



Aalto-yliopisto
Kauppakorkeakoulu

32E29000 European and international tax law

Negative integration: case law of the EU Court of Justice

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EU primary tax law

- Negative integration through EU primary law
 - Fundamental freedoms of the TFEU (Treaty on the Functioning of the EU)
 - State aid rules of the TFEU (not further discussed during the course)
- Actors: CJEU (EU Court of Justice), national courts & EU Commission

The goals of the EU: Single/Common Market

- General non-discrimination principle on grounds of nationality (Art. 18 TFEU)
 - Applied in cases where no other specific fundamental freedom is applicable
- Fundamental freedoms
- Free movement of goods (Art. 28 TFEU)
 - Establishment of a customs union, elimination of all quantitative barriers
 - Creation of an area without internal borders, in which goods move as freely as on a national market

The goals of the EU: Single/Common Market

- Free movement of persons (Art 21 TFEU)
 - Citizens' freedom to move and reside within the EU
- Free movement of workers (Art. 45 TFEU)
 - Workers freedom to work in other Member States
- **Freedom of establishment (Art. 49 TFEU)**
 - Right of individuals to take up and pursue activities as self-employed person in other Member States
 - Right of companies to set up branches or subsidiaries in other Member States

The goals of the EU: Single/Common Market

- Freedom to provide services (Art. 56 TFEU)
 - Freedom to exercise professions in and provide cross-border services into other Member States
- **Free movement of capital (Art. 63/65 TFEU)**
 - Movements of capital between Member States...
 - and, subject to certain restrictions, between Member States and third countries (i.e. non-Member States)...
 - may not be subject to restrictions

Main legal principles of fundamental freedoms

- **Principle of direct effect:** European citizens, i.e. individuals and companies may rely directly on rules of EU law before their national courts (Van Gend & Loos C-26/62)
- **Principle of direct applicability:** If a national rule violates EU law, a Member State is prohibited to apply it

Main legal principles of fundamental freedoms

- **Principle of supremacy:** EU law overrides conflicting national law. The application of EU law must be ensured by national courts and administration

Sovereignty in direct taxation

- Member States have sovereignty in direct taxation but only conditional
 - Conditional to positive integration (i.e. tax directives)
 - Conditional to the respecting the TFEU (i.e. non-discrimination and fundamental freedoms)

Sovereignty in direct taxation

- Egon Schempp C-403/03, para 19 (and cited case law)
 - While in the present state of EU law direct taxation falls within the competence of the Member States....
 - they must none the less exercise that competence in accordance with EU law ...
 - protecting the right of every citizen of the Union to move and reside freely within the territory of the Member States, and therefore avoid any overt or covert discrimination on basis of nationality

Sovereignty in direct taxation

- D C-376/03, para 52 (and cited case law):
 - Member States are at liberty in the framework of double tax conventions (DTC) to determine the connecting factors for the purposes of allocating powers of taxation
 - The Court has also accepted that differential treatment that results from that allocation cannot constitute discrimination contrary to the fundamental freedoms

Court of Justice of the European Union (CJEU)

- Supreme guardian of legality within the EU
- Ensures that the law is observed in the interpretation and application of EU law (rule of law)
- 11 advocate-generals (AG) submit “opinions”
 - Not binding upon the CJEU
- Preliminary rulings submitted by national courts concern interpretation of EU law

Court of Justice of the European Union (CJEU)

- Highest national court shall bring a matter before the CJEU, if doubts arise concerning the interpretation of EU law
 - To ensure the effective and uniform application of EU legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the Court of Justice and ask it to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law.
 - It is thus through references for preliminary rulings that any European citizen can seek clarification of the EU rules which affect him

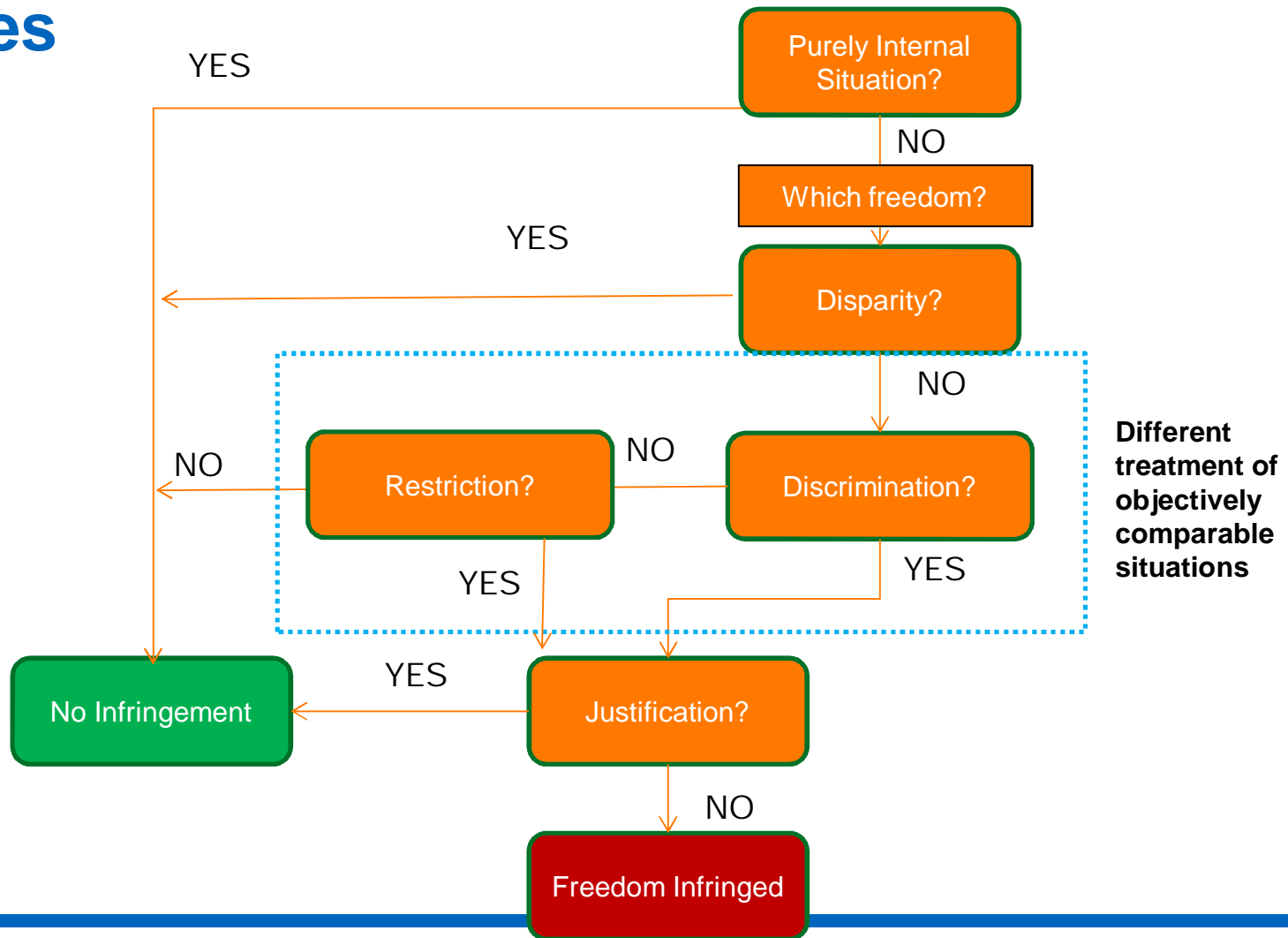
Court of Justice of the European Union (CJEU)

- **Acte clair** = correct application of EU law is obvious
→ no obligation to refer to CJEU
- **Acte éclairé** = CJEU has already interpreted law applying to the case
→ no obligation to refer to CJEU
- Highest national court shall refer only unclear cases to the CJEU
- Finland: highest national court = Supreme Administrative Court (korkein hallinto-oikeus, KHO)

European Commission

- The Commission's role
 - shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of EU law under the control of the Court of Justice of the European Union
- If the Commission suspects a violation of EU law, the Commission can launch formal infringement procedure
 - For secondary law: Non- or incorrect implementation of a directive
 - For primary law: Breach of fundamental freedoms of TFEU

CJEU's general approach to direct taxation cases



Access to fundamental freedoms

- A link with another Member State needed = cross-border situation
 - Economic activity in/to another Member State
 - In a purely internal (e.g. domestic) situation) there is no access to fundamental freedoms
- For multinational corporations (MNC) most important freedoms are
 - Freedom of establishment
 - Free movement of capital
- Different freedoms have different scope, but the CJEU follows in practice the same approach for all freedoms

Discrimination & restriction

- Discrimination = different treatment of objectively comparable situations
 - E.g. the situations of a non-resident and resident company are often regarded as comparable
- Restriction = any other unequal treatment of domestic and cross-border situation
- Discrimination and restriction is prohibited under fundamental freedoms
- Tax rule amounts to discrimination or restriction if it makes the exercise of a fundamental freedom (e.g. having a foreign subsidiary or a PE or making an investment abroad) less attractive

Discrimination/restriction vs. disparity

- Disparity = differences in laws of Member States
 - E.g. Corporate tax rate in Finland is 20% and in France 33.3%
- Fundamental freedoms do not guarantee that cross-border activity were neutral as regards to taxation
 - A Finnish resident company establishes a PE in France and income of the PE is subject to 33.3% corporate tax in France. The corporate tax rate in Finland is 20%. Taxation of the PE in France at 33.3% is not regarded as discrimination/restriction but as disparity
- Disparities in the tax legislations of the Member States may only be eliminated by means of directives

Rule of reason: Justification grounds

- Discrimination or restriction may be accepted if there is justification
- Justification = A policy aim of public interest that is able to outweigh (“override”) the private right to free movement
 - CJEU: “general grounds of public interest/mandatory requirement in the public interest”

Justification grounds

- Accepted justifications
 - effectiveness of tax supervision
 - coherency of tax system
 - balanced allocation of taxing rights
 - countermeasure against tax avoidance and evasion
 - no double advantages
- Unaccepted justifications
 - loss of tax revenue
 - administrative reasons

Justification grounds

- Justification should also be:
 - Necessary and suitable to achieve the aims of the public interest (“necessity test”)
 - Proportional to those aims (“proportionality test”)
 - Restriction should not go any further than necessary to attain the aims

Court case workshop 29.1.2019 (13.15-15.30)

- The idea of workshop is to learn about the real life impacts that the case law of the Court of Justice of the European Union has on the tax laws of the Member States by analyzing some of the landmark case law
- Please work individually or form a group (2-4 students) and book a court case (list of available cases is attached below) with the teacher by e-mail (tomi.viitala@aalto.fi)
- The workshop may be attended even if you don't present a court case

Court case workshop 29.1.2019 (13.15-15.30)

- The presentation should include
 - a) facts of the case
 - b) decision and argumentation of the court
 - Which freedom, comparability of situations, discrimination or restriction, accepted/rejected justification grounds
 - c) brief discussion of implications from the perspective of taxpayers (e.g. opportunities and risks)
- Please use power point slides (5-10 slides) for the presentation and submit the presentation on MyCourses – Assignments – Court Cases before 29 January 2019
- The length of the presentation should be maximum of 15 min

List of cases

- **Group taxation**

- Marks & Spencer, C-446/03 (UK group relief system, so-called "final losses")
- Oy AA, C-231/05 (Finnish group contribution rules)
- A C-123/11 and KHO 2013:155 (loss relief in cross-border merger into Finland)

- **Permanent establishments (PE)**

- CLT-UFA, C-253/03 (applicable tax rate)
- Lidl Belgium, C-414/06 (deduction of losses)
- Philips Electronics, C-18/11 (access to group taxation)
- Bevola, C-650/16 (deduction of losses)

List of cases

- **Anti-tax avoidance measures**
 - Cadbury Schweppes, C-196/04 (UK CFC rules)
 - Thin Cap Group Litigation, C524/04 (UK anti-avoidance rules)
 - Holcim France and Enka, C-6/16 (French general Anti-tax avoidance rule and Parent-Subsidiary Directive)

List of cases

- **Taxation of dividends**
 - Denkavit Internationaal, C-170/05 (cross-border dividends generally)
 - Aberdeen Property, C-303/07 (Finnish dividend taxation/ EU investment funds)
 - KHO 2015:9 (Finnish dividend taxation/ US investment funds, case in Finnish only)