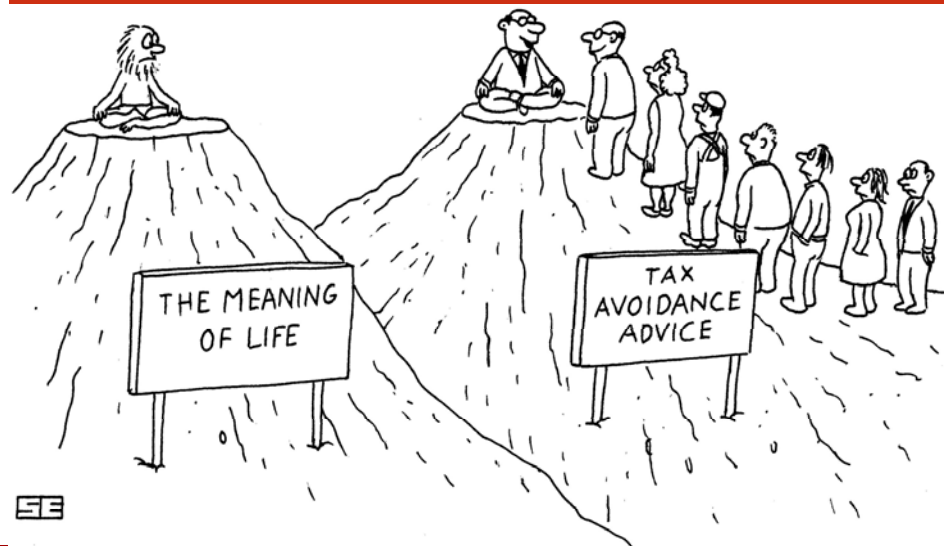


Anti-abuse & EU directives

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June 2013



Agenda

General observations

Merger Directive

Parent-Subsidiary Directive

Conclusion

General observations

- Freedom to choose the fiscally most attractive route
- General principle prohibiting abuse of rights
- Double non-taxation is not automatically abuse
- Hierarchy between directives and primary EU law
 - *Cadbury Schweppes*-doctrine
 - Principle of legal certainty: specific rules

Merger Directive

Scope

Leur-Bloem §36

“it is clear (...) from the general scheme of the Directive that the common tax rules which it lays down which cover different tax advantages, apply without distinction to all mergers, divisions, transfers of assets or exchanges of shares *irrespective of the reasons, whether financial, economic or simply fiscal, for those operations*”

Merger Directive

Article 15(1)(a)

“1. A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Articles 4 to 14 where it appears that one of the operations referred to in Article 1:

(a) Has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that the operation is not carried out for valid commercial reasons such as the restructuring or rationalisation of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives.”

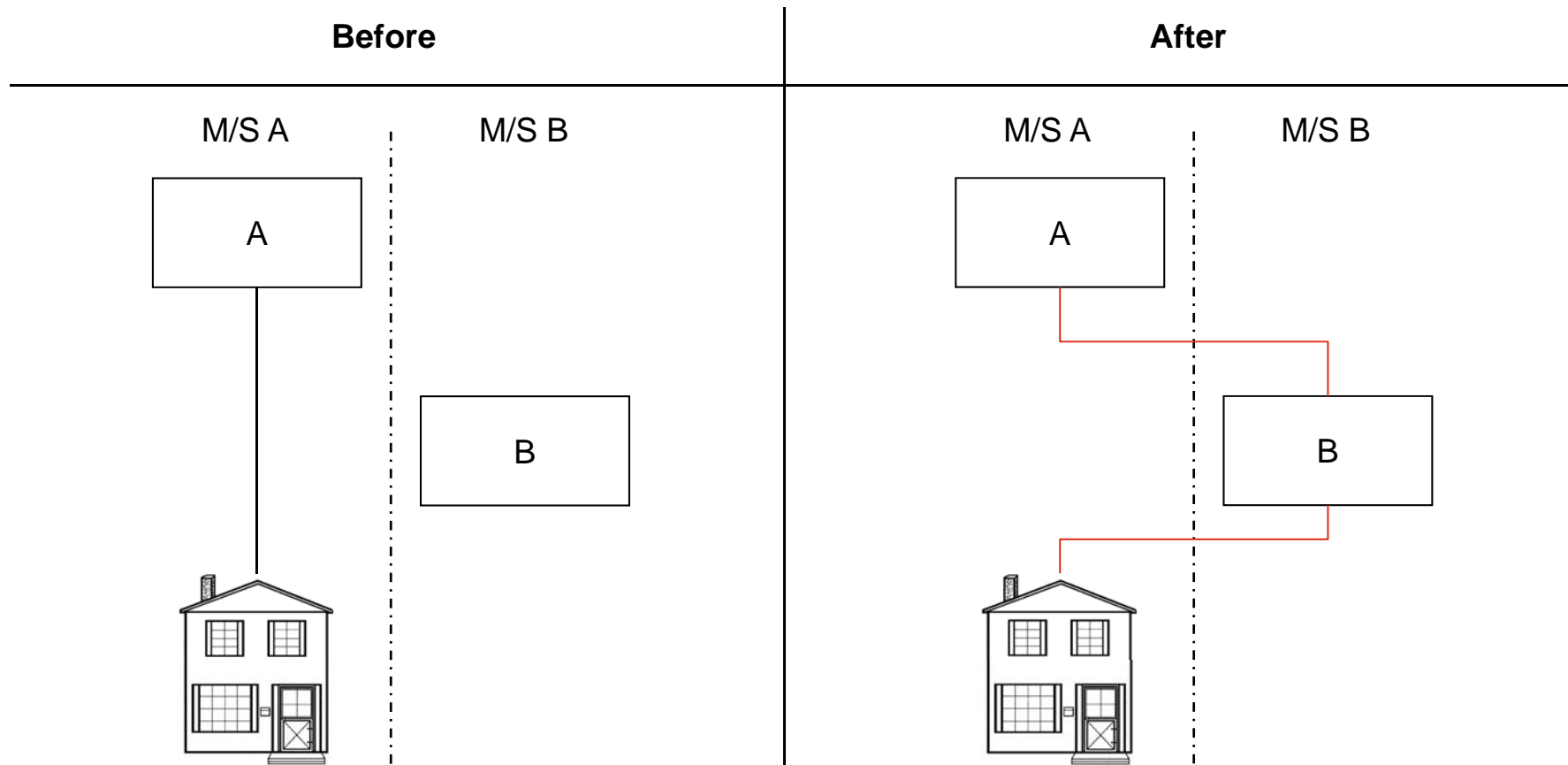
Merger Directive

Issues

- Abuse?
 - Conversion of taxable gain into tax exempt gain (see next slide)
- Specific measures?
 - Utilisation of losses
 - Non-resident taxation
- Double taxation

Merger Directive

Conversion of taxable gain into tax exempt gain



Parent-Subsidiary Directive

Articles 1(2) and 3(2)(b)

1(2):

“This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse.”

3(2)(b):

“By way of derogation from paragraph 1, Member States shall have the option of (...) not applying this Directive to companies of that Member State, which do not maintain for an uninterrupted period of at least 2 years holdings qualifying them as parent companies, or to those of their companies in which a company of another Member State does not maintain such a holding for an uninterrupted period of at least 2 years.”

Parent-Subsidiary Directive

Articles 1(2) and 3(2)(b)

- *Cadbury Schweppes*-doctrine
 - Subjective (intention) and objective (substance) element
- Directive / treaty shopping rules
 - The German experience
- Beneficial ownership
 - The pending Danish case
- Prevention of temporarily set-up structures
 - *Lex generalis derogat legi generali*

Conclusion

***The directives should contain
(more) specific anti-abuse rules
instead of general anti-abuse rules!***

Thank you ...

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