Answer-to-Question-_9 (a)

In terms of Article 107 of the Treaty of the Functioning of the European Union (TFEU), all state aid as defined, granted by Member States (MS) through state resources, are prohibited, if the various conditions are met.

The various conditions set out in Article 107 include:
1) the Aid must provide a benefit - the case of GEMO comes to mind, where it was found that the free removal of animal carcasses by the state did result in a benefit or advance

2) the aid must be granted through state resources in any form. Per the separate EC Commission Notice of the notion of State aid as referred to in Article 107, this can include a financial impact that affects the States resources - grants, additional funding, or losing out on revenue, like tax revenue.
It seems as if the lowering of the corporate tax rate to 20% will result in a state resource negatively affected as the coffers will be impacted.

3) the aid must distort or threaten competition, it is not necessary for the distortion to be proved, but it must be possible of creating distortion.
in this case, the lowering of the tax rate might impact competition as its not clear if foreigners owning museums and gifts shops or restaurants outside of the museums will also benefit, so the unfair advantage is granted to museums.

4) the aid must be selective - in this case the Autogrill case can be helpful, where the aid only benefit certain companies, in that case offshore entities and was therefore limited to a small group. In this case, museums (no other businesses) are affected, so it appears as if its a general, non selective aid, but what about other attractions and galleries?

In order to analyse the selective, the 3 criteria in the EU Commission notice is helpful:
the 3 steps require a system of reference (the income tax in this cases), second, it should be determined if the measure constitutes a derogation (exception) from the reference system (in this case yes, the income tax rate is lower) and lastly, is the derogation

justified? only when case are justified by exceptional cases. The Gibraltar cases analysed this option and it was found that the measure was not a random consequence of the regime but the inevitable consequence of the fact that the base of assessment was specifically designed so these companies had no tax base.
It can be argued that the museums might not be selective (as all are included), but compared to other institutions like galleries and other tourist attraction spots, it will be selective.

There are certain cases in Article 107 of the TFEU where State aid is allowed:
If the aid has a social character, it makes good the damage of natural disasters and other economic initiatives.
It does not appear as if this scenario meet any of those criteria.

Under Article 107(3) it may be considered compatible aid in terms of economic development areas or the promotion of common European interests. It does not appear as if this initiate contribute to specific important European projects, so it won't be allowed.

It would appear as if this measure is incompatible aid in terms of the EU Competition rules and hence not in line with the state aid regulations.

However, if Artis is uncertain and this is new aid, which appears as if it is from the facts - a proposal only, they have to approach the Commission with a notification of the aid to be granted for the Commission to analyse. The Commission will then raise questions and determine if the aid is compatible or should be altered. However, Artis may not implement this rule until the Commission has specifically approved the aid.

Question 9 (2)

The consequences of aid that violated the state aid rules mean they are not compatible with the EU laws and hence illegal. These aid programs will need to be abolished or altered in a time period determined by the Commission.

If a State does not comply with a decision of the Commission, the Commission may refer the matter to the court of Justice (ECJ) for a ruling in the matter.

The Commission decisions can be referred to the ECJ for review and the ECJ can overrule the previous decisions of the ECJ - there is no appeal available against the ECJ decisions.

The process to be followed by the aggrieved party would follow the guidance in Article 267 procedure where the ECJ can rule on the validity of interpretations of the acts of institutions.

Alternatively, the Commission can bring the matter to the ECJ in terms of the procedure under Article 258

States will be ordered to amend their legislation and also a recovery procedure and timing will be communicated where the Member state should collect the aid so granted and refund, to reinstate the Member state coffers to the position as if the aid was not granted.

This has been demonstrated through a few recent cases in the news like the Apple Ireland case and the recent Amazon Luxembourg cases.

---------DO-NOT-EDIT-THIS-DIVIDER----------

Answer-to-Question- 8

Memorandum
To: Jeanette

From: Tax Advisor
Date: 13 June 2019
Topic: Appealing your inheritance tax assessment

Dear Jeanette, I note you have not appealed your domestic inheritance tax decision that was issued to you as a EU national, by an EU member state, Memora.

Note that as a EU national, you can rely on the fundamental freedoms contained in the Treaty of the Functioning of the European Union (TFEU).
As you are an individual you can possible relay on Article 45 or Article 63. Article 63 states that all restrictions on the movement of capital between Member States (MS) and third countries shall be prohibited.

AS inheritance taxes qualify as capital in terms of the historic Directive and annexure 1, your freedom of movement of capital (Article 63) freedom might be infringed.

However, it is important to note that Memora as a MS must adhere to an important rule set out in the Cadbury Schweppes case - direct taxation falls within the competence of MS, but MS must exercise that competence consistent with Community Law. The EU and The Court of Justice (ECJ) does not rule on national law provisions, this is for the national courts to determine.

Adhering to time lines for assessments and appeals are set out in domestic law and important to be adhered to in terms of legal certainty. In a few ECJ cases, the ECJ has commented on appeals and time lines for assessments.
In Pelati, th ECJ highlighted that it is important that timelines are clearly communicated and set, so taxpayers know what their rights and obligations are.

In summary, even if an assessment is in breach of EU law, the national rules prevail in terms of when appeals can be filed.

The case of Barth is relevant - the Barth decision was made against the taxpayer, but then a subsequent ECJ ruling (Kobler) gave a different decision. However, in this case Barth did not appeal to the highest court. Although his case was analysed, it was found that in fact he was not mislead by the courts - the court did look at his facts and case compared to the new finding in Kobler but determined that there was no remedy available, the national provisions did not mislead him.

The one exception is if an appeal was filed by you to the highest court available in Memora and as soon as you became aware of the new decision of the ECJ that impacted your case and gave a different you, you 'immediately' notified the authorities, the national authorities are obliged to review your case and then make amends even though your deadline for filing an appeal has passed per domestic law.
The case law supporting this is Kunz & Heinze.

If you can demonstrate that you followed this approach, your inheritance tax assessment will be amended. In addition, you might be privy to claiming damages due to the infringement of your rights, in line with the Francovich case, but based on the rules in national legislation of Memora that will indicate if damages or restitution is applicable.

Damages can be claimed where the criteria in the Francovich case is followed - the taxpayers must be granted rights, the content of the rights must be able to be identified and there must be a causal link between the damages and the infringement.

Damages must also be sufficiently serious, as set out in the Brasserie du Pucheur case.

I think you have a good chance of having your inheritance tax assessment amended.

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Answer-to-Question-_4

LawTechCo receives dividends from Australia, which is not an EU company, so a third country.

LawTechco as an EU company can rely on various fundamental freedoms in the Treaty for the Functioning of the European Union (TFEU), but in the case of dividends, the two most relevant ones are Article 49 (freedom of establishment) or Article 63 (Free movement of capital).

Only Article 63 applies to third countries.

In order to determine if the claim is successful, an infringement of a fundamental freedom must be present.

In the Baars case, it was identified that where an entity has 'significant influence' over the other entity, the Freedom of establishment applies.

In the Manninen case, it was decided that in the case where domestic dividends received a credit but not foreign dividends, this was discrimanatory. The case highlighted that the the unequal treatment must be analysed and if it relates to arbitrary discrimination, th rule can't be followed.

However, the FII GLO 2 case is relevant in terms of a third country scenario and dividends. In this case it was defined that where national legislation is not exclusively aimed at control/significant influence scenarios, so portfolio investments are included, only the Article 63 Freedom of capital freedom can apply.

It is also possible for more than one freedom to apply, as demonstrated in the Holbock case, where the facts provided were not clear as to purpose of the legislation.

In terms of third countries, the FII GLO case highlighted that only the purpose of the legislation is to be analysed, not the facts (so the actual shareholding). It is therefore important to determine if the purpose of the legislation of Legibus is aimed at only portfolio investments, or only where significant influence is present or unclear. In terms of third countries, where the legislation is not clear, only Article 63 is relevant.

In the Kronos case, it was determined that where the company distributing the dividend is in a third country,only the freedom of capital can be relied upon.

In this case, it would appeared as if domestic entities receive preferential treatment as dividends are 100% exempt, no taxes or underlying taxes and cash flow implications suffered. Non-resident dividends are discriminated against, as the credit method applied might not give the same tax implication as the exemption method.

This was also analysed in the FII GLOB case. Both the credit and exemption method can be applied with different methodologies to residents and non residents, as they are not in the same position. However, the non-resident implications might not be subject to higher taxes (due to rate differences) than those from domestic companies.
In summary foreign sources dividends must not be subject to a higher ate of tax which applies to nationally sourced (domestic) dividends.

However, the Court of Justice (ECJ) does not rule on national law provisions or matters of facts and hence it is for the national courts to determine if different levels of taxation occur.

When an infringement is present, the national law is prima facie unlawful, unless it can be justified (permissible) only if it pursues a legitimate objective compatible with the Treaty and is justified by reasons in the public interest. It is further necessary that the application must be appropriate to ensure the attainment of the objective intended and must not go beyond what is necessary to attain it. This is called the proportionality test as often quoted in cases like Gebhard and Marks & Spencer.

In order to determine if an infringement or discrimination is present, the principles of

Schumacher is relevant. Discrimination can only exist in the case of the applying different rules to comparable situations, or the same rule to different situations.

In this case, if it can be demonstrated that in light of the purpose or objective of the national legislation, the resident and non-resident companies are in objectively comparable situations, their tax treatment should be he same and the infringement or discrimination should not be allowed.

An important point was made in the Manninen case, that where a country has a system of preventing or mitigating a series of charges to avoid double taxable for dividends paid by resident companies, it must treat dividends paid to residents by non-resident companies in the same way.

It is also important to note that the member state where a company or person is resident, is best placed to determine the shareholder's ability to pay tax.

It would appear as if the treatment of dividends received by Legibus is in contradiction of the treaty and how they apply legislation to
resident and non-resident companies as far as the taxation of dividends are concerned. The exemption extended by Legibus to resident entities in terms of the dividends from resident companies, should be granted to non-resident companies as well and hence LawTechCo's claim should be successful.

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Answer-to-Question-2

In terms of the Interest and Royalty Directive, the preamble states that the purpose is so abolish taxation of interest and royalty payments in Member States (MS), specifically to abolish such taxes on payments made between associated companies of different member states.

In terms of the directive, interest and royalty payments arising in MS, shall be exempt from any taxes, but it doesn't affect the ability of the recipient to tax these income streams.

In terms of the directive, interest and royalties arising in a Member state, shall not carry withholding taxes provided the beneficial owner of the interest is a company in another member state.

Article 1(7) states that the directive shall apply only if the company which is the payer of the interest, is an associated company of the company which is the beneficial owner of that interest.

companies will be treated as the beneficial owner of the interest and royalties if they receive those payments for their own benefits. It would appear as if the interest paid by the subsidiaries are on loans granted by Yoyan Europe and if Yoyan Europe is not a conduit and pay tax on these interest and use it for its own benefit, it will be the beneficial owner and this part of the Directive applies.

Article 1(10) also states that the Member states have the option of not applying the directive if the shareholding for the other member state has not been maintained for an uninterrupted period of at least two years.
This aspect was analysed in the Denkavit case, where the Court of Justice (ECJ) did not give a definitive guideline as how this is to be interpreted, but referred to the domestic courts to analyse. It is not clear from the facts of the case how long the shareholding's have been in place but the national courts can advise if the taxes must be paid and then refunded, once the two year holding period is achieved or another alternative.

In order for the directive to apply, certain criteria must be met:
1) the companies must meet the criteria as set out in the form listed in the Annex to the directive;
2) the companies must be resident in that MS; and
3) the companies must be subject to one of the following taxes listed in the directive.

In addition, the company must be an 'associated' company of the other company - referring to the relationship between the 2 MS companies:
1) a direct (not indirect minimum shareholding of 25% in the capital of the second company or a third company has a direct minimum holding of 255 both of the capital of the first company and in the capital of the second company.

In addition, holdings must not involve companies resident outside the community.

In this scenario, the top holding company, Yoyan, is established in India (a Non EU Company). Yoyan Europe and its three subsidiaries are all established in EU member states.

So the criteria of the directive is met in terms of the relationship between Yoyan Europe and its three subsidiaries in terms of the shareholding requirement (over 25%) but it is not clear if all the entities are subject to tax in their respective countries and if they are tax resident in the respective EU MS.

A further aspect to analyse is the definition of the interest and royalties - interest in terms of the Directive includes income from debt-claims of every kind, however, in terms of article 4 of the Directive, payments which are treated as a distribution of profits or which carry the right to participate in the debtor's profits, are not covered by the Directive.

So although the relationship between Yoyan Europe and its subsidiaries meet the criteria of associated companies (direct minimum shareholding's of at least 25%), the top holding company in India is not an EU entity as it is established in India and assumed resident in India (for tax purposes).

The Directive will not apply between Yoyan Holdings India and Yoyan Europe as Yoyan in India is not resident in a EU member state

The interest on the loans do qualify, but the interests for Subsidiary C does not seem to qualify in terms of Article 4.

In addition, the Directive shall not preclude the application of any domestic provisions required to combat fraud or abuse, so where there is transactions for which the principal motive is tax evasion, tax avoidance or abuse, the benefits of this directive can be withdrawn as per article 5.

The cases like Foggia, which focused on the merger directive, highlighted that transactions without valid commercial reasons, might be classified as tax avoidance or abuse schemes. Valid commercial reasons can include many factors, but where the tax benefits far exceed or dominate any other benefits, it can be an indication of abuse.

the Leur Bloem case also highlighted that abuse rules can't merely be applied generally, each case is to be analysed in detailed to determine if they do meet the criteria.

the Kofoed case highlighted that the treaty provisions can't be relied upon to support abusive practices.

Article 4 (2) also highlights that where there is a special relationship between the payer and the beneficial owner of the interest and the amount of the interest exceeds the amount that would have applied in the absence of a special arrangement, the directive will only apply to the amount in absence of the special arrangement.
So if the interest for instance exceed the arm's length amount that would have applied, the directive will only exempt from withholding tax the portion of the interest or royalties that fall within the arm's length range.

Question 2(2)

the tax inspectors are of the view the Yoyan Europe is an artificial conduit company and hence of the view abusive tax practises are exercised.

In order for a transaction to be classified as abusive various case law can apply. In the indirect tax space the Halifax case sets various criteria - a two stepped approach: does the transaction result in a tax advantage that is not in line with the purpose of the directive (VAT directive in that case) and is the overriding objective of the transaction to obtain a tax advantage.

In direct taxes, that are not harmonised, there is not a single, defined definition of tax abuse.

The Halifax case is referenced in direct tax cases like Cadbury Schweppes. In Cadbury Schweppes, it was determined that abuse must involve wholly artificial arrangements, which do not reflect the economic reality, with a view to escape the tax normally due on profits generated by activities carried out on national territory.

Cadbury Schweppes highlighted an objective and subjective test, but also note the cases like sGI which highlighted that taxpayers should have the opportunity to provide commercial reasons for their decisions and structures and also, only the non commercial or defendable part of their transactions that do qualify as abuse, should be subject to adjustments.

The mere fact that a subsidiary is incorporated in a different territory, subject to a different, even lower tax rate does not immediately mean abuse is at play. Per Halifax, companies are allowed to set up their affairs and transactions to benefit from tax advantages.

The cases like Foggia, which focused on the merger directive, highlighted that transactions without valid commercial reasons, might be classified as tax avoidance or abuse schemes. Valid commercial reasons can include many factors, but where the tax benefits far exceed or dominate any other benefits, it can be an indication of abuse.

the Leur Bloem case also highlighted that abuse rules can't merely be applied generally, each case is to be analysed in detailed to determine if they do meet the criteria.

the Kofoed case highlighted that the treaty provisions can't be relied upon to support abusive practices.

The taxpayers are justified in highlighting the risk of tax abuse, but they should not merely make an assumption, but follow the principles of Foggia, Leur Bloem and Cadbury Schweppes to analyse and give the taxpayer the opportunity to defend. The fact that Yoyan Europe has 25 employees does seem to indicate it is not a conduit, but a real operation.

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Answer-to-Question-_1(1)

World Investors Limited is a fund established in a EU Member state, Catandra.
In terms of Article 49 of the Treaty of the Functioning of the European Union (TFEU), the freedom of establishment freedom, can apply equally to nationals and companies.

Freedom of establishment includes that companies or firms, subject to the laws laid down for their own nationals by the law of the country where the establishment is effected, is covered by Article 49.

in terms of Article 54, companies or firms formed in accordance of the laws of a Member State, that have their registered office, or principal place of business within the union, shall be treated the same as natural persons.

In the Thin Cap Glo case, it was established that Freedom of Establishment includes operations <u>through</u> a company in another state.

For companies, the connecting factor, similar to nationality for individuals, is the corporate seat.

It must also be determined if one of the other freedoms can apply, as more than one freedom can be relevant - Holbock case.

per Gebhard, the freedoms are mutually exclusive and per Fidium Finanz, the predominant freedom shall apply.

the freedom of capital can apply in terms of the definitions of capital, that include the granting of loans, investment funds and others. T

If the provision of services by the investment fund is predominantly seen as services, the Article 45 can apply, as per Fidium Finanz.

so yes, World Investors will be able to relay on the freedoms in the treaty

Question 1 (2)

Belian tax law imposes tax on all dividend distributions by resident companies. Belia grants a refund of any withholding tax paid on the funds investments, if certain conditions are met. However, this refund does not apply to foreign investment funds.

It would appear as if there is discrimination between foreign and domestic investment funds in terms of their access to credit of withholding tax.

for discrimination to apply, the Schumacher principle is important: discrimination refers to the application of different rules to comparable situations, or the same rule to different situations.

in order to determine if discrimination is at play, the situation of the domestic and foreign funds must be analysed - if they are objectively comparable, the discrimination or infringement is prima facie unlawful.

Question 1(3)
A restriction can be justified if it is in the public interest and meets the proportionality criteria, so it must be appropriate (apt) to meet the objective it was set out to achieve and must not go beyond what is required to implement. These aspects are clearly set out in case law like Gebhard and marks & Spencer.

Casis de Dijon is the case law supporting the public interest justification.

Justifications will not be accepted if they are discriminatory per the Schumacher doctrine.

However, in terms of the free movement of capital article, a derogation treating residents and non-residents differently for the application of this article, is allowed. This is on the principle that residents and non-residents are not equal in terms of their tax treatment and situations and different rules can apply. in terms of article 65, this can not amount to arbitrary discrimination, as per the DFA Investment case.

ICI case is an example of a provision that was not appropriate for what is was designed for in terms of the UK consortium rules - in that case, the European Court of Justice (ECJ) ruled that the justification was not apt.

Various justifications are accepted by the court, fiscal cohesion was demonstrated by the Bachmann case in a cross-border situation where the ECJ highlighted the need for the tax advantage and tax disadvantage suffered to be closely linked. Per Baars and Bosal, the same taxpayer and same tax must apply for this justification to apply.

In terms of loss of revenue justifications, this won't apply and will also not be successful - per Lankhorst Hohorst, this has never been a successful justification.

Fiscal supervision, where non-residents are often required to provide additional information, can perhaps be argued, but it would then be required to analyse if any Double Ax agreement with information sharing or the Mutual Agreement procedure can perhaps assist in obtaining certain information from Catandra.

The Orange European Smallcap Fund case highlighted that in certain cases, like Kerkhaert and Morres, a disparity can also be relevant - where dividends from certain countries were disadvantaged was not attributable to the country's legalisation, but the product of parallel exercise of fiscal sovereignty, so a two country problem, that could not be addressed with the current EU provisions.

The territoriality justification of ensuring a balanced allocation of taxing power as per the NGI case is often used to ensure that countries are rightfully able to tax activities in their jurisdiction, without giving them the opportunity to decide where and how to deduct their losses like the A Of case.

It is not clear from the facts if lower tax CIT tax rates apply to the various funds and countries and hence the justification of tax avoidance might not be relevant here.