



# EU Tax Law

## Negative integration

## Taxation of businesses

Katerina Perrou  
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# The EU Fundamental Freedoms

## The Fundamental Freedoms

- **Four** fundamental freedoms + 1:
  - free movement of goods
  - free movement of persons
  - free movement of services and
  - free movement of capital
  - Free movement of residence
- **Directly applicable, covering all areas – including taxation**



# The EU Fundamental Freedoms

## The Fundamental Freedoms

- **Free movement of goods**
  - Abolition of customs duties and similar charges: Articles 28-32 TFEU (ex arts 23-27 EC Treaty)
  - Prohibition of quantitative restrictions: Articles 34-36 TFEU (ex arts 28-30 EC Treaty)
  - Discriminatory internal taxation on imported goods: Articles 110-113 TFEU (ex arts 90-93 EC Treaty)
  - State monopolies of a commercial character: Article 37 TFEU (ex art 31 EC Treaty)
- **Free movement of persons**
  - Free movement of workers: Art 45 TFEU (ex art 39 EC Treaty)
  - Freedom of establishment for persons Art 49 TFEU (ex art 43 EC) and companies Art 54 TFEU (ex art 48 EC)
  - Covers workers, self-employed persons, as well as primary and secondary establishments



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- **Free movement of services:** Arts 56-62 TFEU (ex arts 49-55 EC Treaty): covers nationals of Member States who are established in a Member State other than that of the person for whom the services are intended
- **Free movement of capital:** Arts 63-66 TFEU (ex arts 56-60 EC): removes restrictions on the movement of capital between MS, and between MS and third countries



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- **+1: The free movement of residence**

**Art. 21 TFEU:** Freedom to move and reside freely within the territory of the European Union →

“The right to move and reside freely within the territory of the Member States” applies to **non economically active operators** (e.g. pensioners) while the other freedoms apply to economically active operators.



# The EU Fundamental Freedoms

\* **Discrimination:** directly based on nationality

- The application of different rules to comparable situations and includes also
- The application of the same rule to different situations
  - e.g. **Futura**, C-250/95: Luxembourg rules of evidence that applied indiscriminately to both residents and non-residents



# The EU Fundamental Freedoms

- \* **Distinction:** Measures that result in covert or indirect discrimination (the criterion *is not* nationality)
  - a Luxembourg rule that made “the refund of excess tax withheld on income conditional on permanent residency within a MS constitutes a covert form of discrimination contrary to the free movement of workers” (***Biehl***, C-175/88)



# The EU Fundamental Freedoms

\*Measures **without distinction** that **make free movement less attractive** are also obstacles:

➤ “However, those obligations, combined with the need to follow a centralised procedure, **may dissuade** interested persons from taking out capital life assurance with companies not established in Sweden, since no particular action on their part would be called for if they took out such assurance with companies established in Sweden, the tax being levied in this case on the company.” →





# The EU Fundamental Freedoms

\*Measures **without distinction** that **make free movement less attractive** are also obstacles:

➤ “Legislation containing a number of elements **liable to dissuade** individuals from taking out and insurance companies from offering insurance **is contrary to the freedom to provide services**” (*Jessica Safir*, C-118/96, 28 April 1998) – in this case the Swedish measure was designed to take away discrimination, yet...



# The EU Fundamental Freedoms

## \* **Disparities** are not obstacles!

- “If unequal treatment is due to **differences of the tax systems** between the MS, it results from a disparity for which EC law is not concerned - Schempp (D), C-403/03
- Adverse consequences of the application of the same tax rule to both domestic and cross-border situations that result from **the parallel exercise by two MS of their fiscal sovereignty** (Kerckhaert-Morres (B), C- 513/04, of 14 November 2006)



# The EU Fundamental Freedoms

➤ **How it all started: 28 January 1986 → “Avoir Fiscal” (Case 270/83)**

- French Income Tax Law provided for a tax credit (“avoir fiscal”) for persons who receive dividends distributed by French companies.
- This benefit was available to French companies and French subsidiaries of foreign. It was not available to agencies and branches established in France by companies whose registered office is in another country.



# The EU Fundamental Freedoms

- 28 January 1986 : “Avoir Fiscal” (Case 270/83), para. 24:

“It must first be noted that the fact that the laws of the member states on **corporation tax** have **not been harmonized, cannot justify** the difference of treatment in this case. Although it is true that in the absence of such harmonization, a company’s tax position **depends on the national law** applied to it, article 52 of the EEC Treaty **prohibits** the Member States from laying down in their laws **conditions** for the pursuit of activities by persons exercising their right of establishment **which differ** from those laid down for its own nationals”.



# The EU Fundamental Freedoms

- 28 January 1986 : “Avoir Fiscal” (Case 270/83), para. 27:

Consequently, by failing to grant to the branches and agencies in France of insurance companies whose registered office is in another Member State the benefit of shareholders' tax credits in respect of dividends paid by French companies to such branches or agencies, Article 158 ter of the code général des impôts does not apply to those companies the conditions laid down by French law for insurance companies whose registered office is in France. **That discrimination constitutes a restriction on the right of establishment of insurance companies whose registered office is in another Member State, which is contrary to the first and second paragraphs of Article 52 of the EEC Treaty (now: Art. 49 TFEU).**



# The EU Fundamental Freedoms

**Established case law : C-311/97, *Royal Bank of Scotland v Elliniko Dimosio***  
**(29 April 1999)**

*Royal Bank of Scotland* was subject to 40% income tax rate, applicable to Greek branches of foreign banks; Greek banks and Greek subsidiaries of foreign banks were subject to 35% income tax.

“The first point to be made is that, **although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law and avoid any discrimination on grounds of nationality**” (Case C-279/93 *Schumacker* [1995] E C R 1-225, paragraphs 21 and 26; etc)

**Compliance:** Law 2836/2000 → ITC was amended – all SAs taxed at 35%; effect: 30-9-2000



# The EU Fundamental Freedoms

1. Is a person economically **Active** or **Non-active**?

2. When **active** and more than one freedoms seem to be applicable → which freedom **prevails**?

According to the Treaty → NONE, but: freedom to provide services seems to be supplementing the free movement of goods, persons and capital.

Court → Cadbury-Schweppes, C-196/04 §§32-33:



# The EU Fundamental Freedoms

➤ **WHICH FREEDOM APPLIES?** → Look at the **AIM**

***Scheunemann*, C-31/11**

- Ms Scheunemann, a German resident, inherited a 100% shareholding in a capital company established in Canada.
- Free movement of capital OR freedom of establishment?
- **Para. 21**: “In the main proceedings, the **aim of the measure at issue is to make provision for the tax treatment of inheritances** which include, in particular, a shareholding in capital companies.”





# The EU Fundamental Freedoms

WHICH FREEDOM APPLIES? → Look at the **prevailing aim**

*Cadbury-Schweppes*, C-196/04, §§32-33:

**§32:** In this case, the legislation on CFCs (...) must therefore be examined in the light of Articles 43 EC and 48 EC. [Arts. 49 TFEU and 54 TFEU – freedom of establishment]

**§33.** If (...) that legislation **has restrictive effects** on the free movement of services and the free movement of capital, such effects **are an unavoidable consequence of any restriction on freedom of establishment and do not justify, in any event, an independent examination of that legislation in the light of Articles 49 EC and 56 EC** [Arts. 56 TFEU and 63 TFEU]

# CJEU's approach

