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## *Tax Arbitration and the EU Treaties*

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- 0) Introduction
- 1) Institutional Questions
- 2) Fundamental Rights
- 3) State Aid
- 4) Fundamental Freedoms
- 5) Summary

- Autonomy and unity of EU law
  - CJEU as final arbiter of EU law
  - Article 344 TFEU
  
- Preliminary references— what is a court under Art. 267 TFEU
  - *Cf. Achmea (C-284/16) and Autoridade Tributária e Aduaneira (C-377/13)*
    - (1) Creation by law (2) permanence (3) compulsory jurisdiction (4) *inter-partes* procedure (5) independence (6) decision of judicial nature
  
- Applying principles to the “Advisory Committee”
  - Not a court
  - Does it interpret and apply EU law?
  - “Healing” the flaw through domestic court involvement?

- Applicability of the Charter and common constitutional traditions
  - Article 51(1) Charter
    - EU bodies
    - Member States implementing/acting within the scope of EU law
    - Affecting EU rights?
  - Affected rights
    - Fair trial & effective remedy? (Art 47 CHFR)
    - Right to good administration? (Art 41 CHFR)

- Arbitration outcomes must comply with substantive (internal market) rules:
  - State aid and transfer pricing
    - Non-compliance with ALP as state aid risk
  - State aid and DTC interpretation
    - “Incorrect” results – margin of discretion in tax arbitration?
    - International law obligation does not mitigate against state aid risk (see *Micula*; Art 351 TFEU)
    - Avoidance of double taxation as justification ground?
- Consequences for global tax arbitration?

- Arbitration outcomes must comply with substantive (internal market) rules:
  - Fundamental freedoms: unproblematic since aligned with DTC goals?
  - Except: horizontal discrimination?
    - Accepted in *Sopora*, but likely not applicable in case of DTC or AC
    - Can occur independent of DTC rules?
      - This would be where arbitration (and thus tax) outcomes systematically differ despite application of equivalent DTC
      - E.g. if a MS were to accept different outcomes in arbitration in relation to high-tax countries as compared to low-tax countries.
      - Justification by way of balanced allocation? Risk of profit shifting?

# Tax arbitration and ... EU treaties: Conclusion

- No general provision for tax arbitration in EU treaties
- Autonomy and unity of EU law require broad review capacity by national courts
- EU fundamental rights impact arbitration procedure – at least under TDRD
- Arbitration decisions risk amounting to state aid
- Arbitration decisions are unlikely to interfere with fundamental freedoms

Thank you very much for your attention!



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