PART A
Answer-to-Question-_1_

Homeland and Newhomeland are EU Member States (MS). So, the case should be examined in the light of EU law, primary (EU treaties such as Treaty on the Functioning of the EU, TFEU etc)and secondary law (Directives such as Parent-Subsidiary Directive 2011, Interest and Royalty directive etc, taking also in mind the relevant case-law of the Court of Justice of EU (CJEU).
The direct tax issues that arising are the following.
a)The company considers to transfer part of the company's operation and relevant assets in a subsidiary in another MS. So there is a cross-border element for an EU company and an EU subsidiary. At first, we should identify which freedom is involved. Since in Newhomeland there is subsidiary of the company, we can assume that there is a group(Parent in Homeland which is the state of origin/home State, Subsidiary in Newhomeland, the host state). The freedom involved is the **freedom of establishment (49 TFEU)**, since in involves the establishment of an EU company is anonther MS. It is not clarified if it will be a transfer of shares. However in any case, the transfer of a marority shareholding which gives the right to definite influence and control of the decisions on the other company, is protected by the freedom of establishment and not capital (Baars CJEU). In our care there is the relation between Parent and subsidiary, so we can assume that there is definite influence and control of the subsidiary. So in any case the involved freedom is the freedom of establishment. In our case the company is considering to transfer also the relevant manufacturing assets. The transfer of assets is usually protected under the freedom of capital (63 TFEU). However, when different freedoms overlap, the CJEU accepts that one of them is of secondary (auxilliary) nature, so there is no need to separetly examine it (Fidium Finanz). In our case the transfer of assets in an inevitable consequence of the exercice of the freedom of establishment. In almost all the aspects of the freedom of establishement, will be involved transfers of capital

(assets, property etc.) However the transfer of the relevant manuftacturing assets (which involves the freedom of capital) is of secondary nature to the transfer of the operation of the company which us protected under the freedom of establishment. So there is no need to separetely examine the violation of the freedom of capital. The case is analysed under the freedom of establishment.

b) Now we have to examine **if there is restriction** of the freedom of establishment, and in particular if there is disadvantage for the companies who wish to transfer an activity (operation and relevant assets)in comparison with the companies which do not wish to transfer an operation. We have to compare the 2 categories and define if the companies/legal persons who wish to exercise their freedom of establishment, by trasnfer a part of their operation in another MS, are treated less favorably that the domestic companies. In our case, I believe there is a less favorable treatment of the companies who wish to transfer a part of their activities. We have to examine this case, as a case of **exit tax**.
Art. 49 TFEU aims to ensure that foreign nationals are treated in the host state in the same way as nationals of that state. It also prohibits the MS of origin from hindering the establishment in another MS of one of its own nationals (Baars).

In particular, in our case, it concerns the fact that the Homeland (the home state) will tax the difference between the market price of assets and their current tax basis (10-6,so 4 millions). (**Taxation of capital gains**) The taxation will occur only by the fact that the company will transfer a part of its operation and the relevant assets. The gain of 4 millions is deemed. It is only a fiction, as a result of the transfer of the operation of the company, which exercices its freedom of establishment.This is a disadvantageous treatment in comparison with a company that do not wish to trasfer part of its activity. It will probably discourage the taxpayer for trasfering is

operation and exercise his freedom of establishment (De Lasteyerie du Saillant C-9/02, N. C-470/04).

c) We have also to examine if this restriction can be justified. It is settled case law that for a difference in treatment to be compatible with EU law, it must be related to situations wich are not objectively comparable or be justified by an overriding reason in the general interest (and also pass the proportionality test, to be suitable to acheive the aim and not go beyond what is necessary). The Court has accepted that the freedom of establishment must be interpreted as precluding a MS from establishing, an order to prevent o risk of tax avoidance, a mechanism for taxing not yet realised increases in value of an asset, when a taxpayer exercises its freedom of establishment (Lasteyerie du Saillant C-9/02). In addition, the freedom of establishment prohibits the legislation of a MS which prescribes the immediate recovery of tax on unrealised capital gains relating to assets of a company transferring its operation, at the very time of the transfer . However does not preclude the legislation under which the ammount of tax on unrealised capital related to a company's assets is fixed definitively, without taking account of decreases or inceases which may occur subsequently. (National Grid Indus C-371/10). In our case of the assessement of Homeland meets the rewuirement of National grid Indus case law, the restriction should be considered justified.

d)Newhomeland (the host state) will grant depreciation allowances on basis of the current market value, which is 10 millions and with the condition that the company will use the assets for 5 years, after which it will replace them. We have to examine if this treatment is enought to justify the restriction.
The freedom of establishment adresses also to the host state so we have to examine if this treatment is per se a restriction and if the conditions laid are justified. The host state also should

not make less attractive the exercice of the freedom of establishment.

e) To our case relevant could be also the Parent Subsidiary directive regarding payments and dividends inside the group. Relevant could also be the Merger Directive 2009, for, among others, the mergers, partial divisions and transfers of assets between companies in different MS. In art. 4 it provides for deferral if carry-over of balance sgeets vallues, which could be applied in our case (however Newhomeland is taking account the markert value).According art. 4 MS should sall not tax any income, profits or capital gains (as in our case for the assets)calculated by reference to the difference between the real value of the assets and their values for tax purposes. The art. 5 of ATAD concerning exit taxes is relevant. This article calculates the amount to tax as the market value of the transferred assets, less their value for tax purposes. Provides also the right of the tax payer to defer the payment of an exit tax over 5 years, in the prescribed circumstances.

ASWER TO QUESTION 2

According the CJEU neither tax evasion or tax avoidance enjoys the protection of EU law (Emsland-Starke). The fight against tax avoidance and tax abuse is examined in the justification phase of analysis. Havere with the Danish cases the Court considered anti-abuse as a general principle of EU law, thus a source of EU primary law. Abuse, according the CJEU, is any **artificial arrangement that does not reflect economic reality, the purpose of which is to obtain for the taxpayer an unintended tax benefit** (Cadbury Sweppes C-196/04, ICI, Marks and Spencer). There is an objective and ans subjective element in the concept of abuse. **General assumptions of abusive practice, are not. accepted** (Thin Cap). A case by case analysis is necessary. The tax payers should also have th opportunity to provide valid commercial reasons and

counterproof regarding their practices.
Some examples from the case-law.

-Atificial arrangements which aims to an illegal tax benefits could be considere entites (subsidiaries or PEs) without substance, e.g. without premises, personnel adequate for their activity, equipment etc. (Deister, Cadburry Sweppes). Regargig abusive transactions we should refer to the transfer pricing principle that require the transactions are in market value (market value and with conditions between third parties). The arrangement should reflect economic reality. Also, arrangements totally artificiall which interferes betweem 2 companiesin different MS and lach substances (special vehicule companies etc) should also be considered abusive.

-The simple fact to transfer the seat of a company or its tax residence in another MS cannot be considered as abusive or that it will lead to tax avoidance. Tax evasion or tax avoidance cannot be interferred generally from the fact that the tax residence of a physical person or the seat of a company has been transferred to another MS and this fact cannot jystify a fiscal measure which restricts a fundamenta EU freedon (Commision v. Belgiun C-478/98).

-The national legislation, in order to be justified with the public reason of the fight agains abusive practices, should have a specific purpose to prevent wholly artificial arrangements designed to cinrcumvent the national tax legislation. The legislation should not generally applies to any situation in which the parent company has its seat, for whatever reason, in another MS (Lankhorst-Horhorst).

In the **ATAD** we can say that the concept of abuse an tax avoidance are broader. ATAD concerns rules against tax avoidance that directly affect the functionning of internal market. The provisions are concrete, like iterest limitation rule (art.4),

general anti abuse rule (art.6), CFC rules etc. However the provisions and the ATAD mesures that the MS adopt should be in line with the fundamental freedoms where there is a cross element involved. The CJEU has the ability to examine the measures's compatability. ATAD is secondary law while the fundamental feedoms are primary law. So, the CJEU case las is not superseded by ATAD. The Court examine the anti abuse doctrine as a source of primary law and in the stage of justifications of restrictions. The CJEU case law continues to be of great importance for the fight againsta abuse (through the interpretation of fundamental freedoms) even after ATAD.

PART B
ANSWER TO QUESTION 3
(Marks and Spencer Case).

1)The advantage that the Court is referring to is the right for a resident parent company to deduct from its taxable losses incured in another MS by a subsidiary established in that MS. The advantage is the deduction of losses occured in another MS.

In the Marks and Spencer case, the national legislation prevented o a resident parent company from deducting from its taxable profits, losses that incurred in another MS by a foreign subsidiary, while they allow it to deduct losses incurred by a resident subsidiary. The Court found that this treatment is not prohibited by the freedom of establishment, except in the case of final losses (Losses that the home state definitively could not take account).

2) In national legislation, this advantage should arise as result of tax consolitation schemes for a group with foreigns subsidiaries or PEs. This tax scheme could allow the profits and losses to be consolitated (group taxation systems).
The Court has examined these schemes and the specific issue of deduction of losses incurred in another MS. In the case of X

Holding C-337/08 the Court found that the tax integration system (forming a single tax entity ehich permets for the profits and losses to be consolitaded at the level of parent company) which is reserved only for domestic subsidiaties and not for subsiliaries in another MS profibitis the freedom of establishment. In this case, this provision deterrs the parent company from setting subsidiaries in another MS.

In the Nordea Bank also case-law the Court examined the reincorporation in the taxable profits of the losses which had previoysly been deducted, as a result of the transfer of a PE from a resident to a non resident company in the same group. The Court decides that there was a violation of the freedom of establishment, as long as the first MS taxes both the profits made by that PE before its transfer and those after the transfer resulting from the gain made upon the trasfer. So if a MS taxes the profits of a PE should also provide for losses deductions regarding the relevant acitivity that produses the profits. The resident PE and the non resident PE are in this case in a comparable situation regarding the deduction of losses. So it is very important to maintain the symmerty between the right to tax profits and the right to deduct losses.

However when the profits are not taxed, the MS has the right to not deduct the losses which can be deducted in another MS, the same which taxes the profits (Lidl Belgium).

The deduction from the taxable income of an intra group financial transfer was examined also in the OY AA case.

3) If UK gave this advantage unconditionally, i.d. the advantage of deducting losses incurred in another MS, the results would be the following. By this provision, the company would have the right to choose in which MS their losses shoul be deducted. This would seriously undermine the balanced allocation of the power to impose taxes between the MS, since the tax base would be

increased in the first MS and reduced in the second (Marks and Spencer, X Holding, Lidl Belgium). So this provision is justify the the need to protect the allocation of the power to impose taxes between MS.
There could be also a risk for tax avoidance or a danger that the losses would be used twice. However in the Marks and Spencer case the Court found that the MS must be able to prevent the danger that losses might be taken into account twice. So there is no legitimate justification.

PART C
ANSWER TO QUESTION 4
(principles of equivalence and effectiveness)

According to settled case law, the MS must design rules that are not less favorable than those concerning similar domestic situations (principle of equivalence) and that they do not render virtually imposible or excessively dificult the rights conferred by EU law (principle of effectiveness). The principles and the case-law based on them is the consequence and the complement of the rights conferred on individuals by EU. In the area of direct taxation the Court usually refers to these principles in cases regarginf the refund of taxes unduly levied and the restitution of losses of the taxpayer as a result of the violation of EU law. A taxpayer has the right to be compensated for the loss and damage he suffered as a result of a violation of EU law. In other care, the implementation of EU law and the application of the fundamental freedoms would be without meaning. Individuals has right to be reimboursed foe the taxes, relevant amounts and other losses occured due to the fact of the violation of the fundamental freedoms (FII). They also have right to interest for the taxes and amound unduly paid. The interest should be calculated from the time of the damage and not after (e.g. not after the demand of the applicant). Also, in the N case c-470/04 the Court ruled that damage by the constitution of garanties in violation of EU law is likely to engage the liability of the MS.

The tax payer has the right to be reimboursed under 3 conditions a) the provision violated must me intended to confer rights on individuals b) the violation must be sufficiently serious and c) the must be a direct casual link between the breach and the damage (Thin-Cap, Brasserie du Pecheur and Fractortame). If the taxpayer has the right to be reimboursed the MS has to respect the priciple of equivalence. The conditions sould be no worst or less adnantegeously from those that applies to domestic cases. E. g. the calculation of the interest should be the same for the cross border and the domestic situation. The MS should also respect the pronciple of effectiveness and not design excesive or very strict systems and conditions for the taxpayer to make the demand.

ANSWER TO QUESTION 5
(harmonization)

1) The art. 113 TFEU is the legal basis for the harmonization for the indirect taxes.The art. 115 may be used as a legal basis for harmonisation in direct taxation, to achieve the establishment and functioning of the internal market. The internal market is an shared competence between MS and EU, taking also in mind the principle of subsiadiarity (art. 5 (3) TEU). The direct taxation is within the competence of the MS. However the MS must exercise that competence in a manner consistent with EU law. So the MS should take measure in the base of 115 TFEU but an unamimous approval is required (form of a Direcrive). (negative integration with the case law of CJEU).

2)Also in the art. 114 let. (3) TFEU is provided that par. 1 shall not apply to fiscal provisions relating to free movenet of persons etc
We can say that the double taxation is a result of the parallel exercise of the tax sovereignity of two MS. If the MS are not violating the fundamental freedoms, they have the right to exercise their taxation powers and to choose the connecting

factors (residence or even nationality Gilly) to tax their taxpayers for activities performed in their territory (principle or territoriality). The ante art. 293 EC encouraged States to conclude treaties ti avoid double taxation. The Court ruled that a MS has not the obligation to avoid international double taxation which results from the parallel exercise of national taxing powers(Gilly, Block) In this case, the double taxation is not a violation of EU but a result of differences in the national legislations (disparities). Is it not that the national legislation discriminates but 2 legislations fave differents provisions. The MS have the power to define, unilaterally of by Treaty, the criteria for allocating their powers, with a view to eliminate double taxation and taking in mind the international tax practice.

3) The primary law takes precedence. The harmonisation measures are secondary law (Directives), whose compatibility with the EU primary law is examined.