Faculty of Law, Business & Social Sciences

Double taxation and double non-deductibility of losses – impediments to the freedom of establishment. An analysis of the regulations and practices in the UK and Poland

by

Natalia Wojtyla

Submitted in fulfilment of the requirements for the
Degree of Philosophy in Law
(PhD in Law)

School of Law
University of Glasgow
October 2016

Table of Contents

ABSTRACT

This thesis addresses the question of the implementation of the freedom of establishment (Article 49 Treaty on the Functioning of the European Union) in two EU member states with particular emphasis on impediments to the freedom. It is argued that despite a very long-standing and clear legal prohibition on restrictions to the freedom of establishment, there remain many practical obstacles which inhibit the right. This thesis' hypothesis is that double taxation and double non-deductibility of losses constitute hurdles to a complete freedom of establishment.

As far as the methodology is concerned the approach chosen to test the hypothesis is as follows: first to set out a theoretical framework based on the non-discrimination principle, the basic principles of the freedom of establishment right and the exemptions to that right. Then, right of freedom of establishment is tested as against the practice in three ways, each considered in a chapter: the requirement of the nationality prerequisite; the double taxation of companies operating in more than one EU member state; and the practice of double non-deductibility of losses.

The research is inspired by the case study of an author's businesses, SMEs who trade cross-border in the United Kingdom (UK) and subsequently in Poland. From a study of the implementation practices of both the UK and Poland this thesis suggests that the following form serious restrictions: double taxation and non-deductibility of losses. Moreover, case law and existing literature identify taxation as a core impediment to the exercise of the freedom of establishment as taxation matters deter companies from relocating their whole business.

This thesis examines how to balance the freedom of establishment and the tax powers of the EU member states. Taxation also plays a fundamental role in the development of the EU's internal market. The thesis seeks a pragmatic solution which might be implemented effectively without resorting to substantial international harmonization.

LIST OF FIGURES

ACKNOWLEDGEMENTS

I would like to extend thanks to the many people, in both in Scotland and Poland, who so generously contributed to the work presented in this thesis.

Special mention goes to my enthusiastic supervisors Rosa Greaves, Marco Goldoni, Noreen Burrows and Maria Fletcher. My PhD has been an amazing experience and I thank Rosa wholeheartedly, not only for his tremendous academic support but also for being so patient.

I am also hugely appreciative to Kay Munro, who has been a truly dedicated librarian.

Special mention goes to Esin Örücü, Susan Holmes, Jerzy Pisulinski, Jerzy Serwacki and Agnieszka Puchala.

Finally, but by no means least, thanks go to my husband, for almost unbelievable support and to my children, who shared their mum with so many duties. They are the most important people in my world and I dedicate this thesis to them.

AUTHOR'S DECLARATION

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

NATALIA WOJTYLA

CHAPTER 1: INTRODUCTION

1.1 The thesis

Freedom of establishment is a fundamental freedom of the European Union (EU).[1] It forms one of four strands of the freedoms of the Internal Market.[2] From a superficial perspective it might seem that all EU member states respect the basic requirement to remove all restrictions. However, national practices and provisions of EU member states regarding rules of the establishment vary significantly and some barriers to the freedom of establishment remain. This thesis' hypothesis is that double taxation and double non-deductibility of losses constitute hurdles to a complete freedom of establishment.

The removal of double taxation and high compliance costs would improve market access. Currently, there are 28 different corporate tax systems and both double taxation and double non-deductibility hinder the freedom of establishment. Taxation is identified as a core impediment to the freedom of establishment.[3] The thesis seeks to balance the freedom of establishment and the tax powers of EU member states. Taxation also plays a fundamental role in the development of the Internal Market but the EU has limited competence in the field of taxation. The thesis examines whether there is a solution to eliminate the identified main tax obstacles without resorting to substantial international harmonization. Some solutions have been already proposed by the Commission but they have not been accepted as they are either politically difficult to achieve or ineffective to address adequately the systemic issues related to the principle of freedom of establishment.

In addition, the thesis focuses on SMEs although most of the reasoning holds true also for larger companies. It is noted that SMEs comprise 99.8 per cent of all

[1] Article 49 Treaty on the Functioning of the European Union – TFEU Consolidated version of the Treaty on the Functioning of the European 2012/C 326/01 Union Official Journal C 326 , 26/10/2012 P. 0001 – 0390.

[2] Free Movement of Goods, Freedom of movement for workers, Freedom of establishment and freedom to provide services and Freedom of movement of capital.

[3] See chapters 4 and 5.

undertakings in the EU and that SMEs have a special protection status in the EU.[4] Yet only about 5 per cent operate across borders.[5]

There has been much written on the general topic of freedom of establishment and on the obstacles to the exercise of the freedom.[6] The originality of this thesis, however, lies in the hypothesis and in the approach taken to establish the hypothesis, namely: the distinction between inbound and outbound cases to explain the case law of the European Court of Justice (CJEU) the distinction made between permanent establishment and subsidiary; the comparison between United Kingdom (UK) and Polish relevant national taxation provisions; and the focus of the examination on the *Krankenheim* case[7] and on the Commission's reform proposals.[8]

---

[4] Proposals for reform of the Second, Fourth, Seventh, Eighth Directives: Proposal for a Directive of European Parliament and of the Council amending Council Directive 77/91, as regards the formation of public limited liability companies and the maintenance and alteration of their capital, September 21, 2004, COM (2004) 730 final; Proposal for a Directive of European Parliament and of the Council amending Council Directives 78/660 and 83/349 concerning the annual accounts of certain types of companies and consolidated accounts, October 27, 2004, COM (2004) 725 final; Proposal for a Directive of European Parliament and of the Council on statutory audit of annual accounts and consolidated accounts and amending Council Directives 78/660 and 83/349, COM (2004) 177 final.

[5] Enterprise and Industry – European Commission 'Betting on Small Enterprises. Europe is good for SMEs. SMEs are good for Europe [Komisja Europejska Przedsiębiorstwa i Przemysł 'Stawiając na Małe Firmy. Europa jest dobra dla MŚP. MŚP jest dobre dla Europy] [2008] https://www.google.pl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjlzcCDhcnSAhXlIJoKHRMvA3kQFggaMAA&url=http%3A%2F%2Fbookshop.europa.eu%2Fpl%2Fstawiaj-c-na-ma-e-firmy-pbNB3008452%2Fdownloads%2FNB-30-08-452-PL-C%2FNB3008452PLC_002.pdf%3Bpgid%3Dy8dIS7GUWMdSR0EAlMEUUsWb0000LnLCF94W%3Bsid%3DCOoaYZppewsaY8sPgqOExvhMqilmMZ26Djk%3D%3FFileName%3DNB3008452PLC_002.pdf%26SKU%3DNB3008452PLC_PDF%26CatalogueNumber%3DNB-30-08-452-PL-C&usg=AFQjCNH2Bjkggq95ZuSCiTToIAsOVp424Q&bvm=bv.149093890,d.bGg&cad=rja .

[6] Barnard Catherine 'The substantive law of the EU. The Four Freedom' (Oxford, Oxford University Press 2010); Borg-Barthet 'Justin the Governing Law of Companies in EU Law' (Oxford, Hart Publishing; Chalmers Damian, Davies Gareth, Monti Giorgio 'European Union Law' (Cambridge, Cambridge University Press, 2012); Paschalidis Paschalis 'Freedom of establishment and private international law for corporations' (Oxford, Oxford University Press, 2012).

[7] Discussed in Chapter 5.

[8] Discussed in Chapter 6.

1.2 Methodology

As far as the methodology is concerned the approach chosen to test the hypothesis is as follows: first to set out a theoretical framework based on the non-discrimination principle, the basic principles of the freedom of establishment right and the exemptions to that right. Then, right of freedom of establishment is tested as against the practice in three ways, each considered in a chapter: the requirement of the nationality prerequisite; the double taxation of companies operating in more than one EU member state; and the practice of double non-deductibility of losses.

Two EU member states, the UK and Poland, were selected for testing the practice. The main reason for the choice of the UK and Poland for the comparison lies on their opposite theories of the concept of the 'nationality' of a company. The UK is an example of the incorporation theory, whereas Poland applies the real seat theory. Furthermore, the UK is sometimes referred to as the Delaware of the EU because the UK attracts the incorporation of many businesses as it offers a deregulated environment and lower taxation.[9] However, Poland is placed in 105th position in World Index of Business Freedom and it is even described as 'mostly unfree' by The Wall Street Journal and The Heritage Foundation.[10]

To conclude the thesis recommendations as to reforms are undertaken.

The research method adopted in the thesis is traditional black letter law approach. The research draws mainly on EU measures and CJEU case law as well

---

[9] 43 percent of Top European locations for new Inward Investment projects with HQ operations in 2012 were located in the UK, according to Financial Times Markets database; according to UNCTAD, 2011 the UK is a sixth largest trading nation in the world.
'With extensive air, rail, port and road networks, as a member of the EU, the UK provides ready market access to Europe. The UK also has a highly skilled workforce and four of the top ten universities in the world. In addition, the country has a world-class business infrastructure, with a legal system known for its clarity and ability to handle commercial disputes. English law is widely used in national contracts.' HM Government 'A guide to UK taxation' [2013]
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/183408/A_guide_to_UK_taxation.pdf .

[10] 'Bureaucracy still hinders entrepreneurial activity. Inconsistent application of the commercial code increases the cost of business formation and operation.' [2011] Index of Economic freedom.
http://www.heritage.org/Index/Country/Poland#business-freedom .

as relevant Polish and UK taxation provisions. Other sources include policy and advisory documentation from relevant national organizations and supporting academic literature.

A teleological method of interpretation has been applied to the legislation examined.[11] This means that the thesis seeks the 'true intent' of the law, its purpose.[12] The author envisages that a literal interpretation would not suffice to examine the issue in depth. EU Treaties are concluded in many different languages and all languages are on par with each other. Differences in translation may occur in different language versions of the same source.[13] A research based upon the literal interpretation might be neither complete nor clear. This approach is also supported by the Vienna Convention on the Law of the Treaties of 23rd May 1969.[14] The Convention gauges that a treaty shall be interpreted in its context and in the light of its object and purpose.[15] Moreover, the CJEU also applies the teleological method of interpretation.[16]

The principle of the freedom of establishment provides that restrictions on freedom of establishment of nationals of an EU member state in the territory of

---

[11] Murray, John. Report of Mr. Justice John L. Murray President of the Supreme Court and Chief Justice of Ireland. Methods of Interpretation – Comparative Law Methods http://www.google.pl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&sqi=2&ved=0CFYQFjAE&url=http%3A%2F%2Fcuria.europa.eu%2Fcommon%2Fdpi%2Fcol_murray.pdf&ei=NhwvUo2bI8motAbljoH4CQ&usg=AFQjCNHLqG2GSglA7s2gxyhLt6fnGMRPuA&bvm=bv.51773540,d.bGE&cad=rja .

[12] Stawecki, Tomasz, Winczorek Piotr 'Wstęp do prawoznawstwa'[The introduction to Jurisprudence] (Warszawa, Beck, 2014).

[13] Monsenego, Jérôme. 'Taxation of Foreign Business Income within European Internal Market' (Göteborg, Intellecta Infolog, 2011) p.46.

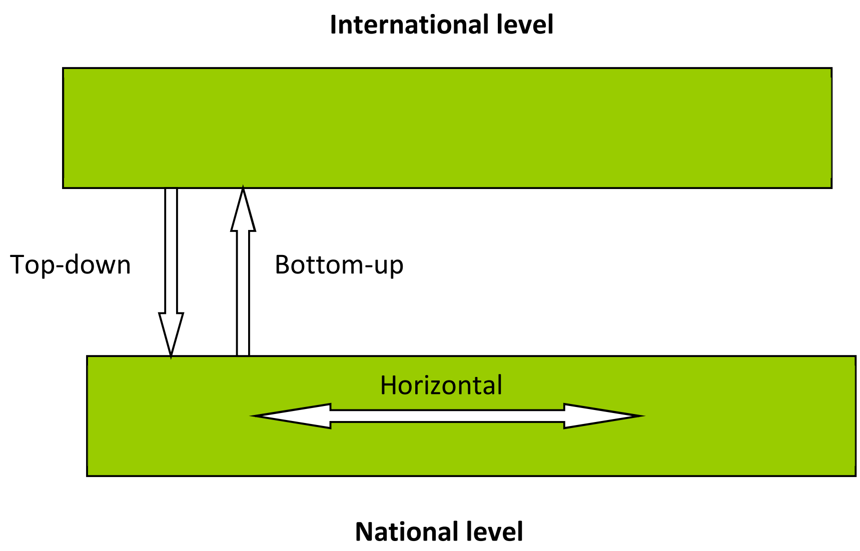
[14] Vienna Convention on the Law of the Treaties of 23 May 1969 United Nation.

[15] Article 31 of the Vienna Convention on the Law of the Treaties of 23 May 1969 United Nation.

[16] Murray John 'Report of Mr. Justice John L. Murray President of the Supreme Court and Chief Justice of Ireland. Methods of Interpretation – Comparative Law Methods' http://www.google.pl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&sqi=2&ved=0CFYQFjAE&url=http%3A%2F%2Fcuria.europa.eu%2Fcommon%2Fdpi%2Fcol_murray.pdf&ei=NhwvUo2bI8motAbljoH4CQ&usg=AFQjCNHLqG2GSglA7s2gxyhLt6fnGMRPuA&bvm=bv.51773540,d.bGE&cad=rja ; C-70/09 *Hengartner and Gasser* [2010] par. 36.

another member state shall be prohibited.[17] As a consequence, the freedom of establishment is mainly based on negative integration. Negative integration or negative harmonisation refers to the removal of tariffs, quantitative restrictions and other barriers to trade or obstacles to free and undistorted competition.[18]

There are three main types of comparisons which are applied in the comparative exercise of the tax provisions of the UK and Poland undertaken in the thesis.



Firstly, a traditional comparison, so-called horizontal, provides that national orders are compared one to another. Secondly, there are two types of vertical relations between international and national levels. A top down comparison provides answers to how member states implement EU law. A bottom-up comparison, in terms of this thesis, will examine how national law rules affect those of EU law. The main argument to support the proposition that national norms or rules may affect the principles on a supra-national level lies in the fact that the key legislator for the EU, the Council, is composed of representatives of national governments. Moreover, lawyers drafting EU law come from different national legal backgrounds with different experiences and these differences may influence

[17] Consolidated version of the Treaty on the Functioning of the European 2012/C 326/01 Union Official Journal C 326 , 26/10/2012 P. 0001 – 0390.

[18] Scharpf Fritz 'Governing in Europe: Effective and Democratic?' (Oxford, Oxford Scholarship Online, 2011) p. 4.

the final shape of EU legislation and the resulting case law. This possibility has not been widely discussed in the published literature. It is acknowledged that comparisons between legal orders are complex and that non-legal aspects on the freedom of establishment are important. However, the research undertaken for the thesis is limited to legal issues.

1.3 Motivation

The thesis was inspired by the practical difficulties experienced by a Small and Medium-sized Enterprise (SME),[19] with a primary establishment in Scotland (UK), when the SME decided to trade in both the UK and Poland. The SME sought to exercise the freedom of establishment by having a secondary establishment in Poland. The most severe hurdle experienced by SME was in relation to the national corporate taxation regimes of both countries. However, the choice of the field of taxation was not only of scientific interest but also due to the significant role of taxation and customs duties which have been reaffirmed by the Commission in the Lisbon Strategy Communication.[20]

[19] On 6 May 2003 the Commission adopted Recommendation 2003/361/EC regarding the SME definition, entering in force from 1 January 2005. It laid down criteria as below:

Enterprise category	Headcount	Turnover	OR	Balance sheet total
Medium-sized	< 250	≤ € 50 million	≤ € 43 million	
Small	< 50	≤ € 10 million	≤ € 10 million	
Micro	< 10	≤ € 2 million	.	

[20] Inter alia Communication to the Spring European Council - Working together for growth and jobs - A new start for the Lisbon Strategy - Communication from President Barroso in agreement with Vice-President Verheugen COM/2005/0024 final ‘Finally, in Europe, despite progress during the

1.4 Structure

In order to prove the hypothesis, the thesis focuses on five topics presented in five chapters. Chapter 2 sets out the theoretical framework with a particular emphasis on the principle of non-discrimination, the freedom of establishment and exemptions. Moreover, the chapter provides an analysis of direct and indirect discrimination in EU law with particular focus on legal persons. The chapter investigates whether a legal person can be directly discriminated and what are basis to establish direct discrimination on a company. It is stated that protected characteristics are not identical for natural and legal persons and only the criterion of 'nationality' is identified as a prerequisite for direct discrimination as far as legal persons are concerned. The chapter analyses what might serve as a 'nationality' criterion for a company.

Chapter 3 begins with the presentation of the most significant case law concerning the scope of the freedom. It is followed by a ramification of inbound and outbound cases depending on whether the restrictions are being imposed by the home or host EU member state. This ramification provides a possible justification for the decisions of the CJEU and establishes consistency in CJEU's line of rulings.

Chapter 4 examines double taxation as experienced by a legal person seeking permanent establishment and a subsidiary. Chapter 5 is dedicated to offsetting negative incomes generated by either subsidiaries or by permanent establishments. In particular, these chapters examine whether double taxation or offset losses (double non-deductibility of losses) are treated differently depending on whether they have been incurred by subsidiaries or by permanent establishments.

The notions of permanent establishment and subsidiary are defined in Chapter 4. This thesis refers to the notion of permanent establishment used by tax and corporate lawyers, closely defined, in particular, by Articles 5 and 7 of the model tax convention drawn up by the Organisation for Economic Cooperation and

---

first five years of Lisbon, there is still insufficient risk capital available to start up innovative young businesses and current tax rules discourage the retention of profits to build up equity.'

Development (OECD).[21] This definition has been recognised by the CJEU in a number of rulings.[22] Thus, Article 5 of the OECD model tax convention provides that the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried out. Contrary, a 'subsidiary' is a legally independent subdivision in another member state and constitutes a separate legal entity. OECD's Glossary of Industrial Organisation Economics and Competition Law provides that 'a subsidiary is a company controlled by another company and (...) *[a subsidiary]* is a corporation with its own charter and is not a division of the controlling company.'[23]

Chapters 4 and 5 inlay a particularity of national legal provisions in respect of double taxation and double non-deductibility of losses both in the UK and Poland. The current line of CJEU rulings is used as a comparative basis for the examination, in practice, of national legal provisions of the selected EU member states.

Chapter 6 reviews past and current law reform proposed by the European Commission in respect of corporate taxation. The chapter analyses the current reform initiative and suggests amendments to the current proposals which might limit efficiently this significant barrier to the freedom of establishment. Based on past proposals, the feasibility of new proposals is assessed.

The law is as it stands on 1st January 2016.

---

[21] Article 5 OECD model tax convention provides '1. For the purposes of this Convention, the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term 'permanent establishment' includes especially:

a) a place of management;

b) a branch;

c) an office;

d) a factory;

e) a workshop and

f) a mine, an oil or gas well, a quarry or any other place of extraction of natural
resources.'

[22] Inter alia C-336/96 *Gilly* [1998] ECR I-02793; C-414/06 *Lidl Belgium GmbH & Co KG v Finanzamt Heilbronn* [2008] ECR I-3601.

[23] Khemani Shyam 'OECD's Glossary of Industrial Organisation Economics and Competition Law' [1990] http://www.oecd.org/regreform/sectors/2376087.pdf .

CHAPTER 2: THE SCOPE OF THE FREEDOM OF ESTABLISHMENT IN THE EUROPEAN UNION – THEORETICAL FRAMEWORK

2.1 The Scope of the Freedom of Establishment in the European Union

The freedom of establishment can be exercised by primary or secondary establishments. Primary establishment describes a situation where a person decides to move a business to another member state; that is, a relocation of the primary establishment to another member state. Secondary establishment includes the creation of branches and subsidiaries in another member state, so the person has a business presence in two member states.

The freedom of establishment, understood as primary establishment, is embedded in the first sentence of Article 49 TFEU: 'restrictions on freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited (…).'[24] This holds true both for natural and legal persons. EU nationals benefit from the freedom of establishment as a natural person when working in another member state in a self-employment capacity.[25] In respect of legal persons, this includes setting up a new business and relocation of central management and control of a company to another member state. In the following sections of the thesis, the focus is mainly on legal persons and examines the relevant case law.

---

[24] Supra, Chapter 1 no. 1.

[25] C-143/87 *Stanton* [1988] ECR 3877.

2.2 Non-Discrimination Principle and the Freedom of Establishment

The principle of non-discrimination is a crucial principle of EU law.[26] First, it is expressly included in the Treaty.[27] Article 18 TFEU states, 'Within the scope of application of the Treaties and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'[28]

Secondly, Article 19 TFEU[29] provides that 'Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

As established by Article 19 TFEU, discrimination based on protected characteristics is widely stipulated in a number of directives[30] and in the Charter of Fundamental Rights of the European Union.[31] However, it is very unlikely that a company might be discriminated against based on most of the protected

---

[26] Ellis Evelyn, Watson Philippa 'EU Anti-Discrimination Law' (Oxford Scholarship Online, 2013) p.44; C-311/97 *Royal Bank of Scotland v Elliniko Dimosio (Greek State)* [1999] ECR I-2664 par. 22.

[27] Article 18, 19(1), 45(2) and 157(2) TFEU supra, no. 1.

[28] Supra, Chapter 1 no. 1.

[29] Supra, no. 1.

[30] Inter alia Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Directive), Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women as regards access to and supply of goods and services, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast Directive).

[31] Charter of Fundamental Rights of the European Union 2010/C 83/02.

characteristics such as disability, gender reassignment, sexual orientation, marriage, civil partnership, pregnancy and maternity, race, religion or belief or sex.[32]

Thus, only Article 18 TFEU is analysed,[33] in terms of the circumstances under which a company may be discriminated against based on nationality. This is a complex subject as a legal person does not have nationality *sensu stricte*. Therefore, it is highly controversial to state that a company is discriminated against on grounds of nationality.

It is shown in Chapter 3 that there are different types of links that could be applied to establishing the governing law of a company. There are two basic theories: the incorporation and the real seat theory. However, these theories are only examples;[34] each member state establishes its own criteria to link a company to its legal system.

The issue of nationality was widely debated at the beginning of the twentieth century.[35] It was argued that nationality for natural and legal persons does not have the same meaning and this can be demonstrated by illustrative examples.[36] The removal from the company registrar results in a status of ‘non-existence’ which is not the case for a natural person. As a consequence, there is no unique understanding of company ‘nationality’. Moreover, as it has already been observed, a company might become ‘apatride’ or ‘national’[37] of more than one member

[32] A direct discrimination can be observed in case of any protected characteristic. However, as mentioned, this study focuses on the discrimination of a company and nationality criteria constitute only one relevant element. Further details of direct discrimination based on the other protected characteristics can be found in the following: 'What's the difference? Direct and indirect discrimination?' [2013] Workplace Snippets, ACAS http://www.acas.org.uk/index.aspx?articleid=4614.

[33] Professor Nina Półtorak suggested that Article 18 is directed only to the EU institutions and does not apply to member states. Therefore, it cannot solely be the legal basis for an individual claim. Półtorak Nina ‘Zakres związania państw członkowskich Kartą Praw Podstawowych UE’ [author’s translation: The scope of application of the Charter of Fundamental Rights of the European Union] (2014, Europejski Przegląd Sądowy) p. 17.

[34] See section 3.1.

[35] Niboyet, Jaun. ‘Existe-t-il vraiment une Nationalité des Sociétés?’ [1927] Journal de droit international p.30.

[36] Paschalis Paschalidis ‘Freedom of establishment and private international law for corporations’ (Oxford, Oxford University Press, 2012) p. 73.

[37] Instead of 'nationality', the terms of 'incorporation', ‘registration', 'legal personality' or 'legal status' can be used. Arguably, these terms are not perfectly selected but this cannot be the case, as there are

state.[38] In *Überseering*,[39] the case which is analysed in Chapter 3.3.3, the company was 'quasi-national' of more than one member state.[40] In this landmark case, both The Netherlands and Germany claimed to be an appropriate state to govern the company. Arguably, the notion of nationality is not a useful tool to resolve a problem in a situation of double company 'nationality'.[41] According to German provisions, the company should be established in Germany and be granted 'German nationality', whereas The Netherlands perceived Überseering as a 'Dutch national'. Thus, the term 'nationality' is not helpful in deciding upon the rights of member states.[42]

Nonetheless, the notion of company 'nationality' is important for an undertaking and has great significance in the context of discrimination. In *Überseering*, the CJEU ruled that Germany could not deny legal personality to a company duly incorporated in another member state, unless it is justified by overriding public interest. In other words, by denying legal personality Überseering was being subject to discriminatory treatment.

The question as to whether a company can be directly discriminated against on grounds of nationality[43] has great significance.[44] The different criteria apply depending on whether the discrimination is direct or indirect.[45]

---

substantial differences between the nationality of a natural person and the 'quasi-nationality' of a company.

[38] See section 3.1.

[39] C–208/00 *Überseering BV v. Nordic Construction Company Baumanagement GmbH* [2002] ECR I–9919.

[40] See section 3.1. for detailed analysis.

[41] For an opposite view, see Feria Rita de la, Vogenauer Stefan 'Prohibition of Abuse of Law. A New General Principle of EU Law?' (Oxford, Studies of the Oxford Institute of European and Co, 2011) p. 337.

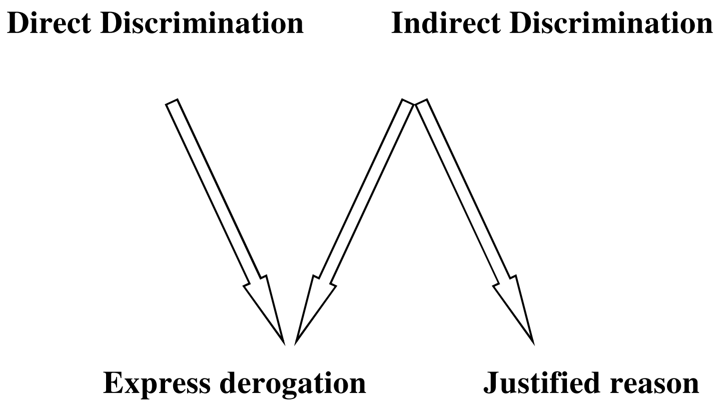
[42] For a detailed analysis of this case see 3.1.

[43] Forshaw Simon, Pilgerstorfer Marcus 'Direct and indirect discrimination: is there something in between?' [2008] Industrial Law Journal p. 348.

[44] Ibid., p. 347 Forshaw Simon and Pilgerstorfer Marcus distinguished 'quasi-direct discrimination' or establish a 'form of discrimination'; see also C-127/92 *Enderby v Frenchay Health Authority* [1993] ECR I-5535.

[45] Article 200.1 TFEU, supra, no. 1. This problem is also regulated in a number of secondary legislative measures: Council Directive 2000/42/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in

Figure 1. Direct and Indirect Discrimination.



It is noteworthy that this issue has not been the subject of the CJEU consideration.[46] Advocate General Léger has observed the Court does not inquire into whether the discrimination was direct or indirect. The Court states that there is a difference in treatment which creates a disadvantage for economic operators who have exercised the freedom of establishment and could deter them from exercising such rights.[47]

Consequently, the classification of direct and indirect discrimination is not widely discussed in the literature.

However, the problem has been identified by Sunberg-Weitman Brita[48] who based her remarks on Steindorf.[49] She suggested that the discrimination against a company is indicated by 'the crossing of the national framework.'[50] Thus, it is

employment and occupation; Council Directive 2004/113/EC of 13 December 2004 implementing men and women in the access to and supply of goods and services. It is also confirmed in Article 21 of the Charter of Fundamental Rights on the European Union OJ 2012/C 326/391.

[46] The notion of nationality was not mentioned in *Überseering*.

[47] Opinion of Advocate General Léger delivered on 2 May 2006 in C-196/05 *Cadbury Schweppes* [2006] ECR I-7995 par. 74.

[48] Sunberg-Weitman Brita 'Discrimination on grounds of nationality. Free movement of workers and freedom of establishment under the EEC Treaty' (Amsterdam, North-Holland Publishing Company 1977) p. 93.

[49] Stiendorf E. 'Der Gleichheitssatz im Wirtschaftrecht des Gemeinsamen Markets' [1965] Berlin.

[50] This approach is supported by Article 79 of the Treaty establishing the European Community Consolidated Version at OJ 2002/C 325/33 (EEC). The article provides that international discrimination against capital may be based on the place of residence of the owner or on the place where the capital is invested. Furthermore, Article 95 EEC stipulates that taxation may not be

submitted that a company can be discriminated against on the grounds of its nationality, even though the definition of nationality differs from the notion used for a natural person. It is surprising that there is no further research in this matter. If it is assumed that direct discrimination is based solely on nationality criteria *sensu stricte*, the right of companies would be significantly narrowed in comparison with natural persons.

It seems contradictory to Article 18 TFEU,[51] especially in the context of the wording of Article 54 which states that 'companies and firms' shall be treated in the same way as natural persons. Companies may be deprived of protection against direct discrimination, whereas a natural person benefits from it. However, the Treaty does not define nationality and avoids using the term 'nationality' in relation to companies. In this context, Steindorf is right in highlighting the difference in definition between a company's nationality and that of a natural person. However, the criterion of 'the crossing of the national framework' seems to be too wide. It may result in the assumption that any discrimination against a cross-border operating company is direct.

It is proposed linking the 'nationality' of a company to factors that connect it to a legal system. A member state is free to choose a factor which links a company to that state's legal system. As a result, it cannot be unambiguously defined company 'nationality'.[52] Nonetheless, it is also contended that a residence criterion cannot always serve as a substitute for the nationality of a company. If a company is governed by the incorporation theory, it can have its place of management outside the country of incorporation. However, it has no impact on the governing law applied. Even though a company moves its place of residence, it still has the

---

imposed on the products of other member states in excess of that imposed on similar domestic products. In addition, Article 67 EEC prohibits discrimination based on nationality, the place of residence of the parties or the place where such a capital is invested. However, all these provisions are not included in the TFEU.

[51] Sunberg-Weitman Brita 'Discrimination on grounds of nationality. Free movement of workers and freedom of establishment under the EEC Treaty' (Amsterdam, North-Holland Publishing Company, 1977) p.93.

[52] There are two main theories: real seat and incorporation. However, there is no state which applies either theory in its pure version.

‘nationality’ of a state of incorporation.[53] In the below section the factors which link a company to a legal system are examined to determine whether discrimination is direct or indirect.

2.2.1 Direct Discrimination

It has been established that a company may be directly discriminated against. The direct discrimination looks for a form, irrespective of the outcomes it creates. Nonetheless, direct discrimination can be overt or covert.[54] If a direct discriminatory treatment is observed, it can be allowed only by express derogation.[55]

First, expressed derogation to the freedom of establishment is rooted in Article 52 TFEU[56] which states:

‘the provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.’

There is no doubt that public policy, security and health are substantial values for a society. These terms are not expressly defined which leaves scope for different interpretations. Secondly, Article 52 TFEU, as a derogation to a fundamental freedom of the EU, is construed narrowly.[57]

---

[53] Additionally, Steindorf proposed a ‘crossing of the national framework’ would be equal to direct discrimination. Stiendorf E. ‘Der Gleichheitssatz im Wirtschaftrecht des Gemeinsamen Markets’ [1965] Berlin.

[54] An opposite and early ruling can be found in CJEU (C-43/75 *Second Defrenne* [1976] ECR 455). The Court wrongly concluded the difference between direct as overt and indirect as covert. It has been explained in 19/81 *Burton v British Railways Board* [1982] ECR 555. See also Ellis Evelyn, Watson Philippa ‘EU Anti-Discrimination Law’ (Oxford, Oxford Scholarship Online, 2013) p. 145.

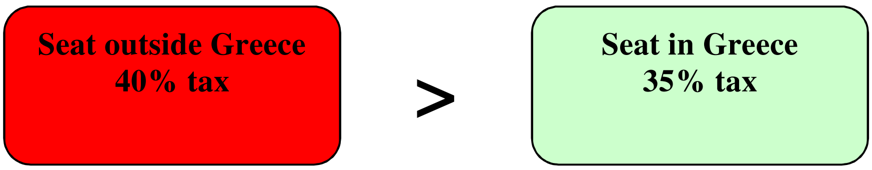
[55] C-177/88 *Dekker* 1990 ECR I-3941; C-129/79 *Wendy Smith* ECR I-1275; C-136/95 Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne *Thibault* ECR I-2011.

[56] Supra, Chapter 1 no. 1.

[57] Further discussion can be found in section 2.2.2. Four conditions besides being non-discriminatory must be met. The law in question must ‘1) have legitimate aim compatible with the Treaty, 2) they must be justified by imperative requirements of general interest, 3) they must be suitable for securing the attainment of the objective which they pursue, 4) they must not go beyond what is necessary in order to attain the objective in mind.’ Kiikeri Markku added that rules must be unique and not less

Indeed, the CJEU seldom allows national discriminatory measures to prevail. In *Royal Bank of Scotland,*[58] the Court considered whether Greece had entrenched discriminatory treatment. Greece had granted the possibility of a lower rate of tax only to domestic business. A company having its seat in another member state and carrying business in Greece was excluded from this advantage.[59] Indeed, Greek companies benefited from 35% taxation rate, whereas companies having their seat in another member state were subjected to a 40% tax.[60]

Figure 2 Royal Bank of Scotland.



The Court first ruled that direct taxation falls within the competence of member states but it must be exercised consistently in accordance with EU Law to avoid any discrimination 'on grounds of nationality.'[61] The CJEU reaffirmed that the non-discrimination principle constitutes one of the most fundamental provisions of EU law and it is directly applicable to the member states.[62] The Court highlighted that freedom of establishment provides for the right of a company or a firm formed in accordance with the law of a member state and having a seat, a registered office, a central administration or a principal place of business within the EU, to pursue an

---

restrictive measures already exist. Kiikeri Markku 'The Freedom of establishment in European Union.' Report to the Finnish Ministry of Trade and Industry, http://www.kiikerilaw.com/Sijoittautumistutkimus.englanti.pdf, p. 64.

[58] C-311/97 *Royal Bank of Scotland v Elliniko Dimosio (Greek State)* [1999] ECR I-2664.

[59] Ibid, par. 18.

[60] The corporate tax in Greece has been, since 2015, 29%. More information on current and historical corporate tax rates in Greece can be found in https://tradingeconomics.com/greece/corporate-tax-rate .

[61] Ibid, par.19. The Court based its decision on other prominent cases such as C-279/93 *Schumacker* [1995] I-225 par. 21, 26; C-80/94 *Wielockx* [1995] ECR I-2493 par. 16, C-107/94 *Asscher* [1996] ECR I-3089 par. 36 and the below examined case C-250/95 *Futura Participations and Singer* [1997] ECR-2471 par. 19.

[62] C-311/97 *Royal Bank of Scotland v Elliniko Dimosio (Greek State)* [1999] ECR I-2664 par. 22.

activity in any member state of the EU, including Greece, through a branch or an agency. The Greek code introduced a difference in treatment in the calculation of tax on the profits of companies depending on whether companies have their seat in or outside Greece. In particular, a Greek undertaking, in certain conditions relating to the legal form and the nature of shares issued, might be taxed at the rate of 35% instead of 40%.

The Court noted that there was a substantial difference in treatment between residents and non-residents undertakings arising from unlimited or limited tax liability.[63] However, in these circumstances, both residents and non-residents undertakings are in a similar situation.[64] The Court concluded that the Greek government failed to establish 'any distinction such as to justify a difference of treatment between the two categories of companies.'[65]

The CJEU stated clearly that any discrimination, on grounds of nationality, is prohibited.[66] and found that Greece discriminated against companies with their seat in another member state.[67] The Court expressly declared that this constitutes a direct discrimination which might be justified only by expressed derogation.[68]

A residence requirement is often perceived as an example of indirect discrimination.[69] However, Christa Tobler wisely observed that whether such discrimination should be seen as indirect depends on the legislative framework. Depending on the area, the differentiation ground of residence can give rise to either direct or indirect discrimination. The Treaty rules on free movement provide an

---

[63] Ibid, par. 29.

[64] Ibid, par. 30. The same solution was issued in C-270/83 *Commission v. France (tax credits)* [1986] ECR 273. The CJEU found that granting tax credit only to companies with their registered office in France was discriminatory.

[65] Ibid, par.28.

[66] Ibid, par.19.

[67] Ibid, par.30.

[68] Ibid, par. 32: 'it is necessary to examine whether discrimination such as that in question in the main proceeding may be justified. According to settled case-law, only an express derogating provision, such as Article 56 of the EC Treaty, could render such discrimination compatible with Community law' (see Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraphs 32 and 33 and Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others* [1991] ECR I-4007, par. 11).

[69] It can be observed in AG Jacobs Opinion 'discrimination on the basis of residence has been recurrent theme in the Court's case law as a form of indirect discrimination on grounds of nationality.' C-224/02 *Pusa* [2004] ECR I-5763.

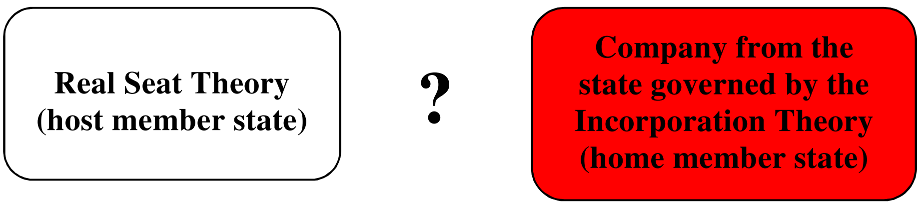
illustrative example. Thus, the relevance of a differentiation based on residence was obvious under the original rules on free movement of capital which prohibited 'any discrimination based on the nationality or on the place of residence of the parties or on the place.'[70]

The *Royal Bank of Scotland (RBS)* is a key example, in which a residence requirement works as 'nationality' for companies. In the analysed case, a seat in another member state was a criterion to tax a company or firm at a higher rate. As mentioned above,[71] there is a general acceptance that a company or firm might be directly discriminated against even though it does not possess 'nationality' *sensu stricte*. Moreover, Article 54 TFEU states that 'companies and firms' shall be treated in the same way as natural persons.

As already discussed, the consequences of establishing that a company could be discriminated against indirectly provide that the rights of companies or firms are not equal to those conferred on natural persons. To justify an indirectly discriminatory measure, it is sufficient to indicate a justified reason, whereas to justify a direct discrimination, it is necessary to rely on an express Treaty derogation. It is proposed, therefore, to examine whether discrimination is direct or indirect and whether it based on factors which link a company to a legal system.

Thus, it is necessary to determine whether the test will be applied to the governing law of a company exercising freedom of establishment (the member state of registration or the member state where the real seat is located) or the legal system of a host member state.

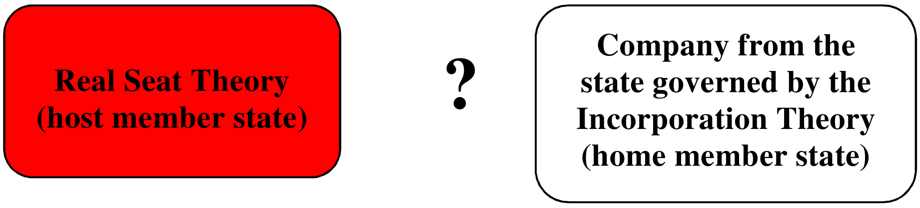
Figure 3. Indirect Discrimination – test applied to the governing law of a company exercising freedom of establishment.



[70] Tobler Christa 'Indirect Discrimination: A case study into the development of the legal concept of indirect discrimination under EC Law' (Antwerp - Oxford, Social Europe Series, 2005) p. 338.

[71] See section 2.2.

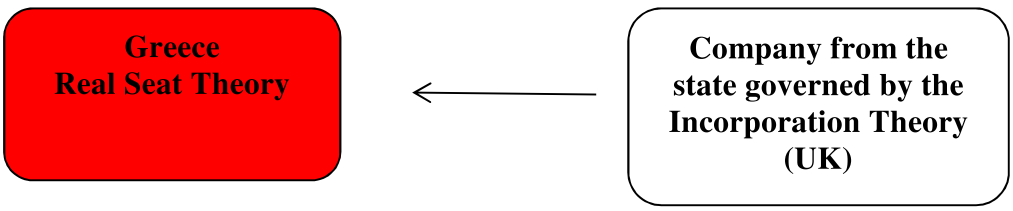
Figure 4. Direct Discrimination – test applied to legal system of the host member state.



In both cases discrimination might be observed but classified as direct or indirect depending on the legal system applied. This is observed based on the facts of the *Royal Bank of Scotland*. The company exercising freedom of establishment was established in the home state governed by the incorporation theory and it exercised the freedom of establishment in a state which adhered to the real seat theory.

It is argued that the legal system of a host member state should be applied to the test. In the examined case, this would be Greek law. Greece is governed by the real seat theory which links a company to the place of its seat. Moreover, the discrimination is based on the criterion of a company's seat. Accordingly, it is direct discrimination, because it is based on residence (seat) criterion and concerns a company governed by a real seat theory legal system. This is supported by the Court's decision in *Royal Bank of Scotland* that the discrimination was direct. Accordingly, the CJEU applied the test to the legal system of the host member state.

Figure 5. Direct discrimination in RBS.



In support of this view, only such a conclusion could ensure legal certainty. Otherwise, a host member state would need to examine the legal system of a company's state of origin and might not ensure that the criterion applied is used by another member state. In the analysed case, Greece used the same criterion (a seat) to link a company to its own legal system and, simultaneously, applied it as a criterion to differentiate the tax rate. As a result, the Court decided that the national provisions in question would be precluded.[72] The case underscores the difficulties with providing an all-purpose criterion for a direct discrimination for companies. Moreover, as discussed below, even in classic circumstances such as exercising official authority, the Treaty might be interpreted in a manner which limit discrimination.

The second express Treaty derogation states that the provisions of this Chapter shall not apply – so far as any given member state is concerned – to activities which in that state are connected, even occasionally, to the exercise of official authority.[73] The derogation must be interpreted 'in a manner which limits its scope to what is strictly necessary for safeguarding the interests which that provision allows the member states to protect.'[74]

A number of rulings might be cited here to demonstrate the Court's approach, indicating that the CJEU on very rare occasions found a derogation to be justified.[75] In *Commission v Belgium, Spain, France, Portugal, Austria, Luxembourg,*

---

[72] C-311/97 *Royal Bank of Scotland v Elliniko Dimosio (Greek State)* [1999] ECR I-2664 par. 34.

[73] Article 51 TFEU.

[74] C-114/97 *Commission v Spain* [1998] ECR I-6717, but also C–473/93 *Commission v Luxembourg* [1996] ECR I–3207.

[75] The Court has already decided that the following activities are not directly and specifically connected to the exercise of official authority: the profession of lawyer, the teaching profession or the running of private education centres, the operation of data-processing systems for public authorities, insurance auditors, technical inspection of vehicles, bets and lottery sales, private insurance, public ambulance services, or inspection bodies in the field of organic production of agricultural products. C-2/74 *Reyners* [1974] ECR 631; C-42/92 *Thijssen* [1993] ECR I-4047; C-114/97 *Commission v Spain* [1998] ECR I-6717; C-306/89 *Commission v Greece* [1991] ECR 5863; C-147/86 *Commission v Greece* [1988] ECR 1637; Case C-3/88 *Commission v Italy* [1989] ECR 4035; C-438/08 *Commission v Portugal* [2009] ECR I-5645; C-272/91 *Commission v Italy* [1994] ECR I-1409; C-114/97 *Commission v Spain* [1998] ECR I-6717; Case C-355/98 *Commission v Belgium* [2000] ECR I-1221; C-283/99 *Commission v Italy* [2001] ECR I-4363; C-465/05 *Commission v Italy* [2007] ECR I-11091; C-404/05 *Commission v Germany* [2007] ECR I-10239; C-393/05 *Commission v Austria* [2007] ECR I-10195; C-405/01 *Colegio de Oficiales de la Marina Mercante Española* [2003] ECR I-10391; C-55/93 *Van Schaik* [1994] ECR I-4837.

Germany, Greece,[76] member states had limited access to the profession of notary, stating that exercising this profession is connected to the exercise of an official authority. This case is relevant to determine whether a company can be directly discriminated against as the problem is addressed both to law firms and individuals providing notary services.[77]

The Court did not find that the profession of notary constitutes an exercise of the official authority. The main function of notaries is to provide a special status to documents, provisions and forms of conduct. Without the notaries' authorisation, it would be nothing more than a private will. Nevertheless, the CJEU did not find that any of the activities undertaken by notaries were connected to an official authority.[78]

It must be noted that the Commission was supported only by the United Kingdom and Northern Ireland. Other member states claimed the opposite. It is a characteristic of the UK that the profession of notary is associated with the profession of solicitor.[79] Moreover, the ruling recalls the earlier case, *Reyners*.[80] In *Reyners* the Court ruled that the profession of advocate (solicitor) is not considered as being one where there is inherent exercise of official authority. In continental Europe, the role of notary has a long-established tradition as a separate profession from that of solicitors mainly for exercising public authority duties.

In *Commission v Belgium, Spain, France, Portugal, Austria, Luxembourg, Germany, Greece* the interpretation was contrary to the view of the majority of member states.[81] The judgement has not yet been widely discussed. According to

---

[76] C-47/08 *Commission v Belgium, Spain, France, Portugal, Austria, Luxembourg, Germany, Greece* [2010] ECR I-4105.

[77] '(…) a notary may practise his profession on his own, in association with one or more established notaries who reside in the same judicial district, or within a professional partnership of notaries' C-47/08 *Commission v Belgium, Spain, France, Portugal, Austria, Luxembourg, Germany, Greece* [2010] ECR I-4105 par.11.

[78] To derogate from the right four conditions, have to be met: national measures have to be applied in a non-discriminatory manner; they must be 'justified by imperative requirements in the general interest; must be suitable for securing the attainment of the objective which they pursue and they must not go beyond that which is necessary in order to attain it.' C-55/94 *Gebhard* [1995] ECR I-4165.

[79] http://www.thenotariessociety.org.uk/

[80] C-2/74 *Reyners* [1974] ECR 631;

[81] 'Case Comment Nationality requirements and the notary profession in the European Union - towards a free movement of notaries?' [2010] Maastricht Journal of European and Comparative Law

some commentators, notaries are conducting an activity in the public interest to assure the legal certainty of documents and are personally liable to their clients. Thus, this activity is not an exercise of official authority.[82]

Moreover, it is in accordance with the wording of the Services Directive.[83] Article 2(2)(i) excludes from the scope of the Directive 'activities which are connected with the exercise of official authority as set out in Article 45 of the Treaty.' The Services Directive stipulates separately in article 2(2)(1) that the Directive does not apply to 'services provided by notaries and bailiffs who are appointed by an official act of government.'[84] These exclusions are added in the final stages of negotiation. It points out clearly that member states perceive a difference between institutions exercising the official authority and notaries.[85]

It is regrettable that the Court did not follow the Advocate General's Opinion. The AG stated that the process of European integration is sufficiently advanced to abandon an official authority exception.[86] Arguably, this means that the derogation of Article 51 TFEU is not a strong one and the development of the EU community is advanced enough to remove all burdens and to enable non-nationals to exercise public authority.[87] It also raises the question whether Article 51 TFEU is still valid. The AG's Opinion is not far from stating, following arguments, that EU society is mature enough to abolish all restrictions and not allow any direct discrimination on the ground of nationality.

This part of the thesis focused on direct discrimination. First, it sought criteria to determine when direct discrimination of a legal person is to be established.

---

p.334; Journal Article - Case Comment Discrimination [2011] Gazette of the Law Society Ireland p. 60.

[82] Journal Article - Case Comment Discrimination [2011] Gazette of the Law Society Ireland p. 60.

[83] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [Official Journal L 376 of 27 December 2006].

[84] Article 2 point 2 letter l of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market.

[85] Catherine Barnard states that the value of this last-minute addition is that clearly the activity of notaries is excluded from the scope of the Directive. Barnard Catherine 'Unravelling the Services Directive' [2008] Common Market Law Review p. 342. However, it has an additional meaning read in conjunction with the analysed judgement.

[86] On the other hand, referring to the argument that citizens can participate in elections, it holds true in a limited sense as they can only take part in a local one.

[87] C-157/09 *Commission v Netherland* [2011] ECR I-0000.

However, such universal criteria do not exit, as member states' legislation varies in stipulating what connects a company to a legal system. In conclusion, a court needs to establish *in concreto* whether discrimination is direct or indirect. This has great significance as direct discrimination is an aggravated form of discrimination and legal persons deserve special protection. Thus, it can only be justified by an express derogation.

Having discussed direct discrimination, the thesis now proceeds to examine the meaning of indirect discrimination.

2.2.2 Indirect Discrimination

Indirect discrimination focuses more on substantive equity, than on formal equity.[88] Simon Forshaw concluded that treating two entities in the same manner (by the application of a separating rule) might create inequality. There are differences between individuals and substantive inequalities might be justified and a balancing act is required between the needs of the putative discriminator (for example, an employer) to apply separating rules and the discriminatory effects which the application of such rules creates.[89]

Indirectly discriminatory measures can be objectively justified. The Court has already entrenched a test to apply. An objectively justified reason must satisfy the Gebhard test. In a leading case, *Gebhard*,[90] the CJEU ruled on the question of whether Italy could impose conditions on non-national lawyers in Italy. The Court held that restrictions might be justified only if 'applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest;

[88] Forshaw Simon, Pilgerstorfer Marcus 'Direct and indirect discrimination: is there something in between?' [2008] Industrial Law Journal p. 351.

[89] Ibid, p. 351. The CJEU stated that: 'a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage. It is not necessary to find that the provision in question does in practice affect a substantially higher proportion of migrant workers.' C–278/94 *Commission of the European Communities v Kingdom of Belgium* [1996] ECR I-4307; Bell Mark 'Anti-Discrimination and the European Union' (Oxford, Oxford Scholarship Online, 2002) p. 34.

[90] C-55/94 *Gebhard* [1995] ECR I-4165.

they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.'[91]

The issue of indirect discrimination is further illustrated by *Pfeiffer*[92] and *Futura & Singer*.[93] The first case concerns a trademark problem and the second a tax issue. Member states have competence in these two fields but the national provisions must be exercised consistently with EU law and avoid discrimination.

In *Pfeiffer*[94] two companies asked to trade under the name 'Plus'. The name 'Plus' was registered in 1969 in Austria by Pfeiffer and in 1989 in Germany by Löwa. Löwa sought to use the same trade name across all EU member states to reduce the costs of marketing. It claimed the right to trade under the same name 'Plus' anywhere in the EU based on the freedom to provide service and the freedom of establishment. However, Pfeiffer requested a restraining order from Austrian authorities against Löwa being able to trade in Austria under the trade name 'Plus'. Pfeiffer claimed that both businesses traded in similar products and, therefore, there was a great risk of confusion.[95]

---

[91] Ibid, par. 40 summary point 6.

[92] C-255/97 *Pfeiffer Großhandel GmbH v Löwa Warenhandel GmbH.* [1999] ECR I-2853.

[93] C-250/95 *Futura & Singer* [1997] ECR I- 2471.

[94] C-255/97 *Pfeiffer Großhandel GmbH v Löwa Warenhandel GmbH.* [1999] ECR I-2853.

[95] Article 36 TFEU provides special protection for intellectual property [IP] rights. Nevertheless, *Pfeiffer* refers to trade names problem which is qualified as IP right only if a broader definition is applied. The protection of trade names is treated differently to one of trademarks. First, TFEU leaves open the door for legislative initiatives covering IP. There are a number of provisions concerning trademarks; Directive 2008/95/EC of the European Parliament and the Council of 22 October 2008 (to approximate the laws of the member states relating to trademarks) OJ 2008 L 299/25; Council Regulation (EC) No 40/94 of 20 December 1993 (on the Community trade mark). Thus, trademarks are protected by a number of legislative measures. It is not the case for the trade names which were the subject of the Paris Convention for the Protection of Industrial Property in 1883. This stated that trade names shall be protected in all the countries of the Paris Union without the obligation of filling or registration, whether or not it forms part of the trademark.

Secondly, the aim of the Paris Convention was to ensure protection for trade names. However, it might indirectly impact on the shortage of a common system of trade names. Currently, there is no such registrar for trade names, whereas Council Regulation (EC) No 40/94 of 20 December 1993 (on the Community trademark) introduced one single centralised registration procedure which grants to its owner an exclusive unitary trademark in all 28 member states of the EU.

The lack of a common system of recognition of trade names raises the question of priority and who is given exclusive right to use a trade name. In *Pfeiffer* a genuine business from one member state sought to access the market of another member state. In the cases, CJEU ruled that it might

First, Advocate General Mischo doubted if such a restraining order might be considered as 'means of arbitrary discrimination.'[96] In his Opinion, the AG provided an analysis of whether a restraining order such as that contemplated in the main proceedings is contrary to Article 52 of the Treaty.[97] The AG concluded that the Treaty does not preclude a national provisions requiring that, in the case of specific designation of undertakings which are liable to be confused, the one with earlier priority is to be protected and prohibiting an undertaking without priority in this particular member state from using a name which is already in use in another member state.[98]

The Court found that such a restraining order is contrary to the freedom of establishment,[99] and convincingly demonstrated that it is in accordance with the previous ruling. The restraining order constitutes a restriction on the right of establishment if they are liable to place the companies in a less favourable factual or legal situation than those from the state of establishment (the home state).[100] Indeed, in the analysed case the foreign entity is not allowed to trade under a lawfully obtained name. Thus, a restraining order must have a hindering effect on the undertaking. However, the CJEU observed that a protection of trade names constitutes a primary aim of national laws[101] and an overriding value.[102]

affect the business already incorporated under a similar name in the host member state. The business was allowed to trade in another member state but needed to choose a different trade name. It is not interesting to investigate the scenario if a company registers in member state A to gain a trade name and trade solely in member state B. Based on *Pfeiffer*, the derogation justified by protection of a trade name seems unrealistic.

[96] Opinion of AG Mischo in C-255/97 *Pfeiffer Großhandel GmbH v Löwa Warenhandel GmbH.* [1998] ECR I-2837 par.38

[97] Supra, no. 1.

[98] Opinion of AG Mischo in C-255/97 *Pfeiffer Großhandel GmbH v Löwa Warenhandel GmbH.* [1998] ECR I-2837, par. 79.

[99] C-255/97 *Pfeiffer Großhandel GmbH v Löwa Warenhandel GmbH.* [1999] ECR I-2853 par. 17. See Case Comment 'European Union: Pfeiffer v Löwa' [2000] International Review of Intellectual Property and Competition Law p. 979.

[100] C-70/95 *Sodemare and Others* [1997] ECR I-339, par. 33.

[101] In particular, paragraph 9(1) of the Gesetz gegen den unlauteren Wettbewerb (law against unfair competition) prohibits the use of names, trading names or specific designations of an undertaking, in manner liable to cause confusion with names, trading names or specific designations which another person lawfully uses.

[102] C-255/97 *Pfeiffer Großhandel GmbH v Löwa Warenhandel GmbH.* [1999] ECR I-2853 par. 21.

Furthermore, the risk of confusion does in fact exist and the restraining order sought by Pfeiffer is suitable for securing the attainment of the objective pursued and does not go beyond what is necessary. The CJEU ruled that 'Article 52 of the Treaty does not preclude a restraining order such as that which may be made against Löwa.'[103]

This case is a good example of derogation based on public policy and examines a process of balancing interests. In this situation, there are two interests: freedom of establishment and protection of trademarks. There was no international register of trademarks at the time of the ruling which might have created difficulties, in particular, if two or more companies conducted similar activities and offered similar products. It is also obvious that the conflict exists between interests and there is a need to decide which one is overriding.

The Court concluded that a restraining order to prevent the use of a trademark is a restriction on the freedom of establishment. The restriction might be applied only if the national measure met the Gebhard test. Both the Court and AG Mischo concluded that all four conditions had been fulfilled. The measure had been applied in a non-discriminatory manner, it was justified by imperative requirements in the general interest and suitable for securing the attainment of the objective pursued and did not go beyond what was necessary in order to attain the objective. In this case, the CJEU ruled that the protection of the trademark had an overriding value over the freedom of establishment and so the issue of the restraining order was justified.

This case is an excellent example of a balancing process carried out by the CJEU. The Court strives and will continue to strive to find a balance between freedom of establishment and other protected interests. Also, the protection granted to trademark rights by national and international conventions varies depending on the weight accorded to these competing rights. In case of patent protection, the problem has been resolved by introducing enhanced cooperation. Currently, there is a unitary system of registering a patent across most of the EU member states.

It has been noted that there was no common system of trademark and no common policy of trademark protection.[104] This might lead to the situation where a

---

[103] Ibid, par. 24.

[104] The situation was significantly changed by Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015, to approximate the laws of the member states relating to trademarks.

company cannot use a uniform name or trademark in all member states. It is appraisable that the CJEU noticed that this situation had a hindering effect on a cross-border activity of an undertaking.

The second case refers to direct taxation. Direct taxation lies within a competence of member states. Nonetheless, national provisions on taxation must be exercised consistently with European law. In *Futura & Singer,*[105] a branch of a non-resident company wished to carry forward previous losses for the years 1981-1986. However, Futura did not have a proper account for this period. Luxembourg law allowed non-resident taxpayers to deduct previous losses only if 'they are economically related to income received locally and that accounts are kept within the country.' Futura provided only an apportionment (estimation) of its total income. As a result, a Luxembourg tax authority refused to allow set-off on the basis of an apportionment.[106]

First, the CJEU decided whether a member state may impose a condition that the losses be economically linked to the income earned in that state. The Court stated that although direct taxation is outside the competence of the EU, member states must exercise their competence consistently with EU law and avoid any discriminatory treatment. The Court repeated that there is a substantial difference between residents and non-residents which is in conformity with the fiscal principle of territoriality to tax non-residents only on income and losses arising from their Luxembourg activity, while residents are assessed to tax on all their income and losses.[107] This relates to the assumption that double non-deductibility of the losses and double taxation are compliant with the current status of the EU law.[108]

Secondly, the Court ruled on whether a member state may require keeping proper accounts. Accordingly, a company needs to keep separate accounts that comply with the tax accounting rules in another member state. These documents need to be held at the place of establishment of its branch.[109] The CJEU concluded

---

[105] C-250/95 *Futura & Singer* [1997] ECR I- 2471.

[106] Ibid, par.11.

[107] Ibid, par. 20-22.

[108] In Chapter 3-6, it is argued that this constitutes one of the greatest burdens to the freedom of establishment.

[109] 'Carry forward any losses incurred by its branch, it must keep, in addition to its own accounts which must comply with the tax accounting rules applicable in the member state in which it has its seat, separate accounts for its branch's activities complying with the tax accounting rules applicable in the State in which its branch is established. Furthermore, those separate accounts must be held,

that this may constitute a restriction on the freedom of establishment. As a result, it may be allowed only if it is justified by an overriding public interest and the conditions of the Gebhard test are satisfied.

Nonetheless, in the current case, the Court concluded that the requirement of keeping proper accounts was essential. The Commission suggested that a set of accounts should be located in the member state of the seat of the concerned company. However, the CJEU noted that rules on keeping accounts vary from member state to member state. The accounts kept by a non-resident taxpayer according to home member state rules may not have provided the required information. The CJEU decided that the requirement was justified and the freedom of establishment may be limited in these circumstances.[110]

The Court ruled that 'the effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction on the exercise of fundamental freedom guaranteed by the Treaty.'[111] The derogation was applied without discrimination and took into account general good concerns within organisation, qualifications, professional ethics, supervision and liability.

The ruling has been criticised for confirming the necessity to keep accounts in the host member state. Pascal Faes argued that it is sufficient that non-resident taxpayers demonstrate clearly and precisely the amount of losses arising from their Luxembourg activities if the accounts are located outside Luxembourg.[112] Convincingly, if accounts are in accordance with the standards and regulations of the Luxembourg tax system, there is no need for them to be located in Luxembourg. It is submitted that less restrictive measures are possible; for example, the Luxembourg tax authority could be entitled to request all documents for inspection. Thus, in this respect, the discriminatory measure goes further than required to attain the aim.

---

not at the company's seat but at the place of establishment of its branch.' C-250/95 *Futura & Singer* [1997] ECR I- 2471 par. 25.

[110] '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' C-120/78 *Dijon* [1985] ECR I-987, par. 8.

[111] C 120/78 *Dijon* [1985] ECR I-987; C-250/95 Futura & Singer [1997] ECR I- 2471.

[112] Faes Pascal 'EU tax cases - extracting the essence' [1998] International Tax Review p. 25.

The ruling has provoked debate on the future of tax harmonisation in Europe.[113] Craig William argued that the main justification acceptable for a restriction is for the member state to prove that there are differences in tax situations that can justify the disadvantage.[114]

As it was previously stated, the issue of discrimination is one of the most discussed in EU law. The freedom of establishment, as one of the EU freedoms, prohibits direct and indirect discrimination. Both direct and indirect discriminatory treatment can be observed in relation to a legal person.

2.3 Concluding Observations

This chapter outlined the principle of discrimination in relation to the freedom of establishment. The freedom of establishment is not absolute. Other rights or interest might prevail and thus, a freedom is limited. There are two types of discriminatory measures: a direct discrimination and indirect discrimination. The ramification is crucial as there are different criteria to justify direct and indirect discrimination.

First, it is considered that both natural and legal persons might be directly and indirectly discriminated. The direct discrimination might prevail only if it is expressly derogated in the Treaty. The chapter examined the criteria for indirect discrimination for legal persons. A company can be directly discriminated against based on 'nationality.' However, the meaning of company nationality varies depending on the national legal system. It is argued that the criteria for direct

---

[113] Ruud A. De Mooji and Sjef Ederveen, 'Taxation and foreign direct investment: A synthesis of empirical research' [2003] 10 International Tax and Public Finance 673 at p. 680; Marsha Blumenthal and Joel Slemrod, 'The compliance costs of taxing foreign-source income: Its magnitude, determinants and policy implications' [1995] International Tax and Public Finance p. 37, cited by T.F. Staff, 'The Economics of International Taxation', The Tax Foundation, www.taxfoundation.org; D. Rodrik, Globalization, pp.49-69, cited in Reuven S. Avi-Yonah, "Globalisation, tax competition and the fiscal crisis of the state' (1999-2000) 113 Harvard Law Review, p. 1635.

[114] Another justification suggested by Craig William is the need to safeguard the fiscal coherence of the member state's tax system. However, this justification is doubtful after the decision of the court in the *Danne*r case. Craig William J., Kumar Ajay 'Tax harmonisation for Europe and the world: could the ECJ show the way?' [2007] International Company and Commercial Law Review p. 341. The detailed debate is presented in Chapter 6.

discrimination of a company is inherent to the provisions for the connecting factors to link a company to a legal system. This solution is based on analysis of current case law of the CJEU.

Secondly, the indirect discriminatory measure might be saved based on justified reason. The Gebhard / proportionality test provides criteria for justifying indirect discrimination. The indirect discrimination and proportionality test was presented based on *Pfeiffer* and *Futura & Singer*. The particularity of discrimination in scope of the freedom of establishment can be observed is the so-called 'doctrine of abuse' which refers to situations where an indirect discriminatory treatment is justified by the misuse of law. It relates both to objective and subjective criteria. The objective criterion is met when despite formal observance of EU law, the objective pursued by the freedom of establishment has not been achieved. The subjective circumstances arise when the intention is to evade provisions of national law that would normally apply. A detailed analysis is presented in the following Chapter 3.

CHAPTER 3: NATIONALITY

3.1 Governing Law of a Company: Real Seat Theory and Incorporation Theory

When examining the primary establishment, it is necessary to discuss conflicts in corporate laws. There are two main theories about the legal system that governs companies: the real seat theory and the incorporation theory.

The real seat theory dates to the nineteenth century and is accepted by the majority of civilian law systems.[115] Accordingly, a company is governed by the law of a country where it has its 'real' seat.[116] A real seat can be understood as a central management or control centre.[117] Thus, a company is not free to choose a governing law but rather it is linked to the place where it operates.

One argument against the real seat theory is that in today's world it is difficult to determine a company's real seat.[118] It may lead to long disputes if the place of management does not correspond with, inter alia, the place of a main business or the place where the main business of a company is undertaken. Conversely, the real seat theory aims to establish the closest connection to the place of residence.[119] This works as a 'double-edged sword.'[120] It affects both companies incorporated abroad but having a centre of management in the real seat governed

---

[115] Including Austria, Belgium, Germany, Greece, Italy, Luxembourg and Poland.

[116] Erk Nadja Kuba 'The cross-border transfer of seat in European Company law: a deliberation about the status quo and the fate of real seat theory.' [2010] European Business Law Review, p. 413.

[117] After a long debate, French law has opted for 'le siège social' as a connecting factor for a company. It is defined as a real seat, the primary situs of legal, financial, administrative and technical management. 'Le siège social est lá oú se trouvent la direction supérieure et la contrôle de la société, et non celui oú elle a seulement son exploitation et une direction de caractère secondaire' Batiffol Henri 'Droit international privé' (Paris, J.G.D.J. 1970)

[118] Hirt Hans 'Freedom of establishment, international company law and the comparison of European company law systems after the ECJ's decision in *Inspire Art Ltd.'* [2004] European Law Review p. 1195.

[119] Borg-Barthet, Justin The Governing Law of Companies in EU Law (Hart Publishing, Oxford, 2012) p. 71; Dyrberg Peter 'Full free movement of companies in the European Community at last?' [2003] European Law Review, p. 530.

[120] This expression has been used by the European Personnel Selection Office and can be found online: *europa.eu/epso/doc/en_lawyling*.

country and companies incorporated under domestic law and having a centre of management abroad.

Moving a seat from a country governed by the real seat theory to a country governed by the incorporation theory may mean that the company would be an 'apatride'.[121] It would lose its link to the state of origin and not gain a link with a host state.[122] The situation is analysed below[123] taking into consideration the seminal case of *Cartesio*.[124]

In contrast, the incorporation theory allows founders of a company to choose freely a state it can be incorporated and, consequently, a governing law.[125] A company is governed by the law of the state where the act of incorporation is completed.[126] Thus, the place of an activity of a company is irrelevant. Moving a seat from a home state would not have consequences for a company governed by the incorporation theory. A company would be able to operate exclusively in a foreign state but be governed by the national law of the state of incorporation.

The incorporation theory which dates to the eighteenth century,[127] is strongly applied in common law countries such as the UK and the United States (US) but it is also adopted by some civilian systems, as in The Netherlands,[128] Switzerland and Russia.

---

[121] Wymeersch Eddy 'The transfer of the Company's Seat in European Company Law' [2003] Common Market Law Review 662-695.

[122] According to the rules of a host state, it would not qualify as a domestic entity, as it was not incorporated there.

[123] See section 3.2.2.

[124] C-210/06 *Cartesio Oktato es Szolgaltato Bt* [2008] I-9641.

[125] Wymeersch Eddy 'The transfer of the Company's Seat in European Company Law [2003] Common Market Law Review 662-695.

[126] Borg-Barthet, Justin The Governing Law of Companies in EU Law [2012] Hart Publishing, Oxford p. 72.

[127] It was first adopted by the UK court in 1728, *Henrique v Dutch Westi India Co.* It has been stated that 'corporation duly created in a foreign country shall be recognised as a corporation in England.' This opinion is shared by Paschalis Paschalidis 'Freedom of establishment and private international law for corporations' (Oxford, Oxford University Press, 2012) p. 12 An opposite view has been presented in Rammeloo Stephen 'Corporations private international law: A European perspective' (Oxford, Oxford University Press, 2001) p. 129.

[128] The Netherlands applied the theory of the real seat until 25 July 1959.

The advantages of the application of the incorporation theory are legal certainty, predictability, party autonomy and security of transaction.[129] However, the main disadvantage of the theory is that the founders of a business might choose freely to incorporate in a state with a lax company law. Thus, they are allowed to circumvent the rules of the state of operation. It has been observed that in states where companies are required to adhere to the theory of incorporation, lenient rules are offered to attract many businesses to incorporate in their jurisdiction. Delaware is one American state which offered lenient rules and attracted businesses from across all the US to incorporate there. Other states had to change their rules to become more 'competitive' with Delaware. It is sometimes described as a 'race to the bottom' or 'law beauty competition' but most frequently, the 'Delaware Syndrome'.[130] As a result, there is no state in the world that applies the incorporation theory in its purest version. Some states protect themselves from pseudo-foreign companies,[131] for example, the US and The Netherlands. An entity is regarded as pseudo-foreign if it has no connection, except the act of establishment, in the state of incorporation and the centre of management and activities are undertaken somewhere else.[132] However, as far as EU law is concerned, as analysed below in *Centros*[133] and *Cadbury*,[134] the CJEU has not completely accepted the theory of incorporation as part of the EU legal order.[135] The 'European version' of this doctrine is examined below in the landmark case *Cadbury*.[136]

---

[129] See also Paschalis Paschalidis 'Freedom of establishment and private international law for corporations' (Oxford, Oxford University Press, 2012) p.12.

[130] Drury Robert 'The Regulation and recognition of foreign corporations: Responses to the Delaware Syndrome' [1998] Cambridge Law Journal p. 165.

[131] Inter alia The Netherlands.

[132] The doctrine of pseudo-foreign companies was first proposed by Elvin R Latty 'Pseudo-foreign corporations' [1955] Yale Law Journal p. 137 and subsequently applied in the US, in California and New York and then extended to all states of the US.

[133] See section 3.3.1.; C-212/97 *Centros Ltd* [1999] ECR I-1459.

[134] See section 4.2; C-196/04 *Cadbury Schweppes* [2006] ECR I-7995.

[135] The opposite is true in the US, where the doctrine of pseudo-foreign still enjoys great support; Vestal Allan 'Choice of Law and the Fiduciary Duties of Partners under the Revised Uniform Partnership Act' [1994] Iowa Law Review p. 219.

[136] The European version of the anti-abuse doctrine is examined in the following subsection 3.4.

It needs to be highlighted that neither the incorporation theory nor the real seat theory is ideal. The theory (incorporation theory or real seat theory) chosen by a member state concerns the private international rules which are not, per se, contrary to the EU law. These rules are neutral and abstract. To provide an example, the rule that a Polish legal order shall apply is not contrary to EU law.[137] Only the legal content of Polish/national norm might be contrary to EU law. Any incompatibility stems from the content of the applicable substantive national law and its effects in a specific case. Thus, the theory is not the most crucial issue for this thesis. To support the view of the author, this issue is not and should not be, a subject of a CJEU ruling.[138]

Nonetheless, there is strong debate[139] as to whether the CJEU should adopt the incorporation or the real seat theory. Moreover, the main objective of this thesis is to determine the hurdles of freedom of establishment. As noted above, the discussion on advantages or disadvantages of this theories does not contribute to reach this aim.

Instead, research should be undertaken to answer two main questions concerning primary establishment. First, does a home member state have an

---

[137] The private international rules are not, per se, contrary to EU law. These rules are neutral and abstract. For example, the rule indicating that a Polish legal order shall apply is not contrary to EU law.

[138] The international private rules are not part of EU law. These rules indicate only which national set of rules shall be applied. For instance, an international private rule might indicate, in case of conflict of law, whether the law applicable would be Polish or French. It does not affect the norm, the content of the national rule. The statement that national legal provisions are applicable is not contrary to EU law. However, the content of the French law, for example, including the discriminatory measure, might be. Nonetheless, the contrary opinion can be found in Erk Nadja Kuba 'The cross-border transfer of seat in European Company law: a deliberation about the status quo and the fate of real seat theory' [2010] European Business Law Review p.413.

[139] Drury Robert 'The 'Delaware Syndrome': European fears and reactions.' [2005] Journal of Business Law p. 709; Drury Robert 'The regulation and recognition of foreign corporations: Responses to the Delaware Syndrome' [1998] Cambridge Law Journal p. 165; Erk Nadja Kuba 'The cross border transfer of seat in European Company law: a deliberation about the status quo and the fate of real seat theory' [2010] European Business Law Review p.413; Daigeler Fabienne, Ebert Sabine 'The liability of a director for the liabilities of a private company limited by shares (Ltd) according to the laws of England and Wales with its real seat in Germany' [2005] European Newsletter p.3. Paschalis Paschalidis 'Freedom of establishment and private international law for corporations' (Oxford, Oxford University Press, 2012) p. 68.

obligation to retain the legal personality of an emigrating company (outbound cases)? Secondly, should a host member state recognise the fact that the undertaking has been incorporated by the law of another member state and according to that law its activities are governed by the home state (inbound cases)? Answering these questions helps to define the freedom of establishment and the 'borders' of freedom. It is considered whether the freedom of establishment is an absolute right. If it is not, what are the limits of this freedom? This is essential, as it is not possible to state whether there is a hurdle to the freedom which is not well defined.

There are no Treaty expressed provisions to answer these questions. Nevertheless, the CJEU interprets and rules on the applicability of EU law when such questions are referred to the Court by national courts.[140]

In order to analyse how the CJEU answers these questions, the rulings are considered depending on whether the company encountered problems when exiting the member state of incorporation (i.e. restrictions imposed by the state of incorporation, the home state) or when seeking primary or secondary establishment in another member state (restrictions imposed by the host state).

3.2 Outbound Cases

The outbound cases examine the rights and obligations of a home member state to answer the question of whether a home member state has an obligation to retain legally the personality of emigrating companies. There are two landmark rulings[141] in this field which, chronologically, are: *Daily Mail*[142] and *Cartesio*.[143]

[140] Wymeersch Eddy 'The transfer of the Company's Seat in European Company Law [2003] Common Market Law Review 662-695.

[141] However, there are a number of other not directly relevant judgements, inter alia C-79/85 *D. H. M. Segers v Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen* [1986] ECR I-273.

[142] C-81/87 *Daily Mail* [1988] ECR I-5483.

[143] C-210/06 *Cartesio Oktato Es Szolgaltato Bt* [2008] ECR I-9641.

3.2.1 The Daily Mail

In *Daily Mail,*[144] the UK newspaper sought to move its central management and control to The Netherlands. The main aim of relocation was to avoid UK capital gains tax. At the time of the proceedings, the Treasury was required to provide consent for a UK incorporated company to move outside the jurisdiction and retain its status (legal personality) as a UK company. *Daily Mail* is an example of an outbound case and thus relevant to determining whether a home member state has an obligation to retain the legal personality of an emigrating company.

The CJEU ruled that the Treaty does not confer a right on a company to move to another member state, while retaining its legal status in the member state of origin.[145] In other words, an emigrating company has no right under EU law to retain its legal personality (status) under the law of the member state of origin. If such a right exists, it is conferred by the national law of the member state of origin and not by EU law. Thus, the freedom of establishment must be understood as not covering the right to retain legal personality in case of relocation to another member state. Furthermore, it states the limits of this examination. Notably, the CJEU did not found any hindrance to the freedom of establishment, as argued in cases such as *Royal Bank of Scotland*,[146] *Commission v Belgium, Spain, France, Portugal, Austria, Luxembourg, Germany, Greece*,[147] *Pfeiffer*[148] and *Futura & Singer*[149] which were discussed in the previous chapter. Nonetheless, *Daily Mail* clearly concluded that this situation was not covered by the freedom of establishment.

---

[144] C-81/87 *Daily Mail* [1988] ECR I-5483.

[145] Gajjar Jay 'Your dominion or mine? A critical evaluation of the case law on freedom of establishment for companies and the restrictions' [2013] International Company and Commercial Law Review p. 50.

[146] Chapter 2.2.1. C-311/97 *Royal Bank of Scotland v Elliniko Dimosio (Greek State)* [1999] ECR I-2664.

[147] Chapter 2.2.1. C-47/08 *Commission v Belgium, Spain, France, Portugal, Austria, Luxembourg, Germany, Greece* [2010] ECR I-4105.

[148] Chapter 2.2.2. C-255/97 *Pfeiffer Großhandel GmbH v Löwa Warenhandel GmbH.* [1999] ECR I-2853.

[149] Chapter 2.2.2. C-250/95 *Futura & Singer* [1997] ECR I- 2471.

Thus, the lack of a possibility to relocate the primary establishment and retain legal personality cannot be classified as a main restriction to the freedom of establishment. Eddy Wymeersch argued that the *Daily Mail* ruling represents a textual reading of the Treaty.[150] Moreover, the CJEU stated that 'unlike natural persons companies are creatures of the law and in the present state of Community law creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning.'[151] As vividly described in the literature, a 'company will be killed at the border.'[152]

Immediately after this ruling, there were a number of critical views expressing the fear that such a restrictive could hinder EU integration.[153] Some authors perceived the ruling as a confirmation of the prevalence of the real seat

---

[150] Wymeersch Eddy 'The transfer of the Company's Seat in European Company Law [2003] `Common Market Law Review 662-695; Borg-Barthet, Justin The Governing Law of Companies in EU Law (Hart Publishing, Oxford, 2012) p. 134;C-81/87 *Daily Mail* [1988] ECR I-5483;

[151] Ibid, p.19.

[152] Wymeersch Eddy 'The transfer of the Company's Seat in European Company Law [2003] Common Market Law Review p. 662.

[153] 'By way of comment it has to be stated that this decision is regrettable both from the point of view of EEC law and from that common law. From the EEC point of view, it is regrettable that a provision, which by its nature is no more than an administrative measure of tax law, can defeat a principle which the Court has described – rightly –as fundamental to the Community. From the point of view of the common law, it is regrettable that the Court has rejected a notion familiar to every common lawyer, who has studied his conflict of laws, *viz.* that the two concepts of incorporation and central management are separable. As a matter of policy, if we have a European Community, why should people not avail themselves of the benefit resulting from different taxation, principles applied by the member states? If the Revenue of a member state is unhappy about it, the simple remedy is to create in its own territory a tax climate which makes it unattractive for companies to seek a transfer of their residence.' J.B.L. 'Daily Mail loses in the European Court. Case Comment.'[1988] Journal of Business Law, p. 454. It was even called 'a setback to the entire process of European integration'; Ballarino Tito 'From *Centros* to *Überseering* EC Right of establishment and the conflict of laws' (Yearbook of Private International Law, Kluwer Law International, 2002) p. 203.

theory.[154] On the other hand, some French authors argued that the *Daily Mail* ruling constituted the end of the era of the real seat theory. [155]

Both these conclusions are surprising for various reasons. First, as Christiann Timmermans remarked, 'question of international company law, of a conflict rule regarding the company's status, did not really arise in the *Daily Mail* case.'[156] Secondly, it is noteworthy that both concerned states were governed by the incorporation theory and the issue of the real seat theory did not emerge at all.

Justin Borg-Barthet suggested the ruling safeguards member states from the necessity to recognise pseudo-foreign companies incorporated under the law of other member states.[157] This view cannot be accepted. The CJEU did not consider whether the Daily Mail could ask The Netherlands to move to its territory. Instead, the issue concerned was whether the Daily Mail could leave the UK and keep its legal personality (outbound case). In *Daily Mail*, the Court explicitly ruled that the right to retain legal personality when moving out of the member state of origin is not guaranteed by the Treaty. As a result, the activity of the UK Treasury is not discriminatory and does not have a hindering effect on the freedom of the establishment.

Daily Mail was delivered in 1988 but, from the present perspective, the case has slowed down companies' mobility within the EU. However, there is no explicit right for a company to retain its legal personality if it moves its seat. Interestingly, the UK repealed the regulations requiring HMRC consent prior to the move of a company outside the UK[158] in the same year that the Daily Mail ruling was

[154] Andenas Mads 'Free movement of companies' [2003] Law Quarterly Review p. 221; Halbhuber Harald 'National Doctrinal Structures and European Company Law [2001] Common Market Law Review p. 1385.

[155] Loussouarn Yvon 'Le droit d'établissement des sociétes' [1990] Revue trimestrielle de droit européen p. 229; Navez Edouard-Jean, Traversa Edoardo 'La liberté d'établissement s'oppose à l'annulation d'une réduction d'impôt consécutive au transfert du siège social d'une société' [2012] Revue des Affaires Européennes p.697.

[156] Opposite opinion was given by Timmermans Christiann 'Impact of EU Law on International Company Law' [2010] European Review of Private Law p. 549, p. 554. This opinion was also shared by Paschalis Paschalidis 'Freedom of establishment and private international law for corporations' (Oxford, Oxford University Press, 2012) p. 37.

[157] Borg-Barthet Justin The Governing Law of Companies in EU Law (Hart Publishing, Oxford, 2012) p. 140;

[158] Schedule 7: after 15 March 1988, there is no need to receive consent from HMRC to move a seat /central management abroad from the UK.

delivered. It might be understood that the UK is eager to accept more cross border mobility of companies despite the fact EU law does not provide such an obligation.

3.2.2 Cartesio Oktato Es Szolgaltato Bt

On 16 December 2008, the *Cartesio*[159] ruling was delivered, over 20 years after *Daily Mail*. The case concerned a limited partnership which sought to transfer its operational headquarters from Hungary to Italy, while remaining registered in Hungary. The registrar of the commercial register run by the Hungarian court refused to enter a new foreign address in the local register and this was justified on the basis that Hungarian law does not allow it. According to the Hungarian provision, partnerships should be dissolved and then reregistered in a host member state. Consequently, the Hungarian commercial court asked the CJEU if Hungarian rules were compatible with the freedom of establishment. It is worthy to recall Advocate General Maduro's Opinion in this case. The AG recommended that to exercise effectively the freedom of establishment, there is a need to have at least some degree of mutual recognition and coordination of the different national systems. However, the CJEU did not follow AG's approach. In this seminal ruling, the CJEU based its reasoning on the *Daily Mail*. The decision was a confirmation of the previous rulings stating that:

'Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a member state under which a company incorporated under the law of that member state may not transfer its seat to another member state whilst retaining its status as a company governed by the law of the member state of incorporation.'[160]

Thus, the CJEU has explicitly confirmed that member states are entitled to apply real seat theory.

Returning to the first question posed: does a home member state have an obligation to retain the legal personality of an emigrating company? Based on existing case law, it is clear that such an obligation does not exist. As noted above,

[159] C-210/06 *Cartesio Oktato Es Szolgaltato Bt* [2008] I-9641.

[160] C-210/06 *Cartesio Oktato Es Szolgaltato Bt* [2008] I-9641 par. 124.

Cartesio was delivered at the end of 2008 and followed the *Daily Mail* case. One of the submissions argued by the *Daily Mail* was based on Article 293 EEC which was repealed a year after *Cartesio,* when the Lisbon Treaty entered into force.[161] The article required member states to enter into negotiations with a view to abolishing double taxation in the EU. As a result, without further action of member states, the transfer of a company does not require retaining its legal personality in its state of origin. Would it have made any difference if the ruling had been given a year later? Probably not as it seems that article 293 EEC did not have significant influence on the Court.[162] Notably, in the earlier case of *Überseering,*[163] it was explicitly rejected that this article 'does not constitute a reserve of legislative competence vested in the member states.'[164]

The ruling was highly criticised as inconsistent with previous rulings[165] which mainly stemmed from the fact that commentators did not notice the difference between inbound and outbound cases. This difference was pointed out both by AG Maduro in his Opinion and by the judge rapporteur in extra-judgement writing.[166]

---

[161] Currently, it is repealed by the Lisbon Treaty (formerly Article 220 EEC). In 1968, a founding member state prepared a proposal for a Convention on the Mutual Recognition of Companies but it never came into force. The Convention provides for the incorporation theory: 'Companies under civil or commercial law, including co-operative societies, established in accordance with the law of a Contracting State which grant them the capacity of persons having rights and duties and having their statutory registered office in the territories to which the present Convention applies, shall be recognised as a right.' EC Convention on the Mutual Recognition of Companies and Bodies Corporate of 29 February 1968, Bulletin of the European Communities, Supplement 2/69, 7-18.

[162] An opposite view has been presented by Borg-Barthet Justin 'European private international law of companies after Cartesio (Case Comment)' [2009] The International and Comparative Law Quarterly p.1020.

[163] C-208/00 *Überseering* [2002] ECR I-9919.

[164] Ibid, p. 54. See also Paschalis Paschalidis 'Freedom of establishment and private international law for corporations' (2012, Oxford, Oxford University Press) pp.86–87.

[165] Borg-Barthet Justin 'European private international law of companies after Cartesio (Case Comment)' [2009]; Gutman Oliver 'Cartesio Oktato Es Szolgaltato Bt - the ECJ gives its blessing to corporate exit taxes' [2009] British Tax Review p. 385; Erk Nadja Kuba 'The cross-border transfer of seat in European Company law: a deliberation about the status quo and the fate of real seat theory' [2010] European Business Law Review p. 413.

[166] The judge rapporteur Christiann Timmermans in *Cartesio* clearly notes this ramification in his extra-judicial writing: 'It can hardly be astonishing in view of the fact that the validity of *Daily Mail* as to outbound case was confirmed so explicitly as recently as 2002 by the judgement *Überseering* and still less given that the basic conditions for that interpretation as set out in the *Daily Mail*

It should be noted that the national regulations of European states have been changed significantly. French company law expressly admits the transfer of the registered seat when changing applicable law and to do so a unanimous decision needs to be taken in the general meeting of the company.[167] Dutch law allows the transfer if both states recognise the survival of companies. Swiss law expressly states that a company may transfer abroad its registered seat and keep its legal personality.[168] The change has been observed since the *Daily Mail* was delivered. There are more and more states which accept the need to retain legal personality in the state of origin. It was previously noted that the significant change of law would be beneficial to the exercise of the freedom of establishment. AG Maduro in his Opinion proposed a law reform. [169] He suggested that letter box companies should not benefit from the freedom of the establishment. Therefore, the doctrine of abuse might be applied in both types of cases, *Daily Mail* and *Centros* and the ramification of inbound and outbound cases might be abandoned.

Of the inbound and outbound cases, both *Daily Mail* and *Cartesio* are 'exit' types. Current EU law does not permit an entity to retain its legal personality if it moves its seat to another member state. To qualify for outbound cases, the two criteria from Article 54 TFEU need to be met. First, an entity is incorporated under the laws of a member state. Secondly, the registered office, the real seat of the principal place of business, should be located in this member state. In *Cartesio*, both requirements were satisfied in Hungary and, consequently, the Hungarian law needed to be applied. This application is correct regardless of whether a real seat or incorporation theory is adopted. It is explicitly stated in *Cartesio*:
'a member state has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that member state and, as such, capable of enjoying the right of establishment and that required if the company is to be able subsequently to maintain that status.'[170]

---

judgement were still unchanged, namely, that no Community legislation or international agreement between member states has been adopted on the issue.'

[167] Article L. 225-97 of the French Code de commerce.

[168] Swiss federal law on Private International Law, 18 December 1987.

[169] Opinion of AG Maduro in *Cartesio* par. 29.

[170] C-210/06 *Cartesio Oktato Es Szolgaltato Bt* [2008] I-9641 par.110.

Consequently, if the legal personality is granted by a home member state, does a host member state have to recognise it? The next section on inbound cases aims to answer this question.

3.3 Inbound Cases

The second type of cases refers to inbound situations which cover both primary and secondary establishment. The CJEU has adopted a common approach to inbound cases. For this reason, both secondary and primary establishment are analysed. The first two cases, *Centros*[171] and *Inspire Art,*[172] concern secondary establishment. Another two cases, *Überseering*[173] and *Vale,*[174] are examples of primary establishment. Both groups of cases are presented to answer the question as to whether a host member state has an obligation under EU law to recognise an immigrating company.

3.3.1 Centros

Centros[175] concerns the refusal of the Danish Trade and Companies Board to register a branch of a formally incorporated foreign company. This private English company had been set up by shareholders residing in Denmark. The only reason to incorporate in the UK was to circumvent Danish minimum capital requirements. The business planned to operate solely in Denmark.

The CJEU ruled that Mr and Mrs Bryde, by forming a limited liability company in the UK, had made use of the freedom of establishment. In other words, they did exactly what is allowed by the Treaty. The CJEU stated that a general prohibition was not compliant with the Treaty. However, member states might apply derogation *in concreto*: 'case by case, take account – on the basis of objective evidence – of abuse or fraudulent conduct on the part of the persons concerned in order, where

[171] C-212/97 *Centros Ltd* [1999] ECR I-1459.

[172] C-167/01 *Inspire Art* [2003] ECR I-10195.

[173] C-208/00 *Überseering* [2002] ECR I-9919.

[174] C-378/10 *VALE Epitesi kft*, Unreported July 12, 2012 (CJEU).

[175] C-212/97 *Centros Ltd* [1999] ECR I-1459.

appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions.'[176]

The case was widely commented upon and opinions were divided.[177] Ebke Werner argued that the case concerned only secondary establishment and this solution should not be reconciled with *Daily Mail* as the latter concerned matters of a primary establishment.[178] It is true that this ruling may, at first sight, be difficult to reconcile with *Daily Mail*.[179] However, there is a binary result of accepting the view that a home state has the power of 'life and death' of a company. Only a home member state that 'gives birth' to a company might impose a 'life sentence.' As long as a home member state allows a company to retain legal personality, it is 'alive' and needs to be recognised as such by other member states. Member states are sovereign in choosing the factors that determine the existence of a company. Therefore, a company granted legal personality in one member state becomes an existing legal entity across the EU.

Secondly, comments published shortly after the *Centros* ruling concluded that the case abolished the real seat theory.[180] This group of scholars argued that the CJEU supports the most favoured treatment principle. As a result, even pseudo-foreign entities might benefit from the freedom of establishment.

---

[176] Ibid., par. 25.

[177] Ebke Werner 'Centros - some realities and some mysteries' [2000] American Journal of Comparative Law p. 623.

[178] Ibid., p. 623.

[179] Siems Mathias 'Convergence, competition, *Centros* and conflicts of law: European company law in the 21st century' [2002] European Law Review p.47, Borg-Barthet, Justin 'The Governing Law of Companies in EU Law' (Oxford, Hart Publishing, 2012) p. 136, Ballarino Tito 'From *Centros* to *Überseering* EC Right of establishment and the conflict of laws' [2002] Yearbook of Private International Law, Kluwer Law International, p. 203, 127. Omar Paul J. '*Centro*s, *Überseering* and beyond: a European recipe for corporate migration: Part 2' [2005] International Company and Commercial Law Review p. 398; Wulf -Henning Roth 'From *Centros* to *Überseering*: free movement of companies, private international law and Community law' [2003] International & Comparative Law Quarterly p. 177.

[180] Behrens Peter 'International company law in view of the *Centros* decision of the ECJ' [2000] European Business Organisation Law Review p. 125; Deakin Simon 'Legal diversity and regulatory competition: which model for Europe?' [2006] European Law Journal p. 440.

The opposite view has been presented by Roth Wulf -Henning, who claimed that *Centros* dealt with a matter of substantive law and not the conflict of laws. [181] In fact, both concerned member states, the UK and Denmark, were governed by the incorporation theory. The ruling did not include a discussion of the real seat theory. Arguably, therefore, the approach presented by Roth Wulf -Henning is legitimate.[182] Moreover, according to some commentators, *Centros* should be considered as a significant contribution to the doctrine of abuse.[183] However, this position is not convincing. *Centros* clearly stated that establishing a company in another member state to benefit from its corporate legislation is not an abuse[184] However, the ruling remains silent as to what is an abuse.[185] Further elaboration of abuse theory is found in section 3.4.

In summary, Centros Ltd was lawfully incorporated in the UK and the Danish institutions could not deprive it from possessing legal entity. A general prohibition would constitute a restriction to the freedom of establishment. However, as it previously stated, the freedom of establishment is not an absolute right and might be denied if it is justified by an overriding public interest. This has to be examined *in concreto*. However, according to double taxation treaties, a foreign company might have to establish a secondary establishment in a host member state if the conditions apply. All in all, the actions of Centros Ltd were perfectly legal.

---

[181] Wulf -Henning Roth 'Case C-212/97 *Centros Ltd v Erhvervs-og Selskabsstyrelsen'* [2000] Common Market Law Review p. 147.

[182] German commentators reached another conclusion: 'Yet another group of legal scholars is of the opinion that *Centros* constitutes a major step forward towards a conflict of law principle that would recognize, as a general rule, the incorporator's choice of corporate law, but would allow EU member states to apply, under certain conditions, mandatory statutory forum law over the law of state of incorporation.' Ebke Werner 'Centros - some realities and some mysteries' [2000] American Journal of Comparative Law p.623, p. 627-628. However, this approach has not been widely accepted.

[183] Paschalis Paschalidis 'Freedom of establishment and private international law for corporations' (Oxford, Oxford University Press, 2012) p. 41.

[184] Sorensen Karsten Engsig 'Reconciling secondary legislation with the Treaty rights of free movement' [2011] European Law Review p. 423.

[185] The commentator based decision mainly on other rulings such as C-33/74 *Van Binsbergen* [1974] ECR 1299; C-23/93 *TV10* [1994] ECR I-4795; C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447.

3.3.2 Inspire Art

The later ruling in *Inspire Art*[186] repeated the solution adopted in *Centros*. The facts of this case were unquestionably similar to those of the earlier case.[187] Inspire Art Ltd, a pseudo-foreign UK company, sought to establish a branch in The Netherlands to circumvent provisions on minimum capital requirements. However, a Dutch regulation on pseudo-foreign companies stipulates minimum capital requirements. Otherwise, the directors of a pseudo-foreign company are jointly and severally liable for a company's debts.

The CJEU ruled that such a requirement could hinder the freedom of establishment and the CJEU proceeded to examine if the restriction might be justified. The Dutch government[188] submitted that the restriction was justified by prevention of fraud, the protection of creditors, the effectiveness of tax inspections and the fairness of business dealings.[189] The government indicated that minimum capital requirements exist in all member states except Ireland and the UK. Moreover, the government submitted that the measure applied was necessary to allow a foreign entity to establish a branch in The Netherlands. On the other hand, the Commission claimed that Inspire Art was a foreign company and all those concerned were sufficiently informed, for example, by the unusual suffix 'ltd.'

The Court ruled that derogation could not be justified under Article 52 TFEU. The CJEU agreed that protection of fairness of business and efficiency of tax inspections might become an overriding reason to justify the restriction. However, in *Inspire Art* the Dutch government did not discharge the burden of proof. Inspire Art is a step forward from *Centros* as it provides that not only the existence of a foreign company but also all the rules governing the company must be respected.[190] The limited liabilities of owners and directors of a foreign business, if granted by a home member state, must be accepted by a host member state. This means that a home member state decides on the life and death of a company and prescribes the constitution and rules of the entity.

---

[186] C-167/01 *Inspire Art* [2003] ECR I-10195.

[187] Kersting Christian, Schindler Philipp 'The ECJ's Inspire Art Decision of 30 September 2003 and its effect on practice' [2003] German Law Journal p. 1277.

[188] Accompanied by the German and Austrian governments.

[189] C-167/01 *Inspire Art* [2003] ECR I-10195 par. 108.

[190] C-212/97 *Centros Ltd* [1999] ECR I-1459.

It was claimed that *Inspire Art* constituted the end of an era of the real seat theory.[191] The ruling in *Inspire Art* was understood by Michel Menjucq as representing an urgent need for modification of the French legal system,[192] as French private law stipulated a restriction equivalent to that in The Netherlands. The ruling sparked a debate on creditor protection in the EU.[193] However, discussion which might become a priori example of justified reason, is not possible. Even when the case was under the scrutiny of the CJEU, the German government asked how member states could combat pseudo-foreign companies. The CJEU did not provide an answer but AG Alber suggested that this question should be addressed to member states directly.[194]

The questions of a proportionality test and requirements that might justify a restriction were examined in Chapter 2. Thus, the discussion continues by analysing two landmark decisions concerning inbound situations within the scope of the primary establishment.

3.3.3 Überseering

In this landmark case, German nationals acquired shares of a Dutch company and became its sole directors. Both were residents in Germany and controlled and managed the company from Germany at all times. Überseering ordered work to be

[191] Menjucq Michel 'Kamer can Koophandel en Fabrieken vow Amsterdam v Inspire Art Ltd' [2004] Journal de Droit International p. 917.

[192] Ibid., p. 917.

[193] Ebke Werner 'The European conflict-of-corporate-laws revolution: Überseering, Inspire Art and beyond' [2005] European Business Law Review p. 9.

[194] Opinion of AG Alber par. 123: 'such a request to the Court is surprising: it ought rather to be addressed to the member states. It is not for the Court to tell the member states what steps they may lawfully take to prevent any exercise of the rights conferred by the Treaty which constitutes, or is suspected of being, abuse. In *Centros* and *Überseering* the Court stated that it was in principle lawful to take measures preventing abuse of right conferred by the Treaty. According to Article 220 EC, the Court is competent to interpret the provisions of the Treaty. For that reason, in the present case (as in *Centros* and *Überseering*) the Court is confined to describing the limits of the rights which Article 43 EC and 48 EC confer on citizens of the Union and undertakings. It is for the member states to draw from those limits such conclusions as may be desirable or necessary.'

carried out in Germany and as this was defective the company decided to sue the German contractor in the German courts.

German law provided that a company incorporated in another member state and having its centre of administration in Germany did not possess legal capacity in Germany.[195] The national court decided that the actual centre of administration had been transferred to Düsseldorf ‘once its shares had been acquired by two German nationals’ and Überseering should be incorporated in Germany.[196] In other words, the legislation presumed a transfer of the seat even if the company did not wish to move elsewhere. The German government argued that its reasoning followed the *Daily Mail* ruling.[197] In effect, Überseering could not prosecute the construction company for defective work. However, the CJEU found that the company had legal capacity and was duly incorporated in The Netherlands. Germany could not deny the legal capacity of a company duly incorporated in another member state.

The ramification of inbound and outbound cases can be traced to this ruling. The CJEU stated that *Cartesio* cannot be based on *Daily Mail* as the latter applies to the relations between the company and the state of incorporation.[198] In *Daily Mail* the ruling refers to retaining legal existence in the UK and having central management and residence in the other member state. By contrast, Überseering maintained its legal personality in The Netherlands. It was a question of whether the company had legal capacity to sue in Germany.

Furthermore, the question was whether such treatment amounted to a restriction. The CJEU decided that rules which are liable to hinder or make less attractive the exercise of a fundamental freedom must (1) be applied in a non-discriminatory manner, (2) justified by imperative requirements in the general

[195] C-208/00 *Überseering* [2002] ECR I-9919.

[196] Ibid., par. 9.

[197] The problem that a company registered in one member state will not be perceived to have legal capacity in accordance with law of the Host State has been observed for a long time. In 1968, there was an attempt to create a Convention on the Mutual Recognition of Companies. However, it has never entered into force, because The Netherlands refused to ratify it. The Court suggested conflicts between legal systems should be solved by multilateral conventions between member states. Thus, there is no unanimously agreed rule determining the law applicable to a transfer of a company.

[198] C-208/00 *Überseering* [2002] ECR I-9919 p. 65; 70-73. The AG Colomer in his Opinion in Überseering (par. 37) concluded that such a ramification would be artificial but this approach has not been shared with the CJEU.

interest, (3) suitable for securing the attainment of the objective that they pursue and (4) they must not go beyond what is necessary in order to attain their objective.[199] In this seminal case, the CJEU did not find any justification to deny judicial protection based only on the fact that the company was registered in another member state.

Some commentators argued that the CJEU ruled in favour of the incorporation theory and established the end of the real seat theory. In their opinions, the German legislation which governed by the real seat theory was contrary to the EU.[200] On the other hand, Peter Dyrberg[201] stated that the CJEU ruled only that the real seat theory could be used to indicate a connecting factor to the governing company law. Erk Nadja Kuba noted that the CJEU did not even use the term of the real seat in its ruling.[202] This view should be accepted as governing company law is not per se compatible with EU law. The CJEU did not rule on the compatibility of the real seat theory. Instead, it ruled on whether a member state could not deny the legal capacity of a company duly incorporated in another member state. Thus, the Court examined whether the application of substantive law causes the breach. Indeed, the CJEU stated that the incorporation theory is accepted by EU law. If an undertaking is legally established and is granted legal capacity in one member state, the concerned undertaking possesses capacity in all member states. A host member state cannot require from the undertaking to be (again) incorporated according to the host member state law. Such a requirement would cause the infringement and is not compatible with the freedom of establishment.

---

[199] The issue of saving restriction and *Gebhard test* are discussed in the preceding chapter.

[200] Lowry John 'Eliminating obstacles to freedom of establishment: the competitive edge of UK company law' [2004] Cambridge Law Journal p. 331. This opinion was shared also by Schon Wolfgang 'The free choice between the right to establish a branch and to set-up a subsidiary - a principle of European business law' [2001] European Business Organization Law Review p. 340; Baldwin Teresa, Baelz Kilian 'The End of the Real Seat Theory (Sitztheorie): the European Court of Justice Decision in *Überseering* of 5 November 2002 and its Impact on German and European Company Law' [2002] German Law Journal p.85.

[201] Dyrberg Peter 'Full free movement of companies in the European Community at last?' [2003] European Law Review, p. 530.

[202] C-208/00 *Überseering* [2002] ECR I-9919. See also Erk Nadja Kuba 'The cross-border transfer of seat in European Company law: a deliberation about the status quo and the fate of real seat theory' [2010] European Business Law Review p. 424.

3.3.4 Vale Epitesi kft

The final ruling to be considered also helps to answer the second question as to whether a host member state has an obligation to recognise the legal personality of an immigrating company. In *Vale Epitesi kft,*[203] an Italian company, Vale Construzioni S.r.l (limited liability company) transferred its seat to Hungary. It was required to liquidate the company and remove it from the Italian register and then to apply for a new incorporation in Hungary. Vale Epitesi S.r.l. claimed to be registered as the legal successor of the Italian company.

In *Vale*, the company was refused re-registration as the successor of the Italian company. Nonetheless, such a conversion was available for Hungarian companies. The CJEU stated that it would be discriminatory to allow purely domestic companies to convert and did not permit foreign companies to do the same.

The CJEU clearly ruled that denial of conversion and registration as a successor might hinder the freedom of establishment. The derogation might be saved purely on the basis of an overriding reason of public interest.[204] The Court noted that in some particular situations, for example, 'protection of the interests of creditors, minority shareholders and employees, the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions,'[205] the national law could deny a conversion. However, this could not be done in a general manner, as it makes any cross-border conversion impossible. The conversion shall be possible when it is available for national companies.[206]

---

[203] C-378/10 *VALE Epitesi kft*, Unreported July 12, 2012 (CJEU).

[204] Ibid., par. 39: 'In so far as concerns justification on the basis of overriding reasons in the public interest, such as protection of the interests of creditors, minority shareholders and employees, the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions, it is established that such reasons may justify a measure restricting the freedom of establishment on the condition that such a restrictive measure is appropriate for ensuring the attainment of the objectives pursued and does not go beyond what is necessary to attain them (…)'

[205] Ibid., par. 23.

[206] Borg-Barthet Justin 'Free at last? Choice of corporate law in the EU following the judgment in Vale' [2013] International & Comparative Law Quarterly p. 503.

Conversely, the European Court was clear that conversion is possible only by virtue of national law.[207] If national law does not allow conversion both for national and non-national companies, it would then be considered as compatible with EU freedoms. Otherwise, nationals would be put in a less advantageous position (reverse discrimination).[208]

Reverse discrimination takes place when nationals are in a worse position than non-nationals.[209] According to case law, the Court has prohibited reverse discrimination where member states subjected their own nationals to more burdensome requirements than non-nationals.[210] In *Asscher v Staatssecretaris van Financiën* the Court stated that

'Article [49 TFEU] nevertheless cannot be interpreted in such a way as to exclude a given member state's own nationals from the benefit of Community law [the EU law] where by reason of their conduct they are, with regard to their member state of origin, in a situation which may be regarded as equivalent to that of any other person enjoying the rights and liberties guaranteed by the Treaty.'[211]

It should be noted that in terms of the free movement of goods, the CJEU has ruled on reverse discrimination issues[212] only if a member state wished to proclaim the non-discrimination principle in its national legal systems. Member

[207] C-378/10 *VALE Epitesi kft*, Unreported July 12, 2012 (CJEU) p. 27 'To this end, the court's decision in VALE began with a sense of worrying déjà vu as it reminded us that, in the absence of a European definition of companies, companies only exist by virtue of national legislation, carrying the hallmarks of the decision in *Daily Mail*' Gajjar Jay 'Your dominion or mine? A critical evaluation of the case law on freedom of establishment for companies and the restrictions' [2013] International Company and Commercial Law Review.

[208] Some authors suggest that *Carpenter* should be based on non-discrimination issue. According to existing EU law, a British national and his spouse are entitled to reside in the State where services are provided for a period during which they exercise business activity there. It might lead to reverse discrimination. Mrs Carpenter was entitled to reside anywhere in the EU but not in the UK. Moreover, if Mr Carpenter was a non-UK national, he would be entitled to reside in the UK. Ritter Cyril 'Purely internal situations, reverse discrimination, Guimont, Dzodzi and Article 234' [2006] European Law Review p. 690.

[209] Ibid., p. 690.

[210] Ljungberg Anna 'Limitations of deductibility of intra-group interest payments' (Lund, University of Lund, 2009)

[211] C-107/94 *Asscher v Staatssecretaris van Financiën* [1996] ECR I-3089.

[212] Ritter Cyril 'Purely internal situations, reverse discrimination, Guimont, Dzodzi and Article 234' [2006] European Law Review.

states are free to decide if they wish to protect their nationals against placing them in a less favourable situation than non-nationals. Even if they do so, the national juridical system, not the CJEU, should deal with the matter.

This was shown in *Guimont*[213] (the so-called Ementhal case) which concerned a French national producing Ementhal cheese. There was a special regulation describing the qualities of cheese and, accordingly, a cheese must possess rind in order to be labelled 'Ementhal.' The defendant argued that in other member states the cheese did not have rind and that he was entitled to use the name even if his own product did not have rind. The French authorities claimed that the regulation on cheese was created to protect consumers and was of overriding value to the freedom of establishment. Mr Guimont claimed that he was subjected to reverse discrimination. The CJEU agreed and found that less restrictive measure was possible, i.e. the 'Ementhal' name could be used but some additional information must be included on the label. Notably, the decision was in line with the ruling prohibiting even non-discriminatory measures but which could hinder exercising the right of establishment.

The different approach of the CJEU was welcomed in *VALE*. In this case, the following rule was issued:

> As regards the principle of equivalence, the Court notes that, pursuant to that principle, a member state is not required to treat cross-border operations more favourably than domestic operations. That principle merely implies that the detailed rules of national law aimed at safeguarding the rights which individuals derive from European Union law cannot be less favourable than those governing similar situations under national law.[214]

In this case, the prohibition of reverse discrimination becomes a general principle and does not need to be based on national provisions. Moreover, the Court ruled that a company may provide documents from a host member state and these need to be accepted. Otherwise, the conversion formally allowed would not be possible in practice.[215]

---

[213] C-448/98 *Guimont* [2000] ECR I-10663.

[214] -378/10 *VALE Epitesi kft*, Unreported July 12, 2012 (CJEU) p. 54.

[215] EU Focus 'Hungarian law on conversion of companies criticized' [2012] EU Focus p.15.

3.4 Doctrine of Abuse in the EU

A prohibition of (tax) abuse is a legal principle[216] developed by the CJEU which prevents a person from relying on a right in law where such reliance would constitute an abuse of that right.[217] The doctrine of abuse in the EU is traditionally connected to a 1974 CJEU.[218] In *Van Binsbergen,*[219] CJEU stated:

'A member state cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article [49 EC] for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that state.'[220]

---

[216] For the opposite view see Liebman H. M, Rousselle O. 'The doctrine of abuse of community law: The Sword of Damocles hanging over the head of EC corporate tax law?' [2006] European Taxation p. 559. Kjellgren argued in 2000 that such a principle has never been recognized by the Court, Kjellgren Anders 'On the border of abuse - the jurisprudence of the European Court of Justice on circumvention, fraud and other misuses of Community Law' [2000] European Business Law Review 179; Heukel Ton and Curtin Deirdre 'Institutional Dynamics of European Integration' [1994] Dordrecht, Boston, Martinus Nijhoff Publishers p. 511. However, most of these arguments are difficult to accept after the most recent CJEU developments.

[217] The definition is proposed by Paolo Piantavigna, Piantavigna Paolo 'Tax abuse in European Union law: a theory' EC Tax Review 2011, p 134; Piantavigna Paolo 'Conference report prohibition of abuse of law: a new general principle of EU law?' [2009] Intertax, p. 166. 'It follows that *Cadbury Schweppes* could be regarded as the final confirmation of prohibition of abuse of law, not only as a Community interpretative principle but as a general principle of Community law, capable of being used as instrument of judicial review where national legislation falls within the scope of Community law.' Feria Rita de la 'Prohibition of Abuse of (community) Law: the creation of a new general principle of EC Law through tax'[2008] Common Market Law Review p. 438.

[218] Edwards Vanessa, Farmer Paul 'The concept of abuse in the freedom of establishment of companies: a case of double standards?' in Arnull Anthony, Eeckhout Piet, Tridimas Takis (eds.) 'Continuity and Change in EU Law' (Oxford, Oxford University Pres, 2009) p. 206.

[219] C-33/74 *Van Binsbergen* [1974] ECR I-1299.

[220] The case refers to the free movement of services but the Court relies on it in later right of establishment rulings. The case concerned a Dutch lawyer representing a Dutch client in a Dutch court. While the case was still pending the Dutch lawyer moved to Belgium. Under Dutch law, legal representation was reserved to Dutch residents only. The Court found that such a restriction could be justified in limited circumstances.

The CJEU based the abuse theory on a business purpose test which originated from the Common Law Countries. The test determines whether a transaction has any economic sense, besides a fiscal one. Nonetheless, the theory is based also on Civil Law Countries' legal measures such as Generalklausel conception which describes an abuse as mistreatment of legal instruments or forms.[221] It was followed by further development of the abuse theory in the so-called broadcasting cases,[222] and eventually extended to the freedom of establishment in *Knoors*,[223] *Bouchoucha*,[224] *Singh*,[225] *Halifax*[226] and *Cadbury Schweppes*.[227]

The issue of abusive establishment is mentioned in the recitals of the Services Directive: 'According to this definition, which requires the actual pursuit of an economic activity at the place of establishment of the provider, a mere letter box does not constitute an establishment.'[228] It is pointed out that the Services Directive has been implemented to promote the freedom of establishment to provide services in the EU.[229] The Directive is 'to a large extent, nothing more than a codification of existing ECJ [CJEU] case law.'[230] However, the first Commission's proposal provided that the Directive should cover all economic activities involving services.[231] The final version of the Services Directive has a much more limited

---

[221] Some authors suggest that Civil Law Countries' legal systems have a predominant influence on the existing concept of the abuse in the EU. Piantavigna Paolo 'Tax abuse in European Union law: a theory' [2011] EC Tax Review, p. 135.

[222] C-23/93 *TV10 v. Commissariaat voor de Media* [1994] ECR I-4795; C-211/91 *Commission v. Belgium* [1992] ECR I-6773.

[223] C-115/78 *Knoors* [1979] ECR 399.

[224] C-61/89 *Bouchoucha* [1990] ECR I-3551.

[225] C-370/90 *Singh* [1992] ECR I-4265.

[226] C-255/02 *Halifax and Others* [2006] ECR I-1609.

[227] C-196/05 *Cadbury Schweppes* [2006] ECR I-7995.

[228] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [Official Journal L 376 of 27 December 2006] Recital 37.

[229] https://ec.europa.eu/growth/single-market/services/services-directive_pl .

[230] Paschalis Paschalidis 'Freedom of establishment and private international law for corporations' (Oxford, Oxford University Press, 2012) p. 99; European Commission 'Handbook on implementation of the Services Directive' http://ec.europa.eu/growth/single-market/services/services-directive/implementation/handbook/index_en.htm.

[231] Commission 'Proposal for a Directive of the European Parliament and of the Council on services in the internal market' COM [2004] 2 final, 5 March 2004, p.8.

scope.[232] Moreover, a letter-box company does not constitute an establishment[233] and it is not subject to the regime of the Services Directive. Thus, can the provisions of the Directive reflect the freedom of establishment for letter-box companies? Paschalis Paschalidis cautiously stated that the Services Directive cannot deprive entities from rights provided by the Treaty. [234] It is should be agreed that the Service Directive only stipulates that a letter box company might be deprived from the benefits of Articles 9-14 of the Directive. As a result, the Services Directive does not have significant impact on the freedom of establishment and the theory of abuse.

Before examining tax abuse, it should be recalled the difference between tax abuse and tax avoidance. Tax avoidance is a type of tax abuse. Tax abuse is a non-proper use of a right, whereas tax avoidance is a circumvention of law. There is a classic ramification of tax abuse to an abuse of law and an abuse of right. Abuse of law may relate to a situation where a person relies on a European legal right to circumvent or displace national law. In other words, a person uses a legal tool to avoid national law (act *contra iuris*).[235] Abuse of right concerns a person seeking to take advantage of a right in European law but in a manner contrary to its spirit and its result is illegitimate. For instance, the tool that is used is legal but the tax reduction is illegal. This is referred to as act *intra iuris*.[236]

The doctrine of abuse is illustrated by the seminal case *Cadbury Schweppes*.[237] In this case national anti-avoidance provisions were under the scrutiny of the CJEU. The provisions were aimed at countering the practice whereby a UK resident company transfers its taxable profits to a company it controls, which was established in another state and applies a substantially lower rate of taxation than that in effect in the UK.[238]

---

[232] As a result of strong opposition, the scope of application has been substantially limited and, inter alia, the Directive does not apply to any of the activities listed in Article 2(2) financial services, electronic communications services, healthcare, private security and social services.

[233] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [Official Journal L 376 of 27 December 2006] Recital 37.

[234] Paschalis Paschalidis 'Freedom of establishment and private international law for corporations' (Oxford, Oxford University Press, 2012) p. 106.

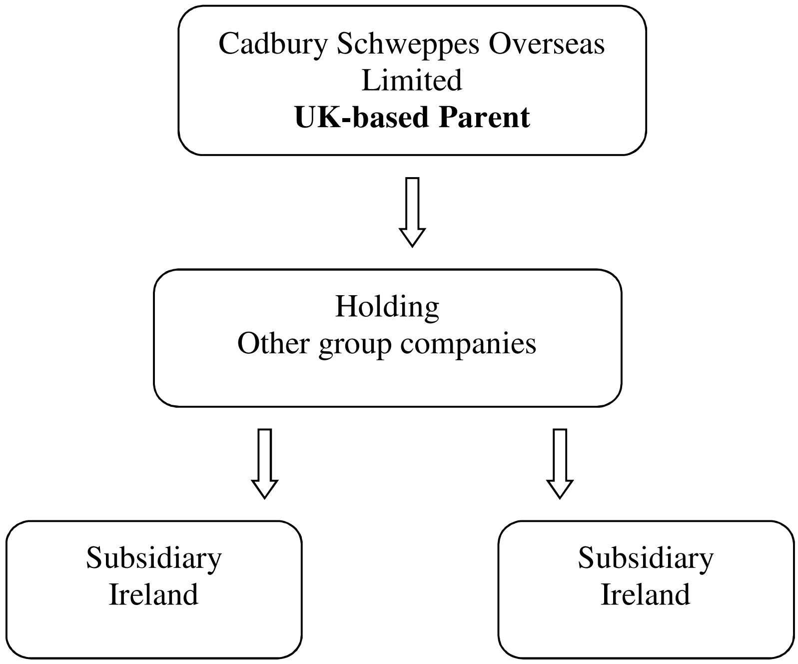
[235] The abuse of law might be illustrated by C-196/05 *Cadbury Schweppes* [2006] ECR I-7995.

[236] The abuse of right might be illustrated by C-255/02 *Halifax and Others* [2006] ECR I-1609.

[237] C-196/05 *Cadbury Schweppes* [2006] ECR I-7995.

[238] Opinion of Advocate General Léger delivered on 2 May 2006 in C-196/05 *Cadbury Schweppes* [2006] ECR I-7995.

Figure 6 Cadbury Schweppes



[239]

Cadbury Schweppes has a UK-based parent company which indirectly owns two Irish subsidiaries. These subsidiaries were subjected to 10% tax burden in Ireland but the UK tax authority (HMRC) applied Controlled Foreign Companies [CFC] rules and claimed tax on incomes incurred by subsidiaries. The Special Commissioners referred the case to the CJEU.

First, the Court examined whether establishing and capitalising companies in another member state, solely because of a more favourable tax regime available in that member state, is an abuse of the freedom of establishment.[240] In *Cadbury Schweppes* the Court, based on the rulings of *Centros*[241] and *Inspire Art*,[242] decided that establishing a company in another member state for the sole purpose of obtaining tax advantages does not suffice to constitute an abuse of freedom.[243]

---

[239] Based on Monsenego Jérôme 'Taxation of foreign business income within European Internal Market' (Intellecta Infolog, Göteborg. 2011) p. 112. Jérôme Monsenego suggested that *Cadbury Schweppes* is a sign that the CJEU is critical of the principle of worldwide taxation p.119.

[240] C-196/05 *Cadbury Schweppes* [2006] ECR I-7995 par. 34.

[241] C-212/97 *Centros Ltd* [1999] ECR I-1459 p. 52, par. 66.

[242] C-167/01 *Inspire Art* [2003] ECR I-10195.

[243] C-196/05 *Cadbury Schweppes* [2006] ECR I-7995 par. 37.

Some authors[244] suggest that these cases are difficult to reconcile despite the ruling and *Centros*[245] and *Cadbury Schweppes* are not connected.[246] In *Cadbury Schweppes*, the Irish subsidiary did not have a real establishment in Ireland, nor in any other member state. It was suggested that *Centros* refers to the rights of founders and not to the right of the company itself. Thus, a company does not exist before its creation. The commentators claimed that this solution is supported by inconsistency in the ruling itself, as it refers sometimes to the company and other times to Danish nationals. Furthermore, the argument for a different situation to that of *Cadbury Schweppes* is that the subsidiary does not have a real establishment anywhere in the EU. This view[247] was based on Advocate General La Pergola's Opinion in *Centros*.[248] It was argued that tax matters needed to be treated differently by the CJEU, because direct taxation lies outside the competence of the EU. However, member states might use their sovereignty only with respect to EU law, including the freedom of establishment. In *Cadbury Schweppes*, the domain of competence of the EU and the domain of the member state overlapped.

These arguments cannot be supported. It must be noted that *Cadbury Schweppes* gives a right to taxpayers to test a domestic anti-abuse measure if in accordance with EU law. It is clear from the wording of the ruling that the Court relied on *Centros*.[249] A tax provision, as well as any other provision, may be

[244] Paschalis Paschalidis 'Freedom of establishment and private international law for corporations' (Oxford, Oxford University Press, 2012) p. 108. Edwards Vanessa, Farmer Paul 'The concept of abuse in the freedom of establishment of companies: a case of double standards?' in Arnull Anthony, Eeckhout Piet, Tridimas Takis (eds.) 'Continuity and Change in EU Law' (Oxford, Oxford University Press, 2009) p. 218.

[245] Supra, section 3.3.1.

[246] Other views presented were that *Centros* refers only to the requirement of minimum capital or that the line of rulings has been changed and cases similar to *Centros* shall be assumed as potentially abusive. However, these interpretations have been rejected by their authors. Paschalis Paschalidis 'Freedom of establishment and private international law for corporations' (Oxford, Oxford University Press, 2012) p. 109.

[247] Edwards Vanessa, Farmer Paul 'The concept of abuse in the freedom of establishment of companies: a case of double Standards? in Arnull Anthony, Eeckhout Piet, Tridimas Takis (eds.) 'Continuity and Change in EU Law' (Oxford, Oxford University Press, 2009) p.220.

[248] Opinion of Advocate General La Pergola dated 16/07/1998 in case C-212/97 Centros Ltd [1999] ECR I-1461.

[249] C-212/97 *Centros Ltd* [1999] ECR I-1459 par. 52, par. 66.

prohibited if it hinders the freedom of establishment.[250] It is such if the challenged provision does not deserve protection and is not proportionate to safeguard a tax system.[251] This view is supported by Paolo Piantavigna, who has commented:
'the immediate precedent of *Cadbury Schweppes* (are) *Daily Mail, Segers, Centros and Inspire Art*, regarding freedom of establishment. The ECJ has imported in tax law issue born in corporate law, because it does not distinguish among legal matters but on the basis of diverse freedoms. In these cases, the benchmark is the same, id est, freedom of establishment.'[252]

Secondly, the CJEU proceeded to examine whether the freedom of establishment precludes the application of legislation, for example, on CFCs [Controlled Foreign Companies] and if such provisions might be viewed as a restriction. The Court stated that member states must exercise their competence in direct taxation consistently with EU law. It was decided that different tax treatment creates tax disadvantages.[253] The application of the CFC provisions result in the taxation of the resident company on profits of another legal person. It has a hindering effect on the freedom of establishment.[254] However, the Court added immediately that member states cannot attempt to circumvent their national legislation. Member states must not improperly or fraudulently take advantage of the provisions of EU law.[255]

---

[250] There is support from the Opinion of Advocate General Léger: 'It is settled case-law that, although direct taxes do not fall as such within the competence of the Community, powers retained by the member states must nevertheless be exercised consistently with Community law. That limitation on the exercise by the member states of the powers reserved to them also applies to measures designed to prevent tax evasion and avoidance. Although the power of member states to take such measures is expressly recalled both by the Treaty and acts of secondary legislation, the fact remains that those measures must not infringe the undertakings they have made under the Treaty and, in particular, the rights of freedom of movement instituted by it.' Opinion of Advocate General Léger delivered on 2 May 2006 in C-196/05 *Cadbury Schweppes* [2006] ECR I-7995 p. 29.

[251] Jiméner Adolfo 'Towards a homogeneous theory of abuse in EU (Direct) Tax Law' [2012] Bulletin for International Taxation p. 270

[252] Piantavigna Paolo 'Tax abuse in European Union law: a theory' [2011]EC Tax Review, p. 141; Jiméner Adolfo 'Towards a homogeneous theory of abuse in EU (Direct) Tax Law' [2012] Bulletin for International Taxation p. 271.

[253] C-196/05 *Cadbury Schweppes* [2006] ECR I-7995 par. 45.

[254] C-196/05 *Cadbury Schweppes* [2006] ECR I-7995 par. 46.

[255] Ibid., par. 34-35.

The CJEU established two requirements for conduct to be judged abusive: first, an objective element which can be independently verified by a third party in terms of premises, staff and equipment[256]; secondly, a subjective element which is the CFC motive test.[257] In particular, the subjective element raises the question of its necessity. There are two groups of commentators: those who claim that a subjective element is essential and those who consider it indispensable. For most, the subjective element is not important in cases of an abuse of law.[258] Paolo Piantavigna suggested that a tax motive becomes irrelevant if there is an objective economic justification for the transaction.[259] It was considered whether a right is abused based solely on objective observation of the third party regardless of a taxpayer's intention. This view is in accordance with *TV10*, *Levin, O'Flynn* and *Centros*. If freedom goals are achieved, private abusive aims should not matter. Moreover, Paolo Piantavigna argued that applying a subjective test may lead to a paradox, whereby EU protection is denied even when a transaction concretizes EU aims.[260]

The opposite solution was presented by Rami Karimeri,[261] who claimed that the motive test protects taxpayers' bona fide. Taxpayers who have an intention to

---

[256] '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.' C-196/05 *Cadbury Schweppes* [2006] ECR I-7995 p. 67; Weber Denis 'Abuse of law in European tax law: an overview and some recent trends in the direct and indirect tax case law of the ECJ: Part 2' [2013] European Taxation p. 313.

[257] C-196/05 *Cadbury Schweppes* [2006] ECR I-7995 p. 72.

[258] Piantavigna Paolo 'Tax abuse in European Union law: a theory' EC Tax Review 2011, p 144; McBarnet, Whelan C 'The exclusive spirit of the law: formalism and the struggle for legal control' [1991] Modern Law Review p. 54; Pawlowski M 'Fraud, Legal formality and equity' [2001] p 73-79. This view is also supported by Vanistendael Frans 'Halifax and Cadbury Schweppes. One single European Theory of Abuse in Tax Law?' [2006] EC Tax Review p. 192.

[259] 'Any transaction should be considered legal. In absence of harmonization within Community, regulatory competition should be free' Piantavigna Paolo 'Tax abuse in European Union law: a theory' EC Tax Review 2011 p. 138.

[260] Ibid., 'Any transaction should be considered legal. In absence of harmonization within Community, regulatory competition should be free' p. 145; Tom O'Shea argued that 'tax avoidance from one member state's perspective is simply exercise of the freedoms from another state's point of view.' O'Shea Tom 'The UK's CFC rules and the freedom of establishment: Cadbury Schweppes Plc and its IFSC subsidiaries - tax avoidance or tax migration?' [2007] EC Tax Review, p. 13.

[261] Karimeri Rami 'A critical review of the definition of tax avoidance in the case law of the European Court of Justice' [2011] Intertax p. 296.

abuse the right should not be grouped with those who have no such intentions. However, it is difficult to state if the intention is 'good.' As wisely noted by HMRC Guidance Manual on CFC Rules: 'one man's tax avoidance is another man's tax efficiency.'[262]

The commentators have strong justifications for their views and each group of commentators presents rational arguments. The opinions might be reconciled if the motive test is applied specifically in cases where a lack of genuine activity has already been established. Only then does a motive test not lead to nonsensical outcome. One might envisage a situation where a taxpayer has a genuine business abroad but a taxpayer's main intention is to circumvent tax provisions. Only if an investigation leads to the conclusion that there was no genuine activity can the intention of a taxpayer be considered. This interpretation is in accordance with the CJEU.[263]

However, the Court is not strict when examining the burden of proof. Thus a resident company establishes a subsidiary in another member state cannot per se set up a general presumption of tax evasion.[264]

Thus, there is presumption of legitimate exercise of freedom by a taxpayer which leads to the conclusion that burden of proof is imposed on the state and its qualified tax authorities. Nonetheless, the Court added in paragraph 71 that the competent national authorities have to decide on the matter of abuse in the light of the evidence furnished by a resident company. The issue of burden of proof should

---

[262] HRMC Guidance Manuals INTM208010 – 'Controlled Foreign Companies – exemptions – the motive test.'

[263] 'if none of those exceptions applies, the taxation provided for by the CFC legislation may not apply if the establishment and the activities of the CFC satisfy the motive test. 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. (…) 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.' C-196/05 *Cadbury Schweppes* [2006] ECR I-7995 par. 62, par. 64.

[264] Ibid., par. 50.

be interpreted in light of the Opinion in this case.[265] The AG Léger concluded that preparing proof is not an unreasonable workload for tax authorities.[266]

It is of note that the doctrine of abuse has been developed over time but the meaning of letter-box companies is still unclear. The doctrine formulated in *Cadbury Schweppes* has been followed by the CJEU, whereby national tax regulations were tested, in particular, *Cadbury Schweppes,*[267] and *Test Claimants in the CFC and Dividend Group Litigation.*[268]

3.5 Concluding Observations

The chapter briefly analysed the different types of establishment: primary establishment and secondary establishment; real seat theory and incorporation theory; and inbound and outbound situations. There are two basic ways of exercising freedom of establishment which are primary and secondary establishment. These two should be treated equally. Moreover, the real seat theory or incorporation theory cannot be, per se, contrary to the EU law.

Consequently, the thesis introduced ramification into inbound and outbound cases. As indicated above, this line of reasoning has been adopted by the CJEU. Only such reasoning can highlight the consistency of the CJEU rulings. The basic difference between inbound and outbound cases is that a home member state does not have an obligation to retain the legal entity of the emigrating company. The national rule is not treated as a restriction and member states are entitled to deny the retention. However, a host member state must recognise an immigrating company. The freedom of establishment is not an absolute right and it can be denied by an overriding public interest.

Moreover, this chapter aimed to determine when obstacles or hindrance to the freedom of establishment might be legal and justified. In Chapter 2, it was

[265] This opinion is shared by Jiméner Adolfo 'Towards a homogeneous theory of abuse in EU (Direct) Tax Law' [2012] Bulletin for International Taxation p. 276.

[266] Opinion of Advocate General La Pergola dated 16/07/1998 in case C-212/97 Centros Ltd [1999] ECR I-1459 p. 139.

[267] C-196/05 *Cadbury Schweppes* [2006] ECR I-7995.

[268] C-201/05 *The Test Claimants in the CFC and Dividend Group Litigation v HMRC* [2008] STC 1513.

argued that the freedom of establishment is not absolute. Other rights or interest might prevail and, thus, a freedom is limited. There are two types of discriminatory measures: direct discrimination and indirect discrimination. The second part of this chapter examined the qualified form of indirectly discriminatory measure which is an abuse theory. This provides conditions to combat non-genuine establishments and introduces the notion of a letter-box company and genuine economic activity which remain at the heart of the theory. It is concluded that neither the CJEU nor any other EU institution has defined what a letter-box company is. However, it would not be reasonable to interpret the Services Directive or *Cadbury Schweppes* in a way that deprives a letter-box company from the right to exercise the freedom of establishment. Nonetheless, a letter-box company might benefit from the freedom of establishment in a limited way and merely a business conducting a genuine economic activity is entitled to benefit fully from the freedom.[269]

Cadbury Schweppes 'widened' the scope of the freedom of establishment and is 'an invitation' for taxpayers to test their national tax provisions in a cross-border situation.[270] The rights of an undertaking might be restricted only when it is justified and a restriction passes a so-called Gebhard test which was presented in the preceding chapter. In particular, it was noted that it is easier for member states to protect interests related to their sovereign powers (i.e. taxation in *Cadbury Schweppes*) than to private interest (i.e. corporate law *Centros*).[271] Thus, taxation is the main obstacle to the freedom of establishment and is the subject of detailed analysis in the following chapter.

---

[269] See also Paschalis Paschalidis 'Freedom of establishment and private international law for corporations' (Oxford, Oxford University Press, 2012) p. 116.

[270] Jiméner Adolfo 'Towards a homogeneous theory of abuse in EU (Direct) Tax Law' [2012] Bulletin for International Taxation p.273.

[271] Paschalis Paschalidis 'Freedom of establishment and private international law for corporations' (Oxford, Oxford University Press, 2012) p. 124.

CHAPTER 4: DOUBLE TAXATION

As demonstrated in Chapter 3, double taxation of undertakings operating in more than one EU member state is not contrary to international law, but it may, nevertheless, constitute a considerable hindrance to the freedom of establishment. A cross-border business affected by double taxation is in a less favourable situation than a purely domestic entity. In the absence of the harmonisation of national tax systems, member states remain competent to determine their income and wealth taxation criteria, as well as having the competence to eliminate double taxation by concluding international treaties and agreements.[272] However, this competence must be exercised consistently with EU law.[273]

As framed in Chapter 3, discrimination is prohibited as an obstacle to the exercise of the freedom of establishment. Both direct and indirect discrimination is contrary to the TFEU and can be justified on very rare occasions. The discrimination must be objectively justified (if indirect discrimination) or be expressly derogated (if direct discrimination). In addition, indirect discriminatory treatment is only allowed if the justification conforms to the proportionality test. The proportionality test provides that for a derogation to apply the national measures must be applied in a non-discriminatory manner; must be justified by imperative requirements in the general interest; must be suitable for securing the attainment of the objective which they pursue; and must not go beyond what is necessary in order to attain the objective which they pursue.[274] It is submitted that the CJEU favours a restrictive approach when the free movement rules are

[272] C-298/05 *Columbus Container Services BVBA & Co v Finanzamt BielefeldInnenstadt* [2007] ECR I-10451 par. 27; C-307/97 *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt* [1999] ECR I-6161 par. 57; C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673 par. 52.

[273] C-298/05 *Columbus Container Services BVBA & Co v Finanzamt BielefeldInnenstadt* [2007] ECR I-10451 par. 28; C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673 par. 36.

[274] See Chapter 3.

threatened but that the Court narrows its reasoning on discrimination only in cases where the obstacles to the freedom of establishment are taxation measures.

Basic notions and terminology concerning taxation will be explained first, before proceeding to examine a concrete case in relation to double taxation. Firstly, it is necessary to examine the principle of tax neutrality. It is submitted that tax neutrality is also an important factor which can ensure the freedom of establishment. Moreover, fiscal neutrality is considered to be the fundamental element of a good tax system.[275] The two opposite concepts of fiscal neutrality are analysed below, depending on the state in which fiscal neutrality is sought: it may be sought either in the home state ('capital export neutrality') or in the host state ('capital import neutrality').

This chapter is divided into three sections. The first presents the basic principles of tax neutrality. The second is dedicated to a foreign subsidiary of an undertaking exercising a freedom of establishment and rights of the home member state to tax a foreign establishment. Finally, the rights of the home member state to tax a foreign permanent establishment will be examined.

4.1 The Meaning of 'Tax Neutrality'

4.1.1 Capital Export Neutrality (CEN)

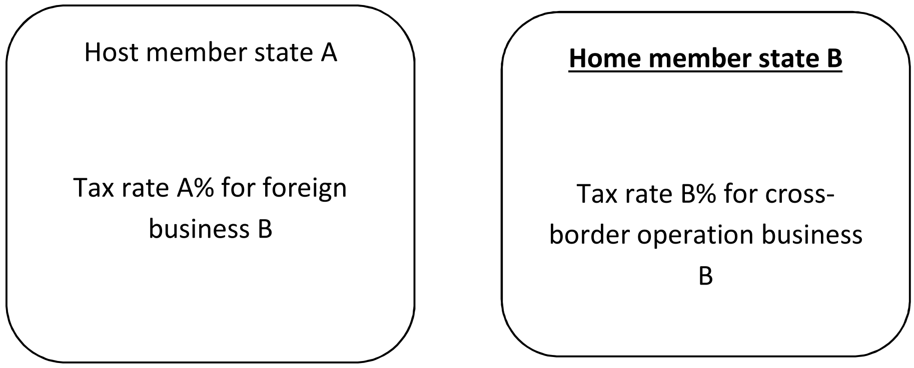
The concept of Capital Export Neutrality (CEN) provides that a tax consideration shall not be influenced by whether an investor resides in one jurisdiction and invests the capital at home or abroad.[276]

CEN is the neutrality sought in a home member state. The concept can be illustrated by the following example:

[275] 'A good tax law is a neutral tax law,' Steuben, Norton L., 'Fundamental aspects of a good tax system. Tax Notes International' [2000] p. 1578;

[276] Knoll, Michael. 'Considering International Tax Neutrality' [2010] Tax Law Review p. 99.

Figure 1 Capital export neutrality (sought in <u>home member state</u>)



As presented in the above boxes, the neutrality is achieved in a home member state. The CEN does not promote business mobility. Its effects are irrelevant for a business operating solely in the domestic market but it might affect a decision on the mobility of a business.

The concept is based on the principle of worldwide taxation. This issue was already the subject of discussion when the nationality of legal persons was examined.[277] It provides that a state is entitled to tax its residents/nationals regardless of where the income is generated (the principle of worldwide taxation). The principle has a long tradition in international and national jurisdictions.[278]

Jérôme Monsenego[279] aptly observed three basic problems of the pure application of CEN. Firstly, it is noted that foreign investment involves higher level of risk and a rational decision would tend to lead to the non-exercise of the freedom. One might argue that CEN ensures business mobility is used only if a business is genuine and avoids abusive or fraudulent mobility. It has already been stated that the freedom of establishment only covers a situation of genuine business activity.

---

[277] See Chapter 3.1.1.

[278] Lord Mansfield's famous utterance states 'no country ever takes notice of the revenue laws of another' *Holman v. Johnson* [1775] English Reports p. 1120;

[279] Monsenego, Jérôme, 'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011) p. 36.

However, the application of CEN also has a great influence on genuine business and its application is not limited to an abusive situation. If a genuine business cannot predict a solid chance of success, it might be discouraging by double taxation.[280]

Secondly, Wolfgang Schön argues that CEN might breach the principle of fair competition.[281] There are two possible outcomes; one is that a cross-border business would be in a worse situation, for example a broader tax base, or the cross-border business could enjoy better tax treatment, for instance by obtaining a tax relief not available in a host member state. Alternatively, the majority of member states can apply an ordinary foreign tax credit, limited to the amount of taxes levied on foreign income in the home member state, instead of the full tax credit.[282]

4.1.2 Capital Import Neutrality (CIN)

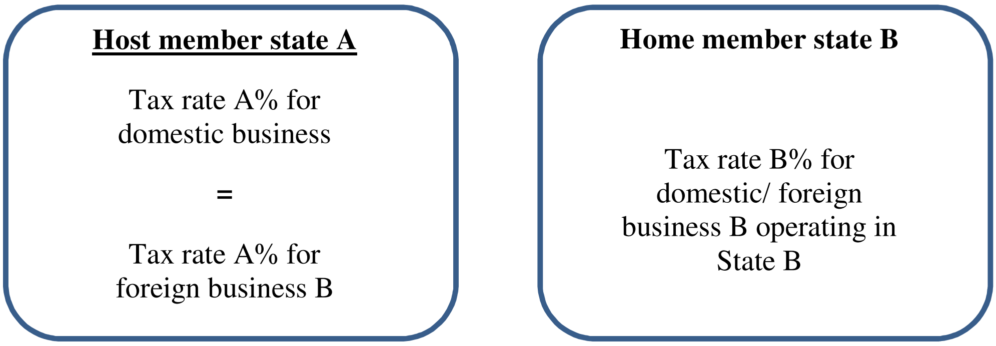
Capital Import Neutrality (CIN) provides that tax considerations should not influence whether a particular investment is made by domestic or foreign investors. This concept is based on the principle of territoriality which provides that a state is entitled to tax a subject (or an object) based on a territorial connection, in respect of tax treaties (if they exist). CIN occurs when neutrality is sought in the host member state:

[280] In particular with a view of potential double non-deductibility of losses. See Chapter 5.

[281] Schön, Wolfgang, 'International tax coordination for a second-best world (part I)' [2009] World Tax Journal, p. 85.

[282] See CFC rules discussed below. Read more about full and ordinary tax credit in Monsenego, Jérôme, 'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011) p. 252 'To conclude, although, a full tax credit has some theoretical advantages over the ordinary tax credit, the risk of tax avoidance and the case law of the ECJ [currently CJEU] plead against, the requirement of a dull tax credit as a consequence of EU law.'

Figure 2 Capital Import Neutrality (sought in host member state)



CIN also has some drawbacks as the principle leads to the isolation of tax bases across member states.[283] Consequently, it creates the problem of deducting a foreign base when profits occur in different member states.[284] Moreover, it may cause member states to become involved in harmful competition (the Delaware effect).[285] It should be remembered that tax is revenue of a state and it is necessary that the tax is collected in sufficient amounts.

To summarise, no satisfactory solution has been found so far. There is a major debate[286] as to which theory - CEN or CIN - meets EU goals. However, there is no single answer to this question. The Treaty is mute on the subject of export or import neutrality.[287] It does not help to search guidance in analogy to other

[283] Monsenego, Jérôme, 'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011) p. 37.

[284] For details see Chapter 5.

[285] More on the Delaware effect in Chapter 2.1.

[286] Kemmeren, Eric, 'Principle of origin in tax conventions. A rethinking of models' [2001] Dongen (The Netherlands) Pijnenburg vorngevers; Gordon, Leon. 'Indirect taxes and Europe' [1993] British Tax Review, p. 164; Knoll, Michael. 'Considering international tax neutrality' [2010] Tax Law Review, p. 99; Snell, Jukka. 'Non-discrimination tax obstacles in community law' [2007] International and Comparative Law Quarterly, p. 339; Shaheen, Fadi. 'International Tax Neutrality: Revisited' [2010] Tax Law Review, p. 131; Banks, Karen. 'The application of the fundamental freedoms to member state tax measures: guarding against protectionism or second-guessing national policy choices?' [2008] European Law Review, p. 482; Tyc, Vladimir. 'Harmonization of indirect taxes in the European Union' [2008] International Journal of Law & Management, p. 87.

[287] Some authors observe that the Treaty seems to focus primary on neutrality in the home state inter alia 'through insisting on not hindering establishment in 'another member state', i.e. outbound movement' but the wording of the Article applies also to a host member state. Monsenego, Jérôme.

freedoms. The freedom of movement of workers refers to both capital export neutrality[288] and capital import neutrality.[289] The freedom to provide services focuses on capital import neutrality,[290] whereas the freedom of capital concerns capital export neutrality.[291] Furthermore, the CJEU's case law[292] is not consistent

'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011) p. 116.

[288] Article 45 TFEU:

It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of member states for this purpose;

[289] Article 45 TFEU:

It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (…)

(c) to stay in a member state for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a member state after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

[290] Article 56 TFEU. Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of member states who are established in a member state other than that of the person for whom the services are intended.

[291] Article 65 TFEU:

1. The provisions of Article 63 shall be without prejudice to the right of member states:

(a) 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 or with regard to the place where their capital is invested;

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

[292] In particular, the neutrality of tax has been widely discussed in case law concerning the free movement of goods. Article 86 of the TFEU seeks to guarantee the complete neutrality of internal taxation as regards the competition between products already on the domestic market and imported products. As far as the taxation of imported second-hand vehicles is concerned, the Court has also held that Article 86 of the TFEU (at the time of the proceedings it was Article 90 of the EC Treaty) 'seeks to ensure the complete neutrality of internal taxation as regards competition between products

with cases opting sometimes for[293] capital import neutrality[294] and other times for capital export neutrality.[295]

As might be seen from the above boxes, CIN or CEN might have an important influence on results if equality is achieved. It is not the aim of this thesis to answer the question of which theory should prevail.[296] However, it is crucial to note the criterion of comparison. The CJEU compares only domestic situations. In other words, the CJEU scrutinises if, within a single member state, domestic and foreign businesses are treated equally.[297] For example, if a tax burden is the same for domestic and foreign businesses.[298] It begs the question as to whether the aim of the freedom of establishment and the principle of a single market seek to promote the freedom in a single member state or in the EU as a whole.

---

already on the domestic market and imported products.' C-313/05 Brzezinski v Dyrektor Izby Celnej w Warszawie [2007] 2 C.M.L.R. 4 p. 28; see also C-387/01 *Weigel* [2004] ECR I-4981, par. 66.

[293] Kemmeren, Eric. 'Principle of Origin in Tax Conventions: A rethinking of models.' Katholieke Universiteit Brabant, Tillburg, 2001, p.133.

[294] C-168/01 *Bosal* [2003] ECR I-9409; C-33/76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1973] ECR I-1039; C-319/02; *Petri Manninen* [2004] *ECR* I-7477, C-513/04 *Kerckhaert and Morres* [2006] ECR I-10967; C-62/00 *Marks and Spencer Plc. v Commissioners of Customs & Excise* [2002] ECR I-6325; *C*-128/08 *Damseaux* [2009] ECR I-6823 etc.

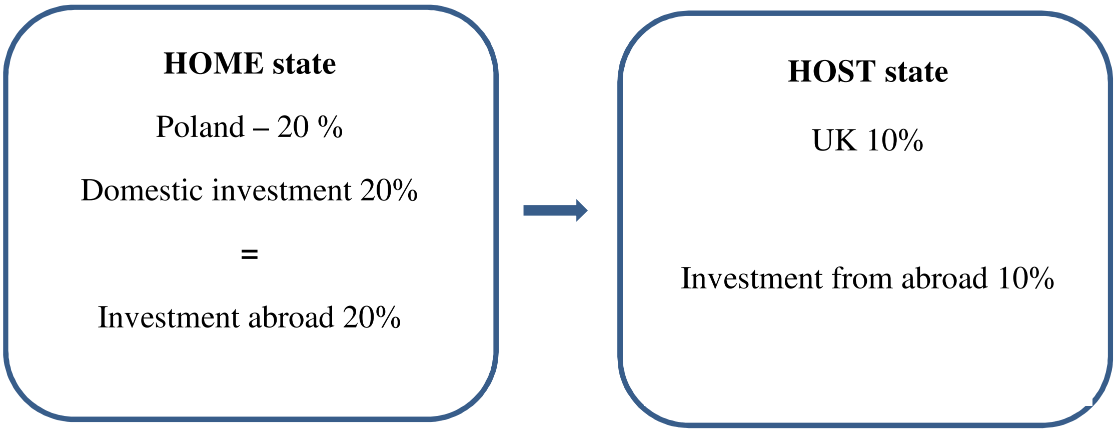
[295] C-336/96 *Gilly* [1998] ECR I-02793; C-250/95 *Futura* [1997] ECR I-2471; C-391/97 *Gschwind* [1999] *ECR* I-5451; C-307/97 *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt* [1999] ECR I-6161 etc.

[296] Besides the classic ramifications of CEN and CIN, there are other international tax neutrality theories, such as national neutrality, capital ownership neutrality and national ownership neutrality. For details and in particular a discussion on which theory shall prevail see Knoll, Michael. 'Considering International Tax Neutrality' [2010] Tax Law Review p. 99, Shaheen, Fadi. 'International Tax Neutrality: Revisited' [2010] Tax Law Review, p. 131.

[297] Monsenego suggests that an alternative might be to compare two cross-border situations depending on the investment form, i.e. comparing the tax treatment of foreign subsidiaries and permanent establishments. Monsenego, Jérôme. 'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011).

[298] C-311/97 *Royal Bank of Scotland v Elliniko Dimosio (Greek State)* [1999] ECR I-2664.

Figure 3 CEN (worldwide tax)



An undertaking investing in Poland, it pays 20% and when investing in host state it pays 20%. If tax is paid in host state, it can be granted tax credit of 10-20%.

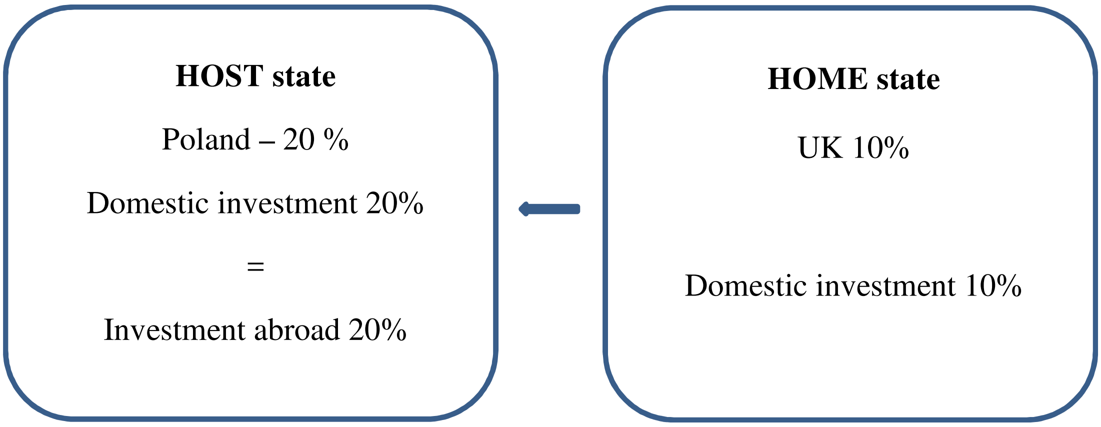
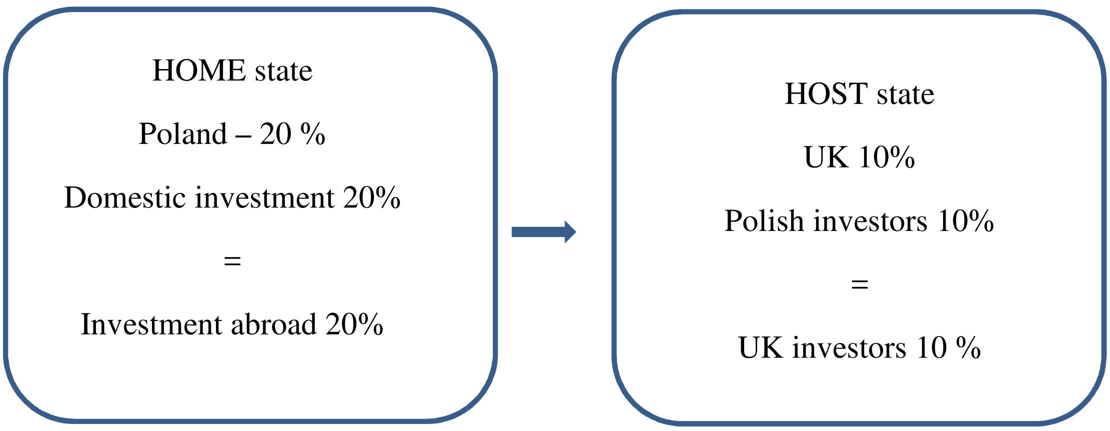
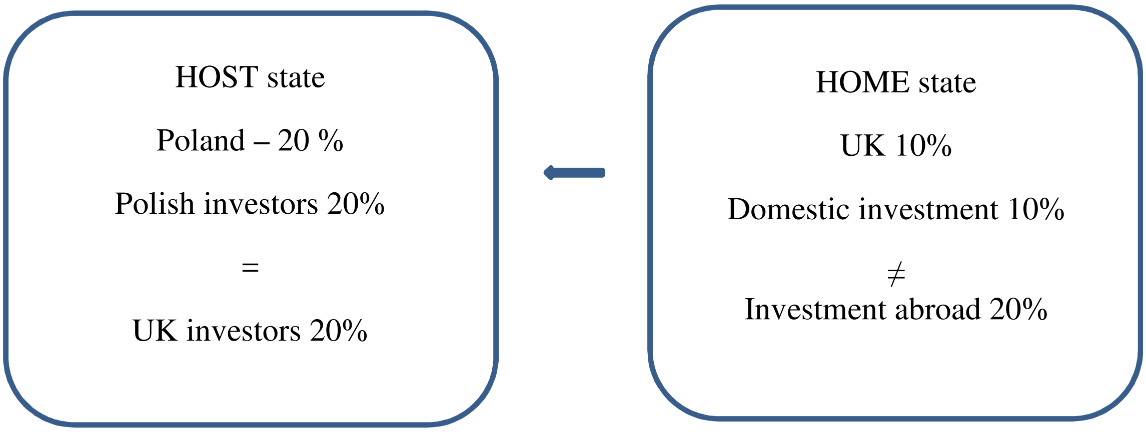


Figure 4 CIN





The CJEU does not find it discriminatory that a foreign business faces additional tax burdens resulting from its cross-border activity as long as within one member state equal treatment is assured, as it stems directly from the wording of the Treaty.[299]

In fact, it is in accordance with the current state of EU law that a cross-border business is deemed to be treated equally if neutrality is achieved within one member state. Indeed, it seems that in light of current acquis communautaire the freedom of establishment is understood as providing equity within a single member state. The CJEU cannot rule over the whole system as import and export neutrality cannot be achieved. Nonetheless, it is proposed that this approach should be modified, for example by the implementation of a common tax rate to achieve the single market, the freedom of establishment and other freedoms. However, this solution seems to be unrealistic.

A further discrepancy results from the different forms of establishment. It has been previously stated[300] that there are two types of establishment: primary and secondary. Secondary establishment can be executed through setting up agencies,

---

[299] The result of the Court's reasoning might differ if the CJEU inlays the international situation of a business. Indeed, the foreign or domestic business might be put in a disadvantageous or more favourable position.

[300] Supra, Chapter 1.3.

branches or subsidiaries. The first two forms (agencies and branches) are a permanent establishment (PE), as they are part of the existing enterprise. A subsidiary is a distinct, legal entity of an existing enterprise and therefore will be considered separately. The difference between them and the consequences are far-reaching and the next part of this chapter is divided into sections devoted first to subsidiaries and secondly to PE.

Given the growing number of cases referred to the CJEU on these issues, a selection of cases is necessary. The selected case is prominent and widely debated but the main reason for selecting them is that they are suitable tools to test the national practices of UK and Poland. It is submitted in this thesis that PEs and subsidiaries are not in comparable situations. However, in some circumstances, the CJEU accepts that each is an 'autonomous fiscal entity.'[301] Indeed, in some situations a subsidiary might be taxed as a PE. In fact, when the Controlled Foreign Company (CFC) rules apply, a member state taxes a foreign entity as a domestic one. This issue has already been discussed in Chapter 3 and will be further extended below in the section devoted to the issue of the double taxation of a subsidiary (*Cadbury Schweppes*)[302]. Section two contains an analysis of the double taxation of PE based on the famous case of *Columbus Container*[303] and is then followed by an examination of the legal provisions of the selected two member states.

It will be accompanied by an analysis of the legal provisions of the UK and Poland given their relevancy to the concrete case that inspired this thesis. Thus, as mentioned in Chapter 1, the thesis was inspired by the practical difficulties experienced by a SME, with a primary establishment in Scotland (UK), when it decided to trade in both the UK and Poland. The SME sought to exercise the freedom of establishment by having a secondary establishment in Poland. The most severe impediment the SME experienced was in relation to the national corporate taxation regimes of both countries. In order to provide context to the thesis the experience of the relevant SME will be described.

---

[301] C-414/06 *Lidl Belgium* [2008] ECR I-3601, par. 21.

[302] C-196/04 *Cadbury Schweppes* [2006] ECR I-7995.

[303] C-298/05 *Columbus Container Services BVBA & Co v Finanzamt BielefeldInnenstadt* [2007] ECR I-10451.

The business was started in 2008 in Scotland (UK). It was established as a Limited Liability Partnership (LLP). The main activity was to provide site management services. The place of the business was determined by the place of residence of its owners. Moreover, it was targeted to the UK market.

As a result of a credit crunch, the construction industry in some member states, including the UK, suffered a decline of demand. At the same time there were a number of significant infrastructural projects under construction in Poland due to subsidies from EU Structural Funds 2007-2013. Furthermore, there was a high demand for qualified and experienced construction companies in Poland. In 2010, the partnership was contracted by an Irish group to provide services in respect of motorway construction in Poland (A4 - south east of Poland). The partnership decided to operate cross-border, in both countries. The partnership did not intend to move its seat to Poland and planned to realize only one project in this country. The business had no interest in setting up any permanent structure in Poland. At that stage, the partnership decided to offer its management services on the basis of providing cross-border services. The partnership did not suffer any restriction in scope of the freedom to provide services. Nevertheless, according to the Convention between the UK and Poland for the avoidance of double taxation[304] if construction works are executed for more than 12 months the business is deemed to have a permanent establishment (PE) in the host state.[305]

For the purpose of the Convention, the term ‘permanent establishment’ means a fixed place of business through which the business of an undertaking is wholly or partly carried on.[306] Accordingly, the profits shall be taxed only in the host state unless the enterprise carries on business in the other contracting state through a permanent establishment situated therein.[307] Thus, the fact of establishing a PE has serious fiscal consequences.

---

[304] https://www.gov.uk/government/publications/convention-between-the-uk-and-poland-for-the-avoidance-of-double-taxation .

[305] A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months. Article 5 (3) Convention between the UK and Poland for the avoidance of double taxation.

[306] Article 5 (1) Convention between the UK and Poland for the avoidance of double taxation.

[307] Ibid, Article 7 (1).

Analysing the A4 motorway project, the main contractor was a Spanish company with an Irish subcontractor and a Scottish LLP as sub-subcontractor. The works were planned for a period of over 12 months. Thus, the Irish undertakings would be deemed to have established PE in Poland if the work exceeds 12 months.[308] As a result, they might face a double tax burden. Having a PE in Poland and a head office in Ireland, an undertaking is a taxpayer in both countries. It will be noted that permanent establishment is treated less advantageously in respect of double non-deductibility of losses and double taxation than branch or group of companies.[309] To avoid alleged permanent establishment, they have established a new business solely for the purpose of the project in Poland (subsidiary). However, based on Organisation for Economic Co-operation and Development (OCDE) Tax model conventions, this applies to construction companies only. The analysed partnership provides civil engineering services and is not assumed to be a construction company, thus, this special regulation is not applied. Moreover, the partnership is not a typical contractor. According to OCDE the project / site management is not 'a building site or construction project.'[310] Thus, the partnership operated solely as provider of services. The partnership has been contracted to work on other projects in Poland, by customers from a number of member states and is not required to establish a permanent establishment.

The business considered setting up a branch or permanent establishment in Poland (secondary establishment). For reasons explained in above paragraph, in respect of the Spanish and Irish contractors, the option to create PE was disadvantageous.[311] Moreover, it was not possible to find a legal advisor who had

---

[308] See also: Convention between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Spain for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital 2006 http://treaties.fco.gov.uk/treaties/treaty.htm

[309] See details in Chapter 5.

[310] Skaar Arvid 'Rapports de 2002 relatifs ou Modele de Convention fiscale de l'OCDE' (Part III, p 93-99); 'Permanent Establishment – erosion of a tax treaty principle'0 1st ed 1991, Brzezinski Bogumil 'Model Konwencji OECD' [Model Tax Convention OECD] (Poznan, Wydawnictwi Politechniki Poznanskiej, 2010) p. 119, Vogel Klaus Double Tax Treaties and their interpretation [1986] Berkeley Journal of International Law.

[311] Neighbour John, Saunders Robin, Pilkington Helen-Frances 'Time to branch out' [2012] Transfer Pricing International Journal; Wall Allard de 'Can branches and subsidiaries be treated equally?' [1997] International Business Law Journal; DeCarlo Joseph 'Hybrid branches face Stern test' [1998] International Tax Review.

been involved in the registration of a branch of a UK undertaking in Poland. Thus, this solution is not feasible in practice.[312] A branch in another member state might also lead to a long investigation by tax authorities as to why expenses or incomes have been accounted for a branch and not for the headquarters. This situation creates uncertainty to a business.

4.2 Subsidiary

As it was presented above a subsidiary is a company controlled or owned wholly or partly by another company.[313] A subsidiary is a separate, distinct legal entity from the parent company that controls or owns it. According to Article 22 of Directive 2013/34/EU[314] an undertaking is a parent if:

'(a) has a majority of the shareholders' or members' voting rights in another undertaking (a subsidiary undertaking);

(b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another undertaking (a subsidiary undertaking) and is at the same time a shareholder in or member of that undertaking;

(c) has the right to exercise a dominant influence over an undertaking (a subsidiary undertaking) of which it is a shareholder or member, pursuant to a contract entered into with that undertaking or to a provision in its memorandum or articles of

---

[312] The significant number of request for quotation have been send and no one of potential service providers were able to contribute a testimony from previous client or any other proof of having clients linked with Scottish legal system. The core examples are also big names as for example Coca Cola who does not establish a branch in Poland but operates as a new entity (Coca Cola Poland ltd).

[313] Supra, Chapter 1.4.

[314] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA relevance OJ L 182, 29.6.2013, pp. 19–76.

association, where the law governing that subsidiary undertaking permits its being subject to such contracts or provisions (...)

(h) is a shareholder in or member of an undertaking and:

(i) a majority of the members of the administrative, management or supervisory bodies of that undertaking (a subsidiary undertaking) who have held office during the financial year, during the preceding financial year and up to the time when the consolidated financial statements are drawn up, have been appointed solely as a result of the exercise of its voting rights; or

(ii) controls alone, pursuant to an agreement with other shareholders in or members of that undertaking (a subsidiary undertaking), a majority of shareholders' or members' voting rights in that undertaking. The member states may introduce more detailed provisions concerning the form and contents of such agreements.'

The discussion of a subsidiary's taxation will be based on the case of *Cadbury Schweppes,*[315] the facts of which have already been stated. In summary, Cadbury Schweppes is an UK-based parent company which indirectly owns two Irish subsidiaries.[316] The subsidiaries were subjected to a 10% tax burden in Ireland but the UK tax authority (HMRC) applied CFC rules and claimed tax on the income generated by the two subsidiaries.

A state has the right to tax on the basis of residence or source. The right is limited by the principle of personality of tax which provides that taxpayers are taxed on their own income and not on the income generated by another person. However, the principle is not absolute.[317] For instance, a partnership can be considered transparent and taxed at an ownership level.[318] The same situation can take place at

[315] C-196/04 *Cadbury Schweppes* [2006] ECR I-7995.

[316] '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 CSTI which CS owns indirectly through a chain of subsidiaries at the head of which is CSO.' Ibid, par. 13.

[317] Monsenego, Jérôme. 'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011) p. 107.

[318] See for example C-298/05 *Columbus Container Services BVBA & Co v Finanzamt BielefeldInnenstadt* [2007] ECR I-10451.

an international level. States dismiss principles of personality if they seek to avoid situations of abuse of their tax rights. There are various methods to eliminate tax avoidance, one of which might be regulations on Controlled Foreign Companies (CFC). CFC serves to discourage companies from establishing 'tax havens'.[319] It provides that if an undertaking is controlled by a national company, the income would be taxed regardless of whether it has been generated in a domestic tax system or elsewhere.

As a result of the CFC application a subsidiary may be subjected to heavier taxation.[320] Moreover, a taxpayer may face other financial costs. Some home states tax at source only at the time of the actual distribution of dividends. Usually, tax credits are granted at the level of the CFC but some states limit the tax credits to the tax paid by the CFC or even qualify the tax paid as an expense. If there is no tax paid at the time of accrual of profit from deemed or actual dividends, some CFC regimes will deny the possibility to offset in future. Moreover, some CFC regimes provide taxation of a later distribution if a specific time has elapsed since the taxation, as a deemed dividend.[321]

Nonetheless, the CFC provisions are accepted by the OECD[322] and European institutions[323] and have an impact on the EU single market. Applying CFC provisions to an EU company is likely to discourage establishment in another

---

[319] Papotti, Raul Angelo. 'Italy: extension of CFC legislation to subsidiaries based in white list states or territories - EU compatibility issues.' [2011] British Tax Review, p. 15.

[320] This approach has been extended in the latter case C-524/04 *Thin Cap Group Litigation* [2007] ECR I-2107.

[321] Aigner, Hans-Jorgen, Scheuerle, Ulrich, Stefaner, Markus. 'CFC legislation, tax treaties and EC law' [2004] EUCOTAX Series on European Taxation, p. 41.

[322] 'CFC rules may also apply in situations which do not involve harmful tax practices as defined in this Report. It is recognised that countries retain their right to use such rules in such situations.' Harmful Tax Competition [1998], OECD, p. 98.

[323] ECOFIN Council stated 'anti-abuse provisions or countermeasures contained in tax laws or double taxation conventions play a fundamental role in counteracting tax avoidance and evasion'. ECOFIN Council meeting, 01/12/1997, 98/C2/01, Official Journal of European Communities, 06/01/1998, p. 5; Council Resolution on coordination of the Controlled Foreign Companies (CFC) and thin capitalisation rules within the European Union, 08/06/2010, 2010/C156/01, Official Journal of European Union, 16/06/2010. Also, the Commission accepts CFC if they fight wholly artificial arrangements, COM (2007) 785 final, 10/12/2007: 'The application of anti-abuse measures in the area of direct taxation – within EU and in relation to third countries.'

member state where the level of taxation is lower than the rate provided in the home state.[324] The CJEU has already ruled on the CFC regime and concluded that it is allowed only if it serves as anti-abuse rule and only if it relates to purely artificial arrangements.[325] In particular, in the seminal case, *Cadbury Schweppes*,[326] the CJEU ruled that CFC rules may be applied only to wholly artificial arrangements aimed solely at escaping national tax normally due and where the regime does not go beyond what is necessary to achieve that purpose.

CFC implements CEN. The CJEU, denying the application of CFC, indirectly stated that the application of CEN may be contrary to EU law. However, the issue of CEN and CIN was not expressly discussed in the ruling.

Many member states still maintain a separate CFC regime which may impede freedom of establishment. A number of member states decided to regulate separately the issue of incomes coming from EU and non-EU foreign subsidiaries.[327] These member states operate two regimes, one to be applied to EU subsidiaries and another to be applied to non-EU subsidiaries. The EU aims not to treat relationships between parent companies and subsidiaries of different member states less favourable than domestic ones. This right is based on the TFEU and is regulated by Council Directive on the common system of taxation applicable in the case of parent companies and subsidiaries of different member states[328] (Directive on CFC). This short Directive comprises only four articles. The Directive provides a general possibility to prevent arrangements which are, in their entirety, not

[324] Lane Make 'CFC Focus - CFC reform and the EU.' [2012] Tax Journal https://www.google.pl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCAQFjAA&url=https%3A%2F%2Fwww.slaughterandmay.com%2Fmedia%2F1755403%2Fcfc-focus-cfc-reform-and-the-eu.pdf&ei=FjuiVdKYG4OssgGjvIPoBA&usg=AFQjCNGbCm-CqbznmU0vlefmnROcASC5kA&bvm=bv.97653015,d.bGg&cad=rja

[325] C-196/05 *Cadbury Schweppes* [2006] ECR I-7995, C-201/05 *The Test Claimants in the CFC and Dividend Group Litigation v HMRC* [2008] STC 1513.

[326] C-196/04 *Cadbury Schweppes* [2006] ECR I-7995.

[327] For example, Spain and France - unless the French tax authorities prove that a scheme transaction is an artificial arrangement aimed at circumventing the French tax legislation.

[328] Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different member states OJ L 21, 28.1.2015, pp. 1-3.

genuine.[329] The Directive does neither define these non-genuine arrangements nor provide any guidance as to how they shall be prevented.

The CFC rules are based on the principle of residence. However, these rules are difficult to reconcile with the freedom of establishment principle. As a result of the application of CFC rules, the attractiveness of the host state is limited and so the free movement of enterprises is discouraged. The application of CFC rules may also result in double taxation[330] and cash flow disadvantages.[331]

The CFC rules may have an impact on the decision as to where to conduct a business. If an entity chooses to establish in a member state which falls under the CFC regulations, they may be faced with an additional tax burden. Thus, the consequences of the possibility of the additional tax burden may have a detrimental effect on the freedom of establishment and constitute a restriction to the exercise of the freedom. It is difficult to advocate a justification for such a restriction. As shown in *Cadbury Schweppes*[332] the CFC legislation is intended to deal with a specific type of tax avoidance involving the artificial transfer by a resident company of profits from the member state in which they were generated to a lower-tax state by means of the establishment of a subsidiary in that state and the effecting of transactions intended primarily to make such a transfer to that subsidiary. As the Court aptly observes, less restrictive measures shall be applied. It is not necessary to apply CFC measures to all businesses that have decided to trade in a lower tax state but only to a business that operates in wholly artificial arrangements.

Moreover, Article 49 of the TFEU entrenched the freedom of establishment as a right to set up agencies, branches (so called PE in corporate and tax law) or

---

[329] Recital 8 Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different member states OJ L 21, 28.1.2015, pp. 1-3.

[330] Monsenego, Jérôme. 'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011).

[331] The CJEU proclaimed that the cash flow disadvantage might constitute burden to the freedom of establishment. In *Société de Gestion Industrielle SA (SGI) v Belgium State* the CJEU ruled: 'Moreover, a procedure aimed at resolution by mutual agreement, followed, if necessary, by an arbitration procedure, may extend over several years. During that period, the company in question must bear the burden of double taxation.' C-31/081 *Société de Gestion Industrielle SA (SGI) v Belgium State* [2010] ECR I-487.

[332] C-196/05 *Cadbury Schweppes* [2006] ECR I-7995, par. 48, Supra, Chapter 3.2.

subsidiaries. CFC rules provide that a subsidiary is taxed at the same parent level, as a PE. It is submitted that this constitutes a restriction, as the TFEU expressly provides both forms of secondary establishment.[333] It is argued that a subsidiary and a PE are not in a comparable situation.[334] Otherwise, member states applying a tax credit method of avoiding double taxation might tax a foreign subsidiary and states applying exemption method might refuse cross-border loss relief of a PE.[335] This may lead to a situation of double taxation and double non-deductibility of losses which is not desirable.[336] Furthermore, the criterion for the application of CFC is a tax rate. In other words, to establish if a member state is a tax haven it is sufficient to identify a nominal tax rate. Nonetheless, a tax rate does not provide full information about the tax system.[337] To establish a final tax burden, it is unavoidable to examine a complex tax system. A formally higher tax rate might not include substantive tax allowances in order to attract cross-border businesses.[338]

British and Polish legislative provisions vary significantly in the scope of the implementation of CFC regimes. There was no separate regulation of CFC in Poland until 1st January 2015. Moreover, Poland has not provided any general anti-abuse rules [GAAR]. On the other hand, the UK has had CFC rules since 1984 regulating this issue in a very detailed way and provides restrictive conditions to reduce taxable basis.

---

[333] However, the CJEU accepts in particular situation that a PE is treated as an autonomous fiscal entity. C-414/06 *Lidl Belgium* [2008] ECR I-3601, par. 21.

[334] Further discussion on the differences between a subsidiary and a PE can be found in section 4.3.

[335] On the comparison of CFC taxation with the taxation of a permanent establishment see: Monsenego, Jérôme. 'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011) p. 123.

[336] Double non-deductibility of losses is examined in Chapter 5.

[337] For instance, the corporate rate in Ireland is currently 12.5 per cent. However, the effective corporate tax rate attributed to Ireland is 14.4 per cent, if the European Commission Model Company approach has been used for calculation. Effective Rates of Corporation Tax in Ireland, Technical Paper [2014] Department of Finance.

[338] It might refer here to a case already analysed C-311/97 *Royal Bank of Scotland v Elliniko Dimosio (Greek State)* [1999] ECR I-2664. In this particular case, the nominal tax rate was identical for both residents and non-residents. However, the Court found it discriminatory that the tax allowance was granted to bank customers only.

4.2.1 Poland – a State without CFC Rules?

As already stated, there was no separate CFC regulation in Polish law until 1st January 2015. However, the new provision raises substantial constitutional incompatibility problems. According to Article 1.2 of the EU Directive on CFC,[339] member states are not precluded from applying an anti-abuse regime. However, the Polish regulator did not include such a regime in the Polish legal system until 2015.[340] As a result, even purely artificial transactions may be considered legal.

Conversely, there is a rule[341] in Polish private law which provides for an anti-abuse regime and adopts the circumvention of law [obejscie prawa] principle. For the principle to be applied three conditions must be met. Firstly, an express legal provision which prohibits achieving the abuse must exist. Secondly, the use of the transaction to achieve this prohibited aim is precluded. And thirdly, the act must be formally legal. However, the anti-abuse rule has limited application in the field of the tax law, because it may be applied only if a transaction is declared void.

The reform of the CFC regime was conducted in a hurry and in an atmosphere of disgrace. According to the Polish Act on Proclamation of Acts and some other legal provisions,[342] a legal act may enter into force at least 14 days after the proclamation.[343] Moreover, the Annual Finance Bill must be proclaimed at least three months before the start of a financial year. This *vacatio legis* ensures that all concerned have time to familiarise themselves with the provisions of a new legal act. Nonetheless, acts may enter into force within a shorter period if an important public interest requires it and the principles of democratic government do not

[339] Council Directive on the common system of taxation applicable in the case of parent companies and subsidiaries of different member states 90/435/EWG, 23/07/1990.

[340] It is clear that the Polish law did not constitute infringement on the freedom of establishment.

[341] Article 58 of Polish Civil Code [Kodeks Cywilny] 1964 Nr 16 poz. 93 z pozn.zm.

[342] Act on proclamation of acts and some other legal provisions [Ustawa o oglaszaniu aktow normatywnych i niektorych innnych aktow prawnych]. Dz. U. z 2005 nr 190, poz. 1606, nr 267, poz. 2253, z 2006 r., nr 73, poz 501, nr 104, poz. 708, nr 145, poz. 1050, nr 220, poz. 1600.

[343] Article 4 par. 1 Act on proclamation of acts and some other legal provisions [Ustawa o oglaszaniu aktów normatywnych i niektórych innych aktów prawnych]. Dz. U. z 2005 nr 190, poz. 1606, nr 267, poz. 2253, z 2006 r., nr 73, poz 501, nr 104, poz. 708, nr 145, poz. 1050, nr 220, poz. 1600.

preclude it.[344] It is clear from the wording of the Proclamation Act that to decide to confer immediate force to legislation is an extraordinary and exceptional situation. It is not understandable why the Polish legislator acted in excessive haste.

The Polish Act provides that an entity may qualify as CFC only if it is established outside Poland and is either controlled by persons residing in Poland or controlled by at least 25 per cent by a Polish person for a period of at least 30 days. Solely passive incomes are taxed by the Polish CFC rules.

It is surprising that Poland which had the most lenient provisions, adopted one of the strictest CFC rules in the EU. For instance, France, Germany, Estonia and Lithuania provide for at least 50 per cent control to qualify as CFC.[345]

The French provisions are a good example to explain the evolution of a CFC system. France was the fourth country in the world to apply CFC.[346] In 1993 a substantial reform introduced rigid provisions on CFC by extending the scope of the regime to foreign direct exploitations of French entities established in a state or a territory where they benefit from a favourable tax regime and by reducing the minimum participation threshold in foreign subsidiaries to 10 per cent.[347] These provisions seem to be similar to those applied in the Polish legislation. However, the French CFC provisions were amended by reform in 2007 as they raised incompatibility issues regarding both EU Treaties[348] and bilateral conventions.[349]

---

[344] Article 4 par. 2 Act on proclamation of acts and some other legal provisions [Ustawa o ogłaszaniu aktów normatywnych i niektórych innych aktów prawnych]. Dz. U. z 2005 nr 190, poz. 1606, nr 267, poz. 2253, z 2006 r., nr 73, poz 501, nr 14, poz. 708, nr 145, poz. 1050, nr 220, poz. 1600

[345] Panas, Adriana, Nogacki, Robert. ‘Taxation of controlled foreign companies in the world’ [Opodatkowanie zagranicznych spółek kontrolowanych na świecie] [2013] Skarbiec Kancelaria Prawna, p. 1

[346] CFC was enacted in 1980 after the United States, Canada and Germany. Gutmann, Daniel, Meziane, Francois. ‘The French CFC Regime’. International Taxation and Competitiveness [2011]. Paper presented on the conference sponsored by the American Tax Policy Institute, Washington.

[347] Gutmann, Daniel, Meziane, Francois. ‘The French CFC Regime’. International Taxation and Competitiveness [2011] Paper presented on the conference sponsored by the American Tax Policy Institute, Washington.

[348] C-196/05 *Cadbury Schweppes* [2006] ECR I-7995.

[349] The French Supreme Administrative Court for direct taxation and VAT matters ruled in Schneider Electric that article 7 of the France-Switzerland bilateral tax treaty precluded the

Currently, French CFC rules apply if a French legal entity, which is subjected to corporate tax, owns or controls directly or indirectly at least 50 per cent shares, share interest, voting rights or financial rights.[350] The existence of a minimum participation threshold of 50% is determined either on the day of the closing of the financial year of the foreign entity or by reference to a 183-day period.[351] Secondly, the CFC applies only if a tax rate in a state concerned is at least 50% lower than in France.[352] All incomes are included in the CFC tax base. There is no list of excluded countries. If an EU member state is involved, the CFC rules apply only if it is proven that the arrangement is artificial and there is no genuine economic activity.

There are two crucial incompatibility issues in the new CFC Act in Poland. Firstly, the CFC provisions may be contrary to the Polish constitution. Secondly, as in France, the rules may be incompatible with EU law.

For reasons presented below, it is likely that the provisions will be declared unconstitutional. The Opinion of Legislation Council announced on 5 July 2013 suggests that twenty-five per cent is not enough to have real control over an enterprise. Some commentators sarcastically conclude that the CFC reform in Poland is inspired by Chinese provisions.[353] A taxpayer might not have sufficient rights to provide the Polish Tax Authority with the documents required. Moreover, the reform is based on an assumption that a taxpayer has a right to profits over a single tax year. For example, a taxpayer has 30% shares for 31 days of Company

---

application of section 209 B French Tax Code. *Schneider Electric* Conseil d'Etat 28 Juin 2002 n°232276.

[350] Section 209 B p. 1 of the French Tax Code [Code général des impôts] [Lorsqu'une personne morale établie en France et passible de l'impôt sur les sociétés exploite une entreprise hors de France ou détient directement ou indirectement plus de 50 % des actions, parts, droits financiers ou droits de vote dans une entité juridique (...)]

[351] Gutmann, Daniel, Meziane, Francois, 'The French CFC Regime'. International Taxation and Competitiveness [2011] Paper presented on the conference sponsored by the American Tax Policy Institute, Washington.

[352] Section 209 B of the French Tax Code [Code général des impôts].

[353] Chinese CFC regulations provides 10 per cent share holds and applies to all states where a tax rate is at least 50 per cent lower than in the home state. Panas Adriana, Nogacki Robert 'Taxation of controlled foreign companies in the world' [Opodatkowanie zagranicznych spółek kontrolowanych na świecie] [2013] Skarbiec Kancelaria Prawna p. 1

X. The company has achieved €2m profit for a tax year. The tax base would be €600,000, calculated as follows: €2m * 30% * 1 tax year. It might result in taxing a profit which has not been obtained.

The Act also raises compatibility issues,[354] in particular with wording of the Article 20 of the Polish Constitution,[355] which provides for the freedom of establishment for all nationals. It should be read in the light of Article 148 of Polish Constitution which ensures a legal certainty in relation to the tax burden. Moreover, the Polish CFC provides that tax credits may be granted based only on bilateral conventions between the concerned states.[356] If a convention is not concluded, a Polish resident cannot claim credits for tax already paid in another state.[357] The CFC provisions do not provide a possibility for deducting foreign losses (negative income). The issue of double non-deductibility is further examined in Chapter 5.

It should also be noted that the Polish regulator has attempted to introduce tax avoidance rules in the past. However, this attempt was declared contrary to the Polish Constitution,[358] especially as it was held to be contrary to the predictability of law and the Polish free trade principles. The Constitutional Tribunal remarked that the constitutional obligation to pay 'taxes specified in statute does not constitute either an obligation for taxpayers to pay the maximum amount of tax or a restriction on taxpayers seeking to take advantage of various lawful methods of tax reduction.'[359]

---

[354] For more negative comments see Nogacki, Robert, Panas, Adriana. 'Critical review of CFC reform proposal' Krytyczna analiza projektu przepisów o opodatkowaniu zagranicznych spółek kontrolowanych' [2013] Gazeta.pl http://pieniadze.gazeta.pl/Gospodarka/1,123741,14659873,Krytyczna_analiza_projektu_przepisow_o_opodatkowaniu.html

[355] Article 20 safeguards a freedom of establishment. Polish Constitution Dz. U. 1997 poz. 78 no. 483.

[356] Article 24a par. 8 Polish Act on Taxation on legal persons.

[357] Art. 24a par. 12, 22b, 20-22 Polish Act on Taxation on legal persons.

[358] Restriction on general clauses in Constitution Tribunal [Trybunał Konstytucyjny] 11 May 2004, K 4/03.

[359] Brzezinski, Bogumił, Lasinski-Sulecki, Krzysztof. Chapter 13 Poland: A comparative look at regulation and corporate tax avoidance [2012]. Comparative Perspective on Law and Justice 12.

Moreover, there were a number of attempts to introduce a general anti-avoidance rule [GAAR] in Polish case law[360] but this was overruled each time by the Constitutional Tribunal which ruled consistently that the notion of legal certainty is a substantial one in the Polish legal order.[361] In the famous *Optimus* case[362] it was held that a school could not deduct VAT for computers they purchased. Thus, a special scheme was created. The manufacturer sold the computers to a Slovakian company. Then, the schools purchased them from the Slovakian company at a lower rate of VAT. The manufacturer transported the computers to Slovakia and brought them back in the same vehicle. It was clear from the facts that the scheme was artificial and had been created solely to circumvent the tax rules. However, the Polish Court was unable to find the scheme illegal as no GAAR existed in Poland and, therefore, the schools were not obliged to pay the higher rate of VAT.

Poland is a member of the continental family of legal systems. It means that all legal provisions must possess a positive legal base in legislation. Courts and their decisions must not constitute a source of law.[363] It is the responsibility of the legislator to formulate clear and understandable laws. The principle of reliance on the state and law means that no negative consequences may be imposed on legal actions. As a result, there is no legal base to conclude that a taxpayer is not allowed to benefit from lower taxation if he or she acts legally.

It must be noted that the Polish Constitution safeguards both the free trade principle and the predictability of a taxation system in a very restrictive manner.[364]

---

[360] Brzeziński, Bogumił, Lasiński-Sulecki, Krzysztof. 'Chapter 13 Poland A comparative Look at Regulation and corporate tax avoidance' [2012] Comparative Perspective on Law and Justice 12.

[361] Inter alia K 47/05 Trybunał Konstytucyjny Constitutional Tribunal [2007], K 19/07 Trybunał Konstytucyjny Constitutional Tribunal [2008], K 4/03 Trybunał Konstytucyjny Constitutional Tribunal [2004], K 40/07 Trybunał Konstytucyjny Constitutional Tribunal [2009].

[362] Administrative Supreme Court [Naczelny Sad Administracyjny] 24th January 1997 *Optimus.*

[363] 'The imposition of taxes, as well as other public imposts, the specification of those subject to the tax and the rates, as well as the principles for granting tax relief and remissions, along with categories of taxpayers exempt from taxation, shall be made by means of statute.' Article 217 of the Polish Constitution.

[364] Read more on Szulc Patryk 'Compatibility of CFC provisions with Constitution' [Konstytucyjność rozwiązań CFC] [2015] http://spolki.cgolegal.pl/optymalizacja/konstytucyjnosc-rozwiazan-cfc/

Article 217 of the Polish Constitution proclaims the principle, its predictability and the certainty of tax duties. The wording of a CFC reform exceeds the normative content allowed by the Polish Constitution. Furthermore, the Constitution provides for an internal examination of the compatibility of a legal act with the Constitution and with international acts.[365] It is conducted by the Constitutional Tribunal. Currently, the CFC provisions are under scrutiny of the Polish Constitutional Tribunal. Secondly, it needs to be established whether the Polish CFC Act remain consistent with the freedom of establishment provided by the TFEU. Thus, it is possible to stipulate that CFC applies to any enterprise controlled above a certain percentage level. Theoretically, CFC is allowed to stipulate that even 1 per cent of shares constitutes control over an enterprise, as long as only purely artificial arrangements are included in the scope of application. Moreover, the Polish CFC rules apply solely to purely artificial arrangements if an enterprise is established in the EU.[366]

The CFC Act does not provide a single definition as to what makes an establishment genuine. This may raise compliance issues in regards to the Polish Constitution but not to EU law. There is no single definition of CFC and economic genuine activities at the EU level.[367] In 2010, the Commission provided a non-exhaustive list of indicators of artificial arrangements.[368] The Commission stated that it is not genuine economic activity if there is inter alia insufficiently valid economic or commercial reasons for the profit attribution, there is no proportionate correlation between the activities carried on by the CFC and the extent to which it physically exists in terms of premises, staff and equipment, the non-resident company is overcapitalised, it has significantly more capital than it needs to carry on its activity; the taxpayer has entered into arrangements which are devoid of economic reality, serve little or no business purpose or which might be contrary to

[365] Article 188-197 Polish Constitution Dz. U. 1997 poz. 78 no. 483.

[366] Article 30f section 19 Polish Act on Taxation on natural persons, Dz. U. 1991 Nr 80 poz. 350 and Article 24a section 16 Polish Act on Taxation on legal persons Dz. U. 1992 Nr 21 poz. 86.

[367] Council Directive OJ L 345, 29.12.2011, 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States

[368] Council Resolution on coordination of the Controlled Foreign Corporation (CFC) and thin capitalisation rules within European Union, 8 June 2010, 2010/C 156/01, Official Journal of European Union, 16 June 2010.

general business interests, if not entered into for the purpose of avoiding tax.[369] However, this list is not exhaustive and member states are free to stipulate otherwise.

To summarise, EU and international law provide for the possibility to regulate separately controlled foreign companies. Poland introduced the CFC Act in 2015 and it is concluded that, although the regime is compatible with EU and international law, it is not compatible with the Polish Constitution.

4.2.2 United Kingdom – Is It Possible to Implement CFC Rules in Accordance with EU Law?

The CFC regulations were implemented in the UK in 1984. As a result of *Cadbury Schweppes*[370] the reform in the UK seemed to be inevitable. In May 2011 the European Commission sent a reasoned Opinion[371] to the UK asking the Government to modify the existing Controlled Foreign Companies' provisions (CFC).[372] According to the Commission a UK-owned CFC may reduce the taxable basis under 'certain restrictive conditions.'[373] The UK legislation provided that a company secured CFC status only if it was established outside the UK and was either controlled by persons resident in the UK or at least 75 per cent controlled by a British person. However, the UK failed to exclude from the scope of CFC all subsidiaries established in member states which are not purely artificial.[374] As

[369] Supra, letter A.

[370] C-196/05 *Cadbury Schweppes* [2006] ECR I-7995.

[371] IP/11/606.

[372] 'CFC interim improvements proposals (corporate tax reform)' [2010] PLC.

[373] IP/11/606.

[374] CFC does not apply if it concerns:

- Activities which are regarded as not having a UK tax avoidance purpose;
- Trading companies with limited UK connections;
- A reduction which is 'no more than minimal' and if it was not a main purpose of any of transaction (motive test);

explained in detail in Chapter 2, according to existing case law, member states may derogate from the EU freedoms only if the restriction is justified and meets certain conditions. Particularly in two cases, *Cadbury Schweppes*[375] and *Test Claimants in the CFC and Dividend Group Litigation*,[376] the CJEU emphasised that a company may be treated less favourably only if the activity is purely artificial.

It is recalled that in *Cadbury Schweppes* the CJEU refused to tax controlled foreign companies in general. However, if the undertaking does not exercise genuine activity the profit might be distributed to a parent company and taxed as an 'own parent' company income. The Court ruled that the activity is genuine if the premises, staff and equipment are established.[377] A Commission Resolution offers further guidance.[378] However, the British CFC rules differed from the solution presented by the CJEU and the Commission.[379]

- A company whose shares are quoted and traded on a recognised stock exchange and at least 35 per cent of the voting power is owned by 'ordinary shareholders who were unconnected member of the public';

- Threshold of £200,000 per year of accounting profits (de minimis profits exemption);[374]

- Countries on a 'white list' of the Controlled Foreign Companies (Excluded Countries)- Regulations 1998 (SI 1998/3081) if the qualified incomes and gains from foreign source do not exceed £50,000 or 10 per cent of its commercial qualified income.

[375] C-196/05 *Cadbury Schweppes* [2006] ECR I-7995.

[376] C-201/05 *The Test Claimants in the CFC and Dividend Group Litigation v HMRC* [2008] STC 1513.

[377] These elements do not perfectly match modern enterprises but Jérôme Monsenego wisely pointed out that choosing indicator 'or' instead of 'and' might lead to further circumvention. Monsenego, Jérôme. 'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011) p. 141.

[378] Council Resolution on coordination of the Controlled Foreign Corporation (CFC) and thin capitalisation rules within European Union, 8 June 2010, 2010/C 156/01, Official Journal of European Union, 16 June 2010. Read also 'Taxation: Commission requests UK to further amend its treatment of controlled foreign corporations (CFCs).' [2011] http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/606&format=HTML&aged=0&language=EN&guiLanguage=en.

[379] Council Resolution on coordination of the Controlled Foreign Corporation (CFC) and thin capitalisation rules within European Union, 8 June 2010, 2010/C 156/01, Official Journal of European Union, 16 June 2010. Read also 'Taxation: Commission requests UK to further amend its treatment of controlled foreign corporations (CFCs).' [2011]

A new proposal was presented in February 2012.[380] Despite difficulties observed by the UK Government, i.e. 'unmanageable uncertainty, result in protracted negotiations with HMRC (…) and give rise to inconsistencies in tax treatment'[381], it seems that it is a mechanism recommended by the Commission. Article 371 of the Company Finance Act provides that CFC rules apply to 'an arrangement if the main purpose, or one of the main purposes, of the arrangement is to reduce or eliminate any liability of any person to tax or duty imposed under the law of the United Kingdom and in consequence of the arrangement, at any time the CFC expects its business to be more profitable than it would otherwise be (other than negligibly so).'[382]

The new regulation came into force in January 2013 and contains complex and detailed provisions. However, a detailed analysis of these provisions is outside the scope of this thesis.[383] Thus, the only issues which are relevant to the freedom

---

http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/606&format=HTML&aged=0&language=EN&guiLanguage=en .

[380] '2.17 The Government also proposes that a reformed regime will include a new motive test for situations where other exemptions are not available. The policy principles document set out the Government's intention to move away from the default assumption that all activities that could have been undertaken in the UK would have been undertaken here, were it not for the tax advantage afforded to them in the overseas territory. This objective should be met through a redesigned motive test that would cover situations where a subsidiary that is properly established overseas is not engaged in activities intended to artificially divert UK profit. The test would provide an opportunity for such an overseas subsidiary to demonstrate the non-tax related commercial rationale for any specified transaction and/or its role or purpose as a member of the group as a whole.' Proposals for controlled foreign companies (CFC) reform: discussion document, January 2011; O'Shea Tom 'CFC Reforms in the UK – Some EU Law Comments.' [2012] EC Tax Review p. 65; Richards, Gary, Fichardt, Liesl. 'Corporate tax reforms - CFC proposals.' [2011] British Tax Review, p.10.

[381] Proposals for controlled foreign companies (CFC) reform: discussion document, January 2011.

[382] Article 371 CA Finance Act 2012.

[383] Read more on CFC. Taylor, David, Sykes, Laurent. 'Controlled foreign companies and foreign profits' [2007] British Tax Review, pp. 609-647; Kofler, Georg. 'The BEPS Action Plan and Transfer Pricing: The Arm's Length Standard Under Pressure?' [2013] British Tax Review, p. 646; Richards, Gary. 'CFCs - the end of a 'long and winding road' [2012] British Tax Review, p. 3; Richards, Gary. 'Finance Act notes: Schedule 8: Lennartz provisions.' [2011] British Tax Review, p. 65; Richards, Gary. 'Finance Act notes: section 10 and Schedule 4: REITs; stock dividends - scrip dividends and REITs.' [2011] British Tax Review, p. 65; Richards, Gary. 'Finance Act notes: section 35 and Schedule 15 - the worldwide debt cap.' [2009] British Tax Review, p. 541; Röder, Erik. 'Co-

of establishment will be examined, as well as the Gateway test and low profits exemption.

The UK introduced a new test, called Gateway, which replaced the motive test. One of the main aims of the reform was the simplification of CFC rules. However, it remained an empty promise and the reform provides further difficulties. New notions have been introduced: 'key entrepreneurial risk-taking functions' (KERT functions) for businesses in the financial sector or, for other businesses and 'significant people functions' relevant to an assumption of risk or to the economic ownership of assets.[384] The terms were based on the 2010 Report from the Organisation for Economic Co-operation and Development's (OECD) on the Attribution of Profits to Permanent Establishments. This might be criticised as the Report does not provide a uniform definition of these terms:

'24. Under the authorised OECD approach, the attribution of these risks within the single enterprise will follow from the identification of the significant people functions relevant to the initial acceptance and subsequent management of those risks:

The excess inventory risk is likely to be regarded as initially assumed by that part of the enterprise which makes the active decisions related to inventory levels. Depending on the circumstances of the case, this may be either the head office or the PE.

The credit risk is likely to be regarded as initially assumed by that part of the enterprise which decides to conclude a sale to a particular customer after having reviewed the creditworthiness of this customer. A question may arise however where a review of the creditworthiness of each customer is performed by one part of the enterprise before a sale is concluded by another part of the enterprise. In such a case, the functional and factual analysis would have to examine whether the people in charge of reviewing the customers' creditworthiness are in effect the ones making a decision that leads to the assumption of credit risk, or if they act as a

---

ordination of corporate exit taxation in the internal market and beyond' [2014] British Tax Review, p. 574.

[384] INTM200200 - Controlled Foreign Companies: The CFC Charge Gateway Chapter 4 - Profits attributable to UK activities: Terms used in Chapter 4 http://www.hmrc.gov.uk/manuals/intmanual/intm200200.htm

support function for the PE which ultimately makes the decision of whether or not to sell to a particular customer.

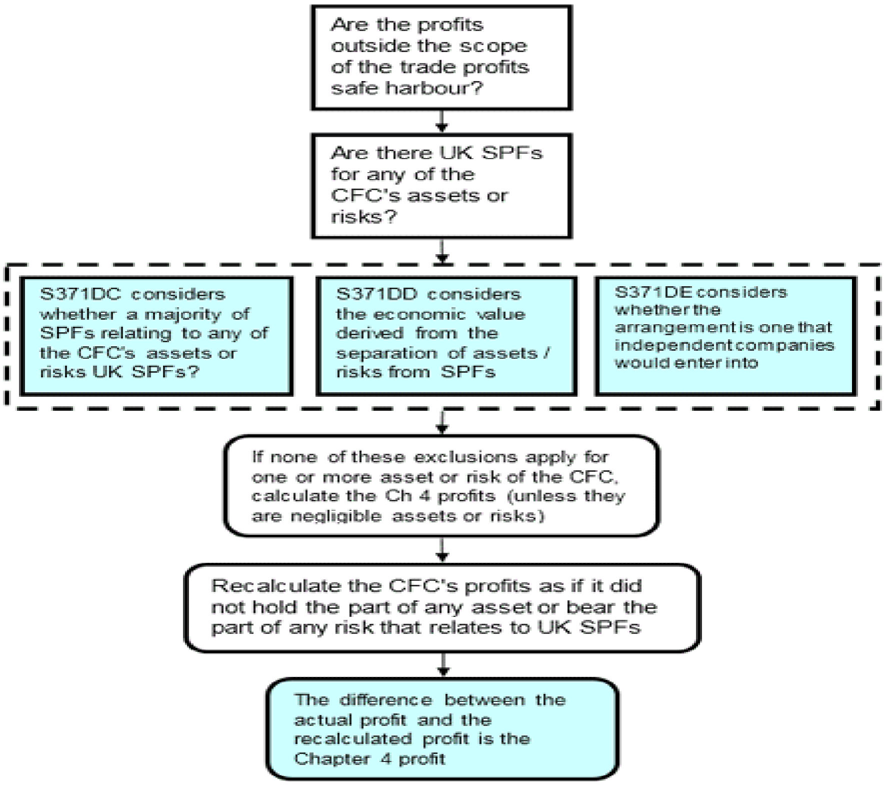
25. Note that the fact that general parameters for inventory levels or credit risks might potentially be set by another part of the enterprise would not change the assumption of the risk, as the significant people functions relevant to the assumption of risks are those which involve active decision-making.'[385]

As can be understood from the above citation from the HMRC Manual, further explanation of these new contentious terms does not help us to provide a single interpretation. Thus, this can lead to uncertainty and entrepreneurs might be exposed to the application of ineptly defined terms. There is a significant risk in the application of restrictive measures to a genuine business. Below, a graphic illustration from the HMRC's manual is reproduced. The illustration seeks to help entrepreneurs to establish whether their businesses fall within the scope of CFC.

As the official 'explanation' showed below does not contribute significantly to the understanding of when a CFC rule applies, below there is an example based on a concrete case study, indicating when the CFC applies.

[385] Organisation for Economic Co-operation and Development's (OECD) 2010 Report on the Attribution of Profits to Permanent Establishments, pp. 24-25.

Figure 5 CFC Charge

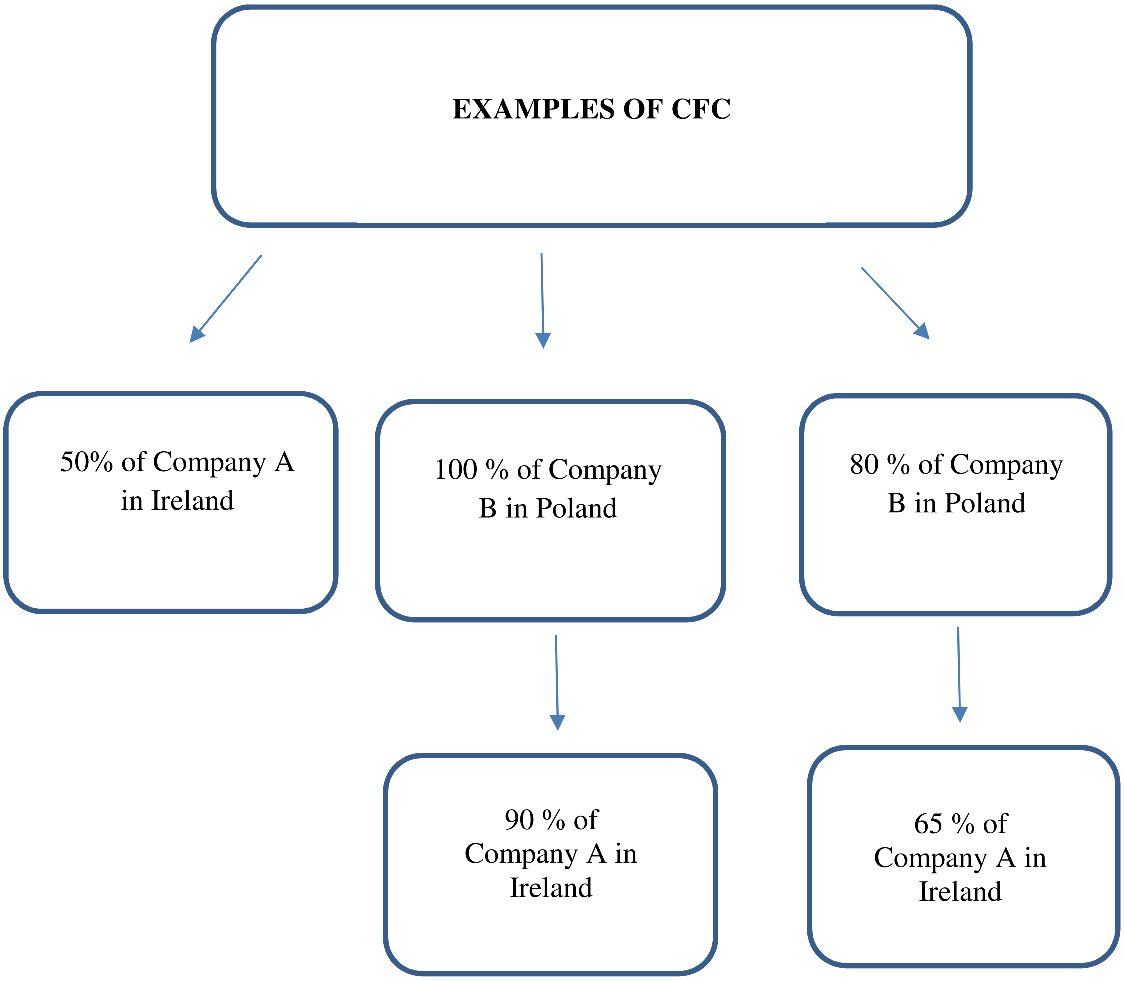


[386]

The boxes below illustrate in a simplified form when the CFC applies. However, it needs to be recalled CFC rules provide that the CFC applies only if the sole or one of the main aims was tax avoidance.

---

[386] INTM200400 - Controlled Foreign Companies: The CFC Charge Gateway Chapter 4 - Profits attributable to UK activities: Flowchart http://www.hmrc.gov.uk/manuals/intmanual/intm200400.htm



As shown on above boxes, John is a UK resident. In the first case, John directly owns 50% of voting power or economic rights in company based in Ireland. Therefore, CFC regulations apply. In the second case, John own voting power or economic right indirectly but CFC regulations apply. In third case, John again owns indirectly voting power or economic right in Irish company. Thus, the calculation should be as follows: 80 x 65 = 52 %. Therefore, in the third example CFC rules also applies.

However, the further criteria of the Gateway[387] may raise a compliance question and especially the finance rules in Chapters 9, 10 and 17. These refer to exemptions for profits from qualifying loan relationships which raised incompatibility issues and were amended by the Finance Bill 2014 (published on 10/12/2013).[388] The Chapters 9, 10 and 17 provide for a choice between the CFC Gateway test and other forms of taxation of non-trading finance profits arising from a qualifying loan relationship. The main advantage of the system was the avoidance of uncertainty in respect of the potential CFC apportionment.[389]

---

[387] 'Even assuming that all three exclusions in the Gateway failed, i.e. significant UK SPFs were performed, trading income of the CFC would not be apportionable if five cumulative conditions were satisfied. These require:

1. the CFC to have premises from which the CFC's operations are wholly or mainly carried on in the territory in which it is resident;
2. that either no more than 20 per cent of the CFC's income, to the extent that income is derived from sales of goods not produced in the country where the CFC is resident, is generated from UK residents or UK permanent establishments and non-resident companies or if the CFC is carrying on a banking business regulated where it is tax resident, no more than 10 per cent of its relevant interest and other trading income is derived from the UK residents or UK PEs of non-resident companies;
3. that in general terms not more than 20 per cent of the CFC's expenditure, either on its own staff or on staff of related persons who carry on activities managing assets or risks, is incurred in the UK directly or indirectly. Where this test cannot be satisfied but all of the other four conditions in section 371 HE in relation to the CFC's activities are satisfied, trading income derived from an asset or risk of the CFC can be excluded from CFC apportionment where no more than 50 per cent of the "related management expenses' on any particular asset is, directly or indirectly, incurred in the UK (the so-called '50 per cent condition');
4. that an IP condition, identical to that discussed above in relation to the ETE is satisfied; and
5. that the CFC does not derive more than 20 per cent of the CFC's income from goods exported from the UK other than goods exported to the country where the CFC is tax resident.' TIOPA s.371 HE

[388] 'It is rather hard to see why, if a group finance company is genuinely established in and carrying on economic activity, in another member state, all of its finance income, whether that is derived or funded from the UK or not, should not be fully exempt. Or at least it is if one sets aside considerations of revenue protection and affordability. I have certainly heard tax directors muttering that 5.75% is a tax rise not a tax break.' Slaughter and May 'CFC focus – CFC reform and EU.' [2012] Tax Journal, p. 1.

[389] Mealey, Mat, Alexander, Kate, Thomson, Fiona. 'CFC finance company exemption - anti-avoidance' [2013] http://www.google.pl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CDYQFjAD&url=http%3A%2F%2Fwww.ey.com%2FPublication%2FvwLUAssets%2FDraft_Finance_Bill_2014_-

The new measure excludes certain loans from qualification for CFC loan relationships. As a result, an offshore financing regime would not apply, whereas a UK resident entity, connected with a CFC, has a loan receivable and an arrangement the main purpose of which is to reduce the loan relationship credits.[390]

The low profits exemption[391] applies if either the CFC's accounting or assumed taxable total profits are not more than £50,000 or the CFC's accounting or assumed taxable total profits are not more than £500,000 and the non-trading element is not more than £50,000.[392]

At first sight it may seem also that CFC rules do not apply to SMEs (Section 166 of Taxation International and other Provisions Act 2012). However, in the other sections of the Act we can see that[393] the exemption is limited by a number of exceptions. As a result, SMEs are also covered by the Act and there is therefore a need to discuss the issue further.[394]

Moreover, the UK has prepared a list of excluded countries. However, not all EU countries have been included in the list. Firstly, Ireland falls within the scope of the CFC in its full regime. Also, an industry established in Luxembourg cannot benefit from the exemption.

To recall the facts of the case study presented above,[395] a UK business contracted for engineering work to be carried out in Poland for a Polish subsidiary of an Irish contractor. It is important to remember that, if a UK business establishes a controlled company in Ireland, the Irish company might be subjected to the British CFC regulations. However, if the company is established in Poland and contracted a subsidiary of Irish contractors to undertake the engineering work, the company

_CFC_finance_company_exemption_-_anti-avoidance%2F%24FILE%2FEY_Draft_Finance_Bill_2014_-_CFC_finance_company_exemption_-_anti-avoidance.pdf&ei=OYufVfLBJ4SsswHWmYLIDg&usg=AFQjCNEAfu5rc73N5ADTiUqdr7g7-D_UQg&bvm=bv.97653015,bs.1,d.bGQ

[390] Ibid.

[391] Chapter 12 Finance Act 2012.

[392] Section 371LB Finance Act 2012.

[393] Section 167, 167A, 168 of Taxation International and other Provisions Act 2012.

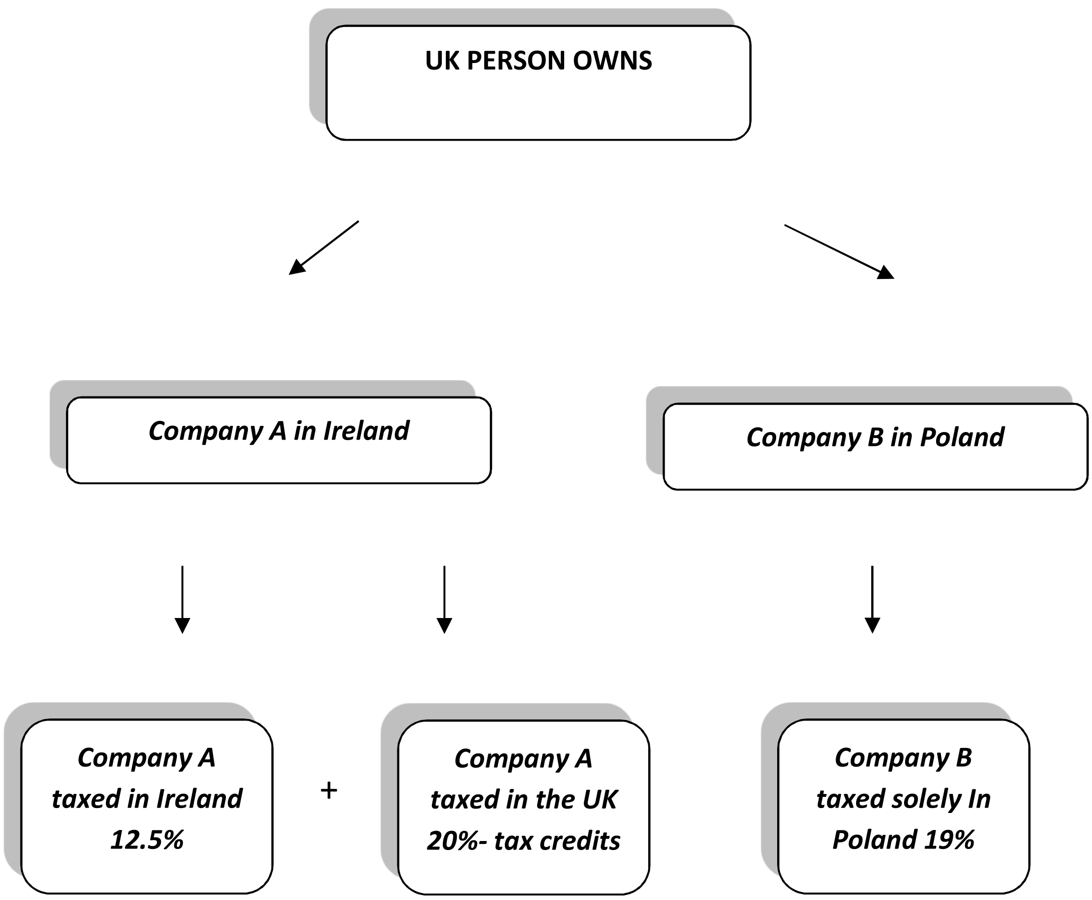
[394] Richards, Gary. 'CFCs - the end of a "long and winding road' [2012] British Tax Review, p. 3.

[395] Chapter 1.3 and 4.1.

would be excluded from the scope of the UK regulations. Thus, the UK CFC regulations lead to the disadvantageous treatment of businesses established in certain member states.

Applying the above rules to the factual situation presented in Chapter 4, there is a difference in treatment between the subsidiaries established in Poland and Ireland. In the described situation, a UK business trades in Poland. The separate company has been established in Poland by UK residents. The company is owned 100% by UK residents. The corporate tax rate in Poland is 19 per cent. A UK CFC regime applies to a CFC established in a state where a corporate tax rate is 25 per cent lower than in the UK. Thus, CFC does not apply.

Figure 6 CFC in the UK

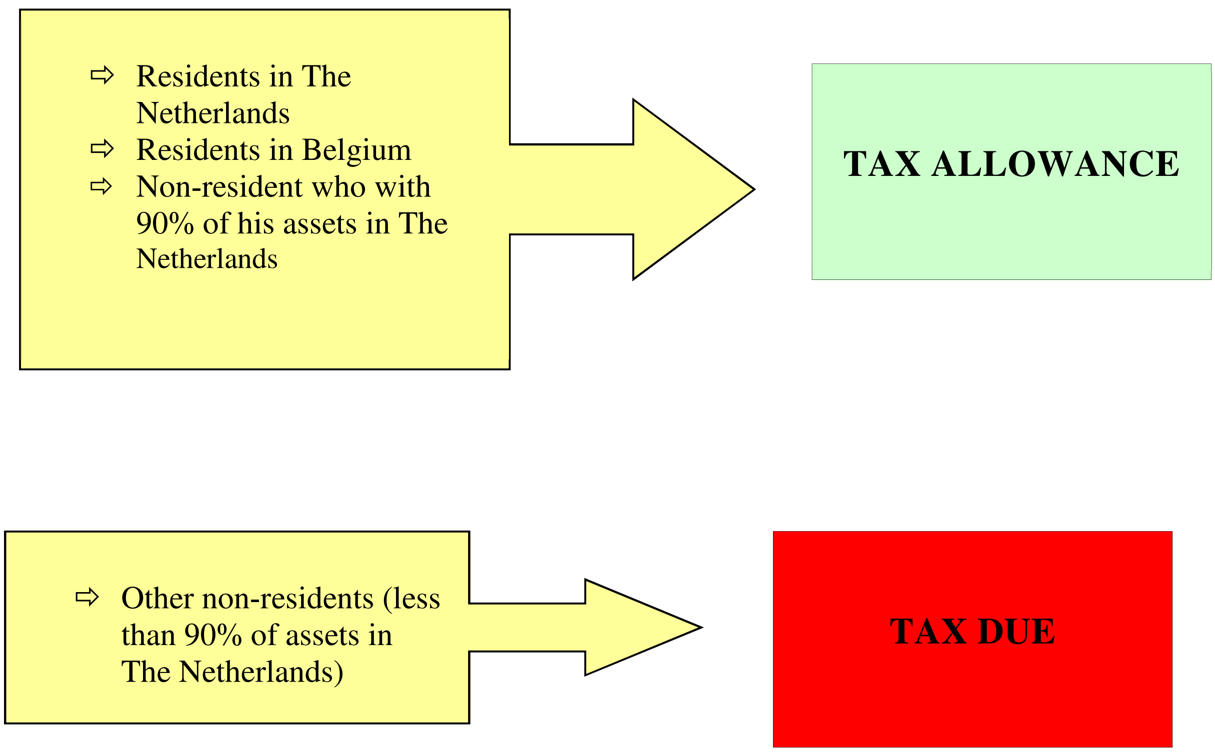


If it is presupposed that a UK person established a company in Ireland, the CFC might apply. The corporate tax rate in Ireland is 12.5 per cent. Thus, it is 37.5 per cent lower than in the UK.

As illustrated above, a UK company wishing to trade in Ireland might be discouraged by the higher tax burden. It should be remembered that CFC is not connected with the taxed resident company and the deductibility of losses is limited. There is, therefore, a difference in treatment between the two CFC companies and the difference depends on the state of establishment.

Is it justified to treat companies from different member states differently? In *Dr Inspecteur D*[396] D claimed relief from a wealth tax in regards to his property located in The Netherlands. D was a resident in Germany, where 90% of his assets were located. Moreover, D owned a property in The Netherlands constituting 10% of his assets.

Figure 7 Dr Inspecteur D



[396] C-367/03 *Dr Inspecteur D.* [2005] ECR I-5821.

D was refused a tax allowance. He claimed to be discriminated against compared to Dutch and Belgian residents. The CJEU did not agree and decided that these situations were not comparable.

D argued that it was discriminatory to treat residents from member state A differently from residents from member state B. The CJEU did not agree given that, although a bilateral tax Treaty had been concluded between The Netherlands and Belgium, no such agreement existed between The Netherlands and Germany. Thus, a reciprocity argument did not arise.

The decision has been criticised, as a bilateral Treaty should not override an EU Treaty.[397] The CJEU in *Dr Inspecteur D* explicitly rejected the requirements of the most favoured treatment which would result in equal (most favoured) treatment given out to residents of all member states.

Dennis Weber suggested[398] that the most favoured national treatment should be the standard for the EU. It is noted that this right has been included in EU agreements with member states acceding the Union on or after 1st May 2004.[399] Although the most favoured treatment is not part of customary international law, its application in the EU would be beneficial for competition in the EU and for the internal market.

It is not contended that Mr. D's situation was disadvantageous compared with residents of The Netherlands or even with other non-residents.[400] Therefore, it is submitted that the CJEU should have provided different criteria for the analysis. The comparison should have been made between a resident and a non-resident. If

---

[397] Calderon, Jose, Baez Andres. 'The Columbus Container Services ECJ case and its consequences: a lost opportunity to shed light on the scope of the non-discrimination principle' [2009] Intertax, p. 212; Monsenego, Jérôme. 'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011) p. 225; Offermanns, Rene. 'Restrictions on treaty override resulting from EU law' [2013], European Taxation p. 430.

[398] Weber, Dennis. 'Most-Favoured-Nation Treatment under Tax Treaties rejected In European Community: Background and Analysis of the D Case. A proposal to include a most-favoured-nation clause in the EC Treaty.' [2005] Intertax, p. 420.

[399] Including Poland.

[400] Wattel, Peter J. 'EC law does not require most-favoured nation tax treatment and a disparity is not a discrimination: D. v Inspecteur van de Belastingdienst.' [2005] British Tax Review, p. 575.

there is a difference in treatment, then it is discriminatory. Thus, there is no obligation to apply the most favoured treatment in case of the taxation and this situation might hinder the freedom of establishment. However, the discriminatory measure may be allowed on the basis of a justified reason. Then, the CJEU should have determined whether the derogation was objectively justified. A proportionality test should then have been applied.

By contrast, the CJEU did not find the situation discriminatory. The Court followed previous rulings in finding discrimination only when there is a prohibitive clause. The CJEU does not consider, within the scope of tax matters, other obstacles 'which might have a hindering effect' on the freedom of establishment.

Notions of 'genuine activity'[401] and 'main aim' are not precisely defined and courts may interpret them differently which may result in different decisions. It puts taxpayers in a highly disadvantageous situation when they cannot foresee the effects of their activities. Moreover, the lack of consistency in the interpretation of these terms may expose member states to a risk of wrong implementation of the TFEU. In such circumstances it may be wiser for the UK to repeal the separate CFC regulations and to provide general anti-abuse rules[402] which may be applied to both national and non-nationals. It is submitted that any CFC provision may lead to compliance questions and only by amending them may EU law be fully implemented. In particular, in the wording of *Test Claimants*[403] CJEU ruled that CFC rules cannot be applied if CFC is established in the host member state and carries on genuine economic activities there. The UK legislator avoided the motive test and the Act expressly and repeatedly stated that the CFC applies if the main or one of the main aims was to obtain a tax advantage. In light of the CJEU ruling, it should be assumed that if, despite tax motives, a genuine establishment exists then the CFC shall not apply.

---

[401] C-196/05 *Cadbury Schweppes* [2006] ECR I-7995.

[402] Report of a study group led by Graham Aaronson QC on the merits of introducing a general anti-avoidance rule has been published on 11 November 2011 and now is a subject of a debate. Lethaby, Helen. 'Aaronson GAAR' [2012] British Tax Review, p.27.

[403] C-201/05 *The Test Claimants in the CFC and Dividend Group Litigation v HMRC* [2008] STC 1513 par. 86.

However, in light of the CJEU line of ruling, it is not surprising that the Commission reached a different view and currently the British CFC rules are no longer under consideration by the Commission.

Based on the Polish experiences, it might be questioned whether the CFC rules are necessary at all. On the one hand, the British Tax Authority has a useful tool to fight purely artificial arrangements. On the other hand, it leads to Tax Authorities' discretion, as emphasised by Polish Constitution Tribunal.[404] Notions of 'genuine activity'[405] and 'main aim' are not precisely defined, either in the EU law, or in national legal systems. The national courts interpret these terms differently, thus resulting in inconsistent rulings. It places taxpayers in a highly disadvantageous situation where they cannot foresee the effects of their activities. Thus, it is not recommended to exclude the CFC regime from undertaking trading within the EU, unless it is purely artificial. It has been argued above that any CFC provision leads to compliance questions and that only by amending them will EU law be fully implemented. However, the Commission reached a different solution and currently British CFC rules are no longer under Commission observation.

However, it is questionable if the solution proposed by the UK does not go beyond what is necessary to achieve the objective it pursues.[406] There was an interesting informal initiative of the HMRC, who appointed a research group to prepare a proposal of general anti-avoidance rules (GAAR). The Aaronson Report[407] proposed to use GAAR instead of the CFC. It was argued that the CFC rules are unnecessarily discriminatory and the GAAR should be used instead.

---

[404] Restriction on general clauses in Constitution Tribunal [Trybunał Konstytucyjny] 11/05/2004, K 4/03.

[405] C-196/05 *Cadbury Schweppes* [2006] ECR I-7995.

[406] Proportionality/Gebhard test provides that the derogation must: (1) be applied in a non-discriminatory manner; (2) must be justified by imperative requirements in the general interest; (3) must be suitable for securing the attainment of the objective which they pursue; and (4) must not go beyond what is necessary in order to attain the objective which they pursue.

[407] Aaronson, Graham. 'GAAR Study. A study to consider whether a general anti-avoidance rule should be introduced into the UK tax system.' [2011] http://www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf .

In March 2011 the European Commission published a draft of general anti-avoidance rules.[408] It was based on the influential CJEU ruling in *Halifax*.[409] The Court ruled that 'artificial transactions carried out for the sole purpose of avoiding taxation shall be ignored for the purposes of calculating the tax base. The first paragraph shall not apply to genuine commercial activities where the taxpayer is able to choose between two or more possible transactions which have the same commercial result but which produce different taxable amounts.'

The proposal for reforms is examined in Chapter 6. However, the reform proposal needs to include all aspects of the double taxation issue.

4.3 Permanent Establishment

Before proceeding to examine the tax treatment of permanent establishment (PE), it is essential to define it. It must be noted that PE is not a separate entity and constitutes a part of a resident company. A PE is a fixed place of business which may raise tax liability in a particular jurisdiction.

The Commentary to the OECD Model Tax Convention on Income, in particular Article 5, gives a detailed analysis of what PE is. Paragraph 1 states that to decide the existence of PE it is needed to establish 'place of business' such as premises, machinery or equipment.[410] Secondly, this place must be 'fixed', i.e. it must be established at a distinct place with a certain degree of permanence and eventually the business must be carried through this fixed place of business.[411]

---

[408] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) COM (2011) 121/4 published on March 16, 2011, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011PC0121:EN:HTML [Accessed May 6, 2011].

[409] C-255/02 *Halifax Plc. and others v CC&E* [2006] ECR I-160.

[410] If such circumstances do not exist, a company is deemed to exercise freedom to provide services/goods. Thus, a tax liability exists only in relation to home member state.

[411] Read more on the evolution of the definition of PE in Cockfield, Arthur. 'Reforming the permanent establishment principle through a quantitative economic presence test' [2003] Canadian Business Law Journal, p. 400.

In the introductory section of this chapter (Section 4.1.), it was stated that there are nine substantial differences between subsidiaries and PE, observed by Professor Peter Wattel.[412] The most important difference is that a branch is not considered to be resident for tax purposes in the host state.[413] A non-resident PE cannot automatically enjoy the same tax benefits as residents.[414] A PE is taxed only for state source profits in a host member state, whereas the subsidiary has unlimited taxation. However, subsidiary suffers unlimited tax subjection in a host member state but it might be taxed in the home member state solely if their activity is not genuine and the sole or one of the main aim of foreign establishment is tax avoidance.[415]

The Model Double Taxation Treaty of the Organisation for Economic Cooperation and Development (OECD) accepts the principle of worldwide taxation of residents. Article 7 paragraph 1 provides that 'profits of an enterprise of a contracting state shall be taxable only in that state unless the enterprise carries on business in the other contracting state through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits that are

[412] The distinctions might be divided into differences from home and host member state perspectives. From a host member state perspective:

- PE needs some duration to qualify as PE (nexis)
- No capital duty is payable in a host state
- No dividend withholding tax – profit repatriation from a PE to its head office is not a profit distribution.
- PE is not resident, has no access to Tax Treaties, to unilateral relief and to domestic tax benefits
- PE might not be entitled to group relief or fiscal unity schemes

Distinction from host state:

- Costs incurred by parent company are deductible in the state of PE
- Losses (including temporary losses) incurred by PE are tax deductible in host member state
- PE profits are taxed in home member state

Moreover, the difference from both perspectives of home and host states are that the interest, royalty and lease payments between PE and parent company are tax deductible (under certain condition). Wattel, Peter. 'Corporate tax jurisdiction in the EU with respect to branches and subsidiaries; dislocation distinguished from discrimination and disparity; a plea for territoriality' [2003] EC Tax Review, p. 194.

[413] Ibid, p. 195.

[414] The CJEU found that residents and non-residents are not in comparable situations. C-279/93 *Roland Schumacker* [1995] ECR I-0225.

[415] Examined above in section 1.

attributable to the permanent establishment in accordance with the provisions of paragraph 2 may be taxed in that other state.'[416] Moreover, there are number of EU Directives in favour of worldwide taxation in the state of residence, inter alia Council Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different member states, Council Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different member States and Council Directive 2003/48/EC on taxation of savings income in the form of interest payments. Furthermore, the CJEU agrees with the opinion that worldwide taxation is compatible with the freedom of establishment.[417] Given the growing number of judgments delivered by the CJEU, it is necessary to select one judgment for further analysis. The chosen case is *Columbus Container*.[418] This seminal ruling provides a justification for the double taxation of a PE.

Columbus' shares were held by eight members of the same family residing in Germany, whereby each member has 10% holding. The remaining 20% shares were owned by a German partnership, shares in which are also held by members of that family.[419] All shareholders were represented by the same person at Columba's general meeting.

In 1996, Columbus was taxed by the Belgian tax authority at the normal rate of 30% of the profits achieved.[420] In accordance with the German tax law, on 8 of June 1998, a tax notice was issued to Columbus. The partners were taxed on the profit derived from Columbus' 'trading results.'[421] Columbus contested the tax notice, claiming that the Bilateral Tax Convention should apply and that withdrawing a tax advantage infringes the freedom of establishment.[422] such as that

[416] Model Convention with respect to taxes on income and on capital OECD.

[417] C-336/96 *Gilly* [1998] ECR I-02793, C-391/97 *Gschwind* [1999] ECR I-5451 par. 24; C-446/03 *Marks & Spencer v Halsey* [2005] ECR I-10837 par. 39.

[418] C-298/05 *Columbus Container Services BVBA & Co v Finanzamt BielefeldInnenstadt* [2007] ECR I-10451.

[419] Ibid, par. 14.

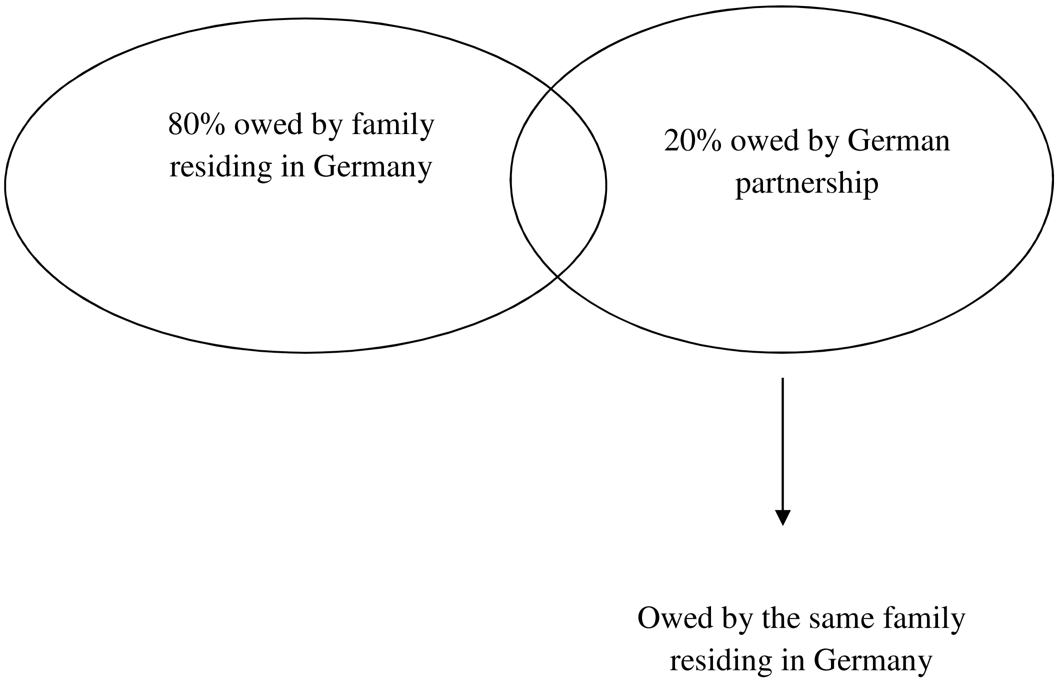
[420] C-298/05 *Columbus Container Services BVBA & Co v Finanzamt BielefeldInnenstadt* [2007] ECR I-10451 par. 17.

[421] Ibid, par. 19.

[422] C-298/05 *Columbus Container Services BVBA & Co v Finanzamt BielefeldInnenstadt* [2007] ECR I-10451, par. 22-24.

in issue in the main proceedings, under which the income of a re[s]ident national derived from capital invested in an establishment having its registered office in another member state is, notwithstanding the existence of a double taxation convention, concluded with the member state in which that establishment has its registered office, not exempted from national income tax but is subject to national taxation against which the tax paid in the other member state is set of.'[423]

Figure 8 Columbus Limited Partnership - Belgium



The German tax law provides that, instead of the exemption method from the Double Taxation Convention, the set-off method has been used. It is important to highlight that it resulted in a 53 per cent increase of the tax burden.[424] The Finanzgericht Münster made a preliminary reference to the CJEU. By its question, the Finanzgericht Münster asked, 'whether the freedom of establishment must be interpreted as precluding tax legislation of a member state.

The CJEU ruled that EU law does not provide any general criteria for the attribution of competence between member states as to elimination of double taxation. The CJEU was found to have no competence to rule on the infringement

[423] Ibid, par. 26.

[424] Ibid, par. 37.

of the provisions of double taxation convention by contracting states.[425] Member states enjoy 'a certain autonomy'[426] and are at liberty to determine the condition and level of taxation for different types of establishments. However, member states shall not treat companies trading solely in one member state and cross-border in a discriminatory manner.[427] Columbus Container contested the tax notice and claimed that the Double Taxation Convention shall apply.

The CJEU stated that in the current state of harmonisation of EU law, member states enjoy certain autonomy and decided not to be competent to rule over the application of the Double Taxation Convention.[428] The CJEU ruled that it is not precluded that 'income of a resident national derived from capital invested in an establishment which has its registered office in another member state is, notwithstanding the existence of a double taxation convention concluded with the member state in which the establishment has its registered office, not exempted from national income tax but is subject to national taxation against which the tax levied in the other member state is set off.'[429] As it is noticed, the answer from the Court is not easy to interpret. An in-depth analysis was made by number of commentators whose reactions were mainly negative as there was a high level of expectance after the Advocate General's Opinion had been delivered.[430] However, for the reasons explained below, the CJEU reached a different conclusion from the Advocate General.

[425] Ibid, par. 46.

[426] Ibid, par. 51.

[427] Ibid, par. 53.

[428] Ibid, par. 51.

[429] Ibid, par. 57.

[430] Farmer, Paul. '*Columbus Container Services BVBA & Co* v *Finanzamt Bielefeld-Innenstadt*: the ECJ fails to grasp the tax competition nettle in relation to foreign income rules.' [2008] British Tax Review p. 105.

Some commentators[431] argued that *Columbus Container* provided the acceptance of the principle of the tax treaty overriding.[432] Rene Offermanns pointed out that it is an example of treaty override as Germany introduced 'an unilateral measure interfering with the taxing powers of other contracting state many years after the conclusion of the tax treaty.'[433] What is more, Advocate General Mengozzi expressed in the Opinion that 'application of the double taxation convention between the Federal Republic of Germany and the United Kingdom of Belgium ensured that the partners in Columbus would enjoy a tax exemption in Germany on the profits they made in Belgium'[434]. Moreover, some authors argued that the treaty overriding makes a ruling important for establishing a consistent line of EU ruling and that the treaty overriding is a core argument to differentiate between *Cadbury Schweppes* and *Columbus Container*.[435]

However, it is considered that this conclusion is too far-reaching. It is observed that the national legal provision overrides an International Act but the act does not constitute a part of *acquis communautaire*. This constitutes non-compliance with international law but lies outside the scope of EU law and CJEU competence. One of the crucial rules of international law is 'pacta sunt servanda;'[436] thus, it may be argued that Germany does not apply a double taxation convention and the tax burden shall not apply.

Nonetheless, it is submitted that not including a permanent establishment into the scope of the tax treaty does not constitute abuse of international law. As

[431] Calderon, Jose, Baez Andres .'The Columbus Container Services ECJ case and its consequences: a lost opportunity to shed light on the scope of the non-discrimination principle' [2009] Intertax, p. 212; Monsenego, Jérôme. 'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011), p. 225; Offermanns, Rene. 'Restrictions on treaty override resulting from EU law' [2013] European Taxation, p. 430.

[432] Monsenego, Jérôme. 'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011), p. 225.

[433] Offermanns, Rene. 'Restrictions on treaty override resulting from EU law' [2013]. European Taxation, p. 430.

[434] Opinion of Advocate General Mengozzi delivered on 29/03/2007 in case C-298/05 *Columbus Container Services UBVBA & Co v Finanzamt BielefeldInnenstadt* ECR I-10454 par. 93.

[435] Calderon, Jose, Baez Andres. 'The Columbus Container Services ECJ case and its consequences: a lost opportunity to shed light on the scope of the non-discrimination principle' [2009] Intertax, p. 212.

[436] Latin for 'agreements must be kept.'

stated in this section, a substantial difference between subsidiary and PE is that the latter is not considered to be a tax resident.[437] As a consequence, tax treaties do not apply to PE.[438] The difference in treatment between subsidiary and PE is found to be justified and compliant with the freedom of establishment. The Treaty provides a choice of different types of secondary establishment. If these two forms shall be treated as identical, the Treaty would be meaningless.[439] Both forms have different features, advantages and disadvantages. For instance, PE enables the company to deduct foreign losses, whereas a subsidiary assures that a genuine undertaking would not be double taxed. In Columbus Container the founders decided to establish a PE and their decision determined that the undertaking is not a subsidiary.

Moreover, the Court observed that the problem does not relate to EU law and EU freedoms. The issue relates, rather, to national unilateral measures which raise compliance questions about the double taxation convention, not to an EU act. Moreover, as stated above,[440] the German measures also remain in accordance with international law. Thus, the Court consistently takes a position that, under Article 267 TFEU, the Court is not competent to decide on possible infringements by member states of the provisions of tax treaties. The CJEU was ruled to be incompetent to rule over direct taxation and leave the autonomy to member states.[441]

---

[437] Wattel, Peter. ‘Corporate tax jurisdiction in the EU with respect to branches and subsidiaries; dislocation distinguished from discrimination and disparity; a plea for territoriality’ [2003] EC Tax Review, p. 194.

[438] However, the opposite solution in regards of passive incomes was presented in CJEU ruling C-307/97 *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt* [1999] ECR I-6161.

[439] Wattel, Peter. ‘Corporate tax jurisdiction in the EU with respect to branches and subsidiaries; dislocation distinguished from discrimination and disparity; a plea for territoriality’ [2003] EC Tax Review, p. 197.

[440] Section 5.1.2.

[441] Pistone, Pasquale. ‘Ups and downs in the case law of the European Court of Justice and the swinging pendulum of direct taxation’ [2008] Intertax, p. 146; The same argument has been raised by Rene Offermanns but it has lead him to a different conclusion. Offermanns, Rene. ‘Restrictions on treaty override resulting from EU law’ [2013] European Taxation, p. 430.

Next, some commentators[442] compared *Columbus Container* with the *Royal Bank of Scotland*[443] case and claimed that it is not understandable why the Court did not apply a non-discrimination analysis in *Columbus Container*.[444]

To recall the facts[445] in *Royal Bank of Scotland*[446] the Court considered whether Greece had entrenched a discriminatory treatment. The case concerned tax legislation which, in relation to companies having their seat in another member state and carrying a business in the first member state through a PE situated there, excluded the possibilities, accorded only to companies having their seat in the first member state, of benefiting from a lower rate of tax profits.[447] Indeed, Greek companies might benefit from the taxation of 35%, whereas companies having their seat in another member state are subject to a sole tax rate of 40%. Some commentators complain that the CJEU is inconsistent. In *Royal Bank of Scotland,* the CJEU ruled that the undertaking was in a situation objectively comparable to residents.[448]

It is essential to stress that *Royal Bank of Scotland*[449] concerned an inbound situation whilst *Columbus Container* concerned an outbound situation.

---

[442] Calderon, Jose, Baez Andres. 'The Columbus Container Services ECJ case and its consequences: a lost opportunity to shed light on the scope of the non-discrimination principle' [2009] Intertax, p. 212; Offermanns, Rene. 'Restrictions on treaty override resulting from EU law' [2013] European Taxation, p. 430.

[443] C-311/97 *Royal Bank of Scotland v Elliniko Dimosio (Greek State)* [1999] ECR I-2664.

[444] Calderon, Jose, Baez Andres. 'The Columbus Container Services ECJ case and its consequences: a lost opportunity to shed light on the scope of the non-discrimination principle' [2009]. Intertax, p. 212.

[445] The case has already been analysed in Chapter 2.2.1.

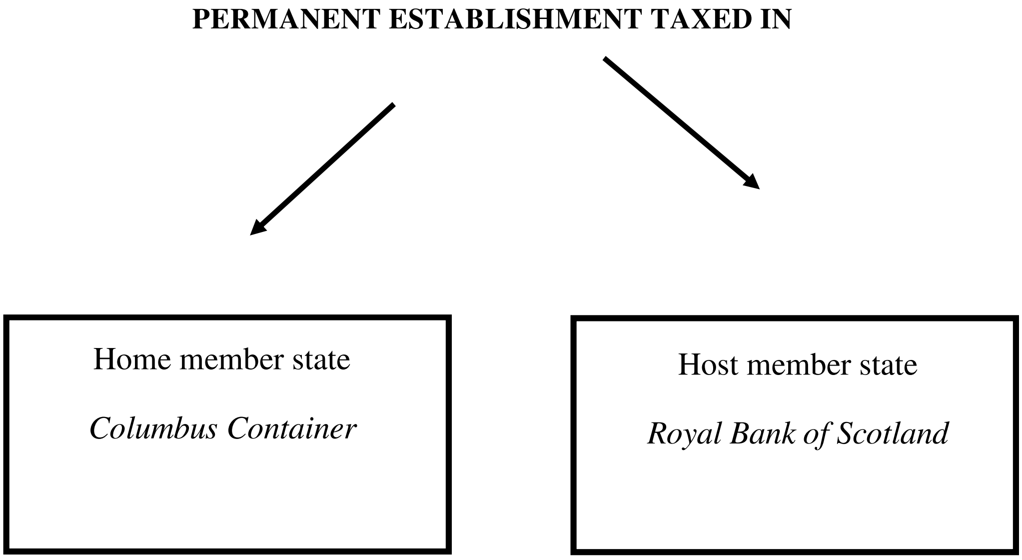
[446] Read more in Chapter 2.2.1. C-311/97 *Royal Bank of Scotland v Elliniko Dimosio (Greek State)* [1999] ECR I-2664.

[447] Ibid, par.18.

[448] Moreover, the United Kingdom – Greece Double Taxation Treaty requires us to treat someone with a PE as a resident.

[449] C-311/97 *Royal Bank of Scotland v Elliniko Dimosio (Greek State)* [1999] ECR I-2664. Read more in Chapter 2.2.1

Figure 9 Royal Bank of Scotland v. Columbus Container



Chapter 3 of the thesis showed the differences between inbound and outbound cases. The selected, seminal rulings were divided into two groups to indicate disparities between these two categories. The consistency in the CJEU rulings might be observed if this criterion is applied. In the outbound cases, for instance, *Daily Mail*[450] or *Cartesio*,[451] the Court did not apply discrimination-based or restriction-based analyses. Notwithstanding, where the Court examined inbound situations, the discrimination-based analysis was a core part of the judgment. The clear examples are cases discussed in Chapter 3*: Centros*,[452] I*nspire Art*,[453] *Überseering*,[454] *Vale*[455] and *Royal Bank of Scotland.*[456] *Columbus Container* is an example of an outbound case. Thus, it is not surprising that the CJEU did not apply either a restriction-based analysis or a discrimination-based analysis. Moreover, the

[450] C-81/87 *Daily Mail* [1988] ECR I-5483.

[451] C-210/06 *Cartesio Oktato Es Szolgaltato Bt* [2008] I-9641.

[452] C-212/97 *Centros Ltd* [1999] ECR I-1459.

[453] C-167/01 *Inspire Art* [2003] ECR I-10195.

[454] C-208/00 *Überseering* [2002] ECR I-9919.

[455] C-378/10 *VALE Epitesi kft*, Unreported July 12, 2012 (CJEU).

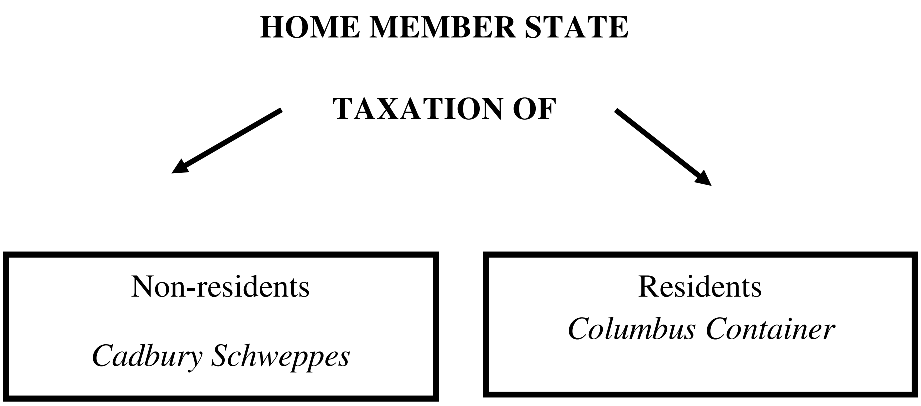
[456] C-311/97 *Royal Bank of Scotland v Elliniko Dimosio (Greek State)* [1999] ECR I-2664.

CJEU was not found to be competent to rule over outbound situation in the scope of national taxation provisions.

It might interesting to understand why the CJEU did not rule that the higher tax burden might be applied solely to non-genuine activity, as was the case in *Cadbury Schweppes*.[457] Some authors expressly stated that, 'non-application of the ECJ's [CJEU] case law on anti-avoidance rules to a case such as Columbus Container Services is difficult to understand.'[458] The authors claimed that there was no substantial difference between these cases and that the only reason for the CJEU to differentiate between them was the treaty overriding. This argument has already been aptly rejected by the CJEU and detailed reasons have been presented above. Other commentators justify the difference between rulings by the fact that in *Columbus Container* there are no specific CFC provisions and the issue relates solely to the attribution of income on the basis of income generated through a tax-transparent entity. This argument is also not convincing. Firstly, concerned rules serve the same objective as CFC and they aim to counterpart the abusive tax avoidance. Secondly, concerned rules have been implemented in the same legislative act as CFC. Thus, this argument shall be rejected.

However, the real reason can be shown in the following graph:

Figure 10 Cadbury Schweppes v. Columbus Container



[457] C-196/04 *Cadbury Schweppes* [2006] ECR I-7995.

[458] Calderon, Jose, Baez Andres. 'The Columbus Container Services ECJ case and its consequences: a lost opportunity to shed light on the scope of the non-discrimination principle' [2009] Intertax, p. 218.

It is illustrated in the above boxes that these cases show a significant disparity. *Cadbury Schweppes* concerned the taxation of non-residents and *Columbus Container* relates to the taxation of residents. It was stated above that the CJEU consistently ruled that residents and non-residents are not in comparable situations. There is a consistent line of ruling of CJEU that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations. The situations of residents and of non-residents are not, as a rule, comparable.[459] Thus, it is not surprising that the Court did not apply the same reasoning to *Columbus Container*. Indeed, Columbus Container was taxed equally to other residents. It is argued that such treatment does not constitute a restriction on freedom of establishment.

In the analysed case the partnership was treated as PE. Columbus Container was treated as a 'coordination centre' based on Belgian Royal Decree number 187 of 30 December 1982 on the creation of coordination centres. As a coordination centre, Columbus Container benefits from taxation on less than 30% profit actually made in 1996. According to Belgian law, a coordination centre is a PE.[460] Moreover, German national provisions treated tax transparent partnership as a resident of Germany and a PE abroad. Accordingly, Columbus was treated as a German undertaking and the profit from 'trading results', both in Belgium and Germany, have been taxed in full. However, the amount of tax paid in Belgium was offset.[461]

It is clear from what has been explored above that Columbus Container intended to establish a PE in Belgium. The legal form was chosen to benefit from a special regime provided solely for coordination centres. The choice was not limited by host or home member states and Columbus might select any other legal form available in Belgium. Unless, the free choice is made, a business has to face advantages and disadvantages of legal and fiscal form.

Nonetheless, it is argued that Columbus Container has exercised its freedom of establishment and cannot claim that a treatment is discriminatory. Columbus

[459] C-279/93 *Schumacker* [1995] I-259 par. 30-31.

[460] Opinion of Advocate General Mengozzi delivered on 29/03/2007 in case C-298/05 *Columbus Container Services BVBA & Co v Finanzamt BielefeldInnenstadt* ECR I-10454 par. 23.

[461] Ibid, par. 24.

Container decided to establish a PE and thus, remain a German resident. Columbus Container was treated equally to other German residents and taxed alike. Moreover, it was already stated that, trading as a PE, Columbus Container benefited from the easier deduction of losses. This is particularly examined in the following chapter.

The ruling significantly differs from the Opinion that Advocate General Mengozzi delivered in the case.[462] The Advocate General established that freedom of establishment is restricted. If PE is located in a country with lower taxation, the tax on capital is not levied. However, if taxation is lower, as was the case in Columbus Container, German legislation treats a PE differently. The Advocate General found these situations comparable and recommended that a restriction on freedom of establishment exists.

Nonetheless, the CJEU follows a discrimination-based analysis, instead of the restriction-based scrutiny proposed by Advocate General Mengozzi. The TFEU used the word 'restriction' with regard to free movements and 'discrimination' in relation to different treatments based on some protected characteristics, in particular nationality.[463] The CJEU tends to find national tax provisions EU compliant if they meet the so-called *Gebhard* test and apply the discrimination-based approach. However, it is argued that the non-discrimination approach is not sufficient to achieve the single market and freedom of establishment.

Nonetheless, it is argued that a restriction-based analysis of the CJEU might be difficult to achieve. It is not possible to state in general what might constitute a hindrance. It needs to be done on a case-by-case basis and even then, it is still problematic. This would be the case if the CJEU follows the Opinion of the Advocate General. Jérôme Monsenego[464] suggests imagining a state with high levels of taxation, providing high benefits from the welfare system. It is difficult to compare the state with another state which offers a low level of taxation and low benefits from the welfare system.

---

[462] Opinion of Advocate General Mengozzi delivered on 29/03/2007 in case C-298/05 *Columbus Container Services BVBA & Co v Finanzamt BielefeldInnenstadt* ECR I-10454.

[463] Monsenego, Jérôme. 'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011).

[464] Monsenego, Jérôme. 'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011), p. 237.

To summarise, taxation of a PE at the same rate as residents is not precluded by the Treaty. It is noteworthy that this double taxation of permanent establishment might affect businesses' decisions to establish using this legal form. It might be a restriction to achievement of the single market and free movement but current EU law does preclude national legislation taxing PE by its home member state.

In the analysed case study outlined in the beginning of this thesis,[465] according to the Convention between the UK and Poland for the avoidance of double taxation,[466] if construction works are executed for more than 12 months the business is deemed to have a PE there.[467] For the purposes of the Convention, the term PE means a fixed place of business through which the business of an enterprise is wholly or partly carried on.[468] Accordingly, the profits of an enterprise shall be taxed only in that State unless the enterprise carries on business in the other Contracting State through a PE situated therein.[469] Thus, the fact of establishing a PE has a serious fiscal consequence.

Not all Polish resident companies operate entirely within the boundaries of Poland and their profits include foreign profits. These companies therefore have to consider the interaction of the principle of worldwide taxation and the tax systems of other states. If a Polish business establishes a PE abroad, the Polish legislation provides that it is treated as resident and taxed on all worldwide income.[470] It means that the resident company can charge corporation tax on all its profits, wherever they arise.[471] As such, double taxation might be avoided if the Tax Convention is concluded. It is not fully understandable why, in the chapter dedicated to CFC, it is stated that provisions on CFC apply also to PE.[472]

---

[465] Supra, Chapter 1.4 and 4.1.

[466] https://www.gov.uk/government/publications/convention-between-the-uk-and-poland-for-the-avoidance-of-double-taxation .

[467] A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months. Article 5 (3) of the Convention between the UK and Poland on the avoidance of double taxation.

[468] Article 5 (1) Convention between the UK and Poland on the avoidance of double taxation.

[469] Supra, Article 7 (1).

[470] Article 7 par. 3 p.3 Polish Act on Taxation on legal persons.

[471] Opposite to non-resident companies which are only subject to Polish tax on certain profits with a Polish association.

[472] Article 30f par. 21 Polish Act on Taxation on natural persons.

Polish provisions on PE are similar to the German ones concerned in Columbus Container. However, according to the Polish legal system, it is not possible to apply a treaty override. The supremacy of the international act is one of the most approved principles in the Polish legal system, as indicated in Chapter 2. If a Polish court has under its scrutiny a Polish legal provision which is not compliant with an international act, it must apply the international act directly.

UK provisions on the taxation of PE applied the same reasoning as the Polish one until 19 July 2011. The reform introduced a 'foreign branch exemption' which gives companies an option to state that the profits of their foreign permanent establishments are exempt from UK corporation tax. Where such an election applies, the company is no longer subject to UK tax on its worldwide profits.[473]

The foreign branch exemption allows UK corporations to exempt the tax profits of worldwide PE of a UK resident company. A company has a choice to opt for foreign branch exemption or keep being taxed on worldwide income. The exemption option from UK taxation may seem more beneficial. However, if a company remains under fiscal sovereignty, it may reduce its UK tax by losses generated by foreign PE. A company is eligible to make one irrevocable election[474] which applies to all of the PEs of a company. Nonetheless, it is important to examine whether such a preclusion of offset losses is accepted by EU law which is the subject of the following chapter.

---

[473] Section 18 A Corporation Tax Act 2009.

[474] Supra, sections 18F(1)(a), 18F(6).

4.4 Concluding Observations

The Chapter briefly presents CEN and CIN. There is a short discussion on whether CEN or CIN meets EU goals. However, there is no single answer to this question and it cannot be found directly in the text of the EU treaties or CJEU case law. Both theories CEN and CIN use the same criterion of comparison. In both cases only the domestic situation is compared. In other words, the CJEU scrutinises whether domestic and foreign businesses are treated equally in the member state concerned. It is concluded that the CJEU does not find it discriminatory that a foreign business faces additional tax burdens resulting from its cross-border activity as long as within the member state concerned equal treatment is assured. The wording of the Treaty is applied strictly. Thus, it is in accordance with the current state of EU law that a cross-border business is deemed to be treated equally if neutrality is achieved within one member state. Indeed, it seems that in light of current acquis communautaire the freedom of establishment is understood as providing equity within a single member state.

The chapter also refers back to the notions of subsidiary and permanent establishment. It is argued that a subsidiary and a PE are not in a comparable situation. A subsidiary is analysed in light of CFC provisions, in particular in the context of the new regulation introducing for the first time CFC rules to the Polish legal system and the situation of the reform of existing provisions by UK regulators. It is contended that Poland which had the most lenient provisions, adopted one of the strictest CFC rules in the EU. The reform in the UK is inspired by *Cadbury Schweppes* and the need to adapt existing rules to EU standards of non-discrimination. Nonetheless, the British CFC rules differ from the solution presented by the CJEU and the Commission but it is anyway in accordance with current EU law.

It is questioned whether the CFC rules are necessary at all. On the one hand, the CFC is a useful tool to deal with purely artificial arrangements. On the other hand, it leads to Tax Authorities having a wide discretion as notions of 'genuine activity'[475] and 'main aim' are not precisely defined either in the EU law or in

[475] C-196/05 *Cadbury Schweppes* [2006] ECR I-7995.

national legal systems. The national courts interpret these terms differently thus resulting in inconsistent rulings. It places taxpayers in a highly disadvantageous situation where they cannot foresee the effects of their activities. Thus, it is not recommended to exclude the CFC regime from undertaking trading within the EU, unless it is purely artificial.

Moreover, a CFC regime may expose member states to a risk of wrong implementation of the TFEU.[476] It might be recommended for member states to avoid separate CFC regulations and provide general anti-abuse rules[477] which may be applied to nationals and non-nationals alike. It has been argued above that any CFC provision leads to compliance questions and that only by amending them will EU law be fully implemented. However, the Commission reached a different solution and currently British CFC rules are no longer under Commission observation.

The difference between a subsidiary and a PE was also highlighted. A subsidiary, as a non-resident, might be taxed by a 'home' member state only if it lacks genuine economic activity and the sole or one of the main aims is tax avoidance. Member states struggle to proclaim EU-compliant national CFC provisions and it is argued that EU member states should not be included in CFC regulations.[478] In contrast, the double taxation of a PE is not precluded by EU law. Member states exercise autonomy in the scope of taxation. Thus, it is it is not likely to enact a national provision which is incompliant with EU law, as the competence is granted solely to member states.

The chapter presents the difference between *Columbus Container* and *Cadbury Schweppes* or *Royal Bank of Scotland*. The comparisons demonstrate that there is an essential difference between subsidiary and permanent establishment.

---

[476] It might be observed when the UK struggle to implement CFC rules in accordance with EU law.

[477] Report of a study group led by Graham Aaronson QC on the merits of introducing a general anti-avoidance rule has been published on 11 November 2011 and now is a subject of a debate. Lethaby, Helen. 'Aaronson GAAR' [2012]. British Tax Review, p. 27.

[478] See Chapter 5.

The following chapter is dedicated to looking at the offset of negative incomes generated by, firstly, subsidiaries and, secondly, by permanent establishments.

CHAPTER 5: DOUBLE NON-DEDUCTIBILITY OF LOSSES

This chapter presents an analysis of the losses incurred by a connected undertaking based in another member state. As a result of a non-deductibility of losses, markets may be segmented instead of creating a single integrated market. It also impedes freedoms, in particular the freedom of establishment.

As a result of the lack of sufficient integration of member states, only final losses are deductible. The strictest definition of 'final losses' would-be liquidation of a company. However, the CJEU in *Marks & Spencer*[479] did not limit losses only to those existing at the time of liquidation but rather refers to the situation when the possibilities to offset have been exhausted. The problem of a lack of common solutions among member states will be observed in further sections. Moreover, the perspective (home or host member state) from which final losses will be computed is not determined.[480] Also, it needs to be determined who in a group of companies is entitled to claim loss deduction. Moreover, in the light of the most recent CJEU rulings,[481] the question might be posed as to whether the offset is possible at all.

---

[479] C-62/00 *Marks & Spencer* [2002] ECR I-6325.

[480] It should be determined, firstly, if export neutrality or import neutrality is to be applied. If a loss is calculated according to the rules of the home state (import neutrality) the situation of a taxpayer would be different than situation of a competitor in a host member state but more equal treatment would be provided in home member state. On the other hand, if export neutrality were applied, the loss would be calculated according to the rules of the host member state. As a consequence, the tax treatment in the home member state would differ but it would be more equal in the host member state. It is not possible to reconcile these solutions without further harmonisation. The CJEU has not provided any help with this problem. With a lack of a common solution, member states may be tempted to apply the most restrictive option. For example, the Swedish Group Relief Law provides that the amount of loss should be computed according to home and host neutrality and then the lowest figure could be deducted (section 35(a) p. 8 Swedish Income Tax Act). Monsenego, Jérôme. 'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011), pp. 194-196.

[481] C-172/13 *European Commission v. United Kingdom of Great Britain and Northern Ireland* [2015] ECR I-0000.

On the one hand, a company who intends to have a secondary establishment abroad faces a bigger risk than if they establish in the same member state. The company faces risks of failure of the undertaking and, moreover, might be denied the chance to offset losses incurred.[482] On the other hand, member states do not deny taking into account such a loss if incurred by a domestic branch or subsidiary. Of course, there is a risk that the loss would be used twice. The CJEU deliberately and persistently ruled (*Marks & Spencer*,[483] *Oy AA*,[484] *Papillon*[485] and *Lidl*[486]) that losses might be offset in another member state only if they cannot be taken into account in the member state of residence. Consequently, if a loss cannot be taken into account in the member state of residence, it might be allowed elsewhere. As discussed below, the criteria of 'being not taken into account' is not very clear and gives rise to a number of problems.

A national provision limiting or denying the offset losses concerns both subsidiaries and PE and may constitute a restriction to the freedom of establishment. The Chapter is consequently divided into two parts; one is devoted to subsidiary establishments and the second to permanent establishments. Also, a special category of loss is presented: a loss which is a result of a currency fluctuation. The CJEU decided that not accepting such a loss is contrary to Article 49 TFEU

---

[482] The taxpayer may be also prevented from reclaiming tax unduly paid. Shiers, Rupert. 'Finance Act notes: sections 25-29 and Schedules 9-13: administration.' [2011] British Tax Review. It was noticed that right of non-resident taxpayers to reclaim overpaid tax is not respected in regard of the stamp duty reserve tax (SDRT). Moreover, it is not provided in regard of the Exercise Duty: compliance check, Schedule 13F (no.3)A 2010 where is no possible for HMRC to make assessment in a six-year window where there has been carelessness, as it is done so in regard of Stamp Duty Land Tax (SDLT) and Petroleum Revenue Tax (PRT) Section 28 and Schedule 12 F (No. 3)A 2010 deal with the right of taxpayers to reclaim overpaid tax. It covers corporation tax, capital gains tax and income tax and new-model legislation to Stamp Duty Land Tax (Part 1 of Schedule 12) and PRT (Part 2 of Schedule 12). However, the right to is not available for other taxes frequently imposed on foreign companies. Nevertheless, it could not be declared contrary to the freedom of establishment. As already stated, double taxation might not be considered a restriction on the freedom of establishment.

[483] C-62/00 *Marks & Spencer* [2002] *ECR* I-6325.

[484] *C-231/05 Oy AA* [2007] *ECR* I-6373.

[485] C-418/07 *Papillon* [2008] ECR I-8947.

[486] C-414/06 *Lidl Belgium* [2008] ECR I-3601.

(especially in *Deutsche Shell*).[487] This category of loss may be identified only if accounts are held in a different currency.

5.1 Subsidiary

A loss is often treated as a negative income or the 'other side of the coin'. The unity of the taxable basis provides that if a member state does not tax the profits incurred abroad it does not have to allow deduction of costs or losses.[488] It is then unsurprising that double non-deductibility of losses takes place in the EU. Moreover, this is in accordance with the fact that the CJEU accepts double taxation. According to international law a state might not permit the offsetting foreign losses. However, the CJEU has ruled on a number of occasions to allow deductions of foreign final losses but only under limited conditions.

The problem arises in a number of cases but only two of the most seminal cases have been selected for analysis in this chapter: *Marks & Spencer*[489] and *European Commission v. United Kingdom.*[490] Both judgments refer to the same facts, as the first judgment turned out to be not clear enough. Marks & Spencer is a company incorporated in England and Wales and trades through a number of companies established either in the UK or in other member states.[491] Marks & Spencer, as a group of companies, seeks to benefit from the British group tax scheme by claiming group tax relief in respect of the losses incurred by its subsidiaries in Belgium, Germany and France.[492] However, the British provisions were open only to British undertakings or undertakings active within the UK. The relief was denied, as the subsidiaries were neither registered nor active in the UK.[493]

[487] E.g. C-293/06 *Deutsche Shell* [2008] ECR I-1129.

[488] Brauner, Yariv, Dourado, Ana Paulam, Traversa, Edoardo. 'Ten years of *Marks & Spencer*' [2015] Intertax, p. 306; Terra, Ben, Wattel, Peter. 'European tax law' (Kluwer, The Netherlands, 2012) p. 733.

[489] C-62/00 *Marks & Spencer* [2002] *ECR* I-6325.

[490] C-172/13 *European Commission v. United Kingdom of Great Britain and Northern Ireland* [2015] ECR I-0000, par. 8.

[491] C-62/00 *Marks & Spencer* [2002] *ECR* I-6325, par.18.

[492] Ibid, par. 22.

[493] Ibid, par. 24.

The UK tax authorities claimed that the profits of concerned subsidiaries were not taxed in the UK. Under section 11(1) ICTA, non-resident companies are charged corporate tax solely in respect of the profits attributable to their United Kingdom branches or agencies.[494] Thus, if the profits are not taxed, the offset of losses generated by such a subsidiary must be denied.

The CJEU ruled that such a provision constituted a hindrance to the freedom of establishment.[495] However, the offset denial might be applied in a non-discriminatory manner if it is justified by imperative requirements in the general interest, is suitable for securing the attainment of the objective which they pursue and does not go beyond what is necessary in order to attain it.[496]

Participant member states have submitted three arguments to justify the restriction. Firstly, it was submitted that profits and losses are two sides of the same coin and must be treated symmetrically in the same tax system in order to protect a balanced allocation of the taxing power of the different member states. The CJEU agreed that giving a company the option to have its losses taken into account in the member state in which they are established or in another member state may jeopardise a balanced allocation of the taxing power.[497] Secondly, participant member states claimed that such a legal provision might cause the same losses to be offset twice. Once more, the CJEU agreed that such a danger exists.[498] Finally, member states submitted that, if the losses were not taken into account in the member state in which a subsidiary is established, there would be a risk of tax avoidance. The CJEU accepted that the risk of tax avoidance exists. A concerned entity may decide to transfer the losses incurred by a non-resident company to a resident company with the consequence that 'company's 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.'[499]

---

494 C-62/00 *Marks & Spencer* [2002] ECR I-6325, par. 5.

495 Ibid, par. 33.

496 C-55/94 *Gebhard* [1995] ECR I-4165 par. 40 summary point 6.

497 C-62/00 *Marks & Spencer* [2002] ECR I-6325, par. 46.

498 Ibid, par. 48.

499 Ibid, par. 49.

In summary, the Court observed that concerned restrictive provisions pursue legitimate objectives, are justified by overriding reasons in the public interest and are apt to ensure the attainment of those objectives.[500]

Finally, the CJEU examined if the concerned provisions do not go beyond what is necessary to attain the objective. The CJEU ruled that there are less restrictive measures available and stated that the offset cannot be prohibited in general. It shall be permitted if 'the non-resident subsidiary has exhausted the possibilities available in its state of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods, 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 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.'[501] In other words, a parent company can deduct a loss incurred by a subsidiary if the loss is final and cannot be offset in the host member state.[502]

The suggested solution in *Marks & Spencer* has been highly criticised, as the automatic deduction is contrary to both arm's length principle[503] and the ability-to-pay principle and also promotes tax planning. Jérôme Monsenego observed that the CJEU did not consider a 'recapture mechanism' in this case. In her Opinion in the *European Commission v. United Kingdom*,[504] Advocate General Kokott noted that the CJEU registered 142 academic publications which deal directly with the judgment and provides a criticism for wide range of possible interpretations of *Marks & Spencer*.

---

[500] Ibid, par. 51.

[501] Ibid, par. 55.

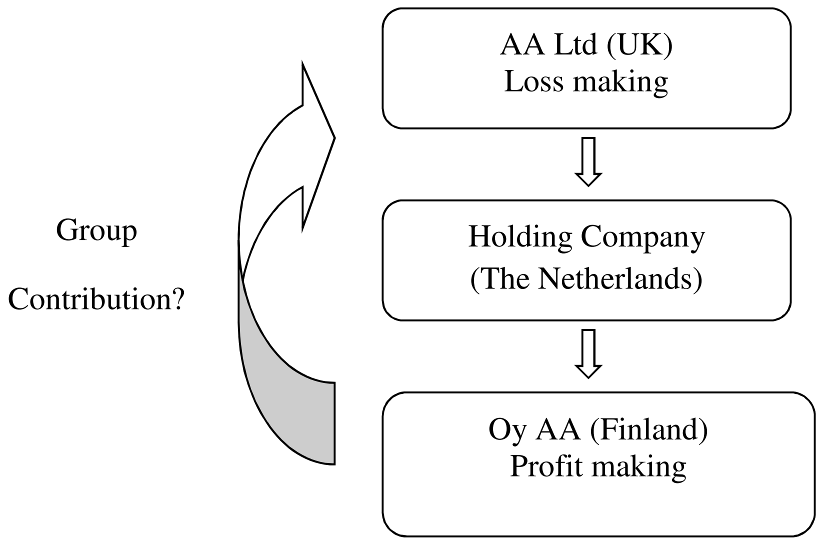
[502] The Court stated that member states might stipulate differently if wholly artificial arrangements are concerned. C-62/00 *Marks & Spencer* [2002] ECR I-6325, par. 57.

[503] "The parent company may support certain losses incurred by a subsidiary particularly if subsidiary is not entitled to relatively high profits or if the parent company has an own interest in providing such a support.' Monsenego, Jérôme. 'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011), p.178.

[504] Opinion of Advocate General Kokott delivered on 23/10/2014 in case C-172/13 *European Commission v. United Kingdom of Great Britain and Northern Ireland* [2015] ECR I-0000.

It is observed that the CJEU did not follow the reasoning of *Mark & Spencer* in the following cases. The issue arose in other cases, i.e. *Oy AA*.[505] In this case, a UK company owned a Finnish subsidiary indirectly. The subsidiary claimed to offset losses incurred by the UK auxiliary parent company. The CJEU sought to establish who in the group of companies was entitled to the deduction, that is, the ultimate parent company, any parent company or maybe a subsidiary

Figure 11 Oy AA

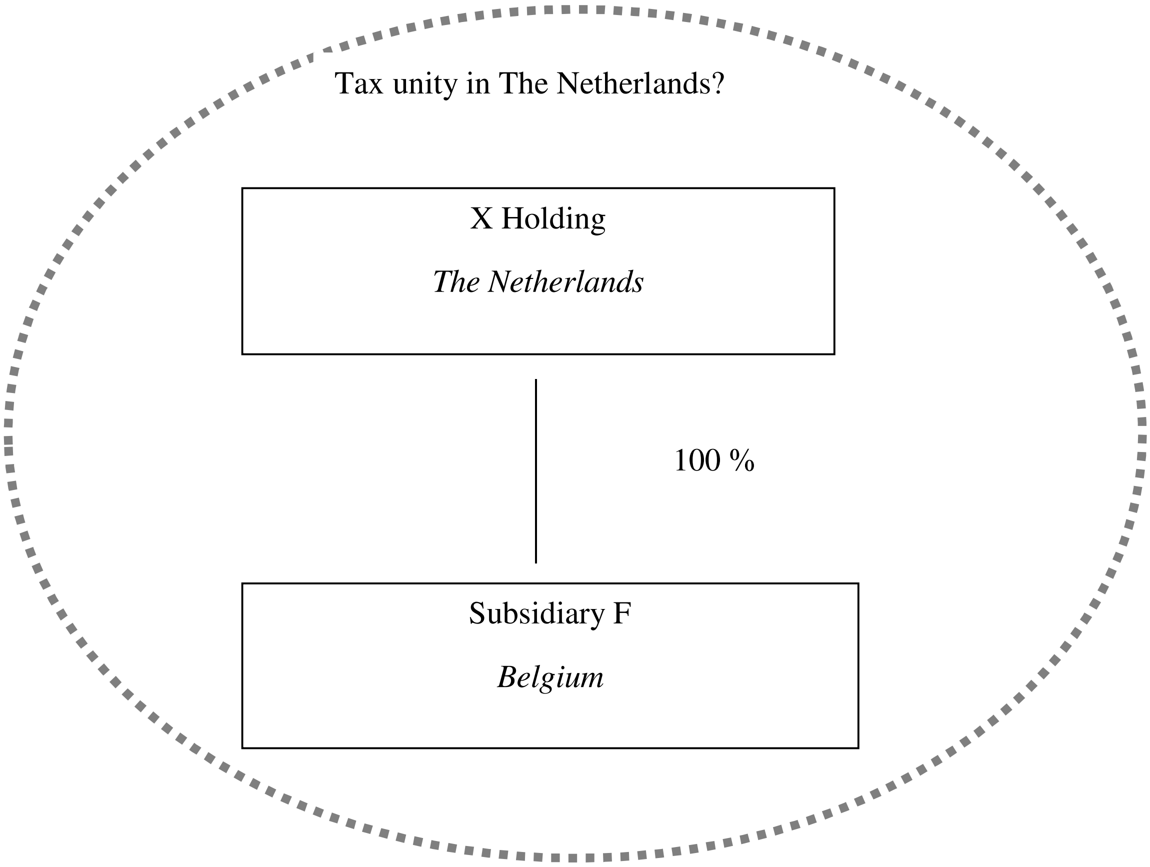


Under Finnish law, for tax purposes, a group contribution allows the transfer of cash or receivables within a group of companies. As a result, it allows the transfer of taxable profits to other companies belonging to the same group, thus enabling the offsetting of profits and losses. However, the possibility was open only to Finnish undertakings.

[505] C-231/05 *Oy AA* [2007] ECR I-6373.

In this case, the CJEU denied the offset.[506] The Court ruled similarly in another seminal judgment, *X Holding*.[507] In this case, a Dutch parent company claimed 'tax unity' with its subsidiary in Belgium. The Dutch 'tax unity' law provides an opportunity to constitute a consolidated tax entity between companies belonging to the same group. According to article 15 of a corporation tax law from 1969, a parent company and one or more subsidiaries owned to 95% could be taxed as one entity. All assets and activities are deemed to be undertaken by a parent company. As a result, all internal transactions are deemed not to exist and a group can submit only one tax return. The tax is levied only on the parent company for all companies included in the tax unity.

Figure 12 Tax unity



[506] It should be noted that there are two main differences between *Oy AA* and *Marks & Spencer*. Firstly, in *Oy AA* it is a subsidiary that claimed the offset. If the CJEU allows such a scheme, companies may establish complicated tax schemes to structure their businesses and locate them within tax havens. This could lead to uncertainty as to which subsidiary in a group is allowed to offset losses incurred by a parent company. Secondly, the losses in *Oy AA* were not final.

[507] C-337/08 *X Holding* [2010] *ECR* I-1215.

The CJEU denied the right for a Dutch parent company to constitute a tax unity with its Belgian subsidiary.[508] The CJEU concluded that 'the member state of origin is not obliged to apply the same tax scheme to non-resident subsidiaries as that which it applies to foreign permanent establishment.'[509] The CJEU pointed out the risk of a shift of income from Belgium to The Netherlands.[510] The Court noted that a significant risk of double deduction of losses exists. It might be the case, for example, if a tax unity is dissolved and the loss would not be recaptured. The CJEU has been explicitly encouraged to rule over a recapture mechanism.[511] However, the CJEU found itself incompetent to rule over a recapture mechanism without further harmonisation of member states' national laws. These two cases support clearly that the CJEU did not confirm the position affirmed in *Marks & Spencer* in its latter judgments.

Nonetheless, following the *Marks & Spencer* judgment, the UK introduced cross-border group relief. Under the Corporation Tax Act 1988 [ICTA] final losses are allowed to be offset if the condition relating to the exhaustion of all possibilities of the non-resident subsidiary's losses is taken into account in the member state where a subsidiary is resident. Thus, the *Marks & Spencer* was again under the scrutiny of the UK Supreme Court. The Supreme Court ruled on 22 May 2013 that the concerned losses must not be deducted. The reform of the UK provisions relates to losses incurred on or after 1st of April 2006 and do not reflect the losses incurred in preceding periods.

On 19 July 2007, the Commission sent a letter of formal notice to the UK 'drawing its attention to the possibility that the tax rules adopted by that member state in the wake of the judgment in *Marks & Spencer* (EU:C:2005:763) are incompatible with the freedom of establishment to the extent that they are based on a particularly restrictive interpretation of the condition relating to the exhaustion of all possibility of the non-resident subsidiary's losses being taken into account in the member state where that subsidiary is resident. In addition, according to the

---

[508] There was a suggestion to compare a subsidiary with PE but this was rightly denied by the CJEU. The proper comparator seems to be resident and non-resident subsidiaries (vertical comparison).

[509] C-337/08 *X Holding* [2010] *ECR* I-1215.

[510] Monsenego, Jérôme. 'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011) p.178.

[511] C-337/08 *X Holding* [2010] *ECR I-1215.*

Commission, those rules apply only from the date on which the new legislation entered into force, that is to say, from 1 April 2006.'[512]

The UK did not agree that the concerned provision is not consistent with the *Marks & Spencer* judgment. Thus, the Commission brought the action before the CJEU[513] claiming that Section 119(4) of the CTA 2010 makes it virtually impossible for a resident parent company to obtain cross-border group relief.[514] In the Commission's opinion, there are only two situations when a loss may be offset. Firstly, if there are no legal provisions in the state of residence of the non-resident subsidiary for losses to be carried forward. Secondly, if a non-resident subsidiary enters into liquidation before the end of the tax year in which the losses occurred.[515] The Commission argued that the lack of the possibility to offset non-resident losses shall be assessed at the time when a claim is made.[516]

However, the CJEU did not agree with the Commission. Accordingly, Section 119 (4) of the CTA 2010 sets the date by reference to which it must be decided whether losses sustained by a non-resident subsidiary are definitive. The Court ruled that the Commission failed to prove that the concerned provisions made the offset virtually impossible.

Next, the CJEU ruled that it is not inconsistent with EU law that the CTA 2010 applies to the period after 1 April 2006. The cross-border group relief is available for preceding periods based on the legislation applicable to those earlier periods, construed in accordance with EU law.[517]

A further justification may be found in the Opinion of the Advocate General Kokott.[518] The Advocate General advised that the judgment of *Marks & Spencer*

---

[512] C-172/13 *European Commission v. United Kingdom of Great Britain and Northern Ireland* [2015] ECR I-0000, par. 8.

[513] Article 267 TFEU.

[514] C-172/13 *European Commission v. United Kingdom of Great Britain and Northern Ireland* [2015] ECR I-0000, par. 14.

[515] Ibid, par. 15.

[516] Ibid, par. 16.

[517] Ibid, par. 42.

[518] Opinion of Advocate General Kokott delivered on 23/10/2014 in case C-172/13 *European Commission v. United Kingdom of Great Britain and Northern Ireland* [2015] ECR I-0000.

should not be followed.[519] She stated that solutions presented in *Marks & Spencer* are impracticable. She added that this regime does not protect the interests of the internal market but constitutes ’a virtually inexhaustible source of legal disputes’ between taxpayers and ta authorities.[520] This reasoning is also supported by the literature.[521] The Advocate General offered four reasons for this statement. Firstly, the definitive lack of possibility to offset losses exists only if a subsidiary ceased to exist in law.[522] In other situations it is always possible to argue that the offset may become possible. Moreover, it may lead to long disputes between the real and theoretical possibilities to deduct losses. This is not recommended as it does not provide legal certainty.[523] Secondly, as mentioned above, the case law following *Marks & Spencer* does not support the possibility of offsetting the losses of a foreign subsidiary.[524] Third, the Advocate General pointed out that the impossibility of loss relief elsewhere can be created arbitrarily by the taxpayer.[525] In her Opinion, ‘it is very difficult to clarify in a specific case when, for example, a subsidiary is wound up for tax reasons and when it is not.’[526] Finally, member states are obliged, under the freedom of establishment rules, to accord equal treatment. Thus, to grant cross-border relief, a member state may need to determine retrospectively what tax

---

[519] Ibid, par. 42.

[520] Opinion of Advocate General Kokott delivered on 23/10/2014 in case C-172/13 *European Commission v. United Kingdom of Great Britain and Northern Ireland* [2015] ECR I-0000, par. 44.

[521] See for example Brauner, Yariv, Dourado, Ana Paulam, Traversa, Edoardo. ‘Ten years of Marks & Spencer’ [2015] Intertax, p. 308. ‘It is therefore widely recognized that the ECJ is not at ease with its *Marks & Spencer* decision. The above-mentioned controversial issues and especially the justifications put forward by the Court and analysed below, demonstrate that *Marks & Spencer* is not the rule (a precedent) but an exception. […] Ten years after the decision *Marks & Spencer*, the time has maybe come for the Court to reassess whether it really brings and added-value or whether it sheds only more confusion to an already complex and protean case law.’

[522] Opinion of Advocate General Kokott delivered on 23/10/2014 in case C-172/13 *European Commission v. United Kingdom of Great Britain and Northern Ireland* [2015] ECR I-0000 par. 45.

[523] Ibid.

[524] C-337/08 *X Holding* [2010] *ECR* I-1215; *C-231/05 Oy AA* [2007] *ECR* I-6373.

[525] Opinion of Advocate General Kokott delivered on 23/10/2014 in case C-172/13 *European Commission v. United Kingdom of Great Britain and Northern Ireland* [2015] ECR I-0000 par. 47.

[526] Ibid, par. 47.

results the non-resident subsidiary would have produced had it been established within that member state.[527]

Thus, for the reasons presented above, the Advocate General recommended to the Court to abandon the '*Marks & Spencer* exception.' The further advantages are legal certainty,[528] consistency of CJEU case law[529] and reaffirming the ability-to-pay principle.[530]

The CJEU ruling in *European Commission v. United Kingdom*[531] completed the "saga' of the *Marks & Spencer* litigation. The case led to thousands of commentaries and was widely discussed. As a result of 14 years of proceeding before the courts, Marks & Spencer was not allowed to deduct the final losses incurred by the foreign subsidiary. It is, however, surprising that there is limited literature referring to *European Commission v. United Kingdom.*[532]

Moreover, it has to be noted that Marks & Spencer was not deprived of the possibility to offset losses in principle. It was a decision of the company to choose the legal form of the subsidiary. If one supposes that Marks & Spencer had been established as a PE, the company would have paid taxes in the UK and would also be entitled to benefit from the deduction of losses. Marks & Spencer used the right to choose the most convenient legal form. As a result, it was not obliged to pay taxes in the UK when the subsidiaries generated profits. Thus, it is hardly understandable why it might be entitled to loss deduction. The company had properly taken advantage of the freedom of establishment and freedom to choose the legal form of its presence.

---

[527] Opinion of Advocate General Kokott delivered on 23/10/2014 in case C-172/13 *European Commission v. United Kingdom of Great Britain and Northern Ireland* [2015] ECR I-0000 par. 48.

[528] Ibid, par. 52.

[529] Ibid, par. 51.

[530] Ibid, par. 53.

[531] C-172/13 *European Commission v. United Kingdom of Great Britain and Northern Ireland* [2015] ECR I-0000 par. 8.

[532] Ibid, par. 8.

5.1.1 The Legal Position in Poland

Firstly, it seems that the offset of losses from a foreign subsidiary is not permissible. The Polish Tax Authority justifies the position by the fact that profits from the foreign subsidiary are not taxable in Poland.[533] It means that Poland decided that if the Tax Authority could not get revenues from a source, the losses from that source could not be deducted. According to existing agreements on avoiding double taxation, Poland is allowed to offset losses incurred only in Austria and Belgium.[534] Losses from other member states cannot be offset.

Moreover, this issue has not been discussed in the literature. It is considered to be obvious that an entity that is not liable to taxation in Poland cannot offset losses incurred in a different jurisdiction. The only theoretically possible situation is the creation of the tax group.

The Polish legal system provides for the possibility of creating Tax Capital Groups [Podatkowe Grupy Kapitalowe] (Tax Group). A Tax Group entitles the parties to joint assessment of costs and profits. It may provide substantial benefit for members of a Tax Group. According to article 1a Income Tax on Legal Persons Law [Ustawy o Podatku dochodowym od osob prawnych] (CIT) Act, joint stocks and limited liability companies [spolki kapitalowe][535] have the opportunity to establish Tax Group. Nonetheless, the CIT provides that all members of a Tax Group must have their seats in Poland and be effectively managed from Poland. If a controlling company does not possess its seat in Poland, a Tax Group cannot be

---

[533] This kind of reasoning has been denied; for example, in *Deutsche Shell* which is broadly discussed below. What is more, the solution provided by the Polish tax system seems to be contrary to rulings of the CJEU, as for example in *Marks & Spencer*. In this case, the CJEU ruled that the final loss should be deducted if the non-resident subsidiary cannot offset the loss in the State of residence.

[534] It is highly criticised that Poland has opted out of the EU law by concluding bilateral international agreements with other member states.

[535] Associations of companies – translation provided by Jerzy Pienkos *Legal dictionary [Słownik prawniczy] (*Zakamycze, Zakamycze 2002).

formed.[536] Moreover, neither a non-resident subsidiary nor a branch can become part of a group. A Tax Group can be established in the form of a notary act only after registration with the Polish Tax Authority.[537] These provisions constitute the discrimination of non-residents undertakings and seriously obstruct the freedom of establishment.

The issue has been raised by the CJEU in the case *X Holding* presented in preceding section. The Dutch 'tax unity' serves the same aim as Polish tax groups as it provides an opportunity to constitute a consolidated tax entity between companies belonging to the same group. It is necessary to refer back to *X Holding*.[538] In this case the CJEU ruled that a member state is allowed to limit a right for constituting tax unity for a domestic subsidiary only.

When considering the factual situation outlined in *X Holding*, the question that needs to be posed and answered is whether the business may establish a subsidiary. It must be restated that a Polish subsidiary cannot surrender losses incurred by a foreign parent company. Moreover, a foreign subsidiary of a Polish company cannot establish a tax group and thus losses incurred are not deductible. Likewise, the taxation of groups is in accordance with the current acquis communautaire.

[536] Some authors suggest that in order to ensure full implementation of the EU freedoms, losses from controlled foreign companies should be offset by the 'Polish mother' company. It will not be possible to register CFC with the Polish Tax Authority but if all other conditions are met, the offset should be allowed. However, this cannot be implied directly from the Law. Adamczyk, Lukasz, Litinczuk, Hanna. *Direct Taxation. Polish Law and Community Law* [Podatki Bezpośrednie. Prawo Polskie a Wspólnotowe] (Oficyna Prawa Polskiego, Warszawa 2009), p. 421.

[537] To operate as TCG very strict requirements (i.e. high share capital) are posed. At the end of 2005 there was only two operating CTG at all. Szymanski Krzysztof G. *Taxing capital companies. Mergers, divisions and restructure.* [*Opodatkowane spółek kapitałowych. Polaczenia Podziały i inne czynności restrukturyzacyjne]* (Wolters Kluwer, Warszawa 2006) p. 411.

[538] Chapter 5.1 C-337/08 *X Holding* [[2010] *ECR* I-1215.

5.1.2 The Legal Position in the United Kingdom

The UK's relevant provisions have in the main been already discussed above in the context of the CJEU's case law. As a result, there is no need to analyse again the UK legal system in respect of group taxation.

However, in the context of the factual case outlined in Chapter 1.3 and 4.1, it is not likely that a Polish subsidiary of a UK company can surrender losses incurred in Poland. The business is not deprived of the possibility of offsetting losses in principle. Under the Corporation Tax Act 1988 [ICTA] the business is allowed to offset final losses if the condition relating to the exhaustion of all possibilities of the non-resident subsidiary's losses are taken into account in the member state where the subsidiary is resident. However, as shown in *Marks & Spencer*, despite the formal wording of ICTA, it is not very likely that a company would be able to meet all the conditions.

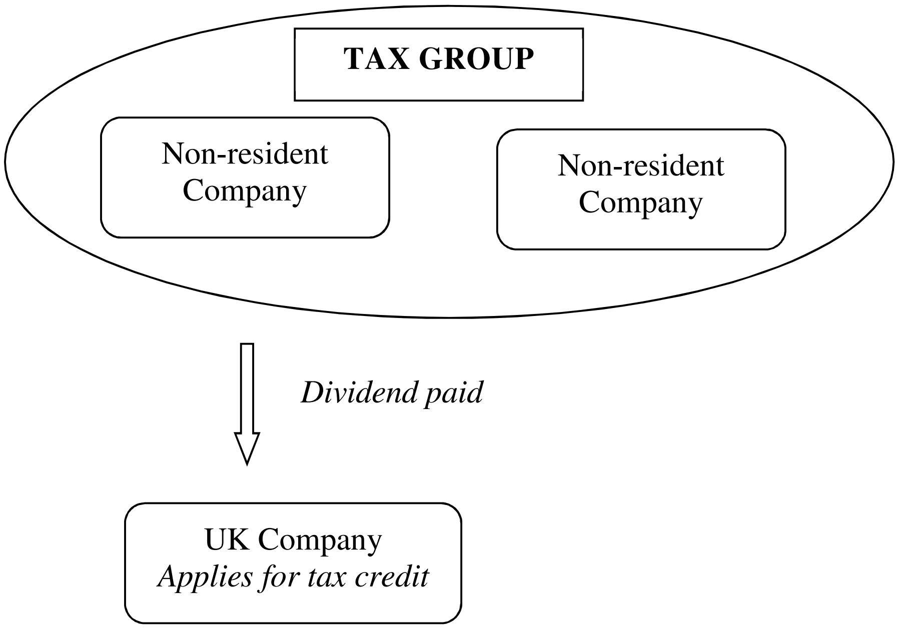
However, the issue of special relief for tax groups requires additional attention.[539] The relief is the result of the implementation of the European Mergers Tax Directive (EMTD) which covers partial divisions. Jonathan Cooklin wisely defined a partial division as an operation such a company transfers, without being dissolved, one or more branches of activity, to one or more existing or new companies, leaving at least one branch of activity in the transferring company. In his opinion UK terms, a partial division is a demerger of part of the demerging company's business. Transfers between companies residing in the same the EU

[539] In addition, the Finance Act of 2006: section 35 and 29 and Schedule 15 and Section 393 CTA 2010 provide a prohibition to offset losses of a UK branch of a non-UK-resident in scope of the worldwide debt cap. Losses are accepted only if the UK net debt exceeds the 75 per cent of the worldwide gross debt. The exemption might be derogated by statute. The surrendering company must be a subsidiary of a claimant company which is resident in the UK or the surrendering company and the claimant company must be 75 per cent subsidiaries of a third party which is resident in the UK. Also, the surrendering company must be within the charge to tax under the law of any EEA territory either because it is resident there or because it trades through a branch there. As explained above, the CJEU has already established criteria which must be met to deny offset of losses incurred in another member state. The requirement provided in CTA 2010 does not match the CJEU line of ruling. However, the provisions relate only to large enterprises and they will not be the subjects of the further discussion here.

member state will therefore not benefit from this relief. Thus, this relief has usually of no use for non-UK resident persons.[540]

The relief was implemented in the Taxation (International and other Provisions) Act 2010 and takes into account the tax group of non-resident companies. The tax relief is open for non- resident subsidiaries only.

Figure 13 Tax group



The relief provided in the Directive does not apply to UK residents and the question is posed as to whether it would constitute reverse discrimination. Firstly, this thesis seeks to establish whether the principle of non-discrimination is recognised in UK law. The issue is not straightforward, because the UK has no single core constitutional document which includes the most important principles. Usually the constitution results from revolution, peaceful negotiation or freedom

[540] Cooklin, Jonathan. 'European mergers tax directive: partial divisions and mergers.' [2009] British Tax Review.

from colonial rule, where in the UK there was no such political shift.[541] The answer might be found in a number of acts and case law. However, there is no indigenous principle of equality or non-discrimination in the UK.[542] The non-discrimination principle is expressly proclaimed in, for example, the Chronically Sick and Disabled Persons Act 1970, the Equality Act 2010 and the Employment Relations Act 1999. It might be thus stated that the no-reverse-discrimination principle is present in the UK's legal system and that the above-mentioned sources of UK law are commonly accepted. Accordingly, the non-discrimination principle applies.

In the UK there are a number of special schemes provided for nationals: Venture Capital Scheme; Venture Capital Trust; and Corporate Venturing Scheme. However, they are available only for a specific purpose and so their scope is limited. On the other hand, there are special reliefs for non-resident companies regulated separately. For example, there is no similar relief to these provided by EMTD open to nationals. Nationals are subject, for example, to 18 or 28 per cent capital gains tax. It might be noted that Entrepreneurs' Relief provides relief and 10 per cent capital gains.[543]

Moreover, national businesses are not only deprived of a tax advantage but are exposed to less favourable treatments. The tax group is predetermined in the UK. A Tax Group created inside the UK is called an Associated Company. According to HMRC, the companies are associated if one has control over the other, or both companies are under the control of the same person or persons.[544] If the conditions are met, HMRC uses different accountancy rules and small profit relief may be reduced. It does not include the possibilities to account for losses or profits generated by another associated company.

---

541 Eden, Sandra. 'Chapter 16 United Kingdom'. [2012] Comparative Perspective on Law and Justice, p. 305.

542 Ibid, p. 12.

543 The first £10 million from 6 April 2011, so medium enterprises might be affected. However, it is not open to some business vehicles, for example, limited liabilities companies and has some ceilings.

544 CTM03710 - Corporation Tax: small profits relief: associated companies - detailed provisions – introduction: http://www.hmrc.gov.uk/manuals/ctmanual/ctm03710.htm.

It may also be argued that this is not purely a national situation. The EMTD requires that the merging companies do not reside in the same member state. However, it is possible that the merging companies are resident in the same member state but are involved in cross-border activity. The cross-border activity will therefore trigger a consideration of EU law. Thus, it must be noted that a national business is in a less favourable situation than a non-national one. National undertakings cannot benefit from the relief which constitutes reverse discrimination. It was stated that the UK should not accept any kind of discrimination, even those concerning its own nationals.

So, there is a need to find out if there is any justified reason for derogation. It is believed that there is neither argument for fiscal cohesion, nor effectiveness of the fiscal system, nor misuse of the EU law. In this case, there is no justification to treat a member state's own nationals differently from non-nationals.

5.1.3 Summary

The full integration and implementation of the freedom of establishment requires member states to allow non-final losses to be offset. Unfortunately, the current status of acquis communautaire does not provide for this. There is a realistic risk that losses will be deducted in more than one state but there is no existing information exchange system between member states which is adequate.[545] Moreover, tax systems and tax bases vary significantly between member states. Without some common basic rules, a deduction of losses would not be possible.

---

[545] Member states enact VIES but it serves in a very limited way. 'VIES does not maintain itself a VAT number database. Instead, it forwards the VAT number validation query to the database of the concerned member state and, upon reply, it responds to the inquirer with the information provided by the member state. This information includes at least a 'YES/NO' answer on the validity and existence of the supplied number and it may also include additional information such as the holder's name and address, if this information is provided by the member state. VIES optionally provides a unique consultation number that can be used to prove to a tax administration that a given VAT number at a given time resulted in a given validation reply.' Source: http://en.wikipedia.org/wiki/VAT_Information_Exchange_System. It was firstly introduced in 1993, based on regulation 218/92 to strengthen the exchange of information for intra-community supplies and the acquisitions of goods. Donato, Raponi. 'International exchange of VAT information within EU'. [2004] Taxud.

Some solutions have already been proposed such as Common Consolidated Corporate Tax Base[546] or Current Inclusion[547] but they have not yet come into force. These proposals are the subject of the following chapter.

---

[546] CCCTB is a new initiative of the Commission. The study started in 2001 and on 16 March 2011 the proposal Council Directive was presented. It might go into force if a minimum of eight member states or nine after ratification of the Treaty of Lisbon ratify it. The Proposal includes detailed provisions how to establish a uniform tax base. The tax base is available not only for a group of companies but also for a single resident company and PE. The non-EU resident companies might also benefit from the Directive (on the activity conducted in EU). The Commission suggested that participation in CCCTB would be voluntary and businesses might decide it is worthy for them to take part. A survey conducted by KPMG in 2007 showed that 80% of business would like to apply for CCCTB. KPMG, 2007. 'Harmonised corporate tax base – are European business for or against it? Pan-EU survey results investing reaction to proposed Common Consolidated Corporate Tax base'. However, the European Parliament voted on 21 April 2012 that the scheme needs to be compulsory.[546]

A pilot scheme was undertaken in 2005. The sample group was SMEs and their taxable profits have been consolidated accordingly to CCCTB rules. The Commission estimates that the costs of extending SME to cross-border activity will be deducted by 67% thanks to CCCTB. Moreover, the costs of cross-border self-assessment will be reduced by 7%. The Commission suggests also that introducing the possibilities to deduct losses incurred in other member state might provide businesses with €1.3 billion across EU.

The Proposal includes regulations on how to calculate tax base and member states will keep their sovereignty to point tax rates. Member states are free to establish different rates for enterprises trading under the CCCTB scheme. However, it might be argued if this is in accordance to the principle of non-discrimination.

The CCCTB seeks to find independent criteria to share the incomes of a business between interested member states. The authors of the Proposal tried to establish criteria which cannot be easily altered by a business and to avoid tax planning.

This formula will be based on three factors, equally weighted:

- Assets: All fixed tangible assets, including buildings, airplanes and machinery will be covered. The costs incurred for R&D, marketing and advertising in the 6 years prior to a company entering the CCCTB will also be included as a proxy for intangible assets for 5 years.
- Labour: Two factors will be taken into account under the heading of labour: 50% payroll costs and 50% the number of employees.
- Sales: This will be calculated on the basis of where the goods are dispatched to/destined for. For services, this will be where the service is physically carried out. 'MEMO/11/171. http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/171

It is believed that the crucial point would be how to establish a principal place of business. It might create conflicts and might result in unwillingness of member states to ratify the Directive.

The UK legal provisions have been significantly amended during the last decade. Currently, the possibility to offset final losses under certain restrictive circumstances exists. Thus, to form a subsidiary may be the central interest of a domestic business wishing to expand abroad.

Conversely, in Poland there is no legal reform of existing legal provisions. There is no possibility to offset the losses incurred by a foreign subsidiary and it is not possible to create a tax group. Nonetheless, the Polish legal provisions remain in accordance with EU law. The reform is highly desirable but the common cooperation of member states is needed to achieve it. As noted above, there are particularly interesting EU proposals, aiming to modify existing acquis communautaire. The reform proposals, with a corresponding critical review are presented in the next chapter. Finally, it is noted that the situation of a PE is less restricted than that of a subsidiary. A PE is closely bound to a company and constitutes part of it, when that subsidiary is a separate legal entity. Despite that, some authors attempt to agitate to treat PE as if they are separate entities and agree with the solution proclaimed in *Krankenheim*[548] and *Philips Electronics*.[549]

5.2 Permanent Establishment

Striking the balance between European Union harmonisation and member state discretion in the context of direct taxation is particularly problematic in relation to the double non-deductibility of losses incurred by PE. In the scope of direct taxation, the European Union has no competence. However, the CJEU has

[547] The alternative solution called Current Inclusion (CI) has been proposed by Schreiber, Ulrich, Fuhrich, Gregor. 'European group taxation – the role of exit taxes.' [2009] European Journal of Law & Economics. It is proposed to compute a tax base for a group using a national tax system of a parent member state. The disadvantage of the solution is that businesses might be tempted to move a parent company's seat to a member state with a lower rate of income tax. It might be mitigated by applying a system of exit tax. However, this is not a convincing answer to introduce further system of exit taxes.

[548] C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH v Finanzamt für Körperschaften III in Berlin* [2008] ECR I-8061.

[549] *Philips Electronics UK Ltd v HMRC* [2009] ECR I-532.

consistently stressed that powers retained by the member states must be exercised consistently with EU law.[550]

The notion of PE has been defined in chapter 4. However we should remember that a PE shall not be confused with a secondary establishment which is sometimes observed in the EU literature.[551] However, this thesis refers to the notion of PE used by tax and corporate lawyers, closely defined in particular by Articles 5 and 7 of the model tax convention drawn up by the Organisation for Economic Cooperation and Development (OECD).[552] This definition has been recognised by the CJEU in a number of rulings.[553] Thus, Article 5 of the OECD model tax convention provides that the term "permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried out. Contrary, a subsidiary is a legally independent subdivision in another member state and constitutes a separate legal entity.[554]

As shown in chapter 4, these terms are recognised by tax lawyers but not frequently recognised in scope of EU law. The clear example of not recognising these differences might be seen in *Lidl Belgium*.[555] In this seminal ruling the CJEU

---

[550] Supra, Chapter 5.1.

[551] Calderon Jose 'The Columbus Container Services ECJ case and its consequences: a lost opportunity to shed light on the scope of the non-discrimination principle' [2009] Intertax, p. 212; Offermanns Rene 'Restrictions on treaty override resulting from EU law' [2013] European Taxation, p. 430.

[552] Article 5 OECD model tax convention provides '1. For the purposes of this Convention, the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term 'permanent establishment' includes especially:

a) a place of management;

b) a branch;

c) an office;

d) a factory;

e) a workshop and

f) a mine, an oil or gas well, a quarry or any other place of extraction of natural
resources.'

[553] Inter alia C-336/96 *Gilly* [1998] ECR I-02793; C-414/06 *Lidl Belgium GmbH & Co KG v Finanzamt Heilbronn* [2008] ECR I-3601.

[554] Supra, Chapter 1.4.

[555] C-414/06 *Lidl Belgium GmbH & Co KG v Finanzamt Heilbronn* [2008] ECR I-3601.

assimilated a situation of a single company to that of the groups of companies. The Court stated 'Indeed and as is shown by the provisions of the Convention, a permanent establishment constitutes, under tax convention law, an autonomous entity.'[556] This statement is contrary to the definition of PE accepted by international tax law. An establishment which constitutes an autonomous entity is thus called a subsidiary. Lack of understanding of tax law by the CJEU requires special attention when case law is analysed. The terms subsidiary and PE might be confusing as they have a different meaning. The CJEU seems not to notice these discrepancies. It is clear from the case law, for example, in *Lidl Belgium*[557] and *Krankenheim*[558].

Nonetheless, to present the issue of double non-deductibility of losses incurred by the PE a careful selection of case law is needed. The case chosen is *Krankenheim.*[559] This seminal ruling has not been noticed by numerous commentators. However, it may have a significant influence on the deduction of losses in the UK and Poland. Moreover, there is seminal case law provided by the

---

[556] Ibid, par. 21.

[557] 'As regards the first of these justifications, it should be noted that the preservation of the allocation of the power to impose taxes between member states may 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' (see *Marks & Spencer*, paragraph 45 and Case C-231/05 *Oy AA* [2007] ECR I-6373, paragraph 54).' C-414/06 *Lidl Belgium GmbH & Co KG v Finanzamt Heilbronn* [2008] ECR I-3601, p. 31.

[558] 'In the first place, it should be recalled that the balanced allocation of the power to impose taxes between the member states, which has been invoked by all the Governments which have submitted observations and by the Commission, is a legitimate objective recognised by the Court (see, inter alia, Case C-371/10 *National Grid Indus* [2011] ECR I-12273, par. 45; and Case C-18/11 *Philips Electronics UK* [2012] ECR I-532, par. 23), which may make it necessary to apply to the economic activities of taxpayers established in one of those member states only the tax rules of that State in respect of both profits and losses (see, to that effect, *Marks & Spencer,* paragraph 45*; Oy AA,* paragraph 54; and *Lidl Belgium,* paragraph 31).' C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH v Finanzamt für Körperschaften III in Berlin* [2008] ECR I-8061, par. 50.

[559] C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH v Finanzamt für Körperschaften III in Berlin* [2008] ECR I-8061.

Polish courts which is based on the ruling of *Krankenheim*[560], *Lidl Belgium*[561] and *Marks & Spencer*.[562]

In *Krankenheim* a German resident company established a PE in Austria. According to the Austria-Germany double tax convention, Germany exempted the profits of an Austrian PE. Austria joined the European Economic Area [EEA] on 1 January 1994 and the EU on 1 January 1995. The PE was generating losses from 1982-1990 and became profitable from 1991-1994. The loss reintegration took place in 1994 and the CJEU decided that the tax mechanism might be subject to scrutiny in relation to Article 31 of the EEA Agreement.[563]

The German tax mechanism provides that Germany may provide relief for the losses of a German resident company incurred by its PE in a foreign state on the condition that the deducted amount is reintegrated in a later taxation period when the PE becomes profitable.[564]

The Austrian tax law made no provision for the carrying forward of losses incurred by partially taxable companies, as was demonstrated in *Krankenheim*. The deduction was introduced in 1989, including in relation to losses incurred before 31 December 1988, during the preceding seven years.[565] However, such a carrying forward was allowed only for PE belonging to a foreign company and only if the undertaking concerned did not make any profit overall, for example, in regard to its worldwide income.[566]

[560] Ibid.

[561] C-414/06 *Lidl Belgium GmbH & Co KG v Finanzamt Heilbronn* [2008] ECR I-3601.

[562] C-62/00 *Marks and Spencer Plc. v Commissioners of Customs & Excise* [2002] ECR I-6325.

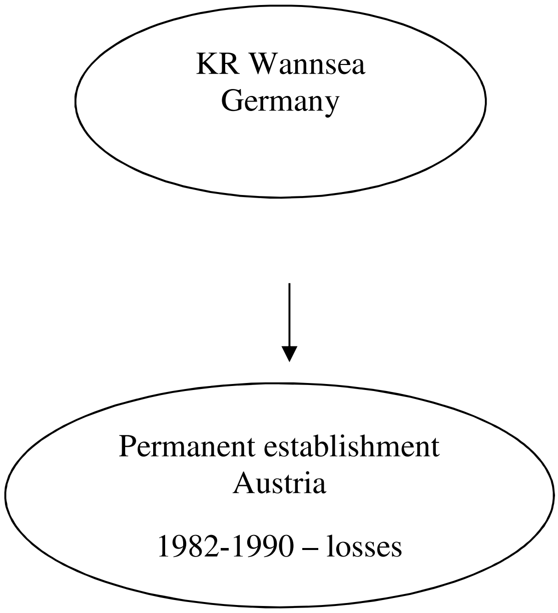
[563] C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH v Finanzamt für Körperschaften III in Berlin [2008] ECR I-8061*, par. 26.

[564] Ibid, par. 9.

[565] Ibid, par. 11

[566] Ibid, par. 12.

Figure 14 Krankenheim



Moreover, Krankenheim received a tax notice from Germany requesting deduction of sums which had been reintegrated into the basis for calculation of the tax drawn up in Germany.[567] Krankenheim argued that as a result of the carrying forward of losses in Austria being limited to seven years, reintegration of those sums was unlawful. The Bundesfinanzhof referred the question to the CJEU for a preliminary ruling.

The CJEU firstly stated that Germany granted a tax advantage to the resident company with PE in Austria but subsequently withdrew the benefit of that tax advantage by reintegration of losses.[568] The CJEU ruled: 'Even though that reintegration operated only up to the amount of the profits made by that permanent establishment, the fact remains that, to that extent, the German legislation thus subjected resident companies with permanent establishments in Austria to less favourable treatment than that enjoyed by resident companies with permanent establishments situated in Germany.'[569] The CJEU found that the situation of a company with PE abroad is less favourable than of a company with a domestic PE.

---

[567] C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH v Finanzamt für Körperschaften III in Berlin* [2008] ECR I-8061, par. 19.

[568] Ibid, par. 35-36.

[569] Ibid, par. 37.

The difference in treatment may discourage a company from carrying on business through a PE situated in Austria[570] and constitute a restriction on the right set out in the Treaty.[571]

However, the CJEU stated that 'the reintegration of losses provided for by the German tax system at issue in the main proceedings cannot be dissociated from there having earlier been taken into account. That reintegration, in the case of a company with a PE in another state in relation to which that company's state of residence has no power of taxation, as the referring court indicates, reflects a logical symmetry. There was thus a direct, personal and material link between the two elements of the tax mechanism at issue in the main proceedings, the said reintegration being the logical complement of the deduction previously granted.'[572] Thus, a restriction on the freedom of establishment is permissible as guarantee the coherence of the German tax system.[573] The Court found the restriction appropriate to achieve the coherence of tax system[574] and stated that it is 'entirely proportionate'[575] to the objective pursued, since the reintegration of losses was made only up to the amount of the profits made.

Finally, the Court held that that freedom of establishment cannot be understood as meaning that a member state is required to draw up its tax rules on the basis of those in another member state in order to ensure, in all circumstances, taxation which removes any disparities arising from national tax rules, given that the decisions made by a company as to the establishment of commercial structures abroad may be to the company's advantage or disadvantage.[576] The fact that a PE ended with a negative result and the losses were final is declared to be irrelevant.[577]

---

[570] Ibid, par. 38.

[571] At the time of the proceeding Article 31 of the EEA Agreement. C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH v Finanzamt für Körperschaften III in Berlin* [2008] ECR I-8061, par. 39.

[572] C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH v Finanzamt für Körperschaften III in Berlin* [2008] ECR I-8061 par. 42.

[573] Ibid, par. 43.

[574] Ibid, par. 44.

[575] Ibid, par. 45.

[576] Ibid, par. 50.

[577] Ibid, par. 53.

Jérôme Monsenego focused on the non-deductibility of the final losses incurred by the PE. Paragraph 53 of the analysed case states 'the principal company disposed of its PE and that the profits and losses made by that establishment throughout its existence end with a negative result.' Jérôme Monsenego[578] observed that CJEU statement is 'puzzling' and is incompatible with *Marks & Spencer*.[579] He argued that the CJEU should not uphold the symmetry of the German system, despite the existence of a loss in Austria that would never be deducted. In his view, the CJEU might change its line of ruling and as a result of *Krankenheim* the deduction of final losses might not be permissible at all or a loss relief will be required solely for subsidiaries, but not for PE.[580]

On the other hand, Tom O'Shea claimed that *Krankenheim* is an important judgment for at least two reasons.[581] Firstly, the Court upheld tax cohesion justification or so-called Bachman coherence.[582] Secondly, the CJEU recommended a mechanism of recapturing losses as a proportionate measure to sort out the issue of double non-deductibility of losses.

Justifications for a restriction have been the subject of debate in Chapter 2. However, there is a need to recall the particularity of Bachmann cohesion. The cohesion of fiscal systems might be a reason in some circumstances to apply derogation.[583] In *Bachmann*[584] the Kingdom of Belgium argued that sickness and invalidity insurance contributions or pension and life assurance contributions might be tax deductible only in the member state where they are paid. This solution seemed, at first sight, to be contrary to the TFEU but the Court found it was justified by cohesion of the systems. The Court stated: 'It follows that, as [EU] law stands at

---

[578] Monsenego, Jérôme. 'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011) p. 279.

[579] C-62/00 *Marks & Spencer* [2002] ECR I-6325.

[580] Monsenego, Jérôme. 'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011), p. 280.

[581] O'Shea, Tom. 'German loss deduction and reintegration rules and the CJE'. [2009] Tax Notes International, p. 967.

[582] C-204/90 *Hanns-Martin Bachmann v Belgium* [1992] ECR I-249.

[583]C-264/96 *ICI* [1998] ECR I-4695.

[584] C-204/90 *Bachmann* [1992] ECR I-249.

present, it is not possible to ensure the cohesion of such a tax system by means of measures which are less restrictive than those at issue in the main proceedings and that the consequences of any other measure ensuring the recovery by the State concerned of the tax due under its legislation on sums payable by insurers pursuant to the contracts concluded with them would ultimately be similar to those resulting from the non-deductibility of contributions.'[585] It is justified through direct correlation between deductibility of the contributions from income taxable and the taxation of payments made by insurers. Some member states have bilateral conventions enabling tax deduction but at this stage of the EU law there are no universal rules governing social insurance contributions.

The CJEU did not apply the same solution in later cases such as *Skandia/Ramstedt,*[586] *Safir,*[587] *Wielockx*[588] and *Danner*.[589] The main differences between the above is that in the later cases the defendant member states argued that the advantages for foreigners will appear when the benefits are paid. The CJEU agreed that an advantage delayed in time usually puts the foreign insurance institution in a less favourable situation. In Bachmann the tax was taken immediately by an insurance company or in the case of a foreign institution by the Belgian tax authority. This was not the case in *Skandia, Safir, Wielockx* and *Danne*r. In *Danner*, the Finnish and Danish governments also claimed that the non-deductibility of contributions paid to schemes operated by foreign insurance institutions is justified by the need to ensure the effectiveness of fiscal controls and to prevent tax evasion.[590] The CJEU did not uphold the argument. The Court found that information could be obtained from authorities from other member states and the aim could be attained by less restrictive measures.

---

[585] Ibid, par. 27.

[586] C-422/01 *Skandia/Ramstedt* [2003] ECR I-6817.

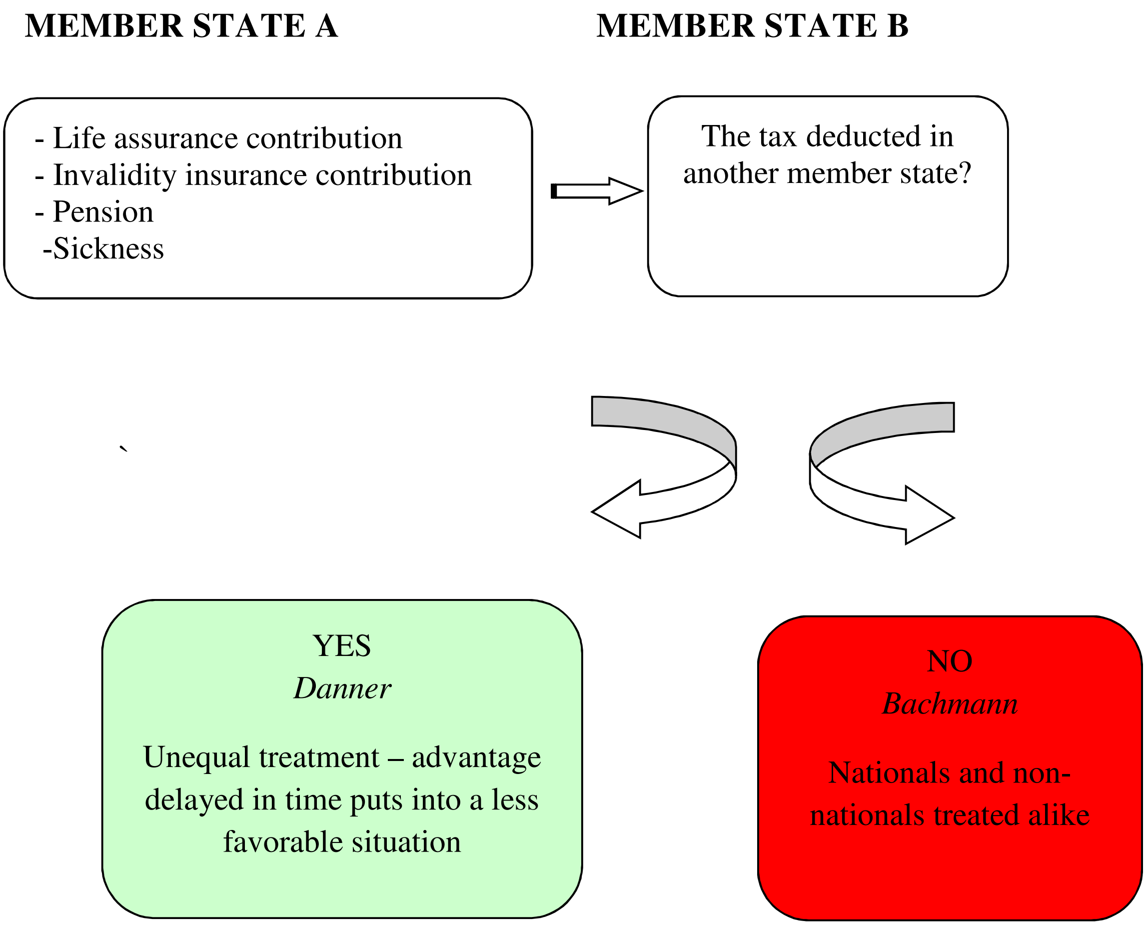
[587] C-118/96 *Safir* [1998] ECR I-189.

[588] C-80/94 *Wielockx* [1995] ECR I-249.

[589] C-71/76 *Thieffry* [1977] ECR I-765.

[590] C-136/00 *Danner* [2002] ECR I-8147.

Figure 15 Danner v Bachmann



Firstly, it is argued that in *Krankenheim*, the CJEU made a mistake stating that the location of the branch was irrelevant for the tax treatment of its results in the hands of the resident company.[591] Losses of both foreign and domestic branches could be deducted from the company's profits in Germany and the profits subsequently made by both foreign and domestic branches were taxed in Germany. Thus, the situation is similar to the one seen in Bachmann, where residents and non-residents are treated alike. Moreover, Ben Terra Wattel wisely concluded that this case certainly should have ended at the first step of the rule of reason.[592]

---

[591] Terra, Ben, Wattel, Peter. 'European tax law' (The Hague, Kluwer, 2012) p. 562.

[592] Ibid, but also Meussen, Gerrard. 'The ECJ's judgment in *Krankenheim* – The last piece in the cross-border relief puzzle?' [2009] European Taxation, p.362; Diepvens, Sander. 'The territoriality principle in the ECJ's case law.' [2014] Tilburg University.

Secondly, the CJEU indirectly approved a mechanism of deduction and recapture. The Court took into consideration rules already existing and ruled that they are necessary to ensure the coherence of the tax system. However, it is not within the competence of the Court to establish a tax mechanism and it is regrettable that member states do not achieve a common solution in this scope. The Court ruled that this system stays in accordance with the EU law. It is necessary to highlight that German tax recapture was done up to the amount of profits generated. The tax notice was limited to losses already deducted.

It is necessary to stress and repeat that PE is a division of a company and does not constitute a separate entity. As a part of an existing enterprise, profits and losses of a company and PE are taken into account jointly. A PE in another member state might benefit from a possibility to offset losses in a member state of a company. However, it might need to suffer from taxation, both from the member state of the primary establishment and the member state of the PE. As already stated, profits and losses are often treated as two sides of the same coin.

A company choosing to have a secondary establishment has to make a decision. Possibilities to offset losses of a subsidiary are very limited. Nonetheless, a genuine business does not need to suffer double taxation. On the other hand, if a company opts for a PE it might offset losses in a member state of a primary establishment. However, if a company generates profits, it might face double taxation.

5.2.1 Poland

Despite the fact that Polish law is regulated only by written regulations, national courts have attempted to modify them in accordance with EU law. The latest case law shows that there are possibilities to deduct some losses incurred by foreign PE.

On 28 November 2011, the Polish Supreme Administrative Court (Naczelny Sad Administracyjny) ruled on a case regarding the deduction of losses incurred by foreign PE.[593] A Polish construction contractor had been involved in works in Hungary. The works has been undertaken for more than 12 months and were accordingly subject to the double taxation Treaty between Poland and Hungary as the company was deemed to have a PE in Hungary. The company paid tax for the activity undertaken in Hungary both in Poland and Hungary during the 2006 tax year. The PE suffered losses in 2007. Part of these losses had been offset in 2008. Subsequently, the PE was liquidated in 2008 and part of the losses could not be deducted in Hungary. The company sought to deduct unused losses in Poland.

The Supreme Court found the claim justified on the basis of EU law especially article 49 TFEU (ex. 43 TEC) and CJEU case law, particularly cases: *Marks & Spencer, Lidl Belgium, Deutsche Shell, Cadbury Schweppes* and *Test Claimants in the Thin Cap Group Litigation.*

The ruling seems to be in accordance with EU law. However, the Court did not consider how the loss would be calculated (import or export neutrality).[594] The decision is in favour of the taxpayer; however, it lacks a practical solution for tax authorities on how to estimate a tax base. It might lead to further legal proceedings and delay the advantage in time.

The same reasoning has been also presented in other cases, e.g. 21 May 2010 Polish Regional Administrative Court (Wojewodzki Sad Administracyjny).[595] However, there is an urgent need to modify Polish law and international tax treaties to meet EU standards. A judgment of a Polish Court cannot constitute a source of law. Thus, a legal act shall be proclaimed in the Polish legal system. Without legal written provisions, businesses having a PE abroad are not guarantee that the offset would be possible at all.

Secondly, Polish Tax Authorities do not accept the loss incurred as result of currency fluctuation. The problem was subject of *Deutsche Shell*.[596] The CJEU

[593] II FSK 929/11 Supreme Administrative Court (Naczelny Sąd Administracyjny) on 28/11/2011.

[594] Also the CJEU did not do so.

[595] III SA/Wa 133/10 Regional Administrative Court (Wojewodzki Sąd Administracyjny) on 21/05/2010.

[596] C-293/06 *Deutsche Shell* [2008] ECR I-1129.

determined that refusal to offset a final loss which cannot be deducted elsewhere is contrary to the TFEU.

In *Deutsche Shell*[597] the CJEU decided that a difference in depreciation of a currency might be treated as a cost of a company. A German company had a branch in Italy. The depreciation of Italian currency was observed when the Italian branch was liquidated. The German Tax Authority denied accepting it as a loss. They argued that taking account of the loss leads to a 'non-coherent' tax system since any equivalent FOREX gain (gain in appreciation of a currency) would not be taxed. The CJEU found that there was no direct relationship between the FOREX loss and any FOREX gain. As a result of FOREX gain, a company does not benefit either in a home member state or in a member state where a branch is located.[598] Moreover, the German government claimed that loss might be taken into account effectively twice because it was deducted as operating expenditure but that the operating profit of PE is not taxed. This argument was also rejected, as Germany was unable to tax a PE's profit because it waived its taxing power under the German-Italian Treaty.[599] The CJEU observed also that FOREX loss could only arise in Germany and be relieved there.

Despite the CJEU decision, this kind of loss is not accepted in Poland. The General Administrative Court [Naczelny Sad Administracyjny] decision[600] stated that this category of expense could not be treated as a loss, because they also do not constitute profit in tax terms.[601] It might be argued that in these situations residents and non-residents are treated equally. However, a national company does not face a risk of the changing value of a currency. Only businesses trading simultaneously in more than one member state must calculate dividends in more than one currency.

[597] Ibid

[598] Ibid, par. 40.

[599] Gammie Malcom *The EJEU and Corporate Tax: Recent Development* denning.law.ox.ac.uk/tax/documents/MGammieEJEUDevelopments.php .

[600] General Administrative Court [Naczelny Sad Administracyjny] decision, 13/01/2006, II FSK 185/05 & 186&05.

[601] The same conclusion was confirmed recently by Voivodship Administrative Court [Wojewodzki Sad Administracyjny] in Gdansk on 28/10/2010, I SA/Gd 722/10; Szczygiel Lukasz 'Comment' [Komentarz] [12/2010] Monitor Podatkowy.

In the case concerned, the Polish Limited Liability Company had a branch in the Czech Republic. A branch was operating well and generated most of the profits for the company. When dividends were paid, there was a need to transfer funds into a Polish bank account. Thus, the funds were paid out in the form of dividends. In 1999 and 2000 the company suffered losses as a result of depreciation of the currency. The company requested the Tax Authority offset the loss. They were denied on the grounds that the losses were incurred by the Czech branch and have no relation to a tax obligation in Poland.[602]

This conclusion should be criticised. The loss suffered as a result of depreciation could not be offset in the State of source (Czech Republic). The depreciation was not 'visible' in Czech currency but only in the Polish one. Moreover, both the company and its branch were co-operating closely and the loss was generated as result of internal transactions between the company and its branch. Accordingly, it is concluded that there is no possibility to offset the loss incurred as result of currency fluctuation in Poland. It is a restriction to the freedom of establishment and it is contrary to the TFEU. This problem should be addressed at EU level.

All in all, the possibilities to offset losses incurred by a PE are very limited in Poland. The latest decision from 2011[603] is in favour of the taxpayer. However, it lacks the same practical solutions as CJEU judgments. Both Courts have granted rights to taxpayers but do not provide the calculation methods. There is no common tax base in the EU and member states' regulations vary in how they structure tax allowances, calculate a tax base, establish allowed costs etc.[604]

To emphasise, the issue of the deductibility of losses incurred by PE and losses which are the result of currency fluctuation, are regulated in Poland discordant with the EU law. In respect to losses incurred by PE as result of its activity, it is possible to deduct them in Poland. However, losses resulting from

[602] In oral justification the Court expressed an opinion that differences arising on time of payment might be offset. It was very surprising because loss has all elements to be considered as such. Bernat, Michal, Nowak, Eliza. *Division of profits gained by foreign branch – currency fluctuation. [Podział zysku wypracowanego przez zagraniczny oddział – różnice kursowe]* Monitor Podatkowy 2/2006, p. 2.

[603] II FSK 929/11 Supreme Administrative Court (Naczelny Sąd Administracyjny) on 28/11/2011.

[604] Current reform projects have been presented above.

currency fluctuation which are characteristic for cross-border businesses only, are not permissible.

Nonetheless, it might be argued that Poland encourages businesses to extend abroad as PE. The possibilities to deduct losses incurred abroad extend the 'minimum level' proposed by the EU law and CJEU.

5.2.2 United Kingdom

The right to deduct losses has been firstly provided in the Finance Act of 2006; however, strict conditions apply. The surrendering company must be a subsidiary of a claimant company which is resident in the UK or a surrendering company and a claimant company must be 75 per cent subsidiaries of a third party which reside in the UK. Moreover, the surrendering company must be subject to a charge under the tax law of any member state, for example, by being a resident or trading there through a PE and in some circumstances meeting further conditions.[605] A foreign loss needed to be of a kind relievable in the UK (equivalence condition). The loss had to be attributable to activities which were taxed in the territory of a member state and were not exempt from a tax basis of double taxation convention[606] (the tax loss condition). Moreover, a tax deduction could be available in a resident member state or any territory outside the EU in any period, future or previous[607] (qualifying loss condition). Lastly, a deduction was not available in the territory of residence of any intermediate company between the surrendering company and the UK resident company. The intermediary company must be at least a 75 per cent subsidiary of the UK resident company[608] (precedence condition). The losses or

[605] Panayi, Christiana, 'Reverse subsidiarity and EU tax law: can member states be left to their own devices?' [2010] British Tax Review.

[606] ICTA s.403F(2)(b) and Sch.18A par.3 repealed and replaced by ss.113(2) and 115-116 in CTA 2010.

[607] ICTA s.403F(2)(c) and Sch.18A paras 5, 6, 7 and 8 repealed and replaced by ss.113(2) and 117-120 in CTA 2010.

[608] ICTA Sch.18A para.9.

gains that resulted from currency fluctuation were treated as loan and derivative contracts,[609] so the general rules apply as well.

Moreover, section 107 of the Company Tax Act (CTA) 2010[610] prohibited using the losses of a UK branch of a non-UK-resident company. It applies when the surrendering company is a non-UK resident company carrying on a trade in the United Kingdom through a PE.

The problem had already emerged in *Philips Electronics UK Ltd v HMRC* (*Philips Electronics*).[611] In this case, the UK tax provisions on tax group relief were questioned. Under section 403D(1)(c) ICTA foreign companies may surrender the

---

[609] CFM61160 - Foreign exchange: tax rules on exchange gains and losses: loan relationships and derivative contracts: special rules on fair value accounting. http://www.hmrc.gov.uk/manuals/cfmmanual/CFM61160.htm .

[610] Chapter applies only so far as conditions A, B and C are met in relation to the loss or other amount.

(3) Condition A is that the loss or other **amount is attributable to activities of the surrendering company in respect of which it is within the charge to corporation tax for the surrender period**.

(4) Condition B is that the loss or other amount is not attributable to activities of the surrendering company that are double taxation exempt for the surrender period (see section 186).

(5) Condition C is that—

(a) the loss or other amount does not correspond to and is not represented in, an amount within subsection (6) and

(b) no amount brought into account in calculating the loss or other amount corresponds to, or is represented in, an amount within subsection (6).

(6) An amount is within this subsection if, for the purposes of non-UK tax chargeable under the law of a territory, the amount is (in any period) deductible from or otherwise allowable against non-UK profits of any person.

(7) But an amount is not to be taken to be within subsection (6) by reason only that it is—

(a) an amount of profits brought into account for the purpose of being excluded from non-UK profits of the person, or

(b) an amount brought into account in calculating an amount of profits brought into account as mentioned in paragraph (a).

(8) Subsection (9) applies for the purposes of subsection (6) if, in order to determine if an amount is deductible or otherwise allowable for the purposes of non-UK tax chargeable under the law of a territory, it is necessary under that law to know if the amount (or a corresponding amount) is deductible or otherwise allowable for tax purposes in the United Kingdom.

(9) The amount is to be treated as deductible or otherwise allowable for the purposes of the non-UK tax chargeable under the law of the territory concerned.

[611] C – 18/11 *HRMC v. Philips Electronics UK, Ltd.* [2012] ECR I-532.

losses of a UK-resident PE only if they cannot be used for the purposes of any foreign tax.[612]

In Phillips Electronics this included also a British company which claimed to surrender losses of its intermediate PE.

The company was firstly granted a deduction but the United Kingdom tax authorities then brought an appeal before the Upper Tribunal.[613] The main reason for the UK Tax Authority denying the offset was that part of the losses had already been deducted from non-UK profits under a Dutch fiscal consolidation scheme.[614] Notwithstanding, the Upper Tribunal[615] along with the Tax and Chancery Chamber referred the question to the CJEU.

---

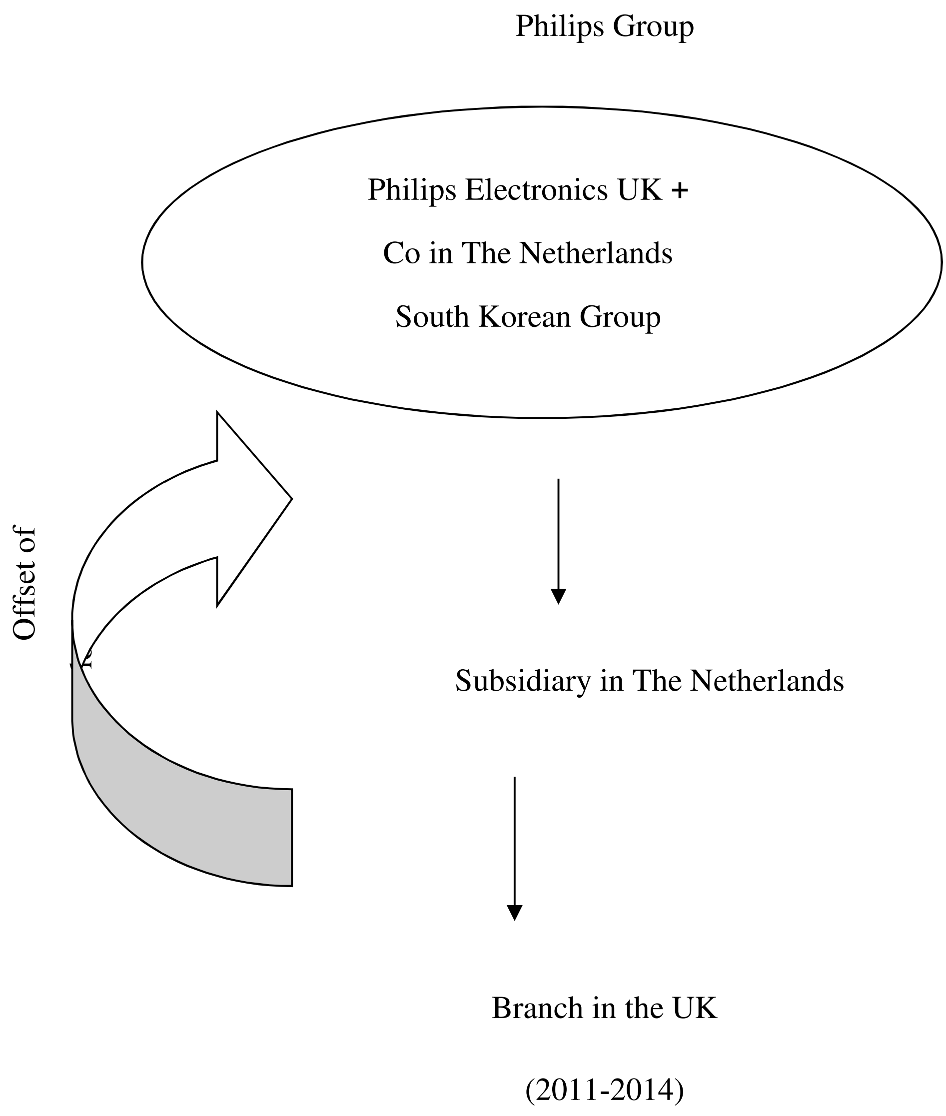
[612] If all companies concerned had been resident in the UK then the UK branch of The Netherlands' subsidiary would have been able to surrender about half of its losses to the taxpayer. 'The claims failed because of two provisions of UK tax law. The first was section 406(2) of ICTA. This has the effect of limiting a claim to circumstances where "link' companies, as defined, could have made consortium relief claims if they had taxable profits. The link companies in this case are KPE and its German subsidiary. They could not have made consortium relief claims. They were not UK resident nor did they carry on business in the UK. The second provision was section 403D(1)(c) of ICTA (section 403D(1)(c)). This prevents the use of losses of a UK branch of a non-resident company, such as LG.PD (UK branch of Netherlands subsidiary), if any part of the losses corresponds to amounts deductible for foreign tax.' Lyons, Timothy. 'Philips Electronics UK Ltd v HMRC: more unjustifiable restrictions on loss relief.' [2010] British Tax Review.

[613] *Philips Electronics UK Ltd v HMRC* [2009] UKFTT 226 (TC); [2009] ECR I-532, par. 9.

[614] Englisch, Joachim. 'HMRC v Philips Electronics UK Ltd: another contribution to EU law jurisprudence on loss relief.' [2012] *British Tax Review*, p. 586; Schuch, Josef, Staringer, Claus, Lang, Michael. 'ECJ - recent developments in Direct Taxation 2009.' [2010] Vienna, Linde, p. 257; Brokelind, Cécile. 'Pending Court of Justice of the European Union Cases.' [2012] European Taxation, p. 382.

[615] *Philips Electronics UK Ltd v HMRC* [2009] ECR I-532.

Figure 16 HRMC v. Philips Electronics UK, Ltd.



Firstly, there is a need to recall the differences between a subsidiary and a permanent establishment. A subsidiary possesses its own legal entity when a PE is a part of a parent company. A PE does not possess its own separate legal entity and is closer bound to the main business. Thus, the PE is an entity related closer to the parent company than to the subsidiary. It is argued in published papers[616] that a PE should be granted more possibilities to deduct losses than a subsidiary.

[616] Monsenego, Jérôme. 'Taxation of Foreign Business Income within European Internal Market' (Intellecta Infolog, Göteborg, 2011).

The Court stated that imposing certain conditions on companies claiming to deduct losses by non-resident PE and not imposing these conditions if a situation is purely domestic is an unequal treatment. It results in non-resident PE being a less attractive form of exercising the freedom of establishment.[617] The CJEU wisely concluded that such a difference in treatment, in order to be compatible with the freedom of establishment, must relate to a situation that is not objectively comparable. Nonetheless, the Court did not consider any difference in the situation of a non-resident company with only a PE in the United Kingdom and the situation presented in *Philips Electronics*.[618]

Next, the Court proceeded to examine if such a difference in treatment is justified by overriding public interest.[619] The CJEU concluded that objective of preventing the risk of double use of losses cannot allow the member state in which the permanent establishment is situated to exclude the use of losses on the ground that those losses may also be used in the member state in which the non-resident company has its seat.[620] Moreover, the Court stated that a restriction cannot be justified solely on a basis of the preservation of the allocation of taxing powers between member states, by the prevention of double use of losses, or by a combination of both objectives.[621]

Cécile Brokelind observed that 'it is not clear from the facts of the case whether the remaining losses incurred by the Dutch branch could have been set off within the Dutch consolidation in The Netherlands but since the Dutch Joint Venture was wound down and terminated, there was basically no risk of double use of losses.'[622] The commentators regretted that the CJEU did not follow the deep analysis of Advocate General Kokott.[623] The Advocate General proposed to assess comparability in a source country situation involving PE taxation. Moreover, it is

[617] *Philips Electronics UK Ltd v HMRC* [2009] ECR I-532, par. 15-16.

[618] Ibid, par. 19.

[619] Ibid, par. 21.

[620] Ibid, par. 32.

[621] Ibid, par 34-35.

[622] Brokelind, Cécile. 'Pending Court of Justice of the European Union Cases.' [2012] European Taxation, p. 385.

[623] Englisch, Joachim. '*HMRC v Philips Electronics UK Ltd*: another contribution to EU law jurisprudence on loss relief.' [2012] British Tax Review, p. 589.

stressed that granting the option to deduct could impose further problems. The PE is a part of any one singular business and it would be difficult to assess which costs stemmed from the activity of a main business and which of a branch. In *Centro Equestre* the CJEU ruled that only costs directly connected to the PE such as travel and accommodation could be deducted.

Taxation of a foreign business income of a PE conforms to international law. It is also provided in the double taxation convention entreated between the United Kingdom and The Netherlands, Article 7 '(…) If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.' However, the UK does not provide possibilities to deduct losses from abroad. Nevertheless, in Centro Equestre, it was determined that preventing all possibilities to deduct is not in conformity with EU law, especially Article 43 TEC (presently 4 TFEU).' Joachim Englisch concluded that source country entitlement to profits also entails source country responsibility for loss relief.[624]

All of these difficulties resulted in reform of the Finance Act.[625] The new provisions are called foreign branch exemption.[626] The new regime has its justification in the reasoning applied in *Philips Electronics*. A company may have a right to surrender losses of its foreign PE if the UK has a right to charge a corporate tax.

The new regime applies to the period after 19th July 2011. The foreign branch exemption allows a UK resident company[627] to select between maintaining the old tax with a credit system or using the exemption regime. It must be stressed that the old tax regime may not cover all of the UK tax due. The new tax regime does not make the UK corporate tax system strictly territorial[628] but it does enable

---

[624] Englisch, Joachim. '*HMRC v Philips Electronics UK Ltd*: another contribution to EU law jurisprudence on loss relief.' [2012] British Tax Review, p. 594.

[625] TIOPA10/S43.

[626] Nonetheless, the name is not luckily chosen, as the concerned provisions refer to exemption from UK corporation tax the profits of the worldwide permanent establishment of a UK resident company.

[627] However, the regime applies to companies only, individuals are not covered by the regulations.

[628] Withers Worldwide, '2011 branch profits exemption.' [2011] http://www.withersworldwide.com/news-publications/2011-branch-profits-exemption

the total taxable profits of a UK tax resident company to be adjusted, so profits located abroad might be exempted from the UK corporate tax.

The exemption stays in accordance with the international taxation rule of 'two sides of a coin.' If a company has decided to be exempt from taxation in the UK, it cannot claim losses deduction. However, if it opted for taxation, the offset of the losses applies. The election is irrevocable and done on a company base. If a head office company elects to be exempt, the decision applies to all branches (permanent establishments). The election might be beneficial for a company, if at least one branch generates profits.[629]

The new regulation deserves close analysis, as it shows the interests of member states. A state might grant offset of losses, if it obtains, at least hypothetically a chance to get revenues (taxes) from the concerned entity. States are reluctant to grant a deduction of losses to a business which is out of its jurisdiction. If a UK company opts not to be covered by worldwide UK taxation, it is treated as subsidiary and the CFC rules apply. Thus, the situation of a PE using the branch exemption is identical to a subsidiary. As a result, it is not the legal form that is chosen but a structure of the tax regime is the deciding factor. In author's opinion this solution is noteworthy and provides a clear and simple criterion to differ between entities operating cross-border. Moreover, an election of a company may reduce differences between meaning of PE and subsidiary between member states. Thus, it is highly recommended that a new reform introduces a possibility for an undertaking to choose whether it wishes to be treated and taxed like PE or subsidiary.

5.3 Concluding Observations

It is obvious that not allowing offsetting losses incurred in other member states might act as discouragement to establishing abroad. Nonetheless, member states face hardship when searching for precision criteria for the offset of losses.

[629] Slater, Alaister, Choi-Ling, Li. 'FA 2011 analysis: foreign profits.' [2011] Tax Journal, p. 47.

There is no coherent system of accounting and it also makes it harder to assess the amount of losses allowed. The common system of accounting and financial reporting has been discussed not only by members of the EU but become subject of worldwide discussion. There are two most significant accounting standards: one is International Financial Reporting Standards (IFRS) and the second Generally Accepted Accounting Principles (GAAP). Both of these accounting standards are not legally binding. The standards are an attempt of creating a common language for international businesses. Both of them are have their followers and adversaries.[630] They are not part of a legal order; they are more codes of good practices. For example, in Poland the national provisions of accounting and taxation are not based by IFRS. However, many accountants based their annual accounts on IFRS. They are not used to calculate a tax base but only to provide accurate information about the business to its owners and customers. Nonetheless, it leads to the situation then the factual situation of a business is different than this accepted by tax office. However, IFRS and GAAP, even in this modest form, are raising a high debate across on the worldwide arena. It is not the aim of this research to establish whether solutions provided in IFRS and GAAP are worthy to be followed but only mention that the agreed system of accounting is an issue difficult to be achieved.

The CJEU has given very vague hints about when to accept the offset of subsidiary losses. This is particularly noted in the seminal case *Marks & Spencer*[631] followed by the *European Commission v. United Kingdom.*[632] The offset of losses incurred by a subsidiary are not widely accepted by member states. Lack of acceptance has its source in international tax law which seems to be reluctant to provide for the deduction of losses for a separate entity. Moreover, a member state of a parent company has very limited possibilities to obtain revenues/taxes from a subsidiary – this might be a case only if a business is not genuine. A loss is treated as a negative income and the 'other side of the coin'. If a positive income lies outside of the taxation power of the member state, negative income shall not be surrendered.

[630] Tepper Steven, Badian Laura 'Closing the GAAP' [2008] European Lawyer p. 14.

[631] C-62/00 *Marks & Spencer* [2002] *ECR* I-6325.

[632] C-172/13 *European Commission v. United Kingdom of Great Britain and Northern Ireland* [2015] ECR I-0000, p. 8.

It is not possible to surrender losses by a Polish company incurred by a foreign PE. The legal system remains mute and there is no relevant case law on this matter. On the other hand, the UK tax system provides a possibility to offset losses under severe conditions. This results in it not being likely that a loss might be surrendered. Nonetheless, these regulations have come under the scrutiny of the CJEU[633] and were declared to be in conformity with EU law. In regard to the tax group in the scope of the application of the EMTD, non-national businesses benefit from wide ranges of tax benefits. These advantages are not available for national entities. Subsequently, the tax groups are obligatory in the national realm, whereas they are restrained within the parameters of cross-border activity.

The situation seems to look opposite if a PE is concerned. The deduction of losses is generally accepted but the home member state retains taxation power and may recapture the losses in future if a company becomes profitable. Poland has incorporated this idea by the line of ruling but no written provisions guarantee this right. On the other hand, the British tax system proposes a choice to taxpayers. It is not only the name of a legal form that can be decided but taxpayers might elect to be taxed in the UK and surrender losses or be exempt from the UK tax system and give up a right to offset losses.

Nonetheless, there is a significant need to make the tax systems of EU member states uniform. As shown above, using the examples of Poland and the UK, the national legal systems vary and their reform is urgently needed. The next part outlines the previous efforts of member states to achieve some level of uniformity and illustrates reform proposals. It has been established that the freedom of establishment is hindered by the double taxation and double non-deductibility. There is currently an intense debate in the EU on the reform of the taxation system. The recent proposals are presented below with their accompanying critical review.

[633] Ibid.

CHAPTER 6: THE COMMISSION'S PROPOSALS FOR TAX REFORM

6.1 Introduction

The significant role of taxation and customs duties has been reaffirmed by the Commission in the Lisbon Strategy Communication.[634] The removal of double taxation and high compliance costs would improve market access. Currently, there are 28 different corporate tax systems and both double taxation and double non-deductibility hinder the freedom of establishment, as indicated in the preceding chapters.

This chapter first examines the Commission's proposals for two directives which were not adopted due to opposition from several member states (subsection 6.2). The proposals were: a directive on a common corporate tax base (the CCCTB proposal) and another directive on arrangements for taking into account by enterprises of the losses of their permanent establishments and subsidiaries situated in other member states (the Losses directive proposal). Then the chapter will focus on the future and it will propose solutions that may enable the member states to accept a directive setting out a single (common) set of rules to calculate companies' taxable profits in the EU (subsection 6.3).

This is particularly important as currently the European Commission[635] is working on a new proposal to facilitate access of companies to the single market through introducing a common tax base. The tax reform proposal has already been drafted but has not yet been adopted as any legislative measure. It is currently again in the early initiative phase and the text of the draft proposal has not yet been proposed officially.

As already stressed, there are significant differences between a subsidiary and a permanent establishment (PE) which constitutes a part of a business, while a

634 European Commission 'The Contribution of Taxation and Customs Policies to the Lisbon Strategy.' [2005] COM, p. 532.

635 The law is as it stands on 1st January 2016.

subsidiary is a distinct, legal entity separate from the existing enterprise. It is argued that PE is closely linked to parent and shall be entitled to offset both final and non-final losses. The chapter analyse an option of the automatically recaptured.

The situation is the opposite when it concerns a subsidiary. As concluded by the CJEU and discussed in Chapters 3 and 4, the CFC (Controlled Foreign Companies) rules may be applied only to wholly artificial arrangements aimed solely at escaping the national tax normally due and where the regime does not go beyond what is necessary to achieve that purpose. Genuine businesses shall not be exposed to the risk of double taxation within the single market. However, if a subsidiary has no right to offset non-final losses and based on *Marks & Spencer*[636] and *European Commission v. United Kingdom*[637] it is difficult to imagine when final losses might be offset. Lack of a possibility to deduct losses stays in accordance with the 'two sides of the same coin' rule. The rule provides that if a positive income of subsidiary cannot per se become taxable at the level of the parent company, the negative income is also not deductible. Some member states, including France, had already implemented the temporary deduction and automatic recapture for small and medium foreign subsidiaries. As such, we will examine whether the special beneficial regime for SMEs may be beneficial for the EU.

6.2 Past Proposals

This part highlights the valuable elements of the previous draft proposals. Nonetheless, it is submitted that the aims of the CCCTB proposal discussed in this chapter are not likely to be achieved by the previous draft version of the proposed directive. Moreover, the costs of introducing the new tax regime compared with the potential savings of beneficent companies are marginal. Nonetheless, only nine member states rejected the previous proposal of the CCCTB directive. It shows that member states are eager to reform the common tax system, unless it does not jeopardise their national tax systems. As a result, it is argued that the mechanism of recapture presented in the proposal for a Council directive concerning arrangements

[636] C-62/00 *Marks & Spencer* [2002] *ECR* I-6325.

[637] C-172/13 *European Commission v. United Kingdom of Great Britain and Northern Ireland* [2015] ECR I-0000, par. 8.

for the taking into account by enterprises of the losses of their permanent establishments and subsidiaries situated in other member states should be reconsidered. It is noted that member states are more amenable today to accepting tax reform and the discussion is highly desirable.

6.2.1 Past Proposals: the draft proposal for a Council directive on a Common Consolidated Corporate Tax Base (CCCTB)

The Commission announced in 2004 that 'companies would only be able to take full advantage of the Internal Market if they have the possibility to use a common consolidated corporate tax base.'[638] The Commission had planned to submit a proposal in 2008. However, during the annual International Fiscal Association (IFA), the general meeting decided that the introduction of common consolidated corporate tax base would be delayed.[639] This might have resulted from the rejection of the Lisbon Treaty by the Irish people in June 2008. Secondly, reports of the Common Consolidated Corporate Tax Base Working Group and public consultations showed that the proposal needs further work before it is submitted to the Council.[640] Thirdly, the business lobby seemed not to support the proposal.[641]

The proposal was published on 16 March 2011 under the name of Council Directive on a Common Consolidated Corporate Tax Base (CCCTB proposal).[642]

---

[638] Commission non-paper to inform Ecofin Council, 10 and 11 September 2004, A Common Consolidated EU Corporate Tax Base, 7 July 2004, p. 2. Read more in Panayi, Christiana. The Common Consolidated Corporate Tax Base and the UK Tax System, 2011 Institute for Fiscal Studies, London, p. 1; Herzing, Norbert, Kuhn, Johannes. Direct Taxation in the EU: the Common Corporate Tax Base as the Next Sub-step Towards Harmonization [2012] Wroclaw Review of Law, Administration & Economics, p. 1.

[639] Sheppard, Lee. 'EU Tax Commissioner puts CCCTB Proposal on Hold' 2008 Tax Analysts, p. 173.

[640] Panayi, Christiana. The Common Consolidated Corporate Tax Base and the UK Tax System, 2011 Institute for Fiscal Studies, London, p. 2.

[641] Ibid.

[642] See speech given by Commissioner Algirdas Šemeta on 1 March 2010 in the Brussels Tax Forum 'Tax Policies for a Post- Crisis World.' [2010] Tax Analysts, p. 30.

The Commission relaunched a ‘one-stop-shop’ system for filling tax returns[643] and the consolidation.[644] Consolidation means adding up all the profits and losses of a company from different member states to provide a net profit or loss for the whole activity in the EU.

It is important to remember that there is no legal base in the TFEU for legislative initiatives concerning direct taxation. The basis for this legislative initiative was therefore based on Articles 115[645] and 352 of the TFEU.[646] Under these provisions, unanimity is required for the EU to adopt the CCCTB proposal. However, the CCCTB proposal has not assumed that some member state might wish to opt-out from its scope.

---

[643] ‘In addition, under CCCTB, companies active in more than one EU member state would only have to file a single tax return for the whole of their activity in the EU’ MEMO/11/171, Brussels, 16 March 2011, p. 1. The Lisbon Treaty has been eventually ratified on 4 November 2009 and the new appointed Commissioner Algirdas Šemeta announced that the CCCTB proposal would be delivered as soon as possible.

[644] ‘The CCCTB would make it possible for companies or groups of companies to consolidate all profits and losses across the EU, thereby recognising their cross-border activity.’ MEMO/11/171, Brussels, 16 March 2011, p. 1.

[645] Article 115 TFEU: Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the member states as directly affect the establishment or functioning of the internal market, Supra, Chapter 1 no. 1.

1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.

3. Measures based on this Article shall not entail harmonisation of member states' laws or regulations in cases where the Treaties exclude such harmonisation.

4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.

[646] Supra, Chapter 1 no. 1.

The Commission favoured that the CCCTB regime would be optional for companies and open only to those operating cross-border. In the view of the Commission the measure should not apply to purely domestic situations. This ensured that the principle of subsidiary is observed. The Commission highlighted that the CCCTB proposal was aimed to remove obstacles to the Internal Market and to lowered the costs of cross-border operations. The Commission argued that it could only be successfully implemented at EU-level. The main elements of the proposal were inter alia cross-border loss relief and allocation of the tax base through a common formula.[647]

In the initial phase, the Commission invited member states to comment on the common CFC regime[648] then published these in 2007. The member states proposed that CFC should cover passive incomes and not interfere with genuine economic activity.[649] Nonetheless, the member states were not eager to implement common CFC rules within the whole European Union.[650] Nonetheless, the final draft of the CCCTB proposal included both CFC rules[651] and a switchover clause.[652] These also

---

[647] MEMO/11/171, Brussels, 16 March 2011, p. 7.

[648] On CFC, see supra Chapter 4.2.

[649] Only one member state stated that the CFC regime shall apply to mobile activity as well. CCCTB/WP057. Read more in Panayi, Christiana. The Common Consolidated Corporate Tax Base and the UK Tax System, 2011. Institute for Fiscal Studies, London, p. 32, 74.

[650] CCCTB/WP057.

[651] Chapter 13: Transactions between associated enterprises and Chapter 14: Anti-abuse rules of draft the CCCTB Directive. The definition of CFC might be found in Article 78 of the draft CCCTB Directive called *Associated Enterprises.*

2. 'For the purposes of paragraph 1, the following rules shall apply:

(a) participation in control shall mean a holding exceeding 20% of the voting rights;

(b) participation in the capital shall mean a right of ownership exceeding 20% of the capital;

(c) Participation in management shall mean being in a position to exercise a significant influence in the management of the associated enterprise.

(d) An individual, his or her spouse and his or her lineal ascendants or descendants shall be treated as a single person.

In indirect participation, the fulfilment of the requirements in points (a) and (b) shall be determined by multiplying the rates of holding through the successive tiers. A taxpayer holding more than 50% of the voting rights shall be deemed to hold 100%.

[652] Article 73 of the drafted CCCTB Directive *Switchover Clause.*

'Articles 11(c), (d) or (e) shall not apply where the entity which made the profit distributions, the entity the shares in which are disposed of or the permanent establishment were subject, in the entity's caused additional resistance from member states.[653] All in all, the main advantage of the CCCTB proposal was declared as the reduction in compliance costs. The Commission argued that the CCCTB regime would make cross-border operations cheaper and simpler for a business. Namely, the Commission argued that current compliance costs could be reduced by 7% (€0.7 billion savings), the costs of expanding to another member state by creating a subsidiary would be reduced for large enterprise from €140,000 to €87,000 (62%) and for medium enterprise from €127,000 to €42,000 (67%). Moreover, the Commission claimed that there would be additional savings of €1.3 billion for companies across the EU resulting from tax purpose such as consolidation. All in all, the CCCTB proposal was aimed to provide in total savings for businesses of €0.7 billion in reduced compliance, €1 billion in reduced costs to expand cross-border and €1.3 billion through consolidation.[654]

However, commentators argued that these savings are 'unlikely to materialise.'[655] Moreover, this opinion was shared by the Organisation for Economic Co-operation and Development (OECD) which stated that compliance

country of residence or the country in which the permanent establishment is situated, to one of the following:

(a) a tax on profits, under the general regime in that third country, at a status corporate tax rate lower than 40% of the average statutory corporate tax rate applicable in the member states;

(b) a special regime in that third country that allows for a substantially lower level of taxation than the general regime.

The average statutory corporate tax rate applicable in the member states shall be published by the Commission annually. (…)'

[653] Read more in a discussion paper written for the UK Tax Law Review Committee: Panayi, Christiana. The Common Consolidated Corporate Tax Base and the UK Tax System, 2011 Institute for Fiscal Studies, London, pp. 73-90.

[654] MEMO/11/17 European Commission Questions and Answers on the CCCTB [2011] Brussels: http://europa.eu/rapid/press-release_MEMO-11-171_en.htm?locale=en

[655] 'Whilst this is not a reason to defer introduction of the CCCTB, it may indicate that compliance cost savings, even if we ignore transition costs, are unlikely to materialise.' *Cline,* Robert, *Neubig,* Tom, *Phillips* Andrew, Sanger, Christopher, Walsh, Aidan. 'Study on the Economic and Budgetary Impact of the Introduction of a Common Consolidated Corporate Tax Base in the European Union' [2011] Ernst & Young, p. 48 http://taxpolicy.gov.ie/wp-content/uploads/2011/06/EY-Report-CCCTB-for-Commissioner-Semeta-4-Jan-2011.pdf; Gordon, Brady. 'Tax competition and harmonisation under EU law: economic realities and legal rules.' [2014] European Law Review, p. 807.

costs of consolidation are 'intolerable.'[656] This result, inter alia, from the fact that member states need to maintain two different tax systems within one member state, as will be discussed below.

However, the main argument against the previous version of the CCCTB proposal, supported by 9 member states,[657] was the non-compliance with the principles of subsidiarity and proportionality.[658] These principles are not the main subject of this thesis but as member states indicated them as a reason for rejection of the CCCTB proposal there is a need to consider them briefly.

Article 5 of the TEU defines that:

'1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the member states in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the member states.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states, either at

---

[656] OECD, 'Transfer Pricing Guidelines.' [2010] Paris, OECD Publishing.

[657] The UK, The Netherlands, Poland, Slovenia, Romania, Bulgaria, Ireland, Malta and Sweden rejected the proposals principally on the grounds of subsidiarity. Nine national parliaments answered the proposal by sending their reasoned opinion claiming non-compliance with the principle of subsidiarity.

[658] It might be noted here that Poland did not deeply consider the CCCTB Directive. The Directive was presented for consultation for the period of six days. After this time, the Polish government, not waiting for a response, announced that the Directive does not stay in accordance with the principles of subsidiarity and proportionality. Read more: http://www.portalfk.pl/wspolna-skonsolidowana-podstawa-opodatkowania-osob-prawnych---sprawdz-jakie-korzysci-przewiduje-dla-przedsiebiorcow-252938

central level or at regional and local level but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.' [659]

The principle of subsidiarity entails two tests. Firstly, it checks if the objectives cannot be achieved by the member states ('national insufficiency'). Secondly, it determines whether the EU can achieve better the objective ('comparative efficiency').[660]

Brady Gordon observed that subsidiarity is irrelevant in the case of CCCTB proposal, as it refers to purely international elements such as eliminating obstacles caused by different tax systems.[661] Thus, he aptly pointed out that the focus should be put on the principle of proportionality which has been comprehensively discussed in Chapter 2.[662]

It is clear from the Impact Assessment that the CCCTB proposal did not meet the proportionality criteria.[663] The CCCTB Impact Assessment[664] itself stated that moving from separate accounting does not result in any significant economic improvement. Brady Gordon argued that overall welfare, GDP, investment and revenue effects showed in above Impact Assessment[665] is far too optimistic forecast, in his opinion the CCCTB proposal could give a 0.02 per cent net welfare gain from tax compliance, the proposal harmed investment (-.74 per cent), GDP (-.15 per cent), tax revenue (-4.5 per cent of the steady state base) and employment

---

[659] Consolidated Version of the Treaty on European Union Official Journal of the European Union C-115/13 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:en:PDF.

[660] Gordon, Brady. 'Tax competition and harmonisation under EU law: economic realities and legal rules.' [2014] European Law Review, p. 809; Schütze, Robert. European Constitutional Law (Cambridge: Cambridge University Press, 2012) p. 178.

[661] Gordon, Brady. 'Tax competition and harmonisation under EU law: economic realities and legal rules.' [2014] European Law Review, p. 809.

[662] It must be applied in a non-discriminatory manner; must be justified by imperative requirements in the general interest; must be suitable for securing the attainment of the objective which they pursue; and must not go beyond what is necessary in order to attain the objective which they pursue.

[663] 'Impact Assessment to the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base.' COM (2011) 121, pp. 136-139.

[664] Ibid, p. 27.

[665] Ibid, p. 27.

(in 16 of 27 countries). [666] Thus, such a small savings have no substantive meaning and the need of implementation of CCCTB proposal might be questioned.

Additionally, the member states objected to the optional choice of CCCTB regime and the consolidation. The CCCTB was open to eligible companies which could opt to apply a common tax base.[667] Annex I listed the types of eligible companies which must be subject to corporate tax in a member state. If a company was non-resident in a member state, it might opt for a common tax base if it has a PE in another member state.[668]

It is stressed that the draft CCCTB regime was open to a subsidiary or a PE under restrictive conditions. The parent company held the right to exercise more than 75% of the company's capital or more than 75% of the rights giving entitlement to profit.[669] The threshold should be maintained throughout the tax year.[670]

It is important to note that the Commission did not presuppose that there might be CCCTB member states and non-CCCTB member states but the CCCTB is an election within one member state. The UK implementation study of CCCTB proposal correctly observes that CCCTB would lead to the existence of two different tax bases within one member state. It might be important to note, however, that during the initial stage of drafting the CCCTB, the Commission compared four

---

[666] Gordon, Brady. 'Tax competition and harmonisation under EU law: economic realities and legal rules.' [2014] European Law Review, p. 810.

[667] Article 2(1) and Article 6 of the draft CCCTB Directive.

[668] "It shall cease to be subject to the national corporate tax arrangements in respect of all matters regulated by Directive unless otherwise stated'. Article 7 of the draft CCCTB Directive.

[669] Article 54 (1) draft CCCTB Directive:

'Qualifying subsidiaries shall be all immediate and lower-tier subsidiaries in which the parent company holds the following rights:

(a) a right to exercise more than 50% of the voting rights;

(b) an ownership right amounting to more than 75% of the company's capital or more than 75% of the rights giving entitlement to profit.'

[670] Article 58 draft CCCTB Directive:

The thresholds of Article 54 must be met throughout the tax year. Notwithstanding paragraph 1, a taxpayer shall become a member of a group on the date when the thresholds of Article 54 are reached. The thresholds must be met for at least nine consecutive months, failing which a taxpayer shall be treated as if it had never having become a member of the group options: optional CCTB (no consolidation), a compulsory CCTB, an optional CCCTB and a compulsory CCCTB.[671] The Commission found that the welfare effect of optional CCCTB was the most favourable.[672]

It might be surprising, but member states did not agree with the Commission that an optional CCCTB regime would encourage member states to implement the proposed directive. Member states who objected to the proposal pointed out that the elective nature of CCCTB is an essential argument to reject reform proposal.[673] As has been already stated, member states wished to avoid maintaining two different tax regimes within one state. Moreover, the two regimes might compete with each other and might lead to tax planning or tax avoidance.

The UK's report on CCCTB proposal argued that the co-existence of two systems was very likely to result in increased compliance costs for multinationals having CCCTB and non-CCCTB group companies. It follows the argumentation that it would result in additional costs to governments collecting the consolidated tax base. The lower compliance costs resulting from the common tax base might not outweigh the compliance costs of running two systems, both from the perspective of CCCTB groups and of tax authorities.[674] Moreover, it was argued that an election might lead to a situation when a company chose to apply more lenient anti-abuse rules. Moreover, it was noted in the Commission's 12th CCCTB meeting that an elective CCCTB system might result in an unfair situation, in particular for SMEs. The CCCTB Working Group summarise that only large companies would in practice have the resources to analyse the potential benefits that might arise from CCCTB regime.[675]

---

[671] 'Impact Assessment to the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base.' COM (2011) 121, p. 7.

[672] Summary Report of the Impact Assessment fn. 11, p. 7.

[673] Panayi, Christiana. The Common Consolidated Corporate Tax Base and the UK Tax System, (London, Institute for Fiscal Studies, 2011) p. 12.

[674] Ibid, p. 1; Herzing, Norbert, Kuhn, Johannes. Direct Taxation in the EU: the Common Corporate Tax Base as the Next Sub-step Towards Harmonization [2012] Wroclaw Review of Law, Administration & Economics, p. 11.

[675] CCCTB/WP.63/en 'Summary Record of the Meeting of the Common Consolidated Corporate Tax Base Working Group, Brussels 12th December 2007, paragraph 6.

Secondly, the apportionment formula enabling the consolidation was contested by member states rejecting the proposal directive. It is argued that CCCTB proposal might not be useful tool to combat tax planning. Many commentators distressed that is likely that international tax planning under CCCTB regime will only shift from transfer pricing to a tax-optimal geographic allocation and manipulation of formula factors.[676]

The factors chosen in CCCTB proposal were labour, assets and sales. The arguments against formula apportionment were widely discussed. As far as assets were concerned, the European Business Initiative on Tax commented that the exclusion of intangible property from assets[677] factors would have a serious implication. The analysis had not been conducted before presenting the draft of CCCTB proposal but it might discourage member states involved in 'innovation'.[678]

Secondly, the sales factor might also be susceptible to avoidance. It was argued that a company might create a tax scheme where a product goes to the low tax country before reached a final customer.[679]

---

[676] Read also Fuest Clemens. 'The European Commission's Proposal for a Common Consolidated Corporate Tax Base.' [2008] Oxford Review of Economic Policy, p. 720; Herzing, Norbert, Kuhn, Johannes. Direct Taxation in the EU: the Common Corporate Tax Base as the Next Sub-step Towards Harmonization [2012]. Wroclaw Review of Law, Administration & Economics, p.4, 12; Oestreicher 'Konzernbesteuerung in Europa – Zum Vorschlag einer konsolidierten körperschaftsteuerlichen Bemessungsgrundlage für die grenzüberschreitende Unternehmenstätigkeit in der EU' [2011] Steuer und Wirtschaft p. 354; Gordon Brady 'Tax competition and harmonisation under EU law: economic realities and legal rules.' [2014] European Law Review, p. 790.

[677] 'The Task Force recognizes that the location of intangible and financial assets is less stable than fixed tangible assets. The geographical volatility of intangible and financial assets should, however, not be exaggerated. Given the high value of these assets and the high level of income-generation they often account for, any consideration of excluding them from the asset factor should be preceded by a thorough impact analysis. Also, a sector-specific formula for the financial sector should be considered (as suggested).' http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/common_tax_base/unicecomments_wp060.pdf .

[678] The opposite solution has been presented by an Ernst & Young impact assessment, p. 5.4.1 p. 53.

[679] Panayi, Christiana. The Common Consolidated Corporate Tax Base and the UK Tax System, 2011 Institute for Fiscal Studies, London, p. 1; Herzing, Norbert, Kuhn, Johannes. Direct Taxation

Further criticism was the use of a sector-specific formula. The Ernst & Young[680] impact assessment study indicated that there have been too many sectors and formulas introduced as some businesses might be categorised in more than one sector.

The concerned version of the Commission's CCCTB proposal was in the form of a directive based on Article 115 TFEU, as it requires unanimity was not likely.[681] Some authors[682] have suggested that the enhanced co-operation procedure was more likely to succeed.[683] This procedure will be closely examined below, when the reformed proposal is presented.[684] However, it is submitted in the thesis that the tax reform provisions are likely to come into force by enhanced co-operation only and there are objectives to adapt the provision within a reasonable period by the Union. Nonetheless, the Commission is currently working on a new text to relaunched a CCTB directive proposal and the new Commission's initiative is presented below in section 6.3.

---

in the EU: the Common Corporate Tax Base as the Next Sub-step Towards Harmonization [2012]. Wroclaw Review of Law, Administration & Economics, p. 29.

[680] Ernst & Young Tax Policy and Controversy Briefing [2011] http://www.ey.com/Publication/vwLUAssets/Tax_Policy_and_Controversy_Briefing:_February_2011/$FILE/Tax%20Policy%20and%20Controversy%20Briefing%20-%20Feb%202011.pdf .

[681] Panayi, Christiana. The Common Consolidated Corporate Tax Base and the UK Tax System, 2011 Institute for Fiscal Studies, London, p. 9.

[682] The UK study on implementation of the CCCTB Directive pointed out that enhanced co-operation would be the only means through which the CCTB can ever come into existence. Panayi, Christiana. The Common Consolidated Corporate Tax Base and the UK Tax System, 2011 Institute for Fiscal Studies, London, p. 9. The solution was also warmly welcome by European Parliament on 15 January 2008 in resolution on Tax Treatment of Losses in Cross-Border Situations [2009] Official Journal of the European Union.

[683] Articles 326-334 of the TFEU; read more in Ceroni, Luca. 'Postponement of the Commission's Proposal for a CCCTB Directive: Possible Ways Forward.' [2010] Bulletin for International Taxation, p. 98.

[684] Chapter 6.3.

6.2.2 Past Proposals: Proposal for a Council directive concerning arrangements for the taking into account by enterprises of the Losses of their PE and Subsidiaries situated in other member states ('Losses directive proposal')

The Losses directive proposal based its reasoning on the conclusion that 'one of the obstacles which might seriously hamper the activities of enterprises in a common market having the same characteristics as an internal market is their inability to deduct from their profits the losses incurred by permanent establishments and subsidiaries situated in member states other than the one in which the enterprise in question is resident for tax purpose.'[685] The aim of the Losses directive proposal was to facilitate cross-border loss relief.[686]

The Losses directive proposal firstly noted that a PE and a subsidiary differ and did not require equal tax treatment.[687] In the case of a PE, the losses directive proposal introduced a method of deducting losses and reincorporating subsequent profits.[688] Nonetheless, member states were permitted to reincorporate automatically amounts previously deducted if reincorporation had still not occurred after five years or if the PE ceased to exist.[689]

---

[685] Proposal Explanatory Notes par. 5.

[686] Panayi Christiana 'European Union Corporate Tax Law' (Cambridge, Cambridge University Press, 2013) p. 80.

[687] Proposal Explanatory Notes par. 5.

[688] The Losses directive proposal also stipulated for a credit method. However, this would not be a subject of the debate, as the credit method has not been accepted. It is worthy to note that both examined member states (Poland and the UK) were forced to change their tax systems from a credit tax method to an exemption tax method.

[689] Article 7 '1. The method of deducting losses and reincorporating subsequent profit may involve:
(a) the deduction from the enterprise taxable profit for a given tax period of the loss incurred in the same tax period by the enterprise permanent establishment situated in other member state
(b) the incorporation of subsequent profit of each permanent establishment into the enterprise's taxable income to the extent of the loss deducted pursuant in subparagraph *(a)*.' *COM* 90 (595) final, 24 January 1991. Proposal for a Council directive concerning arrangements for the taking into

In respect of the subsidiaries, the Losses directive proposal allowed the enterprise heading the group to deduct the losses incurred in a given tax period by its subsidiaries situated in other member states from its taxable profits for the same tax period, with any subsequent profits by these subsidiaries being reincorporated into the enterprise's taxable results to the extent of the loss previously deducted. Under the same condition as a PE, an automatic reincorporation was to take place after a maximum of five years.[690]

It is worth noting that these provisions, contrary to the CCCTB proposal, concerned not only corporate tax but also personal income tax. The Losses directive proposal was never adopted. It is argued that the main disadvantage was the provisions on subsidiaries. It was not clear from the proposed directive who in a group might have been entitled to offset: whether it was only the direct parent company, the ultimate parent company or any other member of the group. This situation could have led to a multiple use for the same loss.

The Losses directive proposal was submitted to the Council at the end of 1990 but was not adopted. The repeated recommendation of the Ruding Committe and the Commission request to amend the proposal basing on guidelines on company taxation.[691] It was planned that the proposal would be adopted in late 1992. However even late 1990 it was not expected to be adopted in the near future.[692]

It is noted that the main fear behind past directive proposals were the loss of revenue by member states and so called 'race to the bottom.'[693] It is particularly interesting to observe that corporate statutory rates have already decreased. Eurostat

---

account by enterprises of the losses of their permanent establishments and subsidiaries situated in other member states.

[690] Articles 9 and 10 of COM 90 (595) final, 24 January 1991. Proposal for a Council directive concerning arrangements for the taking into account by enterprises of the losses of their permanent establishments and subsidiaries situated in other member states.

[691] COM (96) 546 final of 22nd October 1996 Commission of the European Communities Taxation in the European Union Report on the development of tax systems

[692] Lang Michael, Gassner Wolfgang, Lechner Eduard (eds.) 'Tax Treaties and EC Law Series on International Taxation' [2007] London, Kluwer p.81, Richards Gary 'Group relief - past its sell-by date?' [1992] British Tax Review p. 201.

[693] See Chapter 3.1.

presents clear evidence that between 1995 and 2013 the average top statutory CIT rates decreased significantly and simultaneously tax revenues increased.

Figure 17 Average Top Statutory Rates and Tax Revenue in EU 27 and EU 17

Average Top Statutory Rates

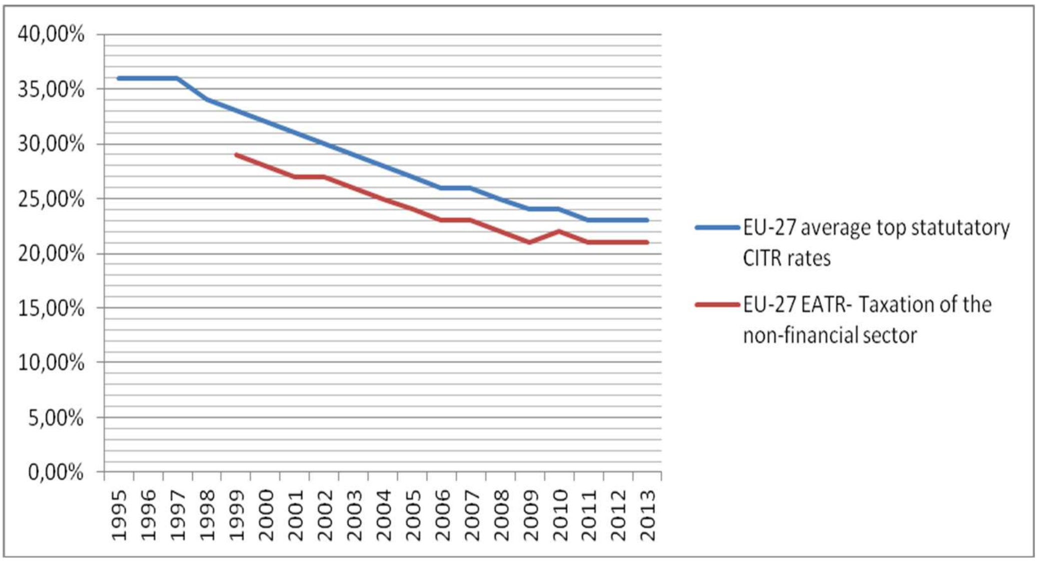
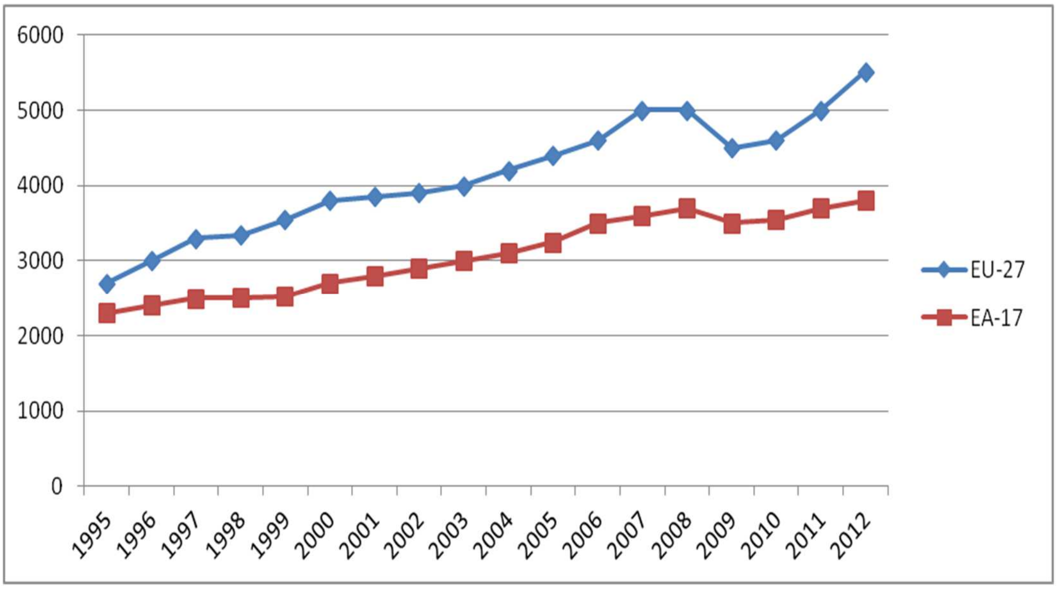


Figure 24 Tax Revenue in EU-27 and EU-17, in € (billions)



Commentators argued that the ‘race to the bottom’ has not occurred in the EU because member states have remained free to expand their tax base.[694] It is difficult to predict what might happen if a common tax base is introduced in the EU, regardless of the social security systems, the size of the state or other economic attributes. On the other hand, it is clear from the above statistics that ‘the effects of tax competition are demonstrably concomitant with the objective of EU tax policy: It has reduced top nominal rates by an astounding 34.28 per cent and broadened the tax base, without affecting revenues from corporate factors.’[695]

In the next section of this chapter, when setting out proposals that may be more acceptable to the EU member states, the recapture mechanism presented in Losses directive proposal will be reconsidered and promoted as a useful tool from EU perspective.

6.3 The Future: proposals for EU tax reform

In this section, some reforms will be presented as suitable solutions to the problems identified in the earlier chapters. The non-deductibility of losses was recognised as a hindrance to the internal market both in the rejected CCCTB directive and in the Losses directive proposals. However, these two proposals were not adopted so the need remains to find solutions which may have a chance of being acceptable to the EU member states.

The new tax reform proposal which is planned to be announced in late 2016[696] and offers an answer to two core issues.

---

[694] Gorter, Joeri, de Mooij, Ruud. Capital income taxation in Europe; trends and trade-offs [2001] CPB Special Publication from CPB Netherlands Bureau for Economic Policy Analysis http://econpapers.repec.org/paper/cpbspcial/30.htm. Gordon, Brady. ‘Tax competition and harmonisation under EU law: economic realities and legal rules.’ [2014] European Law Review, p. 794; Mendoza, Enrique, Tesar, Linda. ‘Why Hasn’t Tax Competition Triggered a Race to the Bottom? Some Quantitative Lessons from the EU.’ [2005] Journal of Monetary Economics, p. 163 http://www-personal.umich.edu/~ltesar/pdf/JME2005.pdf .

[695] Gordon, Brady. ‘Tax competition and harmonisation under EU law: economic realities and legal rules.’ [2014] European Law Review, p. 795.

[696] The law is as it stands on 1st January 2016.

This thesis submits that replacing CCCTB with CCTB (common corporate tax base, without a consolidation element) would be more feasible for member states. the Federal Government of Germany rejected the CCCTB proposal but are likely to welcome a CCTB only proposal, long before the formal CCTB proposal.[697] It can be observed from the former French President, Nicolas Sarkozy and the German Federal Chancellor, Angela Merkel, stated that both member states wished to introduce a common set of rules for tax base.[698]

All in all, the new CCTB will offer only a common tax return: common rules in the calculation of the tax base. The CCTB regime will be obligatory for non-domestic businesses. However, member states will be required to maintain two different tax regimes within one member state.

Thus, it is unavoidable to examine what are advantages offered by the proposed CCTB regime.

Firstly, CCTB claimed to be 'about removing obstacles to the internal market, so that it is cheaper and easier for businesses to operate cross-border'[699] The obstacles to the internal market have been identified as double taxation and double non-deductibility of losses. A common tax return does not help to override these obstacles. It must be observed that businesses located in different member states may indeed not be linked. A compulsory CCTB may need to be applied to genuine, non-economically linked companies but may also require businesses to operate under a completely new regime, where no one is familiar with the rules and requirements. It is submitted that it is not more difficult for a business expanding abroad to get familiar with the tax rules of host member state or with the new EU regime.

Secondly, does the proposed CCTB enforce an exchange of information between tax authorities and member states? The answer to this question needs to be positive. A common corporate tax base and a common tax return will help to control

[697] Herzing, Norbert, Kuhn, Johannes. Direct Taxation in the EU: the Common Corporate Tax Base as the Next Sub-step Towards Harmonization [2012] Wroclaw Review of Law, Administration & Economics, p. 3. Read more: Bundestags-Drucksache 17/5748 on 5 May 2011, p. 2;

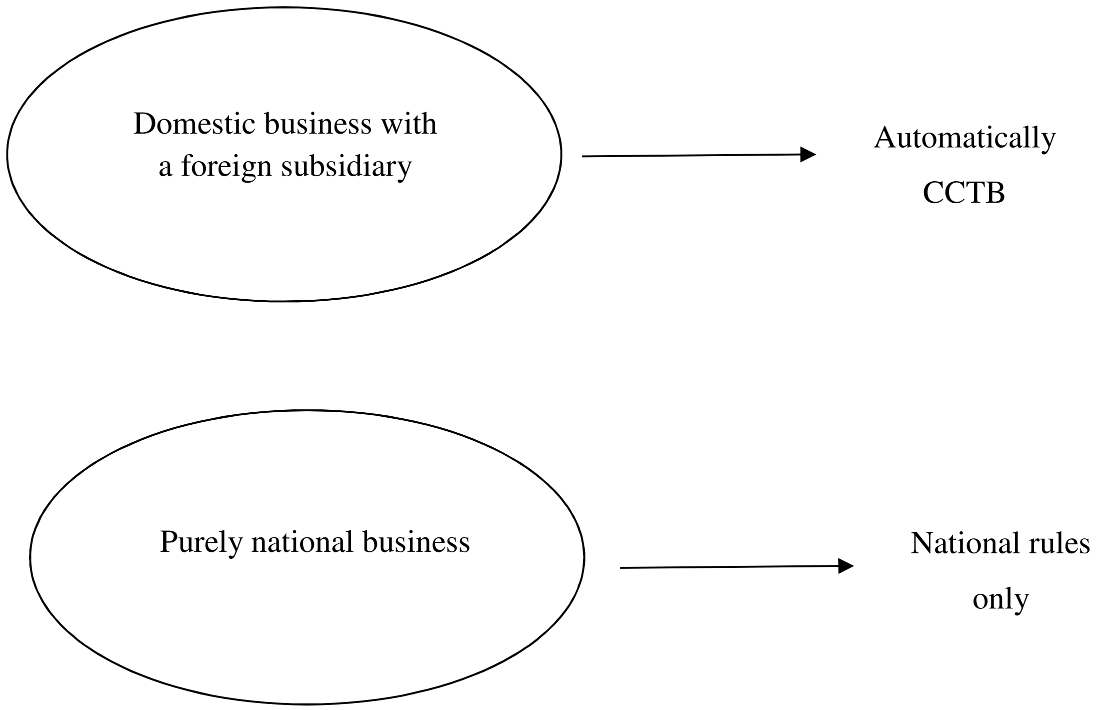
[698] 15 August 2011 Paris http://www.spiegel.de/international/europe/euro-zone-crisis-merkel-and-sarkozy-plan-true-economic-government-a-780630.html

[699] MEMO/11/171, Brussels, 16 March 2011, p. 7.

the information provided to different tax authorities. As the same tax base is accepted amongst member states, tax avoidance is more likely to be detected. Thus, the new the proposed CCTB regime may reinforce the exchange of tax information between member states and strengthen the control of tax authorities.

Nonetheless, it is important to note that strengthening tax control was not an ambition of the previous CCCTB or of the current CCTB projects. Moreover, if strengthening tax control is the only one aim of the new proposal, the principle of proportionality may be infringed.[700]

Figure 18 CCTB



In summary, it is concluded that neither the CCCTB nor the CCTB are useful tools to remove obstacles to the cross-border activity of EU businesses. Nevertheless, an interesting initiative was Losses directive proposal.[701] The Losses directive proposal suggested that a recapture mechanism might help to encourage

[700] Further debate of principle of proportionality might be found above.

[701] COM 90 (595) final, 24 January 1991. Proposal for a Council directive concerning arrangements for the taking into account by enterprises of the losses of their permanent establishments and subsidiaries situated in other member states.

businesses to trade cross-border in other member states. The proposal was never favoured by member states. However, as indicated above, the majority of member states were keen to accept the proposal CCCTB directive, even though the positive effects were marginal and the member states might face high compliance costs. In this atmosphere, it may be worthwhile to re-debate some elements of the proposal for the Losses directive. In particular, the recapture mechanism desires decent notice.

This section will be divided into two parts. One relates to a subsidiary and one to a PE. As has been highlighted several times, there is a substantial difference in these two forms of establishment. Only a clear understanding of the differences between them will lead to a successful reform proposal. The international taxation rule of 'two sides of a coin' provides easy guidance. A subsidiary cannot be taxed in the state of the parent company; thus, the parent company cannot offset the losses of its subsidiary.[702] On the contrary, a PE is part of an existing business and its profits are taxed in the home member state. Accordingly, the PE losses are deducted in the home member state. Nonetheless, there are no common rules at the EU level and the rights of a PE and its subsidiary are often threatened, as presented in Chapters 4 and 5.

The underlying common mistake in the unsuccessful two earlier proposals (CCCTB and Losses) was a confusion between these two forms of establishment. Thus, for a subsidiary the solution of a deduction followed by a recapture mechanism is not dedicated. Nonetheless, some member states have already offered a recapture mechanism to subsidiaries of SMEs.[703] It is submitted that if a member state provides a loss deduction for a 'subsidiary' it is in fact often treating the entity as a PE.[704]

Nonetheless, the proposed solution for a PE is a recapture mechanism. This reasoning is in line with CJEU rulings, presented in Chapter 4 and 5.

---

[702] To see exemption, read Chapters 4 and 5.

[703] For instance, France, Article 209 C Code général des impôts [Tax Law] Ordonnance no. 2013-676 on 25 July 2013.

[704] For instance, the UK, sections 18F(1)(a), 18F(6) Corporation Tax Act 2009.

6.3.1 The Situation of a Subsidiary

It was stated that a subsidiary is a distinct legal entity from the parent company. Personal or capital control shall not, therefore, be a factor to justify double taxation, or a right to deduct losses incurred. The conclusion is supported by the CJEU's ruling in *Cadbury*,[705] where the CJEU observed that only a purely artificial arrangement may be faced with a restrictive CFC regime. However, it is worth taking note of the new tax regime on CFC and profit exemption introduced in the UK in 2011.[706] To recall a subsidiary or a PE may be granted to offset losses if, at least hypothetically, the company may become a taxpayer in the UK. If a UK company opts to be exempted from worldwide UK taxation, it is treated as a subsidiary and CFC rules apply. Thus, the situation of a PE using the branch exemption is identical to the subsidiary. As a result, the meaning given by the tax regime is the deciding factor as opposed to the legal form chosen. Thus, if a loss deduction is granted to a 'subsidiary' it is in fact treated as a PE.

It was argued many times in this thesis that qualification as a subsidiary or PE is crucial for establishing a right of the concerned entity. In some situations, it may be difficult to decide if an entity is a PE or subsidiary. For instance, in some situations a partnership might be declared tax transparent and treated as a PE.[707] The UK has offered the option to choose whether a foreign entity wished to be taxed and profit from offset of losses (thus, it is treated as permanent establishment) or is not taxed in the UK and cannot deduct any losses (thus, it is treated as subsidiary).[708]

Thus, it is recommended that an entity establishing a new business in another member state and wishing to be treated as a PE should make an irrevocable choice in this matter.

---

[705] C-196/04 *Cadbury Schweppes* [2006] ECR I-7995. The case has been discussed in Chapter 5.

[706] Sections 18F(1)(a), 18F(6) Corporation Tax Act 2009. The foreign branch profit exemption is presented in Chapter 4.

[707] The situation is under discussion in Chapter 4 and is related to the seminal case: C-298/05 *Columbus Container Services BVBA & Co v Finanzamt BielefeldInnenstadt* [2007] ECR I-10451.

[708] Supra, Chapter 4.1.2.

Nonetheless, some member states have previously conferred a right to deduct the losses incurred by foreign subsidiaries. For instance, France offered the possibility to offset the losses incurred by a foreign subsidiary to SMEs.[709] The amounts were due to reincorporation when a subsidiary became profitable or after period of 5 years whichever came first.[710]

This solution requires more comment. The recapture of losses followed by automatic deduction was also suggested in the Losses directive proposal. It offers a temporary tax advantage for cross-border SMEs. Moreover, it is highlighted that many member states offer tax group relief for affiliated domestic companies.[711]

Figure 19 Automatic recapture with no deduction

	Parent Company	**Subsidiary**	**Automatic Recapture**		**No deduction**	
			Tax Base	**Tax Burden 20%**	**Tax Base**	**Tax Burden 20%**
Year 1	100	**-100**	0	0	100	20
Year 2	100	-100	0	0	100	20
Year 3	100	-50	50	10	100	20
Year 4	100	-50	50	10	100	20
Year 5	100	-50	50	10	100	20
Year 6	**100**	**0**	**200**	40	100	20
Total	600	0	**350**	70	600	**120**

It is submitted that such a solution might become beneficial for cross-border trade and does not significantly influence the fiscal policy of home member state.

[709] Article 209 C Code général des impôts [Tax Law] Ordonnance no. 2013-676 on 25 July 2013. Nonetheless, the provision was amended in 2013 LOI n°2013-1278 29th December 2013 - art. 26.

[710] Article 209 VII Code général des impôts Ordonnance [Tax Law] no. 2013-676 on 25 July 2013.

[711] For example, the UK provides Group Relief see: CTM80105 - Groups: group relief: outline, ICTA88/S402 http://www.hmrc.gov.uk/manuals/ctmanual/ctm80105.htm and Poland "Ustawa o podatku dochodowym od osób prawnych z dnia 15 lutego 1992 r.' [Corporate Tax Act] – Dz. U. Nr 21, poz. 86; Art. 1a. http://isap.sejm.gov.pl/DetailsServlet?id=WDU19920210086

The solution applied by France might become exemplary, as it is offered to small and medium size enterprises only.

As presented above, a home member state offered only cash flow advantage, as the amount previously reclaimed would be recaptured when the subsidiary became profitable, would be wound up, sold or after a maximum period of 5 years.

Nonetheless, this solution is not recommended for the proposed EU directive. Firstly, it is not likely that member states will allow a deduction of losses, if the profits are simultaneously exempt for a taxable basis. Moreover, it might cause unnecessary confusion on forms of foreign establishment.

The situation is the opposite if a PE is concerned. It is submitted that not only temporary losses but also final losses, should be deducted.

6.3.2 The Position of the PE

It is submitted that relief should be granted in taxing a PE for both final and temporary non-final loss. It might be submitted that, as a part of the one enterprise, a PE shall be entitled to the consolidation and deduction of all losses incurred. However, the taxation powers of the home member state in the case of a PE are usually limited by Double Taxation Tax Treaties. The CCCTB proposal has been rejected and it is not likely than consolidation will become a rule in the near future. It is argued that temporary relief for ‘temporary losses’ might be a reasonable project for the current status of integration in the EU. Firstly, enterprises gain a cash flow advantage. Secondly, member states’ interests in the realm of fiscal policy would not be jeopardised.

The comparative analysis of the option to use deduction and recapture mechanisms and lack of deduction, is presented below:

Figure 20 Recapture and deduction

	Head Office	PE	Deduction & Recapture		No deduction	
			Tax Base	**Tax Burden 20%**	**Tax Base**	**Tax Burden 20%**
Year 1	100	-100	0	0	100	20
Year 2	100	-50	50	10	100	20
Year 3	100	-50	150	30	100	20
Year 4	100	50	150	30	100	20
Year 5	100	50	150	30	100	20
Total	500	0	500	100	500	100

The temporary loss relief constitutes a cash flow advantage. It should be noted that the CJEU stated that 'a cash flow disadvantage may constitute a restriction of the fundamental freedoms.'[712] Moreover, the temporary cash flow advantage facilitates setting up a new PE and meeting its initial costs.

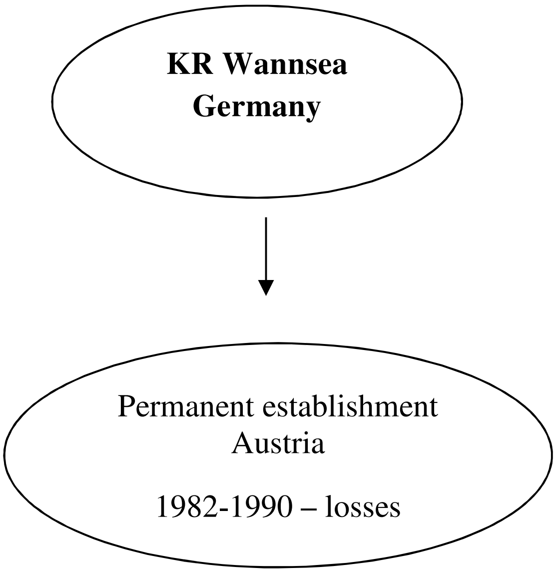
Secondly, the recapture of losses would ensure that the interests of member states are observed. The common tax return proposed by CCTB would be beneficial. However, it might also be achieved by adding an obligation to report on the situation of a PE to the relevant state tax authority. It must be noted that an enterprise with PE has access to information on PE, as PE is only a division of an enterprise.

It is worth recalling a case we discussed in Chapter 5, *Krankenheim*[713] and figure number 23.[714]

[712] C-9/02 *Hughes de Lasteyrie du Saillant* [2004] ECR I-2409 and C-470/04 *N v Inspecteur van de Belastingdienst Oost/kantoor Almelo* [2006] ECR I-07409.

[713] C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH v Finanzamt für Körperschaften III in Berlin* [2008] ECR I-8061, p. 9.

[714] See section 5.2. of Chapter 5.



In this case, the CJEU indirectly approved a mechanism of deduction and recapture. *Krankenheim* had received a tax notice from Germany requesting a deduction of sums which had been reintegrated into the basis for a calculation of the tax drawn up in Germany.[715] *Krankenheim* argued that, as a result the carrying forward of losses in Austria being limited to seven years, reintegration of those sums was unlawful. The CJEU approved the German tax recapture system which was allowed up to the amount of profits generated,[716] because the tax notice was limited to losses already deducted. Nonetheless, it was also stated to be in accordance with the freedom of establishment to deduct only the amounts which do not exceed taxable base in the home member state.

[715] C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH v Finanzamt für Körperschaften III in Berlin* [2008] ECR I-8061, p. 19.

[716] It is recalled that CJEU ruled that 'the reintegration of losses provided for by the German tax system at issue in the main proceedings cannot be dissociated from there having earlier been taken into account. That reintegration, in the case of a company with a permanent establishment in another state in relation to which that company's state of residence has no power of taxation, as the referring court indicates, reflects a logical symmetry. There was thus a direct, personal and material link between the two elements of the tax mechanism at issue in the main proceedings, the said reintegration being the logical complement of the deduction previously granted.' C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH v Finanzamt für Körperschaften III in Berlin* [2008] ECR I-8061, par. 42.

Figure 21 Recapture and no deduction.

	Head Office	PE	Recapture		No deduction	
			Tax Base	**Tax Burden 20%**	**Tax Base**	**Tax Burden 20%**
Year 1	100	**-200**	**0**	0	**100**	**20**
Year 2	100	-50	50	10	100	20
Total	200	0	50	10	200	40

Firstly, as is clearly stated in the concerned ruling, incorporating more than previously deducted to the tax notice may not be compliant with the principle of proportionality.[717] Secondly, it is argued that final losses incurred by a PE should be deducted in the home member state.

This solution is compatible with the line of CJEU rulings. In the seminal case, *Nordea Bank Denmark A/S*[718] foreign PEs of the Danish bank had been transferred or sold to foreign affiliated subsidiaries.

Nordea Bank has its seat in Denmark and between 1996 and 2000 undertook retail banking activities in Finland, Sweden and Norway through loss-making PEs. The losses of foreign establishments have been lawfully deducted from taxable income in Denmark.[719] In 2000 PEs were restructured and their offices were closed, with their customers offered the possibility of retaining their accounts on identical terms with subsidiaries of Nordea Bank in the same state, while half of their staff were taken on by those subsidiaries.[720]

The tax authorities in Denmark sent a tax bill for Nordea Bank stating that deducted losses which were not matched by profits were included in the calculation

[717] C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH v Finanzamt für Körperschaften III in Berlin* [2008] ECR I-8061, par. 50.

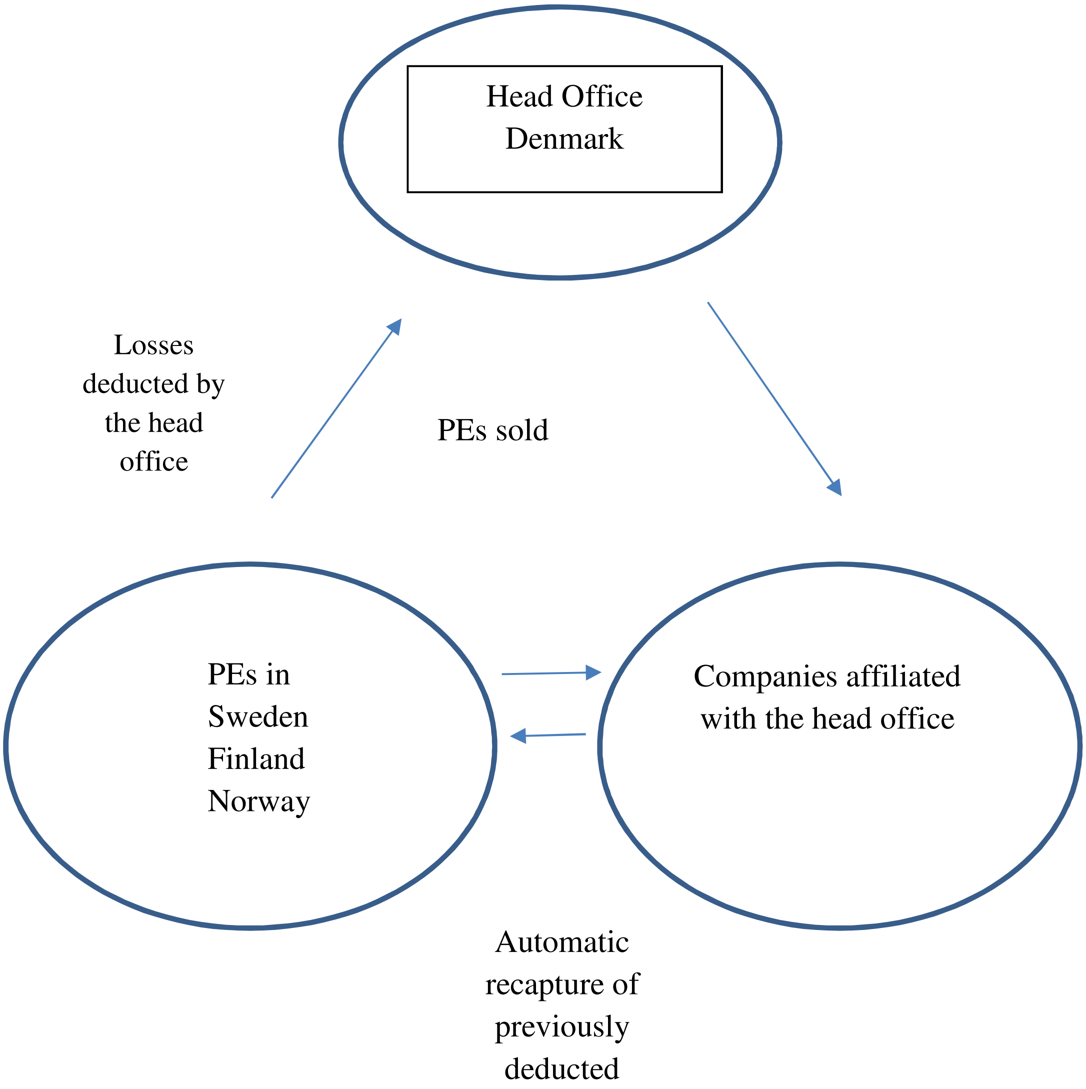
[718] C-48/13 *Nordea Bank Denmark A/S v Skatteministeriet* [2014] ECR I-2807.

[719] Ibid, par. 10.

[720] Ibid, par. 11.

of taxable incomes.[721] The decision was made based on paragraph 33 D (5) of the Law on the assessment of state income tax[722] in the case of a sale of a permanent company to an affiliated company.

Figure 22 Nordea Bank Denmark A/S



Nordea Bank contested the tax authority's decision, arguing that such treatment was contrary to Articles 49 and 54 of the TFEU and the question was referred to the CJEU for a preliminary ruling. The CJEU found that such a treatment

[721] C-48/13 *Nordea Bank Denmark A/S v Skatteministeriet* [2014] ECR I-2807, par. 12.

[722] Ibid, par. 8.

constituted a disadvantageous treatment for companies with PE abroad.[723] Thus, this disadvantageous treatment is liable to deter a Danish company from carrying on its business through a PE situated in another member state.[724]

It is remarkable that the CJEU did not consider if domestic and foreign PE were in comparable situations and therefore hinders its exercise of the freedom of establishment.[725] However, the taxation of profits of a foreign establishment was assumed to be equated to profits of domestic PE.[726] Thus, the Court proceeded to examine if the restriction was permissible.[727]

The Court agreed that the reasoning behind the concerned provisions of the Danish law on the assessment of state income tax were to prevent Danish companies from making deductions for losses in a foreign branch and, when the branch becomes profitable, to transfer them to a foreign affiliated company to avoid the reincorporation of losses by Danish tax authorities.[728] This was also noted by Advocate General Kokott: 'It is easy to see how this might create an opportunity for tax avoidance, particularly given the course traditionally followed by an investment, that is to say a loss-making phase — resulting from the initial investments — followed by a profit-making phase. For that reason, transferring the activity of a foreign permanent establishment within a group of companies, even if the company taking it over no longer qualifies for relief on its losses, may be advantageous if the foreign rate of tax is lower than the Danish rate.'[729]

---

[723] Ibid, par. 21.

[724] Ibid, par. 22.

[725] In this point, the CJEU follows the Opinion of the Advocate General Kokott: 'The Court's entire case-law does not make it clear in which circumstances a difference in the situations compared should preclude their objective comparability. In the present case, for example, it must be concluded that the situations of a foreign branch and of a domestic branch are objectively different, because only in the case of a foreign branch can foreign tax be offset against Danish tax.' Opinion of the Advocate General Kokott C-48/13 *Nordea Bank Denmark A/S v Skatteministeriet* [2014] par. 26.

[726] C-48/13 *Nordea Bank Denmark A/S v Skatteministeriet* [2014] ECR I-2807, par. 24.

[727] Ibid, par. 25.

[728] Ibid, par. 28.

[729] Opinion of the Advocate General Kokott C-48/13 *Nordea Bank Denmark A/S v Skatteministeriet* [2014] par. 59.

Nonetheless, the CJEU stated that the legislation went beyond what was necessary to attain the objective to eliminate tax avoidance.[730]

Figure 23 Recapture with and without automatic recapture

	Head Office	PE	Recapture		Automatic Recapture	
			Tax Base	Tax Burden 20%	Tax Base	Tax Burden 20%
Year 1	100	-100	0	0	0	0
Year 2	100	-100	0	0	0	0
Year 3	100	-100	0	0	0	0
Year 4	100	Wound up	100	20	400	80
Year 5	100	Wound up	100	20	100	20
Total	500	-300	200	40	500	100

The Court rejected the argument of the Danish government that it is difficult to assess the market value of the transaction taking place in another member state. The Court took the position that a member state investigates such a suspicious transaction within their borders and are free to seek any documents that appear to them necessary in order to verify the value of the transaction concerned.[731] Nonetheless, it is regrettable that the CJEU did not provide guidance on how member states may lawfully protect their fiscal interests.

The Advocate General stated that 'the taxable person must be given an opportunity to provide evidence of any commercial justification. Secondly, the corrective tax measure must be confined to the part which exceeds what would have arisen if the companies did not have a relationship of interdependence.'[732] She also

[730] C-48/13 *Nordea Bank Denmark A/S v Skatteministeriet* [2014] ECR I-2807, par. 31.

[731] Ibid, par. 39.

[732] Opinion of the Advocate General Kokott C-48/13 *Nordea Bank Denmark A/S v Skatteministeriet* [2014] par. 60.

concluded that the definition of tax avoidance was exceeded.[733] A taxable person has no way of indicating lack of tax avoidance, even a PE has an economic justification for this activity which was in this case successfully demonstrated reducing the duplication of capacity. Moreover, EFTA Surveillance Authority argues, disproportionate to require previous loss relief to be recaptured in full in the case of any sale or wounding up of a permanent establishment.[734]

It is clear from the reasoning of the Advocate General and the judgment of the Court that the current status of EU law does not provide an automatic recapture. If a member state provides a PE with the possibility to offset foreign losses, the deduction is not automatically recaptured. However, it is essential to remind that some member states, including Poland, do not have any legal base for reintegration of the losses of foreign establishment. Thus, it is very desirable for member states to agree on the common rules of recapture.

Finally, member states are not helpless and might charge a capital gains tax based on an appropriate sale price determined by reference to an objective market value, in accordance with the 'arm's length' principle.'[735] Secondly, it is submitted that if a transaction is fictitious and has no economic justification, the host member state may apply its own CFC rules to combat tax avoidance.

It is submitted that it is not only SMEs that will benefit from a right to deduct losses. As we have stated many times a PE is a division of an enterprise. All of its incomes are taxable in home member states. Thus, all losses shall be offset.

It is also submitted that not only corporate tax but also personal tax, shall be included in the reform proposal, similar to the losses directive. Many SMEs trade as self-employed and do not create a legal person. Thus, they do not have to pay corporate tax, only personal tax. For instance, both in the UK[736] and Poland the profits from self-employed activity are taxed but losses incurred as a result of

---

[733] Ibid, par. 62.

[734] Ibid, par. 62.

[735] 'To that extent, the taxation is entirely consistent with the right of a member state to tax such capital gains on a company's assets as fall within its tax jurisdiction' Opinion of the Advocate General Kokott C-48/13 *Nordea Bank Denmark A/S v Skatteministeriet* [2014], par. 50.

[736] HMRC Income Tax losses toolkit [2014] https://www.gov.uk/government/publications/hmrc-income-tax-losses-toolkit.

foreign business activity are not even reported. This is contrary to the international tax rule of ‘two sides of the coin’, as positive incomes are taken into the taxable base but negative incomes are irrelevant. However, it is noted that the offset shall be related to self-employed activity both in home and host member states.

It is submitted that the reform shall take the form of an enhanced co-operation procedure.[737] It holds true that enhanced co-operation can only be used when the Council has established that the objectives of such co-operation cannot be attained within a reasonable period by the Union.[738] It is highlighted that the ‘internal market without tax obstacles’ has been one of the Commission’s political aims since 2001.[739] As such, enhanced co-operation would be applied to participating states only.[740]

All in all, it is essential to examine if the above reform remains in accordance with the principles of national insufficiency and comparative efficiency. As in the case of the CCCTB directive proposal, the subsidiarity is irrelevant, as it refers to purely international elements such as eliminating obstacles caused by different tax systems. Thus, the focus shall be put on the principle of proportionality.

It is essential to examine what the advantages are of the above reform proposal. Firstly, it was established that the obstacles to the internal market have been identified as double taxation and double non-deductibility of losses. Does the reform proposal eliminate these obstacles? It is admitted that the temporary deduction of losses, followed by recapture, does not eliminate full double taxation. Nonetheless, as stated in Chapter 4, double taxation exists even within one member state.[741] Thus, it is not an ambition of the reform proposal to eliminate it in total. Otherwise, some may oppose given that cross-border businesses would be in a more

[737] Articles 326-334 of the TFEU. Read more in Ceroni, Luca. ‘Postponement of the Commission’s Proposal for a CCCTB Directive: Possible Ways Forward’ [2010] Bulletin for International Taxation, p. 98.

[738] See Article 20(2) TEU.

[739] European Commission ‘Proposal for a Council Directive on a Common Consolidated Corporate Tax Base.’ [2001] COM 12/4.

[740] Article 327 of the TFEU: ‘Any enhanced cooperation shall respect the competences, rights and obligations of those member states which do not participate in it. Those member states shall not impede its implementation by the participating member states.’

[741] Chapter 4.1.

favourable situation than purely domestic ones. Therefore, it is an aim of the reform to reduce obstacles and promote cross-border activity. The reform indeed offers a temporary tax advantage to help businesses to expand abroad. Moreover, if reform would be extended to personal taxation of the self-employed, it might result in removing obstacles to the Internal Market, by making cheaper and easier for businesses to operate cross-border.

Secondly, the reform proposal provides clear criteria of taxation, accordingly to the international rule of 'two sides of the coin.' A member state is entitled to tax positive incomes if it offers a deduction of negative incomes. Moreover, this solution has already been implemented in some member states, including the UK and has been confirmed in a number of the CJEU rulings. It can be observed here, that not only member states might implement the EU law but some elements of national legal orders might become part of the biggest picture of common EU policy.

As has already been shown above under the subheading 6.2.2, member states are afraid that the common tax base may cause a 'race to the bottom' which is not desirable for the EU. The further advantage is that, tax rates and tax base remain with no competence of the member states. Moreover, the proposed solutions are substantially cheaper to implement than introducing a new CCTB or CCCTB tax regime within each member state. Thus, the solution is more proportional and does not go beyond what is necessary. Furthermore, member states are more likely to accept deduction of losses for PE which is taxable within its territory and deny it to foreign subsidiaries which are not taxable, unless the economic activity is genuine. All of these factors shall increase the chance of acceptance of the reform proposal within the EU.

6.4 Concluding Observations

This chapter has outlined the previously drafted proposals which aimed at eliminating the obstacles of double taxation and double non-deductibility of losses. The CCCTB proposal, the common tax base and the consolidation do not overcome the identified obstacles. It was also concluded that the competitiveness between member states reduces the top average corporate tax rate without affecting tax revenues and that it is not beneficial for member states to implement a common tax base. Nonetheless, the Losses directive proposal provided an interesting idea of recapture, whose elements should be taken into account when drafting a new reform proposal. The drawbacks of the Losses directive proposal are equal treatment of PE and subsidiaries but also the automatic recapture of losses incurred in other member states after a period of five years.

According to the international rule of 'two sides of the coin,' a subsidiary and a PE should not be treated equally. A subsidiary is a distinct legal entity and shall not be taxed at the parent's level. As a result, a foreign subsidiary is not entitled to offset losses at the parent's level. The situation is the opposite as far as a PE is concerned. Following again the 'two sides of the coin' international tax rule, the positive and negative income shall be taxed at parent company level. This can be done in accordance with the principle of the personality of the tax, as PE constitutes a division of the existing company. The difference in treatment between a subsidiary and a PE is justified by the objectively different situation of each entity. It is also concluded that the reform should concern not only corporate tax but in near future also personal income tax if it relates to a self-employment activity in more than one EU member state. Finally, it is recommended that the procedure of enhanced co-operation is applied.

The chapter shows that the negative impact of the identified hindrances to the freedom of establishment, namely double taxation and double non-deductibility of losses, can be significantly reduced. It is submitted that the change proposed in this chapter will not eliminate fully double taxation but may reduce the detrimental impact. Moreover, the solution is already applied in some member states and such national solutions remain in-line with the CJEU rulings on these issues. Thus, the EU legislator, the Council, may be more likely to adopt such a directive and the member states are also more likely to implement the directive correctly.

CHAPTER 7: CONCLUSION

7.1 Scope of the research undertaken

As stated in chapter one of the thesis, the research is focussed on evaluating the extent to which tax rules found in the national laws of two selected EU member states (Poland and the UK) restrict the exercise of the EU's freedom of establishment. Moreover, the scope of the thesis was limited to secondary establishment of legal persons, meaning situations where a legal person establishes itself in another EU member state by either creating a subsidiary or a branch. This thesis' hypothesis was that double taxation and double non-deductibility of losses constitute significant hurdles to achieving a complete freedom of establishment.

The approach chosen to test the hypothesis was as follows: first a theoretical framework was set out based on the non-discrimination principle, on the basic principles of the freedom of establishment right and on the exemptions to that right; secondly, the scope of the right of freedom of establishment was tested against three practical obstacles: the nationality prerequisite requirement; the double taxation of companies operating in more than one EU member state; and the double non-deductibility of losses. Two EU member states, the UK and Poland, were then selected for testing the practice. In conclusion, the thesis offers recommendations as to how to improve the reforms currently being undertaken.

The originality of this thesis lies in the hypothesis and in the approach taken to establish the hypothesis, namely: the distinction between restrictions imposed on inbound and restrictions imposed on outbound undertakings to explain the case law of the European Court of Justice (CJEU); the distinction made between a permanent establishment and a subsidiary; the comparison between United Kingdom (UK) and Polish relevant national taxation provisions; and the focus on the examination on pertinent case law and on the Commission's proposals for reform.[742]

[742] See Chapter 6.

7.2 Findings

In order to prove the hypothesis, the thesis focused on five topics presented in six chapters. The thesis presents the theoretical framework with particular emphasis on the principle of non-discrimination, the scope of the freedom of establishment and the exemptions. An analysis of direct and indirect discrimination in EU law with particular focus on legal persons was also provided. Next, it is sought for evidence and argumentation that a legal person can be directly discriminated. Protected characteristics are not identical for natural and legal persons and only the criterion of 'nationality' was identified as a prerequisite for direct discrimination as far as legal persons are concerned. The CJEU line of ruling varies and there is no criterion which may serve as an equivalent of a nationality for a natural person. Nonetheless, Article 54 TFEU states that 'companies and firms' shall be treated in the same way as natural persons. It was a core argument that companies and firms deserve protection against direct discrimination.

It was stated that a member state is free to choose a factor which links a company to its legal system. As a result, it cannot be unambiguously defined what is a 'nationality' of a company. Nonetheless, it was also contended that a residence criterion cannot always serve as a substitute for the nationality of a company. It was concluded that the criterion for direct discrimination of a company should be inherent to t the connecting factors that link a company to a legal system.

Next, the most significant case law on the scope of the freedom was presented. It was followed by a ramification of the inbound and outbound case law depending on whether the restrictions were imposed on the companies by the home or the host EU member state. This ramification provided an explanation for the reasoning of the CJEU and provided a degree of consistency in the Court's rulings. Chapter 3 also presented the abuse theory in the EU. This theory outlined conditions to combat non-genuine activity ('letter-box companies'). It was concluded that letter-box companies may benefit from the freedom of establishment in a limited way but only a business conducting a genuine economic activity is entitled to benefit fully from the freedom. It was highlighted by the examination of existing CJEU case-law that member states can protect their interests related to their sovereign taxation powers more easily than interests related to private interests. Thus, taxation was identified as the main barrier to the freedom of establishment.

However, taxation remains within the scope of the sovereignty of the member states. In principle, member states may exercise their taxation powers but the exercise of those powers should not impede the freedom of establishment.

Chapter 4 examined double taxation as experienced by a legal person seeking a permanent establishment or a subsidiary. Chapter 5 was dedicated to offsetting negative incomes generated by either subsidiaries or by permanent establishments. In particular, these two chapters examined whether double taxation or offsetting losses (double non-deductibility of losses) are treated differently depending on whether they were incurred by subsidiaries or by permanent establishments. One of the conclusions reached was the importance of the difference between subsidiary and permanent establishment. Chapter 4 also provided definitions of permanent establishment and subsidiary.

Chapters 4 and 5 inlayed a particularity of national legal provisions in respect of double taxation and double non-deductibility of losses both in the UK and Poland. The current line of CJEU rulings was used as a comparative basis for the examination of national legal provisions of the selected two EU member states. A subsidiary, as a non-resident undertaking, may be taxed by the home member state of the parent only if it lacks genuine economic activity and one of the main aims of owning the subsidiary is tax avoidance. Member states struggle to proclaim EU compliant national CFC provisions which are aimed at combating tax avoidance. It is a conclusion of the thesis that EU member states should not be included in CFC regulations. Next, it is stressed that the possibility of deducting losses incurred in other member states is desirable to secure fully the freedom of establishment. Nonetheless, member states face hardship when searching for precision criteria for offsetting losses. The CJEU case law provides only vague hints as to when to accept the offset of foreign subsidiary losses. Moreover, lack of a possibility to deduct losses incurred in another state has its source in international tax law. A loss is treated as a negative income according to the international tax rule of the 'other side of the coin.' The member state of the parent company has limited possibilities to obtain revenue from the subsidiary in another member state. The company might be taxed only if the business is not genuine. If positive income lies outside the taxation powers of the member state, also negative income shall not be offset.

In contrast, double taxation of a permanent establishment is precluded neither by the EU nor by international law. Member states exercise autonomy in the scope of taxation. Thus, they are not likely to enact national provisions which are not compliant with EU law, as the competence on taxation is granted solely to member states. Thus, double taxation of a permanent establishment is accepted and the deduction of losses is generally accepted but the home member state retains taxation power and, in the future, may recapture the losses if a company becomes profitable.

Chapter 6 reviewed past and present law reform proposed by the European Commission in respect of corporate taxation. The chapter analysed the current reform initiative and suggests amendments to the proposals. It is submitted, that the proposals may reduce significantly this major barrier to the freedom of establishment. Based on past proposals, the feasibility of the new proposals was also assessed.

The main disadvantage that was identified was that the proposed Losses directive stipulate for an equal treatment of permanent establishment and subsidiary but also for automatic recapture of losses incurred in other member state after period of five years. However, the main aim for chapter 6 was to find elements which are worthy of adoption in the new reform proposal. In particular, the proposal should take into consideration the conclusion of the thesis that subsidiary and a permanent establishment should not be treated equally.

A subsidiary is a distinct legal entity and should not be taxed at the parent’s level. As a result, a foreign subsidiary is not entitled to offset losses at the parent’s level. The situation is the opposite if a permanent establishment is concerned. A permanent establishment is a division of a company in a home member state and should be taxed at this level. As a consequence, losses incurred, both final and non-final, should be deducted at headquarter level. In case of non-final losses, the automatic recapture mechanism may ensure a cash flow advantage for companies and also safeguard the revenues of member states.

Finally, it is concluded that taxation barriers to the freedom of establishment remain and that they significantly impede the mobility of companies across the EU. It is not possible to ensure the freedom of establishment without minimum harmonisation of national taxation laws and the EU has competence to adopt the necessary measures to achieve this. As highlighted in chapter 6, it is recommended that the reform proposal should be promoted under the enhanced co-operation procedure which may facilitate the adoption of a tax reform proposal in the foreseeable future. The tax reform proposed in chapter 6 contains elements which are absolutely necessary to ensure that the freedom of establishment of EU businesses operating across EU borders is not significantly restricted by current national taxation practices.

There are a number of additional areas for further research that have been highlighted by the studies undertaken for the thesis. These include the further investigation of a company's presence in a host member state[743] as regards of double taxation and double non-deductibility of losses or a relocation of a primary establishment of a company to another member state.[744] The complexity of these issues requires further independent research.

[743] See Chapters 4 and 5.

[744] See Chapter 3.

BIBLIOGRAPHY

Legislation

Scotland:

1. 59FD (3) Entering into an exit charge payment plan Corporation tax: HMRC Deferral of payment of exit charges [2013] http://www.hm-treasury.gov.uk/d/corporation_tax_deferral_of_payment_of_exit_charges.pd.
2. Income (Trading and Other Income) Act 2005.
3. Income and Corporation Taxes Act 1988 ICTA 1988.
4. Income Tax Act 2007
5. Proposals for controlled foreign companies (CFC) reform: discussion document, January 2011.

Poland:

6. Income Tax on Legal Persons Law [Ustawy o Podatku dochodowym od osob prawnych].
7. Income Tax on natural persons [Ustawa o podatku dochodowym od osób fizycznych] 26/07/1991 r. Dz.U. 1991 Nr 80 poz. 350.
8. Consitution of Republic of Poland on 02/04/1997.
9. VAT Act [Ustawa o podatku od towarów i usług] 11/03/2004 Dz.U. z 2004 r. Nr 54, poz. 535.

International Acts and Treaties

10. Consolidated Texts of the EU Treaties as amended by the Treaty of Lisbon [2008] C115/1.
11. Charter of Fundamental Rights of the European Union 2010/C 83/02.
12. COM (1998) 67 final.
13. Council Directive 2006/112/EC on the common system of value added tax [2008] OJ L 347.
14. Council Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between parent companies and subsidiaries in different Member States [2003] OJ L 157.
15. Council Directive 23/07/EWG on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member State [1990] L 225.
16. Council Directive 2001/86/EC on supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L 294.
17. Directive 2006/123/EC of the European Parliament and the Council on services in the Internal Market [2006] OJ L 376/36.
18. Regulations 2007/2974 on Companies (Cross -Border Mergers) [2007] OJ L 15.
19. Regulations 2157/2001 EC Company Law Statute [2004] OJ L 294.
20. Commission's Regulatory Fitness and Performance Programme (REFIT) (Commission press release IP/13/891 and MEMO/13/833, October 2, 2013.
21. Convention between the UK and Poland for the avoidance of double taxation.
22. COM (96) 546 final of 22nd October 1996 Commission of the European Communities Taxation in the European Union Report on the development of tax systems.

Case Law

CJEU Case Law

1) C-26/62 *Van Gend en Loos v Nederlandse Tariefcommissie* [1963] ECR I-0000.
2) C-6/64 *Costa v ENEL* [1964] ECR 585.
3) C-34/67 *Lück v Hauptzollamt Köln-Rheinau* [1968] ECR 245.
4) C-2/74 *Reyners* [1974] ECR 631.
5) C-33/74 *Van Binsbergen* [1974] ECR I-1299.
6) C-33/76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1973] ECR I-1039.
7) C-71/76 *Thieffry* [1977] ECR 765.
8) C-11/77 *Patrick* [1977] ECR 1199.
9) C-115/78 *Knoors* [1979] ECR 399.
10) C 120/78 *Dijon* [1985] ECR 1987.
11) C-148/78 *Pubblico Ministero v. Ratti* [1979] ECR 1629.
12) C-129/79 *Wendy Smith* [1979] ECR I-1275.
13) C-89/81 *Straatssecretaris van Financiën v. Hong Kong Trade Development Council* [1982] ECR I-0000.
14) C-107/83 *Klopp* [1984] ECR 2971.
15) C-270/83 *Commission v. France (tax credits)* [1986] ECR I-273.
16) C/205/84 *Commission v Germany* [1986] ECR 3755.
17) C-79/85 *D. H. M. Segers v Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen* [1986] ECR 2375.

18) C-147/86 *Commission v Greece* [1988] ECR 1637.

19) C-292/86 *Gullung v. Conseil de l'ordre des avocats du barreau de Colmar* [1988] ECR 111.

20) C-143/87 *Stanton* [1988] ECR 3877.

21) C-81/87 *Daily Mail* [1988] ECR 5483.

22) C-3/88 *Commission v Italy* [1989] ECR 4035.

23) C–103/88 *Fratelli Constanzo SpA v Comune Milano* [1989] ECR I-1839.

24) C–297/88 & C–197/89 *Massam Dzodzi v. Belgian State* [1990] ECR I-3763.

25) C-61/89 *Bouchoucha* [1990] ECR I-3551.

26) C-221/89 *Factortame* [1991] ECR I-3905.

27) C 260/89 *ERT* [1991] ECR I-2925.

28) C-306/89 *Commission v Greece* [1991] ECR I-5863.

29) C-340/89 *Vlassopoulou* [1991] ECR I-2357.

30) C-177/88 *Dekker* [1990] ECR I-3941.

31) C-204/90 *Hanns-Martin Bachmann v Belgium* [1992] ECR I-249.

32) C-272/91 *Commission v Italy* [1994] ECR I-1409.

33) C-431/91 *Commission v Germany* [1995] ECR I-2189.

34) C-19/92 *Kraus* [1993] ECR I-1663.

35) C-42/92 *Thijssen* [1993] ECR I-4047.

36) C-127/92 *Enderby v Frenchay Health Authority* [1993] ECR I-5535.

37) C-370/90 *Singh* [1992] ECR I-4265.

38) C-23/93 *TV10 v. Commissariaat voor de Media* [1994] ECR I-4795.

39) C-55/93 *Van Schaik* [1994] ECR I-4837.

40) C–473/93 *Commission v Luxembourg* [1996] ECR I–3207.

41) C-55/94 *Gebhard* [1995] ECR I-4165.

42) C-80/94 *Wielockx* [1995] ECR I-249.

43) C-101/94 *Commission v. Italy (Re Restrictions on Foreign Securities Dealing)* [1996] ECR I-2691.

44) C-107/94 *Asscher v Staatssecretaris van Financiën* [1996] ECR I-3089.

45) C-233/94 *Germany/Parliament and Council* [1997] ECR I-2405.

46) C–278/94 *Commission of the European Communities v Kingdom of Belgium* [1996] ECR I-4307.

47) C-2/95 *Sparekassernes Datacenter (SDC) v Skatteministeriet* [1997] ECR I-3017.

48) C-70/95 *Sodemare* [1997] ECR I-3395.

49) C-134/95 *USSL* [1997] ECR I-195.

50) C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault* ECR I-2011.

51) C-250/95 *Futura & Singer* [1997] ECR I-2471.

52) C-62/96 *Commission v Greece* [1997] ECR I-6725.

53) C-118/96 *Safir* [1998] ECR I-189.

54) C-264/96 *ICI* [1998] ECR I-4695.

55) C-336/96 *Gilly* [1998] ECR I-02793.

56) C-114/97 *Commission v Spain* [1998] ECR I-6717.

57) C-134/97 *Victoria Films* [1998] I-7023.

58) C-212/97 *Centros Ltd* [1999] ECR I-1459.

59) C-234/97 *Fernandez de Bobadilla* [1999] ECR I-4773.

60) C-255/97 *Pfeiffer Großhandel GmbH v Löwa Warenhandel GmbH.* [1999] ECR I-2853.

61) C-307/97 *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt* [1999] ECR I-6161.

62) C-311/97 *Royal Bank of Scotland v Elliniko Dimosio (Greek State)* [1999] ECR I-2664.

63) C-337/97 *C.P.M. Meeusen* [1999] ECR I-3289.

64) C-391/97 *Gschwind* [1999] ECR I-5451.

65) C-424/97 *Haim* [2000] ECR I-5123.

66) C-108/98 *RI.SAN.* [1999] ECR I-5219.

67) C-238/98 *Hocsman* [2000] ECR I-6623.

68) C-251/98 *Baars* [2000] ECR I-2787.

69) C-355/98 *Commission v Belgium* [2000] ECR I-1221.

70) C-384/98 *Dotter v Willimaier* [2000] ECR I-6795.

71) C-448/98 *Guimont* [2000] ECR I-10663.

72) C-63/99 *Gloszczuk* [2001] ECR I-6369.

73) C-76/99 *Commission v France* [2001] ECR I-249.

74) C-110/99 *Emsland Stärke* [2000] ECR I-1569.

75) C-268/99 *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie* [2001] ECR I-8615.

76) C-283/99 *Commission v Italy* [2001] ECR I-4363.

77) C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

78) C-62/00 *Marks and Spencer Plc v Commissioners of Customs & Excise* [2002] ECR I-6325.

79) C-136/00 *Danner* [2002] ECR I-8147.

80) C–208/00 *Überseering BV v. Nordic Construction Company Baumanagement GmbH* [2002] ECR I–9919.

81) C-235/00 *Commissioners of Customs & Excise v CSC Financial Services Ltd. - Reference for a preliminary ruling: High Court of Justice (England & Wales), Queen's Bench Division (Crown Office)* [2001] ECR I-10237.

82) C-287/00 *Commission of the European Communities v. Federal Republic of Germany* [2002] ECR I-5811.

83) C-167/01 *Inspire Art* [2003] ECR I-10195.

84) C-168/01 *Bosal* [2003] ECR I-9409

85) C-313/01 *Morgenbesser* [2003] ECR I-13467.

86) C-422/01 *Skandia / Ramstedt* [2003] ECR I-6817.

87) C-405/01 *Colegio de Oficiales de la Marina Mercante Española* [2003] ECR I-10391.

88) C-9/02 *Hughes de Lasteyrie du Saillant* [2004] ECR I-2409.

89) C-255/02 *Halifax and Others* [2006] ECR I-1609.

90) C-319/02 *Petri Manninen* [2004] ECR I-7477.

91) C-327/02 *Panayotova* [2002] ECR I-11055.

92) C-419/02 *BUPA Hospitals* [2006] ECR I-1685.

93) C-442/02 *Caixa Bank France* [2004] ECR I-8961.

94) C-140/03 *Commission v Greece* [2005] ECR I-3177.

95) C-223/03 *University of Huddersfield* [2006] ECR I-1751.

96) C-367/03 *Dr Inspecteur D.* [2005] ECR I-5821.

97) C-446/03 *Marks & Spencer v Halsey* [2005] ECR I-10837

98) C-514/03 *Commission v. Spain* [2006] ECR I-963.

99) C-411/03 *Sevis Systems AG* [2005] ECR I-10805.

100) C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941.

101) C-196/*04 Cadbury Schweppes* [2006] ECR I-7995.

102) C-255/04 *Commission v France* [2006] ECR I-5251.

103) C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673.

104) C-470/04 *N v Inspecteur van de Belastingdienst Oost/kantoor Almelo* [2006] ECR I-07409.

105) C-513/04 *Kerckhaert and Morres* [2006] ECR I-10967.

106) C-522/04 *Commission v Belgium* [2007] ECR I-5701.

107) C-524/04 *Thin Cap Group Litigation* [2007] ECR I-2107.

108) C-170/05 *Denkavit International BV SARL* [2006] ECR I-11673.

109) C-196/05 *Cadbury Schweppes* [2006] ECR I-7995.

110) C-201/05 *The Test Claimants in the CFC and Dividend Group Litigation v HMRC* [2008] STC 1513.

111) C-298/05 *Columbus Container Services BVBA & Co v Finanzamt BielefeldInnenstadt* [2007] ECR I-10451.

112) C-210/06 *Cartesio Oktato es Szolgaltato bt* [2008] I-9641.

113) C-354/05 *Commission v Luxembourg* [2006] ECR I-67.

114) C-393/05 *Commission v Austria* [2007] ECR I-10195.

115) C-404/05 *Commission v Germany* [2007] ECR I-10239.

116) C-465/05 *Commission v Italy* [2007] ECR I-11091.

117) C-293/06 *Deutsche Shell* [2008] ECR I-1129.

118) C-414/06 *Lidl Belgium GmbH & Co KG v Finanzamt Heilbronn* [2008] ECR I-3601.

119) C-531/06 *Commission v Italy* [2009] ECR I-4103.

120) C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH v Finanzamt für Körperschaften III in Berlin* [2008] ECR I-8061.

121) C-161/07 *Commission v Austria* [2008] ECR I- 10671.

122) C-169/07 *Hartlauer* [2008] ECR I- 1721.

123) C-171/07 & C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171.

124) C-414/07 *Magoora* [2008] ECR I-10921.

125) C-47/08 *Commission v Belgium, Spain, France, Portugal, Austria, Luxembourg, Germany, Greece* [2010] ECR I-483.

126) C-128/08 *Damseaux* [2009] ECR I-6823.

127) C-334/08 *Commission v Italy* [2010] ECR I-6869.

128) C-438/08 *Commission v Portugal* [2009] ECR I-5645.

129) C-563/08 *Sáez Sánchez and Rueda Vargas* [2010] ECR I-0000; ECLI:EU:C:2013:41.

130) C-371/10 *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoot Rotterdam* [2011] I-12273.

131) C-378/10 *VALE Epitesi kft* [2012] ECR I-0000; ECLI:EU:C:2012:440.

132) C-18/11 *Philips Electronics* [2012] ECR I-532.

133) C-385/12 *Hervis Sport- es Divatkereskedelmi Kft v Nemzeti Ado- es Vamhivatal Kozep-dunantuli Regionalis Ado Foigazgatosaga* [2014] ECR I-0000.

134) C-172/13 *European Commission v. United Kingdom of Great Britain and Northern Ireland* [2015] ECR I-0000.

Polish Case Law

1) General Administrative Court [Naczelny Sad Administracyjny] decision, 13/01/2006, II FSK 185/05 & 186&05

2) Voivodship Administrative Court [Wojewodzki Sad Administracyjny] in Gdansk on 28/10/2010, I SA/Gd 722/10

3) General Administrative Court (Naczelny Sad Administracyjny) decision on 18/03/2011, I FSK 1471/09.

4) PP-I-005/390/TL Document issued by Director of Tax Office in Opole [Pismo Dyrektora Izby Skarbowej w Opolu] 11/10/2005, http://sip.mf.gov.pl.

5) PP-I-077/SIP/246/05 Document issued by Director of Tax Office in Bydgoszcz [Pismo Dyrektora Izby Skarbowej w Bydgoszczy] 12/05/2005, http://sip.mf.gov.pl.

6) PP-443-117/04 Document issued by Director of First Tax Office in Krakow [Pismo Naczelnika Pierwszego Urzedu Skarbowego w Krakowie] 29/12/200, http://sip.mf.gov.pl.

7) US-26-PP-443/88/04 Document issued by Director of Tax Office in Siedlce [Pismo Naczelnika Urzedu Skarbowego w Siedlcach] 30/09/2004, http://sip.mf.gov.pl.

8) Constitution Tribunal [Trybunal Konstytucyjny] 11/05/2004, K 4/03.

9) IP-PP2-443-939/08-2/AS Individual Interpretation issued by Director of Tax Office in Warszawa [Interpretacja Indywidualna Dyrektora Izby Skarbowej w Warszawie] 05/09/2008 http://interpretacja-podatkowa.pl

10) Administrative Court [Sąd Administracyjny] 10 January 2001 sygn. akt III SA 1037/00.

11) Administrative Court [Sąd Administracyjny] 26 September 2003 sygn. akt III SA 2457/02

12) Administrative Court [Sąd Administracyjny] 25 June 2003 r. sygn. akt III SA 3118/01.

13) K 47/05 Trybunał Konstytucyjny Constitutional Tribunal [2007].

14) K 19/07 Trybunał Konstytucyjny Constitutional Tribunal [2008].

15) K 4/03 Trybunał Konstytucyjny Constitutional Tribunal [2004].

16) K 40/07 Trybunał Konstytucyjny Constitutional Tribunal [2009].

UK Bibliography

Books

1. Lang Michael, Gassner Wolfgang, Lechner Eduard (eds.) 'Tax Treaties and EC Law Series on International Taxation' (London, Kluwer, 2007).
2. Panayi Christiana 'European Union Corporate Tax Law' (Cambridge, Cambridge University Press, 2013).
3. Arnull Anthony, Eeckhout Piet, Tridimas Takis (eds.) 'Continuity and Change in EU Law' (Oxford, Oxford University Press, 2009).
4. Barnard Catherine (eds.) 'Cambridge Yearbook of European Legal Studies, 10, (Oxford, Hart Publishing Limited, 2007-2008)
5. Barnard Catherine 'The substantive law of the EU. The Four Freedom' (Oxford, Oxford University Press, 2010).
6. Batiffol Henri 'Droit international privé' (Paris, J.G.D.J. 1970).
7. Bell Mark 'Anti-Discrimination and the European Union' (Oxford, Oxford Scholarship Online, 2002).
8. Bernitz Ulf 'General Principles of European Community Law' (Hague Kluwer, 2000).
9. Borg-Barthet 'Justin the Governing Law of Companies in EU Law' (Oxford, Hart Publishing, 2012).
10. Boyle & Birds 'Company Law' (Bristol, Jordan Publishing Ltd., 2009)
11. Breuss Fritz, Fink Gerhard, Griller Stefan (eds.) 'Service Liberalisation in the Internal Market' (Wien, Springer-Verlag Wien, 2008)
12. Caspe Matthias 'German Corporate Governance in International and European Context' (Berlin Heidelberg , Springer – Verlag, 2012).
13. Chalmers Damian, Davies Gareth, Monti Giorgio 'European Union Law' (Cambridge, Cambridge University Press, 2010).

14. Corrias Luigi 'The Passivity of Law. Competence and Constitution in the European Court of Justice' (Amsterdam, Springer, 2011).

15. Davies Paul L. ‘Principles of modern company law’ (London, Thomson Sweet & Maxwell, 2008).

16. Ellis Evelyn, Watson Philippa ‘General principles and equal treatment’ (Oxford, Oxford Scholarship Online, 2012).

17. Ellis Evelyn, Watson Philippa ‘EU Anti-Discrimination Law’ (Oxford, Oxford Scholarship Online, 2013).

18. Feria Rita de la, Vogenauer Stefan ‘Prohibition of Abuse of Law. A New General Principle of EU Law?’ (Oxford, Studies of the Oxford Institute of European and Co., 2011).

19. Heukel Ton and Curtin Deirdre 'Institutional Dynamics of European Integration' (Dordrecht, Boston, Martinus Nijhoff Publishers, 1994).

20. Kemmeren Eric ‘Principle of Origin in Tax Conventions: A rethinking of models.’ (Katholieke Universiteit Brabant, Tillburg, 2001).

21. Kemmeren Eric 'Pricniple of origin in tax conventions. A rethinking of models' (Dongen (The Netherlands) Pijnenburg vorngevers, 2001).

22. Mattei Ugo 'Efficiency in Legal Transplants: an Essay in Comparative Law and Economics' (University of California, Hastings College of Law, 1994).

23. Monsenego Jérôme ‘Taxation of Foreign Business Income within European Internal Market’ (Intellecta Infolog, Göteborg, 2011).

24. Morse Geoffrey ‘Charlesworth’s Company law’ (London, Thomson Sweet & Maxwell, 2010).

25. Paschalidis Paschalis ‘Freedom of establishment and private international law for corporations’ (Oxford, Oxford University Press, 2012).

26. Rammeloo Stephen ‘Corporations Private International Law: A European Perspective’ (Oxford, Oxford University Press, 2001).

27. Schuch Josef, Staringer Claus, Lang Michael 'ECJ- recent development in Direct Taxation 2009' (Vienna, Linde, 2010).

28. Skaar Arvid ‘Permanent Establishment – erosion of a tax treaty principle’ (Deventer, 1991).

29. Spengel Christoph ‘Common Corporate Tax Base (CC9C)TB) and determination of taxable income. Part One Concept and necessity of a common tax base - an academic introduction' (Berlin Heidelberg , Springer – Verlag, 2012).

30. Stelkens Ulrich, Weiß Wolfgan, Mirschberger Michael (eds.) 'The Implementation of the EU Service Directive. Transposition, problems and strategies' (The Hague, T.M.C. Asser Press, 2012).

31. Sunberg-Weitman Brita ‘Discrimination+ on grounds of nationality. Free movement of workers and freedom of establishment under the EEC Treaty’ (Amsterdam, North-Holland Publishing Company, 1977).

32. Terra Ben, Wattel Peter ‘European tax law’ (The Hague, Kluwer, 2012).

33. Tobler Christa 'Indirect Discrimination: A case study into the development of the legal concept of indirect discrimination under EC Law' (Antwerpen - Oxford, Social Europe Series, 2005).

34. Tridimas Takis ‘The General Principles of EC Law’ (2nd edition Oxford, Oxford University Press, 2006).

35. Usher John ‘General Principles of EC Law’ (London, Longmans, 1998).

36. Watson Alan 'Legal transplants and European private Law' (University of Belgrade School of Law, 2006).

Journal Articles:

1. Aaronson Graham 'GAAR Study. A study to consider whether a general anti-avoidance rule should be introduced into the UK tax system.' [2011] http://www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf .

2. Acierno Silvia 'The Carpenter judgment: fundamental rights and the limits of the Community legal order.' [2003] European Law Review p. 398.

3. Airs Graham 'Oy AA- limitations on transfers of profits to domestic situations not precluded by the EC Treaty' [2007] p. 597.

4. Andenas Mads 'Cross border establishment in the EU.' [2006] Company Lawyer p. 22.

5. Andenas Mads 'Free movement of companies.' [2003] Law Quarterly Review p. 221.

6. Andenas Mads 'Member States, courts and free movement of companies.' [2006] Company Lawyer p. 1.

7. Andresen Ene 'State Tasks of the Public Office of Notary – Belonging to the Domain of National or European Union Law?'[2009] Juridica International p. 157.

8. Aujean Michel, Hoo Marie Pierre 'An outline of the CCCTB (Common Consolidated Corporate Tax Base) and some focal points.' http://www.law.nyu.edu/ecm_dlv/groups/public/@nyu_law_website__alumni/documents/documents/ecm_pro_058785.pdf .

9. Avery Jones J.F. '50 years of the OECD model.' [2008] British Tax Review p. 623.

10. Bachner Thomas 'Freedom of establishment for companies: a great leap forward.' [2003] Cambridge Law Journal p. 47.

11. Baker Philip 'Are the 2006 amendments of the CFC legislation compatible with Community law?' [2007] British Tax Review p. 1.

12. Baldwin Teresa, Baelz Kilian 'The End of the Real Seat Theory (Sitztheorie): the European Court of Justice Decision in Uberseering of 5 November 2002 and its

Impact on German and European Company Law' [2002] German Law Journal p. 85.

13. Ball Susan 'Finance Act notes: small companies’ relief- associated companies- section 35' [2008] British Tax Review p. 437.

14. Ball Susan 'Finance Act notes: stamp duty land tax- sections 93-97 Schedule 31' [2008] British Tax Review p. 495.

15. Ballarino Tito ‘From Centros to Überseering EC Right of establishment and the conflict of laws’ [2002] Yearbook of Private International Law, Kluwer Law International, p. 203.

16. Banks Karen 'The application of the fundamental freedoms to Member State tax measures [2008] European Law Review p. 482.

17. Barnard Catherine ‘Unravelling the Service Directive’ [2008] Common Market Law Review p. 323.

18. Barnard Catherine, Deakin Simon 'Negative and positive harmonization of Labor Law in the European Union' [2002] Columbia Journal of European Law p. 389.

19. Becht M. Mayer C. Wagner H. ‘Where do firms incorporate? Deregulation and the Costs of entry’ [2006] ECGI Working Paper Series in Law p. G38.

20. Behrens Peter 'International company law in view of the *Centros* decision of the ECJ' [2000] European business organisation law review p. 125.

21. Benvenisti Eyal, Downs George ‘The premises, assumption as and implications of Van Gend en Loos: viewed from the perspectives of democracy and legitimacy of international institutions’ [2014] European Journal of International Law p. 85.

22. Bhandari Monica 'Finance Act notes: VAT claims and time limits- sections 120-121' [2008] British Tax Review p. 514.

23. Bird Richard, Wilkie Scott ‘Source vs Residence-based taxation in the European Union: the wrong question?’ [2007] International Centre For Tax Studies, Univeristy of Toronto p. 20.

24. Borg-Barthet Justin 'European private international law of companies after Cartesio' [2009] International & Comparative Law Quarterly, p. 1020.

25. Borg-Barthet Justin 'Free at last? Choice of corporate law in the EU following the judgment in Vale' [2013] International & Comparative Law Quarterly p. 503.

26. Brown W. Ronald 'RBS Deutschland Holdings GmbH v HMRC: mind the gap' British Tax Review p. 675.

27. Bullock James 'Finance Act notes: time limits for claims and assessments- general and income tax and corporation tax - section 118 and Schedule 39, section 199' [2008] British Tax Review p. 510.

28. Burbidge Peter 'Cross border insolvency within the European Union: dawn of a new era.' [2002] European Law Review p. 589.

29. Cabral Pedro 'The internal market and the right to cross border medical care' [2004] European Law Review p. 673.

30. Campbell Emily 'Finance Act notes: inheritance tax- interest in possession settlements- sections 140-141' [2008] p. 528.

31. Campbell Emily 'Finance Act notes: inheritance, etc. of tax- relieved pension savings'- section 91 and Schedule 28 [2008] p. 492.

32. Caridi Alessandro ‘Proposed Changes to the OECD Commentary on Article 5: Part I – the physical PE notion’ [2003] European Taxation p. 8.

33. Case Comment ’Hungarian law on conversion of companies criticized’ [2012] EU Focus p. 15.

34. Case Comment 'European Union: Pfeiffer v Löwa' [2000] International Review of Intellectual Property and Competition Law p. 979.

35. Case Comment 'Hungarian taxation appears discriminatory' [2014] EU Focus p. 29.

36. Case Comment 'Imposition of a special tax by Hungary that has the effect of making foreign-owned resident companies liable to higher average rate of taxation incompatible with the freedom of establishment.' [2014] European Taxation p. 54.

37. Case Comment 'Member State of incorporation can prevent company transferring its seat' [2009] Company Lawyer, p. 105.

38. Case Comment 'Passing off - freedom of establishment' [1999] European Competition Law Review p. N99.

39. Case Comment 'Taxation of capital gains on transfer of companies examined' [2012] EU Focus p. 37.

40. Cécile Brokelind 'Pending Court of Justice of the European Union Cases' [2012] European Taxation p. 382.

41. Cerioni Luca 'The abuse of rights in EU company law and EU tax law: The re-reading of The ECJ case law and the quest for unitary notion.' [2010] European Business Law Review p. 783.

42. Cerioni Luca 'Cross- border mobility of companies in the European Union: tax competition and increased scope for the CCCTB following Cartesio' [2010] Legal Journals Index p. 380.

43. Cerioni Luca 'The cross-border mobility of companies within the European Community after the Cartesio ruling of the ECJ.' [2010] Journal of Business Law p. 311.

44. 'CFC interim improvements proposals (corporate tax reform).' [2010] PLC p.1.

45. Charny David 'Competition among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the Race to the Bottom in the European Communities' [1991] Harvard International Law Journal p. 423.

46. Christian John 'Finance Act notes: section 13: R&D relief for SMEs - removal of intellectual property condition.' [2011] British Tax Review p. 62.

47. Chu-Shiu Li, Chwen-Chi Liu, Chen-Sheng Yang 'Tax Deductions for Losses and Equilibrium in Competitive Insurance Markets' [2009] International Atlantic Economic Society p. 52.

48. Cleave Brian 'Boake Allen Ltd and others v HMRC- group income elections and non- discrimination' [2007] British Tax Review p. 604.

49. Cockfield Arthur J. 'Reforming the permanent establishment principle through a quantitative economic presence test' [2003] 38 Can. Bus. L.J 400-422.

50. Cohen David 'Finance Act notes: employment- related securities- section 49-50' British Tax Review, British Tax Review p. 456.

51. Collins Jason 'Finance Act notes: penalties- section 122-123 and Schedules 40 and 41' [2008] British Tax Review p. 520.

52. 'Commission challenges UK CFC rules.' [2011] PLC p.1.

53. 'Commission takes next steps to make EU law lighter' [2013] EU Focus p. 16.

54. 'Common Consolidated Corporate Tax Base.' http://europa.eu/legislation_summaries/taxation/fi0007_en.htm .

55. Conway Gerard 'Breaches of EC law and the international responsibility of Member States' [2002] European Journal of International Law p. 679.

56. Cooklin Jonathan 'The European Mergers Tax Directive: partial divisions and mergers.' [2009] British Tax Review p. 23.

57. Cooklin Jonathan; Bailey Emma 'Controlled foreign companies and attribution of gains: tax.' [2011] PLC p. 1.

58. Cooklin Jonathan; Bailey Emma 'Discrimination: tax and Eu principles.' [2011] PLC p. 1.

59. Cooklin Jonathan; Bailey Emma 'Thin capitalisation and transfer pricing.' [2011] PLC p. 1.

60. Craig Paul 'Directives: direct effect, indirect effect and the construction of national legislation' [1997] European Law Review p. 519.

61. Craig Paul 'The legal effect of Directives: policy, rules and exceptions' [2009] European Law Review p. 349

62. Craig William J., Kumar Ajay 'Tax harmonisation for Europe and the world: could the ECJ show the way?' [2007] International Company and Commercial Law Review p. 341.

63. Currie Samantha 'Case C-161/07, Commission v. Austria, Judgment of the Court (First Chamber) of 22 December 2008' [2010] Common market law review, p. 197.

64. Cussons Peter 'Member States ignore European tax decision.' [2004/2005] European Lawyer p. 14.

65. Cussons Peter 'UK Government proposals for the taxation of foreign profits.' [2009] British Tax Review p. 1.

66. Daigeler Fabienne, Ebert Sabine ‘The liability of a director for the liabilities of a private company limited by shares (Ltd) according to the laws of England and Wales with its real seat in Germany.' [2005] European Newsletter p.3.

67. Davies Gareth 'The Services Directive: extending the country of origin principle and reforming public administration' [2007] European Law Review p. 232.

68. Deakin Simon 'Legal diversity and regulatory competition: which model for Europe?' [2006] European Law Journal p. 440.

69. Dean Janice 'Corporate mobility and company law cultures in Europe.' [2003] International Company and Commercial Law Review p. 197.

70. Deards Elspeth 'Closed shop versus one stop shop: the battle goes on.' [2002] European Law Review p. 618.

71. DeCarlo Joseph ‘Hybrid branches face Stern test’ [1998] International Tax Review p. 19.

72. Devereux Michael 'Proposals for controlled foreign companies reform: a tale of two principles.' [2009] British Tax Review p. 111.

73. Diesum Ad Van; Norden Gert-Jan Van 'T(w)o become one: the Communication from the Commission on VAT grouping.' [2009] British Tax Review p. 657.

74. Doesum Ad Van; Norden Gert-Jan Van ‘EU 2011, Eutopia and EU 2020: the European Commission's Green Paper on the future of VAT’[2011] British Tax Review p. 253.

75. Drake Sara 'Twenty years after Von Colson: the impact of "indirect effect" on the protection of the individual's community rights.' [2005] European Law Review p. 329.

76. Drucker Thomas ‘Companies in Private international law’ [1968] Quarterly International and Comparative Law p. 28.

77. Drury Robert 'The 'Delaware Syndrome': European fears and reactions.' [2005] Journal of Business Law p. 709.

78. Drury Robert 'The Regulation and Recognition of Foreign Corporations: Responses to the Delaware Syndrome' [1998] Cambridge Law Journal p. 165.

79. Dyrbeg Peter 'Full free movement of companies in the European Community at last?' [2003] European Law Review p. 528.

80. Dyrberg Peter ‘Full free movement of companies in the European Community at last?’ [2003] European Law Review, p. 528.

81. Ebert Sabine 'European Union: company law - freedom of establishment.' [2003] International Company and Commercial Law Review p. N51.

82. Ebke Werner 'Centros - Some Realities and Some Mysteries' [2000] American journal of comparative law p. 623.

83. Eddi Wymeersch ‘The transfer of the Company’s Seat in European Company Law [2003] Common Market Law Review p. 661.

84. Eden Sandra 'Capital gains tax- round in a full circle' [2007] British Tax Review p. 668.

85. Eden Sandra 'The obstacles faced by the European Court of Justice in removing the "obstacles" faced by the taxpayer: the difficult case of double taxation.' [2010] British Tax Review p. 610.

86. Editorial ‘Refusal to allow deduction was discriminatory’ [2011] EU Focus p. 1.

87. Editorial 'European Commission proposes Small Business Act' [2008] Company Law Newsletter p.1.

88. Editorial 'Portuguese rules on construction sector condemned.' [2011] EU Focus p. 20.

89. Elliffe Craig 'International tax avoidance - the tension between protecting the tax base and certainty of law.' [2011] Legal Journal Index p. 647.

90. Englisch Joachim ‘HMRC v Philips Electronics UK Ltd: another contribution to EU law jurisprudence on loss relief [2012] British Tax Review p. 586.

91. Englisch Joachim ‘Schmelz v Finanzamt Waldviertel (C-97/09): small business VAT exemption, a big issue’ [2011] British Tax Review p. 472.

92. Englisch Joachim 'HMRC v Philips Electronics UK Ltd: another contribution to EU law jurisprudence on loss relief' [2012] British Tax Review p. 586.

93. EP pushes for a compulsory corporate tax base‘ [2012] Europost http://www.europost.bg/article?id=4348 .

94. Erk Nadja Kuba 'The cross-border transfer of seat in European Company law: a deliberation about the status quo and the fate of real seat theory.' [2010] European Business Law Review p. 413.

95. Ernst & Young Study on the implementation of the Tax Merger Directive [2009] http://ec.europa.eu/taxation_customs/common/publications/studies/index_en.htm.

96. EU Focus ‘ECJ upholds Basque tax aid decisions [2011] EU Focus p. 22.

97. EU Focus ‘Hungarian law on conversion of companies criticised’ [2012] EU Focus p. 15.

98. EuroStat European Commission 'Taxation trends in the European Union.' [2009] European Commission Taxation and customs union p. 3.

99. Everling Ulrich 'The Court of Justice as an decision-making authority' [1983-1984] Michigan Law Review, vol. 82 p. 1294.

100. Faes Pascal 'EU tax cases - extracting the essence' International Tax Review p. 25.

101. Farmer Paul 'Columbus Container Services BVBA & Co v Finanzamt Bielefeld-Innenstadt: the ECJ fails to grasp the tax competition nettle in relation to foreign income rules.' [2008] British Tax Review p. 105.

102. Fedeli Silvia; Forte Francesco 'EU VAT frauds' [2011] European Journal of Law & Economics p. 1.

103. Feria Rita de la 'HMRC v Weald Leasing Ltd - not only artificial - the abuse of law test in VAT.' [2008] British Tax Review p. 548.

104. Feria Rita de la ‘Prohibition of Abuse of (community) Law: the creation of a new general principle of EC Law through tax’ [2008] Common Market Law Review p. 395.

105. Fluss Michael, James Morgan 'Finance Act notes: non- residents- investment managers- section 38 and Schedule 16' [2008] British Tax Review p. 442.

106. Forshaw Simon, Pilgerstorfer Marcus 'Direct and indirect discrimination: is there something in between?' [2008] Industrial Law Journal p. 347.

107. Fraser Ross 'Finance Act notes: needles, haystacks and the taxation of foreign dividends of UK resident investors – section 34 and Schedule 12- section 68' [2008] British Tax Review p. 433.

108. Fraser Ross 'Finance Act notes: section 39 and section 40 and Schedule 19- income tax credits for foreign dividends- “gunboat diplomacy”? ' [2009] British Tax Review p. 556.

109. Freedman Judith 'GAAR as a process and the process of discussing the GAAR.' [2012] British Tax Review p. 22.

110. Freedman Judith, Loomer Geoffrey, Vella John 'Corporate tax risk and tax avoidance: new approaches.' [2009] British Tax Review p. 74.

111. Gajjar Jay 'Your dominion or mine? A critical evaluation of the case law on freedom of establishment for companies and the restrictions' [2013] International Company and Commercial Law Review p. 50.

112. Gajjar Jay 'Your dominion or mine? A critical evaluation of the case law on freedom of establishment for companies and the restrictions' [2013] International Company and Commercial Law Review p. 50.

113. Gammie Malcom 'Reflections on Jones v Garnett' [2007] British Tax Review p. 687.

114. Gammie Malcom The ECJ and Corporate Tax: Recent Development denning.law.ox.ac.uk/tax/documents/MGammieECJDevelopments.ppt.

115. Gammie Malcom The ECJ and Corporate Tax: Recent Development denning.law.ox.ac.uk/tax/documents/MGammieECJDevelopments.ppt.

116. Garbarino Carlo 'Tax transplants and circulation of corporate tax models' [2011] British Tax Review p. 160.

117. Gerner-Beuerlel Carsten, Schillig Michael 'The mysteries of freedom of establishment after Cartesio.' [2010] International & Comparative Law Quarterly p. 303.

118. Ginter Carri 'Access to courts for branches - some thoughts under Estonian and EC law.' [2004] European Competition Law Review p. 708.

119. Goddard Charel 'Finance Act notes: alternative finance arrangements- sections 154-157 and Schedule 46' [2008] British Tax Review p. 530.

120. Gordon Leon 'Indirect taxes and Europe' [1993] British Tax Review p. 164.

121. Gosset-Grainville Antoine, Prost Olivier ‘Legislative Comment. Service Directive dissected.’ [2006] European Lawyer, p. 42.

122. Graetz Michael J,. Warren Alvin C. 'Income Tax Discrimination and the Political and Economic Integration of Europe' [2005] The Yale Law Journal p. 1186.

123. Graziadei Michele 'Legal Transplants and the Frontiers of Legal Knowledge ' [2009] Theoretical Inquires in Law p. 693.

124. Grilli Stefano, Valle Antonio 'Banca Popolare di Cremona Soc coop Arl Agenzia Entrate Ufficio Cremona: when is a tax not a turnover tax?' [2007] British Tax Review p. 11.

125. ‘Guarding against protectionism or second-guessing national policy choices?' [2008] European Law Review p. 482;

126. Gutman Oliver 'Cartesio Oktato Szolgaltato Bt - the ECJ gives its blessing to corporate exit taxes.'[2009] British Tax Review p. 385.

127. Gutmann Daniel 'Derouin v Urssaf de Paris-Region Parisienne: to what extent may EU Member States convert their social security contributions into taxes for tax treaty purposes?' [2008] British Tax Review p. 625.

128. Halbhuber Harald ‘National Doctrinal Structures and European Company Law [2001] Common Market Law Review p. 1385.

129. Hamad Andrew ‘Rationalising the “Permanent Establishment’ [2006] 35 Australian Tax Review p. 60.

130. Hannam James 'Finance Act notes: double tax relief - sections 57-59' British Tax Review p. 462.

131. Hardwick Mike 'Finance Act notes: section 37 and Schedule 17- international movement of capital' [2009] British Tax Review p. 549.

132. Harper Andrew 'Finance Act notes: annual investment allowance, etc- sections 74-76 and Schedule 24' [2008] British Tax Review p. 480.

133. Harper Andrew 'Finance Act notes: section 5 and Schedule 2: venture capital schemes' [2011] British Tax Review p. 40.

134. Harris Peter 'Cross-border dividend taxation in the 21st century: the (ir)relevance of tax treaties.' [2010] British Tax Review p. 573.

135. Heidemann Maren 'International Commercial Harmonization and Resistance - the development and reform of transnational commercial law and its application within national legal culture.' [2010] European Business Law Review p. 227.

136. Henkow Oskar 'Financial Activities in European VAT' [2009] British Tax Review p. 480.

137. Hepple Bob ‘Race and Law in Fortress Europe’ [2004] Modern Law Review p. 1(16).

138. Hickey J.B. Julian ' Johnston Publishing (North) Limited v HMRC: associated companies' [2007] British Tax Review p. 132.

139. Higginbottom Louise 'Finance Act notes: leasing'- section 55 and Schedule 20; section 56, British Tax Review p. 458.

140. Hillion C. 'Cases C-63/99 Secretary of State for the Home Department ex parte Wiesław Głoszczuk and Elzbieta Głoszczuk; C-235/99 Secretary of State for the Home Department ex parte Eleanora Ivanova Kondova; C-257/99 Secretary of State for the Home Department ex parte Julius Barkoci and Marcel Malik; judgments of the Full Court of 27 September 2001; Case C-268/99 Aldona Małgorzata Jany v. Staatssecretaris van Justitie, judgment of the Full Court of 20 November 2001; Case C-162/00 Land Nordrhein-Westfalen v. Beata Pokrzeptowicz-Meyer, judgment of the Full Court of 29 January 2002.' [2003] Common Market Law Review p. 465.

141. Hirt Hans ‘Freedom of establishment, international company law and the comparison of European company law systems after the ECJ’s decision in Inspire Art Ltd.’ [2004] European Law Review p. 1195.

142. HMRC 'An Introduction to the Enterprise Investment Scheme (EIS).' [2011].

143. HMRC 'Capital allowances: the basics.' [2011].

144. HMRC 'Company Share Option Plan (CSOP): Introduction.' [2011].

145. HMRC 'Introduction to Capital Gains Tax.' [2011].

146. HMRC 'Introduction to Corporation Tax.' [2011].

147. HMRC 'Non-residents.' [2011].

148. HMRC 'Share Incentive Plan.' [2011].

149. HMRC 'The Corporate Venturing Scheme .' [2011].

150. HMRCSAYE Option Scheme.' [2011].

151. http://www.hmrc.gov.uk/manuals/intmanual/intm120200.htm

152. J.B.L. 'Daily Mail loses in the European Court. Case Comment.'[1988] Journal of Business Law, p. 454.

153. Jiméner Adolfo ‘Towards a homogeneous theory of abuse in EU (Direct) Tax Law’ [2012] Bulletin for International Taxation p. 270.

154. Jonathan Cooklin, Emma Bailey Cross-border interest and royalties payments: tax [2011] PLC p. 1.

155. Jones John F. Avery 'The definition of company residence in early UK tax treaties' [2008] British Tax Review p. 556.

156. Jones John F. Avery, Luc De Broe, Maarten J. Ellis, Kees Van Raad, Jean-Pierre Le Gall, Sanford H. Goldberg, Jurgen Killius, Guglielmo Maisto, Toshio Miyatake, Henri Torrione, Richard J. Vann, David A. Ward, Bertil Wiman ‘The origins of concepts and expressions used in the OECD Model and their adoption by states’ [2006] British Tax Review p. 220.

157. Journal Article - Case Comment Discrimination [2011] Gazette of the Law Society Ireland p. 60.

158. Karimeri Rami 'A critical review of the definition of tax avoidance in the case law of the European Court of Justice.' [2011] Intertax p. 296.

159. Kerridge Roger ' Jones v Garnett (Arctic Systems): another way of getting to the same results' [2007] British Tax Review p. 591.

160. Kerridge Roger 'Finance Act notes: attempting to enact the rule (or "principle") in Sharkey v Wernher- section 37 and Schedule 15' British Tax Review p. 438.

161. Kersting Christian, Schindler Philipp 'The ECJ's Inspire Art Decision of 30 September 2003 and its effect on practice' [2003] German Law Journal p. 1277.

162. Khan Aaron 'Corporate Mobility under Article 49 TFEU: A Question of Means, not Ends' [2011] 22 European Business Law Review, Issue 6, p. 847.

163. Kiekebeld Ben 'Anti-abuse in the field of taxation: is there one overall concept?' [2009] EC Tax Review p. 144.

164. Kjellgren Anders 'On the border of Abuse - The jurisprudence of the European Court of Justice on circumvention, fraud and other misuses of Community Law' [2000] European Business Law Review p. 179.

165. Kjellgren Anders 'The Services Directive- Consequences for the Welfare State and the European Social Model' [2009] European Law Review p. 163.

166. Klass David 'Finance Act note: intangible fixed assets- related parties- section 65' [2008] British Tax Review p. 2002.

167. Knoll Michael 'Considering International Tax Neutrality' [2010] Tax Law Review p. 99.

168. Kofler Georg 'The BEPS Action Plan and Transfer Pricing: The Arm's Length Standard Under Pressure?'[2013] British Tax Review p. 646.

169. Krarup Mathias 'VALE: Determining the Need for Amended Regulation Regarding Free Movement of Companies within The EU' [2013] 24 European Business Law Review, Issue 5, p. 691.

170. Lagerberg Francesca 'Finance Act notes: new information, etc. powers section 113 and Schedule 36; sections 114-115 and Schedule 37 and section 117' [2008] British Tax Review p. 503.

171. Lagerberg Francesca 'Finance Act notes: residence and domicile (remittance basis) - sections 24-27 and Schedule 7' British Tax Review, p. 425.

172. Lande John 'Teaching students to negotiate like a lawyer' [2012] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2086871.

173. Landwell& Associés (PwC) Droit de L'Union Européenne: chronique de l'année 2011.' [2011] Droit Fiscal p. 12.

174. Lane Make 'CFC Focus - CFC reform and the EU.' [2012] Tax Journal p. 1.

175. Latty Elvin 'Pseudo –foreign corporations' [1955] Yale Law Journal p. 137.

176. Lehner Moris ' Limitation of the national power of taxation by the fundamental freedoms and non- discrimination clauses of the EC Treaty [2000] Limitation of the national power of taxation p. 5.

177. Lenaerts Koen 'Interlocking Legal Orders in the European Union and Comparative Law' [2003] International and Comparative Law Quarterly p. 873.

178. Lenaerts Koen 'The constitutional allocation of powers and general principles of EU law' [2010] Common Market Law Review p. 1629.

179. Lethaby Helen 'Aaronson GAAR' [2012] British Tax Review p. 27.

180. Lianos Ioannis 'Shifting Narratives in the European Internal Market: Efficient restrictions of trade and nature of 'economic' integration.' [2010] European Business Law Review p. 705.

181. Liebman H. M, Rousselle O. 'The Doctrine of Abuse of Community Law: the Sword of Damocles Hanging over the Head of EC Corporate Tax Law?' [2006] European Taxation p. 559

182. Limitation periods on reclaiming levies not contrary to EU law' [2011] EU Focus p. 22

183. Lindsay John 'Finance Act note: financial arrangements avoidance'- section 62 and Schedule 22 [2008] British Tax Review p. 467.

184. Lindsay John 'Finance Act notes: section 38 and Schedule 18- corporation tax- foreign currency accounting' [2009] British Tax Review p. 553.

185. Lindsay John 'Finance Act notes: section 43 and Schedule 21- foreign exchange matching- anti- avoidance' [2009] British Tax Review p. 561.

186. Lombardo Stefano 'Conflict of law rules in company law after Überseering: an economic and comparative analysis of the allocation of policy competence in the European Union [2003] European Business Organization Law Review p. 301

187. Loussouarn Yvon 'Le droit d'établissement des sociétes' [1990] Revue trimestrielle de droit européen p. 229.

188. Loutzenhiser Glen ' Income splitting and settlements: further observations on Jones v Garnett' [2007] British Tax Review p. 693.

189. Lowry John 'Eliminating obstacles to freedom of establishment: the competitive edge of UK company law.' [2004] Cambridge Law Journal p. 331.

190. Lyon Tom, Owen Julia 'The new leasing tax regime for corporate lessors and lessees- a summary' [2006] British Tax Review p. 37.

191. Lyons Timothy ' Out with an exit charge: Hughes de Lasteyrie du Saillant' [2004] British Tax Review p. 589.

192. Lyons Timothy 'Marks & Spencer: something for everyone? [2006] British Tax Review p. 9.

193. Lyons Timothy 'Tax in a single market - Bosal and Marks and Spencer plc.' [2003] British Tax Review p. 443.

194. Lyons Timothy 'Class IV ACT: limited benefits for all' [2007] British Tax Review p. 114.

195. Lyons Timothy 'EC Customs Law.' [2010] British Tax Review p. 1.

196. Lyons Timothy 'Finance Act notes: section 12 and Schedule 6: consortium claims for group relief' [2011] British Tax Review p. 60.

197. Lyons Timothy J. 'Case Comment. Futura Participations: discriminatory accounting' [1998] British Tax Review p. 61.

198. Lyons Timothy J. 'Danner: the next to impossible task of justifying discrimination' [2003] British Tax Review p. 98.

199. Lyons Timothy 'Philips Electronics UK Ltd v HMRC: more unjustifiable restrictions on loss relief.' [2010] British Tax Review p. 46.

200. Lyons Timothy 'What will the ECJ decide tomorrow?' [2006] British Tax Review p. 399.

201. MacCaher Joseph A.; Vermeulen Eric P.M. ‘Limited Partnership Reform in the United Kingdom’ [2004] European Business Organization Law Review p. 61.

202. MacDonald Graeme 'Revenue and Customs Commissioners v William Grant & Sons Distillers LTD and small (Inspector of Taxes) v Mars UK LTD: accountancy practice and the computation of profit ' [2007] British Tax Review p. 366.

203. Mahalingham Shiv ‘UK thin capitalisation: is it time to eradicate domestic (UK-UK) legislation?’ [2012] British Tax Review p. 134.

204. Makowicz Bartosz, Saifee Faisal 'Societas Privata Europaea: The European Private Company' [2010] Company Lawyer p. 227.

205. Malke Christiane ' Taxation of European Companies at the Time of Establishment and Restructuring' [2009] Dissertation Universitat Mannheim p. 1.

206. Manzo Marco 'Corporate Taxation and SMEs: The Italian experience’ [2011] OECD taxation Working Papers No 6 p. 1.

207. Margalioth Yoram 'Taxing multinationals: policy analysis with a focus on technology.' [2011] British Tax Review p. 97.

208. Marsden Simon ‘Invoking direct application and effect of international treaties by the European Court of Justice: implication for international environmental law in the European Union’ [2011] International and Comparative Law Quarterly p. 737.

209. Martines Francesca ‘Direct effect of international agreements of the European Union’ [2014] European Journal of International Law p. 129.

210. Mason Peter 'Is European law "always speaking"?' [2011] VAT Digest p. 1.

211. Mathys Peter ‘Cross Border Transactions under the New Swiss Merger Act A report to the seminar on International Business Transactions organized by the Center for International Legal Studies at Salzburg (Austria) from 20-22 November 2004’ [2004] http://www.msp-law.ch/fileadmin/documents/Kanzleibroschuren/CrossBorder.pdf.

212. McCarthy Hui Ling 'Abuse of rights: the effect of the doctrine on VAT planning' British Tax Review p. 160.

213. McGowan Michael 'European Commission v Portuguese Republic: implications for exit taxes in the EU'[2013] British Tax Review p.15.

214. McGrady Steven 'Finance Act notes: section 124- mutual societies- tax consequences of transfers of business' [2009] British Tax Review p. 651.

215. Menjucq Michel ‘Kamer can Koophandel en Fabrieken vow Amsterdam v Inspire Art Ltd’ [2004] Journal de Droit International p. 917.

216. Meussen Gerrard ‘The ECJ’s judgment in Krankenheim – The last piece in the cross-border relief puzzle?’ [2009] European Taxation, p. 362

217. Micheler Eva 'Recognition of companies incorporated in other EU Member States.' [2003] International & Comparative Law Quarterly p. 521.

218. Milman David ‘The European input into UK company law: an overview of recent developments’ [2010] Company Law Newsletter p. 1.

219. Milman David 'Companies: issues of status, standing and jurisdiction.' [2005] Company Law Newsletter p. 1.

220. Milman David 'The European input into UK company law: an overview of recent developments' [2010] Company Law Newsletter p. 278.

221. Moens Gabriel, Trone John 'Removal of Taxation Barriers to Trade' [2010] Commercial Law of the European Union p. 229.

222. Morgan David 'Finance Act notes: section 58 and Schedule 29- manufactured overseas dividends' [2009] British Tax Review p. 592.

223. Morse Geoffery ' Restricting the composite supply approach in VAT: primacy of zero- rating and other categorising legislation: Talacre Beach Caravan Sales Ltd v CEC' British Tax Review p. 17.

224. Morse Geoffery 'HMRC v Principal and Fellows of Newnham College in the University of Cambridge: VAT anti-avoidance - the end of an era?' [2008] British Tax Review p. 542.

225. Morse Geoffrey 'Finance Act notes: entrepreneurs relief and hold- over relief for gifts of business assets – section 9 and Schedule 3' British Tax Review p. 421.

226. Morse Geoffrey 'Identifying supplies. Further reflections on third party and multiple supplies: Debenhams Retail plc v CEC and College of Estate Management v CEC' British Tax Review p. 54.

227. Mucciarelli Federico M. 'Company "emigration" and EC freedom of establishment: Daily Mail revisited' [2008] European Business Organization Law Review, p. 268.

228. Mullan Rory 'Test Claimants in the Thin Cap Group Litigation v HMRC: what amounts to commercial justification in considering issues of proportionality?' [2011] British Tax Review p. 295.

229. Müller Wolfgan, Bovens Mark, Jørgen Grønnegaard Christen, Jenny Marcelo, Yesilkagit Kutsal 'Legal Europeanization: comparative perspective.' [2010] Public Administration Vol. 88 Blackwell Publishing Ltd p. 75.

230. Navez Edouard-Jean, Traversa Edoardo 'La liberté d'établissement s'oppose à l'annulation d'une réduction d'impôt consécutive au transfert du siège social d'une société'[2012] Revue des Affaires Européennes p. 697.

231. Neighbour John, Saunders Robin, Pilkington Helen-Frances 'Time to branch out' [2012] Transfer Pricing International Journal p. 28.

232. Niboyet Jaun 'Existe-t-il vraiment une Nationalité des Sociétés?' [1927] Journal de droit international p. 30.

233. Nørgaard Laursen 'Permanent establishment – an analysis of article 5 of the OECD Model Tax Convention' http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0

CFAQFjAD&url=http%3A%2F%2Fwww.djoef-forlag.dk%2Fsites%2Fntj%2Ffiles%2F2012%2F2012_19.pdf&ei=wiBpU6q0DPSu7AbY7oGoDg&usg=AFQjCNGfvuU98iY1l56JDYTa76BxNvq5Kg&bvm=bv.66111022,d.ZGU&cad=rja

234. Nyssens Harold, Lackhoff Klaus ‘Direct effect of Directives in triangular situations’ [1998] European Law Review p. 397.

235. O’Shea Tom 'CFC Reforms in the UK – Some EU Law Comments.' EC Tax Review [2012] p. 65.

236. Oats Lynne ' Finance Act notes: disclosure of tax avoidance schemes section 116 and Schedule 38' [2008] British Tax Review p. 505.

237. Oats Lynne ' Finance Act notes: repeal of obsolete anti- avoidance provisions – section 66' [2008] British Tax Review p. 478.

238. O'Brien Martha 'Company taxation, state aid and fundamental freedoms: is the next step enhanced cooperation?' [2005] European Law Review p. 209.

239. Offermans Rene 'Restrictions on Treaty Override Resulting from UE Law' [2013] European Taxation p. 430.

240. Olivier J. D. B. ' Beneficial ownership: HMRC’s draft guidance on interpretation of the Indofood decision' [2007] British Tax Review p. 39.

241. Olivier J. D. B. 'Tax treaties and state succession: some UK experience.' British Tax Review p. 563.

242. Omar Paul J. 'Centros, Überseering and beyond: a European recipe for corporate migration: Part 2.' [2005] International Company and Commercial Law Review p. 398.

243. O'Shea Tom ‘ The UK's CFC rules and the freedom of establishment: Cadbury Schweppes Plc and its IFSC subsidiaries - tax avoidance or tax migration?’ [2007] EC Tax Review, p. 13.

244. Ottersbach Christina 'The effect of Inspire Art: a critical comparison of the formation of German an English companies.' [2005] Journal of International Trade Law & Policy p. 31.

245. Panayi Christiana H.J.I. 'Reverse subsidiarity and EU tax law: can Member States be left to their own devices?' [2010] British Tax Review p. 267.

246. Panayi H, J.I. ‘National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam: exit taxes in the European Union revisited.' [2012] British Tax Review p. 41.

247. Pantazatou Katerina 'National Grid Indus: The First Case on Companies’ Exit Taxation' [2012] 23 European Business Law Review p. 945.

248. Papadopoulos Thomas 'Criticising the horizontal direct effect of the EU general equality' [2011] European Human Rights Law Review p. 437.

249. Papotti Raul Angelo 'Italy: extension of CFC legislation to subsidiaries based in white list states or territories - EU compatibility issues.' [2011] British Tax Review p. 15.

250. Petronella Vittoria 'The Cross-Border Transfer of the Seat after Cartesio and the Non-Portable Nationality of the Company' [2010] 21 European Business Law Review, Issue 2, p. 245.

251. Piantavigna Paolo ‘Prohibition of abuse of law: a new general principle of EU law? 3-4 October 2008, Oxford (UK)’ [2009] Intertax p. 166.

252. Piantavigna Paolo ‘Tax abuse in European Union law: a theory’ EC Tax Review 2011, p. 134.

253. Piantavigna Paolo ’Conference report prohibition of abuse of law: a new general principle of EU law?’ [2009] Intertax, p.166.

254. Pistone Pasquale 'Test Claimants in Class IV of the ACT Group Litigation: limitation-of-benefits clauses are clearly different from most-favoured-nation clauses' [2007] British Tax Review p. 363.

255. Quaghebeur Marc 'Kerckheart- Morres v Belgian State: the wrong battle' [2007] British Tax Review p. 121.

256. Rapports de 2002 relatifs ou Modele de Convention fiscale de l’OCDE’ (Part III, p 93-99).

257. Rehberg Markus ' Inspire Art- freedom of establishment for companies in Europe between “abuse” and national regulatory concerns. [2010] Legal Journals Index p. 1.

258. Rehse Steven 'Centros II and the freedom of establishment.' [2003] Coventry Law Journal p. 35.

259. Richards Gary ' Corporate tax reforms- CFC proposals' [2011] British Tax Review p. 10.

260. Richards Gary ‘Restriction on exemption from French tax not prohibited [2011] EU Focus.

261. Richards Gary 'CFCs - the end of a "long and winding road"' [2012] British Tax Review p. 3

262. Richards Gary 'Restrictions on establishment discussed.' [2003] EU Focus p. 23.

263. Richards Gary 'Finance Act notes: pre- appeal reviews- HMRC decision etc- reviews and appeals- section 124' [2008] British Tax Review p. 522.

264. Richards Gary 'Finance Act notes: Schedule 8: Lennartz provisions.' [2011] British Tax Review p. 65.

265. Richards Gary 'Finance Act notes: section 10 and Schedule 4: REITs; stock dividends - scrip dividends and REITs.' [2011] British Tax Review p. 65.

266. Richards Gary 'Finance Act notes: section 35 and Schedule 15 - the worldwide debt cap.' [2009] British Tax Review p. 541.

267. Richards Gary 'Finance Act notes: section 76 and Schedule 36 and sections 77 and 78- cross-border VAT changes' [2009] British Tax Review p. 613.

268. Richards Gary 'Finance Act notes: set-off- sections 130-133' [2008] British Tax Review p. 526.

269. Richards Gary 'Group relief - past its sell-by date?' [1992] British Tax Review p. 197.

270. Richards Gary; Fichardt Liesl 'Corporate tax reforms - CFC proposals.' [2011] British Tax Review p. 10.

271. Ringe Wolf-Georg 'Company law and free movement of capital.' [2010] Cambridge Law Journal p.378.

272. Ritter Cyril 'Purely internal situations, reverse discrimination, Guimont, Dzodzi and Article 234.' [2006] European Law Review p. 690.

273. Robertson Domonic E. 'Überseering: nailing the coffin on Sitztheorie?' [2003] Company Lawyer p. 344.

274. Röder Erik 'Co-ordination of corporate exit taxation in the internal market and beyond' [2014] British Tax Review p. 574.

275. Rosen Jonathan 'Finance Act notes: section 36 and Schedule 16 - controlled foreign companies' [2009] British Tax Review p. 544.

276. Rothe Nicole ' Freedom of Establishment of legal persons within the European Union: An analysis of the European Court of Justice Decision in the Überseering Case' [2004] American University Law Review p. 1103.

277. Schön Wolfgan ‘International tax coordination for a second-best Word (part I)’ [2009] World Tax Journal p. 85.

278. Schon Wolfgang 'Persons and territories: on the international allocation of taxing rights.' [2010] British Tax Review p. 554.

279. Schon Wolfgang 'The free choice between the right to establish a branch and to set-up a subsidiary - a principle of European business law' [2001] European Business Organization Law Review p. 340.

280. Schon Wolfgang 'The Mobility of Compromise in Europe and the Organizational Freedom of Company Founders' [2006] European Company and Financial Law Review p. 122.

281. Schoueri Luis Eduardo, Günther Oliver Christoph 'The Subsidiary as a Permanent Establishment.' [2011] Bulletin for international taxation p. 69.

282. Schreiber Ulrich, Fihrich Gregor 'European group taxation - the role of exit taxes.' [2009] European Journal of Law & Economics p. 67.

283. Shaheen Fadi 'International Tax Neutrality: Revisited' [2010] Tax Law Review p. 131.

284. Shen M. Zongling 'Legal Transplant and Comparative Law ' [1999] Persee p. 853.

285. Shiers Rupert 'Finance Act notes: sections 25-29 and Schedules 9-13: administration.' [2011] British Tax Review p. 67.

286. Shipwright Adrian 'Finance Act note: manufactured payments'- section 63 and Schedule 23 [2008] British Tax Review p. 475.

287. Shipwright Adrian 'Finance Act note: restrictions on trade loss relief for individuals' [2008] British Tax Review p. 464.

288. Siems Mathias ' The impact of the European company (SE) on legal culture' [2005] European Law Review p. 431.

289. Siems Mathias 'Convergence, competition, Centros and conflicts of law: European company law in the 21st century.' [2002] European Law Review p.47.

290. Sinfield Greg 'The Halifax principle as a universal GAAR for tax in the EU' [2011] British Tax Review p. 235.

291. Sloan Brian ' Quantifying inequity in the taxation of individuals and smalls firms' [2007] British Tax Review p. 58.

292. Snape John 'Corporation tax reform- politics and public law' [2007] British Tax Review p. 374.

293. Snell Jukka 'Non-discriminatory tax obstacles in Community law.' [2007] International & Comparative Law p. 339.

294. Sorensen Karsten Engsig 'Abuse of rights in Community Law: a principle of substance or merely rhetoric' [2006] Common Market Law Review p. 339.

295. Sorensen Karsten Engsig 'Reconciling secondary legislation with the Treaty rights of free movement' [2011] European Law Review p. 423.

296. Sørensen Karsten Engsig 'The Fight against Letterbox Companies in the Internal Market'[2015] Common Market Law Review p. 85.

297. Sourgens Frederic Gilles 'Comparative Law as Rhetoric: An Analysis of the Use of Comparative Law in International' [2007] Pepperdine Dispute Resolutiona Law Journal p. 2.

298. Sousa Pedro Caro de ‘Horizontal expressions of vertical desires: horizontal effect and the scope of the EU fundamental freedoms’ [2013] Cambridge Journal and Comparative Law p. 479.

299. Spink Paul ‘Direct effect: the boundaries of the state. Case Comment’ [1997] Law Quarterly Review p. 524.

300. Susan Bell 'Finance Act notes: section 11 and Schedule 5: worldwide debt cap.' [2011] British Tax Review p. 51

301. Sykes Laurent 'Vodafone 2 v HMRC: the roaming boundaries of European Community law.' [2008] British Tax Review p. 536.

302. Tailby Chris 'Some reflections on tax avoidance.' [2011] Private Client Business p .1.

303. Tank Jiten; Weston George; Melia Marc 'Finance Act notes: section 9 and Schedule 3: return to corporation tax and dividends - income or capital now a moot point?' [2011] British Tax Review p. 47.

304. 'Taxation: Commission requests UK to further amend its treatment of controlled foreign corporations (CFCs).' [2011] http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/606&format=HTML&aged=0&language=EN&guiLanguage=en .

305. Taylor David, Sykes Laurent 'Controlled foreign companies and foreign profits' [2007] British Tax Review p. 609.

306. Theodossiou Maria A. 'An analysis of the recent response of the Community to non-compliance with Court of Justice judgments: Article 228(2) E.C.' [2002] European Law Review p. 25.

307. Timmermans Christiann 'Impact of EU Law on International Company Law' [2010] European Review of Private Law p. 549.

308. Troger Tobias H. ‘Choice of jurisdiction in European corporate law - perspectives of European corporate governance.’ [2005] European Business Organization Law Review p.3

309. Tryfonidou Alina 'Jia or 'Carpenter II': the edge of reason.' [2007] European Law Review p. 908.

310. Tyc Vladimir 'Harmonization of indirect taxes in the European Union' [2008] International Journal of Law & Management p. 87

311. Vanistendael Frans 'General Report on The fundamental freedoms and national sovereignty in the European Union.' [2004] http://www.eatlp.org/uploads/Members/General_Report_Frans_Vanistendael.pdf .

312. Vanistendael Frans 'Halifax and Cadbury Schweppes. One single European Theory of Abuse in Tax Law?'[2006] EC Tax Review p. 192.

313. Vanistendael Frans 'Halifax and Cadbury Schweppes. One single European Theory of Abuse in Tax Law?'[2006] EC Tax Review p. 194.

314. Tepper Steven, Badian Laura 'Closing the GAAP' [2008] European Lawyer p. 14.

315. Vann Richard 'Travellers, tax policy and agency permanent establishments.' [2010] British Tax Review p. 538.

316. Vestal Allan 'Choice of Law and the Fiduciary Duties of Partners under the Revised Uniform Partnership Act' [1994] Iowa Law Review p. 2019.

317. Vogel Klaus 'Double tax treaties and their interpretation' [1986] Volume 4, Berkeley Journal of International Law p.8

318. Vording Henk 'Renneberg v Staatssecretaris van Financien - the problems of an extended Schumacker rule.' British Tax Review p. 67.

319. Vording Henk, Lubbers Allard 'The ECJ, retrospectivity and the Member States tax revenues' [2006] p. 91.

320. Wall Allard de 'Can branches and subsidiaries be treated equally?' [1997] International Business Law Journal p. 76.

321. Warburton Jean 'Charities and business: a VAT conundrum' British Tax Review p. 73.

322. Wattel Peter J. 'Corporate tax jurisdiction in the EU with respect to branches and subsidiaries; dislocation distinguished from discrimination and disparity; a plea for territoriality' [2003] EC Tax Review p. 194.

323. Wattel Peter J. 'EC law does not require most-favoured nation tax treatment and a disparity is not a discrimination: D. v Inspecteur van de Belastingdienst.' [2005] British Tax Review p. 575

324. Weber Denis ‘Abuse of law in European tax law: an overview and some recent trends in the direct and indirect tax case law of the ECJ: Part 1’ [2013] European Taxation p. 251.

325. Weber Denis ‘Abuse of law in European tax law: an overview and some recent trends in the direct and indirect tax case law of the ECJ: Part 2’ [2013] European Taxation p. 313.

326. Weber Denis 'Fidium Finanz AG v Bundesanstalt fur Finanzdiensteistungsaufsicht: the ECJ gives the wrong answer about the applicability of the free movement of capital between the EC Member States and non- member countries' [2007] British Tax Review p. 670.

327. Weber Denis 'Most-favoured-nation treatment under tax treaties rejected in the European Community: Background and analysis of the D case.' [2005] Intertax p. 420.

328. Weber Dennis ' The proposed EC Interest and Royalty Directive' [2000] Limitation of the national power of taxation p. 15.

329. Welsh David 'Tuczka v Revenue and Customs Commissioners: the end for ordinary residence?' [2010] British Tax Review p. 223.

330. What's the difference? Direct and indirect discrimination?’ [2013] Workplace Snippets, ACAS http://www.acas.org.uk/index.aspx?articleid=4614 .

331. 'Whither EU company law?' [2012] Company Law Newsletter p. 1.

332. Whiting John 'Finance Act notes: power to give statutory effect to concessions-section 160' [2008] British Tax Review p. 533.

333. Whiting John 'Overseas property owned via company' [2007] British Tax Review p. 431.

334. Williams F. David 'Avoidance through the creation and use of capital losses by companies' [2006] British Tax Review p. 23.

335. Wilson Martin 'JD Wetherspoon Plc v HMRC: machinery and plant capital allowances under review' [2008] British Tax Review p. 119.

336. Wirgo Graham ' Deutsche Morgan Grenfell: restitution of mistaken tax payments: back to basic' British Tax Review p. 27.

337. Wisniewski Andrzej W. and Opalski Adam 'Companies' freedom of establishment after the ECJ Cartesio judgment. Case Comment.' [2009] European Business Organization Law Review, p. 569.

338. Wulf de Hans, Dejonghe Sofie 'Netherlands: company law - corporate seats.' [2004] International Company and Commercial Law Review p. 29.

339. Wulf -Henning Roth 'Case C-212/97 Centros Ltd v Erhvervs-og Selskabsstyrelsen' [2000] Common Market Law Review p. 147.

340. Wulf -Henning Roth 'From Centros to Überseering: free movement of companies, private international law and Community law.' [2003] International & Comparative Law Quarterly p.177.

341. Yates Simon 'Finance Act notes: certificate 18 policymaking: the death of taper relief- sections 8-9 and Schedules 2-3 and some reflections on entrepreneurs relief' [2008] British Tax Review p. 417.

342. Yates Simon 'Partnerships and capital gains' [2008] British Tax Review p. 587.

343. Zadkovich John 'Finance Act notes: taking control of goods, etc- sections 127-129 and Schedule 43' [2008] British Tax Review p. 523.

344. Zailer Issac ' Legislative Comment. Jersey v HMRC ' [2007] British Tax Review p. 106.

345. Zaman D.F.M.M. Schwarz C.A. Lennarts M.L. De Kluiver H.J. Dorresteijn A.F.M. 'The European Company (SPE): A critical analysis of the EU Draft Statue.' [2010] European Law Review p. 899.

346. Zaman Jeanette ‘Exit Taxes: an infringement deferred?’ [2013] Tax Journal, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=https%3A%2F%2Fwww.slaughterandmay.com%2Fmedia%2F1934104%2Fexit-tax .

Polish Bibliography

Books

1. Antonow Dobroslawa [Wykladnia prawa podatkowego po wstapieniu Polski do Unii Europejskiej] (Warszawa, Oficyna, 2009).

2. Brzezinski Bogumil ‘Model Konwencji OECD’ [Model Tax Convention OECD] (Poznan, Wydawnictwo Politechniki Poznańskiej, 2010)

3. Charkot Justyna, Cichosz Marlena, Kowalska Daria 'Tax Groups’ [Podatkowa grupa kapitalowa'] (Torun, Uniwersytet Mikolaja Kopernika w Toruniu Wydzial Nauk Ekonomicznych i Zarzadzania, Kierunek Finanse i Rachunkowość, 2012).

4. Lipniewicz Rafal ‘Targets of VAT system in the EU. Harmonization of taxation intra-Community transactions’ [Docelowy system VAT w Unii Europejskiej. Harmonizacja opodatkowania transakcji wewnatrzwspolnotowych] (Warszawa, Oficyna, 2009).

5. Litinczuk Hanna Direct Taxation. Polish Law and Community Law [Podatki Bezposrednie. Prawo Polskie a Wspolnotowe] (Warszawa, Oficyna Prawa Polskiego, 2009).

6. Maruchin Wojciech [VAT w prawie polskim i prawie wspólnotowym] (Warszawa, Oficyna Prawa Polskiego, 2009).

7. Nykiel Wlodzimierz, Sek Malgorzata ‘Protection of Taxpayer’s rights. European International and Domestic Tax Law Perspective’ (Warszawa, Oficyna, 2009).

8. Pienkos Jerzy ‘Legal dictionary’ [Slownik prawniczy] (Zakamycze, Zakamycze, 2002).

9. Selera Pawel [Miedzynarodowe a unijne prawo podatkowe w kontekście opodatkowania zyskow przedsiębiorstw] (Warszawa, Lex, 2009).

Journals

1. Adamczyk Lukasz ‘Restriction on VAT reclaim In ECJ decisions’ [Ograniczenie prawa do odliczenia VAT w orzecznictwie ETS] [12/2006] Prawo i Podatki.

2. Adamczyk Lukasz ‘Restriction on VAT reclaim In ECJ decisions’ [Ograniczenie prawa do odliczenia VAT w orzecznictwie ETS] [12/2006] Prawo i Podatki.

3. Bernat Michal, Nowak Eliza ‘Division of profits gained by foreign branch – currency fluctuation’ [Podzial zysku wypracowanego przez zagraniczny oddzial – roznice kursowe][2/2006] Monitor Podatkowy.

4. Bernat Michal, Nowak Eliza ‘Division of profits gained by foreign branch – currency fluctuation’ [Podzial zysku wypracowanego przez zagraniczny oddzial – roznice kursowe][2/2006] Monitor Podatkowy.

5. Bobek Michal 'Cartesio: appeals against an order to refer under Article 234(2) EC Treaty revisited.' [2010] Civil Justice Quarterly.

6. Gortat-Kopacka K., Sobczak A. ’Impact of EU Directives on development of CIT In Poland(3) [Wplyw dyrektyw unijnych na kształtowanie CIT w Polsce (3)] [8/2001] Przeglad Podatkowy.

7. Kaczanowska Iwona ‘Right to reclaim VAT cannot be limited by differenced in tax legal systems in Member States’ [Prawo do odliczenia VAT nie może być ograniczane ze względu na rozbieżności pomiędzy systemami podatkowymi w państwach członkowskich] [12/2006] Prawo i Podatki.

8. Nogacki Robert, Panas Adriana 'Critical review of CFC reform proposal' Krytyczna analiza projektu przepisow o opodatkowaniu zagranicznych spolek kontrolowanych' [2013] Gazeta.pl

   http://pieniadze.gazeta.pl/Gospodarka/1,123741,14659873,Krytyczna_analiza_projektu_przepisow_o_opodatkowaniu.html

9. Oplustil Krzysztof ‘Transgraniczna fuzja spółek w prawie europejskim i polskim.’ [2007]

http://www.google.pl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CEoQFjAD&url=http%3A%2F%2Fusfiles.us.szc.pl%2Fgetfile.php%3Fpid%3D5102&ei=vyppUfKkIcusPILQgYgM&usg=AFQjCNFkISTH9m9BCOawagViygvGK-L2lg&bvm=bv.45175338,d.ZWU&cad=rja.

10. Oplustil Krzysztof, Spyra Marcin 'Fuzja trans graniczna z udziałem polskich spółek kapitałowych w świetle prawa europejskiego i polskiego ' [2008] Wolters Kluwer Polska p. 259.

11. Panas Adriana, Nogacki Robert 'Taxation of controlled foreign companies in the world' [Opodatkowanie zagranicznych spółek kontrolowanych na świecie] [2013] Skarbiec Kancelaria Prawna p. 1

12. Półtorak Nina 'Zakres związania państw członkowskich Kartą Praw Podstawowych UE' [The scope of application of the Charter of Fundamental Rights of the European Union] [9/2014] Europejski Przegląd Sądowy, p. 17.

13. Prajs Artur 'Commentary' [Komentarz] [5/2011], Monitor Podatkowy.

14. Prajs Artur 'Commentary' [Komentarz] [5/2011], Monitor Podatkowy.

15. Rajski Jerzy 'The new legal framework of the economic activity of foreigners in Poland' [1990] International Business Law Journal.

16. Romanowski Michał, Opalski Adam 'Nowelizacja Kodeksu spółek handlowych w sprawie trans granicznego łączenia się spółek kapitałowych ' [15/2008], dodatek do Monitora Prawniczego.

17. Szczygiel Lukasz 'Comment' [Komentarz] [12/2010] Monitor Podatkowy.

18. Szulc Patryk 'Compatibility of CFC provisions with Constitution' [Konstytucyjnosc rozwiązań CFC] [2015] http://spolki.cgolegal.pl/optymalizacja/konstytucyjnosc-rozwiazan-cfc/