Answer-to-Question- 1

According to Article 26 of the Treaty on the Functioning of the European Union (TFEU), the Union shall adopt measures with the aim of establishing the functioning of the internal market (paragraph 1).

Paragraph 2 of the Article 26 establishes that the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.

The free movement of capital is established under the Article 63 of the TFEU which prohibits all the restrictions on the movement of capital between Member States and between Member States (MSs) and third countries. The free movement of capital is the only fundamental freedom able to be applied to third countries (non-Member countries)(paragraph 1). Paragraph 2 refers to the restrictions on payments between MSs and third countries which shall also be prohibited.

Although the TFEU do not provide a definition for the concept of direct investment and "movement of capital", it is settled case law that the Annex 1 of the Directive 88/361/EEC of 24 June 1988 shall be used to define the nomenclature of the capital movements as set out therein (e.g. Holbock case).

The Article 64 of TFEU provide an exception to the prohibition of restrictions on the movement of capital between Member States and non-member states countries as laid down in Article 63. Paragraph 1 establishes that Article 63 shall be without prejudice to the application to third countries of any restrictions which existed on 31 December 1993 under national or Union Law adopted in respect of the movement of capital to or from third countries involving direct investment (including in real estate) establishment, the provision of financial services or the admission of securities to capital markets. In respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date shall be 31 December 1999.

This exception is commonly known as "standstill provision" and it states that a Member State may, in its relations with non-member states (i.e. third countries), apply restrictions on capital movements which come within the substance of that provision (paragraph 1 Article 64) even though they contravene the principle of the free movement of capital laid down under the Article 63 TFEU, provided that those restrictions already existed on 31 December 1993 (or 1999 for specific cases).

The landmark case on the standstill provision is the Holbock case (C-157/05) which considered the application of the standstill provision regarding the Austrian taxation of dividends received from an enterprise in a non-member country.

Although, on that regards, the CJEU held that the standstill provision should be interpreted strictly and affirmed that any national measure adopted after a date thus fixed is not, by that fact alone, automatically excluded from the derogation laid down in the community measure in question. The court held that a provision which is, in substance, identical to the previous legislation, or limited to reducing or eliminating an obstacle to the exercise of the Community rights and freedoms in the earlier legislation, will be covered by the derogation. By contrast, the Court held that legislation based on an approach which differs from that of the previous law and establishes new procedures cannot be treated as legislation existing at the date fixed in the Article 63 (1).

Following the same approach and interpretation, the case Konle (paragraphs 52 and 53) and Test Claimants in the FII Group Litigation (paragraph 192).

In light of the above, in the Holbock case the court looked at the changes/ amendments introduced to the restrictive measures after 1993 and concluded that the amendments to the legislation made after 31 December 1993 did not change the legal framework applicable to the facts under analysis (including in respect of the period after that date) and therefore held that the restrictions on the movement of capital existed before December 1991 and could be considered under the scope of the exception provided under the Article 64 (1) - the standstill provision.

In the same line with the mentioned case law, the CJEU specifically held in paragraph 38 of Welte case that "while the fundamental freedoms recognised by the Treaty should be interpreted broadly, derogations from such a freedom must be interpreted strictly". In particular, in the paragraph 29 the CJEU held that Article 64(1) in so far as it is an exception to the fundamental freedom of movement of capital must be interpreted strictly (by analogy Eckelkamp and others (paragraph 57).

Question 2

The case under analysis refers to the situation where an enterprise established in a Member State pays interest to its holding company (100%) which is established in a different Member State. The tax law of the State of the borrowing company do not allow the deduction of the interest expenses paid under a loan agreement with a non-resident entity when the majority of its capital is owned by the non-resident lender.

The description of the facts do not clarify if interest payments are tax deductible in the case where the loan is received from a resident shareholder of Carixia with the same shareholding or not.

Free movement of capital or freedom of establishment?

As regards the determination of the fundamental freedom in question in such case, it should be noted that financial loans and credits granted by non-residents to residents constitute movements of capital for the purposes of the Article 63 TFEU as has been set under the nomenclature set out in Annex I of the Directive 88/361/EEC.

Although, as noted in the facts it seems that the Carixia rules at issue constitute a regime based on the existence of "special relations" and "majority of participation" arising from the fact that the lending entity has the power to exert, directly or indirectly, significant influence over the management and financing decisions of the borrowing entity this measures should be analysed in the light of the freedom of establishment. On this regard should be noted the discussion held on Baars case and Verkooijen case.

In particular, the Court held in Baars that a 100% holding in the capital of a company having its seat in another Member State undoubtedly brings such a taxpayer within the scope of the application of the Treaty provision on the freedom of establishment as such holding confers on the shareholder a definite influence over the company's decisions and allows him to determine its activities (which is always self evidently the case wherever there is a 100% holding).

Therefore, the current case should be considered under the freedom of establishment. The freedom of establishment is established under the Article 49 of the TFEU. Even though article 49 according to its terms, aimed particularly at ensuring that foreign nationals are treated in the host member states in the same way as nationals of that state, it also prohibits the member state of origin from hindering the establishment in another member state of one of its own nationals. However, the freedom of establishment does not apply to transactions carried out, as in our case,

with an entity established in a non-member state.

Therefore, as held by the CJEU in the Itelcar case regarding a similar situation concerning a partial non-deducibility of interest paid to a company established in a third country, since the treaty chapter on freedom of establishment does not contain any provision which extends the application of its provisions to situations concerning the establishment of a company of a member state in a non-member country or the establishment of a company of a non-member country in a Member state, such legislation cannot fall in the scope of article 49 TFEU (also Test claimants in the FII Group Litigation (2012))(paragraph 16).

Therefore, the Court has held that, where it is apparent from the purpose of such national measure that it can apply only to those shareholdings (majority shareholding) which enable the holder to exert a definite influence on the decisions of the company concerned and to determine its activities, neither Article 49 (Freedom of Establishment) nor Article 63 (Free movement of capital) may be relied upon (paragraph 17 Itelcar case). On this regards, also the opinion of the CJEU in C-35/11 Test Claimants in the FII Group Litigation paragraph 98 on the tax treatment of dividends which was considered by analogy by the CJEU in the Itelcar case regarding interest payments.

In light of the above, the measures under analysis (Carixia tax treatment) would not fall within the scope of article 49 or article 63 of the TFEU as it seems that they concern only to situations in which the lending company's shareholding in the resident borrowing company enabled it to exert a definite influence over the latter.

So far as concerns the rule under analysis the term "majority participation" only relates to situations in which the lending company of a non-member country exerts a definite influence with the meaning of the above mentioned case law of the CJEU, over the resident borrowing company by reason of its shareholding in that company.

Therefore, Automotive Engineering could not rely successfully on the EU Law in this case as the case could not be examined neither under the free movement of capital nor freedom of establishment in this case.

Question 3

Whether a national provision is considered to be a prohibited restriction on the fundamental freedoms under the EU law, such restrictions may be permissible only if justified by overriding reasons of public interest. It is further necessary, in such 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 (principle of proportionality). This is clear in the settled case law, such as Futura Participations case, Singer case, De Lasteyrue du Saillant case and Marks & Spencer case.

The situation under analysis refers to the situation where the restriction entailed by a national tax legislation can be justified by the need to preserve the coherence of the tax system.

The landmark case for this justification on the need to preserve the coherence of the tax system is the Bachmann and C-300/90 Commission v Belgium.

As regards to the need to preserve the cohesion of the tax system, the Court held in its judgment delivered in Case C-300/90 Commission v Belgium that there exists under the Belgian rules a connection between the deducibility of contributions and the liability to tax sums payable by the insurers under pension and life assurance contracts. It follows that in such a tax system the loss of revenue resulting from the deduction of life assurance contributions from total taxable income is offset by the taxation of pensions, annuities or capital sums payable by the insurers. Where such contributions have not been deducted, those sums are exempted from tax. (Bachmann case paragraph 22).

In light of the mentioned case law, we can conclude that the cohesion of a tax system, the formulation of which is a matter for each member state, therefore presupposes that, in the event of a State being obliged to allow the deduction of a life insurance contributions paid in another Member State, it should be able to tax sums payable by insurers.

Therefore, such justification to succeed , a direct link must be established, according to settled case law, between the tax advantage concerned and the compensating of that advantage by a particular tax levy, with the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question.

Relevant case law regarding the analysis of the justification on basis of the need to preserve the

coherence of the tax system is (in addition to the mentioned above): Commission v Denmark C-150/04, Commission v Belgium C-296/12, Bosal Holding case, Baars case, Verkooijen case, Danner case, Krankenheim case, Commission v Hungary C-253/09, National Grid case, and others.

Moreover, it is worth to note that where bilateral conventions exist between certain Member States under which a Member State has given up of the cohesion of the tax system, a restrictive measure cannot be relied on the need to preserve the cohesion of the tax system.

In particular, in Bachmaan the Court held that as community law stands at present it is not possible to ensure the cohesion of such a tax system.

Question 8

This situation is similar to the one examined under the case Persche regarding the deduction for tax purposes by a German taxpayer of a gift in kind donated to a body in Portugal recognised as being charitable.

Th deduction for tax purposes of gifts to bodies established and recognised as charitable in another member state come within the compass of the provisions of article 63 TFEU on the free movement of capital even if they are in Kind in the form of everyday consumer goods.

Following the Annex 1 of the Directive 88/361/EEC regarding the deduction for tax purposes it does not matter in order to determine whether the legislation under analysis is covered by the treaty provision on the movement of capital, whether the donation was made in money or in kind.

In order to determine whether the national legislation of Taranta falls within the scope of one or another freedoms of movement, the purpose of the legislation concerned must be taken into consideration (see Persche paragraph 28 and Holbock case paragraph 22).

Therefore, it is sufficient to point out that the national legislation in our case excludes the deduction of donations made to bodies established in other member states irrespective of whether those donations are in money or in kind, and, in the case of donations in kind, of the place of

purchase of the goods donated. The legislation only refers that donations are only tax deductible where made to resident charitable/ non-governmental organisations.

Therefore, the restriction imposed regarding the deduction of the donations made by Mr Johnson to an international charity organisation in another Member State (non-resident) compasses within the provisions of the treaty relating to free movement of capital.

While excluding a tax advantage for donations to bodies established outside of Taranta the measure can have a significant influence on the donor's attitude, the inability in taranta of deducting donations to charity organisations established in another Member States is likely to affect the willingness of Taranta taxpayers to make such donations.

Therefore, such legislation is a restriction on the free movement of capital which is prohibited by the article 63 of TFEU as a rule.

It is true that in accordance with article 65 (1) (a) TFEU, Article 63 is without prejudice to the right of MSs to distinguish in their tax law between taxpayers who are not in the same situation with regard to the place of residence or where their capital is invested.

However, as held in Persche case, it is important to distinguish unequal treatment permitted under such provision from arbitrary discrimination prohibited under Art 65 (3).

Regarding the legislation under analysis which distinguish between national bodies and those established in other MSs, to be regarded as compatible with the treaty on the free movement of capital the difference in treatment must concern situations which are not objectively comparable or it must be justified by an overriding reason in the public interest. In order to be justified moreover the measure must not go beyond what is necessary in order to attain its objectives (principle of proportionality).

Where a body recognised as having a charitable status in one MS satisfies the requirements imposed for that purpose by the law of that MS and where its object is to promote the very same interests of the general public, the authorities of a Member state cannot deny that body the right to equal treatment solely on the ground that it is not established in its territory.

In light of the above, the Taranta's legislation is restrictive and harmed the free movement of

capital as established in Article 63 TFEU which is prohibited. Taranta's law in principle does not comply with EU Law unless it is justified by general interest. Note that in the Persche case the CJEU rejected the justification to prevent reduction of tax revenues.

Question 9

The article 15 of the Mergers Directive estalishes that a Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Article 4 to 14 where it appears that one of the operations referred to in Article 1 (which covers the situation of transfer of assets under certain conditions) in the following situations (paragraph 1):

- has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that the operation is not carried out for valid commercial reasons may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives (Article 15(1)(a)); and
- where results in a company, whether participating in the operation or not, no longer fulfilling the necessary conditions for the representation of employees on company organs according to the arrangements which were in force prior to that operation (Article 15(1)(b)).

In light of the above, and since it is clear that the proposed merger operation will not be carried out for valid commercial reasons such as the restructuring or rationalisation of the activities of the companies participating in the operation but merely for tax avoidance of the real estate transfer tax imposed on Company B, the tax administration concerned would, in principle, have base for applying the anti-abuse provision of the Merger Directive - Article 15.

Consequently, the advantage of exemption regarding any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes under a merger operation that would be applied by the application of the Article 4 of the Merger Directive to the proposed operation could be denied by the tax administration concerned due to the lack of commercial valid reasons for the merger and the the real estate transfer tax be still imposed. A tax savings motivation cannot be considered a valid commercial reason for a merger and therefore would constitute a presumption that the operation had a tax evasion or avoidance principal objective justifying the application of the anti abuse

provision and rejection of the benefits given under the Mergers Directive.