q* case,[38] the CJEU analyses the contentious Flemish exemption provision and notes that it serves an environmental purpose, i.e. the sustainable management of Flemish forests and woodlands.

The CJEU however remarks that such an objective cannot be confined to its domestic territory, as woodlands can extend to the territories of several Member States – as seems to be the case in the situation at hand – and typically show cross-border features within the EU territory, entailing common responsibilities.[39]

The CJEU therefore finds that the distinction made between adjoining parts of a single woodland according to whether they are located in the Flemish Region or in the Netherlands is artificial and does not correspond to any objective difference. Consequently, the CJEU finds that the inheritance of woodland in the

35 CJEU, 17 January 2008, C-256/06, *Jäger*, ECLI :EU:C:2008:20, para. 25; CJEU, 27 January 2009, C-318/07, *Persche*, ECLI :EU:C:2009:33, para. 27.

36 CJEU, 17 January 2008, C-256/06, *Jäger*, ECLI EU:C:2008:20, para. 35; CJEU, 18 December 2014, C-133/13, *Q*, ECLI :EU:C:2014:2460, para. 20.

37 "*The provisions of Article 63 shall be without prejudice to the right of Member States … to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation* […] *with regard to the place where their capital is invested*". However, Article 65(3) TFEU provides that the national provisions referred to in Article 65(1) are not to constitute *"a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63* [TFEU]*"*.

38 CJEU, 18 December 2014, C-133/13, *Q*, ECLI:EU:C:2014:2460, para. 22: To assess whether the different treatment concerns situations which are not objectively comparable, account must be taken of the object and content of the national provisions at issue in the main proceedings.

39 The CJEU refers by analogy to CJEU, 12 July 2007, C-507/04, *Commission v Austria*, ECLI:EU:C:2007:427, para. 87, and CJEU, 26 January 2012, C-192/11, *Commission v Poland*, not published, ECLI:EU:C:2012:44, para. 23.

territory of a Member State bordering on the Flemish Region, and where it can be shown that it is subjected to sustainable management as required by Article 2.7.6.0.3 FITC, constitutes a comparable situation to that of a taxpayer who inherits woodland which is situated in the territory of that region.[40]

The CJEU ultimately rejects all the justifications invoked by the Belgian government on the grounds that the protection of the environment cannot be confined to its own domestic territory, especially in a cross-border situation within an EU context, as it is already an essential EU objective. As regards the allegation that supervision of compliance with its legislation would be hindered or more difficult in a cross-border context, the CJEU refers to its settled case law pursuant to which practical difficulties in determining whether the conditions for obtaining a tax advantage are continuously satisfied over the years cannot justify the categorical refusal to grant them.[41] Indeed, exchange of information and mutual mechanisms should provide for an adequate solution, even in the long run, and all the more if the neighbouring Member State in which the woodland is located grants a similar tax advantage.

The question may arise whether this CJEU ruling condemning the contentious territoriality requirement might not be deemed in contradiction with other and prior CJEU rulings, such as the *Laboratoires Fournier* case[42] and the Dutch case *X* on the protection of cultural heritage,[43] where the CJEU admitted that in the case of respectively[?] research and development incentives, or the tax deductibility of gifts sustaining cultural heritage, a territoriality requirement could be justified.

6. BU v Belgium (C-35/19)[44]

6.1. Facts and legal background

The applicant was born in the United States but has lived in Belgium since 1973 and even acquired Belgian nationality in 2009. She suffered an accident in Belgium

40 The CJEU refers by analogy to CJEU, 14 September 2006, C-386/04, *Centro di Musicologia Walter Stauffer*, ECLI:EU:C:2006:568, para. 40, and CJEU, 27 January 2009, C-318/07, *Persche*, ECLI:EU:C:2009:33, para. 48–50.

41 See inter alia, by analogy, CJEU, 14 September 2006, C-386/04, *Centro di Musicologia Walter Stauffer*, ECLI:EU:C:2006:568, para. 48; CJEU, 25 October 2007, C-464/05, *Geurts and Vogten*, ECLI:EU:C:2007:631, para. 28; CJEU, 17 January 2008, C-256/06, *Jäger*, ECLI :EU:C:2008:20, para. 54–55; and CJEU, 27 January 2009, C-318/07, *Persche*, ECLI :EU:C:2009:33, para. 53–55.

42 CJEU, 10 March 2005, C-39/04, *Laboratoires Fournier*, ECLI:EU:C:2005:161, cited in E. Traversa, *Tax Incentives and Territoriality within the European Union: Balancing the Internal Market with the Tax Sovereignty of Member States*, Journals IBFD, World Tax Journal, 2014, p. 315: "*Among business-related incentives, several cases concerned incentives for research and development. Member States legislations allowed the deduction (Baxter) or Laboratoires Fournier, or a tax credit (Commission v. Spain) for research expenditures for scientific and technical research carried out exclusively in their territory*".

43 CJEU, 18 December 2014, C-87/13, *Staatssecretaris van Financiën v. X*, ECLI:EU:C:2014:2459.

44 CJEU, 24 October 2019, C-35/19, *BU,* ECLI:EU:C :2019 :894.

in 1996, while on her way to work in the neighbouring Netherlands. Ultimately the injuries she sustained and incapacity for work led to her dismissal in 2000.

Because she was working in the Netherlands at the time of the accident, the applicant fell under the scope of Dutch social security law and she therefore received a social security allowance by virtue of the Dutch *Wet arbeidsongeschiktheid* ("WAO"), in other words the Act on insurance against incapacity for work (the WAO allowance), as well as an allowance pursuant to the *Algemeen Burgerlijk Pensioenfond* ("ABP"), i.e. a pension fund for civil servants including old-age, survivors and invalidity pensions (the ABP allowance).

In principle, a domestic exemption can be claimed when allowances are paid to disabled persons by the Belgian Treasury. However, the nature of the income under Belgian Tax law was debatable: should it be treated as a invalidity allowance or also as replacement income?

The BTA contended that the allowances qualified as pension income and should therefore be subjected to tax in Belgium. The Applicant disputed this characterization of the WAO allowance, by arguing that such an allowance qualified as damages for a sustained disability, though she did acknowledge that the ABP allowance qualified as pension income.

The Court of first instance of Liège concurred with the applicant on the characterization of the allowance as a disability allowance. Furthermore, it considered that Belgian legislation which solely exempts disability allowances paid by the Belgian Treasury could be deemed contrary to the free movement of workers enshrined in Article 45 of the TFEU, hence the referral to the CJEU.

6.2. CJEU decision

The CJEU, in line with its reasoning in the *Jacob and Lennertz* case,[45] ruled that a difference in treatment between (Belgian) residents, on the basis of the origin of the received income, could infringe the free movement of workers. *In casu* the CJEU ruled that:

> "Article 45 TFEU must be interpreted as precluding [domestic] legislation[…], which, without providing justification in that regard, a matter which is however for the referring court to verify, provides that the tax exemption applicable to disability allowances is subject to the condition that those allowances are paid by a [Belgian] body […], therefore, excludes from that exemption allowances of the same nature paid by another Member State, even where the recipient of those allowances is a resident of [Belgium]."

This case is interesting when compared to the *Gottwald* case[46] where the CJEU ruled that an annual toll discount for a motor vehicle to disabled persons could

45 Discussed *supra* as well as the *Imfeld-Garcet* case also referred to *supra*.

rightfully be restricted to disabled persons resident or ordinarily resident in the national territory of a State (Austria in that case).

7. Joined cases IN (C-469/18) and JM (C-470/18) v Belgium[47]

7.1. Facts and legal background

The following account is based on a provisional version of the CJEU decision issued on 24 October 2019 after the Belgian Supreme Court stayed its judicial review process and filed two requests for a preliminary ruling in a direct taxation matter pertaining this time to the interpretation of Article 47 of the Charter of Fundamental Rights of the European Union (the "Charter").

The facts in both cases are similar and started with the Belgian tax authorities adjusting the personal income tax returns of the appellants in the main proceedings for tax years 1997 and 1998. Both are Belgian tax residents managing Belgian businesses subjected to a criminal investigation in Luxembourg, initiated after suspicions of value added tax ("VAT") carousel fraud emanated from the Belgian VAT authorities.

Due to the cross-border factual setting, the criminal investigation had to be conducted in Luxembourg as well. The evidence gathered abroad was however transferred to the Belgian tax authorities in breach of Article 20 of the Treaty on Extradition and Mutual Assistance in Criminal Matters between Belgium, Luxembourg and the Netherlands, absent the mandatory prior approval of a judicial body.

The contentious evidence (payments to Luxembourg accounts) enabled the Belgian tax authorities to adjust the personal income tax returns of both taxpayers and order the payment of income tax ad. € 536,738.94 for tax year 1997 and ad. € 576,717.62 for tax year 1998.

IM and JM disputed these additional income taxes arguing that the evidence had been illegally obtained and was therefore inadmissible. While the court of first instance initially ruled in their favour, the ruling was overturned on appeal and the taxpayers subsequently filed a motion for judicial review with the Belgian Supreme Court.

IM and JM argued that pursuant to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), and Article 7 of the EU Charter, individuals' banking data can only be transferred provided the applicable procedures are complied with. In the absence of the mandatory judicial

46 Comp. CJEU, 1 October 2009, C-103/08, *Gottwald*, ECLI:EU:C:2009:597.

47 CJEU, 24 October 2019, C-469/18 and C-470/18, *IN & JM,* ECLI:EU:C:2019:895,request for a preliminary ruling from the Belgian Supreme Court, lodged on 19 July 2018.

approval, their fundamental right to a private life has been infringed. Hence, the use of evidence obtained in such circumstances should be considered as inadmissible.

The Supreme Court decided to stay the proceedings and to request a preliminary ruling on whether Article 47 of the EU Charter – as applicable to VAT matters – *in any circumstances* precludes the use of evidence obtained in violation of the right to privacy enshrined in Article 7 of the EU Charter; or, whether under said Article 47 a domestic judge is not precluded from assessing the admissibility of such evidence for the levying of VAT, in light of its own case law that does not provide for an absolute ban on the use of such evidence.[48]

7.2. Conclusions of Advocate General Kokott and the CJEU decision

The key issue for both the Advocate General and the CJEU concerned the admissibility of the request for a preliminary ruling as the specific facts in the case at hand did not relate to the levying of VAT, but to the levying of personal income taxes.

In principle and pursuant to Article 51, paragraph 1 of the EU Charter,[49] an issue concerning an adjustment of personal income tax returns does not fall within the scope of EU law. Moreover, the fact that the contentious evidence was obtained in criminal proceedings triggered by a VAT fraud investigation does not *necessarily* mean that the use thereof in a direct tax context will also fall under the scope of Article 51(1) of the Charter,[50] despite any close interaction that may exist domestically between the VAT and the income tax levying rules.

The CJEU therefore *prima facie* concludes in line with its Advocate General, that it has no jurisdiction to assess whether the national legislation or case law applicable to the use of illegally obtained evidence in a personal income tax context, violates the Charter or not.

However, the CJEU does take the time to further assess the admissibility of the question raised by the Supreme Court, as it specifically concerns the interpretati-

48 According to what is known as the *Antigone* theory, as applied to tax cases, the use of illegally acquired evidence should only be deemed inadmissible when it has been acquired in a manner that should be deemed inadmissible in all circumstances or, when its use would violate the right of the taxpayer to due process. This assessment is to be performed by the judge, within the whole context of the case and facts.

49 "*The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*"

50 CJEU, C-389/18, *IM & JM*, opinion of the Advocate General KoKott issued on 11 July 2019, ECLI:EU:C:2019:597, point 66. The CJEU also refers to that effect, to CJEU, 10 July 2014, C-198/13, *Julián Hernández and Others*, ECLI:EU:C:2014:2055, para. 34 and the case-law cited.

on of Article 47 of the Charter, and seeks to determine to what extent EU law permits or does not permit the use of improperly obtained evidence for the purposes of the levying of VAT. The Supreme Court further elaborated in its request, that there could potentially be a discrepancy between the *WebMindLicenses* case[51] and the case law of the European Court of Human Rights. The Supreme Court therefore chose to stay the proceedings because the CJEU's ruling would enable it to assess the alleged unequal treatment between a case of a personal income tax levy, versus a VAT levy.

Further assessment of the admissibility is in order, given the fact that the CJEU has already ruled in favour of the admissibility of certain preliminary ruling requests when the facts of the cases have fallen outside the scope of EU law but where those provisions of EU law have been rendered applicable by national law due to a domestic statutory reference made to the content of those EU provisions.[52]

Moreover, when in purely internal situations domestic law applies identical provisions to those under EU law, the jurisdiction of the CJEU can indeed be justified on the grounds of uniformity and coherence, irrespective of the circumstances in which they are to be applied.[53]

However the CJEU takes the view that in this case, which does not fall within the scope of EU law, the Supreme Court must demonstrate in what way the pending dispute has a connecting factor with the provisions of EU law that makes the preliminary ruling on interpretation necessary for it to give judgment in that dispute (in accordance with the requirements of Article 94 of the Rules of Procedure of the CJEU).[54]

Finally, as EU law does not provide for VAT fraud procedural rules relating to evidence collection and because it is for the Member States to establish such rules in accordance with the principle of the effectiveness of EU law and the rights guaranteed by that law,[55] the CJEU concludes that no direct reference or connection in Belgian law could thus have been made to or with provisions of EU law in this area, which is required for the preliminary ruling requests to be admissible.

51 CJEU, 17 December 2015, C-419/14, *WebMindLicenses*, ECLI:EU:C:2015:832.

52 CJEU, 18 October 2012, C-583/10, *Nolan*, ECLI :EU:C:2012:638, para. 45; CJEU, 15 November 2016, C-268/15, *Ullens de Schooten*, ECLI:EU:C:2016:874, para. 53 and the case law cited therein.

53 CJEU, 18 October 1990, C-297/88 and C-197/89, *Dzodzi*, ECLI :EU:C:1990:360, para. 37; CJEU, 17 July 1997, C-28/95, *Leur-Bloem*, ECLI :EU:C:1997:369, para. 32; CJEU, 18 October 2012, C-583/10, *Nolan*, ECLI :EU:C:2012:638, para. 46–47.

54 CJEU, 15 November 2016, C-268/15, *Ullens de Schooten*, ECLI :EU:C:2016:874, para. 55; and CJEU 20 September 2018, C-343/17, *Fremoluc*, ECLI :EU:C:2018:754, para. 22.

55 see, to that effect, judgments of CJEU, 17 December 2015, C-419/14, *WebMindLicenses*, ECLI:EU:C:2015:832, para 65–68, and of CJEU, 17 January 2019, C-310/16, *Dzivev and Others*, ECLI:EU:C:2019:30, para 24.

7.3. Comments

This case raised interesting procedural issues on the use of evidence obtained in breach of fundamental rights which, due to the lack of admissibility, remain unresolved. In particular the referring court points out an apparent contradiction between the CJEU and the ECHR, which should be clarified.

Moreover, the decision of the Court as regards the admissibility could appear rather severe in the light of previous case law, such as the *3M* case where it accepted the request to answer several questions related to a purely direct tax case, despite both parties before the referring judge arguing in favour of their inadmissibility,[56] In contrast, in the case at stake the relationship with harmonized areas of domestic tax law was more clear.

56 CJEU, 29 March 2012, C-417/10, *3M Italia*, ECLI:EU:C:2012:184.