

THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

June 2026

MODULE 3.01 – EU DIRECT TAX OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

Part 1

Homeland's refusal to exempt the dividends is incompatible with the PSD. Scope requirements are met – type of company and payment of CIT. Holding requirement is met (above 10%). Holding period is contestable – Article 3 (2) (b):

Option 1: Is it necessary that the minimum holding period is already fulfilled at the time of the distribution or option 2: is it sufficient that the minimum holding period is completed after the distribution?

For the PSD option 2 is sufficient - completion after payment is sufficient [see Denkavit, VITIC and Vormeer = Minimum holding period need not be fulfilled at the moment of distribution, as long as the holding is maintained for the holding period). Use of the present tense in Art. 3(2)(b) ("do not maintain") and goal and purpose of the Directive.

Homeland must eliminate economic double taxation (via exemption or tax credit) and its refusal breaches the PSD.

Part 2

Refusal to consolidate BLUE's losses: The suggestion to establish a PE instead of a subsidiary to benefit from the losses consolidation is incompatible with freedom of establishment. The core of the freedom, as per Article 49 TFEU is that companies should be free to choose the legal form they want to establish. However, despite the restriction imposed, the refusal to consolidate BLUE's losses may be justified, on grounds of the balanced allocation of taxing powers, prevention of double use of losses and fiscal coherence (see Marks and Spencer and subsequent case law). The only possibility would be if one of the subsidiaries' losses were the final ones.

Part 3

Yes, Homeland is correct to refuse to take into account the PE's losses, as according to the DTC these are taxed in Pinkland. No separation of taxation of profits and consideration of losses (balanced allocation of taxing powers). Bonus: Even if those losses are final, as per the W. judgment, Homeland still should not be obliged to take them into account.

Part 4

According to the ATAD (Art. 7) the low tax test is met, as Blackland applies a CIT of 12% which is less than half of the CIT in Homeland (= 29%). The control requirement is also met (more than 50%). Bonus if hypothesis/ assumption / distinction between Model A and Model B of the ATAD. In any case, and regardless of the Model adopted, as CFC rules constitute a restriction on freedom of establishment, and as per CJEU case law a mere non-distribution of profits does not suffice to satisfy the non-genuine arrangement test. Instead, Homeland must show that BLACK is a non-genuine/artificial arrangement established mainly to obtain a tax advantage. If BLACK carries on genuine economic activity, CFC legislation cannot be applied solely because of its low tax rate or retained earnings □ Homeland cannot automatically apply its CFC rules.

Question 2

The facts reproduce, in substance, Gilly (Case C-336/96, ECLI:EU:C:1998:221): a taxpayer resident in one Member State, employed in another, taxed in the state of employment on the strength of a nationality-based allocation rule in the double tax agreement, and relieved in the residence state by an ordinary credit that fails to absorb the higher foreign tax. Gilly governs the first two questions and disposes of both.

Nationality as a connecting factor in the DTA

Question. Whether Article 45 TFEU (and, residually, Article 18 TFEU) precludes Member States A and B from using the taxpayer's nationality, in their bilateral DTA, as a connecting factor for the allocation of the power to tax employment income.

Framework

Direct taxation falls within the competence of the Member States, which must nevertheless exercise it consistently with EU law (Schumacker, Case C-279/93, ECLI:EU:C:1995:31). In the absence of unifying or harmonising measures at Union level, Member States remain free to determine the criteria for the allocation of taxing powers between themselves, by treaty if necessary. Article 293 EC, which invited them to negotiate the abolition of double taxation, was repealed by the Treaty of Lisbon and, while in force, conferred no rights on individuals (Gilly). Member States may follow the OECD Model, which itself uses nationality as a connecting factor in Article 19(1)(b).

Analysis

In Gilly the Court held that although the Treaty prohibits discrimination on grounds of nationality, a nationality criterion used in a DTA to allocate fiscal jurisdiction is not a prohibited discrimination: Member States are at liberty to determine the connecting factors for the allocation of taxing powers (Gilly, paragraphs 24 and 30). The criterion operates as a rule of allocation. It does not determine the level of tax, nor does it condition the grant of a tax advantage on nationality.

The distinction matters. The freedom concerns allocation; the exercise of the taxing power so allocated must comply with EU law, including the prohibition of discrimination against nationals of other Member States (Saint-Gobain, Case C-307/97; de Groot, Case C-385/00; Renneberg, Case C-527/06). Had Member State B used Mrs X's nationality to deny her a deduction or an allowance available to its residents, the answer would be different.

Conclusion

The nationality criterion in the DTA is compatible with Articles 45 and 18 TFEU. Mrs X's first argument fails.

The ordinary credit in Member State A

Question

Whether Article 45 TFEU obliges the residence state to grant a full credit, rather than an ordinary credit, where the source state taxes at a higher rate.

Analysis

It does not. In Gilly, France credited the German tax only up to the French tax attributable to the German income; because the German scale was more progressive, part of the German tax remained uncredited. The Court held that the unfavourable consequences flow from the disparity between the tax scales of the two Member States, and that in the absence of harmonisation the fixing of those scales is a matter for the Member States (Gilly, paragraphs 49 and 53). A full credit would require Member State A to refund tax levied by Member State B, that is, to fund B's rate choice out of A's budget. Nothing in the Treaty imposes that.

The employment income of Mrs X in Member State B is her only income. Under Schumacker (Case C-279/93), where a non-resident earns all or almost all of his income in the state of employment, that state must grant him the personal and family tax advantages it grants to its residents, because the residence state has no taxable base against which to give them. Her complaint is directed at Member State A. Her better claim, if Member State B refuses her the allowances it grants residents, lies against Member State B. Separately, if the operation of A's credit causes her to lose part of the benefit of A's personal allowances, de Groot (Case C-385/00) requires A to ensure that her personal and family circumstances are taken into account in full.

Conclusion

The ordinary credit is compatible with the free movement of persons. Mrs X has no right to a full credit.

Discrimination or disparity?**The distinction**

Discrimination, or a restriction, is attributable to the rules of a single Member State: comparable situations treated differently, or different situations treated alike, within one tax system, to the detriment of the exercise of a freedom. A disparity is the product of the parallel exercise by two Member States of their respective taxing powers, neither of which is in itself discriminatory. Only the first is prohibited by the Treaty.

Application

Neither state, taken alone, treats Mrs X worse than a comparable taxpayer within its own system. Member State B taxes her employment income at the rate applicable to everyone taxed there. Member State A grants her the credit it grants to any resident with foreign-source income. The additional burden arises from the coexistence of two systems with different rates. That is a disparity: Kerckhaert and Morres (Case C-513/04), Damseaux (Case C-128/08), Block (Case C-67/08), Columbus Container Services (Case C-298/05). Disadvantages resulting from the parallel exercise of taxing competences, where that exercise is not discriminatory, are not restrictions prohibited by the Treaty. Mrs X's counterfactual (what she would have paid had all her income arisen in Member State A) compares two tax jurisdictions, not two situations within one jurisdiction. The Treaty does not guarantee that working in another Member State will be fiscally neutral.

Conclusion

Disparity, not discrimination. No breach of Article 45 TFEU.

Is there an EU-law obligation to eliminate juridical double taxation?**Analysis**

There is no general obligation. Article 293 EC was repealed by the Treaty of Lisbon and never had direct effect. Primary law contains no rule allocating taxing power between Member States and no prohibition of juridical double taxation: Kerckhaert and Morres (Case C-513/04), Damseaux (Case C-128/08), Block (Case C-67/08). Double taxation resulting from the parallel exercise of taxing powers must be cured by the Member States themselves, in particular by treaty, following the criteria used in international practice.

Secondary law intervenes only in defined fields. The Parent-Subsidiary Directive (2011/96/EU) and the Interest and Royalties Directive (2003/49/EC) address economic double taxation and source taxation of specific flows. The Arbitration Convention (90/436/EEC) and Directive (EU) 2017/1852 on tax dispute resolution mechanisms create binding procedures, including mandatory arbitration, for disputes arising from the interpretation and application of agreements providing for the elimination of double taxation. Those are procedural obligations within a defined scope; they presuppose an agreement, and they do not create a free-standing substantive duty to eliminate double taxation.

Conclusion

No general obligation under EU law. Mrs X cannot ground a claim on the mere existence of unrelieved double taxation.

DTAs and EU law: which prevails?**Analysis**

A DTA between Member States is an instrument of international law concluded in the exercise of a retained competence. That competence must be exercised in compliance with EU law (Saint-Gobain, Case C-307/97; Denkavit Internationaal, Case C-170/05). Where a DTA provision conflicts with EU law, EU law prevails and the national court must disapply the treaty provision: primacy (Costa v ENEL, Case 6/64, ECLI:EU:C:1964:66; Simmenthal, Case 106/77, ECLI:EU:C:1978:49). A convention between Member States cannot be relied on to prevent the application of EU law (Matteucci, Case 235/87). The same holds for agreements with third states (Commission v United Kingdom, Case C-466/98, "Open Skies"; Saint-Gobain).

Article 351 TFEU offers only limited protection. It covers agreements concluded with third countries before 1 January 1958 or before accession, and even then the Member State is required to take all appropriate steps to eliminate the incompatibility. It has no application to agreements between Member States.

Two points could also be explored. Firstly, a DTA may be taken into account in deciding whether a restriction imposed by one state is neutralised by the other, but neutralisation must be effective, not merely stipulated (Amurta, Case C-379/05; Denkavit Internationaal, Case C-170/05). Secondly, EU law does not impose a most-favoured-nation

obligation: a resident of one Member State cannot claim the benefit of a treaty concluded between two other Member States (D, Case C-376/03; Test Claimants in Class IV of the ACT Group Litigation, Case C-374/04).

Conclusion

In case of conflict, EU law prevails. On the facts of the case there is no conflict: the DTA allocates taxing power, and the allocation is lawful.

PART B

Question 3

The case is modelled on the Belgian Excess Profit Exemption case (Belgian Excess Profit Exemption). Students are expected to conduct first a state aid analysis (Art. 107 TFEU):

State resources: Yes – the exemption reduces Argonia's tax revenue.

Distortion of competition: "easiest test" ☐ yes, beneficiaries compete with other undertakings in the internal market. More emphasis should be put on the economic advantage and selectivity conditions.

Regarding the advantage: Yes, as the exemption reduces the taxable profits of the beneficiaries ☐ beneficiaries pay less CIT than they would pay otherwise.

Selectivity:

- Establish the reference framework: the ordinary Argonia CIT system [bonus to relevant case law such as World Duty free]
- Does the measure derogate from that system? Yes, by allowing only multinational group companies to exclude "excess profits". Vs. standalone companies, although subject to the same corporate tax system and in a comparable factual and legal situation, cannot benefit.
- This difference in treatment is not justified by the nature or general scheme of the tax system.
- The measure is selective.

Since it meets all Art. 107 (1) TFEU criteria, the measure qualifies as state aid.

In terms of procedure, the procedure followed is not compatible with EU law. According to Article 108(3) TFEU, Argonia is required to notify the aid to the European Commission before implementation. The European Commission has exclusive competence to determine the compatibility of State aid with the internal market. A decision of the domestic competition authority cannot replace Commission notification or approval. Implementing the measure without notification constitutes unlawful (non-notified) aid.

Question 4

Legal framework

Article 4(1) of Directive 2011/96/EU obliges the Member State of the parent company, where the parent receives distributed profits from a subsidiary in another Member State otherwise than on liquidation, either to refrain from taxing such profits to the extent that they are not deductible by the subsidiary (the exemption method, Article 4(1)(a)), or to tax them while granting a credit (the imputation method, Article 4(1)(b)). Article 4(3) allows the Member State to provide that charges relating to the holding and losses resulting from the distribution may not be deducted from the parent's taxable profits, and provides that where management costs are fixed at a flat rate, the fixed amount may not exceed 5% of the profits distributed. The purpose of the Directive is to eliminate economic double taxation of distributed profits and to secure fiscal neutrality between domestic and cross-border groups (recitals 3 to 9). Article 4(1)(a) is unconditional and sufficiently precise to be relied on before the national courts (Cobelfret, Case C-138/07).

Case law

The Court has consistently held that the obligation to refrain from taxing is breached by any mechanism whose effect is that the dividends bear tax, however that effect is produced. In Cobelfret (Case C-138/07) the Belgian regime allowed the deduction of received dividends only up to the amount of the year's profits, with the consequence that carried-forward losses were reduced; that was held contrary to Article 4(1), first indent, and the point was confirmed in KBC Bank (Joined Cases C-439/07 and C-499/07).

The label of the charge is irrelevant. In AFEF and Others (Case C-365/16) the French 3% additional contribution on distributed profits, a charge distinct from corporation tax, was held contrary to Article 4(1)(a) in so far as it taxed dividends received from EU subsidiaries and redistributed. In X (Case C-68/15), the Belgian "fairness tax", a separate levy of 5.15% triggered on distribution, was held contrary to Article 4(1)(a) read with Article 4(3) where it results in the parent being taxed on more than the 5% ceiling. Schneider Electric and Others (Case C-556/20) applied the same logic to the French précompte mobilier.

Banca Mediolanum settles the present question. Italy applies the exemption method and taxes 5% of inbound dividends in the IRES base. Financial intermediaries were nevertheless required to include 50% of those dividends in the base of IRAP, the regional tax on production activities, which is not a tax on corporate income, and which applied irrespective of the origin of the dividends. The Court held that Article 4(1)(a) does not refer to any tax in particular; the exemption system therefore concerns any tax which includes in its basis of assessment the dividends a parent company receives from subsidiaries resident in other Member States. In particular, since the Directive seeks to prevent economic double taxation, the exemption applies to any tax which includes in its base even a part of those profits, whatever the nature of that tax. Accordingly the Directive precludes national legislation under which a Member State levies tax on more than 5% of the amount of the dividends, including where it does so by way of a tax which is not a corporate income tax but which includes those dividends, or a fraction of them, in its basis of assessment.

Application to Company C

First, the 5% permitted by Article 4(3) is a ceiling on the total tax that the parent's state may impose on the qualifying dividends. Member State C has already exhausted it in the corporate income tax base. Every further inclusion of those dividends in the base of the special sector tax means that more than 5% of them bears tax. Article 4(1)(a) is breached.

Second, the special, sectoral character of the tax and the fact that it is levied in addition to the corporate income tax do not remove it from the scope of Article 4. That was precisely the argument advanced by the Italian authorities and rejected. The test applied by the Court is mechanical: does the tax include the dividends, or a fraction of them, in its basis of assessment.

Third, the fact that the special tax applies equally to domestic and cross-border dividends is no defence. Article 4(1)(a) imposes an unconditional obligation to refrain from taxing; it is not a rule of non-discrimination, and it does not require a comparison with a domestic situation. IRAP applied irrespective of the origin of the dividends and was still precluded. The position under the fundamental freedoms, where comparability and less favourable treatment must be shown, is different, and Company C does not need to reach it.

Fourth, the protection extends only to dividends from subsidiaries qualifying under Articles 2 and 3 of the Directive: a company having one of the legal forms listed in Annex I, Part A, subject to one of the taxes listed in Annex I, Part B, without the possibility of an option or of being exempt, and a holding of at least 10% of the capital, subject to any holding period condition imposed under Article 3(2). The facts state that the subsidiaries are qualified EU subsidiaries. Dividends from non-qualifying subsidiaries, or from third-country subsidiaries, fall outside the Directive and are protected only by Articles 49 and 63 TFEU.

Counter-arguments

Member State C will argue that the special tax has an independent base, measuring sectoral activity rather than profit, so that dividends enter the base only as one component of a broader measure of economic capacity, and that the Directive was never intended to constrain taxes outside the corporate income tax. That argument has now failed before the Court, and its failure is the ratio of *Banca Mediolanum*.

Remedy

Article 4(1)(a) has direct effect (*Cobelfret*, Case C-138/07). Company C may rely on it before the courts of Member State C, which must disapply the national provision to the extent of the excess and order the reimbursement of the tax unduly levied, together with interest. Only the inclusion of the qualifying dividends beyond 5% is affected. The special sector tax itself is not affected, it is only its base that must be corrected in order to comply with EU law.

Conclusion

The legislation of Member State C is incompatible with Article 4(1)(a) of Directive 2011/96/EU in so far as the special sector tax includes in its basis of assessment dividends received by Company C from its qualifying EU subsidiaries in excess of the 5% permitted by Article 4(3). The 5% ceiling applies to the aggregate tax burden that the parent's state may impose on those dividends, not separately to each tax. The tax authority's position, that the Directive protects only the corporate income tax, is wrong: the Court of Justice rejected it in *Banca Mediolanum* (Joined Cases C-92/24, C-93/24 and C-94/24, ECLI:EU:C:2025:599, judgment of 1 August 2025). Company C should claim reimbursement of the special sector tax levied on the excess.

PART C

Question 5

Students are expected to identify the definition of minimum harmonisation directives = the establishment of a minimum common 'standard' that all Member States must implement. Bonus if they contrast it to full harmonisation. Explain that the idea is to ensure a minimum level of protection (considering the respective goal of the (relevant) directive) or a minimum degree of coordination. This means that Member States are free to adopt stricter rules that they must be assessed in light of the objective of each directive. At the same time, they must ensure that these rules are compatible with primary EU law.

The most representative example would be the ATAD (Art. 3 specifically indicates that the ATAD is a minimum harmonisation directive) – Member States can adopt stricter anti-avoidance rules than those required by the Directive. These rules would provide a higher level of protection against tax avoidance. Examples here are encouraged (interest-limitation rule, EBITDA 25% etc – provided that the measure complies with EU primary law. Other examples (e.g. shorter periods for deferral in exit taxation) are also welcome.

Another example of minimum harmonisation directive is the DACs that establish minimum obligations regarding exchange of information. Member States remain free to exchange additional information or adopt broader reporting obligations, provided EU law is respected. Directives such as the GloBE (especially), the PSD and the IRD are not considered good examples of minimum harmonisation as they leave much less discretion to Member States.

Students should also identify the opposite scenario – that minimum harmonisation does not mean the Member State can provide less protection than the Directive requires, neither that MS may omit mandatory provisions of the Directive.

Question 6

Neutralisation refers to the situation where a restriction created by one Member State (typically the source State) is eliminated by the operation of a DTC, usually through relief granted by the residence State (e.g. a tax credit). The issue is usually dealt with at the level of determining whether a restriction exists.

BONUS if distinction is made between: Neutralisation: relief provided by the residence State (typically under a DTC) and compensation: corrective mechanisms provided by the source State itself (e.g. refunds, optional regimes or other tax advantages) – traditionally rejected by the CJEU as a means to 'cure' restriction or discrimination.

Member States may rely on DTCs to neutralise restrictions, but under conditions. Reference to the leading case: *Amurta*. A restriction created by the source State may be neutralised where: the relief results from a binding bilateral DTC; and the DTC effectively and fully eliminates the disadvantage in practice (e.g. through a full tax credit or exemption).

The assessment is fact-specific and must be carried out by the national court and a mere theoretical possibility of obtaining relief is insufficient.

Limitations: A Member State cannot rely on unilateral relief granted by another Member State to escape its own obligations under EU law + the DTC must actually remove the disadvantage in practice (see *Miljoen* case).

Question 7ATAD is a minimum standard

Article 3 of Council Directive (EU) 2016/1164 provides that the Directive "shall not preclude the application of domestic or agreement-based provisions aimed at safeguarding a higher level of protection for domestic corporate tax bases". Recital 3 describes the instrument as laying down a minimum level of protection. Two consequences follow. Pre-existing domestic rules (CFC regimes, interest limitations, exit taxes, general anti-abuse rules) and pre-existing treaty provisions (limitation-on-benefits clauses, subject-to-tax and switch-over clauses, treaty anti-abuse rules) continue to apply where they protect the domestic corporate tax base more strictly than the Directive. Taxpayers may not invoke ATAD as a shield against a stricter national rule that is otherwise lawful.

Measures below the minimum must be amended

A directive binds as to the result to be achieved (Article 288 TFEU). ATAD had to be transposed by 31 December 2018 and applied from 1 January 2019 (Article 11(1)), with exit taxation under Article 5 applying from 1 January 2020 (Article 11(5)). The Directive preserved certain pre-existing positions expressly: Article 4(4)(a) permits the exclusion of exceeding borrowing costs on loans concluded before 17 June 2016, excluding subsequent modifications; and Article 11(6) allowed Member States which, on 8 August 2016, had national targeted rules equally effective to the interest limitation rule to defer the application of Article 4, at the latest until 1 January 2024, subject to notification to the Commission. Those carve-outs are exhaustive. Outside them, a pre-existing domestic or treaty measure that falls short of the ATAD minimum must be replaced or supplemented.

Interpretation and effect

National rules predating ATAD must be interpreted, so far as possible, in conformity with it (Marleasing, Case C-106/89). A directive cannot of itself impose obligations on an individual, so a Member State cannot invoke ATAD directly against a taxpayer in the absence of implementing legislation (Kolpinghuis Nijmegen, Case 80/86; Kofoed, Case C-321/05). That gap is largely closed by the general principle of EU law that abuse is prohibited, which national authorities must apply to refuse a directive benefit even where no domestic or treaty anti-abuse provision exists (T Danmark and Y Denmark, Joined Cases C-116/16 and C-117/16, ECLI:EU:C:2019:135; N Luxembourg 1 and Others, Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, ECLI:EU:C:2019:134). Pre-ATAD national anti-abuse rules therefore operate alongside both the ATAD GAAR and the unwritten principle.

Primary law remains the outer limit

Article 3 permits stricter national and treaty rules however such rules must still comply with EU law. Since ATAD is minimum harmonisation, and the field is not exhaustively harmonised, national measures continue to be measured against the fundamental freedoms and the general principles of proportionality and legal certainty. For intra-EU situations, Cadbury Schweppes (Case C-196/04, ECLI:EU:C:2006:544) remains the benchmark: a restriction on the freedom of establishment can be justified only in respect of wholly artificial arrangements. The Court continues to apply that test to pre-ATAD national rules. In X BV (Case C-585/22, judgment of 4 October 2024) it held that Article 49 TFEU does not preclude the refusal of the whole of the interest deduction on an intra-group loan which constitutes a wholly artificial arrangement, even where the interest is set at arm's length.

"Non-genuine" and "wholly artificial"

The relationship between the ATAD terminology and Cadbury Schweppes is often stated too crudely. The Commission's position is that the two formulations carry the same meaning. Recital 11 of the proposal (COM(2016) 26 final) stated that, within the Union, the application of GAARs should be limited to arrangements that are "wholly artificial" (non-genuine), and the explanatory memorandum records that, in compliance with the *acquis*, the proposed GAAR is designed to reflect the artificiality tests of the CJEU where it is applied within the Union. The adopted recital 11 dropped the parenthesis and provides only that "[w]ithin the Union, GAARs should be applied to arrangements that are not genuine; otherwise, the taxpayer should have the right to choose the most tax efficient structure for its commercial affairs". On that reading, Article 6 ATAD codifies Cadbury Schweppes for intra-EU situations rather than extending it, and a GAAR faithful to Article 6 is, by construction, within the primary-law standard.

The genuine difficulty lies in Article 7. Under option A (Article 7(2)(a)) the carve-out for a controlled foreign company carrying on a substantive economic activity supported by staff, equipment, assets and premises secures compliance with Cadbury Schweppes expressly, and it is mandatory for CFCs resident in the Union or the EEA. Option B (Article 7(2)(b)) contains no equivalent carve-out. The Commission's view, stated in its State aid decision on the United Kingdom's CFC group financing exemption, is that option B does not restrict the freedom of establishment at all, because the significant people functions test attributes to the parent only the income that the CFC could not have generated itself, so the wholly artificial arrangement limitation is not engaged and the carve-out is unnecessary. That view is contested. A CFC charge on a subsidiary established in another Member State is a difference in treatment

by comparison with a domestic subsidiary, whatever the method used to quantify the income attributed. The better view is that option B must be read as carrying the same limitation, through the two cumulative conditions it imposes: a non-genuine arrangement, and an essential purpose of obtaining a tax advantage. The Court has not ruled on the point.

Treaty-based measures

Article 3 expressly covers "agreement-based" provisions, so treaty anti-abuse clauses offering higher protection survive the adoption of ATAD and may be applied alongside the implementing legislation. However, a DTA between Member States cannot excuse non-compliance with ATAD or with primary law: EU law prevails (*Costa v ENEL*, Case 6/64; *Simmenthal*, Case 106/77; *Matteucci*, Case 235/87), and Article 351 TFEU covers only agreements concluded with third countries before 1 January 1958 or before accession, and then only pending the elimination of the incompatibility. A Member State whose treaty prevents it from applying its ATAD-implementing rules must renegotiate the treaty, or rely on the Multilateral Instrument. It may not plead the treaty against the Directive.

To conclude, pre-ATAD measures are neither repealed nor validated by the Directive. ATAD sets a floor. Measures that give more protection remain applicable; measures that give less must be brought up to the minimum; and both remain subject to primary EU law.

Question 8

Origin: an OECD concept

The term entered the OECD Model in 1977, in Articles 10, 11 and 12, as a narrow anti-conduit device directed at agents, nominees and similar intermediaries. The 2014 Commentary confirmed that it is not to be read in a narrow technical domestic-law sense, and BEPS Action 6 shifted the anti-abuse burden onto the principal purpose test. The concept arrives in EU law from outside.

The Directives

The Parent-Subsidiary Directive (originally 90/435/EEC, recast as 2011/96/EU) contains no beneficial ownership requirement. Entitlement turns on formal conditions: legal form listed in Annex I Part A, subject to one of the taxes listed in Annex I Part B without the possibility of an option or of being exempt, and a holding of at least 10% of the capital (Article 3(1)), with an optional two-year holding period (Article 3(2)). Anti-abuse was originally left to the Member States as an option under Article 1(2) of Directive 90/435. Directive (EU) 2015/121 replaced it with a mandatory GAAR, now Article 1(2) and (3) of Directive 2011/96: benefits are denied to an arrangement, or a series of arrangements, which is not genuine having regard to all relevant facts and circumstances and which has been put in place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the Directive.

The Interest and Royalties Directive (2003/49/EC) does use the concept. Article 1(1) reserves the exemption to the beneficial owner of the interest or royalties, and Article 1(4) defines it: a company is treated as the beneficial owner "if it receives those payments for its own benefit and not as an intermediary, such as an agent, trustee or authorised signatory, for some other person". Article 5 preserves domestic and agreement-based anti-fraud and anti-abuse provisions.

The Savings Directive (2003/48/EC) used "beneficial owner" in an entirely different sense, to identify the individual receiving interest for the purposes of information exchange (Article 2). It was repealed by Directive (EU) 2015/2060 once the CRS-based amendments to the Directive on administrative cooperation took over. The two concepts should not be conflated.

The Merger Directive (2009/133/EC) has no beneficial ownership condition at all; abuse is addressed by Article 15.

The case law before 2019

The Court said little about beneficial ownership and much about abuse. Halifax (Case C-255/02) and Cadbury Schweppes (Case C-196/04) built the doctrine of abuse of rights and of wholly artificial arrangements. Kofoed (Case C-321/05) held that the anti-abuse option in the Merger Directive could not be applied against a taxpayer without a national legal basis, subject to the duty of consistent interpretation.

The Danish cases: the turning point

On 26 February 2019 the Grand Chamber decided the six Danish references. In *N Luxembourg 1 and Others* (Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, ECLI:EU:C:2019:134), on the IRD, the Court held that beneficial owner is an autonomous concept of EU law, to be interpreted in the light of the definition in Article 1(4) and, as context, of the OECD Model and its Commentaries. It designates the entity which actually benefits economically from the interest and which has the power freely to determine its use. It is not confined to formally designated agents or nominees: a conduit company obliged, in law or in fact, to pass the payment on is not the beneficial owner. The Court also listed the indicia of an abusive conduit structure: back-to-back arrangements, the near-immediate onward payment of the sums received, negligible taxable profit, absence of genuine economic activity, and structures interposed shortly before the flows.

In *T Danmark and Y Denmark* (Joined Cases C-116/16 and C-117/16, ECLI:EU:C:2019:135), on the PSD, the Court did not import a beneficial ownership condition, because the Directive contains none. It reached an equivalent result through the general principle that EU law cannot be relied on for abusive or fraudulent ends, and held that the national authorities must refuse the exemption in cases of abuse even in the absence of any domestic or agreement-based provision to that effect.

The two directives therefore converge in result and diverge in technique. Under the IRD, the absence of beneficial ownership defeats the claim on the text. Under the PSD, the absence of beneficial ownership is only an indicium within an abuse analysis that requires both an objective and a subjective element.

After 2019

Nordcurrent Group UAB (Case C-228/24, ECLI:EU:C:2025:239, judgment of 3 April 2025) confirms the point and refines the abuse test under the PSD GAAR. The provision is not confined to conduit structures. Denial of the exemption requires both a non-genuine arrangement, that is one not put in place for valid commercial reasons reflecting economic reality, and the essential aim of obtaining a tax advantage that defeats the object or purpose of the Directive. The assessment must take account of all the facts and circumstances, including the evolution of the structure over time and the overall tax burden of the group, and not merely the position at the moment of distribution. As far as legislation is concerned, ATAD Article 6 provides that application of the GAAR to corporate tax, and the principal purpose test incorporated in DTCs through the Multilateral Instrument (MLI) governs the granting of treaty benefits. The Commission's UNSHELL proposal (COM(2021) 565), which would have introduced minimum substance indicators, was withdrawn in the Commission's 2026 work programme (published in October 2025) after the Council failed to reach unanimity, so substance continues to be assessed case by case rather than by a codified test.

To conclude, beneficial ownership has never been a general condition for entitlement to the benefits of the EU tax directives. It is a textual condition in the Interest and Royalties Directive alone. Its content has moved from a formal test, aimed at agents and nominees, to a substantive economic test. Outside the IRD, the same policy work is now done by the general prohibition of abuse and by the directive GAARs, into which beneficial ownership has been absorbed as one factual indicium among several.