THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

June 2025

MODULE 3.01 – EU DIRECT TAX OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

Part 1

The student should identify the application of the ATAD, Art. 5. Ideally, they should distinguish whether the transfer takes place before the implementation of the ATAD, in which case, the CJEU case law would be applicable or after the implementation of the ATAD, in which case, ATAD Art. 5 would be applicable. In case the ATAD applies, then the legislation is in line EU law, as per Articles 5(2) possibility to defer payment through instalments over a 5 year period & Art. 5(3) possibility to charge interest and ask for bank guarantees, if there is a high risk of non-recovery. If the CJEU case law applied (before ATAD), then the candidate should make reference to the NGI DMC and Verder LabTec cases, according to which the measure would be again in line with EU law and the free movement of establishment (leading to similar conditions to the ones later 'codified' in the ATAD).

In case an individual moved their residence, then the candidate should identify that the ATAD is not applicable. Instead, one should resort to the CJEU case and specifically the De Lasteyrie and N. cases (also Wachtler and the later saga). One of the main differences in relation to the 'company law case law' is that the provision of a guarantee as a condition for deferral is not permitted. The case law remains inconclusive as to whether interest may be charged or not.

Part 2

As per Article 5(5) ATAD, the destination Member State must accept the valuation made by the Member State of origin as the starting value of the assets for tax purposes, unless this does not reflect the market value. Thus, if this value does not 'reflect the market value', then the destination Member State is not required to accept the value determined by the departure Member State. In case of disagreement, Member States are encouraged to solve this conflict under the existing dispute resolution mechanisms.

Part 3

Article 5(1) ATAD specifies that the market value and, thus, the computation of all amounts should be fixed at the time of exit of the assets, because as the Preamble suggests this is the time that the taxing right of the departure state is lost. Thus, any subsequent to the transfer losses should not be taken into account; the crucial time for the definition of the tax base is the time of the exit. This is in line with the CJEU jurisprudence, where the Court has held that Member States are not required to take into account any decreases in value that occur between the transfer of assets and the actual disposal of the assets concerned.

Part 4

As Article 5(1) of the ATAD specifies, the provision is applicable even when the transfer (the transfers in scope of Art. 5) happens from a Member State to a third country. Thus, this provision appears to be contrary to Article 5(2) of the ATAD. If the candidate approached the case from a fundamental freedoms' perspective, they would have to show that the applicable freedom in casu is the free movement of capital – which is not the case. Thus, in such a scenario (before the implementation of the ATAD), the measure would appear compatible with EU law.

Question 2

From: Tax Advisor
Subject: Compatibility of the draft legislation on a group taxation regime with the EU fundamental freedoms

Introduction

The Government examines the introduction of a group taxation regime. The draft legislation that was presented to me provides, among other things, that losses incurred by a company resident in Member State A can be surrendered to, and offset against the profits of, another company of the same group arising in the same accounting period, provided the other company is also established in Member State A or is a permanent establishment in Member State A. As a result of this particular feature of the proposed legislation, losses that arise outside Member State A cannot be surrendered and offset against profits arising in Member State A.

In view of the particular features of the proposed legislation, I was asked to prepare a report assessing the compatibility of the proposed legislation with the EU Fundamental freedoms.

The applicable freedom

In order to determine whether national legislation falls within the scope of one or other of the freedoms of movement, it is clear from now well established case law that the aim of the legislation concerned must be taken into consideration (see, Joined Cases C 436/08 and C 437/08 Haribo Lakritzen Hans Riegel and Österreichische Salinen, paragraph 33, and Case C 132/10 Halley, paragraph 17).

According to settled case law, national legislation which is intended to apply only to shareholdings enabling the holder to exert a definite influence over a company's decisions and determine its activities is covered by the Treaty provisions on freedom of establishment. On the other hand, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment, with no intention of influencing the management and control of the undertaking, must be examined exclusively in the light of the free movement of capital (Haribo Lakritzen Hans Riegel and Österreichische Salinen, paragraph 35 and the case law cited).

In order to determine which freedom the national legislation at issue in the main proceedings falls under, it is necessary to examine whether the shareholding referred to in that legislation is sufficient to enable the shareholder to exert a definite influence over the company's decisions and to determine its activities.

It is apparent from the Court's case-law that freedom of establishment is hindered if, under a Member State's legislation, a resident company having a subsidiary or a permanent establishment in another Member State suffers a disadvantageous difference in treatment for tax purposes compared with a resident company having a permanent establishment or a subsidiary in the first Member State.

The draft legislation applies in the case of group of companies. Therefore, the applicable freedom is the freedom of establishment (C-446/03, Marks and Spencer).

Is there a restriction?

Group relief such as that at issue in the proposed legislation constitutes a tax advantage for the companies concerned. By speeding up the relief of the losses of the loss-making companies by allowing them to be set off immediately against the profits of other group companies, such relief confers a cash advantage on the group.

The exclusion of such an advantage in respect of the losses incurred by a subsidiary established in another Member State which does not conduct any trading activities in the parent company's Member State is of such a kind as to hinder the exercise by that parent company of its freedom of establishment by deterring it from setting up subsidiaries in other Member States. It thus constitutes a restriction on freedom of establishment, in that it applies different treatment for tax purposes to losses incurred by a resident subsidiary and losses incurred by a non-resident subsidiary (C-446/03, Marks and Spencer, paras. 32-34).

Is the restriction justified?

Such a restriction may be permissible only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest. It is further necessary, in such a case, that its application be appropriate to ensuring the attainment of the objective thus pursued and not go beyond what is necessary to attain it (C-446/03, Marks and Spencer, paras. 41 et seq.). In the Marks and Spencer judgment (para. 45), the Court developed a three-factor test in order to justify the restriction:

- First, in tax matters, profits and losses are two sides of the same coin and must be treated symmetrically in the same tax system in order to protect a balanced allocation of the power to impose taxes between the different Member States concerned.
- Second, if the losses were taken into consideration in the parent company's Member State they might well be taken into account twice.
- Third, and last, if the losses were not taken into account in the Member State in which the subsidiary is established there would be a risk of tax avoidance.

Is the restriction proportionate?

The court in the Marks and Spencer case found that there was indeed an issue with the proportionality of the measure as far as final losses are concerned. It held that a restrictive measure such as that at issue in the Marks and Spencer case and similar to the draft legislation that is under assessment in this report, goes beyond what is necessary to attain the essential part of the objectives pursued where:

- the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods, if necessary by transferring those losses to a third party or by offsetting the losses against the profits made by the subsidiary in previous periods, and
- there is no possibility for the foreign subsidiary's losses to be taken into account in its State of residence for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party.

Where, in one Member State, the resident parent company demonstrates to the tax authorities that those conditions are fulfilled, it is contrary to Article 49 TFEU to preclude the possibility for the parent company to deduct from its taxable profits in that Member State the losses incurred by its non-resident subsidiary.

The Court pointed out that Member States are free to adopt or to maintain in force rules having the specific purpose of precluding from a tax benefit wholly artificial arrangements whose purpose is to circumvent or escape national tax law (see, to that effect, ICI, paragraph 26, and De Lasteyrie du Saillant, paragraph 50). Furthermore, in so far as it may be possible to identify other, less restrictive measures, such measures in any event require harmonisation rules adopted by the Community legislature.

Conclusion

Despite criticism and unclear scope (see, e.g., Opinion of A.G. Kokott, 23 October 2014, Case C-172/13, European Commission v. United Kingdom, paras. 36 et seq., calling for the abandonment of the "Marks & Spencer exception") the "final losses" doctrine has become a constant theme in the Court's case law on foreign losses after the Marks and Spencer case, as shown in e.g., case C-414/06, Lidl Belgium; case C-337/08, X Holding; case C-123/11, A Oy; and case C-322/11, K.

Therefore, the draft legislation should be amended in order to align with the case law.

It should be noted however that a few refinements made by the Court still allow some exceptions.
First, lack of a loss carry-forward in the subsidiary's state does not lead to losses being available for offset, i.e., "losses sustained by a non-resident subsidiary cannot be characterised as definitive, as described in paragraph 55 of the judgment in Marks & Spencer by dint of the fact that the Member State in which the subsidiary is resident precludes all possibility of losses being carried forward" (Case C-172/13, European Commission v. United Kingdom, para. 33) This position was already taken by the Court in K, which concerned "adverse consequences arising from particularities" of domestic law of the source State, i.e., the rather unusual rule that domestic law allows no carry-forward at all. Therefore, "the Member State in which the parent company is resident may not allow cross-border group relief without thereby infringing Article 49 TFEU".

Second, as in A Oy , losses may only be considered as definitive "if that subsidiary no longer has any income in its Member State of residence". And "[s]o long as that subsidiary continues to be in receipt of even minimal income, there is a possibility that the losses sustained may yet be offset by future profits made in the Member State in which it is resident" (C-172/13, European Commission v. United Kingdom, para. 36). Hence, ceasing trading alone is not sufficient in itself to satisfy the Marks & Spencer exception if some income is still being generated.

The students may refer to the Opinion Statement ECJ-TF 2/2015 on the decision of the European Court of Justice in Case C-172/13, European Commission v. United Kingdom ("Final Losses"), concerning the "Marks & Spencer exception".

PART B

Question 3

In order to assess whether this measure constitutes a state aid, the candidates should first explain briefly the four 'state aid conditions' as per Article 107(1) TFEU. They should focus more on the selectivity question and analyse this in the context of the specific question at issue. Specifically, they should draw from the environmental taxes/ state aid case law (for example cases Adria- Wien Pipeline, ANGED and British Aggregates).

As the CJEU has held in the context of those cases, 'special environmental taxes/ benefits' may create their own reference framework. However, all undertakings that are comparable in light of the objective of the (environmental) system should be treated alike. Thus, comparability is established in light of the objective that is inherent in the created system. This was confirmed in the British Aggregates case, for instance, where the Court held that the pursuit of an environmental objective, does not necessarily exclude a priori the granting of 'selective advantage', independently of the effects of the fiscal measure in question. Thus, the candidate should primarily analyse whether the measure grants a selective advantage.

In light of this, they should first perform the test of selectivity:

- Reference framework and how to define it.
- What is the objective of the measure at issue and do these undertakings compete in the same market?

Then they should evaluate whether a derogation from the system of reference exist: Is there any derogation from the standard regime resulting in an advantage for certain economic operators? Are the cases comparable from a factual and legal standpoint? Finally they should consider whether the measure is justified by the nature or general scheme of that system. This is the case where a measure derives directly from the intrinsic basic or guiding principles of the reference system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system.

(Extra points if reference to Article 107 (3) TFEU is made and the possibility granted therein, that a measure may be considered compatible with the internal market.)

Question 4

By: Tax Advisor
To: The Ministry Of Finance, Member State A
Subject: Compatibility of limitation-on-benefits (LoB) clauses in double tax treaties with the EU fundamental freedoms.

Introduction

During tax treaty negotiations with a Country X, a non-EU member country, with the aim to conclude a double tax treaty based on the 2017 OECD Model tax Convention, the treaty negotiation team of Member State A received a request by Country X to include in their prospective treaty a limitation-on-benefits clause (LoB clause), i.e. a clause that would restrict the benefits of a double tax treaty for certain residents of a Contracting State, such as ones controlled by a resident of a non-Contracting State, (notably foreign-controlled corporations).

I have been asked to deliver an expert opinion on whether Member State A can accept an LoB clause in a double tax treaty.

Analysis

Limitation-on-benefits clauses (hereinafter also: LoB clauses), are tax treaty clauses that restrict the benefits of a double tax treaty for certain residents of a Contracting State, such as ones controlled by a resident of a non-Contracting State, (notably foreign-controlled corporations). Such clauses aim to counter “treaty shopping”. This typically involves the establishment of an intermediate holding company in a State with tax treaties with both the State of residence of the investor, and with that of a source of profit, which together provide a more favourable regime than if the investor had received the profit directly.

The compatibility of LoB clauses with EU fundamental freedoms has long been under scrutiny, especially as to their restrictive effect on the exercise of the right of establishment within the Internal Market.

In the Commission‘s working document “EC Law and Tax Treaties”, TAXUD E1/FR DOC (05) 2306 (9 June 2005), it was stated that when a treaty is concluded with a third country, its compatibility with Community law must be assessed on a different basis than that used when examining a legal act between Member States. The Commission pointed out that some bilateral tax treaties between Member States and third countries contain clauses limiting some of the treaty’s benefits to companies resident in the signatory countries, explicitly excluding permanent establishments and even resident companies where they are “foreign [in relation to the two signatory countries] controlled”. According to the interpretation of the Treaty in the Court's ruling on the Saint Gobain case, these clauses conflict with the right of establishment.

Under BEPS Action 6 recommendation, it was provided that states should include a GAAR in the treaties, either in the form of a LoB clause or in the form of a PPT provision. Also the BEPS Multilateral Instrument, includes a simplified LoB provision as a tool to counter treaty shopping, and also the 2017 Update to the OECD Model Convention contains an LoB clause in the new Article 29. However, the Commission in its Recommendation C(2016)271 of 28.1.2016 on the implementation of measures against tax treaty abuse suggests the Member States should adopt the PPT rule.

In 2015 the Commission the Netherlands to amend the LoB clause contained in Article 21 of the Netherlands- Japan tax treaty (Taxation: Commission asks the Netherlands to amend the Limitation on Benefits clause in the Dutch-Japanese Tax Treaty for the Avoidance of Double Taxation” in the Commission’s Fact Sheet “November infringements package: key decisions”, MEMO/15/6006 (19 November 2015). The Commission announced:

> *“The European Commission asked the Netherlands today to amend the Limitation on Benefits (LOB) clause in the Dutch-Japanese Tax Treaty for the Avoidance of Double Taxation, which entered into force on 1 January 2012. The Commission believes that, on the basis of previous cases such as C-55/00 Gottardo and C-466/98 Open Skies, a Member State concluding a treaty with a third country cannot agree better treatment for companies held by shareholders resident in its own territory, than for comparable companies held by shareholders who are resident elsewhere in the EU/EEA. Similarly, it cannot agree better conditions for companies traded on its own stock exchange than for companies traded on stock exchanges elsewhere in the EU/EEA. However, under the current terms of the LOB clause, some entities are excluded from the benefits of the tax treaty. This means that they suffer higher withholding taxes on dividends, interest and royalties received from Japan than similar companies with Dutch shareholders or whose shares are listed and traded on ‘recognised stock exchanges’, which include certain EU and even third-country stock exchanges. The Commission's request takes the form of a reasoned opinion. In the absence of a satisfactory response within two months, the Commission may refer the Netherlands to the Court of Justice of EU.”*

The Commission held the view that, on the basis of previous (non-tax) case law of the European Court of Justice – such as Gottardo and the Open Skies decisions – “a Member State concluding a treaty with a third country cannot agree better treatment for companies held by shareholders resident in its own territory, than for comparable companies held by shareholders who are resident elsewhere in the EU/EEA”.

A restriction could arise from such a clause in two ways. First, as the taxpayer resident another member state is deprived of his entitlement to the tax treaty benefits available to other residents, a substantive obstacle to the exercise of fundamental freedoms may arise. Second, even where the taxpayer is ultimately able to obtain the treaty benefit the LoB clause can also be the source of procedural obstacles to the exercise of fundamental freedoms, taking into account the complexity of such clauses and the potential difficulties in proving the facts required to preserve the entitlement to tax treaty benefits.

As show in the case C-374/04, Test Claimants in Class IV of the ACT Group Litigation v Commissioners of Inland Revenue, an "ownership test" LoB clause can deprive taxpayers resident in another member stare who are controlled by non-residents, of the entitlement to the benefits of tax treaties that they would otherwise enjoy along with other residents of that other member state. However the Curt in the ACT Group claimants case held that the LOB clause did not infringe the freedom of establishment.

Conclusion

Following the line of reasoning adopted in Gottardo and Open Skies, an EU Member State cannot invoke any justification for the LoB clause. Accordingly, EU Member States could no longer include such LoB clauses in future treaties. Typical limitation-on-benefits clauses are likely to be incompatible with EU fundamental freedoms, since the different tax treaty regime connected with their application is likely to generate a procedural or substantive restrictive impact on the exercise of the right of establishment within the Internal Market, which may dissuade EU national individuals and corporations from controlling a subsidiary in a different EU Member State. The different specific features of LoB clauses cannot justify such restriction in the absence of the assessment of an actual abusive practice, which settled case-law of the Court of Justice requires to be done on the basis of a case-by-case analysis.

Therefore, Member State A should either refrain from adopting an LOB clause altogether or, adopt an LOB clause but extend its scope in order to make sure that the non-discrimination principle applies vis a vis other EU nationals (individuals or legal entities).

Students may find an analysis of these issues in the CFE Opinion Statement ECJ-TF 1/2018 on the Compatibility of Limitation-on-Benefits (LoB) Clauses with the EU Fundamental Freedoms.

PART C

Question 5

The candidate is expected to explain the differences between economic and juridical double taxation. Then, they are expected to explain how the CJEU case law shows that in cases of discriminatory restrictions the fundamental freedoms can resolve cases of economic double taxation (plenty of examples to refer to, including Verkooijen, Lenz, etc.)

An analysis similar to that of the CJEU is expected – why are the situations comparable (because the measure at stake aims to resolve this double taxation but only in domestic situations). However, the candidates should also point out that it is unlikely that the fundamental freedoms will be able to resolve cases of juridical double taxation as very commonly those would fall under the 'disparity' classification (no discriminatory restriction but rather the interaction of two tax systems).

Once again, there are plenty of examples to mention including Kerkchaert and Morres, Damseaux, etc. Inevitably, juridical double taxation will have to be resolved by Double Tax Conventions.

Question 6

The candidate is expected to first discuss the meaning of the Most Favoured Nation (MFN) principle: the idea that a state can request the extension of the treatment accorded by the granting State to the beneficiary State (usually by a DTC) also to a third State (not a party in the DTC) or to persons or things in the same relationship with that third State. The candidate should explain the ‘comparability’ aspect of this question, that is the request of the taxpayer to be compared to another taxpayer who receives a more beneficial treatment. Then it should be explained how the CJEU approached the question in the N. judgment.

After briefly presenting the facts, the candidates should explain that the persons (above) are not in the same situation because the fact that those reciprocal rights and obligations apply only to persons resident in one of the two Contracting Member States is an inherent consequence of the DTC. As the Court held, the rules included in the DTC cannot be regarded as a benefit separable from the remainder of the Convention, but is an integral part of it. As such they cannot be extended to taxpayers of states that are not members of the DTC.

Question 7

Students are required to briefly describe the BEPS project and then list the EU legislation under which the various measures were transposed into EU law.

The following provides an indicative approach:

The OECD/G20 BEPS Project, finalized in 2015, aimed to curb tax avoidance strategies that exploit gaps and mismatches in tax rules. The EU not only adopted OECD recommendations but also supplemented them with its own legislative measures to ensure coherence within the internal market.

The EU implemented BEPS measures using primarily EU Directives, supported by non-binding instruments such as recommendations and guidelines. The core legal instruments are the Anti-Tax Avoidance Directives (ATAD I and II) and the Directive on Administrative Cooperation (DAC).

Anti-Tax Avoidance Directive (ATAD I) – Directive (EU) 2016/1164

Transposes several BEPS Actions into EU law:

- Interest Limitation Rule (BEPS Action 4): Limits deductibility of interest to 30% of EBITDA.
- Exit Taxation (BEPS Action 5): Ensures taxation on capital gains when assets leave a Member State.
- General Anti-Abuse Rule (GAAR) (BEPS Action 3 & 6): Allows disregarding arrangements not genuine or mainly tax-driven.
- Controlled Foreign Company (CFC) Rule (BEPS Action 3): Taxes income shifted to low-tax jurisdictions.
- Hybrid Mismatch Rules (BEPS Action 2): Prevents double deductions or deductions without inclusion.

Anti-Tax Avoidance Directive II (ATAD II) – Directive (EU) 2017/952

Extends hybrid mismatch rules to non-EU countries and addresses more complex arrangements.

Directive on Administrative Cooperation, 2011/16/EU (DAC)

- DAC4 - Country-by-Country Reporting (CbCR) –: Transposes BEPS Action 13.
- DAC3- Exchange of tax rulings –: Based on BEPS Action 5.
- DAC6 – Council Directive (EU) 2018/822 (BEPS Action 12) Requires mandatory disclosure of aggressive cross-border tax arrangements by intermediaries or taxpayers.

Question 8

Students could develop their answer along the following lines.

The coherence of the tax system refers to a justification invoked by Member States to defend tax measures that might otherwise restrict the fundamental freedoms. It is used to ensure internal consistency between tax benefits and burdens within a specific tax framework. For this justification to be accepted by the CJEU, there must be a direct link between the tax advantage granted and the corresponding disadvantage, typically in the same tax system or transaction.

According to the CJEU, for a restriction to be justified on grounds of tax system coherence, the following conditions must be met:

- There must be a direct connection between the tax advantage and the corresponding tax burden.
- The measure must be proportionate, i.e., not go beyond what is necessary to maintain coherence.
- The justification must not be based on general concerns (e.g., tax avoidance or revenue loss) alone.

The following cases provide an illustration of how this justification has been used by the Court.

Bachmann (Case C-204/90)

- Facts: Belgium denied tax deductibility for insurance premiums paid to foreign insurers.
- CJEU's Ruling: The restriction was justified to preserve the coherence of the tax system – deductibility of premiums was linked to taxation of the insurance benefits, which could not be enforced if the insurer was abroad.
- Significance: First time the Court accepted "coherence of the tax system" as a valid justification.

Wielockx (Case C-80/94)

- Facts: Dutch legislation allowed self-employed residents to deduct pension contributions, but not non-residents.
- CJEU's Ruling: No justification on coherence grounds because there was no direct link between the denied deduction and the taxation of pension income in another state.

ICI (Case C-264/96)

- Facts: UK rules prevented a consortium of companies from offsetting losses of non-UK subsidiaries.
- CJEU's Ruling: The coherence argument failed – there was no direct link between the denied group relief and the purpose of the legislation.

De Groot (Case C-385/00)

- Facts: Dutch rules limited double taxation relief to residents, not non-residents.
- CJEU's Ruling: The coherence justification was rejected due to lack of proportionality – other less restrictive means could be used.

Groupe Steria SCA (C-386/14)

- Facts: French tax group regime allowed exemption of dividends from domestic subsidiaries but denied it for EU-based subsidiaries.
- CJEU Ruling: The restriction infringed the freedom of establishment. The coherence argument failed because France allowed the tax exemption unconditionally for domestic subsidiaries. Thus, it could not justify differential treatment of EU subsidiaries.
- Significance: The Court reaffirmed that consistency alone is not enough – there must be a direct compensatory mechanism between taxation and deduction.

Joined cases X BV and X NV v. Staatssecretaris van Financiën (C-398/16, C-399/16)

- Facts in the X Nv case : Dutch company sought a deduction for currency losses on a foreign branch. The Netherlands denied the deduction because the profits of the branch were exempt.
- CJEU Ruling: The denial was justified by the coherence of the tax system (although the Court does not refer to "cohesion" but to symmetrical treatment, see para. 60 of the judgment). The Netherlands applied the exemption method for foreign income, so allowing a deduction for foreign losses would undermine symmetry.

- Significance: This is one of the rare post-Bachmann cases where the coherence argument succeeded, due to a direct link between the exempted foreign income and denied deductions.

The coherence of the tax system is a narrow and strictly interpreted justification that the CJEU only accepts when a concrete, direct link exists between the tax advantage and disadvantage within a single national system. Although introduced in Bachmann, it has rarely succeeded since.