

**European Court of Justice case law
and Commission's communications**

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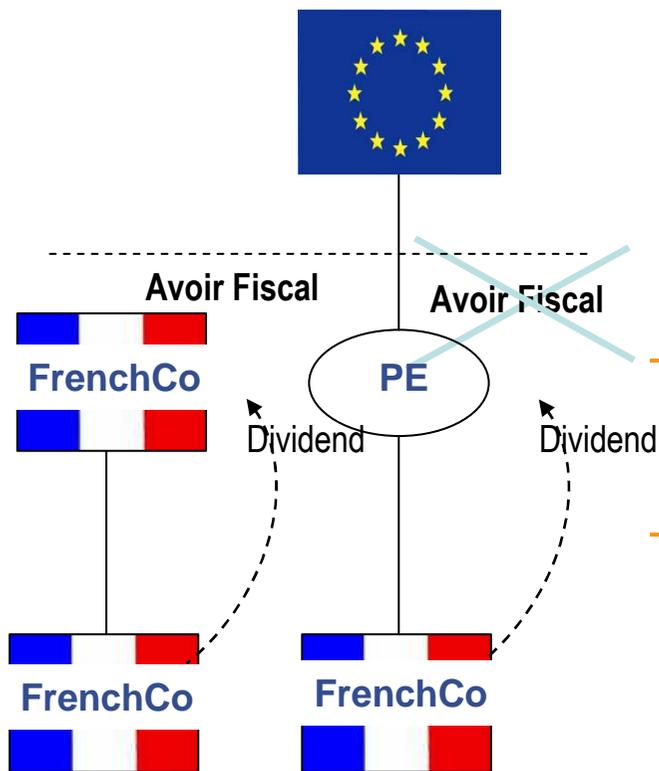
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Primary vs. secondary right of establishment

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28.1.86 – 270/83 Comm v France – Avoir fiscal



– Facts

- In order to reduce economic double taxation, the French tax law provides for a tax credit equal to half of the tax paid by the distributing company (3)
- Such a credit is not attributed to PE of EU companies (4)

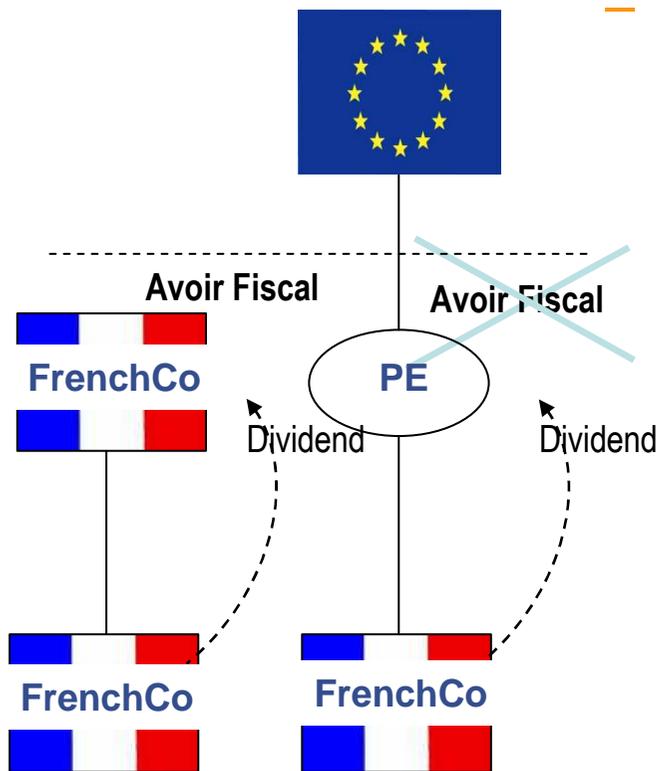
– Question

- Is the different in treatment compatible with EU law?

– Have you exercised a fundamental Freedom?

- Freedom of establishment includes the right to pursue activities through a branch or an agency. It is the registered office, central administration or principal place of business that serves as the **connecting factor** (18)

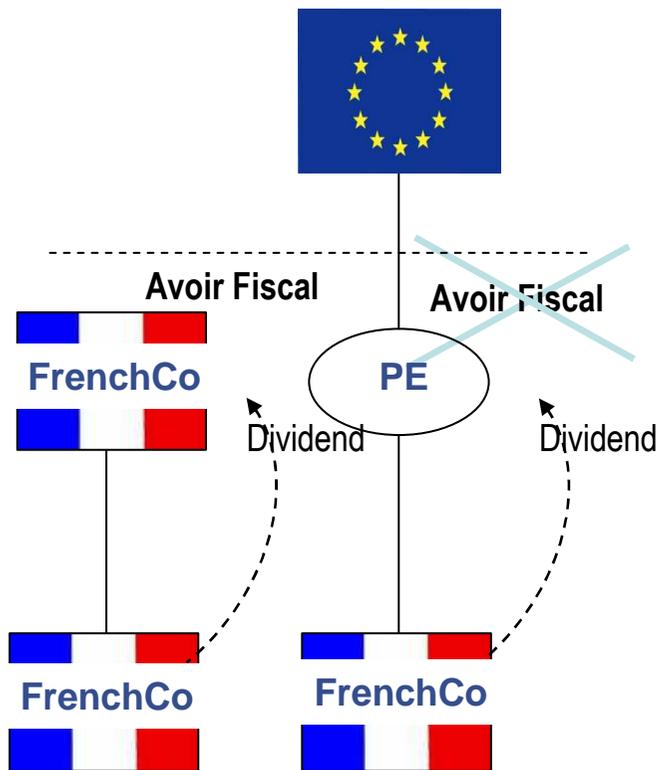
28.1.86 – 270/83 Comm v France – Avoir fiscal (2)



– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- Acceptance of the proposition that the Member State in which the company seeks to establish itself may freely apply to it a different treatment solely by reason of the fact that its registered office is situated abroad **would deprive that provision of all meaning (18)**
- For the purposes of calculating corporate income tax liability, French tax law **does not draw any distinction (19)**. Since they are on the same footing for the purposes of taxing their profits, the non-recognition of the avoir fiscal is a discrimination (20). Such a discrimination constitutes a restriction incompatible with EU Law (27)

28.1.86 – 270/83 Comm v France – Avoir fiscal (3)

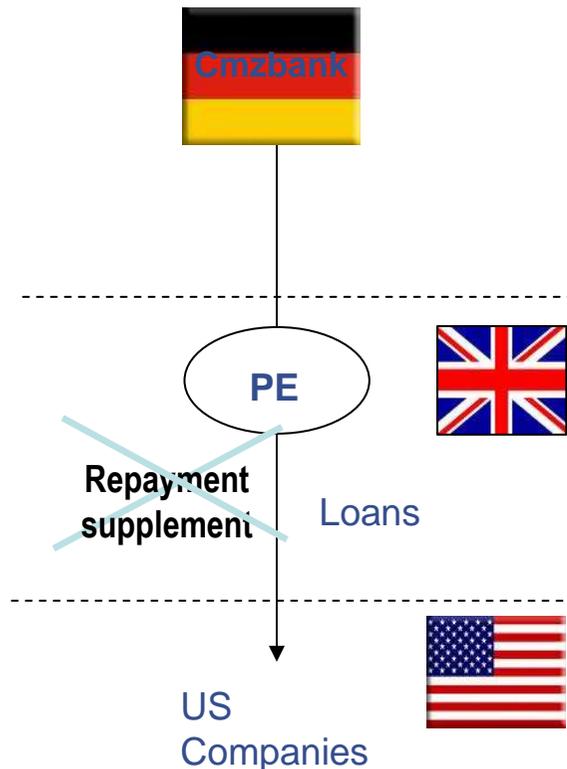


– Is there a justification?

- Advantages that PE may enjoy vis-à-vis French companies. This is never a justification (21)
- Lack of tax harmonization. Such a justification cannot be accepted in **this** case (24)
- Risk of tax avoidance. This is not a justification (25)
- The difference in treatment is due to the DTT. DTT does not concern the instant case

– Proportionality? N/A

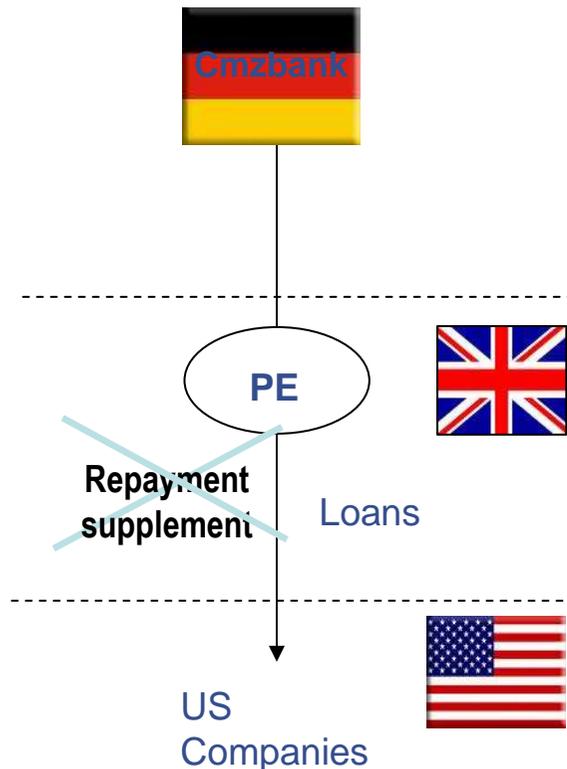
13.7.93 – C-330/91 Commerzbank



– Facts

- Commerzbank AG is a company incorporated under German law whose registered office is in Germany (2)
- Commerzbank has a branch in the United Kingdom through the intermediary of which it granted loans to a number of United States companies. Commerzbank paid tax in the United Kingdom on the interest received from those companies (3)
- Subsequently Commerzbank sought repayment of that sum from the tax authorities on the ground that the interest was exempt in the United Kingdom by virtue of the US – UK DTT (4)

13.7.93 – C-330/91 Commerzbank (2)



– Facts

- Commerzbank received a refund of the overpaid tax (5)
- Commerzbank asked also for the refund of the “repayment supplement” equal to interest on the amount paid. However, the repayment was not granted because only resident taxpayers can ask for it (8)

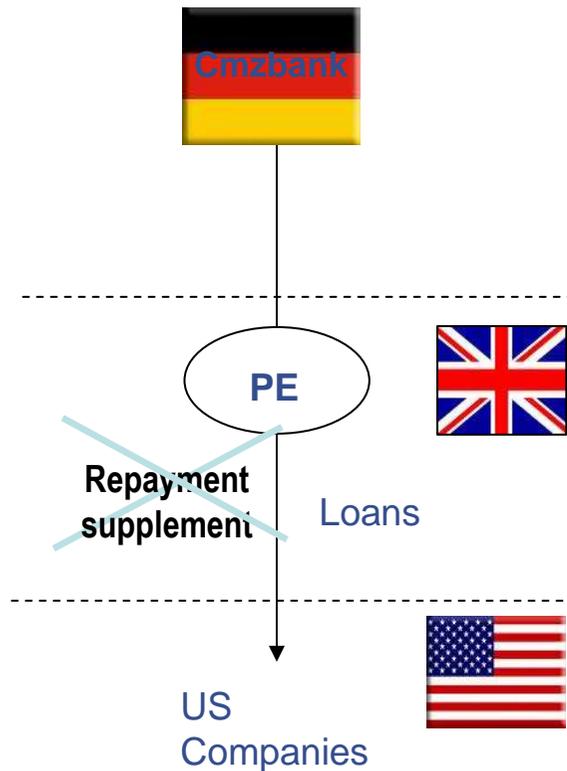
– Question

- Is this provision against the freedom of establishment?

– Have you exercised a fundamental Freedom?

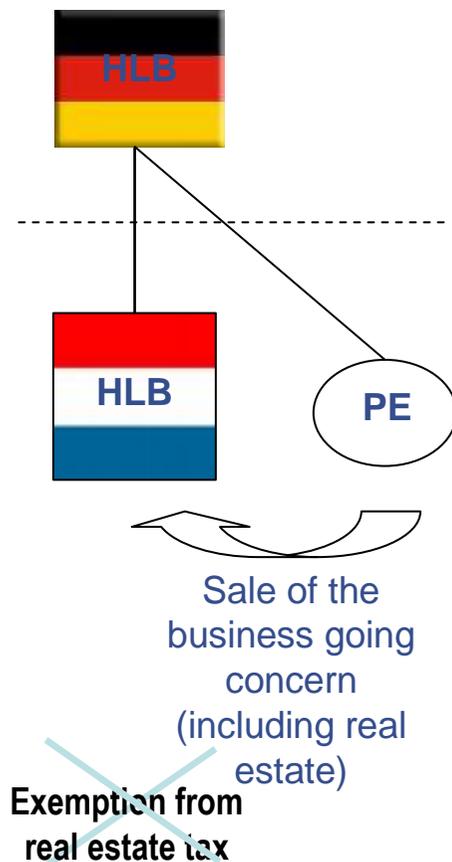
- Freedom of establishment: Registered office, central administration or principal place of business is the **connecting factor** (13)

13.7.93 – C-330/91 Commerzbank (3)



- Is there a discrimination or a restriction? Overt? Covert? Home or Host State?
 - Although it applies independently of a company's seat, the use of the criterion of fiscal residence within national territory for the purpose of granting repayment supplement on overpaid tax is liable to work more particularly to the disadvantage of companies having their seat in other Member States (15)
- Is there a justification? N/A
Proportionality? N/A

12.4.94 – C-1/93 Halliburton



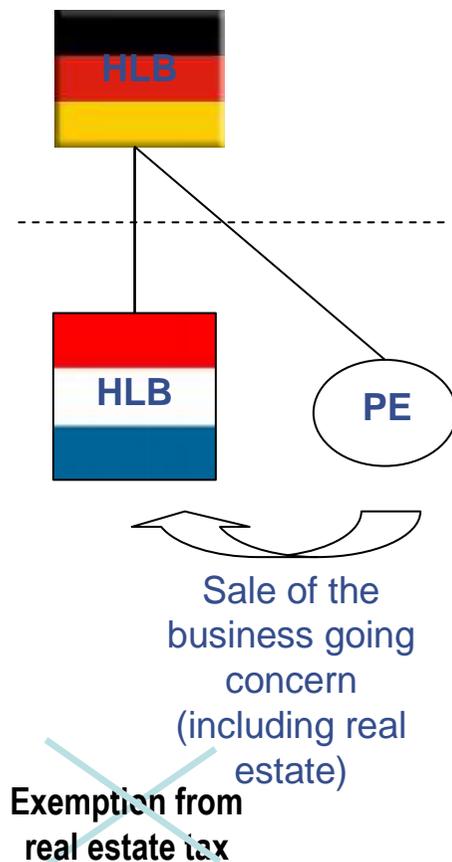
– Facts

- As part of a reorganization the German subsidiary transferred and sold to the Netherlands subsidiary its permanent establishment in the Netherlands, which included immovable property (4)
- In the Netherlands the transfer of immovable property is subject to the tax on legal transactions. However, the Dutch law provides for exemption of transactions which are carried out "as part of an internal reorganization of public limited companies and private limited companies" (5). The exemption does not apply when the transferor is a foreign company

– Question

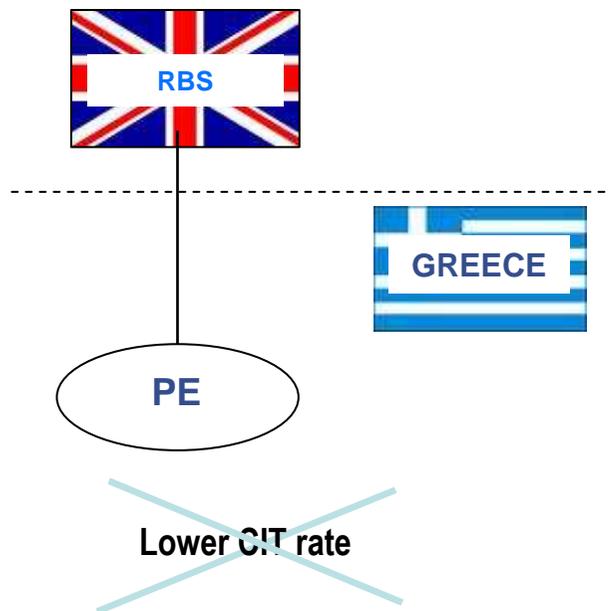
- Is this provision against the freedom of establishment?

12.4.94 – C-1/93 Halliburton (2)



- **Have you exercised a fundamental freedom**
 - Freedom of establishment
- **Is there a discrimination or a restriction? Overt? Covert?**
 - It constitutes discrimination on grounds of nationality which is prohibited by EU Law (20)
- **Is there a justification?**
 - Non possibility check whether the legal forms of entities constituted in other Member States are equivalent to those of public and private limited companies within the meaning of the relevant national legislation. N/A Directive on the Mutual Assistance (22)
- **Proportionality?** N/A

29.4.99 – C-311/97 Royal Bank of Scotland



– Facts

- The Royal Bank of Scotland has its seat in the United Kingdom. It carries on business in Greece through a branch established in Greece (3)
- The RBS branch claimed the lower rate of tax applicable to resident companies (35% instead of 40%) (5)

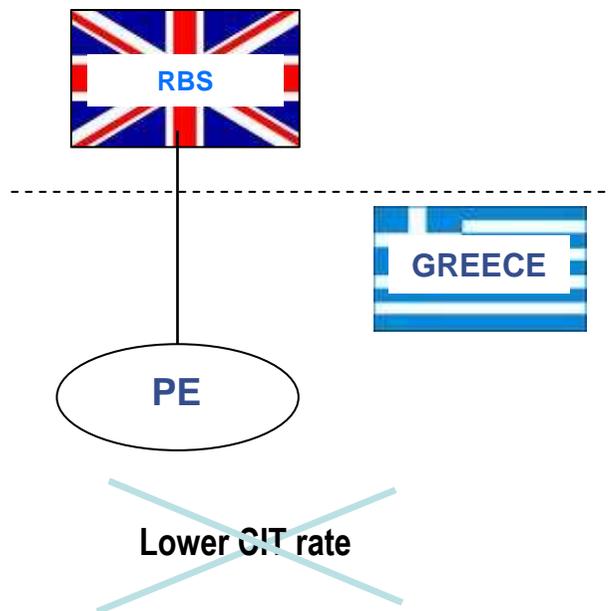
– Question

- Is the application of different rate of tax contrary to EU law?

– Have you exercised a fundamental Freedom?

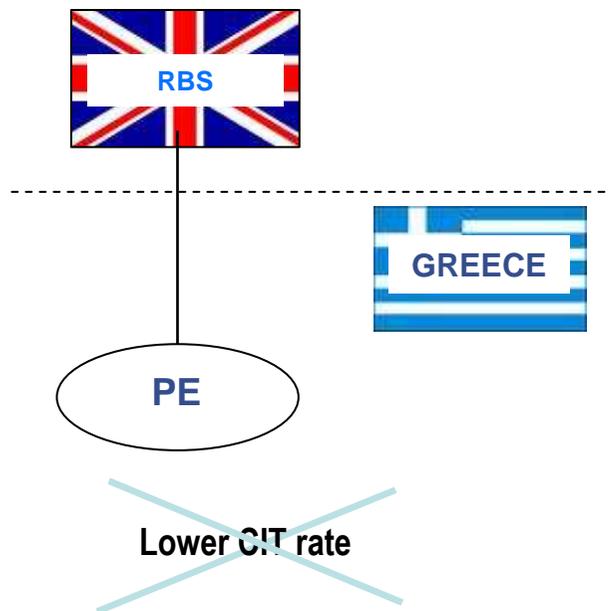
- Freedom of establishment (23)

29.4.99 – C-311/97 Royal Bank of Scotland (2)



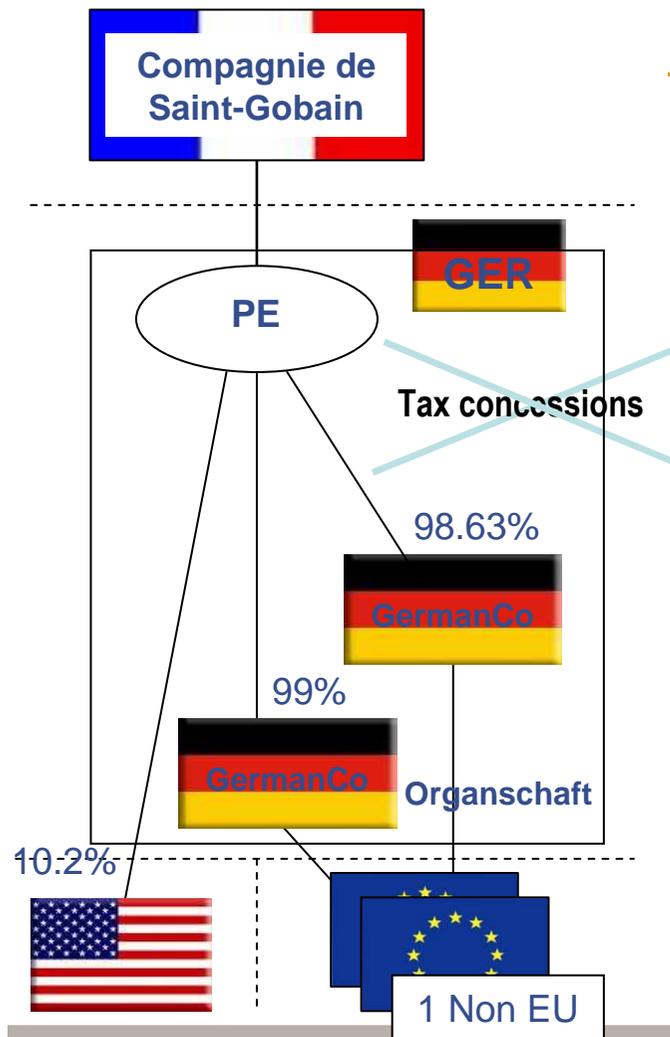
- Is there a discrimination or a restriction? Overt? Covert? Home or Host State?
 - The way in which the taxable basis is computed is almost the same. Thus, the situation of residents and non-residents is comparable. Discrimination (30)
- Is there a justification? N/A
- Proportionality? N/A

29.4.99 – C-311/97 Royal Bank of Scotland (3)



- The same principles have been upheld in CLT - UFA (23.2.06 – C-253/03): the freedom of establishment precludes a national law which, in the case of a branch of a company having its seat in another Member State, lays down a tax rate on the profits of that branch which is higher than that on the profits of a subsidiary of such a company where that subsidiary distributes its profits in full to its parent company
- A slightly different principle (however affecting taxes paid by the branch) have been upheld in Talotta (22.3.07 – C-383/05): EU law precludes minimum tax base only for non-residents

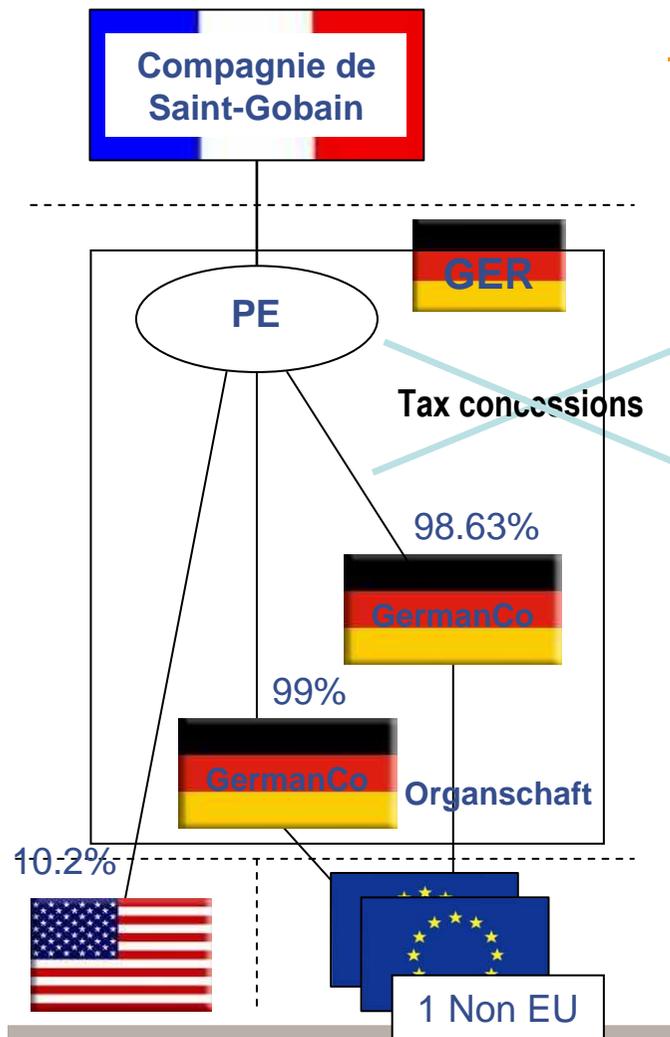
21.9.99 – C-307/97 Saint-Gobain



– Facts

- Saint-Gobain ZN is the German branch of Compagnie de Saint-Gobain SA (hereinafter 'Saint-Gobain SA'), which is a company incorporated under French law whose seat and business management are located in France (3)
- In Germany, Saint-Gobain SA is subject to limited tax liability because neither its seat nor its business management are located in that State (5)
- The German tax authorities refused to grant Saint-Gobain SA certain tax concessions relating to the taxation of dividends from shares in foreign companies limited by shares, those concessions being restricted to companies subject in Germany to unlimited tax liability (8)

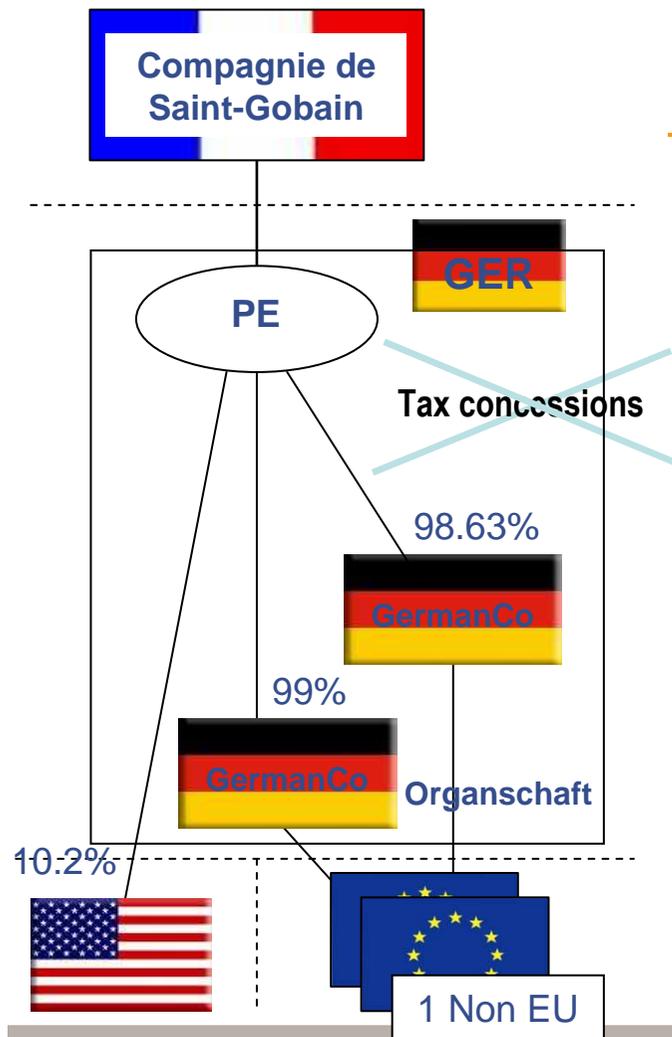
21.9.99 – C-307/97 Saint-Gobain (2)



– Facts

- Saint-Gobain SA held, through the operating capital of its German branch, Saint-Gobain ZN, some shareholdings (9)
- The German companies are part of tax consolidation (10)
- The profits of the two German subsidiaries which were transferred to Saint-Gobain ZN under the tax consolidation, included group dividends distributed by foreign subsidiaries (2 EU and 1 non EU) (11)
- Saint-Gobain ZN is challenging before the German tax authorities the refusal to grant tax concessions designed to prevent dividends which are received in Germany by companies with shareholdings in foreign companies and which have already been taxed abroad from being taxed again in Germany

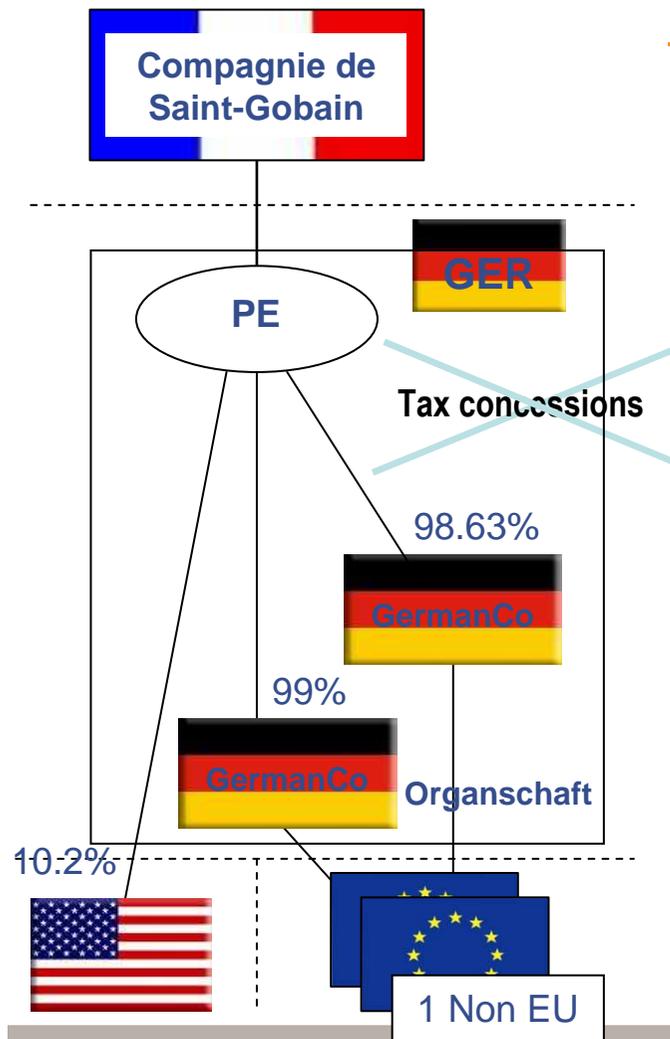
21.9.99 – C-307/97 Saint-Gobain (3)



– Facts

- First, the German tax authorities refused to grant an **exemption** from German corporation tax for the dividends received by Saint-Gobain ZN from the United States of America and another non-EU country on the ground that the **treaties** for the avoidance of double taxation concluded between the Federal Republic of Germany and each of those two non-member countries, which provide for such exemption, restrict it to, respectively, German companies and companies subject in Germany to unlimited tax liability (16)

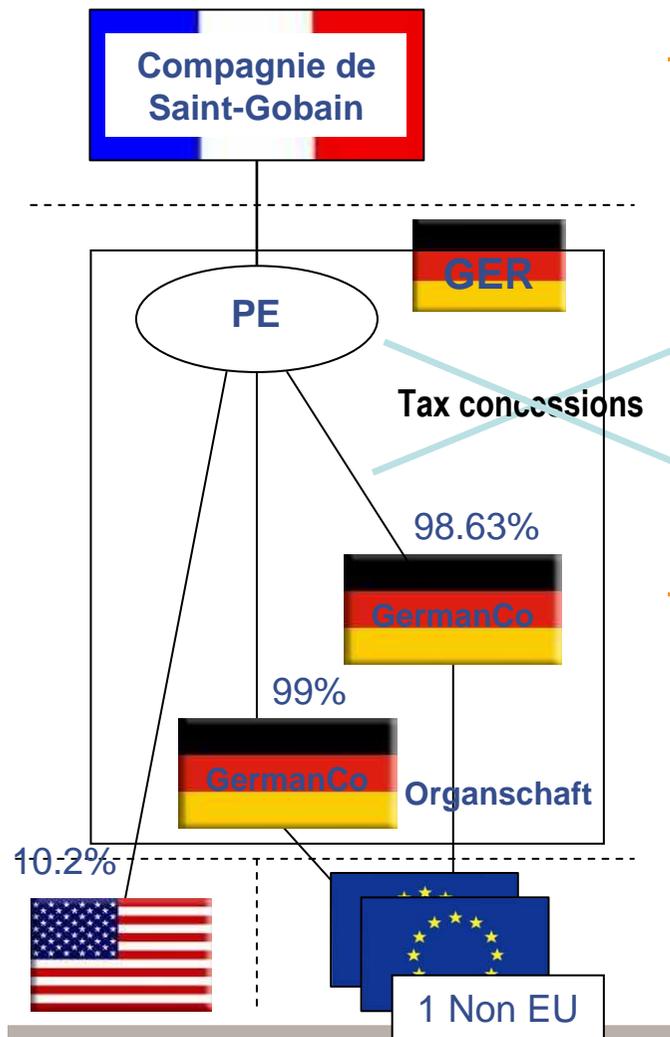
21.9.99 – C-307/97 Saint-Gobain (4)



– Facts

- Second, although the German tax authorities allowed Saint-Gobain SA the direct credit provided for the German tax law and therefore credited against the German corporation tax payable by Saint-Gobain SA on dividends received through Saint-Gobain ZN the foreign tax which it had already paid and which had been withheld at source in the various countries in which the distributing companies are established, it refused a credit for the foreign corporation tax levied on the profits distributed by the foreign subsidiaries and sub-subsidiaries of Saint-Gobain SA in the countries in which they are established (indirect tax credit) because the law restricts that concession to companies subject in Germany to unlimited tax liability (19)

21.9.99 – C-307/97 Saint-Gobain (5)



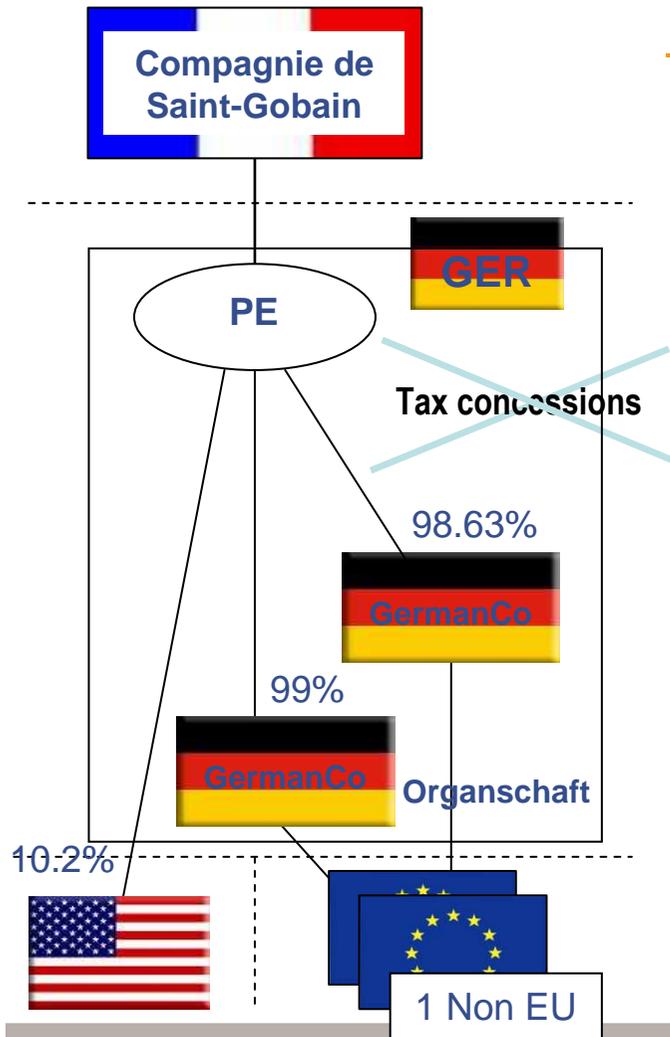
– Facts

- Third, the German tax authorities included the shareholding in the American subsidiary in the domestic assets of the permanent establishment, taxable by way of capital tax, and did not therefore allow Saint-Gobain SA the **capital tax concession** for international groups since that Law restricts that concession to domestic companies limited by shares (21)

— Questions

- Is it compatible with EU law to exclude PEs of EU companies from enjoying tax concessions taking the form of:

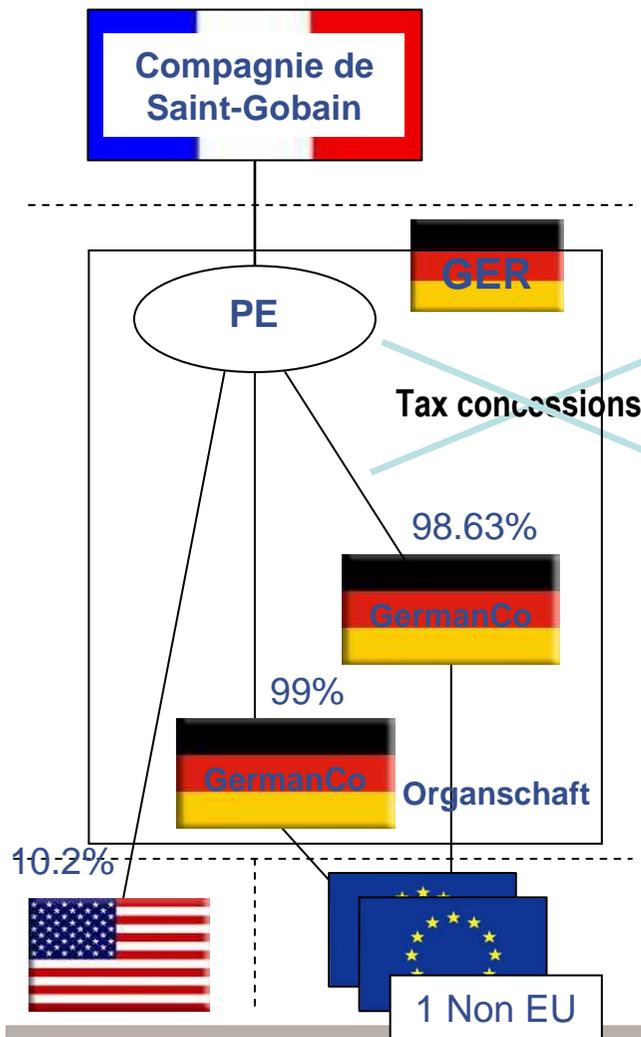
21.9.99 – C-307/97 Saint-Gobain (6)



– Questions

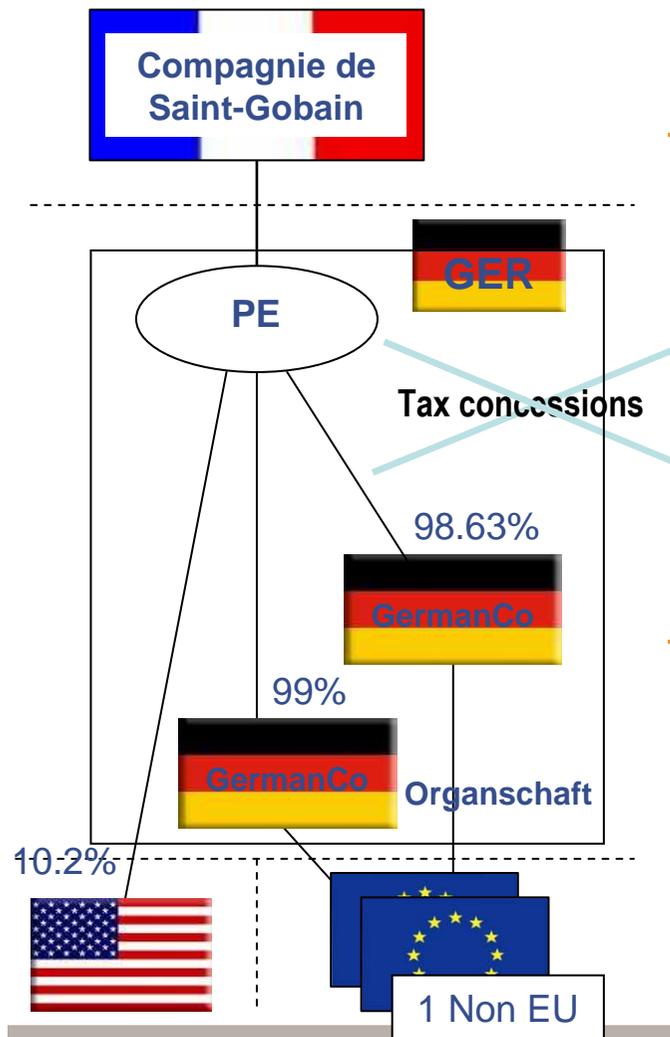
- an **exemption from corporation tax** for dividends received from companies established in non-member countries (corporation tax relief for international groups), provided for by a treaty for the avoidance of double taxation concluded with a non-member country
- the crediting, against German corporation tax, of the corporation tax levied in a State other than the Federal Republic of Germany on the profits of a subsidiary established there, provided for by German legislation, and
- an exemption from capital tax for shareholdings in companies established in non-member countries (capital tax relief for international groups), also provided for by German legislation

21.9.99 – C-307/97 Saint-Gobain (7)



- **Have you exercised a fundamental Freedom?**
 - Freedom of establishment (34)
- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - Discrimination and restriction (43). As regards taxation of dividends they are comparables (47)
- **Is there a justification?**
 - Loss of fiscal revenues. It is not possible to tax the distribution of profits (49). This is not a justification (50)
 - Advantages that PE may enjoy vis-à-vis German companies. This is not a justification (53)

21.9.99 – C-307/97 Saint-Gobain (8)



– Is there a justification?

- Double tax treaties with third countries is not within EU competency. Countries are free to allocate taxing powers within DTTs. However, in doing so, they must respect EU law: the balance and the reciprocity of the treaties are not affected by unilateral extension of tax advantages (59)

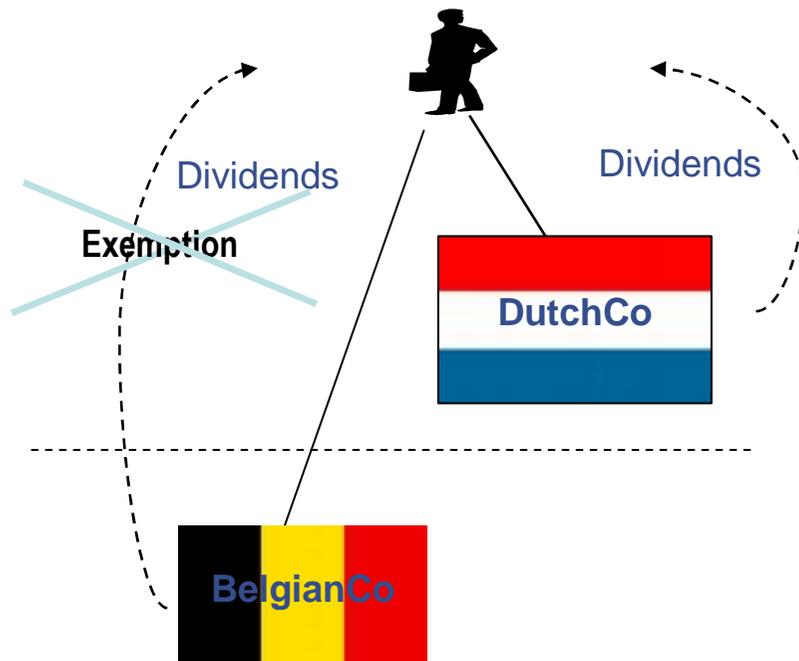
– Proportionality? N/A

Dividends

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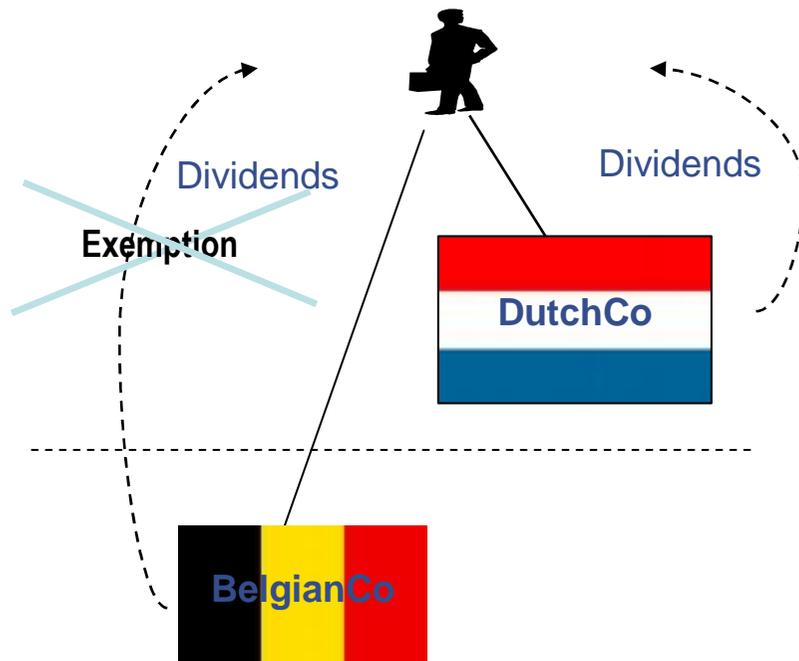
6.2.00 – C-35/98 Verkooijen



– Facts

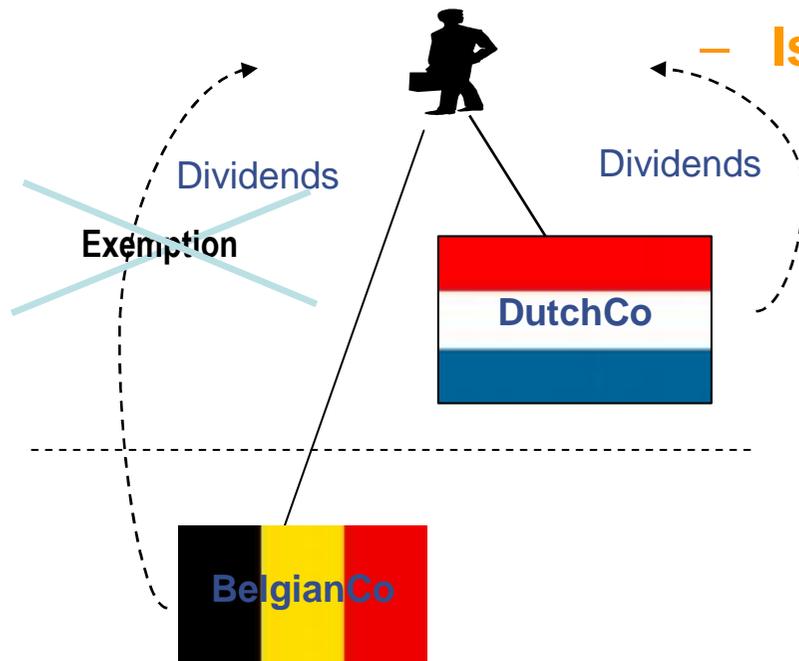
- Mr. Verkooijen is a Dutch citizen
- Dividends are subject to corporate income tax in the Netherlands (4)
- When distributed by a Dutch company, dividends are subject to a withholding tax (6)
- An exemption from Dutch tax is provided for dividends received by Dutch companies (9)
- Mr. Verkooijen receives dividends from a Belgian company and is **not entitled to exemption** from Dutch tax because such dividends are not subject to Dutch dividend withholding tax (14)

6.2.00 – C-35/98 Verkooijen (2)



- **Question**
 - Is the fact that exemption is granted only subject to the condition that a dividend withholding tax is levied in the Netherlands contrary to EU law?
- **Have you exercised a fundamental Freedom?**
 - Free movement of capital (29)
- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - Restriction (36)

6.2.00 – C-35/98 Verkooijen (3)

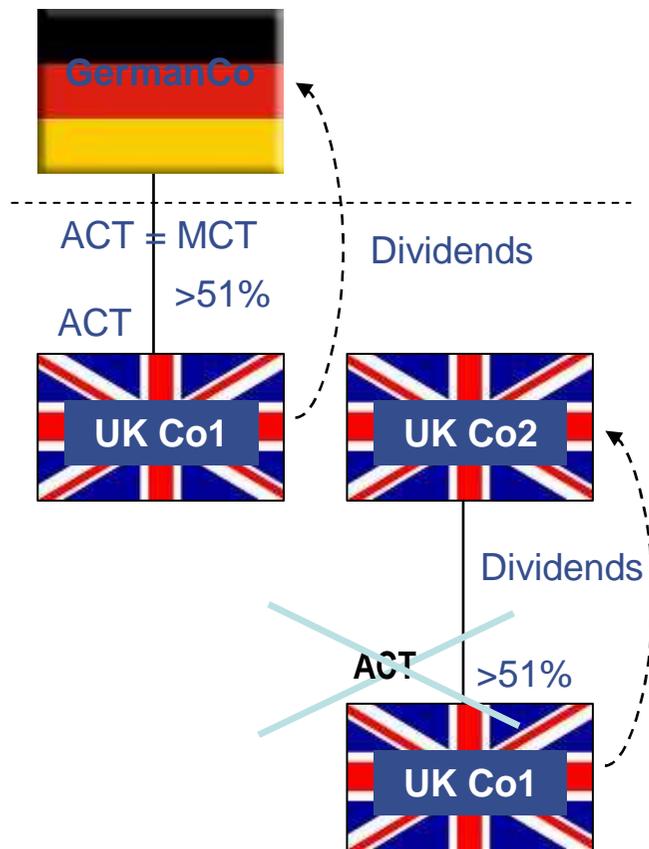


– Is there a justification?

- Economic reasons. Aims of a purely economic nature cannot constitute an overriding reason in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty (48, 59)
- Tax cohesion. There is no direct link (58)
- Other tax advantages derived by the fact that the withholding tax may be lower than the one in the Netherlands. This is not a justification (61)

– Proportionality? N/A

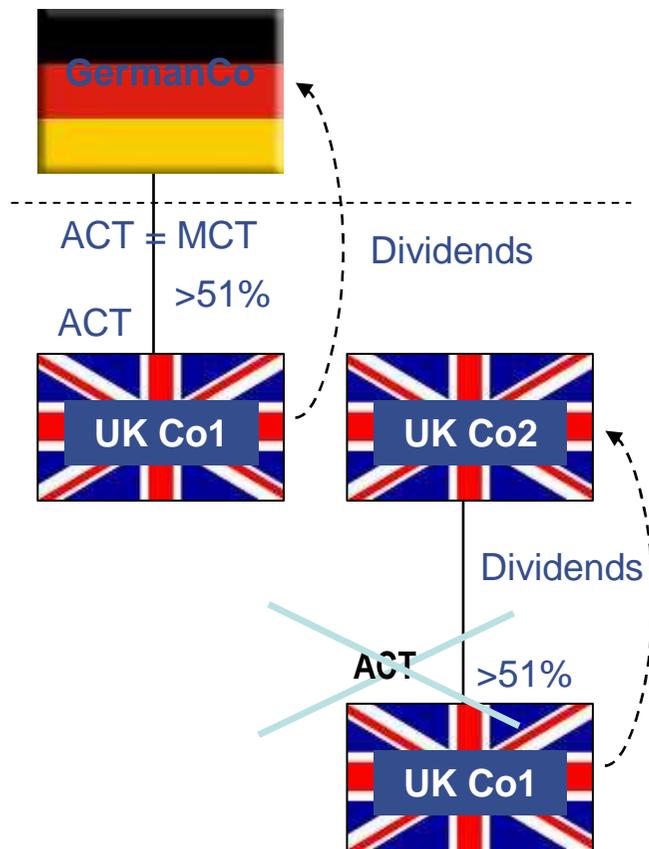
8.3.01 – C-397/98 – C/410/98 Metallgesellschaft / Hoechst



– Facts

- A company resident in the United Kingdom which makes the payment of dividends to its shareholders is liable to pay advance corporation tax ('ACT') (5)
- ACT is not a sum withheld on a dividend, which is paid in full, but is rather corporation tax borne by the company distributing dividends, paid in advance and set off against the mainstream corporation tax ('MCT') payable in respect of each accounting period (6)

8.3.01 – C-397/98 – C/410/98 Metallgesellschaft / Hoechst (2)

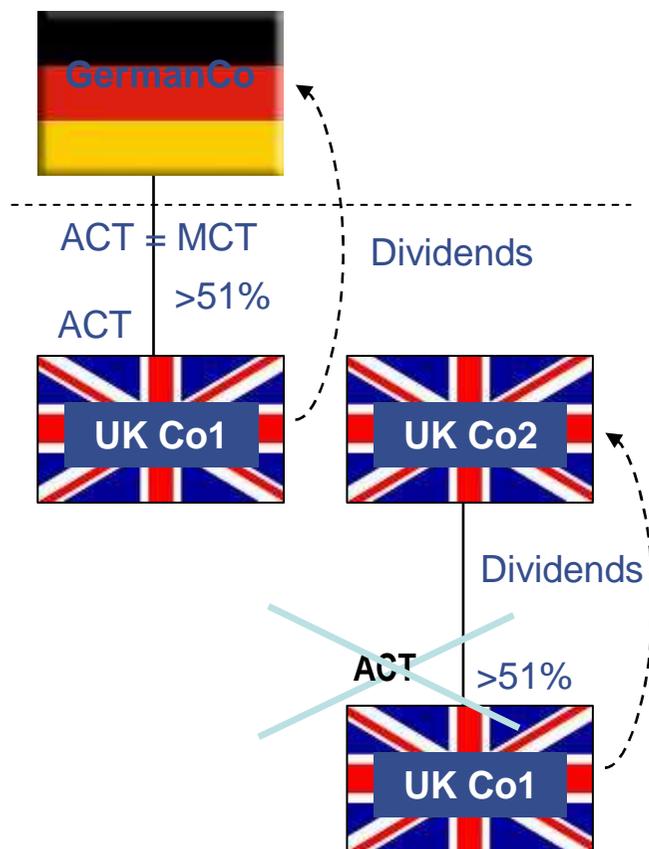


– Facts

- A company resident in the United Kingdom is not liable to pay corporation tax in respect of dividends which it receives from another company resident in the United Kingdom. Accordingly, any distribution of dividends subject to ACT made by one resident company to another gives rise to a tax credit for the company receiving the dividends (11)
- Under section the ICTA, two companies resident in the United Kingdom, one of which holds at least 51% of the other, may make a **group income election** (21)
- The result of such election is that the subsidiary does not pay ACT on the dividends which it pays to its parent company (22)

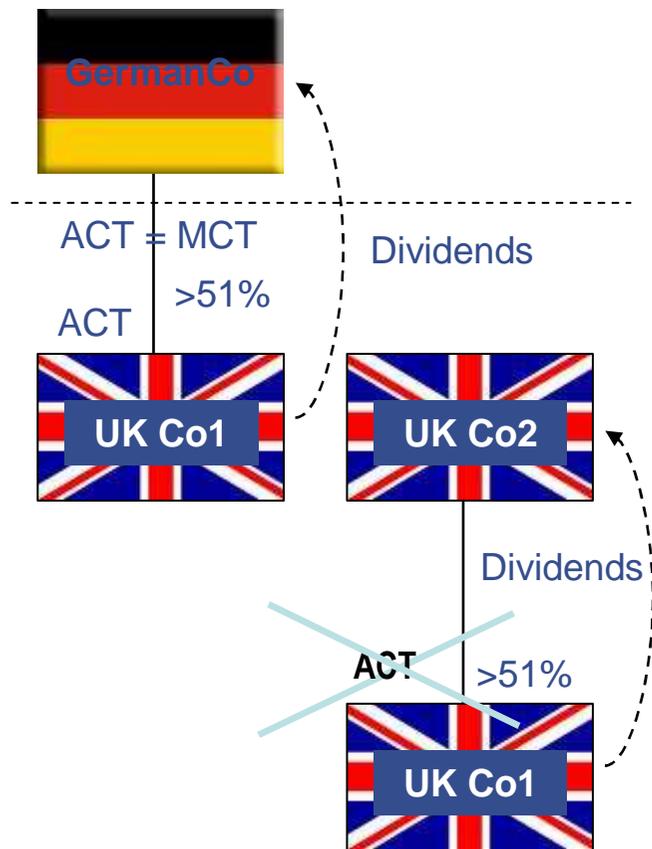
8.3.01 – C-397/98 – C/410/98 Metallgesellschaft / Hoechst (3)

– Facts



- Where a dividend is paid under a group income election by a subsidiary resident in the United Kingdom to its parent company which is also resident in the United Kingdom, no ACT is payable by the subsidiary and the parent company is not entitled to a tax credit. A group of companies may not simultaneously benefit from a group income election and from a tax credit in respect of the same dividend (24)
- In instant cases UK1, company resident in the United Kingdom, paid dividends to their respective parent companies (Metallgesellschaft and Hoechst), companies having their seat in Germany, and were therefore required to pay ACT (26)

8.3.01 – C-397/98 – C/410/98 Metallgesellschaft / Hoechst (4)



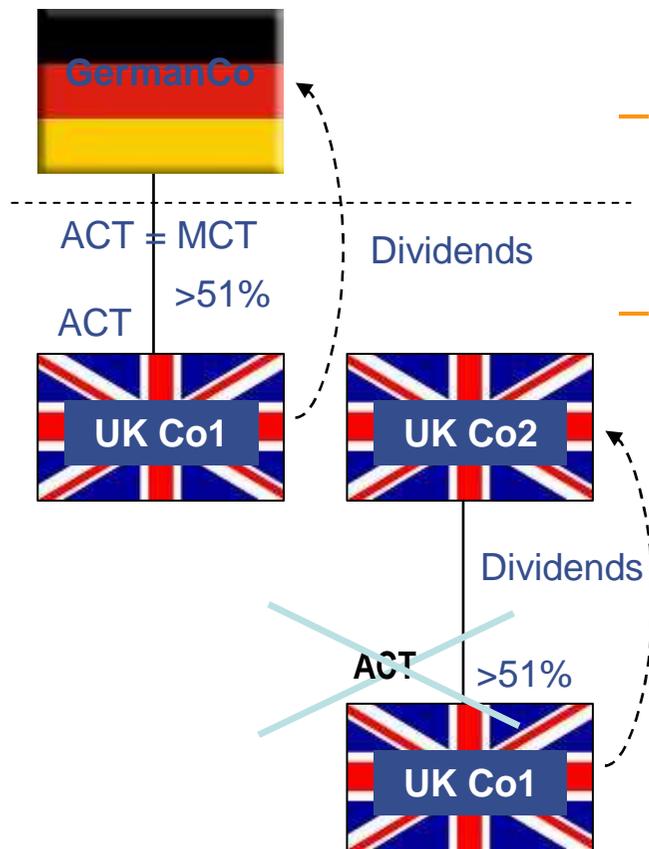
– Facts

- In each of the cases in the main proceedings, the parent companies maintain that, because it was impossible for them and their subsidiaries to make a group income election, which would have enabled the subsidiaries to avoid payment of ACT, those subsidiaries suffered a **cash-flow disadvantage** (30)

– Question

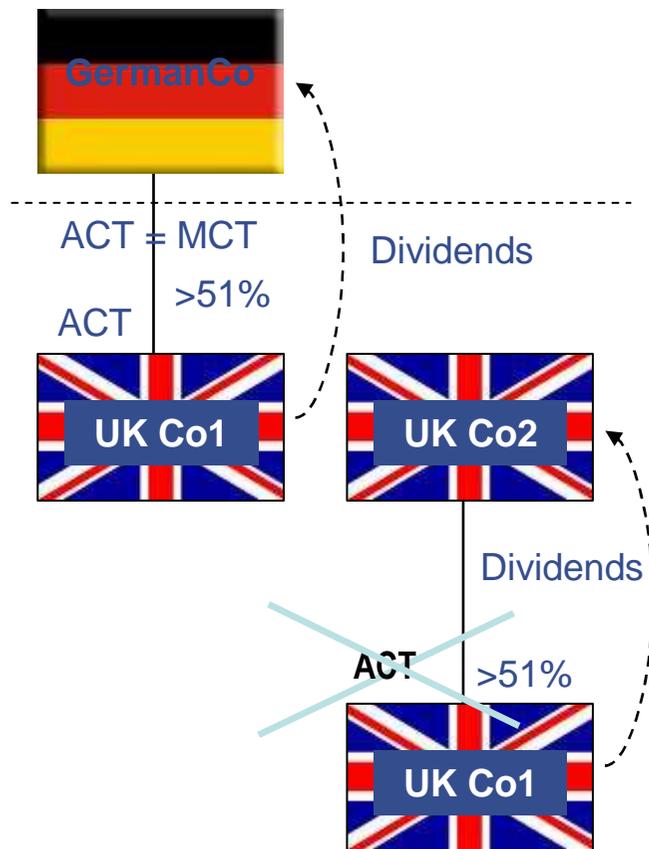
- Is the fact that the group income election is possible only for companies having their seat in the United Kingdom compatible with EU law?

8.3.01 – C-397/98 – C/410/98 Metallgesellschaft / Hoechst (5)



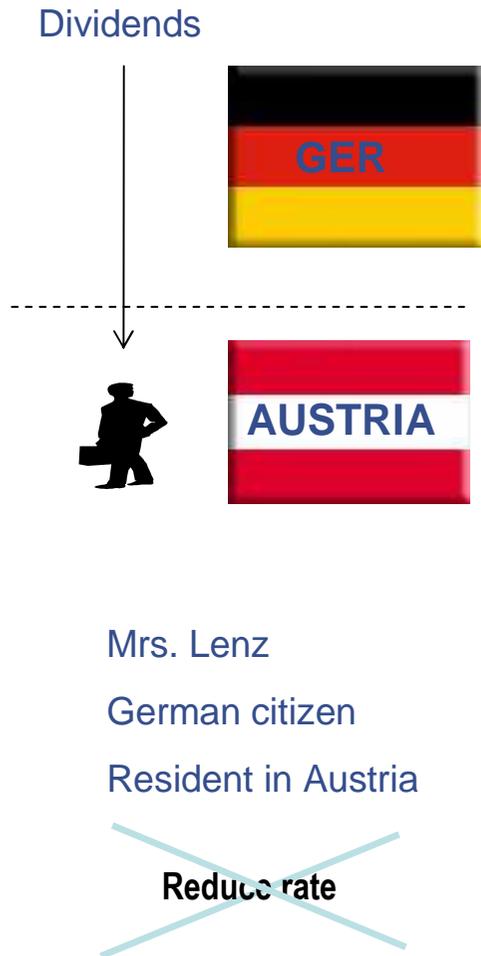
- Have you exercised a fundamental Freedom?
 - Freedom of establishment (40)
- Is there a discrimination or a restriction? Overt? Covert? Home or Host State?
 - Discrimination (44)
- Is there a justification?
 - Risk of tax evasion. This is not a justification because the establishment of a company outside the United Kingdom does not, of itself, necessarily entail tax avoidance, since that company will in any event be subject to the tax legislation of the State of establishment (57)
 - Loss of tax revenues. This is not a justification (59)

8.3.01 – C-397/98 – C/410/98 Metallgesellschaft / Hoechst (6)



- Is there a justification?
 - Tax cohesion. N/A (69)
- **Proportionality?** N/A
- Cash flow disadvantages have been quoted also in FII (Franked Investment Income) Group Litigation (12.12.06 – C-446/04) and Rewe Zentralfinanz (as successor of ITS Reisen) (29.3.07 – C-347/04)

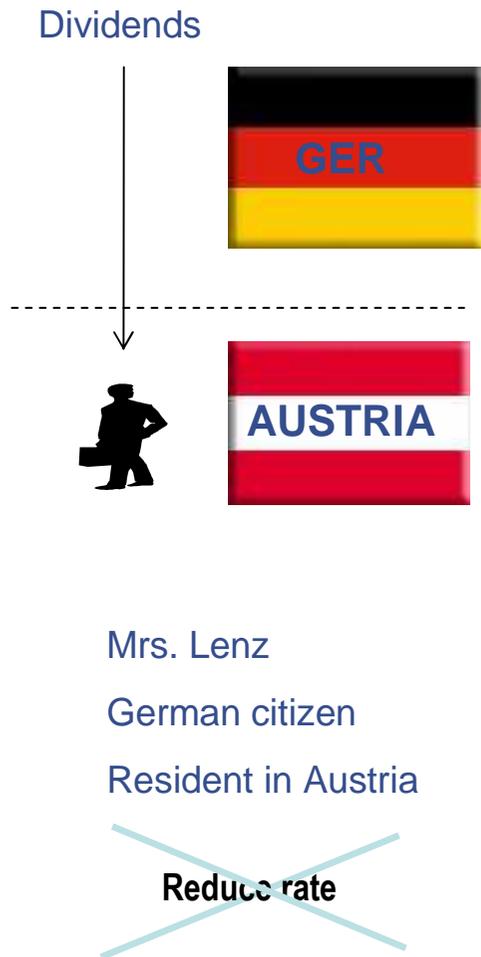
15.7.04 – C-315/02 Lenz



– Facts

- According to Austrian law, dividends received from Austrian companies are subject to final tax equal to 25% (6). In case the recipient does not opt for the final tax equal to 25%, dividends contribute towards determining aggregate taxable income, possibly leading to an increase in the rate to be applied. However, in compensation for that increase, such revenue from capital is subject to a tax rate reduced to half the average rate applicable to aggregate income (10)
- Dividends received from foreign companies are subject to **ordinary taxation (11)**
- Mrs. Lenz, German citizen and resident in Austria, received dividends from a German company. Such dividends were subject to ordinary taxation instead of the reduced one (13)

15.7.04 – C-315/02 Lenz (2)



- **Question**
 - Is the different in treatment contrary to EU law?
- **Have you exercised a fundamental Freedom?**
 - Free movement of capital (17)
- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - Restriction (20)
 - It should be noted in that respect that, in accordance with the free movement of capital, the Treaty ‘... shall be without prejudice to the right of Member States ... to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to ... the place where their capital is invested’ or their right ‘to take all requisite measures to prevent infringements of national law and regulations’ (24)

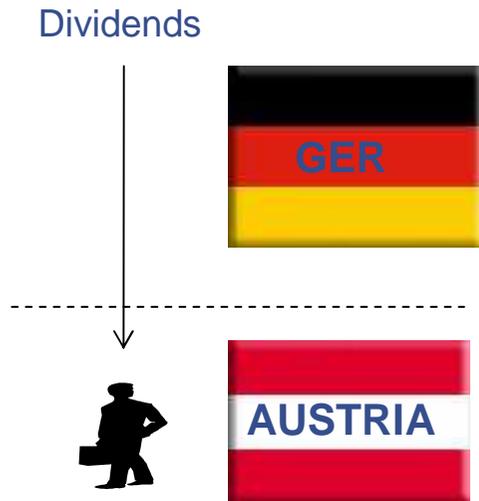
15.7.04 – C-315/02 Lenz (3)



– **Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?**

- In that respect, it should be noted that the Treaty must be interpreted strictly. It cannot be interpreted as meaning that any tax legislation making a distinction between taxpayers by reference to the place where they invest their capital is automatically compatible with the Treaty. The derogation ‘shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments’ (26)

15.7.04 – C-315/02 Lenz (4)



– **Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?**

- The legislation is designed to reduce economic double taxation. In this respect, shareholders who receive dividends from Austrian or other EU countries **are in a comparable situation (32)**

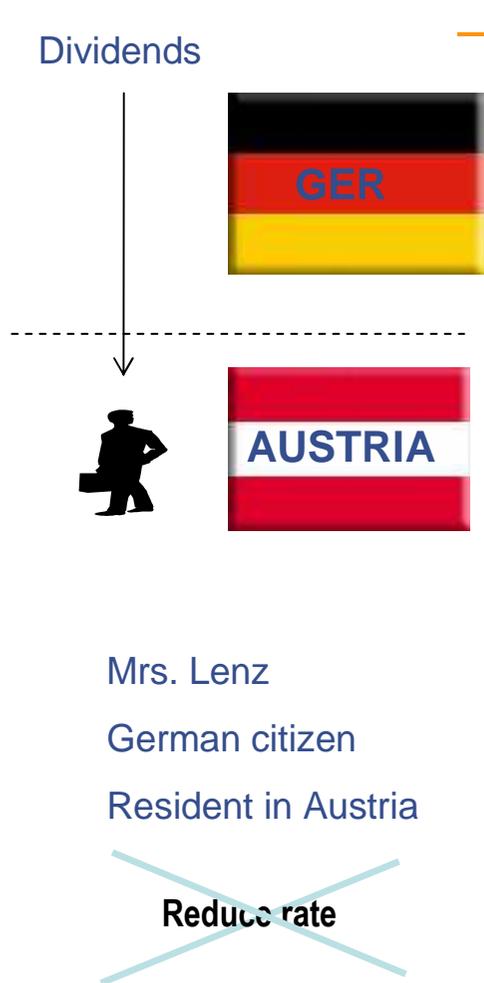
Mrs. Lenz

German citizen

Resident in Austria

~~Reduce rate~~

15.7.04 – C-315/02 Lenz (5)

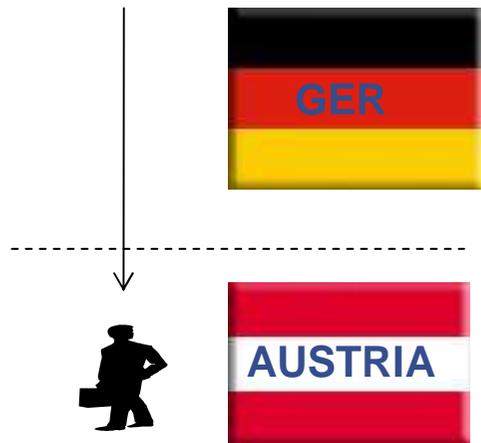


– Is there a justification?

- Tax cohesion. In this case, apart from the fact that tax on the income of physical persons and corporation tax are two distinct taxes which affect different taxpayers, it should be noted that the Austrian tax legislation **does not make the obtaining of the tax advantages at issue enjoyed by Austrian residents on their domestic revenue from capital dependent upon the taxation of the companies' profits by way of corporation tax (36)**
- It should also be recalled that the argument based on the need to preserve the coherence of a tax system **must be verified having regard to the aim pursued by the tax legislation in question** (Case C-9/02 *De Lasteyrie du Saillant*, paragraph 67) (37).
- In the instant case, the aim of reduced economic double taxation is not affected by the residence of the distributing company (38)

15.7.04 – C-315/02 Lenz (6)

Dividends



Mrs. Lenz

German citizen

Resident in Austria

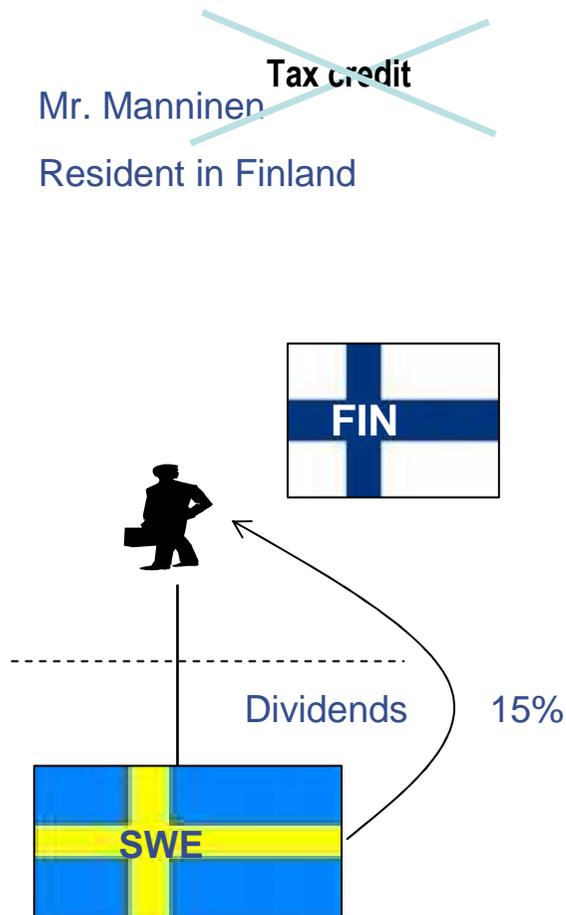
~~Reduce rate~~

Is there a justification?

- Loss of fiscal revenues. This argument cannot be upheld (40)
- Other tax advantages. This argument cannot be upheld (43)
- Effectiveness of fiscal supervision. The difference in tax rates of distributing companies has nothing to do with fiscal supervision. In addition, the 25% definitive tax can also be self assessed in the tax return (48)

– **Proportionality?** N/A

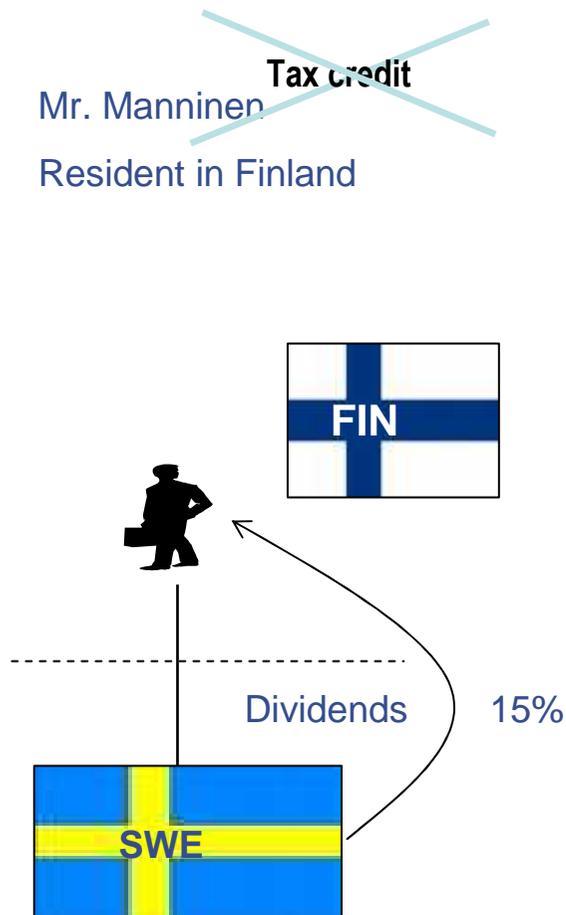
7.9.04 – C-319/04 Manninen



– Facts

- Dividends received by a person fully taxable in Finland from a Finnish or foreign quoted company are taxable as revenue from capital at the rate of 29% (6, 7)
- Companies established in Finland pay a tax on their profits which is also at the rate of 29%. In order to avoid double taxation of such revenue on the distribution of dividends, shareholders are entitled of tax credit equal to 29/71 of the amount of the dividends received (8). Should the tax paid by the company be less of 29%, the latter would be charged with the difference (11)

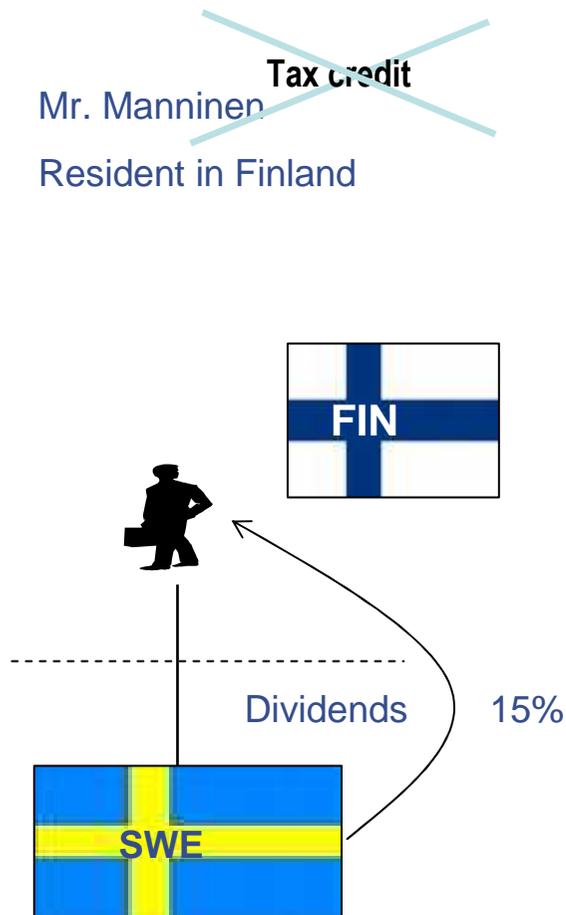
7.9.04 – C-319/04 Manninen (2)



– Facts

- The tax credit applies only to dividends distributed by Finnish companies (9)
- Mr Manninen is fully taxable in Finland. He holds shares in a Swedish company quoted on the Stockholm (Sweden) Stock Exchange (12)
- The profits distributed by that Swedish company in the form of dividends to Mr Manninen have already borne corporation tax in Sweden. The dividends also bear a tax in Sweden on revenue from capital by means of deduction at source (13)

7.9.04 – C-319/04 Manninen (3)



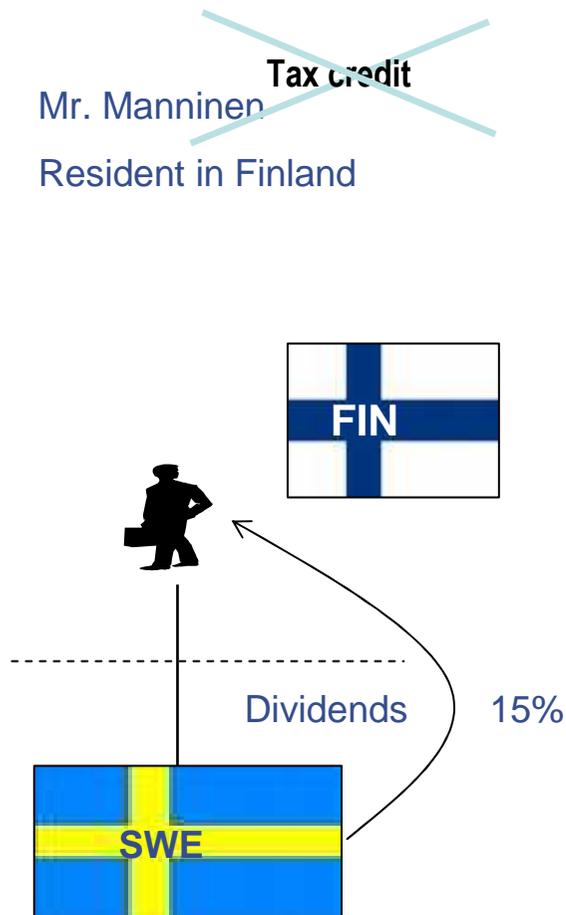
– Facts

- Since dividends distributed by foreign companies to Finnish taxpayers confer no entitlement to a tax credit in Finland, they are subject in that Member State to income tax on revenue from capital at the rate of 29%. However, in accordance with Convention 26/1997 concluded between Member States of the Nordic Council for the avoidance of double taxation, the rate of which cannot exceed 15% by virtue of Article 10 of that convention, is deductible from the tax due by way of income tax on revenue from capital from the fully taxable shareholder in Finland (13)

– Question

- Is the fact that tax credit is granted only for domestic dividends contrary to EU law?

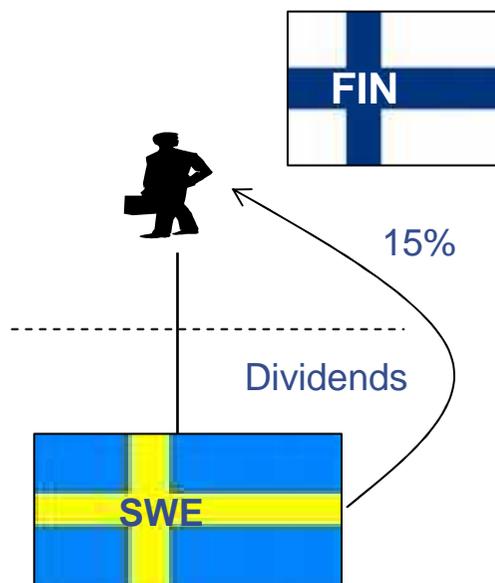
7.9.04 – C-319/04 Manninen (4)



- **Have you exercised a fundamental Freedom?**
 - Free movement of capital (20)
- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - Restriction (22)
 - It should be recalled in that respect that, in accordance with the Treaty, ‘... the free movement of capital shall be without prejudice to the right of Member States ... to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to ... the place where their capital is invested’ (26)

7.9.04 – C-319/04 Manninen (5)

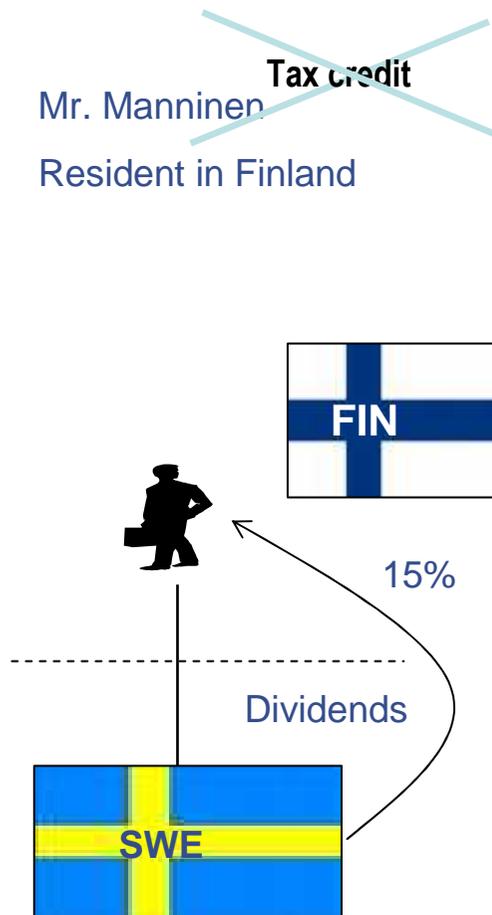
~~Tax credit~~
Mr. Manninen
Resident in Finland



– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- However, this provision must be interpreted **strictly** and cannot be a means of arbitrary discrimination or disguised restriction (28). In the face of a tax rule which takes account of the corporation tax owed by a company in order to prevent double taxation of the profits distributed, shareholders who are fully taxable in Finland find themselves in a comparable situation, whether they receive dividends from a company established in that Member State or from a company established in Sweden (36)

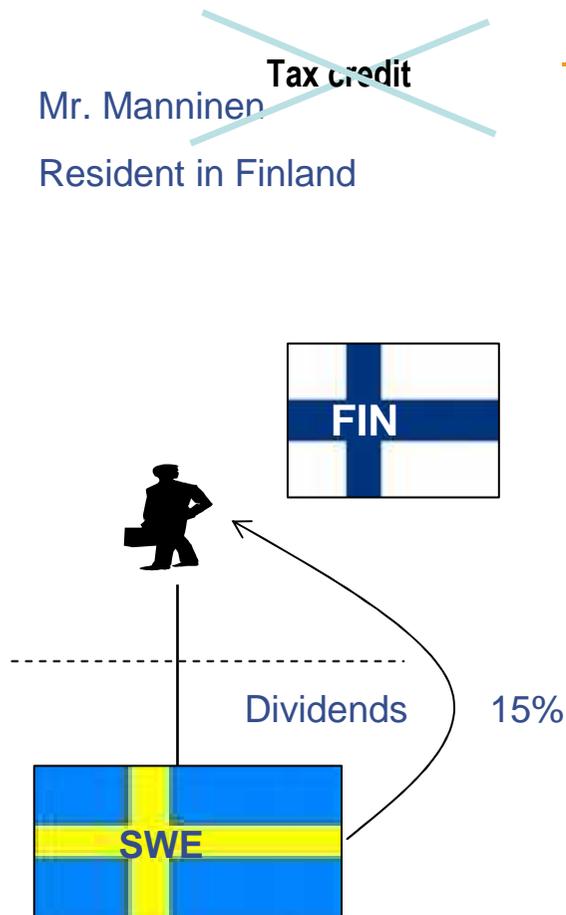
7.9.04 – C-319/04 Manninen (6)



– Is there a justification?

- Principle of territoriality. unlike the legislation at issue in *Futura*, the Finnish tax legislation cannot be regarded as an emanation of the principle of territoriality. That principle does not preclude the granting of a tax credit to a person fully taxable in Finland in respect of dividends paid by companies established in other Member States (*Futura*, paragraphs 18 to 22) (38). In any event, having regard to Article 58(1)(a) EC, the principle of territoriality cannot justify different treatment of dividends distributed by companies established in Finland and those paid by companies established in other Member States, if the categories of dividends concerned by that difference in treatment share the same objective situation (39)

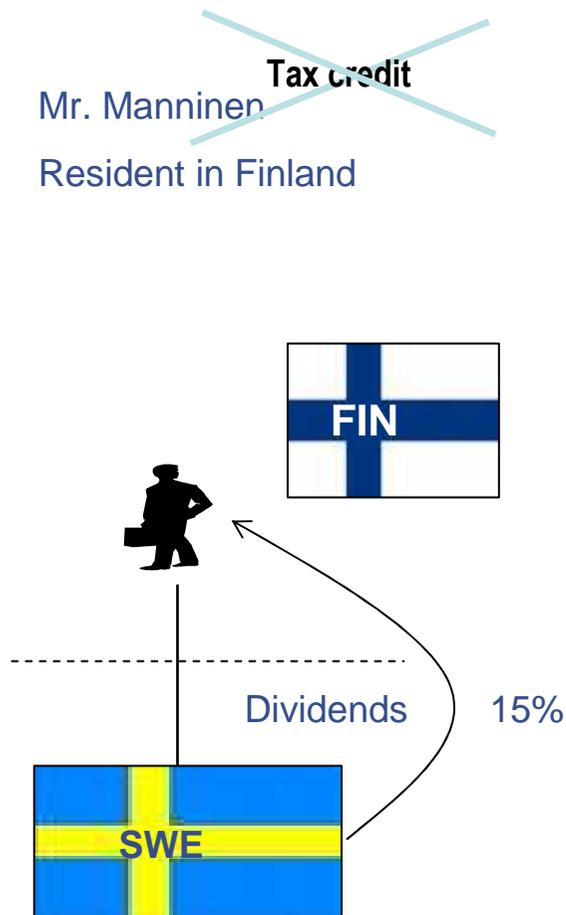
7.9.04 – C-319/04 Manninen (7)



– Is there a justification?

- Tax cohesion. There must be direct link (42). The **case-law further shows that an argument based on the need to safeguard the cohesion of a tax system must be examined in the light of the objective pursued by the tax legislation in question (Case C-9/02 *De Lasteyrie du Saillant*, paragraph 67) (43).** Even if that tax legislation is thus based on a link between the tax advantage and the offsetting tax levy, in providing that the tax credit granted to the shareholder fully taxable in Finland is to be calculated by reference to the corporation tax due from the company established in that Member State on the profits which it distributes, such legislation does not appear to be necessary in order to preserve the cohesion of the Finnish tax system (44)

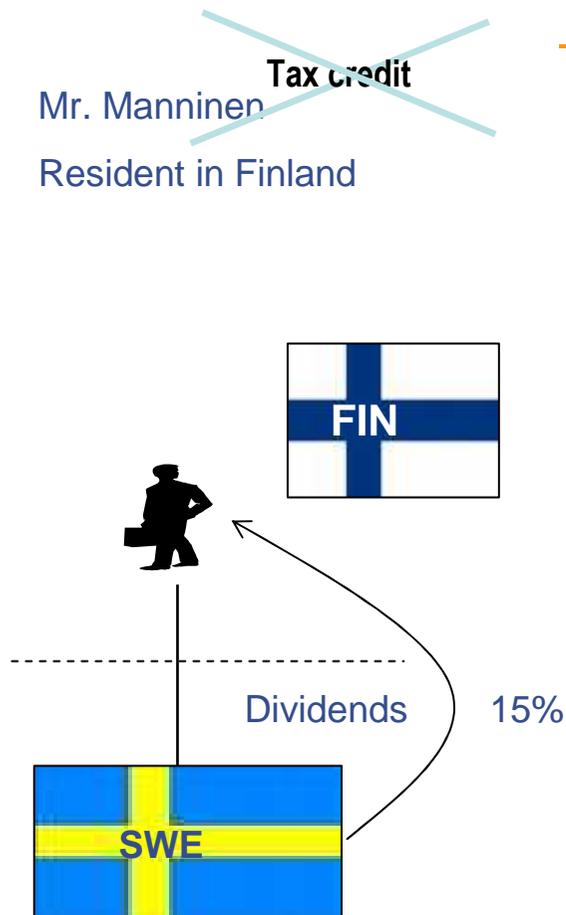
7.9.04 – C-319/04 Manninen (8)



– Is there a justification?

- Having regard to the objective pursued by the Finnish tax legislation, the cohesion of that tax system is assured as long as the correlation between the tax advantage granted in favor of the shareholder and the tax due by way of corporation tax is maintained. Therefore, in a case such as that at issue in the main proceedings, the granting to a shareholder who is fully taxable in Finland and who holds shares in a company established in Sweden of a tax credit calculated by reference to the corporation tax owed by that company in Sweden would not threaten the cohesion of the Finnish tax system and would constitute a measure less restrictive of the free movement of capital than that laid down by the Finnish tax legislation (46)

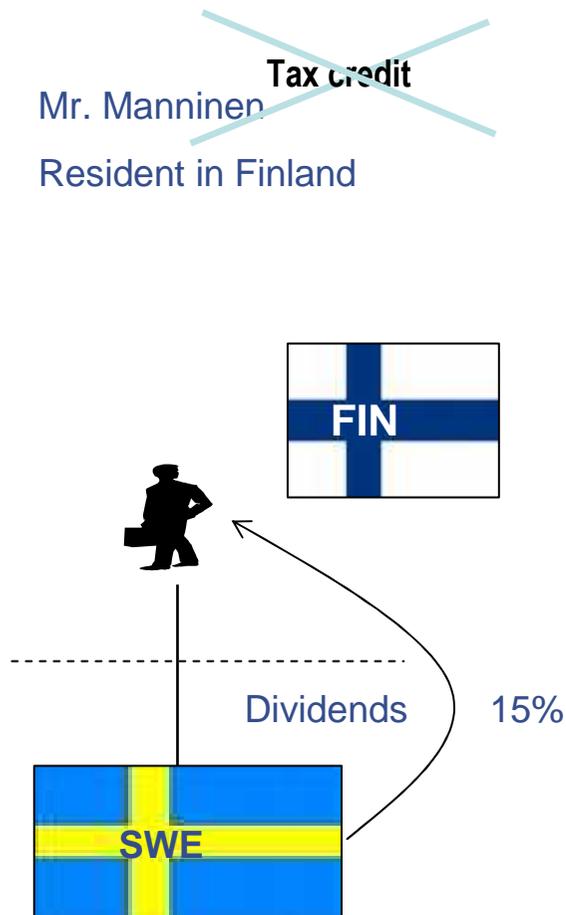
7.9.04 – C-319/04 Manninen (9)



– Is there a justification?

- In *Bachmann*, the purpose of the tax provisions in question was also to avoid double taxation. The possibility which Belgian legislation gave to physical persons to deduct payments made under life assurance contracts from their taxable income was based on the justification that the capital constituted by means of those contributions would subsequently be taxed in the hands of its holders. In such a system, double taxation was avoided by postponing the sole taxation. Coherence of the tax system necessarily required that, if the Belgian tax authorities were to allow the deductibility of life assurance contributions from taxable income, they had to be certain that the capital paid by the assurance company at the expiry of the contract would in fact subsequently be taxed

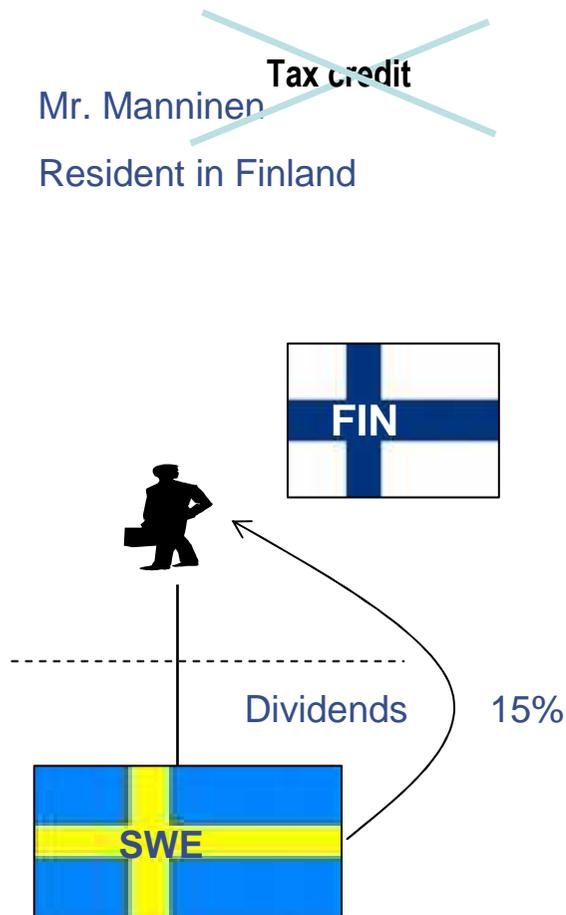
7.9.04 – C-319/04 Manninen (10)



– Is there a justification?

- In the case at issue in the main proceedings here, however, the factual context is different. At the time when the shareholder fully taxable in Finland receives dividends, the profits thus distributed have already been subject to taxation by way of corporation tax, irrespective of whether those dividends come from Finnish or from Swedish companies. **The objective pursued by the Finnish tax legislation, which is to eliminate the double taxation of profits distributed in the form of dividends, may be achieved by also granting the tax credit in favor of profits distributed in that way by Swedish companies to persons fully taxable in Finland (48)**

7.9.04 – C-319/04 Manninen (11)

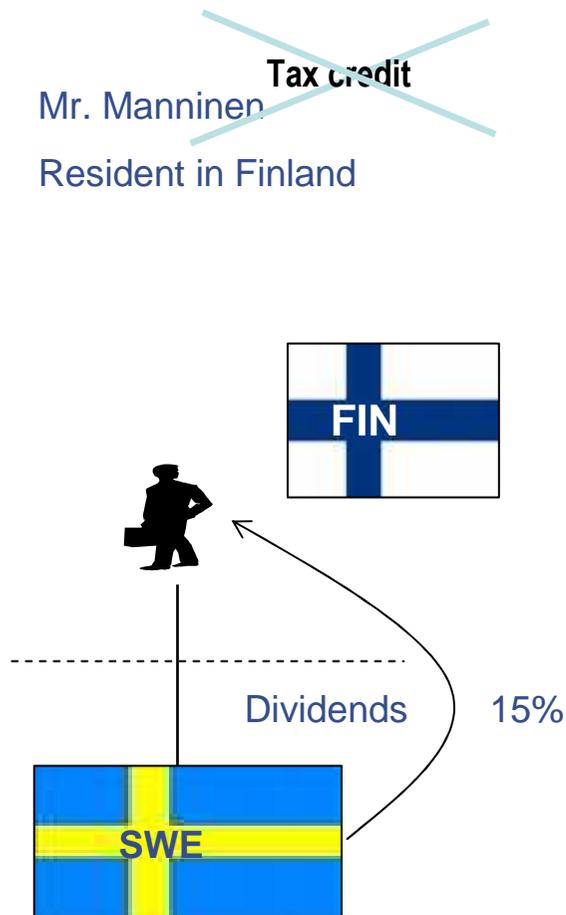


– Is there a justification?

- Reduction in tax revenues. This argument cannot be upheld (49)
- Difficulty in determining the credit. This argument cannot be upheld. **The numerator is equal to the tax paid (52).** There are cases in which the amount differ. However, difficulties in determining the tax actually paid cannot, in any event, justify an obstacle to the free movement of capital such as that which arises from the legislation at issue in the main proceedings (*Commission v France*, paragraph 29).

– Proportionality? N/A

7.9.04 – C-319/04 Manninen (12)

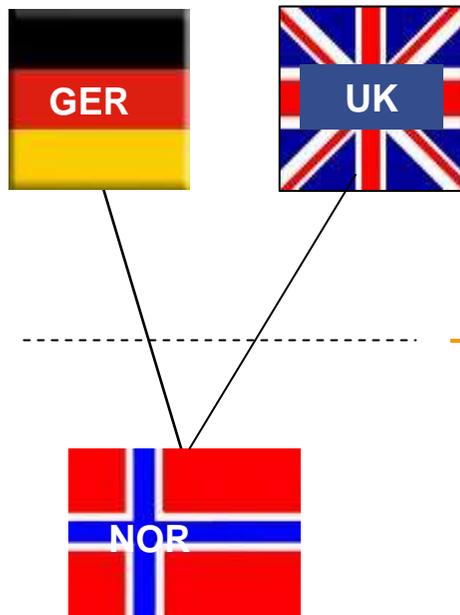


- The same principles have also been applied in **Meilicke** (6.3.07, C-292/04): EU Law is to be interpreted as precluding tax legislation under which, on a distribution of dividends by a capital company, a shareholder who is fully taxable in a Member State is entitled to a tax credit, calculated by reference to the corporation tax rate on the distributed profits, if the dividend-paying company is established in that same Member State but not if it is established in another Member State

27.11.04 – E-1/04 Fokus (EFTA)

– Facts

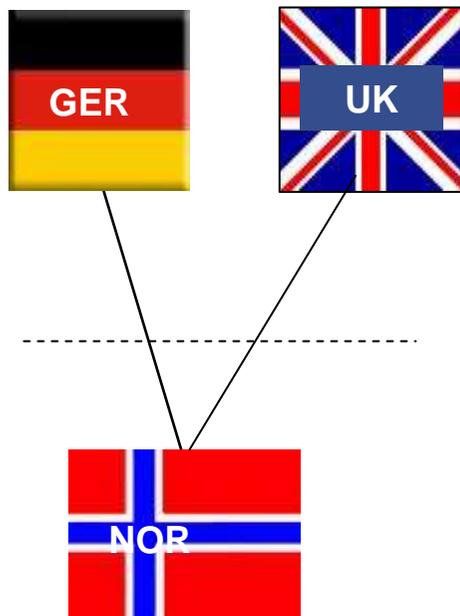
- The Appellant, a Norwegian resident company, withheld withholding tax before paying dividends to shareholders, resident in Germany and UK respectively (3)
- In case of dividends paid to Norwegian companies, an imputation credit is granted to the recipient. The imputation credit is not granted to foreign companies



– Question

- Is it consistent with EU law that imputation tax credit for withholding tax is not granted to taxpayers resident in other Member States?

27.11.04 – E-1/04 Fokus (EFTA) (2)

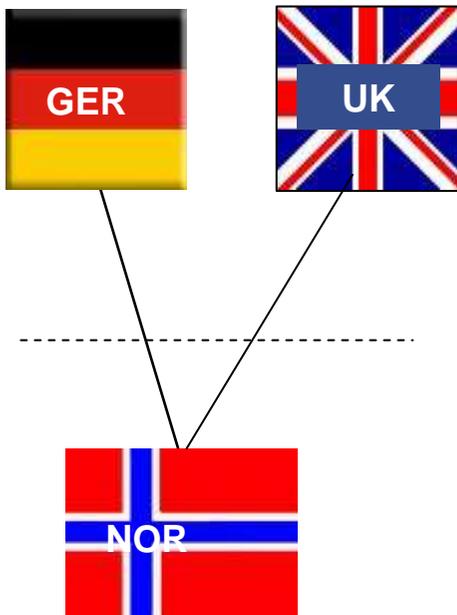


- **Have you exercised a fundamental freedom**
 - Freedom of capital (24)
- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - Restriction (26)
- **Is there a justification?**
 - Reduction in tax revenues. This argument cannot be upheld (33)

27.11.04 – E-1/04 Fokus (EFTA) (3)

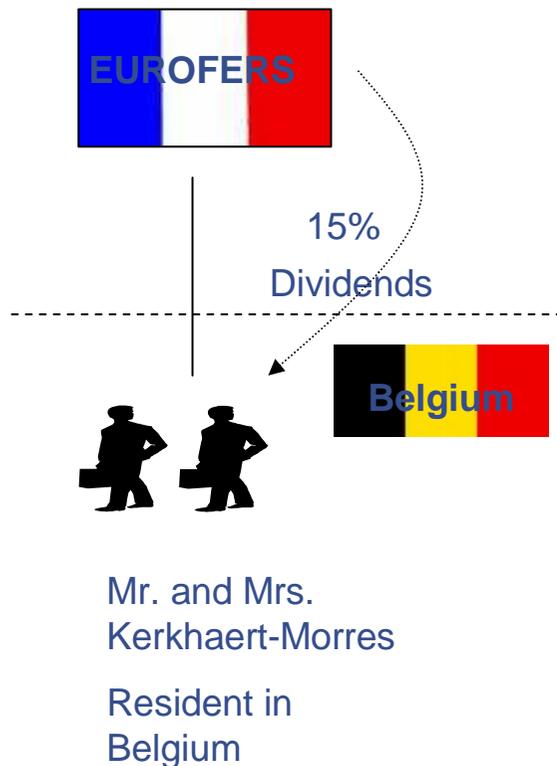
– Is there a justification?

- Other tax advantages. This argument cannot be accepted. A Contracting Party cannot shift its obligation to comply with the EEA Agreement to another Contracting Party by relying on the latter to make good for discrimination and disadvantages caused by the former's legislation. Likewise, the principle of legal certainty would require that the granting, or not, of an imputation tax credit to a non-resident shareholder, may not depend on whether a tax credit is granted in his or her state of residence in respect of dividend payments (37)



– Proportionality? N/A

14.11.06 – C-513/04 Kerckhaert-Morres



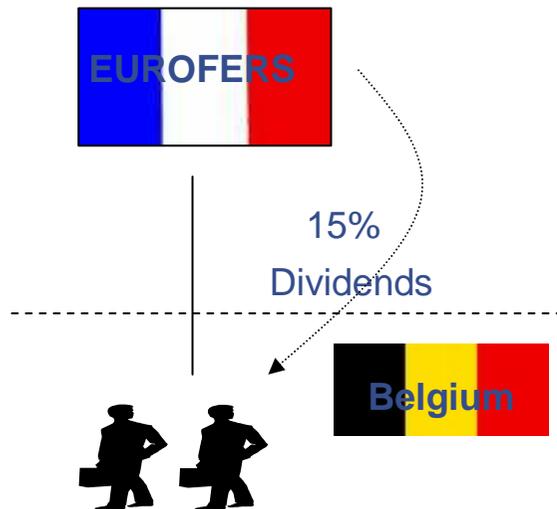
– Facts

- According to Belgian law, dividends, either domestic or foreign, are subject to 25% tax
- Dividends received by a France company are subject, pursuant to the concerned DTT, to 15% withholding tax
- Such a withholding tax cannot be credited against the taxable income in Belgium
- Mr and Mrs Kerckhaert-Morres, who are resident in Belgium, received dividends from Eurofers SARL, a company established in France (9) and asked to credit the withholding tax levied in France against their Belgian tax liability (11)

– Question

- Is the lack of the tax credit against EU law?

14.11.06 – C-513/04 Kerckhaert-Morres (2)



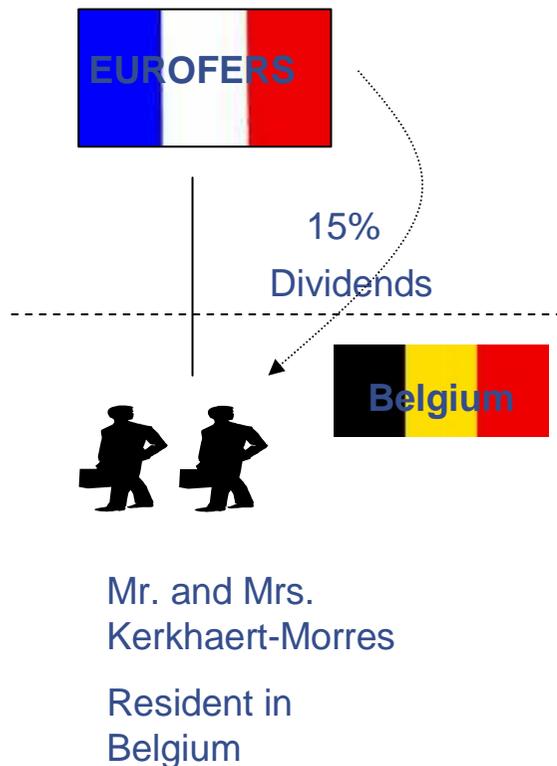
Mr. and Mrs.
Kerkhaert-Morres

Resident in
Belgium

– Have you exercised a fundamental Freedom?

- Free movement of capital (24)
- It must be recalled, in that regard, that conventions preventing double taxation such as those envisaged in Article 293 EC are designed to eliminate or mitigate the negative effects on the functioning of the internal market resulting from the coexistence of national tax systems referred to in the preceding paragraph (21)

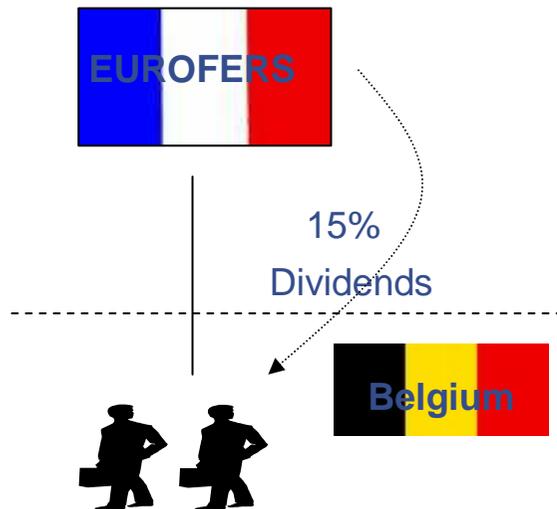
14.11.06 – C-513/04 Kerckhaert-Morres (3)



– Have you exercised a fundamental Freedom?

- Community law, in its current state and in a situation such as that in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the Community. Apart from Council Directive 90/435/EEC of 23 July 1990, the Convention of 23 July 1990 and Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, no uniform or harmonization measure designed to eliminate double taxation has as yet been adopted at Community law level (22)

14.11.06 – C-513/04 Kerckhaert-Morres (4)

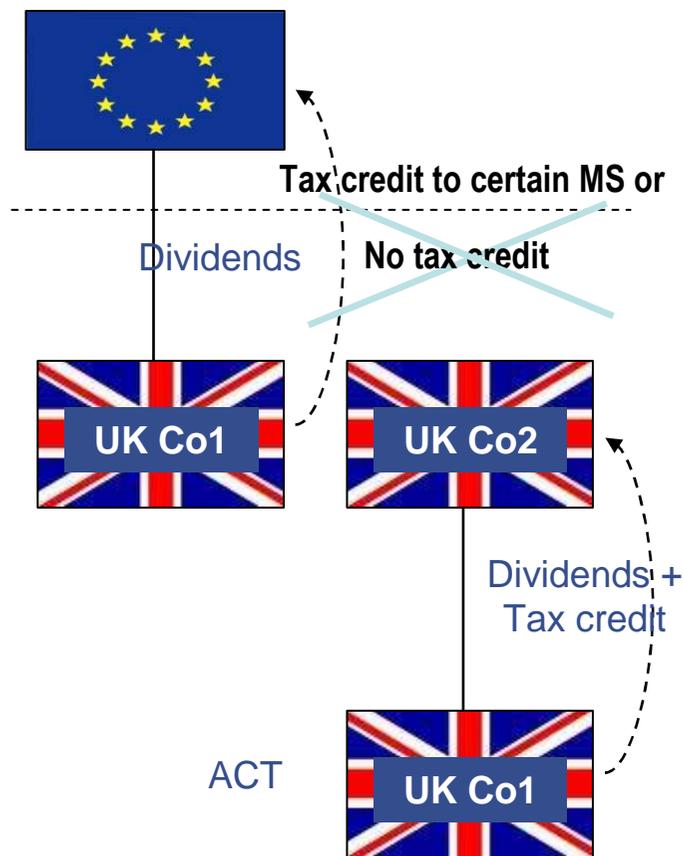


Mr. and Mrs.
Kerkhaert-Morres

Resident in
Belgium

- **Have you exercised a fundamental Freedom?**
 - Consequently, it is for the Member States to take the measures necessary to prevent situations such as that at issue in the main proceedings by applying, in particular, the apportionment criteria followed in international tax practice (23)
- **Is there a justification?** N/A
- **Proportionality?** N/A

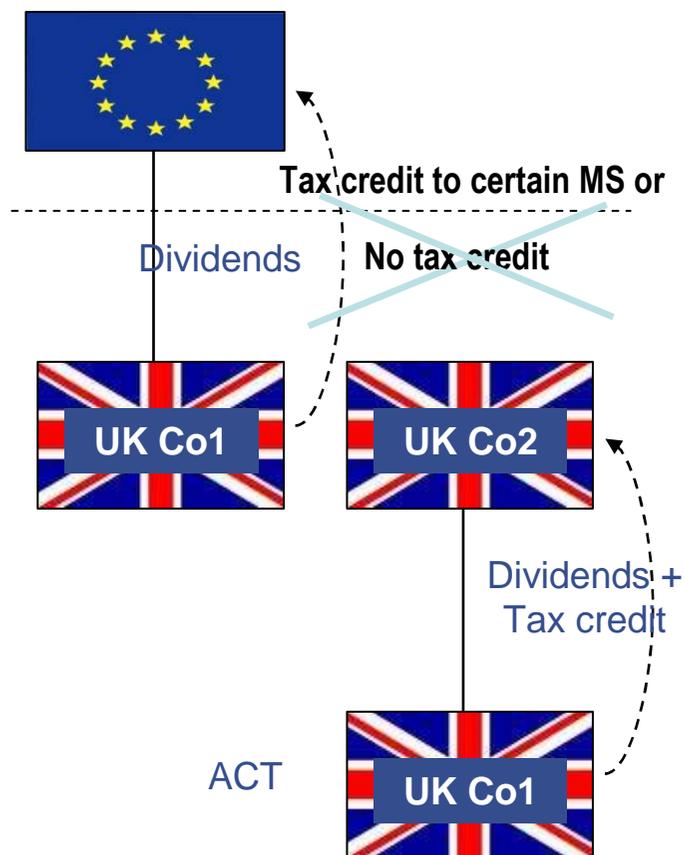
12.12.06 – C-374/04 ACT Group Litigation



– Questions

- The national court essentially asks whether EU law precludes a rule of a Member State which, on a payment of dividends by a resident company, grants a full tax credit to the ultimate shareholders receiving the dividends who are resident in that Member State or in another State with which the first Member State has concluded a DTC providing for such a tax credit, but does not grant a full or partial tax credit to companies receiving such dividends which are resident in certain other Member States

12.12.06 – C-374/04 ACT Group Litigation (2)



– Questions

- The national court also asks whether EU law precludes a Member State from applying DTCs concluded with other Member States in terms of which, on a payment of dividends by a resident company, companies receiving those dividends which reside in some Member States are not entitled to a tax credit, while companies receiving such dividends which reside in certain other Member States are granted a partial tax credit

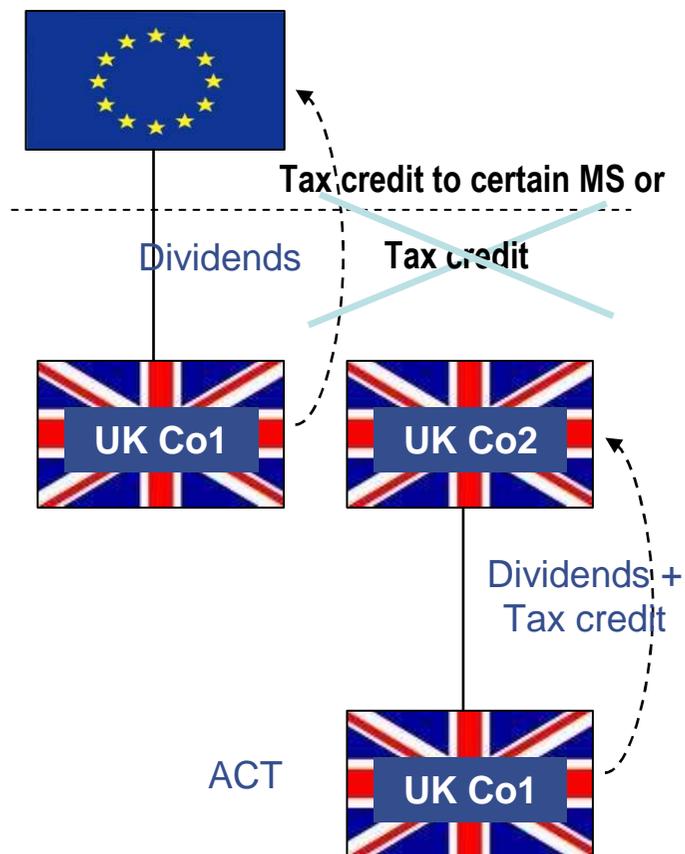
– Have you exercised a fundamental Freedom?

- Freedom of establishment and free movement of capital (38)

12.12.06 – C-374/04 ACT Group Litigation (3)

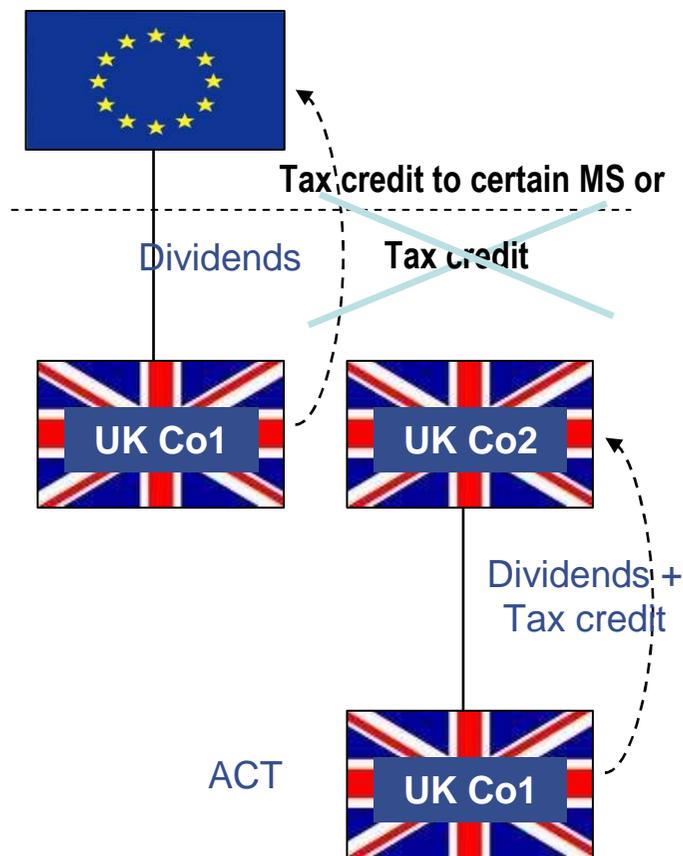
– Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?

- As regards the first question, it must be pointed out that, where a company resident in the United Kingdom pays dividends to another company, neither the dividends received by a resident company nor those received by a non-resident company are subject to tax in the United Kingdom (61). There is therefore no difference in treatment in that respect (62)



12.12.06 – C-374/04 ACT Group Litigation (4)

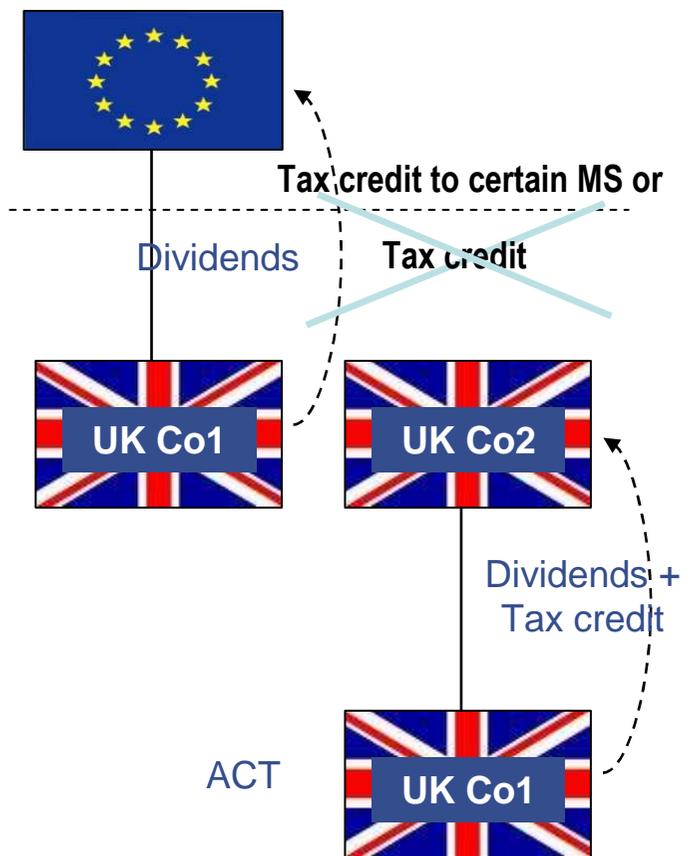
- Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?



- With respect to the second question, as the Court noted in paragraph 54 of *D.*, the scope of a bilateral tax convention is limited to the natural or legal persons referred to in it (84). 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 (*D.*, paragraph 61)

12.12.06 – C-374/04 ACT Group Litigation (5)

- Is there a justification? N/A
- Proportionality? N/A

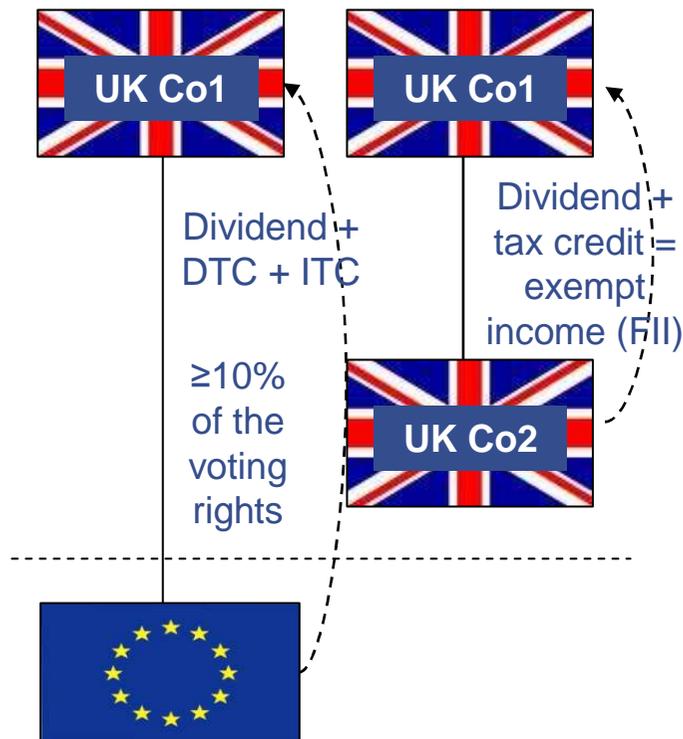


12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation

Case Ia

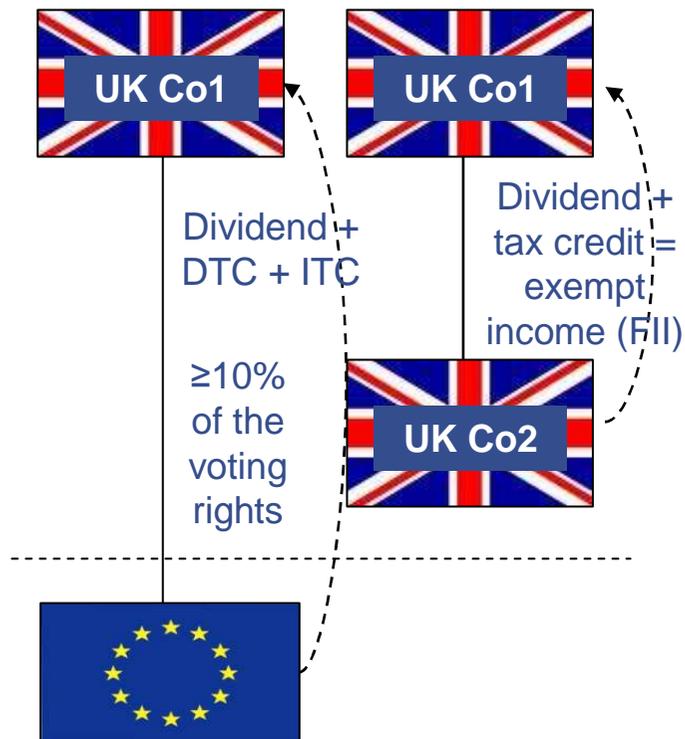
– Questions

- The national court essentially asks whether EU law precludes legislation of a Member State which makes dividends received by a resident company from a company which is also resident in that State ('nationally-sourced dividends') exempt from corporation tax, when it imposes that tax on dividends received by a resident company from a company which is not resident in that State ('foreign-sourced dividends'), while granting relief in the latter case for all withholding tax levied in the State in which the company making the distribution is resident and, where the resident company receiving the dividends holds, directly or indirectly, 10% or more of the voting rights in the company making the distribution, relief against corporation tax paid by the company making the distribution on the profits underlying the dividends



12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation (2)

Case Ia



— Have you exercised a fundamental Freedom?

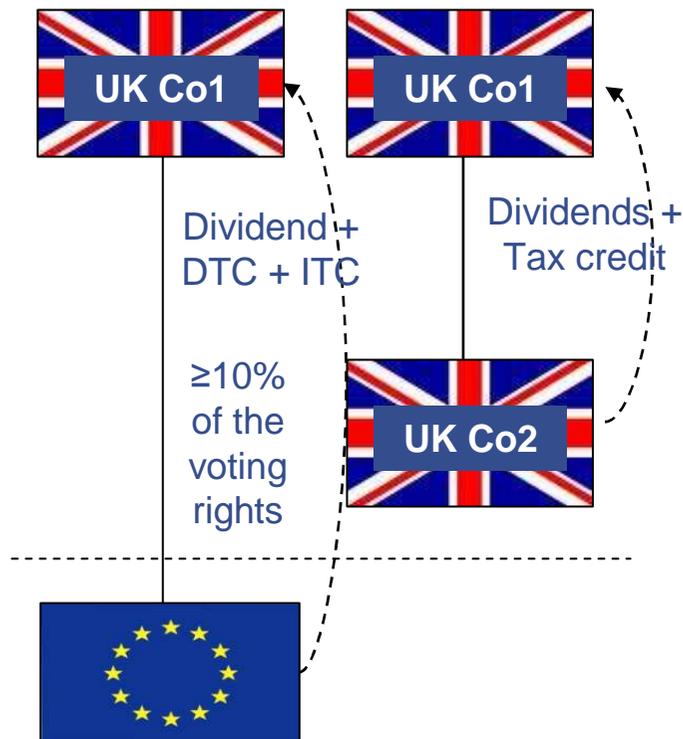
- Freedom of establishment and free movement of capital

— Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- It is for each Member State to organize, in compliance with Community law, its system for taxing distributed profits and, in particular, to define the tax base and the tax rate which apply to the company making the distribution and/or the shareholder receiving them, in so far as they are liable to tax in that Member State (47)

12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation (3)

Case Ia

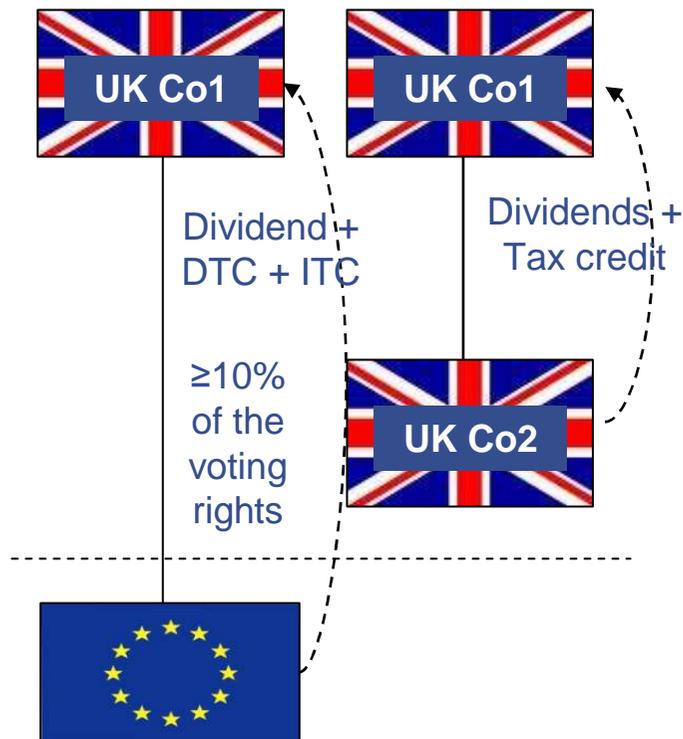


– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- Thus, Community law does not, in principle, prohibit a Member State from avoiding the imposition of a series of charges to tax on dividends received by a resident company by applying rules which exempt those dividends from tax when they are paid by a resident company, while preventing, through an imputation system, those dividends from being liable to a series of charges to tax when they are paid by a non-resident company (48)

12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation (4)

Case Ia

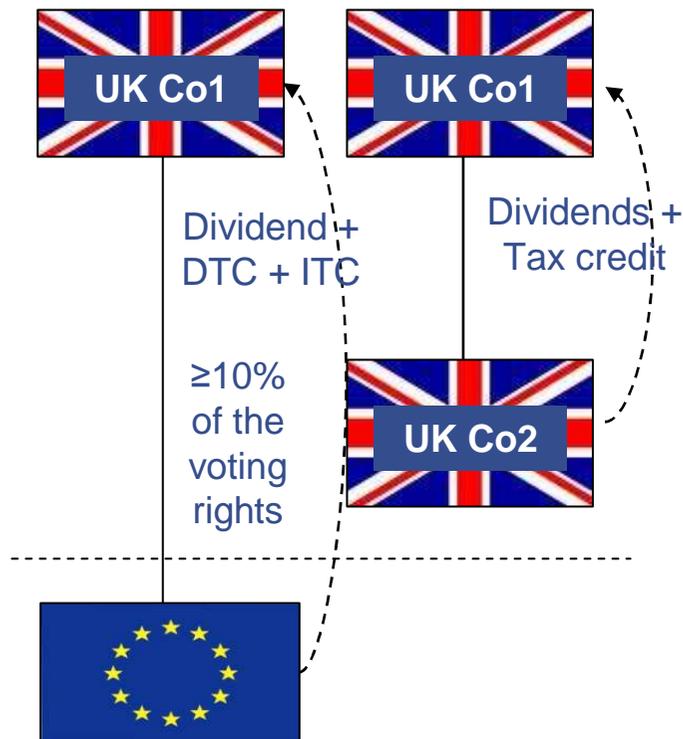


– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- In order for the application of an imputation system to be compatible with Community law in such a situation, **it is necessary, first** of all, that the foreign-sourced dividends are **not** subject in that Member State to a **higher rate** of tax than the rate which applies to nationally-sourced dividends (49)

12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation (5)

Case Ia

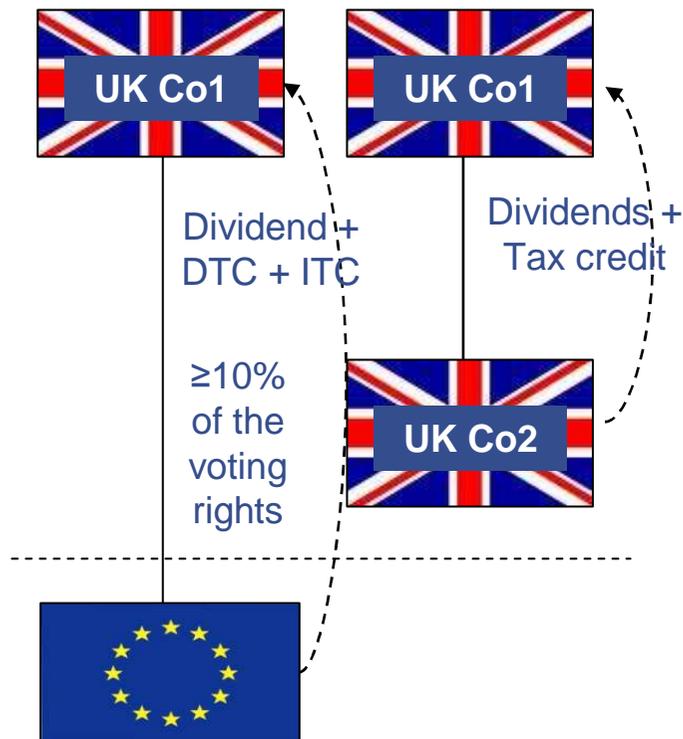


– Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?

- **Next**, that Member State must prevent foreign-sourced dividends from being liable to a series of charges to tax, by **offsetting** the amount of tax paid by the non-resident company making the distribution against the amount of tax for which the recipient company is liable, **up to the limit of the latter amount (50)**
- Thus, when the profits underlying foreign-sourced dividends are subject in the Member State of the company making the distribution to a lower level of tax than the tax levied in the Member State of the recipient company, the latter Member State must grant an overall tax credit corresponding to the tax paid by the company making the distribution in the Member State in which it is resident (51)

12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation (6)

Case Ia

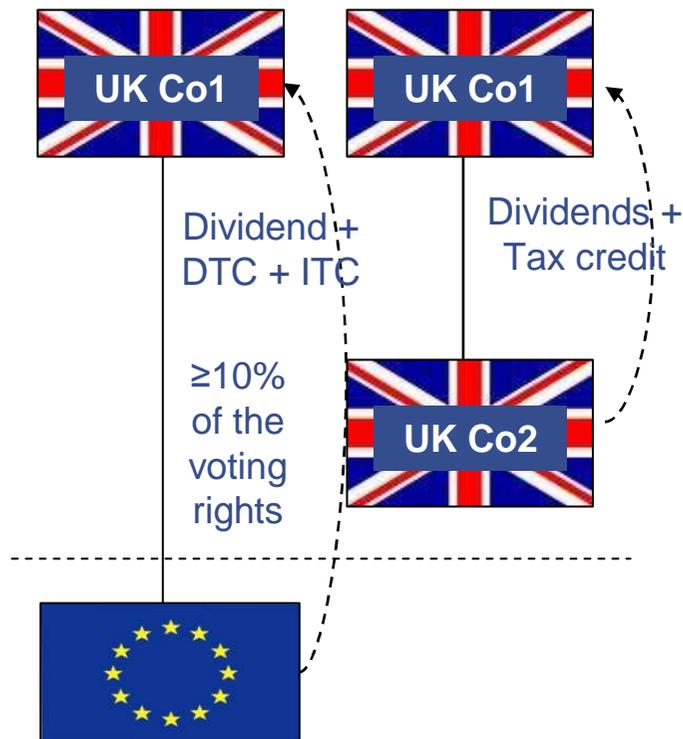


– Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?

- Where, conversely, those profits are subject in the Member State of the company making the distribution to a higher level of tax than the tax levied by the Member State of the company receiving them, the latter Member State is obliged to grant a tax credit **only up to the limit of the amount of corporation tax for which the company receiving the dividends is liable**. It is not required to repay the difference, that is to say, the amount paid in the Member State of the company making the distribution which is greater than the amount of tax payable in the Member State of the company receiving it (52)

12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation (7)

Case Ia



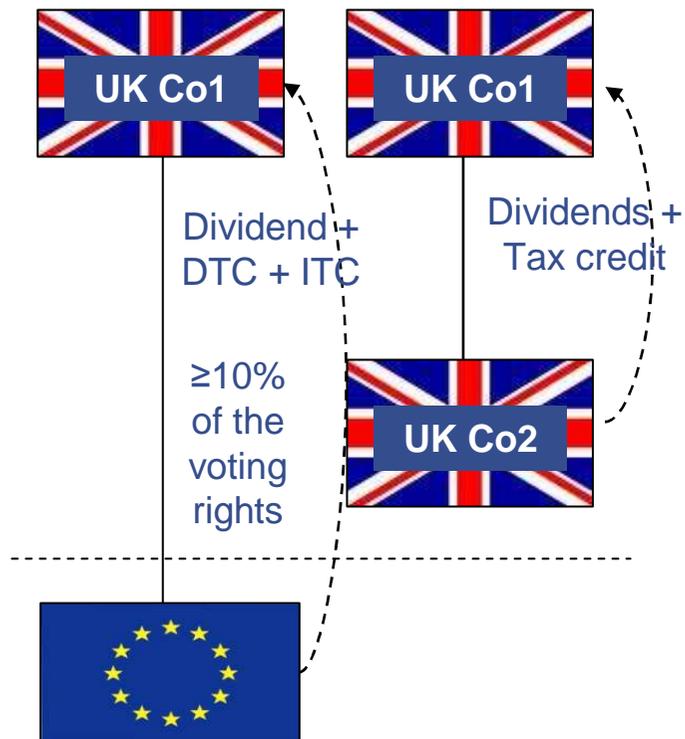
– Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?

- Against that background, the mere fact that, compared with an exemption system, an imputation system imposes additional administrative burdens on taxpayers, with evidence being required as to the amount of tax actually paid in the State in which the company making the distribution is resident, cannot be regarded as a difference in treatment which is contrary to freedom of establishment, since particular administrative burdens imposed on resident companies receiving foreign-sourced dividends are an intrinsic part of the operation of a tax credit system (53)

12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation (8)

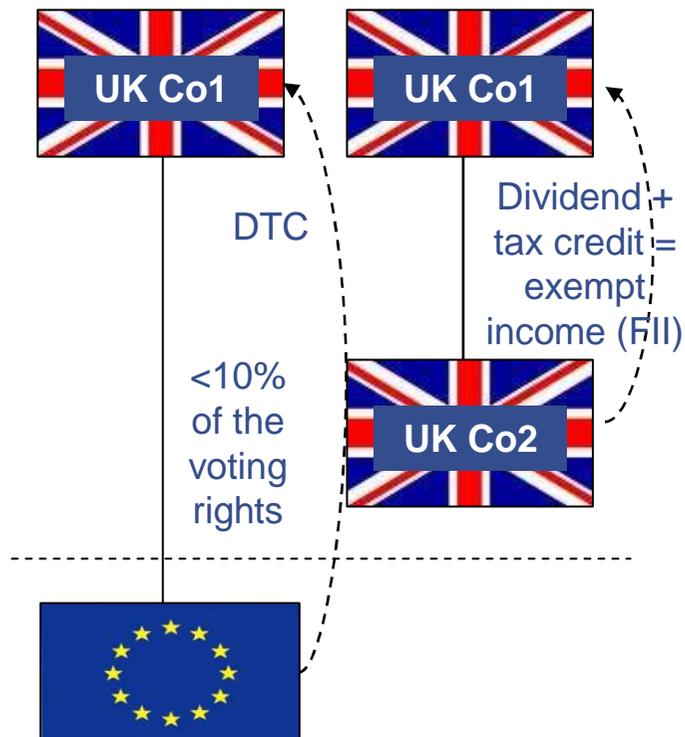
Case Ia

- Is there a justification? N/A
- Proportionality? N/A



12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation (9)

Case Ib



– Question

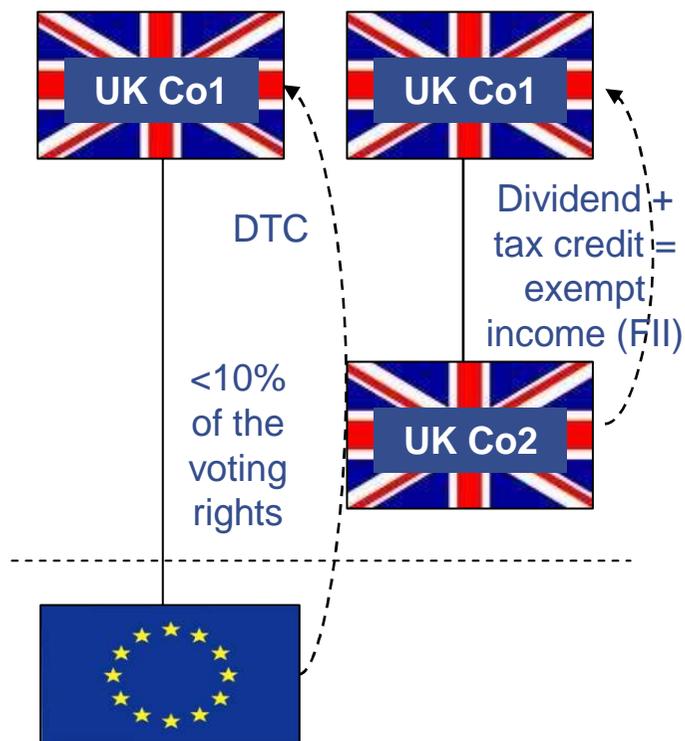
- As regards resident companies which received dividends from companies in which they hold fewer than 10% of the voting rights, nationally-sourced dividends are exempt from corporation tax, whilst foreign-sourced dividends are subject to that tax and are entitled to relief only as regards any withholding tax charged on those dividends in the State in which the company making the distribution is resident. Is this contrary to EU law?

– Have you exercised a fundamental Freedom?

- Freedom movement of capital

12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation (10)

Case Ib

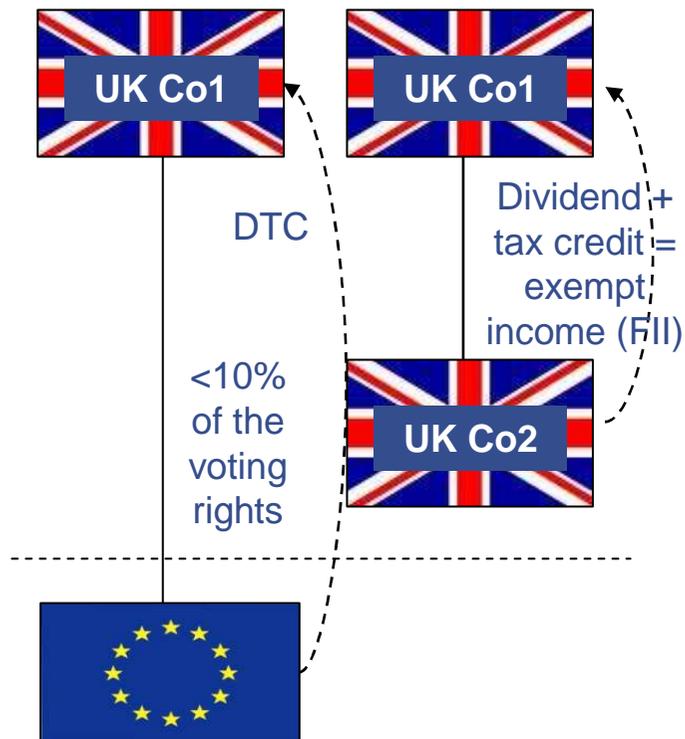


– **s there a discrimination or a restriction?
Overt? Covert? Home or Host State?**

- Restriction. It must be held, first of all, that in the context of a tax rule which seeks to prevent or to mitigate the taxation of distributed profits, the situation of a shareholder company receiving foreign-sourced dividends is comparable to that of a shareholder company receiving nationally-sourced dividends in so far as, in each case, the profits made are, in principle, liable to be subject to a series of charges to tax (62)

12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation (11)

Case Ib

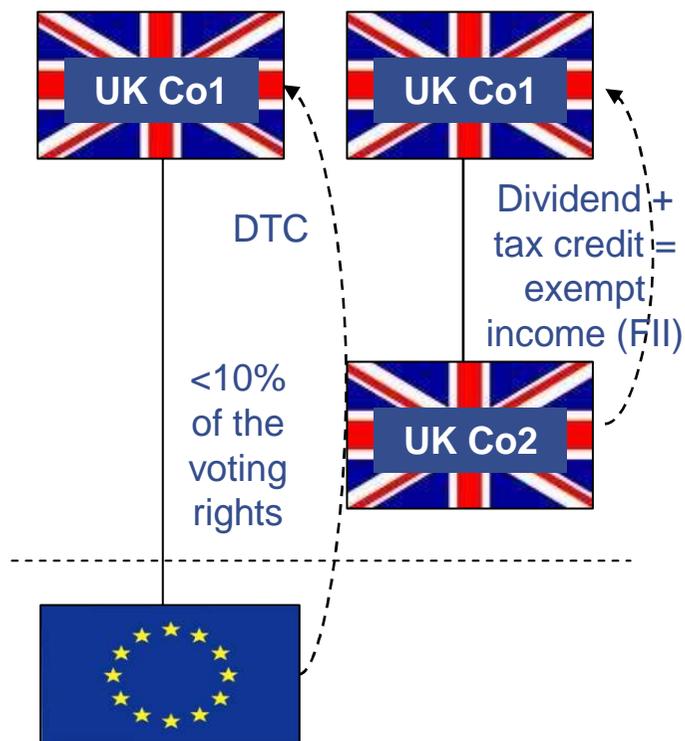


– Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?

- While, in the case of a resident company receiving dividends from another resident company, the exemption system that applies eliminates the risk of the distributed profits being subject to a series of charges to tax, the same is not true for profits distributed by non-resident companies
- If, in the latter case, the State in which the company receiving the distributed profits is resident grants relief on withholding tax levied in the State in which the company making the distribution is resident, such relief **does no more than eliminate a double legal charge to tax in the hands of the company receiving those profits (juridical double taxation)**

12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation (12)

Case Ib

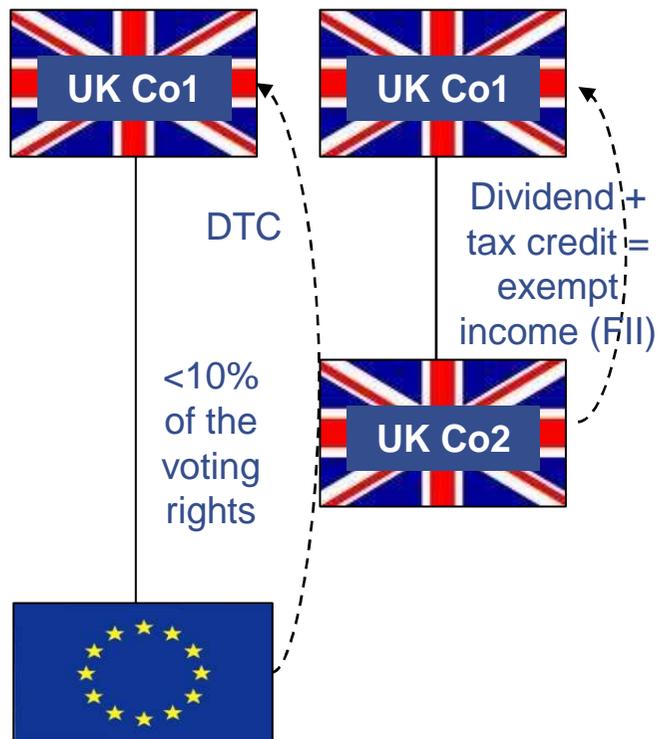


– Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?

- Conversely, that relief does not extinguish the series of charges to tax which arises when distributed profits are subject to tax, first of all, in the form of corporation tax for which the company making the distribution is liable in the State in which it is resident and, subsequently, in the form of corporation tax for which the company receiving the distribution is liable (63)

12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation (13)

Case Ib



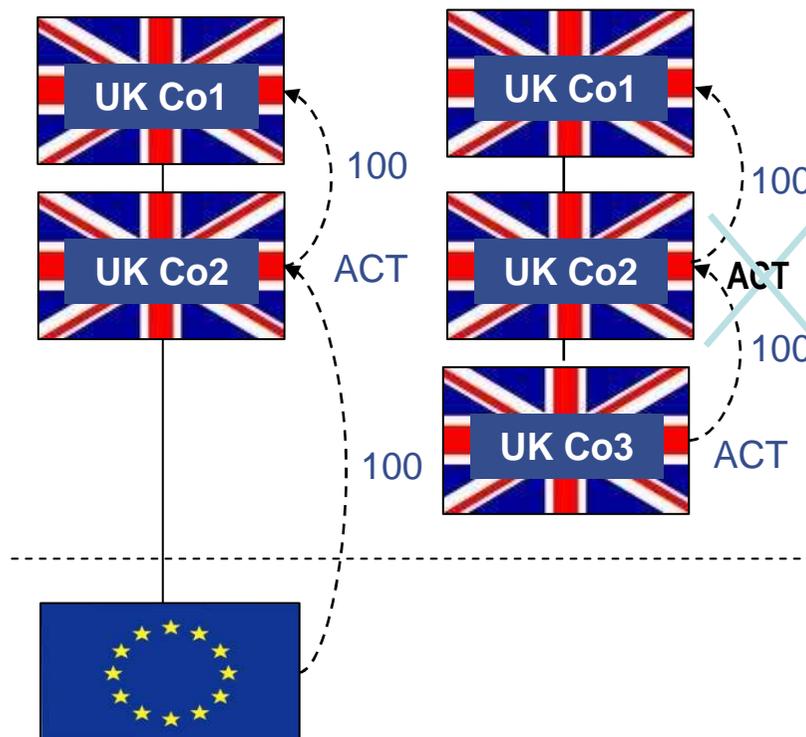
– Is there a justification?

- Effectiveness of fiscal supervision. Difficulty in assessing taxes cannot be upheld (70)

– Proportionality? N/A

12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation (14)

Case II

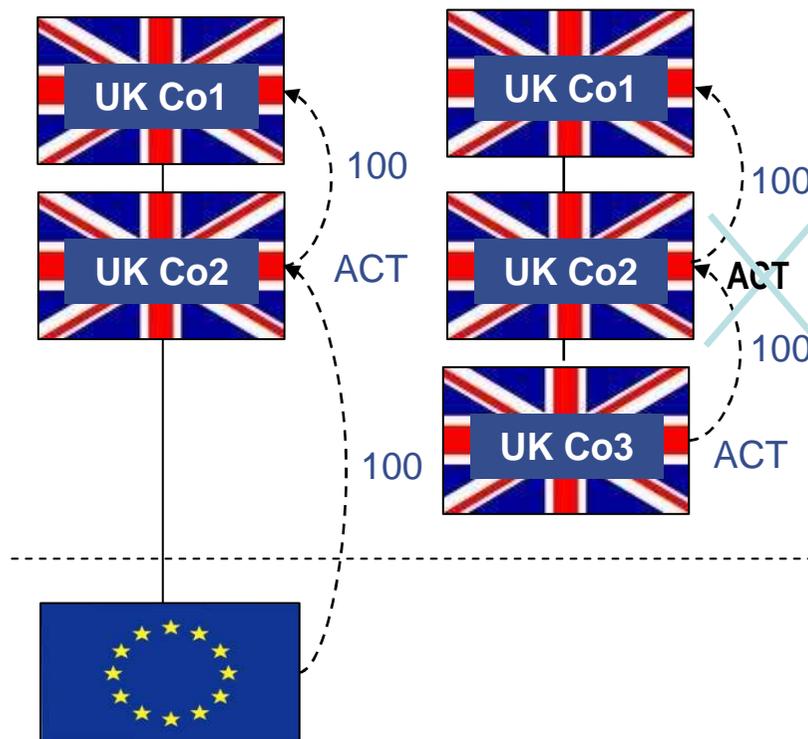


– Question

- The national court essentially asks whether EU law must be interpreted as meaning that they preclude national legislation which, in granting a tax credit to a resident company receiving dividends from another resident company by reference to the ACT paid by the latter in respect of the distribution, allows the former company to pay dividends to its own shareholders without being obliged to account for the ACT, whereas a resident company which has received dividends from a non-resident company must, in a similar case, pay the ACT in full

12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation (15)

Case II



— Have you exercised a fundamental Freedom?

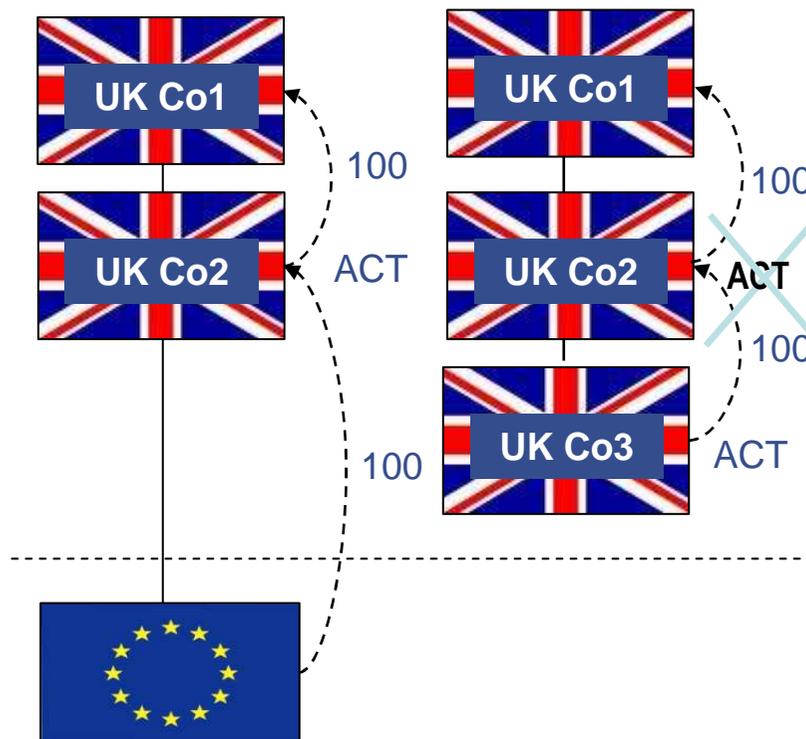
- Freedom of establishment and free movement of capital

— Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- Discrimination (94, 95)
- It must be held that the fact of not having to pay ACT represents a cash-flow advantage (*Metallgesellschaft*, paragraph 44).

12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation (16)

Case II



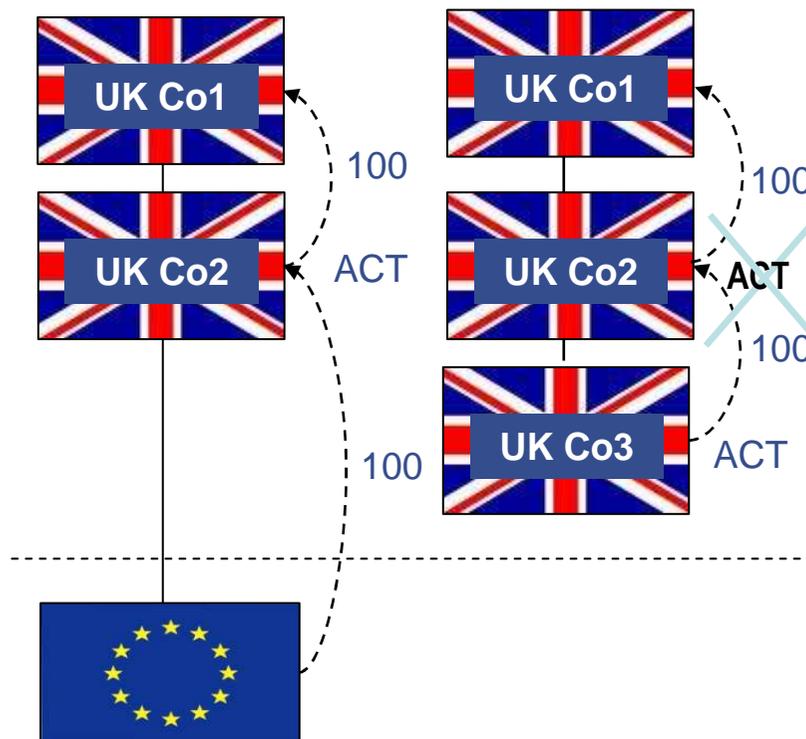
– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- The fact remains that that system leads, in practice, to a company receiving foreign-sourced dividends being less favorably treated than a company receiving nationally-sourced dividends. On a subsequent payment of dividends, the former is obliged to account for ACT in full, whereas the latter has to pay ACT only to the extent to which the distribution paid to its own shareholders exceeds that which the company has itself received (86)

12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation (17)

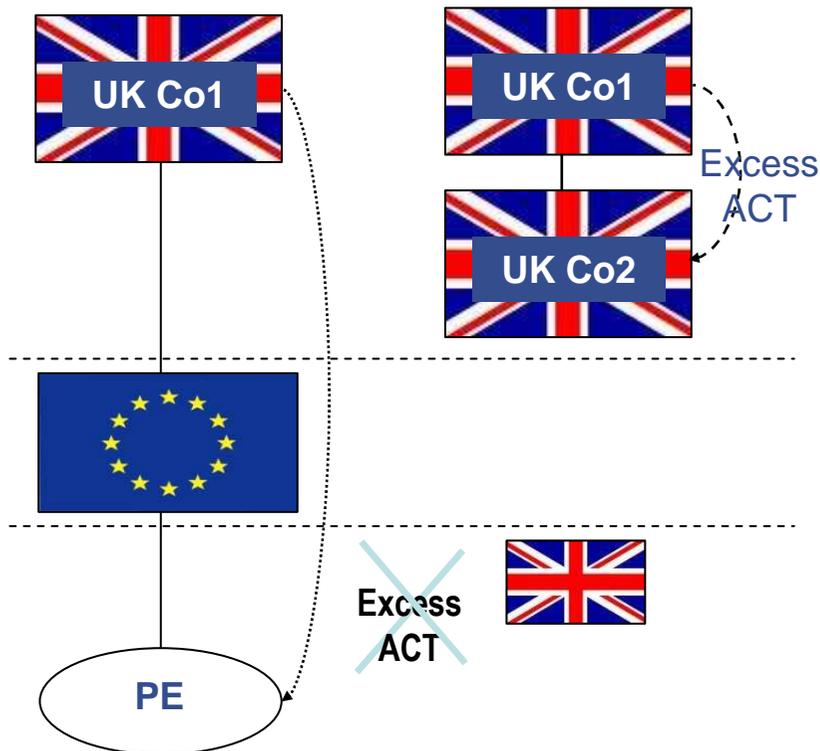
Case II

- Is there a justification? N/A
- Proportionality? N/A



12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation (18)

Case III



– Question

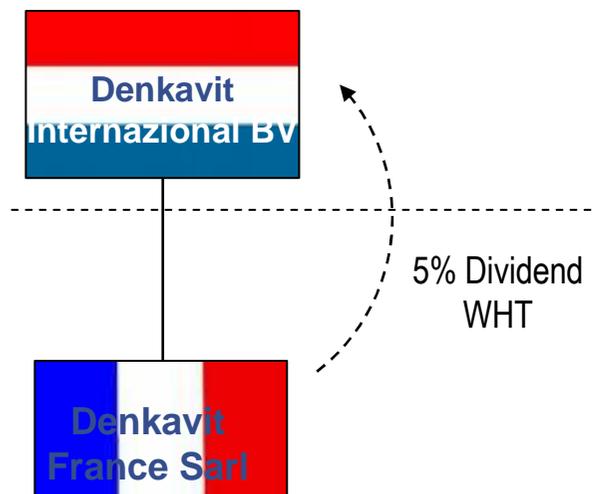
- The national court essentially asks whether EU law must be interpreted as meaning that it preclude legislation which does not allow a resident company to surrender the amount of ACT paid which cannot be set off against the corporation tax due for the current accounting period or for previous or subsequent accounting periods to non-resident subsidiaries in order that they may offset it against the corporation tax for which they are liable (inability of a resident company to surrender surplus ACT to non-resident subsidiaries in order for them to set it off against the corporation tax for which they are liable in the United Kingdom in respect of activities carried on in that Member State)

12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation (20)

– Third countries

- It is necessary first of all to clarify the concept of ‘restrictions which exist’ on 31 December 1993 within the meaning of the freedom of establishment provision (189)
- Reference should be made to Case C-302/97 *Konle* (190)
- As the Court stated in *Konle*, any national measure adopted **after** a date laid down in that way is not, by that fact alone, automatically excluded from the derogation laid down in the Community measure in question. If the provision is, **in substance, identical** to the previous legislation or is limited to reducing or eliminating an obstacle to the exercise of Community rights and freedoms in the earlier legislation, it will be covered by the derogation. By contrast, legislation based on an approach which is different from that of the previous law and establishes new procedures cannot be regarded as legislation existing at the date set down by the Community measure in question (see *Konle*, paragraphs 52 and 53)
- The same principles have been repeated in **Holböck** (24.5.07 – C-157/05)

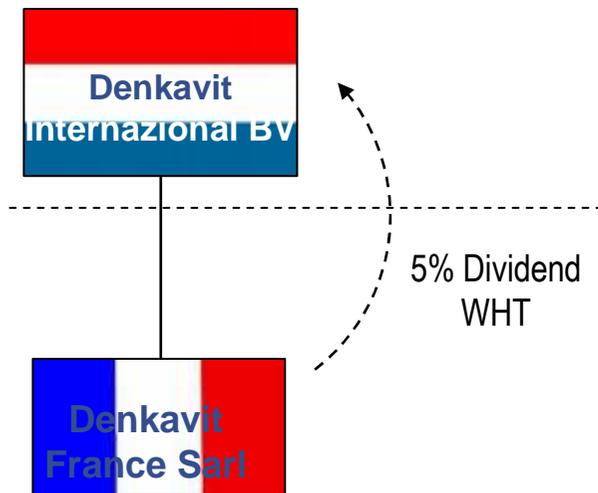
14.12.06 – C-170/05 Denkavit II



– Facts

- Dividends paid by a French company to a non-resident entity is subject to 25% withholding tax
- According to the relevant DTT, the withholding tax is reduced to 5% under certain conditions
- The method for relieving juridical double taxation under DTT is an ordinary credit
- The PSD was not yet issued at that time
- The withholding tax is not applied in case the recipient was a French company (3)
- A part from withholding tax, the French recipient is subject to tax only to 5% of the gross amount of dividends received at the CIT rate (4)

14.12.06 – C-170/05 Denkavit II (2)

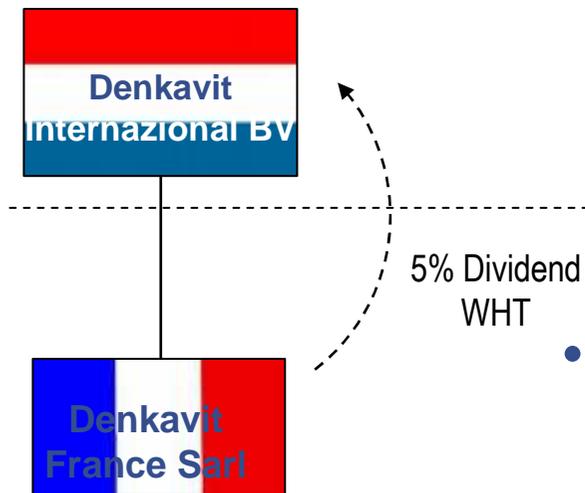


— Question

- Is the fact that a withholding tax applicable only to cross-border transactions compatible with the freedom of establishment?
- **Have you exercised a fundamental Freedom?**
 - Freedom of establishment (20)
- **Is there a discrimination or a restriction? Overt? Covert?**
 - Restriction (29) and discrimination (40)

14.12.06 – C-170/05 Denkavit II (3)

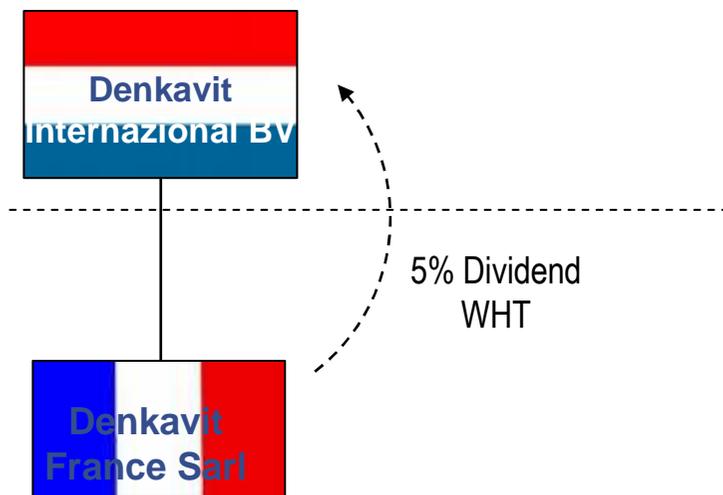
– Is there a justification?



- There is no restriction because almost full exemption is granted also to non-residents subject to the condition that a PE does exist in France. This argument cannot be upheld because to the extent that France decides to tax dividends residents and non residents becomes comparables (35)
- Article 43 EC and Article 48 EC preclude national legislation which imposes, only as regards non-resident parent companies, a withholding tax on dividends paid by resident subsidiaries, even if a tax convention between the Member State in question and another Member State, authorizing that withholding tax, provides for the tax due in that other State to be set off against the tax charged in accordance with the disputed system, whereas a parent company is unable to set off tax in that other Member State, in the manner provided for by that convention

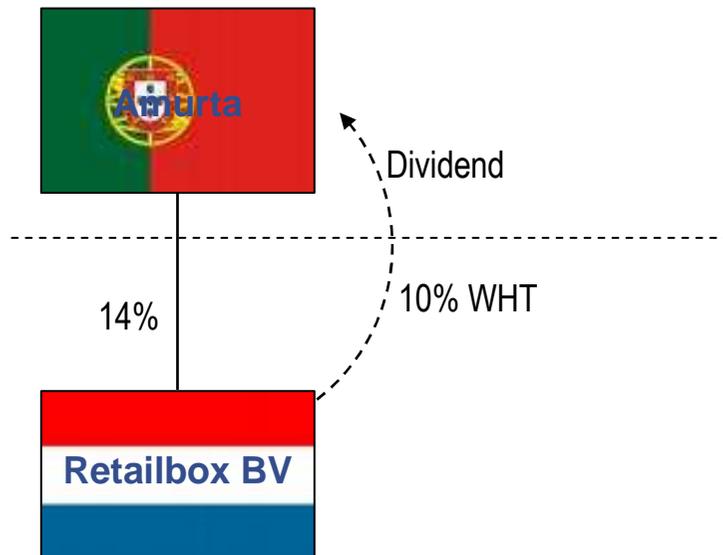
14.12.06 – C-170/05 Denkavit II (4)

– Proportionality? N/A



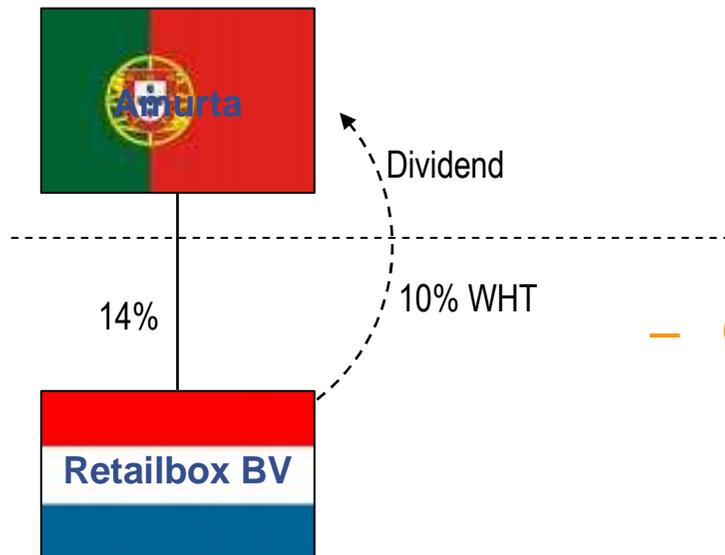
8.11.07 – C-379/05 Amurta

– Facts



- This reference was made in the context of proceedings between Amurta SGPS, a company established in Portugal, and Dutch Tax Office concerning the application of withholding tax on dividends paid to Amurta by Retailbox BV, a company established in the Netherlands (2)
- According to Dutch law, the distribution of dividends out of the scope of the PSD is subject to 25% final withholding tax (4)
- No withholding tax is applied if the recipient is either a Dutch company or a foreign company with a PE in the Netherlands with the shares forming part of the assets of that PE (8)

8.11.07 – C-379/05 Amurta (2)



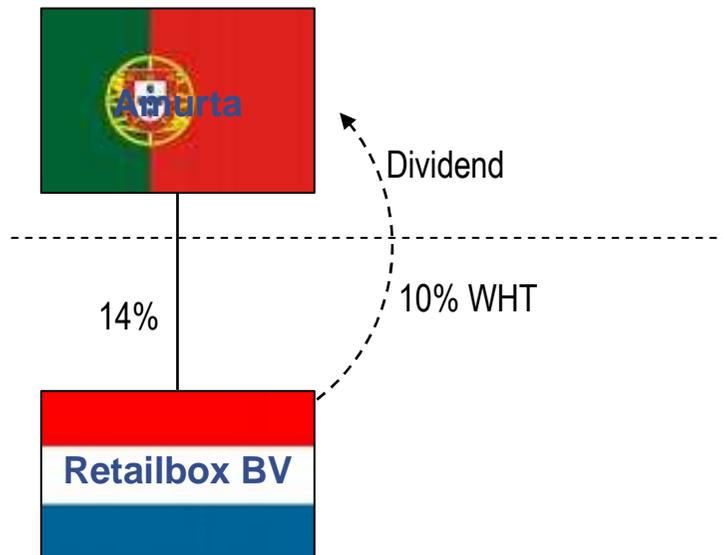
– Facts

- According to the DTT, the final withholding tax is reduced, under certain conditions, to 10% (9)
- The method for relieving juridical double taxation under DTT is an ordinary credit

– Questions

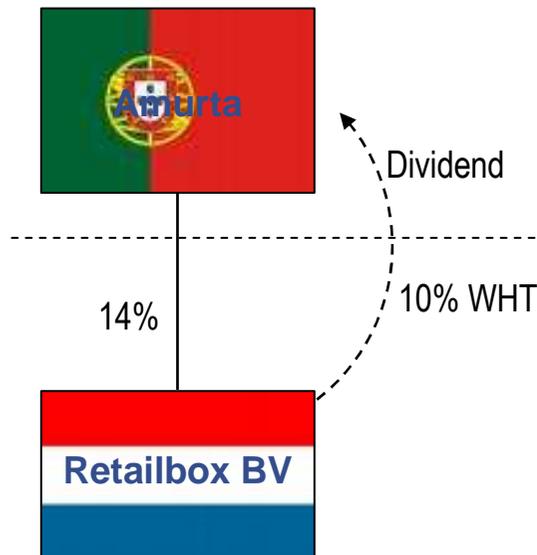
- Is the different in treatment between resident and non-resident shareholders contrary to the free movement of capital?
- Does the answer depend on whether the State of residence of the foreign shareholder grants full credit for the withholding tax?

8.11.07 – C-379/05 Amurta (3)



- **Have you exercised a fundamental Freedom?**
 - The situation does not fall under the scope of the PSD (20)
 - Free movement of capital (28)
- **Is there a discrimination or a restriction? Overt? Covert?**
 - Restriction (28)

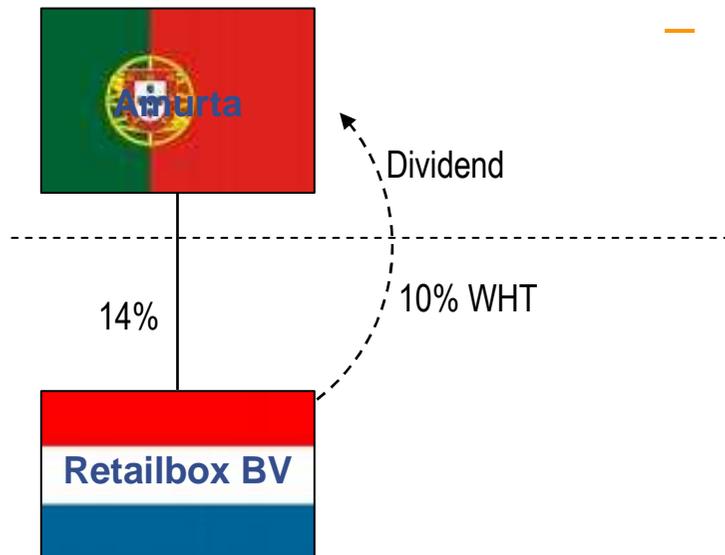
8.11.07 – C-379/05 Amurta (4)



– Is there a discrimination or a restriction? Overt? Covert?

- It must be borne in mind that, under Article 58(1)(a) EC '[t]he provisions of Article 56 shall be without prejudice to the right of Member States ... to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence ...'. (30)
- Furthermore, the derogation in Article 58(1)(a) EC is itself limited by Article 58(3) EC, according to which the provisions of national law referred to in Article 58(1) EC 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56' (31)

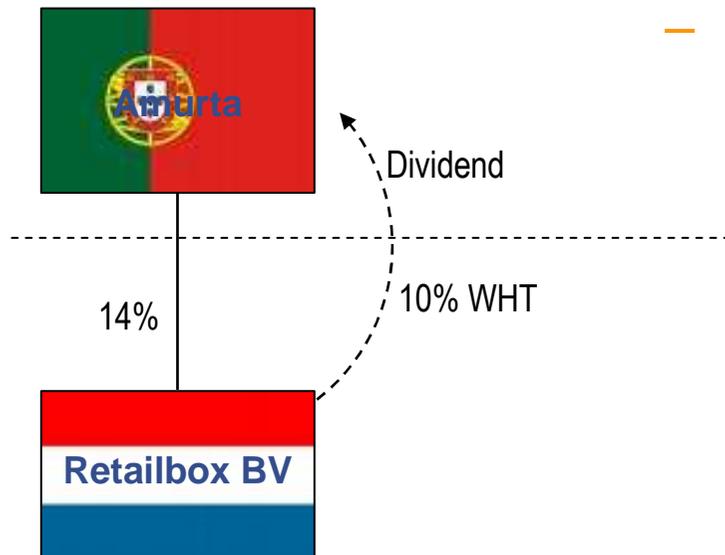
8.11.07 – C-379/05 Amurta (5)



– Is there a discrimination or a restriction? Overt? Covert?

- It is therefore appropriate to distinguish unequal treatment permitted under Article 58(1)(a) EC from discrimination prohibited under Article 58(3). According to the case-law, for a national fiscal provision such as that at issue in the main proceedings to be capable of being regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by overriding reasons in the public interest (32)

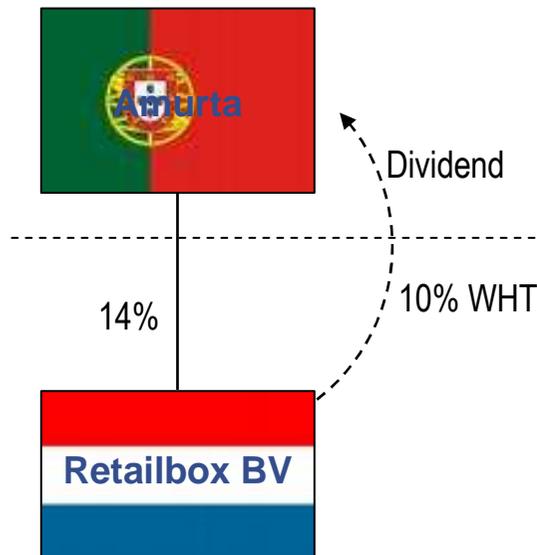
8.11.07 – C-379/05 Amurta (6)



– Is there a discrimination or a restriction? Overt? Covert?

- As soon as a Member State, either unilaterally or by way of a convention, imposes a charge to income tax not only on resident shareholders but also on non-resident shareholders in respect of dividends which they receive from a resident company, the position of those non-resident shareholders becomes comparable to that of resident shareholders

8.11.07 – C-379/05 Amurta (7)



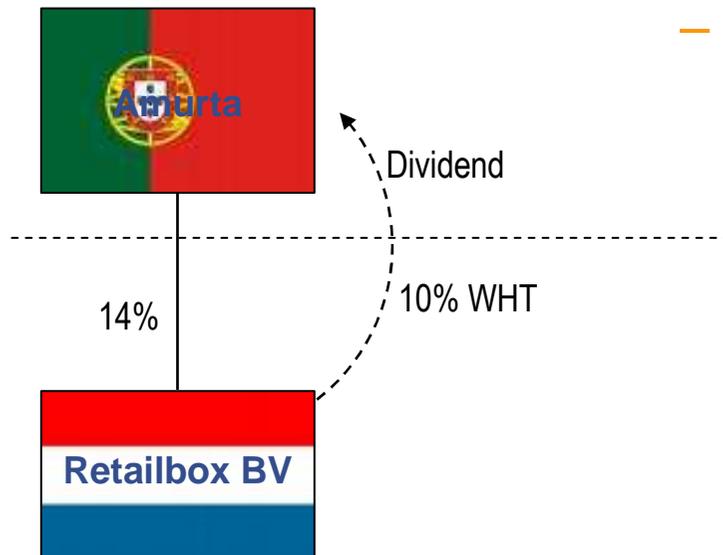
– Is there a discrimination or a restriction? Overt? Covert?

- The State in which the company making the distribution is resident is obliged to ensure that, under the procedures laid down by its national law in order to prevent or mitigate a series of liabilities to tax, non-resident shareholder companies are subject to the same treatment as resident shareholder companies (see *Test Claimants* paragraph 70) (39)
- Economic double taxation is avoided for those recipients resident in the Netherlands (40)

– Is there a justification?

- Tax cohesion. Not accepted (51)

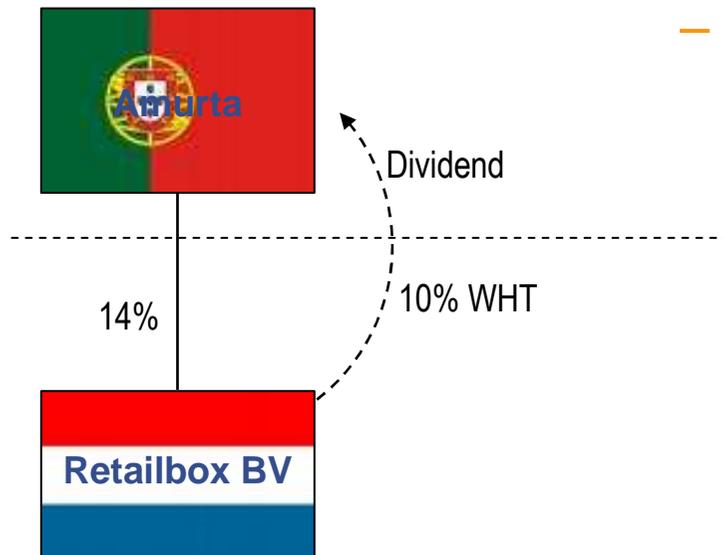
8.11.07 – C-379/05 Amurta (8)



– Is there a justification?

- Tax cohesion at treaty level. Not accepted: the application of a withholding tax on the dividends distributed to companies established in another Member State is not made conditional on the existence of a convention for the avoidance of double taxation that allows the amount withheld to be deducted in the Member State in which the company receiving dividends is established (52)

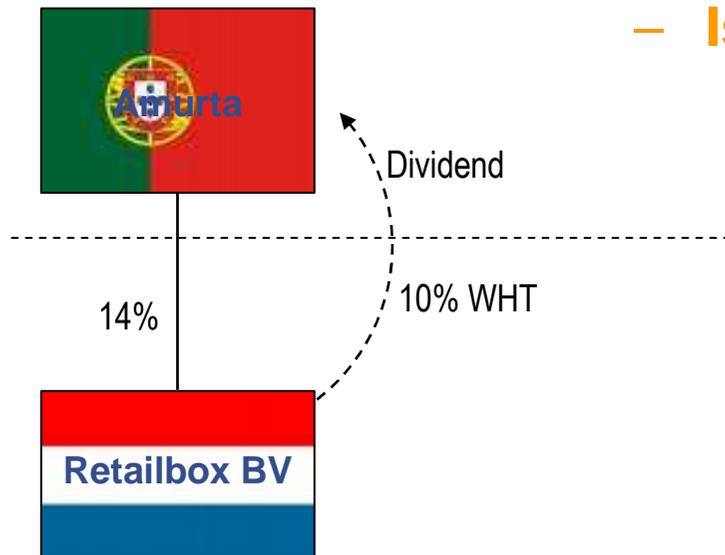
8.11.07 – C-379/05 Amurta (9)



– Is there a justification?

- Balance allocation between the MS of the power to tax. Not accepted. As is clear from paragraphs 51 and 60, respectively, of *Marks & Spencer*, and *Oy AA*, the need to safeguard the balanced allocation between the Member States of the power to tax has been recognized together with other grounds based on the risks of tax avoidance or of double use of losses (56). It is common ground that the existence of risks of double use of losses or of tax avoidance was not relied on by the governments who submitted observations to the Court (57)

8.11.07 – C-379/05 Amurta (10)

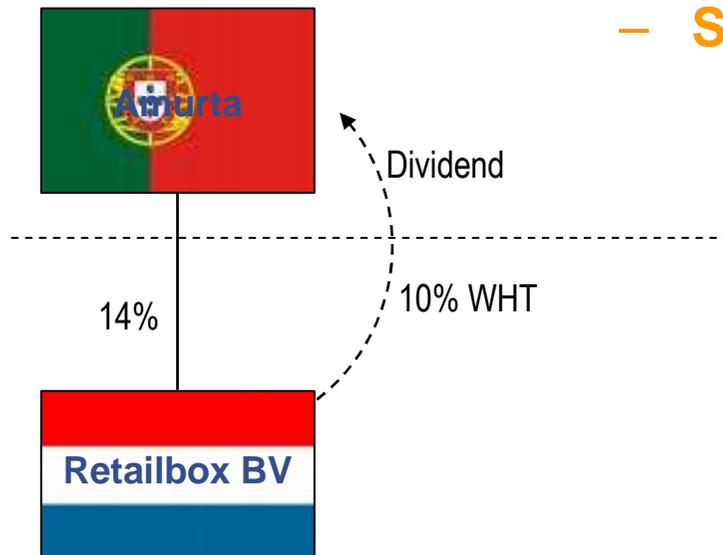


– Is there a justification?

The need to safeguard the balanced allocation between the Member States of the power to tax may be accepted, in particular, where the system in question is designed to prevent conduct capable of jeopardizing the right of the Member States to exercise their taxing powers in relation to activities carried on in their territory. In the instant case, Netherlands is giving up its taxing rights with respect to resident recipients (59)

– Proportionality? N/A

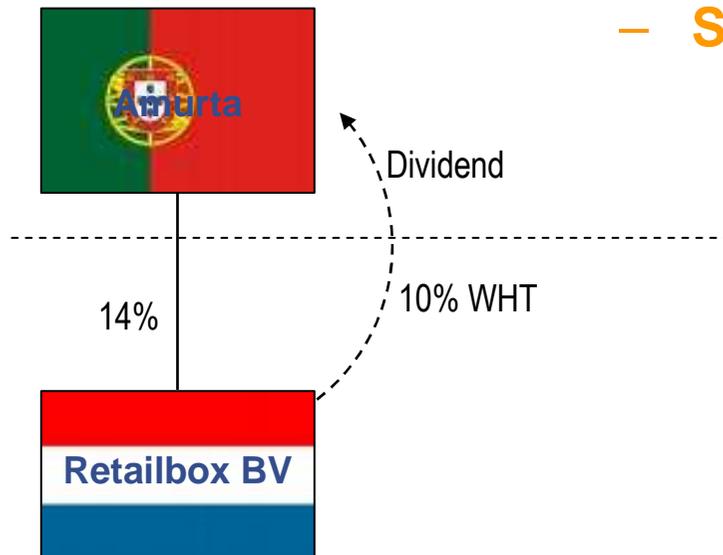
8.11.07 – C-379/05 Amurta (11)



– Second question

- The answer to the second question must therefore be that a Member State may not rely on the existence of a full tax credit granted unilaterally by another Member State to a recipient company established in the latter Member State in order to escape the obligation to prevent economic double taxation of dividends resulting from the exercise of its power to tax in a situation where the first Member State prevents economic double taxation of dividends distributed to companies established in its territory

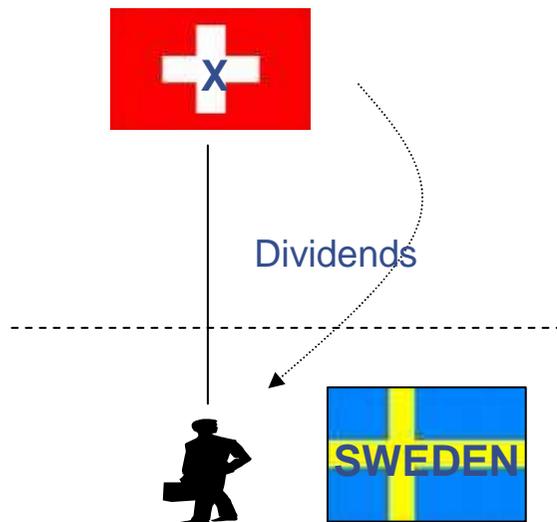
8.11.07 – C-379/05 Amurta (12)



– Second question

- Where a Member State relies on a convention for the avoidance of double taxation concluded with another Member State, **it is for the national court to establish whether account should be taken, in the main proceedings, of that convention, and, if so, to determine whether it enables the effects of the restriction on the free movement of capital to be neutralized (84)**

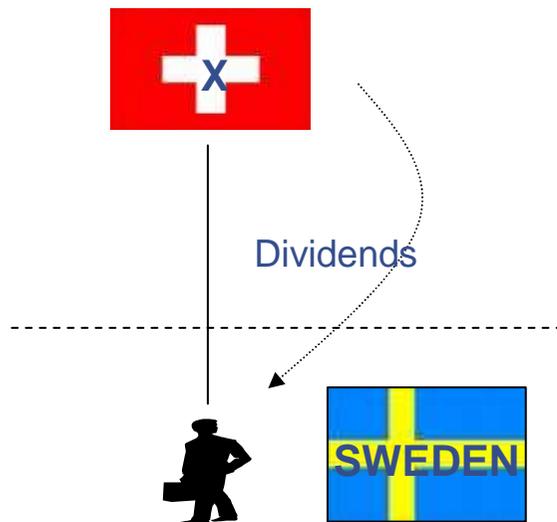
18.12.07 – C-101/05 S v. A



– Facts

- Under Swedish law, dividends are exempt from tax when distributed by a limited company under certain conditions (e.g., the distribution is made in proportion to the number of shares held in the parent company, the shares in the parent company are quoted in the Stock exchange, ect.)
- The exemption also applies where the distribution of shares is carried out by a foreign company which corresponds to a Swedish limited liability company and is established in a State within the European Economic Area ('EEA') or in a State with which the Kingdom of Sweden has concluded a tax convention that contains a provision on exchange of information (6)
- DTT does not include any exchange of information provision (9)

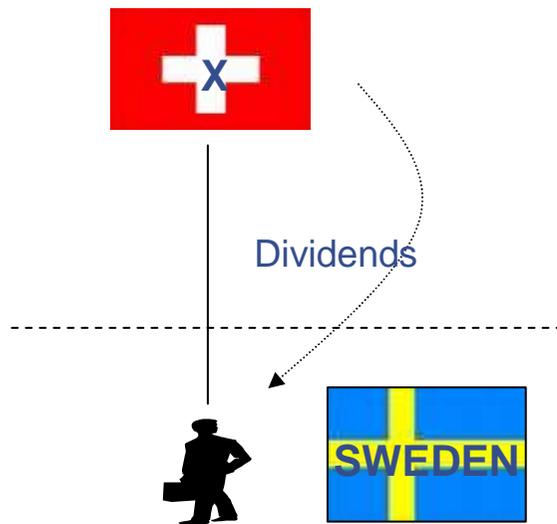
18.12.07 – C-101/05 S v. A (2)



– Facts

- A owns shares in company X, which has its registered office in Switzerland and is considering distributing the shares which it holds in one of its subsidiaries. A applied to the Revenue Law Commission for a preliminary decision on whether such a distribution was exempt from income tax. A stated that X corresponded to a Swedish limited liability company and that the conditions for tax exemption imposed by the Law, other than those relating to the location of the registered office of the company, were satisfied (11). The Revenue Law Commission stated that exemption could not be inferred by domestic law but should stand under EU law (13)
- The tax office appealed against the decision (14)

18.12.07 – C-101/05 S v. A (3)



– Question

- Is it contrary to the provisions on free movement of capital between Member States and third countries to tax A in respect of dividends distributed by X because X is not established in a State within the EEA or in a State with which the [Kingdom of] Sweden has concluded a taxation convention that contains a provision on exchange of information ?

– Have you exercised a fundamental Freedom?

- Free movement of capital (20)

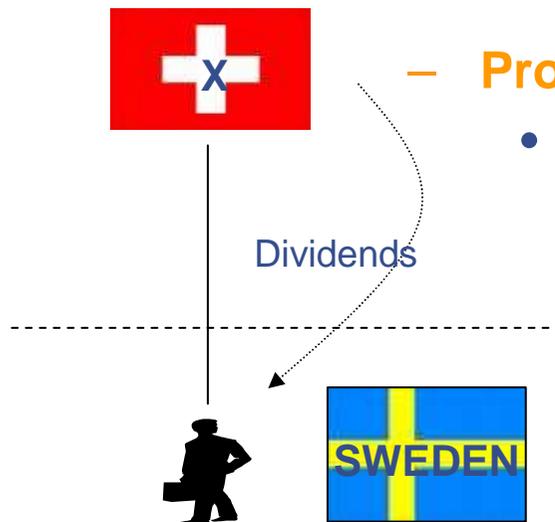
– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- Restriction (53)

– Is there a justification?

- Effectiveness of fiscal supervision. This argument can be upheld (55)

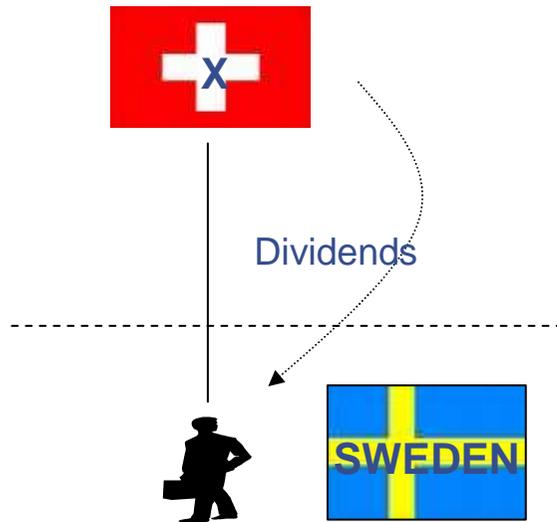
18.12.07 – C-101/05 S v. A (4)



– Proportionality?

- With regard to national legislation restricting the exercise of one of the freedoms of movement guaranteed by the Treaty, the Court has held that a Member State **cannot rely on the fact that it may be impossible to seek cooperation from another Member State** in conducting inquiries or collecting information in order to justify a refusal to grant a tax advantage. Indeed, even if it proves difficult to verify the information provided by the taxpayer, in particular due to the limited nature of the exchange of information provided for by Article 8 of Directive 77/799, there is no reason why the tax authorities concerned should not request from the taxpayer the evidence that they consider they need to effect a correct assessment of the taxes and duties concerned and, where appropriate, refuse the exemption applied for if that evidence is not supplied (58)

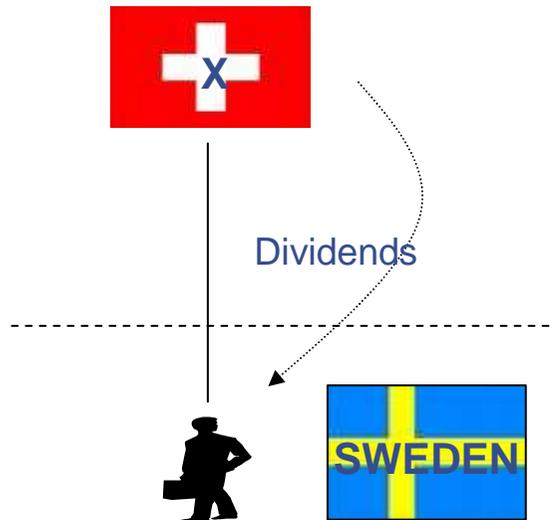
18.12.07 – C-101/05 S v. A (5)



– Proportionality?

- In that context, the Court has held that the taxpayer should not be precluded a priori from providing relevant documentary evidence enabling the tax authorities of the Member State imposing the tax to ascertain, clearly and precisely, that he is not attempting to avoid or evade the payment of taxes (59)

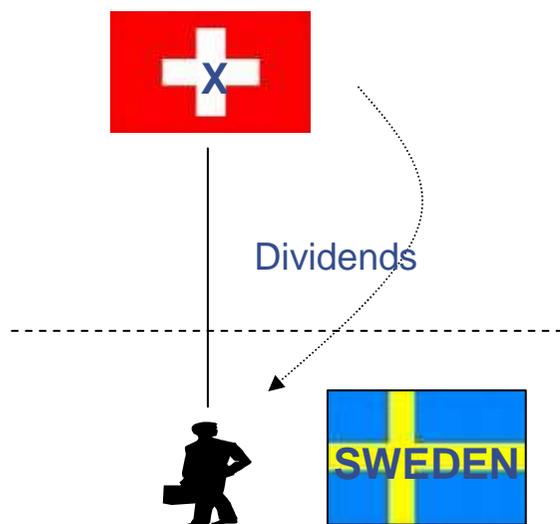
18.12.07 – C-101/05 S v. A (6)



– Proportionality?

- However, that case-law, which relates to restrictions on the exercise of freedom of movement within the Community, **cannot be transposed in its entirety to movements of capital between Member States and third countries**, since such movements take place in a different legal context from that of the cases which gave rise to the judgments referred to in the two preceding paragraphs (60)

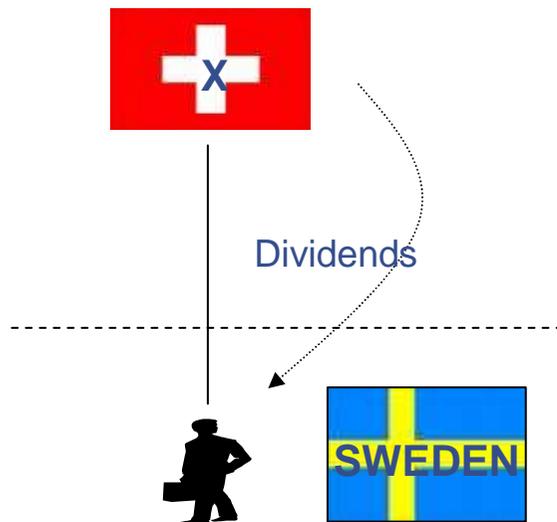
18.12.07 – C-101/05 S v. A (7)



– Proportionality?

- In the first place, relations between the Member States take place against a common legal background, characterized by the existence of Community legislation, such as Directive 77/799, which laid down reciprocal obligations of mutual assistance. Even if, in the fields governed by that directive, the obligation to provide assistance is not unlimited, the fact remains that that directive established a framework for cooperation between the competent authorities of the Member States which **does not exist** between those authorities and the competent authorities of a third country where the latter has given no undertaking of mutual assistance (61)

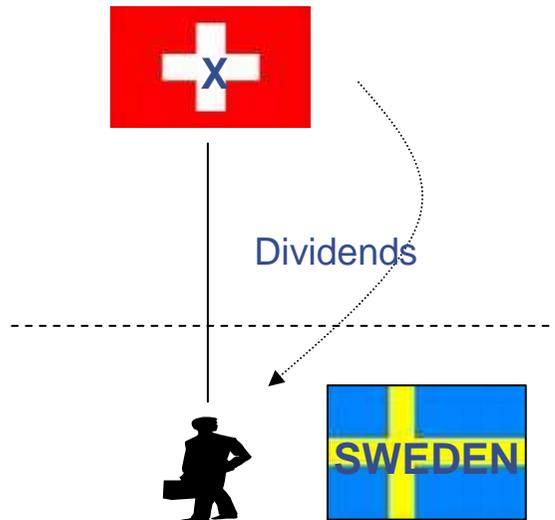
18.12.07 – C-101/05 S v. A (8)



– Proportionality?

- In second place, with regard to the documentary evidence which the taxpayer may provide to enable the tax authorities to ascertain whether the requirements under national legislation are satisfied, **the Community harmonization measures on company accounts which apply in the Member States allow the taxpayer to produce reliable and verifiable evidence on the structure or activities of a company established in another Member State**, whereas the taxpayer is not ensured of such an opportunity in the case of a company established in a third country which is not required to apply those Community measures (62)

18.12.07 – C-101/05 S v. A (9)



– Proportionality?

- It follows that, where the legislation of a Member State makes the grant of a tax advantage dependent on satisfying requirements, compliance with which can be verified only by obtaining information from the competent authorities of a third country, it is, in principle, legitimate for that Member State to refuse to grant that advantage **if**, in particular, because that third country is not under any contractual obligation to provide information, it proves impossible to obtain such information from that country (63)
- In the action in the main proceedings, the Swedish tax authorities cannot verify compliance with domestic law (64)

Dividend taxation of individuals COM (2003) 810 final of December 19, 2003

- ! Member States operate different systems for the taxation of dividend payments in the hands of individuals
- ! Where, in applying their systems, Member States differentiate between the tax treatment of domestic and inbound or outbound dividends this can be a restriction on cross-border investments and it can result in fragmented capital markets in the EU
- ! In its developing case law the ECJ has considered this issue on the basis of the provisions on the free movement of capital. It has given a clear ruling on the incompatibility of a measure which provided for a different tax treatment of domestic and inbound dividend

Dividend taxation of individuals COM (2003) 810 final of December 19, 2003 (2)

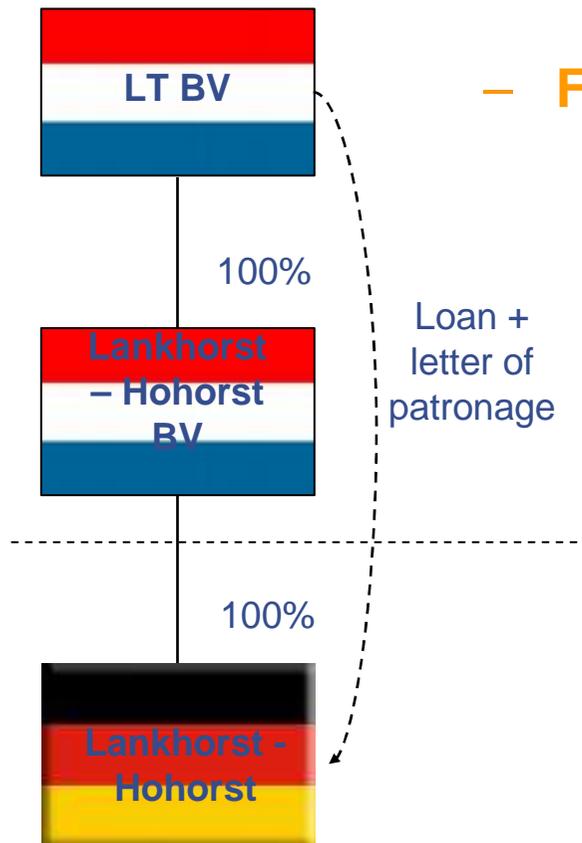
- ! The Commission believes that analysis of this case law leads to fundamental conclusions about the design of dividend taxation systems: Member States cannot levy higher taxes on inbound dividends than on domestic dividends. Likewise, they cannot levy higher taxes on outbound dividends than on domestic dividend

Thin capitalization and interest/cost deduction

Fabio Aramini, LL.M., Partner

Studio Adonnino Ascoli & Cavasola Scamoni

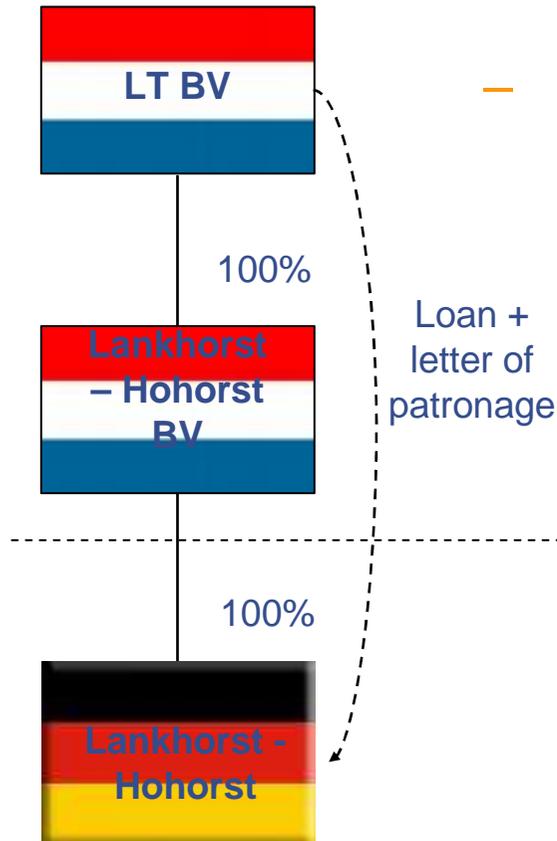
12.12.02 – C-324/00 Lankhorst – Hohorst



– Facts

- According to German tax law, repayments in respect of loan capital which a company limited by shares subject to unlimited taxation has obtained from a shareholder not entitled to corporation tax credit which has a substantial holding in its share or nominal capital at any point in the financial year is regarded as a covert distribution of profits... where repayment calculated as a fraction of the capital is agreed and the loan capital is more than three times the shareholder's proportional equity capital at any point in the financial year, save where the company limited by shares could have obtained the loan capital from a third party under otherwise similar circumstances or the loan capital constitutes borrowing to finance normal banking transactions (3)

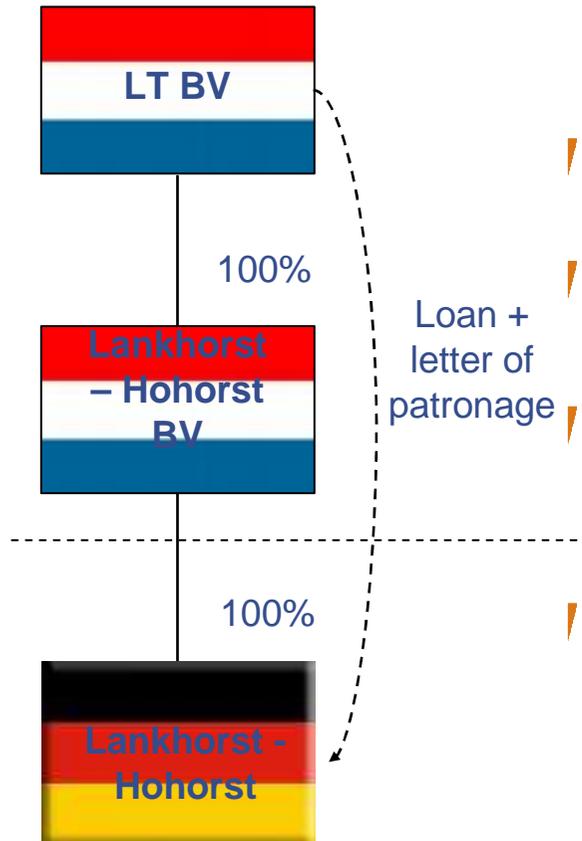
12.12.02 – C-324/00 Lankhorst – Hohorst (2)



– Facts

- Lankhorst-Hohorst is a German resident company fully owned by Lankhorst-Hohorst BV that is, in turn, fully owned by LT BV
- LT BV granted a loan to Lankhorst-Hohorst together with a letter of patronage based on which the former would have give up the loan in case of bankruptcy (8). The loan allowed Lankhorst-Hohorst to reduce the loan towards banks (and related interest)
- The German tax authorities considered the interest paid as a disguised distribution of profits and claimed a final withholding tax equal to 30% (11)

12.12.02 – C-324/00 Lankhorst – Hohorst (3)



Question

- Is this rule contrary to EU law?

Have you exercised a fundamental Freedom?

- Freedom of establishment(32)

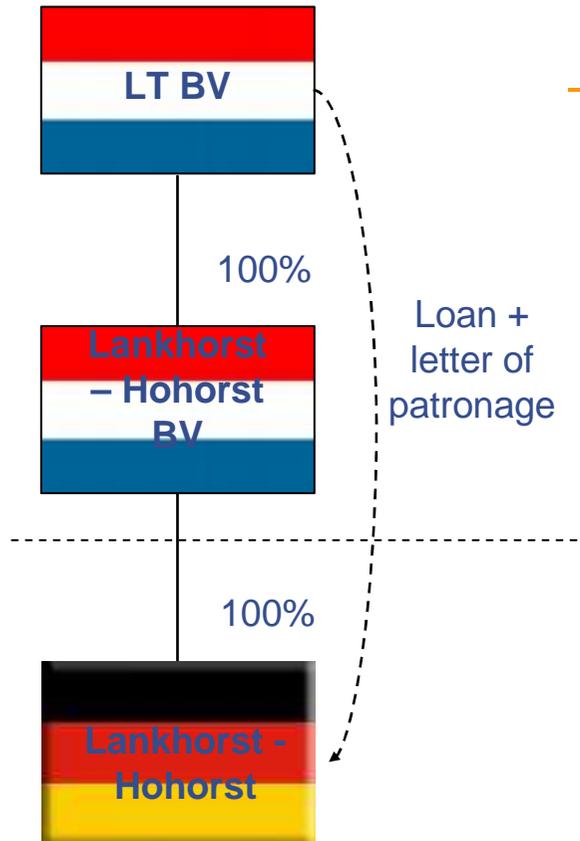
Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- Restriction (32)

Is there a justification?

- Reduction of tax revenues. The reduction in tax revenue does not constitute an overriding reason in the public interest which may justify a measure which is in principle contrary to a fundamental freedom (36)

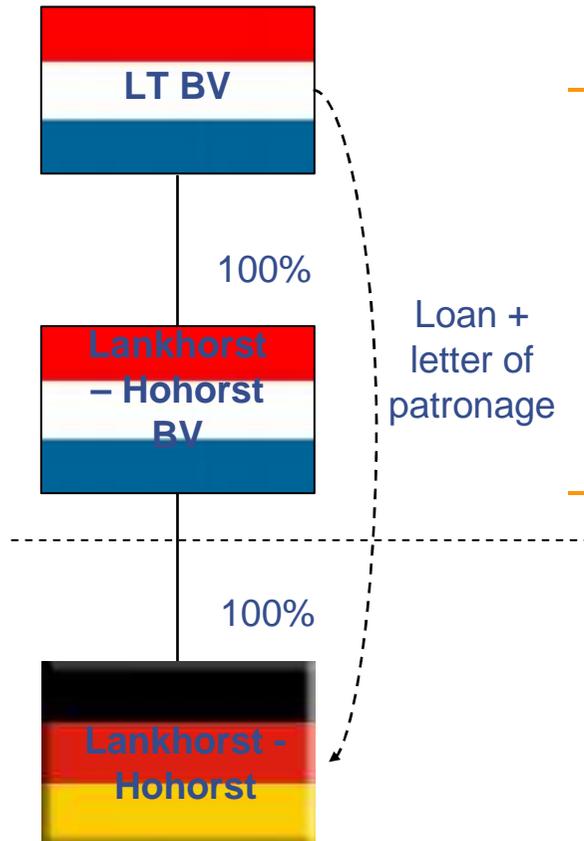
12.12.02 – C-324/00 Lankhorst – Hohorst (4)



– Is there a justification?

- Risk of tax evasion. The legislation at issue here does not have the **specific purpose** of preventing wholly artificial arrangements, designed to circumvent German tax legislation, from attracting a tax benefit, but applies **generally** to any situation in which the parent company has its seat, for whatever reason, outside the Federal Republic of Germany. Such a situation does not, of itself, entail a risk of tax evasion, since such a company will in any event be subject to the tax legislation of the State in which it is established (37)

12.12.02 – C-324/00 Lankhorst – Hohorst (5)

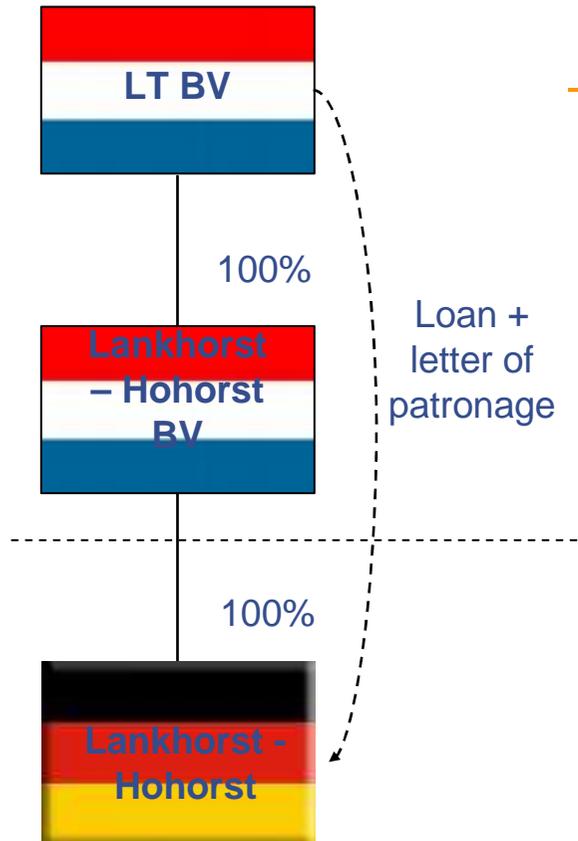


– **Is there a justification?**

- Tax cohesion. There is no direct link where, as in the present case, the subsidiary of a non-resident parent company suffers less favorable tax treatment and the German Government has not pointed to any tax advantage to offset such treatment (42);

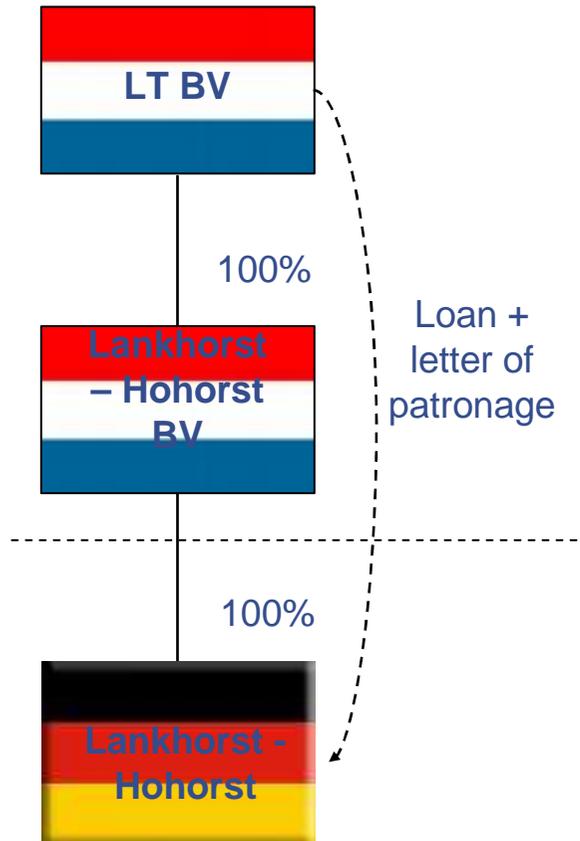
– **Proportionality?** N/A

12.12.02 – C-324/00 Lankhorst – Hohorst (6)



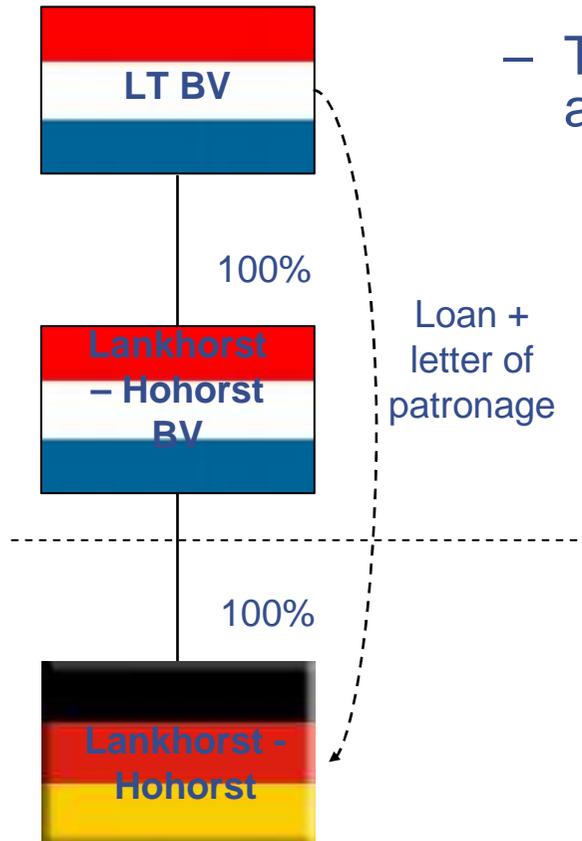
- The same principles have been applied in **Thin cap** (13.3.07, C-524/04): EU law precludes legislation of a Member State which restricts the ability of a resident company to deduct, for tax purposes, interest on loan finance granted by a direct or indirect parent company which is resident in another Member State or by a company which is resident in another Member State and is controlled by such a parent company, without imposing that restriction on a resident company which has been granted loan finance by a company which is also resident, unless

12.12.02 – C-324/00 Lankhorst – Hohorst (7)



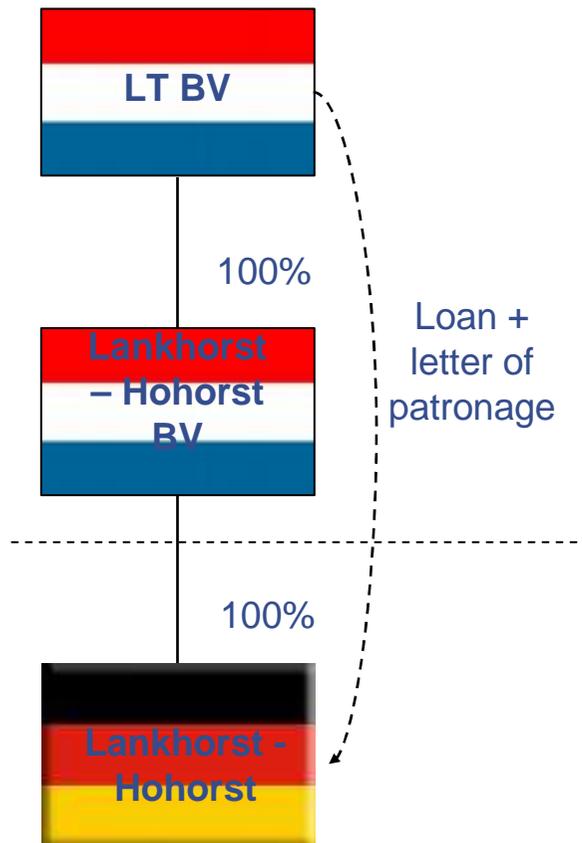
- First, that legislation provides for a consideration of objective and verifiable elements which make it possible to identify the existence of a **purely artificial arrangement**, entered into for tax reasons alone, to be established and allows taxpayers to produce, if appropriate and without being subject to undue administrative constraints, evidence as to the commercial justification for the transaction in question and,
- Secondly, where it is established that such an arrangement exists, such legislation treats that interest as a distribution **only in so far as it exceeds what would have been agreed upon at arm's length**

12.12.02 – C-324/00 Lankhorst – Hohorst (8)



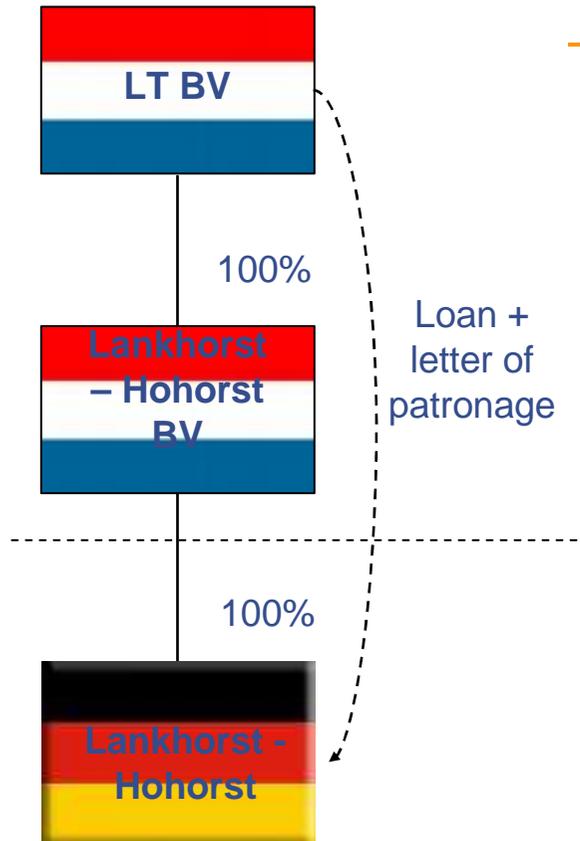
- This ruling contained some important principles on anti avoidance
 - The fact that the terms and conditions of financial transactions between related companies resident in different MSs deviate from those that would have been agreed upon between unrelated parties constitutes an objective and independently verifiable element for the purpose of determining whether the transaction in question represents, in whole or in part, a purely artificial arrangement. Legislation framed on this basis is proportionate on condition that the taxpayer is given the opportunity to provide evidence of any commercial justification for the arrangement (The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007, par. 2)

12.12.02 – C-324/00 Lankhorst – Hohorst (9)



- For the purposes of determining whether a transaction represents a purely artificial arrangement, national anti-abuse rules may comprise 'safe harbour' criteria to target situations in which the probability of abuse is highest. However, in order to ensure that genuine establishments and transactions are not unduly sanctioned it is imperative that where the existence of a purely artificial arrangement is presumed, the taxpayer is given the opportunity, without being subject to undue administrative constraints, to produce evidence of any commercial justification that there may be for that arrangement. With regard to intra-group transactions that means adherence to the arm's length principle (The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007, par. 2)

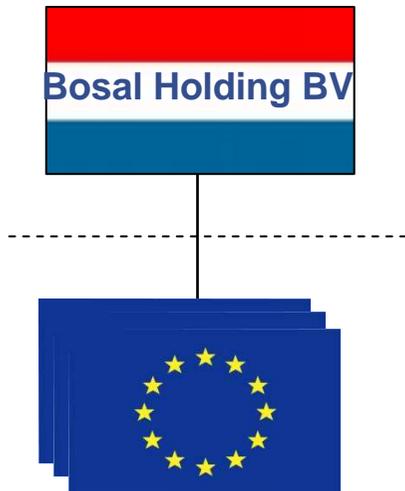
12.12.02 – C-324/00 Lankhorst – Hohorst (10)



- As far as the application of the subject provision to third countries, the European Court of Justice held, in **Lasertec** (10.5.07, C-492/04), that: a national measure in accordance with which the loan interest paid by a resident capital company to a non-resident shareholder who has a substantial holding in the capital of that company is, under certain conditions, regarded as a covert distribution of profits, taxable in the hands of the resident borrowing company, primarily affects freedom of establishment. Those provisions cannot be relied on in a situation involving a company in a non-member country
- The non application of the freedom of establishment to third countries have been confirmed in **(S) v. A and B** (10.5.07, C-102/05) and **Holböck** (24.5.07 – C-157/05)

18.9.03 – C-168/01 Bosal

~~Deduction of costs~~



– Facts

- Bosal Holding BV is a Dutch resident company
- According to Dutch tax law, in determining profit no account shall be taken of gains acquired from a holding or of the costs relating to a holding, unless it is evident that such costs are **indirectly instrumental in making profit that is taxable in the Netherlands** (exemption relating to holdings) (8)
- Based on such rule, the Dutch tax office refused the deduction of interest paid related to the acquisition of holdings in other Member States

– Question

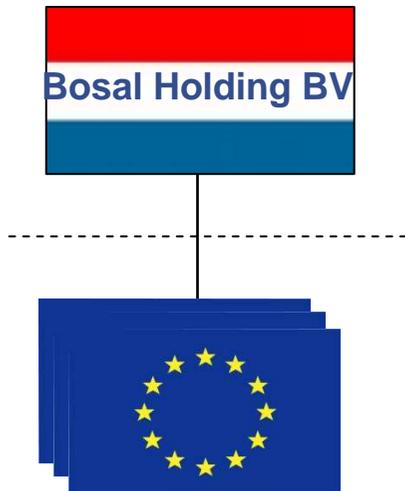
- Is the deny of deduction of interest paid in relation to the acquisition of foreign holdings in compliance with EU law?

– Have you exercised a fundamental Freedom?

- Freedom of establishment

18.9.03 – C-168/01 Bosal (2)

~~Deduction of costs~~

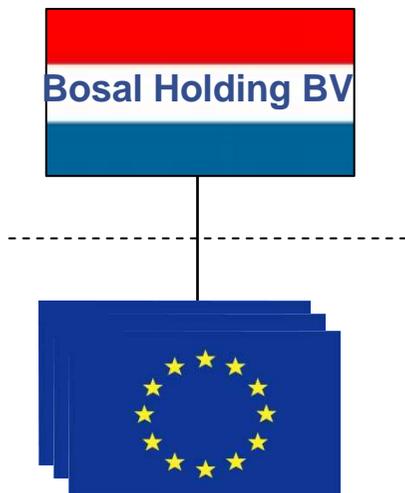


**Is there a discrimination or a restriction? Overt?
Covert? Home or Host State?**

- According to the Parent Subsidiary Directive each Member State retains 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
- It follows that, in so Dutch tax law merely implements the possibility offered by the Parent Subsidiary directive to refuse the deduction of costs incurred by parent companies in connection with holdings in the capital of their subsidiaries, it is compatible with the directive (25)

18.9.03 – C-168/01 Bosal (3)

~~Deduction of costs~~

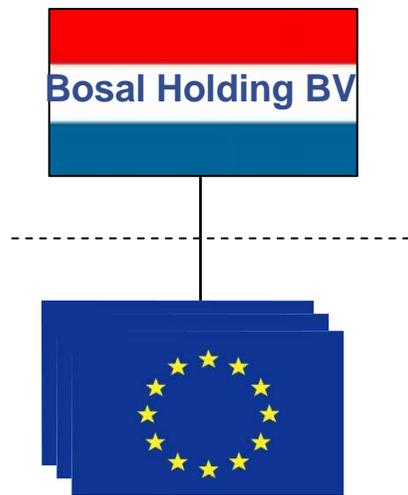


Is there a discrimination or a restriction? Overt?
Covert? Home or Host State?

- However, that possibility may be exercised only in compliance with the fundamental provisions of the Treaty (26)
- The limitation laid down in Dutch Tax Law, even if only indirectly, constitutes a **hindrance** to the establishment of subsidiaries in other Member States (27)
- Moreover, such a limitation goes against the objective set forth by the directive, spelt out in the third recital of its preamble, according to which it is necessary to introduce a common system and eliminate the disadvantage due to the application of tax provisions governing relations between parent companies and subsidiaries of different Member States which are less advantageous than those applicable to parent companies and subsidiaries of the same Member State (28)

18.9.03 – C-168/01 Bosal (4)

~~Deduction of costs~~



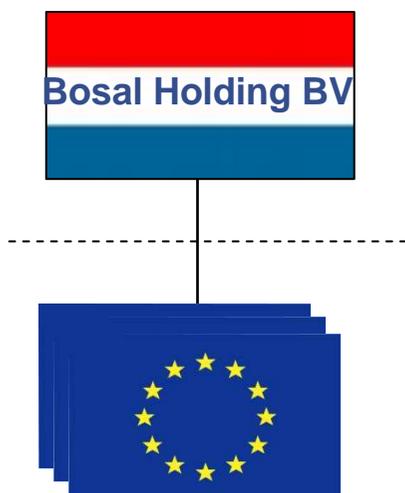
– Is there a justification?

- Tax cohesion. There is no direct link (28)
- Principle of territoriality. In that respect, it should be noted that the application of the territoriality principle in *Futura* concerned the taxation of a **single company** which carried on business in the Member State where it had its principal establishment and in other Member States from secondary establishments (38)
- Loss fiscal revenues. This argument cannot be accepted (42)

– Proportionality? N/A

18.9.03 – C-168/01 Bosal (5)

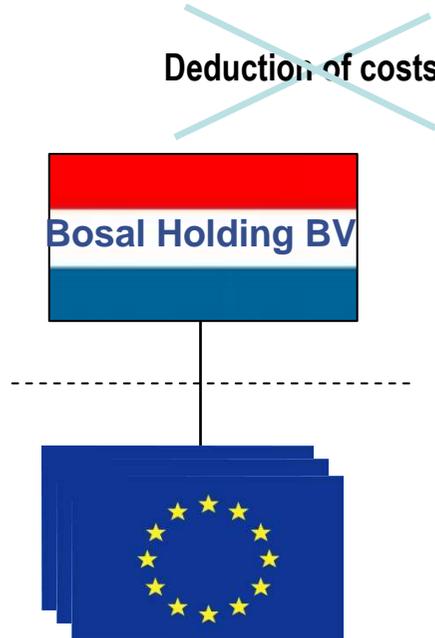
~~Deduction of costs~~



- The same principles have been applied in **Keller** (23.2.06, C-471/04): EU law and the Agreement on the European Economic Area of 2 May 1992 must be interpreted as precluding legislation of a Member State which excludes the possibility of deducting for tax purposes financing costs incurred by a parent company subject to unlimited tax liability in that State in order to acquire holdings in a subsidiary where those costs relate to dividends which are exempt from tax because they are derived from an indirect subsidiary established in another Member State or in a State which is party to the Agreement, whereas such costs may be deducted where they relate to dividends paid by an indirect subsidiary established in the same Member State as that of the place of the registered office of the parent company and which, in reality, also benefit from a tax exemption

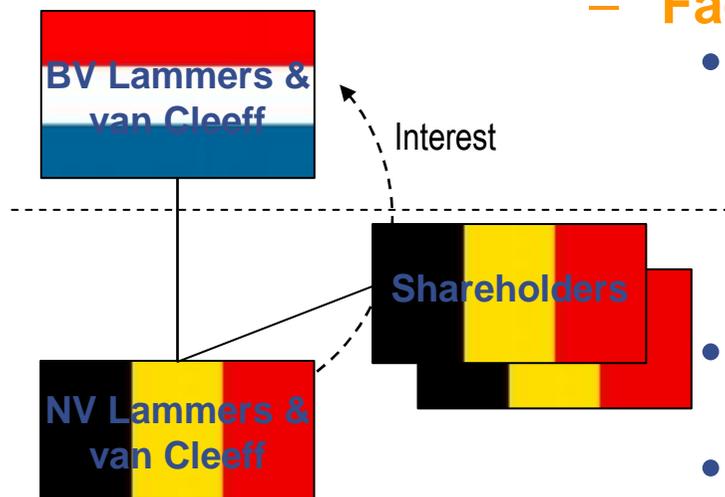
18.9.03 – C-168/01 Bosal (6)

~~Deduction of costs~~



- Similarly, however with respect to write-offs of shares, **Rewe Zentralfinanz (as successor of ITS Reisen)** (29.3.07 – C-347/04): EU law precludes legislation of a Member State which restricts the right of a parent company which is resident in that State to deduct for tax purposes losses incurred by that company in respect of write-downs to the book value of its shareholdings in subsidiaries established in other Member States

17.1.08 – C-105/07 NV Lammers & van Cleeff v. Belgium



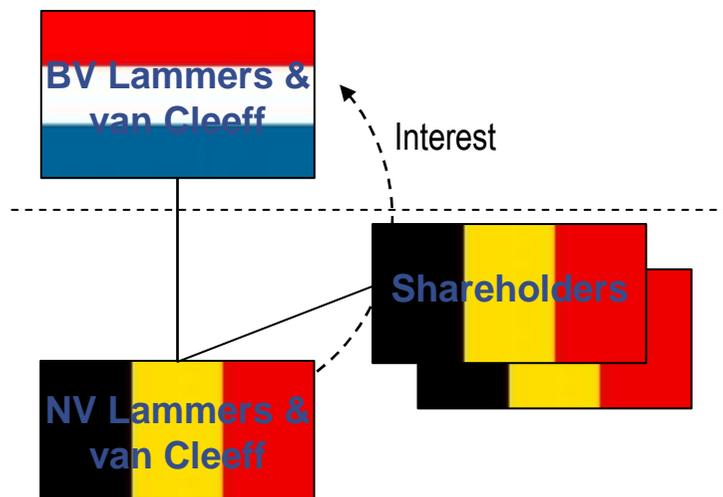
– Facts

- NV Lammers & van Cleeff is a Belgian resident company established in 1991 whose directors were the two Belgian shareholders and NV Lammers & van Cleeff, established in the Netherlands (7)
- The Belgian subsidiary paid interest to the Dutch parent company
- Pursuant to the Belgian law part of the interest were re-qualified as dividends when paid to a non-resident company (8)

– Question

- Does the EC Treaty preclude Belgian rules whereby interest payments are re-classified only when paid to director that is a resident company? (11)

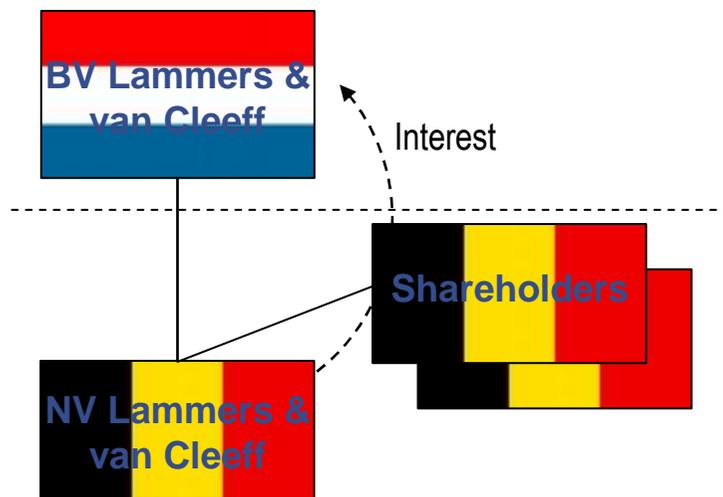
17.1.08 – C-105/07 NV Lammers & van Cleeff v. Belgium (2)



- **Have you exercised a fundamental Freedom?**
 - Freedom of establishment (17)
- **Is there a discrimination or a restriction? Overt? Covert?**
 - Restriction approach (24)
- **Is there a justification?**
 - A national measure restricting freedom of establishment may be justified where it specifically targets wholly artificial arrangements designed to circumvent the legislation of the Member State concerned (26)

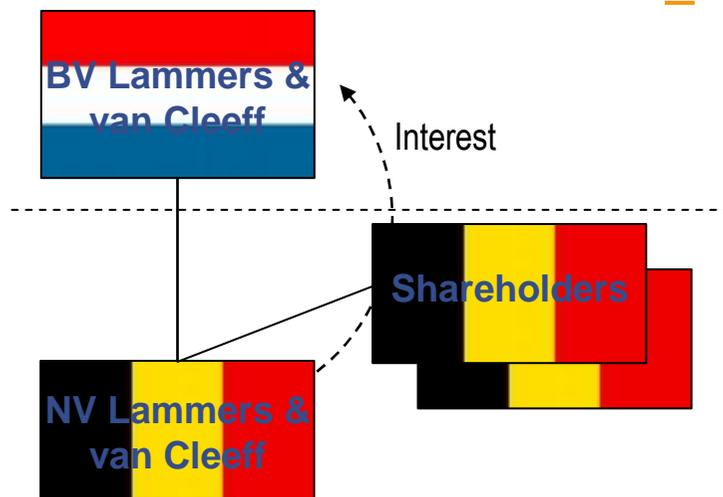
17.1.08 – C-105/07 NV Lammers & van Cleeff v. Belgium (3)

– Is there a justification?



- In *Test Claimants*, the Court held that legislation of a Member State may be justified by the need to combat abusive practices where it provides that interest paid by a resident subsidiary to a non-resident parent company is to be treated as a distribution only if, and in so far as, it exceeds what those companies would have agreed upon on an arm's-length basis (29)

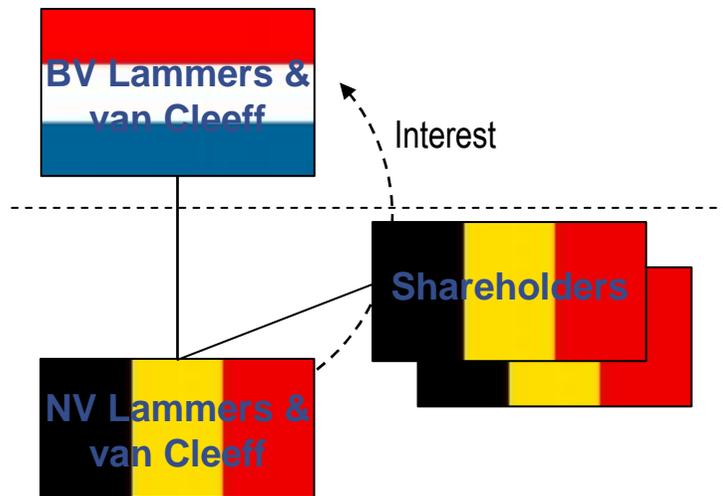
17.1.08 – C-105/07 NV Lammers & van Cleeff v. Belgium (4)



– Is there a justification?

- The fact that a resident company has been granted a loan by a non-resident company on terms which do not correspond to those which would have been agreed upon at arm's length constitutes, for the Member State in which the borrowing company is resident, an objective element which can be independently verified in order to determine whether the transaction in question represents, in whole or in part, a purely artificial arrangement, the essential purpose of which is to circumvent the tax legislation of that Member State (*Test Claimants*, paragraph 81) (30)

17.1.08 – C-105/07 NV Lammers & van Cleeff v. Belgium (4)



– Proportionality?

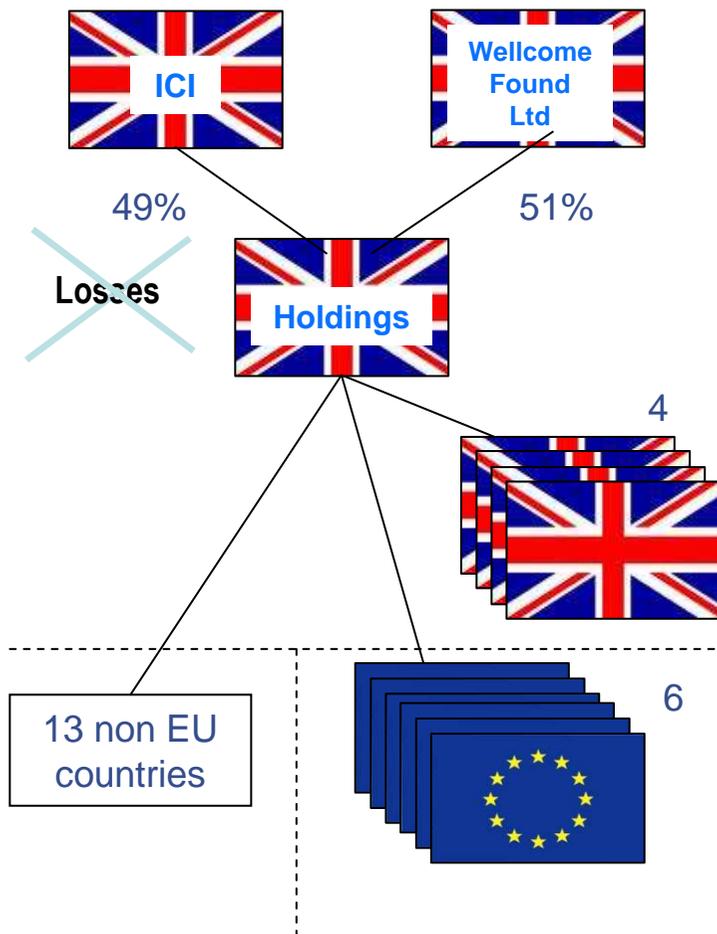
- In the present case, it is apparent from the order for reference that the interest payments made by the Belgian subsidiary on a loan granted by a non-resident company which is a director were reclassified as dividends because ... at the beginning of the taxable period the total of the interest-bearing loans was higher than the paid-up capital plus taxed reserves (31)
- Not proportional measure (32)

Group relief

Fabio Aramini, LL.M., Partner

Studio Adonnino Ascoli & Cavasola Scamoni

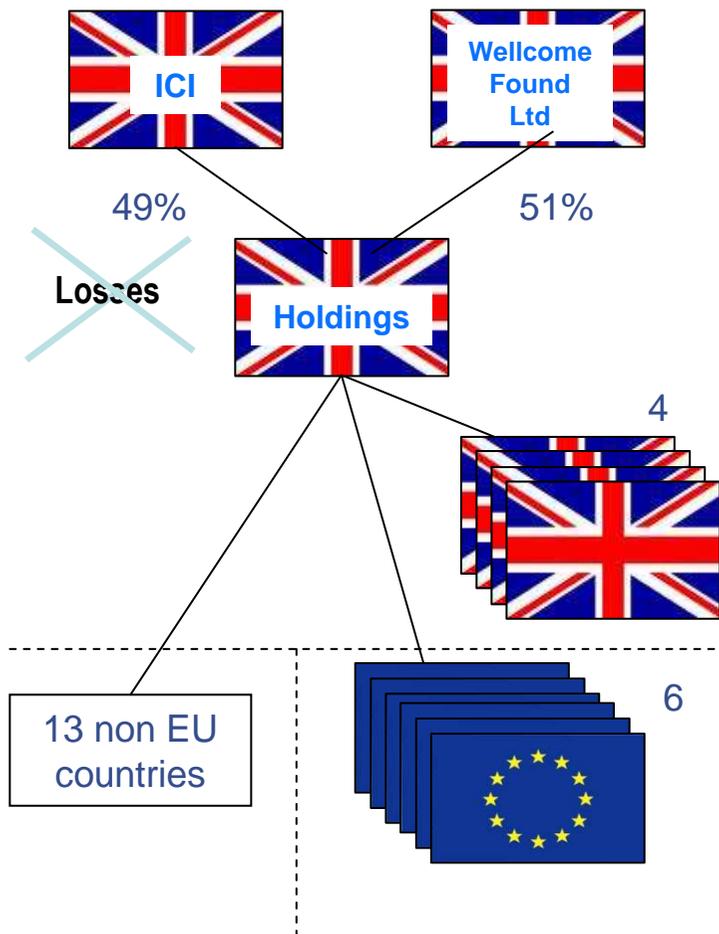
16.7.98 – C-264/96 ICI



– Facts

- ICI and Wellcome Foundation Ltd are both companies resident in the United Kingdom. They form together a consortium through which they beneficially own 49% and 51%, respectively, of Cooper's Animal Health (Holdings) Ltd (hereinafter 'Holdings') (3)
- The sole business of Holdings is to hold shares in some 23 trading companies which are its subsidiaries and which operate in many countries. Of those 23 subsidiaries, 4 are resident in the United Kingdom, 6 in other Member States and 13 in non-member countries (4)

16.7.98 – C-264/96 ICI (2)



– Facts

- During certain years, one of its subsidiaries resident in the UK suffered a loss (5)
- ICI sought to utilize 49% of such losses but the British tax authorities refused on the basis that most of the subsidiaries (19 out of 23) controlled by Holdings are not resident in the UK

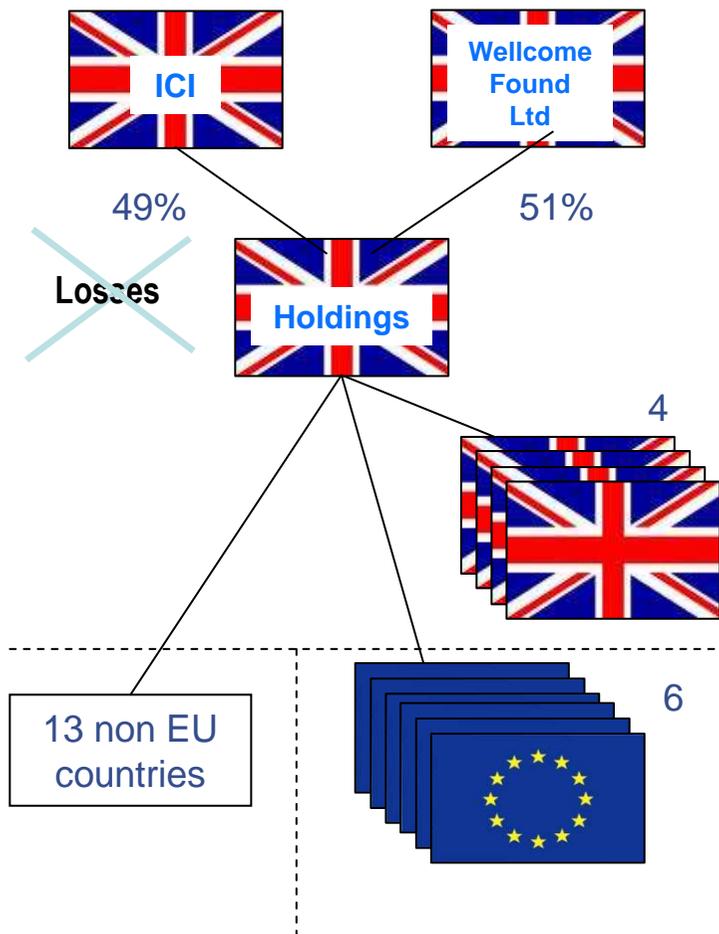
– Question

- Is the rule contrary to EU law?

– Have you exercised a fundamental Freedom?

- Freedom of establishment (21): only for EU (31-35)

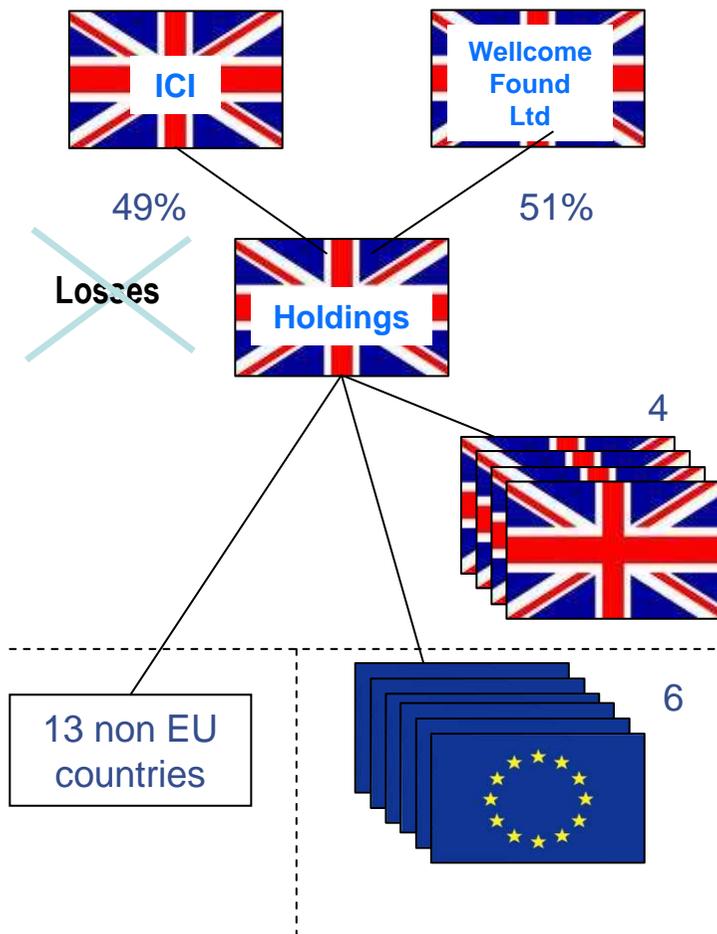
16.7.98 – C-264/96 ICI (3)



– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- Such legislation applies the test of the subsidiaries' seat to establish differential tax treatment of consortium companies established in the United Kingdom. **Consortium relief** is available only to companies controlling, wholly or mainly, subsidiaries whose seats are in the national territory (14)

16.7.98 – C-264/96 ICI (4)

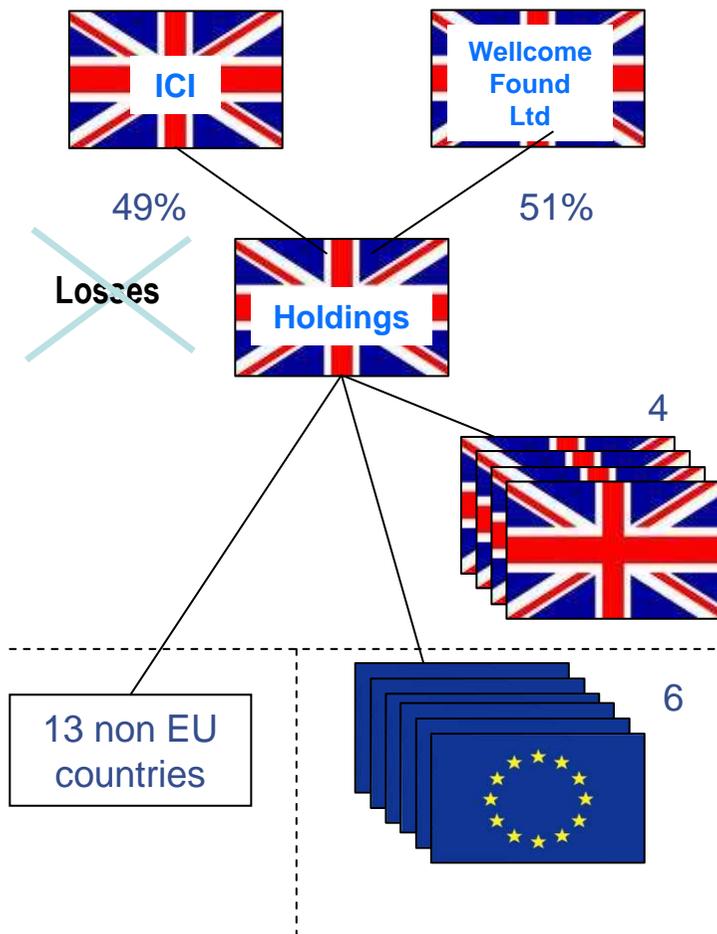


– Is there a justification?

- Risk of tax evasion. Group of companies could transfer profits abroad and losses in the UK (26). However, this is not the aim of the legislation under analysis (27). In addition, it is sufficient to have only one non UK company to transfer profits outside UK (28)
- Loss of fiscal revenues. This is not a justification (28)

– Proportionality? N/A

16.7.98 – C-264/96 ICI (5)



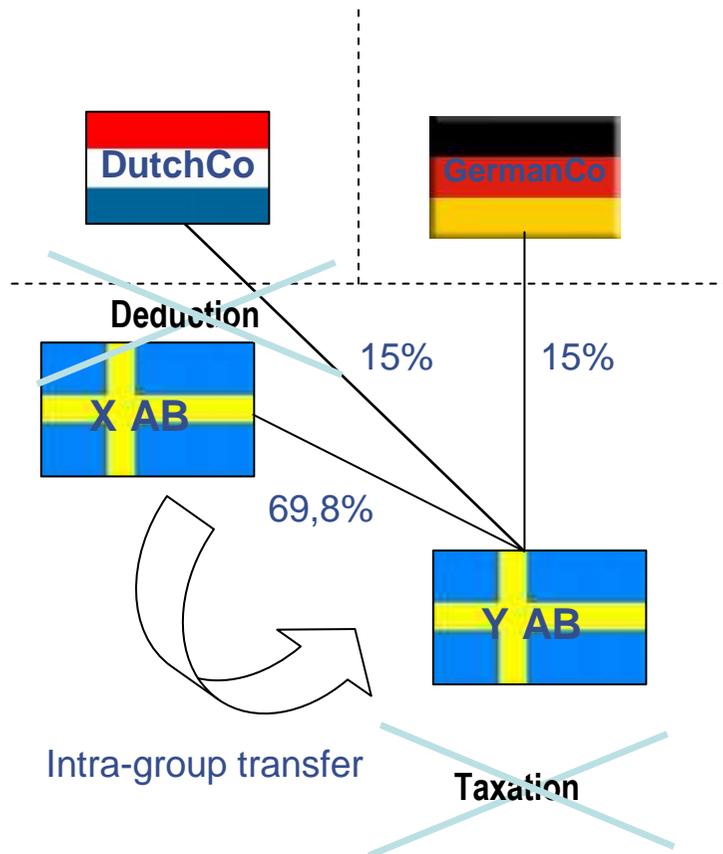
– An important statement on anti avoidance

- The establishment of a company outside the United Kingdom does not, of itself, necessarily entail tax avoidance, since that company will in any event be subject to the tax legislation of the State of establishment (26)
 - I.e, the mere fact that a subsidiary is established in another MS cannot, of itself, be treated as giving rise to anti avoidance (The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007, par. 2)

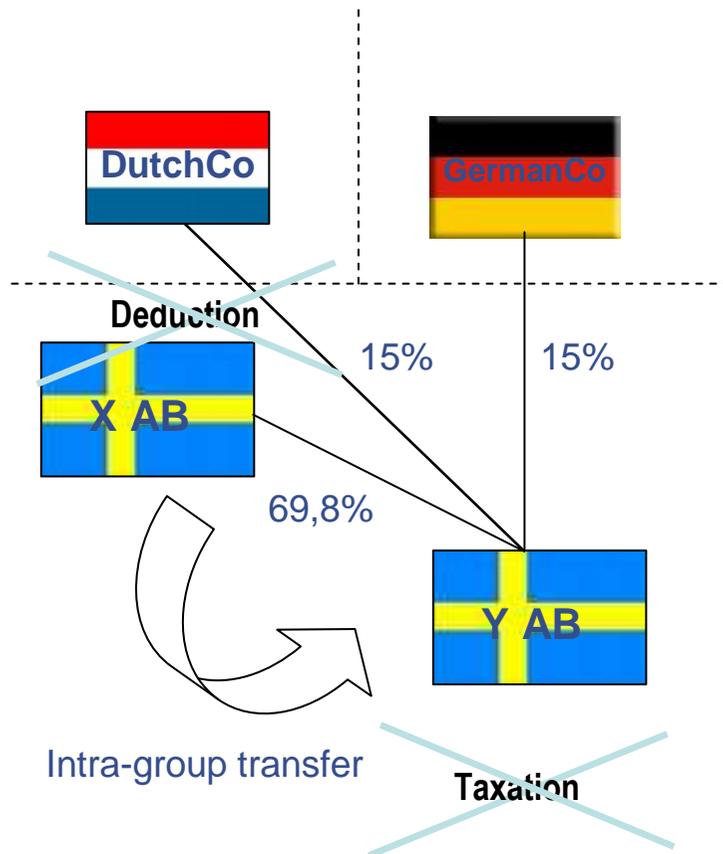
18.11.99 – C-200/98 X AB et Y AB

– Facts

- On certain conditions, transfers between companies belonging to the same group may benefit from tax relief. Under this rule, if a Swedish company owns more than nine tenths of the shares in another Swedish company, intra-group transfers between the first company and the second company are treated as deductible expenses for the transferring company and as taxable income for the transferee. The aim of that group transfer rule is to prevent the tax burden borne by a business carried on by a number of undertakings in a group from being greater than if it is carried on by a single undertaking (4)



18.11.99 – C-200/98 X AB et Y AB



– Facts

- Such a rule is not applicable in case the shares are held by other group companies (part of the same group) located in more than one Member State (10)

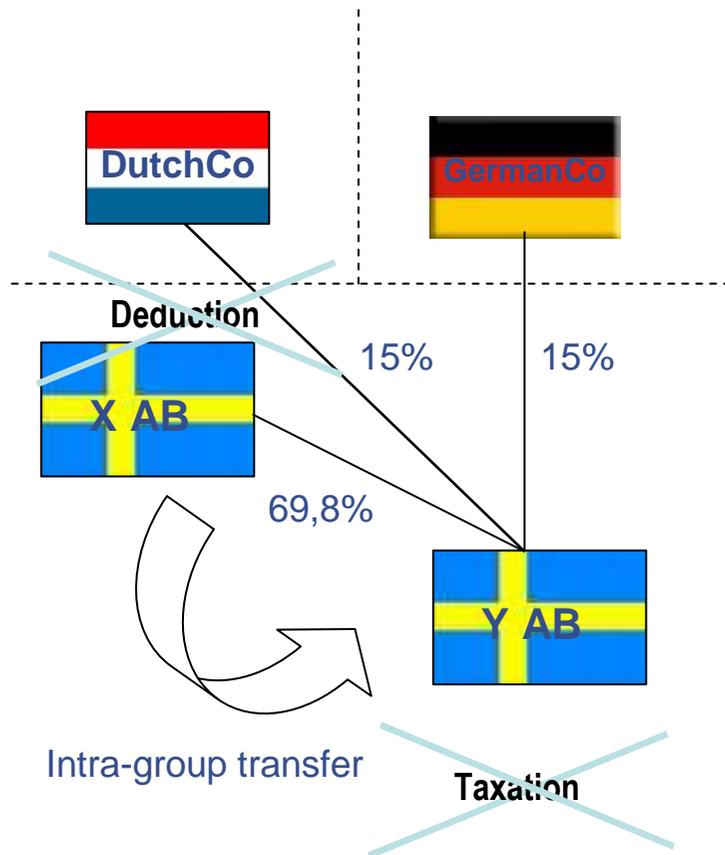
– Question

- Is this rule contrary to EU law?

– Have you exercised a fundamental Freedom?

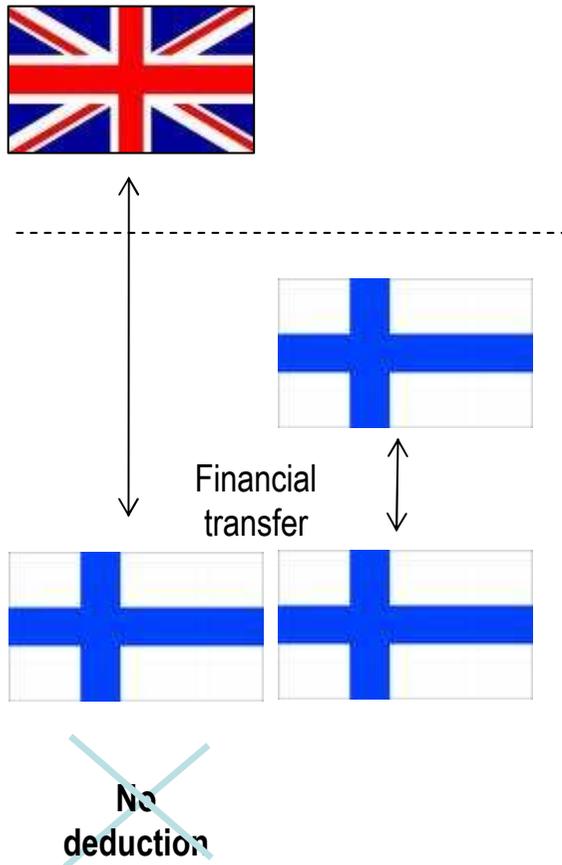
- Freedom of establishment (26)

18.11.99 – C-200/98 X AB et Y AB (2)



- Is there a discrimination or a restriction? Overt? Covert? Home or Host State?
 - Discrimination: there is no need to examine the freedom of capital (30)
- Is there a justification? N/A
- Proportionality? N/A

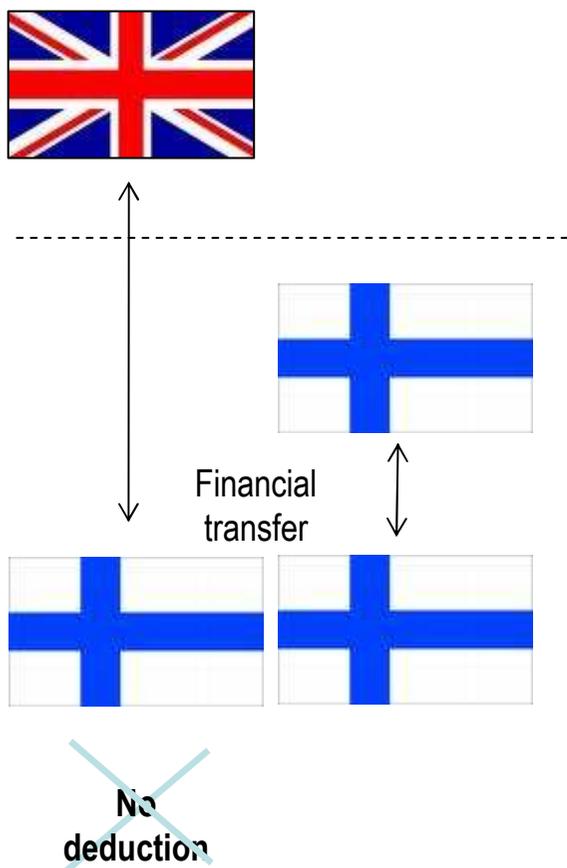
18.7.07 – C-231/05 AA v. FIN



– Facts

- According to Finnish law, intra-group financial transfer allows the transfer of losses inside the group by allowing tax deduction in the hands of the payor and taxable income in the hands of the payee
- Intra-group transfer is permitted only if the payor has a minimum 9/10 capital of the payee or vice versa. Both the payor and the payee must be Finnish companies
- AA Ltd, a company established in the United Kingdom, indirectly holds, through two other companies, 100% of the shares in Oy AA (11)

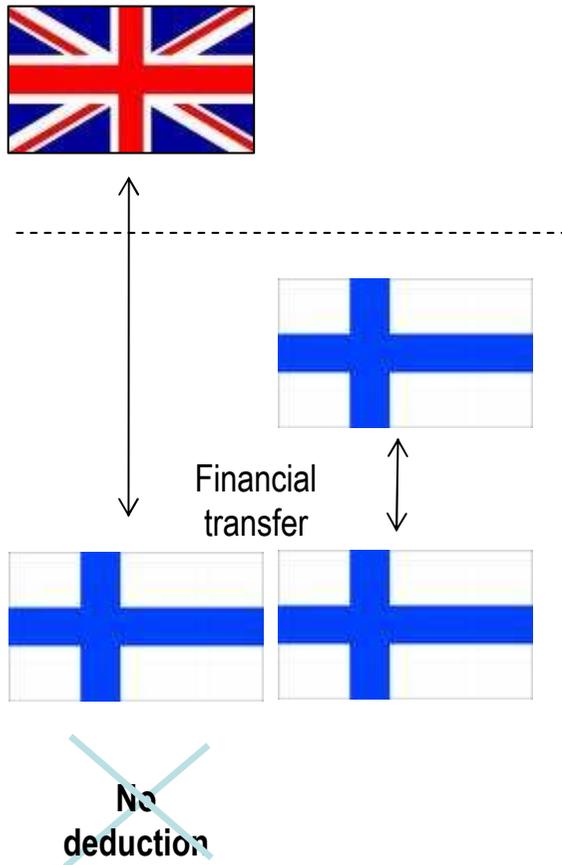
18.7.07 – C-231/05 AA v. FIN (2)



– Facts

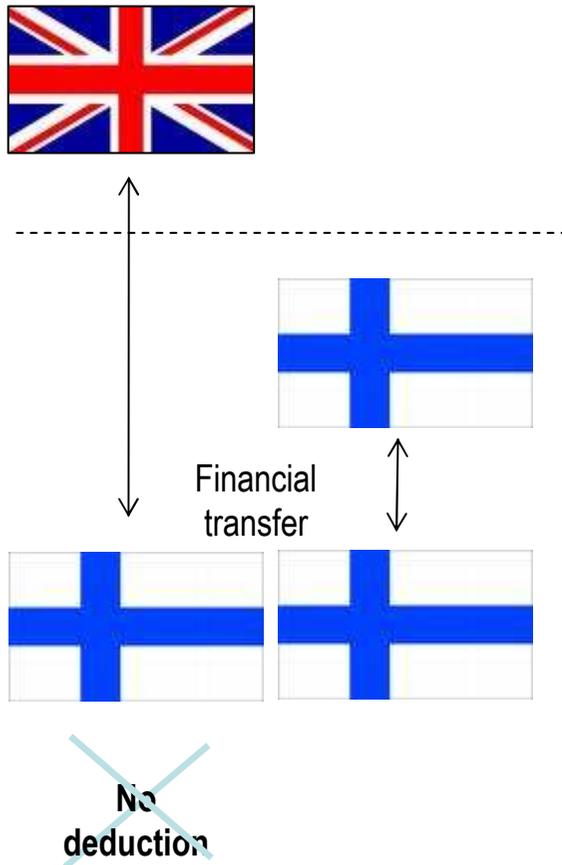
- Unlike the business of Oy AA, the business of AA Ltd ran at a loss and, according to Oy AA. Since the business of AA Ltd was also important for Oy AA, the latter envisaged making an intra-group financial transfer in favour of AA Ltd in order to secure its financial position (12)
- Oy AA applied to the Central Tax Commission for a preliminary decision as to whether the transfer envisaged constituted an intra-group financial transfer and could therefore be regarded as a tax-deductible expense (13). The Court refused (14)

18.7.07 – C-231/05 AA v. FIN (3)



- **Question**
 - Does EU law preclude the system established by the Finnish Law on Intra-Group Financial Transfers, which makes the deductibility of intra-group financial transfers subject to the condition that the transferor and the transferee be national companies?
- **Have you exercised a fundamental Freedom?**
 - Freedom of establishment (23)
- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - Restriction (38)

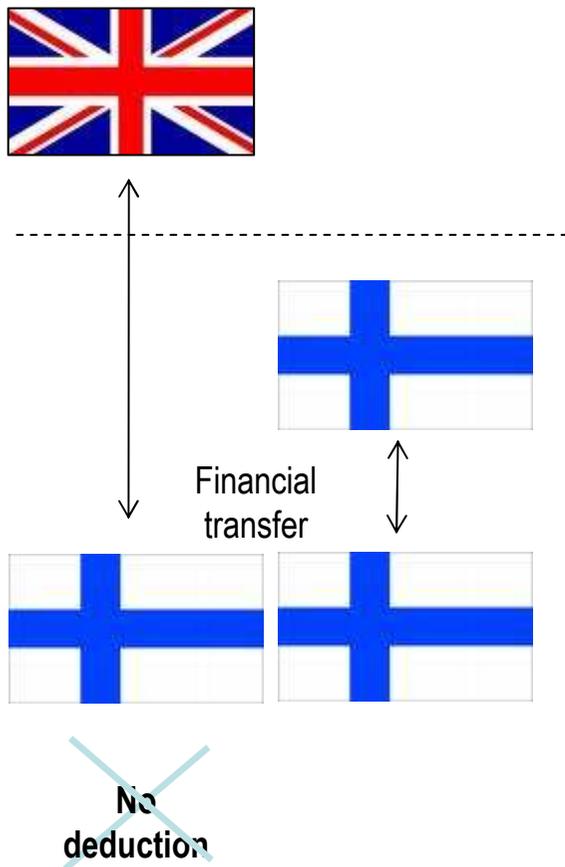
18.7.07 – C-231/05 AA v. FIN (4)



– **Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?**

- The purpose of the Finnish system of intra-group financial transfers is to remove tax disadvantages inherent in the structure of a group of companies by allowing a balancing out within a group that comprises both profit-making and loss-making companies. An intra-group financial transfer is regarded as an expense of the transferor and is deducted from that person's taxable income **only if it is recorded as income of the transferee (35)**

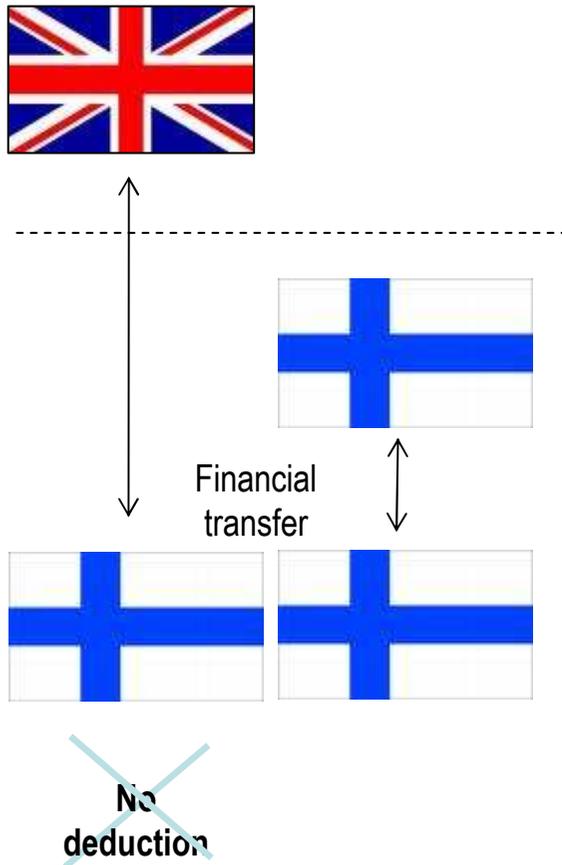
18.7.07 – C-231/05 AA v. FIN (5)



– **Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?**

- In a cross-border situation, where the transferee is not subject to tax in the Member State of the transferor, that latter Member State cannot guarantee that the transfer will be treated as taxable income of the transferee. The fact that the Member State of the transferor allows deduction of the transfer from the taxable income of the transferor does not guarantee that the aim pursued by the system applicable to transfers will be attained (36)

18.7.07 – C-231/05 AA v. FIN (6)

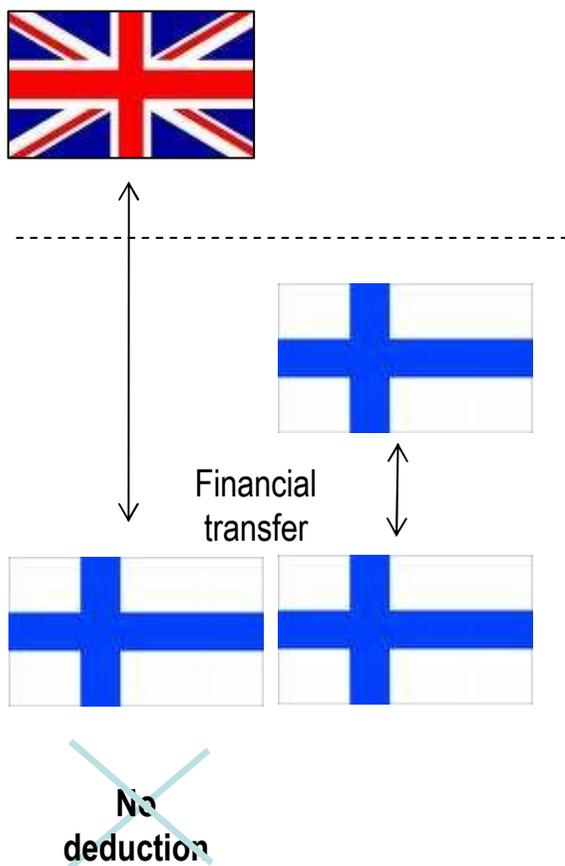


– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- However, even if the Member State in which the subsidiary is established does not have competence over the parent company, which is established in another Member State and is not subject to tax in the first Member State, it may nevertheless make deductibility of the intra-group financial transfer from the transferor's taxable income subject to conditions concerning the treatment to be applied to the transfer by that other Member State (37)
- Therefore, in relation to the aim pursued by the Finnish system of intra-group financial transfers, the mere fact that parent companies which have their corporate establishment in another Member State are not subject to tax in Finland does not differentiate the subsidiaries of those parent companies from the subsidiaries of parent companies which have their establishment in Finland, and does not render the positions of those two categories of subsidiary incomparable (38)

18.7.07 – C-231/05 AA v. FIN (7)

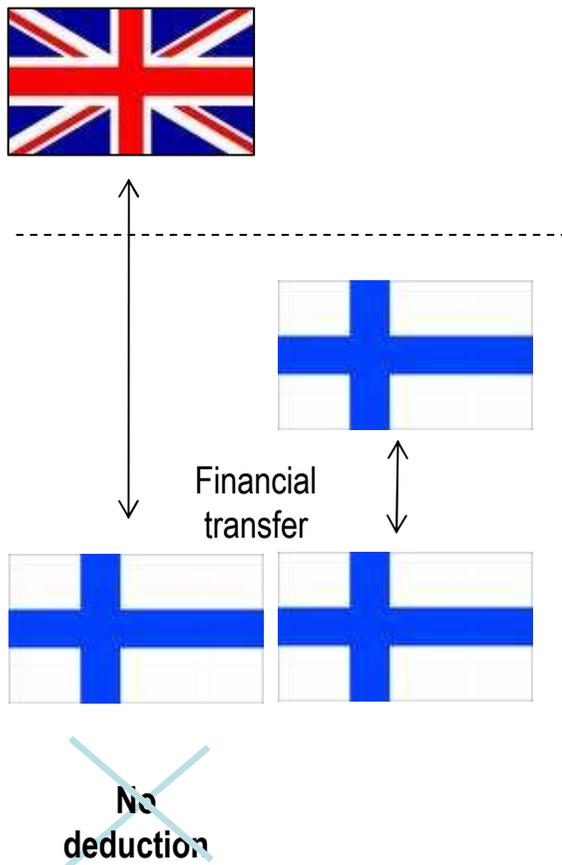
– Is there a justification?



- Need to safeguard the balance allocation of the power to tax + risk of taking losses into consideration twice + risk of tax avoidance.
- Concerning, **first**, the need to safeguard a balanced allocation of the power to tax between Member States, it should be pointed out that that need cannot justify a Member State systematically refusing to grant a tax advantage to a resident subsidiary, on the ground that the income of the parent company, having its establishment in another Member State, is not capable of being taxed in the first Member State (53). That element of justification may be allowed, however, where **the system in question is designed to prevent conduct capable of jeopardizing the right of the Member States to exercise their taxing powers in relation to activities carried on in their territory (54)**

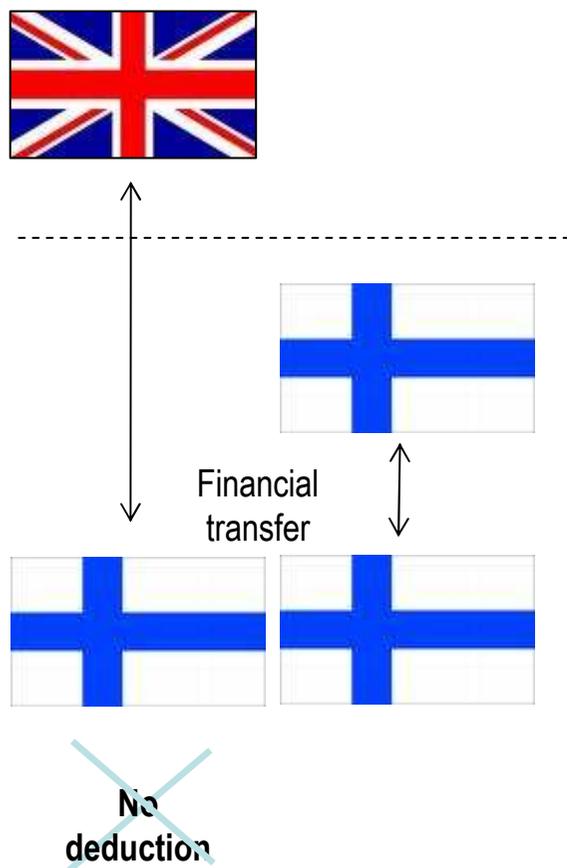
18.7.07 – C-231/05 AA v. FIN (8)

– Is there a justification?



- The Court has thus held that to give companies the right to elect to have their losses taken into account in the Member State in which they are established or in another Member State would seriously undermine a balanced allocation of the power to impose taxes between the Member States (*Marks & Spencer*, paragraph 46) (55)
- Similarly, to accept that an intra-group cross-border transfer, such as that at issue in the main proceedings, may be deducted from the taxable income of the transferor would result in allowing groups of companies to choose freely the Member State in which the profits of the subsidiary are to be taxed, by removing them from the basis of assessment of the latter and, where that transfer is regarded as taxable income in the Member State of the parent company transferee, incorporating them in the basis of assessment of the parent company

18.7.07 – C-231/05 AA v. FIN (9)



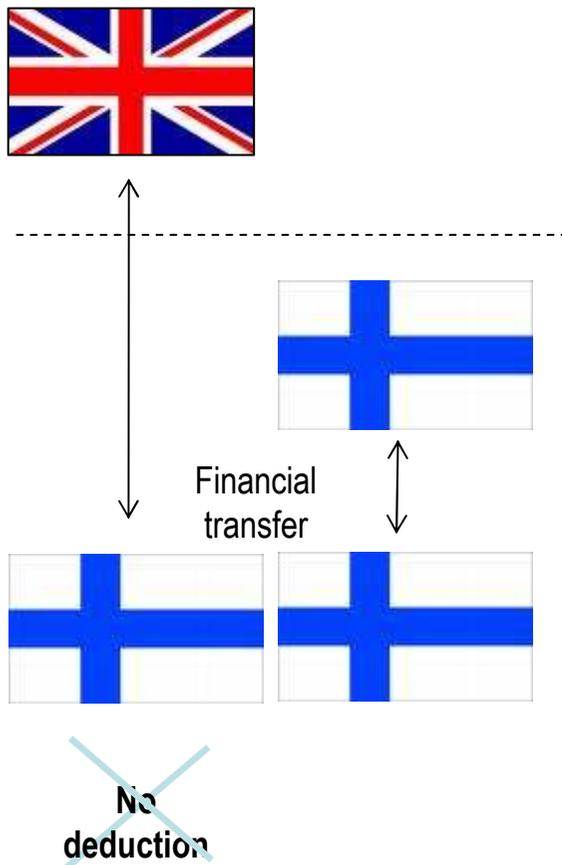
– Is there a justification?

- That would undermine the system of the allocation of the power to tax between Member States because, according to the choice made by the group of companies, the Member State of the subsidiary would be forced to renounce its right, in its capacity as the State of residence of that subsidiary, to tax the profits of that subsidiary in favor, possibly, of the Member State in which the parent company has its establishment (55)
- Concerning, secondly, the risk that losses might be used twice, it is sufficient to point out that the Finnish system of intra-group financial transfers does not concern the deductibility of losses (56)

18.7.07 – C-231/05 AA v. FIN (10)

– Is there a justification?

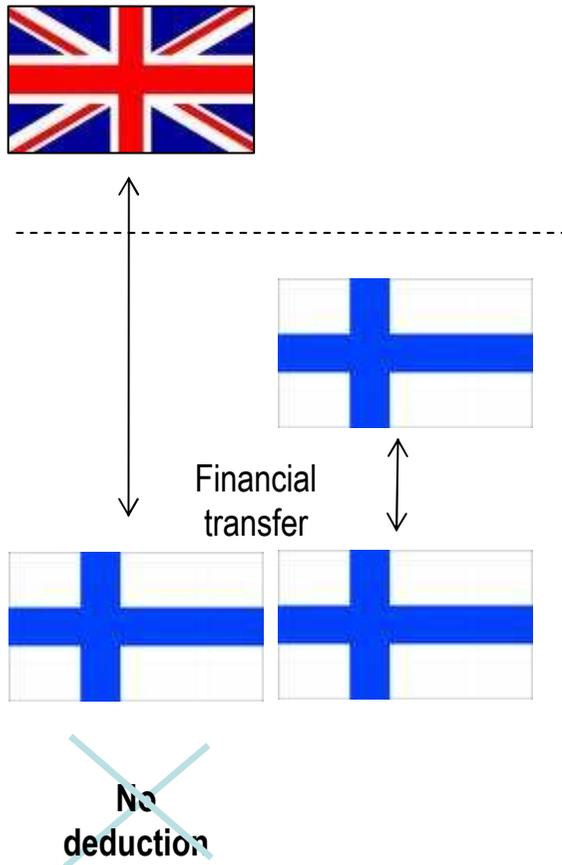
- Concerning, **finally**, the prevention of tax avoidance, it must be acknowledged that the possibility of transferring the taxable income of a subsidiary to a parent company with its establishment in another Member State carries the risk that, by means of purely artificial arrangements, income transfers may be organized within a group of companies towards companies established in Member States applying the lowest rates of taxation or in Member States in which such income is not taxed. That possibility is reinforced by the fact that the Finnish system of intra-group financial transfers does not require the transferee to have suffered losses (58)



18.7.07 – C-231/05 AA v. FIN (11)

– Is there a justification?

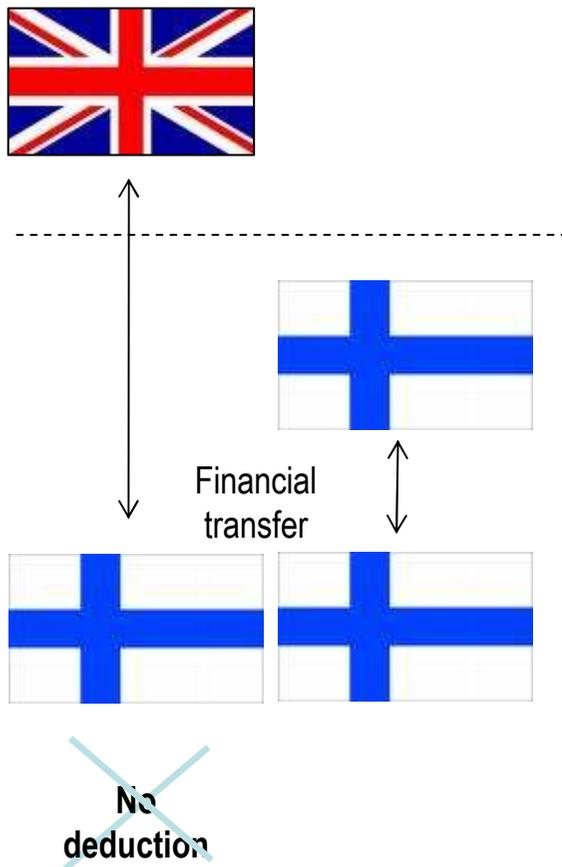
- By granting a subsidiary the right to deduct an intra-group financial transfer in favor of its parent company from its taxable income only in cases where the latter has its principal establishment in the same Member State, the Finnish system of intra-group financial transfers is able to prevent such practices, likely to be encouraged by the finding of significant disparities between the bases of assessment or rates of tax applied in the various Member States and designed only to avoid the tax normally due in the Member State of the subsidiary on its profits (5)



18.7.07 – C-231/05 AA v. FIN (12)

– Is there a justification?

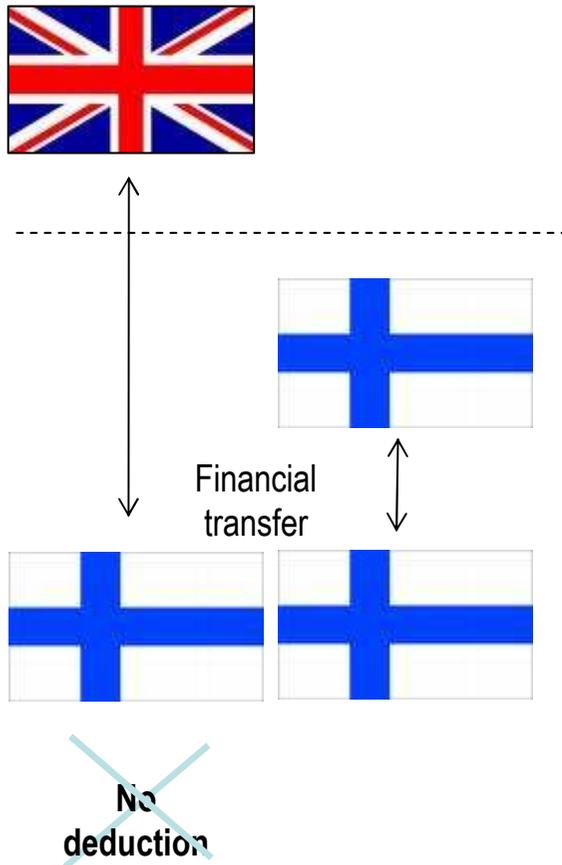
- Having regard to the combination of those two factors, concerning the need to safeguard the balanced allocation of the power to tax between the Member States and the need to prevent tax avoidance, this Court therefore finds that a system, such as that at issue in the main proceedings, which grants a subsidiary the right to deduct a financial transfer in favor of its parent from its taxable income only where the parent and the subsidiary both have their principal establishment in the same Member State, pursues legitimate objectives compatible with the Treaty and justified by overriding reasons in the public interest, and is appropriate to ensuring the attainment of those objectives (60)



18.7.07 – C-231/05 AA v. FIN (13)

– Proportionality?

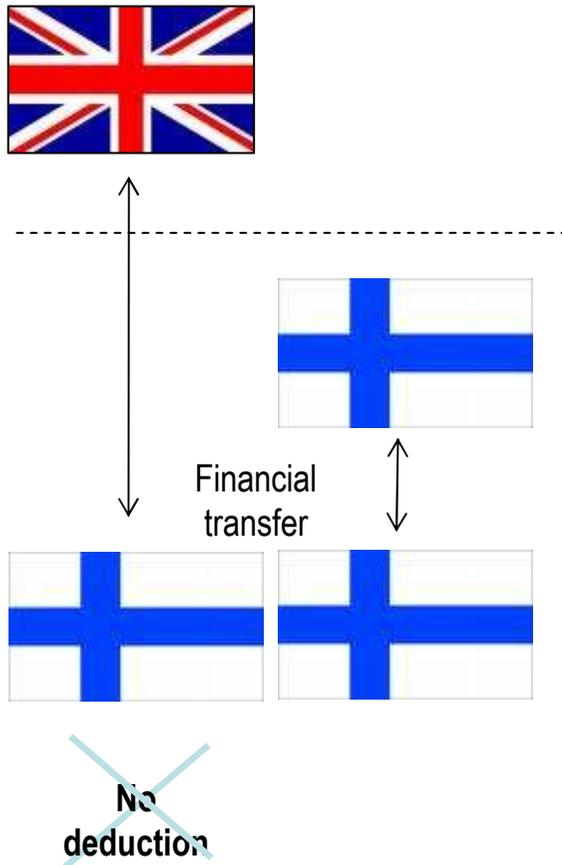
- It should be noted at the outset that the objectives of safeguarding the balanced allocation of the power to impose taxes between Member States and the prevention of tax avoidance are linked (62)



18.7.07 – C-231/05 AA v. FIN (14)

– Proportionality?

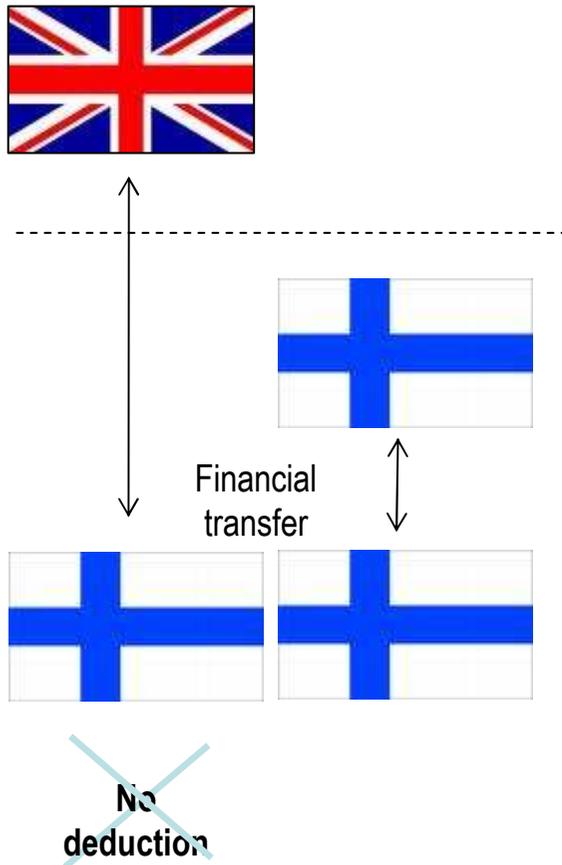
- Even if the legislation at issue in the main proceedings is not specifically designed to exclude from the tax advantage it confers purely artificial arrangements, devoid of economic reality, created with the aim of escaping the tax normally due on the profits generated by activities carried out on national territory, such legislation may nevertheless be regarded as **proportionate** to the objectives pursued, taken as a whole (63)



18.7.07 – C-231/05 AA v. FIN (15)

– Proportionality?

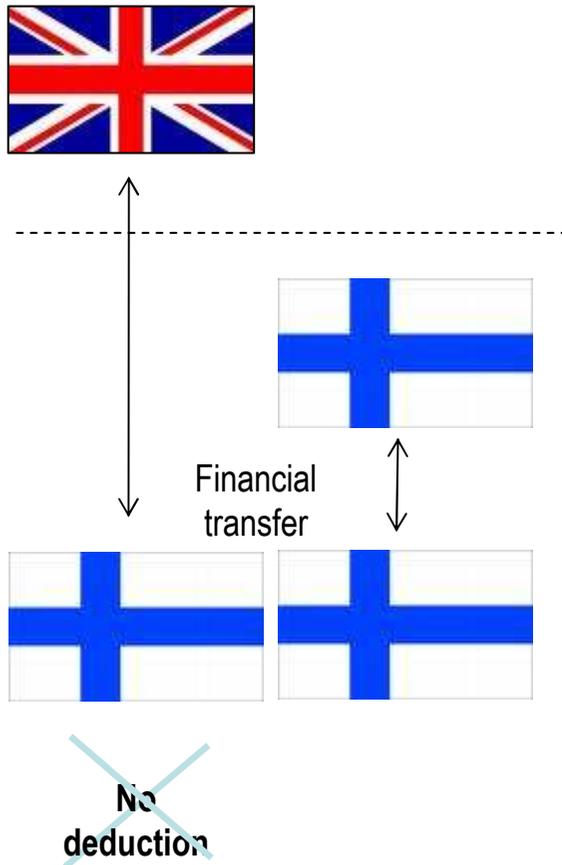
- In a situation in which the advantage in question consists in the possibility of making a transfer of income, thereby excluding such income from the taxable income of the transferor and including it in the taxable income of the transferee, **any extension of that advantage to cross-border situations would have the effect of allowing groups of companies to choose freely the Member State in which their profits will be taxed**, to the detriment of the right of the Member State of the subsidiary to tax profits generated by activities carried out on its territory (64)



18.7.07 – C-231/05 AA v. FIN (16)

– Proportionality?

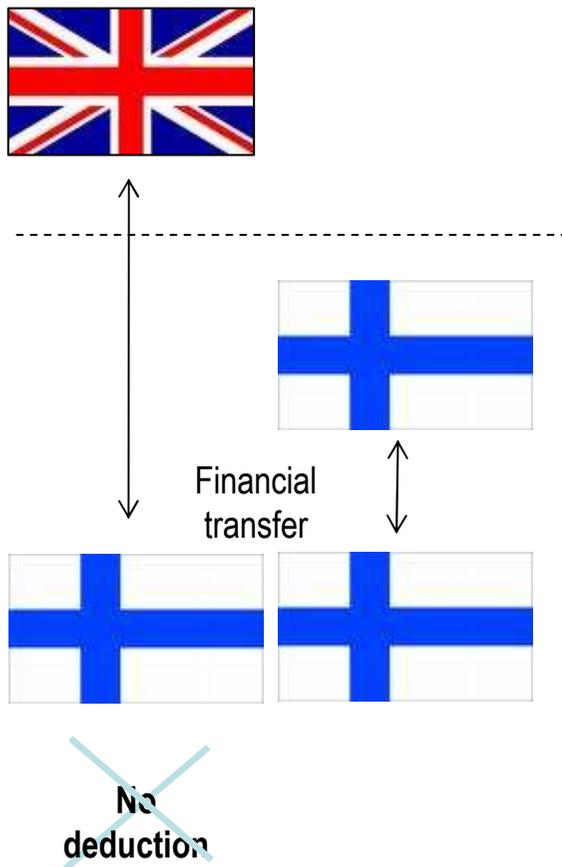
- That detriment cannot be prevented by imposing conditions concerning the treatment of the income arising from the intra-group financial transfer in the Member State of the transferee, or concerning the existence of losses made by the transferee



18.7.07 – C-231/05 AA v. FIN (17)

– Proportionality?

- To allow deduction of the intra-group financial transfer where it constitutes taxable income of the transferee company, or where the opportunities for the transferee company to transfer its losses to another company are limited, or to allow deduction of an intra-group financial transfer in favor of a company whose establishment is in a Member State applying a lower rate of tax than that applied by the Member State of the transferor only where that intra-group financial transfer is specifically justified by the economic situation of the transferee, as Oy AA has proposed, would nevertheless mean that, in the final analysis, the choice of the Member State of taxation would be a matter for the group of companies, which would have a wide discretion in that regard

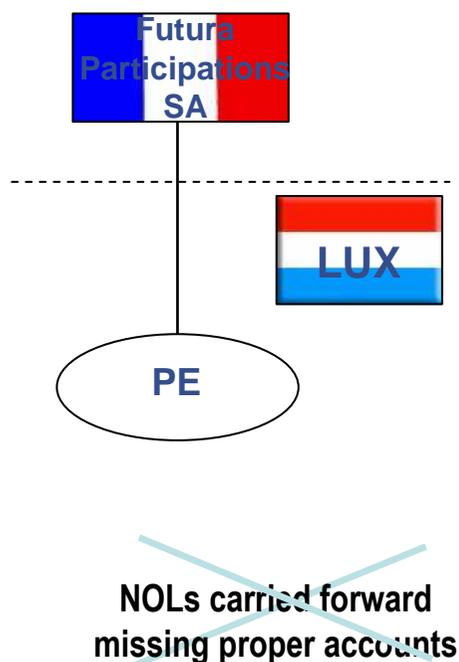


Losses

Fabio Aramini, LL.M., Partner

Studio Adonnino Ascoli & Cavasola Scamoni

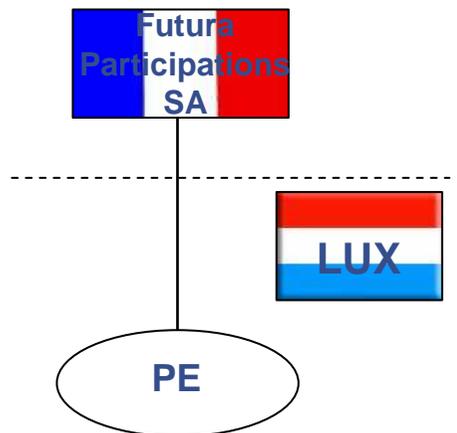
15.5.97 – C-250/95 Futura



– Facts

- According to Luxembourg law, resident taxpayers may use loss carried forward provided they have kept proper accounts (6)
- Non residents are not obliged to keep proper accounts. If they don't they are allowed to compute their income based on the apportionment method (8)
- **Losses carried forward** can be set off against non residents income **provided that they are related to Luxembourg source income and that separate accounts are kept (9)**
- Not having proper accounts, Singer determined the taxable income based on the apportionment method: however Singer asked to also keep into accounts losses incurred during previous years in which also proper accounts were not kept (10). The Luxembourg tax authorities refused (11)

15.5.97 – C-250/95 Futura (2)



~~NOLs carried forward
missing proper accounts~~

– Question

- Is it contrary to the freedom of establishment to allow non residents the use of only **local losses** (economic link) and to require to keep **proper accounts**?

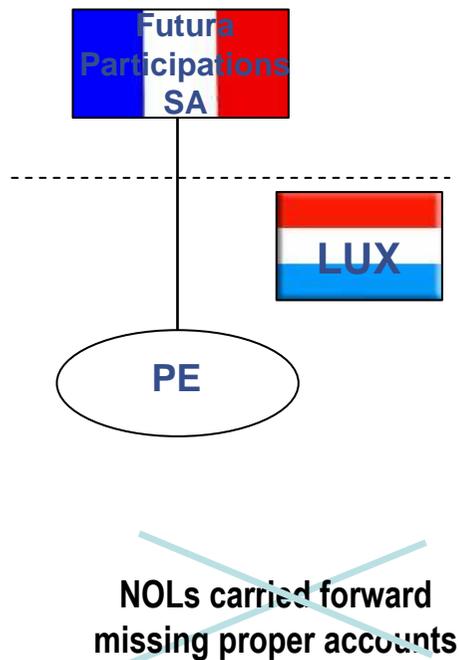
– Have you exercised a fundamental Freedom?

- Freedom of establishment

– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- The fact that, for the purposes of calculating the tax liability of non-residents, only Luxembourg income and losses are kept into account is consistent with the **principle of territoriality** and does not entail any discrimination (21,22)
- The need to keep separate accounts may constitute a restriction (24)

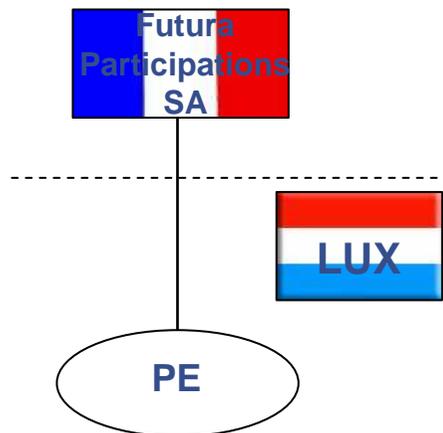
15.5.97 – C-250/95 Futura (3)



– Is there a justification?

- Effectiveness of fiscal supervision. The Court has repeatedly held that the effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction on the exercise of fundamental freedoms guaranteed by the Treaty. A Member State may therefore apply measures which enable the amount of both the income taxable in that State and of the losses which can be carried forward there to be ascertained clearly and precisely (31)

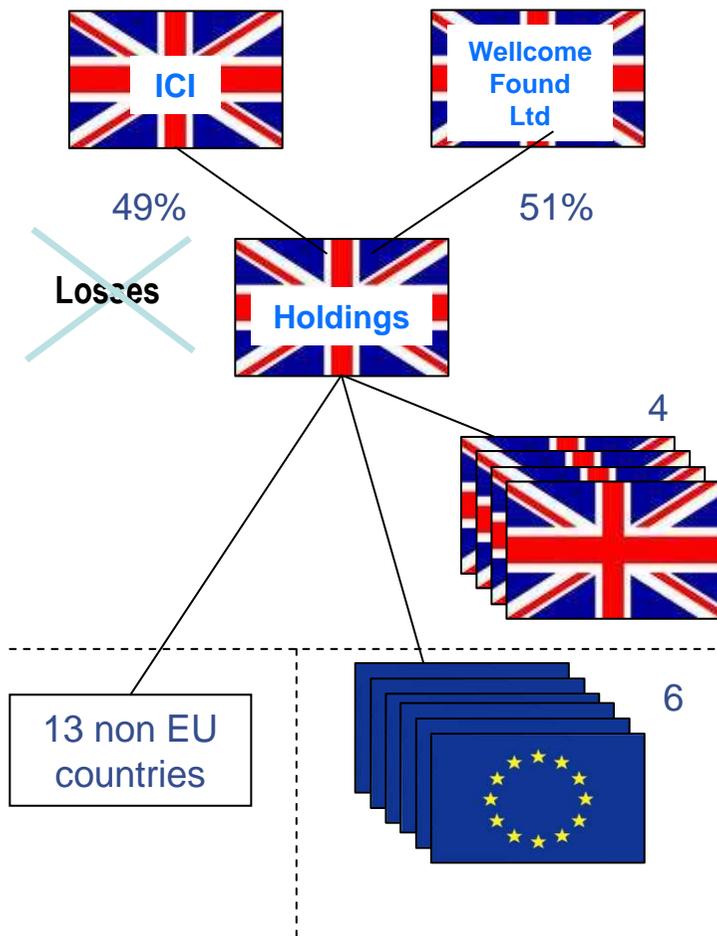
15.5.97 – C-250/95 Futura (4)



~~NOLs carried forward
missing proper accounts~~

- **Proportionality?** Non proportional (42). The Member State concerned may, however, require the non-resident taxpayer to demonstrate clearly and precisely that the amount of the losses which he claims to have incurred corresponds, under its domestic rules governing the calculation of income and losses which were applicable in the financial year concerned, to the amount of the losses actually incurred in that State by the taxpayer (43)

16.7.98 – C-264/96 ICI

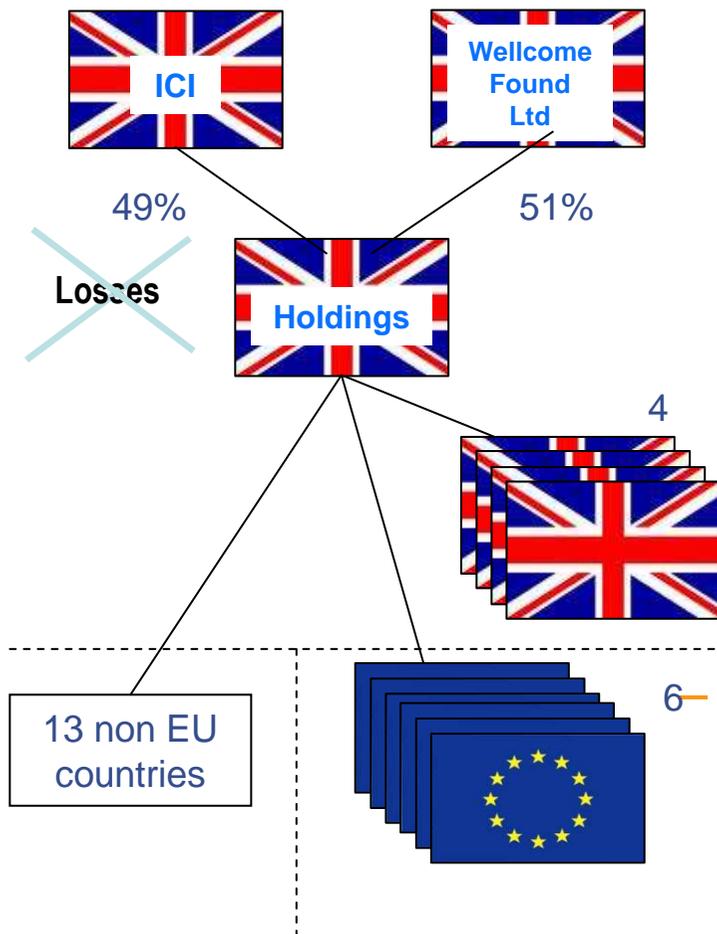


– Facts

- ICI and Wellcome Foundation Ltd are both companies resident in the United Kingdom. They form together a consortium through which they beneficially own 49% and 51%, respectively, of Cooper's Animal Health (Holdings) Ltd (hereinafter 'Holdings') (3)
- The sole business of Holdings is to hold shares in some 23 trading companies which are its subsidiaries and which operate in many countries. Of those 23 subsidiaries, 4 are resident in the United Kingdom, 6 in other Member States and 13 in non-member countries (4)

16.7.98 – C-264/96 ICI (2)

– Facts



- During certain years, one of its subsidiaries resident in the UK suffered a loss (5)
- ICI sought to utilize 49% of such losses but the British tax authorities refused on the basis that most of the subsidiaries (19 out of 23) controlled by Holdings are not resident in the UK

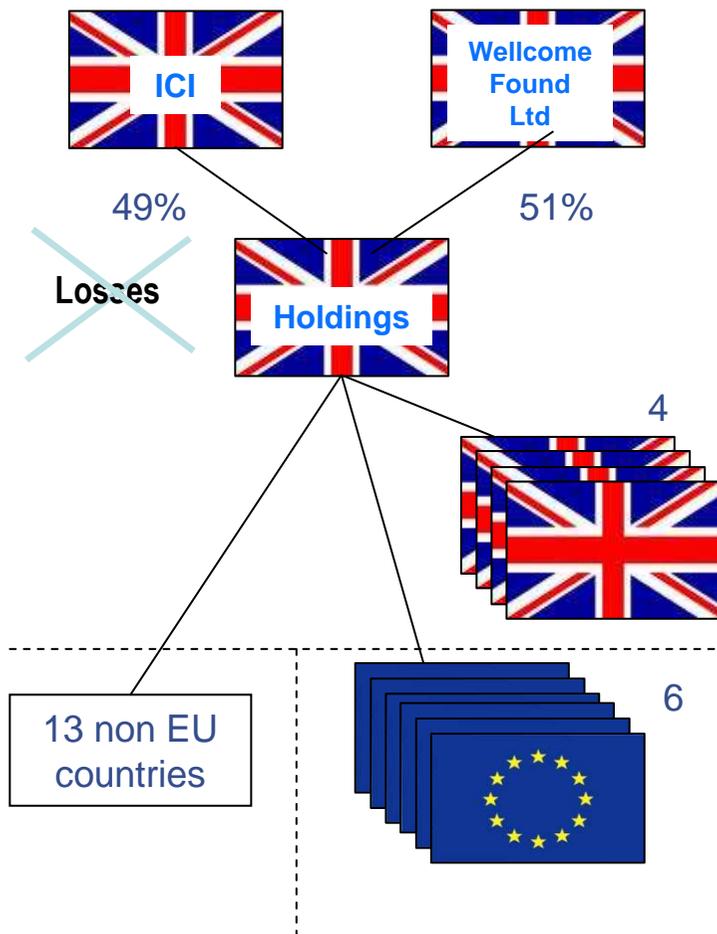
Question

- Is the rule contrary to EU law?

Have you exercised a fundamental Freedom?

- Freedom of establishment (21): only for EU (31-35)

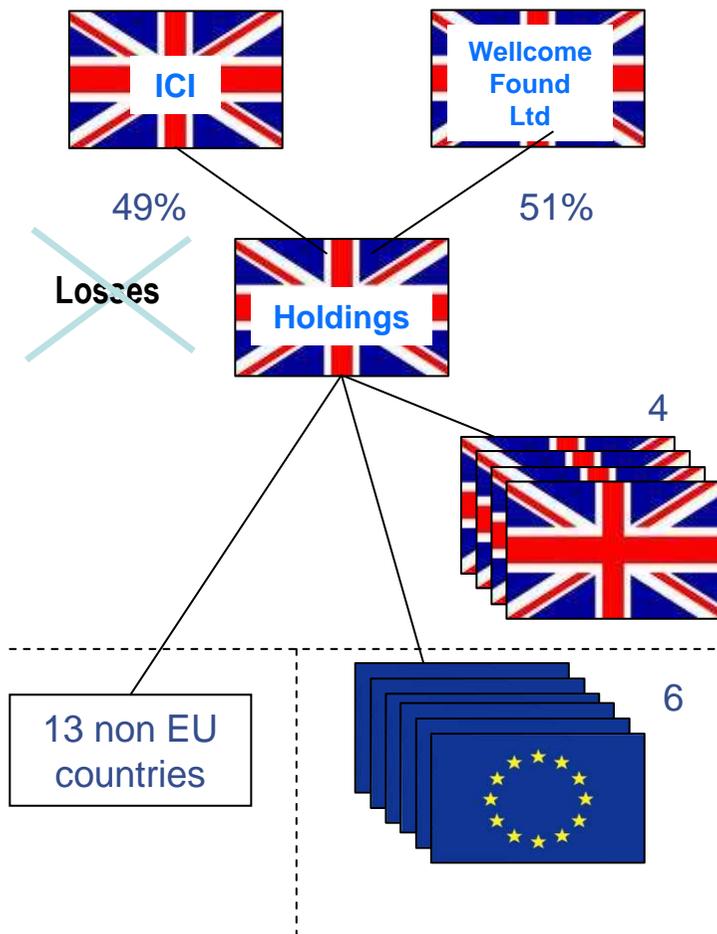
16.7.98 – C-264/96 ICI (3)



– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- Such legislation applies the test of the subsidiaries' seat to establish differential tax treatment of consortium companies established in the United Kingdom. **Consortium relief** is available only to companies controlling, wholly or mainly, subsidiaries whose seats are in the national territory (14)

16.7.98 – C-264/96 ICI (4)

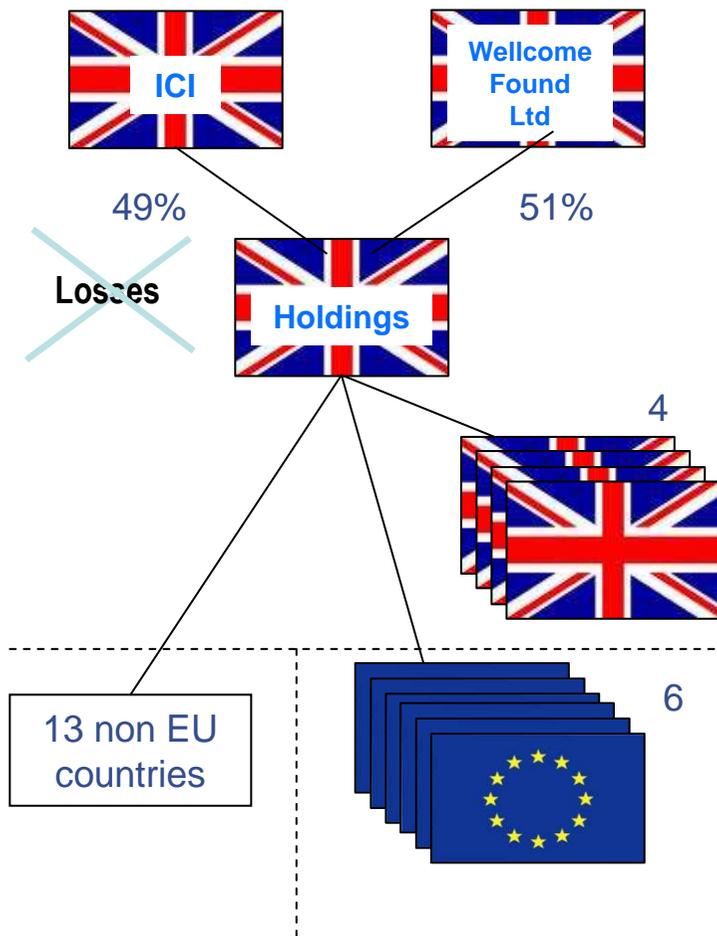


– Is there a justification?

- Risk of tax evasion. Group of companies could transfer profits abroad and losses in the UK (26). However, this is not the aim of the legislation under analysis (27). In addition, it is sufficient to have only one non UK company to transfer profits outside UK (28)
- Loss of fiscal revenues. This is not a justification (28)

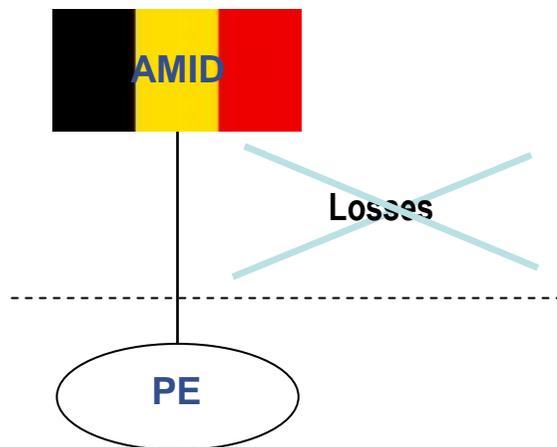
– Proportionality? N/A

16.7.98 – C-264/96 ICI (5)



- An important statement on anti avoidance
 - The establishment of a company outside the United Kingdom does not, of itself, necessarily entail tax avoidance, since that company will in any event be subject to the tax legislation of the State of establishment (26)
 - I.e, the mere fact that a subsidiary is established in another MS cannot, of itself, be treated as giving rise to anti avoidance (The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007, par. 2)

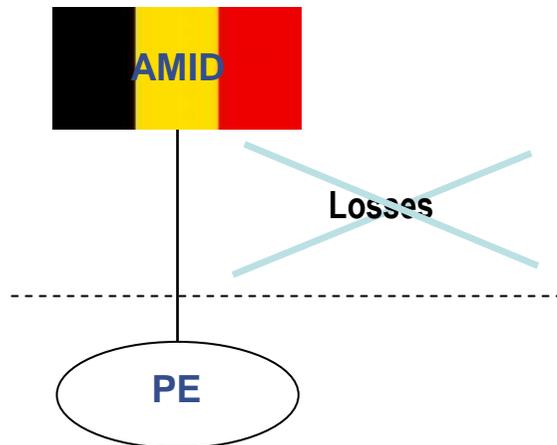
14.12.00 – C-141/99 AMID



– Facts

- AMID is a Belgian limited liability company which has its seat and fiscal domicile in Belgium. The company also has a permanent establishment in Luxembourg. Under the Convention, AMID's income from its permanent establishment in Luxembourg is exempt from tax in Belgium (9)
- Since, under the Luxembourg corporation tax system, it was not possible to set off the Belgian loss against the Luxembourg profit, AMID, in its Belgian corporation tax return in respect of the 1982 accounting year, deducted its Belgian loss of 1981 from its Belgian profits of 1982 (11)

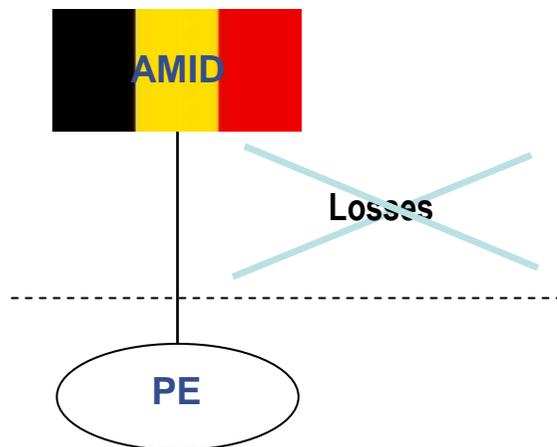
14.12.00 – C-141/99 AMID (2)



– Facts

- The Belgian tax administration rejected that deduction on the ground that, in this case, the Belgian loss of 1981 should, in accordance with Belgian law, have been set off against the profits made the same year in Luxembourg, with the result that it could not be deducted from the Belgian profits of 1982 (12)

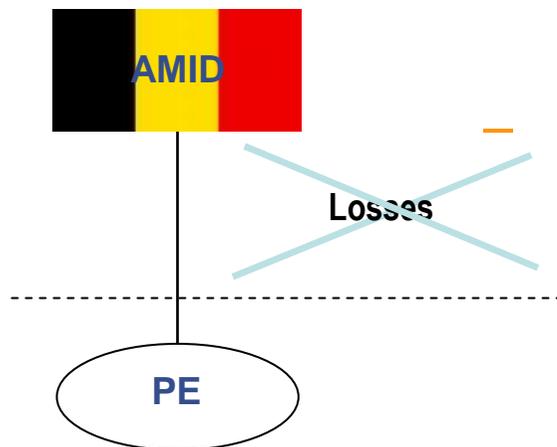
14.12.00 – C-141/99 AMID (3)



– Question

- Does EU law preclude the application of national legislation of a Member State under which, for the purposes of assessment to corporation tax, a business loss incurred in that Member State during an earlier taxable period by a company established in that State can be offset against the profits made by that company during a later taxable period only to the extent to which that loss cannot be attributed to the profit made by a permanent establishment of that company in another Member State during that earlier taxable period, with the result that the loss thus attributed cannot be offset, in either of the Member States concerned, against the taxable income of that company for the purposes of assessment to corporation tax, whereas, if the permanent establishment were located in the same Member State as the company, the business losses in question could certainly be set off against the taxable income of that company?

14.12.00 – C-141/99 AMID (4)



— **Have you exercised a fundamental Freedom?**

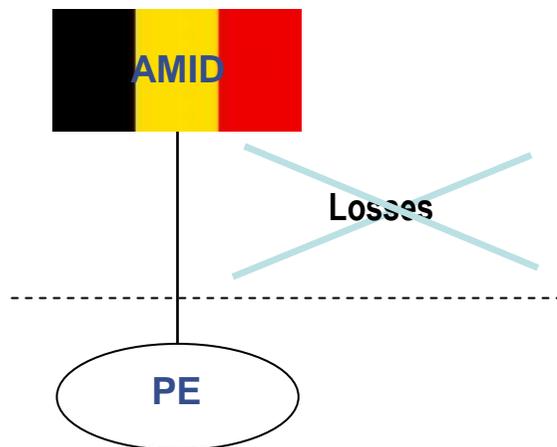
- Freedom of establishment (20)

— **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**

- The legislation at issue in the main proceedings limits the possibility of carrying forward losses incurred in that Member State during a previous tax period where, during that same tax period, those companies made profits in another Member State through the intermediary of a permanent establishment, whereas it would be possible to set off those losses if the establishments of those companies were situated exclusively in the Member State of origin (22)

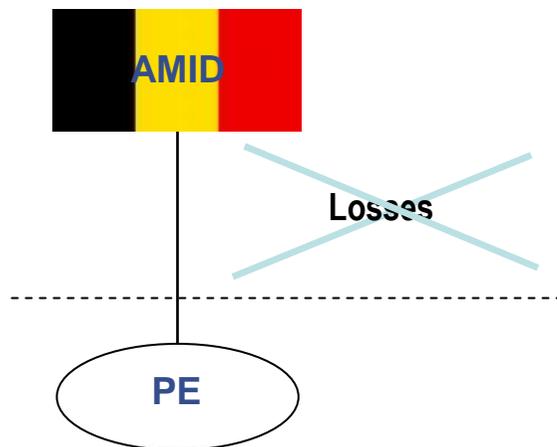
14.12.00 – C-141/99 AMID (5)

– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?



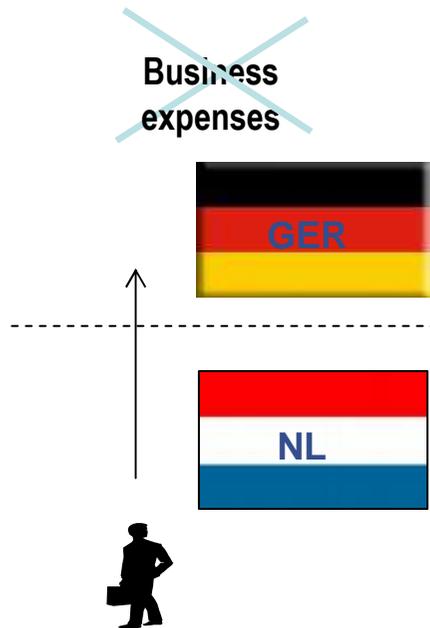
- By setting off domestic losses against profits exempted by treaty, the legislation of that Member State establishes a differentiated tax treatment as between companies incorporated under national law having establishments only on national territory and those having establishments in another Member State. As the Belgian Government itself recognizes, where such companies have a permanent establishment in a Member State other than that of origin and a convention to prevent double taxation binds the two States, those companies are likely to suffer a tax disadvantage which they would not have to suffer if all their establishments were situated in the Member State of origin (23)

14.12.00 – C-141/99 AMID (6)



- The same principles have been applied in **Mertens** (12.2.02, C-431/01). Mr Mertens is a Belgium resident working in Germany (free movement of workers) trying to offset losses incurred in Belgium in the previous year against profits in Belgium

12.6.03 – C-234/01 Gerritse



Mr. Gerritse

Dutch citizen

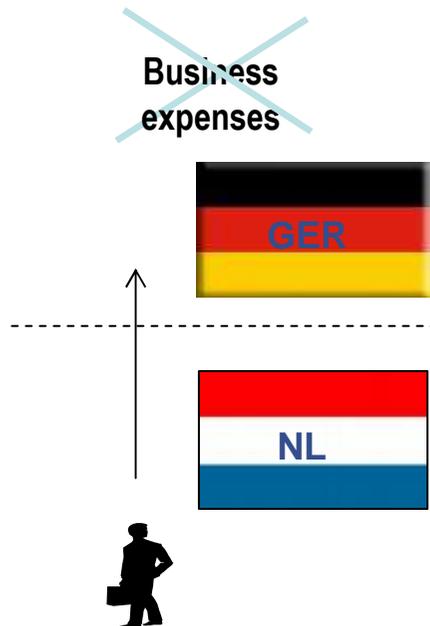
Resident in the
Netherlands

Working in
Germany as an
artist

– Facts

- According to German tax law, non residents are subject to 25% definitive withholding tax in respect to artistic performances (3)
- No deduction of business expenses is in principle authorized, unless those costs represent more than half of the income received (4). These expenses are deductible for German residents
- Non resident persons can ask to be treated as fully taxable individuals but only if either their income is more than 90% of the total earned during the year or the amount is equal or less a certain threshold (7)
- Mr. Gerritse asked to be treated as a resident in Germany to deduct business expenses but the tax office refused due to the lack of the mentioned conditions (12)

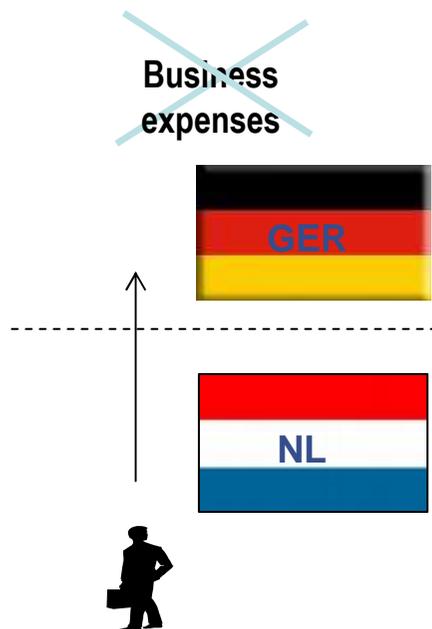
12.6.03 – C-234/01 Gerritse (2)



Mr. Gerritse
Dutch citizen
Resident in the
Netherlands
Working in
Germany as an
artist

- **Question**
 - Is this rule contrary to EU law?
- **Have you exercised a fundamental Freedom?**
 - Freedom to provide services (23)
- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - It is to be noted that the business expenses in question are **directly linked** to the activity that generated the taxable income in Germany, so that residents and non-residents are placed in a comparable situation in that respect (27)

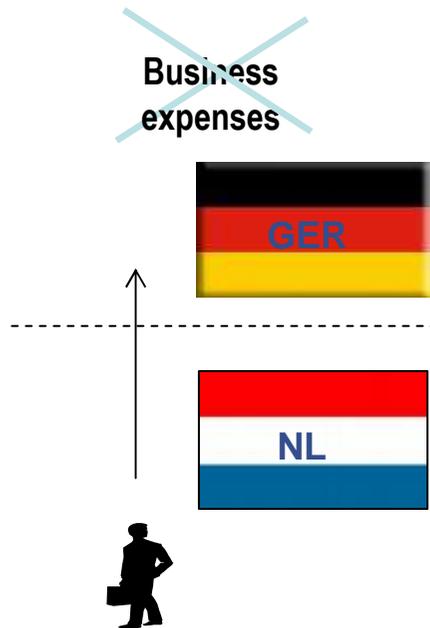
12.6.03 – C-234/01 Gerritse (3)



Mr. Gerritse
Dutch citizen
Resident in the
Netherlands
Working in
Germany as an
artist

- Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?
 - Discrimination. (28)
- Is there a justification? N/A
- Proportionality? N/A
- The same principles have been applied in **Conijn** (6.7.06, C-346/04): EU law precludes national legislation which does not allow a person with restricted tax liability to deduct from his taxable income, as special expenditure, the costs incurred by him in obtaining **tax advice for the purpose of preparing his tax return**, in the same way as a person with unrestricted tax liability

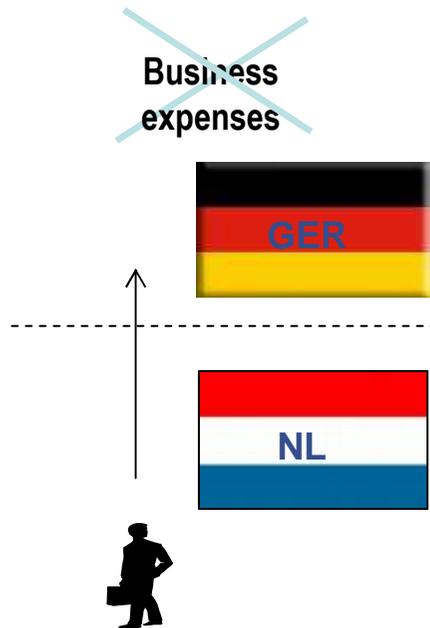
12.6.03 – C-234/01 Gerritse (4)



Mr. Gerritse
Dutch citizen
Resident in the
Netherlands
Working in
Germany as an
artist

- The same principles have also been applied in **Scorpio** (3.10.06, C-290/04).
- In the ruling, the Court held that EU law must be interpreted as **precluding**
 - National legislation which does not allow a recipient of services who is the debtor of the payment made to a non-resident provider of services to deduct, when making the retention of tax at source, the business expenses which that service provider has reported to him and which are **directly linked** to his activity in the Member State in which the services are provided, whereas a provider of services residing in that State is taxable only on his net income, that is, the income received after deduction of business expense

12.6.03 – C-234/01 Gerritse (5)



Mr. Gerritse

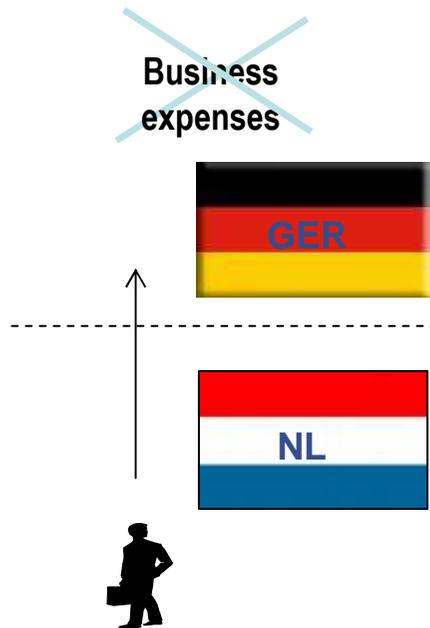
Dutch citizen

Resident in the
Netherlands

Working in
Germany as an
artist

- In this ruling, the Court also held that EU law must be interpreted as **not precluding**
 - National legislation under which a procedure of retention of tax at source is applied to payments made to providers of services not resident in the Member State in which the services are provided, whereas payments made to providers of services resident in that Member State are not subject to such a retention
- **The final withholding tax is necessary to ensure the effectiveness of fiscal supervision and is proportionate (35-37)**

12.6.03 – C-234/01 Gerritse (6)



Mr. Gerritse

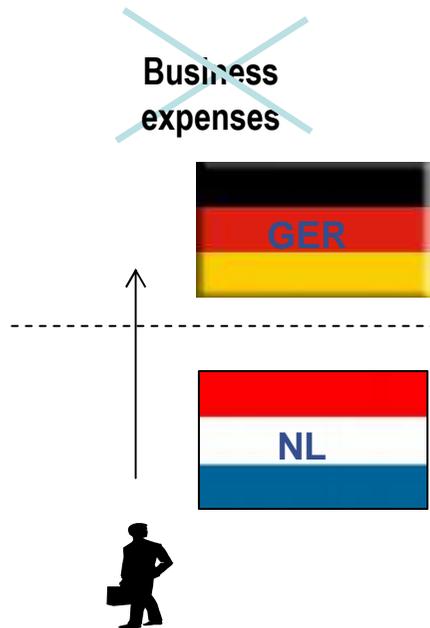
Dutch citizen

Resident in the
Netherlands

Working in
Germany as an
artist

- In this ruling, the Court also held that EU law must be interpreted as **not precluding**
 - National legislation under which **liability is incurred by a recipient of services** who has failed to make the retention at source that he was required to make
 - The liability is necessary to ensure the **effectiveness of fiscal supervision** and is proportionate (38)
 - A rule that the tax exemption granted under the DTT to a non-resident provider of services who has carried on activity in Germany can be taken into account by the payment debtor in the procedure for retention of tax at source only if a **certificate** of exemption stating that the conditions laid down to that end by that convention are satisfied is issued by the competent tax authority

12.6.03 – C-234/01 Gerritse (7)



Mr. Gerritse

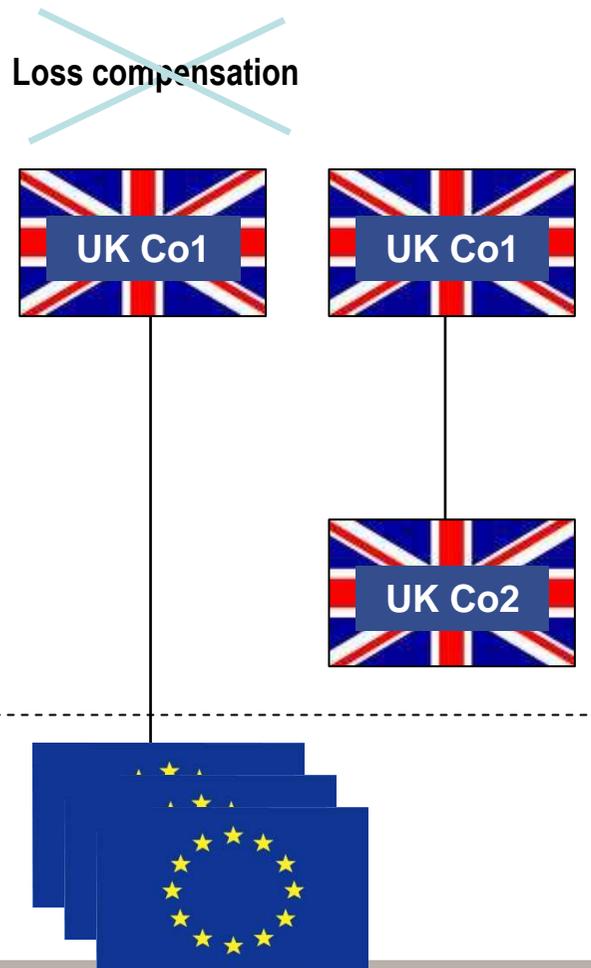
Dutch citizen

Resident in the
Netherlands

Working in
Germany as an
artist

- Finally, the same principles have also been applied in **Centro equestre** (15.2.07, C-345/04) with respect to a company: EU does not preclude national legislation in so far as that legislation makes repayment of corporation tax deducted at source on the income of a taxpayer with restricted tax liability subject to the condition that the operating expenses in respect of which a deduction is claimed for that purpose by that taxpayer have a **direct economic connection** to the income received from activities pursued in the Member State concerned, on condition that all the costs that are inextricably linked to that activity are considered to have such a direct connection, irrespective of the place and time at which those costs were incurred. By contrast, EU law precludes such national legislation in so far as it makes repayment of that tax to that taxpayer subject to the condition that those same operating expenses exceed half of that income

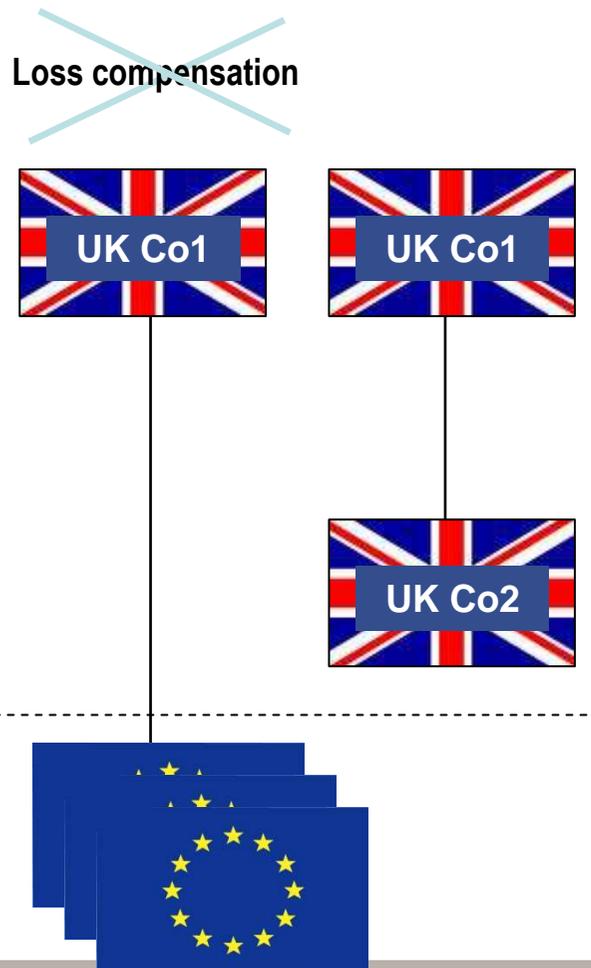
13.12.05 – C-446/03 Marks & Spencer



– Facts

- In the United Kingdom, group relief allows the resident companies (and branches of non-resident persons) in a group to offset their profits and losses **among themselves (12, 16, 17)**
- Marks & Spencer is a company incorporated and registered in England and Wales. It is the parent company of a number of companies established in the United Kingdom and in other States (18)
- Marks & Spencer wanted to offset losses incurred abroad against profits in the United Kingdom (22)

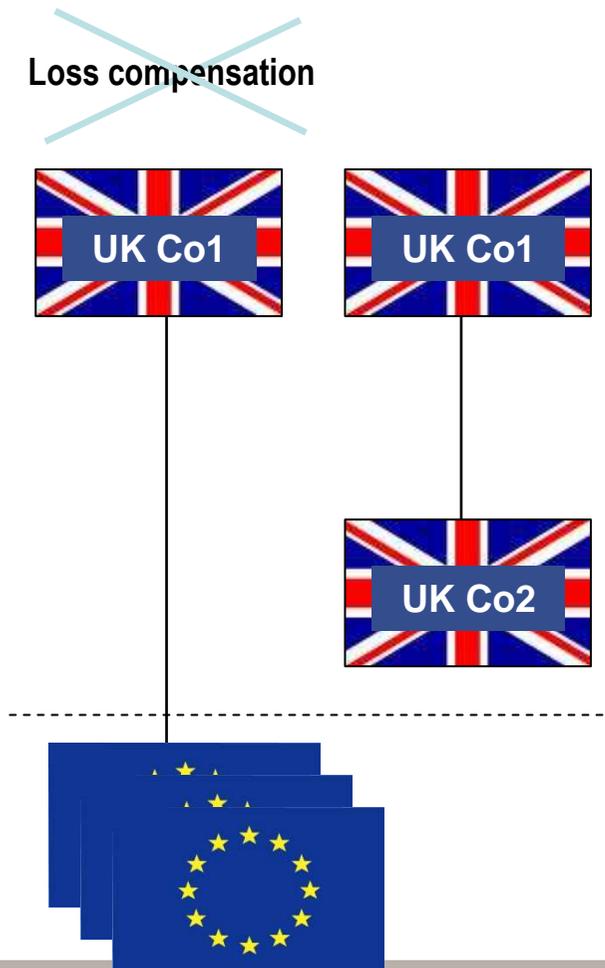
13.12.05 – C-446/03 Marks & Spencer (2)



- **Question**
 - Is the non-possibility to offset foreign losses in compliance with EU law?
- **Have you exercised a fundamental Freedom?**
 - Freedom of establishment (28)
- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - Restriction (34)

13.12.05 – C-446/03 Marks & Spencer (3)

– Is there a justification?

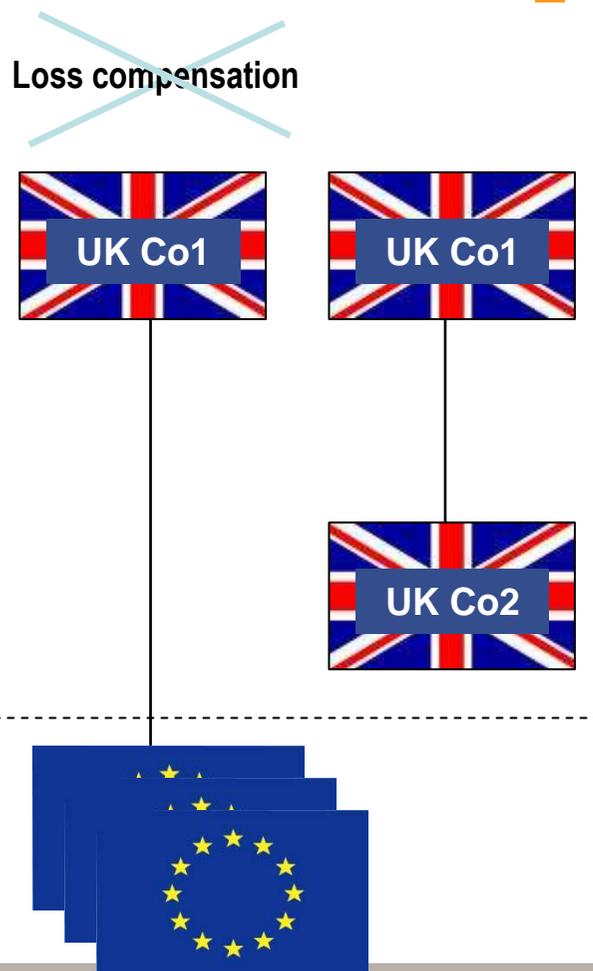


- Such a restriction is permissible only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest. It is further necessary, in such a case, that its application be **appropriate** to ensuring the attainment of the objective thus pursued and **not go beyond** what is necessary to attain it (35)
- Loss of fiscal revenues + risk that losses are taken into consideration twice + risk of tax avoidance.

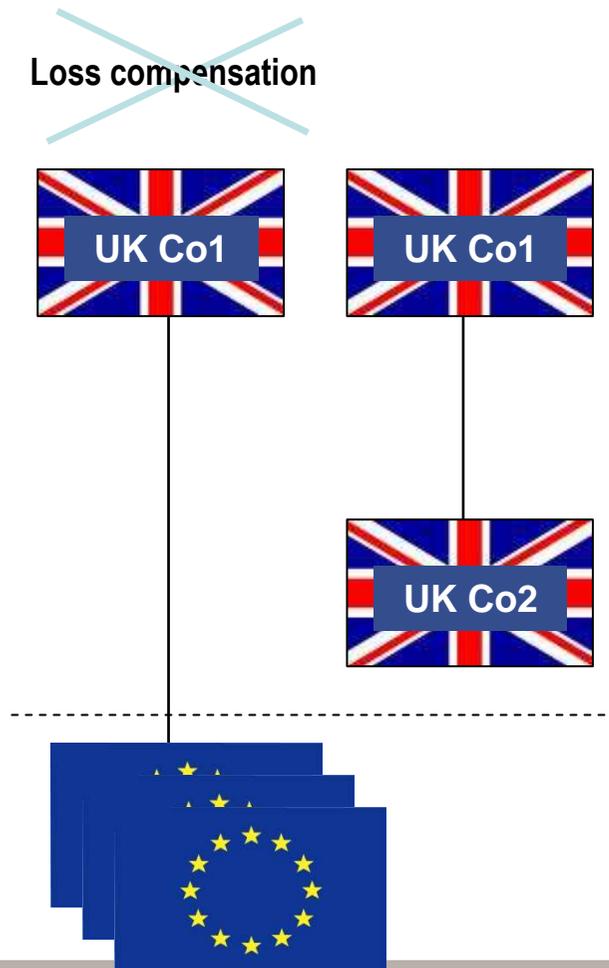
13.12.05 – C-446/03 Marks & Spencer (4)

– Is there a justification?

- Loss of fiscal revenues is not a justification (44). **None the less, the preservation of the allocation of the power to impose taxes** between Member States might make it necessary to apply to the economic activities of companies established in one of those States only the tax rules of that State in respect of both profits and losses (45). In effect, to give companies the option to have their losses taken into account in the Member State in which they are established or in another Member State would significantly **jeopardize a balanced allocation of the power to impose taxes between Member States**, as the taxable basis would be increased in the first State and reduced in the second to the extent of the losses transferred (46)



13.12.05 – C-446/03 Marks & Spencer (5)



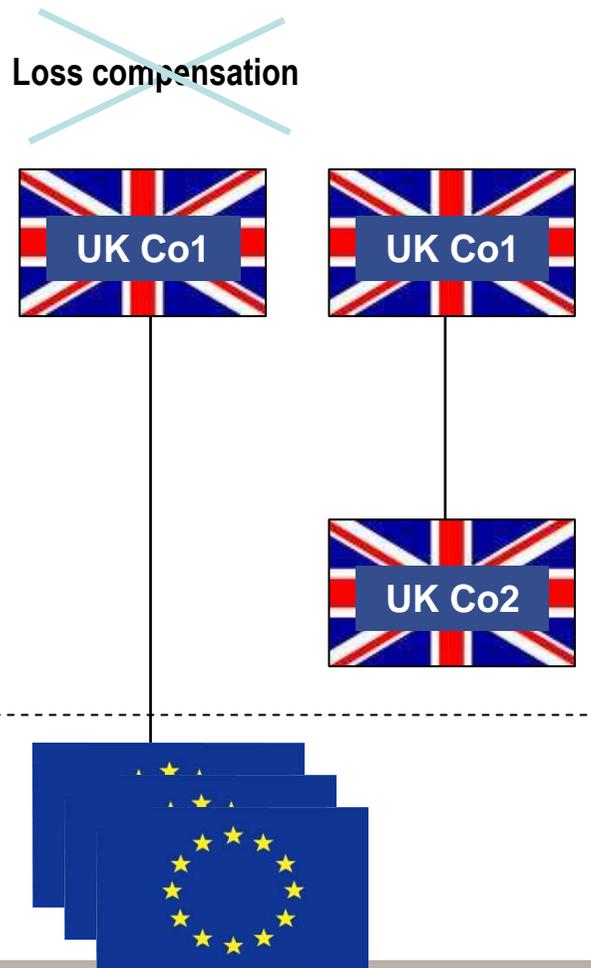
– Is there a justification?

- Risk that losses are taken into consideration twice. Such a risk does exist by simply extending the offsetting of losses also to foreign operations (48)
- Risk of tax avoidance. It must be accepted that the possibility of transferring the losses incurred by a non-resident company to a resident company entails the risk that within a group of companies losses will be transferred to companies established in the Member States which apply the highest rates of taxation and in which the tax value of the losses is therefore the highest (49)

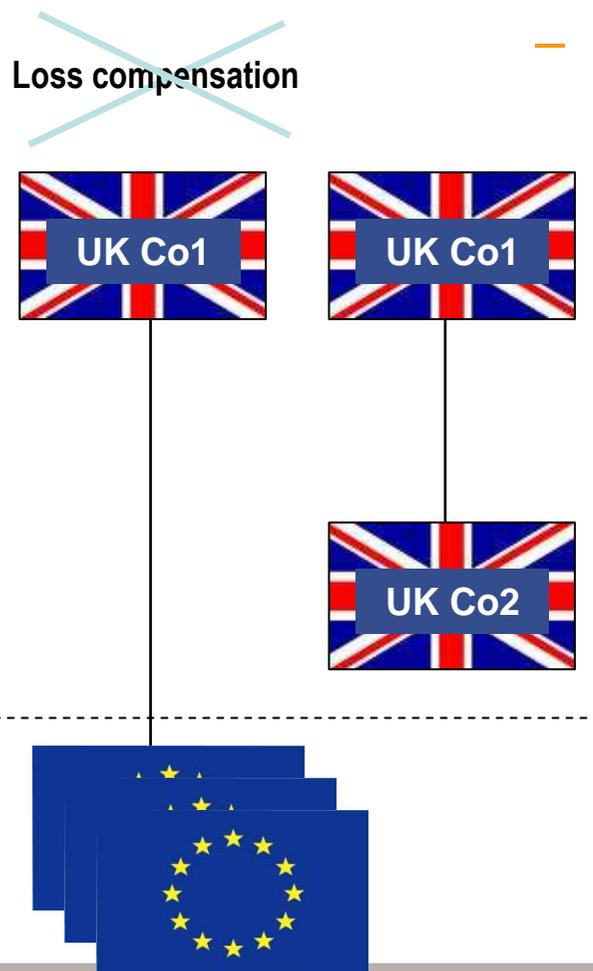
13.12.05 – C-446/03 Marks & Spencer (6)

– Is there a justification?

- In the light of those three justifications, **taken together**, it must be observed that restrictive provisions such as those at issue in the main proceedings pursue legitimate objectives which are compatible with the Treaty and constitute overriding reasons in the public interest and that they are apt to ensure the attainment of those objectives (52)



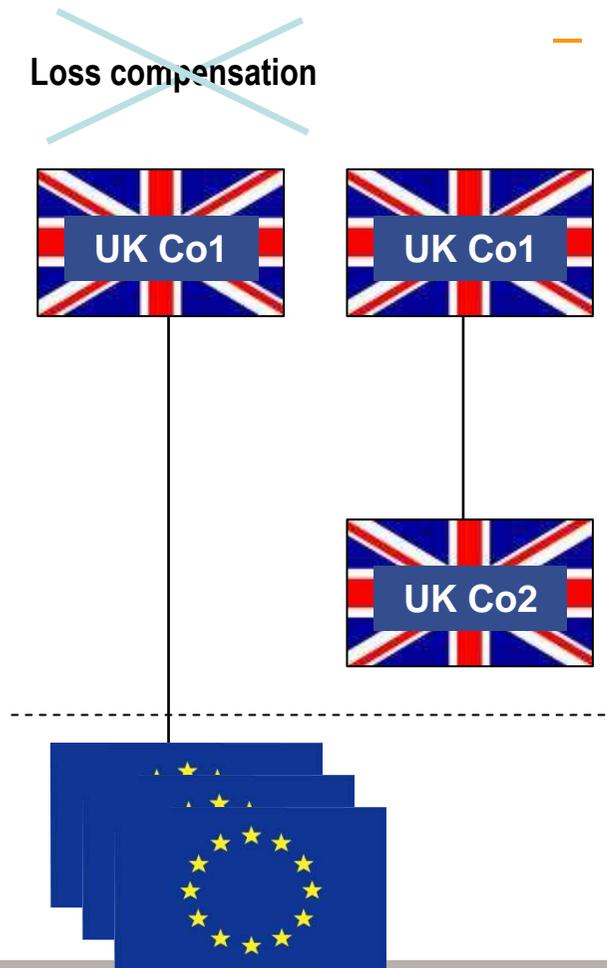
13.12.05 – C-446/03 Marks & Spencer (7)



– Proportionality?

- The Court considers that the restrictive measure at issue in the main proceedings **goes beyond** what is necessary to attain the essential part of the objectives pursued where:
 - 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, if necessary by transferring those losses to a third party or by offsetting the losses against the profits made by the subsidiary in previous periods, **and**

13.12.05 – C-446/03 Marks & Spencer (8)



– Proportionality?

- there is no possibility for the foreign subsidiary's 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
- Where, in one Member State, the resident parent company demonstrates to the tax authorities that those conditions are fulfilled, it is contrary to the freedom of establishment to preclude the possibility for the parent company to deduct from its taxable profits in that Member State the losses incurred by its non-resident subsidiary (56)
- Anti avoidance measures counteracting abusive conducts can be adopted by Member States (57)

Tax treatment of losses in cross-border situations COM (2006) 824 final of December 19, 2006

ECJ: compensation of losses with PE

- ! The ECJ has dealt with cross-border loss offset involving **permanent establishments** in the *Futura* and *AMID* cases.
- ! In *Futura*, the Court looked at the situation from the perspective of the **host State** of the permanent establishment, finding that the territoriality principle could justify limiting the amount of loss carry-forward available in that State to the losses that had an economic link with income earned there

Tax treatment of losses in cross-border situations COM (2006) 824 final of December 19, 2006

ECJ: compensation of losses with PE (2)

- ! In *AMID*, adopting a **home State** perspective, the Court found that the exemption from taxation of Luxembourg permanent establishment profits under Belgium's double tax agreement (DTA) with that country did not establish, in respect of loss relief, an objective difference between the situation of a Belgian company with a permanent establishment in Luxembourg and that of a Belgian company with an establishment (branch) in Belgium. In the absence of justification, different treatment of those two companies as regards the deduction of losses was contrary to the freedom of establishment and could not be accepted

Tax treatment of losses in cross-border situations COM (2006) 824 final of December 19, 2006

ECJ: compensation of losses between companies

- ! The issue of cross-border loss relief **between companies** was the subject of an ECJ decision for the first time in the *Marks & Spencer* case. It was claimed that the refusal to allow the UK parent to set off against its profits the losses of its foreign EU subsidiaries which did not carry on business in the UK infringed the freedom of establishment provided for by the EC Treaty. Trading losses had eventually led to the complete cessation of the activities of most of the subsidiaries

Tax treatment of losses in cross-border situations COM (2006) 824 final of December 19, 2006

ECJ: compensation of losses between companies (2)

- ! The UK put forward several justifications for this restriction: (a) the need for a balanced allocation of taxing powers between the Member States, (b) the need to prevent losses from being taken into account twice, and (c) the risk of tax avoidance. The ECJ accepted that these three factors, taken together, could justify provisions restricting the freedom of establishment. However, it found that the UK group relief scheme did not respect the principle of proportionality where the possibilities for having the losses taken into account in the subsidiary's State of residence had been exhausted

Tax treatment of losses in cross-border situations COM (2006) 824 final of December 19, 2006

Compensation of losses with PE

- ! The methods for relieving juridical double taxation chosen by MS are mainly the following:
 - Tax credit
 - Income exemption: losses are not taken into account
 - Tax exemption: losses are taken into account and recaptured once profitability return

Tax treatment of losses in cross-border situations COM (2006) 824 final of December 19, 2006

The Commission view on compensation of losses with PE

- Where losses incurred by permanent establishments may not be set off against profits of a head office (“vertical upward” set-off), there will be a difference in treatment in comparison with a purely domestic situation. This makes it less attractive to exercise freedom of establishment and a company may refrain from setting up a permanent establishment in another Member State. Such a difference in treatment constitutes an obstacle to the freedom of establishment which is prohibited by Article 43 EC

Tax treatment of losses in cross-border situations COM (2006) 824 final of December 19, 2006

The Commission view on compensation of losses with PE (2)

- ! The ECJ explicitly stated in *AMID* that the situation of a company with a permanent establishment abroad is in a comparable situation to that of a company without one
- ! The need to prevent losses being taken into account twice may be addressed by a **recapture mechanism**. Whereas in domestic situations loss recapture occurs automatically, in cross-border situations such a recapture mechanism has to be provided for expressly

Tax treatment of losses in cross-border situations COM (2006) 824 final of December 19, 2006

The Commission view on compensation of losses with PE (3)

- ! The risk of tax avoidance is very limited for the losses incurred by a permanent establishment, since losses are taken into account only at the level of the head office (“vertical upward” setoff)

Tax treatment of losses in cross-border situations COM (2006) 824 final of December 19, 2006

Compensation of losses between companies

- ! The methods for relieving economic double taxation chosen by MS are mainly the following:
 - Intra-group loss transfer
 - Pooling of the tax results of a group
 - Full tax consolidation (for tax purposes, the legal personality of the group members and any intra-group transaction is disregarded)

Tax treatment of losses in cross-border situations COM (2006) 824 final of December 19, 2006

Compensation of losses between companies (2)

- Simply extending regimes applicable in domestic situations to cross-border situations, although representing an improvement over the current situation, would not produce an ideal solution. In domestic situations recapture of the losses is automatic: extending such a scheme to cross-border situations therefore needs an explicit mechanism for recapture. It could also be technically difficult to extend all aspects of a domestic system for loss relief to a cross-border situation. All Member States with a system for cross-border loss relief apply different rules in cross-border and domestic situations

Tax treatment of losses in cross-border situations COM (2006) 824 final of December 19, 2006

The principles of the M&S ECJ ruling

- ! Permanent loss relief should be granted by the MS of the parent company only in case of terminal losses
- ! The risk of taking losses into consideration twice can be addressed by making relief conditional upon the subsidiary having exhausted the immediate possibilities for loss relief available in its MS of residence
- ! The risk of tax avoidance increases when a group of companies is free to determine when and where it wished to have its losses

Tax treatment of losses in cross-border situations COM (2006) 824 final of December 19, 2006

The commission view on compensation of losses between companies

- ! The Commission believes that concerns of anti avoidance can largely be met by:
 - Limiting cross-border relief to vertical upward situations and
 - Having a recapture provision and
 - Having a requirement that any relief currently available to the subsidiary be used first

Tax treatment of losses in cross-border situations COM (2006) 824 final of December 19, 2006

The commission view on compensation of losses between companies

! A targeted measure should:

- Permit an effective and immediate, once-only deduction of losses
- Allows, as a minimum, vertical upwards set-off
- Not result in a definitive shift of income from one MS to another unless losses are terminal and there is no possibilities for relief in the MS in which they are incurred
- Exhaust domestic possibilities for current loss relief first
- Not offer scope for abuse

Tax treatment of losses in cross-border situations COM (2006) 824 final of December 19, 2006

The commission view on compensation of losses between
companies

! Alternatives for cross-border loss relief might be

Alternative 1	Alternative 2	Alternative 3
Definitive loss transfer without recapture	Temporary transfer of loss with recapture in future years (when the sub returns to profitability)	Current taxation of profits and losses of subsidiary results

Parent subsidiary directive

Fabio Aramini, LL.M., Partner

Studio Adonnino Ascoli & Cavasola Scamoni

History

- ! **Directive 90/435/EEC of July 23, 1990**

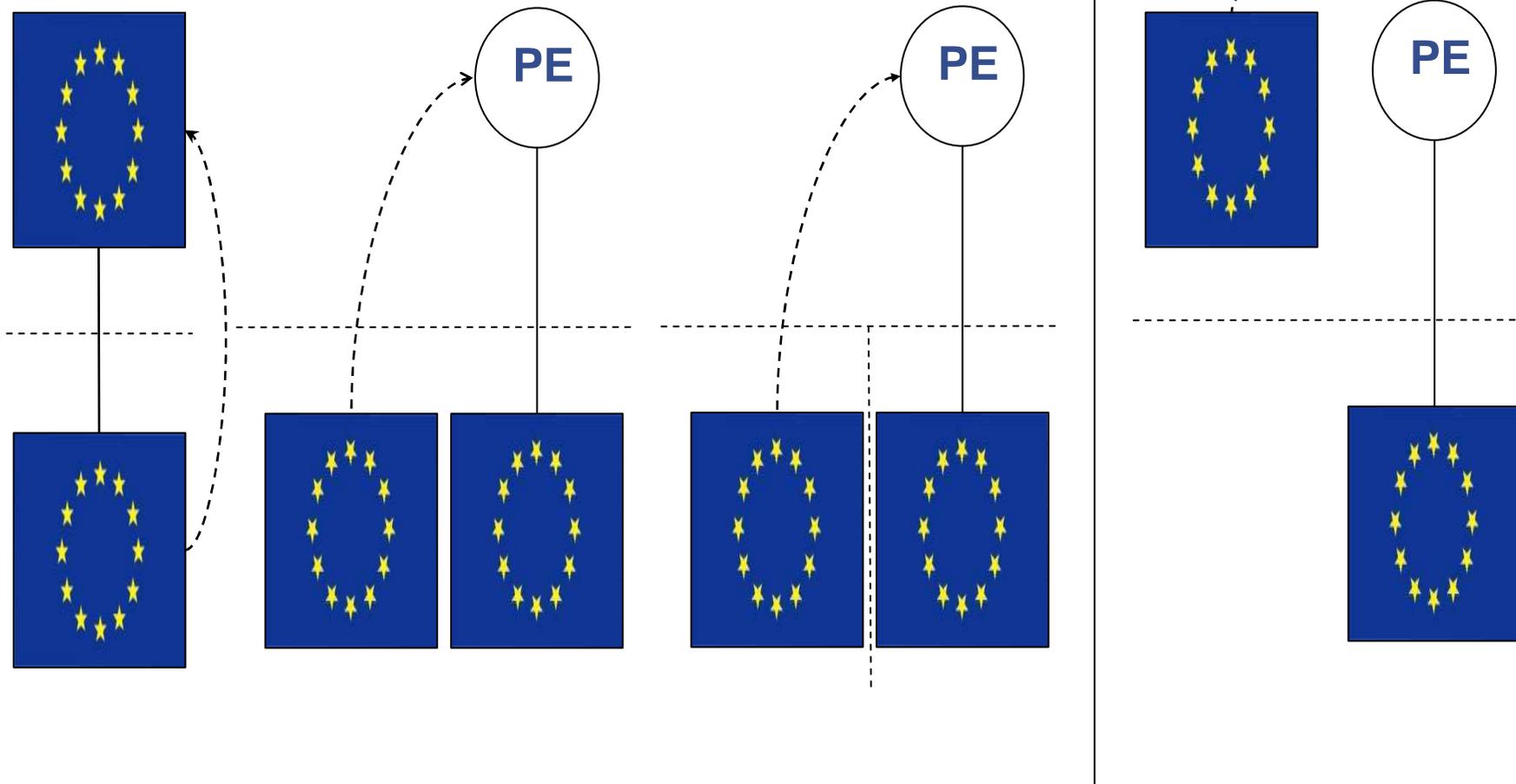
- ! **Directive 2003/123/EC of December 22, 2003**
 - Update of the list (Annex)
 - Application to PE
 - Reduction of the participation threshold
 - Lower tier subsidiaries
 - Hybrid entities

- ! **Directive 2006/98/EC of November 20, 2006 to adapt list of companies and taxes to Accession Countries**

Scope of the PSD

Applicable

NOT Applicable



Requirements

- ! Taking one of the forms listed in the Annex
- ! Resident in the EU without being DTT non resident outside EU
- ! Subject to tax
- ! Minimum holding of 15% of the capital or voting rights
 - 10% starting from January 1, 2009
- ! Optional
 - Holding period: 2 years

Elimination of juridical and economic double taxation

! The source State must

- Refrain from taxing distributed profits

! The residence State must

- Exempt received dividends from taxation or
- Tax such dividends while providing for ITC for each lower tier subsidiaries meeting the tests
 - Hybrid entities

Main ECJ rulings on the PSD

- ! 17.10.96 – C-283/94 **Denkavit**
- ! 6.6.00 – C-375/98 **Epson**
- ! 4.10.01 – C-294/99 **Athinaiki Zythopoiia**
- ! 18.9.03 – C-168/01 **Bosal**
- ! 25.9.03 – C-58/01 **Océ**

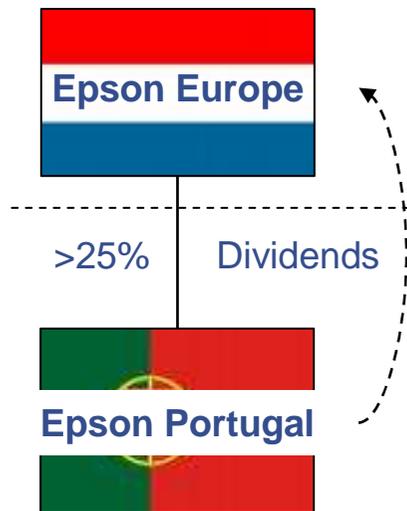
17.10.96 – C-283/94 **Denkavit**

- ! Reference must be made to the actual wording of the second indent of Article 3(2) of the Directive, according to which a parent company may be deprived of the exemption from withholding tax only if it "does not maintain such a holding for an uninterrupted period of at least two years." (24)
- ! It follows from the wording of that provision, and in particular from the use of the **present tense** ("maintain") in all language versions except the Danish, that, in order to receive the tax advantage, the parent company must have a holding in the subsidiary during a certain period of time, without its being necessary that this period should have come to an end at the time when the tax advantage is granted (25)

17.10.96 – C-283/94 **Denkavit (2)**

- ! Moreover, the interpretation is confirmed by the purpose of the Directive, which is to facilitate the tax arrangements governing cross-border cooperation. Member States cannot therefore, in this regard, unilaterally introduce restrictive measures such as the requirement, as in this instance, that a minimum holding period must already have been completed when the profits in respect of which the tax advantage is sought are distributed (26)
- ! The Member States' option to lay down a minimum period during which the parent company must maintain a holding in the subsidiary is to be interpreted **strictly** (27)
- ! Member States are free to determine, in the light of the requirements of their domestic legal systems, the detailed arrangements for ensuring that this period is observed

6.6.00 – C-375/98 Epson



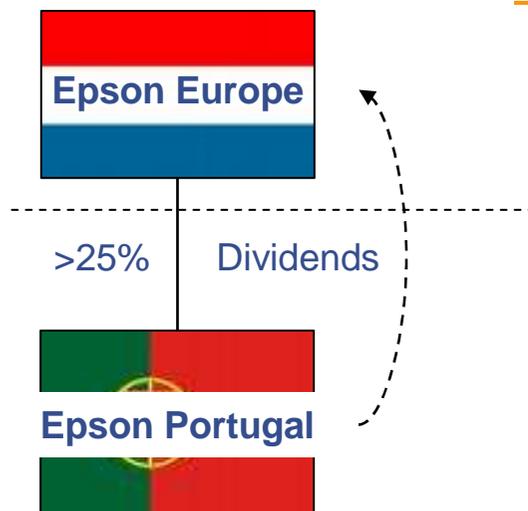
– Facts

- According to the Portuguese law, a succession and donation tax (ISD) is levied upon distribution of dividends by Portuguese companies (6)

– Question

- Is such a tax compatible with the parent subsidiary directive?

6.6.00 – C-375/98 Epson (2)

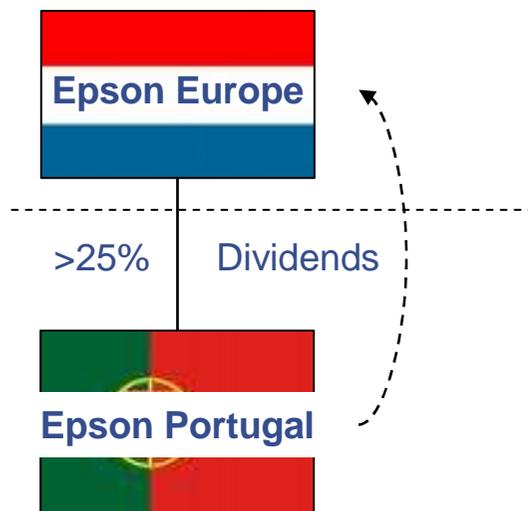


– Decision

- It must be observed at the outset that, as is clear in particular from the third recital in its preamble, the Directive seeks, by the introduction of a common tax system, to ensure that cooperation between companies of different Member States is not penalized as compared with cooperation between companies in the same Member State and thereby to facilitate the grouping together of companies at Community level. Thus, with a view to avoiding double taxation, Article 5(1) of the Directive provides for exemption in the State of the subsidiary from withholding tax upon distribution of profits (20)

6.6.00 – C-375/98 Epson (3)

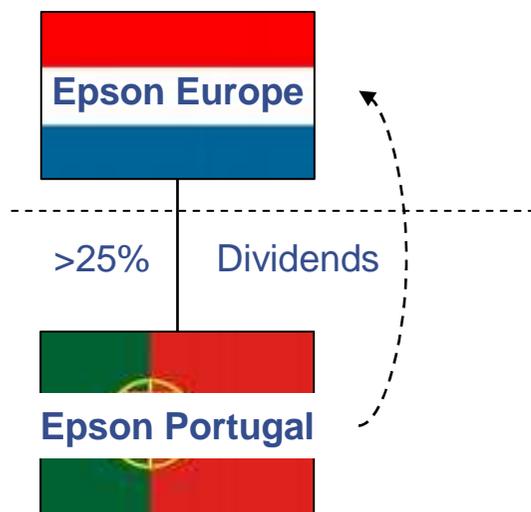
– Decision



- It is in order to determine whether the levying of ISD on distributed profits falls within the scope of Article 5(1) of the Directive, reference must be made, in particular, to the wording of that provision. The term 'withholding tax' contained in it is not limited to certain specific types of national taxation. In particular, Article 2(c) of the Directive enumerates, for the purpose of identifying those companies in the Member States which are regarded as falling within the scope of the Directive, the national taxes to which those companies are normally subject, and the Portuguese tax referred to is the 'imposto sobre o rendimento das pessoas colectivas', that is to say IRC. However, it cannot be inferred from this that other taxes having the same effect are authorized, particularly since the final part of Article 2 refers expressly to 'any other tax which may be substituted for any of the above taxes (22)

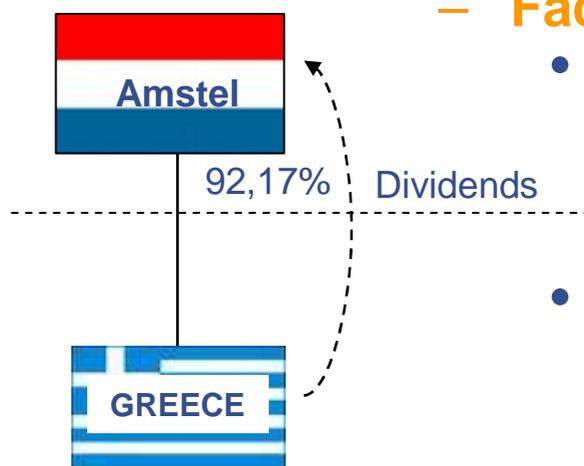
6.6.00 – C-375/98 Epson (4)

– Decision



- As regards the Portuguese Government's argument that it is clear from various documents and, in particular, from a declaration of the Council that ISD was excluded from the scope of Article 5(1) of the Directive, there is no basis for that contention in the wording of the Directive. Moreover, according to settled case-law, declarations recorded in Council minutes in the course of preparatory work leading to the adoption of a directive cannot be used for the purpose of interpreting that directive where no reference is made to the content of the declaration in the wording of the provision in question, and, moreover, such declarations have no legal significance (26)

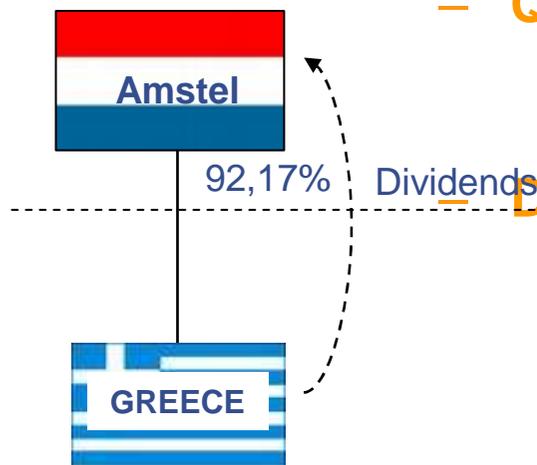
4.10.01 – C-294/99 **Athinaiki Zythopoiia**



– Facts

- According to Greek tax law, where a distribution is made, the taxable profits are supplemented by the fraction of the non-taxable profits or profits subject to special taxation (13)
- Thus, where a public limited company governed by Greek law whose gross income includes non-taxable income or income subject to special taxation, that is to say to reduced taxation, distributes profits, those profits are deemed to arise proportionally from that income. Consequently, in order to determine the basic taxable amount, non-taxable income and income subject to special taxation are reincorporated into the basis of assessment *pro tanto*, after being converted into gross amounts (15)

4.10.01 – C-294/99 Athinaiki Zythopoia (2)



– Question

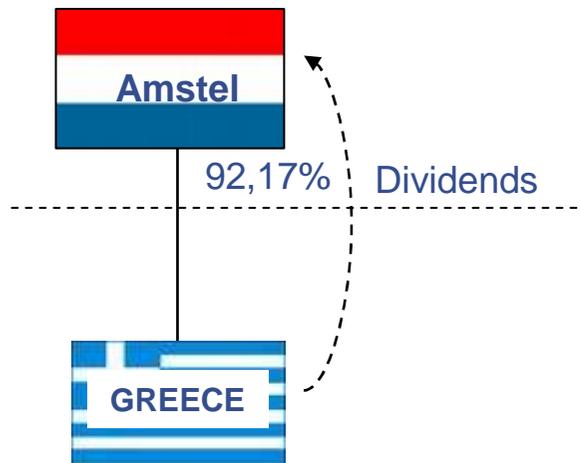
- Is there a withholding tax within the meaning of the Parent –Subsidiary Directive?

Decision

- As appears particularly from the third recital in its preamble, the Directive, with a view to avoiding double taxation, provides for exemption in the State of the subsidiary from withholding tax upon distribution of profits (25)

4.10.01 – C-294/99 **Athinaiki Zythopoiia** (3)

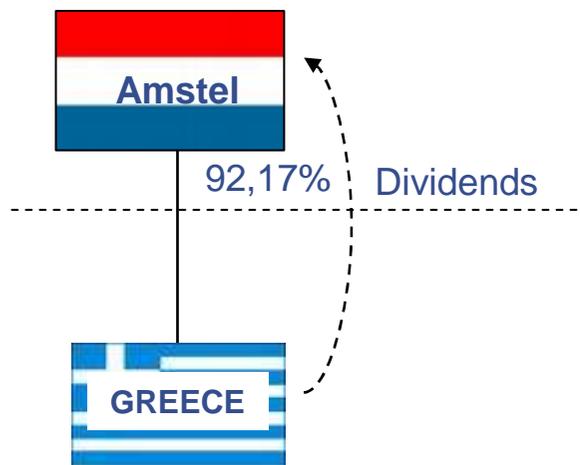
– Decision



- It is settled case-law that the nature of a tax, duty or charge must be determined by the Court, under Community law, according to the objective characteristics by which it is levied, irrespective of its classification under national law (27)
- It is apparent that the **chargeable event** for the taxation at issue is the payment of dividends. In addition, the amount of tax is directly related to the size of the distribution (28)

4.10.01 – C-294/99 *Athinaiki Zythopoiia* (4)

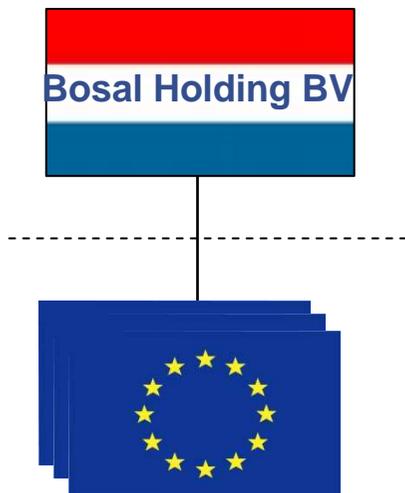
– Decision



- The taxation relates to income which is taxed only in the event of a distribution of dividends and up to the limit of the dividends paid. That is shown by the fact (*inter alia*) that the increase in the basic taxable amount generated by the distribution of profits cannot be offset by the subsidiary using negative income from previous tax years, contrary to the fiscal principle enabling losses to be carried forward which is nevertheless laid down in Greek law (29)

18.9.03 – C-168/01 Bosal

~~Deduction of costs~~



– Facts

- Bosal Holding BV is a Dutch resident company
- According to Dutch tax law, in determining profit no account shall be taken of gains acquired from a holding or of the costs relating to a holding, unless it is evident that such costs are **indirectly instrumental in making profit that is taxable in the Netherlands** (exemption relating to holdings) (8)
- Based on such rule, the Dutch tax office refused the deduction of interest paid related to the acquisition of holdings in other Member States

– Question

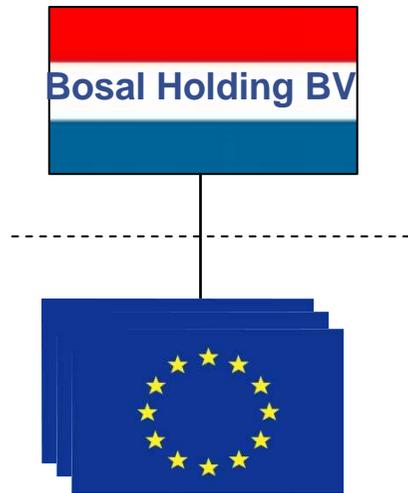
- Is the deny of deduction of interest paid in relation to the acquisition of foreign holdings in compliance with EU law?

– Have you exercised a fundamental Freedom?

- Freedom of establishment

18.9.03 – C-168/01 Bosal (2)

~~Deduction of costs~~

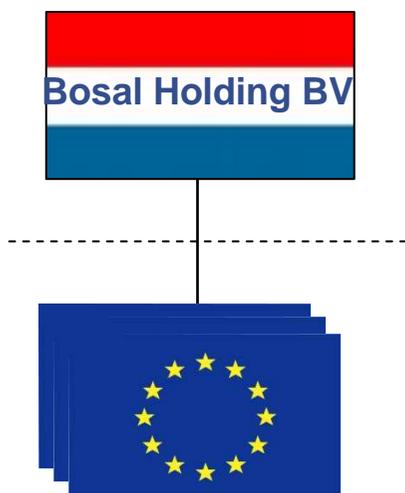


**Is there a discrimination or a restriction? Overt?
Covert? Home or Host State?**

- According to the Parent Subsidiary Directive each Member State retains 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
- It follows that, in so Dutch tax law merely implements the possibility offered by the Parent Subsidiary directive to refuse the deduction of costs incurred by parent companies in connection with holdings in the capital of their subsidiaries, it is compatible with the directive (25)

18.9.03 – C-168/01 Bosal (3)

~~Deduction of costs~~

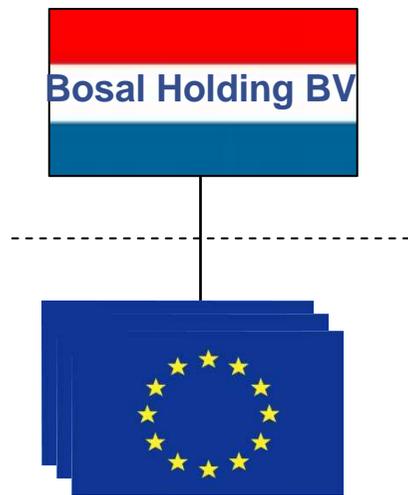


Is there a discrimination or a restriction? Overt? Covert?
Home or Host State?

- However, that possibility may be exercised only in compliance with the fundamental provisions of the Treaty (26)
- The limitation laid down in Dutch Tax Law, even if only indirectly, constitutes a **hindrance** to the establishment of subsidiaries in other Member States (27)
- Moreover, such a limitation goes against the objective set forth by the directive, spelt out in the third recital of its preamble, according to which it is necessary to introduce a common system and eliminate the disadvantage due to the application of tax provisions governing relations between parent companies and subsidiaries of different Member States which are less advantageous than those applicable to parent companies and subsidiaries of the same Member State (28)

18.9.03 – C-168/01 Bosal (4)

~~Deduction of costs~~



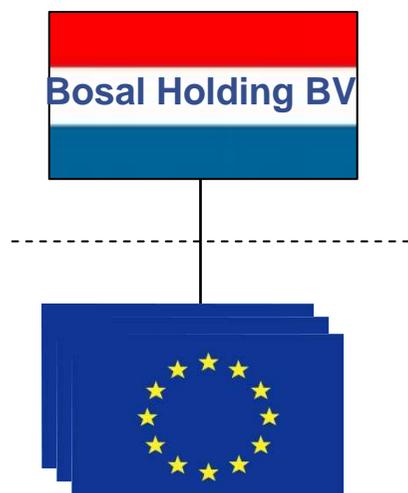
– Is there a justification?

- Tax cohesion. There is no direct link (28)
- Principle of territoriality. In that respect, it should be noted that the application of the territoriality principle in *Futura* concerned the taxation of a **single company** which carried on business in the Member State where it had its principal establishment and in other Member States from secondary establishments (38)
- Loss fiscal revenues. This argument cannot be accepted (42)

– Proportionality? N/A

18.9.03 – C-168/01 Bosal (5)

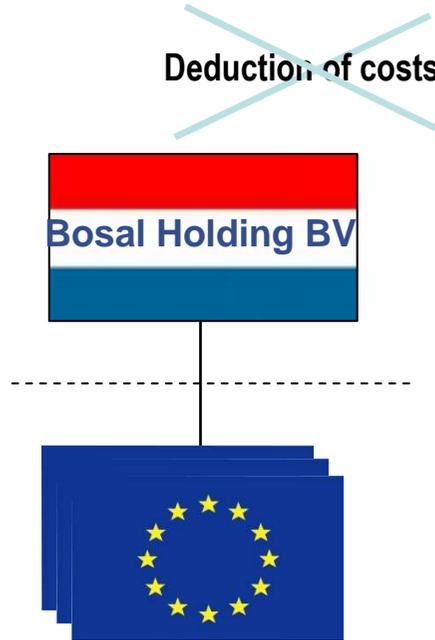
~~Deduction of costs~~



- The same principles have been applied in **Keller** (23.2.06, C-471/04): EU law and the Agreement on the European Economic Area of 2 May 1992 must be interpreted as precluding legislation of a Member State which excludes the possibility of deducting for tax purposes financing costs incurred by a parent company subject to unlimited tax liability in that State in order to acquire holdings in a subsidiary where those costs relate to dividends which are exempt from tax because they are derived from an indirect subsidiary established in another Member State or in a State which is party to the Agreement, whereas such costs may be deducted where they relate to dividends paid by an indirect subsidiary established in the same Member State as that of the place of the registered office of the parent company and which, in reality, also benefit from a tax exemption

18.9.03 – C-168/01 Bosal (6)

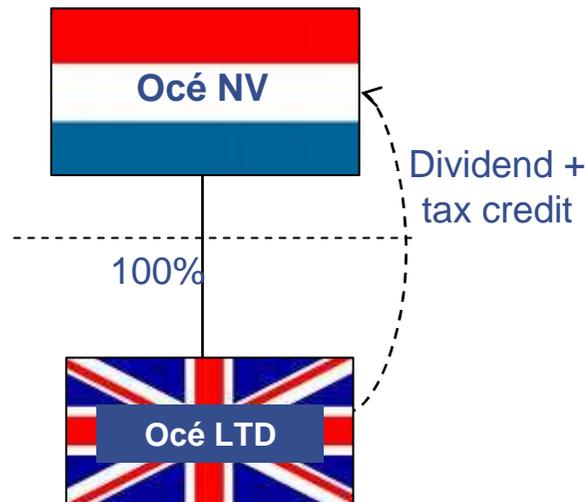
~~Deduction of costs~~



- Similarly, however with respect to write-offs of shares, **Rewe Zentralfinanz (as successor of ITS Reisen)** (29.3.07 – C-347/04): EU law precludes legislation of a Member State which restricts the right of a parent company which is resident in that State to deduct for tax purposes losses incurred by that company in respect of write-downs to the book value of its shareholdings in subsidiaries established in other Member States

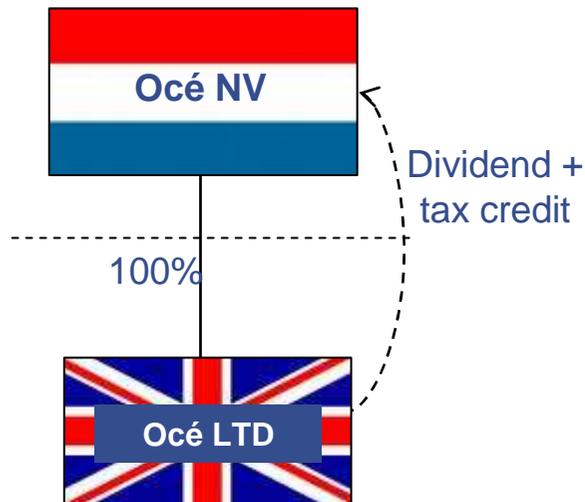
25.9.03 – C-58/01 Océ

– Facts



- The Parent Subsidiary Directive does not affect the application of domestic or agreement-based provisions designed to eliminate or lessen economic double taxation of dividends, in particular provisions relating to the payment of tax credits to the recipients of dividends (4)
- A UK resident company receiving dividend from another UK resident company is entitled to a tax credit. Such a credit is not granted to foreign recipients unless a tax treaty provide for it, as is the case of the Dutch – UK tax treaty. The tax credit is refunded net of a final withholding tax
- Océ NV asked for refund of the final withholding on the ground that the Parent – Subsidiary directive provides for exemption from any withholding tax on dividend distributions (30)

25.9.03 – C-58/01 Océ (2)



– Question

- Is the withholding tax contrary to EU law and, in particular, the Parent – Subsidiary Directive?

– Decision

- The Directive allows a withholding tax to the extent that such a withholding does not affect dividends but only tax credits

Merger directive

Fabio Aramini, LL.M., Partner

Studio Adonnino Ascoli & Cavasola Scamoni

History

! Directive 90/434/EEC of July 23, 1990

! Directive 2005/19/EC

- Update of the list (Annex)
- Extension to partial division (split off)
- Capital gain exemption when the receiving company holds shares in the transferring company
- Conversion of branches into subsidiaries
- Transfer of the registered office of the SE or SCE in other MS
- Hybrid entities

! Directive 2006/98/EC of November 20, 2006 to adapt list of companies and taxes to Accession Countries

Scope

- ! **Neutrality of company re-organizations**

- ! **Operations include**
 - Mergers
 - Divisions
 - Partial divisions
 - Transfer of assets
 - Exchange of shares

- ! **Involving companies (not shareholders) of two or more MS**

- ! **Transfer of registered office of the SE or SCE from one MS to another**

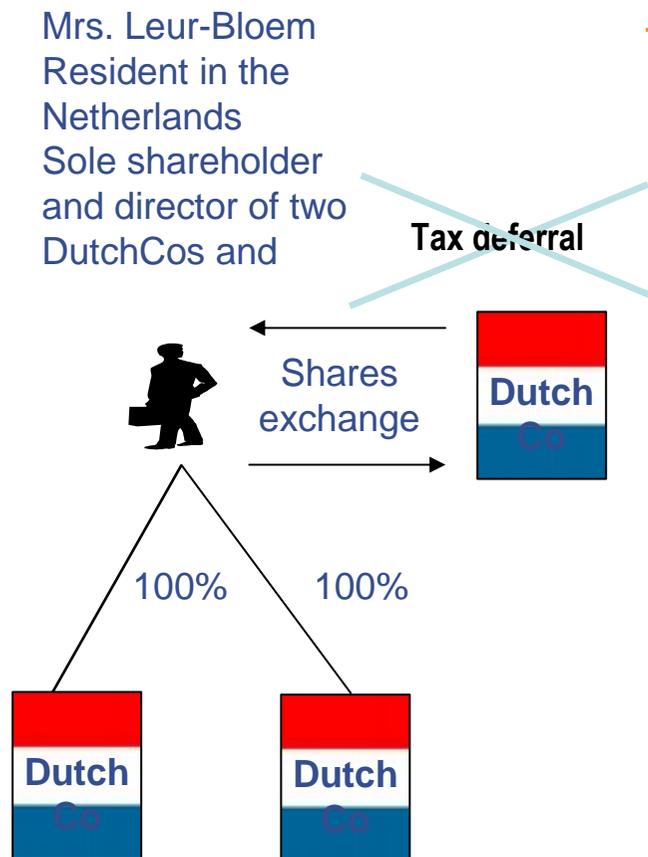
Requirements

- ! Taking one of the forms listed in the Annex
- ! Resident in the EU without being DTT non resident outside EU
- ! Subject to tax

Main ECJ rulings on the Merger Directive

- ! 17.7.97 – C-28/95 **Leur-Bloem**
- ! 15.1.02 – C-43/00 **Andersen & Jensen ApS**
- ! 13.12.05 – C-411/03 **SEVIC (company law)**
- ! 5.7.07 – C-325/05 **Kofoed**

17.7.97 – C-28/95 Leur-Bloem

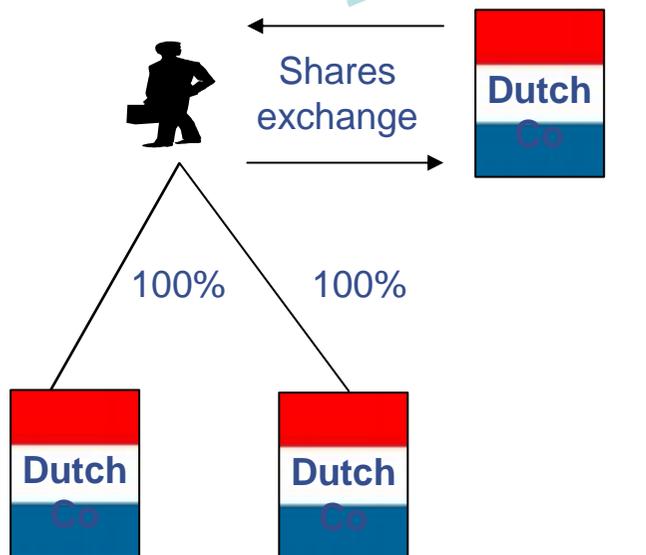


– Facts

- Mrs Leur-Bloem is the sole shareholder and director of two private Dutch companies and is planning to acquire the shares in a third private company, a holding company, payment to be made by exchanging shares in the first two companies. After the transaction, Mrs Leur-Bloem was to become, no longer directly but only indirectly, the sole shareholder in the two other companies (3)
- Mrs Leur-Bloem is resident in the Netherlands. Under Dutch law, the shares exchange is not subject to tax (deferment of tax) under certain conditions (4)

17.7.97 – C-28/95 Leur-Bloem (2)

Mrs. Leur-Bloem
Resident in the
Netherlands
Sole shareholder
and director of two
DutchCos and



– Facts

- The Dutch tax authorities did not allow exemption from tax under the assumption that the purpose of the proposed transaction is not to combine, on a permanent basis from an economic and financial viewpoint, the undertaking of those companies in a larger single entity. Such an entity already exists, from the economic and financial viewpoint, since both companies already have the same director and sole shareholder (10)

17.7.97 – C-28/95 **Leur-Bloem** (3)

– **Questions**

- 1. May questions be referred to the Court of Justice concerning the interpretation of the provisions and scope of a directive even where the directive is not directly applicable to the specific circumstances of the case but it is the national legislature's **intention** that those circumstances are to be treated in the same manner as a situation to which the directive does apply?
 - The Court has jurisdiction under Article 177 of the Treaty to interpret Community law where the situation in question is not governed directly by Community law but the national legislature, in transposing the provisions of a directive into domestic law, has chosen to apply the same treatment to purely internal situations and to those governed by the Directive, so that it has aligned its domestic legislation to Community law (34)

17.7.97 – C-28/95 Leur-Bloem (4)

– Question(s)

– 2(a) Can there be an exchange of shares within the meaning of the Directive if the acquiring company does not itself carry on a business?

2(b) Is an exchange of shares within the meaning of the Directive precluded by the fact that the same natural person who was the sole shareholder in, and director of, the acquired company before the exchange is the director of, and sole shareholder in, the acquiring company after the exchange?

2(c) Is there an exchange of shares within the meaning of the Directive only if its effect is to merge the business of the acquiring company and that of another permanently in a single unit from a financial and economic point of view?

17.7.97 – C-28/95 Leur-Bloem (5)

– Questions

- 2(d) Is there an exchange of shares within the meaning of the Directive only if its effect is to merge the businesses of two or more acquired companies permanently in a single unit from a financial and economic point of view?
 - The fact that the acquiring company does not itself carry on a business or that **the same natural person**, who was the sole shareholder and director of the companies acquired, becomes the sole shareholder and director of the acquiring company does not prevent the operation from being treated as an exchange of shares within the meaning of the Directive. Similarly, it is not necessary, in order for the operation to be treated as an exchange of shares within the meaning of that provision, for there to be a permanent merger of the business of two companies into a single unit (37)

17.7.97 – C-28/95 **Leur-Bloem** (6)

– Questions

- Member States must grant the benefits of the Directive unless the operations has their principal objective or as one of their principal objectives tax evasion or tax avoidance (40)
- Member States may stipulate that the fact that those operations were not carried out for valid commercial reasons constitutes a presumption of tax evasion or tax avoidance (40)
- However, in order to determine whether the planned operation has such an objective, the competent national authorities **cannot confine themselves to applying predetermined general criteria** but must subject each particular case to a general examination. According to established case-law, such an examination must be open to **judicial review** (41)

17.7.97 – C-28/95 **Leur-Bloem (7)**

– Questions

- In the absence of more detailed Community provisions concerning application of the presumption mentioned in the Directive, it is for the Member States, observing the principle of proportionality, to determine the provisions needed for the purposes of applying this provision (42)

17.7.97 – C-28/95 **Leur-Bloem** (8)

– **Questions**

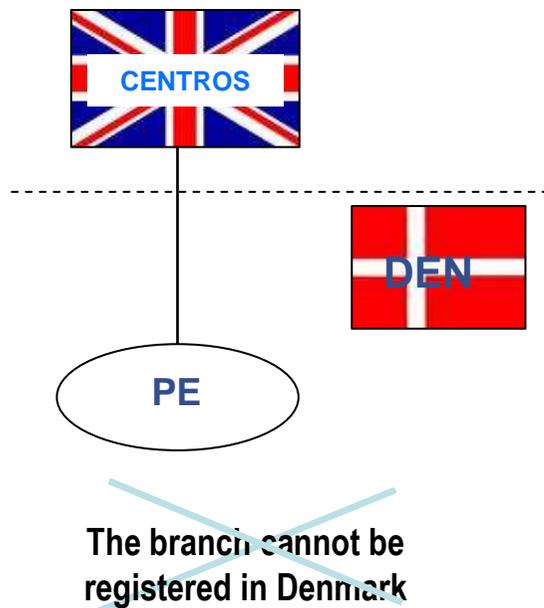
- 2(e) Is an exchange of shares which is carried out in order to bring about a horizontal setting-off of tax losses between the participant undertakings within a fiscal unit a **valid commercial reason** for the exchange for the purposes the Directive?

- **“Valid commercial reasons” is a concept involving more than the attainment of a purely fiscal advantage.** A merger by way of exchange of shares having only such an aim cannot therefore constitute a valid commercial reason within the meaning of that article

9.3.99 – C-212/97 Centros (company law)

– Facts

- Centros Ltd is a private limited company registered in England and Wales (2)
- Centros has **never traded** in the UK from its formation. The UK does not provide for minimum capital requirements. Thus, the capital of Centros has never been paid up (3)
- Centros requested to register a PE in Denmark but the local authorities refused on the ground that Centros was in fact seeking to establish in Denmark, not a branch, but a principal establishment, by circumventing the national rules concerning the paying-up of minimum capital (7)

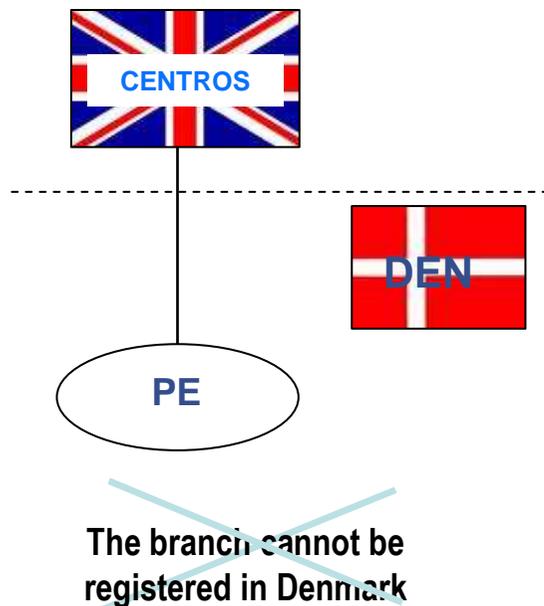


– Question

- Is the refusal compatible with EU law also considering that Centros does not exercise any business in the UK?

9.3.99 – C-212/97 Centros (company law) (2)

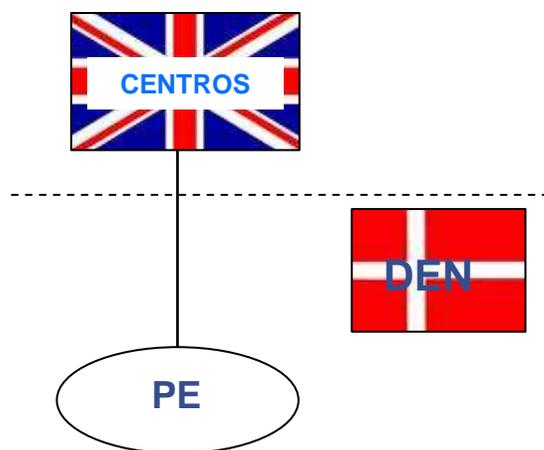
– Have you exercised a fundamental Freedom?



- Freedom of establishment (18). In that regard, it is immaterial that the company was formed in the first Member State **only** for the purpose of establishing itself in the second, where its main, or indeed entire, business is to be conducted (17)
- The question of the application of those articles of the Treaty is different from the question whether or not a Member State may adopt measures in order to prevent attempts by certain of its nationals to evade domestic legislation by having recourse to the possibilities offered by the Treaty (18)

9.3.99 – C-212/97 Centros (company law) (3)

– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?



~~The branch cannot be registered in Denmark~~

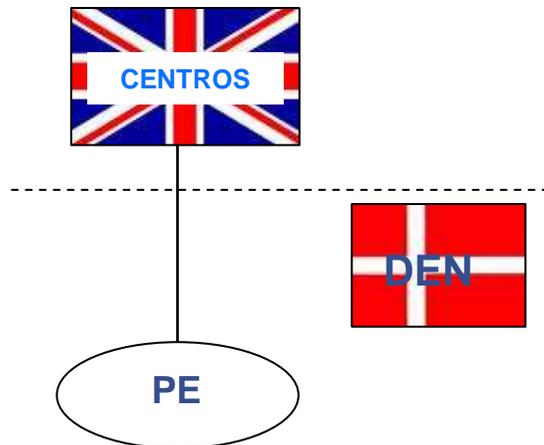
- Under EU law companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are to be treated in the same way as natural persons who are nationals of Member States (19)
- Restriction (22)
- The fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct **which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment (29)**

9.3.99 – C-212/97 Centros (company law) (4)

– Is there a justification?

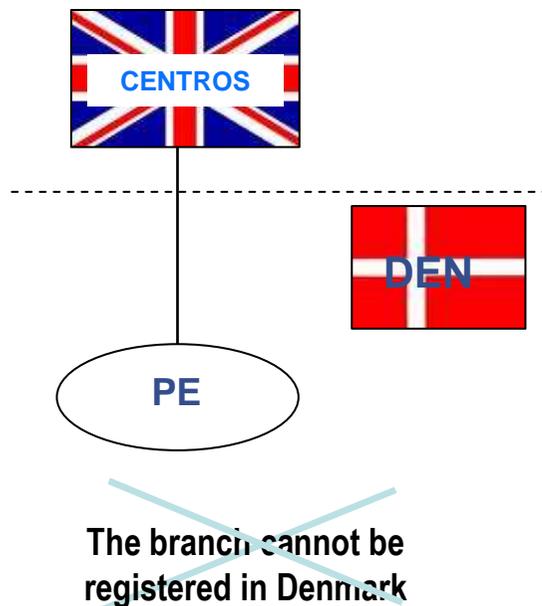
- The practice in question is not such as to attain the objective of protecting creditors which it purports to pursue since, if the company concerned had conducted business in the United Kingdom, its branch would have been registered in Denmark (35)

— Proportionality? N/A



~~The branch cannot be registered in Denmark~~

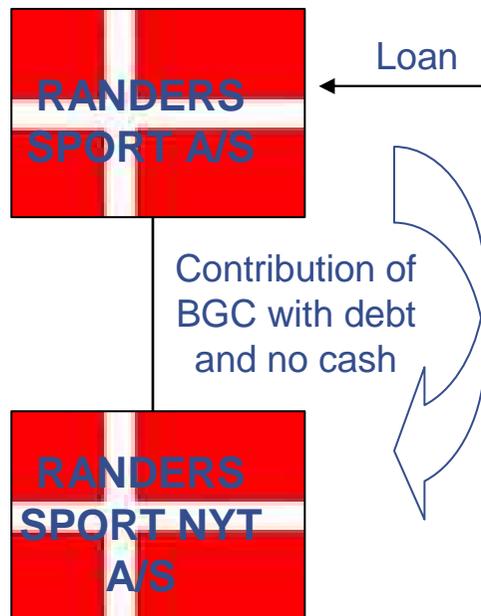
9.3.99 – C-212/97 Centros (company law) (5)



! The same principles have been upheld in Inspire Art (30.9.03 – C-167/01): it is contrary to the freedom of establishment for national legislation to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established on a case-by-case basis

15.1.02 – C-43/00 Andersen & Jensen ApS

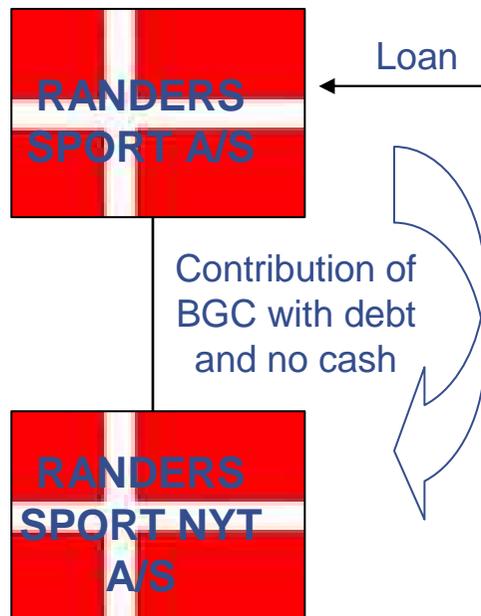
– Facts



- The claimant in the main proceedings was originally a limited company incorporated under Danish law called Randers Sport A/S
- The shareholders of the claimant in the main proceedings set up a new company, Randers Sport Nyt A/S, to which the undertaking's business was to be transferred
- Since it was the intention of those shareholders that the existing capital should for the most part be protected from the burdens to be borne by the future business and should remain within the claimant company, the latter took out a loan, the proceeds of which were to remain with that company, whilst the financial obligation arising from the loan was to be transferred to Randers Sport Nyt A/S

15.1.02 – C-43/00 Andersen & Jensen ApS (2)

– Facts



- Randers Sport Nyt A/S's cash-flow requirements would be covered by a line of credit granted by a financial institution which, by way of security, would seek a lien over all the shares representing the capital of Randers Sport Nyt A/S
- Randers Sport A/S retained a small number of shares in a third company, which at that time was in receivership (8)
- According to Danish law, the neutral regime for contribution of business going concern can be obtained subject to administrative authorization
- The administrative authority admitted the neutral regime subject to the following condition:
 - The debt and cash should either be contributed or remain yj Randers Sport A/S
 - No lien should be granted by shareholders or Randers Sport A/S

15.1.02 – C-43/00 Andersen & Jensen ApS (3)

– Questions

- ! The national court seeks to ascertain whether the directive must be interpreted as meaning that there is a transfer of assets within the meaning of the directive where, first, the terms of a transaction are such that the proceeds of a loan contracted by the transferring company remain with that company and the obligations arising from the loan are transferred to the company receiving the transfer and, second, the transferring company retains a small number of shares in a third company (20)
 - It is clear from the wording of the directive that, in order to be covered by the directive, a transfer of assets must encompass all the assets and liabilities relating to a branch of activity. Under the directive, only an entity capable of functioning by its own means can constitute such a branch of activity (24)

15.1.02 – C-43/00 Andersen & Jensen ApS (4)

– Questions

- As the Advocate General has stated in his Opinion, the Community legislature considered it necessary that the assets and liabilities relating to a branch of activity should be transferred in their entirety. However, if the transferring company retains the proceeds of a large loan contracted by it and transfers the obligations deriving from that loan to the company to which the assets are transferred, those two elements are dissociated (25)
- Moreover, the transferring company and the company receiving the transfer in the main proceedings would have achieved the same result if the latter company had contracted the loan and **had then acquired the assets of the transferring company by way of consideration consisting, first, of its own shares and, second, of the capital borrowed**. However, such a transfer, made partly in cash, would not constitute a transfer of assets within the meaning of the directive (26). The conditions set forth in the directive are not satisfied (27)

15.1.02 – C-43/00 Andersen & Jensen ApS (5)

– Questions

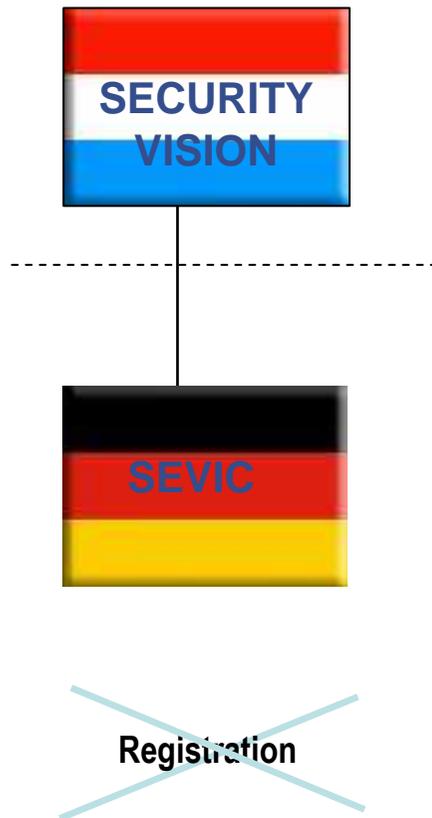
- ! The national court seeks in essence to ascertain whether the directive must be interpreted as meaning that an independent business, that is to say, an entity capable of functioning by its own means, can exist even where the future cash-flow requirements of the company receiving the transfer must be satisfied by a credit facility from a financial institution which insists, in particular, that the shareholders of the company receiving the transfer provide security in the form of shares representing the capital of that company (30)
 - The independent operation of the business must be assessed primarily from a **functional point of view** and only secondarily from a financial point of view. The fact that a company receiving a transfer takes out a bank loan under normal market conditions cannot in itself mean that the transferred business is not independent, even where the loan is guaranteed by shareholders of the receiving company who provide their shares in that company as security for the loan granted (35)

15.1.02 – C-43/00 Andersen & Jensen ApS (6)

– Questions

- The position may, however, be different where the financial situation of the receiving company, as a whole, makes inevitable the conclusion that it will very probably not be able to survive by its own means. That may be the case where the income of the company receiving the transfer does not appear sufficient to cover the payments of principal and interest due in respect of its debts (36)
- The assessment as to whether or not a business is **independent** must, however, be left to the national court, having regard to the particular circumstances of each case (37)

13.12.05 – C-411/03 SEVIC (company law)



– Facts

- The merger contract concluded in 2002 between SEVIC and Security Vision provided for the dissolution without liquidation of the latter company and the transfer of the whole of its assets to SEVIC, without any change in the latter's company name (6)
- The German authorities rejected the application for registration of the merger in the commercial register, arguing that German commercial law provides only for mergers between legal entities established in Germany (7)

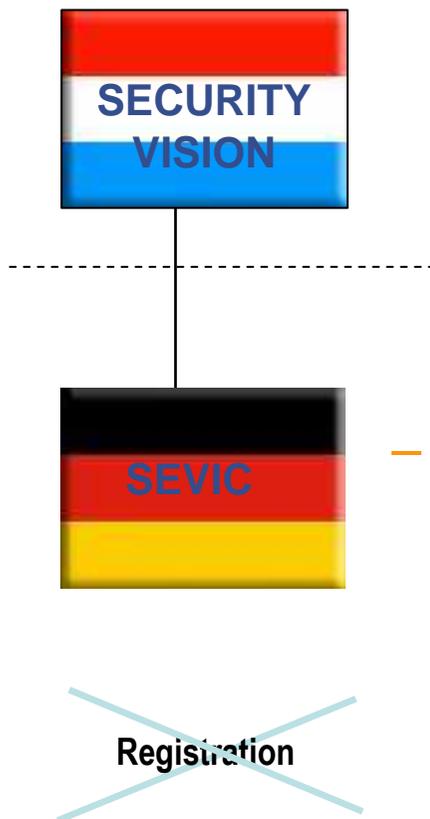
13.12.05 – C-411/03 SEVIC (company law) (2)

– Question

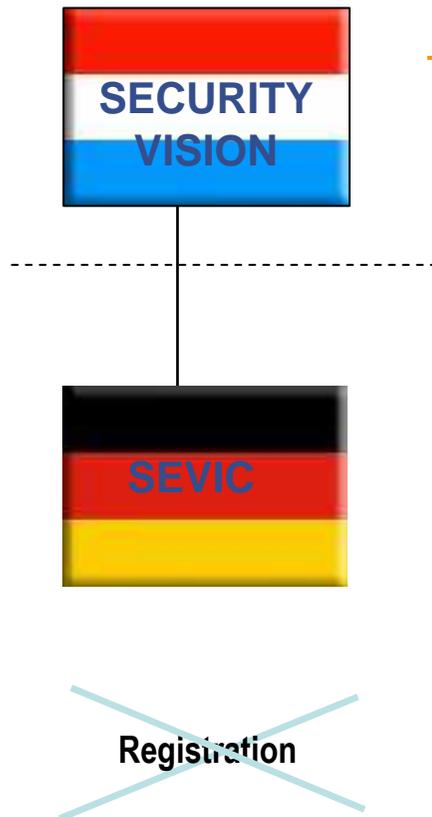
- Is EU law to be interpreted as meaning that it is contrary to freedom of establishment for companies if a foreign European company is refused registration of its proposed merger with a German company in the German register of companies, on the ground that German commercial law provides only for transformation of legal entities established in Germany?

– Have you exercised a fundamental Freedom?

- Freedom of establishment (16). The right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State by allowing the persons concerned to participate in the economic life of the country effectively and under the same conditions as national operators (18)

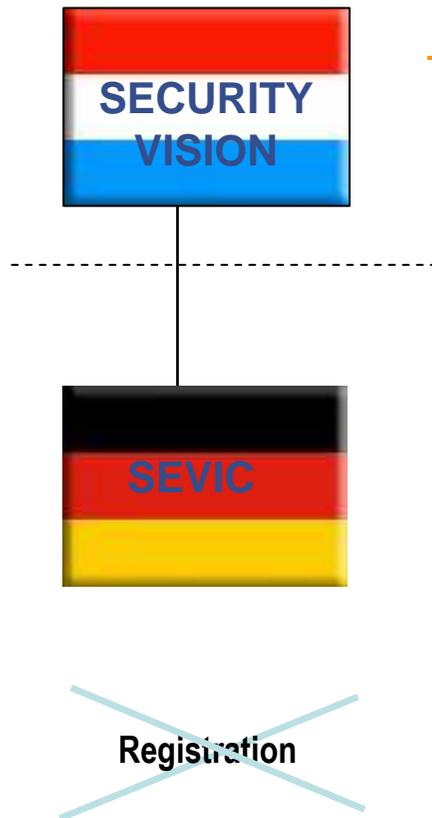


13.12.05 – C-411/03 SEVIC (company law) (3)



- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - Restriction (23). In so far as, under national rules, recourse to such a means of company transformation is not possible where one of the companies is established in a Member State other than the Federal Republic of Germany, German law establishes a difference in treatment between companies according to the internal or cross-border nature of the merger, which is likely to deter the exercise of the freedom of establishment laid down by the Treaty (22)

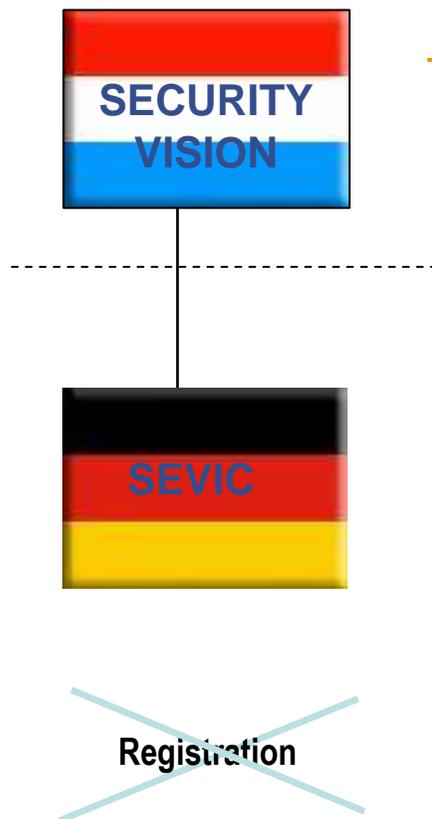
13.12.05 – C-411/03 SEVIC (company law) (4)



– Is there a justification?

- The German and Netherlands Governments argue that internal mergers are subject to conditions more particularly designed to protect the interests of creditors, minority shareholders and employees, and to preserve the effectiveness of fiscal supervision and the fairness of commercial transactions. They submit in that respect that specific problems arise in relation to cross-border mergers and that the solution to those problems presupposes the existence of specific rules designed to protect those interests in the context of a cross-border merger that involves the application of several national legal systems in a single legal operation. Such rules, they submit, presuppose a harmonization of the legislation at the Community level (24)

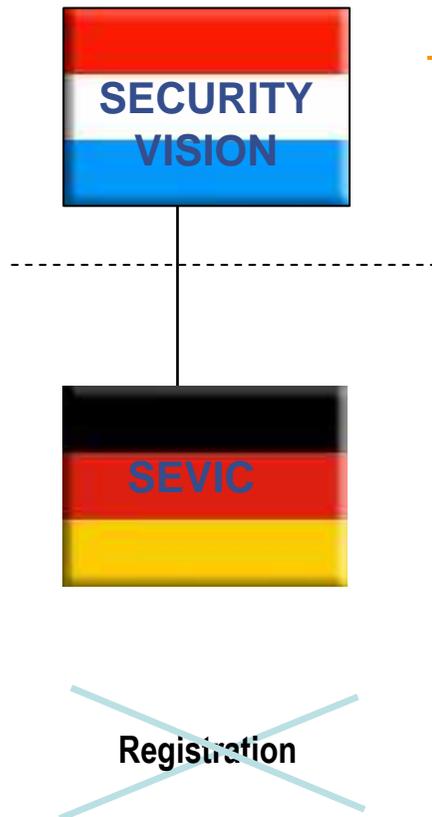
13.12.05 – C-411/03 SEVIC (company law) (5)



– Is there a justification?

- In that context, the Netherlands Government points out that the Commission of the European Communities submitted to the Community legislature on 18 November 2003 the Proposal for a Directive of the European Parliament and of the Council on cross-border mergers of companies with share capital (COM(2003) 703 final) (25). It should be noted in that respect that, whilst Community harmonization rules are useful for facilitating cross-border mergers, the existence of such harmonization rules cannot be made a precondition for the implementation of the freedom of establishment laid down by the Treaty (see, to that effect, Case C-204/90 *Bachmann*, paragraph 11) (26)

13.12.05 – C-411/03 SEVIC (company law) (6)

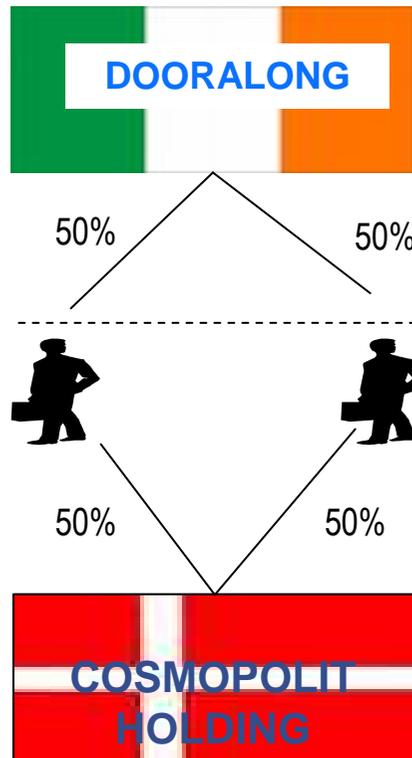


– Is there a justification?

- It cannot be excluded that even in State in which domestic mergers are possible, general reasons of public interest such as protection of the interests of creditors, minority shareholders and employees (Case C-208/00 *Uberseering*, paragraph 92), and the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions (Case C-167/01 *Inspire Art*, paragraph 132), may, in certain circumstances and under certain conditions, justify a measure restricting the freedom of establishment (28). However, such must be appropriate and proportionate (29)

– Proportionality? N/A

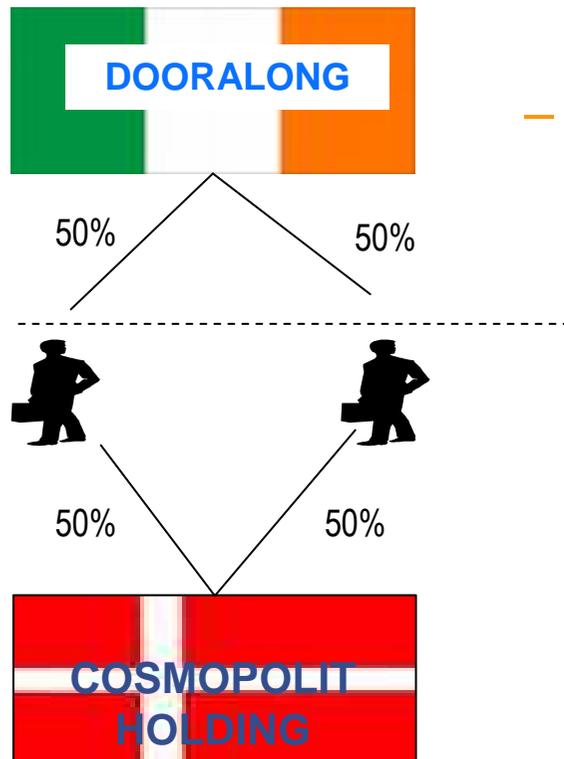
5.7.07 – C-325/05 Kofoed



– Facts

- Article 2(d) of Directive 90/434 defines ‘exchange of shares’ as ‘an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10% of the nominal value or, in the absence of a nominal value, of the accounting par value of the securities issued in exchange’ (5). According to Article 2(g) and (h) of Directive 90/434, ‘acquired company’ means ‘the company in which a holding is acquired by another company by means of an exchange of securities’ and ‘acquiring company’ means ‘the company which acquires a holding by means of an exchange of securities’ (6)

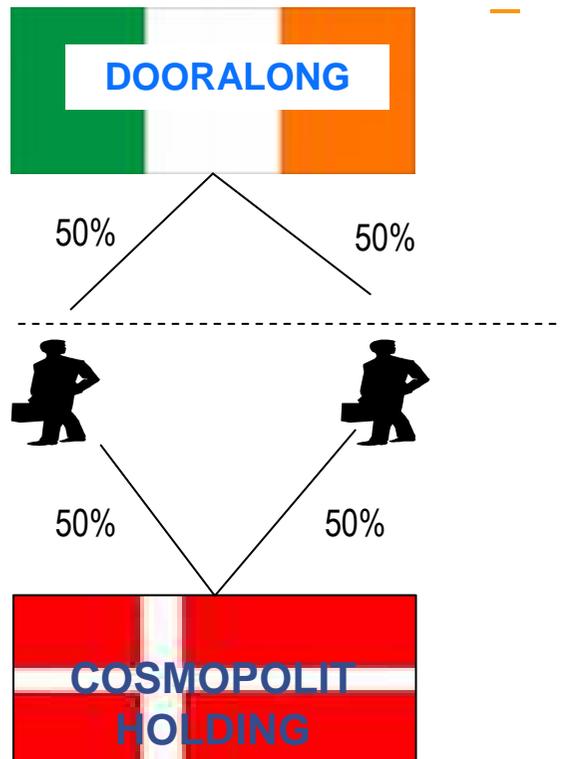
5.7.07 – C-325/05 Kofoed (2)



– Facts

- According to the Directive, exchange of shares is neutral (7)
- Mr Kofoed and Mr Toft each held 50% of the total share capital of Cosmopolit Holding ApS ('Cosmopolit'), a limited liability company incorporated under Danish law (14)
- They each acquired one share in Dooralong Ltd ('Dooralong'), a limited liability company incorporated under Irish law, those two shares constituting the share capital of Dooralong (15)
- Dooralong subsequently increased its share capital (16)
- Mr Kofoed and Mr Toft exchanged all the shares they held in Cosmopolit for all the new shares in Dooralong (17)

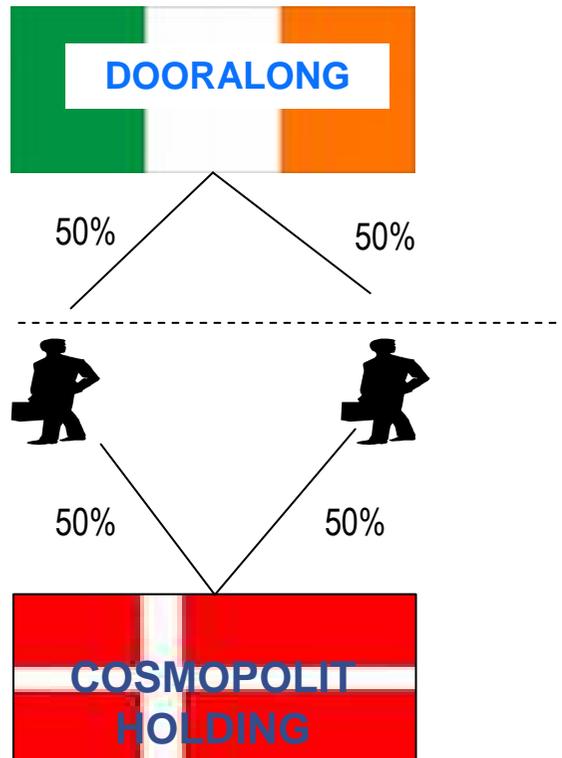
5.7.07 – C-325/05 Kofoed (3)



– Facts

- After two days from the exchange of shares, Dooralong cashed dividends from Cosmopolit (18). After two days, the dividends were distributed to Mr. Kofoed and Mr. Toft (19)
- For the purposes of his income tax relating to the year 1993, Mr Kofoed stated in his income declaration that the exchange of shares in Cosmopolit in return for new shares in Dooralong should be exempt from tax. The Danish tax authorities did not accept that statement, taking the view that the dividend distribution had to be regarded as forming part of the exchange of shares, with the result that the maximum threshold of 10% of the nominal value of the securities issued in exchange, provided for by Directive 90/434 for a possible cash payment, had been exceeded. In the authorities' view, that exchange of shares could accordingly not be exempt under that directive (20)

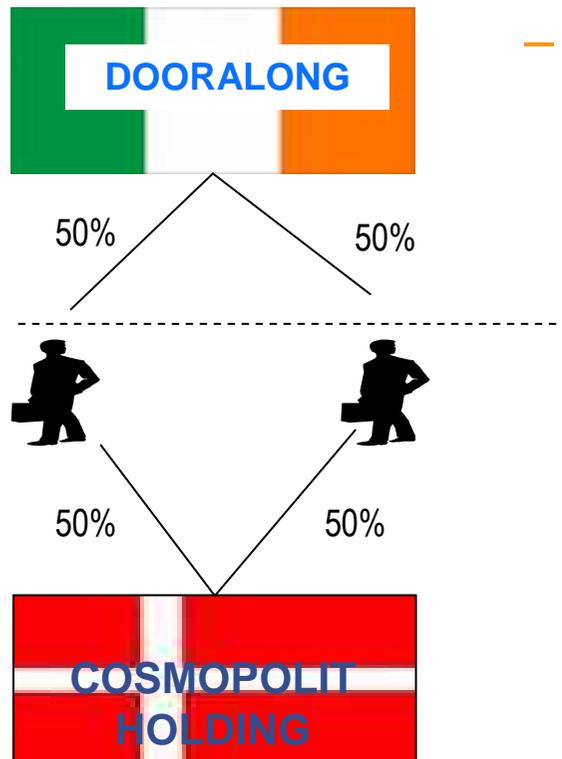
5.7.07 – C-325/05 Kofoed (4)



– Question

- Is Article 2(d) of Directive 90/434/EEC ... to be interpreted as meaning that there is no “exchange of shares” within the meaning of that directive where the persons involved in the exchange of shares, at the same time as agreeing to exchange the shares in a non-legally binding manner, declare it to be their common intention to vote, at the first general meeting of the acquiring company after the exchange, in favor of distributing a profit in excess of 10% of the nominal value of the security transferred by way of the exchange of shares and such a profit is in fact distributed?

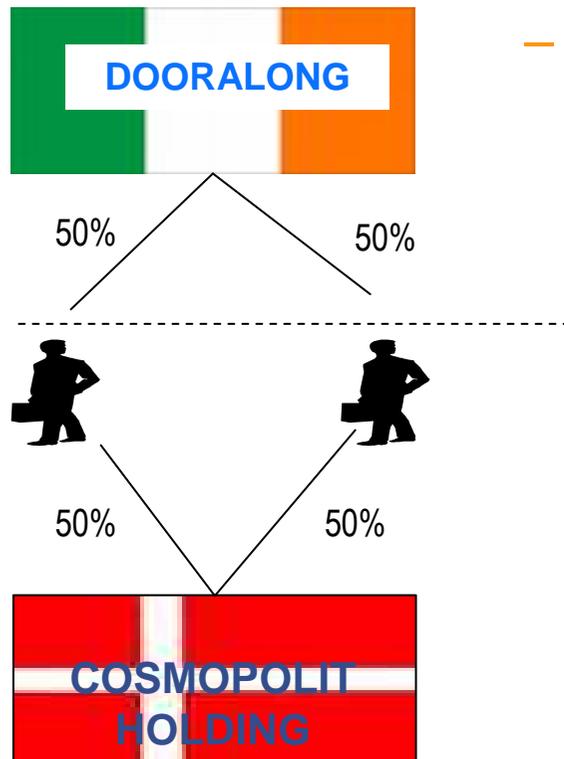
5.7.07 – C-325/05 Kofoed (5)



– Decision

- A monetary payment made by an acquiring company to the shareholders of the acquired company cannot be classified as a 'cash payment' for the purposes of Article 2(d) of Directive 90/434 merely because of a certain temporal or other type of link to the acquisition, or possible fraudulent intent. On the contrary, it is necessary to ascertain in each case, having regard to the circumstances as a whole, whether the payment in question has the characteristics of binding consideration for the acquisition (31)

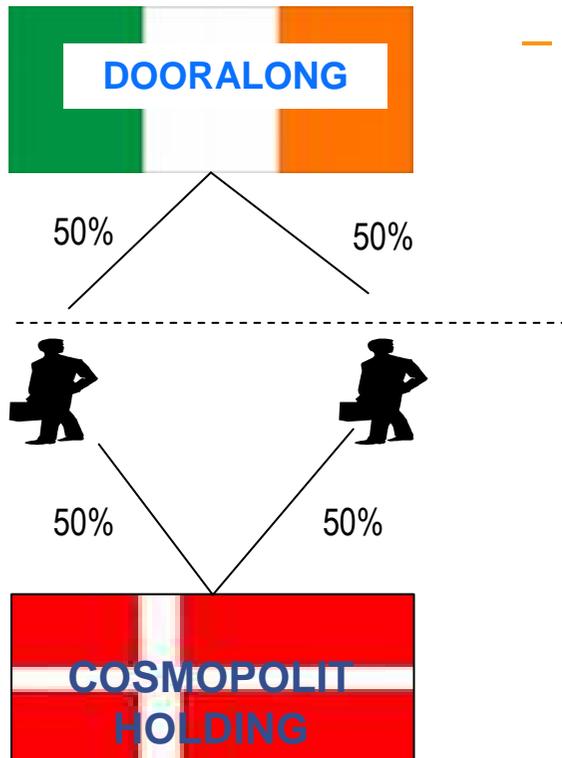
5.7.07 – C-325/05 Kofoed (6)



– Decision

- That interpretation is supported by the purpose behind Directive 90/434, which is to eliminate fiscal barriers to cross-border restructuring of undertakings, by ensuring that any increases in the value of shares are not taxed before they are actually realized and by preventing operations involving high levels of capital gains realized on exchanges of shares from being exempt from income tax simply because they are part of a restructuring operation (32)
- The Court finds that, in the main proceedings, there is nothing in the case-file demonstrating that the dividend in question formed an integral part of the necessary consideration to be paid by Dooralong for the acquisition of Cosmopolit (33)

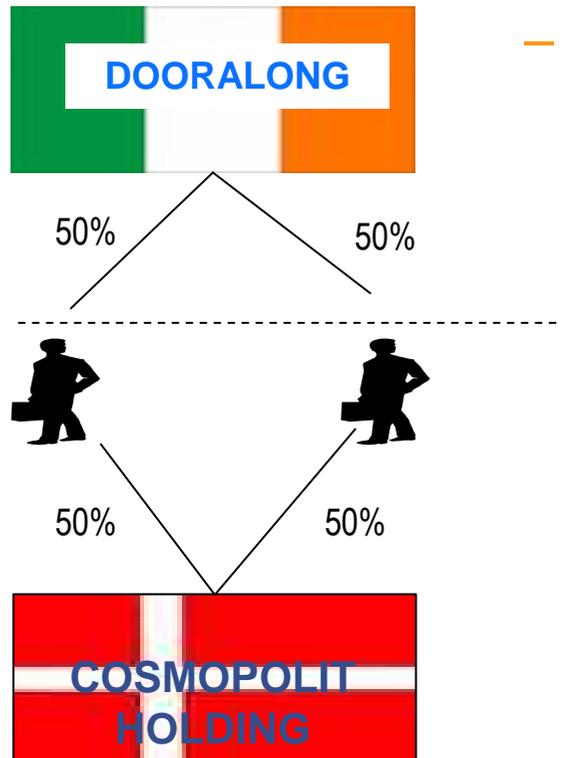
5.7.07 – C-325/05 Kofoed (7)



– Decision

- Since the national court and the Danish Government state several times that the exchange of shares in issue in the main proceedings was not carried out for any commercial reason whatsoever but solely for the purpose of achieving tax savings, it is still appropriate to consider the application of Article 8(1) in the event of possible abuse of rights (36)

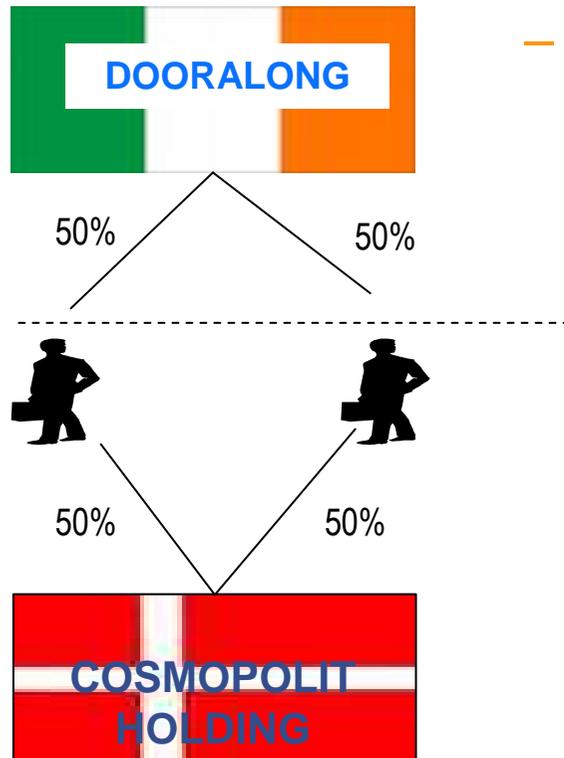
5.7.07 – C-325/05 Kofoed (8)



– Decision

- It is necessary, as a preliminary issue, to determine whether, in the absence of a specific transposition provision transposing Article 11(1)(a) of Directive 90/434 into Danish law, that provision may nevertheless apply in the case in the main proceedings (40)
- In that regard, it should be borne in mind that, according to Articles 10 EC and 249 EC, each of the Member States to which a directive is addressed is obliged to adopt, within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective that it pursues (41)

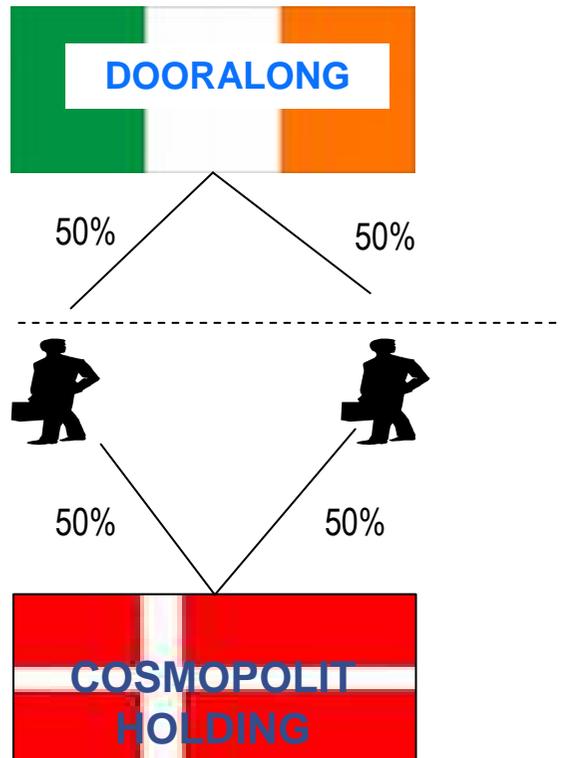
5.7.07 – C-325/05 Kofoed (9)



– Decision

- Moreover, the principle of legal certainty precludes directives from being able by themselves to create obligations for individuals. Directives cannot therefore be relied upon per se by the Member State as against individuals (42)
- However, the Court observes, first, that, according to the actual wording of the third paragraph of Article 249 EC, Member States may choose the form and methods for implementing directives which best ensure the result to be achieved by those directives (43)

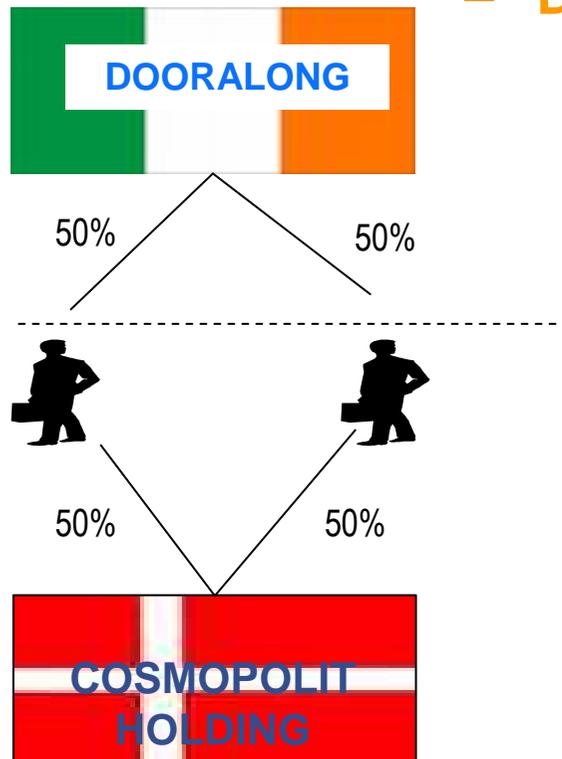
5.7.07 – C-325/05 Kofoed (10)



– Decision

- Accordingly, provided that the legal situation arising from the national transposition measures is sufficiently precise and clear and that the persons concerned are put in a position to know the full extent of their rights and obligations, transposition of a directive into national law does not necessarily require legislative action in each Member State. Likewise the transposition of a directive may be achieved through a **general legal context**, so that a formal and express re-enactment of the provisions of the directive in specific national provisions is not necessary (44)

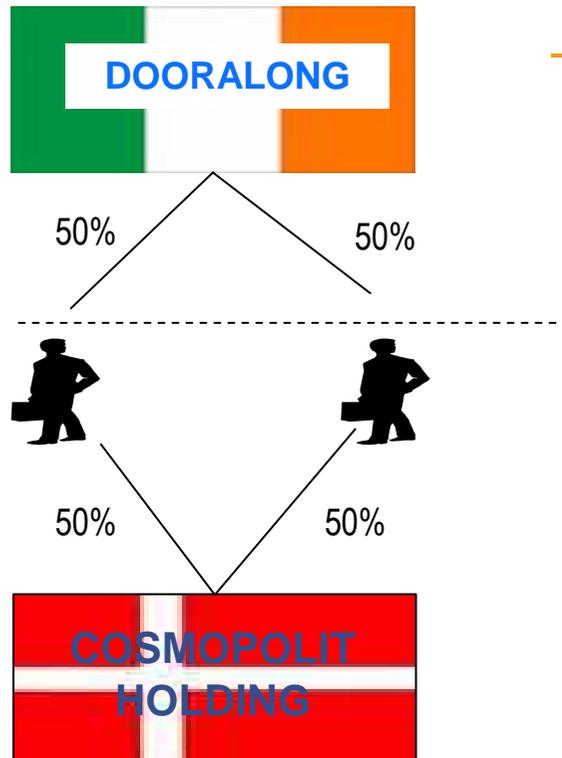
5.7.07 – C-325/05 Kofoed (11)



– Decision

- The Court notes that all authorities of a Member State, in applying national law, are required to interpret it as far as possible in the light of the wording and purpose of the Community directives in order to achieve the result pursued by those directives. Moreover, although it is true that the requirement of a directive-compliant interpretation cannot reach the point where a directive, by itself and without national implementing legislation, may create obligations for individuals or determine or aggravate the liability in criminal law of persons who act in contravention of its provisions, a Member State may nevertheless, in principle, impose a directive-compliant interpretation of national law on individuals (45)

5.7.07 – C-325/05 Kofoed (12)



– Decision

- It is therefore for the national court to ascertain whether there is, in Danish law, a provision or general principle prohibiting abuse of rights or other provisions on tax evasion or tax avoidance which might be interpreted in accordance with Article 11(1)(a) of Directive 90/434 and thereby justify taxation of the exchange of shares in question (46)

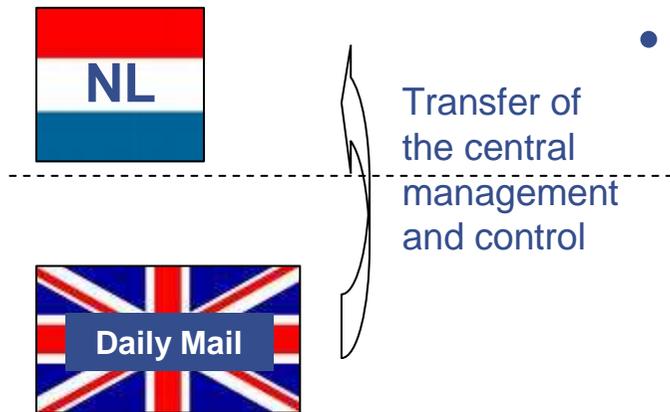
Exit taxes

Fabio Aramini, LL.M., Partner

Studio Adonnino Ascoli & Cavasola Scamoni

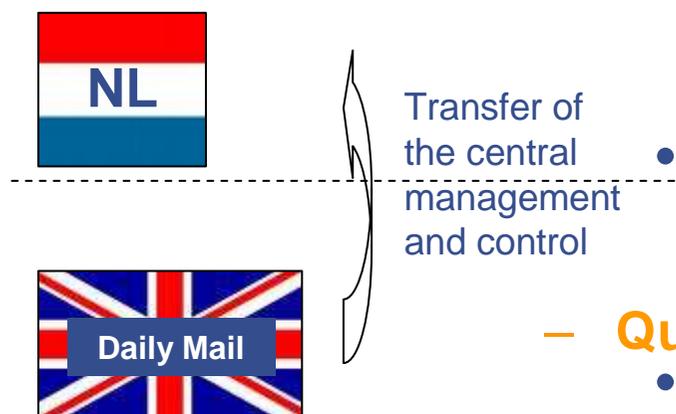
27.9.88 – 81/87 Daily Mail

– Facts



- Under United Kingdom **company** legislation a company, incorporated under that legislation and having its registered office in the United Kingdom, may establish its central management and control outside the United Kingdom without losing legal personality or ceasing to be a company incorporated in the United Kingdom (3)
- UK tax law prohibits companies resident for tax purposes in the United Kingdom from ceasing to be so resident without the consent of the Treasury (5)

27.9.88 – 81/87 Daily Mail (2)



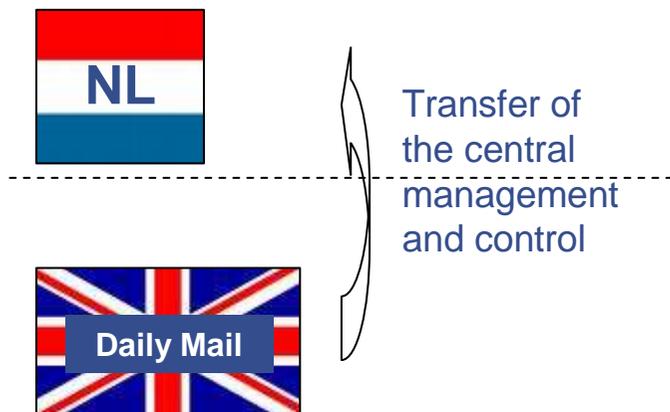
– Facts

- Daily Mail applied for consent in order to transfer its central management and control to the Netherlands (6)
- There are mainly a fiscal reasons (sale of participations) for the proposed transfer of central management in the Netherlands (7)

– Question

- Does the freedom of establishment preclude a Member State from prohibiting a body corporate with its central management and control in that Member State from transferring without prior consent or approval that central management and control to another Member State?

27.9.88 – 81/87 Daily Mail (3)



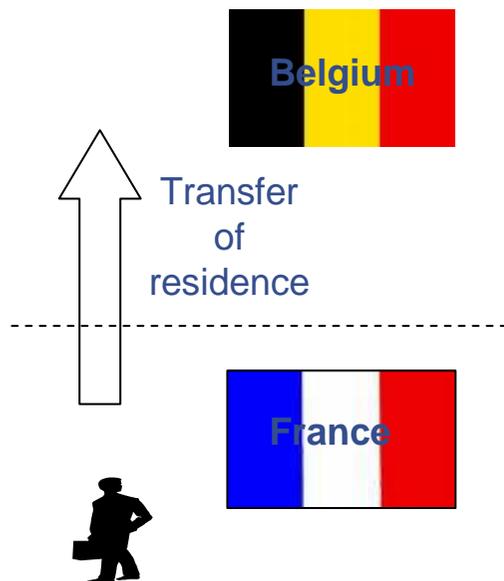
– Have you exercised a fundamental Freedom?

- The Treaty regards the differences in national legislation concerning the required connecting factor and the question whether - and if so how - the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as **problems which are not resolved by the rules concerning the right of establishment** but must be dealt with by future legislation or conventions (23)

– Is there a discrimination or a restriction? Overt? Covert? Home or Host State? N/A

– Is there a justification? N/A Proportionality? N/A

4.3.04 – C-334/02 de Lasteyrie du Saillant



Mr. de Lasteyrie
du Saillant

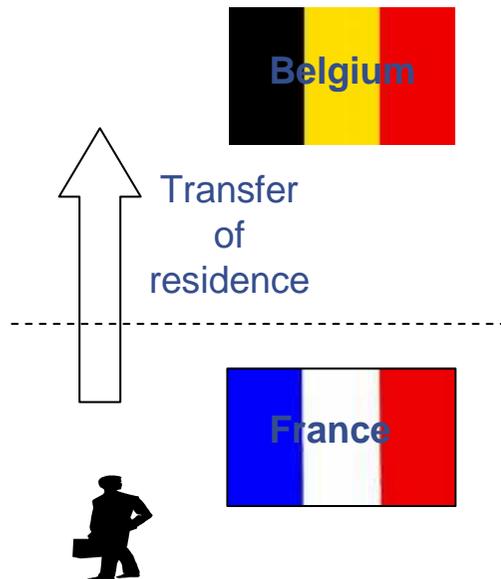
French citizen

Resident in
France

– Facts

- According to French tax law, taxpayers resident for tax purposes in France are taxable, at the date of the transfer of their residence from France, on the increases in value determined in the company securities (3)
- Payment of the tax on the increase in value determined may be deferred (3)
- Suspension of payment is subject to the condition that the taxpayer shall declare the amount of the increase in value, applies for the benefit of suspension, designates a representative established in France authorized to receive communications concerning the basis of assessment, collection of the tax and any disputes relating thereto, and, before his departure abroad, constitutes guarantees sufficient to ensure recovery of the debt by the Treasury (3)

4.3.04 – C-334/02 de Lasteyrie du Saillant (2)



Mr. de Lasteyrie
du Saillant

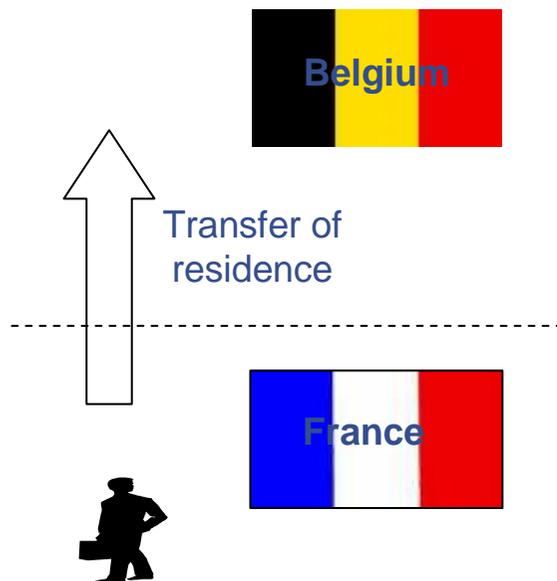
French citizen

Resident in
French

– Facts

- The tax paid locally by the taxpayer and relating to the increase in value actually realized outside France may be set off against the income tax established in France provided it is comparable with that tax (3)
- Mr. De Lasteyrie du Sauillant is a French citizen, moving to Belgium to become resident there (12)
- At the time of the transfer, Mr. de Lasteyrie was taxed on the increase in value of the securities he owned (12)
- Mr. de Lasteyrie sustains that the taxation is contrary to EU law

4.3.04 – C-334/02 de Lasteyrie du Saillant (3)



Mr. de Lasteyrie du
Saillant

French citizen

Resident in French

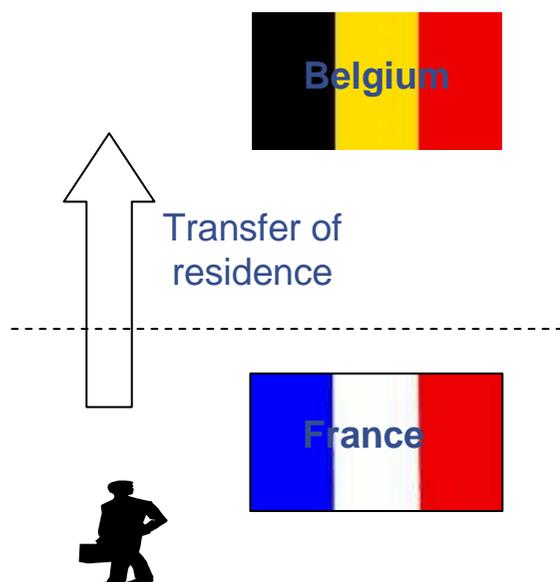
– Question

- Does EU law preclude the introduction by a Member State, for the purpose of preventing the risk of tax avoidance, of arrangements for taxing capital gains in the case of transfer of tax residence?

– Have you exercised a fundamental Freedom?

- Freedom of establishment. In reply to the doubts expressed by certain governments as to the applicability of that provision to the dispute in the main proceedings, and in the absence of sufficient information on that point in the documents presented before the Court, it should be noted that any assessment of the facts in the case is a matter for the national court and that, in this case, the referring court appears to have concluded that the freedom of establishment applies to the dispute before it (41)

4.3.04 – C-334/02 de Lasteyrie du Saillant (4)



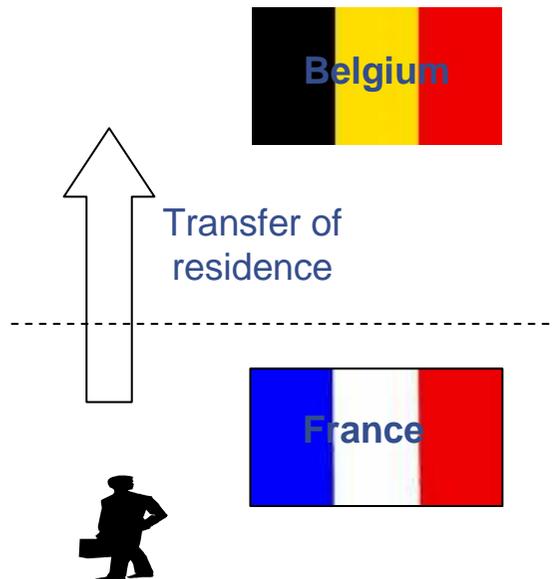
Mr. de Lasteyrie du Saillant

French citizen

Resident in French

- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - Restriction (45). A taxpayer wishing to transfer his tax residence outside French territory, in exercise of the right of the Treaty, is subjected to disadvantageous treatment in comparison with a person who maintains his residence in France. That taxpayer becomes liable, simply by reason of such a transfer, to tax on income which has not yet been realized and which he therefore does not have, whereas, if he remained in France, increases in value would become taxable only when, and to the extent that, they were actually realized (46)

4.3.04 – C-334/02 de Lasteyrie du Saillant (5)



Mr. de Lasteyrie du Saillant

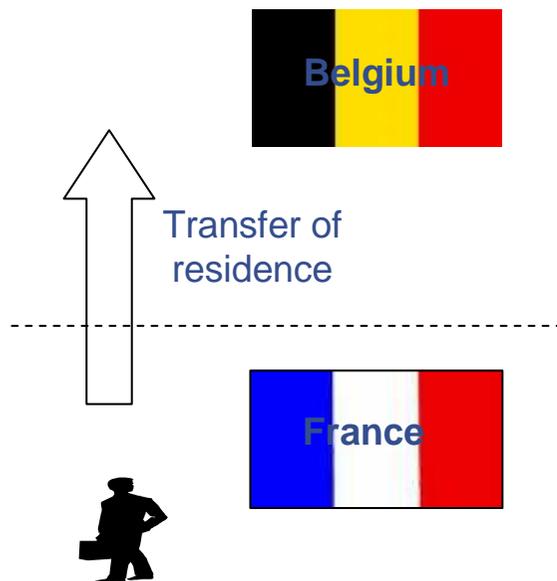
French citizen

Resident in French

– Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?

- Although it is possible to benefit from suspension of payment, that **is not automatic** and it is subject to strict conditions including, in particular, conditions as to the setting up of **guarantees**. Those guarantees in themselves constitute a restrictive effect, in that they deprive the taxpayer of the enjoyment of the assets given as a guarantee (47)

4.3.04 – C-334/02 de Lasteyrie du Saillant (6)



Mr. de Lasteyrie du Saillant

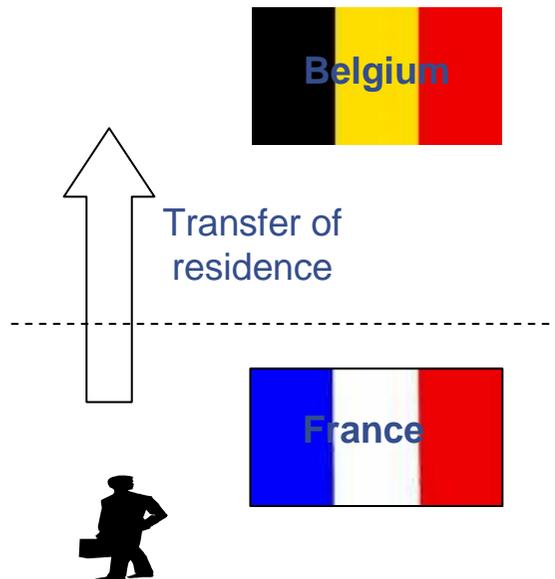
French citizen

Resident in French

– Is there a justification?

- Tax avoidance. This argument cannot be upheld. The transfer of a physical person's tax residence outside the territory of a Member State does not, in itself, imply tax avoidance (51). This rule cannot, therefore, **without greatly exceeding what is necessary in order to achieve the aim which it pursues,** assume an intention to circumvent French tax law on the part of every taxpayer who transfers his tax domicile outside France (52)

4.3.04 – C-334/02 de Lasteyrie du Saillant (7)



Mr. de Lasteyrie du Saillant

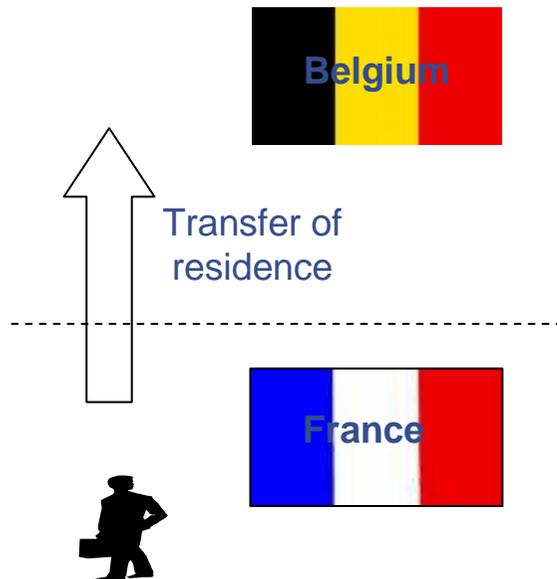
French citizen

Resident in French

– Is there a justification?

- The objective envisaged, namely preventing a taxpayer from temporarily transferring his tax residence before selling securities with the sole aim of avoiding payment of the tax on increases in value due in France, may be achieved by measures that are less coercive or less restrictive of the freedom of establishment, relating specifically to the risk of such a temporary transfer, for example, provide for the taxation of taxpayers returning to France after realising their increases in value during a relatively brief stay in another Member State, which would avoid affecting the position of taxpayers having no aim other than the bona fide exercise of their freedom of establishment in another Member State (54)

4.3.04 – C-334/02 de Lasteyrie du Saillant (8)



– **Is there a justification?**

- Loss of tax revenues. This argument cannot be upheld (60)
- Tax cohesion. The cohesion is not the aim of the provision (67)

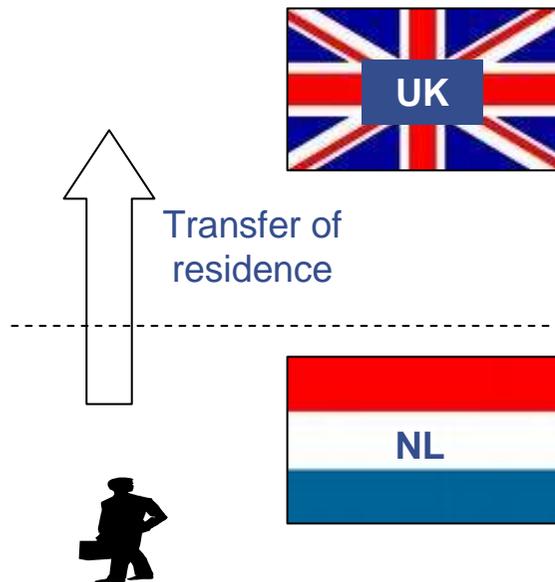
– **Proportionality?** N/A

Mr. de Lasteyrie du Saillant

French citizen

Resident in French

7.9.06 – C-470/04 N

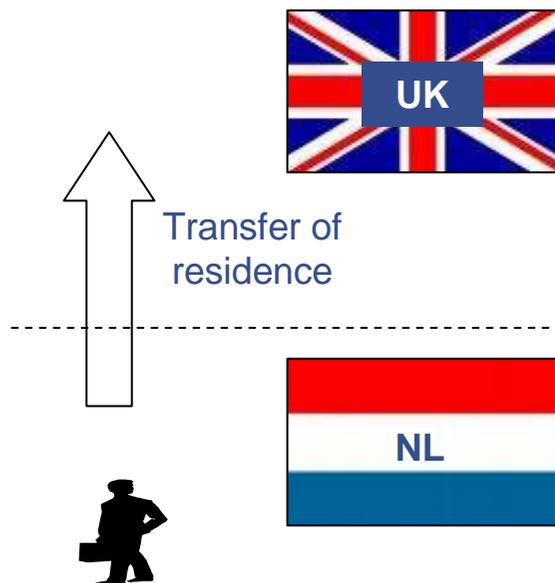


Mr. N
Dutch citizen
Resident in the
Netherlands

– Facts

- According to Dutch law, the tax payable by a national taxpayer is calculated on the basis of the taxable income, which includes, inter alia, the profits derived from a substantial shareholding, i.e., more than 5% of a company's capital (3, 4)
- The loss of the status of national taxpayer, other than by death, is assimilated to a disposal of shares (5)
- In case of transfer of residence, the payment of tax is suspended subject to the condition that a sufficient **security** is provided (8)
- Tax on the transfer of the shares is not due after 10 years or within the limit of the tax paid abroad (9)

7.9.06 – C-470/04 N (2)

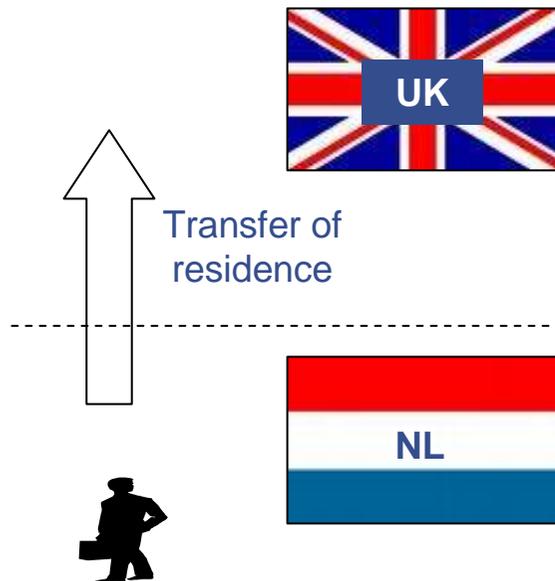


Mr. N
Dutch citizen
Resident in the
Netherlands

– Facts

- N transferred his residence from the Netherlands to the United Kingdom. At the time he left the Netherlands, he was the sole shareholder of three limited liability Netherlands companies (11)
- N obtained, at his request, a deferment of payment of those amounts. However, in accordance with the national legislation such deferment was made subject to the provision of security. N therefore deposited by way of security his holdings in one of his companies (13)
- Following the judgment **de Lasteyrie du Saillant**, the Collector of Taxes told N that the security he had provided could be regarded as released (14)

7.9.06 – C-470/04 N (3)



Mr. N

Dutch citizen

Resident in the
Netherlands

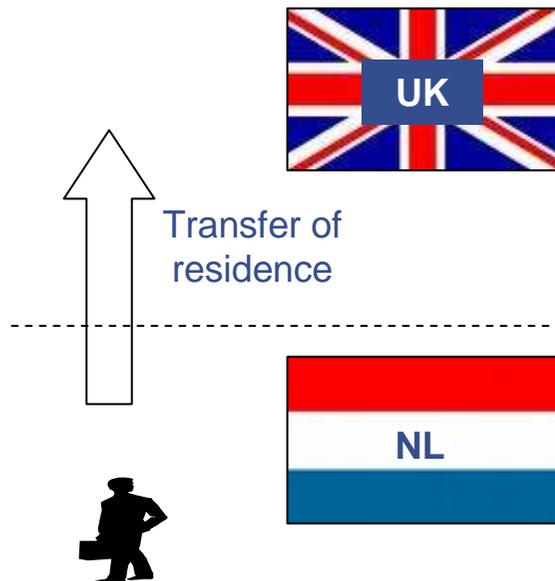
– Facts

- N has been running a farm in the United Kingdom since 2002 (date of transfer 1997) (15)

– Questions

- What provision of the EC Treaty is applicable in the instant case?
- What about the security?

7.9.06 – C-470/04 N (4)



Mr. N

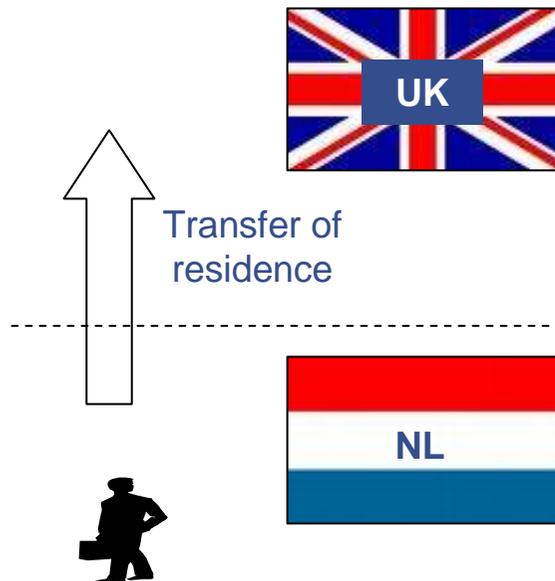
Dutch citizen

Resident in the
Netherlands

– Have you exercised a fundamental Freedom?

- Freedom of establishment. The Court has held that a 100% holding in the capital of a company having its seat in another Member State undoubtedly brings such a taxpayer within the scope of application of the Treaty provisions on the **right of establishment (26)**. The situation here is that of a Community national who, since the transfer of his residence, has been living in one Member State and holding all the shares of companies established in another. It follows that, since that transfer, N has fallen within the scope of the freedom of establishment (28)

7.9.06 – C-470/04 N (5)



Mr. N

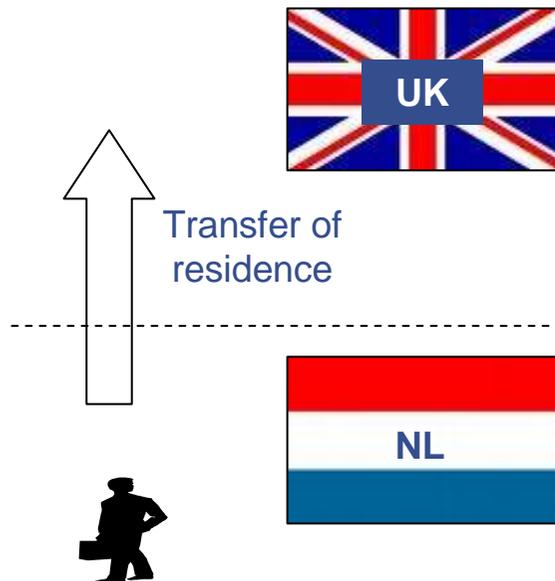
Dutch citizen

Resident in the
Netherlands

– **Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?**

- Restriction (39). Although it is possible to benefit from suspension of payment, that is not automatic and it is subject to conditions, such as the provision of guarantees. Those guarantees in themselves constitute a restrictive effect (36). In addition, decreases in value occurring after the transfer of residence **were not taken into account** in order to reduce the tax debt at the time of the facts in the main proceedings (37). Finally, the tax declaration required at the time of transferring residence outside the Netherlands is an additional formality likely further to hinder the departure (38)

7.9.06 – C-470/04 N (6)



Mr. N

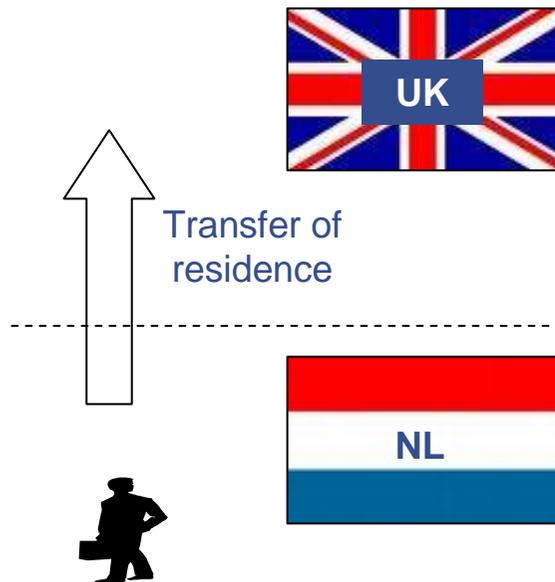
Dutch citizen

Resident in the
Netherlands

– Is there a justification?

- Allocation of taxing rights. This Court finds that preserving the allocation of the power to tax between Member States is a **legitimate objective** recognized by the Court of Justice (*Marks & Spencer*, paragraph 45). In addition, in accordance with Article 293 EC, Member States are to negotiate with each other with a view to securing for the benefit of their nationals the abolition of double taxation within the Community (42). However, apart from Convention 90/436/EEC, no unifying or harmonizing measure for the elimination of double taxation has yet been adopted at Community level, and Member States have not yet concluded any multilateral convention to that effect under Article 293 EC (Case C-336/96 *Gilly*, paragraph 23, and *D*, paragraph 50) (43)

7.9.06 – C-470/04 N (7)



Mr. N

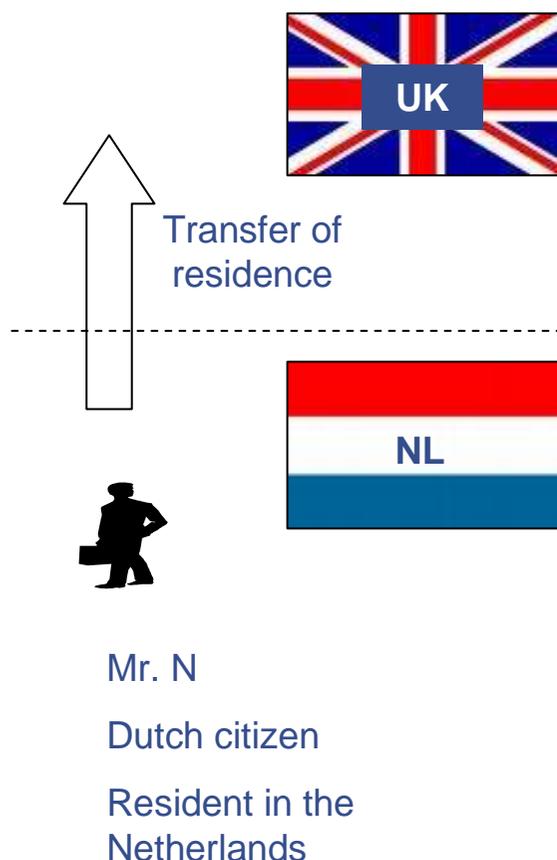
Dutch citizen

Resident in the
Netherlands

– Is there a justification?

- It is in that context that the Court has already held that, in the absence of any unifying or harmonizing Community measures, Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation (*Gilly*, paragraphs 24 and 30; *Saint-Gobain ZN*, paragraph 57) (44)

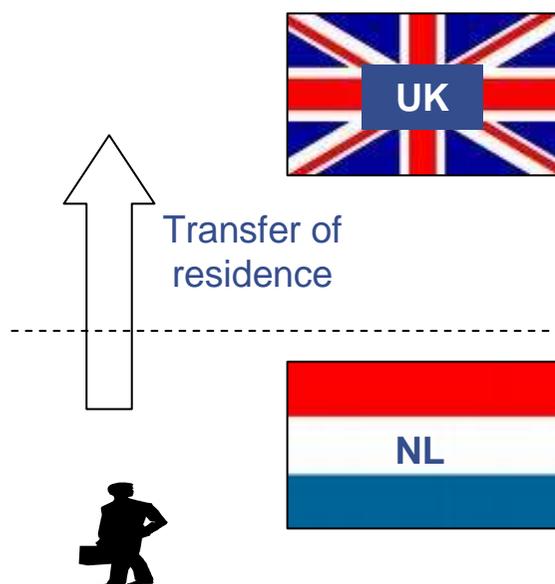
7.9.06 – C-470/04 N (8)



– Is there a justification?

- In this area, it is not unreasonable for the Member States to find inspiration in international practice and, particularly, the model conventions drawn up by the Organization for Economic Cooperation and Development (OECD) (45)
- Thus, gains realized on the disposal of assets are taxed, in accordance with Article 13(5) of the OECD Model, in the contracting State of which the person making the disposal is a resident

7.9.06 – C-470/04 N (9)



Mr. N

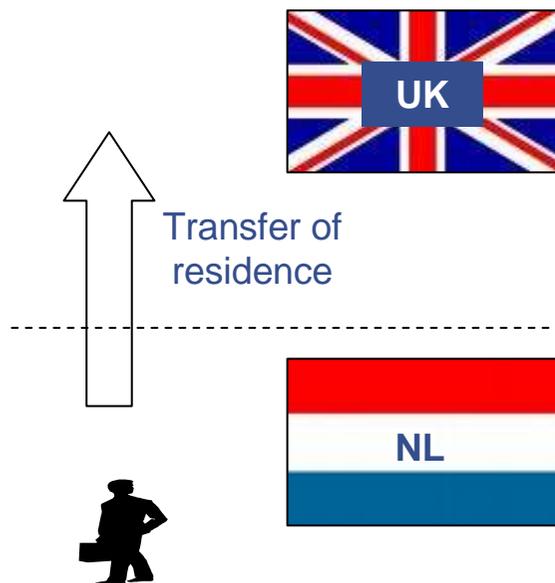
Dutch citizen

Resident in the
Netherlands

– Is there a justification?

- As the Advocate General has observed in paragraphs 96 and 97 of her Opinion, it is in accordance with that **principle of fiscal territoriality**, connected with a temporal component, namely residence within the territory during the period in which the taxable profit arises, **that the national provisions in question provide for the charging of tax on increases in value recorded in the Netherlands**, the amount of which has been determined at the time the taxpayer concerned emigrated and payment of which has been suspended until the actual disposal of the securities (46)

7.9.06 – C-470/04 N (10)

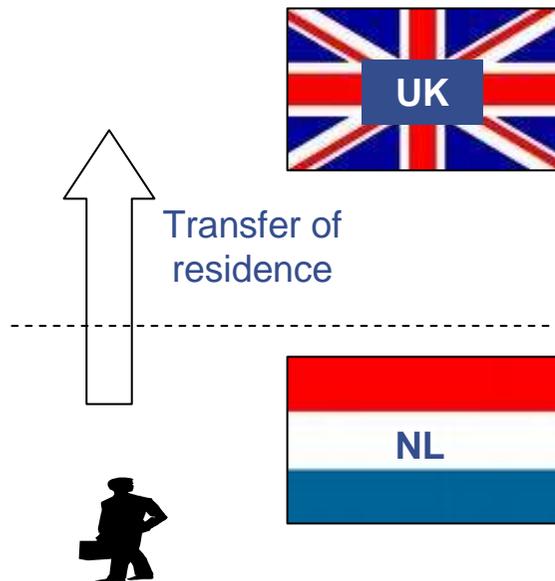


Mr. N
Dutch citizen
Resident in the
Netherlands

– Proportionality?

- Whilst the tax declaration demanded at the time of transfer of residence, necessary in order to calculate the tax on income, constitutes an administrative formality likely to hinder the exercise of fundamental freedoms by the person concerned or make such exercise less attractive, it **cannot be regarded as disproportionate** having regard to the legitimate objective of allocating the power of taxation, in particular for the purposes of eliminating double taxation between Member States (49). Tax declaration would have been necessary even at the moment of the sale (50)

7.9.06 – C-470/04 N (11)



Mr. N

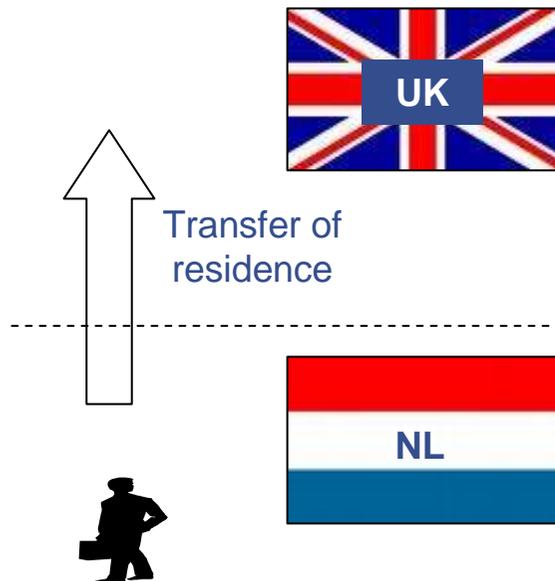
Dutch citizen

Resident in the
Netherlands

– Proportionality?

- **On the other hand**, the obligation to provide guarantees, necessary for the granting of a deferment of the tax normally due, whilst doubtless facilitating the collection of that tax from a foreign resident, goes beyond what is strictly necessary in order to ensure the functioning and effectiveness of such a tax system based on the principle of fiscal territoriality. There are methods less restrictive of fundamental freedoms (51). The Community legislature has already taken harmonization measures, which essentially pursue the same goal. In particular, Council Directive 77/799/EEC of 19 December 1977 (52)

7.9.06 – C-470/04 N (12)



Mr. N

Dutch citizen

Resident in the
Netherlands

– Proportionality?

- Finally, in order to be regarded in this context as proportionate to the objective pursued, such a system for recovering tax on the income from securities would have to take full account of reductions in value capable of arising after the transfer of residence by the taxpayer concerned, unless such reductions have already been taken into account in the host Member State (54)

Exit taxation COM (2006) 825 final of December 19, 2006

ECJ: exit taxes for individuals

- ! The principles stemming from the *de Lasteyrie* and *N* can be summarized as follows:
 - MS from which an individual departs is not prevented by EC law from assessing the amount of income on which it wishes to preserve its taxing jurisdiction, provided this does not give rise to an immediate charge to tax
 - The possible suspension of payment made subject, e.g., to the condition that a guarantee is provided constitute a restriction
 - Similarly, the suspension cannot be made conditional of designating a representative in the MS of origin
 - The condition of presenting a tax declaration at the time of transfer is proportionate

Exit taxation COM (2006) 825 final of December 19, 2006

The Commission view

Timing differences arise

- Article 13 of the OECD Model provides for exclusive taxation in the residence State
- Some MS takes the view that disposal arises at the moment of the transfer, thus DTTs are not applicable
- MS compute the income in different ways
- Different views could lead to double taxation or non taxation
- The Commission believes that MS exercising taxing powers should provide relief against double taxation

Exit taxation COM (2006) 825 final of December 19, 2006

The Commission view (2)

- ! The Commission see different options to resolve these **mismatches**:
 - In practice, a number of MSs which either assume a deemed disposal just before emigration or apply a system of extended tax liability already provide for a mechanism to credit any tax levied by the new residence state on the same gains

Exit taxation COM (2006) 825 final of December 19, 2006

The Commission view (3)

- MSs could also agree to divide the taxing rights on the gains, e.g. by splitting up the taxing rights according to the period that the shareholder was resident in the respective MSs. This may require changes to existing double tax conventions. As confirmed by the ECJ in *N*, any solution would need to take account of a possible decrease in value of the shares by either the host MS or that of origin. The fact that a taxpayer has exercised his or her right of free movement may not result in taxation of a higher amount of gains than would have been taxable had he/she not changed residence

Exit taxation COM (2006) 825 final of December 19, 2006

The Commission view: the implication for companies

- ! The Commission is of the opinion that the interpretation of the freedom of establishment given by the ECJ in *de Lasteyrie* in respect of exit tax rules on individuals also **has direct implications for MSs' exit tax rules on companies**

Exit taxation COM (2006) 825 final of December 19, 2006

EEA/EFTA States

- ! The European Economic Area (EEA) Agreement provides for the same four basic freedoms as the EC Treaty (goods, persons, services and capital). It also includes horizontal provisions relevant to the four freedoms
- ! Secondary Community legislation in the area of taxation, however, has not been incorporated in the EEA Agreement. The Mutual Assistance Directive and the Recovery Directive therefore do not apply to these states

Exit taxation COM (2006) 825 final of December 19, 2006

EEA/EFTA States (2)

- ! Taxes levied in case of the emigration of individuals or the transfer of seat of companies would primarily appear to involve the free movement of workers (Article 39 EC / 28 EEA Agreement) and the freedom of establishment (Article 43 EC / 31 EEA Agreement) respectively
- ! The exit taxes at issue in *de Lasteyrie* and *N* which applied to individuals with substantial shareholdings were found to contravene the freedom of establishment. As the same basic freedoms apply to EEA states, the rulings in *de Lasteyrie* and *N* are of direct relevance to them

Exit taxation COM (2006) 825 final of December 19, 2006

EEA/EFTA States (3)

- ! The question is whether there are significant differences in situation which could justify such restrictions in the case of EEA states. The Commission is of the opinion that an immediate collection of tax may be justified in certain circumstances by overriding reasons in the general interest, **in particular the need to ensure the effectiveness of fiscal supervision and to prevent tax evasion**

Exit taxation COM (2006) 825 final of December 19, 2006

EEA/EFTA States (4)

- EEA states are **not obliged to implement secondary Community legislation** in the area of taxation, such as the Mutual Assistance Directive and the Recovery Directive. As a consequence, MSs do not necessarily have the same guarantees that deferred tax claims can be discharged at a later stage as they would have within the Community. In many cases, MSs have, however, concluded bilateral or multilateral tax conventions with EEA states which include information exchange obligations that provide for an equivalent level of mutual assistance. **The Commission believes that in situations where a lack of administrative cooperation prevents MSs from safeguarding their tax claims they should be entitled to take appropriate measures at the moment of emigration or transfer**

**Exit taxation COM (2006) 825 final of December 19,
2006**

EEA/EFTA States (5)

- ! The same conclusions apply to companies in which the freedom of establishment and the free movement of capital apply

Exit taxation COM (2006) 825 final of December 19, 2006

Third countries

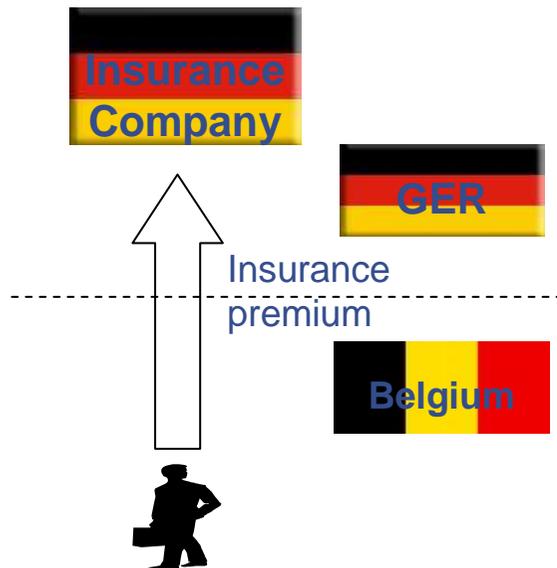
- ! Of the four basic freedoms, only the free movement of capital and payments applies to third countries
- ! The same conclusions apply

Insurance premiums

Fabio Aramini, LL.M., Partner

Studio Adonnino Ascoli & Cavasola Scamoni

28.1.92 – C-204/90 Bachmann



Mr. Bachmann
German citizen
Resident in
Belgium
Working in Belgium
(employed person)

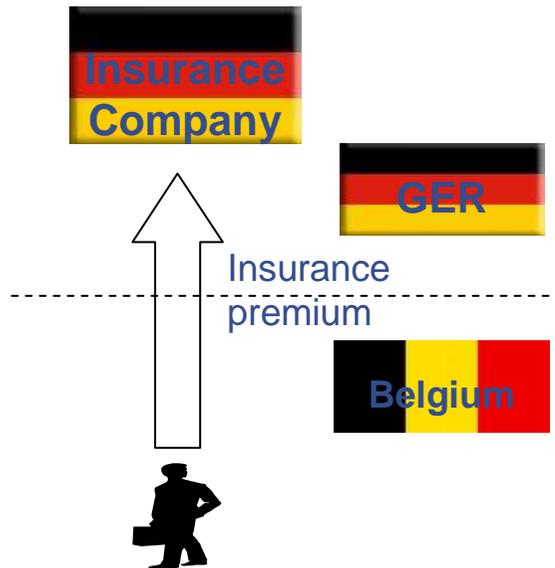
– Facts

- According to Belgium law, only insurance contributions paid to a mutual insurance company recognized by Belgium may be deducted from occupational income (3)

– Question

- Are the provisions of Belgian revenue law relating to income tax pursuant to which the deductibility of sickness and invalidity insurance contributions or pension and life assurance contributions is made conditional upon the contributions being paid 'in Belgium' compatible with the free movement of workers and the freedom to provide services? (4)

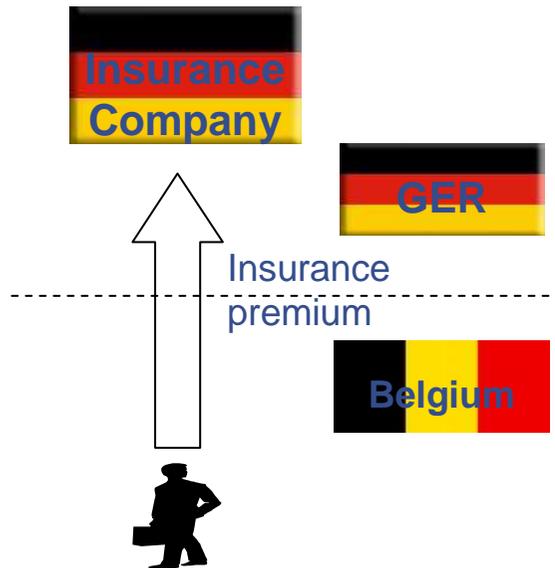
28.1.92 – C-204/90 Bachmann (2)



Mr. Bachmann
German citizen
Resident in
Belgium
Working in Belgium
(employed person)

- **Have you exercised a fundamental Freedom?**
 - Free movement of workers (9)
 - Freedom to provide services (31)
- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - Free movement of workers. There is a risk that the provisions in question may operate to the particular detriment of those workers who are, as a general rule, nationals of other Member States (9)
 - Restriction to provide services (31)

28.1.92 – C-204/90 Bachmann (3)

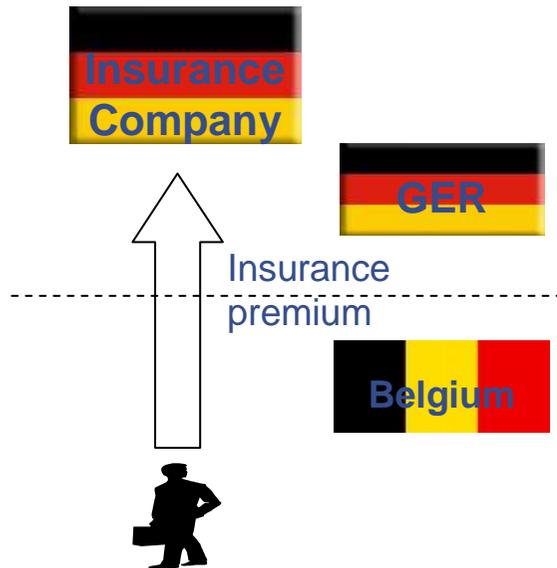


Mr. Bachmann
German citizen
Resident in
Belgium
Working in Belgium
(employed person)

– Is there a justification?

- The insurance contract can be terminated and another one signed. N/A (31)
- Effectiveness of fiscal controls. N/A Directive on the Mutual Assistance (18)
- Tax cohesion. This argument is **accepted**. There exists under the Belgian rules a connection between the deductibility of contributions and the liability to tax of sums payable by the insurers under pension and life assurance contracts. According to Belgium law pensions, annuities, capital sums or surrender values under life assurance contracts are exempt from tax where there has been no deduction of contributions (21)

28.1.92 – C-204/90 Bachmann (4)



Mr. Bachmann

German citizen

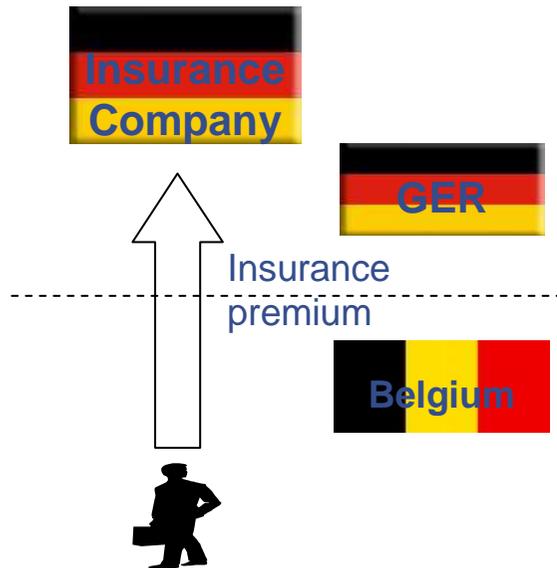
Resident in
Belgium

Working in Belgium
(employed person)

– Is there a justification?

- The cohesion of such a tax system, the formulation of which is a matter for each Member State, therefore presupposes that, in the event of a State being obliged to allow the deduction of life assurance contributions paid in another Member State, it should be able to tax sums payable by insurers (23)

28.1.92 – C-204/90 Bachmann (5)

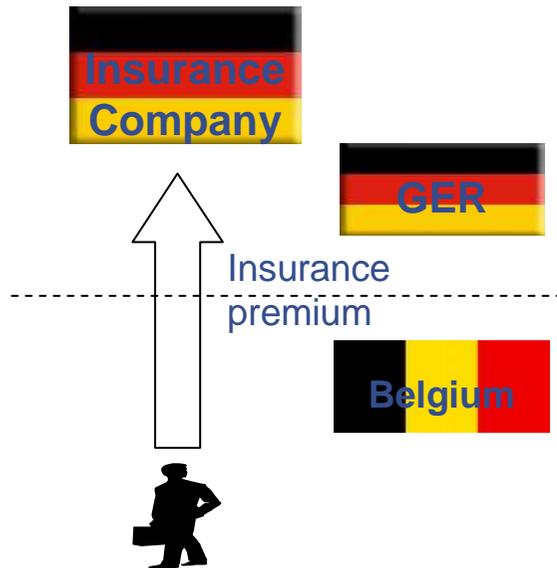


Mr. Bachmann
German citizen
Resident in
Belgium
Working in Belgium
(employed person)

– Proportionality

- An undertaking by an insurer to pay such tax cannot constitute an adequate safeguard. If the undertaking were not honored, it would be necessary to enforce it in the Member State in which the insurer is established, and quite apart from the problems encountered by a State in discovering the existence and amount of the payments made by insurers established in another State, there remains the possibility that the recovery of the tax might then be prevented on the grounds of public policy (24)
- It follows that, as Community law stands at present, it is not possible to ensure the cohesion of such a tax system by means of measures which are less restrictive (27)

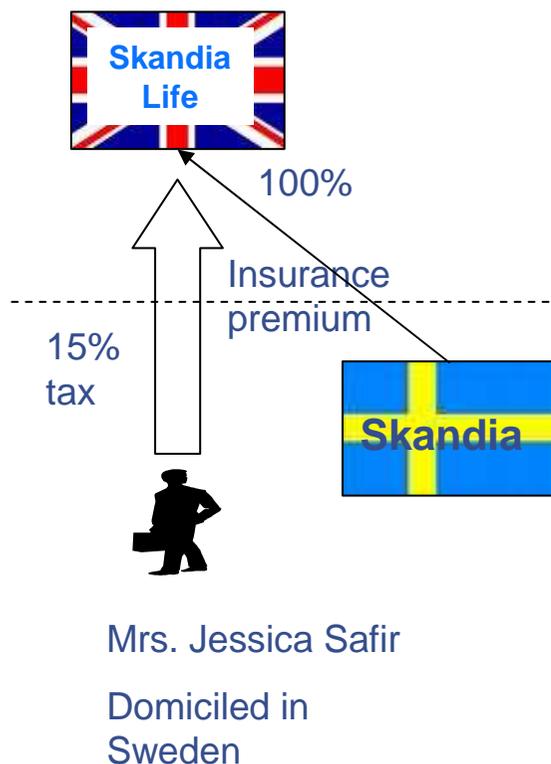
28.1.92 – C-204/90 Bachmann (6)



Mr. Bachmann
German citizen
Resident in
Belgium
Working in Belgium
(employed person)

- See also *Comm v Belgium* (28.1.92 – C-300/90)
- The same principles have been upheld in *Danner* (3.10.02 – C-136/00): EC Treaty is to be interpreted as precluding a Member State's tax legislation from restricting or disallowing the deductibility for income tax purposes of contributions to voluntary pension schemes paid to pension providers in other Member States while allowing such contributions to be deducted when they are paid to institutions in the first-mentioned Member State, **if that legislation does not at the same time preclude taxation of the pensions paid by the abovementioned pension providers**

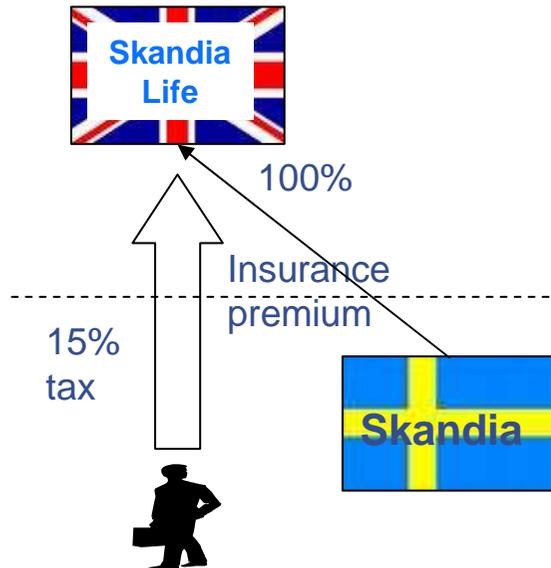
28.4.98 – C-118/96 **Jessica Safir**



– Facts

- Jessica Safir is domiciled in Sweden and pay capital life assurance premiums to Skandia Life Assurance Company Ltd ('Skandia Life'), a British insurance company operating on the Swedish market and wholly owned by the Swedish insurance company Skandia (2)
- Capital life assurance premiums paid to non resident insurance companies are subject to 15% (9)
- In addition the payment must be registered and declared to the competent authorities (10)

28.4.98 – C-118/96 Jessica Safir (2)



Mrs. Jessica Safir

Domiciled in
Sweden

– Facts

- The 15% tax is not applied if the capital life assurance premiums are paid to Swedish resident companies

– Question

- Is the difference in treatment compatible with EU law?

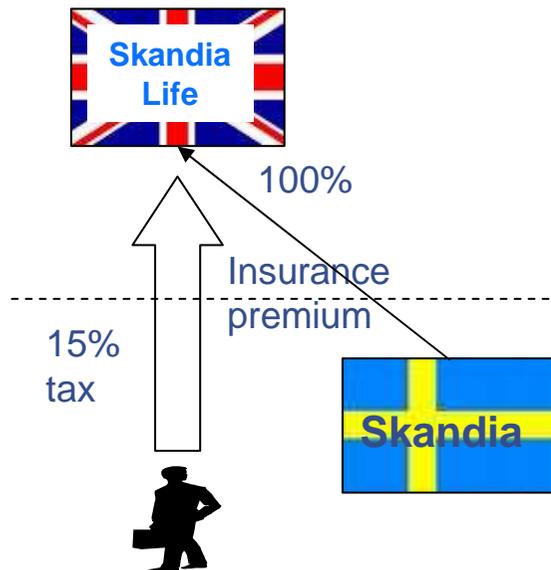
– Have you exercised a fundamental Freedom?

- Freedom to provide services (22)

– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- Restriction (30)

28.4.98 – C-118/96 Jessica Safir (3)



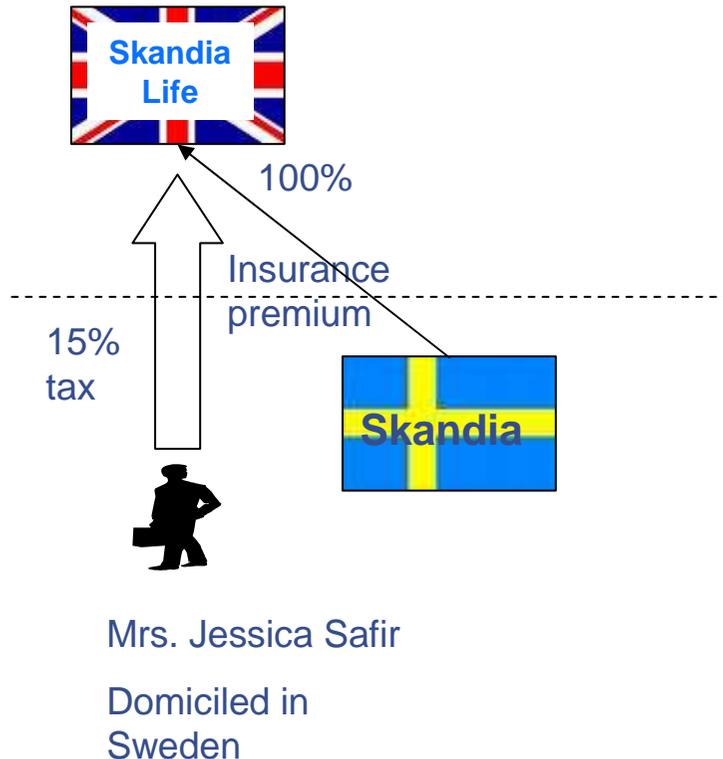
Mrs. Jessica Safir

Domiciled in
Sweden

– **Proportionality** N/A

— The same principles have been upheld, again, in **Skandia** (26.6.03 – C-422/01): EU law precludes an insurance policy issued by an insurance company established in another Member State which meets the conditions laid down in national law for occupational pension insurance, apart from the condition that the policy must be issued by an insurance company operating in the national territory, from being treated differently in terms of taxation, with income tax effects which, depending on the circumstances in the individual case, may be less favorable

28.4.98 – C-118/96 Jessica Safir (4)



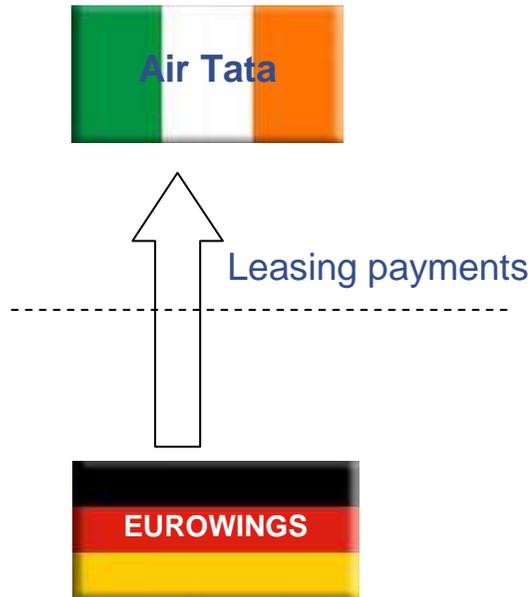
- The same principles have been upheld, another time, in **Comm v Denmark** (20.1.07 – C-150/04): by introducing and maintaining in force a system for life assurance and pensions under which tax deductions and tax exemptions for payments are granted only for payments under contracts entered into with pension institutions established in Denmark, whereas no such tax relief is granted for payments made under contracts entered into with pension institutions established in other Member States, the Kingdom of Denmark has failed to fulfil with EU law
- See also **Comm v Belgium** (5.7.07 – C-522/04)

Leasing payments

Fabio Aramini, LL.M., Partner

Studio Adonnino Ascoli & Cavasola Scamoni

26.10.99 – C-297/97 Eurowings



– Facts

- Eurowings is a German resident company. Eurowings rent a plane from Air Tata resident in Ireland (13)
- The German tax office assessed a higher taxable base, for local trade tax purposes, by denying the deduction of the lease payments (13)

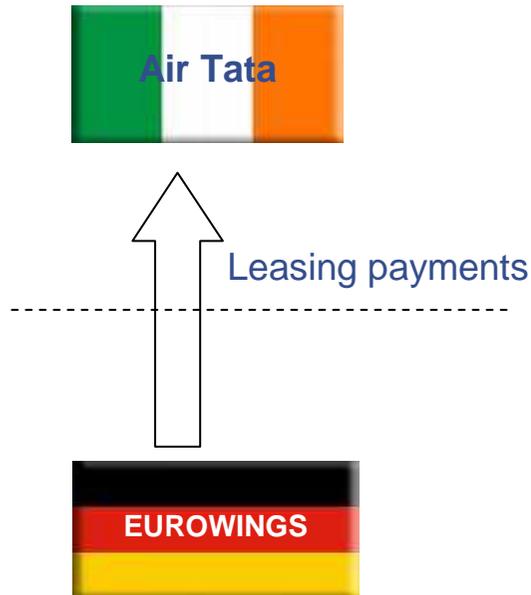
– Question

- Is such a rule against the freedom to provide services?

– Have you exercised a fundamental Freedom?

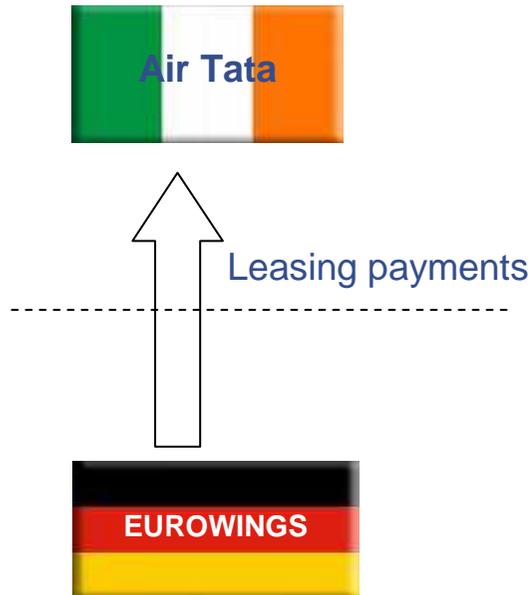
- Freedom to provide services (34)

26.10.99 – C-297/97 Eurowings



- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - The fact that the upward adjustment is made on the ground that the recipient is not subject to the local trade tax in Germany is restriction (37). The upward adjustment is always made to companies resident in other Member States (35)
- **Is there a justification?**
 - Tax cohesion. There is only an indirect link (42)
 - Tax advantages in other Member States. This is not a justification (44)
- **Proportionality?** N/A

26.10.99 – C-297/97 **Eurowings (3)**



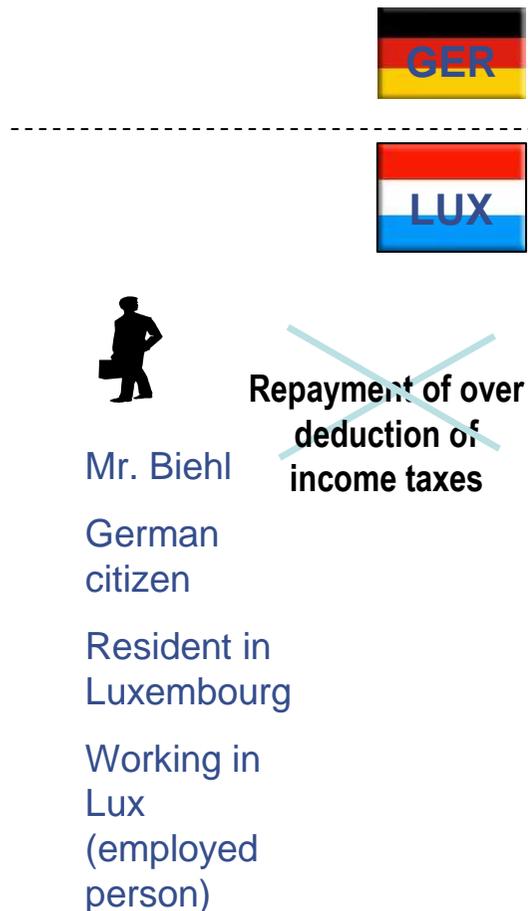
- **An important statement on anti avoidance**
 - ECJ expressed the principle that in so far as taxpayers have not entered into abusive practice, MSs cannot hinder the exercise of the rights of freedom of movement **simply because of lower levels of taxation in other MSs** (The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007, par. 2)

Repayment of excess tax

Fabio Aramini, LL.M., Partner

Studio Adonnino Ascoli & Cavasola Scamoni

8.5.90 – 175/88 Biehl I



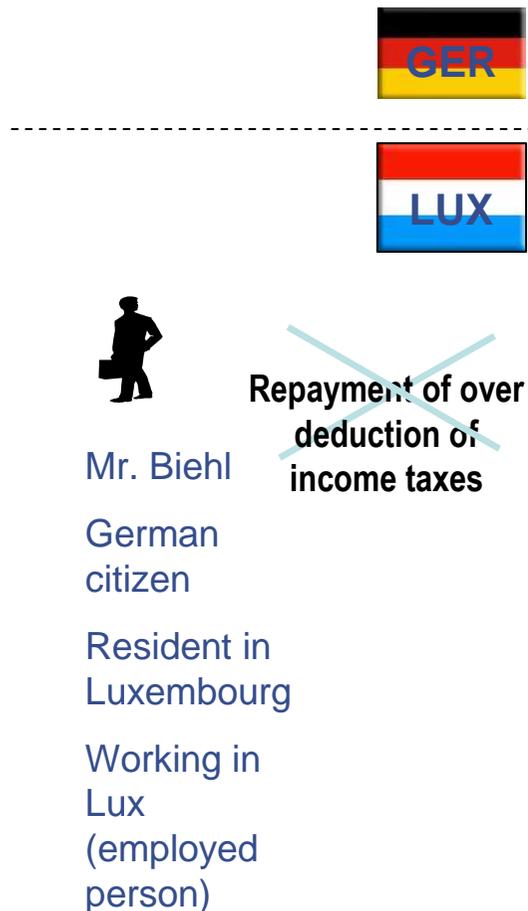
– Facts

- Mr Biehl' s Luxembourg employer deducted sums by way of income tax from Mr Biehl' s salary . It emerged from Mr Biehl' s final tax assessment that the amount deducted by his Luxembourg employer **exceeded the total amount of his liability to tax (4)**
- Mr Biehl asked the Luxembourg tax office to repay the over deduction of income tax but the latter refused on the ground that the repayment is not permitted to persons who are resident during only part of the year in Luxembourg (5 and 6)

– Question

- Is this provision in contrast with the free movement of workers? (9)

8.5.90 – 175/88 Biehl I (2)



- **Have you exercised a fundamental Freedom?**
 - Free movement of workers (11 and 12)
- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - The rules regarding equality of treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination (13)
- **Is there a justification?**
 - Protection of the system of progressive taxation. This justification cannot be upheld (16)

8.5.90 – 175/88 Biehl I (3)



Mr. Biehl

German
citizen

Resident in
Luxembourg

Working in
Lux
(employed
person)

~~Repayment of over
deduction of
income taxes~~

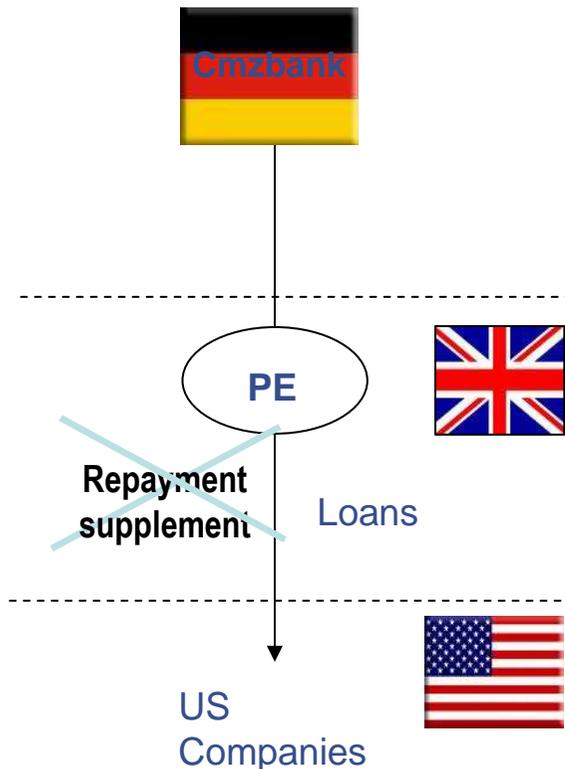
– Is there a justification?

- The refund can be obtained if the person proves the unfair consequences of the non refund. the Luxembourg Government has not cited any provision **imposing an obligation** on the administration des contributions to remedy in every case the discriminatory consequences arising from the application of the national provision at issue (18)

– **Proportionality?** N/A

– See also Biehl II (26.10.95, C-151/94)

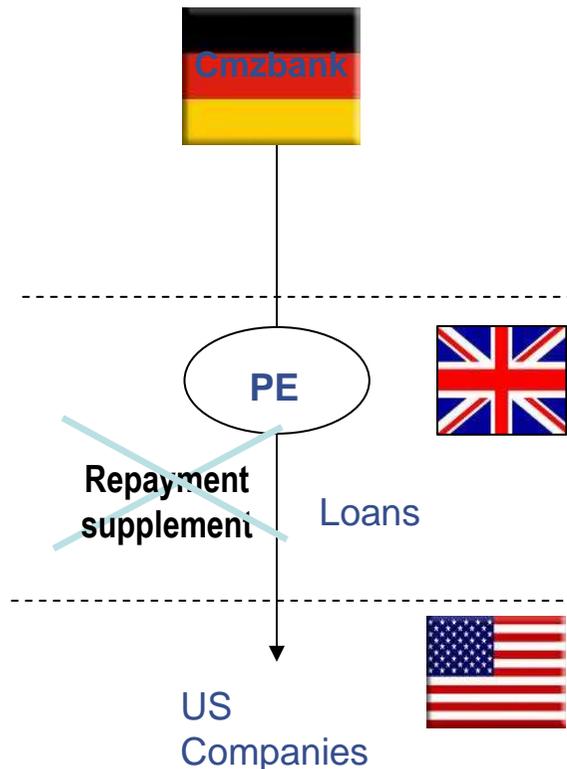
13.7.93 – C-330/91 Commerzbank



– Facts

- Commerzbank AG is a company incorporated under German law whose registered office is in Germany (2)
- Commerzbank has a branch in the United Kingdom through the intermediary of which it granted loans to a number of United States companies. Commerzbank paid tax in the United Kingdom on the interest received from those companies (3)
- Subsequently Commerzbank sought repayment of that sum from the tax authorities on the ground that the interest was exempt in the United Kingdom by virtue of the US – UK DTT (4)

13.7.93 – C-330/91 Commerzbank (2)



– Facts

- Commerzbank received a refund of the overpaid tax (5)
- Commerzbank asked also for the refund of the “repayment supplement” equal to interest on the amount paid. However, the repayment was not granted because only resident taxpayers can ask for it (8)

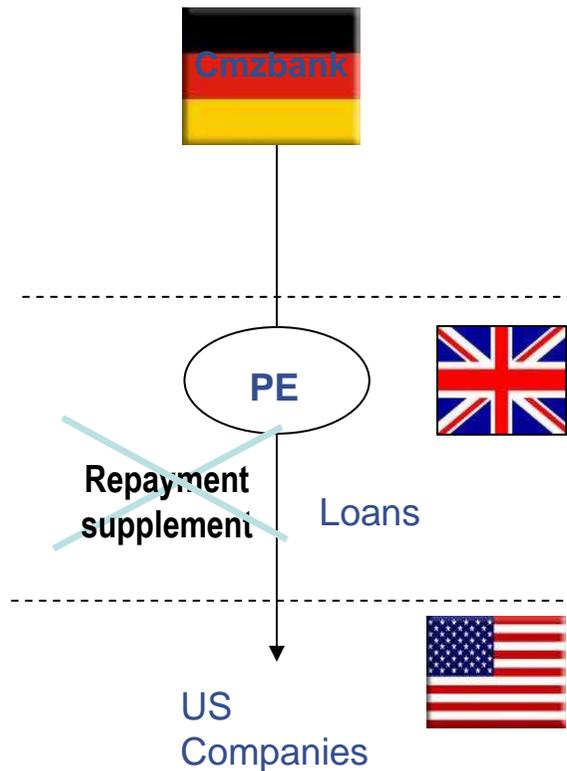
– Question

- Is this provision against the freedom of establishment?

– Have you exercised a fundamental Freedom?

- Freedom of establishment: Registered office, central administration or principal place of business is the **connecting factor** (13)

13.7.93 – C-330/91 Commerzbank (3)



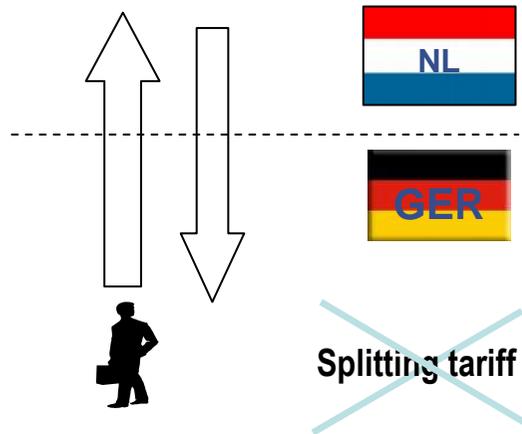
- Is there a discrimination or a restriction? Overt? Covert? Home or Host State?
 - Although it applies independently of a company's seat, the use of the criterion of fiscal residence within national territory for the purpose of granting repayment supplement on overpaid tax is liable to work more particularly to the disadvantage of companies having their seat in other Member States (15)
- Is there a justification? N/A
Proportionality? N/A

Splitting tariff and others

Fabio Aramini, LL.M., Partner

Studio Adonnino Ascoli & Cavasola Scamoni

26.1.93 – C-112/91 Werner



– Facts

- Mr. Werner leaves with his wife in the Netherlands
- Mr. Werner works as a dentist in Germany
- Mr. Werner is resident in the Netherlands
- Mr. Werner claim the splitting tariff in Germany, but the office refused (7)

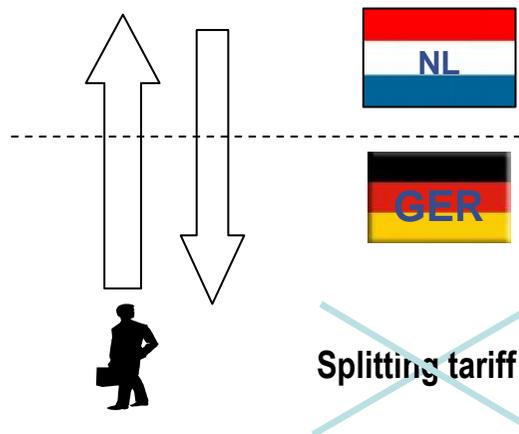
– Question

- Is this rule contrary to EU law?

– Outcome

- The EU law does not preclude a Member State from imposing on its nationals who carry on their professional activities within its territory and who earn all or almost all of their income there or possess all or almost all of their assets there a heavier tax burden if they do not reside in that State than if they do

26.1.93 – C-112/91 **Werner (2)**



Mr. Werner

German
citizen

Resident in
the
Netherlands

Working in
Germany

- Differently: **Asscher** (27.6.96 – C-107/94)
 - A national of a Member State pursuing an activity as a self-employed person in another Member State, in which he resides, may rely on Article 52 of the EC Treaty as against his State of origin, on whose territory he pursues another activity as a self-employed person, if, by virtue of pursuing an economic activity in a Member State other than his State of origin, he is, with regard to the latter, in a situation which may be regarded as equivalent to that of any other person relying as against the host Member State on the rights and liberties guaranteed by the Treaty

14.2.95 – C-279/93 Schumacker



Mr.
Schumacker

Belgium
citizen

Resident in
the Belgium

Working in
Germany
(employed
person)

– Facts

- The splitting tariff (introduced to mitigate the progressive nature of the income tax rates and under which the spouses' total income is aggregated, notionally attributed to each spouse as to 50% and then taxed accordingly) is granted only to resident taxpayers (7)
- Equally, other tax deductions and benefits are granted only to resident taxpayers (9-12)

– Question

- Is the different in treatment compatible with the free movement of workers especially when more than 90% of the income is derived from the source State and according to the DTT the income may be taxed only in that State?

14.2.95 – C-279/93 Schumacker (2)



Mr.
Schumacker

Belgium
citizen

Resident in
the Belgium

Working in
Germany
(employed
person)

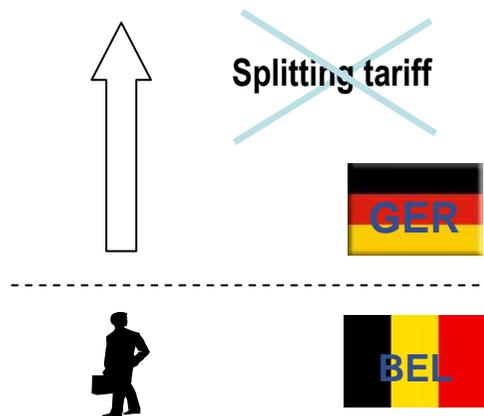
– **Have you exercised a fundamental Freedom?**

- Free movement of workers (48)

– **Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?**

- National rules of that kind are liable to operate mainly to the detriment of nationals of other Member States. Non-residents are in the majority of cases foreigners (29)
- The fact that a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory since those two categories of taxpayer are not in a comparable situation (34)

14.2.95 – C-279/93 Schumacker (3)



Mr.
Schumacker

Belgium
citizen

Resident in
the Belgium

Working in
Germany
(employed
person)

– Is there a discrimination or a restriction? Overt?
Covert?

- The position is different, however, in a case such as this one where the non-resident receives no significant income in the State of his residence and obtains the major part of his taxable income from an activity performed in the State of employment, **with the result that the State of his residence is not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances (36)**
- **Discrimination** arises from the fact that his personal and family circumstances are taken into account neither in the State of residence nor in the State of employment (38)

14.2.95 – C-279/93 Schumacker (4)



Mr.
Schumacker

Belgium
citizen

Resident in
the Belgium

Working in
Germany
(employed
person)

– Is there a justification?

- Tax cohesion (there is a direct link between deductions and taxation). This is not the case because the tax payable in the residence State are not sufficient to take into consideration personal and family circumstances (41)
- Administrative difficulties. N/A Directive on the Mutual Assistance (45)
- Non binding procedures. N/A (54)

– Proportionality? N/A

14.2.95 – C-279/93 Schumacker (5)



Mr.
Schumacker

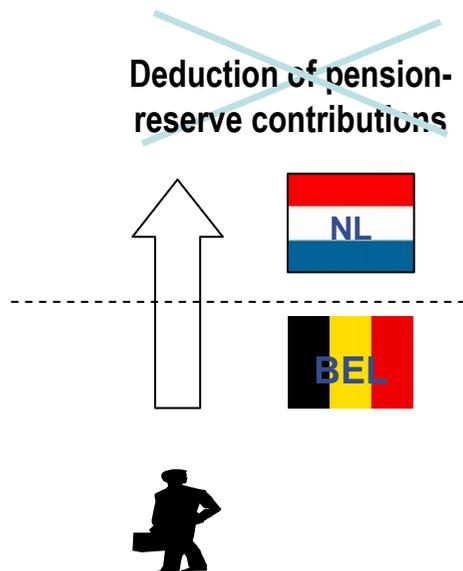
Belgium
citizen

Resident in
the Belgium

Working in
Germany
(employed
person)

- **Gschwind** (14.9.99 – C-391/97): if less than 90% of the income is earned in Germany (58%), the latter State is not obliged to extend the splitting tariff to non residents
- The same principle has been upheld in **Turpeinen** (9.11.06, C-520/04): Article 18 EC must be interpreted as meaning that it precludes national legislation according to which the income tax on a retirement pension paid by an institution of the Member State concerned to a person residing in another Member State exceeds in certain cases the tax which would be payable if that person resided in the first Member State, where that pension constitutes all or nearly all of that person's income

11.8.95 – C-80/94 Wielockx



Mr. Wielockx

Belgium citizen

Resident in the Belgium

Working in the Netherlands
(self employed person)

– Facts

- Pension-reserve contributions are not deductible for non-resident taxpayers (7)

– Question

- Is this difference in treatment against the freedom of establishment?

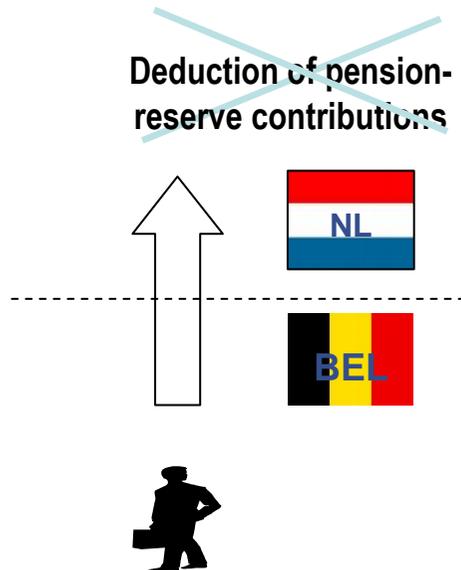
– Have you exercised a fundamental Freedom?

- Freedom of establishment

– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- Non-resident taxpayer, whether employed or self-employed, who receives all or almost all of his income in the State where he works is objectively in the same situation (20)

11.8.95 – C-80/94 Wielockx (2)



Mr. Wielockx

Belgium citizen

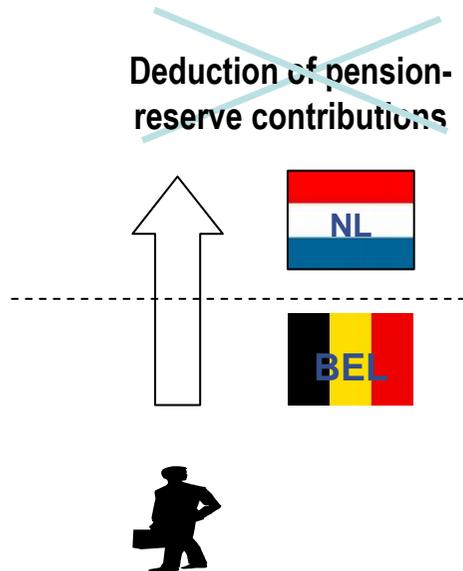
Resident in the Belgium

Working in the Netherlands
(self employed person)

- Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- If a non-resident taxpayer is not given the same tax treatment as regards deductions from his taxable income as a resident, his personal situation will be taken into account neither by the tax authorities of the State where he works because he is not resident there nor by the State of residence because he receives no income there (21)

11.8.95 – C-80/94 Wielockx (3)



Mr. Wielockx

Belgium citizen

Resident in the Belgium

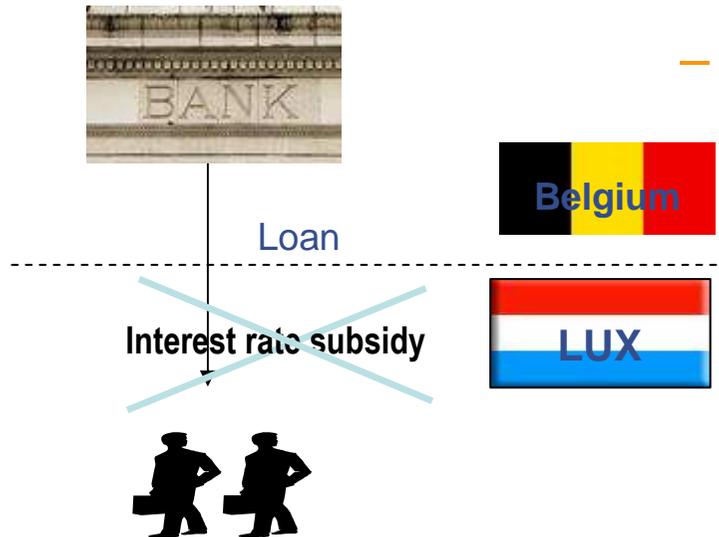
Working in the Netherlands
(self employed person)

– Is there a justification?

- Tax cohesion. This argument cannot be upheld. The effect of double-taxation conventions which follow the OECD model is that the State taxes all pensions received by residents in its territory, whatever the State in which the contributions were paid, but, conversely, waives the right to tax pensions received abroad even if they derive from contributions paid in its territory which it treated as deductible. Fiscal cohesion **is shifted to another level, that of the reciprocity** of the rules applicable in the Contracting States (24)

– Proportionality? N/A

14.11.95 – C-484/93 **Svensson & Gustavsson**



Mr. and Mrs. Svensson &
Gustavsson

Resident in the Luxembourg

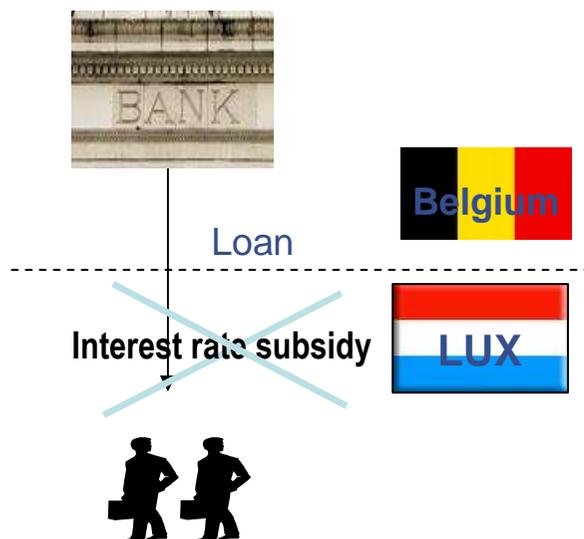
– Facts

- In Luxembourg an interest rate subsidy is provided only on loans granted by credit institutions approved in that Member State (i.e., resident companies or permanent establishments of non resident entities) (3 and 9)

– Question

- Is this provision compatible with EU law?

14.11.95 – C-484/93 Svensson & Gustavsson (2)

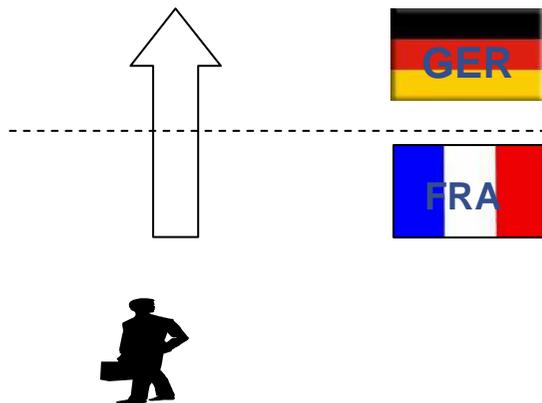


Mr. and Mrs.
Svensson &
Gustavsson

Resident in the
Luxemburg

- **Have you exercised a fundamental Freedom?**
 - Freedom of capital (7)
 - Freedom to provide services (11)
- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - Restriction (10)
 - Discrimination (12)
- **Is there a justification?**
 - Tax cohesion. This argument cannot be upheld because there is no a direct link between granting the subsidy and the taxation of the bank (18)
- **Proportionality?** N/A

12.5.98 – C-336/96 Gilly



Mrs. Gilly

German national
who acquired
French nationality
by marriage

Resident in France

– Facts

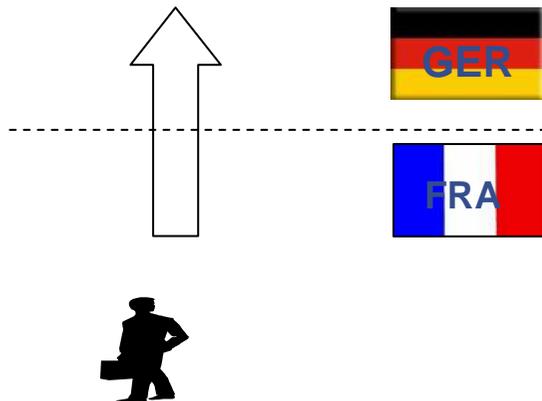
- Mrs Gilly is a German national having also acquired French nationality by marriage. She teaches in a State primary school in Germany, in the frontier area (3)
- According to the DTT, Mrs Gilly may be taxed both in Germany and France. The latter must grant an ordinary tax credit for the income taxed in Germany
- Following the application of the ordinary tax credit method, income received by Mrs Gilly is taxed more heavily compared to a French resident receiving similar income from France (10)

12.5.98 – C-336/96 Gilly (2)

– Preliminary question

- Must the objective of abolishing double taxation laid down in Article 220 of the Treaty be regarded, in view of the time which the Member States have had to implement it, as now having the status of a directly applicable rule under which double taxation may no longer take place?
 - Although the abolition of double taxation within the Community is included among the objectives of the Treaty, it is clear from the wording of that provision that **it cannot itself confer on individuals any rights** on which they might be able to rely before their national courts (16)

12.5.98 – C-336/96 Gilly (3)



Mrs. Gilly

German national
who acquired
French nationality
by marriage

Resident in France

– Question

- Several questions to ask whether the result of the DTT is compatible with EU law

– Have you exercised a fundamental Freedom?

- Free movement of workers: no matter that Mrs Gilly has dual nationality (21)

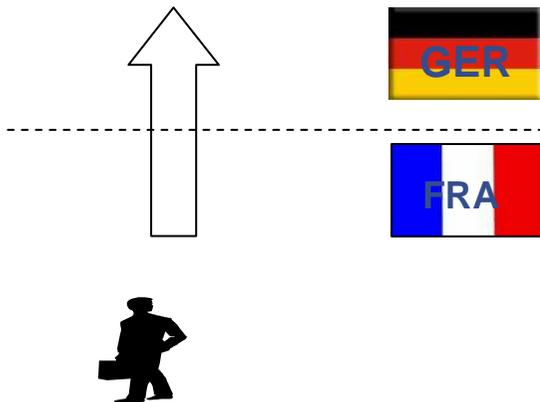
– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- The difference in treatment stems from the allocation of the taxing rights among Members States (30) and the lack of harmonization (34, 49)

12.5.98 – C-336/96 Gilly (4)

– **Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?**

- The fact that Germany does not keep into account the personal situation of Mrs Gilly is of no importance because residents and non residents are not in comparable situations (50) and France keep it into account in calculating the tax liability (49)

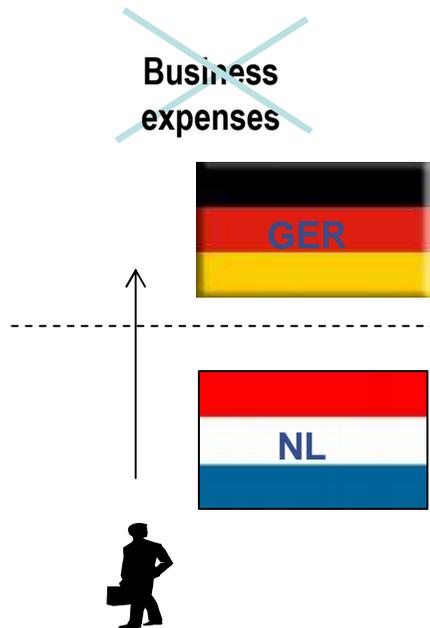


Mrs. Gilly

German national
who acquired
French nationality
by marriage

Resident in France

12.6.03 – C-234/01 Gerritse



Mr. Gerritse

Dutch citizen

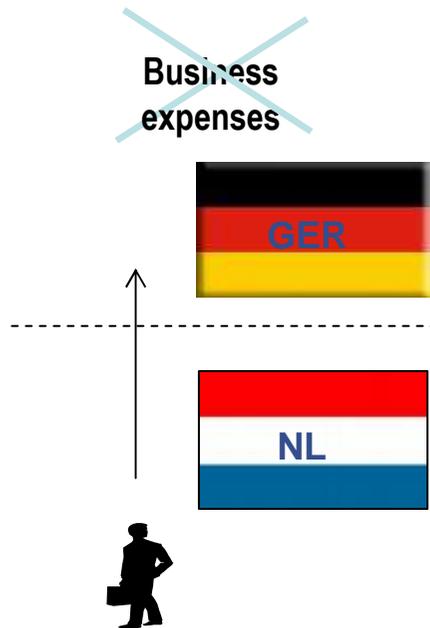
Resident in the
Netherlands

Working in
Germany as an
artist

– Facts

- According to German tax law, non residents are subject to 25% definitive withholding tax in respect to artistic performances (3)
- No deduction of business expenses is in principle authorized, unless those costs represent more than half of the income received (4). These expenses are deductible for German residents
- Non resident persons can ask to be treated as fully taxable individuals but only if either their income is more than 90% of the total earned during the year or the amount is equal or less a certain threshold (7)
- Mr. Gerritse asked to be treated as a resident in Germany to deduct business expenses but the tax office refused due to the lack of the mentioned conditions (12)

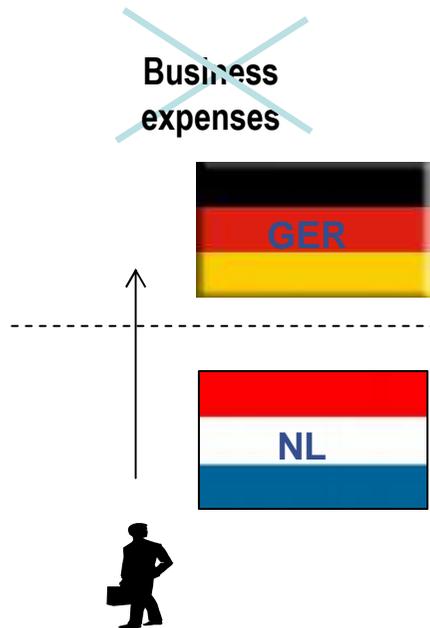
12.6.03 – C-234/01 Gerritse (2)



Mr. Gerritse
Dutch citizen
Resident in the
Netherlands
Working in
Germany as an
artist

- **Question**
 - Is this rule contrary to EU law?
- **Have you exercised a fundamental Freedom?**
 - Freedom to provide services (23)
- **Is there a discrimination or a restriction?**
Overt? Covert? Home or Host State?
 - It is to be noted that the business expenses in question are **directly linked** to the activity that generated the taxable income in Germany, so that residents and non-residents are placed in a comparable situation in that respect (27)

12.6.03 – C-234/01 Gerritse (3)



Mr. Gerritse

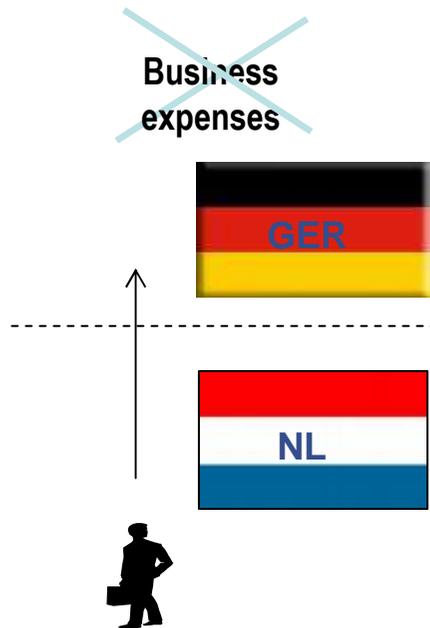
Dutch citizen

Resident in the
Netherlands

Working in
Germany as an
artist

- Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?
 - Discrimination. (28)
- Is there a justification? N/A
- Proportionality? N/A
- The same principles have been applied in **Conijn** (6.7.06, C-346/04): EU law precludes national legislation which does not allow a person with restricted tax liability to deduct from his taxable income, as special expenditure, the costs incurred by him in obtaining **tax advice for the purpose of preparing his tax return**, in the same way as a person with unrestricted tax liability

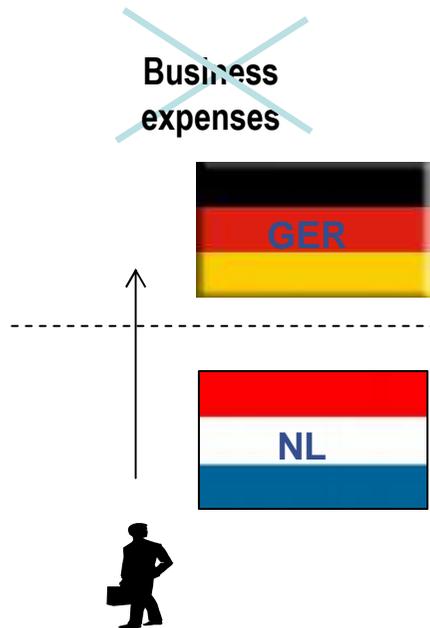
12.6.03 – C-234/01 Gerritse (4)



Mr. Gerritse
Dutch citizen
Resident in the
Netherlands
Working in
Germany as an
artist

- The same principles have also been applied in **Scorpio** (3.10.06, C-290/04).
- In the ruling, the Court held that EU law must be interpreted as **precluding**
 - National legislation which does not allow a recipient of services who is the debtor of the payment made to a non-resident provider of services to deduct, when making the retention of tax at source, the business expenses which that service provider has reported to him and which are **directly linked** to his activity in the Member State in which the services are provided, whereas a provider of services residing in that State is taxable only on his net income, that is, the income received after deduction of business expense

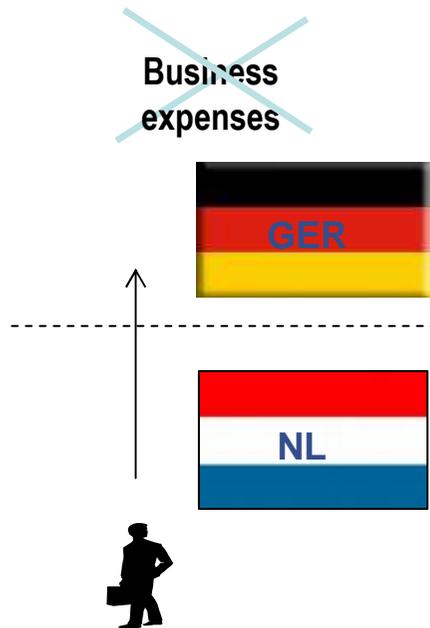
12.6.03 – C-234/01 Gerritse (5)



Mr. Gerritse
Dutch citizen
Resident in the
Netherlands
Working in
Germany as an
artist

- In this ruling, the Court also held that EU law must be interpreted as **not precluding**
 - National legislation under which a procedure of retention of tax at source is applied to payments made to providers of services not resident in the Member State in which the services are provided, whereas payments made to providers of services resident in that Member State are not subject to such a retention
- **The final withholding tax is necessary to ensure the effectiveness of fiscal supervision and is proportionate (35-37)**

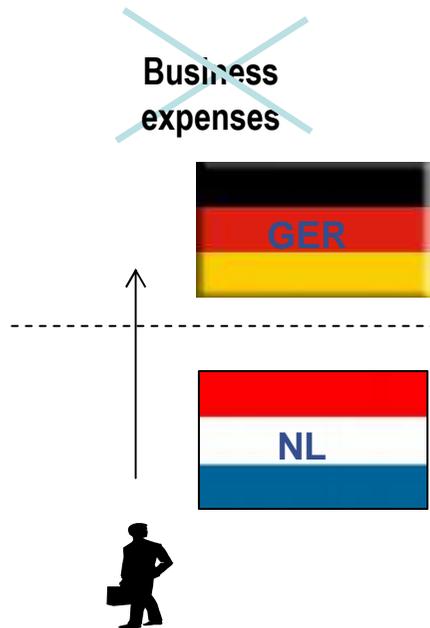
12.6.03 – C-234/01 Gerritse (6)



Mr. Gerritse
Dutch citizen
Resident in the
Netherlands
Working in
Germany as an
artist

- In this ruling, the Court also held that EU law must be interpreted as **not precluding**
 - National legislation under which **liability is incurred by a recipient of services** who has failed to make the retention at source that he was required to make
 - The liability is necessary to ensure the **effectiveness of fiscal supervision** and is proportionate (38)
 - A rule that the tax exemption granted under the DTT to a non-resident provider of services who has carried on activity in Germany can be taken into account by the payment debtor in the procedure for retention of tax at source only if a **certificate** of exemption stating that the conditions laid down to that end by that convention are satisfied is issued by the competent tax authority

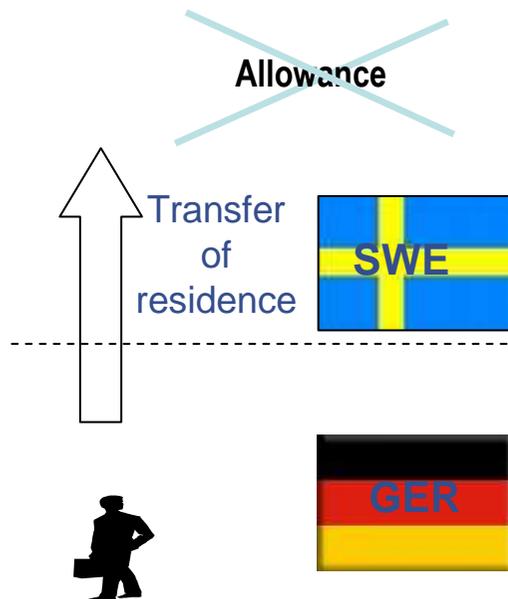
12.6.03 – C-234/01 Gerritse (7)



Mr. Gerritse
Dutch citizen
Resident in the
Netherlands
Working in
Germany as an
artist

- Finally, the same principles have also been applied in **Centro equestre** (15.2.07, C-345/04) with respect to a company: EU does not preclude national legislation in so far as that legislation makes repayment of corporation tax deducted at source on the income of a taxpayer with restricted tax liability subject to the condition that the operating expenses in respect of which a deduction is claimed for that purpose by that taxpayer have a **direct economic connection** to the income received from activities pursued in the Member State concerned, on condition that all the costs that are inextricably linked to that activity are considered to have such a direct connection, irrespective of the place and time at which those costs were incurred. By contrast, EU law precludes such national legislation in so far as it makes repayment of that tax to that taxpayer subject to the condition that those same operating expenses exceed half of that income

1.7.04 – C-169/03 Wallentin

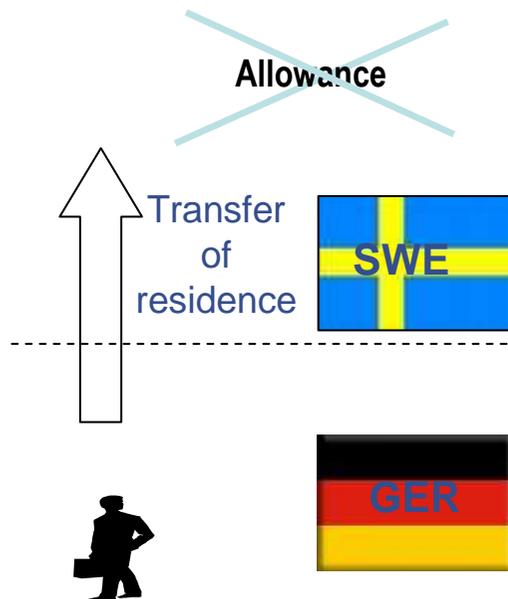


Mr. Wallentin
German citizen
Resident in
Germany

– Facts

- Mr Wallentin, a German national, was, at the time material to the main proceedings, resident in Germany where he was studying. His parents paid him a monthly sum and he received a grant from the German State per month for his accommodation and living expenses. Those sums did not of their nature constitute taxable income under German tax law (3)
- Mr Wallentin undertook a period of work experience with the Church of Sweden. For that purpose he stayed in Sweden and received a remuneration for his period of work experience (4)

1.7.04 – C-169/03 Wallentin (2)

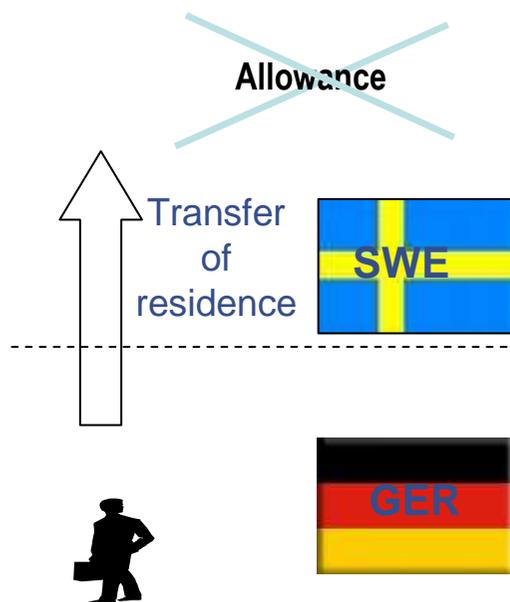


Mr. Wallentin
German citizen
Resident in
Germany

– Facts

- Mr Wallentin applied to the Swedish tax authorities for exemption from income tax on that sum. That application was rejected by the tax authorities, which stated that a final withholding tax (with no right for deduction or allowance) had to be levied on the amount in question (5). **The allowance is granted only to persons resident in Sweden (6)**
- Mr Wallentin takes the view that the fact that the basic allowance is granted only to persons fully liable for tax but not to persons with restricted liability constitutes discrimination prohibited by the EU law

1.7.04 – C-169/03 Wallentin (3)

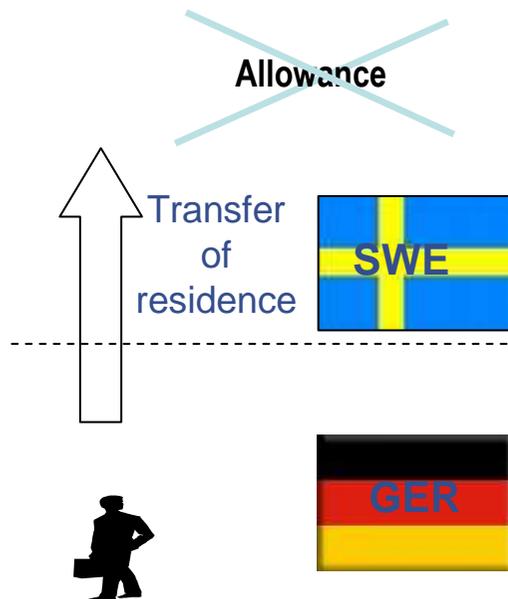


Mr. Wallentin
German citizen
Resident in
Germany

- Question

- Is the EC Treaty to be interpreted as precluding a Member State's legislation which provides that natural persons who are not regarded as resident in the country for tax purposes but who receive income from employment in the country (restricted tax liability) are subject to a **tax at source of such a nature that a basic allowance or other allowance or deduction for personal circumstances is not granted**, whereas persons resident in the country are entitled to such an allowance or deduction at the time of ordinary assessment to income tax in respect of all income which they receive in the Member State and abroad (full tax liability)?

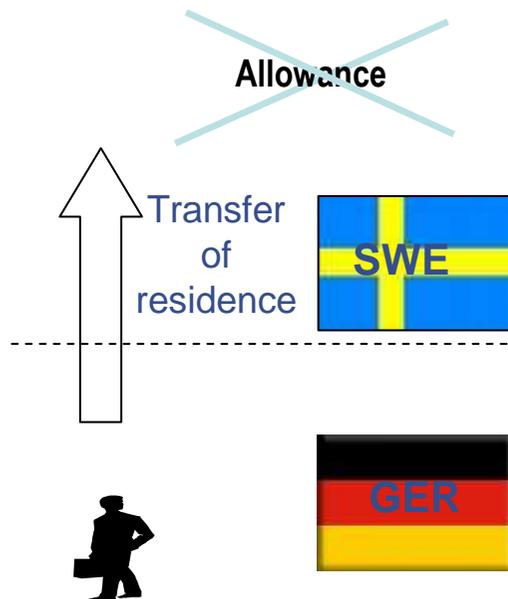
1.7.04 – C-169/03 Wallentin (4)



Mr. Wallentin
German citizen
Resident in
Germany

- **Have you exercised a fundamental Freedom?**
 - Free movement of workers
- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - The situations of residents and of non-residents are generally not comparable (15)

1.7.04 – C-169/03 Wallentin (5)

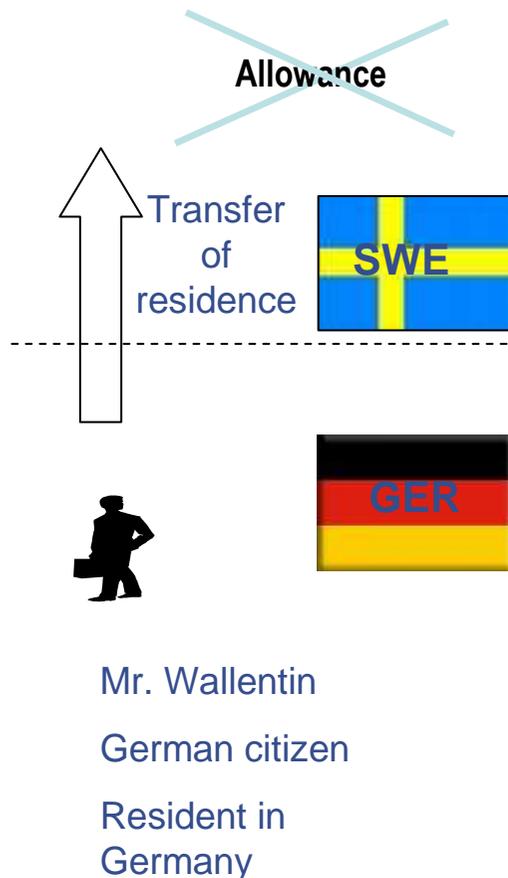


Mr. Wallentin
German citizen
Resident in
Germany

– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

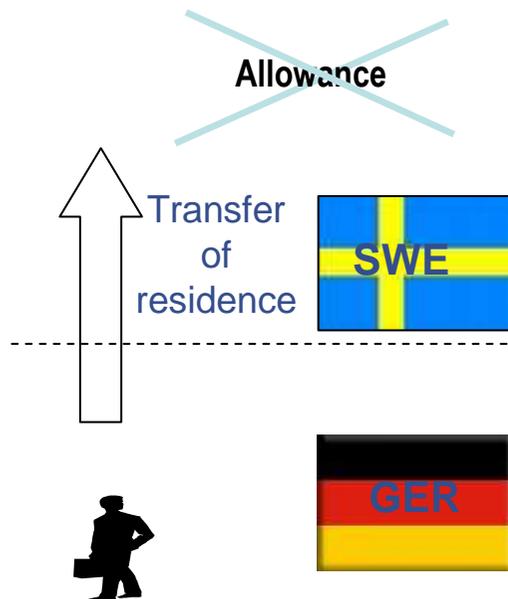
- Also, the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory having regard to the objective differences between the situations of residents and of non-residents (16)
- The Court has held that the position is different, however, in a case where the non-resident receives **no significant income in the State of his residence** (17)

1.7.04 – C-169/03 Wallentin (6)



- Is there a discrimination or a restriction? Overt? Covert? Home or Host State?
 - That is exactly the situation in the main proceedings, whose distinguishing feature is that Mr Wallentin **did not have**, at the material time, **any taxable income in his State of residence**, since the monthly subsistence allowance from his parents and the grant paid to him by the German State did not constitute taxable income under German tax legislation (18)

1.7.04 – C-169/03 Wallentin (7)



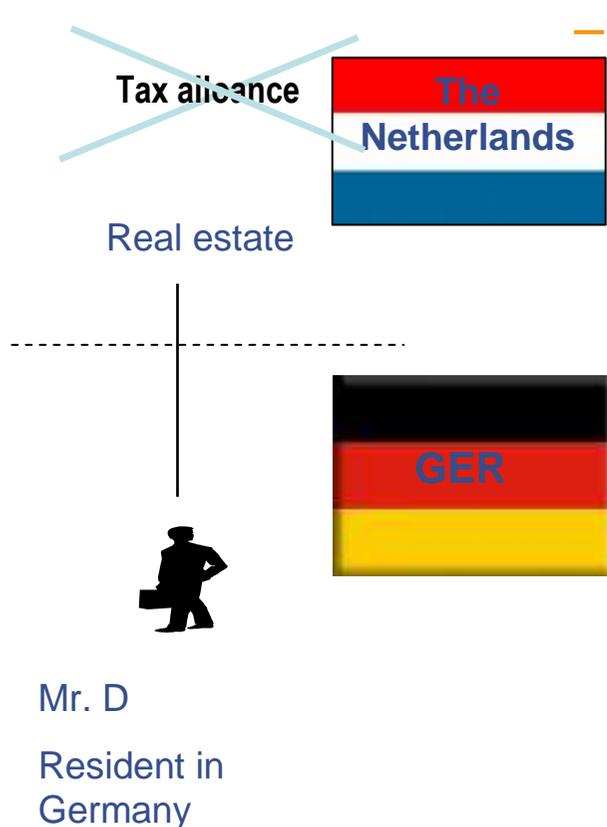
Mr. Wallentin
German citizen
Resident in
Germany

– Is there a justification?

- Tax cohesion. The State of residence cannot take account of the taxpayer's personal and family circumstances because there is no liability for tax there. Where that is the case, the Community principle of equal treatment requires that, in the State of employment, the personal and family circumstances of a foreign non-resident be taken into account in the same way as those of resident nationals and that the same tax benefits be granted to him (21)

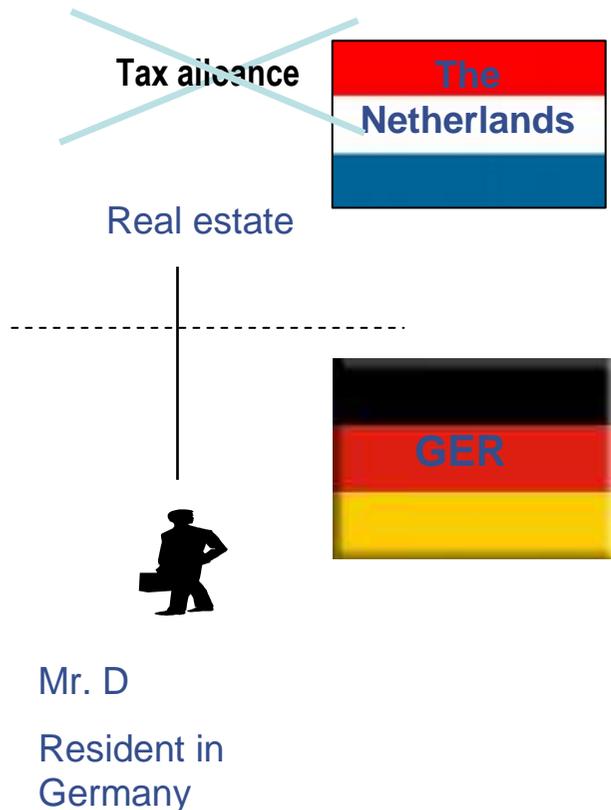
– Proportionality? N/A

5.7.05 – C-376/03 D



- According to Dutch tax law, all natural persons resident in the Netherlands (resident taxpayers) and all natural persons who, although not resident in the Netherlands, have net assets there (non-resident taxpayers) are subject to wealth tax (4)
- Resident taxpayers are taxed on the basis of their net worldwide assets at the beginning of the calendar year. Their taxable wealth is equal to the value of all their assets less the amount of all their liabilities (5). Non-resident taxpayers are taxed according to the net assets owned by them in the Netherlands at the beginning of the calendar year in question. Their taxable wealth is equal to the value of their assets situated in the Netherlands less the amount of their liabilities there (6)

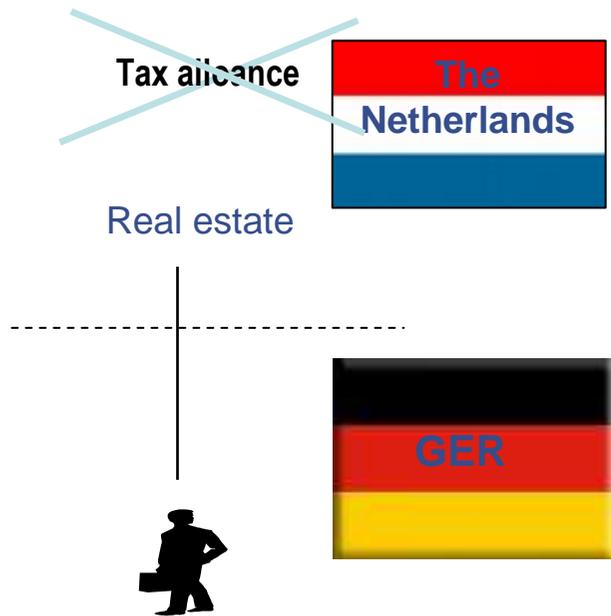
5.7.05 – C-376/03 D (2)



– Facts

- Resident taxpayers are entitled to an allowance applied to their net worldwide assets while non-resident taxpayers taxed on their net assets in the Netherlands are not entitled to an allowance (7). The amount of the allowance varies depending on whether the resident taxpayer falls within category I (unmarried persons) or II (married couples) (8)
- The allowance is also available to non-resident taxpayers if at least 90% of the wealth is held in the Netherlands (9)
- According to the Dutch – Belgium tax treaty, Belgian resident are always granted the allowance (13)

5.7.05 – C-376/03 D (3)



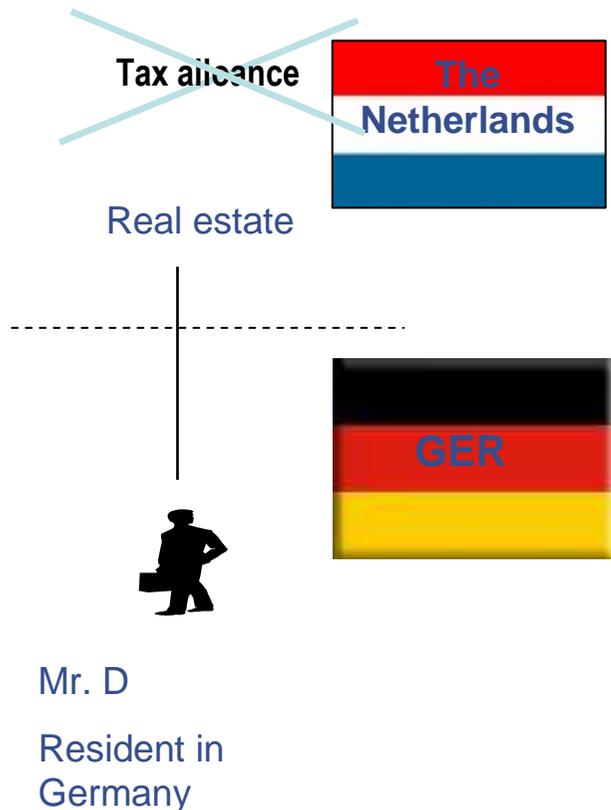
Mr. D

Resident in
Germany

– Facts

- Mr. D is a German resident. 10% of his wealth consist of real property situated in the Netherlands, while the remainder is held in Germany (15)
- **In Germany, no wealth tax is levied**
- Although he did not hold 90% of his wealth in the Netherlands, Mr D. applied, in reliance upon Community law, to be treated as a resident. However, the Dutch tax office refused (16)

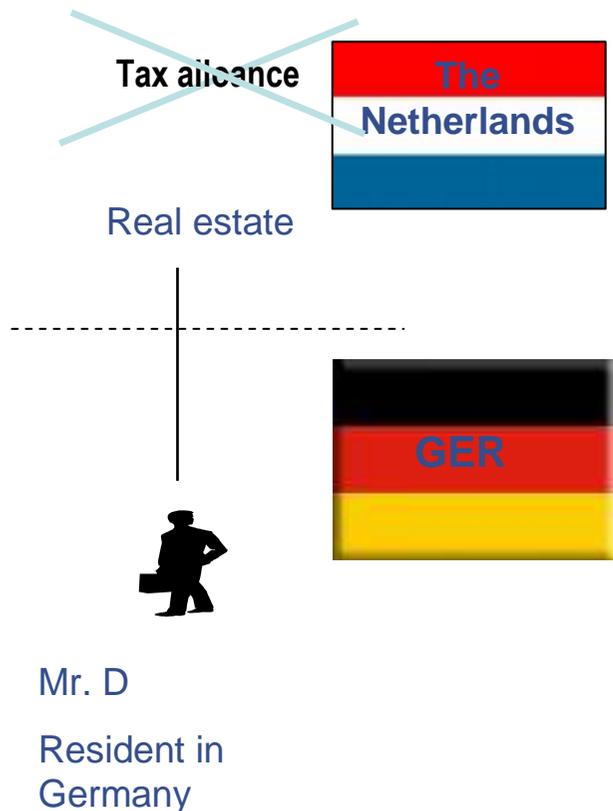
5.7.05 – C-376/03 D (4)



– Questions

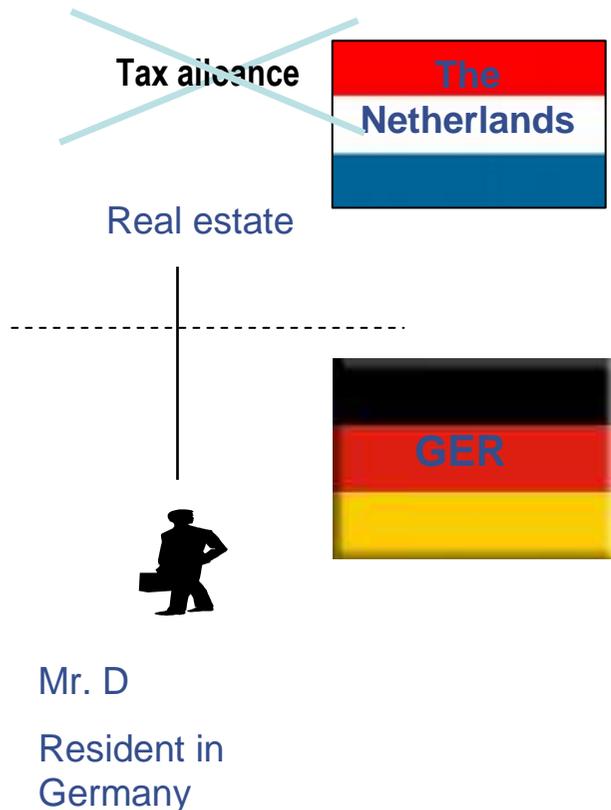
- Does Community law preclude legislation under which a domestic taxpayer is always entitled to deduction of a tax allowance in respect of wealth tax, whereas a non-resident taxpayer has no such entitlement in the case where the assets in question are situated predominantly in the taxpayer's State of residence (in which no wealth tax is levied)?
- If not, does it make a difference in this case that the Netherlands has, under a bilateral treaty, granted to residents of Belgium, who in all other respects are in comparable circumstances, entitlement to the tax allowance (no wealth tax being levied in Belgium either)?

5.7.05 – C-376/03 D (5)



- **Have you exercised a fundamental Freedom?**
 - Free movement of capital (24)
- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - With regard to income tax, the Court has held that the situation of a resident is different from that of a non-resident (27). The Court has concluded from this that the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to residents is not, as a rule, discriminatory since those two categories of taxpayer are not in a comparable situation (28)

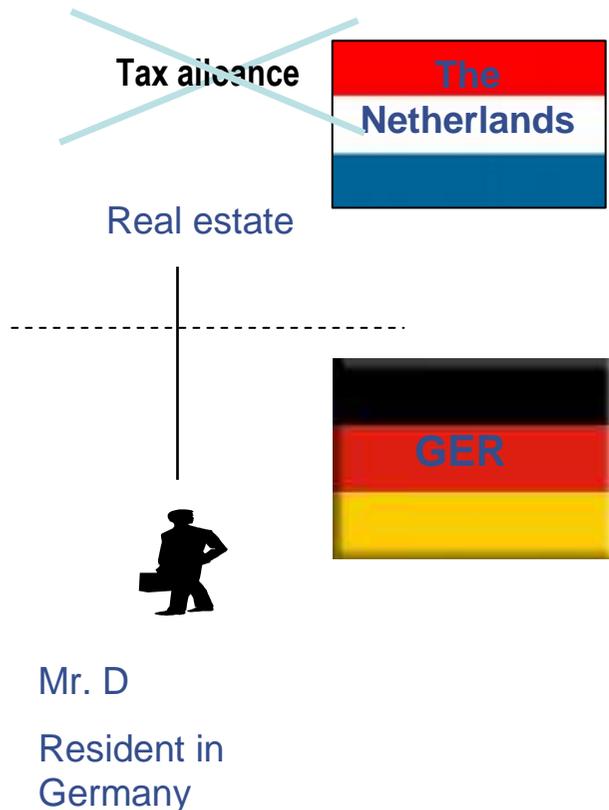
5.7.05 – C-376/03 D (6)



– Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?

- The Court has nevertheless held that the position could be different where the non-resident receives **no significant income** in the Member State of residence **and** obtains **the major part of his taxable income from an activity performed in the State of employment.** There is then **no objective difference** between such a non-resident and a resident (see, in particular, *Schumacker*, paragraphs 36 and 37, and Case C-169/03 *Wallentin*, paragraph 17).

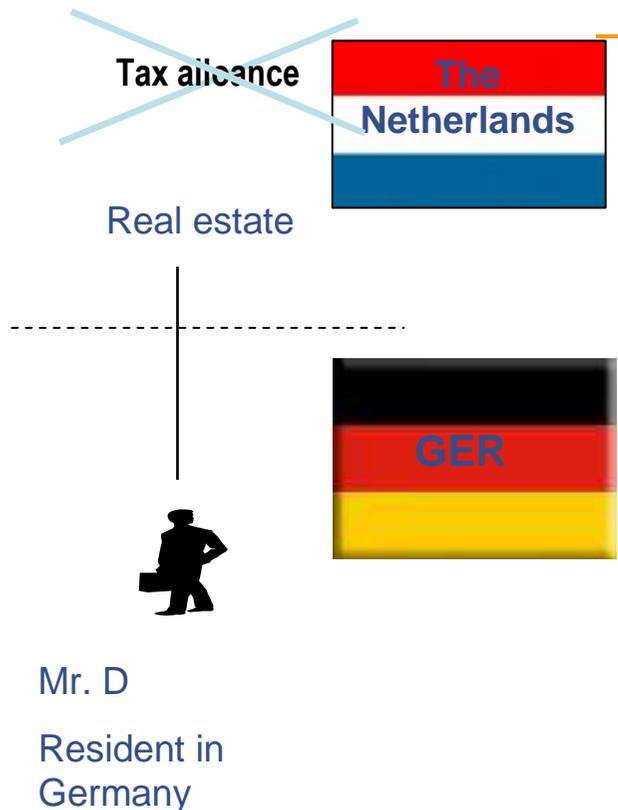
5.7.05 – C-376/03 D (7)



– Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?

- The Court has thus allowed a Member State to make grant of a benefit to non-residents subject to the condition that **at least 90%** of their worldwide income must be subject to tax in that State (30)
- The situation of a person liable to wealth tax and that of a person liable to income tax are similar in several respects (31)
- In Mr D.'s submission, however, the fact that the legislation of the Member State in which the person concerned is resident does not impose a wealth tax means that that person is not entitled in either of the relevant Member States to have his personal and family circumstances taken into account for the purposes of grant of an allowance and gives rise to a situation in which he is discriminated against (39)

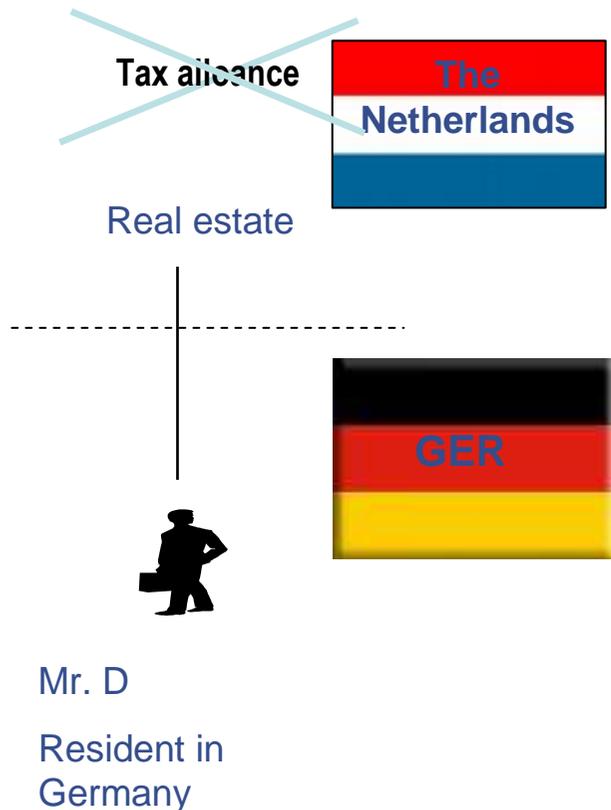
5.7.05 – C-376/03 D (8)



Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- That proposition cannot be upheld (40)
- The situations are not comparable (41)
- The circumstances of the main proceedings can be distinguished from those in *Wallentin* insomuch as sums such as the subsistence allowance paid to Mr Wallentin by his parents and the grant which he received from the German State did not of their nature constitute taxable income under German tax legislation. Accordingly, the sums received by Mr Wallentin in Germany and the wealth held by Mr D. there cannot be regarded as comparable for the purpose of determining whether, with regard to taxation of the wealth possessed by him in the Netherlands, Mr D. must be eligible for the allowance provided for by Netherlands legislation (42)

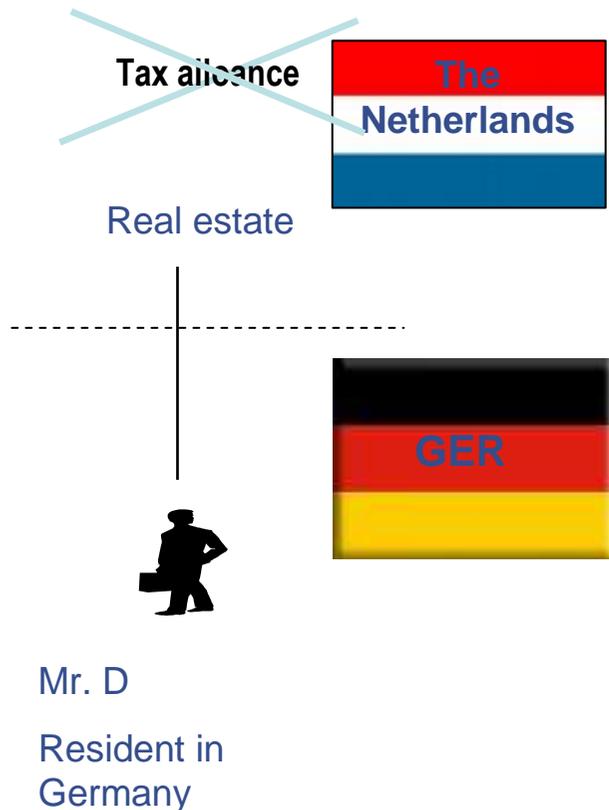
5.7.05 – C-376/03 D (9)



– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- With respect to the second question, as the Court has already pointed out, the Member States are **at liberty**, in the framework of those conventions, to determine the connecting factors for the purposes of allocating powers of taxation. The Court has also accepted that a difference in treatment between nationals of the two Contracting States that results from that allocation cannot constitute discrimination contrary to Article 39 EC (*Gilly*, paragraph 30)

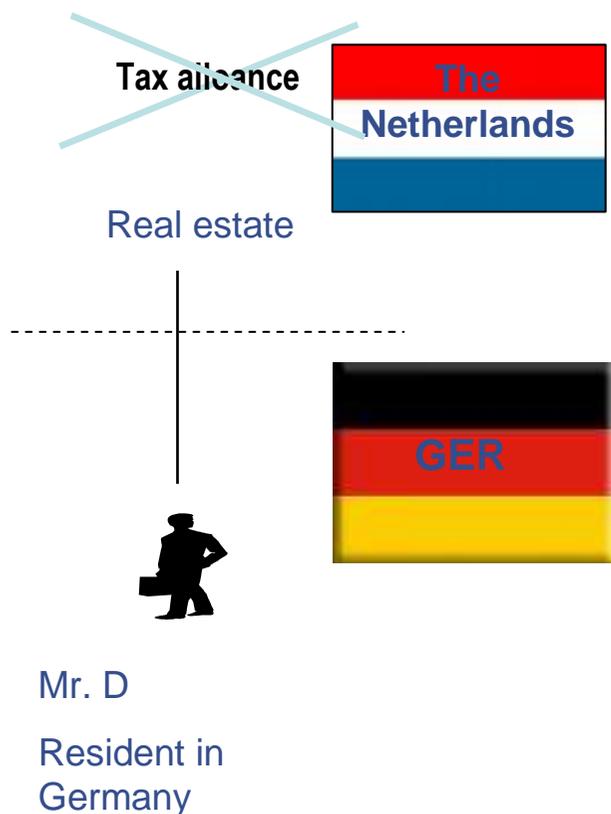
5.7.05 – C-376/03 D (10)



– Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?

- The main proceedings do not, however, relate to the consequences of allocating powers of taxation in relation to nationals or residents of Member States that are party to a convention, but are concerned with drawing a comparison between the situation of a person resident in a State not party to such a convention and that of a person covered by the convention (53). The scope of a bilateral tax convention is limited to the natural or legal persons referred to in it (54)

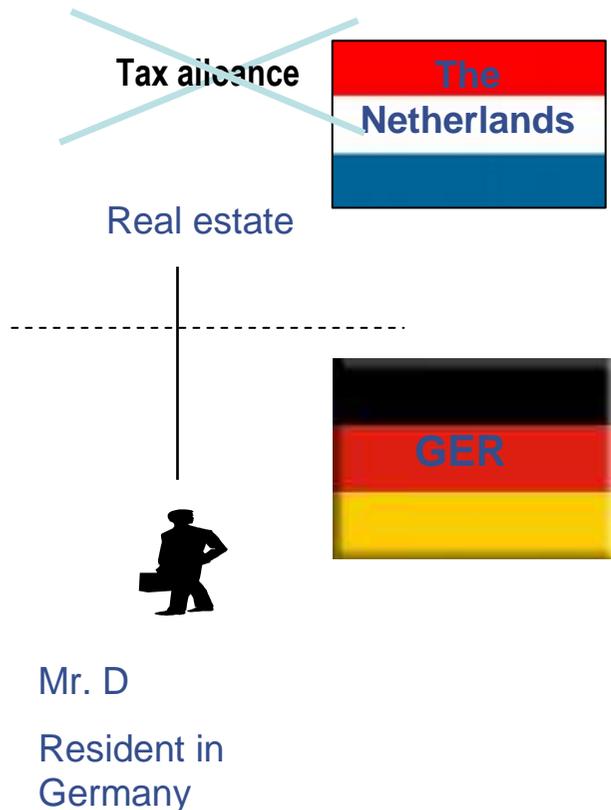
5.7.05 – C-376/03 D (11)



– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- However, there are situations where the benefits under a bilateral convention may be extended to a resident of a Member State which does not have the status of party to that convention (55). The Court has thus held that, in the case of a double taxation convention concluded between a Member State and a non-member country, the national treatment principle requires the Member State which is party to the convention to grant to permanent establishments of non-resident companies the benefits provided for by that convention on the same conditions as those which apply to resident companies (*Saint-Gobain ZN*, paragraph 59)

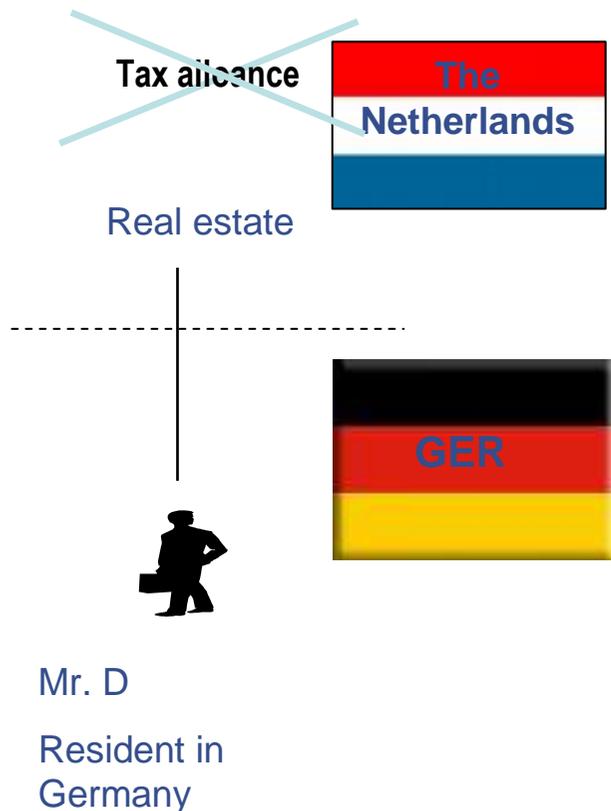
5.7.05 – C-376/03 D (12)



– **Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?**

- In such a case, the non-resident taxable person having a permanent establishment in a Member State is regarded as being in a situation equivalent to that of a taxable person resident in that State
- However, similar treatment with regard to wealth tax in the Netherlands of a taxable person, such as Mr D., resident in Germany and a taxable person resident in Belgium presupposes that those two taxable persons are regarded as being in the same situation (59).

5.7.05 – C-376/03 D (13)



– **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**

- It is to be remembered that, in order to avoid the same income and assets being taxed in both the Netherlands and Belgium, Article 24 of the Belgium-Netherlands Convention allocates powers of taxation between those two Member States and Article 25(3) lays down a rule under which natural persons resident in one of those two States are entitled in the other to the personal allowances which are granted by it to its own residents (60). 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**

– **Is there a justification? N/A**

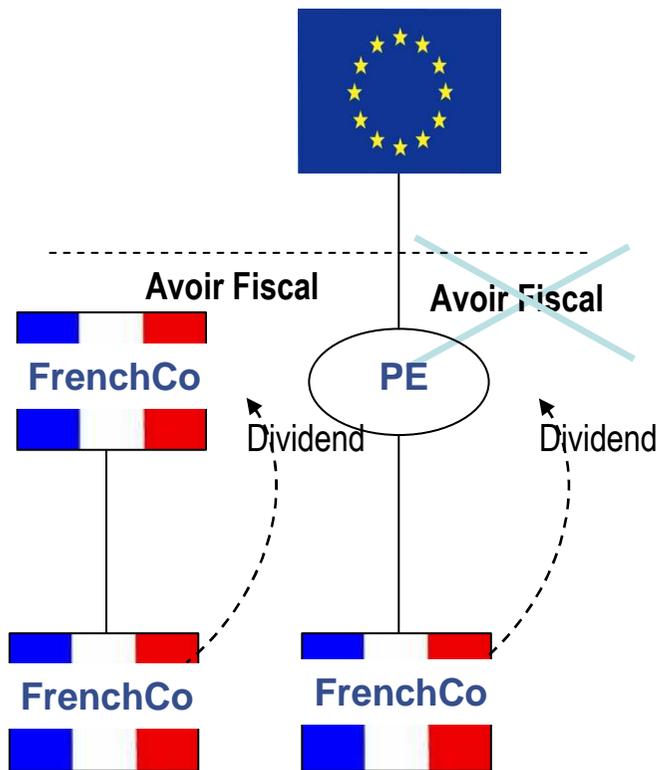
– **Proportionality? N/A**

Tax treaties and EU law

Fabio Aramini, LL.M., Partner

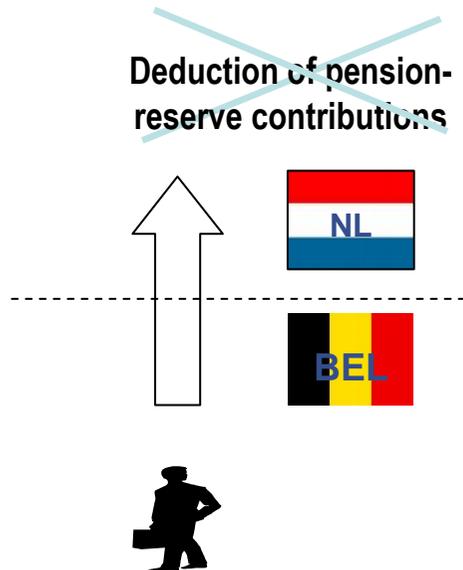
Studio Adonnino Ascoli & Cavasola Scamoni

28.1.86 – 270/83 Comm v France – Avoir fiscal



- The ruling contains this important statement
 - The rights conferred by the freedom of establishment are unconditional and a Member State cannot make respect for them subject to the contents of an agreement concluded with another Member State. In particular, that Article does not permit those rights to be made subject to a condition of reciprocity (25)

11.8.95 – C-80/94 Wielockx



Mr. Wielockx

Belgium citizen

Resident in the Belgium

Working in the Netherlands
(self employed person)

– Facts

- Pension-reserve contributions are not deductible for non-resident taxpayers (7)

– Question

- Is this difference in treatment against the freedom of establishment?

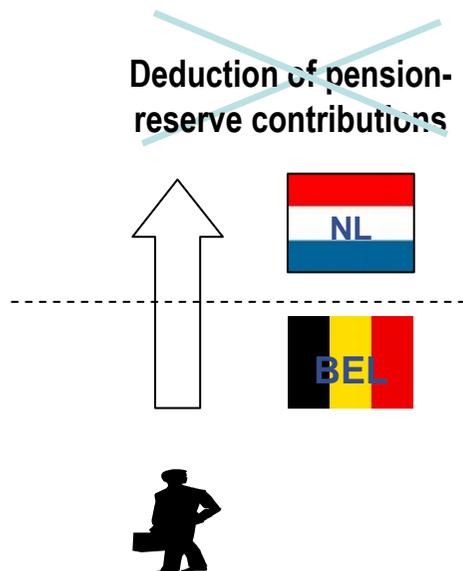
– Have you exercised a fundamental Freedom?

- Freedom of establishment

– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- Non-resident taxpayer, whether employed or self-employed, who receives all or almost all of his income in the State where he works is objectively in the same situation (20)

11.8.95 – C-80/94 Wielockx (2)



Mr. Wielockx

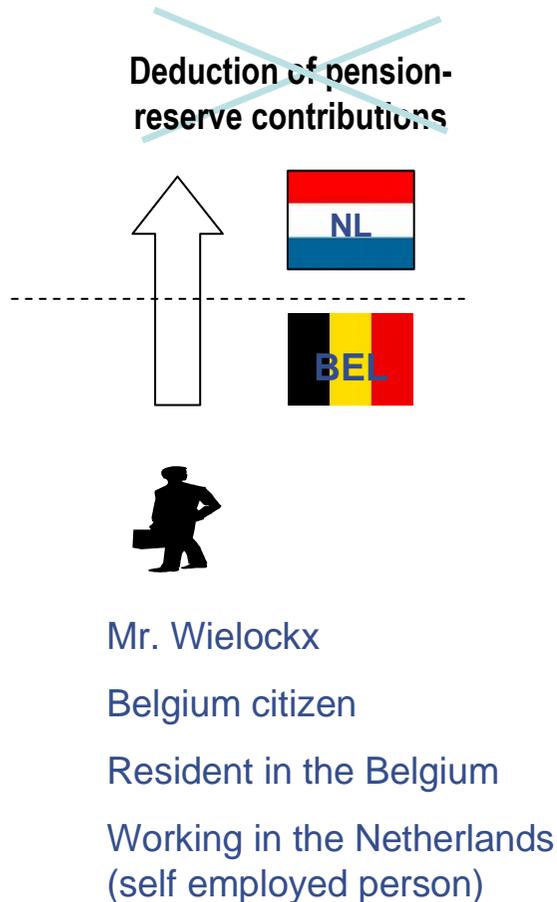
Belgium citizen

Resident in the Belgium

Working in the Netherlands
(self employed person)

- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - If a non-resident taxpayer is not given the same tax treatment as regards deductions from his taxable income as a resident, his personal situation will be taken into account neither by the tax authorities of the State where he works because he is not resident there nor by the State of residence because he receives no income there (21)

11.8.95 – C-80/94 Wielockx (3)

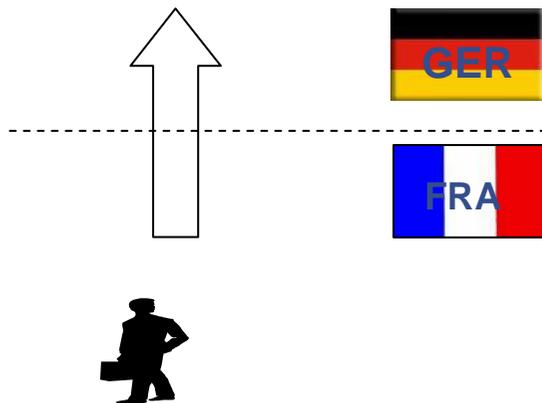


– Is there a justification?

- Tax cohesion. This argument cannot be upheld. The effect of double-taxation conventions which follow the OECD model is that the State taxes all pensions received by residents in its territory, whatever the State in which the contributions were paid, but, conversely, waives the right to tax pensions received abroad even if they derive from contributions paid in its territory which it treated as deductible. Fiscal cohesion **is shifted to another level, that of the reciprocity** of the rules applicable in the Contracting States (24)

– Proportionality? N/A

12.5.98 – C-336/96 Gilly



Mrs. Gilly

German national
who acquired
French nationality
by marriage

Resident in France

– Facts

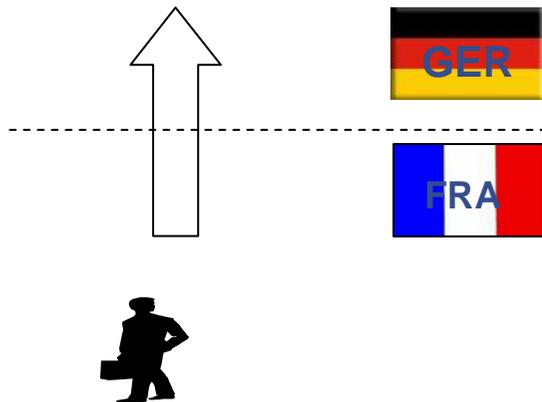
- Mrs Gilly is a German national having also acquired French nationality by marriage. She teaches in a State primary school in Germany, in the frontier area (3)
- According to the DTT, Mrs Gilly may be taxed both in Germany and France. The latter must grant an ordinary tax credit for the income taxed in Germany
- Following the application of the ordinary tax credit method, income received by Mrs Gilly is taxed more heavily compared to a French resident receiving similar income from France (10)

12.5.98 – C-336/96 Gilly (2)

– Preliminary question

- Must the objective of abolishing double taxation laid down in Article 220 of the Treaty be regarded, in view of the time which the Member States have had to implement it, as now having the status of a directly applicable rule under which double taxation may no longer take place?
 - Although the abolition of double taxation within the Community is included among the objectives of the Treaty, it is clear from the wording of that provision that **it cannot itself confer on individuals any rights** on which they might be able to rely before their national courts (16)

12.5.98 – C-336/96 Gilly (3)



Mrs. Gilly

German national
who acquired
French nationality
by marriage

Resident in France

– Question

- Several questions to ask whether the result of the DTT is compatible with EU law

– Have you exercised a fundamental Freedom?

- Free movement of workers: no matter that Mrs Gilly has dual nationality (21)

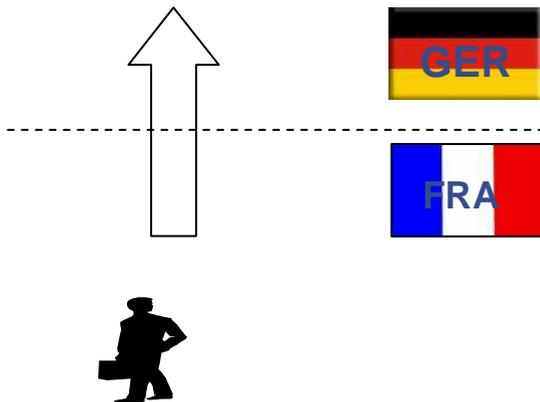
– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- The difference in treatment stems from the allocation of the taxing rights among Members States (30) and the lack of harmonization (34, 49)

12.5.98 – C-336/96 Gilly (4)

– **Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?**

- The fact that Germany does not keep into account the personal situation of Mrs Gilly is of no importance because residents and non residents are not in comparable situations (50) and France keep it into account in calculating the tax liability (49)

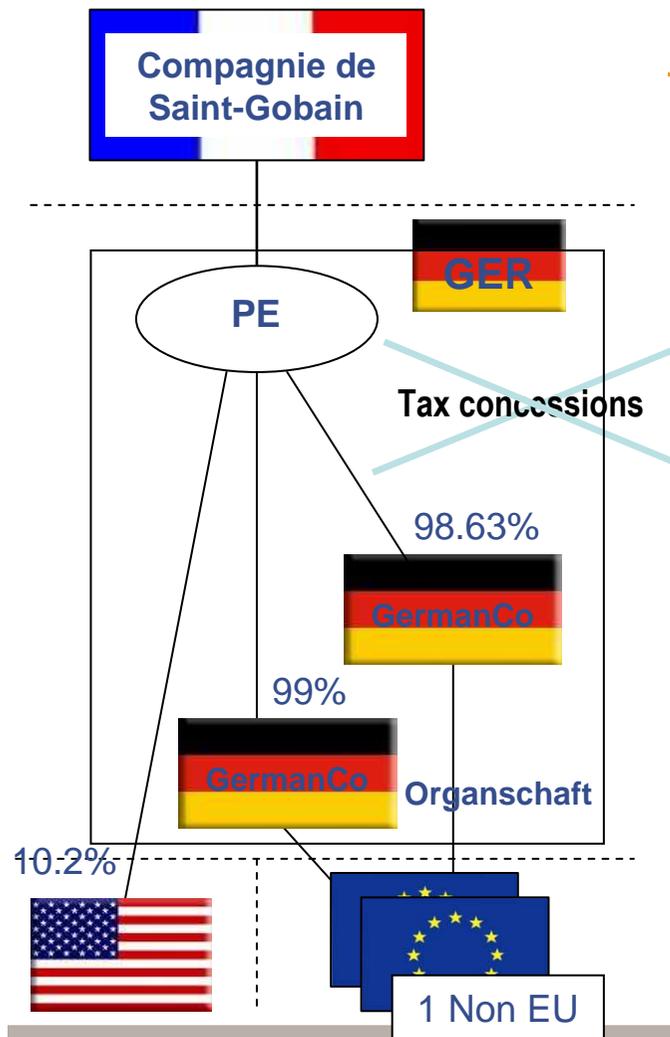


Mrs. Gilly

German national
who acquired
French nationality
by marriage

Resident in France

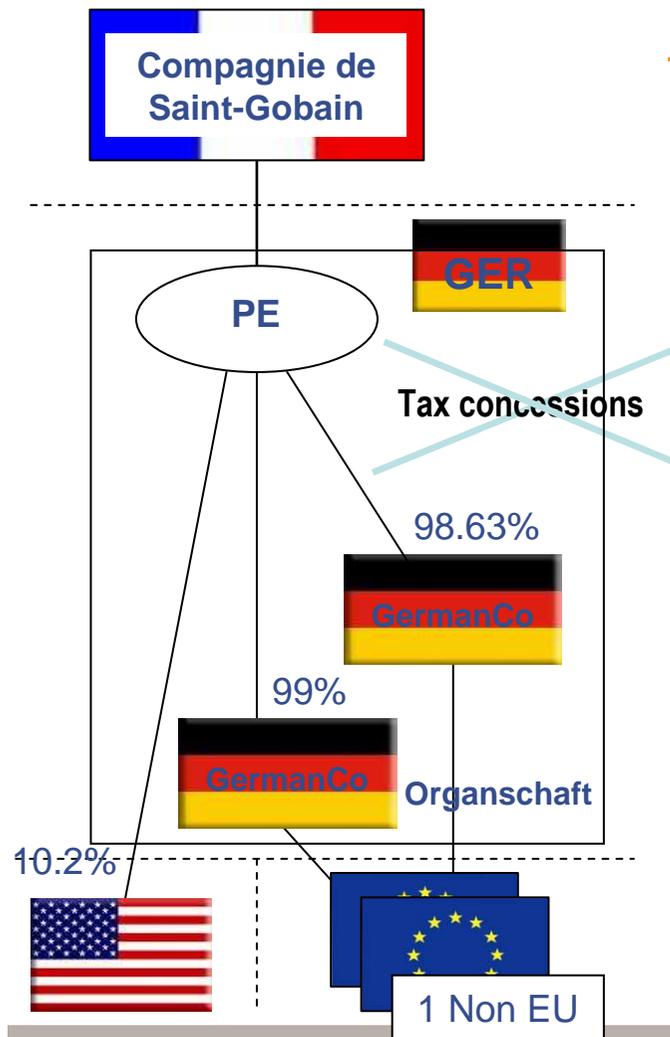
21.9.99 – C-307/97 Saint-Gobain



– Facts

- Saint-Gobain ZN is the German branch of Compagnie de Saint-Gobain SA (hereinafter 'Saint-Gobain SA'), which is a company incorporated under French law whose seat and business management are located in France (3)
- In Germany, Saint-Gobain SA is subject to limited tax liability because neither its seat nor its business management are located in that State (5)
- The German tax authorities refused to grant Saint-Gobain SA certain tax concessions relating to the taxation of dividends from shares in foreign companies limited by shares, those concessions being restricted to companies subject in Germany to unlimited tax liability (8)

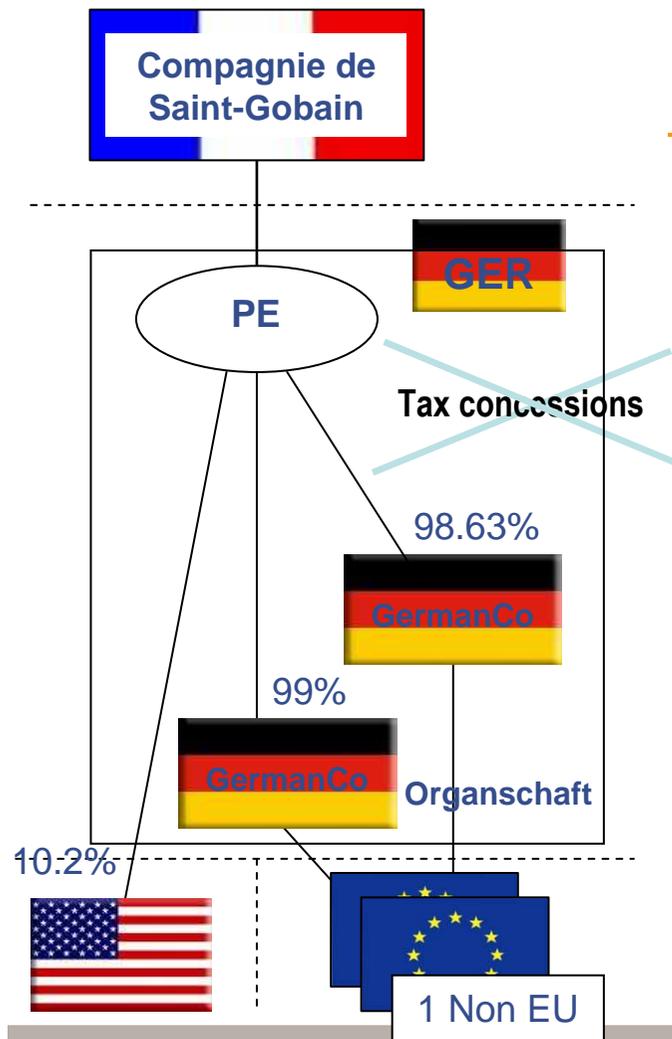
21.9.99 – C-307/97 Saint-Gobain (2)



– Facts

- Saint-Gobain SA held, through the operating capital of its German branch, Saint-Gobain ZN, some shareholdings (9)
- The German companies are part of tax consolidation (10)
- The profits of the two German subsidiaries which were transferred to Saint-Gobain ZN under the tax consolidation, included group dividends distributed by foreign subsidiaries (2 EU and 1 non EU) (11)
- Saint-Gobain ZN is challenging before the German tax authorities the refusal to grant tax concessions designed to prevent dividends which are received in Germany by companies with shareholdings in foreign companies and which have already been taxed abroad from being taxed again in Germany

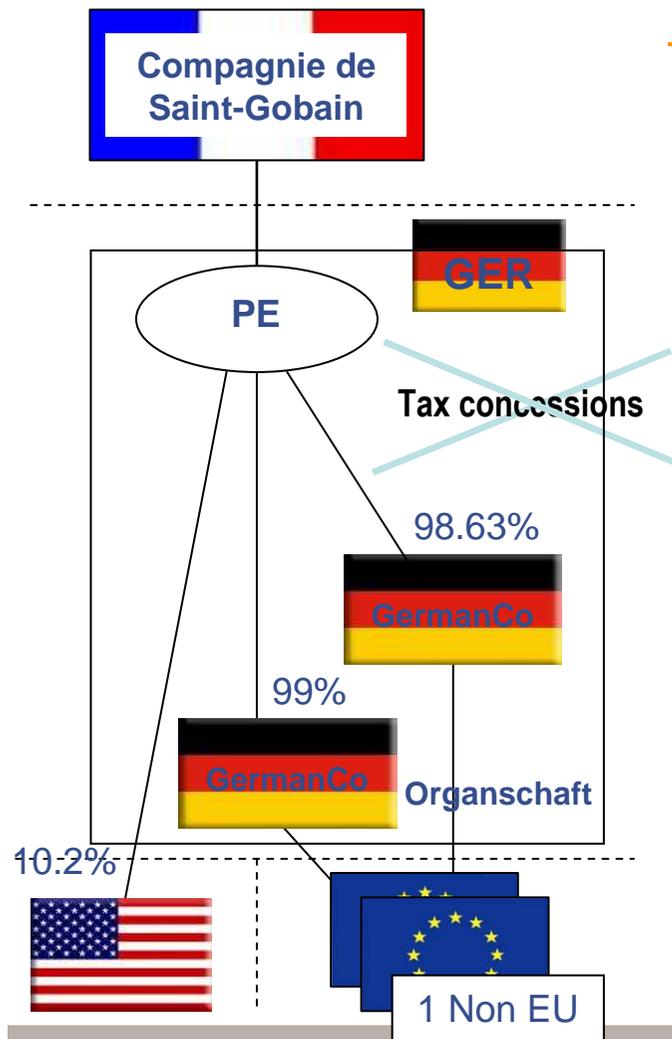
21.9.99 – C-307/97 Saint-Gobain (3)



– Facts

- First, the German tax authorities refused to grant an **exemption** from German corporation tax for the dividends received by Saint-Gobain ZN from the United States of America and another non-EU country on the ground that the **treaties** for the avoidance of double taxation concluded between the Federal Republic of Germany and each of those two non-member countries, which provide for such exemption, restrict it to, respectively, German companies and companies subject in Germany to unlimited tax liability (16)

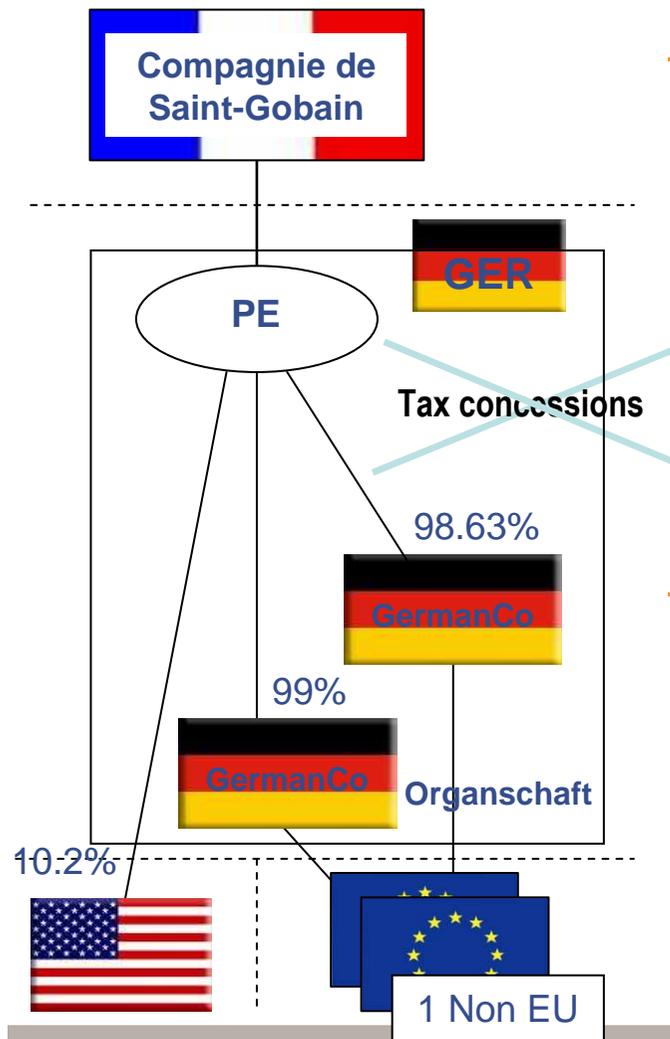
21.9.99 – C-307/97 Saint-Gobain (4)



– Facts

- Second, although the German tax authorities allowed Saint-Gobain SA the direct credit provided for the German tax law and therefore credited against the German corporation tax payable by Saint-Gobain SA on dividends received through Saint-Gobain ZN the foreign tax which it had already paid and which had been withheld at source in the various countries in which the distributing companies are established, it refused a credit for the foreign corporation tax levied on the profits distributed by the foreign subsidiaries and sub-subsidiaries of Saint-Gobain SA in the countries in which they are established (indirect tax credit) because the law restricts that concession to companies subject in Germany to unlimited tax liability (19)

21.9.99 – C-307/97 Saint-Gobain (5)



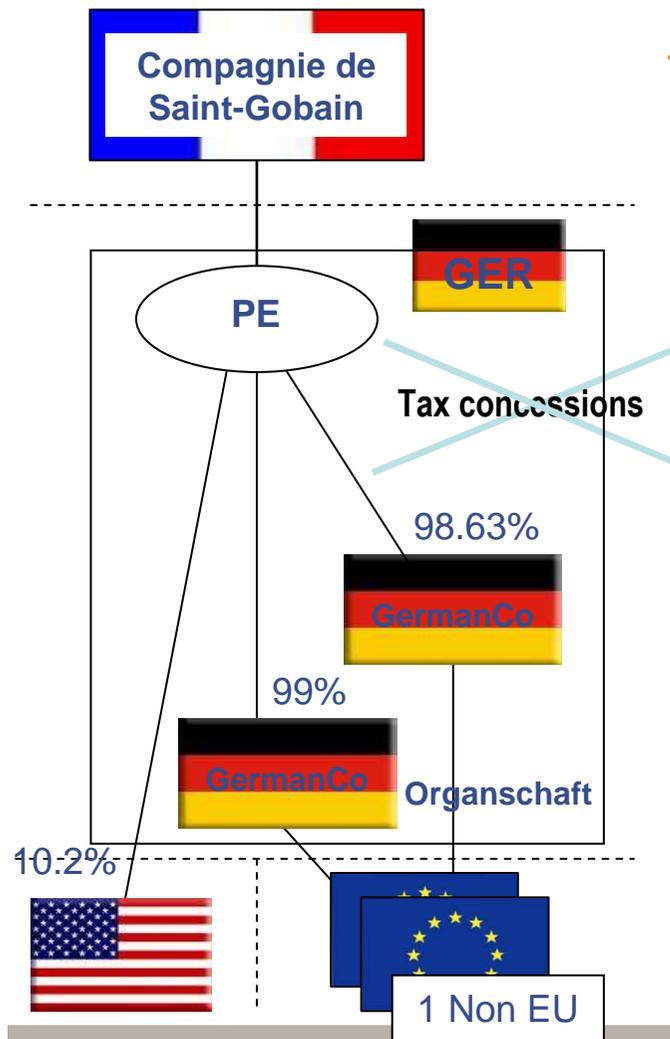
– Facts

- Third, the German tax authorities included the shareholding in the American subsidiary in the domestic assets of the permanent establishment, taxable by way of capital tax, and did not therefore allow Saint-Gobain SA the **capital tax concession** for international groups since that Law restricts that concession to domestic companies limited by shares (21)

– Questions

- Is it compatible with EU law to exclude PEs of EU companies from enjoying tax concessions taking the form of:

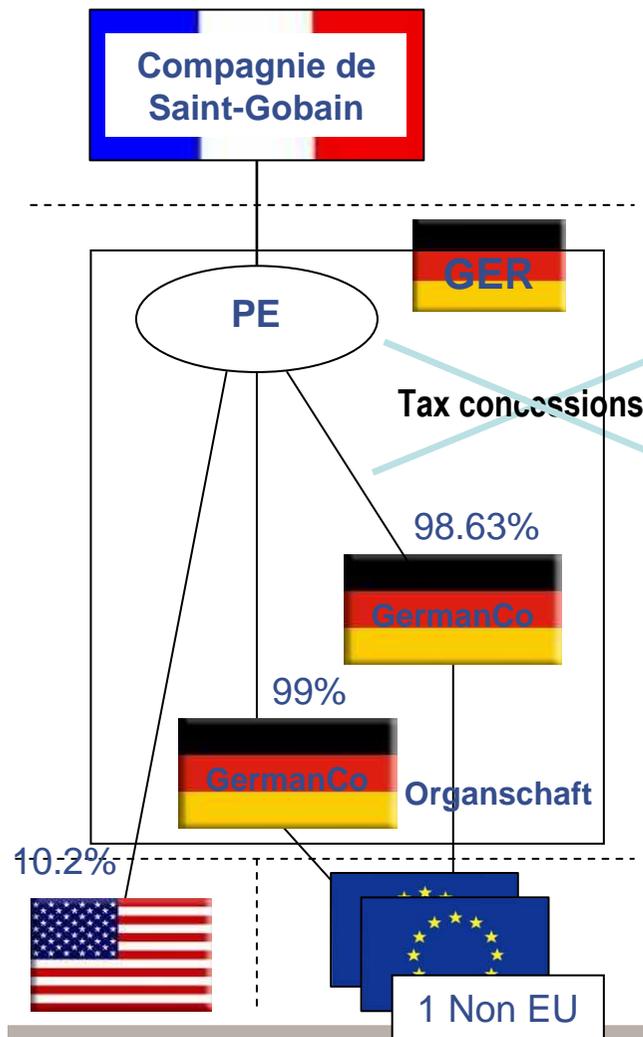
21.9.99 – C-307/97 Saint-Gobain (6)



– Questions

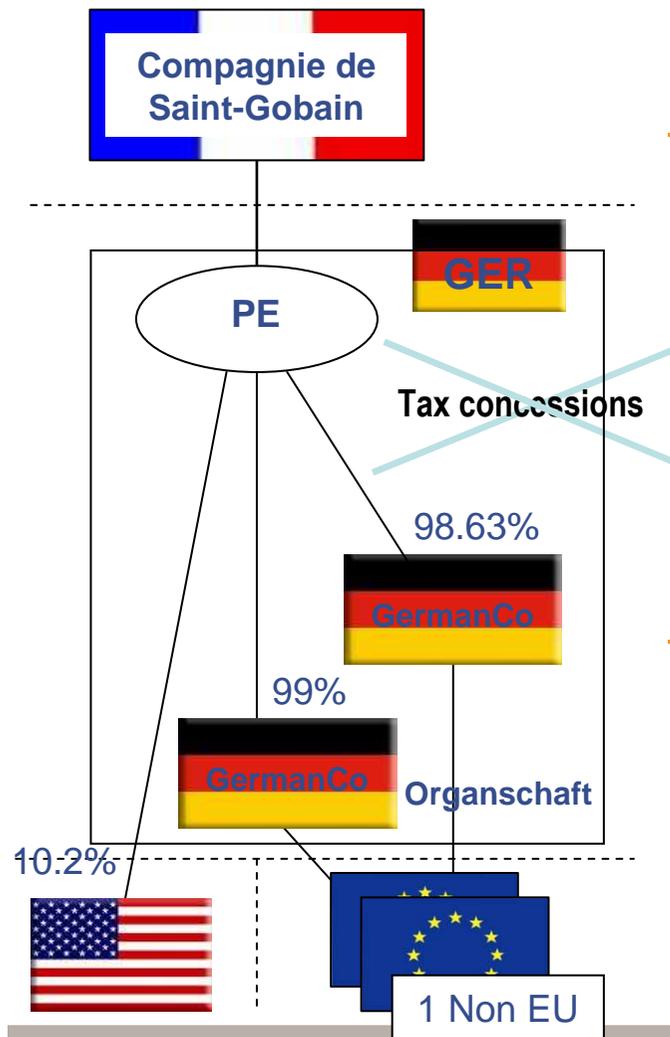
- an **exemption from corporation tax** for dividends received from companies established in non-member countries (corporation tax relief for international groups), provided for by a treaty for the avoidance of double taxation concluded with a non-member country
- the crediting, against German corporation tax, of the corporation tax levied in a State other than the Federal Republic of Germany on the profits of a subsidiary established there, provided for by German legislation, and
- an exemption from capital tax for shareholdings in companies established in non-member countries (capital tax relief for international groups), also provided for by German legislation

21.9.99 – C-307/97 Saint-Gobain (7)



- **Have you exercised a fundamental Freedom?**
 - Freedom of establishment (34)
- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - Discrimination and restriction (43). As regards taxation of dividends they are comparables (47)
- **Is there a justification?**
 - Loss of fiscal revenues. It is not possible to tax the distribution of profits (49). This is not a justification (50)
 - Advantages that PE may enjoy vis-à-vis German companies. This is not a justification (53)

21.9.99 – C-307/97 Saint-Gobain (8)

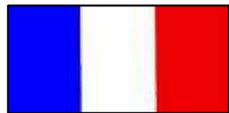


– Is there a justification?

- Double tax treaties with third countries is not within EU competency. Countries are free to allocate taxing powers within DTTs. However, in doing so, they must respect EU law: the balance and the reciprocity of the treaties are not affected by unilateral extension of tax advantages (59)

– Proportionality? N/A

12.12.02 – C-385/00 de Groot



Mr. de Groot

Dutch citizen

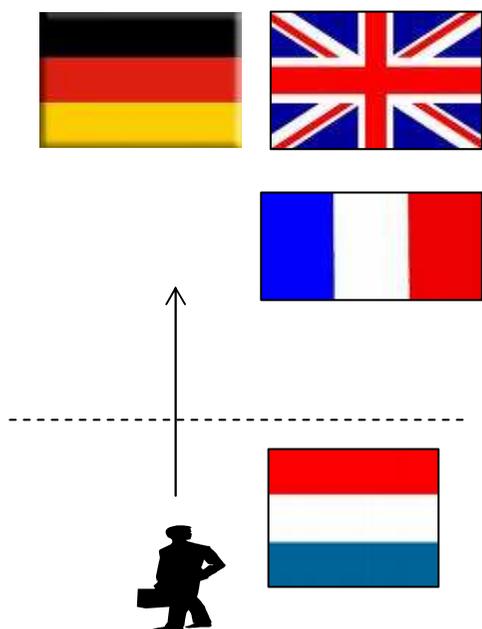
Resident in the
Netherlands

Working in several EU
countries

– Facts

- The questions is raised in proceedings between Mr de Groot, a Netherlands national who had employment in various Member States, and the Dutch tax authorities concerning the calculation of the income tax to which he is subject in his State of residence (2)
- The Netherlands signed DTTs with Germany, UK and France based on the OECD Model (6)
- The way in which relief from juridical double taxation is calculated pursuant to domestic and treaty provisions are the same (19)
- The exemption with progression is calculated as follows: foreign gross income / total gross income (18)

12.12.02 – C-385/00 de Groot (2)



Mr. de Groot

Dutch citizen

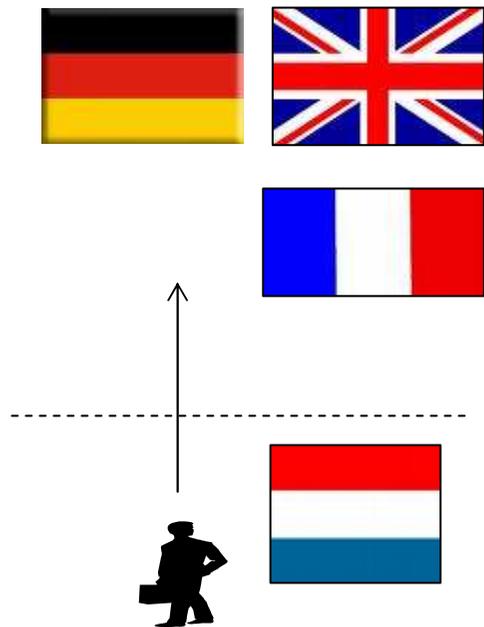
Resident in the
Netherlands

Working in several EU
countries

– Facts

- Where, like Mr de Groot, the resident taxpayer earns his income partly in the Netherlands and partly in another Member State, the tax is first calculated using the generally applicable progressive rate on the basis of overall income, including exempt foreign income, from which are deducted the amounts paid under maintenance obligations and the tax-free allowance to which the taxpayer is entitled as a result of his personal or family circumstance (21)
- The aim of the rules governing the calculation of the exemption is to distribute the allowances relating to a taxpayer's personal and family circumstances over his total income (26)

12.12.02 – C-385/00 de Groot (3)



Mr. de Groot

Dutch citizen

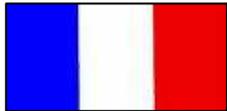
Resident in the
Netherlands

Working in several EU
countries

– Facts

- It follows that those allowances are deducted from the tax payable in the Netherlands only **in proportion** to the income received by the taxpayer in that Member State (26)
- Mr De Groot worked in Germany, UK and France and paid taxes there according to the relevant DTT. Pursuant to the local legislation of Germany, UK and France he was not allowed to deduct maintenance payments when calculating German, UK and France taxes (30)
- When making the calculation of the Dutch personal income tax, Mr de Groot claimed that whole deduction of maintenance expenses, but the tax office refused based on the proportional method (32)

12.12.02 – C-385/00 de Groot (4)



Mr. de Groot

Dutch citizen

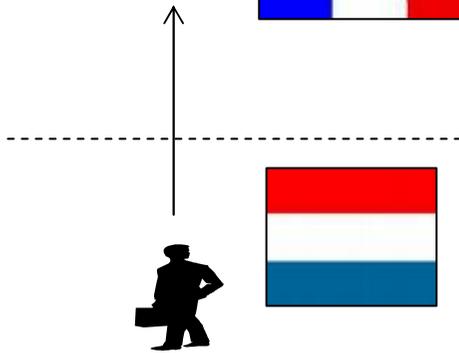
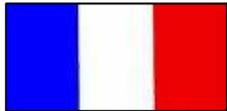
Resident in the
Netherlands

Working in several EU
countries

- Questions

- Is the proportional method in compliance with EU law? I.e., Does EU law preclude rules - **irrespective of whether or not they are laid down in a convention for the avoidance of double taxation** - under which a taxpayer loses in the calculation of the income tax payable by him in his State of residence part of the benefit of the tax-free allowance and of his personal tax advantages because, during the year in question, he also received income in another Member State which was taxed in that State without his personal and family circumstances being taken into account?
- Do specific requirements arise from Community law with regard to the manner in which the personal and family circumstances of the employee must be taken into account in the State of residence?

12.12.02 – C-385/00 de Groot (5)



Mr. de Groot

Dutch citizen

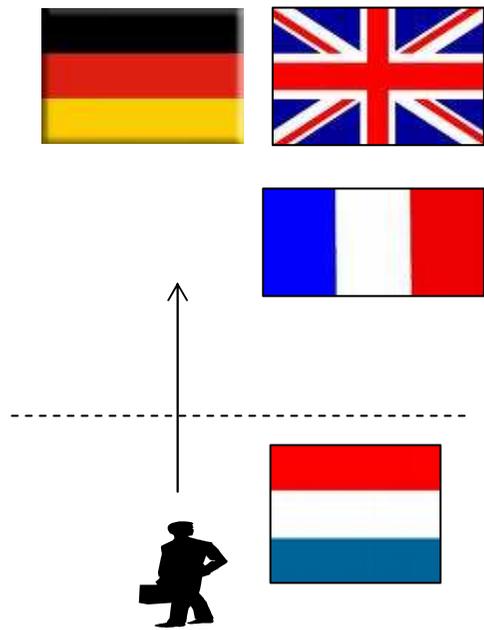
Resident in the
Netherlands

Working in several EU
countries

– Have you exercised a fundamental Freedom?

- Free movement of workers (76 and 81). The fact that Mr de Groot was no longer in an employment relationship at the time of the taxation **cannot deprive him of certain guaranteed rights which are linked to the status of worker**, since the dispute in the main proceedings is concerned with the direct tax consequences of Mr de Groot's pursuit, as a worker, of activities in other Member States (82)

12.12.02 – C-385/00 de Groot (6)



Mr. de Groot

Dutch citizen

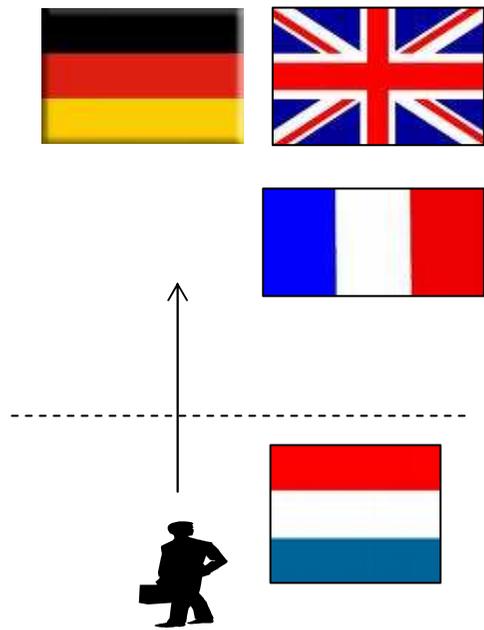
Resident in the
Netherlands

Working in several EU
countries

– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- Restriction (84 and 95)
- A situation such as that at issue in the main proceedings can be distinguished from that with which the *Gilly* case was concerned. The tax disadvantage suffered by Mr de Groot is in no way the result of the difference between the tax rates of the State of residence and those of the States of employment (86). Moreover, while Mrs Gilly obtained in her State of residence all the tax advantages provided for its residents by the legislation of that State, that is not the case with respect to Mr de Groot (87)

12.12.02 – C-385/00 de Groot (7)



Mr. de Groot

Dutch citizen

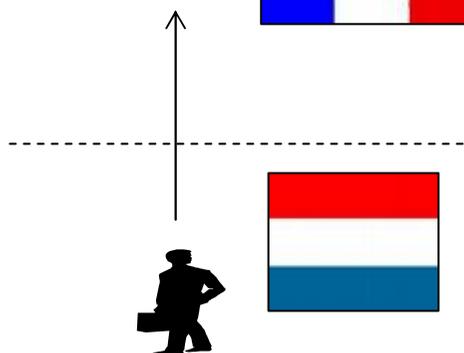
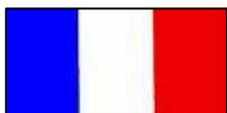
Resident in the
Netherlands

Working in several EU
countries

– **Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?**

- The Court ruled that the Member State of employment is required to take into account personal and family circumstances only where the taxpayer derives almost all or all of his taxable income from employment in that State and where he has no significant income in his State of residence, so that the latter is not in a position to grant him the advantages resulting from taking account of his personal and family circumstances
- **As far as the exercise of the power of taxation allocated in DTTs is concerned, the Member States must comply with the Community rules (94)**

12.12.02 – C-385/00 de Groot (8)



Mr. de Groot

Dutch citizen

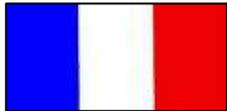
Resident in the
Netherlands

Working in several EU
countries

– Is there a justification?

- Advantages that may compensate disadvantages. This is not a justification (97)
- The mechanisms used to eliminate double taxation or the national tax systems which have the effect of eliminating or alleviating double taxation must permit the taxpayers in the States concerned to be certain that, as the end result, all their personal and family circumstances are taken into account, irrespective of how Member States have allocated that obligation amongst themselves, in order not to give rise to inequality of treatment and in no way results from the disparities between the national tax laws (101)

12.12.02 – C-385/00 de Groot (9)



Mr. de Groot

Dutch citizen

Resident in the
Netherlands

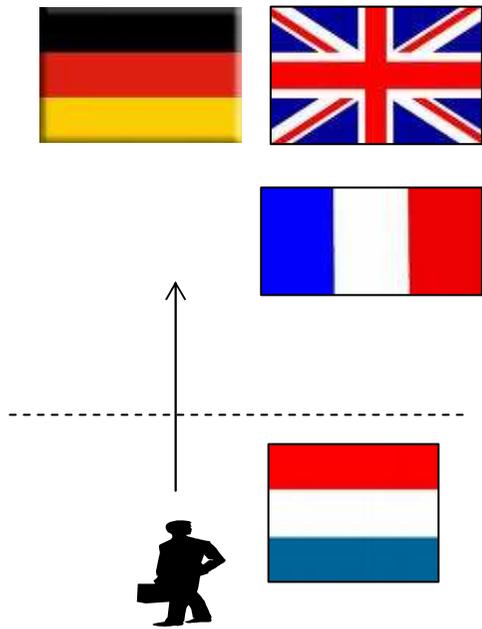
Working in several EU
countries

– Is there a justification?

- Loss of tax revenue. This is not a justification (103)
- Tax cohesion. There is no direct link. The effectiveness of the progressive rates of income tax in the State of residence, which the method of exemption with progression seeks to ensure, is not dependent on the restriction, in that State, of the account to be taken of the taxpayer's personal and family circumstances. (109)

– Proportionality? N/A

12.12.02 – C-385/00 de Groot (10)



Mr. de Groot

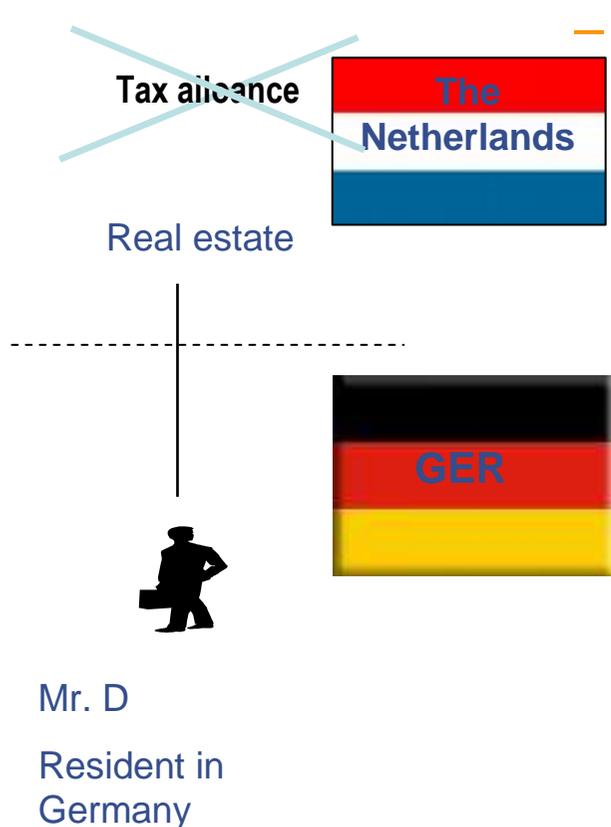
Dutch citizen

Resident in the
Netherlands

Working in several EU
countries

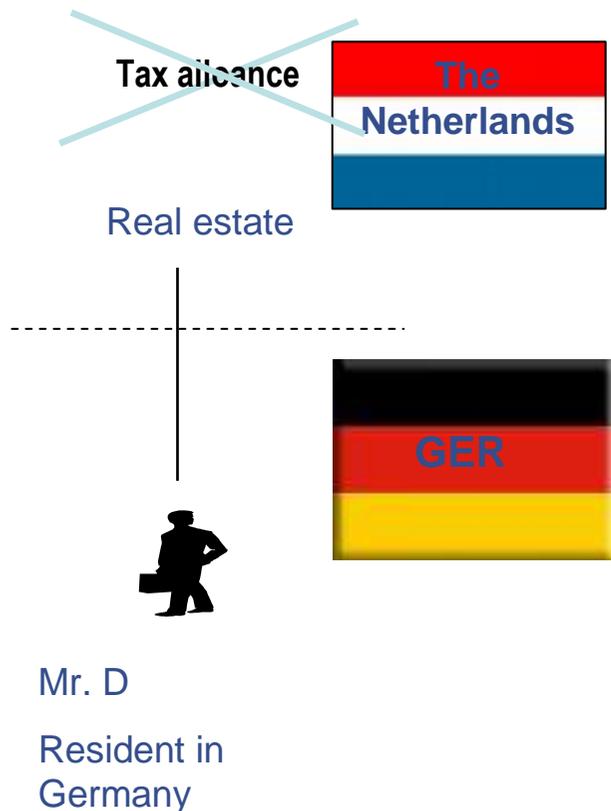
- **Second question:** a person resident for tax purposes in a Member State who exercises his right to freedom of movement for workers is entitled to have the allowance relating to his personal and family circumstances fixed at an amount equal to that which he could have claimed if he had derived his total income in the State of residence. Subject to that, there is no specific requirement in Community law with regard to the way in which the State of residence must take account of the personal and family circumstances of the employee concerned (113)

5.7.05 – C-376/03 D



- According to Dutch tax law, all natural persons resident in the Netherlands (resident taxpayers) and all natural persons who, although not resident in the Netherlands, have net assets there (non-resident taxpayers) are subject to wealth tax (4)
- Resident taxpayers are taxed on the basis of their net worldwide assets at the beginning of the calendar year. Their taxable wealth is equal to the value of all their assets less the amount of all their liabilities (5). Non-resident taxpayers are taxed according to the net assets owned by them in the Netherlands at the beginning of the calendar year in question. Their taxable wealth is equal to the value of their assets situated in the Netherlands less the amount of their liabilities there (6)

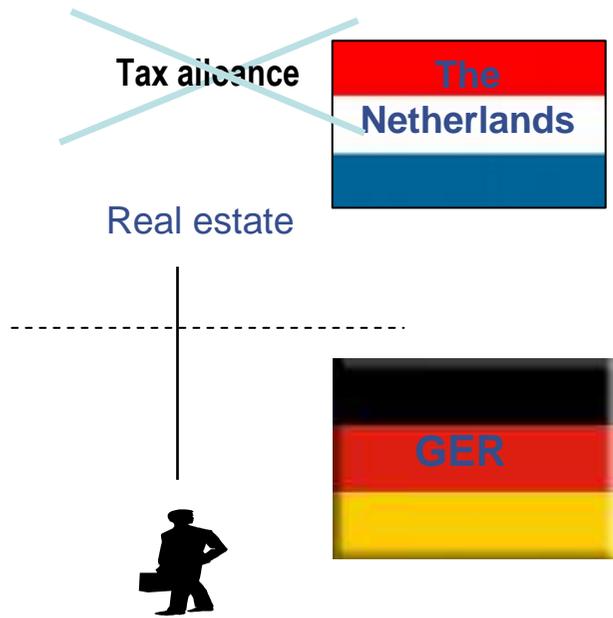
5.7.05 – C-376/03 D (2)



– Facts

- Resident taxpayers are entitled to an allowance applied to their net worldwide assets while non-resident taxpayers taxed on their net assets in the Netherlands are not entitled to an allowance (7). The amount of the allowance varies depending on whether the resident taxpayer falls within category I (unmarried persons) or II (married couples) (8)
- The allowance is also available to non-resident taxpayers if at least 90% of the wealth is held in the Netherlands (9)
- According to the Dutch – Belgium tax treaty, Belgian resident are always granted the allowance (13)

5.7.05 – C-376/03 D (3)



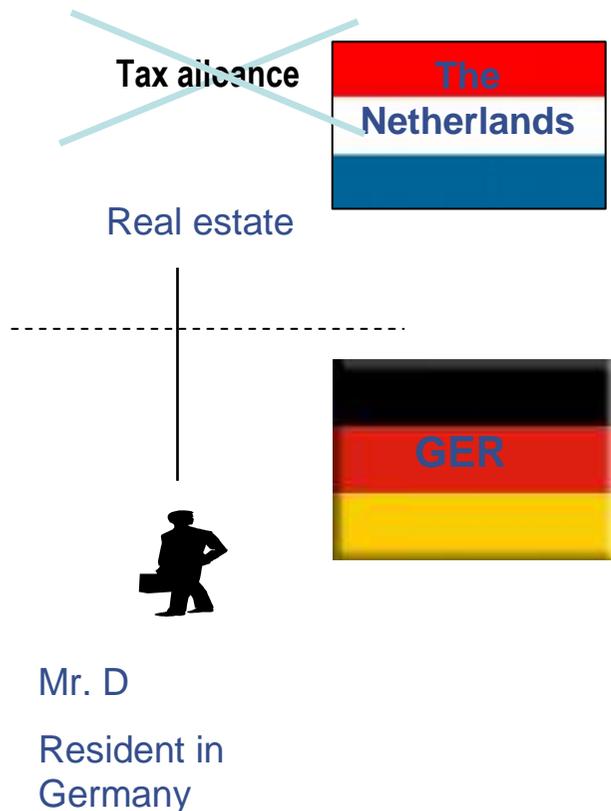
Mr. D

Resident in
Germany

– Facts

- Mr. D is a German resident. 10% of his wealth consist of real property situated in the Netherlands, while the remainder is held in Germany (15)
- **In Germany, no wealth tax is levied**
- Although he did not hold 90% of his wealth in the Netherlands, Mr D. applied, in reliance upon Community law, to be treated as a resident. However, the Dutch tax office refused (16)

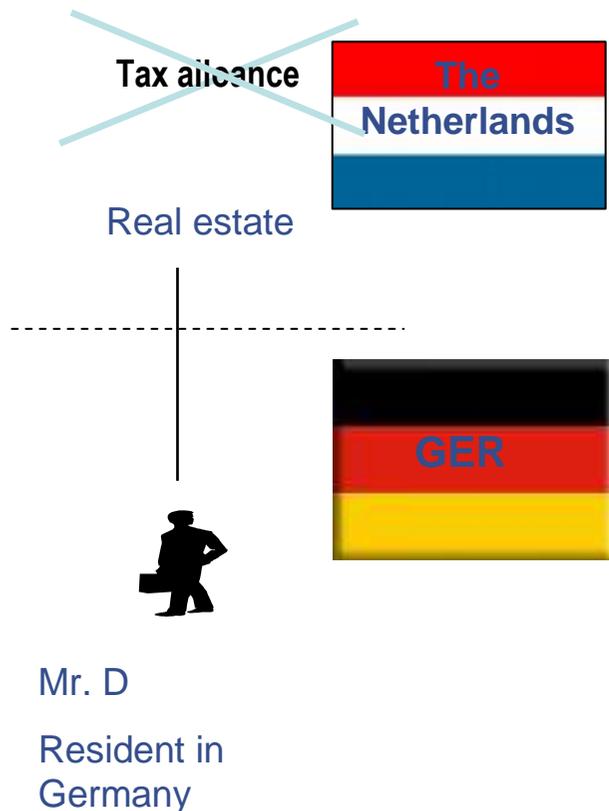
5.7.05 – C-376/03 D (4)



– Questions

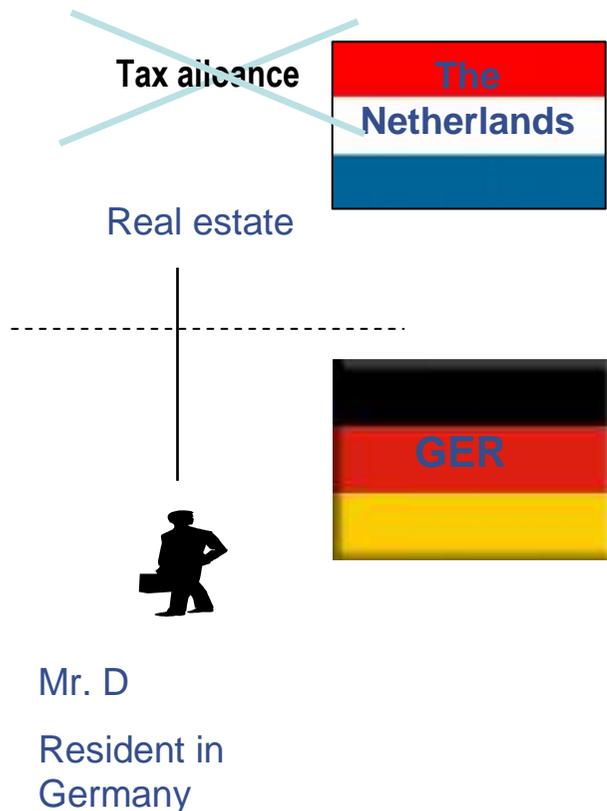
- Does Community law preclude legislation under which a domestic taxpayer is always entitled to deduction of a tax allowance in respect of wealth tax, whereas a non-resident taxpayer has no such entitlement in the case where the assets in question are situated predominantly in the taxpayer's State of residence (in which no wealth tax is levied)?
- If not, does it make a difference in this case that the Netherlands has, under a bilateral treaty, granted to residents of Belgium, who in all other respects are in comparable circumstances, entitlement to the tax allowance (no wealth tax being levied in Belgium either)?

5.7.05 – C-376/03 D (5)



- **Have you exercised a fundamental Freedom?**
 - Free movement of capital (24)
- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - With regard to income tax, the Court has held that the situation of a resident is different from that of a non-resident (27). The Court has concluded from this that the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to residents is not, as a rule, discriminatory since those two categories of taxpayer are not in a comparable situation (28)

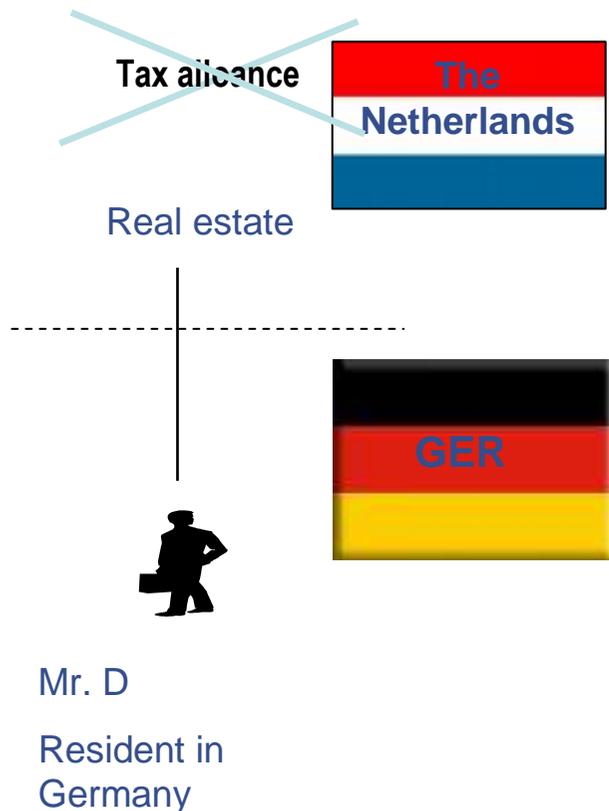
5.7.05 – C-376/03 D (6)



– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- The Court has nevertheless held that the position could be different where the non-resident receives **no significant income** in the Member State of residence **and** obtains **the major part of his taxable income from an activity performed in the State of employment.** There is then **no objective difference** between such a non-resident and a resident (see, in particular, *Schumacker*, paragraphs 36 and 37, and Case C-169/03 *Wallentin*, paragraph 17).

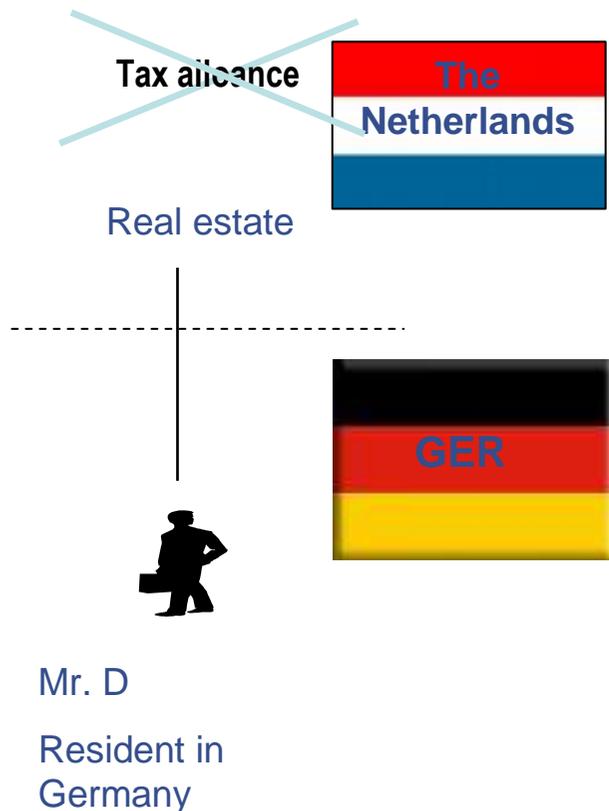
5.7.05 – C-376/03 D (7)



– Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?

- The Court has thus allowed a Member State to make grant of a benefit to non-residents subject to the condition that **at least 90%** of their worldwide income must be subject to tax in that State (30)
- The situation of a person liable to wealth tax and that of a person liable to income tax are similar in several respects (31)
- In Mr D.'s submission, however, the fact that the legislation of the Member State in which the person concerned is resident does not impose a wealth tax means that that person is not entitled in either of the relevant Member States to have his personal and family circumstances taken into account for the purposes of grant of an allowance and gives rise to a situation in which he is discriminated against (39)

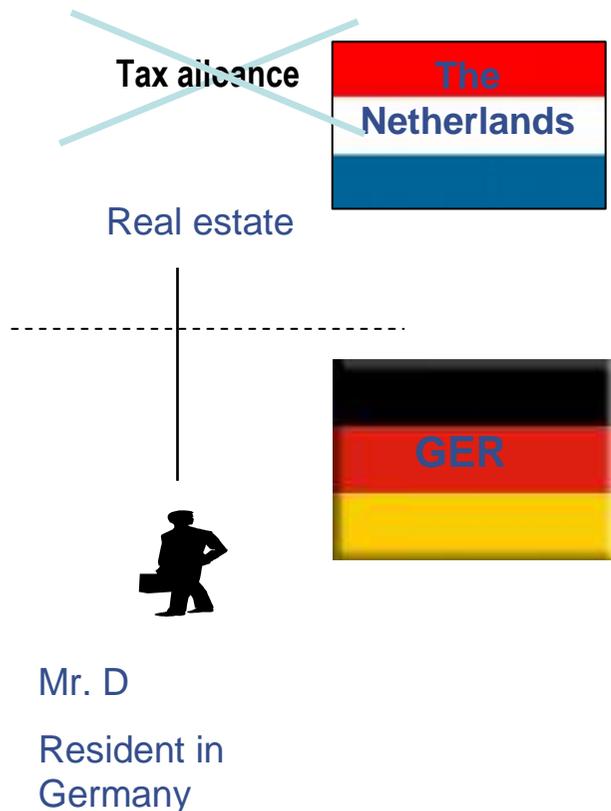
5.7.05 – C-376/03 D (8)



– Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?

- That proposition cannot be upheld (40)
- The situations are not comparable (41)
- The circumstances of the main proceedings can be distinguished from those in *Wallentin* insomuch as sums such as the subsistence allowance paid to Mr Wallentin by his parents and the grant which he received from the German State did not of their nature constitute taxable income under German tax legislation. Accordingly, the sums received by Mr Wallentin in Germany and the wealth held by Mr D. there cannot be regarded as comparable for the purpose of determining whether, with regard to taxation of the wealth possessed by him in the Netherlands, Mr D. must be eligible for the allowance provided for by Netherlands legislation (42)

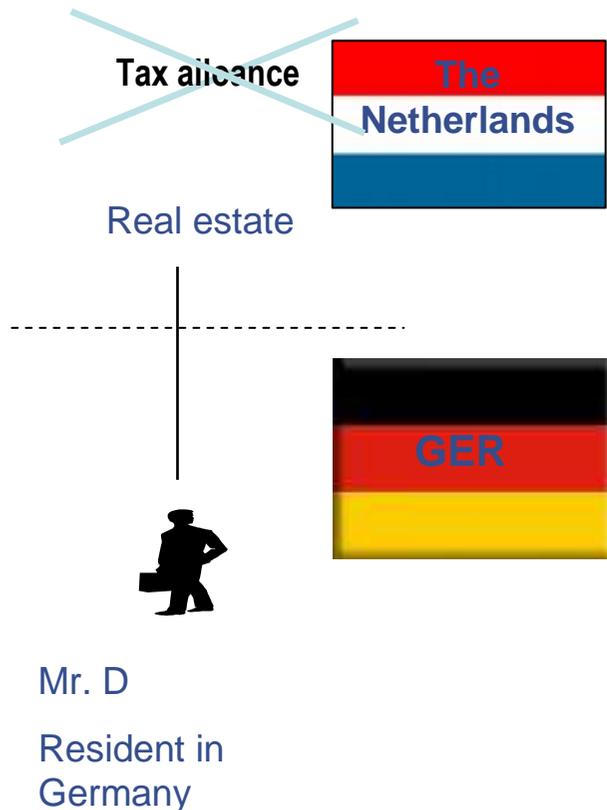
5.7.05 – C-376/03 D (9)



– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- With respect to the second question, as the Court has already pointed out, the Member States are **at liberty**, in the framework of those conventions, to determine the connecting factors for the purposes of allocating powers of taxation. The Court has also accepted that a difference in treatment between nationals of the two Contracting States that results from that allocation cannot constitute discrimination contrary to Article 39 EC (*Gilly*, paragraph 30)

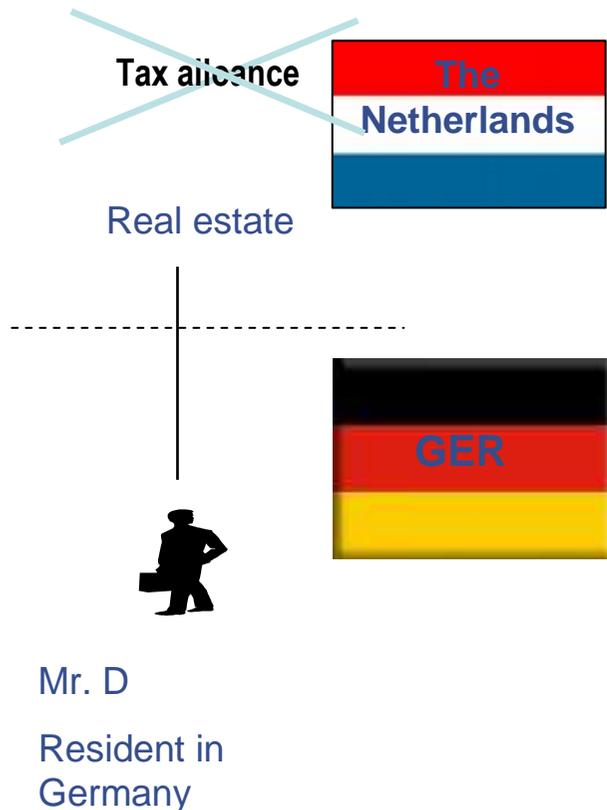
5.7.05 – C-376/03 D (10)



– Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?

- The main proceedings do not, however, relate to the consequences of allocating powers of taxation in relation to nationals or residents of Member States that are party to a convention, but are concerned with drawing a comparison between the situation of a person resident in a State not party to such a convention and that of a person covered by the convention (53). The scope of a bilateral tax convention is limited to the natural or legal persons referred to in it (54)

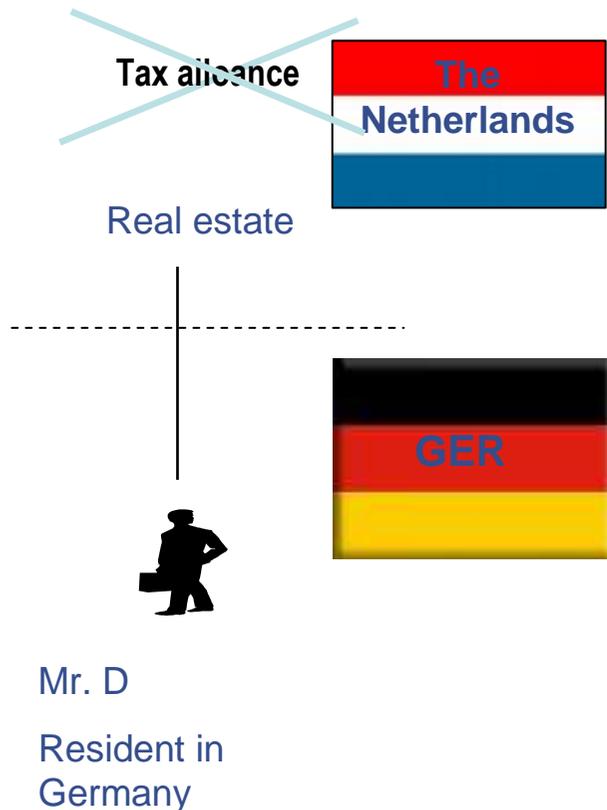
5.7.05 – C-376/03 D (11)



– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- However, there are situations where the benefits under a bilateral convention may be extended to a resident of a Member State which does not have the status of party to that convention (55). The Court has thus held that, in the case of a double taxation convention concluded between a Member State and a non-member country, the national treatment principle requires the Member State which is party to the convention to grant to permanent establishments of non-resident companies the benefits provided for by that convention on the same conditions as those which apply to resident companies (*Saint-Gobain ZN*, paragraph 59)

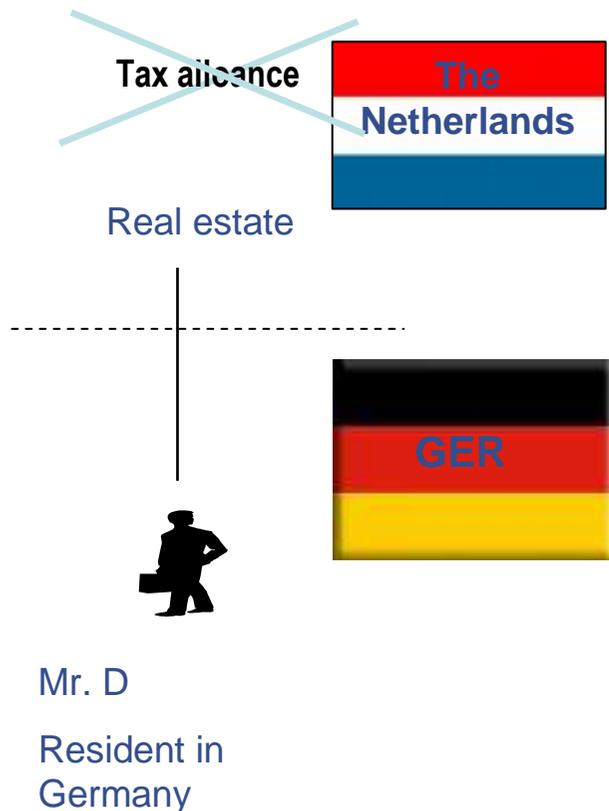
5.7.05 – C-376/03 D (12)



– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- In such a case, the non-resident taxable person having a permanent establishment in a Member State is regarded as being in a situation equivalent to that of a taxable person resident in that State
- However, similar treatment with regard to wealth tax in the Netherlands of a taxable person, such as Mr D., resident in Germany and a taxable person resident in Belgium presupposes that those two taxable persons are regarded as being in the same situation (59).

5.7.05 – C-376/03 D (13)



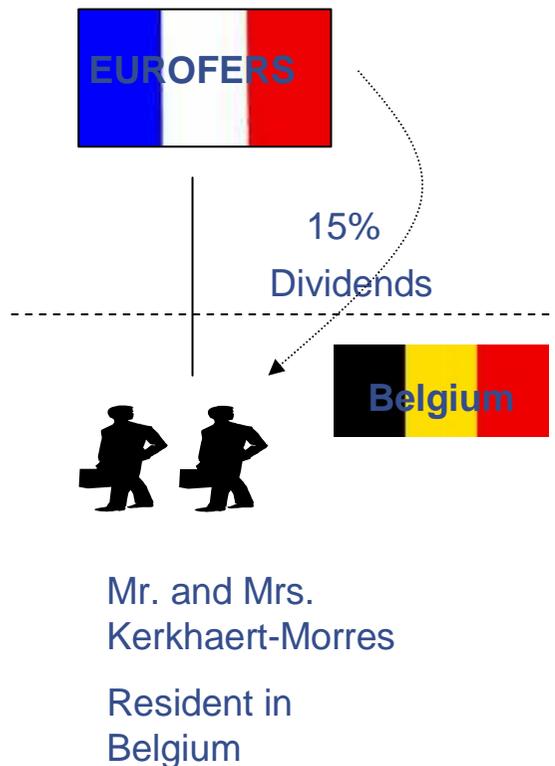
– Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?

- It is to be remembered that, in order to avoid the same income and assets being taxed in both the Netherlands and Belgium, Article 24 of the Belgium-Netherlands Convention allocates powers of taxation between those two Member States and Article 25(3) lays down a rule under which natural persons resident in one of those two States are entitled in the other to the personal allowances which are granted by it to its own residents (60). 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**

– Is there a justification? N/A

– Proportionality? N/A

14.11.06 – C-513/04 Kerckhaert-Morres



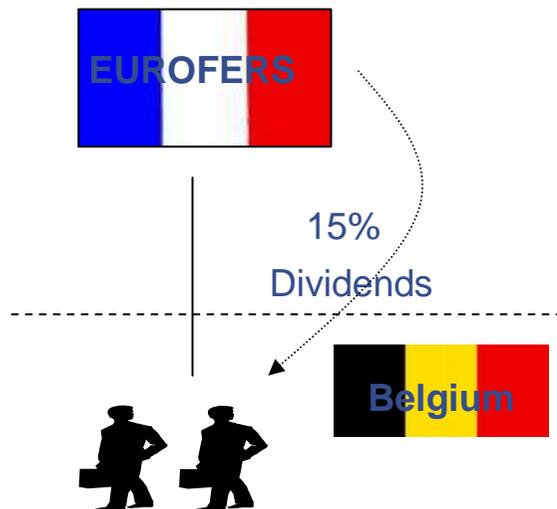
– Facts

- According to Belgian law, dividends, either domestic or foreign, are subject to 25% tax
- Dividends received by a France company are subject, pursuant to the concerned DTT, to 15% withholding tax
- Such a withholding tax cannot be credited against the taxable income in Belgium
- Mr and Mrs Kerckhaert-Morres, who are resident in Belgium, received dividends from Eurofers SARL, a company established in France (9) and asked to credit the withholding tax levied in France against their Belgian tax liability (11)

– Question

- Is the lack of the tax credit against EU law?

14.11.06 – C-513/04 Kerckhaert-Morres (2)



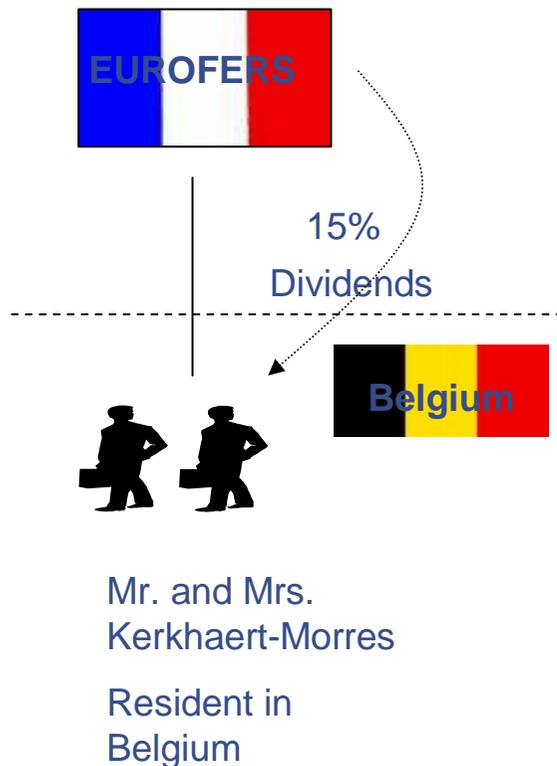
Mr. and Mrs.
Kerkhaert-Morres

Resident in
Belgium

– Have you exercised a fundamental Freedom?

- Free movement of capital (24)
- It must be recalled, in that regard, that conventions preventing double taxation such as those envisaged in Article 293 EC are designed to eliminate or mitigate the negative effects on the functioning of the internal market resulting from the coexistence of national tax systems referred to in the preceding paragraph (21)

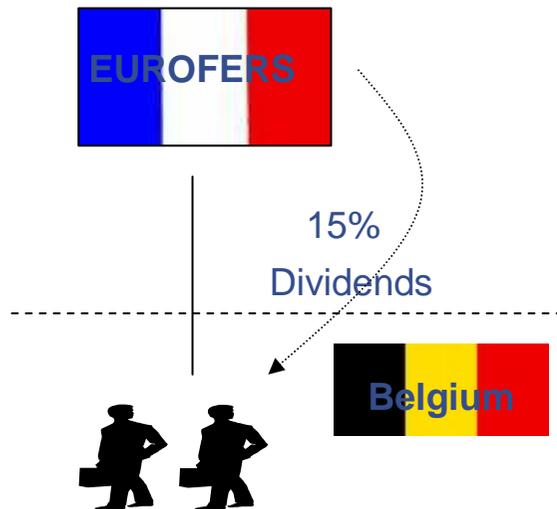
14.11.06 – C-513/04 Kerckhaert-Morres (3)



– Have you exercised a fundamental Freedom?

- Community law, in its current state and in a situation such as that in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the Community. Apart from Council Directive 90/435/EEC of 23 July 1990, the Convention of 23 July 1990 and Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, no uniform or harmonization measure designed to eliminate double taxation has as yet been adopted at Community law level (22)

14.11.06 – C-513/04 Kerckhaert-Morres (4)

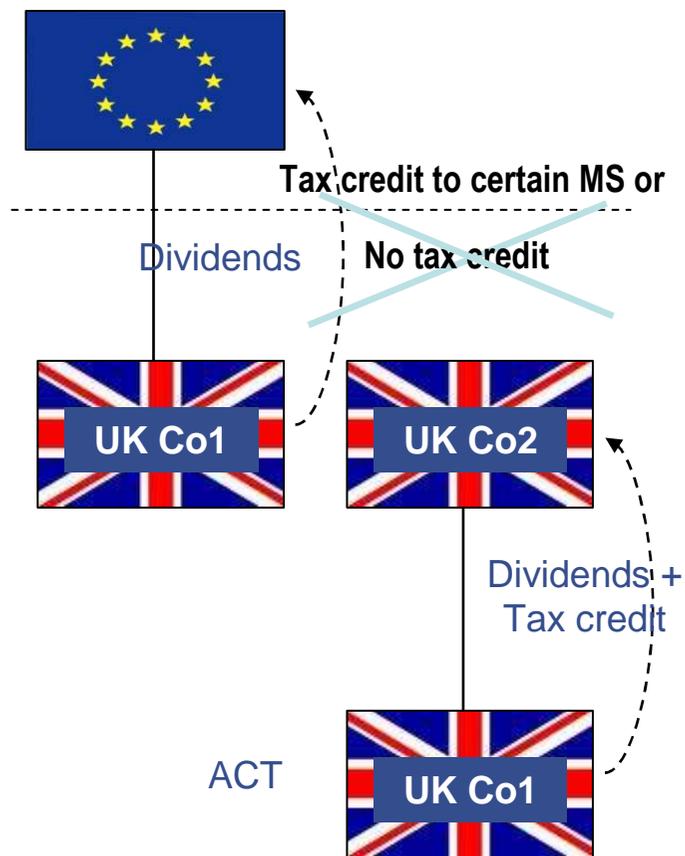


Mr. and Mrs.
Kerkhaert-Morres

Resident in
Belgium

- **Have you exercised a fundamental Freedom?**
 - Consequently, it is for the Member States to take the measures necessary to prevent situations such as that at issue in the main proceedings by applying, in particular, the apportionment criteria followed in international tax practice (23)
- **Is there a justification?** N/A
- **Proportionality?** N/A

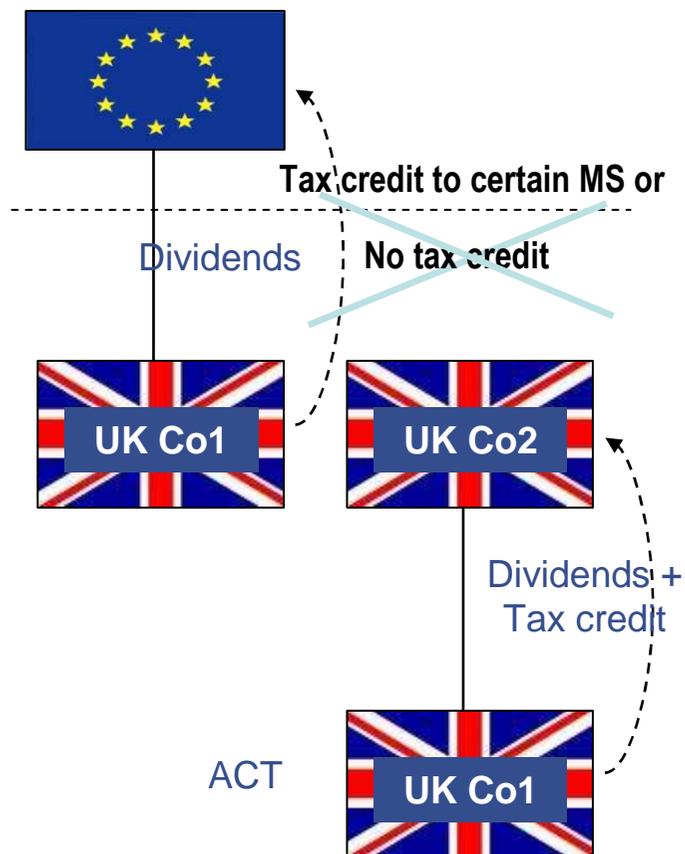
12.12.06 – C-374/04 ACT Group Litigation



– Questions

- The national court essentially asks whether EU law precludes a rule of a Member State which, on a payment of dividends by a resident company, grants a full tax credit to the ultimate shareholders receiving the dividends who are resident in that Member State or in another State with which the first Member State has concluded a DTC providing for such a tax credit, but does not grant a full or partial tax credit to companies receiving such dividends which are resident in certain other Member States

12.12.06 – C-374/04 ACT Group Litigation (2)



– Questions

- The national court also asks whether EU law precludes a Member State from applying DTCs concluded with other Member States in terms of which, on a payment of dividends by a resident company, companies receiving those dividends which reside in some Member States are not entitled to a tax credit, while companies receiving such dividends which reside in certain other Member States are granted a partial tax credit

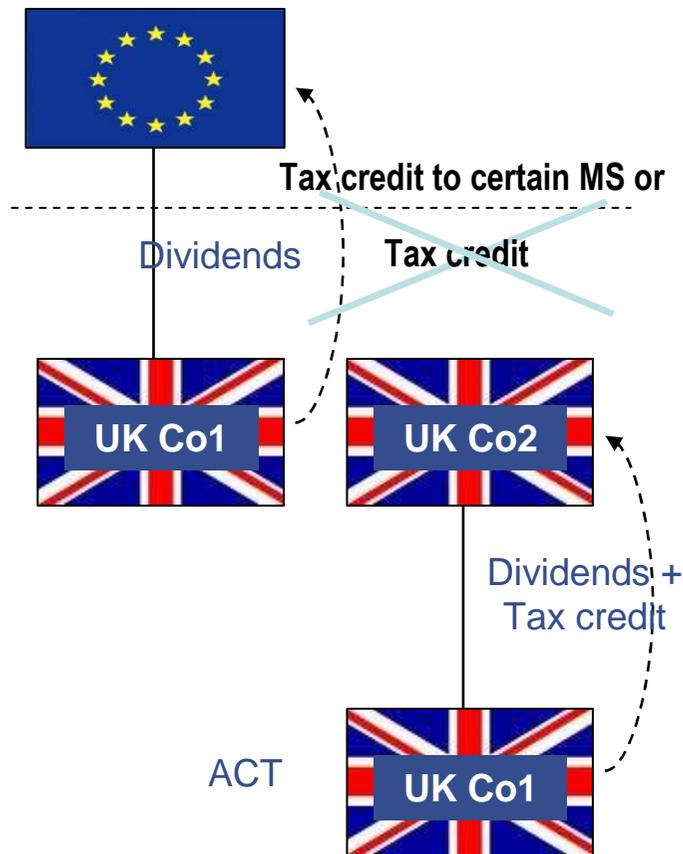
– Have you exercised a fundamental Freedom?

- Freedom of establishment and free movement of capital (38)

12.12.06 – C-374/04 ACT Group Litigation (3)

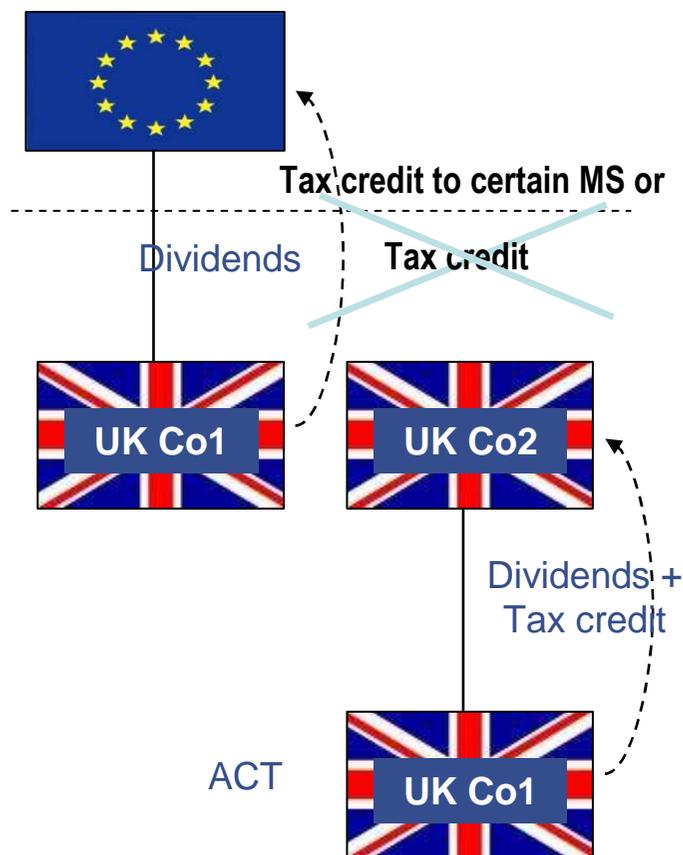
– Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?

- As regards the first question, it must be pointed out that, where a company resident in the United Kingdom pays dividends to another company, neither the dividends received by a resident company nor those received by a non-resident company are subject to tax in the United Kingdom (61). There is therefore no difference in treatment in that respect (62)



12.12.06 – C-374/04 ACT Group Litigation (4)

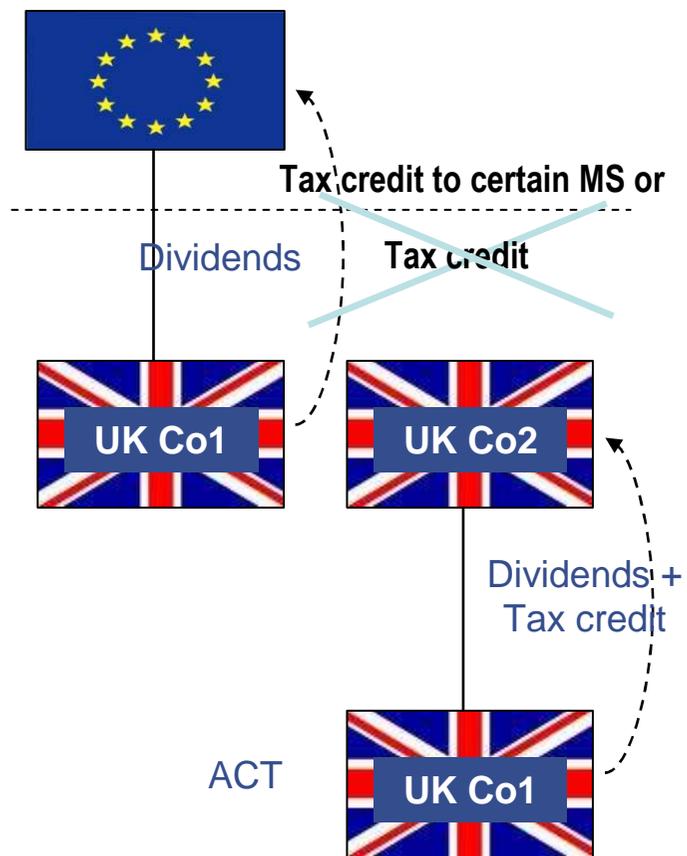
- Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?



- With respect to the second question, as the Court noted in paragraph 54 of *D.*, the scope of a bilateral tax convention is limited to the natural or legal persons referred to in it (84). 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 (*D.*, paragraph 61)

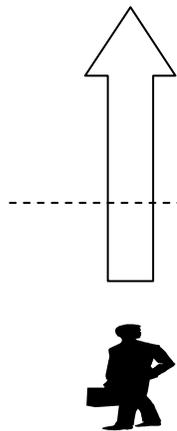
12.12.06 – C-374/04 ACT Group Litigation (5)

- Is there a justification? N/A
- Proportionality? N/A



6.12.07 – C-298/05 Columbus

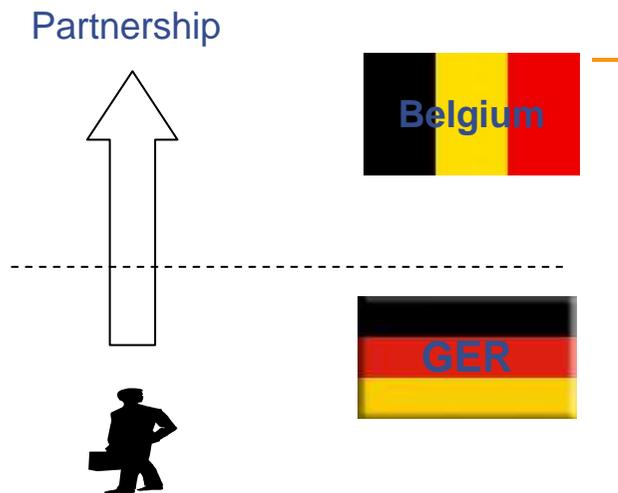
Partnership



– Facts

- Under German tax law, an entity that is regarded as a partnership based on German rules is not as such subject to tax. The profits made by a partnership, either in Germany or elsewhere, are assigned pro rata to the partners residing in Germany and are taxed as their own profit in accordance with the principle of tax transparency of partnerships (4)
- This assignment of the profits of a partnership to its partners applies even if the partnership is liable, as such, to corporation tax abroad, namely in the State in which it is registered (5)
- According to the DTT, income derived by German residents from Belgium limited partnerships are exempt (8)

6.12.07 – C-298/05 Columbus (2)

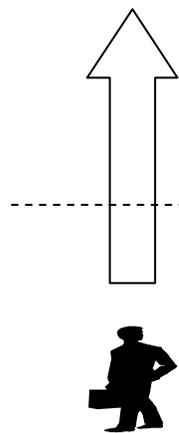


– Facts

- However, according to German tax law income from limited partnership subject to a low level of taxation abroad are subject to tax and indirect tax credit is applied for taxes paid abroad (9)
- Under Belgian law, coordination centers' profits are determined at a standard rate in accordance with the 'cost-plus' method (12)
- Columbus is a limited partnership governed by Belgian law. The company is a coordination centre (13)
- Columbus' shares are held, on the one hand, by eight members of the same family residing in Germany (14)

6.12.07 – C-298/05 Columbus (3)

Partnership



– **Facts**

- Under German law, Columbus is a partnership (18)
- Columbus' income has been (partially) subject to tax in Germany with indirect tax credit (19)



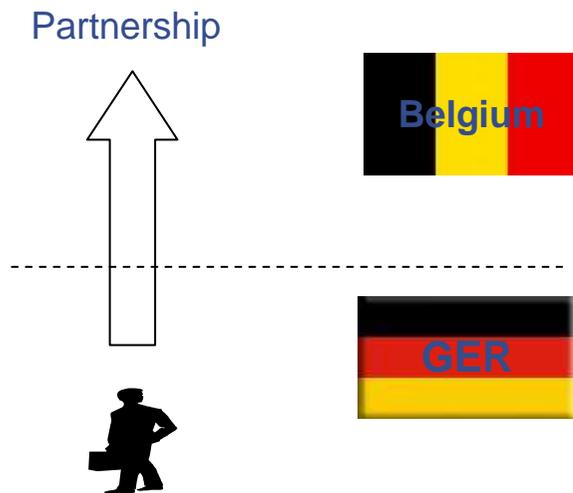
– **Question**

- Is it contrary to EU the switch from exemption to imputation?

– **Have you exercised a fundamental Freedom?**

- Freedom of establishment (32)

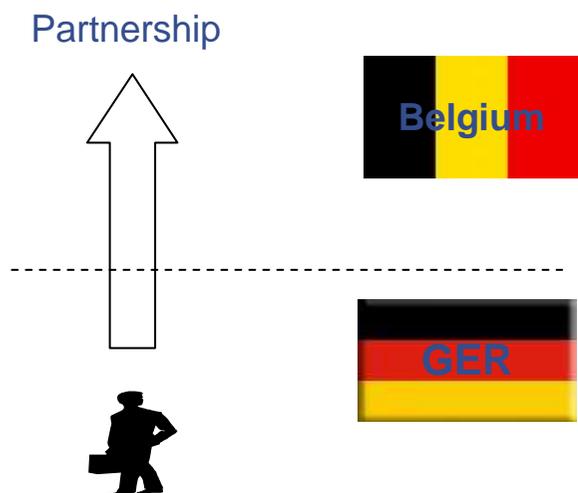
6.12.07 – C-298/05 Columbus (4)



– **Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?**

- Given that the freedom of establishment prohibits any discrimination based on the place in which companies or partnerships have their seat, it is not contested that the German tax legislation in issue in the main proceedings **does not make any distinction** between taxation of income derived from the profits of partnerships established in Germany, and taxation of income derived from the profits of partnerships established in another Member State which subjects the profits made by those partnerships in that State to a rate of tax below 30%. By applying the set-off method to such foreign partnerships, that legislation merely subjects, in Germany, the profits made by such partnerships to the same tax rate as profits made by partnerships established in Germany

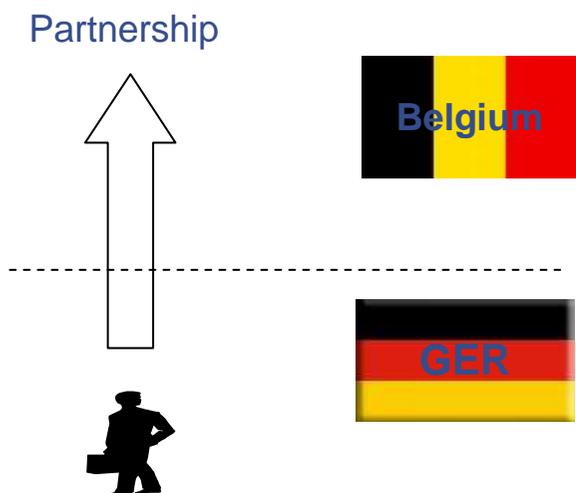
6.12.07 – C-298/05 Columbus (5)



– **Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?**

- Since partnerships such as Columbus do not suffer any tax disadvantage in comparison with partnerships established in Germany, there is no discrimination resulting from a difference in treatment between those two categories of partnerships (40)
- In circumstances such as those in the main proceedings, the adverse consequences which might arise from the application of a system for the taxation of profits such as that put in place by the AStG result from the exercise in parallel by two Member States of their fiscal sovereignty (43)

6.12.07 – C-298/05 Columbus (6)

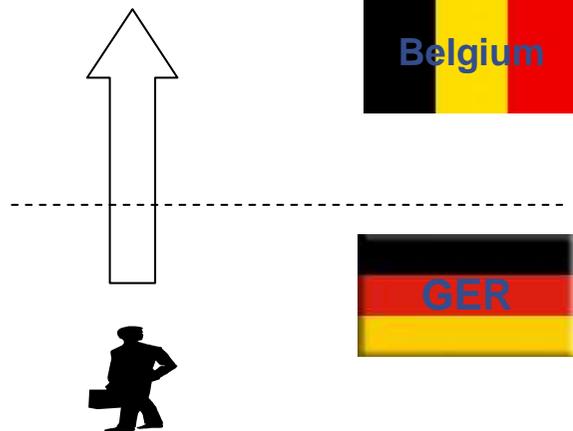


– Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?

- The Court may not examine the relationship between a national measure, such as that in issue in the main proceedings, and the provisions of a double taxation convention, such as the Bilateral Tax Convention, since that question does not fall within the scope of Community law (Case C-141/99 *AMID*, paragraph 18) (44)
- Contrary to what the applicant in the main proceedings claims, it also does not follow from paragraphs 43 and 44 of the judgment in Case C-294/97 *Eurowings* that the freedoms of movement guaranteed by the Treaty preclude the application of national legislation such as that in issue in the main proceedings (48)

6.12.07 – C-298/05 Columbus (7)

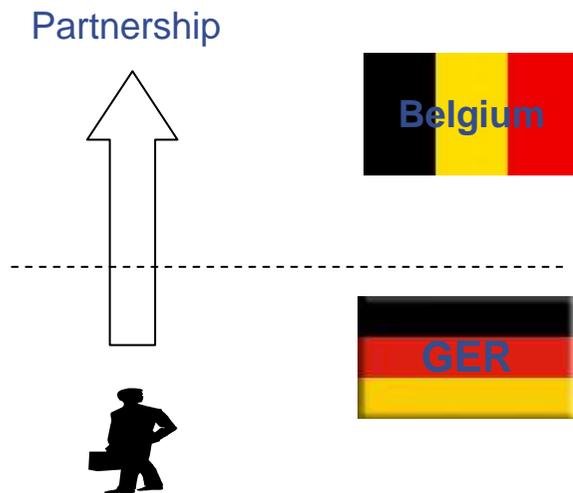
Partnership



– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- Although the Court, in the *Eurowings* judgment, held that a Member State cannot justify the application of a tax levy to recipients of services on the ground that the persons providing those services were subject to low taxation in another Member State, the case which led to that judgment concerned national legislation that subjected providers of services established in the Member State concerned to less favorable tax treatment than those established in other Member States. However, in the main proceedings in the present case, limited partnerships such as Columbus and partnerships established in Germany are subject, as regards their partners, to a tax treatment that is not based on such a difference in treatment (49)

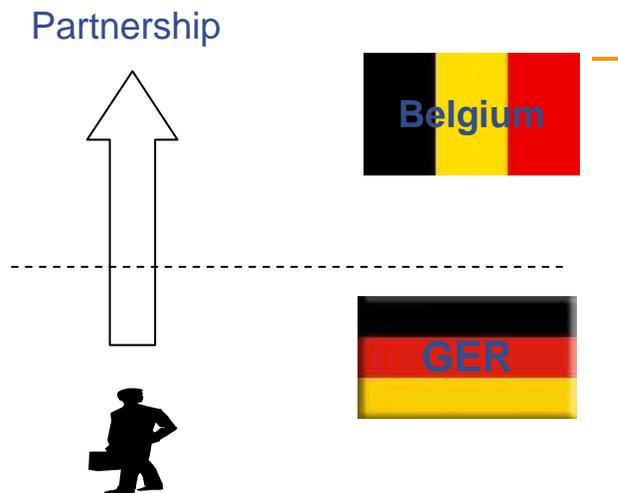
6.12.07 – C-298/05 Columbus (8)



– **Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?**

- Columbus also submits that the provisions of the AStG at issue in the main proceedings lead to a distortion of the choice that companies and partnerships have to establish themselves in different Member States (50)

6.12.07 – C-298/05 Columbus (9)

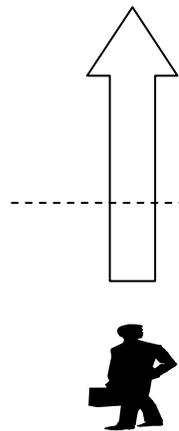


– **Is there a discrimination or a restriction?
Overt? Covert? Home or Host State?**

- In the current state of harmonization of Community tax law, Member States enjoy a certain autonomy. It follows from that tax competence that the freedom of companies and partnerships to choose, for the purposes of establishment, between different Member States in no way means that the latter are obliged to adapt their own tax systems to the different systems of tax of the other Member States in order to guarantee that a company or partnership that has chosen to establish itself in a given Member State is taxed, at national level, in the same way as a company or partnership that has chosen to establish itself in another Member State (51)

6.12.07 – C-298/05 Columbus (10)

Partnership



- Is there a justification? N/A
- Proportionality? N/A

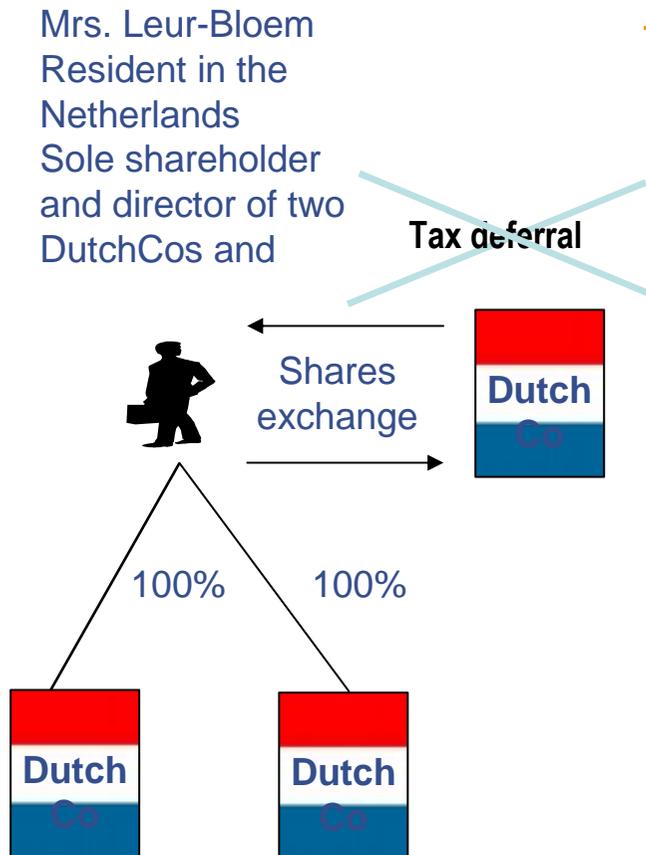


Anti avoidance

Fabio Aramini, LL.M., Partner

Studio Adonnino Ascoli & Cavasola Scamoni

17.7.97 – C-28/95 Leur-Bloem

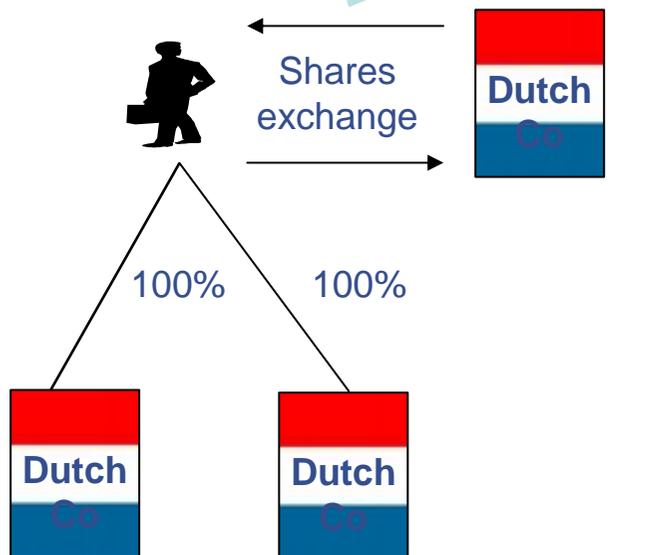


– Facts

- Mrs Leur-Bloem is the sole shareholder and director of two private Dutch companies and is planning to acquire the shares in a third private company, a holding company, payment to be made by exchanging shares in the first two companies. After the transaction, Mrs Leur-Bloem was to become, no longer directly but only indirectly, the sole shareholder in the two other companies (3)
- Mrs Leur-Bloem is resident in the Netherlands. Under Dutch law, the shares exchange is not subject to tax (deferment of tax) under certain conditions (4)

17.7.97 – C-28/95 Leur-Bloem (2)

Mrs. Leur-Bloem
Resident in the
Netherlands
Sole shareholder
and director of two
DutchCos and



– Facts

- The Dutch tax authorities did not allow exemption from tax under the assumption that the purpose of the proposed transaction is not to combine, on a permanent basis from an economic and financial viewpoint, the undertaking of those companies in a larger single entity. Such an entity already exists, from the economic and financial viewpoint, since both companies already have the same director and sole shareholder (10)

17.7.97 – C-28/95 **Leur-Bloem** (3)

– Questions

- 1. May questions be referred to the Court of Justice concerning the interpretation of the provisions and scope of a directive even where the directive is not directly applicable to the specific circumstances of the case but it is the national legislature's **intention** that those circumstances are to be treated in the same manner as a situation to which the directive does apply?
 - The Court has jurisdiction under Article 177 of the Treaty to interpret Community law where the situation in question is not governed directly by Community law but the national legislature, in transposing the provisions of a directive into domestic law, has chosen to apply the same treatment to purely internal situations and to those governed by the Directive, so that it has aligned its domestic legislation to Community law (34)

17.7.97 – C-28/95 Leur-Bloem (4)

– Question(s)

– 2(a) Can there be an exchange of shares within the meaning of the Directive if the acquiring company does not itself carry on a business?

2(b) Is an exchange of shares within the meaning of the Directive precluded by the fact that the same natural person who was the sole shareholder in, and director of, the acquired company before the exchange is the director of, and sole shareholder in, the acquiring company after the exchange?

2(c) Is there an exchange of shares within the meaning of the Directive only if its effect is to merge the business of the acquiring company and that of another permanently in a single unit from a financial and economic point of view?

17.7.97 – C-28/95 Leur-Bloem (5)

– Questions

- 2(d) Is there an exchange of shares within the meaning of the Directive only if its effect is to merge the businesses of two or more acquired companies permanently in a single unit from a financial and economic point of view?
 - The fact that the acquiring company does not itself carry on a business or that **the same natural person**, who was the sole shareholder and director of the companies acquired, becomes the sole shareholder and director of the acquiring company does not prevent the operation from being treated as an exchange of shares within the meaning of the Directive. Similarly, it is not necessary, in order for the operation to be treated as an exchange of shares within the meaning of that provision, for there to be a permanent merger of the business of two companies into a single unit (37)

17.7.97 – C-28/95 **Leur-Bloem** (6)

– Questions

- Member States must grant the benefits of the Directive unless the operations has their principal objective or as one of their principal objectives tax evasion or tax avoidance (40)
- Member States may stipulate that the fact that those operations were not carried out for valid commercial reasons constitutes a presumption of tax evasion or tax avoidance (40)
- However, in order to determine whether the planned operation has such an objective, the competent national authorities **cannot confine themselves to applying predetermined general criteria** but must subject each particular case to a general examination. According to established case-law, such an examination must be open to **judicial review** (41)

17.7.97 – C-28/95 **Leur-Bloem (7)**

– **Questions**

- In the absence of more detailed Community provisions concerning application of the presumption mentioned in the Directive, it is for the Member States, observing the principle of proportionality, to determine the provisions needed for the purposes of applying this provision (42)

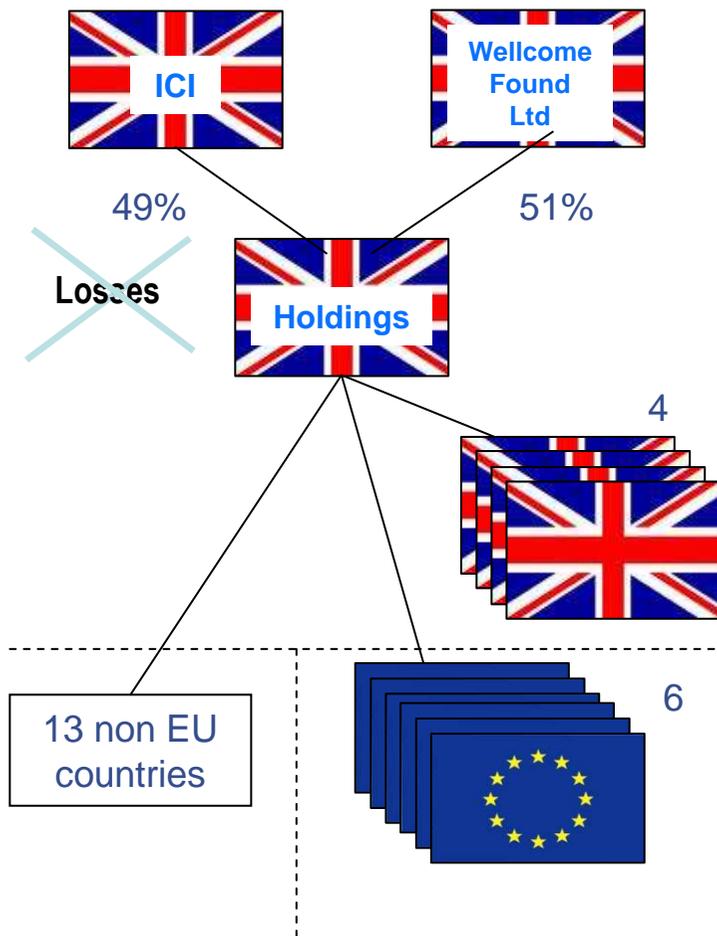
17.7.97 – C-28/95 **Leur-Bloem** (8)

– **Questions**

- 2(e) Is an exchange of shares which is carried out in order to bring about a horizontal setting-off of tax losses between the participant undertakings within a fiscal unit a **valid commercial reason** for the exchange for the purposes the Directive?

- **“Valid commercial reasons” is a concept involving more than the attainment of a purely fiscal advantage.** A merger by way of exchange of shares having only such an aim cannot therefore constitute a valid commercial reason within the meaning of that article

16.7.98 – C-264/96 ICI

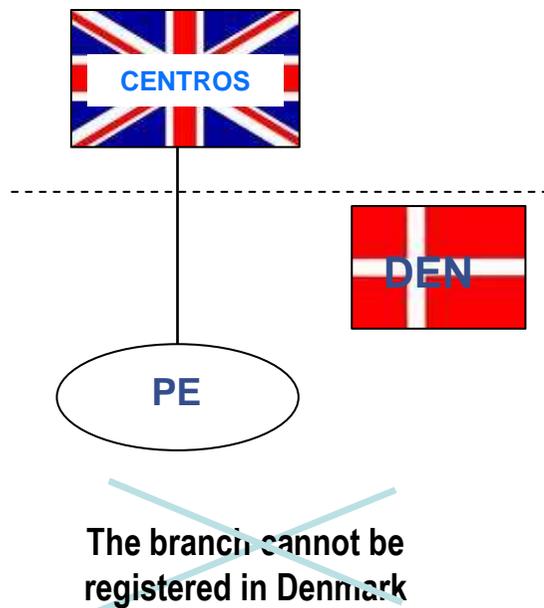


- An important statement on anti avoidance
 - The establishment of a company outside the United Kingdom does not, of itself, necessarily entail tax avoidance, since that company will in any event be subject to the tax legislation of the State of establishment (26)
 - I.e, the mere fact that a subsidiary is established in another MS cannot, of itself, be treated as giving rise to anti avoidance (The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007, par. 2)

9.3.99 – C-212/97 Centros (company law)

– Facts

- Centros Ltd is a private limited company registered in England and Wales (2)
- Centros has **never traded** in the UK from its formation. The UK does not provide for minimum capital requirements. Thus, the capital of Centros has never been paid up (3)
- Centros requested to register a PE in Denmark but the local authorities refused on the ground that Centros was in fact seeking to establish in Denmark, not a branch, but a principal establishment, by circumventing the national rules concerning the paying-up of minimum capital (7)

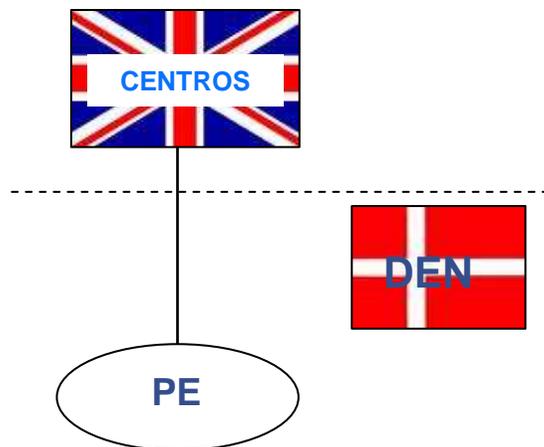


– Question

- Is the refusal compatible with EU law also considering that Centros does not exercise any business in the UK?

9.3.99 – C-212/97 Centros (company law) (2)

– Have you exercised a fundamental Freedom?

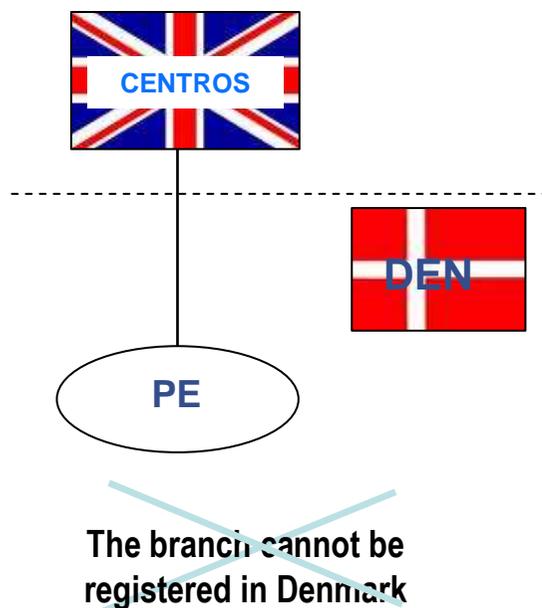


~~The branch cannot be registered in Denmark~~

- Freedom of establishment (18). In that regard, it is immaterial that the company was formed in the first Member State **only** for the purpose of establishing itself in the second, where its main, or indeed entire, business is to be conducted (17)
- The question of the application of those articles of the Treaty is different from the question whether or not a Member State may adopt measures in order to prevent attempts by certain of its nationals to evade domestic legislation by having recourse to the possibilities offered by the Treaty (18)

9.3.99 – C-212/97 Centros (company law) (3)

– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?



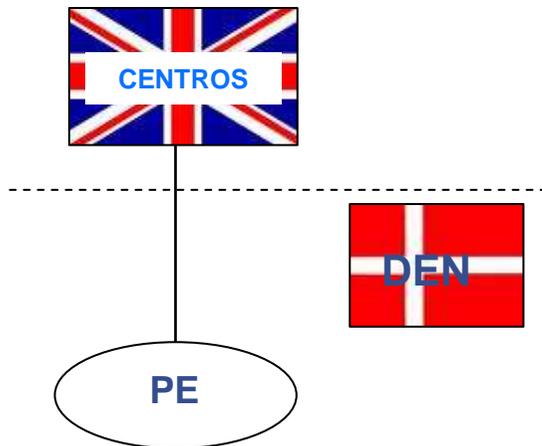
- Under EU law companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are to be treated in the same way as natural persons who are nationals of Member States (19)
- Restriction (22)
- The fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct **which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment (29)**

9.3.99 – C-212/97 Centros (company law) (4)

– Is there a justification?

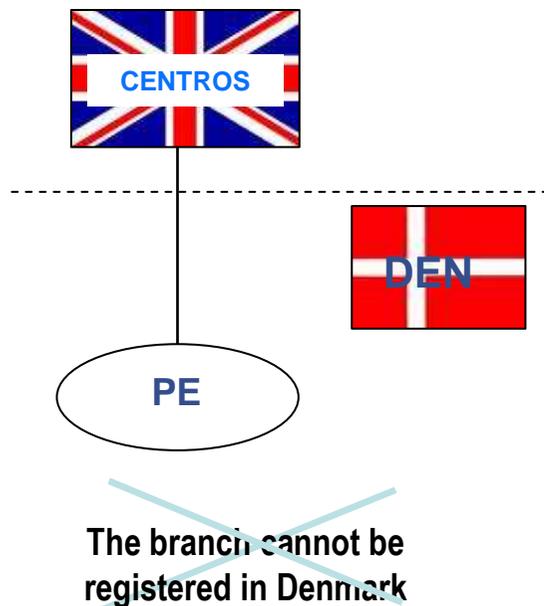
- The practice in question is not such as to attain the objective of protecting creditors which it purports to pursue since, if the company concerned had conducted business in the United Kingdom, its branch would have been registered in Denmark (35)

— Proportionality? N/A



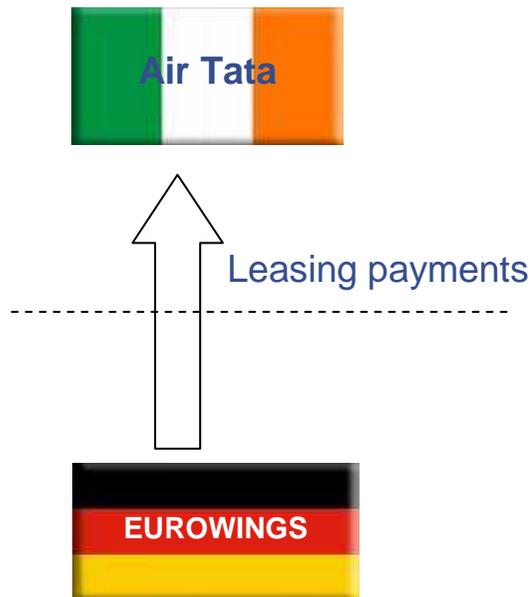
~~The branch cannot be registered in Denmark~~

9.3.99 – C-212/97 Centros (company law) (5)



- ! The same principles have been upheld in Inspire Art (30.9.03 – C-167/01): it is contrary to the freedom of establishment for national legislation to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established on a case-by-case basis

26.10.99 – C-297/97 **Eurowings**

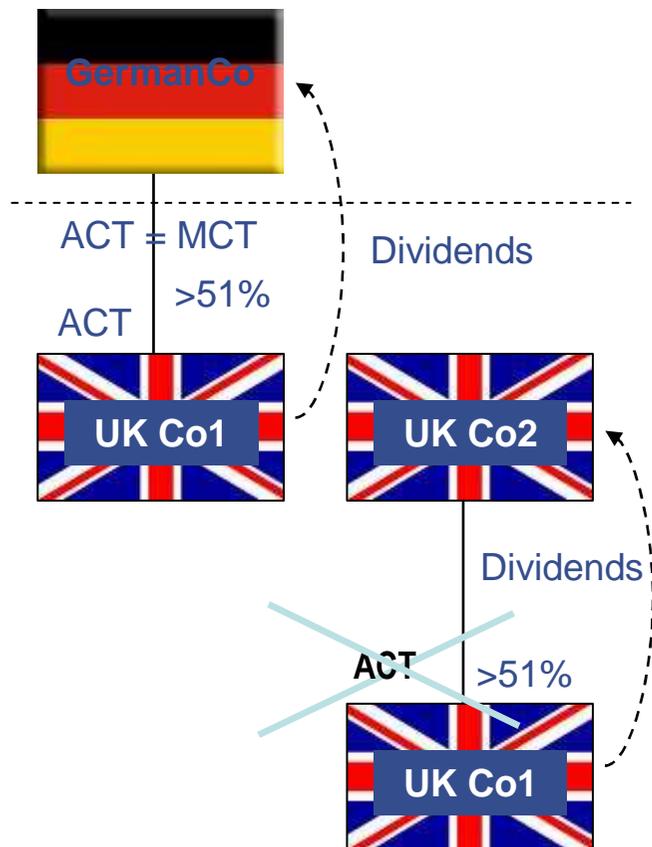


- **An important statement on anti avoidance**
 - ECJ expressed the principle that in so far as taxpayers have not entered into abusive practice, MSs cannot hinder the exercise of the rights of freedom of movement **simply because of lower levels of taxation in other MSs** (The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007, par. 2)

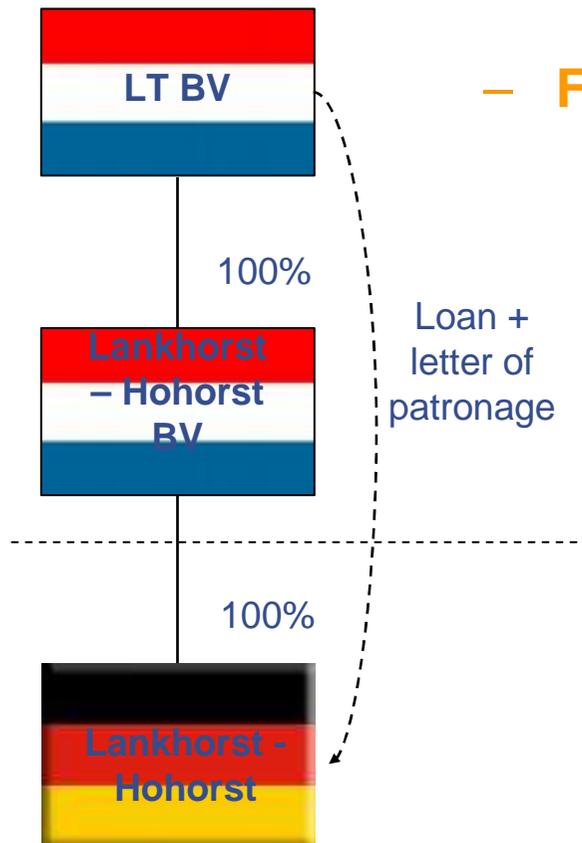
8.3.01 – C-397/98 – C/410/98 Metallgesellschaft / Hoechst

– An important statement on anti avoidance

- The establishment of a company outside the United Kingdom **does not, of itself, necessarily entail tax avoidance**, since that company will in any event be subject to the tax legislation of the State of establishment (57)



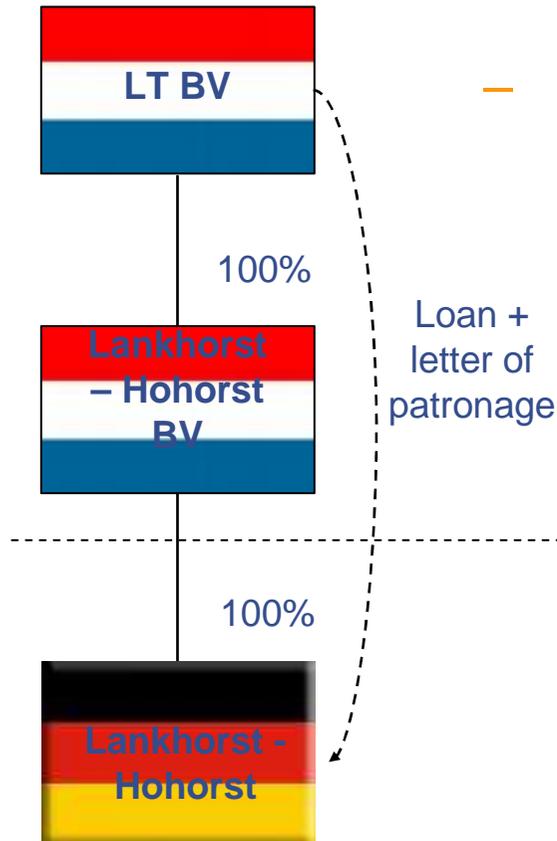
12.12.02 – C-324/00 Lankhorst – Hohorst



– Facts

- According to German tax law, repayments in respect of loan capital which a company limited by shares subject to unlimited taxation has obtained from a shareholder not entitled to corporation tax credit which has a substantial holding in its share or nominal capital at any point in the financial year is regarded as a covert distribution of profits... where repayment calculated as a fraction of the capital is agreed and the loan capital is more than three times the shareholder's proportional equity capital at any point in the financial year, save where the company limited by shares could have obtained the loan capital from a third party under otherwise similar circumstances or the loan capital constitutes borrowing to finance normal banking transactions (3)

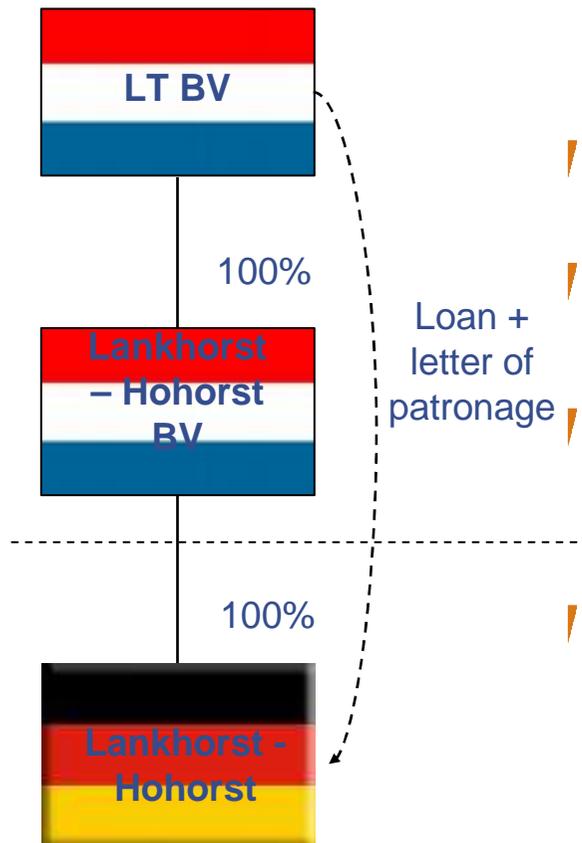
12.12.02 – C-324/00 Lankhorst – Hohorst (2)



– Facts

- Lankhorst-Hohorst is a German resident company fully owned by Lankhorst-Hohorst BV that is, in turn, fully owned by LT BV
- LT BV granted a loan to Lankhorst-Hohorst together with a letter of patronage based on which the former would have give up the loan in case of bankruptcy (8). The loan allowed Lankhorst-Hohorst to reduce the loan towards banks (and related interest)
- The German tax authorities considered the interest paid as a disguised distribution of profits and claimed a final withholding tax equal to 30% (11)

12.12.02 – C-324/00 Lankhorst – Hohorst (3)



Question

- Is this rule contrary to EU law?

Have you exercised a fundamental Freedom?

- Freedom of establishment(32)

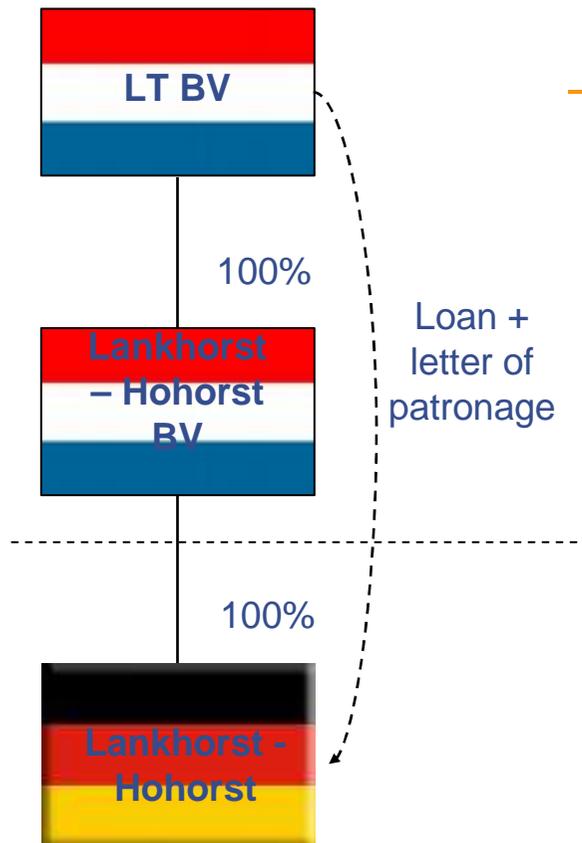
Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- Restriction (32)

Is there a justification?

- Reduction of tax revenues. The reduction in tax revenue does not constitute an overriding reason in the public interest which may justify a measure which is in principle contrary to a fundamental freedom (36)

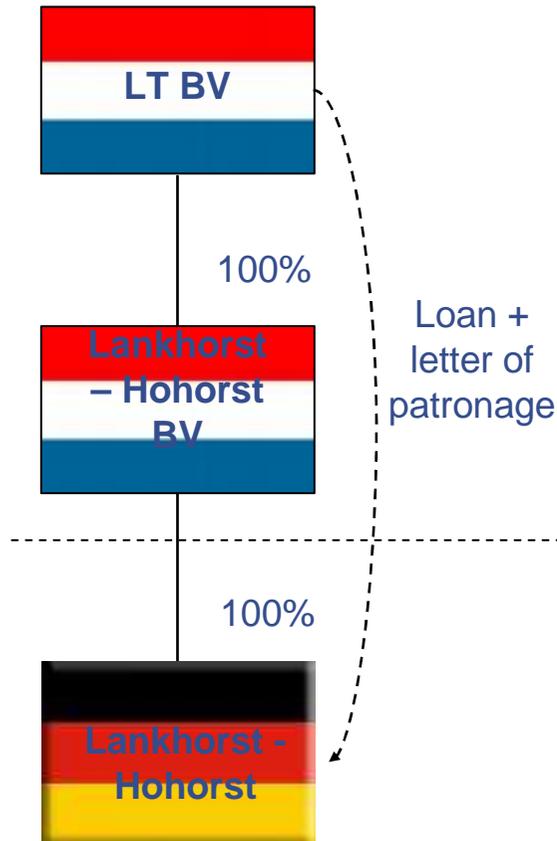
12.12.02 – C-324/00 Lankhorst – Hohorst (4)



– Is there a justification?

- Risk of tax evasion. The legislation at issue here does not have the **specific purpose** of preventing wholly artificial arrangements, designed to circumvent German tax legislation, from attracting a tax benefit, but applies **generally** to any situation in which the parent company has its seat, for whatever reason, outside the Federal Republic of Germany. Such a situation does not, of itself, entail a risk of tax evasion, since such a company will in any event be subject to the tax legislation of the State in which it is established (37)

12.12.02 – C-324/00 Lankhorst – Hohorst (5)

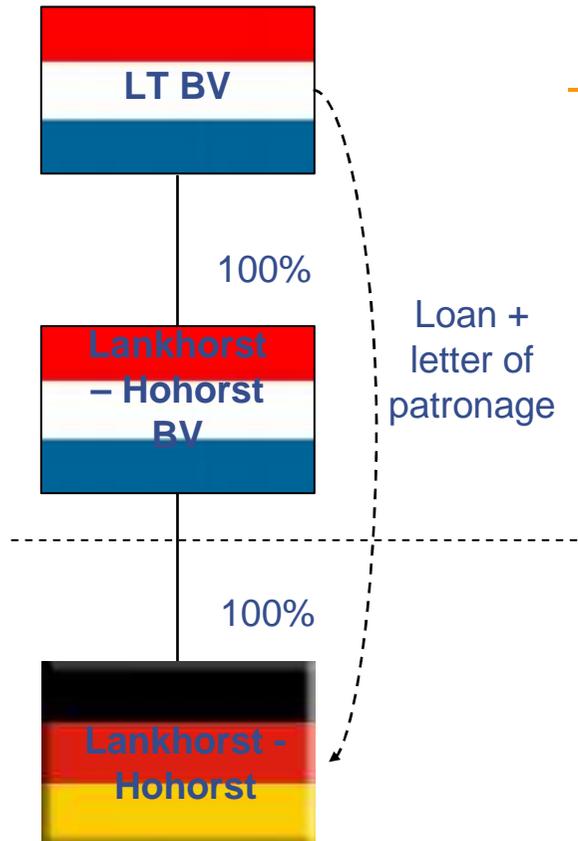


– **Is there a justification?**

- Tax cohesion. There is no direct link where, as in the present case, the subsidiary of a non-resident parent company suffers less favorable tax treatment and the German Government has not pointed to any tax advantage to offset such treatment (42);

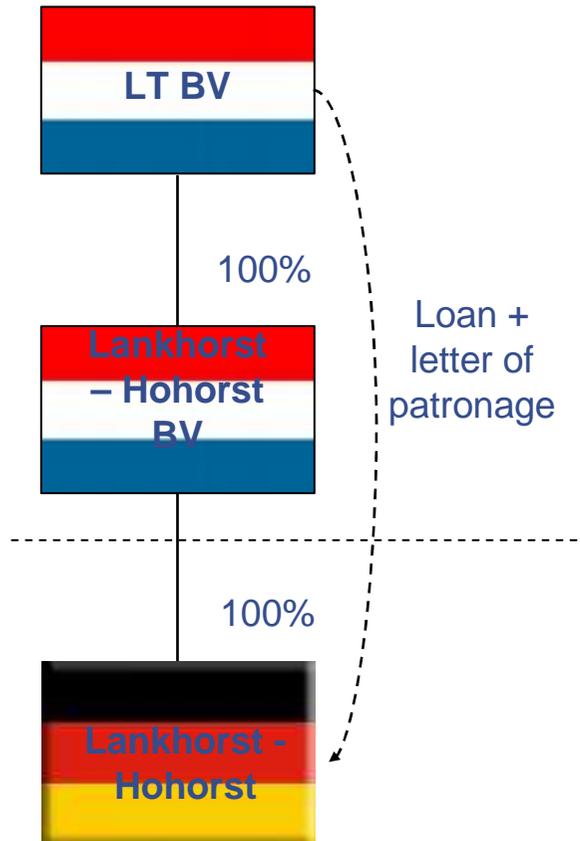
– **Proportionality?** N/A

12.12.02 – C-324/00 Lankhorst – Hohorst (6)



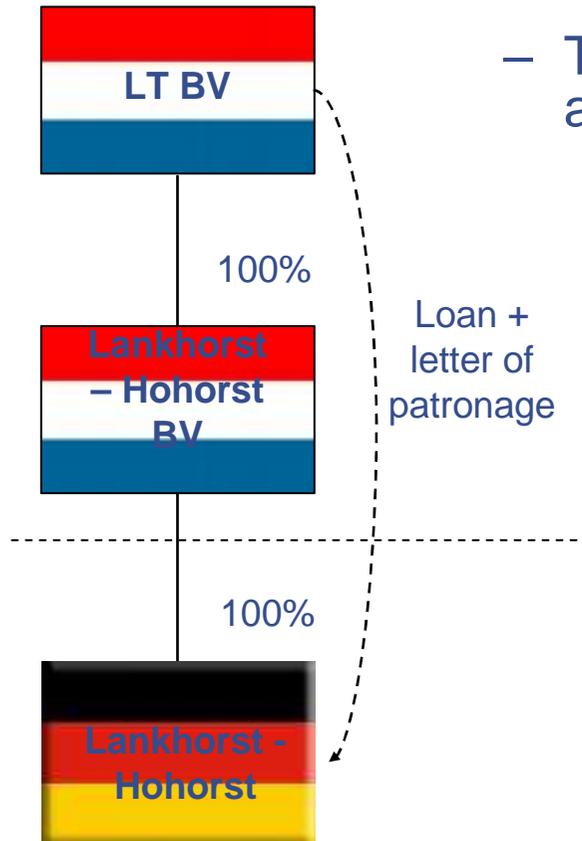
- The same principles have been applied in **Thin cap** (13.3.07, C-524/04): EU law precludes legislation of a Member State which restricts the ability of a resident company to deduct, for tax purposes, interest on loan finance granted by a direct or indirect parent company which is resident in another Member State or by a company which is resident in another Member State and is controlled by such a parent company, without imposing that restriction on a resident company which has been granted loan finance by a company which is also resident, unless

12.12.02 – C-324/00 Lankhorst – Hohorst (7)



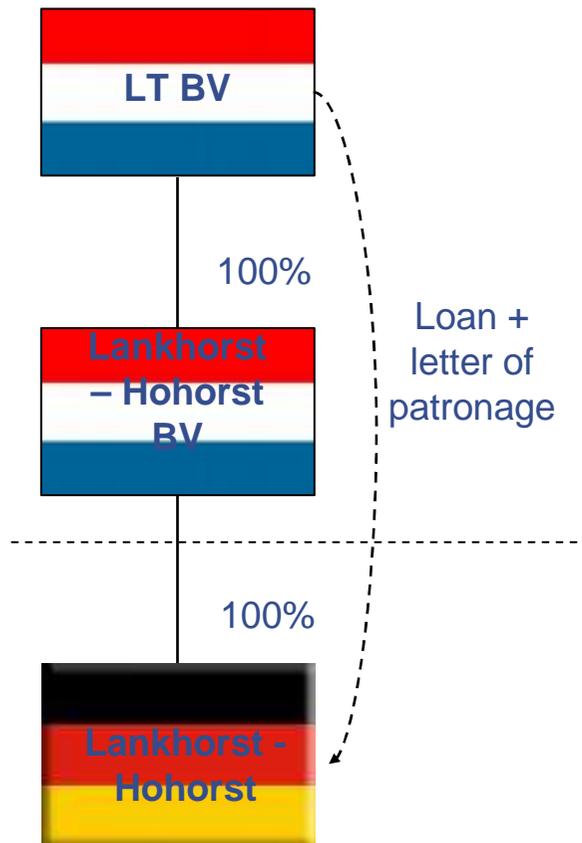
- First, that legislation provides for a consideration of objective and verifiable elements which make it possible to identify the existence of a **purely artificial arrangement**, entered into for tax reasons alone, to be established and allows taxpayers to produce, if appropriate and without being subject to undue administrative constraints, evidence as to the commercial justification for the transaction in question and,
- Secondly, where it is established that such an arrangement exists, such legislation treats that interest as a distribution **only in so far as it exceeds what would have been agreed upon at arm's length**

12.12.02 – C-324/00 Lankhorst – Hohorst (8)



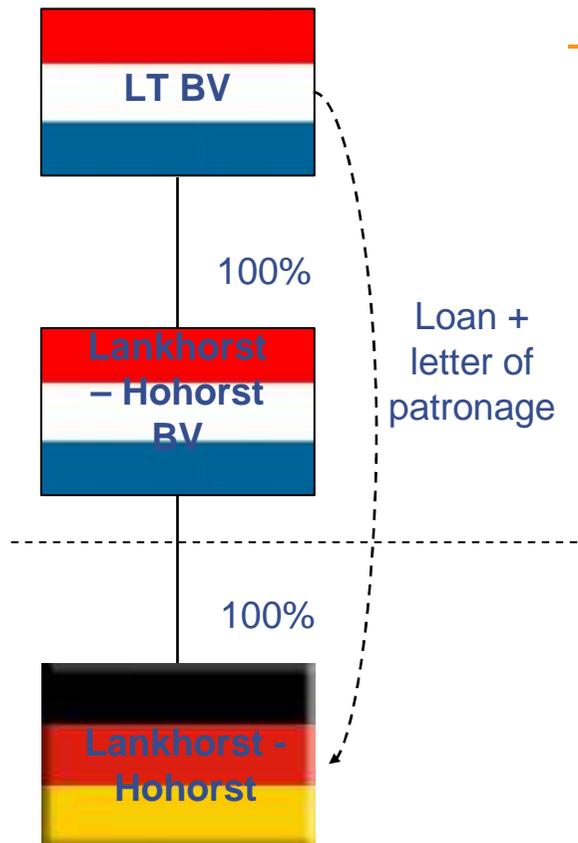
- This ruling contained some important principles on anti avoidance
 - The fact that the terms and conditions of financial transactions between related companies resident in different MSs deviate from those that would have been agreed upon between unrelated parties constitutes an objective and independently verifiable element for the purpose of determining whether the transaction in question represents, in whole or in part, a purely artificial arrangement. Legislation framed on this basis is proportionate on condition that the taxpayer is given the opportunity to provide evidence of any commercial justification for the arrangement (The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007, par. 2)

12.12.02 – C-324/00 Lankhorst – Hohorst (9)



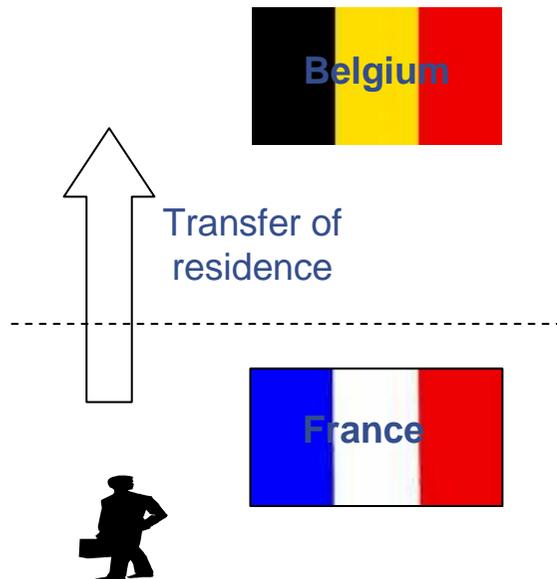
- For the purposes of determining whether a transaction represents a purely artificial arrangement, national anti-abuse rules may comprise 'safe harbour' criteria to target situations in which the probability of abuse is highest. However, in order to ensure that genuine establishments and transactions are not unduly sanctioned it is imperative that where the existence of a purely artificial arrangement is presumed, the taxpayer is given the opportunity, without being subject to undue administrative constraints, to produce evidence of any commercial justification that there may be for that arrangement. With regard to intra-group transactions that means adherence to the arm's length principle (The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007, par. 2)

12.12.02 – C-324/00 Lankhorst – Hohorst (10)



- As far as the application of the subject provision to third countries, the European Court of Justice held, in **Lasertec** (10.5.07, C-492/04), that: a national measure in accordance with which the loan interest paid by a resident capital company to a non-resident shareholder who has a substantial holding in the capital of that company is, under certain conditions, regarded as a covert distribution of profits, taxable in the hands of the resident borrowing company, primarily affects freedom of establishment. Those provisions cannot be relied on in a situation involving a company in a non-member country
- The non application of the freedom of establishment to third countries have been confirmed in **(S) v. A and B** (10.5.07, C-102/05) and **Holböck** (24.5.07 – C-157/05)

4.3.04 – C-334/02 de Lasteyrie du Saillant



Mr. de Lasteyrie du
Saillant

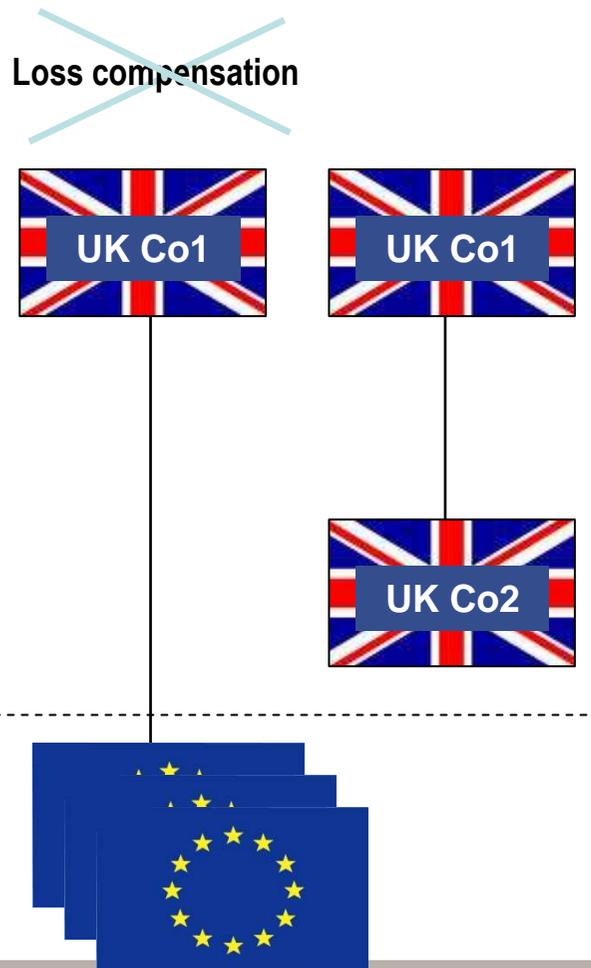
French citizen

Resident in French

– An important statement of anti avoidance

- The transfer of a physical person's tax residence outside the territory of a Member State does not, in itself, imply tax avoidance (51)

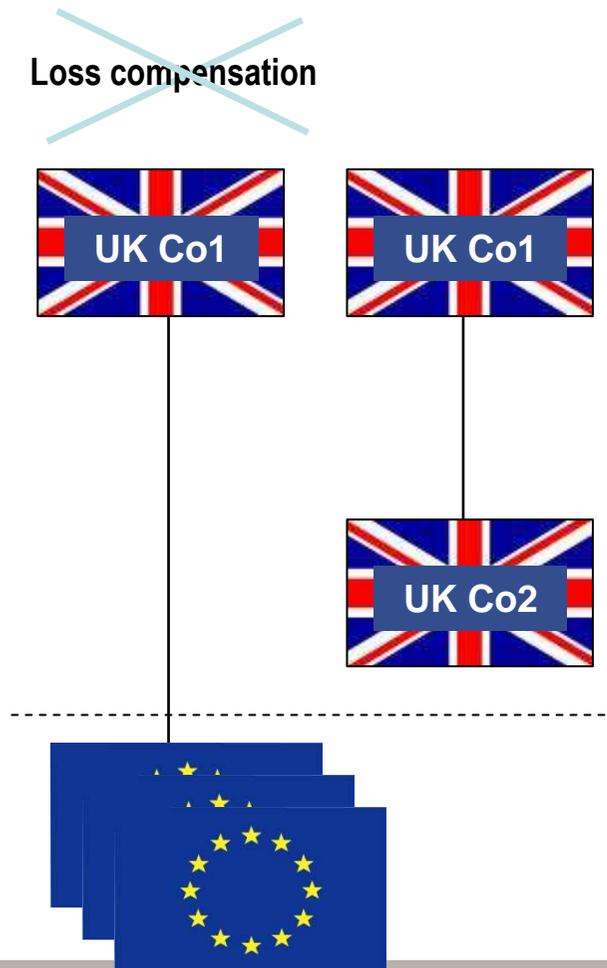
13.12.05 – C-446/03 Marks & Spencer



– Facts

- In the United Kingdom, group relief allows the resident companies (and branches of non-resident persons) in a group to offset their profits and losses **among themselves (12, 16, 17)**
- Marks & Spencer is a company incorporated and registered in England and Wales. It is the parent company of a number of companies established in the United Kingdom and in other States (18)
- Marks & Spencer wanted to offset losses incurred abroad against profits in the United Kingdom (22)

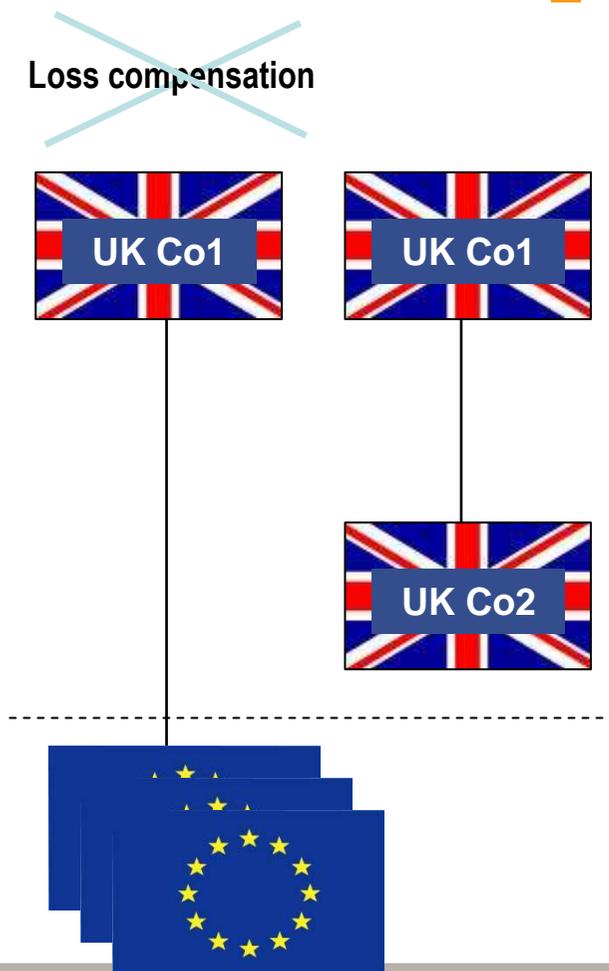
13.12.05 – C-446/03 Marks & Spencer (2)



- **Question**
 - Is the non-possibility to offset foreign losses in compliance with EU law?
- **Have you exercised a fundamental Freedom?**
 - Freedom of establishment (28)
- **Is there a discrimination or a restriction? Overt? Covert? Home or Host State?**
 - Restriction (34)

13.12.05 – C-446/03 Marks & Spencer (3)

– Is there a justification?

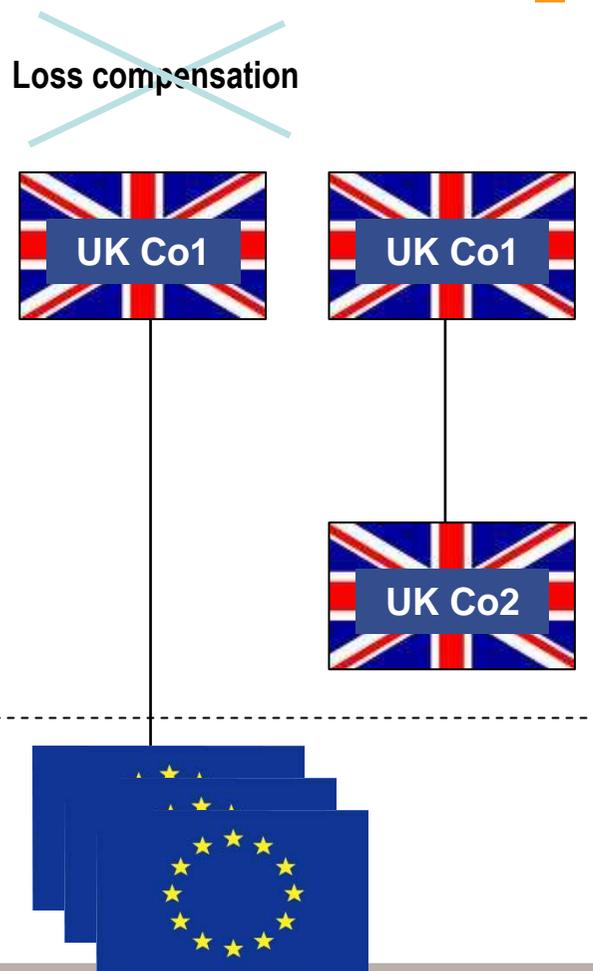


- Such a restriction is permissible only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest. It is further necessary, in such a case, that its application be **appropriate** to ensuring the attainment of the objective thus pursued and **not go beyond** what is necessary to attain it (35)
- Loss of fiscal revenues + risk that losses are taken into consideration twice + risk of tax avoidance.

13.12.05 – C-446/03 Marks & Spencer (4)

– Is there a justification?

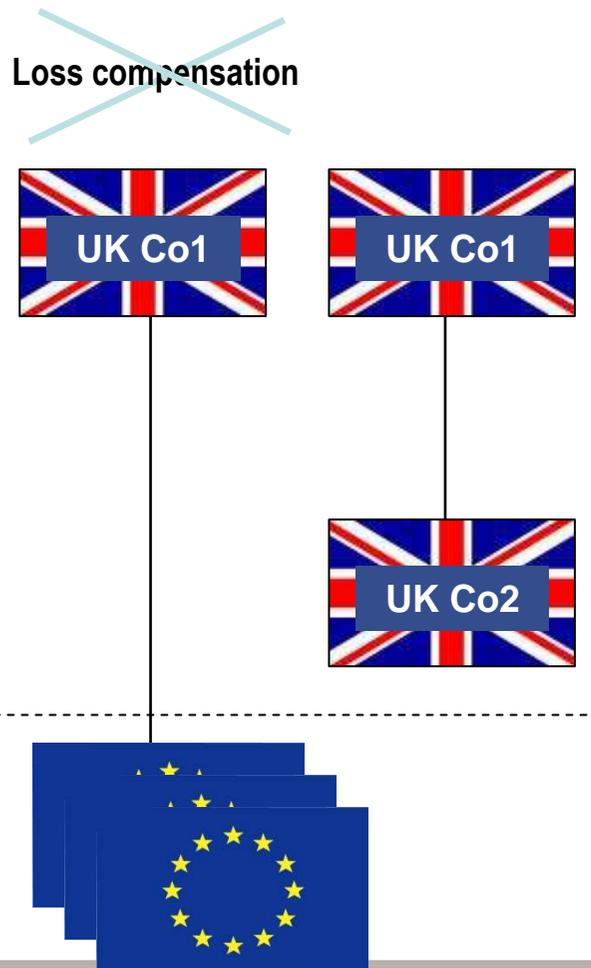
- Loss of fiscal revenues is not a justification (44). **None the less, the preservation of the allocation of the power to impose taxes** between Member States might make it necessary to apply to the economic activities of companies established in one of those States only the tax rules of that State in respect of both profits and losses (45). In effect, to give companies the option to have their losses taken into account in the Member State in which they are established or in another Member State would significantly **jeopardize a balanced allocation of the power to impose taxes between Member States**, as the taxable basis would be increased in the first State and reduced in the second to the extent of the losses transferred (46)



13.12.05 – C-446/03 Marks & Spencer (5)

– Is there a justification?

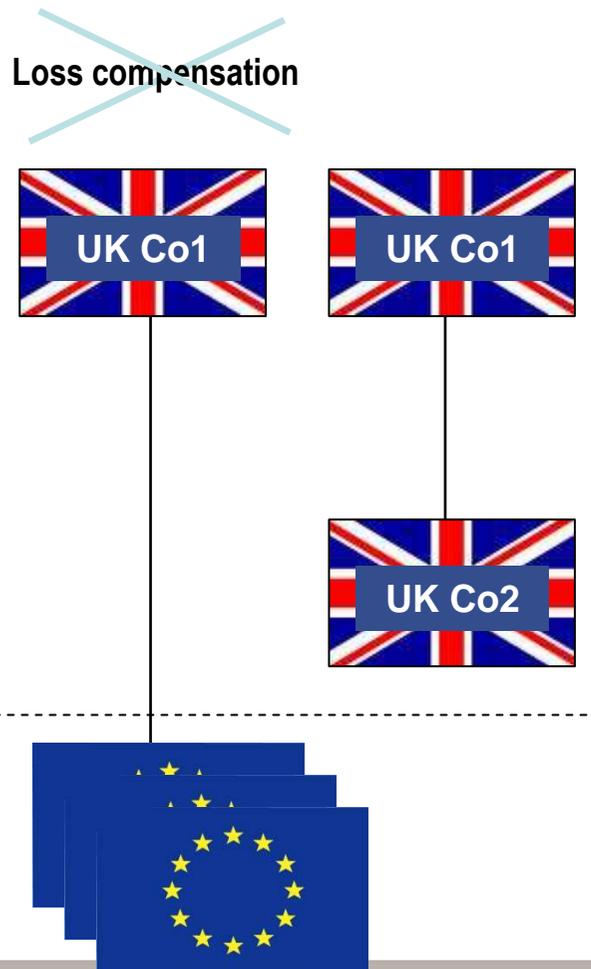
- Risk that losses are taken into consideration twice. Such a risk does exist by simply extending the offsetting of losses also to foreign operations (48)
- Risk of tax avoidance. It must be accepted that the possibility of transferring the losses incurred by a non-resident company to a resident company entails the risk that within a group of companies losses will be transferred to companies established in the Member States which apply the highest rates of taxation and in which the tax value of the losses is therefore the highest (49)



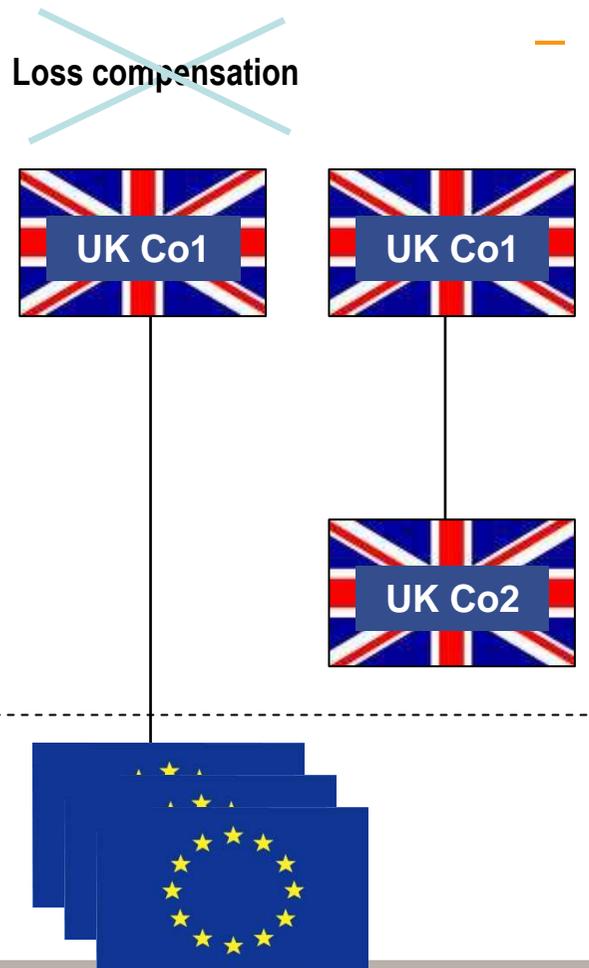
13.12.05 – C-446/03 Marks & Spencer (6)

– Is there a justification?

- In the light of those three justifications, **taken together**, it must be observed that restrictive provisions such as those at issue in the main proceedings pursue legitimate objectives which are compatible with the Treaty and constitute overriding reasons in the public interest and that they are apt to ensure the attainment of those objectives (52)



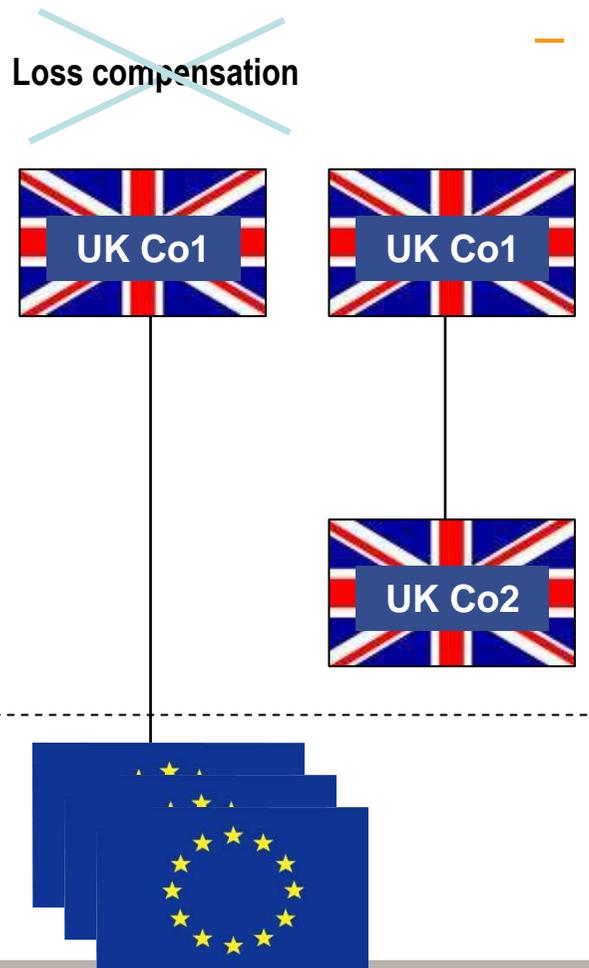
13.12.05 – C-446/03 Marks & Spencer (7)



– Proportionality?

- The Court considers that the restrictive measure at issue in the main proceedings **goes beyond** what is necessary to attain the essential part of the objectives pursued where:
 - 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, if necessary by transferring those losses to a third party or by offsetting the losses against the profits made by the subsidiary in previous periods, **and**

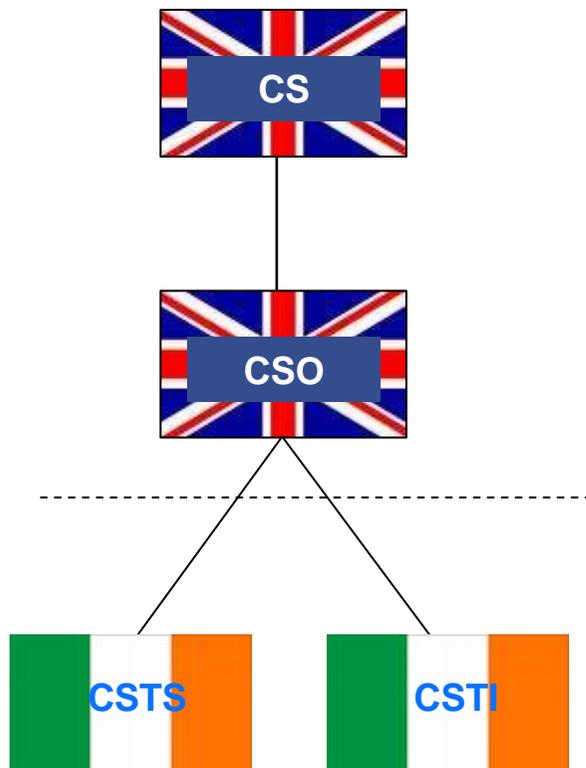
13.12.05 – C-446/03 Marks & Spencer (8)



– Proportionality?

- there is no possibility for the foreign subsidiary's 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
- Where, in one Member State, the resident parent company demonstrates to the tax authorities that those conditions are fulfilled, it is contrary to the freedom of establishment to preclude the possibility for the parent company to deduct from its taxable profits in that Member State the losses incurred by its non-resident subsidiary (56)
- Anti avoidance measures counteracting abusive conducts can be adopted by Member States (57)

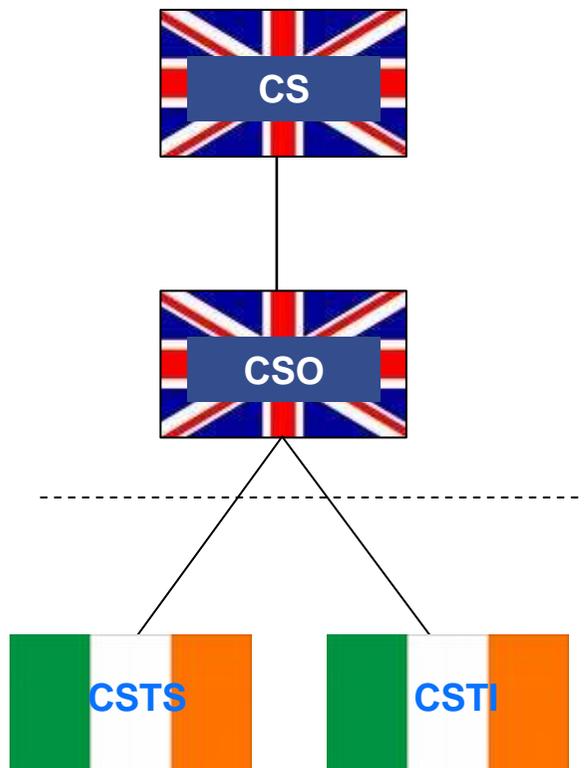
12.9.06 – C-196/04 Cadbury Schweppes



– Facts

- The legislation on CFCs is designed to apply when the CFC is subject, in the State in which it is established, to a 'lower level of taxation', which is the case, under that legislation, in respect of any accounting period in which the tax paid by the CFC is less than three quarters of the amount of tax which would have been paid in the United Kingdom on the taxable profits as they would have been calculated for the purposes of taxation in that Member State (7)
- The taxation which is attributable to the application of the legislation on CFCs is accompanied by a number of exceptions: 1. distribution policy (90%); 2. exempt activities; 3. listed companies; 4. *de minimis* rule (profits not exceeding certain thresholds (8))

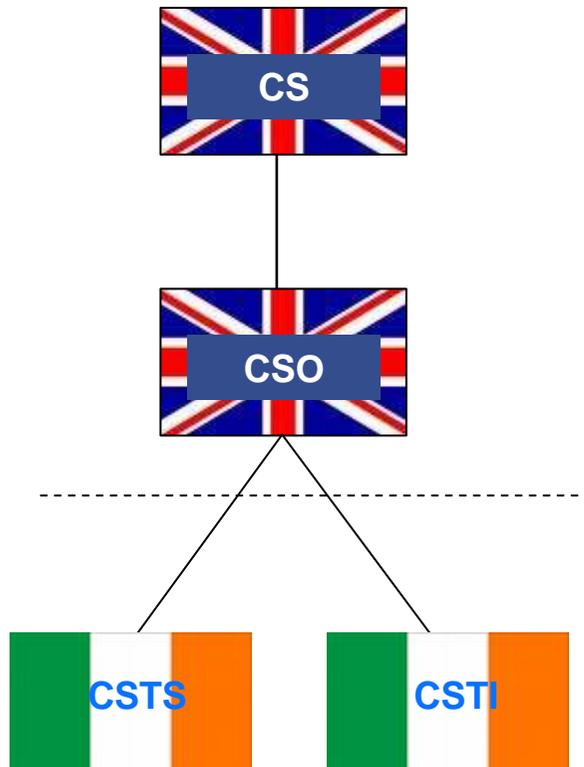
12.9.06 – C-196/04 Cadbury Schweppes (2)



– Facts

- The taxation provided for by the legislation on CFCs is also excluded when 'the motive test' is satisfied. The latter involves two **cumulative** conditions. That requires, essentially, that the resident company show, first, that the considerable reduction in United Kingdom tax resulting from the transactions routed between that company and the CFC was not the main purpose or one of the main purposes of those transactions and, secondly, that the achievement of a reduction in that tax by a diversion of profits within the meaning of that legislation was not the main reason, or one of the main reasons, for incorporating the CFC (62)

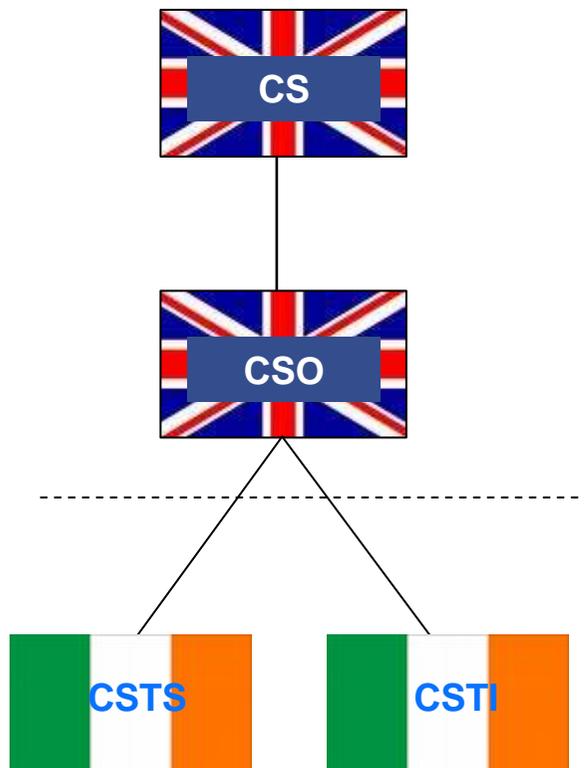
12.9.06 – C-196/04 Cadbury Schweppes (3)



– Facts

- Cadbury Schweppes plc ('CS'), a resident company, is the parent company of the Cadbury Schweppes group which consists of companies established in the United Kingdom, in other Member States and in third States. That group includes, inter alia, two subsidiaries in Ireland, Cadbury Schweppes Treasury Services ('CSTS') and Cadbury Schweppes Treasury International ('CSTI'), which CS owns indirectly through a chain of subsidiaries at the head of which is Cadbury Schweppes Overseas Ltd ('CSO') (13)
- CSTS and CSTI, which are established in the IFSC, are subject to a tax rate of 10% at the time of the facts in the main proceedings (14)

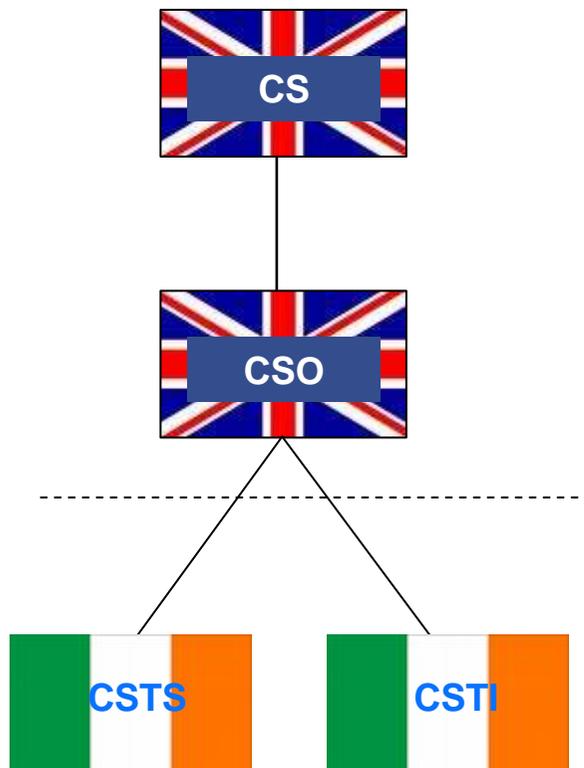
12.9.06 – C-196/04 Cadbury Schweppes (4)



– Facts

- The business of CSTS and CSTI is to raise finance and to provide that finance to subsidiaries in the Cadbury Schweppes group (15)
- Given the rate of tax applicable to companies established in the IFSC, the profits of CSTS and CSTI are subject to ‘a lower level of taxation’ within the meaning of the legislation on CFCs. The United Kingdom tax authorities took the view that none of the conditions for exemption from taxation provided for by that legislation applied to those subsidiaries (19)

12.9.06 – C-196/04 Cadbury Schweppes (5)



– Question

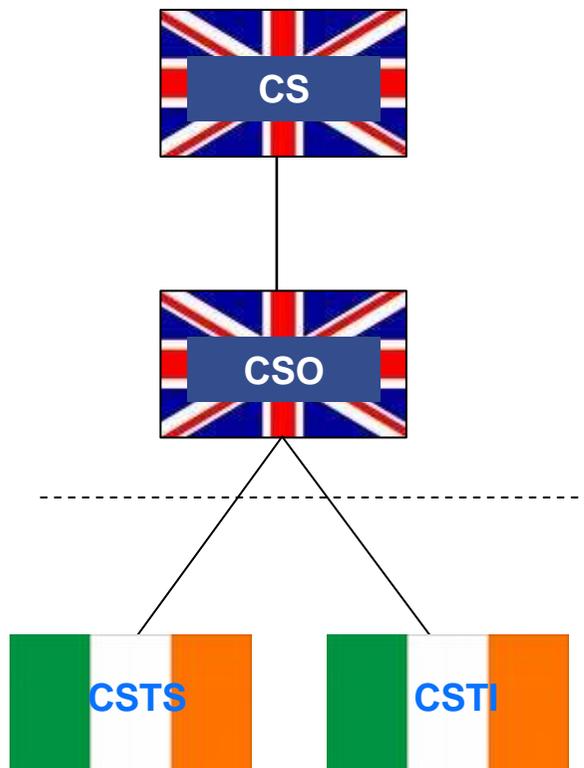
- Is the CFC rule in compliance with EU law?

– Have you exercised a fundamental Freedom?

- Freedom of establishment (32)
- The fact that a Community national, whether a natural or a legal person, sought to profit from tax advantages in force in a Member State other than his State of residence cannot in itself deprive him of the right to rely on the provisions of the Treaty (see, to that effect, Case C-364/01 *Barbier*, paragraph 71) (36)

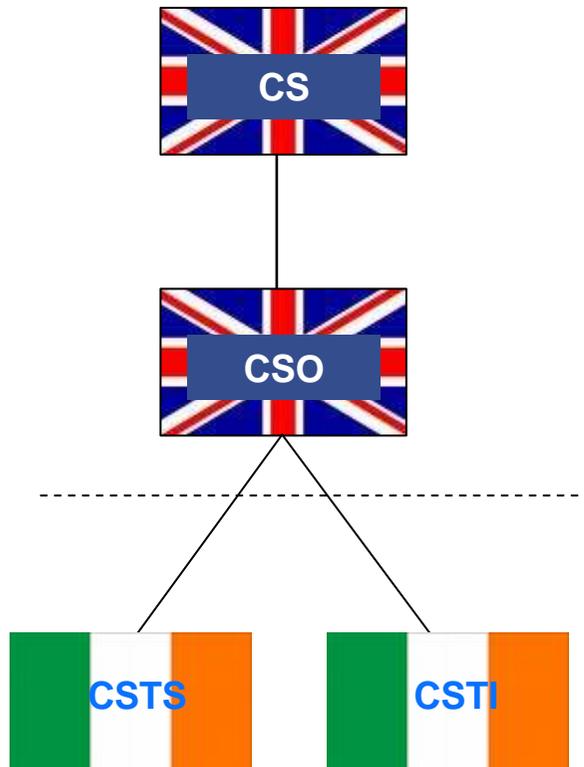
12.9.06 – C-196/04 Cadbury Schweppes (6)

– Have you exercised a fundamental Freedom?



- As to freedom of establishment, the Court has already held that the fact that the company was established in a Member State **for the purpose of benefiting from more favorable legislation** does not in itself suffice to constitute abuse of that freedom (*Centros*, paragraph 27, and *Inspire Art*, paragraph 96) (37)
- It follows that the fact that in this case CS decided to establish CSTS and CSTI in the IFSC for the avowed purpose of benefiting from the favorable tax regime which that establishment enjoys **does not in itself constitute abuse**. That fact does not therefore preclude reliance by CS on Articles 43 EC and 48 EC (*Centros*, paragraph 18, and *Inspire Art*, paragraph 98) (38)

12.9.06 – C-196/04 Cadbury Schweppes (7)



Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

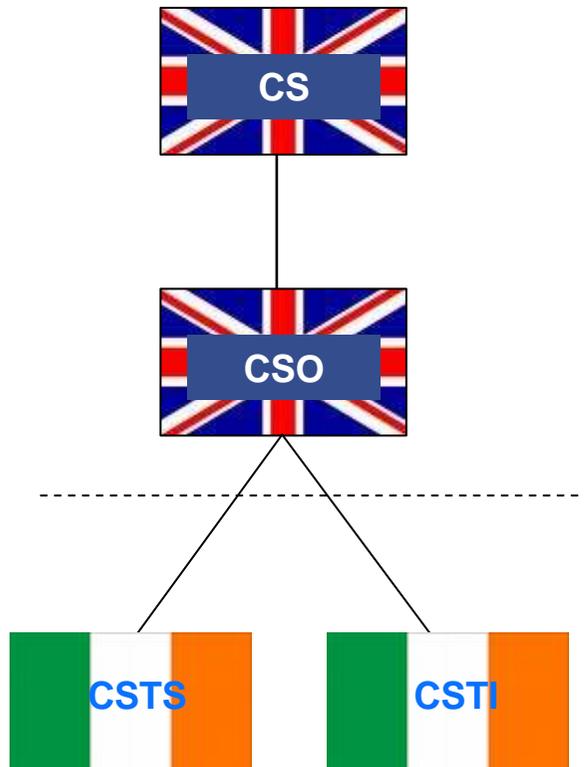
- Restriction (46)

Is there a justification?

- Loss of tax revenues. This is not a justification (49)
- Tax avoidance. A national measure restricting freedom of establishment may be justified where it **specifically** relates to wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned (*De Lasteyrie du Saillant*, paragraph 50; and *Marks & Spencer*, paragraph 57) (51)

12.9.06 – C-196/04 Cadbury Schweppes (8)

! Is there a justification?

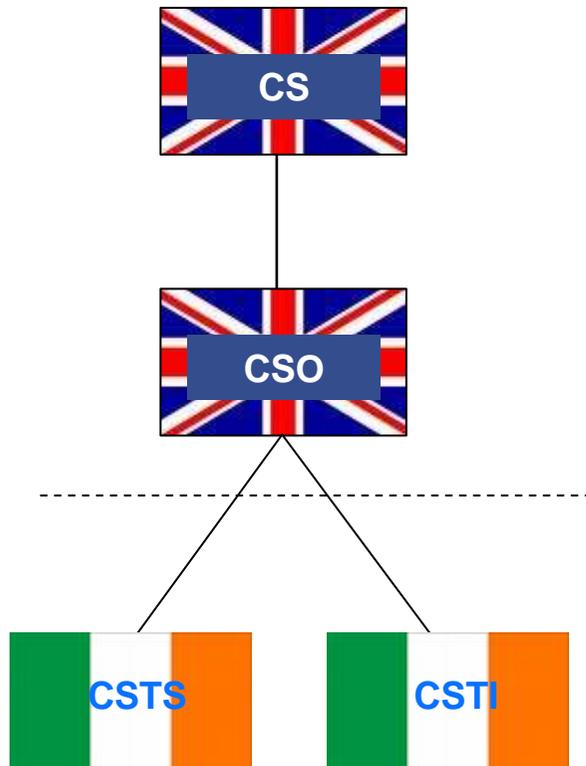


- The concept of establishment within the meaning of the Treaty provisions on freedom of establishment involves the **actual pursuit of an economic activity** through a fixed establishment in that State for an indefinite period. Consequently, it presupposes **actual establishment** of the company concerned in the host Member State and the pursuit of genuine economic activity there (54). It follows that, in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent 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 (55)

12.9.06 – C-196/04 Cadbury Schweppes (9)

— Is there a justification?

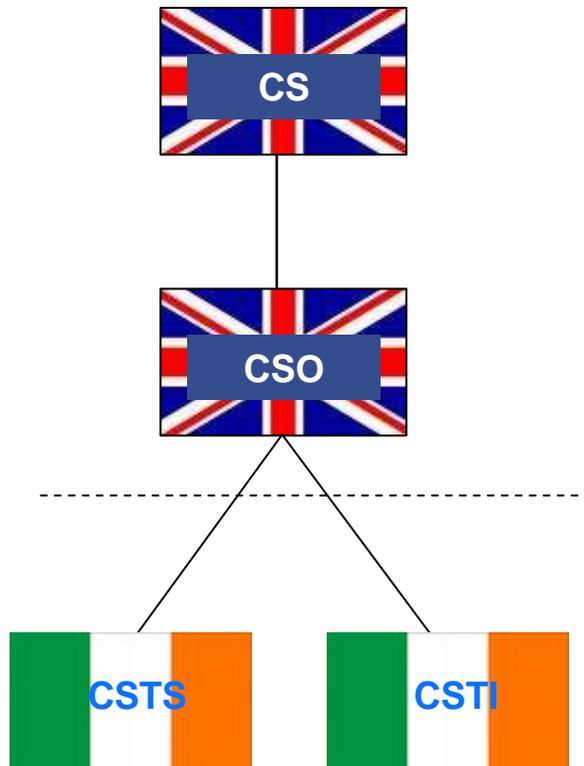
- By providing for the inclusion of the profits of a CFC subject to very favorable tax regime in the tax base of the resident company, the legislation on CFCs makes it possible to tackle practices which have **no purpose other than** to escape the tax normally due on the profits generated by activities carried on in national territory. Such legislation is therefore suitable to achieve the objective for which it was adopted (60)



12.9.06 – C-196/04 Cadbury Schweppes (10)

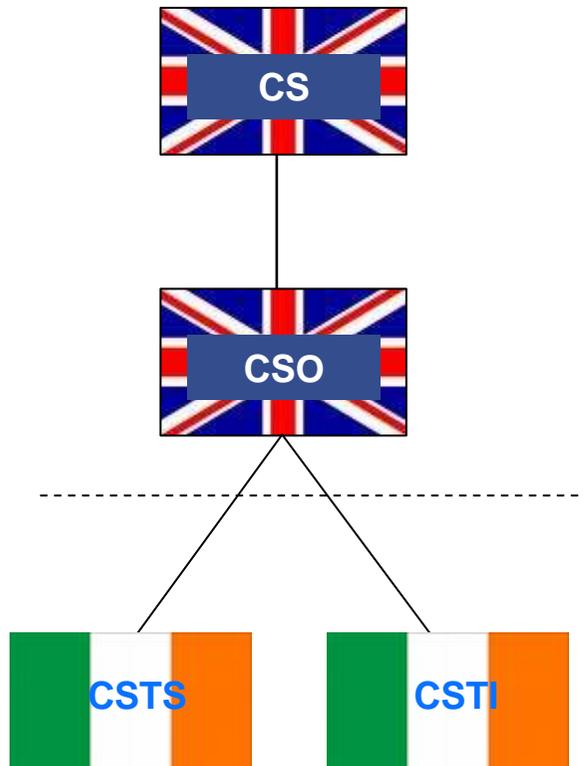
— Proportionality?

- In order to find that there is a wholly artificial arrangement intended solely to escape that tax there must be, in addition to a subjective element consisting in the intention to obtain a tax advantage, **objective circumstances** showing that, despite formal observance of the conditions laid down by Community law, the objective pursued by freedom of establishment, as set out in paragraphs 54 and 55 of this judgment, has not been achieved (Case C-255/02 *Halifax and Others*, paragraphs 74 and 75) (64). In those circumstances, in order for the legislation on CFCs to comply with Community law, the taxation provided for by that legislation must be excluded where, despite the existence of tax motives, the incorporation of a CFC reflects **economic reality** (65)



12.9.06 – C-196/04 Cadbury Schweppes (11)

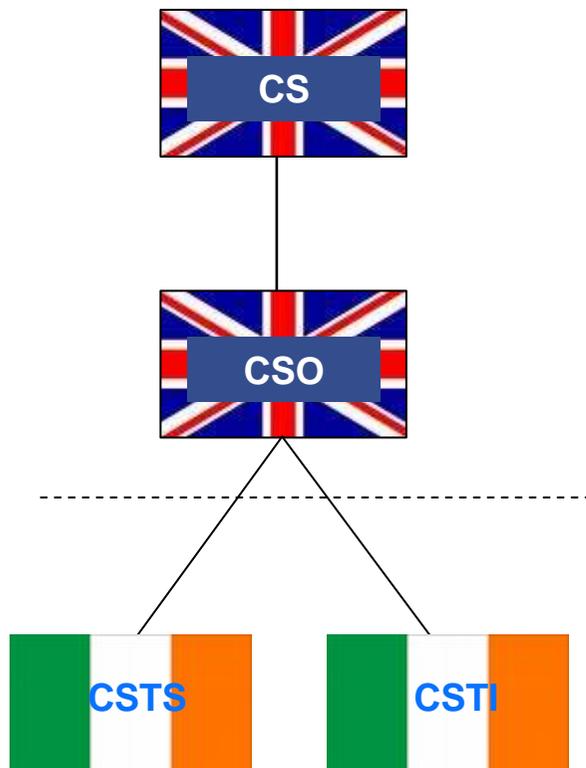
— Proportionality?



- That incorporation must correspond with an actual establishment intended to carry on genuine economic activities in the host Member State (66). That finding must be based on objective factors which are ascertainable by third parties with regard, in particular, to the extent to which the CFC physically exists in terms of premises, staff and equipment (67)
- The resident company, which is best placed for that purpose, must be given an opportunity to produce evidence that the CFC is actually established and that its activities are genuine (71)

12.9.06 – C-196/04 Cadbury Schweppes (12)

— Proportionality?

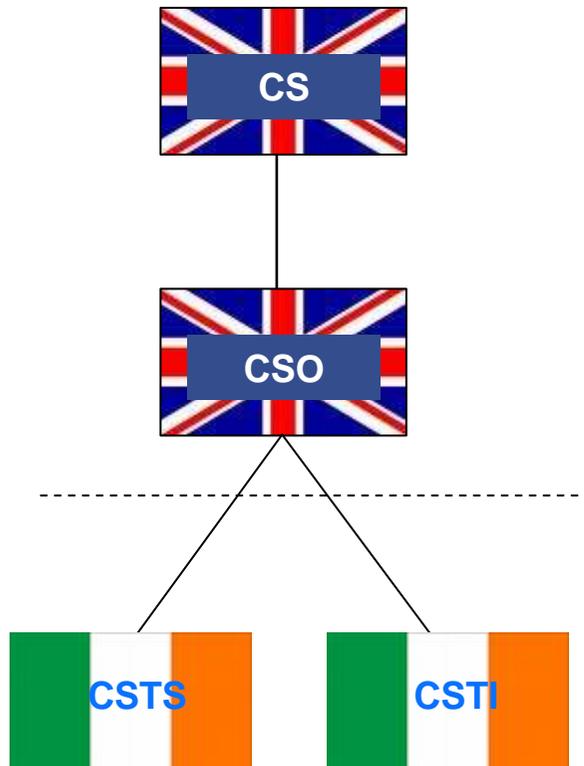


- In this case, it is for the national court to determine whether the motive test, as defined by the legislation on CFCs, lends itself to an interpretation which enables the taxation provided for by that legislation to be restricted to wholly artificial arrangements or whether, on the contrary, the criteria on which that test is based mean that, where none of the exceptions laid down by that legislation applies and the intention to obtain a reduction in United Kingdom tax is central to the reasons for incorporating the CFC, the resident parent company comes within the scope of application of that legislation, despite the absence of objective evidence such as to indicate the existence of an arrangement of that nature (72)

12.9.06 – C-196/04 Cadbury Schweppes (13)

— Some important statements on anti avoidance

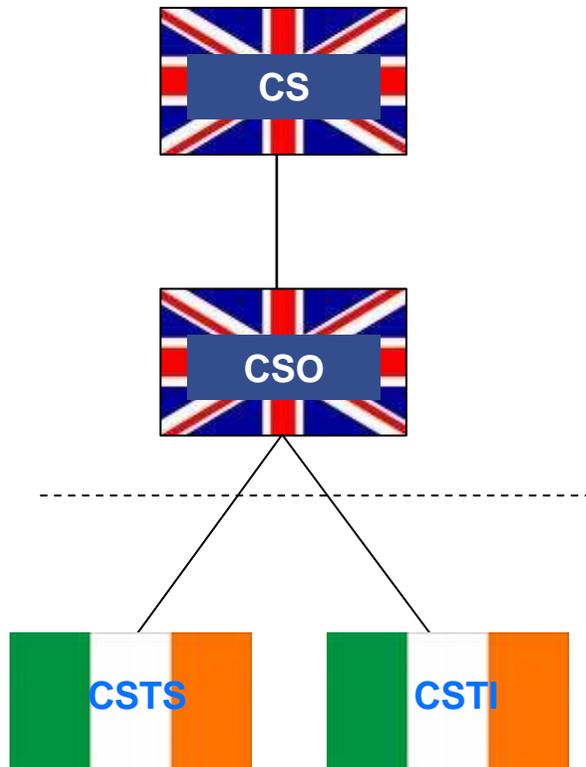
- The Court has already held that the fact that the company was established in a Member State for the purpose of benefiting from more favorable legislation does not in itself suffice to constitute abuse of that freedom (see, to that effect, *Centros*, paragraph 27, and Case C-167/01 *Inspire Art*, paragraph 96) (37)



12.9.06 – C-196/04 Cadbury Schweppes (14)

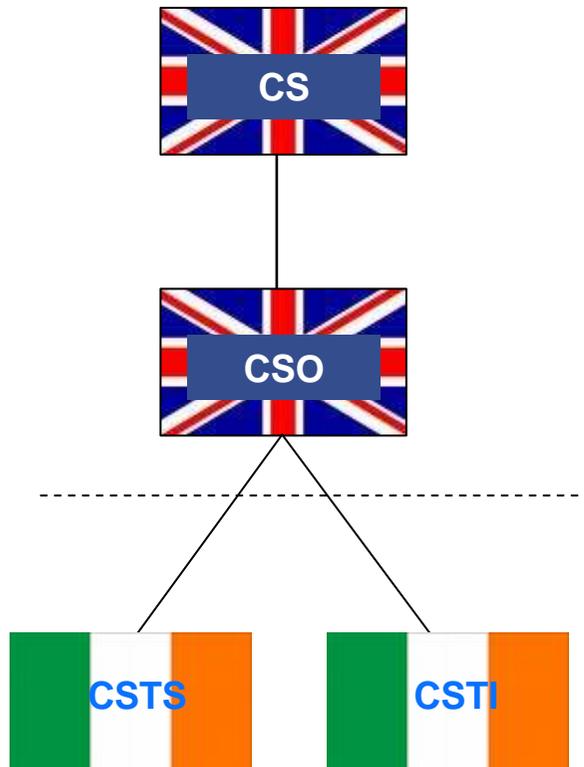
— Some important statements on anti avoidance

- I.e., it is quite legitimate for tax considerations to play a role in the decision on where to establish a subsidiary. The object of minimizing one's tax burden is in itself a valid commercial consideration as long as the arrangements entered into with a view to achieving it do not amount to artificial transfer of profits (The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007, par. 2)



12.9.06 – C-196/04 Cadbury Schweppes (15)

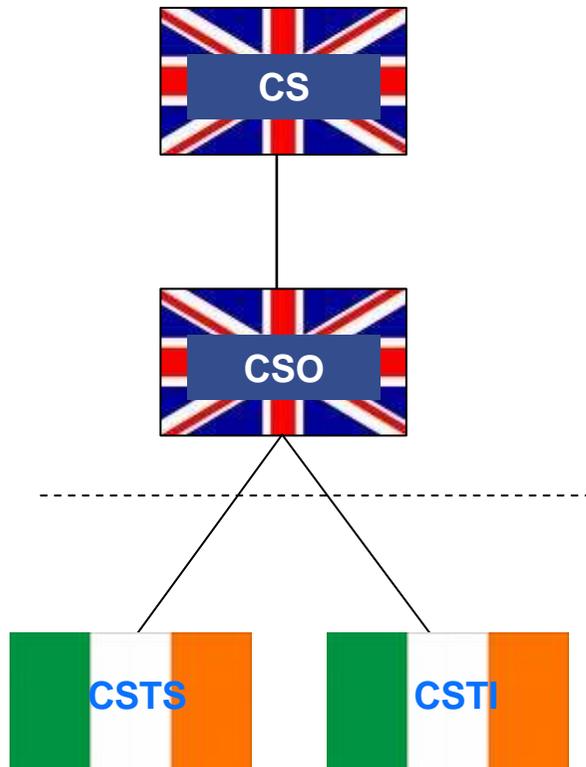
— Some important statements on anti avoidance



- The fact that the activities which correspond to the profits of the CFC could just as well have been carried out by a company established in the territory of the Member State in which the resident company is established does not warrant the conclusion that there is a wholly artificial arrangement (69)
 - I.e., the fact that activities carried out by a secondary establishment in another MS could just as well be pursued by the taxpayer from within the territory of its MS does not warrant the conclusion that there is a wholly artificial arrangement (The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007, par. 2)

12.9.06 – C-196/04 Cadbury Schweppes (16)

— Some important statements on anti avoidance

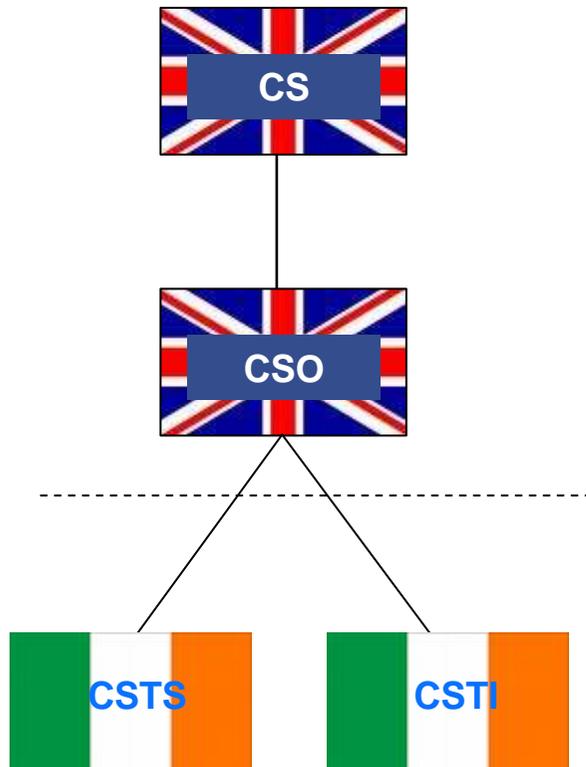


- However, the fact that a Community national, whether a natural or a legal person, sought to profit from tax advantages in force in a Member State other than his State of residence cannot in itself deprive him of the right to rely on the provisions of the Treaty (see, to that effect, Case C-364/01 *Barbier*, paragraph 71) (36)
- As to freedom of establishment, the Court has already held that the fact that the company was established in a Member State for the purpose of benefiting from more favorable legislation does not in itself suffice to constitute abuse of that freedom (see, to that effect, *Centros*, paragraph 27, and Case C-167/01 *Inspire Art*, paragraph 96) (37)

12.9.06 – C-196/04 Cadbury Schweppes (17)

— Some important statements on anti avoidance

- As noted, it follows that the fact that in this case CS decided to establish CSTS and CSTI in the IFSC for the avowed purpose of benefiting from the favorable tax regime which that establishment enjoys does not in itself constitute abuse. That fact does not therefore preclude reliance by CS on Articles 43 EC and 48 EC (see, to that effect, *Centros*, paragraph 18, and *Inspire Art*, paragraph 98) (38)

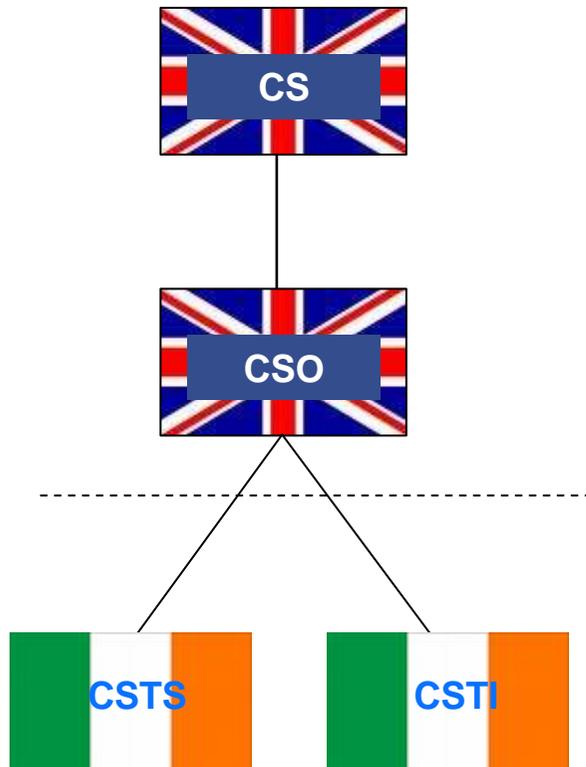


12.9.06 – C-196/04 Cadbury Schweppes (18)

— Some important statements on anti avoidance

– I.e., in so far as taxpayers have not entered into abusive practice, MSs cannot hinder the exercise of the rights of freedom of movement simply because of lower levels of taxation in other MSs. This is the case even in respect of special favorable regimes in the other MSs' tax systems (The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007, par. 2)

- As suggested, that finding must be based on objective factors which are ascertainable by third parties with regard, in particular, to the extent to which the CFC physically exists in terms of premises, staff and equipment (67)

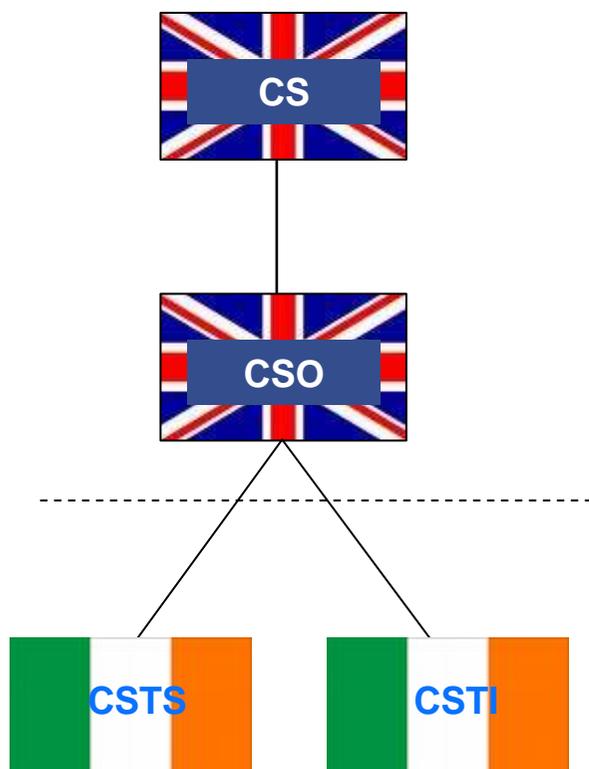


12.9.06 – C-196/04 Cadbury Schweppes (19)

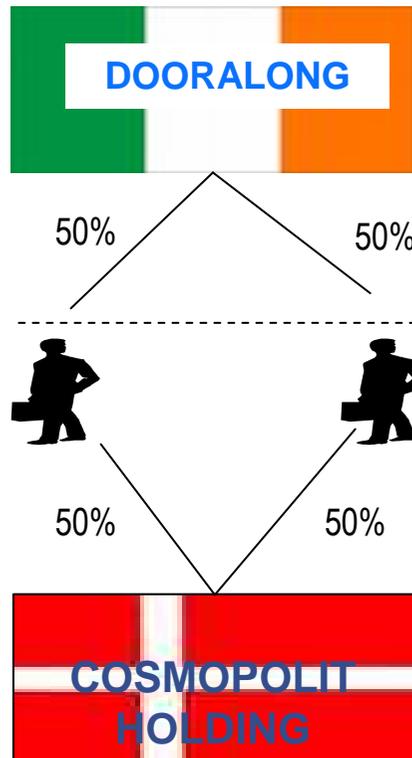
Some important statements on anti avoidance

- If checking those factors leads to the finding that the CFC is a fictitious establishment not carrying out any genuine economic activity in the territory of the host Member State, the creation of that CFC must be regarded as having the characteristics of a wholly artificial arrangement. That could be so in particular in the case of a **'letterbox' or 'front' subsidiary (see Case C-341/04 Eurofood IFSC, paragraphs 34 and 35) (68)**

– (The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007, par. 2)



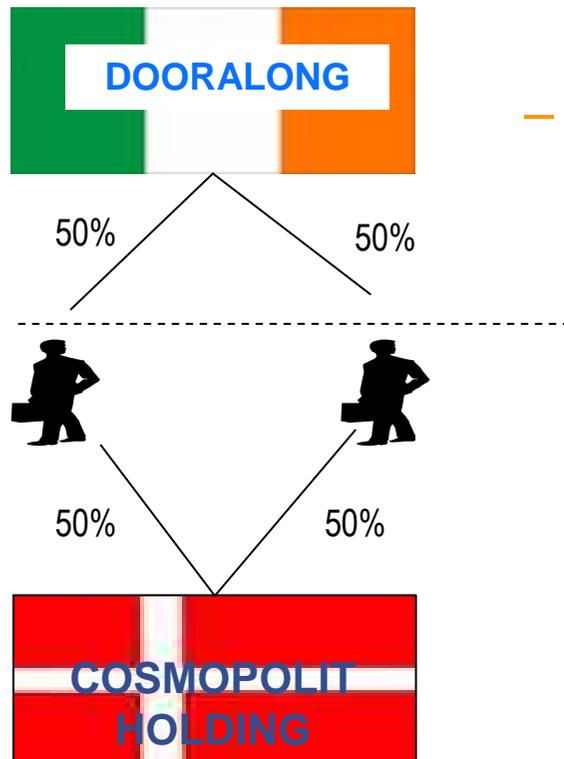
5.7.07 – C-325/05 Kofoed



– Facts

- Article 2(d) of Directive 90/434 defines ‘exchange of shares’ as ‘an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10% of the nominal value or, in the absence of a nominal value, of the accounting par value of the securities issued in exchange’ (5). According to Article 2(g) and (h) of Directive 90/434, ‘acquired company’ means ‘the company in which a holding is acquired by another company by means of an exchange of securities’ and ‘acquiring company’ means ‘the company which acquires a holding by means of an exchange of securities’ (6)

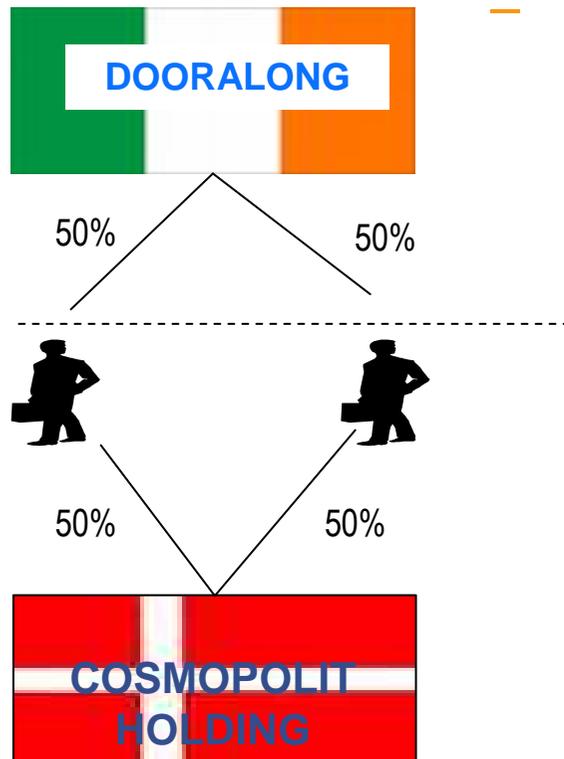
5.7.07 – C-325/05 Kofoed (2)



– Facts

- According to the Directive, exchange of shares is neutral (7)
- Mr Kofoed and Mr Toft each held 50% of the total share capital of Cosmopolit Holding ApS ('Cosmopolit'), a limited liability company incorporated under Danish law (14)
- They each acquired one share in Dooralong Ltd ('Dooralong'), a limited liability company incorporated under Irish law, those two shares constituting the share capital of Dooralong (15)
- Dooralong subsequently increased its share capital (16)
- Mr Kofoed and Mr Toft exchanged all the shares they held in Cosmopolit for all the new shares in Dooralong (17)

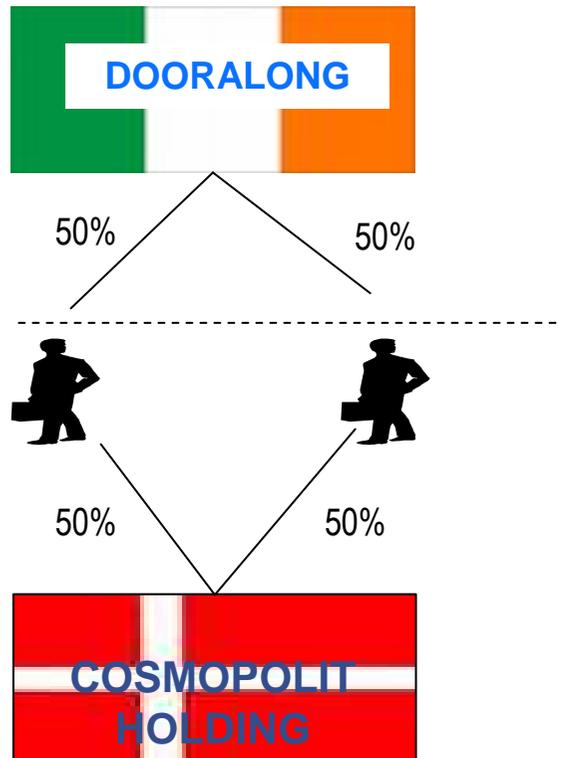
5.7.07 – C-325/05 Kofoed (3)



– Facts

- After two days from the exchange of shares, Dooralong cashed dividends from Cosmopolit (18). After two days, the dividends were distributed to Mr. Kofoed and Mr. Toft (19)
- For the purposes of his income tax relating to the year 1993, Mr Kofoed stated in his income declaration that the exchange of shares in Cosmopolit in return for new shares in Dooralong should be exempt from tax. The Danish tax authorities did not accept that statement, taking the view that the dividend distribution had to be regarded as forming part of the exchange of shares, with the result that the maximum threshold of 10% of the nominal value of the securities issued in exchange, provided for by Directive 90/434 for a possible cash payment, had been exceeded. In the authorities' view, that exchange of shares could accordingly not be exempt under that directive (20)

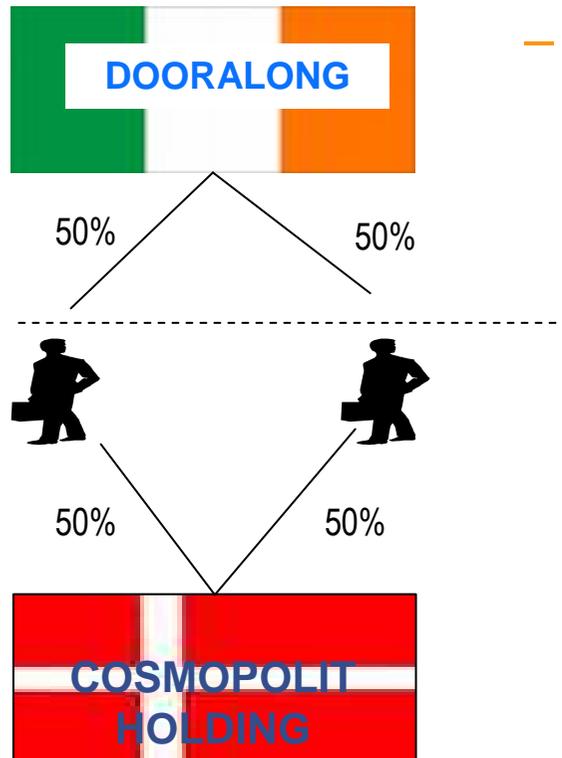
5.7.07 – C-325/05 Kofoed (4)



– Question

- Is Article 2(d) of Directive 90/434/EEC ... to be interpreted as meaning that there is no “exchange of shares” within the meaning of that directive where the persons involved in the exchange of shares, at the same time as agreeing to exchange the shares in a non-legally binding manner, declare it to be their common intention to vote, at the first general meeting of the acquiring company after the exchange, in favor of distributing a profit in excess of 10% of the nominal value of the security transferred by way of the exchange of shares and such a profit is in fact distributed?

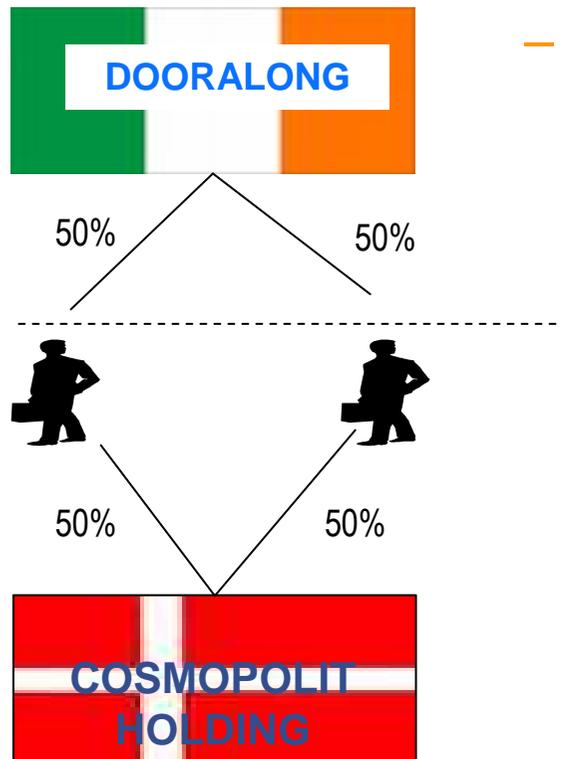
5.7.07 – C-325/05 Kofoed (5)



– Decision

- A monetary payment made by an acquiring company to the shareholders of the acquired company cannot be classified as a 'cash payment' for the purposes of Article 2(d) of Directive 90/434 merely because of a certain temporal or other type of link to the acquisition, or possible fraudulent intent. On the contrary, it is necessary to ascertain in each case, having regard to the circumstances as a whole, whether the payment in question has the characteristics of binding consideration for the acquisition (31)

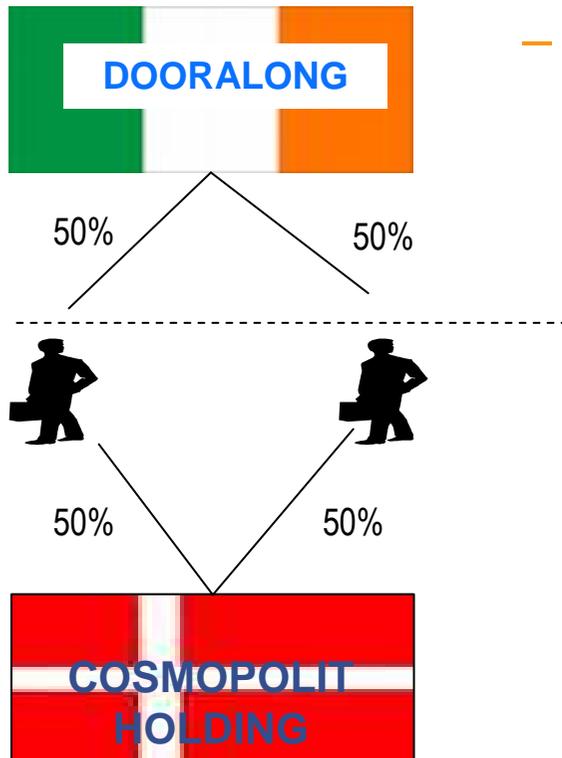
5.7.07 – C-325/05 Kofoed (6)



– Decision

- That interpretation is supported by the purpose behind Directive 90/434, which is to eliminate fiscal barriers to cross-border restructuring of undertakings, by ensuring that any increases in the value of shares are not taxed before they are actually realized and by preventing operations involving high levels of capital gains realized on exchanges of shares from being exempt from income tax simply because they are part of a restructuring operation (32)
- The Court finds that, in the main proceedings, there is nothing in the case-file demonstrating that the dividend in question formed an integral part of the necessary consideration to be paid by Dooralong for the acquisition of Cosmopolit (33)

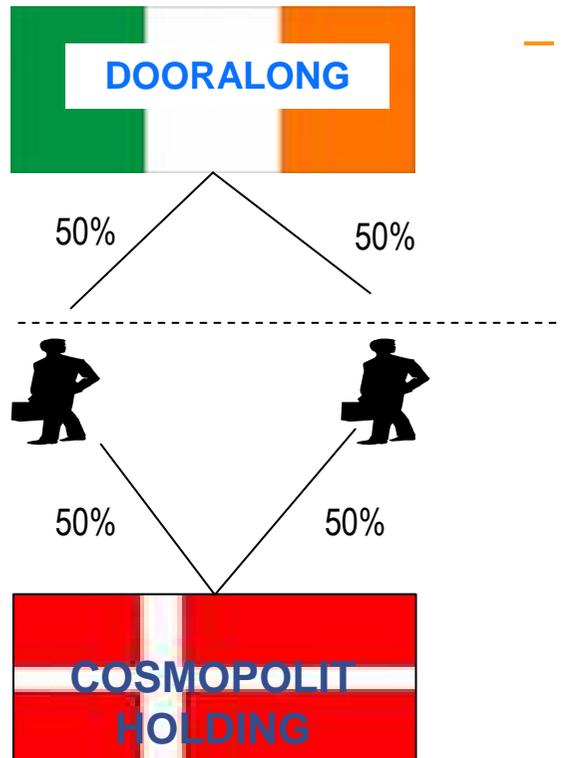
5.7.07 – C-325/05 Kofoed (7)



– Decision

- Since the national court and the Danish Government state several times that the exchange of shares in issue in the main proceedings was not carried out for any commercial reason whatsoever but solely for the purpose of achieving tax savings, it is still appropriate to consider the application of Article 8(1) in the event of possible abuse of rights (36)

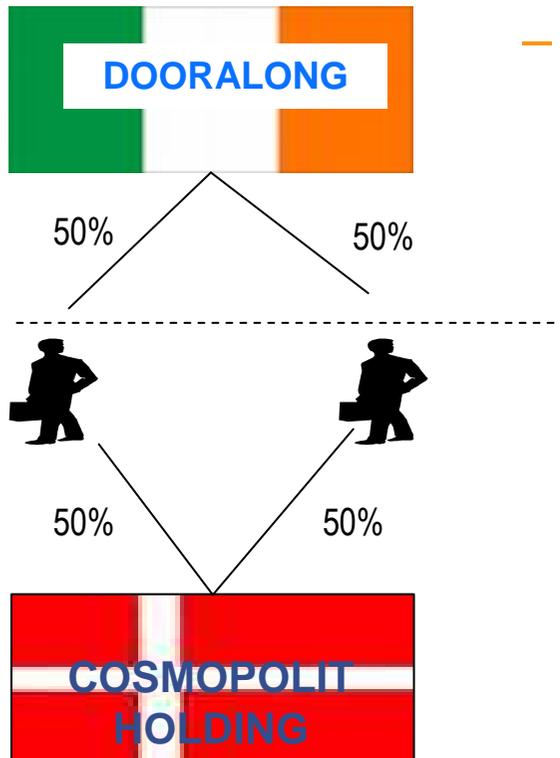
5.7.07 – C-325/05 Kofoed (8)



– Decision

- It is necessary, as a preliminary issue, to determine whether, in the absence of a specific transposition provision transposing Article 11(1)(a) of Directive 90/434 into Danish law, that provision may nevertheless apply in the case in the main proceedings (40)
- In that regard, it should be borne in mind that, according to Articles 10 EC and 249 EC, each of the Member States to which a directive is addressed is obliged to adopt, within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective that it pursues (41)

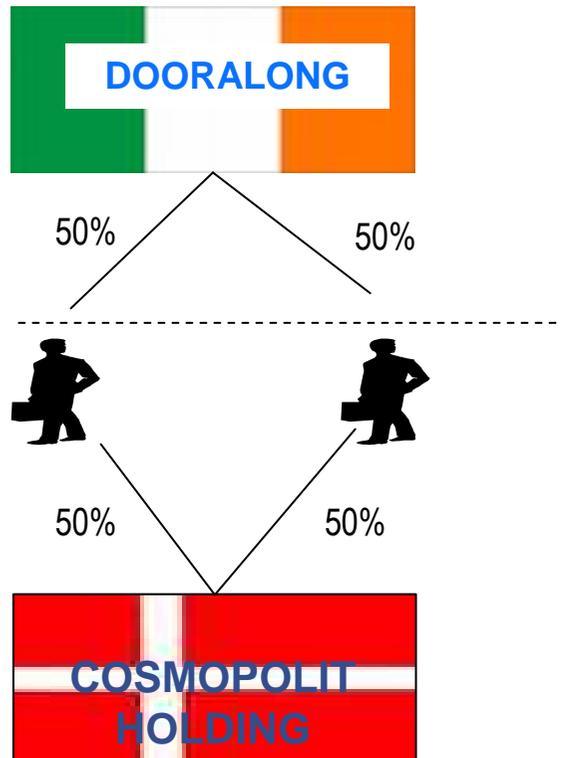
5.7.07 – C-325/05 Kofoed (9)



– Decision

- Moreover, the principle of legal certainty precludes directives from being able by themselves to create obligations for individuals. Directives cannot therefore be relied upon per se by the Member State as against individuals (42)
- However, the Court observes, first, that, according to the actual wording of the third paragraph of Article 249 EC, Member States may choose the form and methods for implementing directives which best ensure the result to be achieved by those directives (43)

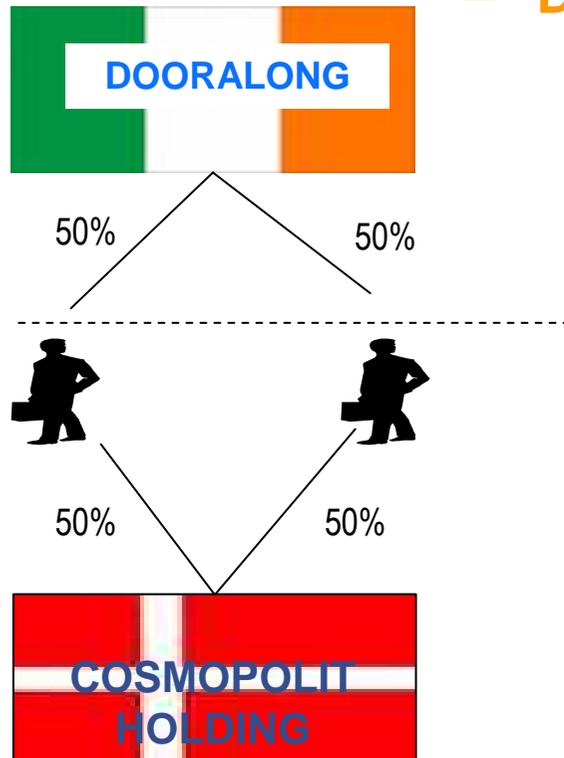
5.7.07 – C-325/05 Kofoed (10)



– Decision

- Accordingly, provided that the legal situation arising from the national transposition measures is sufficiently precise and clear and that the persons concerned are put in a position to know the full extent of their rights and obligations, transposition of a directive into national law does not necessarily require legislative action in each Member State. Likewise the transposition of a directive may be achieved through a **general legal context**, so that a formal and express re-enactment of the provisions of the directive in specific national provisions is not necessary (44)

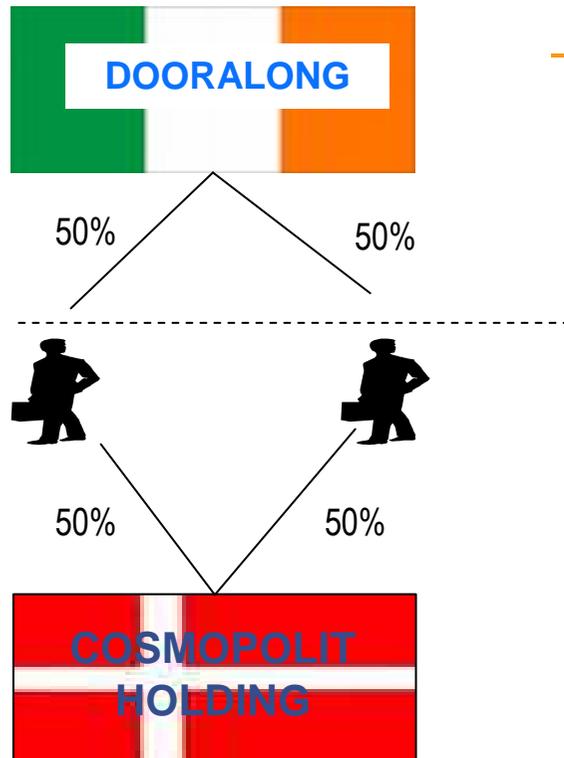
5.7.07 – C-325/05 Kofoed (11)



– Decision

- The Court notes that all authorities of a Member State, in applying national law, are required to interpret it as far as possible in the light of the wording and purpose of the Community directives in order to achieve the result pursued by those directives. Moreover, although it is true that the requirement of a directive-compliant interpretation cannot reach the point where a directive, by itself and without national implementing legislation, may create obligations for individuals or determine or aggravate the liability in criminal law of persons who act in contravention of its provisions, a Member State may nevertheless, in principle, impose a directive-compliant interpretation of national law on individuals (45)

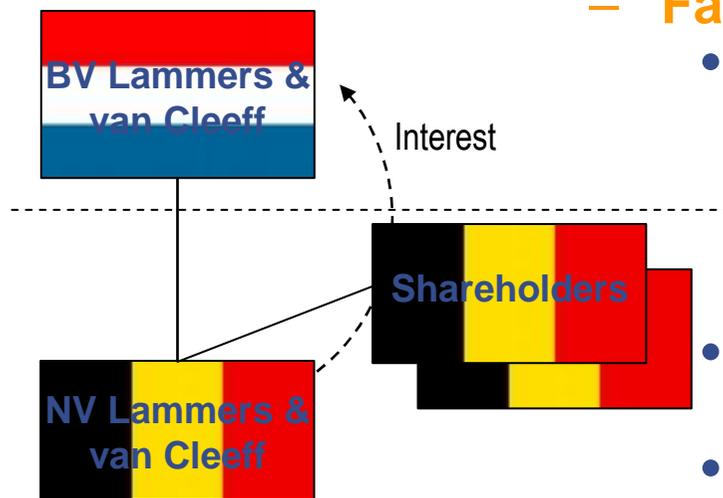
5.7.07 – C-325/05 Kofoed (12)



– Decision

- It is therefore for the national court to ascertain whether there is, in Danish law, a provision or general principle prohibiting abuse of rights or other provisions on tax evasion or tax avoidance which might be interpreted in accordance with Article 11(1)(a) of Directive 90/434 and thereby justify taxation of the exchange of shares in question (46)

17.1.08 – C-105/07 NV Lammers & van Cleeff v. Belgium



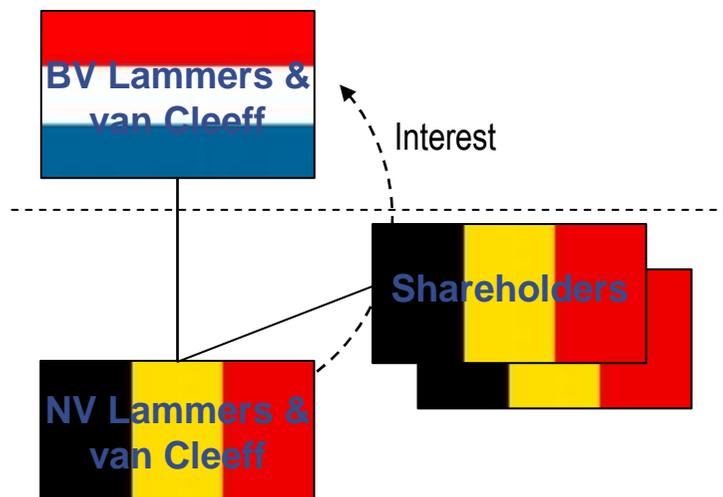
– Facts

- NV Lammers & van Cleeff is a Belgian resident company established in 1991 whose directors were the two Belgian shareholders and NV Lammers & van Cleeff, established in the Netherlands (7)
- The Belgian subsidiary paid interest to the Dutch parent company
- Pursuant to the Belgian law part of the interest were re-qualified as dividends when paid to a non-resident company (8)

– Question

- Does the EC Treaty preclude Belgian rules whereby interest payments are re-classified only when paid to director that is a resident company? (11)

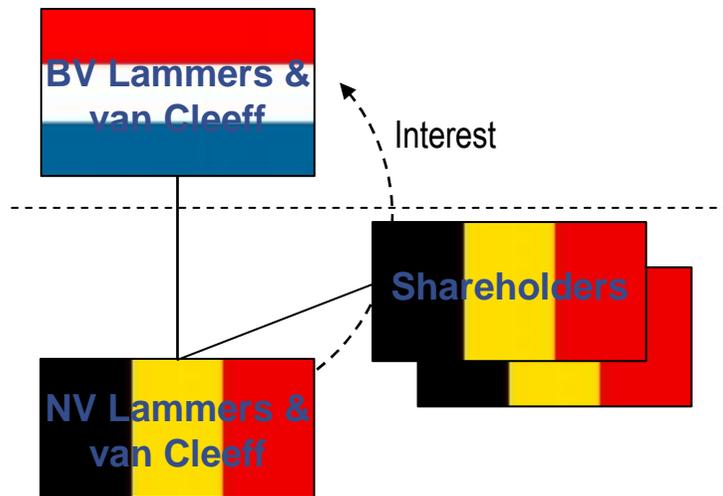
17.1.08 – C-105/07 NV Lammers & van Cleeff v. Belgium (2)



- **Have you exercised a fundamental Freedom?**
 - Freedom of establishment (17)
- **Is there a discrimination or a restriction? Overt? Covert?**
 - Restriction approach (24)
- **Is there a justification?**
 - A national measure restricting freedom of establishment may be justified where it specifically targets wholly artificial arrangements designed to circumvent the legislation of the Member State concerned (26)

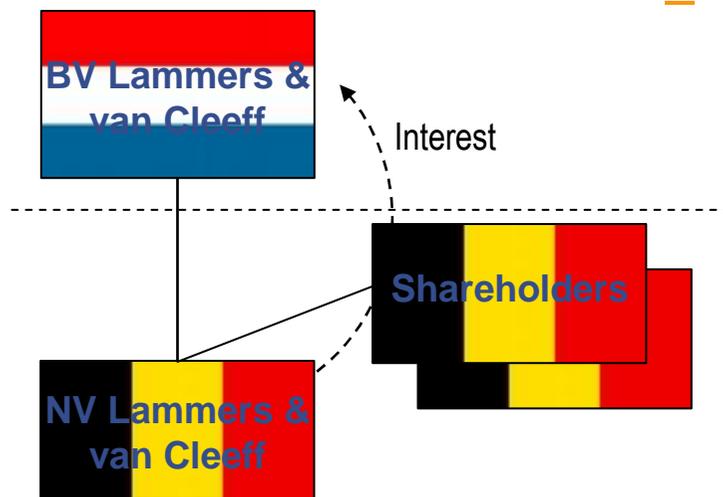
17.1.08 – C-105/07 NV Lammers & van Cleeff v. Belgium (3)

– Is there a justification?



- In *Test Claimants*, the Court held that legislation of a Member State may be justified by the need to combat abusive practices where it provides that interest paid by a resident subsidiary to a non-resident parent company is to be treated as a distribution only if, and in so far as, it exceeds what those companies would have agreed upon on an arm's-length basis (29)

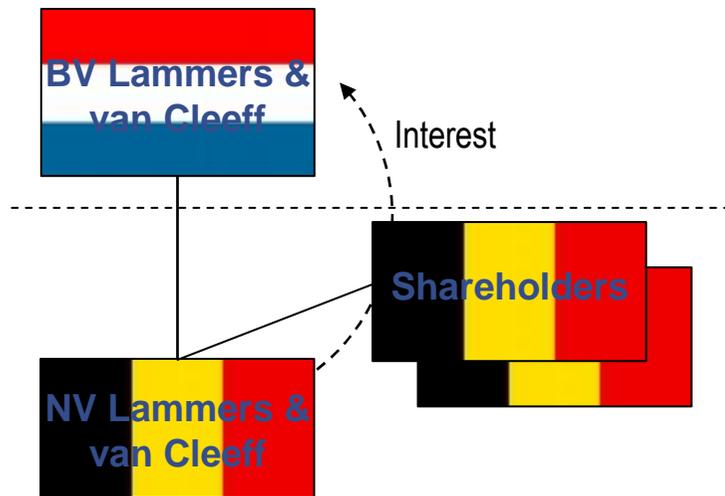
17.1.08 – C-105/07 NV Lammers & van Cleeff v. Belgium (4)



– Is there a justification?

- The fact that a resident company has been granted a loan by a non-resident company on terms which do not correspond to those which would have been agreed upon at arm's length constitutes, for the Member State in which the borrowing company is resident, an objective element which can be independently verified in order to determine whether the transaction in question represents, in whole or in part, a purely artificial arrangement, the essential purpose of which is to circumvent the tax legislation of that Member State (*Test Claimants*, paragraph 81) (30)

17.1.08 – C-105/07 NV Lammers & van Cleeff v. Belgium (4)



– Proportionality?

- In the present case, it is apparent from the order for reference that the interest payments made by the Belgian subsidiary on a loan granted by a non-resident company which is a director were reclassified as dividends because ... at the beginning of the taxable period the total of the interest-bearing loans was higher than the paid-up capital plus taxed reserves (31)
- Not proportional measure (32)

The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007

Definition from ECJ

- ! The notion of tax avoidance from the ECJ is "wholly artificial arrangements aimed at circumventing the application of the legislation of the MS concerned"
 - The mere fact that a subsidiary is established in another MS cannot, of itself, be treated as giving rise to tax avoidance
 - The fact that the activities carried out by a secondary establishment in another MS could just as well be pursued by the taxpayer from within the territory of its home MS does not warrant the conclusion that there is a wholly artificial arrangement

The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007

Definition from ECJ (2)

- It is quite legitimate for tax considerations to play a role in the decision on where to establish a subsidiary. The objective of minimising one's tax burden is in itself a valid commercial consideration as long as the arrangements entered into with a view to achieving it do not amount to artificial transfers of profits. In so far as taxpayers have not entered into abusive practices, MSs cannot hinder the exercise of the rights of freedom of movement simply because of lower levels of taxation in other MSs. This is the case even in respect of special favourable regimes in the other MSs' tax systems

The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007

Definition from ECJ (3)

- An establishment is to be regarded as genuine where, based on an evaluation of **objective factors which are ascertainable by third parties**, in particular evidence of physical existence in terms of premises, staff and equipment, it reflects economic reality, i.e. an actual establishment carrying on genuine economic activities and not a mere "letterbox" or "front" subsidiary
- The detection of a wholly artificial arrangement thus amounts in effect to a substance-over form analysis

The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007

Definition from ECJ (4)

- In the context of corporate establishment there are inevitably difficulties in determining the level of economic presence and commerciality of arrangements
- Objective factors for determining whether there is adequate substance include such verifiable criteria as the effective place of management and tangible presence of the establishment as well as the real commercial risk assumed by it
- However, it is not altogether certain how those criteria may apply in respect of, for example, intra-group financial services and holding companies, whose activities generally do not require significant physical presence

The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007

Definition from ECJ (5)

- The fact that the terms and conditions of financial transactions between related companies resident in different MSs deviate from those that would have been **agreed upon between unrelated parties** constitutes an objective and independently verifiable element for the purpose of determining whether the transaction in question represents, in whole or in part, a purely artificial arrangement. Legislation framed on this basis is **proportionate** on condition that the taxpayer is given the opportunity to provide evidence of any commercial justification for the arrangement

The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007

Proportionality from ECJ

- For the purposes of determining whether a transaction represents a purely artificial arrangement, national anti-abuse rules may comprise '**safe harbour**' criteria to target situations in which the probability of abuse is highest (setting out of reasonable presumptive criteria contributes to a balanced application of national anti-abuse measures as it is in the interest of both legal certainty for the taxpayers, and workability for tax authorities)

The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007

Proportionality from ECJ (2)

- However, in order to ensure that genuine establishments and transactions are not unduly sanctioned it is imperative that where the existence of a purely artificial arrangement is presumed, the taxpayer is given the opportunity, without being subject to undue administrative constraints, to produce evidence of any commercial justification that there may be for that arrangement
- With regard to intra-group transactions that means adherence to the arm's length principle

The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007

Application of anti abuse rules within EU/EEA

- The above should be hold true also with regard to EEA States (except for situations where there is no adequate information exchange relationship with the EEA State concerned)

The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007

Extension to purely domestic situations

- In the Commission's view it would be regrettable if, in order to avoid the charge of discrimination, MSs extended the application of anti-abuse measures designed to curb crossborder tax avoidance to purely domestic situations where no possible risk of abuse exists.
- Such unilateral solutions only undermine the competitiveness of the MSs' economies, and are not in the interest of the Internal Market. Indeed, as AG Geelhoed observed in *Thin Cap* such an extension *"...is quite pointless and indeed counterproductive for economic efficiency."*
- Moreover, **it remains debatable whether such extensions can successfully bring all restrictive measures into line with MSs' EC Treaty obligations**

The application of anti-abuse measures in the area of direct taxation COM (2007) 785 final of December 10, 2007

- ! As regards the compatibility of national anti-abuse measures with EC law, a distinction has to be drawn between their application within the Community (where the four fundamental freedoms apply) and their application vis-à-vis third countries (where only the free movement of capital applies)
- ! CFC and thin cap should be evaluated with respect to the freedom of establishment. Thus, MSs should not be precluded in applying them
- ! If the free movement of capital apply, i.e., outside the group, the measures should only counteract wholly artificial arrangements (with the exception of situations where there is no adequate exchange of information)

Third countries

Fabio Aramini, LL.M., Partner

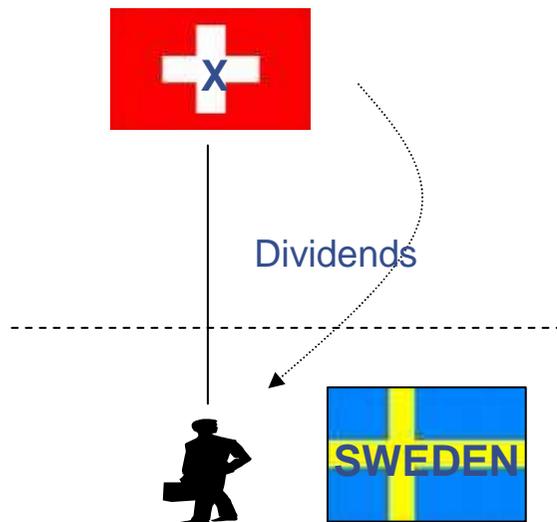
Studio Adonnino Ascoli & Cavasola Scamoni

12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation

– Third countries

- It is necessary first of all to clarify the concept of ‘restrictions which exist’ on 31 December 1993 within the meaning of the freedom of establishment provision (189)
- Reference should be made to Case C-302/97 *Konle* (190)
- As the Court stated in *Konle*, any national measure adopted **after** a date laid down in that way is not, by that fact alone, automatically excluded from the derogation laid down in the Community measure in question. If the provision is, **in substance, identical** to the previous legislation or is limited to reducing or eliminating an obstacle to the exercise of Community rights and freedoms in the earlier legislation, it will be covered by the derogation. By contrast, legislation based on an approach which is different from that of the previous law and establishes new procedures cannot be regarded as legislation existing at the date set down by the Community measure in question (see *Konle*, paragraphs 52 and 53)
- The same principles have been repeated in **Holböck** (24.5.07 – C-157/05)

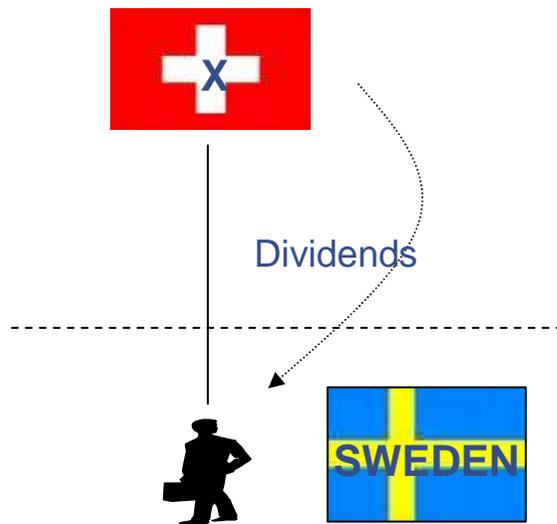
18.12.07 – C-101/05 S v. A



– Facts

- Under Swedish law, dividends are exempt from tax when distributed by a limited company under certain conditions (e.g., the distribution is made in proportion to the number of shares held in the parent company, the shares in the parent company are quoted in the Stock exchange, ect.)
- The exemption also applies where the distribution of shares is carried out by a foreign company which corresponds to a Swedish limited liability company and is established in a State within the European Economic Area ('EEA') or in a State with which the Kingdom of Sweden has concluded a tax convention that contains a provision on exchange of information (6)
- DTT does not include any exchange of information provision (9)

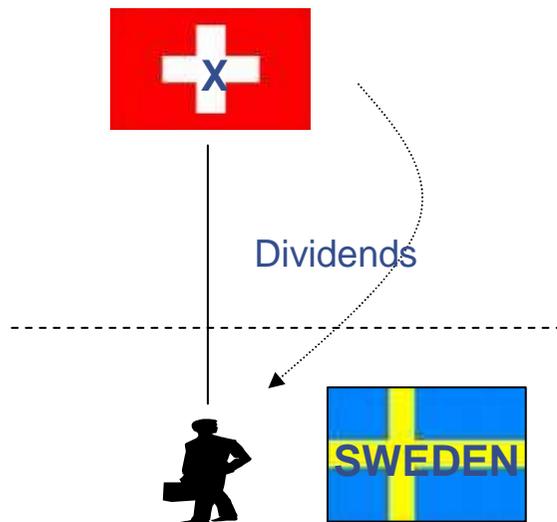
18.12.07 – C-101/05 S v. A (2)



– Facts

- A owns shares in company X, which has its registered office in Switzerland and is considering distributing the shares which it holds in one of its subsidiaries. A applied to the Revenue Law Commission for a preliminary decision on whether such a distribution was exempt from income tax. A stated that X corresponded to a Swedish limited liability company and that the conditions for tax exemption imposed by the Law, other than those relating to the location of the registered office of the company, were satisfied (11). The Revenue Law Commission stated that exemption could not be inferred by domestic law but should stand under EU law (13)
- The tax office appealed against the decision (14)

18.12.07 – C-101/05 S v. A (3)



– Question

- Is it contrary to the provisions on free movement of capital between Member States and third countries to tax A in respect of dividends distributed by X because X is not established in a State within the EEA or in a State with which the [Kingdom of] Sweden has concluded a taxation convention that contains a provision on exchange of information ?

– Have you exercised a fundamental Freedom?

- Free movement of capital (20)

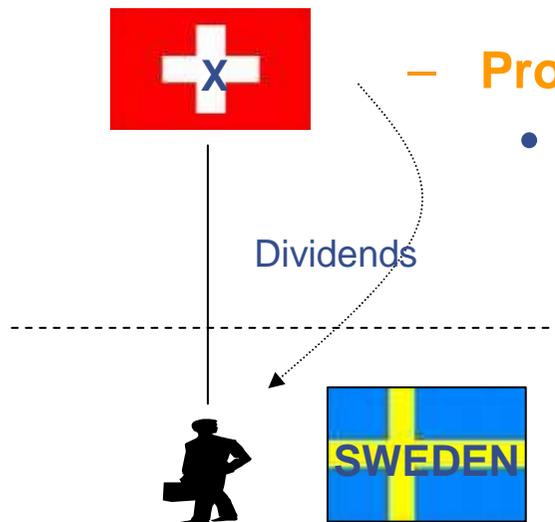
– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- Restriction (53)

– Is there a justification?

- Effectiveness of fiscal supervision. This argument can be upheld (55)

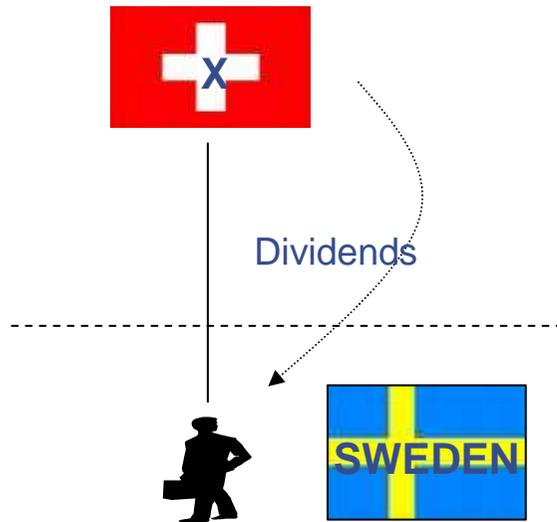
18.12.07 – C-101/05 S v. A (4)



– Proportionality?

- With regard to national legislation restricting the exercise of one of the freedoms of movement guaranteed by the Treaty, the Court has held that a Member State **cannot rely on the fact that it may be impossible to seek cooperation from another Member State** in conducting inquiries or collecting information in order to justify a refusal to grant a tax advantage. Indeed, even if it proves difficult to verify the information provided by the taxpayer, in particular due to the limited nature of the exchange of information provided for by Article 8 of Directive 77/799, there is no reason why the tax authorities concerned should not request from the taxpayer the evidence that they consider they need to effect a correct assessment of the taxes and duties concerned and, where appropriate, refuse the exemption applied for if that evidence is not supplied (58)

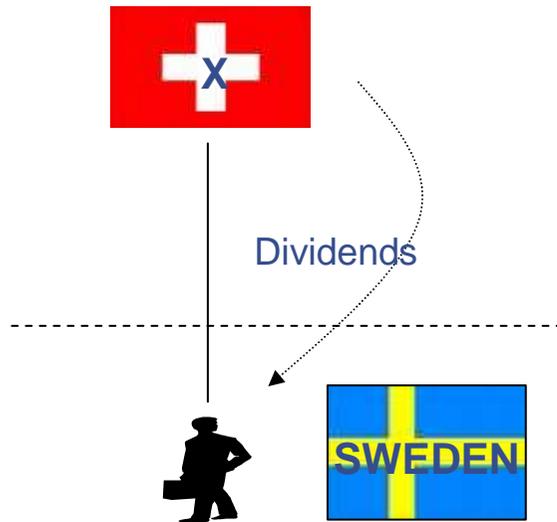
18.12.07 – C-101/05 S v. A (5)



– Proportionality?

- In that context, the Court has held that the taxpayer should not be precluded a priori from providing relevant documentary evidence enabling the tax authorities of the Member State imposing the tax to ascertain, clearly and precisely, that he is not attempting to avoid or evade the payment of taxes (59)

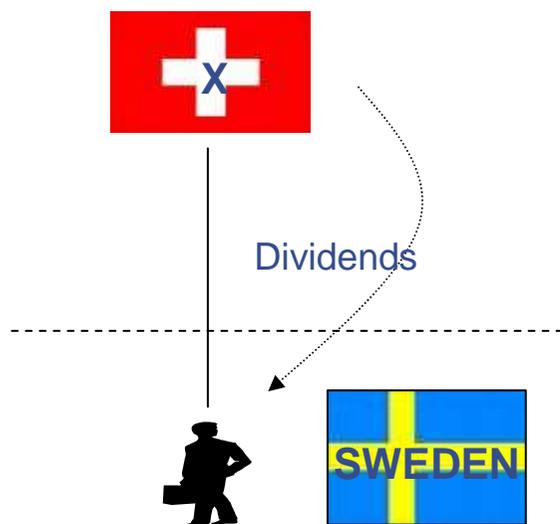
18.12.07 – C-101/05 S v. A (6)



– Proportionality?

- However, that case-law, which relates to restrictions on the exercise of freedom of movement within the Community, **cannot be transposed in its entirety to movements of capital between Member States and third countries**, since such movements take place in a different legal context from that of the cases which gave rise to the judgments referred to in the two preceding paragraphs (60)

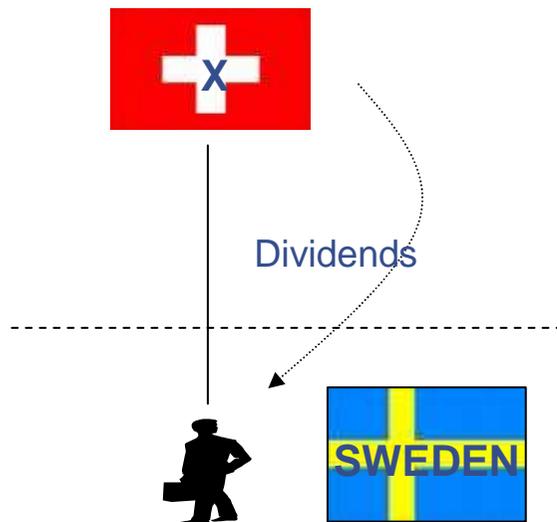
18.12.07 – C-101/05 S v. A (7)



– Proportionality?

- In the first place, relations between the Member States take place against a common legal background, characterized by the existence of Community legislation, such as Directive 77/799, which laid down reciprocal obligations of mutual assistance. Even if, in the fields governed by that directive, the obligation to provide assistance is not unlimited, the fact remains that that directive established a framework for cooperation between the competent authorities of the Member States which **does not exist** between those authorities and the competent authorities of a third country where the latter has given no undertaking of mutual assistance (61)

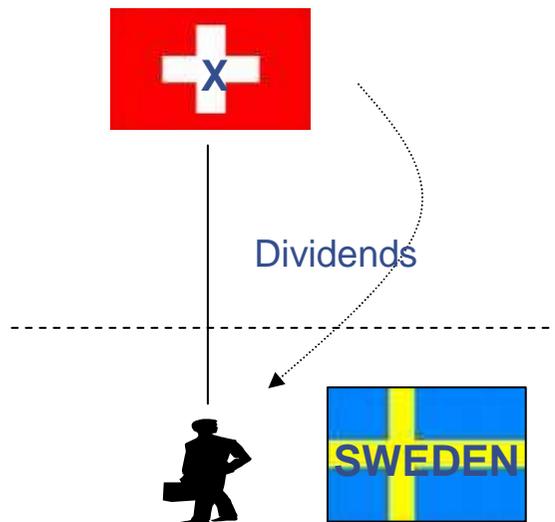
18.12.07 – C-101/05 S v. A (8)



– Proportionality?

- In second place, with regard to the documentary evidence which the taxpayer may provide to enable the tax authorities to ascertain whether the requirements under national legislation are satisfied, **the Community harmonization measures on company accounts which apply in the Member States allow the taxpayer to produce reliable and verifiable evidence on the structure or activities of a company established in another Member State,** whereas the taxpayer is not ensured of such an opportunity in the case of a company established in a third country which is not required to apply those Community measures (62)

18.12.07 – C-101/05 S v. A (9)



– Proportionality?

- It follows that, where the legislation of a Member State makes the grant of a tax advantage dependent on satisfying requirements, compliance with which can be verified only by obtaining information from the competent authorities of a third country, it is, in principle, legitimate for that Member State to refuse to grant that advantage **if**, in particular, because that third country is not under any contractual obligation to provide information, it proves impossible to obtain such information from that country (63)
- In the action in the main proceedings, the Swedish tax authorities cannot verify compliance with domestic law (64)

Thank you!



For any question please contact:

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