Chapter 5

Double Tax Agreements: Between EU Law and Public International Law

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5.1 INTRODUCTION

After the first drafts of the Treaty of Lisbon were available outside of the small circle of *cogniscenti,* specialists of the various policies tried to establish whether the new Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) contained anything relevant for their specific areas of law. People interested in tax law and those interested in the relation between EU law and public international law quickly established that one familiar yet not always well understood part of the old EC Treaty was missing: The TFEU like the earlier draft Treaty Establishing a Constitution for Europe, did not contain an equivalent to Article 293 EC—an Article regulating agreements between EU Member States on matters such as *inter alia* double taxation. Very little is known about the background discussions which led to the decision to abolish the old Article 293 EC, other than that it was regarded as one of the parts of the EC Treaty which had lost, over time, their practical relevance and thus could be discharged.

In this chapter, I will embark on looking at the reasons and, more importantly, the effects of abolishing Article 293 EC in the current legal system. Several questions

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Alexander Rust (ed.), *Double Taxation within the European Union*, pp. 75–86.

need to be addressed: Is there now a legal void? If not, was the initial article superfluous? What does its disappearance say about the future relation between double tax agreements concluded under public international law and EU law? That latter question requires pondering over the relation between tax law and EU law, the relation between taxation provisions and fundamental freedoms under EU law, the distribution of competencies in the EU and the relation between agreements under public international law and EU law generally. The issue of double tax agreements in the context of the EU thereby raises some fundamental questions about the complex multi-level legal world we are living in.

5.2 THE FORMER ARTICLE 293 EC IN CONTEXT

Generally speaking, in absence of a genuine EC competence on direct taxation, the old Article 293 EC was designed as a rule to regulate the co-existence of various levels of law—national, European and international. Article 293 EC, which had already existed in the original Treaty of Rome as former Article 220 EEC, read: "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:" *inter alia* for "the abolition of double taxation within the Community."[1]

The provision contained a list of matters which despite being of great relevance to the single market and EU law in general, were within the competence of the Member States. The matters listed in the article generally related to politically sensitive issues such as taxation; the treatment of foreign nationals ; the mutual recognition of companies and firms; the reciprocal enforcement and recognition of judgments and arbitration awards. Many of these issues had been addressed over time by Treaty amendments, secondary legislation and case law of the European Court of Justice (ECJ).

One of the main problems with Article 293 EC for individual tax payers was that the ECJ had repeatedly denied this chapter direct effect.[2] For good reasons: explicitly, Article 293 EC was addressed at Member States to enter into negotiations with the goal of reaching vaguely defined targets. This was neither the material of sufficiently precise nor of unconditional formulation of rights—the hallmarks of those Articles successfully qualifying for direct effect since the early days of ECJ case law on the Treaty of Rome. Article 293 EC therefore was a hybrid instrument in the tool-box of the EU. It provided for a way of concealing the paradox that although direct relief of double taxation is of central interest in assessing the relation between a national competence within the scope of the exercise or limitation of an EU

1. Conventions and agreements concluded under Art. 293 EC or Art. 34(2) EU were published in the Official Journal of the European Union pursuant to Art. 17(1)(e) to (g) of the Council Rules of Procedure; others may be published therein (Council Decision 2004/338/EC, Euratom of Mar. 22, 2004 adopting the Council's Rules of Procedure, OJ L 106/22-45, 2004).
2. See, e.g., Case 137/84 *Mutsch* [1985] ECR 2681 para. 11 and Case C-398/92 *Mund & Fester* [1994] ECR I-467 para. 22, both concerning another indent of Art. 293; Case C-336/96 *Gilly* [1998] ECR I-2793 para. 15.

fundamental freedom, taxation remained—and to date largely remains—a well defended national competence.

The only relevant convention concluded in the context of double taxation under Article 293 EC, was the Convention of July 23, 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises—more generally known as the "Arbitration Convention."[3] The ratification of the convention took time. It entered into force only on January 1, 1995 but with a life-span of only five years. The convention's objective was to create a procedure to resolve disputes in cases of double taxation of enterprises by establishing so called advisory commissions, inspired by the model of commercial arbitration. The purpose of the advisory commissions was to make proposals for the settlement of double taxation conflicts. The charm of such solution—in the eyes of some Member States—might have been that by choosing a convention over a traditional EC directive, the ECJ was not granted any interpretative power over the matter of double taxation agreements. The exact extent of the use of the convention's arbitration facility is, however, not known to the public. One might speculate that the mere existence of such a procedure might have motivated governments to find negotiated solutions to conflicts of interpretation and application of the convention.

The convention also established a so called "Joint Transfer Pricing Forum" which *inter alia* resulted in a code of good conduct for the Member States regarding the calculation of transfer pricing.[4]

Article 293 EC was, we should note at this stage, only one of several links between EC and EU law as such, and international conventions entered into by Member States *inter se*. Most have been repealed under the Treaty of Lisbon. Next to conventions which were "linked to" the former EC Treaty by being established within the framework of the former Article 293 EC,[5] conventions between Member States also were possible in the context of Article 20 EC for the conclusion of international agreements between Member States on the consular protection of citizens.[6] Other similar instruments, for example those established in the context

3. OJ L 225/10, 1990.
4. See: Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Pricing Agreements within the EU [COM(2007) 71 final].
5. See Case C-398/92 *Mund & Fester* [1994] ECR I-467 para. 12 referring to the Brussels Convention. Generally, the ECJ will decline its jurisdiction by means of an order of the president of the Court, see e.g., Case C-162/98 *Hartmann* [1998] ECR I-7083 on an agreement concluded between certain Member States on charges for the use of roads in the framework of Art. 293 EC. For more information and references see K. Lenaerts, P. van Nuffel and R. Bray (eds), *Constitutional Law of the European Union* (2nd edn, London, Sweet & Maxwell, 2005) paras. 18-007, 18-008.
6. This option still exists in Art. 23 TFEU and is a rare example for an officially acknowledged parallel of EU law and public international law of its Member States. The second sentence of Art. 23 TFEU reads: Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection.

of the former EU treaty under ex. Article 34(2)(d) EU, have not survived. Under the original EU Treaty, as established by the Treaty of Maastricht, conventions could be concluded in order to deal with matters of immigration, asylum and more generally in relation to cooperation in the field of justice and home affairs.[7] Within the field of Police and Justice Cooperation in Criminal matters, under the former Article34(2)(d) EU the Council was authorized to "establish conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements."[8]

Irrespective of these Treaty provisions, conventions between the Member States had been all along concluded outside of the framework of the EU and EC Treaties despite them having direct relevance to the exercise of fundamental freedoms such as the free movement of persons. Such "conventions" under public international law concluded by the Member States in the context of EU and EC policies, were generally rather complete, establishing *inter alia* common administrative procedures and administrative structures. Agreements adopted between the EU Member States, outside of the scope of the EU treaties, are agreements under public international law.[9] Generally, such "conventions" between Member States do not form part of EU law and thus are not within the jurisdictional reach of the ECJ,[10] but nevertheless may due to their links to EU competencies be part of the *aquis communautaire*.[11]

Amongst the most prominent examples for such multilateral agreements between several EU Member States is the convention of June 19, 1990 on the application of the Schengen Agreement of June 14, 1985.[12] The Treaty of

6. See for example the Convention drawn up on the basis of Art. (ex) K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations of Dec. 18, 1997, OJ C 24/1, 1998.
7. Over conventions so established, the ECJ has limited jurisdiction under Art. 35(7) EU, despite them being governed by public international law, "whenever such dispute cannot be settled within six months of its being referred to the Council by one of its members" and in case of disputes between the MS and the Commission regarding the conventions.
8. This holds true even when concluded in the framework of Council meetings, then generally presented as "decision of the Member States meeting in Council" instead of "Council decision." See: K. Lenaerts, P. van Nuffel and R. Bray (eds), *Constitutional Law of the European Union* (2nd edn, London, Sweet & Maxwell, 2005), para. 18-006.
9. See Joined Cases C-181/91 and C-248/91 *EP v. Council and Commission (Bangladesh aid)* [1993] ECR I-3685 paras. 11–15.
11. AG Jacobs in Joined Cases C-181/91 and C-248/91 *EP v. Council and Commission (Bangladesh aid)* [1993] ECR I-3685 para. 18.
12. Schengen Convention implementing the Schengen Agreement of Jun. 14, 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the abolition of border controls, Jun. 19, 1990, OJ L 239/1, 2000. The Convention was later signed by Italy, Portugal, Spain, Greece, Austria, Denmark, Finland and Sweden. The latter had introduced common rules on entry visas for nationals of non-EU Member States, had provided for the gradual abolition of border controls amongst the signatory states, and introduced a system for the exchange of information and cooperation between police forces and the judicial authorities. It set up its own administrative structure, the Schengen Information System (SIS), enabling authorities to access data held by other administrations.

Amsterdam then incorporated the so called "Schengen *aquis*" (the entirety of the rules on the application of the Schengen agreements and conventions) into EU law.[13] With this incorporation the status of the Schengen *aquis* changed from one derived from agreements under public international law between the individual Member States to one anchored within EU law.[14] A further important example of multilateral conventions between Member States under public international law is the Dublin Convention of June 15, 1990 which determines the Member State in which any given application for asylum is to be examined.[15] Implementing provisions for the Dublin system were adopted by the Committee established under Article 18 of the Convention.[16]

Nonetheless, EU law still provides for possibilities to link conventions under public international law to EU law. One example which I already mentioned is Article 23 TFEU on agreements between EU Member States to ensure consular protection of EU citizens abroad. More generally, and probably practically more importantly, it is possible to authorize EU institutions to act as implementing bodies or arbitrators for disputes under conventions. Article 273 TFEU (former Article 239 EC), for example, explicitly states that the Court of Justice (CJ) "shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties." This option has been chosen in the context of double-taxation agreements, for example, in Article 25(5) of the German/Austrian double taxation agreement.[17]

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13. Subject to two full opt-outs (Ireland, United Kingdom) and one partial opt-out (Denmark). A full summary of the Schengen *aquis* has been published by the Council in OJ L 239/1, 2000.
14. Therefore, the new Member States which joined the EU in 2004 and those set to join in the future accept the full Schengen *aquis* as part of the *aquis communautaire*.
15. Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities—Dublin Convention, OJ C 254/1, 1997, which entered into force on Sep. 1, 1997 (OJ L 242/63, 1997) to be read in connection with provisions of accession of further EU Member States (OJ L 176/39, 1998) and non-EU Member States such as Iceland and Norway, approved by Council decision of Mar. 15, 2001 (OJ L 93/38, 2001).
16. For details see the contributions to E.R. Thieleman (ed.), "Special Issue European Burden-Sharing and Forced Migration" [2003] 16 *J Refugee Stud*; therein: R. Byrne, "Harmonization and Burden Redistribution in the Two Europes" [2003] 16 *J Refugee Stud*,336–358; K. Hailbronner, C. Thiery, "Schengen II and Dublin: Responsibility for Asylum Applications in Europe" [1997] 34 *CML Rev,* 957–989. The Dublin Convention has for most purposes been replaced by a Council Regulation based on Art. 63(1)(a) EC (now Art. 78(2)(e) TFEU) (Dublin II)—Council Regulation 343/2003 establishing the criteria and mechanisms for determining the MS responsible for examining an asylum application lodged in one of the MS by a third-country national, OJ L 50/1, 2003.
17. It reads: "Artikel 25 Verständigungsverfahren (5) Können Schwierigkeiten oder Zweifel, die bei der Auslegung oder Anwendung dieses Abkommens entstehen, von den zuständigen Behörden nicht im Verständigungsverfahren nach den vorstehenden Absätzen dieses Artikels innerhalb einer Frist von 3 Jahren ab der Verfahrenseinleitung beseitigt werden, sind auf Antrag der Person im Sinne des Absatzes 1 die Staaten verpflichtet, den Fall im Rahmen eines Schiedsverfahrens entsprechend Artikel 239 EG-Vertrag vor dem Gerichtshof der Europäischen Gemeinschaften anhängig zu machen."

Further, under some EU legislative acts for example in the areas of value added tax as well as for customs matters, Member States are explicitly encouraged to enter into agreements or "common accords" under public international law in order to facilitate mutual assistance of the enforcing authorities.[18]

5.3 WHY ABOLISH THE OLD ARTICLE 293 EC?

One might argue that the abolition of Article 293 EC was an expression of the general rule that EU law should not be seen to encourage public international law regulation between Member States. In the words of *Bruno de Witte*, such international law conventions are, from the point of view of EU law, a "curious legal phenomenon" fitting "oddly with the vision of the EU as an autonomous legal order with its own legal instruments, its own system of decision-making, enforcement and judicial control."[19]

The elimination of double taxation within the single market is a goal of the EU as such, and should also be addressed by EU institutions with the appropriate means.[20] As the late Advocate General Ruiz-Jarabo Colomer had found in a much cited opinion of 2004, "the fact that a taxable event might be taxed twice is the most serious obstacle there can be to people and their capital crossing internal borders."[21] In any case, it hardly needs to be repeated that Member States are obliged to exercise the competencies which remain national—including in tax matters—within the framework of their obligations under EU law. The ECJ refers to such activity as action within the scope or sphere of EU laws, a concept which is widely defined in the *ERT* case law.[22]

18. This is for example explicitly established in Art. 38 of Council Regulation (EC) 1798/2003 of Oct. 7, 2003 on administrative cooperation in the field of value added tax (OJ 2003 L 264/1) according to which the competent authorities can agree on the language to be used for requests and acts mutual assistance. In the area of social policy a similar provision exists in Art 92 of Regulation (EEC) 1408/71 of the Council of Jun. 14, 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ 197 L 149/2) which provides that the mutual assistance "shall be governed, in so far as is necessary . . . by means of agreements between Member States." Further, the rules on customs law in Art. 47 of Council Regulation (EC) 515/97 of Mar. 13, 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (OJ 1997 L 82/1), state that "Member States may decide by common accord whether procedures are needed to ensure the smooth operation of the mutual-assistance arrangements provided for in this Regulation."
19. B. de Witte, "International Law as a Tool for the European Union" [2009] 5 *European Constitutional Law Review*, 265–283.
20. E.C.C.M. Kemmeren, "Editorial: After Repeal of Art. 293 EC Treaty under the Lisbon Treaty: The EU Objective of Eliminating Double Taxation can be Applied More Widely" [2008] *EC Tax Rev*,156–158.
21. Opinion of AG Colomer in Case 376/03 *D v. Inspecteur van de Belastingsdienst* [2005] ECR I-5821 para. 85.
22. Case C-260/89 *ERT-AE v. DEP* [1991] ECR I-2925 paras. 42–43.

Also, the disruptive use of double taxation agreements can be analyzed from a different angle. Links between the issues of double taxation also exist with other EU policies such as the control of state aid. Double taxation agreements can also be used to grant a hidden state aid to an exporter. This is explicitly recognized in the context of World Trade Organization's (WTO) subsidy agreement SCM. Footnote 59 of the WTO's SCM agreement did not intend "to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member."[23] Equally, in the EU context, the past 15 years have seen an increase in application of EU State aid rules to issues of taxation, thus also addressing this potential angle of double-taxation related regulatory activity by means of EU law.[24]

Overall, Article 293 EC was based on the rather obvious notion that the Member States had maintained their powers to conclude agreements under public international law in the context of their remaining competences (i.e., those not delegated to the EU). Article 293 EC had however also explained that the Member States had an obligation "in so far as necessary" for achieving the goals of establishing the single market under ex Article 14 EC, to enter into negotiations for concluding agreements. The formulation "in so far as necessary" indicated that the inter-governmental agreements under Article 293 EC were subsidiary to general EU (and former EC) legal acts in the area.[25] Some authors however at the time argued, that "in so far as necessary" when read in the context of the general principle of subsidiarity in Article 5 TEU (ex Article 5 EC), instead implied that primarily the Member States were, in the exercise of their competence, called upon to eliminate double taxation by means of bilateral agreements.[26] Only where that was not successful, so the argument went, would the EU have a competence to act. This interpretation, in my view, seemed problematic. First, that would have led to an atomization of the legal regimes applicable in the context of the single market. That is neither an efficient nor a "better" way of regulating in the context of the subsidiarity principle. The argument also disregarded the principle that a public international law instrument is an instrument of last resort in EU matters. Many examples show that public international law is generally only

23. Fifth sentence of Footnote 59 to item (e) of the Illustrative list of Export Subsidies in Annex I of the SCM Agreement.
24. See, for instance, the 2003 Commission decision on the Irish Foreign Income Scheme (Commission Decision of Feb. 17, OJ 2003 L 204/46). At issue was an Irish tax regime which consisted of two measures. The first measure exempted from tax liability foreign dividends which were used for investments supporting employment in Ireland in Ireland. The second measure allowed tax emption for profits of foreign branches which were used for investments supporting employment. This tax system derogated from the general rules applied to avoid double taxation and based on a system of tax credits. Under the Foreign Income Scheme, the method applied allowed for a full exemption of the tax normally due, regardless of the amount of tax due abroad.
25. See, e.g., Case C-208/00 *Überseering* [2002] ECR I-9919 on the aspect of company law also mentioned in a different indent to Art. 293 EC and much of the commenting literature.
26. See e.g., M. Lehner, "Der Einfluss des Europarechts auf die Doppelbesteuerungsabkommen" [2001] *Internationales Steuerrecht*, 329–341.

the second-best solution for establishing flexible integration. From the point of view of subsidiarity, addressing a goal as central to the single market as the abolition of double taxation, might thus have been better addressed in a uniform manner through EU law than through competing and often contradictory measures on the national levels.

Article 293 EC was thus in my view not *lex specialis* but subsidiary to general EU law. Be it as it may, the extensive interpretation of fundamental freedoms and their possibility of having direct effect, had, in reality, long eroded the usefulness of Article 293 EC in most of its areas of application. However, unlike in the areas of private international law, where increasing Community legislation had made the subsidiary clauses of Article 293 EC largely abundant, the area of double-taxation had remained largely covered by bilateral double taxation agreements under public international law. But by establishing these conventions, Member States did not have the power to limit or give exception to the exercise of fundamental freedoms with the help of agreements in the context of Article 293 EC.[27] Neither were they authorized to flout the EC rules on State Aids (ex Articles 87–89 EC, now Articles 107–108 TFEU).

The final death nail might have been that as tool of EU integration, Article 293 EC also had some specific problems. It requested that "Member States shall, so far as is necessary, enter into negotiations with each other" in order to achieve its goals. Problems arose as to whether this required all Member States to do so or whether a select group or even only two were sufficient. Equally problematic remained the inclusion of non-EU Member States in double tax agreements—especially from the point of view of how to solve potential conflicts between the rules of these agreements and EU law. The objective of achieving a common level or protection in a Union of 27 Member States using bilateral conventions under public international law was thus becoming increasingly un-realistic.

More generally stated, tax law integration through public international law highlights the very disadvantages of using the instrument of public international law—or with other words, the reasons why the supranational method of integration has proven rather successful in comparison with traditional public international law tools for legal integration. Integrating a policy by public international law is a cumbersome procedure. It requires ratification of an agreement by all parties. Amendment procedures are equally difficult. That makes the act adaptable to necessary changes only with great pain and effort—nothing a modern legal system would want to wish to use for some essential, yet sometimes quite technically complex sets of rules. Also, the more Member States the EU has, the more the use of tools under public international law becomes complex. Therefore, the more successful uses of public international law conventions between Member States have been the real cases of flexible integration in the EU. The Schengen, Dublin, Prüm agreements all started as agreements between a small avant-garde group of Member States who used an agreement under public international law to advance in a policy area which was later to be opened to all Member States by

27. Case C-398/92 *Mund & Fester* [1994] ECR I-467 para. 22.

"communitarising" the policy. In that sense, public international law had not the feared corrosive effect to the uniform application of EU law but allowed for an advancement of cooperation in certain policy areas. AQ1

In summary, two reasons might have contributed to the decision to quietly let Article 293 EC die: First, it had, due to case law of the ECJ and due to legislation in all areas but for double-taxation decreased in relevance. Second, agreements under public international law are often ill-suited to address the complexities of the single market.

5.4 DOUBLE TAX AGREEMENTS UNDER LISBON

The fact that Article 293 EC has been repealed (together with its cousin in the old EU Treaty, the ex. Article 34(2)(d) EU) does however not mean that Member States would no longer be allowed to conclude international agreements between themselves in connection with the operation of the EU. It only means that these agreements, besides of Article 23 TFEU which is the proverbial exception that proves the rule, will no longer be mentioned as a "normal category of instruments of EU law."[28] The use of bilateral and pluri-lateral tax agreements is thereby not per se ruled out if they are established and implemented in compliance with the specific legal requirements arising from EU law.

So is the future just another version of the past? The answer depends largely on the starting point of the very diverse interpretations which had over the years been offered on Article 293 EC. First of all, no changes have been introduced in the Treaty of Lisbon with respect to the Member States power to conclude agreements under public international law to further the goals of the EU. Indeed, even without a reference in a specific provision of the TFEU, the Member States are free in principle to address certain matters, which are connected to the substance of the Treaties and which are important for the achievement of their objectives, in the form of an international agreement concluded between them. In reality, these agreements are often referred to as agreements of "Member States in Council" or as concluded by "the Representatives of the Member States in Council." The legality of such activity was confirmed by the ECJ in the pre-Lisbon *Bangladesh* case.[29] I see no reason why this would change after the Lisbon Treaty has eliminated the express references to the adoption of subsidiary conventions in certain cases.

Limits to the Member States freedom to enter into agreements under public international law arise from their obligations arising from Treaty provisions, secondary law and general principles of EU law such as the principle of sincere

28. B. de Witte, "International Law as a Tool for the European Union" [2009] 5 *European Constitutional Law Review*, 274.
29. See Joined cases C-181/91 and C-248/91 *EP v. Council (Bangladesh aid)* [1993] ECR I-3685. Further: B. de Witte, "International Law as a Tool for the European Union" [2009] 5 *European Constitutional Law Review*, 274.

cooperation (Article 4(3) TEU). Due to the principles of supremacy and direct effect, EU law overrides incompatible national law and international agreements entered into by the Member States—even if such agreements have been entered into after the accession to the EU.

Further, it follows from Article 344 TFEU that when using the instrument of public international law, Member States may not ‘‘submit a dispute concerning the interpretation or application of the Treaties to any other method of settlement other than those provided for’’ in the Treaties. This provision has been interpreted by the ECJ in the *Sellafield* case to mean that it is firstly the ECJ which defines the distinction between areas falling within the scope of EU law, and thus are subject to its jurisdiction, and secondly, disputes between Member States in the context of international agreements interpreting EU law, are within the ECJ's powers to address.[30] Member States concluding double taxation agreements need to remain aware of this exclusive competence for conflict resolution. Seen from this angle, the 1990 Arbitration Convention might not appear entirely unproblematic. This has two reasons. First, with the evolving case law of the ECJ reviewing economic as well as judicial double taxation in the context of their compliance with fundamental freedoms, double taxation agreements are increasingly becoming agreements interpreting EU law obligations. Second, the nature of the arbitration procedure as a non-public forum the results of which are not published might, upon closer review, appear to fall foul of requirements arising from General Principles of EU law such as those of transparency and legal certainty.

In future, in absence of an equivalent to an Article 293 EC in EU law, the argument that the ECJ should restrain itself when reviewing the compatibility of double taxation with the single market becomes weaker than it was. The two Courts now united under the ECJ's roof—the Court of Justice and the General Court, of course, tread with great caution in the area of double taxation. This is especially due to the very clear delimitations of EU powers and the relatively few legislative acts regulating the area of double taxation.[31] The Courts regularl restate that EU law ‘‘does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation.’’[32] From this, the Courts draw the conclusion that the Member States enjoy a certain degree of autonomy in the area of direct taxation as long as they exercise their powers in compliance with EU law. Basically, therefore the ECJ is limited to reviewing the compliance of the Member States with the principle of sincere cooperation and the fundamental freedoms. Member States on the other hand, under EU law, are not obliged to adapt their own tax systems to the different

30. Case C-459/03 *Commission v. Ireland (Sellafield)* [2006] ECR I-4635 paras. 123–126, 128 and 133.
31. See e.g., Council Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ L 225, 1990, 6), the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises Jul. 23, 1990 (OJ L 225, 1990, 10) and Council Directive 2003/48/EC on taxation of savings income in the form of interest payments (OJ L 157, 2003, 38).
32. See e.g., Case C-96/08 *CIBA v. APEH* [2010] ECR I-nyr para. 27.

systems of taxation of another Member State. They are thus not obliged to eliminate the double taxation if that exclusively arises from the exercise in parallel by those States of their remaining fiscal sovereignty.[33]

Another more hidden consequence of the abolishment of Article 293 EC in the Treaty of Lisbon is the potential widening of the role of EU fundamental freedoms in the context of the review of double taxation agreements and their effects before Court.[34] Undeniably double taxation can have dissuasive and chilling effects on the exercise of fundamental freedoms such as the free movement of goods, services, labor and capital in the EU. Generally, in case of competing policy interests, the ECJ analyses whether, in the absence of common EU rules relating to a matter, there is a mandatory requirement of general interest which a Member State may present as argument for limiting the exercise of that fundamental freedom.[35] Such limitation of the fundamental freedom for protection of a mandatory requirement can only be justified, if measures for the protection are proportionate in the sense of the EU's proportionality principle. The application of the EU principle of proportionality is, however, generally problematic in areas such as tax law, where there are many legitimate possible policy approaches existing in the Member States legal systems—often contradictory in nature. One approach to establishing a proportionality threshold might be in this situation to refer to the OECD model bilateral tax agreement as neutral regulatory frame. The approach to be developed—an approach which would be respecting the public international law nature of the agreements—would consist of giving a Member State complying with the standard OECD model double taxation agreement the benefit of doubt as being compliant with the principle of proportionality. This method is tried and tested in many areas of law, where the compliance with the proportionate justification of a limitation of a right is reviewed. It consists of applying a third "neutral" source of rules as criteria for proportionality. These rules may arise from scientific, standard setting or international regulatory bodies. It is an approach applied in the context of EU fundamental freedoms as well as, for example, in the WTO's review of state compliance with limitations of nontariff barriers to trade under the Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) agreements.

5.5 CONCLUSIONS

Article 293 EC is dead—long live the bilateral tax agreements on the basis of public international law? Favorable to such a statement is the finding that there continues to be a place for agreements concluded between Member States of the EU in areas which touch upon EU competencies but where the Member States

33. Case C-298/05 *Columbus Container Services* [2007] ECR I-10451 para. 51.
34. See for a discussion of this problem with further references to the case law, L. Cerioni, "Double Taxation and the Internal Market: Reflections on the ECJ's Decisions in *Block* and *Damseaux* and the Potential Implications" [2009] *Bulletin for International Taxation*, 543–556.
35. For many: Case 120/78 *Rewe Central AG (Cassis de Dijon)* [1979] ECR 649 para. 8.

retain significant amounts of power which needs to be exercised in way compliant with EU law. Article 23 TFEU on consular protection of EU citizens is an example for the continued role of such "hybrid" instruments under the new legal framework under the Treaty of Lisbon. The instruments concluded between Member States on the basis of public international law will continue to exist in parallel with EU law. The big challenge remains ensuring compliance of these instruments under public international law with EU law. In this context the situation is that Member States must refrain from implementing through unilateral state law or through public international law means, measures which would limit the *effet utile* of EU law or which might enter into conflict with supremacy or primacy of EU law. In absence of harmonized EU law in the field of direct taxation, ensuring Member State compliance with fundamental freedoms of EU law takes the centre stage in this exercise. Here, the key is to find a sufficiently reliable and transparent approach to draw the line between legitimate use of Member State powers in the area of direct taxation and the requirements of EU law. In the area of double taxation, the potential use of compliance with the OECD model convention as justification for a proportionate limitation of fundamental freedoms appears to allow for a transparent co-existence of the EU legal framework on the single market and the requirements of Member States to create a coherent system of double taxation of their own.