TAX DISCRIMINATION IN EU LAW AND THE OECD MODEL TAX CONVENTION

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Approval of the Institute of Social Sciences

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PLAGIARISM PAGE

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ABSTRACT

TAX DISCRIMINATION IN EU LAW AND THE OECD MODEL TAX CONVENTION

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The use of taxes by states as a tool to protect their nationals and domestic products constitutes a problem, tax discrimination, to be avoided in the international arena. Tax discrimination creates a heavy tax burden on foreign goods, services and persons as an obstacle to international trade. Increased mobility as a result of globalization caused high pressure about the elimination of barriers to trade and the fight against discrimination. With this pressure, the principle of non-discrimination is introduced by international organizations, economic integrations and treaties. The last two constitute the main levels of non-discrimination rules. For the treaties level, model tax treaties such as the OECD and the UN Models are important. For the second level, regulations of economic integrations such as EU or NAFTA are instances. To reach a more comprehensive, effective and fair rule globally, these different levels should be compared. For this study, EU law and the OECD Model are chosen due to their wide practices and spheres of influence. With evaluating their existing interactions and differences, the possible interactions have been discussed and many suggestions have been made such as the utilization of the CJEU's case law in the OECD Model, adding concepts such as indirect or reverse discrimination to the OECD Model, transferring practices like eliminating the objective justifications to EU law. Besides, Turkish tax and tax treaty systems have been compared with EU law and the OECD Model. Because the principle of non-discrimination is significant for Turkey due to being an EU candidate and applying the OECD Model in tax treaties. Moreover, some suggestions have been made for a better practice in Turkey such as involving the protection of stateless persons or the last paragraph of Article 24, reflecting the case law of the CJEU.

Keywords: The Principle of Equality, Non-Discrimination, Tax Discrimination, Tax Discrimination in EU Law, Tax Discrimination in the OECD Model Tax Convention

ÖZET

AVRUPA BİRLİĞİ HUKUKU VE OECD MODEL ANLAŞMA ÇERÇEVESİNDE VERGİ AYRIMCILIĞI

Arıtı Erdem, İmran

Yüksek Lisans, Maliye Bölümü

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Ülkelerin kendi vatandaşları ve ürünlerini korumak için vergileri araç olarak kullanması, uluslararası alanda kaçınılması gereken bir problemi, vergi ayrımcılığını oluşturmaktadır. Vergi ayrımcılığı, ticarete engel olarak yabancı mallar, hizmetler ve kişiler için ağır vergi yükü yaratmaktadır. Küreselleşmeyle artan mobilite, ticaretin önündeki engellerin kaldırılması ve ayrımcılıkla mücadeleyi gerektirmektedir. Bu baskıyla ayrım yapmama kuralı uluslararası örgütler, ekonomik bütünleşmeler ve anlaşmalar aracılığıyla uluslararası alana getirilmiştir. Bunlardan son ikisi, ayrım yapmama kurallarının ana düzeyleridir. İlk düzey olan anlaşmalar için OECD ve BM Modelleri gibi model vergi anlaşmaları önemlidir. İkinci düzey için, AB veya NAFTA gibi ekonomik bütünleşmelerin düzenlemeleri örnektir. Küresel ölçekte daha kapsamlı, etkin ve adil bir kurala ulaşmak için, bu düzeyler karşılaştırılmalıdır. Bu çalışmada, geniş uygulama alanları nedeniyle AB hukuku ve OECD Modeli seçilmiş ve iki düzeyin mevcut etkileşim, farklılık ve benzerlikleri ortaya konulmuştur. Ayrıca olası etkileşimler tartışılarak OECD Modeli'nde Avrupa Adalet Divanı içtihatlarından yararlanılması, dolaylı ve ters ayrımcılık gibi kavramların eklenmesi, haklı gerekçe kurumunun kaldırılması gibi uygulamaların AB hukukuna nakledilmesi gibi önerilerde bulunulmuştur. Ayrıca Türk vergi ve vergi anlaşması sistemleri, AB hukuku ve OECD Modeli ile karşılaştırılmıştır. Zira ayrım yapmama ilkesi, AB adaylığı ve OECD Modeli'nin anlaşmalarda kullanılması nedeniyle Türkiye için önemlidir. Yine daha iyi bir uygulama için vatansız kişilerin korunması, 24. maddenin son paragrafının anlaşamalara eklenmesi, Adalet Divanı içtihadının yansıtılması gibi önerilerde bulunulmuştur.

Keywords: Eşitlik İlkesi, Ayrım Yapmama, Vergi Ayrımcılığı, Avrupa Birliği Hukukunda Vergi Ayrımcılığı, OECD Model Vergi Anlaşması'nda Vergi Ayrımcılığı

To My Family

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LIST OF ABBREVIATIONS

BEPS	Base Erosion and Profit Shifting
cc	Cubic Centimeter
CFC	Controlled Foreign Company
DTAA	Double Taxation Avoidance Agreements
EBSC	European Coal and Steel Company
ECHR	The European Convention on Human Rights
ECtHR	The European Court of Human Rights
EEA	European Economic Area
etc	etcetera
EU	European Union
GATS	The General Agreement on Trade in Services
GATT	The General Agreement on Tariffs and Trade
MFN	Most Favoured Nation
NAFTA	The North American Free Trade Act
NT	National Treatment
OECD	The Organization for Economic Co-operation and Development
OEEC	The Organization for European Economic Co-operation
PE	Permanent Establishment
p	page
pp	page range
SAAP	the State Aid Action Plan
TFEU	The Treaty on the Functioning of the European Union
TEC	The Treaty of the European Community
UK	United Kingdom
UN	The United Nations
US	United States
WTO	The World Trade Organization

I- INTRODUCTION

The continuity of international trade and the removal of obstacles against it have been priority targets in the international arena since the past. It has been understood that states' policies to protect their own products and nationals, and to tax heavily foreign products and nationals, harm international trade and also the profits derived from it. Although some states have tried to overcome this problem with giving privileges to foreign merchants; these privileges were not sufficient in order to solve this problem. So the principle of non-discrimination has been reached in the historical process as a solution. States recognized that they needed a cooperation with other states in order to remove barriers to trade, because they could not be able to remove those obstacles to trade with unaided aims such as privileges or applying the non-discrimination rule unilaterally. So the non-discrimination rule in terms of taxes was born in this framework. Althought equality and general non-discrimination principles are accepted as normative international standards, they have not been applied in terms of taxation. Since it has been recognized that this approach was resulting in negative consequences for international trade, the non-discrimination rule in regards to taxation has begun to take place in various friendship, commerce and navigation treaties, especially beginning of the 19th Century. In this framework, tax treaties, that have increased rapidly since the 20th Century, have been used as an important tool.

The importance of this rule has increased with globalization. Since globalization boosts interstate relations, commerce and the mobility of persons, labor, capital; tax competition has been came to the fore. In this context, the prohibition of tax discrimination has acquired another dimension. Because in this competitive globalised world, some states have chosen to join to the harmful tax competition and some states have chosen to act as a protectionist state. From the latter approach, discriminating the other state's nationals, enterprises or goods and services have been seen as a useful behavior for the state. This situation have also created both the tax discrimination problem and the need to solve this problem. So besides bilateral tax treaties, international organizations such as the Organisation for Economic Co-operation and Development (OECD) or the World Trade

Organization (WTO) have begun to take measures against tax discrimination with multilateral treaties. In addition, the OECD is committed to fighting against tax discrimination in the context of international tax treaties, including the notion of non-discrimination in its Model Convention.

Tax discrimination has also been a substantial concern in European Union law. The purpose to realize the internal market in European Union (EU) was the most important reason for the fight against tax discrimination as well as the perception of tax discrimination as a major threat especially for fundamental rights. Also tax discrimination was regarded as a problem in terms of providing Customs Union. So one of the founding treaties, the Treaty on the Functioning of the EU (TFEU) includes various provisions as a tool to prohibit member states from tax discrimination. These provisions have a binding characteristic to try to meet the international trade and especially the internal market goals.

As it can be seen, tax discrimination is prohibited in two different international levels which are the international treates level which also includes the regulations of international organizations and the economic integrations level (i.e. EU). Although all of these levels include more or less a non-discrimination provision in terms of taxation with respect to trade concerns, their scopes and meanings as well as their binding characteristics are different. In the international arena, the most comprehensive and most used tax discrimination prohibitions are those in the EU and the OECD Model Convention. Thus in this study, tax discrimination concepts in the EU and the OECD Model Convention will be examined extensively, and then a comparison will be made by showing the similarities and differences between these levels. This comparison makes it possible to achieve a more comprehensive and applicable rule for both levels.

Also the concept of tax discrimination is important for Turkey which is a candidate of EU and also an actor in international area with various tax treaties that are designed based on the OECD Model Convention. Thus tax discrimination is also a problem for Turkey. For this reason, tax discrimination concept is to be examined with regards to Turkish tax system and the bilateral tax treaties.

II- TAX DISCRIMINATION IN GENERAL

II.1- The General Concept of Tax Discrimination

Tax discrimination is a sub-norm of the general discrimination term which is particularly one of the most important concepts both in domestic laws and international law. It is worth hihghlighting in a sense that tax discrimination is the tax law version of the general discrimination concept. Correspondingly, the non-discrimination principle in tax law can be seen as a requirement of the general non-discrimination clauses. In respect to this, the general discrimination and non-discrimination concepts should be evaluated initially.

Discrimination occurs when a treatment for a person or an object is different from the treatment for another person or object which has the same (or comparable) conditions with the first person or object. Besides this, discrimination can be observed when the same treatment is applied to two persons or objects which are in different (not in comparable) situations. The first one is considered as "*de jure* discrimination", while the latter is considered as "*de facto* discrimination" (Davey, 2012: 58).

To eliminate unfair and disadvantageous results of discrimination, the non-discrimination principle is created in accordance with the legal order. It should be added that although the non-discrimination principle has begun to be accepted in the international tax law as an unitary regulation arena mostly after the end of World War II, particularly with the Charter of the United Nations (UN) and now, this principle shows itself in bilateral, regional and multilateral agreements or economic integrations; the general concept of non-discrimination has an old tradition in relation to equality (Kardachaki, 2013: 39). In the historical process, non-discrimination emerges as a fundamental principle both international law and domestic laws and shows itself in different types of international levels. This principle can be derived from the ethical principle of fairness (Van de Vijver, 2015: 248). Equality is another concept which underlies the non-discrimination principle. Vertical and horizontal equality concepts can only be actualized when the non-discrimination principle is provided.

Considering the general explanation, the position of the non-discrimination principle in regards to taxes in domestic and international areas can be evaluated in a more substantial way. However before this evaluation, questions such as why states tend to discriminate foreigners by using taxes and why this is tried to be prohibited, should be answered, in order to understand tax discrimination better.

II.1.1- Reasons Behind Tax Discrimination and Non-Discrimination

In international area, states may choose to apply discriminatory taxes to foreign natural or legal persons or products with various purposes. So states do not consider the principle of equality and the general principle of non-discrimination (especially the prohibition of nationality based discrimination) for the sake of realizing their purposes.

States may use discriminatory taxes as a tool to protect their economy and domestic products. For instance, if nationality based discrimination targets particularly foreign products, these taxes are reflected to the prices, and at the end, the prices of foreign products increase. These foreign products with higher prices are likely not prefered by consumers. By this way, states use discriminatory taxes to direct consumers to domestic products or to bias them. In order to realize another purpose, protecting national economy, states may use discriminatory taxes so as to protect their infant industries. As in Frederick List's infant industry argument, new industries in developing states are not able to compete with improved industries of developed states at the start. Thus, these states may determine protectionist trade and tax policies to protect infant industries by using taxes such as tariffs among other measures in order to maximize domestic welfare over time (Melitz, 2005: 177). So this argument can be considered as the purpose of protecting domestic economy for developing states.

In these protectionist policies of states, another relevant purpose for the states is to narrow their foreign trade deficit which is the difference between the total amount of exports and imports. So with imposing discriminatory taxes to the import side, the state aims to narrow the foreign trade deficit. Because again, these taxes increase prices of imported products and so demand decreases. This low demand also decreases the amount of export, then as a result, the foreign trade deficit shrinks.

Although there are incentives for discriminating foreign natural or legal persons or products from the viewpoint of states, in international area, tax discrimination is tried to be eliminating. There are different motives for the prohibiton of tax discrimination at different levels in the international arena. These motives are different in their nature and they are examined in the previous headings and then in chapters for EU law and the OECD Model Convention seperately. However these motives intersect at certain points. The most general purpose of these levels is to prevent the damage that tax discrimination gives to international trade. Because tax discrimination is able to hinder cross-border trade and investment (Mason, 2007: 79).

Discriminatory taxes negatively affect international trade in two ways; first it may encourage foreign natural or legal persons from investing another state which uses a discriminatory tax regime. As a second way, tax discrimination may affect the prices of imported goods or services. Because if a state apply discriminatory taxes to foreign goods or services, then taxes are reflected to prices of these goods or services and prices automatically increase. Due to these higher prices, consumers choose domestic goods or services which have lower prices. So the international circulation of goods or services is adversely affected by these taxes. With the non-discrimination concept, states try to prevent other states from discriminating against cross-border goods or services. In other words, international mobility of goods, services, investors etc. are encouraged.

Within the concept of trade concerns, states try to provide the principle of equality in spite of sovereign states by the prohibition of tax discrimination (Santiago, 2009: 250). If this equality is provided, then international trade competition between states is protected from distortions. Since unfair activities of states such as using discriminatory taxes to protect their own products or establishing preferential tax regime to attract investment, distort choices and decisions of consumers and affect international competition in a negative manner. So trade concens also include competition concerns.

Another incentive which is related with the principle of equality can be to provide ability to pay principle. As it is known, ability to pay principle is a tax law principle which serves for the principle of equality, particularly horizontal equality. Because taxpayers who are in the same circumstances with tax purposes have also similar ability to pay. In other words, being in the same circumstances contain having the same level of ability to pay. This principle generally takes place in constitutions of states. Non-discrimination clauses and practices serve for this principle with providing the same tax treatment to taxpayers who have the same level of ability to pay. So again, it is important for providing the principle of equality.

As another purpose behind the prohibition of tax discrimination may be that states desire to provide an uniform treatment to persons and products which is a result of a cooperation between states. Because without a non-discrimination rule which occurs at different levels such as bilateral treaties or international integrations, sovereign equality of states gives those states an opportunity to treat foreigners arbitrarily in a different or more burdensome manner. So implementing the non-discrimination in different levels may provide a uniform application in regards to taxes which affect international trade and relations.

As it can be understood, although some states have incentives to discriminate against foreign natural or legal persons or products, generally tax discrimination is not a desirable practice and it is tried to be eliminated both in internationally and domesticly. Although sometimes it creates advantages for states, especially in the international sense, now, states are aware of its negative results in the long run. In particular with the effect of the general non-discrimination principle going back many years and the international area which is shrinking and involving increasingy interdependent states under the influence of globalization, states are now on the same page that it is a requirement that the tax discrimination should be prohibited. So now, the non-discrimination idea is evaluated in international aspects.

II.1.2- The Principle of Non-Discrimination in the International Tax Law

Before the evaluation of the non-discrimination concept in the international law, it is worth noting that the prohibition of tax discrimination takes place in the domestic laws of many countries, particularly at the constitutional level. For instance in Belgian, French and Turkish constitutions, all types of discrimination are prohibited (Van de Vijver, 2015: 241). But it should be said that the non-discrimination principle is exhibited by the clauses which involve the principle of equality. In these clauses, discrimination on the grounds of nationality, age, sex, race, religion etc. is prohibited in order to provide the equality. So, non-discrimination in tax law can be applied by these regards. Also some states which do not give a place to the non-discrimination principle within their constitutions, reach this principle with interpreting some other principles. For instance Germany uses the ability to pay principle to implement the prohibition of tax discrimination with tax matters, while rule of law is preferred by United Kingdom (UK) with the same purposes (Van de Vijver, 2015: 242). On the other hand, "Dormant Commerce Clause" is interpreted as a non-discrimination source (Mason & Knoll, 2012: 1018). In addition, by making bilateral tax treaties and transforming them into their legal systems, states may promise to apply the non discrimination principle in regards to tax law. However the domestic application of this principle is not included in this study.

The general non-discrimination principle has an important role in international law. Most of the international texts include this principle at different shapes and levels. For instance international tax law and international human rights law are sharing it as a common principle (Kardachaki, 2013: 6). Article 14 of European Convention On Human Rights (ECHR), non-discrimination is explained as:

> "*The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other statu.*"

As it can be seen from Article 14 of ECHR, discrimination is prohibited on any grounds, especially on nationality. With fairness and vertical or horizontal equality concerns, this article reveals the main approach to the discrimination concept. Also this general principle is taken place in Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Article 1 of this Protocol again prohibits discrimination on any grounds.

ECHR includes the general non-discrimination principle in its core and this principle is based on Aristotle's equality and non-discrimination ideals. In *Ethica Nicomachea*, Aristotle reveals the theory of "golden mean" which brings along some principles. One of these main principles is equality which represents fairness. According to Aristotle, the fairness consists of three principles which are non-discrimination, proportionality and the rule of law (Van de Vijver, 2015: 243). This demonstrates the non-discrimination principle in the classical Aristotelian equality concept. In the basic Aristotelian concept of discrimination, four main elements can be revealed:

- Two situations
- The different treatment
- Comparability
- The disadvantageous result for one situation (Bammens, 2012: 9).

Considering these four elements, the definition of discrimination can be constructed. Every discriminatory treatment creates a disadvantage for one natural/legal person or a good/service which has got the comparable situations in accordance with another natural/legal person or another good/service. So in the nature of the discrimination concept, there exists always a comparison with another person or another good/service which has got the same circumstances with the person or the good/service allegedly subjected to discrimination.

At this point, it should be said that the definition of tax discrimination has the same requirements. Discriminatory treatments in tax law can be observed when domestic tax laws treat same natural/legal persons or same goods/services differently. There is no doubt that there should be a disadvantageous situation for the person or the good/service allegedly subjected to discrimination. Again, it can be said that the comparison and the disadvantageous situation should be factors in determining discriminatory practices.

It is stated in the jurisdiction of the European Court of Human Rights (ECtHR) that general non-discrimination article should be read in relation with Article 1 of the First Protocol (Van de Vijver, 2015: 248). Therefore, in tax discrimination cases, Article 1 can also be used as a prohibition source. It is worth remarking that this general non-discrimination clause is applied for tax issues by the ECtHR in relation with Article 8 on “Right to respect for private and family life”, Article 9 on “Freedom of thought, conscience and religion” or Article 1 of Protocol No 1 “Property Rights” in its case law; but Article 1 of Protocol No 12 has not been covered by the ECtHR yet due to being no claim for this. (Arslan Öncü, 2015: 166-170).

The egalitarian logic of the tax discrimination prohibition is based on the general non-discrimination principle which is one of the cornerstones of modern human rights theory (Georgopoulos, 2006: 1). Also international tax discrimination is broadly based on the definitions of general discrimination and tax discrimination terms, while there is no general definition of this concept (Aşçı Akıncı, 2012: 5). In this respect, international tax discrimination can be defined as the application of different tax provisions to those who are in the same situations with regard to international tax law and as a consequence, a different or heavy taxation on the group is exposed to discrimination. However, there are some other factors for discrimination concept in international tax law. One of them can be described as the nationality concern.

As a rule, discrimination in international tax law, particularly tax discrimination, should include a nationality factor. There should be a different treatment based on the nationality of the subjected natural/legal person or the origin of the subjected good/service. So with the nationality, one state treats different to another state's nationals or residents who are comparable with the first state's own nationals or residents. Generally the reason behind such discriminatory treatments can be expressed as a purpose to protect or boost the economy of the state which treats differently to foreign elements. Thus, as a rule, tax discrimination occurs when there is a different treatment for non-nationals/foreigners or non-residents or foreign products/production who are comparable with nationals or residents or domestic products/production. It should be noted that DOLZER and STEVENS add "the intention to harm the aliens" as another requirement for discrimination (Dolzer & Stevens, 1995: 61).

Although the prohibition of discrimination on which tax discrimination is based, appears to be an international prohibition, as mentioned before, tax discrimination has both national (domestic) and international types. In national aspect, tax discrimination occurs based on the domestic law and means a situation which appears when provisions that have no nationality concern in domestic legislation is applied. Inasmuch as our working subject is tax discrimination which exists in international area and is shaped in the frame of the nationality purpose, internal or domestic discrimination practices which arise only between nationals or domestic goods/services are not included in this work.

Non-discrimination is related with the concept of sovereignty of states. Within this context, tax discrimination has the same relationship with the sovereignty. Because in international tax law, the sovereign equality of states is one of the fundamental rules. There is no international tax authority which regulates this zone, imposes sanctions and provides the implementation of the non-discrimination principle. However some international economic integrations or unions and international treaties can be seen as exceptions for this rule. Because these kind of institutions try to provide the application of the non-discrimination rule and sometimes, some of them have the power to dictate the implementation of this rule to its member states. At this point, the relationship between tax discrimination and sovereignty, and exceptions of the principle of sovereign equality of states will be clarified in the next section.

II.2- Sovereignty and Tax Discrimination

The taxation authority is seen as one of the most important authorities in the hands of the governing power from past to present. This concept is of great importance for the modern state. The power of taxation as a view of the sovereignty of the state expresses the legal and de facto power possessed in relation to taxation (Çağan, 1982: 3). This authority based on sovereignty prevails at the national and international level.

Questions such as why tax sovereignty is a part of the general sovereignty of a state and why it is of great importance lies under the deep idea of the need for a state. So with the social contract and building the concept of state, the necessity of persistence and maintaining state functions such as providing public goods has become important. In order to achieve these, sufficient amount of revenue should be generated and the main source is tax. Thus every state has dominated a sovereignty of taxation. Taxation authority can be combined with sovereignty (Christians, 2009: 104). The obligatory characheristic of taxes also stems from sovereignty of state.

It is important to note that taxation authority is not limitless and cannot be seen as an absolute power in the hands of the state; since the fundamental rights and freedoms of people and the power of taxation have a very close relationship (Canbay & Akyol, 2014: 74). The fundamental rights and freedoms should not be neglected. Therefore, the taxation authority should be restricted with those fundamental rights and freedoms in general terms.

In Turkey, the national level of taxation authority is embodied primarily in Article 73 of the Constitution. Also the Constitution draws the line for the national meaning of this authority which finds its source from the Constitution. As the wording of Article 73 of the Constitution shows, "principle of legality" is important, the sole authority to tax is the government. However, again, this authority is not limitless. The principle of legality should be seen as a limit to the taxation authority, since this principle obliges the government to use its power in accordance with the rule of law.

In the international arena, financial sovereignty is the same for all states in accordance with the principle of "sovereign equality of states", and it shows itself in the way the state identifies and implements independent fiscal policies (İdikut Özpençe & Özpençe, 2007: 3). Under the “principle of territoriality”, states use their taxation powers within their borders and in accordance with their own laws. Although the conditions in the law are fulfilled, those who realize the taxable event that creates tax liability within the borders of the state, even though they are not citizens, pay taxes as a rule. The state which uses its taxation power in accordance with the principle of territoriality can be regarded as “the source (origin/host) state”. It means that the taxable event is realized in that state, so that state will be the source or origin of this taxable event and as a rule, will gain the right to tax it regardless of the nationality of the taxpayer. According to international law, the source state can only tax income which is generated from its territory (Tudor, 2015: 144). So non-national taxpayers who are subject to taxation in the source state are limited tax liables.

The second principle is called as the “principle of personality”. According to this principle, states can also use their taxation power for their own nationals’ transactions in both its territory and foreign states which does not take place in the borders of this state. In other words, according to the principle of personality, the taxation authority is able to follow its citizens outside the borders of the state. So nationals are taxed on their worldwide income regardless of its geographical source (Green, 1994: 117). The state which uses this principle is regarded as “the residence (home) state”. According to international law, the residence state, as a rule, can levy taxes on worlwide income of their citizens regardless of their origin (Tudor, 2015: 144). So those taxpayers, who are residents, can be described as unlimited or full tax liables.

In addition it should be remarked that using taxation power by states over both foreigners within the borders of the state and its own nationals which are in other states’ borders, creates problems such as conflicts of the taxation powers of the states in practice. Although every state is independent in terms of taxation power due to the principle of sovereign equality; the conflicts which have arisen brought the matter of taxation authority to the agenda of the international arena. For instance, home state, which is the residence state of a person, can use its power to tax for a taxable event in accordance with the principle of personality, besides the source state where the taxable event occurs can use its power to tax in accordance with the principle of territoriality. In this example, two states can levy a tax for the same event and the taxpayer should bear the tax burden two times. So the use of taxation power might cause the double taxation problem. These kind of conflicts are tried to be eliminated by the bilateral or multilateral efforts of the states with the idea to limit tax sovereignty in international area.

The prohibition of tax discrimination is also used as a tool to limit states' sovereignty. In other words, tax discrimination constitutes a reason for limiting sovereignty of states in international area. Because discriminating against foreigners is included in that sovereignty and it affects international area negatvely. Due to this reason, with bilateral and multilateral treaties and also by regulations of economic integrations, the non-discrimination principle is included in international law so as to provide the sovereign equality of states in a more fair manner.

In addition, tax havens, tax competition, electronic commerce, tax evasion, ecological taxation are also seen as tax problems that create the need to restrict international taxation authority of states (Canbay & Akyol, 2014: 75). On the other hand, they can be considered as problems which are brought or increased by globalization. Limiting taxation authority in international relations has become a necessity today. Since states have the sovereign autonomy over taxation, this creates inconsistencies with the global economic reality (Christians, 2009: 99). With the globalization, interstate relationships and trade have been developing and interdependence between economies have been increasing. Therefore only domestic policies and the strict use of the right to tax cannot guide states in international area. States should design their tax policies in order to adapt themselves to this globalized world and limit their own taxation authorities with different methods. One of them is afore-mentioned constitutional restrictions. Also states can limit their authority or make trade offs with other states voluntarily. This kind of actions are related with "sovereign duty" of states. This notion means that states have a duty to respect the sovereignty of other states in regards to taxation and to comply with tax policy standards of global community (Christians, 2009: 108-109). However limiting their auhtority is also involved in sovereignty of these states. Within this framework, it can be expressed that taxation authority can be restricted by international agreements (tax agreements, information exchane agreements, trade agreements), memberships in international organizations and economic integrations (Canbay & Akyol, 2014: 77). With using this opportunities, states try to combat with problems such as discrimination with cooperation.

II.3- Sources of The Prohibition of Tax Discrimination

There are lots of sources of the non-discrimination principle in practice. Inasmuch as there is no generally accepted legal text which is obligatory for all states in international tax law. In other words, there is no constitutional source to be applied as a primary source in international tax law. Therefore the sources to be considered in terms of the concept of tax discrimination which are limiting the sovereignty of the state can be seen as international treaties or economic integrations. Also memberships in international organizations are another level. However they are examined in the heading of the tax treaties level as multilateral treaties in this study, since they are constituted with multilateral treaties. So non-discrimination clauses are included in these basic levels. The main purpose of them is generally to provide a legal and functional framework for international trade and in order to achieve this, non-discrimination clauses can be seen as a cornerstone element (Kardachaki, 2013: 39).

In order to determine whether an application about taxation results in a discrimination or not, it should be evaluated that the level of this application at first. Because every source identifies the tax discrimination term and its sphere of influnce according to their own circumstances and constitutes their own formulations. Although there are no great differences between them, every source has a different place in terms of the concept of discrimination. Thus whether there is a tax discrimination, every tax regulation or practice should be evaluated according to the source of prohibition. These sources have been characterized by their ability to limit the taxation authority of states.

At this point, it is worth noting that the afore-mentioned levels of source consist of economic integrations and different types of treaties. So in order to understood tax discrimination concept generally and to identify different practices of non-discrimination clauses, these main levels of source should be evaluated.

II.3.1- Non-Discrimination Clauses in the International Treaties Level in General

These treaties which include tax discrimination prohibitions are international treaties, i.e. bilateral, regional or multilateral treaties. Also they can be tax treaties as well as other types of treaties (non-tax agreements) such as economic ones or friendship, commerce and navigational treaties as it was in the historical process. It should be noted that not to treat foreigners and their enterprises discriminatorily has been applied as a principle in international fiscal relations before the start of the stage of classical bilateral treaties in the 19th Century (Goldberg & Glicklich, 1992: 53). So sources in this level is not divided based on their subjects but based on the number of parties which sign the treaty.

II.3.1.1- Bilateral Treaties

Bilateral treaties are entered by two contracting states and so they affect only these two parties. These treaties are constituted with a negotiation which means a process of reconciliation of conflicting interests of the contracting states (Vogel, 1986: 43). They can be again tax treaties or other types of treaties. Tax treaties can be constituted as double taxation avoidance agreements (DTAA) or other treaties such as information exchange or treaties on combating tax evasion. However it is worth noting that other types of tax treaties do not include non-discrimination clauses because of their subjects.

So among bilateral treaties, DTAA’s are of great importance. Since states who try to avoid and prevent double taxation create DTAA’s and generally all of these agreements include a prohibition of tax dicrimination (non-discrimination) clause. By this way, states protect their own nationals or residents or products and of course they guarantee to protect the other contracting state’s nationals or residents or products. So these treaties which limit states’ taxation power will be taken into account as a source when a tax regulation or application which is claimed to be discriminatory, occurs between the two contracting states. It should be highlighted that recently, the vast majority of more than 2,500 DTAA's include a non-discrimination principle in regards to taxes (Avi-Yonah, 2007: 6). Correspondingly, this level is important because the majority of the tax treaties between states are constituted as DTAA's.

Bilateral tax treaties are generally designed based on international model tax treaties. States may use these models without changing them or they may negotiate to change them in a more appropriate way. Thus the Model Treaty of OECD ("Model Tax Convention on Income and on Capital") and the Model Treaty of UN ("United Nations Model Double Taxation Convention between Developed and Developing Countries") should also be considered as the sources in the treaties level. These model treaties are mostly used by states as DTAA's. In other words, states commonly use these models in their DTAA making process by completely using them or by changing them. These models contain a similar comprehensive clause which means a prohibition of tax discrimination (Green, 1994: 117). So, states who use these models also include a clause for prohibition of tax discrimination in their DTAA's. By this way, both the OECD's Model and the UN's Model become basic sources for tax discrimination at the treaties level. For instance the non-discrimination provision of U.S. Model Income Tax Treaty is prepared based on the OECD's Model Treaty (Goldberg & Glicklich, 1992: 51). However as mentioned before, states which use these treaties as a model can change their provisions based on their public interests. So the non discrimination provisions might change treaty to treaty, therefore prohibition of tax discrimination concept might vary.

These two models have many similarities to each other. Both of them cover all types of taxes and designed to be applied as widely as possible (Pickering, 2014: 63). Also the UN Model can be considered as it reproduces the non-discrimination clause in the OECD Model of that time (Aneja & Singh, 1997: 164). But OECD's Model has developed and adopted based on the necessities of the time and it has a broader application area due to the number of states which use this model. For instance EU member states make bilateral tax treaties between other member states based on this model (Helminen, 2014: 2). It is worth highlighting that the main difference between these two models is the level of development of target states. In 1977, OECD issued a new model. This model was considered as a model which included provisions for the benefit of the source state. In the real world, source states which were able to attract investment or labor force were generally developed states. In other words, investment flows were generally tend to move from developing states to developed states and the OECD Model was not convenient to reduce the loss of tax revenue for developing states due to this flow. Since this model required that the residence state which was most likely a developing state should give up revenue in certain subjects. So, this situation created a need for a more compatible model to the interests of developing states and in order to meet this need, the UN Model was prepared (Byrne, 1995: 701). In this model, the compromise of both residence and source state principles can be observed. So this historical fact can be seen in the name of the UN Model which is "the United Nations Model Double Taxation Convention between Developed and Developing Countries". Also this model promotes politically acceptable investments in developing states in practice, thus such states frequently use this Model as a fiscal instrument (Krishna, 2016: 18-19). Indeed it can be observed that the OECD Model is used by developed states. For instance the US Model tax treaty is prepared based on the OECD Model. This model is not explained in detail, because in Chapter 4 it will be held on more depthly.

II.3.1.2- Regional Treaties

Another source of non-discrimination clauses can be seen as regional treaties which are included in the international treaties level. These treaties are signed by only states which belong to the same region that is determined with geographical concerns. So these treaties constitute a circle which precludes other states. On the other side, these are signed by more than one states. So they can be considered as multilateral treaties at the same time. These treaties generally mention trade or investment, thus they are related with taxation. Within this context, these regional treaties may bring prohibitions of tax discrimination or they prompt states to make DTAA's which inlude non-discrimination clauses.

The North American Free Trade Act (NAFTA) which is agreed by Canada, United States and Mexico, can be regarded as a source in this manner. This agreement creates one of the worlds largest free trade zones (Kardachaki, 2013: 15). The main concern behind the NAFTA are market access and non-discrimination in the cross-border supply of services, but discrimination on direct taxation has been largely carved out of the NAFTA as a rule (Brown, 2005: 100-101). It is worth noting that indirect taxes and direct taxes which are related to the purchase or consumption of services can be considered as they fall within the scope of non-discrimination clauses in the NAFTA (Brown, 2016: 10). Similar with this, there are some other sources in the regional treaties level such, i.e. ASEAN is another regional agreement which establishes the association of Southeast Asian Nations or The Trans-Pacific Partnership and they also include non-discrimination clauses in the general basis but exclude direct taxes from the sphere of influence of those clauses. Also Treaty of Chaguaramas which establishes the Carribean Community prohibits discrimination.

In addition, tax treaties which are made under the influence of the NAFTA are bilateral tax treaties between member states which are Canada, United States and Mexico. These treaties which can be called as "NAFTA tax treaties" are prepared based on the OECD Model and they include the non-discrimination clause which covers both direct and indirect taxation (Brown, 2005: 101). So it can be said that NAFTA tax treaties are used to compensate for the exclusionary effects of the NAFTA system on direct taxation. Thus the NAFTA tax treaties are included in this level of source.

Another source in this level is the TFEU which is one of the founding treaties in the EU law. Because this treaty is binding for only member states of EU. This treaty includes a non-discrimination clause in regrds to taxation. This non-discrimination clause prevents only member states from discriminatory treatments to another member state's nationals or goods/services. In other words, the only prohibited type of discrimination is realized by a member state to the detriment of another member state, so at the end, the prohibited tax discrimination occurs between member states. But it should be said that this treaty is not examined under this heading, because it belongs to EU law and this constitutes another level of source for prohibitions of tax discrimination. Thus the TFEU should be examined with the entire EU law.

II.3.1.3- Multilateral Treaties

Multilateral treaties, as it can be understood from its name, are prepared and signed by more than two states. These treaties may have global effects depending on the contracting states. These treaties are instruments for regulating a field for common interest and have opportunity to be applied worldwide (Kardachaki, 2013: 11). They may include non-discrimination clauses with international trade considerations. In this level, the WTO can be seen as a source, since the principle of non-discrimination lies at the core of several international organizations such as the WTO (Staringer & Schneeweiss, 2007: 230). The WTO is the first global agreement which brings the non-discrimination obligation in relation with trade (Brown, 2017, 19). In order to eliminate domestic barriers against trade, the WTO enshrined non-discrimination principle at its heart and soul (Brauner, 2005: 266).

Many international trade agreements are being made under the WTO roof. Each of them aims to provide free circulation of goods or services (Kardachaki, 2013: 11). So in order to eliminate barriers against international trade, non-discrimination should be counted as a fundamental principle. Also tax dicrimination is one of the problems for the purposes of providing free circulation and boosting international trade, since states use tariffs, import expansions or export subsidies to distort decisions (Kardachaki, 2013: 10). So the international non-discrimination should be included in multilateral agreements for taxation considerations.

The General Agreement on Tariffs and Trade (GATT) can be counted in these multilateral treaties which are components of the WTO (Brown & Manolakas, 2008: 11). It applies to all WTO members and it is specialized on the elimination of obstacles against goods in international trade. Also The General Agreement on Trade in Services (GATS) which stems from the WTO Agreement is created to prevent distorting effects on services in international trade. GATS can be considered as the first global attempt in building a multilateral understanding in trade in services (Brown, 2017: 21). Both of these agreements use non-discrimination clauses as a tool to realize purposes about international trade and free circulation. It should be said that there are two basic appearances of the non-discrimination principle in these agreements which are “most favoured nation” (MFN) and “national treatment” (NT) applications. Pursuant to MFN obligation, one of the contracting states commits that it must not treat subjects of other contracting state “no less favourable” than subjects of another third state. So in here, discriminatory treatment is prohibited for subjects of the other contracting state when compared to a favoured third state. In other words, discrimination amongst imported products of WTO members is prohibited under this obligation (Davey, 2012: 31).

Also in order to meet the NT obligation, one contracting state must not treat subjects of the another contracting state “no less favourable” then its own subjects (Kardachaki, 2013: 39-40). In here, discriminatory treatment to foreign subjects which belong to the other contracting state is prohibited. In other words, this obligation prevents member states from treating discriminatorily between national and foreign products. This situation is frequently seen in regards with alcoholic beverages among member states (Davey, 2012: 160). Imported alcoholic beverages may be taxed heavier than domestic alcoholic beverages, in order to promote domestic production. This kind of discrimination exists in an indirect discrimination form; but it is prohibited on grounds of national treatment obligations.

These forms of prohibition are the same with general non-discrimination clauses. Therefore these prohibited discriminatory treatments include all types of discrimination; they may be heavier taxes or some other treatments such as trade obstacles. However there are exceptions which give states opportunity to take different measures between domestic and similar foreign products or services such as regional trade agreements which are made based on “Enabling Clause” and these general exceptions lead to distortions from non-discrimination clauses in the nature, even if they are allowed (Kaya, 2010: 188).

At this point it should be highlighted that the scope and application of these components of the general non-discrimination clause can be seperated into two parts in regards to taxation. Because these agreements such as GATS or GATT prohibit discrimination in regards to trade and taxation practices are seen as only a part of trade. This means that these agreements are specialized agreements on trade and are not designed to involve taxation issues clearly. In other words, taxation is only considered within the scope of the agreement as long as it deals with the field of trade. So particularly MFN and NT obligations are desgined to be cover issues related with trade; while non-discrimination clauses in bilateral tax treaties are created especially for including taxation issues. Therefore MFN and NT obligations are applied for only taxes which are related with goods and services. This means that the main focus on these obligations are indirect taxes and customs duties, while bilateral tax treaties primarily deal with direct taxes such as income taxes (Brown, 2017: 3).

Specific clauses can exemplify this condition. For instance pursuant to Article 3(1) of the GATT, the national treatment provision uses the phrase of “imported or domestic products” when decribing the extent of this provision (Cockfield & Arnold, 2010: 141). So pursuant to this article, non-discrimination is only prohibited for taxes which are related with goods. Therefore taxes on such as income or corporation tax which are collected from manufacturers are not included within the scope of this article (Kaya, 2010: 206). In addition to this, there are exemptions from most favoured nation or national treaty obligations and specific articles which limit these obligations (Brown, 2005: 105). For instance, in Article 14 of the GATS, general exemptions are counted. As one of them, Article 14(d) states that member states may bring direct tax measures even if they are inconsistent with the national treatment standard. The only limit to the right is that these measures should not constitute "arbitrary or unjustifiable discrimination" in trade or services and should aim an “equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Member countries”.

It is worth explaining that direct taxes are not entirely excluded from the context of MFN and NT clauses in trade agreements. They can only be applied for direct taxes provided that if these taxes are related with goods or services. So the main determinant which leads to the inclusion of direct taxes in MFN and NT clauses is their potential impact on the cross-border trade (Brown, 2017: 3). If a direct link can be established between a direct tax and trade (goods and services), then non-discrimination clauses can be applied to these taxes. For instance in the GATS, member states’ tax discretion on direct taxes on the services or service providers of the other Member States are limited; these tax measures are allowed as far as being contary to the NT obligation in the GATS (Brown, 2016: 7). However it should be noted that this application does not exist very often. The issue of non-discrimination in direct taxes is virtually left to bilateral treaties.

As it can be seen tax discrimination prohibitions in treaties which derive from the WTO do not guarantee MFN or NT standards for direct taxation (Ault & Sasseville, 2010: 122). These prohibitions are only applied to internal taxes on products or services, as a rule. Similar with this, another source of non-discrimination such as the NAFTA also limit or exclude MFN and NT obligations particularly with respect to direct taxation, in order to protect tax sovereignty (Brown & Manolakas, 2008: 9). Although these agreements avoid to provide non-discrimination clauses for tax matters, they provide supremacy for tax treaties instead (Brown & Manolakas, 2008: 64). So the tax discrimination prohibitions in these regards are neither MFN nor NT clauses. But they aim that states treat foriegners and nationals the same when they are in the same circumstances. Within this context, these prohibitions are close to national treatment obligations (Brauner, 2005: 267).

II.3.2- Non-Discrimination Clauses in the Economic Integrations Level in General

Another main source of the non-discrimination clauses is EU law and especially the TFEU. It can be said that EU is a regional economic integration which can be considered as a source in "international integrations" level. The TFEU, which is one of the founding treaties of EU, prohibits both the discrimination in general and discrimination in the manner of tax law (tax discrimination). From this point of view, if there is a discrimination at EU level, the TFEU will come into force. In addition to this, the jurisdiction of the European Court of Justice (CJEU) plays an important role too. The CJEU has established a jurisdiction with assessments which were created with interpreting the TFEU's provisions and whether the applications which subject to judgement caused tax discrimination or not. This case law becomes a source for us. This source will not be explained further under this heading, because it will be evaluated in more detail in the next chapter.

II.3.3- The Framework For This Study

There are mainly two sources for non-discrimination clauses; the economic integrations level and the treaties level. It is worth adding that membership of international organizations could be regarded as another level which is actually involved in multilateral treaties of treaties level, but it is prefered to examine this as it is involved in multilateral treaties level. The treaties level consists of various types of international treaties which constitute different forms of non-discrimination clauses. Within the context of this study, only two practices are addressed and examined. The first one, EU law which is included in the international integrations and in a sense, the regional treaties level (due to the TFEU, one of the components of EU law). The main idea behind this choice is that EU law represents the economic integrations level. In other words, EU law is considered to be the most important source that reflects the characteristics of the level of economic integrations. Also the case law on non-discrimination of the CJEU is thought as it shed light on different and complicated issues within this scope. Under the influence of the CJEU which has developed case law on non-discrimination for a long time and transformed this case law according to recent developments, the practice of non-discrimination in EU law is one of the most significant sources across the world. It is of great importance to examine EU law in order to reach a more effective and comprehensive non-discrimination rule which is applicable worldwide standards.

The second one, the OECD Model Tax Convention on Income and Capital, is included in the tax treaties level and also represents it. The distinctive feature of this Model Convention is that it is the most used one. Correspondingly, the practice of this Model can be observed globally and this affects the international meaning and the scope of tax discrimination and the principle of non-discrimination. For instance, bilateral tax treaties between the WTO members are based on this Model. Thus this Model can be considered as a text which has the widest application area and it deserves to be examined seriously. While the application of non-discrimination clauses in the WTO (both GATT and GATS) or NAFTA has a narrow sphere of influence and they discourage direct taxes based on some conditions, the OECD Model generally includes direct taxes, i.e. taxes on income and capital and in addition, but its scope is not limited with direct taxes, all kinds of taxes are included in the Model. Although direct taxes are not harmonised and they are generally left to the authorities of the member states to a large extent, the CJEU covers direct taxes by interpreting the provisions of the TFEU. So these two applications together create similar features as well as different features.

The fundamental purpose behind choosing EU law and the OECD Model Tax Convntion is that they are the widest and most frequent examples in their levels and they have the most extensive application area. This causes a large practice to be compared and to interact with each other. Also in EU law, as a rule, tax discrimination on grorunds of nationality is prohibited; in parallel with this, the OECD Model includes the non-discrimination provision which prohibits nationality based discrimination. In addition to this, the fact that the concept of discrimination is different in EU law from that of treaty law also provides the necessary motivation for this choice. For instance, these are included in two different levels and choosing applications in two different levels provides a broader and comparative perspective and by this way, international non-discrimination practices can be examined in a deeper view and they may become more effective applications.

EU law has a narrower geographical application area but includes binding rules for member states. The applications of the strict and binding non-discrimination clauses may affect the practice of the non-discrimination rule in the OECD Model and by this way, the non-discrimination rules may be more strength in a more extensive geographical area. Also in the EU's legal system, there is the Commission and the CJEU which are bodies for controlling member states whether they fulfil their obligations. In contrast with this, there is no institution or a court which controls contracting states in the tax treaties level. So the application or non-application of bilateral treaties which are based on the OECD Model is not investigating by an international body. International treaties are governed by the Vienna Convention of the Law of Treaties (Holmes, 2007: 70). This is only a matter of *pacta sunt servanda*. Because of the lack of a supranational body which can control and give decisions for states, making the non-discrimination rule in the OECD Model more extensive and detailed is important and the practice in EU law can shed a light for this purpose. So this kind of differences between the chosen levels and their effects to the practices are worth examining. In addition, the comparison between the EU system and the OECD Model serves to see disputes, defficiencies and requirements of their applications and creates opportunity to give suggestions to make both of them work better.

As it is expressed, the concept of tax discrimination or the extent of non-discrimination clauses may vary depending on the level of emergence. Thus, several different applications can be observed based on different situations. The following sections will deal with different tax discrimination prohibitions, in selected levels.

III- THE TAX DISCRIMINATION IN EUROPEAN UNION LAW

III.1- European Union Law in General

Before examining non-discrimination concept in EU law; first, general features and characteristics of this legal order should be understood. Since the concept of "non-discrimination" takes place in the TFEU which "*organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences*"[1], it is worth understanding the sources of EU law, the hierarchy among them as well as whether the TFEU is a legal source or not and if it is so, the place of it in the hierarchy of norms.

EU is a *sui generis* economic and political actor with twenty-eight member states. The Community's legal order is formed by transferring some of the sovereignty rights of these twenty eight members to the Community. Thus, EU law is a supranational legal order which means that it has a supremacy over domestic laws of member states (Yaltı Soydan, 2002: 32).

Primarily, the main idea behind the Community in the early days was simple: economic cooperation. After the end of World War II, the six founding countries i.e. Belgium, France, West Germant, Italy, the Netherlands and Luxembourg came together and set up the European Coal and Steel Community (EBSC), which can be regarded as a first step to European Community (later EU). Indeed, the main rationale behind this step was to prevent possible further war between Germany and France with the creation of common and integrated market for coal and steel which were essential goods for war industry. Then the EBSC became o model for other communities i.e. The European Economic Community and the European Atomic Energy Community that were set up by the Treaty of Rome. This Treaty is of great importance as the treaty establishing the single common market objective which is able to boost the trade between member states (Kaye, 2005: 92). Following the

[1] The Treaty On The Functioning Of The European Union, Article 1, Official Journal of the European Union, Vol. 55, 2012.

Treaty of Rome, the TFEU serves to provide this objective.

One of the most important principle of EU is the rule of law. Treaties regulate every action taken by EU. Especially for the TFEU, it can be said that this principle of supremacy gives a constitutional level to this binding treaty and member states should consider the TFEU's provisions in the legal aspect for several subjects. Under the TFEU, member states implement legislation which is adopted by EU institutions. Also in Flaminio Costa v. E.N.E.L. case, the CJEU stated that the Community law is superior to legislations of the member states and it is also directly implemented and binding in all member states.[2] According to the Court, this superiority originated from the power to limit the sovereign powers of the member states and to transfer it to the Union (O'Shea, 2010: 97).

One of the main ideas behind the TFEU is the internal (common/single) market purpose. In a sense, this internal market would be provided with establishing and securing the fundamental freedoms. The fundamental freedoms can be regarded as the free movement of persons, goods, services and capital and it should be noted that the realization of the single market objective depends on the provision of these fundamental freedoms. Therefore, the removal of obstacles on the free movement has been one of the most important milestones of the EU treatments. This removal is mainly based on the principle of equal treatment that in turn hinders discrimination, especially on the grounds of nationality. Because in order to realize fundamental freedoms, different treatments to nationals of other member states should be prohibited. In the past, Article 12 of the Treaty of the European Community was built to prevent general means of discrimination and now, Article 18 of the TFEU serves the same purpose.

The internal market purpose and fundamental freedoms have also important implications for tax law. These elements that constitute main characteristics of EU law are aslo important factors in the tax law; since member states may likely use their domestic legislations and implement their taxation policies so as to harm internal market purpose and fundamental freedoms. To prohibit this, the TFEU brings provisions about taxation authority of member states and draws up taxes as a tool to meet the purposes of the Community (Yaltı Soydan, 2002: 118). However, it is noteworthy that especially if the direct taxes are the issue, European income tax legislation can be vetoed by member states

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[2] **Flaminio Costa v. E.N.E.L. [1964], Case: 6-64,** ECLI:EU:C:1964:66.

(Graetz & Warren, 2012: 1120). Also, tax directives have leastwize power to regulate the tax law issues. For instance, income tax directives are issued by the European Commission, European Council and the Parliament together. However as a rule and especially for income taxation, foundational treaties of EU leave the authority to determine the tax burden and the rates to the member states (Graetz & Warren, 2012: 1120). The CJEU also accepts that every member state is entitled to determine its own tax rate, irrespective of what rate is prescribed by another member state (Aşçı Akıncı, 2012: 222). In other words, there is no authority to create and levy (indirect) taxes within the Community.

Provisions about taxation in the TFEU, if provisions about customs duties are excluded, generally regulate indirect taxation area. It is worth noting that provisions on giving authority to the Community about direct taxes are almost never included in the founding treaties (Yaltı Soydan, 2002: 118). But the foundation and operation of the internal market idea also concerns direct tax area.

Bearing mind that there is no common regulation that can determine the tax rate within the Community, harmonisation concept becomes critical in understanding non-discrimination concept.

Harmonisation can be seen as a key concept for establishing the internal market purpose and ensuring the application of EU law uniformly. Since different rules (especially for tax law) and implications might have a possibility to create obstacles in terms of fundamental freedoms, starting from the Treaty of Rome, harmonisation of national laws have been accepted as a requirement. Harmonisation of national laws is possible by means of positive integration which can be realized with the Community regulations and negative integration which is realized by the CJEU with its case law (Terra & Wattel, 2012: 4).

The harmonisation concept is important for tax law and should be examined from both direct and indirect tax law aspects. First, it should be said that the harmonisation is a necessary tool to be used, if indirect taxes are the issue. According to Article 113 of the TFEU

> "*The Council (...) shall adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the*

functioning of the internal market and to avoid distortion of competition."[3].

Also directives are of great importance in harmonising national rules/laws. For instance, the harmonisation of VAT has been almost realized by 6th Directive.

If this issue is to be assessed from the perspective of direct taxation, it should be highlighted that the TFEU does not include special provisions about direct taxes in particular because direct taxation policies are seen as a part of member states' sovereignty and as a related area with economic policies. Therefore the harmonisation of direct taxes has not been achieved yet. However Article 115 of the TFEU which refers to directives for the harmonisation purpose is important for direct taxes; so particularly for corporate income, directives can be used. Indeed, generally personal income taxes does not included in directives, because they are thought to be more sensitive to free movement of persons (Aşçı Akıncı, 2012: 35). Also the complete harmonisation of the direct taxation is not possible because of the principle of taxation in the source state and sovereignty of member states (McGowan & Koenig,1997: 164). Direct taxes has solely been harmonised some aspects such as double taxation and cross-border economic activities (Oral, 2015: 273). It should be said that harmonisation of direct taxes are largely affected by the case law of the CJEU which points out that *"…althought direct taxation does not as such fall within the purview of the EU, the powers retained by the member states must nevertheless be exercised consistently with EU law.*"[4] Thus it can be summarized that in direct tax area, harmonisation has not been achieved completely but the jurisdiction of the CJEU can touch the issue about these taxes. So we can say that the CJEU's case law is of great importance.

At this point and before viewing non-discrimination provisions in EU law, the role of the CJEU in EU legal system should be examined briefly. As it is known, the CJEU is the judicial authority of EU and it works in cooperation with the courts and tribunals of the member states. The main role of the CJEU is to make certain that EU law is applied uniformly. With concerning the same application of EU law, the CJEU pursues whether member states comply with treaty obligations or not. Also the Court interprets EU law and settles legal disputes. The jurisdiction of the CJEU surpasses the national law of member states (Tudor, 2015: 144).

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[3] The Treaty On The Functioning Of The European Union, Article 113, Official Journal of the European Union, Vol. 55, 2012.

[4] **Finanzamt Köln-Altstadt v Roland Schumacker [1995], Case C-279/93,** ECLI:EU:C:1995:31.

If this issue is evaluated from the perspective of tax law, it should be highlighted that the CJEU surveys whether member states' tax laws violate the treaty provisions, especially provisions which are related with fundamental freedoms. Along with this, the Court also interprets provisions on tax law and settles legal disputes in this area.

If how the CJEU works in discriminatory tax issues is asked, it should be said that private litigants starts the procedure. They litigate against discriminatory taxation in national courts in their own states and then these courts may apply to the CJEU for the interpretation of EU law as a preliminary ruling. The CJEU deals with the case and creates a binding interpretation for the case in question. This binding interpretation affects all the other national courts in member states (Mason, 2007: 95).

III.2- The Status of The Non-Discrimination Clauses in European Union Law

Non-discrimination is an important prohibition in EU's legislation related with tax issues. As mentioned above, it can be seen as a general rule for all cases about discrimination on grounds of nationality. In addition to this, there is a special rule for dicrimination about taxes; this rule prohibits solely discriminatory treatments on taxation. It can be seen as a special appearance of the principle of equality. Also in the CJEU's established case law, it is indicated that the special provisions in the TFEU involving the principle of non-discrimination are nothing more than the expression of general principle of equality which is one of the basic principles of the Community law (Yaltı Soydan, 2002: 149-150). Both of these provisions are related with "four fundamental freedoms" which are the freedom of movement for workers, the freedom of establishment, the freedom to provide services and the freedom of movement of capital. Non-discrimination provisions ensure the protection of these freedoms and also the realization of the idea of the internal market. Because discriminatory regulations restrain the entrance of the internal market and in EU law, this kind of obstacles are wanted to be annihiliated. According to Article 26/2 of the TFEU "*The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the* *provisions of the Treaties*."[5] In order to fulfill this requirement, it should be provided that the member states annihilate their legal provisions which are discriminatory (Mavraganis, 1993: 221).[6] In paralel with, it should be noted that provisions about fundamental freedoms are also important for the concept of discrimination. These provisions can be used as benefical tools to prohibit tax discrimination. In other words, these provisions on four fundamental freedoms can be used as special non-discrimination provisions.

Before Article 18, Article 10 which is placed in "Provisions Having General Application" named Title II of the TFEU says that "*In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*."[7]. In addition to this general, legal and basic principle, Article 18 of the TFEU is given importance (De Sandeleer, 2014: 25). This article which can be described as a general non-discrimination principle based on nationality states that "*Within the scope of application of the Treaties and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.*"[8] This general rule prohibits discrimination on grounds of nationality, however it is not only for discriminatory taxation but also other discriminatory treatments. It reflects on the TFEU's many provisions about the internal market and also the EU acquis. Thus it can be said that this non-discrimination rule influences the spirit of the TFEU.

Prohibition of nationality-based discrimination is included in Charter of Fundamental Rights of EU in general terms. This was first introduced in the 2000's Charter of Fundamental Rights; but in this time, this Charter was not binding. With Treaty of Lisbon, this Charter has become a binding document and gain a legal status similar with the primary sources of EU (Baykal, 2010: 393).

This general non-discrimination rule can solely be implemented when the issue is included in the Community law and there is a lack of a special non-discrimination provision (Aşçı Akıncı, 2012: 45). So it can be said that this provision has a subsidiary characteristic

[5] The Treaty On The Functioning Of The European Union, Article 26, Official Journal of the European Union, Vol. 55, 2012.
[6] Retrieved from Yaltı Soydan, 2003: 123.
[7] The Treaty On The Functioning Of The European Union, Article 10, Official Journal of the European Union, Vol. 55, 2012.
[8] The Treaty On The Functioning Of The European Union, Article 18, Official Journal of the European Union, Vol. 55, 2012.

(Santiago, 2009: 250). When there is a discriminatory treatment, it must be first assessed whether there is a special discrimination prohibition of discrimination or not. This general provision shall apply if there is no violation of provisions of fundamental freedoms and Article 110 which will be explained in the previous paragraphs. This subsidiary character of Article 18 is highlighted by the CJEU in Commission v. Greece Case.[9]

It should be added that Article 19 of the TFEU specifies conditions for taking measures to combat discrimination but it cannot be implemented directly, since it does not bring special legal obligations for the member states (Aşçı Akıncı, 2012: 48).

Before explaining Article 110 which is a special article for non-discrimination, articles on fundamental freedoms should be evaluated. Since they can be also regarded as speacial provisions about non-discriminiaton. It can be said that the general non-discrimination principle has reflections in EU law and especially in several provisions about the internal (single) market. For instance Article 37 of the TFEU which is about state monopolies, Article 40 of the TFEU which is about agricultural policy, Article 157 of the TFEU which is about sex based discrimination among workers etc (Aşçı Akıncı, 2012: 49). But our main focus is provisions about the fundamental freedoms, since the internal market purpose requires a nationality based prohibition of discrimination.

Free movement of workers is one of the fundamental freedoms in the Community law and Article 45 of the TFEU concerns for this purpose. In order to provide the purpose of free movement of workers, this provision requires "*the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.*"[10] So as it can be seen, nationality based discrimination is prohibited between workers in EU and if this kind of discrimination is related with tax issues, this provision gains a characterstic as a special tax discrimination prohibition. For instance, in discriminatory income taxation cases, this article gains importance. Thus in a sense, this article limits the member states' taxation authority (Yaltı Soydan, 2002: 152).

Article 49 of the TFEU is about free movement of establishment which is included in free

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[9] **Commission of the European Communities v Hellenic Republic [1989], Case 305/87,** ECLI:EU:C:1989:218.

[10] The Treaty On The Functioning Of The European Union, Article 45, Official Journal of the European Union, Vol. 55, 2012.

movement of persons and it prohibits any restiriction for the right of establishment of EU member states' citizens and also corporates (Aşçı Akıncı, 2012: 51). So these restirictions might be about tax issues which are related with the right of establishment and then this provision can be used as a special tax discrimination prohibition.

Free movement of capital is another fundamental principle which is stated in Article 63 of the TFEU. According to this article, "*all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited*."[11] Thus, any nationality based discrimination between capital movements is prohibited.

These provisions has a great importance in the CJEU's case law on non-discrimination. Especially the CJEU interprets these provisions to include direct tax issues in the non-discrimination case law. These articles are used by the CJEU as a tool for realizing purposes of the Community law in direct tax area (Yaltı Soydan, 2002: 150). This relevance was first addressed by the CJEU in Avoir Fiscal case[12]. In this case, the CJEU stated that companies are at liberty to choose their legal forms for their economic activities in another member state, on grounds of the Treaty articles. Therefore, discriminatory tax regimes should not hinder them to use this right. Then, the case law which is about direct taxation and non-discrimination has been evolved (Dziurdź & Marchgraber, 2015: 3).

As it is explained above, these articles which are about free movement bring the prohibition of discrimination in regards to tax law area. This non discrimination concept includes both natural and legal persons (Yaltı Soydan, 2002: 159).

Beyond this, Article 110 of the TFEU is the guide for non-discrimination in taxation:

> "*No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.*
>
> *Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products*."[13]

As it can be seen, with the interpretation of Article 18, this provision aims also to protect

[11] The Treaty On The Functioning Of The European Union, Article 63, Official Journal of the European Union, Vol. 55, 2012.
[12] **Commission of the European Communities v French Republic (known as Avoir Fiscal case) [1986], Case 270/83,** ECLI:EU:C:1986:37.
[13] The Treaty On The Functioning Of The European Union, Article 110, Official Journal of the European Union, Vol. 55, 2012.

the internal market with regard to wording of it (especially choosing the word “products”). Thus again the purpose of it is to prohibit the importation deterrent and export promotion measures. Tax discrimination can harm the cross-border trade and investment between member states by regulatory and indirect tax barriers (Mason, 2007: 80). So this creates a great problem for the internal market purpose and non-discrimination principle in tax law may help the Community to eliminate this kind of situations.

Also another reason to create this type of provision is that the inadequacy of the harmonisation. Non-discrimination clause which is one of the main principle of EU’s tax policy and tax harmonisation have a close relationship as both of them complete each other. So they cannot diverge from one another for the purpose of a fair taxation and of course the internal market (Keşmir, 2016: 38). It should be added that the harmonisation of tax law is restricted with indirect taxes. In order to protect sovereignty, domestic direct taxes cannot be interfered finitely. In other words, in direct tax area, member states did not transfer the vast majority of their tax authorities to the Community. Thus the harmonisation does not include these kind of taxes. If an example is given in discrimination concept, European Commission’s action against some member states’ corporate taxation can be mentioned. In 2006, Commission requested from Belgium, Italy, Luxembourg, the Netherlands, Portuguese and Spain to end discriminatory taxation on dividends paid abroad with abolishing or changing their legislations. According to the CJEU, these discriminatory taxes created obstacles for free movement of capital and right to establishment (Üzeltürk, 2008: 82). However, this was only a request, European Commission cannot abolish or change the member states’ legislations by itself or this request does not oblige member states to accord the request.

So it can be said that EU can interfere domestic rules on indirect taxes with regard to the TFEU and the harmonisation purposes, while EU cannot regulate member states’ legislations and uses its juridical power by favour of the CJEU which can affect member states with judicial decisions to interfere domestic rules about direct taxes. About this subject, in Schumacker Case[14], the CJEU decide on that the tax power should be used within the frame of EU law by member states, even if the purview of EU law does not include direct taxation (Azoulai, 2011: 201). Inasmuch as non-discrimination is a prohibition in the TFEU and a provision in EU law, member states should concern this

[14] **Finanzamt Köln-Altstadt v Roland Schumacker [1995],** Case: 279/93, ECLI:EU:C:1995:31, para. 21.

prohibition while they constitute and apply their direct tax legislation. Therefore the Court surveys whether the states act this way.

At this point it should be noted that the non-discrimination practice was shaped by the internal market purpose, these provisions and the case-law of the CJEU. The CJEU's case law has been established since 1980's, because the TFEU states this principle in broad terms and this creates a need for explanation (Santiago, 2009: 250). The CJEU's case law includes both direct discrimination based on nationality and indirect discrimination which creates the same results by the use of criteria which are differ from nationality (Aşçı Akıncı, 2012: 110).

The non-discrimination principle which is shaped by both clauses of the TFEU and the interpretation and implementation by the CJEU (as its settled case law). Within the frame of this practice, the definition of non-discrimination is that the prohibition of the different taxation of taxpayers who have comparable situations or the same taxation of taxpayers who are in different situations on grounds of nationality without any reasonable justification (Hinnekens, 2002: 113). It can be said that there are 4 main conditions when evaluating one case in regards to the non-discrimination clause based on this description:

First there should be two taxpayers/objects and they should have the same conditions

- There should be a different treatment between them
- The reason behind this different treatment should solely be nationality
- There should be no reasonable justification to legitimize this treatment.

Based on these conditions, the CJEU evaluates the case which includes claims on the violation of the non-discrimination clause. Thus the CJEU tries to determine whether two taxpayers/objects have same the conditions or not with "comparability test". If this test is positive, then the CJEU makes another test which is used for determining whether there is a reasonable justification or not. This test can be named as "the objective justification test". If the state has an objective justification which extinguish the discriminatory character of the treatment, then there is no violation. But if the only reason behind discriminatory treatment is nationality, then the non-discrimination clause is violated. If there is an objective justification, then the Court evaluates that the treatment is proportionate to this justification. Thus these tests and determinations are important for the CJEU and also non-discrimination clause practice.

The CJEU accepts that Article 110 of the TFEU is directly effective (Tudor, 2015: 152). In Firma Fink case[15], the CJEU states that due to the entry in force or the implementation of Article 110 of the the TFEU, there is no requirement which adresses the Comminity or a member state. Therefore the non-discrimination clause is "*self-sufficient and legally complete*". In other words, this clause is able to effect the EU area directly. Again in Firma Molkerei case[16], the CJEU highlighted that this article had a direct effect and was not required national enabling legislation (Tudor, 2015: 165). However the Court added that there might be a role for national courts while establishig the meaning of this article.

In addition to this direct effect, Article 110 of the TFEU has a supplementary effect. In Maciej Brzeziński case[17], the CJEU said that this provision had a supplementary characteristic and it was related with other articles which touch on the removal of the barriers to the free movement of goods but it specifically concerns internal tax policy (Tudor, 2015: 153).

III.3- Tax Discrimination Types in European Union Law

Before examining the CJEU's case law which determines discriminatory treatments, it should be explained that there are two types of discrimination. These can be expressed as direct (overt) and indirect (covert) discrimination. This distinction is important in the Community law as well as the international area. The CJEU interprets Article 110 of the TFEU so as to expand to both direct (overt) or indirect (covert) discrimination.

According to the case law of the CJEU, Article 110 of the TFEU prohibits not only discrimination on grounds of nationality which is called as direct (overt) discrimination but also discrimination which is based on different criteria from nationality but results in

[15] See **Firma Fink-Frucht GmbH v. Houptzollamt-Munchen –Landsbergerstrasse [1968], Case 27-67**, ECLI:EU:C:1968:22.
[16] **Firma Molkerei-Zentrale Westfalen/Lippe GmbH v Hauptzollamt Paderborn [1968], Case 28-67,** ECLI:EU:C:1968:17.
[17] **Maciej Brzeziński v Dyrektor Izby Celnej w Warszawie [2007], Case C-313/05,** ECLI:EU:C:2007:33.

nationality based discrimination.[18] The latter is called as indirect (covert) discrimination. Both Articles 18 and 110 include these two types of discrimination. This case law has been established since 1980s (Aşçı Akıncı, 2012: 110).

Direct (overt) discrimination can be seen obviously, since the only reason which is considered by the state for the different treatment is nationality or the origin. In this kind of discrimination, the different treatment occurs against foreign natural or legal persons, goods, services or capital obviously (Can, 2004: 59). However indirect (covert) discrimination should be determined by detecting its effects on taxpayers such as disadvantageous effects in comparison with nationals (Wouters, 1999: 103). Although this kind of discrimination does not include an obvious nationality based different treatment factor, the effect of the different criterion and treatment is the same with nationality based discrimination. It is worth noting that indirect discrimination concept should be evaluated depend on special circumstances of every case.

If a treatment derives from another distinctive criterion which, at first glance, may appear to be neutral but may actually lead to a discriminatory effect, this will create an indirect discrimination (Wouters, 1999: 103). It should be highlighted that provisions which cause this kind of discrimination, seem to be neutral and same for every taxpayer. The first case which includes an indirect tax issue was Biehl case (Aşçı Akıncı, 2012: 213). In this case, Mr. Biehl was a German citizen and he resided and worked in Luxembourg at the time period between November 1973- October 1983. His employer deducted his salary for the time period between January-October 1983 but this deduction was more than his liability as annual tax amount. Then he moved to Germany but asked for the repayment from Luxembourg. In Luxembourg, these kind of repayments solely granted to residents and therefore, Mr. Biehl's request for repayment was denied (Englmair, 2016: 67). According to the CJEU, the provision in Luxembourg's tax law which grants repayments only to residents was discriminatory and violated the article of free movement of workers. So in this case, Luxembourg's legislation did not use nationality as a criterion for different treatment but the use of residence as a criterion caused disadvantageous results same as nationality based discrimination.

[18] **Klaus Biehl v Administration Des Contributions Du Grand-Duché De Luxembourg [1990], Case: C-175/88,** ECLI:EU:C:1990:186.

As it can be seen from Biehl case, one of the factors which causes indirect discrimination issues is residence. As the CJEU accepts as a rule, residence based different treatment does not create indirect discrimination under any circumstances. But it can be said that not being a resident generally refers not being a national and then, residence based different tratment might constitute a discriminatory effect (Yaltı Soydan, 2002: 154-155). Many states use residence as a criterion in tax treatments, thus residence based indirect discrimination is frequently observed (Aşçı Akıncı, 2012: 10). As the CJEU states, since states generally determine types of taxpayers depend on residence, non-resident taxpayers which are only subject to taxation based on the principle of territoraility might be excluded some tax advantages and this creates an indirect discrimination (Aşçı Akıncı, 2012: 110).

Biehl case was an instance for indirect discrimination based on residence criterion for natural persons. At the legal persons side, Avoir Fiscal case can be given as an instance. In this case, pursuant to the French legislation, only profits with France origin or taxpayers which were liable to taxation based on a DTAA were subject to corporation tax. In regards with corporation tax;

> "*In order to limit cumulative taxation of revenue distributed by companies which is liable first to the corporation tax payable by the companies which distribute the dividends and secondly, in the hands of the recipients to personal income tax or corporation tax, Article 158 bis of the code général des impôts created a tax credit called 'avoir fiscal' in favour of recipients of dividends.*"[19]

As it can be seen, the tax credit advantage was only used by corporations which had their registered office in France. The CJEU contended that the registered office criterion created a result which was the same as nationality based discrimination. There was an indirect discrimination which restricted the right to establishment of foreign insurance companies that had their registered offices in another member state. So as it can be seen, registered office is used as residence criterion and creates an indirect discrimination which affects non-resident corporations the same as nationality based discrimination.

Provisions about fundamental freedoms are used by the CJEU to determine indirect discrimination issues (Mason, 2007: 82). As mentioned before, Biehl case includes free movement of workers. Besides this, the CJEU accepts that issues about right to

[19] **Commission of the European Communities v French Republic (known as Avoir Fiscal case) [1986], Case 270/83,** ECLI:EU:C:1986:37.

establishment might cause indirect discrimination. Avoir Fiscal can be given as an instance for this situation.

Halliburton case[20] can be given as another instance for indirect discrimination and fundamental freedoms. In this case, there was a transfer tax imposed on acquiries of an immovable property in the Netherlands but this transfer tax can only exempt based on that it is made from a national transfer. If a foreign element is involved in, then this transfer does not exempt. Halliburton was an American group company and had subsidiaries in Germany and Netherlands. The German subsidiary was sold to Netherlands subsidiary; so because the transferer was German which was not a the Netherlands company, tax exemption not applied to this transfer. The CJEU highligted that although the taxpayer was the subsidiary in the Netherlands, this tax would shifted to the transferer which was not a resident company. Then such tax would be an indirect discrimination to foreign subsidiaries and also violated the freedom of establishment (Van Raad, 2007: 58).

As being in Halliburton case, member states may grant some tax advantages only to residents. The CJEU highlighted that if a member state grants some tax advantages only to residents, this is not a discriminatory treatment every time. However, if it is to be expressed in reverse, when a member state uses a different criterion in order not to grant tax advantages to another member state citizens which are in the same circumstances with citizens, this creates indirect tax discrimination result (Aşçı Akıncı, 2012: 230).

Sandoz case[21] also can be given as an instance regarding the relation between indirect tax discrimination and fundamental freedoms. This case was about indirect tax discrimination and free movement of capital (Aşçı Akıncı, 2012: 281). According to an Austrian tax provision, if national legal transactions were not made in written, this transactions did not required any stamp duty. This provision was applied when residents granted a loan from a lender which had its registered office in Austria. If this loan was granted from a foreign lender, the stamp duty should be paid even if there was no written loan aggrement. In this context, Sandoz GmbH which was an Austrian company granted a loan from Sandoz Management Services SA which was a Belgian company and stamp duty was imposed to Sandoz GmbH. The CJEU contended that this tax provision created an indirect tax

[20] **Halliburton Services BV v Staatssecretaris van Financiën [1994], Case C-1/93,** ECLI:EU:C:1994:127.
[21] **Sandoz GmbH v. Finanzlandedirektion Für Wien, Nierderösterreich und Burgenland [1999], Case C-439/97**, ECLI:EU:C:1999:499.

discrimination issue based on nationality, since it discriminates foreign lenders. Also this provision violated free movement of capital.

Another instance for the relationship between indirect tax discrimination concept and free movement of capital was Blanckaert case[22]. In this case, there was a tax provision in the Netherlands which granted *tax-free capital allowances* or *tax credits* to residents in respect to income taxation. One of these tax credits was about national insurance. Non-resident taxpayers who earn income only from savings and investments could not benefit from this tax credit. Mr. Blanckaert was a Belgian resident who earned savings and investment income from the Netherlands but since he was not a resident and had not a national insurance in the Netherlands, he was not granted a tax credit. The CJEU stated that in that case, this legislation created an indirect tax discrimination for non-residents and also harmed free movement of capital (Aşçı Akıncı, p. 301).

If an instance should be given in indirect tax area, Humbolt case can be mentioned[23]. In this case, Mr. Humbolt bought a German car which had motor power more than 16 CV (fiscal horsepower). According to French tax legislation, motor vehicles which rated at more than 16 CV were taxed with a special tax, different from motor vehicles which rated at less than 16 CV. At first sight, this differentiation might not be seen as discriminatory, the CJEU stated that this was discriminatory. Since motor vehicles which rated at more than 16 CV was not produced nationally in France. This means that motor vehicles more than 16 CV were always foreign products and CV based differentiation caused a discriminatory treatment based on nationality (Üzeltürk, 2008: 57-58).

Now in the light of this information, in order to understand how non-discrimination principle of TFEU is applied in EU and also tests which is used by the CJEU will be evaluated.

[22] **J. E. J. Blanckaert v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen [2005], Case C-512/03**, ECLI:EU:C:2005:516.
[23] **Michel Humblot v Directeur des services fiscaux [1985], Case 112/84,** ECLI:EU:C:1985:185.

III.4- Comparability Test

III.4.1- Comparability of Natural Persons: Beign in the Same Circumstances

As it was expressed before, determination of a discriminatory treatment is a matter of comparison (Yaltı Soydan, 2002: 153). This comparison is necessary, since there are always two situations in the nature of discrimination and similarity of these two situations makes different treatment discriminatory. This test can be seen as a requirement of the classical discrimination analysis (Aşçı Akıncı, 2012: 110). The CJEU applies this test, which can be expressed with other words as "the comparable internal situation test", as a tool to determine whether the situations of taxpayers who are treated differently are the same or different. This determination is important, since the non-discrimination provision can only be applied when taypayers are in the same conditions. Therefore, the CJEU uses some criteria and evaluates the situations based on them. This determination can be called as comparability test. It should be said that this test is a complex test; the CJEU sometimes uses a hypothetical law of other member states or sometimes considers other member states' similar actual law to compare two situations (Mason, 2006: 29-30). "Comparable situations" can be seen as an open question; relevant factors are not revealed in a verbatim and detailed approach by the CJEU (Santiago, 2009: 254). Thus the CJEU's approach is not a predetermined one to choose the object for comparison for every case (Mason, 2006: 30). For instance in Biehl case, as is referred before, there was a German resident which did not granted a repayment in Luxembourg, since he did not resided in Luxembourg. Then the CJEU decided that this was an indirect discrimination. In this case, the Court found Mr. Biehl who was a non-resident as comparable with residents of Luxembourg but did not offered an explanation about what factors are used to determine residents and non-residents as they are in comparable situations (Mason, 2007: 28-29). So the accepted and ignored factors in comparison are determined according to particular cases; factors and results depend on the conditions of the case.

This comparability test can be about vertical or horizontal comparability. While vertical comparability which is generally seen as a tenable benchmark is used for determining whether a national measure leads to discrimination or not; horizontal comparability is used between two cross-border situations (Dziurdź & Marchgraber, 2015: 10).

III.4.2- Comparability of Goods: Similarity

When comparability test is made for products, similarity is regarded as a key factor. Determining the similarity is an important and as well a difficult work. The regulations of Common Customs Tariff is not adequate. Thus, as stated in Cogis case[24], there should be more extensive perspective (Üzeltürk, 2008: 59). According to the CJEU, alongside with the same products, similar products can also be subject to the non-discrimination provision. Products which meet the same needs form the consumers' point of view and also have the same characteristics (such as *their origin, the method of manufacture and their organoleptic properties, in particular taste and alcohol content)* can be considered as similar (and comparable) goods. The point is the usage. In other words, products which can be substituted instead of another product are seen as similar goods. For instance, in Commission v. Denmark case, Denmark determined tax rates for imported wines made from grapes higher than local wines made from other fruits. The CJEU decided that this treatment could be considered as a discriminatory treatment.[25] Since there were two goods which were wines, the only difference was fruits which were used as a source. These two wines were alcoholic beverages and used for the same purposes, so they were considered as similar goods. Then the different treatment between them constituted discrimination.

Another decision about product similarity is John Walker & Sons case (Tudor, 2015: 161). In this case, a Danish tax provision charged a specific duty on some alcoholic beverages. Pursuant to this provision, fruit wine, grape wine and Scotch whisky were subject to a specific duty but the calculation of the duty on fruit wine was different than others. This difference resulted in a lower taxation for fruit wine. So, John Walker & Sons Ltd was a producer of Scotch whisky and they were taxed more heavily than fruit wine producers/sellers. The main point in here was that in Denmark, while nearly all fruit wine was produced domestically, there were no production of Scotch whiskey. As it can be seen, the origin was never used as a criterion in that legislation but there was a disadvantageous situation for a good which was not produced in Denmark. The CJEU first evaluated whether there was a possibility to apply comparability test. This means that the CJEU primarily assessed that Scotch whiskey and fruit wine were comparable goods. In addition

[24] **COGIS v Amministrazione Delle Finanze Dello Stato [1982], Case: 216/81**, ECLI:EU:C:1982:275.
[25] **Commission of The European Communities v. Kingdom of Denmark [1989], Case: 106/84,** ECLI:EU:C:1986:99.

to “similar characteristics and meeting the same needs” criteria, the Court assessed their certain objective characteristics *“such as their origin, the method of manufacture and their organoleptic properties, in particular taste and alcohol content*”. Then the Court considered their ability to meet “*the same needs from the point of view of consumers.*”[26] So as it can be seen, the CJEU interprets its own case law on similar or comparable goods.

Commission v. France case is another important case about comparability of goods. In this case, according to the European Commission, French government was using taxation authority in a discriminatory way in regards to dark and light tobacco products. Since France applied different tax rates between them and while protecting dark tobacco products which were almost completely domestically produced goods, a higher rate was applied for light tobacco products which were almost totally imported products (Tudor, 2015: 164). The CJEU again interpreted “similar goods” concept and added that these two tobacco cigarettes were based on the same product which was tobacco and were produced with comparable processes, although the type of tobacco which was used were different. This constituted the Court’s main approach. Then it evaluated their organoleptic characteristics such as taste or smell. According to the Court, these characteristics were different, so these two tobacco cigarettes were not identical but similar. So, it can be said that the CJEU added “manufacturing process” to its similarity jurisprudence. Also the Court evaluated the criterion of “meeting the same needs of consumers” and then stated that both of them were produced for tobacco consumption. Althought the consumers ages were different, nevertheless they were intended for the same need.[27] This statement shows the interpretation of the CJEU’s “meeting the same needs” criterion.

In Tulliasiamies and Antti Siilin case, the CJEU again expressed what similar goods concept is in regard to Article 110 (Tudor, 2015: 157). In this case, Mr. Siilin brought a used 1986 Mercedes Benz car. When 180 000 km had done with the car, Mr. Siilin imported this car to Finland. The Customs Office in Finland levied a car tax and this was assessed based on a car which had similar technical characteristics but was a different model. Starting from this comparison, the Court found them competitive based on their characteristics and needs in which they served. According to the Court, they satisfied various requirements such as *“price, size, comfort, performance, fuel consumption,*

[26] **John Walker & Sons Ltd v Ministeriet for Skatter og Afgifter [1986],** ECLI:EU:C:1986:100.
[27] **Commission of the European Communities v French Republic [2002], Case C-302/00,** ECLI:EU:C:2002:123.

durability, reliability and other matters"[28]. So again, this can be seen an interpretation of the similarity concept and shows the CJEU's approach to this issue.

The CJEU sees any additional tax for imported products which increases the price of these products prices when compared to prices of domestic products, as discriminatory and Outokumpu Oy case is an instance for this. In this case, according to Finnish legislation *coal, peat, natural gas, electricity and pine oil were subject to basic duty and additional duty*. With regards this additional duty, *persons who import electricity from outside the Community were liable to pay electricity duty*. There was a flat rate for this duty and it was calculated so as to correspond to the average rate levied on electricity produced in Finland but but without taking into account the reduction of duty on peat and natural gas. While the assessment on domestic electricity based on its method of production, electricity duty on imported electricity was taxed without considering the method of production. Outokumpu Oy was a company who has imported electricity from Sweden and had to pay electricity duty but claimed that this duty created a discriminitory treatment. The CJEU reminded the settled case law about similar goods which was based on *the nature of the raw materials used or the production processes employed.*[29] In this decision, the Court stated that imposed products were levied a higher tax burden, since calculation methods based on different criteria leaded a higher taxation. With this statement, the CJEU revealed that although electricity was subject to both taxation, tax rates were determined based on different criteria and this created a different treatment between domestic and imported electricity. In addition to this, the Court highlighted that the production method of imported electricity was difficult. But this could not change the result. Because the Finnish legislation did not provide an opportunity to prove that their production method was similar with the domestic opponents to importers in order to subject to the same tax burden. Then the Court constituted that this legislation violated non-discrimination principle due to the different treatment based on the origin.

As it can be understood from chosen decisions, the CJEU established an important case law on comparability of goods. In this regard, "similar products" are evaluated as comparable goods and this implication is based on "*similar characteristics and meeting the same needs from the point of view of consumers*" criteria. As well as the main requirement

[28] **Tulliasiamies and Antti Siilin [2002], Case C-101/00,** ECLI:EU:C:2002:505.
[29] **Outokumpu Oy [1998], Case C-213/96,** ECLI:EU:C:1998:155.

is that, the Court interprets this requirement according to circumstances in the certain case at hand. Manufacturing process or competitive relationship concepts can be used as additional criteria. With this case law, the CJEU largely prevent member states from using discriminatory taxes in a way to make domestic products more advantageous goods vis-à-vis imported products.

III.4.3- Comparability of Residents and Non-Residents

Residence is another complicated point in comparability test especially with regards to income taxation. Because the determination about discriminatory treatment is based on whether residents and non-residents are comparable or not. As it is explained in indirect discrimination section, residence can be used as a discriminatory criterion for different treatment in regards to direct taxation. Again as it is expressed, as a rule, residents and non-residents are not comparable; since they are not in the same circumstances. But before this acceptance, the Court's case law about residence as a criterion should be evaluated.

The CJEU accepts that residents and non residents are not comparable groups, as a principle. Since they are classified as different taxpayer groups and non-residents are generally generate their all or nearly all income from their residence states. So non-residents are considered as "limited tax liable" persons, while residents are named as "unlimited tax liable" group. In other words, as a general practice, residents are taxed based on their worldwide income, while non-residents can only be taxed based on their income which is generated from the source state. This causes that the possibility of taking into consideration of the source of income and ability to pay or personal allowances, reliefs and reductions become different for these groups. As a rule, these limited tax liable group cannot benefit from tax benefits, since these benefits are granted by their residence state (Aşçı Akıncı, 2012: 111). So in order to prevent taking advantage of these benefits twice, the residence state is entitled to grant these benefits. Because the residence state has the opportunity to comprehend its own resident's ability to pay.

As it can be understood, this situation constitutes a difference between residents and non-residents. But there is an exception for every rule. In 1993, a Recommendation was issued by the European Commission. This Recommendation stated that if a non-resident taxpayer generated 75% of his/her all income in the source state, this non-resident should be considered as the same with residents with respect to income taxation (Van Raad, 2001: 1485-1486).

If this issue is evaluated in the sense of the Court, it should be said that the CJEU followed this Recommendation but instead of giving a certain percentage, “all or almost all income” is choosen by the Court as a criteron. According to the CJEU, when assessing situations of residents and non-residents, the location where all or almost all income is received is important. So, taxpayers can be considered as comparable groups even if one of them is non-resident, as long as this non-resident taxpayer earns his/her all or almost all income from the source state. Schumacker case was the first case that includes comparability test which was applied between residents and non-residents (Aşçı Akıncı, 2012: 112). In that case, there is a taxpayer (Mr. Schumacker) who resided in Belgium but worked and earned all of his money from Germany and he was taxed much more then German residents. According to the CJEU, Article 48 of the TFEU did not prohibit taxing a limited tax liable different from a full tax liable which worked in the same job. However this non-resident taxpayer could be assessed as comparable with German residents, since he earned his all income from Germany. Then personal or family deduction could not be considered by the residence state, since there was no or almost no taxable income in that state. Thus there was no objective difference between them, when taxation and especially personal and family deductions were the issue.[30] According to the CJEU, after this different (and discriminatory) treatment, both residence and source states did not consider personal and family deductions for Mr. Schumacker and this created a disadvantageous situation (Yaltı Soydan, 2002: 87). So with this decision, the Court accepts that if a non-resident taxpayer earns all or almost all income in the source state, this state should consider this taxpayer similar with residents and treat him/her same with residents. Because in this situation, the source state able to comprehend the non-residents personal or family circumstances and his/her ability to pay, rather than the residence state. This approach, later, called as “Schumacker doctrine”.

[30] **Finanzamt Köln-Altstadt v Roland Schumacker [1995], Case: C-279/93,** ECLI:EU:C:1995:31.

Another instance in this manner is Wielockx case[31]. In this case, Mr. Wielockx was a German resident but working in and generating his all income from the Netherlands. Mr. Wielockx could not deduct his pension reserve contributions because of the Netherlands' tax legislation, while resident taxpayers could benefit from these deductions. Same with the Schumacker case, the CJEU stated that the Netherlands' tax legislation were discriminatory, since residents and non-residents which generate their all or almost all income from the source state were in the same situations with regard to income taxation. So this decision can be reproduction of the Schumacker doctrine.

Turpeinen case can be another instance for this issue. In this case, Ms Turpeinen was a resident in Spain but took retirement pensions from Finland and this pensions was her only income source. According to the Finnish tax legislation, a flat withholding tax was levied on retirement pensions which were paid to non-residents and the rate of this tax was higher than the rate which was determined for residents. The CJEU was accepted that Ms Turpeinen has comparable circumstances with residents. According to the Court, full tax liables and limited tax liables were subject to the same procedures if retirement pensions were the subject. Some taxpayers who are Finnish nationals can continue to reside in Finland and some taxpayers can establish their residence in another member state. This does not lead to *a difference in treatment unfavourable to the latter*. This should be seen in the scope of their *right to freedom of movement.* And also the Court noted that the retirement pension constituted the only taxable income of Ms. Turpeinen and it was taxed on a progressive scale similar with residents direct incomes from an economic activity. There were also allowances which based on personal and family circumstances in regards to the ability to pay principle. Therefore the CJEU considered Mr. Turpenien as in comparable situations with resident retired persons who received the same retirement pensions. So in this case, the CJEU expresses its case law which constitues that residents and non-residents might be in comparable situations and also reveals factors which are used in comparison.[32]

In respect to residence, the CJEU settled its case law this way. This Schumacker doctrine shows that tax advantages which are granted solely to residents can also be granted to non-residents under some prescribed contidions (Aşçı Akıncı, 2012: 116-117). In parallel with

[31] **G. H. E. J. Wielockx v Inspecteur der Directe Belastingen [1995], Case C-80/94**, ECLI:EU:C:1995:271.

[32] **Pirkko Marjatta Turpeinen [2006], Case C-520/04,** ECLI:EU:C:2006:703.

this, Biehl case was another instance which revealed this case law (Mason, 2006: 34). Except these conditions, tax advantages such as tax returns for couples or personal allowances are generally related to civil status and worldwide income of the taxpayer and they show taxpayer's ability to pay. So these kind of advantages generally are granted solely to residents (Mason & Knoll, 2011: 1028).

If the matter is to be recovered, it is noteworthy that member states generally grants tax advantages such as personal or family deductions or refunds to residents or full tax liables, since states tax these taxpayers' worldwide income and have opportunity to measure their ability to pay and other personal knowledge. If a non-resident is subject, they are limited tax liables and a member state levies taxes only on their income which is generated from that state. So this member state cannot comprehend a non-resident taxpayers ability to pay completely. In general, personal and family deductions are considered and applied by the residence state and then the source state does not grant them to non-residents. In Schumacker doctrine, the CJEU accepts this point but stated that if a non-resident generates his/her all or almost all income from the source state, the residence state cannot consider this/her ability pay utterly. In order to provide a fair taxation, the source state should grant tax advantages and treat this taxpayer as a residence, since there is no objective difference between them.

In paralel with this case law, the CJEU contended that not granting tax benefits to non-residents may not cause a discriminatory treatment, if residents and non-residents are not in the same circumstances. An instance for this can be Truck Center SA decision (Aşçı Akıncı, 2012: 126). In this case, Truck Center was a Belgian resident company and Wickler Finances which was a Luxembourg company which held 48% of the share capital of Truck Center. Wickler Finances granted Truck Center a loan and interest for that loan was entered into the accounts but not paid by Truck Center. Pursuant to Belgian tax legislation, if an amount of interest paid to a non-resident company, a withholding tax levied for this interest. However if that loan was granted between residents, no withholding tax had to be paid. Based on that legislation, an automatic assessment to withholding tax was made and sent to Truck Center. Truck Center has applied to the court, then this case brought to the CJEU.

According to the CJEU, in here, in order to say that there was a discriminatory traetment, residents who were benefit from this legislation by not paying a withholding tax and non-residents who were subject to a withholding tax should be in comparable situations. In this case, resident and non-resident companies were not comparable. The Court constituted this assessment with two reasons. The first reason was that position of the Belgium was different depends on different cases. If the interest was transfered form a resident company to another resident company, Belgium was considered as the residence state. If the interest was transfered from a resident company to a non-resident company, Belgium was only the origin state. The second reason was that these two afore-mentioned situations gave rise to "*two distinct charges which rest on separate legal bases*."[33] Thus these *different taxation arrangements* made residents and non-residents different. This means that not granting a tax advantage to non-residents did not constitute a discriminatory treatment when resindents and non-residents were not in comparable situations.

At this point it should be noted that Schumacker doctrine is based on that a non-resident generates his/her all or virtually all income from another member state. If a taxpayer earns his/her income from a few different member states, can this doctrine still be applied? De Groot case can be given as an instance for this situation. De Groot was a national of the Netherlands but earned his income from various member states and one of them was Germany. Mr. De Groot were taxed by his residence state, the Netherlands, but his foreign income was not taxed by the Netherlands based on the exemption in the DTAA between the Netherlands and Germany. Also the Netherlands granted tax benefits such as allowances *relating to his personal and family circumstances* to Mr de Groot *only in proportion to the income which he had received in the Netherlands*[34]. In other words, the Netherlands reduced Mr. De Groot's tax benefits which were normally granted to residents, in proportion to the income received in other member states. The CJEU accepted this application as a violation of free movement for workers. The Court stated that the residence state should consider tax benefits as stated in Gilly case.[35] According to the Court, being a national of the Netherlands could not prevent Mr. De Groot from relying on his right to freedom of movement for workers against to the Netherlands. Also the Court highlighted that the DTAA between the Netherlands and Germany did not require such a reduction in tax benefits. So as a result, it was decided that the residence state should consider tax benefits in such cases.

[33] **Belgian State - SPF Finances v Truck Center SA [2008], Case C-282/07,** ECLI:EU:C:2008:762.
[34] **F.W.L. de Groot v Staatssecretaris van Financiën [2002], Case C-385/00,** ECLI:EU:C:2002:750.
[35] **Mr and Mrs Robert Gilly v Directeur des services fiscaux du Bas-Rhin [1998], Case C-336/96,** ECLI:EU:C:1998:221.

In another perspective, Zurstrassen case can be an instance for different application of the Schımacker doctrine. Mr. and Mrs. Zurstrassen were both Belgian nationals. Mr. Zurstrassen worked and resided in Luxembourg, while Mrs. Zurstrassen who was not an employee lived in Belgium. Mr. Zurstrassen earned all the income of the family and this income was taxed by Luxembourg. In Luxembourg, married couples are granted a tax advantage which was named joint taxation but in order to benefit from this advantage, both spouses should be resident in Luxembourg. Then Mr. Zurstrassen could not benefit from joint taxation, because his wife was a Belgian resident, so he was taxed as a single taxpayer and borne more tax burden. According to the CJEU, personal and family circumstances of Mr. Zurstrassen could only be taken account by the Luxembourg, because this state was the residence state and also it received the tax payment for the whole income of Mr. Zurstrassen. Then the Court stated that this residence requirement for a tax advantage which is named joint taxation constitutes an indirect tax discrimination which violates free movement for workers[36].

It should be noted that the CJEU does not reveal "all or almost all income" concept but this concept is used every comparability test which includes a resident and a non-resident taxpayer. The Court enhanced this jurisprudence with Asscher case. In this decision, the CJEU stated that non-residents which earn their all or almost all income may not be seen similar with residents and may not be granted tax benefits in the source state every time. If this non-resident can benefit equivalent tax advantages in his/her residence state, the source state does not have to grant these tax advantages.

Also another case about not giving any certain percentage for applying the Schumacker doctrine, D case can be an instance.[37] In this case, pursuant to the Netherlands tax legislation, wealth tax were levied on residents and non-residents which had net assets there. Resident taxpayers were entitled to an allowance applied to their net worldwide assets while non-resident taxpayers were not entitled to an allowance, except non-residents who had 90% of their net assets in the Netherlands. Mr. D who were a German resident had their 10% of net assets in the Netherlands and was not benefit from this allowance. He brought an action and then the CJEU held the issue.

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[36] **Patrick Zurstrassen v Administration des contributions directes [2000], Case C-87/99,** ECLI:EU:C:2000:251.

[37] **D. v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen [2005], Case C-376/03,** ECLI:EU:C:2005:424.

According to the CJEU, non-residents were limited tax liables in regards to wealth tax, because they were taxed only on the part of their wealth situated in the Netherlands, while residents were full tax liables and they were taxed based on their worldwide assets. However this did not constitute an objective difference. Although giving this statement, the Court constituted that Mr. D was not comparable with residents in regards to this wealth tax and the allowance. The reason behing this was that Mr. D held only a minor part of his wealth in the Netherlands. So the Netherlands, as a state in which Mr. D held only a proportion of his wealth, did not have to grant him benefits which were normally granted to its own residents. So as it can be seen, when "all or almost all income" criterion applied to this case, the Court thought that 10% percentage in regards to net assets was not sufficient for concerning in the same circumstances with residents.

In another case which is named Gschwind case[38], the CJEU followed this assessment and add a new criterion to it (Yaltı Soydan, 2002: 159). In this case, Mr. and Mrs. Gschwind were German nationals and residents. Mr. Gschwind was working in Germany and earned 58% of his family's total income, while Mrs. Gschwind was working in the Netherlands. German tax authority taxed Mr. Gschwind as a full tax liable but considered him as single. So the taxation procedure which was granted to married couples did not applied in here and this created a disadvantageous situation for Mr. Gshwind. According to the Court, this case was totally different from the Schumacker case. In here, with laying down a percentage threshold, Germany considered the possibility of taking into account of personal and family circumstances of taxpayers by the residence state. In here, Gschwinds had their 42% of their all income in the Germany and this percentage was sufficient to be taken into account of personal and family circumstances of Mr. Gschwind by the residence state. As it can be seen, the Court brings in this case an additional criterion for evaluating residents and non-residents comparability.

The CJEU still pursues Schumacker doctrine. This approach shows itself in recent decisions. For instance, in 2013, the Court stated the Schumacker doctrine again (Larsson, 2014: 19-20). In Ettwein case[39], Mr. and Mrs. Ettwein which were both German nationals were living in Switzerland. They were generating their all income from Germany, so their income taxed based on German tax legislation. They wanted to be taxed based on the

[38] **Frans Gschwind v Finanzamt Aachen-Außenstadt [1999], Case C-391/97,** ECLI:EU:C:1999:409.
[39] **Katja Ettwein v Finanzamt Konstanz [2013], Case C-425/11**, ECLI:EU:C:2013:121.

"splitting" arrangement. However in this legislation, splitting which was a tax benefit "*was granted on the basis of the personal and family situation of the spouses"*. So to grant that benefit, German authorities considered residence factor. Since they were not resident in EU or EEA member states, they were subjected to the application of separate taxation. The CJEU considered the Schumacker case and then stated that the source state which was Germany in this case, should consider personal and family circumstances; since Mr. and Mrs. Ettwein were generating their all income from there and there was no significant income from the residence state. So they were comparable with German residents and Germany should take into account their personal and family circumstances and grant tax benefits to them. As it can be seen, the doctrine remains.

III.4.4- Comparability of Legal Persons

Comparability is a different subject for natural persons and legal persons. Thus in comparability test, they are assessed different. Since the distinction between nationality and residence is not clear for legal persons (Aşçı Akıncı, 2012: 111-112). Registered office, central administration or principal place of business can be choosen rather than nationality as a criterion to accept legal persons similar to nationals and this choice is totally included in taxation authority of member states (Yaltı Soydan, 2002: 155). Unlike the residence issue in natural persons, legal entities can be considered as being in the same circumstances regardless of where their registered offices are (Dziurdź & Marchgraber, 2015: 4). In addition, provisions which is based on fiscal residence criterion instead of registered office criterion result in to the detriment of companies which have their registered office in another member state (Yaltı Soydan, 2002: 155). So it can be siad that residence refers deriving of the status based on the legislation of a state and it can include fiscal residence, place of administration or registered office itself. Those concepts can change from domestic laws of member states and all of them determine whether a legal person belongs to this state or not. So residence does not lead indirect discrimination results, it can be considered equivalent as nationality criterion for natural persons.

An instance for different treatment between legal persons can be Royal Bank of Scotland case. In this case, Royal Bank of Scotland which had its seat in United Kingdom and had a branch in Greece. Pursuant to the Greek tax legislation, business profits were taxed at the rate of 40% for foreign banks, while the rate for Greek banks was 35%. So in here, a permanent establishment (PE) of a company which had its seat in another member state was taxed more heavily then a resident company. The CJEU made the comparison test between the company which had its seat in another member state, the PE which placed in Gereece and a Greek company. The Court stated that these companies were "*in a comparable situation as regards the method of determining the taxable base*"[40], not considering location of their seats.

At this point it should be said that the CJEU also uses this test when evaluating tax treatments on cross-border transactions. In these cases, cross-border and purely domestic transactions are subject to comparison (Dziurdź & Marchgraber, 2015: 5). If a horizontal comparability is the issue, two cross-border situations are compared to each other. For instance, in Commission v. The Netherlands case, pursuant to tax legislation of the Netherlands, dividends paid to an EEA resident company were subject to source taxation with a reduction, while dividends paid to a resident company in the Netherlands or a resident company in EU member states were exempt from source taxation; however this exemption was made only if the recipient held at least 5% of the capital of another company. Besides this legislation, the Netherlands made tax conventions with Iceland and Norway. Pursuant to these conventions, a reduction on source taxation on outbound dividends could be made for Iceland if only the recipient held at least 10% of the capital of another company and for Norway this percentage was 25 (Bammens, 2012: 825). In this case, the Court stated that "*dividends paid by Netherlands companies to companies established in Iceland or Norway*" could be seen "*under the same conditions as dividends paid to Netherlands companies or companies of other Member States of the Community*".[41] Thus in here, the CJEU compared two cross-border situations.

In recent decisions, Sopora has a great importance in regards to comparing two cross-border situations for discrimination assessment. In this case, there was a provision in the Netherlands tax legislation in question. Pursuant to the Netherland's legislation, certain reimbursements which were paid to workers were considered in order to assess the taxable

[40] **Royal Bank of Scotland plc v Elliniko Dimosio (Greek State) [1999], Case C-311/97,** ECLI:EU:C:1999:216.

[41] **Commission of the European Communities v Kingdom of the Netherlands [2009], Case C-521/07,** ECLI:EU:C:2009:360.

wage. However if these reimbursements were paid to offset additional expenses which means the worker's expenses stemming from staying outside his residence state for a period not exceeding eight years, they were named as 'extraterritorial expenses' and could be deducted. Also "incoming workers" had an opportunity to deduct extraterritorial expenses in respect of wages. These workers resided in another member state which was at a distance of more than 150 kilometers from the Netherlands border, for more than two thirds of the 24-month period preceding his recruitment in the Netherlands. Mr. Sopora was an employer in a Netherlands company associated with his employer established in Germany. During the 24-month period prior to his recruitment in the Netherlands, he resided in a district in Germany which had a distance of less than 150 kilometers from the Netherlands border. Then he rented a flat in the Netherlands to stay for every week and wanted to benefit from this tax advantage. The tax aouhority in the Netherlands did not allow him.

When examining this legislation, the CJEU interpreted Article 44 of the TFEU and stated that this provision prohibited all discriminatory treatment on grounds of nationality. This means that the extent of this provision covered these situations which included two non-residents. According to the CJEU, non-discrimination rule with Article 26 of the TFEU prohibited different treatment between two non-residents which were under the same circumstances. Then the Court highlighted that the refusal of Mr. Sopora's request for duduction of extraterritorial expenses created a discriminatory situation. Since a non-resident which resided at a distance of less than 150 kilometers from the Netherlands border and another resident which met the criterion of the Netherlands legislation were in the same circumstances in regards to the wage taxation. This legislation excluded most Belgian workers and some workers of Germany, Frence, Luxembourg and United Kingdom from the tax benefit due to their closeness to the Netherlands. So in this case, it can be said that the Court compared two non-nationals or two cross-border situations in regards to tax discrimination.[42]

[42] See **C.G. Sopora v Staatssecretaris van Financiën [2015], Case C-512/13,** ECLI:EU:C:2015:108.

III.5- The Objective Justification Test

After the comparability test, if two sides of the treatment are assessed as they are in comparable situations, then the objective justification test is made. The existance of objective or reasonable justification of a state can change the situation of the treatment. If the CJEU accepts that the reason behind the different treatment is objective and reasonable one, then the conclusion will be that the treatment which includes two comparable situations does not violate non-discrimination provision. In other words, although two comparable situations should be treated the same with regards to the equal treatment principle, an objective justification can make a different treatment between them as it is in compatible with the TFEU and annihilate the treatment's discriminatory character. Thus, if there is an objective justification for a different treatment, this treatment is no longer discriminatory.

According to the case law of the CJEU, only justifications which are expressed in the TFEU obviously are accepted as objective justifications (Aşçı Akıncı, 2012: 136). But it is noteworthy that the CJEU interprets the meaning and the scope of these justifications. In the process of this test, the CJEU assesses whether the treatment gets involved in exceptions or restrictions of the TFEU or not. These exceptions or restrictions can be reasons such as public policy, public security, public health or public interest and they can be found in special non-discrimination clauses as fundamental freedoms. These can be regarded as general terms and the CJEU determined their extent. (Aşçı Akıncı, 2012: 131). Public policy reasons can be examplified such as the need to prevent tax fraud (Mason & Knoll, 2012: 1029). Reasons regard to public interest such as the protection of the consumers or the environmental concerns and the prohibition of unfair competetion can be claimed as a justification and these reasons are accepted (Englmair, 2016: 60). The Court examines the public interest claims since Bachmann case (Van Thiel, 2008: 169).

The objective justification test is applied in three steps in a traditional manner; first, the Court examines whether there is a legitimate objective which is included in the TFEU concept. If so, then the Court scrutinizes that the national provision is suitable for realizing this objective. This means that the national provision should be related with the reason involved in the TFEU and also it should be able to realize the legitimate objective (Aşçı Akıncı, 2012: 131). If so the last step is examinig that this treatment is proportional with regards to the justification (Bammens, 2012: 540). However it is worth noting that although proportionality is regarded in this traditional objective justification test as a step, it is found appropriate that this concept should be evaluated in another section seperately, in this study. Because this test is made after determining there is an objective justification.

The Court strictly examines that whether a justification which takes place in the TFEU, especially in provision on free movement is claimed or not. If a reason which is included in these provisions is claimed, then this reason justifies the different treatment between persons/legal entities or goods/services which are under comparable situations. At this point, an instance can be given. As mentioned before, in Royal Bank of Scotland case, Greece taxed a non-resident, a branch of Royal Bank of Scothand, at a higher rate than resident banks. The Court stated in this decision that this kind of different treatment could be justified based on the allowed justifications which are included in Article 63 of the TFEU (ex Article 56 Treaty of the European Community (TEC) with regards to the free movement of capital. However the Greek gorvenment did not rely on any of these justifications, thus the Court found this provision as discriminatory.

Another instance for this point can be Svensson-Gustavson case. In this case, Mr. and Mrs. Svensson-Gustavson were residents of Luxembourg. They borrowed a loan from a Belgium company for the construction of their house and wanted to benefit from an interest rate subsidy. The Luxembourg tax authority refused this wish based on the tax legislation which allowed this subsidy only providing that this house construction loan was borrowed from a credit institution approved in Luxembourg. The Luxembourg government justified this treatment with arguing that this was *a part of a social policy which has considerable financial and economic repercussions*.[43] The Court stated that this provision could only be justified based on Article 56 of the TEC (Article 63 of the TFEU), since it violated the freedom of establishment. This provision did not include economic aims. Thus the result was that there was a discriminatory treatment.

[43] **Peter Svensson and Lena Gustavsson v Ministre du Logement et de l'Urbanisme [1995], Case C-484/93,** ECLI:EU:C:1995:379.

III.5.1- Objective Justifications in the TFEU and the Case Law of the CJEU.

In addition to reasons which take place in the TFEU and their interpretations by the CJEU, The Court establishes a case law and accepts some other reasons which can be seen compatible with justifications which are stated in the TFEU by interpreting the provisions. One of these reasons which changes the characteristic of the treatment for derogating state, is the prevention from tax abuse (Ault & Sasseville, 2010: 118). It is noteworthy that this justification can be considered within the concept of sovereignty of member states. If it is accepted that a member state should exercise its sovereignty on taxation, then provisions on combating tax abuse should be seen in this sovereignty (Ferose, 2015: 141).

Also the need to constitute fiscal control and supervision and to prevent tax evasion are seen as objective justifications with regards to public interest (Mason, 2007: 85). Same as these, the internal consistency of tax systems of member states is also an accepted justification (Graetz & Warren, 2006: 1207). As an instance for the latter justification can be Commission of the European Communities v. Italian Republic decision. In this case, Commission argued that Italian government had failed to fulfill its obligations based on Article 56 of the TEC (Article 69 of the TFEU). The reason for this was that dividends which were distributed to companies established in other member states, especially in EEA countires were taxed at the rate of 27%, while dividends which were distributed to companies established in Italy were not taxed. This withholding tax violated the free movement of capital and the freedom of establishment. Dismissing the fact that there was other justifications which were not be accepted by the CJEU, the Italian government argued that this provision aimed to fight against tax evasion. In response to this, the CJEU stated that this might be an objective justification providing that only if it was appropriate and neccessary to realize the objective. According to the CJEU "*a justification based on the fight against tax evasion is permissible only if it concerns purely artificial contrivances, the aim of which is to circumvent tax law*".[44] This decision is important, because it shows the CJEU's approach to the tax evasion justification. It should be noted that after this expression, the CJEU rejected the Italian government's argument. According to the Court, if the tax evasion justification was argued as a general presumption, then it was not sufficient to justify a violation of Article 56 of the TEC (Article 69 of the TFEU).

[44] **Commission of the European Communities v Italian Republic [2009], Case C-540/07,** ECLI:EU:C:2009:717.

The Court accepts providing effectiveness of fiscal audit and ensuring a balanced allocation of tax jurisdictions as objective justifications. For instance in Gilly case which was the first case for the latter objective justification, the Court stated that under the lack of unifying or harmonising measures, member states had competence "*to define the criteria for allocating their powers of taxation as between themselves, with a view to eliminating double taxation*."[45]

In its settled case law, when the Court examines the claim on balanced allocation of tax jurisdiction, first, there should be a legitimate objective. If it is so, then, the lack of *unifying or harmonised measures of the EU* becomes another step for examination. Since this condition is provided, member states can define criteria for allocating tax jurisdiction in regards to eliminating double taxation. This is revealed by the CJEU in the DMC case.[46]

Another important case which includes balanced allocation of taxing rights as an objective justification is Marks & Spencer case (Ferose, 2015: 137).[47] In this case, Marks and Spencer was a company which had its registered office in UK and had subsidiaries in other member states including France, Belgium and Germany. In 2001, Marks & Spencer announced that its commercial activities would be stopped in Continental Europe. After that, the French sunsidiary was sold and subsidiaries in Germany and Belgium had ceased trading. Based on this, Marks & Spencer wanted to benefit from the group tax relief in UK with respect to losses incurred by its subsidiaries in Belgium, Germany and France. UK tax authority rejected this request with arguing that *group relief could only be granted for losses recorded in the UK.* The Court sought whether there was an objective justification for that rejection and highlighted that "*profits and losses are two sides of the same coin*" and based on this, same tax regimes should be applied to them. By this symmetry, the balanced allocation of the taxing powers could be protected. By saying that, the CJEU accepted that the state which taxed profits and granted reliefs, should be the same in regards to a balanced allocation of taxing rights. Thus, UK as a source state could reject the relief claim basen on the symmetry.

[45] **Mr and Mrs Robert Gilly v Directeur des services fiscaux du Bas-Rhin [1998], Case C-336/96,** ECLI:EU:C:1998:221.
[46] **DMC Beteiligungsgesellschaft mbH v Finanzamt Hamburg-Mitte [2014], Case C-164/12,** ECLI:EU:C:2014:20.
[47] **Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes) [2005], Case C-446/03,** ECLI:EU:C:2005:763.

At this point, Lidl Belgium case is of great importance.[48] Since the CJEU accepted balanced allocation of taxing jurisdictions of member states as an justification and in addition to this, another reason which was the need to avoid double taxation (or double non-taxation) was accepted at the same time. So in here, another objective justification instance can be seen. In this case, Lidl Belgium which had its registered office in Germany established a PE in Luxembourg. In 1999, this PE incurred a loss and Lidl Belgium wanted to deduct this loss from its tax base. The German tax authority did not allow it based on the symmetry of taxing powers. The Convention between Germany and Luxembourg gave the taxing authority for capital income to the residence state and thus, deductions should be considered by Germany. The Court accepted that claim. According to the CJEU, such a tax regime could be justified with "*the objective of preserving the allocation of the power to impose taxes between the two Member States*". Because this kind of approach could protect the symmetry between receiving the tax revenue and losing revenue by deductions. In addition to this, second claim of Germany was that this deduction might applied by both two member states. The CJEU also accepted this. According to the Court, there was a risk to using the same losses twice but member states could prevent from such practices with using the profits-deductions symmetry.

The balanced allocation of taxing rights is an important justification for exit tax practices. In general, exit taxes can be defined as a levy which occurs when a person or company wants to exit from the state's tax system. In this concept, a member state levied exit charges on a taxpayer who transfers its seat to another member state and the subject of this charge is latent increases which comes from the transfer (Henze & Petersen, 2015: 51). These latent increases stems from deferring taxation on assets appreciation to the time which this gain is realized on the occasion of a sale or another activity (Mason, 2007: 125). So member states might tax these kind of amounts before the taxpayer leaves the territory of that member state and terminates this member states' source state characteristic. So the main purpose of this taxes is to discourage taxpayers from transferring their residence/fiscal residence out of the state; since in this practice, actually leaving the territory is punished.

[48] **Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn [2008], Case C-414/06,** ECLI:EU:C:2008:278.

In N case[49], the Court states that exit tax regimes could be justified in regards to the balance allocation of taxing rights providing that reductions which were related with the transfer were not taken into account by the source state (Dziurdź & Marchgraber, 2015: 4). The same point was highlighted in National Grid Indus case[50]. In these cases, the CJEU decided based on the principle of territoriality.

In Commission v. Germany case, the CJEU repeated its case law. In this case, there was an unrealized capital gain and it taxed at the time the taxpayer transfered its seat to another member state. The Court highlighted that this exit taxation could be justified on grounds of balanced allocation of taxing rights. But in this case, the Court also revealed another justification which was "*the desire to promote investment in the same undertaking and the restructuring of that undertaking, in order to ensure its continuity and to maintain employment*".[51] However according to the CJEU, in this case, this objective did not achieved on the occassion of using taxation authority only by Germany.

Preventing tax avoidance is another objective justification. It should be said that the Court had rejected it before due to its link between protecting the tax revenue (Almendral, 2013: 155). However, in recent cases, it can be said that there is a possibility for this justification to be succeeded. In order to accept this justification, in Timac Agro case, the CJEU brought a requirement. The specific objective should be eliminate the "*creation of wholly artificial arrangements which do not reflect economic reality*, *with a view to escaping the tax normally due on the profits generated by activities in the national territory*".[52] This ruling was mentioned in Masco Denmark case.[53] In addition, in Timac Agro case, the Court highlighted that the balanced allocation of taxing power and the prevention of tax avoidance are linked.

At this point it should be said, although the Court allows using "preventing tax avoidance" as an objective justification, it sees this concept "*as a limit to the taxpayer's entitlements*" (Schön, 2008: 81). Because taxpayers are free when they're determining their tax planning

[49] **N v Inspecteur van de Belastingdienst Oost/kantoor Almelo [2006], Case C-470/04,** ECLI:EU:C:2006:525.
[50] **National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam [2011], Case C-371/10,** ECLI:EU:C:2011:785.
[51] **European Commission v Federal Republic of Germany [2015], Case C-591/13,** ECLI:EU:C:2015:230.
[52] **Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin [2015], Case C-388/14,** ECLI:EU:C:2015:829.
[53] **Masco Denmark ApS and Damixa ApS v Skatteministeriet [2016], Case C-593/14,** ECLI:EU:C:2016:984.

activities and they are at liberty in choosing taxable events. So they can regulate their activities and avoid from tax burden on condition that not to be contrary to legislation. If a member state uses its taxation authority so as to prevent taxpayers from tax avoidance, it constitutes an intervention to their statuory decisions.

As the case was explained before, Outokumpu Oy case includes an accepted objective justification.[54] In this case, the CJEU accepted environmental considerations as the objective justification. So the Court consitutes that one of the main objectives of EU was protecting the environment. In other words, "*the promotion of sustainable and non-inflationary growth respecting the environment*" was included in the EU policies. So environmental considerations which take place in public interest concept can be accepted as an objective justification. It is worth adding that although environmental considerationa were accepted as a justification, the Court decided that Article 110 was violated. Because the government's another argument was that there was a difficulty in which determining the source of the electricity. According to the Court, this could not justify the different treatment. In other words "practical difficulties" could not used as an objective justification when similar goods were the issue (Tudor, 2015: 156-157).

Tax disparities can be seen as another reason. In the lack of complete harmonisation, member states' tax legislations might have different provisions for the same concepts and institutions. For instance Belgium might levy personal income tax at the rate of 30%, while Luxembourg applies 25% rate. This does not constitue tax discrimination, it should be seen as only a tax disparity. However if Belgium taxes residents at the rate of 25% and non-residents at 30%, this creates a discriminatory treatment (Mason, 2007: 87-88). It should be said that this concept is different from discrimination; because in case of a tax disparity, there is no violance of EU law. Then there is no need to determine a justification. But tax disparities can create an effect same with objective justifications, so mentioning it in this point is needed.

Another justification which is seen as neutral is economic and social purposes. For instance, in Gabriel Bergandi case, the CJEU accepted this as an objective one (Tudor, 2015: 167). In that case, Gabriel Bergandi was an automatic games machines operator and trader. For revenues which were earned from these machines, he was subject to tax based

[54] **Outokumpu Oy [1998], Case C-213/96**, ECLI:EU:C:1998:155.

on types of these machines in France. Also he was subjected to VAT at the same time. He claimed that these machines were imported and not produced in France, thus this was a discriminatory treatment. French government claimed that the main purpose behind this treatment was to discourage people from using this game machines. The Court accepted this claim and stated that member states at liberty to establish a tax system which determined varous categories and granted benefits to them in regards to legitimate economic and social purposes. According to the Court, in here, the legitimate economic and social purpose could be defined as "*the desire to encourage the use, by certain people and in certain places, of particular categories of machines and to discourage the use of other categories*".[55] As it can be seen, preventing people from using game machines was seen as a social porpose and accepted as an objective justification for the different treatment.

Although the CJEU accepts economic and social purposes. In literature, this approach is seen as an allowance for protectionism by some authors. For instance, according to TUDOR (2015), member states might push the limits and use concept of social and economic purposes for support their economies by means of substantially discriminatory treatments.

It should be added that there is a reason which is called "fiscal cohesion". This term was first acknowledged in Bachmann Case. The fiscal cohesion was shaped as the integrity of tax system. In this case, fiscal cohesion was accepted as an objective justification when complete harmonisation or a tax treaty was not observed (Üzeltürk, 2008: 64). But then, this reason was never accepted by the CJEU (Yaltı Soydan, 2002: 165). The reason behind it was that member states tried to protect their revenue base (Van Thiel, 2008: 171). An instance for the case law which is about rejection of fiscal cohesion claims can be Wieclockx case. In here, the CJEU did not accept fiscal cohesion as an objective justification, because there was a tax treaty (Üzeltürk, 2008: 64).

It should be noted that in the current case law of the CJEU, there is a possibility to accept this justification on grounds of fundamental freedoms. The requirement for that was explained in Commission v. Portugese case. According to this, the Court seeks to "*the*

[55] **Gabriel Bergandi v Directeur général des impôts [1988], Case 252/86,** ECLI:EU:C:1988:112.

existence of a direct link be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy”[56] for being an objective justification.

III.5.2- Rejected Justifications in the Case Law of the CJEU

As mentioned before, different treatment between residents and non-residents does not constitute discrimination as a rule. Thus, calculating tax burden with different methods such as taxing on a gross basis or not granting tax benefits cannot be seen as discrimination every time. Member states may justify these kind of treatments with simplifying tax compliance and this is generally accepted as an objective justification by the Court (Mason, 2007: 84). However it is mentioned before, the discriminatory treatment might not derived from a provision who requires this treatment based on nationality. In other words, sometimes a provision does not contain nationality as a condition and does not ground the treatment on nationality. This kind of discrimination is indirect (covert) discrimination. In this type, relying on the criterion which is not based on nationality but creates discriminatory effect cannot be claimed to be an objective justification. In other words, the lack of nationality based different treatment cannot be regarded as a justification.

For instance in Humblot Case[57], there is no treatment which concerns nationality but nationality based discrimination effect can be seen obviously. So, there is no objective justification behind this treatment. In this case, as explained before, Mr Humblot buys a German branded car in France. Pursuant to French tax system, Mr. Humbolt was subject to special consumption tax which was applied based on the engine size of the car. This classification had two groups which were cars with engine size more than 1600 cc and less than 1600 cc. The first group was taxed heavier than the latter. It can be said that the hidden reason behind this classification was to promote domestic production; since all cars produced in France was below 1600 cc. Actually France did not use nationality as a basis for classification and specification of tax rates. However in practice, this resulted in discrimination based on nationality, so here an indirect discrimination can be observed. French tax authority claimed that this different treatment was based on luxury of the car with regards to economic policy of the state. The CJEU did not accepted this reason as an

[56] **European Commission v Portuguese Republic [2016], Case C-503/14,** ECLI:EU:C:2016:979.
[57] **Michel Humblot v Directeur Des Services Fiscaux [1985], Case: 112/84,** ECLI:EU:C:1985:185**.**

objective justification and states that there was an indirect discrimination. In other words, it should be said that if the CJEU does not accept the justification which is made by the member state, different treatment between comparable two situations constitutes a discrimination.

Although in Humbolt case the CJEU did not accept economic policy on luxury consumption as an objective justification, in Commission v. Hellenic Republic case, the decision was total opposite. In paralel with Humbolt case, in Commission v. Hellenic Republic case, Greece levied taxes on car based on engine displacement (cc) and creates three groups which are under 1600 cc, between 1600-1800 cc and more than 1800 cc. Most of imported cars was in the last group and taxed heavier then other cars. However the CJEU stated that there was no discrimination, since there were also imported cars in the second group. In addition to this, Greece claimed that this was a taxation to luxury consumption and the main reason behind it was the social policy of the state. The CJEU accepted this as an objective justification (Üzeltürk, 2008: 58). The Court highlighted that member states had authority to establish a progressive tax system based on "*an objective criterion, such as cylinder capacity, provided that the system of taxation is free from any discriminatory or protective effect.*" [58]

Another two of justifications which can be seen relevant to the economic concerns of a member state are to prevent loss of tax revenue and maintaining the domestic tax base (or preventing erosion of the tax base) (Mason, 2007: 85). In this context, Sandoz case can be given as an example. As mentioned before in this case, according to tax legislation of Austria, if a loan was borrowed from a resident lender, the stamp duty should be paid only if there was a written agreement. However if this loan was granted from a foreign lender, the stamp duty should be paid even if there was no written loan agreement. Based on this, the stamp duty was levied on Sandoz, since it borrowed a loan from a foreign lender. The Austrian government argued that this matter in here was the member states' competence, this provision served a purpose of eliminating infringements of national tax law and regulations. The CJEU stated that avoiding tax fraud could not justify a discrimination in regard to the free movement of capital.

[58] **Commission of the European Communities v Hellenic Republic [1990], Case C-132/88,** ECLI:EU:C:1990:165.

In DI. VI. Finanziaria di Diego della Valle & C. case, the CJEU highlighted that if a fundamental freedom was issue, any justification on *increasing national tax revenue cannot constitute an overriding public-interest ground*.[59] And it should be said that a mere loss of tax revenue which meant a gain for other member state cannot argued as an objective justification, since the CJEU saw it related with the balanced allocation of taxing jurisdictions (Almendal, 2013: 157). Due to the allocation, a member state cannot use protecting or maintaining domestic tax revenue/base justification.

Again in ICI case[60], with regards to freedom of establishment, the CJEU stated that diminution of tax revenue was not included in Article 56 of TEC (Article 69 od TFEU), therefore it could not be used an objective justification.

The CJEU rejects justifications on divergencies between "*quid pro quo*" tax agreements of member states (Van Thiel, 2008: 152). Member states can make several tax agreements with other member states and these aggrements might include provisions on tax benefits such as exemptions for certain member state residents. For instace Germany might constitute a tax agreement with Belgium and grant to residents of Belgium a tax benefit. Then this tax benefit can be applied to both German and Belgian residents in Germany. A resident of Luxembourg which is in the same circumstances with residents of Germany and Belgium might want this tax benefit to be applied to himself/herself. If Germany rejects and claims that there is no provision about this tax benefit in the tax agreement between Germany and Luxembourg, this is not accepted by the CJEU. Then this application consitutues a tax discrimination, since it violates taxpayer equity and also affects the single market purpose negatively (Van Thiel, 2008: 152-153).

The Court also rejects claims on creating also an advantage or a possible advantage from the different treatment for the discriminated taxpayer or also claims about the taxpayer's ability to avoid from disadvantage of the different treatment are not accepted (Van Thiel, 2008: 170-172). Same as the last one, member states might claim that discriminatory result is reduced with a tax treaty. The Court does not regard this kind of reasons as neutral. An instance for this case law is Commerzbank decision. In this case, Commerzbank was a German bank which had a branch in the United Kingdom (UK). The UK branch of

[59] **DI. VI. Finanziaria di Diego della Valle & C. SapA v Administration des contributions en matière d'impôts [2012], Case C-380/11,** ECLI:EU:C:2012:552.
[60] **Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes) [1998], Case C-264/96,** ECLI:EU:C:1998:370.

Commerzbank granted various loans to foreign companies and gained interest from them. Then it paid taxes for the interest. After that, Commerzbank requested a refund for this tax payment based on the DTAA between UK and US. This request was rejected. The UK's justification was that the tax legislation of UK which grants these kind of refunds only to resident companies. The Court found this treatment discriminatory. Insipite of that, UK claimed that this treatment was intended to compensate for the delay in the repayment of overpaid tax with regards to the tax agreement. So the government argued that Commerzbank treated as a privileged non-resident company by exempting it tax which was normally paid by residents. The Court states that the government's argument could not be upheld.[61]

Another instance for that can be Commission v. Italian Republic case. As mentioned before, although the CJEU accepted another justification of the Italian government and stated that this was not a discrimination, the compensation reason had been discussed in this case. In here, Italy taxed outbound dividends, while did not tax dividends which were distributed to resident recipients. The Italian government argued that this tax provision should be taken into account with DTAA's, since there was generally set-off clauses in DTAA's in regard to withholding taxes and based on this set-off mechanism, the outbound dividends would not be taxed in the recipient's residence state. Then discrimination did not occur in regards to this kind of compensation. The Court stated that member states could use their taxing power to eliminate double taxation by establishing DTAA's and these DTAA's could annihilate the difference of treatments. However in this case, the Italian legislation did not guarantee the set-off mechanism. Then the Court rejected this justification.

To make tax collaection easier is other rejected justification (Yaltı Soydan, 2002: 167). For instance, as mentioned before in Zurstrassen case, Mr. Zurtrassen who resided and worked in Luxembourg, earned his family's all (98%) income from there but the tax authority of Luxembourg taxed him as he was single; since his wife who had no income of her own, resided in Belgium. So the tax authority did not allow him to benefit from joint taxation which was special for resident spouses. Thus Mr. Zurstrassen faced with a tax burden which was heavier than other residents. The Luxembourg government claimed that "*the*

[61] **The Queen v Inland Revenue Commissioners, ex parte Commerzbank AG [1993], Case C-330/91,** ECLI:EU:C:1993:303.

joint assessment to tax of spouses simplifies tax collection"[62] but if one of the spouses was not a resident, it made difficult tax collection. The CJEU examined that justification based on the Luxembourg Tax legislation which established that non-resident spouses could benefit from the joint assessment only after an assessment and provided that more than 50% of the earned income of their household. Then the Court stated that if in the legislation the joint assessment could be granted to non-resident spouses in certain conditions, the government's claim was not acceptable. Because granting this joint assessment to non-residents was possible and then, not granting it to Mr. Zurstrassen did not include the objective based on making easier tax collection or did not serve this objective. As it can be seen, the CJEU rejected facilitating tax collection justification with respect to the circumstances of the case.

Same as the justification of facilitating tax administration, to avoid administrative difficulties and to guarantee tax revenue are also other rejected justifications by the CJEU in regards to tax administration. At this point, it is wort noting that although "the need to fiscal audit and supervision" was mentioned in the group of accepted objective justifications, the Court sometimes did not see this justification as objective in regards to public interest. For instance in Futura Participations case, the Court rejected this justification (Yaltı Soydan, 2002: 167).

In this case, Futura Participations had its seat in France and had a branch, Singer, in Luxembourg. In accordance with Luxembourg's tax legislation, Singer determined its taxable income on the basis of an apportionment of Futura's total income and wanted to reduce losses from the taxable income. Since Singer had not its own accounts, the branch determined these losses based on the Futura's losses. The Luxembourg tax authority did not allow this set-off and claimed that according to the legislation, losses could only reduced only if they were related with income which was earned in Luxembourg. Also the tax authority claimed that another condition to set-off was that accounts should be kept in Luxembourg. The CJEU accepted the first claim which was about existance of an economic link with regards to the territoriality principle and stated that this condition did not create any overt or covert discrimination. In the context of the second claim which was about keeping of accounts, the Court rejected that. According to the Court, effectiveness of

[62] **Patrick Zurstrassen v Administration des contributions directes [2000], Case C-87/99,** ECLI:EU:C:2000:251

fiscal supervision could be able to justify a different treatment in regards to general public interest concept. The Court states that keeping of accounts in the resident state did not guarantee to "*provide relevant figures concerning the amount of income chargeable to tax and of the losses which can be carried forward in another Member State*".[63] The Court did not see this condition as appropriate for facilitating fiscal supervision. So it can be said that the CJEU evaluates features of every case and accepts or rejects some justifications based on these features; so a justification which is accepted for one case can be rejected for the other case.

III.6- Proportionality Test

As it is mentioned before, proportionality test is included in the objective justification test. In objective justification test, first, it is examined that whether there is an objective justification for the domestic provision which causes a different treatment among two objects or persons that are in comparable circumstances. If the justification can be considered as objective by the CJEU, then it is examined that whether this provision and the different treatment is suitable for purposes included in that justification. If suitability is provided, then it its measured that whether the provision and the different treatment is proportional for the provision's purposes. If both of these conditions are provided, then it can be said that the result of the objective justification test is positive. It means that the provision cannot be defined as discriminatory.

From the prespective of simplicity, it is thought that proportionality should be examined under a seperate section. Also in regards to the result of the tested domestic provision, proportionality test cannot change the assumption that there is an objective justification. Although there is an acceptable justification, the application and result may exceed limits of this justification in terms of disproportion. Then the result should be evaluated as there is no acceptable justification, even though this disproportionality cannot change objectivity of the justification. In other words, proportionality test affects result of the objective justification test by causing inadmissibility.

[63] **Futura Participations SA and Singer v Administration des contributions [1997], Case C-250/95,** ECLI:EU:C:1997:239.

This general principle derives from the objective of equity and fairness in law (De Souza Pereira Rolim, 2013: 17). Proportionality is also expressed in Article 5 of the Treaty on European Union (TEU) as a general principle. Pursuant to this article,

"The use of Union competences is governed by the principles of subsidiarity and proportionality (...)Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties".[64]

As it can be seen, there must be a continence between the justification set out and the domestic provision used to carry out this justification. In other words, the provision should not go beyond the requirements of the justification (Santos, 2015: 191). So it can be said that both of these tests serve to the purpose of preventing from arbitrariness (De Souza Pereira Rolim, 2013: 21). Also proportionality as a general principle is able to affect all articles of the TFEU and plays a role in determining the meaning and extents of fundamental freedoms.

The principle of proportionality has been developed by the CJEU in regards to the rule of law and the rule of reason (Tridimas, 2006: 136). This case law is also applied for tax discrimination cases. According to this, the proportionality is determined based on three main tests which are suitability, necessity and balancing tests (Craig & De Burca, 2003: 372). The afore-mentioned suitability means that the provision in question is able to realize the objective in accordance with the Community principles. Neccesity means weighting competing interests (Tridimas, 2006. 139). The third, balancing test evaluates whether there is a less restrictive provision as an alternative (Moossdorff, 2011: 7). In other words, with this test it is sought that whether there is a balance between the provision and the justification. According to this, there should be no other possible tax meaure which leads to a less restrictive effect on fundamental freedoms (Terra & Wattel, 2012: 44).

In case law of the CJEU, there are a raft of decisions which include proprtionality test. One instance for that can be United Kingdom v. Commission case. In this case, the CJEU expressed the nature and extent of proportionality test with saying that "*when there is a choice between several appropriate measures recourse must be had to the least onerous,*

[64] The Treaty On Functioning of European Union, Article 5, Official Journal of the European Union, Vol. 55, 2012.

and the disadvantages caused must not be disproportionate to the aims pursued".[65] In here, with using "appropriate" term, the Court referred to suitability test. Also "the aims pursued" phrase refers to necessity test and "the least onerous" phrase refers to balancing test.

One of the cases in which the Court applied proportionality test is Sandoz case. As mentioned before, in this case, pursuant to an Austrian tax provision, residents did not required any stamp duty, if they granted a loan from a lender which had its registered office in Austria and this agreement were not made in written. However if residents granted a loan from a foreign lender, the stamp duty should be paid even if there was no written loan agreement. The Austrian government claimed that the objective behind this provision was ensuring "*for Austrian residents equal tax treatment, regardless of the borrower's nationality, and the place where the loan is contracted*".[66] The Court considered this objective and the provision is inproportionate. Since this provision created discrimination between residents which granted a loan from an Austrian lender and residents which granted a loan from outside. In other words, the provision did not able to achive its claimed objective which was providing equal treatment between residents, moreover it discriminated them.

As explained in previous part of this study, environmental considerations take place in objective justifications in the case law of the CJEU. When a logical sequence is followed, after the recognition of environmental considerations as objective justifications, the Court examines whether national provisions are proportional to serve these considerations. There can be found various cases as instances for applying proportionality test for cases which include environmental considerations claim. Commission v. Italy can be considered in one of them. In this case, Commission claimed that Italia did not fulfill its obligations under TFEU, since in the Italian legislature, there was a provision which created discrimination between "*lubricating oil coming from other Member States and discourages Italian manufacturers from using used oil collected in other Member States in the regeneration process*"[67] by not granted a reduced rate to imported products. The Italian government argued that this provision could be justified in regards to environmental considerations

[65] **United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities [1998], Case C-180/96,** ECLI:EU:C:1998:192.
[66] **Sandoz GmbH v. Finanzlandedirektion Für Wien, Nierderösterreich und Burgenland [1999], Case C-439/97**, ECLI:EU:C:1999:499.
[67] **Commission of the European Communities v Italian Republic [1980], Case 21/79,** ECLI:EU:C:1980:1.

such as ecological and energy considerations. The Court made proportionality test and stated this provision was not satisfied balancing test. Since extending this reduction to imported goods did not restrain these environmental objectives.

De Coster case also involves proportionality considerations. In this case, a municipal tax on satellite dishes which was levied by the Belgium tax legislation, was subjected to a complaint by Mr. De Coster. He argued that this tax restrained him from "*receiving television programmes coming from other Member States*". Because this tax was only levied on transmission of television programmes by the satellite, not levied on transmission by cable. Programmes which came from other members states could only be transmitted by the satellite, thus this tax only affected satellite usage. The Belgium government argued that the main reason for levying this tax was to prevent heavy increase of the number of satellites in regards to environmental considerations. The Court stated that environmental considerations could justify this kind of provisions and also this provision was suitable for realizing this objective. Although suitability test was positive, this provision failed to pass necessity and balancing tests. According to the Court, "*the tax exceeded what was necessary to do so*" and there was various measures which were less restrictive to realize this objective. With proportionality test, the Court decided that this tax provision violated freedom to provide services of broadcasters from other member states.[68]

In regards to resident and non-resident seperation, the Court also use proportionality test when assessing discriminatory treatment for non-residents who are in comparable situations with residents. One example for that can be Wielockx case. Here, as mentioned before, Mr. Wielockx who was a German resident but generated his all income from the Netherlands. Pursued to the legislation, Mr. Wielockx could not deduct his pension reserve contributions, while resident taxpayers could benefit from these deductions. Government of the Netherlands argued that the reason behind this application was fiscal cohesion considerations. Since the DTAA between the Netherlands and Germany ruled that this pension was taxed by the residence state (Germany) and the Netherlands said that if tax was not paid to the Netherlands, deductions could not be applied. The Court did not accept this justification, since there were methods "to collect all necessary information" and in order to fulfill fiscal coherence objective, there were less restrictive methods in regards to

[68] See **François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort [2001], Case C-17/00,** ECLI:EU:C:2001:651.

balancing test. Thus, the Court found this provision discriminatory due to not meeting proportionality test.

Fiscal supervision was another objective justification in regards to public interest and again, the Court seeks to realizing proportionality test to accept this justification. In Baxter case, the relationship between justification on fiscal supervision and proportionality test can be observed. In this case, pursuant to the French tax legislation, a special levy was applied to undertakings which exploitied one or more proprietary medicinal products but there was a tax benefit which was in the form of a deduction of "*the costs accounted for during the same period corresponding to expenditure on scientific and technical research carried out in France*". Baxter and others were subsidiaries of parent companies which had their seats in other member states and they were not allowed for deducting their expenditures on scientific and technical research from the tax due to these researchs were not made in France. The French government claimed that there should be a link between deductions and the place where scientific and technical research were incurred. Thus this provision helped to achieve an effective fiscal supervision. However the Court stated that although fiscal supervision was an objective justification, there should also a proportionality between this objective and the provision. In this case, the French tax legislation did not allow foreigners to bring evidence about their expenditures on scientific and technical research which were incurred in other member states and this did not serve the fiscal supervision justification. So the Court highlighted that the result of proportionality test was negative, so this different treatment could not be justified with fiscal supervision objective.[69]

Another case which includes proportionality test in itself is Louloudakis case. Here, the Court applied this test when determining whether tax penalty and the justification for that was proportional or not (De Souza Pereira Rolim, 2013: 178). In this case, Mr. Louloudakis who had both Greek and Italian nationality was a resident of Italy and also did business both in two states. The main question was whether Mr. Louloudakis was exempted from excise duty for his transactions about his Italian based business which were doing with some vehicles or not. Because the Greek goverment applied a flat rate tax

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[69] See **Société Baxter, B. Braun Médical SA, Société Fresenius France and Laboratoires Bristol-Myers-Squibb SA v Premier Ministre, Ministère du Travail et des Affaires sociales, Ministère de l'Economie et des Finances and Ministère de l'Agriculture, de la Pêche et de l'Alimentation [1999], Case C-254/97,** ECLI:EU:C:1999:368.

penalty which was based on the vehicle's cubic capacity and also applied an increased duty to Mr. Louloudakis' cars which were used in Italia for business, for failure to make a declaration on entry into Greece. The Greek government claimed that this penalty was compatible with the TFEU, since the main justification for this was disparities between legislations of Member States as regards the possibilities of tax evasion. Also another justification was "*avoiding loss of Community and national revenue*" and "*ensuring the proper functioning of the temporary vehicle importation arrangements*". Based on these justifications, the government argues that the tax penalty was compatible with the principle of proportionality. According to the CJEU, member states had power to apply appropriate penalties due to the lack of harmonisation of the Community legislation. However this power had to be used in accordance with general principles of the Community law which includes the principle of proportionality. Therefore, the Court referred to necessity and balancing tests with stating that penalties must not exceed what was necessary to realize the main objective in regards to proportionality. In this case, the proportionality between realizing freedom of movement and "avoiding a loss of tax revenue" and "ensuring application of domestic arrangements" justifications were in question. Also this proportionality test included an evaluation about whether the tax penalty was the less burdensome option or not. While applying proportionality test, the Court highlighted that when there was also an increased duty which could be seen as another heavy penalty, the penalty which was based on a sole criterion could be disproporionate to the gravity of the infringement. Thus these penalties became obstacles to free movement of establishment in regards to proportionality test.[70]

Commission v. Spain is another instance in which the Court applies proportionality test. In this case, according to the Spanish tax legislation, income tax was levied on winnings from lotteries, games of chance and betting, while these kind of income was exempted when there were generated from certain Spanish lotteries or games of chance. Commission claimed that this provision was incompatible with the TFEU. The Spanish government asserted that the main objective was enjoying its discretion as a member state and also eliminating the harmful effects of that type of activity. Also another justifications were preventing money laundering and combating tax evasion. The Court stated that objectives about public interest such as "*consumer protection*", "*the general need to preserve the*

[70] **Paraskevas Louloudakis v Elliniko Dimosio [2001], Case C-262/99,** ECLI:EU:C:2001:407.

social order”, “*the prevention of both fraud and incitement to squander money on gambling*” could be used to justify “*a restriction to freedom to provide services*” but could not be used to justify “*a discriminatory restriction*”. In order to justify a discriminatory provision about freedom to provide services, only justifications related with public policy, public security or public health could be used based on Article 46 of the TEC (Article 52 of the TFEU). The Court highligted that these kind of justifications made the provision be “*in conformity with the principle of proportionality*”.

After these general explanations, the Court examined the situation in case. According to the CJEU, preventing money laundering and combating tax evasion justifications could not be used to justify and they are disproportionate, “*as it goes beyond what is necessary to combat crime*”. The Court also stated that the other justification which was expressed as eliminating the harmful effects of that type of activity could be considered as an acceptable justification with regards to public interest. Inasmuch as the Spanish government did not give serious evidence which were able to show that the addiction to this games reached a considerable amount in population. Therefore, the Court did not found this justification as suitable. Then this provision was evaluated as discriminatory in nature.[71]

When examining tax avoidance as a justification, the Court also uses proportionality test. An instance for this can be Société de Gestion Industrielle SA (SGI) case. In here, SGI was a holding company which was incorporated under the Belgian law. Cobelpin incorporated under law of Luxembourg, had SGI’s 34% of share and SGI had 65% of share of Recydem which was incorporated under French law. Recydem was granted an interest-free loan by SGI and Belgian tax authority assessed interest for that loan due to it granted unusual or gratuitous advantages. And also SGI paid its director a remuneration to Cobelpin but the Belgian tax authority did not allow SGI to deduct it as a business expense, due to legal requirements for this kind of deduction were not realized. According to the Belgian tax authority, this remuneration was unrelated to the economic benefit of the services. The SGI argued that resident companies were not taxed when they granted an unusual or gratuitous advantage to an another resident company. And also the refusal of deduction for remuneration created a heavier taxation. The Belgian government claimed that the reason behind this legislation was elimination of tax avoidance. Because with an interest-free loan

[71] See **Commission of the European Communities v Kingdom of Spain [2009], Case C-153/08,** ECLI:EU:C:2009:618.

to a non-resident subsidy which had a relationship of interdependence with the resident company would return to the resident company's accounts as a hidden profit and this created a tax avoidance practice. Also refusal of the deduction of renumeration which was paid to the same non-resident subsidy served to the same aim. Also another claim of the Belgian government was that providing the balanced allocation of taxing jurisdictions between member states.

The Court examined these reasons with using proportionality test. First for the balanced allocation, the Court stated that this provision was suitable. Because this legislation was able to help exercising Belgium's tax jurisdiction in its territory. Then for tax avoidance, the Court again stated that this legislation in question was able to encourage resident companies from tax avoidance. After suitability test, the Court applied balacing test. According to the Court, taxpayers should be provided an opportunity for their commercial justifications which were able to prove that there was no tax avoidance practice. In this case, the Belgium government argued that taxpayers had this chance. Therefore, the CJEU accepted that this legislation was proportionate with claimed objectives. So as it can be seen, in this case, the CJEU used proportionality test and accepted justifications for a different treatment based on this test.[72]

In another case which is named as Centro di Musicologia can be given as another case. Here, Centro di Musicologia was a foundation which was established under Italian law and had a charitable status. This foundation were proprietor of commercial premises in Munich and this commercial property was rented through the instrument of a German property management agent. Although Centro di Musicologia did not have any subsidiaries in Germany, the German tax authority assessed corporation tax based on the rental income. Pursuant to a German tax provision, corporations which worked on exclusively and directly charitable objects were granted an exemption from corporation tax; while "taxable persons with limited tax liability" which were non-residents were not granted this exemption. Thus Centro di Musicologia could not benefit from this exemption. The German government claimed that the justification behind this provision was the need to monitor the effective management of that foundation. Also another claim was "*preventing money-laundering and the illegal transfer of funds*".

[72] See **Société de Gestion Industrielle (SGI) v Belgian State [2010], Case C-311/08,** ECLI:EU:C:2010:26.

The Court states that, in here, the difference in treatment between limited and unlimited tax liable charitable foundations "*must not go beyond what is necessary in order to attain the objective of the legislation in question*". So the Court examined whether the different treatment was a requirement of the need to monitor the effective management of that foundation justification. Based on this, the Court states that this justification had "a purely administrative nature" and did not sufficient to justify the provision in question. Because there were always possibilities "*to obtain all the information that may be necessary to effect a correct assessment of a taxpayer's liability to tax*". By stating this, the Court made suitability, necessity and balancing tests and the result was negative. In regards to the second justification which was preventing money-laundering and the illegal transfer of funds, the Court highlighted again that there were "*a number of measures were available to monitor their accounts and activities*". So balancing test was negative for the secound justification. As a result, the Court stated that this provision violated free movement of capital.[73]

III.7- The Case Law of The CJEU On Other Tax Discrimination Issues

There are various subjects which show the CJEU's case law on tax discrimination except comparability, the objective justification and proportionality tests. These tests can be seen as main veins of the non-discrimination case law. In addition to this case law, the CJEU also interprets provisions of the TFEU on non-discrimination issue and settles different parts of its case law. So it can be said that the CJEU's case law involves various issues which are shaped under the main veins of the discrimination analysis.

III.7.1- Reverse Discrimination

One of the cases which should be considered in the CJEU's case law is reverse discrimination concept. Reverse discrimination means that disadvantage element of tax discrimination concept become reverse. In other words, when a national/resident and a

[73] See **Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften [2006], Case C-386/04,** ECLI:EU:C:2006:568.

non-national/resident are in comparable situations, the disadvantage condition is observed total opposite with regards to direct taxes. So in reverse discrimination cases, a state treats a national/resident and a non-national/resident within the context of direct taxation, to the detriment of its own national/resident. This type of discrimination can also observed between domestic goods/services and identical or similar imported goods/services and this may stem from the purpose to curtail exportation of some scarce goods (Kaczorowska, 2008: 508). But it should be noted that every different treatment between nationals/residents and non-nationals/residents to the detriment of nationals/residents does not cause reverse discrimination. Sometimes, the state may treat non-nationals/residents more favorably than nationals/residents so as to bring them to the same position as the nationals (Tryfonidou, 2009: 17). Moreover such cases cannot pass comparability test; since the non-national/resident in question is not in the same circumstances with the nationals. The main reason behind the different treatment of the state is to render non-nationals/residents to the same position with nationals/residents. So in such cases, reverse discrimination or discrimination does not exist.

In this globalized world, a state may want to attrract foreign capital or qualified labor force. In order to boost its tax revenues or to develop its economy, industry etc, a state can benefit from preferential tax systems and create zero or low rates for non-residents. This may cause reverse discrimination issues; since in these cases, differential treatments for non-residents are more advantageous but residents cannot benefit from them. If low or zero rates, tax benefits peculiar to non-residents such as tax credits or special deductions, lack of transperancy or other advantageous conditions are only applied to non-residents, this kind of harmful tax competition behaviors may create reverse discrimination for residents.

At this point, it is noteworthy that according to the CJEU, harmful tax competition actions and particularly tax preferences for non-residents do not fall within the scope of fundamental freedoms (Mason, 2007: 125). Therefore, if an harmful tax competition policy is in fact, the Court did not apply non-discrimination article, as it is expressed in Volkeer Steen case[74] (Yaltı Soydan, 2002: 146).

In the traditional approach, the Court had the opion that provisions on free movement could only be considered when cases on the question had a link with EU law and this link

[74] See **Volker Steen v Deutsche Bundespost [1992], Case C-332/90,** ECLI:EU:C:1992:40.

was seen as an inclusion of two or more member states (Cambien, 2012: 128). From this approach, it can be said that tax discrimination prohibitions which take place in the articles on fundamental freedoms could only be considered for cases with foreign elements. In other words, non-discrimination provisions can only be effective when the case includes the use of fundamental freedoms (Tryfonidou, 2009: 19). So in reverse discrimination cases, inasmuch as there was a situation which included a member state and its citizens/residents, the Court accepted that provisions on non-discrimination could not be applied to these cases. Thus residents which were treated discriminatorily compared to non-residents could not ground on free movement provisions, since their situations did not include an inter-state element (Cambien, 2012: 129). This means that member states do not obliged to apply non-discrimination rules when a purely internal situation which are majorly governed by domestic legislation (Stalley, 2015: 106). This is because a national who never use its fundamental freedoms cannot be subjected the protection of EU law (Lenaerts, 2011:8). So the Court establishes its case law on purely internal situations based on some criteria; one of them is that the fundamental freedoms should be exercised before the violation claim, the second one is that this exercised fundamental freedom should be directly linked with the case (Mataija, 2009: 45). But it should be noted that these are conditions which are accepted as a rule. They can be stretched by the CJEU according to the features of case at hand.

The main idea behind excluding purely internal situations from the scope of EU law was the same with suitability and proportionality purposes; the Court wanted to leave some area to member states to regulate with their own national laws (Mataija, 2009: 35). With various policy considerations, member states should be able to establish their legislation outside the area covered by EU law. This can be seen as a result of the allocation of competences which were determined by the treaties and states autonomy over their constitutional systems (Eleftheriadis, 2007: 15). On the other hand, the Court assumes that the nationals who have a claim on reverse discrimination can use domestic solutions with applying national courts.

The cross-border link was a criterion which was sometimes applied strictly by the CJEU depends on the type of fundamental freedom. For instance, the Court did not find “only hypothetical possibilities” sufficient to establish the cross-border link in regards to free movement of workers (Göçmen, 2011: 122). Fundamental freedoms should be exercised actively, in this traditional case law. But for instance, the cross-border link condition is stretched for situations on free movement of services. In Freskot AE case[75], the Court accepted that if an internal pracitce included possibilities of existance of potential service provider or recipient, free movement of capital provisions could cover this case even if this free movement right was not used (Göçmen, 2011: 124-125).

As an instance, Peureux case is of great importance for expressing this traditional approach of the CJEU. In this case, France constituted a monopoly in the national production and marketing of ethyl alcohol but leaved the production to private undertakings providing that the gorvernment had the property in the production and marketed them itself. According to the French legislation, there were two exceptions for this monopoly; the first one is that certain potable spirits were exempted. As the second one, the state might allow producers to sell out alcohol which was reserved to the state. To benefit from this second exception, French distillers should pay a charge which is named "cash adjustment". This charge was thought to compensate the State's loss which stemmed from not using its right to the monopoly. Also at this time, the state reserved to itself the importation right for alcohol. Based on the amendments on the legislation, while the monopoly on the production and the importation of ethyl alcohol maintained and the cash adjustment on freed ethyl alcohol remained, the "compensatory surcharge" application began to be applied. According to this application, if one wanted to import ethyl alcohol usable or consumable without further processing, he/she should pay the this surcharge. If products intended for drinking which contained ethyl alcohol were wanted to be imported, this action was exempted from the surcharge.

The Peureux was a French distillery which paid cash adjustments on potable spirits and obtained the right to free sell out between 1970-1976 and it claimed that the different treatment between freed alcohol and alcohol originating from other member states constituted a discrimination. Because imported alcohol was not subjected to cash compensation. It only subjected to compensatory surcharge, if the product was ethyl alcohol usable or consumable without further processing. The importation of products for drinking which contained ethyl alcohol was exempted from surcharge. So as it can be seen, the imported products may be treated more advantageously than domestic situations. Even "reverse discrimination" term was not expressed within the text, the plaintiff's claim was

[75] **Freskot AE v Elliniko Dimosio [2003], Case C-355/00,** ECLI:EU:C:2003:298.

substantially this. When assessing the case, the Court interpreted Article 37 of the TFEU and stated that this provision did not prevent member states from "*imposing internal taxation on national products in excess of that on similar imponed products*". Because this provision lost its power to be applied "*at the end of the transitional period*". After this period, Article 95 of the TFEU which prohibited member states from imposing heavier internal taxation on imported products, did not prohibit "*the imposition on national products of internal taxation in excess of that on imported products*".[76] The Court highlighted that this kind of treatments were not discriminatory, they only stemmed from disparities between member states legislations which were not harmonised completely. So this decision is important to see the traditional approach of the CJEU.

Also Werner case[77] can be given as another instance. In this case, there were German tax provisions which defined limited and unlimited tax liables. Pursuant to this legislation, natural persons who resided in Germany were taxed on all their income. These unlimited tax liables had a chance to benefit from splitting tariff application which meant deduction of certain expenses by married couples. Natural persons who did not reside in Germany were only taxed on their German originated income and these limited tax liables could not benefit from splitting tariff. Mr. Werner was a German national and worked in Germany as a dentist but lived in the Netherlands with his wife. The German tax authority considered him as a limited tax payer and did not allow him to benefit from splitting tariff. He claimed that this was a discriminatory treatment in regards to freedom of establishment.

In this case, the Court summarized the situation of Mr. Werner was not a purely internal practice. Since there was a criterion which constituted a difference from purely internal cases. This criterion was living in another member state. After that, the Court explained the extent of Article 52 of the TEC (Article 59 of the TFEU). So this provision did not prevent member states from treating differently or disadvantageously to their nationals who were working and generating all of their income in that state but residing in another member state when compared to other nationals which were residing in that state. Thus there was no discriminatory treatment in regards to right to establishment. It can be seen from this explanation, the Court interpreted a non-discrimination provision so as to exclude reverse discrimination concept, even though it did not found the situation purely internal.

[76] **SA des grandes distilleries Peureux v directeur des Services fiscaux de la Haute-Saône et du territoire de Belfort [1979], Case 86/78,** ECLI:EU:C:1979:64.
[77] See **Hans Werner v Finanzamt Aachen-Innenstadt [1993], Case C-112/91,** ECLI:EU:C:1993:27.

When the provisions of the TFEU are thought in a body, it should be said that for all cases, discrimination on grounds of nationality is prohibited, particularly in Article 18 of the TFEU. This can be supported with the purpose of harmonisation. Since harmonisation means that the purpose of EU law is establihing common rules for cross-border and domestic situations together on the legal basis in order to meet internal market purpose (Hanf, 2011: 37). Also inasmuch as every citizen of a member state is taken place in the Communtiy and one of the purposes of harmonisation is establishing common rules, a citizen should benefit from fundamental freedoms in his/her own state as he/she can benefit from them in other member states (Van Der Mei, 2003: 80).

In addition, the said purely internal situations are not purely internal, since these situations also have a foreign element. There were two taxpayers or goods/services which are treated differently, although they are in the same circumtances and one of them has a foreign character. On the other hand, a domestic provision which is claimed to violated articles on fundamental freedom, can deter a national/resident from exercising a free movement right (Mataija, 2009: 45). In this kind of situations, the cross-border link should be considered as fulfilled. Thus, the said purely internal situations are not completely internal at all. In addition, this kind of discrimination also harms the single market purpose, it affects domestic taxpayers or goods/services which have an opportunity to use fundamental freedoms and can be deter them to use their rights. If main purposes of the Community which are expressed in the TEU, TEC and TFEU and fundamental freedoms are thought together, it can be seen that it violates the free market principle (Tietje, 2007: 295). In other words, it is a matter of unity and effectiveness of the internal market (Mataija, 2009: 35).

EU citizenship can also another solution for covering reverse discrimination issues. Every national of member states are Union citizens and they fall within the scope of EU law. EU citizenship can be a connecting factor when establishing the cross-border link, although one EU citizen does never use his/her fundamental freedoms (O'Leary, 2012: 27).

Also reverse discrimination is an unequal treatment. With purposes such as attracting foreign capital and labor force or restraining exportation of some domestic products, states may treat comparable situations differently in such a way that they violate the principle of equality. In literature, some observers describe this situation as betrayal of the principle of equality by EU law; since in these situations, there is a favorable treatment for mobile EU member states' citizens or in other words, different treatment arises between mobile and non-mobile EU member states' citizens (Isiksel, 2016: 197-198). In these situations, the different treatment is based on the hidden criteria as "*non-contribution to the internal market*" and this criteria can be seen as a violation of the principle of equality (Tryfonidou, 2009: 19). This violations can be considered as a discriminatory practice, since the only difference between nationals and non-nationals (residents and non-residents) is using their fundamental freedoms or not. In reverse discrimination practices, a member state does not treat its nationals/residents disadvantagously based on their nationality but in here, the discriminatiory treatment derives from not exercising fundamental freedoms (Van Der Mei, 2003: 82).

Another approach can be that there are provisions in the TFEU which allows EU to interfere purely internal situations; thus cross-border link is not a general rule in EU law (Mataija, 2009: 40). So the Court can read non-discrimination provisions as provisions which can be interpreted as they are giving allowance to EU to held reverse discrimination issues, even if there is no cross-border link.

As it can be understood with this justifications in general meaning, it is perfectly reasonable that this kind of discrimination should be considered as prohibited by the TFEU. In addition to this acceptance which is based on the equality principle or internal market purpose, another possible approach to solve this problem can be defining cross-border situations in a large extent (Hanf, 2011: 42). Realizing complete harmonisation can also help to eliminiate reverse discrimination practices and before this, member states can solve the reverse discrimination problem with changing their legislations or using constitutional courts decisions as a tool (Göçmen, 2011: 132). The TFEU highlights that the internal market has no completely material frontiers; both frontiers between member states and the frontiers within one member state should be considered as a whole Community's frontiers. Therefore all of these districts are seen to be the same for using fundamental freedoms (De Cecco, 2014: 404). Excluding internal frontiers from fundamental freedoms concept harms the internal market purpose.

It can be said that a competence extending process has been living in reverse discrimination concept. The CJEU began to consider that the distinction between purely internal and cross-border situations arbitrary and artificial (Stalley, 2015: 107). In recent years, the Court's some decisions can be interpreted as it can be change its traditional approach which was mentioned before. For instance, cross-border link criterion can be stretched. In the Queen case[78], the Court accepted that a citizen could be covered with EU law, when he/she participated a certain activity in another member state (Göçmen, 2011: 119). Now, the CJEU may cover reverse discrimination in the case law for some conditions and can accept that reverse discrimination falls within the competence of EU (Stalley, 2015: 110). But it should be noted that The Court can leave its traditional approcah only for very specific set of circumstances such as undermining the effectiveness of fundamental freedoms by the domestic legislation (De Cecco, 2014: 403). These kind of decisions are particularly about obtaining residence statute or work permit. Ruiz Zambrano case[79] which is about obtaining right to reside and work can be seen as a great step towards to consider reverse discrimination within the context of EU law (Isiksel, 2006: 199).

In regards to tax discrimination cases, although a great majority of the claims derive from non-resident taxpayers, there is also some discrimination claims of resident taxpayers (Mason, 2007: 95). Moreover, the Court also may decide so as to cover reverse discrimination issues. For instance, in Flemish Government case, the Court said that purely internal stiuations can benefit from interpretations of EU law[80]. But it is worth noting that the CJEU's approach can be described as hazy. In regards to direct tax area, recent approach of the Court is uncertain and traditional case law is not seem to be abandoned.

For goods and services, the case law of the CJEU in regards to reverse discrimination is a bit different. Although the traditional approach of the CJEU about direct taxation considers that reverse discrimination is not included in EU law, the Court had decided positively on cases which included purely internal situations for goods/services in regards to reverse discrimination in some circumstances. According to the Court, the reason behind it may be that harmonised areas in the Community level does not require a cross-border link (Mataija, 2009, 39). So it can be said that although the Court regards reverse discrimination situations out of the protection of EU law, it can also decide that there is a reverse discrimination when a purely internal situation is issue in regards to goods and services within the context of indirect taxation. Or the interpretation of "purely internal

[78] **The Queen v Immigration Appeal Tribunal and Surinder Singh [1992], Case C-370/90,** ECLI:EU:C:1992:296.
[79] **Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm) [2011], Case C-34/09,** ECLI:EU:C:2011:124.
[80] See **Government of Communauté française and Gouvernement wallon v Gouvernement flamand [2008], Case C-212/06,** ECLI:EU:C:2008:178.

situation" term can be stretched. Freskot AE case[81] which was an afore-mentioned case, can be an instance for that. So the Court can accept that sometimes a potential cross-border link –not realized yet- is sufficient to apply free movement of goods provisions (Mataija, 2009: 49).

The Apple and Pear Development Council case[82] can also be given as an instance for the traditional approcah of the CJEU in regards to taxes on goods and services. In here, to Court did not find a domestic legislation which only affected nationals negatively as a discrimination. In this case, The Apple and Pear Development Council was a semi public body which was established in England (Kaczorowska, 2008: 492). This Council had functions such as publicity, promotion, improvement of the quality of indigenous fruit, scienctific or technical research or advisory functions. To finance the Council's activities, a statutory domestic levy was imposed on growers of apples and pears in England. Lewis Ltd. and others were domestic growers of apples and pears and they refused to pay this levy due to its incompatibility of the Community law. Because this levy was only imposed to domestic producers and importers had not pay it. The Court did not accept this claim. Pusuant to provisions on free movement of goods, the Court stated that measures to finance the expenses of the Council by a domestic levy did not prohibited. So the Court did not determine that there was a reverse discrimination to the detriment of domestic apple and pear producers.

As mentioned before, the CJEU can also decide that there is a violation in regards to reverse discrimination practices. In these decisions, the Court examines the relationship between the national legislations and free movement provisions without choosing to use "reverse discrimination" term. Larsen and Kjerulff case can be given as an instance for that. In this case, the Dannish legislation was in question. Pursuant to this legislation, undertakings which engaged in manufacturing and importing as selling or offering for sale by way of trade or business on precious metals should own a mark and this process was subjected to the supervision. The costs of this supervision was levied on the owners of that mark as an annual charge. Mr. Larsen and Mr. Kjerulff were goldsmiths and were compelled to pay this charge. The CJEU stated that while domestic production, selling or importation of precious metals should be required to use the mark by undertakings and a

[81] **Freskot AE v Elliniko Dimosio [2003], Case C-355/00**, ECLI:EU:C:2003:298.
[82] See **Apple and Pear Development Council v K.J. Lewis Ltd and others [1983], Case 222/82,** ECLI:EU:C:1983:370.

charge was levied on the using of that mark, undertakings which carried on business on the exportation of precious metals should not use that mark. Therefore this kind of activity was not required a charge. The CJEU said that this situation was included in EU law which prohibited "*any tax discrimination against products intended for export to other member states*". Although the Court, for some other reason, decided that this legislation did not create a discriminatory practice, this case is important for seeing the interpretation of internal situations and reverse discrimination.[83]

Another instance is Nygård case. Pursuant to Dannish legislation, for every pig which was bred and slaughtered in Denmark, a production levy should be paid. If pigs were slaughtered in abattoirs for export, this levy should be paid to the supplier. The revenue which was generated from this production levy was allocated to finance to production of pigs in Denmark. Mr. Nygård was a pig breeder in Denmark and as his business, he exported pigs to Germany. Pursuant to the German legislation, he paid a production levy for each pig supplied to the abattoirs. Therefore, he refused to pay the production levy in Denmark. According to the Court, again, this situation was in the extent of EU law. Because non-discrimination rules were included discriminatory treatments on exportation. The CJEU also stated that the use of the revenue which was generated from this levy could reduce the burden of the same levy for pigs produced for slaughter in Denmark, but production for exportation could not benefit from this compensation. So the Court named this situation as "discriminatory internal taxation".[84]

So there are also some instances which show the extended view of the Court on free movement of goods provisions in regards to reverse discrimination. Smitzi case[85] is one of them. Here, the Court extended it case law interstate trade (Mataija, 2009: 51). In this case, there was a charge which was a consumption duty on consumer goods entering or leaving the Dodecanese which was a group of Islands situated in Agean Sea and administered by Greece. This communal charge was collected by the Island's municipalities. The tax was applied for imports for 4% of the value of the imported goods and the rate was 1% of the value of exported goods. Mrs. Simitzi was an importer and she refused to pay this tax. According to the Greece government, this communal tax purposed to generate revenue for

[83] See **Statens Kontrol med ædle Metaller v Preben Larsen ; Flemming Kjerulff v Statens Kontrol med ædle Metaller [1978], Case 142/77,** ECLI:EU:C:1978:144.
[84] See **Niels Nygård v Svineafgiftsfonden, and Ministeriet for Fødevarer, Landbrug og Fiskeri [2002], Case C-234/99,** ECLI:EU:C:2002:244.
[85] See **Maria Simitzi v Dimos Kos [1995], Joined cases C-485/93 and C-486/93,** ECLI:EU:C:1995:281.

local administrative authorities. Also inasmuch as it was levied on both exports and imports, this could not be seen as a customs duty. The Court rejected these claims and said that the reason for this higher tax was crossing the frontier. This condition was sought both imported and exported goods, so it had an equivalent effect to customs duty. So this was not compatible with EU law.

III.7.2- Protectionism

Protectionism is a concept which can create discrimination and it is sometimes referred in the case law of the CJEU. This is the paradigmatic form of discriminatory taxation and results in a discriminatory treatment to the detriment of foreign taxpayers, goods or services (Mason, 2007: 121). In this practice, member states use their tax regimes as a tool for protecting or promoting its own economy or products. As mentioned before, member states can choose to levy heavier tax burdens to outsiders with or without using "nationality" term as a differentiating factor in their legislation. So both direct and indirect discrimination practices can be arised from this kind of tax regimes. Protectionist taxes can be observed in the form of tariffs or taxes on goods (Bakshi, 2017: 40).

There can be various purposes for the state to create this kind of tax regimes. One of them may be preservation. The state may treat outsiders disadvantageously in tax manners in contrast with insiders so as to protect its own nationals/residents or domestic goods/services. In other words, the state can use discriminatory taxes as a tool to protect its own economy (Mason, 2006: 8). So as it can be seen, this kind of situations were explained in the discrimination concept. Because protectionist provisions satisfy all the conditions of a discriminatory treatment; there are two objects which were in the same circumstances, there are a different treatment between them and there are a disadvantage which affects foreigners. So if the state cannot justify this treatment, then this can be seen as a discrimination practice. It should be said that, when the state's main purpose is the protect its domestic economy or taxpayers, this purpose cannot be seen as an objective justification.

To eliminate protectionst tax practices, the Community has been taken action since 1968. At that time, a common external tariff was established, while internal customs duties were abolished. Also in order to prevent member states from using indirect taxes as tax barriers in regards to protectionism, indirect tax harmonisation was required and realized gradually (Cnossen, 1990: 471). Both in direct and indirect taxation area, the CJEU's interpretations and case law has also an important place. With this actions, member states can be discouraged from implementing protectionist tax policies but this is not a certain result. In particular, cohesion economies such as Spaini Portugal or Greece maintained their protectionist tax regimes for longer than the rest of western states in EU (Barry, 2003: 900). But now, they are also close to end these practices.

The CJEU regards protectionist tax provisions discriminatory and as violations of EU law. Because they are obviously discriminatory treatments which result against foreign elements and harm the internal market purpose by distorting decisions of foriegners (Mason, 2007: 122). Also protectionist taxation can be described as a trade distortive barrier. It can be seen generally in cases which include a charge having an equivalent effect to a customs duty. Because in these cases, a charge is imposed to foreign goods which are in competition with domestic goods due to they passed the frontier (Kaczorowska, 2008: 486).

There can be several instances for the case law of the CJEU on protectionism. One of them is Humbolt case. As mentioned before, in this case, the French government discriminated cars with using their engine size as a criterion. Cars with engine size more than 1600 cc were taxed more heavily, since in this group, there were only imported cars. France did not product cars with engine size more than 1600 cc. So in here, a covert discrimination arised and the French government highlighted that one of the purposes behind this legislation was to protect domestic products. The Court stated that this kind of legislation could be compatible with the TFEU only when it was free from its protective effect. So the Court can be seem to consider protectionism as a reason which make a treatment discriminatory.

Other instance for protectionist taxation can be Commission v. United Kingdom case.[86] In this case, Commission claimed that United Kingdom treated wine and beer differently. The rate of excise duty on still light wine which was a completely imported product was higher than the rate of excise duty on beer which was a domestic product. According to Commission, this was an indirect protection for beer and it was contrary to the TFEU. The

[86] **Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland [1983], Case 170/78,** ECLI:EU:C:1983:202.

Court stated that wine and beer had a competetive character and this tax regime created a protectionist effect on behalf of beer. So as a result, this practice violated Article 95 of the TEC.

Similar with this decision, the Court uses "indirect protection" term again in F. G. Roders BV and others case (Alber, 1998: 784).[87] In this case, there were a convention between Belgium, the Netherlands and Luxembourg on the unification of excise duties. Then the rate of excise duty on fermented fruit beverages and sparkling fermented beverages were standardized. In addition to this common excise duty, there were an additional excise duty for both these three states. According to this convention, some beverages fermented from fruit could be exempted from excise duties by the states. The Netherlands regulated its legislation pursuant to these requirements. So in this state, there was an excise duty for all still wines and all sparkling wines. Still fruit wines were exempt from this excise duty based on some requirements. Imported sparkling fruit wines were also exempted, while domestic sparkling fruit wines were subject to a lower rate of excise duty in contrast with sprakling grape wines. Importers who could not benefit from these exemptions claimed that this legislation violated EU law. Because the Netherlands taxed wines differently "*according to whether they had been made from grapes or from fruit other than grapes*".

While examining this case, the Court explained that the aim of Article 95 of the TEC was to ensure eliminating protectioist tax regimes which created discrimination against foreign products. So the main point in here was providing neutrality in internal taxation while "*partially, indirectly or potentially*" competetive products were issue. EU law prohibited "*any form of indirect fiscal protectionism*" against imported products which were similar to domestic ones. Thus the Court stated that this practice was an instance of protectionism and it was not compatible with EU law.

Stylianakis case is another instance for protectionism.[88] In this case, there was the "airport modernisation and development tax" and it imposed on passengers which were departing from a Greek airport for a domestic or international destination. Mr Stylianakis was a traveller and paid this tax. He claimed that this tax creates different treatment between domestic flights in Greece and international flights. The Court stated that the tax on flights

[87] See **F. G. Roders BV and others v Inspecteur der Invoerrechten en Accijnzen [1995], C-367/93 to C-377/93,** ECLI:EU:C:1995:261.
[88] See **Georgios Stylianakis v Elliniko Dimosio [2003], Case C-92/01,** ECLI:EU:C:2003:72.

to other member states was higher than the tax on domestic flights within Greece. The view behind it was protectionist concerns (Banks, 2007: 30).

It should also be noted that the Court uses comparability test when evaluating protectionism. So if there are comparable taxpayers or goods/services, then the measure might be protectionist and create discriminatory effect. Existing a similar competetive good shows the state's protectionist purpose. If such a good does not exist, then protectionism cannot be observed. De Danske Bilimportører case can be an instance for this situation.[89] In this case, there was a charge which was named as 'registration duty' in Denmark. This duty was levied on new motor vehicles which were imported to Denmark and it was collected when the vehicle's first registration in the national territory was completed. It also levied on used vehicles which were imported to Denmark. This registration duty was imposed on De Danske Bilimportører which purchased a new Audi and imported it to Denmark. Then the corporation wanted a refund for this duty. The Danish tax authority rejected this request since the refund was only granted to domestic purchases of previously registered used vehicles. So the corporation claimed that this duty violated EU law. The Court made a comparability test and stated that there was no domestic production of motor vehicles. So this registration duty was only imposed on imported motor vehicles but there was no competetive domestic product which was tried to be protect. It means that there could be no protectionist purpose behind this duty which was only imposed on imported motor vehicles. Thus the Court did not find any discriminatory or protective effect and decided that there was no violation of EU law.

If the Court's recent approach for protectionist tax provsions should be expressed, it can be said that the negative approach is continuing. The Court still regards these kind of practices as violations of EU law and as restictions to fundamental freedoms. For instance in SECIL case, Portuguese's protectionist taxation against foreign dividends were not found compatible with EU law.[90] In here, there was a tax provision in Portugal which regulated the taxation of dividends. Pursuant to this provision, companies which had their head office or effective management in Portugal and distributed dividends to resident companies. These recepient resident companies could deduct these dividends from their

[89] See **De Danske Bilimportører v Skatteministeriet, Told- og Skattestyrelsen [2003], Case C-383/01,** ECLI:EU:C:2003:352.
[90] See **SECIL - Companhia Geral de Cal e Cimento SA v Fazenda Pública [2016], Case C-464/14,** ECLI:EU:C:2016:896.

taxable amount fully or partially. However if a resident company received dividends from a company which had its head office or effective management in a non-member state, these dividends could not be deducted. So SECIL which had its seat in Portugal held considerable amounts of shares of Ciments de Gaber which had its seat in Tunisia and Ciments de Sibline which had its seat in Lebanon. SECIL received dividends from these companies and paid corporation tax in Portugal but could not deduct said dividens. Then it claimed that the provision in question was not compatible with the TFEU.

The CJEU evaluated the case and then stated that the difference in treatment which was about deducting dividends was liable to discourage resident companies from investing their capital in companies which had their seats in non-member states. Because this provision made the shares of compaines in non-member states less attractive in contrast with the shares of resident companies. A resident company could benefit from this deduction, when dividends were distributed by a resident company; while it could not deduct dividends which were distributed by a company in non-member state. The Court considered it incompatible with EU law due to it restricted free movement of capital. Although protectionism or a similar term were not used, it can be understood that Portuguese legislation's main aim was to keep domestic capital in its territory with not granting deductions to dividends which were received from a company established in a non-member state. So this decision of the CJEU shows that the Court did not allow these kind of restrictions to fundamental freedoms.

A similar decision is given by the CJEU in Equiom case.[91] In this case, there was a provision in French legislation which reversed the proof mechanism in the exemption method for divideds. Pursuant to this provison, if a resident company received dividends which were distributed by a company in an EU member state which was controlled by a company in a third country, this resident company could only benefit from the exemption for these dividends with proving that "*the principal purpose or one of the principal purposes of the chain of interest was not to take advantage of the exemption*". This provision was made to eliminate tax fraud, evasion and abuse. Normally if the domestic tax authority claimed that a company was in activity such tax fraud, evasion or abuse, it should proof that. But in here, this burden was reversed and without proofing, a resident company

[91] See **Eqiom SAS, formerly Holcim France SAS and Enka SA v Ministre des Finances et des Comptes publics [2017], Case C-6/16,** ECLI:EU:C:2017:641.

could not benefit from tax exemption. So in this case, there were three companies which are Eqiom, Enka and Euro Stockage. Eqiom and Euro Stockage were both established in French and Enka was a subsidiary of Enka and successor in law to Euro Stockage. Enka which was established in Luxembourg, owned all the shares of Eqiom and was wholly controlled by Campsores Holding which was established in Switzerland. So in this case, Euro Stockage paid dividends to Enka and the French tax authority imposed a withholding tax for these payments. Both Enka and Euro Stockage applied to benefit from the exemption from withholding tax but they were refused. Because such an exemption did not apply to dividends which were distributed by a resident company to a non-resident EU company which were wholly controlled by a company in a third country without realizing the proof requirement. So companies claimed that this application was not compatible with EU law.

The Court held the case and stated that in here, a resident company which distributed dividends to another resident company that controlled by company established in a third country may benefit from this exemption without being subject to such a requirement. This different treatment was able to dissuade non-resident parent companies from investing in France with a subsidiary. Thus in here, this provsion created "*an impediment to freedom of establishment*". So again in here, although protectionism was not referred, this provision can be seen as a political fiscal protectionism practice with reference to the Courts determination (Danon & Turina, 2017: 62). France aimed to protect its tax base and revenue with discourage resident companies from distributing dividends to non-resident companies which were controlled by a company in third countries.

As it can be seen, discriminatory and restrictive practices might have a protectionist character and this causes the governments' justifications could not be seen as objective justifications or proportionate with the result. So the CJEU considers these practices as incompatible practices with EU law.

III.7.3- State Aid Practices

"State aid" term is one of the concepts which included in EU law. This term can be defined as various forms of advantages which were granted to undertakings on a selective basis by a member state (Kalogirou, 2015: 310). So there are four main elements which constitute stade aids. As the first one, a state should grant a state aid in the form of an advantage. As a second one, this advantage should be granted on a selective basis which means that this advantage is not granted to similar domestic/foreign products or operators. Then this advantage should be granted by public sources or funded by the state. And the last element is the distorting effect on competetion, trade or business. Among them, granting an advantage and being a selective practice are main characteristics of state aid practices (Wattel, 2013: 141). On the other hand, state aids can be granted as advantages in taxation area or they have some other characteristics. It is worth adding that not every state aid which meets these conditions, is not undesirable, only unlawful state aids are prohibitied. So this can be regarded as one of the practices which can be seen as a product of harmful tax competition and it may create discriminatory results by favoring on behalf of some taxpayers or goods/services. Subsidies, tax concessions or investments from public funds can be given as instances for that practice (European Commission, 2010: 11-12). In addition to distorting effects on investments and labor forces, it can also affect natural and legal persons' decisions as well as create obstacles to fundamental freedoms. Therefore it is not always a desirable practice in EU area.

The relationship between state aids and discrimination is obvious. Since as mentioned before, this practices might cause different treatments between comparable domestic and foreign situations by granting advantages to certain products or undertakings under the name of state aids. If coditions which are stated in Article 108 of the TFEU are not observed, then these different treatments might consitute unjustified discrimination (Ahlborn & Berg, 2004: 53). Thus state aids might have protectionist character or can be used as a tool to promote harmful tax competition for attracting foreign investment. Having a protectionist character means that tax benefits are granted to domestic undertakings or products as state aids; while promoting harmful tax competition means that tax benefits are granted to foreign undertakings and products as state aids. One of the main characteristics of state aid is, as mentioned before, being a selective measure and it means favouring certain economic operators or products; so selectivity and discrimination can be seen as identical concepts (Wattel, 2013: 146). Thus particularly this characteristic make state aids tend to be discriminatory.

In Articles 107-108 and 109 of the TFEU are about aids granted by states. Pursuant to these articles, as a rule, state aids which "*distort or threaten to distort competition*" and "*affect trade between member states*"[92] are not compatible with the purpose of internal market. However if they have a social characteristic and they are granted to individual consumers without including discriminatory purposes according to origin of the products, or if they are granted to goods which are affected by natural disasters or exceptional occurrences, then they are seen as compatible with the TFEU. If state aids are meet these conditions, then they cannot be discriminatory practices; these conditions can be regarded as objective justification for different treatments. There are other conditions which are able to make a state aid compatible with the internal market. If these conditions are observed, then the state aid practice has an opportunity to be considered as a non-discriminatory treatment. These conditions are regulated in Article 107(3) of the TFEU. In addition to these, member states have to inform the Commission about their plans to grant or alter a state aid (Paterno, 2011: 343). So Articles 108 and 109 regulate the role of the Commission in state aid applications. Also Article 34 of the TFEU which prohibits member states from "*quantitative restrictions on imports and all measures having equivalent effect*"[93] can be read as a prohibition to state aids (De Souza Pereira Rolim, 2013: 182). So a state aid can affect usage of fundamental freedoms and create discriminatory practices by favouring resident undertakings or domestic productions or vice versa. In this cases the state aid can be described as "unlawful". But if this aid meets conditions of the TFEU, it is not considered as discriminatory and incompatible with EU law.

In addition to this regulations in the founding treaties level, there is also an action plan on state aids. Commission prepared an action plan which was called as "the State Aid Action Plan" (SAAP) to regulate state aid regimes. The main purpose behind SAAP is reducing state aid practices and providing "less but better targeted" state aids (European Commission, 2010: 10). In addition, there are lots of cases which are referred by the Comission to the CJEU in order to eliminate unlawful state aid practices. Many of these cases are related with effectice tax rates which are granted to great US multinationals such as Apple, McDonalds or Starbucks (Grinberg, 2016: 2). For instance, in 4 October 2017, Commission referred Ireland to the Court on the grounds that it granted illegal state aid

[92] The Treaty On The Functioning Of The European Union, Article 107, Official Journal of the European Union, Vol. 55, 2012.
[93] The Treaty On The Functioning Of The European Union, Article 34, Official Journal of the European Union, Vol. 55, 2012.

which was in form of a tax benefit to Apple. In this decision, the Commission stated that by grantingg this illegal state aid, Ireland has made Apple pay substantially less tax than other businesses which included similar domestic corporations. Comimission highlighted that this practice distorted competition and was incompatible with EU state aid rules.[94] Before this referring, Commission requested Ireland to recover the amount which were received from this illegal state aid, but the Ireland did not pay it. Then Commission decided to refer to the Court.

Also Commission found Luxembourg's state aid which was in form of a tax benefit to Amazon as illegal. Pursuant to the Luxembourg tax legislation, Amazon as an operating company was able to use a method for calculating its annual payments to the holding company, Amazon Europe Holding Technologies, for the rights to the Amazon intellectual property. This payment reduced Amazon's taxable profits. As a result, while other domestic companies' profits were taxed for all of the year, Amazon's profits were not taxed for almost three quarters, because they were shifted to a company that was not subject to tax. But this practice did not show the economic reality. So this selective tax advantage were considered as prohibited by EU state aid rules.[95]

Another action which was taken by Commission was against to Luxembourg and the Netherlands. In Luxembourg, a selective advantage on the calculation of return on capital which was considered as an illegal state aid was granted to Fiat Finance and Trade. As a result, a lower tax was imposed on Fiat in contrast with similar domestic companies. So this state aid was illegal in regards to EU state aid rules. Also in the Netherlands, Starbucks was granted a tax advantage as an illegal state aid. With benefiting from the legislation, Starbucks paid a very "substantial royalty" for know-how and an "inflated price" for green coffee beans and this was not in parallel with the economic reality. Both in two cases, multinational corporations' tax bases were reduced with selective tax advantages, while

[94] Commission Press Release IP/17/3702 of 4 October 2017, Brussels, "*Commission refers Ireland to Court for failure to recover illegal tax benefits from Apple worth up to €13 billion*". http://europa.eu/rapid/press-release_IP-17-3702_en.htm (Date Accessed: 23.10.2017).

[95] Commission Press Release IP/17/3701 of 4 October 2017, Brussels, "*Commission finds Luxembourg gave illegal tax benefits to Amazon worth around €250 million*". http://europa.eu/rapid/press-release_IP-17-3701_en.htm (Date Accessed: 23.10.2017).

domestic operators remained to pay higher amounts. Thus Commission considered these practices were in branch of EU state aid rules.[96]

If the CJEU's approach on state aids should be examined, it can be said that there are cases in which the Court evaluates some unlawful state aid practices. One of them is Portuguese Rebuplic v. Commission case[97]. In this case, tax reduction practices of Azores, an autonomous region in Portugal, is in question. This region had its own tax regime and applied a large extent of reductions on personal and corporate income tax rates. This regime was not approved by Commission. According to the Commission, all the conditions of unlawful state aid was observed in this application. There was an advantage in the form of a tax reduction. This advantage had a selective characteristic; because only operators in Azores could benefit from this, while all other Portuguese undertakings were excluded. Also this advantege was made with state resources. Since this practice would reduce the tax revenue and the state provided this advantage with a tax expenditure. As the least condition, this practice was able to distort competetion and treade between member states. According to Commission, there was no justification which was allowed by Article 108 of the TFEU. So, this was an unlawful state aid.

The CJEU first examined the selectivity condition. According to the Court, in here, granting a tax advantage by an infra-state authority could not change the examination; the selectivity test should be made based on the particular legal system of this authority. Thus in here, this advantage was only granted to operators in a certain region. In other words, tax rates of that region was lower than the rest of the state. Therefore this practice was a selective measure. Then the Court stated that this practice was not compatible with EU state aid rules.

Another case is Presidente del Consiglio dei Ministri v Regione Sardegna.[98] In here, pursuant to legislation of the Region of Sardina which was placed in Italy, there was a regional tax on "*stopovers for tourist purposes by aircraft*" and the paxpayers were "*undertakings which were operating aircraft, which they used for the transport of persons*

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[96] Commission Press Release IP/15/5880 of 21 October 2015, Brussels, "*Commission decides selective tax advantages for Fiat in Luxembourg and Starbucks in the Netherlands are illegal under EU state aid rules*". http://europa.eu/rapid/press-release_IP-15-5880_en.htm (Date Accessed: 23.10.2017).
[97] See **Portuguese Republic v Commission of the European Communities [2006], Case C-88/03,** ECLI:EU:C:2006:511.
[98] See **Presidente del Consiglio dei Ministri v Regione Sardegna [2009], Case C-169/08,** ECLI:EU:C:2009:709.

in the course of 'general business aviation' activities, had their tax domicile outside the territory of the Region of Sardinia". The Court regarded this practice as an illegal state aid. Because it was not applied to resident undertakings which were in the same circumstances with non-resident undertakings. Therefore, it was a selective practice. It also restricts freedom of establishment. So this advantange which could only be applied in favour of undertakings established in that territory was an unlawful state aid.

Gibraltar case is another important case for state aid concept.[99] In this case, two tax advantages in the Gibraltar tax legislation which stemmed from a tax reform, was in issue. The first one was about "exempt company" status. Pursuant to this legislation, in order to have this status, companies should observe "*the prohibition of carrying on or transacting any trade or business in Gibraltar, other than with other exempt or qualifying companies*". These compannies were exempted from corporate income tax. The second advantage was about qualifying company" status. The same requirement with the first one was needed for gaining this status. These companies Qualifying companies paid corporate income tax at a lower rate. According to the Court, this advantages regarded as selective advantages to offshore companies. Then other companies could not benefit from them. So this was an unlawful state aid practice.

The last instance is World Duty Free Group case.[100] In here, there was a provision in the Spanish legislation which was about a specific deduction. Pursuant to this, if "an undertaking acquired "*a shareholding in a foreign company equal at least 5% of that company's capital*", the goodwill which was received from that shareholding could be deducted from the corporation tax. The CJEU regarded this provision as a selective one; since in here, this deduction was granted to undertakings which acquired a shareholding in a non-Spanish company, while this shareholding acquired from a comparable Spanish undertaking could not benefit from it. So this was a selective practice and an unlawful state aid.

At this point it is worth adding that unlawful state aid practices may be similar with other terms in discrimination concept such as reverse discrimination or protectionism, although

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[99] See **European Commission (C-106/09 P) and Kingdom of Spain (C-107/09 P) v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland [2011], Joined cases C-106/09 P and C-107/09 P,** ECLI:EU:C:2011:732.
[100] See **European Commission v World Duty Free Group SA and Others [2016], Case C-20/15 P,** ECLI:EU:C:2016:981.

both Commission and the CJEU generally do not use discrimiantion term in these cases. Distinctions from these terms is blurred and complicated, there are some basic considerations. For instance, in state aid practices, selectivity analysis is an important test, while comparability analysis is used in discrimination cases. These tests seem to be similar; because in both of them, there are two situations and one of them is treated disadvantageously. The main idea and practice are almost identical, so it can be said that only the name is different. On the other side, state aid practices should also require granting a public source or a state fund. So this can be observed in discriminatory practices but the Court does not evaluate whether the state uses a public fund or source in discrimination analyses. In addition, there is a recovery mechanism in unlawful state aid practices which can be used as a tool before the Court hold the case. However in cases about discrimination, there is no such mechanism.

III.7.4- Interpretations and Examinations on the Case Law of the CJEU

The CJEU's case law on tax discrimination consists of both interpretations of articles of the TFEU and also evaluations of some tax law concepts. This case law explains certain articles of the TFEU in regards to discrimination and sometimes broadens extents of them or reveals conditions required. The Court establish its case law on basic explanations of the articles and benefit from these explanations while examining a certain case at hand. Depending on the conditions of the case, the Court diversifies its case law. So it can be said that discriminatian concept stems from these different implementations and interpretations and it can be regarded as an alive process. It is changing based on the conditions and understandings of the present day.

Some commentators find this case law arbitrary. For instance MASON (2007) highlights that the case law is established in the lack of a transparent, consistent reasoning for tax discrimination decisions; this characteristic is easily seen in comparability test. In this test, selecting the pair of taxpayer which are compared can be considered as arbitrary. The Court does not reveal any certain criteria or analytic reasoning to select them. GRAETZ & WARREN (2012) claim that the CJEU's blurred approach reduces the chance to eliminate discriminatory practices in the absense of a harmonised system; so the Court will have to accept that it should create legal certainty and doctrinal coherence for non-discrimination case law.

Beyond arbitrariness, MASON (2006) argued that there are also some errors of the CJEU in its case law. These errors can be observed some false porsitives in which the Court considers a legal issue as a discrimination or some false negatives in which the Court failed to identify a discrimination such as some disparity cases. Also there are claims about that the case law on discrimination creates discrimination itself. According to ISIKSEL (2016), the Court's interpretations cause discriminatory results particularly for third country nationals. This argument can be true, especially for fundamental freedoms. Because these rights are only granted to nationals of EU member states and therefore, states' discriminatory practices might target to non-EU nationals which, for instance, aim to invest or work in EU. Also ISIKSEL (2016) claimed that sometimes, the Court's case law on tax discrimination affects nationals of EU member states which did not use their fundamental freedoms. This is generally seen in reverse discrimination cases. The CJEU's traditional approach in reverse discrimination is against immobile nationals of EU member states; the Court does not see them in comparable situations with mobile nationals of EU member states. So according to ISIKSEL (2016), this situation constitues unfair instances in the case law. GRAETZ & WARREN argued that after all these criticisms, it can be said that this indefinite jurisdiction of the CJEU restricts member states' flexibility on determining their fiscal policies.

To meet these reviews, it can be said that the reason behind the lack of certainty might be that the TFEU's different phrasing in different free movement articles (Cordewener, 2004: 2). So the Court might avoid to exceed the wording of the TFEU when interpreting the actual meaning. On the other hand, the CJEU's main aim in not determining a strict reasoning or criteria in discriminatory cases might be to provide a flexible elbow room to itself. By this way, the Court may extend its discretion on discriminatory issues. For instance in comparability test, the Court might freely select comparison subjects and as a result, discrimination analysis area can be extended due to meet the principle of equality and provide internal market. Also the Court can include some third country nationals or nationals who do not use their fundamental freedoms in its decisions, by the help of this flexible approach. Nevertheless there is a considerable uncertainty in this flexibility. So the

Court had beter to provide clarity and legal certainty with not changing flexibility (Bammens, 2012: 567). This may help to make non-discrimination articles more effective.

When evaluating the CJEU'a case law, the concept of restiriction should be handled. This concept means that a provision in the domestic law of a member state creates an obstacle to use of a fundamental freedom with differentiating the user. So member states can use their taxation authority to hinder the use of fundamental freedoms by residents or non-residents. This term is very close to discrimination, since in here, a group of taxpayers may be discouraged from realizing their freedoms with using different regulations. When determining whether there is a restriction or not, the Court uses two test; at first, the Court verifies the liability of the national provision to bring obstacles and as a second step, the Court makes the objective justification test. So the restirction analysis does not include comparability test in contrast with discrimination analysis (Englmair, 2016: 65). Another difference is that restriction practices can only be justified based on rule of law, while jusftifications which are referred in the TFEU can be used for discriminatory practices (Bammens, 2012: 567).

Sometimes, the Court uses both of these terms. Because they are intermeshed naturally. A considerable amount of discrimination practices include a restriction to fundamental freedoms; since this discrimination hinders one resident or non-resident to use its rights with increasing the tax burden. In discriminatory practices, the disadvantage may be seen as an obstacle to use fundamental freedoms. So discriminatory restrictions may exist and the analysis of the Court gains importance. However it should be added that, as a difference, in restriction cases, the foreign element is not observed every time. In parallel with this, some discrimination cases does not include any harm to fundamental freedoms, some other matters which are protected by the TFEU can be the issue (De Moraes, 2015: 229).

Some commentators claimed that the Court's approach has been shifting from the term discrimination to the term restriction when direct taxation is the issue. In general, the Court has began to use this term in recent case law in regards to fundamental freedoms. DE BROE (2008) argues that the approach of the CJEU has gradually evolved to a restriction based reading in regards to fundamental freedoms. Also BAMMENS (2012) argues that the case law can be divided into two terms. The first one which remained from 1986 to 1997 can be described as a term in which the CJEU reads the treaty freedoms based on a strict discrimination view. Then the second term which have been continuing since 1997. A similar historical determination is made by CORDEWENER (2004). According to him, this can be seen as an evolution of the fundamental freedoms from a narrow concept of discrimination to a broader concept of restiriction. However this is not a replacement; it can be considered as a cooperation of both concepts. DE MOREAS (2015) also argues that discrimination and restriction analysis are not opponents but supplementary concepts. So the CJEU sometimes fails to use these concepts and one of the critisms which target the case law on discrimination is this fail. The Court may use a restriction based analysis in some discrimination cases or vice versa (De Broe, 2008: 800). The court usually makes such fails in cases of indirect discrimination and evaluated them as restriction practices (Cordewener, 2004: 1). Due to this kind of fails, some discriminatory cases might not benefit from objective justifications which take place in the TFEU. Sometimes the Court uses these two concepts together, for instance in Avoir Fiscal case, the Court stated that they were closely linked to each other and for this case, they should be considered together (Bammens, 2012: 575). CORDEWENER (2004) and BAMMENS (2012) summarizes the recent case law with highlighting that each fundamental freedom includes a non-discrimination and a non-restriction components and both of them serve to realize the internal market purpose.

III.8- The Relationship Between EU Law and Bilateral Tax Treaties

Tax discrimination is tried to be eliminated globally with using afore-mentioned methods such as treaties in different levels. EU law can be considered as one of them. Member states are also able to apply other methods, i.e. they can use treaties in order to combat with discrimination or they prepared DTAA’a which include non-discrimination clauses. These treaties can be made with other member states as well as with third states. As mentioned, this treaties have a bilateral character and they balance the interests of the two states and fully meet their needs. Member states are at freedom to prepare bilateral tax treaties with third countries in the way that best suits them. However problems may arise when two member states make tax treaties with each other. These treaties may include non-discrimination provisions in regards to taxation. Thus these treaties should be considered as a different source from EU law. Member states can reflect their tax policies and shape the provision of non-discrimination according to these policies. This situation is particularly significant in terms of agreements made between the two Member States, since there may be conflicts between these treaties and EU law on the non-discrimination clauses.

Today, bilateral treaty network between member states is nearly completed (Brown & O'Brien, 2006: 21). These treaties are generally seen as DTAA's and they also include non-discrimination provisions. It should be highlighted that Article 293 TEC (repealed by the Treaty of Lisbon) oblige member states to negotitate with other member states in order to eliminate double taxation within the Community; however this obligation did not include to take action against tax discrimination (Brown & O 'Brien, 2006: 21). This article was the mainmast of the relationship between Community law and bilateral tax treaties but it was repealed (Pistone, 2002: 69). Although a similar provision is not included in the TFEU, Article 4(3) of the TFEU which obliges member states to act in order to realize the objectives of the Union. It means that member states should enter into negotiations with other member states. So, fighting with double taxation can be a justification for member states to make bilateral tax treaties in the form of DTAA's. Because double taxation is considered as an obstacle to the Community's objectives, i.e. by means of restricting fundamental freedoms. Also a balanced allocation of taxing rights can be another reason behind making bilateral tax treaties (Helminen, 2011: 25). So these can be used as justifications. Treaties who meet these conditions can be seen in the secondary Community law based on the reverse subsidiarity principle (Pistone, 2002: 223). They should be considered as sources of non-discrimination clauses.

At this point, it should be added that, Article 4(3) also prohibits member states from any measure that is incompatible with the Community's objectives. So this provision can be interpreted as non-discrimination provisions in bilateral tax treaties should not fall afoul of the TFEU's non-discrimination provsions. To conclude, it can be said that member states still have an opportunity to make bilateral tax treaties with other member states (Helminen, 2011: 24). Nevertheless, member states can only use bilateral tax treaties as a tool to realize the Community's objectives.

On the other hand, bilateral tax treaties can be considered as a part of the national law of the member states. These treaties are imported to member states' own law after signing and then they apply as they are domestic rules. Although their place in the hierarchy of norms changes depending on the member state's approach to international treaties, these treaties gain a domestic feature. It means that being consistent with EU law is a necessity for these treaties due to their characteristics.

When a tax treaty which meets above-mentioned conditions is signed by two member states, then its non-implementation becomes an incompatible action with EU law and therefore, the member state which avoids to implement this treaty by claiming that this treaty is in conflict with its domestic law, should amend provisions in its obstructive domestic law (Pistone, 2002: 71). Also domestic law should be interpreted in accordance with treaty provisions.

The CJUE's case law on this issue is important. There are some decisions in which the Court examines this issue and makes implications. For instance in Avoir Fiscal case, the CJEU highlighted that EU law had a supremacy, thus bilateral tax treaty provisions could not be in conflict with EU law (Brown & O'Brien, 2006: 22). So this kind of treaties should be evaluated as inapplicable. The same statement is given in Saint Gobain case.[101] In this case, the Court stated that tax treaties should be applied and interpreted so as to be consistent with EU law (Helminen, 2011: 25). Also afore-mentioned case law which is about the balanced allocation of tax jurisdiction (in **III.**5) can be seen as instances of the Courts case law on bilateral tax treaties between member states. Another case can be Schumacker. In this case, the Court accepted that a tax treaty between two member states may affect negatively to fundamental freedoms of another member states' individuals (Kofler, 2005: 60).

As it can be seen, the tax treaties between member states can be accepted as sources for non-discrimination principle, when they meet the conditions which are established by EU law and also reinforced by the CJEU. With certain justifications, i.e. to provide the balanced allocation of taxing rights and to eliminate double taxation, tax treaties become consistent with EU law and then, they are considered to be applicable sources.

[101] **Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt [1999], Case C-307/97,** ECLI:EU:C:1999:438.

IV- TAX DISCRIMINATION IN THE OECD MODEL TAX CONVENTION

As it is expressed before, tax discrimination is tried to be eliminated in international fiscal area mainly with three different levels. One of them is afore-mentioned international treaties level. In this level, bilateral and multilateral treaties are used as tools to prevent tax discrimination between states. These treaties which include a non-discrimination provision in regards to taxes can be treaties on commerce or trade as well as tax treaties. In other words, treaties involving the prohibition of tax discrimination are not always tax treaties; there are other types of international treaties which basically aim to prevent tax discrimination.

International bilateral and multilateral treaties may include a non-discrimination rule for tax purposes. This prohibition is of great importance in particularly to carry out the international commerce and to eliminate trade barriers. So it is understandable that these provisions are included in commercial agreements. This point can be understood properly when the history of principle of non-discriminaton in tax matters in internatioanl treaties is understood. However in today's world, non-discrimination provisions on taxation generally take place in bilateral tax treaties. Main reasons behind it are the changing world conditions and efforts of international organizations such as the OECD or the UN on this issue. So first, it is noteworthy to reveal the historical process of bilateral tax treaties in order to understand today's tax treaties and also the process of the OECD Model Convention and the draft non-discrimination provision which is often used in these treaties.

At this point it should also be added that tax treaties which include a prohibition of tax discrimination may be in the form of DTAA's or other types of tax treaties such as income tax treaties. Also the OECD Model Convention is on income and capital; it can be observed from the name of it. This model may be used in DTAA's as well as income tax treaties, so the non-discrimination rule in this Model affects each type of tax treaties.

IV.1- The History of The OECD Model Tax Convention

It is observed that throughout history, different and even heavier rules have been applied foreigners as well as foreign products in contrast with nationals and domestic products with the aim of protecting or supporting the domestic economy. Especially in the pre-globalization period, this kind of different/heavier treatments have been seen on taxation grounds. Although such practices that have emerged as discriminatory practices in the past are more or less continuing today, particularly after the development of international mobility, states have begun to understand that these practices were harmful treatments for international fiscal relations and trade (Bammens, 2012: 33). States have realized that some measures should be taken in order to eliminate discrimination, since these different treatments and heavier burdens affected their own nationals or products in the international area. Thus, non-discrimination idea in tax manners was raised.

It is worth noting that, first steps against tax discrimination existed as unilateral measures. Because in order to be able to take joint measures by more than one state on the international scene, more states had to be aware of the issue of discrimination. So the states have taken measures on their own initiative. They have often accomplished this by providing privileges to the foreigners beyond protection. Since the non-discrimination idea in regards to international taxation was born with concerns on trade, measures taken by states were generally based on this concern and aimed to end the obstacles and to boost trade. In this context, the very actions on tax discrimination were formed as priviliges such as the freedom to trade on markets and granted to foreign merchants (Bammens, 2012: 33). Although these privileges were far from being tax discrimination prohibitions, they can be seen as the first stages that prepared the rule of non-discrimination in the present sense. The same treatment with nationals was not the main focus of this kind of measures, but protection of foreigners or foreign products from heavier taxes can be seen as a common aim with the present application.

The very first idea on stimulating trade and this first stage to protect foreigners gradually evolved into the actions based on the treatment of strangers in the same way as citizens. In this context, the most important development that has brought this application closer to today's practice was that the prohibition of tax discrimination has been taken place in the in the treaties to prevent double taxation from the late 19th Century (Bammens, 2012: 34).

Especially after the World War I, the need to generate more revenue and the volume of international trade have increased for states with the effect of the end of the war. This situation has led an increasing particularly in direct taxation area and also has raised the double taxation problem (Bammens, 2012: 36). In order to fight with this problem, the number of bilateral tax treaties on double taxation has been increasing, so in parallel with this, the non-discrimination provision has become widespread. These provisions were constituted based on nationality concerns. In other words, heavier burdens on foreigners which were brought based on the foreign nationality were prohibited.

Also friendship, commerce and navigation treaties were other types of treaties which involved non-discrimination provisions with taxation concerns at about the same time. These treaties can be considered as a continuation of the purpose of developing trade and removing obstacles to it. In order to achieve these, the equal treatment was included in such treaties. It is worth noting that these concerns of equal treatment were included in provisions such as NT or MFN's, at that time.

All of these measures were based on the dual efforts of the states. However in time, it became clear that these efforts were not enough. Nationality based tax discrimination was a problem which had its effects on worldwide. The importance and necessity of eliminating barriers to international trade increased day by day. This situation has led international organizations to work on the prohibition of tax discrimination issue. In this context, the first action has been taken by the League of Nations with establishing the Fiscal Committee. In fact, the work of the Fiscal Committee was on the prevention of double taxation apart from discrimination. For eliminating double taxation purpose, the first model treaty was primarily created in 1928 (Canyaş, 2016: 64). The main ideas behind preparing this kind of model were to relive states from the troublesome process of making bilateral treaties and to create a model for states as a basis to their bilateral treaties.

After the model treaty of 1928, two draft model treaties were prepared. But it is noteworthy that these draft treaties which were the Mexico Draft of 1943 and the London Draft of 1946 also included a prohibition on tax discrimination (Bammens, 2012: 39). By this way, the principle of non-discrimination in tax matters has taken place in model treaties level and has become a provision which could be used and applied by all states in their tax treaties.

The development of the prohibition of tax discrimination on grounds of nationality in model tax treaties began in this manner. After this first step which was expressed as the two draft models, another term has begun. In this period, the UN have come to replace the League of Nations. However while the UN could not cover a distance, the Organisation for European Economic Cooperation (OEEC) continued to carry out the work on nationality based tax discrimination. It is worth adding that reasons such as the gaps in the previous two models, the economic growth of Europe and increasing importance of eliminating double taxation has required a new model (Canyaş, 2016: 65). So OEEC bended over this issue.

After the OEEC became the OECD, another stage for the development of the tax discrimination prohibition in model treaties has begun. Tax discrimination issue introduced in the agenda of Fiscal Committee of the OECD in 1956 (Brown & Mintz, 2010: 581). Then the OECD has prepared its first model tax convention in 1963. This model convention involved Article 24 which was the prohibition of tax discrimination, especially on grounds of nationality. Thus this model was the prototype of today's model convention of the OECD, although various revisions or amendments have been made on this article with renovated model conventions. Also a similar provision on tax discrimination was found in Article 10 of the 1982 Estates, Inheritances and Gifts Model Convention of OECD (Brandstetter, 2010: 134). This shows that the aim of eliminating tax discrimination was on the agenda of tax treaties as well as other types of treaties at the same time.

At this point, it is noteworthy that the 1963 Model was a product of a quite strong cooperation as well as following models; because works of the Fiscal Committee of the OECD were based on tax systems of almost all states and it has been prepared for almost all states of the world (Bayar, 2006: 55). This efforts were also important in establishing a standard on the international scene and ensuring that these standards were adopted by more states (Işık, 2014: 46).

The OECD Model Convention was renewed in 1977, 1992, 1994, 1995, 2000, 2002, 2005, 2009, 2010 and 2014, however Article 24 remained to be the single non-discrimination article (Canyaş, 2016: 64). It should be highlighted that Article 24 has not changed widely; the most important changes can be seen as additions to the Article such as the 1977 addition of the deductibility provision and the 1992 addition of the term of "residence" to the first paragraph (Bammens, 2012: 56). This development and renewal process suggests that the OECD is constantly striving to align itself with the world agenda and in particular with tax treaties between states. So it is noteworthy that another update on Model Convention is planned for 2017 and “Draft Contents of the 2017 Update to the OECD Model Tax Convention” was prepared by Working Party 1 of the OECD Committee on Fiscal Affairs. This update is essentially a part of measures relating with the Base Erosion and Profit Shifting (BEPS) but this planned change was not realized in 2017. So it should be added that this draft did not include revisions for article 24 of the OECD Model. The only proposed amendment to Article 24 relates to the paragraph 71 of the Commentary of this article. Thus today, article 24 of the OECD Model Convention With Respect to Taxes On Income and On Capital of 2014 is still in force.

IV.2- General Overview of The Non-Discrimination Clause in the OECD Model Tax Convention

The OECD Model Convention includes aforementioned Article 24. This Article is named as “Non-Discrimination” and takes place in the Chapter VI which includes special provisions. Article 24 can be seen as a “*heterogenous compilation of prohibitions of various forms of discrimination*” (Kostic, 2014: 137). Before examining its six paragraphs which hold different non-discrimination practices, it is necessary to look at the Article in general terms.

The aim of this provision is to prevent states from discriminating against foreigners. In other words, it is undesirable that one of the contracting states treats foreigners who can be seen as the same as nationals, different from nationals. As mentioned before, the general trend of the OECD model is towards developed states. Therefore, the non-discrimination provision is generally designed in accordance with the fact that the source state’s taxation authority should not be used discriminatorily (Brown & Mintz, 2010: 593). However since the text does not obviously reflect this purpose, it can be said that with this provision, it is generally prohibited that one of the contracting states should not discriminate against the nationals of the other contracting state.

Although Article 24 prohibits the discrimination on grounds of nationality as a whole, this prohibition includes different treatments for different matters in different paragraphs. Thus in general, this provision is violated when the different treatment is based on "foreignness" (Rust, 2010: 631). So to sketch the body of the Article, it can be said that different treatments generally prohibited, along with other conditions, when they target foreign nationals, PE's of foreign residents, domestic enterprises owned or controlled by foreign nationals and payments such as interest or royalties made to foreign residents (Warren, 2000: 150).

It is worth noting that the first five paragraphs of the Article include the "personal scope" which means the subjects of the different treatment and the sixth paragraph constitutes the "substantially scope" which draws the extent of "taxation" term (Brandstetter, 2010: 134). These paragraphs constitute a general set of prohibited discriminatory treatments with determining the subject of the treatment and the relation between this treatment and taxation. Also these paragraphs do not cover all of the discriminatory practices, it deals with only certain specific issues which were observed frequently in international area (OECD, 2007: 4). In addition, none of these paragraphs can be considered as a *lex specialist* norm (Bammens, 2012: 58). Thus all of them exist in the same level and one of them cannot be superior to the others.

If paragraphs are examined in short, it can be said that the first paragraph is concerned with "other or more burdensome" treatment to non-nationals which are in the same circumstances with the nationals. Article 24(2) extends this protection for stateless persons who are residents of one of the contracting state. Article 24(3) states that a contracting state should not treat "less favourbly" to PE's of enterprises of the other contracting state in regards to taxation. Article 24(4) prohibits the denial of deductions of disbursements such as interest or royalty payments to enterprises of other contracting state on condition that such deductions are allowed for nationals. Article 24(5) deals with the prohibition of "other or more burdensome" treatment of resident enterprises which are owned or controlled by residents of the other contracting state.

It can be said that the first paragraph includes the main and general rule. This prohibits different or more burdensome treatment between similar circumstances based on nationality. But this paragraph only concerns with natural or legal persons. Therefore Article 24(3) is brought to prevent discrimination which targets PE's that have no personality in legal terms. Also Articles 23(4) and 24(5) is different from this general rule; since in here discrimination does not target directly foreign taxpayers. Residents are subject to discrimination based on their relationship with foreigners. So these situations are involved seperately as additional paragraphs.

Finally the sixth paragraph states that all of these paragraphs should applied to taxes of every kind and description. So the last paragraph does not determine a prohibited treatment or the subject of this treatment, it only constitutes the scope of the application of the provision. In other words, it tells us what the term "taxation" includes in regards to the Model.

In addition it is noteworthy that the scope of the non-discrimination rule is extended by the OECD. In the first paragraph of Article 24, nationality based tax discrimination is prohibited on behalf of natural and legal persons. Then stateless persons which are residents of one of the contracting states are added to the scope with Article (2). Due to these two paragraphs do not involve PE's which do not have legal personality, a non-discrimination rule for PE's is brought with Article 24(3). Actually in here, the discriminatory practice targets to the legal person which is resident of the other contracting state; because the tax should be paid by this legal person. But due to the wording of the paragraph includes the PE, the abovemention implication can be made. Then the OECD goes forward and adds some internal discrimination practices to the scope. With Articles 24(4) and 24(5), discrimination against residents are prohibited. Although the reason of discrimination is residents' relationship with residents of the other contracting state, it is aimed to prevent the discrimination for residents. So with these articles, some discriminatory practices for residents are also added to the scope. These additional paragraphs can be regarded as prohibitions for the most frequent discriminatory practices in international area.

As it is mentioned above, tax discrimination can be observed when the domestic and foreign taxpayers have the same conditions; this comparability is the main component to apply the non-discrimination provision. This component is handled by paragraphs of Article 24 with different wordings. In first and second paragraphs, it is stated as "in the same circumstances", while third paragraph uses the term "carrying on the same activities". Comparability component can be observed in paragraph five in the form of "similar enterprises" phrase. All of these wordings mention "comparability" for different subjects. Non-discrimination rules are constructed by this way.

This should also be highlighted that the Article is designed in accordance with the capital import neutrality in regards to paragraphs 3, 4 and 5. This means that it is tried to be ensured that one of the contracting states should treat similarly to national and non-national investors (Ault & Sasseville, 2010: 102). So this can be understood with the main concern of this Model. As it is mentioned before, this Model was prepared based on developed states. These states are known with “capital exporters” because of their development level. So nationals of these states generally invest to less developed states. These less developed or in other words, developing states might treat these investors or investments in an “other or more burdensome” way in contrast with their nationals. So with these non-discrimination provisions, this undesirable possibility is ensured to be eliminated.

Another point is that Article 24 should not be considered as a MFN clause. Third parties which are nationals of a third state apart from contracting states cannot be claim to benefit from Article 24 of a bilateral tax treaty (Işık, 2014: 410). The main reason behind is the principle of reciprocity which ensures the favourable treatment for contracting states; the use of this favourable treatment by a third party violates the principle of reciprocity (OECD, 2007: 4-5). The Commentary also highlights that this Article cannot be considered as a MFN clause because of the principle of reciprocity. This principle makes bilateral treaties a product of the specific relationship between contracting states; so provisions of such a treaty should not be interpreted as general protections (OECD, 2015: C(24)-1).

At this point, it is noteworthy that this provision and particularly these paragraphs can only be considered as an ideal non-discrimination prohibition. However the ideal form can be changed state to state in accordance with their international and fiscal policies or based on the relation between contracting states. So Article 24 is subject to change to the extent of the negotiations between states. At the end of the day, the Model Convention is a recommendation for a desirable bilateral tax treaty as a whole, although in the Council decision of 1992 with a reference to Article 5(b) of the Convention of 1960, it is required that member states adhere to the Model Convention when they signing bilateral treaties (Yaltı Soydan, 1995: 42). Notwithstanding that, this Article can be subject to reciprocity.

Alongside with the text of the Model Convention, the Commentary of it is of great importance in understanding the means and the extent of the non-discrimination article. The Commentary is a part of the Model Convention and includes explanations of the Model as a whole. These comments are designed by experts appointed by the member states to the Committee on Financial Affairs to ensure establishing a common understanding and application. Although the Commentary does not included in the text of the Model Convention, it is accepted as a source in international tax law in regards to bilateral tax treaties which are disgned based on the OECD Model Convention (Bayar, 2006: 55).

The OECD conducts its activities through decisions, recommendations and international agreements; so the Commentary can be considered as a reccommendation and it is not binding for member states (Canyaş, 2016: 169). This means that although states can use the Commentary as a source when applying a bilateral tax treaty which is prepared based on the OECD Model Convention, this Commentary does not considered as a binding source for contracting states.

IV.3- Article 24, Paragraph 1: The Definition

In the broadest sense, Article 24(1) prohibits discrimination based on nationality. Before the examination of this paragraph, the text of it should be given:

> *"1. Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States.*" (OECD, 2015: m-56).

As it can be seen, there is a general prohibition on tax discrimination in this paragraph due to foreignness. This paragraph should be thought with a historical perspective for deep understanding. It is worth indicating that this paragraph derives from the very first equal treatment articles of commerce treaties of which date back 16th century (Van Raad, 2007: 56). As explained, at that time, nationality based discrimination was an usual treatment to foreigners; but the damages of these practices, especially the damage on the trade, began to be understood, the non-discrimination has been accepted as a rule in commercial treaties. So it should be highlighted that this paragraph reflects the traditional language of commerce treaties (Oliveira, 2016: 384). Thus Article 24(1) can be considered as an up to date adaptation of this historical rule.

This paragragh provides three main conditions which make a treatment discriminatory. They are

- an “other or more burdensome treatment” (in regards to taxation or connected requirements) by one contracting state

- application to a taxpayer which has the same circumstances as the contracting state’s nationals

- nationality as a distinctive factor

When thinking all of these conditions together, it is clear that this paragraph prohibits the nationality based tax discrimination which can be classified as a direct discrimination. Besides this, a contracting state’s nationals should not be treated less favourably in comparison to other contracting state’s nationals which are in the same circumstances, when reciprocity is provided. In other words, with this Article, one contracting state’s harsh tax treatment which is applied to other contracting state’s nationals who have same circumstances with the first contracting state’s nationals is prohibited. Regarding this, the treaty intentionally uses a negative wording.

IV.3.1- Nationality Based Tax Discrimination

The first condition which should be met in order to determine a nationality based discrimination is the basis of the allegedly discriminating taxation. As it can be seen from the paragraph, nationality is the main element in here; because the discriminatory characteristic of a treatment depends on the less favourable taxation originated solely from foreign nationality (Yaltı Soydan, 1995: 277-278). In other words, if a taxpayer is treated different or heavily than nationals of the state which uses its power to tax, based on another criteria which is different from nationality, the non-discrimination rule is not violated. Also if the foreign taxpayer is not in the same circumstances with the nationals, nationality based “other or mor e burdensome” treatment does not constitute a discriminatory practice.

According to the Commentary, the paragraphs of this Article should be read within the context of other articles of the Model Convention (OECD, 2015: C (24)-2). Therefore, in order to determine the meaning of the term nationality, relevant articles of the model must be considered. Nationality is decribed in Article 3 of the OECD Model. According to Article 3(1)(g);

> "*The term 'national', in relation with a contracting state, means*
>
> - *any individual possesing the nationality or citizenship of that contracting state and,*
>
> - *any legal person, partnership or association deriving its status as such from the laws in force in that contracting state*."

This definition should be considered when nationality is the issue. This article identifies nationality but leaves the door open for the domestic laws of the contracting states (Oliveira, 2016: 384). Also it is worth noting that the first paragragh should be applied both to individuals and to legal persons (Rasmussen, 2011: 100). Because pursuant to Article 3, the term "national" meets both of them. So all legal persons, partnerships and associations who have their status based on the domestic law of a contracting state should be considered as nationals of this state. In general, nationality of such legal persons are defined based on the place of corporation, management or control in domestic laws (Oliviera, 2016: 384).

Also Article 3 refers to nationality provisions of contracting states' domestic laws. So when determining whether the treatment results in the nationality based discrimination, the term nationality should be identified primarily based on the legislation of allegedly discriminating state (Bammens, 2012: 67). Also it is stated in the Commentary that the nationality based non-discrimination does not protect solely nationals of a contracting state which reside in the other contracting state; besides this, all nationals are able to benefit from this protection even though they are not residents of the other contracting state or both of the contracting states (OECD, 2015: C(24)-2-3).

Another issue is the dual nationality. Both Articles 3 and 24(1) do not refer this term in regards to non-discrimination. Dual nationality means that a natural or a legal person has the nationality of both contracting states. But from the perspective of logical thinking, this is not a problematic issue, since nationality based discrimination is not possible for such natural or legal persons (Oliviera, 2016: 384-385). In this situation, even if a contracting state has a discriminatory provision with the nationality basis in the domestic law, this state cannot apply this provision to the person with dual nationality which is a national of this state at the same time.

At this point, it is noteworthy that the term “in particular with respect to residence” is of great importance. Because most states in the world do not use nationality as a determinant of tax liability; tax residence is generally considered as a criteria in order to establish a tax liability system (Kostic, 2014: 138). So it can be said that nationality is used as a main basis for prohibition with the effect of the historical perspective but the term “residence” is needed to be highlighted in order to catch the *zeitgeist*. Therefore, this term was added to Article 24 with the 1992 Amendment. This term is not the substitution of nationality; so it is not the main criteria which solely makes a treatment discriminatory. It means that as a rule, indirect discrimination is excluded from the extent of the prohibition of this paragraph. This situation is stated in the Commentary of this Article with highlighting that all states are at freedom to determine the tax liability based on legitimate distinctions. Then it is explained that the non-discrimination provision only aims to balance “*the need to take account of these legitimate distinctions*” with “*the need to prevent unjustified discrimination*”; therefore, “*the article should not be unduly extended to cover so-called ‘indirect’ discrimination*” (OECD, 2015: C(24)-1).

While this is the case for the individuals, fiscal residence has a great importance for legal persons, partnerships and associations; because in general, fiscal residence is a determinant for legal persons’ tax liability rather than nationality in domestic laws (Kostic, 2014: 138). Thus this term has greater importance for companies in national tax systems. Many states attach full tax liability when the incorporation is the issue; then, these states seem to have chance to extend benefits attached to such full tax liability to foreign companies with using requirements of such non-discrimination provision (Bammens, 2012: 64). Sof rom this point of view, it should be said that residence refers to a concept the same as nationality for natural persons. So it is possible to say that residence as a criterion can result in a nationality based discrimination for legal persons.

IV.3.2- The Term “Being In The Same Circumstances”

In the wording of the Article, the term “in the same circumstances” constitutes the second condition. Based on this, foreign nationals which sould not be treated less favourably than nationals of the taxing state need to have the same status as those nationals (Van Raad, 2007: 56). Thus, being "in the same circumstances" is important for foreigners while an allegation about tax discrimination is issue.

This condition requires a comparison between nationals and non-nationals. Because when determining whether there is a discrimination or not, foreigners and nationals should be in the same circumatances except their nationality. In other words, the only difference between foreigners and nationals should be nationality in order to apply Article 24(1). Thus, the circumstances should be comparable which does not mean purely similarity but rather, substantially similar in regards to the law and the fact (Santiago, 2009: 255).

The required substantially similarity is expressed in the Commentary. Beyond this, the Commentary does not shed light to the meaning and the extent of the term being in the same circumstances (O'Brien, 1978: 554). So with this statement, it can be said that the phrase "same circumstances" adresses to taxpayers (individuals, legal persons, partnerships etc) who have the same status based on both legal and factual level, in terms of application of the tax laws. In other words, substantial similarity requires situations in which all the facts are identical except the difference which is being tested (Goldberg & Glicklich, 1998: 86). In this comparison, factors which are not relevant with the tax measure are excluded (Bammens, 2012: 84).

The term "substantially same" also takes place in national court decisions. For instance in Com. v. United Dominions Trust case[102], the Tax Court of New Zealand states that Article 24(1) does not refer roughly similar circumstances, it includes only sunstantially identical circumstances except nationality (Rust, 2010: 631).

At this point, it should also be noted that to evaluate said substantially same circumstances, a comparison which is similar with the CJEU's comparability test is made. This comparison can be described as a strict test; only when everything is the same between taxpayers and their circumstances except nationality (or sometimes residence), discrimination by reason of nationality can be observed (Dziurdź & Marchgraber, 2015: 9-10). In this comparison, the national of the other contracting state which is allegedly discriminated, is the subject of comparison, while the object of comparison is the situation

[102] See Wellington Court of Appeal, Commissioner of Inland Revenue v. United Dominions Trust Ltd. 1NZTC 61,026 (16 July 1973).

or category which is used as a benchmark in determining the discrimination claim (Bammens, 2012: 10).

This paragraph includes a question mark about the comparability. Who will be considered when evaluating the comparability, the person which is exposed to a discriminatory treatment or the class of this person? According to the OECD's Public Discussion Draft of 2007, this comparison "*should be at the level of the individual taxpayer and not at the level of the class of taxpayers to whom the taxpayer belongs*." (OECD, 2007: 10). So the OECD's intention is that the 24(1) is applicable only individual cases; it does not seem possible to benefit from this protection collectively. This statement is important but does not answer the above-mentioned question totally.

Neither Article 24(1) itself nor the Commentary provides a guide for this comparison (Oliveria, 2016: 385). In other words, it is not obvious that which object will be compared with the discriminated non-national or non-resident. It can be a real national which is a resident of that contracting state at the same time or a hypothetical one. To clarify this issue, it should be said that a hypothetical comparison is logical (Bammens, 2012: 83). Because in discriminatory cases, there is no counter-defendant which can be compared with the discriminated foreigner. Also it should not be disregarded that if a real national to be chosen for comparison, there is a possibility that there can be no comparable taxpayer (Oliveira, 2016: 385). So the foreigner must be compared with a hypothetical national which is in the same circumstances with him/her in a factual manner.

At this point, it is worth noting that this comparison is made by the national courts of the allegedly discriminating state. The lack of an international dispute settlement body leads to a result that the decision on whether foreigners and nationals are in the same circumstances or not will be given by the national courts of the contracting state (Carmo, 2017: 947). There are cases to be given as examples to this situation.

For instance the New York Supreme Court for New York Country concluded that the comparison in determining tax discrimination should be made with a reasonable basis (Bammens, 2012: 85). Based on this, the Court did not consider "*ownership of the shares of stock of a foreign corporation*" as a factor which made situations not comparable.[103]

[103] Deutsche Lufthansa AG v. City of New York, 379 N.Y.S.2d 635 (1978).

As an instance to set forth national court's approaches to the comparison issue, the decision of the Court of Appeal of Arnhem-Leeuwarden (the Netherlands) which is given on 26 April 2016 is important. This case involved four Dutch sister companies who were held by a common Israeli parent company and these sister companies requested to form a fiscal unity for corporate income tax concerns but it was rejected. Because pursuant to the legislation, a fiscal unity could only be established by Dutch resident companies and all of them in the fiscal unity should be resident in the Netherlands. The Dutch subsidiaries claimed that this clause violated the non-discrimination provision of the tax treaty between the Netherlands and Israel which was prepared based on the OECD Model Convention.

When this case was brought to the Court, a comparison had to be made. So the Court revealed its understanding on "being in the same circumstances" condition. According to the Court, Dutch sister companies who were held by the common Israeli parent company must be compared with Dutch sister companies who were held by a common Dutch parent company. So these hypothetical Dutch sister companies could be able to form a fiscal unity because of their residence. Based on this comparison, the Dutch Court stated that in this case, the only reason of the rejection was that the shareholder of the claimant sister companies was an Israeli company. As a consequence, the domestic clause resulted in a dicriminatory practice.[104] So in here, the Court centered its approach to comparison issue and based on this, it was determined that the only differentiate factor was nationality.

As an another instance, Arzteversorgung and Landesarztekammer cases[105] can be given. In these cases French withholding tax was the issue. Based on the French legislation, the French tax authority applied withholding tax for dividends paid to a pension fund, while dividends paid to French pension funds were exempted from this tax. The French national Courts stated that this application was in breach of the non-discrimination clause in the France-Germany tax treaty. In here, the Court found German and French pension funds was in the same circumstances with respect to dividend received (Sullivan & Cromwell LLP, 2009: 1-2). Thus, the only difference was that these pension funds were established in different states; so this practice caused a nationality based discrimination.

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[104] Hof Arnhem-Leeuwarden 26 April 2016, nr. 15/00206, V-N 2016/27.13 See PWC-EU Tax News, May-June 2016, Issue: 2016/4 https://www.pwc.com/gx/en/tax/newsletters/eu-direct-tax-newsletters/assets/pdf-pwc-eudtg-newsletter-issue-2016-nr-004.pdf (Date Accessed: 22.11.2017).
[105] TA Paris, 24 June 2008, Arzteversorgung; TA Paris, 21 October 2008 Landesarztekammer, RJF 2009 n°379.

In addition to the comparison issue, there are some other points which should be explained in this heading. The first one of them is the reverse discrimination issue. The question of whether or not the reverse discrimination is included in this article can bear in mind while the Article is being read. As explained before, reverse discrimination is that one of the contracting state imposes heavier taxes to its own nationals in contrast with non-nationals. The Commentary answers this question in the negative way. According to the Commentary, this paragraph does not prohibit a contracting state to constitute a better tax treatment for non-nationals (OECD, 2015: C(24)-2). Article 24(1) is designed in a negative wording; so it cannot be interpreted as a prohibition for granting a better tax treatment or tax advantages to non-nationals by a contracting state (Işık, 2014: 412). Thus, the use of preferential tax regimes for foreigners will not be interpreted a violation of this paragraph (Bammens, 2012: 127). This issue can be considered in the taxation sovereignty of a state based on its legitimate public policies. In addition, reverse discrimination can be seen in an opposite perspective; this paragraph does not prohibit a contracting state from taxing its own nationals with a more comprehensive tax liability (OECD, 2015: C(24)-4). Also it should be said that the negative wording of the paragraph does not grant nationals of a contracting state a prohibition; they cannot be the subject of comparison. On the other side, their situations may be seen as a completely internal issue which is not concerned a tax treaty.

Another issue is concerned with special taxation privileges which are granted to public bodies or services of one contracting state. As a part of the national fiscal or economic policy, a contracting state can grant some privileges on taxation to its own public bodies or services. According to the Commentary, this kind of choices must not be taken into account when reading the first paragraph of the Article (OECD, 2015: C(24)-4). So this state cannot be forced to extend these privileges to similar foreign public bodies or services under Article 24(1). The same comment should be made about private institutions not for profit whose activities are performed for purpose of public benefit. If a contracting state grants privileges to this kind of private institutions, this state does not have to grant them foreign private institutions which are working the same as domestic ones, under the obligation of this paragraph (OECD, 2015: C(24)-4). The main idea behind this is that public bodies or services or private institutions not for profit of a contracting state cannot be in the same circumstances with public bodies or services or private institutions not for profit of the other contracting state.

A similar application is valid for the immunities. According to the Commentary, if a state grants immunities from taxation to its public bodies and services, Article 24(1) cannot be read as a necessity to extend these immunities to comparable foreign public bodies and services (OECD, 2015: C(24)-4). It can be said that these immunities and privileges which meet the requirements in the Model Convention can be considered as justifications for different treatments, even if the Model itself does not use and explain the term “justification”. In regards to immunities, the same interpretation with privileges can be made; this application derives from the fact that public bodies or services or private institutions not for profit of one contracting state and of the other contracting state cannot be in the same circumstances.

As a final remark, it is worth adding that this nationality based discrimination prohibition covers solely the non-national himself/herself (Bammens, 2012: 82). It means that discriminatory domestic taxation might be target other foreigners but it cannot be applied as long as these foreigners are not dealing with taxation in that state.

IV.3.3- Residence As A Relevant Factor

To evaluate Article 24(1) and the comparability issue, residence should also be considered. Because the paragraf contains the term “in particular with respect to residence” immediately afterwards the term “in the same circumstances”. So residence can be considered as a factor in determining whether “being in the same circumstances” condition is realized or not. In fact the meaning of the “being in the same circumstances” includes the residence factor itself. So it can be said that this paragraph tries to ensure that two natural or legal persons which are residents in the same contracting state do not treated differently based on their different nationalities.

With the effect of this term, if one non-national is not a resident in a contracting state, he/she is not in the same circumstances with the resident nationals of that state. Thus as mentioned before, the main reason behind adding residence term to this paragraph is the frequent use of this term in domestic laws in conrast with the nationality. The residence emphasis did not included in the OECD Model Convention of 1963; the Committee on Fiscal Affairs needed to add it in order to eliminate possible doubts on the term “being in the same circumstances” (OECD, 2015: C(24)-3).

As it is understood, this paragraph obviously centers that residence should be considered as a relevant factor when making an evaluation about whether a resident or a non-resident taxpayer has the same circumstances in accordance with the national taxpayer or not. Regarding this point, the main question when applying this paragraph is that there may be a tax discrimination, if two taxpayers who are resident of one state but have different nationalities is the issue.

This distinction understandable with considering that a state does not have to grant certain tax advantages based on a residence condition to non-residents. So with this instance, it can be understood that a non-resident may be treated differently from those who are residents of that state. It should be accepted that residents and non-residents are not in the same circumstances within the perspective of the OECD Model Convention (Kostic, 2014: 141).

Article 4 of the OECD Model defines the term “resident of a contracting state”. The first paragraph of this article is worded as follows:

> *“For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof”* (OECD, 2015: M-13).

Although the definition is obvious for individuals; in the case of companies, the distinction between being national or resident is often complicated. Many states apply a broad range of criteria to define the connecting factors between a state’s jurisdiction and a company. For instance incorporation or registration can be used as the criterion to specify the subject (Bammens, 2012: 107). As it mentioned before, incorporation or registration can be used as criteria in determining the nationality. But most states apply these criteria in determining the residence. So according to the Commentary, if this condition is interpreted in accordance with the aims of the Model, then the companies which are residents of different states cannot be accepted as they are in the same conditions (OECD, 2015: C(24)-6).

In a similar manner with the nationality, both Article itself and the Commentary do not shed light to the comparison in regards to residence. So the same path with the nationality issue should be follow. It means that, again, a hypothetical resident national should be considered to compare with the resident non-national in regard to discrimination claims.

There are various court decisions on the consideration of residence in the bilateral tax treaties manner. For instance in John M. McManus and The United States case[106], The US Court of Federal Claims decided on whether Mr. McManus was a resident or not. This determination was important for benefiting from the portection of the nationality based non-discrimination rule. In this case, Mr. McManus resided in Switzerland but was subject to the "domicile levy" for its property in Ireland and also to income taxation in the US in 2012. A gambling winning withholding was included in that income taxation in the US but he claimed a refund from the US tax authority for this part of income based on Articles 4 and 22 of the DTAA between the US and Ireland which was made based on the OECD Model Treaty. After the denial, he argued that pursuant to these articles, he should be considered as an Ireland resident due to the paid domicile levy and resident of Ireland was entitled to this refund.

The tax authority of the US applied to the Ireland's tax authority for information exchange and asked whether Mr. McManus was a resident of Ireland or not. According to the Ireland's tax authority, he was not a resident of Ireland, since this domicile levy did not mean a full tax liability and a comprehensive taxation. After this legal dispute brought to the Court, the US Court of Federal Claims decided in accordance with the answer of the Ireland's tax authority. In that decision, the Court states that this domicile levy was a wealth tax and did not make the taxpayer a resident. So he could not benefit from this treaty.

As a note it should be added that in this case, Mr. McManus also claimed that this denial constituted a discrimination. Since this claim was made before the court; he did not argue non-discrimination when he claimed a refund from the tax authority and argued it for the first time as an oral argument on the parties' cross-motions for summary judgement. So based on "the substantial variance doctrine", the Court rejected the non-discrimination argument without evaluated it.

At this point, it is worth adding that residence can refer to being a non-national. In these

[106] United States v. McManus, 734 F.3d 315 (4th Cir. 2013), https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2015cv0946-50-0 (Date Accessed: 11.11.2017).

situations, domestic tax clauses which use residence as a differentiating criterion constitute nationality based discrimination. For instance, French natioal Courts establish a case law in this manner. According to this case law, if residence refers not only to taxpayers' status as non-French residents but also to their "attachment to a state other than France", then residence may cause nationality based discrimination. In the Anglo/Swiss Land & Building Company Ltd. case[107], the French Court found the criterion of the corporate seat of companies as a discriminatory condition. Also in Stichting Unilever case[108], the French Court accepted that a withholding tax which applied to gains of non-French companies on the sale of a French real asset was a discriminatory application (Sullivan & Cromwell LLP, 2009: 2). So if this decision is interpreted, it can be said that in here, the national court considers an indirect discrimination within the context of Article 24(1).

As an opposite instance, United Dominions Trust Ltd. case shows where the nationality and residence overlap (Bammens, 2012: 94). In this case United Dominions Trust Ltd. was an UK company and held a certain amount of share of a New Zealand company. The New Zealand company paid interest to United Dominions Trust Ltd. and this payment was taxed highly by New Zealand at the rate applied for non-residents. United Dominions Trust Ltd. claimed that this application was incompatible with the non-discrimination clause of New Zealand and UK Tax Treaty which was based on the OECD Model Convention; because the residence criterion in here created the nationality criterion effect in fact. But Wellington Court of Appeal rejected this claim. According to the Court, residence criterion was important to divide taxing rights between contracting states and it constituted a basis of taxation for the source state. In the domestic clause, different rate was included in the taxing right of the source state. Thus residence could not be understand as the same with the nationality criterion. So the United Dominions Trust Ltd could not be considered as in the same circumstances with New Zealand resident corporations.[109] This decision can be regarded as it is in line with the Commentary which states that contracting parties are free in determining criteria for tax liability system and residence can be one of those criteria.

As a last instance, Transworld Garnet Co Ltd. case[110] can be given. The decision of the

[107] See Cass. 28 February 1989, The Anglo/Swiss Land & Building Company Ltd., RJF 4/89, n°524.
[108] See CAA Paris, 6 December 2007, Stichting Unilever, RJF 4/08, n°409.
[109] See Wellington Court of Appeal, Commissioner of Inland Revenue v. United Dominions Trust Ltd. 1NZTC 61,026 (16 July 1973).
[110] See Transworld Garnet Co Ltd v Director of Income Tax (International Taxation) : AAR No 843 of 2009, [2011-TII- 02-ARA-INTL].

Authority for Advance Rulings, New Delhi shows that residence is a criterion for being in the same circumstances and if this criterion is not met, then a non-resident cannot invoke Article 24(1). In this case, Transworld Garnet India was an Indian company and 74% of the shares of it was held by a Canadian company. This Canadian company transferred shares to an Indian partnership and made profits. These profits were subject to Indian income tax as a capital gain. But the Indian Income Tax Act provided for different methods when calculating tax burden for capital gains based on the residence. Pursuant to this, benefit of indexation for the cost of acquisition was granted to resident taxpayers, whereas non-residents are denied such benefit (PKF International Tax Alert, 2012: 17). The Canadian company claimed that this practice violated Article 24(1) which was the nationality discrimination clause of the Canada-India tax treaty. The Authority for Advance Rulings did not accept this claim and interpreted Article 24(1). According to the Authority for Advance Rulings, this clause only prohibited discrimination on gorunds of nationality between identical situations. In the decision, it was stated that the comparison which was made to determine whether situations were the same or not, could not include "*a resident and a national of a state and a national of another state. The state is not obliged to extend the same privileges which it accords to its own residents to one who is not*".[111] So in here, it was repeated by the Authority for Advance Rulings that residents and non-resident were not in the same circumstances.

IV.3.4- Other or More Burdensome Treatment

Another condition of Article 24(1) to determine a discriminatory practice is whether there is an "other (different) or burdensome" treatment. These two phrases, "other" and "more burdensome" are alternatives (Bammens, 2012: 124). It means that a treatment may be different from the treatment which is made to nationals or more burdensome or it may be both different and more burdensome.

It is noteworthy that this "other or more burdensome" treatment can be about taxation itself or connected requirements with taxation. In other words, not only taxation itself can be

[111] See Transworld Garnet Co Ltd v Director of Income Tax (International Taxation) : AAR No 843 of 2009, [2011-TII- 02-ARA-INTL]. http://aarrulings.in/it-rulings/uploads/pdf/1298533416_final-ruling-in-843-transworld-garnet-co.ltd..pdf (DateAccessed: 27.11.2017).

subject to tax discrimination but also connected requirements can cause a different or less favourable treatment. However it is worth noting that the phrase “other or more burdensome” does not require that the taxation must be equal for nationals and foreigners, but similar (Oliveira, 2016: 387).

Other treatment can be described as a treatment which occurs when applications such as not to permit a deduction for expenses or personal deductions are the issue (Yaltı Soydan, 1995: 278). Thus, with this other treatment, the state has a chance to increase the amount of tax assessment or to levy a different tax on foreign nationals. More burdensome means a higher tax rate for foreign nationals and less favourable taxation formalities such as returns, payment or prescribed times (Rasmussen, 2011: 101). Thus, the method of assessment, the basis of charge and also the rate should be the same between nationals and foreign nationals who are in the same circumstances, such as the formalities connected with the taxation should not be more onerous (Bammens, 2012: 126). As it can be seen, this provision takes both the substance and the form of taxation into the scope of the principle of non-discrimination.

The Commentary constitutes the same point by stating that both the method of assessment, the rates and the basis of charge must be the same for nationals and foreigners who are in the same circumstances and also the formalities which are related with taxation must not be more burdensome for foreigners (OECD, 2015: C(24)-5). In this sense, the term “taxation” includes the substance and the form together. Also the term “connected requirements” means the method of procedure such as returns, payments, exemptions, deductions as well as other formalities connected with this taxation. So these connected requirements can render the taxation as a discriminatory one even if the taxation itself is the same both foreigners and nationals.

In fact, the term “other treatment” derives from old commercial treatments (Bammens, 2012: 124). As mentioned before, in the past, foreigners were generally subject to different tax regimes than the nationals. The prohibition of other treatment was brought to ensure that the same rules were to be applied to both foreigners and nationals. However this prohibition on taxation was not sufficient to eliminate discrimination. There was still a risk for discrimination, because states were able to treat foreigners in a different way with using the same rules. These different treatments were through connected requirements; state could levy taxes in a more burdensome manner (Bammens, 2012: 124). This risk caused the inclusion of the phrases "more burdensome treatment" and "connected requirements" in the non-discrimination clause in order to provide an effective protection.

It should be noted that the prohibition of other or more burdensome treatment does not lead to a MFN obligation. In other words, a contracting state should not extend benefits which are granted to nationals of the other contracting state to nationals of third states in the name of the non-discrimination clause (Bammens, 2012: 133). This means that a foreigner cannot invoke the non-discrimination clause of a tax treaty between the two states of where he/she is not a national.

There might be some reasons which justify other or more burdensome treatments based on nationality. These justifications change the qualification of the treatment and this treatment does not constitute a discrimination anymore. As it is explained before, some of these justifications stated in the Commentary as immunities and privileges. More precisely the situations are taken place in the Model Convention as exceptions to the non-discrimination clause, so they can be regarded as unofficial justifications. Because the Model Convention does not include or refer any justifications. In addition, some administrative justifications, i.e. different methods of tax assessment to collect information about foreign taxpayers may exist (Oliviera, 2016: 387). In other words, they can be considered as justifications in order to provide a logical thinking. It should be highlighted that such justifications are difficult to determine, because both Article 24(1) and the Commentary do not draw a road map (Goldberg & Glicklich, 1992: 51). Because these are stated both in Model and the Commentary only exclusions, without using the term "justification" and also without an intent in this manner. It can be said that these exlusions can be considered as justifications only with a subjective hypothetical thought.

There are two national court decisions which show how the condition "other or more burdensome" is interpreted. For instance, in Mitsubishi Corporation India (P.) Ltd v. Dy. CIT case[112], the Delhi Bench of the Income-tax Appellate Tribunal decided that if there was a different tax treatment to a foreign enterprise, it is enough invoke the non-discrimination clause in the tax treaty (Aggarwal & Narula, 2016: 4-5).

[112] Mitsubishi Corporation India Pvt. Ltd v. DCIT (I.T.A. No.: 5042/Del/11), See https://indiankanoon.org/doc/119279959/ (Date Accessed: 21.11.2017).

At this point, a decision of the Spanish Supreme Court on Westlaw Aranzadi RJ case[113] can be given as another instance. In this case, the Spanis tax legislation involved a limitation period for the refund of withholding tax only on non-residents; and as a result of this, a US company faced a shorter deadline for the refund than a Spanish company (Garbarino, 2016: 518). On the claim that this practice is discriminatory, the Court stated that there was a more burdensome treatment for non-residents. The discrimination stemmed from this more burdensome treatment.

IV.3.5- The Disadvantage Criterion

The last criterion of a discriminatory treatment is that this treatment should create a disadvantagous situation for the foreigner. Although the text of Article 24(1) does not include this term, the logical thinking requires such an inference. Because the term "more burdensome" leads to an implication about the disadvantage condition. Also if a treatment which differentiates nationals and foreigners in regards to taxation does not cause an unfavourable situation, then discrimination does not questioned.

This disadvantage occurs when a different or more burdensome treatment is formed. Thus, a disadvantage test should be used to evaluate this situation and determine particularly the other or more burdensome treatment. It should be noted that, in order to implement the non-discrimination clause, there should be only a disadvantage for foreign nationals by means of nationality discrimination. If a foreign national is in a granted position in comparison with nationals, the prohibition of Article 24(1) cannot applied. In other words, this prohibition is not used when an advantage is provided for a foreigner. This article allows state to grant preferential tax treatment to certain non-nationals in order to attrack foreign investment (Bammens, 2012: 128). However, BAMMENS (2012) argues that different tax rates should not be applied between nationals and non-nationals, even though these rates (lower tax rates) are advantageous for foreigners. According to him, the Commentary itself does not prohibit states from granting advantageous treatments to foreigners in regards to reverse discrimination; but limits it with only connected requirements, since the reverse discrimination in taxation itself violates the equal treatment

[113] Spain, Tribunal Supremo, 2598/2010, 25 March 2010, Westlaw Aranzadi RJ, 2010, 2598, See. Garbarino, 2016: 519).

principle (Bammens, 2012: 23). This approach accords with the strategies of the fight with harmful tax competition and in particular with tax havens. Since tax havens use lower tax rates to attract foreigners, this kind of different treatments are tried to be eliminate. Therefore to allow these advantages which are only given to foreigners are incompatible with strategies on eliminating tax havens. So Article 24(1) should be read in this manner.

As a final remark, the same as the CJEU accepted, this disadvantage cannot be ended with claiming that the foreign taxpayer is granted an equivalent advantage in his/her home state (Bammens, 2012: 122). This kind of claims are irrelevant with the discrimination.

As it can be seen, causing a disadvantageous situation as a result is a condition in determining other or more burdensome treatment and at the end, the discriminatiory practice. For a better understanding, decisions of national courts has a great importance. For instance Swiss Supreme Court did not accept a domestic rule which involved a different treatment for foreigners, as a violation of treaty non-discrimination rules, since it did not lead to disadvantageous for foreigners. In these cases[114], a Swiss tax which was levied source of income earned by foreigner residents with no permanent residency permit (C permit), was in question, since this tax was not applied to Swiss nationals and C permit holders (Oberson & Hull, 2011: 253). So it was discussed whether this practice was in breach of non-discrimination rules of tax treaties or not. According to the Supreme Court, this form of taxation did not lead to discrimination, because foreign residents which did not have a C permit, did not encounter a heavier tax burden. As a result, these decisions show that the lack of a disadvantageous situation means that there is no other or more burdensome treatment which causes discrimination.

IV.4- Article 24, Paragraph 2: Stateless Persons

> **"***2. Stateless persons who are residents of a Contracting State shall not be subjected in either Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of the State concerned in the same circumstances, in particular with respect to residence, are or may be subjected."*(OECD, 2015: M-56).

[114] Supreme Court Judgements of 28 January 1970, ATF 96 1 45; 12 May 1965, ATF 91 1 81. See Oberson & Hull, 2011: 253.

This paragraph brings a prohibition about dicriminatory treatment which occurs when a stateless person is the subject. According to this paragraph, contracting state should not treat stateless persons different or more burdensome way based on nationality when taxing them.

The term “stateless person” does not defined in 24(2) but the Commentary gives a definition. According to this, the status of a stateless person should be determined based on Article 1(1) of the 1954 New York Convention Relating to the Status of Stateless Persons which is signed by several OECD member states. Pursuant to this article, “*a person who is not considered as a national by any state under the operation of its law*” is defined as a stateless person (UN General Assembly, 1954: 6). In parallel with Article 24(2), this Convention also includes in article 29 states that stateless persons must be accorded national treatment (OECD, 2015: C(24)-9). So persons who can be defined as stateless under article 1(1) of the 1954 New York Convention can invoke the non-discrimination clauses in tax treaties which are signed by his/her residence satete.

It should be added that based on the definition of stateless person, such persons can only be natural persons. Since nationality of legal persons is generally determined by considering their place of incorporation, the term stateless person does not suitable for them.

In order to protect stateless persons from discriminatory taxation, this paragraf uses residence criterion. Thus, if a stateless person resides in one contracting state, he/she should not be exposed to discriminatory taxation by both of the contracting states. However again, the provision can only be applied when the stateless but resident person is in the same circumtances with nationals (Yaltı Soydan, 1995: 277).

In order to eliminate discrimination of stateless persons, this paragrapgh prohibits other or more burdensome treatment in regards to taxation and connected requirements. So in here, the statless person should be compared with nationals of alleged discriminatory state and they should be in the same circumstances.

This article can not be expand in order to provide the MFN treatment to stateless persons; these people cannot request that an application of this provision for procuring themselves most advantageous treatments of both of the contracting states. In other words, a stateless person which does not reside in both two contracting states, he/she cannot benefit from the protection of the non-discrimination clause of the tax treaty between those two states.

IV.5- Article 24, Paragraph 3: The Permanent Establishment Clause

> *"3. The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents."* (OECD, 2015: M-56).

This paragraph prohibits a contracting state from subjecting a PE of an enterprise of another contracting state's resident to disadvantageous taxation which is different from its own enterprises. In order to apply this kind of non-discrimination clause, owners of PE's should "carry on the same activities" with national ones (Bennett, 2006: 443). Also it is worth adding that in here, "an enterprise of a contracting state" means that a full tax liable enterprise which derives its status based on the other contractins state's domestic laws. Thus this terms refers to the fiscal residence concept in this context, it can be said that it means a non-resident enterprise from the discriminating state's point of view.

In order to invoke this paragraph, these conditions should be met:

- a PE which is owned by a non-resident
- the non-resident owner which carries on the same activities with national enterprises
- a less favourably tax treatment

There is a guarantee in this paragraph which is provided from one contracting state for residents of the other contracting state and so, non-resident taxpayers are treated in the first state not less favourably than this state's own residets. Thus this paragraph deals with direct discrimination of non-residents and their business income with regard to the PE and this is the single paragraph which includes direct discrimination of non-residents (Van Raad, 2007: 57). According to the Commentary, with prefering residence as a criterion, the actual status of an enterprise is given importance (OECD, 2015: C(24)-10). On the other side, it is still the prohibition of direct discrimination, because in hre, the main focus is the less favourable taxation of resident PE's. So the prohibition is still target domestic situations. Foreign situations constitute only the reason of the contracting state to discriminate a resident PE.

As it can be seen, the type of discrimination which is tried to prevent in here does not based on nationality but also based on residence (the location of the PE). This clause affects one contracting state's residents who have PE's in other contracting state without any criterion depends on nationality. So, this clause is fundamentally different from the first paragraph inasmuch as it does not depend on nationality. It is applied irrespective of nationality to all residents who have PE's in another state (Bammens, 2012: 185). In other words it can be said that Article 24(1) protects nationals of one contracting state regardless of their residence from the other's less favourable treatment, while protection of Article 24(3) covers all tax residence of the concerned state (Uys, 2014: 18)

It is noteworthy that this derives from the nature of PE's. Because PE's do not have legal personalities, so they are not included in the protection of Article 24(1). Also their commercial characteristic leads to a residence based reading, since nationality is not generally used as a criterion in determining tax liability of PE's.

IV.5.1- The Term "Permanent Establishment"

In Article 24(3), the term "Permanent Establishment" is used for determining the scope and target of the portection of this paragraph. The wording of Article 1(1) of the OECD Model Convention does not include the term PE; it covers only nationals and residents and PE's fall out of the scope (Uys, 2014: 58). Because of the nature of PE's, Article 24(1) does not cover PE's and a separate paragraph is prefered. In parallel with this, the term PE is defined in a separate article, Article 5(1), in the Model.

Pursuant to Article 5(1), "*the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on*" (OECD, 2015: M-16). So this is the general rule (Brown, 2017: 32). Following this, Article 5(2) counts the content of this term. Based on this, a PE "*includes especially a place of management, a branch, an Office, a factory, a workshop and a mine, an oil or gas well, a quarry or any other place of extraction of natural resources*" (OECD, 2015: M-16).

Then the Article includes specific deeming rules in paragraph 3 through 7; by this way, certain activities is included in or excluded from the scope of the Article (Brown, 2017: 32). In Article 5(4) counts excluded activities, so these are not covered in the definition of the PE. This means that it these kind of activities cannot lead to invoke article 24(3).

IV.5.2- Less Favourable Treatment

In this paragraph, the term “less favourable treatment” is prefered. According to the Commentary, this term does not lead to a rule about the same taxation. In other words, a contracting state can tax non-resident persons differently as long as they are not harmed (OECD, 2015: C(24)-10). If the different treatment leads to less favourable taxation than residents, then discrimination occurs. So it can be said that this paragraph aims to protect PE’s (or limited tax liables) from discrimination but does not guarantee an equal treatment with residents, because equal treatment is left to contracting states’ discretion (Uys, 2014: 58). Also in this paragraph, “connected requirements” is not referred, thus less favourable treatment on connected requirements is not covered by protection of this paragraph.

With interpreting the paragraph, it can be said that these advantages which are granted to residents enterprises should be granted to PE’s of non-residents. These are also stated in the Commentary with the heading “assessment of tax” and different paragraphs. It means that the Commentary determined some points which should be applied similarly to both residents and non-residents in ragards to taxation and some of other points regard to assessment of the tax. So it can be said that less favourable treatment prohibition covers different points:

- First of all, taxation of capital gains is included in the scope of Article 23(4). According to the Commentary, the same rules should be applied to PE’s in regards to taxation of capital gains in regards to gains which are attributable to the PE (OECD, 2015: C(24)-13).

  Also PE’s should be given the right “*to deduct the trading expenses that are, in general, authorised by the taxation law to be deducted from taxable profits*” (OECD, 2015: C(24)-12). If such deductions are allowed for residents, non-residents should be treated similarly in order not to cause a discriminatory practice.

- The same facilities with regard to depreciation and reserves should be accorded to residents and non-residents (OECD, 2015: C(24)-12).

- Non-residents should be able to carry their losses backward or forward the same as residents and they should have the same prescribed times with residents (OECD, 2015: C(24)-13). However the loss which is to be carried should be the PE's own loss, not be the loss of the non-resident enterprise which owns the PE.

- A PE may receive dividends, interest or royalties such income, one contracting state may accept them as taxable profits. According to the Commentary, this state is able to apply a withholding tax to such income at the full rate (OECD, 2015: C(24)-21). But if this withholding tax is applied only such income which is paid to non-residents (in other words, such income which is paid to residents is not subject to withholding tax), then this is prohibited by Article 24(3).

- If the credit method is granted to foreign income received by residents, then for income of a PE which is included in the scope of paragraph 3, the credit method should be applicable (OECD, C(24)-21).

- If one state excludes certain categories of business income from the tax base for residents enterprises, this paragraph requires that these exceptions should be applied for non-resident's PE's (Rust, 2010: 632).

As it can be seen, these are issues which make a non-resident enterprise be able to invoke Article 24(3). At this point, within the context of these issues, a national court decision can be given as an instance. One of the issues which falls within the scope of 24(3) is the credit method and UBS AG v. Her Majesty's Revenue and Customs case[115] is concerned with it.

[115] UBS AG v. Her Majesty's Revenue and Customs (HMRC), 7 February 2006, [2006] EWHC 117 (Ch), Case No: CH2005/APP/0539. See http://www.bailii.org/cgi-

In this case, there was a Swiss Bank, UBS, with branches in UK and its London branch was not allowed to benefit from the credit method for dividends received by itself, while such credit was applicable to residents. So this branch claimed that this was a violation of the non-discrimination article of the UK-Switzerland Treaty. England and Whales High Court accepted that this constituted a discrimination; since this branch was in the same circumstances of a UK resident and also not allowing to benefit from tax credit created a less favourable treatment.

Another instance can be Daimler Chrysler India Private Limited v. DCIT case.[116] In this case, there was an Indian company and its 18.6 % of capital was held by an Indian company, while its 81.33 % of capital was held by Daimler Benz AG. After a merger between Daimler Benz and Chrysler, a new company, DaimlerChrysler AG was born as a Germany corporation. Following this, the shareholder of the Indian company was changed. Based on this merger, the Indian company incurred tax losses but the Indian tax authority did not allow carrying forward of these losses. The Indian company claimed that this was not incompatible with the Indian-Germany tax treaty in regards to non-discrimination principle. The Indian Court accepted this claim. Then the term "other similar enterprise" was evaluated. According to the Court, taxation of this Indian company should be compared with taxation of such an Indian company. Based on this comparison, the Court stated that the taxation of Indian company was in a disadvantageous situation. So this decision shows that how the comparison within the context of Article 24(3) is made by national courts.

In addition, the Commentary also sets forth some points which are not covered by Article 24(3). So these points are left out the scope of the term "less favoureble treatment. Therefore they do not violate the non-discrimination principle:

- The mode of taxation can be adopt to the specific conditions under which it is made by a contracting state (OECD, 2015: C(24)-10).

- As an implication of the first point, Article 24(3) "*does not prevent the application of specific mechanism that apply only for the purposes of*

bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2006/117.html &query=UBS&method=all (Date Accessed: 26.11.2017).

[116] Daimler Chrysler India Private Limited v. DCIT [2009-TIOL-68-ITAT-PUNE]. See http://itatonline.org/archives/daimlerchrysler-india-vs-dcit-itat-pune/ (Date Accessed: 26.11.2017).

determining the profits that are attributable to a PE” (OECD, 2015: C(24)-10). So one contracting state can constitute different rules and administrative applications in order to determine the profits that are attributable to a PE. If the use of such applications are suitable within the context of requirements in Article 7(2) of the OECD Model, then 24(3) is not violated. But it is noteworthy that it is not clear what such rules and administrative applications might be (O’Brien, 1978: 568).

- 24(3) does not mean that a state should apply the same rate to the income of a PE which is included in this paragraph with an enterprise of that State that is carried on by a resident company (OECD, 2015: C(24)-11-12).

- Article 7(2) requires that transfer pricing rules based on the arm’s lenght standart. So this application to PE’s for transfers to their foreign head offices does not violate Article 24(3), even if these rules are not applicable to residents (OECD, 2015: C(24)-14).

- Many states have special rules for taxation of dividends distributed between companies. Some of them include PE’s within the scope of these special rules to avoid double taxation. In contrast, some of them do not apply these special rules to PE’s, since preventing transfers of assets made by a company which resides in one contracting state to its PE in other contacting state in order to benefit from special rules. For latter states, not applying these special rules to PE’s does not constitute violation of Article 24(3) (OECD, 2015: C(24)-15). So the Model allows state to determine their special rules on taxation of dividens distributed between companies.

- This paragraph does not cover the distribution of dividends which is made by the non-resident enterprise to its PE in the other contracting state (OECD, 2015: C(24)-19). Because in here, dividends are not distributed by the PE itself and only activities of the PE is included in the paragraph. In here, the PE has a passive role.

- In parallel with Article 24(1), priviliges which are granted to resident non-profit institutions cannot be extended to non-resident non-profit institutions with claiming the non-discrimination principle in Article 24(3). Because the former work for the public benefits for its residence state but the latter does not (OECD, 2015: C(24)-15). Similar with this, some fields may not be open to non-residents such as national defence. So if some tax advantages which are granted to enterprises that work on these fields are not granted to non-residents who work on same fields of their residence state, this cannot be constituted a less favourable treatment in the meaning of Article 24(3).

To determine whether there is a less favourable treatment, a comparison should be made. Within this context, it is important to determine that the treatment is less favourable than "who". According to the Commentary, the comparison should be made with a hypothetic enterprise of the allegedly discriminating state which carries on the same activities and has the same legal structure (OECD, 2015: C(24)-11).

To understand this comparison, Mitsubishi Corporation India Pvt. Ltd v. DCIT case[117] can be given as an instance. In this case, Mitsubishi Corporation which was a Japannese corporation had a PE in India. This PE made payments to MCJ for purchase of goods and for this accounting year, it deducted these payments were deducted from the corporation tax but these deductions were rejected. Because pursuant to Indian legislation, payments only made to resident enterprises could allowed to be deducted. Then the non-resident enterprise claimed that this was incompatible with the non-discrimination rule for PE's of the Tax Treaty between Japannese and India. The Delhi Trubunal also decided that way. According the the Court, article 24(3) prohibited a contracting state from disallowing such deductions, if these were applicable to resident enterprises. So in here, the Court compared the PE with Indian enterprises. In other words, the Court found this domestic clause discriminatory, because if those payments were made to an Indian enterprise, they would be considered as deductible payments.

Another instance for illustrating the comparison issue can be a decision of the Supreme Administrative Court of Finland[118]. In these case, there were two different clauses in the Finnish legislation; one of them did not allow the transfer of the losses of a PE which was owned by a non-residet enterprise to the foreign head office, while it was allowed

[117] Mitsubishi Corporation India Pvt. Ltd v. DCIT [2014]. See KPMG Tax Highlights, 12 February 2015, https://home.kpmg.com/content/dam/kpmg/pdf/2015/02/KPMG-Tax-Highlights-2014.pdf (Date Accessed: 24.11.2017).

[118] Korkein Hallinto-oikeus (The Supreme Administrative Court of Finland) KHO:2013:169 (25 October 2013). See Garbarino, 2016: 527.

transferring losses to a resident head office. The other clause did not allow the transfer of the losses when a company's assets were transferred. In the light of these, the Finnish tax authority rejected the transfer of a US resident company's losses which were attributable to its Finnish resident PE to its newly established Finnish subsidiary. According to the Court, this rejection did not violate the PE non-discrimination rule of the Finnish-US tax treaty (Garbarino, 2016: 527). So the Court considered a Finnish resident who had also a subsidiary in Finland in the comparison, rather than a PE which was owned by a Finnish resident company. The difference in here was that a subsidiary had a seperate personality, while a PE did not. So there was no risk for decrease in tax revenue when a PE transfered its losses to its resident head office, but the risk occured based on the foreignness of the head office. The domestic legislation brought different rules for these two situations. But in the perspective of the second clause, there was a transfer of losses from a company to another legal person. So the domestic legislation aimed to limit this. This difference and also the characteristic of the case leaded to this result: based on this comparison, the Court concluded that there was no discrimination.

Canadian Sapeim UK case is also important to see how national courts make the comparison in order to determine whether there is a discrimination practice or not. In this case, Sapiem UK was a UK company and has a subsidiary, SEI in UK. Both Sapiem UK and SEI carried on business in Canada through their PE's. When SEI's PE was in a loss position, SEI was liquated into Sapiem UK through a group reorganization. Based on this, Sapiem deducted losses of SEI's PE from the assessment of income tax in Canada. Canadian tax authority denied this deduction because Sapiem UK was not a Canadian corporation. Pursuant to Canadian legislation, only resident corporations were considered as Canadian corporations. Sapiem UK argued that this clause was in breach of the non-discrimination clause of Canada-UK Tax Treaty.

The Canadian Federal Court of Appeal determined who should be the subject of comparison against Sapiem who was a non-national and a non resident company with a non-national and a non-resident subsidiary. According to the Court, Sapiem UK should be compared with a Canadian national who was not a resident and has a non-resident subsidiary (Bammens, 2012: 117). Also another point was that these two corporations should carry on the same activities (Stirling, 2011: 329). Then the Court applied this comparison to the case. Based on this, a –hypothetical- non-resident Canadian national carrying on the same activities with Sapiem UK and has a non-resident subsidiary could not deduct its liquidated subsidiary's losses. Because pursuant to the Canadian deductibility clause, only resident companies could deduct these kind of losses. At the end of this comparison, Sapiem UK and the hypothetical Canadian national were treated in the same way; thus there was no discrimination.[119] As it can be seen, the Court revealed the meaning of "being in the same circumstances" condition and how to make the comparison.

At this point, the approach of the Spanish Supreme Court is of great importance, because the Court takes another position in making the comparison for determining whether there is a violation of Article 24(3). In Solvay España case[120], there was a Spanish PE of a Belgian parent and this PE had also Spanish subsidiaries. The application for the consolidation regime between the PE and its subsidiaries was denied by the Spanish tax authority based on the legislation. Pursuant to the legislation, all entities of the group should residents of Spain. The parent claimed that this denial was in breach of the PE non-discrimination provision in the Spain-Belgium tax treaty. The Supreme Court did not accept this claim. According to the Court, the PE which was a Spanish PE with a Belgian parent and had subsidiaries in Spain should be compared with a Spanish PE in Belgium with subsidiaries in Belgium. Based on this comparison, the Court concluded that these two situations were being treated the same, then there was no discirmination (Farinha Aniceto da Silva, 2016: 162). So this case can be seen a different case from the others with including a different comparison.

IV.5.3- The Term "Carrying on the Same Activities"

With the term "carrying on the same activities", the aim of this clause is to protect PE's (or limited tax liable/non-resident enterprises) from discriminatory taxes which are levied on commercial or industrial activities and especially from taxes which are on the business income (Yaltı Soydan, 1995: 279). So according to the Commentary, this term refers to same sector activities and especially on business profits (OECD, 2015: C(24)-11).

[119] Saipem UK Limited v. The Queen, 2011 TCC 25 (decision rendered on January 14, 2011).
[120] Tribunal Supremo, Decision of 15 July 2002, Rec. no. 4517/1997, See. Farinha Aniceto da Silva, 2016: 162.

According to the Commentary, "*similarly regulated and unregulated activities would generally not constitute 'the same activities' for the purposes of paragraph 3*" (OECD, 2015: C(24)-12). Then it gives an instance for illustrating the issue. If activities of a PE is on borrowing and lending without a registration as a bank, this PE does not claimed that it is treated less favourably then resident banks (OECD, 2015: C(24)-12). The lack of "carrying on the same activities" condition, this PE cannot invoke Article 24(3).

It is worth highlighting that this clause should be understood that it is limited with the business profits, for instance income from immovable property etc cannot be considered as earnings and subject to non-discrimination clause. This prohibition has a restricted scope of application, it can only applied to the taxation of profits attributed to the PE (Bammens, 2012: 186).

The scope of this paragraph includes only profits. According to the Commentary

> "*the corporate and shareholder's taxes are outside the scope of paragraph 3 because paragraph 3 is restricted to the taxation of the profits from the activities of the permanent establishment itself and not to the taxation of the enterprise as a whole.* (…) *paragraph 3 deals with the realisation of profits and not with the decisions of the company and its shareholders after the realisation of profits concerning, for example, the distribution of these profits*" (OECD, 2007: 14).

This paragraph also provides for an exception in respect of personal deductions; if a tax is levied on the PE income by the source state, non-residents cannot claim personal deductions (Van Raad, 2007: 57). In other words, this clause allows source states to treat differently between residents' and non-residents' PE's in terms of personal allowances, reliefs and reductions is issue. One contracting state can only apply these kind of concessions to its own residents. The purpose behind this is to prevent a taxpayer from making use of one deduction in both of the contracting states. Since most states allow its own residents for personal deductions while this right is not given to non-residents, the OECD Model Convention confirms this practice with defining it as an exception for the non-discrimination rule (Van Raad, 2009: 4).

In addition, according to the Commentary, this paragraph covers only a PE's own activities; for instance, distribution of the profits of a resident enterprise does not fall into the scope of this paragraph, since it is not considered as business activities of a PE (OECD, 2015: C(24)-14).

IV.5.4- The Second Sentence of the Paragraph

The second sentence of this paragraph deals with one contracting state's individual residents who have PE's in another state and ensures that these individuals do not get more advantages than this state's own residents through entitlement to personal allowances etc. as a result of the principle of equal treatment (Rasmussen, 2011: 101). The Commentary also states that with this sentence, it is tried to be ensured that a PE in the scope of the first sentence does not "*obtain greater advantages than residents, through entitlement to personal allowances and relief for family responsibilities, both in the state of which it is resident and in the other state*" (OECD, 2015: C(24)-11). So it can be seen as a prohibition of reverse discrimination from an other perspective; since it prohibits contracting states treat their residents less favourably. But neither the Model itself nor the Commentary use this term obviously in this context.

In addition, according to the Commentary, contracting states are free to grant personal allowances and reliefs to PE's which are considered in the scope of this paragraph. The Commentary highlights that these allowances and reliefs are in the proportion which the amount of the PE's profits bears to the world income taxable in the other contracting state state (OECD, 2015: C(24)-11). Most states in the world, personal allowances and reliefs are used for comprehending ality to pay of taxpayers and they are generally granted to most full tax liables which are taxed based on their worldwide income (Ault & Sasseville, 2010: 107). Since it is the general application, limited tax liables which consist of no-residents are generally not granted. The main idea behind is to prevent double application of personal allowances and reliefs. Limited tax liables for one contracting (source) state is a full tax liable of the other contracting (residence) state. By excluding limited tax liables from the application of personal allowances and reliefs, the source state eliminates the risk of double deduction of them. The OECD Model Convention designed Article 24(3) with considering this application.

IV.6- Article 24, Paragraph 4: The Non-Deductibility Clause

> "*4. Except where the provisions of paragraph 1 of Article 9, paragraph 6 of Article 11, or paragraph 4 of Article 12, apply, interest, royalties and other*

disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State. Similarly, any debts of an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable capital of such enterprise, be deductible under the same conditions as if they had been contracted to a resident of the first-mentioned State." (OECD, 2015: M-56).

This paragraph can be named as "the non-deductibility clause" (Van Raad, 2007: 57). It obligates one contracting state to allow its own residents to deduct interest, royalties or other disbursements paid to a non-resident as though the payments to residents (Bennett, 2006: 452). The term "other disbursements" may include the executive and general administrative expenses, research and development expenses (Agarwal, 2016: 24). It is noteworthy that this paragpraph is more associated with the interest paid within the context of thin capitalization (Ferhatoğlu, 2006: 12).

IV.6.1- The Scope of the Paragraph

The discrimination type in here is that the rejection of deduction of interest, royalties or other disbursements which is paid to a non-resident by a resident enterprise, while such deduction is applicable for resident enterprises when these payments are made to residents. Thus it is noteworthy that in here, the discriminated person is a resident as a consequence the fact that the payment is made to a non-resident (Van Raad, 2007: 62). According to the Commentary, the only prohibition is not about the rejection; restrictions on the deductibility of these payments made to a non-resident are also undesirable (OECD, 2015: C(24)-24).

Pursuant to the second sentence of this paragraph, the same obligation should be extended to debts. Also the Commentary states that this non-deductibility clause covers "*capital taxation, as regards debts contracted to a non-resident*" (OECD, 2015: C(24)-24). Thus the debts which are taken by a resident enterprise from a non-resident should also considered as deductible, if such deduction is possible when this debt is taken by a resident.

According to BENNETT (2006), these two prohibitions constitute an indirect discrimination (Bennett, 2006: 452). Because in here, the discrimination which is tried to be prevented is based on the foreignness of the recipient or creditor. So rules which constitute discrimination create a deterrence effect for business relation with non-residents. This approach, for instance, is taken by Mexican Federal Court of Tax and Administrative Justice. This Court states that the violation of Article 24(4) creates an indirect discrimination in its decisions about non-deductibility issues. Pursuant to Mexican Income Tax Law, residents are not allowed to deduct their *pro rata* expenses when they paid to non-residents, while these expenses are deductible when they paid to residents. In a case[121], the Court evaluated this clause and stated that if Mexican tax authorities did not allow deduction of such expenses made to non-residents, then it constituted an indirect discrimination within the context of Article 25(4) which was the non-discrimination clause of Mexican tax treaties (Perez, 2012: 2-3). But neither the claims of BENNETT nor the Mexican Court correspond the meaning of the indirect discrimination. Because the term "indirect" does not refer to a treatment which does not affect the resident taxpayer, but a related non-resident based on the fact that being a non-resident. "Indirect" means that a criterion which is different from the nationality is used in order to get a result equivalent to nationality based discrimination. So this is again a direct discrimination which only involves non-residency of a reason.

According to the Commentary, although the non-deductibility clause brings these two (payments and debts) prohibitions, contracting states are able to change them in order to prevent the use of this paragraph with tax avoidance purposes by non-residents (OECD, 2015: C(24)-24). Also avoiding tax abuse can be another reason for changing the designation of the paragraph. Because anti-abuse rules are generally applied to transactions involving non-residents and this paragraph can constitute a great obstacle to the application of these anti-abuse rules (Ault & Sasseville, 2010: 117).

[121] The Federal Court of Tax and Administrative Justice, January 2011, Trial number: 13403/09-17-01-4/503/10-PL- 07-09. See Perez, 2012: 2.

IV.6.2- The Exclusion of Domestic Thin Capitalization Rules

This paragraph excludes the application of the provisions of Articles 9(1), 11(6) and 12(4) of the OECD Model. The Commentary states that this means that the application of domestic thin capitalization rules cannot violate Article 24(4) as long as they are compatible with Articles 9(1), 11(6) and 12(4) (OECD, 2015: C(24)-24). These articles are about ascertaining the profits within the context of the arm's lenght basis (Elliffe, 2013: 10) So this is the exception of the non-deductibility clause.

From the opposite perspective, if domestic thin capitalization rules are not compatible with these stated Articles, then the application of them constitutes a discriminatory practice when these rules are not applicable to debts from non-resident creditors. Thus it can be said that when interest, royalty and other disbursements which are not compatible with the arm's lenght standart is paid to a non-resident related enterpise by a resident enterpise, this payments falls out of the scope of this paragraph. All other payments of interest, royalty or other disbursements are deductible with purposes of the determining the taxable profits of residents, if this deduction option is open to payments to residents (Işık, 2014: 418-419).

The main reason behind this seperation is seeking a balance between the fiscal objective of taxation and fair taxation aims. As a fiscal objective, states take measures to protect their tax base. By this way, they can generate sufficient tax revenue. This tax base protection generally required a prevention of profit shifting in a cross-border context (Marres, 2016: 40). Thin capitalization rules can be considered related with tax base protection and therefore, allowed by the OECD Model as a fiscal measure. On the other side, fair taxation is the extra-fiscal objective of taxation and requires an equal treatment and non-discrimination principle in Article 24(4) is used as a tool to realize equal treatment. So thin capitalization rules are applied based on the arm's lenght standart in order to provide a fair taxation. Non-discrimination principle will be applied to thin capitalization rules as long as they diverge from the fair taxation line.

A similar approach can be seen in one decision of Mexican Federal Court of Tax and Administrative Justice.[122] In this decision, the Court stated the meaning of Article 25(4) which is the non-deductibility clause of the Mexico-US Tax Teaty with highlighting that

[122] The Federal Court of Tax and Administrative Justice, January 2011, Trial number: 13403/09-17-01-4/503/10-PL-07-09. See Perez, 2012: 3.

this clause can be seen as protection of indirect discrimination for non-residents; but the exception of this rule was brought to prevent undue benefits for related companies that form part of an economic group distorting tax revenues (Perez, 2012: 3).

At this point, it should be said that decisions of domestic national courts is of great importance in determining whether a domestic rule falls withtin the scope of Articles 9(1), 11(6) and 12(4) in regards to thin capitalization rules. As an instance, a Russian Supreme Court decision[123] can be given. In here, the Court found thin capitalization rules were discriminatory (Wijtvliet, 2013: 175). In this case, a Russian company taken on debts from Russian, Swiss and Luxembourg resident and affiliated companies and deducted interest paid to them from its taxable income. The Russian tax authority consdiered interests which were paid to non-resident companies within the contaxt of thin capitalization rules; since the Russian domestic law brought thin capitalization rules to Russian companies in case of their more than 20% share capital were held or controlled by a non-resident company. So these rules were not applied to Russian companies which were owned by other Russian companies. In other words, thin capitalization rules were only applied based on the condition of "holding or controlling by a non-resident".

The Supreme Court states that this practice diverged from the arm's lenght principle even if they were aimed to prevent tax abuse. So in here, the Court found this practice as a discriminatory one (Wijtvliet, 2013: 176).

Another instance can be CIT v Herbalife International India Pvt Ltd case.[124] In this involved an Indian Company, Herbalife India which made payments to its US fellow subsidiary for various services including data processing, accounting and marketing (Cinnamon, 2016: 16). India applied withholding tax to these payments but Herbalife India failed to pay. Following this, Herbalife India wanted to deduct these payments which were considered as "fees for professional or technical services" within the Indian legislation, but the Indian tax authority did not allow this deduction. Herbalife India claimed that this violated Article 26(3) which was the non-deductibility clause of the India-US tax treaty. Delhi High Court accepted this claim and also did an evaluation of the exception of this

[123] Supreme Commercial Court, 15 Nov. 2011, Severny Kuzbass case, no. 8654/11.
[124] CIT v Herbalife International India Pvt Ltd. ITA 7/2207, May 13 2016. See http://itatonline.org/archives/cit-vs-herbalife-international-india-pvt-ltd-delhi-high-court-s-40ai-the-law-in-s-40ai-that-failure-to-deduct-tds-on-payment-to-a-non-resident-will-result-in-a-disallowance-violates-the-non/ (Date Accessed: 26.11.2017).

clause. Pursuant to Article 26(3) of the India-Us Tax Treaty, "included services" was an exception and payments for such services were not included in Article 26(3). It means that the protection of this paragraph did not cover these payments. According to the Court, payments which were made by Herbalife India to its US subsidiary could not be considered as included services and therefore, the non-deductibility paragraph should apply to them.

Another case can be a decision of the Fiscal Court of Düsseldorf.[125] In this case, there was a German company which was wholly held by a US company (A) and A which was wholly held by another US company (C) obtained an unsecured loan from another US company (B) which was wholly held by C. Then A allocated this debt to the German company and tried to deduct the interest paid for that loan from the German company's income (Lüdicke & Baker, 2016: 363). The German tax authority did not allow this deduction based on German thin capitalization rules. Pursuant to these rules, this interest expenses should not be deducted, since they were exceeded the equity capital of the German company by 150%. Following this, the German company claimed that this was incompatible with the non-discrimination clause of the US-Germany tax treaty. The authority claimed that the German company could not benefit from this clause, because it was not a US taxpayer. The Court stated that the claim of the German company was acceptable. The Court compared the German company which was held by a US resident with a German tax residents carrying on the same activities (EY German Tax & Legal Quarterly, 2015: 7). Then it was stated that the German company should not be treated less favourable then German residents only because of its shareholders tax residence. Based on this comparison, the German company should be entitled to deduct such expenses.

As a final note, the Commentary highlights that this paragraph does not prohibit additional information requirements when a non-resident recipient or creditor is observed. Because this can be seen in the context of the aim "*to ensure similar levels of compliance and verification in the case of payments to residents and non-residents*" (OECD, 2015: C(24)-24).

[125] The Local Tax Court of Düsseldorf, 21 May 2015, (8 K 2541/12 G).

IV.7- Article 24, Parapraph 5: The Foreign Ownership and Control Clause

> "*5. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first mentioned State are or may be subjected"* (OECD, 2015: M-56).

This clause prohibits "other or more burdensome" treatment to a resident company who is wholly or partially owned or controlled by a non-resident company in accordance with a company who is wholly or partially owned or controlled by a resident company. According to the Commentary, this paragraph ensures that all resident companies are treated equally regardless of who own or control their capital (OECD, 2015: C(24)-24). In other words, the aim of this paragraph is to provide an equal treatment for resident companies wihtout considering owners or controllers of their capital. So with providing equal treatment, this paragraph aims to prohibit heavier taxes or connected requirements on foreign capital (Işık, 2014: 420).

It is noteworthy that for decades, such a prohibition has been a widely accepted feature of international economic treaties, and in today's world, it is broadly used for preventing "tax protectionism", according to the OECD's Thin Capitalization Report of 1987 (Bennett, 2006: 454).

The term "owned or controlled" is of great importance in determining the scope of the paragraph. Because this prohibition does only include resident enterprises which are characterized by the fact that their owner or controller is a non-resident. Foreign ownership means that a resident company is held by a non-resident. This ownership can be wholly/partially or directly/indirectly in the context of this paragraph. Foreign control is a different manner which means generally that a resident company is controlled wholly or partially, directly or indirectly by one or more foreign residents. This general definition can be changed based on the legislation of a contracting state. For instance in Turkish legislation, these companies are defined based on some criteria. Pursuant to Article 7(1) of Turkish Corporate Income Tax Law, if at least 50% of a resident company's capital, dividend or voting rights belongs directly or indirectly, seperately or jointly to a foreign company, then it is a controlled company by the foreign company.[126] These definitions are important, because the taxation of foreign controlled company (CFC) is substantially discussed in terms of tax avoidance nowadays. Thus the foreign ownership or control clause is of great importance. In recent years, both internationally and domestically measures are trying to be taken againts aggressive tax planning by multinationals and in order to constitute and strenghten CFC legislations (Schmidt, 2016: 87). OECD is one of the institutions which make an effort on this issues; for instance CFC rules is one of the focuses of BEPS measures. With these measures, it is aimed that the passive income which is gained from mobile income sources by abusing the partnership relations of companies in international level is ensured to be taxed (Balcı, 2007: 119). So CFC rules focus on preventing actions of CFC's towards to reduce the overall tax burden by shifting the mobile assets and income to a company/subsidiary in a low-tax state (Schmidt, 2016: 88). Taxation of undistributed profits is involved in CFC measures; thus the resident company which is controlled by a foreign company can be seen as a part of CFC measures and states can tax such residents in order to applying CFC rules effectively. Article 24(5) also accepts such applications as long as they do not create any discriminatory results.

It is noteworthy that this paragraph is related with only the taxation of resident companies, not their owners or controlling companies. This seperation is important for determining the scope of this protection. So first, questions like which conditions are expressed in the text of this paragraph and when these conditions are met should be understood in determining whether a resident company can invoke Artixle 24(5):

- First of all there should be a resident company which is directly or indirectly, wholly or partially owned or controlled by a non-resident
- Such resident company should be subjected to a taxation or a connected requirement in an "other or more burdensome" way
- This resident company should be in the same circumstances with the other resident companies (except the foreign control or ownership)

The term "other or more burdensome" is explained in the previous paragraphs. It can be said in short that the prohibited treatment can be a different treatment such as a higher tax

[126] See http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5520.pdf (Date Accessed: 30.11.2017).

rate from compared resident companies. Also this treatment can be more burdensome which means a more harsly taxation or connected requirements. However in addition, it should be said that some instances which do not constitute other or more burdensome taxation were given in the Commentary. In other words, the Commentary states some circumstances which are not covered by Article 24(5), as follows:

- This paragraph does not include the obligation for extending advantages of the domestic rules which are based on the relationship between a resident company and other resident companies. In order to illustrate this statement, the Commentary gives instances such as rules that allow consolidation, transfer of losses or tax-free transfer of property between companies under common ownership (OECD, 2015: C(24)-25).

- Since this paragraph only deals with the unfavourable taxation of a resident company with a non-resident controller or owner, it is not covered in this paragraph that rules which include different treatment between distributions to residents and non-residents. Thus a contracting state is able to levy withholding tax on a resident company with respect to dividends paid to non-resident shareholders, even if this tax is not applicable for dividends paid to residents (OECD, 2015: C(24)-25). Because in here, the different taxation derives from the difference in the characteristics of dividends, not from the existence of the foreign owner or controller. The same statement can be made about the denial of indirect tax credit for such companies, even if this credit is applicable to companies with a resident controller or owner (Rust, 2010: 461).

- The Commentary also states that Articles 9(1) and 11(6) should be considered as a part of Article 24(5) (OECD, 2015: C(24)-26). It means that if a rule which includes other or more burdensome treatment for resident companies due to their foreign owner or controller and this rule falls within the scope of the said articles, then this rule cannot be considered as a violation of Article 24(5). It is worth noting that Articles 9(1) and 11(6) are not referred in the text of this paragraph, but the Commentary adds them in the scope.

In the wording of this paragraph, the term “similar enterprises” is used as a criterion. This refers to similar activities or ownership of the enterprise (Bennett, 2006: 453). In Article

24(3), the term “carrying on the same activities” is prefered in order to restrict the scope of the paragraph and to highlight the “activities” rather than the enterprises; however in 24(5), such a restriction is not constituted and the term “similar enterprises” is prefered in order to indicate that the main focus is being an enterprise (Harris & Oliver, 2010: 172).

On the other side, the term “similar enterprises” also means that this protection is only for enterprises, it cannot be interpreted on behalf of persons owing or controlling the capital. Inaddition, to determine whether “similar enterprises” are observed again a comparison should be made. So in here, the question arises as to who will be compared with a resident company which is owned or controlled by residents of other contracting state. There are two possibilities: such company should be compared with a resident enterprise which is owned or controlled by residents of the same contracting state or with a resident company which is owned or controlled by residents of the other contracitng state or even a third state (Neto, 2015: 555). However with considering the “prohibition of tax protectionism” aim of this paragraph which is stated by the OECD’s Thin Capitalization Report of 1987, it can be said that a hypothetic resident which is owned or controlled by residents should be used in the comparison (Pappoti, 2003: 321). Because in order to combat tax protectionism, this paragraph should be able to prevent less favourable tax treatments for resident companies which is owned or controlled by foreigners. In other words, in here, the discriminatory practice derives from the aim of to protect domestic capital, so a taxation which will be in favour of resident enterprises with a resident controller or owners will choose by the state. In order to determine such taxation, a resident enterprise with a resident controller or owner should be chosen.

This problem about choosing the object of comparison was clarified by the OECD Committee on Fiscal Affairs in 2008 update and it was determined that the object of comparison should be a resident company which was owned or controlled by residents (OECD, 2008: 70). So this determined comparison takes place in the Commentary today. The term “enterprises of the first mentioned state” in the text of Article 24(5) also supports this indication. This term is related with Article 3(1) of the OECD Model. Pursuant to this provision, such enterprises are enterprises carried on by a company having its seat or place of effective management in the contracting state (Rust, 2010: 642). Nowadays, some states design their equivalent paragraphs to Article 24(5) so as to including the term “by one or more residents of a third state”, while national courts of some states such as France or UK accept that this comparison should be made with a resident company which is owned or controlled by residents (Elliffe, 2013: 13).

It should also be added that this paragraph does not contain the relationship between the resident company which is owned or controlled by a foreign company and other resident subsidiaries of the same foreign parent; the Commentary does not include any statement about this issue (Harris & Oliver, 2010: 172).

Another point which should be evaluated that the group consolidation issue. As it is mentioned before, the group consolidation is excluded from the context of this paragraph by the Commentary. The main reason behind it to prevent double non-taxation; because if the paragraph covers the group consolidation, then controlled company should be allowed to pass its income to its parent company which is a resident of the other state as long as such transfer is applicable to be made to its resident parent company (Rust, 2010: 642). So in order to prevent such transfers which have the aim of tax avoidance, group consolidation practices are excluded from the scope of this paragraph.

In order to a better illustration, decisions of national courts are impoartant. For instance, a Bundesfinanzhof (The Federal Fiscal Court of Germany) decision can be given as an instance. In Gewerbesteuer case[127], a German parent company taken a loan from its UK resident grandparent and lent it to its subsidiary. This subsidiary paid interest for this loan but pursuant to the German tax legislation, this payment could not be deducted. In order to compensate this disadvantage, the German parent company tried to benefit from a consolidated tax return, but the German tax authority denied it, since it was controlled by an UK resident (Wijtvliet, 2013: 176). The Federal Fiscal Court held this case within the context of the non-discrimination rule of the German-UK tax treaty and states that this denial constituted a more burdensome taxation regarding the German parent company. According to the Court, the aim which is preventing double taxation could not justify this more burdensome treatment (Wijtvliet, 2013: 176). So the Court applied the prohibition which was included in Article 24(5) to a consolidation case, notwithstanding the consolidation issues were excluded by the Commentary.

[127] Bundesfinanzhof 9 Feb. 2011, I R 54, 55/10, IStR 2011, 345. See Wijtvliet, 2013: 176.

As another instance, a decision of the Administrative Court of Appeals in Luxembourg can be given.[128] In this case, there were a six Belgian companies which were all held by a Belgian parent company and one of them was in a loss situation, while others were profitable in the tax year of 2004. In order to eliminate this losses, this company applied for a fiscal integration. But this application was denied by the Luxembourg tax authority, since the legislation allowed fiscal integration if the parent company was a Luxembourg company. In other words, this application was rejected because of the foreignness of the Belgian parent company. After the claim that this denial was incompatible with the non-discrimination clause of the Luxembourg-Belgium tax treaty. The Administrative Court of Appeals did not accept this claim. The Court made a comparison with Luxembourg companies with a Luxembourg parent company and stated that this fiscal integration which means a horizontal pooling was not applicable for these companies as well. So there was no discrimination (Winandy & Richter, 2008: 377-378).

Similar with this national courts of the Netherlands do not apply Article 24(5) of any tax treaty of the Netherlands to consolidation among subsidiaries (Farinha Aniceto da Silva, 2016: 192); while the High Court of London sees consolidation issues within the context of Article 24(5) (Rust, 2010: 642).

At this point, it is worth explaining that Article 24(4) and 24(5) can be related. This relate can be observed when a contracting state denies the deduction of, for instance, interest payments. If this denial solely based on the foreignnes of the recipient and such deduction is possible for payments made to residents, then this violates Article 24(4). In the same conditions, if this denial based on an extra condition such as that the non-resident recipient is the owner or the controller of the resident company which pays interest, then this constitutes also a violation of Article 24(5).

According to the Commentary, "other or more burdensome" treatments between resident companies based on their interest payments to resident and non-resident creditors are not involved in Article 24(5) (OECD, 2015: C(24)-26). Because such rules are seen as rules which regulate a debtor-creditor relationship regardless of the ownership or control relationship. The main difference starts from this point. Such rules may include different applications for deductions of interest payments which are made to residents and non-

[128] Cour Administrative du Grand-Duché de Luxembourg, no. 21979 C, of 19 April 2007.

residents, in regards to domestic thin capitalization rules. So in this case, Article 24(4) is violated. If such rules do not allow deduction of interest payments made to non-residents, then this application covers interest payments made to the foreign controller or owner. According to the Commentary, in this case, these rules are not incompatible with Article 24(5) (OECD, 2015: C(24)-26). Because the main concern of such rules does not include the foreign contol or ownership, only the application covers these situations. So if the denial is based on the non-residence of the recipient, then Article 24(4) is applicable. If the denial is based on the foreign ownership or controlling, then Article 24(5) is applicable (Rust, 2010: 643).

This can be explained in short with saying that, for instance, the denial of deduction of interest payments made to non-residents does not fall into the scope of Article 24(5) as long as such deduction is denied only if the payment made to a non-resident owner or controller and if payments made to other non-residents are deductible. However until 2008, the Commentary contained a statement that 24(4) should be applied as a *lex specialis* over 24(5); but after then, the Commentary was amended so as to involve the above implication (Govind, 2016: 553).

At this point, it should be highlighted that the fifth paragraph itself does not contain exceptions within the context of the arm's lenght principle (Elliffe, 2013: 11). In contrast with, Article 24(4) excludes the application of domestic thin capitalization rules within the context of the arm's lenght standart from the protection of the non-discrimination clause. But the Commentary adds Articles 9(1) and 11(6) to the context of 24(5). So it is noteworthy that the application of thin capitalization rules does not violate Article 24(5) even if they target only resident companies with a non-resident owner or controller. But the only condition for this is that these rules result in adjustments to profits that are made in accordance with 9(1) or 11(6) (Elliffe, 2013: 16). This is also stated in the Commentary and as a result, the arm's lenght principle is of great importance in determining whether domestic thin capitalization rules are incompatible with Article 24(5) or not within the cotext of Article 9(1) or 11(6). For instance, Conseil d'Etat takes this approach in Andritz case[129] with stating that Article 9(1) should be read along with Article 24(5) (Govind, 2016: 553).

[129] Conseil d'Etat, SA Andritz, CE 30 December 2003, n° 23-3894.

Approaches of national courts are also important. Some courts exclude thin capitalization rules wholly from the extent of Article 24(5), while some courts see these rules within the context of this paragraph. For instance the Supreme Arbitration Court of Russia tends to interpret Article 24(5) as it does not prevent the application of thin capitalization rules. The same approach with the Russian Court, the French Supreme Court accept that thin capitalization rules do not considered as a violation of Article 24(5) (Eliffe, 2013: 23).

Another approach was taken by the Administrative Court of Nantes in France. In a case, there was a French corporation and this corporation took a loan from its sister Dutch company which was wholly held by a US parent. The French tax authority considered that the actual lender was the US parent in here and the interest which was paid for this loan could not be deducted by the French corporation within the context of domestic thin capitalization rules. The French corporation claimed that this violated the non-discrimination rule of the French-US tax treaty. The Court rejected this claim with stating that Article 24(5) did not prohibit the application of domestic thin capitalization rules as long as these rules were incompatible with Article 9 (André & Theologitis, 2015: 3). So it can be said that the Court accepted that Article 24(5) did not completely exclude thin capitalization rules, in similar with the Commentary. In another case, the French Supreme Court again remains this approach and sees the Commentary which determines the condition which makes thin capitalization rules incompatible with the fifth paragraph, as a subsequent source (Elliffe, 2013: 36).

In contrast, Spanish Supreme Court accepts that treaty non-discrimination rules take precedence of domestic thin capitalization rules (Elliffe, 2013: 23). It means that the thin capitalization rules are applicable to resident companies with a foreign owner or controller as long as they do not discriminate them.

This approach is taken by Bundesfinanzhof, the Federal Fiscal Court of Germany. A decision of the Court, there was a company which was incorporated in Switzerland but had its management in Germany. This company were considered as a German unlimited tax liable which was owned by a resident of Switzerland. The Swiss parent granted the German company directly and indirectly loans and these loans were considered as “covert distribution of profits” by the German tax authority within the context of domestic thin capitalization rules (Lüdicke & Baker, 2011: 646). The German company claimed that this determination was incompatible with the ownership non-discrimination rule of the

Germany-Switzerland tax treaty. The Federal Fiscal Court of Germany accepted this claim; because these thin capitalization rules which was used in determining the qualification of loans was only applied to resident companies which was owned residents outside Germany.

Similar with this, national courts of UK accept that if thin capitalization rules focus on the foreign ownership or control relationship and these rules are not applicable to resident companies which owned or controlled by residents, then thin capitalization rules violate Article 24(5) (Eliffe, 2013: 42).

As a final point, the Commentary expresses that "*the additional information requirements which would be more stringent than the normal requirements, or even a reversal of the burden of proof*" cannot be considered as a violation of Article 24(5), even if these requirements take place in transfer pricing enquiries (OECD, 2015: C(24)-26).

III.8- Article 24, Paragraph 6: The Substantially Scope

> *"6. The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description."* (OECD, 2015: M-57).

This paragraph sets out the substantially scope of the non-discrimination clause in the OECD Model Convention (Brandstetter, 2010: 134). In this paragraph, the term "tax" is considered in a general concept beyond the Article 2 of the OECD Model. Article 2 sets out taxaes which are covered by the Model. Pursuant to this article, the Model includes "*taxes on income and on capital imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied*" (OECD, 2015: M-7).

Although the covered taxes are expressed this way in the Article 2, the term "notwithstanding the provisions Article 2" means that the scope of the non-discrimination Article is broader then the determination of Article 2. This is also stated in the Commentary with highlihting that taxes which are included in Article 24 is not restricted by Article 2 of the OECD Model. According to the Commentary, Article 24 is applied within the context of all taxes which are levied by a Contracting State or its political subdivisions or local authorities, irrespective of the manner in which they are levied (OECD, 2015: C(24)-26-27).

As an illustrative example, the Netherlands Supreme Court decisions can be given. With several decisions, the Court determines the scope of the term “taxes covered” in regard to the non-discrimination clauses of different tax treaties of the Netherlands which are based on the OECD Model. The Court excludes real estate transfer tax from the scope of the ownership non-discrimination paragraph of the Netherlands-US tax treaty, as well capital duty is another excluded tax from the scope of Article 24(3) of the Netherlands-Canada tax treaty (Bosman & Boulogne, 2016: 577). These examples shows that althought the Commentary tires to keep the scope of this article wide, the scope can be restricted by national courts.

III.9- The Relationship Between Tax Treatıes Based On the OECD Model and Domestic Laws

Tax treaties which are designed based on the OECD Model are, as mentioned before, signed by two contracting states and applied by them. It is important to explain that the application of tax treaties are up to these states and their domestic laws. Although tax treaties are one of the essential sources of international tax law, the qualification of them as a source is generally determined by domestic laws. So tax treaties have become a source of domestic law in different ways, depending on whether the constitutional system of the state is monist or dualist.

When examining the relationship between tax treaties and domestic law, the most important issue is determining the place of tax treaties in the hierarchy of norms for one contracting state. So this examination consists of two seperate question: the first one is how tax treaties have entered into force, the second one is in which step in the norms hierarchy the tax treaties are applying after the tax treaties entered into force.

It is noteworthy that tax treaties are considered as sources of international tax law as well as domestic laws. The latter can be possible only when these treaties are transformed into a part of the domestic law. This process is generally different for monist or dualist state approaches. Tax treaties can only be applied as a domestic legal source when this process is done.

It should be highlighted that the process by which tax treaties based on the OECD Model become part of domestic law is not much different from the other international agreements. There are generally two approaches of this process in general which are monistic and dualistic approaches. According to these understandings, a tax treaty can be applied internally after a transformation into domestic law or without a transformation process, it can directly be applied.

In monist understanding, national and international laws are parts of the same single system. In this respect, a tax treaty which is made in the international arena must automatically bear legal consequences in domestic law; because norms on both international and domestic areas are at the same level. In other words, this approach attributes a "self-executing" characteristic to tax treaties. Thus from the moment that a treaty is signed, this tax treaty enters into force and grants rights to the nationals of this contracting state (Arnold, 2015: 1).

Examples of states that have included this understanding in their constitutions can be the USA, France, the Netherlands, Russia, Italy, Switzerland (Canyaş, 2016: 97). When an international treaty enters into force in these states, it becomes a part of domestic law simultaneously. In other words there is no need for transforming this tax treaty which is made based on the OECD Model into domestic law. So in those states, treaty override is seen as a illegitimate issue; because in those states international law has direct effect on domestic law (De Pietro, 2015: 74).

According to the dualist understanding, international law and national law constitute different systems. While international law regulates relations among sovereign states; national law governs relations between the state and persons and between persons (Canyaş, 2016: 90). Since there are two different legal schemes which are international and domestic areas in this understanding, a provision in international law does not have direct applicability in domestic law. Therefore, in order for an international tax treaty to become part of domestic law, it has to be transformed into the domestic law. Without this transformation, an international treaty does not entitle a national/resident to claim benefits based on this treaty, even if the treaty generates obligations between contracting states (Rust, 2006: 234).

This transformation is carried out by operating the procedure defined in each state's own constitution. In general terms, international tax treaties in this sense enter into force following the approval of the competent body in accordance with the constitutional systems of the signatory states (Cenkeri, 2012: 168). Some states require a parlamentary approval in order to realize transformation, while legislation implementing is required some other states (Hilling, 2005: 52). Thus the provisions of international tax treaties can only grant rights to persons after being incorporated into a part of domestic law by the competent body which is generally the parliament (Rust, 2006: 243). Examples of such states that adopt this understanding in their domestic laws include the UK, Denmark and Norway (Canyaş, 2016: 91-95).

At this point, above-mentioned second question which is about the place of international tax treaties in the hierarchy of norms should be evaluated. As it is explained, this issue comes after signing and for states based on dualist approach after the transformation. Because after these processes, an international tax treaty becomes a domestic legal source and can be applicable directly to internal matters.

The domestic legal position of international tax treaties which became part of domestic law after the completion of the required legal procedure, has been debated ever since. There is no accepted general rule for all states on the place of these treaties in the hierarchy of norms in domestic law; each state makes determinations about this issue in its own constitutional system (Canyaş, 2016: 268-269).

In order to determine the position of international tax treaties that have become part of domestic law, it is first necessary to examine the situation of international treaties in general. The position of international treaties is concerned with which stage they stand in the hierarchy of norms. Hence, the position gives knowledge of the applicability of the treaty as a norm of domestic law. Applicability is generally related to the issue of whether treaty provisions can be prefered in case of a conflict with a norm of domestic law. In other words, while the position of international treaties within the domestic law is determining, it is in fact determined where the norms are located in the hierarchy of norms and what is to be in the case of a conflict with the Constitution or other provisions in the domestic law.

There are three possibilities on the position of international treaties and their applicability in the case of conflict in the hierarchy of norms; international treaties may be regarded as superior or equivalent to the law, or laws may be superior to international treaties. The choice between these possibilities is entirely at the initiative of the state.

When it comes to state practice, it is generally seen that the provisions of the treaty is determined to be applied in case of conflict. Therefore, international treaties can be considered as they are superior to laws in the hierarchy of norms. However, it is also possible to determine that the treaties are equivalent to the laws and the provisions of the treaty is only prefered in case of a conflict with provisions of domestic laws. In other words, sometimes although states does not give superiority to international treaties over domestic law, they may accept the application of the provisions of the international treaties rather than the provisions of domestic laws in case of a conflict between them. So in these states which adopt this manner, provisions of domestic law cannot violate the non-discrimination clause in tax treaties.

Examples of states with a constitutional clause that give supremacy to international treaties over domestic laws are the Netherlands, Japan, Poland, Portugal, Greece, Spain, New Zealand; In Russia, Germany and France, the superiority was not accepted but the international treaty was preferred as the norm to be applied in case of conflict between a treaty and a domestic law (Canyaş, 2016: 105). The acceptance of the supremacy of international agreements is often important to ensure transparency and predictability for foreign investors (Nakayama, 2011: 2). A different approach is adopted by Moldova, international treaties are given superiority only in case of conflicts between international treaties and domestic laws about human rights (Han, 2011: 44).

In states such as Australia, Canada, Norway, Sri-Lanka, international treaties and laws are considered as equivalent (Arnold, 2013:3). Again, the United States sees international treaties are equal with laws (Nakayama, 2011:2). This equality issue is also ensured by the American Revenue Code; besides the Supreme Court admits that an international treaty could nullify a law or vice versa (Han, 2011: 46). If the equality is accepted, then the conflict between provisions of an international treaty and a domestic law as equal norms is overcomed with the same method which is applied when two provisions of domestic laws conflict. So in these cases, *lex specialis derogat legi generali* (special law repeals general law) or *lex posterior derogat legi priori* (a later law repeals an earlier law) rules are applied. So based on rules, a provision of domestic rule which violate the non-discrimintion clause in a tax treaty can be applied without leading to any contradiction to law. In these states, treaty overriding can made by a national court with its interpretation, the non-discrimination rule can be overrided.

In these states, the above-mentioned treaty overriding can be possible by amending a domestic provision or enact a new norm that is discriminatory after the signing a treaty.

In some of the parliamentary democracies that have accepted the principle of legislative supremacy, domestic laws may prevail over international treaties in case of a conflict between them, as a constitutional rule (Arnold, 2015: 8). So in these states, although the non-discrimination clause exists in tax treaties, a provision of domestic law can ovverride this rule.

These explanations are considered when international tax treaties are the issue. So as a summary, interntional tax treaties which are designed based on the OECD Model are agreed that they are both international and domestic legal sources. The issue is that what qualification they have in the hierarchy of norms in regards to internal application. In other words, whether both foreign and national or resident and non-resident taxpayers can invoke the non-discrimination clause of a tax treaty against one contracting state or not is the most important point in evaluating the relationship between these norms. It is worth highlighting that this issue is up to contracting state's own constitutional systems. If international tax treaties are given supremacy over domestic laws, then a conflict between the non-discrimination rule and a provision of a domestic law should be considered as a violation and the non-discrimination rule nullify the application of this domestic rule. If a state give an equal status to tax treaties and domestic laws, then a possible conflict should be solved by general rules based on speciality or antecedency. If domestic laws are determined as superior to international tax laws, then a domestic law which is in conflict with the non-discrimination clause of the tax treaty should be applied. This means that this conflict does not mean a violation of the non-discrimination rule or this rule is not applicable in fact. So as it can be seen, the position of international tax treaties is substantially important when determining the applicability of the non-discrimination rule in an internal manner.

At this point, it is worth noting that in the 1989 Report, determining the position of tax treaties which are made based on the OECD Model has been left to the states without actually arriving at a unique and shared solution (De Pietro, 2015: 74). This general understanding can be seen on the whole of the Model's text. To understand the OECD's approach, Article 3(2) is important:

> "*any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State*" (OECD, 2015: M-9).

So this is an internal interpretation rule which stating that if a definition is involved in the treaty, then this definition should be used in the interpretation an article; if a definition does not observed in the treaty, then domestic legislation can be used as a source as long as another meaning can be reached at the treaty context (Soler Roch & Ribes Ribes, 2001: 312).

It should be said that tax treaties which is based on the OECD Model is a product of a reciprocal process. So contracting states have a great opportunity to adopt the content of the treaty to their fiscal policies, then there is no need to treaty override (De Pietro, 2015: 75). On the contrary, the reciprocal characteristic of these treaties means that a balance between taxing rights of the contracting state is included in the treaty and this constitute certain restricts to tax sovereignty of contracting states in the form of relief from taxing right. So there is always a risk that states compensate for these restrictions by using domestic laws.

In order to combat this issue, the OECD Model requires a coordination between tax treaties and international law (De Pietro, 2015: 77). In the system of the Model, tax treaty can only be applied effectively with this coordination with domestic law. So domestic law and treaties sould be considered as supplementary sources.

At this point, it is noteworthy to note that the Vienna Convention on the Law of Treaties has an important role in treaty overriding issue. The Vienna Convention on the Law of Treaties is an international convention which concerns with the process such as making or ending the treaties or invalidity of the treaties and includes general rules on treaties (Canyaş, 2016:156). With this characteristic, this Convention also relates to tax treaties which are designed based on the OECD Model. So these general rules involved in the Vienna Convention affects such tax treaties as well as contracting states. In particular, the general interpretation rules in the Vienna Convention are concered tax treaties (Canyaş, 2016: 159). One of these rules is Article 31 of the Vienna Convention. Pursuant to this Article, "*[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".[130]

So this rule refers to *pacta sund servanda* which is a classical rule with the term "good faith". This rule obliges contracting states to interpret and apply articles of a tax treaty in good faith and it draws the roadmap with stating that the scope of the interpretation is restricted with the context, object and purpose of the treaty.

II should be highlighted that although this convention brings this good faith obligation, it is only an international treaty too. So explanations on the position of tax treaties in the hierarchy of norms are exactly valid for the Vienna Convention. Based on their domestic rules and understandings, states can override this convention too. So the obligation on good faith cannot be seen as a strict obligation. Also the lack of a general international institution which has a jurisdiction or an authority for applying enforcement over states, weakens the Vienna Convention. So this obligation cannot have the power to end treaty override. This is again a reciprocal matter and based on the relationship between states.

[130] https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf (Date Accessed: 30.11.2017).

V- THE GENERAL COMPARISON AND EXAMINATION OF NON-DISCRIMINATION CLAUSES IN EU LAW AND THE OECD MODEL TAX CONVENTION

It is clear that the well known concept of tax discrimination, which is a problem to be avoided generally in commercial terms, cannot be solved by the measures taken by states alone in national level. With the understanding of the importance of the non-discrimination concept, various attempts have been made to take measures on the international scene. As it is mentioned before, states have begun to prepare bilateral treaties due to the unsufficiency of privileges given to foreigners alone. This creates the bilateral treaties level of measures taken against tax discrimination. Alongside with this, international organizations such as the OECD or the UN have either prepared model conventions with non-discrimination clauses in order to shorten the bilateral contracting process of the states and to provide them with an ideal text, or they have included non-discrimination clauses in their own agreements. By this way, the non-discrimination concept have became one of the main veins of the bilateral tax treaties.

On the other side, EU also forms another level that includes the concept of non-discrimination. EU, which is an international integration, gives a place to the non-discrimination concept in the legal system, in a way to be differently from the bilateral treaties, as a means to realize the internal market objective. So realizing this objective have a different extent from eliminating trade barriers purpose of the OECD.

If these two non-discrimination concepts should be explained in short, it should be said that there are six main provisions in the TFEU which can be interpreted as prohibitions of tax discrimination. The first one is Article 10 which is the non-discrimination provision in general terms. This prohibits not only tax discrimination but also all kind of discriminations. Another similar provision is Article 18 which is the general prohibition of nationality based discrimination. This prohibitis every kind of discrimination on grounds of nationality, so tax discrimination can be regarded as a part of the prohibited practices. Article 110 includes tax discrimination but this is specialized on goods and services. So this can be seen the main non-discrimination clause in indirect tax area. Since direct taxes is regarded as a matter of sovereignty of member states, the TFEU only includes indirect taxes in Article 110 obviously. However with the CJEU case law, clauses on fundamental freedoms are regarded as special non-discrimination clauses within the context of direct taxes. The Court concludes that every member state should use their taxation power so as to be compatible with the TFEU. This means that although the member states are able to design their direct taxes without any interference, this sovereignty should be used within the context of the regulations of the TFEU. Therefore articles for fundamental freedoms, Article 45 (free movement of persons and workers), Article 49 (free movement of establishment), Article 56 (free movement of services) and Article 63 (free movement of capital) are used as special non-discrimination provisions for direct taxes. These prohibit member states from discriminating persons, enterprises or workers from other member states so as to restict their use of fundamental freedoms. Thus these are main clauses which should be considered in the evaluation.

The OECD Model Convention includes only one article as a non-discrimination clause in regards to tax discrimination. Article 24 has six main paragprahs which regulate six different areas of the non-discrimination concept. With this article, the main concern is to prohibit non-discrimination on grounds of nationality. This prohibition includes natural and legal persons, as well as PE's and foreign capital. The first paragraph brings the general rule which is the proibition of tax discrimination on gorunds of nationality, while the second paragraph includes stateless persons. Article 24(3) protects PE's of non-residents from discrimination and 24(4) is the deductibility clause which aims to prevent states from discriminating resident enterprises which make payments such as interest or royalty to non-resident enterprises, with denying the deduction of such payments. 24(5) includes the prohibition of discrimination which is made to resident enterprises that are owned or controlled by non-residents.

These two levels which include non-discrimination clauses in regards to taxation, have similarities and differences on their nature, content and extent. These similarities and difficulties derives from their starting point, the international level to which they belong, as well as their purposes. With abovementioned reasons, these two different non-discrimination standards will be compared with each other.

V.1- Similarities Between the Tax Discrimination Practices in Two Levels

Both the TFEU and the OECD Model Convention include similarities within the context of their nature and their purposes. Although they constitute two different systems in the international area, they are affecting each other and these interactions create similarities between them.

As the first point it should be said that the OECD itself highlights these interactions. According to the OECD Public Discussion Draft of 2007, national courts can extend the CJEU's case law to the treaty non-discrimination cases when both EU member and non-EU member states are involved in these cases (OECD, 2007: 29). These kind of interactions on the interpretations of national courts can be seen thereinafter. In addition, in this draft it is stated that it might be useful these interactions and especially some concepts and arguments developed under EU law such as the concept of justification can be considered for better results (Bammens, 2013: 182).

These interactions are also recognized by the Commission. According to the Commission, Article 24 of the OECD Model Convention should reflect the fundamental non-discrimination principles of the Treaty (then the TFEU) in regards to nationality, residence, treatments to PE's of non-residents and group taxation issues (Commission of the European Communities, 2001: 361). Also the case law of the CJEU involves interpretations of the OECD Model Convention as a re-examination of Article 24 (Farinha Aniceto da Silva, 2016: 239). From another point of view, the CJEU moulds its case law so as to fit settled international tax law which includes the OECD Model Convention practice and especially uses the allocation of taxing powers between the source and the residence states as a negative integration (Wattel, 1995: 347).

On the other side, it can be observed that the OECD's some practices are also affected by interpretations of national courts on fundamental freedoms. This approach can be seen in cases where both of contracting states are EU members or not. For instance, the Paris Administrative Court of Appeal follows this path. In a case, there was a Dutch pension fund which sold shares in French real estate companies and for these sales, capital gains tax was assessed for the Dutch pension fund. Pursuant to the French legislation, French pension funds were exempted from such a tax. The Dutch pension fund claimed that this application was in breach of the non-discrimination clause of the Netherlands-France tax treaty. The French tax authority argued that French pension funds were non-profit organizations and according to the Commentary of Article 24 of the OECD Model, resident and non-resident non-profit organizations were not in the same circumstances; thus France was not obliged to extent this exception to the Dutch pension fund. The Court made comparison between the Dutch and a hypothetical French pension funds. In this comparison, the Court rejected the argument which based on the Commentary and considered the provision on free movement of capital in the TFEU. In addition, the Court adduced the CJEU's Stauffer decision (Bammens, 2013: 177). So with starting from free movement of capital nd following the CJEU's approach, the French Court concluded that there were comparable situations and different treatment between them constituted discrimination. So with the impact of EU law, the Court interpreted a treaty provision and excluded the Commentary of the OECD Model Convention.

V.1.1- Purposes of The Non-Discrimination Clauses In Two Levels

In the historical process, the starting point can be considered as the same for both of two non-discrimination concepts which are involved in two different levels. It is worth saying that both of two concepts included trade concerns in their nature. Although their approaches to trade issues are different, it can be said that both of them aim to eliminate obstacles against trade and to boost mobility. In EU law and especially in the TFEU, these obstacles are tried to be eliminated for the sake of the internal market, while the OECD Model Convention is prepared so as to cover a wider area. Nevertheless, the starting point is the same, both of these concepts are important for ending deterrent effects on trade.

Preventing tax protectionism is also another similarity with regards to purposes of these two concepts. As mentioned before, tax protectionism is a concept which is used by states to support and protect their own economies and nationals. So with these aims, states may discriminate against foreigners. Since 1986, EU has begun to take measures against tax protectionism. In addition, the CJEU sets its case law so as to include tax protectionism within the context of tax discrimination. Also it is stated in the OECD's Thin Capitalization Report of 1987 that one of the purposes of the OECD Model Convention is preventing tax protectionism. However it is worth adding that neither in the text of the Model nor in the Commentary, the term tax protectionism and the purpose to prevent it are not referred. When it is thought that tax protectionism create effects as trade distortive barriers, then this concept is regarded as it is incompatible with the spirit of the OECD Model Convention and Article 24.

Limiting states' taxation power can be considered another purpose of these two concepts. Actually it is both a purpose and a tool to realize other purposes. The non-discrimination concept in EU law aims to limit member states' taxing pawers in both direct and indirect taxation area. Member states are already restricted with EU law in regards to harmonisation of indirect taxes; with using the CJEU's case law, taxing jurisdiction of member states in direct taxation area is also restricted in the name of compatibility with the spirit of the TFEU. So both Article 110 and articles on fundamental freedoms are used for limiting taxation powers of member states in order to eliminate tax discrimination.

In the OECD Model Convention, the main aim is allocating taxing jurisdiction between contracting states for certain subjects in order to prevent double taxation. If one subject is taxed by one contracting state based on a treaty provision, then the other state's taxation power is restricted by the same treaty. This general characteristic also shows itself through the non-discrimination article. In Article 24, generally, taxing power of the source state is restricted; this state cannot use its power outrightly. For instance one contracting state cannot use its taxation power as a source state so as to discriminate against non-nationals. As it can be seen, in both of these two levels, taxation powers of states are limited as a sub-purpose which minister to the main purpose of eliminating discrimination.

Also another purpose is to provide equal treatment. This can be regarded as a supplementary purpose which can be important in realizing the main purpose that is about trade obstacles. States should treat equally to equal circumstances. Both of the two concepts in two differet levels have the same approaches to this equal treatment condition; states should not differentiate taxpayers on grounds of nationality, when other circumstances are the same for them. Thus it should be highlighted that the prohibited unequal treatment is based on nationality factor. States are prevented from this kind of discrimination in these two concepts.

V.1.2- Approaches in the Non-Discrimination Clauses of Two Levels to the Comparability Issue

Another similarity derives from one of both EU law and the OECD Model's common purpose which is equal treatment. In order to provide equal treatment between legally equal ones, states should make a comparison between them. Determining the comparability is the main issue to apply these non-discrimination clauses in two different levels. Non-discrimination concepts require a comparison between the object and subject of comparison and if these are not in comparable situations, then tax discrimination cannot exist. In other words, in order to determine a tax discrimination, there should be always two situations; one of them is a foreigner and the other one of them is a national and they should be similar except their nationality and a state should treat differently the foreigner with nationality concerns.

This comparison is highlighted in texts of both the TFEU and the OECD Model Convention. In EU law level, the case law of the CJEU involves a comparability test. While applying the non-discrimination clauses for natural persons, this test is being made by the CJEU. It requires that all relevant factors should be the same between the allegedly discriminated person and the hypothetical subject of comparison, except nationality. For legal persons, again this comparability test is used in determining whether there is a tax discrimination or not. But the nationality concept is different for them because of their nature. So obtaining their status based on the domestic law can be regarded as nationality for them. In indirect tax area and for goods and services, this comparability test requires the similarity. The CJEU considers goods as similar only when they meet the same needs of consumers.

Comparability is again an important concept in the OECD Model Convention. Because in Article 24(1), the term "being in the same circumstances" is brought as a condition, while Article 24(3) requires carrying on the same activities for PE's and enterprises and Article 24(5) uses the term "similar enterprises" in identifying the comparability. In order to determine these prescribed conditions, national courts should make a comparison.

At this point it should be said that both of these concepts include corresponding approaches to the comparability condition. In order to determine whether a tax discrimination occurs or not, this comparability test should be made both by the CJEU and national courts of states which use the OECD Model Convention in their tax treaties. Both of these concepts require being substantially the same, except nationality and irrelevant factors are excluded from comparability test by both of them.

In comparability test, residence is an important factor. Althought nationality is the main factor in determining discrimination, residence can be a problematic issue. Because most of the states in the world design their tax systems based on residence in determining the tax liability of taxpayers. As explained before, in general, there are two types of tax liability as limited and full. States generally determine full tax liability in regards to being a resident, rather than a national. This point has a greater importance for legal persons. Because nationality is an irrelevant factor for them, but residence is an equivalent term to nationality. So criteria such as fiscal residence, registered office, place of corporation or administration are used in determining their full tax liability. Both of legal and natural persons, non-residents are limited tax liables. This frequent usage of residence makes this term one of the key factors in comparability test.

In international area, as a rule, residents and non-residents are not regarded as they are being in the same circumstances with respect to natural persons. Because their tax liabilities are different within the context of the taxing state. Both of the TFEU and the OECD Model Convention follow this path. For these two levels, residents and non-residents are, as a rule, not in the same circumstances, then are not comparable. Since comparability test is negative for them, a different treatment between them does not constitute a discriminatory practice.

In Schumacker case, the CJEU specifies this not-comparability as a rule. According to the CJEU, the residence state is best situated to assess the ability to pay of a taxpayer as a full tax liable. Then the source state cannot treat non-residents as the same with residents. In this decision, the CJEU also highlights that this is an accepted concept by the OECD Model Convention and the same statement is included in the Gerritse decision (Hilling, 2005: 167). Also in Futura case, the CJEU stated that residents and non-residents are not in the same circumstances, since residents are taxed on their worldwide income (full tax liability) and non-residents are taxed on their domestic income (limited tax liability). So different taxation cannot create the discrimination result (Monsenego, 2011: 216).

In the OECD Model Convention, residence is referred in Article 24(1) so as to highlight residence as a criterion in determining the comparability. In the understanding which is reflected in the Commentary of Article 24 of the OECD Model Convention, residents and non-residents are not comparable, so in order to determine comparability of two persons, residence can be used as a crieterion. In other words, without meeting having the same state's residence criterion, comparability test cannot be positive. If the object and subject of comparison are not residents of the same state, then there is no possibility to consider them as they are under comparable situations. So the OECD Model Convention shares the same approach with the CJEU.

At this point it should be said that this non-comparability between residents and non-residents is accepted as a rule by the CJEU. So there is an exception for this rule which was mainly revealed by Schumacker case. Since this acception constitutes a difference between the approaches of the CJEU and the OECD Model Convention, this will be explained in the heading on differences.

Another similarity between two concepts is on residence issue. As it is explained before, only the residence state can comprehend ability to pay of its residents as a whole. This means that personal and family circumstances can be considered better by the residence state. This statement is accepted as a rule by both the CJEU and the OECD Model Convention. The CJEU states in its case law that the source state is not obliged to consider personal and family circumstances of non-residents, because this state generally does not have sufficient knowledge. Although this is accepted as a rule and aforementioned exception can change it, it can be said that the CJEU's main approach is in this manner.

The OECD Model Convention also accepts this statement. Personal and family circumstances should be assessed by the residence state. This can be evidenced by Article 24(3) which states that personal and family circumstances do not have to be taken into account by the PE state (Kemmeren, 2012: 173). So this approach can be considered as a similarity between two concepts.

V.1.3- Balanced Allocation of Taxing Jurisdictions

After comparability test, there is another test which is used in determining a discriminatory practice, in the case law of the CJEU. This test, the objective justification test is used to seek whether there is a justification which changes the characteristic of the different treatment for non-nationals. If this test is positive, then this treatment is considered as it is compatible with the TFEU. Such a test is not observed in the system of the OECD Model Convention.

Although it is one of the differences between two levels, there is a similarity within the context of this test. According to the CJEU, "balanced allocation of taxing jurisdictions" is one of the objective justifications. As it is known, states share taxing jurisdictions in international area through bilateral tax treaties with some purposes such as eliminating double taxation risks. With these treaties, a state can give up on its taxing jurisdiction for certain subjects and in turn, some other subjects can be taxed only by that state. So the CJEU accepts that states can bring different treatments for foreigners based on their nationality, for the sake of providing a balanced allocation of taxing rights. An instance for this acceptance can be Gilly case. With accepting it as an objective justification, treaties which are prepared based on the OECD Model Convention are included by the CJEU. The Court held that to base tax treaties on the OECD model is not unreasonable for the member states (Kemmeren, 2012: 169).

The OECD Model Convention is also respectful to the share of taxing jurisdictions of contracting states. So states are able to change or omit the non-discrimination rule in designing their bilateral tax treaties based on the OECD Model. So when this is thought with the approach to sharing taxing jurisdictions between states in the EU law, even if there are some basic differences such as the entent of this share, the main point can be considered as it is the same.

V.1.4- The Relationship Between Freedom of Establishment and Article 24(3) of the OECD Model Tax Convention

In addition to these processes to determine whether there is a discriminatory treatment or not, there are some other similarities between the practices of two concepts. One of them is about the similarity between the freedom of establishment of the TFEU and Article 24(3) of the OECD Model Convention. This can be seen in the approaches of these two concepts to the PE non-discrimination rule.

Article 49 of the TFEU includes the non-discrimination rule for freedom of establishment. This protection covers enterprises as well as their branches and subsidiaries so as to reflect some echoes of the PE non-discrimination paragraph of the OECD Model Convention (Bennett, 2006: 462). According to the CJEU, especially PE's should be regarded as the same with enterprises in regards to the tax benefits such as imputation credits or participation exemptions (Van Thiel, 2008: 162). It is clearly seen from the Saint Gobain decision; the CJEU states that PE's of residents of other member states should be granted the same tax treatment with PE's of residents (Pistone, 2002: 148).

With Article 24(3) of the OECD Model Convention, contracting states are obliged not to treat PE's of the other contracting state's residents less favourably than resident enterprises which are carrying on the same activities. So the protection which is provided by this paragraph can be considered as similar with that of the CJEU. It should be also added that, with the effect of the OECD's Triangular Cases Report and the CJEU's case law, most of the states are of opinion that PE's of non-residents can invoke the non-discrimination principle (Dourado, 2002: 148).

It is noteworthy that the approaches of the CJEU and the OECD Model Convention is similar in regards to carrying losses. According to the Commentary on Article 24(3) of the OECD Model Convention, resident PE's should be able to carry their losses backward or forward same as residents and they should have same prescribed times with residents. In Futura case, the CJEU decided in the same way. According to the CJEU, losses could be carried forward by the non-resident company which had the PE, if these losses could be considered as they were economically connected with this PE.

V.1.5- The Relationship Between Freedom of Establishment and Article 24(4) of the OECD Model Tax Convention

Article 24(4) of the OECD Model Convention states that payments such as interest, royalties and other disbursements which was made by a resident enterprise to a non-resident enterprise should be deductible, if the same payments made to resident enterprises are deductible. This article is related with freedom of establishment in regards to the CJEU's case law.

It should be said that the application of domestic thin capitalization rules is excluded from the scope of Article 24(4) as long as they are compatible with the arm's length standard which is referred by Articles 9(1), 11(6) and 12(4) of the OECD Model Convention. This path was followed by the CJEU in Thin Capitalization Group Litigation case. In this case, the UK thin capitalization rules which treated interest payments as distributive profits where these payments were made by a resident subsidiary to a lending non-resident parent. According to the CJEU, such treatment increased the borrowing company's tax burden and therefore gave rise to difference in comparison with resident companies which were granted a loan by a resident company. The Court also referred to the arm's lenght principle and Article 9(1) of the OECD Model Convention in determining the incompatibility of domestic thin capitalization rules (Kemmeren, 2012: 169). Because the UK tax authority claimed that the domestic thin capitalization rules were compatible with Article 9(1) of the OECD Model and it was the right of UK to determine whether the transaction was incompatible with the arm's lenght standard or not. The CJEU rejected this argument with highlighting that the application of the tax treaty rules should comply with EU law. As a result, this case shows the implications between two concepts.

Another instance can be Lankhorst-Hohorst case. In this case, LT BV was a Netherlands parent company which was the sole shareholder of LH BV which was also a Netherlands resident company. LH BV held all shares of Lankhorst which was a German company. LT BV granted a loan to Lankhorst and the German tax authorities regarded the interest which was paid for that loan by Lankhorst as a covert distribution based on the domestic thin capitalization rules which did not include such a rule for resident companies. According to the CJEU this treatment constituted a difference for payments made to non-residents in contrast to residents. This difference derived from the seat of the parent company which was outside Germany. Thus in here, there was an obstacle to freedom of establishment. The German tax authority claimed that in here, the German legislation was in accordance with the arm's length principle, which is internationally recognised. Then Court pointed out Article 9(1) of the OECD Model in its decision.

Again in the SGI case, there were Belgian thin capitalization rules which regarded an interest-free loan that was granted by SGI (a Belgian company) to its Luxembourg resident group company, as unusual or gratuitous advantages. The Belgian tax authority argued that the balanced allocation of taxing rights and the prevention of tax abuse were justifications for that treatment and this was in accordance with the arm's lenght standard. In its decision, the CJEU accepted these as objective justifications. According to the Court, the arm's length principle can be defended as a means to fight abusive arrangements (Schön, 2011: 7). So again, this can be regarded as an interaction between the CJEU's case law and international tax law, particularly the OECD Model Convention.

V.1.6- The Relationship Between Freedom of Establishment and Article 24(5) of the OECD Model Tax Convention

As it is expressed before, Article 24(5) prohibits other or more burdensome treatments to enterprises which are owned or controlled by residents of the other contracting state. With this paragraph, foreign capital is protected against discrimination within the context of the purpose of eliminating trade obstacles. The CJEU's approach to foreign ownership non-discrimination issue can be considered within the context of freedom of establishment. It can be said that this approach is in line with the OECD Model Convention. So it can be said that there is a similarity between two concepts on group taxation issues.

In order to illustrate this similarity and interaction, national court decisions can constitute great examples. One of them is a Bundesfinanzhof decision. In this case, there was a German resident company which made interest payments to its Swiss resident parent. Pursuant to the German thin capitalization rules, such payments were not deductible if they were made to an enterprise who was not entitled to the German corporation tax credit. This means payments which were made to non-residents were not deductible. The German company claimed that this was incompatible with the ownership paragraph of the German-

Switzerland tax treaty. According to the High Court, it was acceptable. Because these thin capitalization rules differentiated German resident companies which were held by non-residents. In here, the Court stated that the comparison under Article 24(5) should be made identically to that under fundamental freedoms, in parallel with the European perspective (Bammens, 2013: 178). So with this point of view, the Court compared the German company with another German company which had a resident shareholder. Then the Court concluded that these rules constituted discrimination.

The similarity between the CJEU's approach to foreign ownership and the foreign ownership clause of the OECD Model Convention can also be observed in Papillon case. In this case, Société Papillon was a French parent company which had a Dutch subsidiary. This intermediate subsidiary held the shares of a French sub-subsidiary. The integration request of Société Papillon was denied by the French tax authority, because of the existance of the Dutch intermediate subsidiary. Pursuant to the French legislation, only French companies that were subject to French corporate income tax can constitute an integration and the Dutch intermediate subsidiary did not meet this condition. According to the CJEU, in here, the different treatment derived from foreignness of the Dutch subsidiary's registered office (Boulogne, 2011: 1). So in here, the Court's approach can be regarded as similar with the 24(5), because in here, the Court decided that there was a restriction on freedom of establishment because of the foreignness of the intermediate subsidiary.

A similar fiscal unity issue can be seen in a national court decision and it can be given as an instance which shows the similarity between understandings of the CJEU and the OECD Model Convention. In Delaware case, Bundesfinanzhof decided that Article 24(5) required the extention of German fiscal unity provisions to resident companies which were owned by residents of the other contracting state. The High Court adduced Überseering decision of the CJEU (Bammens, 2013: 181). So this case reveals that beyond similarity, there is an interaction between practices of the CJEU and the OECD Model Convention. Because the Court relied on EU law arguments in determining there is a discriminatory practice within the context of (the Germany-US tax) treaty non-discrimination (Farinha Aniceto da Silva, 2016: 242).

V.2- Differences Between the Non-Discrimination Clauses in Two Levels

The non-discrimination concepts of EU law and the OECD Model Convention have some differences from various aspects. These differences generally derives from their content and also the nature. It is worth adding that most of these differences derive from the context of the non-discrimination clauses in the body of both the TFEU and the OECD Model. Non-discrimination is a fundamental issue in EU law, because it is a tool to realizing the internal market purpose. In contrast with this approach, the non-discrimination clause is not one of the main components of the OECD Model Convention. In other words, non-discrimination is not the primary goal of tax treaties, they are generally constituted to prevent double taxation (Van Raad, 2007: 61).

It is noteworthy that the OECD Model Convention is only a requirement which is subject to change. The principle of reciprocity is important for this system and contacting states can change the scope or context of the non-discrimination provision based on their negotiations. However the TFEU is not such a treaty, although it has a multinational characteristic. It is created by the European Community which included representatives of member states (Molenaar, 2005: 293). Member states cannot change non-discrimination provisions included in the TFEU based on their interests; beyond this, these provisions are binding for every member state. In other words, the TFEU has a supremacy in the application. This difference between these two levels creates some other differences such as the scope or the application of these two non-discrimination concepts.

V.2.1- Differences Between Their Scopes

It can be the most important difference between these two concepts that the scope of the non-discrimination concept in EU law is broader than the non-discrimination concept in the OECD Model Convention (Santiago, 2009: 250). The main reason behind this that the OECD Model Convention does not include a provision such as Article 18 of the TFEU which is the general nationality based non-discrimination rule. The Model only picks some specific subjects of discrimination and prohibits only them as it is stated in the Commentary (Hilling, 2005: 50). In fact, when the text of the TFEU is examined, the non-discrimination concept in EU law may be thought as it has a narrow scope. Because tax discrimination is obviously prohibited only in Article 110 which covers goods. But the CJEU changes this narrow scope with its interpretations for other articles in TFEU. Within this context, Article 18 extends the scope of the non-discrimination concept. Also articles on fundamental freedoms have great importance in the case law of the CJEU, since these articles give opportunity to the CJEU for the integration of direct taxes to the non-discrimination area. The lack of such articles restricts the scope of the non-discrimination concept in the OECD Model Convention. For intance, there is no provision for discrimination on indirect taxes in the OECD Model which already bears the name "Model Tax Convention on Income and on Capital". Although Article 24(6) may be interpreted as the non-discrimination rule covers indirect taxes at the same time, due to this paragraphs changeable characteristic, indirect taxes are generally excluded from the scope of Article 24 by contracting states in practice.

So as a summary, in EU law and with both the TFEU and the CJEU's case law, direct and indirect discrimination for both natural and legal persons which can be regarded as nationals and discrimination for goods and services are prohibited in regards to both direct taxes (Articles 45, 49, 63) and indirect taxes (Articles 36, 110). In contrast with this, the OECD Model does not include any prohibition for indirect discrimination and discrimination in indirect taxes. In fact, there are prohibitions against tax discrimination practices which target residents that have a relationship with non-residents. So this may be regarded as it extends the scope of the Model, but this does not make the scope of the Model be wider as EU law.

Also the lack of an institution for dispute resolution in the OECD system is a determinant for this difference between two concepts. The role of the CJEU in determining the scope of the non-discrimination concept in EU law is obvious and undeniable. As mentioned before, for instance, although only indirect taxes are harmonised in EU law and Article 110 covers only those taxes, the CJEU includes direct taxes with using articles on fundamental freedoms. With efforts of the CJEU, the non-discrimination concept in EU law becomes more dynamic and broader than the OECD Model Convention. Also in the OECD system, Committee on Fiscal Affairs provides changes and adaptations to new developments with amendments to the text of the Model and changes in the Commentary; but these efforts are not as quick and comprehensive as the efforts of the CJEU. Also national courts of contracting states interpret Article 24, but these interpretations depend on understandings of these courts. This causes an inconsistent form of interpretations and an uniform application cannot be provided. In addition, a national court interprets the treaty non-discrimination rule, only when there is a violation of this rule. This means that the national court of the source state which is the violator party interprets the article and the case at hand. So this hinders again the unity of application. As a result of this difference, the interpretation of non-discrimination provisions in the TFEU has a more consistent and uniform characteristic (Farinha Aniceto da Silva, 2016: 246).

Their targeted transtactions also cause this difference between their scopes. The OECD Model Convention generally targets discrimination against inbound activities (Bennett, 2006: 462). As it is explained before, all of the provisions in Article 24 limit the source state's taxation authority which is used for some kind of inbound activities. While the PE non-discrimination provision includes direct involvement by foreign natural or legal persons in the source state's economic life, the deductibility provision and the control and ownership non-discrimination provision include indirect involvement by foreigners (Bennett, 2006: 462). The reason behind this is that the focus of the OECD Model Convention. As it is explained before, the Model's main aim is to prevent double taxation by limiting the taxing power of the source state. In parallel with this, the obligation of non-discrimination also targets the source state. This means that the source state is obliged not to discriminate against direct and indirect involvements of foreigners to domestic economy. There is no obligation that prevents the residence state from discriminating against foreign investment or foreign income (Farinha Aniceto da Silva, 2016: 245).

On the other side, the TFEU's main target is to provide the internal market and also to eliminate obstacles against fundamental freedoms. They require that the TFEU should include both inbound and outbound activities; especially the usage of fundamentel freedoms. Beyond that, the CJEU does not accept wholly internal situations as they are involved in the TFEU, especially within the context of articles on fundamental freedoms. Thus the main target of the non-discrimination concept in EU law is both inbound and outbound activities of domestic persons which are subject to articles of fundamental freedoms (Farinha Aniceto da Silva, 2016: 245). The CJEU does not distinguish between inbound and outbound characteristics of the activities (Bammens, 2012: 1014). But when provisions of fundamental freedoms are the issue, the CJEU does not accept that purely internal situations are involved. So this constitutes a difference between two concepts.

It is worth adding that this difference may be due to the fact that the non-discrimination provisions take place in different contexts in two different systems. The non-discrimination rule has a great importance in realizing the internal market purpose of EU. So this rule is given a broader place. The main aim of the OECD Model Convention is preventing double taxation, therefore non-discrimination has a secondary place. Based on this, the OECD Model Convention prohibits some certain forms of tax discrimination, while the TFEU brings the entire protection from tax discrimination (Vogel, 1997: 1283). As a result of the stronger application and the broader scope of EU law, taxpayers are more inclined to rely on fundamental freedoms where both of the states are EU members and even if there is a bilateral tax treaty (Bammens, 2013: 175).

Another difference related with the scope is the geographical scope of application which means that where the non-discrimination provision can be applied or which states are included in the scope of the provision. The OECD Model Convention is a general requirement of the OECD which can be used as a basic text when preparing bilateral tax treaties. Therefore rather than the application area of this Model, treaties which are made based on this Model should be considered in determining the geographical scope of the Model. So bilateral treaties are products of reciprocity and only applicable for two contracting states. The applicability of the TFEU non-discrimination provisions depends on the provision itself. For instance, freedom of establishment is only applicable within the boundaries of EU, while free movement of capital can also be applied to transactions involved third states, according to some conditions (Farinha Aniceto da Silva, 2016: 245). However it can be said that non-discrimination provisions in the TFEU can generally be applicable to only intra-Community cases. Although there is a limit for the application, it is worth noting that these provisions are applicable to all member states. So the geographical scope is wider in EU law in comparison to the treaties based on the OECD Model.

In addition it should be said that the bilateral tax treaties which are made between EU member states based on the OECD Model Convention are only applicable as long as provisions of these treaties are compatible with EU law. Thus EU law limits the applicability of bilateral tax treaties. In general, the CJEU accepts that making treaties is included in the sovereignty of member states but these treaties cannot bring provisions, especially non-discrimination provisions which do not comply with the TFEU.

In Avoir Fiscal decision, the CJEU accepts the supremacy of EU law. Due to bilateral tax treaties which are prepared based on the OECD Model are regarded as a part of the national laws of contracting member states, EU law also has supremacy over these treaties. Again in Saint Gobain decision, the Court states that these bilateral treaties should be applied and interpreted so as to be consistent with EU law. So the difference between two levels is also set forth by the CJEU in its case law.

Indirect discrimination can be given as an instance for differences. As it is explained before, there are two types of tax discrimination which are direct and indirect discrimination. Direct discrimination means an obvious discrimination on grounds of nationality. In other words in this kind of discrimination, the national provision clearly differentiates non-nationals because of their nationality. Indirect discrimination means that a national provision does not include nationality as a criterion for different treatment to non-nationals but the used criterion results in a discriminatory practice which creates an effect equivalent to nationality based discrimination.

In EU law, direct discrimination is prohibited in Articles of the TFEU. However the CJEU covers indirect discrimination as well, with its case law. For instance in Biehl case, the Court accepts that provisions which differentiate non-residents can constitute discrimination for natural persons under some conditions. Avoir Fiscal decision has similar implications for legal persons. The CJEU interprets non-discrimination provisions and states that some other criteria different from nationality can create an equivalent effect to nationality based discrimination. So the Court includes indirect discrimination concept to the scope of the TFEU. Also in case law for indirect taxes on alcoholic beverages, the CJEU accepts that determining the alcohol content rather than the origin of the alcoholic beverage can create discriminatory results, if the alcohol content condition differentiates only imported alcoholic beverages. In parallel with this, in Humbolt case, the CJEU accepts that if the engine size criterion affects only imported cars in regards to the special tax on motor vehicles, then this criterion creates indirect discrimination.

The OECD Model convention does not bring an obvious rule for indirect discrimination. The Commentary states that this concept is not prohibitied with Article 24. In addition, there is no general authority as the CJEU which interprets and adds this concept to the scope of Article 24. For instance a residence based national provision does not fall foul of Article 24, even if this provision affects non-residents as a nationality based discrimination (Bammens, 2012: 58). So this is a difference from EU law.

Another difference can be observed when reverse discrimination concept is thought. As it was expressed above, reverse discrimination means the nationality based discrimination which targets the discriminating state's own nationals. In other words, if one state treats in favour of non-nationals and nationals are taxed more harshly based on their nationality, then reverse discrimination occurs. This kind of practice is prohibited with the case law of the CJEU, if some conditions are met. Actually as a rule, the CJEU does not see reverse discrimination within the scope of non-discrimination provisions. Because in here, there is only a treatment which has wholly internal characteristic. Such a lack of exercise of a fundamental freedom makes this treatment an internal situation. However the Court stretches this cross-border link condition when free movement of services is the issue. If a potential service provider or recipient might be observed, then an internal practice can be covered by free movement of services and this practice might consitute a reverse discrimination. So with the interpretations of the CJEU, reverse discrimination can be covered in the non-discrimination rule, even if the conditions of this practice are determined strictly and it's a rare situation.

On the other side, the OECD Model Convention does not include reverse discrimination in the non-discrimination article. Also the Commentary excludes this concept obviously. In here, it is stated that this Article does not cover better tax treatments for non-nationals. So reverse discrimination is another difference between two concepts. But it is noteworthy that BAMMENS states that this exclusion is only valid for taxation itself. As it is explained before, not only taxation but also the connected requirements are involved in the non-discrimination provision. According to BAMMENS, as a requirement of the equal treatment principle, reverse discrimination can be considered in the prohibition of tax discrimination in regards the connected requirements (Bammens, 2012: 23).

Article 24(2) of the OECD Model Convention constitutes another difference in the scopes of these two levels. This article prohibits contracting states from discriminating against stateless persons which are residents of one of the contracting states. So this article adds stateless persons to the scope of the non-discrimination provision as long as they are residents. The TFEU does not include such a provision for stateless persons. The reason behind that may be the EU citizenship concept. Because the non-discrimination rule only includes nationals of EU member states. Residence, as a rule, cannot grant rights which are given by the non-discrimination clauses. So a provision such as Article 24(2) may not be compatible with the spirit of the TFEU.

V.2.2- The Difference Between Their Approaches to Comparability of Residents and Non-Residents

After the difference in their scopes, the determination process of these two concepts should be evaluated. As expressed before, both of these concepts include a comparison in their nature. Because nationality based discrimination requires a different treatment between similar persons or objects. Determining this similarity is possible with making a comparability test. So this test is a common application of these two concepts. But there are some differences in the manner of the application of the test.

The first difference shows itself in the residence concept. As it is explained before, comparability test requires a substantial similarity between two persons or objects. This means that every relevant factor should be the same, except nationality. One of these relevant factors is residence. Because residents and non-residents are, as a rule, not considered as they are in the same circumstances from the viewpoint of both of these two levels. Based on this rule, a member state does not have to grant some tax benefits to non-residents, even if these tax benefits are granted to residents. Similar with this, this state is not obliged to consider personal and family circumstances of this non-resident. But the CJEU provides for an exception for these rules in regards to natural persons. Based on its Schumacker doctrine, residents and non-residents are not comparable persons, but if a non-resident receives his/her all or almost all income from the source state, then this state should treat him/her as a resident. So if this condition is met, then this non-resident should be regarded as he/she is under the same circumstances with residents. In addition, this non-resident should be granted tax benefits which are normally granted to residents; or the state should consider his/her personal or family circumstances as a resident.

On the other hand, the OECD Commentary refers residence as a relevant factor. In other words, in the system of the Model, residence should be considered in determining the comparability. So if a resident and a non-resident are included in one case, they cannot be considered as similar; because all relevant factors are not the same for them. So not granting tax benefits which are available for residents does not constitute a discriminatory practice. Different from the case law of the CJEU, the OECD Model Convention does not include an exception such as the “all or almost all” condition.

At this point it should be said that although indirect discrimination is not included in Article 24, sometimes national courts accepts treatments, which are not based on nationality as a differentiating criteron, as discriminatory practices. Anglo/Swiss Land & Building Company Ltd. decision of the High Court of France can be given as an instance for this situation. In this decision, the Court considers a residence based different treatment as it is discriminatory.

As another remark, even if it mentioned before, it should be said again that, Article 24(3) includes that the non-discrimination rule does not oblige contracting states to take account of personal and family circumstances of the other contracting state’s residents. In other words, a contracting state which is the source state from the viewpoint of a non-resident, does not have to consider personal and family circumstances of this non-resident, even if this state takes account of such circumstances of its own residents. This approach is not followed by the CJEU. Based on the radically different approach by the CJEU, non-residents should be entitled to personal allowances or expenses, if they generate all or almost all income from the source state (Ault & Sasseville, 2010: 109). So Schumacker doctrine is also included considering of personal or family circumstances by the source state.

Another difference can be observed for the comparability of products. In the case law of the CJEU, “similar goods” are defined as they are goods which meet the same needs of consumers. In addition to this general definition, the CJEU evaluates every case based on their own conditions and develops new criteria for the similarity between goods. However in the OECD Model Convention, indirect taxes, particularly goods are not referred. So there is no comparability for goods in this system.

It should be highlighted as another difference that the OECD Model Convention excludes special taxation privileges and immunities which are granted to public bodies or services or private institutions not for profit from the scope of Article 24. Because from the Model's point of view, foreign public bodies or services or private institutions not for profit are not in the same circumstances with the domestic ones. However this kind of distinction is not made by the TFEU. So this is a difference in the scope of the comparability between two standards.

V.2.3- The Objective Justification Test

In determining whether there is a discriminatory practice or not, the CJEU applies the objective justification test, after comparability test. According to the case law, there might be justifications which exclude a nationality based different treatment from the scope of non-discrimination clauses. These justifications are constituted by the TFEU and the CJEU interprets them based on the conditions of a case at hand. Public policy, public security, public health or public interest are counted by articles of fundamental freedoms as objective justifications. With the interpretation of the CJEU, the prevention from tax abuse, tax evasion or tax avoidance, ensuring balanced allocation of taxing jurisdictions are accepted as justifications. Preventing loss of tax revenue, maintaining the domestic tax base or preventing erosion of tax base are rejected justifications. In other words, they are not considered as objective justifications by the CJEU.

The objective justification test is not included in the OECD Model Convention as a second step. In the text of the Model, no such objective justifications are counted or this term is not referred. But it is noteworthy that in the Commentary, it is stated that the non-discrimination provision seeks a balance between state's tax liability cirteria and "the need to prevent unjustified discrimination". So this statement raises the question whether the Model allows objective justifications or not. In other words, does the Model leave the door open to national courts in regards to the objective justification issue?

When the text of the Model thought, it should be highlighted that neither the term "justification" nor a framework for its application is mentioned by the Model. So this statement which takes place in the Commentary only means that the term "unjustified discrimination" refers to arbitrary discrimination. In addition, if this term refers to the term objective justification, there is no guide for national courts in determining whether there is an objective justification or not. Thus accepting that this term refers to the objective justification test will lead to confusion in practice. Therefore, the Model does not allow contracting states to argue that the different treatment is justified on the basis of certain grounds such public policy (Bammens, 2012: 1013). In other words, it is better to conclude that the OECD Model Convention does not include the objective justification test.

In the process of the determination of discrimination, proportionality test is used by the CJEU as a step. Actually this test is involved in the objective justification test. This means that the allegedly discriminatory treatment is able to realize the objective justification which is claimed by one member state and should not exceed it. This test includes sub-tests which are suitability, necessity and balancing tests. These are not observed in the OECD Model Convention system, because the objective justification test is not involved in Article 24.

V.2.4- The Deductibilty Paragraph and The Arm's Length Standard

Pursuant to Article 24(4) of the OECD Model Convention, payments such as interest, royalty or other disbursements which made by a resident company to a non-resident company should be deductible if payments made to residents are able to be deducted. But if such deduction is denied based on the national thin capitalization rules and the application of them is compatible with the arm's lenght standard, then this denial does not constitute discrimination.

However in EU law, there is no comparable arm's length exception for discriminatory practices (Bennett, 2006: 463). For instance, as it was given before, in Lankhorst-Hohorst decision, the CJEU found the German thin capitalization rules discriminatory, even if these rules complied with the arm's length standard (Bennett, 2006: 463). So this shows the different approaches of the CJEU and the OECD Model Convention.

V.3- The Examination of Similarities and Differences Between the Non-Discrimination Clauses in Two Levels

Although there are some similarities between EU law and the OECD Model Convention, some fundamental differences between them are required an evaluation of two non-discrimination concepts. As it is explained before, it is inevitable that there are interactions between the two levels of non-discrimination concepts. Because in international area, both EU and the OECD are institutions with a great importance and also they intersect at some points. 22 of 28 EU member states are members of the OECD at the same time. Also almost all member states are using the OECD Model Convention in their treaty making process. So these relations are required these two levels to be compared to each other in regards to non-discrimination concepts.

Making a comparison between these two levels is possible within the concept of the non-discrimination, although they are seperated and their dynamics are different from each other. Because more or less they include this concept as a rule. In this regard, the non-discrimination rule in EU law has a much more substantial characteristic and the implementation of it is more strong. Dismissing the fact that the member states should change their national laws based on the non-discrimination rule which has a binding characteristic, this prohibition in EU law is established in a more firmly manner. Because the general nationality based non-discrimination rule is given by the TFEU in addition to the prohibition of tax discrimination. Also there are other rules such as articles on fundamental freedoms which can be used as tools as they are non-discrimination provisions. In this respect, EU law has a rich background for the non-discrimination rule to be implemented in a more strict way; although their implementation area is smaller than the OECD Model.

In contrast with EU law, the OECD Model selects specific tax discrimination instances and only prohibits them. Although one of these prohibitions is the nationality based non-discrimination rule which can be seen as a general rule, the protection which is provided for foreigners, can be regarded as it is somewhat weak. The OECD Model practice cannot be a comprehensive and dynamic one as EU law, because there is no institution to extend the scope of application of the non-discrimination rule such as the CJEU. At the same time, an unity in practice cannot be provided. However it is clear that a transnational court cannot be established within the OECD system, and for this reason, an unitary implementation such as that in EU, or an interpretation mechanism will not be provided. Nevertheless, this problem can be overcomed with establishing a more precise and detailed provision and also the OECD should encourage member states to use such a model without changing it.

In fact the OECD model is basically a set of measures designed to prevent double taxation. The provision of non-discrimination in this respect can be seen as a side concern. In other words, since the main purpose is not the elimination tax discrimination, Article 24 is not a comprehensive rule. So in order to reach an extensive rule which is more expedient, preventing tax discrimination may be regarded as another main purpose by the OECD. So the policies and viewpoints of the Model may be adopted in this manner.

Another important interaction can be provided about comparability test. Although this test can be observed within the context of these two levels, the implementation of it is different in some ways in practice. Because the OECD Model strictly accepts that resident and non-resident natural persons cannot be considered as they are in comparable situations. So the non-discrimination rule was shaped based on this idea. On the contrary, although the TFEU involves this acceptance as a rule, the CJEU elasticizes this rule in a more fair way. Based on abovementioned Schumacker doctrine of the Court, residents and non-resident can be in comparable situations, if the non-resident generates his/her all income from the source state. So the source state should consider such a non-resident as a resident and it is obliged not to discriminate him/her. This case law of the CJEU is an application that conforms to the principle of equality which is one of the underlying incentives of the non-discrimination rule. In other words, such a revision of comparability test makes the Model Convention able to realize the purpose of providing the principle of equality in international area. Thus making such a determination is important for making the OECD Model a more convenient text to the principle of equality.

It is worth noting that such implementation which is about the comparability of residents and non-residents, has a great importance within the concept of indirect discrimination. Because Schumacker doctrine can be regarded as a result of the CJEU's approach to the indirect discrimination concept. Although the TFEU prohibits only nationality based tax discrimination, the Court accepts that there can be criteria which are different from nationality but create an effect such as nationality based discrimination. Residence is one of the grounds which can make a provision discriminatory, but in an indirect manner. However the OECD Model does not include indirect discrimination. So with adding a provision which reflects Schumacker doctrine of the CJEU, the scope of the Model can be extended so as to involve indirect discrimination. This will lead to a more comprehensive non-discrimination concept in the OECD Model.

Justifications are another substantial difference between these two levels. These objective justifications change the discriminatory characteristic of a different or more burdensome treatment to foreign natural or legal persons or products. Because such justifications are accepted as valid grounds for a different treatment. In EU law, the state which has one of these objective justifications cannot be regarded as it is violating the prohibition of tax discrimination. These justifications which are counted by the TFEU such as public interest and are able to be interpreted by the CJEU, should be considered as tools to balance taxing powers of member states and the non-discrimination rule. Because member states have taxing power in their territories and they are able to use this power in accordance with their legitimate public policies. So with these justifications, EU law has left an open door to public policies of the member states. Such elasticity is not observed in the OECD Model Convention. From this point of view, some objective justifications can be added to the Model, in order to make the OECD system so as to provide a balance between the interests of contracting states and natural or legal persons. The OECD can give contracting states an opportunity to negotiate and add some justification grounds to their treaties within the frame which is determined by the OECD Model and by this way, an unitary implementation can be provided.

On the other hand, although objective justifications are counted by the TFEU, these justifications are interpreted by the CJEU according to the conditions of each case. So these justifications can be considered as a framework. From this point of view, there is always a risk of uncertainty and unpredictability. Because the justifications which are determined in the TFEU are being reinterpreted for every single situation, and interpretations can change in this way. For instance the Court accepts preventing from tax abuse, tax evasion or tax erosion as objective justifications, while does not accept preventing tax erosion or loss of rax revenue as they are objective ones. However the fact that those who are considered to be objective justifications prevent the reduction of the final purpose tax revenues. As it can be seen, there is uncertainty and inconsistency here.

As another instance, the fiscal cohesion concept is important. Because while this was regarded as an objective justification in Bachmann case, it was rejected in Wieclockx case. Such changes create a danger of unpredictability and discrimination for foreigners, which poses a problem in terms of non-discrimination and in particular the realization of the internal market objective.

If the issue is thought in terms of the OECD Model Convention, the absence of a supreme court or a single authority which gives binding decisions for states in this area makes it difficult to determine such objective justifications which have general meanings such as in the TFEU. Despite the existence of a court like the CJEU, it is more appropriate not to include justifications in the OECD Model because of the ambiguity that may occur. Besides this, in EU law, following of the route in the OECD Model will be more beneficial in terms of the creation of a more effective implementation of the non-discrimination rules and elimination of ambiguity. By this way it can be guaranteed that Member States will be treated in the same way for comparable circumstances.

State aid practices also constitutes another area for interaction. In the case law of the CJEU, unlawful state aid practices are prohibited within the context of the non-discrimination. With such state aids, member states may give rise to different treatments between comparable domestic and foreign situations by granting tax advantages to certain products or undertakings. In order to prevent these kind of discriminatory results, the TFEU identifies unlawful state aids and with the effect of the CJEU's case law, this practice is included in the non-discrimination concept. Such an approach is not seen in the OECD Model Convention. Besides this, the reciprocity in the nature of bilateral tax treaties creates a risk for the inclusion of such practices in the treaties as a permitted case, rather than a prohibition. Thus this deficiency in the OECD Model Convention can be ended with following the TFEU's path. So a provision which prohibits unlawful state aids can be added to the Model. As another solution, to bring limitations to the competence of national authorities or to constitute more detailed rules which do not leave a room for different interpretations by contracting states, can be beneficial in making the OECD Model a more comprehensive text (Nettestad, 2017: 29).

Another deficiency in the OECD Model is that it covers inbound activities to the source state. It means that there is no obligation of non-discrimination for outbound activities; Article 24 only include direct and indirect involvement of foreigners to the source state's economy. On the other side, in EU law, there is no seperation such as inbound and outbound activities. Both founding treaties and the case law of the CJEU do not distinguish such activities and provide protection for both of them. This approach may not be compatible with the main idea behind the OECD Model which is designed for developed states, but it is better not to distinguish inbound and outbound activities to reach an extensive non-discrimination rule.

On the other side, EU law also has lessons to be learned from the OECD Model. These deficiencies are noticed when the two non-discrimination rules which take place in different levels are read together. One of these deficiencies is about the scope of the non-discrimination rule. This deficiency derives from the perspective of both systems. As it is explained before, both the wording of the TFEU and the CJEU's case law does not include purely internal activities to the scope of the non-discrimination rule. This situation is well observed when fundamental freedoms are the issue. Because generally the Court seeks that in order to apply non-discrimination provisions of fundamental freedoms, there should be always a crossborder activity. From the pointview of the Court, foreignness is a condition of the nationality based tax discrimination and only cross-border activities can meet this condition. Based on this, internal issues are excluded from the scope of the non-discrimination rule, due to they do not involve the foreignnes factor. Although this approach seems to change slowly, it cannot be said that the transformation of the case law is completed.

In contrast with the CJEU's general approach, the OECD Model does not inlcude such an approach. Even though this model does not include purely internal situations, it can be observed that residents of a contracting state are protected from the discriminatory treatments of their home state in some conditions. For instance in Article 24(4), it is stated that residents should not be denied when they want to deduct their payments such as interest, royalty or other disbursements to residents of the other contracting state, if such payments are deductible when they are made to residents. So in here, residents of a contracting state are protected from discriminatory taxation of their residence state. Although they are discriminated due to their relationship with non-residents, it is sure that an internal situation is covered by the Model. The same approcah is followed in Article 24(5) by the OECD Model. In this article, again residents are protected from discriminatory taxation of the residence state based on the foreignness of the owner or the controller of these residents.

Such an approach can be followed in EU law in order to extend the scope of the non-discrimination rule. By this way, this rule can be applied effectively. Also reverse discrimination may be included in the scope of the non-discrimination rule by the CJEU. Because this kind of discrimination is regarded as a purely internal practice and therefore, it is exluded from the scope. But this is incompatible with the principle of equality. So if this interaction will result in a change in EU law, then this might create a side affect such as the inclusion and prohibition of reverse discrimination. Also it should be added that reverse discrimination is also not covered by the OECD Model Convention. It is possible that the inclusion of this concept by the TFEU can affect the OECD practice and by this way, a more comprehensive and fair non-discrimination concept can be reached in international area.

Another defficiency in EU law is the lack of a provision such as Article 24(2) which prohibits discrimination against stateless persons. This provision is a reflection of the New York Convention of 1954. It can be regarded as a rule that extends the non-discrimination practice. Although it is explained above that this provision may be incompatible with the spirit of EU since it does not serve to the internal market purpose, its fair characteristic should not be ignored. But in a different pointview, the general non-discrimination rule in the TFEU can be interpreted as it covers such persons, because the wording of it does not exclude any possibility.

In addition The EU Charter of Fundamental Rights which has the same effect with the founding treaties, can be interpreted as it includes the protection of stateless persons from discrimination. This document was created to bring together all rights protected in EU. So in here, with Article 21, discrimination is prohibited in a general sense so as to include nationality based discrimination to which tax discrimination belongs. Actually this article can be interpreted as it only covers nationals of EU member states. In addition to this, the CJEU has not been applied this article so as to affect stateless persons (Molnar, 2017). Although the general approach is in that manner, the implication made for the general non-discrimination rule in TFEU can also be made here. In other words, this general non-discrimination provision can be read in a context so as to prohibit discrimination against stateless persons similar with nationals of EU states (Molnar, 2017). However it is worth remarking that these kind of implications are not supported by the case law of the CJEU and they are regarded as only comments on this issue. Thus the lack of the obvious protection for stateless persons is a concrete result. A provision such as Article 24(2) of the OECD Model can be regarded as a requirement for a better and extensive non-discrimination rule.

VI- TAX DISCRIMINATION AND TURKISH TAX SYSTEM

Tax discrimination prohibitions both in EU law and in the OECD Model Convention has a great importance for Tukish tax system. Because Turkey is a candidate of EU and also the OECD Model has been used as a basis for the tax treaties of Turkey since the past. So non-discrimination provisions in both levels concern Turkey closely.

In this part of the study, first of all Turkish tax system is evaluated within the context of Progress Reports and discriminatory practices which are determined by the Commission are centered. In addition to this, possible instances for provisions in Turkish tax systems which can be regarded as discriminatory practices are set forth. Then the bilateral tax treaties of Turkey is evaluated. Following this, the transmission process of bilateral tax treaties and their position in the hierarchy of norms is examined. And finally, tax laws in Turkish tax system is evaluated from the perspective of both EU law and the OECD Model Convention and possible discriminatory practices are highlighted.

VI.1- The Relationship Between EU Law and Turkish Tax System

As it is previously explained, in establishing the internal market, non-discriminarion rule is used as a key point in EU law. With regulations included in founding treaties, this prohibition is given a binding characteristic. In other words, prohibition of nationality or origin based tax discrimination functions so as to provide market equality and this is important particularly for fundamental freedoms (free movement rights).

Non-discrimination is also a substantial issue for Turkey; since Turkey is a candidate for EU membership and negotiations are ongoing. As a part of the candidacy process, Turkey has to act in accordance with the purpose of harmonisation in the EU acquis and the action plans which are prepared for it. So it is also a part of the membership process to rearrange our tax system appropriately in accordance with the acquis. In this context, changes have been determined for the harmonisation of the tax system since the beginning of the candidacy period and Turkey has made various arrangements to take the necessary precautions.

It is also worth noting that there are always two main tax practices which are meant to be violations of non-discrimination rules within the context of our tax system; the first one is on alcoholic beverages and the second one is on tobacco products. These two points are still problematic issues for the harmonisation with the acquis and for providing the non-discrimination rule in our tax system. Because it is argued by the Commission that these practices are discriminatory obstacles to free movement of goods and they hinder the integration process which is held in membership negotiations. Well, under this heading, first the position of EU law in Tukish legal system is evaluated. Then the differences between the Turkish tax system and the EU acquis which can be seperated into two parts as alcoholic beverages and tobacco products are set out within the frame of non-discrimination rule, and the changes which are made from past to today and also the current situation are examined together with the Progress Reports.

VI.1.1- The Position of EU Law in Turkish Legal System and The Effect of EU Law On Tax Discrimination Practices in Turkey

In EU system, any European state can apply for the membership of EU provided that they are respectful for the democratic values of EU and able to promote them. Being a member of EU can only be possible when an official candidate state complies with the EU acquis, all EU member states and their citizens consent this membership. Thus when a state applies to be a candidate, membership negotiations starts provided that these conditions are met.

Copenhagen Criteria which determined by the European Council for the accession, should be met by candidate states. So in membership negotiations, whether Copenhagen criteria are met or not and the adoption process of EU rules are negotiated by ministers and ambassadors of the EU governments and the candidate state. These formal membership negotiations are divided into thirty five main chapters which include a chapter (Chapter 16) for taxation and with these chapters, the Commission pursues the candidate state's adaptation. Also annual progress reports are issued by the Commission in order to inform the EU Council and European Parliament. If the meaning of these progress reports in regards to tax discrimination should be highlighted, it should be said that discriminatory practices in the legislation of the candidate state are set forth and required to be changed in these progress reports. It is noteworthy that negotiations for each chapter can only be closed provided that all member states are satisfied in regards to the progress of the candidate for that chapter. When these negotiations have been completed, then this candidate state can join EU. This entrance is made by way of an accession treaty.

If the situation of Turkey is examined, it should be said that relations between Turkey and EU have officially begun with the Agreement Creating an Association Between The Republic of Turkey and the European Economic Community (the Ankara Agreement) signed in 1963 (Aşçı Akıncı, 2012: 101). This was not an application for full membership but it started a harmonisation period for Turkey until the completion of full membership. Then Turkey applied for full membership to the European Community in 1987 (Serdaroğlu, 2013: 1). In 1999 and at the Helsinki Summit, the European Council declared Turkey as a candidate state and then in 2006, accession talks with Tukey began (Erkem, 2016: 125). This status required that Turkey should start to make reforms in the legal system in regards to the EU acquis.

Within this candidacy, regulations of the TFEU and decisions and jurisdiction of the CJEU are important for Turkish tax system; because the relationship between EU and Turkey, for now, can only be seen as advisory documents for Turkey. Because Turkey is not a member of EU yet, but the membership process continues. This situation is highlighted in progress reports and action plans which also can be thought as advisory documents. Thus Turkey needs to act in accordance with these documents due to end a part of the membership process and then be a member of EU. So it can be said that Turkey should realize reforms for the membership based on the Ankara Agreement which is a legal document equivalent to laws in the legal system.

At this point it is worth noting that taxation is an important policy field which constitutes Chapter 16 in our membership negotiations. Article 16 of the Ankara Agreement also shows the importance of this field with stating that "*the contracting parties recognize that the principles lay down in the provisions on competition, taxation and the approximation of law must be made applicable in their relations within the Association*" (T.C. Avrupa Birliği Bakanlığı, 2011). So with this article, Turkey has accepted the application of the provisions on taxation of the TFEU in partnership relations (Aşçı Akıncı, 2012: 101). Also particularly in regards to discriminatory practices, pursuant to Article 9, there is a general prohibition of any discrimination based on nationality which arises in the application field of the Ankara Agreement (Eroğlu, 2015: 2). In addition, the Additional Protocol extends this obligation which is constituted by the Ankara Agreement, with laying down provisions on the discriminatory taxation (Cavlak & Işık, 2015: 34). Based on these articles, Turkey should provide the integration with the EU acquis with regard to taxation. In 2000, the Commission prepared an accession partnership document and with this, the strategy of Turkey for full membership was determined. Based on this, the general target for the adaptation process of taxation were to start the integration for excise duties and the value added tax and also to abolish discriminatory tax practices (Pehlivan & Öz, 2015: 222).

Changes in our tax system and ending discriminatory applications can be regarded as they are not only important for the membership process but also a part of the membership. Because the TFEU is one of the main documents of EU and to check whether governments are in line with the agreements is included in the scope of the CJEU's jurisdiction. If a member state does not meet the obligations which are determined by the TFEU, the Court can invite a member state to fulfill its obligations under EU law. Because EU law is superior when compared with national laws. Hence both legal regulations and legislation of the CJEU require a tax harmonisation.

Non-discrimination rules of the TFEU can be considered within the context of the harmonisation. Specifically, the harmonisation of indirect taxes is important from this perspective. The legal basis for the harmonisation of indirect taxes is Article 93 of the TFEU which states that

> "*The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition*."

At this point, the tax harmonisation on indirect taxes should be examined. Especially the special consumption tax is an important issue within this context. Because one of the arms of the indirect tax harmonisation is about the special consumption tax. The purpose behind the tax harmonisation of special consumption tax is to prevent tax discrimination within the context of freedom of movement, there are some other reasons such as the application of the Customs Union, agriculture, environment, energy and transport policies of member states (Oral, 2006: 127-128). This harmonisation is carried out with the directives of the European Council. These directives are compulsory regulations that must be complied by member states, such as those in the statutes, but they do not enter into force directly and are transformed into domestic law by a law or decree to be taken by the member states (Oral, 2006: 127). The subject, tax base and rates of private consumption taxes are harmonised with six separate directives issued on October 1992 (Oral, 2006: 122).

With regards to Turkey, it should be said that the special consumption tax is a consequence of the indirect tax harmonisation. The Turkish tax system met with the special consumption tax in 2002 in order to harmonise with the EU acquis (Yıldırım, 2015: 219). It has been accepted in EU that the special consumption tax should be applied to three main categories of goods which consist of alcohol and alcoholic beverages; tobacco products and energy products. But Turkey applies this tax to more than these three categories; unlike the EU acquis in our system, non-alcoholic products, some food products, motorized land, sea and air transportation vehicles are subject to the special consumption tax. This application derives from the purpose of obtaining more tax revenue but in EU, protection of public health, prevention of environmental pollution and energy saving are purposes behind the special consumption tax (Oral, 2006: 123).

Apart from the differences in tax subjects, there are also differences in implementation aspects such as tax rates which also creates tax discrimination problems. For instance, in the case of alcoholic beverages, EU determines the method of calculation of the tax as a fixed rate; it is seen that the proportional calculation method is adopted in Turkey (Oral, 2006: 123-124). This case is stated in the progress reports, our special consumption tax is not in line with the EU acquis. Thus, althought one of the reasons for the introduction of the special consumption tax is compliance with the EU acquis, a number of differences in Turkish special consumption tax can be observed (Yıldırım, 2015: 146). These differences can sometimes lead to tax discrimination, which, as already explained, hampers both harmonisation with the EU legislation and the development of our membership process.

As it can be seen, tax harmonisation is an important issue in implementation of non-discrimination rules. If the issue will be evaluated for Turkey from the view of non-discrimination, it should be highlighted that with the decision of the Council of Ministers dated March. 2001, "Turkey's National Program for the Adoption of the European Union Acquis" was accepted. In this program, our commitment to compliance with the EU legislation backed up short and medium term plans (Taylar, 2010: 436). In these plans, non-discrimination in regards to taxation absolutely plays a part. This situation is also highlighted in Progress Reports. This means that our tax laws which create discriminatory practices should be changed. In this context, all the rules in our tax system that are incompatible with the EU acquis, particularly discriminatory rules for alcoholic beverages and tobacco products should be rearranged. The pressures on this issue can already be seen in the Progress Reports. Hence, if Turkey will be a member of EU, tax harmonisation should be completed and this includes elimination of discriminatory legal regulations and practices. Eventhough this harmonisation and elimination is important for our membership process now, but it will become even more important in case of a possible membership, specifically when it is thought that the Court will be able to make decisions for us.

Customs Union which is a second form of economic integration is also an important point in the relationship between EU and Turkey (Tapan, 1998: 980). In regards to tax discrimination, it should also be considered as a source for the non-discrimination concept. Customs Union is defined as a union in which members apply the same tariff, establish a customs wall against non-member states and abolish customs duties and all charges having equivalent effect which are on the internal transactions (Tapan, 1998: 981). Customs Union was originally established with Article 9 of the Treaty of Rome, and with establishing such a union, it was desired to implement free movement of goods completely (Pehlivan & Öz, 2015: 183). Thus the main characteristics of Customs Union is that member states apply a customs wall to non-member states, although they abolish customs duties and equivalent charges for member states.

With the Ankara Agreement, Turkey started the process of entering into the Customs Union (Erkem, 2016: 124). So it can be said that Customs Union is not a result of a seperate agreement with EU; it is a stage of the integration process. This stage consists of two different parts which are association and accession (Alkan, 2017: 4). Association process started with the Ankara Agreement. Based on this, EU have abolished unilaterally all taxes on goods which were covered by Customs Union, particularly industrial goods, on behalf of Turkey. The second one, accession process was completed in 1996 with the Decision No 1/95 of the Association Council.

Pursuant to Article 10 of the Ankara Agreement, Customs Union involve

> "*the prohibition between member States of the Community and Turkey, of customs duties on imports and exports and of all charges having equivalent effect, quantitative restrictions and all other measures having equivalent effect which are designed to protect national production in a manner contrary to the objectives of this Agreement*" (T.C. Avrupa Birliği Bakanlığı, 2011).

In order to show the non-discrimination rule in Customs Union, Article 9 of this agreement which states that "*The contracting parties recognise that within the scope of this agreement (...) any discrimination on grounds of nationality shall be prohibited (...)*" is also important (T.C. Avrupa Birliği Bakanlığı, 2011).

So with the Customs Union, Turkey finds an opportunity to get involved in the internal market and undertakes to comply with a part of the EU legislation which includes free movement of industrial goods and also common customs tariff. On the other side, Turkey is obliged to harmonise its special consumption tax and value added tax systems, since these taxes affect free movement of goods in regards to import and export transactions.

At this point it should also be said that although being a member of Customs Union obliges Turkey to adapt its laws, to comply with the EU legislation and not to infringe free movement of goods, EU member states are also obliged to take account of Turkey's membership of Customs Union. It means that free movement of goods should not be infringed to the detriment of Turkey. In order to better illustrate this situation, it is essential to mention a decision given by the CJEU in the near future. In Istanbul Lojistik Ltd case[131], there was a haulage company, Istanbul Lojistik Ltd, which was registered in Turkey and was carrying goods by road from Turkey to other various EU member states. In this transportation process, Hungary was a state of transit and the company had a Hungarian-Turkey transit licence. Based on this licence, the company was transporting textiles to other states, particularly Germany with heavy goods vehicles. One of those vehicles faced an inspection which was carried out by National Tax and Customs Authority of Hungary, on March 2015. As a result of this inspection, it was determined that the transit licence of the company did not include the revenue stamp which was a sign showing that the motor vehicle tax had been paid. Based on this determination, Hungarian National Tax and

[131] See **Istanbul Lojistik Ltd v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság [2017], Case C-65/16,** ECLI:EU:C:2017:770.

Customs Authority required Istanbul Lojistik to pay the motor vehicle tax with a penalty and an administrative fine.

After Istanbul Lojistik appealed before the second-instance tax authority, the company brought an action before the Administrative and Labour Court, Szegerd, Hungary. In this case, the company claimed that this motor vehicle tax should be regarded as a charge having equivalent effect to a customs duty and it was contrary to EU law, because it levied in a discriminatory, protective manner and created a restriction against free movement of goods. The National Court requested for a preliminary ruling from the CJEU. Because the Court was uncertain whether this tax could be regarded as a charge having equivalent effect to customs duty and it added that pursuant to the national legislation, persons operating motor vehicles registered in a member state did not have to pay this tax, while persons registered in a non-EU member such as Turkey had to pay in respect of transit through Hungary. So the Court asked whether Article 4 of Decision No 1/95 of the Association Council which stated that "*import and export duties and charges having equivalent effect shall be wholly abolished between the Community and Turkey (...)*", must be interpreted so as to conclude that the tax in the issue constituted a charge having equivalent effect to a customs duty or not.

The CJEU referred its case law on this issue with stating that charges having equivalent effect to customs duties were regarded as charges which were not customs duties in the strict sense but were levied on goods due to they crossed a frontier. According to the Court, these kind of charges created obstacles to free movement of goods; since they caused an increase in prices of imported or exported goods. So free movement of goods required that such charges were prohibited by Article 36 of the TFEU. Also in order to realize free movement of goods completely, not only cross-border transactions but also transit movements should be prohibited from intervention of member states. Thus a charge having equivalent effect to customs duty covered such charges which affected free movement of goods in transit.

It is important that the CJEU highlighted that in this case, the Ankara Agreement required that free movement of goods should not be regarded only within the context of EU but also Customs Union. So this motor vehicle tax should be considered as a charge having equivalent effect to customs duty within the meaning of Article 4 of Decision No 1/95 of the Association Council. Because this tax was imposed on the goods transported by vehicles registered in Turkey due to they crossed the Hungarian border.

The Court did not accept the Hungarian government's justifications such as the low amount of tax and the need to maintain the national road network and the echological damage resulting from that mode of transport. According to the Court, justifications listed in Article 36 of the TFEU did not include charges having equivalent effect to customs duties, it only covered measures having equivalent effect to quantitative restrictions. Thus the Court answered the national court of Hungary so as to be positive. It highlighted as a result that, Article 4 of Decision No 1/95 of the Association Council was available to be interpreted as it prohibited the Hungarian motor vehicle tax which imposed to Turkey although Turkey was also a member of Customs Union, while the implementation of the tax did not cover other member states.

This decision given on October 2017 is important from the viewpoint of Turkey, because such charges having equivalent effect are not only imposed by Hungary but also other EU member states to the detriment of Turkey. Based on these applications, Turkey faced losses of 3.5 billion Euro for a year in the trade between Turkey and EU due to such charges on transit goods (Anadolu Ajansı, 2017). Before this decision, Turkish haulage companies were discriminated by obliging to pay nearly 800 Euro for each transit pass; for instance Greece obliged Turkey to pay 1000 Euro, while the amount was 236 Euro in Romania or 86 Euro in Bulgaria (Yücel, 2017). Thus Turkish companies had to reflect this payments to the price of transportation and then the EU companies which determined a lower price, were prefered and this affected negatively to the export capacity of Turkey. With this decision, it is estimated that annually loss of 3.5 billion Euro in regards to trade between Turkey and EU will be prevented (Orhun, 2017).

So this decision shows that besides Turkey is obliged to comply with the provisions of Customs Union and not to discriminate EU members with charges having equivalent effect to customs duties, Turkey is also protected from discriminatory and restrictive practices of EU member states within the context of Customs Union.

So now, Progress Reports should be evaluated, in order to illustrate how discrimination is determined and which subjects are regarded as discriminatory practices by EU. These Progress Reports generally include taxes on two main subjects which are alcoholic beverages and tobacco products. They can be regarded as areas in which EU has the authority to intervene a member state's tax sovereignty.

VI.1.2- Discrimination in Taxation of Alcoholic Beverages

One of the main problematic subjects in tax discrimination issue in Turkey is the taxation of alcoholic beverages. This problematic issue has been tried to be solved from past to present. Because according to the Commission, taxation of this kind of beverages causes a discrimination between domestic and imported products in Turkey.

To clear up the matter it is worth noting that, in Turkish tax system, the special consumption tax which includes alcoholic beverages, is always one of the most important taxes. Within the context of membership negotiations and harmonisation with the acquis, harmonisation of the special consumption tax have always been underlined. It can be seen that from the first Progress Report to the last, the need for harmonisation within the context of non-discrimination has been highlighted. Although the phrase of "discrimination on alcoholic beverages" was not used in the first Progress Report of 1999, it was stated that imported products should be taxed in the same proportion with similar products produced domestically. So this includes also alcoholic beverages. The same approach can be observed in the second Progress Report of 2000. In 2001 Progress Report, the same situation was mentioned but it was emphasized that new regulations should be made especially on the rates of the special consumption tax which was applied to alcoholic beverages.

In 2002 Progress Report, the amendment of special consumption tax which brought an ad valorem duty for alcoholic beverages was seen as an improvement but it was also noted that this duty might create discriminatory results, since there was a possibility to increase duties for certain products.

On 2004, Turkey has introduced a minimum level on alcoholic products and began to levy the special consumption tax based on the type of the beverage. This has been criticized in the Progress Report, because the tax in EU was taken based on the content of alcohol and the taxation based on the type of the beverage had discriminatory consequences. In the report, this issue was highlighted with stating that "*This results in discrimination against* *imported products, which are taxed at higher rates than comparable domestic products with similar alcohol content.*"[132] With this justification, it was stated that there was an urgent need to harmonise the removal of the discriminatory tax regime of the special consumption tax.

Taxing alcoholic beverages based on their type rather than the majority of the alcohol content was also criticized in 2005 Progress Report. In this report, it was pointed with stating that "*(...) several alcoholic drinks of the types normally produced in Turkey (eg. Raki) are taxed at much lower rates than imported ones (Whiskey, Rum etc.) even though their alcoholic content is the same.*" In parallel with this, 2006 Progress Report showed that this situation was contrary to the acquis; with resulting in higher rates for imported products compared to domestic products. This issue was also criticized in Progress Report of 2007 and 2008, but this time, this implementation which was not in line with the acquis was also interpreted as the violation of Customs Union and WTO rules. In addition, it was pointed out that the elimination of this discriminatory tax implementation was the key for further progress in accession negotiations.

At this point, it should be said that 2009 was an important milestone for the harmonisation of the special concumption tax. Because in this year on 18th May, an Action Plan was prepared and accepted; Turkey guaranteed the elimination of discriminatory rules which included alcoholic beverages. Within this framework, taking legislative measures on the taxation scales and the rate for alcohol and alcoholic beverages were commited in accordance with Directives No. 92/84/EEC, 95/59/EEC, 2002/10/EC and 92/79/EEC.[133] So, as stated in 2009 Progress Report;

> "*the propotional taxation was fully eliminated by a Cabinet Decree adopted on 6 April 2009 with effect from 14 April 2009 and new specific duty rates were set within clear milestones mutually accepted in the view of full elimination of remaining discriminatory taxation.*"[134]

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[132] Commission of The European Communities, 2004 Regular Report on Turkey's Progress Towards Accession, 06.10.2004, Brussels.
[133] Republic of Turkey Ministry of EU Affairs, Turkish programme for alignment with the acquis, http://www.ab.gov.tr/files/ardb/evt/2_turkiye_ab_iliskileri/2_2_adaylik_sureci/2_2_6_muzakere_sureci/2_2_6_2_turkiyen_in_ab_muktesebatina_uyum_programi/16_vergilendirme.pdf.
[134] Commission of The European Communities, 2009 Regular Report on Turkey's Progress Towards Accession, 14.10.2009, Brussels.

However, in 2010 Progress Report, it was said that this Cabine Decree did not fully eliminate the discrimination but did reduce the differences. Althought this can be seen as a positive step, the report also noted that;

> "*in January and October 2010, the excise duty rate on alcoholic beverages was increased by 10% and 30% respectively across the board. Contradicting the action plan, this increased the differentials in absolute figures between the taxation of imported compared to domestic alcoholic beverages.*"[135]

When it comes to 2011, it was emphasized that no progress could be reported on the elimination of discrimination against imported alcoholic beverages but that Turkey must comply with commitments in the action plan and gradually abolish these discriminatory practices. Also in 2012 and 2013 Progress Reports, it was highlighted that these practices still existed because Turkey did not properly implement the Action Plan of 2009 and further efforts were needed to eliminate them gradually according to the Action Plan.

Althought the difference between imported and domestically produced beverages were increased, as states in Progress Report of 2014, it can be seen from Progress Report of 2015, the discriminatory difference between imported and domestically produced products were reduced in January. According to the report,

> "*The increase in excise duties on raki was proportionally higher than on other alcoholic drinks, thereby significantly reducing taxation differentials. Although not fully compliant with the agreed differentials for 2015 included in the 2009 taxation action plan, this is a positive step towards meeting them.*"[136]

However the general increase in the special consumption tax which was made in July was again regarded a discriminatory action about alcoholic beverages.

Finally in the last report – 2016 Progress Report, it was stated that

> "*in December Turkey increased the excise duty on all alcoholic beverages by 15 %, thereby increasing the discriminatory differentials between domestic and imported products. Consequently, the excise duty gap between raki and equivalent spirits increased from TRY 17.41 to TRY 20.03 in absolute terms, whereas the 2009 action plan forecast a gap of just TRY 6. This contradicts the 2009 action plan on reduction of discriminatory taxation.*"[137]

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[135] Commission of The European Communities, 2010 Regular Report on Turkey's Progress Towards Accession, 09.11.2010, Brussels.
[136] Commission of The European Communities, 2015 Regular Report on Turkey's Progress Towards Accession, 10.11.2015, Brussels.
[137] Commission of The European Communities, 2016 Regular Report on Turkey's Progress Towards Accession, 09.11.2016, Brussels.

As it can be seen from the Progress Reports, the discriminatory implementation of the special consumption the alcoholic beverages derives from the taxation based on the type rather than the alcohol rate or content of the alcoholic beverage. When the tax is applied in this way, domestic products such as raki and foreign products such as whiskey or rum become different types of products, and while raki is taxed at a lower rate, taxes at higher rate are levied on imported alcoholic beverages. However there is no difference between for instance raki and whiskey based on their alcoholic content and they meet the same needs of consumers, the only difference is their names and origins. So there is an origin based discriminatory implementation for comparable products are in hand. In other words, these alcoholic beverages are similar from the perspective of the CJEU and they should not be taxed differently without any objective justification. Turkey has put in place the Action Plan of 2009 to address this situation and to align with the EU acquis on non-discrimination between similar products, thereby committing itself to gradually diminishing discriminatory taxation. This is one of the key points on which the Chapter 16 titled “taxation” is introduced, but by 2017 it has not yet been achieved. According to the Action Plan, this elimination will take place until 2018. Therefore, until 2018, Turkey must end the discriminatory practices and achieve alignment with the acquis.

VI.1.3- Discrimination in Taxation of Tobacco Products

The discriminatory implementation of taxes can also be observed in tobacco products. The second issue which is highlighted in the Progress Reports is eliminating discriminatory taxation on tobacco product. These practices can be divided into two main points; the first practice derives from the special consumption tax and the second one derives from the Tobacco Fund.

If the discrimination created by the special consumption tax on tobacco products is examined, it should be said that the first critic of this was made in 2000 Progress Report. This report emphasized that the rates which were applied to tobacco products should be changed so as to be comply with the acquis. However 2004 Progress Report made the situation more concrete. In this report, the taxation of cigarettes based on per content of oriental tobacco was criticized and it was noted that "*this is contrary to the acquis, as it introduces a de facto discrimination against imported products.*"[138]

A positive review can be observed in 2005 Progress Report; because in this year, legislative amendments which were adopted in July of 2005 reduced discriminatory taxes on imported cigarettes.

In 2006, the discriminatory practice of the special consumption tax on tobacco products evaluated as a practice which were incompatible with the acquis as well as against the Customs Union and WTO rules. Because as indicated before, tax discrimination is prohibited in both areas.

2009 was an important year for tobacco products as it was explained for alcoholic beverages above. In this year, an Action Plan was accepted by Turkey and it was promised to end discriminatory taxation about tobacco products as well as other areas. In this context, amendments on cigarette taxation criteria and definitions in other tobacco products in accordance with Directives No 95/59/EEC, 2002/10/EC and 92/79/EEC was highlighted. But neither in 2010 nor in 2011, a single positive step which was taken by Turkey could not be observed about this issue.

Aside from the fact that there was still no positive step in 2012, negative comments have been placed on the raport. It was highlighted that "*the government has the possibility to set different specific amounts in respect of certain characteristics of the tobacco or its packaging that could be discriminatory and therefore non-compliant.*"[139]

It should be said that there were no positive actions reported from 2013 to 2016 about the special consumption taxes on tobacco products. So the discriminatory implementation can be observed today and the elimination did not achieved. In other words, the taxation of imported tobacco products which remains to be discriminatory does not comply with the standards in EU with regard to the non-discrimination concept.

To fully understand Turkey's situation in tax discrimination, the second instance of discrimination should be examined. This second discriminatory practice which is the case

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[138] Commission of The European Communities, 2004 Regular Report on Turkey's Progress Towards Accession, 06.10.2004, Brussels.
[139] Commission of The European Communities, 2012 Regular Report on Turkey's Progress Towards Accession, 10.10.2012, Brussels.

for tobacco products, comes to the fore in regards to the Tobacco Fund. Turkey applies a special tax on imported tobacco products under the name of the "Tobacco Fund" in addition to the special consumption tax. This practice has been reviewed as a discriminatory action and criticized for imported tobacco products from past to present.

At this point, it is necessary to discuss in detail the Tobacco Fund. This fund first came to the fore in 1986 when the monopoly of the government on tobacco products was abolished. With this abolishment, the Law No 1177 was amended and “The Tobacco Production Development Fund” has been established under the Ministries of Finance and Customs, and this can be seen as a prototype of today’s Tobacco Fund. Following to this, in 1991, the fund’s name was changed as “Tobacco Fund”.

The purpose behind the fund is to develop tobacco products in the country (Tütün Eksperleri Derneği, 2016). The subject of this fund which is currently being applied, is imports of tobacco and tobacco products and the revenue which is generated by the fund is transferred directly to the general budget.[140] So it should be highlighted that this fund had contributed almost $ 200 million annually to the budget in the past (Özdemir, 2010: 75). Actually it is noteworthy that, in fact, this fund was abolished in 2001 with the Law No 4629 which abolished all funds. But it was stated in the same law that this fund will continue to be procured until a new regulation is made. This means that this fund was never abolished, but in Turkey’s 8th Five-Year Developmet Plan, the government advocates that the fund should be seen as a temporary application (T.C. Başbakanlık, 2004: 48).

This Fund was mentioned for the first time in 2003 Progress Report. According to the report, “*The Tobacco Fund which has been in force since 1986, stipulating collection of the special duty from imported tobacco and cigarettes, is discriminatory and should be abrogated.*” This issue were stated in 2004 Progress Report.

In 2005 Progress Report, it was first mentioned that the implementation of the Tobacco Fund should not be seen as only a contradiction of the acquis, but also it violated the Customs Union and WTO rules.

[140] See T.C. Devlet Bakanlığı ve Başbakanlık Yardımcılığı, 04.11.2009, No B.02.0.003/13-3239 sayılı 7/8987, https://www.tbmm.gov.tr/develop/owa/yazili_sozlu_soru_sd.onerge_bilgileri?kanunlar_sira_no=75435 (Date Accessed: 04.04.2017)

The Fund criticized in 2008 Progress Report. According to this, "*The Tobacco Fund remains discriminatory. It sets a special duty on imported tobacco and cigarettes only, which is not applied to domestic products.*" In this way, it was highlighted that there were comparable products, but domestic ones was not taxed while the fund applied to imported ones.

2009 was also an important year for Tobacco Fund due to the abovementoioned Action Plan. Because the committement about the elimination of discriminatory implementations which took place in this plan, included also this Fund. But a single measure was not made to remove the Tobacco Fund in 2009 or in 2010.

When it came to 2011, a positive development finally came in view. According to 2011 Progress Report, "*Turkey decreased the Tobacco Fund on imported non-processed tobacco. This is a positive step towards full abolition of discriminatory practices in the taxation of tobacco.*"[141] This step continued in 2012 and a further reduction was made in the Tobacco Fund. In 2013, the amount of Tobacco Fund which was applied to tobacco products has been reduced by half and Turkey came close to realizing the commitments in the Action Plan.

In 2014, according to the Commission, "*Turkey reduced the specific duty that finances the Tobacco Fund on imported unprocessed tobacco from $ 1.500 to $ 1.200 per tonne. This is a positive step for the eventual elimination of the current discriminatory practices.*"[142] This reduction remained in 2015 and again, it was criticized as a positive step by 2015 Progress Report. In December 2016, this duty was reduced from $ 900 to $ 600. So it was also seen as a significant action in line with the Action Plan.

As it can be understood from the reports, Turkey has made substantive progress by decreasing the Tobacco Fund although did not act in a way to prevent discrimination in terms of the special consumption tax on tobacco products. It should be said that the process did not complete, because the Tobacco Fund is not fully abrogated. Also the special consumption tax on tobacco products still create discrimination againts imported tobacco

[141] Commission of The European Communities, 2011 Regular Report on Turkey's Progress Towards Accession, 12.10.2011, Brussels.
[142] Commission of The European Communities, 2014 Regular Report on Turkey's Progress Towards Accession, 08.10.2014, Brussels.

products which are comparable with domestic ones. According to the Action Plan, the elimination of these discriminatory practices should be achieved until 2018.

VI.1.4- Other Discriminatory Practices in Turkish Tax System

Progress Reports which constitute that there are discriminatory practices in the Turkish tax system, it is noticed that all of these determinations relate to indirect taxation. Because as already explained, the harmonisation in EU is provided in the field of indirect taxes, and sovereignty in the field of direct taxes belongs to the states themselves. In EU law, discriminatory practices in direct taxes are included in the non-discrimination rule by the CJEU with its case law. As explained before, the CJEU bases its case law upon the general nationality based non-discrimination rule and articles on fundamental freedoms. By this way, the CJEU can examine whether member states levy discriminatory direct taxes to non-nationals or non-residents.

Based on this, discriminatory practices only in indirect tax area of Turkey are assessed by the Commission. Because Turkey is a candidate state, not a EU member. So the CJEU cannot examine discriminatory practices in direct tax area in Turkey; its jurisdiction does not involve such an assessment. But it should be said that taking consideration of the non-discrimination rules in the TFEU with regard to direct tax area and reforming direct taxes based on these rules so as to eliminate discriminatory provisions are important actions within the context of ending the candidacy and being an EU member. Therefore Turkey's discriminatory practices in direct tax area should be examined for a further development.

VI.1.4.1- Tax Liability Concept in Turkish Tax System and Instances of Possible Tax Discrimination Practices

In parallel with the general international practice, Turkey determines tax liability based on the residence criteria for both natural and legal persons within the context of direct taxes. In Personal Income Tax Act, residents are determined as "full tax liables" and they are taxed based on their worldwide income in Turkey. Residence is also determined as having legal permanent residence in Turkey or residing in Turkey more than six moths in one calendar year. Natural or legal persons who do not meet these criteria are determined as non-residents and they are considered as “limited tax liables”. It means that non-residents are not taxed based on their worldwide income, but only their income generated from Turkey. These non-residents are generally non-nationals of Turkey.

In Corporate Income Tax, full tax liability is determined based on again residence. It means that corporates which have their legal or business headquarters in Turkey or whose operations are centered and managed in Turkey are residents and full tax liables. Corporations which do not have one of their legal or business headquarters in Turkey are non-residents and limited tax liables. So they are taxed on only their income generated from Turkey.

These categories are important; because in order to determine whether there is a discriminatory practice or not, a different treatment should be made to non-residents who are in the same circumstances with nationals or resident corporations of Turkey.

First of all it is necessary to mention the possible discriminatory tax provisions in the Turkish Income Tax Law. There are some possible indirect and reverse discrimination practices in this law. For instance in duplicated Article 22, natural persons who are considered as full tax liable for the first time based on their commercial, agricultural or professional activities and who is not yet 29 years old, can be excluded from income tax with some conditions.[143] So only full tax liables which are Turkish residents can be able to benefit from this tax exception. This provision may be regarded as an indirect discrimination practice within the context of the Schumacker doctrine of the CJEU, only if a non-resident taxpayer who cannot benefit from this tax exception generates his/her all or almost all income from Turkey. So this can be seen as a possible discriminatory provision.

Another possible discriminatory practice takes place in Article 22(3) of the same Law. One half of

- dividends from stocks of every kind,
- earnings from participation shares and
- dividends paid to the chairmen and the members of the board of directors

[143] Turkish Personal Income Tax Law, Law No. 193, Official Gazette No. 10700 dated 06.01.1961, Duplicated Article 20.

which are earnings from full tax liables are counted as exceptions from income tax.[144] So if these kind of earnings come from limited tax liables who are non-residents, then income tax should be paid for these earnings. If in here residents and non-residents can be regarded as they are in the same circumstances based on Schumacker doctrine, then this provision can be accepted as it creates indirect discrimination.

Another instance is Article 30 of Income Tax Law. Pursuant to this provision, income generated from commercial or self employment activities in exhibitions and fairs which are opened with the permission of local authorities by limited tax liables who are non-residents are excluded from income tax.[145] This means that if such income is generated by full tax liables, income tax should be paid. So this provision creates a reverse discrimination effect for full tax liables and this can be regarded as a discriminatory practice by the CJEU with its changing case law.

Some other instances can be given from Corporate Income Tax Law. Articles 19 and 20 of this law can be regarded in this manner. Pursuant to these articles, only full tax liable corporations are able to realize full or partial merger, spin-off or transfer and based on those transactions, companies which are transferor and transferee is granted a tax exemption for the gains accrued as a result of these transactions.[146] So only resident companies can benefit from this exemption and this practice does not comply with the case law of the CJEU, i.e. Avoir Fiscal, Royal Bank of Scotland or Commerzbank cases (Aşçı Akıncı, 2012: 369).

Another instance is Article 22 of Corporate Income Tax Law. Pursuant to this article, when applying Article 12, which is on thin capitalization, and determining the natural or legal person related with the partner based on this article for debts used for the company which are borrowed by limited tax liables, captial and voting right are not required as a condition.[147] So captial and voting right are criteria in determining the natural or legal person related with the partner for full tax liables; based on Article 12(3)(a), a natural or legal person can only be considered as a related person with the partner, when the partner has directly or indirectly 10% of this legal person's shares or the same percentage of voting

[144] Turkish Personal Income Tax Law, Article 22(3).
[145] Turkish Personal Income Tax Law, Article 30.
[146] Turkish Corpoate Income Tax Law, Law No. 5520, Official Gazette No. 26205 dated 21.06.2006, Articles 19-20.
[147] Turkish Corpoate Income Tax Law, Article 22.

right or dividends of this legal person. If a natural or legal person has directly or indirectly 10% of the shares which grant voting right or dividends or the capital of the partner or abovementioned legal person related with the partner, then this person can also be regarded as the related person.[148] These rules and determinations are not applied for limited tax liables/non-residents. Any percentage of voting right or share is not used in the determination; so the lack of a condition for the determination of the related person makes the application of thin capitalization rules which are more disadvantageous, easier for limited tax liables. Thus this kind of application creates a disadvantage for non-residents. It can be seen as a possible indirect discrimination practice.

Article 26 of Corporate Income Tax Law is another instance. Pursuant to this article, foreign corporations which are limited tax liables should submit a declaration within 15 days from the date of obtaining other income and earnings which are determined by Personal Income Tax, provided that those earnings are the only income of the limited tax liable.[149] This is a special declaration procedure which brings a heavier burden for non-residents. In other words, non-residents are treated more heavily in regards to connected requirements. So the government may justificate this with using reasons such as to protect tax base, to guarantee tax revenue, to prevent loss of revenue or tax evasion. It is noteworthy that to prevent tax evasion is the only objective justification among them. Thus whether there is an indirect tax discrimination practice or not depends on the CJEU's evaluation, in case of Turkey's membership of EU.

The last possible instance is observed in Turkish Value Added Tax Law. Pursuant to Article 13 of this law, first deliveries of buildings such as housing or workplaces to non-resident natural or legal persons or corporations who does not generate income from Turkey through a PE are exempted from value added tax, provided that costs of these housing or workplaces should be brought Turkey in foreign exchange.[150] So if this provision is thought in reverse, first deliveries of such housing or workplaces to residents are not exempted from this tax. In here, residents are excluded from this exemption which is only available for deliveries to non-residents. This disadvantageous result may create a reverse discrimination practice; but again, this is only a matter of the change of the CJEU's case law.

[148] Turkish Corpoate Income Tax Law, Article 12.
[149] Turkish Corpoate Income Tax Law, Article 26.
[150] Turkish Value Added Tax Law, Law No. 3065, Official Gazette No. 18563 dated 02.11.1984, Article 13.

VI.2- The Relationship Between the OECD Model Tax Convention and Turkish Tax System

Bilateral tax treaties are given a great importance in the international tax law area. Because as a rule, every state has sovereignty in designing their tax systems which affect internal, as well as international taxable events. In other words, sovereign equality of states can have an impact on events which exist outside their borders. These impacts may result in some conflicts or non-regulated areas in international tax law. In order to eliminate this kind of possibilities, states prefer to make bilateral tax treaties and by this way, they try to protect their interests. So whether or not they are related to preventing double taxation, with these bilateral treaties, states often divide the taxation authority based on some certain subjects. Eliminating discriminatory taxation is also included in the interests of states and can be subject to bilateral tax treaties.

The OECD Model Convention, as it is explained before, is one of the most widely used models in the world. For instance EU member states prepare their tax treaties which are made between them based on this model, also nearly all members of the OECD use it. Because this model is preferred due to its comprehensive structure in addition to shortening the construction process of the tax contract which is a difficult and long process. This model reflects the views of developed states. In other words, the interests of the developed states in the distribution of taxation authority is given a particular importance by the OECD. This model has also an important place in Turkish tax system; since it is used as a basis in bilateral treaties.

In this heading, first the position of bilateral tax treaties in the hierarchy of norms is evaluated within the context of Turkish tax system. Then the situation of the tax discrimination prohibition in our tax treaties are examined from the perspective of Article 24 of the OECD Model Convention.

VI.2.1- The Position of Bilateral Tax Treaties in Turkish Tax System

As it is known, constitutions have its place on the top of the hierarchy of norms and all norms which are placed under should comply with constitutions in order to provide legality. The first norm which is placed under constitutions is laws. Then the hierarchy includes other norms based on the legal structure of the state. The position of international treaties which involve bilateral tax treaties in the hierarchy of norms is well examined in the Chapter III.9. If it is evaluated in short it should be said that this position is determined depends on the conditions of each state. Treaties may accepted as norms which are equal to laws or has a supremacy over laws. In addition, states may not determine a supremacy for treaties or laws and give them equality but in the case of a conflict between provisions of a treaty and a law, they may prefer international treaties to be applied or vice versa.

In Turkish legal system, the position of international treaties is taken place in Article 90 of the Constitution. Pursuant to the fifth paragraph of this article,

> "*International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.*"[151]

In general, in our system, international treaties which include tax treaties are considered as they are equal to laws. As a rule, when there is a conflict between provisions of a treaty and a law, this problem is solved by using principles of *lex specialis* and *lex posterior*. But there is an exception for this rule; if the treaty which includes a provision that conflicts with a national law is regarded as it is related with fundamental rights and freedoms, then the treaty provision is given a superiority over national laws. It means that such a treaty provision is applied rather than the provision of national law.

Article 90(5) of the Constitution determines the position of international treaties but disagreements in the literature remains. Some authors accept that they are in the same step with national laws in the hierarchy of norms. For instance AYBAY claims that this position is obviously determined by the Constitution with the first sentence of Article 90(5). Thus there is no need to hesitate in regards to the grammatical interpretation. The last sentence of this paragraph which gives priority to treaties on fundamental rights and freedoms is only a norm that is brought towards to prevent conflicts (Aybay, 2007: 206). From the perspective of this kind of claims, international treaties should be regarded as

[151] See Article 90 of Constitution of the Republic of Turkey, the Grand National Assembly of Turkey, https://global.tbmm.gov.tr/docs/constitution_en.pdf (Date Accessed: 12.12.2017).

they are in the same situation with national laws and they can be prefered when there is a conflict with national laws only if they regulate fundamental rights and freedoms. This preference does not make them superior to the laws; this is only a norm for solution.

From another point of view, some authors share the same opinion which is about equality between treaties and laws but they interpret the last sentence of Article 90(5) in a different way. For instance, according to ÖZBUDUN, this sentence gives superiority to international treaties which include fundamental rights and freedoms. Thus such treaties take place in the hierarchy of norms, below the Constitution but above national laws (Özbudun, 2012: 230). Other treaties are stil equal to laws. So from the viewpoint of such claims, international treaties are differentiated based on their characteristics; while treaties on fundamental rights and freedoms take place over the laws, other treaties are in the same level with the laws.

Some other authors argue that the treaties are superior to the laws, by looking at the second sentence of the paragraph. For instance GÜLMEZ states that international treaties cannot be subject to appeals to the Constitutional Court with the claim of unconstitutionality, although this kind of appeals are possible for national laws. So this characteristic shows that international treaties are superior to laws (Gülmez, 2004: 51). Based on these kind of claims, although the first sentence states that international treaties and national laws are equal, treaties are superior over them in practice because they cannot be rescinded by the Constitutional Court.

When these views are all considered together, international agreements and national laws should be regarded as equal in principle. Because the first sentence of Article 90(5) is clear enough to leave no room for doubt. The abolition of the possibility of applying to the Constitutional Court for these agreements does not give treaties a superiority. The aim here is to protect Turkey from getting into a difficult international situation which derives from the treaty override possibilities when it is accepted that international treaties and laws are in the same level (Canyaş, 2016: 128). The situation is different in terms of international agreements on fundamental rights and freedoms. Such agreements will be preferred to laws in case of a conflict. But this preference does not mean that these agreements are superior to laws; the last sentence of Article 90(5) should be regarded only a norm which is brought for cases of a conflict. So the main aim is not giving superiority to treaties but eliminating conflicts within the context of *pacta sunt servanda*.

The same explanations can be thought within the context of bilateral tax treaties, since they are international treaties. The most important point in determining the position of bilateral tax treaties is whether they are regarded as treaties on fundamental rights ands freedoms. Because if they are in this category, then they can be applied when a conflict with a national law exists. This determination depends on the definition of the term “fundamental rights and freedoms”. This term refers to the national law but it is noteworthy that if this term is to be understood only in a limited manner in the Constitution, it is reached that the treaties concerning the rights between Articles 12 and 74 of the Constitution are covered. Then since Article 73 which includes duty to pay taxes is involved in this category.

The term “fundamental rights and freedoms" used in the Constitution should not be seen only limited with the national law. It should be considered that the term "fundamental" includes rights and freedoms guaranteed not only in national laws but also in international human rights law (Gülmez, 2004: 66). Within this context, tax treaties should be again considered in the category of treaties on fundamental rights and freedoms. Because taxation authority is an authority which intervenes in the area of fundamental rights and freedoms.

Taxes are, first of all, in close relation to the right to property, which is included in fundamental rights and freedoms; it can be said that right to property is the most sensitive right to taxation authority (Nazalı & Demirci, 2009: 30). Tax policies and measures taken due to these policies affect and limit the right to property. In particular, taxes on inheritance and transfer, income taxes, real estate and capital gains taxes are the most significant taxes limiting right to property (Güneş, 2011: 60). Bilateral treaties mostly deal with such taxes and these treaties have a direct impact on the right to property by dividing states taxation authorities. On the other hand, the right to property is set out in Article 1 of Protocol No 1 of the ECHR. The ECtHR also considers that the measures relating to taxation in particular are an interference with the right of property; in its decision in the Travers / Italy case, the Court underlined that taxation meant an intervention to the right of property (Yaltı, 2006: 44). In the light of these evaluations, bilateral tax treaties can be considered as they are treaties on fundamental rights and freedoms, due to its accepted relationship between the right to property which takes place in fundamental rights and freedoms.

This conclusion leads to the application of the last sentence of Article 90(5) for bilateral tax treaties. In general, they should be considered as they are in the same position with national laws. But in times of a conflict, bilateral tex treaties should be prefered to be applied. Although this cannot be seen as a superiority over national laws, it leads to a privileged position.

VI.2.2- The OECD Model Tax Convention and Bilateral Tax Treaties of Turkey

Bilateral tax treaties in the international area is an unavoidable necessity of today's world. Especially with the impact of globalization, international mobility has increased, capital has become more fluid and investments have gained a cross-border character. Such changes have prompted states to create a favorable environment to attract capital and to take measures in order to prevent from loss of tax revenue. Making bilateral tax treaties has gained importance within this context. Because these treaties establish rules that are applicable to international area, as well as create a legally predictable, reliable environment, also provide some certain rights to taxpayers and improve cooperation between states.

Turkey remained distant from particularly DTAA's until the 1980s due to reasons such as that the OECD model was designed based on interests of developed states, and signed only two treaties (with Austria and Norway) up to this date (Pehlivan & Öz, 2015: 204). From the 1980s onwards, Turkey quickly began to make international tax treaties. Today, like most states in the world, Turkey also makes tax treaties with various aims such as preventing double taxation on the international scene. There are currently eighty three bilateral tax treaties (except tax information exhange agreements) that Turkey has already made with other states.[152]

The Model which is used in preparing these treaties is the OECD Model Convention, since Turkey is one of the members of the OECD. It is noteworthy that Turkey makes some reservations to Articles of this Model, due to the differences in development between other member states (Pehlivan & Öz, 2015: 204).

[152] Based on the data of the Turkish Revenue Administration., 2016. http://www.gib.gov.tr/sites/default/files/uluslararasi_mevzuat/VERGIANLASMALIST.htm (Date Accessed: 15.12.2017).

At this point it is worth noting that actually Turkey has created its own model in the past. This model, which was prepared in 1969, was created according to the requirements of Turkish tax system. Thus the source state was based when preparing this model. Turkey was a developing state and it was far more likely that Turkey could attract the flow of capital from developed states. Within this context, the taxing jurisdiction for various subjects was preeminently given to the source state when making a treaty with developed states (Pehlivan & Öz, 2015: 204). So the vice versa was valid for treaties which were made with developing states. However no state including Turkey has used this model (Bayar, 2006: 53). Rather than it is observed that Turkey uses the OECD Model Convention today.

With the effect of the OECD Model, bilateral tax treaties of Turkey also include a tax discrimination provision. Generally these articles are in harmony with Article 24 of the OECD Model Convention (Yaltı Soydan, 1995:283). Turkey has in total 83 DTAA's with other states; 47 of them[153] include the non-discrimination rule in their Article 23, while 30 of them[154] include it in Article 24 and 5 of them[155] include it in Article 25. Only the DTAA between Turkey and Saudi Arabia does not include a non-discrimination rule. In this treaty, it is stated that the non-discrimination rule will be added to the treaty after negotiations between two state, if Saudi Arabia "*introduce an income tax applicable to its nationals who are residents of Saudi Arabia, or the existing tax will be modified accordingly*".[156]

To illustrate the situation of the non-discrimination articles in Turkey's tax treaties, the differences and similarities between these articles and Article 24 of the OECD Model

[153] These treaties are made between Turkey and other states which are Austria, Azerbaijan, Bahrain, Belarus, Bulgaria, Chezia, Crotia, Denmark, Egypt, Estonia, Finland, Gergoia, Germany, Greece, Hungary, Indonesia, India, Israel, Japan, Kazakhistan, Kirghizistan, Kosovo, Latvia, Lithuania, Lebanon, Malaysia, Malta, Mexico, Mongolia, Moldova, Morocco, New Zealand, Oman, Pakistan, Qatar, Russia, Slovakia, South Africa, South Korea, Spain, Sudan, Switzerland, Tajikistan, Turkish Republic of Northern Cyprus, Turkmenistan, Uzbekistan, Yemen.

[154] These treaties are made between Turkey and other states which are Albania, Australia, Bangladesh, Belgium, Brasil, Canada, China, Ethiopia, France, Iran, Ireland, Italy, Jordan, Luxembourg, Macedonia, Norway, Poland, Portugal, Singapore, Slovenia, Syria, Tailand, The Netherlands, The Philippines, Sweden, Tunusia, UAE, UK, Ukraine, US.

[155] These treaties are made between Turkey and other states which are Algeria, Bosnia-Herzegovina, Kuwait, Romania, Serbia-Montenegro.

[156] See "Convention Between the Government of the Kingdom of Saudi Arabia and the Government of the Republic of Turkey for the Avoidance of Double Taxation and the Prevention of Tax Evasion with Respect to Taxes on Income" http://www.gib.gov.tr/sites/default/files/uluslararasi_mevzuat/TURKCE_METIN/SARABISTAN.pdf (Date Accessed: 16.12.2017).

Convention should be evaluated one by one. First if the overall appearance should be summarized, it is worth saying that none of the DTAA's contain exactly the same non-discrimination rule with Article 24 of the OECD Model; in all treaties some provisions are excluded or amended and sometimes new provisions which are not included in the Model are added.

Initially the first paragraph of Turkey's DTAA's with other states should be examined. As it is known, Article 24(1) of the OECD Model Convention includes nationality based non-discrimination rule. Every first paragraph of DTAA's are the same with the OECD Model in regards to nationality based non-discrimination. However only 35 of 83 DTAA's[157] include this last sentence. Other 47 DTAA's[158] do not include the last sentence of Article 24(1) of the OECD Model which states that the nationality based non-discrimination rule should be applied for persons who are a national of one of the contracting states but does not reside both of them. Thus it can be said that Turkey generally does not prefer to involve the last sentence of Article 24(1) of the OECD Model Convention in the non-discrimination clause in its DTAA's.

Article 24(2) of the OECD Model Convention which brings the non-discrimination rule for stateless persons are not included in the non-discrimination clause in most of the DTAA's. Only 14 of them[159] include this clause in the non-discrimination rule. So it can be said that the prohibition of discrimination against stateless persons are not generally included in non-discrimination rules in Turkey's DTAA's.

Within the context of Article 24(3) which is the PE non-discrimination clause of the OECD Model Convention, it is noteworthy that only 4 of the DTAA's[160] which are made by Turkey with other states include the same PE non-discrimination rule with the OECD

[157] These are DTAA's with Austria, Bangladesh, Belgium, Brasil, Chezia, Croatia, Estonia, Finland, France, Georgia, Germany, Greece, Ireland, Iran, Italy, Japan, Morocco, Latvia, Lebanon, Letonia, Luxembourg, Malta, Mexico, Norway, Portugal, Romania, Russia, Serbia-Montenegro, South Africa, Spain, Switzerland, The Netherlands, Turkmenistan, Ukraine, USA.

[158] These are DTAA's with Albania, Algeria, Australia, Azerbaijan, Bahrain, Belarus, Bosnia-Herzegovina, Bulgaria, Canada, China, Denmark, Egypt, Ethiopia, Hungary, India, Israel, Indonesia, Jordan, Kazakhistan, Kirghizistan, Kosovo, Kuwait, Macedonia, Malesia, Mongolia, Moldova, New Zealand, Oman, Pakistan, Poland, Singapore, Slovakia, Slovenia, South Korea, Sudan, Sweden, Syria, Qatar, Tajikistan, Thailand, The Philippines, Tunusia, Turkish Republic of Northern Cyprus, UAE, UK, Uzbekisatan, Yemen.

[159] These are DTAA's with Australia, Georgia, Germany, Lebanon, Letonia, Moldova, Morocco, Norway, Pakistan, Romania, Slovakia, South Korea, Ukraine.

[160] These are DTAA's with China, Germany, Pakistan and South Korea.

Model. In other words, these 4 DTAA's use the PE non-discrimination rule of the OECD Model without changing.

The rest of the states change the non-discrimination rule of the OECD Model Convention in three ways; either by adding an exception to this rule, or by including the second sentence of Article 24(3) of the OECD Model which is on personal and family circumstances as a separate paragraph, or both of these.

70 of 83 DTAA's[161] include exceptions for the PE non-discrimination rule. Both of them exclude profits of a non-resident company which are attributable to its PE in the other contracting state. Pursuant to this rule, if a state taxed profits of a PE which is owned by a resident of another contracting state, then this state may levy taxes to the rest of the profits such profits can be taxed by the contracting state in which the PE resident, after having been taxed under Article 7. These kind of treatments do not constitute discrimination.

66 of 83 DTAA's[162] include the second sentence of Article 24(3) of the OECD Model Convention which is about personal and family circumstances, as a seperate paragraph. Only one of the DTAA's does not include the second sentence of Article 24(3) of the OECD Model in its non-discrimination clause; it is the DTAA which is made between Turkey and Australia.

As it is known, Article 24(4) of the OECD Model is the deductibility clause and it prohibits the denial of the deduction of interest, royalty or other disbursements which are made by a resident company to a resident of the other state and the denial of debts of a resident company, if the lender is a resident of the other contracting state. In our DTAA's, mostly this paragraph is included but the deductibility of debts which is stated in the second sentence of Article 24(4) of the OECD Model Convention generally excluded from

[161] These are DTAA's with Albania, Algeria, Australia, Austria, Azerbaijan, Bahreyn, Belarus, Belgium, Bosna-Herzegovina, Brasil, Bulgaria, Chezia, Denmark, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Greece, Hungary, India, Iran, Ireland, Israel, Italy, Kazakhistan, Kirghizistan, Kosovo, Latvia, Lebanon, Letonia, Luxembourg, Macedonia, Malesia, Malta, Mexico, Mongolia, Moldova, Morocco, New Zealand, Oman, Qatar, Singapore, Slovakia, Slovenia, South Africa, Spain, Sudan, Sweden, Switzerland, Syria, Tajikistan, Thailand, The Netherlands, The Philippines, Turkish Republic of Northern Cyprus, Turkmenistan, UAE, UK, Ukraine, US, Yemen.

[162] These are DTAA's with Algeria, Azerbaijan, Bahreyn, Belarus, Belgium, Brasil, Bulgaria, Canada, Chezia, China, Egypt, Ethiopia, Finland, France, Georgia, Greece, Hungary, India, Iran, Ireland, Jordan, Kazakhistan, Kirghizistan, Kosovo, Kuwait, Lebanon, Luxembourg, Macedonia, Malesia, Malta, Mexico, Mongolia, Moldova, New Zealand, Norway, Oman, Pakistan, Poland, Porrugese, Qatar, Romania, Russia, Serbia-Montenegro, Singapore, Slovakia, Slovenia, South Africa, South Korea, Spain, Sudan, Sweden, Switzerland, Syria, Tajikistan, Thailand, The Philippines, Tunisia, Turkish Republic of Northern Cyprus, Turkmenistan, UAE, UK, Ukraine, Uzbekistan, Yemen.

the scope of this deductibility clause. Only 8 of the DTAA's[163] include the deductibility clause as it is stated in the OECD Model, without any change. 23 of the DTAA's[164] does not include this deductibility clause which is in parallel with Article 24(4) of the OECD Model. 50 of the DTAA's[165] does not include the deductibility of debts in the deductibility clause. So these DTAA's accept that only payments such as interest, royalty or other disbursements which is made by a resident to a non-resident can be deductible when assessing the taxable income. This constitutes the general practice of the deductibility clause of Turkish DTAA's.

The control or ownership non-discrimination rule which takes place in Article 24(5) of the OECD Model Convention is included nearly all DTAA's of Turkey. This clause is included in the DTAA's without changing, so it can be say that this is the only paragraph which is used in almost all our DTAA's as the same with the Model. The DTAA between Turkey and Kuwait is the only DTAA which does not involve the control or ownership non-discrimination rule in its text.

As it is explained before, the last paragraph of the OECD Model Convention gives the substantially scope of the non-discrimination rule. Pursuant to this paragraph, the non-discrimination rule should be applied for all kind and description of taxes, without adhesion to Article 2 of the Model which constitutes the meaning of the term taxation. In Turkish DTAA's, this paragraph is generally not included in the treaty. Only 5 of the DTAA's[166] include a paragraph which is in conformity with Article 24(6) of the OECD Model. So these DTAA's include the substantially scope paragraph without changing. 54 of the DTAA's[167] do not give the substantially scope of the non-discrimination rule. In

[163] These are DTAA's with Albania, Bosna-Herzegovina, Bulgaria, Luxembourg, Macedonia, Poland and Serbia-Montenegro and Ukraine.
[164] These are DTAA's with Algeria, Canada, Egypt, Ethiopia, Hungary, India, Iran, Jordan, Kazakhistan, Kuwait, Malesia, Mongolia, New Zealand, Oman, Qatar, Romania, Singapore, Sudan, Tajikistan, Thailand, UAE, Uzbekisatan.
[165] These are DTAA's with Australia, Austria, Azerbaijan, Bahreyn, Bangladesh, Belarus, Belgium, Brasil, Chezia, China, Croatia, Denmark, Estonia, France, Finland, Georgia, Germany, Greece, India, Ireland, Israel, Italy, Japan, Kirghizistan, Kosovo, Latvia, Lebanon, Letonia, Malta, Mexico, Moldova, Morocco, Norway, Pakistan, Portugal, Russia, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Syria, The Netherlands, The Philippines, Turkish Republic of Northern Cyprus, Turkmenistan, UK, USA, Uzbekistan, Yemen.
[166] These are DTAA's with Georgia, Kosovo, Mexico, Spain and USA.
[167] These are DTAA's with Algeria, Austria, Azerbaijan, Bahreyn, Belarus, Belgium, Bulgaria, Chezia, China, Croatia, Denmark, Egypt, Ethiopia, France, Germany, Greece, Hungary, India, Iran, Ireland, Israel, Japan, Jordan, Kazakhistan, Kirghizistan, Kuwait, Lebanon, Macedonia, Malesia, Malta, Mongolia, Moldova, Norway, Oman, Pakistan, Poland, Qatar, Romania, Russia, Slovakia, South Korea, Sudan, Sweden,

other words, these DTAA's does not involve a paragraph which is similar with Article 24(6) of the OECD Model.

21 of the DTAA's[168] include a paragraph which constitutes the substantially scope of the non-discrimination rule but these paragraphs do not comply with Article 24(6) of the OECD Model. Because these paragraphs limit the substantial scope with stating that the non-discrimination rule can only be applied to taxes which are covered by the treaty, rather than taxes of every kind and description.

In addition to these paragraphs which are more or less similar with the OECD Model, there are some other provisions in some DTAA's of Turkey which do not take place in the Model. These extra provisions can be regarded as special paragraphs which reflect the relationship between Turkey and other contracting states. In other words, these paragraphs are added by one of the contracting states with regards to the special relationship between them. For instance, in the DTAA between Turkey and Australia, based on the negotiation between these two states, some tax practices are excluded from the scope of the non-discrimination rule. Pursuant to the sixth paragraph of the non-discrimination clause, for example, this rule is not applied to laws of the contracting states which are "*designed to prevent the avoidance or evasion of taxes*" or "*provide deductions to eligible taxpayers for expenditure on research and development*".[169]

Another DTAA which brings an extra provision is the DTAA between Turkey and South Africa. Pursuant to its sixth paragraph of the non-discrimination clause, South Africa is able to tax profits attributable to a resident PE of a Turkish company "*at a rate which does not exceed the rate of normal tax on profits of companies by more than five percentage points*".[170] So with this paragraph, an exclusion for the PE non-discrimination rule is constituted. A similar extra provision is involved in the DTAA between Turkey and India, with the same percentage.

Syria, Tajikistan, The Netherlands, The Philippines, Tunusia, Turkmenistan, Turkish Republic of Northern Cyprus, UAE, UK, Ukraine, Yemen.

[168] These are DTAA's with Albania, Australia, Bosna-Herzegovina, Bangladesh, Brasil, Canada, Estonia, Finland, Italy, Latvia, Letonia, Luxembourg, Morocco, New Zealand, Portugal, Serbia-Montenegro, Singapore, Slovenia, South Africa, Switzerland, Thailand.

[169] See other extra paragraphs in the DTAA between Turkey and Australia, https://archive.treasury.gov.au/documents/1796/PDF/Australia_Turkey_Tax_Treaty.pdf (Date Accessed: 18.12.2017).

[170] See the DTAA between Turkey and South Africa, http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2005/050622turkeyagr.pdf (Date Accessed: 18.12.2017).

As another instance, the DTAA between Turkey and Kuwait can be given. Pursuant to the fourth paragraph of the non-discrimination clause, this clause does not affect "*the right of a Contracting State to grant an exemption or reduction of taxation to its own nationals who are residents of that contracting state*". But it is stated immediately that this paragraph does not "*apply to companies the capital of which is partly or wholly owned by individuals possessing the nationality of the other contracting state*".[171] So it can be said that, although this DTAA does not include any deductibility or control and ownership clauses, this provision can be regarded as it touches these issues in a different manner from the OECD Model.

The DTAA between Turkey and the Turkish Republic of Nothern Cyprus also includes an extra provision. This provision is the deductibility clause and it states that mutual agreement procedure can be applied, in order to apply this deductibilty clause, if it is needed.[172] So this is a different provision which refers to mutual agreement procedure and such a provision does not observed in the OECD Model. A similar extra provision is involved in the DTAA between Turkey and New Zealand. Pursuant to the fourth paragraph of the non-discrimination rule, the contracting state which claims that the other contracting state "*infringe the principles set forth in this (non-discrimination) Article, the competent authorities shall use the mutual agreement procedure to endeavour to resolve the matter*".[173] So this provision gives contracting states an opportunity to apply mutual agreement procedure not only for infringe claims on the deductibility clause but also the whole non-discrimination clause.

There is another instance for the extra provisions; the DTAA between Turkey and Pakistan includes such a provision. Pursuant to the sixth paragraph of the non-discrimination rule in this treaty, allowances or tax rebates to companies "*whose shares are listed on a recognised stock exchange in Pakistan*" or tax holidays which "*are available only to companies registered in Pakistan*" are excluded from the scope of the non-discrimination clause. In other words, such tax practices which are only available to Pakistan residents

[171] See the DTAA between Turkey and Kuwait, https://www.cottgroup.com/images/ikili-anlasmalar/VERGI/kuveyt-EN.pdf (Date Accessed: 18.12.2017).
[172] See the DTAA between Turkey and the Turkish Republic of Northern Cyprus, http://www.gib.gov.tr/sites/default/files/uluslararasi_mevzuat/TURKCE_METIN/KKTC.pdf (Date Accessed: 18.12.2017).
[173] See the DTAA between Turkey and the New Zealand, http://www.gib.gov.tr/sites/default/files/uluslararasi_mevzuat/TURKCE_METIN/YENIZELLANDA.pdf (Date Accessed: 18.12.2017).

cannot constitute discrimination. This clause limits the effect of non-discrimination rule on behalf of Pakistan. But the same paragraph includes another provision which states that the non-discrimination rule does not apply to "*the taxation of non-resident companies in Turkey in regard to income tax which applied for the deemed dividend of shareholders after corporation tax*".[174] So this is an exclusion which reflects the benefits of Turkey.

The last DTAA which includes an extra provision is the DTAA between Turkey and Romania. Pursuant to this, the contracting states are able to exclude non-residents from the application of some deductions or exceptions which are related with the promotion of investments.[175] In other words, if contracting states do not grant such benefits to non-residents, these treatments cannot create discrimination. A similar provision is involved in the DTAA between Turkey and Singapore, as an extra provision. So tax incentives which are granted to only residents for the sake of promotion of social and economic development do not violate the non-discrimination rule.[176]

So as a result of these evaluations, DTAA's of Turkey generally include

- the first sentence of Article 24(1) of the OECD Model,

- the PE non-discrimination rule which is constituted in Article 24(3) of the OECD Model but with an exception which is about taxation of profits and generally takes place in Article 10(4) in the texts,

- the second paragraph of Article 24(3) of the OECD Model which is about taking account of personal and family circumstances, as a seperate paragraph,

- the deductibility clause which is given by Article 24(4) of the OECD Model

- the control or ownership clause which takes place in Article 24(5) of the OECD Model.

In addition, DTAA's of Turkey generally exclude

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[174] See the DTAA between Turkey and Pakistan, http://internationaltaxtreaty.com/download/Turkey/DTC/Turkey-Pakistan-DTC-Nov-1985.pdf (Date Accessed: 18.12.2017).
[175] See the DTAA between Turkey and Romania, http://www.gib.gov.tr/sites/default/files/uluslararasi_mevzuat/TURKCE_METIN/ROMANYA.pdf (Date Accessed: 18.12.2017).
[176] See the DTAA between Turkey and Singapore, https://www.iras.gov.sg/IRASHome/uploadedFiles/IRASHome/Quick_Links/Protocol%20Amending%20Singapore-Turkey%20DTA%20(Ratified)%20(8%20Jul%202013).pdf (Date Accessed: 18.12.2017).

- the second sentence of Article 24(1) which is about the application for nationals of contracting states who do not reside in two contracting states,
- Article 24(2) of the OECD Model which constitutes the prohibition of discrimination against stateless persons which are resident of one of the contracting states,
- the second sentence of Article 24(4) which is about the deductibility of debts which is borrowed by a resident company from a resident of the other contracting state,
- the paragraph for the substantially scope which is similar to Article 24(6) of the OECD Model.

These differences from the OECD Model Convention may derive from the differences of development levels between Turkey and other contracting states (Pehlivan & Öz, 2015: 213). Especially the exceptions from the PE non-discrimination clause can be regarded within this context.

VI.2.3- The Comparison Between The Turkish Bilateral Tax Treaty System and EU law

As it is explained, Turkish tax treaty system more or less complies with the OECD Model Convention. Thus in general terms, implications on the comparison between the OECD Model and EU law is valid for the comparison between the Turkish treaty practice and EU law. There are also some similarities and differences between two systems. Especially if it is thought that tax treaties are a part of the Turkish legal system, the similarities have a significant role in our harmonisation and integration process in regards to the EU membership. However it is noteworthy that differences do not constitute a violation, for now. Because Turkey is only a candidate today and does not oblige to comply with EU law as an EU member within the context of Article 4(3) of the TFEU which prohibits member states from any measure that is incompatible with the Community's objectives. Member states cannot make bilateral tax treaties with other states which fall afoul of the TFEU's non-discrimination concept. But this is only a principle for Turkey, since there is no membership and then, a binding characteristic of the TFEU. In other words, the conformity of Turkish bilateral tax treaties to the TFEU non-discrimination standards is not a necessity; but it has a great importance, because these treaties become a part of the Turkish legal system and they are taken into consideration in the candidacy of Turkey.

If the similarities between two systems is evaluated first, it can be said that particularly the nationality based non-discrimination rule is the same between the Turkish practice and EU law. Based on this, being a non-national cannot be used as a criteria for a different or more burdensome tax treatment, when this non-national is in the same circumstances with the nationals. In determining whether they are under the same circumstances or not, every factual related factors are considered and residence is the one of those factors in both of the Turkish system and EU law. Both of these systems accept, as a rule, that residents and non-residents are not in the same circumstances. So this is one of the similarities between the Turkish tax treaty system and EU law. At this point, critisims which are made for the OECD Model should be repeated in here. Schumacker doctrine of the CJEU which brings "generating all or almost all income from the source state" condition has no effect in our system. Similar with the OECD Model, the lack of this approach is a deficiency and a possible interaction between EU law and the OECD Model will create more fair results for our tax treaties system.

The general approach of the Turkish tax treaty system to the prohibition of tax discrimination against stateless persons is that this prohibition is not included in the treaties. In some treaties, Article 24(2) of the OECD Model is included but in general, this paragraph does not take place in treaties. This approach is similar with EU law, since such a prohibition is not observed in the EU non-discrimination system. However similar with the implications which were made for EU law, this is a deficiency in our system and for a more fair and comprehensive non-discrimination clause, a similar paragraph with Article 24(2) should be added to our tax treaties.

So other similarities are the similarity between the Turkey's approach to the PE non-discrimination and the control and ownership paragraphs and the EU's approach to freedom of establishment and the similarity between the approaches of both systems to national thin capitalization and group taxation rules.

There are also differences between the Turkish bilateral tax treaty system and EU law. First of all, there is no such acceptance that residents and non-residents can be in the same circumstances in some certain conditions. In Turkish tax treaties, in parallel with the OECD Model, there is no such approach which takes place in the CJEU's case law.

Another difference can be the lack of a dispute settlement body. Actually there is no court such as the CJEU which can give a binding ruling for both of the contracting states in Turkish tax system. Although Turkish courts has the authority to decide about the claims on the violation of treaty provisions by Turkey, these courts are not entitled to give a ruling on claims of violations by the other contracting state. So this jurisdiction cannot be compared to that of the CJEU.

Indirect discrimination practices also constitute a difference between two systems. The Turkish tax treaty system, indirect discrimination is not included in the non-discrimination provision, as the same with the OECD Model. On the contrary, the CJEU covers indirect discrimination practices by its case law.

Another difference is the substantially scope of the non-discrimination rule. As it is known, the TFEU includes a general nationality based non-discrimination clause and a specific one for indirect taxes area, i.e. Article 110. Also there are articles on fundamental freedoms which prohibit different treatments to nationals of other EU member states so as to prevent them from using their fundamental freedoms. The CJEU adds direct taxes which are not wholly intervened by EU law to the scope of the non-discrimination concept with interpreting the general non-discrimination rule and also articles on fundamental freedoms.

The scope of the non-discrimination rule is determined by the OECD Model with Article 24(6). This gives the substantially scope of the rule and states that the rule should be applied not only to taxes covered by the treaty, but also to taxes of every kind and description. In contrast with this, the general approach in the Turkish tax treaty system is that the substantially scope paragraph is not included in the non-discrimination rule. So most of our treaties does not involve a paragraph which is similar with Article 24(6). A few treaties involving such a provision do not generally follow Article 24(6) of the OECD Model. These treaties limit the scope of the application of the non-discrimination rule with taxes which are covered by the treaty. Generally these taxes are personal and corporate income taxes; so even if the treaty involves the substantially scope paragraph, it only covers direct taxes. This constitutes a substantial difference between Turkish and EU systems. In order to make our tax treaties system more extensive and efficient, a paragraph which is in parallel with Article 24(6) of the OECD Model should be added to our non-discrimination provisions. By this way, our system will also be consistent with EU law.

VII- CONCLUSION

Non-discrimination has become an important rule in terms of taxation, especially in the recent past, to remove barriers to international trade and to ensure the principle of equality. However this rule, which is understood to be possible only with the cooperation of the states, is regulated in different levels on the international scene. One of these levels is the international treaties level. Non-discrimination is included in tax treaties as a principle related with taxation, especially since the 20th century, as it has been used since past in international friendship, commerce and navigation treaties. Today, almost all states in the world make tax treaties with other states and most of these treaties involve a non-discrimination provision. The most important factor in this result is model treaties which are prepared by international organizations or some states. Many states take advantage of these models instead of preparing tax treaties themselves and accept them after some changes with negotiations based on their own interests. The OECD Model Tax Convention is one of these model treaties and this is one of the most used models. This model and its Commentary, which are updated by the OECD according to current conditions, have an important position in terms of the prohibition of tax discrimination.

One of the levels in which tax discrimination is prohibited, is EU level that constitutes the economic integrations level. The non-discrimination rule in terms of taxation in EU which is established for economic purposes and subsequently evolving into a political structure, is an important tool for achieving the internal market objective. Because the purpose of the internal market can only be reached by ensuring free movement of people, workers, capital and goods among the member states and preventing states from imposing discriminatory taxes. So with various provisions in the TFEU, tax discrimination is prohibited. The CJEU also extends the practice of these provisions in order to eliminate discrimination in a more comprehensive manner.

The second level is international treaties level. Bilateral, multilateral and regional treaties constitute this level. Membership of international organizations can also be evaluated in this level. Actually international organizations involve their non-discrimination provisions in their founding treaties which are multilateral treaties; so international treaties level also covers regulations of international organizations such as the UN or the WTO. They are trying to prohibit tax discrimination with some certain activities. For instance in the WTO, the prohibition of tax discrimination is regulated with multilateral treaties in regards to their members. But these efforts are not sufficient because of their weak scope and application. For instance, direct taxation is generally excluded from the scope of non-discrimination rules in regulations of international organizations. In order to provide a more comprehensive, efficient and fair non-discrimination rule in terms of taxation, the most common and widest applications in the international area, the practices of the OECD Model Convention and EU law, have been compared.

The EU practice includes various provisions for tax discrimination. There are some general provisions which prohibit all discriminatory practices such as Article 10 of the TFEU or Article 18 which is the general nationality based non-discrimination provisions. Article 110 is the only provision obviously related with tax discrimination. This article involves only discriminations to goods in terms of indirect taxes. However the CJEU includes provisions on fundamental freedoms to the non-discrimination area, in order to eliminate tax discrimination in regards to direct taxes. So articles on free movement of persons, workers, capital and goods are included in the scope of the nationality based tax discrimination. The main idea behind this is realizing the internal market purpose; because Article 110 is not sufficient for this. So with the interpretations of the CJEU, the scope of the prohibition of tax discrimination is extended to direct taxes. As a result, nationality based tax discrimination for legal and natural persons, as well as origin based tax discrimination for goods and services are prohibited.

Another contribution of the CJEU to the practice of non-discrimination in tax matters is observed in indirect discrimination area. According to the case law of the CJEU, tax discrimination may occur in two manners; one of them is the obviously nationality based tax discrimination and the other one is the tax discrimination which grounds on a different criterion from nationality but creates an effect equivalent to nationality based discrimination. The first one is named as direct discrimination and the latter one is named as indirect discrimination. When the wording of the provisions for non-discrimination, the only prohibited form of discrimination is the direct one. But the CJEU adds the indirect discrimination concept to the scope with its case law. The reasons which are different from nationality such as alcohol content or motor size can be regarded by this way as they create tax discrimination results.

In determining tax discrimination, the CJEU applies a series of tests. One of them is comparability test. This test derives from the understanding of similarity. Discrimination can occur only when there are two similar things. This similarity means that all relevant factors should be similar between these two things. This acceptance creates comparability issue. So the Court evaluates that the object and the subject of the allegedly discriminating provision are comparable or not. If these object and subject of comparison are similar, then the test is positive. This means that there may be a discriminatory practice.

The second test which is applied by the CJEU is the objective justification test. In fundamental freedoms provisions, some policy grounds are counted as objective justifications such as public interest or public health. When a member state brings a discriminatory practice for foreigners with one of these reasons, then this practice is regarded as it is justified. In other words, the CJEU accepts that this practice does not constitute discrimination. The justifications which are counted in the TFEU are general concepts and they are interpreted by the CJEU. With the case law, the prevention from tax abuse, tax evasion or tax avoidance, ensuring balanced allocation of taxing jurisdictions are accepted as justifications. Preventing loss of tax revenue, maintaining the domestic tax base or preventing erosion of tax base are instances for rejected justifications. So the Court interprets the general justifications in the TFEU based on the conditions of the case at hand. If this test is negative, then there can be a discrimination.

As the last test which is applied by the CJEU in determining whether there is a tax discrimination or not, proportionality test should be evaluated. This test is involved in the objective justification test and means that the allegedly discriminatory treatment is able to realize the objective justification which is claimed by one member state and should not exceed it. This test includes sub-tests which are suitability, necessity and balancing tests. So based on these sub-tests, the CJEU evaluates whether the alleged provision is able to realize the claimed justification. If these tests are negative, then the national provision at hand is considered as discriminatory.

Alongside these tests which are used as tools to determine a discriminatiory national provision, the CJEU also adds some other concepts to the scope of the prohibition of tax discrimination. For instance with Schumacker doctrine, the Court extends the application of comparability test. In international area as well as EU law, residents and non-residents are not in the same circumstances. So a different tax treatment to non-residents does not constitute a discrimination, due to they are not comparable situations. With this doctrine, although this fact is accepted, it is stated that a resident and a non-resident can be regarded as they are in comparable situations when the non-resident generates his/her all or almost all income from the source state. This doctrine is able to be applied to cases where a state does not grant some tax benefits such as personal and family allowances to the non-resident, when these benefits are available for residents. So with this doctrine, the applicability of non-discrimination rules is extended to non-residents.

Reverse discrimination is also another addition of the CJEU to the scope. In these practices, a state imposes taxes more harshly to its own nationals. In other words, different treatments for foreigners are advantageous for them, while these treatments do not include nationals. The CJEU did not see such discriminatory cases covered by the non-discrimination rules, because it was entirely related to domestic law, in other words a free movement right was not used in these cases. However the Court has recently begun to evaluate reverse discrimination practices within the scope of non-discrimination rules, even if they do not take place in the field of tax. So this can be regarded as a positive development.

One of the practices which are added to the scope of the non-discrimination practice by the CJEU is unlawful state aid practices. The conditions of these practices are numbered in the TFEU. If these conditions are met, then this practices are considered as discriminatory practices. Tax protectionism also another concept which is included in the scope of non-discrimination rules. In these practices, a state uses discriminatory taxes to protect or support its own economy. There can be several decisions in which tax protectionism is regarded as a prohibited practice.

The second regulation in international area which is considered for the comparison in this study, is the OECD Model Convention. This Model is prepared by the OECD particularly to shorten the tax treaty making process to the detriment of states. Actually the target of the Model is to prevent double taxation in international area, so the context of the Model is designed based on this. However both the OECD's position in international area and the general interests of states require that a prohibition of tax discrimination is needed. So

Article 24 of this Model is brought to meet that need. With this article, the OECD adds a general nationality based non-discrimination provision to the context of the Model, as well as some other instances which are frequently observed in international area.

Article 24(1) prohibits the nationality based tax discrimination. Natural and legal persons that can be regarded as nationals of a contracting state, can be able to evoke this provision. So based on this, a contracting state should not treat to nationals of the other contracting state in a different or more burdensome manner. This provision excludes residence from the scope of the tax discrimination. It means that different or more burdensome treatments to non-residents are not prohibited. So it can be said that the general approach to the non-comparability of residents and non-residents in the international area is reflected by the OECD. This reflection shows that indirect discrimination excluded from the scope of the non-discrimination rule. Also reverse discrimination practices are not included in the Model, if the wording of the text is interpreted. These two points are stated in the Commentary obviously.

In addition to the protection for natural and legal persons, stateless persons are also included in the non-discrimination rule with Article 24(2). Pursuant to this article, stateless persons who reside in one of the contracting states should not be faced discrimination. This provision is a reflection of the New York Convention of 1954. It can be regarded as a rule that extends the scope of the non-discrimination practice.

Due to the first paragraph of Article 24 only includes natural and legal persons, Article 24(3) prohibits states from discriminating PE’s which do not have legal personality. So this article is brought to fill the void in this context. Based on this, a contracting state should not treat PE’s of residents of the other contracting state less favourably. So with this, the scope of the non-discrimination provision is extended so as to cover PE’s.

Article 24(4) and 24(5) are different from previous paragraphs. In here, residents of a contracting state are protected from discriminatory practices of that state. In Article 24(4), the denial of the deduction of interest, royalty or disbursements which are made by a resident company to a resident of the other contracting state, if such payments are able to be deducted when they are made to residents. In addition to this, Article 24(5) prohibits other or more burdensome treatments to resident enterprises which are controlled or owned by a resident of the other contracting state.

Article 24(6) gives the substantially scope of the non-discrimination rule in the OECD Model. Pursuant to this provision, the scope of this rule is not limited with Article 2 which gives the meaning of the term taxation. Actually the Model includes only taxes on income and capital. So the Article reflects this view. But Article 24(6) states that the scope of the rule does not include only taxes on income and capital, but also taxes of every kind and description.

After the summaries of the non-discrimination rules' application, it can be said that there are some similarities, as well as some differences between them. Similarities between them covers first the purpose of these two concepts. Because both of them reflects some concerns on international trade. They aim to boost the mobility and to eliminate trade barriers. Limiting taxation power and providing equal treatment are also another common purposes.

As another similarity, the scope of these two concepts are in a sense intercept. They are generally designed to prohibit nationality based tax discrimination. So in both of them, inbound activities are covered. In addition to this, comparability test is included in both of the concepts. In EU law it is expressed with the term "being in the same circumstances" while terms such as "other or more burdensome treatment" or "less favourable treatment" are prefered in the OECD Model. So both in these concepts, in order to determine whether there is a discrimination, a comparability test is made between the allegedly discriminating natural or legal person/PE and the hypothetic one. Another similarity in this regard is that residence is a factor in determining the comparability for both of these concepts. Within this context, both of these concepts reflect the general approach to comparability of residents and non-residents. They are not in comparable situations according to both of the understandings.

Although the OECD Model Convention does not involve the objective justification test, a similarity can be observed in this regard. According to the CJEU, balancing taxing rights of member states is seen as an objective justification. This means that bilateral tax treaties can constitute a justification. In the OECD Model, the main aim is to distribute taxing powers between contracting states to eliminate double taxation issues. So this can be seen as another similarity.

In the deductibility non-discrimination rule (Article 24(4)), the denial of the deductibility constitutes a discrimination, if the state is not applying thin capitalization rules or if these rules are not compatible with the arm's lenght standard. This approach can be observed in the CJEU's case law. The Court can accept thin capitalization rules as they justificate different or more burdensome treatments. So the Court sees such issues are related with freedom of establishment. Again a similar approach is followed by the CJEU in the foreign control or ownership cases. The Court considers these issues similar with Article 24(5) and accepts that these are related with freedom of establishment.

There are also differences between these two concepts. It is necessary to set forth possible the lessons and the necessary interactions between the two concepts by considering these differences. First difference is about their scopes. Because the scope of EU law is broader than the OECD Model. There are no articles such as Article 18 or Articles on fundamental freedoms in the TFEU. In addition to these provisions, also the CJEU extends to scope of EU law. So with benefiting from provisions of the TFEU and the case law of the CJEU, a more precise and detailed provision can be established and also the OECD should encourage member states to use such a model without changing it.

The narrow scope of the OECD Model may derive from the purposes of the OECD. Because the Model is designed primarily to eliminate double taxation. Non-discrimination only a sub-purpose of the Model. So with including non-discrimination as one of the primariy purposes, the approach in the Model to this issue can be changed.

Another difference is the approach to comparability of residents and non-residents. In contract with Schumacker doctrine of the CJEU, the OECD Model does not include an understanding of the comparability of residents and non-residents under some conditions. In other words, there is no rule such as "generating all or almost all income" in the Model. Besides this, it is stated in the Model that residence is a factor which is used in determining the comparability between subject and object of comparison. Also the Model highlights that a state is not obliged to take account of personal and family circumstances of non-residents. This can be also regarded as a deficiency in the Model. So these are to be overcomed with additions which reflect Schumacker doctrine. By this way, the indirect discrimination concept can be covered by the non-discrimination rule of the OECD Model and a more comprehensive and efficient rule can be reached.

Unlawful state aid practices or the concept of tax protectionism are another deficiencies of the Model. Such concepts which are stated with the case law of the CJEU extend the scope of the non-discrimination rule in EU and make it a more comprehensive protection. So such instances which constitute discriminatio in international area can be included in the OECD Model, if it is not possible, it can be referred by the Commentary to establish a more extensive application.

In addition to these explanations, it should be said that EU law also has lessons to be learned from the OECD Model. One of these grounds is about the scope. The OECD involves inbound activities. Articles 24(1)-(2)-(3) include inbound activities which can be regarded as direct involvement of foreigner to the source state's economy, while Articles 24(4) and 24(5) reflect inbound activities which can be regarded as indirect involvement of foreigners. Beyond this, discrimination to residents is included in the OECD Model. But in the case law of the CJEU, although both inbound and outbound activities are involved in the scope of the non-discrimination rules, discrimination of residents are totally excluded. So this can be regarded as a deficiency and in order to reach a more comprehensive and effective rule, purely internal situations should be added to the scope of the rule in EU law.

A provision such as Article 24(2) can also be considered as a deficiency of EU law. Because the lack of the protection of stateless persons from discriminatory practices does not comply with the general non-discrimination rule. So if such a protection is included, an extention in the scope can be provided.

Objective justifications are also another difference between these two concepts. Such justifications are not observed in the system of the OECD Model. In a sense, this may be regarded as a deficiency, because with these justifications, a balance between interests of states which reflect tax sovereignty and the prohibition of non-discrimination rule is going to be provided. With bringing such justification to the Model, the OECD can give contracting states an opportunity to negotiate and add some justification grounds to their treaties within the frame which is determined by the OECD Model. However in EU law, these justification are possible to be interpreted in a broader manner. This creates the risk of unpredictability and uncertainty. Particularly when the case law of the CJEU is observed widely, it can be seen that some justifications are rejected, while some others which are actually the same with the rejected ones, are accepted. As a result, the Court can reject a justification it has previously accepted as an objective one. So these kind of changes constitute an environment in which there is a risk of uncertainty and discrimination in terms of foreigners. The use of fundamental freedoms also has the risk of being restricted, as the risk of discrimination continues in this respect. The fact that these justifications, which impede the realization of the internal market objective, should not be included in the TFEU just like it is in the OECD Model. It will be better for the implementation of a more efficient, certain and predictible non-discrimination rule.

With this comparison and these required interactions, a more extesive, effective and fair non-discrimination rule which answers the needs in international area can be reached. Also the purposes of both non-discrimination rules in different levels can be fulfilled.

As a final remark, it is worth noting that the tax discrimination practice and non-discrimination clauses in international area have also an important effect for Turkey. Provisions in the TFEU and the case law of the CJEU directly concern Turkey due to its process of membership of EU. In the progress reports which are prepared annually by the EU authorities, the provisions and practices in the Turkish tax system which violate the non-discrimination rules are set out. In almost all progress reports, it is emphasized that Turkey has discriminatory practices especially in alcoholic beverages and tobacco products. Concordantly, the Commission highlights that changing these violations is important for realizing the membership. Becuse tax harmonisation is the key factor for both membership process and becoming a member state. Thus whether the membership process continues or whether Turkey is a member, we have to realize this harmonisation and put an end to discriminatory practices in our tax system.

The OECD Model Convention has also a great importance from the viewpoint of Turkey. Because this model is utilised in our bilateral tax treaty making process. All of 83 DTAA's of Turkey is designed by using this model. It is noteworthy that Article 24 of the OECD Model is not used as a whole or without changing. Generally the first paragraph of Article 24 is included in our treaties, but the last sentence of this paragrapgh is avoided. Also Article 24(2) of the OECD Model does not take place in our treaties. Even if Article 24(3) is observed in our texts, some exceptions are set forth as a difference from the Model. Also Article 24(4) is not used as it is; deductibility for debts which is included in the second sentence of Article 24(4) of the OECD Model does not take place in our DTAA's. On the other side, our foreign ownership or control clause is exactly the same Article 24(5) of the OECD Model, Article 24(6) which gives the substantially scope of the non-discrimination article does not included in our treaties. In addition, some of our treaties involve paragraphs to the non-discrimination article which are not seen in the OECD Model. So it can be said that although the non-discrimination article in Turkey's DTAA generallty reflects the approach of the OECD Model, there are some differences and exceptions which are not observed in the Model. In order to make our tax treaties more comprehensive and fair, it is better to add the last sentence of Article 24(1) and also Article 24(6) of the OECD Model to our treaties. The latter addition is much more important, because as explained, this paragraph gives the substantially scope of the non-discrimination rule. Absence of this paragraph causes a narrow scope and this is not a desirable situation. Also Article 24(2) of the OECD Model can be reflected in our treaties and by this way, the protection of stateless persons can be involved in the scope our non-discrimination provisions. This means an extension in the scope.

There are also some suggestions for Turkey which come from the differences between Turkey's tax treaty system and EU law. In particular, the case law of the CJEU creates the greater difference and this case law such as Schumacker doctrine or some concepts like indirect discrimination or reverse discrimination can be reflected in our treaties. By this way, the non-discrimination rule in our tax treaties becomes a more extensive and fair rule.

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TEZ FOTOKOPİSİ İZİN FORMU

<u>ENSTİTÜ</u>

Fen Bilimleri Enstitüsü [ ]

Sosyal Bilimler Enstitüsü [X]

<u>YAZARIN</u>

Soyadı : Arıtı Erdem
Adı : İmran
Bölümü : Maliye

<u>TEZİN ADI</u> (İngilizce): Tax Discrimination in EU Law and the OECD Model Convention

<u>TEZİN TÜRÜ</u>: Yüksek Lisans [X] Doktora [ ]

1. Tezimin tamamından kaynak gösterilmek şartıyla fotokopi alınabilir. [ ]
2. Tezimin içindekiler sayfası, özet, indeks sayfalarından ve/veya bir bölümünden kaynak gösterilmek şartıyla fotokopi alınabilir. [ ]
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