

LLM Programme International and European Legal Studies
International and European Tax Law

5. Tax avoidance

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Tax avoidance

Case study

Rishi Sunak is a prominent British politician of Indian ancestry, who has been serving as Prime Minister of the United Kingdom and Leader of the Conservative Party since 2022. From February 13th, 2020 to July 5th, 2022 he served as Chancellor of the Exchequer from (a post equivalent to a Minister of Finance). Recently, it was revealed that in July 2019, while Sunak was serving as a Chief Secretary to the Treasury, he deposited a great part of his multimillion-pound property in a so-called "blind trust" that holds assets in various offshore tax havens.

A blind trust arrangement is where control over shares and other assets is handed over to an independent trustee empowered to make investment decisions on behalf of the beneficiary.

What is your opinion in such a case?

- (a) The politician should be criminally prosecuted for tax fraud;**
- (b) The politician should resign his office;**
- (c) The politician should not get reelected by UK voters;**
- (d) The politician has done nothing wrong.**

Tax avoidance

Terminology

- **Tax evasion (tax fraud)**

Violation of law in order to obtain a tax advantage

- **Tax avoidance (tax abuse)**

Making use of loopholes in the law, without directly violating it, in order to obtain a tax advantage

- **Tax planning**

Making use of incentives granted by law in order to obtain a tax advantage

- Terminology

- Aggressive tax planning = tax avoidance
- The terms are often used interchangeably

Tax avoidance

Terminology

- OECD definitions:
 - ◆ **Tax fraud:** a form of deliberate evasion of tax which is generally punishable under criminal law. The term includes situations in which deliberately false statements are submitted, fake documents are produced, etc.
 - ◆ **Tax evasion:** illegal arrangements where liability to tax is hidden or ignored, i.e. the taxpayer pays less tax than he/she is supposed to pay under the law by hiding income or information from the tax authorities.
 - ◆ **Tax avoidance:** arrangement of a taxpayer's affairs that is intended to reduce his liability and, although the arrangement could be strictly legal, is usually in contradiction with the intent of the law it purports to follow
 - ◆ **Tax planning:** Arrangement of a person's business and/or private affairs in order to minimize tax liability.

Tax avoidance

Examples

- **Tax evasion/fraud**
 - ◆ Not reporting or under-reporting income,
 - ◆ Inflate deductions without proof
 - ◆ Not reporting cash transactions
 - ◆ Submitting false tax returns
 - ◆ Inaccurate financial statements
 - ◆ Using fake documents to claim exemption
 - ◆ Claiming personal expenses as business expenses
 - ◆ Engaging in a "sham transaction."
- **Tax avoidance**
 - ◆ Company directors receive their income as directors' loan
 - ◆ Storing wealth outside the country
 - ◆ Offshoring (using offshore companies)

Tax avoidance

Examples

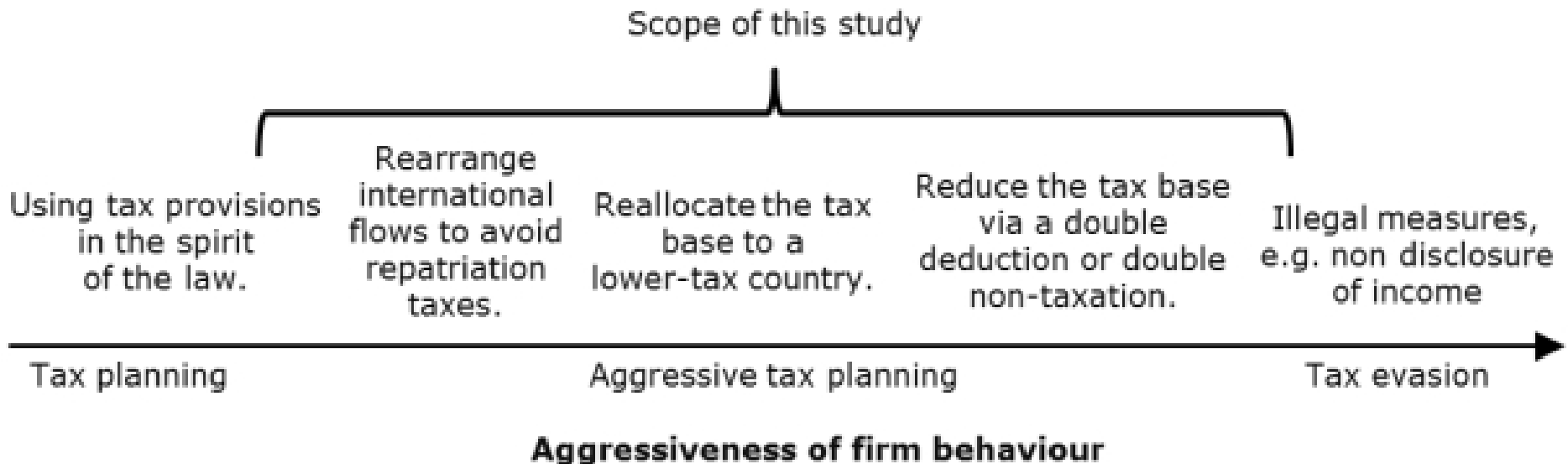
- **Tax planning**
 - ◆ Forecasting income and expenses (controlling the timing of income and deductions)
 - ◆ Minimizing taxable income
 - ◆ Maximizing tax deductions and tax credits
 - Take full advantage of every available deduction
 - Claim every tax credit

Tax avoidance

Terminology

- European Commission: Recommendation C (2012) 8806
 - ◆ **Aggressive tax planning:** taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability.

Figure 1: Boundaries of ATP definition



Tax avoidance

Terminology

	<i>Lawful</i>	<i>Legitimate</i>
Tax evasion	✗	✗
Tax avoidance (aggressive tax planning)	✓	✗
Tax planning	✓	✓

Tax avoidance

Tax havens

- Tax haven
 - ◆ not tax heaven
 - ◆ French: paradis fiscal (fiscal paradise)
 - ◆ German: Steueroase (tax oasis)
- Definition
 - ◆ Countries that are able to finance their public services with no or nominal income taxes and that offer themselves as places to be used by non-residents to escape tax in their country of residence.
 - ◆ Also countries that raise significant revenues from their income tax but whose tax system offers preferential tax features in order to attract investment from other countries
- OECD definition:

Tax haven in the "classical" sense refers to a country which imposes a low or no tax, and is used by corporations to avoid tax which otherwise would be payable in a high-tax country.

Tax avoidance

Tax havens

- Characteristics
 - ◆ Tax non-residents are subject to no or minimum taxation
 - ◆ No effective exchange of tax information with other countries
 - ◆ No transparency as to company operations
 - ◆ No real domestic business activity required
- Other useful features
 - ◆ Absence of exchange controls
 - ◆ Provision of offshore banking facilities
 - ◆ Good communication facilities
 - ◆ Political stability
 - ◆ Availability of professional advisers
 - ◆ Convenient location

Tax avoidance

Tax havens

- Tax haven types
 - ◆ Traditional or "base" tax havens
 - no/very low taxes on all business income
 - usually colonies or former colonies of onshore jurisdictions
 - Examples: Bermudas, Cayman Islands, Mauritius, Netherlands Antilles, British Virgin Islands (BVI), etc.
 - ◆ Treaty havens
 - Countries with very favorable network of tax treaties
 - Extensive networks
 - low withholding taxes
 - particularly suitable for intermediate holding companies.
 - Examples: the Netherlands, Cyprus, Luxembourg
 - ◆ Concession havens
 - countries offering particular tax incentives or benefits
 - e.g. offshore financial centers
 - Examples: Belgium, the Netherlands, Ireland, UK

Tax avoidance

Tax havens

- Use of tax havens
 - ◆ Individuals
 - Concealing income and assets
 - Not always for tax purposes
 - ◆ MNEs (Multinational Enterprises)
 - Locating operations (especially financial operations) in low-tax countries in order to reduce overall tax burden
 - preventing or delaying earnings and/or investment income from entering high-tax jurisdictions by "parking" them in a very low-tax country

Tax havens

- Offshore Magic Circle
 - ◆ The largest multi-jurisdictional law firms that specialize in offshore financial centers
 - ◆ Law firms
 - Appleby
 - Bedell
 - Carey Olsen
 - Conyers
 - Harneys
 - Maples
 - Mourant Ozannes
 - Ogier
 - Walkers

Tax avoidance

Tax havens

- A US report found
 - ◆ 83 of the 100 largest corporations in the US had subsidiaries in offshore tax havens in 2007
 - ◆ One corporation was reported as having 427 subsidiaries in tax havens
- LuxLeaks (2014)
 - ◆ Disclosure of tax rulings for over 300 multinational companies based in Luxembourg
- Panama Papers (2016)
 - ◆ 11.5 million leaked documents for more than 214,488 offshore entities held in Panama by wealthy individuals and public officials
- Paradise Papers (2017)
 - ◆ 13.4 million confidential electronic documents relating to offshore investments
 - ◆ They originate from law firm Appleby, corporate services providers Estera and Asiaciti Trust, and business registries in 19 tax jurisdictions.
 - ◆ They contain the names of more than 120,000 people and companies

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Tax havens

- 1998: OECD Report «Harmful tax competition: an emerging global issue»
- 2000: OECD Report «Progress in Identifying and Eliminating Harmful Tax Practices»
 - ◆ List of 47 jurisdictions with preferential tax regimes
 - ◆ List of 35 tax havens
- As of 2000: OECD maintains and updates a list of uncooperative tax havens)
 - ◆ Problem: updating is based on political commitments rather than actual measures
 - ◆ As of 2007 the list remains empty
 - ◆ As of 2010 3 lists are maintained: black, grey and white
- 2017: EU established its own list of non-cooperative jurisdictions
 - ◆ Regularly updated
 - ◆ As of 2020 it will be updated twice a year

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Tax havens

- The current EU list of non-cooperative jurisdictions for tax purposes (adopted by the Council on 8 October 2024)
 - ◆ American Samoa
 - ◆ ~~Antigua and Barbuda~~
 - ◆ Anguilla
 - ◆ Fiji
 - ◆ Guam
 - ◆ Palau
 - ◆ Panama
 - ◆ Russia
 - ◆ Samoa
 - ◆ Trinidad and Tobago
 - ◆ US Virgin Islands
 - ◆ Vanuatu

Tax avoidance

Offshore companies

- OECD Definition: Term usually applied to a company registered in a country (often a tax haven) other than the country or countries in which it carries on its business activities
- Often but not always residing in a tax haven
 - ◆ Examples: Cypriot, Bulgarian, UK companies
- Commonly used for
 - ◆ captive insurance
 - ◆ marketing abroad
 - ◆ international shipping
 - ◆ tax avoidance

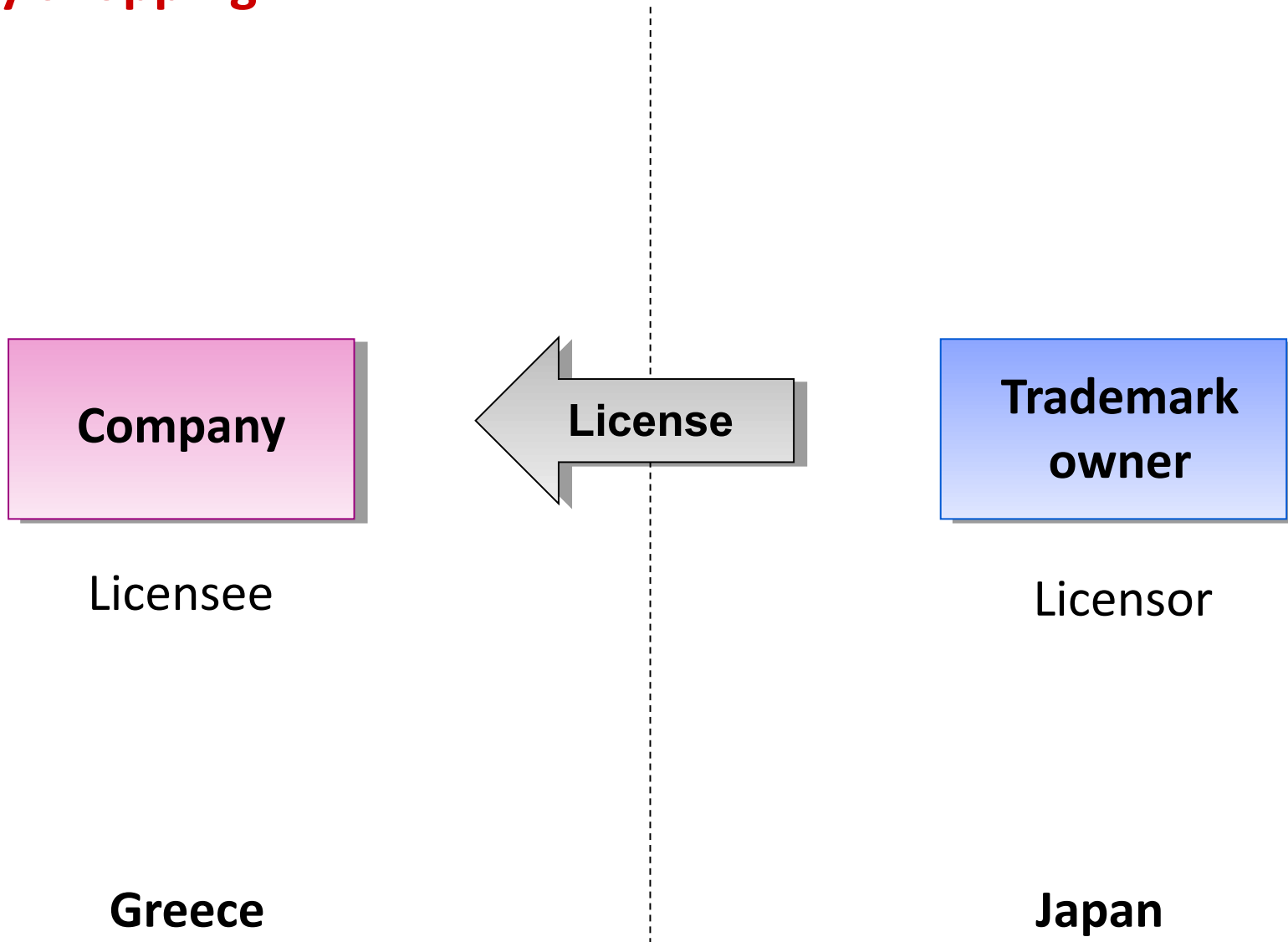
Tax avoidance

Treaty shopping

- Definition: the situation where a person who is not entitled to the benefits of a tax treaty makes use of an individual or of a legal person in order to obtain those treaty benefits that are not available directly.
- Variant: Directive shopping
 - ◆ The tax benefits of EU directives (Parent-Subsidiary Directive, Interest and Licensing Fees Directive) are used.
- Tax avoidance scheme, not evasion
- Conduit (or "stepping stone") company
 - ◆ an entity that is an intermediary between a source of income and the destination of that income, and
 - ◆ this intermediary acts in its own right as the legal owner of the income that it receives and that it passes on, and
 - ◆ this entity is not the ultimate beneficiary of the income
- Frequently used jurisdictions for intermediate corporations: the Netherlands, Cyprus and Luxembourg

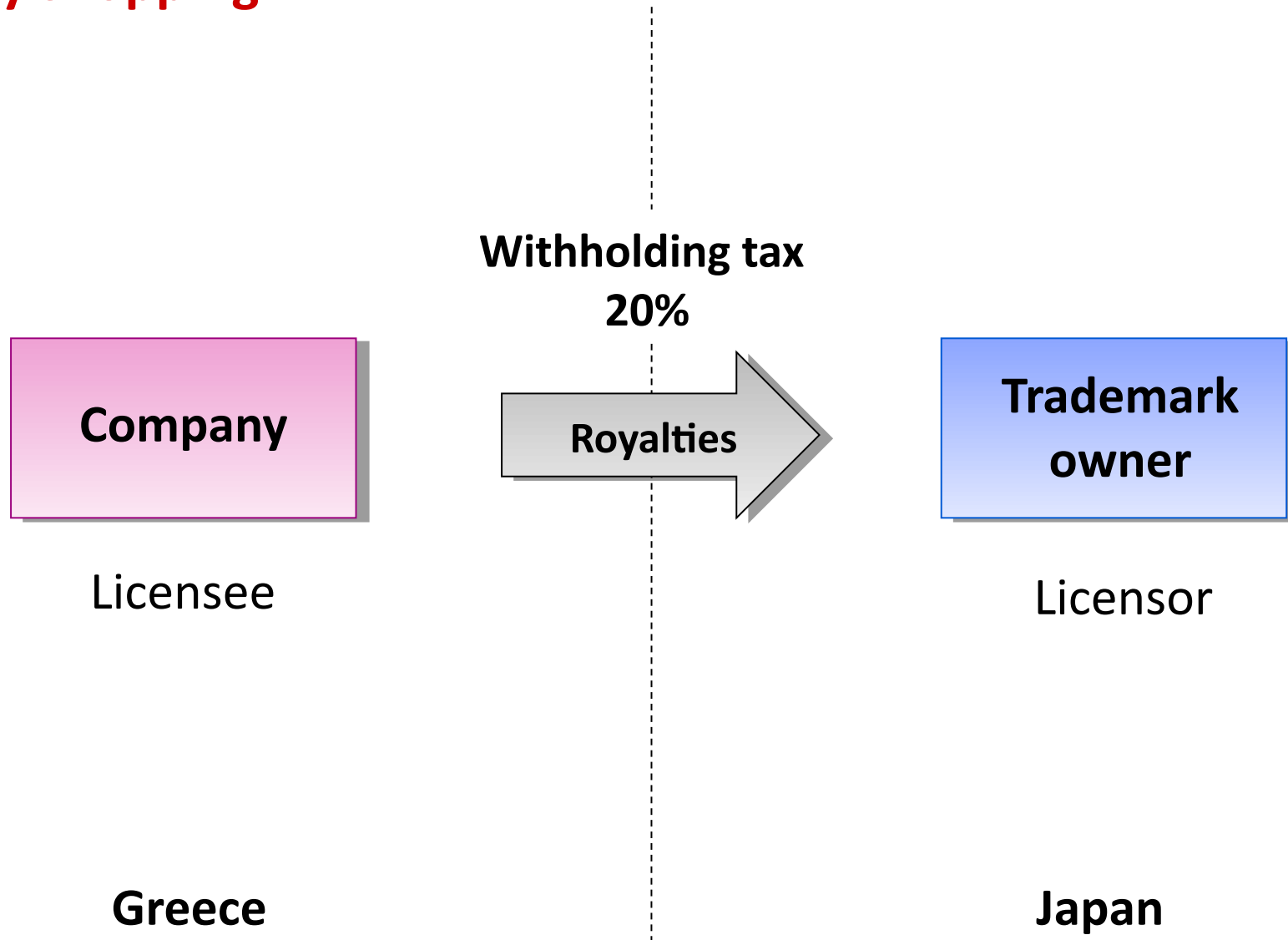
Tax avoidance

Treaty shopping



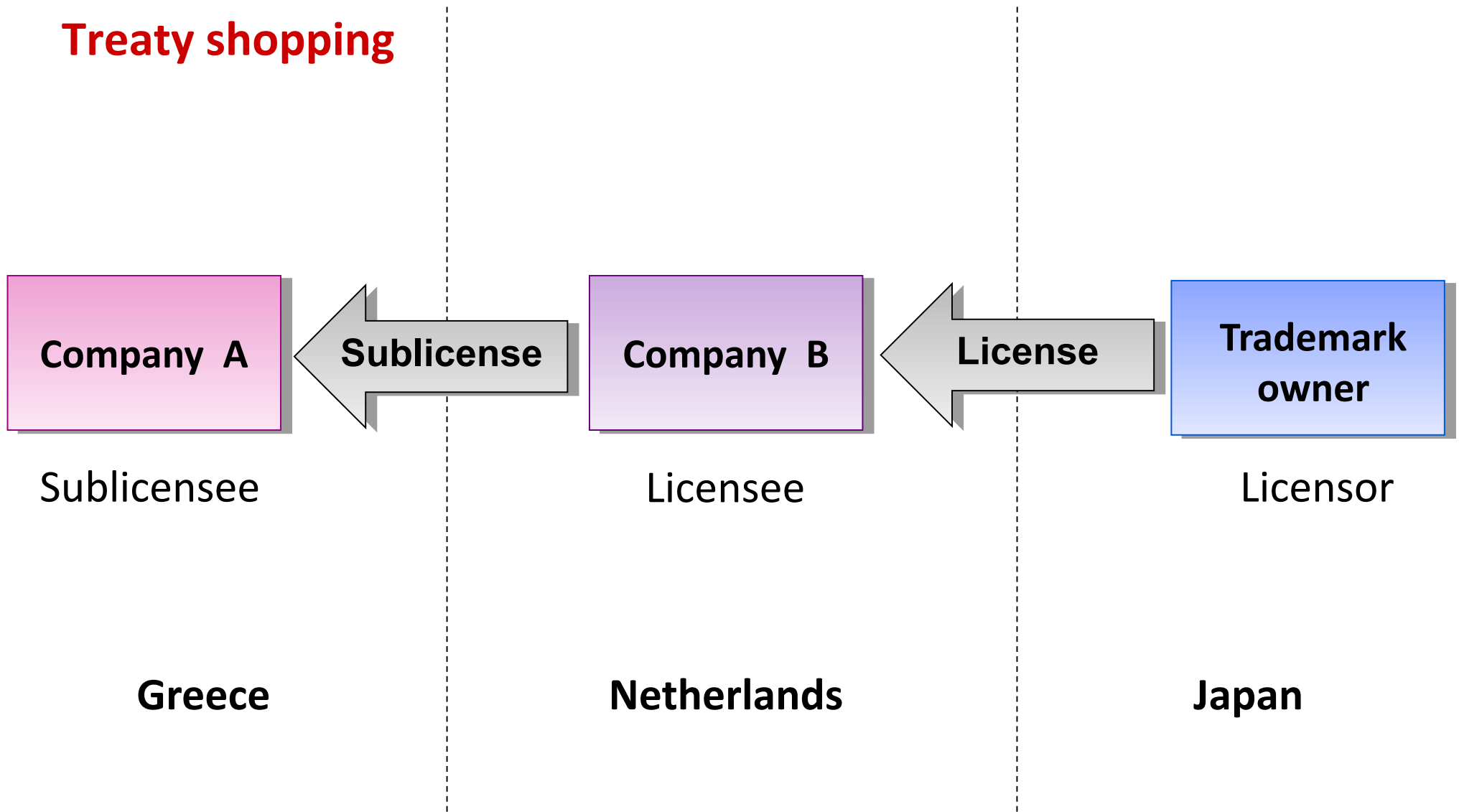
Treaty shopping

Treaty shopping



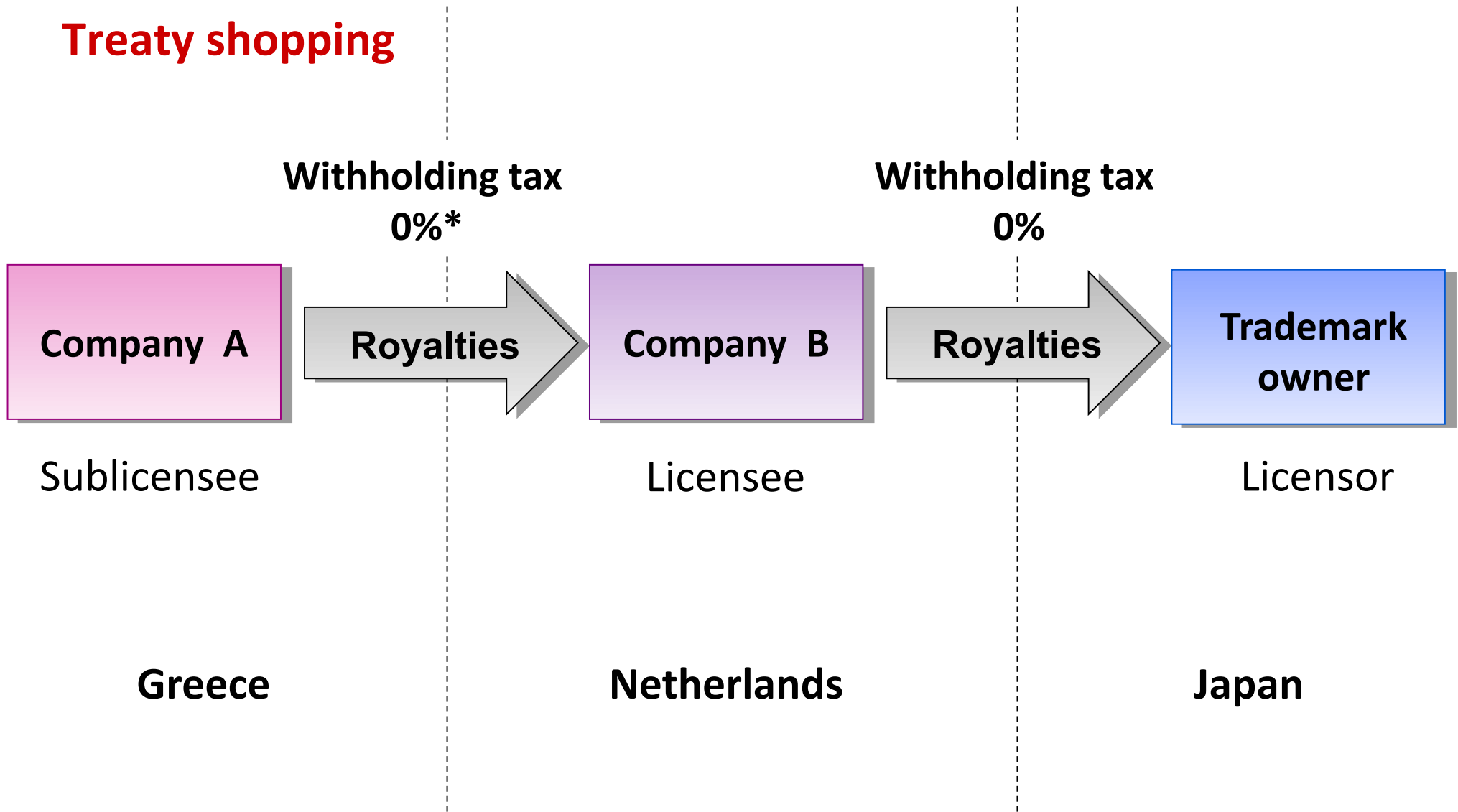
Treaty shopping

Treaty shopping



Treaty shopping

Treaty shopping



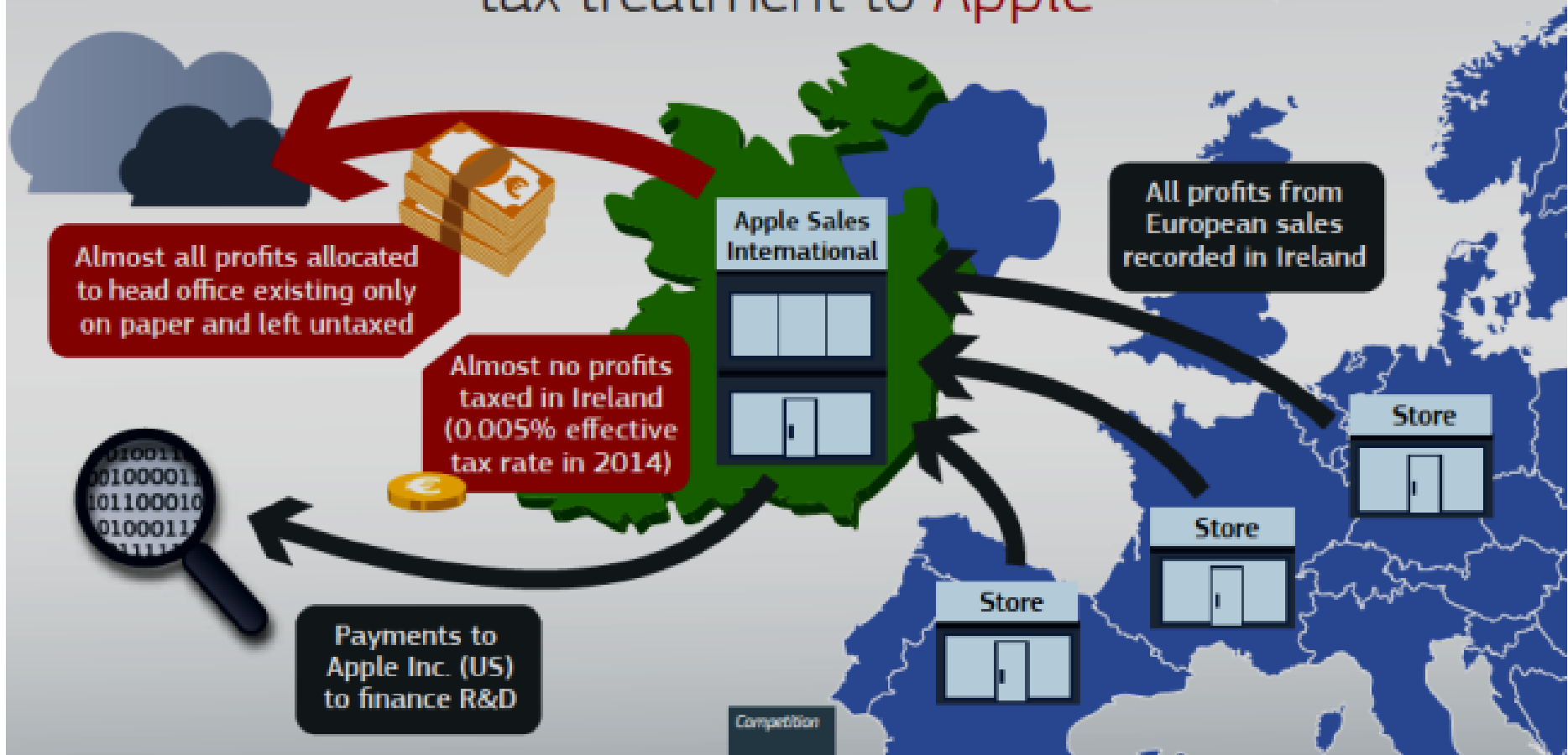
* Greek-Dutch Treaty: 5%-7% withholding, Directive 2003/49/EC: 0%
Dutch-Japanese Treaty: 0%

Tax avoidance

Apple

- Apple has built up a cash stockpile of around €187bn
- In 2013, Apple US Inc. took a loan of US 17 billion (the first loan in a decade)
- The loan was intended for financing dividends to shareholders
- Apple's cash is deposited in tax havens outside the USA
- If money is imported in the USA, tax will be due
- The loan does not trigger any tax liability, whereas interest is deductible

State aid: Ireland gave illegal preferential tax treatment to **Apple**

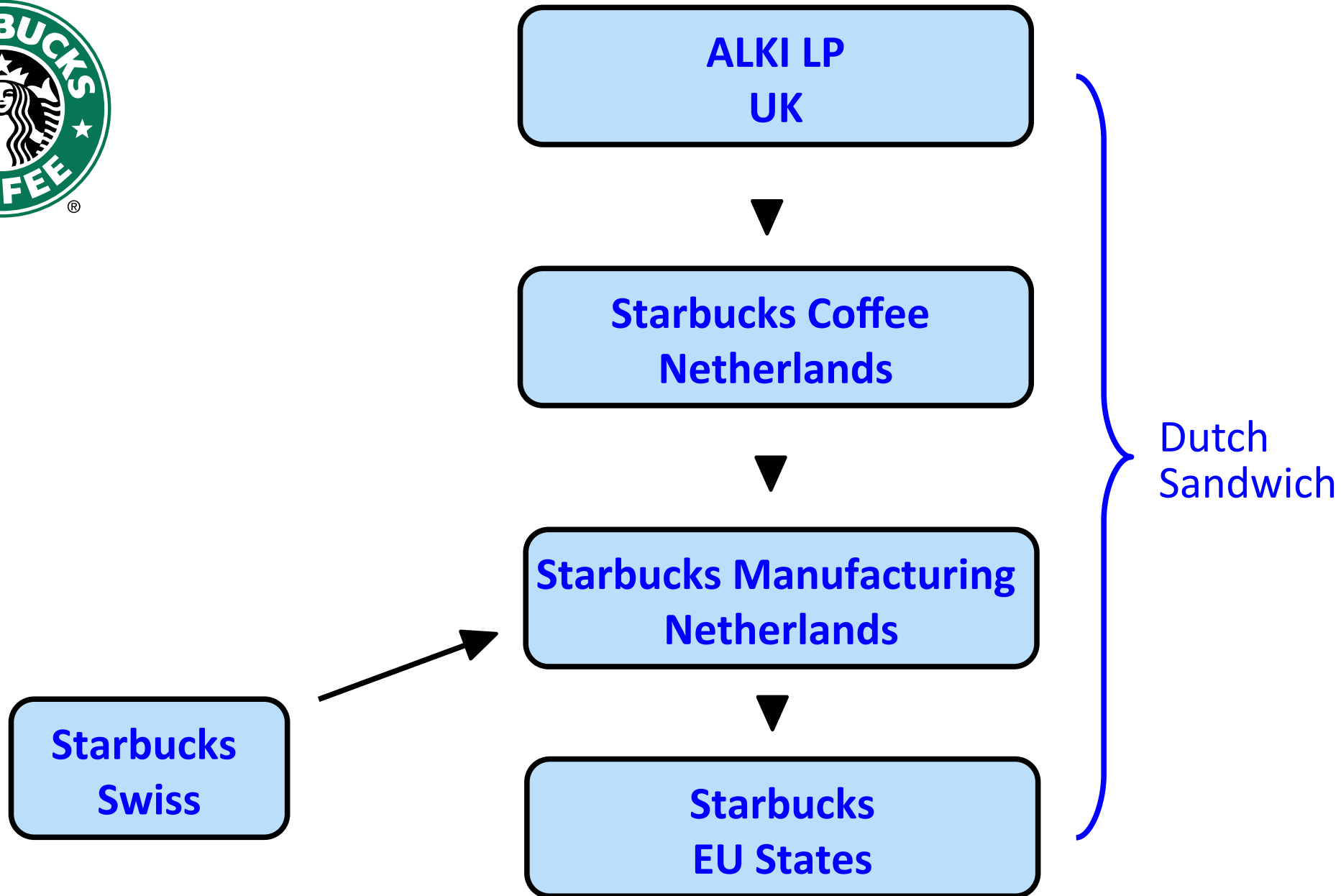


Tax avoidance

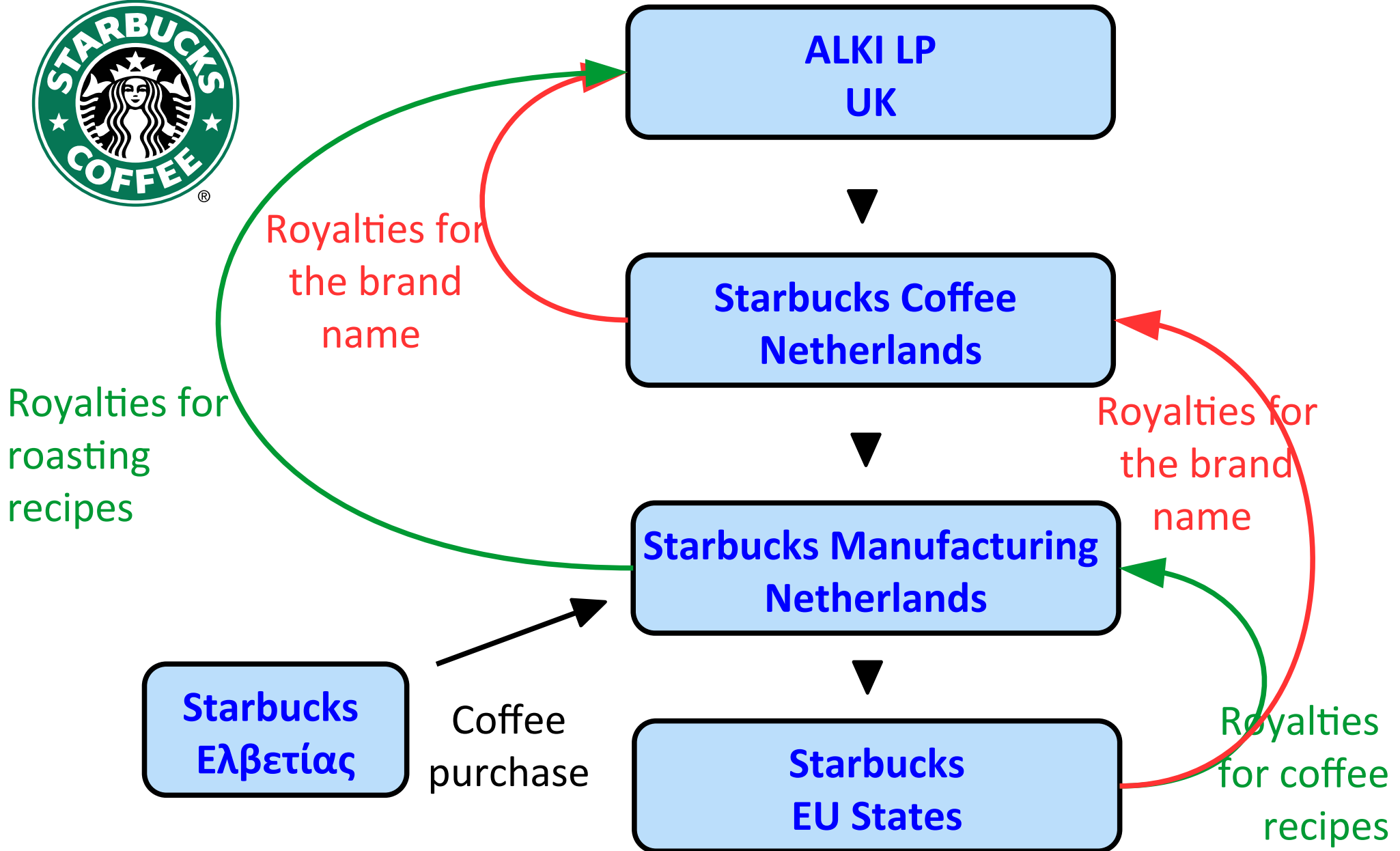
Starbucks

- US multinational
- UK subsidiary (from 2008 to 2012)
 - Total revenue: £3 billion
 - Tax paid: £8.6 million
 - In 2011: No tax
- Under pressure by the public opinion, the company agreed to pay £20 million more

Tax avoidance



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Tax avoidance

Amazon

- Amazon EU S.a.r.L. Luxembourg
- Sales pooling
- Tax Ruling in Luxembourg

Tax avoidance

Google

- Branches or subsidiaries in all EU countries
- All transactions are performed by the Irish subsidiary
- The profits of the Irish subsidiary are transferred to the Dutch subsidiary
- The profits are then transferred to Bahamas

Permanent Establishment



Google USA

Royalties

Bermudas

Bermudas Black Hole

Bermudas (management)
Ireland (incorporation)

Google Ireland 1

Netherlands

Double Irish

Google Netherlands

Dutch Sandwich

Ireland

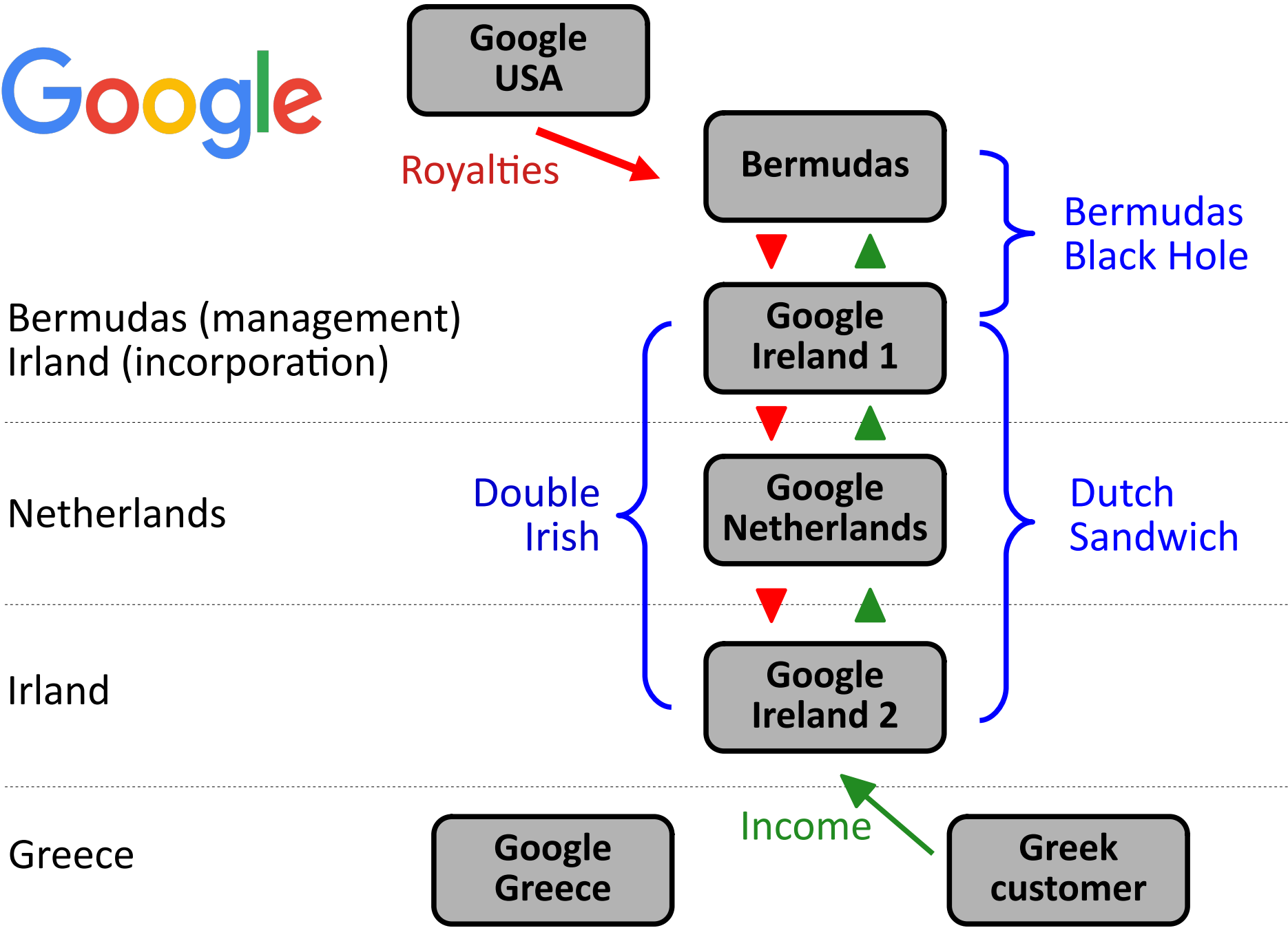
Google Ireland 2

Greece

Google Greece

Income

Greek customer



Tax avoidance

Dolce e Gabbana

- They established a Luxembourg holding company (GADO Srl)
- They transferred ownership of their trademarks to GADO, which was subject to a low rate of tax in Luxembourg
- They received royalties from GADO tax free through various companies
- Italian tax authorities argued that GADO was fictitious and the brands were managed from Italy
- Dolce e Gabbana were convicted in lower courts
- Finally, they were acquitted by the Italian Supreme Court on grounds that GADO was an active company

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