

WIRTSCHAFTS UNIVERSITÄT WIEN VIENNA UNIVERSITY OF ECONOMICS AND BUSINESS

EFMD EQUIS ACCREDITED

LOB and PPT Rules from an EU Law Perspective

Kasper Dziurdź

Agenda

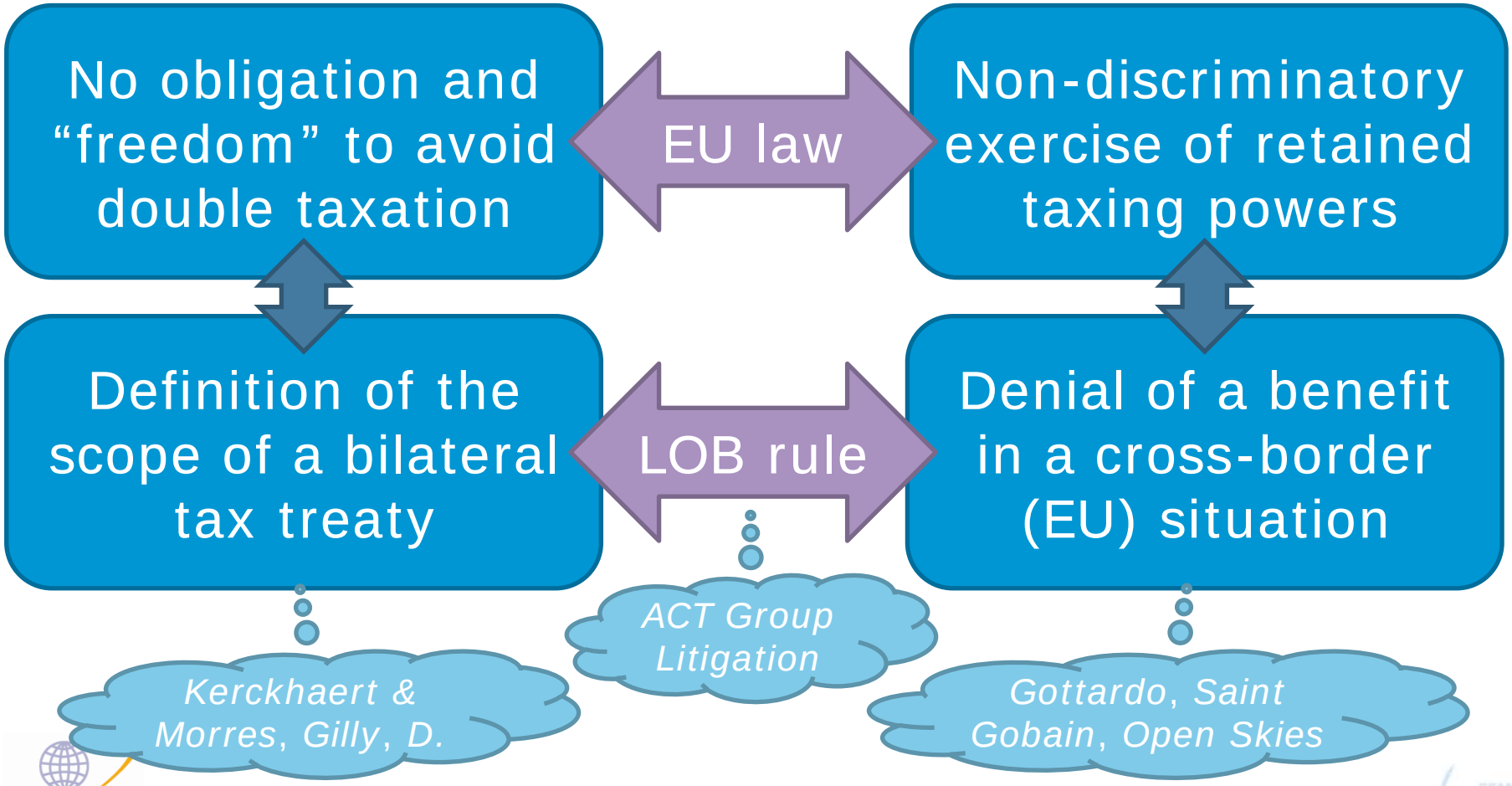
- Article 7 of the Multilateral Convention: **Prevention of Treaty Abuse**
  - Limitation on Benefits (LOB) Rule
  - Principal Purposes Test (PPT) Rule
  - Compatibility with EU law?

LOB Rule and EU Law

- LOB rule aims at avoiding **treaty shopping**
- Denial of benefits if a resident EU corporation is not listed on a recognised stock exchange
- Denial of benefits if a resident EU corporation is EU-owned instead of domestically owned
- Item-related exceptions
  - Active conduct of a business (but not holding, overall supervision or administration of a group, group financing, making or managing investments)
  - Owned by equivalent beneficiaries
  - Discretionary relief

… insufficient to overcome EU law concerns (item-based, not all activities, cliff effect, discretion)

LOB Rule and EU Law



PPT Rule – Relevant Elements

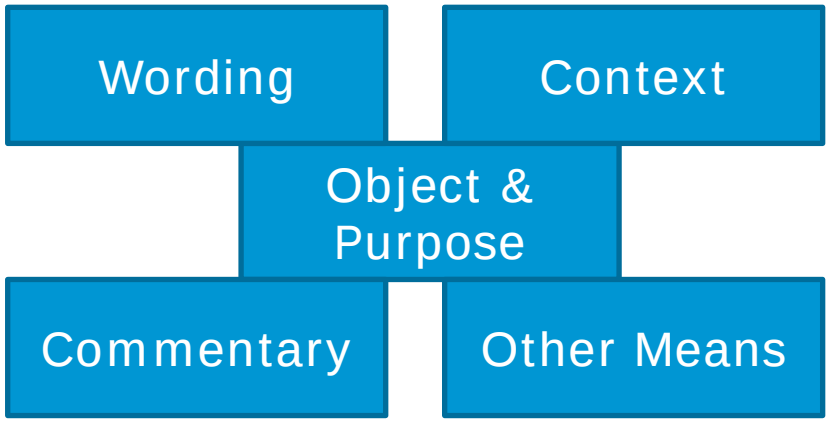
- Subjective element
  - Tax treaty benefit was one of the principal purposes …
- Objective element
  - … and would not be in accordance with the object and purpose of the relevant provisions of the Convention
- Focus on specific benefits and, thus, not only on the establishment (≠ *Cadbury Schweppes*)
- BEPS Action 6 Report an important means of interpretation under Article 32 of the VCLT

PPT Rule – Relevant Elements

- Subjective element (objective analysis)
  - Tax treaty benefits are as such inconclusive
  - Tax treaty benefits may tip the balance in favour of a particular transaction without being a principal purpose
  - Tax treaty benefits may be a business consideration
- Objective element
  - Aim to avoid double taxation in respect of *bona fide* exchanges of goods and services, and movements of capital and persons (including overall supervision or administration of a group, group financing, etc.)
  - Benefits depend on the object and purpose

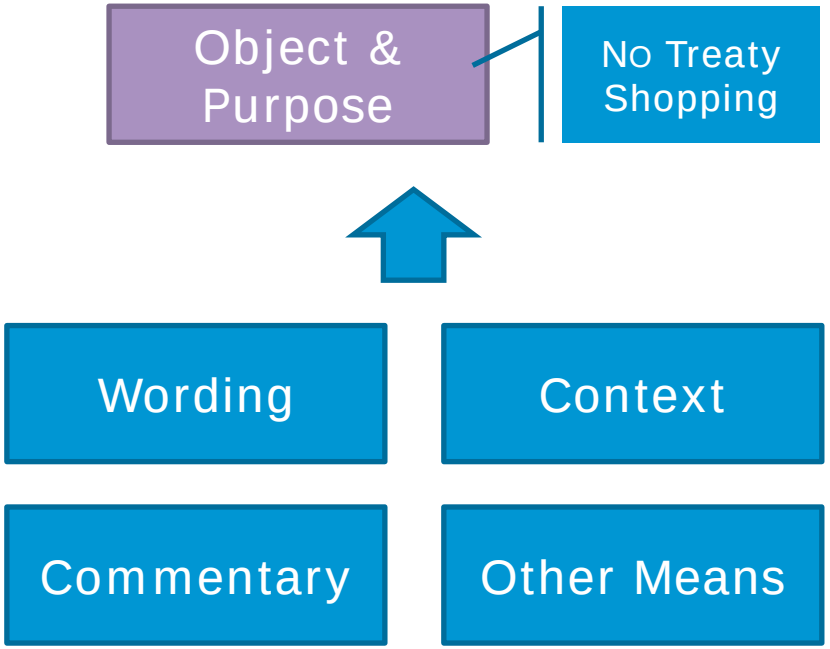
PPT Rule – Objective Element: Object and Purpose

VCLT



... a single combined operation: object & purpose may have more *or less weight* than wording, etc.

PPT Rule



PPT Rule and EU Law

- EU law requirements (including ATAD)
  - Tax treaty benefits cannot be denied if “genuine economic activity” for “valid commercial reasons”?
    - Tax treaty benefits alone a “valid commercial reason” or rather more than a purely fiscal advantage required?
  - Potential problem: denial of tax treaty benefits even though genuine exercise of a fundamental freedom
- PPT rule unlikely to cover genuine transactions
  - Specifies scope by emphasizing the object and purpose
  - Changes allocation of taxing rights (discretionary relief)

Shift of the Burden of Proof?

Tax authority

Taxpayer?

Rule **Exception**

Avoidance of Double Taxation	Principal Purposes (subjective test)	Object and Purpose (objective test)

Burden of proof a domestic issue

Rule **Exception**



Shift of the burden of proof?

Conclusions

- Commission's investigation: LOB rule NL/Japan
  - Concerns about recognised stock exchanges
  - Concerns about ownership requirement
  - Request for a reasoned opinion in November 2015
    - … since then: no new developments?!
- Compatibility of LOB rule with EU law unclear
- Compatibility of PPT rule with EU law probable
- Multilateral Convention: better to avoid LOB rule and to choose PPT rule and discretionary relief
  - … at least from an EU law perspective

VIENNA UNIVERSITY OF ECONOMICS AND BUSINESS

INSTITUTE FOR AUSTRIAN AND INTERNATIONAL TAX LAW
Welthandelsplatz 1
1020 Vienna, Austria

DR. KASPER DZIURDŹ
(APART Fellowship)

T +43-1-313 36-5922
F +43-1-313 36-90-5922
kasper.dziurdz@wu.ac.at
www.wu.ac.at/taxlaw