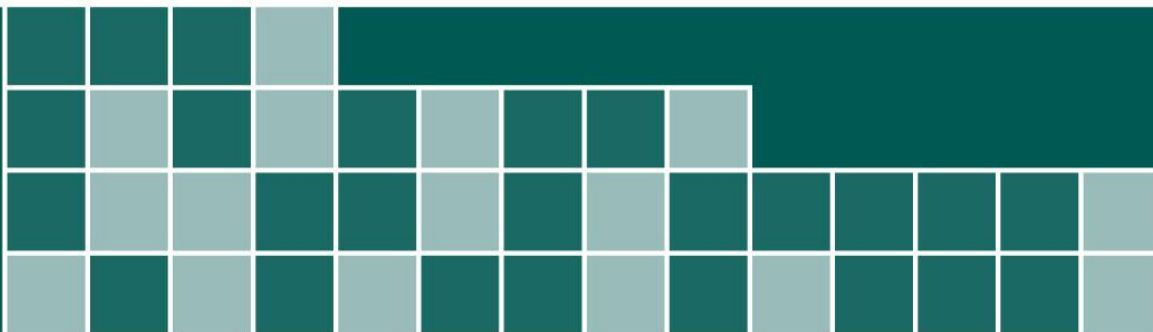


Prof. Dr. Ana Paula Dourado

The Institutional Framework of the European Union and its Competence on Tax Matters

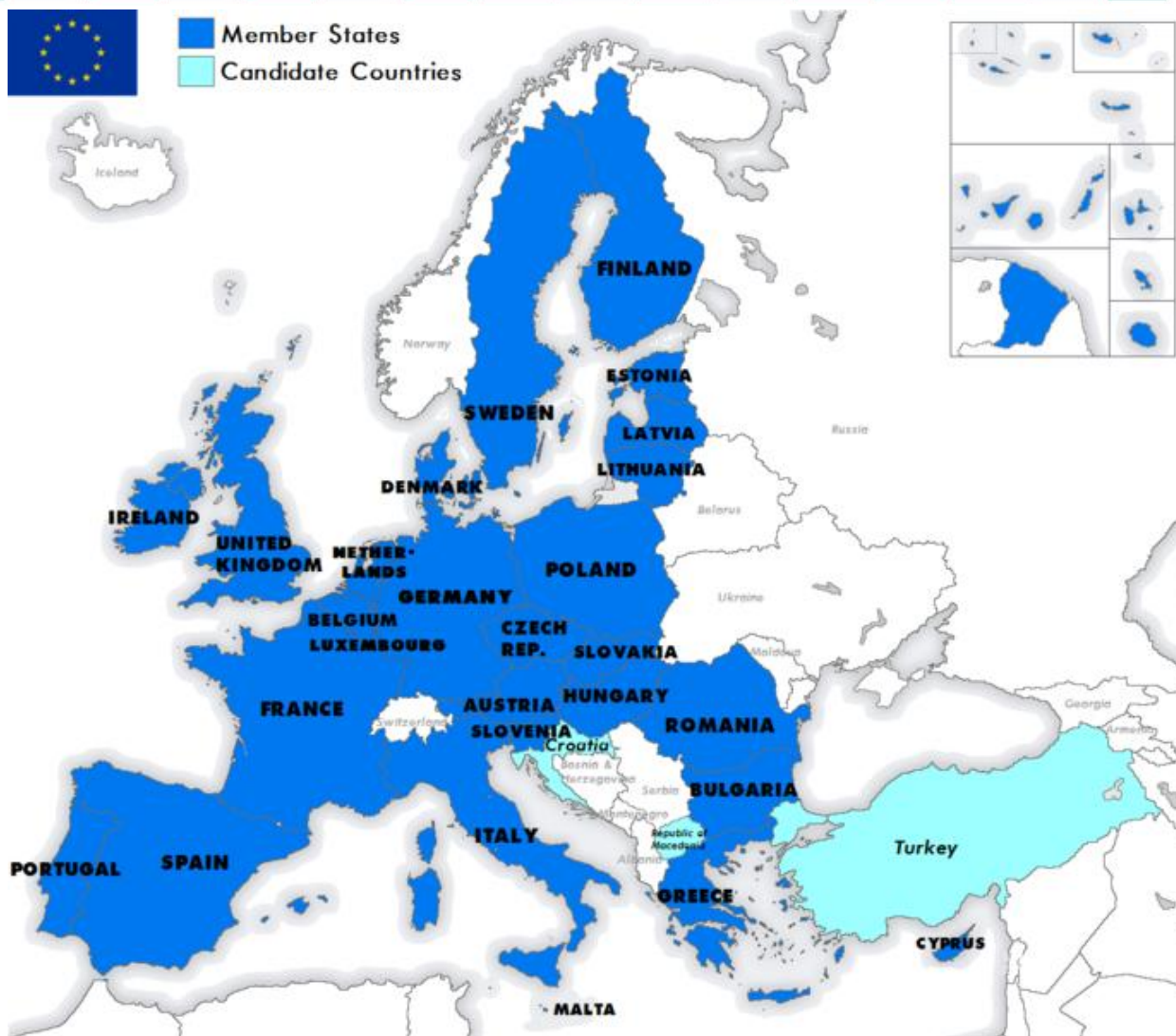


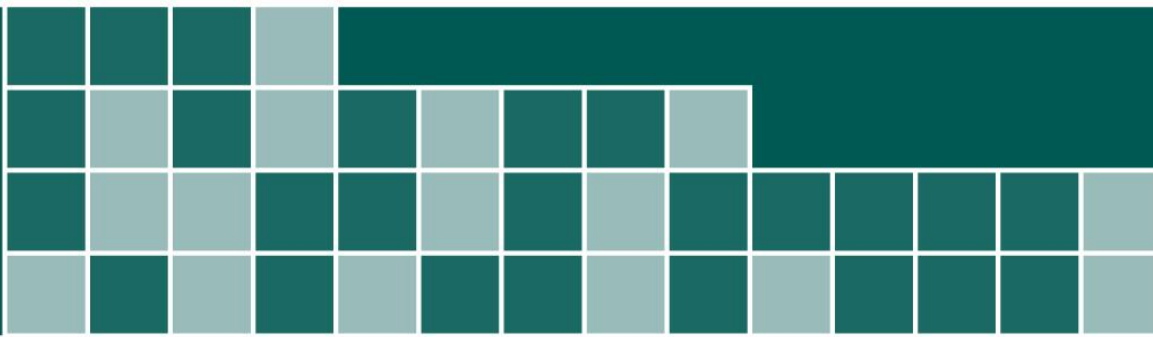
•1957

•1988

•1994

•2009/
10





MS

Eurozone

Outside it

EEA (1
Jan. 1994)

Norway,
Iceland

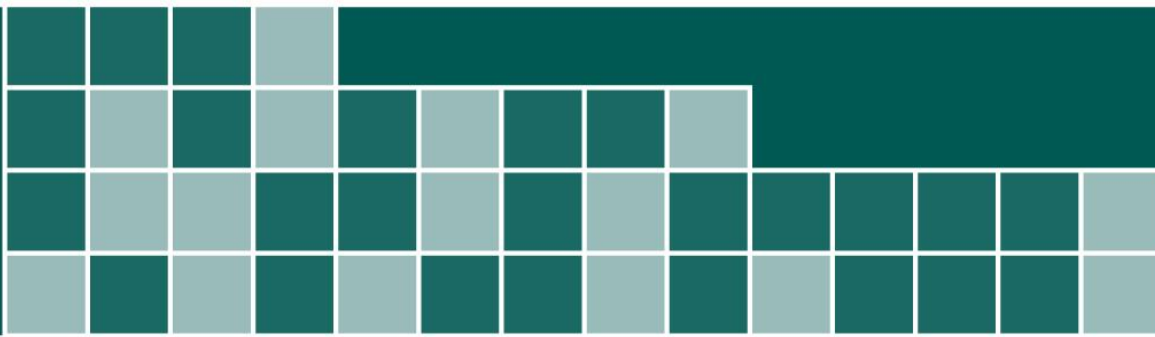
Liechten-
stein

Other
categories

Switzerland
and special
agreements

Association
Agreements

Other
third
countries



- What is the EU?
- Political community where Member States (MS) decided to confer competences to attain objectives in common (Art. 1 TEU)
- Supremacy of EEC/EC/EU law: Costa v. E.N.E.L. (1964)
- Treaty of Lisbon: TEU, TFEU
- Democratic deficit?



The Union
founded on

TEU

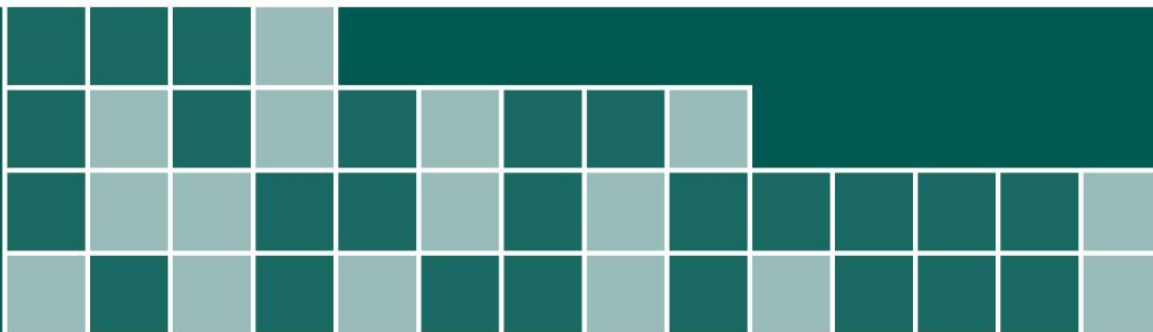
TFEU

Mission statement
in the form of a
list of high
objectives:
Sustainable
development

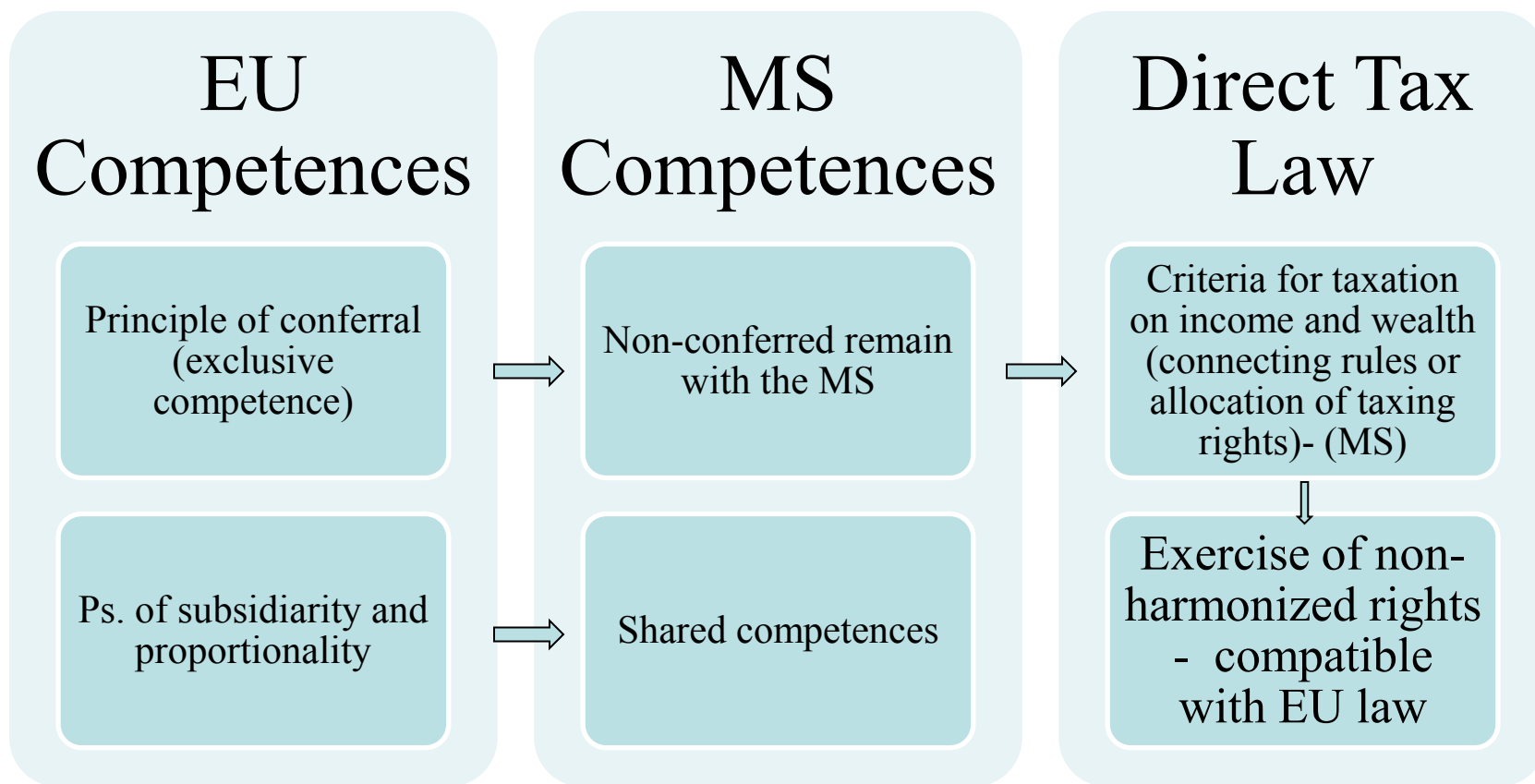
Balanced
economic
growth
Highly
Competitive
social
market
economy

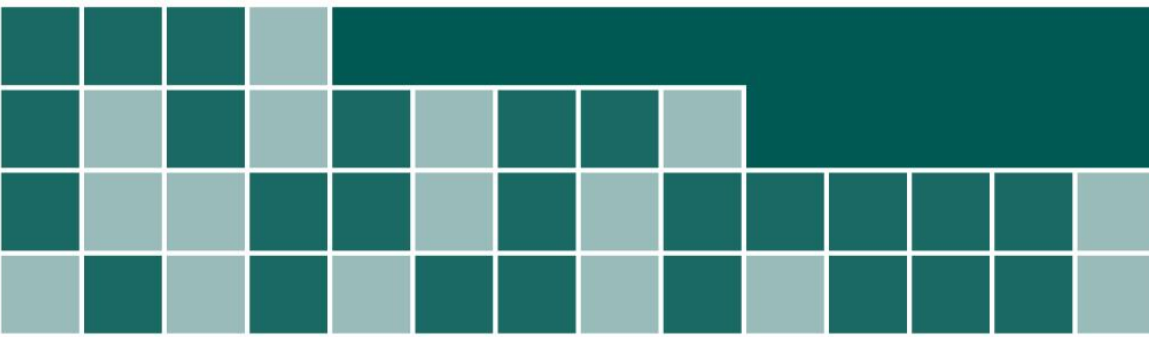
Means to reach these
objectives:
establishment of an
internal market
economic and
monetary union and
implementing
common policies and
activities

Competences
Harmonization
Fundamental
Freedoms



Distribution of Competences EU/MS: Art. 5 TEU

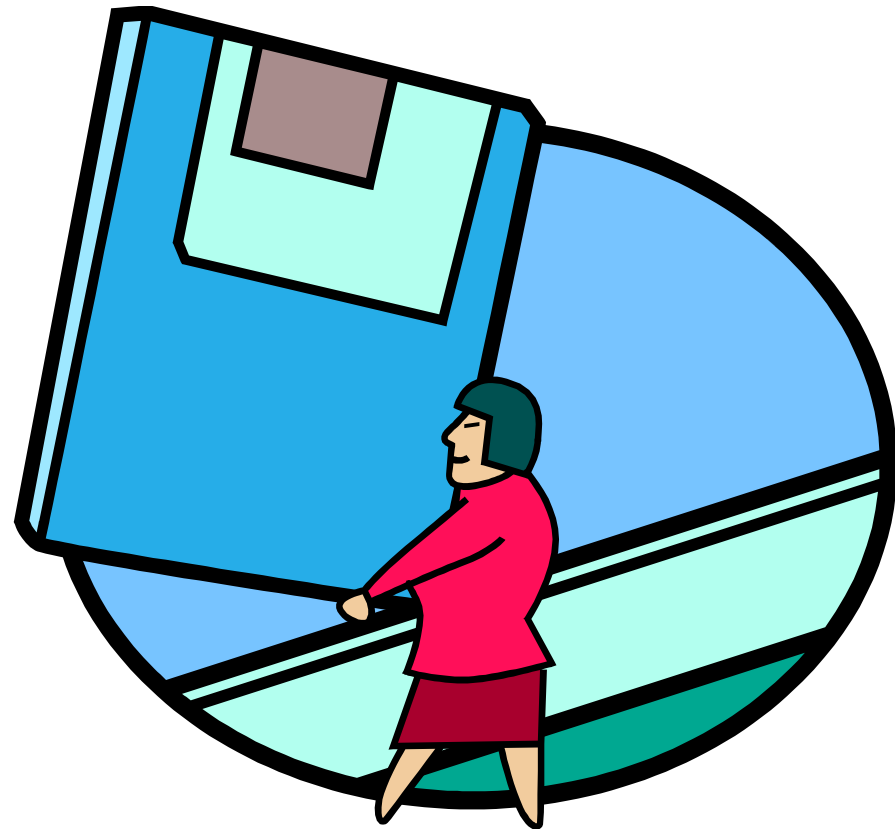


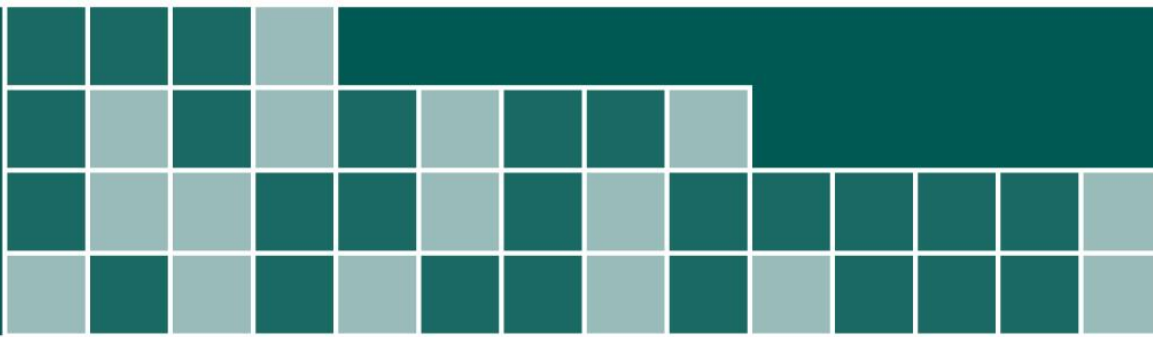


Mrs. Gilly: German and Fr.
National, resident in Fr.,
teaches in Germany

Taxed in Germany as
a result of the G/Fr
TT

Tax credit: less than the
tax actually paid in G:
greater progressivity of
the tax scale in G.





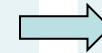
Gilly (C-336/96)

Connecting factors are not harmonized by EU law



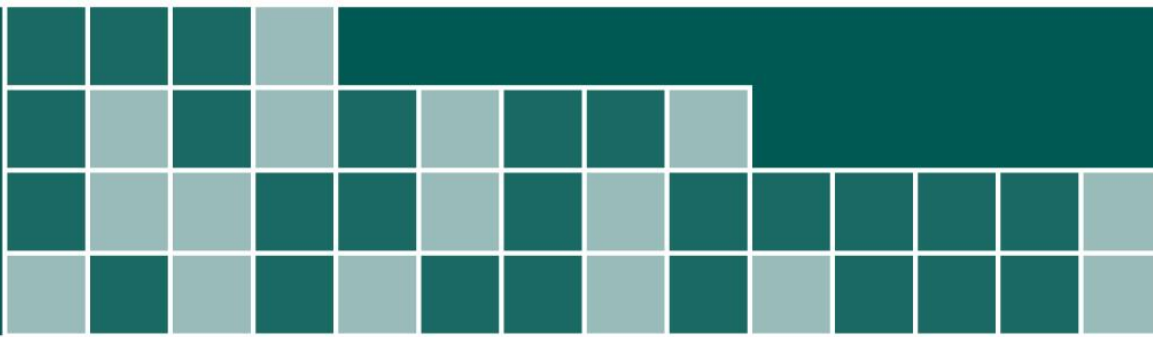
Gilly (C-336/96)

Double taxation could be avoided by full tax credit in the Residence MS

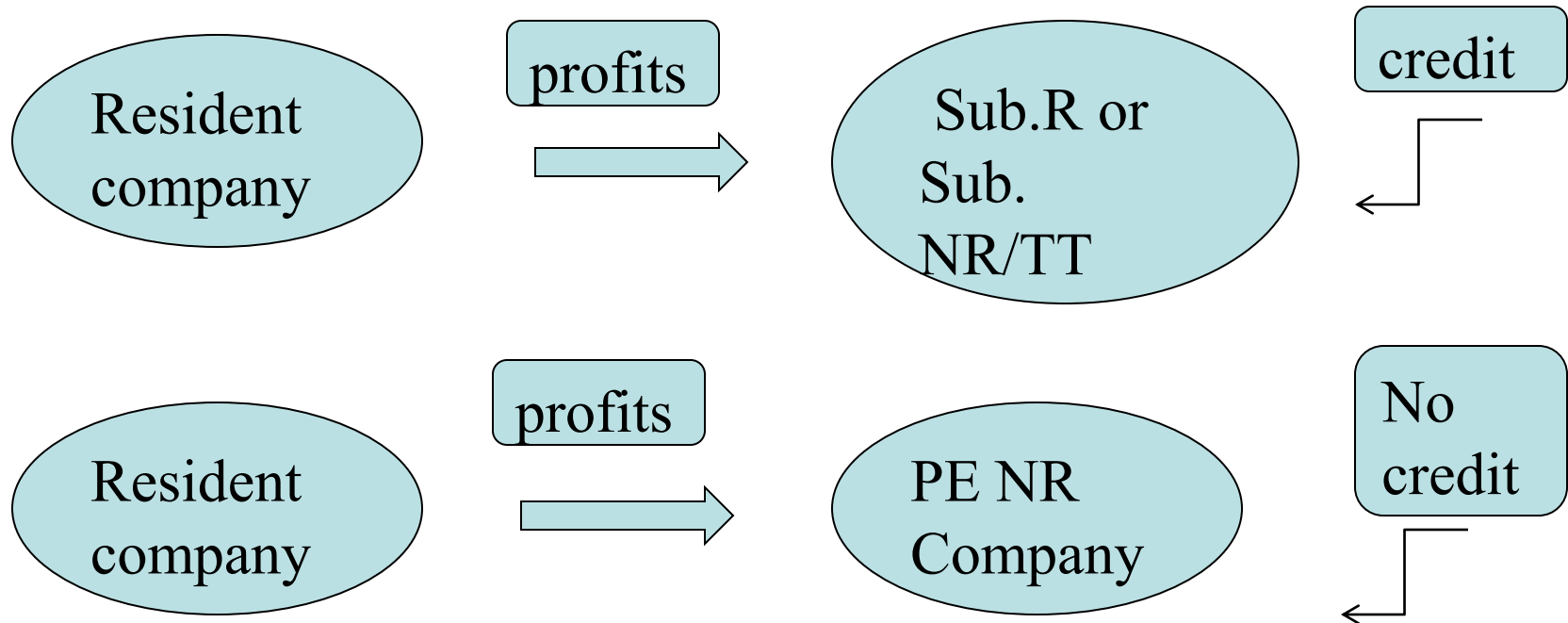


Gilly (C-336/96)

Unfavourable consequences: consequences of different tax rates

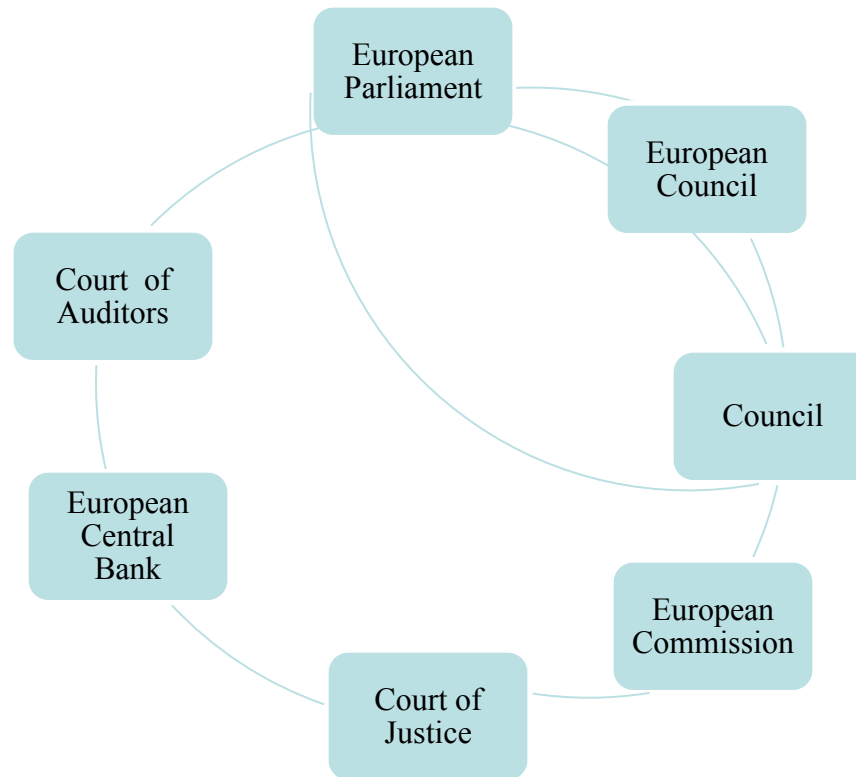


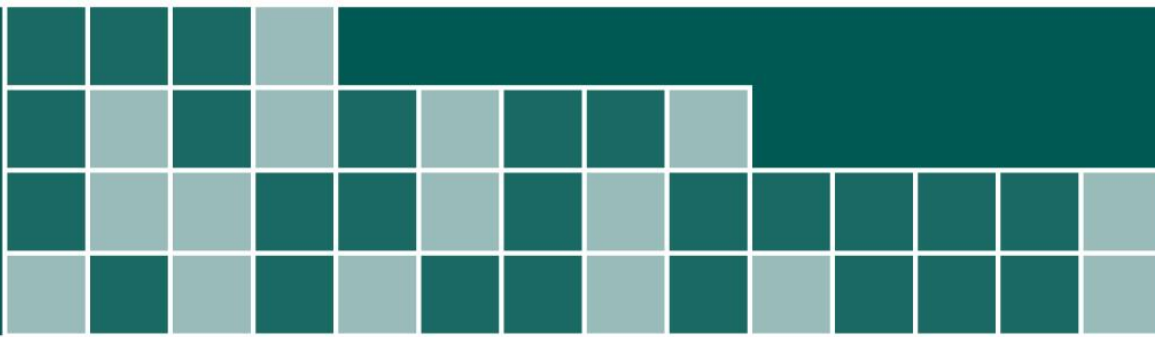
Avoir Fiscal (ECJ 270/83). Facts of the case:





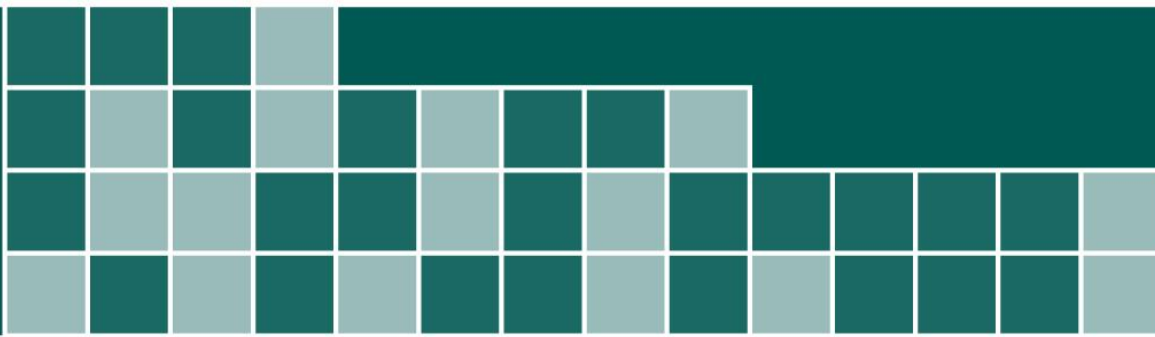
Institutions of the Union



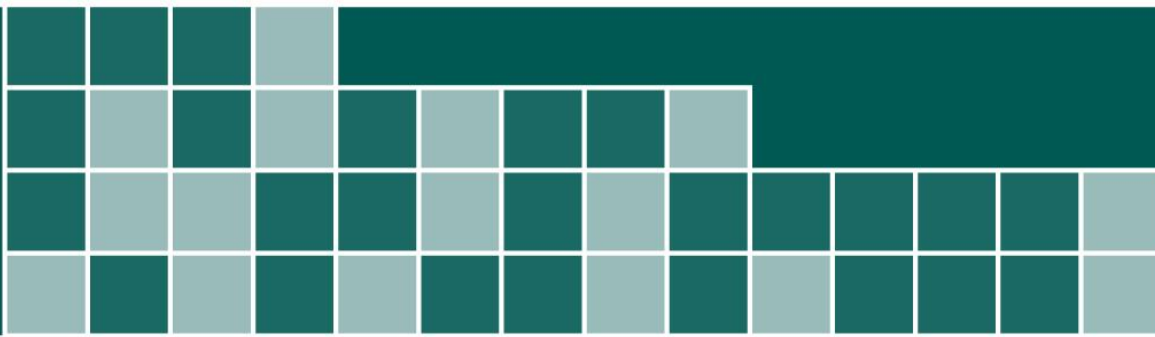


Institutions and Taxation:

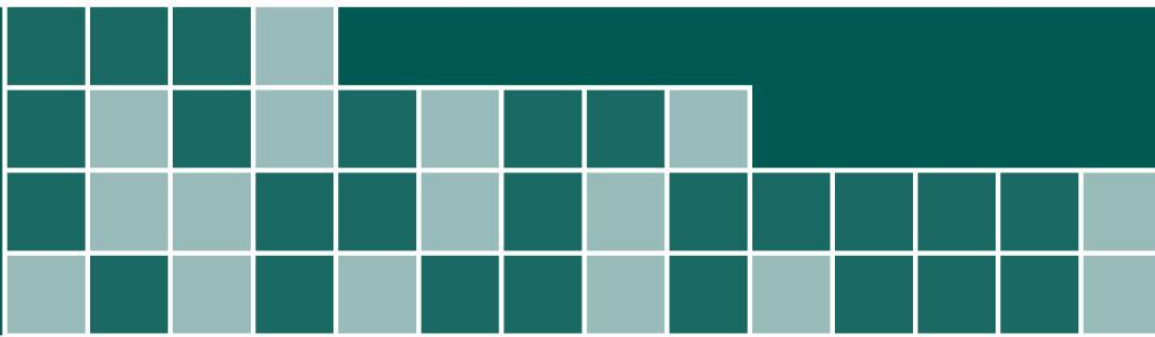
- European Parliament – relevant role in passing the EU budget
- No decisive role in respect of taxes: but consultation (harmonization) and consent on enhanced cooperation



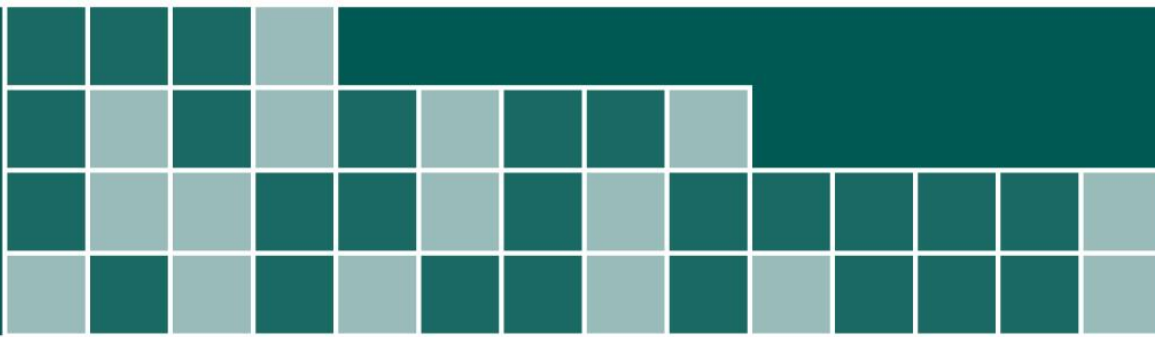
- Commission – proposals of directives; negotiations/conclusion of treaties with third countries containing tax provisions or with consequences in taxation
- Infringement procedures
- Soft law



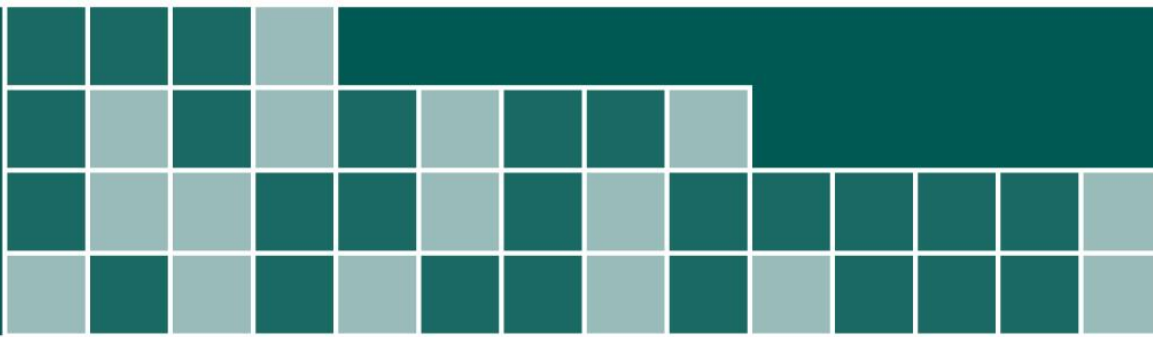
- Council – unanimity for tax directives
- Court of Justice – last word on the compatibility of national law and secondary law with the Treaty



- References for a preliminary ruling; 267 – ex 234
- Actions for failure to fulfil an obligation 258 – ex 226
- Actions for annulment
- Actions for failure to act
- Actions for damages

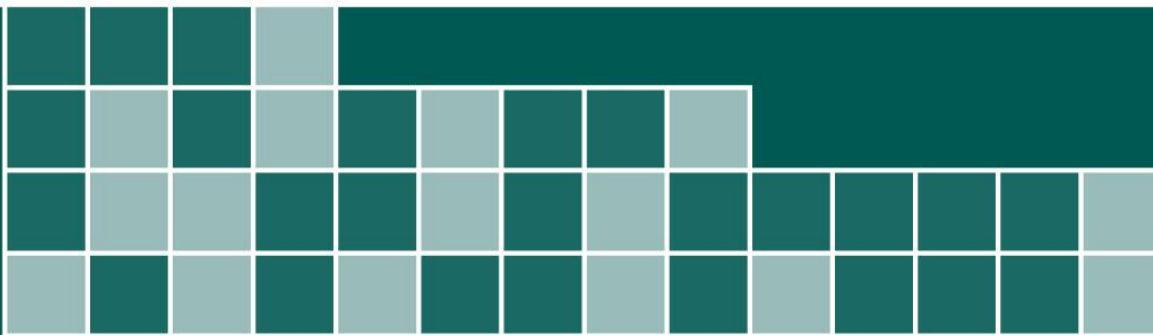


- Preliminary rulings and direct tax law:
Avoir Fiscal
- National courts as European Courts
- Da Costa, CILFIT and the Acte Clair
Doctrine



Routes for European Tax Integration

- Hard law and soft law
- Aim: establishing an internal market
Elimination of all obstacles to intra-EU trade
Merging national markets into a single market
- Free movement of goods, persons, services and capital



Harmonization

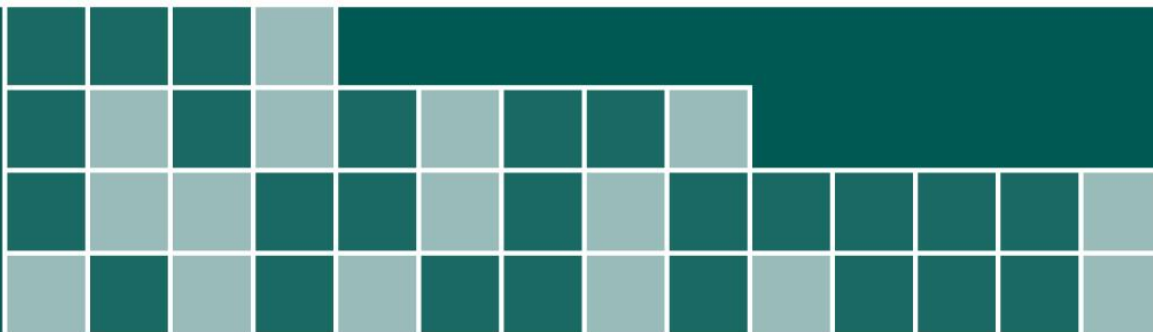
Negative
integration

Unanimity

Tax
competition

Principle of
subsidiarity

Legally enforceable
prohibitions on
domestic/bilateral
measures

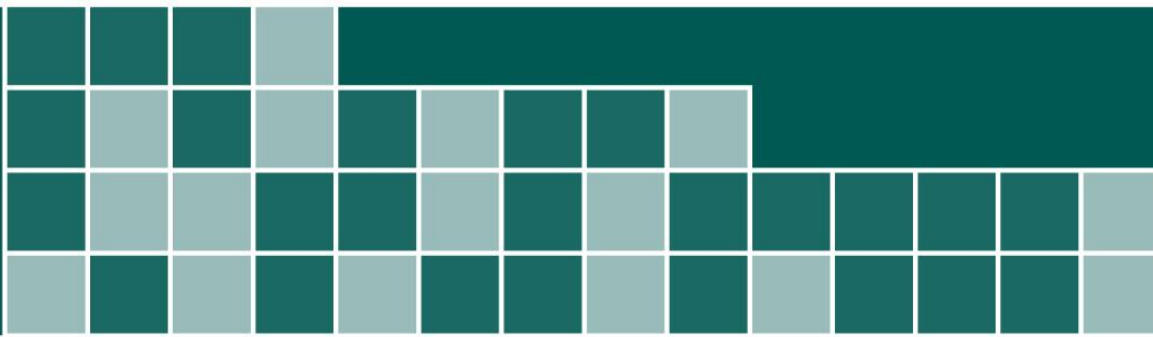


Harmonization of direct taxes: Instrument + unanimity

Article 115

(ex Article 94 TEC)

Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market



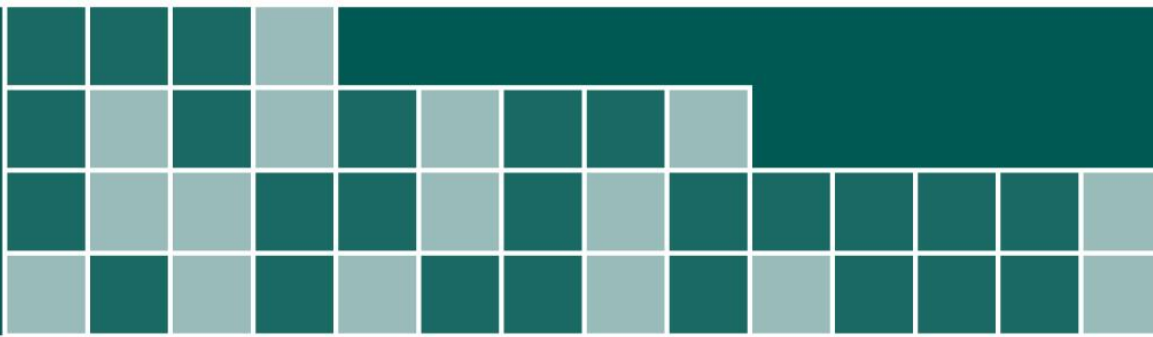
Article 114

(ex Article 95 TEC)

1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and

Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

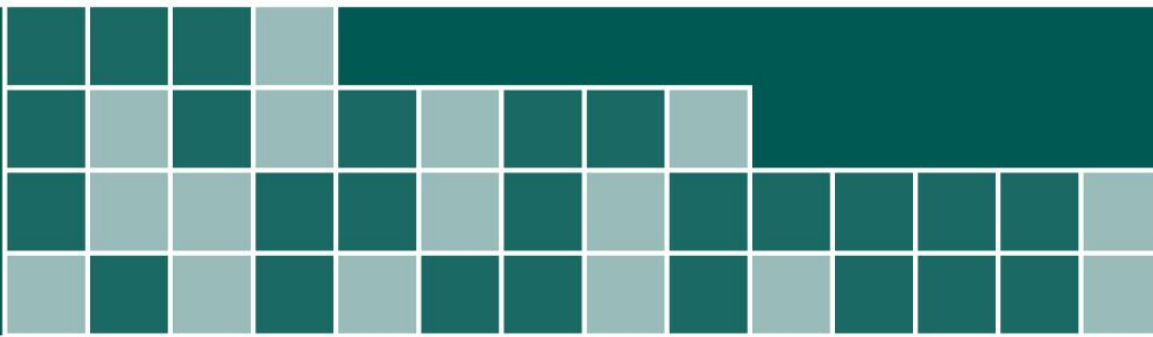
2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.



MS wishing enhanced
cooperation shall address a
request to the Commission,
specifying the scope and
objectives

The Commission may submit a proposal
to the
Council. In the event of the Commission
not submitting a proposal, it shall inform
the Member States concerned of the
reasons.

Authorisation to proceed shall be granted by the Council, on a proposal
from the Commission and after obtaining the consent of the European
Parliament

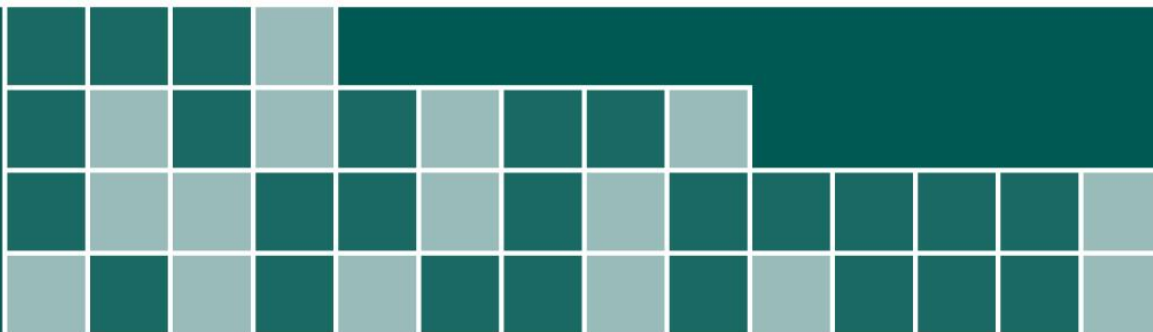


Article 330

(ex Articles 27*a* to 27*e*, 40 to 40*b* and 43 to 45 TEU
and ex Articles 11 and 11*a* TEC)

All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote.

Unanimity shall be constituted by the votes of the representatives of the participating Member States only.



- Soft law ex Art. 249
- Opinions
- Recommendations

Income received by non-residents (1993); SMEs (1994)

- Codes of Conduct

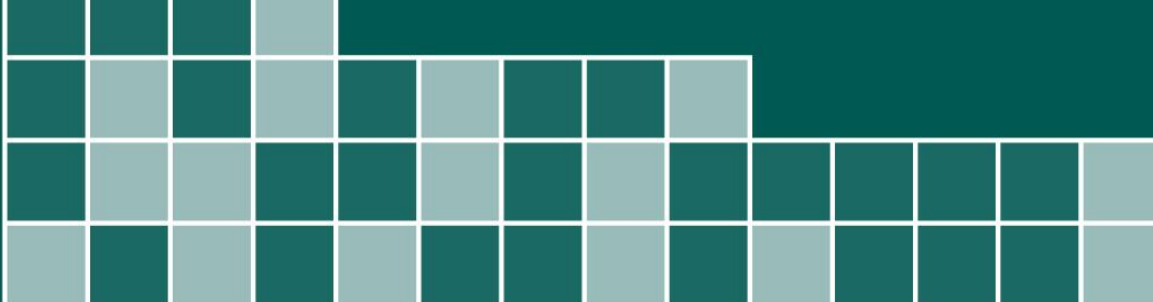
Code of Conduct for business taxation (1997); State aid guidelines (1998, 2004); Transfer pricing (2007)

- Communications

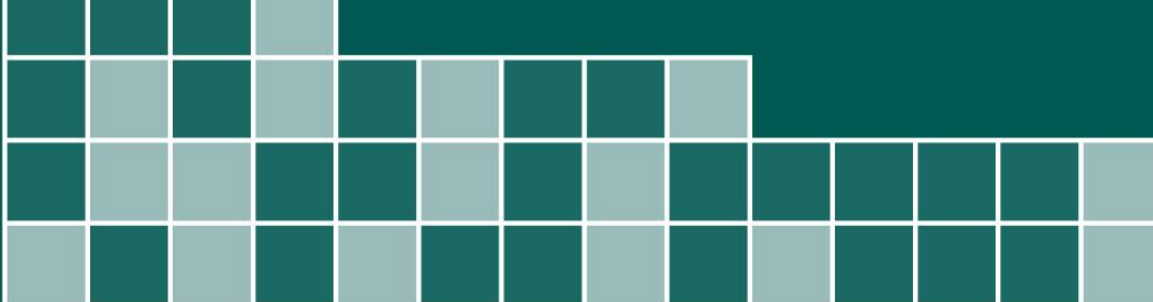
Towards an Internal Market without Tax Obstacles (2001)

Coordinating MSs direct tax systems, exit taxes, cross-border losses, anti-abuse measures (2006, 2007)

Good governance: exchange of information (2009)



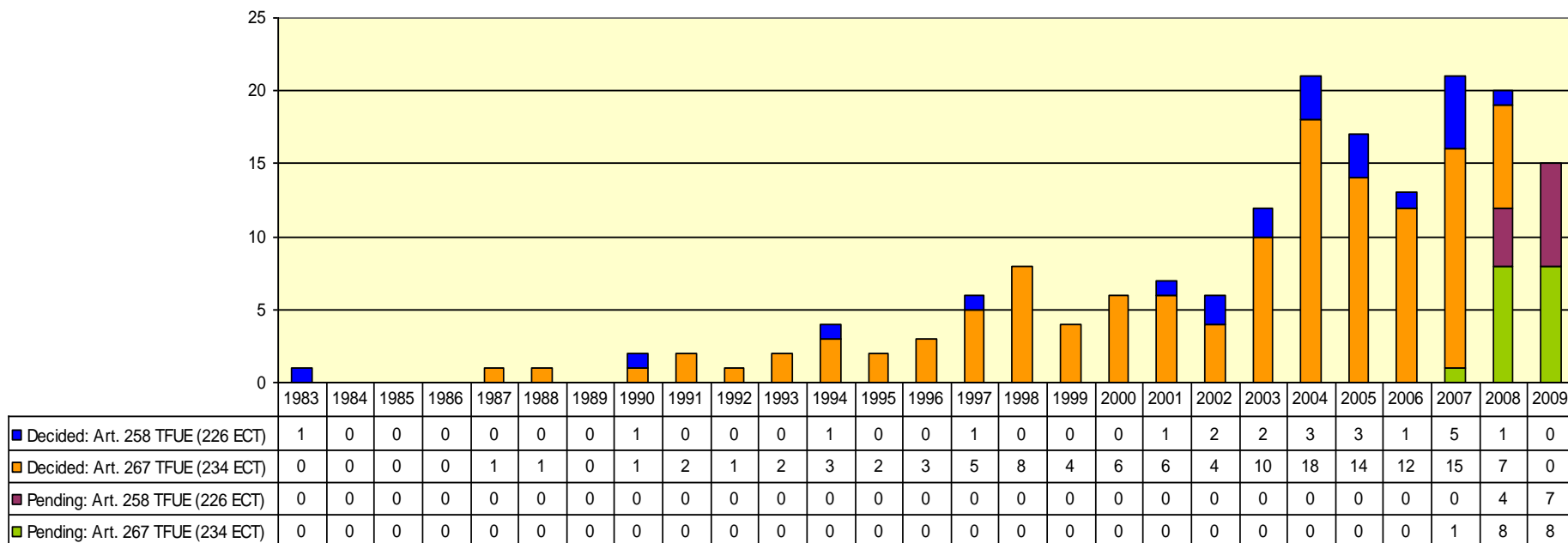
- Regulations: indirect taxation (executive aspects: customs, VAT)
- Directives: indirect and direct taxation (harmonization)
 - Direct taxes:
 - Undistorted conditions of competition – level playing field
 - Harmonization of national laws in as far as disparities between them impede the functioning of a common market
 - Broad concept: basically a political one. Maximum vs. minimum level of harmonization: corporate taxation, taxation of individual savings
- International double taxation of the same tax base

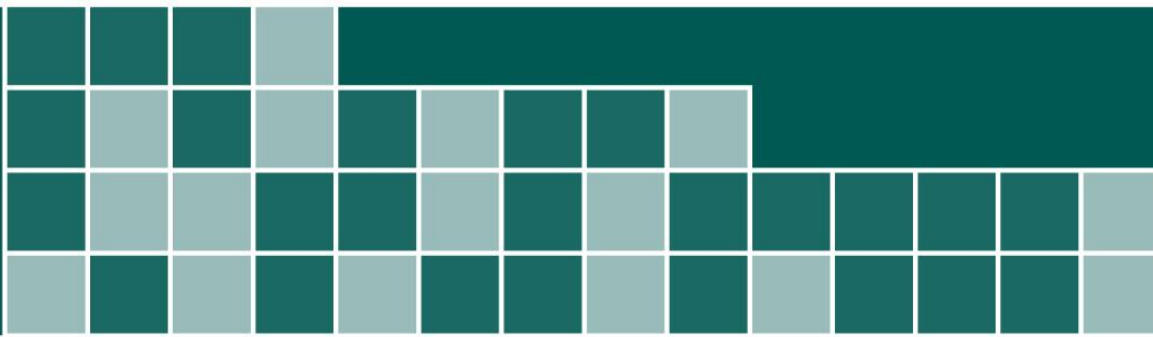


- Characteristics of the EU Law System
- Supremacy
- Direct Effect of the Treaty Provisions (see: fmc, 1988)
- Direct Effect of Regulations and Directives
- Direct Effect of International Agreements' Provisions

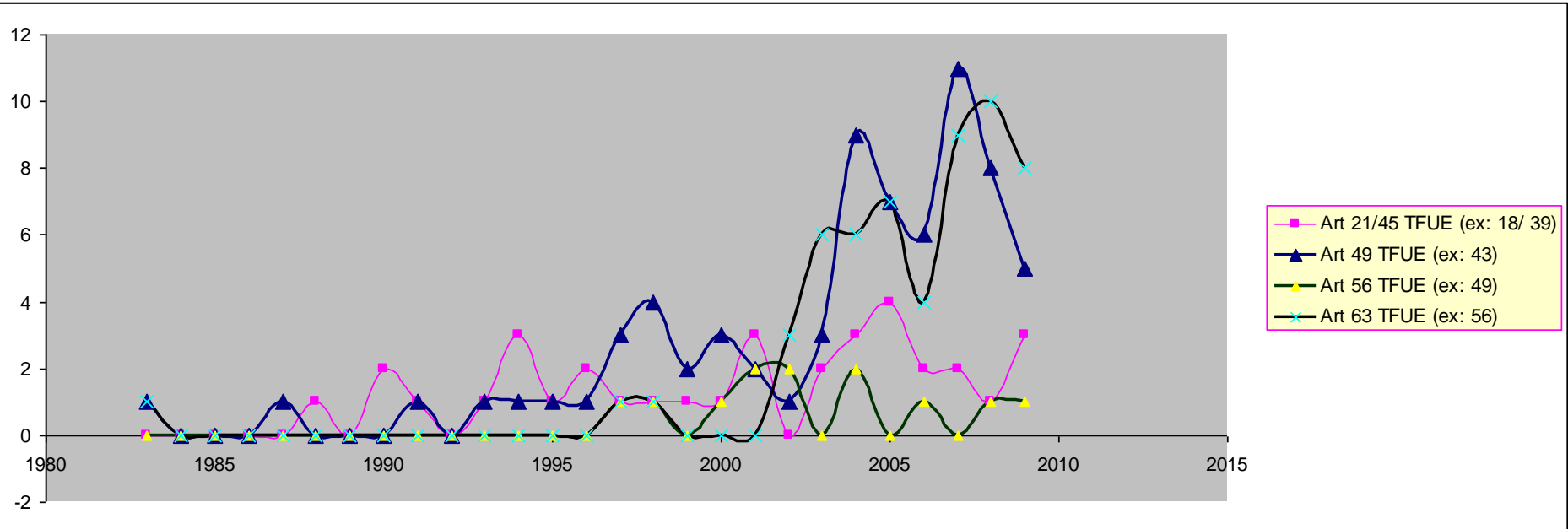


Direct tax cases decided by/pending before the ECJ (by year of reference to the Court)



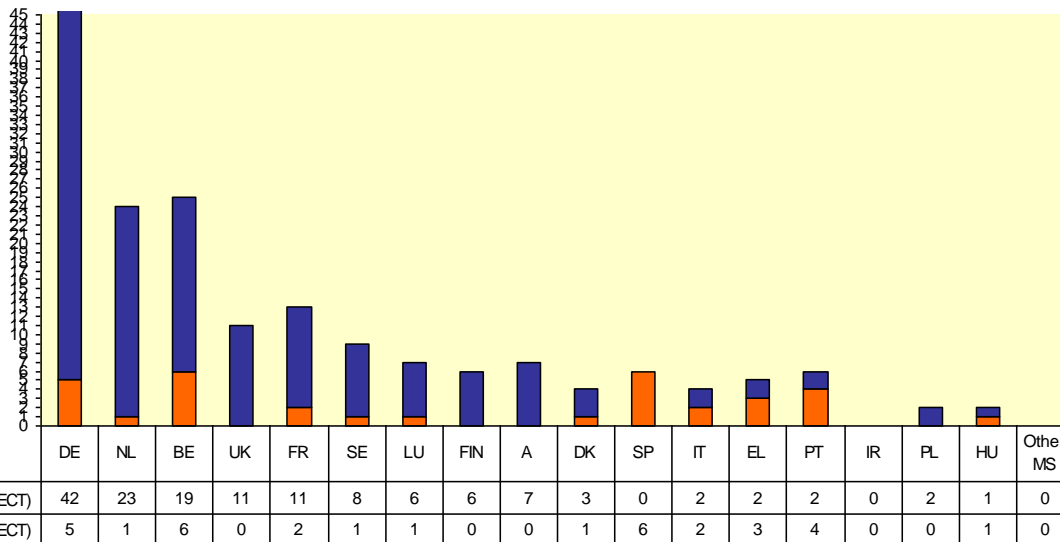


Decided and pending ECJ direct tax cases (by legal base)





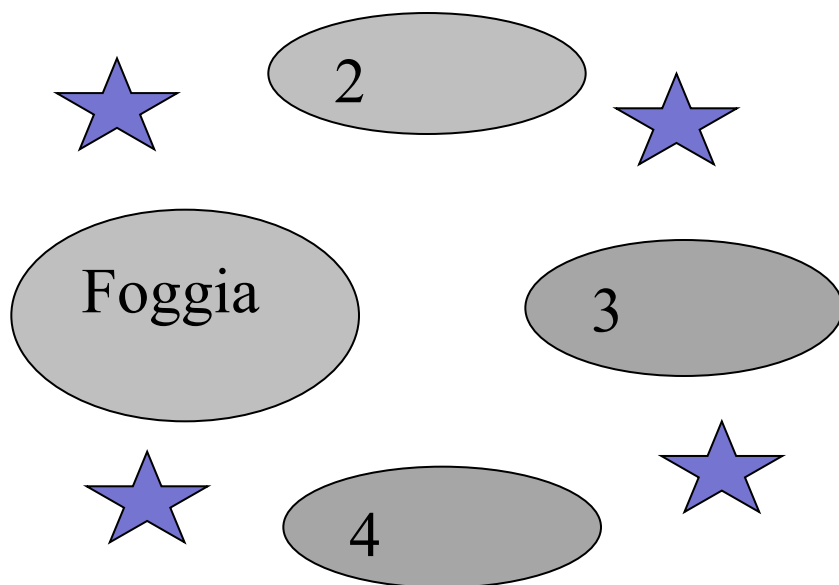
**Number of cases in direct taxation, capit duty excluded, decided by or pending before the ECJ
broken by Member State (26.11.2009)**





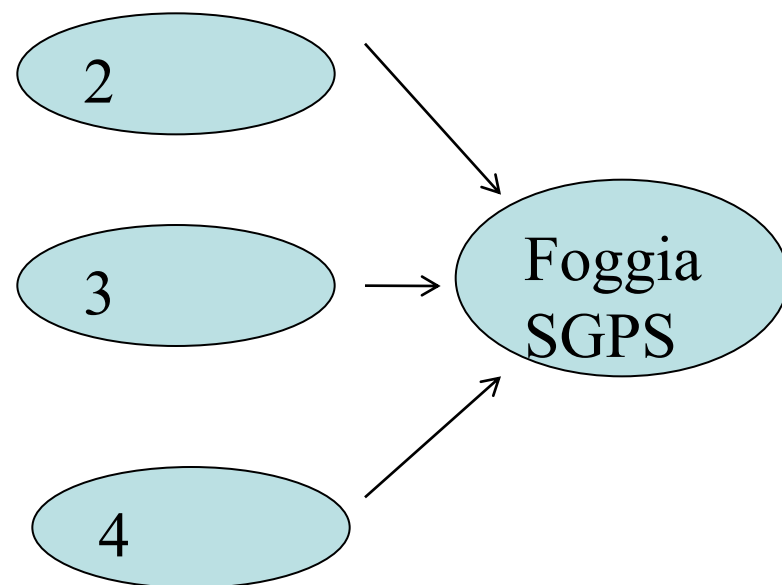
Foggia C-126/10

A PT bank had 4 holding companies
- SGPS



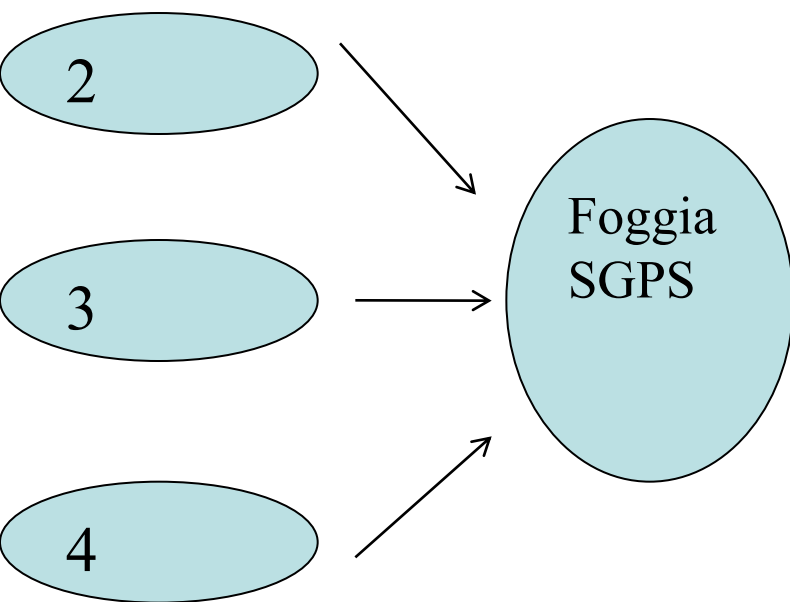
2, 3 and 4 merged by
incorporation into
Foggia.

Company 2 had incurred
losses of € 3,500,000.00

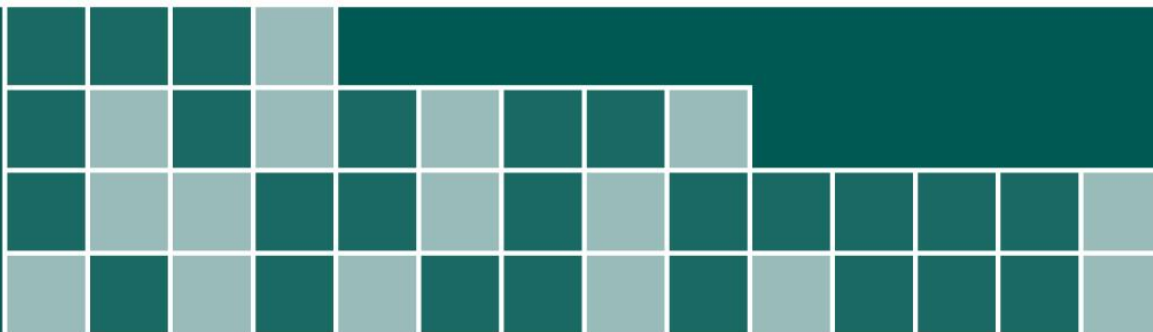




Foggia C-126/10

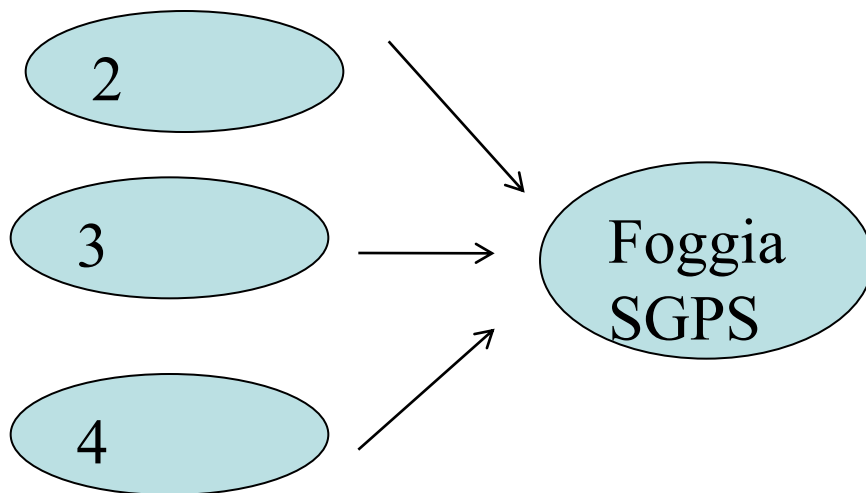


Art. 69 CITC: The transfer of losses subject to one of the transactions foreseen in Art. 67 CITC - merger, division, transfer of assets and exchange of shares.



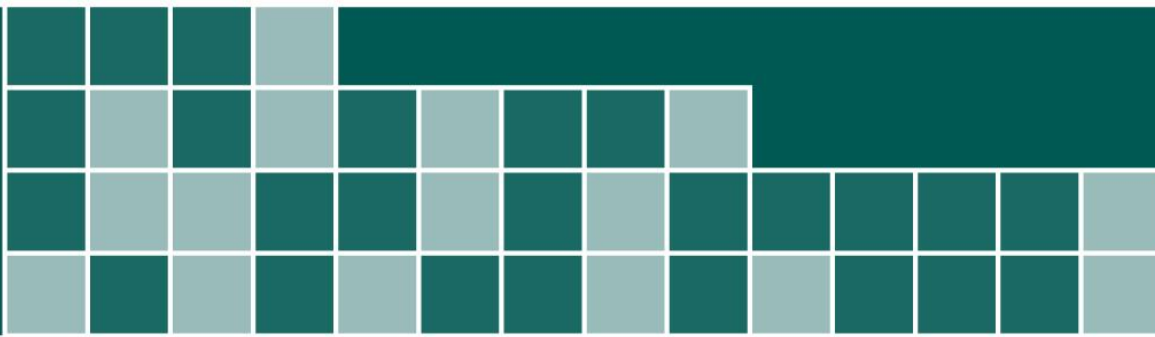
Foggia C-126/10

2, 3 and 4 merged by
incorporation into Foggia.
2 had incurred losses of €
3,500,000.00



The transfer of losses also subject to:

- Request with the Ministry of Finance;
- “Valid commercial reasons” such as:
 - the restructuring or rationalisation of the activities of the companies involved (= art. 11, 1 a) Merger D.);
 - *fitting in with a medium or long term strategy of re-dimensioning and corporate development with positive effects in the producing structure.*

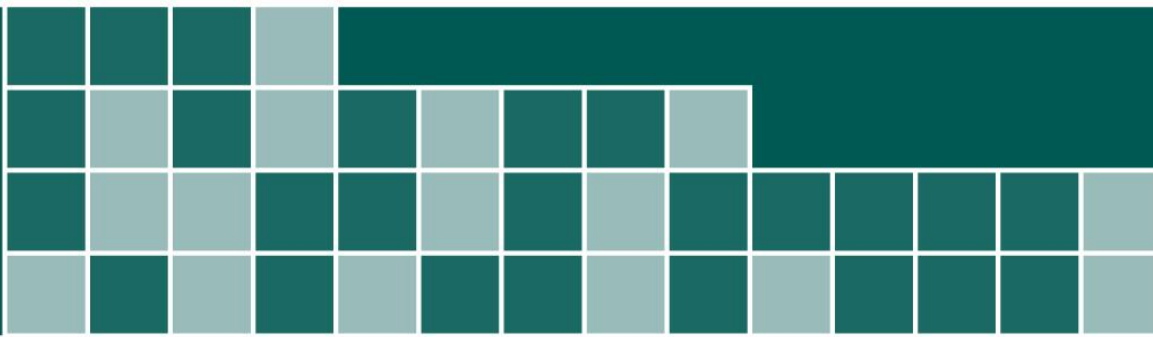


C-126/10 Foggia



Ministry of Finance arguments in the PT Supreme Court Decision:

- No evidence of valid economic reasons;
- Acquired company *for the years under consideration (para. 11, ECJ)*: almost no activity as holding company;
- No financial holdings; net value almost irrelevant; positive effects of the merger insignificant for the acquiring company;
- The only interest: transfer of the substantial amount of losses;
- *MF: Analysis from the perspective of the acquiring company and not the whole group.*



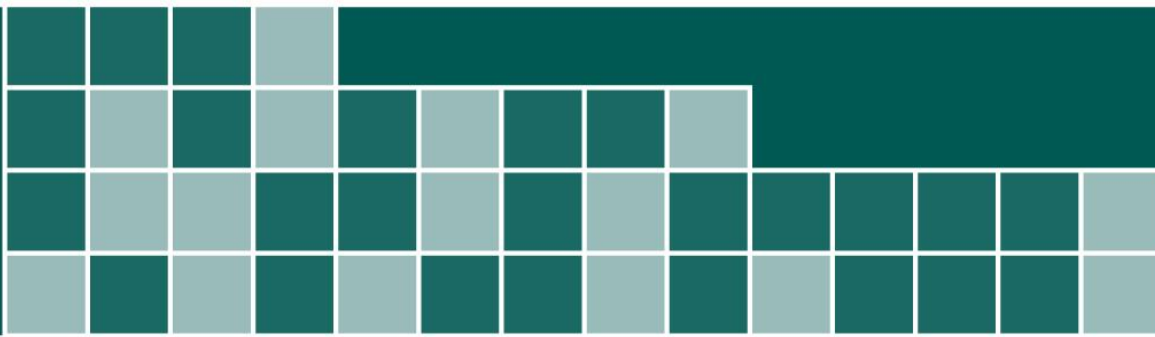
Foggia C-126/10

- Foggia: incorporating company had carried on relevant activity within the scope of its object; had relevant shareholding (3.26% of the assets of the acquiring company); *valid commercial reasons should be evaluated at the level of the group.*

• *Cf. para. 11 ECJ*

PT Government: The merger may have a positive effect in terms of the overall cost structure of the group – it would allow reduction of the administrative and managing costs: “cannot be considered of commercial interest for Foggia - SGPS”.

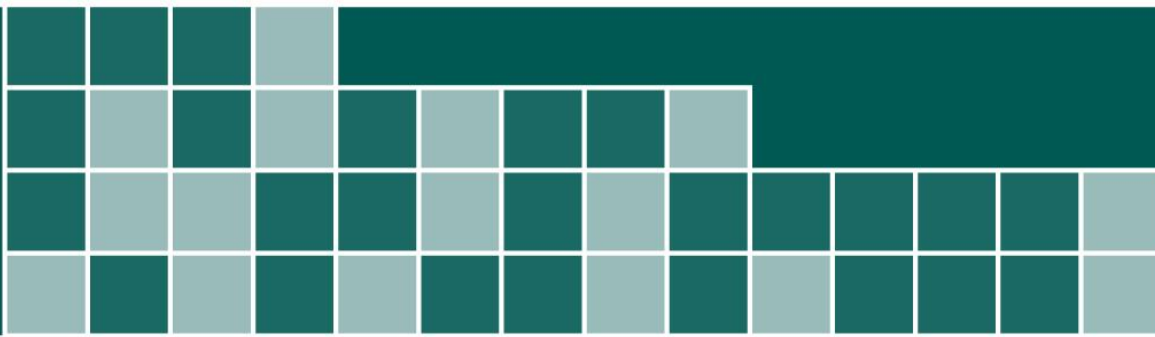




Foggia C-126/10

- Merger D. 90/434/EEC
- transfer of losses: an option in Art. 6 of the Directive as long as it is non-discriminatory (no reference to “valid commercial reasons”).
- “Valid commercial reasons” : anti-abuse provision Art. 11 (1) (a) of the Merger Directive.
- Kofoed, § 38: the directive does not cover abusive practices, transactions carried out not in the context of normal commercial operations, but for the purpose of wrongfully obtaining advantages (Centros, Halifax, Cadbury).

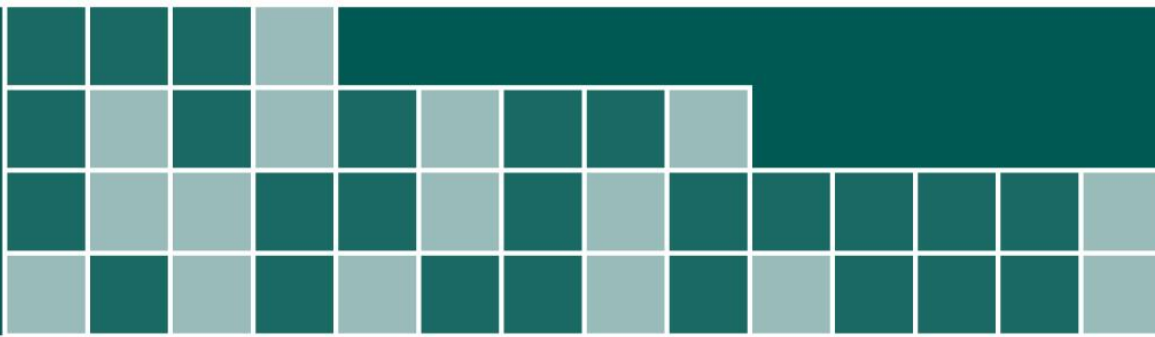




Foggia C-126/10



- Comments:
- PT Tax neutrality regime regarding the merger (Art. 67, para. 10 CITC): OK.
- “Valid commercial reasons”: condition to the tax neutrality regime (Art. 11 merger Directive, Art 67 CITC)) + carry forward of losses (Art. 69 CITC)
- Tax neutrality regime applies automatically and may be challenged later by the tax administration
- Carry forward of losses requires authorisation
- Is the meaning of “valid commercial reasons regarding carry forward of losses” within the scope of the Directive?
- Inconsistent if the neutrality regime is applicable?
- Different procedural rules but same concept of “valid commercial reasons”.



- Is “Valid commercial reasons” a EU concept?
- Why didn’t the AG give an Opinion?

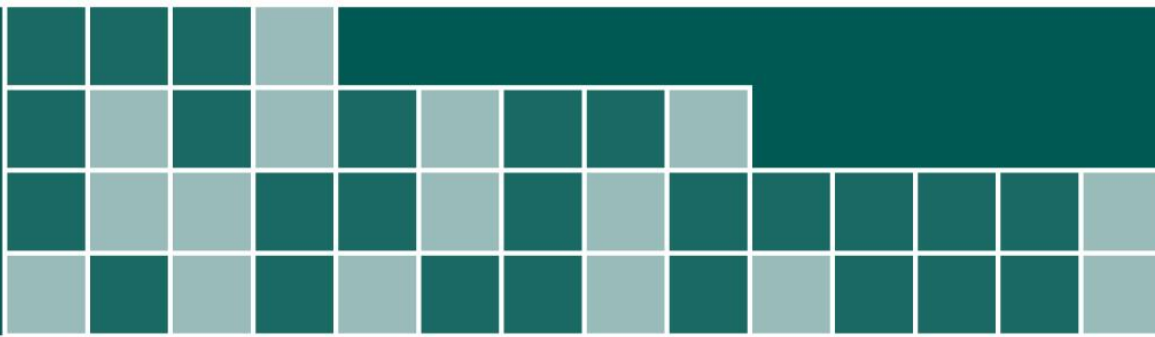
I. Pure National Context (Foggia, para. 16 et seq.)

- Internal and cross-border restructuring subject to the same merger taxation system and refusal to the benefits of the system is applicable to both internal and cross-border situations: Art. 11, 1 a) (Foggia, para. 20)
- Pure internal situations treated as EU situations governed by the Merger Directive: Leur-Bloem, paras. 16-34; Zwijnenburg, paras. 31-35; Foggia, para. 21.
- Uniform interpretation of EU Law concepts: avoids reverse discrimination or any distortion of competition.



II . PT Government: no connection between Art. 11,a a) and the subject matter – Art. 6

- Presumption of relevance, admissible:
- Referred question is on the interpretation of Art. 11, 1 a):
did the PT Supreme Court get it wrong?
- If the ECJ concludes that there are no “valid commercial reasons in the concrete case”, for the purposes of the tax neutrality regime, no autonomy of the transfer of losses regime.



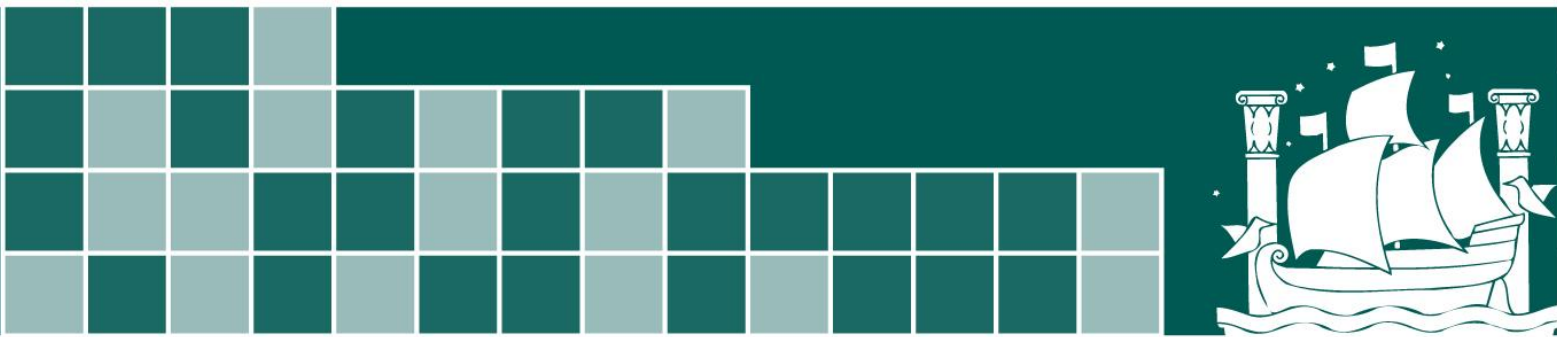
III. Questions referred to the ECJ



“Valid commercial reasons” – where positive effects in terms of structure of the group, even where **the acquired company does not pursue any activity**, has **no financial holdings** and **transfers only substantial losses** to the acquiring company?

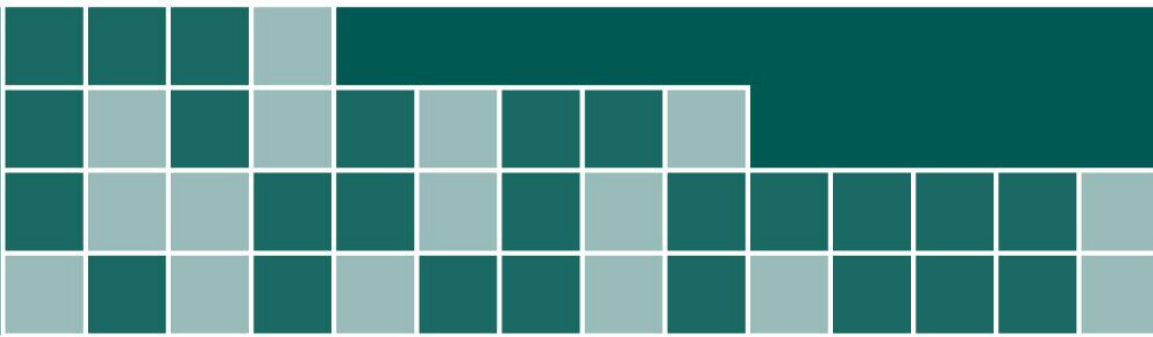
- **Purely** fiscal advantage cannot constitute a valid commercial reason – Leur-Bloem.

- Tax considerations cannot be **predominant** – Foggia, para. 35.



- Predetermined general criteria presuming tax evasion or avoidance are not acceptable (Foggia para. 37) – cf. cross-border losses and SGI
- Facts mentioned by the national court have to be considered: no management activity, no financial activity, the acquired company intended to take over the losses (Foggia, para. 38)
- Decisive: losses are substantial, unclear origin, no contribution of assets (para. 42)
- Saving made by the group concerned in terms of cost structure: marginal (para. 47)
- The purpose of Art. 11, 1 a) is to safeguard the financial interests of the MS (para. 50)
- Abuse of a EU rule. Financial interests of the internal market

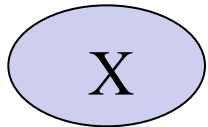




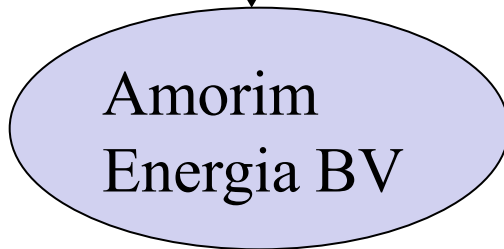
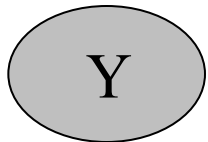
C- 38/11 Amorim Energia BV

PT

PT



WHT



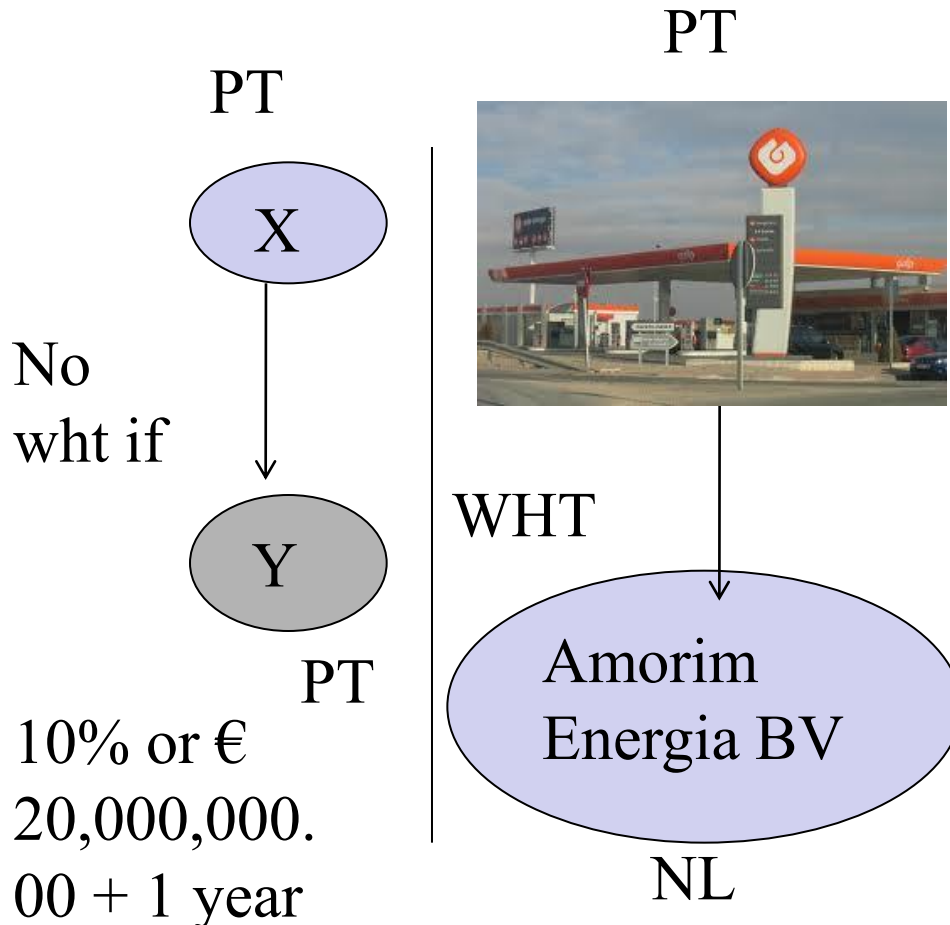
PT

NL

- FACTS: taxpayers, holdings & claims
- Amorim Energia BV (NL) acquired shares in Galp Energia SGPS SA (7 Dec. 2005)
- 14,268%
- Since 18 Sep 2006: 31.612% and until 5 Jan 2007: > 20%
- Payment of dividends:
 - 27 July 2006 (WHT)
 - 29 Sep 2006 (WHT)
 - 20 Nov 2006: claim for reimbursement of WHT on the basis of discriminatory treatment



C- 38/11 Amorim Energia BV



- Moreover: claim that dividends paid after 27 Jan 2007: no WHT
- II. Domestic Legislation in 2006
- domestic situations: no wht if 10% or more of holdings + 1 year before distribution
- Reimbursement deadline: after annual tax return delivered and within 3 months
- EU situation: no wht if 20% + 2 y (= PSD)
- 2 relevant sets of facts
- less than 20% and less than 2 years: WHT and no reimbursement (domestic situation – right to reimbursement after 1 year)
- 20% or more: reimbursement after 2 years (domestic situation – right to reimbursement after 1 year)
- Reimbursement deadline: 3 months after delivering the required proof to the Tax Administration



C- 38/11 Amorim Energia BV • Discrimination under EC

• WHT:

• Acte clair: Denkavit, Amurta, Comm. NL, Comm. It., Comm. Sp.; Secilpar

• Comm. Sp.: no opinion of AG; Secilpar, reasoned order (22-11-10)

• Art. 24 para 3 TT PT/NL – The NL shall allow a deduction from the NL tax so computed for dividends that may be taxed in PT.

• The amount *shall be equal to the tax paid* in PT on the items but shall not exceed the amount of the reduction which would be allowed if the items of income or capital so included were *the sole items of income or capital that are exempt from the NL tax* under NL law.

• The ECJ invited the PT court to clarify why it is not satisfied with Amurta, paras. 24-40 and Secilpar, paras. 30-38

PT

PT



WHT

Amorim
Energia BV

NL

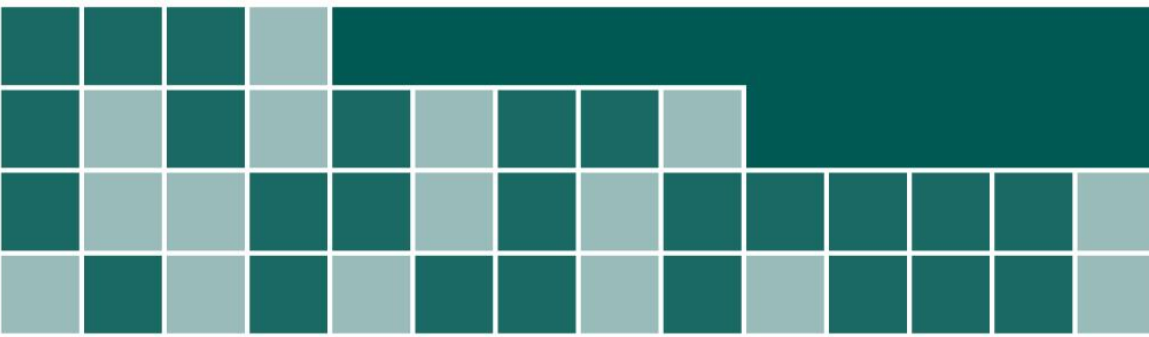
X

Y

No wht
if:

PT

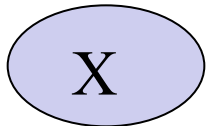
10% or €
20,000,000.00
+ 1 year



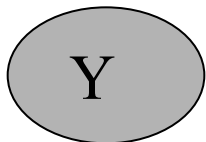
C- 38/11 Amorim Energia BV • Fundamental freedoms: question referred – only fmc. ?

- More onerous conditions for reimbursement: autonomous question?
- 20% or more: reimbursement after 2 years (domestic situation – right to reimbursement after 1 year)
- if the NL credits whole amount of PT wht...double non taxation
- If the NL does not reimburse – autonomous question
- Amorim BV: 2 years vs. 1 year: disparity or discrimination?
- Comparability between R & NR?
- Truck Center, paras. 41-50 & WHT as a mechanism with different purposes?
- Cash flow disadvantage?
- Metallgesellschaft and effective legal remedy for discriminatory treatment
- FII glo: cash flow disadvantage resulting from different methods to avoid double taxation
- Comparability – more onerous conditions: Futura, Comm. V. PT and legal representative
- No justification

PT



No
wht if:



PT

10% or €
20,000,000.00
+ 1 year

PT



WHT

Amorim
Energia BV

NL