

European Tax Law

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**European Tax Law:
From Directives' Harmonization
to ECJ Cases and Decisions**



“The Role Of ECJ Decisions”

Means of Tax Integration

- Positive integration:
 - Harmonization: enactment of common rules at EU level, i.e. adoption of secondary law (mainly directives) limited in taxation due to unanimity requirement
 - Coordination: making the divergent direct tax systems compatible with each other in order to mitigate obstacles to the freedoms
- Negative integration:
 - Based on general prohibitions laid down in primary law (fundamental freedoms and State aid), the Court disallows the application of national tax measures incompatible with these prohibitions



“A Sum Up of Tax Relevant Directives”

Harmonization in the Field of Direct Taxation

- Directives on substantive matters:
 - Parent - Subsidiary Directive (1990), major amendments in 2014, 2015
 - Merger Directive (1990)
 - Interest & Royalties Directive (2003)
 - Anti-Tax Avoidance Directive (2016)
- Directives of procedural nature:
 - Directive on Administrative Cooperation (2011) (DAC), **six amendments** till 2018
 - Directive on Recovery of Tax Claims (2010)
 - Arbitration Convention on elimination of double taxation arising from transfer pricing adjustments (1990)
 - Directive on Tax Dispute Resolution (2017)



“THE COURT OF JUSTICE IN DIRECT TAX CASES”

- “Although, as Community law stands at present, **direct taxation does not as such fall within the purview of the Community**, the powers retained by the MSs **must nevertheless be exercised consistently with Community law** and therefore avoid any overt or covert discrimination on grounds of nationality.” (C-279/93 *Schumacker*, para. 21; C-307/97 *Saint Gobain*, para. 57; C-446/03 *Marks & Spencer*, para. 29)



“THE ECJ Decisions in Direct Tax Cases”

- First direct tax case decided in 1986, French case *Avoir Fiscal* (Case 270/83) based on an infringement procedure by the EU Commission
- Cases on direct tax measures gradually increased, peak in 2007-2008 (around 25 cases per year), since then fell back again
- In the initial phase decisions were always favourable to the taxpayer, around 2005-2006 the trend has started to change, now the outcome is more balanced but not fully predictable



“THE ECJ Procedures in Tax Cases”

- Preliminary ruling procedure (Art. 267 TFEU)
 - national courts refer questions to the CJEU on:
 - interpretation of the Treaties fundamental freedoms
 - interpretation and validity of the acts of the Union institutions
direct tax directives

- Infringement procedure (Art. 258 TFEU)
 - EU Commission starts the procedure against a Member State, if the matter is not resolved between the Commission and the MS:
 - Commission refers the case to the CJEU



“THE ECJ Procedures in Tax Cases- 4 STEPS ANALYSIS”

1) Scope

- does the situation fall within the scope of one of the freedoms?

2) Restriction

- does the national tax measure cause a restriction on the applicable freedom by treating cross-border situations less favourably than comparable domestic ones; i.e. is there a discrimination at hand?

3) Justification

- can the restriction be justified by overriding reasons in the public interest?

4) Proportionality

- is the restriction proportionate to the aim pursued by the national measure?

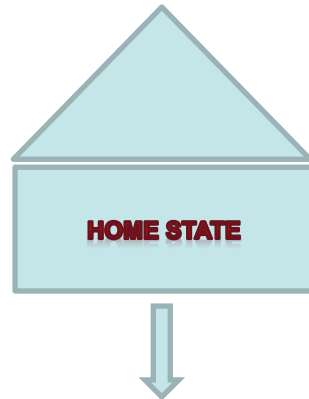


“DISCRIMINATION”

- In matters of direct taxation discrimination analysis:
 - are situations which are objectively comparable treated differently (or situations which are different treated in the same way)?
- Difference in treatment based on:
 - nationality: overt/direct discrimination: rare in direct tax matters
 - criteria other than nationality which leads *de facto* to the same result, e.g. residence: covert/indirect discrimination: predominant in direct tax matters, however, the Court regularly uses the term “restriction” in these cases thus, it does not have to check whether the criterion of differentiation leads in most cases or in the majority of cases to the same result as nationality-based differentiation
 - in practice, the question is whether a situation with a cross-border element is treated less favourably than a similar domestic situation
- Comparability analysis:
 - most unpredictable and source of most uncertainty

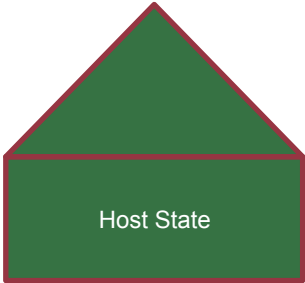


“HOME STATE vs HOST STATE RESTRICTIONS”



In case of outbound movements, the MS of origin cannot treat a national/resident that exercises their right of free movement less favourably than those nationals/residents who do not exercise such a right

in case of inbound movements to a MS, the MS must grant “national treatment”, i.e. cannot treat the non-national/non-resident in its territory less favourably than its own nationals/residents





“JUSTIFICATION GROUNDS”

- Based on Treaty:
 - public policy, public security, public health – not relevant in matters of direct taxation
- Based on Court’s case law, rule of reason test:
 - public interest justification (mandatory or overriding reasons in the public interest”)
 - coherence (cohesion) of the tax system
 - balanced allocation of taxing rights
 - effectiveness of fiscal supervision
 - prevention of tax avoidance



“PROPORTIONALITY”

- Suitability
 - Is it a suitable/appropriate measure to achieve the aim pursued?
- Necessity
 - Does it go beyond what is necessary to achieve the aim pursued, i.e. is there a less restrictive measure to achieve the same result?
- (*stricto sensu* proportionality)
 - Weighing the restriction caused against the benefits achieved



“THE ECJ Procedures in Tax Cases”

- Prohibiting any discrimination on grounds of nationality, Art. 18 TFEU
 - Right of Union citizens to move and reside freely within the Union, Art. 21 TFEU
 - Free movement of **goods**, Art. 30, 34, 35 TFEU
 - Free movement of workers, Art. 45 TFEU
 - Freedom of establishment, Art. 49 TFEU
 - Freedom to provide **services**, Art. 56 TFEU
 - Free movement of **capital** and payments, Art. 63
- } **persons**



“Free movement of workers”

Bel



residence

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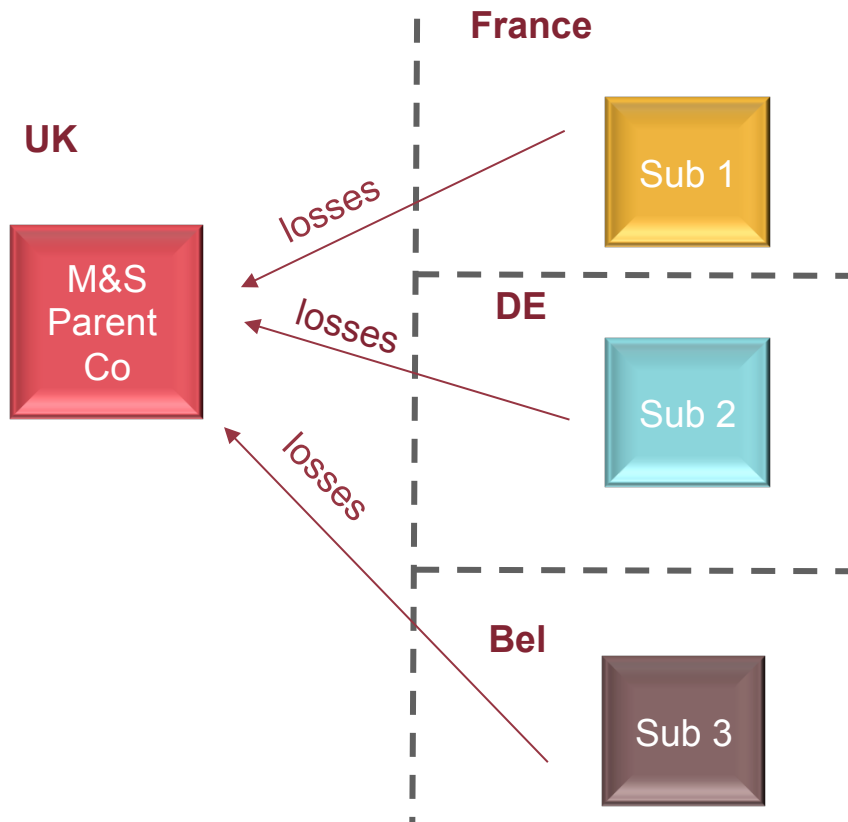
Schumacker (C-279/93)

Personal deductions?

employment



“Freedom of Establishment”

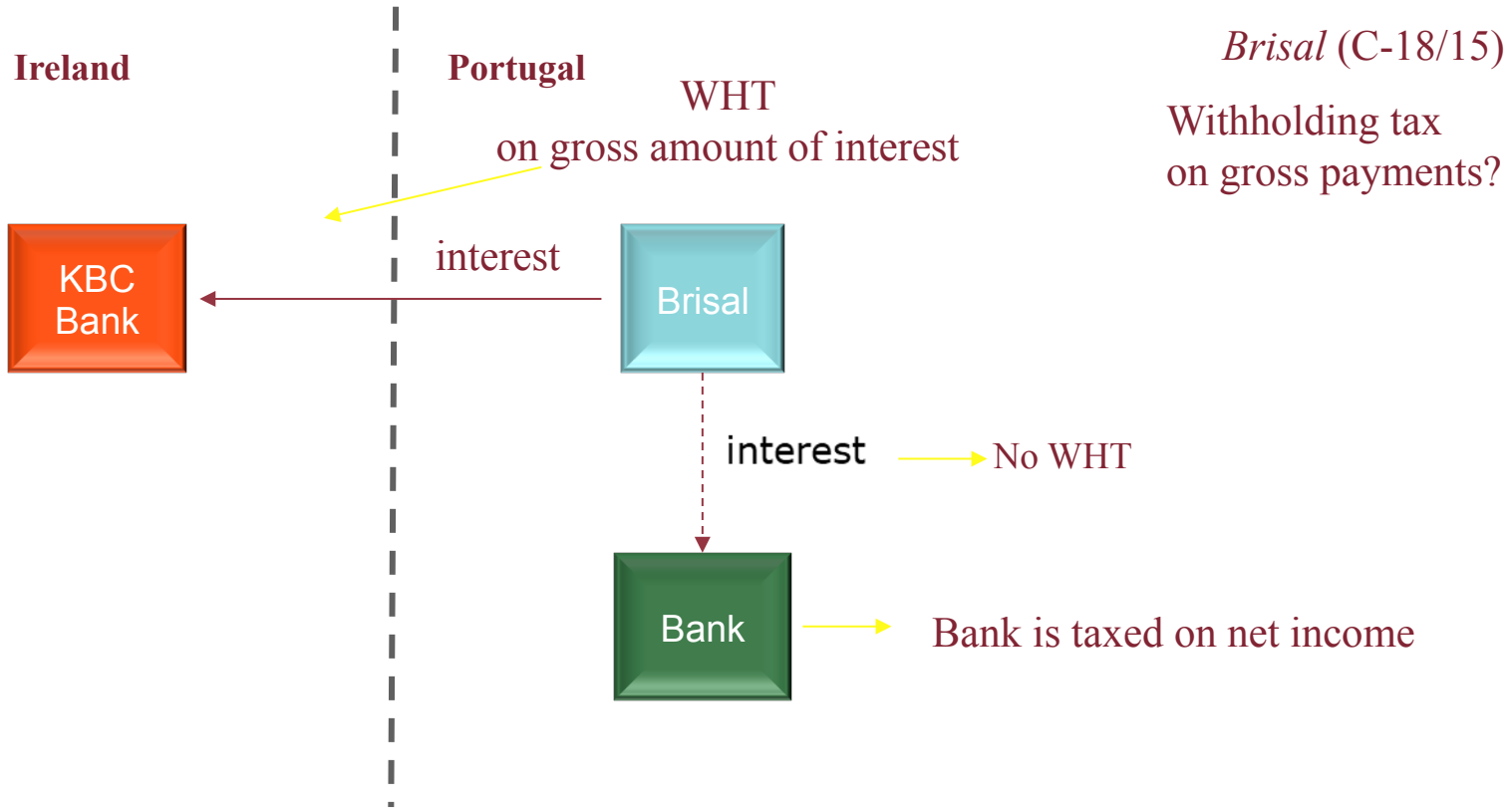


Marks & Spencer (C-446/03)

Group taxation:
cross-border offset of losses?

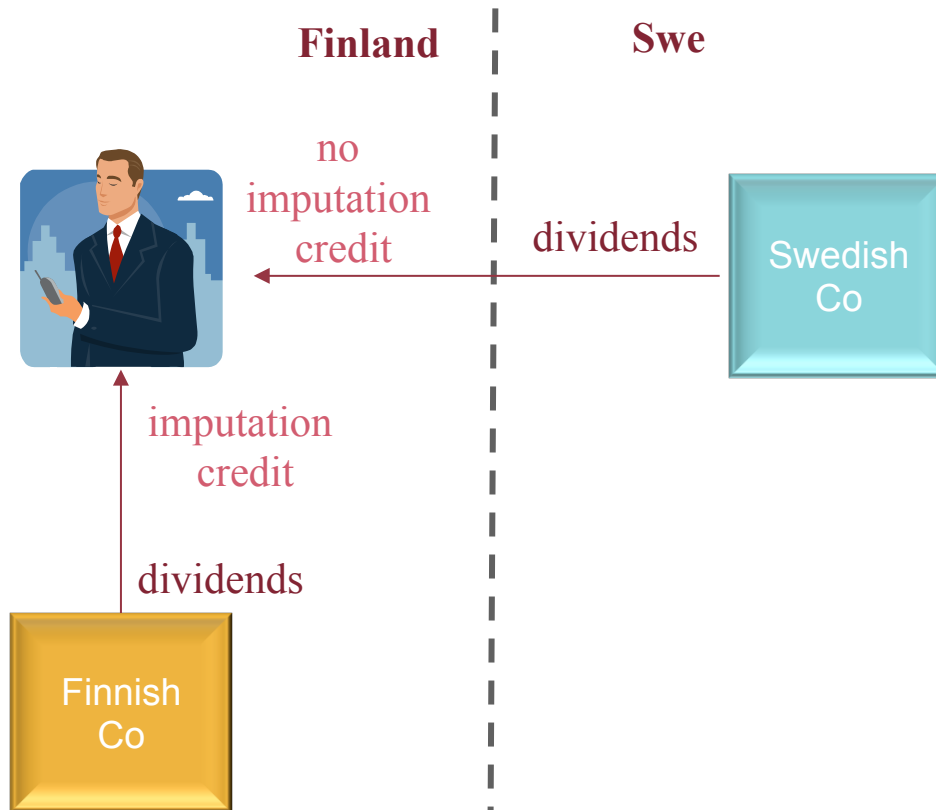


“Freedom to Provide Services”





“Free Movement of Capital”



Manninen (C-319/02)

Relief of economic double taxation on foreign-source dividends?