

# The Shielding Effect of European Tax Directives



**OMG Transatlantic Tax Talks**

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# Overview

- **Part I** – Legal Framework
- **Part II** – “Pro-Freedom” Directives
- **Part III** – “Pro-Fiscal” Directives
- **Part IV** – The GloBE Directive

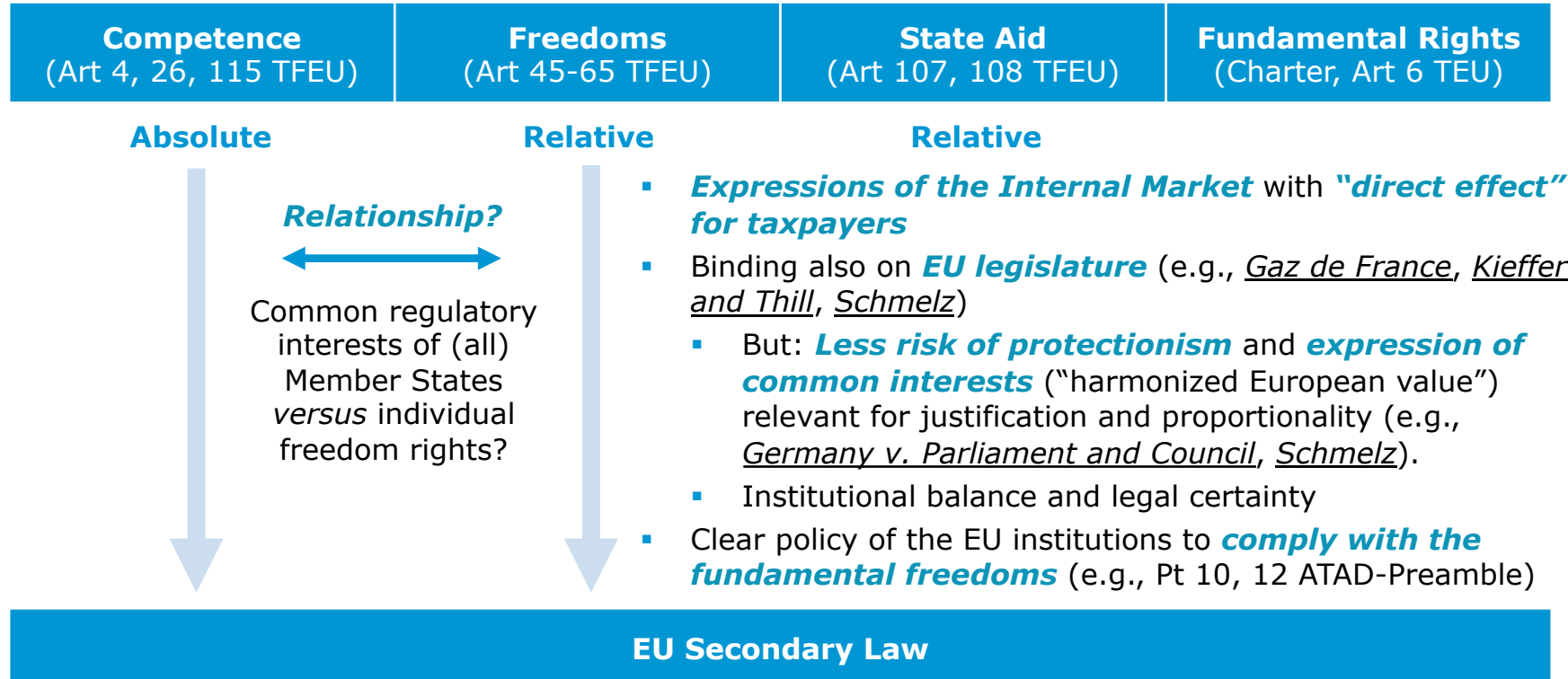
# *Part I* Legal Framework




# Introduction | *Primary Law*

<b>Competence</b> (Art 4, 26, 115 TFEU)	<b>Freedom</b> (Art 45-65 TFEU)	<b>State Aid</b> (Art 107, 108 TFEU)	<b>Fundamental Rights</b> (Charter, Art 6 TEU)
<p style="text-align: center;"><b>Absolute</b></p> <ul style="list-style-type: none"> <li>▪ Dimensions of the Internal Market               <ul style="list-style-type: none"> <li>▪ Removal of tax distortions, freedom rights</li> <li>▪ "Fair taxation", "unfair" tax competition</li> </ul> </li> <li>▪ Directives (Art 288(3) TFEU)</li> <li>▪ Unanimity in Council (Art 115 TFEU)</li> <li>▪ Subsidiarity and proportionality (Art 5 TEU)</li> </ul>	<p style="text-align: center;"><b>Relative</b></p> <ul style="list-style-type: none"> <li>▪ Restriction versus Discrimination</li> <li>▪ Binding on Member States and also on EU Legislature (Art 13 TEU)</li> <li>▪ Treaties as basis, framework and bounds for secondary law (<i>Viola</i>)</li> <li>▪ Jurisdiction of the CJEU on legality and validity of secondary law (Art 263, 267 TFEU)</li> </ul>	<p style="text-align: center;"><b>Relative</b></p> <ul style="list-style-type: none"> <li>▪ Criteria for "illegal State aid", especially selectivity and advantage</li> <li>▪ Imputability of aid to a State (separate from the question whether aid was granted through State resources)</li> </ul>	<ul style="list-style-type: none"> <li>▪ Binding on the EU (Art 6 TEU), its institutions etc and "Member States only when they are implementing Union law" (Art 51 CFR)</li> <li>▪ EU Fundamental Rights versus constitutional protections in the Member States</li> </ul>

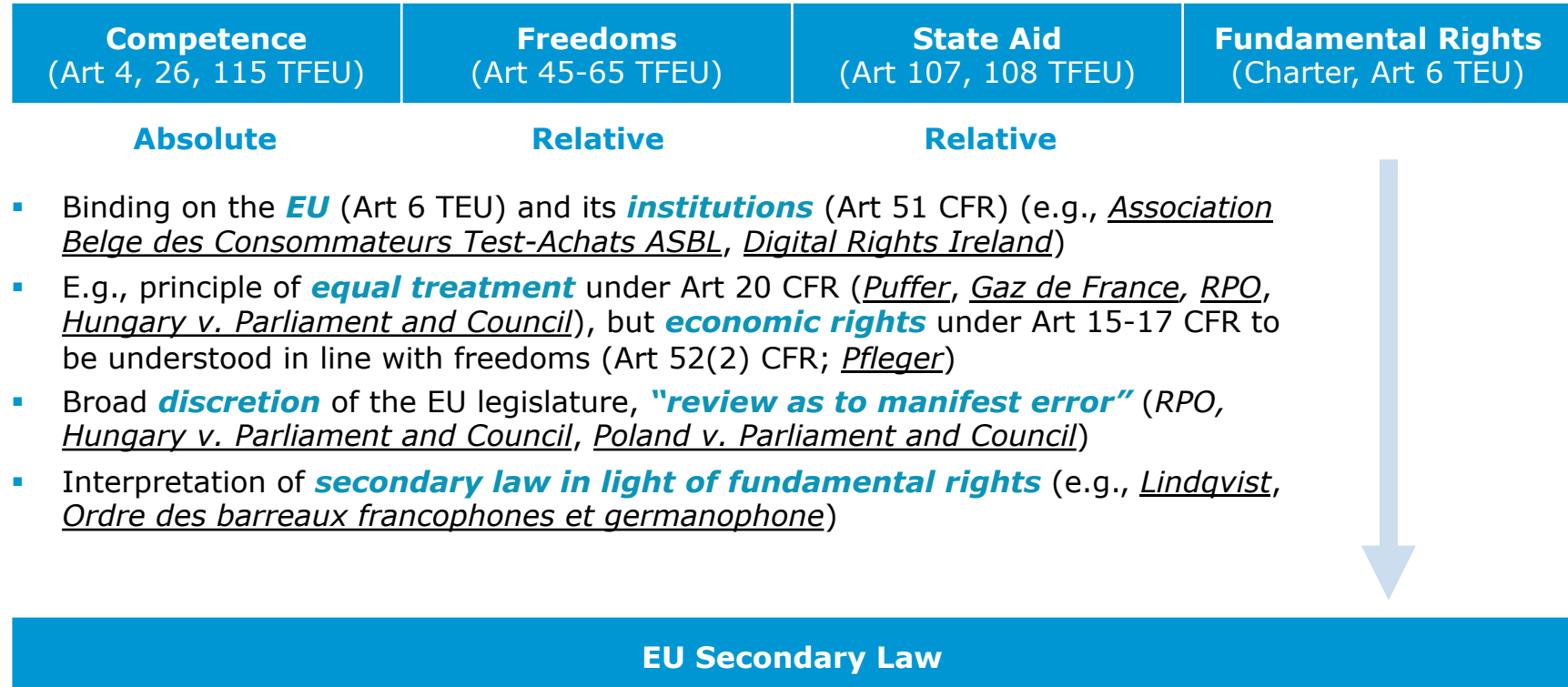
# Introduction | *Freedom*s



# Introduction | *State Aid*

Competence (Art 4, 26, 115 TFEU)	Freedoms (Art 45-65 TFEU)	State Aid (Art 107, 108 TFEU)	Fundamental Rights (Charter, Art 6 TEU)
<b>Absolute</b>	<b>Relative</b>	<b>Relative</b>	
		<ul style="list-style-type: none"><li>▪ Art 107 TFEU only refers to “aid granted by a Member State or through State resources”</li><li>▪ No <b>imputability to a Member State</b> (e.g., <i>Deutsche Bahn</i>, Para. 44 of the <u>2016 Commission Notice</u>)</li><li>▪ Generally, <b>discretion of the Commission</b> and the Council, especially with regard to the unanimity requirement</li><li>▪ Deference to the <b>political process</b></li></ul>	
			
<b>EU Secondary Law</b>			

# Introduction | *Rights*



# Introduction | *Exhaustiveness*

**Competence**  
(Art 4, 26, 115 TFEU)

**Freedoms**  
(Art 45-65 TFEU)

**State Aid**  
(Art 107, 108 TFEU)

**Fundamental Rights**  
(Charter, Art 6 TEU)

- “Exhaustive”, “full”, “complete” harmonization?
  - In case of “exhaustive” harmonization, a national measure “must be assessed *in the light of the provisions of the harmonising measure and not those of the Treaty*” (e.g., Vanacker and Lesage, DocMorris, HSBC, Air Berlin, Swedish Match AB)
  - It then becomes a question of **validity** of secondary EU Law (Article 263, 267 TFEU) → Secondary law **presumed lawful** until withdrawn, annulled or declared invalid, unless “tainted by an **irregularity whose gravity** is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect” (e.g., Commission v. Greece [“Ouzo”])

## EU Secondary Law



**Competence**  
(Art 4, 26, 115 TFEU)

**Freedoms**  
(Art 45-65 TFEU)

**State Aid**  
(Art 107, 108 TFEU)

**Fundamental Rights**  
(Charter, Art 6 TEU)

- **“Exhaustive”, “full”, “complete” harmonization?**
  - Not only relates to an **“area”** (*Lodewijk Gysbrechts, Visnapuu*), a **“sector”** (*UPC DTH Sàrl*), a **“sphere”** (*DocMorris, Citroën Belux*), a **“matter”** (*DaimlerChrysler*) or a **“field”** (*Matratzen Concord AG*), ...
  - ... but also to a **singular (mandatory) rule, i.e., if no down- or upward derogation is permitted from that “floor” or “ceiling”** (i.e., even if it is so-called **“minimum harmonization”**) → **“Duty” versus “entitlement”** (AG Kokott in *A Oy*)
  - Examples from the tax area
    - No exhaustive harmonization, e.g., in old Art 1(2) PSD (*Egiom, Deister Holding and Juhler Holding, GS*) or Art 11 MD (*Euro Park Service*)
    - Exhaustive harmonization, e.g., with regard to Art 10, 11 of the Directive on indirect taxation of the raising of capital (*HSBC, Air Berlin*) and Art 282, 283 VAT (*Schmelz*)
    - What about the **ATAD**? What about the **GloBE Directive**? What about the **“Unshell” Directive**?

## EU Secondary Law

# Introduction | *Discretion*

**Competence**  
(Art 4, 26, 115 TFEU)

**Freedom**  
(Art 45-65 TFEU)

**State Aid**  
(Art 107, 108 TFEU)

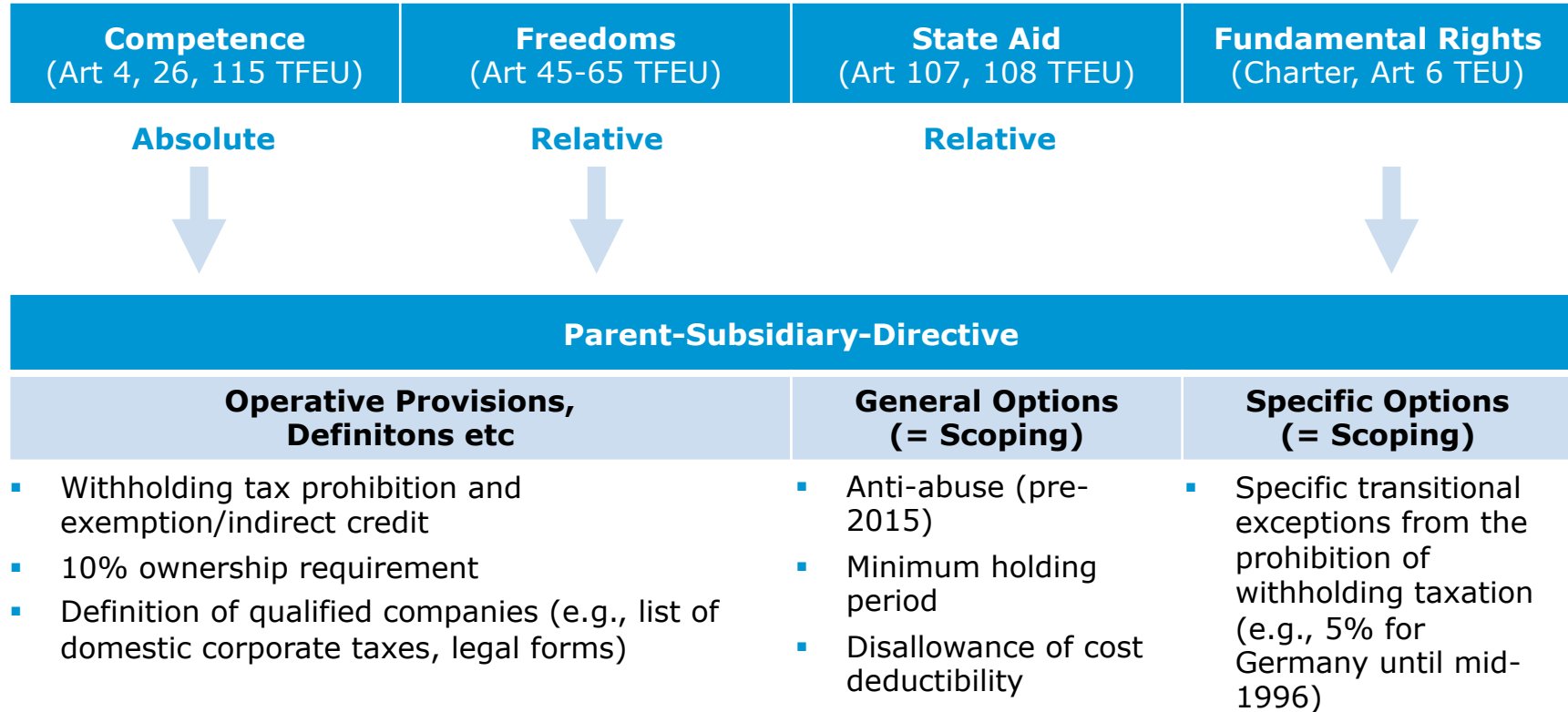
**Fundamental Rights**  
(Charter, Art 6 TEU)

- EU legislature enjoys “**broad discretion** when it is asked to intervene in an area” (such as taxation) “which entails **political, economic and social choices** on its part, and in which it is called upon to undertake complex assessments” (*RPO, Hungary v. Parliament and Council*)
- Legality of a measure (in light of equality and proportionality, but also competence) can “be affected only if the measure is **manifestly inappropriate** having regard to the objective which the competent institutions are seeking to pursue” (*Czech Republic v Parliament and Council, Hungary v. Parliament and Council*).
- EU legislature’s broad discretion, “implies **limited judicial review** of its exercise” (*Hungary v. Parliament and Council*) and is “limited to review as to **manifest error**” (*Billerud, RPO*)
- **Public interest aims** of the various Member States and level of protection for that interest which seems acceptable in the Union (*Germany v. Parliament and Council, Luxembourg v. Parliament and Council*)

## EU Secondary Law

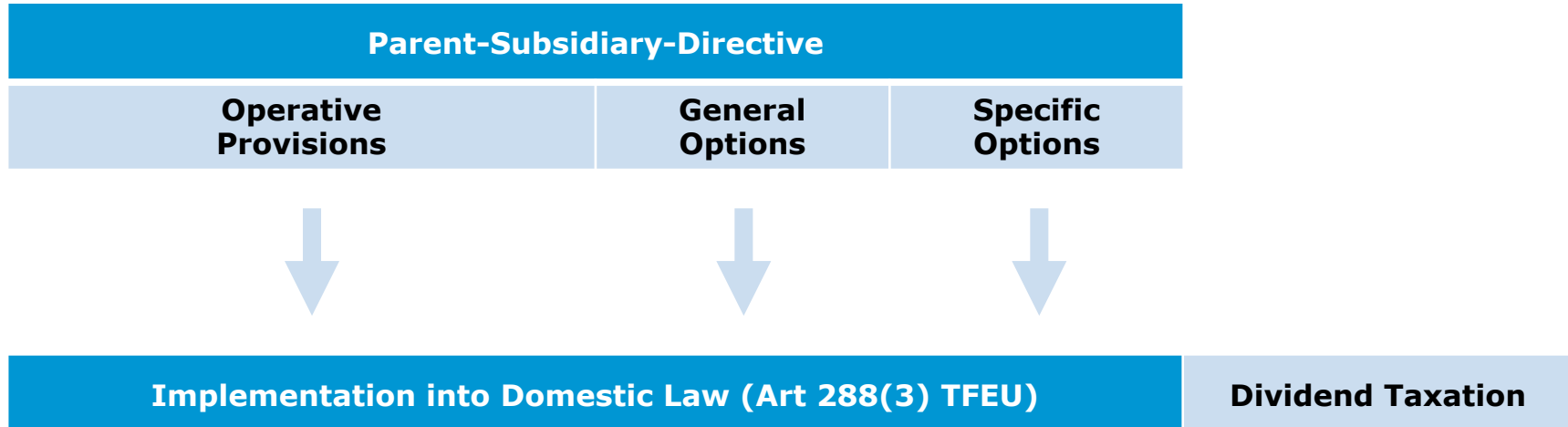
# *Part II* “Pro-Freedom” Directives

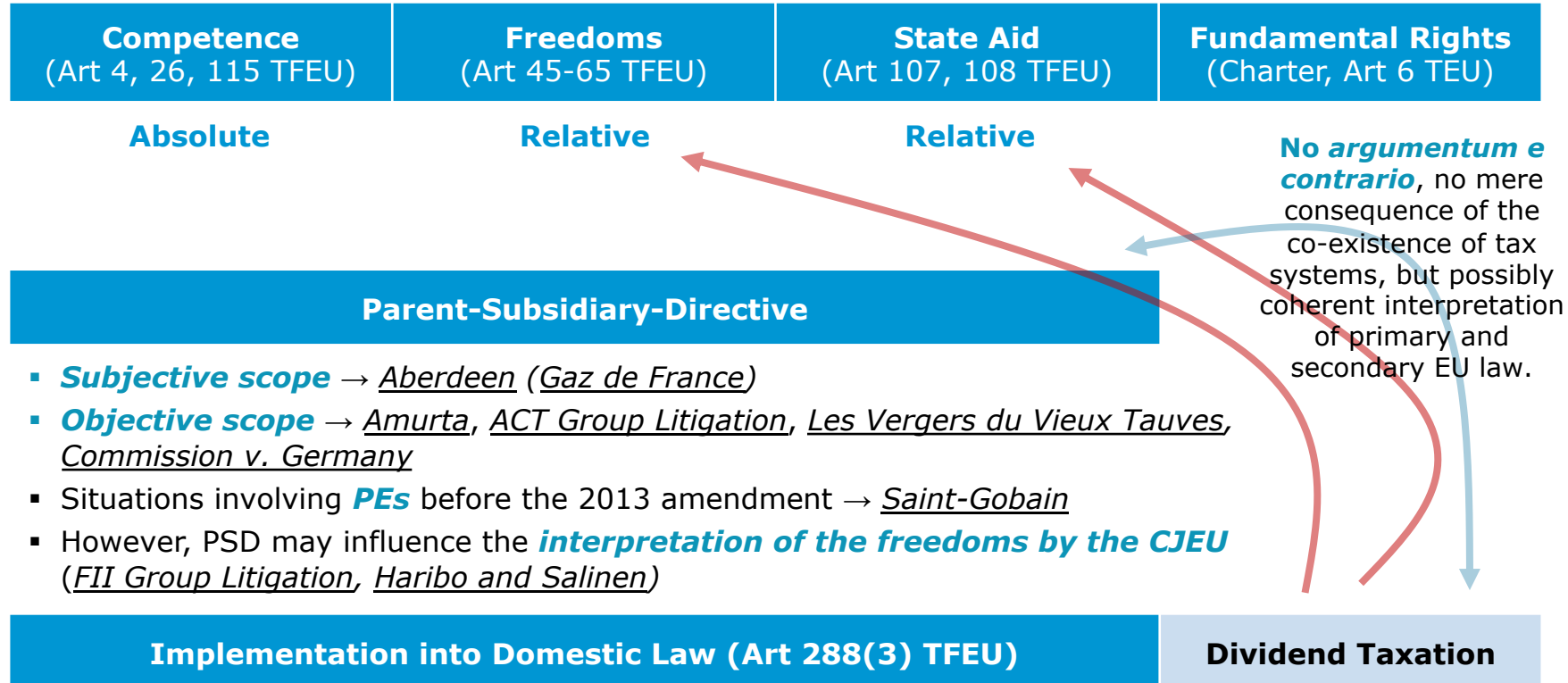




# PSD | *Implementation*

<b>Competence</b> (Art 4, 26, 115 TFEU)	<b>Freedoms</b> (Art 45-65 TFEU)	<b>State Aid</b> (Art 107, 108 TFEU)	<b>Fundamental Rights</b> (Charter, Art 6 TEU)
<b>Absolute</b>	<b>Relative</b>	<b>Relative</b>	





<b>Competence</b> (Art 4, 26, 115 TFEU)	<b>Freedom</b> (Art 45-65 TFEU)	<b>State Aid</b> (Art 107, 108 TFEU)	<b>Fundamental Rights</b> (Charter, Art 6 TEU)
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**Absolute**

**Relative**

**Relative**



At all events, in adopting this directive the Council ensured that the Member States' tax regulations were harmonised; consequently, provided that they are in line with the obligatory provisions of the directive in future, they will no longer be attributable to a particular Member State and cannot therefore be classed as state aid.

Para 112 of Commission Decision  
[2003] OJ L 282/25

**Implementation into Domestic Law (Art 288(3) TFEU)**

**Dividend Taxation**

# General Options | *Freedom*s

<b>Competence</b> (Art 4, 26, 115 TFEU)	<b>Freedom</b> (Art 45-65 TFEU)	<b>State Aid</b> (Art 107, 108 TFEU)	<b>Fundamental Rights</b> (Charter, Art 6 TEU)
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**Absolute**

**Relative**

**Relative**

**Context** of “options” and “permissions”, e.g., exercise of non-discriminatory options (e.g., *Bodin*) → But: **Absolute versus relative**

Parent-Subsidiary-Directive		
<b>Operative Provisions</b>	<b>General Options</b>	<b>Specific Options</b>

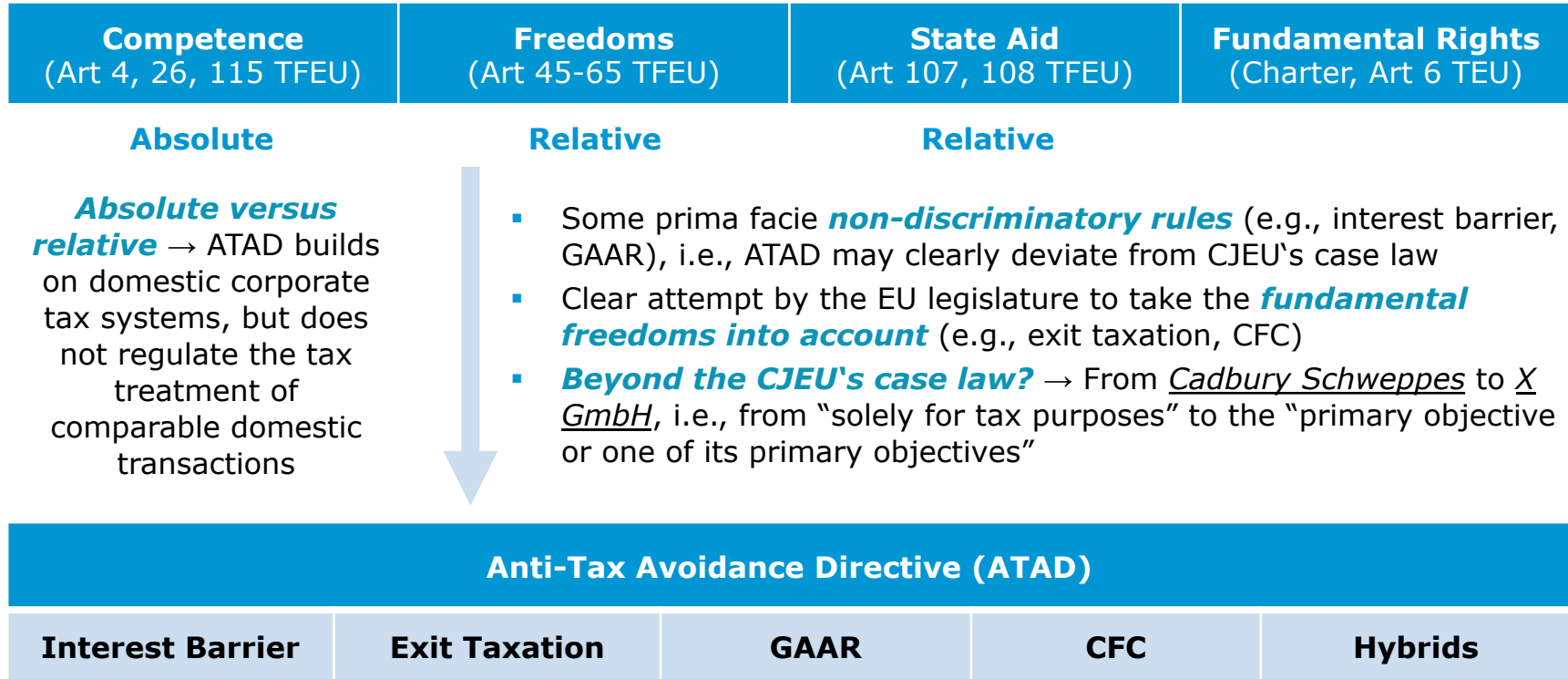
- **Abuse** (old Art 1(2) PSD) → *Egiom*, *Deister Holding and Juhler Holding*, *GS* – But: General principle of anti abuse (e.g., *T Danmark*)
- **Holding costs** (Art 4(2) PSD) → *Bosal*, *Keller Holding*, *Groupe Steria*. – But (new) doubts in BFH, 19 July 2017, I R 87/15

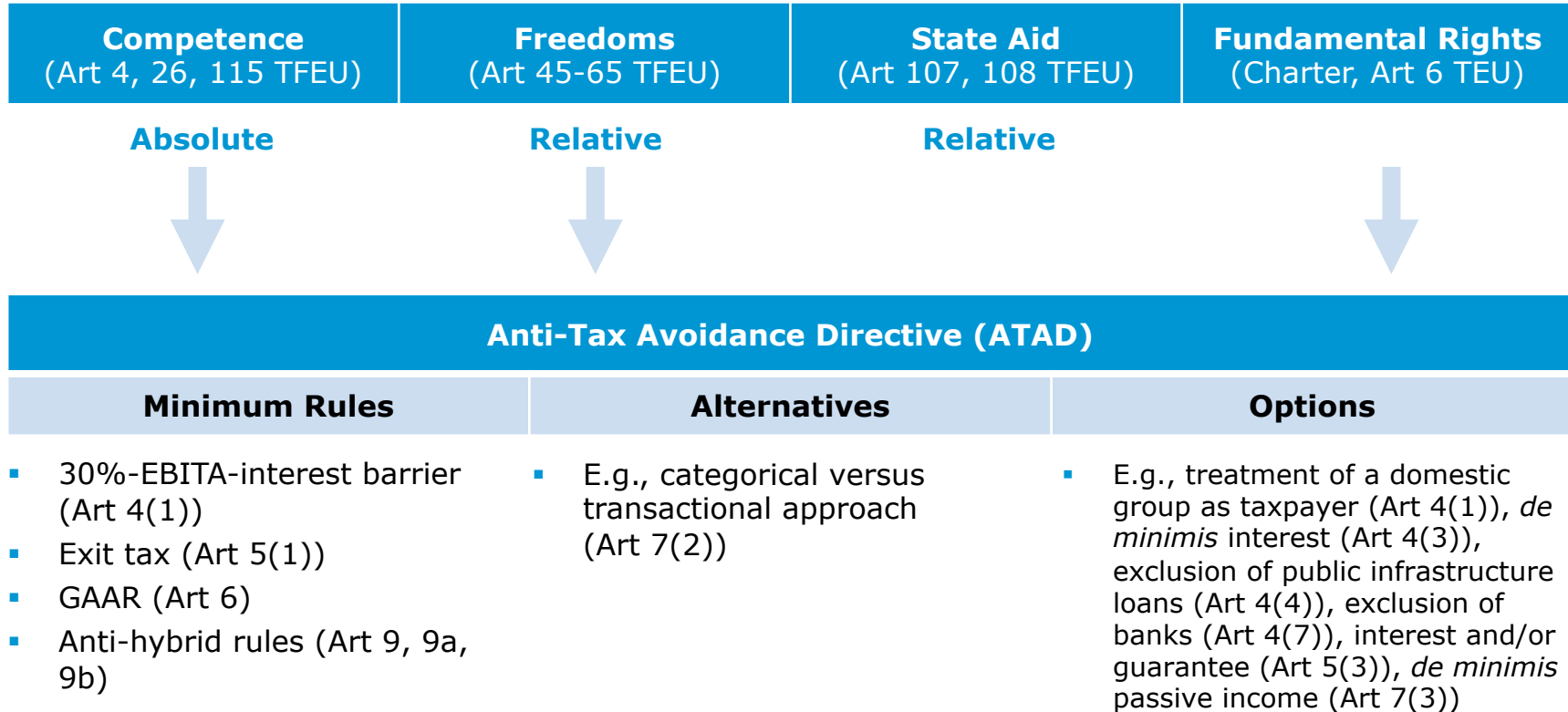
<b>Implementation into Domestic Law (Art 288(3) TFEU)</b>	<b>Dividend Taxation</b>
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# *Part III* “Pro-Fiscal” Directives







# ATAD | “Shield”?

Competence (Art 4, 26, 115 TFEU)	Freedoms (Art 45, 65 TFEU)	State Aid (Art 107, 108 TFEU)	Fundamental Rights (Chapter Art 6 TFEU)
implementing measures which follow a common line across the Union would provide taxpayers with legal certainty in that those measures would be compatible with Union law.			Finally, national

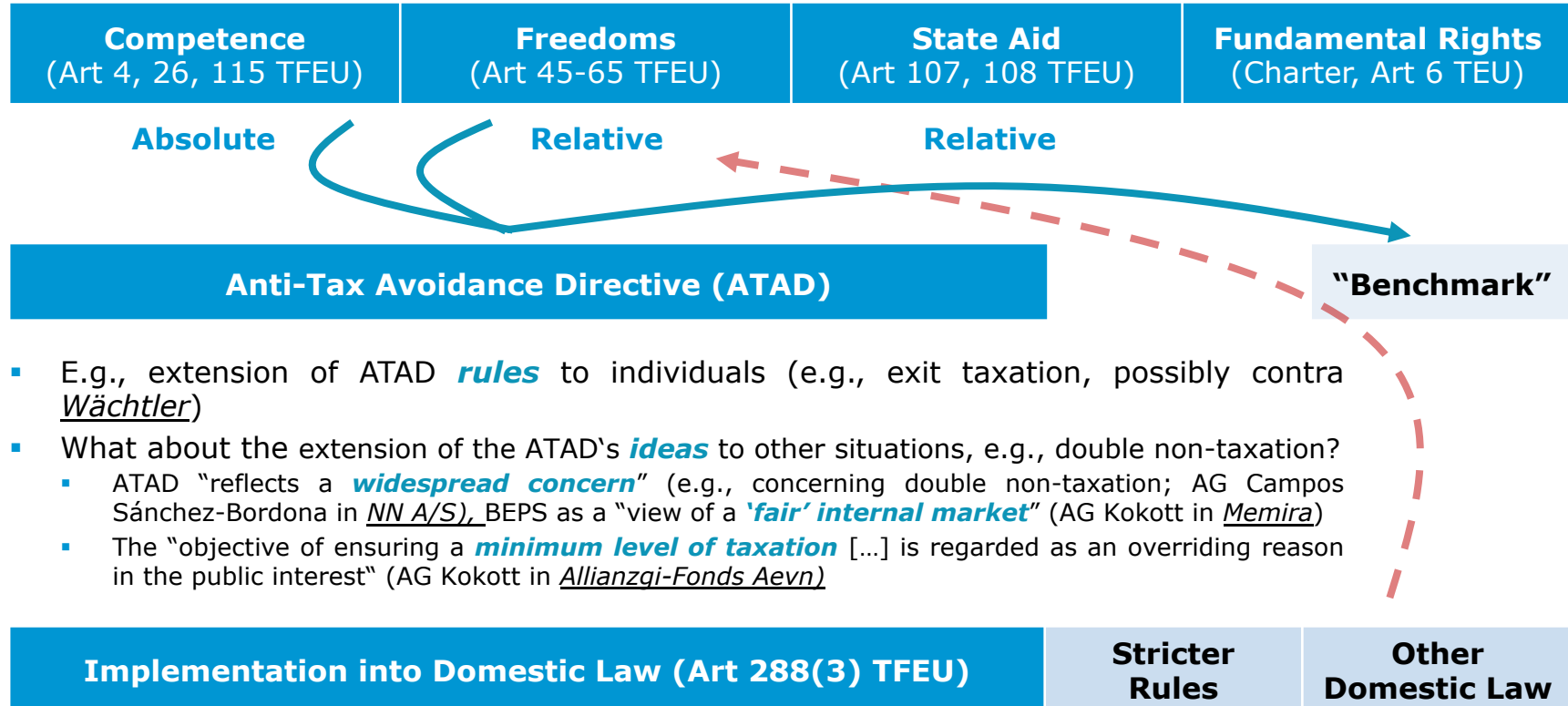
## Anti-Tax Avoidance Directive (ATAD)

**Minimum Harmonization** →  
Member States can be stricter (Art 3 ATAD)

Interest Barrier	Exit Taxation	GAAR	CFC	Hybrids
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- Indirect **impact of the ATAD on EEA countries** via Art 6 EEA-Agreement? → Pending E-3/21, *PRA Group Europe*, concerning treatment of a domestic group as taxpayer for purposes of the interest barrier)?

Implementation into Domestic Law (Art 288(3) TFEU)	Stricter Rules	Other Domestic Law
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# Minimum Rules | *Freedom*s

<b>Competence</b> (Art 4, 26, 115 TFEU)	<b>Freedom</b> s (Art 45-65 TFEU)	<b>State Aid</b> (Art 107, 108 TFEU)	<b>Fundamental Rights</b> (Charter, Art 6 TEU)
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Absolute

Relative

Relative

## Anti-Tax Avoidance Directive (ATAD)

**Minimum Rules**

**Alternatives**

**Options**

- Possibly exceeding standards set by **CJEU case law** (e.g., *Cadbury Schweppes*)
- But: Complete harmonization → **Mandatory rules** (*Berendse-Koenen*, *DocMorris*)
- Member States' rules **tested only against EU secondary law** (ATAD)

**Implementation into Domestic Law (Art 288(3) TFEU)**

# Minimum Rules | *State Aid*



Relative

Relative



## Anti-Tax Avoidance Directive (ATAD)

**Minimum Rules**

**Alternatives**

**Options**

- **No imputability of aid to a State** (separate from the question whether aid was granted through State resources) (e.g., Forum 187 ASBL, Puffer, Deutsche Bahn AG)

## Implementation into Domestic Law (Art 288(3) TFEU)

# Minimum Rules | *Rights*

<b>Competence</b> (Art 4, 26, 115 TFEU)	<b>Freedom</b> (Art 45-65 TFEU)	<b>State Aid</b> (Art 107, 108 TFEU)	<b>Fundamental Rights</b> (Charter, Art 6 TEU)
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Relative

Relative



## Anti-Tax Avoidance Directive (ATAD)

### Minimum Rules

### Alternatives

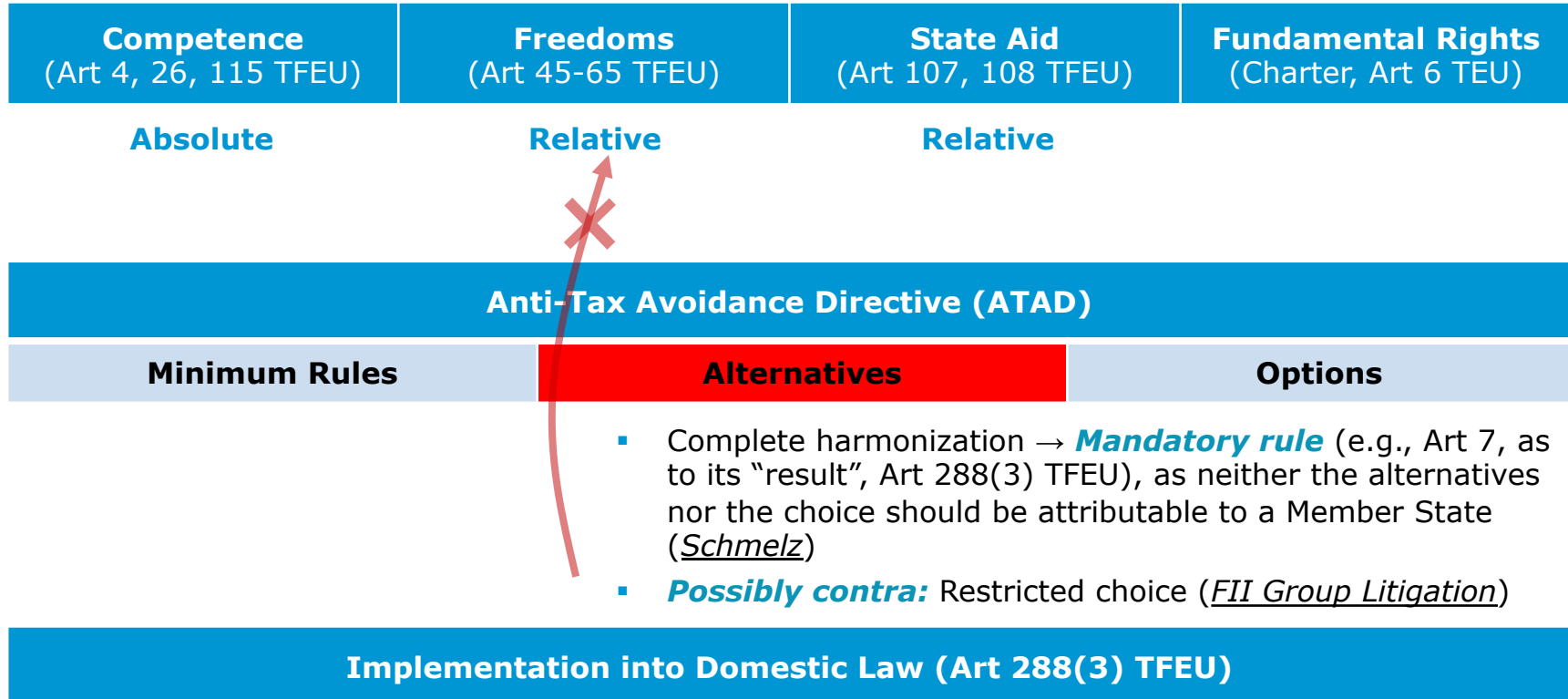
### Options

- **Supremacy of EU law** (*Costa/ENEL*) → Implementation of mandatory EU rules, in principle, not subject to scrutiny under **domestic constitutional rules** (e.g., German BVerfG, 13 March 2007, 1 BvF 1/05, and German BVerfG, 6 November 2019, 1 BvR 276/17)
- Scrutiny only of EU secondary law **against EU fundamental rights** (e.g., *Melloni*)
- Supremacy of EU law and **dialogue between domestic courts and the CJEU** (Art 267 TFEU)

## Implementation into Domestic Law (Art 288(3) TFEU)



# Alternatives | *Freedom*s

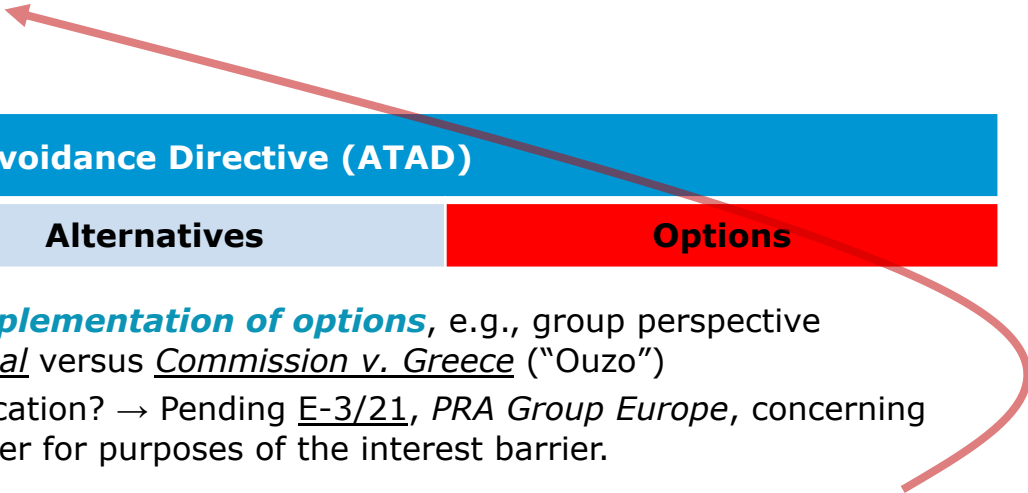


<b>Competence</b> (Art 4, 26, 115 TFEU)	<b>Freedom</b> s (Art 45-65 TFEU)	<b>State Aid</b> (Art 107, 108 TFEU)	<b>Fundamental Rights</b> (Charter, Art 6 TEU)
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**Absolute**

**Relative**

**Relative**



<b>Anti-Tax Avoidance Directive (ATAD)</b>		
<b>Minimum Rules</b>	<b>Alternatives</b>	<b>Options</b>

- Requirement of **non-discriminatory implementation of options**, e.g., group perspective for the interest barrier (Art 4(1))? → Bosal versus Commission v. Greece ("Ouzo")
- "**Unionized**" **interests** regarding justification? → Pending E-3/21, PRA Group Europe, concerning treatment of a domestic group as taxpayer for purposes of the interest barrier.

**Implementation into Domestic Law (Art 288(3) TFEU)**

# Options | *State Aid*

<b>Competence</b> (Art 4, 26, 115 TFEU)	<b>Freedom</b> (Art 45-65 TFEU)	<b>State Aid</b> (Art 107, 108 TFEU)	<b>Fundamental Rights</b> (Charter, Art 6 TEU)
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**Absolute**

**Relative**

**Relative**

**?**

## Anti-Tax Avoidance Directive (ATAD)

**Minimum Rules**

**Alternatives**

**Options**

However, this is not the case in situations where Union law simply allows for certain national measures and the Member State enjoys discretion (i) as to whether to adopt the measures in question or (ii) in establishing the characteristics of the concrete measure which are relevant from a State aid perspective. <sup>(65)</sup>

Para. 45 of the 2016 Commission Notice

## Implementation into Domestic Law (Art 288(3) TFEU)

# Options | *Rights*

<b>Competence</b> (Art 4, 26, 115 TFEU)	<b>Freedom</b> (Art 45-65 TFEU)	<b>State Aid</b> (Art 107, 108 TFEU)	<b>Fundamental Rights</b> (Charter, Art 6 TEU)
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**Absolute**

**Relative**

**Relative**

## Anti-Tax Avoidance Directive (ATAD)

**Minimum Rules**

**Alternatives**

**General Options**

- **Dual standard** → EU Fundamental Rights (*Akerberg Fransson*, *Meloni*) and domestic constitutional law (e.g., German BVerfG, 2 March 2010, 1 BvR 256/08)
- Also, invalidity of secondary EU law if it **permits a derogation from a fundamental right** (e.g., equal treatment for men and women; *Association Belge des Consommateurs Test-Achats ASBL*)

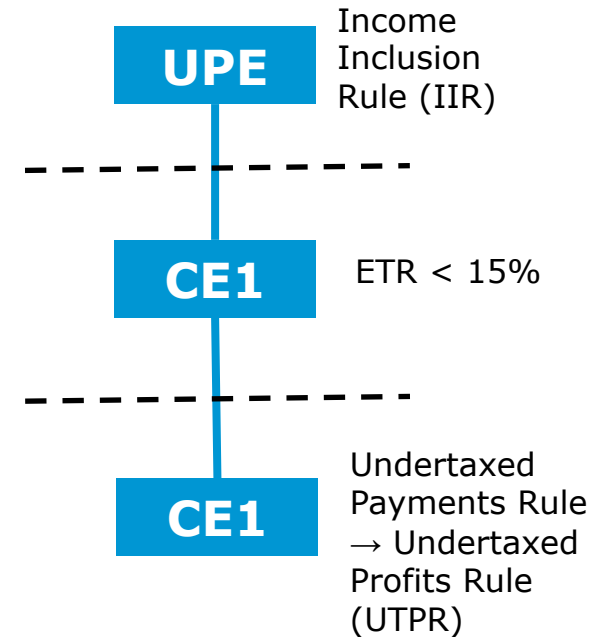
## Implementation into Domestic Law (Art 288(3) TFEU)

# *Part IV* The GloBE Directive



# Pre-Proposal | *Early Discussions*

- **Scope of the future GloBE-Directive?**
  - **Mandatory** minimum taxation (“full harmonization”) or ...
  - ... mere **option for Member States** to adopt the common (unionized, fully harmonized) approach? → Note: Harmonization achieved by the Directive concerning indirect taxes on the raising of capital is “complete” (“exhaustive”) (*HSBC, Air Berlin*)
- **Relationship with the Freedoms** (e.g., *Cadbury Schweppes, X GmbH*)?
  - **Option 1:** Extension to **purely domestic situations**
  - **Option 2:** “Shielding” → Justification of **purely cross-border rules** by a valid harmonized Union interest to achieve a **“fair” minimum level of taxation**? → “[O]bjective of ensuring a minimum level of taxation [...] is regarded as an overriding reason in the public interest” (Kokott in *Allianzgi-Fonds Aevn*).



Competence (Art 4, 26, 115 TFEU)	Freedoms (Art 45-65 TFEU)	State Aid (Art 107, 108 TFEU)	Fundamental Rights (Charter, Art 6 TEU)
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**Absolute**

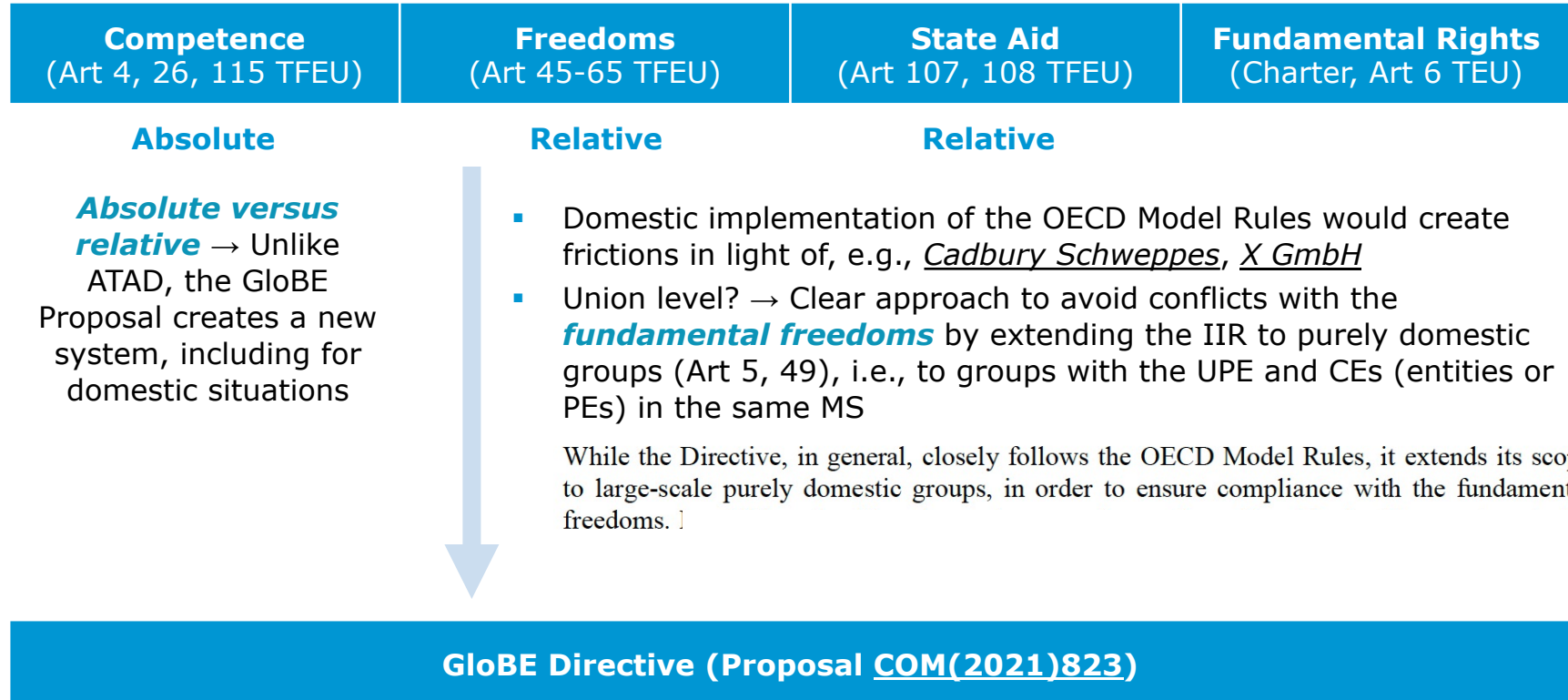
**Relative**

**Relative**

▪ **Internal Market? Subsidiarity and proportionality (Art 5 TEU)?**

- OECD Model Rules (“common approach”) → Uniform rules and a common minimum level of protection in the internal market and prevention of disparities in cross-border situations
- But:
  - Is rate harmonization permissible? → Mandatory IIR, UTPR – Agreement on an absolute **“floor” of minimum taxation** as a common internal market interest? (≠ Art 7 ATAD)
  - Is the application of the IIR to purely domestic groups an internal market interest? (~ Art 4, 6 ATAD) → Avoidance of conflicts with the fundamental freedoms
- Two **“collateral issues”**:
  - **Explicit external powers** (Art 54) and **implied external competence** (Art 3(2), 216 TFEU)?
  - “EU mandated” **tax treaty override**, should IIR/UTPR be viewed as violating tax treaty law (Art 351 TFEU)

**GloBE Directive (Proposal [COM\(2021\)823](#))**





Competence (Art 4, 26, 115 TFEU)	Freedom (Art 45-65 TFEU)	State Aid (Art 107, 108 TFEU)	Fundamental Rights (Charter, Art 6 TEU)
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**Absolute**

**Relative**

**Relative**

- Domestic implementation of the OECD Model Rules could create frictions with **State aid rules**, e.g., regarding the the threshold (€ 750 mio) and the restriction to cross-border situations → Unclear impact of Tesco, Vodafone etc in light of Hervis
- Art 107 TFEU only refers to “aid granted by a Member State or through State resources” → No **imputability to a Member State** (e.g., Deutsche Bahn, Para. 44 of the 2016 Commission Notice)



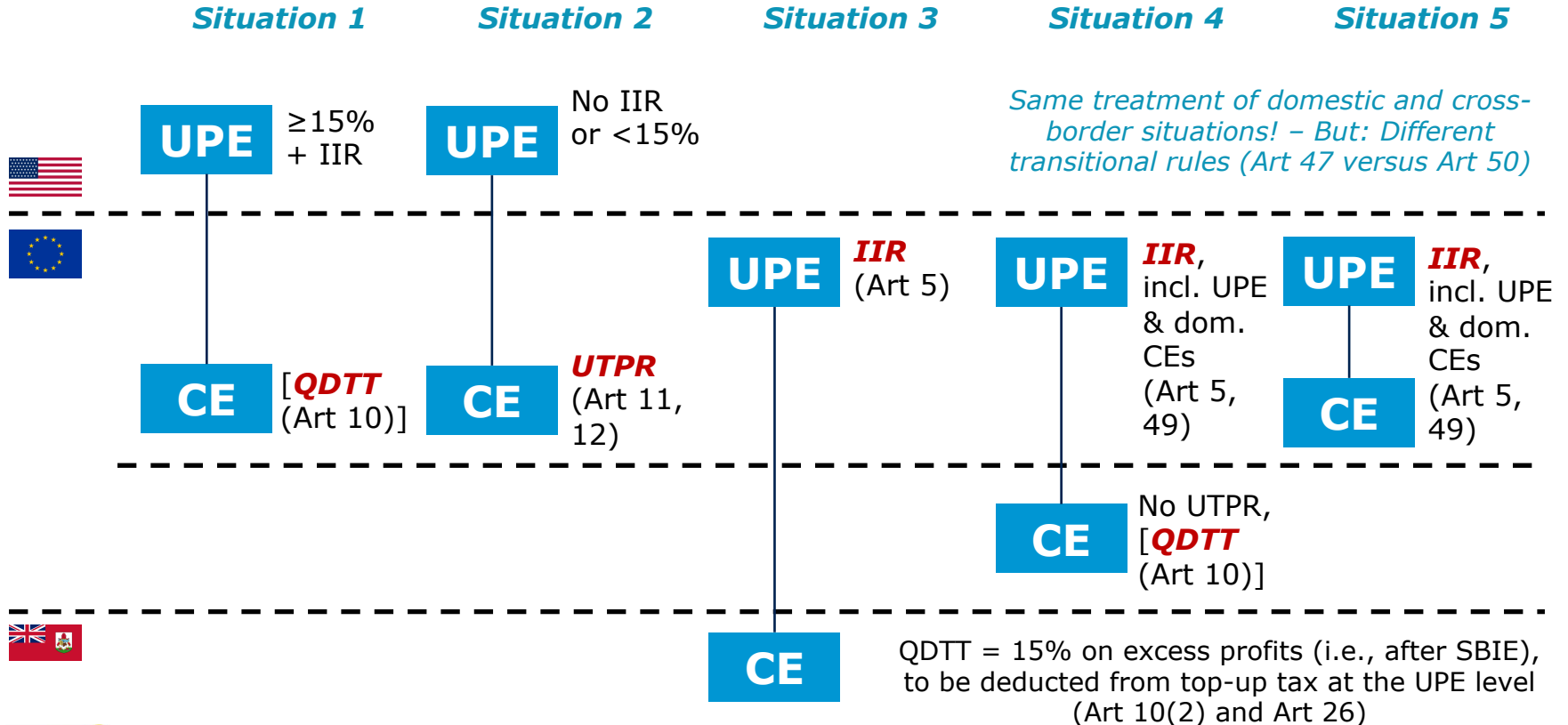
**GloBE Directive (Proposal COM(2021)823)**

<b>Competence</b> (Art 4, 26, 115 TFEU)	<b>Freedom</b> (Art 45-65 TFEU)	<b>State Aid</b> (Art 107, 108 TFEU)	<b>Fundamental Rights</b> (Charter, Art 6 TEU)
<b>Absolute</b>	<b>Relative</b>	<b>Relative</b>	

<b>GloBE Directive (Proposal <u>COM(2021)823</u>)</b>	
<b>Mandatory Rules</b>	<b>Option</b>
E.g., IIR, UTPR, ETR, Top-up tax calculation etc etc	Qualified Domestic Top-up Tax (QDTT)

Restriction caused by the exercise of the option to exempt *only* domestic small enterprises from VAT "**cannot be attributed to the Member States**" (Schmelz)

<b>Implementation into Domestic Law (Art 288(3) TFEU)</b>	<b>Expansion</b>
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Thank you!

