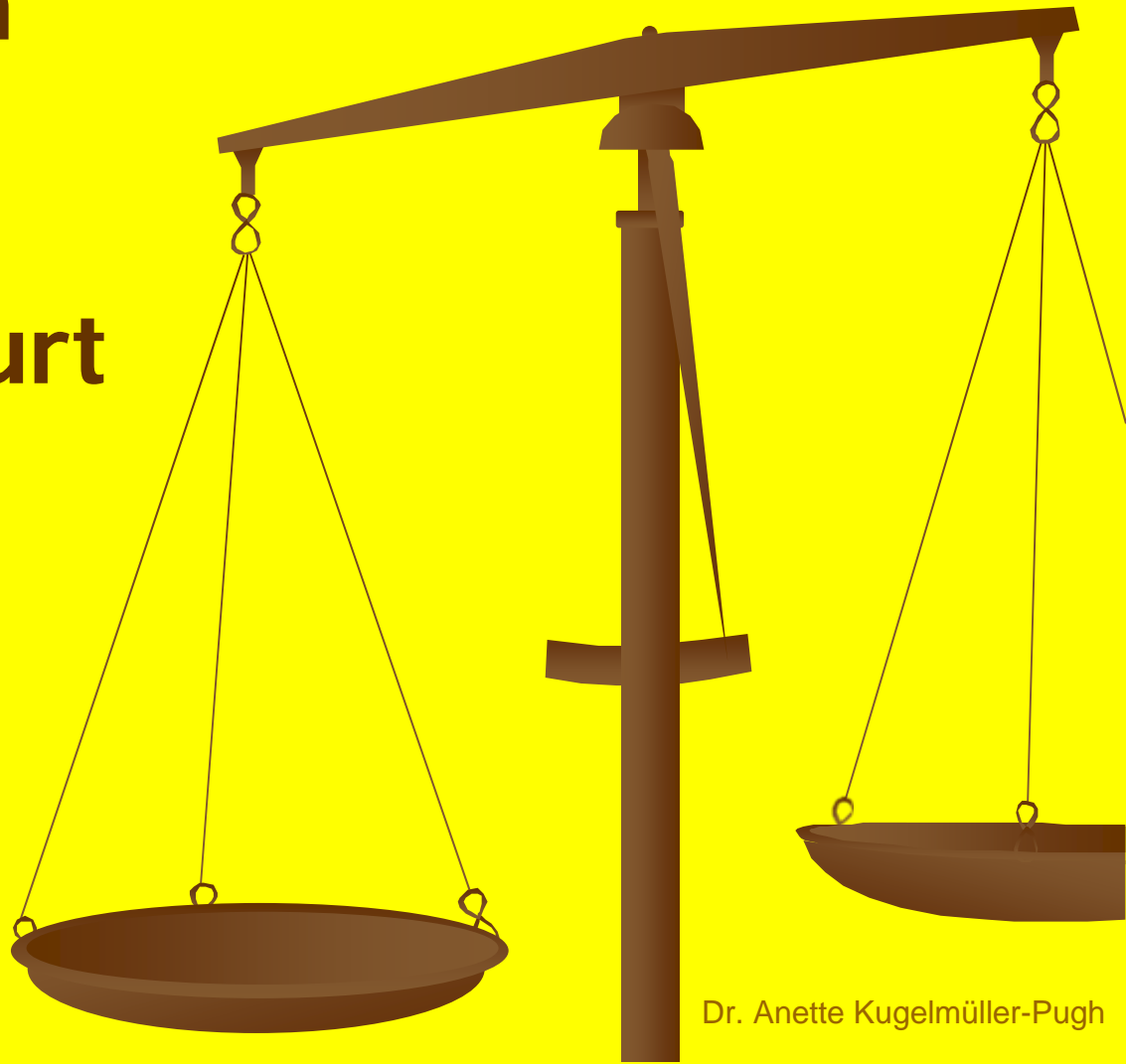


**Anti-Abuse
Jurisdiction
of the
European Court
of Justice
(ECJ)**





Overview

- **Introduction**
- **General Community Law Principle on Anti-Abuse**
- **Anti-Abuse Concept for Tax Law**
 - Anti-Abuse Principle for VAT
 - Anti-Abuse Principles in EU Secondary Law (non VAT)
 - Anti-Abuse Principles reg. Exercise of EU Primary Law
- **Conclusions**



General Community Law Principle on Anti-Abuse

➤ **3 M Italia Spa, C- 714/10, judgment of 29/03/2012, rec. 32:**

*„Finally, in any event, it is clear that **no** general principle exists in European Union law which might entail an obligation of the Member States to combat abusive practices in the field of direct taxation and which would preclude the application of a provision such as that at issue in the main proceedings where the taxable transaction proceeds from such practices and **European Union law is not involved.**“*



General Community Law Principle on Anti-Abuse (cont.)

- Centros, C-212/97; Halifax, C-255/02; Agip Petroli, C-456/04; Cadbury Schweppes and Cadbury Schweppes Overseas, C-196-04; Kofoed, C-321/05:

*„...reflects the general Community law principle that **abuse of rights is prohibited**. Individuals must not improperly or fraudulently take advantage of provisions of Community law. The application of Community legislation cannot be extended to cover abusive practices, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law...”*



Anti-Abuse Concept for Tax Law

Anti-Abuse Principle for VAT

- **Art. 13 of Sixth VAT Directive (77/388/EEC):**
Member States „to prevent...any possible evasion, avoidance or abuse“.
- **Art. 273 of the VAT Directive (2006/112/EC):**
*„Member States may impose other obligations...necessary to ensure the correct collection of VAT and to **prevent evasion**, subject to ...“*



Anti-Abuse Concept for Tax Law

Anti-Abuse Principle for VAT (cont.)

ECJ Case Law:

„...an abuse practice can be held to exist where:

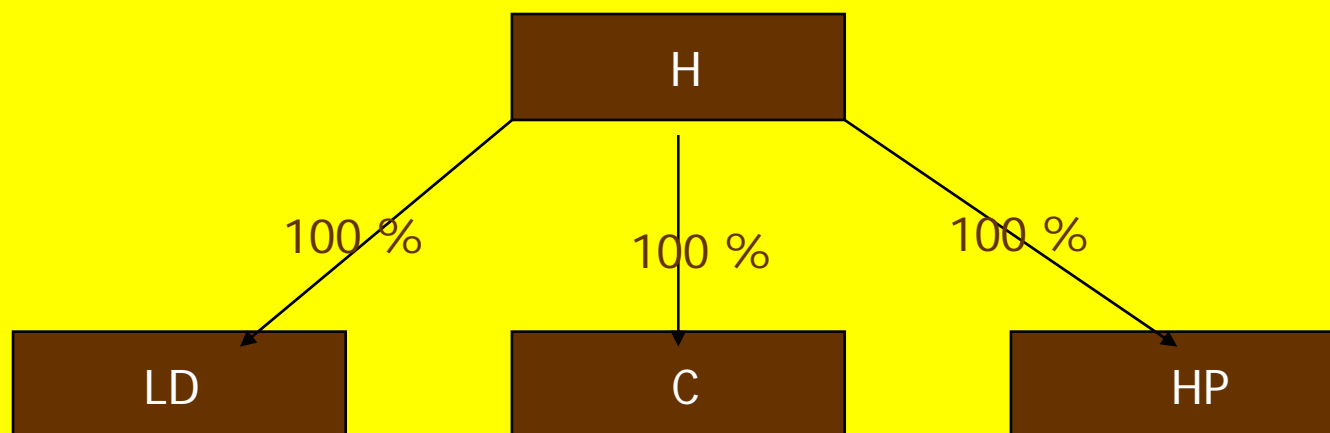
- the transactions concerned,... result in the **accrual** of a **tax advantage** the grant of which would be contrary to the **purpose** of those provisions,
- it is apparent from a number of objective factors that the **essential aim** of the transactions concerned is to obtain a **tax advantage.**“



Anti-Abuse Concept for Tax Law

Anti-Abuse Principle for VAT (cont.)

Halifax, C-255/02





Anti-Abuse Concept for Tax Law

Anti-Abuse Principle for VAT (cont.)

Halifax, C-255/02, judgment of 21/02/2006

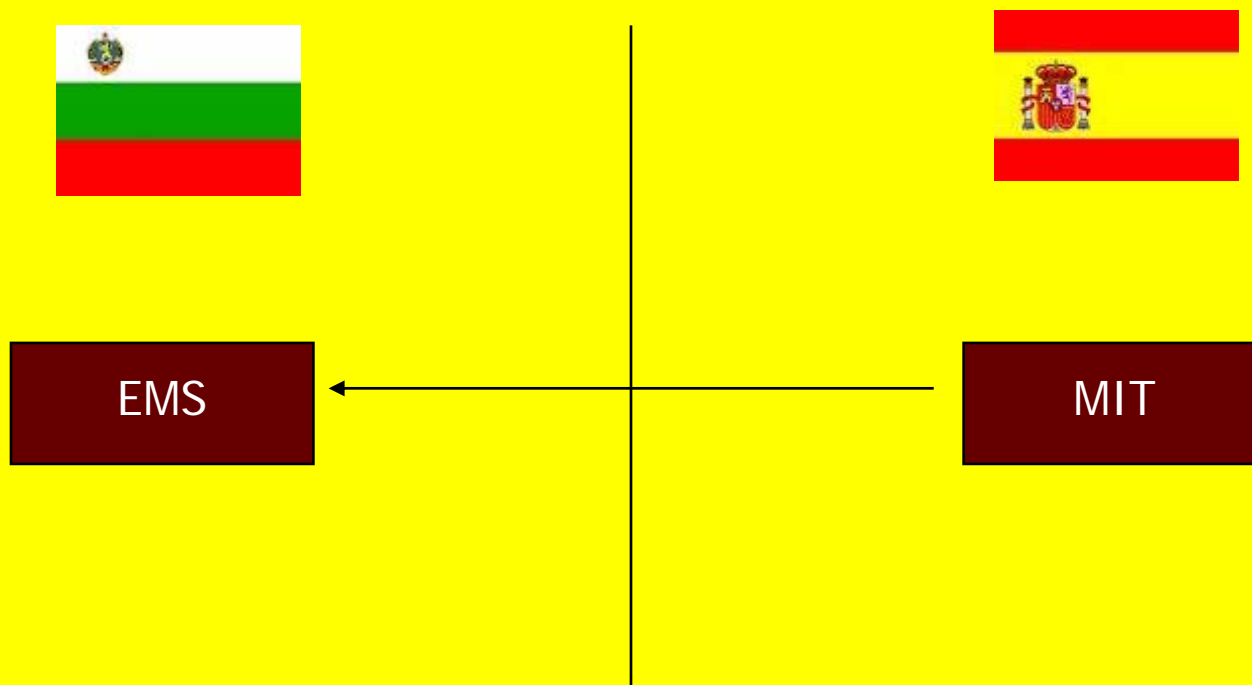
- “Transactions of the kind at issue...constitute supplies of goods or services and an economic activity... provided that they satisfy the objective criteria on which those concepts are based, even if they are carried out **with the sole aim of obtaining a tax advantage, without any other economic objective.**
- The **Sixth Directive** must be interpreted as precluding any right of a taxable person to deduct input VAT where the transactions from which that right derives **constitute an abusive practice.** ...transactions...result...accrual of a **tax advantage** the grant of which would be **contrary** to the **purpose** of those **provisions.** ...apparent from a number of objective factors...**essential aim** of the transactions concerned is to obtain a tax advantage.
- ...abusive practice...found to exist, the transactions involved...redefined... to **re-establish** the **situation** that would have prevailed in the **absence** of the transactions constituting that abusive practice.”



Anti-Abuse Concept for Tax Law

Anti-Abuse Principle for VAT (cont.)

EMS-Bulgaria Transport OOD, C-284/11





Anti-Abuse Concept for Tax Law

Anti-Abuse Principle for VAT (cont.)

EMS-Bulgaria Transport OOD, C-284/11,
judgment of 12/07/2012

- **Principle of Proportionality:** Effective means to prevent possible tax evasion and avoidance \Leftrightarrow least detrimental of fundamental principle of the right to deduct VAT,
- A belated accounting for of VAT **cannot, per se**, be equated with tax evasion,
- The principle of fiscal neutrality precludes a penalty consisting in a refusal of the right to deduct if VAT is accounted for belatedly,
- The payment of default interest may constitute an adequate penalty, provided that it does **not go further** than is **necessary**
 - to attain the objective of preventing tax evasion and
 - ensuring the correct collection of VAT.



Anti-Abuse Concept for Tax Law

Anti-Abuse Principles in EU-Secondary Law (non VAT)

- **Parent subsidiary directive (90/435/EEC), Art. 1 (2) and Interest royalty directive (2003/49/EC), Art.5:**

*“This Directive shall not preclude the application of **domestic** or agreement-based provisions required for the prevention of fraud or abuse”.*

- **Interest royalty directive (2003/49/EC), Art. 5 (2):**

*“Member States may, in the case of transactions for **which...the principal motive or one of the principal motives is tax evasion, tax avoidance or abuse**, withdraw the benefits of this Directive...”*



Anti-Abuse Concept for Tax Law

Anti-Abuse Principles in EU-Secondary Law (non VAT)

(cont.)

➤ Merger Directive (90/434/EEC) :

Art. 11 (1) : " A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Titles II, III and IV where it appears that the merger, division, transfer of assets or exchange of shares:

*(a) has **as its principal objective or as one of its principal objectives** tax evasion or tax avoidance; the fact that one of the operations referred to in Article 1 is not carried out for valid commercial reasons such as the restructuring or rationalization of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives..."*



Anti-Abuse Concept for Tax Law

Anti-Abuse Principles in EU-Secondary Law (non VAT) (cont.)

“Tax avoidance/evasion as one of its principal objectives”

ECJ Case Law:

- Competent national authorities carry out a **general** examination of the operation in each particular case;
- Such examination open to **judicial review**;
- Member States: Fact that planned operation **not** carried out for valid commercial reasons = a **presumption** of tax evasion or tax avoidance;
- Member States: **Internal** procedures necessary for this purpose;
- **Principle of proportionality**: General rule **automatically** excluding certain categories of operations from the tax advantage - whether or not actually tax evasion or tax avoidance: **Further than necessary** for preventing undermining the aim of the Directive.

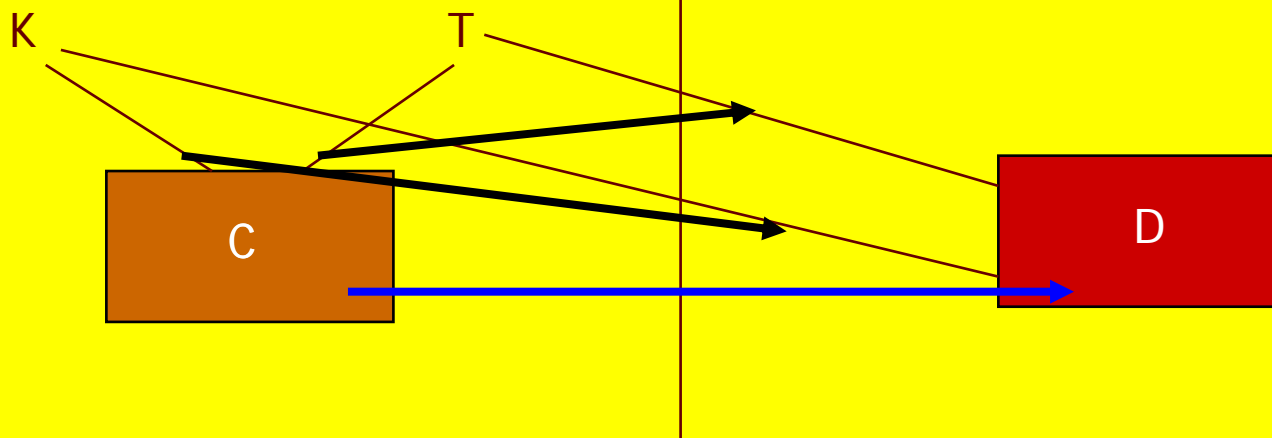
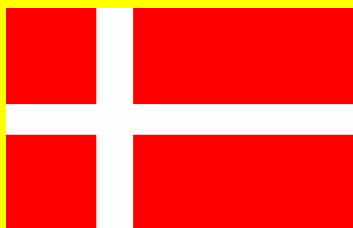


Anti-Abuse Concept for Tax Law

Anti-Abuse Principles in EU-Secondary Law (non VAT)

(cont.)

Kofoed, C-321/05





Anti-Abuse Concept for Tax Law

Anti-Abuse Principles in EU-Secondary Law (non VAT) (cont.)

Kofoed, C-321/05,
judgment of 05/07/2007

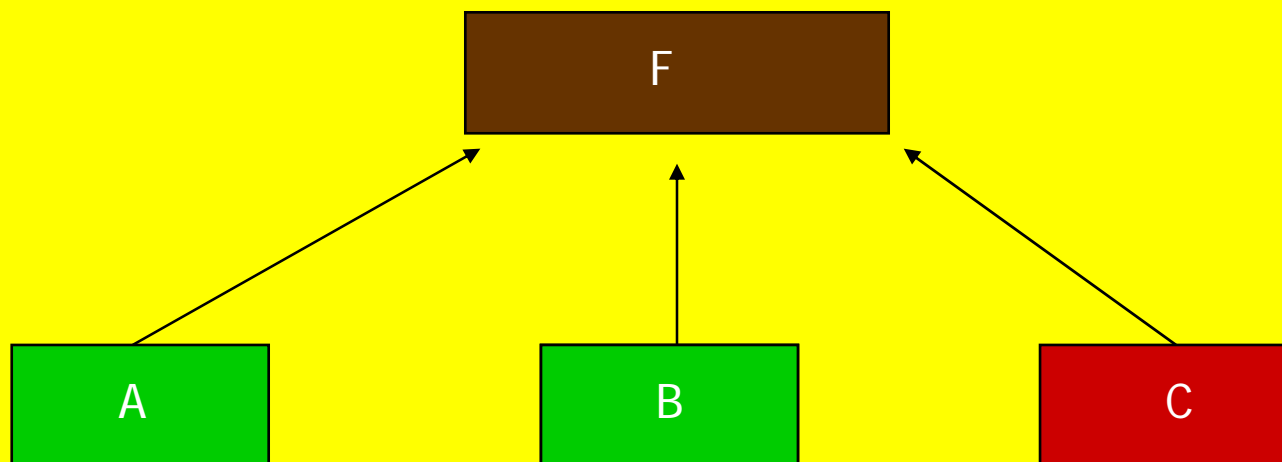
- Non-taxable Merger + : Exchange of shares & dividend = cash payment not exceeding 10% of nominal value
- **Anti-Abuse: Direct** application of Art. 11(1) (a) of Directive 90/434?
Not necessarily, but „...national courts to ascertain whether there is,“ in national law, “a provision or general principle prohibiting abuse of rights or other provisions on tax evasion or tax avoidance which **might be interpreted in accordance with Article 11(1)(a) of Directive 90/434** and thereby justify taxation of the exchange of shares in question...”



Anti-Abuse Concept for Tax Law

Anti-Abuse Principles in EU-Secondary Law (non VAT) (cont.)

Foggia, C-126/10





Anti-Abuse Concept for Tax Law

Anti-Abuse Principles in EU-Secondary Law (non VAT) (cont.)

Foggia, C-126/10, judgment of 10/11/2011

- Despite pure national context jurisdiction of ECJ +: National law contains provisions equal to Art. 1(1)(a) of Directive 90/434
- **Anti-Abuse:**
 - ‚Valid commercial reasons‘: Concept has to attain **more** than attainment of a purely fiscal advantage > fiscal advantage **sole aim: no merger**
 - Company C: no management activity, no financial holdings and tax losses not yet set off to be acquired by company F
 - None of these aspects **on its own** decisive > however substantial tax losses & origin not determined: indicator of tax abuse
 - Reduction of administrative and management costs as valid commercial reasons? > Does not outweigh tax advantage



Anti-Abuse Concept for Tax Law

Anti-Abuse Principles reg. Exercise of EU-Primary Law

ECJ Case Law:

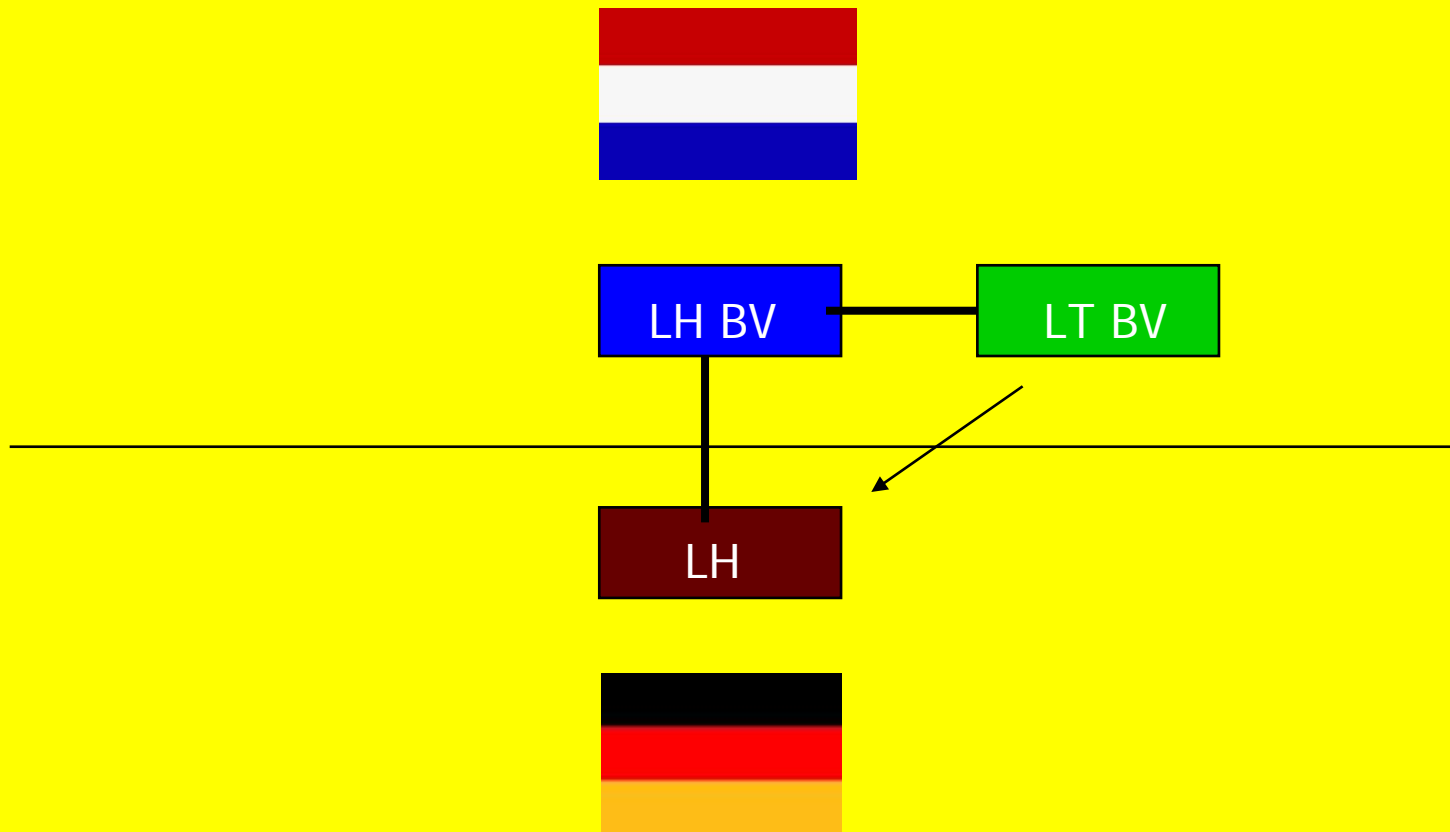
- The **need to prevent** the reduction of tax revenue is **not** a matter of overriding general interest which would **justify** a **restriction** on a **freedom** introduced by the **Treaty**,
- A national measure restricting a freedom introduced by the Treaty may be justified where it specifically relates to **wholly artificial arrangements** aimed at **circumventing the application** of the **legislation** of the Member State concerned,
- Seeking a **tax advantage per-se** does **not** constitute an **abuse**.



Anti-Abuse Concept for Tax Law

Anti-Abuse Principles reg. Exercise of EU-Primary Law (cont.)

Lankhorst-Hohorst GmbH, C-324/00





Anti-Abuse Concept for Tax Law

Anti-Abuse Principles reg. Exercise of EU-Primary Law (cont.)

Lankhorst-Hohorst GmbH, C-324/00, judgment of 12/12/2002

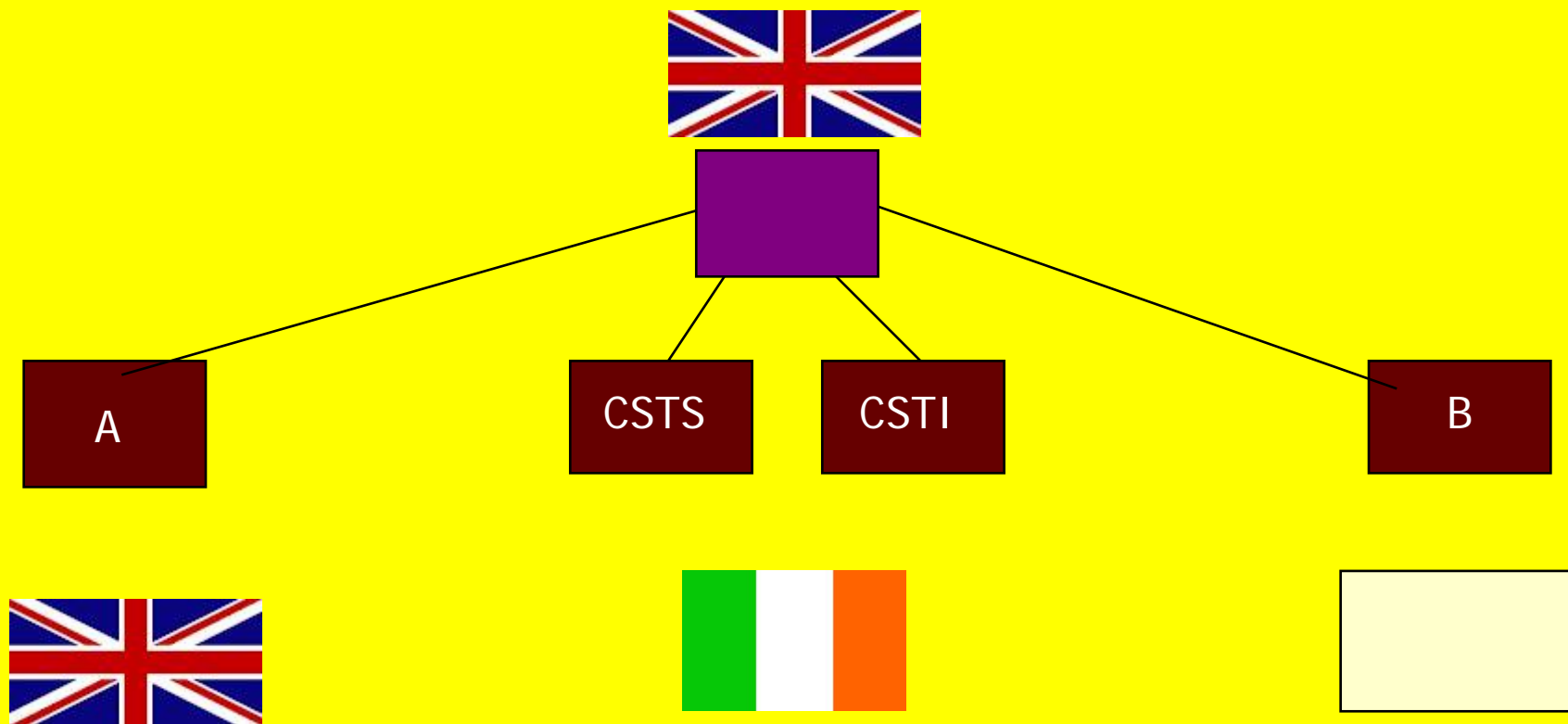
- A „reduction in tax revenue does not constitute an overriding reason in the public interest which may justify a measure which is in principle contrary to a fundamental freedom“,
- „...does not have the **specific purpose** of preventing wholly artificial **arrangements**, designed to circumvent German tax legislation, from attracting a tax benefit, but **applies generally** to any situation in which the parent company has its seat, for whatever reason, outside the Federal Republic of Germany. Such a situation does not, of itself, entail a risk of tax evasion, since such a company will in any event be subject to the tax legislation of the State in which it is established“,
- “...**no abuse** has been **proved** in the present case, the loan having been made in order to assist Lankhorst-Hohorst by reducing the interest burden resulting from its bank loan.”



Anti-Abuse Concept for Tax Law

Anti-Abuse Principles reg. Exercise of EU-Primary Law (cont.)

Cadbury Schweppes plc and Cadbury Schweppes Ltd, C-196/04





Anti-Abuse Concept for Tax Law

Anti-Abuse Principles reg. Exercise of EU-Primary Law (cont.)

Cadbury Schweppes plc and Cadbury Schweppes Ltd, C-196/04,
judgment of 12/09/2006

- „The fact that a Community national...sought to profit from tax advantages in force in a Member State other than his State of residence cannot **in itself** deprive him of the right to rely on the provisions of the Treaty“,
- However, „it presupposes **actual establishment** of the company concerned in the host Member State and the **pursuit of genuine economic activity** there“,
- **Not** only „a **fictitious establishment** not carrying out any genuine economic activity in the territory of the host Member State“,
- The resident company must be given an opportunity to produce evidence that the CFC is actually established and that its activities are genuine.



Conclusions

Concepts of Abuse in European Tax Law

VAT: "Prevent...any possible evasion, avoidance or abuse"

EU-Directives (non VAT): „Tax avoidance/evasion as one of its principal objectives"

EU-Primary Law: „Wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned"

Principle of Proportionality

**Thank you for
your attention!**

