Answer-to-Question-_1_

1)
Direct tax matters are not in the remit of the EU.

EU memberstates are required to ensure that national legislation does not hinder the fundamental freedoms.

This can be see in the **Cadbury Schweppes case**.

As seen in the Gebhard case fundamental freedoms of the EU are mutually exclusive and there is not priority for which one takes precedence.

As per the **FII GLO** case regarding the payment of dividends the court set out some rules that help to determine which rule should apply.

1)Consider the purpose of the national legislation

2)Where national legislation relates to definite influence of the company the freedom of establishment is on point.

3)Where it relates solely with the making of an investment where managment and control is not sought then this would fall within te free movement of capital provisions.

4) Where both 2) and 3) could be applied you will need to consider the facts and circumstances of the situation further.

EU Parent has 25% interest in the company and prima facie it may be able to claim a restriction unde the freedome of movement of capital if domestic company are able to claim a deduction for costs related to domestic companies.

The free movement of capital is not defined in treaties and is unique as it extends to people outside of the EU.

A tax payer cannot seek protection under Freedom of establishment purely because it is not able to claim under the freedom of establishment.

Freemovement of capital is Article 63 TFEU.

A comparison between the position of costs in relation to residents and non-residents will need to take place.

Article 65 TFEU.

If EU parent can prove that tax deductions are available when investing in domestic companies this would be discrimination.

At 25% the EU parent would not be able to control the company and make decisions without the approval of the other shareholders and therefore therefore the freedom of establishment may not be engaged.

As per the **Baars case** there is not set percentage that determines whether an person as definite control.

The facts and circumstances of the power that can be obtained at 25% will need to be examined.

It can be seen that the purpose of the purpose of the national legislation is that it applies to shareholderings greater than 25%.

This is evidence that the legilation applies partly to companies that exert definite influence.

As there is no shareholder with a holder greater shareholding EU parents will be the most powerful shareholder.

Article 64 will need to be reviewed to ensure the restriction does nto arise from legilsation that was in existance prior to the 31st December 1993. This is referred to as the 'Standstill clause'.

As per the **x Gmbh v Finanzamt case** it will need to be reviewed whether such legislation existed prior to the 31st December 2019, has been maintained and existed continously.

If the legislation has be amended the tax authority would waive the right to appply the restriction.

Conclusion:
The free movement of capital should be engaged however the facsts and circumstances of the case should be considered further.

The fact the legislation applies to shareholdings greater than 25% is possitive evidence freedom of establishment may be engagement.

Under the freedom of establishment EU parent would not be able to claim under the treaty.

2) If the remaining 75% was owned by to indivuals with no connection to EU parent. The position would not change.

We need to look at the predominant freedom that is being engaged.

Denying a reduction for costs in relation to investing in the Non-EU company will deter companies from investing outside of the EU and therefore this restriction will reduce investment.

EU legislation does not allow such discrimination to take place.

Increasing the shareholding of the other investors to 75% will reduce the likelihood of this falling within the Freedom of establishment rules.

In such a scenario these rules would not extent to this scenario as it does not apply to Non-EU Co.

3)
Under this scenario the national legislation would not apply exclusively therefore the situation must be reviewed under the free movement of capital.

As per the **Glaxo Wellcome case** the predominant freedom should be reviewed. The free movement of capital was more dominant than the freedom of establishment.

It if legislation applies to all companies then the strength of the freedom of establishment basis is much reduced.

The predominant freedom is the freedom movement of capital.

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Answer-to-Question-__2_

To: Mr C
From: ADIT
Subject: Restructuring DevelCo Ltd's business

This short note has been writtent to summarise the key points relating to the restructuring.

Wholly artifically arrangement in order to achieve a tax benefit are defined as unacceptable by the court of justice.

Direct tax matters are not within the control of the EU aor the EU legislation. However where EU members states have to ensure that national legislation is in place to ensure tax practices do not infringe on the fundamental freedoms.

As such national legislation has been established that;
- CFCs; prevent the movement of assets away from the home state
- Exit tax; Migration of assets so no longer within the charge of corporation tax
- Thin capitalisation; Excessive payment of interest abroad

Within the VAT directive there are various refernences to abuse of EU law and the **Emsland-Starke** case sets out that tax payers cannot rely on EU law to support abusive arrangements.

Per the **Halifax** case it was established that tax payers are free to structure and arrange their tax affairs in such a way that reduces their tax liabilty.

Equally, Member states are entitled to establish national legislation that prevent abuse arrangements (as set out above).

<u>Cadbury Schweppes case</u>

In the **cadbury schweppes** claimed that national legislation led to a restriction of the freedom of establishment.

The court concluded that there was nothing wrong with seeking to exploit national legislation as seeking to and this itself should not deprive an individual from being able to rely on the provisions.

National legislation should not presume tax evasion when activities has been sought in the pursuit of genuine economic activity. Where there is not genuine activity the actions/ transaction may fall within anti-avoidance.

As you intent to move IP 'Offshore' the commercial reasons should be reviewed.

-Do have any activities 'offshore'?
- What number of employees are working in the offshore company
- What level of substance does the offshore company have
- Level of qualifications of the individuals
- Commercial and business rationale for moving assets abroad

All of these questions and greater analysis into the facts of circumstances will need to be reviewed in order to ensure these activities do not fall witin anti-avoidance legislation.

The business benefits should be material and significant in relation to the tax benefits.

<u>Further considerations</u>

- Exit taxes
- GAAR

Exit taxes

Exit taxes are national legislation that is triggered upon the change in tax residence or when taxable assets are moved.

Direct tax matters are not within the competence of the EU. EU members states have sovereignty and the abiility to determine the scope of their taxation and tax base.

EU member states have the right to tax assets based on the value that accrued whilst the assets was within their jurisdition.

As the development of the innovatice process has taken place an significant exit tax could arise on the movement of assets offshore.

It is assumed that offshore means non-EU.

The market value of any movement abroad should be calculated in accordance with transfer pricing principles.

In accordance with EU law tax payers should be given an opportunity to deferr the payment.

Deferral should be atleast for 5 years and can be paid via instalments.

Interest and guarantees may be required for such a deferral but should be proportional and not excessive.

GAAR

The EU has an anti-avoidance directive for General Anti-avoidance (GAAR) that is meant to be applicable when local/national GAAR is not applicable.

This is to ensure consistency within the EU on application of rights and obligation imposed by the EU. Which is general principle of EU law.

Conclusion:
Valid commerical reasons must be provided in order to rely on EU law to protect the transfers rights offshore.

The BEPS (Base erosion and profit shifting) iniciative means that tax payers, EU law and OECD have a vested interest in ensuring artifical arranagments do not receive benefits from national legislation and EU Law.

EU law will not provide protection when actions are not for genuine economic commercial reasons.

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Answer-to-Question-_3__

1) The deferral may fall within a restriction under the free movement of persons.

- Article 21 Right to move and reside within territory of Members statea
- Article 49 Freedom of establishment

Based on the facts that Mr E intends to move his state of residence to the location where he has a permanent position implies that Article 49 is the predominant freedom.

The is due to Mr E intending to be in the other member state in a 'stable and continous basis'. This position was clarified in the **Gebhard case.**

The deferral duty will bring Mr E into the charge of deferred duty instantly without the ability for deferral and as such this acts as a deterrant for Mr E accepting the permanent position in another EU member state.

EU law was established with the pricipal aim of creating an internal market such that goods, person, services and capital can move freely within the EU.

These provision clearly act as a restriction.

In the **N** case which involved a dutch national/resident being subject to dutch gains tax when moving his residence to the UK. The court deemed this to be akin to an exit tax and therefore it also fell within the freedom of establishment rules.

A key to determining whether the freedom of establishment rules have been engaged is to compare this situation if he have a new permanent job within the same member state.

Mr E would be able to continue to defer his gains. As such there is a difference based on the location of his new property.

2)
Restriction of treaty freedoms is unlawful, meaning they are not allowed within the EU.

As per the **Gebhard and Cassis De Dijon case** it was found that restrictions may be allowed if it can be proven that it was for a public interest.

Typically this must be:
1) Must be proportionate and not beyond what is necessary
2) Suitable for the stated objective
3) General interest
4) Not be discrimination e.g. based on nationality

The stated objective is to not hinder people from moving to a new area out of fear of being subject to property duty of 20% (which continues to rise due to inflation).

Due to EU member states retaining soverignty to property tax measures they are not prohibiited from taxing gains that accrue in their territory.

The immediate payment of the taxation is not proportionare to the stated aims of the legislation.

In accordance with EU law tax payers should be given an opportunity to deferr the payment.

Deferral should be atleast for 5 years and can be paid via instalments.

Interest and guarantees may be required for such a deferral but should be proportional and not excessive.

Brionia may put forward the following justifications:
- Fiscal cohesiion
- Tax avoidance and abuse
- Fiscal protection
- Fiscal administration and supervision
- Balanaced allocation of taxing powers

Fiscal Cohension

This justification is successful when there is a direct link between advantage and disadvantage of the taxpayer and the same type of taxation. **Bachmann**

Prevention of tax avoidance and abuse

The tax authority would fear that Mr E is using this arrangment to avoid being subject to taxation in Brionia. The facts and circumstances behind the employment will nee to be examined further.

This justification is unlikely to be successful as he has genuine employment abroad and the reasons for moving abroad is not wholly artificlel.

Balanced allocation of taxing powers

This is widely used as a defence by tax authorities ie. **NGI.**

Conclusion

The legislation in Brionia is likely to go beyond what is deemed proportionate to the aim and the justification grounds are unlikely to be successful based on established EU case law.

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Answer-to-Question-_6__

Direct taxation falls within the competence of EU member states.

CJEU is the arbiter of EU law and does not have jurisdiction to interpret treaties and domestic legislation. It is for the national courts to decide.

In the **Marks and spencer case** the territority principal was clarified which determined that the state of residence should provide the personal allowances that the available if the person earned materially of the their income from within the state.

The **Schumacker case** showed that this general principle does not apply when a person earns the majority of their income from outside of their territory of residence.

Applying the general rule in this scenario would amount to discrimination as the person would be comparable to a immigrant working.

The facts and circumstances for each case should be considered.

Hostia taxes based on global income. Ms P should be entitled to relief from taxes incurred in Origina. This relief should be via a credit method of via exemption.

Both methods would lead to a similar result based on the tax rates in Originia. Originia has a higher tax rate than Hostia. If a full credit is available this would be advantagous.

Hostia could be entitled to personal allowance relief dependent on the proportion of her income that arised in each state. **X v staatsecretaris**.

The key method to decrease the amount of taxation would be to increase the level of personal allowance available in Origina as this country has the higher tax rate.

2)

Amount of taxation:
Taxation Originia:
- Pension EUR 4,000
- Personal allowance (4/(4+10)) x 12,000 [X v Staat secretaris] = (3,428)
- Taxable amount= 571
- Tax rate of 25% = EUR 142

Taxation in Hostia
= Income 10,000 + 4000 = 14,000
Personal allowance (10/14) x 9000 = (6,428)
Taxable amount = 14,000 - 6428 = 7572
Taxation @ 15% = 7572 x 0.15 = 1,135

Credit relief
1,135 - 142 = EUR 992 Full tax liabilty

Total taxation = 992 + 992

Full credit reflief available due to the presence of personal allowance available.

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Answer-to-Question-_9_
1)

Pricing of supply should be in accordance with transfer pricinig legislation.

An arm's length price should be chosen and should be comparable to the price an independent unrelated 3rd party would pay for the supply.

Transfer priciing legislation is purely guidance and several member states are ratifed this guidance into its national legislation. E.g. UK and France.

Pricing amounts in accordance with TP legislation will give each tax authority its fair share of profits. Therefore will ensure an adequate amount of profits is brought into taxation in each jurisidiction.

EU legislation has an overriding aim to ensure that an internal market is created which allows the free movement of goods, persons, services and capital.

Transfer pricing legislation is fully compatable with EU legislation.

Each member state has a responsibility to ensure that national legislation is sufficient to ensure the objectives of EU Law and its fundamental freedoms can be adhered to.

EU freedoms:
- Free movement of goods
- Free movement of persons
- Free movement of services
- Free movement of capital

SGI belgium company that had a relief that was not arms length. This law constituted a breach of a freedom.

InvestCO is subject to EU national and similar to the SGI case pricing of goods needs to be at arms length to avoid it being treated as a breach of EU law.

Based on the fact that no individual owns more than 20% interest in EngineerCo it is likely to be deemed a breach under the free movement of capital. Article 63.

It will not be deeemed a breach under the freedom of establishment as no party has definite influence. This was a principal established in the **Baars case**.

Failure to adhere to transfer pricing legislation could result in non deductiblitity of expense or deemed income in an EU member state.

The double tax treaty between each member state should be reviewed to ensure the allcation of taxes rights is appropriate.

Further analysis into the reason for the diffcult trading period should be conducted. The price of the machinery should be proportionate to function, assets and risks performed by each party.

The OECD has transfering pricing guidance to assist with how to appropriate price such transactions.

Providing support for a different trading period will put other entities in that jurisdication at a competitive disadvantage.

The facts and circumstances behind this difficult trading period should be considered. If the price determined is deeemed to be comparable to a price a person would be a independent enterprise under such conditions then it would be deemed in accordance with transfer pricing legislations.

<u>Conclusion</u>
The facsts and circumstances behind the difficult trading period

will need to be considered further to determine

In light of BEPS care should be taken to ensure the arrangments are fully documented and in accordance with transfer pricing legislation and in accordance with the codes of conduct shown by the EU joint transfer pricing forum.