



International Association of Tax Judges

## 4. THE IMPACT OF SOFT LAW ON EU TAX LAW

Mr. E. FAASE

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### 4-A: EU SOFT LAW

- Instruments
- ECJ C-322/88, Grimaldi
- ECJ C-226/11, Expedia Inc.
- ECJ C-221/08, Commission v Ireland

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## Instruments

- Recommendations and Opinions of EU institutions (art. 288 TFEU)
- Guidelines and Notices issued by the Commission
  - Not legally binding, may have 'some legal effect'
- Codes of Conduct of the Council: gentlemen's agreements
  - May politically be 'de facto' binding
- ECJ 2016/C 439/01 – Recommendations on the initiation of preliminary ruling proceedings

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## ECJ C-322/88, Grimaldi (on occupational diseases):

*"National courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions."*

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### ECJ C-226/11, Expedia Inc. (on competition law):

*“The competition authority of a Member State may take into account the thresholds established in paragraph 7 of the de minimis notice but is not required to do so. Such thresholds are no more than factors among others that may enable that authority to determine whether or not a restriction is appreciable by reference to the actual circumstances of the agreement.”*

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### ECJ C-221/08, Commission v Ireland (on excise duties):

*“Equally, no specific conclusions concerning the recourse to systems of minimum prices can be drawn from Recommendation 2003/54, which, furthermore, is not binding. The section to which Ireland refers merely expresses the idea that high prices for tobacco products discourage tobacco consumption.”*

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## 4-B: OECD SOFT LAW

- Instruments
- Primary EU law (the TFEU and the Community freedoms)
- Secondary EU law (Directives and Regulations)
- Ambulatory effect OECD soft law?

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## Instruments

- OECD Model Tax Conventions
- Commentaries on the OECD Model Tax Conventions
- OECD Guidelines for Transfer Pricing
- OECD Code of Conduct for Business Taxation

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## Primary EU law (Community freedoms)

### Member States:

- exclusive competence in (international) direct taxation
- exercise this competence consistently with EU law

Compliance with OECD rules can provide sufficient justification for unequal treatment under national law?

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## Primary EU law (Community freedoms)

### ECJ:

- no interpretation of national law (bilateral treaties / OECD rules)
- interpretation of EU law that is relevant to national court
  - ✓ presentation of OECD rules by referring national court
  - ✓ appeal to OECD practices by Member State

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## Primary EU law (Community freedoms)

- OECD rules may provide justification for unequal treatment under national law
- ECJ only applies OECD rules / Commentaries as part of national law
  - ✓ when interpreting treaty provisions and national court expressly refers to Commentaries, or
  - ✓ where Member States refer to OECD rules with same objective

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## Primary EU law (Community freedoms)

### Case law:

- Schumacker (C-279/93)
- Wielockx (C-80/94), Gerritse (C-234/01), Heirs Van Hilten-van der Heijden (C-513/03), N (C-470/04)
- Bouanich (C-265/04), Belgium and Forum 187 (C-182/03 and C-217/03), Lidl Belgium (C-414/06)

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## Primary EU law (Community freedoms)

### Case law:

- Lankhorst-Hohorst (C-324/00)
- Test Claimants in the Thin Cap Group Litigation (C-524/04)

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## Secondary EU law (Directives)

- OECD rules in principle not used for interpretation of Directives

ECJ C-138/07, Cobelfret (on the meaning of article 4 of the Parent-Subsidiary Directive):

*“In the absence of an express indication to the contrary, a Community act such as Directive 90/435 must be interpreted in the context of the sources of Community law and of the Community legal order itself.”*

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## Secondary EU law (Directives)

- One exception: where Directives are expressly inspired by OECD concepts

ECJ C-682/15, *Berlioz Investment Fund* (on administrative cooperation in the field of taxation):

Directive 2011/16/EU is inspired by the concept of “foreseeable relevance” of art. 26 OECD Model, because of “*the similarity between the concepts used and given the reference to OECD conventions in the explanatory memorandum [to the Proposal for the Directive].*”

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## Secondary EU law (Directives)

- where Directives are expressly inspired by OECD concepts
  - no legal obligation to follow OECD definitions
  - tool of interpretation only

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## Secondary EU law (Directives)

- where Directives are expressly inspired by OECD concepts

Landmark cases of 26 February 2019:

- ECJ C-115/16, C-118/16, C-119/16 and C-299/16, N Luxembourg 1 and others (on the Interest and Royalty Directive)
- ECJ C-116/16, T Danmark, and C-117/16, Y Denmark (on the Parent-Subsidiary Directive)

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## Secondary EU law (Directives)

In the interest cases:

- Member States have obligation to combat abuse of EU law
- one test to establish abuse of law is beneficial ownership test
- IRD draws upon art. 11 OECD 1996 Model and pursues same objective (avoiding international double taxation)
- when interpreting IRD's provisions, concept of 'beneficial owner' in bilateral treaties, successive amendments of OECD Model and of Commentaries are relevant

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## Secondary EU law (Directives)

In the dividend cases:

- similar reasoning
- even where PSD does not require that parent is beneficial owner
- requirement introduced presumably as element of anti-abuse test, since no basis in legislative history for separate test

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## Ambulatory effect OECD soft law?

Probably not:

- February 26 rulings - ECJ refers only to 1977 and 2003 versions of Commentary
- ECJ C-265/04, Bouanich - interpretation "*in the light of the OECD's commentaries on its applicable model convention*"

But:

- ECJ C-470/04, N - interpretation based on 2005 OECD version, while much earlier applicable treaty (1980) and tax year in question (1997)

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