The effect of directives within the area of direct taxation on the interpretation and application of tax treaties

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PART I

Introduction

1 Introduction

1.1 Subject of this study

The subject of this study is determining the effect of directives within the area of direct taxation adopted on the basis of article 115 TFEU (hereinafter: the 'Directives') may have on the interpretation and application of tax treaties. In determining such effect, this study focuses on the perspectives of public international law and the laws of the European Union.

1.2 Background of this study

The subject of this study seems to have become more and more relevant.[1] This relevance can, firstly, be explained by the circumstance that the number of Directives has increased over time, as well as their overlap with distributive provisions of tax treaties concluded by the Member States.[2] The increase in overlap with distributive provisions can be illustrated as follows. As of 1 January 1992, the extent to which dividend payments may be taxed can be covered by the Parent-Subsidiary Directive,[3] as well as article 10 OECD Model.[4] In addition, as of 1 January 1992, the extent to which capital gains may be taxed can be covered by the Merger Directive,[5] as well as article 13 OECD Model.[6]

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1 See, inter alia, L. Hinnekens, EC Tax Review 1994/4, p. 146 et seq., A.C.G.A.C. de Graaf, 2004, p. 225 et seq., F. Avella, World Tax Journal 2012/6, O.C.R. Marres in: The KPMG Guide to the CCCTB 2012, A. Pirlot in: European Tax Integration: Law, Policy and Politics (Pistone), 2018, par. 14.2.2, P. Ariginelli in: The External Tax Strategy of the EU in a Post-BEPS Environment (Jiménez), 2019, I.M. De Groot, Intertax 2019/8 & 9, F.A. Engelen, J. Vleggeert & T.M. Vergouwen, WFR 2019/257, Y. Brauner & G. Kofler in: Global Tax Treaty Commentaries 2019, and I. Panzeri, European Taxation 2021/4.

2 Reference can, in addition to distributive provisions, also be made to the overlap between the Mutual Assitance Directive (77/799/EEC), (as been replaced by the Mutual Assistance Directive (2011/16/EU)) and article 26 OECD Model (2017), as well as to the overlap between the Arbitration Directive ((EU) 2017/1852) and article 25(5) OECD Model (2017).

3 Parent-Subsidiary Directive (90/435/EEC). This directive has subsequently been replaced by Parent-Subsidiary Directive (2011) and amended by Parent-Subsidiary Directive (2014) and Parent-Subsidiary Directive (2015).

4 TAXUD E1/FR DOC (05) 2306/A, p. 6-7.

5 Merger Directive (90/434/EEC). This directive has subsequently been amended by Merger Directive (2005/19/EC) and has been replaced by Merger Directive (2009/133/EU).

As of 1 January 2004, the extent to which interest and royalty payments may be taxed can be covered by the Interest and Royalty Directive,[7] as well as articles 11 (for interest payments) and 12 (for royalty payments) OECD Model.[8] As of 1 January 2019, the extent to which business profits may be taxed can be covered by the Anti-Tax Avoidance Directive,[9] as well as articles 7, 10(5) and 23 OECD Model.[10] Finally, the exit tax provision of the ATAD1 may also apply to transactions covered by article 13(5) OECD Model.[11]

As a second development illustrating the increasing relevance of the effect that the Directives may have on tax treaties, reference can be made to the changing nature of obligations arising from the Directives.[12] At the time of the adoption of the first Directives in 1990 (Parent-Subsidiary Directive and Merger Directive), the obligations imposed on the Member States were similar in nature to those arising under tax treaties in the sense that the Directives and tax treaties both provided for rules limiting the extent to which cross-border income could be taxed with a view to eliminating double taxation.[13]

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6 See G.F. Boulogne, 2016 for various examples wherein the Merger Directive and article 13 OECD Model would cover the same capital gain.

7 Interest and Royalty Directive.

8 TAXUD E1/FR DOC (05) 2306/A, p. 7-8.

9 ATAD1 and ATAD2.

10 See I. Panzeri, European Taxation 2021/4, p. 1.2 who notes that the taxation of profits attributable to a permanent establishment can be covered by the controlled foreign company rules of ATAD1, as well as by articles 7 and 23 OECD Model. See V. Chand, A. Turina & K. Romanovska, World Tax Journal 2022/2, p. 5 for the position that controlled foreign company rules, in general, can fall within the scope of articles 7 and 10(5) OECD Model.

11 See K. Moser, Bulletin for International Taxation 2019/10, p. 542, as well as V. Chand, Bulletin for International Taxation 2013/4/5, par. 4.3.1.

12 See regarding the changing nature of the obligations arising from the Directives, F.P.G. Pötgens & T.M. Vergouwen in: Jubileumbundel 150 jaar WFR (Jansen & Stevens), 2022, par. 3.

13 The Directives adopted in 1990 – the Parent-Subsidiary Directive (90/435/EEC) and Merger Directive (90/434/EEC) – and 2003 – the Interest and Royalty Directive (2003/49/EC) – related to areas that were covered by tax treaties, but related to the same objective, i.e. avoiding international double taxation. With respect to the Parent-Subsidiary Directive (90/435/EEC), see M. Helminen in: Principles of Law: Function, Status and Impact in EU Tax Law (Brokelind), 2017, par. 17.2 and A. Cordewener in: European Tax Law (Wattel, Marres & Vermeulen), 2018, p. 399. Regarding the objective of the Interest and Royalties Directive (2003/49/EC), see Joined Cases C-115/16, C-118/16, C-119/16 & C-299/16 (*N Luxembourg 1*), par. 90. Such objective is achieved – by the directives and tax treaties – by restricting the right of the source state (and, on occasion, the residence state) to tax dividend, interest, and royalty payments. Regarding the initial similarity of the obligations arising from the Directives and tax treaties, reference can also be made to Y. Brauner & G. Kofler in: Global Tax Treaty Commentaries 2019, par. 2.3.3.2 who note that *'treaty rules, such as articles 10 and 11 of the OECD Model, that would provide for reduced withholding taxes in the source Member State do not apply, as the domestic law that implemented the directives already provides for a zero withholding taxation'*, F.P.G. Pötgens & T.M. Vergouwen in: Jubileumbundel 150 jaar WFR (Jansen & Stevens), 2022, par. 3.1, D. Gutmann in: Building Global International Tax Law. Essays in Honour of Guglielmo Maisto (Pistone), 2022, par. 18.1 who notes that these Directives provided for '*the elimination of withholding taxes on a number of cross-border payments*

As of 2014, however, the duties arising under the Directives can be incompatible with obligations arising under tax treaties.[14] This is due to Directives being able to, ever since 2014, impose an obligation to tax cross-border income (instead of merely imposing a duty to refrain from taxing cross-border income).[15] Such an obligation can be found in the Parent-Subsidiary Directive (2014/86/EU),[16] ATAD1 (2016/1164),[17] and ATAD2 (2017/952),[18] as well as in the on 31 October 2022 pending proposal for a directive on ensuring a global minimum level of taxation for multinational groups in the Union (hereinafter: the 'Pillar 2 Directive Proposal').[19] This duty to tax income may, contrary to the duty to refrain from taxing income, conflict with obligations arising under tax treaties if such treaties impose a duty to not tax that same income.[20]

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and make it possible to conduct restructurings of European groups without suffering adverse tax consequences', and L. de Broe in: Building Global International Tax Law. Essays in Honour of Guglielmo Maisto (Pistone), 2022, par. 23.1 who states that the Directives have '*traditionally aimed at improving the effective functioning of the internal market by protecting corporate taxpayers against double taxation and providing for the equivalent tax treatment of domestic and cross-border transactions. The practical result of such legislation is that Member States relinquish certain taxing rights and that the taxpayer's situation is improved*'.

14 See L. de Broe in: Building Global International Tax Law. Essays in Honour of Guglielmo Maisto (Pistone), 2022, par. 23.1 noting that directives obliging Member States to include certain income items in the taxpayer's tax base that would otherwise go untaxed '*may impose obligations on Member States that conflict with their commitments under tax treaties*'.

15 For the Parent-Subsidiary Directive, see recital (3) of Parent-Subsidiary Directive (2014) for the aim of avoiding double taxation and article 1(1) for the obligation to tax certain dividend payments. For ATAD1, see recital (5) ATAD1 and article 7 for the obligation to tax income of controlled foreign companies. For ATAD2, see recital (27) ATAD2 and articles 9 and 9a for the obligation to tax income. See also F.A. Engelen, J. Vleggeert & T.M. Vergouwen, WFR 2019/257, p. 1553 and Y. Brauner & G. Kofler in: Global Tax Treaty Commentaries 2019, par. 2.3.3.3. Reference may also be made to W.C. Haslehner in: A Guide to the Anti-Tax Avoidance Directive (Haslehner, Pantazatou, Kofler & Rust), 2020, p. 32 who refers to ATAD as '*the first piece of major EU tax legislation that directly imposes a burden on corporate taxpayers*'.

16 See article 1(1) of Parent-Subsidiary Directive (2014) which provides that Member States are obliged to '*tax such profits to the extent that such profits are deductible by the subsidiary*'.

17 See article 5(1) ATAD1 as well as article 7(2) ATAD1. Pursuant to article 5(1), '*a taxpayer shall be subject to tax*' over the difference between the market value less the value for tax purposes with respect to so defined 'transferred assets'. Moreover, article 7(2) provides that Member States '*shall include in the tax base*' certain categories of non-distributed income of controlled foreign companies.

18 See articles 9(2)(b) and 9(5) ATAD2. Pursuant to article 9(2) ATAD2, Member States are obliged to include income in the taxable base of its taxpayers in the event of a deduction without inclusion outcome whereas article 9(5) imposes a duty to include income attributable to a disregarded permanent establishment in the taxable base as well.

19 Pillar 2 proposal (COM(2021) 823 final). Regarding the potential for a conflict between the Pillar 2 Directive Proposal and a tax treaty, see L. de Broe in: Building Global International Tax Law. Essays in Honour of Guglielmo Maisto (Pistone), 2022, par. 23.2.2.

20 See F.A. Engelen, J. Vleggeert & T.M. Vergouwen, WFR 2019/257, p. 1553, Y. Brauner & G. Kofler in: Global Tax Treaty Commentaries 2019, par. 2.3.3.3, P. Ariginelli in: The External Tax Strategy of the EU in a Post-BEPS Environment (Jiménez), 2019, par. 8.3.3, W.C. Haslehner in: A Guide to the Anti-Tax Avoidance Directive (Haslehner, Pantazatou, Kofler

This could, for example, be the case where a tax treaty contains an exemption for income attributable to a permanent establishment without a switch-over clause.[21] In the event that such income would qualify as non-distributed controlled foreign company income within the meaning of ATAD1 or as income attributable to a disregarded permanent establishment for the purposes of ATAD2, a Member State would be required to simultaneously tax the income attributable to the permanent establishment (under ATAD1 or ATAD2) and to not tax that income under the relevant tax treaty.[22] The question that arises within this respect is whether the tax treaty can be affected in such a way, either under public international law or EU law, that it allows for the taxation of such income in accordance with the provisions of ATAD1 and ATAD2. In addition to a conflict being able to arise between the duty to tax income in Directives and the duty to not tax income under tax treaties, the on 31 October 2022 pending ATAD3 Proposal may also give rise to a conflict with tax treaties given that it could require Member States to disregard a tax treaty between Member States.[23]

& Rust), 2020, p. 60, par. 2.66, I. Panzeri, European Taxation 2021/4, p. 147 and L. de Broe in: Building Global International Tax Law. Essays in Honour of Guglielmo Maisto (Pistone), 2022, par. 23.1.. Regarding the duty to deny benefits of a Directive and its overlap with tax treaties, see O.C.R. Marres & I. de Groot, European Taxation 2021/8, p. 339.

21 See, regarding the relevance of a switch-over clause, I.M. de Groot, Intertax 2019/8 & 9, p. 781-782.

22 The example regarding a controlled foreign company permanent establishment is also used by I.M. de Groot, Intertax 2019/8 & 9, p. 781-782, F.A. Engelen, J. Vleggeert & T.M. Vergouwen, WFR 2019/257, p. 1553, Y. Brauner & G. Kofler in: Global Tax Treaty Commentaries 2019, par. 2.3.3.3, footnote 211, W.C. Haslehner in: A Guide to the Anti-Tax Avoidance Directive (Haslehner, Pantazatou, Kofler & Rust), 2020, p. 61, par. 2.66, A. Rust in: A Guide to the Anti-Tax Avoidance Directive (Haslehner, Pantazatou, Kofler & Rust), 2020, p. 182, par. 7.20, I. Panzeri, European Taxation 2021/4, p. 147, and L. de Broe in: Building Global International Tax Law. Essays in Honour of Guglielmo Maisto (Pistone), 2022, par. 23.2.1. Reference made also be made, more generally, to P. Ariginelli in: The External Tax Strategy of the EU in a Post-BEPS Environment (Jiménez), 2019, par. 8.3.2 who notes that the CFC rules of ATAD1 may conflict with tax treaties.
S. Pancham in: The Implementation of Anti-BEPS legislation in the European Union: A Comprehensive Study (Pistone & Weber), 2018, par. 19.4.6 and P. Ariginelli in: The External Tax Strategy of the EU in a Post-BEPS Environment (Jiménez), 2019, par. 8.3.3 argue that the hybrid mismatch rules of ATAD2 with respect to disregarded permanent establishments may conflict with tax treaties, although not with respect to third states given the carve-out in article 9(5) ATAD2. Ariginelli also notes in par. 8.3.3.3 that a conflict may arise between the obligation under article 9(2)(b) ATAD2 to tax income with *'the tax treaties concluded by those states with third countries that oblige the relevant Member State to exempt the payments made by companies resident in the third country'*. He also signals that no carve-out applies in this event. In addition, reference may also be made to C. Brokelind in: The External Tax Strategy of the EU in a Post-BEPS Environment (Jiménez), 2019, par. 9.2.2.3 who notes that a conflict may arise between article 9(5) ATAD2 and exemptions provided for by tax treaties.

23 See article 11(1) ATAD3 Proposal (COM(2021 565 final)) which provides that a Member State *'shall disregard any agreements and conventions that provide for the elimination of double taxation of income, and where applicable, capital'* if the conditions would be met.

A third development relates to the judgment of the CJEU in the so-called *Danish* cases of 2019. In these cases, the CJEU ruled that the general EU anti-abuse principle requires Member States to deny benefits of the Parent-Subsidiary Directive and Interest and Royalties Directive in fraudulent or abusive cases.[24] Denial of such benefits, i.e. an exemption of (source) taxation in respect of intra-group cross-border profit distributions, interest payments and royalty payments from a corporate taxpayer resident in one Member to a corporate taxpayer in another Member State, would entail a duty to not exempt such distributions and payments. A duty to not exempt would then seem to entail a de facto obligation to tax. Such a de facto obligation to tax could then conflict with an obligation to not tax under a tax treaty. Hence, it has become apparent that as of 2019 a conflict may also arise in connection with Directives adopted before 2014 if the denial of their benefits is required under the general EU anti-abuse principle.

Finally, as a fourth development, it can be mentioned that there are relatively recent judgments of the CJEU relating to the interpretation of terms in Directives that resemble terms used in the OECD Model.[25] In *Berlioz Investment*, the CJEU interpreted the term 'foreseeably relevant' in the Mutual Assistance Directive (2011/16/EU),[26] which term is also used in article 26 OECD Model (2017). In the *Danish cases*, the term 'beneficial owner' in the Interest and Royalty Directive (2003/49/EC)[27] was interpreted by the Court, which term is also used in articles 11 and 12 OECD Model (2017). These judgments, wherein the CJEU has interpreted terms that seem to have been 'borrowed' from the OECD Model, could raise the question as to whether national courts, when interpreting the 'original' OECD Model terms in tax treaties, must take the interpretation given by the CJEU to such terms into account.[28]

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24 Joined Cases C-115/16, C-118/16, C-119/16 & C-299/16 (*N Luxembourg 1*) and Joined Cases C-116/16 & C-117/16 (*T Danmark*).

25 See Case C-682/15 (*Berlioz*), par. 67 and Joined Cases C-115/16, C-118/16, C-119/16 & C-299/16 (*N Luxembourg 1*), par. 90. See also Y. Brauner & G. Kofler in: Global Tax Treaty Commentaries 2019, par. 2.3.3.5 who refer to this as 'the borrowing of treaty concepts'.

26 Article 1(1) of the Mutual Assistance Directive (2011/16/EU).

27 Article 1(1) of the Interest and Royalty Directive.

28 See R.A. Bosman & F.P.G. Pötgens in: De toekomst van de vennootschapsbelasting (Van de Streek), 2017, par. 13.4.2.3 and L. de Broe in: Current Tax Treaty Issues (Maisto), 2019, par. 19.2. See more generally, see F. Avella, World Tax Journal 2012/6, p. 96 et seq. See also A.J. Martin Jimeìnez in: Global Tax Treaty Commentaries – Global Topics 2022, par. 5.7.2.4 highlighting that Spanish courts have, in fact, used the 'beneficial owner' interpretation of the CJEU in the so-called *Danish Cases*, i.e. Joined Cases C-115/16, C-118/16, C-119/16 & C-299/16 (*N Luxembourg 1*) and Joined Cases C-116/16 & C-117/16 (*T Danmark*).

1.3 RESEARCH QUESTION

Against the background of the increasing overlap of Directives with provisions of tax treaties, the changing nature of obligations arising from, and in connection with, the Directives (and their potential for conflicts with tax treaties), and the CJEU interpreting Directive terms that are similar to those used in tax treaties, the present study is aimed at determining the effect that the Directives may have on tax treaties concluded by the Member States. Therefore, it seeks to answer the following research question:

> *To what extent do the Directives affect the interpretation and application of tax treaties concluded by the Member States?*

As follows from the research question, a distinction is drawn between the effect of the Directives on the interpretation and the application of tax treaties.[29] The reason for drawing such a distinction between the effect on the 'interpretation' and 'application' of tax treaties is three-fold. Firstly, it accurately reflects the basic rule that any application of a treaty is preceded by an interpretation, either consciously or subconsciously, of that treaty.[30] As such, 'interpretation' and 'application' of a treaty are two distinct steps in determining the effect of the Directives on tax treaties. The second reason is that this basic rule also seems to be recognized by the CJEU, considering that it has consistently held that '*the question [of] whether a national provision must be disapplied (...) arises only if no compatible interpretation of that provision proves possible*'.[31] As such, before

29 It is thus not the purpose of the present thesis to determine the effect of the Directives on the 'conclusion' of tax treaties. With respect to such effect, it can nevertheless be mentioned here that, from the perspective of the laws of the EU, it can be derived from the so-called 'Open Skies' judgments of the CJEU that the conclusion of tax treaty contrary to, at the time of conclusion, a Directive is not permitted because it would entail that the Member State(s) concerned failed to fulfil the obligations under article 4 TEU (duty of Union loyalty) and article 288 TFEU (see, for example, Case C-467/98 (Open Skies (Denmark)), par. 112). Hence, the effect of the Directives on the conclusion of tax treaties is that such treaties may not be concluded in a way that is incompatible with such Directives (from the perspective of the laws of the EU). See, in this respect, also F.P.G. Pötgens & T.M. Vergouwen in: Jubileumbundel 150 jaar WFR (Jansen & Stevens), 2022, par. 2.
The effect of the Directives on the 'conclusion' of tax treaties from the perspective of the laws of the EU should, however, also be compared with the public international law perspective. As such, the effect described in the previous paragraph of the present footnote represents only 'one side of the same coin'. The other side, the public international law side, should also be taken into account in this respect. This side is not discussed here (or elsewhere in the present thesis).

30 G. Schwarzenberger, Virginia Journal of International Law 1968/1, p. 8. This basic rule is also referred to by O. Dörr & K. Schmalenbach, 2018, p. 568, par. 14.

31 See Case C-585/19 (*Academia de Studii Economice din Bucureşti*), par. 68, Case C-308/19 (*Consiliul Concurenței*), par. 63, Case C-122/17 (*Smith*), par. 41, Joined Cases C-569/16 & C-570/16 (*Wuppertal*), par. 25, Case C-306/12 (*Spedition Welter*), par. 28, Case C-97/11 (*Amia*), par. 27, and Case C-282/10 (*Dominguez*), par. 23.

the application of a national provision can be affected by a Directive ('disapplied') under the laws of the EU, a national court must first determine whether the interpretation of such provision can be affected in such a way that it is compatible with a Directive ('compatible interpretation'). In addition, as a third reason, the VCLT 1969 also provides different sets of rules with respect to the interpretation of treaties (part III, section 3 of the VCLT 1969) and the application of treaties (part III, section 2 of the VCLT 1969). As such, drawing a distinction between the effect of the Directives on the interpretation and application of tax treaties would also seem justified under public international law.[32]

It also follows from the research question that the present study solely focuses on the effect of Directives on the interpretation and application of tax treaties. It is as such not the purpose of the present study to also determine the effect of other sources of EU law that are not linked to the Directives on the interpretation or application of tax treaties. The reasons for not addressing such other sources are as follows. First, the developments set out in section 1.2 demonstrate the increasing overlap of Directives and tax treaties.[33] As such, the effect of the Directives is most relevant.[34] Second, the effect that

32 This distinction between the effect of the Directives on the interpretation and application of tax treaties does not, however, detract from the fact that any effect that the Directives would have on the 'interpretation' would also affect the way in which a tax treaty is applied. As such, the reference in the research question to the effect of the Directives on the interpretation and application could also be understood as relating to the indirect (via the 'interpretation' question) and direct (via the 'application' question) of such Directives on the application of tax treaties.

33 For these purposes, the obligation to deny the benefits of the Directives under the general EU anti-abuse rule is considered as linked to the Directives.

34 This does not mean, however, that the effect of the other sources of EU law on the interpretation and application of tax treaties would not be relevant. Such other sources would include the fundamental freedoms and state aid rules. Developments in the area of such freedoms and state aid rules may thus also be relevant for the interpretation and application of tax treaties. They are, however, less relevant at present in terms of the extent to which there have been developments over the period 2012-2022.
With respect to the relation between the fundamental freedoms and tax treaties, there does not seem to have been recent case law of the CJEU within the context of such freedoms that relates directly to the interpretation and application of tax treaties (most relevant would seem to be the so-called *Danish cases*, but those are considered as being linked to the Directives). As such, the topic of the relation between the fundamental freedoms and tax treaties – in terms of recent case law of the CJEU – seems less relevant as compared to the topic of the effect of the Directives on tax treaties given the developments set out in section 1.2 (with respect to the academic debate regarding the relation between the fundamental freedoms and tax treaties, reference can be made in general to A.C.G.A.C. de Graaf, 2004. More specifically, i.e. with respect to limitation-on-benefits clauses, reference can also be made to Opinion Statement ECJ-TF 1/2018, p. 11, paras. 52-54 where it is concluded that '*typical limitation-on-benefits clauses are likely to be incompatible with EU fundamental freedoms*').
Moreover, with respect to the relation between tax treaties and state aid rules, the most relevant development would seem to be the state aid decision of the European Commission

the Directives may have on the application of tax treaties from the perspective of the laws of the EU is fundamentally different from that of other sources such as the EU Treaties or regulations. This is due to the primacy of directly effective provisions of the EU Treaties and regulations being enforceable irrespective of the effect on taxpayers, whereas this is not the case for the Directives due to the prohibition of horizontal direct effect and reverse vertical direct effect.[35] As such, the effect of the Directives on the application of tax treaties is less clear-cut. Such effect essentially depends on whether relying on the primacy of a Directive, which could result in the setting aside of a tax treaty, would be beneficial or detrimental to a taxpayer. If one then takes into account that ATAD1 and ATAD2 seek to increase the tax burden of taxpayers, Directives may not be able to affect the application of tax treaties under the laws of the EU notwithstanding their primacy. This would have been different if ATAD1 and ATAD2 had been adopted in the form of, for example, regulations because the enforceability of the primacy of regulations is not dependent on the effect on taxpayers. It thus follows that the nature of Directives is relevantly different from that of other sources of EU law.[36] As such, this study focuses on the effect of Directives only.

regarding alleged aid to McDonald's (SA.38945 (2015/NN – 2015/C) (reference can also be made to the investigation of the Commission into the limitations of benefits clause in the tax treaty between the Netherlands and Japan, as announced in the November Infringement Package, MEMO 15/6006. This investigation has not, however, resulted in a (formal) decision of the Commission). In its final decision of 26 July 2019, the Commission concluded, however, that the tax treaty between Luxembourg and the United States did not constitute aid. As such, the question as to whether such tax treaty would have been incompatible with the state aid rules has not been brought before the Courts of the EU. For that reason, there do not seem to have been concrete developments – in terms of state aid decisions of the European Commission or case law of the CJEU – within the area of the relation between tax treaties and state aid rules (with respect to the academic debate regarding such relation, reference can be made to R. Luja, European Taxation 2004/5, L. de Broe, EC Tax Review 2017/5, and Y. Brauner & G. Kofler in: Global Tax Treaty Commentaries 2019).

35 See S. Prechal, 2009, p. 15-16. This prohibition does not apply with respect to the EU Treaties and regulations because they do not require transposition. For that reason, Member States cannot fail to implement obligations arising from such sources of EU law. This is different for Directives, considering that form and methods are left to the Member States to achieve the result of a Directive.

36 This does not not, however, entail that the findings of the present study are irrelevant for the effect of other sources of EU law on the interpretation and application of tax treaties. For example, the line of reasoning regarding the effect of the Directives on the interpretation and application of tax treaties under public international law may also be applied to the EU Treaties. The same applies to the arguments set out with respect to the EU law perspective, although one should bear in mind that the prohibition of reverse vertical direct effect only applies to directives.

1.4 THREE PERSPECTIVES TOWARDS ANSWERING THE RESEARCH QUESTION

The effect that the Directives may have on tax treaties can be studied from the following three 'legal' perspectives: public international law, European Union law, and Member State law. The interaction between these three perspectives can be illustrated as follows.

> Member State A has concluded a tax treaty with Member State B pursuant to which income attributable to a permanent establishment in Member State B must be exempt in Member State A. Under the constitution of Member State A, such a tax treaty takes precedence over any national legislation if such legislation is incompatible with the tax treaty (which would not seem uncommon in the Member States, see section 1.4.3 below). Following the adoption of ATAD1, Member State A has amended its national legislation in such a way that certain categories of non-distributed income of a controlled foreign company permanent establishment in Member State B would be taxed. However, taking into account the superiority of tax treaties, it would seem that such national legislation aimed at implementing ATAD1 would have to be set aside by the tax treaty with Member State B entailing that Member State A has not been able to adequately implement ATAD1. At the same time, however, if such national legislation must be set aside by the tax treaty, the primacy of EU law might, in turn, require the setting aside of such tax treaty by Member State A (subject to the prohibition of reverse vertical direct effect).

From the Member State perspective, in this case, it follows that the application of its tax treaty with Member State B is, in principle, not affected by the national legislation aimed at implementing ATAD1. There may, however, also be Member States where tax treaties are not superior to national law. In such Member States, a domestic legislator would be able to effectively set aside tax treaties that would require an exemption with a view to ensuring that the result of the Directive is achieved. In such a way, a Directive could de facto be regarded as affecting the application of tax treaties. Such a 'treaty override' would not, however, have any effect on the binding nature of the obligation of such Member States to perform the obligations arising from a tax treaty in good faith. The extent to which the treaty obligation is affected, is a matter of public international law and should therefore be studied from the public international law perspective.

The extent to which tax treaties are affected as a matter of public international law would be relevant for Member State A in the example above. This is because its national legislation aimed at implementing ATAD1 would only be set aside to the extent incompatible with a tax treaty. If such tax treaty would be affected by ATAD1 in such a way that it does not require an exemption of the income attributable to the permanent establishment in Member State B, the national legislation aimed at implementing ATAD1 would no longer be set aside by the tax treaty (because there is no longer any conflict), and the non-distributed income of the permanent establishment is taxed in accord-

ance with ATAD1. Hence, it is relevant for Member State A to determine the extent to which its tax treaties would be affected by ATAD1 under public international law because this would have consequences, from its own (Member State) perspective, for the extent to which it has adequately implemented ATAD1.

If, however, the tax treaty with Member State B would not be affected in such a way under the rules of public international law that its application allows Member State A to tax controlled foreign company income attributable to a permanent establishment in Member State B, Member State A has not implemented the Directive correctly. If that would be the case, the European Union law perspective would be relevant because it provides for a conflict rule, i.e. the primacy of EU law, pursuant to which Member State courts must set aside tax treaties if they would stand in the way of complying with the obligations arising from the Directives (subject to the prohibition of reverse vertical direct effect). If set aside on the basis of such primacy, a tax treaty would be affected by the European Union law perspective.

The paragraphs above thus illustrate that tax treaties may be affected by a Directive under the national law of a Member State, under public international law, and under European Union law. In addition, it demonstrates that the effect under European Union law would, effectively, only be relevant after determining the effect of a Directive on tax treaties under the national laws of a Member State and public international law. This is due to the primacy of EU law being dependent upon a Member State not achieving the result of a Directive, which requires an assessment of the result achieved by a Member State bearing in mind the national laws of such a Member State and, if no treaty override is provided for, the public international law perspective. As such, in order to determine the effect of a Directive on (the interpretation and application of) tax treaties in a given situation, all three perspectives could, in principle, be relevant.

1.4.1 The focus of the present thesis

While all three perspectives would be relevant, the present study focuses on only two: public international law and the European Union law. The reason for focusing on these two perspectives is that the effect of the Directives on the interpretation and application of tax treaties under public international law, at least to the extent that it concerns customary international law, and the laws of the European Union should be the same in all Member States. Thus, the findings of present study should be relevant for all Member States. This would be different for the Member State perspective because the effect of national laws aimed at implementing a Directive on tax treaties may differ from one Member State to another. This would thus require a study of each individual Member State's legal order. This author is not able to perform such

a study because he does not, for starters, have sufficient knowledge of the languages of each of the Member States to be able perform a thorough study into the hierarchy of tax treaties within the legal order of each Member State. For that reason, the focus of the present thesis will be on the perspectives of the laws of public international law, to the extent reflecting customary international law, and European Union law.

Whereas the focus is on these two perspectives, this author has performed a preliminary study into the priority of tax treaties in the Member States' legal orders in section 1.4.3. Such study aims to provide some insights into the extent to which national legislation, by means of which a Directive would have to be implemented, would seem to be able to override, and hence to affect the application of, incompatible tax treaties.

1.4.2 The public international law and European Union law perspectives

As noted, the present study focuses on the effect of the Directives on the interpretation and application of tax treaties from the perspective of public international law and the perspective of European Union law. As such, it seeks to essentially answer the following four questions:

a) to what extent do the Directives affect the *interpretation* of tax treaties concluded by the Member States *under public international law*?
b) to what extent do the Directives affect the *interpretation* of tax treaties concluded by the Member States *under the laws of the EU*?
c) to what extent do the Directives affect the *application* of tax treaties concluded by the Member States *under public international law*?
d) to what extent do the Directives affect the *application* of tax treaties concluded by the Member States *under the laws of the EU*?

The first question and third question, relating to the public international law perspective, are aimed at determining the effect that Directives can have, or are allowed to have, on tax treaties on the inter-state level (the public international legal order). The answer to this question is relevant for the Member States because it determines the extent to which giving effect to the Directives may be contrary to tax treaties. If, for example, a tax treaty would seem to be incompatible with a Directive but – following the application of the rules of public international law – would prove to be compatible with it, the effect of the Directive is achieved in a way that is consistent with such tax treaty (thereby avoiding any violation of tax treaty obligations). It is also relevant for those Member States wherein tax treaties have priority over national laws, including those implementing Directives, because it could prevent a conflict from arising between such laws and tax treaties. It is thus the purpose of the first and third questions to determine the extent to which Directives can affect

tax treaties in such a way that conflicts with the Directives are avoided under public international law.

The second question and fourth question have a different purpose. Their purpose is to, essentially, determine the extent to which the Directives can have, or must have, an effect on the tax treaties concluded by the Member States. Their focus is on determining to what extent Member States would be obliged to ensure that the interpretation or application of their tax treaties is affected in order to achieve the result of a Directive. As such, these questions can be regarded as being aimed at determining the 'required' effect of the Directives on the interpretation and application of tax treaties whereas the first and third questions (i.e. the public international law questions) are more concerned with the 'allowed' effect of the Directives on the interpretation and application of tax treaties.

1.4.3 The Member State law perspective

In addition to the public international law and EU law perspective, the Member State law perspective (hereinafter: the 'Member State Perspective') would also be relevant for determining the effect that Directives may have on the interpretation of tax treaties in practice. With respect to such Member State Perspective, this section seeks provide a preliminary insight into whether national law aimed at implementing a Directive may be able to override a tax treaty or may be overridden by such a tax treaty. This thus concerns the question regarding the hierarchy of (tax) treaties within the legal orders of the Member States vis-à-vis national laws

The answer to this question is based on the information available on national legislation at https://e-justice.europa.eu (last accessed: 6 July 2022), an official website of the European Union providing '*information on justice systems and improving access to justice throughout the EU*', as supplemented by publications of legal scholars in English. Based on the information this website of the European Union, the following picture arises as a starting point:

a) treaties are superior to national legislation, but not with respect to European Union law and the constitution: Estonia, and Greece;
b) treaties are superior to national legislation, except for the constitution: Cyprus, Lithuania, Portugal,[37] and Spain;[38]

37 See J.A. Fernandes & F. de Sousa da Camara in: IFA Cahiers 2010 – Volume 95A: Tax Treaties and tax avoidance: application of anti-avoidance provisions 2010, par. summary (*'the Portuguese Constitution has established a hierarchy where tax conventions prevail over domestic law if conflicts arise between a DAAR and a treaty, the DAAR will be deemed unlawful and hence inapplicable'*) and C.R. de Melo & T.C. Ramos in: 2020, p. 672 (*'Portugal adopts a monist system regarding international law and therefore the MLI and tax treaties are automatically applicable in Portuguese territory, after their entry into force, with no need to be incorporated or transformed*

c) treaties are superior to national legislation (without clarifying the superiority with respect to the constitution): Belgium,[39] Bulgaria, Czech Republic, France,[40] Hungary,[41] Luxembourg,[42] Netherlands,[43] and Slovenia;
d) the status of a treaty depends on the national measures by means of which it is given effect: Finland; and
e) the status of treaties vis-a-vis national law is not clear because (i) the hierarchy of sources is not set out (Croatia, Denmark, Malta, Romania and Sweden), (ii) the hierarchical status of treaties is not explicitly addressed (Germany, Italy, Ireland and Slovakia), (iii) such hierarchical status is not explicitly confirmed (Latvia and Poland), or (iv) such hierarchical status is dependent on its content (Austria).

With respect to those Member States wherein the status of treaties is unclear, i.e. the Member States falling in category (e), the following can be noted based on publications of legal scholars. In Austria, Denmark, Germany, and Sweden, the domestic legislator seems to be able to override tax treaties by enacting subsequent legislation.[44] This seems to be different in Croatia, Ireland, Poland,

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into national law, prevailing over the latter. Therefore, domestic legislation will not be able to override the provisions brought forward by the MLI.')

38 See A. Ribes Ribes in: 2020, p. 777 (*'any kind of international treaty duly ratified by Congress, is considered legally superior to domestic law and must be implemented in accordance to this superior value over domestic legislation.') and p. 778 ('Furthermore, article 7(b) and (c) of the Spanish General Tax Act -the general framework of the Spanish taxation system and of all fiscal procedures- clearly regulates that international agreements take precedence over domestic laws and regulations on any tax issues.'*).

39 See E-J. Navez in: Taxation of Companies on Capital Gains on Shares under Domestic Law, EU Law and Tax Treaties (Maisto), 2013, par. 12.8.1, C. Docclo, Fiscoloog 2017/406, and P. de Vos & C. Docclo in: Online: IFA 2020, p. 187-188 who note that tax treaties would also supersede the constitution.

40 See Report on Tax Treaty Override, p. 7, par. 15, N. Message in: Tax Treaties and Domestic Law (Maisto), 2006, par. 8.2.1.1.2, and N. De Boynes in: 2020, p. 362.

41 See also B. Kolozs & A. Koszegi in: IFA Cahiers 2010 – Volume 95A: Tax Treaties and tax avoidance: application of anti-avoidance provisions 2010, par. 1.4.1.

42 O.R. Hoor & A. Medler in: IFA Cahiers 2020: Volume 105A – Reconstructing the treaty network 2020, p. 513 *('Luxembourg applies a monist theory according to which domestic law including the constitution must be amended or may be disregarded to the extent it is incompatible with international law (such as European primary and secondary law). International treaties (such as DTT or the MLI) first have to be ratified through the Luxembourg legislative procedure and transposed into domestic law. Therefore, such international treaties rank higher than domestic law and may not be overridden by contradictory Luxembourg legal provisions.'*).

43 See Report on Tax Treaty Override, p. 7, par. 15, F.G.F. Peters & A. Roelofsen in: IFA Cahiers 2010 – Volume 95A: Tax Treaties and tax avoidance: application of anti-avoidance provisions 2010, par. 1.4, and D. Tiesinga & E. Nuku in: 2020, p. 558.

44 D. Hohenwarter in: Tax Treaties and Domestic Law (Maisto), 2006, par. 7.2.3 (*'if it becomes evident in the course of interpretation that the later domestic law provision deliberately overrules the special treaty provision, this then is a case of treaty override which – at least from the point of view of the Austrian Constitution – has to be accepted.'*), P.K. Schmidt in: 2020, p. 335 (Denmark), and A. Rust in: Tax Treaties and Domestic Law (Maisto), 2006, par. 9.3.1 (Germany;

Italy and Slovakia. In Croatia, Ireland, Poland, and Slovakia treaties seem to take precedence over national law in the event of a conflict,[45] while this also seems to be the case in Italy subject to the exception that a treaty might be inapplicable if domestic law would be more favourable.[46] The situation in Latvia seems less clear, but Mits argues that international law would be superior to national law except for the constitution.[47] Moreover, in Romania, the status of treaty seems to be linked to the status of the act of ratification,[48] which would seem similar to the Finnish system (see d) above. Finally, the present author has not been able to ascertain the hierarchy of treaties within the national legal order of Malta, which seems to be in any event a dualist state.[49] Taking these considerations into account, a more complete overview can be provided:

a) in 20 Member States, treaties are superior to non-constitutional national legislation;
b) in 4 Member States, domestic legislators can override treaties by national legislation;
c) in 2 Member States, the status of treaties is equal to that of the domestic act giving effect to such treaties; and
d) in 1 Member States, the status of treaties could not be determined.

Based on this overview, it would seem that tax treaties may not necessarily be affected by national laws aimed at implementing Directives in 20 Member States. The key question with respect to such Member States would be whether the superiority of treaties also extends to national legislation aimed at imple-

see also Report on Tax Treaty Override, p. 8, par. 15, and A. Linn in: IFA Cahiers 2010 – Volume 95A: Tax Treaties and tax avoidance: application of anti-avoidance provisions 2010, par. 1.5.1.2), and D. Edvinsson in: IFA Cahiers 2020: Volume 105A – Reconstructing the treaty network 2020, p. 793 (Sweden).

45 See S. Rodin, 55 1995, p. 797 (Croatia; *'legal force superior to ordinary laws'*), D. Noone & A. Quinn in: IFA Cahiers 2010 – Volume 95A: Tax Treaties and tax avoidance: application of anti-avoidance provisions 2010, par. 1.4.2 (Ireland; *'[i]t is common case that if there is such a conflict [between domestic law and the double taxation treaty] it is the terms of the Convention that must prevail'*), K. Lasinìski-Sulecki & W. Morawski in: 2020, p. 638 (Poland; *'precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes'*), and A. Koroncziovaì & M. Kacaljak, Economics and Social Issues Review 2017/3, p. 149 (Slovakia; reference is made to a constitutional provision that stipulates *'International treaties (...) which were ratified and promulgated in the way laid down by a law shall have precedence over laws'*).

46 P. Bracco in: IFA Cahiers 2010 – Volume 95A: Tax Treaties and tax avoidance: application of anti-avoidance provisions, Online: IFA 2010, par. 1.4, and A. Zaimaj in: 2020, p. 455.

47 M. Mits, 2016, The European Convention on Human Rights and Democratisation of Latvia, p. 5.

48 V. Vita, Germany Law Journal 2015/6, p. 1630.

49 See I. Mifsud, 2022, p. 50.

menting Directives as a matter of their (constitutional) laws. At least for one Member State, i.e. the Netherlands, this seems to be the case.[50]

If the superiority of treaties extends to national law aimed at implementing a Directive, the outcome under the Member State Perspective is that tax treaties are not affected by the Directives beyond the extent to which such treaties may be affected by such Directives under public international law. The effect of the Directives under the Member State Perspective would then, essentially, seem to be linked to that under the public international law perspective (which perspective is the focus of the present thesis). As such, the ability of such Member States to achieve the result of a Directive would essentially be dependent on the effect of the Directives on their tax treaties. If such effect does not go so far as allow the Member State concerned to achieve the result of a Directive, it would not achieve that result. It is in such a situation, i.e. a Member State cannot, or has not, (adequately) implement(ed) a Directive, that the tax treaty's interpretation or application may be required to be affected under the laws of the EU with a view to ensuring that the result of such Directive is achieved (notwithstanding the superiority of such a treaty from the Member State Perspective).[51] As such, EU law would then provide for a treaty override.[52]

If, however, the superiority of treaties does not extend to national legislation giving effect to the Directives, which would in any event seem to be the case in the 6 Member States wherein such treaties have no superiority over national laws, the result of the Directives can be achieved due to domestic law providing for the setting aside of incompatible tax treaties. As such, those Member States would be able to affect (the application of) tax treaties by means of their domestic legislation aimed at implementing a Directive in order to

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50 See, for example, *Parliamentary Proceedings II* 2020/2021, 25 087, no. 260, p. 28 where the Dutch State Secretary of Finance expressed the position that '*[w]ithin the Dutch legal order treaties take precedence over national legislation based on article 94 Dutch Constitution. In principle, this also applies if the applicable national legislation arises from the implementation of EU-directives*' [unofficial translation]. This also seems to have been the case, at least initially, in Belgium given that L. de Broe in: Building Global International Tax Law. Essays in Honour of Guglielmo Maisto (Pistone), 2022, par. 23.2.1, footnote 8, notes that the '*Belgian legislator initially refused to include PEs in the CFC regulations on those grounds*', i.e. because adopting '*CFC rules would force them to breach their existing tax treaties, leading to uncertainty for taxpayers*'. De Broe also notes, in par. 23.4.3 that the Belgian legislator has subsequently adhered to the argument that '*since the Member States adopt these directives with unanimity, they simultaneously consent to amend their tax treaties and replace them with the provisions adopted under the directive*'. Following such line of reasoning, Belgium should then be able to apply the domestic legislation aimed at giving effect to the CFC rules of ATAD1 to *'low-taxed PEs established in treaty countries*'. The validity of this argument of the Belgian legislator, which essentially assumes an effect of the Directives on tax treaties under public international law, is discussed in Chapter 6.

51 The extent to which such primacy may be applicable and enforceable is discussed in Chapter 7.

52 This question is addressed in Chapter 6 (application), as well as Chapter 3 (interpretation).

achieve the result of such Directive irrespective of the effect that the Directives would have on tax treaties under public international law. If tax treaties would be overridden by such domestic legislation, the result of the Directive is achieved and there would be no reason to (also) rely on the primacy of EU law to override a tax treaty. As such, for those Member States wherein a tax treaty can be overridden by national legislation, it would be less relevant what effect the Directives may have on tax treaties under public international law because they can achieve the result of such Directives irrespective of such effect. This does not, however, mean that the effect of the Directives on tax treaties under public international law would be irrelevant for them. If tax treaties are affected in such a way that they do not need to be performed to the extent incompatible with the result to be achieved by a Directive under public international law, the domestic treaty override would not violate obligations under such treaties. As such, no international responsibility would arise. By contrast, if tax treaties would not be affected under public international law, international responsibility would arise due to a treaty override by means of national legislation, which national legislation may not be invoked as a justification for a failure to perform a treaty under article 27 VCLT 1969.[53]

In sum, it follows from the previous paragraphs regarding the Member State perspective that 6 Member States seem to be able to override their tax treaties (and, hence, affect their application), while it seems questionable whether the national laws of the other 21 Member States would allow them to do so. With respect to 20 of them, it would seem to be the case that, as a starting point, national laws cannot override tax treaties. It is for those Member States that it may be impossible to implement Directives if their result would require them to set aside their tax treaties. If, however, such tax treaties would be affected in such a way, under the rules of public international law, that they are compatible with the Directives, the result of the Directives would also be achieved in those Member States notwithstanding the superiority of tax treaties vis-à-vis national legislation aimed at implementing a Directive.

1.5 EARLIER RESEARCH

The effect of Directives on tax treaties has, taking to account the developments set out in section 1.2, attracted a considerable amount of attention of legal scholars over the past years. Scholars have, for example, submitted that the Directives – or EU law in general – can have an effect on the interpretation of tax treaties from both the public international law[54] and the European

53 Article 27 VCLT 1969 reads as follows: *'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.'*

54 F. Avella, World Tax Journal 2012/6 and L. de Broe in: Current Tax Treaty Issues (Maisto), 2019, par. 16.2.

Union law perspectives.[55] In addition, the effect of the Directives on the application of tax treaties has also attracted the attention of legal scholars. Such scholars have mainly focused on such effect from the perspective of the laws of the EU,[56] i.e. the extent to which the Directives should take precedence over tax treaties under EU law. With respect to the effect of the Directives on the application of tax treaties under the public international law perspective, submissions have been made that article 30 VCLT 1969 could affect the application of tax treaties (i.e. from the public international law perspective).[57] In-depth studies regarding the application of this provision of the VCLT 1969 to Directives and tax treaties do not, however, seem to have been performed to the present author's knowledge.

The present study is different from these previous studies for the following reasons. First, the present study focuses on both the public international law perspective and the perspective of the laws of the EU. In such a way, the present study is different from most of the previous studies because they generally focus on only one of the two perspectives.[58] By focusing on both perspectives, the present study seeks to determine the extent to which the public international law and EU law perspective allow for the same outcome regarding the effect of the Directives on the interpretation and application of tax treaties. It thus aims to be able to to provide an answer to the question as to what extent the 'required' effect of the Directives under the laws of the EU would overlap with the 'allowed' effect of such Directives on the interpreta-

55 See R.A. Bosman & F.P.G. Pötgens in: De toekomst van de vennootschapsbelasting (Streek), 2017, par. 13.4.2.3 and L. de Broe in: Current Tax Treaty Issues (Maisto), 2019, par. 16.2.3.

56 With respect to Directives, see F.A. Engelen, J. Vleggeert & T.M. Vergouwen, WFR 2019/257, I. Panzeri, European Taxation 2021/4, and L. de Broe in: Building Global International Tax Law. Essays in Honour of Guglielmo Maisto (Pistone), 2022, par. 23.3 (De Broe also recognises that legal scholars have mainly focused on the EU perspective). In addition to these specific studies on the effect of the Directives – or EU law in general – on the application of tax treaties, other legal scholars have made submissions regarding such effect. See, in this respect, W.C. Haslehner in: A Guide to the Anti-Tax Avoidance Directive (Haslehner, Pantazatou, Kofler & Rust), 2020, p. 59-63, P. Ariginelli in: The External Tax Strategy of the EU in a Post-BEPS Environment (Jiménez), 2019, par. 8.3, and D.S. Smit in: European Tax Law (Wattel, Marres & Vermeulen), 2018, p. 490.

57 See O.C.R. Marres in: The KPMG Guide to the CCCTB 2012, p. 16, D.S. Smit in: European Tax Law (Wattel, Marres & Vermeulen), 2018, p. 490, footnote 19, I.M. de Groot, Intertax 2019/8 & 9, p. 782, and I. Panzeri, European Taxation 2021/4, p. 148-149. See also TAXUD E1/FR DOC (05) 2306/A, p. 15 wherein the position is taken that Mutual Assistance Directive (2011/16/EU) would '*replace*' tax treaties with more limited obligations in relation to the exchange of information or recovery of tax claims.

58 The only exception seems to be, at present, L. de Broe in: Current Tax Treaty Issues (Maisto), 2019, par. 16.2 who studies both the rules of interpretation of article 3(2) OECD Model and article 31 VCLT 1969, as well as the duty of consistent interpretation.

tion and application of tax treaties under public international law.[59] Such a study aimed at determining such overlap has, to the knowledge of the present author, not been performed yet. The present study is also different from earlier studies because it addresses the preliminary question what the status of the Directives is under public international law, which question is highly relevant, but often overlooked.[60] Thirdly, the present study seeks to perform the, currently absent, study into the applicability of article 30 VCLT 1969 to successive Directives and tax treaties. In that way, the present study is different from earlier publications wherein submissions have been made regarding the effect of the Directives under article 30 VCLT 1969.

1.6 METHODOLOGY

With respect to the present study, the following methodologies are adopted. In answering the research question, the legal dogmatic methodology is adopted. Pursuant to this method, the relevant rules of public international law, to the extent reflecting customary international law, and rules of the EU as in force on 31 October 2022 will be analysed. Such an analysis will be based, mainly, on doctrines, literature, and case law (of the CJEU, ICJ and arbitral tribunals).[61] Based on the content of the rules in force up to and including 31 October 2022, the present author aims to determine the effect of the Directives on the interpretation and application of tax treaties.

In addition to this methodology, applied for the purposes of answering the research question, elements of the EU tax treaty network have also been empirically studied. The methodology adopted in that respect is set out in Annexes 1 and 2.

59 With respect to the reference to the 'required' effect of the Directives, it is noted that this relates to the effect that the Directives may be required to have under the duty of consistent interpretation or the primacy of EU law. As such, it does not reflect the 'required' effect of a Directive in terms of the result that must be achieved by it and the extent to which such result would 'require' tax treaties to be affected. For example, a Directive may require a result that is incompatible with a tax treaty. This could also be described as a 'required' effect in terms of the result that must be achieved. This is not, however, the meaning that is attributed to the term 'required' effect in the present thesis. In this thesis, the 'required' effect relates to the question to what extent the duty of consistent interpretation and primacy of EU law require the interpretation or application of a tax treaty to be affected in order to achieve the (required) result of a Directive (with respect to situations covered by tax treaties).

60 The only exception seems to be F. Avella, World Tax Journal 2012/6.

61 J. Vranken, Recht en Methode in onderzoek en onderwijs 2012/2, p. 43.

1.7 Relations between Leiden University and other employers

Bearing in mind the academic debate in the Netherlands regarding legal scholars that work in academia and legal practice,[62] as well as the proposal of Vleggeert in his inaugural lecture 'Een burgerperspectief op belangenverstrengeling',[63] the author declares the following. During the period wherein the research regarding, and the drafting of, this thesis has been performed (between 1 September 2017 and 31 October 2022), the author has been employed by both Leiden University as a Ph.D-fellow (0,6 fte until 30 September 2022; 0,4 fte as of 1 October 2022) and De Brauw Blackstone Westbroek as a tax adviser (0,4 fte until 30 September 202; 0,6 fte as of 1 October 2022). Being aware of such dual employment relationship, the author and the supervisors declare that Leiden University has borne all salary costs associated with this thesis and that De Brauw Blackstone Westbroek has not been involved with the formation of this thesis. Moreover, the author declares that there has also not been any obligation vis-à-vis De Brauw Blackstone Westbroek to submit this thesis, or any drafts of it, to De Brauw Blackstone Westbroek for approval or otherwise. As such, this author declares, and the supervisors confirm, that this thesis has been written under the sole supervision of Leiden University and without any interference by De Brauw Blackstone Westbroek, either financially or otherwise.

1.8 Structure

This study is divided into four parts and has the following structure. In Part I, in addition to this introduction, the status of the Directives is discussed (Chapter 2). This discussion is key for the purposes of answering the research question.

In Part II, the effect of the Directives on the interpretation of tax treaties is discussed. Such effect is studied from the perspective of public international law first (Chapter 3) and, subsequently, from the perspective of the laws of the EU (Chapter 4). Part II ends with an assessment of the extent to which the Directives are simultaneously 'allowed' and 'required' to affect the interpretation of tax treaties (Chapter 5).

Having established the effect of the Directives on the interpretation of tax treaties, Part III addresses the effect of such Directives on the application of tax treaties. Such effect is first assessed from the perspective of public international law (Chapter 6), followed by the effect of such Directives under the laws of the EU (Chapter 7). Part III ends with an answer to the question regard-

62 See, for example, J. Vleggeert, 2020, and J. Vleggeert, 2022.
63 See J. Vleggeert, 2022, p. 7.

ing the extent to which the Directives are simultaneously 'allowed' and 'required' to affect the application of tax treaties (Chapter 8).

In the final part of the present thesis, Part IV, the answer to the research question is provided (Chapter 9). Based on such answer, the final chapter provides recommendations aimed at aligning the 'allowed' and 'required' effect of the Directives on the tax treaties (Chapter 10).