European Tax Law

Priv.-Doz. DDr. Georg Kofler, LL.M. (NYU)
28 May 2008, 2 June 2008, and 3 June 2008
The European Union
The European Union

European Commission

Council

European Parliament

European Court of Justice (ECJ)
Overview

- Introduction
- Milestones in European Tax Policy
- Fundamental Freedoms and Direct Taxation
- Secondary Community (Tax) Law
  - Parent-Subsidiary-Directive
  - Merger Directive
  - Interest-Royalties-Directive
  - Arbitration Convention
- Tax Harmonization Projects
  - HST
  - CCCTP
- Harmful Tax Competition
Part I
Introduction
Roadmap

- **Indirect Taxation**
  - Customs Union (Art 23 et seq EC), prohibition of custom duties (Art 25 EC), and prohibition of direct and indirect discrimination against foreign products (Art 90 EC)
  - Harmonization under **Art 93 EC** → “The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, **adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation** to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market within the time limit laid down in Article 14.”
Roadmap

- Direct Taxation
  - No harmonization program, but **Art 94 EC** → “The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, **issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.**” → See also Arts 96 and 308 EC
  - But: Unanimity under Art 95(2) EC
  - Current Tax Policy
    - No need for broad harmonization of Member States’ tax systems. → Provided that Community rules are respected, Member States are free to choose the tax systems that they consider most appropriate and according to their preferences.
    - Proposal for Community action in the tax field would take full account of the principles of subsidiarity and proportionality. → Many tax problems might, in fact, simply require better co-ordination of national policies.
    - Main priority for tax policy that of addressing the concerns of individuals and businesses operating within the Internal Market by focusing on the elimination of tax obstacles to all forms of cross-border economic activity, in addition to continuing the fight against harmful tax competition.
  - Art 293 EC
Roadmap

EC Treaty → Primary Community Law

Secondary Community Law → Art 249 EC

- **Regulation** → General application and binding in its entirety and directly applicable in all Member States.
- **Directive** → Binding, as to the result to be achieved, but leaves to the national authorities the choice of form and methods.
- **Decision** → Binding in its entirety upon those to whom it is addressed
- **Recommendations and Opinions** → No binding force.
The Legal Framework for Direct Taxation

- Domestic Tax Law
- Double Taxation Conventions
- Community (Tax) Law
  - EC Treaty $\rightarrow$ Fundamental Freedoms
Part II
Milestones in European Tax Policy
Milestones – 1963 to 1969


Milestones – 1970 to 1977

1970

Communication from the Commission Action Programme for Taxation, COM(75)391 final.

1971


1972

Körperschaftsteuer und Einkommensteuer in den Europäischen Gemeinschaften (1971) (van den Tempel Report)

1973


1974

Communication from the Commission Action Programme for Taxation, COM(75)391 final.

1975

1976

1977


Communication from the Commission on Community Action to Combat International Tax Evasion and Avoidance, COM(84)603 final

Communication from the Commission on Fiscal Measures Aimed at Encouraging Cooperation Between Undertakings of Different Member States, COM(85)360 final
Milestones – 1986 to 1993

- **1986**
  - Commission Communication subsequent to the conclusions of the Ruding Committee indicating guidelines on company taxation linked to the further development of the internal market, SEC(92)1118 final

- **1987**

- **1988**
  - Communication from the Commission on **Tax Measures to be Adopted by the Community in Connection with the Liberalization of Capital Movements**, COM(89)60 final

- **1989**
  - Guidelines on Company Taxation, SEC(90)601 final

- **1990**
  - **1992: Principle of Subsidiarity — Treaty of Maastricht**

- **1991**
  - **1992**

- **1993**
  - Commission Communication subsequent to the conclusions of the Ruding Committee indicating guidelines on company taxation linked to the further development of the internal market, SEC(92)1118 final
Milestones – 2002 to 2005

- **2002**
  - Communication from the Commission on An Internal Market without company tax obstacles: achievements, ongoing initiatives and remaining challenges, COM(2003)726 final

- **2003**

- **2004**

- **2005**
Milestones – 2006 to 2007

- Communication from the Commission **Co-ordinating Member States’ direct tax systems in the Internal Market**, COM(2006)823 final
- Communication from the Commission **Exit taxation and the need for co-ordination of Member States’ tax policies**, COM(2006)825 final

Report from the Commission **Implementing the Community Lisbon Programme: Progress to date and next steps towards a Common Consolidated Corporate Tax Base (CCCTB)**, COM(2006)157 final

Communication from the Commission concerning **the need to develop a co-ordinated strategy to improve the fight against fiscal fraud**, COM(2006)254 final


Communication from the Commission on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on **Guidelines for Advance Pricing Agreements within the EU**, COM(2007)71 final.
Part III
Fundamental Freedoms and Direct Taxation
Overview

- EC Law and Direct Taxation
  - Fundamental Freedoms
    - Free Movement of Workers (Art 39 EC)
    - Freedom of Establishment (Art 43 EC)
    - Freedom to Provide Services (Art 49 EC)
    - Free Movement of Capital (Art 46 EC) — Between the Member States and between Member States and Third Countries!
  - Directives
    - Parent-Subsidiary-Directive
    - Merger Directive
    - Interest-Royalties-Directive
    - Savings Directive
    - Directives on Mutual Assistance and Recovery of Tax Claims
Overview

- **Fundamental Freedoms and Direct Taxation**
  - The Fundamental Freedoms
    - are directly applicable in the Member States,
    - confer rights to individuals and companies,
    - take precedence over domestic legislation to the extent of any inconsistency,
    - and not only operate “negatively” by superseding national law, but also “positively” by granting taxpayers benefits denied to them in breach of Community law
  - Infringement — The Test Used by the European Court of Justice
    - Territorial Scope?
    - Discrimination (and Restriction)?
    - Justification?
    - Proportionality?
Fundamental Freedoms

Pair of Comparison from the Perspective of the Residence State = „Outbound“-Situation

Economic Activity in the Residence State

Unlimited Tax Liability – Worldwide Income

Cross-Border Economic Activity

Limited Tax Liability – Income from Sources within the Source State

Pair of Comparison from the Perspective of the Source State = „Inbound“-Situation

Economic Activity in the Residence State
Basics: Inbound Situations

- **Disadvantageous Treatment of Non-Residents by the Source State**
  - Identification of a Pair of Comparison and the Criterion of Comparison (*tertium comparationis*) = “Equality in a Box” (“Kästchengleichheit”)
  - *Ad personam*-Comparison

- **Vertical Issues**
  - Obligation of the Source State to grant non-residents equal treatment with residents, insofar the former are subjected to its taxing jurisdiction, and even if they are Source State nationals = **Prohibition of Vertical Discrimination = Obligation to Grant National Treatment**
  - *Subjective Ability to Pay* (e.g., *Schumacker*, *Wallentin*, *D*)
  - *Objective Ability to Pay*
    - Companies (*Avoir Fiscal*, *Saint-Gobain*, *CLT-UFA*, *Denkavit Internationaal*)
    - Individuals (*Gerritse*, *Conijn*, *Scorpio*)

- **Horizontal Issues**
  - Obligation of the Source State to treat two different cross-border situations equally? **Prohibition of Horizontal Discrimination**
  - *Inbound*-Most-Favored-Nation-Treatment (*D*, *Bujara*, *ACT Group Litigation*)
Basics: Outbound Situations

- Disadvantageous Treatment of Residents by the Residence State
  - Identification of a Pair of Comparison and the Criterion of Comparison (*tertium comparationis*)
  - *Ad rem*-Comparison
- **Vertical Issues**
  - Guideline: Equal treatment has to be granted if foreign-source income is included in the tax base ⇒ *Tax Base Fragmentations*?
  - Issues
    - Foreign-Source Income (*Lenz, Manninen, Meilicke*)
    - Deductions (*Bachmann etc, Bosal, Marks & Spencer*)
    - Exit Taxation (*X und Y, Hughes de Lasteyrie du Saillant, N*)
- **Horizontal Issues**
  - Obligation of the Residence State to treat two different cross-border situations equally? *Prohibition of Horizontal Discrimination*
  - *Outbound*-Most-Favored-Nation-Treatment (*De Graaf, Cadbury Schweppes, Columbus Container Services*)
Fundamental Freedoms

Graph 1: Number of (pending) direct tax cases before the ECJ as of 1 January 2008
Graph 2: Geographical distribution of direct tax cases before the ECJ as of 1 January 2008
Fundamental Freedoms

Graph 3: Success rate – Taxpayers 80%, Member States 20%
Fundamental Freedoms

Graph 4: Source and Residence State Discrimination

![Graph showing Source and Residence State Discrimination from 1986 to 2007. The x-axis represents years from 1986 to 2007, and the y-axis represents the number of cases. The graph indicates a significant increase in cases of source state discrimination from 2005 onwards, with a peak of 18 cases in 2007, whereas residence state discrimination remains relatively stable.](image-url)
Fundamental Freedoms

**Graph 5:** Direct and Indirect Discrimination
Fundamental Freedoms and Tax Treaties

Internal Market (Art 3(1)(c) and Art 14(2) EC → Fundamental Freedoms

Discriminatory Restrictions
- Inbound
  - Vertical
  - Overt – Direct and Indirect
    - Nationality Paragraph → Art 24(1) OECD-MC → Commercial Agreements (Friendship, Commerce, and Navigation)
  - Covert – Direct and Indirect
    - Permanent Establishment Paragraph → Art 24(3) OECD-MC
  - Vertical
  - Horizontal
- Outbound
  - Vertical
  - Horizontal

Non-Discriminatory Restrictions
- Disparities
  - Vertical
  - Horizontal

Double Taxation Conventions
- Deductibility Paragraph → Art 24(4) OECD-MC
- Ownership Paragraph → Art 24(5) OECD-MC
As a Starter: Disparities

Tax Rate: 50%

Tax Rate: 30%

MS 1

MS 2
Inbound-Situations and Individuals


More than 90% of income, but denial of personal and family related tax benefits

Belgium

Germany

More than 90% of income, but denial of personal and family related tax benefits
Inbound-Situations and Individuals


Exemption of foreign source income, but pro-rata denial of personal allowances

Employee

Netherlands
Germany
France
UK

Not in Schumacker-Situation
Inbound-Situations and Individuals

Personal and Family Circumstances: Subjective Ability to Pay — Fractional Taxation?

- Limited Tax Liability
- Salery Splitting

MS 2

Employee

Schumacker?
De Groot?
Inbound-Situations and Individuals

Personal and Family Circumstances: Subjective Ability to Pay — *Schumacker*, Domestic Legislation and Art 24 OECD-MC

90% of Worldwide Income

Austrian Citizen

US-Citizen

USA

Austria

Art 24(1)
OECD-MC
**Inbound-Situations and Individuals**


- **Gerritse**
  - No deduction of business expenses
  - Final 25% withholding tax
    (→ C-290/04, *Scorpio*)

- **Conijn**
  - No deductions for expenses incurred for preperation of German tax return

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The Netherlands

Germany
Inbound-Situations and Individuals

Business Expenses: Objective Ability to Pay — Timing Issues → ECJ, 3 October 2006, C-290/04, *Scorpio*

*Scorpio*
- Gross withholding tax
- Treaty exemption certification
- Third-country service provider

*Services*
- Gross withholding tax
- Subsequent assessment or refund procedure
Inbound-Situations and Companies

- Business Expenses
- Tax Benefits
- Tax Rate

Comparison from the perspective of the source state = „Inbound“-Situation

Unlimited tax liability

Dividends

MS 1

MS 2

Inbound-Situations and Companies

No tax credit (avoir fiscal) for permanent establishment of a non-resident company
Inbound-Situations and Companies


Saint-Gobain SA

Organschaft

A

I

CH

USA

France

Germany

Third Countries

- No DTC-exemption for distributions from CH and US subsidiaries
- No indirect credit for distributions from A and I subsidiaries

MS
**Inbound-Situations and Companies**

**Tax Rate** — ECJ, 29 April 1999, C-311/97, *Royal Bank of Scotland* [1999] ECR I-2651

- Tax rate for permanent establishments of foreign banks @ 40%, for domestic banks @ 35%

Diagram:

- Royal Bank
- UK
- Greece
Inbound-Situations and Companies

Tax Rate — ECJ, 23 February 2006, C-253/03, **CLT-UFA** [2006] ECR I-1831

- Tax rate for permanent establishment @ 42%
- Tax burden for distributed profits of subsidiaries of EU parent companies: 30% + 3,5% (70%·5%) = 33,5% (until 30 June 1996), thereafter 30%
**Inbound-Situations and Companies**

**Tax Rate, Economic Double Taxation and Treaty Relief** — “Equality in a Box”, but
DTC Obligations \(\rightarrow\) ECJ, 14 December 2006, C-170/05, *Denkavit Internationaal*, [2006]
ECR I-11949, and ECJ, 8 November 2007, C-379/05, *Amurta*

- Withholding tax on outbound distributions (reduced to 5% by DTC), exemption for domestic distributions (\(\rightarrow\) EFTA Court 23 November 2004, E-1/04, *Fokus Bank* [2005] EFTA Court Report 11)
- Treaty credit method.
- But: Dutch participation exemption

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**Denkavit NL**

**Denkavit FR**

*Participation Exemption*

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The Netherlands

France
Outbound-Situations – Dividends

Outbound-Situations – Dividends


<table>
<thead>
<tr>
<th></th>
<th>Domestic Dividends</th>
<th>Foreign Dividends</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corporate Tax Base</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>/. CIT (34%)</td>
<td>(34)</td>
<td>(34)</td>
</tr>
<tr>
<td>= Dividend</td>
<td>66</td>
<td>66</td>
</tr>
<tr>
<td>= Income Tax Base</td>
<td>66</td>
<td>66</td>
</tr>
<tr>
<td>/. IT (25%/50%)</td>
<td>(16,5)</td>
<td>(33)</td>
</tr>
<tr>
<td>= Income Tax in A</td>
<td>16,5</td>
<td>33</td>
</tr>
<tr>
<td>= Overall Tax Burden</td>
<td>50,5</td>
<td>67</td>
</tr>
<tr>
<td>= Net Dividend</td>
<td>49,5</td>
<td>33</td>
</tr>
</tbody>
</table>
**Outbound-Situations – Dividends**


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<table>
<thead>
<tr>
<th></th>
<th>Finish Dividends</th>
<th>Swedish Dividends</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corporate Tax Base</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>( \therefore ) CIT (29%)</td>
<td>(29)</td>
<td>(29)</td>
</tr>
<tr>
<td>= Dividend</td>
<td>71</td>
<td>71</td>
</tr>
<tr>
<td>+ Tax Credit (29/71)</td>
<td>29</td>
<td>—</td>
</tr>
<tr>
<td>= Income Tax Base</td>
<td>100</td>
<td>71</td>
</tr>
<tr>
<td>( \therefore ) IT (29%)</td>
<td>(29)</td>
<td>(20.59)</td>
</tr>
<tr>
<td>+ Credit (29/71)</td>
<td>29</td>
<td>—</td>
</tr>
<tr>
<td>= IT in Finland</td>
<td>0</td>
<td>20.59</td>
</tr>
<tr>
<td>= Overall Tax Burden</td>
<td>29</td>
<td>49.59</td>
</tr>
<tr>
<td>= Net Dividend</td>
<td>71</td>
<td>50.41</td>
</tr>
</tbody>
</table>
**Outbound-Situations – Dividends**

**Different Systems for Domestic and Foreign Source Dividends** — ECJ, 12 December 2006, C-446/04, *FII Group Litigation*

<table>
<thead>
<tr>
<th></th>
<th>UK Dividend</th>
<th>Foreign-Source Dividend</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corporate Income</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>/. Effective CIT on Level of Subsidiary</td>
<td>(10)</td>
<td>(10)</td>
</tr>
<tr>
<td>= Gross Dividend</td>
<td>90</td>
<td>90</td>
</tr>
<tr>
<td>/. Foreign w/h tax (e.g., 10%)</td>
<td>—</td>
<td>(9)</td>
</tr>
<tr>
<td>= Corporate Tax Base for UK Parent</td>
<td>90</td>
<td>100</td>
</tr>
<tr>
<td>/. CIT (35%)</td>
<td>(0)</td>
<td>(35)</td>
</tr>
<tr>
<td>/. Credit for Foreign Taxes</td>
<td>—</td>
<td>19</td>
</tr>
<tr>
<td>= Tax Burden in UK</td>
<td>35</td>
<td>16</td>
</tr>
<tr>
<td>= Overall Tax Burden</td>
<td>10</td>
<td>35</td>
</tr>
<tr>
<td>= Net Dividend</td>
<td>90</td>
<td>65</td>
</tr>
</tbody>
</table>

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Diagram:

- Dividend
- Withholding tax
- MS or Third Country
- UK
Outbound-Situations – PEs

PE Losses — Requests for Preliminary Rulings in C-414/06, Lidl Belgium, and Order in C-415/06, SEW (Stahlwerk Ergste Westig) GmbH

- „Symmetry“
- Dual Loss Utilization?
- Art 43 and Art 56 EG

Germany

MS or Third Country

Losses
Outbound-Situations – PEs


No deduction for financing costs unless subsidiary is taxable in The Netherlands

Bosal Holding

Tax Base Fragmentation?

The Netherlands

MS
Outbound-Situations – Exit Taxation

Transfer of Shares and Nonrecognition Treatment — ECJ, 21 November 2002, C-436/00, *X and Y* [2002] ECR I-10829,

*Denial of Non-Recognition Treatment for Contribution of Shares in X to Z AB*
Outbound-Situations – Exit Taxation


- Which Fundamental Freedom?
- Appreciated Value of and Hidden Reserves in Substantial Shareholdings
- Collateral?
- Tax Avoidance versus Demarcation of Taxing Jurisdiction
- Directives on Information Exchange and Recovery of Tax Claims

Exit, i.e., leaving of taxing jurisdiction and entering DTC protection
“Most-Favored Nation Treatment”

**“Most-Favored Nation Treatment”**

*Inbound-Most-Favored Nation Treatment — ECJ, 12 December 2006, C-374/04, *ACT* Group Litigation*

<table>
<thead>
<tr>
<th></th>
<th>Individual</th>
<th>UK Company</th>
<th>NL Company</th>
<th>GER Company</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dividend</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>+ Tax Credit</td>
<td>11,1</td>
<td>—</td>
<td>5,5</td>
<td>—</td>
</tr>
<tr>
<td>= DTC-Refund</td>
<td>—</td>
<td>—</td>
<td>0,27</td>
<td>—</td>
</tr>
<tr>
<td>= Net</td>
<td>100 + 11,1</td>
<td>100</td>
<td>100,27</td>
<td>100</td>
</tr>
</tbody>
</table>

Diagram:
- Dividend
- UK
- NL
- GER

Legend:
- UK
- NL
- GER

Germany
The Netherlands
UK
“Most-Favored Nation Treatment”

Outbound-Most-Favored Nation Treatment — (Rejected) Request for Preliminary Ruling in C-436/05, De Graaf

Possible Examples
- DTC-Activity Clauses (→ C-298/05, Columbus Container Services)
- Different methods of DTC relief
- Tax Sparing Credits
- Switch-over on the basis of domestic law

Advantage/benefit under DTC or domestic law

“Normal” taxation

MS = Residence Country
“Most-Favored Nation Treatment”

Outbound-Most-Favored Nation Treatment under Domestic Law — ECJ, 12 September 2006, C-196/04, Cadbury Schweppes

International Financial Services Center (IFSC) → Tax Rate @ 10%

CSTS → CSTI

Cadbury Schweppes

Cadbury Schweppes Overseas

D-GmbH

„High Taxation“

UK CFC-Rules

UK CFC Rules do not apply

Germany

Ireland
“Most-Favored Nation Treatment”

**Outbound-Most-Favored Nation Treatment under Treaty Law — Case C-298/05, Columbus Container Services**

Switch-over from exemption to foreign tax credit method if foreign permanent establishment is lowly taxed and earns passive income (treaty override)

### Situation 1: DTC-Exemption

<table>
<thead>
<tr>
<th></th>
<th>Belgian PE</th>
<th>German PE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgian Tax Base</td>
<td>—</td>
<td>100</td>
</tr>
<tr>
<td>CIT in Belgium (e.g., 10%)</td>
<td>—</td>
<td>(10)</td>
</tr>
<tr>
<td>German Tax Base</td>
<td>100</td>
<td>0</td>
</tr>
<tr>
<td>Income Tax in Germany (25%)</td>
<td>(25)</td>
<td>(0)</td>
</tr>
<tr>
<td>Credit</td>
<td>—</td>
<td>10</td>
</tr>
<tr>
<td>Tax Burden in Germany</td>
<td>25</td>
<td>0</td>
</tr>
<tr>
<td>Overall Tax Burden</td>
<td>25</td>
<td>10</td>
</tr>
</tbody>
</table>

### Situation 2: Switch Over to Credit Method

<table>
<thead>
<tr>
<th></th>
<th>Belgian PE</th>
<th>German PE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgian Tax Base</td>
<td>—</td>
<td>100</td>
</tr>
<tr>
<td>CIT in Belgium (e.g., 10%)</td>
<td>—</td>
<td>(10)</td>
</tr>
<tr>
<td>German Tax Base</td>
<td>100</td>
<td>0</td>
</tr>
<tr>
<td>Income Tax in Germany (25%)</td>
<td>(25)</td>
<td>(0)</td>
</tr>
<tr>
<td>Credit</td>
<td>—</td>
<td>10</td>
</tr>
<tr>
<td>Tax Burden in Germany</td>
<td>25</td>
<td>0</td>
</tr>
<tr>
<td>Overall Tax Burden</td>
<td>25</td>
<td>10</td>
</tr>
</tbody>
</table>
Neutrality of Legal Form

Comparison from the Residence State’s Perspective = Outbound-Situation

Loss-situations, e.g., DTC credit method or loss-utilization under domestic law (recapture)

Losses
Neutrality of Legal Form

Comparison between Foreign PE and Foreign Subsidiary → Rejected (?) by ECJ, 13 December 2005, C-446/03, *Marks & Spencer*

No loss-utilization under UK group relief for losses of non-resident subsidiaries

- **Marks & Spencer plc**
  - **M & S Int’l Holdings Ltd**
    - **M & S NL**
      - **M & S FR**
      - **M & S BE**
      - **M & S D**

Losses

Loss Utilization by Purchaser

?
Quo vadis, ECJ?

Inter-Subjective Connection \(\rightarrow\) ECJ, 12 July 2005, C-403/03, *Schempp* [2005] ECR I-6421

- Principle of Correspondence \(\rightarrow\) Deductible if taxable in the hands of recipient (irrespective of actual taxation)
- Also cross-border, if foreign taxation is certified

Alimony payments

Germany

Austria

Alimony payments not taxable
Quo vadis, ECJ?


No loss relief under British “group relief” system for losses of non-resident subsidiaries

![Diagram showing the structure of Marks & Spencer plc and its subsidiaries](image)
**Quo vadis, ECJ?**

**No Prohibition of Juridical Double Taxation → ECJ, 14 November 2006, C-513/04, Kerckhaert-Morres**

<table>
<thead>
<tr>
<th></th>
<th>Domestic Distribution</th>
<th>Inbound Distribution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross dividend</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>W/h tax (15%)</td>
<td>—</td>
<td>(15)</td>
</tr>
<tr>
<td>Tax base in Belgium</td>
<td>100</td>
<td>85</td>
</tr>
<tr>
<td>Tax rate (25%)</td>
<td>(25)</td>
<td>(21,25)</td>
</tr>
<tr>
<td>Credit for foreign tax</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Tax burden in Belgium</td>
<td>25</td>
<td>21,25</td>
</tr>
<tr>
<td>Overall tax burden</td>
<td>25</td>
<td>36,25</td>
</tr>
<tr>
<td>Net dividend</td>
<td>75</td>
<td>63,75</td>
</tr>
</tbody>
</table>

- Tax rate for inbound and domestic dividends @ 25%
- No credit for foreign withholding tax (Euro for Euro), but rather deduction from tax base

**Dividends**

Withholding tax @ 15%

Belgium

France
Quo vadis, ECJ?

No Prohibition of Limitation on Benefits-Clauses → ECJ, 12 December 2006, C-374/04, ACT Group Litigation → What happened to Open Skies?

<table>
<thead>
<tr>
<th></th>
<th>NL-Company Variante 1</th>
<th>NL-Company Variante 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dividend</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>+ UK Credit</td>
<td>5.5</td>
<td>—</td>
</tr>
<tr>
<td>= DTC Payment</td>
<td>0.27</td>
<td>—</td>
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<tr>
<td>= Net</td>
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Limitation on Benefits => Ownership-Test and Derivative Benefits

Dividend

NL

UK

G

NL

NL

UK

UK

Germany

Netherlands

UK
Cross-Border DTC Compensation — ECJ, 14 December 2006, C-170/05, *Denkavit Internationaal and Denkavit France*, and ECJ, 8 November 2007, C-379/05, *Amurta*

- Withholding tax on outbound distributions (reduced to 5% by DTC), exemption for domestic distributions (→ EFTA Court 23 November 2004, E-1/04, *Fokus Bank* [2005] EFTA Court Report 11)
- Treaty credit method.
- But: Dutch participation exemption
Quo vadis, ECJ?

Tax Avoidance → ECJ, 12 September 2006, C-196/04, *Cadbury Schweppes*

Diagram:
- **Cadbury Schweppes**
  - **UK CFC Legislation**
  - **Cadbury Schweppes Overseas**
    - **CSTS**
    - **CSTI**
      - **International Financial Services Center (IFSC) → Tax Rate @ 10%**

UK → Ireland
Part IV
Secondary Community (Tax) Law
Part IV-I
The Parent-Subsidiary-Directive
Objective
- Removal of tax barriers concerning the distribution of profits within a group of companies
- Twofold approach
  - Relief from **juridical double taxation** through exemption from withholding taxation on the subsidiary level → **Art 5**
  - Relief from **economic double taxation** through either exemption or indirect tax credit on the parent level → **Art 4**

Legal Texts


Structure of the Directive

- **Art 1** – Scope of Application and Anti-Abuse
- **Art 2** – Definition of “company of a Member State” and “permanent establishment”
- **Art 3** – Definition of “parent” and “subsidiary” company
- **Art 4** – Avoidance of economic double taxation on the parent level (exemption or indirect credit) and inclusion of hybrid entities
- **Art 5** – Avoidance of juridical double taxation on the subsidiary level (prohibition of withholding taxation)
- **Art 6** – Prohibition of withholding taxation in the parent’s country
- **Art 7** – Exclusion of prepayments and certain measures for the avoidance of double taxation from the definition of taxation at source
- **Art 8** – Deadline for implementation
- **Art 9** – Directive is addressed to the Member States
Art 1 → Each Member State shall apply this Directive

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

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

- Art 2 → For the purposes of this Directive 'company of a Member State' shall mean any company which:
  - takes one of the **legal forms** listed in the Annex to the Directive → Art 2(a)
  - according to the tax laws of a Member State is considered to be **resident in that State for tax purposes** and, under the terms of a **double taxation agreement concluded with a third State**, is not considered to be resident for tax purposes outside the Community → Art 2(b)
  - is **subject to one of the taxes** listed in Art 2(c), **without the possibility of an option or of being exempt**

- “Permanent establishment” means a **fixed place of business situated in a Member State** through which the business of a company of another Member State is wholly or partly carried on in so far as the **profits of that place of business are subject to tax in the Member State in which it is situated by virtue of the relevant bilateral tax treaty or, in the absence of such a treaty, by virtue of national law.**
Parent and Subsidiary

- **Minimum Holding Requirement → Art 3(1)**
  - Liberalization
    - 20% from 1 January 2005 to 31 December 2006;
    - 15% from 1 January 2007 to 31 December 2008;
    - 10% from 1 January 2009.
  - Main Features
    - Directly in the foreign subsidiary or indirectly in a domestic subsidiary via a permanent establishment in another Member State
    - Capital or voting rights (Art 3(2))

- **Minimum Holding Period → Art 3(2)**
  - Member States shall have the option of “not applying this Directive to companies of that Member State which do not maintain for an uninterrupted period of at least two years holdings qualifying them as parent companies or to those of their companies in which a company of another Member State does not maintain such a holding for an uninterrupted period of at least two years.”
  - Usually 1 year, but differentiation for purposes of Art 4 and Art 5 possible
  - Timing issues → Minimum Holding Period need not be fulfilled at the moment of the distribution, as long as the holding is maintained for the holding period → ECJ, 17 October 1996, C-283/94 etc, Denkavit, VITIC und Vormeer
Economic Double Taxation

- **Two Options for Member States**
  - Exemption at the Parent Level → Art 4(1) 1st intend
  - Indirect Tax Credit at the Parent Level → Art 4(1) 2nd intend

- **“Distributions of profits” in Art 1 and 4**
  - Transfer of wealth from the subsidiary to the parent that reduces the subsidiary’s capital and is based on an equite investment of the parent
  - Examples:
    - Dividends
    - Constructive Distributions
    - Reclassified interest payments
    - Excluded are capital gains and liquidating distributions → Art 4(1), but questionable for Art 5
Economic Double Taxation

- **Art 4(1)** → Where a parent company or its permanent establishment, by virtue of the association of the parent company with its subsidiary, receives distributed profits, the State of the parent company and the State of its permanent establishment shall, except when the subsidiary is liquidated, either:
  - refrain from taxing such profits, or
  - tax such profits while authorising the parent company and the permanent establishment to **deduct from the amount of tax due that fraction of the corporation tax related to those profits and paid by the subsidiary** and any lower-tier subsidiary, subject to the condition that at each tier a company and its lower-tier subsidiary meet the requirements provided for in Articles 2 and 3, up to the limit of the amount of the corresponding tax due.
Economic Double Taxation

- **Multi-Tier Tax Credit according to Art 4(1) 2nd intend**
- **Member States** “tax such profits while authorising the parent company and the permanent establishment to *deduct from the amount of tax due that fraction of the corporation tax related to those profits and paid by the subsidiary and any lower-tier subsidiary*, subject to the condition that at each tier a company and its lower-tier subsidiary meet the requirements provided for in Articles 2 and 3, up to the limit of the amount of the corresponding tax due.”

<table>
<thead>
<tr>
<th>MS SS</th>
<th>MS S</th>
<th>MS P</th>
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<td><strong>CIT @ 20%</strong></td>
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<td><strong>CIT @ 40%</strong></td>
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<th>MS S: Credit</th>
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<td>Exemption</td>
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<td>Income in MS P</td>
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<tr>
<td>Overall CIT</td>
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<td>40</td>
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Economic Double Taxation

- **Costs of the Holding**
  - Asymmetry of Treatment of Profits and Costs?
  - **Art 4(2) →** “However, each Member State shall retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company. Where the management costs relating to the holding in such a case are fixed as a flat rate, the fixed amount may not exceed 5% of the profits distributed by the subsidiary.”
  - Typically, only 95% of the profit distribution are exempt from taxation
  - But: No justification for discriminatory taxation
Economic Double Taxation

Financing Costs and Exempt Income — ECJ, 18 September 2003, C-168/01, Bosal
[2003] ECR I-9409

No deduction for financing costs unless subsidiary is taxable in The Netherlands

Tax Base Fragmentation?
Juridical Double Taxation

- **Prohibition of Withholding Taxation → Art 5**
  - “Profits which a subsidiary distributes to its parent company shall be exempt from withholding tax.”
  - Definition of “Withholding Tax”
    - *The term withholding tax contained in Art 5 is not limited to certain specific types of national taxation.* The nature of a tax, duty or charge must be determined under Community law, according to objective characteristics, irrespective of its classification under national law.
  - Three characteristics:
    - The chargeable event for the tax is the payment of dividends or any other income from shares,
    - the taxable amount is the income from those shares, and
    - the taxable person is the holder of the shares (?).

- **Case Law**
Juridical Double Taxation

- **Art 7(1)**
  - "The term 'withholding tax' as used in this Directive shall not cover an advance payment or prepayment (précompte) of corporation tax to the Member State of the subsidiary which is made in connection with a distribution of profits to its parent company."
  - "Equalization Taxes" in imputation systems → E.g., précompte in Frankreich, maggiorazione di conguaglio in Italy, ACT in the UK, and Ausschüttungsbelastung in Germany

- **Art 7(2)**
  - "This Directive shall 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."
  - Safeguard of provisions in DTCs that provide for payment of a cross-border imputation credits?
Art 7(2)

- “This Directive shall 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.”

\[
\begin{align*}
13,045,629.60 & \quad \text{Dividend} \\
+ \quad 2,174,271.60 & \quad \text{Half Tax Credit} \\
\hline
= 15,219,901.20 & \quad \text{Tax Base} \\
\times \quad 5\% & \quad \text{Tax Rate} \\
\hline
= 760,995.06 & \quad \text{UK Tax} \\
2,174,271.60 & \quad \text{Tax Credit} \\
\hline
/. \quad 760,995.06 & \quad \text{UK Tax} \\
\hline
= 1,413,275.54 & \quad \text{Payment to Océ NV} \\
\end{align*}
\]

Océ NV (Netherlands)

Dividend of £ 13,045,629.60

Océ UK (UK)

Payment of ACT of £ 4,348,543.2

13,045,629.60 Dividend
+ 2,174,271.60 Half Tax Credit = 15,219,901.20 Tax Base * 5% Tax Rate = 760,995.06 UK Tax 2,174,271.60 Tax Credit /. 760,995.06 UK Tax = 1,413,275.54 Payment to Océ NV
Part IV-2
The Merger Directive
Overview

- **Objective**
  - Tax neutral treatment of mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office, of an SE or SCE, between Member States → *Deferral*
  - Such operations
    - may be necessary in order to create within the Community conditions analogous to those of an internal market
    - ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States;
    - require tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level;
    - must not be treated more burdensome than those concerning companies of the same Member State.

- **Legal Texts**
Merger Directive — Timeline


- 1969

- 1990

- 1993
- Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, Annex I, XI.B.I, [1994] OJ C 241, p. 196.

- 1994

- 2003
- Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded – Appendix II, 9, [2003] OJ L 236, p. 555.

- 2005

- 2006
Structure of the Directive

- **Art 1** – Scope of Application
- **Art 2** – Definitions of “merger,” “division,” “partial division,” “transfer of assets,” “exchange of shares,” “transferring company,” “receiving company,” “acquired company,” “acquiring company,” and “branch of activity”
- **Art 3** – Definition of “company from a Member State”
- **Art 4 and Art 9** – Neutrality on the level of transferred assets – “permanent establishment requirement”
- **Art 5 and Art 9** – Carry-over of provisions or reserves
- **Art 6 and Art 9** – Loss-carry forward in permanent establishments
- **Art 7** – Tax neutrality of gains accruing to the receiving company on the cancellation of its holding
- **Art 8** – Tax neutrality of the allotment of securities representing the capital of the receiving or acquiring company to a shareholder
- **Art 10** – Transfer of a permanent establishment in a third country
- **Art 10a** – Special case of transparent entities
- **Art 10b to Art 10d** – Rules applicable to the transfer of the registered office of an SE or an SCE
- **Art 11** – Anti-Abuse
- **Art 12** – Deadline for implementation
- **Art 13** – Directive is addressed to the Member States
Scope of Application

- **Merger** → Art 2(a)
  - Transfer of all assets and liabilities from the transferring company” (A) to a pre-existing “receiving company” (B) (A being dissolved without going into liquidation)
  - Transfer of all assets and liabilities from two or more transferring companies” (A) a the pre-existing “receiving company” (B)
  - Up-stream-merger of a 100% subsidiary

- **Taxation**
  - Neutrality on the Company Level
    - Permanent Establishment Requirement → Art 4, 10
    - Carry-over of provisions or reserves → Art 5, 6
  - Neutrality on the Shareholder Level
    - Tax neutrality of the allotment of securities representing the capital of the receiving company (B) to a shareholder in exchange for securities representing the capital of the “transferring company” (A) → Art 8(1)
- **Division** → Art 2(b)
  - Transfer by the “transferring company” (A), on being dissolved without going into liquidation, of all its assets and liabilities to two or more existing or new “receiving companies” (B and C), in exchange for the pro rata issue to its shareholders of securities representing the capital of the “receiving companies” (B and C)

- **Taxation**
  - Neutrality on the Company Level
    - Permanent Establishment Requirement → Art 4, 10
    - Carry-over of provisions or reserves → Art 5, 6
  - Neutrality on the Shareholder Level
    - Tax neutrality of the allotment of securities representing the capital of the “receiving companies” (B and C) to a shareholder in exchange for securities representing the capital of the “transferring company” (A) → Art 8(1)
Scope of Application

- **Partial Division** → Art 2(ba) (*new*)
  - Transfer by the “transferring company” (A), without being dissolved, of one or more branches of activity, to one or more existing or new “receiving companies” (B), leaving at least one branch of activity in the “transferring company” (A), in exchange for the pro-rata issue to its shareholders of securities representing the capital of the companies

- **Taxation**
  - Neutrality on the Company Level
    - Permanent Establishment Requirement → Art 4, 10
    - Carry-over of provisions or reserves → Art 5, 6
  - Neutrality on the Shareholder Level
    - Tax neutrality of the allotment of securities representing the capital of the “receiving company” (B) to a shareholder → Art 8(2)
Scope of Application

- **Transfers of Assets → Art 2(c)**
  - Transfer by the “transferring company” (A), without being dissolved, of all or one or more branches of its activity to the “receiving company” in exchange for the transfer of securities representing the capital of the company receiving the transfer

- **Taxation**
  - Neutrality on the Company Level
    - Permanent Establishment Requirement → Art 4, 10
    - Carry-over of provisions or reserves → Art 5, 6
  - Neutrality on the Shareholder Level
    - No change on the shareholder level, hence no rule in the Directive
Scope of Application

- **Exchange of Shares → Art 2(d)**
  - “Acquiring company” (B) acquires a holding in the capital of the “acquired company” (A) such that it obtains a majority of the voting rights or further extends such holding in that “acquired company” (A) from this company’s shareholders in exchange for the issue to the shareholders of the “acquired company” (A) of securities representing the capital of the “acquiring company” (B)

- **Taxation**
  - Neutrality on the Company Level
    - No change on the property level, hence no rule in the Directive
  - Neutrality on the Shareholder Level
    - Tax neutrality of the allotment of securities representing the capital of the “acquiring company” (B) to a shareholder in exchange for securities representing the capital of the “acquired company” (A) → Art 8(1)
Scope of Application

- **Exchange of Shares** $\rightarrow$ Art 2(d)
  - **Extension through Directive** 2005/19/EC
    - Until **Directive** 2005/19/EC $\rightarrow$ Acquiring company had to acquire "a holding in the capital of another company such that it obtains a majority of the voting rights in that company"
    - Doubts if the extension of a majority holding is also covered $\rightarrow$ **Directive** 2005/19/EC: Amendment of Art 2(d) so that acquiring company has to acquire "a holding in the capital of another company such that it obtains a majority of the voting rights in that company, or, holding such a majority, acquires a further holding".
Scope of Application

- **Transfer of the Registered Office** of an SE or an SCE → Art 2(j) (*new*)
  - A European Company (SE) or a European Cooperative Society (SCE), without winding up or creating a new legal person, transfers its registered office from one Member State to another Member State

- **Taxation**
  - Neutrality on the Company Level
    - Permanent Establishment Requirement → Art 10b
    - Carry-over of provisions or reserves → Art 10c
  - Neutrality on the Shareholder Level
    - No taxation because of the change in qualification of the shares (domestic versus foreign company) → Art 10d
# Scope of Application — Overview

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<thead>
<tr>
<th></th>
<th>Company Level</th>
<th>Shareholder Level</th>
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<tbody>
<tr>
<td></td>
<td>Assets</td>
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<td><strong>Merger</strong></td>
<td>Art 4(1)</td>
<td>Art 6</td>
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<td>Art 6</td>
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<td>Art 2(b)</td>
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<td><strong>Partial Division</strong></td>
<td>Art 4(1)</td>
<td>Art 6</td>
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<td>Art 2(ba)</td>
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<tr>
<td><strong>Transfer of Assets</strong></td>
<td>Art 9 → Art 4(1)</td>
<td>Art 9 → Art 6</td>
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<td>Art 2(c)</td>
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<td><strong>Exchange of Shares</strong></td>
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<tr>
<td>Art 2(d)</td>
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<td><strong>Transfer of the</strong></td>
<td>Art 10b</td>
<td>Art 10c(2)</td>
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<td>Registered Office**</td>
<td></td>
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<tr>
<td>Art 2(j)</td>
<td></td>
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Qualified Companies

- Art 3 → For the purposes of the Directive, “company from a Member State” shall mean any company which:
  - takes one of the legal forms listed in the Annex to the Directive → Art 3(a)
  - according to the tax laws of a Member State is considered to be resident in that State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Community → Art 3(b)
  - is subject to one of the taxes listed in Art 3(c), without the possibility of an option or of being exempt

Art 4(3)
OECD-MC
Permanent Establishments

- Permanent Establishment Requirement for Neutrality on the Company Level → Arts 4, 9 and 10b
  - Merger, Division, Partial Division or Transfer of Assets (Art 4 and Art 9)
    - Such transactions shall not give rise to any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred (→ Art 4(1)(b)) and their values for tax purposes (→ Art 4(1)(a)).
    - The term “transferred assets and liabilities” is limited to those assets and liabilities of the transferring company which, in consequence of the transaction, are effectively connected with a permanent establishment of the receiving company in the Member State of the transferring company and play a part in generating the profits or losses taken into account for tax purposes
  - Transfer of the Registered Office → Art 10b (new)
    - Deferral under Art 10b, if assets and liabilities remain effectively connected with a permanent establishment of the SE or of the SCE in the Member State from which the registered office has been transferred and play a part in generating the profits or losses taken into account for tax purposes
Permanent Establishments

- **Permanent Establishment Requirement for Neutrality on the Company Level → Arts 4, 9 and 10b**
  - No Change in Art 4 through Directive 2005/19/EC, introduction of Art 10b
  - No tax-neutrality under the Directive if the permanent establishment requirement (e.g., because of a DTC) is not met
  - Effects of the Fundamental Freedoms and ECJ case-law on Exit Taxation?
    - ECJ, 7 September 2006, C-470/04, *N*
Permanent Establishments

- **Treatment of Permanent Establishments** → **Art 10**
  - Art 10 applies to mergers, divisions, partial divisions and transfers of assets, but not to transfers of the registered office of an SE or an SCE
  - **PE Member State and Residence Member State of the Receiving Company**
    - Legal fiction that PE State is the residence country of the *transferring company* (Art 10(1) 3rd sentence) → Application of Arts 4, 5 and 6 from the perspective of the PE State and the residence country of the *receiving company*
    - This applies even if the PE State is the residence country of the *receiving company* (Art 10(1) 4th sentence)
  - **Residence Member State of the Transferring Company**
    - DTC with **Exemption Method** → **Art 10(1)**
      - The residence Member State of the transferring company shall renounce any right to tax that permanent establishment (even if it is situated in the country of the receiving company) → Art 10(1) 1st sentence
      - However, the residence Member State of the transferring company may **recapture losses of the permanent establishment** that have been set off against the taxable profits of the company → Art 10(1) 2nd sentence
    - DTC with **Credit Method** → **Art 10(2)**
      - The residence Member State of the transferring company may **tax capital gains**
      - But: **Credit for fictitious tax** that would have been levied (but for Art 10(1) 3rd and 4th sentence)
“Incorporation” of Foreign Permanent Establishment?

- Extension of Art 10(1) through Directive 2005/19/EC to cover “split-offs”
- Art 10(1) 4th sentence now explicitly covers situations “where the permanent establishment is situated in the same Member State as that in which the receiving company is resident”.
- Recapture of losses under Art 10(1) 2nd sentence

“Split-off” of a Permanent Establishment in a Third Member State?

- Point 14 of the Preamble of Directive 2005/19/EC \(\rightarrow\) “it should be made clear that this transaction, being the transfer of assets from a company of a Member State of a permanent establishment located in a different Member State to a company of the latter Member State, is covered by the Directive.”
Permanent Establishments

- Transfers of the Registered Office of an SE or an SCE
  - Art 10(1) **2nd sentence** allows a recapture of losses in the case of a DTC with the exemption method
  - But: Art 10 applies to mergers, divisions, partial divisions and transfers of assets, **but not to transfers of the registered office of an SE or an SCE** → **Art 10(1) 1st sentence**
  - **No Rule for the Transfer of the Registered Office**
    - The Commission Proposal included an explicit reference to Art 10 in Art 10b(3)
    - **Point 8 of the Preamble of Directive 2005/19/EC** → “**Directive 90/434/EEC does not deal with losses of a permanent establishment in another Member State recognised in the Member State of residence of an SE or SCE. In particular, where the registered office of an SE or SCE is transferred to another Member State, such transfer does not prevent the former Member State of residence from reinstating losses of the permanent establishment in due time.”**
“Confusio Gains”

- **Art 7(1)** → Tax neutrality for confusio gains that result from the difference in book (?) value between the participation and the assets → “Where the receiving company has a holding in the capital of the transferring company, any gains accruing to the receiving company on the cancellation of its holding shall not be liable to any taxation.”

- **Prior Law: No “finetuning“**
  - Art 3 of the “old” Parent-Subsidiary-Directive: “minimum holding of 25 %“
  - Art 7(2) of the “old” Merger Directive Directive: “The Member States may derogate from paragraph 1 where the receiving company’s holding in the capital of the transferring company does not exceed 25 %.”
  - What happens if the holding is exactly 25%?

  - Art 3 of the “old” Parent-Subsidiary-Directive: “minimum holding of 20 % [15%, 10%]“
  - Art 7(2) of the “new” Merger Directive Directive: “The Member States may derogate from paragraph 1 where the receiving company has a holding of less than 20 % [15%, 10%] in the capital of the transferring company”
Double Taxation

- **Duplication of Hidden Reserves, e.g., in the case of an Exchange of Shares**
  - Carry-over of book value and nonrecognition on the shareholder level upon the exchange of A shares for B shares \(\rightarrow\) Art 8(1)
  - But: The Merger Directive does not contain a rule on the valuation of the A shares on the level of B \(\rightarrow\) Usually, book values are carried over
  - Hidden reserves in the A shares have been duplicated by giving the B shares in the hands of the former A shareholders and the A shares in the hands of company B the same (lower) value

- **Directive 2005/19/EG**
  - Commission Proposal for an Art 8(10) \(\rightarrow\) Acquiring corporation values the acquired shares with their fair market value
  - Proposal not adopted into final version of the Directive
Hybrid Entities

- New Rules on Transparent (Hybrid) Entities
  - Basic Rules → Art 4(2), 8(3)
  - Opt-outs for Member States → 10a
- Company Level → Art 4(2)
  - Where Art 4 (1) applies and “where a Member State considers a non-resident transferring company as fiscally transparent on the basis of that State’s assessment of the legal characteristics of that company arising from the law under which it is constituted and therefore taxes the shareholders on their share of the profits of the transferring company as and when those profits arise, that State shall not tax any income, profits or capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes.”
New Rules on Transparent (Hybrid) Entities
- Basic Rules → Art 4(2), 8(3)
- Opt-outs for Member States → 10a

Shareholder Level → Art 8(3)
- “Where a Member State considers a shareholder as fiscally transparent on the basis of that State’s assessment of the legal characteristics of that shareholder arising from the law under which it is constituted and therefore taxes those persons having an interest in the shareholders on their share of the profits of the shareholder as and when those profits arise, that State shall not tax those persons on income, profits or capital gains from the allotment of securities representing the capital of the receiving or acquiring company to the shareholder.”
Hybrid Entities

Problem 1 – Merger of a hybrid leads to a permanent loss of taxing jurisdiction

- Art 4(2) prohibits State A to tax hidden reserves in the PE’s assets
- Art 8(1) prohibits State A to tax the allotment of B shares to company A
- Art 10(2) does not apply as the hybrid is a company within the meaning of the Directive (and not a permanent establishment of company A)
- But: **Art 10a(1) and (2)** → State A may tax, provided it grants relief for (fictitious) tax that would have been levied in the PE State
Problem 2 – Merger of a hybrid prevents the recapture of losses

• Losses of the PE have already been utilized in Member State A, but have not yet been recaptured
• Art 10(1) does not apply as the hybrid is a company within the meaning of the Directive (and not a permanent establishment of company A)
• But: Art 10a(1) and (2) → State A may tax, provided it grants relief for (fictitious) tax that would have been levied in the PE State
Part IV-3
The Interest-Royalty-Directive
Overview

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

- **Legal Text**
Proposal for a Council Directive on a common system of taxation applicable to interest and royalty payments made between parent companies and subsidiaries in different Member States, COM(90)571 final. — Replaced by COM(93)196 final, and withdrawn on 9 December 1994.


Structure of the Directive

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

- Exemption from source-taxation of
  - interest payments → Art 2(a)
  - royalty payments → Art 2(b)
- Interest or royalty payments “arising” in a Member State shall be exempt from any taxes imposed on those payments in that State (“source State” → Art 1(2)), whether by deduction at source or by assessment, provided that the beneficial owner of the interest or royalties (→ Art 1(4) and (5)) is
  - a company of another Member State (→ Art 1(4) → Art 3(a))
  - or a permanent establishment situated in another Member State of a company of a Member State (→ Art 1(5) and (8) → Art 3(c)).
- A payment made by a company of a Member State or by a permanent establishment situated in another Member State shall be deemed to arise in that Member State (i.e., the “source State” → Art 1(2) and (3))
Scope of Application

- **Precedence of the PE** → Art 1(6) → “Where a permanent establishment of a company of a Member State is treated as the payer, or as the beneficial owner, of interest or royalties, no other part of the company shall be treated as the payer, or as the beneficial owner, of that interest or those royalties for the purposes of this Article.”

- **Exemption at source** → Refund procedure only if certain procedural requirements set forth in Art 1(11) to (13) are not fulfilled

- The exemption requires that “the company which is the payer, or the company whose permanent establishment is treated as the payer, of interest or royalties is an associated company of the company which is the beneficial owner, or whose permanent establishment is treated as the beneficial owner, of that interest or those royalties”. → Art 1 Abs 7 → Art 3(b)
Scope of Application

Direct Payment

Permanent Establishment as Payor

Permanent Establishment as Beneficial Owner
**Definition of “Interest” and “Royalties”**

- **Interest → Art 2(a)**
  - “Interest” means “income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures; penalty charges for late payment shall not be regarded as interest;”
  - See also Art 11(3) OECE-MC

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

- Art 3(a) → “Company of a Member State” shall mean any company which:
  - takes one of the legal forms listed in the Annex to the Directive → Art 3(a)(i)
  - which in accordance with the tax laws of a Member State is considered to be resident in that Member State and is not, within the meaning of a Double Taxation Convention on Income concluded with a third state, considered to be resident for tax purposes outside the Community → Art 3(a)(ii)
  - is subject to one of the taxes listed in Art 3(a)(iii), without being exempt, or to a tax which is identical or substantially similar and which is imposed after the date of entry into force of this Directive in addition to, or in place of, those existing taxes

- Art 3(c) → “Permanent establishment” means “a fixed place of business situated in a Member State through which the business of a company of another Member State is wholly or partly carried on.”
The exemption under Art 1(1) requires that “the company which is the payer, or the company whose permanent establishment is treated as the payer, of interest or royalties is an associated company of the company which is the beneficial owner, or whose permanent establishment is treated as the beneficial owner, of that interest or those royalties”. → Art 1 Abs 7 → Art 3(b)

Art 3(b) → A company is an “associated company” of a second company if, at least:
- the first company (A) has a direct minimum holding of 25% in the capital (or voting rights) of the second company (B), or
- the second company (A) has a direct minimum holding of 25% in the capital (or voting rights) of the first company (B), or
- a third company (C) has a direct minimum holding of 25% both in the capital (or voting rights) of the first company (A or B) and in the capital of the second company (A or B).

Art 1(10) → “A Member State shall have the option of not applying this Directive to a company of another Member State or to a permanent establishment of a company of another Member State in circumstances where the conditions set out in Article 3(b) have not been maintained for an uninterrupted period of at least two years.”
Exclusions and Transitional Rules

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

- **Arm’s Length Standard → Art 4(2)**
  - “Where, by reason of a special relationship between the payer and the beneficial owner of interest or royalties, or between one of them and some other person, the amount of the interest or royalties exceeds the amount which would have been agreed by the payer and the beneficial owner in the absence of such a relationship, the provisions of this Directive shall apply only to the latter amount, if any.”
  - See also Art 11(6) and Art 12(4) OECD-MC
  - Application of Parent-Subsidiary-Directive?

- **Transitional rules for certain Member States → Art 6**
  - Certain Member States may temporarily apply (limited) withholding taxes → Art 6(1)
  - Obligation to credit such tax imposed on the country of the beneficial owner (company or permanent establishment) → Art 6(2)
Part IV-4
The Arbitration Convention
Arbitration Convention — Timeline


Communication from the Commission on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Pricing Agreements within the EU, COM(2007)71 final.

Convention on the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic to the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, [2005] OJ C 160, p. 1.


Concession to the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Pricing Agreements within the EU, COM(2007)71 final.

Part IV-5
Overview: Withdrawn Commission Proposals
Withdrawn Proposals — Timeline


Part V
Corporate Tax Harmonization
Part V-1
Home State Taxation (HST)
Core Documents

- Developed by *Malcolm Gammie* and *Sven-Olof Lodin*

- **Principle of Mutual Recognition** → Every Member State (branch or subsidiary) shall recognize the tax system of the headquarters State, i.e., the Home State of the group

- **Home State Taxation for SMEs**
  - Towards an Internal Market without tax obstacles – A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities, COM(2001)582 final.
Principle of Mutual Recognition ➔ Every Member State shall recognize the tax system of the headquarters State, i.e., the Home State of the group.

Group of companies is taxed as a unity and only once on its consolidated profits, irrespective of the number and legal form of its operations (branches or subsidiaries) and regardless of their location in the EU.

Income is calculated under the laws of the Home State and is subsequently divided among the jurisdictions where the group operates.

Allocation
- Turnover, asset value and payroll
- Fraction of the total VAT base per Member State
- Gross Domestic Product

Every Member State applies its own corporate tax rate to the allocated tax base.
# Outline of HST

<table>
<thead>
<tr>
<th>Pros</th>
<th>Cons</th>
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<tbody>
<tr>
<td>- No harmonization (EU common tax base)</td>
<td>- Administration for tax authorities</td>
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<tr>
<td>necessary</td>
<td>- “Capital Import Neutrality” and location of headquarters</td>
</tr>
<tr>
<td>- Administration and compliance for</td>
<td>- Tax measures taken by the Home State would affect all jurisdictions where the group</td>
</tr>
<tr>
<td>companies</td>
<td>operates</td>
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<td></td>
<td>- Sale of shares and “switch” in Home State → Corporate emigration and “Exit Tax”?</td>
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<td></td>
<td>- Need for similarity of tax systems → “Europe of two speeds”</td>
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<td></td>
<td>- Member States only get a “slice” of EU average → Profits vs losses</td>
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<tr>
<td></td>
<td>- Treatment of income from third countries?</td>
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<td></td>
<td>- Tax treaty application?</td>
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</tbody>
</table>
Part V-2
Common Consolidated Corporate Tax Base (CCCTB)
Core Documents

- **Positive Integration → Common Tax Base and Common Fiscal Profit Determination System**

- **Common Consolidated Corporate Tax Base**
  - Towards an Internal Market without tax obstacles - A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities, COM(2001)582 final.
  - Implementing the Community Lisbon Programme: Progress to date and next steps towards a Common Consolidated Corporate Tax Base (CCCTB), COM(2006)157 final.
  - Common Consolidated Corporate Tax Base Working Group (CCCTB WG) – *Progress to date and future plans for the CCCTB*, CCCTB/WP/046.
Outline of CCCTB

- Positive Integration $\rightarrow$ Common Tax Base
- Group of companies is taxed as a unit and only once on its consolidated profits, irrespective of the number and legal form of its operations (branches or subsidiaries) and regardless of their location in the EU
- Income is calculated based on the *Common Tax Base*, not on a domestic tax base as in HST
- Allocation/Apportionment $\rightarrow$ Turnover, asset value and payroll
- Every Member State applies its own corporate tax rate to the allocated tax base
## Outline of CCCTB

<table>
<thead>
<tr>
<th>Pros</th>
<th>Cons</th>
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<tbody>
<tr>
<td>Only one system → Administration and compliance for companies and tax authorities</td>
<td>Harmonization necessary → Unanimous decision required or “core group” of Member States → <em>Tax Base</em> and <em>Allocation</em></td>
</tr>
<tr>
<td></td>
<td>Member States only get a “slice” of EU average → Profits vs losses</td>
</tr>
<tr>
<td></td>
<td>Apportionment and double taxation</td>
</tr>
<tr>
<td></td>
<td>Treatment of income from third countries?</td>
</tr>
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<td></td>
<td>Tax treaty application?</td>
</tr>
</tbody>
</table>
Part VI
Harmful Tax Competition
Overview

- Capital mobility puts **downward pressure on corporate income taxes**, but little consensus on whether this is **beneficial, harmful or irrelevant to economic welfare**
- "Tax Competition" →
  - **Corporate Taxation and Location Decisions** → Countries lower their corporate income taxes in order to attract the real activities of firms → Sensitive to tax-rate and allowances
  - "**Taxing Rights**" and "**Income Shifting**" → Competition for taxing rights, i.e. competition for having profits reported in a particular country, without an associated movement of production (e.g., by transfer pricing) → Sensitive only to tax-rate
- Consensus: Address **harmful tax practices** and promote **fair tax competition**
  - Both OECD and EU are concerned at the proliferation of certain tax regimes which, together with the new opportunities opened up by globalization,
    - increase the potential for distorting economic behavior and
    - widen the avenues for non-compliance with the tax laws of a taxpayer’s home country.
  - Law-abiding businesses are concerned that such opportunities can skew the competitive environment unfairly in favour of the tax abuser and against the company that plays by the rules.
### Tax Competition

<table>
<thead>
<tr>
<th>Tax Competition</th>
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<tbody>
<tr>
<td><strong>“First-best result”</strong> → Classical jurisdictional theory → Universal preference satisfaction</td>
</tr>
<tr>
<td><em>Samuelson</em>-condition of public sector economics → A person’s willingness to pay for another unit of a public good = cost of producing that additional unit</td>
</tr>
<tr>
<td>But: Distortions and fiscal externalities</td>
</tr>
<tr>
<td>Financial services and mobile investments → <em>Harmful Tax Competition</em></td>
</tr>
</tbody>
</table>

**Establishing fiscal discipline** → Government efficiency and reduction of political distortions → Monopoly versus “lean state”, restriction of unbridled growth of the public sector and promotion of efficiency in the use of government finances → Taxes as price for benefits |
| Spontaneous approximation of laws |
| But: Marginal costs versus average costs → decrease of public investments? |
| “Cartelization” through tax harmonization |
Economic Distortions → Removal of economic distortions, but restriction of sovereignty of states → CIN and CEN

Lack of efficiency of allocation → Tax Competition might lead to a “Race to the Bottom” and massive limitation of the scope of state action (e.g., redistribution)

But: No empirical evidence, but rather modest corporate tax rates and broad tax base

International Equity → Transfer of tax bases to source countries (e.g., because of “ring fenced” tax preferences with low marginal costs) and “free riders” of the domestic welfare state

Individual Equity → Mobile versus less mobile taxpayers and shift of tax burden to less mobile taxpayers

But: Tax relief for business profits will eventually benefit employees
The Standard Model

- **Canonical theoretical economic models of tax competition**
  - If capital is perfectly mobile between many jurisdictions, the post-tax rate of return earned on capital must be equated between jurisdictions.
  - Any tax on capital levied within a jurisdiction will raise the required pre-tax rate of return and drive part of the capital stock elsewhere (spillover effect), which creates an additional cost to levying a source-based tax on capital.
  - Hence: As a result, the optimal tax rate is lower than it otherwise would be (if any), and might lead to an under-provision of public goods (in an extreme analysis: move to residence-based tax). → EU
Empirical Evidence

- Development of taxes on corporate income in EU and G7 countries over the last two decades (Devereux, Griffith and Klemm, “Corporate Income Tax Reforms and International Tax Competition”, *Economic Policy* 17 (35), 449–495 (2002)):
  - Statutory tax rates fell.
  - Tax bases were broadened, particularly during the 1980s (e.g., by reducing the depreciation allowances for capital expenditure, resulting in increased tax bases).
  - Effective tax rates, which capture the impact of the tax rate and base on the return from an investment, fell for profitable projects, but remained fairly stable for projects that just break even or make low profits.
  - Tax revenues from corporate income have remained broadly stable as a proportion of GDP since 1965.
  - Tax revenues from corporate income have declined as a proportion of total tax revenue since 1965, but have remained relatively stable since 1980.
Overview

OECD


Also:


EU

- Communication “Towards tax co-ordination in the European Union – A package to tackle harmful tax competition”, COM(97)495 final and COM(97)564 final
- Package:
  - Savings Directive
  - Interest and Royalty Directive

Also:

- Communication on “Community Action to Combat International Tax Evasion and Avoidance”, COM(84)603 final
## Scope

<table>
<thead>
<tr>
<th>OECD</th>
<th>EU</th>
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<tbody>
<tr>
<td>- Criteria to identify harmful preferential regimes</td>
<td>- Criteria to identify harmful preferential regimes</td>
</tr>
<tr>
<td>- Limited to financial and other service activities</td>
<td>- Business activities in general (emphasis on mobile activities)</td>
</tr>
<tr>
<td>- Broad geographical grouping</td>
<td>- Code of Conduct is part of a “package” of measures</td>
</tr>
<tr>
<td>- Focus on exchange of information</td>
<td></td>
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<tr>
<td>- OECD Guidelines are accompanied by 19 Recommendations</td>
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</table>
### Policy Considerations

<table>
<thead>
<tr>
<th>OECD</th>
<th>EU</th>
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<tbody>
<tr>
<td>Positive impact of globalization on taxation (less distortions, government spending, “fiscal climate”, reduction of tax barriers)</td>
<td>Welcomes tax competition “as a means of benefiting citizens and of imposing downward pressure on government spending”</td>
</tr>
<tr>
<td>But: Preferential regimes may cause harm by</td>
<td>But: Unrestrained competition for mobile factors</td>
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<tr>
<td>- distorting financial and, indirectly, real investment flows;</td>
<td>- can bias tax systems against employment;</td>
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<td>- undermining the integrity and fairness of tax structures;</td>
<td>- can make an orderly and structured reduction in the overall tax burden more difficult;</td>
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<td>- discouraging compliance by all taxpayers;</td>
<td>- reduces the room for manouvre to meet Community objectives (e.g., protection of the environment);</td>
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<td>- re-shaping the desired level and mix of taxes and public spending;</td>
<td>- can hamper efforts to reduce budget deficits (necessary to comply with the Maastricht criteria and the Stability and Growth Pact);</td>
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<tr>
<td>- causing undesired shifts of part of the tax burden to less mobile tax bases, such as labour, property and consumption; and</td>
<td>- can, in an integrated market without co-ordination, put increasing constraints on Member States’ freedom to choose the appropriate tax structure</td>
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</table>
| - increasing the administrative costs and compliance burdens on tax authorities and taxpayers. | }
“Harmful” Tax Competition

<table>
<thead>
<tr>
<th>OECD</th>
<th>EU</th>
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<tbody>
<tr>
<td><strong>Preferential Tax Regimes</strong></td>
<td>Tax measures that provide for a significantly lower effective level of taxation than those levels which generally apply in the Member State in question are regarded as potentially harmful.</td>
</tr>
<tr>
<td>- Low or no taxes on the relevant income (from geographically mobile financial and other service activities);</td>
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<tr>
<td>- regime lacks transparency;</td>
<td></td>
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<td>- no effective exchange of information with respect to the regime;</td>
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<tr>
<td>- regime is ring-fenced from the domestic economy, especially</td>
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<td>- regimes that restrict benefits to non-residents;</td>
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<tr>
<td>- regimes that deny access to domestic markets.</td>
<td></td>
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<tr>
<td>- Additionally:</td>
<td></td>
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<tr>
<td>- Artificial definition of the tax base;</td>
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<td>- failure to adhere to international transfer pricing principles;</td>
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<td>- foreign source income is exempt from tax;</td>
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<td>- negotiable tax rate or tax base;</td>
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<td>- existence of secrecy provisions;</td>
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<tr>
<td>- access to a wide network of tax treaties</td>
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<tr>
<td>- regimes are promoted as tax minimization vehicles;</td>
<td></td>
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<tr>
<td>- regime encourages purely tax-driven operations or arrangements</td>
<td></td>
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<tr>
<td>Other factors:</td>
<td></td>
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<tr>
<td>- Advantages are accorded only to non-residents or in respect of transactions carried out with non-residents;</td>
<td></td>
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<tr>
<td>- advantages are ring-fenced from the domestic market;</td>
<td></td>
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<tr>
<td>- advantages are granted even without any real economic activity and substantial economic presence;</td>
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<tr>
<td>- profit determination departs from internationally accepted standards;</td>
<td></td>
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<tr>
<td>- tax measure lacks transparency.</td>
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</tbody>
</table>
# Measures and Outlook

<table>
<thead>
<tr>
<th>OECD</th>
<th>EU</th>
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<tbody>
<tr>
<td><strong>19 Recommendations</strong></td>
<td><strong>Code of Conduct is part of the “Tax Package”</strong></td>
</tr>
<tr>
<td>- concerning <strong>domestic legislation</strong> (CFC rules, foreign investment</td>
<td>- <strong>Standstill and Rollback</strong></td>
</tr>
<tr>
<td>ruling practice, transfer pricing standards, access to banking</td>
<td>- <strong>State Aid</strong> - Commission Notice on the application of the State</td>
</tr>
<tr>
<td>information)</td>
<td>aid rules to measures relating to direct business taxation, 1998</td>
</tr>
<tr>
<td>- concerning <strong>tax treaties</strong> (exchange of information, entitlement</td>
<td>O.J. C 384/, 3 (Dec. 10, 1998)</td>
</tr>
<tr>
<td>to benefits, status of domestic anti-abuse rules, “exclusion” list</td>
<td></td>
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<tr>
<td>no treaties with tax havens, co-ordinated enforcement, recovery</td>
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<td>of tax claims)</td>
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<tr>
<td>- for <strong>intensification of international cooperation</strong> (Forum,</td>
<td></td>
</tr>
<tr>
<td>standstill and rollback, list of tax havens, links with tax</td>
<td></td>
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<tr>
<td>havens, “Principles of Good Tax Administration”, associating</td>
<td></td>
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<tr>
<td>non-member countries)</td>
<td></td>
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<tr>
<td>- 33 “committed jurisdictions” and OECD countries work together to</td>
<td></td>
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<tr>
<td>develop the international standards for transparency and effective</td>
<td></td>
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<tr>
<td>exchange of information in tax matters → “Model Agreement on</td>
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<tr>
<td>Information Exchange on Tax Matters”</td>
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<tr>
<td>- Global level playing field in the areas of transparency and</td>
<td></td>
</tr>
<tr>
<td>effective exchange of information in tax matters</td>
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</tbody>
</table>
"Abuse" and Countermeasures


- **CFC-Legislation** → ECJ, 12 September 2006, C-196/04, *Cadbury Schweppes*, and Requests for Preliminary Rulings in C-201/05, *CFC and Dividend Group Litigation*, and C-203/05, *Vodafone 2*

- **Switch Over** → ECJ, 6 December 2007, C-298/05, *Columbus Container Services*

- **Treaty Shopping**
  - GAARs
  - **Limitation on Benefits** → ECJ, 12 December 2006, C-374/04, *ACT Group Litigation*
Thin Capitalization I


Diagram:

- LT BV
- LH BV
- LH

Loan

Netherlands

Germany

Reclassification of Interest Payments
Thin Capitalization II

ECJ, 13 March 2007, C-524/04, *Thin Cap Group Litigation*

**Lafarge SA**

**Financerie Larfage**

**Lafarge Building**

Reclassification of Interest into Dividend Payments

Loan for Financing an Acquisition

France

UK
CFC Legislation

ECJ, 12 September 2006, C-196/04, *Cadbury Schweppes*

![Diagram showing relationships between UK CFC Legislation, Cadbury Schweppes, Cadbury Schweppes Overseas, CSTS, and CSTI. International Financial Services Center (IFSC) Tax Rate @ 10% to Ireland and UK.](image)
Switch Over and Outbound-Most-Favored Nation Treatment under Treaty Law — ECJ, 6 December 2007, C-298/05, *Columbus Container Services*

Switch-over from exemption to foreign tax credit method if foreign permanent establishment is lowly taxed and earns passive income (treaty override)

<table>
<thead>
<tr>
<th>Situation 1: DTC-Exemption</th>
<th>Situation 2: Switch Over to Credit Method</th>
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</thead>
<tbody>
<tr>
<td><strong>Belgian Tax Base</strong></td>
<td><strong>German Tax Base</strong></td>
</tr>
<tr>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td><strong>CIT in Belgium (e.g., 10%)</strong></td>
<td>(10)</td>
</tr>
<tr>
<td><strong>German Tax Base</strong></td>
<td>100</td>
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<tr>
<td><strong>Income Tax in Germany (25%)</strong></td>
<td>(25)</td>
</tr>
<tr>
<td><strong>Credit</strong></td>
<td>10</td>
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<tr>
<td><strong>Tax Burden in Germany</strong></td>
<td>25</td>
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<tr>
<td><strong>Overall Tax Burden</strong></td>
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</tbody>
</table>
Treaty Shopping

GAAR and Treaty Shopping

DTC @ 0%

DTC @ 10%

DTC @ 0%

Dividend

UK

Netherlands

Austria
**Limitation on Benefits**

No Prohibition of *Limitation on Benefits-Clauses* → ECJ, 12 December 2006, C-374/04, *ACT Group Litigation* → What happened to *Open Skies*?

<table>
<thead>
<tr>
<th>NL-Company Variante 1</th>
<th>NL-Company Variante 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dividend</td>
<td>100</td>
</tr>
<tr>
<td>+ UK Credit</td>
<td>5.5</td>
</tr>
<tr>
<td>= DTC Payment</td>
<td>0.27</td>
</tr>
<tr>
<td>= Net</td>
<td>100.27</td>
</tr>
</tbody>
</table>

| Dividend              | 100                   |
| + UK Credit           | —                     |
| = DTC Payment         | —                     |
| = Net                 | 100.00                |

*Limitation on Benefits* => *Ownership-Test and Derivative Benefits*

Dividend
Part VII
Links
Important Weblinks

- Gateway to the European Union — http://europa.eu/