BEPS & EU LAW

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BEPS – BASE EROSION & PROFIT SHIFTING

BEPS ACTION PLAN – 15 ACTIONS

Challenges of the Digital Economy

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Challenges of the Digital Economy

Neutralise Effects of Hybrid Mismatch Arrangements

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Challenges of the Digital Economy

Neutralise Effects of Hybrid Mismatch Arrangements

Strengthen CFC Rules

BEPS – BASE EROSION & PROFIT SHIFTING

BEPS ACTION PLAN - 15 ACTIONS

Challenges of the Digital Economy	Neutralise Effects of Hybrid Mismatch Arrangements	Strengthen CFC Rules	Limit Base Erosion by Interest Deductions

BEPS – BASE EROSION & PROFIT SHIFTING

BEPS ACTION PLAN – 15 ACTIONS

- Challenges of the Digital Economy
- Neutralise Effects of Hybrid Mismatch Arrangements
- Strengthen CFC Rules
- Limit Base Erosion by Interest Deductions
- Counter Harmful Tax Practices

BEPS – BASE EROSION & PROFIT SHIFTING

- Challenges of the Digital Economy
- Neutralise Effects of Hybrid Mismatch Arrangements
- Strengthen CFC Rules
- Limit Base Erosion by Interest Deductions
- Counter Harmful Tax Practices
- Prevent Treaty Abuse

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- Neutralise Effects of Hybrid Mismatch Arrangements
- Strengthen CFC Rules
- Limit Base Erosion by Interest Deductions
- Counter Harmful Tax Practices
- Prevent Treaty Abuse
- Prevent Artificial Avoidance of PE Status

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Counter Harmful Tax Practices

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Assure Transfer Pricing Outcomes are in line with value creation

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Collect & Analyse Data on BEPS

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Disclose Aggressive Tax Planning Arrangements

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Re-examine Transfer Pricing Documentation

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Improve Dispute Resolution Mechanisms

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Prevent Treaty Abuse	Prevent Artificial Avoidance of PE Status	Assure Transfer Pricing Outcomes are in line with value creation		
Collect & Analyse Data on BEPS	Disclose Aggressive Tax Planning Arrangements	Re-examine Transfer Pricing Documentation	Improve Dispute Resolution Mechanisms	Develop a Multilateral Instrument to Implement BEPS

G20 + OECD BEPS

- Promoting new global standard for automatic exchange of information
- Interest, dividends, account balances and income from certain insurance products
- Put in place the right legal and administrative framework to ensure confidentiality
- Establish a multilateral legal platform to allow signatories to opt into automatic exchange of information – convention
- G20 has endorsed the OECD BEPS Action Plan

G20 + BEPS

- Cross border tax evasion and tax avoidance undermine public finances and peoples' trust in the fairness of the tax system
- G20 undertook to "act together" and to "implement all our commitments in a timely manner and rigorously monitor this process
- **Profits should be taxed where economic activities deriving the activities are performed and where value is created**

Transfer Pricing Documentation White Paper

- Suggest how TP documentation can be made simpler
- Provide tax authorities with more focused and useful information
- Idea is to make a “big picture” financial information available to tax authorities
- Concerns that this information is used in a way which does not give rise to additional information requests => increased compliance burden
- Also, a need to link this work with Country by Country Reporting aspect of BEPS

Discussion Draft – Taxation of Intangibles

- Proposed amendments to Chapters I-III of the Transfer Pricing Guidelines
- **Location savings**
  - comparability issues evaluating differences between different markets resulting in cost savings
  - often in the context of business restructuring
  - sharing the savings between group companies
  - may be other local market factors which are not related to cost savings (size of the market, purchasing power and product preference of households)
  - Sometimes, market advantages and disadvantages may affect arm's length prices of goods or services between associated enterprises

Discussion Draft – Taxation of Intangibles

- **Assembled Workforce**
- May be a uniquely qualified and experienced group of employees
- The existence of such a group may affect the arm's length price for services provided by the employee group or the efficiency with which services are provided or goods are produced
- Transfer of the assembled workforce may save the transferee the time and expense of hiring and training a new workforce
- Sometimes, the transfer of an assembled workforce may result in limitations on the transferee's flexibility in structuring business operations and may create potential liabilities if workers are terminated => needs to be compensated for in the transfer pricing

Discussion Draft – Taxation of Intangibles

- **Group Synergies**
- MNEs will generally benefit from group synergies that are not generally available
- **Examples**: combined purchasing power, economies of scale, integrated computer and communication systems, integrated management and increased borrowing capacity
- These may heighten the aggregate profits of group members
- Other synergies may be negative => size and scope of corporate operations create bureaucratic barriers not faced by small companies

Discussion Draft – Taxation of Intangibles

- **Group Synergies**
- If important group synergies exist and can be attributed to deliberate concerted group actions, the benefits of such synergies should generally be shared by members of the group in proportion to their contribution to the creation of the synergy
- Example: where members of a group take deliberate concerted actions to consolidate purchasing activities to take advantage of economies of scale resulting from high volume purchasing

BEPS + Digital Economy (Comments)

- Digital economy has permeated all business sectors
- Updated solutions are necessary to address the issue related to jurisdiction to tax – including revision of DTC provisions
- Need to take into account the regulatory environment, particularly, in relation to financial services
- New opportunities for reorganising corporate structures by separating functions and organising international value chains to exploit locational advantages
- Location decisions have become distorted by tax rules which encourage the artificial separation of functions and their attribution to affiliated companies which are under common control

BEPS + Digital Economy (Comments)

- Firms are able to defend low profit margins in a country under current TP rules
- Establishing the country of residence for an internet business is difficult
- Digital economy requires a re-think of international tax rules designed a century ago
- MNEs operate as integrated firms under central direction – they should be treated as unitary firms for tax purposes.
- Should Arm's Length Principle be replaced by Formulary Apportionment?

BEPS + Digital Economy (Comments)

- Should digital businesses be treated / taxed differently to non-digital ones?
- Specific issues arise around the PE concept and around profit attribution
- New business models (high frequency trading and cloud computing services)
- Is a server a PE? Sometimes yes, sometimes no!
- One view internationally would be an improvement !

BEPS + Digital Economy (Discussion Draft)

- Emergence of new business models
- Diversity of new revenue models (advertising-based, pay-per-download; sale of goods and virtual items; subscription-based; sales of services + licensing content and technology)
- Technological advances make it possible for businesses to carry on economic activities with a minimal need for personnel to be present
- Functions and assets can be spread among many different countries
- Growing importance of services
- SMEs can reach global markets from inception

BEPS + Digital Economy (Discussion Draft)

- Companies avoiding a taxable presence or reducing net profits by maximising deductions at the level of the payer
- Low or no WHT at source
- Low or no tax at the level of the recipient
- No current taxation of the low tax profits at the level of the ultimate parent company
- Minimising functions, assets and risks in market jurisdictions
- Prevent treaty abuse and artificial avoidance of the PE status
- Develop changes to the definition of PE to prevent circumvention
- Excessive cross-border payments to related entities in low tax jurisdictions can erode the tax base

BEPS + Digital Economy (Discussion Draft)

Main Policy Challenges

- Nexus
- Data – able to gather lots of information => problems attributing value
- Characterisation – proper characterisation of services
- VAT collection
- Various related administrative issues

BEPS + Digital Economy (Discussion Draft)

Possible Ways Forward

- Modify the PE article 4 MTC
- Maybe a new nexus based on Significant Digital Presence
- Virtual PE Concept
- Virtual Agency PE
- WHT on Digital Transactions – on payments
- Consumption tax options

Discussion Draft – Treaty Abuse (Comments)

- No clear, common understanding of what constitutes “tax abuse”
- “One of the main purposes” => too widely framed => needs to be more focused to retain clarity and certainty of tax treatment
- Focus should be on “substance”
- Companies should not be seen as abusing treaty benefits where a genuine business is set-up (perhaps, specifically attracted by benefits enacted for the express purpose of attracting business), one of the implications of which is a preferable treaty being available

Discussion Draft – Treaty Abuse (Comments)

- Include “substance” considerations to protect genuine commercial structures
- Include a Regional HQ provision to allow them to qualify for benefits in the absence of abuse
- Taxpayers must have access to timely administrative relief from competent authorities to apply the treaty when there is no abuse
- Need to have a “derivative benefits” provision where there is no treaty shopping to ensure treaty access

Discussion Draft – Treaty Abuse (Comments)

- GAARs must be well constructed, more narrowly defined to target abuse and ensure a more certain outcome for the majority of taxpayers. It should not catch genuine commercial structures.
- The GAAR should target structures which have been (wholly) artificially set up to secure a treaty benefit
- LoB articles should allow for bona fide commercial activities which do not involve “treaty shopping” + contain reasonable objective tests that can be applied by taxpayers and confirmed by tax authorities
- Multiple layers of rules in the LoB, GAAR and SAARs need to be reconsidered to make them simpler and more certain

Discussion Draft – Treaty Abuse (Comments)

- If States enact incentives specifically aimed at attracting business, then when businesses structure themselves accordingly, this should not be considered tax avoidance.
- The existence of a low effective tax rate should not be a concern, provided the structure is a genuine commercial set-up
- The test is whether the structure is artificial

Discussion Draft – Treaty Abuse (Comments)

- CIVs – under the proposed LoB many CIVs will be denied treaty benefits. The LoB requires a fund to have a significant connection with the country in which it is resident for tax purposes, be it an effective listing or a majority of investors there – many funds are not listed and pool capital from investors across a number of countries
- CIVs should be included in treaty benefits unless specifically abusive
- Investors under a CIV should be no worse off than if they made the investment directly
- The “derivative benefits” provision is too narrowly drafted

Discussion Draft – Treaty Abuse (Comments)

- CIVs should qualify for DTC benefits if they qualify as a person that is resident in a jurisdiction and are subject to tax there on the income of the CIV
- If a CIV does not qualify for DTC benefits then its investors should qualify for benefits
- CIVs are vital to the proper functioning of capital markets and represent a key source of investment capital.
- CIVs are the vehicle of choice for retail investors and pension funds
- CIVs allow investors to pool their investments to maximise returns, increase investment diversification and risk management and receive the benefit of experienced fund managers

Discussion Draft – Treaty Abuse (Comments)

- The ability of CIVs to readily access the protection of DTCs (given to direct investors) is vital to ensuring that CIVs remain a viable product for saving and investment, and that capital invested through CIVs is available for cross-border investment and long term financing of economies
- Proposed LoB will block CIVs from receiving DTC benefits – if more than 50% of the gross income of the CIV is paid or accrued by persons not resident in one of the DTC States => tax neutrality will be compromised
- CIVs are excluded without any consideration of commercial purpose or the presence of inappropriate tax motives

Discussion Draft – Treaty Abuse (Comments)

- **One suggestion** => refine the definition of “qualified person” to include CIVs which are:
- (1) publicly available / widely marketed or
- (2) funds which meet a “not closely held” test (such as the “genuine diversity of ownership” test found in UK legislation)

BEPS + Hybrid Mismatch Arrangements

- although general anti-avoidance rules are an effective tool, they do not always provide a comprehensive response to cases of unintended double non-taxation through the use of hybrid mismatch arrangements.
- certain countries have introduced rules that in certain cases deny the deduction of payments where they are not subject to a minimum level of taxation in the country of the recipient.
- Other countries deny companies a deduction for a finance expense where the main purpose of the arrangement is gaining a tax advantage under local law.

BEPS + Hybrid Mismatch Arrangements

- **“Linking rules”**
- Under these rules, the domestic tax treatment of an entity, instrument or transfer involving a foreign country is linked to the tax treatment in the foreign country, thus eliminating the possibility for mismatches.
- Hybrid mismatch arrangements incorporate techniques that exploit a difference in the characterisation of an entity or arrangement under the laws of two or more tax jurisdictions to produce a mismatch in tax outcomes.
- The focus of the Action Plan is on hybrid mismatches that shift profit between jurisdictions or permanently erode the tax base of a jurisdiction. The Action Plan calls for domestic rules designed to put an end to these arrangements

BEPS + Hybrid Mismatch Arrangements

- A hybrid mismatch arrangement is a profit shifting arrangement that utilises a hybrid element in the tax treatment of an entity or instrument to produce a mismatch in tax outcomes in respect of a payment that is made under that arrangement.
- The two key mismatch arrangements identified in Action 2 are
- **payments that are deductible under the rules of the jurisdiction of the payer and not included in the income of the recipient** (so called deduction / no inclusion or D/NI outcomes) and
- **payments that give rise to duplicate deductions from the same expenditure** (a double deduction or DD outcome).

BEPS + Hybrid Mismatch Arrangements

- The focus of Action 2 is on arrangements that exploit differences in the way the payment is characterised in the jurisdiction of payment and the jurisdiction of receipt in order to achieve profit shifting and base erosion outcomes.
- some arrangements involve the use of **hybrid entities,** where the same entity is treated differently under the laws of two or more jurisdictions; and
- others involve the use of **hybrid instruments,** where there is a conflict in the treatment of the same instrument under the laws of two or more jurisdictions.
- **In both cases the hybrid element leads to a different characterisation of a payment under the laws of different jurisdictions.**

BEPS + Hybrid Mismatch Arrangements

- the rules are intended to drive taxpayers towards less complicated and more transparent tax structuring that is easier for jurisdictions to address with more orthodox tax policy tools.
- **this report recommends that** every jurisdiction introduces a complete set of rules that are sufficient to neutralise the effect of the hybrid mismatch on a stand-alone basis, without the need to rely on hybrid mismatch rules in the counterparty jurisdiction.
- **the hybrid mismatch rules should apply automatically to a hybrid mismatch arrangement if it produces a base erosion or profit shifting outcome.**

BEPS + Hybrid Mismatch Arrangements

- In order minimise the disruption to the rules of other jurisdictions this document limits its recommendations to adjusting the effect of the arrangements (e.g. deny the deduction for, or require the inclusion of, the payment) rather than the character of the entities and instruments under the arrangement.
- the primary response should be to deny the payer a deduction for payments made under a hybrid financial instrument with the jurisdiction of receipt applying a secondary or defensive rule that would require a deductible payment to be included in income in the event the payer was located in a jurisdiction that did not apply the primary rule.

BEPS + Hybrid Mismatch Arrangements

- **recommends that** jurisdictions that have a dividend exemption as part of their policy to alleviate double taxation should not apply the exemption to deductible payments as a matter of domestic law.

BEPS + TREATY ABUSE DISCUSSION DOCUMENT

- 1. Cases where a person tries to circumvent limitations provided by the treaty itself.

- 2. Cases where a person tries to circumvent the provisions of domestic tax law using treaty benefits.

BEPS + TREATY ABUSE DISCUSSION DOCUMENT

- **recommended that** the following three-pronged approach be used to address treaty shopping situations:
- include in tax treaties **a specific anti-abuse rule** based on the limitation-on-benefits provisions included in treaties concluded by the United States **(LoB Clause)**
- **recommended to** add to tax treaties a more general anti-abuse rule **(GAAR) -** where one of the main purposes of arrangements or transactions is to secure a benefit under a tax treaty and obtaining that benefit in these circumstances would be contrary to the object and purpose of the relevant provisions of the tax treaty

BEPS + TREATY ABUSE DISCUSSION DOCUMENT

- deal will some **specific forms of treaty shopping**, such as strategies aimed at using a permanent establishment located in a low-tax jurisdiction in order to take advantage of the exemption method applicable by a Contracting State.

- **tax policy considerations** that, in general, States should consider before deciding to enter into a tax treaty with another country, may also contribute to reducing treaty shopping opportunities

BEPS + TREATY ABUSE DISCUSSION DOCUMENT

- Entitlement to Benefits Provision (LoB)
- "Qualified Person":
- A company if –
- i) the principal class of its shares (and any disproportionate class of shares) is regularly traded on one or more recognized stock exchanges, and either:
- A) its principal class of shares is primarily traded on one or more recognized stock exchanges located in the Contracting State of which the company is a resident; or
- B) the company's primary place of management and control is in the Contracting State of which it is a resident; or

BEPS + TREATY ABUSE DISCUSSION DOCUMENT

- ii) at least 50 percent of the aggregate voting power and value of the shares (and at least 50 percent of any disproportionate class of shares) in the company is owned directly or indirectly by five or fewer companies entitled to benefits under subdivision i) of this subparagraph, provided that, in the case of indirect ownership, each intermediate owner is a resident of either Contracting State;

BEPS + TREATY ABUSE DISCUSSION DOCUMENT

- d) a person, other than an individual, that
- i) was constituted and is operated exclusively for religious, charitable, scientific, artistic, cultural, or educational purposes,
- ii) was constituted and is operated exclusively to administer or provide pension or other similar benefits, provided that more than 50 per cent of the beneficial interests in that person are owned by individuals resident in either Contracting State, or
- iii) was constituted and is operated to invest funds for the benefit of persons referred to in subdivision ii), provided that substantially all the income of that person is derived from investments made for the benefit of these persons.

BEPS + TREATY ABUSE DISCUSSION DOCUMENT

- **e) a person other than an individual, if:**
- **i) on at least half the days of the taxable year, persons who are residents of that Contracting State and that are entitled to the benefits of this Convention under subparagraph a), subparagraph b), subdivision i) of subparagraph c), or subparagraph d) of this paragraph own, directly or indirectly, shares or other beneficial interests representing at least 50 percent of the aggregate voting power and value (and at least 50 percent of any disproportionate class of shares) of the person, provided that, in the case of indirect ownership, each intermediate owner is a resident of that Contracting State, and**

BEPS + TREATY ABUSE DISCUSSION DOCUMENT

- **ii) less than 50 percent of the person's gross income for the taxable year, as determined in the person's Contracting State of residence, is paid or accrued, directly or indirectly, to persons who are not residents of either Contracting State entitled to the benefits of this Convention under subparagraph a), subparagraph b), subdivision i) of subparagraph c), or subparagraph d) of this paragraph in the form of payments that are deductible for purposes of the taxes covered by this Convention in the person's Contracting State of residence (but not including arm's length payments in the ordinary course of business for services or tangible property).**

BEPS + TREATY ABUSE DISCUSSION DOCUMENT

- **3. a) A resident of a Contracting State will be entitled to benefits of this Convention with respect to an item of income derived from the other Contracting State, regardless of whether the resident is a qualified person, if the resident is engaged in the active conduct of a trade or business in the first-mentioned Contracting State (other than the business of making or managing investments for the resident's own account, unless these activities are banking, insurance or securities activities carried on by a bank, insurance company or registered securities dealer respectively), and the income derived from the other Contracting State is derived in connection with, or is incidental to, that trade or business.**

BEPS + TREATY ABUSE DISCUSSION DOCUMENT

- **b) If a resident of a Contracting State derives an item of income from a trade or business activity conducted by that resident in the other Contracting State, or derives an item of income arising in the other Contracting State from an associated enterprise, the conditions described in subparagraph a) shall be considered to be satisfied with respect to such item only if the trade or business activity carried on by the resident in the first-mentioned Contracting State is substantial in relation to the trade or business activity**

BEPS + TREATY ABUSE DISCUSSION DOCUMENT

- 4.
- If a resident of a Contracting State is **neither a qualified person** pursuant to the provisions of paragraph 2 **nor entitled to benefits with respect to an item of income under paragraph 3 of this Article,** the competent authority of the other Contracting State shall nevertheless **treat that resident as being entitled to the benefits of this Convention**, or benefits with respect to a specific item of income, **if such competent authority determines that the establishment, acquisition or maintenance of such person and the conduct of its operations did not have as one of its principal purposes the obtaining of benefits under this Convention.**

BEPS + TREATY ABUSE DISCUSSION DOCUMENT

- 5.
- d) **a company's "primary place of management and control"** will be in the Contracting State of which it is a resident **only if** executive officers and senior management employees exercise day-to-day responsibility for more of the strategic, financial and operational policy decision making for the company (including its direct and indirect subsidiaries) **in that Contracting State than in any other state** and the staff of such persons conduct more of the day-to-day activities necessary for preparing and making those decisions in that Contracting State than in any other state.

BEPS + TREATY ABUSE DISCUSSION DOCUMENT

- 6.
- Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income if it is reasonable to conclude, having regard to all relevant facts and circumstances, that **obtaining that benefit was one of the main purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention. (switch in the burden of proof to the taxpayer)**

BEPS + TREATY ABUSE DISCUSSION DOCUMENT

- **Para 6 =>**
- is intended to ensure that tax conventions apply in accordance with the purpose for which they were entered into, i.e. to provide benefits in respect of bona fide exchanges of goods and services, and movements of capital and persons as opposed to arrangements whose main objective is to secure a more favourable tax treatment.

BEPS + TREATY ABUSE DISCUSSION DOCUMENT

- The reference to **“one of the main purposes”** in paragraph 1 means that obtaining the benefit under a tax convention **need not be the sole or dominant purpose of a particular arrangement or transaction.**
- It is **sufficient that at least one of the main purposes was to obtain the benefit.**
- A purpose will not be a main purpose when it is reasonable to conclude, having regard to all relevant facts and circumstances, that **obtaining the benefit was not a main consideration** and would not have justified entering into any arrangement or transaction that has, alone or together with other transactions, resulted in the benefit.


Anti-abuse Rules
No/Low Taxation
Artificial BEPS
BEPS
Tax Treaty Abuse
Tax Mitigation
Aggressive Tax Planning

BEPS: EU LAW ISSUES

HALIFAX C-255/02

Taxpayers may choose to structure their business so as to limit their tax liability

(ECJ in para. 73)

RBS Deutschland C-277/09

Taxable persons are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purposes of limiting their tax burdens.

(para. 53)

Tanoarch C-504/10

- **preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the [VAT] directive (para 50)**
- **But**
- **The effect of the principle prohibiting abuse of rights is therefore to prohibit wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage (para 51)**

Cantor Fitzgerald C-108/99

The principle of the neutrality of VAT does not mean that a taxable person with a choice between two transactions may choose one of them and avail himself of the effects of the other.

para. 33.

Cadbury Schweppes C-196/04

It is true that nationals of a Member State cannot attempt, under cover of the rights created by the Treaty, improperly to circumvent their national legislation. They must not improperly or fraudulently take advantage of provisions of Community law

para. 35

Barbier C-364/01

A Community national cannot be deprived of the right to rely on the provisions of the Treaty on the ground that he is profiting from tax advantages which are legally provided by the rules in force in a Member State other than his State of residence.

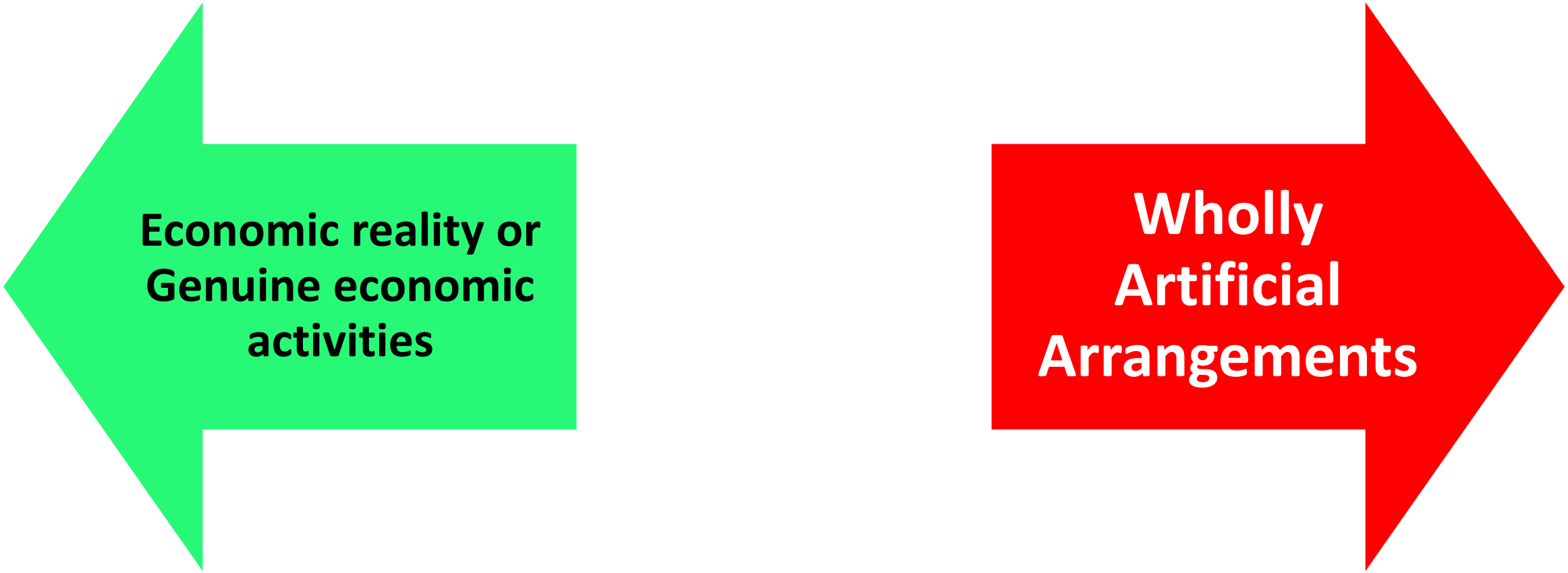
para. 71

Cadbury Schweppes

The fact that the company was established in a Member State for the purpose of benefiting from more favourable legislation does not in itself suffice to constitute abuse of that freedom

para. 37

The Tax Planning Spectrum



Key message: The ECJ accepts certain types of tax planning

Anti-abuse Rules

CFC RULES (*Cadbury Schweppes*)

THIN CAP RULES (*Thin Cap GLO*)

TRANSFER PRICING RULES (*SGI*)

In an EU environment – these anti-abuse rules constitute restrictions on the freedoms which require justification and must meet the principle of proportionality

Cadbury Schweppes

The separate tax treatment under the legislation on CFCs and the resulting disadvantage for resident companies which have a subsidiary subject, in another Member State, to a lower level of taxation are such as to hinder the exercise of freedom of establishment

Para 46

Thin Cap GLO C-524/04

The national provisions relating to thin capitalisation give rise to a difference in treatment between resident borrowing companies according to whether or not the related lending company is established in the United Kingdom.

para. 40

SGI C-311/08

It follows that the tax position of a company resident in Belgium which, like SGI, grants unusual or gratuitous advantages to companies with which it has a relationship of interdependence that are established in other Member States is less favourable than it would be if it granted such advantages to resident companies with which it has such a relationship.

para. 43

Cadbury Schweppes

the mere fact that a resident company establishes a … subsidiary, in another Member State cannot set up a general presumption of tax evasion and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty

para. 50

Cadbury Schweppes

a national measure restricting freedom of establishment may be justified where it specifically relates to wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned

para. 51

Cadbury Schweppes

In order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality

para. 55

Cadbury Schweppes

The type of conduct described in the preceding paragraph is such as to undermine the right of the Member States to exercise their tax jurisdiction in relation to the activities carried out in their territory and thus to jeopardise a balanced allocation between Member States of the power to impose taxes

para. 56

Cadbury Schweppes

the fact … that the intention to obtain tax relief prompted the incorporation of the CFC and the conclusion of the transactions between the latter and the resident company does not suffice to conclude that there is a wholly artificial arrangement intended solely to escape that tax

para. 63

Cadbury Schweppes

in order for the legislation on CFCs to comply with Community law, the taxation provided for by that legislation must be excluded where, despite the existence of tax motives, the incorporation of a CFC reflects economic reality…

Para 65

Cadbury Schweppes

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.

para. 67

Cadbury Schweppes

If checking those factors leads to the finding that the CFC is a fictitious establishment not carrying out any genuine economic activity in the territory of the host Member State, the creation of that CFC must be regarded as having the characteristics of a wholly artificial arrangement. That could be so in particular in the case of a 'letterbox' or 'front' subsidiary

***p*ara. 68**

Cadbury Schweppes

The resident company, which is best placed for that purpose, must be given an opportunity to produce evidence that the CFC is actually established and that its activities are genuine.

para 70

Thin Cap GLO C-524/04

a national measure restricting freedom of establishment may be justified where it specifically targets wholly artificial arrangements designed to circumvent the legislation of the Member State concerned

para. 72

Thin Cap GLO C-524/04

The mere fact that a resident company is granted a loan by a related company which is established in another Member State cannot be the basis of a general presumption of abusive practices and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty

para. 73

Thin Cap GLO C-524/04

In order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory

para. 74

Thin Cap GLO C-524/04

By providing that that interest is to be treated as a distribution, such legislation is able to prevent practices the sole purpose of which is to avoid the tax that would normally be payable on profits generated by activities undertaken in the national territory.

Para 77

Thin Cap GLO C-524/04

that requirement is not met by national legislation which does not have the specific purpose of preventing wholly artificial arrangements designed to circumvent that legislation, but applies generally to any situation in which the parent company has its seat, for whatever reason, in another Member State.

para. 79

Thin Cap GLO C-524/04

The fact that a resident co has been granted a loan by a non-resident co on terms which do not correspond to those …[at] arm's length constitutes, for the MS in which the borrowing co is resident, an objective element which can be independently verified in order to determine whether the transaction in question represents, in whole or in part, a purely artificial arrangement, the essential purpose of which is to circumvent the tax legislation of that MS.

para. 81

Thin Cap GLO C-524/04

National legislation which provides for a consideration of objective and verifiable elements in order to determine whether a transaction represents a purely artificial arrangement, entered into for tax reasons alone, is to be considered as not going beyond what is necessary to prevent abusive practices where, in the first place, on each occasion on which the existence of such an arrangement cannot be ruled out, the taxpayer is given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that arrangement.

para. 82

Thin Cap GLO C-524/04

it is necessary, in the second place, that, where the consideration of those elements leads to the conclusion that the transaction in question represents a purely artificial arrangement without any underlying commercial justification, the re-characterisation of interest paid as a distribution is limited to the proportion of that interest which exceeds what would have been agreed had the relationship between the parties or between those parties and a third party been one at arm's length.

Para. 83

Thin Cap GLO C-524/04

it is for the national court to determine, should it be established that the claimants in the main proceedings benefited from such a regime, whether that regime gave them an opportunity, if their transactions did not satisfy the conditions laid down under the DTC in order to assess their compatibility with the arm's-length criterion, to provide evidence as to any commercial justification there may have been for the transactions, without being subject to any undue administrative constraints.

para. 86.

SGI C-311/08

It follows that the tax position of a company resident in Belgium which, like SGI, grants unusual or gratuitous advantages to companies with which it has a relationship of interdependence that are established in other Member States is less favourable than it would be if it granted such advantages to resident companies with which it has such a relationship.

para. 43

SGI C-311/08

as regards the balanced allocation between Member States of the power to tax, it should be recalled that such a justification may be accepted, in particular, where the system in question is designed to prevent conduct capable of jeopardising the right of a Member State to exercise its tax jurisdiction in relation to activities carried out in its territory

para. 60

SGI C-311/08

as regards the prevention of tax avoidance, it should be recalled that a national measure restricting freedom of establishment may be justified where it specifically targets wholly artificial arrangements designed to circumvent the legislation of the Member State concerned

***SGI* para. 65**

SGI C-311/08

national legislation which is not specifically designed to exclude from the tax advantage it confers such purely artificial arrangements – devoid of economic reality, created with the aim of escaping the tax normally due on the profits generated by activities carried out on national territory – may nevertheless be regarded as justified by the objective of preventing tax avoidance, taken together with that of preserving the balanced allocation of the power to impose taxes between the Member States

para. 66

SGI C-311/08

National legislation which provides for a consideration of objective and verifiable elements in order to determine whether a transaction represents an artificial arrangement, entered into for tax reasons, is to be regarded as not going beyond what is necessary to attain the objectives relating to the need to maintain the balanced allocation of the power to tax between the Member States and to prevent tax avoidance where, first, on each occasion on which there is a suspicion that a transaction goes beyond what the companies concerned would have agreed under fully competitive conditions, the taxpayer is given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that transaction

para. 71

SGI C-311/08

Second, where the consideration of such elements leads to the conclusion that the transaction in question goes beyond what the companies concerned would have agreed under fully competitive conditions, the corrective tax measure must be confined to the part which exceeds what would have been agreed if the companies did not have a relationship of interdependence.

para 72

Itelcar C-282/12

- **that situation involves less favourable tax treatment for a resident company which contracts overall debts in excess of a certain level with a company established in a non-member country than for a resident company which contracts such debts with a company residing in the national territory or in another Member State.**
- **Para. 30**

Itelcar C-282/12

- **where rules are predicated on an assessment of objective and verifiable elements for the purposes of determining whether a transaction represents a wholly artificial arrangement entered into for tax reasons alone, they may be regarded as not going beyond what is necessary to prevent tax evasion and avoidance, if, on each occasion on which the existence of such an arrangement cannot be ruled out, those rules give the taxpayer an opportunity, without subjecting him to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that transaction**
- **Para 37**

Itelcar C-282/12

- the rules at issue in the main proceedings also affect conduct the economic reality of which cannot be disputed. In presuming that, in such circumstances, the basis of assessment for corporation tax payable by the resident borrowing company is being eroded, those rules go beyond what is necessary to attain their objective.
- Para 42

Newey C-653/11

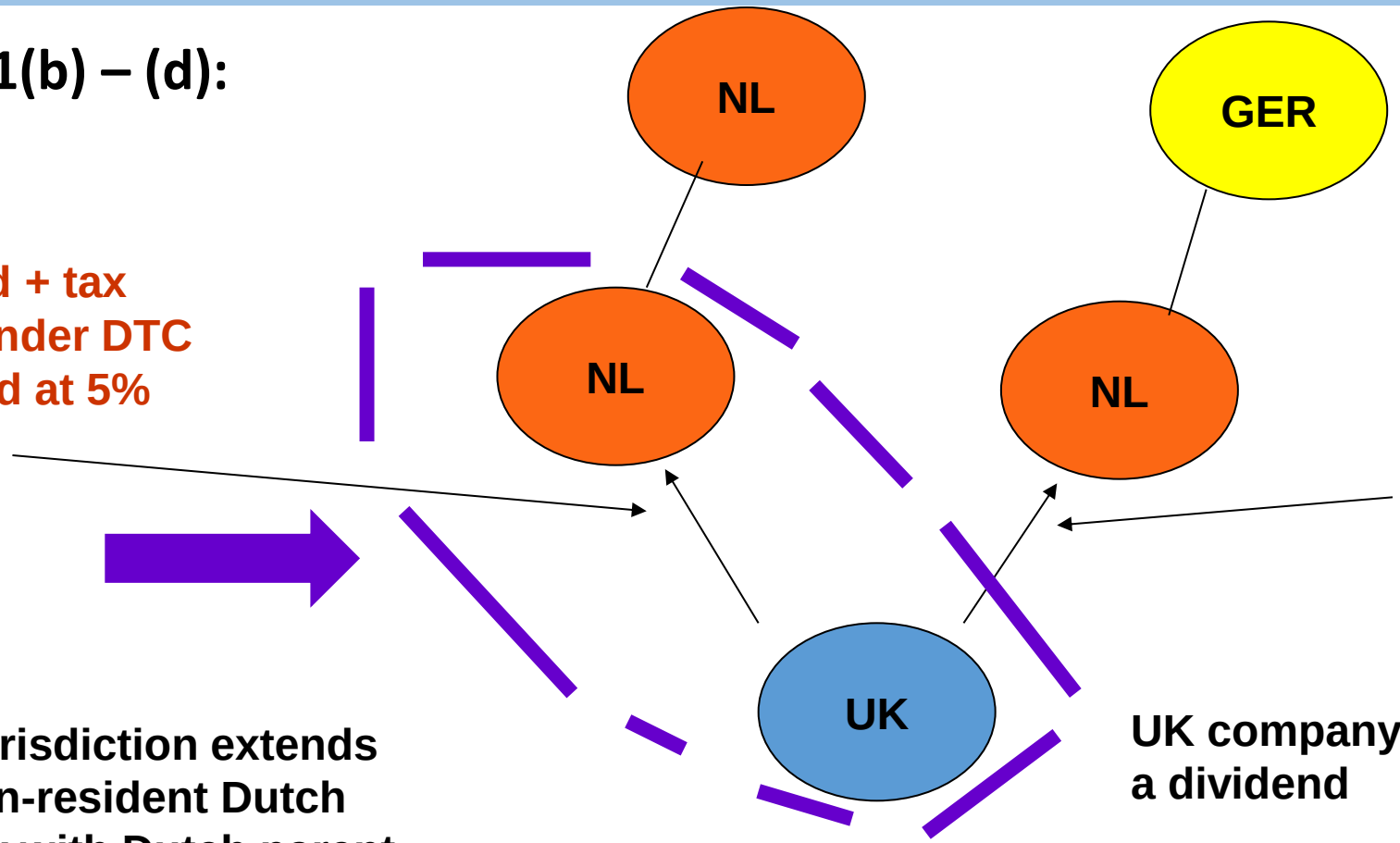
Re-characterising transactions which are abusive

It is for the referring court, by means of an analysis of all the circumstances of the dispute in the main proceedings, to ascertain whether the contractual terms do not genuinely reflect economic reality

para. 49

ACT IV GLO LoB Issue

- **Q1(b) – (d):**



Dividend + tax Credit under DTC but taxed at 5%

Dividend exempted under DTC – no tax credit + no economic DT + no extension of UK tax system

UK tax jurisdiction extends to the non-resident Dutch Company with Dutch parent

UK company paying a dividend

ACT IV GLO

- **65 As regards the application of procedures intended to prevent or mitigate the imposition of a series of charges to tax or economic double taxation, the position of a Member State in which both the companies making the distribution and the ultimate shareholders are resident is thus not comparable to that of a Member State in which a company is resident which pays dividends to a non-resident company, which pays them, in turn, to its ultimate shareholders, in that the second State acts, in principle, only as the State in which the distributed profits are derived.**

ACT IV GLO

- **70 If the Member State of residence of the company making distributable profits decides to exercise its taxing powers not only in relation to profits made in that State but also in relation to income arising in that State and paid to non-resident companies receiving dividends, it is solely because of the exercise by that State of its taxing powers that, irrespective of any taxation in another Member State, a risk of a series of charges to tax may arise.**
- **….=> the State in which the company making the distribution is resident is obliged to ensure that, under the procedures laid down by its national law in order to prevent or mitigate a series of liabilities to tax, non-resident shareholder companies are subject to the same treatment as resident shareholder companies.**

ACT IV GLO (LoB issue)

- **84 the scope of a bilateral tax convention is limited to the natural or legal persons referred to in it.**
- **85 the DTCs concluded by the United Kingdom provides for an allocation of taxing powers between that Member State and the other contracting State.**
- **85 While some of those DTCs do not provide for dividends received by a non-resident company from a company resident in the United Kingdom to be subject to tax in that Member State, other DTCs do provide for such a liability to tax. It is in the latter case that the DTCs provide, each according to its separate conditions, for the grant of a tax credit to a non-resident company to which dividends are paid.**

ACT IV GLO (LoB Issue)

- **87 The situations in which the United Kingdom grants a tax credit to companies resident in the other contracting State which receive dividends from a United Kingdom-resident company are those in which the United Kingdom also retains the right to tax the companies on those dividends.**

ACT IV GLO (LoB issue)

- **88 Thus, the grant of a tax credit to a non-resident company receiving dividends from a resident company, as provided for under a number of DTCs concluded by the United Kingdom, cannot be regarded as a benefit separable from the remainder of those DTCs, but is an integral part of them and contributes to their overall balance**

ACT IV GLO (LoB issue)

- **89 The same applies to the provisions of the DTCs which make the grant of such a tax credit subject to the condition that the non-resident company is not owned, directly or indirectly, by a company resident in a Member State or a non-member country with which the United Kingdom has concluded a DTC which does not provide for such a tax credit.**

ACT IV GLO (LoB issue)

- **90 Even where such provisions extend to the situation of a company which is not resident in one of the contracting Member States, they apply only to persons resident in one of those Member States and, by contributing to the overall balance of the DTCs in question, are an integral part of them.**

ACT IV GLO (LoB issue)

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

ACT IV GLO (LoB issue)

- **92 It follows that the Treaty provisions on freedom of establishment do not preclude a situation in which the entitlement to a tax credit laid down in a DTC concluded by a Member State with another Member State for companies resident in the second State which receive dividends from a company resident in the first State does not extend to companies resident in a third Member State with which the first State has concluded a DTC which does not provide for such an entitlement.**

Commission v Germany (Open Skies)

- **150. In this case, the clause on the ownership and control of airlines does, amongst other things, permit the United States of America to withdraw, suspend or limit the operating authorisations or technical permissions of an airline designated by the Federal Republic of Germany but of which a substantial part of the ownership and effective control is not vested in that Member State or in German nationals.**

Commission v German (Open Skies)

- **151. There can be no doubt that airlines established in the Federal Republic of Germany of which a substantial part of the ownership and effective control is vested either in a Member State other than the Federal Republic of Germany or in nationals of such a Member State (Community airlines) are capable of being affected by that clause.**

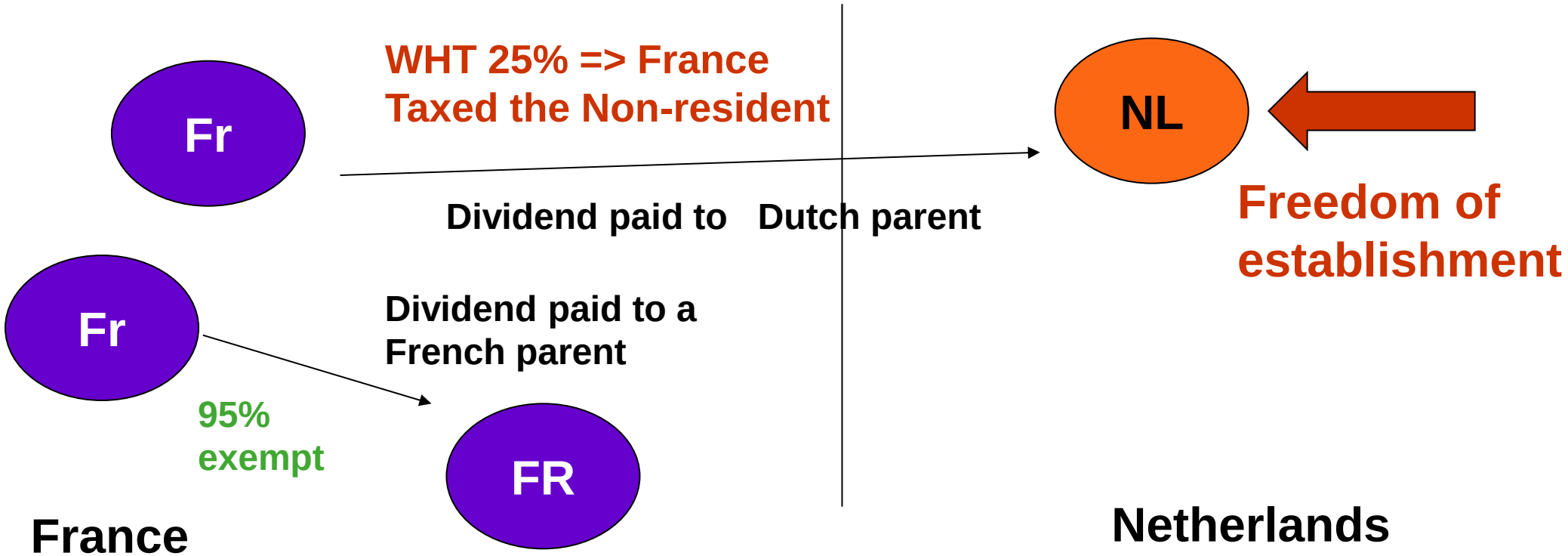
Commission v Germany (Open Skies)

- **153. It follows that Community airlines may always be excluded from the benefit of the air transport agreement between the Federal Republic of Germany and the United States of America, while that benefit is assured to German airlines. Consequently, Community airlines suffer discrimination which prevents them from benefiting from the treatment which the host Member State, namely the Federal Republic of Germany, accords to its own nationals.**

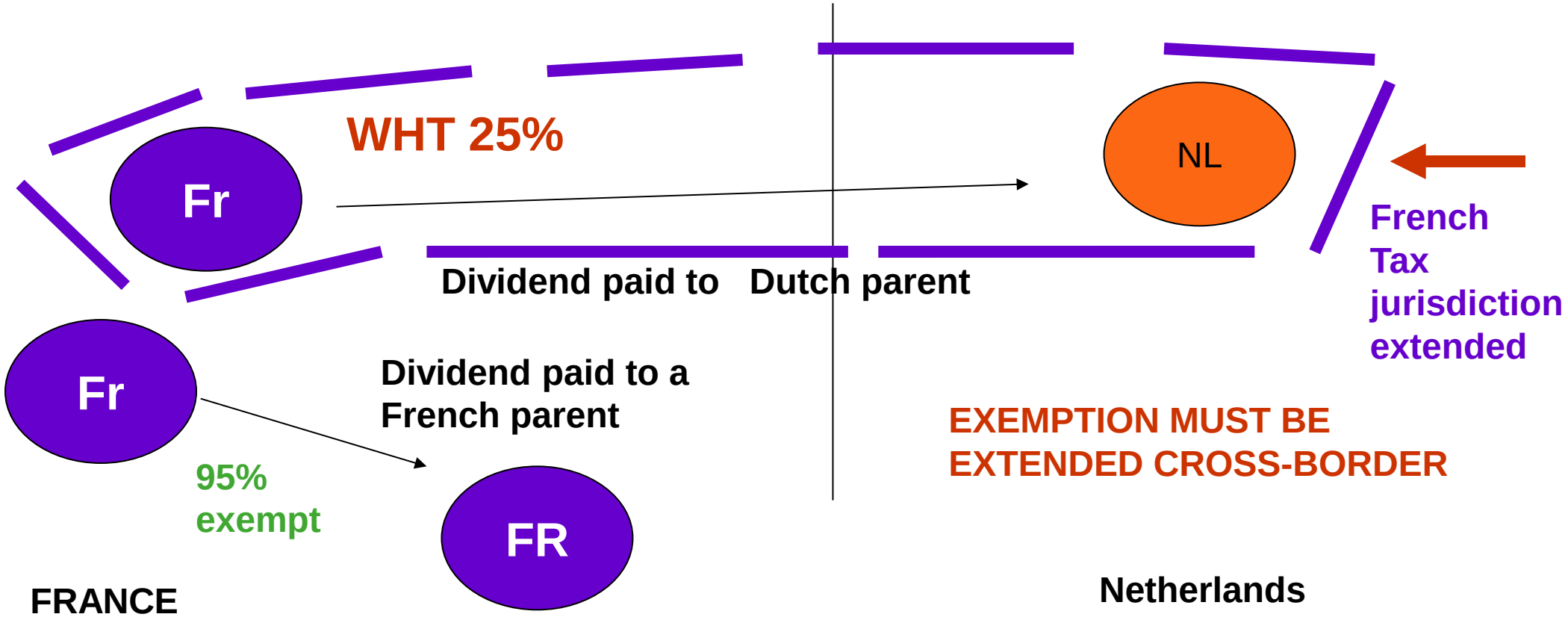
Commission v Germany (Open Skies)

- **154. Contrary to what the Federal Republic of Germany maintains, the direct source of that discrimination is not the possible conduct of the United States of America but the clause on the ownership and control of airlines, which specifically acknowledges the right of the United States of America to act in that way.**

Denkavit


Fr
WHT 25% => France
Taxed the Non-resident
NL
Freedom of establishment
Dividend paid to Dutch parent
Fr
Dividend paid to a French parent
95% exempt
FR
France
Netherlands

Denkavit


WHT 25%
Fr
NL
Dividend paid to Dutch parent
French Tax jurisdiction extended
Fr
Dividend paid to a French parent
EXEMPTION MUST BE EXTENDED CROSS-BORDER
95% exempt
FR
FRANCE
Netherlands

THANKS / MERCI