

# COMPARATIVE TAX POLICY SEMINAR: EU TAX LAW AND POLICY



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# OVERVIEW | *CONTENTS*

- ***Part I*** – Introduction
- ***Part II*** – Fundamental Freedoms and Direct Taxation
- ***Part III*** – State Aid and Direct Taxation
- ***Part IV*** – EU Charter of Fundamental Rights
- ***Part V*** – Direct Tax Directives
- ***Part VI*** – Recent EU Legislation and Initiatives

# OVERVIEW | *SOURCES*

## ■ **Research resources, e.g.,**

- ☐ Cases available at <http://curia.europa.eu/>
- ☐ Legal texts available at <http://eur-lex.europa.eu>
- ☐ Commission documents available at [http://ec.europa.eu/taxation\\_customs/index\\_en.htm](http://ec.europa.eu/taxation_customs/index_en.htm)
- ☐ Collection of old EU documents at <http://www.steuerrecht.jku.at/gwk/> → “EU-Doku”

## ■ **Recommended reading, e.g.,**

- ☐ *Lang/Pistone/Schuch/Staringer* (eds.), Introduction to European Tax Law on Direct Taxation, 5th edition (2018)
- ☐ *Helminen*, EU Tax Law – Direct Taxation 2018 (2018)
- ☐ *Terra/Wattel*, European Tax Law, 7th edition (2018)

# *PART I* INTRODUCTION





European Commission



Council



European Parliament



Court of Justice

# OVERVIEW | *BACKGROUND*

## ■ Direct and Indirect Taxation

### □ *Indirect taxation*

- Customs Union (Art. 28 TEFU, ex-Art. 23 EC)
- Prohibition of discrimination (Art. 110 TFEU, ex-Art. 90 EC)
- “Standing harmonization order” (Art. 113 TFEU, ex-Art. 93 EC) → E.g., VAT

### □ *Direct taxation*

- General “internal market” harmonization under Art. 115 TFEU → *Only directives!*  
*Unanimity*

#### *Article 115*

(ex Article 94 TEC)

Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.

- However, relevance of direct taxation for the “internal market” (Art. 26 TFEU), the fundamental freedoms (Arts. 45, 49, 56, 63 TFEU) and in respect of State aid (Art. 107 TFEU)

# OVERVIEW | *BACKGROUND*

## ■ Direct Taxation

### ☐ *Fundamental Freedoms*

- Free Movement of Workers (Art 45 TFEU, ex-Art 39 EC — Art 28 EEA)
- Freedom of Establishment (Art 49 TFEU, ex-Art 43 EC — Art 31 EEA)
- Freedom to Provide Services (Art 56 TFEU, ex-Art 49 EC — Art 36 EEA)
- Free Movement of Capital (Art 63 TFEU, ex-Art 56 EC — Art 40 EEA) — *Between the Member States and between Member States and third countries!*

### ☐ *State Aid (Art. 107 TFEU)*

# OVERVIEW | *BACKGROUND*

## ■ Directives

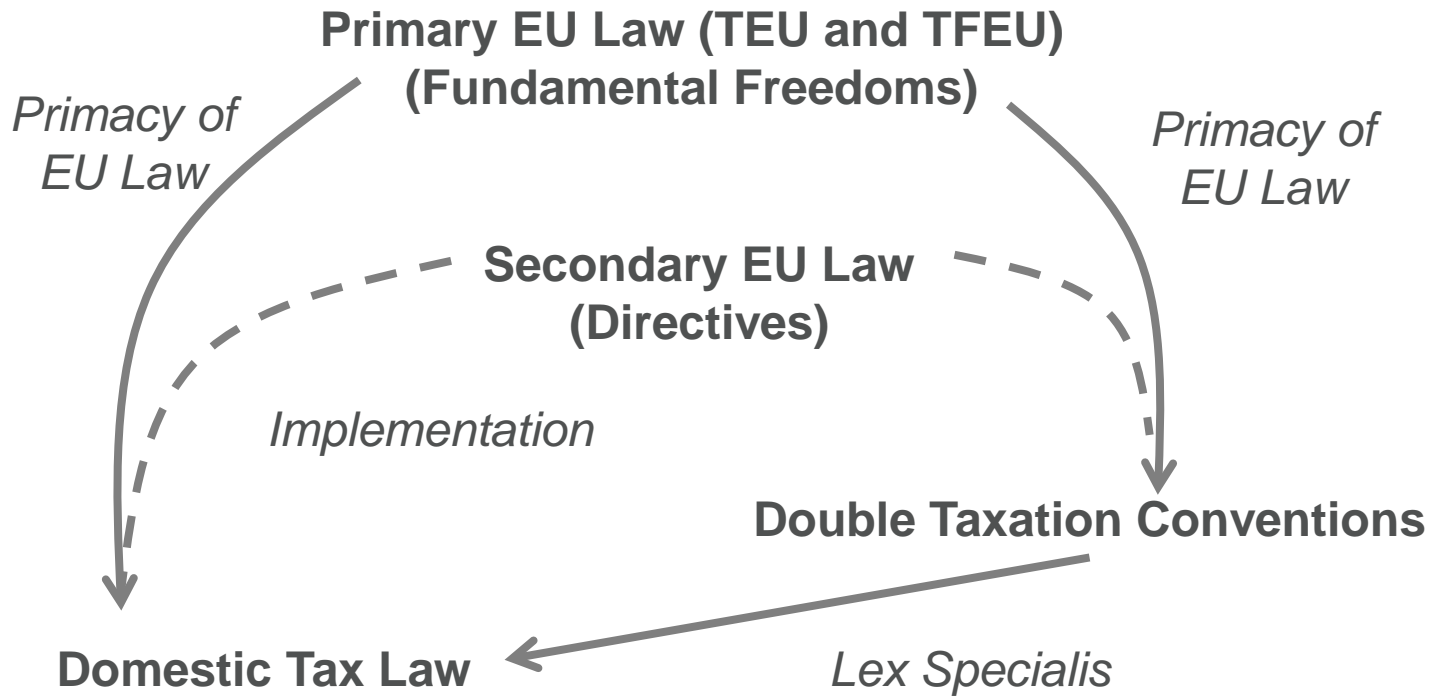
### □ *Taxpayers*

- Anti-Tax-Avoidance-Directive (ATAD) (Directive (EU) 2016/1164, [2016] OJ L 193/1), as amended by Directive (EU) 2017/952, [2017] OJ L 144/1 [7 June 2017])
- Parent-Subsidiary-Directive (Council Directive 2011/96/EU, [2011] OJ L 345/8, as amended by Directive 2014/86/EU, [2014] OJ L 219/40, and Directive (EU) 2015/121, [2015] OJ L 21/1)
- Merger Directive (Directive 2009/133/EC, [2009] OJ L 310/34)
- Interest-Royalties-Directive (Directive 2003/49/EC, [2003] OJ L 157/49) – *Amending proposal COM(2011) 714 final (11 November 2011)*
- Dispute Resolution Directive (Directive (EU) 2017/1852, [2017] OJ L 265)

### □ *Tax administrations*

- Directive on Mutual Assistance (Directive 2011/16/EU, [2011] L 64/1, as amended by Directive 2014/107/EU, [2014] OJ L 359/1, Directive (EU) 2015/2376, [2015] OJ L 332/1, Directive (EU) 2016/881, [2016] OJ L 146/8, Directive (EU) 2016/2258, [2016] OJ L 342/1, and Directive (EU), [2018] OJ L 139/1)
- Directive on Recovery of Tax Claims (Directive 2010/24/EU, [2010] OJ L 84/1)
- Savings Interest Directive (Directive 2003/48/EC, [2003] OJ L 157/38, as amended by Directive 2014/48/EU, [2014] OJ 111/50) – *Repealed by Council Directive (EU) 2015/2060 of 10 November 2015, [2015] OJ L 301/1*

# OVERVIEW | *STRUCTURE*



*PART II*  
FUNDAMENTAL  
FREEDOMS



# CONTENT

- ***Chapter I*** – Foundations
- ***Chapter II*** – Personal and family benefits
- ***Chapter III*** – Business expenses
- ***Chapter IV*** – Permanent establishments
- ***Chapter V*** – Cross-border dividends
- ***Chapter VI*** – Foreign losses
- ***Chapter VII*** – Exit taxation
- ***Chapter VIII*** – Tax planning
- ***Chapter IX*** – Horizontal discrimination
- ***Chapter X*** – Double taxation

*CHAPTER I*  
FOUNDATIONS



# OVERVIEW | *STRUCTURE*

## ■ *Fundamental Freedoms*

- Workers (Art. 45 TFEU, ex-Art. 39 EC — Art. 28 EEA)
- Establishment (Art. 49 TFEU, ex-Art. 43 EC — Art. 31 EEA)
- Services (Art. 56 TFEU, ex-Art. 49 EC — Art. 36 EEA)
- Movement of Capital (Art. 63 TFEU, ex-Art. 56 EC — Art. 40 EEA) —  
*Between the Member States and between Member States and third countries!*

## ■ *Impact*

- The freedoms are (1) directly applicable in the Member States, (2) confer rights to individuals and companies, (3) take precedence over domestic legislation to the extent of any inconsistency, (4) and not only operate “negatively” by superseding national law, but also “positively” by granting taxpayers benefits denied to them in breach of EU law
- CJEU (ECJ) and domestic courts → Preliminary Rulings and *Acte Clair*
- “Retroactivity” and domestic procedural law

### CHAPTER 2 RIGHT OF ESTABLISHMENT

#### Article 49 (ex Article 43 TEC)

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

# OVERVIEW | *FUNDAMENTAL FREEDOMS*

<b>Personal and Teritorial Scope</b>	<ul style="list-style-type: none"><li>▪ Nationals of the Member States (Art. 21 TFEU) or EU companies (Art. 54 TFEU) for Arts. 45, 49, 56 TFEU (no personal requirement for Art. 63 TFEU)</li><li>▪ Cross-border economic activity (private movements are covered by Art. 21 TFEU), not purely internal situations</li><li>▪ Convergence → Internal Market (Art. 26 TFEU)</li></ul>
<b>Restriction</b>	<ul style="list-style-type: none"><li>▪ Discriminatory restrictions (→ difference in treatment and comparability) for inbound and outbound situations<ul style="list-style-type: none"><li>– Overt v. Covert</li><li>– Direct v. Indirect</li><li>– Vertical v. Horizontal</li><li>– „Single Country Approach“ v. „Overall Approach“</li></ul></li><li>▪ Inbound and outbound situations<ul style="list-style-type: none"><li>– <i>Ad personam</i> v. <i>ad rem</i>-comparison</li><li>– Obligation to grant “national treatment”</li></ul></li><li>▪ Non-discriminatory restrictions (?)</li><li>▪ ≠ Disparities (e.g., <i>Gilly</i>)</li><li>▪ ≠ Quasi-restrictions (e.g., <i>Kerckhaert-Morres</i>)</li></ul>

# OVERVIEW | *FUNDAMENTAL FREEDOMS*

Justification	<ul style="list-style-type: none"><li>▪ Written grounds of justification (Arts. 45(3), 52(1) and 65(1) TFEU) , i.e., public policy, public security or public health</li><li>▪ Unwritten grounds of justification (“rule of reason”, <i>Gebhard</i>), e.g.,<ul style="list-style-type: none"><li>– prevention of tax avoidance (e.g., <i>Metallgesellschaft und Hoechst, Marks &amp; Spencer, Cadbury Schweppes</i>)</li><li>– administrative supervision (zB <i>Futura Participations, Baxter</i>)</li><li>– efficiency of tax collection (e.g., <i>Scorpio, X NV</i>)</li><li>– coherence (e.g., <i>Bachmann, Krankenhaus Ruhesitz am Wannsee, Société Papillon</i>)</li><li>– balanced allocation of taxing rights (e.g., <i>D, Marks &amp; Spencer, Lidl Belgium, X Holding, National Grid Indus</i>)</li></ul></li></ul>
Proportionality	<ul style="list-style-type: none"><li>▪ National measures restricting the individual freedoms cannot exceed what is necessary to attain their legitimate objectives.</li></ul>

# OVERVIEW | *INBOUND AND OUTBOUND SITUATIONS*

## Inbound Situations

- Disadvantageous treatment of non-residents by the source State
- *Ad personam*-comparison (→ Competition!)
- Obligation of the Source State to grant non-residents equal treatment with residents, insofar the former are subjected to its taxing jurisdiction, and even if they are Source State nationals → Prohibition of vertical discrimination → Obligation to grant national treatment
- Main issues
  - Subjective ability to pay (e.g., *Schumacker, Wallentin, D*)
  - Objective ability to pay
    - Companies (e.g., *Avoir Fiscal, Saint-Gobain, CLT-UFA, Denkavit International*)
    - Individuals (e.g., *Gerritse, Conijn, Scorpio*)

## Outbound Situations

- Disadvantageous treatment of residents by the residence State
- *Ad rem*-comparison (→ domestic v. cross-border situation)
- Guideline → Equal treatment has to be granted if foreign-source income is included in the tax base
- Main issues
  - Foreign-source income, e.g., dividends (e.g., *Lenz, Manninen, Meilicke, Kronos*)
  - Deductions, incentives and cross-border loss relief (e.g., *Bachmann, Bosal, Marks & Spencer*)
  - Exit taxation (e.g., *Hughes de Lasteyrie du Saillant, N, National Grid Indus*)

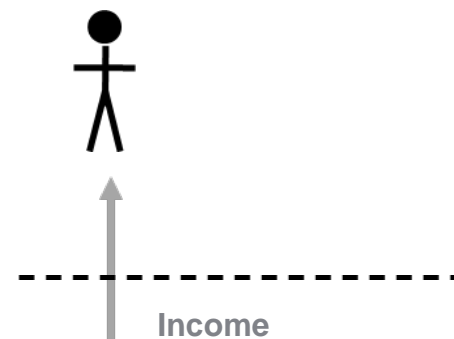
# FOREIGN SOURCE INCOME | *OVERVIEW*

## ■ *Leading Cases*

- ECJ, 13 April 2000, C-251/98, *Baars*, EU:C:2000:20, ECJ, 15 July 2004, C-315/02, *Lenz*, EU:C:2004:446, ECJ, 7 September 2004, C-319/02, *Manninen*, EU:C:2004:484

## ■ *Guideline*

- Identification of a pair of comparison and the criterion of comparison (tertium comparationis) → *Ad rem*-comparison
- Comparability if foreign-source income is included in the tax base (e.g., ECJ, 17 September 2015, C-10/14, C-14/14 and C-17/14, *Miljoen*, EU:C:2015:608, para. 67)



Problems, e.g., with wealth tax exemption only for domestic shares (*Baars*), beneficial treatment only for domestic dividends (*Verkooijen*, *Lenz*, *Manninen*, *Meilicke*), taxation of capital gains only for sales of foreign shares (*Wiedert and Paulus*), different thresholds for taxability of sales (*Gronfelt*), different valuation of domestic and foreign assets (*Scheunemann*)

*CHAPTER II*  
PERSONAL AND FAMILY  
BENEFITS



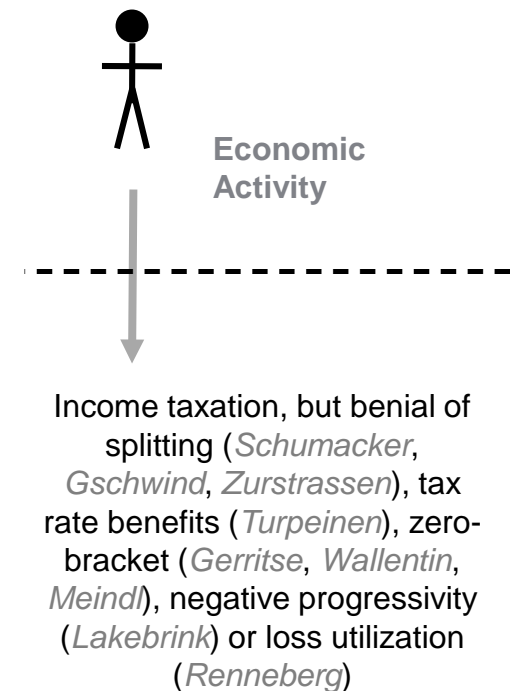
# "SUBJECTIVE ABILITY TO PAY" | *SCHUMACKER*

## ■ Leading Case

- ECJ, 14 February 1995, C-279/93, *Schumacker*, EU:C:1995:31 etc

## ■ Decision

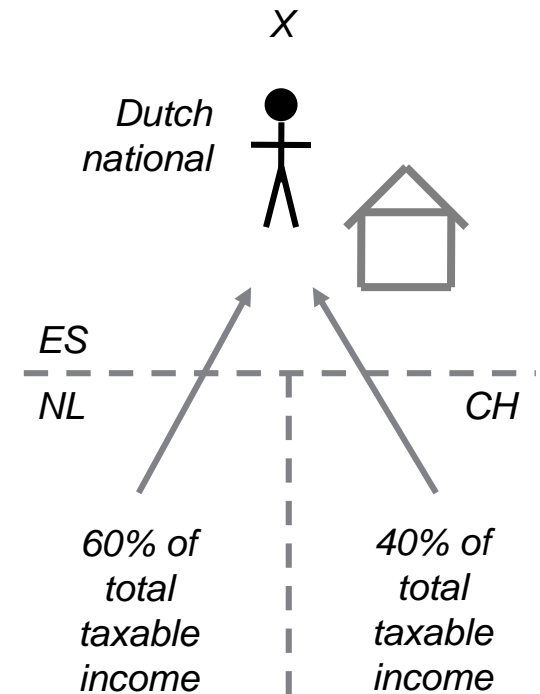
- Prohibition also of "covert" discrimination (based on residence rather than nationality), but "[i]n relation to direct taxes, the situations of residents and of non-residents are not, as a rule, comparable" (*ad personam*-comparison), ...
- ... but they become comparable if a taxpayer ...
  - ... obtains his income entirely or almost exclusively from the work performed in the source State [90%; full-year basis, ECJ, 18 June 2015, C-9/14, *Kieback*, EU:C:2015:406) and
  - ... does not receive in his residence State sufficient income to be subject to taxation there in a manner enabling his personal and family circumstances to be taken into account (determined under the legislation of the residence State, ECJ, 10 May 2012, C-39/10, *Commission v. Estonia*, EU:C:2012:282, para. 53)
- The scope of the case-law arising from the judgment in *Schumacker* extends to all the tax advantages connected with the non-resident's ability to pay tax which are granted neither in the State of residence nor in the State of employment. → *I.e., personal ability to pay tax or personal and family circumstances.*



# "SUBJECTIVE ABILITY TO PAY" | *SCHUMACKER REFINED*

■ ECJ, 9 February 2017, C-283/15, *X*, EU:C:2017:102

- ☐ Deduction of the negative income arising from his dwelling in Spain in the Netherlands?
- ☐ Discrimination? ✓, because the Member State of residence is not in a position to grant him the benefits that result from taking into account his personal and family circumstances
- ☐ Granting of benefits in proportion to the share of his income received within each such Member State, it being his responsibility to provide to the competent national authorities all the information on his global income needed by them to determine that proportion



# "SUBJECTIVE ABILITY TO PAY" |

## DE GROOT

### ■ Cases

- ECJ, 12 December 2002, C-385/00, *De Groot*, EU:C:2002:750 → See also ECJ, 28 February 2013, C-168/11, *Beker & Beker*, EU:C:2013:117, and ECJ 12 December 2013, C-303/12, *Imfeld & Garcet*, EU:C:2013:822

### ■ Decision

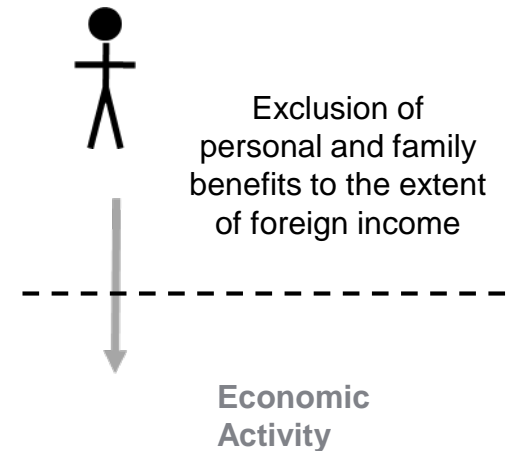
- *Pro-rata* exclusion of personal and family benefits by the taxpayers residence State violates freedoms

### ■ Example

- Exemption with progression in residence State (e.g., income of 50.000 in each State, 50% flat rate in residence State, 10.000 of personal exemption/deduction):

$$\begin{aligned} & \text{Tax on Worldwide Income} - \left[ \text{Foreign Income} \cdot \frac{\text{Tax on Worldwide Income}}{\text{Worldwide Income}} \right] \\ & = 45.000 - \left[ 50.000 \cdot \frac{45.000}{100.000} \right] = 22.500 \end{aligned}$$

Effectively 2.500 "exported" to source State (and not taken into account in the home State) → Violates freedoms!



*CHAPTER III*  
BUSINESS EXPENSES



# "OBJECTIVE ABILITY TO PAY" |

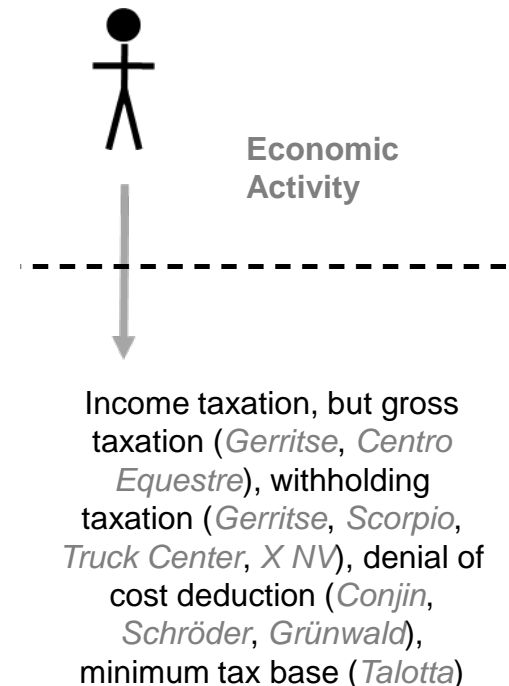
## *GERRITSE*

### ■ Leading Case

- ECJ, 12 June 2003, C-234/01, *Gerritse*, EU:C:2003:340

### ■ Decisions

- **Tax Base** → Prohibition of gross-base taxation (also on the level of withholding taxation) → ECJ, 12 June 2003, C-234/01, *Gerritse*, EU:C:2003:340, and ECJ, 3 October 2006, C-290/04, *Scorpio*, EU:C:2006:630
- **Expenses** → In relation to expenses directly linked to an activity which has generated taxable income in a Member State, that residents of that State and non-residents are in a comparable situation. → ECJ, 31 March 2011, C-450/09, *Schröder*, EU:C:2011:198
- **Form of Taxation** → Justification of the form of taxation (through a withholding tax → entails an additional administrative burden and related liability risks) by the need to ensure the effective collection of income tax, even if the Recovery Directive would be applicable → E.g., ECJ, 18 October 2012, C-498/10, *X NV*, EU:C:2012:635, and ECJ, 13 July 2016, C-18/15, *Brisal*, EU:C:2016:549



*CHAPTER IV*  
PERMANENT  
ESTABLISHMENTS



# PERMANENT ESTABLISHMENTS |

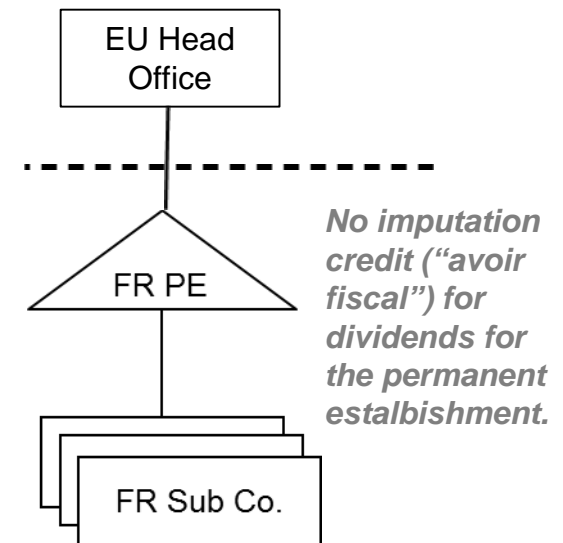
## *“AVOIR FISCAL”*

### ■ Case

- ECJ, 28 January 1986, 270/83, **Commission v. France** („*Avoir fiscal*“), EU:C:1986:37

### ■ Decision

- The Court declares “that by not granting to the branches and agencies in France of insurance companies whose registered office is in another Member State on the same terms as apply to insurance companies whose registered offices is in France the benefit of shareholder tax credits in respect of dividends paid to such branches or agencies by French companies, the French Republic has failed to fulfil its obligations under Article 52 of the EEC Treaty [now Art 49 TFEU].”
- Not justified by (1) (potential) advantages that branches enjoy, (2) the fact that subsidiaries could have been established instead of branches, or (3) the fact that tax laws are not harmonized.



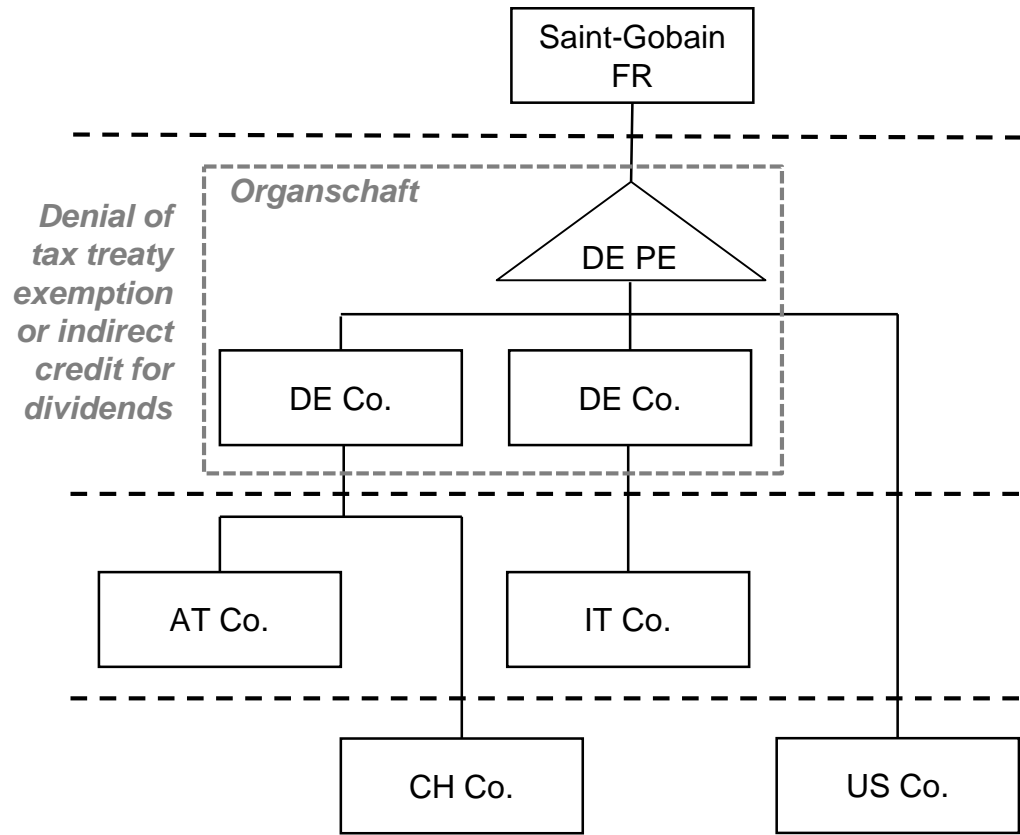
# PERMANENT ESTABLISHMENTS | *TREATY BENEFITS*

## ■ Case

- ECJ 21 September 1999, C-307/97, ***Saint-Gobain***, EU:C:1999:438

## ■ Decision

- Discrimination that branches of EU companies are not entitled to (1) exemption under German tax treaties with third States, (2) indirect credits under domestic law, and (3) exemption from capital tax *under domestic law*.
- *Not justified by (1) the (potential) advantage branches enjoy in comparison with resident subsidiaries as regards the transfer of profits to the non-resident parent company or (2) the principle of reciprocity and the balance inherent in tax treaties.*
- Conclusions for triangular situations?



# PERMANENT ESTABLISHMENTS |

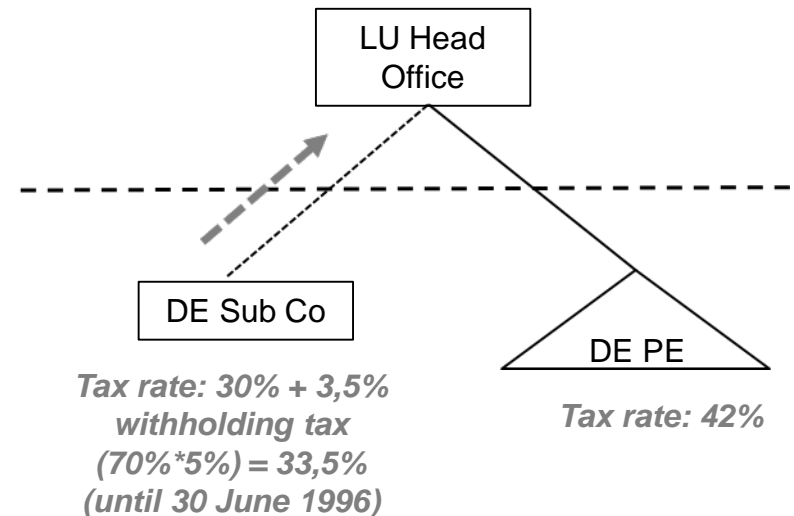
## TAX RATES

### ■ Case

- ECJ, 23 February 2006, C-253/03, **CLT-UFA**, EU:C:2006:129. – See also ECJ, 29 April 1999, C-311/97, **Royal Bank of Scotland**, EU:C:1999:216

### ■ Decision

- Discrimination (higher tax rate on branch profits) ...
- ... but it “is necessary to apply a tax rate to the profits made by a branch which is equivalent to the overall tax rate which would have been applicable in the same circumstances to the distribution of the profits of a subsidiary to its parent company.” → *Horizontal comparison!* → *I.e., 33,5% (BFH, 9 August 2006, I R 31/01, BFHE 214, 496)*



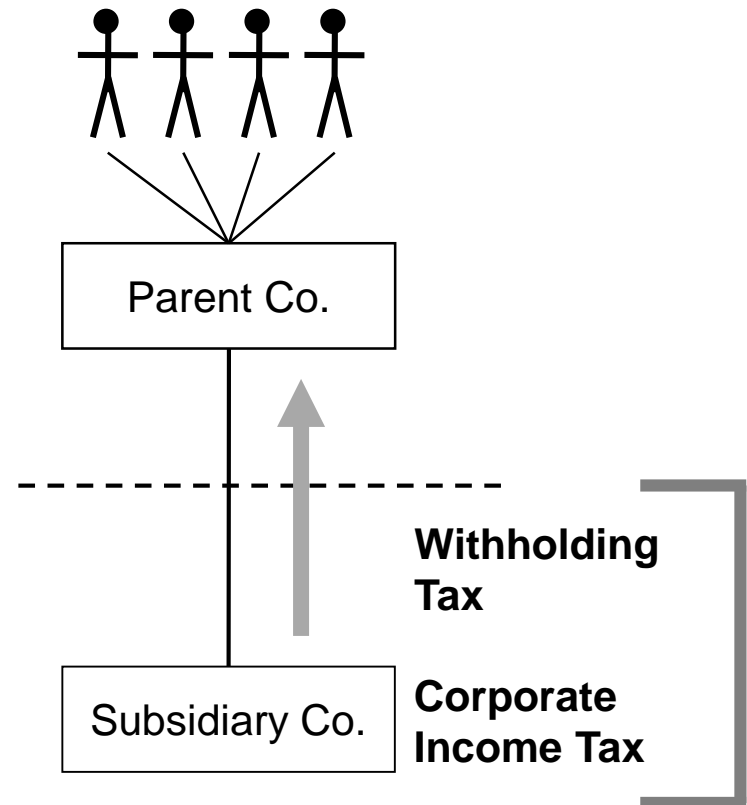
*CHAPTER V*  
CROSS-BORDER DIVIDENDS



# OVERVIEW | *CROSS-BORDER PROFIT DISTRIBUTIONS*

## ■ *Economic Double Taxation*

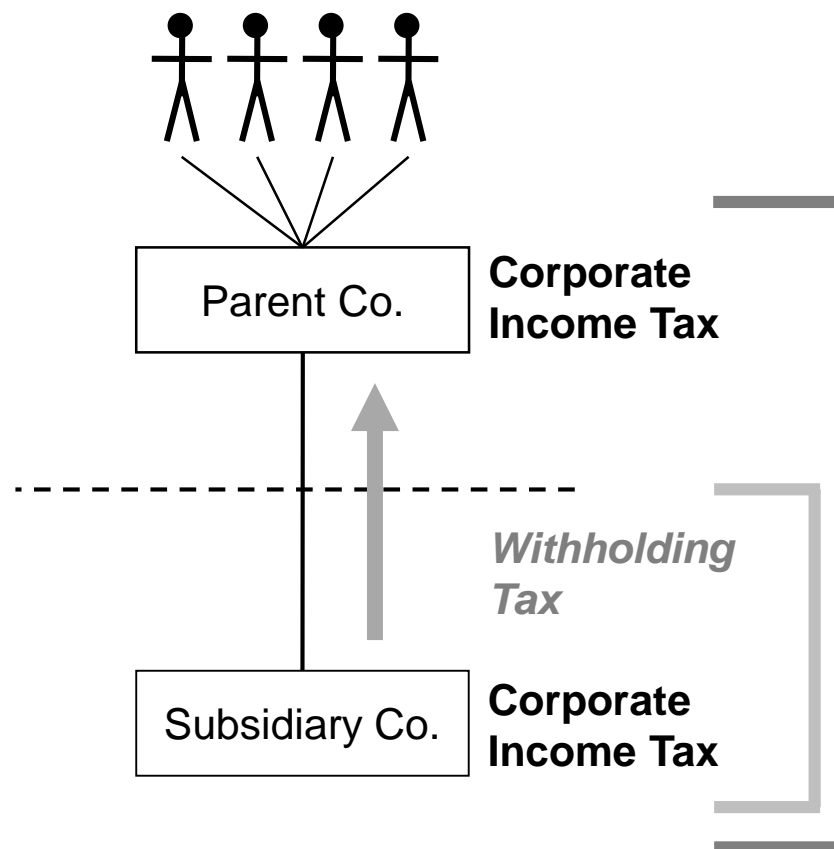
- **Domestic** → Corporate Level Tax in one State and withholding tax on the recipient in the same State
- Solutions
  - Reduction of withholding taxes by the Source State and credit by the Residence State → DTCs (Art 10, 23 OECD-MC)
  - Extension of the domestic system to cross border-dividends → Freedom of Capital Movement
  - Prohibition of source taxation → Parent-Subsidiary-Directive (Art 5 and Art 15 of the EU-Swiss Savings Income Agreement)



# OVERVIEW | *CROSS-BORDER PROFIT DISTRIBUTIONS*

## ■ *Economic Double Taxation*

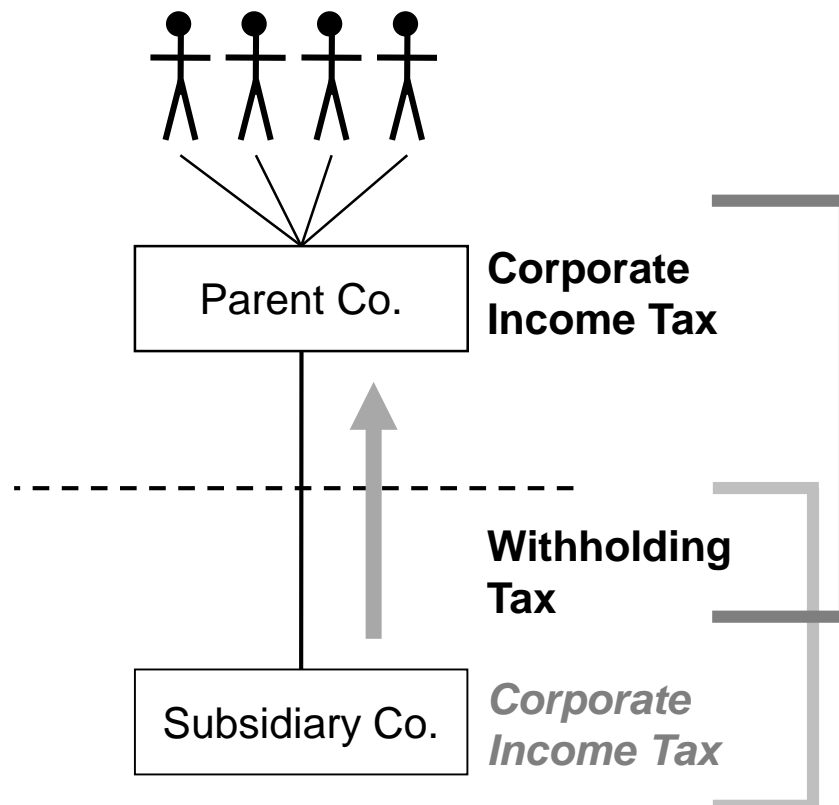
- **Cross-border** → Corporate Level Tax in one State and Shareholder Level Tax in the other State
- Solutions
  - Usually no solution in DTCs (but: participation privileges)
  - Extension of the domestic integration system to cross border-dividends → Freedom of Capital Movement
  - Prohibition of economic double taxation → Parent-Subsidiary-Directive (Art 4)



# OVERVIEW | *CROSS-BORDER PROFIT DISTRIBUTIONS*

## ■ *Juridical Double Taxation*

- Source State (= State of residence of the distributing company) levies a withholding tax (e.g., 25%), i.e., a tax on the foreign shareholder, and the Residence State of the shareholder taxes the dividends received
- Solutions
  - Reduction of withholding taxes by the Source State and credit by the Residence State → DTCs (Art 10, 23 OECD-MC)
  - Extension of the domestic system to cross border-dividends → Freedom of Capital Movement
  - Prohibition of source taxation → Parent-Subsidiary-Directive (Art 5 and Art 15 of the EU-Swiss Savings Income Agreement)



# CROSS-BORDER DIVIDENDS |

## OVERVIEW

### ■ **Case Law**

- ☐ Inbound Dividends (e.g., *Lenz, Manninen, FII Group Litigation 1 & 2, Haribo and Salinen, Kronos*)
- ☐ Outbound Dividends (e.g., *Fokus Bank, ACT Group Litigation, Denkavit Internationaal, Amurta, Commission v. Germany, Miljoen*)

### ■ **Commission**

- ☐ Communication on “Dividend taxation of individuals in the Internal Market” COM(2003) 810 final (19 December 2003)
- ☐ Recommendation on withholding tax relief procedures, C(2009)7924 final (19 October 2009)

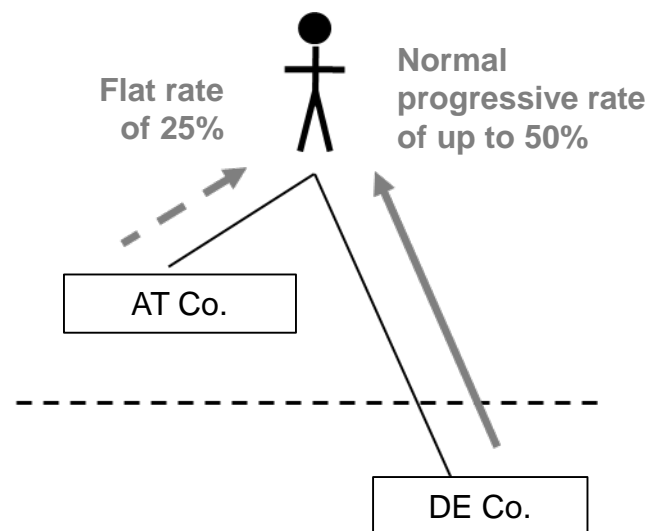
# CROSS-BORDER DIVIDENDS | *INBOUND (LENZ, MANNINEN)*

## ■ **Leading Cases**

- ECJ, 15 July 2004, C-315/02, **Lenz**, EU:C:2004:446 (reduced rate) and ECJ, 7 September 2004, C-319/02, **Manninen**, EU:C:2004:484 (imputation credit)

## ■ **Decisions**

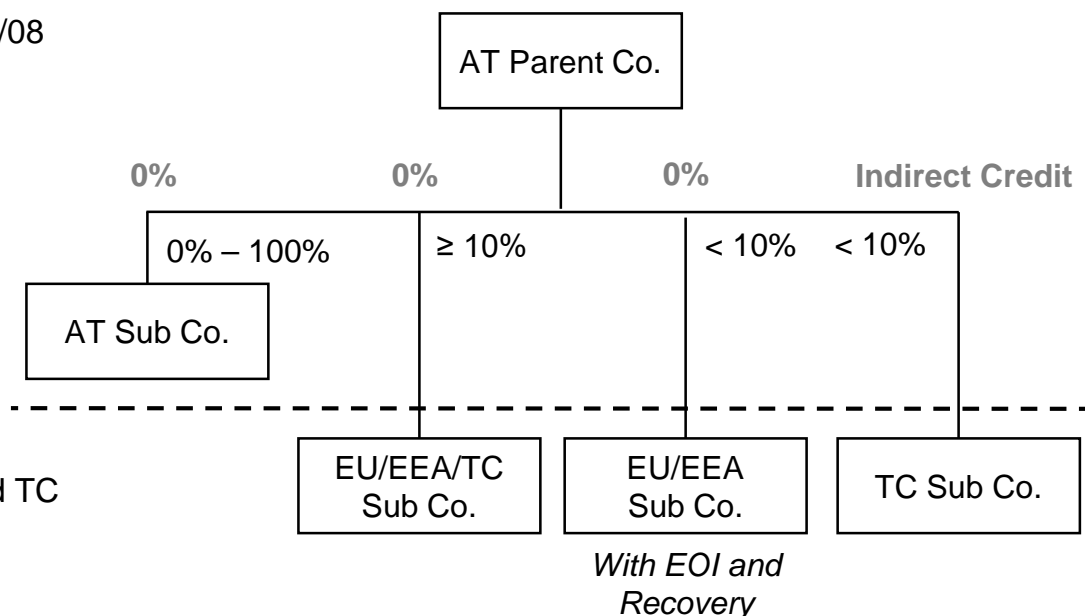
- Comparability of situations with respect to the economic double taxation of distributed profits.
- No justification based on (1) the need to ensure the coherence of the national tax system or (2) the need to ensure the effectiveness of fiscal supervision.



# CROSS-BORDER DIVIDENDS | *INBOUND (HARIBO AND SALINEN)*

## ■ Case

- ECJ, 10 February 2011, C-436/08 and C-437/08, *Haribo and Salinen*, EU:C:2011:61
- See also ECJ, 13 November 2012, C-35/11, *FII 2*, EU:C:2012:707, and ECJ, 11 September 2014, C-47/12, *Kronos*, EU:C:2014:2200



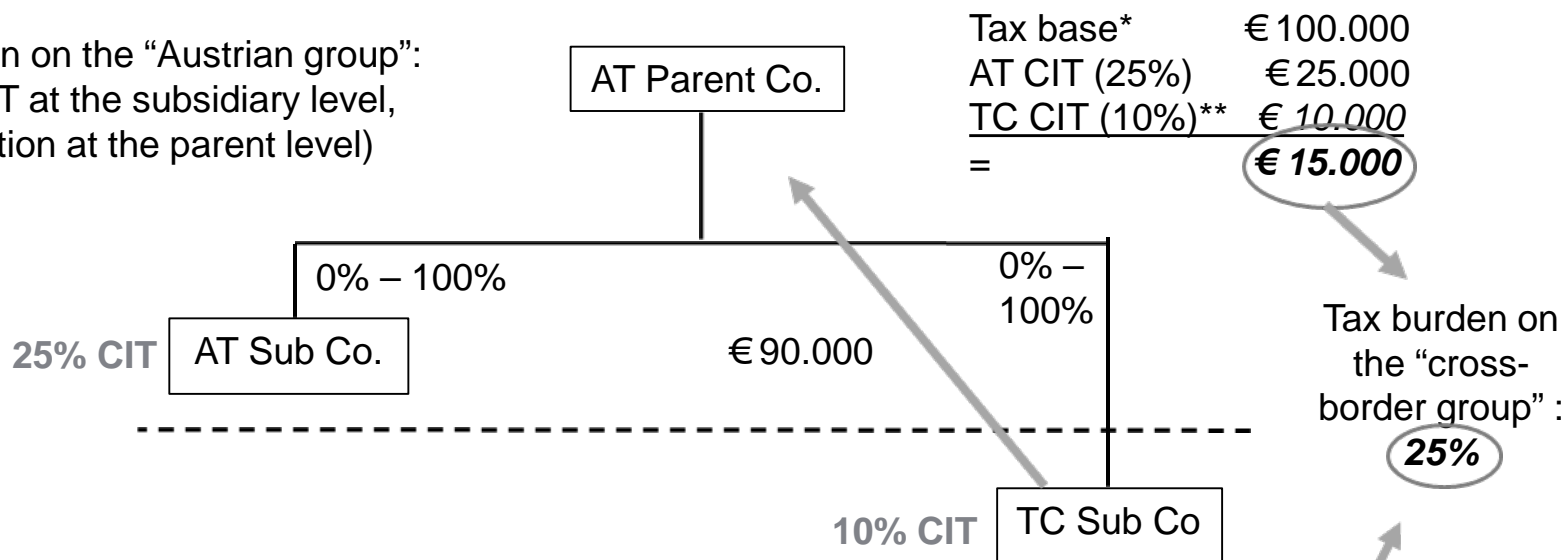
## ■ Decision

- Relief also for portfolio dividends from EEA States and TC
- Permissibility of administrative assistance, but not recovery assistance as a prerequisite
- Equivalence between the exemption and imputation methods (→ based of effective, not nominal foreign taxation; *FII 2*) → Conversely: Non-comparability if an indirect credit is granted for domestic dividends and exemption for foreign dividends (*Kronos*)
- Indirect (not: direct) credit-carry forward in loss situations

AT = Austria; EU = European Union; EEA = European Economic Area; TC = Third Country.

# CROSS-BORDER DIVIDENDS | *INBOUND (HARIBO AND SALINEN)*

Tax burden on the “Austrian group”:  
**25%** (CIT at the subsidiary level,  
exemption at the parent level)



\* Credit carry-forward in loss situations (ECJ, 10 February 2011, C-436/08 und C-437/08, Haribo and Salinen, EU:C:2011:61).

\*\* Tax credit arguably to be calculated by reference to the nominal tax rate of the TC (ECJ, 13 November 2012, C-35/11, FII 2, EU:C:2012:707)

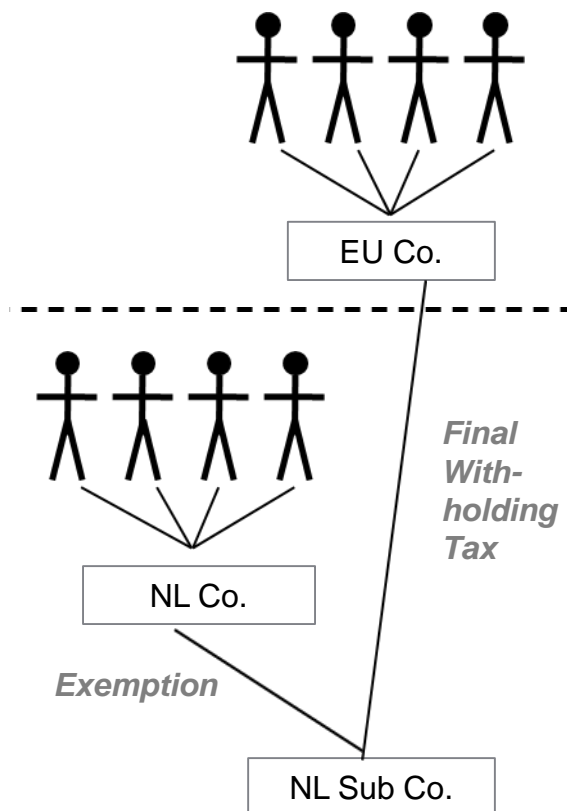
# CROSS-BORDER DIVIDENDS | *OUTBOUND*

## ■ *Leading Cases*

- ECJ, 14 December 2006, C-170/05, *Denkavit Internationaal*, EU:C:2006:783, ECJ, 8 November 2007, C-379/05, *Amurta*, EU:C:2007:655, ECJ, 20 October 2011, C-284/09, *Commission v. Germany*, EU:C:2011:670, and ECJ, 17 September 2015, C-10/14, C-14/14 and C-17/14, *Miljoen*, EU:C:2015:608. – See also EFTA-Court, 23 November 2004, E-1/04, *Fokus Bank*, [2004] EFTA Court Report 11.

## ■ *Decisions*

- Definitive (final) withholding tax on distributions to EU/EEA shareholders (companies, individuals) is discriminatory if less advantageous than the taxation of domestic recipients (e.g., exemption)
- But: Neutralization through a tax credit?
  - Yes, but only if elimination of discrimination by way of a tax treaty credit in the recipients residence State → Treaty-based overall approach (*Denkavit Internationaal*, *Amurta*, *Miljoen*. – Contra: *Fokus Bank*), no neutralization by a credit under domestic law.
  - “Full credit” v. partial credit (because of credit limitation)?



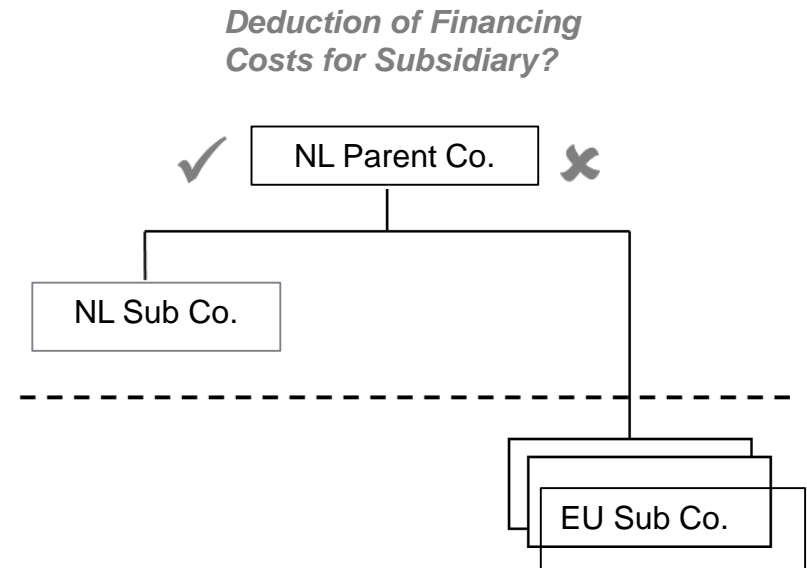
# CROSS-BORDER DIVIDENDS | *COST DEDUCTION (BOSAL)*

## ■ Case

- ECJ, 18 September 2003, C-168/01, *Bosal*, EU:C:2003:479

## ■ Decision

- The Parent-Subsidiary-Directive, “interpreted in the light of Article 52 of the EC Treaty (now, after amendment, Article 43 EC) precludes a national provision which, when determining the tax on the profits of a parent company established in one Member State, makes the deductibility of costs in connection with that company's holding in the capital of a subsidiary established in another Member State subject to the condition that such costs be indirectly instrumental in making profits which are taxable in the Member State where the parent company is established.”
- Not justified by (1) the need to preserve the coherence of the tax system, (2) the principle of territoriality, or (3) the aim of avoiding an erosion of the tax base



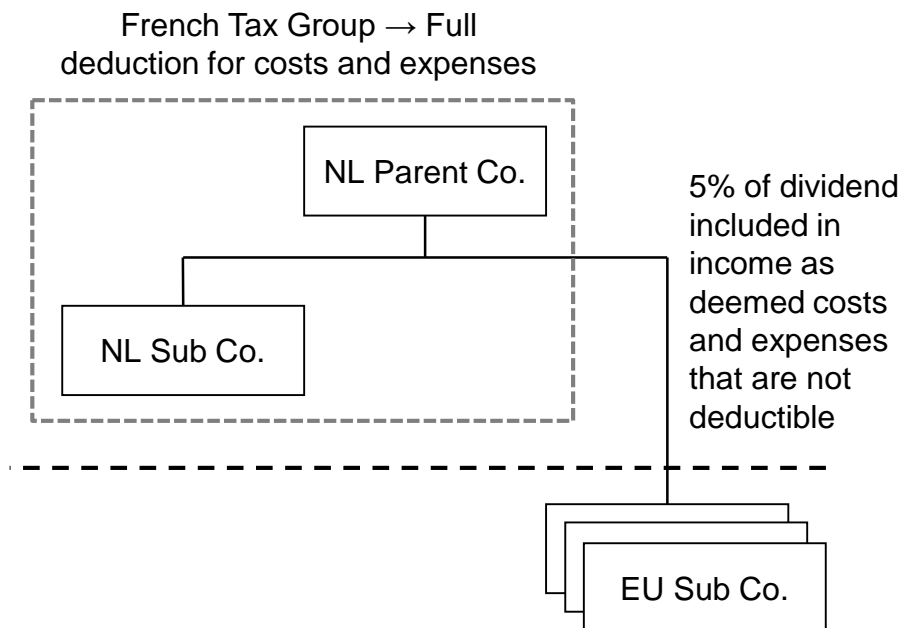
# CROSS-BORDER DIVIDENDS | *COST DEDUCTION (GROUPE STERIA)*

## ■ Case

- ECJ, 2 September 2015, C-386/14, *Groupe Steria*, EU:C:2015:524

## ■ Decision

- Discrimination (because the fact that the dividends received by a parent company which enjoy full tax exemption come from subsidiaries that are part of the tax-integrated group to which the parent company concerned also belongs does not amount to an objective difference in the situation of parent companies that would justify the difference in treatment identified) ...
- ... and no justification based on (1) the need to safeguard the balanced allocation of the power to impose taxes between the Member States (as only the fiscal sovereignty of one and the same Member State is concerned), on (2) the need to safeguard the cohesion of the tax system (as there is no offsetting disadvantage), or on (3) the option offered by Art. 4(2) of the Parent-Subsidiary-Directive (which must be exercised in compliance with the fundamental provisions of the Treaty).



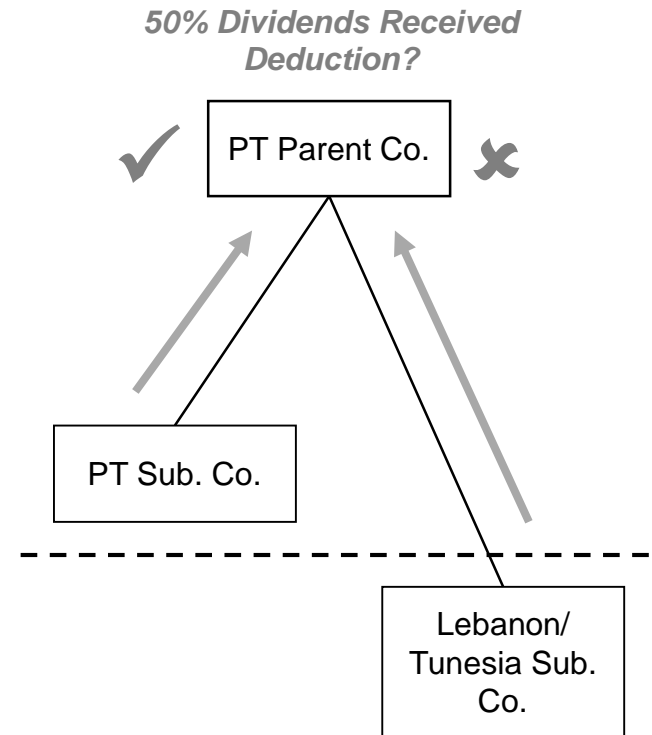
# CROSS-BORDER DIVIDENDS |

## CONCLUSIONS

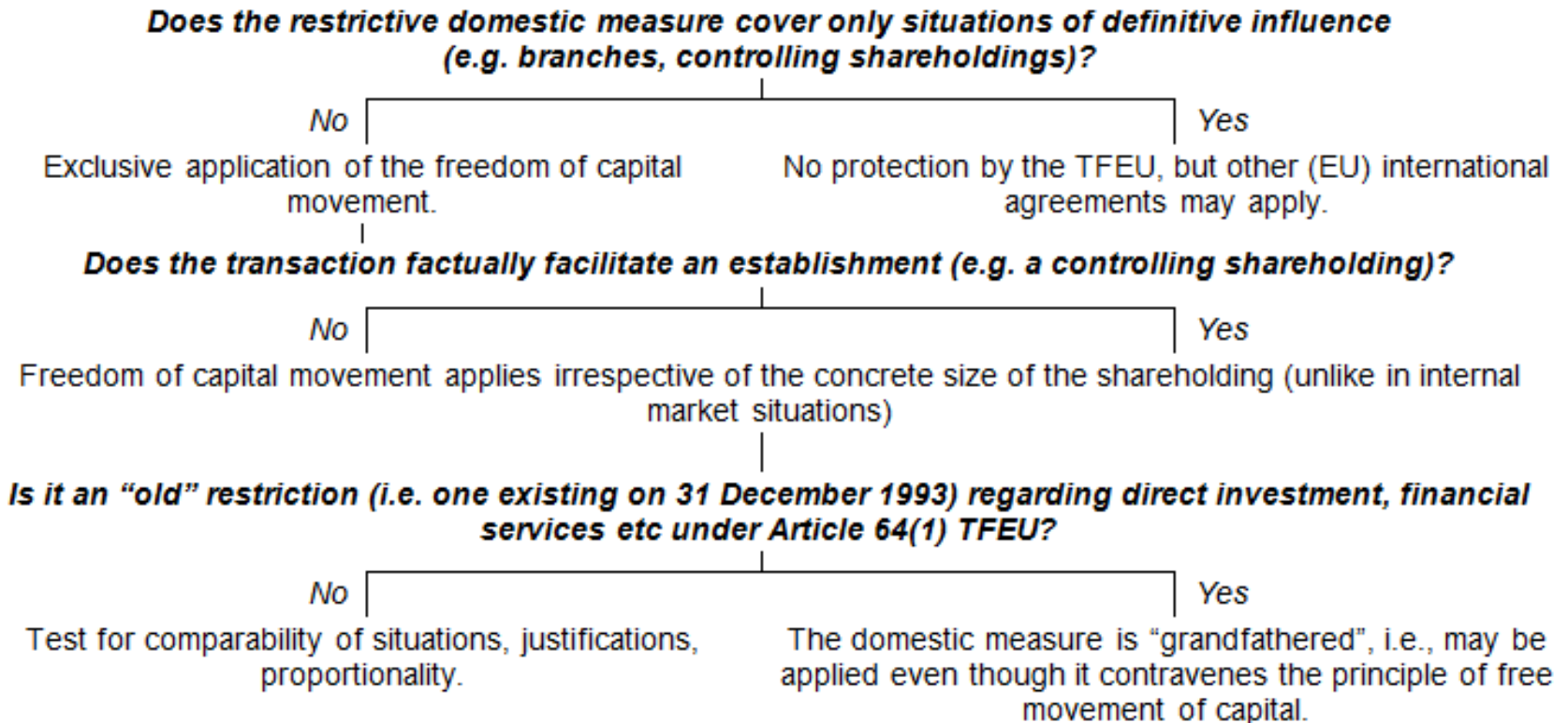
		Schedular System	Full Imputation System	Exemption System
Shareholder's Residence State		<ul style="list-style-type: none"> <li>Same treatment as for domestic dividends (<i>Verkooijen, Lenz</i>)</li> </ul>	<ul style="list-style-type: none"> <li>Credit for foreign corporate tax (<i>Manninen, Meilicke, FIL</i>)</li> <li>Limited by the level of domestic corporate tax (<i>FIL</i>)</li> <li>But: Non-comparability if exemption for foreign dividends (<i>Kronos</i>)</li> </ul>	<ul style="list-style-type: none"> <li>Same treatment as for domestic dividends (<i>A, Les Vergers du Vieux Tauves</i>)</li> <li>However, a Member State may decide to grant an indirect foreign tax credit instead (<i>FIL 1 &amp; 2, Haribo and Salinen</i>)</li> </ul>
Source State = Company's Residence State	Taxation of Non-Resident Shareholder	<ul style="list-style-type: none"> <li>Same treatment as for resident shareholders</li> </ul>	<ul style="list-style-type: none"> <li>Same treatment as for resident shareholders (<i>Avoir Fiscal, Saint-Gobain, Fokus Bank, ACT Group Litigation</i>)</li> <li>Only to the extent to cancel domestic economic double taxation (<i>ACT Group Litigation</i>)</li> <li>"Neutralization"? (<i>Denkavit, Amurta, Commission v. Spain, Commission v. Italy, Miljoen</i>)</li> </ul>	<ul style="list-style-type: none"> <li>Same treatment as for resident shareholders (<i>Saint-Gobain, Denkavit, Amurta, Commission v. Netherlands, Aberdeen, Secilpar</i>)</li> <li>"Neutralization"? (<i>Denkavit, Amurta, Commission v. Spain, Commission v. Italy, Miljoen</i>)</li> </ul>
	Taxation of Company's Profits	Not affected by fundamental freedoms ( <i>ACT Group Litigation, Burda</i> )		

# CROSS-BORDER DIVIDENDS | *THIRD-COUNTRY SITUATIONS*

- ECJ, 24 November 2016, C-464/14, **SECIL**, EU:C:2016:896
  - ☐ Applicability of the freedom of capital movement? ✓
  - ☐ Restriction? ✓
  - ☐ Possible justification based on the effectiveness of fiscal supervision? ✓/✗, depending on exchange of information
  - ☐ “Grandfathering” in light of the EU-Agreements with Lebanon and Tunisia? ✗
  - ☐ Direct effect of the EU-Agreements with Lebanon and Tunisia? ✓



# CROSS-BORDER DIVIDENDS | *THIRD-COUNTRY SITUATIONS*



Note: A 10% holding requirement does not necessarily imply control (*Itelcar*, *Kronos*, *Secil*), and neither does 20% (*Egiom*).

*CHAPTER VI*  
FOREIGN LOSSES



# LOSSES | OVERVIEW

## ■ Case Law

- Cross-Border Group Relief and Group Taxation (*Marks & Spencer, Oy AA, X Holding, Commission v. UK [Marks & Spencer II]*)
- Foreign Permanent Establishments (*Lidl Belgium, Krankenhaus Ruhesitz am Wannsee, Nordea Bank Danmark, Timac Agro*)
- Cross-Border Reorganizations (*A Oy*)
- Foreign Private Assets (*K*)
- “Indirect” Utilization of Domestic Losses (*Papillon, Felixstowe Dock and Railway Company Ltd, SCA Group Holding BV*)

## ■ Commission

- Withdrawn Proposal for a Council Directive concerning arrangements for the taking into account by enterprises of the losses of their permanent establishments and subsidiaries situated in other Member States, COM(90)595, [1991] OJ (C 53), 30.
- Commission Communication on “Tax Treatment of Losses in Cross-Border Situations”, COM(2006) 824 final (19 December 2006), and Commission Staff Working Document SEC(2006) 1690 (19 December 2006)
- Commission’s work on a CC(C)TB, where the plans to propose that, “until full CCCTB consolidation is introduced, group entities should be able to offset profits and losses they make in different Member States” (i.e., loss utilization with recapture) → Chapter 3.1 of COM(2015) 302 final (17 June 2015).

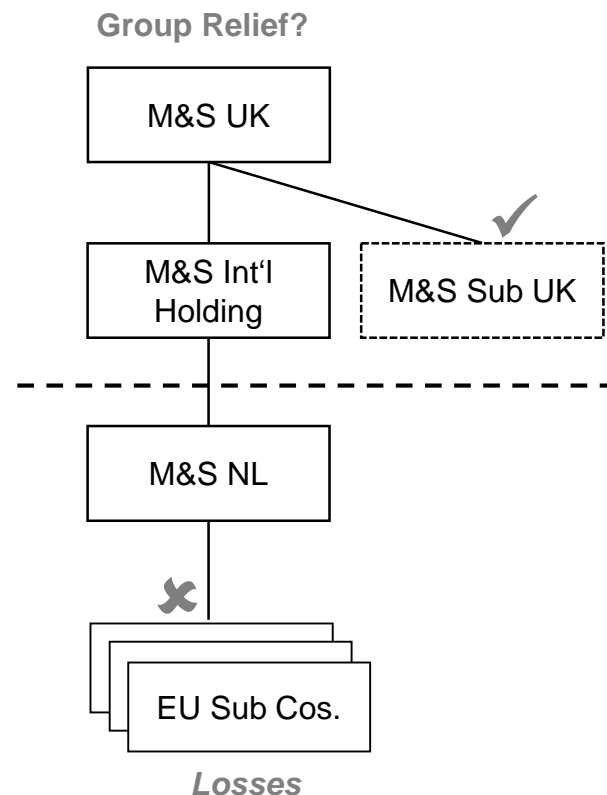
# LOSSES | SUBSIDIARIES (MARKS & SPENCER I & II)

## ■ Cases (Grand Chamber)

- ECJ, 13 December 2005, C-446/03, *Marks & Spencer*, EU:C:2005:763 → ECJ (Grand Chamber), 3 February 2015, C-172/13, *Commission v. UK*, EU:C:2015:50.

## ■ Decision

- Restriction on freedom of establishment (different treatment for tax purposes to losses incurred by a resident subsidiary and losses incurred by a non-resident subsidiary) ...
- ... but justified by (1) the consideration profits and losses are two sides of the same coin and must be treated symmetrically (i.e., to protect a balanced allocation of the power to impose taxes between the different Member States concerned), (2) to avoid that losses are taken into account twice (“double dip”), and (3) the risk of tax avoidance, taken together ...
- ... but proportionality requires that losses are taken into account if „the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods and where there are no possibilities for those losses to be taken into account in its State of residence for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party” (“final loss exception” or “*Marks & Spencer* exception”).



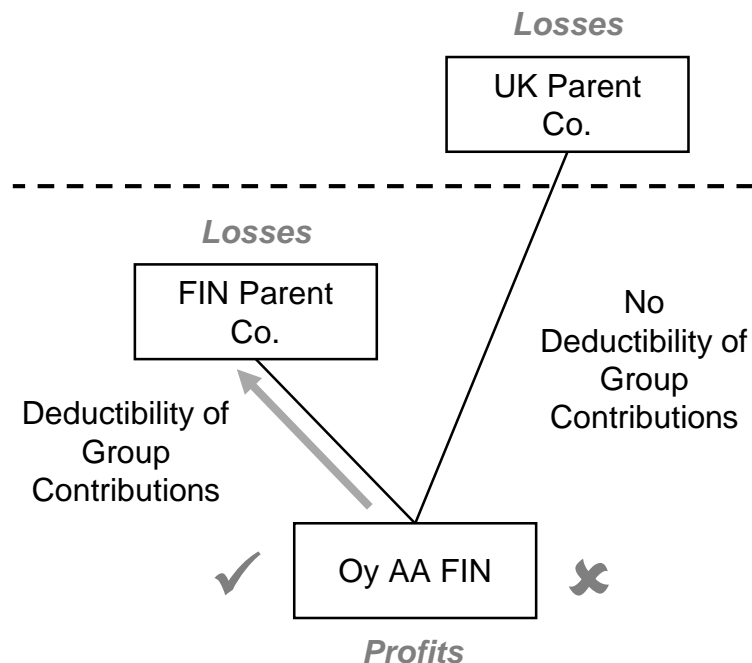
# LOSSES | *SUBSIDIARIES (OY AA)*

## ■ Case

- ECJ, 18 July 2007, C-231/05, *Oy AA*, EU:C:2007:439

## ■ Decision

- “Article 43 EC [now: Art 49 TFEU] does not preclude a system instituted by legislation of a Member State [...] whereby a subsidiary resident in that Member State may not deduct an intra-group financial transfer which it makes in favour of its parent company from its taxable income unless that parent company has its establishment in that same Member State.”
- Justified by the objectives of (1) safeguarding the balanced allocation of the power to impose taxes between Member States and (2) the prevention of tax avoidance.



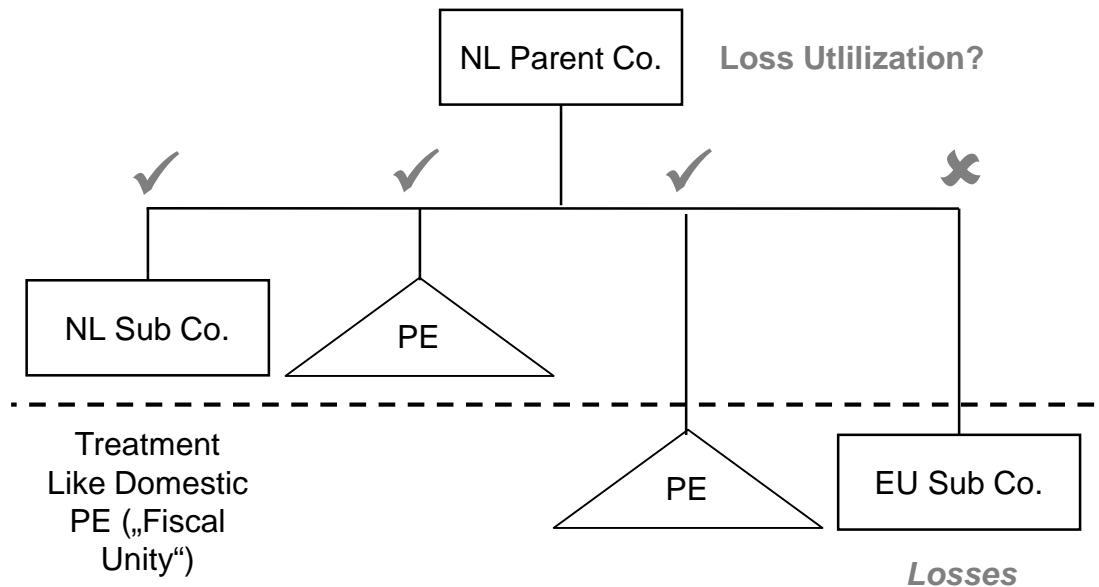
# LOSSES | *SUBSIDIARIES (X HOLDING)*

## ■ Case

- ECJ, 25 February 2010, C-337/08, *X Holding*, EU:C:2010:89

## ■ Decision

- “Articles 43 EC and 48 EC [now: Arts. 49 and 54 TFEU] do not preclude legislation of a Member State which makes it possible for a parent company to form a single tax entity with its resident subsidiary, but which prevents the formation of such a single tax entity with a non-resident subsidiary, in that the profits of that non-resident subsidiary are not subject to the fiscal legislation of that Member State.”
- Justified by the aim of safeguarding the allocation of the power to impose taxes between the Member States (i.e., to avoid that companies can choose freely the Member State in which the losses of that subsidiary are to be taken into account),
- Not altered by the fact that NL permits the temporary offsetting of losses incurred by a foreign permanent establishment.



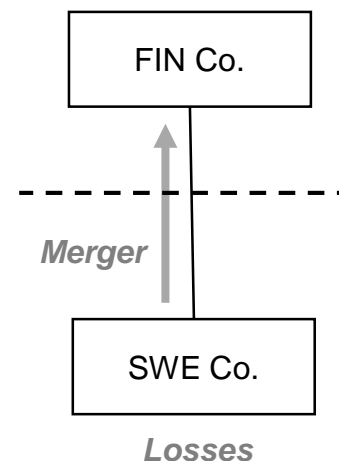
# LOSSES | *CROSS-BORDER REORGANIZATIONS*

## ■ Case

- ECJ, 21 March 2013, C-123/11, *A Oy*, ECLI:EU:C:2013:84

## ■ Decision

- Does the freedom of establishment require (non-discriminatory) loss relief if no PE remains? → Confirmation of Marks & Spencer and the “final loss exception” (contra AG *Kokott*), also the voluntary decision to merge does not lead to “non-finality” (contra AG *Kokott*); moreover, the PE requirement of Art. 4 of the Merger Directive is irrelevant.
- Which law determines the calculation of losses? → No abstract answer possible, but prohibition of discrimination.
- Decision on finality of losses left to the national court → “The German Government submits that those losses can be deducted from the income, admittedly very small, which B continues to receive in Sweden. It adds that B is still involved in leases which could be assigned. The French Government also submits that Swedish law allows companies to take losses into account in previous tax years or on the occasion of the taxation of capital gains made on the assets and liabilities of the merged company. The Italian Government submits that Sweden is entitled to evaluate the assets transferred and to tax the merged company on the profit thus realised.”



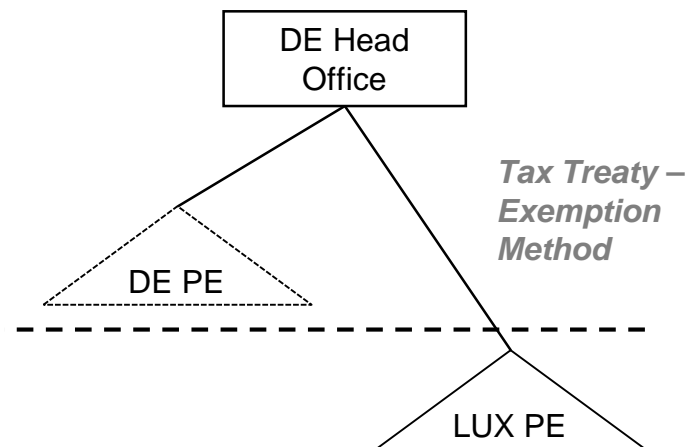
# LOSSES | *PERMANENT ESTABLISHMENTS (LIDL BELGIUM)*

## ■ Case

- ECJ, 15 May 2008, C-414/06, *Lidl Belgium*, EU:C:2008:278

## ■ Decision

- “Article 43 EC [now: Art. 49 TFEU] does not preclude a situation in which a company established in a Member State cannot deduct from its tax base losses relating to a permanent establishment belonging to it and situated in another Member State, to the extent that, by virtue of a double taxation convention, the income of that establishment is taxed in the latter Member State where those losses can be taken into account in the taxation of the income of that permanent establishment in future accounting periods.
- Justified by (1) the need to preserve the allocation of the power to impose taxes between the Member States concerned and (2) the need to prevent the danger that losses may be taken into account twice, taken together
- But “final loss exception” (did not apply as the Luxembourg tax legislation provides for the possibility of deducting a taxpayer’s losses in future tax years for the purposes of calculating the tax base).



## ■ Symmetrical system: Utilization and (full) recapture (of final losses)?

- See ECJ, 23 October 2008, C-157/07, *Krankenheim Ruhesitz am Wannsee*, EU:C:2008:588, and ECJ, 17 December 2015, C-388/14, *Timac Agro*, EU:C:2015:829

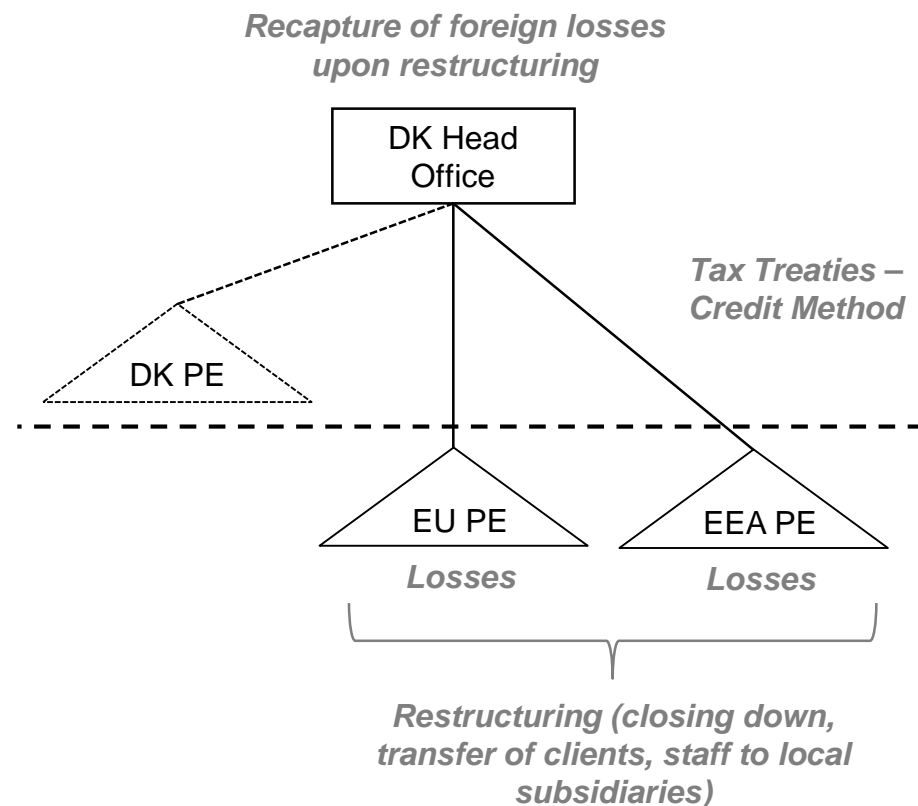
# LOSSES | *PERMANENT ESTABLISHMENTS (NORDEA BANK)*

## ■ Case (*Grand Chamber*)

- ECJ, 17 July 2014, C-48/13, *Nordea Bank Danmark*, EU:C:2014:153

## ■ Decision

- Comparability of situations as, „by making the profits“ of the foreign permanent establishments subject to Danish tax“, Denmark „has equated those establishments with resident permanent establishments so far as concerns the deduction of losses“
- No justification by the need to safeguard the symmetry between the power to tax profits and the right to deduct losses, as Denmark could tax (1) profits when the permanent establishments belonged to the Danish company (after deducting a tax credit) and (2) gains upon the transfer (valued at market terms)



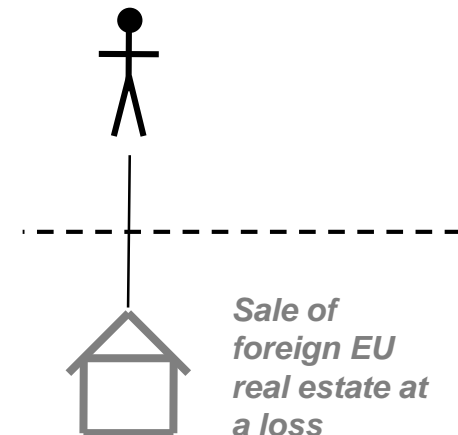
# LOSSES | *PRIVATE ASSETS (K)*

## ■ **Case**

- ECJ, 7 November 2013, C-322/11, **K**, EU:C:2013:716

## ■ **Decision**

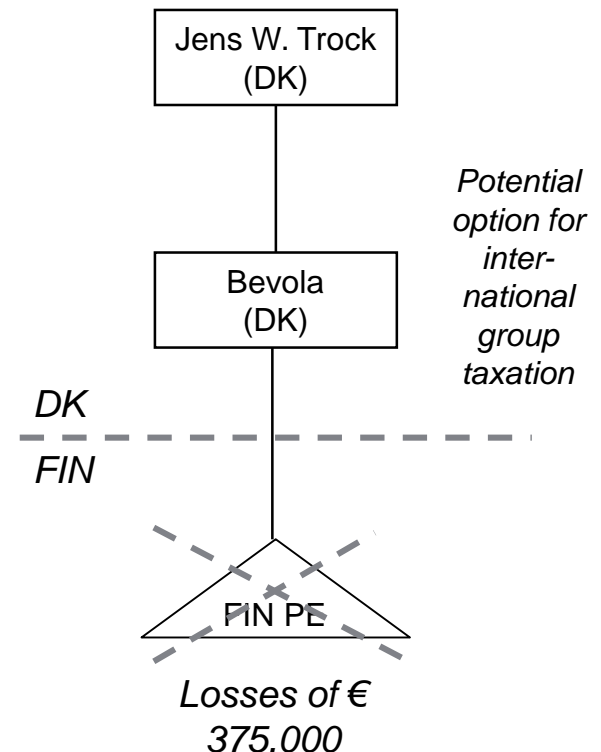
- “Articles 63 TFEU and 65 TFEU do not preclude national tax legislation [...], which does not allow a taxpayer who resides in the Member State concerned and is fully liable to income tax there to deduct the losses arising on the transfer of immovable property situated in another Member State from the income from moveable assets which is taxable in the first Member State, although that would have been possible, on certain conditions, if the immovable property had been situated in the first Member State.”
- No application of the “final loss exception” because “the Member State in which the property is situated does not provide for the possibility of losses incurred on the sale of the property being taken into account”, i.e., such a possibility of exhaustion of losses in the source State has never existed.



# LOSSES | *PERMANENT ESTABLISHMENTS (BEVOLA)*

■ ECJ, 12 June 2018, C-650/16, **Bevola**,  
EU:C:2018:424

- Difference in treatment → Between Danish companies which possess a permanent establishment in Denmark and those whose permanent establishment is situated in another Member State.
- Comparability (distinguishing *Timac Agro*, C-388/14) → Companies with exempt foreign PEs are in principle not comparable to companies with domestic PEs, but become comparable „as regards losses attributable to a non-resident permanent establishment which has ceased activity and whose losses could not, and no longer can, be deducted from its taxable profits in the Member State in which it carried on its activity“



# LOSSES | *PERMANENT ESTABLISHMENTS (BEVOLA)*

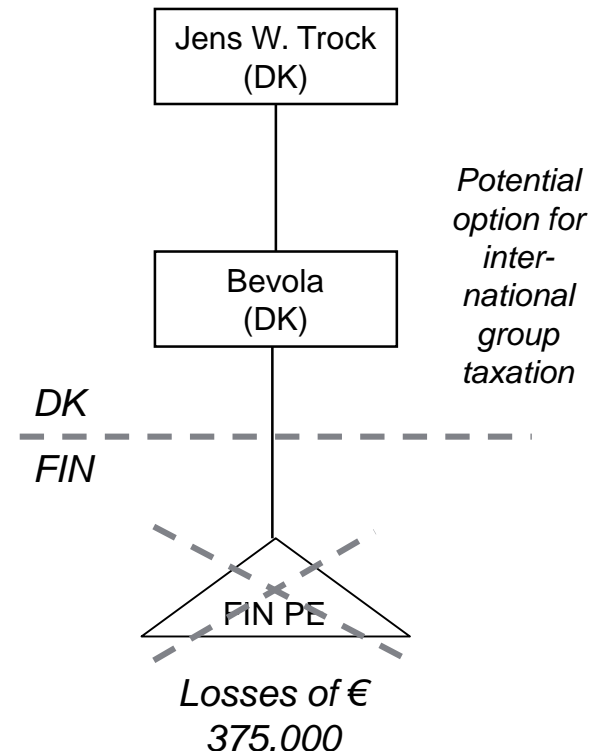
■ ECJ, 12 June 2018, C-650/16, *Bevola*,  
EU:C:2018:424

□ Justification

- Preservation of the allocation of the power to impose taxes between Member States
- Coherence of the tax system
- Risk of the double use of losses

□ Proportionality

- Where there is no longer any possibility of deducting the losses of the non-resident permanent establishment in the Member State in which it is situated, the risk of double deduction of losses no longer exists
- *Marks & Spencer* and *Commission v. UK* also for PEs
- Criteria
  - First, the company possessing the establishment has exhausted all the possibilities of deducting those losses available under the law of the Member State in which the establishment is situated and,
  - second, it has ceased to receive any income from that establishment, so that there is no longer any possibility of the losses being taken into account in that Member State.



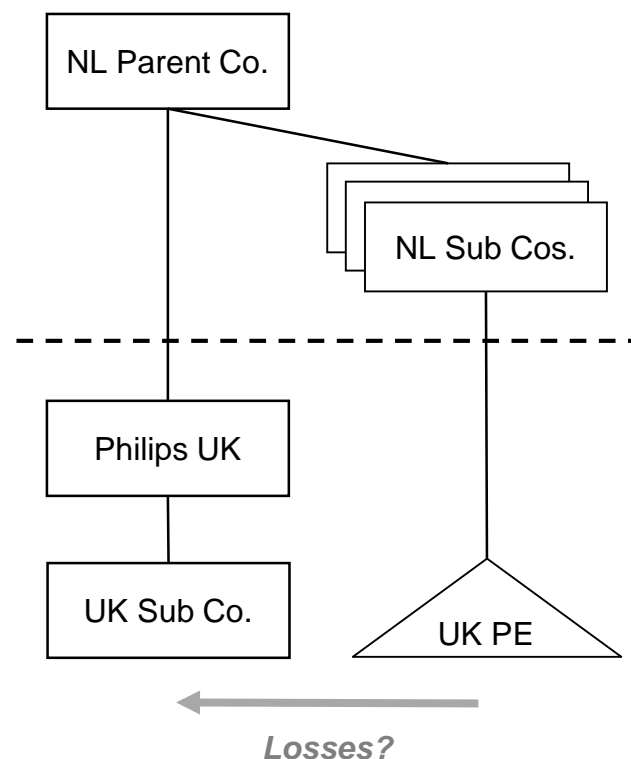
# LOSSES | “INDIRECT” DOMESTIC LOSSES (PHILIPS ELECTRONICS)

## ■ Case

- ECJ, 6 September 2012, C-18/11, *Philips Electronics*, EU:C:2012:532 – Limited by ECJ, 4 July 2018, C-28/17, *NN*, EU:C:2018:526 (?)
- See also UK First Tier Tribunal 27 and 28 July 2009, *Philips Electronics UK Ltd v. HMRC* [2009] UKFTT 226(TC)

## ■ Decision

- A loss surrender cannot be made dependent on whether it is clear that at the time of the claim there can never be any deduction or allowance in any State outside the UK (including another Member State, such as the Netherlands)
- No justification (1) by the need to prevent the double use of losses, (2) by need to preserve the balanced allocation of taxing powers between Member States, or (3) both.



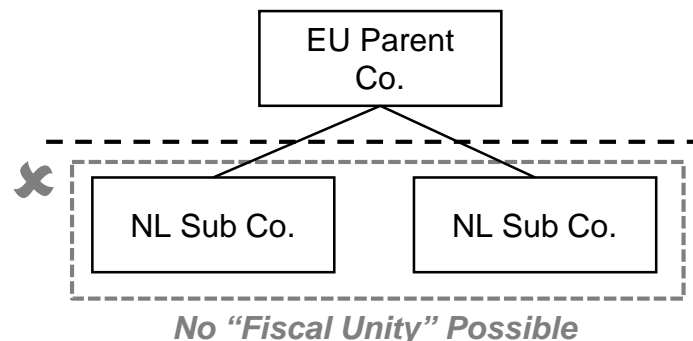
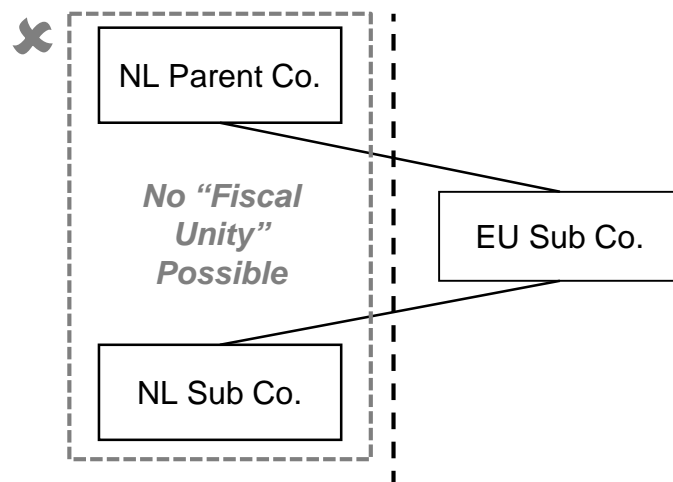
# LOSSES | “INDIRECT” DOMESTIC LOSSES (SCA GROUP HOLDING)

## ■ Case

- ECJ, 12 June 2014, C-39/13, C-40/13 and C-41/13, *SCA Group Holding BV et al*, EU:C:2014:1758
- → See also ECJ, 27 November 2008, C-418/07, *Papillon*, EU:C:2008:659, and ECJ, 1 April 2014, C-80/12, *Felixstowe Dock and Railway Company et al*, EU:C:2014:200

## ■ Decision

- Denial of “fiscal unity” because (1) the “linking” intermediate subsidiary (and sub-subsidiary) is resident in another EU Member State or (2) because the common parent of two resident sister companies was resident in another Member State
- Different treatment of objectively comparable situations (irrespective of the level of consolidation)
- Not justified by (1) Member State’s preservation of powers of taxation (with regard to symmetry between the right to tax profits and the right to deduct losses), (2) the risk of tax or (3) the coherence with regard to the prevention of the double use of losses.



# LOSSES | “FINAL LOSSES” AND *SCHUMACKER*

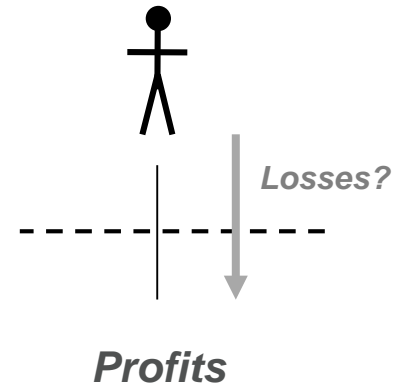
## ■ Case

- ECJ, 16 October 2008, C-527/06, *Renneberg*, EU:C:2008:566. – See also ECJ, 18 July 2007, C-182/06, *Lakebrink*, EU:C:2007:452

## ■ Decision

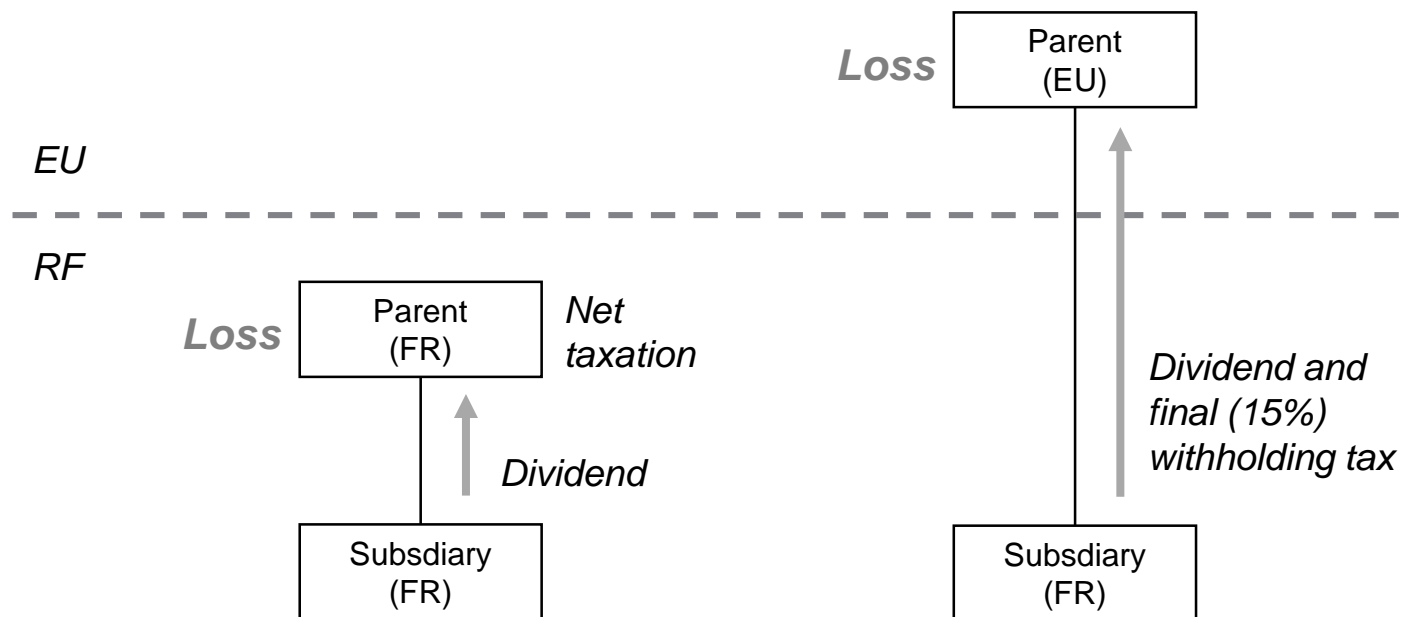
- “Article 39 EC must be interpreted as precluding national legislation such as that at issue in the main proceedings, pursuant to which a Community national who is not resident in the Member State in which he receives all or almost all of his taxable income cannot, for the purposes of determining the basis of assessment of that income in that Member State, deduct negative income relating to a house owned by him and used as a dwelling in another Member State, whereas a resident of the first Member State may deduct such negative income for the purposes of determining the basis of assessment of taxation of his income.”

## ■ Practical problems (recapture etc)?



# LOSSES | *REVERSE LOSSES (SOFINA)?*

■ ECJ, 22 November, C-575/17, *Sofina et al*, EU:C:2018:943



# LOSSES | CONCLUSIONS

- **“Symmetrical” (Krankenheim Ruhesitz, Nordea Bank) versus “Asymmetrical” (Marks & Spencer, Lidl Belgium, A Oy, Bevola) Loss Utilization Regimes**
- **“Final Loss Exception”**
  - **Legal versus factual circumstances** → I.e., losses do not become final because of a lack of carry-forward in the source State (*K, Commission v. UK [Marks & Spencer II]*; see also BFH 3 February 2010, I R 23/09)
  - **Exhaustion of all possibilities?**
    - Even receipt of minimal income hinders losses to become final (*A Oy, Commission v. UK [Marks & Spencer II]*)
    - Does the mere legal possibility of a carry-forward hinder losses to become final? → *Timac Agro*, contra: UK Supreme Court 22.5.2013, *HMRC v Marks & Spencer*, [2013] UKSC 30
  - **Timing issues**
    - Permissible (?) to require the assessment of “finality” of losses “immediately after the accounting period” (*Commission v. UK [Marks & Spencer II]*)
    - Permissible (?) to limit “final” losses to the losses of the last accounting period (and not extend the concept to accumulated loss carry-forwards) (*Commission v. UK [Marks & Spencer II]*)

*CHAPTER VII*  
EXIT TAXATION



# EXIT TAXATION | *OVERVIEW*

## ■ **Case Law**

- ☐ Individuals (*Hughes de Lasteyrie du Saillant, N*)
- ☐ Corporations (e.g., *National Grid Indus, Arcade Drilling, Verder LabTec*)
- ☐ Cross-Border Reorganizations (*A Oy, DMC*)

## ■ **Commission and Council**

- ☐ Commission Communication on “Exit taxation and the need for co-ordination of Member States’ tax policies”, COM(2006) 825 final (19 December 2006)
- ☐ Council Resolution on coordinating exit taxation, 2911th Economic and Financial Affairs (2 December 2008)
- ☐ Art 5 of the Ant-Tax-Avoidance-Directive

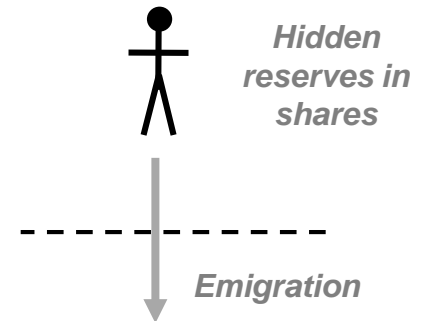
# EXIT TAXATION | *INDIVIDUALS*

## ■ Cases

- ECJ, 11 March 2004, C-9/02, *Hughes de Lasteyrie du Saillant*, EU:C:2004:138, and ECJ, 7 September 2006, C-470/04, *N*, EU:C:2006:525
- Still good law? → ECJ, 21 December 2016, C-503/14, *Commission/Portugal*, EU:C:2016:979

## ■ Decisions

- Discrimination (as in a domestic situation increases in value would have become taxable only when, and to the extent that, they were actually realised) ...
- ... but justified by the need to preserve the allocation of the power to tax between Member States is a legitimate, ...
- ... but proportionality requires suspension of payment (1) without guarantees (because of the existence of EOI/Recovery) and (2) must take full account of post-exit decreases in value, unless those decreases have already been taken into account in the host Member State.
- However, *Hughes de Lasteyrie du Saillant* and *N* need to be distinguished for companies (businesses) since „[t]he assets of a company are assigned directly to economic activities that are intended to produce a profit. Moreover, the extent of a company's taxable profits is partly influenced by the valuation of its assets in the balance sheet, in so far as depreciation reduces the basis of taxation“ (*National Grid Indus*, paras. 54-57)



# EXIT TAXATION | COMPANIES

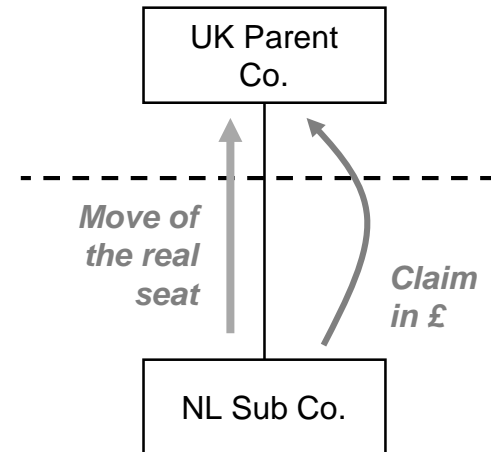
## ■ Case (Grand Chamber)

- ECJ, 29 November 2011, C-371/10, *National Grid Indus*, EU:C:2011:785.
- See also, e.g., EFTA-Court, 3 October 2012, E-15/11, *Arcade Drilling*, ECJ, 18 July 2013, C-261/11, *Commission v. Denmark*, EU:C:2013:480, ECJ, 23 January 2014, C-164/12, *DMC*, EU:C:2014:20, and ECJ, 21 May 2015, C-657/13, *Verder LabTec*, EU:C:2015:331
- Also for individuals/private assets? ECJ, 21 December 2016, C-503/14, *Commission/Portugal*, EU:C:2016:979

## ■ Decision

- Company may rely on the freedom of establishment (distinguish *Daily Mail* and *Cartesio*) → Rejection of the “If I Can Shoot You, I Can Tax You”-Argument!
- Exit taxation is discriminatory but may be justified based on the allocation of taxing rights if proportionate
- Deferral of tax collection, however (1) no consideration of later decreases in value, (2) interest and (3) provision of a bank guarantee
- However: Proportionate to spread the recovery of tax on unrealised capital gains over five annual instalments (*DMC*) or ten annual instalments (*Verder LabTec*)

## ■ ATAD!



### Unrealized currency gains

Also for the cross-border transfer of (depreciable) assets (e.g., *Commission v. Portugal*; *Commission v. Spain*, *Commission v. Denmark*), the transfer of intangibles (*Verder LabTec*), for the move of the statutory seat (*Arcade Drilling*; *Commission v. Netherlands*), and for reorganizations (*DMC*)

# EXIT TAXATION | COMPANIES

Question	Analysis	
Is it proportionate to spread the recovery of tax on unrealised capital gains over five or ten annual instalments?	✓	<i>DMC</i> , para. 64 (5 instalments) and <i>Verder LabTec</i> , para. 52 (10 instalments) – Swedish solution (5 years for tangible assets, 10 years for intangible assets) accepted by Commission (IP/10/299 of 18 March 2010)
Does the “Exit” State have to take post-exit losses into consideration?	✗	<i>National Grid Indus</i> , paras. 52 et seq. → Contra <i>N</i> , para. 54 (unless “double use”)
Can the “Exit” State charge interest on the deferred tax?	✓, according to the national rule	<i>National Grid Indus</i> , paras. 73; <i>Commission v. Portugal</i> (C-38/10), para. 32; <i>Commission v. Denmark</i> (C-261/11), para. 73; <i>Verder LabTec</i> , para. 49. → Contra <i>N</i> , paras. 56 et seq.
Can the “Exit” State take measures to secure the eventual payment?	✓, if there is a genuine and proven risk of non-recovery	<i>National Grid Indus</i> , paras. 73; <i>Arcade Drilling</i> , para. 101 et seq.; <i>DMC</i> , para. 67; <i>Verder LabTec</i> , para. 50. → Contra <i>N</i> , paras. 51 et seq.

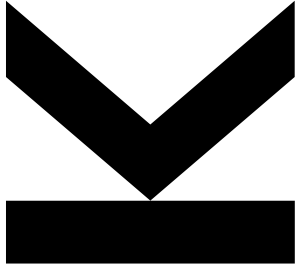
# EXIT TAXATION | COMPANIES

Question	Analysis	
Can the “Exit” State require annual proof about the assets?	✓	<i>National Grid Indus</i> , paras. 70 et seq.
Is it relevant if a subsequent decrease in value is tax effective in the “Import” State?	✗	<i>National Grid Indus</i> , para. 64
Does the “Import” State have to give a step-up?	✗	Unclear <i>National Grid Indus</i> , paras. 58, 61
Do qualified unrealized gains have to be set off against losses?	?	—
May the “Exit” State tax if there is no loss of a taxing right?	✗	<i>Commission v. Denmark</i> (C-261/11 ), para. 47
Does <i>NGI</i> apply to EEA countries?	✗/✓, depending on EOI/Recovery	<i>Commission v. Spain</i> (C-269/09), paras. 97 et seq.; <i>Arcade Drilling</i>

# EXIT TAXATION | *INFRINGEMENT PROCEEDINGS*

	Commission (COM(2006) 825 final)	Case	AG	ECJ
Belgium	IP/10/299 (18 March 2010 – 2nd step) – RefNr 2008/4250	<i>Closed.</i>		
Denmark	IP/10/1565 (24 January 2010 – ECJ) – RefNr 2008/2157	C-261/11	—	18 July 2013 (3d Chamber)
Germany	Request – RefNr 2011/4043	—	—	—
United Kingdom	IP/12/285 (22 March 2012 – 2nd step) – RefNr 2008/4923	<i>Closed.</i>		
Ireland	IP/11/78 (27 January 2011 – 2nd step)	<i>Closed.</i>		
Luxembourg	Request – RefNr 2012/4016	—	—	—
Netherlands	IP/10/1565 (24 November 2010 – ECJ) – RefNr 2008/2207	C-301/11	—	31 Jan, 2013 (7th Chamber)
Portugal	IP/09/1460 (8 October 2009 – ECJ) – RefNr 2007/2365	C-38/10	28 June 2012 ( <i>Mengozi</i> )	6 Sept. 2012 (4th Chamber)
Sweden	IP/08/1362 (18 September 2008 – 2nd step) – RefNr 2007/2372	<i>Closed. – IP/10/299 (18 March 2010)</i>		
Spain	IP/10/1565 (24 November 2010 – ECJ) – RefNr 2007/2382	C-64/11	—	25 Apr. 2013 (2nd Chamber)

*CHAPTER VIII*  
TAX PLANNING



# TAX PLANNING | *OVERVIEW*

## ■ **Case Law**

- ☐ Thin Capitalization (*Lankhorst-Hohorst, Thin Cap Group Litigation, Itelcar*)
- ☐ CFC-Legislation (*Cadbury Schweppes, Fred. Olson, Commission v. UK*)
- ☐ Switch Over Clauses (*Columbus Container Services*)
- ☐ Transfer Pricing (*SGI*)
- ☐ “Matching Rules” (*SIAT*)

## ■ **Commission and Council**

- ☐ Commission Communication on the application of anti-abuse measures in the area of direct taxation – within the EU and in relation to third countries, COM(2007)785 final
- ☐ Council Resolution of 8 June 2010 on coordination of the Controlled Foreign Corporation (CFC) and thin capitalisation rules within the European Union, [2010] OJ C 156/1
- ☐ Arts 4, 6, 7, 8 and 9 of the Anti-Tax-Avoidance-Directive – See also, e.g., OECD, *Designing Effective Controlled Foreign Company Rules, Action 3 – 2015 Final Report* (5 October 2015), p. 17 et seq.

# TAX PLANNING | *THIN CAPITALIZATION RULES*

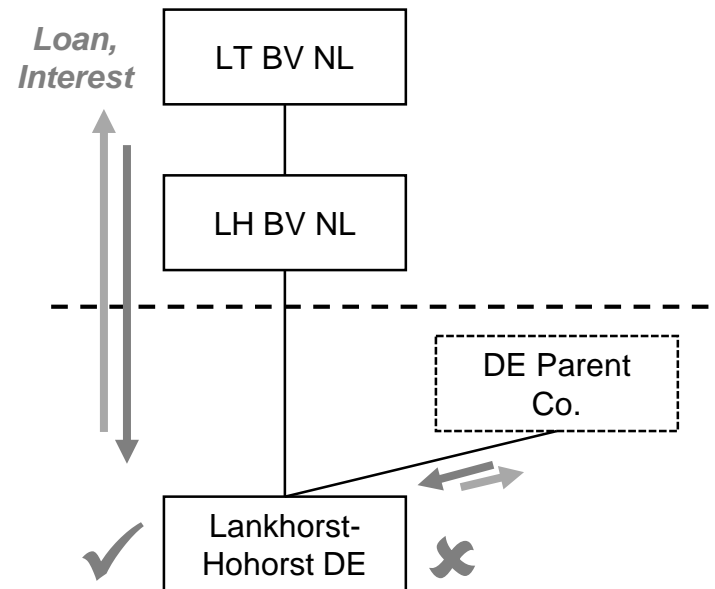
## ■ Cases

- ECJ, 12 December 2002, C-324/00, *Lankhorst-Hohorst*, EU:C:2002:749 , ECJ, 13 March 2007, C-524/04, *Thin Cap Group Litigation*, EU:C:2007:161, and ECJ, 3 October 2013, C-282/12, *Itelcar*, EU:C:2013:629

## ■ Decisions

- Discrimination if thin capitalization rule only apply to cross border interest payments, but ...
- ... possible justification where it specifically targets wholly artificial arrangements which do not reflect economic reality and the sole purpose of which is to avoid the tax normally payable on the profits generated by activities carried out on the national territory ...
- ... but need to be proportionate (i.e., assessment of objective and verifiable elements, possibility for taxpayer to show a commercial justification, limited on an arm's length basis)

### Application of Thin Capitalization Rules?



# TAX PLANNING | *CFC RULES*

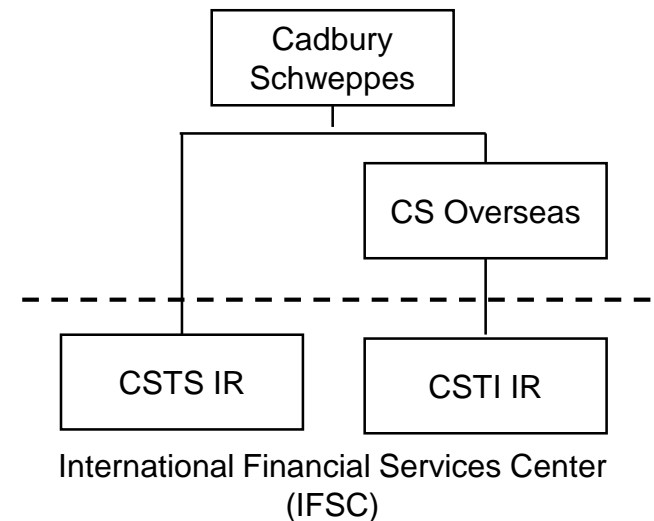
## ■ Cases

- ECJ, 12 September 2006, C-196/04, **Cadbury Schweppes**, EU:C:2006:544, EFTA-Court, 9 July 2014, E-3/13 and E-20/13, **Fred. Olson**, and ECJ, 13 November 2014, C-112/14, **Commission v. UK**, EU:C:2014:2369,

## ■ Decisions

- Discrimination (immediate taxation of the UK parent on the CFC's income), but ...
- ... possible justification by preventing conduct involving 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 carried out on national territory ...
- ... but not when it is proven, on the basis of objective factors which are ascertainable by third parties, that despite the existence of tax motives that CFC is actually established in the host Member State (e.g., in terms of premises, staff and equipment) and carries on genuine economic activities there (e.g., is not "letterbox" or "front" subsidiary).

### *Application of CFC rules*



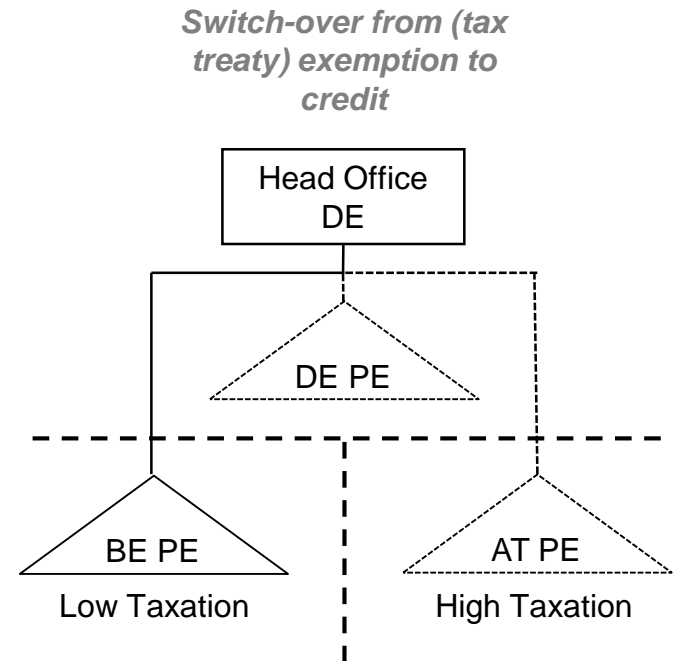
# TAX PLANNING | *SWITCH-OVER*

## ■ Case

- ECJ, 6 December 2007, C-298/05, **Columbus Container Services**, EU:C:2007:754

## ■ Decision

- “Articles 43 EC and 56 EC [now: Art. 49 and 63 TFEU] must be interpreted as not precluding tax legislation of a Member State under which the income of a resident national derived from capital invested in an establishment which has its registered office in another Member State is, notwithstanding the existence of a double taxation convention concluded with the Member State in which the establishment has its registered office, not exempted from national income tax but is subject to national taxation against which the tax levied in the other Member State is set off.”



# TAX PLANNING | *LIMITATION-ON-BENEFITS CLAUSES*

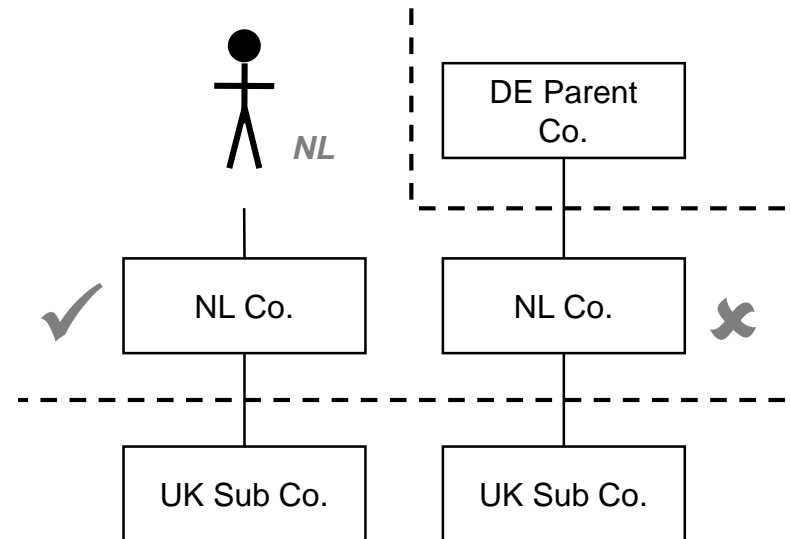
## ■ Case

- ECJ, 12 December 2006, C-374/04, *ACT Group Litigation*, EU:C:2006:773

## ■ Decision

- Limitation-on-Benefits-Provision (“LoB-Rule”)
- “The fact that those reciprocal rights and obligations apply only to persons resident in one of the two contracting Member States is an inherent consequence of bilateral double taxation conventions. It follows, as regards the taxation of dividends paid by a company resident in the United Kingdom, that a company resident in a Member State which has concluded a DTC with the United Kingdom which does not provide for such a tax credit is not in the same situation as a company resident in a Member State which has concluded a DTC which does provide for one [...]” (para. 91)

*Entitlement to tax-treaty benefits (e.g., tax credit) under the NL-UK DTC?*



# TAX PLANNING | *TRANSFER PRICING*

## ■ **Case**

- ECJ, 21 January 2010, C-311/08, **SGI**, EU:C:2010:26

## ■ **Decision**

- Profit adjustment provisions that apply only in cross-border situations and are to the disadvantage of taxpayers constitute **discriminatory restrictions** on the freedom of establishment, ...
- ... but such restrictions can be justified based on (1) the need to ensure a **balanced allocation of taxing powers** between Member States taken together with (2) the need to **combat tax avoidance**.
- However, a national provision is proportional and hence in compliance with the freedom of establishment if,
  - it provides “for a consideration of **objective and verifiable elements**”;
  - the taxpayer is given, “an opportunity, without being subject to undue administrative constraints, to provide evidence of any **commercial justification** that there may have been for that transaction”; and
  - “where the consideration of such elements leads to the conclusion that the transaction in question **goes beyond what the companies concerned would have agreed under fully competitive conditions**, the corrective tax measure must be confined to the part which exceeds what would have been agreed if the companies did not have a relationship of interdependence”.

# TAX PLANNING | *TRANSFER PRICING*

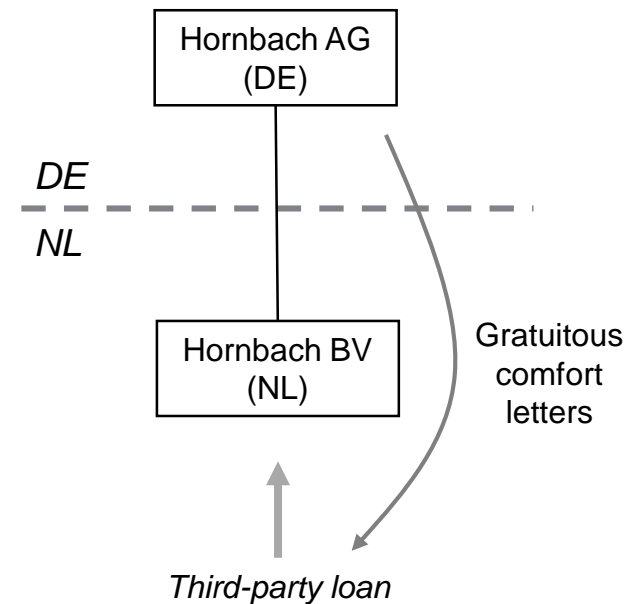
## ■ ***What is a “commercial justification”?***

- ☐ Any transaction that is neither a sham nor abusive?
- ☐ Or does the arm's length principle constitute an appropriate test by which to distinguish artificial arrangements from genuine economic transactions? → England and Wales Court of Appeal (Civil Division) of 18 February 2011, *Test Claimants in the Thin Cap Group Litigation v. HMRC*, [2011] EWCA Civ 127

# TAX PLANNING | *TRANSFER PRICING*

## ■ ECJ, 31 May 2018, C-382/16, *Hornbach-Baumarkt*, EU:C:2018:366

- German law → Adjustment, remuneration in exchange for granting the guarantees
- ECJ
  - Discrimination, but potentially justified with regard preservation of the balanced allocation of the power to tax between the Member States (ECJ, 21 January 2010, C-311/08, *SGI*, EU:C:2010:26)
  - Proportionality
    - Taxpayer must, *inter alia*, have opportunity to provide evidence of any commercial justification for an agreement on non-arm's-length terms
    - Includes economic reasons resulting from its position as a shareholder of the non-resident company (e.g., „economic interest of Hornbach-Baumarkt AG itself in the financial success of the foreign group companies, in which it participates through the distribution of profits, as well as by a certain responsibility of the applicant in the main proceedings, as a shareholder, in the financing of those companies“)



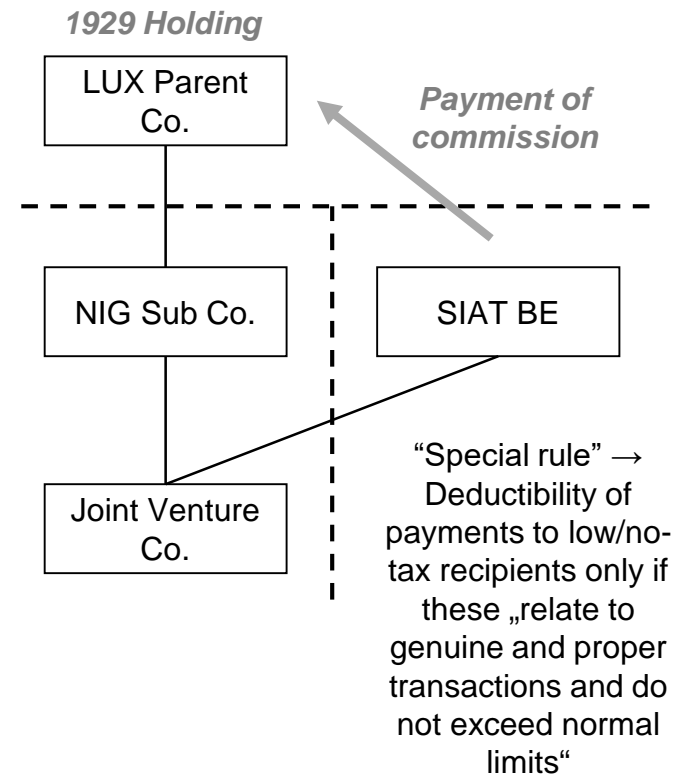
# TAX PLANNING | “MATCHING RULES”

## ■ Case

- ECJ, 5 July 2012, C-318/10, **SIAT**, EU:C:2012:415

## ■ Decision

- Discrimination (“special rule” v. normal deductibility) ...
- ... but possible justification by (1) the need to combat tax avoidance (i.e., target wholly artificial arrangements that are not genuine and proper), (2) the need to ensure fiscal supervision (by allowing proof that transactions are genuine and proper) and (3) to safeguard the balanced allocation of the power to tax (by impeding fraudulent conduct), ...
- ... however, that rule is not proportionate as it requires taxpayers to prove that all transactions are genuine and proper and normal, “without the tax authority being required to provide even prima facie evidence of tax evasion or avoidance” (since only the level of foreign tax is taken into account) and hence does not meet the requirements of the principle of legal certainty.



*CHAPTER IX*  
HORIZONTAL  
DISCRIMINATION



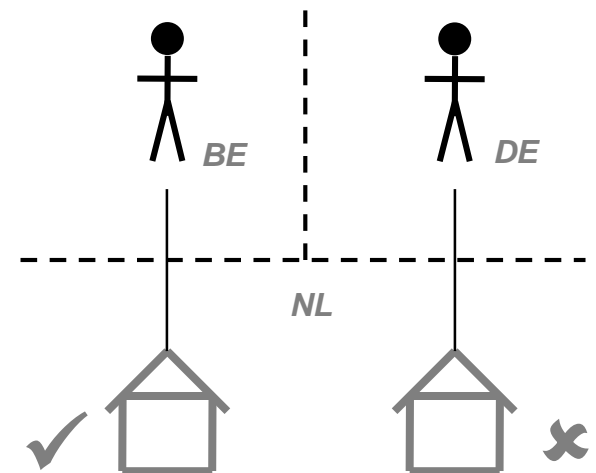
# HORIZONTAL DISCRIMINATION | *TAX TREATY LAW*

## ■ Case

- ECJ, 5 July 2005, C-376/03, *D*, EU:C:2005:424 (see also ECJ, 12 December 2006, C-374/04, *ACT Group Litigation*, EU:C:2006:773)

## ■ Decision

- Rejection of most-favored nation treatment in tax treaty law!
- The fact that the reciprocal rights and obligations in a tax treaty “apply only to persons resident in one of the two Contracting Member States is an inherent consequence of bilateral double taxation conventions. It follows that a taxable person resident in Belgium is not in the same situation as a taxable person resident outside Belgium so far as concerns wealth tax on real property situated in the Netherlands.” (ECJ, 5 July 2005, C-376/03, *D*, EU:C:2005:424, para. 61)
- “A rule such as that laid down in” the BE-NL tax treaty “cannot be regarded as a benefit separable from the remainder of the convention, but is an integral part thereof and contributes to its overall balance.” (ECJ, 5 July 2005, C-376/03, *D*, EU:C:2005:424, para. 62)



*Tax-free amount for wealth  
tax in the source State?*

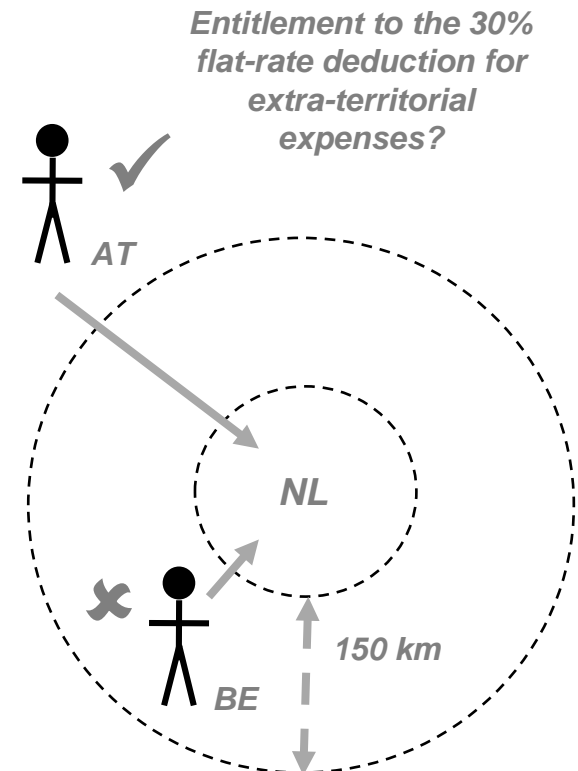
# HORIZONTAL DISCRIMINATION | *DOMESTIC LAW*

## ■ Case

- ECJ, 24 February 2015, C-512/13, *Sopora*, EU:C:2015:108

## ■ Decision

- Art. 45 TFEU does not preclude “national legislation [...] by which a Member State provides that workers who resided in another Member State prior to taking up employment in its territory are to be granted a tax advantage consisting in the flat-rate exemption of reimbursement of extraterritorial expenses in an amount up to 30% of the taxable base, on condition that those workers resided at a distance of more than 150 kilometres from its border, unless — and this is a matter for the referring court to ascertain — those limits were set in such a way that that exemption systematically gives rise to a net [= clear] overcompensation in respect of the extraterritorial expenses actually incurred.”
- Horizontal comparison → “[H]aving regard to the wording of Article 45(2) TFEU, which seeks to abolish all discrimination based on nationality ‘between workers of the Member States’, read in the light of Article 26 TFEU, the view must be taken that that freedom also prohibits discrimination between non-resident workers if such discrimination leads to nationals of certain Member States being unduly favoured in comparison with others” (para. 25). → *Applicable for the other freedoms?*



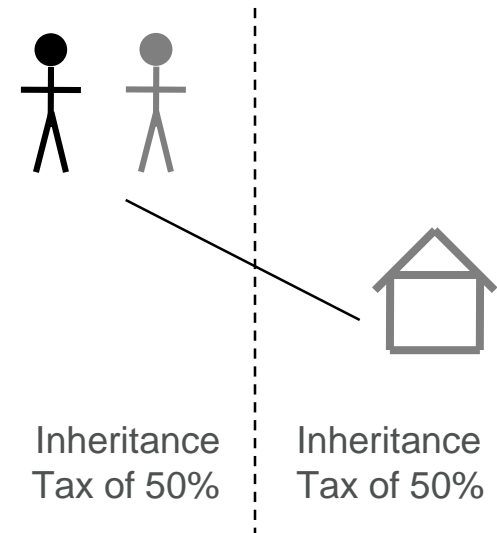
*CHAPTER X*  
DOUBLE TAXATION



# DOUBLE TAXATION | OVERVIEW

## ■ *Double Taxation and the Internal Market*

- Ex-Art 293 EC (repealed by the Treaty of Lisbon), urged the Member States “so far as is necessary, [to] enter into negotiations with each other with a view to securing for the benefit of their nationals [...] the abolition of double taxation within the Community.”
- “Double taxation or the absence of taxation is incompatible with the internal market” (ESC Opinion [1997] OJ C 296/37, Appendix II)
- “[T]he fact that a taxable event might be taxed twice is the most serious obstacle there can be to people and their capital crossing internal borders” (Opinion of AG Ruiz-Jarabo Colomer, C-376/03, *D*, EU:C:2004:663, para. 85)
- “Notwithstanding the absence of an applicable tax convention, the two Member States are bound by the EC Treaty principle of free movement within the Community to avoid and eliminate double taxation, at least by imputing a tax paid in the other Member State on their own charge to tax.” (Answer given by Mr Bolkestein on behalf of the Commission to Written Question E-2287/99, [2000] OJ C 225 E/87, and Petition 626/2000 by Mr Klaus Schuler [25 January 2007])



- *Disparity?*
- *Discrimination?*
  - Different Treatment of Comparable Situations?
  - Equal Treatment of Different Situations?
- *Quasi-Restriction?*
- *“Double Burden”?*

# DOUBLE TAXATION | *KERCKHAERT-MORRES*

## ■ Case (*Grand Chamber*)

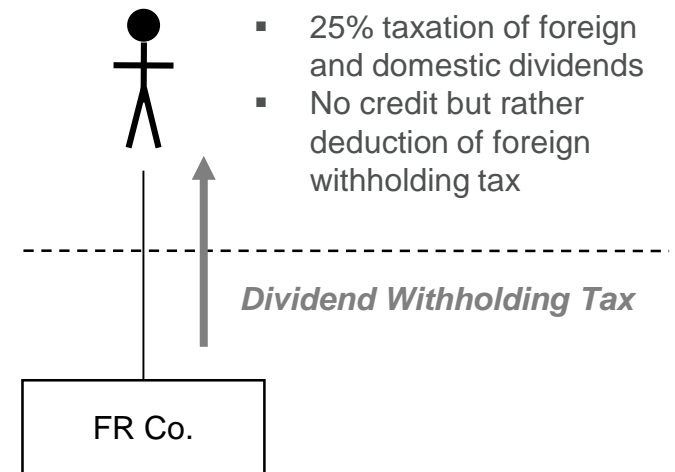
- ECJ, 14 November 2006, C-513/04, *Kerckhaert and Morres*, EU:C:2006:713
- See also, e.g., ECJ, 12 February 2009, C-67/08, *Block*, EU:C:2009:92, ECJ, 16 July 2009, C-128/08, *Damseaux*, EU:C:2009:471, ECJ, 19 September 2012, C-540/11, *Levy and Sebbag*, EU:C:2012:581. – EFTA-Court, 7 May 2008, E-7/07, *Seabrokers*, EFTA Court Report 2008, 174

## ■ Decision

- No prohibition of juridical double taxation, because it is no problem of equal treatment of different situations (paras. 18-19) but rather parallel exercise of taxing jurisdiction (para. 20)
- Also, no criteria in EU law exist for the attribution of competence between the Member States in relation to elimination of double taxation (para. 22).

## ■ Commission

- Communication on “Double Taxation in the Single Market”, COM(2011) 712 final (11 November 2011)
- Recommendation of 15 December 2011 regarding relief for double taxation of inheritances, [2011] OJ L 336/81



# DOUBLE TAXATION | *FUNDAMENTAL FREEDOMS AND TAX TREATIES*

## ■ *Fundamental Freedoms and Tax Treaties*

- Member States “remain at liberty to determine the connecting factors for the allocation of fiscal jurisdiction by means of bilateral agreements” (e.g., ECJ, 12 December 2006, C-374/04, **ACT Group Litigation**, EU:C:2006:773, para. 81).
- The allocation of taxing rights between the contracting Member States in a tax-treaty is “neutral” from the perspective of the fundamental freedoms, even if it is based on nationality of the taxpayer (ECJ, 12 May 1998, C-336/96, **Gilly**, EU:C:1998:221).
- Member States are free to define who is treated as a resident and for how long, e.g., for purposes of a “trailing tax”, even if this definition is based on nationality (ECJ, 23 February 2006, C-513/03, **van Hilten-van der Heijden**, EU:C:2006:131).
- Permanent establishments may enjoy fictitious (unilateral) treaty entitlement, e.g., with respect to the avoidance of economic double taxation and juridical double taxation in “triangular situations” (ECJ, 21 September 1999, C-307/97, **Saint-Gobain**, EU:C:1999:438).
- Both, credit (with limitation) and exemption (with progressivity) are permissible methods to avoid double taxation, but that both methods must be applied so to fully take into account family and personal benefits (ECJ, 12 December 2002, C-385/00, **De Groot**, EU:C:2002:750; ECJ, 28 February 2013, C-168/11, **Beker and Beker**, EU:C:2013:117).
- There is no obligation to grant “most favored nation treatment” in tax treaties, i.e., to grant to one non-resident the most beneficial treatment afforded to another non-resident under a tax treaty (ECJ, 5 July 2005, C-376/03, D, EU:C:2005:424).

# DOUBLE TAXATION | *FUNDAMENTAL FREEDOMS AND TAX TREATIES*

## ■ *Fundamental Freedoms and Tax Treaties*

- “Limitation-on-benefits”-clauses in tax treaties that deny treaty benefits based on foreign ownership of a company resident in the other contracting State to avoid “treaty shopping” are permissible (ECJ, 12 December 2006, C-374/04, **ACT Group Litigation**, EU:C:2006:773).
- A discriminatory withholding tax may be “neutralised”, i.e., “compensated”, by a (full) tax-treaty credit in the residence State (ECJ, 14 December 2006, C-170/05, **Denkavit Internationaal**, EU:C:2006:783; ECJ, 8 November 2007, C-379/05, **Amurta**, EU:C:2007:655; ECJ, 17 September 2015, C-10/14, C-14/14 and C-17/14, **Miljoen, X and Société Générale**, EU:C:2015:608).
- There is no EU law prohibition of a “treaty override” (ECJ, 6 December 2007, C-298/05, **Columbus Container Services**, EU:C:2007:754; ECJ, 19 September 2012, C-540/11, **Levy and Sebbag**, EU:C:2012:581).
- There is an obligation to take into account “final losses” of foreign permanent establishments which are, in principle, exempt from taxation in the head office’s State under a tax treaty (ECJ, 15 May 2008, C-414/06, **Lidl Belgium GmbH**, EU:C:2008:278).
- There is no obligation to grant a credit carry-forward in respect of withholding taxes that could not be credited in the same period because of a credit limitation (ECJ, 10 February 2011, C-436/08 and C-437/08, **Haribo and Salinen**, EU:C:2011:61, paras. 166-172).
- Fiscal cohesion, on the level of justification, may be secured by a bilateral convention concluded with another Member State (ECJ, 11 August 1995, C-80/94, **Wielockx**, EU:C:1995:271, paras. 23-25).

*PART III*  
STATE AID



# CONTENT

- ***Chapter I*** – Overview
- ***Chapter II*** – State Aid and Business Taxation
- ***Chapter III*** – State Aid and Rulings
- ***Chapter IV*** – State Aid Law as an Anti-BEPS-Instrument?

# *CHAPTER I* OVERVIEW



# OVERVIEW | *ARTICLE 107 TFEU*

## ■ To be qualified as *State aid under Art. 107(1) TFEU*, a tax measure must ...

- ☐ ... be granted by Member State or through State resources,
- ☐ ... afford an advantage,
- ☐ ... favor certain undertakings or the production of certain goods (“selectivity”),
- ☐ ... distort or threaten to distort competition, and
- ☐ ... be capable of affecting trade between Member States.
- ☐ → Some automatic or discretionary exceptions (Art. 107(2) and (3) TFEU).

SECTION 2  
AIDS GRANTED BY STATES

*Article 107*  
(ex Article 87 TEC)

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

## ■ Also applies to *tax measures*, e.g., to reductions in the tax base, total or partial reduction in the amount of tax through exemption or credit, deferment, cancellation or even special rescheduling of tax debt

- ☐ Commission’s Notice on the notion of State aid pursuant to Article 107(1) TFEU, [2016] OJ C 262/1 (replaces Commission’s Notice on the application of the State aid rules to measures relating to direct business taxation, [1998] OJ C 384/3)
- ☐ DG Competition Working Paper on State Aid and Tax Rulings (3 June 2016)

# OVERVIEW | *GUIDELINES*

- Commission's Notice on the notion of State aid pursuant to Article 107(1) TFEU, [2016] OJ C 262/1 (19 July 2016)
  - Includes a Chapter on "Specific issues concerning tax measures" (Paras 156-184) zu
    - Cooperative societies (Paras 157-160)
    - Undertakings for collective investment (Paras 161-163)
    - Tax amnesties (Paras 164-168)
    - Tax rulings and settlements (Paras 169-176)
    - Depreciation/amortisation rules (Paras 177-188)
    - Fixed basis tax regime for specific activities (Paras 181-182)
    - Anti-abuse rules (Para. 183)
    - Excise duties (Tz 184)
  - Replaces Commission's Notice on the application of the State aid rules to measures relating to direct business taxation, [1998] OJ C 384/3
- DG Competition Working Paper on State Aid and Tax Rulings (3 June 2016)

# OVERVIEW | *GUIDELINES*

## ■ Also:

- ☐ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, [2013] OJ L 352/1 (24 December 2013)
- ☐ Commission notice on the enforcement of State aid law by national courts, [2009] OJ C 85/1 (9 April 2009)
- ☐ Notice from the Commission – Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, [2007] OJ C 272/4 (15 November 2007)

# OVERVIEW | *PROCEDURE*

## ■ **Framework**

- Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), [2015] OJ L 248/9.
- Commission notice on the enforcement of State aid law by national courts, [2009] OJ C 85/1.

## ■ **Art 108 TFEU**

- The Commission constantly monitors Member States' rules (Art.108(1) TFEU)
- Member States are required to notify the Commission as to any plans to grant or alter State aid under Art 108(3) TFEU:

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

# OVERVIEW | *PROCEDURE*

## ■ “Old” and “New” Aid

- “Existing Aid” (Art 108(1) TFEU) → Deemed legal as long as the Commission does not conclude their that aid is not compatible with the internal market (e.g., ECJ, 18 November 2010, C-322/09 P, *NDSHT*, EU:C:2010:701, Rn 52)
- “New Aid” → Art 108(3) TFEU
  - The Member State concerned may not put the measure into effect until a Commission decision authorising that aid is taken (Art 108(3) last sentence TFEU), i.e., such notifiable aid “shall not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid” (Art 3 of Council Regulation 2015/1589)
  - This “standstill clause” is directly effective and must be enforced by national courts (→ Commission notice on the enforcement of State aid law by national courts, [2009] OJ C 85/1)
  - Commission learns about aid through notification, complaints or ex officio (e.g., from the press)

# OVERVIEW | *PROCEDURE*

## ■ **Commission's Procedure (Art. 108(1) and (2) TFEU)**

### □ **Preliminary examination** (Art. 4 of Council Regulation 2015/1589)

- Decision ...
  - ... that the measure does not constitute aid (Art 4(2))
  - ... that the measure does not to raise objections (Art 4(3))
  - ... to initiate the formal investigation procedure (Art 4(4))
- Decision within 2 months (otherwise fiction that the measure has been authorized; Art 4(5) and (6))

### □ **Formal investigation** (Art 108(2) TFEU and Arts. 6-8 of Council Regulation 2015/1589)

- Decision that ...
  - ... the measure (after modification) does not constitute aid (Art 9(2)),
  - ... that the aid is compatible with the internal market ("positive decision"), also under conditions ("conditional decision") (Art. 9 (3)), or
  - ... that aid is not compatible with the internal market ("negative decision") (Art. 9(4))
- Litigation against Commission decision has **no suspensive effect** → Art. 278 TFEU states that in principle actions are not to have suspensory effect, in so far as acts adopted by the Union institutions enjoy a presumption of legality (e.g., GC, 27 February 2015, T-826/14 R, *Spain v. Commission*, EU:T:2015:126)

# STATE AID | *RECOVERY*

## ■ *Negative Decision and Recovery*

- ***Recovery*** → Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (“recovery decision”), unless this would be contrary to a general principle of Union law (Art. 16(1) of Council Regulation 2015/1589)
- ***Interest*** → Recovery includes compound interest (Art. 16(2) of Council Regulation 2015/1589, and the Commission’s Notice in [2007] OJ C 272/4, and Arts 9, 11(2) of Regulation (EC) No 794/2004)
- ***Procedure*** → Recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned (Art 16(3))
- ***Limitation Period*** → The powers of the Commission to recover aid shall be subject to a limitation period of 10 years (Art 17)
- ***Detailed overview*** → Notice from the Commission – Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, [2007] OJ C 272/4 (15 November 2007)

# STATE AID | *RECOVERY*

## ■ *Limits to Recovery*

- General principles of Union law.(Art 16(1); e.g., principles of the protection of legitimate expectation and of legal certainty) – *But: A prudent business person must check if aid has been notified* (e.g., ECJ, 20 September 1990, C-5/89, *Commission/Germany*, EU:C:1990:320) – Detailed discussion in GC, 15 November 2018, T-207/10, *Deutsche Telekom AG*, EU:T:2018:786
- Expiration of the 10-year-recovery-period (Art 17(3))
- Absolute impossibility (not, e.g., practical problems or even economic impossibility such as insolvency proceedings, ECJ, 15 January 1986, 52/84, *Belgium/Commission*, [1986] ECR 89)

# STATE AID | *RECOVERY*

- Use of state funds also if a tax measure leads to an overall revenue generation (e.g., because of attracting establishments; see implicitly ECJ, 15 December 2005, C-66/02, *Italy/Commission*, EU:C:2005:768)
- Recovery does not take into account that enterprises may have structured their affairs in good faith and might have chosen alternative structures otherwise (e.g., ECJ, 15 December 2005, C-148/04, *Unicredito*, EU:C:2005:774, Rn 114 ff) – *How to get relevant information? Liability of advisors?*
- Also: Distortions because of recovery? → Pt 134 European Parliament resolution of 25 November 2015 on tax rulings and other measures similar in nature or effect , P8\_TA(2015)0408 (25 November 2015)

134. Takes note that current state aid control rules seek to address anti-competitive practices by recovering undue advantages granted to companies; calls on the Commission to assess the possibility of modifying the existing rules in order to allow the amounts recovered following an infringement of EU state aid rules to be returned to the Member States which have suffered from an erosion of their tax bases and not to the Member State which granted the illegal tax-related aid, as is currently the case, or be allocated to the EU budget; calls on the Commission to modify the existing rules to ensure that sanctions can be adopted against the relevant countries and companies in case of breach of state aid rules;

# STATE AID | RECOVERY

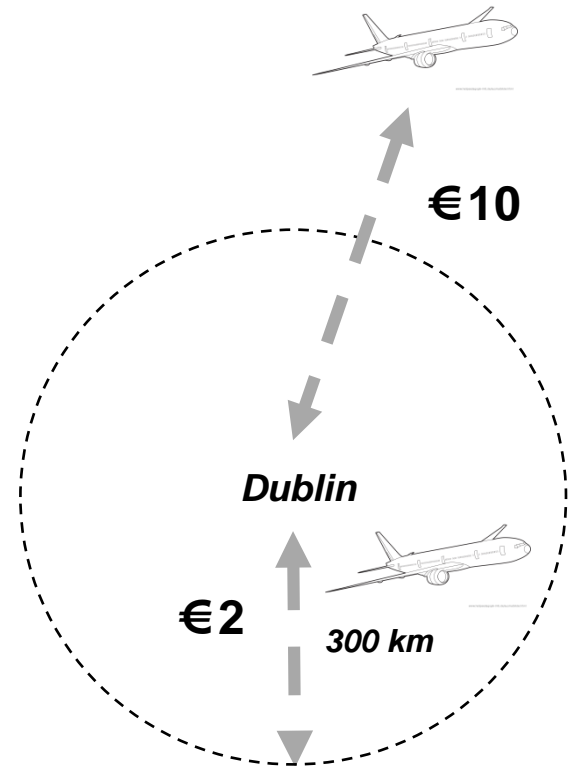
- Different tax rates in the Irish Air Travel Tax of €2 für short distances from Dublin (300 km) and €10 for long distances (subsequent decrease to €3 for all cases)

- Air lines' arguments

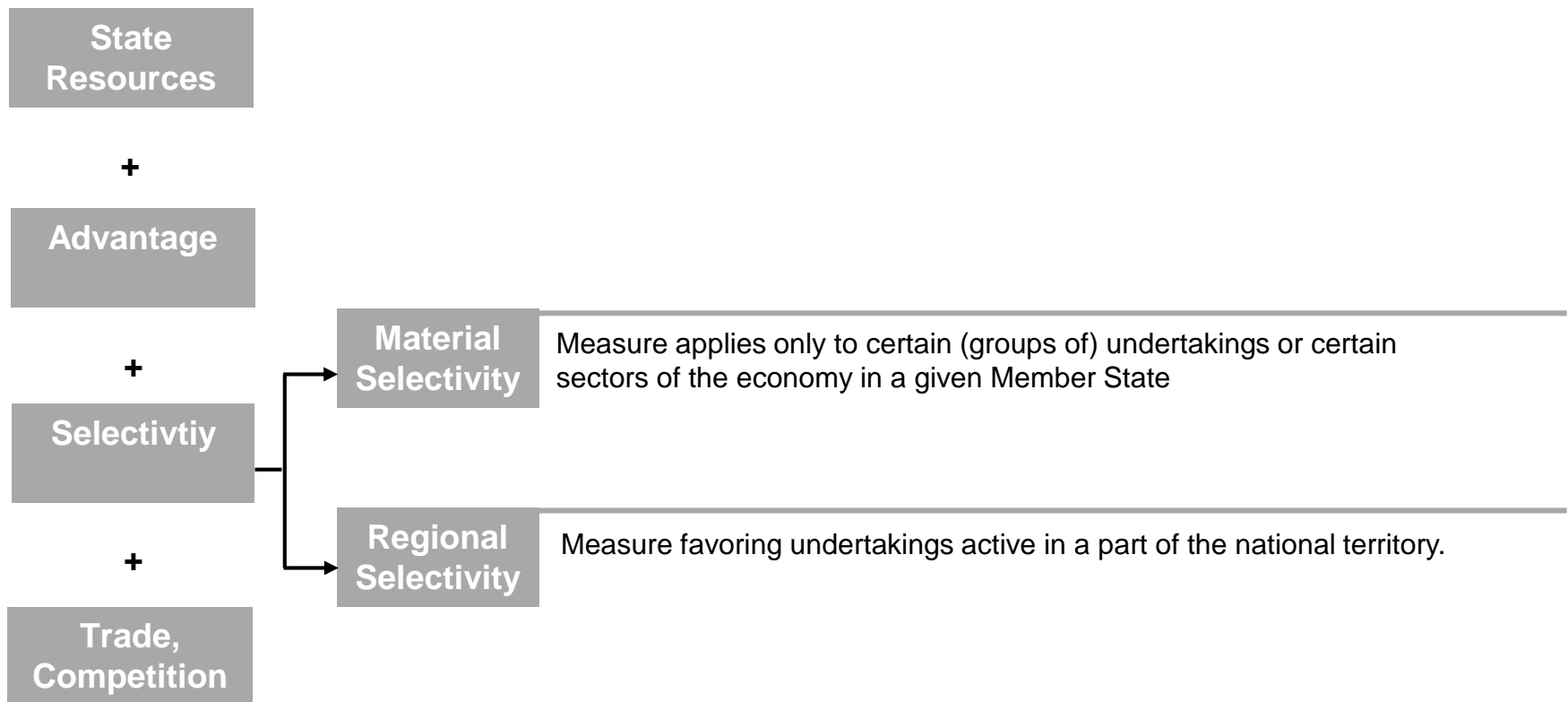
- ☐ Reference system = €2 (or €3), but not €10
- ☐ The lower tax rate has been passed on to customers
- ☐ €10 tax violates the fundamental freedoms

- ECJ, 21 December 2016, C-164/15 P and C-165/15 P, *Aer Lingus and Ryanair*, EU:C:2016:990

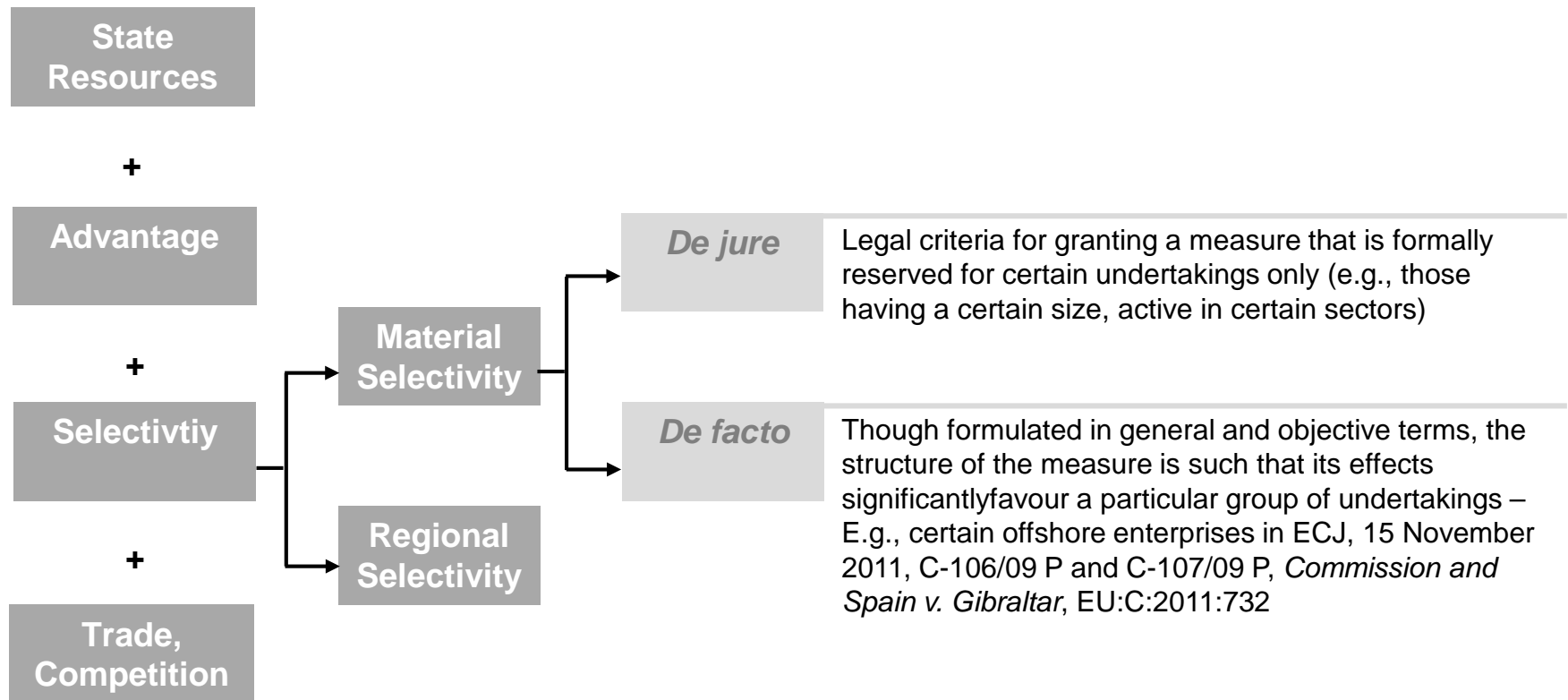
- ☐ State aid
- ☐ Recovery of €8



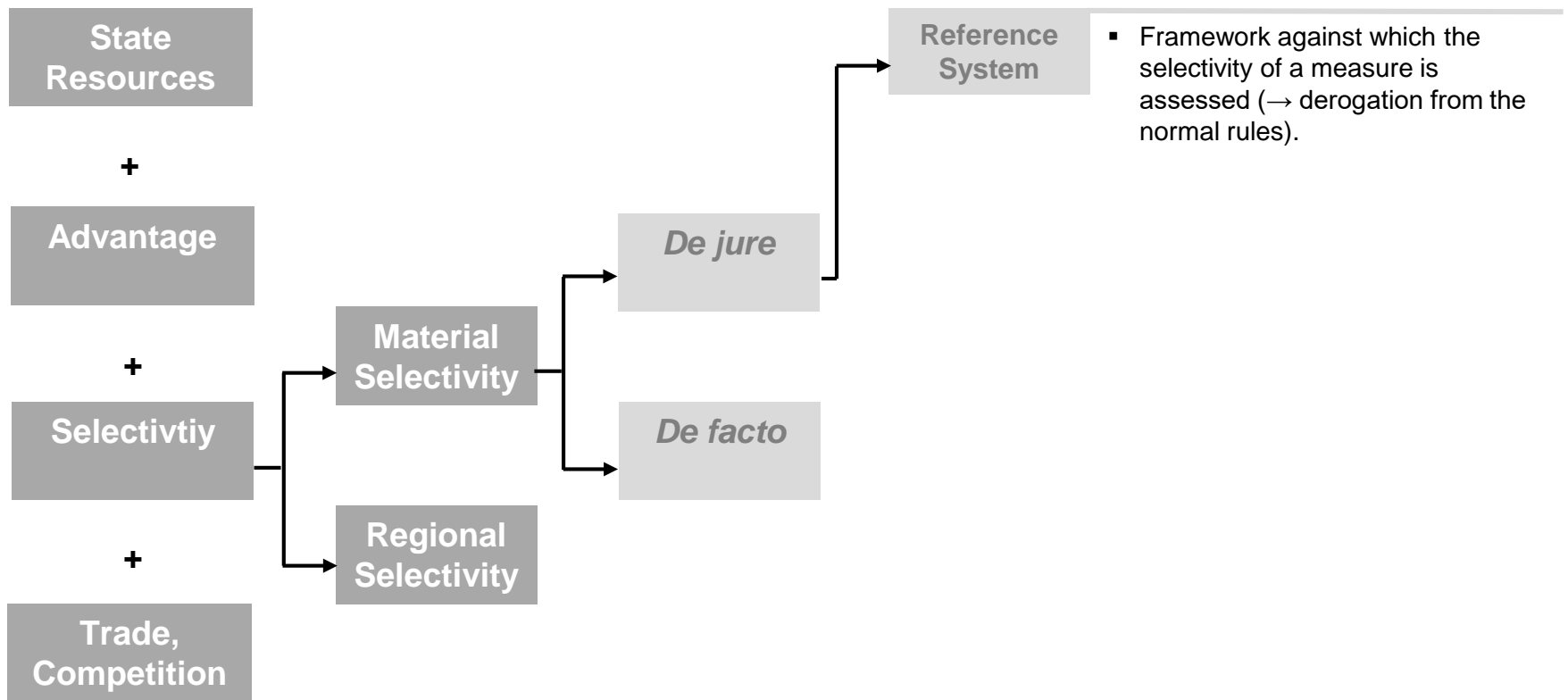
# STATE AID | *ART. 107(1) TFEU*



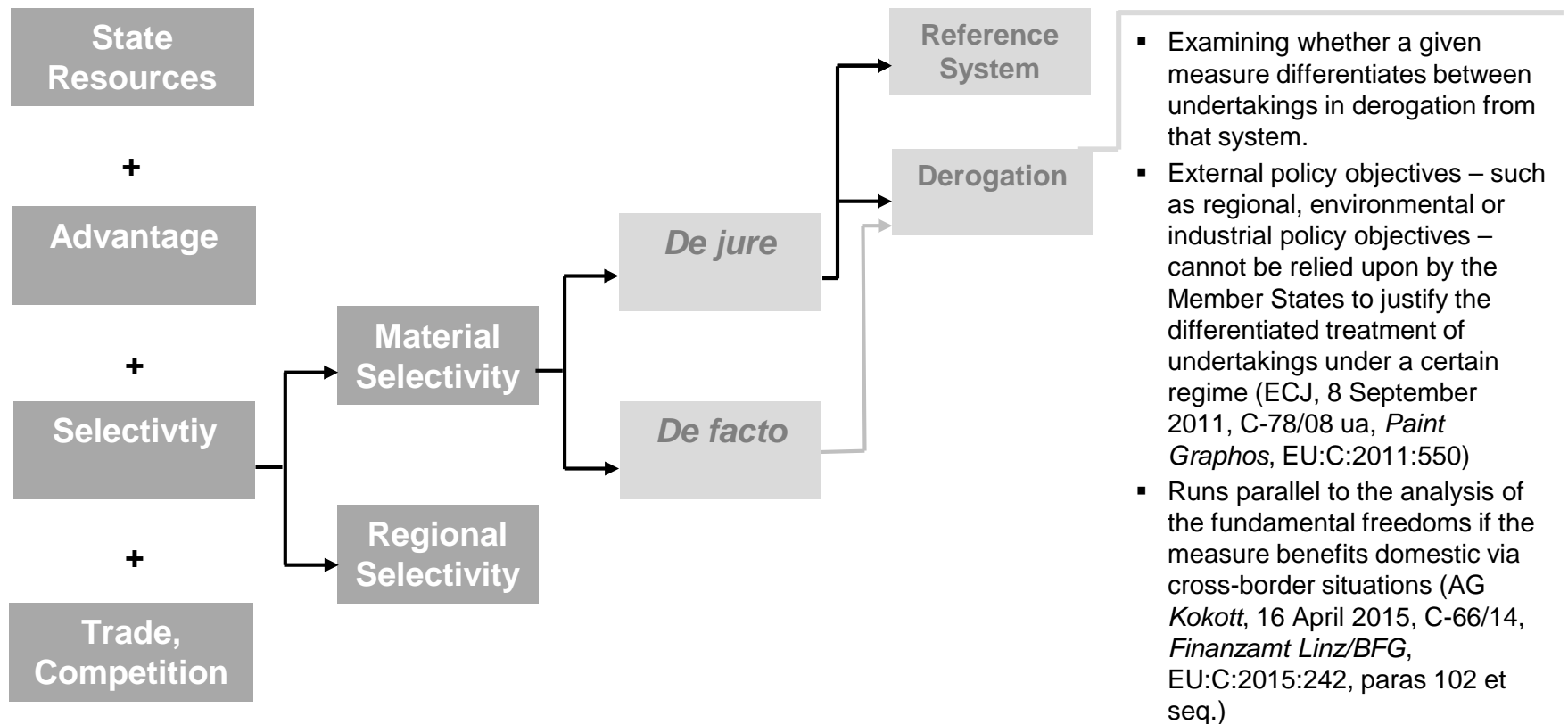
# STATE AID | *ART. 107(1) TFEU*



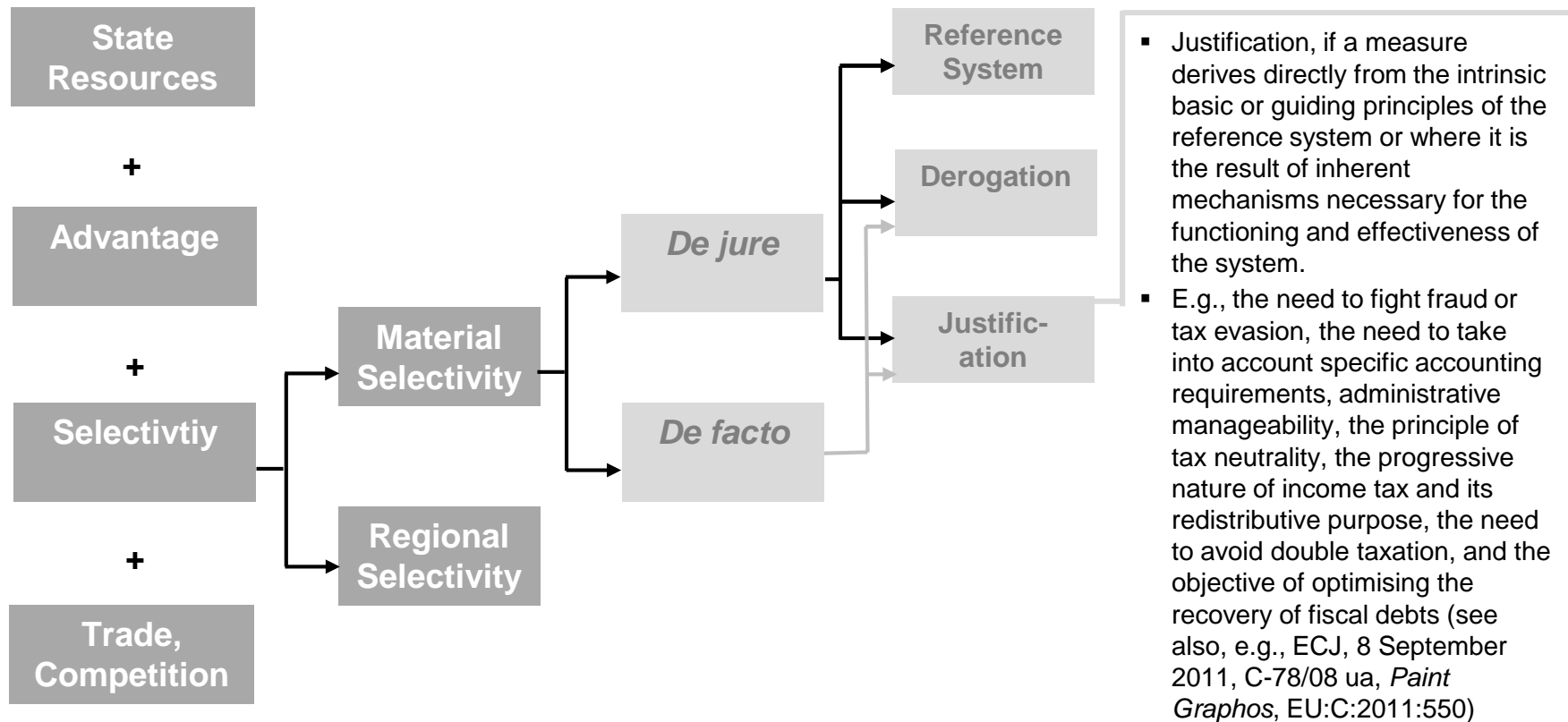
# STATE AID | *ART. 107(1) TFEU*



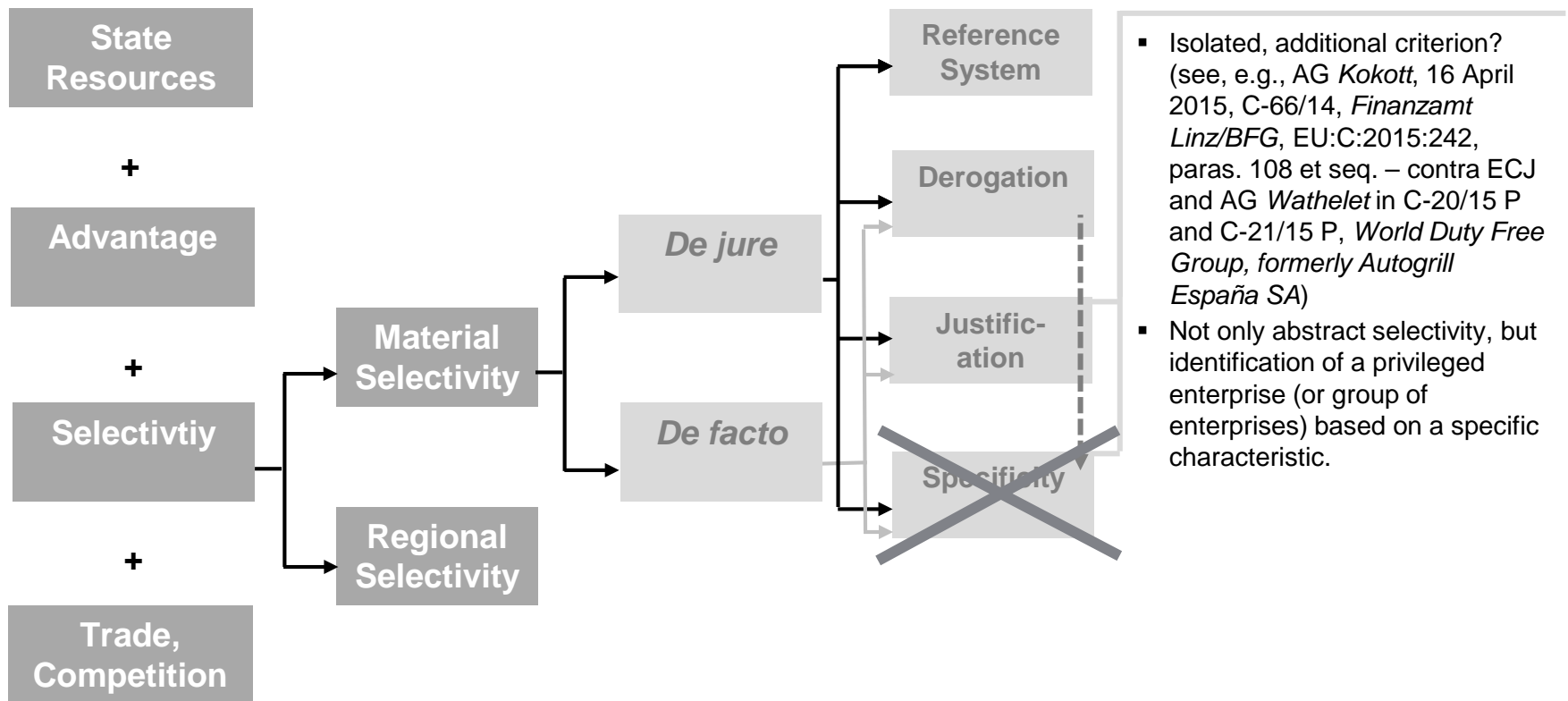
# STATE AID | *ART. 107(1) TFEU*



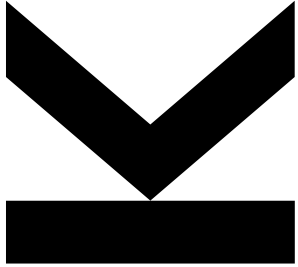
# STATE AID | *ART. 107(1) TFEU*



# STATE AID | *ART. 107(1) TFEU*

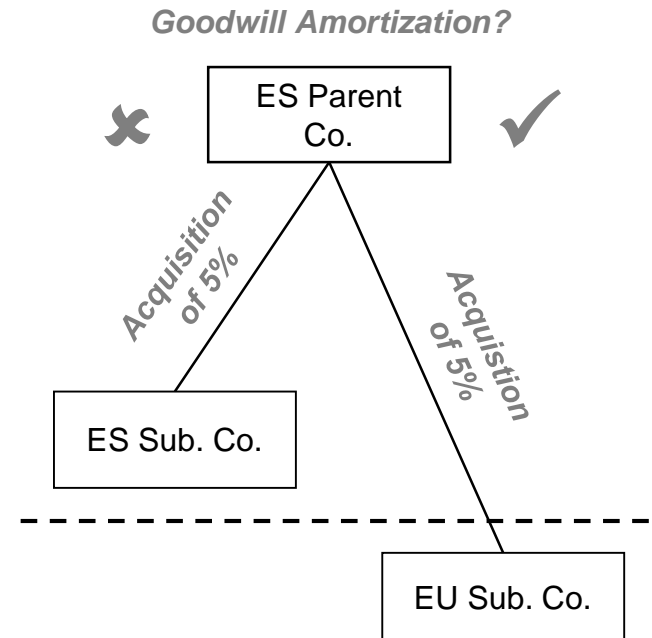


*CHAPTER II*  
STATE AID AND  
BUSINESS TAXATION



# EXAMPLE 1 | *SPANISH GOODWILL AMORTIZATION (WORLD DUTY FREE)*

- Amortization of goodwill only in case of the acquisition holding in a foreign company (no amortization for domestic holdings) – 5% ownership threshold, 1 year holding period
- Three state aid proceedings against Spain
  - ☐ Acquisition of direct EU holdings
  - ☐ Acquisition of direct third country holdings
  - ☐ Acquisition of indirect holdings



# EXAMPLE 1 | *SPANISH GOODWILL AMORTIZATION (WORLD DUTY FREE)*

	Topic	Case	Commission Decision	Decision of GC	ECJ
1	Acquisition of Direct EU Holdings	C 45/07 = SA.22309	Decision of 28 Oct. 2009, K(2009)8107 = [2011] OJ L 7/48 (11 Jan. 2011) – See also [2007] OJ C 311/21 (21 Dec. 2007)	Annulment by GC, 7 November 2014, T-219/10, <i>Autogrill España</i> , EU:T:2014:939	Setting aside and referral back to the GC: ECJ, 21 December 2016, C-20/15 P and C-21/15 P, <i>World Duty Free Group SA, Banco Santander ua</i> , EU:C:2016:981 – <i>Grand Chamber!</i>
2	Acquisition of Direct Third Country Holdings	SA.22309	Decision of 12 Jan. 2011, K(2010) 9566) = [2011] OJ L 135/1 (21 May 2011) – See also [2007] OJ C 311/21 (21 Dec. 2007)	Annulment by GC, 7 November 2014, T-399/11, <i>Banco Santander SA and Santusa Holding SL</i> , EU:T:2014:938	
3	Acquisition of Indirect Holdings	SA.35550	Decision of 15 Oct. 2014, C(2014)7280 = [2015] OJ L 56/38 (27 Feb. 2015) – See also [2013] OJ C 258/8 (7 Sept. 2013)	Pending as T-826/14 – No interim measures (GC, 27 February 2015, T-826/14 R, <i>Spain/Commission</i> )	—

# EXAMPLE 1 | *SPANISH GOODWILL AMORTIZATION (WORLD DUTY FREE)*

- GC, 7 November 2014, T-219/10, *Autogrill España*, EU:T:2014:939, and GC, 7 November 2014, T-399/11, *Banco Santander SA and Santusa Holding SL*, EU:T:2014:938
  - Annulments of the Commission's decisions from October 2009 and January 2011
  - No selectivity because it did not benefit "a particular category of undertakings" (citing *Gibraltar*), no minimum investment amount
    - Similarly Opinion of AG Kokott 16 April 2015, C-66/14, *Finanzamt Linz/BFG*, paras. 108 et seq.
    - Contra Opinion of AG Wathelet, 28 July 2016, Joined Cases C-20/15 P and C-21/15 P, *Commission/World Duty Free Group, formerly Autogrill España SA* (C-20/15 P), *Banco Santander SA, Santusa Holding SL* (C-21/15 P), EU:C:2016:624

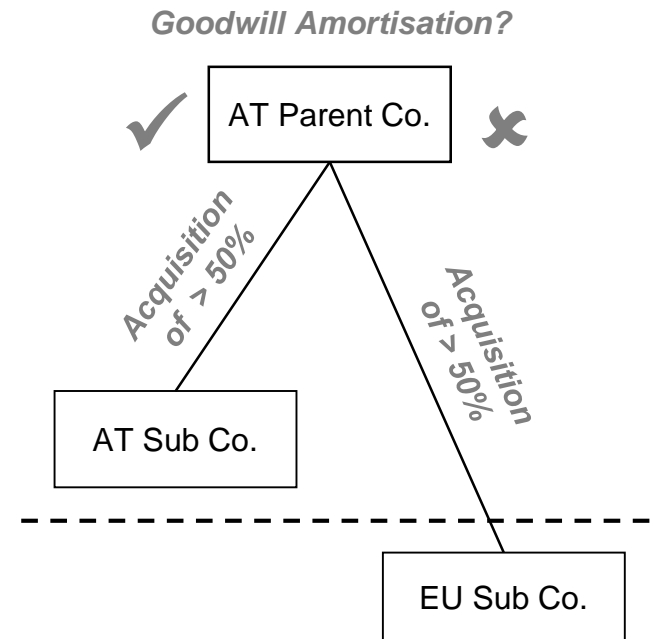
# EXAMPLE 1 | *SPANISH GOODWILL AMORTIZATION (WORLD DUTY FREE)*

- ECJ (Grand Chamber), 21 December 2016, C-20/15 P and C-21/15 P, ***World Duty Free Group and Banco Santander SA und Santusa Holding SL***, EU:C:2016:981
  - ECJ reversed and remanded GC decision
  - Comparison between resident companies that held at least five percent of Spanish companies (no goodwill deduction) with resident companies that held at least 5% of foreign companies (goodwill deduction)
  - Limited *Gibraltar* to its facts (the whole Gibraltar regime, rather than a derogating part, constituted a scheme designed to confer selective advantages on offshore companies)
  - In ordinary (derogation) cases, Commission need not show that (*ex ante*) a particular, identifiable group benefits from the advantage

# EXAMPLE 2 | AUSTRIAN GOODWILL AMORTIZATION (FINANZAMT LINZ)

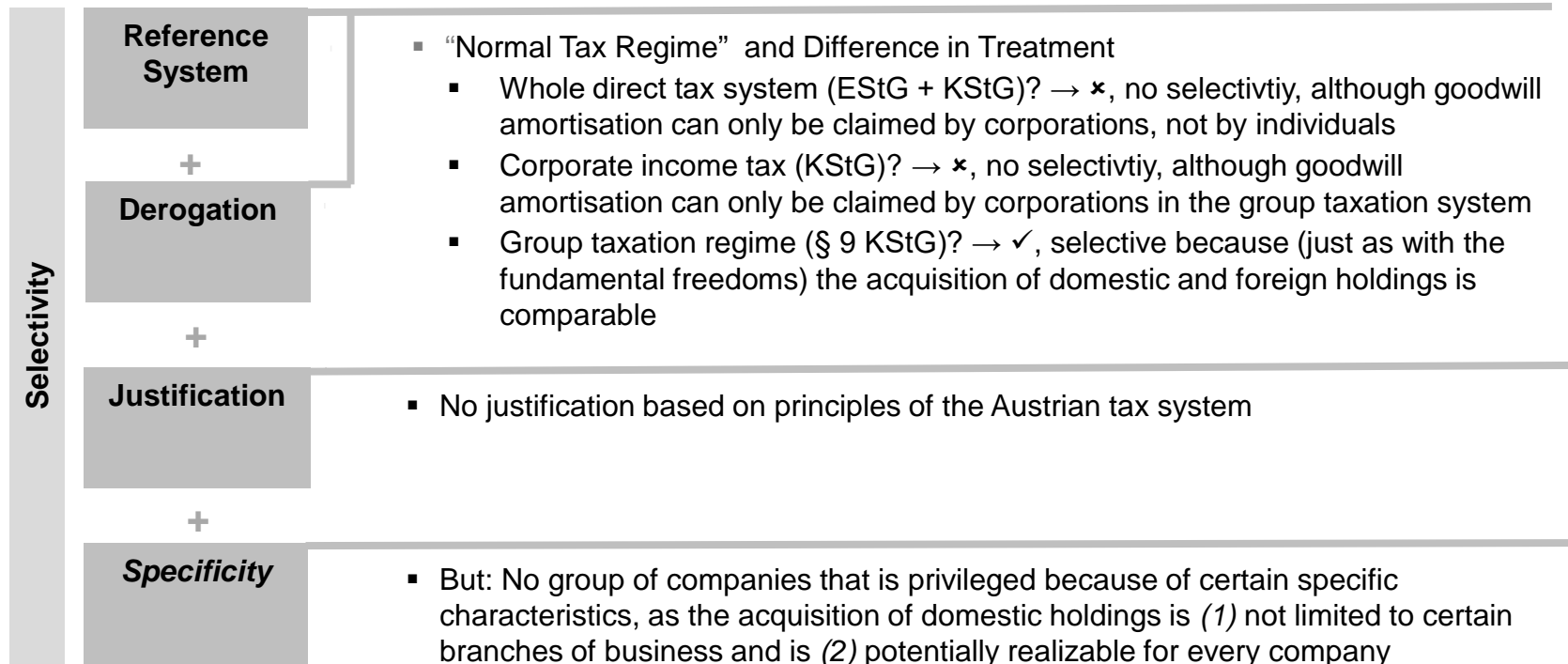
## ■ *Goodwill Amortisation as a Special Feature within the Austrian Group Taxation Regime*

- Goodwill may be amortised over 15 years only in the case where a holding is acquired in a domestic company (i.e., not in a foreign EU company) and that company is included in a corporate group (requires a holding of > 50%)
- Litigation → Reference to the CJEU whether this regime is a violation of (1) the State aid rules (Art 107 TFEU) and/or (2) the freedom of establishment under Art. 49 TFEU (reference by the Supreme Administrative Court, 30 January 2014, 2013/15/0186) → Case C-66/14
- Legislative Reaction → Repeal of the amortisation rule from 1 March 2014 onwards (Federal Gazette I 2014/13), with a special rule for old “1/15” amounts.
- Final decision by VwGH 10 February 2016, 2015/15/0001 (no state aid), and BMF-Info BMF-010203/0178-VI/6/2016 (16 June 2016)



# EXAMPLE 2 | *AUSTRIAN GOODWILL AMORTIZATION (FINANZAMT LINZ)*

- Opinion of A.G. Kokott, 16 April 2015, C-66/14, *Finanzamt Linz*, EU:C:2015:242 (CJEU did not rule on the State aid issue)



## EXAMPLE 3 | *GERMAN RESTRUCTURING CLAUSE*

- Exception from the cancellation of the loss carry-forward in case of a qualified change of ownership by introducing a restructuring clause (“Sanierungsklausel”) in § 8c(1a) German Corporate Tax Act (KStG)
- Commission Decision of 26 January 2011, C 7/10, K(2011) 275 ([2011] OJ L 235/26 [10 September 2011])
  - § 8c KStG is the reference system and the restructuring clause provides a selective advantage and is not in compliance with the internal market (e.g., the “Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis”)
  - Negative decision with recovery
  - Also: Germany was asked to provide a list of enterprises with the overall amount of aid → 40 cases, overall amount: € 1,78 Mio (BT-DRs 17/5752, 4 [5 May 2011])

# EXAMPLE 3 | *GERMAN RESTRUCTURING CLAUSE*

## ■ German reaction

- Non-application of the restructuring clause until its compatibility with state aid law is clear (see initially BMF 30 April 2010, IV C 2 - S 2745-a/08/10005:002, and subsequently § 36 Abs 6 KStG as amended by BGBl I 2011, 2592 and BGBl I 2013, 1266)
- Action for annulment ([2011] OJ C 186/28 [25 June 2011]) rejected by the GC (18 December 2012, T-205/11, ECLI:EU:T:2012:704) because the action was brought (one day) too late (confirmed by ECJ, 3 July 2014, C-102/13 P, EU:C:2014:2054)

- But: 14 actions for annulment brought by several companies and supported by Germany (according to Art 278 TFEU no suspensive effect; see, e.g., E-002574/14, [2014] OJ C 324/1 [18 September 2014])

# EXAMPLE 3 | *GERMAN RESTRUCTURING CLAUSE*

	Enterprise	GC	Decision of the GC	Case at ECJ
1	<i>Heitkamp BauHolding</i>	T-287/11	4 Feb. 2016 (EU:T:2016:60)	C-203/16 P, C-208/16 P
2	<i>Cheverny Investments</i>	T-585/11	—	—
3	<i>Oppenheim</i>	T-586/11	—	—
4	<i>Wagon Automotive Nagold</i>	T-610/11	—	—
5	<i>Treofan Holdings</i>	T-612/11	—	—
6	<i>VMS Deutschland</i>	T-613/11	—	—
7	<i>Garner CAD Technic</i>	T-614/11	Removed (Order 27 Apr. 2016, EU:T:2016:271)	
8	<i>CB</i>	T-619/11	—	—
9	<i>GFKL Financial Services</i>	T-620/11	4 Feb. 2016 (EU:T:2016:59)	C-219/16 P, C-209/16 P
10	<i>SinnLeffers</i>	T-621/11	—	—
11	<i>Sky Deutschland</i>	T-626/11	—	—
12	<i>ATMvision</i>	T-627/11	—	—
13	<i>Biogas Nord</i>	T-628/11	—	—
14	<i>Biogas Nord Anlagenbau</i>	T-629/11	—	—

# EXAMPLE 3 | *GERMAN RESTRUCTURING CLAUSE*

- GC dismissed the actions by two enterprises against the Commission decision and confirms that the German restructuring clause is illegal state aid (GC, 4 February 2016, T-287/11, *Heitkamp BauHolding*, EU:T:2016:60, and T-620/11, *GFKL Financial Services*, EU:T:2016:59)
- Main reasons:
  - The reference system is § 8c Abs 1 KStG from which § 8c Abs 1a KStG is a selective exception (loss carry-forward – cancellation of the carry-forward – exception based on the “restructuring clause”), even if the exception conforms with the ability-to-pay-principle
  - Selective advantage for the undertakings in difficulty because ...
    - ... there is no similar exception for other cases where no risk of abuse exists ...
    - ... the measure is not potentially open to all enterprises but only to those in difficulty (distinguishing *Autogrill*)
  - No justification because ...
    - ... dealing with the financial and economic crisis or the restructuring of enterprises in difficulty is not part of the nature and general scheme of the German tax system (ECJ, 18 July 2013, C-6/12, *P Oy*, EZ:C:2013:525, Rn 30)
    - ... it is not apparent why ability-to-pay (i.e., loss carry-forward) should not likewise be relevant for “healthy” enterprises

# EXAMPLE 3 | *GERMAN RESTRUCTURING CLAUSE*

## ■ ECJ annuls GC decision

- Appeal with regard to a violation of 107 TFEU (e.g., C-203/16 P, C-208/16 P)
- ECJ, 28 June 2018, C-203/16 P, **Dirk Andres**, EU:C:2018:505, and ECJ, 28 June 2018, C-209/16 P, **Lowell Financial Services**, EU:C:2018:507
- Suggestion to set aside the judgment of the General Court in the Opinion of AG Wahl, 20 December 2017, C-203/16 P, *Dirk Andres (administrator of Heitkamp BauHolding GmbH), previously Heitkamp BauHolding GmbH*, EU:C:2017:1017
- Reasons of the ECJ
  - The regulatory technique used is not decisive for establishing selectivity – Exceptions from the exception confirm the general rule
  - Flawed determination of the reference system by the GC
- Also: It would be unclear which effects the unconstitutionality of the whole § 8c KStG has on the state aid analysis (the German Constitutional Court found that provision, in part, to violate the principle of equal treatment; BVerfG 29 March 2017, 2 BvL 6/11)

# SOME OPEN ISSUES

## ■ *Uncertainties with “Selectivity”*

- ☐ Three-prong-test versus comparability analysis?
- ☐ Does Art 107(1) TFEU require that “certain undertakings” or “the production of certain goods” are identified by properties which are specific to them, as a privileged category *ex ante*?
  - Yes → GC in *Autogrill* and *Banco Santander* and Opinion AG Kokott, 16 April 2015, C-66/14, *Finanzamt Linz*, EU:C:2015:242
  - No → ECJ (Grand Chamber), 21 December 2016, C-20/15 P and C-21/15 P, *World Duty Free Group*, EU:C:2016:981; Opinion of AG Wathelet, 28 July 2016, Joined Cases C-20/15 P and C-21/15 P, *World Duty Free Group*, EU:C:2016:624
    - Should all tax expenditures adopted by Member States then be regarded as state aids and, as a result, need to be approved pursuant to Art 108(3) TFEU (e.g., general R&D tax incentives etc)?
    - Would this be compatible with the division of competences between the European Union and the Member States? Would this amount to a transfer of the Member States’ economic policy to the European Union?
    - In the end, would EU Member States be placed at a competitive disadvantage with third countries?

# SOME OPEN ISSUES

## ■ *Uncertainties with “Selectivity”*

- ☐ Is international activity *per se* a criterion for selectivity? – Rejected by the General Court in T-219/10, *Autogrill España*, EU:T:2014:939, and T-399/11, *Banco Santander SA und Santusa Holding SL*, EU:T:2014:938
- ☐ Does the extension of illegal state aid to other taxpayers “remove” the state aid character of a measure? – Rejected by, e.g., ECJ, 15 June 2006, C-393/04 und C-41/05, *Air Liquide*, EU:C:2006:403, para. 45, but accepted if the disadvantage is removed through the application of a fundamental freedom by Austrian Supreme Administrative Court, 10 February 2016, 2015/15/0001, ÖStZB 2016/59, 154.

# SOME OPEN ISSUES

## ■ *De Minimis-threshold (€ 200.000 in 3 years)?*

- ☐ Relevance of the formal proceeding (regulation (EU) Nr. 1407/2013)?
- ☐ Characterization of a measure independent from individual cases (e.g., ECJ, 5 March 2005, C-172/03, *Heiser*, EU:C:2005:130, para. 34)
- ☐ Also: Would it violate the EU principle of equality if a general rule would only apply to certain persons (i.e., those below the threshold)? → See Austrian Supreme Administrative Court, 29 June 2005, 2005/14/0024, ÖStZB 2006/7, 12.

*CHAPTER III*  
STATE AID AND RULINGS



# RULINGS | *OVERVIEW*

## ■ *Improvements in the area of harmful business taxation and related areas*

(Action 10 in the Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012)722 [6 December 2012])

## ■ *“Tax Rulings”*

- ☐ Examination of the the tax ruling practice of some Member States since June 2013, extension of information enquires on tax rulings practice to all Member States (IP/14/2742 [17 December 2014])
- ☐ State aid proceedings with respect to individual rulings – Apple, Starbucks, Fiat, Amazon
- ☐ State aid proceedings with respect to general ruling practice – Belgian excess profit ruling system (IP/15/4080 [3 February 2015] – Also: State aid proceedings in respect of certain tax regimes (e.g., coordination centers) in the early 2000s.
- ☐ Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, COM(2015)135 final, and adoption as Council Directive (EU) 2015/2376 of 8 December 2015, [2015] OJ L 332/1

# RULINGS | *GENERAL INFORMATION*

- European Parliament resolution of 25 November 2015 on tax rulings and other measures similar in nature or effect, P8\_TA(2015)0408 (25. 11. 2015)
- Statements by the Commission
  - Paras 169 et seq. of the Commission's Notice on the notion of State aid pursuant to Article 107(1) TFEU, [2016] OJ C 262/1 (19 July 2016)
  - DG Competition Working Paper on State Aid and Tax Rulings (3 June 2016)

# RULINGS | *EXCHANGE OF INFORMATION*

## ■ ***Automatic Exchange of Information***

- Council Directive (EU) 2015/2376 of 8 December 2015, [2015] OJ L 332/1 (based on proposal COM(2015)135 final)
- Automatic exchange of information on advance cross-border rulings and advance pricing arrangements starting in 2017 (for rulings that have been issued after 31 December 2016 and certain older rulings)

## ■ ***But***

- “Information communicated to the Commission pursuant to this Directive shall be kept confidential by the Commission in accordance with the provisions applicable to Union authorities and may not be used for any purposes other than those required to determine whether and to what extent Member States comply with this Directive” (Art 23a(1)), i.e., no transfer of information from DG TAXUD to DG COMP.
- Limited access by the Commission, i.e., “[i]nformation as defined under points (a), (b), (h) and (k) of paragraph 6 of this Article shall not be communicated to the European Commission” (Art 8(8a) and Art 21(5)), e.g., the identification of the person, other than a natural person, and where appropriate the group of persons to which it belongs, a summary of the content of the advance cross-border ruling or advance pricing arrangement, or the description of the set of criteria used for the determination of the transfer pricing or the transfer price itself.

# RULINGS | *SPECIFIC CASES*

- Administrative rulings that merely contain an interpretation of the relevant tax provisions without deviating from the case law and administrative practice do not give rise to a presumption of aid.
- However, state aid exists where a general rule is applied favorably, especially in case of a deviation from objective criteria (ECJ, 26 September 1996, C-241/94, *France/Commission*, [1996] ECR I-4551, paras 23-24)
- Advantage because of a deviation from arm's length (ECJ, 22 June 2006, C-182/03 and C-217/03, *Belgium and Forum 187 ASBL/Commission*, EU:C:2006:416, paras. 95-96)

# RULINGS | *SPECIFIC CASES*

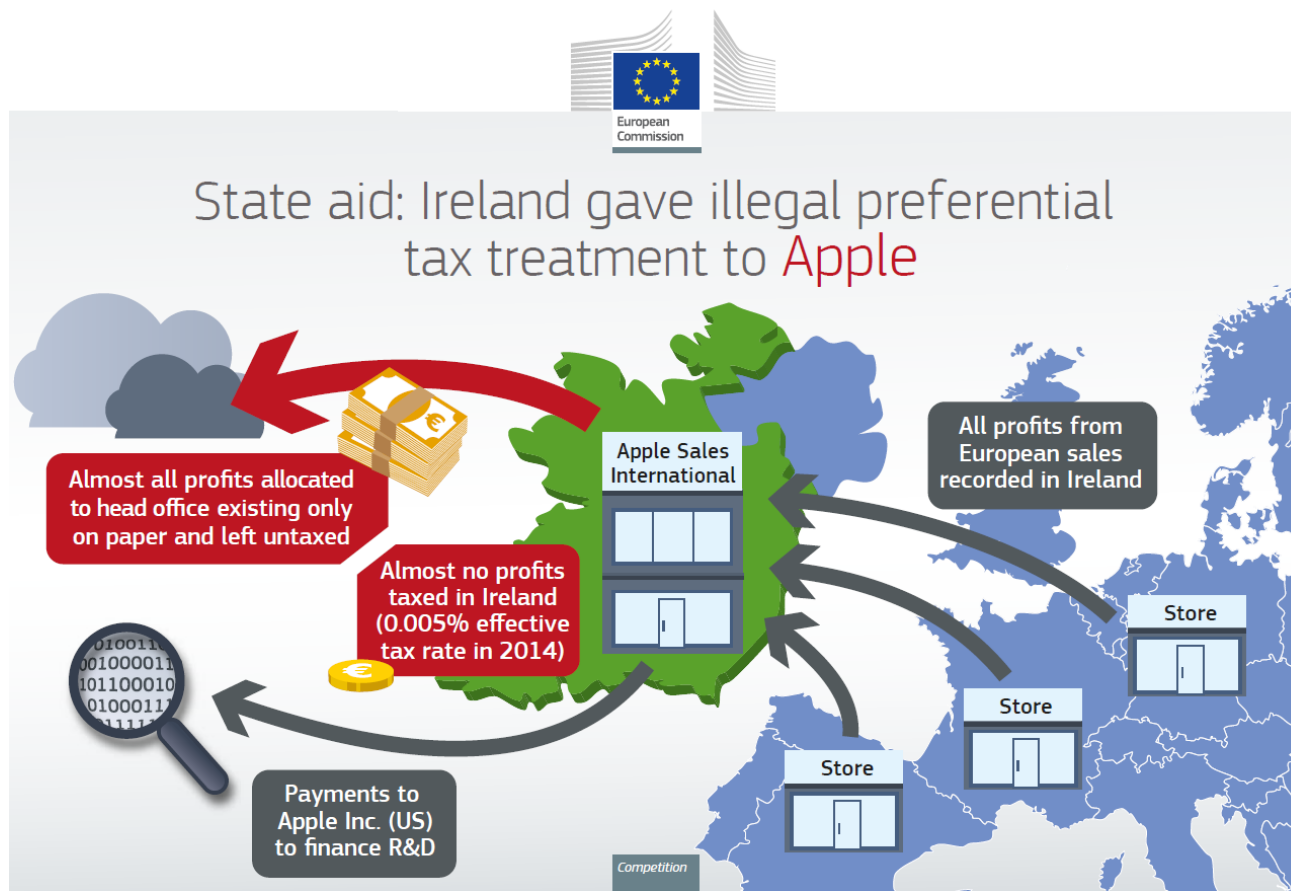
- Advance administrative rulings involve selectivity in particular where (see, e.g., Commission's Notice on the notion of State aid pursuant to Article 107(1) TFEU, [2016] OJ C 262/1 (19 July 2016), and Para. 21 of the Commission's notice on the application of the State aid rules to measures relating to direct business taxation, [1998] OJ C 384/3) ...
  - ☐ ... the tax authorities have discretion in granting administrative rulings;
  - ☐ ... the rulings are not available to undertakings in a similar legal and factual situation;
  - ☐ ... the administration appears to apply a more “favourable” discretionary tax treatment compared with other taxpayers in a similar factual and legal situation;
  - ☐ ... the ruling has been issued in contradiction to the applicable tax provisions and has resulted in a lower amount of tax

# RULINGS | *SPECIFIC CASES*

MS	MNE	Procedure	Issue	Decision	Case
IR	Apple	SA.38373 – C(2014)3606 (11 June 2014)	Long-term (15 years) application of the TNMM (65% or 20%) so that a certain profit is achieved (28-38 Mio US\$)	Negative decision with recovery – IP/16/2923 (30 Aug. 2016)	T-778/16, <i>Ireland/ Commission</i> , T-892/16, <i>Apple Sales International et al/Commission</i>
NL	Starbucks	SA.38374 – C(2014)3626 (11 June 2014)	Qualification as „toll manufacturer“ and TNMM (9-12%) with a specifically defined tax base and matching calculation of licence fees	Negative decision with recovery – IP/14/663 (21 Oct 2015)	T-760/15, <i>Netherlands/ Commission</i> , T-636/16, <i>Starbucks/ Commission</i>
LUX	Fiat	SA.38375 – C(2014)3627 (11 June 2014)	Determination of a tax base of ca €2,5 Mio (+/- 10%) on the basis of the TNMM	Negative decision with recovery – IP/14/663 (21 Oct 2015)	T-759/15, <i>Fiat Chrysler Finance Europe</i> , T-755/15, <i>Luxembourg/ Commission</i>
LUX	Amazon	SA.38944 – C(2014)7156 (7 Oct. 2014)	Long-term (10 years) application of the TNMM (4-6% with revenue-based cap and floor) and matching calculation of licence fees	Negative decision with recovery – IP/17/3701 (4 October 2017)	T-816/17, <i>Luxembourg/ Commission</i> , T-318/18, <i>Amazon/ Commission</i>

# RULINGS | *SPECIFIC CASES*

- **Apple** – Negative decision with recovery – IP/16/2923 (30 Aug. 2016)



# RULINGS | *SPECIFIC CASES*

## ■ **Apple** – Negative decision with recovery – IP/16/2923 (30 Aug. 2016)

- In a speech given to the Irish Upper House on 4 October 2016, the Irish Minister for Finance announced the primary arguments it will rely upon in its appeal against the EC's Apple State aid decision.
- The grounds to be relied upon are as follows:
  - The absence of a favourable tax treatment granted to Apple by Ireland;
  - The damage that being called into question may cause to Ireland's credibility in the international tax debate;
  - The concern that the Commission is undermining the international tax principle of taxing value where it is created;
  - The fact that the concerned companies were not Irish tax residents;
  - The concern expressed by the US Treasury regarding Apple's US tax liability reduction;
  - The contradiction of allowing other jurisdictions to tax the sums that Ireland is required to recover;
  - The encroachment of Member States' sovereignty in tax matters and the uncertainty it creates for businesses; and
  - The absence of any right by Ireland to the EUR 13 billion of unpaid taxes claimed by the EC's Apple State aid decision.

# RULINGS | *COMMISSION PRACTICE*

State	Tax Regime	Date	Proceeding	OJ
BE	Coordination Centers	2 May 1984	Not published – Direct taxes are not covered by state aid rules (!)	C 36/37 (11 Mar. 1991)
DE	Control and Coordination Centers	5 Sept. 2002	K(2002) 3298 – No recovery	L 177/17 (16 July 2003)
LUX	Finance Companies	16 Oct. 2002	C 50/2001 – K(2002) 3741 – No recovery	L 153/40 (20 June 2003)
LUX	Coordination Centers	16 Oct. 2002	C 49/2001 – K(2002) 3740 – No recovery	L 170/20 (9 July 2003)
NL	Finance Activities	17 Feb. 2003	K(2003) 568 – No recovery	L 180/52 (18 July 2003)
IR	Foreign Income	17 Feb. 2003	C 54/2001 – K(2003) 569 – No recovery	L 204/51 (13 Aug. 2013)
BE	Coordination Centers	17 Feb. 2003	K(2003) 564	L 282/25 (30 Oct. 2003)
FR	Administration and Logistic Center	13 May 2003	K(2003) 1483 – No recovery	L 23/1 (28 Jan. 2004)

# RULINGS | *COMMISSION PRACTICE*

State	Tax Regime	Date	Proceeding	OJ
BE	US Sales Companies	24 June 2003	K(2003) 1868 – No recovery	L 23/14 (28 Jan. 2004)
LUX	1929 Holding Companies	19 July 2006	C 3/2006 – K(2006) 2956	L 366/47 (21 Feb. 2006)
ES	Patent Box	13 Feb, 2008	N 480/07	C 80/3 (1 Apr. 2008)
NL	Group Interest Box ("Groepsrentebox")	8 July 2009	C 4/07 – K(2009) 4511	L 288/26 (4 Nov. 2009)
LIE	IP Box	1 June 2011	177/11/KOL (EFTA)	C 278/9 (22 Sept. 2011)
BE	Excess profit exemption	11 Jan. 2016	SA.37667	L 260/61 (27 Sept. 2016)

# RULINGS | *PROBLEMS*

- Para. 172 of the Commission's Notice on the notion of State aid pursuant to Article 107(1) TFEU, [2016] OJ C 262/1 (19 July 2016):

172. This arm's length principle necessarily forms part of the Commission's assessment of tax measures granted to group companies under Article 107(1) of the Treaty, independently of whether a Member State has incorporated this principle into its national legal system and in what form. It is used to establish whether the taxable profit of a group company for corporate income tax purposes has been determined on the basis of a methodology that produces a reliable approximation of a market-based outcome. A tax ruling endorsing such a methodology ensures that that company is not treated favourably under the ordinary rules of corporate taxation of profits in the Member State concerned as compared to standalone companies who are taxed on their accounting profit, which reflects prices determined on the market negotiated at arm's length. The arm's length principle the Commission applies in assessing transfer pricing rulings under the State aid rules is therefore an application of Article 107(1) of the Treaty, which prohibits unequal treatment in taxation of undertakings in a similar factual and legal situation. This principle binds the Member States and the national tax rules are not excluded from its scope. <sup>(255)</sup>

# RULINGS | *PROBLEMS*

- Para. 173 of the Commission's Notice on the notion of State aid pursuant to Article 107(1) TFEU, [2016] OJ C 262/1 (19 July 2016):

173. When examining whether a transfer pricing ruling complies with the arm's length principle inherent in Article 107(1) of the Treaty, the Commission may have regard to the guidance provided by the Organisation for Economic Cooperation and Development ('OECD'), in particular the 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations'. Those guidelines do not deal with matters of State aid *per se*, but they capture the international consensus on transfer pricing and provide useful guidance to tax administrations and multinational enterprises on how to ensure that a transfer pricing methodology produces an outcome in line with market conditions. Consequently, if a transfer pricing arrangement complies with the guidance provided by the OECD Transfer Pricing Guidelines, including the guidance on the choice of the most appropriate method and leading to a reliable approximation of a market based outcome, a tax ruling endorsing that arrangement is unlikely to give rise to State aid.

# RULINGS | *PROBLEMS*

- Para. 174 of the Commission's Notice on the notion of State aid pursuant to Article 107(1) TFEU, [2016] OJ C 262/1 (19 July 2016)

174. In sum, tax rulings confer a selective advantage on their addressees in particular where:

- (a) the ruling misapplies national tax law and this results in a lower amount of tax; <sup>(256)</sup>
- (b) the ruling is not available to undertakings in a similar legal and factual situation; <sup>(257)</sup> or
- (c) the administration applies a more 'favourable' tax treatment compared with other taxpayers in a similar factual and legal situation. This could, for instance, be the case where the tax authority accepts a transfer pricing arrangement which is not at arm's length because the methodology endorsed by that ruling produces an outcome that departs from a reliable approximation of a market-based outcome. <sup>(258)</sup> The same applies if the ruling allows its addressee to use alternative, more indirect methods for calculating taxable profits, for example the use of fixed margins for a cost-plus or resale-minus method for determining an appropriate transfer pricing, while more direct ones are available. <sup>(259)</sup>

# RULINGS | *PROBLEMS*

- Art 9 OECD MC and OECD Transfer Pricing Guidelines (TPG) as an independent "reference system"?
  - See e.g., Paras 172-173 of the Commission's Notice on the notion of State aid pursuant to Article 107(1) TFEU, [2016] OJ C 262/1 (19 July 2016), and Pt 18 of the DG Competition Working Paper on State Aid and Tax Rulings (3 June 2016)
  - Comparison with independent enterprises *versus* comparison with domestic associated enterprises *versus* comparison with other, cross-border associated enterprises?
  - Relevance of the existence of domestic transfer pricing rules?
- Choice of the appropriate transfer pricing methode (e.g., TNMM instead of CUP)?
- Analysis based on "economic rationality"?
- Range versus exact price?
- Relevance for "safe harbors"?
- However, focus on „manifest breach of the arm's length principle“ (Pt 23 of the DG Competition Working Paper on State Aid and Tax Rulings [3 June 2016])

# RULINGS | *PROBLEMS*

- Political discussion between the US and the EU with regard to “retroactive taxation” (i.e., recovery) and the “disproportionate targeting” of US MNEs
  - Letter by *Jacob Lew*, Secretary of the Treasury, to Mr. *Jean-Claude Juncker*, President of the European Commission (11. 2. 2016).
  - Letter by *Margrethe Vestager*, Member of the European Commission, to *Jacob Lew*, Secretary of the Treasury (29. 2. 2016)
- Treasury Department White Paper „The European Commission’s Recent State Aid Investigations of Transfer Pricing Rulings“ (24.8.2016)
- Current and future legal questions, e.g., regarding ...
  - ... (indirect) foreign tax credits in the US? (*Problems may include statute of limitations, recovery outside the tax system*) → *Vice versa: Must a non-creditability be taken into account in the recovery decision?*
  - ... punitive taxation of EU enterprises in the US under § 891 IRC („Senators Ask White House to Consider Retaliatory Tax Measure on EU”, Wall Street Journal vom 15. 1. 2016)? – Double tax rate “[w]henever the President finds that, under the laws of any foreign country, citizens or corporations of the United States are being subjected to discriminatory or extraterritorial taxes”.
  - ... possible impact of arbitration in the Transatlantic Trade and Investment Partnership (TTIP) with respect to recovery of state aid?

*CHAPTER IV*  
STATE AID LAW AS AN  
ANTI-BEPS-INSTRUMENT?

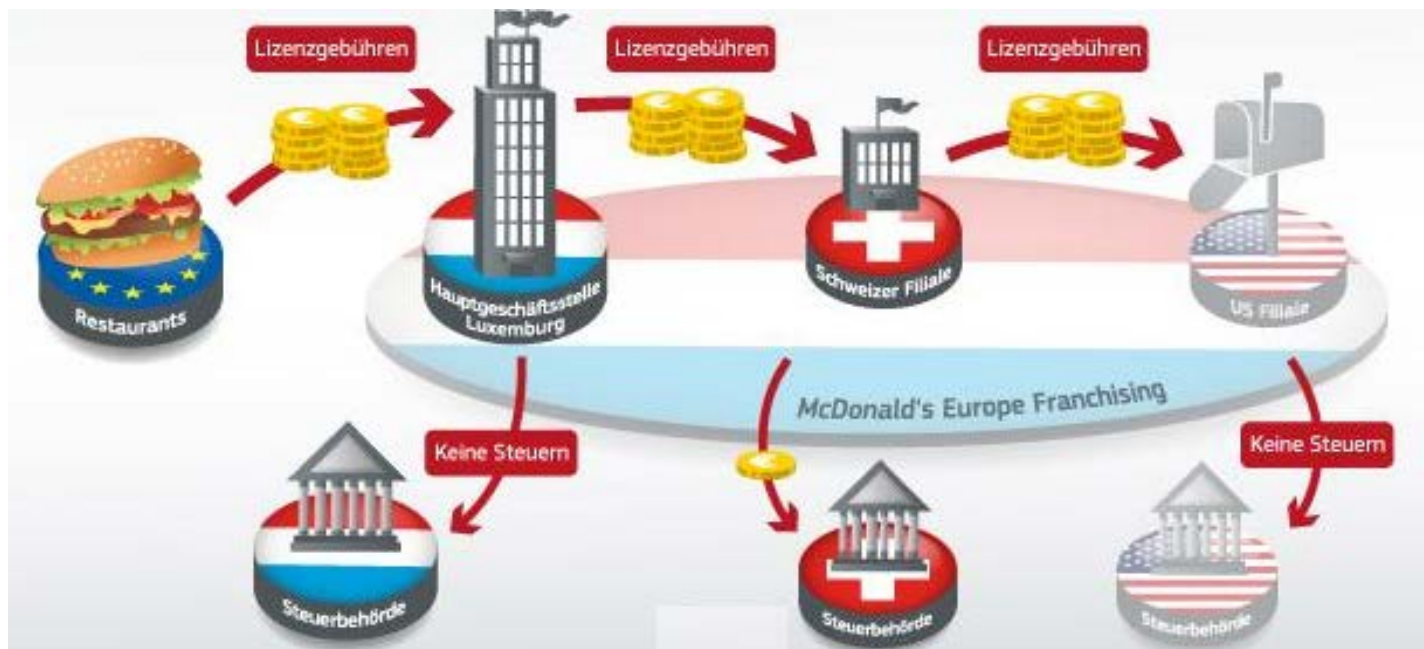


# BEPS | *PROBLEM AREAS*

- Current discussion about the use of state aid law with regard to BEPS and numerous open questions (e.g., which State would be to “blame” in case of double non-taxation?) – See, e.g., the discussion between *Rossi-Maccanico* (75 Tax Notes Int'l 857 [Sept. 8, 2014]) and *Luja* (76 Tax Notes Int'l 453 [Oct. 27, 2014])
- Distinction between “real mismatches” because of disparities and “deliberate mismatches” → Commission decision with regard to the Dutch group interest box K(2009) 4511, paras 110 et seq)
- State aid and BEPS?
  - Are Member States free to design their tax systems or must they comply with certain “principles of international taxation” (e.g., single taxation, taxation of active income in the source State, non-avoidance)? → Reference system must be derived from domestic law.
  - Is low-taxation suspicious to be state aid? → No selectivity even if some enterprises benefit more than others (Commission decision with regard to the Dutch group interest box K(2009) 4511, para. 118)
  - Is cross-border tax planning and tax arbitrage (e.g., through hybrid entities or instruments) per se selective because it is only possible for multinational enterprises? → Factual selectivity?
  - Is it possible to allocate a certain advantage derived from tax arbitrage to one Member State? → No selectivity if a rule applies to domestic and cross-border activities (Commission decision with regard to the Dutch group interest box K(2009) 4511, paras 110 et seq)

# BEPS | *DOUBLE NON-TAXATION*

- Decision to initiate the formal investigation procedure concerning alleged aid by Luxembourg to McDonald's (SA.38945, decision published in [2016] OJ C 258/11 [15 July 2016]) – **Closed (no state aid: IP/18/5831 [19 September 2018])!**
- Double non-taxation → Luxembourg allocated royalties to a US branch and gave rulings on that allocation (and exempted them under the tax treaty with the US) and the US did not tax those profits (under domestic law)



# BEPS | *DOUBLE NON-TAXATION*

- Double non-taxation based on the application of a tax treaty with the exemption method is not per se state aid, but may be state aid if the tax treaty is “misapplied”
- Several problems with the Commission’s initial interpretation of the US-Luxembourg tax treaty
  - The tax treaty does not mention the avoidance of double non-taxation as one of its aims.
  - The tax treaty predates (1996) the change of the OECD MC following the Partnership Report (1999, now Art 23A Para. 32.6 OECD MC).
  - Art 23A Para. 32.6 OECD MC only deals with conflicts of qualification but not with situations where a State might tax under the treaty but does not exercise that taxing right under its domestic law.
- However, proceedings closed without the finding of state aid (IP/18/5831 [19 September 2018])

*PART IV*

# EU CHARTER OF FUNDAMENTAL RIGHTS



JOHANNES KEPLER  
UNIVERSITÄT LINZ

# CONTENT

- ***Chapter I*** – Development of Human Rights Protection in the EU
- ***Chapter II*** – Application of the Charter and Taxation
- ***Chapter III*** – Conclusions

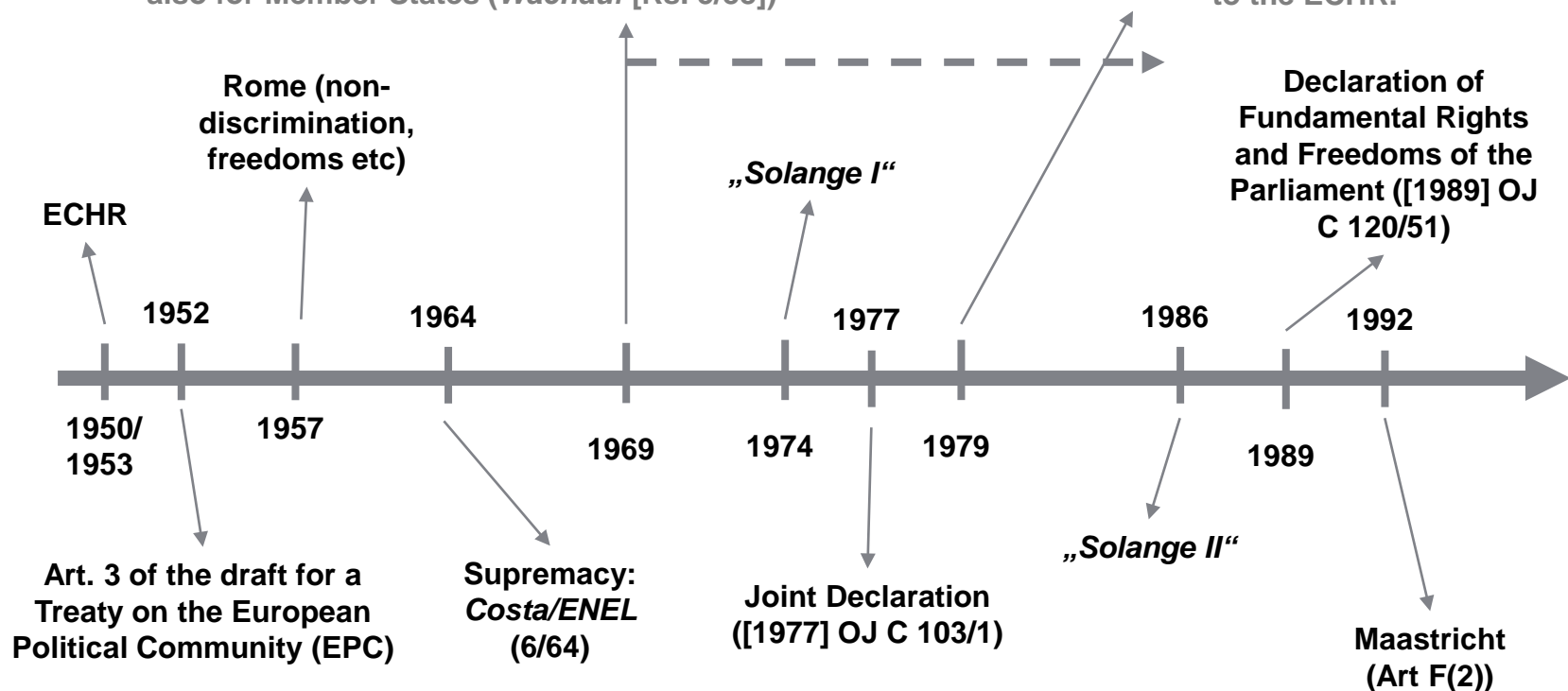
*CHAPTER I*  
DEVELOPMENT OF  
HUMAN RIGHTS PROTECTION  
IN THE EU



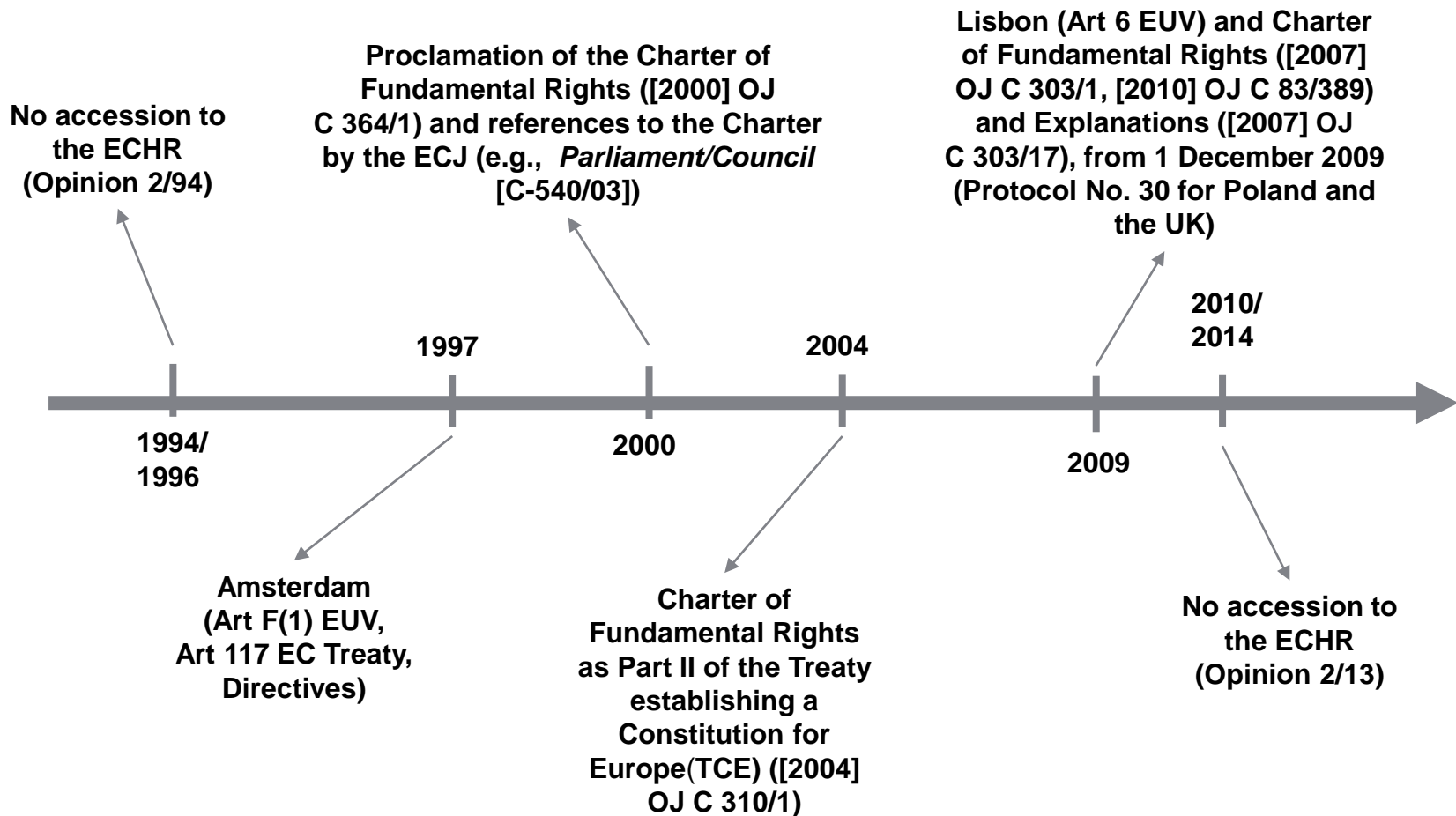
# MILESTONES | 1950 – 1992

Development of “general principles”, starting with *Stauder* [29/69], *Int. Handelsgesellschaft* [11/70] and *Nold* [4/73]), originally as standards for the EC institutions, later also for Member States (*Wachauf* [Rs. 5/88])

Explicit reference to the ECHR (*Hauer* [44/79]) – Following France’s ratification in 1974 all EC Member States also were parties to the ECHR.



# MILESTONES | 1994 – 2017



# "RIGHTS, FREEDOMS AND PRINCIPLES"

## ■ Art 6 TEU, Charter and Explanations

### *Article 6*

(ex Article 6 TEU)

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

**Charter als  
Primary Law  
(*Küçükdeveci*)**

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

**Art 51(2) Charter**

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

**Art 51-53 Charter**

**Art 52(7) Charter**

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

**Opinion 2/13**

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

**Art 52(3) and (4)  
Charter**

# UNION LAW

- General principles of Community law derived from common constitutional principles of the Member States since 1969 (29/69, *Stauder*)
- ECHR not part of Union law (e.g., *Åkerberg Fransson*), but essential for the development of general principles (explicit since 1979: C-44/79, *Hauer*)
- Relationship between general principles and Charter rights (Art 6(3) TEU)
  - Possible divergence between legal sources (e.g., Art 41 Charter)
  - Uniformity through “horizontal clauses” → Art 52(2) Charter (“primary law clause”), Art 52(3) Charter (“ECHR clause”) and Art 52(4) Charter (“principles clause”)

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

- Coherent interpretation
- Relevance of ratification, reservation etc with regard to ECHR protocols?

# INTERNAL MARKET VS FUNDAMENTAL RIGHTS

## ■ Internal Market vs Fundamental Rights

- Primacy (supremacy) of EU law (fundamental: 6/64, *Costa/ENEL*)
- Aim of human rights protection in Union law
  - Consideration of the legal framework → “[A]rea of freedom, security and justice without internal frontiers“ and establishment of the Internal Market (Art 3 TEU, Art 26 TFEU, fundamental freedoms, competition etc), principle of loyal cooperation (Art 4(3) TEU) (*Wachauf*, Opinion 2/13)
  - Human rights protection should not interfere with the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law (*Internationale Handelsgesellschaft*, *Melloni*, *Siragusa*)
  - Balancing between Internal Market and fundamental rights (*Schmidberger*)
- Primacy before favorability!

# INTERNAL MARKET VS FUNDAMENTAL RIGHTS

## ■ Internal Market vs Fundamental Rights

- Overlaps between Union and national protection of fundamental rights and diverging “density” of protection (e.g., equality, property)
- Favorability in Art 53 Charter?

### *Article 53*

#### **Level of protection**

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

- But: Application of national human rights standards in the Member States only “provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised” (*Melloni, Åkerberg Fransson*) → Primacy before favorability!

# FUNDAMENTAL RIGHTS AND TAXATION | *STEPS*

## ■ Steps

- Personal and objective scope
- Infringement
- Justification (Art 52(1) and (2) Charter)

### *Article 52*

#### **Scope and interpretation of rights and principles**

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

**Law,  
proportionality**

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

**TFEU vs  
Charter?**

# FUNDAMENTAL RIGHTS AND TAXATION | *CHARTER RIGHTS*

## ■ Title I: Dignity

## ■ Title II: Freedoms

- Article 7: Respect for private and family life
- Article 8: Protection of personal data
- Article 15: Right to marry and right to found a family
- Article 16: Freedom to conduct a business
- Article 17: Right to property

## ■ Title III: Equality

- Article 20: Equality before the law
  - General principle of Union law (e.g., *Ruckdeschel*, *Racke*, *EARL*, *Karlsson*), subordinated to special non-discrimination rules (*Schmelz*)
  - E.g., neutrality in VAT (e.g., *HE*, *Linneweber*, *Zimmermann*, *Jetair*)
- Article 21: Non-discrimination

## ■ Title IV: Solidarity

# FUNDAMENTAL RIGHTS AND TAXATION | *CHARTER RIGHTS*

## ■ Title V: Citizens' Rights

### ■ Article 41: Right to good administration

- General principle of Union law (e.g., *Burban, Nölle, Kamino*), but Art 41 only addresses the Union and not the Member States (e.g., *Cicala, Y. S., WebMindLicenses*)

## ■ Title VI: Justice

### ■ Article 47: Right to an effective remedy and to a fair trial

- General principle of Union law (e.g., *Johnston, Heylens, Allassini*) → Art 13 ECHR (extending to court procedure) and Art 6(1) EMRK (without the limitation to civil and criminal matters)

- “Fair trial” → Also applicable in tax proceedings

### ■ Article 48: Presumption of innocence and right of defence

### ■ Article 49: Principles of legality and proportionality of criminal offences and penalties

### ■ Article 50: Right not to be tried or punished twice in criminal proceedings for the same criminal offence

- General principle of Union law (e.g., *Gutmann*) → Art 4 7th protocol to the ECHR (e.g., not ratified by Germany) and territorial extension by Art 50 Charter (e.g., VAT fraud in several Member States)

*CHAPTER II*  
APPLICATION OF THE  
CHARTER AND TAXATION



# APPLICABILITY OF THE CHARTER

## ■ Temporal Aspects

## ■ Objective Aspects (Art. 51 GRC)

- Union itself (Art 6 TEU) and institutions, bodies, offices and agencies of the Union (→ COM(2010)573 [19 October 2010])
- Member States (central, regional, local bodies) “only when they are implementing Union law”
- Art 51(1):

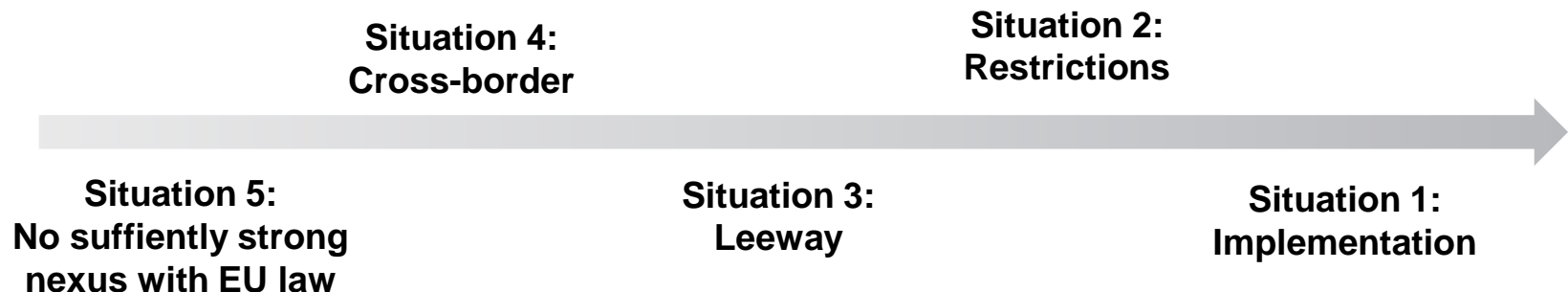
### *Article 51*

#### **Field of application**

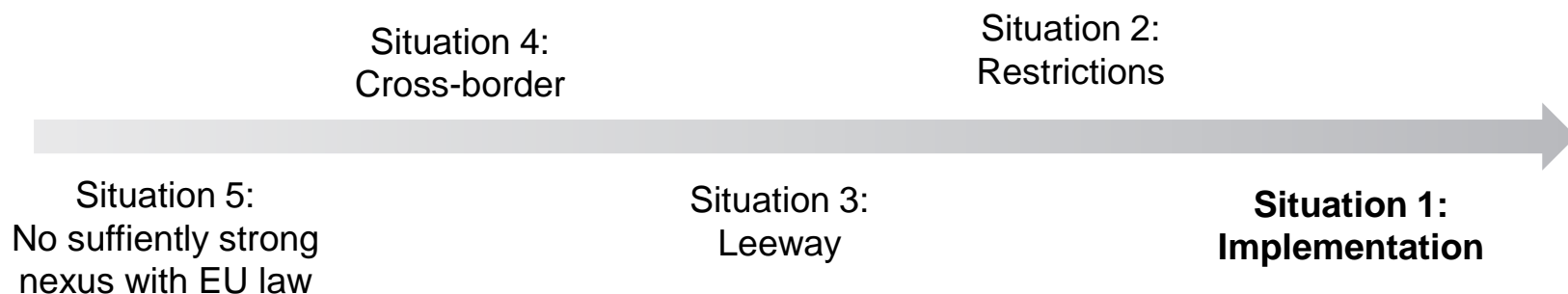
1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

# “IMPLEMENTING UNION LAW”

- Binding on Member States “only when they are implementing Union law” (Art 51(1))
- = “[A]ct in the scope of Union law” (Explanations to Art 51 with reference to *Wachauf*, *ERT* and *Annibaldi*) = “applicable in all situations governed by EU law” (*Åkerberg Fransson*, *Pfleger*, *WebMindLicenses*) = “within the scope of EU law” (*Pfleger*)
- Confirmation of case-law on the general principles (*Pfleger*, *Åkerberg Fransson*)
- Situations:



# SITUATION 1 | *IMPLEMENTATION*



- Implementation of Directives or administration of Regulations (“agency situation”; 5/88, *Wachauf*),
- Supremacy (primacy) of Union law, no “benchmarking” of Union law in light of national fundamental rights (e.g., BVerfG 102, 157 [Bananenmarkt]; BVerfGE 118, 79 [Emissionshandel], BVerfGE 121, 1 [Vorratsdatenspeicherung]) → Primacy before favorability! (C-399/11, *Melloni*)
- But: ECJ decides whether Union law is valid (see, e.g., C-293/12, C-594/12, *Digital Rights Ireland und Seitlinger ua*), and domestic courts may refer that question to the ECJ → If Union law (e.g., a Directive) is invalid, it falls away with *ex tunc* effect and domestic implementation – which is no longer “shielded” by supremacy – may then be tested against domestic fundamental rights, e.g., by a domestic constitutional court

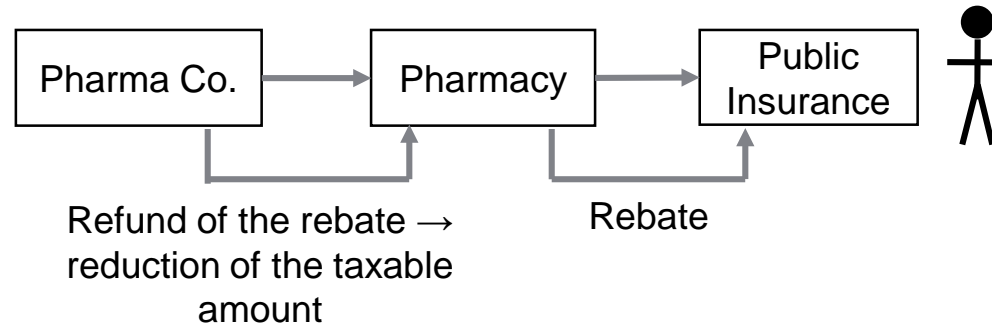
# SITUATION 1 | *IMPLEMENTATION*

- So far the ECJ has exercised a low “density” of review, e.g., with respect to the principle of equality →
  - No comparability between non-taxpayers and taxpayers that use a building for private purposes with regard to the input VAT deduction for dual-use buildings (C-460/07, *Puffer*)
  - No comparability of travel agencies and intermediaries because “the European Union legislature considered that those two categories of travel agents were not in a comparable situation” (C-599/12, *Jetair*)
  - No extension of VAT exemptions to comparable situations (e.g., C-174/11, *Zimmermann* [non-profit activities]; C-502/13, *Commission/Luxembourg* [no application of reduced VAT rate for books to e-books])
  - No concerns with regard to the country-specific exceptions in Art 370 et seq VAT-Directive (see, however, Opinion of AG Kokott, C-144/13 ua, *VDP Dental Laboratory*)
- Interpretation in line with primary law (e.g., 218/82, *Commission/Council*)
- Also: No incompatibility if Directives leave Member States sufficient leeway to allow for an implementation that is in line with primary law (e.g., *Wachauf*, *Socridis*).

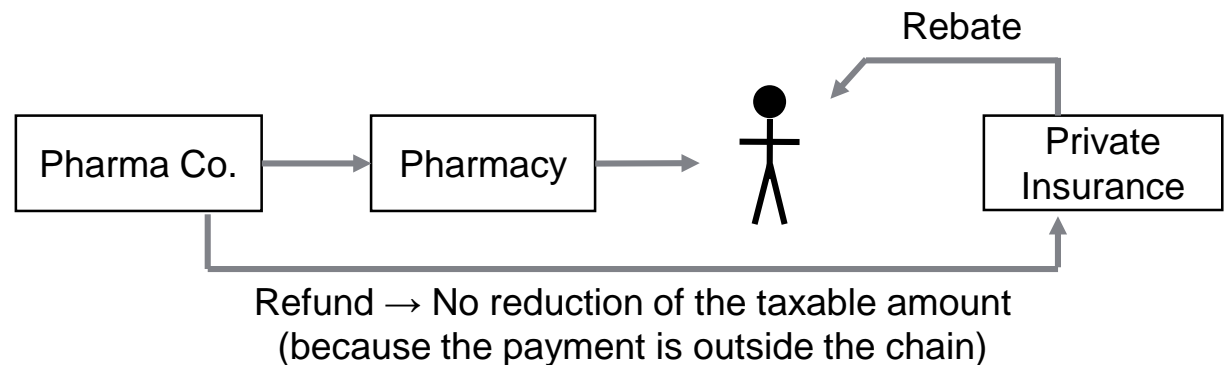
# SITUATION 1 | IMPLEMENTATION

- **Example:** Equal treatment in VAT law (reduction of the tax base under Art 90 VAT Directive) – ECJ, 20 December 2017, C-462/16, *Boehringer Ingelheim Pharma GmbH & Co. KG*, EU:C:2017:1006

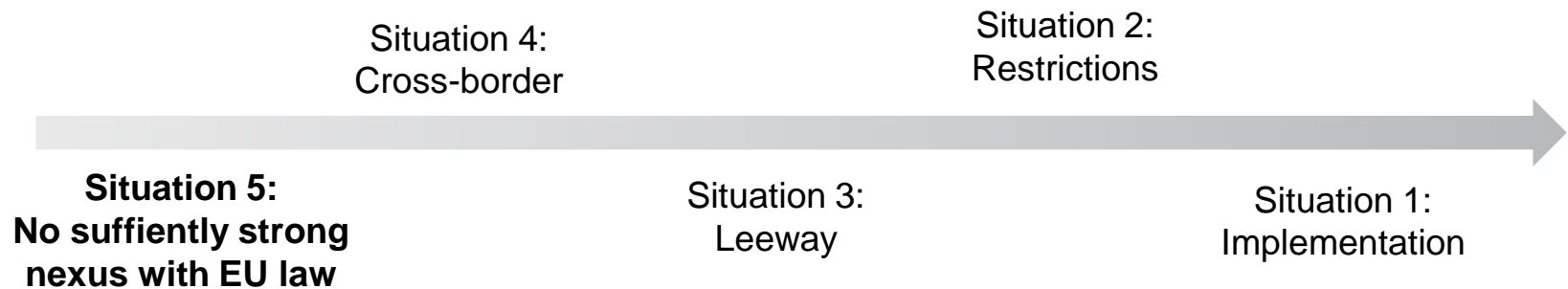
**Case 1:**  
Medicinal products for persons with *public* health insurance



**Case 2:**  
Medicinal products for persons with *private* health insurance

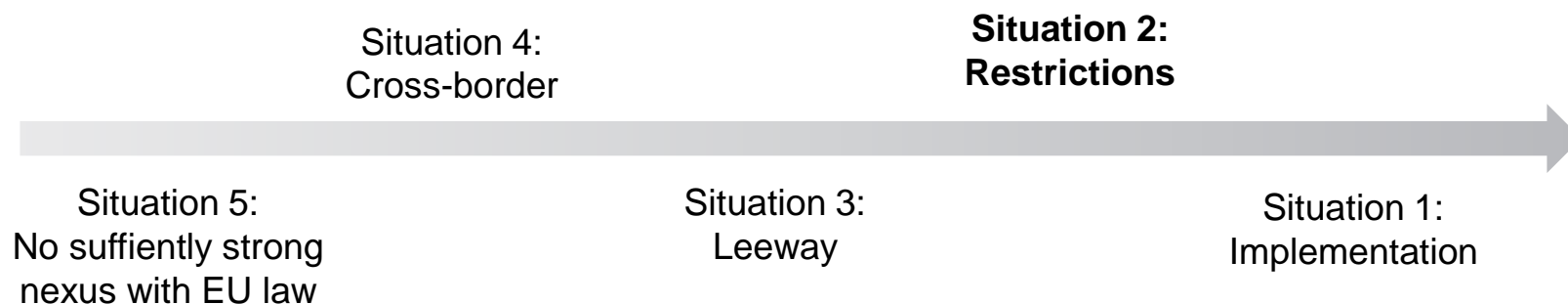


# SITUATION 5 | *NO SUFFICIENT NEXUS WITH EU LAW*



- No sufficient nexus to EU law (C-309/96, *Annibaldi*), specifically if there is no obligation for Member States following from EU law (C-206/13, *Siragusa*) or if there is only an abstract, non-exercised competence of the Union (e.g., Art 115 TFEU) (C-309/96, *Annibaldi*)
- “[T]he concept of ‘implementing Union law’, as referred to in Article 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other“ (e.g., C-206/13, *Siragusa*)
- Examples
  - Taxation of a Belgian by Belgium for an activity in Belgium (C-457/09, *Chartry*)
  - Different tax rates for different legal forms for agricultural activities (C-505/13, *Yumer*)
  - Double punishment for failure to withhold wage tax in a purely domestic income tax case (C-497/14, *Burzio*)
  - Additional tax on pension income (C-122/15, C)

# SITUATION 2 | *RESTRICTIONS*



- **Barrier-Barrier-Effect of fundamental rights** → Effect of fundamental rights on the justification of restrictions of the fundamental freedoms (C-260/89, *ERT*, and C-390/12, *Pfleger*) → Reinforcement of the fundamental freedoms through fundamental rights! → Problem of this higher standard in multi-polar situations.
- **Barrier-Effect of fundamental rights** → Protection of national fundamental rights may justify a restriction of fundamental freedoms (C-112/00, *Schmidberger*: free movement of goods vs free speech; C-36/02, *Omega*: freedom to provide services vs dignity; C-438/05, *Viking Line*: freedom of establishment vs right to strike) → Problem of weighing Union and national fundamental rights (see C-105/14, *Taricco*).

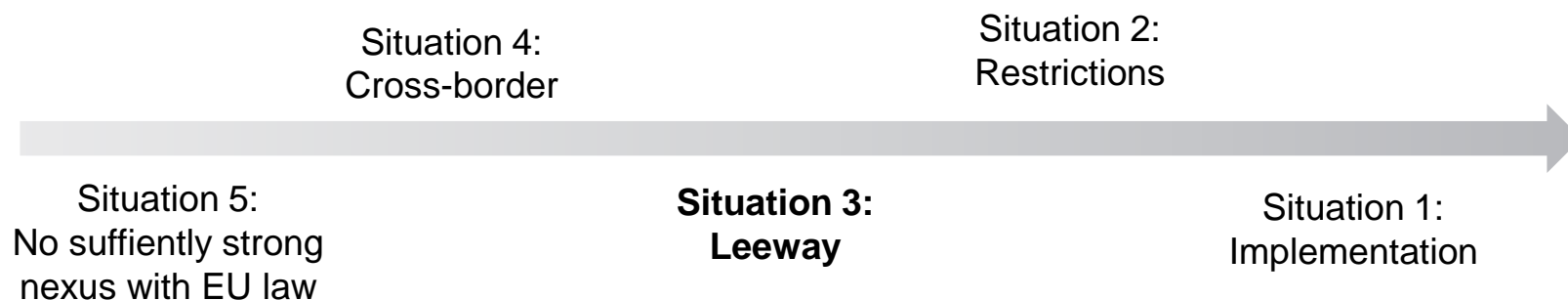
## SITUATION 2 | *RESTRICTIONS*

- **Example:** Barrier-Effect of fundamental rights – ECJ, 12 June 2003, C-112/00, *Schmidberger*



- Austrian agencies permit a truck-blockage (as protest against transit) on an Austrian highway
- Free movement of goods versus protection of freedom to assemble and free speech, both of which are also general (though not limitless) principles of Union law
- Balancing (= proportionality test) between impact on the fundamental right versus impact on the fundamental freedom

# SITUATION 3 | *LEEWAY*

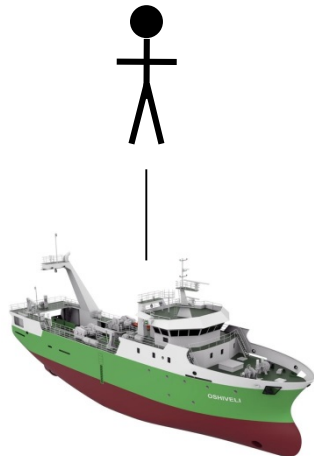


- E.g., exercise of leeway in secondary EU law (e.g., C-384/04, *Federation of Technological Industries*, C-84/09, X, C-20/00, *Booker Aquaculture Ltd*) or when there is sufficient nexus to EU law, even if domestic law is not “implementing” it, e.g.,
  - Surcharge and penalties to safeguard VAT collection (C-617/10, *Åkerberg Fransson*)
  - National statutes of limitation for VAT offenses (C-105/14, *Taricco*)
  - VAT collection in case of abuse (C-419/14, *WebMindLicenses*)
  - Penalties in exchange of information procedures (C-682/15, *Berlitz*)
  - Generally, procedure to administer implemented EU law, e.g., in the VAT area (e.g., right to a hearing)
- Union fundamental rights versus national fundamental rights → Both apply, if the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (C-399/11, *Melloni*; C-617/10, *Åkerberg Fransson*)

# SITUATION 3 | *LEEWAY*

- **Example 1: *Ne bis in idem*** (Art 50 Charter) – ECJ (Grand Chamber), 26 February 2013, C-617/10, **Åkerberg Fransson**

## Åkerberg Fransson

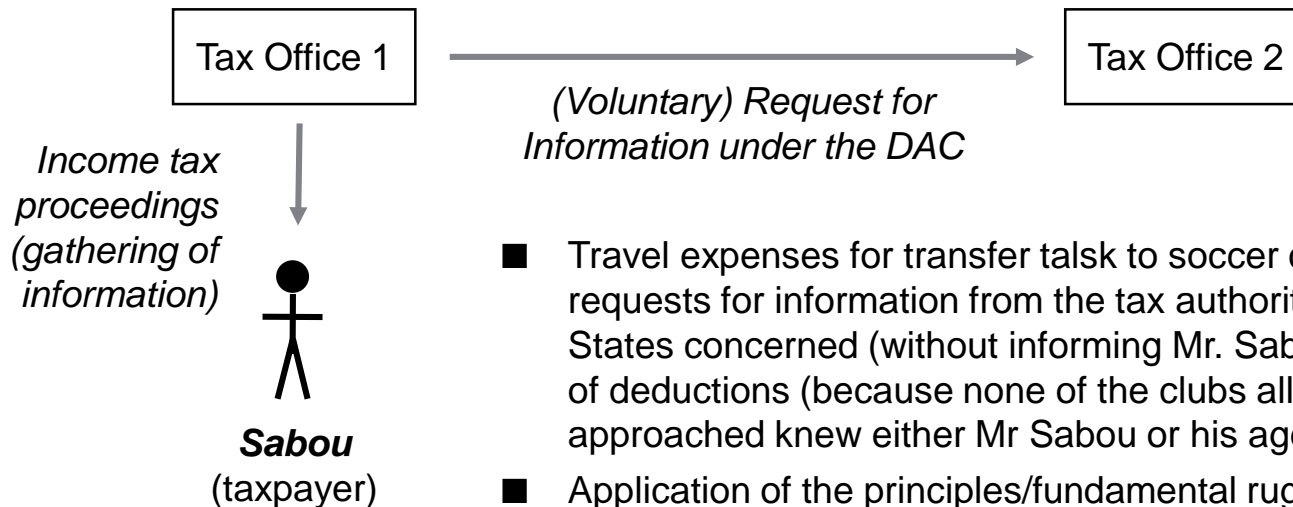


*Fishing activities*

- Non-declaration of revenues (for income tax and VAT) in 2004 and 2005 → Tax surcharges (5% to 40% of the unpaid amount) and indictment for tax offenses (prison sentence of 6 months to 6 years)
- “Implementation” of EU law? → Yes (Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion, protection of EU’s own resources; Art 2, Art 250(1) and Art 273 VAT Directive and Art 325 TFEU) → Contra Member States, EU Commission and AG *Cruz Villalón*!
- Application of the *ne bis in idem* principle of Art 50 of the Charter to a prosecution for tax evasion presupposes that the measures which have already been adopted against the defendant by means of a decision that has become final are of a criminal nature. → *Engel* criteria (legal qualification of the offense, nature of the offense and type and severity of the sanction) → Determination by the national court.
- What happens if the ECtHR would subsequently decrease the level of protection below the *Engel* criteria? → Pending as C-524/15, *Menci*

# SITUATION 3 | *LEEWAY*

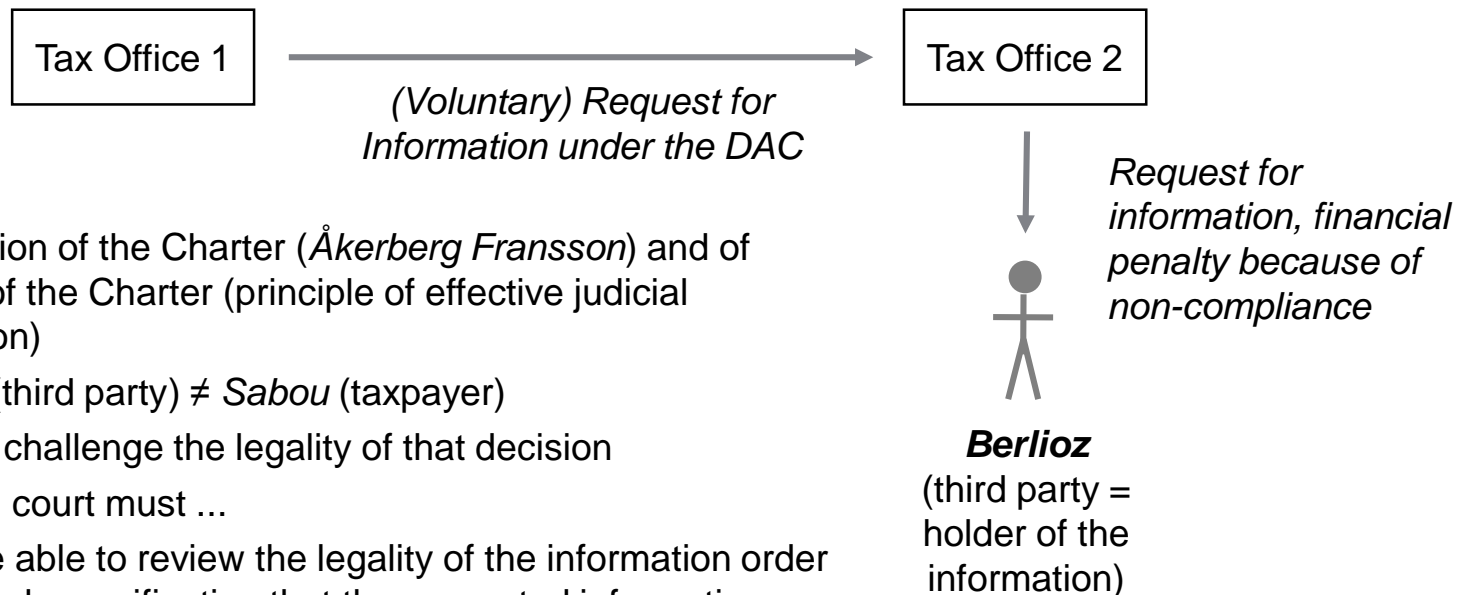
- **Example 2:** Exchange of information → ECJ (Grand Chamber), 16 May 2017, C-682/15, **Berlio**, EU:C:2017:373, versus ECJ (Grand Chamber), 22 October 2013, C-276/12, **Sabou**, EU:C:2013:678)



- Travel expenses for transfer talks to soccer clubs in other MS, requests for information from the tax authorities of the Member States concerned (without informing Mr. Sabou), disallowance of deductions (because none of the clubs allegedly approached knew either Mr Sabou or his agent)
- Application of the principles/fundamental rights of Union law, especially the right to be heard (pre-Charter)
- Distinguishing between the process of collecting information and the contradictory tax proceedings → No right to be heard in the former phase (because taxpayer can make use of his rights in the tax proceedings)

# SITUATION 3 | *LEEWAY*

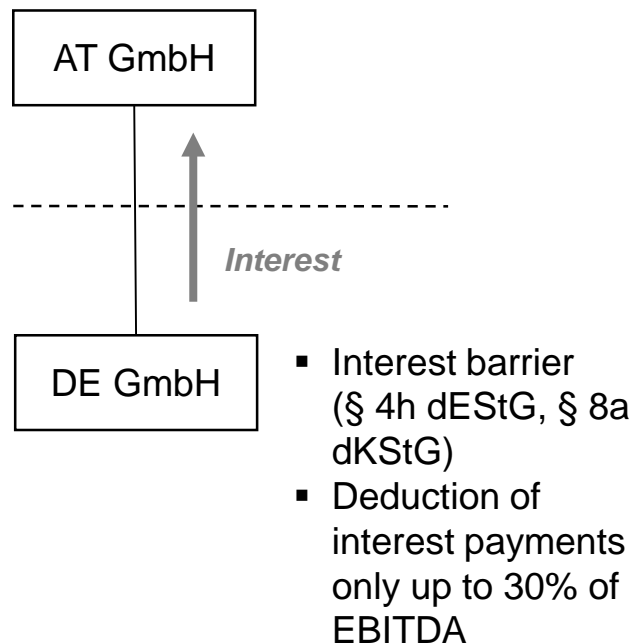
- **Example 3:** Exchange of information → ECJ (Grand Chamber), 16 May 2017, C-682/15, **Berlioz**, EU:C:2017:373, versus ECJ (Grand Chamber), 22 October 2013, C-276/12, **Sabou**, EU:C:2013:678)



- Application of the Charter (*Åkerberg Fransson*) and of Art. 47 of the Charter (principle of effective judicial protection)
- *Berlioz* (third party) ≠ *Sabou* (taxpayer)
- Right to challenge the legality of that decision
- National court must ...
  - ☐ ... be able to review the legality of the information order (includes verification that the requested information manifestly has no “foreseeable relevance”).
  - ☐ ... have access to the request for information addressed to the requested Member State

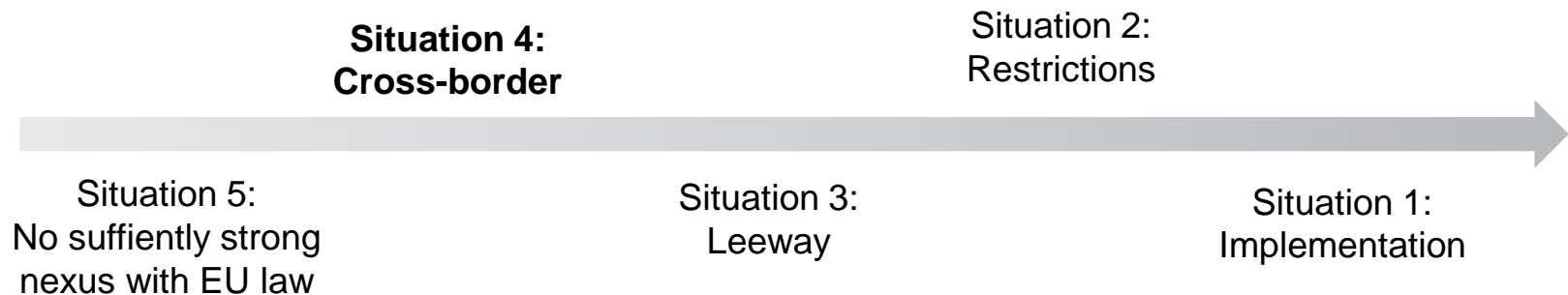
# SITUATION 3 | *LEEWAY*

- **Example 4:** “Cancellation” of national fundamental rights protection by EU law → Art 4 ATAD and the German interest barrier – German Bundesfinanzhof, 14 October 2015, I R 20/15, BFHE 252, 44 (pending at the German Constitutional Court as 2 BvL 1/16)



- Constitutional concerns against the national interest barrier rule in light of the principle of equality and the principle of ability to pay (BFH → BVerfG)
- Art. 4 ATAD (Directive (EU) 2016/1164) obliges Member States to implement an interest barrier (30% of EBITDA) by 1 January 2019
- ATAD “shields” national implementation against national constitutional scrutiny (primacy/supremacy of EU law) → Validity of the ATAD?
- But: Art 4 ATAD is only a minimum standard and Member States may be more lenient to taxpayers → Obligation of the Germany to fully exercise those options in light of domestic constitutional law?

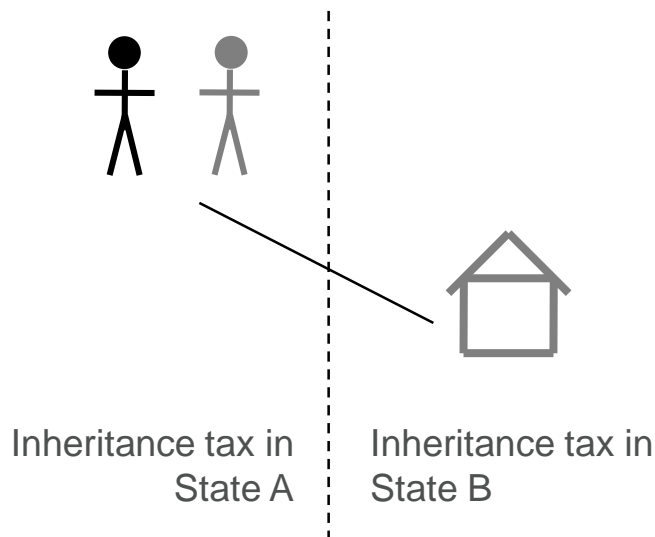
# SITUATION 4 | *CROSS-BORDER*



- It is unclear if the mere (unrestricted) exercise of a fundamental freedom already triggers the application of the Charter (unclear C-457/09, *Chartry*, and C-71/02, *Karner*, contra, e.g., German Bundesfinanzhof, 19 June 2013, II R 10/12, BFHE 241, 402; pro, e.g., Austrian Supreme Court, 4 March 2013, 8 Ob 7/13g)
- Too broad? Intended? Consequences?

# SITUATION 4 | *CROSS-BORDER*

- **Example:** Double taxation – German Bundesfinanzhof, 19 June 2013, II R 10/12, BFHE 241, 402



- Inheritance = Capital movement
- Double taxation is not a prohibited restriction (e.g., C-67/08, *Block*)
- But:
  - Application of Art 17 Charter (right to property)?  
→ Contra German Bundesfinanzhof, 19 June 2013, II R 10/12, BFHE 241, 402, because inheritance taxation is not EU law but rather national law undetermined by EU law.
  - Also: Unclear consequences of (excessive) double taxation within the scope of the ECHR

*CHAPTER III*  
CONCLUSIONS



# CONSEQUENCES

- **Future impact of the Charter in the post-BEPS-world?**
- **Active obligation of States to fight tax avoidance to protect fundamental rights and freedoms?** (Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24 [10.8.2017], Rz 37)

37. Consistent with article 28 of the Universal Declaration of Human Rights,<sup>87</sup> this obligation to fulfil requires States parties to contribute to creating an international environment that enables the fulfilment of the Covenant rights. To that end, States parties must take the necessary steps in their legislation and policies, including diplomatic and foreign relations measures, to promote and help create such an environment. States parties should also encourage business actors whose conduct they are in a position to influence to ensure that they do not undermine the efforts of the States in which they operate to fully realize the Covenant rights — for instance by resorting to tax evasion or tax avoidance strategies in the countries concerned. To combat abusive tax practices by transnational corporations, States should combat transfer pricing practices and deepen international tax cooperation, and explore the possibility to tax multinational groups of companies as single firms, with developed countries imposing a minimum corporate income tax rate during a period of transition. Lowering the rates of corporate tax solely with a view to attracting investors encourages a race to the bottom that ultimately undermines the ability of all States to mobilize resources domestically to realize Covenant rights. As such, this practice is inconsistent with the duties of the States parties to the Covenant. Providing excessive protection for bank secrecy and permissive rules on corporate tax may affect the ability of States where economic activities are taking place to meet their obligation to mobilize the maximum available resources for the implementation of economic, social and cultural rights.<sup>88</sup>

*PART V*

# DIRECT TAX DIRECTIVES



JOHANNES KEPLER  
UNIVERSITÄT LINZ

# CONTENT

- ***Chapter I*** – Anti-Tax-Avoidance-Directive (ATAD)
- ***Chapter II*** – Parent-Subsidiary-Directive (PSD)
- ***Chapter III*** – Interest-Royalties-Directive (IRD)
- ***Chapter IV*** – Dispute Resolution

# OVERVIEW | *BACKGROUND*

## ■ Secondary EU Law → Directives (Art 115 TFEU)

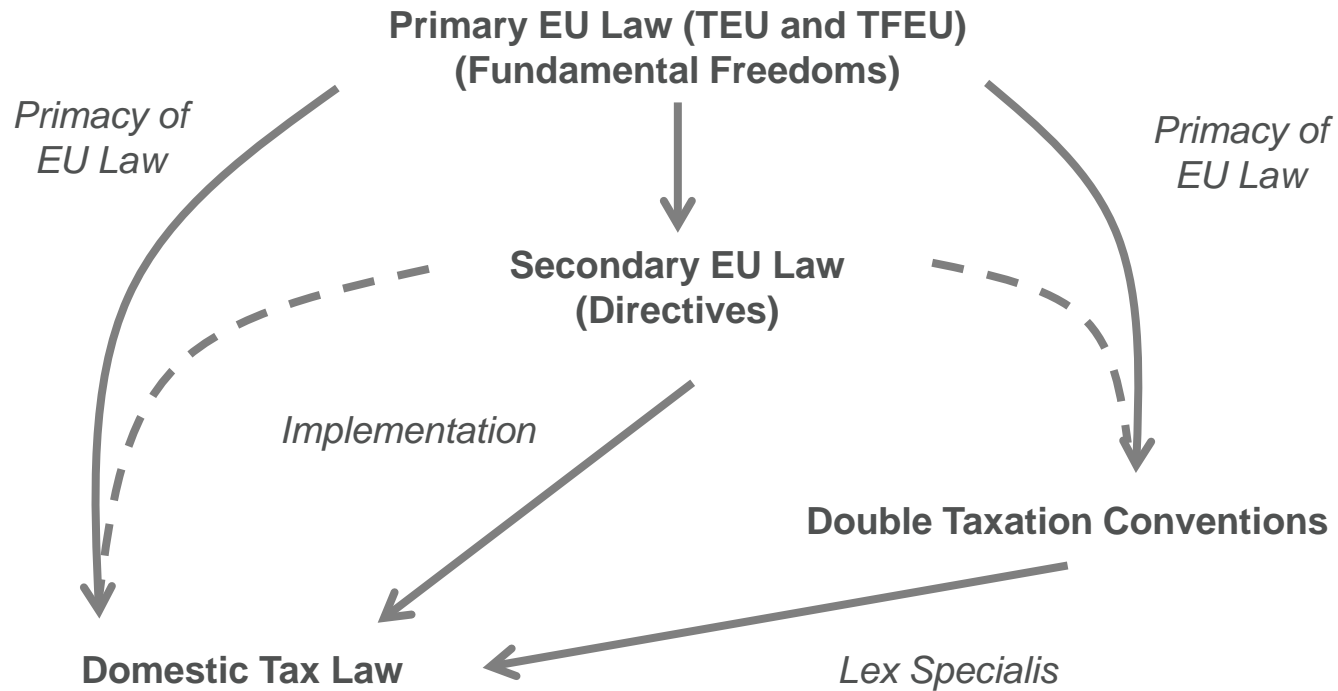
### □ *Taxpayers*

- Anti-Tax-Avoidance-Directive (ATAD) (Directive (EU) 2016/1164, [2016] OJ L 193/1), as amended by Directive (EU) 2017/952, [2017] OJ L 144/1 [7 June 2017])
- Parent-Subsidiary-Directive (Council Directive 2011/96/EU, [2011] OJ L 345/8, as amended by Directive 2014/86/EU, [2014] OJ L 219/40, and Directive (EU) 2015/121, [2015] OJ L 21/1)
- Merger Directive (Directive 2009/133/EC, [2009] OJ L 310/34)
- Interest-Royalties-Directive (Directive 2003/49/EC, [2003] OJ L 157/49) – *Amending proposal COM(2011) 714 final (11 November 2011)*
- Dispute Resolution Directive (Directive (EU) 2017/1852, [2017] OJ L 265)

### □ *Tax administrations*

- Directive on Mutual Assistance (Directive 2011/16/EU, [2011] L 64/1, as amended by Directive 2014/107/EU, [2014] OJ L 359/1, Directive (EU) 2015/2376, [2015] OJ L 332/1, Directive (EU) 2016/881, [2016] OJ L 146/8, Directive (EU) 2016/2258, [2016] OJ L 342/1, and Directive (EU), [2018] OJ L 139/1)
- Directive on Recovery of Tax Claims (Directive 2010/24/EU, [2010] OJ L 84/1)
- Savings Interest Directive (Directive 2003/48/EC, [2003] OJ L 157/38, as amended by Directive 2014/48/EU, [2014] OJ 111/50) – *Repealed by Council Directive (EU) 2015/2060 of 10 November 2015, [2015] OJ L 301/1*

# OVERVIEW | *BACKGROUND*



# LEGAL CONTEXT | *RELATIONSHIP TO DOMESTIC LAW*

## ■ ***Example: Implementation of the Parent-Subsidiary-Directive into Domestic Tax Law***

- ☐ Parent-Subsidiary-Directive: 1 January 1992
- ☐ Enlargement 2004: 2003/123/EC: 1 January 2005
- ☐ Enlargement 2007: 2006/98/EC: 1 January 2007
- ☐ Recast 2011: 2011/96/EU: 18 January 2012
- ☐ Enlargement 2013: 2013/13/EU: 1 July 2013
- ☐ Amendments 2014 and 2015: 1 January 2016

## ■ ***Directive-Conform Interpretation***

## ■ ***Direct Applicability***

- ☐ Avoidance of Economic Double Taxation (Art 4) → ECJ, 12 February 2009, C-138/07, ***Cobelfret***, EU:C:2009:82, para. 65; ECJ, 4 June 2009, C-439/07, ***KBC Bank***, EU:C:2009:339, para. 48
- ☐ Prohibition of Withholding Taxation (Art 5) → ECJ, 17 October 1996, C-283/94 etc, ***Denkavit, VITIC and Vormeer***, EU:C:1996:387, paras. 37 et seq.

# LEGAL CONTEXT | *RELATIONSHIP TO THE FUNDAMENTAL FREEDOMS*

## ■ ***Directives and Fundamental Freedoms***

- Problem: Is the domestic implementation of a Directive “immunized” from scrutiny under the freedoms if the domestic implementation is discriminatory?
  - Unconditional protection by the freedoms?
  - Erosion of the fundamental freedoms through Directives?
  - Legal certainty for the Member States?
  - Hypothetical non-acceptance by the Member States?
  - Presumed conformance of primary and secondary EU Law?

## ■ ***Three Situations***

- Directive ***imposes an obligation*** to enact certain measures → No violation of the freedoms (e.g., ECJ, 11 December 2003, C-322/01, *DocMorris*, [2003] ECR I-14887, paras. 52-53)
- Directive ***prohibits certain measures*** → No recourse to farther reaching grounds of justification under the freedoms by Member States (zB ECJ, 20 September 1988, 190/87, *Moormann*, [1988] ECR 4689, paras. 10-11)
- ***Permissions, options*** → Parent-Subsidiary-Directive?

# LEGAL CONTEXT | *RELATIONSHIP TO THE FUNDAMENTAL FREEDOMS*

## ■ **Examples: Parent-Subsidiary-Directive and the Fundamental Freedoms**

### □ **Non-Regulation**

- Subjective Scope of Application → ECJ, 18 June 2009, C-303/07, **Aberdeen**, [2009] ECR I-5145, para. 28
- Objective Scope of Application → E.g., ECJ, 8 November 2007, C-379/05, **Amurta**, [2007] ECR I-9569, paras. 18-24, and ECJ, 12 December 2006, C-374/04, **ACT Group Litigation**, [2006] ECR I-11673, paras. 53-54

### □ **Options**

- Holding Costs (Art 4(2)) → ECJ, 18 September 2003, C-168/01, **Bosal**, EU:C:2003:479, paras. 21-28, ECJ, 23 February 2006, C-471/04, **Keller Holding**, [2006] ECR I-2107, para. 45, and ECJ, 2 September 2015, C-386/14, **Groupe Steria**, EU:C:2015:524
- Choice of Method (Art 4(1) – Indirect Credit versus Exemption) → ECJ, 12 February 2006, C-446/04, **FII Group Litigation**, [2006] ECR I-11753, para. 46

### □ **Specific Permission for a Specific Member State**

- ECJ, 5 October 2004, C-475/01, **Commission/Greece (“Ouzo”)**, [2004] ECR I-8923,
- E.g., withholding tax permission for Germany under Art 5(3) of the pre-amendment version of the Directive (until 30 June 1996)

*CHAPTER I*  
ANTI-TAX-AVOIDANCE-  
DIRECTIVE



# BEPS AND C(C)CTB | *ANTI-TAX AVOIDANCE DIRECTIVE*

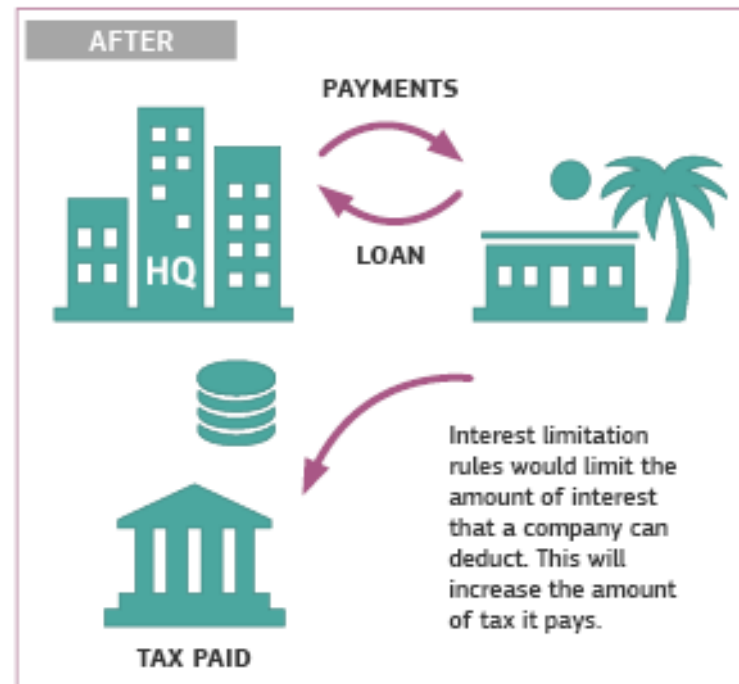
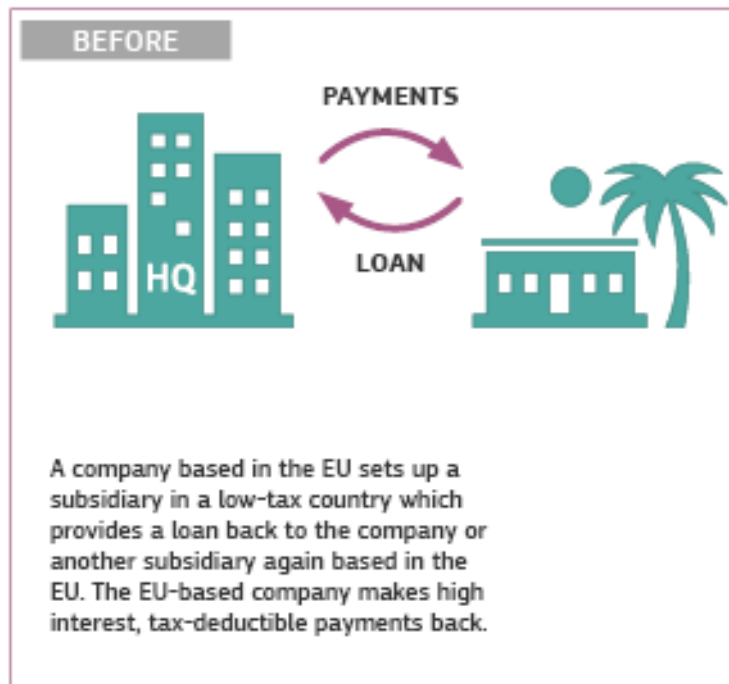
- *Carve-out of BEPS-related topics from the CCCTB project for a “standalone” directive*
- *Work of the Luxembourg Presidency in Council*
  - Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) – State of play (Doc. 14509/15 FISC 169 ECOFIN 916 (1 December 2015))
  - Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) (Doc. 14544/15 FISC 171 (2 December 2015))
  - Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) – Explanatory notes (Doc. 14544/15 ADD 1 FISC 171 (2 December 2015))
- *Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market (COM(2016) 26 final (28 January 2016)) – The “Anti-Tax Avoidance Directive” (“ATAD”, “Anti-BEPS-Directive”)*
- *Adoption of the Anti-Tax-Avoidance-Directive as Council Directive (EU) 2016/1164, [2016] OJ L 193/1, in June 2016*
- *Amended with regard to hybrids by Directive (EU) 2017/952, [2017] OJ L 144/1 (based on Proposal COM(2016)687)*

# ATAD | OVERVIEW

- **Applicable to all EU corporate taxpayers and PEs of third-country corporate taxpayers (Art 1)**
- **Definitions, e.g., of interest etc (Art 2)**
- **Only “minimum level of protection” (Art 3), i.e., Member States can go beyond the rules of the Directive to protect their corporate tax bases**
- **Substantive rules of the Anti-Tax Avoidance Directive**
  - Limit interest deductions, i.e., for net interest expense > 30% EBITDA or > €3 million (Art 4);
  - Exit taxation rules for the cross-border transfer of assets, permanent establishments or a company’s seat with a 5-year-installment option inside EU/EEA (Art 5)
  - General Anti Abuse Rule (GAAR) (Art 6);
  - CFC rules based on control, low tax and certain types of income with carve-outs for EU/EEA based on artificiality (Arts 7 and 8); and
  - Hybrid mismatch rules for double deduction and deduction/no inclusion situations (Art 9).
  - *No switch-over clause! (Formerly Art 6 of the Commission’s proposal.)*
- **Implementation**
  - Until 31 December 2018 (Art 12(1))
  - Exceptions for exit taxation (31 December 2019), interest deductions (1 January 2024, if a Member State already has effective rules in place) and the old/amended hybrid rules, 1 January 2020/2022)

# ATAD | *INTEREST LIMITATION*

## THE LOW TAX LOANS: Interest Limitation Rules



Source: [http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/anti\\_tax\\_avoidance/key\\_measures/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/key_measures/index_en.htm)

# ATAD | *INTEREST LIMITATION*

## ■ **Limitation** → **OECD BEPS Action 4**

- Deductibility of “exceeding borrowing costs” only up to 30% of the taxpayer’s EBITDA (Art 4(1))
- Exceeding borrowing costs = interest expense > taxable interest revenues (Art 2(1), (2)) including economically equivalent costs/revenues (= OECD Action 4, para. 36)
- Single taxpayer or group-wide perspective (Art 4(1)(a) and (b) – Option for MS)

## ■ **Deductibility of “exceeding borrowing costs”**

- Fixed Ratio Rule
  - 30% of taxpayer’s EBITDA (Art 4(1))
  - EBITDA (Art 4(2) = Income subject to corporate tax + tax adjusted exceeding borrowing costs + tax adjusted depreciation/amortization (+ impairments [?]) – OECD Action 4, para. 142) → “Tax EBITDA” – *Unlike OECD Action 4, para. 78, no fractional exclusion of income benefitting from a foreign tax credit.*
- *De minimis*-Threshold → € 3 Mio of exceeding borrowing costs (Art 4(3)(a) – Option for MS)
- Standalone-Exception → Full deduction if taxpayer is a standalone entity (Art 4(3)(a) – Option for MS) – *Definition of associated enterprises in Art 2(4).*
- Grandfathering-Exception → Loans concluded before 17 June 2016, unless subsequently modified (Art 4(4)(a) – Option for MS)
- Public Infrastructure Exception → Loans used to fund EU long-term public infrastructure projects (Art 4(4)(b) – Option for MS)

# ATAD | *INTEREST LIMITATION*

## ■ ***Deductibility of “exceeding borrowing costs”***

- Group-Equity-Escape-Clause (Art 4(5)(a) – Option for MS)
  - Taxpayer is a member of a consolidated group for financial accounting purposes (→ Definition in Art 4(8))
  - Full deduction of exceeding borrowing costs if the taxpayer's ratio equity:assets  $\geq$  group's ratio equity:assets (2% window)
- Group Ratio Rule = Group-EBITDA-Escape-Clause (Art 4(5)(b) – Option for MS)
  - Taxpayer is a member of a consolidated group for financial accounting purposes (→ Definition in Art 4(8))
  - Deduction of exceeding borrowing costs →  
$$\frac{\text{Group's exceeding borrowing costs vis-à-vis third parties}}{\text{Group's EBITDA}} * \text{Taxpayer's EBITDA}$$

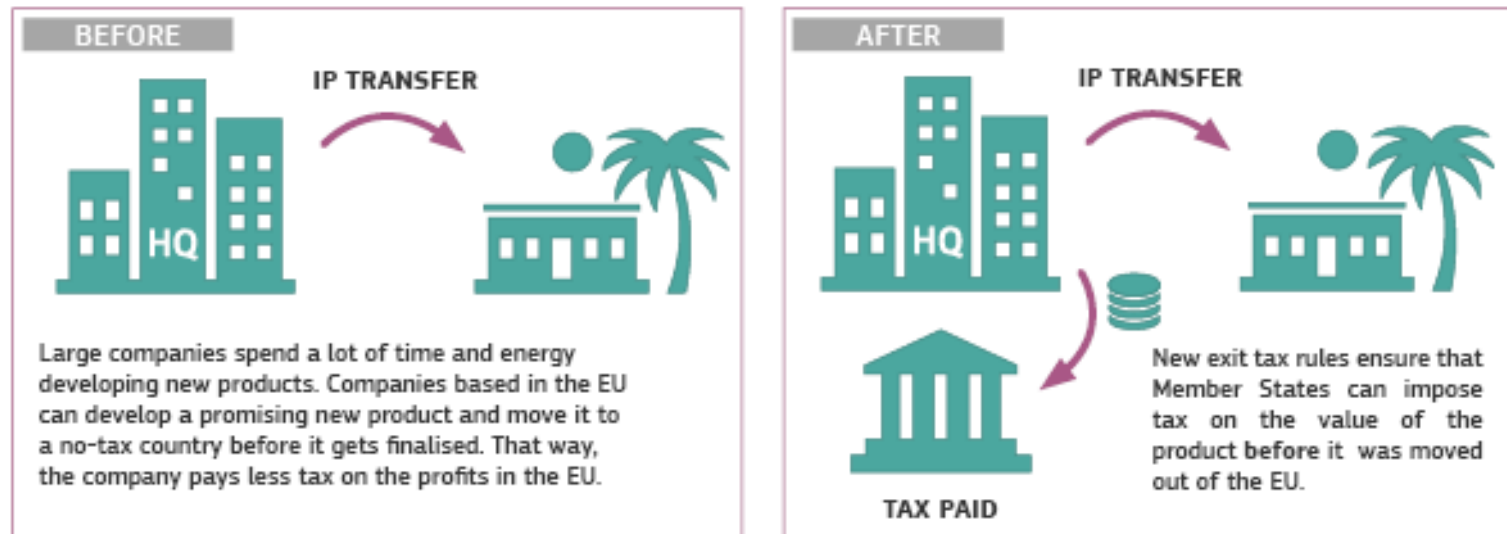
# ATAD | *INTEREST LIMITATION*

## ■ ***Deductibility of “exceeding borrowing costs”***

- ☐ Exclusion of financial undertakings Art 4(7) – Option for MS)
- ☐ Timing issues (Art 4(6) – Option for MS)
  - Carry forward of exceeding borrowing costs without time limitation (Art 4(6)(a)) or
  - Carry forward without time limitation and carry back for three years of exceeding borrowing costs (Art 4(6)(b)) or
  - Carry forward of exceeding borrowing costs without time limitation and carry forward of unused interest capacity for a maximum of five years (Art 4(6)(c))

# ATAD | *EXIT TAXATION*

## THE PATENT FLIGHT: New Exit Taxation Rules



Source: [http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/anti\\_tax\\_avoidance/key\\_measures/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/key_measures/index_en.htm)

# ATAD | *EXIT TAXATION*

## ■ *Exit State*

- ☐ Tax on market value (→ Art 5(6)) less tax value (Art 5(1)) in cases of ...
  - ... transfer of assets from head office to foreign permanent establishment.
  - ... transfer of assets from permanent establishment to foreign head office or permanent establishment.
  - ... transfer of residence of the taxpayer (except for assets that remain effectively connected with a permanent establishment in the exit State).
  - ... transfer of the business carried on by a permanent establishment.
- ☐ Always: Exit State must lose taxing right!
- ☐ Exclusion of short-term transfers (Art 5(7))
- ☐ Deferral
  - Instalment payments of the tax over 5 years if exit to EU Member State or EEA Member State with recovery of tax claims (Art 5(2) – *DMC* and *Verder LabTec*)
  - Interest (Art 5(3))
  - Guarantee if there is a demonstrable and actual risk of non-recovery (Art 5(3))
  - Discontinuation of the deferral, e.g., if assets are sold, assets are transferred to a third country etc (Art 5(4))

## ■ *Import State*

- ☐ Step-up to market value (Art 5(5))

# ATAD | *EXIT TAXATION*

## ■ *Excursus: Relationship between exit taxes and tax treaties*

- **No Step-Up** → Threat of double taxation, but MAP (Para 67 of Final Report of Action 6)
- **Timing** → OECD MC Update 2014 → Art. 13 OECD MC covers the whole capital gain (Art 13 Para 3.1 OECD MC Comm)

**3.1** The Article does not specify to what kind of tax it applies. It is understood that the Article must apply to all kinds of taxes levied by a Contracting State on capital gains. The wording of Article 2 is large enough to achieve this aim and to include also special taxes on capital gains. *Also, where the Article allows a Contracting State to tax a capital gain, this right applies to the entire gain and not only to the part thereof that has accrued after the entry into force of a treaty (subject to contrary provisions that could be agreed to during bilateral negotiations), even in the case of a new treaty that replaces a previous one that did not allow such taxation.*

### *Observation on the Commentary*

**32.1** *With respect to paragraph 3.1, Austria and Germany hold the view that when a new tax treaty enters into force, these countries cannot be deprived of the right to tax the capital appreciation which was generated in these countries before the date when the new tax treaty became applicable.*

# ATAD | *GAAR*

## THE SAFETY NET: A General Anti-Abuse Rule (GAAR)

### BEFORE



Companies engaged in aggressive tax planning continue to try and find ways of bypassing rules and finding loopholes in tax laws.

### AFTER



A GAAR gives EU countries the power to tackle artificial tax arrangements if other specific rules don't cover it.

Source: [http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/anti\\_tax\\_avoidance/key\\_measures/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/key_measures/index_en.htm)

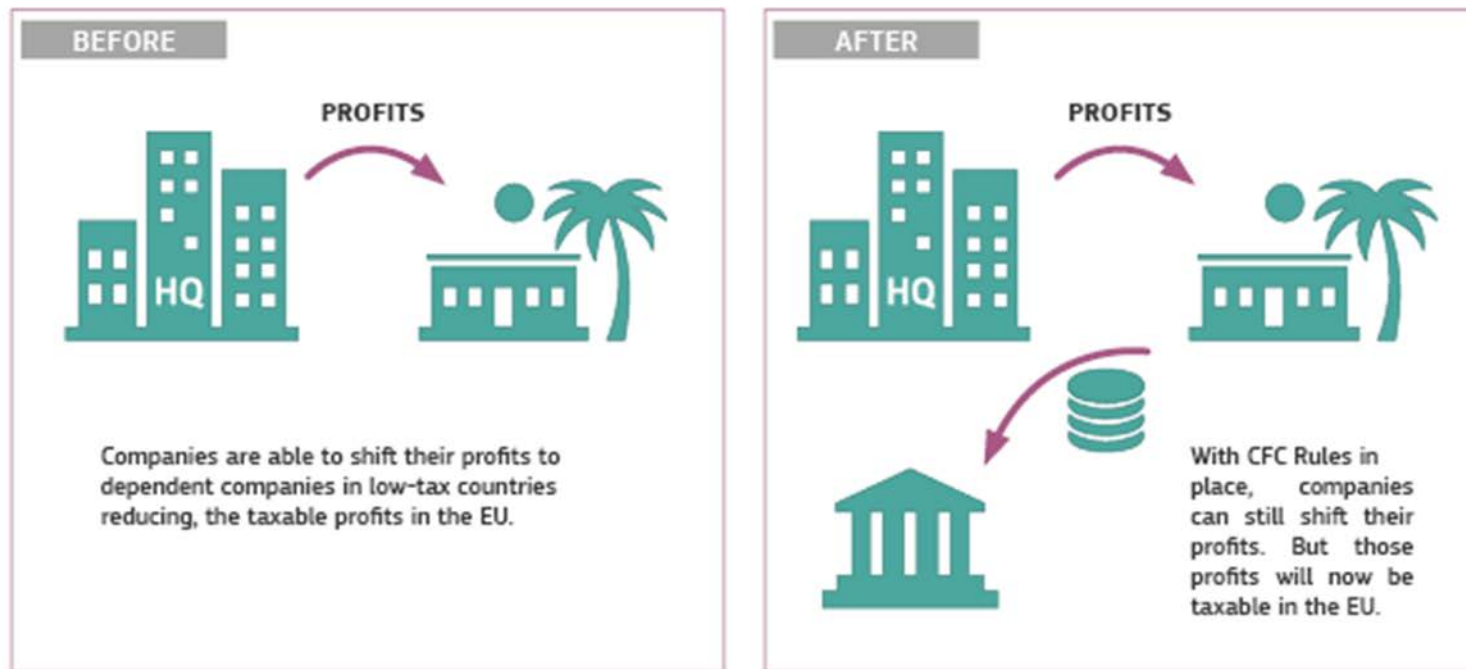
## ■ Article 6

### General anti-abuse rule

1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.
2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.
3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law.

# ATAD | *CFC RULE*

## THE CLASSIC PROFIT SHIFT: Controlled Foreign Companies (CFC) Rules



Source: [http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/anti\\_tax\\_avoidance/key\\_measures/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/key_measures/index_en.htm)

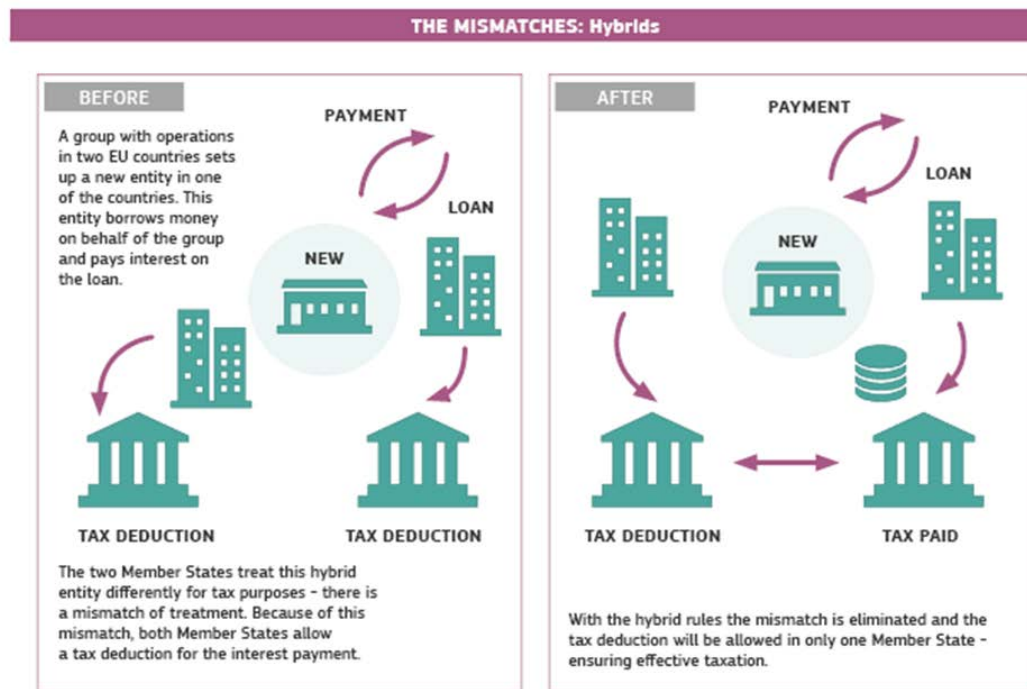
# ATAD | *CFC RULE*

## ■ **Controlled Foreign Company (CFC) Rule → OECD BEPS Action 3**

- CFC = Entity or permanent establishment under the following conditions (Art 7(1))
  - taxpayer (+ associated enterprises) holds directly or indirectly > 50% voting rights or > 50% capital or > 50% profits entitlement (Art 7(1)(a)) *and*
  - actual corporate tax paid on profits is lower than the difference between the hypothetical corporate tax in the taxpayer's state and the actual corporate tax (Art 7(1)(b))
- Inclusion in the tax base of ...
  - ... certain non-distributed income (e.g., interest, royalties, dividends, capital gains, financial leasing income, insurance, banking income) unless the (EU or EEA) CFC carries on a substantive economic activity (supported by staff, equipment, assets and premises) (Art 7(2)(a)) or
  - ... the non-distributed arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage (Art 7(2)(b))
- Certain exclusions from the CFC rule (Art 7(3) and (4) – Option for MS)
- Calculation of CFC income → Art 8

# ATAD | *HYBRID MISMATCHES*

- Hybrid mismatches → Art 9 fully amended by ATAD 2 (Directive (EU) 2017/952, [2017] OJ L 144/1 [7 June 2017]) – Implementation before 2020 (with exception for reverse hybrid entities, 2022)



Source: [http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/anti\\_tax\\_avoidance/key\\_measures/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/key_measures/index_en.htm)

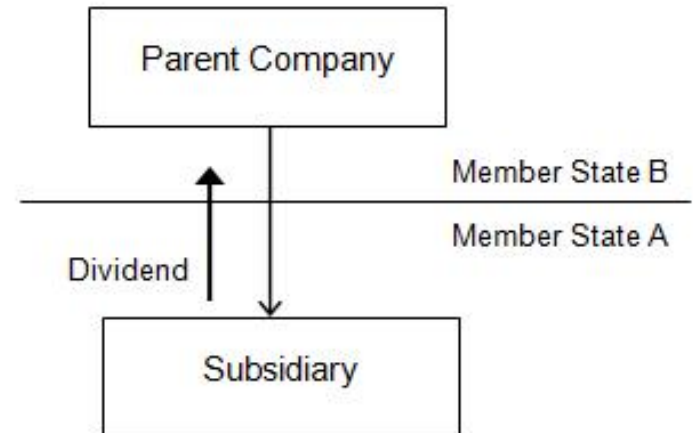
*CHAPTER II*  
PARENT-SUBSIDIARY-  
DIRECTIVE



# OVERVIEW | *CROSS-BORDER PROFIT DISTRIBUTIONS*

## ■ **Economic Double Taxation**

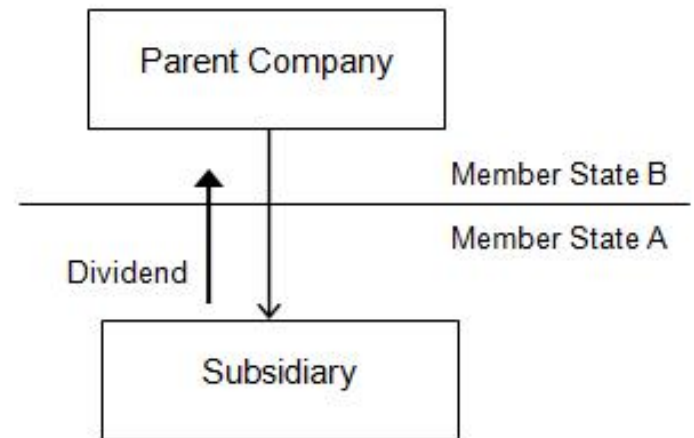
- Corporate Level Tax in one State and Shareholder Level Tax in the other State
- Solutions
  - Usually no solution in DTCs (but: participation privileges)
  - Extension of the domestic integration system to cross border-dividends → Freedom of Capital Movement
  - Prohibition of economic double taxation → Parent-Subsidiary-Directive (Art 4)



# OVERVIEW | *CROSS-BORDER PROFIT DISTRIBUTIONS*

## ■ *Juridical Double Taxation*

- Source State (= State of residence of the distributing company) levies a withholding tax (e.g., 25%), i.e., a tax on the foreign shareholder, and the Residence State of the shareholder taxes the dividends received
- Solutions
  - Reduction of withholding taxes by the Source State and credit by the Residence State → DTCs (Art 10, 23 OECD-MC)
  - Extension of the domestic system to cross border-dividends → Freedom of Capital Movement
  - Prohibition of source taxation → Parent-Subsidiary-Directive (Art 5 and EU-Swiss Agreement)



# OVERVIEW | *OBJECTIVE*

## ■ *Objective*

- Removal of tax barriers concerning the distribution of profits within a group of companies
- Twofold approach
  - Relief from juridical double taxation through exemption from withholding taxation on the subsidiary level → *Art 5*
  - Relief from economic double taxation through either exemption or indirect tax credit on the parent level → *Art 4*

# OVERVIEW | *LEGAL SOURCES*

## ■ *Directive and Amendments*

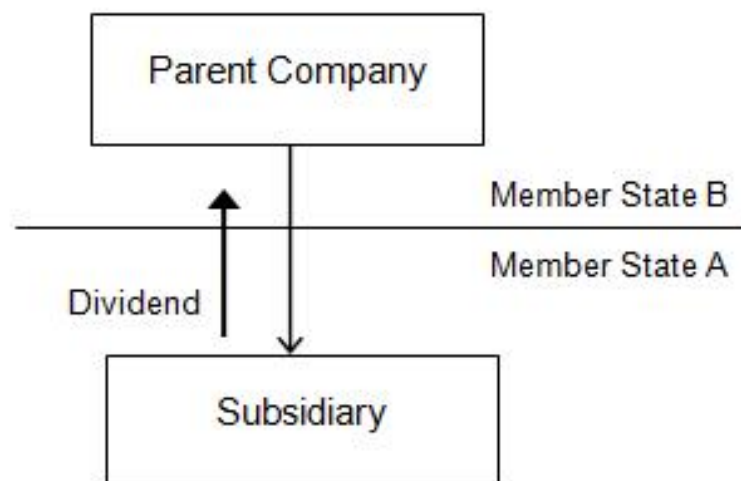
- **Original Version** – Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [1990] OJ L 225, p. 6, with correction in [1990] OJ L 266, p. 20 (proposal KOM(69)6 endg.)
- **2003 Amendment** – Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [2004] L 7, p. 41 (proposal COM(2003)462 final)
- **Enlargement** – Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (recast), [2011] OJ L 345, p. 8 (proposal COM(2010) 784 final)
- **Hybrid Loans** – Council Directive 2014/86/EU of 8 July 2014 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [2014] OJ L 219, p. 40 (proposal COM(2013)814 final)
- **Anti-Abuse** – Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [2014] OJ L 21/1 (proposal COM(2013) 814 final)

# OVERVIEW | *STRUCTURE*

- **Art 1** – Scope of Application and Anti-Abuse
- **Art 2** – Definition of “company of a Member State” and “permanent establishment”
- **Art 3** – Definition of “parent” and “subsidiary” company
- **Art 4** – Avoidance of economic double taxation on the parent level (exemption or indirect credit) and inclusion of hybrid entities
- **Art 5** – Avoidance of juridical double taxation on the subsidiary level (prohibition of withholding taxation)
- **Art 6** – Prohibition of withholding taxation in the parent’s country
- **Art 7** – Exclusion of prepayments and certain measures for the avoidance of double taxation from the definition of taxation at source
- **Art 8** – Deadline for implementation
- **Art 11** – Directive is addressed to the Member States

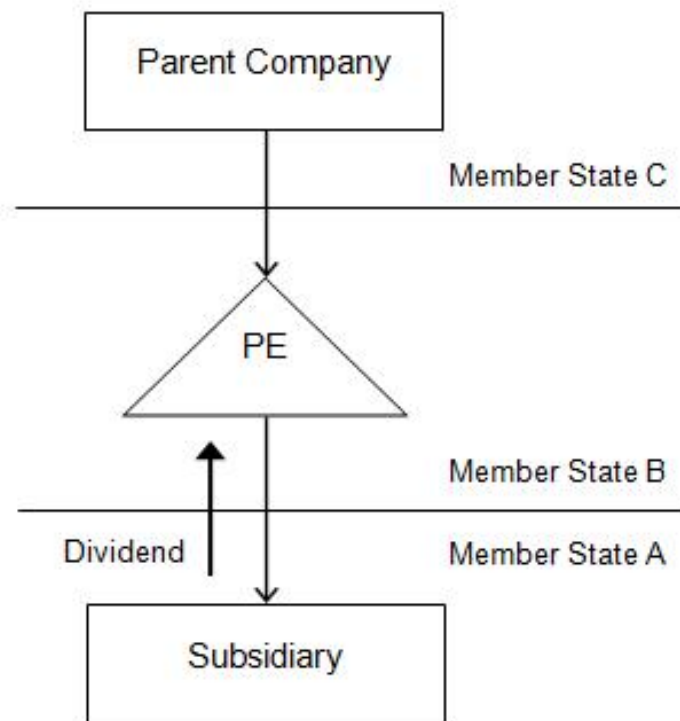
# SCOPE OF APPLICATION | *ARTICLE 1*

- *Art 1* — Each Member State shall apply this Directive
  - a. *to distributions of profits received by companies of that State which come from their subsidiaries of other Member States*
  - b. *to distributions of profits by companies of that State to companies of other Member States of which they are subsidiaries*
  - c. to distributions of profits received by permanent establishments situated in that State of companies of other Member States which come from their subsidiaries of a Member State other than that where the permanent establishment is situated
  - d. to distributions of profits by companies of that State to permanent establishments situated in another Member State of companies of the same Member State of which they are subsidiaries



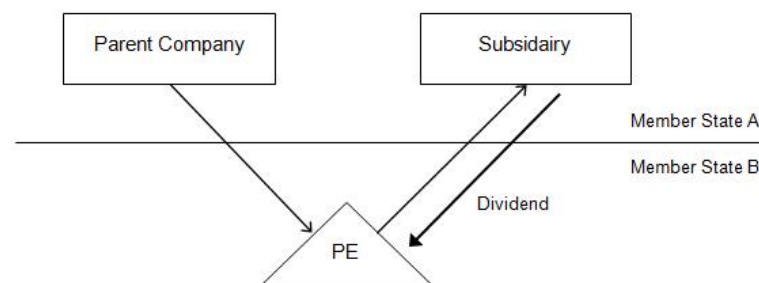
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  - d. *to distributions of profits by companies of that State to permanent establishments situated in another Member State of companies of the same Member State of which they are subsidiaries*



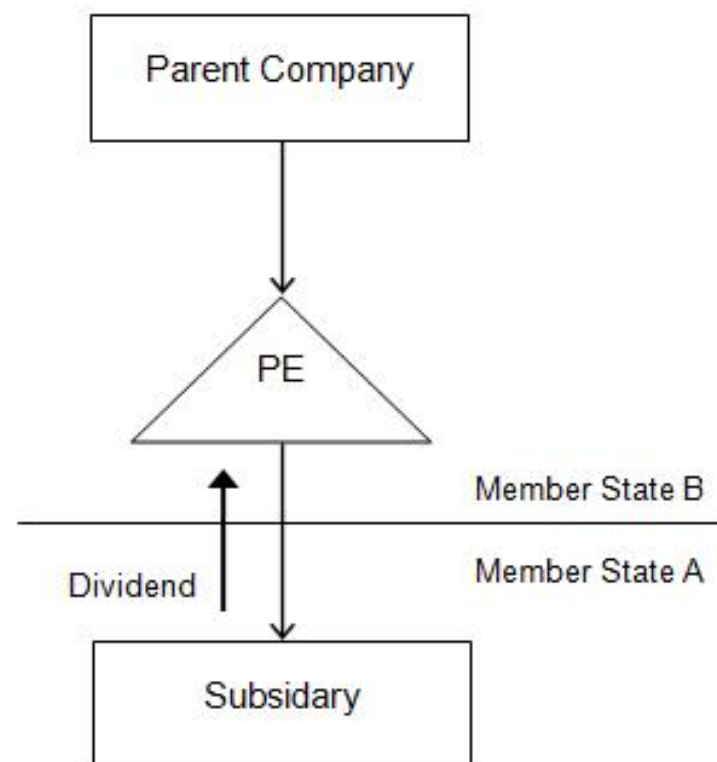
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- **Art 1** — Each Member State shall apply this Directive
  - a. *to distributions of profits received by companies of that State which come from their subsidiaries of other Member States (→ Art 3(1)(a)(ii))*
  - b. **to distributions of profits by companies of that State to companies of other Member States of which they are subsidiaries**
  - c. *to distributions of profits received by permanent establishments situated in that State of companies of other Member States which come from their subsidiaries of a Member State other than that where the permanent establishment is situated*
  - d. *to distributions of profits by companies of that State to permanent establishments situated in another Member State of companies of the same Member State of which they are subsidiaries*



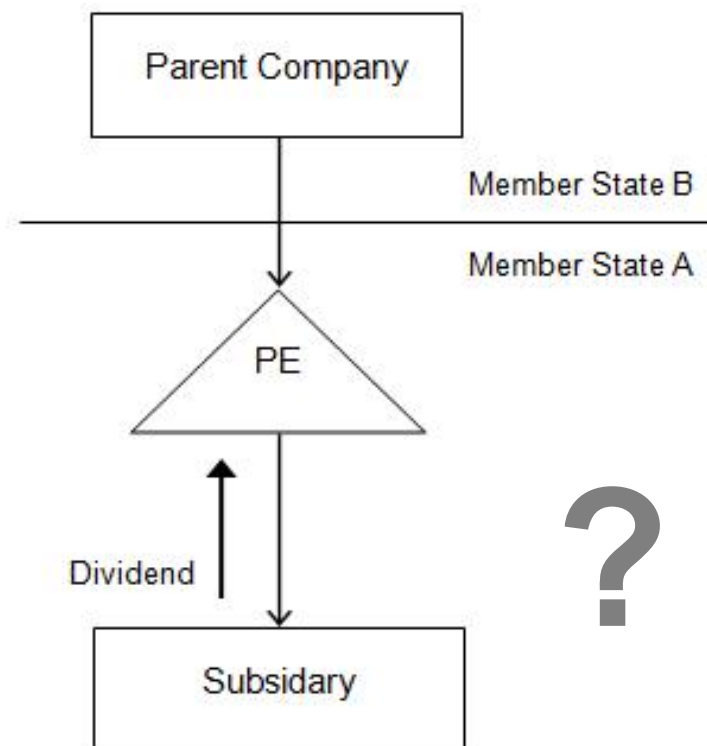
# SCOPE OF APPLICATION | *ARTICLE 1*

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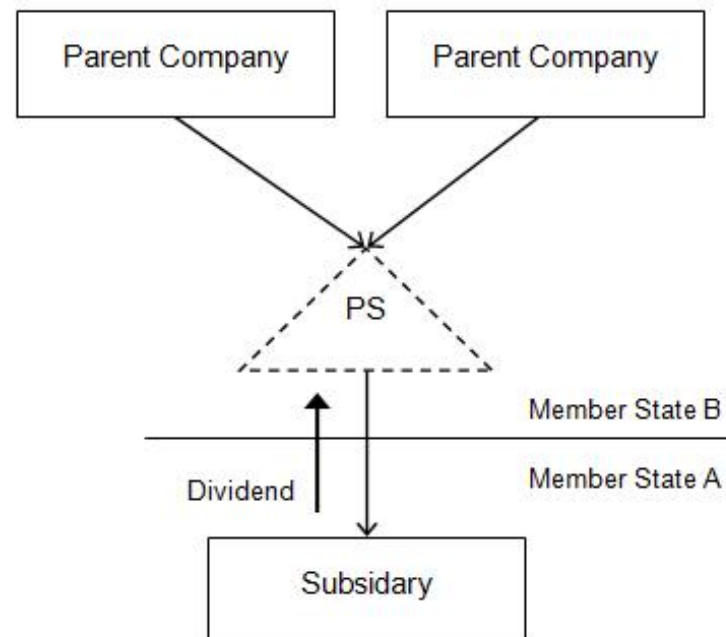
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# SCOPE OF APPLICATION | *ARTICLE 1*

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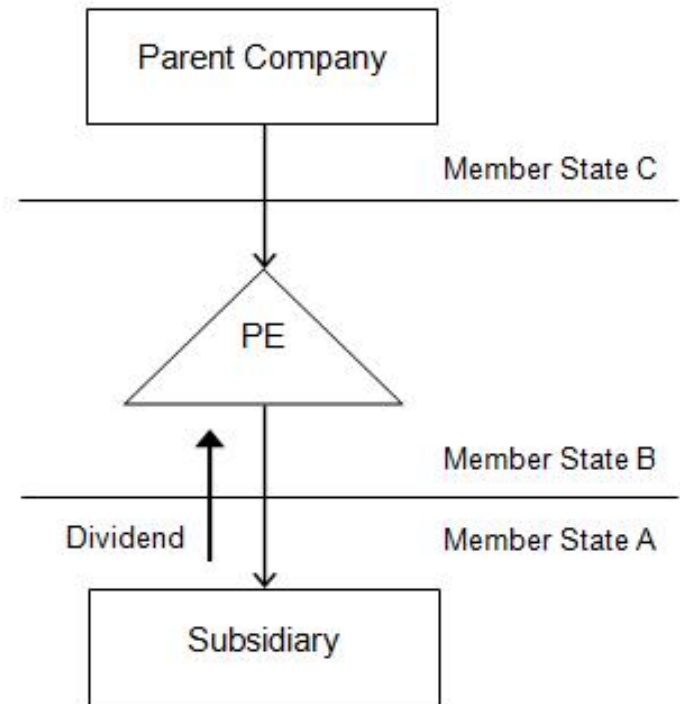
# DEFINITIONS | *ARTICLE 2*

- **“Company of a Member State”** – For the purposes of this Directive **“company of a Member State”** shall mean any company which:
  - takes one of the **legal forms** listed in the Annex to the Directive → Art 2(a)(i)
    - *No analogous application to comparable legal forms that are not mentioned in the Annex → ECJ, 1 October 2009, C-247/08, Gaz de France, EU:C:2009:600 (concerning the French SAS, which was introduced in 1992)*
  - according to the tax laws of a Member State is considered to be **resident in that State** for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be **resident for tax purposes outside the Union** → Art 2(a)(ii)
    - *Art 4(3) OECD-MC (before 2017): Place of effective management → Avoids benefits for third countries!*
  - is **subject to one of the taxes** listed in Art 2(a)(iii) and Annex I B, **without the possibility of an option or of being exempt**
    - *Excludes (quasi) subjectively exempt companies but does not establish a criterion of effective taxation! Also if company is subject to tax, but is “not actually liable to pay that tax”*
    - *E.g., ECJ, 18 June 2009, C-303/07, Aberdeen Property Fininvest Alpha Oy, EU:C:2009:377 (exempt SICAV); ECJ, 8 March 2017, C-448/15, Wereldhave, EU:C:2017:180 (Flls subject to a zero rate)*

# DEFINITIONS | *ARTICLE 2*

## ■ ***“Permanent Establishment”***

- “Permanent establishment” means ...
  - ... a fixed place of business situated in a Member State through which the business of a company of another Member State is wholly or partly carried on ...
  - ... in so far as the profits of that place of business are subject to tax in the Member State in which it is situated by virtue of the relevant bilateral tax treaty or, in the absence of such a treaty, by virtue of national law.
- Interpretation
  - Art 5(1) OECD MA (not: Art 5(3) and (4) OECD MC)
  - „Subject-to-tax“ Clause? – Effective taxation? All income of the permanent establishment? Dividends?



# PARENT AND SUBSIDIARY | *ARTICLE 3*

## ■ *Minimum Holding Requirement → Art 3(1)*

- Liberalization
  - 20% from 1 January 2005 to 31 December 2006
  - 15% from 1 January 2007 to 31 December 2008
  - 10% since 1 January 2009
- Main Features
  - Directly in the foreign subsidiary or indirectly in a domestic subsidiary via a permanent establishment in another Member State
  - Capital or voting rights (Art 3(2)(a))
  - Not: Usus fructus → ECJ, 22 December 2008, C-48/07, *Les Vergers du Vieux Tauves* SA [2008] ECR I-10627 (but: non-discrimination under fundamental freedoms)

# PARENT AND SUBSIDIARY | *ARTICLE 3*

## ■ *Minimum Holding Period → Art 3(2)(b)*

- ☐ Member States shall have the option of “not applying this Directive to companies of that Member State which do not maintain for an uninterrupted period of at least two years holdings qualifying them as parent companies or to those of their companies in which a company of another Member State does not maintain such a holding for an uninterrupted period of at least two years.”
- ☐ Usually 1 year
- ☐ Differentiation for purposes of Art 4 and Art 5 possible

# PARENT AND SUBSIDIARY | *ARTICLE 3*

## ■ *Minimum Holding Period → Art 3(2)(b)*

### □ Timing Issues

- Is it necessary that the minimum holding period is already fulfilled at the time of the distribution or
- is it sufficient that the minimum holding period is completed after the distribution?

### □ ECJ, 17 October 1996, C-283/94 etc, *Denkavit, VITIC and Vormeer*, EU:C:1996:387

- Minimum Holding Period need not be fulfilled at the moment of the distribution, as long as the holding is maintained for the holding period → Use of the present tense in Art 3(2) (“do not maintain”) and goal and purpose of the Directive
- Member States may safeguard the minimum holding period through other means (e.g., guarantee, refund procedure)
- Relation to Art 1(10) Interest-Royalties-Directive? → Option to not apply the directive “where the conditions set out in Article 3(b) have not been maintained for an uninterrupted period of at least two years.”

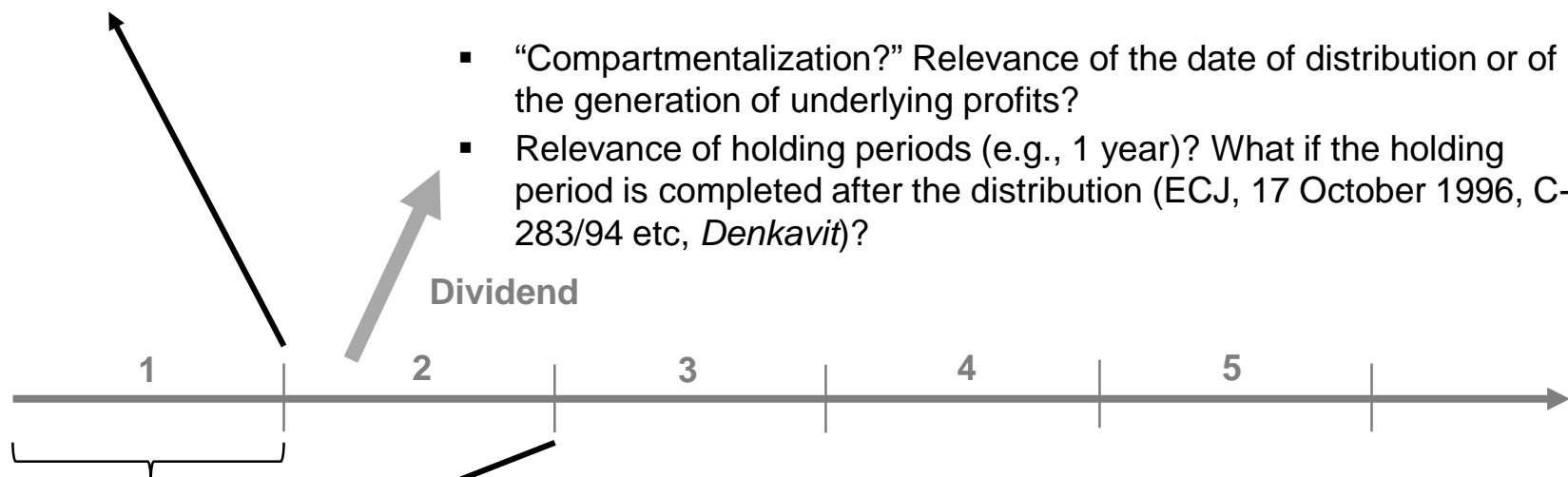
# PARENT AND SUBSIDIARY | *ARTICLE 3*

## ■ *Excursus: Timing Issues*

- Acquisition of a qualifying holding (e.g., 10%)
- Accession of the subsidiary's State to the EU
- Change of the legal form of the subsidiary

- “Compartmentalization?” Relevance of the date of distribution or of the generation of underlying profits?
- Relevance of holding periods (e.g., 1 year)? What if the holding period is completed after the distribution (ECJ, 17 October 1996, C-283/94 etc, *Denkavit*)?

Dividend



Accrual of  
Profits

- Effects of a subsequent
  - increase of a qualifying holding (e.g., from 10% to 15%)?
  - decrease of a holding (e.g., from 10% to 5%)? *Conseil d'Etat 15 December 2014 SA Technicolor.*

# ECONOMIC DOUBLE TAXATION |

## ARTICLE 4

### ■ *Options for Member States*

- ☐ Exemption at the Parent Level → Art 4(1)(a) → Capital Import Neutrality
  - No Netting with Losses → ECJ, 12 February 2009, C-138/07, **Cobelfret**, EU:C:2009:82; ECJ, 4 June 2009, C-439/07, **KBC Bank**, EU:C:2009:339
- ☐ Indirect Tax Credit at the Parent Level → Art 4(1)(b) → Capital Export Neutrality
- ☐ Direct Applicability? → ✓, ECJ, 12 February 2009, C-138/07, **Cobelfret**, EU:C:2009:82; ECJ, 4 June 2009, C-439/07, **KBC Bank**, EU:C:2009:339

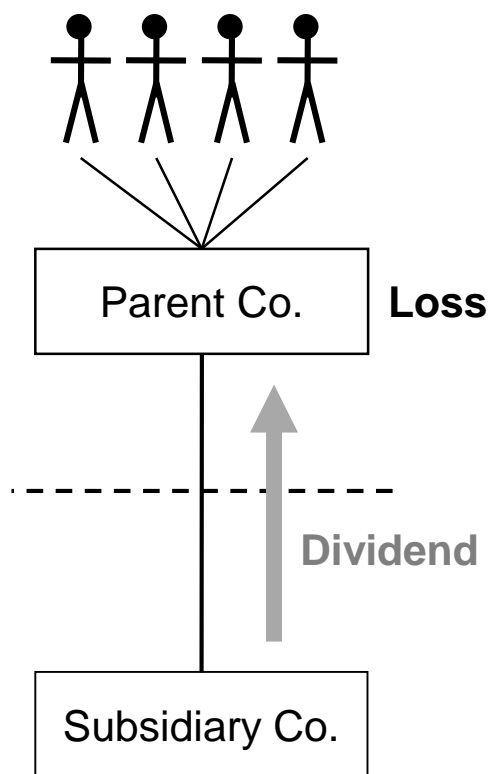
### ■ *“Distributions of profits” in Art 1 and 4*

- ☐ Transfer of wealth from the subsidiary to the parent that reduces the subsidiary's capital and is based on an equity investment of the parent
- ☐ Examples: Dividends, constructive distributions, reclassified interest payments, but excluded are capital gains liquidating distributions (Art 4(1), but likely not for Art 5)

# ECONOMIC DOUBLE TAXATION |

## ARTICLE 4

■ ECJ, 12 February 2009, C-138/07, **Cobelfret**, EU:C:2009:82



Income	(20)
+ Dividend	200
= <i>Tax Base 1</i>	180
∴ DRD (95% of the Dividend [= 190], but limited to Base 1 [= 180])	180
= <i>Tax Base 2</i>	0

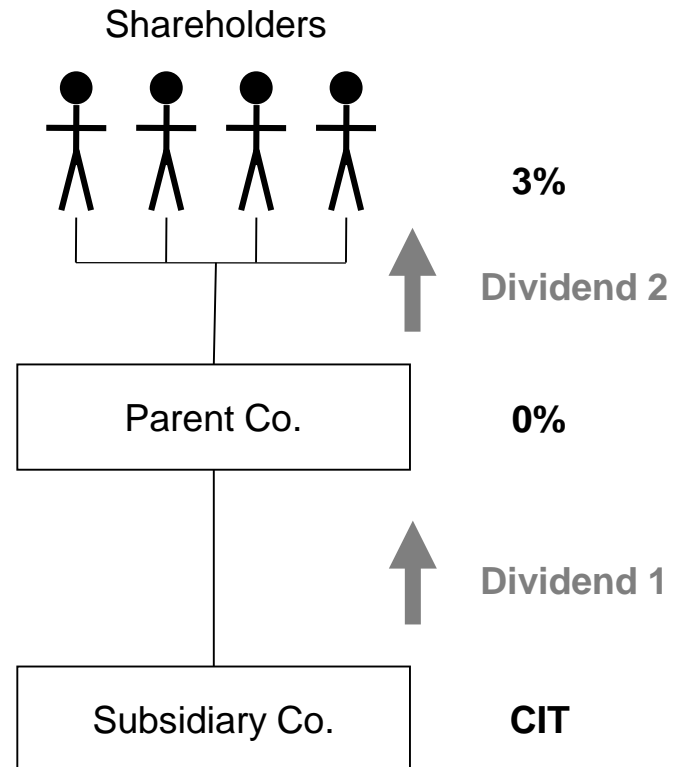
*I.e., loss-carry forward would effectively be limited because of the receipt of an “exempt” dividend!*

# ECONOMIC DOUBLE TAXATION |

## ARTICLE 4

### ■ “Fairness Tax” and “Surtax”

- ☐ Additional tax, e.g., in Belgium and France on (re)distributed profits on the level of the parent company
- ☐ Violates Art. 4(3)
  - ECJ, 17 May 2017, C-365/16, *AFEP*, EU:C:2017:378 (for France)
  - ECJ, 17 May 2017, C-68/15, *X*, EU:C:2017:379 (for Belgium)



# ECONOMIC DOUBLE TAXATION |

## ARTICLE 4

- Where a parent company or its permanent establishment, by virtue of the association of the parent company with its subsidiary, receives distributed profits, the State of the parent company and the State of its permanent establishment shall, except when the subsidiary is liquidated, either:

	Exemption	Credit
CIT in MS S (30%)	30	30
Income in MS P	70	100
Tentative CIT in MS P (40%)	28	40
Exemption (70 @ 40%)	28	—
Credit (Min(30;100@40%))	—	(30)
CIT in MS P	0	10
Overall CIT	30	40

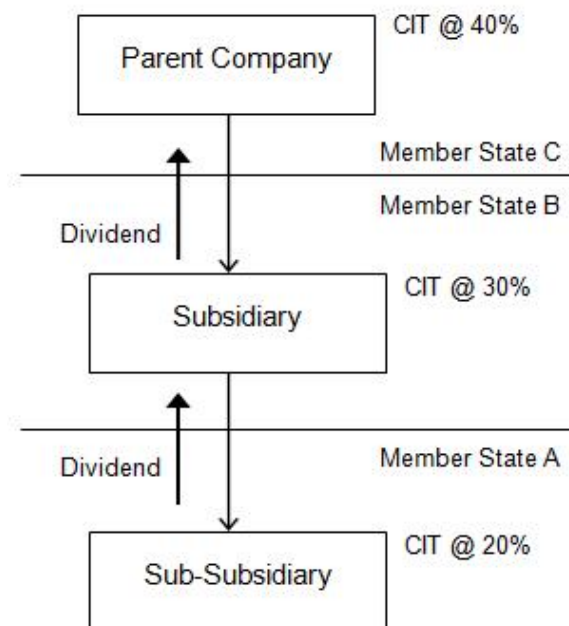
- *[Exemption:] refrain from taxing such profits to the extent that such profits are not deductible by the subsidiary, and tax such profits to the extent that such profits are deductible by the subsidiary; or,*
- *[Indirect Credit:] tax such profits while authorising the parent company and the permanent establishment to deduct from the amount of tax due that fraction of the corporation tax related to those profits and paid by the subsidiary and any lower-tier subsidiary, subject to the condition that at each tier a company and its lower-tier subsidiary meet the requirements provided for in Articles 2 and 3, up to the limit of the amount of the corresponding tax due.*

# ECONOMIC DOUBLE TAXATION |

## ARTICLE 4

- **[Indirect Credit:]** tax such profits while authorising the parent company and the permanent establishment to **deduct from the amount of tax due that fraction of the corporation tax related to those profits and paid by the subsidiary** and any lower-tier subsidiary, subject to the condition that at each tier a company and its lower-tier subsidiary meet the requirements provided for in Articles 2 and 3, up to the limit of the amount of the corresponding tax due.

	MS S: Exemption		MS S: Credit	
	Domestic	Directive	Domestic	Directive
CIT in <b>MS S</b> (20%)	20	20	20	20
Income in MS S	80	80	100	100
Tentative CIT in MS S (30%)	24	24	30	30
Credit (Min(20;100@30%))	—	—	(20)	(20)
Exemption	(24)	(24)	—	—
CIT in <b>MS S</b>	0	0	10	10
Income in MS P	80	100	80	100
Tentative CIT in MS P (40%)	32	40	36	40
Credit (Min(CIT;Income@40%))	0	20	10	30
CIT in <b>MS P</b>	32	20	26	10
Overall CIT	52	40	56	40



# ECONOMIC DOUBLE TAXATION |

## ARTICLE 4

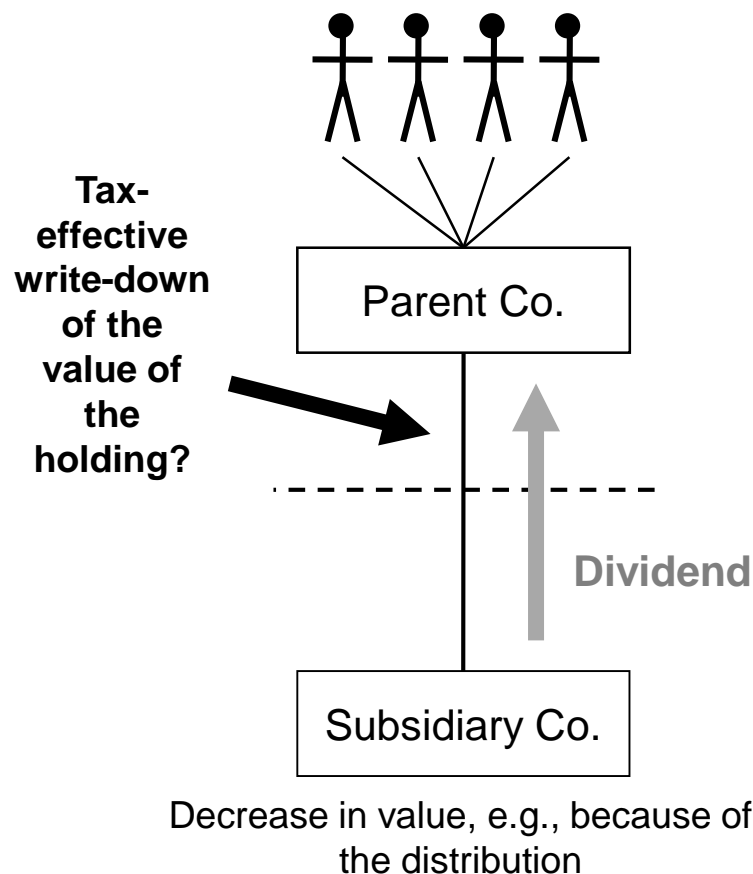
- Action 14 of the EU Action Plan to Strengthen the Fight against Tax Fraud and Tax Evasion calls for a revision of the Parent-Subsidiary-Directive with regard to *hybrid loans* → *OECD BEPS Action 2*
  - Amendment of the Parent-Subsidiary-Directive by Council Directive 2014/86/EU of 8 July 2014, [2014] OJ L 219/40 (based on Proposal COM(2013) 814 final [25 November 2013])
    - Background: “In as far as payments under a hybrid loan arrangement are qualified as a tax deductible expense for the debtor in the arrangement, Member States shall not exempt such payments as profit distributions under a participation exemption” (Report of the Code of Conduct Group of 25 May 2010, Doc. 10033/10, FISC 47, par. 31 [access to the public restricted]).
    - Stakeholder’s consultation concerning an amendment of the Parent-Subsidiary-Directive with respect to hybrid loan structures, D.1 (2013) (27 March 2013)
  - Amendment of *Art 4(1)(a) of the Parent-Subsidiary-Directive* (to be implemented until 31 December 2015):
    - (1) in Article 4(1), point (a) is replaced by the following:
      - ‘(a) refrain from taxing such profits to the extent that such profits are not deductible by the subsidiary, and tax such profits to the extent that such profits are deductible by the subsidiary; or’;

# ECONOMIC DOUBLE TAXATION |

## ARTICLE 4

### ■ **Cost deduction (Art. 4(3))**

- ☐ Each Member State shall retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company.
- ☐ Where the management costs relating to the holding in such a case are fixed as a flat rate, the fixed amount may not exceed 5 % of the profits distributed by the subsidiary.

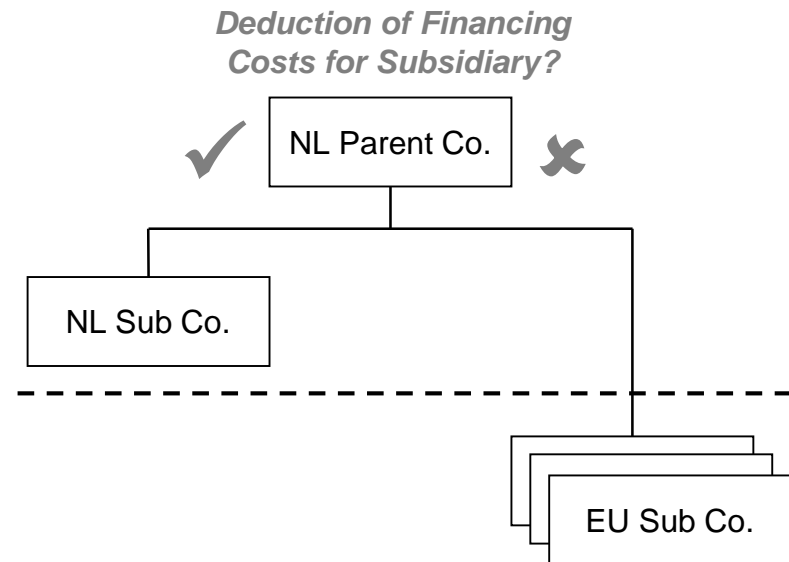


# ECONOMIC DOUBLE TAXATION |

## ARTICLE 4

### ■ *Financing Costs*

- Art 4(3) → “Each Member State shall retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company. Where the management costs relating to the holding in such a case are fixed as a flat rate, the fixed amount may not exceed 5 % of the profits distributed by the subsidiary.”
- Typically, only 95% of the profit distribution are exempt from taxation
- But: No justification for discriminatory taxation → E.g., ECJ, 18 September 2003, C-168/01, *Bosal*, EU:C:2003:479



# JURIDICAL DOUBLE TAXATION |

## ARTICLE 5

### ■ *Prohibition of Withholding Taxation → Art 5*

- “Profits which a subsidiary distributes to its parent company shall be exempt from withholding tax.”
- *Withholding taxation versus assessment?*
  - No relevance of the form of taxation → E.g., ECJ, 26 June 2008, C-284/06, **Burda**, EU:C:2008:365
  - But: Deviating wording of Art 1(1) of the Interest-Royalties-Directive → Exemption from source State taxation, “whether by deduction at source or by assessment”
- *Exemption at source* (no refund procedure) → Neutrality and simplification! → Unlike under the fundamental freedoms (e.g., *Denkavit Internationaal*, *Amurta*) “neutralization” is not relevant”
- *Timing Issues*
  - Date of distribution, not generation of underlying profits , is relevant → ECJ, 17 October 1996, C-283/94 etc, **Denkavit**, **VITIC and Vormeer**, EU:C:1996:387
  - Prerequisites of the Directive have to be fulfilled at the time of the distribution (e.g., 10%, accession of a new Member State, reduction of holding requirements)
  - No „compartmentalization“!

# JURIDICAL DOUBLE TAXATION |

## ARTICLE 5

### ■ *Prohibition of Withholding Taxation* → Art 5

#### □ *Definition* of “Withholding Tax ”

- The term withholding tax contained in Art 5 is not limited to certain specific types of national taxation.
- The nature of a tax, duty or charge must be determined under Union law, according to objective characteristics, irrespective of its classification under national law.
- Autonomous interpretation, negative delimitation in Art 7 (i.e., does not cover an advance payment or prepayment (précompte) of corporation tax).

#### □ Three *characteristics* ...

- ... the *chargeable event* for the tax is the payment of dividends or any other income from shares,
- ... the *taxable amount* is the income from those shares, and
- ... the *taxable person* is the holder of the shares.
  - Is taxation of the subsidiary a taxation of the parent company? → See ECJ, 4 October 2001, C-294/99, *Athinaiki Zythopiia*, EU:C:2001:505
  - But: Directive does not restrict the taxation of the subsidiary → See ECJ, 26 June 2008, C-284/06, *Burda*, EU:C:2008:365
  - Special situation: Act of Accession for Estonia

# ANTI-ABUSE | ARTICLE 1

- Action 15 of the EU Action Plan to Strengthen the Fight against Tax Fraud and Tax Evasion calls for a ***review of anti-abuse provisions in EU legislation***
  - Amendment of the Parent-Subsidiary-Directive by Council Directive (EU) 2015/121 of 27 January 2015, [2014] OJ L 21/1 (based on Proposal COM(2013) 814 final [25 November 2013])
  - ***Mandatory minimum standard of anti-abuse*** in the Parent-Subsidiary-Directive (to be implemented until 31 December 2015):

In Directive 2011/96/EU, Article 1(2) is replaced by the following paragraphs:

‘2. Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances.

An arrangement may comprise more than one step or part.

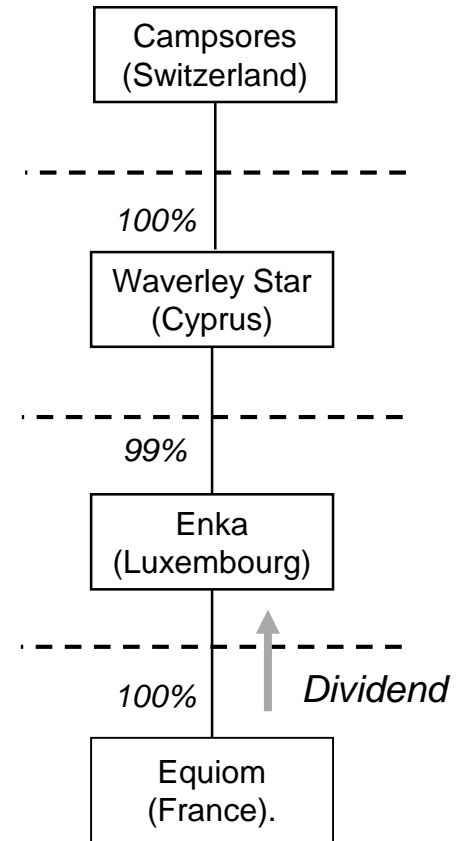
3. For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

4. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of tax evasion, tax fraud or abuse.’

# ANTI-ABUSE | *EQIOM*

- ECJ, 7 September 2017, C-6/16, ***Eqiom***, EU:C:2017:641 - See also ECJ, 20 December 2017, C-504/16 and C-613/16, ***Deister Holding and Juhler Holding***, EU:C:2017:1009, and ECJ, 14 June 2018, C-440/17, ***GS***, EU:C:2018:437

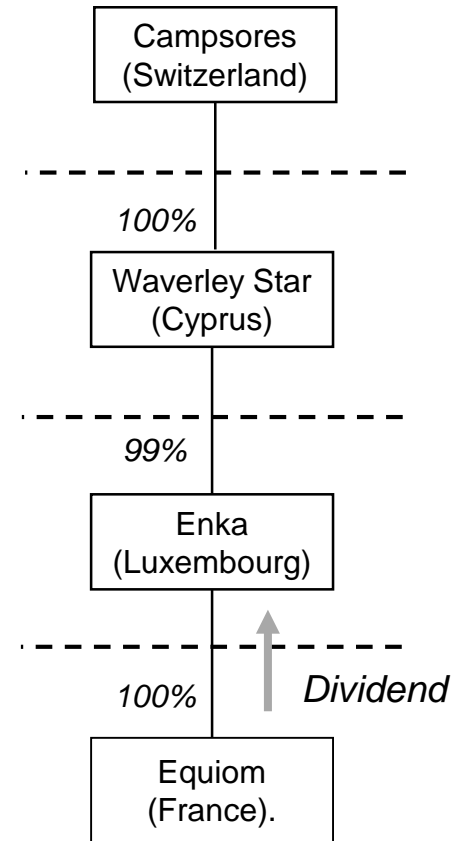
- Under French law, there is no withholding tax exemption for dividends distributed to a legal person controlled directly or indirectly by one or more residents of non-EU-MS, unless that legal person provides proof that the principal purpose or one of the principal purposes of the chain of interests is not to benefit from the exemption.
- Issues
  - Violation of Art. 5 (withholding tax exemption) in light of Art 1(2) (anti-abuse reservation) of the Parent-Subsidiary Directive (PSD)?
  - Violation of the freedom of establishment under Art 49 TFEU?



# ANTI-ABUSE | *EQIOM*

## ■ Parent-Subsidiary-Directive (PSD)

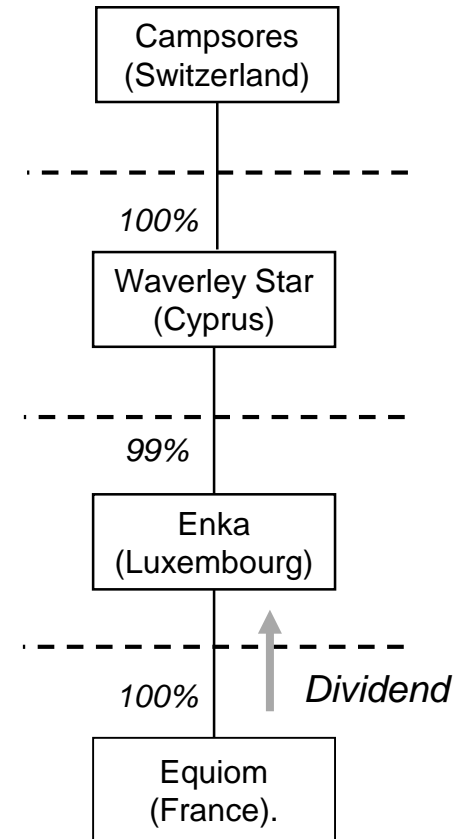
- Withholding tax exemption under Art 5(1) PSD and exception under Art 1(2) PSD (application of domestic or agreement-based provisions required for the prevention of fraud and abuse), which is to be interpreted narrowly
- Requirement of necessity under Art 1(2) PSD, i.e., the specific objective must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, the purpose of which is unduly to obtain a tax advantage (*Cadbury Schweppes*)
- Control by non-resident shareholders does not indicate the existence of a purely artificial arrangement, also “principal purpose condition” does not save the French rule, because the tax authorities are not even required to provide even *prima facie* evidence of fraud and abuse



# ANTI-ABUSE | *EQUIOM*

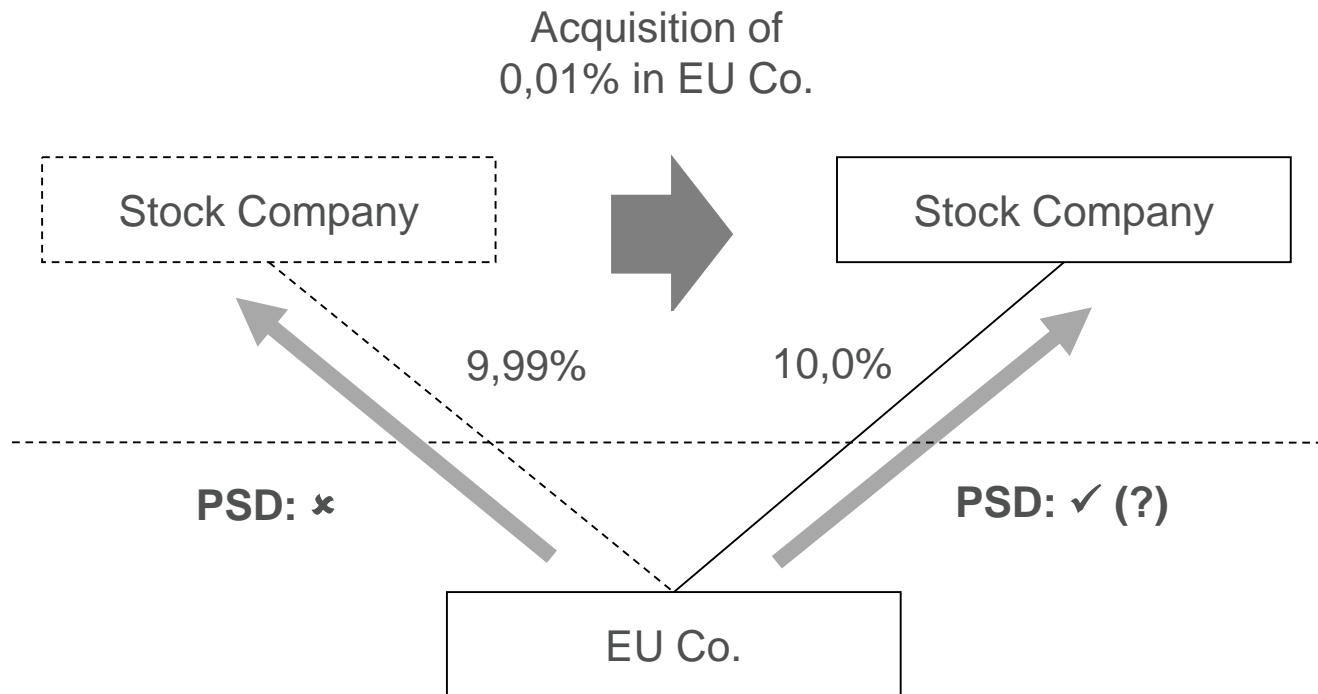
## ■ Freedom of Establishment (Art 49 TFEU)

- Exclusion of freedom of capital movement based on the factual size of the holding (100%)
- Discrimination → Difference in treatment between profit distributions to foreign parent companies (directly or indirectly controlled by non-EU shareholders) and resident parent companies (also directly or indirectly controlled by non-EU shareholders), with both groups being comparable
- Justification and Proportionality → Objective of combating fraud and tax evasion, “whether it is relied on under Article 1(2) of the Parent-Subsidiary Directive or as justification for an exception to primary law, has the same scope. Therefore, the findings set out [with regard to Art. 1(2) PSD] also apply with regard to that freedom.”



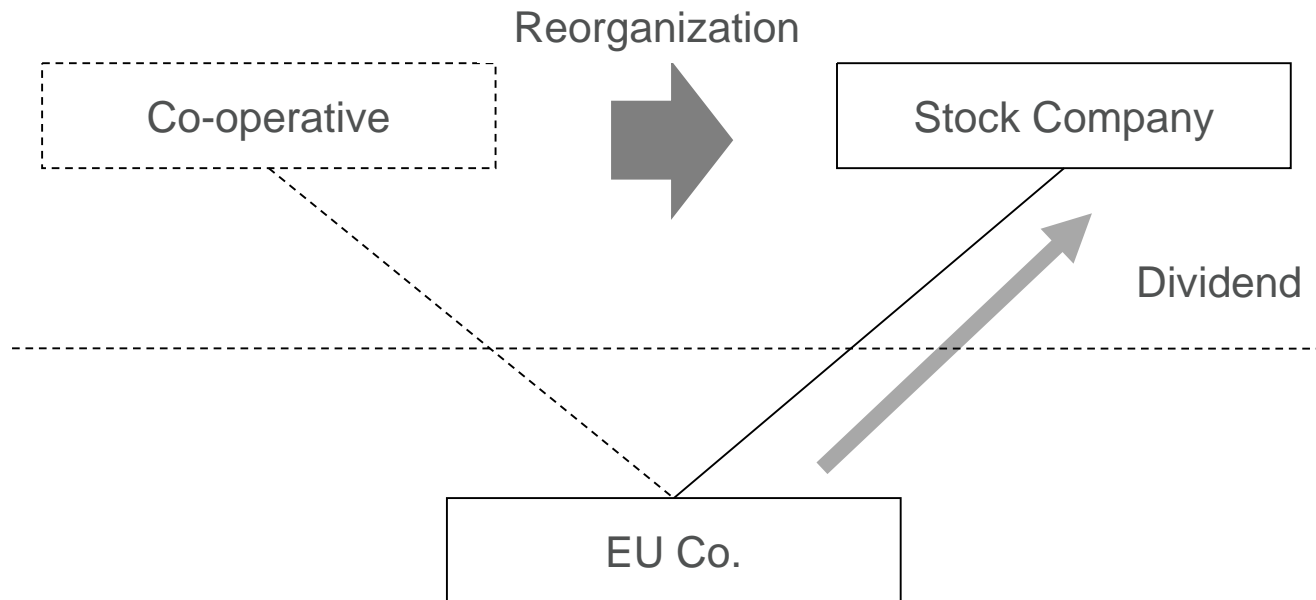
# ANTI-ABUSE | *EXAMPLE 1*

## ■ The “Extra Percent”



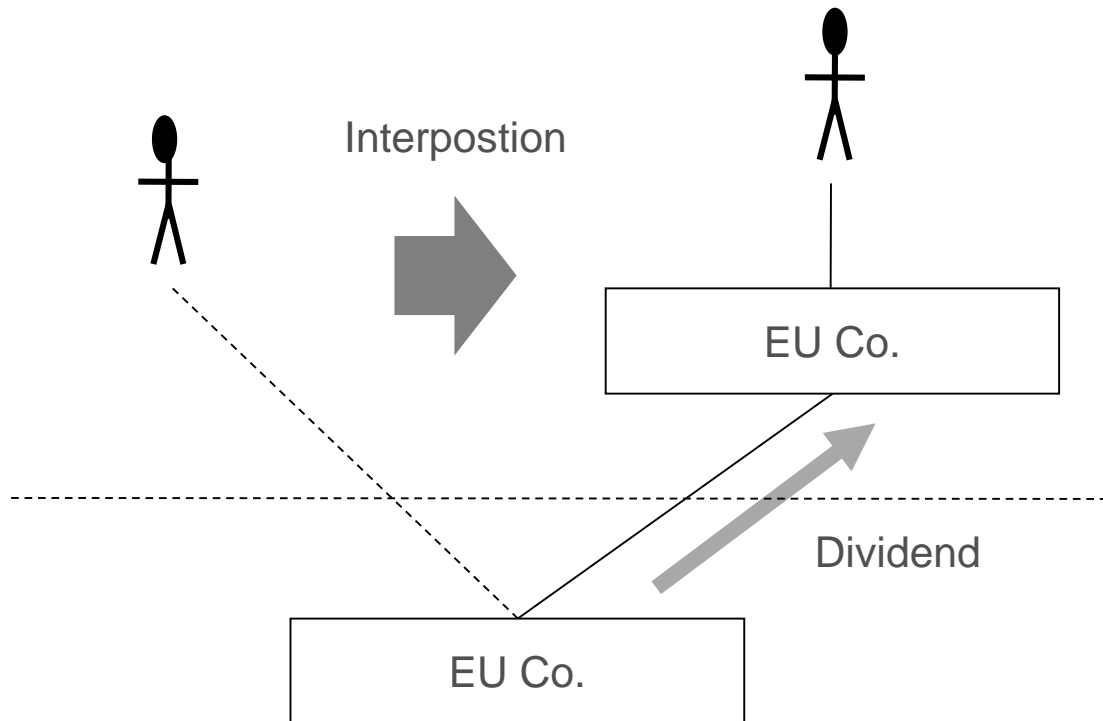
# ANTI-ABUSE | *EXAMPLE 2*

## ■ “Tax Motivated” Reorganization



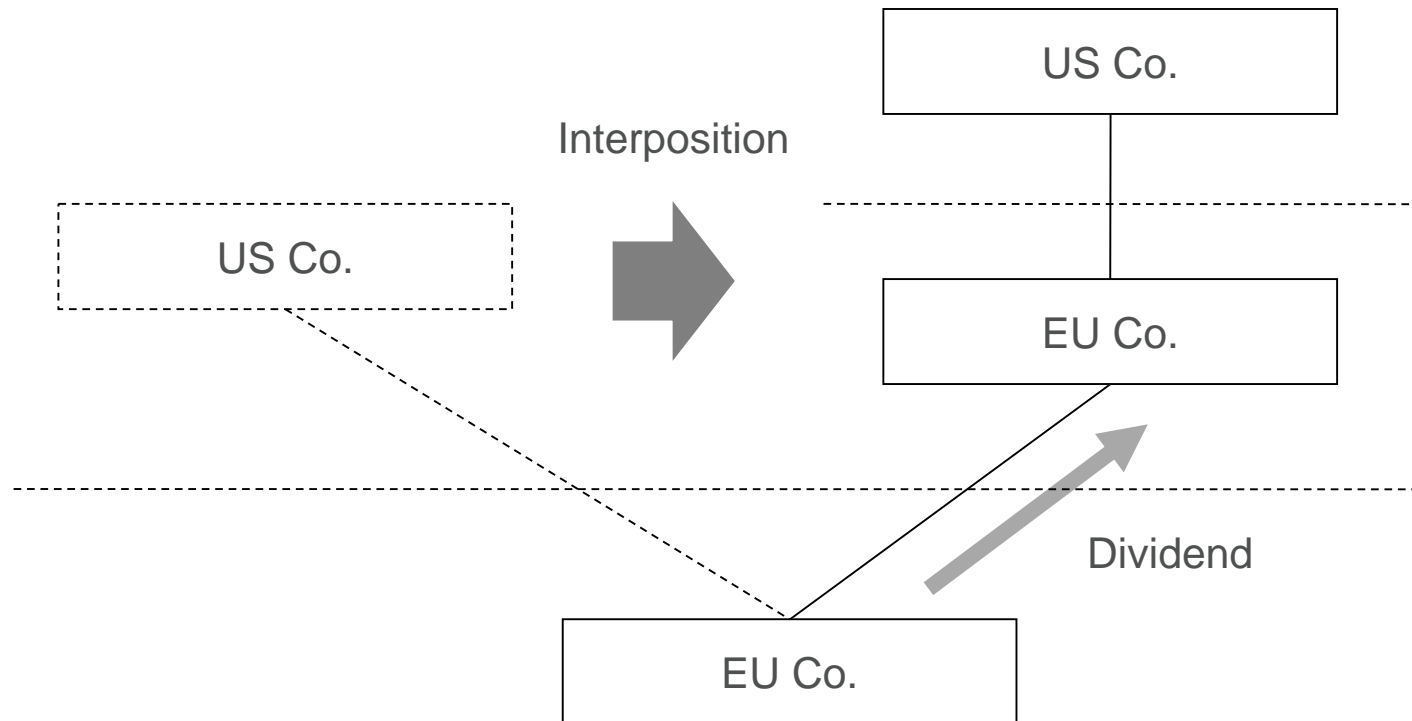
# ANTI-ABUSE | *ARTICLE 1*

## ■ Interposition



# ANTI-ABUSE | *EXAMPLE 4*

## ■ Third-Country Relations



*CHAPTER III*  
INTEREST-ROYALTIES-  
DIRECTIVE



# OVERVIEW | *OBJECTIVE*

## ■ **Objective**

- ☐ Part of the Tax Package to Tackle Harmful Tax Competition
- ☐ Avoidance of double taxation through removal of withholding taxes on interest and royalty payments made between associated companies of different Member States → Art 1(1)
- ☐ Safeguard effective taxation at the level of the beneficial owner → Art 3

## ■ **Legal Text**

- ☐ Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, [2003] OJ L 157, p. 49.
- ☐ Amending Proposal COM(2011)714 final (e.g., reduction of holding requirement from 25% to 10%)

# OVERVIEW | *STRUCTURE*

- **Art 1** – Scope of Application and Procedure
- **Art 2** – Definition of “interest” and “royalties”
- **Art 3** – Definition of “company,” “associated company” and “permanent establishment”
- **Art 4** – Exclusion of payments as interest or royalties
- **Art 5** – Fraud and abuse
- **Art 6** – Transitional rules for various Member States
- **Art 7** – Deadline for implementation
- **Art 8** – Review – *See Report COM(2009)179 final.*
- **Art 9** – Delimitation clause for the application of domestic or agreement-based provisions which go beyond the provisions of this Directive and are designed to eliminate or mitigate the double taxation of interest and royalties
- **Art 10** – Entry into force
- **Art 11** – Addressees

# SCOPE OF APPLICATION | *ARTICLE 1*

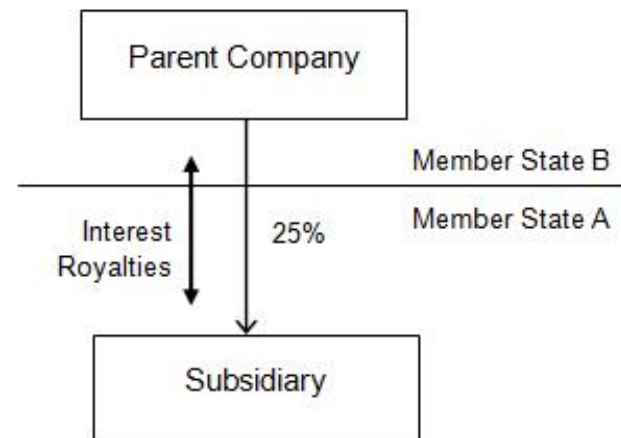
## ■ *Exemption from source-taxation of*

- ☐ *interest payments* (Art 2(a))
- ☐ *royalty payments* (Art 2(b))

## ■ Interest or royalty payments “arising” in a Member State shall be exempt from any taxes imposed on those payments in that State (“source State”; Art 1(2)), whether by deduction at source or by assessment, provided that the beneficial owner of the interest or royalties (Art 1(4) and (5)) is

- ☐ *a company of another Member State* (Art 1(4) → Art 3(a))
- ☐ or a *permanent establishment situated in another Member State of a company of a Member State* (Art 1(5) and (8), Art 3(c)).

## ■ A payment *made by a company of a Member State or by a permanent establishment situated in another Member State shall be deemed to arise in that Member State* (i.e., the “source State” → Art 1(2) and (3))



# SCOPE OF APPLICATION | *ARTICLE 1*

## ■ *Precedence of the PE → Art 1(6)*

- ☐ “Where a permanent establishment of a company of a Member State is treated as the payer, or as the beneficial owner, of interest or royalties, no other part of the company shall be treated as the payer, or as the beneficial owner, of that interest or those royalties for the purposes of this Article.”

## ■ *Exemption at source*

- ☐ Refund procedure only if certain procedural requirements set forth in Art 1(11) to (13) are not fulfilled

## ■ *Associated Company requirement → Art 1(7) → Art 3(b)*

- ☐ The exemption (Art 1(1)) requires that “the company which is the payer, or the company whose permanent establishment is treated as the payer, of interest or royalties is an associated company of the company which is the beneficial owner, or whose permanent establishment is treated as the beneficial owner, of that interest or those royalties”.

# SCOPE OF APPLICATION | *ARTICLE 1*

## ■ *Art 3(b) → Two companies are “associated” if ...*

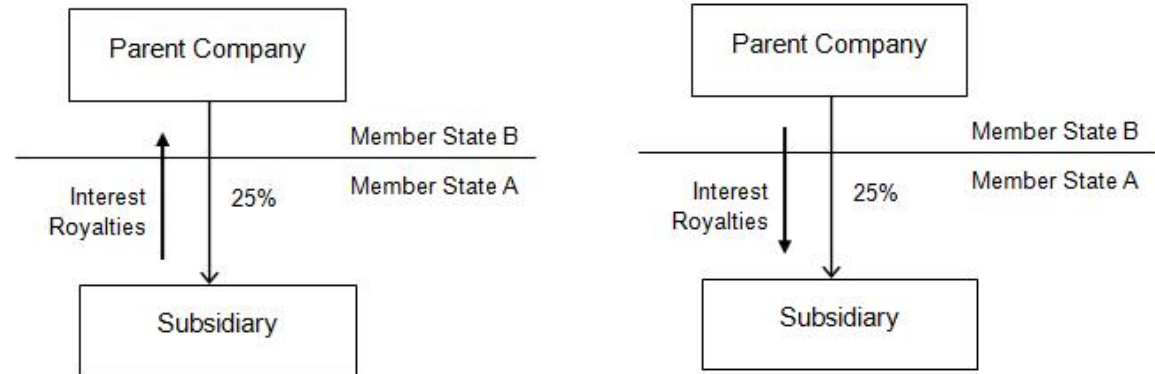
- ☐ ... either company has a direct minimum holding of 25% in the capital (or voting rights) of the other company (Parent-subsidiary relationship), or
- ☐ ... a third company has a direct minimum holding of 25% in the capital (or voting rights) of two other companies (Common control – sister companies).

## ■ *Minimum Holding Period → Art 1(10)*

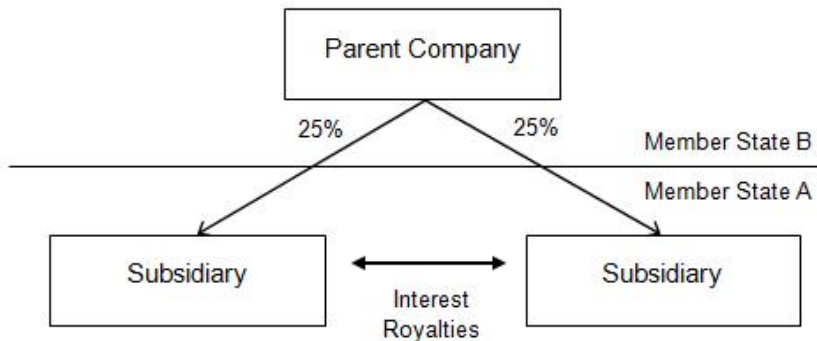
- ☐ Member States have the option not to exempt in cases where companies are associated for less than two years → “A Member State shall have the option of not applying this Directive to a company of another Member State or to a permanent establishment of a company of another Member State in circumstances where the conditions set out in Article 3(b) have not been maintained for an uninterrupted period of at least two years.”

# SCOPE OF APPLICATION | *ARTICLE 1*

## Payment Between Parent and Subsidiary

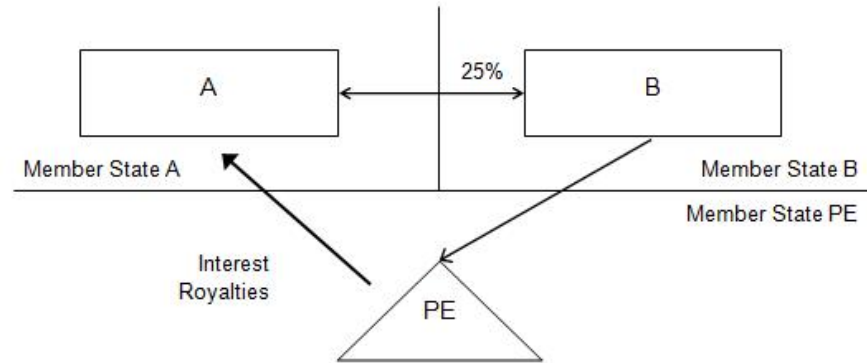


## Payments Between Sister Companies

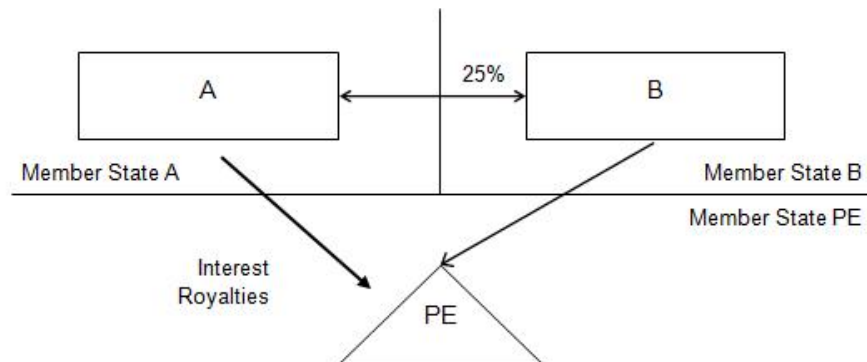


# SCOPE OF APPLICATION | *ARTICLE 1*

Permanent  
Establishment as Payor



Permanent  
Establishment as  
Beneficial Owner



# INTEREST AND ROYALTIES | *ARTICLE 2*

## ■ *Interest* → *Art 2(a)*

- ☐ “Interest” means “income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures; penalty charges for late payment shall not be regarded as interest;”
- ☐ See also Art 11(3) OECD-MC

## ■ *Royalties* → *Art 2(b)*

- ☐ “Royalties” means “payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematograph films and software, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; payments for the use of, or the right to use, industrial, commercial or scientific equipment shall be regarded as royalties.”
- ☐ See also Art 12(2) OECD-MC

# DEFINITIONS | *ARTICLE 3*

## ■ **Art 3(a) → “Company of a Member State”**

- ☐ Taking the legal form listed in the Annex to the Directive → Art 3(a)(i)
- ☐ Resident in that Member State and not, because of a DTC concluded with a third state, considered to be resident for tax purposes outside the Community → Art 3(a)(ii)
- ☐ Subject to one of the taxes listed in Art 3(a)(iii) and not exempt from tax. → Art 3(a)(iii)

## ■ **Art 3(c) → “Permanent establishment”**

- ☐ “[A] fixed place of business situated in a Member State through which the business of a company of another Member State is wholly or partly carried on.”

# EXCLUSIONS | *ARTICLE 4*

## ■ *Option to exclude certain Interest Payments from the Benefits of the Directive → Art 4(1)*

- ☐ ... payments which are treated as a distribution of profits or as a repayment of capital under the law of the source State → Art 4(1)(a)
- ☐ ... payments from debt-claims which carry a right to participate in the debtor's profits → Art 4(1)(b)
- ☐ ... payments from debt-claims which entitle the creditor to exchange his right to interest for a right to participate in the debtor's profits → Art 4(1)(c)
- ☐ ... payments from debt-claims which contain no provision for repayment of the principal amount or where the repayment is due more than 50 years after the date of issue → Art 4(1)(d)

## ■ *Arm's Length Standard → Art 4(2)*

- ☐ “Where, by reason of a special relationship between the payer and the beneficial owner of interest or royalties, or between one of them and some other person, the amount of the interest or royalties exceeds the amount which would have been agreed by the payer and the beneficial owner in the absence of such a relationship, the provisions of this Directive shall apply only to the latter amount, if any.” → Application of Parent-Subsidiary-Directive?
- ☐ See also Art 11(6) and Art 12(4) OECD-MC

# FRAUD AND ABUSE | *ARTICLE 5*

## ■ *Fraud and Abuse*

- ☐ “This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse.”
- ☐ “Member States may, in the case of transactions for which the principal motive or one of the principal motives is tax evasion, tax avoidance or abuse, withdraw the benefits of this Directive or refuse to apply this Directive.”

# EXCLUSIONS | *OVERVIEW*

	Proposal COM(90)571	Proposal COM(1998)67	Directive 2003/49/EC	Proposal COM(2003)841	Proposal COM(2011)714
Beneficial Ownership Requirement	x	✓	✓	—	—
Subject-to- Effective- Taxation- Requirement	x	x for companies, ✓ for permanent establishments	x for companies, ✓ for permanent establishments	✓, also for companies	✓, also for companies
Exclusion of Certain Payments	x	✓	✓	—	—
Fraud and Abuse	✓	✓	✓	—	—
Non-Applicatio n in Cases of Low-Taxation etc	x	✓	x	—	—

*CHAPTER IV*  
DISPUTE RESOLUTION



# OVERVIEW

- ***Transfer Pricing and EU Law*** → ***Arbitration Convention*** – Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, [1990] OJ L 225, 10, as amended
- ***Dispute Resolution*** → ***Dispute Resolution Directive*** – Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, [2017] OJ L 265

# TRANSFER PRICING | *JOINT TRANSFER PRICING FORUM*

## ■ Codes of Conduct and Guidelines

### ■ Code of Conduct on the **Implementation of the Arbitration Convention**

- Code of conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, [2006] OJ (C 178), 8. → Proposal COM(2004) 297 final
- Revised Code of Conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, [2009] OJ (C 322), 1. → Proposal COM(2009) 472 final (Working Documents in SEC(2009)1168 and SEC(2009)1169)

### ■ Code of Conduct on **Transfer Pricing Documentation**

- Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, of 27 June 2006 on a code of conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD), [2006] OJ (C 176), 1. → Proposal COM(2005) 543 final (Working Document in SEC(2005)1477)

### ■ Guidelines for **Advance Pricing Agreements** within the EU

- Communication on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Pricing Agreements within the EU, COM(2007) 71 final (Working Document SEC(2007)246)
- (Draft) Council Conclusions in Dok. 9904/07 FISC 84 (25 May 2007) (agreement in Dok. 10493/07 PV/CONS 31 ECOFIN 254 [21 June 2007]): "The Council recognises the work done by the JTPF as an important step forward and notes the commitment of Member States to follow the Guidelines and implement them in their national administrative practices as far as legally possible."

# TRANSFER PRICING | *JOINT TRANSFER PRICING FORUM*

## ■ Other Reports, e.g.,

### ■ Guidelines on **Low Value Adding Intra-Group Services** and Potential Approaches to non-EU Triangular Cases

- Commission Communication on the work of the EU Joint Transfer Pricing Forum in the period April 2009 to June 2010 and related proposals 1. Guidelines on low value adding intra-group services and 2. Potential approaches to non-EU triangular cases, COM(2011)16 final
- See also Council conclusions in Dok. 8480/11 FISC 28 (31 March 2011)

### ■ **Small and Medium Enterprises** and Transfer Pricing

- Commission Communication on 1. the Report on Small and Medium Enterprises and Transfer Pricing and 2. the Report on Cost Contribution Arrangements on Services not creating Intangible Property (IP), COM(2012)516 final
- Report on Small and Medium Enterprises and Transfer Pricing, JTPF/001/FINAL/2011/EN (4 March 2011)

### ■ **Cost Contribution Arrangements on Services not creating Intangible Property (IP)**

- Commission Communication on 1. the Report on Small and Medium Enterprises and Transfer Pricing and 2. the Report on Cost Contribution Arrangements on Services not creating Intangible Property (IP), COM(2012)516 final
- Report on Cost Contribution Arrangements on Services not creating Intangible Property (IP), JTPF/008/FINAL/2012/EN (June 2012)

# TRANSFER PRICING | *FUNDAMENTAL FREEDOMS*

- ECJ, 21 January 2010, C-311/08, **SGI**, [2010] ECR I-487
  - Profit adjustment provisions that apply only in cross-border situations and are to the disadvantage of taxpayers constitute discriminatory restrictions on the freedom of establishment, ...
  - ... but such restrictions can be justified based of the need to ensure a balanced allocation of taxing powers between Member States taken together with the need to combat tax avoidance.
  - However, a national provision is proportional and hence in compliance with the freedom of establishment if,
    - it provides “for a consideration of objective and verifiable elements”;
    - the taxpayer is given, “on each occasion on which there is a suspicion that a transaction goes beyond what the companies concerned would have agreed under fully competitive conditions, [...] an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that transaction”; and
    - “where the consideration of such elements leads to the conclusion that the transaction in question goes beyond what the companies concerned would have agreed under fully competitive conditions, the corrective tax measure must be confined to the part which exceeds what would have been agreed if the companies did not have a relationship of interdependence”.

# TRANSFER PRICING | *FUNDAMENTAL FREEDOMS*

■ ECJ, 21 January 2010, C-311/08, **SGI**, [2010] ECR I-487

■ What is a “commercial justification”?

■ Any transaction that is neither a sham nor abusive? Or does this phrase mean nothing else than an opportunity to prove that the arrangement satisfied, in whole or in part, the arm's length test, so that indeed the arm's length principle would constitute an appropriate test by which to distinguish artificial arrangements from genuine economic transactions?

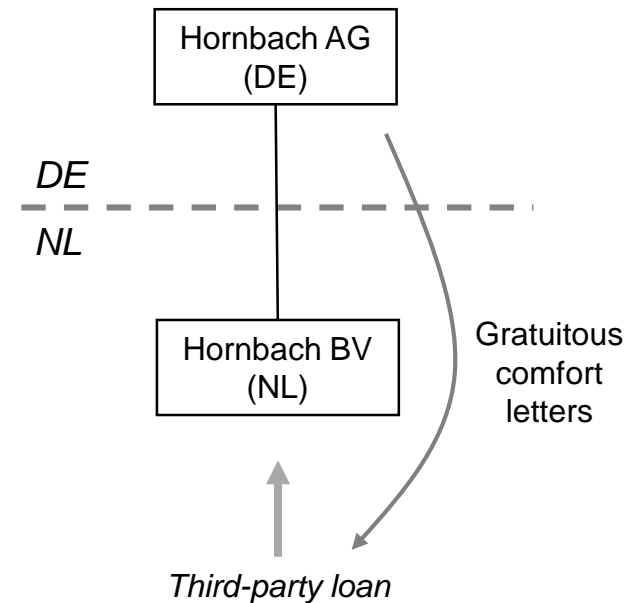
■ The latter approach was endorsed by the England and Wales Court of Appeal (Para. 57 of England and Wales Court of Appeal (Civil Division) of 18 February 2011, *Test Claimants in the Thin Cap Group Litigation v. HMRC*, [2011] EWCA Civ 127), noting that “[l]egislation that involves the application of the arm's length test, as embodied in Article 9 of the OECD Model Convention, does not unlawfully interfere with [Art. 49 TFEU], provided the taxpayer is given an adequate opportunity to present his case to the tax authority that the transaction in question was on arm's length terms, and may challenge the decision of the tax authority before the national court, and, secondly, that the effect of the legislation is limited to those aspects of the advantage conferred by the taxpayer company that do not satisfy that test.”

■ Case on the application of transfer pricing in relation to transactions between resident and non-resident companies → ***Hornbach-Baumarkt AG***

# TRANSFER PRICING | *FUNDAMENTAL FREEDOMS*

## ■ ECJ, 31 May 2018, C-382/16, *Hornbach-Baumarkt*, EU:C:2018:366

- German law → Adjustment, remuneration in exchange for granting the guarantees
- ECJ
  - Discrimination, but potentially justified with regard preservation of the balanced allocation of the power to tax between the Member States (ECJ, 21 January 2010, C-311/08, *SGI*, EU:C:2010:26)
  - Proportionality
    - Taxpayer must, *inter alia*, have opportunity to provide evidence of any commercial justification for an agreement on non-arm's-length terms
    - Includes economic reasons resulting from its position as a shareholder of the non-resident company (e.g., „economic interest of Hornbach-Baumarkt AG itself in the financial success of the foreign group companies, in which it participates through the distribution of profits, as well as by a certain responsibility of the applicant in the main proceedings, as a shareholder, in the financing of those companies“)

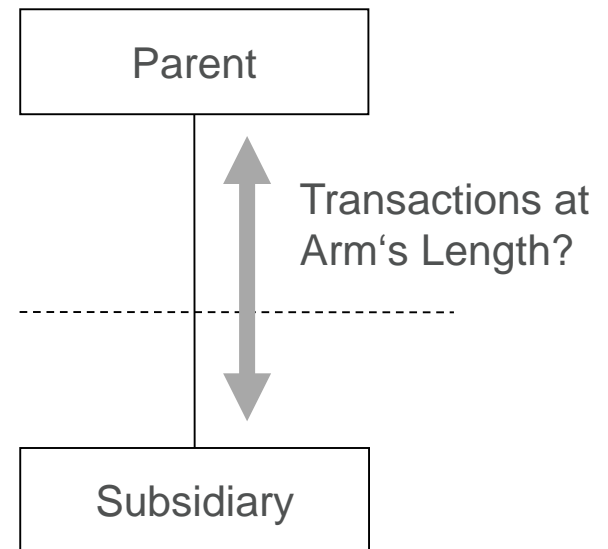


# ARBITRATION CONVENTION |

## *OBJECTIVE*

### ■ **Objective** of the Arbitration Convention

- Binding **elimination of double taxation in transfer pricing cases** (also in relation to permanent establishments) by agreement between the contracting states including, if necessary, by reference to the opinion of an independent advisory body (i.e., the arbitration panel)
- **Multi-phase process** designed to achieve a solution within a **three-year timeframe**



# ARBITRATION CONVENTION | STATUS

## ■ Arbitration Convention

- Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, [1990] OJ L 225, 10, as amended → Originally: Proposal for a Council Directive, COM(76)611 final, withdrawn in [1997] OJ C 2, p. 6.
- Following lengthy ratification procedures, applicable in all 351 bilateral relationships between the 27 EU Member States since 2010
- Interpretation
  - Part of the *acquis communautaire*, but no jurisdiction of the ECJ
  - Art 3(2) of the Arbitration Convention refers to double tax agreements for the definition of undefined terms, unless the context requires otherwise → I.e., no solution if there is no DTC, if the DTC does not define the term, or if the DTC refers to domestic law → The Arbitration Convention does not apply to double taxation caused by disputes concerning its interpretation (e.g., the term “enterprises” or “permanent establishment”)!

# ARBITRATION CONVENTION | *SCOPE*

## ■ Scope of Application

- The Arbitration Convention applies in cases of (likely) double taxation because of arm's length profit adjustments between related enterprises of different Contracting States (Art. 1(1)), including situations involving EU permanent establishments of enterprises of Contracting States (Art. 1(2)), and also where the price adjustment has no current tax effect for any (or all) enterprises due to losses (Art. 1(3)).
- The Code of Conduct recommends that the Arbitration Convention's scope should cover EU triangular transfer pricing cases and thin capitalization.
- The Convention is, however, not applicable to cases
  - between enterprises carried on by residents of the same Member State, unless a permanent establishment in another Member State is involved (Art. 1(2));
  - between enterprises of which one is resident in a non-Member State, even if the latter's permanent establishment within a Contracting State is concerned;
  - where a permanent establishment in a non-Member State is involved;
  - or where two EU permanent establishments of the same non-Member State enterprise are concerned.

# ARBITRATION CONVENTION | *SCOPE*

## ■ Scope of Application

- The taxes covered are the domestic 'taxes on income' of corporations and individuals (Art. 2(1)), with examples of existing taxes listed in Art. 2(2).
- The territorial scope of the Convention is identical to the scope of Art. 52 TEU with the exception of certain French overseas territories, the Faroe Islands and Greenland (Art. 16); the territorial scope hence does not extend to territories covered by Art. 355 TFEU (such as, e.g., Gibraltar).

# ARBITRATION CONVENTION |

## *PRINCIPLES*

### ■ Principles of Application

- The principles for profit adjustments and attribution of profits set out in Art 4 are nearly literal renditions of (old) Art 7(2) and Art 9(1) OECD MC, i.e., the arm's length standard:
  - Art 4(1) replicates the wording of Art 9(1) OECD MC and sets the standard for adjustments between separate enterprises, also where permanent establishments are involved.
  - Art 4(2) uses the language Art 7(2) OECD MC before the full implementation of the 'Authorized OECD Approach' ('AOA') in the 2010 revision and – unlike Art 7(2) OECD MC – without making reference to former Art. 7(3); it sets the standard for transactions between a head office and its permanent establishment.

# ARBITRATION CONVENTION |

## *PRINCIPLES*

### ■ Principles of Application

- The Arbitration Convention contains only two rules of substantive tax law, i.e.,
  - the arm's length standard as principle for profit adjustments and attribution of profits set out in Art 4 and understood as advocated by the OECD, and
  - the elimination of double taxation under Arts 12 and 14.
- Instead of mandating corresponding adjustments to the tax base (as in Art 9(2) OECD MC), Art 14 of the Convention considers double taxation as eliminated if either the profits are included in the computation of the taxable profits in one State only or if a tax credit is granted for the additional tax charged to the associated enterprise by the adjusting State as a consequence of the revised transfer price.

# ARBITRATION CONVENTION | *PHASES*

## ■ Overview

- If no satisfactory solution can be reached by the competent authority domestically (Art 5), the Arbitration Convention foresees a mutual agreement procedure between the States involved (Art 6(2)) and, if they fail to reach an agreement that eliminates double taxation, an arbitration procedure (Art 7).
- Phases
  - Domestic Proceedings (Art. 5)
  - Mutual Agreement Procedure (Phase I) (Art 6(2))
  - Arbitration Procedure (Phase II) (Art 7)
  - Elimination of Double Taxation (Phase III) (Art 12)

# ARBITRATION CONVENTION | *PHASES*

## ■ Exclusions

- The Contracting States are, however, not required to initiate or continue a mutual agreement or arbitration procedure where
  - the complaint does not appear to be well-founded (Art 6(2));
  - if one of the enterprises is (charged to be) liable to a – judicial or administrative – adjustment-related ‘serious penalty’ (Art 8(1) and (2));
  - or if, under domestic law, the Contracting State involved is not allowed to derogate from judicial decisions, unless the enterprise involved has allowed the time provided to for appeal against the profit adjustment to expire or withdrawn such appeal before a decision has been delivered (Art 7(3)).

# ARBITRATION CONVENTION | *PHASES*

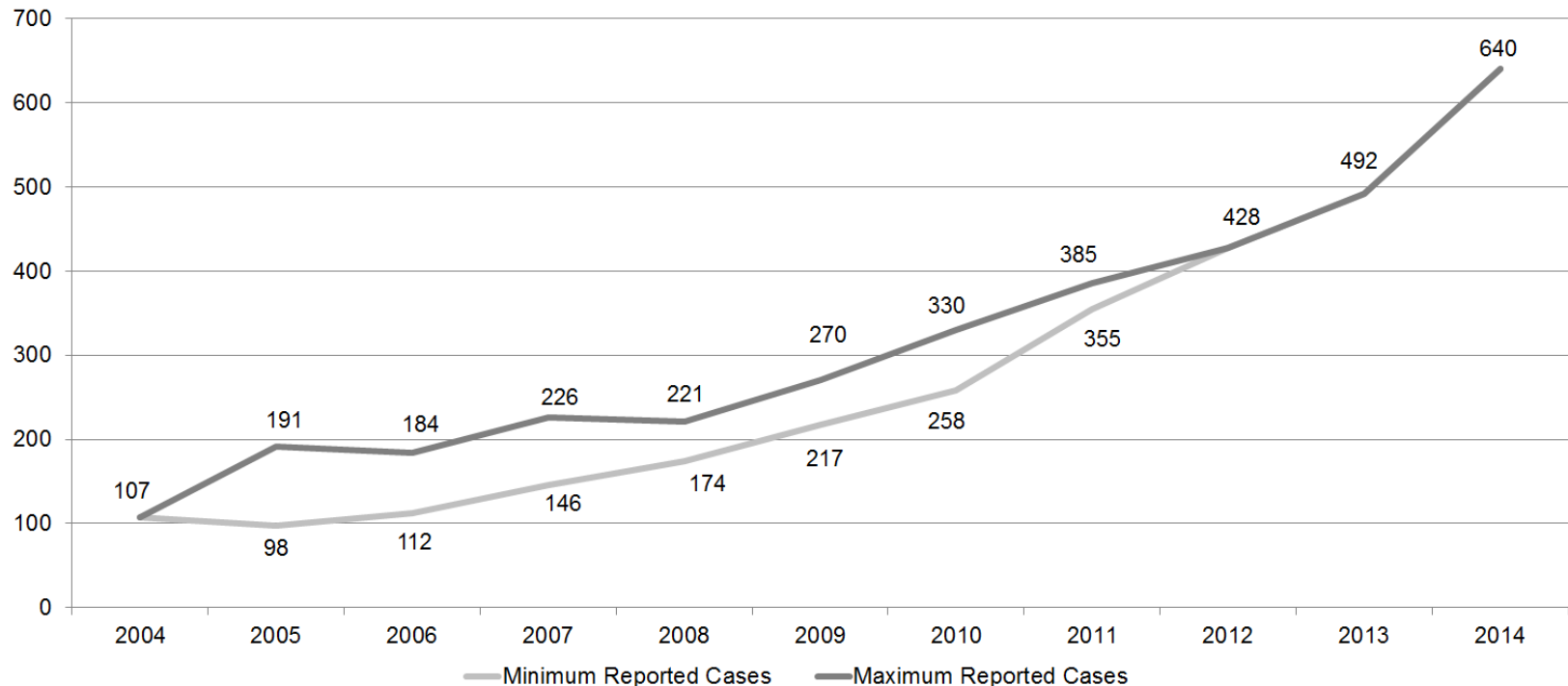
## ■ Multi-Phase Process: **Domestic Proceedings (Art 5)**

- A Contracting State shall inform the taxpayer of the intention to make a transfer pricing adjustment in due time to give it 'the opportunity to inform the other enterprise so as to that other enterprise the opportunity to inform in turn the other Contracting State' (Art 5).
- Unless the enterprises involved and the other Contracting State agree to that adjustment (Art. 5), the taxpayer affected by a re-allocation of profits has the right to present its case to the competent authority of the Contracting State of which it is an enterprise or in which its permanent establishment is situated (Art. 6(1)).
- This application must be made "within three years of the first notification of the action which results or is likely to result in double taxation within the meaning of Article 1" (Art 6(1)).

# ARBITRATION CONVENTION | *PHASES*

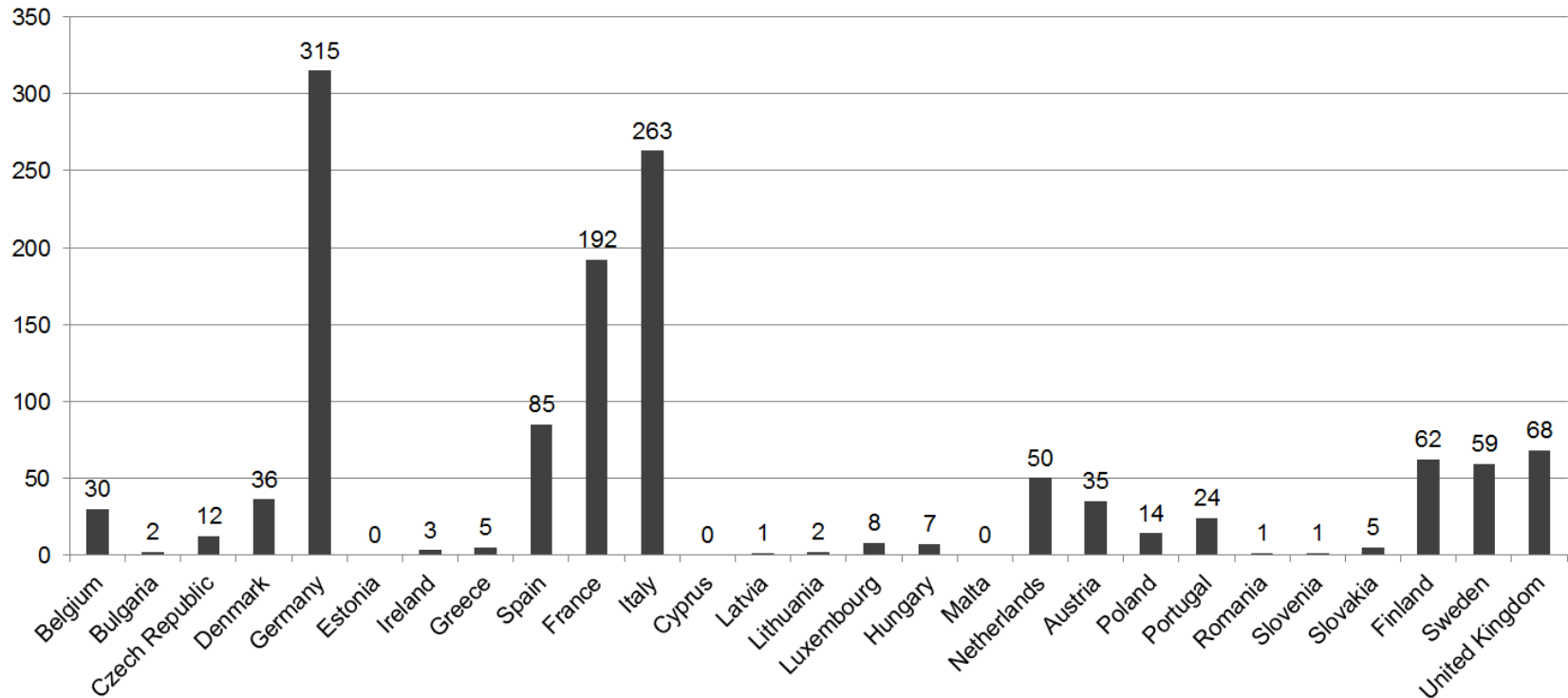
- **Multi-Phase Process: Mutual Agreement Procedure (Phase I) – 2 years**
  - If no satisfactory uni- or bilateral solution can be reached, the Arbitration Convention foresees a (mandatory) mutual agreement procedure between the States involved (Art. 6(2)). – The enterprises involved are not parties to that procedure and have no right to be present at competent authority discussions.
  - Under Art. 6(2), “[a]ny mutual agreement reached shall be implemented irrespective of any time limits prescribed by the domestic laws of the Contracting States concerned”.
  - A mutual agreement that eliminates double taxation should be reached “within two years of the date on which the case was first submitted to one of the competent authorities in accordance with Article 6 (1)” (Art. 7(1)).
  - The two-year period starts on the later of either (1) the date on which the competent authority receives the request or (2) the date of the tax assessment notice.
  - There are two exceptions:
    - If the case has also been submitted to a court of tribunal, the two-year period starts with the date on which the judgment of the final court of appeal was given (Art 7(1)).
    - The competent authorities may by mutual agreement and with the agreement of the associated enterprises concerned waive the two-year time limit (Art 7(4)).

# ARBITRATION CONVENTION | *PHASES*



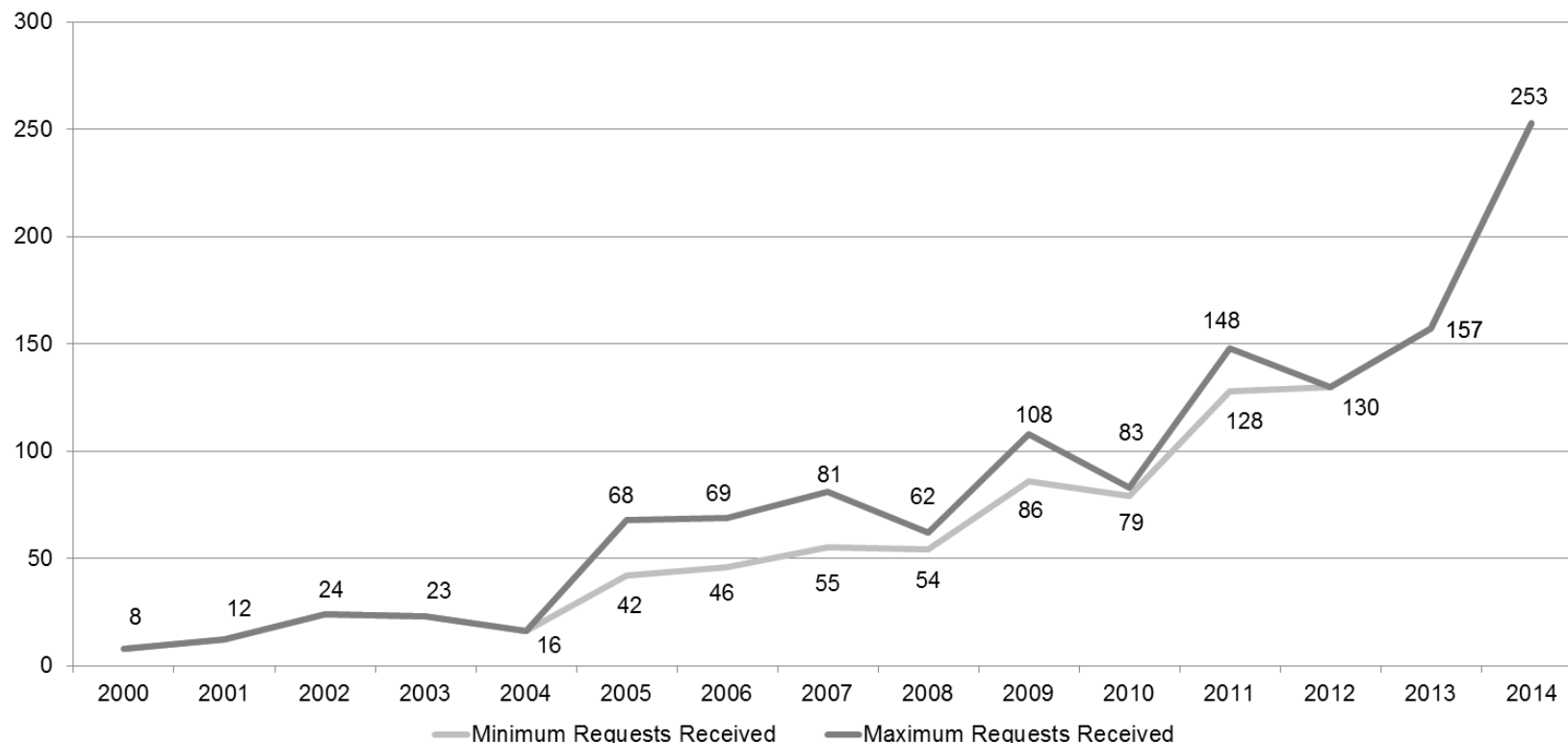
Number of cases reported under the EU AC. This graph shows the evolution of reported pending cases under EU AC's mutual agreement proceedings at the end of each year from 2004 to 2014. Due to the existence of discrepancies in the number of cases reported by the Member States until 2011, a minimum and a maximum number of cases is shown. See, e.g., JTPF/008/2015/EN (October 2015) for an explanation of the methodology of counting "initiated" and "completed" cases and various deviations by individual Member States.

# ARBITRATION CONVENTION | *PHASES*



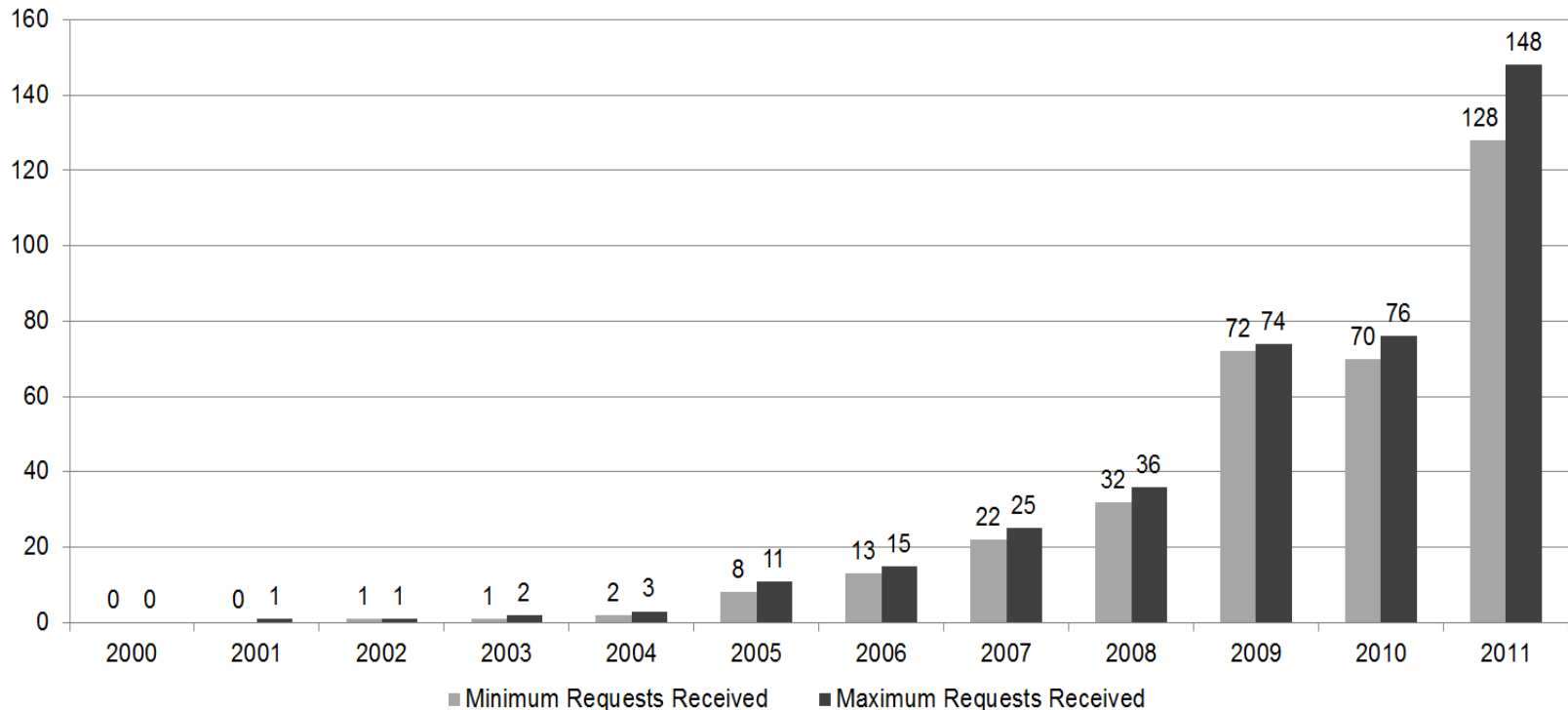
Number of cases pending under the EU AC in each Member State by the end of 2014. This graph shows the number reported pending cases under EU AC's mutual agreement proceedings in each Member State at the end of 2014, where each Member State reported cases originating from or received by it, i.e., a total of 1.280 reported cases, implying approximately 640 initiated bilateral cases. This data is taken from JTPF/012/2013/EN (August 2013).

# ARBITRATION CONVENTION | *PHASES*



Requests for mutual agreement proceedings under the EU AC received by tax administrations from 2000 to 2014. This graph shows the evolution of requests received by tax administrations for proceedings under the EU AC each year from 2000 to 2014. Due to the existence of discrepancies in the number of cases reported by the Member States in the statistics until 2011, a minimum and a maximum number of requests is shown. See for data on 2004 to 2011 JTPF/013/2012/EN (June 2012), and for data on 2012 JTPF/012/2013/EN (August 2013).

# ARBITRATION CONVENTION | *PHASES*



Cases pending by the end of 2011 itemized by year of request. This graph shows the number of total pending cases by the end of 2011 itemized by the year in which the request has been received, where each Member State reported cases originating from or received by it. Due to the existence of discrepancies in the number of cases reported by the Member States, a minimum and a maximum number of requests is shown. This data is taken from JTPF/013/2012/EN (June 2012). Later statistics by the JTPF do not itemize cases by the year in which the request has been received.

# ARBITRATION CONVENTION | *PHASES*

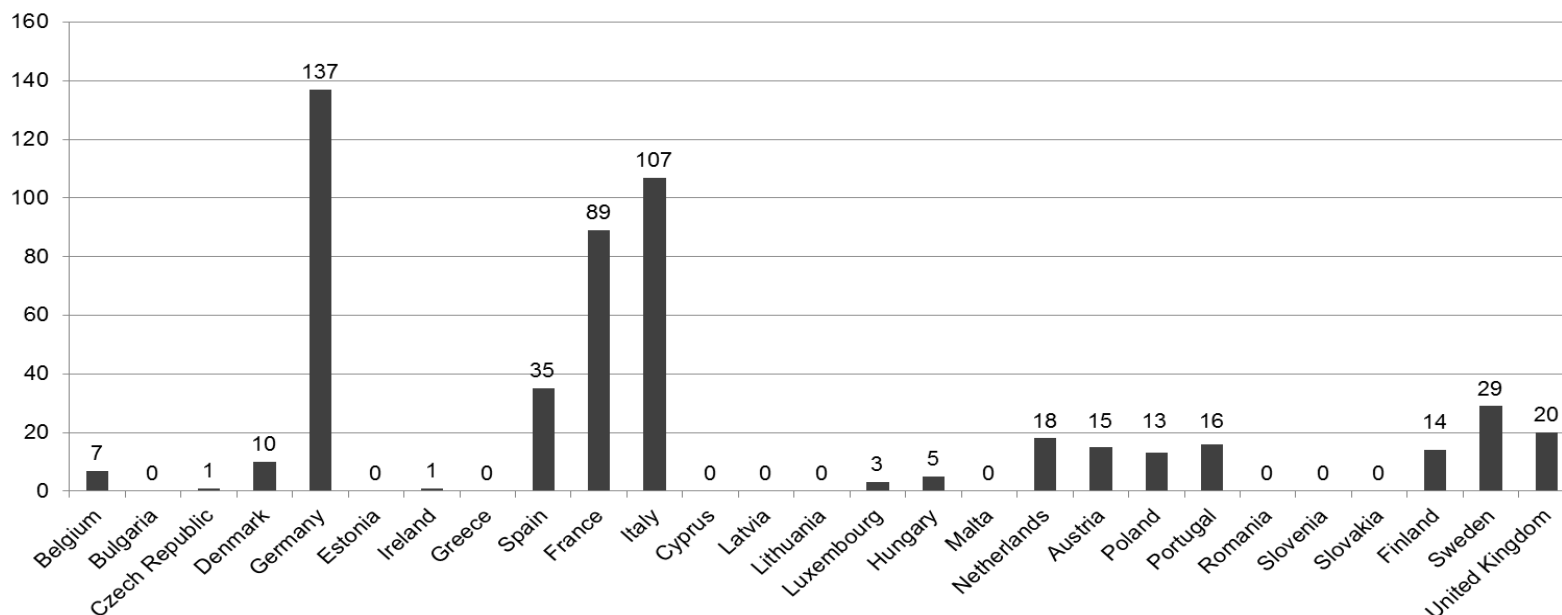
## ■ Multi-Phase Process: **Arbitration Procedure (Phase II) – 6 months (12 months)**

- If the competent authorities fail to reach an agreement within the time frame under Art 7, the Contracting States are required to set up an advisory commission, i.e., an arbitration panel (Art 7). – The advisory commission should be established ‘no later than six months following expiry of the period referred to in Article 7’.
- Arts 9 and 10 set out rules as to the composition of the advisory commission and procedure, with the competent authorities being at liberty to agree on additional rules of procedure (Art. 11(2)).
- The enterprises involved are not parties to that procedure. However, they can or must provide any information, evidence or documents and have the right or obligation to be heard or to appear before the commission (Art 10).
- Arbitration Decision
  - Panel decides by simple majority vote (Art 11(2)).
  - Opinion within six months from the date on which the matter was referred to it (Art 11).
  - The advice must be based on the principles of Art 4 of the Convention, i.e., the arm's length principle (Art 11(1)), hence excluding decisions *ex aequo et bono*.

# ARBITRATION CONVENTION | *PHASES*

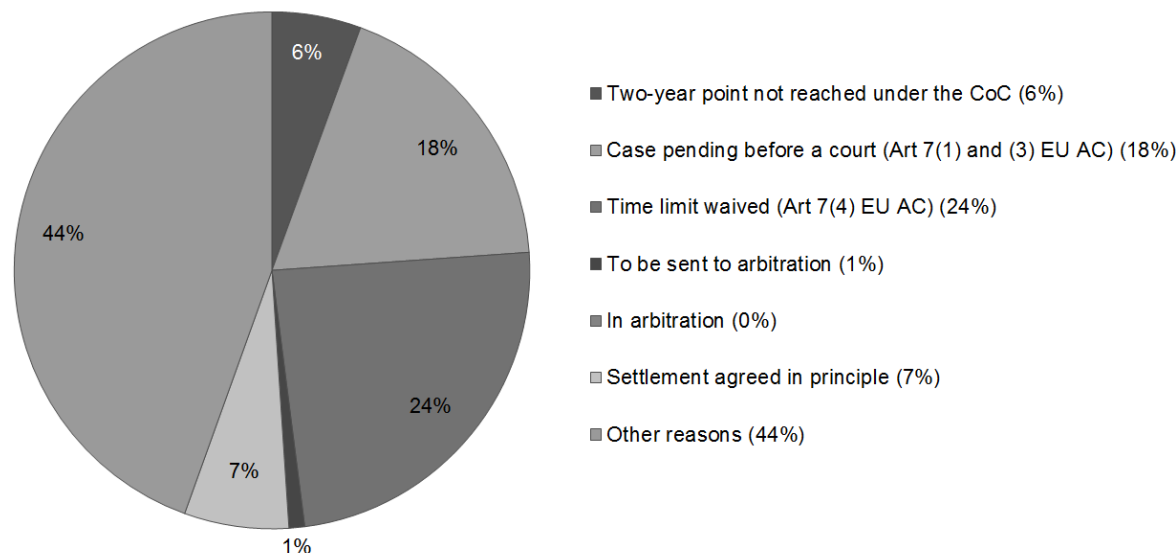
- Multi-Phase Process: **Elimination of Double Taxation (Phase III) – 6 months**
  - Within six months following the advice of the arbitration committee, the competent authorities must issue a decision eliminating double taxation (Art 12(1))
  - The decision does not have to follow the advice of the advisory commission, yet it must be in line with Art 4 of the convention, i.e., it must be in conformity with the arm's-length principle.
  - If they fail to reach agreement, they shall be obliged to act in accordance with the committee's opinion (Art 12(1)).

# ARBITRATION CONVENTION | *PHASES*



Number of cases that are pending two years after the date of their initiation by the end of 2014. This graph shows the number of cases by the end of 2014 that are pending two years after the date they were initiated in the different Member States, where each Member State reported cases originating from or received by it, i.e., a total of 520 reported cases, implying approximately 260 bilateral cases. According to the Revised Code of Conduct, the two-year period starts on the latest of the following dates: (1) the date of the tax assessment notice, i.e. a final decision of the tax administration on the additional income or equivalent; (2) the date on which the competent authority receives the request and the minimum information as stated under point 5(a) of the Revised Code of Conduct. Thus, if the tax assessment notice was not yet issued when the case was initiated, the two year period starts after initiation, i.e., at the day of the tax assessment notice. This data is taken from JTPF/008/2015/EN (October 2015).

# ARBITRATION CONVENTION | *PHASES*



Reasons why cases are still pending two years after initiation by the end of 2014. This graph itemizes the reasons why cases are still pending two years after initiation by the end of 2014. These include: (1) cases where the two year point has not been reached under the Revised Code of Conduct, i.e., because no assessment notice has been issued at the time of initiation; (2) cases pending before Court, i.e., cases where the two-year period has not yet expired because of Article 7(1) 2nd sentence and Article 7(3) EU AC; (3) cases where the time limit has been waived with agreement of the taxpayer according to Article 7(4) EU AC; (4) cases which are to be sent to arbitration, i.e., cases for which the two-year period has expired, but which have not yet been referred to an advisory commission; (5) cases that have been referred to an advisory commission and awaiting its opinion; (6) cases where a settlement has been agreed in principle awaiting exchange of closing letters or final signed minutes, i.e., cases where Competent Authorities have agreed in a mutual agreement proceeding or where the advisory commission has delivered its opinion and the six-month period where Competent Authorities can deviate has not yet expired; and (7) other reasons. This data is taken from JTPF/008/2015/EN (October 2015).

# DISPUTE RESOLUTION DIRECTIVE | *CORPORATE TAX REFORM*

## ■ ***Corporate Tax Reform Package: Dispute Resolution***

- Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union (COM(2016)686 final)
- Adopted by the Council on 2 October 2017 (Dok. 9806/17 FISC 118 ECOFIN 472) → Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, [2017] OJ L 265
- To be implemented by Member States by 30 June 2019. Directive shall apply to any complaint submitted from 1 July 2019 onwards relating to questions of dispute relating to income or capital earned in a tax year commencing on or after 1 January 2018.

# DISPUTE RESOLUTION DIRECTIVE | *SCOPE*

**Not limited to double taxation** (but a Member State may deny access to the dispute resolution procedure under Art 6 on a case by case basis where a question of dispute does not involve double taxation (Art 16(7)).

**DTCs and EU  
Arbitration  
Convention.**

*Article 1*

*Subject matter and scope*

This Directive lays down rules on a mechanism to resolve disputes between Member States when these arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital. It also lays down the rights and obligations of the affected persons when such disputes arise. Hereinafter in this Directive, the matter giving rise to such disputes is referred to as a “question of dispute”.

**Individuals and corporations.**

**Not included VAT, inheritance taxes, might  
raise issues with regard to the notion of  
income.**

# DISPUTE RESOLUTION DIRECTIVE |

## *HIGHLIGHTS*

### ■ *Dispute Resolution*

- Member States have a legal obligation to take conclusive and enforceable decisions under the improved dispute resolution mechanism
- Taxpayers faced with tax treaty or EU Arbitration Convention disputes can initiate a procedure whereby the Member States in question must attempt to resolve the dispute amicably within two years
- If at the end of the two-year period no solution has been found, the competent authority of each Member State must set up an Advisory Commission to arbitrate
- If the competent authorities fail to set up the Advisory Commission to arbitrate, the taxpayer can bring an action before the national court to do so in their place

# DISPUTE RESOLUTION DIRECTIVE |

## *STRUCTURE*

- Complaint by an affected person within 3 years (Art 3)
- Member State decision on the complaint within 6 months
  - Accept complaint → Mutual agreement procedure to reach agreement within 2 years (Art 4)
  - Reject complaint, e.g., for lack of information lack of dispute (Art 5)
- Dispute resolution by the Advisory Commission upon affected person's request if complaint was rejected only by one Member State or if no agreement could be reached (Art 6) – Alternatively: Appointments by competent courts or national appointing body (Art 7)
  - Composition of the Advisory Commission (Art 8, 9)
  - Note: Alternative Dispute Resolution Commission (Art 10)
  - Procedural rules, costs etc (Art 11, 12 and 13)

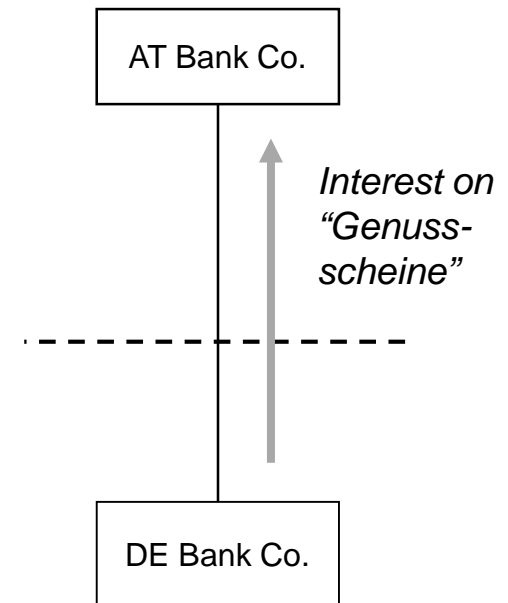
# DISPUTE RESOLUTION DIRECTIVE |

## *STRUCTURE*

- Opinion of the Advisory Commission or Alternative Dispute Resolution Commission within 6 months (+ 3 months) (Art 14)
- Final decision by the Member States within 6 months (Art 15) → May deviate from the opinion of the Advisory Commission or Alternative Dispute Resolution Commission, but the latter becomes binding if no agreement is reached
- Interaction with national proceedings and derogations (Art 16)
- Special provisions for individuals and smaller undertakings (Art 17)
- Publicity (Art 18)

# EXCURSUS | *ECJ AS ARBITRATION COURT (AUSTRIA V. GERMANY)*

- ECJ (Grand Chamber), 12 September 2017, C-648/15, *Austria v. Germany*, EU:C:2017:664
  - ECJ as arbitration court under Article 25(5) of the Austro-German Convention → Article 273 TFEU (dispute related to the subject matter of the treaties) ✓
  - Interest on “Genussscheine” (annual payment at a fixed percentage, but reduction in cases of losses and subsequent making up)
    - Austria: Art. 11(1) DTC → Exclusive taxing right in the residence State.
    - Germany: Art. 11(2) DTC (exception from para. 1, *inter alia*, for “debt-claims with participation in profits”) → Unlimited taxing right in Germany (and credit in Austria)

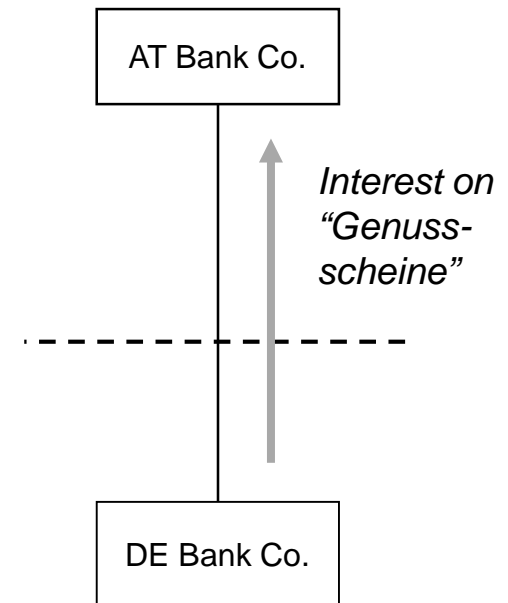


# EXCURSUS | *ECJ AS ARBITRATION COURT (AUSTRIA V. GERMANY)*

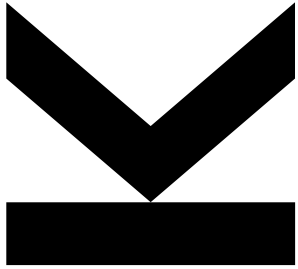
■ ECJ (Grand Chamber), 12 September 2017, C-648/15, *Austria v. Germany*, EU:C:2017:664

□ ECJ's reasoning in substance

- No reference to Art. 3(2) DTC but rather autonomous treaty interpretation based on the methods proper to international law (i.e., Vienna Convention)
- Exceptions in Art. 11(2) DTC → Commonality that the remuneration is supposed to vary according to the annual profits of the issuer
- As an exception Art. 11(2) DTC must be interpreted narrowly, also because the application of Art. 11(2) DTC “implies double taxation, the detrimental effects of which on the proper functioning of the internal market are mitigated only by the offsetting rule laid down in Article 23(1)(b) and (2)(b) of that convention”
- “Debt-claims with participation in profits” do not include Genussscheine where the (fixed) remuneration is merely reduced or suspended when its payment would lead to a loss, with an adjustment being made subsequently in the course of the following beneficial financial years



# *PART VI* RECENT EU LEGISLATION AND INITIATIVES



# CONTENT

- ***Chapter I*** – Overview
- ***Chapter II*** – Exchange of Information
- ***Chapter III*** – Tax Good Governance
- ***Chapter IV*** – Taxation of the Digital Economy

# *CHAPTER I* OVERVIEW



# CURRENT DEVELOPMENTS |

## OVERVIEW

- ***Action Plan to Strengthen the Fight against Tax Fraud and Tax Evasion (December 2012)*** → Commission's Communication on An Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722 final (6 December 2012)
- ***Tax Transparency Package (March 2015)*** → Commission's Communication on tax transparency to fight tax evasion and avoidance, COM(2015) 136 final (18 March 2015)
- ***Action Plan on Corporate Taxation (June 2015)*** → Commission's Communication on A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM(2015) 302 final (17 June 2015)
- ***Anti-Tax Avoidance Package (January 2016)***
- ***Fight against Tax Evasion and Avoidance (July 2016)*** → Communication on further measures to enhance transparency and the fight against tax evasion and avoidance, COM(2016)451 (5 July 2016)
- ***Corporate Tax Reform Package (October 2016)***

# CURRENT DEVELOPMENTS |

## OVERVIEW

- **Action Plan to Strengthen the Fight against Tax Fraud and Tax Evasion (December 2012)** → Commission's Communication on An Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722 final (6 December 2012)
- 34 concrete Actions, including ...
  - **Administrative Cooperation** → Mandatory automatic exchange of information in the field of taxation in the Directive on Mutual Assistance – Proposal COM(2013) 348 final (12 June 2013), adopted as Directive 2014/107/EU of 9 December 2014, [2014] OJ L 359/1
  - **Aggressive Tax Planning** → Recommendation C(2012)8806 final (6 December 2012)
  - **Third Countries and Good Tax Governance** → Recommendation C(2012)8806 final (6 December 2012)
  - **Hybrid Loans** → Amendment of the Parent-Subsidiary-Directive – Proposal COM(2013)814 final (25 November 2013), adopted as Directive 2014/86/EU of 8 July 2014, [2014] OJ L 219/40 → OECD BEPS Action 2
  - **Anti-Abuse Provisions in EU Legislation** → Amendment of the Parent-Subsidiary-Directive – Proposal COM(2013)814 final (25 November 2013), adopted as Directive (EU) 2015/121 of 27 January 2015, [2015] OJ L 21/1.

# CURRENT DEVELOPMENTS |

## OVERVIEW

- **Tax Transparency Package (March 2015)** → Commission's Communication on tax transparency to fight tax evasion and avoidance, COM(2015) 136 final (18 March 2015)
  - **Transparency on Tax Rulings** → Amending the Directive on Mutual Assistance – Proposal COM(2015) 135 final (18 March 2015), adopted by Council on 6 October 2015 (Doc. 12774/15 FISC 122 ECOFIN 752)
  - **Other Tax Transparency Initiatives**
    - Assessing possible new transparency requirements for multinationals → Specifically “Country-by-country reporting” (“CBCR”) → **OECD BEPS Action 13**
    - Reviewing the Code of Conduct on Business Taxation → *Action Plan on Corporate Taxation* → **OECD BEPS Action 5**
    - Quantifying the scale of tax evasion and avoidance (“tax gap”)
    - Repealing the Savings Tax Directive (in light of the extended Directive on Mutual Assistance) → Proposal COM(2015) 129 final (18 March 2015), adopted as Directive (EU) 2015/2060 ([2015] OJ L 301/1)

# CURRENT DEVELOPMENTS |

## OVERVIEW

- **Action Plan on Corporate Taxation (June 2015)** → Commission's Communication on A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM(2015) 302 final (17 June 2015)
  - Re-launching the **Common Consolidated Corporate Tax Base (CCCTB)**
  - Ensuring **fair taxation where profits are generated** → CCCTB, CoC, double non-taxation in EU legislation (i.e., in the Interest-Royalties-Directive and the Parent-Subsidiary-Directive), transfer pricing framework in the EU, linking preferential regimes to where value is generated (i.e., for "patent boxes") → **OECD BEPS Action 5**
  - Creating a **better business environment** → Greater coordination between Member States on tax policy, along with measures to reduce administrative burden, compliance costs and tax obstacles in the internal market, specifically by (1) enabling cross border loss offset (with recapture) and (2) improving double taxation dispute resolution mechanisms
  - Increasing **transparency** → E.g., adopt a common approach to non-cooperative tax jurisdictions, specifically by (1) publishing an EU-wide list of third country non-cooperative tax jurisdictions and (2) coordinating possible counter-measures towards non-cooperative tax jurisdictions
  - Improving **EU coordination** – Specifically by (1) coordination on tax audits and (2) reforming the Code of Conduct for Business Taxation and the Platform on Tax Good Governance

# CURRENT DEVELOPMENTS |

## OVERVIEW

### ■ *Anti-Tax Avoidance Package (January 2016)*

Chapeau Communication (COM(2016) 23 final)			
<p>Proposal for an Anti-Tax Avoidance Directive (COM(2016) 26 final) – Adopted as Council Directive (EU) 2016/1164, [2016] OJ L 193/1</p>	<p>Recommendation on Tax Treaties (C(2016) 271 final)</p>	<p>Revised Administrative Cooperation Directive – CbC-Reporting (COM(2016) 25 final) – Adopted as Council Directive (EU) 2016/881, [2016] OJ L 146/8</p>	<p>Communication on External Strategy (COM(2016) 24 final)</p>
Staff Working Document (SWD(2016) 6/2) and Study on Aggressive Tax Planning			

# CURRENT DEVELOPMENTS |

## OVERVIEW

- Adopted as Directive (EU) 2016/1164, [2016] OJ L 193/1
- Five mandatory measures, but “minimum standard”
- Reflects (1) G20/OECD BEPS Actions, (2) Council work on the CCCTB, and (3) Parliament’s resolution on tax avoidance (P8\_TA(2015)0457)
- Sets new good governance standards in tax matters (EOI, AEOI, CoC, BEPS Standard, anti-money laundering)
- Announces work on a common EU system for assessing, screening and listing third countries (“EU blacklist”)
- Links EU funds and tax good governance

### Chapeau Communication (COM(2016) 23 final)

Proposal for an Anti-Tax Avoidance Directive (COM(2016) 26 final)

Recommendation on Tax Treaties (C(2016) 271 final)

Revised Administrative Cooperation Directive – CbC-Reporting (COM(2016) 25 final)

Communication on External Strategy (COM(2016) 24 final)

### Staff Working Document (SWD(2016) 6/2) and Study on Aggressive Tax Planning

- Recommends EU-adjustment of the PPT-rule
- Recommends to adopt new Art 5 OECD MC
- Addresses OECD BEPS Actions 6, 7 and 15
- Adopted as Directive (EU) 2016/881, [2016] OJ L 146/8
- Requires country-by-country reporting and exchange of those reports

# CURRENT DEVELOPMENTS | *OVERVIEW*

- ***Fight against Tax Evasion and Avoidance (July 2016)*** → Communication on further measures to enhance transparency and the fight against tax evasion and avoidance, COM(2016)451 (5 July 2016)
  - ***Harness the link between Anti Money Laundering and Tax Transparency rules*** → Tax authorities must be given access to the data provided under the E's anti-money laundering rules (e.g., customer due diligence information and the information in their national beneficial ownership registries) — Proposal for a Council Directive amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities, COM(2016)452 (5 July 2016)
  - ***Improve Information Exchange on Beneficial Ownership*** → Currently pilot project (launched by UK, Germany, Spain, Italy and France) to exchange information on the ultimate beneficial owners of companies and trusts
  - ***Increase Oversight of Enablers and Promoters of Aggressive Tax Planning*** → The Commission will explore the best way to increase oversight and ensure that effective disincentives apply for promoters and enablers of aggressive tax planning schemes → ***OECD BEPS Action 12***
  - ***Promote higher tax good governance standards worldwide*** → Development of the “EU black list”
  - ***Improve the protection of whistle-blowers***

# CURRENT DEVELOPMENTS | *OVERVIEW*

## ■ *Corporate Tax Reform Package (25 October 2016)*

Chapeau Communication (COM(2016) 682 final)			
	C(C)CTB		
Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union (COM(2016) 686 final)	Proposal for a Council Directive on a Common Corporate Tax Base (COM(2016) 685 final)	Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM(2016) 683 final)	Proposal for a Council Directive to amend the ATAD with regard to hybrid mismatches with third countries (COM(2016) 687 final)

# C(C)CTB | *STATUS QUO*

## ■ **Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)**, COM(2011) 121 final (16 March 2011)

- Impact Assessment in SEC(2011)315 and Summary in SEC(2011)316
- Work on the level of Council on the tax base (under the Danish, Lithuanian and Hellenic Presidencies) and on international and BEPS-related aspects and issues of the financial sector (under the Italian Presidency) → Compromise text in Doc. 15756/14 FISC 197 and 15756/14 FISC 197 ADD 1 (19 November 2014)

## ■ **Structure** of the Commission's proposal:

One single set of profit determination rules for EU groups of companies that opt for the common system. Optionality and “All-In”.

Only corporations, not individuals or partnerships!

### **Common Consolidated Corporate Tax Base**

Profits and losses of all group members are aggregated into one single overall group tax base, including irrelevance of intra-group transactions. → Sharing mechanism (formulary apportionment)

No intention to harmonize tax rates!

- ## ■ **Main goals** → (1) Reduction of compliance costs (no transfer pricing), (2) elimination of double taxation (base sharing mechanism), and (3) elimination of over-taxation (i.e., automatic cross-border loss relief)

# C(C)CTB | *ACTION PLAN ON CORPORATE TAXATION*

## ■ ***Re-launch of the Common Consolidated Corporate Tax Base (CCCTB)***

- Commission's Communication on A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM(2015) 302 final (17 June 2015)
- CCCTB as a holistic solution to profit shifting in the BEPS-context → Highly effective in “tackling profit shifting and corporate tax abuse in the EU”, as a CCCTB would (1) remove mismatches between national tax systems, (2) remove the possibility to manipulate transfer pricing, (3) address the “debt bias”, (4) introduce transparency as to the effective tax rate in each jurisdiction, (5) allow Member States to implement a common approach towards third countries, (6) reinforce the link between profit creation and taxation, (7) enable a common adoption of BEPS measures (e.g., definition of permanent establishments, CFC rules)

## ■ ***New proposals***

- Proposal for a Council Directive on a Common Corporate Tax Base (COM(2016) 685 final)
- Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM(2016) 683 final)

# OTHER LEGISLATION | *OVERVIEW*

## ■ *New Directives*

- ☐ Double Taxation Dispute Resolution Mechanisms in the European Union Council Directive (EU) 2017/1852 of 10 October 2017, [2017] OJ L 265)
- ☐ Mandatory Disclosure of Potentially Aggressive Cross-Border Tax Planning Arrangements (Council Directive (EU) of 25 May 2018, [2018] OJ L 139/1)

## ■ *Proposals*

- ☐ Re-launch of the Common Consolidated Corporate Tax Base (CCCTB)
  - Proposal for a Council Directive on a Common Corporate Tax Base (COM(2016) 685 final)
  - Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM(2016) 683 final)
- ☐ Taxation of the Digitalized Economy
  - Long-Term Solution → Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018) 147 and Annexes, and Commission Recommendation of 21.3.2018 relating to the corporate taxation of a significant digital presence, C(2018)1650
  - Short-Term Solution → Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018)148
- ☐ Whistleblower Protection
  - Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, COM(2018)218

*CHAPTER II*  
EXCHANGE OF INFORMATION



# ADMINISTRATIVE COOPERATION |

## *AUTOMATIC EXCHANGE OF INFORMATION*

### Step 1 – Certain Types of Non- Financial Income (2011)

- Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, [2011] L 64/1 (based on proposal COM(2009)29 [2 February 2009])
- Automatic exchange of information with effect from 1 January 2015, where information is available, in respect of five non-financial categories of income and capital, i.e., for
  - ☐ income from employment,
  - ☐ director's fees,
  - ☐ life insurance products not covered by other Directives,
  - ☐ pensions, and
  - ☐ ownership of and income from immovable property.
- Implementation (computerized format) → Commission Implementing Regulation (EU) 2015/2378, [2015] OJ L 332/19
- Also: First Report of the Commission AEFI expert group on the implementation of Directive 2014/107/EU for automatic exchange of financial account information (March 2015)

# ADMINISTRATIVE COOPERATION | *AUTOMATIC EXCHANGE OF INFORMATION*

## Step 2 – Financial Information (2014)

- Council Directive 2014/107/EU of 9 December 2014, [2014] OJ L 359/1 (based on Proposal COM(2013) 348 final [12 June 2013]) → *Implementation of the OECD's Common Reporting Standard (CRS)*
- Automatic exchange of information with effect from 1 January 2016/17 (without the requirement of “availability”) for financial information, i.e.,
  - ☐ interest, dividends and similar types of income,
  - ☐ sale proceeds from the sale of financial assets,
  - ☐ account balances.
- Implementation (computerized format) → Commission Implementing Regulation (EU) 2015/2378 of 15 December 2015, [2015] OJ L 332/19

# ADMINISTRATIVE COOPERATION |

## *AUTOMATIC EXCHANGE OF INFORMATION*

### Step 2 – Financial Information (2014)

- Relation to Savings Interest Directive? → Repeal of the Savings Interest Directive by Council Directive (EU) 2015/2060 of 10 November 2015, [2015] OJ L 301/1 (based on proposal COM(2015)129 [18 March 2015]) (aligned with entry into force of Council Directive 2014/107/EU)
- Savings Interest Agreements with Third countries - Negotiations/agreements for amending protocols with

	Council Decision on Signing	Text of the Protocol in the OJ	Council Decision on Conclusion	In force
Switzerland	(EU) 2015/860, [2015] OJ L 136/5 — COM(2015)150	[2015] OJ L 333/12	(EU) 2015/2400, [2015] OJ L 333/10 — COM(2015)151	1 Jan. 2017
Liechtenstein	(EU) 2015/1994, [2015] OJ L 290/16 — COM(2015)394	[2015] OJ L 339/3	(EU) 2015/2453, [2015] OJ L 339/1 — COM(2015)395	1 Jan. 2016
Monaco	(EU) 2016/1392, [2016] OJ L 225/1 — COM(2016)200	[2016] OJ L 225/3	(EU) 2016/1830, [2016] OJ L 280/1 — COM(2016)201	1 Jan. 2017
Andorra	(EU) 2016/242, [2016] OJ L 45/10 — COM(2015)632	[2016] OJ L 268/40	(EU) 2016/1751, [2016] OJ L 268/38 — COM(2015)631	1 Jan. 2017
San Marino	(EU) 2015/2469, [2015] OJ L 346/1 — COM(2015)519	[2015] OJ L 346/3	(EU) 2016/828, [2016] OJ L 140/1 — COM(2015)518	1 Jan. 2016

# ADMINISTRATIVE COOPERATION |

## *AUTOMATIC EXCHANGE OF INFORMATION*

### Step 3 – Tax Rulings (2015)

- Council Directive (EU) 2015/2376 of 8 December 2015, [2015] OJ L 332/1 (based on proposal COM(2015)135 [18 March 2015]) → *OECD BEPS Action 5*
- Exchange of basic information on advance cross-border rulings and advance pricing arrangements with effect from 1 January 2017
- Applies for cross-border rulings and advance pricing arrangements that were issued, amended or renewed
  - after 31 December 2016 or
  - within a period beginning five years before 1 January 2017, but for those issued, amended or renewed
    - between 1 January 2012 and 31 December 2013 only if they are still valid on 1 January 2014,
    - between 1 January 2014 and 31 December 2016 irrespective of whether they are still valid or not, and
    - before 1 April 2016, Member States may exclude such ruling if it concerns a particular person or a group of persons (excluding those conducting mainly financial or investment activities) with a group wide annual net turnover of less than €40 million.
- Does not apply in a case where an advance cross-border ruling exclusively concerns and involves the tax affairs of one or more natural persons.
- Part of the Tax Transparency Package (COM(2015) 136)

# ADMINISTRATIVE COOPERATION | *AUTOMATIC EXCHANGE OF INFORMATION*

## Step 4 – Country-by- Country Reporting (2016)

- Council Directive (EU) 2016/881 of 25 May 2016, [2016] OJ L 146/8 (based on proposal COM(2016)25 [28 January 2016]) → *OECD BEPS Action 13*
- Exchange of country-by-country reports with effect from 1 January 2017.
- Member States must take the necessary measures to require certain taxpayers to file a country-by-country report.
- The relevant competent authority shall then, by means of automatic exchange, communicate the report to any other Member State in which, on the basis of the information in the country-by-country report, one or more of the group entities are either resident for tax purposes, or are subject to tax with respect to the business carried out through a permanent establishment .
- Consistency with
  - ☐ Tax Transparency Package (COM(2015) 136)
  - ☐ Action Plan on a Fairer Corporate Tax System (COM (2015) 302)
- Also: Commitment by 44 States on the OECD level (as of 30 June 2016), electronic format for exchange (22 Mar. 2016)
- *Next step: Public CbC-Reporting in the EU? → Commissions Proposal to change the accounting directive COM(2016)198 (12 Apr. 2016), Council Dok. 15243/16 (19 December 2016)*

# ADMINISTRATIVE COOPERATION | *AUTOMATIC EXCHANGE OF INFORMATION*

## Step 5 – Access to Anti-Money- Laundering Information (2016/17)

- Directive (EU) 2016/2258, [2016] OJ L 342/1 (based on proposal COM(2016)452 [6 December 2016])
- Tax authorities must be given access to the data provided under the EU's anti-money laundering rules (e.g., customer due diligence information and the information in their national beneficial ownership registries)
- Concerns especially situations where the Account Holder is an intermediary structure (i.e. a Passive Non-Financial Entity), as the Financial Institutions shall look through that entity and identify and report its controlling persons (beneficial owners in anti-money-laundering terminology).

# ADMINISTRATIVE COOPERATION | *AUTOMATIC EXCHANGE OF INFORMATION*

## Step 6 – Aggressive Tax Planning (2018)

- Council Directive (EU) of 25 May 2018, [2018] OJ L 139/1 (based on proposal COM(2017)335 [21 June 2017]) → *OECD BEPS Action 12*
- Mandatory Disclosure of Potentially Aggressive Cross-Border Tax Planning Arrangements from 1 July 2020 (but reporting obligation already for arrangements between 25 June 2018 and 1 July 2020) – "Early" disclosure to the tax authorities"
  - ☐ All cross-border schemes that include at least one indicator – "hallmark" – are reportable → General and specific "hallmarks", some combined with a "main benefit test"
  - ☐ Sharing by AEOI with all Member States
  - ☐ Broad definition of intermediaries, which bear the primary reporting obligation with possible shift to taxpayers (e.g., professional privilege)
  - ☐ Penalties for no reporting to be fixed nationally

# CURRENT DEVELOPMENTS | *PUBLIC CBC-REPORTING*

- Disclosure of income tax information by certain undertakings and branches
  - Commission Proposal COM(2016)198 (12 April 2016) (amending the Accounting Directive)
  - European Parliament P8\_TA(2017)0284 (4 July 2017)
  - For large companies (consolidated turnover of or exceeding EUR 750 Mio)

# CURRENT DEVELOPMENTS | *PUBLIC CBC-REPORTING*

- Information to be provided for each jurisdiction (with some exceptions)
  - ☐ the name of the ultimate undertaking and, where applicable, the list of all its subsidiaries, a brief description of the nature of their activities and their respective geographical location ;
  - ☐ the number of employees on a full-time equivalent basis ;
  - ☐ fixed assets other than cash or cash equivalents;
  - ☐ the amount of the net turnover, including a distinction between the turnover made with related parties and the turnover made with unrelated parties ;
  - ☐ the amount of profit or loss before income tax;
  - ☐ the amount of income tax accrued (current year) which is the current tax expense recognised on taxable profits or losses of the financial year by undertakings and branches resident for tax purposes in the relevant tax jurisdiction;
  - ☐ the amount of income tax paid which is the amount of income tax paid during the relevant financial year by undertakings and branches resident for tax purposes in the relevant tax jurisdiction; and
  - ☐ the amount of accumulated earnings.
  - ☐ details of public subsidies received and any donations made to politicians, political organisations or political foundations;
  - ☐ whether undertakings, subsidiaries or branches benefit from preferential tax treatment, from a patent box or equivalent regimes.

# TRANSPARENCY | WHISTLEBLOWER

- Proposal for a Directive of the European Parliament and of the Council on the *protection of persons reporting on breaches of Union law*, COM(2018)218

- ☐ Relevant for *corporate taxation*

d) breaches relating to the internal market, as referred to in Article 26(2) TFEU, as regards acts which breach the rules of corporate tax or arrangements whose purpose is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law.

- ☐ (Likely) also covers (*non-harmonized*) *national corporate tax law* (Pt 17 of the Preamble, TAXE2 considerations in P8\_TA(2016)0310) and Impact Assessment SWD(2018)116):

Recent scandals such as the “Panama Papers”, the “Paradise Papers” and “Luxleaks” have shown that whistleblowers can bring substantial volumes of cases of tax evasion or avoidance to the knowledge of the tax authorities and beyond. Moreover, empirical evidence shows the effect of whistleblowing in deterring the criminal use of offshore banking services and the resulting tax evasion. A 2017 study investigated the effect of the leaks of customer information from banks in tax havens on the stock prices of banks that are known to provide such services. Its findings suggest that such a leak lowered market expectations about the future earnings of tax haven banks that assist foreign customers with tax evasion. Thus, an increase in the perceived probability of a leak should be expected to deter the demand and supply of criminal offshore banking services<sup>92</sup>.

EU whistleblower protection would therefore be a complementary tool to increase Member States' effectiveness in identifying evasive and/or abusive schemes that could otherwise go undetected and would help deter such schemes, thus overall contributing to ensuring the proper functioning of the internal market.

*CHAPTER III*  
TAX GOOD GOVERNANCE



# THIRD COUNTRIES AND GOOD GOVERNANCE | *TRANSPARENCY*

- Action 7 of the EU Action Plan to Strengthen the Fight against Tax Fraud and Tax Evasion calls for a recommendation regarding minimum standards of good governance in tax matters for third countries → *Recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters*, C(2012)8806 final (6 December 2012)
- Contains ...
  - ☐ ... a list of minimum standards of good governance (transparency and effective exchange of information, no harmful tax measures in the area of business taxation)
  - ☐ ... measures against third countries not complying with these standards
  - ☐ ... measures in favor of third countries complying with these standards
  - ☐ ... measures in favor of third countries which are committed to comply with these standards
- Implementation is monitored through the “Platform on Tax Good Governance”.
  - 4. Measures directed against third countries not complying with minimum standards set out in point 3
    - 4.1. Member States should publish blacklists of third countries not complying with minimum standards set out in point 3, with a view to the application of point 4.3. Those blacklists should make reference to this Recommendation.
    - 4.2. Member States that have adopted national blacklists should include in such lists third countries not complying with minimum standards set out in point 3.
    - 4.3. Each Member State having concluded a double taxation convention with a third country not complying with minimum standards as set out in point 3 should, as most appropriate with a view to improve compliance by that third country with these standards, either seek to renegotiate the convention, suspend or terminate the convention.

# THIRD COUNTRIES AND GOOD GOVERNANCE | “BLACK LIST”

- Annex to the Commission’s Communication on a Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM(2015) 302 final ANNEX 1 (17 June 2015)
- Recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters, C(2012)8806 final (6 December 2012) → “Platform on Tax Good Governance” (Member States’ independent national blacklists) → *EU-wide list of third country non-cooperative tax jurisdictions* (covers countries that were identified by at least 10 Member States) that will be further amended on a periodic basis.
- The list offers Member States a transparent tool to compare their national lists and adjust their respective approaches to non-cooperative tax jurisdictions as necessary.

## ANNEX: List of third country non-cooperative tax jurisdictions

As part of the work of the Platform on Good Tax Governance, in late 2014 Member States provided the Commission with lists of those jurisdictions they determined met their definition of non-cooperative tax jurisdictions. Member States use a variety of criteria to identify these jurisdictions, including lack of transparency and exchange of information, the presence of harmful tax measures, and the use of a low or no tax rate.

The below list indicates those tax jurisdictions which appeared the most often on those lists Member States discussed in the December 2014 Platform on Good Tax Governance. Those listed below appear on the list of at least 10 Member States. The Commission will amend this list on a periodic basis to reflect changes to Member States’ national lists.

Andorra\*\*  
 Anguilla \*  
 Antigua and Barbuda\*\*  
 Bahamas\*\*  
 Barbados\*  
 Belize\*\*  
 Bermuda\*  
 British Virgin Islands\*  
 Brunei\*\*  
 Cayman Islands\*  
 Cook Islands  
 Grenada\*\*  
 Guernsey\*  
 Hong Kong\*\*  
 Liberia  
 Liechtenstein\*\*\*  
 Maldives  
 Marshall Islands\*\*  
 Mauritius\*  
 Monaco\*\*  
 Montserrat\*  
 Nauru  
 Niue\*  
 Panama  
 Saint - Vincent and the Grenadines\*\*  
 Saint Christopher and Nevis\*\*  
 Seychelles\*  
 Turks and Caicos Islands\*  
 US Virgin Islands  
 Vanuatu

\* Early adopter of the new global standard on the automatic exchange of information, first exchanges in 2017.

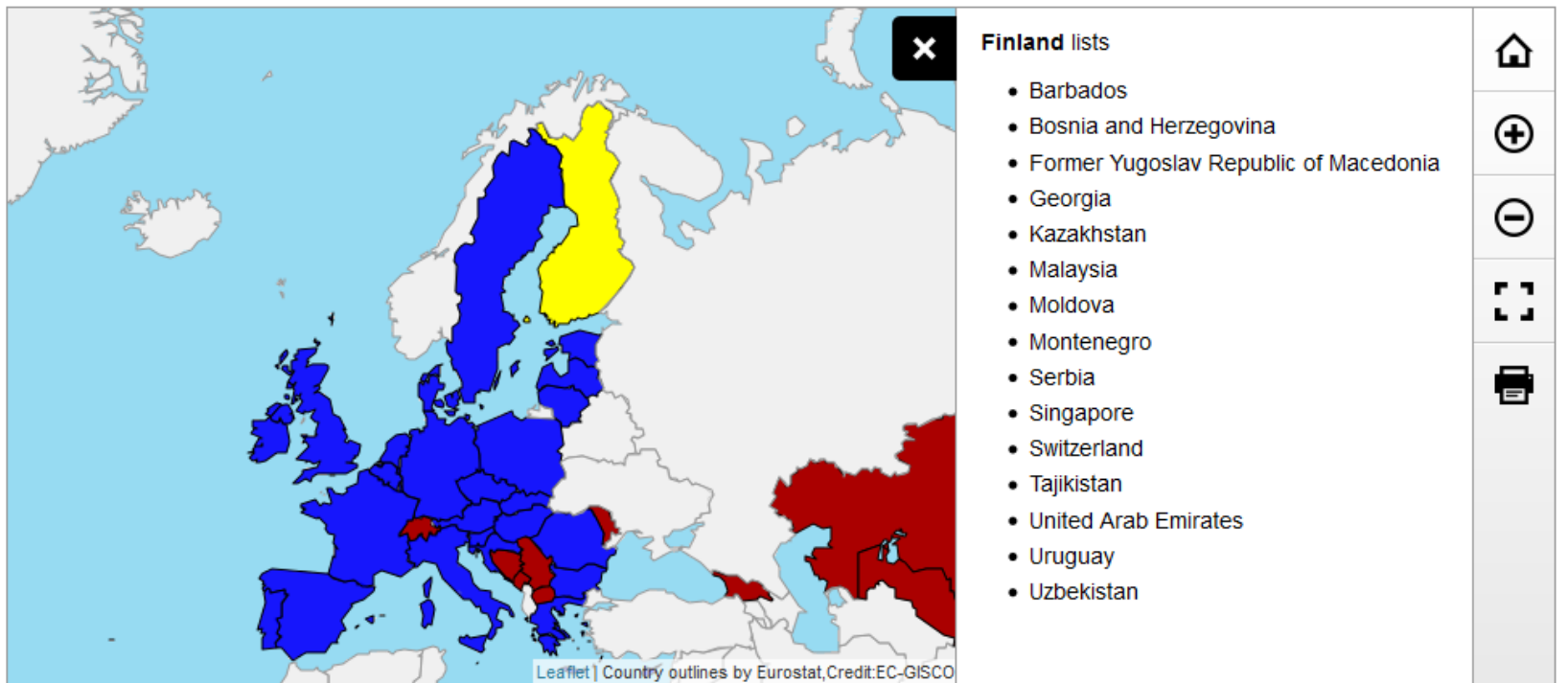
\*\* Committed to adopting the new global standard on automatic exchange of information, first exchanges in 2018.

\*\*\* Early adopter of the new global standard on the automatic exchange of information, first exchanges in 2017. Currently engaged in a dialogue on company taxation with the Code of Conduct for Business Taxation Group.

As Member States may use a number of different criteria when assessing tax jurisdictions, it is not clear how the adoption by some jurisdictions of global reporting standards will affect this list.

# THIRD COUNTRIES AND GOOD GOVERNANCE | “BLACK LIST”

- *Information on third countries listed by Member States for tax purposes available online (as of 31 December 2015)\**



\* At [http://ec.europa.eu/taxation\\_customs/business/company-tax/tax-good-governance/tax-good-governance-world-seen-eu-countries\\_en/](http://ec.europa.eu/taxation_customs/business/company-tax/tax-good-governance/tax-good-governance-world-seen-eu-countries_en/)

# THIRD COUNTRIES AND GOOD GOVERNANCE | “BLACK LIST”

- **Communication on an External Strategy for Effective Taxation**, COM(2016)24 final (28 January 2016)
  - New **EU listing process** to identify and address third country jurisdictions that fail to comply with tax good governance standards.
  - Three-step process for establishing this EU list:
    - Scoreboard (November 2016) → Pre-assessment of all third country jurisdictions based on neutral selection and risk indicators (economic ties with the EU, financial activity, stability factors, risk factors)
    - Communication and Screening (2017, 92 jurisdictions have received a letter in January 2017) → Member States to decide, with the help of the Scoreboard, on the relevant third country jurisdictions to screen against tax good governance criteria (e.g., transparency, fair tax competition, BEPS implementation, level of taxation)
    - Listing (end of 2017) → Once the screening process is complete, third country jurisdictions that refused to cooperate or engage with the EU regarding tax good governance concerns should be put on the EU list.
- Goal: Member States should apply common counter-measures against third countries on the EU list.

I. Third Country Jurisdictions that rank high in all selection indicators	Selection indicators				Risk indicators		
	STRENGTH of ECONOMIC TIES with the EU	MAGNITUDE of FINANCIAL ACTIVITY in the jurisdiction	STABILITY FACTORS		TRANSPARENCY	Preferential GT regimes	No GT/zero rate
Albania	8.0	25.8	64.4				
American Samoa	11.7	—	41.8		X		
Anguilla	—	3.5	22.6		X		
Antigua and Barbuda	9.9	7.0	31.3		X	X	X
Armenia	32.7	96.0	59.6		X	X	
Aruba	9.3	9.5	18.8			X	
Australia	38.9	2.2	4.8				
Bahamas	4.3	7.5	44.7		X		X
Bahrain	30.2	11.3	35.6		X	X	X
Barbados	7.4	7.0	36.5		X	X	
Belice	11.1	13.9	67.3			X	
Bermude	0.6	7.3	22.6				X
Bosnia and Herzegovina	3.1	19.8	51.0		X		
Botswana	25.3	21.9	27.9		X	X	
Brazil	37.0	3.3	55.8		X	X	
British Virgin Islands	—	0.5	—				X
Cabo Verde	12.3	21.5	47.1		X	X	
Canada	29.0	4.4	6.3				
Cayman Islands	1.3	1.0	21.6				X
Chile	45.1	14.0	9.1			X	
China	54.9	2.0	54.8			X	
China, Hong Kong SAR	11.1	1.5	7.7		X	X	
China, Macao SAR	59.9	7.9	21.6		X	X	
China, Taiwan Republic of	58.0	10.5	22.6		X	X	
Colombia	53.7	20.0	57.2			X	
Cook Islands	—	1.5	—		X	X	
Costa Rica	27.8	33.8	29.8		X	X	
Curaçao	1.9	37.4	—		X	X	
Domínica	19.8	10.0	38.9		X	X	
Faeroe Islands	10.5	—	—		X		
FIJ	25.3	18.0	62.5		X		
Former Yugoslav Republic of Macedonia, the	3.7	19.2	40.9		X		
Georgia	29.0	7.9	24.5		X	X	
Greenland	7.4	—	16.3		X		
Grenada	31.5	3.0	40.9		X	X	
Guam	9.9	—	41.8		X		
Guernsey	—	30.8	—				X
Iceland	13.0	1.3	12.0				
India	52.5	6.6	85.4			X	
Indonesia	55.6	11.5	65.9		X	X	
Ile of Man	1.2	31.9	—				X
Israel	26.5	12.6	23.6		X	X	
Jamaica	37.7	18.5	56.3		X	X	
Japan	40.7	4.0	15.9				
Jersey	—	25.3	16.3				X
Jordan	40.1	20.0	45.2		X	X	
Korea, Republic of	53.1	7.9	30.3			X	
Malaysia	39.5	8.6	31.7		X	X	
Maldives	9.3	6.6	60.1		X	X	
Mauritius	6.8	2.0	32.2		X	X	
Mongolia	41.4	4.6	61.5		X		

# THIRD COUNTRIES AND GOOD GOVERNANCE | “BLACK LIST”

- ***Council Conclusions on the criteria for and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes, [2016] OJ C 461/2***
  - Criteria for screening jurisdictions with a view to establishing an EU list of non-cooperative jurisdictions
    - Tax transparency criteria
    - Fair taxation
    - Implementation of anti-BEPS measures
  - Guidelines for the process of screening of jurisdictions with a view to establishing an EU list of non-cooperative jurisdictions for tax purposes

# THIRD COUNTRIES AND GOOD GOVERNANCE | “BLACK LIST”

Tax transparency criteria	Commitment to the OECD Automatic Exchange of Information (AEOI) standard (Common Reporting Standard — CRS) (and, in the future, at least a “Largely Compliant” rating)
	At least a “Largely Compliant” rating by the Global Forum with respect to the OECD Exchange of Information on Request (EOIR) standard
	OECD Multilateral Convention on Mutual Administrative Assistance (MCMAA) in Tax Matters or network of exchange agreements (EOIR, AEOI)
	(Future criterion with regard to the future global exchange of beneficial ownership information)
Fair taxation	No preferential tax measures that could be regarded as harmful according to the code of conduct for business taxation and no facilitation of offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction.
Implementation of anti-BEPS measures	Commitment to the OECD anti-BEPS minimum standards and their consistent implementation (and, in the future, a positive assessment)

# THIRD COUNTRIES AND GOOD GOVERNANCE | “BLACK LIST”

## ■ *Council Conclusions for the EU Black List ([2017] OJ C 438/5)*

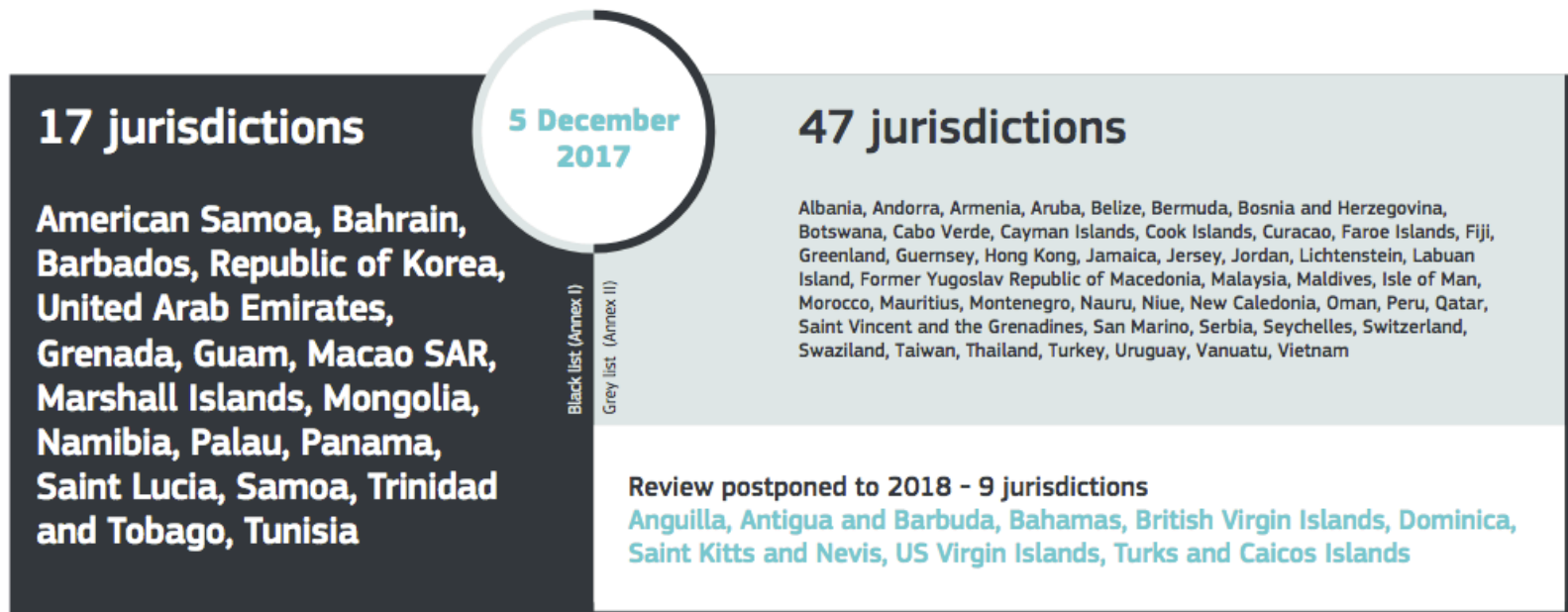
- ☐ Annex I on non-cooperative jurisdictions (“black list”) → 17 jurisdictions
- ☐ Annex II on commitments to implement tax good governance principles (“gray list”) → 47 jurisdictions
- ☐ Annex III on defensive measures (in non-tax and tax areas)
  - E.g., monitoring and increased audits risks and substantive countermeasures (e.g., non deductibility of costs; CFC rules; withholding tax measures; participation exemption limitation; switch-over rules; tax documentation/reporting/disclosure requirements; rebuttable presumptions (burden of proof))
  - Criterion for disclosure of tax planning structures under Directive (EU) 2018/822
- ☐ Annex IV on the further process and de-listing

## ■ *Various adaptations* ([2018] OJ C 29/2, [2018] OJ C 100/5, [2018] OJ C 191/1, [2018] OJ C 191/1, [2018] OJ C 359/3, [2018] OJ C 403/4, [2018] OJ C 441/3, and [2019] OJ C 114/2)

- ☐ Currently 15 jurisdictions on the „black list“
- ☐ Currently 34 jurisdictions on „grey list“

# THIRD COUNTRIES AND GOOD GOVERNANCE | “BLACK LIST”

## ■ Evolution of the “Black List” – Step 1 (ABI C 438/5 [2017])



Source: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/eu\\_list\\_update\\_12\\_03\\_2019\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/eu_list_update_12_03_2019_en.pdf)

# THIRD COUNTRIES AND GOOD GOVERNANCE | “BLACK LIST”

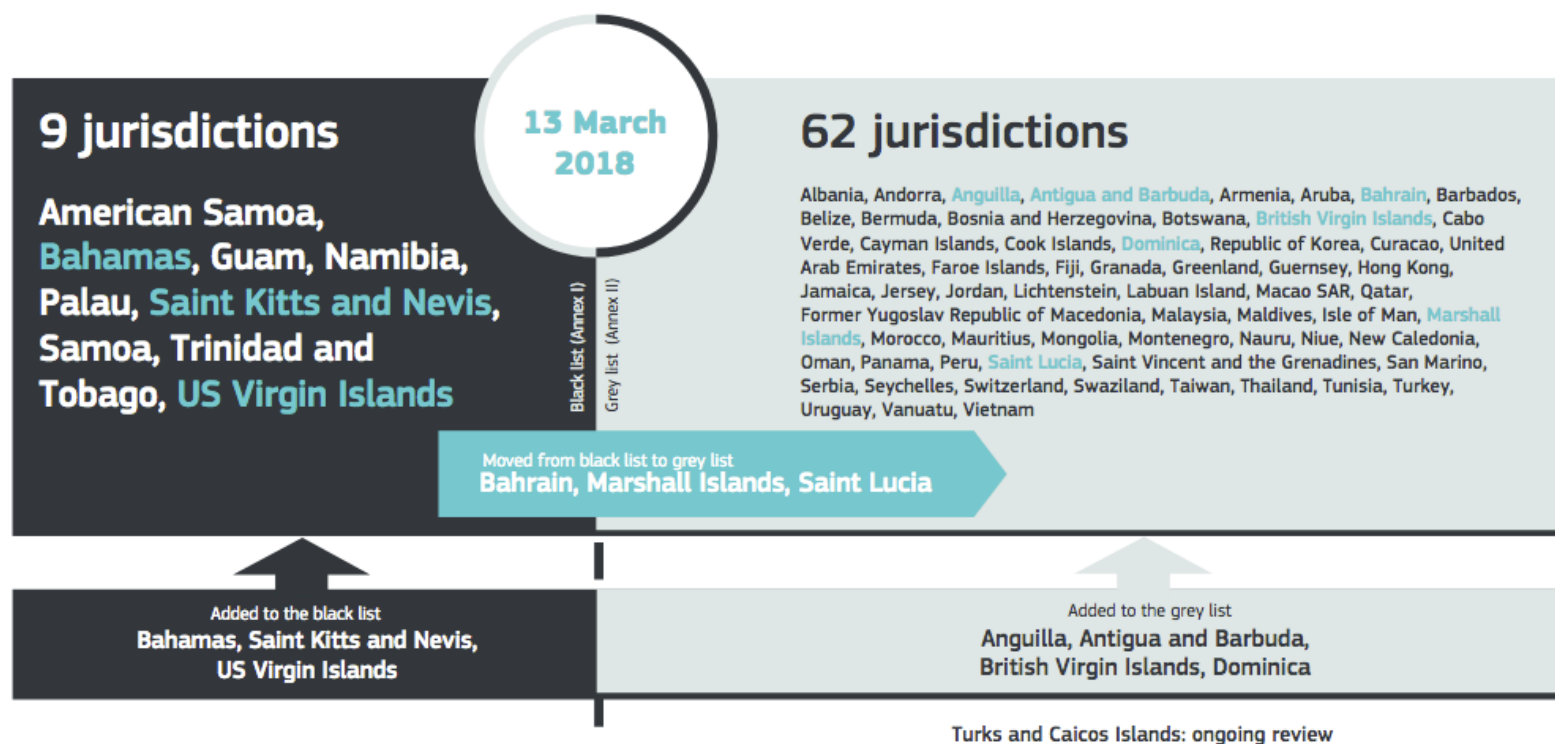
## ■ Evolution of the “Black List” – Step 2 ([2018] OJ C 29/2)



Source: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/eu\\_list\\_update\\_12\\_03\\_2019\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/eu_list_update_12_03_2019_en.pdf)

# THIRD COUNTRIES AND GOOD GOVERNANCE | “BLACK LIST”

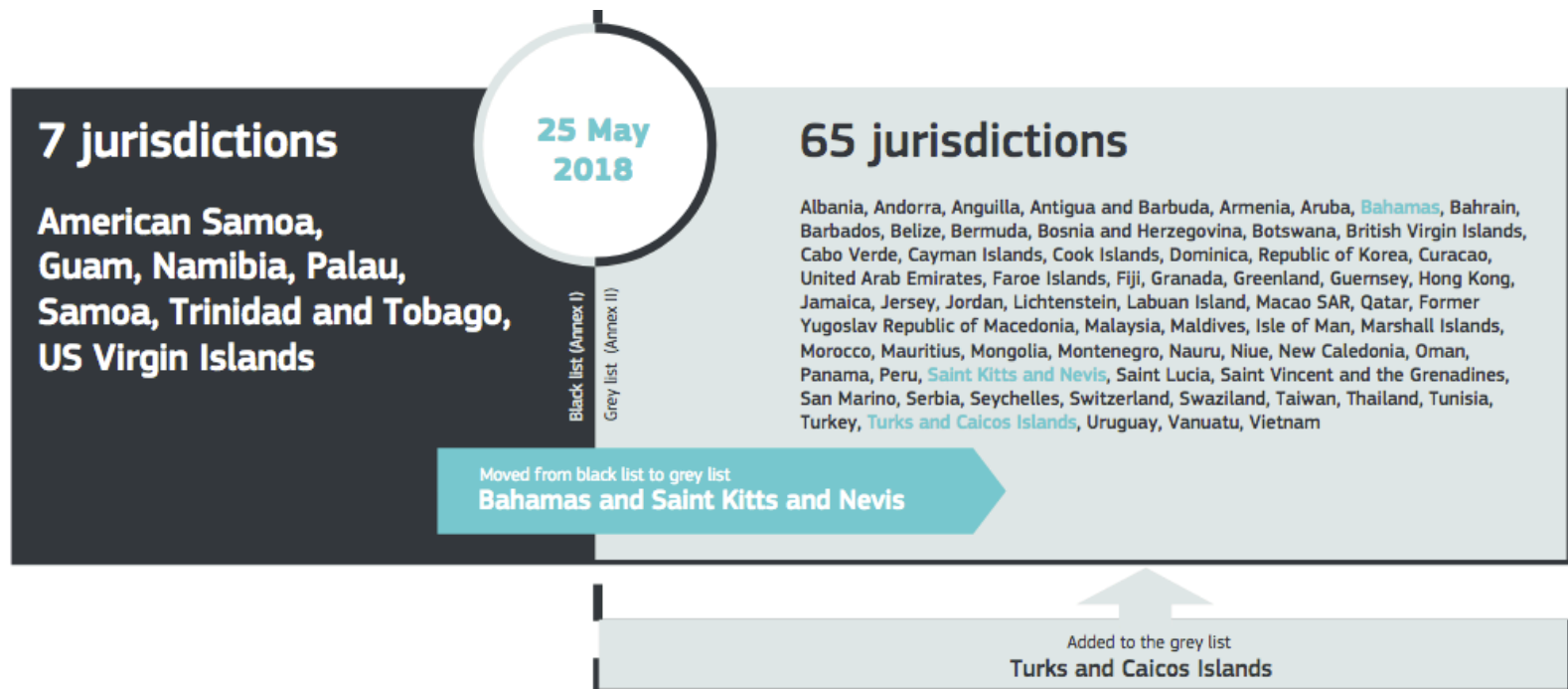
- *Evolution of the “Black List” – Step 3* ([2018] OJ C 100/5, consolidated in [2018] OJ C 191/1)



Source: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/eu\\_list\\_update\\_12\\_03\\_2019\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/eu_list_update_12_03_2019_en.pdf)

# THIRD COUNTRIES AND GOOD GOVERNANCE | “BLACK LIST”

## ■ Evolution of the “Black List” – Step 4 ([2018] OJ C 191/1)



Source: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/eu\\_list\\_update\\_12\\_03\\_2019\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/eu_list_update_12_03_2019_en.pdf)

# THIRD COUNTRIES AND GOOD GOVERNANCE | “BLACK LIST”

## ■ Evolution of the “Black List” – Step 5 ([2018] OJ 359/3)



Source: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/eu\\_list\\_update\\_12\\_03\\_2019\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/eu_list_update_12_03_2019_en.pdf)

# THIRD COUNTRIES AND GOOD GOVERNANCE | “BLACK LIST”

- *Evolution of the “Black List” – Step 6*, Namibia removed from “black list” by [2018] OJ C 403/4



Source: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/eu\\_list\\_update\\_12\\_03\\_2019\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/eu_list_update_12_03_2019_en.pdf)

# THIRD COUNTRIES AND GOOD GOVERNANCE | “BLACK LIST”

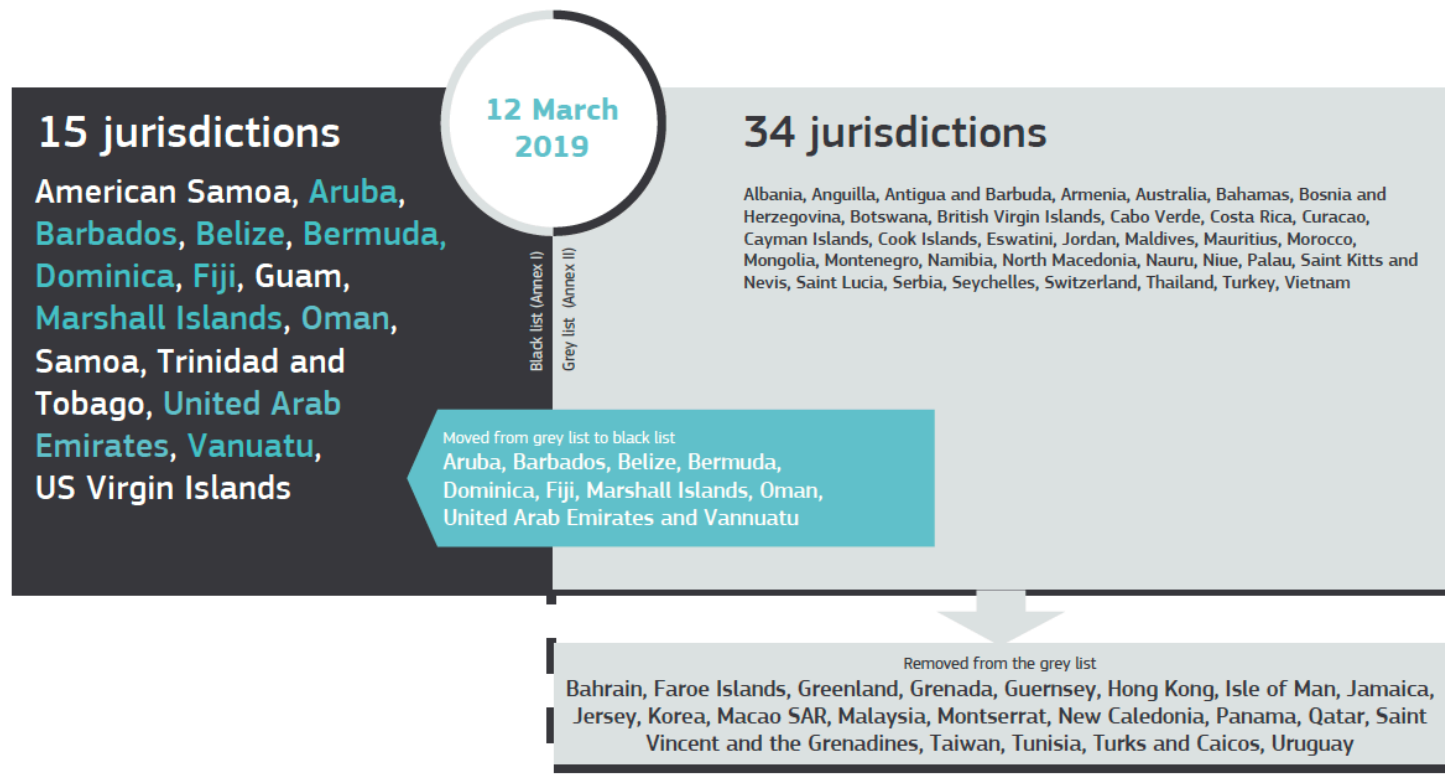
- *Evolution of the “Black List” – Step 7*, removals from the grey list by [2018] OJ C 441/3



Source: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/eu\\_list\\_update\\_12\\_03\\_2019\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/eu_list_update_12_03_2019_en.pdf)

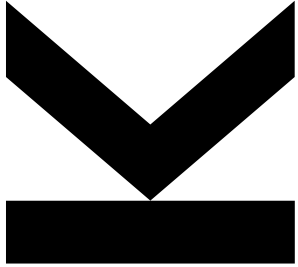
# THIRD COUNTRIES AND GOOD GOVERNANCE | “BLACK LIST”

- **Evolution of the “Black List” – Step 8**, additions to the black list and removals from the grey list by [2019] OJ C 114/2



Source: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/eu\\_list\\_update\\_12\\_03\\_2019\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/eu_list_update_12_03_2019_en.pdf)

*CHAPTER IV*  
TAXATION OF THE DIGITAL  
ECONOMY



# DIGITAL ECONOMY | *BEPS ACTION 1*

## ***ACTION 1***

### ***Address the tax challenges of the digital economy***

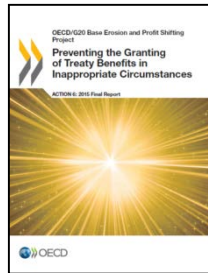
*Identify the main difficulties that the digital economy poses for the application of existing international tax rules and develop detailed options to address these difficulties, taking a holistic approach and considering both direct and indirect taxation. Issues to be examined include, but are not limited to, the ability of a company to have a significant digital presence in the economy of another country without being liable to taxation due to the lack of nexus under current international rules, the attribution of value created from the generation of marketable location-relevant data through the use of digital products and services, the characterisation of income derived from new business models, the application of related source rules, and how to ensure the effective collection of VAT/GST with respect to the cross-border supply of digital goods and services. Such work will require a thorough analysis of the various business models in this sector.*



# DIGITAL ECONOMY | *BEPS ACTION 1*

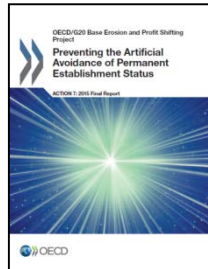
- While the digital economy does not generate unique BEPS issues, some of its key features exacerbate BEPS risks.
- Addressed through other recommendations under other Actions, e.g., recommendations on ...
  - ... modification of the list of exceptions to the definition of Permanent Establishment (PE) regarding preparatory or auxiliary activities as they relate to a digital environment and introduction of new anti-fragmentation rules to deny benefits from these exceptions through fragmentation of certain business activities (Action 7);
  - ... modification of the definition of a PE to address artificial arrangements through certain “conclusion of contracts” arrangements (Action 7);
  - ... a correlative update to the OECD Transfer Pricing Guidelines (Actions 8-10); and
  - ... changes to controlled foreign company (CFC) rules to address identified challenges of the digital economy (Action 3).

# DIGITAL ECONOMY | ISSUES



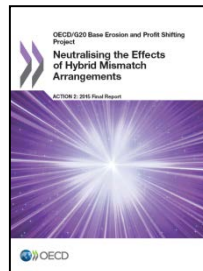
**Action 6**

Action 1 (paras 213-214)

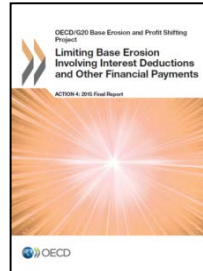


**Action 7**

Action 1 (paras 215 et seq)



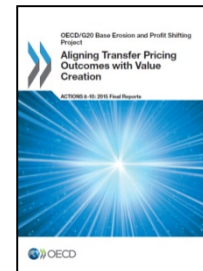
Action 1 (para 219)



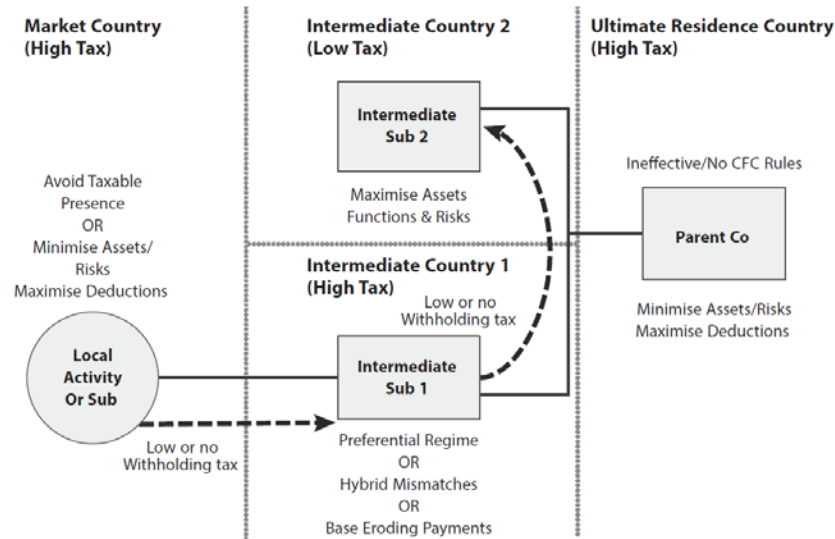
Action 1 (paras 220 et seq)



Action 1 (paras 223-224)



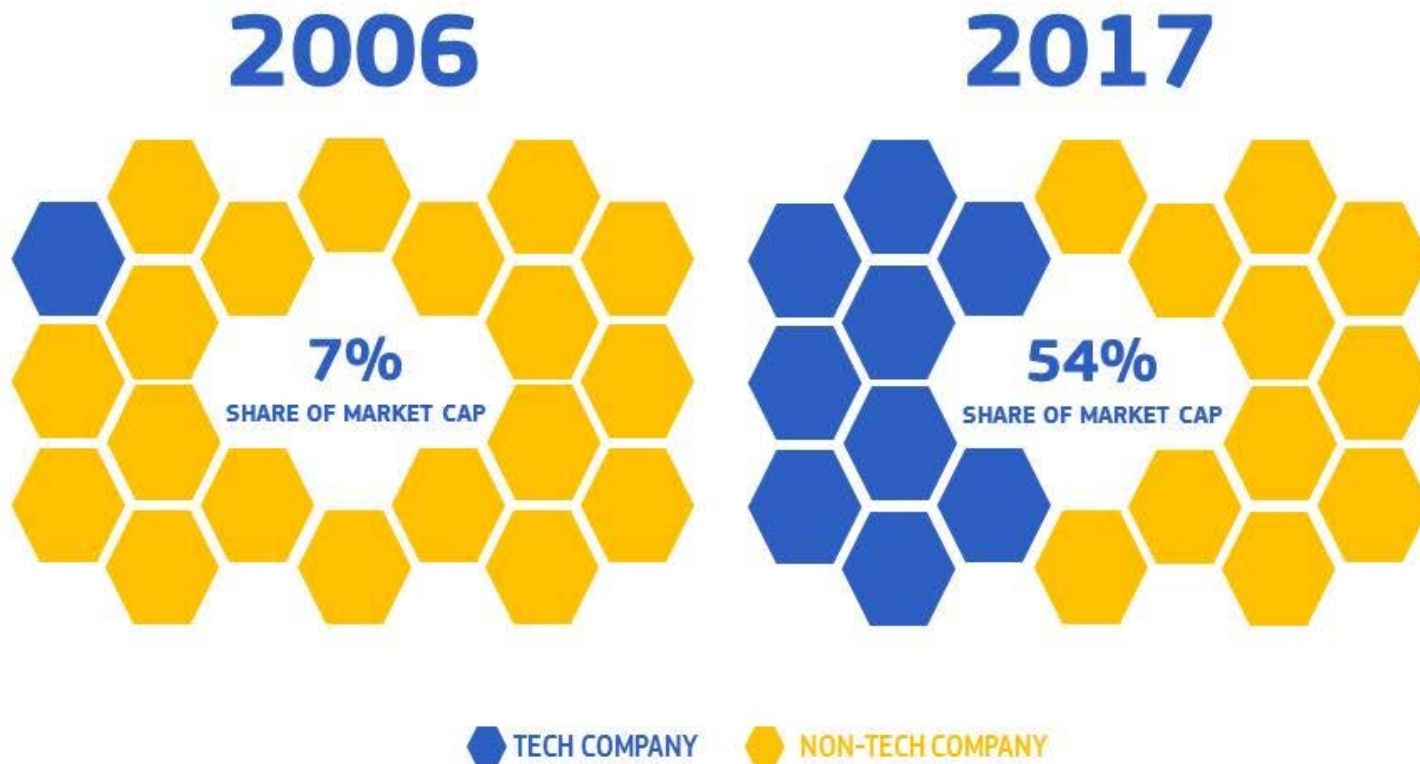
Action 1 (paras 225 et seq)



**Action 3**

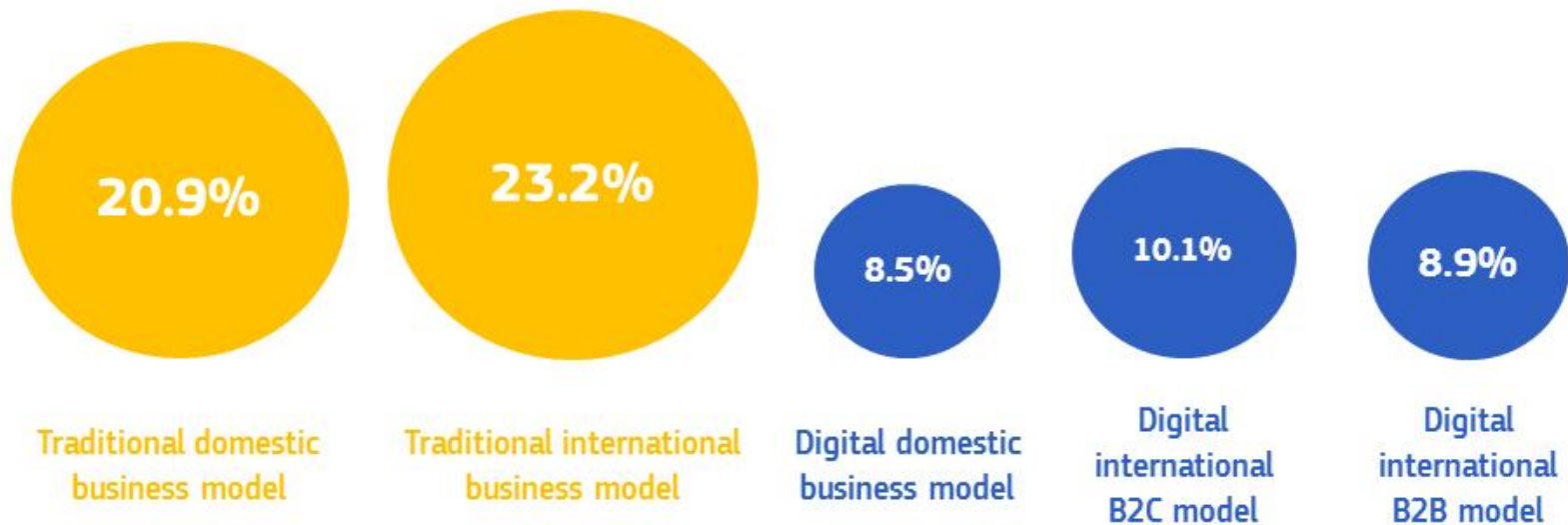
Action 1 (paras 234 et seq)

# DIGITAL ECONOMY | *FACTS*

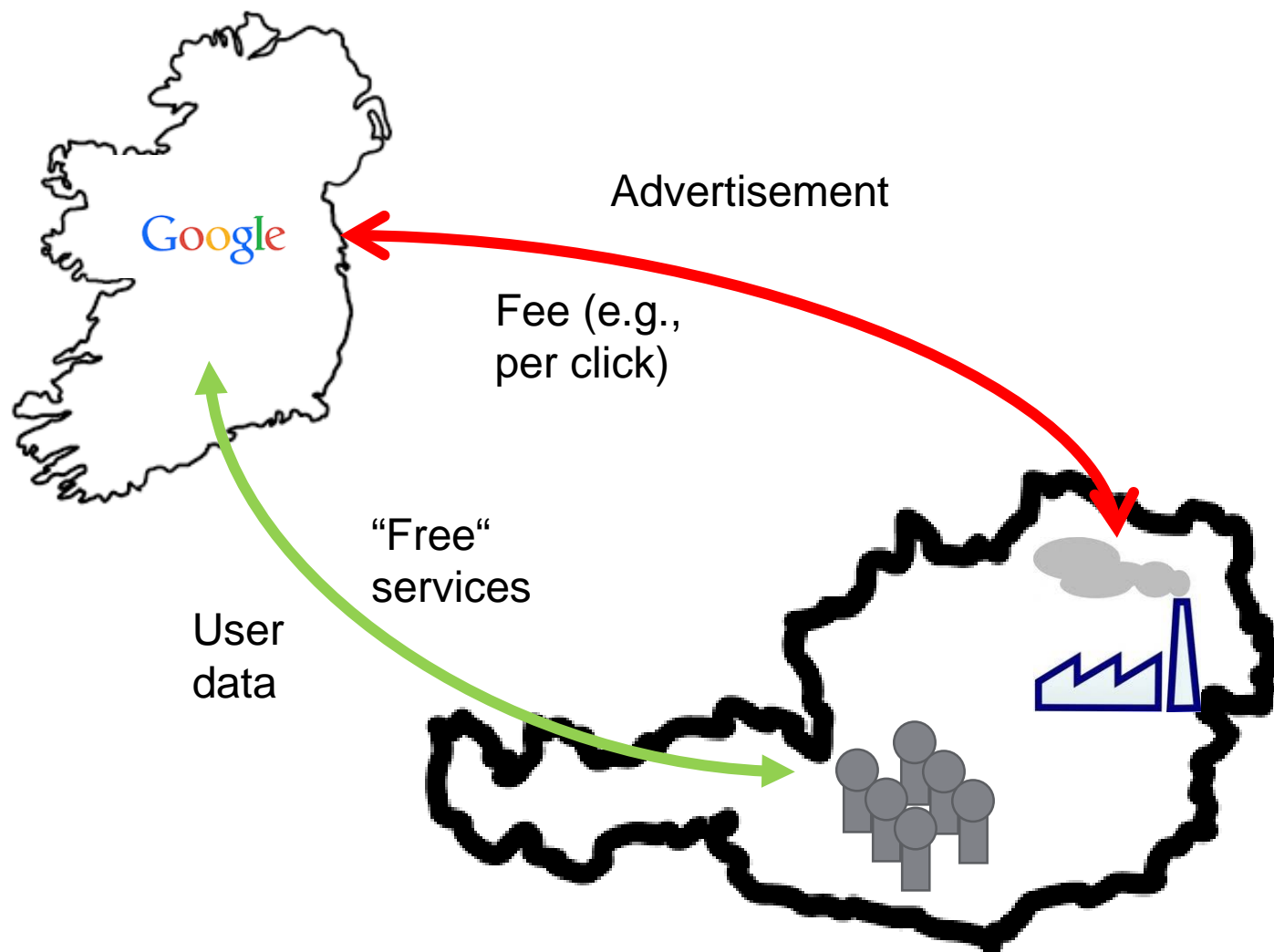


# DIGITAL ECONOMY | *FACTS*

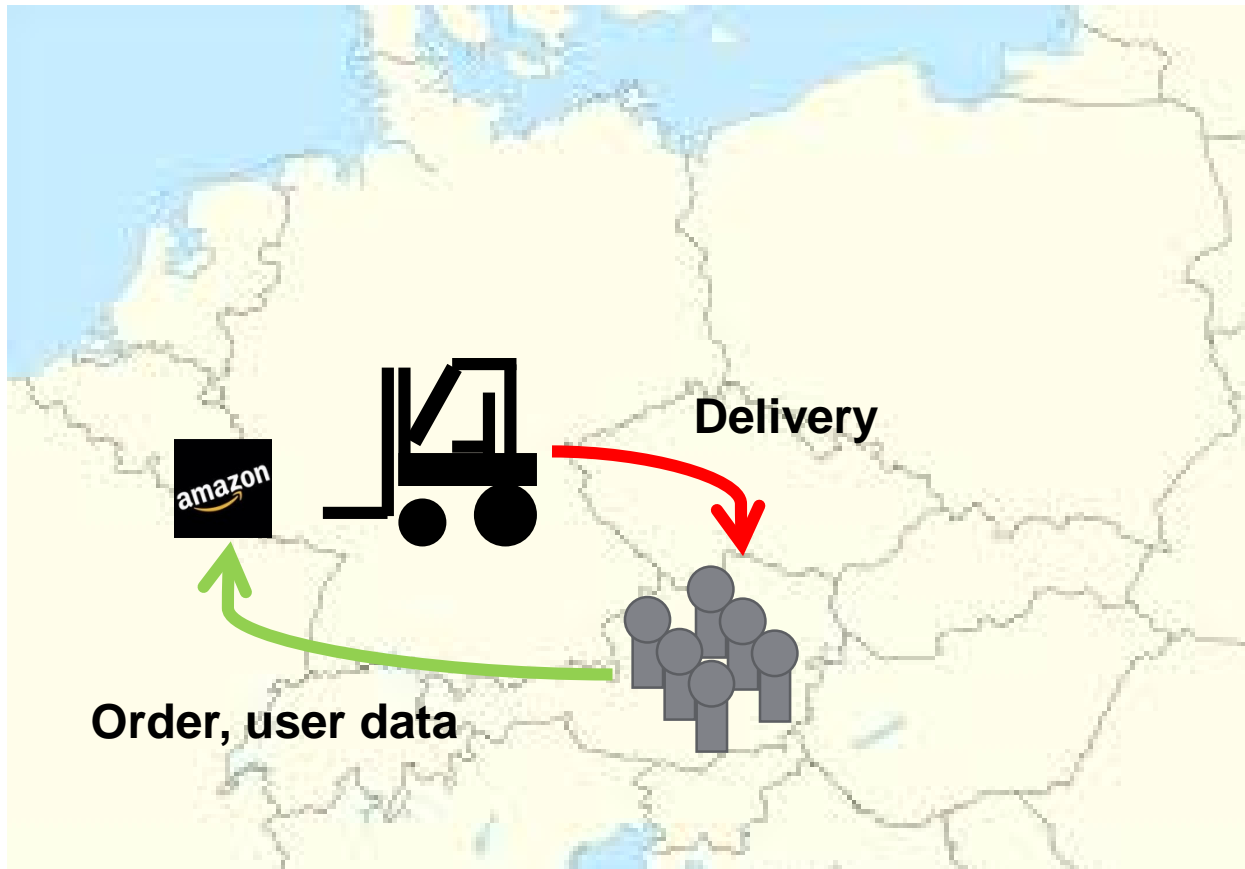
## Effective average tax rate in EU28



# DIGITAL ECONOMY | *MODEL 1*



# DIGITAL ECONOMY | *MODEL 2*



# BACKGROUND | STATUS

- OECD BEPS Action 1 (October 2015) and Interim Report (March 2018) – *Digitalisation of the economy, instead of the “digital economy”* – Delivery of final report by 2020, with 2019 update.
- UN Committee of Experts, *The digitalized economy: selected issues of potential relevance to developing countries*, E/C.18/2017/6 (8 August 2017); *Tax consequences of the digitalized economy*, E/C.18/2017/CRP.23 (10 October 2017); Art 12 UN MC Update 2017
- European Union
  - Political Statement – Joint Initiative on the Taxation of Companies Operating in the Digital Economy” (9 September 2017)
  - Informal ECOFIN meeting in Tallinn on 16 September 2017 and Council conclusions on “Responding to the challenges of taxation of profits of the digital economy”, Doc. 15175/17 FISC 320 ECOFIN 1064 (30 November 2017)
  - Commission’s Communication “A Fair and Efficient Tax System in the European Union for the Digital Single Market”, COM(2017)547 final (21 September 2017), and concrete proposals in March 2018
- Unilateral Action (e.g., DPT, MAAL, Indian equalisation levy, Italian “web tax” etc)



# BACKGROUND | *OECD 2018 INTERIM REPORT*

## ■ ***Tax Challenges Arising from Digitalisation – Interim Report 2018 (16 March 2018)***

- ☐ Chapter 1. Introduction to the Interim Report on the tax challenges arising from digitalisation
- ☐ Chapter 2. Digitalisation, business models and value creation – *Factors, value creation (chain – network – shop)*
- ☐ Chapter 3. Implementation and impact of the BEPS package
- ☐ Chapter 4. Relevant tax policy developments
- ☐ Chapter 5. Adapting the international tax system to the digitalisation of the economy – *Nexus and profit allocation!*
- ☐ Chapter 6. Interim measures to address the tax challenges arising from digitalisation
- ☐ Chapter 7. Special feature – Beyond the international tax rules: The impact of digitalisation on other aspects of the tax system
- ☐ Chapter 8. Conclusion to the Interim Report on the tax challenges arising from digitalisation



# DIGITAL ECONOMY | *OECD*

## ■ *Unilateral reactions* (OECD Interim Report, paras 341 et seq.)

Alternative PE thresholds	Withholding Taxes	Turnover Taxes	Specific regimes for large MNEs
<ul style="list-style-type: none"><li>■ Significant economic presence test (e.g. Israel, Slovak Republic, India)</li><li>■ Virtual service PE (e.g. Saudi Arabia, India)</li></ul>	<ul style="list-style-type: none"><li>■ Broader royalty definitions (instead of Art 7) (e.g., UK proposal)</li><li>■ Technical service fees (e.g., Art 12 UN MC)</li><li>■ New withholding taxes, e.g., on online advertising</li></ul>	<ul style="list-style-type: none"><li>■ Sectoral taxes, such as for advertisement (e.g. Hungary)</li><li>■ Levy on digital transactions (e.g., Italy)</li><li>■ Equalisation levy (e.g. India)</li><li>■ Tax on online and physical distribution of audio-visual content (e.g., France – „YouTube tax“)</li></ul>	<ul style="list-style-type: none"><li>■ Diverted Profits Tax (e.g. UK and Australia)</li><li>■ PE avoidance (e.g. UK DPT, Australia's MAAL)</li><li>■ Disallowance of deductions (e.g., US BEAT)</li></ul>

# DIGITAL ECONOMY | *OECD*

<i>Factor</i>	<i>Cross-jurisdictional scale without mass</i>	<i>Reliance on intangible assets</i>	<i>Data, user participation and network effects</i>
<i>Issue</i>	Digitalisation has allowed businesses in many sectors to locate various stages of their production processes in different countries and access customers around the globe. Digitalisation also allows some highly digitalised enterprises to play a significant economic role in a country without any, or only limited, physical presence.	Digitalised businesses are often characterised by investment in intangible assets, including brand names, patented inventions, trade secrets and algorithms.	Data, user participation, network effects and user-generated content are commonly observed in the business models of more highly digitalised businesses. Search engines and social media businesses rely heavily on gathering data about users' preferences in order to sell highly targeted advertising services to businesses. Network effects occur when the usefulness of a service grows exponentially with the number of users.
<i>Challenge</i>	Impacting the distribution of taxing rights over time by reducing the number of jurisdictions where a taxing right can be asserted over the business profits of an MNE.	Significant progress under BEPS project, but often difficult to determine how to allocate income from intangibles among different parts of an MNE group.	If considered a source of value creation, could pose challenges, as such a concept of value creation is currently not captured by the existing tax framework.

# DIGITAL ECONOMY | *OECD*

## ■ *Need for change?*

- Disagreement on whether there is a problem with the existing nexus rules (which determine when a country has taxing rights) or profit attribution rules (which determine how much of a business' profits can be taxed in that country).

Group 1	Group 2	Group 3
<p>The first group of countries views the lack of recognition of user contribution to value creation as a shortcoming of the international tax system, but considers that it can be addressed through targeted changes to the existing tax framework.</p>	<p>A second group of countries considers that the nexus and profit attribution rules may no longer be adequate. These countries consider that the problems are not limited to the digital economy. Some, but not all, of these countries reject user contribution as a significant driver of value creation.</p>	<p>A third group of countries considers that the BEPS Project has addressed concerns associated with double non-taxation (while acknowledging that the full implications cannot yet be assessed). Countries in this third group are generally satisfied with existing international tax rules.</p>

# DIGITAL ECONOMY | *OECD*

## ■ *User-created value?*

- Some countries are concerned that businesses can generate significant profits from the contribution of users, but have little or no physical presence in the country where those users are located (e.g., UK HM Treasury, Corporate tax and the digital economy: position paper update, 2018; Australian Treasury Discussion Paper, The digital economy and Australia's corporate tax system, October 2018)

User data	User-generated content	Network effects
Data collected from consumers allows advertising to be targeted specifically to consumers that are likely to be interested in the advertised goods or services, thereby increasing the value of these advertising services to businesses.	Users contribute to digital economy businesses in a variety of ways, including, for example, providing reviews, ratings, photographs or live biographical updates. This content adds credibility and trust, and attracts additional users.	As more users participate in a particular online platform, it becomes more attractive to businesses to participate (and vice versa), which can in turn see the platform attract more users or businesses.

- Other countries take the position that sourcing data from users is not an activity to which profit should be attributed, as user's contributed data, content and other information is similar to any other input sourced from an independent, third party

# DIGITAL ECONOMY | *EU*

- OECD Interim Report → No consensus, no recommendations
- Commission's Communication "A Fair and Efficient Tax System in the European Union for the Digital Single Market", COM(2017)547 final (21 September 2017),
- "Prototypes" of the new business models (e.g., Amazon, Google)
- Existing inspirations? (e.g., Art 12A UN Model 2017)
- Policy challenges
  - Where to tax? (nexus) – How to establish and protect taxing rights in a country where businesses can provide services digitally with little or no physical presence despite having a commercial presence?
  - What to tax? (value creation) – How to attribute profit in new digitalised business models driven by intangible assets, data and knowledge?
- Options
  - Significant economic presence: "virtual" permanent establishments → "Long-term" solution (OECD, EU) – CC(C)TB?
  - Withholding tax for digital transactions → "Quick fix"
  - Equalisation levies → "Quick fix"

# DIGITAL ECONOMY | *EU*

- OECD Policy Note (January 2019) and Consultation (March 2019)
  - Pillar 1: Broader challenges of the digitalised economy → Revised profit allocation rules and revised nexus rules → Virtual PE, marketing intangibles, user created value
  - Pillar 2: Remaining BEPS issues → Anti-BEPS rules → Inbound and outbound minimum taxation

# DIGITAL ECONOMY | *EU*

Commission's Communication "Time to establish a modern, fair and efficient taxation standard for the digital economy" (COM(2018)146 and Annex)

## Long-Term Solution: Significant Digital Presence

Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018) 147 and Annexes

Commission Recommendation of 21.3.2018 relating to the corporate taxation of a significant digital presence, C(2018)1650

## Short-Term Solution: Digital Services Tax

Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018)148 – *Failed to reach consensus in December 2018, reduced to online advertising and eventually rejected by Council in March 2019*

Impact Assessment SWD(2018)81 and SWD(2018)82

# A FINAL POINT ON NEXUS | *WAYFAIR*

- US Supreme Court, 21 June 2018, *South Dakota v. Wayfair, Inc.*, 17-494.

*Quill* is flawed on its own terms. First, the physical presence rule is not a necessary interpretation of the requirement that a state tax must be “applied to an activity with a substantial nexus with the taxing State.” *Complete Auto*, 430 U. S., at 279. Second, *Quill* creates rather than resolves market distortions. And third, *Quill* imposes the sort of arbitrary, formalistic distinction that the Court’s modern Commerce Clause precedents disavow.

# DST | *OVERVIEW*

An interim tax of 3% on revenues made from three main types of services, where the main value is created through user participation.



**Online placement  
of advertising**



**Sale of collected  
user data**



**Digital platforms that  
facilitate interactions  
between users**

... and provided by businesses with:

**Total annual worldwide  
revenue above**



**750 M€**

**Total annual revenue from  
digital activities in the EU above**



**50 M€**

# DST | *POLICY OBJECTIVES*

- Generally: “Equalisation tax on turnover of digitalised companies” – The “amounts raised would aim to **reflect some of what these companies should be paying in terms of corporate tax**”.
- **Place of profit taxation ≠ place of value creation**, “notably in the case of business models heavily reliant on user participation” (≠ consumption)
  - Misalignment between “input obtained by a business from users” and establishment or attribution – Relevance of “user contributions”? Active and/or passive?
  - What is “value creation”? Data/user participation and/or algorithms? Consumption? Is it relevant for profit taxation? Where does it happen and to what extent?
  - DST as proxy for taxing user’s “barter transactions”?
- Political pressure, erosion of corporate tax bases, perceived unfairness (doubtful as to the urgency to act Opinion SEC(2018)162 of 21 March 2018)
- No consensus on either merit or need of equalization taxes in the **OECD’s interim report of March 2018** (paras 403 et seq.), but some considerations on the design of interim measures (paras 412 et seq.)

# DST | *POLICY OBJECTIVES*

- **DST as an “interim” solution** → 3% tax on revenues stemming from the supply of certain digital services from “[1 January 2020]” (without a sunset-clause)
- DST includes **both foreign and domestic transactions and companies** (Pt 25 of the Preamble)
  - ☐ Alleviates concerns with regard to the **fundamental freedoms** (intra-EU)
  - ☐ Nevertheless, is it a disguised restriction on international trade under **WTO rules**? (Between 120-150 companies would be affected by the DST, 50% of them from the US, due to business models and threshold of > €750 million.)
- Expected revenues: **€5 bn.** (other estimations around €1,8 bn.; approx. €30-85 m. for Austria), unclear **compliance costs** (Opinion SEC(2018)162 of 21 March 2018)
- However, **broader economic questions**, e.g., impact on investment, innovation, welfare and growth, distortion of consumer choices and business decisions, benefits the older over digital technology

# DST | *LEGAL BASIS*

- Proposal based on **Article 113 TFEU** → Harmonization concerning “other forms of indirect taxation” if necessary for the Internal Market
  - Is the DST an “**indirect tax**”? → DST taxpayers = supposed bearers of the tax? What is the economic incidence of the DST? Is it “cost increasing”? Irrelevance of the counterparty of the monetization of the user data/input.
  - Is it a “**harmonization**”? → Unlike Art 401 VAT Directive, the DST would not legally (!) exclude similar other national taxes.
  - Is it **necessary for the Internal Market**? → Is the danger of potential distortions by different national measures enough? Is it sufficient that unilateral measures are in place or planned in 11 EU Member States? In any event, can non-discriminatory, destination-based unilateral taxes lead to relevant distortions of the Internal Market?

# DST | *LEGAL BASIS*

- Compatibility with **EU law and tax treaties**?
  - Is it incompatible with the **EU VAT system**?
    - DST is not a “turnover tax” barred by Art 401 VAT Directive (C-475/03, *Banco Popolare di Cremona*) and moreover on the same legal level as the VAT Directive. – But: DST potentially as part of VAT base?
    - Why not narrow DST’s scope and integrate it in the VAT system (e.g., place of supply rules, higher rates, partial denial of input VAT deduction)?
  - Is it a tax within the meaning of **Article 2(2), (4) OECD-MC**? (Or should it be one?)
    - Tax on “elements of income”? Gross basis, but lump-sum expenses taken into account via the 3% rate (taking into account “different profit margins”; Pt. 35 of the Preamble)?
    - Would be no issue if it were a “real EU tax”, as it would then not be “imposed on behalf of a Contracting State” under Article 2 OECD-MC.

# DST | *NEXUS AND SCOPE*

- **Source? Residence? Market?** → Location of users (Articles 5, 6 DST) = place of taxation → IP address or other form of geolocation (Article 5(5) DST)
- **Subjective Scope** → Entities = “legal person” or “legal arrangement” that carries on business through either a company or a structure that is transparent for tax purposes (Articles 2, 4 DST) = service providers

# DST | *NEXUS AND SCOPE*

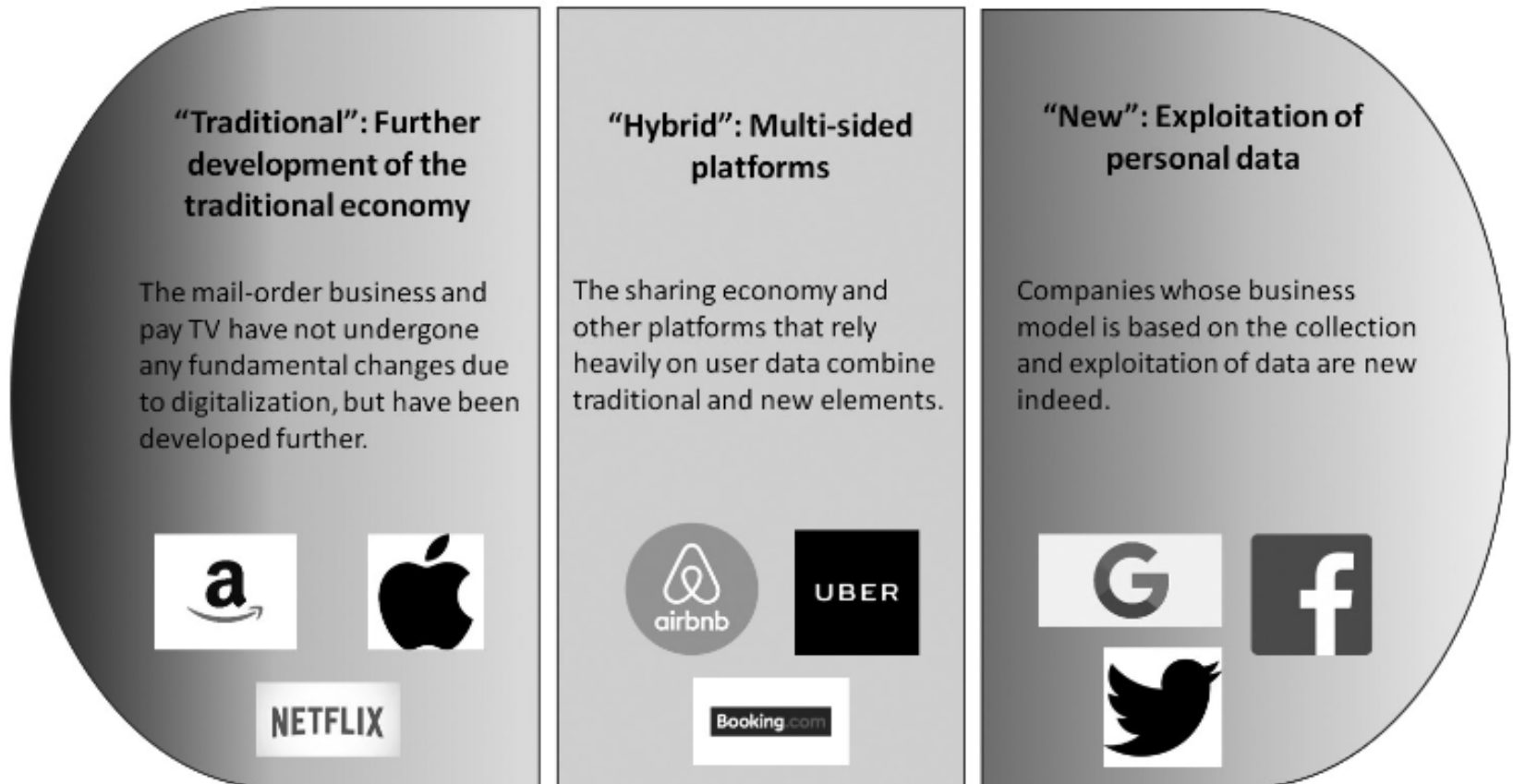
## ■ Material Scope

- "Ring fencing" of certain services with perceived value creation by users ("targeted scope"), i.e., (remotely rendered) services "which would not be able to exist in their current form without user involvement" (user data, engagement of users in multi-sided platforms, i.e., "network effects", facilitation of transactions of goods and services)
- Revenues from **three categories of "taxable services"** (Article 3 DST) with some explicit exclusions and some "vagueness" and room for interpretation:
  - **Category 1:** Placing of advertisements on a digital interface (Article 3(1)(a) DST), not collection of user data or use for own business purposes
  - **Category 2:** Making available multi-sided digital interfaces ("intermediation services") (Article 3(1)(b) DST; exclusive of, e.g., financial, investment and crowdfunding services), but not, e.g., underlying transactions, e-commerce, or supply of digital content or communication services (Art 3(4) DST: "sole or main purpose")
  - **Category 3:** Transmission of user data (Article 3(1)(c) DST)

# DST | *NEXUS AND SCOPE*

Service	Location in a Member State (IP or geolocation)	Revenue Proportion
Placing of advertisements on a digital interface (Article 3(1)(a) DST)	Advertising appears on user's device (Art 5(2)(a) DST)	Number of times an advertisement has appeared on users' devices (Art 5(3)(a) DST)
Making available multi-sided digital interfaces ("intermediation services") (Article 3(1)(b) DST)	User's device for concluding underlying supply of goods or services (Art 5(2)(b)(i) DST)	Number of users having concluded underlying transactions (Art 5(3)(b)(i) DST) – <i>Irrelevance of place of underlying transaction (Art 5(4)(a) DST)!</i>
	User's device for opening account in other cases (Art 5(2)(b)(ii) DST)	Number of users holding an account (Art 5(3)(b)(ii) DST)
Transmission of user data (Article 3(1)(c) DST)	Data generated from the user having used a device (Art 5(2)(c) DST)	Number of users from whom data transmitted has been generated (Art 5(4)(c) DST) – <i>Irrelevance of tax period!</i>

# DST | *NEXUS AND SCOPE*



Source: G. Kofler, C. Schlager & G. Mayr, *Taxation of the Digital Economy: A Pragmatic Approach to Short-Term Measures*, ET 2018, 123.

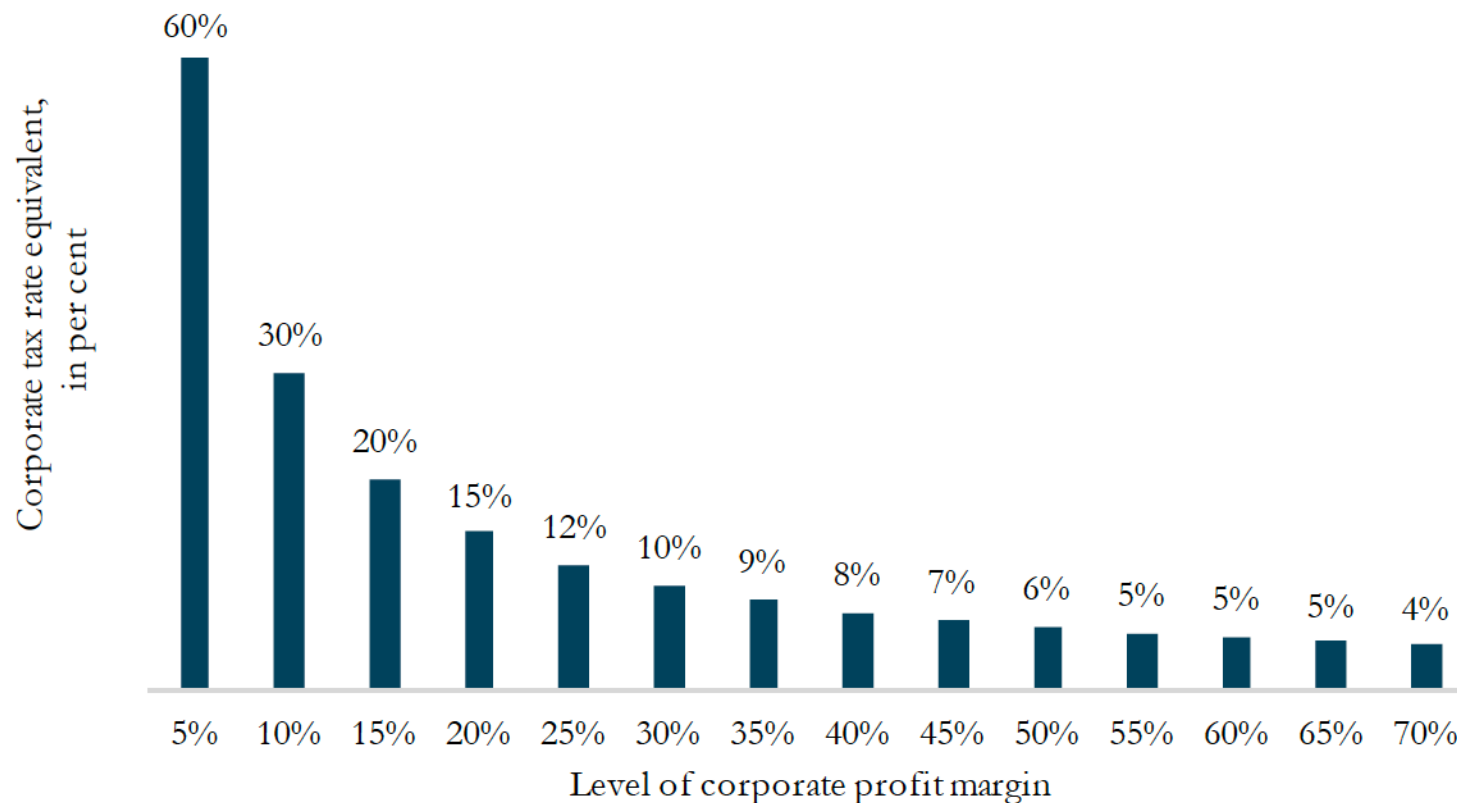
# DST | *THRESHOLD*

- Worldwide **revenues > €750 million** and **taxable EU revenues > €50 million** at a consolidated level (Article 4 DST) → *Also proposed by the OECD Interim Report (paras 454-455)*
- Reasons for first threshold (> €750 million) → “strong market positions”, “capacity to attract high volume of users”, “opportunity of engaging in aggressive tax planning lies with larger companies”, “legal certainty”
- Reasons for second threshold (> €50 million) → “significant digital footprint at Union level”, Union-level “disregard[s] differences in market size”
- Issues
  - Impact on start-ups, business creation, and small businesses more generally?
  - Equality concerns regarding the double threshold? → Comparison between large enterprises with relatively small digital revenues versus smaller enterprises with purely digital revenue? Similar validity of thresholds for procedural (e.g., CbCR) and substantive tax rules (e.g., DST, CCCTB)?

# DST | *BASE AND RATE*

- **Base** → **Gross revenues**, net of VAT and other similar taxes (Article 3(2), 6 DST)
- **Rate** → **3%** (Article 8 DST)
  - Should achieve “an **appropriate balance** between revenues generated by the tax and accounting for the differential DST impact for businesses with different profit margins” (Pt. 35 of the Preamble)
  - Issues: **Overtaxation** as compared with profit taxation, relevance of business model and level of market, etc
  - Unrelieved **double taxation** with regard to profit taxation? → No credit, but expectation “that Member States will allow businesses to deduct the DST paid as a cost from the corporate income tax base in their territory, irrespective of whether both taxes are paid in the same Member State or in different ones” (Pt. 27 of the Preamble) → Revenue shifts between Member States!
  - **Cascading effects** if taxable services are incorporated into a taxable onwards supply. → Partly addressed, e.g., by Article 3(3) DST

# DST | *BASE AND RATE*



Source: M. Bauer, Five Questions about the Digital Services Tax to Pierre Moscovici, ECIPE  
OCCASIONAL PAPER • 04/2018.

# DST | *COLLECTION*

- Withholding? Assessment?
- Identification, annual DST return – Complex procedural arrangements, including OSS (Articles 9-19 DST) and administrative cooperation (Articles 20-23 DST)
- “Trust-based” tax collection and enforcement?

# DIGITAL PRESENCE | *OVERVIEW*

## Where to tax?

Under the proposed new rules, companies would have to pay tax in each Member State where they have a significant digital presence, reaching **one** of the following thresholds:



**Revenues from supplying digital services exceeding €7 million**



**Number of users exceeding 100,000**



**Number of online business contracts exceeding 3,000**



## What to tax?

The attribution of profit will take into account the market values of:



**Profits from user data**

(e.g. placement of advertising)



**Services connecting users**

(e.g. online marketplace, platforms for "sharing economy")



**Other digital services**

(e.g. subscription to streaming services)



# DIGITAL PRESENCE | *POLICY OBJECTIVES*

- **Starting point:** “New international rules are needed specific to the challenges raised by the digital economy in order to determine where the value of businesses is created and how that value should be attributed for tax purposes. These new rules would entail reform of the existing international tax rules on the definition of a permanent establishment and the profit attribution applicable to digital activities.”
  - Nexus and profit attribution
  - Global (OECD) versus regional (EU)
  - EU-internal treaty override versus respect for third-country tax treaties → Commission Recommendation of 21.3.2018 relating to the corporate taxation of a significant digital presence, C(2018)1650
  - Transposition/application: 1 January 2020
- **Goal:** “[I]mprove the resilience of the internal market as a whole in order to address the challenges of taxation of the digitalised economy.”
- No consensus in the **OECD’s interim report of March 2018**, ongoing discussion about nexus and profit allocation (paras 370 et seq.)

# DIGITAL PRESENCE | *OVERVIEW*

- Directive applies to entities irrespective of where they are resident for corporate tax purposes, whether in a Member State or in a third country (Art 2), but no third-country treaty override → *Commission Recommendation of 21.3.2018 relating to the corporate taxation of a significant digital presence, C(2018)1650*
- **Entity** = Any legal person or legal arrangement that carries on business through either a company or a structure that is transparent for tax purposes → *Subject to corporate tax! Also associated entities!*
- Definition of significant digital presence (Art 4) and profits attributable to or in respect of the significant digital presence (Art 5)

# DIGITAL PRESENCE | *NEXUS*

## *Nexus* = “Significant digital presence” (Art 4(3))

Business carried on through it consists wholly or partly of the supply of digital services ...	“Digital services” defined in Art 3(5) and Annex II (and exclusions in Annex III) – Does not include the sale of goods or services which is facilitated by using the internet or an electronic network.
... through a digital interface ...	“Digital interface” defined in Art 3(2) → E.g. websites and applications
... and one or more of the following conditions is met:	Generally, “user” = individual or business (Art 3(4))
<ul style="list-style-type: none"> <li>the annual proportion of total revenues resulting from the supply of those digital services to users located in that Member State exceeds €7 million;</li> </ul>	“Revenues” defined in Art 3(6), proportion defined in Art 5(7)
<ul style="list-style-type: none"> <li>the number of users of one or more of those digital services who are located in that Member State in that tax period exceeds 100.000;</li> </ul>	Location → Device to access the digital interface through which the digital services are supplied (Art 4(4)), determined by reference to the IP address or geolocation (Art 4(6))
<ul style="list-style-type: none"> <li>the number of business contracts for the supply of any such digital service that are concluded in that tax period by users located in that Member State exceeds 3.000.</li> </ul>	Definition of business contract and location (= corporate residency or PE) in Art 4(5)

# DIGITAL PRESENCE | *ATtribution*

- Fiction of a *separate and independent enterprise* (Art 5(2))
- Determination of profits attributable to or in respect of the significant digital presence shall be based on a *functional analysis* (Art 5(3))
  - The *economically significant activities* performed by such presence through a digital interface shall be taken into account. → Activities undertaken by the enterprise through a digital interface *related to data or users* shall be considered economically significant activities.
  - Due account shall be taken of the economically significant activities performed by the significant digital presence which are *relevant to the development, enhancement, maintenance, protection and exploitation of the enterprise's intangible assets* (Art 5(4))
- *Economically significant activities* include (Art 5(5))
  - the collection, storage, processing, analysis, deployment and sale of user-level data;
  - the collection, storage, processing and display of user-generated content;
  - the sale of online advertising space;
  - the making available of third-party created content on a digital marketplace;
  - the supply of any digital service not listed in the previous points.
- *Profit split* (Art 5(6)) → The splitting factors may include expenses incurred for research, development and marketing as well as the number of users and data collected per Member State.

# DIGITAL PRESENCE | CCCTB

- **Digital PEs and „data“** → Report of the EU Parliament on the CCCTB(A8-0051/2018, 1.3.2018)

## Article 28 – paragraph 1 – formula

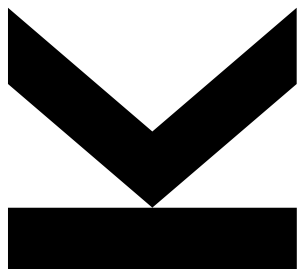
*Text proposed by the Commission*

$$\text{Share A} = \left( \frac{1}{3} \frac{\text{Sales}^A}{\text{Sales}^{\text{Group}}} + \frac{1}{3} \left( \frac{1}{2} \frac{\text{Payroll}^A}{\text{Payroll}^{\text{Group}}} + \frac{1}{2} \frac{\text{No of employees}^A}{\text{No of employees}^{\text{Group}}} \right) + \frac{1}{3} \frac{\text{Assets}^A}{\text{Assets}^{\text{Group}}} \right) * \text{Con'd Tax Base}$$

*Amendment*

$$\begin{aligned} \text{Share A} = & \left( \frac{1}{4} \frac{\text{Sales}^A}{\text{Sales}^{\text{Group}}} + \frac{1}{4} \left( \frac{1}{2} \frac{\text{Payroll}^A}{\text{Payroll}^{\text{Group}}} + \frac{1}{2} \frac{\text{No of employees}^A}{\text{No of employees}^{\text{Group}}} \right) + \frac{1}{4} \frac{\text{Assets}^A}{\text{Assets}^{\text{Group}}} \right. \\ & \left. + \frac{1}{4} \left( \frac{1}{2} \frac{\text{Data collected}^A}{\text{Data collected}^{\text{Group}}} + \frac{1}{2} \frac{\text{Data exploited}^A}{\text{Data exploited}^{\text{Group}}} \right) \right) \\ & * \text{Con'd Tax Base} \end{aligned}$$

# QUESTIONS?



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