

EU DIRECT TAX OPTION

ADIT



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EU Direct Tax option

What you'll cover and what you'll gain

The EU Direct Tax module is one of fourteen elective modules available to ADIT students. Introduced on ADIT's launch in 2004, this module appeals to professionals with an interest in European tax law as it relates to the direct taxation of companies and individuals, and provides a portable benchmark of expertise in the institutions, concepts and case law underpinning EU tax law.

What you'll cover

The EU Direct Tax module examines the impact of European Union Law on all aspects of direct taxation for all Member States. Key topics include:

- The background to EU law in the Treaties
- The role of the various EU institutions, and the jurisprudence of the ECJ relating to direct taxation
- The harmonisation of direct taxes, and administrative co-operation between revenue authorities in Europe
- Taxpayer protection
- The State Aid rules
- The future directions of EU tax law

What you'll gain

- A thorough grounding in the application of EU law on matters relating to direct taxation
- A robust understanding of theory coupled with practical application, giving you the confidence to apply these principles to your daily work
- Up to date knowledge of fast-changing developments in tax law, as exams are regularly updated to cover current tax laws and emerging trends

EU Direct Tax option

Syllabus

I	The institutional background	17.5%
II	Historical overview of the development of EU tax law from the 1950s to the present time	5%
III	The harmonisation of direct taxes	12.5%
IV	The tax jurisprudence of the ECJ relating to direct taxation	25%
V	Administrative co-operation between revenue authorities in Europe	5%
VI	Taxpayer protection within Europe	12.5%
VII	The EU and international tax law	12.5%
VIII	The state aid rules and taxation	5%
IX	The future direction of EU tax law	5%

I The institutional background

A	The provisions of the Treaties establishing the European Community and European Union which are relevant to taxation	1
B	The EU Institutions relevant to taxation: role of the Commission, the Council and the European Court of Justice (ECJ)	1
C	The hierarchy of EU and national tax regimes: possible approaches and implications for taxation	1

II Historical overview of the development of EU tax law from the 1950s to the present time

1

III The harmonisation of direct taxes

A	The basis in the Treaties	2
B	Historical outline of developments with regard to direct taxation	2
C	Measures adopted on direct tax harmonisation: the direct tax Directives	2

IV The jurisprudence of the ECJ relating to direct taxation

A	The concept of discrimination	3
B	The concept of restriction	3
C	The notion of comparability	3
D	Justifications	3
E	The principle of proportionality	3
F	The relationship with non-member countries	3

V Administrative co-operation between revenue authorities in Europe

A	Arrangements for administrative assistance in Europe: the Mutual Assistance Directives; the Mutual Assistance in Recovery of Duties (MARD) Directive	2
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VI Taxpayer protection within Europe

A	The European Convention on Human Rights and taxation	2
B	The link between the Convention and EU law	2
C	General principles of European Union law and their application to taxpayers	2

VII The EU and international tax law

A	The EU and Double Taxation Conventions (including the relevant jurisprudence of the ECJ)	2
B	The EU and the principles of international taxation	2
C	The EU and international tax avoidance and evasion	2

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Syllabus

VIII The State Aid rules and taxation

A	The application of the State Aid rules to taxation, with particular reference to the decisions of the ECJ	2
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IX The future directions of EU tax law

A	Current developments (including Environmental Taxes, European Monetary Union and Taxation)	2
B	Future policy directions	1

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Recommended ways to prepare for the exam

Course Provision

There are study options to suit everyone, from classroom learning to self-study. Whatever your preference, you'll find a method and providers that work for you. Find out more at www.adit.org.uk/courses

There is an excellent compilation of materials on EU Tax Law:

Van Raad, K. *Materials on International, TP and EU Tax Law 2018-2019*. Volumes C1 and C2 (Leiden: International Tax Centre, 2018)

Candidates may take a copy of this text into the examination.

Candidates with a 2016-2017 edition may instead take Volume C of the earlier edition into the examination. Candidates with a 2014-2015 or 2015-2016 edition may instead take Volume 3 of the earlier edition into the examination. Candidates with a pre-2014 edition may instead take Volume 2 of the earlier edition into the examination.

Available from the International Tax Centre at Leiden University:

www.itc-leiden.nl or b.bosman@itc-leiden.nl

Or available from Wildy & Sons: www.wildy.com

In addition, the following list of cases from the European Court of Justice database will be of interest to candidates:

https://ec.europa.eu/taxation_customs/sites/taxation/files/20171116_court_cases_direct_taxation_en.pdf

Books

There are several good books that cover the subject matter of this course. You should choose from the following.

HJ Panayi, C. *European Union Corporate Tax Law* (Cambridge: Cambridge University Press, 2013) [ISBN: 9781107018990]

Available from Amazon: www.amazon.co.uk

O'Shea, T. *EU Tax Law and Double Tax Conventions* (London: Avoir Fiscal Ltd, 2008) [ISBN: 9780955916403] £50 student price available for registered ADIT students quoting their student registration number.

Available from Avoir Fiscal:

avoirfiscal@live.co.uk

Or available from Waterstone's: www.waterstones.com

Terra, B. and Wattel, P. *European Tax Law* (Kluwer, 7th edition, 2017) [ISBN: 9789013133592].

Available from Amazon: www.amazon.co.uk

Periodicals

Bulletin of the International Bureau of Fiscal Documentation (Amsterdam: IBFD) [ISSN: 00074624]
Available from IBFD: www.ibfd.org

EC Tax Journal (Key Haven Publications) [ISSN: 13501089]
Available from Key Haven Publications:
www.khplc.co.uk

EC Tax Review (New York: Kluwer Law International) [ISBN: 9789880007408]
Published together with Intertax.
Available from Kluwer Law International:
www.kluwerlawonline.com

European Taxation (Amsterdam: IBFD) [ISSN: 00143138].
Also known as ET.
Available from IBFD: www.ibfd.org

Highlights and Insights on European Taxation (Deventer: Kluwer Law International) [ISSN: 10134764]
Available from Kluwer Law International:
<http://shop.kluwer.nl>

Tax Notes International (Tax Analysts) [ISSN: 10483306]
Available from LexisNexis: www.lexisnexis.co.uk
Also available from Tax Analysts: www.taxanalysts.com

EU Direct Tax option

Recommended ways to prepare for the exam

Case Reports

Candidates should regularly check the European Court of Justice database for new tax cases:

<http://curia.europa.eu/juris/recherche.jsf?language=en>

European Commission Taxation and Customs Union:

http://ec.europa.eu/taxation_customs/index_en.htm

EU Direct Tax option

June 2017 examination questions

Transparent and accessible past papers

Real questions and answers from previous exams are available to ADIT students to help with their study. Practice with previous exams helps students become familiar with the format of the exam, identify areas for further study and focus on exam technique.

Other papers available

PRINCIPLES OF INTERNATIONAL TAXATION	
AUSTRALIA	IRELAND
BRAZIL	MALTA
CHINA	SINGAPORE
CYPRUS	TRANSFER PRICING
EU DIRECT TAX	UNITED KINGDOM
EU VAT	UNITED STATES
HONG KONG	UPSTREAM OIL & GAS
INDIA	

THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

June 2017

PAPER 3.01 – EU DIRECT TAX OPTION

ADVANCED INTERNATIONAL TAXATION (THEMATIC)

TIME ALLOWED – 3¼ HOURS

This paper has **three** parts: **Part A**, **Part B** and **Part C**.

You need to answer **five** questions in total.

You must answer:

- **Both** questions in **Part A** (25 marks each)
- **One** question from **Part B** (20 marks)
- **Two** questions from **Part C** (15 marks each)

Further instructions

- All workings should be made to the nearest month and in appropriate monetary currency, unless otherwise stated.
- Start each answer on a new page and clearly indicate which question you are answering. If you are using the on-screen method to complete your exam, you must provide appropriate line breaks between each question, and clearly indicate the start of each new question using the formatting tools available.
- Marks may be allocated for presentation.
- The time you spend answering questions should correspond broadly to the number of marks available for that question. You should therefore aim to spend approximately half of your time answering Part A, and the other half answering Parts B and C.
- The first 15 minutes of the exam consists of reading time. You will be allowed to annotate the question paper during this time; however, you will **not** be permitted to start writing or typing your answer, or use a calculator. The Presiding Officer will inform you when you can start answering the questions.

For your information this paper is accompanied by:

- **Council Directive (EU) 2016/1164: the Anti Tax Avoidance Directive**

PART A

You are required to answer BOTH questions from this Part.

1. **Explain the functioning of the standstill provision (Article 64 TFEU), in relation to the free movement of capital (Article 63 TFEU). You should use Court of Justice of the European Union (CJEU) cases to illustrate your answer.** (25)

2. Automotive Engineering is a company established in Carixia, an EU member state. Automotive Holding is resident in Switzerland and holds all shares in Automotive Engineering.

In order to establish a new factory, Automotive Engineering has borrowed €50 million from Automotive Holding and repays the loan with an arm's length interest amount to Automotive Holding. Under the tax laws of Carixia, interest payments are not tax deductible if a loan has been received from a non-resident shareholder with a majority participation.

Can Automotive Engineering successfully rely on EU law, in order to claim a tax deduction in relation to the interest payments? You should use Court of Justice of the European Union (CJEU) cases to illustrate your answer. (25)

PART B

You are required to answer ONE question from this Part.

3. According to the case law of the Court of Justice of the European Union (CJEU), the need to safeguard the cohesion of a tax system may justify measures which impact upon the fundamental freedoms of the Treaty on the Functioning of the European Union (TFEU).

Using Court of Justice of the European Union (CJEU) case law, explain the situations in which this justification may apply on matters of taxation. (20)

4. Since 2009, nationals of EU member states hold EU citizenship (Articles 9 TEU and 20 TFEU) and can exercise specific rights as EU citizens (see, for example, Articles 10 TEU and 21 TFEU).

Explain the relevance of this development for taxation matters. You should use Court of Justice of the European Union (CJEU) cases to illustrate your answer. (20)

PART C

You are required to answer TWO questions from this Part.

5. Tribertia, an EU member state, wishes to have the most competitive economy in the EU. In order to encourage the creation of groups of companies, Tribertia allows parent companies to deduct interest payments on loans in connection to the acquisition and establishing of domestic subsidiary companies. By contrast, interest payments related to the acquisition of non-resident subsidiary companies are not tax deductible, since these non-resident subsidiaries do not contribute to the generation of domestic income.

Explain whether these tax arrangements are in accordance with EU law. You should use Court of Justice of the European Union (CJEU) cases to illustrate your answer. (15)

6. Until recently, Julia was a resident of Wisperia, an EU member state, where she worked as an employee in a bookshop. During the period of her employment, Julia's employer withheld wage tax on her salary.

On 1 October 2016, Julia emigrated to EU Member State Z. In March 2017, Julia filed an income tax return in Wisperia and requested a partial refund of her wage tax, on the basis that she was entitled to a specific tax deduction. However, the Wisperia Tax Authority has refused to grant the refund as, under Wisperian law, refunds can only be granted to taxpayers who have resided in Wisperia for the entire year.

Explain, on the basis of the case law of the Court of Justice of the European Union (CJEU), whether the applicable tax law of Wisperia is compatible with EU law. (15)

7. In July 2016, in order to combat tax avoidance by companies, EU member states adopted the Anti-Tax Avoidance Directive. One of the arrangements of this Directive concerns exit taxation. From 2020, in order to combat tax avoidance, all EU member states are obliged to apply an exit tax on assets in situations where a company transfers its place of residence to another member state. EU member states are allowed to collect the exit tax in five annual installments, and to charge interest due to the deferred tax collection.

The legislature of Member State D has passed legislation which will implement the above exit tax provisions from the Anti-Tax Avoidance Directive from 1 January 2021, without retroactive application to 2020. However, Member State D's tax administration seeks to impose exit taxes from 1 January 2020 in order to comply with the Directive. Can the tax administration rely on the Anti-Tax Avoidance Directive in order to impose exit taxes in 2020? (15)

8. Mr Johnson lives in Taranta, an EU member state. He wishes to donate money to an established international charity, in both Taranta and another EU member state. Under the law of Taranta, only donations to resident non-governmental organisations are tax deductible.

Does this aspect of Tarantan law comply with EU law? You should use Court of Justice of the European Union (CJEU) cases to illustrate your answer. (15)

9. Company A and Company B are residents of two different EU member states. Company A wishes to transfer a commercial building to Company B. However, if Company A sells the building, Company B will be required to pay real estate transfer tax amounting to 4% of the market value of the building. This tax is not due in the event of a merger between both companies. For this reason, the companies have chosen to merge.

Can the tax administration concerned apply the anti-abuse provision of the Merger Directive, in the event of a merger between Company A and Company B? (15)

THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

June 2017

PAPER 3.01 – EU DIRECT TAX OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

Standstill is exception to free movement of capital.

Means that discriminating and restricting rules can continue to be applied.

Only applies in relation to third countries.

Only applies to certain types of capital movement, the categories as mentioned in art. 64. A.o: direct investments: aimed at establishing lasting and direct links between shareholder and company, C-194/06 Orange Smallcap.

Only applies to rules already existing at ultimo 1993 (certain states: ultimo 1999).

Rules that were changed after 1993 are considered 'already existing' if they they are substantially identical or if the discrimination/restriction has been limited. See cases such as C-446/04 (Test Claimants FII GLO) or C-302/97 (Konle).

Question 2

This restriction involves both the freedom of establishment (Baars: majority shareholding) and the free movement of capital (a loan).

The tax law of Carixia discourages companies to take a loan from foreign majority shareholders. This constitutes a restriction a the free market. The case is similar to Lankhorst-Hohorst, C-324/00 and to Lasertec C-492/04 (and Thin Cap GLO). The ECJ ruled that a difference on interest deduction based on the place of residence of the parent company infringes the freedom of establishment.

The freedom of establishment, does, however, not apply to a parent company established in Switzerland. Therefore, in this case the rule does not infringe the freedom of establishment. To the extent that it also affect the free movement of capital: this is only an unavoidable consequence of the exercise of the freedom of establishment. Therefore, the free movement of capital is only secondary. Furthermore, the interest limitation targets majority shareholdings, therefore to situations of establishment (for that reason, the present case differs from Itelcar, C-282/12 and FII GLO). Therefore, the rule cannot be examined under the free movement of capital.

Finally, the Interest & Royalty Directive does not apply to a Swiss company, and it does not regard interest deduction (Scheuten Solar).

Conclusion: Automotive Engineering cannot successfully rely on EU law.

PART B

Question 3

The cohesion of the tax system of a Member State can justify a restriction if a tax disadvantage is directly connected with a tax advantage which is based on the objective pursued by the legislation. Often this justification is not accepted by the Court.

Examples from case law are the deductibility of pension or social security premiums on condition that future pensions/payments can be taxed by the same state (Bachmann, C-204/90; Commission/Belgium, C-319/02; Danner case).

Another example is the recapture of PE losses that were temporarily deductible in a situation that PE profits would be tax exempt (Krankenheim)

The justification only applies if the advantage and disadvantage regard:

- The same taxpayer (Bosal Holding);
- The same type of tax

Furthermore there must be a direct link between advantage and disadvantage (Welte, C-181/12; Deutsche Shell).

It is not possible to rely on this justification if the cohesion was already given up under a treaty (Wielockx, C-80/94)

Question 4

Before 2009, EU nationals could only rely on the treaty freedoms in respect of cross-border economic activities. In non-economic cases, any tax obstacles were simply allowed under EU law (Werner case).

The citizenship rights extended the rights to non-economic activities, such as the right to travel and reside within the EU (example: Pusa case).

Also the non-discrimination provision has been extended to discrimination on other grounds than nationality.

And also the EU Charter of Human rights grants rights to taxpayers.

PART C

Question 5

This rule hampers the acquisition of subsidiary companies in other Member States: it is less attractive than establishing domestic subsidiary companies.

The rule restricts the freedom of establishment (art. 49 TFEU; Baars criterion: majority shares).

This rule cannot be justified.

Identical to the Bosal Holding case or Keller Holding C-471/04.

Certain students examined whether the case involved State Aid in favor of national groups. The question is whether companies receive any advantage. Deduction of costs (interest) as such is not an advantage: it is in line with the general rule that costs are in principle deductible. Furthermore it could be argued that it is selective, because it favors domestic groups. For a proper analysis of the State Aid criteria, also points were given.

Question 6

Julia emigrated within the EU. It remains unclear for what reason (as employee?), but in any case she has (at least) access to the right to move and reside within the EU, art. 21 TFEU.

This right is restricted because of the fact that she didn't live all year in Wisperia. The restriction regards purely procedural grounds: the fact that she had not lived on year in Wisperia. It is not clear what kind of deductions it regards (related to source of income or to personal/family circumstances).

In Biehl (C-175/88), the ECJ has ruled that such procedural restrictions infringe the effectiveness of EU law.

Alternative answer

Applicable freedom: see above.

Most students assume that the case regards the deductions for costs regarding her personal or family circumstances, and they discuss the Schumacker-doctrine. In that situation, Wisperia should grant her the personal/family benefits if she earned almost all her income in that State and not sufficient in her new home state to use such deductions.

This must be examined on a full-years-basis, so on the basis of her income during the entire calendar year (Kieback).

Question 7

This regards the implementation of Directives. As such Directives do not have direct effect. However, if they have not been implemented within the existing deadline, taxpayers may rely directly on the Directive to the extent that its provisions are sufficiently clear and grant rights to taxpayers.

This does not apply to the Tax Administration (the State): it can only rely on the national laws implementing the Directive; it cannot directly invoke a Directive which has not been implemented in time against taxpayers.

Question 8

Donations are subject to the free movement of capital.

The tax laws discourage to make donations to foreign charities and restrict as such this freedom. There is no justification applicable.

The ECJ has ruled so in cases like Persche.

However, each state is allowed to formulate its own rules regarding deductions of donations and its criteria in order to be recognized as qualifying charity.

Question 9

In principle, if there are no valid commercial reasons except saving real estate transfer tax, than the assumption of tax avoidance may apply.

However, in *Zwijnenburg*, C-352/08, the ECJ has ruled that the anti-avoidance rule of art. 15 Merger Directive does not apply in case of the avoidance of real estate transfer tax.

In general, the anti-avoidance provision does not apply to taxes for which the Directive does not grant any relief.

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Leadership

An Academic Board of leading international tax academics is responsible for overseeing and evaluating the technical content and rigour of the ADIT designation, to ensure the highest standard of assessment.

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Dr Zhu Qing
Prof. Luís Eduardo Schoueri
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Prof. Dr Kees Van Raad
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Please visit www.adit.org.uk/academicboard for more information.

For further information or if you have a question you would like to discuss, please contact us:

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