European and International Tax Moot Court Competition - 2006/2007

Memorandum for the applicant
Memorandum for the defendant

Gabriele Paladini
Chiara Pili
Gianmarco Tortora
Gabriella Ambrosino

Coordinamento della ricerca: Alessio Persiani e Federico Rasi

Direzione della ricerca: Giuseppe Melis ed Eugenio Ruggiero

Marzo 2007
Il presente lavoro nasce dalla partecipazione dell’Università Luiss Guido Carli alla European and International Tax Moot Court Competition organizzata dalla European Tax College Foundation di Lovanio.

Si tratta di una competizione che simula un processo, in cui le delegazioni di alcune università europee ed americane si affrontano su uno specifico tema di diritto tributario internazionale e/o comunitario.

Simulando un’udienza dinanzi alla Corte di Giustizia delle Comunità Europee in sede di rinvio preliminare ex art. 234 Trattato CE, le differenti squadre hanno proceduto, in questa edizione, alla redazione di un ricorso per illustrare le posizioni sia della parte ricorrente, sia di quella resistente, in merito alla conformità al diritto comunitario della legislazione di un ipotetico Stato Membro in tema di tassazione di gruppo (c.d. group contribution) che nega l’applicazione di tale regime a società del gruppo residenti in altri Paesi dell’Unione Europea o in Stati terzi.

La parte A del Memorandum for the applicant è stata redatta dalla dott.ssa Chiara Pili, mentre la parte B dello stesso dal dott. Gianmarco Tortora.

La parte A del Memorandum for the defendant è stata redatta dalla sig.na Gabriella Ambrosino, mentre la parte B dello stesso dal dott. Gabriele Paladini.


I lavori sono stati diretti dal Prof. Giuseppe Melis e dal Dott. Eugenio Ruggiero quali team coach della delegazione LUISS.

La delegazione italiana, al termine della fase orale, ha conseguito il premio per il “Best oral team on behalf of the defendant”.

MEMORANDUM FOR THE APPLICANT

TABLE OF CONTENTS

II. Statement of facts ..........................................................................................................................10
III. Issues ...............................................................................................................................................12
IV. Arguments .......................................................................................................................................14
   1. GENERAL REMARKS ON THE METHOD ...............................................................................14
      PART A: VIKLAND LEGISLATION AND THE RIGHT OF ESTABLISHMENT UNDER THE EC TREATY .................................................................16
      2. THE EC TREATY DEFINITION OF THE RIGHT OF ESTABLISHMENT .........................16
      3. APPLICABILITY OF THE RIGHT OF ESTABLISHMENT ..................................................17
         3.1 The restriction to the right of establishment is not justified ............................................19
         3.1.1 Coherence of the national tax system ...........................................................................19
         3.1.2 Prevention of tax evasion ..............................................................................................21
         3.1.3 Protection of revenue ..................................................................................................21
         3.1.4 Abuse of law ................................................................................................................21
         3.1.5 The principle of proportionality ....................................................................................22
         3.2 Communication from the commission on the tax treatment of losses in cross-border situations .................................................................................................................................................23
         3.3 Vikland legislation on the Group Contribution regime constitutes a breach of EC Law in relation to the right of establishment within EC territory ..................................................................................................................24
      PART B: STATE OF VIKLAND LEGISLATION AND THE FREE MOVEMENT OF CAPITAL .................................................................................................................................26
      4. THE FREEDOM OF CAPITAL MOVEMENTS UNDER EC LAW .........................................26
      5. APPLICABILITY OF THE FREE MOVEMENT OF CAPITAL BETWEEN RESIDENTS OF MEMBER STATES ....................................................................................................................................................27
         5.1 The restriction of the freedom of capital movement between residents of Member States is not justified ........................................................................................................................................28
         5.1.1 Coherence of the national tax system ...........................................................................28
         5.1.2 Prevention of tax evasion and tax revenue reduction .....................................................29
         5.1.3 The principle of proportionality ....................................................................................30
         5.2. Vikland legislation on the Group Contribution regime constitutes a breach of EC Law in relation to the free movement of capital within EC residents .................................................................................................................................30
      6. THE FREE MOVEMENT OF CAPITAL TOWARDS RESIDENTS OF THIRD STATES...31
         6.1. Applicability of the free movement of capital towards residents of Third States ..........33
         6.2. The restriction of the freedom of capital movement among residents of Third states is not justified ........................................................................................................................................34
         6.2.1. Prevention of tax evasion and tax revenue reduction .....................................................36
         6.2.2 The principle of proportionality ....................................................................................37
         6.3. VIKLAND LEGISLATION ON THE GROUP CONTRIBUTION REGIME
               CONSTITUTES A BREACH OF EC LAW IN RELATION TO THE FREE MOVEMENT OF CAPITAL TOWARDS THIRD COUNTRIES .................................................................................................................................37
      V. Annexes ...............................................................................................................................................39
      VI. List of abbreviations .....................................................................................................................42
I. List of sources........................................................................................................................................44
II. Statement of facts................................................................................................................................48
II. Issues ..................................................................................................................................................50
  The European union law and third states: direct taxation.................................................................51
  Right of establishment and third states ............................................................................................52
  Free movement of capital and third states .......................................................................................52
  Justifications .......................................................................................................................................52
  Proportionality ...................................................................................................................................52
IV. Arguments..........................................................................................................................................53
  1. General remarks on the method ......................................................................................................53
  2. The EU freedoms at issue .............................................................................................................55
  3. Right of Establishment .....................................................................................................................56
  Compatibility with Article 43 and 48 ECT.........................................................................................56
    The interpretation of the freedom .......................................................................................................56
    Non-discrimination principle and “non-comparability” ....................................................................57
    Justifications .....................................................................................................................................59
    Territoriality principle and the allocation of taxing powers ............................................................59
    The cohesion of the tax system .........................................................................................................61
    Double immunity of profits .............................................................................................................62
    Tax avoidance ...................................................................................................................................63
  Proportionality .....................................................................................................................................63
  4. The european union law and third states: direct taxation.............................................................65
  5. Right of establishment and third states ..........................................................................................66
  6. Free movement of capital and third states .....................................................................................67
  7. Justifications .....................................................................................................................................71
    7.1. General remarks ..........................................................................................................................71
    7.2. Arguments concerning the risk of a loss of effective fiscal supervision .................................71
    7.3. Territoriality principle and the balanced allocation of the power to impose taxes between MS ....................................................................................................................................73
  8. Proportionality ...................................................................................................................................77
V. Annexes...............................................................................................................................................80
VI. List of abbreviations ..........................................................................................................................83
European Tax Moot Court Competition 2006/2007

MEMORANDUM FOR THE APPLICANT

Registration number: C/001
I. List of sources

Scholars


HINTSANEN L., and PETTERSSON K. *The Implications of the ECJ Holding the Denial of Finnish Imputation Credits in Cross-Border Situations to Be Incompatible with the EC Treaty in the Manninen Case*, in *European Taxation*, 2006, pag. 130.


STAHL K., *Free movement of capital between Member States and third countries*, *EC Tax Review* 2004, pag. 47


**European Court of Justice jurisprudence**

European Court of Justice, judgement in case C-270/83, *Avoir Fiscal*.
European Court of Justice, judgement in case C-175/88, *Biehl*. 
European Court of Justice, judgement in case C-204/90, Bachmann.
European Court of Justice, judgement in case C-118/96, Safir.
European Court of Justice, judgement in case C-279/93, Schumacker.
European Court of Justice, judgement in case C-107/94, Asscher.
European Court of Justice, judgement in case C-250/95, Futura Participations SA and Singer.
European Court of Justice, judgement in case C-264/96, Imperial Chemical Industries.
European Court of Justice, judgement in case C-311/97, Royal Bank of Scotland.
European Court of Justice, judgement in case C-35/98, Verkooijen.
European Court of Justice, judgement in case C-251/98, Baars.
European Court of Justice, judgement in joined cases C-397/98 and C-410/98, Metallgesellschaft.
European Court of Justice, judgement in case C-324/00, Lankhorst-Hohorst.
European Court of Justice, judgement in case C-168/01, Bosal Holding.
European Court of Justice, judgement in case C-307/97, Saint-Gobain.
European Court of Justice, judgement in case C-319/02, Manninen.
European Court of Justice, judgement in case C-446/03, Marks & Spencer plc v. Halsey.
European Court of Justice, judgement in case C-80/94, Wielockx.
European Court of Justice, judgement in case C-55/98, Bent Vestergaard.
European Court of Justice, judgement in case C-484/93, Svensson and Gustavsson.
European Court of Justice, judgement in case C-471/04, Keller Holding.
European Court of Justice, judgement in case C-436/00, X and Y.
European Court of Justice, judgement in case C-19/92, Kraus.
European Court of Justice, judgement in case C-196/04, Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue.
European Court of Justice, judgement in case C-471/04, Keller Holding.
European Court of Justice, judgement in case C-255/02, Halifax.
European Court of Justice, judgement in case C-9/02, Laysterie du Saillant,
European Court of Justice, joined cases C-358/93 and C-416/93, Criminal proceedings against Aldo Bordessa, Vicente Mari Mellado and Concepción Barbero Maestre.
European Court of Justice, joined cases C-163/94 and C-250/94, Criminal proceedings against Lucas Emilio, Sanz de Lera, Raimundo Diaz Jimenez and Figen Kapanoglu.
European Court of Justice, judgement in case C-315/02 Anneliese Lenz v Finanzlandesdirektion für Tirol.
European Court of Justice, judgement in case C-513/03, *Van Hilten*.

**Opinions of Advocate General**

Opinion of Advocate General Poiades Maduro in case C-446/03, *Marks & Spencer plc v. Halsey*.


Opinion Advocate General Léger in case C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*.

Opinion of Advocate General Kokott, in case C-231/05, *Oy AA*.

Opinion of Advocate General Kokott, in case C-265/04, *Bouanich*.

Opinion of Advocate General Kokott, in case C-319/02, *Manninen*.

Opinion of Advocate General Alber in case C-251/98, *Baars*.

Opinion of Advocate General Poiares Maduro, in case C-255/02, *Halifax*.

Opinion of Advocate General Geelhoed in case C-446/04, *GLO*.

**Communications from the Commission**

II. Statement of facts

HTTCO is a company incorporated and resident for tax purposes in Cheesland (which is not a Member State of EU, EEA, EFTA). HTTCO is publicly quoted on the Cheesland stock exchange and operates as the ultimate holding company and headquarter of HTTG (High Tec Tools Group). HTTCO owns a direct and 100% shareholding in BASTILLECO, a Societas Europaea, incorporated and resident for tax purposes in EU Member State of Winland, and in FAIRWAY, a Societas Europaea, incorporated and resident for tax purposes in EU Member State of Emeraland. HTTCO also owns a direct and 100% shareholding in FIBEROPTICS, a Societas Europaea, incorporated and resident for tax purposes in EU Member State of Vikland.

The group furthermore includes PRECISIONMATERIALS, a Societas Europaea, incorporated and resident for tax purposes in EU Member State of Vikland. Infact, BASTILLECO owns a direct 50% shareholding in it and FAIRWAY owns the other direct 50% stake.

PRECISIONMATERIALS and FIBEROPTICS were highly profitable in the year 2005 whilst HTTCO, BASTILLECO and FAIRWAY were loss making for corporate income taxes in the same period.

In order to reduce the overall effective tax rate of HTTG, the management decided to claim that under EC law, the 2005 profits of PRECISIONMATERIALS can be contributed to BASTILLECO in Winland (50%) and FAIRWAY in Emeraland (50%); in addition management agreed to claim that according to EC law all the 2005 profits of FIBEROPTICS can be contributed to HTTCO in Cheeseland.

By doing so, all current 2005 corporate income taxes for both Vikland companies were be eliminated, whilst tax losses in BASTILLECO, FAIRWAY and HTTCO were used to offset the transferred profits from Vikland companies.

In 2007, the Vikland tax authorities, when auditing the corporate tax returns, refused the application of the Vikland Group Contribution regime applied by both Vikland companies, because such contribution was not paid to a company resident for tax purposes and subject to corporate income tax in Vikland.
After years of litigation at the level of the tax administration, the case ended up in the competent Vikland Tax Court. PRECISIONMATERIALS and FIBEROPTICS and their direct parents claim that Vikland legislation on the Group Contribution regime is inconsistent with EC law, to the extent that a ‘group contribution’ could only be made to a company which is incorporated and resident for tax purposes in Vikland.

The competent Vikland Tax Court stayed the proceedings and referred a preliminary ruling on the basis of Article 234 EC Treaty to the European Court of Justice in Luxembourg.
III. Issues

The present case involves many juridical questions and topics that can be summarised as follows:

PART A: STATE OF VIKLAND AND THE RIGHT OF ESTABLISHMENT UNDER THE EC TREATY

2. THE EC TREATY DEFINITION OF THE RIGHT OF ESTABLISHMENT
   2.1 The notion of the right of establishment according to Art. 43 of the EC Treaty
   2.2 The scope of application of the right of establishment
   2.3 Direct taxation
   2.4 Definition of “controlling interest”
   2.5 Rule of reason test

3. APPLICABILITY OF THE RIGHT OF ESTABLISHMENT
   3.1 The restriction of the freedom of capital movement between residents of Member States is not justified
      3.1.1 Rule of reason test
         • Coherence of tax systems
         • Prevention of tax evasion and tax revenue reduction
         • Abuse of law
         • Proportionality
   3.2 Communication from the commission on the tax treatment of losses in cross-border situations
   3.3 Vikland legislation on the Group Contribution regime constitutes a breach of EC Law in relation to the right of establishment within EC territory

PART B: STATE OF VIKLAND AND THE FREE MOVEMENT OF CAPITAL

4. THE FREEDOM OF CAPITAL MOVEMENTS UNDER EC LAW
   4.1 Art. 56 EC Treaty
   4.2 Definitions provided by the Annex I of the Second Capital Directive (88/361/EC)
      • The notion of direct investment
4.3 Restrictions to the free movement of capital

5. **Applicability of the Free Movement of Capital between Residents of Member States**

5.1 The restriction of the freedom of capital movement between residents of Member States is not justified

5.1.1 The rule of reason test

- Coherence of tax systems
- Prevention of tax evasion and tax revenue reduction
- Abuse of law
- Proportionality

5.2 Vikland legislation on the Group Contribution regime constitutes a breach of EC Law in relation to the free movement of capital within EC residents

6. **The Free Movement of Capital between Residents of Third States**

6.1. Applicability of the free movement of capital movement among residents of third states is not justified

6.2 The restriction of the freedom of capital movement among residents of third states is not justified:

- Prevention of tax evasion and tax revenue reduction.
- The principle of proportionality

6.3 Vikland legislation on the Group Contribution regime constitutes a breach of EC Law in relation to the free movement of capital towards third countries
1. GENERAL REMARKS ON THE METHOD

1) In order to demonstrate that Vikland legislation, providing a denial of application of the Group Contribution regime to all cross-border situations, breaches the EC Treaty, it is necessary to explain the notion and the scope of application of the right of establishment and of the free movement of capital.

2) With regard to the right of establishment, which is granted only to EU citizens, we will investigate if the Group Contribution regime is equally applicable both to resident and non-resident companies. The question deserves a positive solution: according to the rule of reason test, there is not a sufficient justification for a restriction of the fundamental right of establishment and the only reason for such a restriction is the cross-border dimension of the payment of profits. To the same extent, the legislation of Vikland on the Group Contribution regime does not respect the principle of proportionality, because it provides a restriction to a fundamental freedom which goes far beyond what necessary to protect a national interest, assuming that it exists and it is relevant.

3) With regard to the free movement of capital, we will investigate the relevant operations covered by this freedom, and in particular the meaning of “direct investments” according to EC law.

4) On the basis of the notion of direct investments and, in particular, of “long-term loan” and of “reinvestment of profits”, we will determine if the payment of profits provided by Vikland legislation can fall within the scope of the free movement of capital. Even in this case, the question can have a positive solution and we will demonstrate that the restriction of the free movement of capital between residents of different Member States is not justified. The general method used to affirm the absence of a valid reason for a national restriction is always constituted by the rule of reason test; moreover, the denial of application of the Group Contribution regime is not in line with the proportionality principle.

5) It will be furthermore necessary to extend the applicability of the free movement of capital even to a payment of profits made towards a company resident in a Third State. We will demonstrate that the provisions at issue constitute a breach of EC law even on this point,
because the restriction cannot be justified, on the same grounds of explanation used for the situation regarding an intra-EU contribution of profits.
PART A: VIKLAND LEGISLATION AND THE RIGHT OF ESTABLISHMENT UNDER THE EC TREATY

2. THE EC TREATY DEFINITION OF THE RIGHT OF ESTABLISHMENT

6) The provisions on the right of establishment are stated in Title III, Chapter 2 ECT, regarding the general freedom of movement of persons within the European Community.1

7) The right of establishment applies to all EU citizens, according to art. 43, par. 1, ECT, within the territory of the Community; it has a direct effect and can be invoked by a national of a Member State in front of national courts in order to eliminate unjustified discriminations and restrictions, determined by the application of national provisions.

8) The application and the enforcement of this general freedom, nevertheless, was limited, at a legislative level, by the exclusion of the direct taxation from the purview of the Community.

9) This problem found its solution in the interpretation given by the ECJ: it has stated that the powers retained by the Member States must nevertheless be exercised consistently with Community law 2 and, therefore, any discrimination must be avoided 3.

10) In particular, the Court stated that Member States remain free not only to determine the conception and organization of their tax system but also to allocate between themselves the power of taxation 4. On the other hand, they have to ensure that a taxation scheme takes due account of the consequences which may be determined on the proper functioning of the internal market 5.

---

1 This freedom includes the right to set up and manage undertakings (market access) and the right to equal treatment in the Member State involved (market equality). If, pursuant to Art. 43, par. 2, ECT, the establishment of an undertaking occurs, we have a “primary establishment”, as the citizen, deciding to transfer his economic activity in another EU Member State, loses any bound with the former Member State; if, pursuant to Art. 43, par. 1, ECT a citizen decides to set up an agency, a branch or a subsidiary, we have a “secondary establishment” as a bound with its Member State is maintained. See TERRA B.J.M. - VATTEL P.J., European tax law, The Hague, 2005, p. 48.

2 European Court of Justice, judgement in case C-279/03, Schumacker, par. 21; European Court of Justice, judgement in case C-319/02, Manninen, par. 19; Opinion of Advocate General Poiares Maduro in case C-446/03, Marks & Spencer plc v. Halsey, par. 21.

3 European Court of Justice, judgement in case C-279/03, Schumacker, par. 21 and 29.

4 European Court of Justice, judgement in case C-204/90, Bachmann, par. 23; European Court of Justice, judgement in case C-307/97, Saint-Gobain, par. 57.

5 Opinion of Advocate General Poiares Maduro in case C-446/03, Marks & Spencer plc v. Halsey, par. 51; European Court of Justice, judgement in case C-251/98, Baars, par. 30; European Court of Justice, judgement in case C-107/94, Asscher, par. 42. The Court’s case-law demonstrate that the refusal of a tax advantage may be regarded as a restriction contrary to the Treaty if it appears to be principally associated with the exercise of the right of establishment; European Court of Justice, judgement in case C-319/02, Manninen, par. 49; see also European Court of Justice, judgement in case C-264/96, Imperial Chemical Industries.
11) The European Court of Justice stated 6 that “a difference in treatment between resident subsidiary companies according to the seat of their parent company constitutes an obstacle to the right of establishment which is, in principle, prohibited by Article 43 EC. The tax measure in question in the main proceedings makes it less attractive for companies established in other Member States to exercise right of establishment and they may, in consequence, refrain from acquiring, creating or maintaining a subsidiary in the State which adopts that measure”.

12) In order to investigate when a restrictive national measure is not justified, according to EC law, the jurisprudence of the Court has elaborated the doctrine of unwritten and imperative national interests (s.c. rule of reason test).

13) The rule of reason test consists in three steps:

(i) whether a supposed discriminatory or restrictive measure falls within the scope of a fundamental freedom;

(ii) whether the Member State concerned may invoke a justification;

(iii) whether the principle of proportionality is respected 7.

14) However, the justifications accepted by the Court are limited. Arguments related to lack of harmonization, to compensatory effects resulting from advantages in other areas, to tax treaty obligations, to aims of budgetary or economic policy and to administrative or legislative difficulties have all been rejected by ECJ 8.

15) We are going now to apply the rule of reason criteria at the case at issue, in order to demonstrate that Vikland legislation concerning the tax treatment of the so called Group Contribution regime is not consistent with EC law.

3. APPLICABILITY OF THE RIGHT OF ESTABLISHMENT

16) In the present case, the three companies involved, Bastilleco, Fairway and Precisionmaterials, are all resident within the Community, even if in three different Member States (respectively, Winland, Emeraland and Vikland). According to Artt. 43 and 48 ECT, the right of establishment applies directly to them.

17) In relation to the scope of application of this fundamental freedom, the Court pointed out that a specific situation is covered by the right of establishment “when a national of a Member State

6 European Court of Justice, judgement in case C-324/00, Lankhorst-Hohorst.
has a holding in the capital of a company of another Member State, which gives him a definite influence over company’s decisions [emphasis added]” 9.

18) According to ECJ case-law, the right of establishment applies if the shareholder of the company participates in the management of the business; consequently, the shareholder has to go beyond the mere exercise of his voting rights, strongly influencing the company business decisions. In determining whether such is the case, “regard should be had to the rules of company law in the State in which the undertaking is established [emphasis added]” 10.

19) In the present situation, according to the notion given by Vikland legislation, a relationship of control is fulfilled when a company owns directly at least 50% of the share capital of the other company involved in a Group Contribution regime. This is exactly the situation in the case at issue, between Bastilleco and Precisionmaterials, and, on the other hand, Fairway and Precisionmaterials.

20) Moreover, Bastilleco and Fairway can exercise a definitive and effective influence on Precisionmaterials, because they are part of a group and are directly owned at 100% by the group-holding HTTCo; consequently, it is highly foreseeable that, in such a situation, their decisions concerning Precisionmaterial management will be always in accordance to the business policies of HTTG group.

21) Vikland tax law provides a restriction to the right of establishment, because it is liable to render less attractive the exercise of this fundamental freedom by foreign companies which are resident within the EC territory 11. Vikland Group Contribution regime prohibits the recapture of a fiscal advantage - which is granted to its nationals - in respect to nationals of other Member States that have exercised their right of establishment in Vikland. This constitutes, according to ECJ case-law, a prohibited restriction 12. Consequently, it can be argued that the case at issue falls within the scope of the right of establishment.

---

9 European Court of Justice, judgement in case C-251/98, Baars, par. 22; See also: European Court of Justice, judgement in case C-279/93, Schumacker; European Court of Justice, judgement in case C-264/96, Imperial Chemical Industries; European Court of Justice, judgement in case C-35/98, Verkooijen; European Court of Justice, judgement in case C-324/00, Lankhorst-Hohorst; European Court of Justice, judgement in case C-168/01, Bosal Holding; European Court of Justice, judgement in case C-436/00, X and Y.

10 European Court of Justice, judgement in case C-175/88, Biehl; CORDEWENER A. - DAHLBERG M. - PISTONE P. - REIMER E. - ROMANO C., quot., pag. 218.

11 European Court of Justice, judgement in case C-250/95, Futura Participations SA and Singer; European Court of Justice, judgement in case C-19/92, Kraus, par. 32.

12 European Court of Justice, judgement in case C-251/98, Baars, par. 32.
3.1 The restriction to the right of establishment is not justified

22) According to the aforementioned considerations, the first step 13 of the rule of reason test is fulfilled, so, in order to verify if Vikland Group Contribution regime breaches EC law it is further necessary to demonstrate that the restriction to the right of establishment cannot be justified according to the second and third steps of the rule of reason test.

23) For restrictive tax measures, ECJ generally accepts three justifications: the need to maintain the integrity of the national tax system (fiscal coherence) 14; the need for effective fiscal supervision 15; the need to prevent abuse of law.

3.1.1 Coherence of the national tax system

24) Besides the lack of harmonization in direct taxation within EC law, the Member States can refuse any interference with the internal logic of national tax regimes. Nevertheless, it cannot be accepted that a tax system is arranged in such a way as to favour national situations: the fiscal cohesion does not impede the integration of national systems within the internal market.

25) The idea is a twofold neutrality: the national tax rules must be neutral in respect of the exercise of Treaty freedoms and the exercise of these freedoms itself must be as neutral as possible in regard to the tax arrangements of each Member State.

26) The argument of cohesion has been used very often in front of ECJ in order to justify infringements of the four basic freedoms and ECJ case-law has progressively - since the Bachmann case 16 - modified the meaning and the scope of application of this justification.

27) In the Manninen 17 and Marks & Spencer 18 cases, the Court stated that, on the grounds of the coherence of the national tax system, an advantage can be refused if there is a direct and

---

13 See par. 13 of the present memorandum.
14 European Court of Justice, judgement in case C-204/90, Bachmann; European Court of Justice, judgement in case C-279/93, Schumacker; European Court of Justice, judgement in case C-80/94, Wielockx; European Court of Justice, judgement in case C-484/93, Svensson and Gustavsson; European Court of Justice, judgement in case C-118/96, Safir; European Court of Justice, judgement in case C-55/98, Bent Vestergaard
15 European Court of Justice, judgement in case C-250/95, Futura Participations SA and Singer.
16 European Court of Justice, judgement in case C-204/90, Bachmann; European Court of Justice, judgement in case C-279/93, Schumacker; European Court of Justice, judgement in case C-80/94, Wielockx; European Court of Justice, judgement in case C-484/93, Svensson and Gustavsson; European Court of Justice, judgement in case C-118/96, Safir; European Court of Justice, judgement in case C-55/98, Bent Vestergaard.
17 Opinion of Advocate General Kokott, in case C-319/02, Manninen.
18 Opinion of Advocate General Poiares Maduro, in case C-446/03, Marks & Spencer plc v. Halsey; European Court of Justice, judgement in case C-446/03, Marks & Spencer plc v. Halsey.
necessary connection between the grant of a fiscal advantage and the offsetting of that advantage by a specific charge to tax\textsuperscript{19}.

28) This necessary “direct link” has been interpreted in a broader sense than in the previous ECJ case-law (\textit{i.e. Bachmann}). Two conditions must be met:

(i) the tax at issue must be levied, if not on the same taxpayer, at least on the same income or on the same economic process;

(ii) the legal configuration of the system must ensure that the advantage accrues to one taxpayer only if the disadvantage to the other is real and in the same amount.

29) On the other hand, according to the recent developments, the cohesion principle is no longer limited to the national territory of a single Member State, \textit{but it applies to all tax systems within the whole internal market} \textsuperscript{20}. In the case at issue, Vikland cannot take account of its purely internal situation, but it should consider the tax legislations of other Member States. This condition is not met in the Group Contribution rule, because the only element required in order to enter in the regime is that companies involved are incorporated or resident in Vikland.

30) ECJ case-law further shows that an argument based on the need to safeguard the cohesion of a tax system must be examined in the light of the objective pursued by the tax legislation in question \textsuperscript{21}.

31) The aim of the Vikland legislation on the Group Contribution is to treat a group of companies, which is not a legal entity itself, as a single economic unit. The transfer of profits between companies within the same group achieves the economical effect to distribute the available assets in a better way and to determine a reduction of the overall tax burden in Vikland.

32) The same economic objective can be achieved in a cross-border situation and, in the case at issue, irrespectively of the place of residence or incorporation of the recipient.

33) The denial of application of the Group Contribution regime to HTTG constitutes an unjustified restriction of the right of establishment within EU.

\textsuperscript{19} European Court of Justice, judgement in case C-204/90, \textit{Bachmann}, par. 23; European Court of Justice, judgement in case C-484/93, \textit{Svensson and Gustavsson}, par. 18; European Court of Justice, judgement in case C-471/04, \textit{Keller Holding}, par. 40.

\textsuperscript{20} VANISTENDAEL F., \textit{Cohesion: the Phoenix rises from his ashes}, quot., pag. 221.

\textsuperscript{21} Opinion of Advocate General Kokott, in case C-231/05, \textit{Oy AA}, par. 34. Advocate General Kokott rejected the argument that the fiscal coherence of the tax system justifies the limits on the group contribution rules because the Finnish rules do not allow the deduction of group contributions even where the contribution is subject to tax at the level of the foreign recipient.
3.1.2. Prevention of tax evasion

34) ECJ accepted that mandatory requirements relating, in particular, to the effectiveness of fiscal supervision may be relied upon Member States as a potential justification for the infringement of a Treaty freedom. One of the areas connected to fiscal control regards the prevention of tax avoidance. In the *ICI* 22 judgment the Court underlined that the relevant rule of law did not have the specific purpose of preventing tax avoidance, as it was applied generally to all situations with a cross-border dimension.

35) In the *Lankhorst-Hohorst* 23 case, ECJ stated that if the aim of preventing tax avoidance can be achieved in different ways without discrimination, the national measure is unjustified and constitute a breach of the Treaty.

36) The denial of application of the Group Contribution scheme to cross-border situation *applies to all cross-border situations irrespectively of the effective treatment of the profits in the Member State of the recipient and so it does not show any aim of prevention of tax avoidance.*

3.1.3. Protection of revenue

37) The denial of application could be justified on the grounds of protection of revenue of Vikland or favouring the economical growth of groups which carry on their activity entirely within its territory. This is not a relevant justification, able to offset the application of the fundamental right of establishment, according to ECJ case-law 24.

38) It seems to be furthermore demonstrated that the denial of application of the Group Contribution regime to HTTG constitutes an unjustified restriction of the right of establishment within EC.

3.1.4. Abuse of law

---

22 European Court of Justice, judgement in case C-264/96, *Imperial Chemical Industries.*

23 European Court of Justice, judgement in case C-324/00, *Lankhorst-Hohorst.*

24 European Court of Justice, judgement in case C-446/03, *Marks & Spencer plc v. Halsey,* par. 44; European Court of Justice, judgement in case C-319/02, *Manninen,* par. 49; Opinion of Advocate General Kokott in case C-231/05, *OyAA,* par. 44.
39) The notion of “abuse of Community law” has been analysed by the Court, in particular, whenever Community law provisions are abusively relied upon in order to gain advantages in a manner that conflicts with the purposes and aims of those same provisions.

40) According to the ECJ, the assessment must be made at national level and based on objective evidence. It means that “an abuse exists whenever the activity at issue cannot possibly have any other purpose or justification than to trigger the application of Community law provisions in a manner contrary to their purpose, that is tantamount, in my view, to adopting an objective criterion for the assessment of the abuse. It is true that those objective elements will reveal that the person or persons engaged in that activity had, most likely, the intention of abusing Community law. But it is not that intention that is decisive for the assessment of the abuse” [emphasis added]25.

41) In this context, it is essential to remember that the choice of a particular Member State as host Member State for a subsidiary company does not, in itself, constitutes an abuse of the right of establishment stated by Artt. 43 and 48 ECT.

42) The presence of Precisionmaterials in the host State of Vikland is effective, because this company is operative and profitable, and thus can be regarded as a “genuine” related-company26.

43) In addition, Vikland cannot apply general preventive measures, such as a general denial of application to all cross-border situations27, without any distinction.

44) Moreover, the risk of abuse of tax legislation can be easily avoided within the Community, because tax authorities may always collect all necessary information pursuant to Council Directive 77/799/EEC of December 19th 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation.

45) On this grounds of explanation, Vikland cannot invoke such justification.

3.1.5. The principle of proportionality

25 Opinion of Advocate General Poiares Maduro, in case C-255/02, Halifax, par. 70.
26 European Court of Justice, judgement in case C-324/00, Lankhorst-Hohorst: Advocate General Léger’s Opinion in case C-196/04, Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, par. 110.
With regard to the third step of the rule of reason test, the ECJ requires not only a valid interest, that must be proved on the basis of the arguments exposed before, but even that the measure adopted by the State is proportional to the purpose pursued.\footnote{Opinion of Advocate General Kokott in case C-231/05, Oy AA, par. 59.}

In fact, following the evolution of the Court case-law, a restriction is justified only if it complies with the principle of proportionality: it means that a measure must be appropriate, necessary and proportional for attaining an objective compatible with the ECT \footnote{Opinion of Advocate General Mischo in case C-436/00, X and Y; Opinion of Advocate General Tizzano in case C-516/99, Schmid.}, without going beyond what is necessary to attain it.\footnote{European Court of Justice, judgement in case C-466/98, Commission v. Belgium.} In other words, the Court states that a national provision introducing a distinction in the tax treatment of two comparable cases in order to achieve a certain result is discriminatory even when the same result could be reached in a different and less restrictive way.

Vikland legislation on the Group Contribution regime, providing a restriction to the right of establishment, is not proportional to any relevant aim of protection. Vikland rule of law does not provide a distinction based on the treatment of such distribution of profits in the State of the recipient. This legal treatment and its effect in a concrete situation can be easily known within the Community pursuant the aforementioned Council Directive 77/799/EEC.

Hence, the legislation at issue is not the only one possible, neither the less restrictive to the right of establishment in order to protect national interests.

3.2 Communication from the commission on the tax treatment of losses in cross-border situations

The Commission of the European Communities has recently presented a Communication\footnote{COMMISSION OF THE EUROPEAN COMMUNITY, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, COM (2006) 824 final, Brussels, 2006.} on the tax treatment of losses in cross-border situations, within the framework of the Communication on “Coordinating Member States’ direct tax systems in the Internal Market”.

It evidences that in the absence of cross-border relief for losses, the offset of losses is generally limited to the amount of profits generated in the Member States in which the investment is made. In particular, the domestic relief of losses within a group of companies is actually available in most Member States, whilst cross-border relief of losses is in principle not available with very few exceptions.
52) The Commission observes that Member States with larger domestic markets have an advantage because it is more likely that national companies already have investments in these markets, and thus are able to set any loss from particular activities against the positive tax base of others. This situation constitutes an advantage granted by Member States only to national companies in order to protect the internal market and it is not consistent to the general principles of the European Community.

53) In fact, the denial of cross-border loss relief definitely distorts business decisions within the internal market, because it favours domestic investments, whilst acts as a disincentive to investments in other MS; on the other hand it constitutes a barrier towards companies residents in other MS to entering other markets and thus perpetuates the artificial segmentation of the internal market along national lines.

54) The Commission points out that, even if a group of companies is not recognised as a single taxable entity, from an economic point of view, can be regarded as a single economic unit.

55) The Commission stresses the need to eliminate distortions within the internal market introducing targeted measures, such as Definitive loss transfer or Temporary loss transfer methods, both consenting the cross-border relief of losses.

56) This can be regarded as a further demonstration of the aim pursued by the EC law in an evolutive way and in the case at issue it offers an interpretation of the EC principles of law, prohibiting any restriction of the cross-border relief of losses.

3.3 Vikland legislation on the Group Contribution regime constitutes a breach of EC Law in relation to the right of establishment within EC territory

57) We have demonstrated that Vikland has breached ECT law providing a restriction to the right of establishment. In fact, the denial of application of the Group Contribution regime to any contribution of profits flowing between companies residents within the EC territory (whenever a cross-border situation exists) is not consistent with Artt. 43 and 48 ECT.

58) The Group Contribution regime hinders and renders less attractive for a non-resident company to constitute a branch or to invest in a subsidiary in Vikland, because it prohibits the deduction of a cross-border flowing of profits from Vikland to any other EC Member State, eliminating a fiscal advantage which is granted to its nationals, in relation to a purely internal operation.
59) This means that Vikland must apply, in absence of any reasonable justification, the same national treatment, which is granted to a purely internal situation, to any contribution of profits involving a company resident in another Member State, and, to this extent, it has to consent to Precisionmaterials the deduction of the payment of profits made to Bastilleco and Fairway.
PART B: STATE OF VIKLAND LEGISLATION AND THE FREE MOVEMENT OF CAPITAL

4. THE FREEDOM OF CAPITAL MOVEMENTS UNDER EC LAW

60) The cornerstone of the Community provisions connected with the liberalization of the movement of capital is constituted by article 56 ECT, providing that all restrictions on the movement of capital and of payments between Member States and between Member States and third countries shall be prohibited.

61) In the absence of a definition of what constitutes capital movement in the EC Treaty, the ECJ stated the applicability of Council Directive n. 88/361/EEC (Second Capital Directive) for the implementation of former Article 67 ECT 32.

62) Art. 1 of the Second Capital Directive mandates the abolition of all restrictions on movements of capital taking place between residents of Member States and provides that “capital movements shall be classified in accordance with the Nomenclature in Annex I of the Second Directive itself”. This nomenclature is not exhaustive and provides that capital movements are, among the others, all the operations necessary for the purposes of capital movements, in particular “the conclusion and performance of the transaction and the related transfers and operations to repay credits or loans”.

63) It is important the further definition of ‘direct investment’ given by the Nomenclature, which provides that a direct investment exists and falls within the scope of the freedom of capital movement when it consists in a “long-term loan with a view to establishing or maintaining lasting economic links or a reinvestment of profits with a view to maintaining lasting economic links, made both on national territory by non-residents and abroad by residents”.

64) Furthermore, the goal of a complete liberalization is granted by the provisions contained in the heading XIII-F, ‘Other capital movements - Miscellaneous’, that covers almost every kind of payment, in order to ensure that the definitions given in Annex I 33 cannot be used as a limit to achieve the complete liberalization of capital movements. The concept itself of ‘direct investment’ has to be interpreted in its broader sense.

32 The Second Directive still deserves a legal effect, even after the amendments to the former articles of EEC Treaty; see SİDEK M., European law on the free movement of capitals and EMU, Stockholm, 1999.

33 In fact, in Annex I of the Second Capital Directive it is expressly specified that the definitions should not be interpreted as restricting the scope of the principle of full liberalization of capital movements as referred to in Article I of the Directive.
In the words of the Nomenclature annexed to the Second Capital Directive, the main examples which may be cited as ‘long term loans’ are those granted by a company to its subsidiaries or to companies in which it has a share and those linked with a profit-sharing arrangement.

Art. 58 ECT empowers Member States to apply national tax provisions distinguishing between residents and non residents investors and between domestic and foreign source capital income. Nonetheless, such provisions may not amount to an arbitrary discrimination or covert restriction of the free movement of capital and payments (according to Art. 58, par 3).

According to the Bachmann, Verkooijen and Manninen cases, tax sovereignty must be consistent with EC law and, in particular, with art. 58 ECT on the basis of the rule of reason test.

5. APPLICABILITY OF THE FREE MOVEMENT OF CAPITAL BETWEEN RESIDENTS OF MEMBER STATES

It is necessary to verify if the contribution of profits provided by Vikland legislation falls within the scope of the freedom of capital and payments. The question deserves a positive solution.

As a general remark, in the words of the Advocate General Kokott, the right of establishment and the free movement of capital could be applied together. It means that a concrete situation can stand on the borderline between the two fundamental freedoms, when, for example, it is unclear if a relationship of control in an undertaking exists.

Shall this Court hold that Vikland legislation on the contribution of profits falls within the scope of the right of establishment, nevertheless, the contribution of profits can be regarded as a movement of capital.

The contribution of profits within the Group Contribution regime, under Vikland legislation, is considered an actual payment, whose legal basis is a civil law agreement: it can be regarded as a direct investment, according to the definition given by the Second Capital Directive.

34 European Court of Justice, judgement in case C-204/90, Bachmann; European Court of Justice, judgement in case C-35/98, Verkooijen; European Court of Justice, judgement in case C-319/02, Manninen.

35 European Court of Justice, judgement in case C-302/97, Konle; Opinion of Advocate General Kokott, in case C-231/05, Oy AA, par. 16; Opinion of Advocate General Kokott, in case C-265/04, Bouanich, par. 71; Opinion of Advocate General Alber in case C-251/98, Baars, par. 12 ss.
72) It is not requested that the loan or the reinvestment is interest-bearing or, anyway, profitable: if the Nomenclature annexed to the Directive 88/361/EEC has to be interpreted in its broader sense, a ‘direct investment’ includes every operation, loan or investment, even without security.

73) This is the situation existing between Precisionmaterials and, respectively, Bastilleco and Fairway. In fact, the contribution of profits at issue can be considered a reinvestment of profits, without security, with the final aim to enforce the economic link existing between the companies involved, which are part of the same group and pursue the same economic project.

74) From the argumentation of the Advocate General in the *Schempp* case, one may infer that the Vikland group contribution rules constitutes a restriction of the free movement of capital, as they create an obstacle for companies (both parent companies and subsidiaries) established in Vikland to transfer income to companies resident in other Member States.

5.1 The restriction of the freedom of capital movement between residents of Member States is not justified

75) Art. 58 ECT provides some exceptions to the free movement of capital and payment. As stated before, ECJ case-law has affirmed that a restriction must be justified under the rule of reason test, according to the criteria established in relation to the other freedoms.

5.1.1 Coherence of the national tax system

76) According to ECJ’s settled case-law, an advantage can be refused by a Member State if appears to exist a direct and necessary connection between the grant of a fiscal advantage and the offsetting of that advantage by a specific charge to tax.

77) This actual payment, receives a similar treatment in Emeraland and Winland, because the sums of money transferred from Precisionmaterials to Bastilleco and Fairway will be tax exempt at the moment of the payment, but, these payments will be used by the recipients in order to compensate their losses, therefore, entering in the taxable base.

---

36 European Court of Justice, judgement in case C-403/03, *Schempp*.
38 European Court of Justice, judgement in case C-204/90, *Bachmann*, par. 23; European Court of Justice, judgement in case C-484/93, *Svensson and Gustavsson*, par. 18; European Court of Justice, judgement in case C-471/04, *Keller Holding*, par. 40; Opinion of Advocate General Kokott, in case C-471/04, *Oy AA*, par. 31.
78) There is not a problem of a double exemption of profits: in Emeraland and Winland, as in Vikland, they will be used to the sole extent to offset the amount of exceeding losses and to reduce the overall tax burden of the entire group.

79) Moreover, Vikland legislation does not consider the regime of taxation of such distribution of profits in the State of the recipient: the only condition in order to enter in the Group Contribution regime is that the companies involved are incorporated or residents in Vikland. This provision goes beyond the limits of what could be reasonable in order to maintain the coherence of a tax system. It would be sufficient to establish a condition, based on the tax treatment of the contribution of profits in the State of the recipient. The denial of application of the Group Contribution regime is decisively not the only remedy, neither the less discriminatory one, in order to eliminate the feared double exemption of profits.

**5.1.2 Prevention of tax evasion and tax revenue reduction**

80) According to ECJ case-law, the effectiveness of fiscal supervision constitutes a potential justification for the infringement of a Treaty freedom. Nevertheless, the Court affirmed 39 that such justification exists when the specific goal of the legislation at issue is to prevent tax abuse and avoidance.

81) In the present case, it seems that the denial of application of the Group Contribution regime by Vikland has the only aim to exclude cross-border situations, irrespectively of their abusive nature.

82) The Court stated 40 that if the aim of preventing tax avoidance or abuse can be achieved in different ways, without discrimination, the national measure is unjustified and constitute a breach of ECT.

83) The risk of avoidance or abuse of tax legislation can be the easily avoided within the Community, because tax authorities may always collect all necessary information pursuant to Council Directive 77/799/EEC of December 19th 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation.

84) The State of Vikland cannot invoke such a justification. The denial of application of the Group Contribution regime to cross-border situations does not have the specific aim of

---

39 European Court of Justice, judgement in case C-264/96, Imperial Chemical Industries
40 European Court of Justice, judgement in case C-324/00, Lankhorst-Hohorst
preventing an abuse, since Vikland legislation does not require an examination of the risks of evasion or abuse related to the tax regime of the State of the recipient.

5.1.3 The principle of proportionality

85) It is recognized as a general principle that the measure adopted by the State has to be proportional to the purpose pursued 41.

86) In this sense, a restriction of a fundamental freedom is justified only if it complies with the principle of proportionality: it means that a measure must be appropriate, necessary and proportionate for attaining an objective compatible with the ECT 42, without going beyond what is necessary to attain it 43.

87) In the case at issue, Vikland legislation goes beyond what is necessary in order to protect any national interest. It would be sufficient to provide a control on the treatment of the contribution of profits in the State of the recipient, and to concede the application of the regime to the foreign companies subjected to an equivalent legislation, i.e. a legislation which provides the use of profits to the sole extent to offset losses.

5.2. Vikland legislation on the Group Contribution regime constitutes a breach of EC Law in relation to the free movement of capital within EC residents

88) We have demonstrated that Vikland has breached EC Treaty law providing a restriction to the free movement of capitals and that this circumstance has not a reasonable justification, under EC law.

89) The denial of application of the Group Contribution regime to any contribution of profits, regarded as a ‘payment’, flowing between companies residents within the EC territory (whenever a cross-border situation exists) is not consistent with Art. 56 ECT. It constitutes a covert discrimination based on the place of incorporation and the place of residence 44.

90) The Group Contribution regime renders decisively less attractive for a company resident in Vikland to reinvest its profits in a foreign company, in order to maintain and enforce an

41 Opinion of Advocate General Kokott in case C-231/05, Oy AA, par.59.
42 Opinion of Advocate General Mischo in case C-436/00, X and Y; Opinion of Advocate General Tizzano in case C-516/99, Schmid.
43 European Court of Justice, judgement in case C-466/98, Commission v. Belgium.
44 Since the Biehl case, the Court has ruled that discrimination on the grounds of residence can under certain circumstances be regarded as discrimination on the grounds of nationality.
economical link, because Vikland prohibits to its residents the deduction of a cross-border flowing of profits from Vikland to any other EC Member State, eliminating a fiscal advantage which is granted to its nationals, in relation to a purely internal operation.

91) This means that Vikland must apply, in absence of any reasonable justification, the same national treatment, which is granted to a purely internal situation, to any contribution of profits involving a company resident in another Member State, and, to this extent, it has to consent to Precisionmaterials the deduction of the payment of profits made to Bastilleco and Fairway.

6. THE FREE MOVEMENT OF CAPITAL TOWARDS RESIDENTS OF THIRD STATES

92) As already mentioned in the previous paragraphs, the free movement of capital as set out in art. 56 ECT, unlike the other fundamental EC freedoms, also applies to capital movements towards and from countries that are not EU Member States 45.

93) Indeed, Art. 56, par. 1, ECT states that all restrictions on the movement of capital between Member States and between Member States and third countries are prohibited. Artt. 57 and 58 ECT, however, state some exceptions to this principal rule. Specifically:

(i) art. 57, par. 1 ECT states that the free movement of capital can be limited by measures already existing on December 31st 1993 insofar as the measures relate to direct investment (including investment in real estate), establishment, provision of financial services and the admission of securities to capital markets (so called “standstill provision”);

(ii) under art. 58, par. 1, lett. a ECT, Member States are entitled to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same position with regard to their place of residence or with regard to the place where their capital is invested. However, these measures should not constitute a mean of arbitrary discrimination or a disguised restriction on the free movement of capital and payments.

94) From the ECJ case law 46, it follows that Art. 58 ECT must be interpreted strictly and cannot be interpreted as meaning that any tax legislation making a distinction between taxpayers by

---

45 SIDEEK M., European Community Law on the Free Movement of Capital and the EMU, quot., p. 118.

46 See European Court of Justice, judgement in case C- 319/02, Manninen, par. 28; European Court of Justice, judgement in case C-9/02, Laysterie du Saillant, par. 49; European Court of Justice, judgement in case C-250/95, Futura Participations and Singer, par. 26; European Court of Justice, judgement in case C-436/00, X and Y, par. 49.
reference to the place of residence or with regard to the place where the capital is invested is automatically consistent with Art. 58, par. 1, lett. a, ECT. The differences in treatment must concern situations which are not objectively comparable or must be justified by overriding reasons in the general interest and they can not go beyond what is necessary in order to attain the objective of the legislation.

95) The main interpretative problem concerning the extension of the free movement of capital to third countries regards the uncertainty and the vagueness about the purpose or object of the erga omnes liberalisation. However, the scope of this provision should be seen as a result of an aspiration which was already present in the very beginning of the European Community: the “optimal allocation of capital”. In this sense, the extension of the freedom of capital movement to third countries endeavours to attain a global most efficient capital allocation characterised by the absence of any barriers. Moreover this extension, with regard to inbound capital movements, makes the EU internal market more attractive and pushes the growth of the Extra UE investments.

96) In addition, it must be investigated whether in situations involving third countries the scope of art. 56 ECT has to be interpreted in the same way as in intra-EU situations. Pursuant to some scholars’ point of view, Art. 56 ECT places capital movements to and from third countries on the same footing as capital movements within the EU: as a consequence, the freedom of capital movements in and out of the EU is just as far-reaching as the freedom of capital movements between Member States. To the extent that a tax provision is not consistent with the free movement of capital within the EU it must also be considered inconsistent with the free movement towards third countries.

97) This approach is also supported by the Sanz de Lera case concerned national conditions for the export of money from a Member State. More specifically, the issue in that case was whether it was consistent with the provisions on free capital movements to require authorisation and/or a declaration in advance as a condition for exporting money from the country. It was decided that a requirement for authorisation was not consistent with free capital movement provisions but that a claim on declaration could be accepted. It is worth pointing out that the same national

47 STAHL K., Free movement of capital between Member States and third countries, in EC tax review 2004/2, pp. 47-56,
49 European Court of Justice, joined cases C-163/94 and C-250/94, Criminal proceedings against Lucas Emilio, Sanz de Lera, Raimundo Diaz Jimenez and Figen Kapanoglu.
rules in question were already analyzed by the ECJ in the *Bordessa*\(^{50}\) case, which only concerned the application of these provisions to a movement of capital within the EU. In *Sanz de Lera* case the Court came to the same conclusions regarding the provisions on capital movements to and from third countries and, therefore, extended the *Bordessa* conclusion with no further concerns.

98) With regard to this memorandum, it is very useful to highlight that the ECJ in the *Sanz de Lera* case referred, without any reservation, to its line of reasoning in the earlier *Bordessa* case: nowhere in the judgment is it suggested that another approach may be called for when it concerns capital movements to and from third countries.

99) Moreover, the only judgment dealing with tax restrictions in respect of third countries is the one in the *van Hilten* case\(^{51}\) concerning the inheritance tax regime in the Netherlands of a Dutch national that transferred her residence to Belgium and then Switzerland where she died. On such occasion, the ECJ (in line with the opinion of the Advocate General Léger) decided that the national legislation was not incompatible with the free movement of capital since (i) such national legislation did not provide any restriction, and (ii) the mere transfer of residence of an individual abroad did not amount to a movement of capital. The ECJ ruled on those grounds and did not address the issue of the applicability of the free movement of capital to tax restrictions in the relations with third countries.

6.1. APPLICABILITY OF THE FREE MOVEMENT OF CAPITAL TOWARDS RESIDENTS OF THIRD STATES

100) We must verify whether the contribution of profits provided by Vikland legislation falls within the scope of the freedom of capital and payments even in the case in which profits are transferred to a resident of a third state. The question deserves a positive solution.

101) As already explained in the previous paragraphs, the Group Contribution regime, under Vikland legislation, is considered an actual payment, whose legal basis is a civil law agreement: therefore the group contribution paid by Fiberoptics in favour of its parent company HTTCO has to be seen as a reinvestment of the profits made by HTTCO in Vikland through the incorporation of Fiberoptics that has been built up in order to carry on HTTCO business activity

---

\(^{50}\) European Court of Justice, joined cases C-358/93 and C-416/93, *Criminal proceedings against Aldo Bordessa, Vicente Mari Mellado and Concepción Barbero Maestre*.

\(^{51}\) European Court of Justice, case C-513/03, *Van Hilten*. 
in Vikland. This kind of investment (rectius this return of investment) is consistent with the definition of direct investment arising from the Second Capital Directive.

102) Indeed a direct investment exists when it is a long-term loan or a reinvestment of profits with a view to establishing or maintaining lasting economic links, made both on national territory by non-residents and abroad by residents. It is not requested that the loan or the reinvestment is interest-bearing or, anyway, profitable 52.

103) Therefore, according to the wording of the Second Directive and the free movement of capital as provided in Art. 56 ECT, national rules cannot affect the return of profits in the form of a “contribution of profit” in favour of a third country parent company. Moreover it is worth highlighting that according with the Second Directive’s approach, there is no difference between long term loan and reinvestment of profits: this means that a third country investor that wants to use his capital in the EU market, is free to decide whether to carry on his business through a long term loan to an EU resident borrower or through an injection of capital to an EU subsidiary company.

104) Similarly to the situations pointed out with regard to the contributions of profits existing between Precisionmaterials and Bastilleco and Fairway (resident in EU Member States) also the contribution of profits at issue can be considered a reinvestment of profits with the final aim to enforce the economic link existing between the companies involved, which are part of the same group and pursue the same economic project.

105) Moreover the Vikland group contribution rules constitute a restriction of the free movement of capital not only because they create an obstacle for third country parent companies to receive the reinvestment of the profits made in Vikland (outbound capital flow); but the Vikland rules at issue also affect potential transfer capitals made by third countries investors to Vikland resident companies (inbound capital flow).

6.2. THE RESTRICTION OF THE FREEDOM OF CAPITAL MOVEMENT AMONG RESIDENTS OF THIRD STATES IS NOT JUSTIFIED

106) As stated before, Art. 58 ECT provides some exceptions to the free movement of capital and payments: differential tax treatment (i.e. tax restrictions) can be justified to the extent they pass

52 If the Nomenclature annexed to the Directive 88/361/EC has to be interpreted in its broader sense, a ‘direct investment’ includes every operation, loan or investment, even without security.
the *rule of reason test* or they pertain to *relevant objective differences* between the situation of *domestic* and *cross border* capital movements.53

107) While capital movement protection within EU may be subject to the “classical” comparison, when third countries are involved some specification are required.

108) If we consider inbound capital movements, the effective taxpayer is not resident in a Member State. In this case, the comparability would require a fictitious EU taxpayer investing in the same country where the effective taxpayer has invested. Outbound capital movements, on the other hand, would consider the case where an effective taxpayer qualifying for EC Treaty protection would claim to be granted by his home country the same treatment to his investments, independent whether he invests in his home country, in another Member State or in a third country. In this case, the fictitious taxpayer should:

(i) be resident in the Member State whose rule is being tested and

(ii) invest in that Member State and/or in another Member State and/or in a third country.

109) Focusing our attention on the first capital movement (inbound movement), the only potential difference would be the low-taxation regime existing in the recipient’s country (the corporate tax rate in Cheesland is lower than the Vikland tax rate), but the occurrence of discrimination would not depend on that circumstance.

110) The question whether the level of taxation in the Member State of the dividend distributing company is relevant for the freedom of capital and payments has already been dealt with by the ECJ in the *Lenz*54 case. The ECJ held that “whilst one cannot exclude the possibility that extension of the tax legislation in question to revenue from capital originating in another Member State might make it advantageous for investors living in Austria to buy shares of companies established in other Member States, where corporation tax is lower than in Austria, that possibility is in no way capable of justifying legislation such as that at issue in the main proceedings”. Furthermore: “unfavourable tax treatment contrary to a fundamental freedom cannot be justified by the existence of other tax advantages, even supposing that such advantages exist”.

111) After having shown that there are no substantial difference between the situation of domestic and cross border capital movements, we turn to the rule-of-reason test.

---
53 See STAHL K., *Free movement of capital between Member States and third countries*, quot., p. 50. See also the Opinion of AG Kokott, delivered on 18 March 2004 on case C-319/02, *Manninen*, par. 79
54 European Court of Justice, judgement in case C-315/02 *Anneliese Lenz v Finanzlandesdirektion für Tirol*
6.2.1. Prevention of tax evasion and tax revenue reduction

112) According to ECJ’s case-law, the effectiveness of fiscal supervision constitutes a potential justification for the infringement of a Treaty freedom. Nevertheless the Court affirmed \(^{55}\) that such justification exists when the specific goal of the legislation at issue is to prevent tax abuse and avoidance.

113) In the present case, it seems that the denial of application of the Group Contribution regime by Vikland, pursues the sole extent to exclude cross-border situations, irrespectively of the potential effects of tax abuse and avoidance.

114) The Court stated \(^{56}\) that if the aim of preventing tax avoidance or abuse can be achieved in different ways, without discrimination, the national measure is unjustified and constitute a breach of ECT. In our case, the risk of avoidance or abuse of tax legislation is already avoided by the application of the Double Taxation Convention (DTC) signed by Vikland and Cheesland: as a matter of fact its provisions determine not also the allocation of tax power between the contracting states, but also prevent potential abuse set up by taxpayers resident in one of the contracting states in order to obtain fiscal advantages.

115) Therefore the presence of a DTC between a third country and an EU Member State involved in the capital movement shows that both contracting states have already taken into account the possibility of potential advantages (or disadvantages) in moving capital (and its related income) from a contracting State to the other and the possible loss of tax revenue deriving from these movements. Notwithstanding, since Vikland and Cheeseland follow the OECD Model Tax Convention, they included in their DTC the “non discrimination rule”, as provided in the Art. 24 of the OECD Model Tax Convention, The presence of this rule confirms that the State of Vikland can not apply to the nationals of Cheeseland a more burdensome taxation in comparison with the Vikland’s residents and cannot invoke the loss of tax revenue justification in order to deny a favourable domestic tax regime, such as the contribution group regime, to a resident in the other contracting State.

116) If the “loss of tax revenue” argument does not affect taxpayer treatment at the DTC’s level, it cannot be “recycled” at Art. 56 ECT’s level: it would be very strange and not coherent to invoke a restriction of the free movement of capital with regard to Art. 56 ECT and, at same time, to avoid any potential tax discrimination of Cheeseland residents through the application of Art. 24 of the OECD Model Tax Convention.

\(^{55}\) European Court of Justice, judgement in case C-264/96, Imperial Chemical Industries

\(^{56}\) European Court of Justice, judgement in case C-324/00, Lankhorst-Hohorst
117) Therefore the loss of tax revenue is not a justification, able to offset the application of the fundamental freedom of establishment, according to ECJ case-law.

6.2.2 The principle of proportionality

118) It is recognised as a general principle that the measure adopted by the State has to be proportionate to the purpose pursued. In this sense, a restriction of a fundamental freedom is justified only if it complies with the principle of proportionality: it means that a measure must be appropriate, necessary and proportionate for attaining an objective compatible with the ECT, without going beyond what is necessary to attain it.

119) In the case at issue, Vikland legislation goes beyond what is necessary with regard to any possible aim of protection. It would be sufficient to provide a control on the treatment of the contribution of profits in the State of the recipient, and to concede the application of the regime to the foreign companies subjected to an equivalent legislation, i.e. a legislation which provides the use of profits to the sole extent to offset losses. Moreover, as said below, the presence of a DTC with Vikland and Cheesland erases any need of protecting national tax revenues that would be affected by the movement of capitals (and the related incomes) to the other contracting States: if Vikland signed the DTC with Cheesland, it is logical to think that such DTC already protects any interest of both the Contracting States with regard to the allocation of taxing powers and to the loss of tax revenue.

6.3. Vikland legislation on the group contribution regime constitutes a breach of EC law in relation to the free movement of capital towards third countries

120) We have demonstrated that Vikland has breached EC Treaty law providing a restriction to the free movement of capital and that this circumstance has not a reasonable justification under EC law. The denial of application of the Group Contribution regime to any contribution of profits, regarded as a ‘return of investment’, flowing between a Vikland resident company and a third country resident company is not consistent with Art. 56 ECT. It constitutes a covert discrimination based on the place of incorporation and on the place of residence.

57 Opinion of Advocate General Kokott in case C-231/05, Oy AA, par.59.
58 Opinion of Advocate General Mischo in case C-436/00, X and Y; Opinion of Advocate General Tizzano in case C-516/99, Schmid.
59 European Court of Justice, judgement in case C-466/98, Commission v. Belgium.
121) The Group Contribution regime renders decisively less attractive for a company resident in Vikland to reinvest its profits in a foreign company, in order to maintain and enforce an economical link. This occurs because Vikland prohibits to its residents the deduction of a cross-border flowing of profits from Vikland to any other third state, eliminating a fiscal advantage which is, conversely, granted to its resident subjects in relation to a purely internal operation. Moreover, the Group contribution regime decreases also the appeal of the Vikland companies with regard to third countries investors who would like to start a business in Vikland because they cannot offset the profits arising from Vikland subsidiaries against the losses made by the other companies of the same group.

122) This lack of economic appeal puts Vikland companies in a less competitive situation in comparison with companies resident in other Member States.

123) Therefore, Vikland must apply, in absence of any reasonable justification, the same national treatment, which is granted to a purely internal situation, to any contribution of profit involving a company resident in a third country, and, to this extent, it has to consent to Fiberoptics the deduction of the payment of profits made in favour of HTTCO.
V. ANNEXES

1

HTTG Group

FIBEROPTICS +
Vikland

BASTILLECO -
Winland

Direct 100%

Direct 100%

HTTCO -
Cheesland

FAIRWAY -
Emeraland

50%

50%

PRECISIONMATERIALS +
Vikland
TAX PLANNING

FIBEROPTICS +
   Vikland   CIT:25%
   100% of the 2005 profits

BASTILLECO -
   Winland    CIT:30%

HTTCO -
   Cheesland  CIT:9%

FAIRWAY -
   Emaraland  CIT:11%

50 % of the 2005 profits

PRECISIONMATERIALS +
   Vikland    CIT:25%
   50 % of the 2005 profits
Differeces between M&S and the case concerned

M&S case

UK
CIT:30%

P1
Losses
transfer
S

P2
Losses
transfer

Other MS
CIT 20%

Vikland case

Vikland
CIT:30%

P1
Profits
transfer
S

P2
Profits
transfer

Other MS
CIT 20%
### VI. LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>AG</td>
<td>Advocate General</td>
</tr>
<tr>
<td>Art.</td>
<td>Article</td>
</tr>
<tr>
<td>DTC</td>
<td>Double Tax Convention</td>
</tr>
<tr>
<td>EC</td>
<td>European Community</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>EC Law</td>
<td>European Community Law</td>
</tr>
<tr>
<td>ECT</td>
<td>European Community Treaty</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>MS</td>
<td>Member States</td>
</tr>
</tbody>
</table>
European Tax Moot Court Competition 2006/2007

MEMORANDUM FOR THE DEFENDANT

Registration number: C/001
I. List of Sources

Scholars


P. FARMER – R. LYAL, The judgment in Bachmann indicates that covertly discriminatory tax rules can sometimes be justified by imperative requirements, in EC Tax Law, 1994, p. 330

M. FOSSELARD, L’obstacle fiscal à la réalisation du marché intérieur, in Cahiers de droit européen, 1993, p. 472

M. GAMMIE, The compatibility of national tax principles of the member states with a fully integrated market, report presented to the European Association of Tax Law Professors, June 2004

M. GAMMIE, The impact of Marks & Spencer Case on Us-European planning, in Intertax, 2005, p. 485

M. A. GRAU RUIZ, Mutual assistance for the recovery of tax claims, The Hague, 2003


M. ISENBAERT – C. VALJEMARK, M&S judgement: the ECJ caught between a rock and a hard place, in EC Tax Review, 2006, p. 10

M. LANG, Marks and Spencer – more questions than answers: an analysis of the opinion delivered by the Advocate General Poiares Maduro, in Ec Tax Review, 2005, p. 95

P. MARTIN, The Marks & Spencer EU group relief case – a rebuttal of the “taxing jurisdiction argument”, in Intertax, 2005, p. 63

P. PISTONE, *The impact of european law on the relations with third countries in the field of direct taxation*, in Intertax, p. 234

K. STAHL, *Free movement of capital between member states and third countries*, in EC Tax Review, p. 48


D. WEBER, *In search of a (new) equilibrium between tax sovereignty and the freedom of movement within the EC*, in Intertax, p. 585


**European Court of Justice jurisprudence**

Judgment in case C-279/93, *Schumacker*

Judgment in case C-319/02, *Manninen*

Judgment in case C-204/90, *Bachmann*

Judgment in case C-307/97, *Saint Gobain*

Judgment in case C-451/99, *Cura Anlagen*

Judgment in case C-336/96, *Gilly*

Judgment in case C-365/02, *Lindfors*

Judgment in case C-80/94, *Wielockx*

Judgment in case C-107/94, *Asscher*

Judgment in case C-311/97, *Royal Bank of Scotland*

Judgment in case C-251/98, *Baars*

Judgment in case C-436/00, *X e Y*
Judgment in case C-471/04, *Keller Holding*
Judgment in case C-397/98, *Metallgesellschaft*
Judgment in case C-367/98, *Commission/Portugal*
Judgment in case C-483/99, *Commission/France*
Judgment in case C-503/99, *Commission/Belgium*
Judgment in case C-463/00, *Commission/Spain*
Judgment in case C-98/01, *Commission/United Kingdom*
Judgment in case C-264/96, *ICI*
Judgment in case C-270/83, *Avoir Fiscal*
Judgment in case C-169/03, *Wallentin*
Judgment in case C-250/95, *Futura partecipation and Singer*
Judgment in case C-446/03, *Marks and Spencer*
Judgment in case C-35/98, *Verkooijen*
Judgment in case C-136/00, *Danner*
Judgment in case C-315/02, *Lenz*
Judgment in Case C-452/04, *Fidium Finanz*
Judgment in Case C-19/92, *Kraus*

**Advocate General Opinions**
Opinion of Advocate General Poiares Maduro in case C-446/03, *Marks&Spencer*
Opinion of Advocate General Poiares Maduro in case C-283/04, *Commission/Netherlands*
Opinion of Advocate General Alber in case C-251/98, *Baars*
Opinion of Advocate General Geelhoed in case C-374/2004, *Test Claimants in the Thin Cup Group Litigation*
Opinion of Advocate General Kokott in case C-231/05, *Oy AA*
Opinion of Advocate General Leger in case C-80/94, *Wielockx*
Opinion of Advocate General Tesauro in case C-120/95, *Decker*

Opinion of Advocate General Leger in case C-279/93, *Schumacker*

Opinion of Advocate General Fennelly in case C-397/98, *Metallgesellschaft*

Opinion AG Leger in the case C- 196/04, *Cadbury Schweppes*

**European Community Legislation**


II. STATEMENT OF FACTS

HTTCO is a company incorporated and resident for tax purposes in Cheesland (which is not a Member State of EU, EEA, EFTA). HTTCO is publicly quoted on the Cheesland stock exchange and operates as the ultimate holding company and headquarter of HTTG (High Tec Tools Group). HTTCO owns a direct and 100% shareholding in BASTILLECO a Societas Europaea, incorporated and resident for tax purposes in EU Member State of Winland, and in FAIRWAY, a Societas Europaea, incorporated and resident for tax purposes in EU Member State of Emeraland. HTTCO also owns a direct and 100% shareholding in FIBEROPTICS a Societas Europaea, incorporated and resident for tax purposes in EU Member State of Vikland.

The group furthermore includes PRECISIONMATERIALS, a Societas Europaea, incorporated and resident for tax purposes in EU Member State of Vikland. Infact, BASTILLECO owns a direct 50% shareholding in it and FAIRWAY owns the other direct 50% stake.

PRECISIONMATERIALS and FIBEROPTICS were highly profitable in the year 2005 whilst HTTCO, BASTILLECO and FAIRWAY were loss making for corporate income taxes in the same period.

In order to reduce the overall effective tax rate of HTTG, the management decided to claim that under EC law, the 2005 profits of PRECISIONMATERIALS can be contributed to BASTILLECO in Winland (50%) and FAIRWAY in Emeraland (50%); in addition management agreed to claim that according to EC law all the 2005 profits of FIBEROPTICS can be contributed to HTTCO in Cheeseland.

By doing so, all current 2005 corporate income taxes for both Vikland companies were be eliminated, whilst tax losses in BASTILLECO, FAIRWAY and HTTCO were used to offset the transferred profits from Vikland companies.

In 2007, the Vikland tax authorities, when auditing the corporate tax returns, refused the application of the Vikland Group Contribution regime applied by both Vikland companies, because such contribution was not paid to a company resident for tax purposes and subject to corporate income tax in Vikland.
After years of litigation at the level of the tax administration, the case ended up in the competent Vikland Tax Court. PRECISIONMATERIALS and FIBEROPTICS and their direct parents clam that Vikland legislation on the Group Contribution regime in inconsistent with EC law, to the extent that a ‘group contribution’ could only be made to a company which is incorporated and resident for tax purposes in Vikland.

The competent Vikland Tax Court steyed the proceedings and referred a preliminary ruling on the basis of Article 234 EC Treaty to the European Court of Justice in Luxembourg.
The present case involves many juridical questions and topics that can be summarised as follows:

**PART A: The denial of group contribution deduction between Member States**

**The European Union freedoms at issue**

1.1. The power retained by the states must be exercised consistently with Community law.

1.2. In accordance to the criterion of main scope of the controversial rules, we could desume that the prevalent freedom in question is freedom of establishment.

**Right of Establishment**

2.1. Vikland legislation does not breach Art. 43 and 48 of the EC Treaty

2.1.1. Two different approaches to interpret the right of establishment: the “national non-discrimination principle” and the “market access principle”.

2.1.2. The different treatment is between a subsidiary of a parent company resident in Vikland which is allowed to make a tax deductible group contribution to its parent and a subsidiary of a foreign parent company which is not but we can not leave the groups’ situation out of consideration.

2.1.3. If we applied the same rule to these two different situations, we would obtain a completely different and discriminative result.

2.1.4. Cross border group contribution is a cover discrimination because the fact that a tax advantage is available solely to resident taxpayers is based on *relevant objective elements* apt to justify the difference in treatment.

2.2. Justifications

2.2.1 Territoriality principle and the balanced allocation of the power to impose taxes between member states: the situation of the group and the tax jurisdictions of other Member States.
2.2.2. The cohesion of the tax system: a State grants a fiscal advantage only if it can compensate it with taxation.

2.2.3. Tax avoidance: traffic of profits, budgetary consequences and the escape of Vikland tax system.

2.2.4. The consequences of M&S judgment: use of losses in non resident companies.

2.3 Proportionality

2.3.1 Double immunity of profits, tax avoidance and the balanced allocation of the power to impose taxes.

**Free movement of capital**

3.1 Analysis of the EC law in regard to Free movement of capital: Art. 56 and 58 EC Treaty and the definition of Capital Movement under the Nomenclature in the Annex I of the Directive 88/361/CEE.

3.2 The concept of “reinvestment” under the Annex I and the impossibility to find an explicit definition of GC in the Second Directive on Capital Movement. This happens because the scope of the GC can not be qualified as a way to “maintain economic links” between the related companies involved.

3.3 The GC regime fills within the statement of Art. 58 because the different treatment of resident groups and cross border groups depends on the fact that they are not in the same situation with regard to the place where their capital is invested.

3.4 As regards the rule of reason the considerations explained in regard to the right of establishment are have the same weight in this freedom.

**PART B: The denial of group contribution deduction toward Third Countries**

**The European union law and third states: direct taxation**

4.1 A State that is not Member of the EU or, at least, of one of the other European agreements, must be considered a third country from the perspective of European law: therefore, provisions of the Treaty other than those that expressly refers to third countries should not be applicable.
Right of establishment and third states

5.1 The relevant freedom is the freedom of establishment. The freedom of establishment is not applicable to third countries since there is no reference to non-EU MS in the text of Artt. 43 and 48 ECT.

Free movement of capital and third states

6.1 The concept of capital movements must be interpreted broadly according to the non-exhaustive list of capital movements provided by the Directive 88/361/EEC. It can be said that the concept of capital comprises capital mentioned in the Annex of the Directive and any action related to a subject of this Annex: the group contribution does not fall within any of the category.

6.2 The EC law does not provide a full liberalization of the capital movement towards third countries: such liberalization is established only as far as it is necessary in order to achieve EC Treaty purposes.

JUSTIFICATIONS

7.1 Arguments concerning the risk of a loss of effective fiscal supervision, whereas a national tax authorities cannot rely on a specific EC law rule or international agreement to resolve administrative difficulties in tax field.

7.2 Territoriality principle and the balanced allocation of the power to impose taxes between MS: the MS are free to define unilaterally or in a tax treaty the connecting factors for the allocation of taxation rights. The allocation of the taxing power cannot be overridden by a third State, by invoking EU fundamental freedoms.

7.3 The cohesion of the tax system: the territorial scope of the EC Treaty cannot be broadened until it covers every States in the world.

7.4 Tax avoidance: a Member State has the right to take all measures to prevent infringements of national law and regulations, in particular in the field of taxation.

PROPORTIONALITY

8.1 The denial of the deduction of group contribution paid to a company resident in a third country is a proportionate measure. The group contribution is deemed to be a profit distribution and, therefore, a taxable transaction.
IV. ARGUMENTS

1. GENERAL REMARKS ON THE METHOD

1) This paper basically aims to demonstrate the compatibility of Vikland tax legislation with EC law. It is composed by two different parts: Part A regards the intra-EU denial of group contribution, part B regards the extra-EU one.

2) As a preliminary remark, we will demonstrate that the different treatment between a resident subsidiary of a resident parent and a resident subsidiary of a foreign parent aims to avoid a restriction. In fact, these situations are not comparable if we think about the situations of the group companies concerned: their profits would be taxable in different places, subject to different tax legislations. A cross border group could exploit the different MS tax legislations taking advantage by shifting the global taxable income to the more convenient state, whereas a resident group could not. If we treated them in the same way, we would obtain a discrimination.

3) Should the Court fail to accept this argument, we contend that Vikland did not breach EC Law because it can claim different justification.

4) First, Vikland has no tax jurisdiction on Bastilleco and Fairway and can not influence with its legislation their taxable base in Winland and Emeraland; in the same way, Emeraland and Winland have no tax connection to the profits made by Precisionmaterials in Vikland. On the base of territoriality principle, the cross border group contribution would negatively impact the balanced allocation of the power to impose taxes between MS.

5) Secondly, taking into consideration the coherence principle, if Vikland granted a cross border GC, not only it would not recover the fiscal advantage with a subsequent taxation but it would lose the control on the profits. It is impossible to verify that the fiscal advantage granted will be recovered and in anyway this will go beyond the goal of Vikland GC.

60 Hereinafter GC. See it in the list of abbreviation.
6) Moreover, we will consider the risk of double immunity of profits and demonstrate that it is not only a risk, but a certainty. Regarding the tax avoidance risks in general, we can not leave out of consideration the risks of traffic of profits. It is also easy to understand how a cross border GC favours the creation of artificial arrangements with the sole purpose of exploiting the differences between MS and avoiding national laws.

7) This system must be considered proportional if we think that actually in any way companies will achieve double immunity of profits. Moreover we need to consider the dangerous tax avoidance risk and the need of a balanced allocation of taxing powers.

8) With regard to the free movement of capital, it is worth mentioning that we can exclude the applicability of this freedom in the extra-EU profile of the proceeding.
PART A

2. The EU freedoms at issue

9) Direct taxation does not fall within the purview of the Community; but, in accordance to settled ECJ case-law, the power retained by States must be exercised consistently with Community law. The MS remain free to determine the organisation and conception of their tax systems and to allocate between each other the power of taxation. In the absence of harmonization between national laws in this field, the difference in treatment resulting from legislative disparities do not constitute a discrimination prohibited by the EC Treaty.

10) This principle does not allow the MS to restrict the free movement of nationals within the internal market. In particular, we are analysing whether the circumstance that a Member State denies a group contribution deduction between a domestic subsidiary and two foreign parent companies but grants it between two domestic companies must be considered as a restriction of the right of establishment (Artt. 43 and 48 ECT) and of the free movement of capital (Art. 56 ECT).

11) In the cases in which both the freedoms were in question, the ECJ has stated the criteria of the main scope of the controversial rules which claims to analyse the main purpose of the controversial rules in relation to the freedoms that are assumed to be violated. In the present case, we could argue that the prevalent freedom in question is the right of establishment. In

---

61 See European Court of Justice, judgment in case C-279/93 Schumacker, paragraph 21; European Court of Justice, judgment in case C-319/02 Manninen, paragraph 19; European Court of Justice, judgment in case C-204/90 Bachmann, paragraph 23; European Court of Justice, judgment in case C-307/97 Saint Gobain, paragraph 57; European Court of Justice, judgment in case C-451/99 Cura Anlagen, paragraph 40; European Court of Justice, judgment in case C-336/96 Gilly, paragraph 47; European Court of Justice, judgment in case C-365/02 Lindfors, paragraph 34; European Court of Justice, judgment in case C-80/94, Wielocks, paragraph 16; European Court of Justice, judgment in case C-107/94, Asscher, paragraph 36; European Court of Justice, judgment in case C-311/97, Royal Bank of Scotland, paragraph 19; European Court of Justice, judgment in case C-251/98, Baars, paragraph 17 and the opinion of the Advocate General Poiares Maduro in case C-446/03, Marks & Spencer, paragraphs 21-25.

62 Hereinafter ECT. See it in the list of abbreviation.

63 See European Court of Justice, judgment in case C-251/98, Baars; European Court of Justice, judgment in case C-436/00, X and Y; European Court of Justice, judgment in case C-471/04, Keller Holding; European Court of Justice, judgment in Case 397/98, Metallgesellschaft.

64 European Court of Justice, judgment in Case C-367/98, Commission/Portugal; European Court of Justice, judgment in case C-483/99, Commission/Paris and European Court of Justice, judgment in case C-503/99, Commission/Belgium; European Court of Justice, judgment in Case C-463/00, Commission/Spain, European Court of Justice, judgment in case C-98/01, Commission/United Kingdom. See also the conclusion of the Advocate General Pioares Maduro in the cases C-282/04 e C-283/04, Commission/Netherlands, paragraph 41.

65 As regard the application of this method see the AG Alber in the Baars case and the AG Geelhoed in the Test Claimants in the Thin Group Litigation case and the AG Kokott in the Oy AA case.
fact, the essence of the group contribution consists in the possibility to compensate losses and profits between the group members; in this proceeding a non resident group member which wants to exercise its right of establishment could not achieve this possibility.

3. Right of Establishment

Compatibility with Article 43 and 48 ECT

12) The first step of the analysis is to verify if the legislation of Vikland concerning the group contribution is in breach of Artt. 43 and 48 ECT.

The interpretation of the freedom

13) Basically, it is important to define if and in which way the right of establishment is restricted. In order to do it, we need to set the facts in relation to the different aspects of the freedom concerned.

14) Artt. 43 and 48 ECT ensures that companies constituted according to the law of one Member State and having their registered office, central administration or principal place of business within the community, are entitled to carry on the business in the Member State concerned through the intermediation of a subsidiary, branch or agency.

15) Moreover, the ECJ stated that the right of establishment also prohibits the MS from hindering the establishment in another Member State of one of their nationals or of a company incorporated under their legislation.

16) There are two different approaches to interpret the right of establishment: the national non-discrimination principle and the market access principle. While the first approach is based on the notion of discrimination, the second one underlines the notion of restriction.

17) As regards the market access principle, it takes origin from the persuasion that the interpretation of right of establishment as a non discrimination rule conceals a narrow approach.

66 European Court of Justice, judgment in case C-264/96, ICI; European Court of Justice, judgment in case C-200/98, X AB & Y AB.

67 Opinion of the Advocate General Poiares Maduro in case C-446/03, Marks & Spencer. See also M. Gammie, The compatibility of national tax principles of the member states with a fully integrated market, report presented to the European Association of Tax Law Professors, June 2004; M. Gammie, The impact of Marks & Spencer Case on Us-European planning, in Intertax, 2005, p. 485
18) The essence of market access principle is not only to avoid a discrimination between equal situations but also to eliminate national rules which have the effect of impeding or making the exercise of the fundamental freedoms less attractive for Community nationals.

19) As a matter of fact, it was in the Kraus case that the ECJ ceased to interpret Art. 43 as imposing only an obligation not to discriminate, introducing the different notion of restriction. However, the Court itself delayed in extending this approach to the direct taxation area.

Non-discrimination principle and “non-comparability”

20) From the beginning, the approach of the Court has been focused on the principle of non-discrimination on grounds of nationality. Accordingly to the ratio of this principle, the same rule must apply to comparable situations and different rules must apply to different situations. It results in the distinction between direct (or overt) and indirect (or covert) discrimination. In particular, in case C-279/93 Schumacker, paragraph 37, ECJ chose to look at “objective differences” in the situations considered.

21) In relation to direct taxes, the situations of residents and non-residents are generally not comparable. Nevertheless, the acceptance of this proposition as a general rule would deprive Art. 43 ECT of any meaning. This problem concerns the applicability of non-comparability principle in the field of direct taxes.

22) It is worth remembering what the ECJ specified in the recent M&S judgment, paragraphs 36 and 37: “It must be noted that, in tax law, the taxpayers’ residence may constitute a factor that might justify national rules involving different treatment for resident and non-resident taxpayers. However residence is not always a proper factor for distinction [...] In each specific situation, it is necessary to consider whether the fact that a tax advantage is.

---

68 See Opinion of the Advocate General Poiares Maduro in case C-446/03, Marks & Spencer, paragraph 26. See also M. Gammie, The impact of Marks & Spencer Case on Us-European planning, quot., pag. 485, and D. Gutmann, The Marks & Spencer case: proposal for an alternative way of reasoning, in Ec Tax Review 2003, p. 3.
69 European Court of Justice, judgment in Case C-19/92, Kraus, paragraph 32.
70 European Court of Justice, judgment in Case C-270/83, Avoir Fiscal.
71 “Far from being satisfied with a merely formal distinction between residents and non-residents, the court requires the Member States to have regard to the actual situation of the persons concerned” Opinion of the Advocate General Poiares Maduro in case C-446/03, Marks & Spencer, paragraph 30. See also B.J.M. Terra – P.J. Wattelet, quot., p. 46
72 See, lastly, European Court of Justice, judgment in Case C 169/03, Wallentin, paragraph 15
73 European Court of Justice, judgment in Case C-270/83, Avoir Fiscal.
available solely to resident taxpayers is based on **relevant objective elements apt to justify the difference in treatment**” [emphasis added].

23) The different treatment regards a subsidiary of a parent company resident in Vikland which is allowed to make a tax deductible group contribution to its parent in Vikland and a subsidiary of a foreign parent company which is not.

24) In order to analyze the subsidiaries situations, we can not leave the groups situations out of consideration: at a group level, we can clearly notice “**objective differences**” between a group in which the group members are only companies incorporated in Vikland and a group in which the parent (or generally a member) is a foreign company.

25) In fact, the main difference is **where and how** the final profits will be taxable. In other words, if we applied the same rule to these two different situations, we would obtain a completely different and discriminative result.

26) If we allowed a resident subsidiary to deduct profits and push them up to a foreign parent, the global fiscal treatment of the foreign group with only one subsidiary resident in Vikland would be totally different (and probably more convenient) than the treatment of a group of all companies resident in Vikland.

27) It results since when the State grants a fiscal deduction of group contribution in a domestic context, the goal is to achieve a reduction of the global fiscal burden of the group, giving it the possibility to use profits of a group member in order to compensate them with the losses of a loss making group member 74. If the State granted a GC in cross-border situations, it would completely lose the control on where and how the profits will be taxable 75, as regards for instance the tax rate 76. This will basically result in a great loss of fiscal revenue for Vikland and in an arbitrary fiscal allocation of profits for the companies.

28) This means that a resident group would have the sole possibility to operate on the tax basis finally taxable in Vikland, whereas a cross border group, with the sole creation of a

---

74 The possibility of a group contribution between two profits making companies does not question the main purpose of the system, as defined above.

75 This has nothing to do with the reduction in tax revenue: it can not be regaded as an overriding reason in the public interest which may be relied on to justify a measure which is in principle contrary to a fundamental freedom (European Court of Justice, judgment in case C-446/03 Marks & Spencer; paragraph 44 and European Court of Justice, judgment in case C-319/02 Manninen, paragraph 49).

76 In fact, transferred profits could be totally exempted or subject to a lower or higher tax rate, different in any case.
subsidiary in Vikland, could legally take advantage of the GC system in order to take free profits and make them taxable in another State with a totally different tax system.

29) The different treatment of profits must be considered as a relevant objective element. Consequently, a cross border GC must be qualified as a discrimination because the fact that a tax advantage is available solely to resident taxpayers is based on relevant objective elements apt to justify the difference in treatment 77.

Justifications

30) In the case in which the ECJ does not accept the exposed interpretation and finds a breach of the right of establishment, the Vikland could nevertheless justify its group contribution rules under different principles developed by the ECJ.

31) In fact, the Court accepts that discriminatory rules may be justified for imperative public-interest requirements other than those set out in the Treaty and in particular in the name of the cohesion system 78.

32) In relation to the judgment of the court in the M&S case, par. 51, it will be demonstrated that in the case in question not only those three justifications do exist, but also that they pursue legitimate objectives and constitute overriding reasons of public interest.

Territoriality principle and the allocation of taxing powers

33) It is not easy to make a precise distinction between, on one hand, the principle of territoriality and the protection of a balanced allocation of the power to impose taxes between MS and, on the other hand, the cohesion principle 79.

77 To be more convincing, we can compare this case to the similar M&S case, in respect to which I totally agree with the ECJ about the fact that the denial of cross border group relief constitutes a restriction to Art. 43 ECT. In the M&S Case, in fact, we can assume that the discrimination was substantially at the ground of the parent companies: an UK parent company could use losses of a resident subsidiary, whereas an equal UK parent could not use losses if the subsidiary was established abroad. Even if we consider, as above, the situation of the group, here there is a direct discrimination.

In fact, in the M&S case, the final taxation of the income was exactly the same: the parent company claimed the loss transfer from the foreign subsidiary in order to obtain an equal treatment in respect of another UK parent with UK subsidiary just because it was in the same fiscal situation as the latter, subject to same fiscal treatment in UK.

The difference is that a British parent company could have been disadvantaged by the sole fact of the establishment abroad and claimed the same treatment as another British parent. In the case of a grant of cross border group relief, a group of British members and a cross border group would have received exactly the same treatment. This is why the UK denial was a direct discrimination and the Vikland denial is not.

Territoriality (or, source) principle establishes that a State can tax the non-resident company if and only to the extent it has an economic attachment to the state, because it has limited tax liability.\(^\text{80}\)

If we did not respect this principle, we would erode the balanced allocation of the power to impose taxes between MS.\(^\text{81}\)

As the AG Poiares Maduro stated in the M&S case, the territoriality principle finds its most important application in the Futura Partecipation and Singer Case. So we need to analyse it in relation to the specific facts concerning that proceeding.\(^\text{82}\)

AG Poiares Maduro concluded in the M&S case that this principle can not be applied in the M&S case because the M&S company is subject to an unlimited tax liability in the UK. So the UK can not refuse to extend the British group relief regime on non-resident companies invoking the territoriality principle as a justification.\(^\text{83}\)

In a similar way, we could argue that the territoriality principle is not applicable to the facts at issue because the problem in question is to grant a tax deduction to Precisionmaterials which is a resident subsidiary subject to unlimited tax liability in Vikland.\(^\text{84}\)

Applying the mere M&S approach, only one side of the coin would be appreciated: the situation of the group would be totally ignored, while it must be treated as a unit, even though it is not a proper fiscal independent entity. It is true that the fiscal advantage is directed to the subsidiary, but it will increase the taxable base of other non-resident companies, in relation to which Vikland has not taxing power because there is not an

---

\(^{79}\) See, lastly, for example the different interpretation of the principles in question in the M&S Case, comparing the opinion of the AG Poiares Maduro and in the judgment of the Court. It could be interesting also to compare the different point of view of the AG Poiares Maduro and the AG Kokott in case C-231/05, Oy AA.

\(^{80}\) For the application of the territoriality principle, see European Court of Justice, judgment in case C-250/95, Futura partecipation and Singer, paragraph 22. See also the judgment of the court in case C-446/03, Marks & Spencer, paragraph 39 and the opinion of the AG Geelhoed in the case C-374/04, Test Claimant in the ACT Group Litigation, paragraphs 49-51.

\(^{81}\) It is worth mentioning what the ECJ said in the M&S case, paragraph 45: "the preservation of the allocation of the power to impose tax between Member States might make it necessary to apply to the economic activities of companies established in one of those States only the tax rule of that State in respect of both profits and losses".

\(^{82}\) That case concerned the measure and calculation of tax losses allowable to a Luxemburg branch of a French company and it was imposing a condition that an economic relationship had to be established between the losses carried forward and the income realized in the State imposing a charge to tax.

\(^{83}\) This aspect is almost ignored by the ECJ, that seems to single the territoriality principle out in the case concerned but not to consider it as a sufficient justification.

economic attachment. In other words, the extension of the GC regime would positively influence companies in relation to which Vikland has no taxing power.

40) We also need to consider the position of the other MS involved. Emeraland as well as Winland do not absolutely have any taxing power in relation to profits made in Vinland.

41) “To give the companies the option to have their profits taxed in the Member States in which they are established or in another Member States would significantly jeopardize a balanced allocation of the power to impose taxes between Member States, as the taxable basis would be increased in the first state and reduced in the second” 85.

The cohesion of the tax system

42) In its case-law, the Court acknowledges that the need to ensure cohesion of the tax system may justify a restriction of community freedoms 86. The essence of the cohesion principle is that a State grants a fiscal advantage only if it can compensate it with a taxation.

43) Even if this principle in its first interpretation given by the ECJ required a direct link between the fiscal deductibility and the subsequent taxation, it is important to consider the opinion of the AG Kokott in the Manninen case and the AG Poiares Maduro in the M&S case: analysing the extreme consequences of the strict application of the principle, they pointed out that if we wanted to find at anytime the “direct link” (which specifically requires that the advantage of the taxpayer and the recapture of the State must concern the same tax and the same taxpayer), the conception of fiscal cohesion would rest on over-rigid criteria 87.

44) The ratio of the cohesion principle is, in the words of the AG Poiares Maduro in the M&S case, “to protect the integrity of the national tax systems provided that it does not impede the integration of those systems within the context of the internal market” [emphasis added].

45) We can use the concept of a twofold neutrality. On one hand, the national tax rules must be neutral in regard to the exercise of the freedoms of movement and, on the other hand, the exercise of the freedom of movement must be as neutral as possible in regard to the tax arrangements adopted by the State.

85 European Court of Justice, Judgment in case C-446/03, Marks and Spencer, paragraph 46.
86 European Court of Justice, judgment in case C-204/90 Bachmann, European Court of Justice, judgment in case C-300/90, Commission/Belgium, European Court of Justice, judgment in case C-319/2001, Manninen and European Court of Justice, judgment in Case C-471/04, Keller Holding.
In case C-315/02, *Lenz*, paragraph 37, the ECJ pointed out that the coherence argument must be analyzed having regard to the aim pursued by the tax legislation in question and considering the facts concerned.

In the case concerned, the aim of the Vikland GC regime is, as stated before, to reduce the overall tax burden in the sense of reducing the taxable income of the group in one year, by using the profits of one company to compensate them with the losses of a related company. In this way, Vikland grants a fiscal advantage that it can recapture at the level of the parent company.

If a company claims it in cross border situation, it will go beyond the aim of the system, because it uses the group contribution not to be taxed in the State that grants it (like in the *M&S* case) but to have an advantage by exploiting the differences between different tax legislations. In other words, not even the fiscal advantage granted by Vikland is not recaptured in Vikland, but if it had been recaptured, it would not have been recovered in proportion to the starting position of the company. In fact, it depends on the different tax rates.

The cross border group is not neutral in respect of the Vikland tax legislation because it exploits its right of establishment with the sole purpose of endangering the equilibrium of the state: taking free profits and making them taxable abroad, by “hiding behind” the GC regime. This system, in its original formulation, does not allow tax rates shopping.

The cohesion principle as explained above is negatively impacted by a cross border GC. Consequently, it can constitute a valid justification for the Vikland denial of tax deduction.

**Double immunity of profits**

We can easily imagine what is the most dangerous advantage that a group could achieve in cross border situation: the double immunity of profits.

Can we ensure that free profits transferred will be taxable in the hand of the recipient company? The answer must be no. In fact in the proceeding at issue, Emeraland and Winland exempt profits because they consider them as dividends, so that double immunity is not a risk but a certainty.

In order to verify if this double exemption is not only a mere risk, it must be analysed the *juridical qualification* of the profits transferred and their subsequent treatment. According to
Art. 4, n. 1 of the s.c. Parent-Subsidiary Directive n. 90/435/EEC, MS can choose between the credit and the exemption method for taxing the transferred dividends. Since almost all the EU MS apply the exemption method, in case of cross border group contribution, the profits already exempted in the State of origin will be exempted also in the State of the recipient. This occurs because other MS, in the lack of a legislation similar to the GC regime, could do nothing but qualifying them as dividends.

Tax avoidance

54) As well as in the M&S case the risk of the cross border group relief consisted in the transfer of losses to companies established in Member States which applied higher tax rates and in which the tax value of the losses was therefore higher (the so called traffic of losses), here we have the same situation with regard to profits.

55) It is undoubtful that the right of establishment can not be used by traders with the sole purpose of endangering the equilibrium and the cohesion of national tax system. That would be the case if this right have been used “either abusively to evade laws or artificially to exploit the differences between those laws”.

56) A tax system in which a cross border group contribution regime is granted would attract and pledge artificial arrangements. In other words, it would be sufficient for a company resident in Vikland to establish a company abroad (in a fiscally convenient Member State) which will appear as a holding at a more than 50% of the shares, even if it does not lead any practical economic activities, to exploit the favourable taxation regime granted by Vikland.

57) It would easily grant and favour an escape to the Vikland tax system and at the same time an exploitation of the differences between MS laws.

Proportionality

58) After the analysis of the justifications, we must determine whether the restrictive measure goes beyond what is necessary to attain the objective pursued. It does not.

59) In fact, considering the undesirable effect of double immunity of profits as a consequence of the application of the Parent-Subsidiary Directive, it would be unfair to reform the Vikland tax legislation in order to grant the cross border GC in those few cases in which the

receiving company is resident in a Member State which applies the credit method to tax the same profits.

60) Moreover the main risk of tax avoidance - the attraction of artificial arrangements - could be eliminated only from a general exclusion of cross border group contribution.

61) Anyway, even if we wanted to verify the risks explained above in each factual situation and to grant a GC when the State of the receiving company applies the credit method or when it can be demonstrate that there is not an intent to avoid the Vikland tax legislation, we would disrespect the protection of a balanced allocation of the power to impose taxes between MS, which is a justification that must be considered together with the others, as the ECJ stated in the recent M&S case.

62) In fact the only way to respect this principle is the general exclusion of the tax deduction of a cross border GC.
PART B

4. The European Union law and third states: direct taxation

63) The claim that, under EC law, all the profits of Fiberoptics, resident in Vikland, can be contributed to HTTCO, resident in Cheesland, must be analyzed under the perspective of the impact of European Union Law on the relations with non-EU MS. A State that is not Member of the EU or, at least, of one of the other European agreements 90, must be considered a third country from the perspective of European law.

64) Therefore, provisions of the Treaty other than those that expressly refers to third countries should not be applicable in cross-border transactions involving third countries.

65) It must be examined whether the existence of a bilateral Tax Treaty between Vikland and Cheesland, concluded according to the OECD Model Convention, is relevant.

66) The mere existence of a bilateral (tax) treaty does not seem to imply the applicability of the fundamental freedoms granted by European law, despite the fact that the European Court of Justice has admitted the interaction between the non-discrimination principle of the EC Treaty and the non-discrimination clauses contained in Double Tax Conventions 91.

67) This situation could be relevant for European law as far as the impact of EC Treaty on bilateral tax treaties with third countries is concerned.

68) Furthermore, it must be underlined that a third country has no obligations in respect of European law: from a third country perspective, EC Treaty is merely a multilateral tax treaty. Consequently, in this case the principle of international law pacta tertiiis nec nocent nec prosunt is applicable. This principle is a general principle of international customary law and is reflected in Article 34 of the 1969 Vienna Convention on the Law of Treaties, which

90 It must be underlined that Cheesland is not Member State of the European Union nor European Economic Area Agreement. This observation is relevant since the European Court of Justice stated that EEA countries are not to be regarded as third countries. See Case European Court of Justice, judgment in case C-452/01, Margarethe Ospelt, paragraph 23.

91 See European Court of Justice, judgment in Case C-1/93, Halliburton, paragraph 6.
provides that “[a] treaty does not create either obligations or rights for a third State without its consent”. Consequently, an international agreement, like the EC Treaty, cannot change the rights and obligations under international law of States not party of the agreement.

5. Right of establishment and third states

69) Before analyzing whether the legislation of Vikland, concerning the denial of the group contribution deduction paid to a company resident in a non EU Member State, is in breach with Artt. 43 and 48 ECT, it must be considered if the freedom applicable is the right of establishment or the free movement of capital.

70) It is not always clear if a cross-border shareholding is covered by the right of establishment or by the free movement of capital. This distinction is very significant in relation with third States since the free movement of capital is the only Treaty freedom extended also to third States.

71) The freedom of establishment is not applicable to third countries since there is no reference to non-EU MS in the text of Artt. 43 and 48 ECT. Moreover, the ECJ clearly stated that the right of establishment aim to ensure that foreign nationals and companies are treated in the host Member State in the same way as nationals of that Member State and that it also prohibits the origin Member State from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation 92.

72) In the case of Fiberoptics, the relevant fundamental freedom is the right of establishment and not the free movement of capital. In fact, as stated by the AG Léger in Cadbury Schweppes case 93 “according to case-law, when nationals of a Member State have a holding in the capital of a company established in another Member State giving them definite influence over that company’s decisions and allowing them to determine its activities, it is the provisions of the Treaty on freedom of establishment which apply and not those relating to the free movement of capital”.

92 See European Court of Justice, judgment in Case C-264/96, Imperial Chemical Industries plc (ICI), paragraph 21.
93 See opinion AG Léger in the case C- 196/04, Cadbury Schweppes, paragraph 32.
73) This opinion is supported by the scholars\textsuperscript{94}, who argued that if an economic operator is investing in a business continuation or start-up abroad, the relevant freedom is the right of establishment.

74) Moreover, the ECJ stated that when an economic operator has a holding in the capital of a company which gives definite influence over the company’s decisions and allows to determine its activities, he is exercising the right of establishment\textsuperscript{95 96}.

75) Consequently, it must be analyzed whether an effective power over the company’s business decisions derives from the shareholding. It is clear, that the 100% shareholding in Fiberoptics is sufficient to secure to HTTCO a significant influence in business decisions\textsuperscript{97}.

76) Therefore, the Vikland legislation that denies the deduction of group contribution to the parent company resident neither in Vikland nor in the European Union, is compatible with EC law since the relevant freedom - the right of establishment - is not applicable in situations involving third States.

77) As a consequence, it is not relevant the reliance on the rule on free movement of capital.

6. Free movement of capital and third states

78) In any event, if the relevant freedom were considered the free movement of capital, it must be analyzed the concrete application of this right to third countries. It must be premised that, it is not believed that examination of the legislation at issue in the light of that freedom can change the result of the above analysis.


\textsuperscript{95} See European Court of Justice, judgment in case C-251/98, \textit{Baars}, paragraph 22.

\textsuperscript{96} See opinion AG Alber in the case C-251/98, \textit{Baars} paragraph 33 where it is state that “the border between the simple investment of capital in shares in an undertaking established in another Member State, and actual establishment in that Member State, should probably be set at the point where a shareholder ceases to confine himself to the mere provision of capital in support of a particular business activity carried on by another person, and begins to become involved himself in conducting the business. Such involvement requires the shareholder to go beyond simply exercising his voting rights, and to participate in a way which will enable him to exercise real influence over the company’s business decisions. In determining whether such is the case, regard should be had to the rules of company law in the State in which the undertaking is established”.

\textsuperscript{97} The AG Kokott in her opinions to the Oy AA case (C-231/05) focused on the freedom of establishment principle as the situation involved a 100% shareholding.
79) In order to apply the free movement of capital, it must be decided whether or not there has been a movement of capital. It should be noted that the EC Treaty does not define the terms “movements of capital”. The ECJ when determining whether the Treaty regime on capital movements applies, still refers to the Directive 88/361/EEC and, in particular, refers to the annexed Nomenclature.  

80) The concept of capital movements must be interpreted broadly. The non-exhaustive list of capital movements provided by the mentioned Directive can serve to interpret the concept, by understanding its ratio. This list includes, among the others, direct investments, credits related to commercial transactions or to the provision of services, in which a resident is participating, financial loans and credits, and, in the category “other capital movement”, transfers of monies required for the provision of services.  

81) The group contribution does not fall within any of the category, since it is not a transfer of money connected with a financial transactions or an investment, but it is only a “tax–based” transaction. Group contribution is a profit and loss account item that does not compensate the company assets. Therefore, the transfer of profits through the group contribution is not deductible in the contributor’s taxes under general tax law.  

82) There is not any financial, commercial or personal reason related to the group contribution, unless the fiscal one.  

83) As stated before, the Nomenclature is not an exhaustive list, so the capital movements mentioned in the Directive can be extended without any difficulty. In this perspective, the ECJ in the Trummer and Mayer case has extended the applicability of Art. 56, including a wide range of transactions that could be regarded as financial transactions, as the mortgage services. Therefore, it can be said that the concept of capital under EC law comprises capital mentioned in the Annex of the Directive and any action related to a subject of this Annex. Since the group contribution is not related to a subject of the Annex, consequently it cannot be regarded as capital according to EC law.

---

98 See European Court of Justice, judgment in Case C-222/97, Manfred Trummer and Peter Mayer.
100 See European Court of Justice, judgment in Case C-222/97, Manfred Trummer and Peter Mayer, paragraph 22.
84) That interpretation is consistent with the development of a common EU market of financial services \(^{102}\).

85) The group contribution is not a financial service, being only a transfer of profits to related company for tax reasons. The group contribution made by Fiberopticts is not connected to a financial or commercial transaction, since there is not any transaction between Fiberopticts and HTTCO.

86) In any event, if the group contribution were regarded as capital movements for the purposes of EC law, it must be analyzed the concrete applicability of this right in situations involving third countries. According to Art. 56 ECT all restrictions on the movement of capital between MS and between MS and third countries shall be prohibited. The ECJ has not investigated the compatibility of national tax rules with the free movement of capital between the European Union and third countries yet. In fact, in the recent case *Fidium Finanz* \(^{103}\), dealing with free movement of capital and involving a company resident in a non-EU Member State, the ECJ only focused on the delimitation of and the relationship between the freedom to provide services and the free movement of capital. Therefore, the Court has not specifically addressed the application of the free movement of capital to a subject resident in a third country.

87) Consequently, it is not clear whether in situations involving third countries the scope of Art. 56 of the ECT has to be interpreted in the same way as in intra-EU situations. According to a teleological interpretation of the law, it must be noted that the purpose of the rule on the free movement of capital is to achieve a common internal market and an economic and monetary union \(^{104}\). The aim is to realize an effective common capital market between MS.

88) From this perspective, the purpose of the liberalization of capital movements towards third countries is less clear. Nevertheless, that purpose cannot be the same which lies behind the provisions on the free movement of capital within the European Union, because that liberalization is not necessary in order to achieve an integrated market between MS. The aim

---


\(^{103}\) European Court of Justice, judgment in Case C-452/04, *Fidium Finanz*.

to achieve an internal capital market is not relevant when capital movements towards third countries are concerned.

89) The rule does not provide a full liberalization of the capital movement towards third countries: such liberalization is established only as far as it is necessary in order to achieve EC Treaty purposes.

90) Moreover, the rule on the free movement of capital towards third countries is unilateral: therefore third countries are not obliged to guarantee a corresponding liberalization of the capital movements.

91) The teleological interpretation should prevail over the straight wording of Article 56 ECT which explicitly includes third countries, without further specification. In fact, it is clear that this rule cannot have the same purpose of the free movement of capital between MS and, therefore, the extension cannot be the same.

92) If a different interpretation was applied, then problems of compatibility with the principle of reciprocity would arise. The wording of Art. 56 ECT would create a legal context where MS were bound to comply with the free movement of capital while third countries were not: this asymmetrical situation is incoherent with the international principle of reciprocity.\textsuperscript{105}

93) It must be also considered the potential impact that a total liberalization of capital movements towards third countries would have, especially if this liberalization affects even national tax law of MS.

94) To sum up, the free movement of capital towards third countries should be interpreted in a narrower sense than the corresponding provisions on the free movement of capital within the EU. Consequently, the free movement of capital is not applicable for the mere fact that a capital flow toward third countries is involved.

95) The legislation at issue does not seem to be an obstacle to the integration of the Internal Market as far as it limits the deduction of a transfer of profits to a related company resident in non-EU country. It does not prohibit capital movement toward third countries, since the denial of the deduction is based on the fact that the group contribution is deemed to be a distribution of profits and not a cost.

\textsuperscript{105} See P. PISTONE, \textit{The impact of european law on the relations with third countries in the field of direct taxation}, in \textit{Intertax}, 2006, p. 236.
The fact that this deduction is allowed if the group contribution is paid to a Vikland resident company is only an extraordinary tax allowance, subject to specific requirements. As mentioned above, group contribution is not a compensation for a factor of production and therefore, under tax legislation, it is not deductible in the contributor’s taxes as general rule.

From the above follows that, since there is not a limitation to capital movements toward third countries, the denial of deduction of group contribution paid to HTTCO, resident outside the European Union, is compatible with EC Law.

7. Justifications

7.1. General remarks

In the event in which the ECJ does not accept the above interpretation and find a breach of free movement of capital, the Vikland could nevertheless justify its group contribution tax rules under different principles developed by the ECJ.

However, the application of a fundamental freedom in situations involving third countries increase the number of justifications that the European Court of Justice can accept. In fact, in extra-EU cases there are less reasons to refrain from accept justifications to discrimination or restriction to a fundamental freedom.

Moreover, since the purpose of the liberalization of capital movement toward third countries is more limited than the purpose behind the free movement within the European Union, it is possible to justify a national rule with arguments not always accepted by the European Court of Justice in situations involving MS.

7.2. Arguments concerning the risk of a loss of effective fiscal supervision

The ECJ case law establishes that the effectiveness of fiscal supervision can be considered as an overriding requirement of general interest that can justify a restriction to the exercise of a fundamental freedom.

---

106 See P. PISTONE, The impact of european law on the relations with third countries in the field of direct taxation, quot., p. 237.
107 See K. STAHL, Free movement of capital between member states and third countries, quot., p. 54.
108 See European Court of Justice, judgment in case C-250/95, Futura, paragraph 31 “The Court has repeatedly held that the effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying
The ECJ, while has rejected that justification in intra-EU situations on the base of the Directive n. 77/799/EEC of December 19th 1977 concerning the mutual assistance in the field of direct taxation, must admit this same justification in extra-EU situations, since the aforementioned legal instrument is not applicable in the relations with third countries. Moreover, there is no international customary rule ordaining collaboration with another State for the enforcement of tax claims in its favour. Therefore, in the lack of an international agreement there is no obligation for a State to cooperate with another State in fiscal matters.

Consequently, whereas a national tax authorities cannot rely on a specific EC law rule or international agreement to resolve administrative difficulties in tax field, the justification at issue must be accepted by the Court.

Neither the existence of a bilateral tax treaty, including an exchange of information clause, can be regarded as a measure equivalent to the one provided by the directive. In this respect, it must be underlined that DTCs are not part of EC Law.

Consequently, the mere existence of an exchange of information clause in bilateral tax treaty between Vikland and Cheesland is not a significant argumentation to reject the applicability of the justification represented by the need for effective fiscal supervision.

It must also be noted, as AG Kokott does in her opinion in the case, that MS cannot rely on deficiencies in the cooperation between their tax authorities in order to justify restrictions on fundamental freedoms. The limitation of group contribution toward third countries is therefore justified by the fact that Vikland cannot have fiscal supervision on

---

*a restriction on the exercise of fundamental freedoms guaranteed by the Treaty (see, for example, the judgment in Case 120/78, Rewe Zentral, paragraph 8.*

109 See opinion AG Kokott in the case C-470/04, N, paragraph 114

110 See European Court of Justice, judgment in Case C-204/90, Bachmann, paragraph 18; European Court of Justice, judgment in Case C-80/94 Wielockx, paragraph 26; European Court of Justice, judgment in Case C-279/93, Schumacker, paragraph 43 and ff.; European Court of Justice, judgment in Case C-55/98 Vestergaard, paragraph 26 and ff.; European Court of Justice, judgment in Case C-1-93 Halliburton, paragraph 22; European Court of Justice, judgment in Case C-87/99 Zurstrassen, paragraph 24 and ff.


112 The situation would be totally different if such an information clause existed in agreements between the European Union and third States, as in the Savings agreement with Switzerland. See Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, 3 June 2003.

113 See opinion AG Kokott in the case C-470/04, N, paragraph 114
such transaction, since third country is not obliged to cooperate as it would be if it were a Member State.

107) By concluding on this point, a restriction to free movement of capital towards third States should be considered justified by the need of effective fiscal supervision.\textsuperscript{114}

7.3. Territoriality principle and the balanced allocation of the power to impose taxes between MS

108) As already stated, the power to impose direct taxes falls within the competence of the MS that must observe Community Law. In fact, “\textit{although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by Member States must nevertheless be exercised consistently with Community law}”. This is a consolidated principle in the ECJ case law.\textsuperscript{115}

109) As stated in \textit{M&S}, the preservation of the allocation of the taxing powers between MS is a legitimate purpose which could justify restriction to fundamental freedoms.

110) The principle of territoriality has been recognized by the ECJ.\textsuperscript{116} The territoriality principle is an objective criterion, through which the connection with a tax jurisdiction is determinated on the place of origin of an income. That principle is therefore strictly connected with the tax sovereignty of a State, since it contributes to determine the taxable income. A State is therefore free to determine if an item of income, whose source is extraneous to national territory, must be taxed or not, under the national tax law. It must be underlined that Community law does not mention the territoriality principle and, therefore, it leaves the substance to the MS practice.\textsuperscript{117} Limits to that power can derive only from international law, \textit{i. e.} a tax treaty.

\textsuperscript{114} See K. STAHL, \textit{Free movement of capital between member states and third countries}, quot., p. 54-55.

\textsuperscript{115} See European Court of Justice, judgment in case C-279/93 \textit{Schumacker}; opinion of AG Poiares Maduro, C-446/03 \textit{Marks & Spencer}, paragraph 21.

\textsuperscript{116} See European Court of Justice, judgment in case C-250/95 \textit{Futura Participations and Singer}, paragraph 22. According to Weber the application of the principle of territoriality concerns not only the justification ground, but the question of whether there are similar situations, thus, whether or not there is a matter of discrimination (see D. WEBER, \textit{The Bosal Holding case: analysis and critique}, in EC Tax Review, 4/2003, 228). Consequently, the territoriality principle could be regarded as a principle that must be applied before considering any justifications. It could be argued that on the base of the territoriality principle it could be excluded the existence of similarity among two situations. In this event, there should be no need for any justification as far as different situations are treated in a different way.

\textsuperscript{117} See D. WEBER, \textit{The Bosal Holding case: analysis and critique}, quot., p. 229.
According to the ECJ case law, the MS are free to define unilaterally or in a tax treaty the connecting factors for the allocation of taxation rights\textsuperscript{118}. From the ECJ case law can be inferred that EC law limit is not absolute, but works only as far as it is necessary to achieve the aim of the Internal Market.

Consequently, the principle of territoriality is a relevant justification for an exception to fundamental freedoms even in situations involving exclusively MS. If that principle is a valid and accepted justification for restrictions to fundamental freedoms in situations involving MS, \textit{a fortiori} it is valid in cases involving third countries.

The allocation of the taxing power cannot be overrided by a third State, by invoking EU fundamental freedoms.

Therefore, the MS remain free to determine the structure of their tax system and to determine the need to allocate taxing powers among themselves. Moreover, in the lack of harmonisation of national laws in this field, the difficulties ensuing for economic operators as a result of mere differences in tax regimes as between MS are outside the scope of the Treaty\textsuperscript{119}.

Consequently, differences in treatment of a transaction resulting from legislative differences between a Member State and a third State do not constitute a breach of the EC Treaty.

It can be also noted that the tax sovereignty of the Member States implies that there are several different tax systems. Those are natural consequences of the fact that direct taxation is an exclusive competence of the MS. The advantages and the disadvantages arising from such disparities fall outside the scope of the EC Treaty\textsuperscript{120}, mostly in situations involving third countries that are not part of the process of integration of the EU Market.

\textsuperscript{118} See European Court of Justice, judgment in Case C-336/96, \textit{Gilly}; European Court of Justice, judgment in case C-307/97, \textit{Saint-Gobain}, European Court of Justice, judgment in case C-513/03 \textit{Van Hilten}.

\textsuperscript{119} See opinion AG Poiares Maduro in the case C-446/03, \textit{Marks & Spencer}, paragraph 23.

\textsuperscript{120} See D. WEBER, \textit{In search of a (new) equilibrium between tax sovereignty and the freedom of movement within the EC}, in \textit{Intertax}, 2006, p. 588.
7.4. The cohesion of the tax system

117) As mentioned above, in its case law, the Court acknowledges that the need to ensure cohesion of the tax system may justify the enactment of rules restrictive of the community freedoms.\textsuperscript{121}

118) The cohesion principle covers a variety of public interest arguments.\textsuperscript{122} In this perspective, (i) the right to deny tax deductions because of the loss of taxing rights in favour of another State and (ii) the refusal of a group relief for a group including non-resident companies can be considered as part of the cohesion argument because the losses of the domestic company could not be offset by taxation of the profits of the non-resident subsidiaries.

119) The \textit{ratio} of cohesion principle is, in the words of AG Poiares Maduro, the protection of the \textit{integrity} of the national tax systems provided that it does not impede the \textit{integration} of those systems within the context of the internal market.\textsuperscript{123} Moreover, AG Kokott in her opinion in the \textit{N} case, seems to further develop the meaning of coherence, by emphasizing the relevance of symmetrical tax treatments in inbound and outbound transactions.\textsuperscript{124}

120) Such justification is valid for the present case since the taxable income contributed by a Vikland resident company to a non Vikland resident (related) company will not be taxed in Vikland but only in that other State. Consequently, the loss of taxing rights will not be offset by taxation of the profits of the non resident related company.

121) It has been said that one of the problem with the cohesion concept is that it has been applied in a strictly national and territorial sense.\textsuperscript{125} The problem is that this purely national approach is incompatible with the aim of a fully integrated market as prescribed by EC Treaty. Is it clear, however, that this argumentation is not relevant in situations involving third countries, since the territorial scope of the EC Treaty cannot be broadened until it covers every States in the world.

\textsuperscript{121} European Court of Justice, judgment in Case C-204/90 \textit{Bachmann}, European Court of Justice, judgment in Case C-300/90, \textit{Commission/Belgium}, European Court of Justice, judgment in Case C-319/2001, \textit{Manninen} and European Court of Justice, judgment in Case C-471/04, \textit{Keller Holding}.

\textsuperscript{122} See F. VANISTENDAEL, \textit{Cohesion: the Phoenix rises from his ashes}, quot., p. 215.

\textsuperscript{123} See opinion AG Poiares Maduro, in the case C-446/03, \textit{Marks & Spencer}, paragraph 66.

\textsuperscript{124} See opinion AG Kokott in the case C-470/04, \textit{N}.

\textsuperscript{125} See F. VANISTENDAEL, \textit{Cohesion: the Phoenix rises from his ashes}, quot., p. 216.
122) Otherwise it has been stated that there is a new territorial scope for the application of the cohesion principle, because the application of that principle is no longer limited to the national territory of a single Member State, but it applies to all tax systems of all MS\textsuperscript{126}. Even accepting this new approach, it is necessary to underline that this argumentation is valid only within the Internal Market and not with regard to third countries. It cannot be said that the territorial scope for the application of the cohesion principle must be broadened unilaterally in order to cover even all third countries, otherwise it could be inconsistent with international law.

123) Moreover, it has been stated that “the concept of fiscal cohesion performs an important corrective function in Community law. It serves to correct the effects of the extension of the Community freedoms to the tax systems whose organisation is in principle a matter for the sole competence of the Member States”\textsuperscript{127}. That corrective function covers all the fundamental freedoms, including the free movement of capital toward third States.

124) Furthermore, that argument is even more stronger in situations involving third countries, because in this situations the need for an extension of Community freedoms is less relevant. Indeed, in those situations there is not the exigency to pursue the integration of the Internal Market.

125) Consequently, since Cheeseland is not part of the Community territory, it must be concluded that the cohesion argument is a valid and applicable justification.

7.5. Tax avoidance

126) As above mentioned, Vikland GC regime is justifiable as far as it seeks to counteract tax evasion and avoidance. The risk of tax evasion/avoidance connected to group contribution is more relevant when non EU-MS are involved.

\textsuperscript{126} See F. VANISTENDAEL, Cohesion: the Phoenix rises from his ashes, quot., p. 222.

\textsuperscript{127} See opinion AG Poiares Maduro in the case C-446/03, Marks & Spencer, paragraph 66 where it is also stated that “The Function performed by fiscal cohesion is the protection of the integrity of the national tax systems, provided that it does not impede the integration of those systems within the context of the internal market”.
127) It would be easy for a resident in a Member State to transfer taxable income towards a non-EU-Member State, but such an operation can not be considered as an exercise of the free movement of capital, but only as an abusive tax arrangement. In fact, a company resident in Vikland could avoid or reduce its taxable income in Vikland simply by establishing abroad a parent company. On the other hand, a company resident outside EU, that controls a company resident in Vikland, could avoid its tax liability in Vikland through the group contribution. In this perspective, the legislation at issue is justified by the counteract of the loss of tax revenue deriving by tax avoidance or tax evasion through transnational group contribution.

128) Moreover, it must be underlined that according to Art. 58, par. 1, lett. b) ECT, a Member State has the right to take all measures to prevent infringements of national law and regulations, in particular in the field of taxation. The Vikland provisions concerning group contribution is also intended to prevent a taxpayer from avoiding tax in Vikland by transferring its taxable income to another jurisdiction. If this aim is in principle acceptable whereas MS are involved\textsuperscript{128}, it must be concluded that it is acceptable \textit{a fortiori} in situations involving third countries.

\textbf{8. Proportionality}

129) In any event, the national tax rules hindering the free movement of capital must be proportional. It means that the measure which is in contrast with fundamental freedoms must be suitable to achieve the aim pursued and must not go beyond what is necessary to achieve it. In order to ascertain the proportionality of a measure, the possibility to introduce less restrictive measure must be analyzed.

130) The proportionality principle is a flexible principle and involves an appropriateness test. Moreover, the Court also applies a necessity test as part of the proportionality test: the measure must not be more extensive than what is necessary for achieving the objective pursued\textsuperscript{129}. Therefore, the proportionality has a very factual character.

\textsuperscript{128} See opinion AG Kokott in the case C-470/04, \textit{N}, paragraph 109
131) The existence of less restrictive measures could be invoked when there are bilateral tax treaties concluded by the Member State the legislation of which is supposed to be incompatible with EC law. This is not the case of legislation at issue, because of the lack of a tax treaty between Vikland and Cheesland. It must be underlined that, in the case at issue, there is no international agreement that allows (or oblige) Vikland tax authorities to determine the effective taxation of the group contribution as profits in the third country.

132) In the *Leur-Bloem* case, the ECJ stated that a general rule automatically excluding certain categories of transactions from the tax advantage, whether or not there is actually tax evasion or tax avoidance, is not proportionate since it goes beyond what is necessary to prevent tax evasion or tax avoidance. The ECJ also stated that tax administrations should grant to the taxpayers at least the opportunity to show that such operations were sustained by effective commercial reasons.

133) It can be noted that the group contribution itself is not a wholly artificial arrangements, nonetheless there are no commercial reasons involved in that transaction. The transfer of profits through group contribution has only fiscal reasons. The legislation at issue simply affects the fiscal reasons lying behind the group contribution and not the transfer of profits itself.

134) Moreover, the legislation at issue does not preclude to make a group contribution to a related company, wherever resident, but it avoids the tax abuse of that transaction. Therefore, the denial of the deduction of group contribution paid to a company resident in a third country is a proportionate measure in order to pursue the above mentioned aim.

135) The law cannot be preventive in the abstract otherwise it contravenes the proportionality principle. In this respect, the legislation at issue does not seem to be preventive in abstract, since it denies the deduction of group contribution toward a third country resident company because that profit contribution is deemed to be a profit distribution and, therefore, a taxable transaction. This assumption is even more relevant in situations involving third countries, since in this event, in the absence of an international agreement, it is quite

---

130 See European Court of Justice, judgment in case C-28/95.
difficult to implement a less restrictive measure to pursue the objectives mentioned above as relevant justification.

136) From the above, it follows that the national legislation at issue is justified by overriding reasons in the public interest and that justification fulfils the proportionality principle.
V. ANNEXES

1

HTTG Group

FIBEROPTICS +
Vikland

BASTILLECO -
Winland

HTTCO -
Cheesland

FAIRWAY -
Emeraland

PRECISIONMATERIALS +
Vikland

Direct 100%

50%

50%
TAX PLANNING

FIBEROPTICS +
Vikland CIT: 25%

100% of the 2005 profits

BASTILLECO -
Winland CIT: 30%

50% of the 2005 profits

HTTCO -
Cheesland CIT: 9%

FAIRWAY -
Emaraland CIT: 11%

50% of the 2005 profits

PRECISIONMATERIALS +
Vikland CIT: 25%

50% of the 2005 profits
Differeces between M&S and the case concerned

M&S case

UK
CIT: 30%

P1

S

UK
CIT: 30%

P2

S

Other MS
CIT 20%

Vikland case

Vikland
CIT: 30%

P1

S

Profits
transfer

Vikland
CIT: 30%

S

Profits
transfer

Other MS
CIT: 20%

P2

S

Losses
transfer
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art.</td>
<td>Article</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>EC Law</td>
<td>European Community Law</td>
</tr>
<tr>
<td>ECT</td>
<td>European Community Treaty</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>GC</td>
<td>Group Contribution</td>
</tr>
<tr>
<td>MS</td>
<td>Member State</td>
</tr>
</tbody>
</table>