

**Study on analysis of potential
competition and discrimination
issues relating to a pilot project
for an EU tax consolidation
scheme for the European
Company statute
(Societas Europaea)**

TAXUD/2003/DE/305

**Deloitte EU Tax Group
Deloitte & Touche LLP
London**

18 August 2004

Contents

1. Executive summary	1
1.1. <i>The question to be addressed</i>	1
1.2. <i>Executive summary</i>	2
2. About this document	4
2.1. <i>The background and general objectives of the study</i>	4
2.2. <i>Description of work performed</i>	4
3. The parameters of the study	6
3.1. <i>What kind of specific tax regime?</i>	6
3.2. <i>The temporary nature of a pilot project</i>	7
3.3. <i>Participation in the specific tax regime – a possibility or a requirement?</i>	8
3.4. <i>What does this study compare?</i>	8
3.5. <i>Fundamental rights and non-discrimination principles</i>	9
3.6. <i>What is meant by legal problems for the setting up of a specific tax regime?</i>	22
4. EC Treaty state aid rules	23
4.1. <i>The field of study</i>	23
4.2. <i>Articles 87, 88 and 89 EC – the state aid rules</i>	23
4.3. <i>The conditions for state aid</i>	23
4.4. <i>Compatibility with the Common Market</i>	33
4.5. <i>Conclusion</i>	37
5. EU commitments to the WTO	38
5.1. <i>The field of study</i>	38
5.2. <i>The EU's binding agreement with the WTO</i>	38
5.3. <i>Would income tax legislation for the SE be a generally applicable tax measure outside the scope of the WTO Agreement?</i>	38
5.4. <i>EU commitments on non-discrimination in the WTO</i>	39
5.5. <i>Commitments on subsidies in the WTO</i>	42
5.6. <i>Whether the dispute resolution procedure gives rise to negotiations or a right of compensation</i>	44
5.7. <i>Whether the EU commitments have direct effect in the EC</i>	44
5.8. <i>Whether a specific tax project for the SE that conflicts with the WTO Agreement would give rise to legal consequences</i>	46
5.9. <i>Process for raising potential discrimination or subsidy issues with the WTO</i>	48
5.10. <i>Conclusion</i>	48
6. Discrimination between legal forms and between businesses	49
6.1. <i>The field of study</i>	49
6.2. <i>Interpreting the questions</i>	49
6.3. <i>Different tax treatment of domestic legal forms and the SE</i>	50

6.4.	<i>Different tax treatment of domestic and international companies</i>	62
6.5.	<i>Conclusion</i>	66
7.	Enhanced cooperation	67
7.1.	<i>The field of study</i>	67
7.2.	<i>The relevant treaty provisions</i>	67
7.3.	<i>Interpretation of Article 43 EU Treaty</i>	68
7.4.	<i>The case of a special tax regime for the SE</i>	75
7.5.	<i>Conclusion</i>	77
8.	Literature review	79
8.1.	<i>Published materials</i>	79
8.2.	<i>Table of cases</i>	85
8.3.	<i>Treaty and legal references</i>	88

1. Executive summary

1.1. The question to be addressed

The question to be addressed by the study is:

“Would a specific tax regime that

i) grants to companies formed under the European Company Statute the possibility to or

ii) requires companies formed under the European Company Statute to

establish the consolidated tax base for their EU wide activities according to one set of rules (either European or that of their “home state”) and does not provide this possibility for companies which are run under a different legal form discriminate against these latter companies and/or provide state aid to the former companies?

If yes, would such discrimination cause legal problems to setting up such a specific tax regime for companies formed under the European Company Statute?”

1.2. Executive summary

In our opinion, the proposal to create a special tax regime exclusively for the SE would be likely to be discriminatory and provide state aid and this would create legal obstacles to setting up such a tax regime.

1.2.1. State aid

In our opinion, a special tax regime for the SE would risk creating an advantage within the meaning of the EC state aid rules. If the regime was implemented outside the Community legal framework for harmonisation measures, such aid would clearly be imputable to Member States. If the regime was selective in its application it would need to be notified to the European Commission. If the regime resulted from a Community tax harmonisation act, it would at least have to observe the material principles of the EC state aid rules.

Possible compliance cost savings are unlikely to constitute state aid. However, tax savings would constitute state aid if not compensated for directly on the same level and in the same Member State; and the amount of state aid would have to be determined.

In our opinion, it is unclear whether it is possible to justify an advantage for the SE arising through a special tax regime. Any aid must in any case be proportionate. Granting of aid to the SE could not be justified if it resulted in infringements of the principles of equal treatment and/or non-discrimination.

1.2.2. WTO

In our opinion, the possibility of a conflict with WTO commitments is remote because any benefits of the proposed specific tax regime are not directly linked to the level of exports.

If there is a conflict, there is unlikely to be any consequence within the Community legal order. The ECJ has not treated the WTO Agreement as having direct effect, because the dispute resolution procedure in the agreement gives rise to negotiation aimed at withdrawal or amendment of the measure, with compensation available only as an interim relief.

1.2.3. Discrimination

In our opinion, a special tax regime for the SE as currently envisaged would be likely to be discriminatory under general Treaty rules unless it was also available to other comparable entities.

If they were applied exclusively to the SE, both a home state tax system (HST) and a common base tax system (CBT) would result in infringements of the fundamental right of equal treatment under community law and the non-discrimination principles of the EC Treaty, unless the advantages and disadvantages were compensated for on the appropriate levels.

Such compensation would need to amount not only for differences in tax burden but also differences in compliance cost. It is likely that the operation of such compensation would be impractical.

Both HST and CBT would lead to a tax treatment that does not respect horizontal comparability of internationally operating entities and domestically operating companies, in the situation where no compensation is applied.

Such differential treatment could result – as the case may be – in an infringement against the non-discrimination principles of the EC Treaty or the general EC law principle of equal treatment, which could not be justified.

Based on the available literature and jurisprudence, we conclude that consideration should be given to implementing a system of common base taxation to all comparable entities in Member States.

1.2.4. Enhanced co-operation

In our opinion, enhanced co-operation would not deal with the problem of discrimination under general Treaty rules.

Although uncertainties exist in respect of the interpretation of the conditions for enhanced cooperation, it cannot be used if a specific tax regime for SEs would result in unequal treatment or discrimination. Further, if a specific SE tax regime might result in state aid it must be notified and there are doubts as to whether it could be approved.

A special tax regime for the SE as currently envisaged could not be implemented under enhanced co-operation unless the tax and compliance cost savings were fully compensated for.

2. About this document

This report covers five fields of study set out in the terms of reference.

2.1. The background and general objectives of the study

This report has been prepared by Deloitte EU Tax Group for the European Commission under the terms of reference agreed under reference TAXUD/2003/AO-001. The background and general objectives of the study are set out in the terms of reference.

The report is issued by Deloitte & Touche LLP. It is addressed to the European Commission. Neither Deloitte & Touche LLP nor any related entity shall have any liability to any third party, person or entity who relies on any of the information in this report. Any such reliance is entirely at the user's own risk.

The authors of the report include:

Adam Craig	London
Hans van den Hurk	Eindhoven
Stephan Linhardt	Brussels
Anno Rainer	Brussels
Jan Roels	Brussels
Otmar Thoemmes	Munich
Eric Tomsett	London

2.2. Description of work performed

Preparation of the report commenced on 14 January 2004 following agreement of a scheme of work and a work plan for the study in line with the terms of reference included in the invitation to tender.

Based on a review of European case law and statute, the literature identified and the previous experience of the group, the composite chapters of the Draft Intermediate Report were prepared. The Draft Intermediate Report was submitted on 24 February 2004 for the initial comments of the European Commission.

On 9 March 2004, the Commission provided its comments on the Draft Intermediate Report. The report was redrafted take into account the views expressed by the Commission.

The Amended Intermediate Report was submitted on 6 April 2004. The Commission provided its comments on the Amended Intermediate Report on 19 April 2004.

A Draft Final Report dated 4 May 2004 took into account the comments of the Commission on the Amended Intermediate Report. The Commission provided its comments on the Draft Final report on 11 June and 16 June.

An Amended Final Report dated 10 July took into account the comments of the Commission on the Draft Final Report. The report was made final on 18 August 2004.

3. The parameters of the study

3.1. What kind of specific tax regime?

The question to be addressed envisages two kinds of consolidated tax regime, which are referred to as Home State Taxation (HST), and Common Base Taxation (CBT).

The Commission Staff Working Paper of 23 November 2001 (SEC (2001) 1681) sets out the case for a comprehensive approach to tackle the tax obstacles for companies in the EU, and compares a range of conceptually different methods (chapters 12 to 15, pages 370 to 391). It states that:

“A complete approach should ideally incorporate –

- one set of rules, regulations and legislation
- provide a simpler mechanism for the allocation of profits and losses (which also covers cross-border losses and reorganisations).”

Following the Commission’s analysis, the present study makes a number of assumptions about a specific tax regime for the SE, the details of which would still have to be decided.

3.1.1. Home State Taxation

Home State Taxation involves all, or a group, of Member States agreeing to accept that certain enterprises with operations in a number of Member States should compute their taxable base according to the tax code of a single Member State – the Home State – instead of according to all the different tax codes of the respective Member States where they have operations.

The present study assumes that:

- The home state, whose rules will apply, is the Member State of the EU parent company of the group.
- Inclusion in the group will follow Member State group taxation rules if any, subject to the condition that minority participations (ie less than 50% shareholdings) are not to be included.
- The overall taxable income of the group would be the sum of the income of the entities, with each entity’s result being calculated using the rules of the home state.
- The tax base is divided amongst participating Member States where the group has operations under a formula. Each Member State applies its own tax rate to the portion of profits allocated to that Member State.
- Whether loss consolidation is available would depend on Home State Rules.
- The corporate tax rate will be set by Member States.
- Arrangements will be made to relieve double taxation of interest, royalties and dividends.

3.1.2. Common Base Taxation

Common Base Taxation involves all, or a group, of Member States agreeing to accept that certain enterprises with operations in a number of Member States should compute their taxable base according to a new set of common rules.

The present study assumes that:

- The rules will be administered by the Member State of the EU parent company of the group.
- All, and only, 100% subsidiaries, branches and agencies are included in the group (although, the possibility that groups could include simple majority participations is also acknowledged.)
- Profit allocation will follow a pre-agreed European level mechanism.
- No transfer pricing issues will arise as a result of differences, if any between the profit allocation method and the arm's length principle.
- There will be loss consolidation.
- The corporate tax rate will be set by Member States but might be set at a different rate to standard corporation tax to neutralise the effect of a wider or narrower tax base and maintain a uniform effective tax rate between the SE and other comparable corporate entities.
- Common rules will ensure no double taxation of interest, royalties and dividends.

3.2. The temporary nature of a pilot project

Some of the fields of study require the examination of the implications of a pilot project. The use of the term "pilot project" implies an activity planned as a test or trial, and would involve a small scale experiment or set of observations undertaken to decide how and whether to launch a full-scale project.

The present study makes the following assumptions about the pilot tax scheme:

- The pilot project will run for a temporary, pre-defined period (of, for example, 5 years).
- The pilot project will require the collection of comparative data.
- The analysis of the different treatment of companies taxed according to a special tax regime under the pilot project is the same as the analysis under a full-scale project.
- The purpose of the pilot project is to see if the specific tax regime would work.

For each field of study, the present study assumes that participation in the tax regime would be permanent, and then considers whether it would make a difference if participation were temporary as part of a pilot project.

3.3. Participation in the specific tax regime – a possibility or a requirement?

The question to be addressed envisages that it might make a difference to the analysis whether participation in the specific tax regime is optional or compulsory for the SE.

Many Member States have some form of optional tax treatment for individuals in their tax system. The implication is that offering an option might circumvent the problem of unifying systems by allowing the company to choose the solution which it prefers.

For each field of study, the present study assumes that participation in the tax regime is compulsory for the SE, and then considers whether it would make a difference if participation was optional for the SE.

3.4. What does this study compare?

The SE is defined by the European Company Statute. The comparison requires the SE to be compared with companies which are run under a different legal form. The present study assumes that “companies which are run under a different legal form” means companies of a Member State of the type that are listed in annexes I and II to the European Company regulation.

It is assumed that companies have legal personality. Each company is a separate legal person.

The distinguishing characteristics of a company run under a different legal form are defined by national law and will vary between Member States. The terms of reference do not include a comparative analysis of all the different legal forms available in the Member States - which might include corporate bodies (ie treated as a company in one Member State but not in another).

This study does not deal with the question of whether legal problems arise from the different treatment within or between Member States of all the different corporate bodies which currently exist in Member States, although it will identify areas where problems may occur which could impact a specific tax regime for the SE.

For each field of study, the present study will compare the SE with a company which, but for differences linked to its choice of legal form, or, where the terms of reference require, the location of its activities, is the same in all other respects.

The present study is not required to deal with transitional issues connected with the formation or breaking up of an SE. The analysis is limited to aspects of current direct taxation without addressing tax issues regarding the formation of an SE.

It should be noted at the outset that the analysis cannot give definitive answers to the question that takes into account all potential features of the special SE tax regime(s) for reasons which include:

- Although much has been written of a theoretical nature, the details of the HST concept to be applied are unknown at this point in time;
- The details of a CBT concept are unknown at this point in time;
- The tax laws of the Member States are in constant development;
- The European Court of Justice has not yet had the opportunity to interpret the scope of the non-discrimination principles in respect of all tax rules of the Member States believed not to comply with these freedoms.

3.5. Fundamental rights and non-discrimination principles

In the given context there are two distinguishable sets of rules that might have an impact: the fundamental right of equal treatment and the non-discrimination principles.

3.5.1. The fundamental right of equal treatment

3.5.1.1. Art. 6 (2) EU Treaty

Art. 6 (2) EU Treaty provides:

"The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional tradition common to the Member States, as general principles of community law".

3.5.1.1.1. Binding force for European Community Institutions

Although the relationship between the European Union and European Community is subject to discussion it seems to be generally accepted that Art. 6 (2) EU Treaty is directly binding on the institutions of the European Community¹ and its application subject to the judicial control of the European Court of Justice.²

3.5.1.1.2. European Human Rights Convention

The European Convention for the Protection of Human Rights and Fundamental Freedoms contains in its Art. 14 a prohibition of discrimination. This accessory fundamental right³ provides:

¹ See Bentler in von der Groeben-Schwarze Art. 6 EU, note 49 et seq.; Stumpf in Schwarze, EU-Kommentar, Art. 6 EUV, note 16; Streinz / Pechstein, EUV/EGV, Art. 6 EUV, note 8; Kingrean in Callies/Ruffert (Hrsg.) EUV/EGV, Art. 6 EUV, note 55

² See Art. 46 lit. d EU Treaty.

³ Protocol N°12 to the Convention for the Protection of Human Rights and Fundamental Freedoms contains in its Art. 1 a general prohibition of discrimination (see Explanatory Report on Protocol N°12 to the Convention for the Protection of Human Rights and Fundamental Freedoms). It was opened to signature by the member states of the Council of Europe on

"The enjoyment of the rights and freedoms set forth in this convention shall be secured with discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".⁴

It follows also from the French version that the enumeration of possible discrimination scenarios in Art. 14 ECHR is not exclusive but rather lists potential examples.⁵

Despite its accessory nature Art. 14 ECHR does not require there to be an infringement of the other rights and freedoms set forth in the Convention.⁶ In order for Art. 14 ECHR to be applicable it is sufficient that the respective alleged discrimination falls into the ambit of any of these rights and freedoms.⁷ The rights concerned are not only those mentioned in the Convention itself; any right contained in a protocol to the Convention that entered into force can trigger the application of Art. 14 ECHR.⁸

Taxation falls into the ambit of Art. 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.⁹

Therefore, Art. 14 ECHR is applicable to discriminatory taxation¹⁰. As an accessory right it can be invoked by legal persons¹¹.

Art. 14 ECHR protects those placed in similar situations from discrimination in their enjoyment of their rights under the Convention and its Protocols. However, a difference in treatment of one of these persons will only be discriminatory if it "has no objective and reasonable justification". The difference in treatment must pursue a "legitimate aim" and there must be a "reasonable relationship of proportionality between the means employed and the aim sought to be realised"¹².

Given the fact that the EU itself is not a signatory of the European Convention for the Protection of Human Rights and Fundamental Freedoms and is not a member to the Council of Europe, the consequences of an infringement against its non-discrimination principle would under EC law be

4 November 2000 until 19 February 2004 and was signed by 28 member states. As until 24 February 2004 only 5 member states ratified Protocol 12, it did not yet enter into force.

⁴ Art. 14 ECHR

⁵ See Meyer-Ladewig, Konvention zum Schutz der Menschenrechte und Grundfreiheiten, Art. 14, note 11.

⁶ See ECHR Case Cha'are Shalom Ve Isedek, Uerpmann in Ehlers, EUGR, 2003, §3 III / a).

⁷ See ECHR Case Karlheinz Schmidt, n° 13580/88, ECHR Judgement of 18 July 1994.

⁸ See e.g. Art. 5 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.

⁹ See Case of S.A. Dangeville v. France, no. 36677/97, ECHR Judgement of 16 April 2002; Case of Dorby v. Sweden, no. 17/1989/177/233, ECHR Judgement of 23 October 1990.

¹⁰ See Case of Darby v. Sweden, no. 17/1989/177/233, ECHR Judgement of 23 October 1990

¹¹ See Art. 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.

¹² See Case of Derby v. Sweden, n° 17/1989/177/233, ECHR Judgement of 23 October 1990.

similar to the consequence of an infringement against the fundamental right of equality as inspired by the constitutional traditions common to the Member States.¹³

3.5.1.1.3. Constitutional traditions common to the Member States and general principle of community law

All Member States recognise in one way or another the general principle of equal treatment¹⁴ as fundamental right.

The European Court of Justice has acknowledged for more than 30 years that the fundamental rights of persons form an integral part of the general principles of community law¹⁵, which are inspired by the constitutional traditions common to the Member States.¹⁶

It is well established case law that the general non-discrimination principle is among these general principles of community law.¹⁷

According to this principle, similar situations shall not be treated differently unless differentiation is objectively justified.¹⁸ Similarly, the application of the same rule to different situations can result in discrimination.¹⁹

As regards the justifications, the standards applied by the ECJ seem to vary slightly depending on the factual and legal context and the aim pursued. In the context of Art. 34 (2) 2 EC Treaty, the ECJ held that the lawfulness of a measure adopted in that sphere can be affected only if the measure in question is manifestly inappropriate, having regard to the objective which the competent institution is seeking to pursue.²⁰ In other decisions, the ECJ applied, however, the proportionality principle according to which the restriction on the exercise of fundamental right must not constitute, having regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of the respective fundamental right.²¹ Similarly, the ECJ requested the respective institution to demonstrate

¹³ See section 4.4.1.1.3. , para. 7 below.

¹⁴ For an overview see Kingreen in Calliess/Ruffert, EUV/EGV, Art. 6 EUV, note 170 et seq.; Streinz in Streinz, EUV/EGV, Art. 20 GR-Charta, note 1 et seq.

¹⁵ ECJ, Judgement of 12 November 1969, Case 29/69, Stauder, [1969] 419.

¹⁶ ECJ, Judgement of 17 December 1970, Case 11/70, Internationale Handelsgesellschaft, [1970] ECR p. 1125.

¹⁷ See Kingreen in Calliess/Ruffert EUV/EGV, Art. 6 EUV note 170 for an enumeration of ECJ Judgements.

¹⁸ See e.g. ECJ Judgement of 19 October 1977, joint Cases 117/76 and 16/77, Ruckdeschel and others, [1977] ECR 1753; of 19 October 1977, joint Cases 124/76 and 20/77, SA Moulins Pont à Mousson and others, [1977] ECR 1795.

¹⁹ See e.g. ECJ Judgements of 13 November 1984, Case 283/83, Racke, [1984] ECR 3791; of 13 April 2000, Case C-292/97, Karlsson and others, [2000] ECR I-2737.

²⁰ ECJ Judgement of 13 December 1994, Case C-306/93, SMW Winzersekt, [1994] ECR I-555; of 21 February 1990, joint Cases Case C-267/88 – C-285/888, Wuidart and others, [1990] ECR I-435.

²¹ See e.g. ECJ Judgement of 13 April 2000, Case C-292/97, Karlsson and others, [2000] ECR I-2737.

that the restoration of the market balance could only be achieved at the cost of introducing a new difference in treatment detrimental to the other category of operators.²²

In other cases, the ECJ reviewed the underlying facts in detail²³ and requested the establishment of objective circumstances which justified altering the previous system by a regulation which put an end to the existing equality of treatment.²⁴ In any case, a discrimination is unjustified in cases where it appears to be arbitrary.²⁵

As regards the consequences of an unjustified discrimination, the ECJ held depending on the factual and legal context that:-

- (i) a legislative act was null and void²⁶,
- (ii) it is for the competent institutions of the Community to adopt the measures necessary to correct the incompatibility with the principle of equality where several courses of action exist to remedy the situation²⁷ or
- (iii) that it is for the competent institutions of the Community to make good any damage sustained by these concerned.²⁸

The fundamental principle of equal treatment can be invoked by companies²⁹ and applies to their different treatment due to their company form³⁰ or the different category of their shareholders.³¹

The ECJ applied the fundamental right of equality to situations where the different treatment followed from a regulation that put an end to the existing equality of treatment³² or to situations where a legal act is unlawful because of something for which it makes no provisions, rather than on account of any part of its wording.³³

²² ECJ Judgement of 10 March 1998, Case C-122/95 Germany v. Council, [1998] ECR I-973.

²³ ECJ Judgement of 12 March 1987, Case 215/85, Bundesanstalt für landwirtschaftliche Marktordnung, [1987] ECR 1279.

²⁴ ECJ Judgement of 19 October 1977, joint Cases 117/76 and 16/77, Ruckdeschel and others, [1977] ECR 1753; of 19 October 1977, joint Cases 124/76 and 20/77, Moulins Pont à Mousson and others, [1977] ECR 1795.

²⁵ ECJ Judgement of 13 June 1978, Case 139/77 Denkavit Futtermittel GmbH, [1978] ECR 1317.

²⁶ ECJ Judgement of 5 July 1977, Case 114/76, Bela-Mühle, [1977] ECR 1211.

²⁷ ECJ Judgement of 19 October 1977, joint Cases 124/76 and 20/77, Moulins Pont à Mousson and others, [1977] ECR 1795; of 19 October 1977, joint Cases 117/76 and 16/77, Ruckdeschel and others, [1977] ECR 1753.

²⁸ ECJ Judgement of 19 October 1977, joint Cases 124/76 and 20/77, Moulins Pont à Mousson and others, [1977] ECR 1795; of 19 October 1977, joint Cases 117/76 and 16/77, Ruckdeschel and others, [1977] ECR 1753.

²⁹ See e.g. ECJ Judgement of 19 October 1977, joint Cases 124/76 and 20/77, Moulins Pont à Mousson and others, [1977] ECR 1795; of 13 June 1978, Case 139/77, Denkavit Futtermittel GmbH, [1978] 1317.

³⁰ ECJ Judgement of 17 April 1997, Case C-15/95, EARL de Kerlast, [1997] ECR I-1961.

³¹ ECJ Judgement of 6 July 1982, joint Cases 188 to 190/80, French Republic and others v. Commission, [1982] 2545.

³² ECJ Judgements of 19 October 1977, joint Cases 127/76 and 20/77, Moulins Pont à Mousson and others, [1977] ECR 1795; of 19 October 1977, joint Cases 117/76 and 16/77, Ruckdeschel and others, [1977] ECR 1753.

³³ ECJ Judgements of 19 October 1977, joint Cases 127/76 and 20/77, Moulins Pont à Mousson and others, [1977] ECR 1795; of 19 October 1977, joint Cases 117/76 and 16/77, Ruckdeschel and others, [1977] ECR 1753.

Further, the ECJ examined whether the Council ought not to have taken action by providing, even on a provisional basis, measures that would ensure equality.³⁴

Finally, there is nothing that would suggest that the fundamental principle of equality would not apply in the field of direct taxation.

3.5.2. The Non-Discrimination Principles of the EC Treaty

3.5.2.1. Introduction

Art. 12 EC Treaty contains a general prohibition of discrimination on grounds of nationality, which applies, however, independently only to situations governed by EC law, for which the EC Treaty lays down no specific non-discrimination rules.³⁵ Therefore, Art. 12 EC Treaty is mainly of importance in non-business situations.

The following specific non-discrimination rules are of relevance in the given context:

- the principle of freedom of establishment (Art. 43, 48 EC Treaty);
- the principle of free movement of capital and payments (Art. 56 et seq. EC Treaty);
- the principle of freedom to provide services (Art. 49 et seq. EC Treaty).

According to settled case law these principles are applicable in the field of direct taxation even if in the absence of harmonization of direct taxation falls into the competence of the Member States.³⁶

The European Court of Justice applied these fundamental freedoms in the field of direct taxation in a considerable number of cases.³⁷ These cases, the opinions of the Attorneys-General and the

³⁴ ECJ Judgement of 13 November 1973, joint Cases 63 to 69/72, Wilhelm Werhahn Hansamühle and others, [1973] ECR 1229.

³⁵ See e.g. ECJ, Judgement of 12 May 1998, Case C-336/96, Gilly [1998] ECR I-2793, para 37 et seq.; Judgement of 13 April 2000, case C-251/98, Baars [2000] ECR I-2787 para 23 et seq.; judgement of 8 March 2001, joint cases C-397/98 and C-410/98, Metallgesellschaft and Others ([2001] ECR I-1727 para 37 et seq; Judgement of 26 January 1993, Case C-112/91, Werner [1993] ECR I-429, para 19 et seq.

³⁶ See e.g. ECJ Judgements of 13 April 2000, Case C-251/98 Baars [2000] ECR I -2787 para 17; of 6 June 2000, Case C-35/98, Verkooijen, [2000] ECR I-4073 para 32; of 26 October 1999, Case C-294/97, Eurowings, [2000] ECR I-7449 para 32.

³⁷ See e.g. ECJ Judgements of 28 January 1986, Case 270/83, Commission v. France – avoir fiscal, [1986] ECR 273; of 27 September 1988, Case 81/87, Daily Mail, [1988] ECR 5483; of 8 May 1990, Case 175/88, Biehl I, [1990] ECR I-1779; of 28 January 1992, Case C-204/90, Bachmann, [1992] ECR I-249; of 28 January 1992, Case C-300/90, Commission v. Belgium, [1992] ECR I-305; of 26 January 1993, Case C-112/91, Werner, [1993] ECR I-429; of 30 March 1993, Case C-24/92, Corbiau, [1993] ECR I-1277; of 13 July 1993, Case C-330/91, Commerzbank, [1993] ECR I-4017; of 12 April 1994, Case C-1/93, Halliburton, [1994] ECR I-1137; of 14 February 1995, Case C-279/93, Schumacker, [1995] ECR I-225; of 26 October 1995, Case C-151/94, Commission v. Luxembourg – Biehl II, [1995] ECR I-3685; of 11 August 1995, Case C-80/94, Wielockx, [1995] ECR I-2493; of 14 November 1995, Case C-484/93, Svensson & Gustavsson, [1995] ECR I-3955; of 26 June 1996, Case C-107/94, Asscher, [1996] ECR I-3089; of 15 May 1997, Case C-250/95, Futura and Singer, [1997] ECR I-2471; of 24 April 1998, Case C-118/96, Jessica Safir, [1998] ECR I-1897; of 12 May 1998, Case C-336/96, Gilly, [1998] ECR I-2793; of 16 July 1998, Case C-264/96, ICI, [1998] ECR I-4695; of 26 January 1999, Case C-18/95, Terhoeve, [1999] ECR I-345; of 29 April 1999, Case C-311/97, Royal

judgements gave rise to an ever increasing wave of literature. For the purposes of this analysis we restrict our remarks in the following to the following aspects:

- the applicability of these principles to the SE;
- the main characteristics of application of these principles in the field of direct taxation;
- the situations where infringements against these principles were found;
- the situations where infringements against these principles cannot be excluded although the Court of Justice has not yet had the opportunity to consider these.

3.5.2.2. The relevant freedoms and their application to the SE

3.5.2.2.1. Freedom of establishment

The basic principle of freedom of establishment protects nationals of a Member State who wish to establish themselves in the territory of another Member State and applies to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State (Art. 43 (1) EC Treaty). The freedom of establishment includes the right to take up and pursue activities as self employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital (Art. 43 (2) EC Treaty).

The concept of the right of establishment, within the meaning of the EC Treaty, is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his state of origin.³⁸

Bank of Scotland, [1999] ECR I-2651; of 14 September 1999, Case C-391/97, Frans Gschwind, [1999] ECR I-5451; of 21 September 1999, Case C-307/97, Saint-Gobain, [1999] ECR I-6161; of 14 October 1999, Case C-439/97, Sandoz, [1999] ECR I-7041; of 26 October 1999, Case C-294/97, Eurowings, [1999] ECR I-7447; of 28 October 1999, Case C-55/98, Bent Vestergaard, [1999] ECR I-7641; of 18 November 1999, Case C-200/98, X AB et Y AB, [1999] ECR I-8261; of 13 April 2000, Case C-251/98, Baars, [2000] ECR I-2787; of 13 April 2000, Case C-420/98, W.N., [2000] ECR I-2847; of 16 May 2000, Case C-87/99, Zurstrassen, [2000] ECR I-3337; of 6 June 2000, Case C-35/98, B.G.M. Verkooijen, [2000] ECR I-4071; of 26 September 2000, Case C-478/98, Commission v. Belgium, [2000] ECR I-7587; of 14 December 2000, Case C-141/99, AMID, [2000] ECR I-11619; of 8 March 2001, joint Cases C-397/98 and C-410/98, Metallgesellschaft and others, [2001] ECR I-1727; of 10 May 2001, Case C-389/99, Rundgren, [2001] ECR I-3731; of 29 November 2001, Case C-17/00, De Coster, [2001] ECR I-9445; of 15 January 2002, Case C-55/00, Gottardo, [2002] ECR I-413; of 11 July 2002, Case C-224/98, D'Hoop, [2002] ECR I-6191; of 3 October 2002, Case C-136/00, Danner, [2002] ECR I-8147; of 21 November 2002, Case C-436/00, X and Y, [2002] ECR I-10829; of 12 December 2002, Case 324/00, Lankhorst-Hohorst, [2002] ECR I-11779; of 12 December 2002, Case C-385/00, F.W.L. de Groot, [2002] ECR I-11819; of 12 June 2003, Case C-234/01, Gerritse, [2003] ECR I-5933; of 26 June 2003, Case C-422/01, Skandia and Ramstedt, [2003] ECR I-6817; of 18 September 2003, Case C-168/01, Bosal Holdings BV, [2003] not yet reported; of 13 November 2003, Case C-209/01, Schilling, [2003] not yet reported; of 13 November 2003, Case C-42/02, Lindman, [2003] not yet reported; of 11 December 2003, Case C-364/01, Barbier, [2003] not yet reported; of 4 March 2004, Case C-334/02, Commission v. France, [2004] not yet reported; of 11 March 2004, Case C-9/02, de Lasteyrie du Saillant, [2004] not yet reported; Order of ECJ of 8 June 2004 in case C-268/03, De Baeck v Belgium; judgement of 1 July 2004 in case C-169/03, Wallentin v Rikskatteverket.

³⁸ See e.g. Case 2/74, Reyner, paragraph 21.

All nationals of the Member States of the Community may rightfully claim the right of establishment. In principle, citizens are not required to live in a Member State. However, the same is not true for corporations. In order to benefit from the freedom to set up agencies, branches or subsidiaries on the same terms as nationals, it is necessary for a company to have a primary establishment within the Community.

A national must be attempting to exercise a cross-border economic activity in order to invoke the right of establishment. Article 43 of the EC Treaty states that restrictions on the establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the establishment of agencies, branches, or subsidiaries by nationals of any other Member State established in the territory of any Member State. In order to fall within the scope of the right of establishment, legal persons within the meaning of Article 48 of the EC Treaty or natural persons who are nationals of a Member State must fulfil the criteria set out in Article 43 EC Treaty. According to the judgement of the ECJ in the *Factortame* case, the concept of the right of establishment, within the meaning of Article 43 EC Treaty, involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period.³⁹

According to literature, the SE benefits from this provision, too.⁴⁰ In support of this result, various reasons can be given:

- (i) the SE is partly governed by the laws of the Member State where it has its registered office⁴¹;
- (ii) the EC Treaty is to be interpreted in accordance with the fundamental rights as general principles of EC law including the non-discrimination principle;
- (iii) the provisions of community law are to be interpreted having regard to their useful effect.⁴²

3.5.2.2.2. *Free movement of capital*

Within the framework of the provisions of Title III Chapter 4 of the EC Treaty, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.⁴³ ⁴⁴ However, any restrictions that existed on 31 December 1993 in respect of capital movements to or from third countries involving direct investment may continue to be applied.⁴⁵

³⁹ Case 221/89, *Factortame*, paragraph 20.

⁴⁰ See Müller Graff in Streinz, EUV/EGV, Art. 48 EGV note 9 without further reasoning.

⁴¹ See Art. 9 SE-Regulation, as above.

⁴² See e.g. ECJ Judgement of 4 December 1974, Case 41/74, *van Duyn*, [1974] ECR 1337; of 19 November 1991, joint Cases C-6/90 and C-9/90, *Francovich and others*, [1991] ECR I-5357; see also Schwarze in Schwarze, EU-Kommentar, Art. 220 EGV, note 29.

⁴³ See Art. 56 (1) EC Treaty.

Any harmonisation has to endeavour to achieve the objective movement of capital between Member States and third countries to the greatest extent possible; a step-back in community law on liberalisation requires unanimity in the Council.⁴⁶

Further, Member States may apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested⁴⁷; as from May 1, 2004 all Member States may apply in this respect only those rules that were in force on 31 December 1993.⁴⁸

In addition, Member States may take requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation.⁴⁹ In any case, these measures shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital.⁵⁰

There is nothing that would suggest that an SE, shareholders of an SE, or persons wishing to invest in an SE would not be allowed to invoke the principle of free movement of capital.

3.5.2.2.3. *Freedom to provide services*

Within the framework of the provisions of Title III Chapter 3 of the EC Treaty, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a state of the Community other than that of the person for whom the services are intended.⁵¹

Services shall be considered to be "services" where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.⁵²

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community benefit from the

⁴⁴ We do not deem it necessary for the purposes of this study to enter into the discussion of which level of participation in a company still qualifies under the principle of freedom of establishment or falls into the ambit of the principle of freedom of capital movement (see for a summary of the relationship between the principles of free movement of capital, freedom of establishment and freedom to provide services e.g. Bröhmer in Calliess/Ruffert, EUV/EGV, Art. 56 EGV, notes 14 et seq.). Also discussed by van den Hurk, "The ECJ knows its limits", EC Tax Review 2001.

⁴⁵ See Art. 57 (1) EC Treaty.

⁴⁶ See Art. 57 (2) EC Treaty.

⁴⁷ See Art. 58 (1) lit. (a) EC Treaty.

⁴⁸ See Art. 1 (2) Accession Treaty, OJ L 236, 23.9.2003, p. 1 in conjunction with Art. 22 Accession Act, OJ L 236, 23.9.2003, p. 33 in conjunction with Annex IV n° 1, OJ L 236, 23.9.2003, p. 797.

⁴⁹ See Art. 58 (1) lit. (b) EC Treaty.

⁵⁰ See Art. 58 (3) EC Treaty.

⁵¹ Art. 49 (1) EC Treaty.

⁵² Art. 50 (1) EC Treaty.

freedom to provide services as they benefit from the freedom of establishment.⁵³ Therefore, the SE is within the ambit of the fundamental principle of freedom to provide services.

3.5.2.3. The main characteristics of the non-discrimination principles

3.5.2.3.1. Application of basic freedoms in field of direct taxation

According to well established case law, the basic freedoms of the EC Treaty are applicable to cross-border situations in the field of direct taxation.⁵⁴ Their application does not depend on meeting or exceeding certain minimum thresholds or levels of general importance of the case.

3.5.2.3.2. Binding for community institutions

Although some of the non-discrimination principles are according to their wording addressed to the Member States, they are as fundamental freedoms equally binding for the community institutions.⁵⁵

3.5.2.3.3. Forms of discrimination and restrictions

According to the case law of the ECJ, the basic freedoms not only prohibit discrimination in the host or destination state⁵⁶ but also restrictions in the home country or country of origin.⁵⁷

Equally the basic freedoms prohibit "overt" discrimination and restriction based on nationality⁵⁸ and "covert" discrimination or restriction, which is based formally on other criteria, such as residence or subjection to unlimited or limited tax liability, but has a similar effect as overt discrimination as it is aimed principally at nationals of other Member States or non Member States.⁵⁹

Further, the ECJ distinguishes between discrimination against nationals of other EU Member States making use of the freedoms by cross-border activities and discrimination by the Member States against its own nationals in domestic situations.⁶⁰ Reverse discrimination, if provoked by EC law, might fall within the ambit of a general equal treatment provision⁶¹; the influence of the future adoption of a

⁵³ Art. 55, 48 EC Treaty.

⁵⁴ See e.g. ECJ Judgements of 13 July 1993, Case C-330/91, Commerzbank, [1993] ECR I-4017; of 18 November 1999, Case C-200/98, X AB et Y AB, [1999] ECR I-8261.

⁵⁵ See e.g. Müller-Graff in Streinz, EUV/EGV; Art. 43 EGV note 37; Art. 49 EGV note 63. The wording of Art. 58 is neutral in this respect.

⁵⁶ See e.g. ECJ Judgements of 8 May 1990, Case 175/88, Biehl, [1990] ECR I-1779; of 14 February 1995, Case C-279/93, Schumacker, [1995] ECR I-225.

⁵⁷ See e.g. ECJ Judgements of 13 April 2000, Case C-251/98, Baars, [2000] ECR I-2787; of 18 September 2003, Case C-168/01, Bosal, [2003].

⁵⁸ See e.g. ECJ Judgement of 13 July 1993, Case 330/91, Commerzbank, [1993] ECR I-4017.

⁵⁹ See e.g. ECJ Judgement of 14 February 1995, Case C-279/93, Schumacker, [1995] ECR I-225.

⁶⁰ See e.g. ECJ Judgement of 26 January 1993, Case C-112/91, Werner, [1993] ECR I-429.

⁶¹ Refer 3.5.1.1.3.

general non-discrimination principle that is foreseen by the inclusion of the Charter of Fundamental Rights⁶² of the European Union into a European Constitution⁶³ remains to be seen.

3.5.2.3.4. *Assertion of discrimination against other persons*

The ECJ acknowledged that a taxpayer may not only invoke that a tax rule puts himself at a disadvantage, but also that he may rely on the basic freedoms if they are infringed against in respect of the freedoms of other persons.⁶⁴

In this respect, for example, a service recipient may invoke that a tax rule restricts a service provider⁶⁵ and an investor may invoke that a tax rule restricts the freedom of a non-resident company to seek capital from investors resident in the Member State concerned.⁶⁶

3.5.2.3.5. *Examination of details*

It follows from the established case law of the ECJ that the existence of discrimination or restrictions and their potential justification is to be examined on the basis of the particular tax law provisions and the situation of the particular taxpayer or other market participants concerned. In accordance with this approach, the fundamental freedoms require equal treatment in respect of the details of the tax laws; it is not sufficient that there is a generally comparable tax burden.⁶⁷

3.5.2.4. *Justification*

In cases where a detrimental tax treatment is established, this can only be justified under particular circumstances.

3.5.2.4.1. *Narrow interpretation of exceptions*

In this respect, exceptions from the general rule as provided for by the EC Treaty have to be interpreted in a narrow fashion in order to allow the basic freedoms to take effect to the greatest possible extent.⁶⁸

In particular, when interpreting Art. 58 EC Treaty the ECJ emphasized the prohibition of arbitrary discriminations or disguised restrictions.⁶⁹

⁶² OJ C 364, 18.12.2000, p. 1.

⁶³ Art. 7 of Draft Treaty establishing a Constitution for Europe, CONV 850/03, Brussels, 18 July 2003.

⁶⁴ See e.g. ECJ Judgements of 14 November 1995, Case C-484/93, Svensson & Gustavsson, [1995] ECR I-3955; of 24 April 1998, Case C-118/96, Jessica Safir, [1998] ECR I-1897.

⁶⁵ See e.g. ECJ Judgement of 26 October 1999, Case C-294/97, Eurowings, [1999] ECR I-7447.

⁶⁶ See e.g. ECJ Judgement of 16 March 1999, Case C-222/97, Trummer & Mayer, [1999] ECR I-1661.

⁶⁷ See e.g. ECJ Judgement of 28 January 1986, Case 270/83, Commission v. France – avoir fiscal, [1986] ECR 273.

⁶⁸ See in respect of the similar issue of exemption from the general rule under the Parent Subsidiary Directive: ECJ Judgement of 17 October 1996, joint Cases C-283/94, C-291/94 and C-292/94, Denkvit International and others, [1996] ECR I-5063.

3.5.2.4.2. *Generally: no overriding grounds of public policy*

In line with the principles mentioned above in this section 3.5.2.3. the ECJ rejected the majority of defence arguments brought forward by the Member States, such as:

- absence of tax harmonisation;⁷⁰
- influence of double taxation conventions;⁷¹
- effectiveness of fiscal supervision;⁷²
- protection of tax base and social welfare;⁷³
- availability of alternative structure;⁷⁴
- counterbalance of disadvantage by other advantages;⁷⁵
- prevention of abuse;⁷⁶
- low taxation in another Member State.⁷⁷

3.5.2.4.3. *Cohesion of tax systems as exceptional justification*

In fact, the ECJ accepted one tax law argument⁷⁸ as justification for discrimination and/or restriction: the cohesion of a tax system.⁷⁹⁸⁰ In the case of Mr. Bachmann, the ECJ was of the opinion that under national Belgian tax law, there existed on the level of the same taxpayer a direct link between deduction of pension and life insurance premiums and later taxation of pensions and life insurance payments, and vice versa.

⁶⁹ ECJ Judgement of 6 June 2000, Case C-35/98, Verkooijen, [2000] ECR I-4071.

⁷⁰ ECJ Judgement of 28 January 1986, Case 270/83, Commission v. France – avoir fiscal, [1986] ECR I-273.

⁷¹ ECJ Judgement of 28 January 1986, Case 270/83, Commission v. France – avoir fiscal, [1986] ECR I-273.

⁷² ECJ Judgements of 28 January 1992, Case C-204/90, Bachmann, [1992] ECR I-249; of 3 October 2002, Case C-136/00, Danner, [2002] ECR I-8147; of 4 March 2004, Case C-334/02, Commission v. France, [2004] not yet reported.

⁷³ ECJ Judgement of 3 October 2002, Case C-136/00, Danner, [2002] ECR I-8147.

⁷⁴ ECJ Judgements of 28 January 1986, Case 270/83, Commission v. France – avoir fiscal, [1986] ECR 273; of 12 April 1994, Case C-1/93, Halliburton, [1994] ECR I-1137.

⁷⁵ ECJ Judgements of 28 January 1986, Case 270/83, Commission v. France – avoir fiscal, [1986] ECR 273; of 13 July 1993, Case C-330/91, Commerzbank, [1993] ECR I-4017.

⁷⁶ ECJ Judgement of 3 October 2002, Case C-136/00, Danner, [2002] ECR I-8147.

⁷⁷ ECJ Judgements of 28 January 1986, Case 270-83, Commission v. France – avoir fiscal, [1986] ECR 273; of 27 June 1996, Case C-107/94, Asscher, [1996] ECR I-3089.

⁷⁸ In Judgement of 27 September 1988, Case 81/87, Daily Mail, [1988] ECR 5483, the ECJ based itself rather on corporate law arguments.

⁷⁹ See ECJ Judgements of 28 January 1992, Case C-204/90, Bachmann, [1992] ECR I-249; of 28 January 1992, Case C-300/90, Commission v. Belgium, [1992] ECR I-305.

⁸⁰ The ECJ has also supported the justification that the effectiveness of fiscal supervision is an overriding requirement in the general interest capable of justifying a restriction to the EC Treaty freedoms. See eg case C-120/78 Rewe Zentral, case C-250/95, Futura Participations. However, the restriction must be proportionate see eg case C-245/97 Baxter. In case C-279/93 Schumacher and case C-55/98 Vestergard, the ECJ rejected the argument explicitly, referring consistently to the possibility of Member States to make use of directive 77/799 concerning mutual assistance in the field of direct taxation.

These conclusions were widely criticised,⁸¹ mainly for not taking into account the influence of the double taxation conventions concluded by Belgium on the coherence of the Belgian system. In the meantime, the ECJ seems to have heard the arguments,⁸²: while verbally upholding the reasoning of the Bachmann case, the ECJ has in fact not found any other coherent tax system when taking the respective double taxation conventions into account.⁸³ Similarly, the ECJ "downsized"⁸⁴ the cohesion argument by requiring a direct link on the level of the same taxpayer between disadvantage and a related advantage.⁸⁵

3.5.2.4.4. *Proportionality*

Finally, even if there were a reason to be acknowledged as justification for discrimination and/or restriction the principle of proportionality must be applied: the measure must be able to achieve the justifying goal; there must not be an alternative that discriminates or restricts less than the measure chosen.⁸⁶

It would seem that the ECJ applies this principle of proportionality strictly.⁸⁷

3.5.2.5. *Legal consequence of unjustified discrimination/restriction*

Based on the fact that the fundamental freedoms take priority over national law and are directly applicable, any rule of national tax law infringing against these principles may not be applied⁸⁸. In principle, the same applies to a directive or regulation that does not comply with the non-discrimination principles of the EC Treaty.⁸⁹

3.5.2.6. *Examples of tax infringements identified*

The ECJ found infringements against the fundamental freedoms mentioned above in a very wide range of cross-border situations involving the taxation of international companies including, but not limited to:

⁸¹ For a summary see Cordewener, *Europäische Grundfreiheiten und nationales Steuerrecht*, p. 449 et seq.

⁸² See ECJ Judgements of 3 October 2002, Case C-136/00, Danner, [2002] ECR I-8147; of 26 June 2003, Case C-422/01, Skandia and Ramstedt, [2003] ECR I-6817; of 6 June 2000, Case C-35/98, Verkooijen, [2000] ECR I-4071.

⁸³ See e.g. ECJ Judgement of 11 August 1995, Case C-80/94, Wielockx, [1995] ECR I-2493.

⁸⁴ See Terra/Wattel, *European Tax Law*, 3rd ed. 2001, page 71.

⁸⁵ See e.g. ECJ Judgements of 3 October 2002, Case C-136/00, Danner, [2002] ECR I-8147; of 26 June 2003, Case C-422/01, Skandia and Ramstedt, [2003] ECR I-6817.

⁸⁶ ECJ Judgements of 15 May 1997, Case C-250/95, Futura Participations and Singer, [1997] ECR I-2471; of 6 June 2000, Case C-35/95, Verkooijen, [2000] ECR I-4071; of 12 December 2002, Case C-324/00, Lankhorst-Hohorst, [2002] ECR I-11779; of 4 March 2004, Case C-334/02, Commission v. France, [2004] not yet reported.

⁸⁷ ECJ Judgements of 15 May 1997, Case C-250/95, Futura Participations and Singer, [1997] ECR I-2471; of 6 June 2000, Case C-35/95, Verkooijen, [2000] ECR I-4071; of 12 December 2002, Case C-324/00, Lankhorst-Hohorst, [2002] ECR I-11779.

⁸⁸ See Hatje in Schwarze, *EU Kommentar*, Art. 10 EGV, notes 20 et seq., 27 et seq.; Hetmeier in Lenz, *EG-Vertrag*, 3rd ed., Art. 249, notes 23 et seq.

⁸⁹ See Art. 231, 241 EC Treaty.

- denial of income tax exemption where dividends are paid by non-resident company;⁹⁰
- denial of tax credit on dividend where recipient is a non-resident;⁹¹
- denial of recognition of tax loss carry forward if accounts were kept abroad;⁹²
- denial of lower tax rate to non-resident companies;⁹³
- availability of consortium relief reserved to groups with domestic subsidiaries;⁹⁴
- denial of advance corporation tax relief where dividends paid to foreign ECJ parent company;⁹⁵
- detrimental tax treatment of permanent establishments in respect of their shareholdings in foreign countries;⁹⁶
- detrimental treatment for stamp duty purposes of loan agreements closed abroad;⁹⁷
- detrimental trade tax treatment of lessees leasing business assets from non-resident lesser;⁹⁸
- denial of tax relief in respect of intra-group restructurings and share transfers where there is involvement of foreign companies in the group structure;^{99 100}
- detrimental treatment of foreign permanent establishments for purposes of loss deduction on the level of the domestic head office;¹⁰¹
- application of thin capitalisation rules only to non-resident shareholders and their affiliates;¹⁰²
- denial of deduction of holding cost only where subsidiaries are not conducting business in the same Member State.¹⁰³

It follows that a specific tax regime for the SE would have to avoid any of these features.

3.5.2.7. Potential infringements existing

In respect of the following areas of tax laws of current and future Member States, existence of infringements against the basic freedoms of the EC Treaty cannot be excluded:

- cross-border consolidation of tax base;
- cross-border loss relief in respect of permanent establishments;
- application of differing rules as contained in individual double taxation conventions;

⁹⁰ ECJ Judgement of 6 June 2000, Case C-35/98, B.G.M. Verkooijen, [2000] ECR I-4071.

⁹¹ ECJ Judgement of 28 January 1986, Case 270/83, Commission v. France – avoir fiscal, [1986] ECR 273.

⁹² ECJ Judgement of 15 May 1997, Case C-250/94, FUTURA and Singer (L), [1997] ECR I-2471.

⁹³ ECJ Judgement of 29 April 1999, Case C-311/97, Royal Bank of Scotland, [1999] ECR I-2651.

⁹⁴ ECJ Judgement of 16 July 1998, Case C-264/96, ICI, [1998] ECR I-4695.

⁹⁵ ECJ Judgement of 8 March 2001, joint Cases C-397/98 and C/410/98, Metallgesellschaft and others, [2001] ECR I-1727.

⁹⁶ ECJ Judgement of 21 September 1999, Case C-307/97, Saint-Gobain, [1999] ECR I-6161.

⁹⁷ ECJ Judgement of 14 October 1999, Case C-439/97, Sandoz, [1999] ECR I-7041.

⁹⁸ ECJ Judgement of 26 October 1999, Case C-294/97, Eurowings, [1999] ECR I-7447.

⁹⁹ ECJ Judgement of 18 November 1999, Case C-200/98, X AB et Y AB, [1999] ECR I-8261.

¹⁰⁰ ECJ Judgement of 21 November 2002, Case C-436/00, X and Y, [2002] ECR I-10829.

¹⁰¹ ECJ Judgement of 14 December 2000, Case C-141/99, AMID, [2000] ECR I-11619.

¹⁰² ECJ Judgement of 12 December 2002, Case C-324/00, Lankhorst-Hohorst, [2002] ECR I-11779.

¹⁰³ ECJ Judgement of 18 September 2003, Case C-168/01, Bosal Holdings BV, not yet reported.

- application of differing standards for the determination of transfer prices and related documentation in cross-border and domestic situations;
- application of differing tax rules to corporate restructurings depending on whether domestic or foreign companies are involved;
- application of thin capitalisation rules which distinguish expressly between domestic and cross-border situations or – even in the absence of such an express distinction – work to the detriment of companies with foreign shareholders;
- application of different rules – be it in the host or the home state – depending on whether a permanent establishment (or a subsidiary) exists in the host state;
- application of different credit or exemption rules in respect of dividends or interest received;
- application of final or exit taxation in case of transfer of registered office or residence;
- application of different rules concerning deductibility of expenses or charitable contributions paid domestically or abroad;
- requirements to keep records and books domestically;
- application of different anti-abuse rules and standards in domestic and cross-border situations;
- application of so-called CFC-legislation.

Obviously, this list is not meant to be exhaustive and includes situations which were not yet referred to the ECJ, neither according to Art. 234 EC Treaty nor according to Art. 226 EC Treaty.

It follows that a specific tax regime for the SE which contains any discriminatory features in these areas is also likely to be challenged.

3.6. What is meant by legal problems for the setting up of a specific tax regime?

The present study assumes that no attempt would be made by the Commission to set up a specific tax regime for the SE if such special treatment would be inconsistent with primary Community law, and that Member States would never adopt a measure which is inconsistent with primary Community law.

The present study first considers whether such a special tax regime would be consistent with legal commitments, and then, if potential problems are identified, assesses whether such special treatment could be justified.

4. EC Treaty state aid rules

4.1. The field of study

What state aid considerations are to be taken into consideration in designing a specific tax regime for the SE?

To what extent can the different treatment of SEs be justified by the nature and economy of the tax system?

4.2. Articles 87, 88 and 89 EC – the state aid rules

Since the EC and the internal market is based on the principle of an open market economy with free competition, the principle of state aid restrictions was introduced in the EC Treaty to ensure and stimulate the efficient allocation of means and to avoid distortions of free competition. The principle of state aid prohibits Member States from granting to undertakings any advantage that distorts, actually or potentially, competition or impacts trade between Member States. The key provisions are set out in article 87, 88 and 89 EC.

Article 87 EC contains the relevant rules to consider when designing a specific tax regime for the SE. Both the Commission and the ECJ from an early stage have interpreted article 87(1) broadly. This ensures that both direct and indirect aid, (through cash or in an indirect manner, for example, via a beneficial tax regime), would fall within the rules.

It has sometimes been argued that articles 87 EC et seq. are not applicable in the field of tax harmonisation. This view would follow from the argument presented by certain Governments and interested parties against the initiation of, and final decisions ending, formal investigation procedures against a variety of tax incentives in several EU Member States.¹⁰⁴ The argument is that the European Commission misuses its powers when applying the state aid rules to pursue, in actual fact, objectives of tax harmonisation for which the EC Treaty provides competences only under Arts. 94, 96 EC.

It would follow logically that where tax harmonisation competences are exercised by the Council, state aid rules under the EC Treaty must not be applied. It appears, however, that the European Commission does not follow the initial argument, which has also been rejected by the Court of First Instance.¹⁰⁵ Literature also suggests that state aid rules of Art. 87 et seq. EC remain applicable in the context of harmonisation measures.¹⁰⁶

4.3. The conditions for state aid

¹⁰⁴ See e.g. CFI, Judgement of 6 March 2002, joined Cases T-92/00 and T-103/00, *Territorio Historico de Alava and others v. Commission*, [2002] ECR II-1385.

¹⁰⁵ See e.g. CFI, Judgement of 6 March 2002, joined Cases T-92/00 and T-103/00, *Territorio Historico de Alava and others v. Commission*, [2002] ECR II-1385.

¹⁰⁶ Heidenhain, *Handbuch des Europäischen Beihilferechts*, p. 72.

From article 87 EC, and based on the case law of the ECJ and the Commission notice on the application of the state aid rules to measures relating to direct business taxation (98/ C 384/03), there are four conditions to establish whether the specific tax scheme for the SE constitutes state aid:

- There must be an advantage granted to an undertaking which relieves it of charges normally borne by its budget.
- The advantage must be granted by a Member State or through state resources.
- Aid must have a selective effect, meaning only certain undertakings will benefit from the aid granted and the tax measure can not be justified by the nature of the tax system.
- The result of this selectively granted aid must distort or threaten to distort intra-Community trade and competition.

If these criteria are met the national measure under examination will, in principle, be treated as incompatible with EC law by the European Commission. However, paragraphs 2 and 3 of article 87 of the Treaty provide a number of safe harbours.

4.3.1. An advantage granted to an undertaking by a Member State or through state resources

4.3.1.1. Types of advantage

State aid requires first of all that an advantage is granted. Two advantages are conceivable in the situation of a special tax regime for an SE: a lower effective tax burden and/or lower compliance costs.

The lower effective tax burden might be caused by (i) a rule for determining the tax base that differs from that which would normally apply in the respective Member State without existence of a special SE regime, and (ii) a rule for allocating the tax base that differs from that normally applicable between the respective Member States (in theory, the SE does not change attribution provisions of tax treaties).

These two tax related advantages may occur as the case may be on the level of the parent entity/head office and/or on the level of the subsidiary/permanent establishment if any.

On the other hand, the special tax regime for the SE might potentially result in lower compliance cost as compared to compliance normally incurred without application of the SE regime.

These basic types of advantages might not necessarily share the same fate under the application of EU state aid rules.

When determining the fact that an advantage is given and the extent of that advantage one would have to look at the individual entity or at the group as discussed below.

In any case, an advantage – if given – would remain an advantage, regardless of whether the special SE regime is compulsory or optional.^{107 108}

4.3.1.2. Potential compliance cost advantage

As regards potential compliance costs, it would appear that they do not constitute an advantage granted out of state resources, since at first sight they do not involve a grant or non-levy burdening the states' budget. Even if the point could be made that a potential cost advantage for the benefiting SEs might potentially lead to higher administration cost for the Member States, there would be no direct link between the potential individual benefit and the potential general burden for the state budget. In addition, the quantification of such advantages and in particular the corresponding burden might be doubtful.

Therefore, the potential compliance cost reduction for benefiting SEs would not *per se* qualify as state aid.

4.3.1.3. Compensatory levies

It might be suggested that Member States would compensate for advantages that the SE would potentially derive from a special SE tax system by imposing additional levies. It may be that the system is designed such that the tax rate has to increase in order to eliminate aid.

From a state aid point of view such an additional levy would have to be applied in the country where the advantage would occur and would have to be part of the special SE system if the advantage were to disappear. Further from a state aid point of view, such an additional levy would not have to go as far as seeking compensation for lower compliance costs.

In practice, however, it will be impossible to arrive at a general corporate income tax rate which perfectly compensates for the tax benefits of the special tax regime without actually measuring what the tax liability would have been in the absence of the specific tax regime. This would be an additional compliance burden on the company which would negate the reduction in compliance intended by the special tax regime.

One might query whether this is a realistic option for Member States. Firstly, a higher tax rate could do no more than make an arbitrary attempt at correction, which would widely diverge in practice from offsetting actual financial benefits. Secondly, it seems unlikely that any Member State would follow this option if it wanted to attract European Company registrations.

4.3.1.4. Undertaking

4.3.1.4.1. Identifying the undertaking

¹⁰⁷ See e.g. the definition of "aid scheme" in Council Regulation (EC) N° 659/1999 of 22 March 1999 laying down detailed rules for the application of Art. 93 of the EC Treaty, Chapter I Article 1 (d) first alternative; ECJ Judgement of 19 September 2000, Case C-156/98, Germany v. Commission, [2000] ECR I-6857.

¹⁰⁸ Commission decision C 54/2001, 2003/601/EC, sees OJ 13.8.2003.

It is necessary to clearly identify the recipient of the advantage, as this might be of importance for the determination of the existence of an advantage and potential competition distortions.

When identifying the benefiting undertaking separate legal entities are to be regarded as one single entity, if they form an economic unit. This approach applies to separate legal entities which are controlled by a common parent company.¹⁰⁹

It would follow from this approach that an SE with foreign permanent establishments would qualify as one undertaking in the same way as an SE and its SE subsidiaries if the subsidiaries are controlled by the parent SE.

4.3.1.4.2. Impact on advantage

The situation could occur that in one or several Member States the special SE tax regime would lead to an advantage whereas in other Member States this system would lead to a higher tax burden.

Taking into account the economic unit concept, would the compensation of an advantage in one country by advantages in another country be possible? Based on case law and Commission practice, this would probably not be the case.

Whether a fiscal advantage is granted is determined on a national level. It may not be relevant whether in another EU Member State a similar advantage exists.¹¹⁰ Therefore, it may not be relevant, whether in another EU Member State a disadvantage exists.

4.3.1.5. Transfer of state resources

4.3.1.5.1. The method of transfer

There is a transfer of state resources if an advantage is granted or effectively paid by means of state resources. This definition includes subsidies, as well as all artificial advantages that include, directly or indirectly, a cost element for the concerned government.¹¹¹ This includes surrendering (potential) income streams. This may result in a reduction in costs of capital,¹¹² labour,¹¹³ production, sale, and

¹⁰⁹ See ECJ Judgement of 14 November 1984, Case 323/82, Intermills, [1994] ECR 3809; Commission decision of 15 January 2002, (2002/468/EC), Klausner Nordic Timber, OJ L 15, 24.6.2002, p. 15.

¹¹⁰ See Commission Decision of 17 February 2003, (2003/755/EC), Belgian Coordination Centers, OJ L 282, 30.10.2003, p. 25 et seq., section 101, p. 41; ECJ Judgement of 19 May 1999, Case C-6/97, Italy v. Commission, [1999] ECR I-2981.

¹¹¹ Case 290/83, Commission/France [1985] p. 439; Joined Cases C-72/91 and C-73/91, Sloman Neptune [1993] I-887; C-189/91, Kirsammer-Hack [1993] I-6185; C-387/92, Banco de Crédito [1994] I-877; C-39/94, SFEI [1996] I-3547; T-358/94, Air France [1996] II-2109; C-342/96, Tubacex [1999] I-2459; C-6/97, Italy/Commission [1999] I-2981; T-46/97, SIC [2000] II-2125; C-52-54/97, Viscido [1998] I-2629; C-75/97, Maribel [1999] I-3671; C-200/97, Ecotrader [1998] I-7907; Joined Cases T-204/97 and T-270/97, EPAC [2000] II-2267; C-256/97, DMT [1999] I-3913; C-295/97, Piaggio [1999] I-3735; Joined cases C-15/98 and C-105/99, Sardegna Lines [2000] I-8855; C-156/98, Germany/Commission [2000] I-6857.

¹¹² T-459/93, Siemens [1995] II-1675.

¹¹³ Case 171/83 R, Commission/France [1983] p. 2621.

distribution leading to a distortion of existing or potential competition within the internal market.¹¹⁴ A special tax regime for the SE would need to avoid such features.

Participation of the government or State controlled bodies has been the subject of much case law. Aid that is not financed by state resources but has been granted due to state influences can be treated as state aid.¹¹⁵ However, case law suggests that if the advantages cannot be directly measured in financial terms, then they will not constitute state aid.

4.3.1.5.2. *The position of the recipient*

If the special SE regime resulted in lower taxation for an undertaking than would apply in the absence of such a tax regime, it would appear that such advantages were granted by a Member State or through state resources. If testing whether a special tax regime for the SE invokes state aid, the concept of state resources has to be assessed in light of the aid recipient's situation. As a consequence of the regime this assessment will be rather difficult because some companies which have rolled over into an SE could find themselves in the situation where the new regime is more expensive as a consequence of shift of the tax burden.

4.3.1.5.3. *Whether attributable to the state or to the Community*

In relation to the SE and the proposed special tax regime, it could be argued that because the special tax regime was created at the European Community level, the consequences of the system seem not to be attributable to the Member State. If the advantage is not imputable, no other element need be tested.

In principle only tax exemptions that stem from a decision made at a Community level, for example, in the form of a directive, - and are obligatory for all Member States without any room for discretionary application are not imputable to the state and therefore not state aid. That would not necessarily be the situation for a special tax regime for the SE.

The *Norddeutsches Vieh- und Fleischkontor* case deals with the question of whether there is state aid if the funds that are distributed come from the EU budget and are distributed according to EU (framework) rules. The ECJ held that the financial advantage which traders derive from receiving a share in the national tariff quota was not granted through state resources but through Community resources because the levy that was waived was part of Community resources. Since the measure in issue did no more than allocate a Community tariff quota it did not constitute "aid granted by a Member State or through State resources" within the meaning of Articles 87 to 89 of the Treaty.¹¹⁶

¹¹⁴ Case 173/73, Italy/Commission [1974] p. 709; Case 259/85, France/Commission [1987] p. 4393; Joined Cases C-278-280/92, Spain/Commission [1994] I-4103; T-214/95, Flemish Region [1998] II-717.

¹¹⁵ Case 290/83, Commission/France [1985] p. 439.

¹¹⁶ Joined Cases 213/81, 214/81 and 215/81 *Norddeutsches Vieh- und Fleischkontor v Balm* [1982] ECR 3583. In that case the question arose whether the allocation of special tariff quotas for the importation of frozen beef and veal from non-member countries could invoke state aid. German legislation determined the allocation of the national quota share between domestic traders. Three traders challenged that legislation *inter alia* on the ground that it constituted state aid in favour of certain other traders. According to Advocate General VerLoren van Themaat it was possible to argue on the basis of the distinction made in Article 92(1) (currently 87 (1)) between aid granted by a Member State and aid granted

There are other cases too where the ECJ decided that aid could only be considered as state aid provided that the aid can be attributed to the state.¹¹⁷

As far as a special tax regime for the SE is concerned, it could be argued that the Member States are responsible for the aid because the tax benefits granted will actually come from national – rather than Community – resources. In these circumstances, the condition in the second part of Art. 87 (1) EC seems to be fulfilled.¹¹⁸

As far as can be seen, nothing else follows from the case law of the ECJ, which so far seems to have excluded from the application of Art. 87 EC et seq. only advantages granted from Community resources.¹¹⁹

The same conclusion can be drawn from the fact that in cases of co-financing out of Member State and EU budgets, the total benefits are subject to application of Art. 87 EC et seq.¹²⁰

Even if one chose to neglect the wording of Art. 87 (1) EC Treaty, that reads "by a Member State or through state resources" and the fact that the second alternative would, as the case may be, be fulfilled, this incentive would have to be subject to the same principles of Art. 87 EC Treaty et seq. as otherwise the purpose of Art. 87 EC Treaty et seq. would be undermined.¹²¹

4.3.2. Selectivity

The selectivity criterion should be interpreted very broadly.¹²² This condition excludes a general financial advantage, such as a tax advantage, from qualifying as state aid provided that the measure is not selective.

However, if the measure is only applicable to a certain group of enterprises the measure is treated as being selective. In addition, if the aid granted is the result of a discretionary decision of a government

through State resources that the independent grant of pecuniary advantages which were not paid for by a Member State was caught by Article 92. He mentioned the example of reduced rates which a Member State might require private electricity companies to grant to certain undertakings.

¹¹⁷ See cases *Van der Kooy e.a./Commission*, cases 67/85, 68/85 en 70/85; *Italy/Commission C-303/88 and C-305/89*, and *Air France/Commission*, T-358/94.

¹¹⁸ See Commission notice on the application of the state aid rules to measures relating to direct business taxation, OJ C 384, 10.12.98, p. 3 et seq., p. 4 section 10.

¹¹⁹ See ECJ Judgement of 13 October 1982, joined Cases 213 to 215/81, *Norddeutsches Vieh- und Fleischkontor*, [1982] ECR 3583, section 22.

¹²⁰ See Council Regulation (EC) N° 1260/1999 of 21 June 1999 laying down general provisions on the structural funds, OJ L 161, 26.6.1999, p. 1, Art. 12, p. ; e.g. Commission Regulation (EC) N° 68/2001 of 12 January 2001 on the application of Art. 87 and 88 of the EC Treaty to training aid, OJ L 10, 13.1.2001, p. 20 et seq., Art. 6; e.g. Community guidelines on state aid for environmental protection, OJ C 37, 3.2.2001, sect. 74.

¹²¹ See *Mederer/Triantafyllou in Schröter/Jakob/Mederer*, *Kommentar zum Europäischen Wettbewerbsrecht*, Art. 87 Abs. 1, note 29; *idem in von der Groeben/Schwarze*, *EUV/EGV*, Art. 87 Abs. 1, note 29.

¹²² C-143/99, *Adria-Wien Pipeline* [2001] I-8365; Joined Cases T-92/00 and T-103/00, *Alava* [2002] II-1385.

based on a general law or administrative regulation,¹²³ or if it is the result of a request by the undertaking itself,¹²⁴ then the selectivity condition is met.

Measures that favour certain undertakings can still have a general character if the specific preferential treatment follows from the normal application of the general system.¹²⁵ Such measures are not within the scope of article 87 (1) EC.

In a decision regarding the Dutch financing company regime¹²⁶, the European Commission concluded that the condition of selectivity was fulfilled because the regime was only applicable to international groups, provided they were established on two continents or in four countries. To establish a European Company, the group is required at the outset to be established in at least two Member States.

In that case the Commission recognised that international transactions entailed specific risks which could justify a derogation. But the main problem was that the eligibility criterion set by the Dutch authorities, namely the requirement to carry out financial activities in at least four countries or at least two continents, did not fit with the rationale of the system.¹²⁷ Operating in two or more countries invokes the same risks.

Although the Dutch case has not been brought before the ECJ the decision of the European Commission is based on three joined cases.¹²⁸ In these cases tax benefits were granted to new companies which invested more than Euro 480,810 in Spanish Basque country. The quantitative restrictions proved the existence of a selective measure.

The case of a specific tax regime is different. Although an SE will typically be formed by businesses established in more than one country, this is not a quantitative measure but a qualitative one. It indicates that the company has to operate on a sustained and permanent basis across national borders. If the company operates across national borders then a specific regime might perhaps be justified by the nature and structure of the system.

An argument in favour of this reasoning is that the SE regime deals with the particular problems of cross border undertakings. This ranges from legal aspects like relocation of the seat of the company to tax arguments like not having to deal with exit taxes and transfer pricing problems if the CBT system is chosen. All these problems need to be solved and would likely be solved for SEs by, in this case, the CBT system.

¹²³ C-241/94, Kimberly [1996] I-4551; C-200/97, Ecotrade [1998] I-7907; C-256/97, DMT [1999] I-3913.

¹²⁴ C-156/98, Germany/Commission [2000] I-6857.

¹²⁵ Case 173/73, Italy/Commission [1974] p. 709.

¹²⁶ D/289741

¹²⁷ See European Commission, Report on the implementation of the Commission notice on the application of the state aid rules to measures relating to direct business taxation, p. 10.

¹²⁸ Joined cases T-346/99, T-347/99 and T-348/99 Álava, [2002] II-4259.

However, a specific tax regime for the SE seems selective. The European Commission concluded in its guidance on the implementation of the fiscal state aid rules that, although a specific tax regime is open to all sectors, the measures could be regarded as selective because such measures exclude all small businesses or local firms from receiving aid.¹²⁹

Would one of the two systems delivers benefits which the other does not? Ireland introduced a system whereby under certain circumstances double taxation was relieved by using the exemption system for permanent establishment profits while the normal system provides for a tax credit. Although under certain circumstances the double tax relief is equal, sometimes the taxes levied from the PE are lower than if the profits were taxed in Ireland right away. In these situations the exemption system provides for an advantage. Translated to the SE situation it is likely that companies would be able to choose. So, if one of the options delivers an advantage under certain circumstances the situation can be considered to be state aid.

An advantage granted through state resources qualifies as state aid if it favours certain undertakings. It could be argued that the fact that the regime is available only to entities in the legal form of an SE makes it selective. It seems to follow from case law and European Commission practice¹³⁰ that even though the SE tax regime would be a measure capable of applying across sectors, it would only be available to enterprises organised under the legal form of an SE. It seems to be reiterated by the restrictions and the cost for the constitution of an SE.¹³¹

4.3.3. Derogation by "the nature or general scheme of the system"

According to European Commission practice, the treatment of a differential tax measure as state aid seems to depend on whether or not an advantage is inherent in the tax system.¹³² It appears, however, that neither HST nor CBT are inherent in any of the tax systems of the EU Member States, as these systems developed general solutions that differ from the special SE regime for the same cross-border problems suffered by enterprises organised in different legal forms.

The application of HST or CBT would not even follow from the Member States' tax systems if all potential discrimination were eliminated.

Finally, it is questionable whether it could be argued that the special SE tax regime would constitute a new tax system that is sufficiently different and separate from the general tax regime of the Member States in order not to qualify as an exception. It seems to follow however from the European

¹²⁹ See box nr.5 in European Commission, Report on the implementation of the Commission notice on the application of the state aid rules to measures relating to direct business taxation, p. 7/8.

¹³⁰ For an overview see Heidenhain, Handbuch des Europäischen Beihilferechts, p. 57 et seq.

¹³¹ See Art. 2, 3 (2) Council Regulation (EC) N° 2157/2001 of 8 October 2001 on the statute for a European Company (SE), OJ L 294, 10.11.2001, p. 1 et seq.

¹³² Commission notice on the application of the state aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, p. 3 et seq., section 23, p. 6.

Commission practice and case law¹³³ that the whole of the respective Member States' tax rules need to be taken into account in order to assess whether a derogation from general rules is justified by "the nature or general scheme of the system", i.e., the tax system of the respective Member State.

Moreover derogation may not exclude certain market players in a discriminatory way.¹³⁴

4.3.4. Distortion of competition and of trade between Member States

4.3.4.1. General

In both respects, it appears that a potential impact would be sufficient as long as the circumstances which give rise to distortions of competition and affect trade between Member States can be described.¹³⁵

In particular, the criterion of an impact on trade between Member States is fulfilled if due to a fiscal advantage in favour of an enterprise a future impact on trade between Member States seems to be possible.¹³⁶ This condition could even be fulfilled if an SE that does not have branches or subsidiaries and is active on a national market only benefited from an advantage under the special SE regime due to its qualifying parent company.

Further it has to be taken into account that operating aid, that is to say aid which is intended to or has the effect of releasing an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities, distorts the conditions of competition.¹³⁷

4.3.4.2. De minimis

Based on the so-called "de minimis regulation"¹³⁸, fiscal advantages not exceeding 100,000 EUR over a period of three years would not distort competition. The definition of undertaking, to which as the case may be related companies in other forms than SEs belong, sectoral exceptions¹³⁹, as well as

¹³³ See e.g. CFI, Judgement of 6 March 2002, joined Cases T-92/00 and T-103/00, *Territorio Historiccode Alara and others v. Commission*, [2002] ECR II-1385.

¹³⁴ European Commission, Report on the implementation of the Commission notice on the application of the state aid rules to measures relating to direct business taxation, p. 11.

¹³⁵ See e.g. ECJ Judgement of 19 October 2000, joined Cases C-15/98 and C-105/99, *Italy and others v. Commission*, [2000] I-8855, section 66.

¹³⁶ See e.g. ECJ Judgement of 14 September 1994, joined cases C-278/92, C-279/92 and C-280/92, *Spain v. Commission*, [1994] ECR I-4103, section 40; CFI Judgement of 4 April 2001, Case T-288/97, *Friuli Venezia Giulia v. Commission*, [2001] ECR II-1169, section 51.

¹³⁷ ECJ Judgement of 19 September 2000, Case C-156/98, *Germany v. Commission*, [2000] ECR I-6857.

¹³⁸ Commission Regulation (EC) N° 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid, OJ L 10 of 13 January 2001, p. 30-32 (in the following referred to as "De Minimis Regulation").

¹³⁹ See Art. 1 De Minimis Regulation, *supra*.

formal accumulation and monitoring requirements¹⁴⁰ would have to be taken into account. On the other hand, the de minimis rule would apply on a per country basis.¹⁴¹

Therefore there are serious doubts whether in a situation in which the same rule causes state aid for two companies (one with a big benefit and one with a small benefit) the latter could be regarded as unproblematic as both might form one undertaking for state aid purposes.

4.3.5. Intra-community trade and competition

When evaluating this criterion, the actual influence of the state aid granted on intra-Community trade is irrelevant.¹⁴² Instead, it is sufficient that there is a potential influence on intra-Community trade.¹⁴³ The influence on trade or the distortion of competition does not have to be noticeable,¹⁴⁴ nor is the size of the undertaking¹⁴⁵ or the amount of the aid¹⁴⁶ relevant. According to the ECJ, it is also not relevant that the beneficiary of the aid is not involved in the intra-Community trade¹⁴⁷ or mainly focuses on third countries.¹⁴⁸

In the *Altmark* case, which concerned a company engaged in public transport, the ECJ held that it was of no importance that Altmark, the beneficiary of the state aid, provided services only in local or regional transport.¹⁴⁹ The ECJ argued that the granting of aid could affect intra-Community competition because companies from other Member States were not granted the same aid. However, the ECJ provided some safe-haven conditions under which this aid could be provided.

The question can arise whether in the underlying situation competition and trade would be affected by the proposed special tax regime. In principle the criterion of trade being affected is met if the recipient firm carries on an economic activity involving potential trade between Member States.¹⁵⁰ Usually, it is one state that provides aid and as a consequence frustrates the internal market. But in the situation of a special tax regime for the SE this might be different. Every country would apply in principle the same

¹⁴⁰ See Art. 3 De Minimis Regulation.

¹⁴¹ This would follow from Art. 3 De Minimis Regulation.

¹⁴² Joined Cases T-298/97, T-313/97, T-315/97, T-600-607/97, T-1/98, T-3-6/98 and T-23/98, Mauro and Others [2000] II-2319.

¹⁴³ C-86/89, Italy/Commission [1990] I-3891; C-288/96, Germany/Commission [2000] I-8237.

¹⁴⁴ Case 730/79, Philip Morris [1980] p. 2671; C-142/87, Tubemeuse [1990] I-959; T-55/99, CETM [2000] II-3207.

¹⁴⁵ Joined Cases C-278-280/92, Spain/Commission [1994] I-4103; T-214/95, Flemish Region [1998] II-717.

¹⁴⁶ C-156/98, Germany/Commission [2000] I-6857; T-55/99, CETM [2000] II-3207.

¹⁴⁷ C-303/88, Eni-Lanerossi [1991] I-1433; Joined Cases C-278-280/92, Spain/Commission [1994] I-4103.

¹⁴⁸ Case 310/85, Deufil [1987] p. 901; C-142/87, Tubemeuse [1990] I-959.

¹⁴⁹ C-280/00, Altmark Trans en Regierungspräsidium Magdeburg [2003] I-0000.

¹⁵⁰ See European Commission, Notice on the application of the state aid rules to measures relating to direct business taxation, C384/4, 1998.

rules. However this existence of similar aid in other Member States will have no effect on the Commission's assessment of this criterion.¹⁵¹

The measure frustrates the internal market if the undertaking which is aided experiences a strengthened position compared with that of other undertakings which are competitors. Under the SE tax scheme, SEs in other Member States would have the opportunity to experience the same advantages. Nevertheless, there is still an effect on trade and competition as comparable companies in any of the Member States which are not organised as an SE would not be eligible for the same benefits. The same conclusion can be drawn from the situation under enhanced co-operation. In that situation companies from specific countries will not experience the same advantages. It would appear that a special tax regime for the SE fails the test because it would affect trade and competition.

4.4. Compatibility with the Common Market

4.4.1. Treaty exceptions to the state aid rules

Article 87 specifies the Treaty-based exceptions to the state aid rules. Since it would appear that a possible tax chapter for the European Company might result in state aid, it is prudent to determine what alternatives exist in case the ECJ decides differently. The Treaty-based exceptions are as follows:

4.4.2. Article 87 (2)

Article 87(2) contains exceptions for where a specific measure is incompatible with article 87(1) EC. If a measure can be classified under one of the exceptions, the European Commission is required to approve the aid as these exceptions are deemed to be compatible with the internal market. The exceptions found in this paragraph are unlikely to be relevant for the situation in which tax advantages arising from a specific tax scheme for the European Company are considered to be state aid.

4.4.3. Article 87 (3)

Article 87(3) provides some general exceptions. Three out of the five exceptions may be relevant in a case where tax advantages for the European Company are considered state aid under article 87(1) EC. In these situations the European Commission has discretionary powers. While paragraphs 3 (a) and (d) will not help in justifying incompatible state aid, paragraphs 3 (b), (c), and (e), discussed below, may provide an exception.

4.4.3.1. Article 87, paragraph 3, letter b

Letter b reads as follows:

¹⁵¹ See above 'Notice, Box no.4, p. 6.

The following may be considered to be compatible with the common market: aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State

The question could arise whether the tax regime is an important project of common European interest. From case law we know that a project can only be considered to be of common European interest provided that it forms part of a trans-national European programme supported jointly by a number of governments of the Member States.¹⁵² It would appear that the SE-regime itself to be covered by this description, as the tax regime will be introduced after 8 October 2004 one could argue that this is also a project of common European interest. One could take the position that the tax regime is a necessary part of the SE regime so that the SE succeeds as an important project of common European interest. There is a substantial risk, that without a tax paragraph the results of the SE regime from a European point of view will be disappointing.¹⁵³ However, there seems to be no reason why they should be connected. The favourable tax regime would be just as important to businesses which do not operate through an SE.

But suppose that a tax paragraph for the European Company can be a project of common European interest, the question arises whose opinion is decisive in first instance? The case law indicates that it is for the Commission itself to consider whether aid to promote the execution of an important project of common European interest may be compatible with the internal market. It follows that the Commission enjoys discretion in this matter.¹⁵⁴ Whether the ECJ would support the Commission would depend on whether the Commission gave adequate reasons for the decision.

4.4.3.2. Article 87, paragraph 3, letter c

Letter c reads as follows:

The following may be considered to be compatible with the common market: aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest

In Commission documents, (c) is closely related to (a), which addresses regional aid. It includes aid that can be approved as compatible if the aid is provided to a qualified economically underdeveloped region. This implies that it would not be a generally applied exception for the European Company, since establishments in the several Member States would be in regions which are economically underdeveloped compared to the national average. The question, which still remains, is whether the exception can be applied 'to facilitate the development of certain economic activities'. Although the European Company is a new concept which might fit this description, it does not seem likely that this

¹⁵² See Case 62/87 and 72/87, Glaverbel.

¹⁵³ Fédération des Experts Comptables Européens, Position paper on the taxation of the European Company (Societas Europaea) (2003)

¹⁵⁴ See Case 62/87 and 72/87, Glaverbel.

exception would apply. This conclusion is based on the fact that this exception is meant to be applicable to regional situations or specific activities that need to be supported in order to keep them alive and because these activities are perceived as being necessary in the internal market.

4.4.3.3. Article 87, paragraph 3, letter e

Letter e reads as follows:

The following may be considered to be compatible with the common market: such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.

This provision represents a “catch-all” exception. The Council can exempt state aid measures that would qualify as an infringement on the prohibition of state aid on the advice of the Commission.

However, the Commission and the Council are required to exercise their discretion consistently with Community law and without distorting the single market (*Matra*, C-225/91; *Glaverbel* 62, 72/87). The aid must be proportionate and avoid arbitrariness.

4.4.4. Applying the exceptions in article 87(3)

General considerations in respect of Art. 2 EC et seq. might only be of relevance in respect of Art. 87 (3) EC.

The European Commission alone (in respect of Art. 87 (3) (b) EC) and together with the European Council (in respect of Art. 87 (3) (e) EC) disposes of a wide discretion.¹⁵⁵ The ECJ¹⁵⁶ respects such discretion and limits its judicial review to the question of whether the decisions are obviously erroneous and observe the proportionality principle, i.e., the aid must be necessary, capable of achieving a goal and may not be disproportionate in relation to the goal.

In respect of Art. 87 (3) (b) EC, it would be debatable whether it would be justified to regard the promotion of the SE company form as such as an "important project of common European interest", while the SE is "competing" with other company forms that suffer the same cross-border tax problems as the SE without application of a special tax regime.

Following this line of thinking, if Art. 87 (3) (b) EC were to be applied with a view to overcoming cross-border tax problems state aid to undertakings operating in the form of an SE under a special SE tax regime, the following conditions would have to be applied:

¹⁵⁵ See e.g. ECJ Judgement of 19 September 2000, Case C-156/98, *Germany v. Commission*, [2000] ECR I-6857, section 57.

¹⁵⁶ See e.g. ECJ Judgement of 19 September 2000, Case C-156/98, *Germany v. Commission*, [2000] ECR I-6857, section 71; CFI Judgement of 5 November 1997, Case T-149/95, *Ducros v. Commission*, [1997] ECR II-2031, section 63 et seq., 68.

- The special SE tax regime would have to be a pilot project with a view to developing and opening the regime up to all undertakings that exist under the laws of the Member States that are comparable to the SE and have the same cross-border operations.
- The pilot scheme would have to be limited in time (excluding prolongations) and amounts, and the limitation of amounts would require alternative calculations of tax burdens.

Even if this could be technically arranged, questions could be raised, for example:

- A potential tax advantage would result in operating aid, which has in the past been viewed in European Commission practice in a very critical light.¹⁵⁷ Where allowed at all operating aid is linked to certain material goals rather than to the recipient being organised in a particular legal form that competes with other legal forms or confined to regions covered under Art. 87 (3) (a) EC.¹⁵⁸ It is doubtful that such aid would fit into the general state aid policy of the European Commission.
- Would the granting of state aid in favour of a particular legal form be necessary for dealing with cross-border tax obstacles? Traditionally, the introduction and application of new tax rules is rather a question of involvement of the tax authorities in proper drafting and training. Would a real life test be necessary or could the test not be run on a hypothetical basis?
- The granting of state aid under the special SE tax regime could only be regarded as necessary and capable of achieving its goal if the pilot project were able to provide sufficiently wide data and experience. Particularly but not only in case of an optional regime, the number and range of participating entities would have to be realistically estimated in advance in order to allow a realistic judgement in this respect.

4.4.5. Compatibility with EU law

In addition to the specific state aid aspects, it was observed that any state aid would have to comply with EU law in other respects.¹⁵⁹ This aspect would be of particular relevance taking into account doubts in respect of equal treatment and/or the non-discrimination principles.

It was mentioned that a potential infringement against these principles would also have special state aid repercussions, as the selection of the undertakings (even if participating in a pilot project), i.e. the aid

¹⁵⁷ See e.g. commission decision of 17 February 2003, (2003/755/EC), Belgian Coordination Centres, OJ L 282, 30.10.2003, p. 25 et seq. sec 115; see Commission notice on the application of the state aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, p. 3 et seq., section 32, p. 8.

¹⁵⁸ See e.g. Information from the Commission – Community framework for state aid for research and development, OJ C 45, 17.2.1996, p. 5 as amended by Commission communication amending the Community Framework for state aid for Research and Development, OJ C 48, 13.2.1998, p. 2 as prolonged by Commission communication concerning the prolongation of the Community Framework for state aid for Research and Development, OJ C 111, 8.5.2002, p. 3; Community guidelines on state aid for environmental protection, OJ C 37, 3.2.2001, p. 3; Guidelines on national regional aid, point 4.15, OJ C 74, 10.3.1998, p. 9 et seq., 16.

¹⁵⁹ See Commission notice on the application of the state aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, p. 3 et seq., sec. 29; ECJ Judgement of 19 September 2000, Case C-156/98, Germany v. Commission, [2000] ECR I-6857, section 78 et seq.

recipients results might be arbitrary, therefore excluding such aid from pursuing valid treaty goals and passing the proportionality test.

4.4.6. Legal remedies

Finally, the approval of a state aid programme in the form of a special SE tax regime could be appealed against by interested parties, i.e., competing undertakings in accordance with Art. 230(4) EC.

4.5. Conclusion

In our opinion, a special tax regime for the SE would risk creating an advantage within the meaning of the state aid rules. If the regime was implemented outside the Community legal framework, such aid might be imputable to Member States. If the regime was selective in its application it would need to be notified to the European Commission.

Possible compliance cost savings are unlikely to constitute state aid. However, tax savings would constitute state aid if not compensated for directly on the same level and in the same Member State; and the amount of state aid would have to be determined.

It may be possible to justify an advantage for the SE arising through a special tax regime. Any aid must nevertheless be proportionate. Granting of aid to the SE could not be justified if it resulted in infringements of the principles of equal treatment or non-discrimination.

5. EU commitments to the WTO

5.1. The field of study

Would this situation conflict with the EU commitments on non-discrimination or subsidies in the WTO?

5.2. The EU's binding agreement with the WTO

The World Trade Organisation (WTO) came into being on 1 January 1995, under the Marrakech Agreement Establishing the WTO (WTO Agreement). The WTO Agreement creates a common institutional framework for conducting trade relations between its members. It covers the implementation, administration and operation of a number of multilateral trade agreements, which are listed in annexes to the WTO agreement.

The main trade agreements are binding on all members and include:

- The updated General Agreement on Tariffs and Trade (GATT 1994), including protocols, understandings and side agreements;
- The General Agreement on Trade in Services (GATS), including annexes;
- The Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS);
- An Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU);
- A Trade Policy Review Mechanism (TPRM).

The European Community is a contracting party to the WTO (WTO agreement article XI). The WTO agreement is binding on the European Community and on the Member States.

It follows that a conflict between a specific tax scheme for the SE and the EU's commitments with the WTO could lead to a dispute in national courts, the European Court of Justice, the Court of First Instance, or under the WTO DSU.

5.3. Would income tax legislation for the SE be a generally applicable tax measure outside the scope of the WTO Agreement?

WTO rules are not restricted in their scope to indirect taxes, but cases concerning income tax legislation are rare. There are early cases concerning family allowances in Belgium (1952) and a complaint by Austria concerning income tax waivers in Italy. More recently, the European Communities have complained to the WTO about the US direct tax rules for DISCs (1976) and FSCs (1998), and the complaints have been upheld. In May 1998, the US complained to the WTO about direct tax rules in EU Member States, including measures in Belgium, France, Greece, Ireland and the Netherlands. The complaints concerned tax advantages which were linked to exports.

A special tax regime for the SE might typically be expected to be within the scope of the WTO agreement only if it had a harmful effect on the export of goods, services or intellectual property – for example, an explicit subsidy for exports. HST and CBT as currently envisaged do not contain an explicit subsidy for exports. They would be generally applicable systems for the taxation of the SE. There would not be tax provisions linking the specific tax consolidation framework to the production or sales of goods by the SE. The level of taxation of the company would be tied to its legal form.

It is not necessarily the case that every SE will export. But it is conceivable that an SE will be engaged in cross-border provision of goods and services. Indeed, it cannot be excluded that the SE legal form would only be used in practice by exporting businesses, some of which would export goods and some of which would export services. Formation by merger is available only to public limited companies from different Member States. Formation of an SE holding company is available to public and private limited companies with their registered offices in different Member States or having subsidiaries or branches in Member States other than that of their registered office. The purpose of the SE is to facilitate the removal of barriers for such businesses within the EU. As a minimum, it is likely that, following formation of the SE, the cross-border exchange of goods and services within a group will increase. For example, head office may centralise accounting functions. A subsidiary may consolidate distribution functions.

These flows of goods and services might be viewed as purely internal when looking at the EU as a whole, but they could be viewed as exports from the point of view of a WTO member. If the specific tax regime is available only to the SE and favours the SE compared with other producers then the tax regime would not necessarily be generally applicable from the point of view of a WTO member but might instead be considered by it to be linked to exports.

That possibility is remote because, although access to the SE specific tax regime might be linked to the existence of an exporting business, the benefits of the specific tax regime are not directly linked to the level of exports – they are linked to the performance of the business as a whole.

Bearing in mind from the outset that the possibility of a conflict with WTO commitments is remote, nevertheless, the following analysis considers the features of the WTO Agreement that would be relevant to the design of a specific tax regime and evaluates the legal problems that might result if there was a conflict.

5.4. EU commitments on non-discrimination in the WTO

The WTO's main goal is the removal of discriminatory practices in international trade relations. The main rules are set out in GATT 1994, but there are similar rules in GATS and TRIPS. Contracting parties agree to apply two non-discrimination rules:

- The most favoured nation (MFN) principle – no discrimination between foreign countries (subject to exceptions in GATT 1994 article XXIV and GATT 1994 part IV);
- The national principle – no discrimination between foreign and domestic products (subject to exceptions relating to purchase of goods by governments and to subsidies paid by governments to domestic producers).

5.4.1. Interpretation of WTO most favoured nation rules

There might be a MFN violation if, indirectly, intra-EU imports and exports will be favoured over imports into the EU and exports from the EU. It is an empirical question whether this is really likely to happen. It does not appear likely that there would be a MFN violation.

If a specific tax scheme for the SE were to breach the MFN, it might be argued that the objective of fiscal support for the SE is greater economic integration. There is an exception to the MFN for economic integration, covered by article XXIV(4). The exception for economic integration covers a customs unions falling within XXIV(4(8)), and is generally understood to include the EU Customs Union but does not except preferential treatment. There is nothing in article XXIV to support the conclusion that economic integration arrangements are permitted when they impose trade barriers on other members.

If a specific tax scheme for the SE were found to breach the MFN, WTO case law suggests that the breach would not be justified by other balancing factors. The European Communities might argue that an EU operator would have the option of forming an SE, which would bring with it duties to make arrangements for the involvement of employees in management of the SE under Council Directive 2001/86/EC. In a US case concerning restrictions on the import of non-rubber footwear from Brazil (1992), the MFN forbade the balancing of more favourable treatment under certain procedures against less favourable treatment under other procedures.

In an Indonesian case concerning car production (1998), a preferential tax regime for imports including exemption from duty and luxury car tax was available where the car producer had contracted to produce a car in Indonesia. The panel held that the MFN required that such advantages could not be conditional upon such a contract.

This implies that article I(1) of the WTO Agreement will only apply to a specific tax scheme for the SE if it can be argued that it brings a selective advantage, favour, privilege or immunity to particular Community products.

5.4.2. National treatment on internal taxation and regulation for products

When considering the treatment of an imported and domestic product (the first sentence of III(1)), it is appropriate to ask:

- Are the imported and domestic products alike?
- Are internal taxes applied in excess of those applied to domestic products?

If competition was involved between, on the one hand, a product benefiting directly or indirectly from a preferential specific tax scheme for the SE and, on the other hand, a directly competitive or substitutable product which was not similarly taxed, then to identify an infringement of III(1) (the second sentence of III(2)), it is appropriate to ask:

- Are the products directly comparable and substitutable?
- If the products are not like products, are the products not similarly taxed?
- If the products are not like products, is the measure applied so as to afford protection?

This implies that article III(2) will only apply to the introduction of a specific tax regime for the SE if it can be argued that the effect and intention of the scheme is to afford protection to Community products.

It is unlikely that article III(2) would be applied to a direct tax regime for the SE, as it speaks of taxes to which products are subject or that are applied to products.

A national treatment violation seems unlikely. As with the Most Favoured Nation principle, it is not possible to assess without empirical evidence whether SEs will sell more EU goods rather than imports with a significantly stronger predominance. There is no particular reason to conclude that this would be the case.

So article III(2) is unlikely to apply, and even if it did (or alternatively under article III(4), if applicable), there is no indication that there could be a violation.

5.4.3. National treatment tax carve-out for services

Although GATS contains a commitment to national treatment for services (article XVII), it also contains a broad carve-out for tax measures (article XIV).

There are few cases indicating how the tax carve-out in GATS might be interpreted by a WTO panel.

Drawing on panel reports on a similar provision in GATT, the purpose of the requirement in the carve out that measures are not applied in an arbitrary or unjustifiable way is to prevent abuse of the carve-out (Gasoline case, US, 1998).

For the carve-out to be ineffective, the specific tax regime proposed for the SE would need to undermine the WTO agreement in such a way that threatened the security and the predictability of the WTO trading system (Shrimp-Turtle case, US, 1998). This seems very unlikely.

5.5. Commitments on subsidies in the WTO

5.5.1. Subsidies

Not all subsidies are prohibited. WTO rules prohibit certain subsidies defined within its framework. Contracting parties are permitted to take defensive action to protect domestic industries from subsidised imports. The WTO commitments are set out in GATT 1994 article XVI and in detailed rules within the Agreement on Subsidies and Countervailing Measures (SCM Agreement), agreed as part of the Uruguay Round.

A specific tax scheme for the SE will provide a subsidy if there is a financial contribution by a government of revenue that is otherwise due which is foregone or not collected (article 1.1(a)(1)(ii) of the SCM Agreement) and a benefit is conferred (article 1.1(b)). Therefore, a subsidy may exist where an SE is exempted from a tax liability which it would otherwise have incurred if it was not an SE.

Whether there is actually a subsidy will depend, on which benchmark is used. In many national systems of direct taxation, there are different tax rates and bases for different legal forms, notably for legal entities on the one hand (e.g. joint stock company) and partnerships on the other. These differences of tax treatment often exist because there are substantial differences in the characteristics of the different kinds of legal entity.

It might be the case that the tax regime for an SE would be considered the normative benchmark for the purpose of determining revenue foregone under Article 1.1 of the SCM Agreement. This would be an EC-wide benchmark and would exclude any financial contribution.

On the other hand, there would be a financial contribution if the benchmark is the situation which would have existed for an undertaking without the SE.

A benefit is measured by its effect on the recipient rather than its cost to the government or governments. The WTO panel in the case Canada - Measures affecting the Export of Civilian Aircraft (2000) stated:

“The “benefit to recipient” standard adopted by the Panel, and affirmed by the Appellate Body, states that a “benefit” exists if a recipient has “received a ‘financial contribution’ on terms more favourable than those available to the recipient in the market.”¹⁶⁰

¹⁶⁰ Appellate Body Report, para. 157; Panel Report, para. 9.112.

A specific tax regime for the SE would be a benefit if it resulted in a lower corporate tax burden. The reduction in corporate tax burden would be a financial contribution. A reduction might meaningfully be measured by comparison with what the tax burden would have been if the specific tax regime had not applied.

The obligation to comply with national tax laws is a non-financial commitment of a company. A reduction in costs is not the same as revenue foregone. Nevertheless, if a benefit is measured by its effect on the recipient then a reduction in tax compliance burden under a specific tax regime for the SE is a form of economic support for the SE and is capable of being interpreted as a benefit.

5.5.2. Prohibited subsidies

Specific prohibited subsidies are further identified in article 3.1 of the SCM Agreement:

The Appellate body (2000) in the Canadian aircraft case explained that the subsidy must also be contingent on export performance.

There is a risk that a specific tax scheme for the SE could conflict with WTO Agreement commitments on subsidies. Annex I of the SCM Agreement contains an Illustrative List of Export Subsidies, which includes the total or partial exemption, remission, or deferral specifically in view of exports, of direct taxes paid by industrial or commercial companies (SCM Agreement Annex I (e)). Direct taxes means “taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property”.

The SCM Agreement is intended to cover those direct tax measures which are imposed to subsidise exports and not a specific tax scheme that is generally applicable. Nevertheless, if one of the unintended effects of the specific tax scheme was to operate as a tax subsidy for exports, there may be a conflict.

This implies that a specific tax scheme operating HST or CBT would provide a subsidy if:

- the SE paid less tax than it would otherwise have paid – this would be a benefit to the recipient arising from revenue foregone by a government; and
- the benefit was contingent in law or in fact upon export performance.

A specific tax scheme such as HST or CBT would not normally be expected to make the conferral of a benefit contingent in law on export performance. It seems unlikely that circumstances would arise where the effect of such a specific tax scheme is that a subsidy is contingent in fact on export performance.

5.6. Whether the dispute resolution procedure gives rise to negotiations or a right of compensation

The WTO's dispute resolution procedures are contained within Annex II to the WTO, the Understanding on Rules and Procedures Governing the Settlement of Disputes.

Article 3 of Annex II provides for negotiations between conflicting parties, as well as compensation in certain circumstances¹⁶¹:

The primary aim of the dispute resolution procedures is to achieve a mutually acceptable solution via negotiations. Compensation is provided for only as an interim measure where immediate compliance with WTO agreements is not possible¹⁶².

The rules governing the payment of compensation are contained in Article 22 of Annex II¹⁶³. Article 22 is clear in expressing that this option is voluntary and temporary, and is only to be considered following negotiations between the parties. It is also clear that even in the last resort, there is no "right" to compensation, as the provision for the payment of compensation is entirely voluntary.

If there was a conflict between a specific tax scheme for the SE and the EU's commitments in the WTO, it could lead to a complaint by an aggrieved party before a domestic court of a Member State, leading to a referral to the ECJ, or to an action by a national government (or the European Commission) with a request to invoke the WTO's dispute settlement procedure.

The present state of ECJ case law suggests that there would not be any practical consequence of a complaint before a domestic court of a Member State – unless that Member State's own legal order requires it to give direct effect to the WTO Agreement. A referral to the ECJ would be unlikely to elicit a ruling that the WTO Agreement has direct effect within the EC legal order.

A dispute before the WTO could be resolved by agreeing to remove the specific tax measure for the SE following negotiations, rather than by paying compensation. In the context of a pilot tax project, the withdrawal of the measure would be a planned contingency within the temporary context of the pilot scheme and would not be expected to give rise to legal problems.

5.7. Whether the EU commitments have direct effect in the EC

5.7.1. The binding nature of the WTO Agreement

¹⁶¹ Annex II, Article 3(7).

¹⁶² Ibid, Article 22.

¹⁶³ Ibid.

Within the system of the WTO, the core agreements are “binding on all members” (article II (2) of the WTO Agreement).

Within the European Community legal order, EU commitments in the WTO are binding on the EU and on Member States under article 300 (7) EC, which states:

“Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States.”

5.7.2. Direct effect in the EC and international agreements

WTO rules are part of the EC legal order and have direct application – although it is questionable in the present state of ECJ case law whether they have direct effect.

In a series of cases considering international agreements concluded by the EC, the ECJ has never held that international agreements are capable of having the same kind of direct effect as Community measures within the Community legal order.

5.7.3. Direct effect and GATT 1947

In *International Fruit Company NV v Produktschap voor Groenten en Fruit (1972)*¹⁶⁴, the ECJ considered both the broad issue of whether international law could be given direct effect, and specifically, whether GATT 1947 was capable of direct effect for the purposes of challenging the validity of Community law. The ECJ decided that GATT provision in question was “not capable of conferring on citizens of the Community rights which they can invoke before the courts”.

The GATT 1947 agreement included scope for negotiation and derogation, so that the obligations and rights it created were too uncertain to be given direct effect. So in *International Fruit Company*, the ECJ confirmed the possibility in theory that international law may be given direct effect by the ECJ or national courts, but did not consider in practice that the GATT 1947 agreement satisfied the basic requirements for direct effect in the EC: that the binding commitment under international law must be clear, unconditional and precise.

In *Federal Republic of Germany v Council of the European Union (1994)*¹⁶⁵, the ECJ restricted the possibility of GATT 1947 agreement provisions having sufficient direct effect to override a Community measure to circumstances where¹⁶⁶:

¹⁶⁴ C21-24/72, *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*.

¹⁶⁵ C280/93, *Federal Republic of Germany v Council of the European Union*.

¹⁶⁶ *Ibid*, Para 9.

- the Community intended to implement a particular obligation entered into within the framework of GATT, or
- the Community act expressly refers to specific provisions of GATT.

5.7.4. Direct effect and GATT 1994

From 1 January 1995 the WTO Agreement introduced a more formal dispute resolution mechanism, as well as creating a larger body of rules and provisions which mean that the reasoning of *Germany* and *International Fruit Company* may no longer apply. The ECJ's decision in the first post-WTO case, *Portugal*¹⁶⁷ explains a modestly revised approach to WTO agreements.

In *Portugal*, as in both *Germany* and *International Fruit Company*, the applicant attempted to obtain the annulment of a Community measure on the basis that it conflicted with provisions of the WTO agreements.

Despite the transition from GATT 1947 to GATT 1994 and the WTO, the ECJ continued to deny direct effect. The reasoning was based on three issues:

- The need not to limit the scope for negotiation in the DSU¹⁶⁸
- The risk of a lack of reciprocity between EU and other WTO Member States¹⁶⁹
- The lack of any intention to give the agreement direct effect¹⁷⁰

5.8. Whether a specific tax project for the SE that conflicts with the WTO Agreement would give rise to legal consequences

If there was a conflict with the WTO Agreement - although the possibility seems remote - it would then be relevant to consider whether there would be consequences at the EC level. In summary, there could be consequences, but it seems unlikely.

¹⁶⁷ C-149/96, Portuguese Republic v Council of the European Union.

¹⁶⁸ C-149/96, Portuguese Republic v Council of the European Union, Paras 37-41.

See also Craig, Paul & de Burça, Grainne: EU Law, Oxford University Press, 2002, p198.

C-149/96, Portuguese Republic v Council of the European Union, Para 41-42.

Griller, Stefan: Judicial enforceability of WTO law in the European Union, Annotation to Case C149/96, Portugal v Council, *Journal of International Economic Law*, 2000, p447-450.

C-104/81 Hauptzollamt Mainz v Kupferberg.

Craig, Paul & de Burça, Grainne: EU Law, Oxford University Press, 2002, p195.

¹⁶⁹ C21-24/72, International Fruit Company NV and others v Produktschap voor Groenten en Fruit, Paras 10-12

C149/96, Portuguese Republic v Council of the European Union, Para 42.

T18/99, Cordis Obst und Gemüse Großhandel GmbH v Commission of the European Communities.

¹⁷⁰ Craig, Paul & de Burça, Grainne: EU Law, Oxford University Press, 2002, p195. See also, von Bogdandy, Armin & Makatsch, Tilman: Collision, Co-existence or Co-operation?, *The EU and the WTO: Legal and Constitutional Issues* (Hart, Ed. de Burça, G and Scott, J), 2001, p147.

C69/80 Nakajima All Precision Co Limited v Council of the European Communities.

Zonnekeyn, G: The Status of WTO Law in the Community Legal Order: Some Comments in Light of the Portuguese Textiles Case, *ELRev*, 2000, p293, 302.

On the one hand, it might be argued that the breach of an international agreement is not a breach of Community law. The argument would be that, even if international agreements are binding, they cannot be invoked by individuals before the EC or the national courts (SIOT, 266/81). The WTO agreements have no direct effect. The WTO rules bind the members to follow procedures whose main objective is a balance in trade concessions - so there is no purpose to protect the interests of companies (Dior and others, C-300/98, C302/98).

On the other hand, the WTO rules confer rights on individuals. Following the Nakajima¹⁷¹ case, the WTO rules are rules protecting companies and they confer or imply rights in their favour - at least they do in the limited circumstances in Nakajima, where the rules were adopted to transpose WTO rules into EC law.

For the purposes of an action for compensation following a breach of a WTO rules, it is sufficient that the WTO rules are intended to protect the interests of producers and it is not necessary for the rule to have direct effect (Kampffmeyer and others, cases 5/66, 7/66, 13 - 24/66).

The ECJ has indicated that a legal person may invoke the breach of a rule of international law in order to establish the non-contractual liability of the EC after expressly finding that the rule in question does not have direct effect. Direct effect is not required for the WTO Agreement to be invoked and to be legally binding. In *Nakajima All Precision Co v Council*, the ECJ stated that the:

“possibility of calling into question ... the validity of the ... regulation on the ground that it is at variance with an international agreement ... does not presuppose that that agreement has direct effect”¹⁷².

In *Nakajima*, the ECJ considered that the possibility exists that the provisions of a WTO agreement can be invoked to review the legality of Community law. This judgement is consistent with *International Fruit Company*, in which the ECJ conceded that the provisions of the GATT 1947 bound the Community.

The claimant can rely on the presence of a complex set of factors which, combined, constitute illegal behaviour giving rise to damage - such as an omission to take steps (Kampffmeyer). It is not necessary to show a breach of a directly applicable superior rule of law.

However, later cases *Germany* and *Portugal* placed restrictive criteria on invoking the WTO agreement. Nevertheless, for some the Nakajima case is evidence of the obligation of harmonious

¹⁷¹ C-69/80 *Nakajima All Precision Co Limited v Council of the European Communities*.

¹⁷² *Ibid*, Para 2.

interpretation. This obligation may help to enhance the effectiveness of the WTO agreements but is limited when WTO agreements come into direct conflict with Community law^{173 174}.

Although both the doctrines of harmonious interpretation and direct effect have been applied to WTO agreements and broader international law by the ECJ, this is rarely the case where the effect is to challenge the validity of a Community measure. If a specific tax scheme for the SE were to conflict with commitments in the WTO Agreement, in the present state of Community law and international law no adverse consequence would be expected.

5.9. Process for raising potential discrimination or subsidy issues with the WTO

There is no clear procedure for WTO Members to seek formal consultation concerning potential discrimination or subsidy issues prior to the application of a measure.

The WTO panel will normally only consider a measure once its implementation has been announced.

When the specific tax regime for the SE has been developed then, to minimise the risk of conflict, an attempt could be made to notify the proposed pilot tax scheme to the WTO prior to implementation.

In the meantime, nothing prevents the Commission's legal experts from engaging in informal consultation with the legal experts of the WTO general secretariat.

5.10. Conclusion

In our opinion, the possibility of a conflict with WTO commitments is remote because the benefits of the proposed specific tax regime are not directly linked to the level of exports.

Even if there is a conflict, there is unlikely to be any consequence within the Community legal order. The ECJ has not treated the WTO Agreement as having direct effect, because the dispute resolution procedure in the agreement gives rise to negotiation aimed at withdrawal or amendment of the measure, with compensation available only as an interim relief.

¹⁷³ Craig, Paul & de Burca, Grainne: EU Law, Oxford University Press, 2002, p195.

¹⁷⁴ Zonnekeyn argues that as direct effect will not be given to WTO agreements, legality control of Community acts remains impossible. Zonnekeyn, G: The Status of WTO Law in the Community Legal Order: Some Comments in Light of the Portuguese Textiles Case, *ELRev*, 2000, p293, 302.

6. Discrimination between legal forms and between businesses

6.1. The field of study

Would the different tax treatment of international companies run under a national legal form and of those run as SEs be discriminatory under the general treaty rules?

Would the different tax treatment of domestic and international companies be discriminatory under the general treaty rules?

6.2. Interpreting the questions

The reference to "international companies" in the questions to be examined is understood to address the situation of enterprises of an EU Member State with international operations and/or shareholders and/or subsidiaries and/or permanent establishments in another of the 25 EU Member States.

The discussion of legal forms is not limited to a comparison of an enterprise existing in the legal form of an SE or a group of enterprises organised solely in the legal form of SEs on the one hand and on enterprise or a group of enterprises organised solely under the legal forms provided by the laws of the EU Member States on the other hand. A realistic approach would require the inclusion of mixed scenarios into the analysis.

Based on the assumption that the SE form was conceived for international enterprises, an SE could be regarded as an international company on parent/head office level due to the fact that it holds subsidiaries or operates permanent establishments in other Member States. On the lower tier, an SE would qualify as (part of) an internationally operating entity if its shareholders or head office are situated in other Member States. Turnover or profit ratios seem, however, to be irrelevant in this respect.

In contrast, a domestic operating entity would not have foreign permanent establishments or subsidiaries or shareholders situated abroad.

It is noted that – although this would not be the typical case – an SE could be a national company too, if it did not have foreign subsidiaries or permanent establishments or a majority of direct foreign shareholders. This might be the case of a subsidiary SE whose shareholder is a 100% domestic SE, unless the criterion of internationality were extended to take into account the facts up until the ultimate parent level.

It should be pointed out that, as far as can be seen, the question whether or under which circumstances a special SE tax regime might lead to discrimination has not yet been discussed in detail in literature.

Various authors point out or allude in general terms to the fact that a special SE regime could lead to discrimination.¹⁷⁵

6.3. Different tax treatment of domestic legal forms and the SE

It is appropriate to analyse to what extent the two SE tax regimes would result in different treatment, although there might exist a comparable situation and to what extent this might be in the ambit of EU law. Finally, the question will be discussed whether any unequal treatment or discrimination might be justified.

6.3.1. Tax treatment

A distinction needs to be made between HST and CBT.

6.3.1.1. Home State Taxation

Home state taxation would lead to the application of different tax rules in the home state and the host state in respect of entities taxable in the host state depending on (i) whether a qualifying SE structure exists or other companies of a company form under the law of a Member State would be involved and (ii) the tax rules of the respective home states. HST might result in advantages or disadvantages in respect of tax burden and compliance cost .

Under HST the taxable result of the permanent establishment or a subsidiary would be determined according to the rules of the country of the head office/parent company.

The questions of (loss) consolidation would need to be addressed separately, if HST were pursued any further. The home state might still regard the foreign permanent establishment and wish to apply its particular home state rules of international taxation and DTC rules and to apply exemption, credit, and loss relief with recapture or other methods. These rules may deviate from the rules the home state would apply to a domestic head office with a domestic permanent establishment. Similarly, home state tax rules would decide on whether or not or which system of (loss) consolidation might apply to (a chain of) subsidiaries irrespective of the rules of the Member States of the subsidiaries.

Further, the home state might, for example, make tax consolidation between parents and subsidiaries subject to material conditions (such as agreements) and formal conditions (such as form of agreements, registration) conditions based on its corporate and commercial law, which could legally not be complied with due to diverging corporate and commercial laws in (certain) other countries.

¹⁷⁵ See e.g. Thoemmes, *World Tax Advisor*, September 2003, p. 1; Gammie, *European Taxation*, January 2004, p. 35 et seq.; Helminen, *European Taxation*, January 2004, p. 28 et seq.; 34; Wenz, *European Taxation*, January 2004, p. 4 et seq.; 7; Kreile/Wachenhausen, *Der Betrieb*, 1976, p. 1687 et seq.; 1688; Kessler/Achilles/Huck, *Internationales Steuerrecht*, 2003, p. 715 et seq.; 720; Kessler/Schmalz, *Praxis Internationale Steuerberatung*, 8/2002, p. 210 et seq., 211, 212.

These differences could result on parent/head office level and/or on permanent establishment or subsidiary level in advantages and/or disadvantages consisting in a lower/higher effective tax burden and savings/increase of compliance cost.

In practice, this evaluation might differ depending on the countries involved and/or which of them would be the home state; it might also differ between a permanent establishment and a subsidiary situation. The result might also differ between an analysis of the individual levels and an analysis of the group as a whole and depend on the profit or loss situation of the group as a whole or the respective permanent establishment or entities.

The result might further differ depending on whether it is based on the home state tax national and DTC rules as they are or on home state and host state tax rules as they should be taking into account proper application of the EC Treaty and the secondary EC law.

6.3.1.2. Common EU Tax Base

CBT would lead to the application of different rules in respect of entities taxable in the home state and/or the host state depending on whether a qualifying SE structure exists or other national forms are involved. CBT might result in advantages or disadvantages in respect of the tax burden and compliance cost.

Therefore, CBT might as the case may be result in an increase or a decrease of the tax basis of the total group or the members of the group. The same could be the result if the allocation key differed from the one applied currently between the respective Member States. These differences could lead in function of the applicable tax rates to a decreased or increased tax burden for a permanent establishment or individual entity and/or the group as a whole.

6.3.2. Comparability of situations

Taking into account the criteria that lead to a different tax treatment, the questions are:

- Are pure SE structures on the one hand and similar structures consisting in part of companies existing under legal forms provided for by the national laws of the EU Member States on the other hand in a comparable situation?
- Are subsidiaries or permanent establishments with parent companies or head offices in different Member States comparable in respect of their tax treatment in the host Member State?

6.3.2.1. Comparability of SE and certain national company forms

It follows from company law and tax law considerations that the SE is comparable at least to a certain number of company forms provided for by the national laws of the EU Member States.

6.3.2.1.1. Legal aspects

6.3.2.1.1.1 Main legal characteristics of the SE

The legal form of Societas Europaea (SE) was created in 2001 by a council regulation¹⁷⁶ and shall be available as from 8 October 2004.¹⁷⁷

A SE is governed by the directly applicable SE Regulation, other directly applicable provisions of EC law, the harmonised laws of the EU Member States and the unharmonised laws of the EU Member States. In addition to many individual and specific references to the laws of the EU Member States, the SE regulation provides explicitly:

*"This Regulation does not cover other areas of law such as taxation, competition, intellectual property or insolvency. The provisions of the Member State's law and of Community law are therefore applicable in the above areas and in other areas not covered by this Regulation."*¹⁷⁸

This principle is enshrined in more detail in Article 9 et seq. of the SE Regulation.

The SE has legal personality.¹⁷⁹ The SE is designed to be used for business purposes.¹⁸⁰

The constitution of the SE is largely modelled on the concept of public limited liability companies as known in the legal systems of the EU Member States and – taking into account existing differences – provides for a certain structural flexibility.¹⁸¹

Subject to the more specific rules of the SE-Regulation, an SE shall be treated in every Member State as if it were a public limited liability company formed in accordance with the law of the Member State in which it has its registered office.¹⁸²

Its accounting is subject to the rules applicable to public limited liability companies under the laws of the Member States in which its registered office is situated as regards its annual accounts and consolidated accounts.¹⁸³

¹⁷⁶ Council Regulation (EC) N° 2157/2001 of 8 October 2001 on the statute for a European Company (SE), OJ L 294, 10.11.2001 p. 1 (in the following referred to as "SE Regulation"). This regulation is complemented by Council Directive 2001/86/EC of 8 October 2001 supplementing the statute for a European Company with regard to the involvement of employees, OJ L 294, 10.11.2001, p. 22. It does not appear that these provisions were amended by the Accession Treaty signed on 16 April 2003 in Athens (see OJ L 236, 23.9.2003, p. 17 et seq.).

¹⁷⁷ See Art. 70 SE Regulation, as above.

¹⁷⁸ Recital 20 SE – Regulation, as above

¹⁷⁹ Art. I (3) SE – Regulation, as above

¹⁸⁰ See e.g. Recitals 1, 4 of the SE-Regulation, as above.

¹⁸¹ See for example Art. 38 (b) et seq. SE – Regulation, as above

¹⁸² Art. 10 SE – Regulation, as above.

¹⁸³ Art. 68 et seq. SE – Regulation, as above

6.3.2.1.1.2 Possible corporate constellations

Although the formation of an SE is limited to certain situations and participating entities¹⁸⁴ the transfer of its shares are not. In the absence of other restrictions an SE can therefore be held by individual and/or corporate shareholders that are governed (i) by the SE Regulation, (ii) by the laws of the EU Member State where the SE has its registered office, (iii) by the laws of another EU Member State or (iv) by the laws of a Non-Member State.

Similarly an SE can maintain branch offices/permanent establishments in the same or another EU Member State or a Non-EU-Member State.

An SE can hold all, majority or minority shares in corporate entities that are governed (i) by the SE Regulation, (ii) by the national laws of the EU Member State, where the SE has its registered office, (iii) by the national laws of another EU Member State or (iv) by the laws of a third country.

Further there does not seem to be a provision in the SE Regulation that would prevent an SE from becoming a Member or partner in any partnership or similar entity governed by the laws of any of the EU Member States or a third country.¹⁸⁵

Finally an SE might well have no permanent establishment, hold no share in a subsidiary or hold no participation in any partnership or similar entity.

It follows from the above that the SE is a company form that “competes” with company forms provided for by the national laws of the EU Member States or non-EU Member States.¹⁸⁶ Given the specific provisions for the formation of an SE and good business reasons¹⁸⁷, it may be assumed that the implementation of SE structures in their purest form, i.e. an SE with registered office in one Member State and branch offices in (all) other Member States, will likely be the exception. It might rather be expected that the company form of SE will be used in all scenarios allowed for by the SE-Regulation and other EU- and national law, in the same varied way that entity forms provided for by national law of the Member States are currently and will be used in the future.

¹⁸⁴ See Art. 2, 3 (2) SE – Regulation, as above.

¹⁸⁵ As regards to the activities of an SE in third countries, from the perspective of the SE-Regulation, it does not make any difference whether or not such country is member of the EEA or the EFTA or party to an association agreement with the EU.

¹⁸⁶ Same can be said in respect of the future relation between the form of SE and SCE; the latter will be available as from 18 August 2006 (see Council Regulation (EC) n° 1435/2003 of 22 July 2003 on the Statute of a European Cooperative Society (SCE), OJ L 207, 18.8.2003, p. 1; Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, OJ L 2107, 18.8.2003, p. 25.

¹⁸⁷ Eg. implementation – and maintenance formalities; liability limitation; market approach; certain aspects of competition law.

6.3.2.1.2. Tax aspects

6.3.2.1.2.1 Taxation according tax laws of EU Member States

As from 8 October, 2004 the SE will be subject to the national direct tax laws of the EU-Member States and the Double Taxation Conventions concluded by them amongst themselves and with third countries.

It has been suggested that according to Art. 10 SE-Regulation an SE has to be treated for tax purposes as a public limited liability company formed in accordance with the laws of the Member State in which it has its registered office.¹⁸⁸ In the light of the fact that the SE- Regulation does not cover taxation this seems debatable.¹⁸⁹ The same should follow, however, from the Member States' tax and constitutional law and in cross-border situations from the non-discrimination-principles of the EC Treaty.

6.3.2.1.2.2 Adopted and proposed harmonization measures

As regards harmonization of the national direct tax laws of the EU Member States the SE was included in the list of legal entities to which the Parent Subsidiary Directive applies¹⁹⁰.

The inclusion of the SE into the list of legal entities, to which the Merger Directive applies and rules providing explicitly for the possibility of a tax-neutral transfer of the registered office of an SE have been proposed by the European Commission.¹⁹¹

Similarly the extension of the Interest and Royalty Directive was proposed.^{192 193}

In all cases the inclusion was motivated by two facts: the SE is a public limited liability company; it is similar in nature to other forms of company already covered by the respective Directives.¹⁹⁴

¹⁸⁸ See Thoemmes in Theissen/Wenz, *Die Europäische Aktiengesellschaft*, p. 542.

¹⁸⁹ See Recital 20 SE Regulation: see also Terra/Wattel, *European Tax Law*, 3rd ed. 2001, Chapter 12.5, p. 429.

¹⁹⁰ Council Directive 2003/123/EC of 22 December 2003 amending 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 7 of 13.1.2004, p. 41. Member States are required under the text of the amendment directive to comply with the amendment directive by 1 January 2005 at the latest. The question whether this results in discrimination against the SE during the period starting 8 October 2004 and ending 31 December 2004 lies, however, outside of the scope of this analysis.

¹⁹¹ Proposal of the Commission of the European Communities for a Council Directive amending Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, COM (2003) 613 final, Brussels 17.10.2003.

¹⁹² Proposal of the Commission of the European Communities for a Council Directive amending Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, COM (2003) 841 final, Brussels 30.12.2003.

¹⁹³ Again, the question whether non or late adoption and implementation of these Directives by the Council and in the EU Member States may result in discrimination is not within the scope of this analysis. Same applies to the question whether the reservation of the proposed tax neutrality of transfer of registered office of an SE and an SCE would result in discrimination against other company forms.

¹⁹⁴ See Recital 5 Council Directive 2003/123/EC of 22 December 2003, as above. See Recitals 5, 6 of the Proposal for a Council Directive amending Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, COM (2003) 841 final, Brussels 30.12.2003; see Recitals 6, 7 of the Proposal for a Council Directive amending Directive 90/434/EEC of 23 July 1990 on the common

6.3.2.1.2.3 Applicability of non-discrimination principles

As mentioned above, the SE benefits from protection against discrimination and restriction as provided for in accordance with the fundamental right of equality and the specific non-discrimination principles of the EC Treaty.

6.3.2.1.3. Result

In the absence of specific tax legislation for the SE and subject to the timely adoption and implementation of the amendments to the Merger and the Interest and Royalty Directive the SE is subject to current taxation in the same way as comparable (public) limited liability companies established according to the national laws of the EU-Member States. There is nothing that would suggest that an SE is not comparable to a (public) limited liability company that exists under the laws of one of the EU Member States and is in the same group situations.

6.3.2.2. Comparability in case of different host states

The concept of home state taxation would lead in the host state to a different tax treatment in function of the rules applying in the home state to the determination of income. In case all other facts were the same and only the home state differed, the same activity exercised in the host state could be subject to the rules of 25 different Member States.

Taking into account the basic decision that there should be no discrimination in the host state on the basis of nationality or in case of companies' place of registered office, central administration or principal place of business¹⁹⁵, there is no element that would render the exercise of the same activity in the host state by entities from differing home states incomparable.

6.3.3. Applicability of EU law

As mentioned above, there are various scenarios in which the application of the two forms of a special SE tax regime might result in disadvantages.

6.3.3.1. Home State Taxation

It follows from the summary of the principles of equal treatment and of non-discrimination that

- an SE could invoke the basic rights of equal treatment as general principle of community law in the case where it were disadvantaged by the application of the HST system in comparison to non-SEs.

system of taxation applicable to mergers, divisions, transfers of assets and exchange of shares concerning companies of different Member States, COM (2003) 613 final, Brussels 17.10.2003.

¹⁹⁵ See Art. 43, 48 EC.

- an SE could in this situation invoke in addition the freedom of establishment under the EC Treaty; this is due to the fact that the freedom of establishment contains an element that can be described as freedom of choice of form. The reasoning in respect of freedom of choice of form that was applied so far in cases regarding differential treatment of a permanent establishment as compared to a subsidiary appears to be applicable similarly to the differential tax treatment of a national company form as compared to an EC law company form.
- an SE could invoke the fundamental prohibition of discrimination as general principle of community law and the special non-discrimination provisions of the EC Treaty where it was disadvantaged in the host state by the application of the HST system in comparison to SEs from other home Member States.
- a non-qualifying comparable company existing under the laws of a Member State could invoke the basic rights of equal treatment as a general principle of community law and the freedom of establishment where it was disadvantaged by not having access to an advantageous HST system.

6.3.3.2. Common Tax Base

It follows from the summary of the principles of equal treatment and non-discrimination that

- an SE could invoke the basic rights of equal treatment as general principle of community law in the case where it was disadvantaged by the application of CBT in comparison to comparable non-SEs.
- the same would apply to a comparable company existing under the laws of a Member State that would be in the same situation and suffer disadvantages because secondary EU law would end a comparable treatment of an otherwise equal situation .

6.3.3.3. National non-discrimination principles and provisions

For completeness' sake, it should be mentioned that depending on their respective scope and application the national (constitutional) non-discrimination principles and provisions might be invoked in each of the cases mentioned above.

This finding appears to be supported by the fact that as far as can be seen, none of the EU Member States providing for the possibility of cross-border consolidation seems to have reserved such a scheme for entities under one legal form only.

6.3.3.4. Applicability of EU law

It might be suggested that the system that the ECJ developed when interpreting equal treatment or non-discrimination principles might not fit anymore to adequately judge a situation where the result of the application of the specific tax system would be unpredictable.

First of all, the answer to the question of whether the specific tax regime would result in discrimination might be less obvious but remains possible.

Secondly, discrimination or unequal treatment is a question of the result that a system produces rather than of predictability or intent.¹⁹⁶

Thirdly, the fact of unequal and/or discriminatory treatment would remain; particularly under the Home State system, the situations of discrimination or unequal treatment might multiply, therefore aggravating the problem rather than making it disappear.

Although the result of the application of a special tax regime for the SE may be unpredictable, it is unlikely that a special SE tax regime would escape the application of the prohibitions of unequal treatment or discrimination.

6.3.4. Justification of different treatment of SE

In this respect, the case law of the ECJ reveals a long list of discriminating features that could not be justified and a broad range of potential justifications of unequal treatment, which have been rejected by the ECJ. The pending cases before the ECJ and the national courts of Member States reveal further features of national tax systems which are considered to create unjustifiable discrimination. Any potential inclusion of these features would need to be carefully considered when drafting the specifics of a tax regime in order not to create discrimination.

This would be of particular importance in the case of Home State Taxation, as this system might result in export of discrimination or unequal treatment to other countries.

In addition, the following aspects merit discussion:

6.3.4.1. Freedom to tax different company forms differently

This argument would suggest that under EU law different tax treatment could be based on the different legal forms. Taking into account that the SE-Regulation itself and adopted or suggested amendments to the direct tax directives assume comparability for tax purposes with other corporate forms, the argument would seem to allow for a distinction to be based on a formal aspect rather than substantial aspects.

It follows, however, from the case law on the principles of equal treatment and the non-discrimination principles that material rather than formal comparability is the decisive factor.

¹⁹⁶ Epiney in Calliess/Ruffert, Kommentar zu EU-Vertrag und EG-Vertrag, Art. 12 EGV, notes 6, 15 with further references; Bröhmer in Calliess/Ruffert, Kommentar zu EU-Vertrag und EG-Vertrag, Art. 43 EGV, note 20, all with further references.

Generally a different tax treatment between a corporation and a partnership could possibly be justified on the basis of a materially different constitution (e.g. in respect of legal personality, limited liability, capital structure, representation and supervision, personal (limited) liability of shareholders/partners, initiative, control and participation rights of shareholders/partners, liquidation rules and consequences and accounting rules). This distinction would and does in the Member States depend on the material particularities and might lead depending on the particular features to different results in various Member States. As regards the SE, none of the aspects mentioned seems to justify a different treatment as compared for example to corporations existing under the laws of the Member States.

In this respect, the fact that in the majority of situations foreseen in Art. 2 et seq. an SE would have a cross-border permanent establishment or subsidiary does not materially distinguish it from a company existing under the laws of a Member State having a cross-border permanent establishment or subsidiary either. On the contrary, the SE foundation rules require in various instances that a foreign subsidiary or permanent establishment existed already before the foundation of the SE.

Further it is doubtful whether it could be argued successfully that the fact that an SE can change its registered office across borders without being wound up or creating of a new legal person¹⁹⁷ could justify a special SE tax regime. From a practical point of view, it might appear desirable for an SE to benefit in the case of such transfer from a continuation of income determination rules. From a legal point of view, this would, however, not justify the reservation of the SE tax regime to the SE.

The tax rules applicable to the transfer of a SE registered office as such are subject to a proposal to amend the Merger Directive.¹⁹⁸

Home state taxation could not be justified by this argument as it would not achieve the facilitation of the change of registered office. As regards CBT, the following would have to be taken into account: upon change of registered office the SE would become comparable to companies resident in the new home state and having the same or a comparable cross-border presence in the same way the SE was comparable to other corporate entities in the former home state. As regards current taxation, it is difficult to see why the possibility – even if not used – of changing the registered office or the eventual cross-border change of registered office as an extraordinary event would justify a different current taxation during the whole lifetime of the SE.

Secondly, for tax purposes, the change of registered office of the SE is comparable to the cross-border relocation of the actual seat of management as both are taken into account for the determination of unlimited tax liability. Therefore, the case law of the ECJ concerning corporate law consequences of

¹⁹⁷ See Art. 8 SE – Regulation.

¹⁹⁸ European Commission proposal for a council directive amending Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, COM (2003) 613 final, Brussels, 17 October 2003.

the transfer of place of management¹⁹⁹ and more recently on exit taxes²⁰⁰ needs to be taken into account. Also, in some states, it is possible to for companies to redomicile to another territory.

It follows from the company case law that a company having its registered office in Member State A but its place of management in Member State B, has to be recognised in Member State B as an existing company without having to be wound up or creation of a new legal person, as long as it remains recognised as existing legal entity in Member State A.²⁰¹

Furthermore, the ECJ interpreted the freedom of establishment under the EC Treaty as precluding a Member State from taxing as yet unrealised capital gains at the moment when the taxpayer transfers his residence outside that state.²⁰²

It follows from this case law that the SE shares the possibility of changing its fiscal residence with other companies existing under the laws of certain Member States.

Finally, if the SE had a special tax regime reserved for its particular form, this would result in tax discrimination between new entrants. This is due to the fact that in the case of Arts. 2 (2) (b), 2 (3) (b) and 2 (4) SE-Regulation, a two-year waiting period would apply to enter into the tax regime that would not apply for Arts. 2 (1), 2 (2) (a), 2 (3) (a) and 3 (2) SE-Regulation.

6.3.4.2. Compensation

The European Commission pointed out that possible advantages of the special SE tax regime might be subject to compensation by an optional additional tax that Member States would be free to levy.

From a practical perspective, it would seem that such additional levy would make the SE tax regime only attractive if sufficiently important compliance cost savings remained achievable. Additionally, it would be virtually impossible to formulate.

From a legal perspective, tight restrictions would apply to the compensation. First of all, it needs to be taken into account that the ECJ examines the existence of discrimination not on a global or lump-sum basis but in respect of the individual features of a tax system.²⁰³

Secondly, the ECJ rejected repeatedly the argument that a disadvantage may be compensated by other advantages enjoyed by a taxpayer.²⁰⁴

¹⁹⁹ See ECJ Judgements of 10 July 1986, Case 79/85, Segers, [1986] ECR 2375; of 9 March 1999, Case C-212/97, Centros, [1999] ECR I-1459; of 5 November 2002, Case C-208/00, Überseering BV, [2002] ECR I-9919; of 30 September 2003, Case C-167/01, Inspire Art Ltd., not yet recorded.

²⁰⁰ ECJ Judgement of 11 March 2004, Case C-9/02, Hughes de Lasteyrie du Saillant, not yet recorded.

²⁰¹ See ECJ Judgements of 10 July 1986, Case 79/85, Segers, [1986] ECR 2375; of 9 March 1999, Case C-212/97, Centros, [1999] ECR I-1459; of 5 November 2002, Case C-208/00, Überseering BV, [2002] ECR I-9919; of 30 September 2003, Case C-167/01, Inspire Art Ltd., not yet recorded.

²⁰² ECJ Judgement of 11 March 2004, Case C-9/02, Hughes de Lasteyrie du Saillant, not yet recorded.

²⁰³ See above section 3.5.

Thirdly, it seems, however, that the ECJ recognised in the case of Bachmann that a disadvantage and an advantage could be linked on the level of the same taxpayer in such a way that they form a coherent tax system.²⁰⁵ Although it is not clear that the ECJ took into account in its analysis the double taxation conventions concluded by Belgium and although as far as can be seen the ECJ has not acted on the need to preserve the coherence of a tax system in any other case since then, the concept might in theory be used under the following conditions:

- the tax advantage would have to be compensated on the same level (parent, subsidiary or permanent establishment) in the same Member State where it occurs;
- a tax disadvantage in another Member State B could not be set off against the tax advantage in Member State A prior to compensation in Member State A;
- a tax disadvantage in a Member State would have to be compensated for in that same Member State, too;
- taking into account that differing compliance obligations and costs can result in discrimination²⁰⁶ compensation would have to include compliance cost difference, if any, too;
- taking into account that prohibition of discrimination does not depend on de minimis thresholds compensation would have to be exact;
- where the option to compensate is not exercised by a Member State, discrimination remains.

Such requirements might make a system that would be reserved for the SE impractical.

A different approach to the "coherence of tax system" doctrine was taken in a recent opinion delivered by Advocate General Kokott²⁰⁷. According to that approach, cohesion would exist even where two or more taxpayers are involved provided the same income is concerned and a taxpayer receives an advantage only if the other taxpayer effectively (and to the same extent) suffered a disadvantage. This approach would possibly allow cross-border compensation. It remains to be seen, however, whether the ECJ would follow this reasoning and abandon its restrictive approach.

6.3.4.3. Optional system

It follows from the above that a special tax regime for the SE is unlikely to be justified if the option were not available to all enterprises operating in comparable national company forms in comparable situations. Indeed, the option would only be exercised if the tax system were advantageous; the exclusion of comparable non-SEs would be discriminatory.

Furthermore, it would have to be taken into account that as long as an SE system and national systems would co-exist, the national systems and potentially the SE system would continue to develop. Unless

²⁰⁴ ECJ Judgements of 28 January 1986, Case 270/83, *Commission v. France – avoir fiscal*, [1986] ECR 273; of 13 July 1993, Case C-330/91, *Commerzbank*, [1993] ECR I-4017. The same conclusion follows from sections 46 and 47 of ECJ Judgement of 26 January 1999, Case C-18/95, *Terhoeve*, [1999] ECR I-345.

²⁰⁵ See ECJ Judgement of 28 January 1992, Case C-204/90, *Bachmann*, [1992] ECR I-249.

²⁰⁶ See ECJ Judgement of 28 April 1998, Case C-118/96, *Jessica Safir*, [1998] ECR I-1897.

²⁰⁷ AG Kokott, Opinion of 18 March 2004, Case C-319/02, *Manninen*.

both systems developed in parallel the extent of the advantage might change or an advantage might change into a disadvantage. Therefore, in order to minimise discrimination the opt-in and opt-out would need to be possible on an annual basis.

It is true that national schemes, where available, require at times exercising the option for a certain period of time. Typically, the determination of the tax base would, however, in these cases – leaving the specific adjustments following from the group taxation aside – remain the same for companies within the group and outside of the group, as changes to the national rules for the determination of the tax base (e.g., depreciation rules) would be applied to all taxpayers.

This seems also to be the case where a number of Member States apply or discuss cross-border consolidation: on the level of the permanent establishment/subsidiary, its tax base remains to be determined and taxed according to host state rules. On the level of the parent/head office, the income of the permanent establishment/subsidiary is adjusted according to home state standards before consolidation *in order to assimilate them as closely as possible to the national result. The result which is actually taxable in the PE or subsidiary is calculated based on the rules in the second country.*

In the case where the SE had its own tax base that differed from the general rules in the respective Member States, such a connection to the rules Member States would apply to their company forms, would not be given.

Supporters of an optional scheme might argue that the price of the risk of opting into the SE tax regime is the amount of the advantage (or disadvantage). This argument has been consistently rejected by the ECJ.

6.3.4.4. Pilot scheme

A pilot scheme that is reserved to the SE could not be justified, unless compensation was provided for. A special tax scheme for the SE would result in discrimination, regardless of whether whether the proposed scheme, based on HST or CBT, were optional for international enterprises²⁰⁸. It would reserve an advantageous treatment (- without which the option would not be exercised -) to international enterprises that would not respect horizontal comparability to their national counterparts. Fundamentally similar doubts exist in respect of the question whether the introduction of new discrimination could be justified as a pilot scheme as in respect of the question whether state aid could be justified as part of a pilot scheme.

Unless compensation was applied, a pilot scheme would itself cause discrimination between international and national companies. The final scheme would have to include a harmonised tax basis throughout the EU applicable in cross-border and domestic situations.

²⁰⁸ ECJ Judgements of 8 March 2001, joined Cases C-397/98, Metallgesellschaft and C-410/98, Hoechst, [2001] ECR I-1727; of 4 March 2004, Case C-334/02, Commission v. France, [2004] not yet reported.

6.3.4.5. Proportionality

Finally, it follows from the above that the introduction of a discriminatory tax scheme for the SE only would not stand the proportionality test, as resolving the tax problems an SE might encounter due to its cross-border activities does not require the exclusion of other comparable entities.

6.4. Different tax treatment of domestic and international companies

The distinction between domestic and international companies must be based on the domestic or international character of the business.

6.4.1. Tax treatment

Two main differences would have to be analysed: a difference in tax base and burden and a difference in compliance cost.

6.4.1.1. Tax base and burden

A distinction would be necessary between the systems of home state taxation and common EU tax basis. The same distinction outlined in 6.3.1.1 and 6.3.1.2 above would apply.

6.4.1.2. Compliance cost

The same potential differences as described above in respect of tax burden might in theory follow from the special tax regime for compliance cost. Particularly in respect of home state taxation the result would probably depend on a comparison of prices and cost factors in the respective countries concerned and it might be expected that in case of HST and CBT the main driver for compliance cost savings would be the simplification of transfer pricing rules (documentation, disputes).²⁰⁹

This aspect would have to be addressed and regulated specifically in the scheme as a mere referral to e.g. the application of material and procedural transfer pricing principles of the Double Taxation Conventions or the so-called Arbitration Convention would not be sufficient for the achievement of the compliance cost reduction.

6.4.2. Comparability

The analysis of whether and/or to what extent international and national companies are in a comparable situation would have to go beyond stating the obvious differences that follow for shareholders and subsidiaries/permanent establishments from the definition of an international company and the working assumptions of the rules of HST and CBT.

²⁰⁹ ECJ Judgements of 15 May 1997, Case C-250/95, Futura Participations SA and Singer, [1997] ECR I-2471; of 28 April 1998, Case C-118/96, Jessica Safir, [1998] ECR I-1897.

Such an analysis would have to take into account the non-discrimination principles of the EC Treaty as interpreted by the ECJ.

It would follow that in respect of income determination:

- a company held by foreign shareholders is in principle in a situation comparable to that of a company with domestic shareholders.²¹⁰
- a permanent establishment of a foreign company is in principle in a situation comparable to that of a domestic permanent establishment.²¹¹

This could be referred to as horizontal comparability.

There would be a limited lack of comparability where and to the extent a border is crossed, due to a subsidiary or permanent establishment in another country, which could be referred to as a limited lack of vertical comparability.²¹² This limited lack of comparability arises because each Member State has its own rules for income determination on the respective levels of the structure.

(Loss) Consolidation would be at the crossing between horizontal comparability that requires following the respective Member State's rules applicable to the legal entities and permanent establishments existing in its territory and a lack of vertical comparability due to differing concepts and rules in the various Member States for income determination.

Such vertical comparability would, however, have to be analysed on each level of the group.

It follows from the above that even where vertical comparability would be absent, horizontal comparability would be present. This would have implications for the analysis whether or to what extent a different treatment of international and domestic situations could be justified.

In this respect, it seems that the cross-border consolidation schemes which are being discussed or applied in several EU Member States (such as Austria, Denmark, France and Italy) address the lack of vertical comparability by observing horizontal comparability: On the subsidiary/permanent establishment level, their income is taxed according to the rules of the host state. On the level of the head office/parent, the income of the subsidiary/ permanent establishment is corrected and determined – at least to a certain extent – according to home state rules before consolidation in the home state. It would seem that both HST and CBT would not respect horizontal comparability.

²¹⁰ See e.g. ECJ Judgements of 8 March 2001, joined Cases C-397/98, Metallgesellschaft and C-410/98, Hoechst, [2001] ECR I-1727; of 12 December 2002, Case C-324/00, Lankhorst-Hohorst, [2002] ECR I-11779.

²¹¹ ECJ Judgement of 14 December 2000, Case C-141/99, AMID, [2000] ECR I-11619.

²¹² The ECJ comes to the same result by acknowledging a different situation but limiting the possibility of different treatment (see e.g. ECJ, Judgement of 8 March 2001, joined Cases C-397/98 and C-410/98, Metallgesellschaft and Hoechst, [2001] ECR I-1727, section 60).

6.4.3. Unequal treatment/discrimination due to the special scheme: EC law or national law issue

The traditional understanding would suggest that where a cross-border situation is subject to a detrimental tax consequence, this would fall into the ambit of the EC non-discrimination principles.²¹³

Where, however, the cross-border situation would lead to a preferential treatment, so-called reverse discrimination would be given, which traditionally would be a matter for the – constitutional – laws of the respective Member State.

The argument could be made, however, that where EC legislation would create unequal treatment of comparable situations (including reverse discrimination), this could result in an infringement against the EC law general principle of equal treatment.²¹⁴

6.4.4. Justification of different treatment

A differentiating approach would be necessary and would have to address the following issues: the issue of to what extent a different situation requires different treatment (i.e., the issue of proportionality)²¹⁵, the fact that compensation might be an option, whether the scheme(s) on offer might be optional, and that the special SE tax scheme(s) might be a pilot scheme.

6.4.4.1. Justification by difference of situation

It appears that HST would not take into account the horizontal comparability of international and national situations in the host state and could therefore not be justified.

The same would apply in principle to CBT, as long as there was not a unified tax base applicable throughout the EU in national and international situations.

In this line of thinking, both systems would seem to go beyond what seems to be necessary to address the specific tax problems cross-border activities seem to be facing. This would be particularly true where domestic corporate structures would gain or suffer access to a HST or CBT thanks to upper tier, indirect parent entities.

²¹³ ECJ Judgements of 28 January 1986, Case 270/83, *avoir fiscal*, [1986] ECR 273; of 15 May 1997, Case C-250/95, *Futura and Singer*, [1997] ECR I-2471.

²¹⁴ Art. 6 EU Treaty.

²¹⁵ See e.g. ECJ Judgements of 15 May 1997, Case C-250/95, *Futura Participations and Singer*, [1997] ECR I-2471; of 6 June 2000, Case C-35/95, *Verkooijen*, [2000] ECR I-4071; of 12 December 2002, Case C-324/00, *Lankhorst-Hohorst*, [2002] ECR I-11779; of 4 March 2004, Case C-334/02, *Commission v. France*, [2004] not yet reported.

This might be one reason why e.g. the parent subsidiary and interest and royalty directives deal exclusively with cross-border issues.²¹⁶

6.4.4.2. Compensation

It is doubtful that the ECJ judgement in the case of Terhoeve would indicate that a tax advantage might be compensated for by an additional levy.²¹⁷ This conclusion might, however, follow under the Bachmann doctrine²¹⁸, if the advantage were balanced by a tax disadvantage e.g. an additional levy in the country (or countries) where such an advantage occurs. Compensation would need to be precise and proportionate.

6.4.4.3. Scheme as option

As with discrimination between legal forms, it would appear that the results of the analysis should remain the same, even if HST or CBT was optional for all international enterprises²¹⁹, and the creation of that option would not deal with the problem of discrimination or unequal treatment. It would reserve an advantageous treatment - without which the option would not be exercised - to international enterprises that would not respect the horizontal comparability of international enterprises and national enterprises.

The special tax regime would need to be available to all international and national enterprises.

6.4.4.4. Pilot scheme

As with discrimination between legal forms, it appears that the final scheme would have to include a harmonised tax basis throughout the EU applicable in cross-border and domestic situations. Even then the question would remain to be answered whether such final scheme should be preceded by a pilot scheme that, unless compensation were applied, causes itself discrimination between international and national companies.

²¹⁶ See Art. 1 (1) Council Directive 90/435/EEC of 27 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 225, 20.8.1990, p. 6, last amended by Council Directive 2003/123/EC of 22 December 2003 amending 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 7, 13.1.2004, p. 41; Art. 1 (1) Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, OJ L 157, 26.6.2003, p. 49.

²¹⁷ ECJ Judgement of 26 February 1999, Case C-18/95, Terhoeve, [1999] ECR I-345.

²¹⁸ ECJ Judgements of 28 January 1992, Case C-204/90, Bachmann, [1992] ECR I-249; of 3 October 2002, Case C-136/00, Danner, [2002] ECR I-8147; of 16 July 1998, Case C-264/96, ICI, [1998] ECR I-4711; of 8 March 2001, joined Cases C-397/98, Metallgesellschaft and C-410/98, Hoechst, [2001] ECR I-1727; of 21 November 2002, Case C-436/00, X and Y, [2002] ECR I-10829; of 12 December 2002, Case C-324/00, Lankhorst-Hohorst, [2002] ECR I-11779; of 18 September 2003, Case C-168/01, Bosal, [2003], not yet reported.

²¹⁹ ECJ Judgements of 8 March 2001, joined Cases C-397/98, Metallgesellschaft and C-410/98, Hoechst, [2001] ECR I-1727; of 4 March 2004, Case C-334/02, Commission v. France, [2004] not yet reported.

6.5. Conclusion

A special tax regime for the SE as currently envisaged would be likely to be discriminatory under general Treaty rules unless it was also available to other comparable entities.

If they were applied exclusively to the SE, both a home state tax system (HST) and a common base tax system (CBT) would result in infringements of the fundamental right of equal treatment under community law and the non-discrimination principles of the EC Treaty, unless the advantages and disadvantages were compensated for on the appropriate levels.

Such compensation would need to include not only differences in tax burden but also differences in compliance cost. It is likely that the operation of such compensation would be impractical.

Both HST and CBT would lead to a tax treatment that does not respect horizontal comparability of internationally operating entities and domestically operating companies, in the situation where no compensation is applied.

Such differential treatment could result – as the case may be – in an infringement against the non-discrimination principles of the EC Treaty or the EC law general principle of equal treatment, which could not be justified.

Based on the available literature and jurisprudence, we conclude that consideration should be given to implementing a system of common base taxation to all comparable entities in Member States.

7. Enhanced cooperation

7.1. The field of study

Would the selective application of a specific tax regime to SEs constitute any discrimination or distortion of competition in the sense of the Treaty provisions on enhanced cooperation?

7.2. The relevant treaty provisions

The Treaty provisions on enhanced cooperation are to be found in the EC Treaty and the EU Treaty. They refer directly and indirectly to discrimination and/or distortion as material criteria that need to be taken into account for the basic decision regarding the authorisation of enhanced cooperation and its implementation.

7.2.1. EC Treaty provisions

Article 11 et seq. EC Treaty regulate within the scope of the EC Treaty who may take the initiative to enhanced cooperation, which procedure has to be followed to grant authorisation for enhanced cooperation and finally clarify the requirements for implementation and accession to enhanced cooperation by further Member States. According to Article 11 (1) EC Treaty enhanced cooperation is possible if it falls in one of the areas referred to in the EC Treaty. Authorisation to establish enhanced cooperation shall be granted only in compliance with Article 43 to 45 of the EU Treaty (Article 11 (2) EC Treaty).

The acts and decisions necessary for implementation of enhanced cooperation activities shall be subject to all the relevant provisions of the EC Treaty, save as otherwise provided in Article 11 EC Treaty or Articles 43-45 EU Treaty (Article 11 (3) EC Treaty).

It is generally understood that compliance with the EC Treaty is required not only in respect of the institutional issues such as competence, procedure, type of measure, but also in respect of the material content and effects of the measures taken for the implementation of enhanced cooperation; in addition Article 11 (3) EC Treaty submits such measures to the judicial control by the ECJ and the CFI as provided for by the EC Treaty.²²⁰

²²⁰ See Lenz in Lenz/Borchardt (Hrsg.), EUV/EGV, 3rd edition, Art. 11 EGV, note 5; Hatje in Schwarze (Hrsg.), EU-Kommentar, Art. 11 EGV, note 24; Ruffert in Calliess/Ruffert, Kommentar zum EU-Vertrag und EG-Vertrag, Art. 11 EG-Vertrag, note 5; Becker in von der Groeben/Schwarze, Art. 11 EG, note 20 et seq. In this respect Art. 11 EC goes beyond Art. 44 EU Treaty which renders "only" the institutional provisions of the EC Treaty applicable.

7.2.2. EU Treaty provisions

Article 43-45 EU Treaty contain the common provisions, which apply to enhanced cooperation in all three pillars, i.e. the EC Treaty, the Police and Judicial Cooperation in Criminal Matters²²¹ and a Common Foreign and Security Policy.²²²

Article 43 EU Treaty provides a list of material requirements, which have to be met if enhanced cooperation were to be established. In respect of the question addressed in this section, the following conditions are of direct or indirect relevance:

Enhanced cooperation must

- be aimed at furthering the objectives of the Union and of the Community, at protecting and serving their interests and at reinforcing their process of integration;
- respect the EU and EC Treaties and the single institutional framework of the Union;
- respect the *acquis communautaire* and the other measures adopted under the other provisions of the EU and the EC Treaty;
- remain within the powers of the Union or the Community and not concern the areas which fall within the exclusive competence of the Community;
- not undermine the internal market as defined in Article 14 (2) EC Treaty;
- not constitute a barrier to or discrimination in trade between Member States and not distort competition between them;
- involve a minimum of eight Member States;
- respect the competences, rights and obligations of those Member States which do not participate;
- be open to all the Member States according to Article 43 b.

Furthermore, Member States, which do not participate in such cooperation shall not impede the implementation thereof by the participating Member States.²²³

7.3. Interpretation of Article 43 EU Treaty

7.3.1. General considerations

In literature, the conditions of Article 43 et seq. EU Treaty and Article 11 et seq. EC Treaty are described as lacking a clear system²²⁴ and as expressing the cautious approach Member States took

²²¹ See Art. 40, 40b EU Treaty on enhanced cooperation.

²²² See Art. 27a-27e EU Treaty.

²²³ See Art. 44 (2), sentence 3 EU Treaty.

²²⁴ See e.g. Bitterlich in Lenz/Borchardt (Hrsg.), EUV/EGV, 3rd edition, Vorbemerkung Art. 43-45, note 7.

towards enhanced cooperation.²²⁵ While some authors point out that interpretation of the conditions for enhanced cooperation cannot be based on case law or administrative practice²²⁶, others limit themselves essentially to repeating the relevant treaty text.²²⁷

Nevertheless, there seems to exist a common understanding on the following material aspects of enhanced cooperation:

Firstly, according to the clear wording of Article 43 EU Treaty its material requirements apply to all stages of enhanced cooperation, i.e. the authorisation and its implementation. A judgment of whether enhanced cooperation complies with these material requirements will be possible either:

- in the implementation phase²²⁸;
- earlier, if the details of implementation were submitted to the European Commission, when interested Member States request the Commission proposal according to Article 11 (1) EC Treaty; or
- before the Council decision according to Article 11 (2) EC Treaty is taken.²²⁹

Therefore, taking into account Article 43 (c), EU Treaty Article 11 (3) EC is rather of declaratory nature as regards the application of material laws and principles of the EC Treaty to a special tax regime for the SE implemented under enhanced cooperation.

Secondly, although the material requirements enumerated in Article 43 EU Treaty cover enhanced cooperation in all three pillars, of the requirements relevant to a special tax regime for the SE, the requirements not to undermine the internal market, not to establish barriers to or discrimination in trade between the Member States and not to distort competition between them were formerly contained in Article 11 EC Treaty (ex Article 5a EC Treaty), transferred to Article 43 EU Treaty and are considered to be only of relevance in the context of enhanced cooperation within the EC Treaty.²³⁰ Taking further into account that the requirements to further the objectives of the Community, to respect the Treaties, to respect the *acquis communautaire* and the measures adopted under the provisions of said Treaties refer explicitly to the EC Treaty, recourse can be taken to the EC Treaty and its interpretation for the interpretation of all requirements in Article 43 EU in respect of a special tax regime for the SE.

Thirdly, it appears that Article 43 (c) EU Treaty, and therefore Article 11 (2) EC Treaty, are a concretisation of Article 43 (a) and (b) EU Treaty and that the effect of Article 43 (e) EU Treaty is weaker than the requirement of Article 43 (c) EU Treaty - without diminishing the force of the latter.

²²⁵ Bitterlich in Lenz/Borchardt (Hrsg.), EUV/EGV, 3rd edition, Art. 43 EUV, note 1 in respect of the evolution of the provisions governing enhanced cooperation under the so-called Amsterdam and Nice Treaties; e.g. Pechstein in Streinz, EUV/EGV, Art. 43 EUV, note 1 et seq.; Becker in von der Groeben/Schwarze, Art. 43 EU, note 1 et seq.

²²⁶ Pechstein in Streinz, EUV/EGV, Art. 43 EUV, note 4.

²²⁷ Anton in Leger, Commentaire TUE et TCE, Art. 43-45, note 10 et seq.; Geiger, EUV/EGV, Art. 43, 43a, 43b EUV, note 6 et seq.; Bitterlich in Lenz/Borchardt (Hrsg.), EUV/EGV, 3rd edition, Art. 43 EUV, note 1 et seq.

²²⁸ Becker in von der Groeben/Schwarze, Art. 11 EG, note 8.

²²⁹ Becker in von der Groeben/Schwarze, Art. 11 EG, notes 10 et seq. concurs as he requires that the essentials of the cooperation need to be included in the request and the Commission proposal.

²³⁰ See Becker in von der Groeben/Schwarze, Art. 43 EUV, notes 43 et seq., 47, 48.

Therefore, it appears appropriate to focus on Article 43 (c) and (f) EU Treaty.

Furthermore, Article 43 (f) EU Treaty seems to be of particular relevance for trade and competition between those Member States participating in enhanced cooperation on the one side and those refraining from participation.

7.3.2. Discrimination

According to Article 43 (c) EU Treaty enhanced cooperation must respect the *acquis communautaire* and the measure adopted under the other provisions of the said treaties.

The extent of the *acquis communautaire* can easily be grasped by referring to the last accession treaty signed in Athens on 16 April 2003.²³¹ Generally, it can be said that the *acquis communautaire* does not only comprise the totality of primary and secondary EC law but also the interpretation and general principles developed by the European Court of Justice, declarations and resolutions taken by the institutions as well as international conventions concluded by the Communities and by the Member States, to the extent they concern the Communities.²³²

Therefore, it is beyond any doubt that not only the general and specific non-discrimination principles as defined by the EC Treaty and interpreted by the ECJ need to be respected; this requirement includes also the overarching principle of equal treatment as recognised by the ECJ as a general principle of EC law.

It follows that a special tax regime could not be authorised by the provisions of Article 43 EU Treaty and Article 11 EC Treaty for enhanced cooperation to the extent it would result in unequal and/or discriminatory treatment.

7.3.3. Barrier to or discrimination in trade between Member States

According to Article 43 (f) EU Treaty, enhanced cooperation must not constitute a barrier to or discrimination in trade between Member States.

7.3.3.1. Trade

In literature it is suggested that this requirement is modelled on Article 30 sent. 2 EC Treaty that sets limits to prohibitions and restrictions on imports, exports or goods that may be applied by Member

²³¹ As regards the documents concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union OJ L 236 of 23.09.03.

²³² See Blenke in Calliess/Ruffert, EUV/EGV, Art. 2 EUV, note 14; Pechstein in Streinz, EUV/EGV, Art. 2 EUV, note 14; Becker in von der Groeben/Schwarze, EUV/EGV, Art. 43 EU, note 34 et seq.

States as exceptions from the free movement of goods principle as laid down in Arts. 28, 29 EC Treaty.²³³

The term “trade” as used in Article 43 (f) EU Treaty is not necessarily limited to goods – there is no particular reason why services of any kind should not receive the same protection.

In this respect the interpretation of Article 43 (f) EU Treaty should rather be in line with Article 87 EC Treaty, which also aims at protecting trade between Member States.

The term “trade between Member States” should therefore include the cross border exchange of goods and services.²³⁴

The term “trade” would further include cross border intra-group transactions.²³⁵

7.3.3.2. *Barrier*

Impairment of competition does not only mean negative influence but influence in general.²³⁶ According to case law impairment of competition occurs if it is possible to foresee with a sufficient degree of probability on the basis of a set of factors of law or fact that a measure may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States²³⁷. In the essence the measure must be capable of distorting the natural flow of trade, which would occur without such measure.²³⁸

The ECJ’s interpretation of this requirement of Article 81 EC Treaty is influenced in addition by taking into account the general goals of the Treaty. Accordingly it is not necessary that an agreement should have substantially affected the trade but it is in particular decisive that the agreement is capable of constituting a threat to freedom of trade between Member States in a manner, which might harm the attainment of the objectives of a single market, in particular by protecting domestic forces or by modifying the structure of competition in the common market²³⁹. In general the interpretation is equal

²³³ See e.g. Ruffert in Calliess/Ruffert, EUV/EGV, Art. 43 EU, note 17

²³⁴ See Mederer/Strohschneider in Schröter/Jakob/Mederer, Kommentar zum Europäischen Wettbewerbsrecht, Art. 87 Absatz 1, note 47. Such interpretation would be in line with the interpretation of Art. 81 EC Treaty, which aims at protecting “trade between Member States” as well (see e.g. Eilmannsberger in Strainz, EUV/EGV, Art. 81 EGV, note 31; Schröter in Schröter/Jakob/Mederer, Kommentar zum Europäischen Wettbewerbsrecht, Art. 81 Absatz 1, note 194 with further references). Same interpretation would further concur with a proper interpretation of Art. 95 (6) EC Treaty, as it would be inconsistent with the context of internal market legislation to limit the verification of the European Commission in respect of “trade” to restriction on exchange of goods and exclude services from “trade”.

²³⁵ ECJ Judgement of 27 January 1987, Case 45/85, Verband der Sozialversicherer, [1987] ECR p. 405, 458 et seq.

²³⁶ Schröter in Schröter/Jakob/Mederer (Hrsg.), Kommentar zum Europäischen Wettbewerbsrecht, Art. 81 Abs. 1, note 195.

²³⁷ ECJ Judgement of 30 June 1966, Case 56/65, Societe technique miniere/Maschinenbau Ulm, [1966] ECR p. 337; of 17 July 1997, Case C-219/95, Ferriere Nord SpA v. Commission, [1997] ECR I-4411.

²³⁸ ECJ Judgement of 15 May 1975, Case 71/74, Frubo, [1975] ECR p. 563; of 29 October 1980, Case 209/78, Van Landwyck v. Commission, [1978] ECR p. 2111; of 13 July 1966, joint Cases 56 and 58/64, Consten and Grundig v. Commission, [1966] ECR p. 429.

²³⁹ ECJ Judgement of 13 July 1966, joint Cases 56 and 58/64, Consten and Grundig v. Commission, [1966] ECR p. 429; of 6 April 1995, Case C-241/91, RTE and ITP v. Commission, [1995] ECR I-743.

to the definition of a measure with equivalent effect as a quantitative restriction of trade²⁴⁰. Effect on trade is interpreted in a similar broad sense in Article 87 (1) EC Treaty²⁴¹.

7.3.3.3. *Intensity test*

Finally, the question is discussed in literature whether all, including minor, barriers should suffice to disallow enhanced cooperation. Based on the argument that Article 43 (f) EC Treaty should not make enhanced cooperation impossible²⁴², authors call for a qualification of the barrier/discrimination suggesting either a "proportionality" test²⁴³ or a "noticeable effect" test.²⁴⁴

Whereas a proportionality test is applied in respect of Article 30 EC Treaty and Article 95 (4), (5), (6) EC Treaty²⁴⁵, a test of whether a restriction of competition is qualitatively and/or quantitatively noticeable is applied as unwritten requirement in respect of Article 81 EC Treaty.²⁴⁶ Also in respect of state aid, the application of the de minimis regulation shows that not all state aid measures have an impact on intra-community trade.

Both tests likely lead to same or similar results.²⁴⁷ Furthermore, the proportionality test is to be applied in any case as foreseen by Article 5 (third sentence) EC Treaty.

Therefore, it is difficult to see how a special tax regime for the SE measure that would not withstand the proportionality test in respect of non-discrimination and equal treatment principles or in the context of state aid would withstand any one of the tests in respect of cross-border transfers of goods and services.

7.3.4. **Distortion of competition between Member States**

A similar uncertainty as outlined in respect of the interpretation of trade barriers exists as regards the interpretation of the second part of Article 43 (f) EU Treaty.

²⁴⁰ ECJ Judgement of 11 July 1974, Case 8/74, Dasonville, [1974] ECR p. 837.

²⁴¹ ECJ Judgement of 17 September 1980, Case 730/79, Philippe Morris v. Commission, [1980] ECR p. 2671.

²⁴² Pechstein in Streinz, EUV/EGV, Art. 43 EUV, note 12; Hatje in Schwarze, EU-Kommentar, Art. 11 EGV, note 11.

²⁴³ See Griller/Forgo, The Treaty of Amsterdam, 2000, p. 216; Greiser, Flexible Integration in der EU, Kap. 2.III 2. a) quoted by Becker in von der Groeben/Schwarze, EUV/EGV, Art. 43 EU, note 48.

²⁴⁴ Becker in von der Groeben/Schwarze, EUV/EGV, Art. 43 EU, note 48; Hatje in Schwarze, EU-Kommentar, Art. 11 EGV, note 11.

²⁴⁵ See e.g. Schroeder in Streinz, EUV/EGV, Art. 30 EGV, note 49 et seq.; Leible in Streinz, EUV/EGV, Art. 95 EGV, note 87; Kahl in Calliess/Ruffert, EUV/EGV, Art. 95 EGV, note 33 et seq. 34; Epiney in Calliess/Ruffert, EUV/EGV, Art. 30 EGV, note 47 et seq.

²⁴⁶ For a summary see e.g. Schröter in von der Groeben/Schwarze, EUV/EGV, Art. 81 EG Abs. 1, note 93 et seq.; Schröter in Schröter/Jakob/Medever, Kommentar zum Europäischen Wettbewerbsrecht, Art. 81 Abs. 1, note 209 et seq.; Eilmansberger in Streinz, EUV/EGV, Art. 81 EGV, note 71 et seq.

²⁴⁷ Becker in von der Groeben/Schwarze, EUV/EGV, Art. 43 EU, note 48.

7.3.4.1. Impact on conditions of competition

According to this provision, enhanced cooperation must not "distort competition between Member States". As in the case of trade barriers, the wording of this requirement that was transferred from Article 11 (e) EC Treaty to Article 43 (f) EU Treaty by the Treaty of Nice differs slightly from various other EC Treaty provisions which aim at limiting state or abusive entrepreneurial interference with the market forces, such as Article 81 EC Treaty ("distortion of competition within the common market"), Article 87 EC ("distorts or threatens to distort competition"), Article 96 EC Treaty ("distorting the conditions of competition in the common market") or Article 97 EC Treaty ("distortion within the meaning of Article 96).

In this context, it seems reasonable to interpret the last part of Article 43 (f) EU Treaty as aiming at preventing distortions of conditions of competitions between enterprises resident in or pursuing their activities from different Member States, rather than distortions of competition between the Member States themselves.²⁴⁸

7.3.4.2. Distortion

As it is clear from written EU law, ECJ case law and European Commission practice that tax measures can have an impact on the conditions of competition, the issue then arises how the term "distortion" is to be understood in the context of Article 43 (f) EU Treaty.

On the background of the interpretation of the term "distortion" as used in the EC Treaty provisions mentioned above particularly three questions are to be discussed:

- Does the term distortion imply a certain qualitative or quantitative level or threshold of impact on competition?
- Would distortion of competition need to be specific, i.e. geared at certain enterprises or industries?
- Would distortion of competition need to be measured by comparison to conditions applicable in the same Member States or by comparison to conditions applicable in another Member States?

7.3.4.2.1. Importance of distortion

A review of the EC Treaty provisions mentioned in Section 8.3.4.1. shows that in respect of all of them the distortion must be of a certain importance.

²⁴⁸ Even the Code of Conduct for business taxation covered tax measures "which affect, or may affect, in a significant way the location of business activity in the Community" (see Annex 1 to the Conclusions of the Ecofin Council Meeting on 1 December 1997 concerning tax policy, OJ C 2 of 6.1.98, p. 1 et seq., 3).

In respect of Article 81 EC Treaty, the ECJ developed an unwritten condition according to which a distortion of competition must be noticeable²⁴⁹; this requirement was applied already before in European Commission practice²⁵⁰ and led to the adoption of a de minimis notification.^{251 252}

In respect of Article 87 (1) EC Treaty, the application of an intensity requirement for the distortion of competition is subject to discussion²⁵³; based on the purpose of Article 87 et seq. most of the authors come to the conclusion that in principle any distortion of competition should be prohibited. On the other hand, the application of the de minimis regulation²⁵⁴ shows that below certain thresholds a distortion of competition is in practice not to be feared.

Similarly, there is discussion about a significance test in respect of Article 96 EC Treaty, which seems to have never been applied.²⁵⁵ Based on the wording²⁵⁶ and purpose of Article 96 EC Treaty and a supplementary answer of Mr. Thorn on behalf of the Commission²⁵⁷ to a written question of a MEP the majority of authors require a certain significance of the distortion of competition in order for Article 96 EC Treaty to apply.²⁵⁸

7.3.4.2.2. *Specificity of distortion*

Would distortions of competition need to be specific in order to limit or exclude enhance cooperation? It seems reasonable to require a specific distortion of competition affecting one or a number of certain enterprises or industries. Based on the so-called Spaak report²⁵⁹ and the European Commission answer to a MEP question²⁶⁰, the majority of authors²⁶¹ require such specific distortion when interpreting

²⁴⁹ See ECJ, Judgment of 9 July 1969, Case 5/69, *Völk/Vervaecke*, [1969] p. 295, section 7; ECJ Judgment of 6 May 1971, Case 1/71, *Cardillon/Häss*, [1971] p. 351, 356.

²⁵⁰ See e.g. Commission decision *Grosfilex/Filliskorf*, OJ n° 58 of 9.4.1964, p. 915/64.

²⁵¹ Commission notice on agreements of minor importance which do not appreciably restrict competition under Art. 81 (1) of the Treaty establishing the European Community, OJ C 368 of 22.12.2001, p. 13.

²⁵² For an overview see Schröter in Schröter/Jakob/Mederer, *Kommentar zum Europäischen Wettbewerbsrecht*, Art. 81 Abs. 1, note 209 et seq.

²⁵³ Mederer in Schröter/Jakob/Mederer, *Kommentar zum Europäischen Wettbewerbsrecht*, Art. 87 Abs. 1, note 45 et seq.

²⁵⁴ Commission Regulation (EC) N° 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid, OJ L 10 of 13 January 2001, p. 30-32.

²⁵⁵ Leible in Streinz, *EUV/EGV*, Art. 96 EGV, note 3.

²⁵⁶ Whereas the English version of Art. 96 solely uses the words "distort" and "distortion" to describe the impact on competition, other language versions use different terms for verb and noun; e.g.: "fausse les conditions", "provoque une distorsion"; "falsa le condizioni", "provoca una distorsione"; "falsea las condiciones", "provoca una distorsión"; "...bedingungen verfälschen", "eine Verzerrung hervorrufen".

²⁵⁷ See OJ C 257, 29.6.83, p. 1 et seq. There seem to be differences between the various language versions at least in respect of the second last paragraph of the answer.

²⁵⁸ See Langeheine in Grabitz/Hilf, *Kommentar zur Europäischen Union*, Art. 101 EGV, note 9; Kahl in Calliess/Ruffert, 2nd edition, *Kommentar zu EU-Vertrag und EG-Vertrag*, Art. 96, note 6; Piphorn/Bardenhewer-Ratung in von der Groeben/Schwarze (Hrsg.), *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft*, Art. 96 EG, note 13; Leible in Streinz, *EUV/EGV*, Art. 96 EGV, note 6.

²⁵⁹ The Brussels report on The General Common Market

²⁶⁰ See OJ C 257, 29.6.83, p. 1 et seq.

Article 96 EC Treaty. This view can be supported by the general consideration that the protection of competition provisions contained in the EC Treaty and in particular Articles 87 and 81 EC Treaty are not designed to exclude general measures affecting the general conditions under which all enterprises or industries would have to operate and which do not result in a barrier to cross-border trade.

This being said it needs to be taken into account, however, that the existence of a specific distortion does not depend on whether the respective measure according to its wording or intention is of general or specific application: the effect of a measure is decisive in this respect.²⁶²

Taking into account that Article 43 (f) EU Treaty must not make enhanced cooperation impossible from the outset, no other interpretation should apply to Article 43 (f) EU Treaty.

7.3.4.2.3. National or cross-border comparison

When considering how distortion of competition between Member States in the sense of Article 43 (f) EU Treaty would need to be determined basically two elements need to be taken into account:

First of all the term distortion implies an intervention leading to a change of the market conditions. Therefore, the respective Member States need to change their laws or administrative practice in a specific way.

Secondly, the term implies that at least one or several other Member States do not participate in this measure.²⁶³

7.4. The case of a special tax regime for the SE

7.4.1. Discrimination

A special tax regime for the SE could give rise to unequal treatment and/or discrimination, and this has been discussed above. To the extent unequal treatment or discrimination were present, enhanced cooperation would be blocked by Article 43 (c) EU Treaty.

7.4.1.1. State aid

Similarly, a special tax regime for the SE might qualify as state aid and the risk that such aid might not be compatible with the Common Market and would therefore need to be notified was also discussed

²⁶¹ See Leible in Streinz, EUV/EGV, Art. 96 EGV, note 3; Kahl in Callies/Ruffert, Kommentar zu EU-Vertrag und EG-Vertrag, Art. 96, note 4 et seq.

²⁶² Leible in Streinz, EUV/EGV, Art. 96 EGV, note 6.

²⁶³ This view seems to be shared by the European Commission in its answer to a MEP question, see OJ C 257, 29.6.83, p. 1 et seq.

above. The same considerations would apply to the idea to adopt such a scheme in the framework of enhanced cooperation. Incompatible aid would exclude enhanced cooperation according to Article 43 (c), (f) EU Treaty.

7.4.2. Cross border trade

Even irrespective of the considerations referred to above in respect of discrimination and state aid, there is a risk that the introduction of a specific SE tax regime could result in a barrier to cross border trade in particular with respect to intra group sales and services.

It is widely known practice that multinational groups of companies centralise for non-tax and tax reasons group internal services and functions. The significance of such service centres was generally recognised by the Member States in connection with adoption and implementation of the Code of Conduct. Taking into account that under the specific tax regime no transfer pricing issues will arise and double taxation of interest, royalties and dividends will be effectively avoided the idea of a service centre in a Member State with low general tax rate that participates in enhanced cooperation will be by far more attractive to enterprises of other participating Member States than an otherwise comparable location in a non-participating Member State.

Although enhanced co-operation may well have been conceived with a view to facilitating, for example, tax harmonisation measures, nevertheless the requirements of article 43 EU are very strict. As a consequence of the fact that even positive non-repressive measures may result in trade barriers, this consideration might even apply to enhanced cooperation if a common tax base were applied to all forms of companies that are comparable to an SE, but only between those Member States participating in enhanced cooperation.

7.4.3. Distortion of Competition

As in the case of state aid, there is a concrete risk that a specific tax regime for the SE could be viewed as a specific measure; such specific measure would in principle result in distortion of competition between participating and non-participating Member States as SEs and SE structures in participating Member States would have an advantage not available to competitors in non participating Member States.

The significance of this distortion of competition would depend on the particular tax and compliance cost savings and might imply a difficult evaluation.

7.4.4. Compensation, Option, Pilot scheme

The issues and problems discussed in respect of enhanced co-operation would not be relevant and occur, if any tax and compliance cost savings were compensated for²⁶⁴ as indicated in the discussion of discrimination.

It might be argued that an SE participating in a special tax regime might have certain obligations which offset or remove expected benefits – in respect of adapting to a new set of rules for calculating the tax base or increased compliance requirement in respect of monitoring and reporting the consequences of the project. However, compensation would need to be precise.

In the absence of full compensation, the analysis in this section would not change if the system were adopted as optional or only on a temporary test basis.

7.4.5. Further remarks

If a common tax base regime were implemented in the framework of enhanced cooperation the issue would have to be addressed in the participating country of the head office/parent entity whether the non-discrimination principles of Article 43, 48 EC Treaty would not require to allow inclusion of branches and/or subsidiaries located or resident in non-participating Member States and/or branches and subsidiaries of SEs which had their head office in non-participating Member States.

Further, as mentioned above, Member States not participating in enhanced cooperation shall not impede the implementation thereof by the participating Member States. In this respect application in a non-participating country of provisions denying deduction of a loss that can be deducted in another Member State might be problematic.

The issues discussed in this section on enhanced cooperation would have to be addressed in a similar fashion under Article 97 EC Treaty, if a limited number of Member States agreed outside of the scope of enhanced cooperation, e.g. by way of a multilateral convention²⁶⁵ to introduce a specific tax regime for the SE.

7.5. Conclusion

Although, due to a lack of experience and doctrine, uncertainties exist in respect of the interpretation of Article 43 EU Treaty, the following conclusions seem nevertheless reasonable:

²⁶⁴ See particularly in respect of distortion of competition OJ C 257, 29.6.83, p. 1 et seq. There seem to be differences between the various language versions at least in respect of the second last paragraph of the answer.

²⁶⁵ It follows from the wording of Art. 43 EU Treaty that Member States are not obliged to use the enhanced cooperation system (concurring e.g. Becker in von der Groeben/Schwarze, EUV/EGV, Art. 43 EUV, note 28.)

In our opinion, enhanced co-operation would not deal with the problem of discrimination under general Treaty rules.

Although uncertainties exist in respect of the interpretation of the conditions for enhanced cooperation, it cannot be used if a specific tax regime for SEs would result in unequal treatment or discrimination. Further, if a specific SE tax regime might result in state aid it must be notified and there are doubts as to whether it could be approved.

A special tax regime for the SE as currently envisaged could not be implemented under enhanced co-operation unless the tax and compliance cost savings were fully compensated.

8. Literature review

8.1. Published materials

- Albrecht, Achim, Die Neuerungen des Umwandlungsgerechts im Überblick, NWB, 16 June 2003, p. 3981
- Alioua M., De Marks & Spencer-uitspraak: de relevantie voor de fiscale eenheid in Nederland, WFR 2004/286
- Anton in Leger, Commentaire TUE et TCE,
- Barents and Brinkhorst, 8th edition 1998 p. 288
- Becker in von der Groeben/Schwarze, EUV/EGV,
- Bellingwout J.W. en J.L. van de Streek, Fiscale aspecten van de Societas Europaea, (I) MBB 2003/337
- Bellingwout J.W. en J.L. van de Streek, Fiscale aspecten van de Societas Europaea, (II) MBB 2004/61.
- Bellingwout J.W. Verplaatsing van een Europese vennootschap Ondernemingsrecht (2001) nr. 12 p. 356
- Bellingwout J.W. Zetelverplaatsing: afrekening over stille reserves TFO 1997/179
- Bentler in von der Groeben-Schwarze Art. 6 EU note 49 et seq
- Bevers J.W.F., De Societas Europaea: vennootschapsrechtelijke en fiscale aspecten Forfaitair, 2004/141 p.4.
- Bitterlich in Lenz/Borchardt (Hrsg.), EUV/EGV, 3rd edition,
- Blanquet, Françoise, Das Statut der Europäischen Aktiengesellschaft, in ZGR 2002, p. 20-65
- Blenke in Calliess/Ruffert, EUV/EGV,
- Bond S et al, Corporate tax harmonisation, Europe: A guide to the debate Institute for Fiscal Studies, (2000)
- Bont G.J.M.E. de, Behoud van fiscale claims en het EG-Verdrag, TFO 1996/200
- Brandt, Ulrich, Der Diskussionsentwurf zu einem SE-Ausführungsgesetz, Deutsches Steuerrecht (DStR), 2003, p. 1208
- Brandt, Ulrich/Scheifele, Matthias, Die Europäische Aktiengesellschaft und das anwendbare Recht, in DStR 2002, p. 547-555
- Bröhmer in Calliess/Ruffert EUV/EGV Art. 56 EGV notes 14 et seq
- The Brussels report on The General Common Market
- Bungert, Hartwin/Bayer, Constantin, Die Europäische Aktiengesellschaft – Das Statut und seine Umsetzung in die Praxis, in EWS 2002, p. 1-12
- Callies, Christian, Die Charta der Grundrechte der Europäischen Union – Fragen der Konzeption, Kompetenz und Verbindlichkeit, EuZW, 2001, p. 261
- Calliess/Ruffert, 2nd edition, Kommentar zu EU-Vertrag und EG-Vertrag
- Centre for European Policy Studies, The future of tax policy in the EU - From 'harmful' tax competition to EU corporate tax reform, (1999)
- Ch.P.A., Geppaart Fiscale rechtsvinding in het kader van de Europese Unie, December 1996 chapter 4
- Conci, Paolo, The Tax Treatment of the Creation of an SE, in European Taxation, January 2004, p. 15
- Cordeweyer, Europäische Grundfreiheiten und nationales Steuerrecht, p. 449 et seq

Craig Paul & de Burca Grainne, *EU Law*, Oxford University Press 2002 pp. 195-198

Cremona M, *Neutrality or Discrimination? The WTO the EU and External Trade The EU and the WTO: Legal and Constitutional Issues*, (Hart Ed. de Burca G and Scott J) 2001 p153-4

De Meuleneere, Inez, *Verordeningen over de Europese Venootschap, Bank en Financieel Recht*, 2002, p. 112

Delvoe, Kim, *Europese Unie: Europese Venootschap niet attractief zonder fiscale regeling*, in *Internationale Fiscale Actualiteit*, 28 November 2002, p. 10/03

Dortmond P.J., *De Europese vennootschap en juridische fusie Ondernemingsrecht*, (2001) nr. 7 p. 190.

Eilmansberger in Streinz, *EUV/EGV*,

Epiney in Calliess/Ruffert, *EUV/EGV*,

European Commission *Company taxation in the internal market: Commission staff working paper COM (2001) 582*

Fédération des Experts Comptables Européens, *Position Paper on Tax Treatment of the European Company (Societas Europaea)* (2003)

Förster, Guido & Lange, Carsten, *Ertragsbesteuerung bei grenzüberschreitender Sitzverlegung*, in *Recht der Internationalen Wirtschaft (RIW)*, August 2002, p. 585

Förster, Guido & Lange, Carsten, *Steuerliche Aspekte der Gründung einer Europäischen Aktiengesellschaft*, *Der Betrieb*, 8 February 2002, p. 288

G. Hofmann-Becking *Normaufbau und Methode* Tübingen 1973 p. 65

Gammie M & Lodin S, *The taxation of the European Company European Taxation*, (August 1999)

Gammie M, *Taxation issues for the European Company*, *EC Tax Review* (1998)

Gammie, Malcolm, *EU Taxation and the Societas Europaea – Harmless Creature or Trojan Horse?*, *European Taxation*, January 2004, p. 35

Geiger, *EUV/EGV*,

Geysen J., *Europese vennootschap (SE) Activa* (2002) nr. 2 p. 41

Gooijer J. *De Europese NV en de Nederlandse vennootschapsbelasting* WFR 2003/1273.

Goossens L. en J. Bocken *De nauwere samenwerking en het Verdrag van Nice: een middel tot integratie of een gevaar voor fragmentatie van de Unie?* NTER 7/8 (2001) p. 205.

Goudsmit C.M., *Een driehoekssituatie vanuit het EG-perspectief van de betrokken EG-lidstaten*, WFR 2003/1628

Greiser, *Flexible Integration in der EU*,

Griller/Forgo, *The Treaty of Amsterdam*, 2000

Griller, S, *Judicial enforceability of WTO law in the European Union* Annotation to Case C149/96 *Portugal v Council*, *Journal of International Economic Law* 2000 p447-450

von der Groeben/Schwarze (Hrsg.), *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft*

Grynberg R & Chilala B, *WTO compatibility of the OECD 'defensive measures' against 'harmful tax competition'*

Hamaekers, Hubert, *Taxation Trends in Europe*, in *Asia-Pacific Tax Bulletin*, February 2003, p. 42

Haritz, Detlef & Wisniewski, Thomas, Steuerneutrale Umwandlung über die Grenze – Anmerkungen zum Vorschlag der Europäischen Kommission zur Änderung der steuerlichen Fusionsrichtlinie, GmbH-Rundschau, January 2004, p. 28

Hatje in Schwarze (Hrsg.), EU-Kommentar,

Helminen, Marjaana, The Tax Treatment of the Running of an SE, European Taxation, January 2004, p. 28

Hernler, Jörg, ETAS – European Tax Allocation System, ein Lösungsvorschlag für eine einheitliche Ertragsbesteuerung Europäischer Unternehmen, Der Betrieb, 10 January 2003, p. 60

Herzig, Norbert & Griemla, Stefan, Steuerliche Aspekte der Europäischen Aktiengesellschaft/Societas Europaea, in StuW, 2002, p. 55

Hesse, Katrin, Die Europäische Aktiengesellschaft, INF, 2003, p. 951

Hetmeier in Lenz EG-Vertrag 3rd ed. Art. 249 notes 23 et seq

Hosson F.C. de, Het onderscheid vaste inrichting – dochtervennootschap bezien vanuit gemeenschapsrechtelijk perspectief, WFR 2003/1581

Hurk H.T.P.M. van den en A.E.H.A. Theunissen, Enige institutionele en fiscale aspecten van de Europese, Economische Ruimte MBB 2000/382

Hurk H.T.P.M. van den, De bevoegdheid van lidstaten om belastingverdragen te sluiten aan de ketting?, MBB 2003/155

Hurk H.T.P.M. van den, Europees Gemeenschapsrecht en directe belastingen, Deventer 2001

Ihrig, Hans-Christoph & Wagner, Jens, Diskussionsentwurf für ein SE-Ausführungsgesetz, Bundesblatt, 2003, p. 969

Jahn, Andreas, Die Europäische Aktiengesellschaft – Societas Europaea, WRA, 23 March 2001, p. 631

Jong M.G. de, Distorsies in het nationale recht en EG-recht. Een nadere beschouwing n.a.v. HR 13 November 1996 nr. 30 136 MBB 1997/251

Kahl in Calliess/Ruffert, 2nd edition, Kommentar zu EU-Vertrag und EG-Vertrag,

Kersting, Christian, Societas Europaea: Gründung und Vorgesellschaft, Der Betrieb, 28 September 2001, p. 2079

Kessler, Wolfgang & Achilles, Charlotte & Huck, Friederike, Die Europäische Aktiengesellschaft im Spannungsfeld zwischen nationalem Steuergesetzgeber und EuGH, Internationales Steuerrecht (IStR), 2003, p. 715

Kessler, Wolfgang & Schmalz, Andrea, Wege zur Harmonisierung der Körperschaftsteuer in der EU, in Praxis Internationale Steuerberatung, August 2002, p. 210

Kiegebeld B.J., De (on)mogelijkheden van compenserende heffing binnen EU-verband WFR 2003/914

Kiersch E.D.G., Het statuut van de Europese vennootschap Ondernemingsrecht (2001) nr. 7 p. 183

Kingreen in Callies/Ruffert, (Hrsg.) EUV/EGV Art. 6 EUV note 55

Kingreen in Calliess/Ruffert, EUV/EGV Art. 6 EUV note 170 et seq

Knobbe-Keuk, Brigitte, Die steuerliche Behandlung der Europäischen Aktiengesellschaft, Die Aktiengesellschaft (AG), 1990, p. 435

Kok, Coraline, EC Update – Formal Adoption of European Company Statute, in European Taxation, March 2001

Kok, Coraline, EC Update – Political Agreement on European Company Statute, in *European Taxation*, March 2001

Kreile, Reinhold, Die steuerlichen Bestimmungen im Kommissionsvorschlag über das Statut für Europäische Aktiengesellschaften, *Der Betrieb*, 10 September 1976, p. 1687

Lagarrique, Alexandre, Quel régime fiscal pour la société européenne?, in *Option Finance*, 18 November 2002, p. 33

Langeheine in Grabitz/Hilf, *Kommentar zur Europäischen Union*,

Leger, *Commentaire TUE et TCE*,

Leible in Streinz, *EUV/EGV*,

Lemmens J., Europese vennootschap uit de steigers Accountancy & bedrijfskunde, (2002) nr. 1 p. 3

Lenz in Lenz/Borchardt (Hrsg.), *EUV/EGV*, 3rd edition,

Lenz/Borchardt (Hrsg.), *EUV/EGV*, 3rd edition,

Linders J.P. en B. Wagenaar, De EU-mythe rond non-discriminatie een veredelde Pavlov-reactie, *WFR* 1996/1705

Lodin S & Gammie M, *Home State taxation*, IBFD Publications (2001)

Mederer in Schröter/Jakob/Mederer, *Kommentar zum Europäischen Wettbewerbsrecht*,

Mederer/Strohschneider in Schröter/Jakob/Mederer, *Kommentar zum Europäischen Wettbewerbsrecht*,

Meyer-Ladewig, *Konvention zum Schutz der Menschenrechte und Grundfreiheiten Art. 14 note 11*

Morton, *Company taxation barriers in the single market - Obstacles to cross-border activities of European businesses*, CFE Forum (2000)

Müller Graff in Streinz, *EUV/EGV Art. 48 EGV note 9*

Müller-Graff in Streinz, *EUV/EGV; Art. 43 EGV note 37; Art. 49 EGV note 63*

Neye, Hans-Werner & Teichmann, Christoph, *Der Entwurf für das Ausführungsgesetz zur Europäischen Aktiengesellschaft*, *Die Aktiengesellschaft*, 2003, p. 169

Olislaegers, Michael & Peeters, Bernard, De Europese Naamloze Vennootschap (SE): een nieuwe vennootschap met een Europees en nationaal karakter, *Tijdschrift voor Fiscaal Recht*, 15 February 2003, p.147

Pechstein in Streinz, *EUV/EGV*,

Peeters, Bernard, De Europese Vennootschap: fiscale aspecten, in *Fiskoloog Internationaal*, 22 December 2001, p. 4

Peters M.J., De dividendstrippingmaatregel getoetst aan het EG-recht *WFR* 2004/239

Piphorn/Bardenhewer-Ratung in von der Groeben/Schwarze (Hrsg.), *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft*,

Plasschaert S, An EU tax on consolidated profits of multinational enterprises, *IBFD* (January 1997)

Plasschaert, Sylvain R.F., Further Thoughts on the European Union Company Income Tax and its First Cousins, in *European Taxation*, August 2002, p. 336

Prechal S., Europese integratie in etappen – rustplaats Nice NTER 5 (2001) p. 138

Rödder, Thomas, Grundfragen der Besteuerung der Europäischen Aktiengesellschaft, in *Der Konzern* 2003, p. 522, 528

Roelvink H.L.J., De Europese vennootschap na Nice SEW 5 (2001) p. 162

Rosenbach, Georg, Die grenzüberschreitende Verschmelzung der Europäischen Aktiengesellschaft, in Praxis Internationale Steuerberatung 2003, p. 323-328

Ruffert in Calliess/Ruffert, Kommentar zum EU-Vertrag und EG-Vertrag;

Santa Baraba Ruprez, Non-fiscal discrimination in the WTO and EC law: Relations and Solutions, EC Tax Journal Vol 4 (2000) 2

Schön, Wolfgang, WTO und Steuerrecht, in Recht der Internationalen Wirtschaft (RIW), 2004, p. 50

Schroeder in Streinz, EUV/EGV;

Schröter in Schröter/Jakob/Mederer (Hrsg.), Kommentar zum Europäischen Wettbewerbsrecht,

Schröter in von der Groeben/Schwarze, EUV/EGV,

Schröter/Jakob/Mederer, Kommentar zum Europäischen Wettbewerbsrecht,

Schulz, Andreas & Eicker, Klaus, The European Company Statute – the German View, Intertax, 2001, p. 332

Schulz, Andreas & Petersen, Sven, Die Europa-AG: Steuerlicher Handlungsbedarf bei Gründung und Sitzverlegung, in Deutsches Steuerrecht (DStR), 2002, p. 1508

Schulz, Andreas & Geismar, Bernhard, Die Europäische Aktiengesellschaft, Deutsches Steuerrecht 2001, p. 1078-1086

Schwarze, Jürgen, Der Grundrechtsschutz für Unternehmen in der Europäischen Grundrechtecharta, in EuZW, 2001, p. 517

Schwarze in Schwarze, EU-Kommentar Art. 220 EGV note 29

Soler Roch, Maria Teresa, Tax Residence of the SE, in European Taxation, January 2004, p. 11

Sterdyniak H et al, Vers une fiscalité européenne Economica (1991)

Streek J.L. van de, Fiscale gevolgen van omzetting van een BV in een NV en omgekeerd. Alsmede een vooruitblik op de mogelijke fiscale gevolgen van omzetting van een NV in een Europese vennootschap (SE) en omgekeerd WFR 2003/1076

Streinz / Pechstein, EUV/EGV Art. 6 EUV note 8

Streinz in Streinz, EUV/EGV Art. 20 GR-Charta note 1 et seq

Stumpf in Schwarze, EU-Kommentar Art. 6 EUV note 16

tar zum Europäischen Wettbewerbsrecht, Art. 81 Abs. 1, note 209 et seq.

Tavares Da Costa & de Meester Bilreiro, The European Company Statute, Kluwer law

Terra B, De Societas Europaea

Terra/Wattel, European Tax Law 3rd ed. 2001 Chapter 12.5 pp. 71 429

Theeuwes, Ann & Goemaere, Caroline, De Europese Vennootschap, Internationale Fiscale Actualiteit, 20 December 2001, p. 1

Thömmes, Otmar, EC Law Aspects of the Transfer of Seat of an SE, European Taxation, January 2004, p. 22

Thömmes, Otmar, The European Company – Will it succeed or fail?, World Tax Advisor, International Tax Developments, September 2003, p.1

Thömmes, Die Europäische Aktiengesellschaft (Ed.Theissen & Wenz) p. 542

Thömmes, 7 2.2(16) EC Corporate Tax Law IBFD

Thömmes, Otmar: EG-rechtliche Aspekte der Errichtung und Sitzverlegung der Europa-AG (SE), in Herzig (Hrsg.) Besteuerung der Europäischen Aktiengesellschaft, to be published soon

Thoma, Georg F. & Leuring, Dieter, Die Europäische Aktiengesellschaft – Societas Europaea, in NJW, 2002, p. 1449

Thomas E., De Europeesrechtelijke verhouding tussen richtlijn en vestigingsvrijheid WFR 2001/970

Tuytschaever F., Nauwere samenwerking volgens het Verdrag van Nice SEW 11 (2001) p. 375

Unattributed, La société européenne, Gazette du Palais (*Journal Spécial des Sociétés*), 3 April 2003

Unattributed, Le processus d'intégration de la société européenne en France, *Option Finance*, 8 March 2004, p. 34

Unattributed, Statut de la société européenne: les modalités de transposition en droit français se précisent un peu", in *Droit et Fiscalité*, 22 January 2004

Unattributed, Taxation of the European Company - Press release, *Fédération des Experts Comptables Européens*, 12 December 2003

UNICE/ERT representatives, Company taxation in the single market: A business perspective Brussels (1998)

UNICE/ERT representatives, Memorandum on cross-border company taxation obstacles in the single market Brussels (2000)

VerLoren van Themaat, P, SEW 7(1974) p.469

von Bogdandy Armin & Makatsch Tilman, Collision Co-existence or Co-operation? The EU and the WTO: Legal and Constitutional Issues, (Hart Ed. de Burça G and Scott J) 2001 p147

Wauters, Matthias, Europese Vennootschap: curiosum of katalysator voor een nieuwe harmonisatiegolf?, *Tijdschrift voor Belgisch Handelsrecht*, 2002, p. 157

Weber, Dennis, Exit Taxes on the Transfer of Seat and the Applicability of the Freedom of Establishment after Überseering, in *European Taxation*, October 2003, p. 350

Weber D.M., Belastingontwijking en de EG-verdragsvrijheden, Deventer 2003

Weber D.M., Het Bosal Holding-arrest: analyse kritiek en gevolgen, WFR 2003/1844

Wenz, Martin, The European Company (Societas Europaea) – Legal Concept and Tax Issues, *European Taxation*, January 2004, p. 4

Wiggers W.J.H., Hij is er (bijna): de Europese vennootschap! Vennootschap en onderneming, (2001) nr. 12 p. 194

Winter J.W., De Europese vennootschap als sluis voor in- en uitvoer van vennootschapsrecht, NJB (2002) nr. 41 p. 2034

Winter J.W., De Europese vennootschap: besturen en toezicht houden in rangen en standen Ondernemingsrecht, (2001) nr. 7 p. 195

Woude A.W. van der, EG-rechten discriminaties en belemmeringen WFR 2000/1471

Woude A.W. van der, Toegang tot het EG-Verdrag bij directe belastingen MBB 2002/157

Zonnekeyn G, The Status of WTO Law in the Community Legal Order: Some Comments in Light of the Portuguese Textiles Case ELRev 2000 p293 302

Zwaan J.W., de Het Verdrag van Nice; Een bescheiden stap in het proces van Europese Integratie SEW 2 (2001)

8.2. Table of cases

8.2.1. Cases before the European Court of Justice

26/62	Van Gend en Loos v Nederlandse Tariefcommissie
13/63	Commission/Italy
56 and 58/64	Consten and Grundig v. Commission, [1966] ECR p. 429
56/65	Societe technique miniere/Maschinenbau Ulm, [1966] ECR p. 337; of 17 July 1997,
6/68	Zuckerfabrik Watenstedt/Council
1/69	Commission/Italy [1969] ECR 277
5/69	Völk/Vervaecke, [1969] p. 295, section 7;
29/69	Stauder/Stadt Ulm [1969] 419
11/70	Internationale Handelsgesellschaft [1970] ECR p. 1125
1/71	Cardillon/Häss, [1971] p. 351, 356
43/71	Politi/Italy
6/72	Continental Can [1973] ECR 215
21-24/72	International Fruit Company NV and others v Produktschap voor Groenten en Fruit
63-69/72	Wilhelm Werhachn Hausmühle and others [1973] ECR 1229
152/ 73	Sotgiu
167/ 73	Commission/France [1974] ECR 359
173/ 73	Italy/Commission [1974]
2/74	Reyner
8/74	Dassonville, [1974] ECR p. 837
41/74	van Duyn [1974] ECR 1337
71/74	Frubo, [1975] ECR p. 563; of 29 October 1980,
101/76	Koninklijke Scholten Honig/Council and Commission
114/76	Bela-Mühle [1977] ECR 1211
117/76	Ruckdeschel and others [1977] ECR 1753
124/76	Cases 124/76 and 20/77 SA Moulins Pont à Mousson and others [1977] ECR 1795
124/76	Moulins Pont à Mousson and others [1977] ECR 1795
16/77	Ruckdeschel and others [1977] ECR 1753
139/77	Denkavit Futtermittel GmbH [1978] ECR 1317
209/78	Van Landwyck v. Commission, [1978] ECR p. 2111; of 13 July 1966,
730/79	Philip Morris v. Commission, [1980] ECR p. 2671.
69/80	Nakajima All Precision Co Limited v Council of the European Communities
188-190/80	French Republic and others v. Commission [1982] 2545
203/80	Casati [1981] ECR 2595
8/81	Becker/Finanzamt Münster-Innenstadt paragraph 18
15/81	Schul [1982] ECR 1409
104/81	Hauptzollamt Mainz v Kupferberg
107/83	Orde van advocaten

171/83	Commission v France [1983] p. 2621
270/83	Commission v. France – avoir fiscal [1986] ECR I-273
283/83	Racke [1984] ECR 3791
290/83	Commission/France [1985]
45/85	Verband der Sozialversicherer, [1987] ECR p. 405, 458 et seq.
215/85	Bundesanstalt für landwirtschaftliche Marktordnung [1987] ECR 1279
259/85	France v Commission [1987]
310/85	Deufil [1987]
363/85	Commission v Italy
81/87	Daily Mail [1988] ECR 5483
C-142/87	Tubemeuse [1990] I-959
C-339/87	Commission v Netherlands
C-175/88	Biehl I [1990] ECR I-1779
C-267-285 / 88	Wuidart and others [1990] ECR I-435
C-303/88	Eni-Lanerossi [1991] I-1433
C-86/89	Italy v Commission [1990] I-3891
C-221/89	Factortame
C-6-9/90	Francovich and others [1991] ECR I-5357
C-204/90	Bachmann [1992] ECR I-249
C-300/90	Commission v. Belgium [1992] ECR I-305
C-72-73/91	Sloman Neptune [1993] I-887
C-112/91	Werner [1993] ECR I-429
C-189/91	Kirsammer-Hack[1993] I-6185
C-241/91	RTE and ITP v. Commission, [1995] ECR I-743.
C-330/91	Commerzbank [1993] ECR I-4017
C-24/92	Corbiau [1993] ECR I-1277
C-278-280/92	Spain v Commission [1994] I-4103
C-387/92	Banco de Crédito [1994] I-877
C-1/93	Halliburton [1994] ECR I-1137
C-279/ 93	Schumacker [1995] ECR I-225
C-280/93	Federal Republic of Germany v Council of the European Union
C-306/93	SMW Winzersekt [1994] ECR I-555
C-484/93	Svensson & Gustavsson [1995] ECR I-3955
C-39/94	SFEI [1996] I-3547
C-55/94	Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano
C-80/94	Wielockx [1995] ECR I-2493
C-107/94	Asscher [1996] ECR I-3089
C-151/94	Commission v. Luxembourg – Biehl II [1995] ECR I-3685
C-241/94	Kimberly [1996] I-4551
C-283/94	Denkavit International and others [1996] ECR I-5063 also C-291-292/94
C-15/95	EARL de Kerlast [1997] ECR I-1961

C-18/95	Terhoeve [1999] ECR I-345
C-35/95	Verkooijen [2000] ECR I-4071
C-122/95	Germany v. Council [1998] ECR I-973
C-219/95	Ferriere Nord SpA v. Commission, [1997] ECR I-4411
C-250/95	Futura Participations and Singer [1997] ECR I-2471
C-286/95	Commission v ICI
C-118/96	Jessica Safir [1998] ECR I-1897
C-149/96	Portuguese Republic v Council of the European Union
C-264/96	ICI [1998] ECR I-4695
C-288/96	Germany v Commission [2000] I-8237
C-336/96	Gilly [1998] ECR I-2793
C-342/96	Tubacex [1999] I-2459
C-6/97	Italy v Commission [1999] I-2981
C-75/97	Maribel
C-75/97	Belgium v Commission [1999] I-3671
C-200/97	Ecotrade [1998] I-7907
C-22/97	Trummer & Mayer [1999] ECR I-1661
C-256/97	DMT [1999] I-3913
C-292/97	Karlsson and others [2000] ECR I-2737
C-294/97	Eurowings [1999] ECR I-7447
C-295/97	Piaggio [1999] I-3735
C-307/97	Saint-Gobain v Finanzamt Aachen-Innenstadt [1999] ECR I-6161
C-311/97	Royal Bank of Scotland [1999] ECR I-2651
C-391/97	Frans Gschwind v Finanzamt Aachen-Aussenstadt [1999] ECR I-5451
C-439/97	Sandoz [1999] ECR I-7041
C-52-54/97	Viscido [1998] I-2629
C-15/98	Sardegna Lines [2000] I-8855 also C-105/99
C-35/98	B.G.M. Verkooijen [2000] ECR I-4071
C-55/98	Bent Vestergaard [1999] ECR I-7641
C-15/98	Germany/Commission [2000] I-6857
C-200/98	X AB et Y AB [1999] ECR I-8261
C-224/98	D'Hoop [2002] ECR I-6191
C-251/98	Baars [2000] ECR I-2787
C-397/98	Metallgesellschaft and others [2001] ECR I-1727
C-420/98	W.N. [2000] ECR I-2847
C-478/98	Commission v. Belgium [2000] ECR I-7587
C-480/98	Magefesa [2000] I-8717
C-97/99	Zurstrassen v Administration des Contributions Directes
C-141/99	AMID [2000] ECR I-11619
C-143/99	Adria-Wien Pipeline [2001] I-8365
C-389/99	Rundgren [2001] ECR I-3731

C-17/00	De Coster [2001] ECR I-9445
C-55/00	Gottardo [2002] ECR I-413
C-136/00	Danner [2002] ECR I-8147
C-280/00	Altmark Trans en Regierungspräsidium Magdeburg [2003] I-0000
C-324/00	Lankhorst-Hohorst [2002] ECR I-11779
C-385/00	F.W.L. de Groot [2002] ECR I-11819
C-436/00	X and Y [2002] ECR I-10829
C-168/01	Bosal Holdings [2003] not yet reported
C-209/01	Schilling [2003] not yet reported
C-234/01	Gerritse [2003] ECR I-5933
C-364/01	Barbier [2003] not yet reported
C-422/01	Skandia and Ramstedt [2003] ECR I-6817
C-42/02	Lindman [2003] not yet reported

8.2.2. Cases before the Court of First Instance

T-459/93	Siemens [1995] II-1675
T-67/94	Ladbroke [1998] II-1
T-358/94	Air France [1996] II-2109
T-214/95	Flemish Region [1998] II-717
T-14/96	BAI [1999] II-139
T-46/97	SIC [2000] II-2125
T-204/97	EPAC [2000] II-2267 also T-270/97
T-298/97	Mauro and Others [2000] II-2319
T-18/99	Cordis Obst und Gemüse Großhandel GmbH v Commission of the European Communities
T-55/99	CETM [2000] II-3207
T-92/00	Alava [2002] II-1385 also T-103/00

8.2.3. Cases before the European Court of Human Rights

13580/88	Karlheinz Schmidt
17/1989/177/233	Derby v. Sweden
36677/97	S.A. Dangeville v. France
	Cha'are Shalom Ve Isedek Uerpmann in Ehlers EUGR 2003 §3 III / a

8.3. Treaty and legal references

8.3.1. Primary law

GATT 1994
GATS

SCM Agreement
EC Treaty
EU Treaty
The Convention for the Protection of Human Rights and Fundamental Freedoms
Accession Treaty OJ L 236
Draft Treaty establishing a Constitution for Europe CONV 850/03
Arbitration Convention EC/90/436

8.3.2. Secondary instruments

Council Regulation (EC) No. 2157/2001 - The statute for a European Company (SE) OJ L 294
Council Regulation (EC) No. 1435/2003 - The Statute of a European Cooperative Society (SCE) OJ L 207
Council Directive 79/174/EEG
Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty
Council Directive 90/434/EEC on the common system of taxation applicable to mergers divisions transfers of assets and exchange of shares concerning companies of different Member States
Council Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States
Proposal for a Council Directive amending Directive 90/434/EEC - The common system of taxation applicable to mergers divisions transfers of assets and exchange of shares concerning companies of different Member States COM (2003) 613 final
Council Directive 2001/86/EC - Supplementing the statute for a European Company with regard to the involvement of employees OJ L 294
Proposal for a Council Directive amending Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States COM (2003) 841 final
Council Directive 2003/72/EC - Supplementing the Statute for a European Cooperative Society with regard to the involvement of employees OJ L 2007
Council Directive 2003/123/EC of 22 December 2003 amending 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 7 of 13.1.2004 p. 41

Commission Recommendation 2003/361/EC - The definition of micro small and medium-sized enterprises
Commission Decision Grosfilex/Filliskorf, OJ n° 58 of 9.4.1964, p. 915/64.
Commission Notice on agreements of minor importance which do not appreciably restrict competition under Art. 81 (1) of the Treaty establishing the European Community, OJ C 368 of 22.12.2001, p. 13.
Commission Regulation (EC) N° 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid, OJ L 10 of 13 January 2001, p. 30-32.