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ARTICLE

Article 17(3) for Artistes and Sportsmen: Much More than an Exception

Dick Molenaar & Harald Grams*

'When you are able with power of reason to recognize the exception, you will never create a precedent' – Johan Cruyff (2005)

Most states in the world apply Article 17 (introduced in 1963) of the OECD Model Convention for the taxation of non-resident artistes and sportsmen granting the right to levy withholding tax on the performance fee to the state of performance. In 1977 the OECD introduced Article 17(2) ensuring also the taxation of payments to others than the artistes and sportsmen, for example, so-called 'artiste-companies' or any third party involved. To avoid double taxation states either apply the tax credit or the tax-exemption method.

Inadequacies were discovered and, therefore, the Commentary on Article 17 advised in 1977 to exclude cultural exchanges and subsidized artistes and sportsmen from Article 17. The majority of all states soon started to use this exception as Article 17(3) in their bilateral tax treaties thereby granting the taxing right to the state of residence.

The question of unequal treatment between a subsidized and a commercial theatre group arises. It might lead to the conclusion that an Article 17(3) clause in a bilateral tax treaty between EC Member States does not correspond with the freedom and non-discrimination principles of the EU.

1 Introduction

The taxation of international artistes and sportsmen is a small but special topic in international taxation. Most states in the world follow Article 17 of the OECD Model Tax Convention (hereinafter 'OECD Model'), which means that they levy a withholding tax on the performance fees of non-resident artistes and sportsmen, even if they are self-employed, their fees are business income, and they do not have a permanent establishment in the state of performance. The OECD believes that this taxation at source, deviating from Article 7 (business income) and Article 15 (employment income), is a reasonable measure to ensure that every artiste and sportsman pays his share of his earnings to the government. Due to the fact that Article 17 has been taken over in the UN Model Tax Convention, not only the OECD Member States but also many other states follow this instruction, both in their tax treaties and in their national legislation.[1]

This exceptional clause for artistes and sportsmen was introduced as Article 17 in the 1963 OECD Model, with the argument that 'practical difficulties are avoided which often arise in taxing public entertainers and athletes performing abroad'. In 1977, the OECD introduced a second paragraph to Article 17, under which also payments to others than the artistes and sportsmen would fall. With Article 17(2), the OECD intended 'to counteract tax avoidance devices in cases where remuneration for the performance of an entertainer or athlete is not paid to the entertainer or athlete himself but to another person, for example, a so-called artiste-company'.[2] In 1987, an OECD Report about artistes and sportsmen brought forward that Article 17 was meant to 'counteract tax avoidance behaviour and non-compliance'.[3] Where in 1977 the OECD preferred the limited approach for Article 17(2), that is, only for so-called star companies, the 1987 OECD Report changed this into the unlimited approach, allocating the taxing right to the state of performance for *any* payment for artistic or sports performances to any third party.[4]

To eliminate double taxation, the OECD Model recommends the use of the ordinary tax credit of

Notes

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1 A survey in 2005 of the tax treaties of forty-six states showed that Art. 17 was included in 97% of their tax treaties. See Dick Molenaar, *Taxation of International Performing Artistes* (Amsterdam: International Bureau of Fiscal Documentation (IBFD), 2006), 123.

2 Section 4 of the 1977 Commentary on Art. 17 OECD Model Tax Convention (hereinafter 'OECD Model').

3 'Taxation of Entertainers, Artistes and Sportsmen', in *Issues in International Taxation*, No. 2 (Paris: OECD, 1987).

4 Section 89 of the 1987 OECD Report; also Dick Molenaar and Harald Grams, 'Rent-A-Star: The Purpose of Art. 17(2) of the OECD Model', *Bulletin for International Fiscal Documentation* 56 (2002): 10.

Article 23B,[5] but the tax exemption method of Article 23A is also still used, mainly in older tax treaties and by states that adopt a territorial basis for taxation.

Together, this suggests that the taxation of performance income of artistes and sportsmen is balanced, that is, in allowing the state of performance the right to tax the income but reserving a secondary taxing right plus progression for the state of residence. It seems that a reasonable allocation of income tax has been established, even though it is different from the normal allocation rules of Articles 7 and 15 of the OECD Model.

However, unfortunately, these special taxing rules have also increased the risk of practical inadequacies. This was first recognized in 1977, where the Commentary on Article 17 mentioned that cultural exchanges and subsidized artistes and sportsmen could suffer from the far-reaching impact of the article. This Commentary also gave an option to exclude these artistes and sportsmen from Article 17. States started to use this exception as an Article 17(3) in their bilateral tax treaties. The option was extended and more specified in the 1992 Commentary on Article 17 OECD Model and will be discussed by the authors in this article.

2 Practical problems lead to discussion about article 17

Later, more practical problems with Article 17 for artistes and sportsmen were revealed. These can be divided into three groups:

(1) the non-deductibility of expenses can easily lead to excessive taxation because the taxable income in the country of performance will be much higher than in the residence country. This difference in taxable income is often more than the difference in the tax rates between the two countries;

(2) tax credit problems may arise in the country of residence, creating the risk of double taxation. For example, tax certificates may not be available, may be in the name of the group (and not the individual sportsmen), or may be in an unreadable language. Also, social security contributions or other levies may be deducted for which no credit is granted; and

(3) high fees for professional advice and administrative work are the result for artistes and sportsmen, the promoters of the performances, and the tax authorities, both in the country of performance and in the country of residence.

The tax literature demonstrates that these problems frequently occur, especially because sportsmen and artistes are mobile and often undertake tours through various countries with appearances in only one location per country. It is not only the sportsmen and artistes who face an obstacle to cross-border activities as a result of special international taxing rules following from Article 17 of the OECD Model but also the promoters of the performances.

From 1995 onwards, a series of authors criticized Article 17, and some recommended more or less radical changes.[6] These critics were discussed at the 64th International Fluency Association Congress in Rome, Italy, in September 2010, where the panel members and OECD representatives even spoke about the most far-reaching solution, which is the removal of Article 17 from the OECD Model and which would actually be the extension of the exception of Article 17(3) from only subsidized artistes and sportsmen to all artistes and sportsmen coming from a normal treaty state. Inevitably, there will be more discussion about Article 17 in the (near) future. This article is a contribution to the discussion.

3 The additional article 17(3) is an exception in the commentary

The optional Article 17(3), as an exception to the general rules of Article 17(1) and (2), is mentioned in section 14 of the Commentary on Article 17 OECD Model. The paragraph discusses the wish of states to exclude events supported by public funds from the scope of Article 17. The Commentary allows the exclusion of such events from the scope of Article 17 on the condition that the exemption 'should be based on clearly definable and objective criteria to ensure they are given only where intended'. The Commentary also gives a text proposal for the additional Article 17(3):

> The provisions of paragraphs 1 and 2 shall not apply to income derived from activities performed in a

Notes

[5] Section 12 of the Commentary on Art. 17 of the OECD Model.

[6] Daniel Sandler, *The Taxation of International Entertainers and Athletes: All the World's a Stage* (The Hague: Kluwer Law International, 1995); Harald Grams, 'Artist Taxation: Article 17 of the OECD Model Treaty – a Relic of Primeval Tax Times?', *Intertax* 27 (1999): 188; Joel Nitikman, 'Article 17 of the OECD Model Treaty: An Anachronism?', *Intertax* 29 (2001): 268; Dick Molenaar, 'Obstacles for International Performing Artistes', *European Taxation* 42 (2002): 4; Angel J. Juarez, 'Limitations to the Cross-Border Taxation of Artistes and Sportsmen under the Look-Through Approach in Article 17(1) of the OECD Model Convention', *European Taxation* 43 (2003): 11; Dick Molenaar & Harald Grams, 'How to Modernize Income Taxation of International Artistes and Sportsmen', *Tax Management International Journal* 33 (2004): 4; Molenaar, 2006; Dick Molenaar & Harald Grams, 'Scorpio and the Netherlands: Major Changes in Artiste and Sportsman Taxation in the European Union', *European Taxation* 47 (2007): 2; Daniel Sandler & Dick Molenaar, in *Source Versus Residence: Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives*, ed. Michael Lang (The Hague: Wolters Kluwer, 2008/New Delhi: Taxmann, 2008); Xavier Oberson (ed.), *International Taxation of Artistes & Sportsmen* (Geneva, Zurich: Schulthess, Bruylant, 2009); Karolina Tetlak, 'Tax Treatment of Team Performances under Art. 17 of the OECD Model Convention', *World Tax Journal* 1 (2010): 3; Dick Molenaar & Harald Grams, 'The Critical Need for Reform of Article 17 (Artistes and Sportsmen) of the OECD Model Tax Treaty', *Tax Management International Journal* 40 (2011): 2; Eric Kemmeren, D.P. Sengupta, & Adolfo Martin Jimenez, in *Tax Treaty Case Law around the Globe: 2011*, ed. Michael Lang (Vienna: Linde, 2011).

> Contracting State by artistes or sportsmen if the visit to that State is wholly or mainly supported by public funds of one or both of the Contracting States or political subdivisions or local authorities thereof. In such a case, the income is taxable only in the Contracting State in which the artiste or the sportsman is a resident.

Many states have implemented the use of the additional Article 17(3) in their tax treaty policy, some long before 1992,[7] others more recently.[8] The 1987 Intra-ASEAN[9] Model Double Taxation Convention has even standardized the 'Article 17(3) clause' so that the provision is widespread in treaties between Association of Southeast Asian Nation (ASEAN) members. The provision has also been included in most ASEAN tax treaties with third states.[10]

The multilateral Nordic Convention between Denmark, Finland, Iceland, Norway, and Sweden contains Article 17(3) as a standard addition to Article 17. It was introduced in the Agreement of 1989 and adopted in the most recent Agreement of 1996. The text is comparable to the proposal in section 14 of the OECD Commentary, although there are two differences: the Nordic Convention requires that (1) the visit to the other state has to be *mainly* financed by public funds and (2) there is only a reference to financing from public funds from the *residence* country. These are subtle but interesting differences.

4 More frequent use than expected

The additional Article 17(3) gets much more attention in the tax treaties than would be expected from the simple and not very eye-catching remarks in section 14 of the OECD Commentary. It seems that many states have made the provision an integral part of their tax treaty policy. Article 17(3) is more popular than is realized, and it is interesting that so little attention has been paid by authors in the literature to this exception.[11]

The use of Article 17(3) in bilateral tax treaties was one of the subjects of the survey by one of the authors in 2005.[12] The conclusion can be drawn that a surprising majority of tax treaties (66% on average for the forty-six states that have been included) use the restriction of Article 17(3) and allocate the taxation of artiste and sportsman fees in these specific situations to the country of residence – a very broad use for an optional provision that is not mentioned in the OECD Model itself but only in the Commentary.

It might be thought that mainly eastern European, African, Latin American, and Asian states have inserted Article 17(3) in their bilateral tax treaties with the states of the western world, but the results of the survey show that this supposition is not correct. The percentage use of Article 17(3) is higher for these states, but western states also score high percentages and give more priority to the exception to Article 17 in recent tax treaties. The following table gives an overview of the use of Article 17(3) in order of percentages.

Notes

7 For example, the use of Art. 17(3) in Poland's tax treaties goes back to the older tax treaties with Germany (1972) and France (1975).

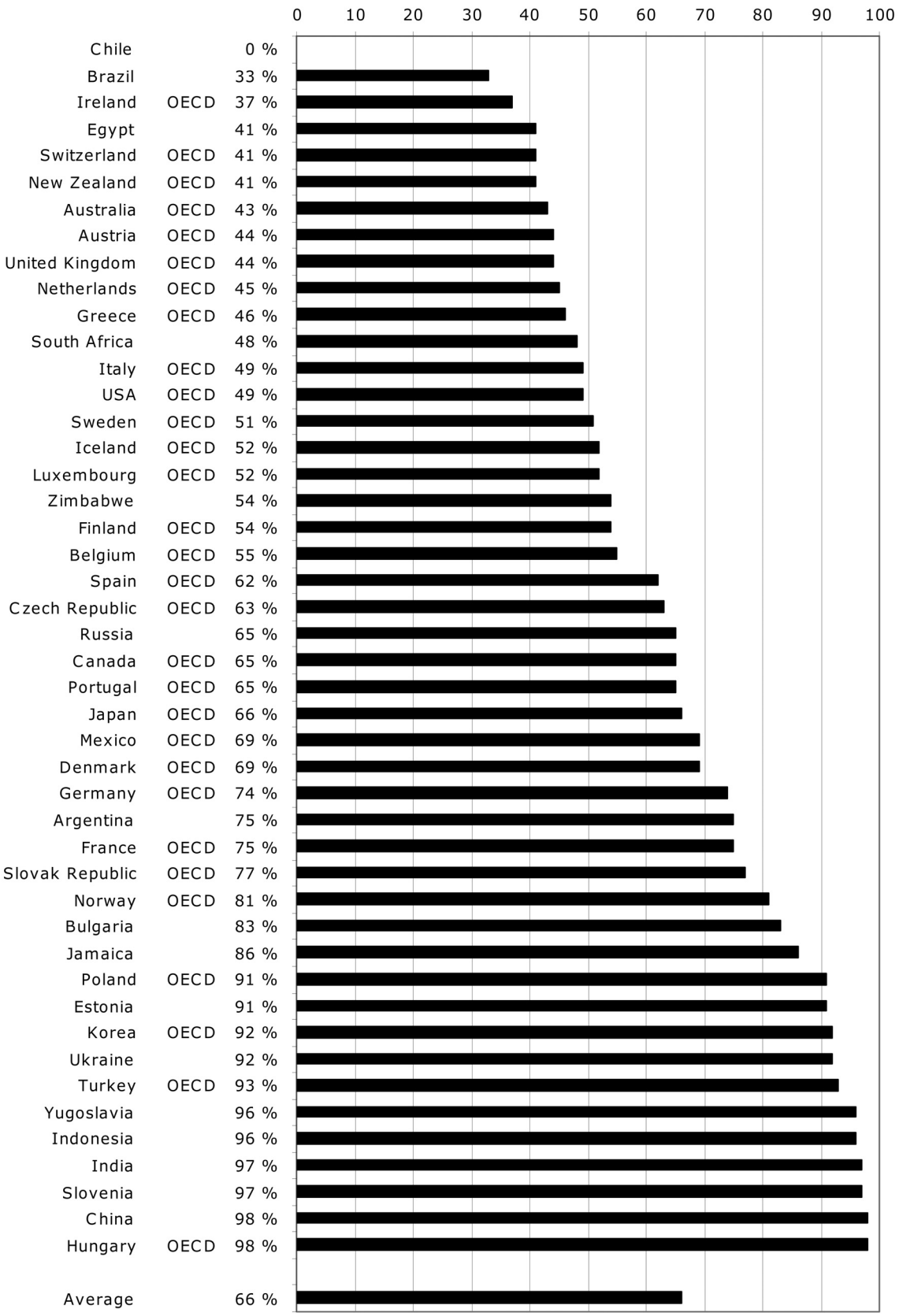
8 For example, the Netherlands had inserted Art. 17(3) in only few tax treaties in earlier years but started more regular use from the mid 1990s and recently in the treaties with the United Kingdom (2008), Japan (2010), and Switzerland (2010).

9 Including Indonesia, Malaysia, the Philippines, Thailand, Singapore, Brunei, Vietnam, Laos, Myanmar, and Cambodia.

10 Edwin van der Bruggen, 'Salient Features of the ASEAN Model Tax Treaty', *Tax Notes International* (2002): 1227.

11 More than passing attention is given by Klaus Vogel to the specific German tax treaties in *Klaus Vogel on Double Taxation Conventions*, 3rd edn (The Hague: Kluwer Law International, 1997), 987.

12 Molenaar, 2006, 121.


0 10 20 30 40 50 60 70 80 90 100
Chile 0 %
Brazil 33 %
Ireland OECD 37 %
Egypt 41 %
Switzerland OECD 41 %
New Zealand OECD 41 %
Australia OECD 43 %
Austria OECD 44 %
United Kingdom OECD 44 %
Netherlands OECD 45 %
Greece OECD 46 %
South Africa 48 %
Italy OECD 49 %
USA OECD 49 %
Sweden OECD 51 %
Iceland OECD 52 %
Luxembourg OECD 52 %
Zimbabwe 54 %
Finland OECD 54 %
Belgium OECD 55 %
Spain OECD 62 %
Czech Republic OECD 63 %
Russia 65 %
Canada OECD 65 %
Portugal OECD 65 %
Japan OECD 66 %
Mexico OECD 69 %
Denmark OECD 69 %
Germany OECD 74 %
Argentina 75 %
France OECD 75 %
Slovak Republic OECD 77 %
Norway OECD 81 %
Bulgaria 83 %
Jamaica 86 %
Poland OECD 91 %
Estonia 91 %
Korea OECD 92 %
Ukraine 92 %
Turkey OECD 93 %
Yugoslavia 96 %
Indonesia 96 %
India 97 %
Slovenia 97 %
China 98 %
Hungary OECD 98 %
Average 66 %

5 Variations in the content of article 17(3)

In various tax treaties, it is not only the criterion 'supported by public funds' that is used in Article 17(3). The exception can also be based on 'cultural exchange', 'cultural and sports exchange', 'cultural agreement', 'cultural cooperation', or 'non-profit organizations'. Sometimes, more than one item is mentioned in an Article 17(3) clause.[13] Unfortunately, the variety of criteria for Article 17(3) make the use of the exception rather inconsistent.

6 Undefined conditions

The conditions for the different types of exception are not very clear. Is a minimum threshold level of support from public funds needed to qualify for Article 17(3)? Some tax treaties use the words 'supported *wholly or mainly* from public funds',[14] while other tax treaties require 'financed *substantially* by public funds'.[15] Unfortunately, the OECD does not propose a minimum level, although paragraph 2 of the Commentary on Article 17 requires that the use of the exception should be based on 'clearly definable and objective criteria'. Belgium and the Netherlands have agreed in a Commentary on their new 2001 Tax Treaty that the threshold condition for the word 'mainly' in the Treaty should be 30% of total earnings.[16] Germany has decided several times that the sending country has to support at least one-third of the costs of the artistes for performances abroad,[17] but for other states, it is not clear whether a minimum threshold percentage has been set.

However, unfortunately, a clear percentage will not always be helpful. A group of artistes or sportsmen from, for example, an east European country is very often wholly, substantially, or mainly financed by its own government but does not have a very big budget. A performance in, for example, a west European country can give the group a substantial performance fee that is much higher than the performance fees in the home country. This would make the trip very much more worthwhile, create extra income for the group, and give exposure on the western market. Nevertheless, a threshold of, for example, 30% can then lead to the problem that this specific performance is no longer *wholly, substantially, or mainly supported by public funds of one or both of the contracting states or political subdivisions or local authorities thereof.*

An example can be given of a Bulgarian opera company that performs in the Netherlands. The opera is fully subsidized by the Bulgarian government, and performance fees in Bulgaria do not exceed EUR 1,000 per evening. The opera is contracted for three performances in the Netherlands against a fee of EUR 8,000 per evening. The 1994 Tax Treaty between Bulgaria and the Netherlands contains the following Article 17(3) clause:

> 3.Notwithstanding the provisions of paragraphs 1 and 2 of this Article, income derived from such activities as defined in paragraph 1 shall be exempt from tax in the State in which these activities are exercised, if the visit of the entertainers, the musicians or the athletes to one of the States is supported wholly or substantially from the public funds of the other State, a political subdivision or a local authority thereof, or if these activities are performed under a cultural or sport agreement or arrangement between the States.

An allocation issue arises in this example. The expenses of the Bulgarian opera need to be divided into direct expenses connected with the three Dutch performances and indirect expenses, which have to be divided over total of performances from the whole year. That will show that the Bulgarian state subsidy is either not or just for a small portion needed for the visit to the Netherlands. It might even be that the Dutch performance fees cover more than the expenses for the visit and contribute to additional funding in Bulgaria. Anyway, a reasonable conclusion should be that the Dutch performances were not 'supported wholly or substantially from public funds of Bulgaria. This means that Article 17(3) will not apply and that the Netherlands will be allowed to tax the performance income of the Bulgarian opera.

The effect can be that the Netherlands will tax the performance fee of the Bulgarian opera while the Bulgarian tax authorities will not allow a tax credit (or exemption) to the opera and/or its artistes because they suggest that the opera will qualify for the use of Article 17(3). This would lead to double taxation and would increase the chance of jeopardizing the cultural exchange. The Bulgarian opera can prevent this by starting a mutual agreement procedure (MAP) between both competent authorities.

Notes

[13] An example is the 2003 Tax Treaty between Austria and Cuba, which mentions both performances supported by public funds and culture and/or sports exchange programmes.

[14] 1990 Tax Treaty between Bulgaria and the Netherlands.

[15] 2001 Tax Treaty between Belgium and the Netherlands.

[16] It is very interesting that there seems to be a difference in the translation from the original treaty languages into English. The official Dutch text says *een wezenlijk onderdeel*, which means substantial but not necessarily more than 50%; the official French text says *pour une large part*, which has approximately the same meaning as the Dutch text, but the English translation says *mainly*, which should mean 'for more than 50%'.

[17] FinMin NRW 2 Nov. 1977, StEK EstG §50a/127, FinMin Nds. 14 Nov. 1985, StEK Doppelbest. UdSSR 3; BMF 14 Oct. 1985, StEK Doppelbest. UdSSR 3. These rulings officially only apply to non-treaty situations but show how the German approach is.

The other measures for Article 17(3) can also easily miss their target if the conditions are not fulfilled. For example, the exception 'cultural exchange' can only be used in one country when a return visit takes place in the other country. For example, The German *Bundeszentralamt fur Steuern* (Central Tax Office) only provides an exemption certificate if the applicant specifies the return visit. Nonetheless, both countries may have different views on whether the levels of the performances are comparable, on whether it is necessary that the cultural exchange is pre-arranged, and on whether there is a limit in time, for example, if a visit at Christmas and a return visit at Easter can still be considered a 'cultural exchange'. The Commentary on Article 17 OECD Model gives no guidance on this, which means that a MAP by the competent authorities might be needed in cases of conflict.

7 Defending the State's Budget?

The question can be raised whether states are trying to protect their own interests with the Article 17(3) clause. It looks as though the OECD and individual states are aware of the excessive or even double taxation resulting from the general rules of Article 17, which evidently would lead to an extra need for subsidies for the cultural and sports organizations and extra expenses for the country's budget. With a reversal of the allocation of the tax right for artistes and sportsmen who rely on governmental subsidies and comparable public funds from the performance country to the country of residence, these states seem to be protecting their own national budgets.

An example of this protective approach is the Observation, which France has made in section 15.1 of the Commentary to Article 17. France does not agree with section 13 of the Commentary, which says that Article 17 also ordinarily applies when the artiste or sportsmen are employed by the government. France explains that in that situation, the activities do not have a profit motive and should not be taxed. It also refers to section 14 of the Commentary, where the option for the exception for performance financed from public funds is specified.

8 Unequal treatment following from Article 17(3)

The use of Article 17(3) in tax treaties also raises questions regarding equal treatment. It is easier for a subsidized artiste group to enter a foreign market with the exceptions of Article 17(3) than for a commercial theatre group, which could experience the tax problems specified at the end of paragraph 1. Excessive or even double taxation and extra administrative expenses can lead to a disadvantage on the (new) foreign market. It is therefore possible that the division between subsidized and non-subsidized artiste and sports organizations breaches the non-discrimination principles of other international agreements, such as Article 24(1) of the OECD Model, Article 26 of the International Covenant on Civil and Political Rights (BUPO), and the European Covenant for the Protection of the Human Rights (ECPHR).

Within the European Union, the additional provision might be in conflict with the freedom principles of the Treaty of the European Union (TEU).[18] Article 17(3) is widely used within the European Union, as can be expected from the results of the survey shown in paragraph 3. The following table shows Article 17(3) in the bilateral tax treaties of sixteen of the twenty-seven EU Member States (year 2011).

Notes

[18] Especially Art. 18 (equal treatment), Art. 45 (freedom of movement for workers), and Art. 56 (freedom to provide services) Treaty of the European Union.

Use of Article 17(3) by Sixteen EU Member States															
	AUS	BEL	CZE	DEN	EST	FIN	FRA	GER	GRE	ITA	NET	POL	POR	SPA	SWE
Austria															
Belgium															
Czech Republic															
Denmark			Yes												
Estonia	Yes	Yes	Yes	Yes											
Finland			Yes	Yes	Yes										
France	Yes	*N/A*			Yes										
Germany	Yes		Yes	Yes	Yes										
Greece			Yes												
Italy			Yes	Yes	Yes		Yes	Yes	Yes						
Netherlands	Yes	Yes			Yes										
Poland		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes				
Portugal			Yes	Yes	Yes						Yes	Yes			
Spain		Yes					Yes		Yes				Yes		
Sweden			Yes	Yes	Yes	Yes	Yes	Yes				Yes			
United Kingdom	Yes	Yes			Yes		Yes	Yes			Yes	Yes			

The Netherlands and Belgium have, for example, inserted Article 17(3) in their 2001 bilateral Tax Treaty, saying that Article 17(1) and (2) do not apply to artistes and sportsmen who are subsidized for more than 30% of their budget for the specific performance. A subsidized Dutch theatre group will meet this condition when it performs in Belgium, but a commercial Dutch theatre company will not qualify for the exemption of Article 17(3). The performance fees of this company (and its artistes) will be taxed in Belgium at 18% *bedrijfsvoorheffing* (withholding tax), with the chance to deduct expenses in a *Voorafgaand Akkoord* (preliminary ruling) and to file a normal income tax return after the year, but both procedures will lead to administrative expenses. In addition, the company and its artistes may experience tax credit problems in the Netherlands.[19] The conclusion needs to be that the commercial Dutch theatre company is in a negative competitive position compared with the subsidized Dutch theatre company when it comes to Belgian performances.[20]

However, this can only be in conflict with the freedom principles of the TEU if the subsidized and non-subsidized artistes and sportsmen are in a comparable (or even equal) position, which is the case here, in our opinion, because it does not make a difference for the audience when buying the tickets and watching the performances, whether or not the artistes or sportsmen are subsidized. Their services are the same; they often collide in the same shows or competitions; only the funds can come from other sources. Therefore, we conclude that the freedom principles of the TEU can be applied here, and we do not see any justifications for the different treatment.

This will give a new discussion for the European Court of Justice (ECJ), which mainly has decided in cases where residents and non-residents are compared, while here, the question arises whether the different treatment of two non-residents in a specific EU Member State violates the freedom principles. According to EU law, tax rules that make it harder to provide services within another Member State are a forbidden restriction of the freedom principles.[21] More specific to this subject and the three problems mentioned in paragraph 2:

(1) the non-deductibility of expenses has been denied by the ECJ in two decisions about artistes;[22]

(2) EU law considers the allocation of a taxing right to one country only in compliance with the TEU if the other country allows complete elimination of double taxation[23] and the risk is likely that this is not secured for non-subsidized artistes and sportsmen falling under Article 17; and

(3) relatively high administrative expenses can also impede the provision of cross-border services, and the ECJ has decided in several decisions that this obstructs the freedom principles.[24]

On the other hand, it can be questioned whether the TEU has priority in this situation. The ECJ has decided in several cases that EU Member States are free to negotiate with each other on how to allocate the taxing rights of various (income) items in a bilateral tax treaty. The TEU does not call for the harmonization of direct taxes, which leaves the composition of a bilateral tax treaty to the Member States' discretion,[25] but the ECJ has also ruled that the results have to meet the principles of community law, such as equal treatment on grounds of nationality, freedom of establishment, and the free movement of persons, services, and capital.[26]

The example from Belgium and the Netherlands makes clear that Article 17(3) can create a disadvantage for those who do not meet the conditions. With the exceptional third paragraph, it is as though states try to protect their state budgets by allowing residence state taxation to subsidized companies and their artistes and sportsmen, removing the extra costs arising from the three problems mentioned in paragraph 1.

Altogether, this leads to our conclusion that an 'Article 17(3)' clause in a bilateral tax treaty between EC Member States does not correspond with the principles of EU law. Non-subsidized artistes or sportsmen from the two states ought to have the same rights when performing in another EU country as subsidized artistes and sportsmen, with residence state taxation for everyone.

Notes

[19] See Molenaar, 2006, for examples of these tax credit problems, such as where there are missing tax certificates or in the name of the group, where the individual artistes or sportsmen need to claim the tax credit.

[20] This negative tax position makes it especially difficult for the commercial theatre company because it also needs to be more profitable to compensate for the absence of subsidies.

[21] See ECJ in *Kohll*, 28 Apr. 1998, C-158/96, para. 33, and *Zanotti*, 20 May 2010, C-56/09, para. 42.

[22] See *Gerritse*, 12 Jun. 2003, C-234/01, para. 55, and *FKP Scorpio Konzertproduktionen GmbH*, 3 Oct. 2006, C-290/04, paras 47–49.

[23] See *Commission v. Italy*, 19 Nov. 2009, C-540/07, paras 37–39, and *Commission v. Spain*, 3 Jun. 2010, C-487/08, paras 59–64.

[24] See *Mazzoleni and ISA*, C-165/98, para. 24, and the joined cases of *Finalarte and Others*, 25 Oct. 2011, C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, para. 30.

[25] See ECJ in *Gilly*, 12 May 1998, C-336/96, para. 30, and *D*, 5 Jul. 2005, C-376/03, para. 52.

[26] See ECJ in *Commission v. French Republic* (*Avoir Fiscal*), 28 Jan. 1986, C-270/83, paras 25–26.

9 Summary and conclusions

Article 17 OECD Model provides a special allocation rule for artistes and sportsmen. Most states have inserted this special clause in their bilateral tax treaties. At this point, the OECD Recommendation seems to work very well, but surprisingly, 66% of the many bilateral tax treaties between states also contain the exceptional Article 17(3) for subsidized artistes and sportsmen. The use of this restrictive rule is especially striking because it is no more than an option to Article 17 OECD, mentioned in section 14 of the Commentary. It may be that countries want to defend their state's budgets by allowing residence state taxation to subsidized artistes and sportsmen and prevent them from experiencing excessive or double taxation.

Countries often change the criterion for Article 17(3) from 'public funds' to 'cultural exchange', 'cultural agreement', or even 'non-profit organizations'. This does not make the use of the exception very clear and reliable. The risk of double taxation increases sharply if source and residence country interpret the conditions of the provision differently.

The OECD could improve its coordination of international artiste taxation if it promoted the option of 'Article 17(3)' from the Commentary to the text of Article 17 of the Model itself or removed the option from the Commentary, although the latter does not seem very realistic with so many tax treaties already using the provision.

Article 17(3) increases the risk of unequal treatment if artistes and sportsmen meeting the conditions for the provision can receive better tax treatment than other artistes or sportsmen. This can be in conflict with international agreements, such as Article 24(1) of the OECD Model and the BUPO and the ECPHR. Within the European Union, the exception for subsidized artistes and sportsmen may be in conflict with equal treatment and two of the freedom principles. This requires a comparison between two nonresidents performing in another EU Member State, for which can be referred to existing ECJ case law.

In many tax treaties, the exception of Article 17(3) takes away the practical problems of the exceptional Article 17, but it would be better if not only subsidized artistes and sportsmen could profit from this return to the normal tax rules from the OECD Model but also every other artiste or sportsman in treaty situations. The national withholding tax would then only remain for artistes and sportsmen from non-treaty countries so that tax avoidance behaviour could still be counteracted.