Answer-to-Question-_1_

In general direct taxation is not under the power of Member States due to Article 5 of TUE, which in conjunction with Art 115 of TFEU leads to the conclusion that direct taxation can be dealt by the EU only by the directives (not regulations).

Nevertheless, due to EU primacy (CostavENEL)and direct effect of some of the TFEU provisions have direct effect(Van Gend and Loos)i.a. the fundamental freedoms, which can used in this case.

Ad. 1 Homeland (EU MS) refuses to take into consideration the losses that arose in ABC's subsidiary which is WOW - the resident of the another EU Member State.

First of all, MS are allowed to consolidate (tax group regime) domestically (see, X Holding case in which the CJEU ruled that domestic provisions that preclude formation of tax group of entities consisting of non-resident entities are not in the contrary to the freedom of establishment if the State of the Parent company has no right to tax them). From the point of view of the Home State (Homeland) the situation of the subsidiary abroad and a domestic subsidiary could be not comparable due to the principle of the territoriality - Homeland has no taxing rights under the WOW, which is the tax resident of the another MS.

So even, if we have here the cross-boarder elements between two MS and potentially restriction that could lead to breach of freedom of establishment, such a restriction can be justified by the balanced allocation of the taxing powers.

Saying that, it is worth to mention Marks and Spencer case, in which the CJEU ruled that such a restriction and the mentioned justification of the balanced allocation of the taxing rights can go beyond is necessary (failed the proportionate test).

In that case, the CJEU ruled that Parent subsidiary should take into account the losses that could not be utilised by the non-resident subsidiary (due to its liquidation). Since it was not the case of ABC and WOW, in my view, the balanced justification should be enough. After all in Marks and Spencer CJEU ruled that such a restriction is not in general in contrary to the freedom of establishment.

Last but not least, in can be noticed from the CJEU approach that there is no need to show a few justifications, the one that I mention can be enough (see, X Holding).

Ad. 2

As it was mentioned in the point one, the principle of territoriality should suggest that the parent company should not be able to take into account the losses of its non-resident subsidiary. Such a rule should not be applied in case of a PE, since the State of the Parent Company has a limited rights to tax such a PE.

CJEU in general is not willing to interpret the DTC (Double Tax Convention) between MS, but when the rights are allocated between the MS under the DTC and they have influence on the national law, then CJEU interpret if in the end the effect is in accordance with the freedom of establishment (see, Saint Gobein). In that case, not allowing Parent to use the PE losses could be the breach of that freedom, and justification of the balanced allocation of the taxing right should not work.

Last, but not least is should be mentioned that in order to use the PE's losses such losses should be "economically related to the income the taxpayer earned in the state of the PE" (see, Futura case).

Ad. 3

CFC rules now have the legal grounds, namely the ATAD directive. My presumption is the ATAD was implemented in Homeland (even if not provision of CFC have a direct effect, see Van Duyn).

According to Article 7, some conditions must to be met in order to apply CFC rules (income from i.a. interest, royalties, dividends of the CFC would taxed in the Parent company).

The conditions of having more that 50% of shares is met. The condition of the lower tax rate (as I assume from the facts of the case) is met.

Nevertheless in order to apply CFC rules LIZ should <u>not</u> carry "substantive economic activity supported by staff, equipment, assets and premises".

Such requirements were first mentioned in the case Cadbury Schepps, in which CFC rules were justified in the view of the freedom of establishment due to the anti-abusive justification.

In general, now the CFC rules are the part of the EU law, reasoning that they in fact breach the rule of the freedom is even more difficult.

Answer-to-Question-2___

In general direct taxation is not under the power of Member States due to Article 5 of TUE, which in conjunction with Art 115 of TFEU leads to the conclusion that direct taxation can be dealt by the EU only by the directives (not regulations).

Nevertheless, due to EU primacy (CostavENEL)and direct effect of some of the TFEU provisions have direct effect(Van Gend and Loos)i.a. the fundamental freedoms, which can used in this case as well as directives.

First of all, A according to its domestic law cannot deduct interest that are paid non the non-resident company, whereas such interest can be deducted if they are paid to the domestic company. State A justifies such rule seeing here the tax benefit. We can assume that State A justification's can be 1. Loss of the taxed profits (which was never respected as a proper justification) and the anti-abuse rule.

The restriction on deduction of interest is due to Interest Limitation Rule (article 4 of ATAD Directive),a according to which the interest cannot be deducted if the exceed 3M EUR or 30%EBITDA. EU in general, wants to encourage MS to invest in equity versus debt (DEBRA directive in plans), but it doesn't mean that the EU is in general against financing acquisition by loans.

What is important, art. 4 of ATAD provides that the taxpayer does need to take into account the interest that appear within the tax consolidated group.

The question is if the group in the case could be qualified as

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such a group. If the Art. 4 concerns only domestic group (versus group with non-resident countries) that could be a breach of freedom of establishment.

At the same that the rule can be in contrary to the objective of the IR Directive aiming to create condition in EU market similar to internal market of MS when it comes to interest and royalties.

Having said that, the relevant case here is X BV and X NV in which CJEU held that articles 49 and 54 of TFEU (freedoms of establishment and freedoms of capital) are preclude domestic legislation like in this case, where the parent company is not allowed to deduct the interest in respect with the loan that it took from a related company to finance an acquisition in another company.

Justification ground which was the anti-abusive approach didn't pass the test of proportionality.

Is shuould be noted that in order to fight with tax evasion provisions shouldn't be as of such a general nature like in this case. The provision should concern wholly artificial transactions. States cannot per se say that loans to a subsidiary consist an abusive behaviour (see, also Itelcar, that that anti-abusive provision cannot be of general nature).

Therefore since the anti-abusive provisions in state A were of the general nature, that cannot be treated as a tailor-made to the case (suitability)and go beyond what was necessary. The needed limitation in that case can be to the limits of the Art. 4 of the ATAD, though.

Answer-to-Question-_3__

AD. 1

In general direct taxation is not under the power of Member States due to Article 5 of TUE, which in conjunction with Art 115 of TFEU leads to the conclusion that direct taxation can be dealt by the EU only by the directives (not regulations).

Nevertheless, due to EU primacy (CostavENEL)and direct effect of some of the TFEU provisions have direct effect(Van Gend and Loos)i.a. the fundamental freedoms, which can used in this case, namely the freedom of establishment.

When it comes to the DTA (Double Tax Agreement), CJEU in general is not willing to interpret the DTA between MS, but when the rights are allocated between under the DTA and they have influence on the national law and the final effect, then CJEU interpret if in the end the effect is in accordance with the EU law - here with the freedom of establishment.

In general, the CJEU changes its option about the application of the credit method and exemption method in the state of the shareholder. At the beginning CJEU stated that such methods are equivalent, and even in the credit method is applied to non-resident and the exemption method to resident there is no breach of EU law (see, Test Claiments FII Group). In the judgement Test Claiments FII Group II and III the CJEU changed its opinion stating that in fact tax credit can be less favourable situation and therefore there can be a restriction between two comparable (domestic and cross-border) situations. The CJEU held that such legislation providing tax exemption for domestic dividend and tax credit to non-resident dividends is contrary to the freedom of

establishment, if first, the tax credit is equivalent to the amount of tax actually paid and second,the "effective level of taxation of the company profits in the MS concerned is lower that the prescribed nominal rate of tax" (Test Claiments FII Group II, para113).

In the case at hand, the tax rate in Dreamland in 40% and the tax rate in Napland is 25%, therefore is is clear the the tax credit method is a burden for Mrd Jones that wouldn't appear if the exemption method was applied.

Having said that, Mrs Jones can rely on freedom of establishment and basing on the Test Claiments FII Group II sue Dreamland State.

If the DTA which other countries assume exemption method it is necessery to say, that two cross-border situations in general can be compared (Cadbury case), but the probisions of one DTA cannot be extend to other countries in such a comparison (D. case).

Anyway, in may opion the conlusion would be the same - as there is a dicrimation method arasing from the national law of Dreamland (exemption method only to domestic dividends).

Last but not least, according to Haribo, in order to make credit method not dicriminating in comparison to exemption method, the tax credit should be able to be used in following years in the case of losses.

Answering the last questio, accroding to CJEU case law, if a taxpayer wants to use the tax benefit from diretives etc. this is obligation to provide necessary documenation. Especially, the Directive of
Muatual Asssictance could not be used here, since it is adressed to member states, to to individuals. So the countries are not obliged to pass to each other the needed documenations, wheras

Mrs Jones is obliged to do so if she wants to benfit the tax credit.

AD. 2

Since the implementation of DAC2 bank secrecy does not exist. The Dreamland had right to ask for information about the bank account as well as about the beneficial owners of them.

Mrs Jones, accroding the DAC Directive, didn't have to be informed about the information collection phase. DAC Directive in general does not give any right to individuals, in particular a MS is not obliged to cosult the individual or hear the individual at the investiagtion stage (see, Sabou case, para 36 and 44). It doesn't meant that the idividual does not have a right to defence.

Right of the defence is the general principle of EU law (Sabu, para 38). Additionaly, individuals have right to defend based on the art. 47 of the EU Charter of Fundamental rights, which was confirmed in Berlioz case para 48) as well as besed on domestic regulations.

Therefore, the fine is not in cotrary to the EU law but Mrs Jones has a right to appeal and defend her rights. One of the procedural mistake in this case could be ruling penality without giving the reasinong of the decision (according to CJEU case law, such a reasoning such appear in order to a taxpayer be able to defend herself).

Answer-to-Question-_7__

Once, the restriction between two comperable situations (domestic and cross-border ones) appear, being potentially contrary to the freedoms of persons / services / establishment / capital, there can be a justification ground for is.

In general, discrimination that appears in direct taxation is the indirect discrimination since is results from the different residency (not nationality). Since the milestone case Cassis de Dijon, the Rule of Reason can be just to justified (overiding public interest).

One of the justification that was accepted by the CJEU is the so-called "balance allocation of taxing rights". Such justification appeard in the Marks&Spancer case (13/12/2005) together with two others justfications (danger that losses could be used twice, Marks & Spancer para 47 and risk of tax avoidance, para 49). That could suggest that the balance allocation of taxing rights alone could be not enough.

Nonetheless, this justification found the approval of the CJEU and was connected to the principle of the terriotriality. The case concerned that, the parent company coulnd utylise losses that arose in its subsidiary abroad (due to the fact that the State of the parent company didn't have any rights under the taxation in the State of subsidiary).
At the end this justification did't pass the proportionality test (so-called "final losses had to be utylised at the level of company).

This example shows that ectually the justification of the balance allocation of rights could be somehow used in the further step,

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namely the restriction phase, in which the teririality principle could be examined (see Nordea case, with ist quasi-justification on the restriction analysys phase). In general CJEU analysis this justification later during the justificiation grounds, because of the necessity of the pricipality test conduction that coudn't be conducted if CJEU stop analys earlier at the restriction phase.

In OY AA Case (18/06/2007) CJEU used the balance allocation of taxing rights together with ani-avoidance justification, so in that case two justifications appered and finally in X Holding case (25/02/2010) the balance allocation of taxing rights was used as a sole justication.

In this case CJEU held that actually subsidiaries of non-resident countries whishing to create a tax group with their Parent company are in fact in comparable situation to domestic subsidiaries(quite contrary to the terririality rule)- see, X Holding, para 24.

Nevertheless, CJEU examined the the justification ground saying that allowing companies the option in which country they should take into account their losses (in a Parent company State or in a Subsidiary state) "would seriously undermine a balanced allocation of the tax powers" between MS. In this case the justification passed the proportionality test.

To cocnlude, looking at the CJEU case law, it can be noticed that the "balance allocation of taxing rights" in one the most important and most often used justification, and can be used and a sole justfication argument (X Holding). Nevertheless, as all justifications this one too needs to pass the proportionality test.

Answer-to-Question-6___

Yes, ATAD was on the most important directive in the direct tax area recently. It was followed by ATAD 2 which contitued rules with CFC, as well AS ATAD 3 is in plans, to introduce rules concering so-called "shell entities".

In general, the question in EU law was is the anti-abusive rule one of general principle of EU law? If so, in cases of abuse the facts of the case should examined.

If not, can it be used as a justification - in that case the domestic provision fighting with abusive cases where examined.

The problem with priviing anti-abusive provisins is in general complex. Sometime states implement anti-avoidende provisions which scope is too general and therefor againf the freedoms of the TFEU law (see, Itelcar).

When preparing ATAD the Commssion and MSs could already befit from the CJEU case law which showed in which cases the arrengments are artificial. Thanks to Cadbury case the CFC rules and GAAR rule could be projected (other important cases: Foggia, also Halifax in VAT).

It is important to notice that evon though the directives like PS DIrective, IR Directive and MR directive had it own SAAR (special anti-avoidence rule), the scope of the directive was not exhostive, so the restrictions could be still challenged.

As we know from the Zwijnenburg case, benefiting of real estate tax in context of the MR Directive wasn't cover by the SAAR in MR too.

In general there was a need to create the directive which will implement the general anti-avoidence rule (GAAR) which can potentially can cover all situations (also domestic ones).

Since the ATAD impementation in cases like Danish Cases or N Luxemburg One it is clear from the CJUE statments, the anti-abusive is in general the rule of the EU.

At the same time, the time has to passed to show how ATAD directive will be chellenged by the TFEU law (fundamental fridomes), which as the primary law shoud prevail secondary law. Still, in my opion by now, it is doubtful.

ATAD play a great role when implemented by MS, one of the potentially provision that could be chellenged via fundamental freedoms is Exit tax also the Interest Limitation Rule (see, X BV X NY); but GAAR and CFC seem to be not challenged so for.

Haing said that, as I mentioned at the beginning, such anti-abusive provisions shouldn't make that all possible situations will be covered by them (see, Euro Park Service).

This is the main chellenge in my opion, ATAD is EU's very powerful intrument and it should be used only when it is necesary.