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**Confrontation RE: Legal autopoiesis theory in operation—
a study of the ECJ case of C-446/03
*Marks & Spencer v. David Halsey***

Abstract. This paper has been prepared in the hope of giving new insights into the case of C-446/03 Marks & Spencer. The author tries to explore the process of communication in the light of the legal autopoiesis theory, the final result of which is the judgment. Reading it, one can find plain arguments both for the effective protection of EC freedoms, including the freedom of establishment, on the one hand, and for stopping regulatory and tax competition, and safeguarding the national interests of Member States, on the other one. The methodology of legal autopoiesis may be useful in better understanding of the message the judgment has negotiated.

Keywords: normative closure and cognitive openness; non-restriction of fundamental freedoms; effective enforcement of rights; equivalence; fiscal cohesion; grant of a last resort; reconciliation of conflicting ideas; micro perspective of harmonisation; temporality in law; filtration of the diverse interpretations of law

The concept of confrontation

This paper has been prepared in the hope of giving new insights into the above-mentioned case. The respective ECJ judgment can be interpreted, based on its wording.¹ It seems to be more important, however, to try to explore the process

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¹ The case of 446/03 Marks & Spencer v. David Halsey concerns the ability of a profitable UK parent company to offset losses generated by its overseas subsidiaries under the UK group relief rules. The case was referred to the ECJ. The ECJ made its judgment on 13 December 2005, referring the case back to the High Court for resolution. The ruling of the High Court was challenged before the Court of Appeals. The Court of Appeals entered its judgment on 20 February 2007. The House of Lords Appeals Committee refused to grant an appeal against the Court of Appeals judgment.

of communication as well, the final result of which is the judgment. Community and tax law commentators have cited this case more widely than any other direct tax case before. Perhaps not surprisingly, the judgment is not unambiguous. One can find plain arguments both for the effective protection of EC freedoms, including the freedom of establishment, on the one hand, and for stopping regulatory and tax competition, and safeguarding the national interests of Member States, on the other one. The methodology of legal autopoiesis may be useful in better understanding of the message the judgment has negotiated.

I. Major theses of the legal autopoiesis theory

An analytic viewpoint that highlights stability in social practice with regard to the interaction between a system and its environment is an integral part of the sociology as elaborated already by Talcott Parsons: „one very highly generalized way of conceptualizing a minimal aspect of a system might be to consider it an area of relative non-randomness.”; „Not only must system boundaries, by some mechanism(s), be maintained in relative integrity, but by some mechanism(s) the system must both draw ‘sustenance’ from the environment and ‘defend itself’ against extreme environmental fluctuation. At the boundary of the system–permeable, open to environmental impingement and intrusion–there must be filtration mechanism, accepting and rejecting possible environmental inputs, and regulatory mechanisms minimizing environmental fluctuation either by direct action into the environment toward control of its relevant aspects or, at least, by neutralizing those effects of such fluctuation as cannot effectively be controlled.”²

From the viewpoint of the sociology of functionalism (Malinowski) and neo-functionalism (Merton, Parsons, Luhmann), it can be highlighted in social practice what is congruent while the macro conditions of social structure are unaffected. From the perspective of functionalism, what has remained in our view on social practice is residual, instead of taking into account the big categories of the production and reproduction schemes of social relationships (social classes, capital entitlement and poverty, the conflict between North and South, etc.). Thus, one can take a look at the various patterns of social integration (like redistribution or reciprocity) or at the process of the internal reconstruction

² Ackermann, Ch.–Parsons, T.: The concept of ‘social system’ as a theoretical device. In: McQuarie, D. (ed.): *Readings in contemporary sociological theory: from modernity to post-modernity*. Englewood Cliffs, 1995. 24 [from: Drenzo, G. J. (eds.): *Concepts, theory and explanation in the behavioural sciences*. New York, 1966].

of argumentative discourse where the inter-subjective use of a common language will be developed. Functional differentiation (into the spheres of economy, law, sciences, religion, etc.) is a basic development of the Western-type modern history.

From the viewpoint of late functionalist sociology, social life cannot merely be described by the traditional categories of class conflicts, the ownership of the means of production or the nation state. As a product of modernisation, in the Western societies it has been more relevant to focus on the events of communication. This way, the monological view of society can be overcome by relying on communicative rationality, as identified by Jürgen Habermas.

With the onset of modernisation, individuals have been liberated from pre-economic control. A social community is able to organise itself as civil society, independent of its nation state. In addition to the autonomous forms of social activities, autopoietic (self-referential) systems can emerge as well. As explained by Niklas Luhmann, in a theory of such self-referential systems, the traditional link of the idea of self-reference to consciousness as the basis of operation is abandoned. Thus, the theory of “subject-ness” of consciousness (subiectum or hypokeimenon) and the primacy of the epistemological difference between object and subject are rejected. Instead, two kinds of operations are distinguished, i.e., self-reproduction and observation.³ An empirically ascertainable connection exists between the principle of differentiation of social systems and the form, in which subsystems differentiate themselves in society, being self-referentially closed, and open to their environment.⁴ In late functionalist sociology, what is causal will be replaced by what is structural.

Given the phenomenon of the autopoietic development of society, a certain break with Kantian methodology can be explained by Luhmann as follows: the voluminous empirical research on causal attribution teaches us that in the matter of causality there is no way of avoiding selective judgments, and this shifts the question of the essential causes into the question of the structural conditions of the causal plan used. Autopoietic systems need not be transparent to themselves; they find nothing in themselves that could be regarded as an undeniable fact of consciousness and applied as an epistemological a priori principle; the assumption of an a priori is replaced by recursivity itself.⁵

Whereas classical scientific thought holds a paradigm to be a “linkage through inputs” (the outside determines the changes in the system), the paradigm of

³ Luhmann, N.: The unity of the legal system. In: Teubner, G.: (ed.): *Autopoietic law: A new approach to law and society*. Berlin, New York, 1988. 13.

⁴ *Ibid.* 31.

⁵ Luhmann, N.: Closure and openness: On reality in the world of law. In: Teubner (ed.): *Autopoietic law... op. cit.* 336.

“linkage through closure” can be proposed as an alternative: it is the internal coherence of the system that determines its development. Then autopoietic systems define themselves against the background of an environment.⁶ The differentiation of a legal system is based on the distinction between normative and cognitive expectations. Legal systems are to combine the closure of recursive self-reproduction and the openness of their relation to the environment (closure in normativity and openness in their cognitive respect).⁷

The conceptualization of social systems brings about three important changes in social theory:⁸

- a radical temporalisation of social systems, meaning that the elements of social life are not stable, but are “events”;
- what has to be maintained in a society is the recursively closed organisation of an open system (closure in operation); and
- observation itself is an operation of an autopoietic system (openness in cognition).

According to the theory of Niklas Luhmann (on the unity of the legal system)⁹

- legal acts are those communicative events that change legal structures;
- the legal system is defined by the circular relationship between legal acts and legal norms; and
- the interplay of closure and openness is represented in the legal system by the combination of normative closure and cognitive openness.

Jean-Pierre Dupuy supplies three different interpretations of how the legal system can be open and closed at the same time:¹⁰

- closure and openness refer to different domains of the legal system (normatively closed, cognitively open);
- legal closure implies legal openness (order from noise¹¹); and
- self-transcendence of a normative order can be explored (see Robert Nozick’s theory of entitlements with its self-referential character of procedural justice or Friedrich Hayek’s theory of law as a spontaneous social order).

⁶ Ost, F.: Between order and disorder: The game of law. In: Teubner (ed.): *Autopoietic law...* 73.

⁷ Luhmann: The unity of the legal system. In: Teubner (ed.): *Autopoietic law... op. cit.* 19–20.

⁸ Teubner, G.: Introduction to autopoietic law. In: Teubner (ed.): *Autopoietic law... op. cit.* 3. For concept summaries of the autopoiesis and legal autopoiesis theories, see separate annexes below.

⁹ *Ibid.* 4.

¹⁰ *Ibid.* 5.

¹¹ Atlan, H.: *Le crystal et le fume*. Paris, 1979. 5, 41, 56.

Law that negotiates reflexive communication provides procedures without intervening in the internal matters of the subjects-at-law. In the beginning of the 20th century, Georg Jellinek identifies the term of legal reflex with the indirect effect of law in the absence of explicit statutory law provisions.¹² According to Gunther Teubner, reflexive law is characterised by a new kind of legal self-restraint. Instead of taking over regulatory responsibility for the outcome of social processes, reflexive law restricts itself to the installation, correction, and re-definition of self-regulatory democratic mechanisms.¹³

According to Teubner, autopoiesis does not exclude evolution, but implies a redefinition of evolution. The questions that can be raised in this respect are:¹⁴

- How does the legal system evolve into autopoietic closure?
- How does legal evolution operate after an autopoietic closure of the legal system?

The proposed solutions are as follows:

- The first question can be answered with reference to the construction of a hyper-cycle (pre-autopoietic evolution—socially diffuse law develops higher forms of autonomy via the cyclical constitution of its system components).

- The second question can be answered with reference to internalisation (post-autopoietic evolution—legal development is coupled to broader social developments by specific mechanisms of co-evolution).

Upon applying the legal autopoiesis theory to real life, it is crucial to explain changes in the environment (structural couplings). Luhmann explains (in his theory on closure and openness) that the theory of self-referential systems leads inevitably to the following dilemma: on the one hand, no system is in a position to operate outside its boundaries, on the other, structural evolution requires the assumption that a system's environment produces effective constraints on the system. Luhmann's proposal for the solution consists in a distinction¹⁵ between internal information processing and external constraints.¹⁶ As to the realisation of external constraints, the following can be highlighted:

- the materiality continuum as the material-energetic basis of meaning systems; and
- the simultaneous presence of events in several meaning processing systems.

¹² Jellinek, G.: *Allgemeine Staatslehre*. Berlin, 1914. 69–70.

¹³ Teubner, G.: Substantive and reflexive elements in modern law. *Law and Society*, 17 (1983) 239.

¹⁴ Teubner: Introduction to autopoietic law. In: Teubner (ed.): *Autopoietic law... op. cit.* 8.

¹⁵ *Ibid.* 10.

¹⁶ As an antecedent, see Ashby's theory on a cybernetic system that can be defined as one "open to energy but closed to information and control"; Ross Ashby, W.: *An introduction in cybernetics*. London, 1956. 4.

II. Application of the legal autopoiesis theory to the case of C-446/03 Marks & Spencer

1. *Temporalisation of law: flexibility in the application of the very same statutory schemes*

Legal rules are being replaced by legal acts which are simply communicative events (enouncements) appearing in the legal order. Teubner asserts¹⁷ that legal rules lose the strategic position they once had as core elements of law. In a switch from structure to process, the central elements of a legal order are “énoncés”, communicative events, being legal acts, and not legal rules. It has proved to be hopeless to search for a criterion delineating social norms from legal ones. The decisive transformation cannot be found in the inherent characteristics of rules, but in their insertion in the context of different discourses.

From the perspective of the legal autopoiesis theory, the case of C-446/03 Marks & Spencer can be seen as a product of the temporalisation of legal institutions. It is embarrassing to admit, how difficult it is to interpret this case. The story can be told in different ways, depending on the standpoint the story-teller has held. Surely, one can realise the legal acts as communicative events that may change legal structures. Key to understanding this case is to appreciate the degree of flexibility of the national tax administration in applying statutory schemes. In the specific case, the UK loss relief regime is put in the context of the question as to whether the UK parent company should be granted a last resort. The question is answered (in the affirmative) as a result of a series of discussions. At the end of the process of communication, an answer is given, which cannot yet be repeated in the same way in another case.

The facts that are relevant to the particular legal case do not really provide solution (for a summary of facts, see the separate annex below). It would be misleading just to focus on the mere facts as covered by statutory law schemes. For example, a particular meaning could be given to the legal fact that the UK consortium system is different from the Scandinavian loss contribution system. It is still more interesting to look behind the pure facts. The UK consortium system is not deemed to be inconsistent with Community law. The competent UK tax authority is, however, expected to apply national law in a manner, which is friendly enough for the purposes of the effective enforcement of taxpayer rights in association with the EC freedom of establishment. The legal acts of the tax authority may lead to real changes in the legal structure. While the

¹⁷ Teubner, G.: *Global Bukowina: Legal pluralism in the world society*. Teubner (ed.): *Global law without a state*. Aldershot, 1997.

UK tax law on consortia does not require generosity, the application of it to a particular case does require taking into account how effectively taxpayer rights can be exercised. The legal acts of the tax authority may thus imply the possibility of a last resort to the effective protection of taxpayer rights, not arising purely from the legal facts.

It is important to distinguish between the internal conception and organisation of a national tax system and the possible effect of its operation on the exercise of EC freedoms. The Community legislator, like the Council or the Commission, or judiciary bodies like the ECJ, must not interfere with the internal organisation of a national tax system. They can halt, however, their operation where the application of national tax law results in the unjustifiable restriction of EC freedoms. The application of particular national tax rules constitutes communicative events—and resources of the self-generation of Community law—at the time when they commence interaction with the exercise of fundamental freedoms.

2. *Closure in operation and openness in cognition, order from noise and self-transcendence*

No sub-systems can be reasonably supposed unless they are close in their operation and open in their capacity of observation at the same time. Structural coupling and openness to its actual environment cannot thus be interpreted without the presupposition of normative closure. A subsystem will not be closed due to its simple separation from its environment. It will be closed in the process of communication with its actual environment only, at the end of which both the system and its environment will be changed.

Closure in operation and openness in observation do not only mean that they refer to the different domains of a legal system. It also means that, paradoxically, legal closure implies legal openness. In other words, law—as reflexive law—fills in an autopoietic system the role of installation, correction and redefinition of self-regulatory mechanisms. It provides filtering of non-legal events through the lens of law. As already Kelsen explains, “the law is like King Midas. Whatever he touched was immediately changed into gold; likewise, everything the law has to do with becomes law”.¹⁸ Due to a series of communicative events, a type of order can be developed without antecedents. Namely, these developments cannot be interpreted based on the simple causality or the study of the relationship between what is objective and subjective. This way, order can be

¹⁸ Ost: *Between order and disorder...* In: Teubner (ed.): *Autopoietic law... op. cit.* 79; Kelsen, H.: *Pure theory of law*. Berkeley, 1967. 369.

evolved from “noise”, a normative order can emerge that is able to justify itself by way of self-transcendence.

Despite the common assumption of a common static view of law, the actual meaning of legal norms may be instable. This is because different elements of the sets of legal norms may be called forth, depending on the circumstances. Coping with the vulnerability of such norms requires a kind of relational way of thinking. A correspondence theory is operational, provided that the facts relevant to legal decisions do not change in an abrupt, comprehensive manner. In the instance where there is no longer stability in the relevant meaning of legal institutions, harmony cannot be achieved between the legal norms and the ever-changing outward reality. Harmony can, however, be reached in another respect, suggested precisely by a coherence theory. Legal institutions may produce harmony in discrete micro relations where the applicable norms are coherent and the people involved in them have developed their sense of communication, adequate to the particular case.

A legal system can eventually be expected to have provisions that are in conformity to each other. This is a holistic idea of law, based on the assumption of system-oriented conformity. That is, legal sources need to be interpretable in a close-circuit system, which is legitimised in itself. Recursive reasoning is not given from the outset: it appears at the end of a process of communication. A good judgment may benefit from the communication completed in the court room. Submissions, statements and declarations of judges and litigating parties are made in interaction with each other. At the end of this process, a ruling should emerge which contributes to the strengthening of the consistency and integrity of law. A good judgment is an example of the coherence to be achieved during the litigation process.

- (i) Simultaneous application of the principles of fiscal cohesion and the effective enforcement of rights

The case of C-446/03 Marks & Spencer cannot be solved without understanding a micro system of the effective enforcement of taxpayer rights in the light of Community law, which is normatively closed and cognitively open. In general, Community law has been developed without relying on the legitimising force of a nation state. Instead, it has been evolved over the decades due to the practice of the citizens to apply it as a system of law, which is autonomous, takes priority over national law, implies a number of provisions with direct effect, and provides for the effective protection of individual rights. The Community law product of “*acquis communautaire*” and the judiciary practice developed by the ECJ have never been posited by single nation states. They

have been evolved due to the functional differentiation of Community law itself. Community law is still open to the changes taking place in its social environment. For instance, in the recent three or four years, more emphasis has been placed on the application of the EC Treaty to specific cases than on interpreting the EC Treaty in a rather innovative way, with the result of developing judiciary law.

The judgment in C-446/03 Marks & Spencer can rely on the Community case law developed on the assessment of the restrictions of national legislation on the freedom of establishment, and on the possible justification of these restrictions. The process of applying the non-restriction principle to direct tax cases started with C-264/96 ICI and has been open to date. Furthermore, it has been uttered, among other things, in the case of C-446/03 Marks & Spencer that:

- the territoriality principle of taxation, as recognised in the C-250/95 Futura Participations case, needs to be respected;
- the fiscal cohesion principle as introduced in the C-204/90 Bachmann case must not be interpreted too narrowly, that is to say, only in relation to the same taxpayer and the same item of tax liability; and
- the competent tax authority must not disregard if there is any instance for the taxpayer in the UK to recognise for tax purposes (and carry over) the losses sustained in another Member State; as a last resort, the relief of the cross-border loss transfer must be granted.

The Community law, being applicable to the case of C-446/03 Marks & Spencer, and consisting of the above components, can be considered as a normatively closed system. It can be interpreted as a result of the combined application of the principles to the single case, which otherwise are in contradiction with each other. The Community law, serving as a basis for the decision in the C-446/03 Marks & Spencer, has been developed progressively during a process of about half of a decade as a result of the assessment of the restrictions on the freedom of establishment by national tax legislation and the evaluation of their possible justification.

The Community law, applicable to this case, can still be regarded as a cognitively open system. Notably, the fiscal cohesion principle has been altered significantly since its formulation in the C-204/90 Bachmann case. The EC Court of Justice has been careful in applying this principle since the time the C-204/90 Bachmann case was decided, giving all the less opportunity for its application. More importantly, the non-restriction principle has been extended to direct tax cases even by providing for the granting of tax relief as a last resort. This constitutes evidence for the right of citizens to exercise the freedom of establishment even in direct tax cases. The UK can be implicated in the case of C-446/03 Marks & Spencer. This is because it has infringed both the

effectiveness principle (Article 10 EC) and the proportionality principle (third Paragraph of Article 5 EC) to the extent that the taxpayer would unreasonably suffer from the non-recognition of tax losses and, in particular, from the fact that the restriction on the cross-border loss-transfer would go beyond what is necessary in order to protect the national tax base.

(ii) Emergence of the principle of equivalence, applicable to direct tax cases

The judgment in C-446/03 *Marks & Spencer* has created a new language. As a result, a new view has formed on the old items of EC harmonisation, the non-restriction of fundamental freedoms and the effective protection of taxpayer rights. The principles of fiscal cohesion, non-restriction and effectiveness cannot be regarded in the same way, as it was the case before. Through the decision in C-446/03 *Marks & Spencer*, a new type of balance between the territoriality principle of taxation and the non-restriction principle has been achieved so far.

It is a major development that, for the first time, the equivalence principle as enshrined in Article 100b of the Maastricht Treaty has been applied to a direct tax case. This means first that national tax systems can be developed due to the recognition of the sovereignty of Member States in the formulation of their system of taxation and economic policy. A Member State is expected secondly, however, to take into account that its own legal institutions need to be compatible with its counterparts, i.e., the law adopted in another Member State. Once the discrepancy between national legislations constitutes an obstacle to the exercise of fundamental freedoms, it must be eliminated. The non-recognition of the losses with the Luxembourg subsidiary of *Marks & Spencer* UK in the UK represents such a discrepancy, although the UK is not requested to change its statutory law.

Article 95 EC on internal market legislation requires the advanced forms of harmonisation compared to the common market legislation, even though not in the area of taxation. The Article 95-based power of Community legislation may be in contradiction with the subsidiarity principle (second Paragraph of Article 5 EC). However, the principle of subsidiarity does not call into question the powers conferred on the Community by the EC Treaty. It is still true that Article 95 does not give the Community exclusive power to legislate. It gives a certain competence only for the purposes of improving the conditions for the functioning of the internal (single European) market by eliminating barriers from fundamental freedoms and removing distortions of competition.¹⁹

¹⁹ C-491/01 *BAT*, ECR 2002. I-11453, Paras 178–179.

Entitlement for the transfer of a Member State's regulatory power to the Community level comes from the specific conferment of the power principle (first Paragraph of Article 5 EC). It is reflected in the joined cases of C-154/04 Alliance for Natural Health, Nutrilink and C-155/04 National Association of Health Stores where the EC Court of Justice has confirmed its practice that the disparities between Member States do not require harmonisation, taken by itself. Harmonisation is necessary only where disparities in national legislation disturb the smooth operation of the internal market, and it is therefore necessary to remove those disparities.²⁰ By virtue of the EC Court's case-law, a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 95 EC (Para. 28 of the quoted judgment). The Court explains (in Para. 78 of the joined cases of C-154/04 and C-155/04): the procedure of the so-called comitology²¹ is intended to reconcile, on the one hand, the requirement for effectiveness and flexibility, arising from the need regularly to amend and update aspects of Community legislation in the light of developments in scientific understanding in various areas and, on the other hand, the need to take account of the respective powers of Community institutions.

The need of coordination between Member States does not prejudice the basic principle that Member States enjoy freedom in deciding matters that do not require a higher level of decision. The national competence of regulation of one Member State cannot be exercised, however, without taking into account what is happening in another Member State. For example, where a lady insured in France, staying in Germany is in a need of hospital treatment in Berlin, the French national authority of social security cannot refuse giving its permission for this treatment outside France and reimbursing her for the costs of treatment where it has turned out that on her stay away from France it was not possible to provide her with treatment in France without delay that would be equivalent to treatment provided in Berlin.²²

A Member State is not obliged to co-operate with another Member State unless the denial of coordination with the other Member State would prevent citizens from exercising their fundamental rights across the Community. The EC Court made use of this principle in the Marks & Spencer case as well: for the lack of a fiscal nexus established in the UK, the United Kingdom is not obliged to grant the opportunity of carrying over the losses of a Luxembourg subsidiary to a UK parent company unless the UK taxpayer proves that in

²⁰ European Court Review, 2005. I-06451, Para. 28.

²¹ Report from the Commission on the working of the Committees during 2001, COM (2002) 733 final.

²² C-56/01 Patricia Inizan, European Court Review 2003. I-12403, Para. 60.

Luxembourg there is no way of recognising for tax purposes any loss carry over. This is something new in the Advocate General's opinion that he would extend the equivalence principle as enshrined in Article 100b of the Maastricht Treaty to the matters of direct taxation, that is, to a territory where Member States traditionally enjoy freedom.²³

(iii) Striking a balance between instances of fighting against trafficking in losses and granting a last resort to cross-border loss carry over

The starting point for the ECJ in C-446/03 *Marks & Spencer* is its concern that the arbitrage in jurisdictions and trafficking in cross-border losses needs to be stopped. Clearly, the ECJ is anticipated to combat tax avoidance or the abuse of Community law. This is one aspect of the complexity only the EC Court has to encounter, however. The other one is equally important. That is, the taxpayer's right to exercise the EC freedom of establishment needs to be effectively protected. The EC Court must not stop therefore at the point of combating the abuse of law. It has to assure at the same time that national tax law measures will not unreasonably put restrictions on one of the fundamental freedoms that can be exercised in the internal market.

Our thesis in this paper is that the EC Court cannot make a link between the two opposite goals unless it has recourse to legal autopoiesis. It will not be successful in striking a balance between the two extremes unless it is able to create "order from noise", by starting to apply the equivalence principle to a direct tax case in parallel with the aspiration of stopping tax avoidance. The equivalence principle purports that both ideas need be protected equally and simultaneously: citizens need be prevented from the abuse of law, but they need be assured at the same time that they will not be prevented from exercising fundamental freedoms.

The EC Court is taking a hard look at whether the taxpayer has fully exhausted the possibilities of loss carry over, including all affected jurisdictions. If not, legal autopoiesis is not invoked. If so, it is because the grant of a last resort shall be accompanied with the warning given about avoidance and abuse.

The assumption of equivalence is of a theoretical nature. It starts operating, however, where communication between the jurisdictions of Member States is a problem. National jurisdictions are not requested to be unified. They are, however, expected to be compatible with each other, and national public

²³ C-446/03 *Marks & Spencer*, European Court Review 2005. I-10837, Para. 59, opinion of AG L. Poiares Maduro, Paras 76–77.

authorities need to start communicating with each other accordingly, whenever it is necessary.

The assumed operation of legal autopoiesis is not static. The legal positions to be taken will depend on how particular factual circumstances will be developed. They are thus open to changes that will be elaborated, provided that the legal acts associated with these changes will be successful, leading to communication with a view to reaching balance and coherence in the case under discussion. This is the filtration effect by law of the non-legal environment. The non-legal considerations of combating avoidance and abuse are not refuted, and they are not accepted either: instead, they are digested and reformulated. Legal autopoiesis is thus a matter of dynamics.

One can learn from the case of C-446/03 Marks & Spencer that tax law does not resist economic reality; rather, it starts reshaping economic reality from non-law into law. In tax cases, conflicts do not arise between law and economic policy in and of itself but between law and economic policy—as they stand at the outset—and the redefined law that appears at the end of the process of communication between the factors of law and non-law.

The emergence in tax law of anti-avoidance rules is not a matter of the intrusion of economic policy considerations into the body, form or language of tax law, but the corollary of the collapse of traditional legal institutions that are not able to provide taxpayers any longer with sufficient guidance. The emergence of anti-avoidance rules is the consequence of a failure of the law used up to the time when taxpayers become engaged in tax avoidance. A court decision that reflects a problem of tax avoidance does not lead simply to the assertion of a new type of law. It can happen to do so only if legal and non-legal systems go through the filter of self-referential law, producing a new order of law. This is precisely what happened in the case of C-446/03 Marks & Spencer: the EC Court spelled out the law on granting a taxpayer a last resort, following the exhaustion of all opportunities for loss carry over across the border.

(iv) A micro perspective of the approximation of national laws in direct tax matters

The work of autopoiesis is largely constrained by the outward (non-legal) society. It can only emerge where the process of functional differentiation has reached a sufficiently high level of social consensus and welfare. Where poverty and degradation prevails, no autopoiesis can be developed. Autopoiesis is not a macro category of social structure. It can only occur as an exception, that is, from time to time where all the conditions for its development are fulfilled.

Importantly, the autonomy of a legal system can only be interpreted from case to case. The standpoint taken by the ECJ in C-446/03 *Marks & Spencer* suggests the approximation of Community law, although not by way of statutory legislation. As an alternative to the bureaucratic coordination of Member States, harmonisation can be achieved, although in the micro sphere of the judgment made in C-446/03 *Marks & Spencer*. This micro perspective of harmonisation also means that it must be redefined in another legal case. What has been stated in C-446/03 *Marks & Spencer* is not necessarily valid in another case. It is therefore a matter of communicative legal acts to be taken whether a new quality of legal autonomy and coherence is developed in a new case, again in a micro situation.

A major source for harmonisation is not necessarily the Member States' agreement of their political will top-down. One has to explore citizens as well who may experience restrictions on their exercise of fundamental rights from case to case, due to the lack of harmony in the Member States' statutory legislation. In such cases, it is ultimately not the question of harmonisation that can be raised. Instead, it is the enforcement of civil rights, which is at stake. Harmonisation, if any, is the inadvertent consequence of creating the possibility of the enforcement of civil rights. This is a micro perspective of harmonisation, which still does not invalidate the relevance of agreements on harmonisation, to be made on a macro level of the institutions of official policy.

Micro-level harmonisation might be seen as a reason for generating casuistic legislation in the instance that the issue of correcting national legislation arises from the limited outlook of the specific problem. This correction must still not be considered as a new branch of national legislation. Instead, the legislator's goal is to make adjustment to national laws in order to achieve harmony in implementing national law in line with its counterpart, effective in the other Member State. The adjustment required by the individual case can take place in terms of modifying the respective national law, releasing implementation decrees or guidance for the interpretation of the law applicable to the case, with a view to bringing national law in accordance with its counterpart. This process can be seen as a matter of adjustment rather than the creation of new law in a spontaneous way.

With regard to the above ECJ cases, we need not require from France to change its law on social security. It can even be maintained that the French legislator does not have to do anything other than to harmonise the implementation of rules on the reimbursement for the costs of the hospital treatment made outside France with the fundamental freedoms of the EC Treaty. The UK is not expected to change its tax system of loss carry over either. It is only important to assure that the UK tax law is to be read in accordance with the

EC Treaty and, if necessary, make provisions to ensure that exceptional foreign losses can be recognised for domestic tax purposes despite the missing fiscal nexus, provided that the taxpayer does not have an opportunity to effectuate loss carry over for tax purposes in any of the affected jurisdictions. In these cases, a Member State is invited to amend its legal practice in order to avoid impeding the exercise of fundamental freedoms. It is up to the Member State to determine which legislative or other measures will be taken to achieve the desired harmony.

3. *Evolution from diffusion into coherence: reconciliation of conflicting principles (constructing a hyper-cycle) and showing sensitivity to tax competition (internalisation)*

The evolution of an autopoietic legal system can be explained (i) by a hyper-cycle of the development of diffuse law into autonomy and coherence, and (ii) by means of internalisation, that is, by coupling with major social developments. The particular law that has been applied in C-446/03 Marks & Spencer has not existed before. It has been developed through the various processes of communication followed by the lawyers specialising in tax law, Community law and public international law. There were judges, EC servants, legal advisers and scholars both in the UK and abroad who pursued the disputes.

It was not clear in advance of this process of communication, what emphasis should be placed on the different principles of Community law that could be applied to a case like that of C-446/03 Marks & Spencer. In particular, it was not clear in which combination these principles could be applied. Due to the hyper-cycle of the development of the Community tax law related to C-446/03 Marks & Spencer, diffusion could be transferred into coherence. Diffusion has been turned into coherence as a result of reconciling with each other the principles of fiscal cohesion and the non-restriction of fundamental freedoms. It has been possible to forge a particular quality of law—this has achieved a fine balance—, which can still be interpreted from opposite directions, depending on where the emphasis is placed in fact.

In addition to the hyper-cycle of the development of the relevant Community law, coupling with social changes was also necessary. It was not possible to take out of consideration that Member States have been all the more susceptible to preserving their sovereignty in legislating their own national tax system. At the same time, it must not be disregarded either that EC freedoms would be undermined if it were precluded to give special relief in specific circumstances, and remove administrative barriers accordingly from the smooth operation of the internal market.

Furthermore, the EC Court of Justice struck a particular balance as a result of coupling with the Member States current policies. In the case of C-446/03 Marks & Spencer, it was first of all at stake as to how policy expectations will be reflected in the ECJ judgment to give more emphasis to the subsidiarity principle and to stop tax competition. Following the accession in 2004 of a number of law tax jurisdictions, a new meaning had to be given to the internalisation of Community law at a particular phase of its development. Sensitivity to the harmful effects of regulatory and tax competition, or to the abuse of Community law could not be taken out of consideration any longer. At the same time, the achievements of the internal market legislation could not yet be given up.

4. Structural couplings: exploring the obstacles to Community law freedoms and identifying the legal basis for the removal of these obstacles in a changing environment

It is a question whether an autopoietic system of law, once it has been developed, is able to survive despite the changes in its environment. This suggests the task of (i) filtering the diverse interpretations of the materiality continuum, and (ii) identifying the components that may qualify the events in several meaning processing systems, relevant to the specific legal case. The materiality continuum arising from outward meaning bases is manifested in restrictions by national legislation on fundamental freedoms that need to be overcome. Disparities in national tax laws cannot be considered taken by themselves as obstacles to the exercise of EC freedoms. Hence, they are not to be eliminated, except in cases where the different legal forms of different jurisdictions are comparable with each other. However, coherence in Community law cannot be achieved unless one day the dispersion and diffusion, arising from the differences in national legal measures is removed.

In addition to the filtration of outward influences (by way of information processing), identifying complex events (as external constraints) is also important. Disparities arising from national loss relief regimes parallel to each other need to be removed, in the event that they impede the smooth operation of the internal market. For instance, a Member State may be in a position to choose legislative means that serve the integrity of the national tax system, but which are still less restrictive than they would otherwise be.

It can be important to encounter the changing external constraints on the process of internal information processing. Openness of an autopoietic legal system to energy flows means that it is vulnerable to outward changes in meta-juridical values. Where non-legal values are not digested and built in the particular micro-system of law, coherence cannot be achieved that would

otherwise be necessary for the development of autonomy, or rather of the self-generation of the system itself. A vast array of the possible solutions, proposed by the profession of Community tax lawyers has been filtered by the EC Court of Justice, arriving at a decision in the case of C-446/03 Marks & Spencer. The communicative process of developing the particular law, which can provide the basis for a final decision, has not yet been concluded by the ECJ decision. The national court, deciding eventually in the case, may have much elbowroom in formulating its final standpoint. To date, it has been the practice of the EC Court to leave all the more room for the national court to assess the relevant circumstances, and freely decide the case on its merits.

III. Lessons to be taken from the angle of the legal autopoiesis theory

1. *Filling the gap left in national law by the recursively closed organisation of interpreting and applying Community law*

A vocabulary of analysing the texts of the ECJ judgment, the AG opinion and the national court decisions following the ECJ judgment may consist in particular of the following terms:

- legal acts as communicative events;
- normative closure and openness in cognition, order from noise, reflexive law;
- hyper-cycle of pre-autopoietic evolution, internalisation upon post-autopoietic evolution; and
- structural couplings (internal information processing and coping with external constraints).

The Community law principles applicable to the case of C-446/03 Marks & Spencer deliver arguments in two opposite directions. Some of them serve for the protection of the UK sovereignty in legislating direct tax matters; others can be used in favour of the taxpayers' freedom of establishment. The principles that belong to the first type are as follows:

- territoriality principle of taxation; and
- fiscal cohesion principle.

The principles that belong to the second type can be enumerated as follows:

- proportionality principle;
- equivalence principle; and
- effectiveness principle.

It is not difficult to follow the ECJ argument aimed at the protection of the Member State's position on the ground of the territoriality principle. Nor is it

problematic to apply the fiscal cohesion principle either as a means of justifying restriction on the freedom of establishment. Furthermore, its meaning has even been broadened significantly to the extent that fiscal cohesion can now be interpreted widely, that is, not only in respect of the same taxpayer and the same item of tax liability.

By way of contrast, it is a novelty of the ECJ decision to see the way in which the proportionality principle has been utilised. It was used until the time of the decision in *C-446/03 Marks & Spencer* in the sense that restrictive national measures can be challenged or approved, depending on whether they meet the proportionality test. The ECJ decision is new, however, at the point of *C-446/03 Marks & Spencer* that the UK national legislation is subject to the proportionality test in the instance where there is no explicit restriction by national law on an EC freedom that would be plainly inconsistent with Community law. The proportionality principle would then be left in a vacuum. This is not yet the case in point because the gap arising from the lack of explicit restrictive national law measures is filled by the special meaning of Community law, suggested by the profession and represented by the ECJ. The expression of this meaning is a result of the recursively closed organisation of interpreting and applying Community law. The law-generated as an order from noise—is the result of the redefinition of Community law, without interfering yet with the sovereignty of a Member State in legislating direct tax matters. The law that has been developed in deciding the case of *C-446/03 Marks & Spencer* is the product of self-generation, that is, it has been developed in the absence of a peculiar legislator who would have been authorised to adopt the applicable law.

A key to understanding the decision in *C-446/03 Marks & Spencer* resides in the EC Court's assessment of whether the opportunity of loss carry over for the company group has been fully exhausted in the particular case. It is not the UK law, strictly speaking, which is being evaluated. No single legal measure of the UK tax law has been condemned in the abstract. It is the UK legal practice that has been condemned, not proven friendly enough in a particular case. No statutory provision of the UK tax law has been challenged. The UK law has been criticised, however, because its impact has been detrimental, constituting a restriction on the taxpayer's right for cross-border loss carry over. This way, the UK law has resulted in an infringement of the effectiveness principle, not providing the taxpayer any guarantee for the effective protection of his or her rights.

Interestingly, the follow-up UK legislation has in fact resisted the Community law developed in *C-446/03 Marks & Spencer*, having implemented the ECJ

decision. The UK reaction to the ECJ challenge was to make changes in statutory law,²⁴ the result of which has been the introduction

- of a statutory regime that allows in principle the carry over of qualifying cross-border losses; and

- of detailed provisions made in the Finance Act 2006 on the conditions, in which a UK company group is in a position as to know whether it has exhausted the possibilities to have the loss taken into account in the jurisdiction of a non-resident subsidiary.

Importantly, on 10 April 2006 the High Court gave its judgment on the question as to what the relevant time is at which point the parent company has to demonstrate that all possibilities have been exhausted in order to take into account for UK tax purposes the losses sustained by the overseas subsidiary. The High Court ruled that the relevant time for determining if conditions exist for cross-border group relief is the later time when the group relief is claimed, not when the losses arise. This position is consistent with the logic arising from the principles of equivalence and effectiveness. However, it is different from the said provisions of FA 2006.

The main issue is still not whether the reaction of the UK legislation is severe or generous for the purposes of the exercise of taxpayer rights. It is more important to emphasise that the UK legislator was quick in filling the gap left by the case of C-446/03 Marks & Spencer, breaking the process of self-generating Community law. It is not precluded, however, that the interpretation of the principles of effectiveness and equivalence will receive fresh impetus from the profession by developing new aspects of the old principles, from now on based on new statutory law.

2. Conclusions

It is clear from the above analysis that

- the legal actions (statements, explanations, arguments, etc.) of the legal representatives of taxpayers and of public authorities, finding and applying the proper law cannot be described as simple equivalents of naked statutory law structures, like the UK loss relief regime (this development is associated with a phenomenon that

²⁴ The UK has already revised its group relief laws, allowing qualifying losses from an EEA subsidiary to offset income of a UK parent company (with a 75% ownership at least). The UK has still introduced provisions in the Finance Act 2006 to give effect to the ECJ Marks & Spencer decision. As a result, the FA 2006 provisions are very difficult to satisfy. See: Downs, A.: Marks & Spencer: A case for pro-European tax harmonization. *The CPA Journal*, 78 (2008) Jan. Commission Communication on the tax treatment of losses in cross-border situations [SEC (2006) 1690], COM (2006) 0824 final.

can be called the temporalisation of legal institutions);

- normative closure and cognitive openness can be developed due to the combined effect of the concurrent application of the principles of fiscal cohesion, the non-restriction of fundamental freedoms and the effective enforcement of rights, applicable in a particular context to the case of C-446/03 Marks & Spencer (simultaneous view of a single case);

- a peculiar legal order as a new quality of Community law can be developed (one can explore order from noise) due to the emergence of the equivalence principle applicable to direct tax matters in parallel with the aspiration of stopping the trafficking in losses (emergence of the idea of equivalence);

- the judgment in C-446/03 Marks & Spencer is bounded to the particular time when the taxpayer, seeking to get access to cross-border loss carry over, is granted a last resort, following the exhaustion of all the opportunities that would have been available for him or her before (striking a balance);

- harmonisation can be achieved on a micro level as a consequence of creating the possibility of the enforcement of taxpayers' rights, while not invalidating the relevance of legislative steps, taken by Community bodies on a macro level of official policy (happening on a micro level);

- reconciliation of conflicting principles with regard to reaching equilibrium between national and Community law (constructing a hyper-cycle of pre-autopoietic evolution) is possible, and sensitivity of public bodies to the harmful effects of tax competition, or to the abuse of Community law (internalisation upon post-autopoietic evolution), is growing (evolutionary aspect of autopoietic law); and

- filtration of diverse interpretations of law and digesting the changing external constraints on the ECJ practice made in direct tax matters are necessary (producing structural couplings).

It follows from the above that the theory of legal autopoiesis, as applied to the case of C-446/03 Marks & Spencer, seems to show the characteristics as enumerated below. Thus, it

- explores temporality in law;
- comprises simultaneous events;
- embraces the idea of equivalence;
- is able to strike balances;
- is understandable on a micro level;
- brings about reconciliation of conflicting ideas and sensitivity to crisis phenomena; and

- contributes to the filtration of diverse interpretations of law and to the removal of discrepancies.

There are a few policy issues that can be raised in connection with the application of the legal autopoiesis theory to the case of C-446/03 Marks & Spencer. They can be summarised as follows:

(i) Does it make sense that relief should be available only where there is no relief in the jurisdiction of the subsidiary? How would foreign rules that terminate the right to loss set-off after a period fit into this framework?

(ii) Why should a group be entitled to relief in respect of the losses of the foreign subsidiary when the group did not have to pay tax on the subsidiary's profits?

(iii) If a Member State allows the free export of capital by taxpayers, why should it have to allow free export when the taxpayer decides to establish a subsidiary? Are EC Treaty rights for the benefit of humans or of companies? Why should a company, which is fictional, be entitled to the rights of this kind?

The above questions can be answered in brief as follows:

(i) Yes, it does. For the UK, it is important to preserve the integrity of its national tax system and resist the trafficking in cross-border losses. This is a materiality continuum (as explained by Luhmann), however, that needs to be taken into account. It should be overcome as long as national tax legislation endangers the exercise of EC freedoms, in particular, the freedom of establishment. Foreign rules on the carry over of losses need not be taken into account in general. However, the UK is obliged to check if the opportunities of setting off foreign losses have been exhausted. If so, the UK has to provide a last resort, which comes from the normative closure of the Community law, applicable to the case of C-446/03 Marks & Spencer. A new order can be developed from noise to the extent that a balance can be reached between the tax competences retained by the Member States and the requirement of the freedom of movement, flowing from the idea of the internal market. For the achieving of this result it is also required that the normatively closed Community law applicable to this case be cognitively open.

(ii) A company group could be entitled under national law to the UK relief of the transfer of cross-border losses even if no tax is paid on the profits of the subsidiary in the UK because the lack of this relief would discourage the UK parent company from extending its business to another Member State through

forming a subsidiary there. This position comes from the equivalence principle applicable now to a direct tax case. According to this principle, to have useful effect, Article 43 EC requires the national authorities competent to grant the tax advantage at issue to take account of the advantages likely to be afforded by the legislation of the state, in which the subsidiaries of the group are established. This solution comes from the reflexive nature of Community law. By virtue of this reflexive nature, the national tax law need not be changed. A Member State is still required to give a last resort if there is no alternative to the restrictive national law on cross-border loss carry over. Otherwise the freedom of establishment—an integral part of the operation of the internal market—would be unjustifiably restricted.

(iii) The EC Treaty has been designed for European citizens. This comes from the requirement of free competition and the smooth operation of the common market—from 1993 on, the internal market—whereby citizens may widely benefit from the principles of the free movement of goods, persons, services and capital. The freedom of establishment arises from the freedom of citizens to extend their business to another Member State by establishing there their branches or subsidiaries (freedom of persons) there. According to the ECJ practice, the freedom of establishment can be carved out from the free movement of capital where citizens (or companies) can exercise decisive influence over their vehicle of investment made in another Member State. It can neatly be explained by means of the legal autopoiesis theory why companies—a legal fiction—may be entitled to exercise rights that are otherwise available for citizens. Corporations can be seen from the viewpoint of the corporatist phenomenology in a process of collectivisation where groups can emerge as the instrument of gathering and enforcing individual interests. A corporation as a legal entity can be interpreted in the light of reflexive law. In order to grasp the substrate of a legal person, it is not sufficient to refer to a system of actions, to the group of persons, to peculiar funds or to decision schemes. Rather, it is necessary to get involved in the analysis of reflexive communication as well. To this end, a business organisation must be discerned as a unit of the process of collectivisation. The two sides of collectivism are the realm of collective imagination (solidarity as interpreted by Parsons) and the reality of the corporative body (capacity for actions in concert as suggested by Parsons).²⁵

²⁵ Teubner, G.: Unternehmenskorporatismus. *Kritische Vierteljahresschrift*, 3 (1987) 70; Ackermann, Ch.:—Parsons, T.: The concept of ‘social system’ as a theoretical device. In: McQuarrie D. (ed.): *Readings in contemporary sociological theory...* [from: Drenzo (eds.): *Concepts, theory and explanation... op. cit.*]

IV. Appendix

- (i) Main proceedings in the C-446/03 Marks & Spencer v. David Halsey case as summarised by the ECJ in its judgment

- “18 Marks & Spencer is a company incorporated and registered in England and Wales. It is the parent company of a number of companies established in the United Kingdom and in other States. It is one of the leading United Kingdom retailers of clothing, food, homeware and financial services.
- 19 From 1975 Marks & Spencer began to move into other States, with the opening of a store in France. By the end of the 1990s it had sales outlets in more than 36 countries, with a network of subsidiaries and a system of franchises.
- 20 A trend towards increasing losses became evident in the mid-1990s.
- 21 In March 2001 Marks & Spencer announced its intention to divest itself of its Continental European activity. By 31 December 2001 the French subsidiary had been sold to third parties, while the other subsidiaries, including those established in Belgium and Germany, had ceased trading.
- 22 In the United Kingdom, Marks & Spencer claimed group tax relief pursuant to paragraph 6 of Schedule 17A to the ICTA in respect of losses incurred by its subsidiaries in Belgium, Germany and France for the four accounting periods ended 31 March 1998, 31 March 1999, 31 March 2000 and 31 March 2001. It is clear from the file before the Court that both parties to the main proceedings agree that the losses must be computed on a United Kingdom tax basis. At the tax authority’s request, Marks & Spencer therefore recomputed the losses on that basis.
- 23 Each of the subsidiaries had operated in the Member State in which it had its registered office. The subsidiaries had no permanent establishment in the United Kingdom and had never traded there.
- 24 The claims for relief were rejected on the ground that group relief could only be granted for losses recorded in the United Kingdom.
- 25 Marks & Spencer appealed against that refusal before the Special Commissioners of Income Tax, which dismissed the appeal.”

(ii) Expression of the legal autopoiesis theory in the wording of the judgment of C-446/03 Marks & Spencer

The particular statements of the judgment and the AG opinion can be structured, depending on how they are associated with the components of the legal autopoiesis theory. The result of this is depicted in a series of tables below.

Components of legal autopoiesis theory	AG opinion	ECJ judgment
Legal acts as communicative events, taxpayer claims and tax authority reaction—looking behind the pure legal facts	It is neither the intention, nor the avowed aim of Community law to call in question the limits inherent in any power of taxation or to disturb the order of priority of the allocation of tax competences as between Member States; it should be recalled that, in the absence of Community harmonisation, the Court is not competent to interfere in the conception or organisation of the tax systems of the Member States (Para. 60)	... it is clear from the file before the Court that both parties to the main proceedings agree that the losses must be computed on a United Kingdom tax basis; at the tax authority's request, Marks & Spencer therefore recomputed the losses on that basis; each of the subsidiaries had operated in the Member State in which it had its registered office; the subsidiaries had no permanent establishment in the United Kingdom and had never traded there. (Paras 22–23)

Components of legal autopoiesis theory	AG opinion	ECJ judgment	Post ECJ history
<p>Normative closure and openness in observation; order from noise—application of the principles of proportionality and effectiveness in the absence of explicit national law measures that would infringe Community law</p>	<p>The proposed judgment is a solution, which requires the authorities of the Member State concerned to take account of the tax situation of companies not resident in its territory; being complex, yet in the absence of Community harmonisation, only a solution of this kind allows a <i>balance</i> to be maintained between the tax competences retained by the Member States and the requirements of freedom of movement flowing from the internal market (Para. 83)</p>	<p>The restrictive measure at issue in the main proceedings <i>goes beyond what is necessary</i> to attain the essential part of the objectives pursued where: – the non-resident subsidiary <i>has exhausted the possibilities available</i> in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods, if necessary by transferring those losses to a third party or by offsetting the losses against the profits made by the subsidiary in previous periods, ... (Para. 55)</p>	<p>The High Court ruled that the relevant time for determining if conditions exist for cross-border group relief is the later time when the group relief claim is made, not when the losses arise (otherwise the parent company could hardly make use of the transfer of cross-border losses)</p>

Components of legal autopoiesis theory	AG opinion	ECJ judgment
<p>Reflexive law–application of the equivalence principle (no interference with the national legislation on its merits)</p>	<p>It follows that the margin of manoeuvre granted to the Member States in order to justify their tax regimes is excessively reduced; for that reason, it is necessary, as Advocate General Kokott recommended, to relax those criteria; to that end I propose to revert to the criterion of the aim of the legislation at issue; cohesion must first and foremost be adjudged in light of the aim and logic of the tax regime at issue (Para. 71)</p> <p>Justification based on cohesion of the system of relief can be accepted only if the foreign losses may be accorded equivalent treatment in the State in which those losses arise (Para. 76)</p> <p>A solution of that kind based on the comparison and equivalence of the treatment accorded in various Member States has already been developed by the Court in regard to health services in the context of national social security systems (Para. 77)</p>	

Components of legal autopoiesis theory	AG opinion	ECJ judgment	Post ECJ history
Hyper-cycle of pre-autopoietic evolution–reconciliation of conflicting considerations (reaching equilibrium)	The <i>conflict</i> between the power conferred on the Member States to tax income arising in their territory and the freedom conferred on Community nationals to establish themselves within the Community cannot be saved; this gives rise to a <i>tension</i> between two opposing systems and to the need to establish an <i>equilibrium</i> in the allocation of competences as between the Member States and the Community (Para. 6)	The fact that it does not tax the profits of the non-resident subsidiaries of a parent company established on its territory does not in itself justify restricting group relief to losses incurred by resident companies (Para. 40)	
Internalisation upon post-autopoietic evolution–showing sensitivity to a new accent of harmonisation (showing more sensitivity to tax competition)	The national legislation is not precluded from making entitlement to cross-border loss relief subject to the condition that it is established that the losses of subsidiaries resident in other Member States cannot be accorded <i>equivalent</i> tax treatment in those other Member States (Para. 82)	Member States are free to adopt or to maintain in force rules having the specific purpose of precluding from a tax benefit <i>wholly artificial arrangements</i> whose purpose is to circumvent or escape national tax law (Para. 57)	Lack of internalisation by making changes in the UK statutory loss relief regime

Components of legal autopoiesis theory	AG opinion	ECJ judgment
Materiality continuum—restrictions by national legislation to be overcome	Within the group the claim is made by the parent company resident in the United Kingdom which is subject under that head to unlimited fiscal obligations in that country; in regard to it the tax competence of that Member State is not limited; in those circumstances the United Kingdom is not entitled to rely on the principle of territoriality in order to refuse to a company within a group resident in its territory the grant of an advantage connected with the transfer of losses (Para. 63)	The United Kingdom and the other Member States which submitted observations in the present proceedings claim that, from the aspect of a group relief system such as that at issue in the main proceedings, resident subsidiaries and non-resident subsidiaries are <i>not in comparable tax situations</i> ; in accordance with the principle of territoriality applicable both in international law and in Community law, the Member State in which the parent company is established has no tax jurisdiction over non-resident subsidiaries (Para. 36)
Identifying the particular meaning of simultaneous events—removing disparities arising from national loss relief regimes parallel to each other, provided that they impede the smooth operation of the internal market	The difficulties ensuing for economic operators as a result of mere differences in tax regimes as between Member States are outside the scope of the EC Treaty; in particular it is well established that the differences in treatment resulting from <i>legislative disparities</i> as between the Member States do not constitute discrimination prohibited by the Treaty (Para. 23)	In so far as it may be possible to identify other, <i>less restrictive</i> measures, such measures in any event require harmonisation rules adopted by the Community legislature (Para. 58)

(iii) Key terms relating to the legal autopoiesis theory: temporality, closure and openness, evolution and structural couplings

Temporalisation:	there are not legal facts, but events; legal acts are communicative events that change legal structures.
Interpreting of how the legal system can be open and closed at the same time:	<ul style="list-style-type: none"> – closure and openness refer to different domains of the legal system (Luhmann: normatively closed, cognitively open); – legal closure implies legal openness (order from noise– Atlan: le crystal et le fume); – reflexive law (Teubner); and – self-transcendence of a normative order (Dupuy).
Evolution of the autopoietic legal system (Teubner):	<ul style="list-style-type: none"> – construction of a hyper-cycle (pre-autopoietic evolution–socially diffuse law develops higher forms of autonomy via the cyclical constitution of its system components); and – internalisation (post-autopoietic evolution–legal development is coupled to broader social developments by specific mechanisms of co-evolution).
Interpreting changes in the environment:	<p>a distinction between internal information processing and external constraints needs to be taken into consideration (Ashby: a cybernetic system is open to energy but closed to information and control); there are two mechanisms of environmental couplings:</p> <ul style="list-style-type: none"> – materiality continuum is the material-energetic basis of meaning systems; and – simultaneous presence of events in several meaning processing systems.

(iv) Table: Legal autonomy and autopoiesis²⁶

Legal autonomy	Legal autopoiesis
Independence from internal factors	Operating a particular selective mechanism for responding to the environment
Autonomy is a matter of degree, ranging from autarchy to total dependence	Autopoiesis is an all or nothing category
Independence as freedom from outside control	Independence as self-dependence
Non-correspondence to other social factors	Reflexivity (circularity)
Responsive to plurality of interests	Self-observation
Justification of legitimacy	Operating according to its own code
Derives from institutional (e.g., organisational), occupational (e.g., legal profession) and procedural specialisation	Derives from functional differentiation of subsystems
Ideal of separation of powers and rule of law	Maintaining evolutionary complexity and avoiding de-differentiation
Limits of law's ability to transcend political and economic interests	Internal limits on law's conditional programmes
On an ontological axis, law can be seen as distinct from society according to the mainstream law and society studies (e.g., Kelsen: imputation versus causality theory)	On an ontological axis, law can be seen as inseparable from society according to alternative law and society studies (e.g., Luhman, Teubner)
On an epistemological axis, society can be seen as being independent of law as its object (e.g., theories of the capitalist mode of production, of social action, etc.)	On an epistemological axis, law can be seen as a competing discourse with sociology (e.g., Teubner's theory on reflexive law)

²⁶ Nelken, D.: Changing paradigms in the sociology of law. In: Teubner, G. (ed.): *Autopoietic law: A new approach to law and society*. Berlin–New York, W. de Gruyter, 1988. 196–197, 210.

(v) Table: Types and dimensions of modern legal rationality²⁷

Dimensions	Types		
	Formal	Substantive	Reflexive
Justification of law	The perfection of individualism and autonomy: establishment of spheres of activity for private actors	The collective regulation of economic and social activity, and compensation for market inadequacies	Controlling self-regulation: the coordination of recursively determined forms of social cooperation
External functions of law	Structural promises for the mobilisation and allocation of resources in a developed market-oriented society and for the legitimation of the political system	The instrumental modification of market-determined patterns and structures of behaviour	Structuring and restructuring systems for internal discourse and external coordination
Internal structures of law	Rule-orientation: conceptually constructed rules applied through deductive logic	Purpose-orientation: purposive programmes of action implemented through regulations, standards and principles	Procedure-orientation: relationally oriented institutional structures and decision processes

²⁷ Teubner, G.: Substantive and reflexive elements in modern law. *Law and Society*, Vol. 17, No. 2 (1983), 257.