Answer-to-Question-_1_

Introduction / general remarks

Art. 5 TEU allows the EU to act outside its direct areas of competence (such as taxes) where the objectives of the Treaties (TEU / TFEU) cannot be achieved by national laws (Principle of Subsisiarity).

Therefore, although as established in Gilly / Sait Gobain, in lack of harmonised rules on direct taxation (unlike with indirect taxation which is harmonized) the power of allocating taxing rights sits with individual States, nonetheless EU Member States (MSs) as part of their shared competences under Art. 4 TEU are required to ensure their legislations complies with EU Law to under the Principle of Supremacy (Costa v ENEL).

This means that should a conflict arise between national laws and EU Laws, EU Laws take priority (also over Double Tax Conventions (DTCs) as established in Avoir Fiscal) which ensures that national laws / DTCS do not infringe / clash with EU provisions and in particular with the Fundamental Freedoms of the EU which are:

- Free movement of capital (FMoC) - Art. 63 TFEU
- Freedom of establishment (FoE) - Art. 49 TFEU
- Free movement of workers - Art. 45 TFEU
- Free movement of services - Art. 56 TFEU
- Free movement of citizens (move and riside) - Art. 21 TFEU

as established in various case laws such as Schumacker, Marks & Spencer, Itelcar, De Groot, Banco Santander, etc. which also ensuring EU Law prevails (Erich Ciola) and MSs refrain from any implementing any measures which could jeopardise the attainment of the EU objectives (per Art. 4 (3) TEU).

In Stauder case law it was also established that EU Law should be interpreted and applied in a uniform way. Also, in Euro Park Service it was established that where the matter in hand falls within the remit of harmonization rules, the latter take priority over primary law. Whereas, per Jacob & Lassus should the matter fall outside the remit of

harmonization rules, primary law will apply.

It is also worth mentioning that should a dispute arise and be brought before the Court of Justice of the European Union (CJEU), the latter will give a ruling on the interpretation of DTCs (it did in Austra v Germany because it was asked to act as an arbitrator), on hypothethical situations, on the interpretation of national laws or engage in fact findings. It might however offer additional interpretation if it feels it appropriate to do so.

Having said all of the above, just because a potential breach of fundamental freedom is identified it does not automatically mean the measure must be amended or withdrawn.

It might be justified and if justified, it could be deemded proportionate for the issue at hand under the principle of proportionality (mentioned in Art. 5 TEU and established in Cassis de Dijon / Gebhard / Rule of Reason).

This answer will explore the scenario/s outline in the question and try to determine what is the case.

Notes:

Part 1

- Ms J res MS A
- taxed in MS B for concert
- below MS B threshold of tax
- taxed on gross income, no expenses deduction
- performers in MS B taxed on net income

Applicable freedom is the free movement of workers. Although in principle resident and non-resident are not in a comparable position (hence no discrimination can arise), as established in Schumacker, when a worker earns the majority of their income (per Commission v Estonia this is not set at 90% nor is 75% Commission's recommendation accepted in settled case laws)in the source state, they are in a comparable position. Ms J is free movement as a worker is restricted if she is

taxed less favourably then a resident of MS B which she clearly is in particular in terms of being taxed on her gross income with not possibility to deduct expenses.

With regards to denial of her personal allowance, because she only earns 10% in MS A and 60% in MS C, she should be allowed a pro-rata 30% PA in MS B.

Part 2

- 60% of income from MS C
- Only 10% in MS A
- Alimony payments refused by MS C

In Imfeld / Gschwind, if the resident state was deemed to be in a position to take into account of the taxpayer personal and family circumstances but again as explained above this should be done on a pro-rata basis 10%, 30% and 60% respectively.

Part 3

- GrandMa resident in MS D
- MS D WTH tax on inheritance per DTC A-D

Applicable freedom is FMoC. Relevant cases laws Van Hilten, Hilka Hirvonen.

There does not appear to be a discrimination / infringement as MS are free to establish their national laws and enter into DTC as they see fit, nobody is being discouraged in having a grandma resident / being a national of MS C

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

Answer-to-Question-_2__

Introduction / general remarks

Art. 5 TEU allows the EU to act outside its direct areas of competence (such as taxes) where the objectives of the Treaties (TEU / TFEU) cannot be achieved by national laws (Principle of Subsisiarity).

Therefore, although as established in Gilly / Sait Gobain, in lack of harmonised rules on direct taxation (unlike with indirect taxation which is harmonized) the power of allocating taxing rights sits with individual States, nonetheless EU Member States (MSs) as part of their shared competences under Art. 4 TEU are required to ensure their legislations complies with EU Law to under the Principle of Supremacy (Costa v ENEL).

This means that should a conflict arise between national laws and EU Laws, EU Laws take priority (also over Double Tax Conventions (DTCs) as established in Avoir Fiscal) which ensures that national laws / DTCS do not infringe / clash with EU provisions and in particular with the Fundamental Freedoms of the EU which are:

- Free movement of capital (FMoC) - Art. 63 TFEU
- Freedom of establishment (FoE) - Art. 49 TFEU
- Free movement of workers - Art. 45 TFEU
- Free movement of services - Art. 56 TFEU
- Free movement of citizens (move and riside) - Art. 21 TFEU

as established in various case laws such as Schumacker, Marks & Spencer, Itelcar, De Groot, Banco Santander, etc. which also ensuring EU Law prevails (Erich Ciola) and MSs refrain from any implementing any measures which could jeopardise the attainment of the EU objectives (per Art. 4 (3) TEU).

In Stauder case law it was also established that EU Law should be interpreted and applied in a uniform way. Also, in Euro Park Service it was established that where the matter in hand falls within the remit of harmonization rules, the latter take priority over primary law. Whereas,

per Jacob & Lassus should the matter fall outside the remit of harmonization rules, primary law will apply.

It is also worth mentioning that should a dispute arise and be brought before the Court of Justice of the European Union (CJEU), the latter will give a ruling on the interpretation of DTCs (it did in Austra v Germany because it was asked to act as an arbitrator), on hypothethical situations, on the interpretation of national laws or engage in fact findings. It might however offer additional interpretation if it feels it appropriate to do so.

Having said all of the above, just because a potential breach of fundamental freedom is identified it does not automatically mean the measure must be amended or withdrawn.

It might be justified and if justified, it could be deemded proportionate for the issue at hand under the principle of proportionality (mentioned in Art. 5 TEU and established in Cassis de Dijon / Gebhard / Rule of Reason).

This answer will explore the scenario/s outline in the question and try to determine what is the case.

Notes:

- Co X res MS X sub of Co Z res in MS Z

- X lent money to Z 5 years zero interest

- in MS X, domestic Txs not ALP, x-border yes

- Adjustment made

<u>Which freedom applies</u>

When a cost adjustment provision applies only to cross border activities FoE is engaged as established in SGI case law which was also about a cross-border interest free loan.

In the SGI case law reference was made to an "usual gratuitous advantage" and it was established to be a discrimination of FoE.

Analysis

However, such restriction can been justified if **both** the safeguarding of the balanced allocation of taxing rights and the need to combat tax evasion could be established.

It is settled case law that the proportionality of the justification needs to be established **objectively** and on **case by case** with the taxpayer being given an opportunity to show if there was a **commercial justification** for the transaction that has taken place.

Also, according to the Advocate General (AG) in the Thin Cap Glo, the ALP principle is a *good starting point* to establish what two indipendent parties would have done and whether the transaction went beyond what those two parties would have agreed.

If it is found to be the case that it did go beyond, only the portion above a normal arm's length price should be subject to the adjustment (in our case however interest was provided at zero % interest hence the entire amount would be deemed beyond the normal arm's length price two unrelated parties would have agreed).

The burder of proof nonetheless would sit with the tax authorities and because Company Z is in fancial trouble, perhaps Company Z may be able to put forward a valid argument that the entire group was at risk without that interest free loan.

There were also other cases such as Honbach in which the CJEU took into account the commercial validity of the loan.

Also, in Lankhorst-Hohorst the CJEU looked at the fact the legislation was disproportionate as rather than just targeting objectively artificial arrangements, it has a blanket approach which targeted all non-German lenders and thus was deemed discrimanatory.

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

Answer-to-Question-_4__

Introduction / general remarks

Art. 5 TEU allows the EU to act outside its direct areas of competence (such as taxes) where the objectives of the Treaties (TEU / TFEU) cannot be achieved by national laws (Principle of Subsisiarity).

Therefore, although as established in Gilly / Sait Gobain, in lack of harmonised rules on direct taxation (unlike with indirect taxation which is harmonized) the power of allocating taxing rights sits with individual States, nonetheless EU Member States (MSs) as part of their shared competences under Art. 4 TEU are required to ensure their legislations complies with EU Law to under the Principle of Supremacy (Costa v ENEL).

This means that should a conflict arise between national laws and EU Laws, EU Laws take priority (also over Double Tax Conventions (DTCs) as established in Avoir Fiscal) which ensures that national laws / DTCS do not infringe / clash with EU provisions and in particular with the Fundamental Freedoms of the EU which are:

- Free movement of capital (FMoC) - Art. 63 TFEU
- Freedom of establishment (FoE) - Art. 49 TFEU
- Free movement of workers - Art. 45 TFEU
- Free movement of services - Art. 56 TFEU
- Free movement of citizens (move and riside) - Art. 21 TFEU

as established in various case laws such as Schumacker, Marks & Spencer, Itelcar, De Groot, Banco Santander, etc. which also ensuring EU Law prevails (Erich Ciola) and MSs refrain from any implementing any measures which could jeopardise the attainment of the EU objectives (per Art. 4 (3) TEU).

In Stauder case law it was also established that EU Law should be interpreted and applied in a uniform way. Also, in Euro Park Service it was established that where the matter in hand falls within the remit of harmonization rules, the latter take priority over primary law. Whereas, per Jacob & Lassus should the matter fall outside the remit of harmonization rules, primary law will apply.

It is also worth mentioning that should a dispute arise and be brought before the Court of Justice of the European Union (CJEU), the latter will give a ruling on the interpretation of DTCs (it did in Austra v Germany because it was asked to act as an arbitrator), on hypothethical situations, on the interpretation of national laws or engage in fact findings. It might however offer additional interpretation if it feels it appropriate to do so.

Having said all of the above, just because a potential breach of fundamental freedom is identified it does not automatically mean the measure must be amended or withdrawn.

It might be justified and if justified, it could be deemded proportionate for the issue at hand under the principle of proportionality (mentioned in Art. 5 TEU and established in Cassis de Dijon / Gebhard / Rule of Reason).

This answer will explore the scenario/s outline in the question and try to determine what is the case.

Notes:

- Co A res. in MS A has a sub Co B res. in MS B

- MS A introduced new special tax, in addition to CIT, that targets COs res. in MS A.

- Group COs (regardless of whether domestic or foreign) turnover of the entire group is taken into account to establish CIT.

- Discrimination against subs of non-res. groups?

Case Laws: Hervis, Vodafone, Tesco.

<u>Which freedom applies</u>

The freedoms which might apply are FoE or FMoC (perhaps even freedom to provide services).

Before FLI GLO 2 C-35/11, in case like Fidium Finance for example, when more than one freedom applied the Court tended to look at the one which was more relevant with the other being only considered secondary and therefore not looked into.

Cases like Baars established that there is no a specific % which determines when a company can extert influence over its sub and other cases like Aberdeen and KBC Bank that one has to look at the fact.

The FLI GlO 2 C-35/11 took a difference approach and considered the possibility of 2 freedoms potentially being applicable (in contrast with Gebhard which ruled that the freedoms are "mutually exclusive") and this was also confirmed in other cases as the Greek media / newspaper case on minimal capital holding requirement which confirmed both FoE and FMoC were applicable.

Looking at the relavant paras. 90-95 of FLI GlO 2 C-35/11 can help us establish which is the applicable freedom in terms of looking at the purpose of the legislation too.

Since the proposed law appears to be aimed at Companies which are linked and therefore one assumes extert influence over the other, FoE seems to be the applicable freedom here (but with the possibility of FMoC also being applicable which would result in non-EU groups also being able to rely on the protection of EU Law).

<u>Analysis</u>

Question says for group companies, whether domestic or foreign, the aggregate turnover is taken into account hence prima facia no discrimination is taking place.

There is no doubt that usually companies part of a foreign group might have a higher overall turnover the companies part of a group which only operates nationally.

In the Hervis case, a similar situation was assessed to be a form of covert discrimination akin to discrimination based on residency or nationality if the facto the groups caught by the new provision are predominantely foreign owned.

Whereas in Vodafone it was argued that even though a similar legislation would primerely hit foreign owned groups it there might not be covert discrimination. It is also worth pointing out the opinion of the AG in the Vodafone case which suggested that de facto discrimination is not for the fundamental freedoms to deal with / resolve.

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

Answer-to-Question-__7_

<u>Introduction / general remarks</u>

Art. 5 TEU allows the EU to act outside its direct areas of competence (such as taxes) where the objectives of the Treaties (TEU / TFEU) cannot be achieved by national laws (Principle of Subsisiarity).

Therefore, although as established in Gilly / Sait Gobain, in lack of harmonised rules on direct taxation (unlike with indirect taxation which is harmonized) the power of allocating taxing rights sits with individual States, nonetheless EU Member States (MSs) as part of their shared competences under Art. 4 TEU are required to ensure their legislations complies with EU Law to under the Principle of Supremacy (Costa v ENEL).

This means that should a conflict arise between national laws and EU Laws, EU Laws take priority (also over Double Tax Conventions (DTCs) as

established in Avoir Fiscal) which ensures that national laws / DTCS do not infringe / clash with EU provisions and in particular with the Fundamental Freedoms of the EU which are:

- Free movement of capital (FMoC) - Art. 63 TFEU
- Freedom of establishment (FoE) - Art. 49 TFEU
- Free movement of workers - Art. 45 TFEU
- Free movement of services - Art. 56 TFEU
- Free movement of citizens (move and riside) - Art. 21 TFEU

as established in various case laws such as Schumacker, Marks & Spencer, Itelcar, De Groot, Banco Santander, etc. which also ensuring EU Law prevails (Erich Ciola) and MSs refrain from any implementing any measures which could jeopardise the attainment of the EU objectives (per Art. 4 (3) TEU).

In Stauder case law it was also established that EU Law should be interpreted and applied in a uniform way. Also, in Euro Park Service it was established that where the matter in hand falls within the remit of harmonization rules, the latter take priority over primary law. Whereas, per Jacob & Lassus should the matter fall outside the remit of harmonization rules, primary law will apply.

It is also worth mentioning that should a dispute arise and be brought before the Court of Justice of the European Union (CJEU), the latter will give a ruling on the interpretation of DTCs (it did in Austra v Germany because it was asked to act as an arbitrator), on hypothethical situations, on the interpretation of national laws or engage in fact findings. It might however offer additional interpretation if it feels it appropriate to do so.

Having said all of the above, just because a potential breach of fundamental freedom is identified it does not automatically mean the measure must be amended or withdrawn.

It might be justified and if justified, it could be deemded proportionate for the issue at hand under the principle of proportionality (mentioned in Art. 5 TEU and established in Cassis de Dijon / Gebhard / Rule of Reason).

This answer will explore the scenario/s outline in the question and try to determine what is the case.

Examples of positive integrations:

Directives (the legal basis of which lies with Art. 115 TFEU) which are binding on MS as to the result to be achieved)such as ATAD, Parent Subsidiary Directive (PSD), Interest & Royalties Directive

Proposals such CCCBT / BEFIT

Examples negative integrations:

CJEU ruling such as those mentioned in the intro above.

European Commission infringement procedures (i.e. Apple / Ireland case was Apple in the end Ireland to to recuperate from Apple 13 billion euros + interest in illegal state aid but also other cases involving Amazon, FIAT)

In terms of advantages / disadvantages of each

It has to be said that whilst so far the majority of intergration / harmonization in the EU has been achieved via negative integration, positive integration whilst more difficult to achieve (see for example the now defunct CCCBT proposals and then new BEFIT replacement which is also uncertain whether it will ever reach enough consensus / be implemented) has more long term benefits.

Positive integration is not without its own issues though. For example, because as mentioned above Directives are binding on MS as to the result to be achieved, each MS has a certain degree of flexibility as to the options avaialable to them in implementing the Directives.

For instance, with the PSD the minimum holding period of 2 years is optional and some MSs go for 2 years whilst in practice the majority choose to opt for 1 year.

Negative integration can sometimes also lead to inconsistencies and to rulings which give rise to slightly different outcome in similar situations (for example Nordea vs Timac Agro on the recapture of losses of foreign PE) or as seen above in interpretation of covert discrimination in Hervis vs Vodafone.

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

Answer-to-Question-_5__

<u>Introduction / general remarks</u>

Art. 5 TEU allows the EU to act outside its direct areas of competence (such as taxes) where the objectives of the Treaties (TEU / TFEU) cannot be achieved by national laws (Principle of Subsisiarity).

Therefore, although as established in Gilly / Sait Gobain, in lack of harmonised rules on direct taxation (unlike with indirect taxation which is harmonized) the power of allocating taxing rights sits with individual States, nonetheless EU Member States (MSs) as part of their shared competences under Art. 4 TEU are required to ensure their legislations complies with EU Law to under the Principle of Supremacy (Costa v ENEL).

This means that should a conflict arise between national laws and EU Laws, EU Laws take priority (also over Double Tax Conventions (DTCs) as established in Avoir Fiscal) which ensures that national laws / DTCS do not infringe / clash with EU provisions and in particular with the Fundamental Freedoms of the EU which are:

- Free movement of capital (FMoC) - Art. 63 TFEU
- Freedom of establishment (FoE) - Art. 49 TFEU
- Free movement of workers - Art. 45 TFEU
- Free movement of services - Art. 56 TFEU
- Free movement of citizens (move and riside) - Art. 21 TFEU

as established in various case laws such as Schumacker, Marks & Spencer, Itelcar, De Groot, Banco Santander, etc. which also ensuring EU Law prevails (Erich Ciola) and MSs refrain from any implementing any measures which could jeopardise the attainment of the EU objectives (per Art. 4 (3) TEU).

In Stauder case law it was also established that EU Law should be interpreted and applied in a uniform way. Also, in Euro Park Service it was established that where the matter in hand falls within the remit of harmonization rules, the latter take priority over primary law. Whereas, per Jacob & Lassus should the matter fall outside the remit of harmonization rules, primary law will apply.

It is also worth mentioning that should a dispute arise and be brought before the Court of Justice of the European Union (CJEU), the latter will give a ruling on the interpretation of DTCs (it did in Austra v Germany because it was asked to act as an arbitrator), on hypothethical situations, on the interpretation of national laws or engage in fact findings. It might however offer additional interpretation if it feels it appropriate to do so.

Having said all of the above, just because a potential breach of fundamental freedom is identified it does not automatically mean the measure must be amended or withdrawn.

It might be justified and if justified, it could be deemded proportionate for the issue at hand under the principle of proportionality (mentioned in Art. 5 TEU and established in Cassis de Dijon / Gebhard / Rule of Reason).

This answer will explore the scenario/s outline in the question and try to determine what is the case.

<u>Analysis of State Aid in relation to a tax benefit which applies to entire financial services sector</u>

Art. 107 (1) TFEU set out the criteria for a benefit to be considered State Aid.

If refers to "any form whatsoever" and the creteria can be broken down in:

- granted by a State or through the State resources

- it distorts or threathens competition

- gives an economic advantage to its receipient

- only available to certain undertakings or production of certain goods (selective criteria, which can be de facto or de jure)

then it would deemed incompatible with the internal market.

It also worth mentioning that in assessing whether State Aid has been provided, the CJEU will look at the effect and not the purpose of the proposed legislation / benefit.

Now, such a proposed tax benefit (though it's not clear from the question what it actually entails, one would assume that it fulfills the criterias of being granted through State resources (according to Italy vs Commission this can mean for example an exemption, reduction or deferral of taxes) which gives an advantage to its recepient.

It will probably also be deemed to give a selective advantage to undertakings involved in the financial sector (even if this is generally speaking potentially a very large group it is settled case law that in itself this does not mean the aid cannot be deemed selective) such as banks for example (which would in itself perhaps result in a public outcry that the State is aiding already wealthy corporations) however if it can be argued that financial services are a crital service of general economic interest for the country (like in the UK for example), perhaps under art. 106 TFEU it might be allowable.

There is a case law which set 4 criteria to be met and generally speaking is very hard to meet all 4 of them though.

Also, some argue that if a measure is only in practice accessible to large MNEs because only they have the resouces to ensure compliance with

the requirement of the tax benefits that is in itself selective and thus would constitute illegal State Aid.