



European Commission  
Taxation and Customs Union

# **ECJ CASE-LAW AND INFRINGEMENT POLICY IN THE AREA OF DIRECT TAXATION**

## **GENERAL OVERVIEW AND THE EUROPEAN COMMISSION'S PRIORITIES**

**27 April 2012**

**Mr. Dieter Kischel  
TAXUD D 3  
Directorate General for Taxation and Customs Union  
European Commission**

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## I. Introduction

# Influence of EU law on national tax legislation

EU law influences the national tax systems in two ways:

- Positive integration:
  - Harmonisation
  - Co-ordination
  
- Negative integration
  - Case law of the Court of Justice



## I. Introduction

# Procedures for bringing a case to the Court of Justice for incompatibility of national provisions with EU law

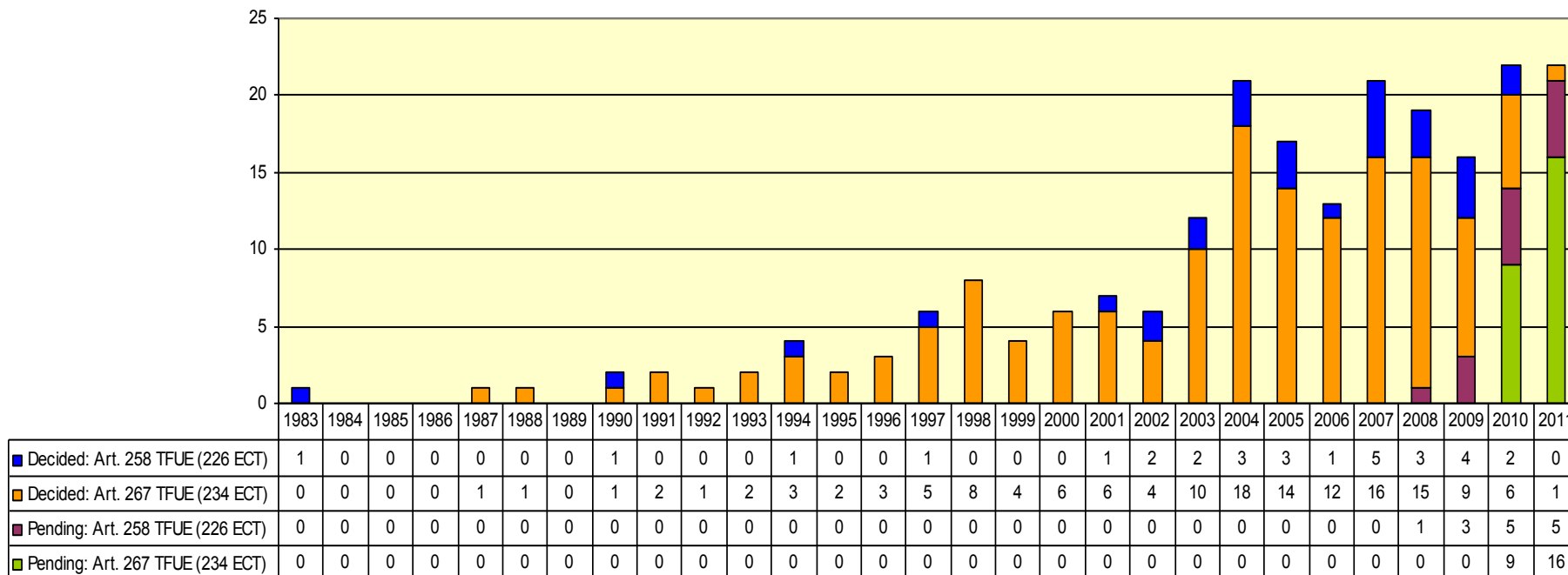
- Article 258 TFEU: Infringement procedure initiated by the Commission
- Article 259 TFEU: Infringement procedure initiated by a Member State
- Article 267 TFEU: References for preliminary rulings initiated by national courts



## II. Infringement Procedures v. References for Preliminary Rulings

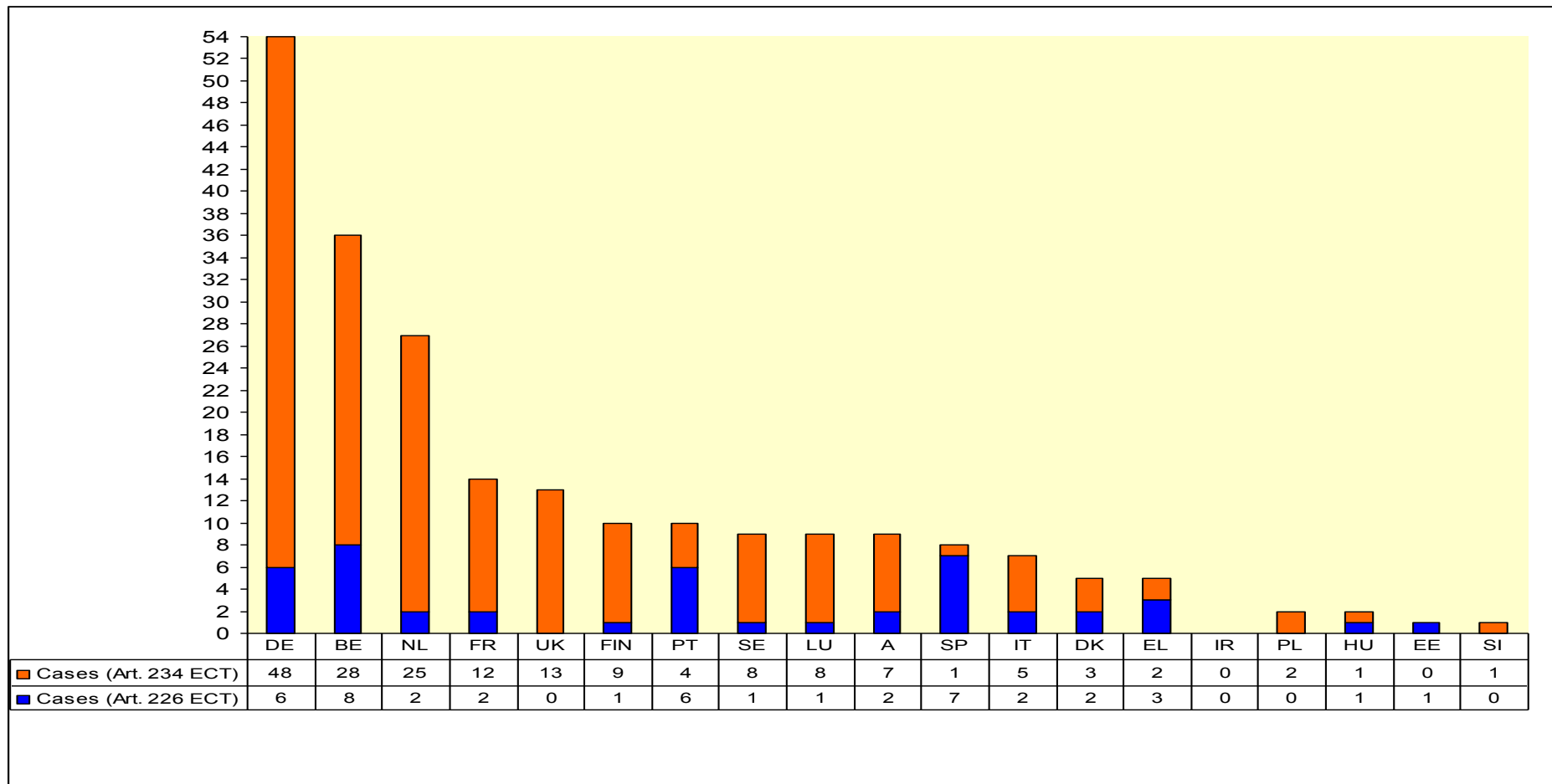
# Statistics on Court cases concerning direct taxation

Increasing number and share of infringement cases  
(by year of reference; 14 October 2011)



## II. Infringement Procedures v. References for Preliminary Rulings

### Statistics on Court cases concerning direct taxation (14.10.2011)



## II. Infringement Procedures v. References for Preliminary Rulings

### Comparison of the effects of the Court's judgements under both procedures

#### ■ Preliminary rulings (Article 267 TFEU):

- Abstract interpretation
- Concerns the individual
- Binding interpretation

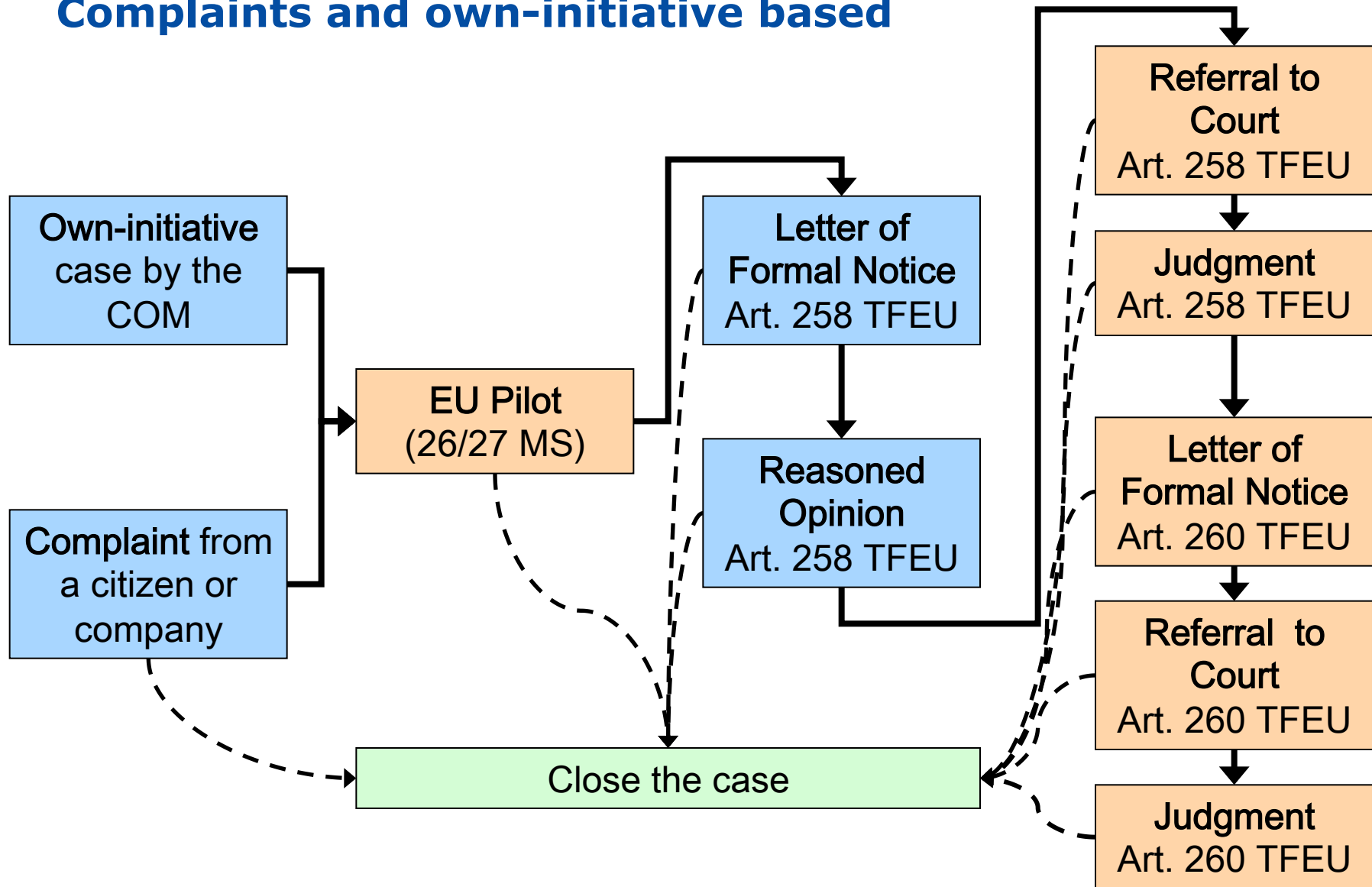
#### ■ Infringement rulings (Article 258 TFEU):

- Concrete appreciation
- Concerns the authorities of the MS, not the individual
- Binding result



### III. The Infringement Procedure

## Complaints and own-initiative based





## IV. The Commission's Infringement Policy

### General infringement policy of the Commission

- General objectives:
  - Compliance with the obligations arising from primary and secondary EU law
  - Ensuring that infringement actions support and complement ongoing Commission policy
  
- New policy [Communication COM(2007)502]; fewer, better and faster procedures through:
  - Improved prevention
  - Efficient and effective response
  - Improved working methods
  - Enhanced dialogue and transparency



## IV. The Commission's Infringement Policy

### Infringement policy in the area of direct taxation

#### ■ Priorities:

- Priority clear and serious infringements of Community law
- Support for policy initiatives, particularly in those areas where the Commission sees scope for co-ordination

#### ■ Other aspects influencing policy:

- Limited harmonisation in the area of direct taxation means that a majority of infringements are based on the fundamental Treaty freedoms
- The increasing body of case law of the Court has driven the number of complaints received and thus the number of infringement procedures



## IV. The Commission's Infringement Policy

### Ongoing horizontal infringement actions

- Inheritance taxation
- Taxation of cross-border workers



## IV. The Commission's Infringement Policy

### Inheritance taxation

- The expanding case-law of the Court of Justice is proof of the citizens' growing interest for inheritance tax rules:
  - C-364/01 *Barbier*
  - C-464/05 *Geurts*
  - C-256/06 *Jäger*
  - C-11/07 *Eckelkamp* and C-43/07 *Arens-Sikken*
  - C-510/08 *Mattner*
  
- Communication from the Commission on Removing cross-border tax obstacles for EU citizens (COM(2010)769 from 20.12.2010)
  
- 15.12.2011: Communication 'Tackling cross-border inheritance tax obstacles' (2011/864); Recommendation (C/2011/8819) and Working Paper



## IV. The Commission's Infringement Policy

### Taxation of cross-border workers

- Commission Recommendation on the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident (94/79/EC) from 21.12.1993
  
- Developing case-law of the Court of Justice since its first ruling in 1995:
  - *C-279/93 Finanzamt Kölm-Alstadt v Roland Schumacker*
  
- Communication from the Commission on Removing cross-border tax obstacles for EU citizens (COM(2010)769 from 20.12.2010)



## V. Results of the Infringement Procedures

### What is the measure of success in infringement procedures?

- Only cases that go as far as a reasoned opinion are, in general, given publicity through a press release
- Many cases are closed after MS have changed their provisions or practice in accordance with what the Commission has expressed in the procedure
  - 68 out of the 98 cases closed in 2010
- Relatively few cases of the total number are brought to the Court
  - 10 of 178 decisions in 2010 were referrals to the Court



## V. Results of the Infringement Procedures

### Limits of the infringement procedures

- The result of an infringement procedure will be limited to defining what legislation a Member State cannot maintain, but will never describe which solutions could be acceptable
- Different Member States will adopt different solutions
- The judgement will be an interpretation of the existing provisions, but will not create any new legal rules
- The non-public nature of the procedures risks limiting the effects



## VI. Alternative Solutions

### Solutions to avoid litigation and achieve a more complete solution for cross-border taxation

#### ■ Co-ordination

- Mainly limited to:
  - allocating the power to tax between the Member States
  - avoiding double taxation and double non-taxation
- May share some of the limitations of the infringement procedures:
  - No common rules are achieved and all Member States adopt the provisions they consider appropriate within the given framework

#### ■ Harmonisation

- Difficult to achieve
  - unanimity required for decisions under Article 115 TFEU
- Enhanced cooperation is an alternative – only 9 states required
- Obstacles, that may not amount to infringements, are removed to the benefit of tax payers and administrations alike





## Conclusions

- Infringement procedures in the area of direct taxation have steadily grown in importance and have had a proven measure of success
- However, infringement procedures have asymmetric effects:
  - even where a number of Member States introduce new tax rules they often do so in vastly differing ways
- There is a need to find ways to develop common solutions to avoid litigation and to achieve an easily accessible internal market with a level playing field

