

OECD Paper on Base Erosion and Profit Shifting (BEPS)

BEPS and ECJ Cases / EU Regulations

10/25/2016 Dr. Sven Helm, LL.M. (UC Davis)

BEPS and ECJ Cases – EU Regulation



Welcome!

May I introduce myself:

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BEPS and ECJ Cases – EU Regulation



- Introduction
- ECJ Leading Decisions
 - Cadbury Schweppes
 - Marks and Spencer
 - Timac Agro Deutschland
- Recent decision of the EU's antitrust regulator on Apple
- Impact on Tax Structuring Strategies
 - Interposing of Holding Companies - Limitations to Treaty and Directive Shopping
 - Tax Deductibility of (e.g. Interest and Royalty) Expenses – „Double Irish Sandwich“ not digestible anymore?

BEPS and ECJ Cases – EU Regulation



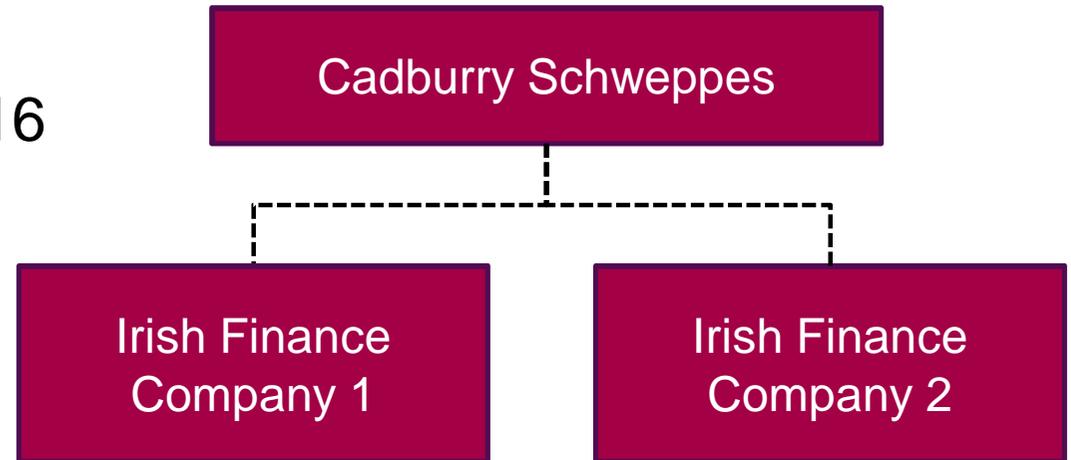
- Outlook on Future Tax Structuring Planning
 - Avoidance of Double Taxation
 - Minimization of Withholding Taxes
 - Sound Business Reasons
- Current Implementation Status of BEPS into German Tax Law and EU Legislation

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ECJ Leading Decisions

- Cadbury Schweppes 09/12/2016



Case:

- Cadbury Schweppes established two subsidiaries in Ireland.
- UK subjects to tax the positive incomes of Company 1, but not the losses of Company 2.
- Question ECJ: Freedom of establishment precludes national tax legislation, under certain conditions, from imposing a charge upon a parent company on the profits made in a foreign subsidiary.

Decision of ECJ:

- National measures restricting freedom of establishment may be justified relating to totally artificial arrangements.
- Freedom of establishment requires a stable and continuing basis in the economic life of the Member States.
- Therefore, a company cannot invoke freedom of establishment in another member state for the sole purpose of benefiting from more advantageous legislation.
- But interposing of corporations generally accepted!

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ECJ Leading Decisions

- Marks and Spencer

Case:

- Marks and Spencer's subsidiaries made losses, M&S sold affiliates.
- M&S claimed group relief from UK tax authorities for subsidiaries.
- UK does not allow to set off losses for non domestic resident subsidiaries.
- Question ECJ: Violation of freedom of establishment?

Marks and Spencer

Subsidiary 1
(Germany)

Subsidiary 2
(Belgium)

Subsidiary 3
(Germany)

Decision of ECJ:

- A restriction of the freedom of establishment is permissible, when it meets two conditions:
 1. It must pursue a legitimate objective compatible with the Treaty and be justified by overriding reasons in public interest.
 2. Must be suitable to ensure the attainment of the objective in question and not to go beyond what is necessary to obtain that objective.

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ECJ Leading Decisions

- Timac Agro Deutschland 12/17/2015

Case:

- German corporation with an Austrian PE in a loss position, which was sold to another group entity in 2005.
- Losses incurred in FYs 1997, 1998 were recognized in GER under a rule allowing for the deduction of foreign PE losses even though the exemption method applied.
- Question ECJ: Violation of freedom of establishment, with discrimination of a foreign establishment compared to a domestic establishment.

Timac Agro Deutschland

Permanent
Establishment
(Austria)

Decision of ECJ:

- Violation of freedom of establishment just in comparable situations, foreign PEs are not comparable with domestic PEs.
- Finality of losses is question of national courts.



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Recent decision of the EU's antitrust regulator on Apple

Decision:

- The European Commission said tax arrangements that Ireland offered Apple in 1991 and 2007 allowed the company to pay annual tax rates of between 0.005% and 1% on its European profits for over a decade to 2014.
- The commission's investigation concluded that Ireland granted illegal tax benefits to Apple, which enabled it to pay substantially less tax than other businesses over many years.
- The European Union's antitrust regulator has demanded that Ireland recoup roughly 14.5 billion of unpaid taxes by Apple Inc.
- European companies, including Fiat Chrysler Automobiles NV or Amazon, have also entered the commission's firing line over their tax deals with EU government.

All profits from European sales recorded in Ireland

Almost no profits taxed in Ireland (0.005% effective tax rate in 2014)

Apple subsidiary makes payment to Apple in U.S. for R&D

Consequences of the decision:

- The decision is likely to be the subject of years of appeals up to the EU's top court.
- It could set off a broader scramble by the U.S. and individual EU government over the right to tax billions of dollars of offshore profits made by Apple and other large companies.

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Impact on Tax Structuring Strategies

- Interposing of Holding Companies – Limitations to Treaty and Directive Shopping
 - Treaty abuse is one of the most important sources of BEPS concerns.
 - DTAs should not only prevent double taxation, but also non taxation.
 - Title and preamble of the OECD-MA have to be changed.
 - The OECD has proposed to limit or eliminate tax regimes that are seen as harming other countries tax bases.
 - The OECD`s recommendations for rule changes emphasize the importance of allocating profits to countries where you have substance (tangible assets and people actively performing business operations).
 - Companies that merely own IP may not be viewed as creating value if the company has no people managing that IP.

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Impact on Tax Structuring Strategies

- Tax Deductibility of (e.g. Interest and Royalty) Expenses
 - “Double Irish” and “Dutch Sandwich” not digestible anymore?



- From January 2015 impossible to register a company into the commercial register, without a tax residence in Ireland.
- Existing companies have an amendment deadline until the end of 2020.

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Outlook on Future Tax Planning

- Avoidance of Double Taxation
 - Use of hybrid transactions, involving companies or instruments that are treated differently in different countries, is often leading in tax efficiencies. These hybrids will be subject to more restrictive treatment by some countries, which may result in double taxation.
 - Use of hybrid transactions is examined with a Limitation-of-Benefit-Clause or Principal-Purpose-Test.
 - Reducing risk of double taxation may require significant operational shifts.
 - Current corporate structures, intercompany flows and business processes obsolete priorities
 - Adjustments should be made, before earnings are affected.

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Outlook on Future Tax Planning

- Minimization of Withholding Taxes
 - BEPS – Game changer for the Revenue and Taxpayers
 - Corporate Tax Rates may be reducing, but the tax base is increasing, which could lead to a higher tax load.
 - More emphasize an reduction / minimization of withholding taxes when doing tax planning as one item that clearly remains as main subject to a “clean” and “clear” tax structuring.

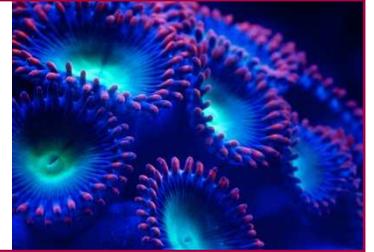
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Outlook on Future Tax Planning

- Sound Business Reasons
 - Is aggressive tax planning structurally different from avoidance?
 - Good Tax Governance: Ability to have objective standards to steer tax governance on cross-border situations towards desired goals, in compliance with best practices (the building up of internationally accepted standards).
 - BEPS + global tax transparency: tools of good tax governance.

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Current Implementation Status of BEPS into German Tax Law and EU Legislation

- Germany is in the implementation phase of BEPS.
 - Ministry of Finance released a Ministerial draft for implementation of modifications of the EU Mutual Assistant Directive and for further actions against transfer of profits and shortening of profits (06.01.2016).
 - The final completion of the concrete modification of international German tax law is expected for 2017 (e.g. Transfer pricing policy).
 - Until 2020: Monitoring-process for surveillance of the implementation in the participating states (OECD countries; USA?).

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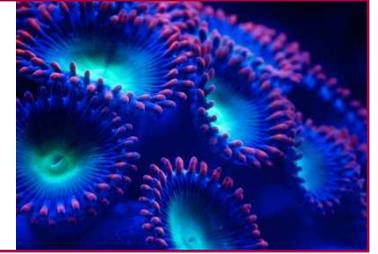
Current Implementation Status of BEPS into German Tax Law and EU Legislation

- **10-point action plan against “Tax Havens”**
 - The points include:
 - Deterring banks from promoting aggressive tax avoidance.
 - Increasing administrative sanctions on companies for misconduct.
 - Harmonizing international blacklists of tax havens and non-cooperative jurisdictions.
 - Global implementation of the new standard on automatic exchange of information (AEOI).
 - Placing pressure on Panama to join the AEOI system and reform its company law.
 - EU puts pressure to follow OECD / BEPS principles
 - State Aid Cases (Fiat, Starbucks,...)

Questions or comments?



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