Introduction to European Business Law

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Module 6 (tax law & company law)

A glossary of key terms and a summary of case notes from week 6

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These notes were prepared by Penny Parker for others who are taking this MOOC course, for personal private use only. Please feel free to comment or submit corrections to pennyparker@me.com.

Agency theory – this is an important concept in company law. Since company laws vary so much from Member State to Member State, the EU treatment of the subject has tried to fall back to a more general concept of functions. From the lecture notes: The point of departure consists of the so called agency theory. According to this theory, the problems of any company law are derived from information asymmetries between so-called agents and principals. The reason is, that these asymmetries give rise to so-called agency costs. And company law, it is thought, can best be explained as motivated by an endeavour to minimize such costs.

In its most general form, the principal is anyone who's interests are affected by the actions of another person. This other person then is an agent. And thus, if A and B are persons and A's decisions influence B's welfare, then B is A's principal, and A is B's agent.

However, in law, agency relationships presuppose the existence of direct or indirect legal relationships between agents and principals. In the context of a company, there usually are multiple agency relations. For an example, such relations exist between the company's members. They also exist between, on the one hand members, and on the other hand non-members, who are invested with decision-making authority. And, they exist between members and other company stakeholders, including the company's creditors.

Aggressive tax planning strategies – this is a euphemistic way of saying tax fraud. Many member states are trying to combat tax fraud by enacting tax legislation that addresses the different tax dodges, especially where the taxpayer appears to be relocating or residing in a low-tax jurisdiction in order to avoid higher taxes elsewhere. Unfortunately that legislation often runs afoul of EU legal principles. Several of the cases in this week's readings strike down member state efforts to tax these cross border elements.

From the lecture notes: Yet another limit on member states powers lie in the need to combat aggressive tax planning strategies. And the court has always been deliberately strong in the face of arguments from member states. Most states try to protect their tax bases. And use anti abuse provisions to counter schemes involving the use of artificial transactions in order to reduce tax liability.

For instance, most states reduce the benefits of favorable inbound dividend when the distributing subsidiary is located in a low tax jurisdiction. The court of justice has consistently stated that such anti abuse provisions are incompatible with freedom of establishment or freedom of capital if they strike blindly at all transactions, presuming that a lower tax in another member state automatically amounts to tax avoidance.

Only tax provisions that catch wholly artificial arraignments designed to escape the national tax normally applicable are compatible with the fundamental freedoms.

The rule of the European court of justice to interpret the TFEU has had a considerable impact on member states tax legislation. Over 350 cases deal with the free movement provisions with help of principles of law such as,

- the equality principle. That is the rule underlying equal treatment of taxpayers in comparable situations.
- the legality principle. There is no taxation without representation.
- and last, but not least, the proportionality principle, which allows derogation to the aforementioned principles only to the extent or in balance with the overall goal of the tax legislation in question, especially where the line of delimitation between tax planning and tax abuse is difficult to draw.

Article 110 TFEU – prohibits Member States from levying import duties or charges with equivalent effect on imported or exported goods. [Note: this was a "fill in the blank" question in the ungraded quiz for this module]

Classifications of taxes – From an economic viewpoint taxes are usually leveled on three kinds of items. labour, capital and consumption.

- Taxation on labour includes personal income tax and to a certain extent, Social Security contributions, but these were not presented in the lectures this week.
- Taxation on capital includes taxes on corporation and investment income as well as property and inheritance taxes.
- Taxation on consumption includes value added tax, and excise duties. VAT applies to the value of the goods and services that are bought and sold for domestic consumption.
- Goods and services sold abroad, exports, are not subject to VAT, in the country of origin, but in the country of destination. Conversely, imports are taxed so as to keep the system fair for producers.
- Excise duties are often levied to improve people's lifestyle. For instance tax on tobacco, or to encourage environmentally friendly production tax on harmful emissions, for instance.

Company – for purposes of this course, a company is a voluntary association formed and organized to carry on a business. This definition is large enough to comprise both companies limited by shares and partnerships. It should be mentioned however, that the word company often is used as a short hand for company limited by shares, also known as corporations. According to this usage, partnerships are not companies at all. But here in this course, we won't use the word in such a narrow meaning.

Company law -- No doubt, the vast majority of the laws applicable to companies are not part of company law. Instead, these laws are usually members of other areas of law, such as contract law, securities law, tort law or tax law, company law. Company law therefore is the law applicable to and only to companies. [Note: this was a question this week on the ungraded quiz].

From the lecture notes: The core of company law has three components.

- First, there have to be rules concerning the decision making procedures within a company. These rules organize and regulate the decision making authority on behalf of the company. In that way, they construct what is known as the company's internal relations.

- Secondly, there had to be rules that organized and regulate the representation of authority on behalf of the company. These rules concern what is known as the company's external relations.
- And thirdly, there have to be rules regarding the responsibilities for the company's debts.

Rules regarding decision making procedures are necessary since companies usually have many members, often they also have other persons involved in the decision making, such as directors and officers. Due to this pluralities, there had to be rules that decide when a company decision exists. In other words, these rules identify the conditions under which the decision is subscribed to the company.

For example, within a company limited by shares, the individual shareholders usually have no decision making authority on behalf of the company. Instead, this authority is granted to entities such as the general meeting and the board of directors.

Comparative company law -- the differences and similarities between jurisdictions are discussed within an international discipline called comparative company law.

Corporate income tax -- a tax on capital (in the economic sense of it) and is levied on a highly mobile tax basis, especially due to the free movement of capital in the EU. For this reason economists often consider this type of tax the most harmful. [Note: this was a true/false question on the ungraded quiz for this module 6].

Corporate social responsibility – a form of corporate self regulation to encourage positive impact on the environment and stakeholders, including consumers, employees, investors, communities and others. From the lecture notes: Such stakeholders typically include company members and the company's creditors. An intensely debated normative question concerns, how the relevance stakeholders should be conceived, especially in the context of multinational corporations. This question has a defining character for the international movement that calls for an enlarged corporate social responsibility. This is not the place to discuss these things further. Let me just say that the issue might be explained in terms of so-called externalities. Actions taken by multinational corporations no doubt have an enormous societal impact. It seems clear then that the welfare of humankind at large is strongly affected by corporate actions for good and evil.

Customs Union – Covered in Article 28 TFEU. A common custom tariff is levided outside the EU borders, pursuant to Article 31 TFEU. From Wikipedia: The European Union Customs Union (EUCU) is a customs union which consists of all the member states of the European Union (EU) and some of its neighbouring countries: Andorra, Monaco, San Marino and Turkey. The customs union is a principal task of the European Economic Community, established in 1958, and now succeeded by the European Union. No customs are levied on goods travelling within the customs union and—unlike a free trade area—members of the customs union impose a common external tariff on all goods entering the union. One of the consequences of the customs union is that the European Union can negotiate as a single entity in international trade deals such as the World Trade Organisation, instead of individual member states negotiating for themselves.

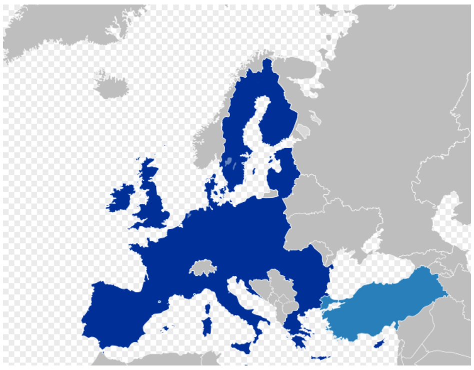

Figure 1 European Union as a single entity.svg. Licensed under CC BY-SA 3.0 via Wikimedia Commons - http://commons.wikimedia.org/wiki/File:Europ%C3%A4isc

Decision-making authority of companies – these fall into two categories: one group of rules that tell us when a company decision exists and one group that draws the limit between lawful and unlawful company decisions. [Note: this was a question on this week's ungraded quiz; the wrong answers included rules for respecting company decisions and rights of stakeholders who are not members]

Direct taxes – taxes that are levied on taxpayers directly.

Domestic taxes – we learned this week that Member States are not obligated to equalize their domestic taxes with other states. Nothing in the TFEU obliges them to equalize their domestic taxes with other states. [Note: this was a true/false question on the ungraded quiz for this module]. In fact there is a wide variety of tax rates in the member states, because the decision to support a broad social welfare system is stronger in some states than others. However, if a state levies a tax on non-residents, they must also levy it on residents. Otherwise they risk a breach of article 63 TFEU on the free movement of capital which forbids restrictions on capital to a certain extent.

European Company law -- The European company is a public corporation. It was introduced by a regulation in 2004. Interestingly enough, European companies are only partly regulated by European law. According to the regulation, many questions are governed by national public company law in the member state where the company is registered. As a consequence, there are as many types of European companies as there are member states in the European Union. As of yet the European company has not been a success. At present, there are only around 1,800 European companies. To put this into perspective, in Sweden alone there are around 450,000 corporations, -- of course, the great majority of them are small, private corporations.

Excise duties -- Excise duties are indirect taxes on the consumption or the use of certain products. In contrast to VAT, they are mainly specific taxes, i.e. expressed as a monetary amount per quantity of the product.The most commonly applied excise duties are those on alcoholic beverages, manufactured tobacco products and energy products (motor fuels and heating fuels, such as petrol and gasoline, electricity, natural gas, coal and coke). Excise duties are often levied to improve people's lifestyle. For instance tax on tobacco, or to encourage environmentally friendly production tax on harmful emissions, for instance.

Externalities -- the cost or benefit that affects a party who did not choose to incur that cost or benefit. For example, manufacturing activities that cause air pollution impose health and clean-up costs on the whole society.

Indirect taxes -- taxes which are levied on consumption but remitted by taxpayers who pass on to the consumer the economic charge of the tax. For example VAT and excise duties.

Primary law – treaties. [as opposed to secondary law, which is the directives, regulations and decisions of the EU institutions]

Primary purpose of taxation -- the primary purpose of taxation is to create space for public sector activities to the detriment of the private sector.

Private corporations – shares are privately held. They are not traded on a public stock exchange.

Public corporations – shares are publicly held and are usually traded on a public stock exchange.

Public sector size – varies significantly between Member States, leading to very different taxation environments to fund the public sector. The highest tax rates are those of Denmark, Belgium, France, Austria, Finland and Sweden – almost 40%.

Relationship between companies and contracts – another quiz question this week asked how companies and contracts are related. The correct answer was that they are both institutions in the service of private autonomy and that companies presuppose contracts as an institution (in other words, companies can not get along without contracts to do business). Thus two boxes need to be ticked.

The wrong answers were that contracts are a species of company (wrong of course), companies are a species of contract (wrong of course) and contracts presuppose companies as an institution (wrong because contracts don't depend on companies for their functioning). Without the institution of contracts companies lose their raison d'etre. Why? Because whatever purpose a given company has it can only be achieved by using contracts as an instrument. It is in the nature of companies and contracts that they are vehicles for voluntary use in order to further private interests. But the opposite is not the case (companies need contracts to function, but contracts don't need companies).

Secondary law – directives, regulations and decisions of EU institutions.

Sovereign power to levy taxes – only the member states can levy taxes (and their municipal governments). The EU has no such power. There is no general EU level income tax nor does the EU benefit directly from the member state's tax revenue.

Tax relief – some tax reliefs can amount to improper state aid. From the lecture notes: Equally member states may not attract foreign direct investment from other states through domestic tax legislation which may be held in breach of EU competition of rules on state aid. Indeed, the ECJ has ruled in several cases that Article 107 of the treaty forbids states to adopt tax reliefs. That may in effect benefit a specific category of taxpayers such as non-residents. Gibraltar had a very attractive tax regime for non-residents, but it had to repeal it for these reasons. The same is also true for state aid to national economic actors. And many times the court has stated that a member state may not reserve tax breaks or advantages that benefit a sectorial or geographical business sector.

VAT – value added tax. It is a form of consumption tax or indirect tax. From the perspective of the buyer, it is a tax on the purchase price. From that of the seller, it is a tax only on the value added to a product, material, or service, from an accounting point of view, by this stage of its manufacture or distribution. The Gaston Schul case in our readings this week dealt with the Dutch VAT on used boats, striking down the tax because it treated non-resident sellers differently from resident sellers.

CASE SUMMARIES FROM THIS MODULE

Case law: EU tax law

- C-15/81 – **Gaston Schul case**, Gaston Schul Douane Expediteur BV v. Inspecteur der Invoerrechten en Accijnzen, Roosendaal (1982). 28 pages. This is a landmark case in the field of Value Added Tax showing how article 110 of the TFEU should be applied in cases of imported goods that are exposed to double taxation. The case deals with the intra-EU importation of a second hand yacht from France by an end consumer which triggered Dutch VAT on the import. Had the boat been purchased from a Dutch seller no VAT would have been charged. The court held this levy of VAT to be in breach of Article 110 of the TFEU as the accumulating of VAT for imports favored domestic transactions.

  "It appears from the particulars given by the national court that turnover tax is not levied in the Netherlands on goods if the delivery is made within the country by a private person who is not a trader whereas if the goods are imported from a non-member country or from Member States the tax is in principle always levied whatever the status of the supplier and whether or not the goods are delivered."

  Gaston Schul was a customs forwarding agent who imported a second-hand pleasure and sports boat on instructions and on behalf of a private person resident in the Netherlands who had bought it in Cannes from a private person resident in Monaco. The Inspector of Customs and Excise levied turnover tax on Schul in respect of the importation. Schul lodged an objection with the Inspector against the turnover tax on importation claiming tat the boat had already been subject to turnover tax within the Community, namely in France, and there had been no remission on tax on exportation. The Inspector, however, dismissed the objection on the ground the levy was made pursuant to the provisions of the Netherlands law on turnover tax. Gaston appealed on the basis of EU law. The national court then referred the case to the ECJ on the issues of EU law.

The court concludes the Netherlands tax constitutes double taxation on the importer, in violation of article 95 of the EU Treaty. The burden is on the state to justify the additional tax. "Article 95 of the Treaty prohibits Member States from imposing VAT on the importation of products from other Member States supplied by a private persons where no such tax is levied on the supply of similar products by a private person within the territory of the Member State, to the extent to which the residual part of the VAT paid in the Member State of exportation and still contained in the value of the product when it is imported is not taken into account."

- C-112/84 – **Michel Humblot vs. Directeur des services fiscaux** (1985). 6 pages. The French road tax was held to be in breach of Article 110 of the TFEU as the rate of tax payable was determined by the power rating of the car. And it applied at a much higher rate to extremely powerful cars, over 16 horsepower which car manufacturers in France did not produce, but which were manufactured and imported from Germany. Although, in the application of this tax no formal distinction was made based on the origin of the car, it manifestly showed protective features as it applied only to imported cars. Because of this, consumers were discouraged from buying non-French cars and Article 110 of the TFEU was found to apply.

  France had two different types of tax due annually on motor vehicles. First, a differential tax to which cars rated at 16 CV [fiscal horsepower] or less are subject and secondly a special tax on vehicles rated at more than 16 CV. Whereas the amount of differential tax payable increases progressively and uniformly with the power rating for tax purposes, the special tax is levied at a single, considerably higher rate.

  The court notes that Member States are at liberty to subject products such as cars to a system of road tax which increases progressively in amount depending on an objective criterion, such as the power rating for tax purposes, which may be determined in various ways. Such a system of domestic taxation is, however, compatible with Article 95 only in so far as it is free from any discriminatory or protective effect.

  "That is not true of a system like the one at issue in the main proceedings. … Although the system embodies no formal distinction based on the origin of products it manifestly exhibits discriminatory or protective features contrary to Article 95, since the power rating determining liability to the special tax has been fixed at a level such that only imported cars, in particular from other Member States, are subject to the special tax whereas all cars of domestic manufacture are liable to the distinctly more advantageous differential tax."

  "The resultant additional taxation is liable to cancel out the advantages which certain cars imported from other Member States might have in consumers' eyes over comparable cars of domestic manufacture, particularly since the special tax continues to be payable for several years. In that respect the special tax reduces the amount of competition to which cars of domestic manufacture are subject and hence is contrary to the principle of neutrality with which domestic taxation must comply."

- C-47/88 – **Commission vs. Denmark** (1990). 8 pages. Denmark has no domestic production to protect so a comparative/non-discriminatory analysis does not apply. In this case the court has applied Article 34 instead, prohibiting quantitative restitution to imports on the theory that a very high tax on imported new cars may still have the effect of restricting importation of new cars even if not discriminatory or protective.

  The Commission brought this action against Denmark, claiming that the Danish registration duty levied on new motor vehicles is incompatible with Article 95 of the Treaty. Because of its very high level and in the absence of domestic production, it compromises the free movement of goods in the common market and does not form part of the framework of the general system of taxation in Denmark. The Commission argues that the fact that Denmark does not manufacture a given product does not preclude the application of the principles laid down in Article 95.

  The Court however concludes that Article 95 only comes into play when imported goods are being treated differently from domestic goods. Where there are no domestic goods to compare the imported goods to, there is no violation of Article 95.

  However this only applies to new vehicles. For used vehicles there is a domestic market and the Danish system charges a higher tax on imported used vehicles than for vehicles bought domestically on the Danish market. Denmark objects and says all of its used vehicles are actually from foreign manufacturers. The court disagrees. The fact that there is no Danish production of motor vehicles does not signify that Denmark has no used-vehicle market. A product becomes a domestic product as soon as it has been imported and placed on the market. Imported used cars and those bought locally constitute similar or competing products. Article 95 therefore applies to the registration duty charged on the importation of used cars.

  The court concludes that the Danish system of assessing the value of imported used cars at 90% of their original purchase value when no such assessment rate applies to domestic used cars, is a discriminatory tax on imported used cars.

- C-196/04 – **Cadbury Schweppes et al v. Commissioners of Inland Revenue** (2006). 7 pages. [Note: the following summary comes in part from this summary at the ec.europa site: http://ec.europa.eu/dgs/legal_service/arrets/04c196_en.pdf] Taxation – Freedom of establishment – Legislation on controlled foreign companies – Inclusion of the profits of controlled foreign companies in the tax base of a parent company. The legislation on 'controlled foreign companies' (CFCs) in force in the United Kingdom at the material time provided for the inclusion, under certain conditions, of the profits of subsidiaries established outside the United Kingdom in which a resident company has a controlling holding. The United Kingdom tax authorities thus claimed from the parent company of the Cadbury Schweppes group, established in the United Kingdom, corporation tax on the profits made by one of the subsidiaries of the group established in Ireland, where the tax rate was lower. The Court was asked to consider whether this legislation was compatible with the provisions of the Treaty on freedom of establishment (Articles 43 and 48 EC).

  The Court recalled that companies or persons could not improperly or fraudulently take advantage of provisions of Community law. However, the fact that a company has been established in a Member State for the purpose of benefiting from more favourable legislation does not in itself suffice to constitute abuse of the freedom of establishment and does not deprive Cadbury Schweppes of the right to rely on Community law.

  The Court then analysed the legislation in terms of freedom of establishment. According to settled case-law, although direct taxation falls within the competence of the Member States, they must nonetheless exercise that competence consistently with Community law. The Court noticed the difference in the treatment of resident companies depending on whether the CFC legislation was or was not applicable: in the first instance the company is taxed on the profits of another legal person, whereas this is not the case in the latter instance (that is, when a resident company has a subsidiary taxed in the United Kingdom or a subsidiary established in another Member State where the tax rate is higher than in the United Kingdom). The Court noted that the separate tax treatment is such as to hinder the exercise of freedom of establishment, dissuading a resident company from establishing, acquiring or maintaining a subsidiary in a Member State with a lower tax rate.

The Court pointed out that a national measure restricting freedom of establishment may be justified only where it specifically relates to wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned and does not go beyond what is necessary to achieve that purpose. In order to find that there is such an arrangement there must be, in addition to a subjective element, objective and ascertainable evidence – with regard, in particular, to the extent to which the CFC physically exists in terms of premises, staff and equipment – that the incorporation of this subsidiary does not reflect economic reality, that is to say it is not an actual establishment intended to carry on genuine economic activities in the host Member State. The tests conducted under the national legislation must incorporate these factors if they are to be compatible with Community law.

"Accordingly such a tax measure may not be applied where it is proven, on the basis of objective factors which are ascertainable by third parties, that despite the existence of tax motives [the] controlled company is actually established in the host Member State and carries on genuine economic activities there."

- C-319/02 – **Maninen v. Finland** (2004). 7 pages. Mr. Maninen is challenging the taxation of dividends under Finnish law, claiming it violates Community law, including the free movement of capital under article 56(1). He is fully taxable in Finland and holds shares in a Swedish company quoted on the Swedish Stock Exchange. The profits distributed by the Swedish company in the form of dividends have already borne corporation tax in Sweden. Since dividends distributed by foreign companies to Finnish taxpayers confer no entitlement to a tax credit in Finland, they are subject to income tax on revenue from capital at the rate of 29%. A Nordic tax treaty permits some reimbursement to avoid double taxation, but not the full 29% levied on Mr. Maninen. It is undisputed that the Finnish tax system creates a financial disadvantage for fully taxable persons in Finland who receive dividends from companies established in other Member States. It is also undisputed that the Nordic Tax Treaty does not fully prevent this double taxation problem.

  "It follows that the Finnish tax legislation has the effect of deterring fully taxable persons in Finland from investing their capital in companies established in another Member State. … It follows from the above that legislation such as that at issue … constitutes a restriction on the free movement of capital which is, in principle, prohibited by Article 56 EC." The Court then examined whether there was anything that would justify the difference in treatment. It concluded there was not. Therefore this legislation is precluded by articles 56 and 58 EC.

- C-9/02 – **de Lasteyrie du Saillant v. Ministere de l'Economomie** (2004). 10 pages. The principle of freedom of establishment laid down by Article 52 of the EC Treaty (now, after amendment, Article 43 EC) must be interpreted as precluding a Member State from establishing, in order to prevent a risk of tax avoidance, a mechanism for taxing as yet unrealised increases in value such as that laid down by Article 167a of the French Code Général des Impôts, where a taxpayer transfers his tax residence outside that State. France's tax legislation allowed it to tax the unrealized increase in the value of Mr. De Lasteryrie's securities because he was transferring his residence from France to Belgium. He owned shares in a French company. The shares were now worth more than the price when he had bought them. Mr. De Lasteyrie challenged the tax and the French court referred the matter to the ECJ on the issue of whether the principle of freedom of establishment under the EU Treaty precluded the French tax.

A taxpayer wishing to transfer his tax residence outside French territory, in exercise of the right guaranteed to him by Article 52 of the Treaty, is subjected to disadvantageous treatment in comparison with a person who maintains his residence in France. That taxpayer becomes liable, simply by reason of such a transfer, to tax on income which has not yet been realised and which he therefore does not have, whereas, if he remained in France, increases in value would become taxable only when, and to the extent that, they were actually realised. That difference in treatment concerning the taxation of increases in value, which is capable of having considerable repercussions on the assets of a taxpayer wishing to transfer his tax residence outside France, is likely to discourage a taxpayer from carrying out such a transfer.

- C-371/10 – **National Grid Indus BV** (2011). 10 pages. [Note: this case also came up under the right to establishment discussed in module 2; this summary is mostly from that discussion.] National Grid is a company incorporated under Netherlands law who was transferring its place of effective management to the UK. The question was, which jurisdiction controlled the taxation of unrealized capital gains in relation to the assets of the company. The Netherlands wanted to impose a final settlement tax on unrealized capital gains; National Grid objected, saying only the UK should be able to tax those gains since they haven't been realized yet.

  Is the UK migration charge contrary to EU law? A Dutch company, relocated its place of effective management from Netherlands to UK. Unrealized foreign exchange gain. Under the tax treaty, National Grid changed residence. Triggered Dutch liability. If a member state makes a final decision, can the taxpayer rely on EU rules? If yes, is it justified? Finally, does it depend on taxing a gain (not a profit)? The Court held that the Dutch company transferring its management to another state could rely on the freedom of establishment in article 49 TFEU. Yes, cash flow disadvantage deters companies from free movement in the market. An exit tax that does not permit payment until gain realized is unfair. Track assets following migration. An exit tax regime that does not take into account subsequent losses, not fair.

  The questions for the Court were

  1. one, if a member state applies a final settlement tax on the transfer of the place of effective management, can the taxpayer rely on Article 49 of the TFEU?
  2. Two, if yes, is a final settlement tax, not permitting the possibility of deferring that tax and without the possibility of taking account of subsequent decreases in value after the transfer of the effective place of management, justified by the necessity of allocating powers of taxation between the member states?
  3. And finally, number three, does the answer depend on whether the final settlement tax is taxing a gain which would not be recognized as a profit in the other state? And by that we mean a currency gain that would not arise in another member state.

The Court held that a Dutch company transferring its effective management to another member state could rely on Article 49. The answer to the second question was also broadly, yes. The Dutch rules place a cash flow disadvantage on National Grid Indus which does not arise if the effective management is relocated within the Netherlands. This deters companies relocating which is a restriction on the freedom of establishment. A glimmer of hope for the taxing authorities arose when the Court stated that such a tax could be justified by the necessity to ensure a balanced allocation of taxing rights between member states. However, this was then measured by the requirement for such a tax to be proportionate.

And the answer to the third question is, no. It does not matter whether the tax is on a gain that would not arise in the receiving state.

In short, the Court found that an exit tax, which does not give the right to defer payment until the gain becomes realized, is not proportionate. The Court recognized that this could give rise to an additional administrative burden as companies and tax authorities would need to track assets following migration. However, it did not consider this to be persuasive argument for not permitting a deferral. The Court did, however, rule that an exit tax regime that does not take into account subsequent decreases in the value of assets, is not as such in breach of the freedom of establishment.

The Court suggested that legislation covering an exit tax should have two options. One, the immediate payment of tax on unrealized gains, and a deferment until the disposal of the asset, that would be potentially with an interest. And two, the amount would be fixed, and the timing could differ.

- C-35/11 – **Test Claimants in the FII Group Litigation (GLO) v. Commissioners of Inland Revenue** etc. (2012). 12 pages. From Wikipedia: ***Test Claimants in the Franked Investment Income Group Litigation v IRC*** [2012] UKSC 19 is an English unjust enrichment law case, concerning liability for overpaid tax, and limitation of claims. Companies in two UK groups, with overseas subsidiaries claimed restitution of advance corporation tax that was in place from 1973 to 1999. It treated dividends received by UK resident companies from non-resident subsidiaries differently to dividends paid and received within wholly UK groups. This was contrary to TEC art 43 on freedom of establishment and TEC art 56 on free movement of capital, and the ECJ said there had to be an effective remedy. The ECJ determined that the tax was unlawful under EU law. The case could result in the UK government having to pay billions, potentially hundreds of billions, of pounds to corporations.

  The case has continued to proceed through the English courts on other issues. Here is part of a report from the KMPG newsletter of January 2015 on the case:

  "This long-running litigation, first heard in the High Court in 2004, reached a further stage on 18 December 2014 with the delivery by Henderson J of his second High Court judgment in the case (*The Test Claimants in the FII Group Litigation v HM Revenue and Customs* [2014] EWHC 4302 (Ch)).

  The first, handed down on 27 November 2008 following a reference to the European Court of Justice (ECJ), established that the claimants could seek restitution in respect of corporation tax and advance corporation tax (ACT) levied in breach of EU law arising from the Case V charge on dividends, the ACT regime and the foreign income dividends (FID) regime. This was subject to certain limitation questions and to possible defences by HM Revenue & Customs (HMRC) including that of change of position. This first judgment was followed by appeals on various issues to the Court of Appeal and Supreme Court and a further reference to the ECJ. Once these had run their course, the case came back to Henderson J to consider the remaining issues of quantification and liability. In the meantime many of the same issues had been addressed by the same judge in *Prudential Assurance Co Ltd and Another v HMRC*, the important difference being that the *Prudential* case related to portfolio dividends (holdings of less than 10 percent of the share capital), to which the EU principle of free movement of capital is most relevant, whereas the *FII Group Litigation* case deals with dividends on larger holdings which fall to be considered in relation to the principle of freedom of establishment.

Henderson J's latest judgment runs to 471 paragraphs and addresses 29 separate issues which fall into a number of separate groups."