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DOI
10.54648/ecta2022008

Publication date
2022

Document Version
Final published version

Published in
EC Tax Review

ec TAX REVIEW 2022–2

Article

The Potential Relevance of the CJEU Case Law on Group Taxation Under the EU/UK Trade and Cooperation Agreement

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The Court of Justice of the European Union (CJEU) ruled that the national treatment provision in Article 49 Treaty on the Functioning of the European Union precludes Member States from disallowing consolidation between entities resident in the same Member State, where the top holding or intermediate holding company is resident in another Member State. After the United Kingdom left the EU from 1 January 2021, this case law no longer directly applies to situations with a top holding or intermediate holding company resident in the United Kingdom. However, the Trade and Cooperation Agreement concluded and in force between the EU and the United Kingdom (TCA) contains in Article 129 a provision on national treatment. The authors argue that the TCA could be interpreted in line with the national treatment provision in Article 49 TFEU and the case law of the CJEU on this. Notwithstanding the absence of any direct effect to the provision of the TCA, Member States should interpret their bilateral tax treaties in line with the TCA. The consequence is that the non-discrimination provisions in existing bilateral tax treaties between Member States and the United Kingdom should be interpreted in line with the TCA.

Keywords: Group regimes, Brexit, Trade and Cooperation Agreement, Non-Discrimination, National Treatment, Capital Ownership, Bilateral Tax Treaties, Interpretation of EU law, Interpretation of Bilateral Tax Treaties

1 Introduction

In recent years, the judgments of the Court of Justice of the European Union (**CJEU**) exposed the EU law limits of consolidation regimes.[1] In short, group regimes conflict with the free movement of establishment if consolidation is not possible between two resident companies with a common non-resident shareholder (so-called Sister consolidation), and similarly if consolidation is not possible between a resident company and its resident sub-subsidiary where the interests are held by a non-resident intermediate holding company (so-called Papillon consolidation).

As the CJEU based its rulings on the freedom of establishment in Article 49 TFEU, Sister or Papillon consolidation is reserved for cases where the top holding or intermediate company is established in another Member State.[2] Until recently, the United Kingdom (**UK**) was one of these Member States. On 31 December 2020, the UK left the EU, rendering the above case law no longer *directly applicable* to situations with a UK top or intermediate company.[3] On 24 December 2020 the EU and the UK concluded the Trade and Cooperation Agreement (**TCA**).[4] Article 129 of the TCA contains a provision regarding the national treatment of UK and EU residents. However, the TCA generally does not have direct effect.[5]

This article examines whether the case law of the CJEU on Sister and Papillon consolidation could also be relevant between Member States and the UK under the TCA. Section 2 analyses the case law of the CJEU on consolidation regimes. Section 3 examines the relevance of CJEU case law for the interpretation of the TCA. Section 4 discusses the absence of the direct effect to the TCA and the possibility of an indirect effect. Section 5 summarizes the authors' findings with a conclusion.

2 The case law of the CJEU on group regimes

2.1 General

Article 49 TFEU prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. This freedom of establishment includes:

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1 *See* B. Farinha Aniceto da Silva, *The Impact of Tax Treaties and EU Law on Group Taxation Regimes* (2016).

2 Article 49 TFEU does not apply in relation to non-Member States. *See* for instance: CJEU 16 July 1998, C-264/96, *ICI,* ECLI:EU:C:1998:370, paras 31–33.

3 The UK formally exited the EU on 31 Jan. 2020. A transitional period then applied from 1 Feb. 2020 until 31 Dec. 2020, during which period a withdrawal agreement applied (*see* Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *OJ C 384I,* 12 Nov. 2019, at 1.

4 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, *OJ L 149*, 30 Apr. 2021, at 10.

5 Article 5 of the TCA.

> 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 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected.

2.2 CJEU

In the case *Papillon*, the CJEU ruled that the Article 49 TFEU:

> precludes legislation of a Member State by virtue of which a group tax regime is made available to a parent company which is resident in that Member State and holds subsidiaries and sub-subsidiaries which are also resident in that State, but is unavailable to such a parent company if its resident sub-subsidiaries are held through a subsidiary which is resident in another Member State.[6]

In the case *SCA*, the CJEU further elaborated on Papillon in relation to the Dutch fiscal unity.[7] Under Dutch national law, a fiscal unity[8] between a Dutch parent company and a Dutch sub-subsidiary was not possible if the interest in the latter was held by a foreign intermediate holding company (a 'Papillon fiscal unity', named after the case *Papillon*). A fiscal unity was also not possible between two Dutch companies with a common shareholder resident in another Member State (a 'sister fiscal unity'). Ultimately, the CJEU ruled that Article 49 TFEU precludes the Netherlands from not allowing a Papillon and sister fiscal unity if the top or intermediate holding company is resident in another Member State.[9] The interesting thing here is that the CJEU based its judgment on the national treatment clause in Article 49 TFEU.[10] The CJEU first cites the national treatment of Article 49 TFEU, stating that the freedom of establishment 'includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected'.[11] Next, the CJEU applies the national treatment to the Dutch fiscal unity regime. According to the CJEU, the Dutch fiscal unity regime 'creates a difference in treatment since the ability to elect for the tax entity regime is dependent on whether the parent company holds its indirect stakes through a subsidiary established in the Netherlands or in another Member State'.[12] The same applies to a sister fiscal unity, as according to the CJEU an 'analogous difference of treatment exists where (…) resident subsubsubsidiaries (…) cannot be integrated into a tax entity with the resident parent company because both the intermediate subsidiary and the intermediate sub-subsidiary are established in another Member State'.[13] The CJEU here found it irrelevant that a sister or Papillon fiscal unity was not possible in the Netherlands without consolidation of that parent entity.[14] As cross-border situations were treated less favourably than domestic situations, the Dutch fiscal unity regime lead to a restriction of comparable cross-border situations,[15] which is in principle prohibited by Article

[6] CJEU 27 Nov. 2008, C-418/07, *Société Papillon*, ECLI:EU:C:2008:659, para. 63.

[7] CJEU 12 June 2014, joined cases C-39/13 to C-41/13, *SCA Group Holding BV and Others,* ECLI:EU:C:2014:1758.

[8] Under the Dutch fiscal unity regime, the Dutch corporate income tax is levied as if there were a single taxpayer, in the sense that, notwithstanding some exceptions, the activities and assets of the subsidiaries are attributed to the parent company. This also means that transactions between companies consolidated in the same fiscal unity are principle not 'recognized' for Dutch corporate income tax purposes. The latter consequence has led to separate CJEU case law. *See* CJEU 22 Feb. 2018, joined cases C-398/16 and C-399/16, *X BV* and *X NV,* ECLI:EU:C:2018:110.

[9] Advocate General Kokott here notes that 'In the case of a foreign parent company, freedom of establishment thus only guarantees that the foreign parent company benefits from the advantages of the Netherlands tax system, at least as far as the domestic sister companies are concerned, if it cannot itself be part of the tax entity'. *See* Opinion of Advocate General Kokott, 27 Feb. 2014, joined cases C-39/13 to C-41/13, *SCA Group Holding BV and Others*, ECLI:EU:C:2014:104, para. 86. The CJEU follows this reasoning by considering that the 'existence of that restriction is not called into question by the fact that the common parent company of the subsidiaries to be consolidated is situated at a higher level in the group's chain of interests, since the intermediate companies, the seat of which is not in the Netherlands and which do not have a permanent establishment there, cannot themselves form part of a tax entity (…)'.

[10] CJEU 12 June 2014, joined cases C-39/13 to C-41/13, *SCA Group Holding BV and Others*, ECLI:EU:C:2014:1758, paras 20–21.

[11] Here, the CJEU refers to the case *Felixstowe Dock and Railway Company Ltd.*, where it was considered that a similar difference in treatment under domestic law in the United Kingdom 'makes it less attractive in tax terms to establish a link company in another Member State, since the applicable national legislation grants the tax advantage at issue only where link companies are established in the United Kingdom'. *See* CJEU 1 Apr. 2014, C-80/12, ECLI:EU:C:2014:200, *Felixstowe Dock and Railway Company Ltd,* para. 21.

[12] CJEU 12 June 2014, joined cases C-39/13 to C-41/13, *SCA Group Holding BV and Others*, ECLI:EU:C:2014:1758, para. 24.

[13] CJEU 12 June 2014, joined cases C-39/13 to C-41/13, *SCA Group Holding BV and Others*, ECLI:EU:C:2014:1758, para. 26.

[14] In a purely domestic situation, a fiscal unity was only possible in these cases if the top or intermediate holding company was also consolidated into the fiscal unity. Here the CJEU considered that while 'a Netherlands parent company which holds Netherlands sub-subsidiaries by means of a non-resident subsidiary cannot, in any case, form a tax entity with those sub-subsidiaries, by contrast, a Netherlands parent company which holds Netherlands sub-subsidiaries through a resident subsidiary still has the ability to elect to do so'. *See* CJEU 12 June 2014, joined cases C-39/13 to C-41/13, *SCA Group Holding BV and Others*, ECLI:EU:C:2014:1758, para. 25.

[15] The cases were found to be objectively comparable, as the Dutch fiscal unity regime aims 'to treat, as far as possible, a group constituted by a parent company with its subsidiaries and its sub-subsidiaries in the same way as an undertaking with a number of establishments, by enabling the results of all those companies to be consolidated for tax purposes (…)'. In reference to the case *Papillon*, the CJEU considered that this objective 'can be attained both in the situation of a parent company which is resident in a Member State and holds sub-subsidiaries also resident in that State through a subsidiary which is itself resident, and in the situation of a parent company which is resident in the same Member State and holds sub-subsidiaries also resident in that State, but through one or more subsidiaries established in another Member State'. *See* CJEU 12 June 2014, joined cases C-39/13 to C-41/13, *SCA Group Holding BV and Others*, ECLI:EU:C:2014:1758, para. 29 and 30.

49 TFEU.[16] Such a restriction could not be justified by the need to preserve fiscal coherence.[17] As a result, the CJEU ultimately ruled that the Dutch fiscal unity regime should allow a Papillon and sister fiscal unity where the top or intermediate company is resident in a Member State. Following this judgment, the Dutch fiscal unity regime has been 'repaired' to also allow for a Papillon and sister fiscal unity when the top or intermediate company is resident in another Member State.[18]

Similar to the case *SCA* and the case *Papillon*, the Luxembourg group regime was found to be conflicting with Article 49 TFEU in the case *B and Others.*[19] Under the Luxembourg group regime, tax integration was not possible between a resident parent company and its resident lower-tier subsidiary if the interest was held by a non-resident company.[20] The judgment seems to be largely based on the doctrine developed in *SCA* and *Papillon*, as the CJEU in this case as well seems to base its judgment on the national treatment provision.[21]

It follows from this case law that the CJEU considers the disallowance of Papillon and sister consolidation to be an infringement of the national treatment provision in Article 49 TFEU, as in that case consolidation is not possible under the same conditions as laid down for residents of the Member State concerned. In the following paragraph, the authors analyse whether the national treatment in the TCA could be read in line with the interpretation by the CJEU.

3 TCA

3.1 General

On 24 December 2020, the EU and the UK concluded the TCA. The TCA was published in the Official Journal of the European Union on 30 April 2021.[22] Article 129(1) of the TCA contains a provision on national treatment. It follows from this provision that 'Each Party shall accord to investors of the other Party and to covered enterprises treatment no less favourably than that it accords, in like situations, to its own investors and to their enterprises, with respect to their establishment and operation in its territory'.

This treatment means in relation to a government of or in a Member State a 'treatment no less favourably than the most favourable treatment accorded, in like situations, by that government to investors of that Member State and to their enterprises in its territory'.[23]

The authors' focus lies with Article 129 TCA. This provision prohibits Member States from treating a UK legal person which seeks to establish itself or has established itself in a Member State, by way of participation in the capital, less favourably with respect to their establishment and operation in the Member State than investors of that Member State in similar situations.[24] Similarly, Article 129 TCA prohibits a legal person resident in a Member State from being treated less favourably because its shares are held by a UK legal person.[25] Hence, Article 129 TCA contains a national treatment provision that seems to be similar to the national treatment under Article 49 TFEU. We hereafter review whether the judgments on national treatment in the cases *SCA, Papillon* and *B. and Others* could be relevant in the interpretation of the TCA.

3.2 Status of the TCA Under EU Law

In the case *Haegeman,* the CJEU considered that:

> under the first paragraph of Article 177 of the EEC Treaty "the Court of Justice shall have jurisdiction to give preliminary rulings concerning … the interpretation of acts of the institutions of the Community" (…) The Athens Agreement was concluded by the Council under articles

[16] CJEU 12 June 2014, joined cases C-39/13 to C-41/13, *SCA Group Holding BV and Others*, ECLI:EU:C:2014:1758, para. 27.

[17] Under the Dutch participation exemption, gains and losses derived from interest of 5% or more are exempt from Dutch corporate income tax. Several other requirements should be met to apply the participation exemption, on which we do not further elaborate. According to the CJEU, the Netherlands seeks to prevent double use of losses through the participation exemption and not through 'specific provisions for the neutralization of certain transactions, as in the system at issue in the case giving rise to the judgment in *Papillon*'. In the latter case, there was no participation exemption. Hence, a specific provision neutralizing certain transactions was required to prevent double use of losses and could be justified by the need to preserve the coherence of a tax system.

[18] *See* for instance: M. Schellekens, *Not Quite the Full Monty (Yet): The Netherlands Fiscal Unity Regime Goes Somewhat Cross-Border,* 56 Eur. Tax'n. 9 (2016), Journal Articles & Opinion Pieces IBFD (accessed 29 Nov. 2021).

[19] CJEU 14 May 2020, C-749/18, *B and Others*, ECLI:EU:C:2020:370.

[20] CJEU 14 May 2020, C-749/18, *B and Others,* ECLI:EU:C:2020:370, par. 23–24.

[21] CJEU 14 May 2020, C-749/18, *B and Others,* ECLI:EU:C:2020:370, par. 20–21.

[22] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, *OJ L 149*, 30 Apr. 2021, at 10.

[23] Article 129(2) TCA specifies that the treatment in Art. 129(1) means 'with respect to a regional or local level of government of the United Kingdom, treatment no less favourably than the most favourably treatment accorded, in like situations, by that level of government to investors of the United Kingdom and to their enterprises in its territory'.

[24] This follows from Article 129 TCA in conjunction with the relevant definitions in Art. 124 TCA. Point (g) defines 'enterprise' as 'a legal person or a branch or a representative office of a legal person'. Point (h) defines 'establishment' as 'the setting up or the acquisition of a legal person, including through capital participation, or the creation of a branch or representative office of a Party, with a view to creating or maintaining lasting economic links'. According to point (j) an 'investor of a Party' means 'a legal person of a Party that seeks to establish, is establishing or has established an enterprise in accordance with point (h) in the territory of the other Party'.

[25] The definition of an undertaking also includes a legal person. A legal person established in a Member State may therefore not be treated less favourably than a UK investor. Article 129(1) TCA prohibits less favourably treatment of UK investors and their companies on Dutch territory.

> 228 and 238 of the Treaty (…). This Agreement is therefore, in so far as concerns the Community, an act of one of the institutions of the Community within the meaning of subparagraph (b) of the first paragraph of Article 177. (…) The provisions of the Agreement, from the coming into force thereof, form an integral part of Community law.[26,27]

In the case *Kupferberg,* the CJEU considered that:

> The Treaty Establishing the Community has conferred upon the institutions the power not only of adopting measures applicable in the community but also of making agreements with non-member countries and international organizations in accordance with the provisions of the Treaty. According to Article 228 (2) these Agreements are binding on the institutions of the Community and on Member States. Consequently, it is incumbent upon the Community institutions, as well as upon the Member States, to ensure compliance with the obligations arising from such agreements.[28]

On the interpretation of such agreements with non-member countries, the CJEU further clarified that:

> It follows from the Community nature of such provisions that their effect in the Community may not be allowed to vary according to whether their application is in practice the responsibility of the Community institutions or of the Member States and, in the latter case, according to the effects in the internal legal order of each Member State which the law of that State assigns to international agreements concluded by it. Therefore it is for the Court, within the framework of its jurisdiction in interpreting the provisions of Agreements, to ensure their uniform application throughout the Community.[29]

In the authors' view, the TCA should be considered an integral part of EU law. Similar to the agreement at hand in the case *Haegeman,* the TCA is concluded by the Council.[30] The TCA therefore constitutes an act of (one of the institutions of) the European Union. This means that the CJEU has jurisdiction to give preliminary rulings concerning the validity and interpretation of the TCA. This is also consistent with the judgment in the case *Kupferberg*, as the interpretation of the TCA by the CJEU ensures the uniform application throughout the EU. Therefore, based on Article 267(b) TFEU, the CJEU shall have jurisdiction to give preliminary rulings concerning the validity and interpretation of the TCA from the EU side of the Agreement. It is noted that the interpretation of the TCA by the CJEU only concerns the interpretation from one Party (i.e., the EU).[31] The preliminary rulings of the CJEU on the interpretation of the TCA from the EU side will therefore not be binding on the UK courts.[32]

3.3 Interpretation of the TCA

Agreements concluded by the EU 'may be interpreted not solely by reference to the terms in which it is worded but also in light of its objectives in accordance with Article 31 of the Vienna Convention on the Law of Treaties' (**VCLT**).[33,34] For the TCA, this is explicitly laid down in Article 4.[35,36]

In its interpretation, each provision of EU law (among which the TCA) must be placed in its context and interpreted in the light of that law as a whole, its objectives and its state of development at the time when the provision in question is to be applied.[37] The CJEU also considers 'the aim pursued by each provision in its own particular context. A comparison between the objectives

[26] CJEU 30 Apr. 1974, C-181/73, *R. & V. Haegeman v Belgian State,* ECLI:EU:C:1974:41, paras 2–5.

[27] Article 177 of the EEC Treaty is the current Art. 267 TFEU. The text of Art. 267 TFEU differs from Art. 177 EEC Treaty on aspects that are irrelevant for this analysis.

[28] CJEU 26 Oct. 1982, C-104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, ECLI:EU:C:1982:362, para. 11.

[29] CJEU 26 Oct. 1982, C-104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, ECLI:EU:C:1982:362, para. 14.

[30] Article 217 TFEU was chosen as the legal basis for the TCA. This provision states that 'The Union may conclude with one or more third countries or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure'. Article 218(2) states that 'The Council shall authorize the opening of negotiations, adopt negotiating directives, authorize the signing of agreements and conclude them'.

[31] The TCA rules out jurisdiction of the CJEU in case of a dispute between the EU and the UK. Art. 736 TCA states that 'The Parties undertake not to submit a dispute between them regarding the interpretation or application of provisions of this Agreement (…) to a mechanism of settlement other than those provided for in this Agreement'. Articles 737 et. seq. of the TCA provides for a dispute resolution mechanism. This dispute resolution mechanism does not concern the interpretation by each respective Party. It only concerns dispute settlement in case the interpretations by the EU and the UK differ from each other. The CJEU does not have jurisdiction to rule on disputes between the UK and the EU, but it does have jurisdiction to rule on disputes between for instance a national of a Member States nationals and a Member States through the preliminary ruling procedures.

[32] Similarly, the interpretation of the TCA by the UK courts would not be binding on the CJEU. *See* Art. 4(3) TCA, which states that 'For greater certainty, an interpretation of this Agreement or any supplementing agreement given by the courts of either Party shall not be binding on the courts of the other Party'.

[33] Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969.

[34] CJEU 20 Nov. 2001, C-268/99, *Jany and others*, ECLI:EU:C:2001:616, para. 35; CJEU 1 July 1993, C-312/91, *Metalsa Srl.*, ECLI:EU:C:1993/279, para. 11.

[35] Article 4(1) TCA states that 'The provisions of this Agreement and any supplementing agreement shall be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the agreement in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969'.

[36] –>It is noted that Art. 4(2) states that 'For greater certainty, neither this Agreement nor any supplementing agreement establishes an obligation to interpret their provisions in accordance with the domestic law of either Party'. In the authors' view, this merely means that, in case of a dispute, the Parties are not obliged to follow the domestic law of either Party but could give an independent interpretation to the provisions (regarding being had to Art. 31 VCLT).

[37] CJEU 6 Oct. 1982, C-283/81, *CILFIT,* ECLI:NL:EU:C:1982:335, para. 20.

and context of the agreement and those of the Treaty is of considerable importance in that regard'.[38] In other words, a mere 'similarity of terms is not a sufficient reason for transposing to the provisions of the Agreement the (…) case-law [*DW/JS: of the CJEU*]'.[39]

Nonetheless, it follows from the case *Simutenkov* that differences in wording and purposes of Agreements do not necessarily entail that they cannot be interpreted in a similar manner as other Agreements.[40] In *Simutenkov,* the CJEU compared Article 23(1) of the Communities-Russia Partnership Agreement with Article 38(1) of the Communities-Slovakia Association Agreement.[41,42] The CJEU found that the wording of the respective provisions were similar, with only minor differences.[43] The agreements however had a different purpose[44], whereas:

> unlike the Communities-Slovakia Association Agreement, the Communities-Russia Partnership Agreement is not intended to establish an association with a view to the gradual integration of that non-member country into the European Communities but is designed rather to bring about the gradual integration between Russia and a wider area of cooperation in Europe.

Despite the differences in purpose of the respective agreements, the CJEU considered[45] that:

> it does not in any way follow from the context or purpose of that [*DW/JS: Communities-Russia*] Partnership Agreement that it intended to give to the prohibition (…) any meaning other than that which follows from the ordinary sense of those words. Consequently, in a manner similar to the first indent of Article 38(1) of the Communities-Slovakia Association Agreement, Article 23(1) of the Communities-Russia Partnership Agreement establishes, for the benefit of Russian workers lawfully employed in the territory of a Member State, a right to equal treatment in working conditions of the same scope as that which, in similar terms, nationals of Member States are recognised as having under the EC Treaty, which precludes any limitation based on nationality, such as that in issue in the main proceedings, as the Court established in similar circumstances in the above judgments in *Bosman* and *Deutscher Handballbund*.

These considerations demonstrate that provisions in agreements with differing objectives may still be interpreted identically. Even if the purpose of such an agreement is different, it may still be interpreted in line with another agreement (and even in line with the TFEU) if it does not follow from the context or purpose that a meaning was intended other than that which follows from the ordinary sense of those words[46]. In that light, Smit argues that 'arguably, by analogy, the same must hold true as far as provisions included in an agreement which are formulated differently from comparable provisions of the TFEU'.[47]

Against this backdrop, it should be assessed the extent to which Article 129 TCA can be interpreted in line with Article 49 TFEU.

3.4 Application of CJEU Group Taxation Case Law to TCA

The TCA lays the foundation for a broad relationship between the EU and the UK, 'within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation, respectful of the Parties' autonomy and sovereignty'.[48] The preamble also recognises the need for an 'ambitious wide-ranging and balanced economic partnership to be underpinned by a level playing field for open and fair competition and sustainable development, through (…) a commitment to uphold their respective high levels of protection in the areas of (…) taxation'.[49] The TFEU has a wider objective than the TCA as it seeks to establish an internal market. In that sense, the preamble to the TFEU recognizes 'that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition'.[50]

Both the TCA and the TFEU however contain a similar provision on national treatment. In the TFEU, this is laid down in Article 49 TFEU, where the freedom of

[38] *See* for instance: CJEU 29 Jan. 2002, C-162/00, *Beata Pokrzeptowicz-Meyer*, ECLI:EU:C:2002:57, para. 33; CJEU 27 Sept. 2001, C-63/99, *Gloszczuk*, ECLI:EU:C:2001:488, para. 49.

[39] *See* CJEU 9 Feb. 1982, C-270/80, *Polydor and others*, ECLI:EU:C:1982:43, para. 15. *See also* CJEU case law cited in footnote 40.

[40] CJEU 12 Apr. 2005, C-265/03, *Igor Simutenkov*, ECLI:EU:C:2005:213.

[41] For the Communities-Russia Partnership Agreement, *see* Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, signed in Corfu on 24 June 1994 and approved on behalf of the Communities by Decision 97/800/ECSC, EC, Euratom: Council and Commission Decision of 30 Oct. 1997, *OJ L* 327, 28 Nov. 1997, at 1.

[42] For the Communities-Slovakia Association Agreement, *see* Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, signed in Luxembourg on 4 Oct. 1993 and approved on behalf of the Communities by Decision 94/909/ECSC, EEC, Euratom of the Council and the Commission of 19 Dec. 1994, *OJ L 359,* 31 Dec. 1994, at 1.

[43] CJEU 12 Apr. 2005, C-265/03, *Igor Simutenkov*, ECLI:EU:C:2005:213, para. 34: '(…) The only significant difference between the respective wording of those two provisions is in the use of the terms 'the Community and its Member States shall ensure that the treatment accorded to Russian nationals … shall be free from any discrimination based on nationality' and 'treatment accorded to workers of Slovak Republic nationality … shall be free from any discrimination based on nationality'.

[44] CJEU 12 Apr.. 2005, C-265/03, *Igor Simutenkov*, ECLI:EU:C:2005:213, para. 35.

[45] CJEU 12 Apr. 2005, C-265/03, *Igor Simutenkov*, ECLI:EU:C:2005:213, para. 36.

[46] *See* D. Smit, *Company Taxation Aspects of Investment Liberalization Provisions Under EU Association Agreements* ELECD 161 (2020); in *Research Handbook on European Union Taxation Law* 618 (Christiana HJI Panayi et al. eds, Edward Elgar Publishing 2020).

[47] *See,* at 618–619.

[48] Article 1 of the TCA.

[49] Paragraph 9 of the Preamble to the TCA.

[50] Preamble to the TFEU.

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 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected'. Similarly, Article 129 TCA lays down that 'Each Party shall accord to investors of the other Party and to covered enterprises treatment no less favourably than that it accords, in like situations, to its own investors and to their enterprises, with respect to their establishment and operation in its territory'.

It is noted that Article 129 TCA only concerns inbound investment, whereas Article 49 TFEU is also concerned with outbound investments. From an EU perspective, the TCA only prohibits the Member States from treating UK companies and their enterprises in a Member State less favourably. Contrarily, Article 49 TFEU also aims to remove obstacles encountered in the resident Member State when performing activities in a different Member State.[51] This means that it is not possible to apply the *entire* (meaning both inbound and outbound) freedom of establishment from Article 49 TFEU to the TCA. This is also logical in light of the context of the TCA, since an identical application of Article 49 TFEU would effectively result in the full freedom of establishment between the UK and the Member States, which would take away the intended effect of the Brexit in that respect. In the wording of the TCA, applying Article 49 TFEU in its entirety (meaning, for both inbound and outbound investments) to the TCA would not be 'respectful of the Parties' autonomy and sovereignty' and would therefore not be in line with the aim of the TCA.

Nonetheless, both provisions aim to eliminate differences in national treatment. In this respect, both the TCA and the TFEU contain a prohibition on less favourably treatment of foreign legal persons and their businesses in the investment state. In this respect, the objective and purpose of the TCA and the TFEU are the same, namely the elimination of such less favourable treatment. The authors therefore see no reason to interpret the national treatment under the TCA differently from the national treatment under Article 49 and 54 TFEU. In the authors' opinion, Article 129 TCA should be interpreted in line with the national treatment under Article 49 TFEU, including the existing CJEU case law.

In light of the above, the authors find that the TCA must be interpreted by analogy to the cases *SCA*, *Papillon* and *B and Others*. Article 129 TCA could therefore be read as precluding legislation of a Member State under which a resident parent company can form a single tax entity with a resident sub-subsidiary where it holds that sub-subsidiary through one or more resident companies in a Member State, but cannot where it holds that sub-subsidiary through companies resident in the UK which do not have a permanent establishment in that Member State. Similarly, the TCA could be read as precluding legislation of a Member State under which treatment as a single tax entity is granted to a resident parent company in a Member State which holds resident subsidiaries, but is precluded for resident sister companies the common parent company of which is resident in the UK and does not have a permanent establishment in that Member State.[52]

4 Indirect effect of TCA

4.1 Absence of Direct Effect

The question whether an agreement between the EU and non-Member States may be considered as having direct effect must be determined on a case-by-case basis, taking account of the provision in question. According to settled case-law, a provision of an agreement concluded by the EU with non-Member States must be regarded as directly applicable when, 'having regard to its wording and to the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'.[53]

It follows from, among others, cases C-404/12 P and C-405/12 P that:

> In conformity with the principles of international law, EU institutions which have power to negotiate and conclude such an agreement are free to agree with the non-member States concerned what effects the provisions of the agreement are to have in the internal legal order of the contracting parties. If that question has not been expressly dealt with in the agreement, it is for the courts having jurisdiction in the matter and in particular the Court of Justice, within the framework of its jurisdiction under the FEU Treaty, to decide it, in the same manner as any other question of interpretation relating to the application of the agreement in question in the European Union on the basis in particular of the agreement's spirit, general scheme or terms.[54]

[51] Similarly, on 14 Apr. 2006, the Supreme Court of the Netherlands ruled (without referring to the CJEU for preliminary questions) that Art. 44 of the EC Association Agreement with Poland does not have as broad a scope as the freedom of establishment in (at that time) Article 43 TFEC and is not intended to remove obstacles encountered by nationals of a Member State in establishing themselves in Poland. In other words, the provision on national treatment could not be read as obliging the Netherlands not to treat investments to Poland less favourably than domestic investments. For the judgment, *see* Supreme Court of the Netherlands 14 Apr. 2006, no. 41 815, ECLI:NL:HR:2006:AV0834 (with opinion of Advocate General Wattel). For the EC Association Agreement with Poland, *see* Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, OJ 31 Dec. 1993, no. L348.

[52] Analogous to the judgments in the case *SCA*.

[53] CJEU 27 Sept. 2001, C-63/99, *Gloszczuk*, ECLI:EU:C:2001:488, para. 30. *See also* CJEU 2 Mar. 1999, C-416/96, El-Yassini, ECLI:EU:C:1999:107, para. 25 and cited case law. *See also* CJEU 24 Nov. 2016, C-464/14, *SECIL*, ECLI:EU:C:2016:896, para. 96 and cited case law.

[54] CJEU 13 Jan. 2015, C-404/12 P and C-405/12 P, *Council and Commission v. Stichting Natuur en Milieu and Pesticide Action Network Europe*, EU:C:2015:5, para. 45.

With respect to provisions expressly dealing with the direct effect of an EU agreement, Advocate General Bot observes that:

> in practice all the free trade agreements recently concluded by the European Union expressly exclude their direct effect. The main reason for excluding the direct effect of those agreements is to guarantee effective reciprocity between the parties, in a manner consistent with the objectives of the common commercial policy.[55]

In line with Advocate General Bot's observations, the TCA also contains a provision that expressly deals with its direct effect. In Article 5 of the TCA, it is mentioned that:

> Without prejudice to Article SSC.67 of the Protocol on Social Security Coordination and with the exception, with regard to the Union, of Part Three of this Agreement, nothing in this Agreement or any supplementing agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties.

Furthermore, the second paragraph of Article 5 TCA states that a 'Party shall not provide for a right of action under its law against the other Party on the ground that the other Party has acted in breach of this Agreement or any supplementing agreement'.

4.2 Presence of Indirect Effect (EU Conform Interpretation)

What may be of the provisions on social security coordination, Article 5 TCA in any event ensure that no direct effect can be derived from the provisions in Article 129 TCA on national treatment. The fact that Article 129 TCA does not grant individual rights to taxpayers does not release a national court however from the obligation to interpret provisions in national law and other international agreements in accordance with the provisions of the TCA. The TCA could therefore have an indirect effect on other (bilateral) agreements between Member States and the UK, for which the effective reciprocity between the parties can be guaranteed. In the authors' view, this is also the case for bilateral tax treaties between Member States and the UK, which in principle grant individual rights to taxpayers.[56]

An argument for such an indirect effect of the TCA be derived from the case *Pupino*.[57] In this case, the question arose whether national law must be interpreted in line with framework decisions that do not have a direct effect.[58] Here, the CJEU concluded, based on the principle of loyal cooperation,[59] that:

> the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU.[60]

In the authors' view, this can also be held with regard to other provisions of EU law that do not have a direct effect, such as the TCA. In the interpretation of bilateral tax treaties between a Member State and the UK (which form part of the Member State's national law), the national court of a Member State must interpret this agreement as much as possible in light of the wording and purpose of the TCA, regardless of whether the latter has direct effect.

Another argument may be found in Article 31 VCTL. Together with the context, any relevant rule of international law that may be applied to the relations between the parties must also be taken into account.[61] F. Engelen notes in his dissertation that Article 31(1)(c) VCLT provides that bilateral (tax) treaties should be read in conjunction with other applicable international rules. In this respect, Engelen gives the striking example that EU law must be seen as the background to treaties between Member States.[62] In the authors' view, the same should apply to the TCA. Bilateral (tax) treaties between Member States and the UK should be read against the background of the TCA.

[55] Opinion of Advocate General Bot 29 Jan. 2019, Avis 1/17, *Accord ECG UE*-Canada, ECLI:EU:C:2019:72, para. 91.

[56] It is noted that dualist systems (inter alia) require international agreements to be converted into national law. This topic is not further addressed in this article.

[57] CJEU 16 June 2005, C-105/03, *Maria Pupino*, ECLI:EU:C:2005:386.

[58] CJEU 16 June 2005, C-105/03, *Maria Pupino*, ECLI:EU:C:2005:386, para. 3. Art. 34(2)(b) of the TEU, in the version resulting from the Treaty of Amsterdam, read: 'To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may (…) b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect'.

[59] Article 4(3) TEU states that 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties', that 'The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union' and that 'The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

[60] CJEU 16 June 2005, C-105/03, *Maria Pupino*, ECLI:EU:C:2005:386, para. 43.

[61] Article 31(3) VCLT.

[62] F. M. Engelen, *Interpretation of Tax Treaties Under International Law* (Doctoral Series, vol. 7), Amsterdam: IBFD 2004, at 436–437.

Considering that bilateral tax treaties between the Member States and the UK should be interpreted in line with the TCA, the following paragraph focusses on the relevance of this interpretation for the CJEU case law on group taxation.

4.3 Non-discrimination in Bilateral Tax Treaties

Bilateral tax treaties between Member States and between EU Member States and the UK are for an important part based on the OECD Model Convention.[63] The OECD Model Convention contains in its Article 24(1) and (5) a provision on national treatment which regarding taxation matters seems in its content similar to Article 129 TCA and the national treatment in Article 49 TFEU. The provision reads as follows:

> 1. Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States. (...)
>
> 5. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.

The provisions on national treatment in bilateral tax treaties, based on Article 24(1) and (5) OECD Model Convention, may provide for the link that is required for an interpretation in line with the national treatment provisions in the TCA and Article 49 TFEU.

4.4 Group Taxation and National Treatment in the OECD Model

Every bilateral (tax) treaty is subject to the VCLT. Under the VCLT, treaties 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[64] Bilateral tax treaties based on the OECD Model Treaty contain a general interpretation rule in Article 3(2). Here is it stated that regarding the application of a bilateral tax treaty:

> at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires or the competent authorities agree to a different meaning pursuant to the provisions of Article 25, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.[65]

Likely the most important source of interpretation of tax treaties based on the OECD Model is the OECD Commentary.[66] On the capital ownership provision in Article 24(5) of the OECD Model Convention, the OECD Commentary notes that:

> Since the paragraph relates only to the taxation of resident enterprises and not to that of the persons owning or controlling their capital, it follows that it cannot be interpreted to extend the benefits of rules that take account of the relationship between a resident enterprise and other resident enterprises (e.g. rules that allow consolidation, transfer of losses or tax-free transfer of property between companies under common ownership). For example, if the domestic tax law of one State allows a resident company to consolidate its income with that of a resident parent company, paragraph 5 cannot have the effect to force the State to allow such consolidation between a resident company and a non-resident parent company. This would require comparing the combined treatment of a resident enterprise and the non-resident that owns its capital with that of a resident enterprise of the same State and the resident that owns its capital, something that clearly goes beyond the taxation of the resident enterprise alone.[67]

It can be derived from the OECD Commentary that it seems to go beyond the scope of Article 24 to allow *cross-border* consolidation. On the contrary, group taxation that leads to a discriminatory treatment of *resident* enterprises under the capital ownership provision has not been explicitly addressed in the OECD Commentary.[68] In that sense, it does not seem reasonable to exclude Papillon and sister consolidation from the scope of Article 24, as it would only lead to consolidation of resident entities in one contracting state.[69]

[63] For the most recent Model Convention, *see* OECD, *Model Tax Convention on Income and Capital 2017* (Full Version) (OECD Publishing 2019), http://dx.doi.org/10.1787/g2g972ee-en.

[64] Article 31(1) VCLT.

[65] OECD, *Model Tax Convention on Income and Capital 2017* (Full Version), OECD Publishing (2019), http://dx.doi.org/10.1787/g2g972ee-en.

[66] This follows, for instance, in a Dutch context from: Supreme Court of the Netherlands 2 Sept. 1992, no. 26 059, ECLI:NL:HR:1992:ZC5045, para. 3.3.2. More elaborate on the relevance of the OECD Commentary, *see* Engelen, *supra* n. 60, at 458–472.

[67] 2008 OECD Commentary on Art. 24(5), of the OECD Model Convention, para. 77.

[68] B. Farinha Aniceto da Silva, *Ch. 4 Revisiting the Application of the Capital Ownership Non-Discrimination Provision in Tax Treaties in Non-Discrimination in Tax Treaties: Selected Issues from a Global Perspective* (D. (Dennis) Weber & P. Pistone eds, IBFD 2016), Books IBFD, para. 4.3.1.

[69] For a historic analysis, *see* J. F. Avery Jones et al., *Art. 24(5) of the OECD Model in Relation to Intra-Group Transfers of Assets and Profits and Losses*, 3 World Tax J. (2011), Journal Articles & Opinion Pieces IBFD. *See also* K. Vogel, E. Reimer, A. Rust, Klaus *Vogel on*

Papillon and sister consolidation would not require comparing the combined treatment of a resident enterprise and its non-resident parent company. It only requires assessing whether excluding Papillon and sister consolidation could be a discriminatory treatment if that is purely based on the parent company being a resident in the other contracting state.[70]

4.5 Interpretation Followed by the UK

Not unimportant is the interpretation that the British court seems to give to the national treatment in the OECD Model Convention. In the British case of *FCE Bank,* the court ruled that not permitting a group regime between subsidiaries held by a non-resident company constituted less favourably treatment than fully domestic situations.[71] The UK court held that the:

> purpose and effect of Article 24(5) are to outlaw the admittedly discriminatory tax treatment to which (but for the convention) FCE would be subject as the directly held subsidiary of a US-resident company as compared with the more favourable tax treatment to which it would be entitled if it were the directly held subsidiary of a UK-resident company. That shows, in my judgment, that the only reason for the difference in treatment in the present case is the fact of FMC's [*DW/JS: the parent company's*] US residence.[72]

A very similar reasoning follows from the UK *Felixstowe Dock and Railway* case.[73] This case also concerned the non-permission of a group regime between the resident subsidiaries of a non-resident parent company. The parent company in this case was established in Luxembourg. The British court appears to have relied on the OECD Commentary on Article 24, which explains that the purpose of non-discrimination under tax treaties is to prevent differences in tax *treatment* and not just differences in taxation.[74] The court therefore concluded that the impossibility of transferring losses constituted a difference in treatment which fell within the scope of the capital ownership provision (Article 26(4) of the bilateral tax treaty between the UK and Luxembourg). The interpretation in line with cases *SCA, Papillon* and *B and Others* therefore seems to be in line with the reciprocity between the Contracting Parties to the bilateral tax treaty, as the UK effectively already interpretates articles 24(1) and (5) in line with these CJEU cases.

Therefore, articles in bilateral tax treaties between Member States and the UK that are based on articles 24(1) and (5) of the OECD Model Convention should be read in line with Article 129 TCA.[75] Based on the authors' interpretation of Article 129 TCA, and an indirect effect of the TCA on bilateral tax treaties between Member States and the UK, Article 24(1) and (5) should be read as obliging Member States to allow Papillon and sister consolidation, where the top holding company respectively the intermediate holding company is a UK resident company.

5 Conclusion

On 31 December 2020, the UK left the EU. This means that from 1 January 2021 onwards, the CJEU case law on group taxation (based on Article 49 TFEU) in principle no longer applies, as this only applies with respect to Member States. From 1 January 2021 onwards, the TCA applies between the EU and the UK, recognizing the need to ensure a level playing field for open and fair competition. The article analyses the relevance in relation to the UK of the CJEU case law on group taxation under Article 49 TFEU.

Double Taxation Conventions, Alphen aan den Rijn, Kluwer law international, 2015, 1688 p, para. 113 to Art. 24.

[70] Disregarding group taxation in general seems to go beyond the meaning of Art. 23.

[71] *See* Alison Last, FCE Bank Plc: Group Relief in reliance on a provision in a Double Taxation Convention (Court of Appeal), *Highlights & Insights on European Taxation* 2013/2.2 or Cleave, at 126–131. *See also* Aniceto da Silva, *supra* n. 66, para. 4.3.1.1.

[72] *First Tier Tribunal: FCE Bank plc v. Revenue and Customs Commissioners*, [2010] UKFTT 136 (TC), 1 Apr. 2010, 12 International Tax Law Reports, at 962–995. Upper Tribunal: FCE Bank plc *v.* Revenue and Customs Commissioners [2011] UKUT 420 (TCC), 13 Oct. 2011, 14 International Tax Law Reports, at 319–332. Court of Appeal: The Commissioners for Her Majesty's Revenue & Customs *v.* FCE Bank plc, [2012] EWCA Civ 1290, 17 Oct. 2012.

[73] The Felixstowe Dock and Railway Company Ltd & Ors *v.* Revenue & Customs, [2011] UKFTT 838 (TC), 19 Dec. 2011. *See* Bruno da Silva, Felixstowe Dock and Railway Company Ltd & Ors *v.* Revenue & Customs: UK group relief: Non Discrimination in Tax Treaties and EU Law, *Highlights & Insights on European Taxation* 2013/2.1.

[74] *See* Aniceto da Silva, *supra* n. 66, para. 4.3.1.1.

[75] An interesting note is that on 15 Dec. 2017, the Supreme Court of the Netherlands ruled on the national treatment provisions (capital ownership) in the treaty between the Netherlands and Israel. Three Dutch entities were held by Israeli entities. On the basis of the capital ownership, the Dutch entities argued that (effectively) a Sister consolidation should be allowed. According to the Supreme Court, the capital ownership provision requires a comparison to be made between the situation where the shares are held by a Dutch entities and the situation where the shares are held by the Israeli entities. The Supreme Court found that in a purely domestic situation, it was not possible to consolidate only the three Dutch subsidiaries without consolidating the Dutch shareholder. Therefore, not allowing a Sister consolidation in case of an Israeli resident was not a discrimination forbidden by the capital ownership provision. S.C.W Douma argues in his note to this decision that the Supreme Court deems consolidation of the parent company essential to the fiscal unity regime, which he finds questionable in light of among others the case *SCA*. He also raises the question whether the 'right of establishment and supply of services' in Art. 29 of the Euro-Mediterranean Agreement between the EU and Israel could have led to a different conclusion, despite the absence of any direct effect to this provision. For the case and accompanying note by S.C.W Douma, *see* Supreme Court of the Netherlands, 15 Dec. 2017, no. 16/02919, *BNB* 2018/57 (conclusion by Advocate General Wattel, note by S.C.W. Douma). For the Euro-Mediterranean Agreement between the EU and Israel, *see* Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, *OJ L* 147, 21 June 2000, at 3.

In the cases *SCA, Papillon* and *B and Others*, the CJEU ruled that the provision on national treatment in Article 49 TFEU precludes Member States from disallowing Parent and Sister consolidation where the top holding company, respectively intermediate holding company, is resident in another Member State. Similar to Article 49 TFEU, the TCA contains a provision on national treatment in Article 129 TCA. In the authors' view, the TCA should be interpreted in line with the national treatment provision in Article 49 TFEU, and the CJEU case law based on that. Therefore, the TCA should be read as precluding Member States from disallowing Parent and Sister consolidation where the top holding company, respectively intermediate company is resident in the UK.

It is noted that Article 129 TCA does not have direct effect. This means that taxpayers cannot base themselves on these provisions. The absence of such a direct effect does however not release the court from the obligation to interpret existing tax treaties in accordance with the provisions of the TCA (EU conform interpretation). The authors argue that existing tax treaties between the UK and the EU should be interpreted against the background of the TCA. This is relevant where bilateral treaties between Member States and the UK contain a non-discrimination Article such as the one laid down in articles in 24(1) and (5) of the OECD Model Convention. Where such a provision exists in tax treaties between Member States and the UK, these should be read as precluding Member States from disallowing Parent and Sister consolidation. Such an interpretation also guarantees the effective reciprocity of the agreement, as the UK already seems to interpretate these provision effectively in line with the cases *SCA*, *Papillon,* and *B. and Others.*