



# EC LAW & TAX TREATIES

EUROPEAN COMMISSION TAXUD-E1



- I. Introduction
- II. Relationship between Tax Treaties and EC Law
- III. Tax Treaties and ECJ
- IV. Conclusions

# I. Introduction



- « Tax Treaty Law » as the main source of international tax law
- « EC Law » prevails over treaties, though acknowledging their role
- Different objectives and different approaches, but

***“... the powers retained by the Member States must nevertheless be exercised consistently with Community law ” (C-279/93 Schumacker, ...)***

# I. Introduction

- ***Communications on company tax in the internal market (Oct. 2001; Nov. 2003)***
  - complex treaty network is an obstacle to Internal market (300 treaties !);
  - additional tax burden for cross-border activities;
  - non-discrimination principle:
    - *no limitation on benefits*
    - *national treatment*

## II. Relationship between Tax Treaties and Community law

Taxation and Customs Union



### *Tax treaties in the Internal market*

*“... in the absence of ...harmonising measures ... the Member States are at liberty, in the framework of bilateral agreements ..., to determine the connecting factors for the purposes of allocating powers of taxation.” (C-307/97 Saint-Gobain)*

- *Fundamental freedoms do not oblige MSs to ensure that “... the tax to which the taxpayer is subject in one State is no higher than that to which he or she would be subject in the other.” (C-336/96 Gilly)*

## II. Relationship between Tax Treaties and Community law

Taxation and Customs Union

### *Tax treaties in the Internal market*

However,

*« Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals ... the abolition of double taxation within the Community ... »*

*(Article 293 EC Treaty)*

## II. Relationship between Tax Treaties and Community law

Taxation and Customs Union



### ***Tax treaties with third countries***

- Different issues arise according to whether treaties were signed before or after 1.1.1958 or Accession (Article 307 EC Treaty)
- Concluding an agreement with a non-Member State could constitute an infringement to fundamental freedoms when it includes nationality clauses ( ECJ – "*Open Skies*" )

# III. Tax Treaties and the European

## Court of Justice

Taxation and Customs Union



- Tax treaties must comply with fundamental freedoms
- OECD Model Convention expresses principles of international law, but
  - treaty relief rules may not hinder entitlement to personal deductions (*Schumacker*)
  - non-entitlement to treaty benefits for a PE (*Saint-Gobain*) could be incompatible with fundamental freedoms



# IV. The Proposed Solutions



- **"Positive integration"**
  - Directive or other instruments of secondary law
  - EU Multilateral Treaty
  - EU Model Treaty
  - Soft law
  - Coordination of domestic law
  - Most-favoured-nation treatment

Otherwise, is the **"Negative integration"** (ECJ)  
the only way ?