

# 《知识产权法研讨课大纲》 教学大纲

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## 前 言

(包括课程性质、编写目的、课程简介、编写人员等)

《知识产权法研讨课》是法学专业的专业选修课，是专门为法学本科生开设的一门通过对知识产权法理论研习综合复习知识产权法基础知识、训练法律思维、提高法律实践能力的课程。本课程的先修课程主要是《民法学原理（一）》、《民法学原理（二）》、《民事诉讼法》、《知识产权法》、《竞争法》。

本课程的教学目的是通过组成研讨小组的形式对知识产权法必修课中涉及到的理论问题进行深入地分析和研讨，通过分析和研讨使学生能够了解接触某一理论问题入手点，引导学生在掌握知识产权法基础理论的前提下对实际生活和司法实践中发生的案件从知识产权法学理论的角度和诉讼技巧、诉讼知识的角度予以关注。以提高学生深层次研究分析实际案件、口头表达以及团组合作研究的能力。

因为，本课程以知识产权理论问题作为教学素材，通过研究小组的主讲发言，全班同学进行分析和讨论，老师进行引导和点评，故本课程没有指定教材。授课所用的案例既要保证案例的经典性又要与时俱进，每节课通过 PPT 或 Word 形式将其展示出来。

本课程的教学方法主要是案例教学法、研讨教学法、合作教学法、互动教学法、启发教学法、对话教学法等。

### 1. 案例教学法

本课程教学内容的学习，主要通过分析案例实现。通过在案例分析过程中梳理案件中的法律关系、确定案件的关键问题、发现问题的解决途径、评析审理结果结果等一系列的教学活动，提高学生运用法学理论适用法律的能力，提高培养学生的实践能力。

### 2. 研讨教学法

本课程的课堂学习以研讨方式进行，借鉴研讨课（Seminar）的教学方式，报告人提前准备书面案例研习报告，课上由研究小组就案例分析做主讲发言，全班同学进行分析和讨论，教师进行引导和点评，并分析案例研习与讨论中存在的问题。通过撰写研习报告、口头报告以及课堂讨论，培养学生深层次研究分析实际案件、口头表达以及团组合作研究的能力。

### 3. 合作教学法

本课程中撰写报告和课堂研讨都将学生分为不同小组，每一案例由自由组合而成的不同小组负责主要报告。小组成员在分组完成相关学习任务的同时，能够在合作学习中训练沟通能力、协调能力和组织能力。

### 4. 互动教学法

本课程的案例分析报告和课堂研讨注重互动，包括师生互动、生生互动，充分发挥学生主体性，注重学生在学习中的主观能动性。通过互动式学习，不断引导学生学习，培养学生的自我学习能力，促进学生形成独立思考的人格与学术风格。

### 5. 启发教学法

本课程进行案例分析，具有复习知识产权法基础理论和基本知识的功能，但目的却在于通过案例训练学生的基本能力，在教学中注意启发学生主动发现问题，通过教师示范性研究分析和学生间的互动性分析为学生进行相关研究分析提供示范，培养学生的创造精神。

本课程的考核方式，可以由期末考察成绩构成，也可以由期末考察成绩与平时成绩相结合。期末考察采取开卷案例分析形式。平时成绩可以由教师根据学生平时案例分析和课堂讨论中的表现确定。

基于以上的考虑，本大纲在结构上分四部分：（1）本章学习目的和要求；（2）本章内容；（3）复习与思考题；（4）拓展阅读书目

“知识产权法案例研习”计划授课总学时 36 学时，共 2 学分。

## 专题一 知识产权制度的合理性

教学目的和要求：通过本专题研讨，使学生深入理解知识产权与有形财产制度的区别，掌握知识产权制度设置的缺欠之处，对于知识产权利益平衡理论有较好的理解。

教学时数 2 课时

研讨内容：

### 一、知识产权的概念

- (一) 知识产权概念的历史起源；
- (二) 知识产权制度的历史发展；

### 二、知识产权、无形财产与民法的关系

- (一) 知识产权与无形财产的关系；
- (二) 无形财产与有形财产的异同；
- (三) 知识产权与民法的关系；

### 三、知识产权制度的合理性

- (一) 知识产权制度的利弊观；
- (二) 知识产权制度的合理性分析。

复习与思考题：

可由授课教师根据研讨情况确定思考题目。

拓展阅读书目：

- 1、吴汉东，《科技、经济、法律协调机制中的知识产权法》，载《法学研究》，2001 年第 6 期，第 128—148 页。
- 2、胡开忠，《无形财产形态的历史演变及启示》，载《云南大学学报法学版》，2003 年第 16 卷第 1 期，第 61—64 页。
- 3、吴汉东，《关于知识产权本体、主体与客体的重新认识——以财产所有权为比较研究对象》，载《法学评论》，2000 年第 5 期，第 3—13 页。
- 4、吴汉东，《财产权客体制度论——以无形财产权客体为主要研究对象》，载《法商研究》，2000 年第 4 期，第 45—58 页。
- 5、吴汉东，《财产的非物质化革命与革命的非物质财产法》，载《中国社会科学》，2003 年第 4 期，第 122—133 页。
- 6、易继明，《知识产权的观念:类型化及法律适用》，载《法学研究》，2005 年第 3 期，第 111—125 页。
- 7、吴汉东，《无形财产权的若干理论问题》，载《法学研究》，第 19 卷第 4 期，第 79—85 页。
- 8、冯晓青，《知识产权法利益平衡理论》，中国政法大学出版社，2006 年 8 月第一版。

## 专题二 知识产权的法律性质

教学目的和要求：通过本专题研讨，使学生对于知识产权的法律性质有系统全面的理解，对知识产权的法定性、时间性、地域性等理论问题，有深入的理解。

教学时数 2 课时

研讨内容：

### 一、知识产权的法定性

- (一) 知识产权法定性的历史发展
- (二) 知识产权法定性的效力

### 二、知识产权的地域性

- (一) 知识产权地域性产生原因
- (二) 知识产权地域性的克服
- (三) 知识产权地域性的效力

### 三、知识产权的时间性

- (一) 知识产权时间性的产生原因
- (二) 知识产权时间性的现代发展
- (三) 特殊类型知识产权的时间性

复习与思考题：

可由授课教师根据研讨情况确定思考题目。

拓展阅读书目：

- 1、李扬，《知识产权法定主义及其适用》，载《法学研究》，2006年第2期，第3—16页。
- 2、《巴黎公约》、《伯尔尼公约》、《Trips 协议》。
- 3、张玉敏，《知识产权的概念和法律特征》，载《现代法学》，2001年第10期，第103—110页。
- 4、王春燕，《论知识产权地域性与知识产权国际保护》，载《中国人民大学学报》，1996年第3期，第61—65页。
- 5、吴汉东，《中国知识产权法制建设的评价与反思》，载《中国法学》，2009年第1期，第51—68页。
- 6、(美)希比 著，倪晓宁，王丽 译，《国际知识产权（第三版）》，中国人民大学出版社，2012年2月第一版。

## 专题三 作品的构成

教学目的和要求：通过本专题研讨，使学生深入理解作品的构成要件，能够区分作品与非作品的差别，同时深入了解著作权法中关于作品保护的基本原则。

教学时数 2 课时

研讨内容：

### 一、作品的属性

- (一) 独创性
- (二) 抄袭剽窃与作品的创造

### 二、作品的分类

### 三、衍生作品、演绎作品与作品的创造

- (一) 衍生作品的概念
- (二) 演绎作品的概念
- (三) 戏仿作品的概念
- (四) 作品的创造的构成要件

复习与思考题：

可由授课教师根据研讨情况确定思考题目。

拓展阅读书目

- 1、曹世华，《论作品独创性之合理规定》，载《法律科学》，1996 年 第 6 期，第 34—40 页。
- 2、姜 颖，《作品独创性判定标准的比较研究》，载《知识产权》，2004 年第 3 期，第 8—15 页。
- 3、张玉敏、曹博，《论作品的独创性——以滑稽模仿和后现代为视角》，载《法学杂志》，2011 年第 4 期，第 54—58 页。
- 4、王 迁，《论法人作品 0 规定的重构》，载《法学论坛》，2007 年第 6 期，第 30—37 页。
- 5、李雨峰，《版权制度的困境》，载《比较法研究》，2006 年第 3 期，第 99—106 页。
- 6、郑成思，《临摹，独创性与版权保护》，载《法学研究》，1996 年第 2 期，第 77—82 页。



## 专题四 作者的界定

教学目的和要求：通过本专题研讨，使学生深入理解作者的构成要件，对于若干特殊类型的作品的作者构成加以区分，对于特殊类型的著作权归属和使用规则有深入的理解。

教学时数 2 课时

研讨内容：

### 一、作者的界定

- (一) 作者的构成要件
- (二) 特殊情况下的作者构成要件

### 二、著作权归属与使用规则

- (一) 合作作品的归属与使用
- (二) 汇编作品的归属与使用
- (三) 演绎作品的归属与使用
- (四) 职务作品的归属与使用
- (五) 委托作品的归属与使用
- (六) 视听作品的归属与使用
- (七) 作者身份不明时的归属与使用
- (八) 作者死亡后的归属与使用

复习与思考题：

可由授课教师根据研讨情况确定思考题目。

拓展阅读书目

- 1、申丹，《何为隐含作者？》，载《北京大学学报(哲学社会科学版)》，2008年第3期，第136—145页。
- 2、崔国斌，《否弃集体作者观——民间文艺版权难题的终结》，载《法制与社会发展》，2005年第5期，第67—78页。
- 3、熊琦，《著作权法中投资者视为作者的制度安排》，载《法学》，2010年第9期，第79—89页。
- 4、李雨峰，《从写者到作者——对著作权制度的一种功能主义解释》，载《政法论坛》，2006年11月，第88—98页。
- 5、曹新明，《我国著作权归属模式的立法完善》，载《法学》，2011年第6期，第81—89页。
- 6、孙国瑞 刘玉芳 孟霞，《视听作品的著作权保护研究》，载《知识产权》，2011年第10期，第60—64页。
- 7、董慧娟，《孤儿作品的利用困境与现行规则评析》，载《中国出版》，2010年9月，第36—39页。
- 8、赵锐，《论孤儿作品的版权利用——兼论《著作权法》(修改草案)第25条》，载《知识产权》，2012年第6期，第58—62页。

## 专题五 著作权的权利内容

教学目的和要求：通过本专题研讨，使学生理解著作权人的权利内容的分类，深入理解著作权的权利内容的立法不足和有待深化完善之处。

教学时数 2 课时

研讨内容：

### 一、著作人身权

- (一) 发表权
- (二) 署名权
- (三) 修改权
- (四) 保护作品完整权

### 二、著作财产权

- (一) 复制权
- (二) 发行权
- (三) 出租权
- (四) 展览权
- (五) 表演权
- (六) 放映权
- (七) 广播权
- (八) 信息网络传播权
- (九) 摄制权
- (十) 改编权
- (十一) 翻译权
- (十二) 汇编权
- (十三) 其他著作财产权

复习与思考题：

可由授课教师根据研讨情况确定思考题目。

拓展阅读书目

- 1、李琛，《质疑知识产权之“人格财产一体性”》，载《中国社会科学》，2004年第2期，第68—78页。
- 2、吴汉东，《形象的商品化与商品化的形象权》，载《法学》，2004年10期，第77—89页。
- 3、吴汉东，《财产的非物质化革命与革命的非物质财产法》，载《中国社会科学》，2003年第4期，第122—133页。
- 4、余俊，《著作财产权的权利束体系及与作品的对应关系》，载《知识产权》，2011年第1期，第20—26页。
- 5、季卫东，《网络化社会的戏仿与公平竞争——关于著作权制度设计的比较分析》，载《中国法学》，2006年第3期，第17—29页。
- 6、杨延超，《表演者精神权利结构与本质探析》，载《法学论坛》，2007年1月，第97—104页。

## 专题六 著作权的限制

教学目的和要求：通过本专题研讨，使学生深入理解著作权的限制理论，包括合理使用、法定许可使用制度的来源、基本原则，对于著作权的权利行使规则有深入的理解。

教学时数 2 课时

研讨内容：

### 一、合理使用制度

- (一) 合理使用的标准
- (二) 合理使用的范围

### 二、法定许可使用制度

- (一) 法定许可的标准
- (二) 法定许可的来源
- (三) 法定许可的范围

复习与思考题：

可由授课教师根据研讨情况确定思考题目。

拓展阅读书目

- 1、冯晓青，《著作权合理使用制度之正当性研究》，载《现代法学》，2009年第4期，第29—40页。
- 2、吴汉东，《美国著作权法中合理使用的“合理性”判断标准》，载《外国法译评》，1997年第3期，第43—56页。
- 3、董炳和，《合理使用：著作权的例外还是使用者的权利》，载《法商研究》，1998年第3期，第36—42页。
- 4、梁志文，《我国著作权法上未发表作品的合理使用及其立法模式》，载《法学》，2008年第3期，第101—108页。
- 5、卢海君，《论合理使用制度的立法模式》，载《法商研究》，2007年第3期，第24—30页。
- 6、吴汉东，《论合理使用》，载《法学研究》，1995年第4期，第43—50页。
- 7、吴汉东，《合理使用制度的法律价值分析》，载《法律科学》，1996年第3期，第30—38页。
- 8、王迁，《论“制作录音制品法定许可”及在我国《著作权法》中的重构》，载《东方法学》，2011年第6期，第50—58页。
- 9、陶鑫良，《网络作品传播的“法定许可”适用探讨》，载《知识产权》，2000年第4期，第11—15页。
- 10、陶鑫良，《网上传播国内一般作品应当适用法定许可》，载《法学》，2000年第8期，第25—29页。
- 11、熊琦，《著作权许可的私人创制与法定安排》，载《政法论坛》，2012年11月，第93—103页。
- 12、吴汉东，《著作权法第三次修改草案的立法方案和内容安排》，载《知识产权》，2012年第5期，第13—18页。

## 专题七 邻接权制度

教学目的和要求：通过本专题研讨，使学生更好地理解邻接权制度的起源、发展与制度安排，对于著作权与邻接权之间的关系有较为深入的理解。

教学时数 2 课时

研讨内容：

一、邻接权的法律特征

（一）著作权与邻接权的关系

（二）邻接权的法律特征

二、出版者权

三、录制者权

四、广播组织者权

五、表演者权

六、各种邻接权的权利限制

复习与思考题：

可由授课教师根据研讨情况确定思考题目。

拓展阅读书目

- 1、张玉敏、曹博，《录像制品性质初探》，载《清华法学》，2011年第1期，第56—61页。
- 2、曲三强，《论影视作品的法律关系》，载《知识产权》，2010年3月，第16—22页。
- 3、杨建斌，《关于表演者权的几点思考》，载《求是学刊》，2000年5月，第80—82页。
- 4、姚天冲、赵维众、刘姝晶，《保护录音录像制作者权的若干问题刍议》，载《知识产权》，2006年05期，第65—68页。
- 5、任秋娟，《论卫星空间活动著作权及邻接权的保护》，载《学术论坛》，2006年第4期，第124—128页。
- 6、李永明，《对完善我国邻接权保护制度的若干设想》，载《知识产权》，1996年05期，第46—48页。
- 7、常青，《关于录音制作者的邻接权保护探赜》，载《知识产权》，2000年第4期，第28—32页。
- 8、冯术杰，《寻找表演中的作品——对“表演”和“表达”的概念反思》，载《清华法学》，2011年第1期，第97—107页。

## 专题八 商标混淆理论与联想理论

教学目的和要求：通过本专题研讨，使学生深入理解商标混淆理论与联想理论的构成要件，对于这两种理论的差异性有更深入的把握，从而为商标反淡化理论的深入研究打下基础。

教学时数 2 课时

研讨内容：

### 一、商标混淆理论

- (一) 商标混淆的界定
- (二) 商标混淆的种类
- (三) 商标混淆的认定

### 二、商标联想理论

- (一) 商标联想理论的形成
- (二) 商标联想理论的基本内容
- (三) 商标联想的类型
- (四) 商标混淆理论与联想理论的异同

复习与思考题：

可由授课教师根据研讨情况确定思考题目。

拓展阅读书目

- 1、金海军，《调查统计方法在商标诉讼案件中的应用——以商标混淆可能性的认定为视角》，载《知识产权》，2011年第6期，第26—32页。
- 2、邓宏光，《商标混淆理论之新发展：初始兴趣混淆》，载《知识产权》，2007年第3期，第72—77页。
- 3、彭学龙，《商标混淆类型分析与我国商标侵权制度的完善》，载《法学》，2008年第5期，第107—116。
- 4、张乔，《商标混淆辨析》（上、下），载《中华商标》，2004年第11、12期。
- 5、李静冰，《禁止商标混淆三规则——《商标审查及审理标准》有关条文的思考》，载《中华商标》，2007年第2期，第42—44页。
- 6、蒋尉，《从混淆理论、反淡化理论到联想理论》，载《学术论坛》，2007年第8期，第62—66页。
- 7、郑瑞琨，《驰名商标淡化与反淡化问题研究——以联想理论为视角》，载《电子知识产权》，2006年第12期，第16—18页。

## 专题九 特种商标

教学目的和要求：通过本专题研讨，使学生深入理解各种特殊类型商标的构成要件及其注册条件，扩展对商标可注册性的理解，加强对商标构成要件的理论深度。

教学时数 2 课时

研讨内容：

### 一、立体商标

- (一) 立体商标的类型
- (二) 不可注册为立体商标的三维标志
- (三) 立体商标与外观设计

### 二、颜色商标

- (一) 颜色商标的种类
- (二) 颜色商标的构成要件
- (三) 颜色商标的显著性
- (四) 颜色商标的功能性

### 三、动画商标

### 四、系列商标

### 五、地名商标

- (一) 地名商标的类型
- (二) 地名商标与合理使用

### 六、姓氏商标

- (一) 姓氏商标的类型
- (二) 姓氏商标的注册条件

### 七、商务标语商标

- (一) 商务标语的概念
- (二) 商标标语商标的注册条件

### 八、通用名称商标

- (一) 通用名称商标的注册条件
- (二) 通用名称商标的显著性

### 九、地理标志

- (一) 地理标志的概念
- (二) 各国地理标志的保护制度

### （三）我国地理标志保护制度

#### 复习与思考题：

可由授课教师根据研讨情况确定思考题目。

#### 拓展阅读书目

- 1、流云，《立体商标、颜色商标欧洲考察实录》，载《中华商标》，2003年第1、2、3、4、5期。
- 2、汪泽，《立体商标的审查》，载《中国专利与商标》2007年第1、2期。
- 3、李明德，《美国对颜色商标和立体商标的保护》，载《中华商标》，2002年第4期，第13—28页。
- 4、【日】青木博通，《日本的立体商标与外观设计》，载《中华商标》，2003年第11期，第46—50页。
- 5、杜颖，《地名商标的可注册性及其合理使用——从百家湖案谈起》，载《法学》，2007年第11期，第120—128页。
- 6、芮松艳，《地名商标的可注册性研究》，载《中华商标》，2008年第11期，第48—54页。
- 7、何炼红，《论动态商标的法律保护》，载《政治与法律》，2009年第4期，第76—82页。
- 8、汪泽，《含有国名、地名商标的审查》，载《中国专利与商标》，2008年第1期，第50—56页。
- 9、林丽娟，《地名商标的法律规定和审查实践》，载《中华商标》，2011年第11期，第8—10页。
- 10、王笑冰，《法国对地理标志的法律保护》，载《电子知识产权》，2006年第4期，第16—20页。
- 11、管育鹰，《日本地理标志保护制度研究》，载《知识产权》，2011年第6期，第79—85页。
- 12、曹新明，《我国地理标志保护制度之完善——以促进我国农业经济发展为视角》，载《知识产权》，2007年第1期，第26—31页。

## 专题十 商标的显著性

教学目的和要求：通过本专题研讨，使学生深入理解商标显著性的判断标准，对于商标的可注册条件有更深入的理解。

教学时数 2 课时

研讨内容：

### 一、商标用词与图案的显著性判断标准

### 二、第二含义

- (一) 如何判断商标用词的第二含义
- (二) 第二含义的基本概念

### 三、商标显著性的中外判例研讨

复习与思考题：

可由授课教师根据研讨情况确定思考题目。

拓展阅读书目

- 1、黄 晖，《商品及其包装外形的显著性——对取得商标保护的影响》，载《中 华 商 标》，2001 年第 10 期，第 15—17 页。
- 2、杜颖，《商标显著性与姓氏商标的可注册性——兼评商标审查标准关于姓氏商标可注册性之规定》，载《法学》，2006 年第 9 期，第 67—74 页。
- 3、杜颖，《商标显著性与商标权的保护》，载《科技与法律》，2006 年第 3 期，第 46—49 页。
- 4、黄 晖，《商标显著性对商标注册和保护的影响》，载《中国专利与商标》，1999 年第 2 期，第 45—52 页。
- 5、张昕，《商标显著性的基本理论分析》，载《中华商标》，2009 年第 2 期，第 36—39 页。
- 6、彭学龙，《商标显著性传统理论评析》，载《电子知识产权》，2006 年第 2 期，第 20—26 页。



## 专题十一 商标权利穷竭与平行进口

教学目的和要求：通过本专题研讨，使学生深入理解商标权利穷竭理论的来源、作用、效力，对于商标平行进口的类型、各国处理做法有深入的理解，在此基础上能够分析我国针对平行进口应当采取的做法。

教学时数 2 课时

研讨内容：

### 一、商标权利穷竭理论

- (一) 商标权利穷竭理论的起源
- (二) 商标权利穷竭的类型
- (三) 商标权利穷竭理论的作用
- (四) 商标权利穷竭理论的效力

### 二、商标平行进口

- (一) 平行进口的概念
- (二) 平行进口的类型
- (三) 美国、欧盟关于商标平行进口的做法
- (四) 中国商标平行进口的做法

复习与思考题：

可由授课教师根据研讨情况确定思考题目。

拓展阅读书目

- 1、李娟，《美国商标平行进口法律评述及对我国的启示》，载《学术界》(月刊)，2011 第 12 期，第 197—205 页。
- 2、王静，《我国对商标平行进口问题应采取的原则——由两起相似案件的不同判决引发的思考》，载《知识产权》，2005 年第 5 期，第 45—48 页。
- 3、吴伟光，《商标平行进口问题法律分析》，载《环球法律评论》，2006 年第 3 期，第 335—342 页。
- 4、王春燕，《平行进口法律规制的比较研究》，中国人民大学出版社，2012 年 5 月第一版。
- 5、尹锋林，《平行进口知识产权法律规则研究》，知识产权出版社，2012 年 4 月，第一版。
- 6、严桂珍，《平行进口法律规制研究》，北京大学出版社，2009 年 1 月，第一版。

## 专题十二 商标合理使用

教学目的和要求：通过本专题研讨，使学生商标合理使用的各种类型，对于商标侵权行为的例外情况有较好的把握。

教学时数 2 课时

研讨内容：

### 一、商标合理使用的种类

### 二、指名商标合理使用

- (一) 指名商标合理使用的类型
- (二) 指名商标合理使用的构成要件

### 三、各国关于商标合理使用的规定

复习与思考题：

可由授课教师根据研讨情况确定思考题目。

拓展阅读书目

- 1、陈惠珍，《For Volvo 与商标合理使用辨析》，载《电子知识产权》，2006 年第 11 期，第 44—47 页。
- 2、熊英、吕少罕，《对他人注册商标的合理使用》，载《中华商标》，2010 年第 3 期，第 72—76 页。
- 3、王玮婧，《美国商标指示性合理使用原则的新发展——兼析 TOYOTA MOTOR SALES INC v. TABARI 案》，载《法制与社会》，2011 年第 10 期，第 55—56 页。
- 4、王莲峰，《商标合理使用规则的确立和完善——兼评《商标法（修改稿）》第六十四条》，载《政治与法律》，2011 年第 7 期，第 73—80 页。
- 5、吴玉和、李江、孟璞、李荣欣、王卓隽、熊玉菲，《商标侵权与商标合理使用的司法界定》，载《中国专利与商标》，2008 年第 4 期，第 3—9 页。
- 6、杜颖，《指明商标权人的商标合理使用制度——以美国法为中心的比较分析》，载《法学论坛》，2008 年 9 月，第 43—48 页。

## 专题十三 可专利客体

教学目的和要求：通过本专题研讨，使学生深入理解授予专利权的标准与条件，将不可授予专利权的客体与可专利客体之间的界线，充分认识清楚。对商业方法专利等新型专利，有较为深入的理解。

教学时数 2 课时

研讨内容：

### 一、可专利客体的标准

- (一) 发明
- (二) 实用新型
- (三) 外观设计
- (四) 可专利客体的认定标准

### 二、不受专利法保护的智力成果

- (一) 违反法律、社会公告或妨害公共利益的发明创造
- (二) 商业方法的可专利性
- (三) 生物技术与可专利标准

复习与思考题：

可由授课教师根据研讨情况确定思考题目。

拓展阅读书目：

- 1、李晓秋，《析商业方法的可专利性》，载《政法论坛》，2011年第2期，第150—160页。
- 2、刘景明，《论商业方法、商业方法软件及系统的可专利性——以花旗银行的专利申请为例》，载《电子知识产权》，2003年12期，第25—28页。
- 3、张炳生，《论现代生物技术的可专利性主题》，载《法学》，2008年05期，第96—106页。
- 4、赵雷，《美国2011年专利法第一案 Myriad 案评——人类基因可专利性的再思考》，载《知识产权》，2012年06期，第85—96页。
- 5、李丽娜，《可专利主题的判断标准》，载《中国发明与专利》，2010年12期，第101—104页。
- 6、何奕秋、宋增锋、田芳、侯宝光、张英姝，《美国医疗方法可专利性的评判思路及其启示——美国法院对 Prometheus 案的审理和判决结果分析》，载《中国发明与专利》，2012年11期，第82—85页。
- 7、高巍，《对美国医疗方法可专利性问题的思考》，载《专利法研究》（2008），知识产权出版社，2008年12月第一版。
- 8、冯晓青，《专利权的扩张及其缘由探析湖南大学学报(社会科学版)》，2006年05期，第130—138页。
- 9、崔国斌，《“文字作品”的专利法保护 计算机程序文本的可专利性分析》，载《法律适用》，2005年09期，第26—30页。

## 专题十四 职务发明

教学目的和要求：通过本专题研讨，使学生深入理解职务发明的基本分类、制度效力，对职务发明的完善有深入的理解。

教学时数 2 课时

研讨内容：

- 一、职务发明的概念
- 二、职务发明的类型
- 三、职务发明的构成要件
- 三、职务发明的制度完善

复习与思考题：

可由授课教师根据研讨情况确定思考题目。

拓展阅读书目

1、钱孟姗，《日本《特许法》职务发明规定的讨论与修改——对我国专利制度完善带来的启示》，载《知识产权》，2004年05期，第56—63页。

2、傅剑清、李艺虹，《我国专利法对职务发明规定之不足与完善——由一起专利纠纷案引发的思考》，载《知识产权》，2006年05期，第50—55页。

3、李晓秋，《职务发明权属制度变革的立足点——兼析我国《专利法第三次修改草案》（征求意见稿）第6条》，载《电子知识产权》，2006年09期，第36—39页。

4、【日】奥田进一，《论日本雇佣形态的变化及职务发明的处置》，载《中外法学》，1997年02期，第116—120页。

5、孙春燕，《职务发明制度的合理性——以经济学为视角》，载《知识产权》，2012年04期，第56—59页。

6、何敏，《新“人本理念”与职务发明专利制度的完善》，载《法学》，2012年09期，第65—74页。

## 专题十五 专利授权条件

教学目的和要求：通过本专题研讨，使学生充分认识和理解新颖性、创造性、实用性的判断标准与原则，对于现有技术、非显而易见性等判断方法有更好的理解。

教学时数 2 课时

研讨内容：

### 一、新颖性

- (一) 新颖性的时间标准
- (二) 新颖性的地域标准
- (三) 现有技术
- (四) 抵触申请
- (五) 新颖性豁免

### 二、创造性

- (一) 创造性的判断标准
- (二) 非显而易见性的判断方法

### 三、实用性

复习与思考题：

可由授课教师根据研讨情况确定思考题目。

拓展阅读书目

- 1、尹新天，《关于新颖性宽限期的问题》，载《知识产权》，2002年01期，第14—19页。
- 2、张广良，《试论外观设计专利新颖性的判断——兼议外观设计专利性判定标准之修改》，载《人民司法》，2009年05期，第96—99页。
- 3、石陆仁，《新专利法修改中的新颖性标准变化》，载《中国发明与专利》，2011年01期，第85—87页。
- 4、和育东、方慧聪，《专利创造性客观化问题研究》，载《知识产权》，2007年02期，第76—81页。
- 5、牛强，《专利“创造性”判断中的“事后诸葛亮”——兼评我国《专利法》第22条及《审查指南》中相关规定》，载《知识产权》，2009年04期，第49—57页。
- 6、刘晓军，《专利创造性评判中的技术启示》，载《知识产权》，2012年05期，第42—47页。
- 7、石必胜，《美国专利创造性制度的司法变迁》，载《比较法研究》，2012年05期，第135—145页。
- 8、孙毅，《抵触申请中的相关问题分析》，载《知识产权》，2011年07期，第68—73页。
- 9、张勇、朱雪忠，《专利实用性要件的国际协调研究》，载《政法论丛》，2005年04期，第88—92页。
- 10、张晓都，《发明与实用新型的实用性》，载《专利法研究》（2002），知识产权出版社，2002年12月第一版。

## 专题十六 专利权的保护范围

教学目的和要求：通过本专题研讨，使学生深入理解专利权保护范围的界定，对于划定专利权保护范围的方法有较充分的认识。

教学时数 2 课时

研讨内容：

### 一、专利权保护范围及其认定原则

- (一) 周边限定原则
- (二) 中心限定原则
- (三) 主题内容限定原则

### 二、发明、实用新型专利的保护范围

### 三、外观设计专利的保护范围

复习与思考题：

可由授课教师根据研讨情况确定思考题目。

拓展阅读书目

- 1、彭敏，《浅谈专利的保护范围与说明书公开内容的概括》，载《中国发明与专利》，2012 年 01 期，第 84—85 页。
- 2、张广良，《论专利权保护范围的确定原则》，载《电子知识产权》，2009 年 10 期，第 12—848 页。
- 3、蔡萍，《专利保护范围的确定》，载《中国发明与专利》，2006 年 08 期，第 75—76 页。
- 4、师彦斌，《专利权利要求中功能性限定特征的审查标准及对策建议》，载《知识产权》，2011 年 01 期，第 38—42 页。
- 5、尹新天，《关于发明和实用新型专利的保护范围》，载《知识产权》，2001 年 05 期，第 3—7 页。
- 6、徐新，《外观设计专利权保护范围的解释原则——以外观设计专利侵权判定为视角》，载《知识产权》，2009 年 06 期，第 55—59 页。

## 专题十七 专利侵权行为认定

教学目的和要求：通过本专题研讨，使学生深入理解专利侵权行为的判定原则与判定方法，对各种专利侵权行为的特殊类型有较好的掌握。

教学时数 2 课时

研讨内容：

一、专利侵权行为的认定

（一）专利侵权行为的判定原则

（二）专利侵权行为的判定方法

二、全面覆盖原则与字面侵权

三、等同替代原则

四、禁止反悔原则

五、公知技术抗辩

六、专利间接侵权的认定

七、专利侵权的例外

复习与思考题：

可由授课教师根据研讨情况确定思考题目。

拓展阅读书目

1、周慧菁、曲三强，《研究工具专利的前景探析——兼评专利权实验例外制度》，载《知识产权》，2011年06期，第9—25页。

2、邵中林，《专利侵权判定的几个基本法律适用问题》，载《专利法研究》（2007），知识产权出版社，2007年12月第一版。

3、朱旭云，《也谈现有技术抗辩的适用——从现有技术抗辩法律制度本源出发》，载《知识产权》，2011年07期，第25—30页。

4、陈芳华，《专利诉讼中禁止反悔原则的理解与适用》，载《电子知识产权》，2006年02期，第43—57页。

5、胡淑珠，《判定专利侵权的等同原则在我国审判实践中的适用与限制》，载《法学》，2006年08期，第153—160页。

6、杨志敏，《关于“公知技术抗辩”若干问题的研究——从中、德、日三国判例与学说的对比角度》，载《比较法研究》，2003年02期，第56—67页。

## 专题十八 知识产权与反不正当竞争

教学目的和要求：通过本专题研讨，使学生深入理解知识产权与反不正当竞争之间的关系，理解知识产权法与反不正当竞争法之间的关系。

教学时数 2 课时

研讨内容：

### 一、反不正当竞争法的概念

- (一) 不正当竞争行为的界定
- (二) 反不正当竞争法的起源与发展
- (三) 反不正当竞争法的特点

### 二、知识产权法与反不正当竞争法的关系

- (一) 知识产权法与反不正当竞争法所保护的客体
- (二) 知识产权法与反不正当竞争法的立法原则
- (三) 知识产权法与反不正当竞争法的关系

复习与思考题：

可由授课教师根据研讨情况确定思考题目。

拓展阅读书目

- 1、韦之，《论不正当竞争法与知识产权法的关系》，载《北京大学学报(哲学社会科学版)》，1999年06期第25—33页。
- 2、张广良、冯靓，《从华盛顿州反不正当竞争新法案看美国知识产权保护新动向》，载《知识产权》2011年10期，第81—87页。
- 3、杨志敏，《论知识产权法的法技术特点——关于传统知识产权法与反不正当竞争法异同点的评析》，载《知识产权》，2003年05期，第11—13页。
- 4、王先林，《竞争法视野的知识产权问题论纲》，载《中国法学》，2009年04期，第5—15页。
- 5、郑成思，《反不正当竞争——知识产权的附加保护》，载《法律适用》，2004年01期，第21—24页。
- 6、韩赤风，《反不正当竞争法的完善与知识产权保护》，载《知识产权》，2003年06期，第20—26页。
- 7、杨明，《试论反不正当竞争法对知识产权的兜底保护》，载《法商研究》，2003年03期，第119—128页。



# 《商法六：信托法》 教学大纲

梅慎实 编写

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## 前 言

在现代社会，信托业是连接货币市场、资本市场和产业市场的纽带，具有经济活化作用和多种社会功能，与银行业、证券业、保险业并称为四大金融支柱产业。信托法属于商事法律范畴，它与公司法、证券法、票据法、破产法和保险法等共同构成商法体系的重要内容。因而，作为信托领域法律规范的信托法也已成为一门重要的法律理论和实务课程。信托法课程的内容包括：以我国《信托法》的框架为主线，西方国家信托法为兼顾，并结合《信托公司管理办法》和《信托公司集合资金信托计划管理办法》的实际运用，介绍和分析信托业与信托立法的起源、历史背景、问题和实践。对英国、美国、日本、韩国、澳大利亚、德国和我国香港、台湾的信托立法略加介绍，重点分析信托法的作用、信托的功能、信托的设立、信托法律关系、信托与其他类似民事行为的比较、信托财产、信托当事人的法律地位、信托的变更和终止、公益信托的特殊规定、商事信托及其在中国的实践以及违反信托的法律责任。本课程要求学生以民法、商法的学习为前提，旨在使学生掌握并理解信托法律制度，并能够应用信托法知识分析和解决实际问题。

本大纲在每章后列出拓展阅读论文，在大纲最后列出课程总参考书目。

本课程为专业选修课,总学时 36 学时。主要内容和课时分配如下：

- 第一章 信托与信托法概述（5 学时）
- 第二章 信托的设立（5 学时）
- 第三章 信托财产（5 学时）
- 第四章 信托当事人（6 学时）
- 第五章 商事信托（7 学时）
- 第六章 公益信托（4 学时）
- 第七章 信托的变更与终止（2 学时）
- 第 18 周 课堂考试（2 学时）

## 第一章 信托与信托法概述

本章教学目的：使学生了解和掌握信托与信托法的基本知识与基本理论，为进一步学习信托法律制度打下坚实的基础。

本章教学要求：要使学生理解并掌握信托与信托法的基本知识与基本理论，尤其是信托法律关系、信托法的功能与作用，并能结合信托业中的实际问题进行法律分析，提高学生发现问题、分析问题、解决问题的能力。加强理论与实际的结合。

本章教学重点：使学生理解并掌握信托的概念、特征与分类，信托的功能，信托法的概念、特征、调整对象、地位与体系。

本章教学难点：信托及其功能，信托法的基本原则。

### 第一节 信托概述

#### 一、信托的定义

##### （一）我国《信托法》关于信托的定义

信托是指委托人基于对受托人的信任，将其财产权委托给受托人，由受托人按委托人的意愿以自己的名义，为受益人的利益或者特定目的，进行管理或者处分的行为。狭义的信托也可称为法律意义上的信托，广义的信托也可称为经济意义上的信托。

##### （二）国外信托法关于信托的定义

#### 二、信托的特征

### 第二节 信托的起源、发展与现状

#### 一、信托的起源

#### 二、信托业务的发展

##### （一）英国

##### （二）美国

##### （三）日本

##### （四）德国

#### 三、国外信托业务的发展趋势

随着资本经营国际化进程加快以及众多国家对金融管制的放宽，发达国家信托业的制度和业务也发生了很大的变化，出现了一些新动向，表现在以下方面：

##### （一）信托职能的多样化

##### （二）信托概念的模糊化

##### （三）信托投资业务日益国际化

#### 四、中国信托业的发展

## 五、信托法律冲突与《海牙信托公约》

- (一) 信托法律冲突
- (二) 《海牙信托公约》

为了解决不同国家在在信托事务交往中发生的信托法冲突问题,1984年10月,包括中国在内的36个国家参加了在荷兰海牙召开的国际私法大会第15次会议,会后通过了《关于信托的法律适用及其承认公约》(Convention on the Law Applicable to Trusts and on Their Recognition,以下简称《海牙信托公约》),该公约给信托下了一个包容性较广的定义。

《海牙信托公约》第2条、第1款将信托定义为:“当财产为受益人的利益或为了特定目的而置于受托人的控制之下时,信托是指委托人设定的在其生前或死后发生效力的法律关系”。

## 第三节 中国信托业的发展与立法

- 一、现代中国信托业的由来
- 二、中国信托业的历次整顿与规范历程
- 三、中国信托业的立法

2001年4月28日第九届全国人大常委会第21次会议审议通过了《中华人民共和国信托法》,2001年10月1日,《中华人民共和国信托法》施行。信托业的“一法两规”。

## 第四节 信托的分类

- 一、按信托目的划分
  - (一) 私益信托
  - (二) 公益信托
- 二、按信托设立的方式划分
  - (一) 合同信托
  - (二) 遗嘱信托
- 三、按信托成立的原因划分
  - (一) 自由信托
  - (二) 法定信托
- 四、按受托人是否以从事信托为营业划分
  - (一) 民事信托
  - (二) 商事信托
- 五、按信托利益是否归属委托人本人划分
  - (一) 自益信托
  - (二) 他益信托



(三) 宣示信托

#### 六、按信托的标的物类别划分

(一) 资金信托

(二) 实物信托

(三) 债权信托

#### 七、按信托服务对象划分

(一) 个人信托

(二) 法人信托

#### 八、按信托是否跨国划分

(一) 国内信托

(二) 国际信托

#### 九、按受益人是否享有确定的受益权划分

(一) 固定信托

(二) 自由裁量信托

#### 十、按信托文件是否明确规定设立信托以及信托的受益人是谁划分

(一) 秘密信托

(二) 半秘密信托

## 第五节 信托与相关概念之比较

### 一、信托与行纪

- (一) 运作机制不同
- (二) 性质不同
- (三) 处理事务的内容不同
- (四) 事务处理的权限不同
- (五) 介入权不同
- (六) 弹性空间不同

### 二、信托与代理

- (一) 运作机制不同
- (二) 委托人的地位不同
- (三) 受托人的地位不同

### 三、信托与赠与

- (一) 性质不同
- (二) 法律效果不同
- (三) 运作机制不同

(四) 弹性空间不同

## 第六节 信托法的概念、调整对象和基本原则

一、信托法的概念

二、信托法的调整对象

三、信托法的基本原则

(一) 促进信托事业健康发展的原则

(二) 保护信托当事人合法权益的原则

(三) 自愿原则

(四) 公平原则

(五) 诚实信用原则

(六) 守法原则和维护国家利益、社会公共利益的原则

## 第七节 信托法的功能

一、确定和创建信托关系

二、保护已建立的信托关系

三、维护信托当事人的合法权益

四、促进信托业的健康发展

## 第八节 信托法的效力范围

一、信托法在时间上的效力范围

二、信托法在空间上的效力范围

三、信托法对人的效力范围

## 第九节 信托法的法源

信托法的法源，亦称信托法的渊源。信托法的法源，是指信托法的法律规范得以表现的形式。

一、立法机关制定的有关信托方面的法律

二、行政法规和行政规章

三、立法解释和司法解释

四、国际公约

## 第十节 信托法律关系

### 一、信托法律关系的概念

### 二、信托法律关系的构成要素

- (一) 信托法律关系主体
- (二) 信托法律关系客体
- (三) 信托法律关系的内容

### 三、信托法律关系的产生、变更和终止

- (一) 信托法律关系的产生
- (二) 信托法律关系的变更
- (三) 信托法律关系的终止

### 本章复习与思考题

- 1、中外信托法关于信托定义差异产生的原因是什么？
- 2、如何理解信托法的功能？
- 3、如何理解信托法的基本原则？

### 本章拓展阅读论文

- 1、马俊驹、梅夏英：《财产权制度的历史评析与现实思考》，载《中国社会科学》1999年第1期。
- 2、李群星：《信托的法律性质与基本理念》，载《法学研究》2000年第3期。
- 3、王志诚：《信托之二面性——强行法规与任意法规之界限》，载[台]《政大法学评论》第77期。
- 4、胡吕银：《信托制度在大陆法系的命运》，载《社会科学战线》2005年第6期。
- 5、张定军：《论英美信托的实质》，载《武汉科技学院学报》2005年第12期。
- 6、余源志：《从信托财产权之辩反思大陆法财产权体系》，载《研究生法学》2006年第2期。

## 第二章 信托的设立

本章教学目的：使学生了解和掌握信托设立制度，领会信托行为的概念、特征和分类，培养学生对信托行为有效要件的理解能力和分析能力。

本章教学要求：要使学生理解并掌握信托设立法律制度的具体内涵与基本内容。

本章教学重点：使学生理解并掌握信托设立的含义与特征，信托设立的形式。

本章教学难点：信托行为有效要件、信托登记。

### 第一节 信托行为的概念、特征和分类

#### 一、信托行为的概念

#### 二、信托行为的特征

- (一) 信托行为必须有合法的信托目的
- (二) 信托行为应当采取书面形式
- (三) 信托行为以意思表示为要素
- (四) 信托行为是合法行为

### 第二节 信托行为的有效要件

#### 一、信托行为的一般有效要件

- (一) 信托行为主体适格
- (二) 意思表示真实
- (三) 信托内容不违反法律或者社会公共利益

#### 二、信托行为的特殊有效要件

- (一) 信托目的合法
- (二) 信托财产能够确定且为委托人合法所有
- (三) 受益人或者受益人范围确定

### 第三节 信托设立的形式

#### 一、信托行为形式应当合法

#### 二、信托文件载明的事项

- (一) 信托文件应当载明的事项
- (二) 信托文件可以载明的事项

#### 三、信托登记

- (一) 信托登记的概念

- (二) 信托登记的效力
- (三) 信托登记的种类
- 1、信托产品登记
- 2、信托文件登记
- 3、信托财产登记

## 第四节 信托的无效

### 一、无效信托的概念

### 二、无效信托的特征

- (一) 信托内容的违法性
- (二) 无效信托不得履行
- (三) 无效信托自始无效
- (四) 无效信托当然无效

### 三、无效信托的种类

- (一) 信托目的违反法律、行政法规或者损害社会公共利益的信托
- (二) 信托财产不能确定的信托
- (三) 委托人以非法财产或者以信托法规定不得设立信托的财产设立信托的信托
- (四) 专以诉讼或者讨债目的设立信托的信托
- (五) 受益人或者受益人范围不能确定的信托
- (六) 法律、行政法规规定的其他无效信托

## 第五节 债权人的撤销权

### 一、债权人撤销权的概念和性质

- (一) 债权人撤销权的概念
- (二) 债权人撤销权的性质

### 二、债权人撤销权的构成要件

- (一) 客观要件
- (二) 主观要件

### 三、债权人撤销权的效力

- (一) 对于委托人的效力
- (二) 对受托人的效力
- (三) 对于受益人的效力
- (四) 对于债权人的效力

### 四、债权人撤销权的消灭时效

### 本章复习与思考题

- 1、什么是信托行为？信托行为的特征有哪些？
- 2、信托法与合同法中债权人的撤销权有何不同？
- 3、如何理解信托行为的有效要件？
- 4、如何理解信托登记的效力？设立所有的信托必须进行信托登记吗？

### 本章拓展阅读论文

- 1、李群星：《信托的法律性质与基本理念》，载《法学研究》，载 2000 年第 3 期。
- 2、伍小美：《浅谈中国信托立法的缺陷——从信托的生效要件到信托财产所有权的归属谈起》，载《电子科技大学学报（社科版）》2005 年第 3 期。
- 3、张淳：《中华人民共和国信托法中的创造性规定及其评析》，载《法律科学》2002 年第 2 期。
- 4、周小明、钟向春：《信托活动中的主要法律问题与对策》，载《上海金融》2001 年第 11 期。
- 5、夏云鹏：《信托公示制度研究》，载《上海金融》，2002 年第 8 期。
- 6、何宝玉：《信托登记：现实困境与理想选择》，载《中国资本市场法治评论》（第二卷），法律出版社，2009 年版。

## 第三章 信托财产

本章教学目的：使学生了解和掌握信托财产和信托财产权的法律性质、信托财产的范围和种类、信托财产的管理和运用。

本章教学要求：要使学生理解并掌握信托财产的概念和信托财产权的法律性质，掌握信托财产的管理和运用，熟悉信托财产与固有财产的区别。

本章教学重点：使学生理解并掌握信托财产的概念和特征、信托财产的处分。

本章教学难点：信托财产的独立性。

### 第一节 信托财产和信托财产权的法律性质

#### 一、信托财产的概念

#### 二、信托财产的独立性

（一）信托财产与委托人未设立信托的其他财产相区别

（二）信托财产与受托人的固有财产相区别

#### 三、信托财产权的法律性质

我国《信托法》并未直接明确信托财产权的法律性质。

### 第二节 信托财产的范围和种类

#### 一、信托财产的范围

（一）委托人交付给受托人的最初信托财产

（二）委托人追加的财产

（三）受托人因管理运用信托财产而取得的财产

（四）受托人因处理信托财产所取得的财产

#### 二、信托财产的种类

（一）金钱

（二）有价证券

（三）不动产

（四）动产

（五）知识产权

（六）其他财产权

### 第三节 信托财产和信托事务的管理

#### 一、受托人亲自管理信托财产和信托事务

#### 二、受托人委托他人管理信托财产和信托事务

### 三、信托财产和信托事务管理方法的变更

## 第四节 信托财产的处分

### 一、信托财产处分的含义

### 二、违反信托目的处分信托财产的法律后果

我国《信托法》对受托人违反信托目的处分信托财产的行为规定了相应的法律后果，以给委托人和受益人以一定的救济权。

- (一) 撤销权、恢复原状或赔偿损失的请求权
- (二) 解任权和申请解任权
- (三) 拒付报酬权

### 三、信托财产占有瑕疵的承继

我国《信托法》没有规定信托财产占有瑕疵由受托人承继这一规则。

### 本章复习与思考题

- 1、如何理解信托财产的独立性？
- 2、如何理解信托财产权的法律性质？
- 3、试比较信托财产与证券交易结算资金的独立性和物权性质？
- 4、谈谈你对占有瑕疵的财产设立信托的认识。

### 本章拓展阅读论文

- 1、李清池：《作为财团的信托——比较法上的考察与分析》，载《北京大学学报（哲学社会科学版）》2006年第4期。
- 2、余源志：《从信托财产权之辩反思大陆法财产权体系》，载《研究生法学》2006年第2期。
- 3、汪翔：《试论信托财产所有权的归属》，载《法制与经济》2006年第14期。
- 4、李勇：《信托财产所有权性质之再思考》，载《时代法学》2005年第5期。
- 5、李元香：《信托财产权属比较研究》，载《企业家天地（下半月）》2006年第1期。
- 6、阳平：《论信托财产的法律特性》，载《河南省政法管理干部学院学报》2005年第2期。
- 7、温世扬、冯兴俊：《论信托财产所有权——兼论我国相关立法的完善》，载《武汉大学学报（哲学社会科学版）》2005年第2期。
- 8、秦苏：《信托财产所有权归属问题研究》，载《中国矿业大学学报（社会科学版）》2004年第4期。
- 9、于萍 史文杰：《论以占有瑕疵的财产设立信托之风险》，载《金融理论与实践》2004年第12期。



## 第四章 信托当事人

本章教学目的：使学生了解和掌握信托当事人的概念和特征、信托当事人的范围和资格、信托当事人之间的关系。

本章教学要求：要使学生理解并掌握信托当事人的概念和特征，掌握信托当事人的范围和资格，熟悉信托当事人之间的关系。

本章教学重点：使学生理解并掌握受托人的义务。

本章教学难点：受益权的性质。

### 第一节 信托当事人概述

#### 一、信托当事人的概念和特征

##### （一）信托当事人的概念

信托当事人有广义和狭义两种

通常，我们所说的信托法律关系的主体，是指依据信托法律规范参与信托法律关系，享受权利并承担义务的当事人。

##### （二）信托当事人的特征

- 1、信托当事人必须是依据信托法律规范参与信托活动。
- 2、信托当事人必须是信托法律关系的直接参加者。
- 3、信托当事人必须享有信托法上的权利并承担信托法上的义务。

#### 二、信托当事人的范围和资格

##### （一）信托当事人的范围

根据世界各国信托法的通例，可以成为信托当事人的主体有四种，即自然人、法人、非法人以及国家。

##### （二）信托当事人的资格

- 1、委托人的资格
- 2、受托人的资格
- 3、受益人的资格

#### 三、信托当事人之间的关系

一般而言，所谓信托当事人之间的关系，是指委托人、受托人和受益人之间的权利义务关系，其确立有赖于设立信托的书面法律文件。

### 第二节 委托人

#### 一、委托人的概念和地位

在我国，自然人、法人以及其他组织等均可以成为委托人。

## 二、委托人的权利

- (一) 信托执行知情权
- (二) 信托财产管理方法调整请求权
- (三) 救济权
- (四) 解任权
- (五) 受托人辞任的同意权
- (六) 新受托人的选任权
- (七) 对信托事务处理报告的认可权
- (八) 特定情形下解除信托权

## 三、委托人的义务

- (一) 移转信托财产的义务
- (二) 支付报酬的义务
- (三) 赔偿损失的义务
- (四) 不干涉受托人处理信托事务的义务
- (五) 费用补偿义务

# 第三节 受托人

## 一、受托人的概念和地位

## 二、共同受托人

同一信托的受托人有两个以上的，为共同受托人。

## 三、受托人的权利

- (一) 委托他人代为处理的权利
- (二) 取得报酬权
- (三) 费用和损失补偿请求权
- (四) 辞任权

## 四、受托人的义务

- (一) 诚实、信用、谨慎和有效管理义务（含注意义务内容）
- (二) 忠实义务
- (三) 分别管理义务
- (四) 亲自管理义务
- (五) 保存记录义务
- (六) 定期报告义务
- (七) 依法保密的义务
- (八) 向受益人支付信托利益的义务

## 五、受托人的变更

- (一) 受托人职责的终止

根据我国《信托法》第 39 条的规定，受托人职责终止的法定事由主要包括以下情形：

- 1、作为自然人的受托人死亡或者被依法宣告死亡。
- 2、作为自然人的受托人被依法宣告为无民事行为能力人或者限制民事行为能力人。
- 3、作为法人的受托人被依法撤销或者被宣告破产。
- 4、作为法人的受托人依法解散或者法定资格丧失。
- 5、辞任。
- 6、被解任。
- 7、法律、行政法规规定的其他情形。

#### （二）新受托人的选任

根据我国《信托法》第 40 条第 1 款的规定，选任新受托人的顺序如下：

- 1、按照信托文件的规定选任。
- 2、由委托人选任。信托文件对选任新受托人没有规定的，由委托人进行选任。
- 3、由受益人选任。如果委托人不指定，或者无能为为力指定时，则应由受益人进行选任。

#### （三）受托人变更的法律效果

我国《信托法》第 40 条第 2 款，原受托人处理信托事务的权利和义务，由新受托人承继。

## 第四节 受益人

### 一、受益人的概念和地位

受益人是在信托中享有信托受益权的人。

### 二、受益人的权利（受益权）

在信托中，受益人的权利又可称为信托受益权，具体有八项，即：

- 1、信托执行知情权。
- 2、信托财产管理方法调整请求权。
- 3、救济权。
- 4、解任权。
- 5、受托人辞任的同意权。
- 6、新受托人的选任权。
- 7、对信托事务处理报告的认可权。
- 8、特定情形下解除信托权等。

我国《信托法》第 49 条的规定明确了受益人的这些权利。

### 三、受益权性质的争论

- （一）债权说
- （二）物权债权说
- （三）特殊法律主体说

### 四、受益人的义务

- （一）补偿义务
- （二）支付报酬义务

## 五、受益权的取得、放弃、用于偿债、转让和继承

受益权是一种信托财产权，作为受益人的法定权利，其取得、放弃、用于偿债、转让和继承必须依照法律的规定进行。

## 六、共同受益人

在一个信托中，受益人有两个或两个以上的即为共同受益人。我国《信托法》第 45 条对共同受益人享受信托利益做出了专门规定。依据该规定，共同受益人按照信托文件的规定享受信托利益，信托文件对信托利益的分配比例或者分配方法未作规定的，各受益人按照均等的比例享受信托利益。

### 本章复习与思考题

- 1、信托当事人的特征和种类有哪些？
- 2、以胎儿为受益人设立的信托是否无效？
- 3、如何理解信托受益权的性质？
- 4、以委托理财为例，分析受托人的义务和责任有哪些？

### 本章拓展阅读论文

- 1、马涛：《论信托受益权的性质》，载《漯河职业技术学院学报》2005 年第 1 期。
- 2、张淳：《中华人民共和国信托法中的创造性规定及其评析》，载《法律科学》2002 年第 2 期。

## 第五章 商事信托

本章教学目的：使学生了解和掌握信托公司的概念和设立原则、信托公司的变更与终止和商事信托的应用。

本章教学要求：要使学生理解并掌握信托公司的概念和设立原则，掌握商事信托业业务的应用能力，熟悉信托公司的经营要求。

本章教学重点：信托公司的经营要求。

本章教学难点：商事信托与民事信托之比较。

### 第一节 信托公司的设立、变更与终止

#### 一、信托公司概述

信托公司是指依照《公司法》和《信托公司管理办法》设立的主要经营信托业务的金融机构。在性质上，信托公司是财产管理机构和金融机构的有机统一。

#### 二、信托公司的设立

信托公司的设立是指信托机构的设立人为取得经营信托业务的资格，依法定程序进行设立的法律行为。1978年改革开放以后，信托业在我国得到恢复。1979年10月，中国国际信托公司成立，标志着我国第一家信托公司诞生。

##### （一）设立原则

在不同的发展阶段，信托公司的设立原则不完全相同。概括起来主要有：

- 1、自由设立主义。
- 2、特许设立主义。
- 3、准则设立主义。
- 4、许可设立主义。

##### （二）设立条件

我国《信托公司管理办法》第6条规定，设立信托公司，应当采取有限责任公司或者股份有限公司的形式。第10条规定，信托公司注册资本最低限额为3亿元人民币或等值的可自由兑换货币，注册资本为实缴货币资本。申请经营企业年金基金、证券承销、资产证券化等业务，应当符合相关法律法规规定的最低注册资本要求。

##### （三）设立程序

- 1、提出设立申请。
- 2、审查批准。

在我国，经批准的信托公司应持中国银监会颁发的信托机构法人许可证到工商行政管理部门申请登记注册，注册后由工商行政管理部门核发营业执照，信托公司自领取营业执行之日起宣告正式成立。

#### 三、信托公司的变更与终止

##### （一）信托公司的变更

我国《信托公司管理办法》第12条规定，信托公司有下列变更事项之一的，应当经中国银监

会批准。

- 1、变更名称。
- 2、变更注册资本。
- 3、变更公司住所。
- 4、改变组织形式。
- 5、调整业务范围。
- 6、更换董事或高级管理人员。
- 7、变更股东或调整股权结构，但持有上市股份公司流通股份未达到公司总股份 5 % 的股东除

外。

- 8、修改公司章程。
- 9、合并或者分立。
- 10、中国银监会规定的其他变更情形。

#### （二）信托公司的终止

信托公司的终止是指信托公司的法律主体资格消灭，组织上解散并终止经营活动的行为或事实。信托公司终止的事由发生后，要依法对该机构进行清算，清理其财产和债权债务。清算结束后办理注销登记，其法律人格消灭。

### 四、信托公司的经营范围

### 五、信托公司的经营要求

- （一）履行义务
- （二）避免利益冲突
- （三）亲自处理信托事务
- （四）负有保密义务
- （五）保存处理信托事务的完整记录
- （六）分别管理、分别记账
- （七）每项信托业务单独核算
- （八）建立防火墙
- （九）信托合同
- （十）开展固有业务和信托业务时的禁止行为

## 第二节 信托的商事应用

从法律上讲，信托的性质，凡涉及“商事法”(商法)的信托事项，称为商事信托。商事信托是一个所指相当广泛的概念，其与美国的 Business Trust 并不相同。在美国，Business Trust 的含义非常有限，它特指以信托形式组织起来的一种自愿的联合体，基于当事人之间的信托契约而成立，以区别于依照法律规定而成立的企业组织。美国商事信托(Business Trust)的典型代表是 1940 年代的麻州商业信托(M•B•T)。而课程所说的商业信托，则是在广义上使用这一概念，用来概括指代那些具有私益性质、由具有商人身份的主体担任受托人的信托。

### 一、美国商事信托业业务模式的特点

美国是当今世界信托业最为发达的国家和信托业最为创新的国家。

#### （一）结构完整，门类齐全

(二)以证券信托、基金信托等为核心的商事信托的地位突出

(三)法人信托业务的创新起源于保险公司

(四)信托公司和商业银行在业务上相互兼营，监管上分业管理

(五)信托业地位显赫

美国的信托资产、银行资产和保险资产三分天下，信托机构地位十分显赫。

## 二、商事信托与民事信托之比较

### 三、信托融资安排（案例）

### 四、表决权信托和资产证券化

#### （一）表决权信托

- 1、表决权信托与表决权代理的区别。
- 2、表决权信托的发展与运用
- 3、表决权信托的功能
- 4、国外职工持股运行方式中的信托设计与信托需求

#### （二）资产证券化

### 五、委托理财与信托法的适用

（一）有名的委托理财合同和无名的委托理财合同

（二）合同性质与类型的认定与法律适用：合同法与信托法

### 本章复习与思考题

- 1、信托公司的设立原则有何特点？
- 2、信托公司的资本制度有何特点？
- 3、商事信托与民事信托之比较
- 4、如何理解表决权信托与表决权代理的区别？
- 5、你认为委托代理持股和信托受托持股合法吗？

### 本章拓展阅读论文

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- 3、吕荣珍：《论我国的信托法律监管》，载《江汉石油职工大学学报》2004年第5期。
- 4、江平：《信托制度在中国的应用前景展望》，载2004年中国（长沙）信托国际论坛论文。
- 5、沈四宝：《商事信托制度的发展现状》，载《甘肃政法学院学报》2005年第4期。
- 6、雷凌：《论受托人营业化与商事信托》，载《中国社会科学院研究生院学报》，2009年第2期

## 第六章 公益信托

本章教学目的：使学生了解和掌握公益信托的概念和设立原则、和公益信托的应用。

本章教学要求：要使学生理解并掌握公益信托的概念和设立原则，掌握公益信托的范围，熟悉公益信托公司的经营要求。

本章教学重点：信托公司的经营要求。

本章教学难点：公益信托与私益信托之比较。

### 第一节 公益信托概述

#### 一、公益信托的概念和设立原则

#### 二、公益信托的范围和成立要件

##### （一）公益信托的范围

- 1、救济贫困。
- 2、救助灾民。
- 3、扶助残疾人。
- 4、发展教育、科技、文化、艺术、体育事业。
- 5、发展医疗卫生事业。
- 6、发展环境保护事业，维护生态环境。
- 7、发展其他社会公益事业。

##### （二）公益信托的成立要件

- 1、公益目的。
- 2、公共利益。
- 3、绝对的公益性。

#### 三、公益信托法律的适用

#### 四、公益信托与私益信托之比较

### 第二节 信托在中国的实践和发展

#### 一、公益信托监管的目标、主体及权限内容

#### 二、我国公益信托监管机构的缺陷

#### 三、公益信托监察人的监管

- （一）设置信托监察人的原因
- （二）设置信托监察人的意义
- （三）信托监察人的选任、辞任与解任
- （四）公益信托监察人的权利与义务



#### 四、公益信托受托人

- (一) 公益信托受托人的资格及其限制
- (二) 公益信托受托人的权力
- (三) 公益信托受托人的义务
- (四) 公益信托监管中受托人的法律责任

#### 本章复习与思考题

- 1、公益信托的范围和成立要件有哪些？
- 2、公益信托与私益信托之比较。
- 3、我国公益信托监管机构的缺陷有哪些？
- 4、如何理解公益信托受托人适用“近似原则”（Cy-pres Doctrine）处置信托财产的权力？

#### 本章拓展阅读论文

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- 2、吕荣珍：《论我国的信托法律监管》，载《江汉石油职工大学学报》2004年第5期。

## 第七章 信托的变更与终止

### 第一节 信托的变更

#### 一、信托变更的概念和特征

- (一) 信托变更概念
- (二) 信托变更的特征

#### 二、信托变更的原则与效力

- (一) 信托变更的原则  
信托的变更一般遵循两个原则：一是法定或约定事由原则。二是协商一致原则。
- (二) 信托变更的效力

#### 三、信托变更权的行使主体

- (一) 委托人的变更权
- (二) 受托人的变更权
- (三) 受益人的变更权
- (四) 法院的变更权
- (五) 公益事业管理机构的变更权

#### 四、信托变更的主要情形

- (一) 信托内容的变更
  - (二) 信托主体的变更
- 1、委托人的变更。
  - 2、受托人的变更。
  - 3、受益人或受益权变更。

### 第二节 信托的终止

#### 一、信托终止的原因

信托终止的原因，即信托终止的事由。

#### 二、信托终止后的法律后果

- (一) 确定信托财产的权利归属人
- (二) 信托财产转移过程中信托被视为存续
- (三) 以权利归属人为被执行人
- (四) 信托终止后受托人仍可行使取得报酬权以及费用和损失补偿请求权
- (五) 对信托事务进行清算

### 本章复习与思考题

- 1、什么是信托变更的概念和特征？
- 2、什么是信托受益权变更？
- 3、如何理解信托变更的原则？
- 4、如何理解信托终止后的法律后果？

### 本章拓展阅读论文

- 1、李群星：《信托的法律性质与基本理念》，载《法学研究》，载 2000 年第 3 期。
- 2、王连洲：《信托法确立崭新信托制度》，载《中国证券报》2001 年 9 月 26 日。

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# 《欧洲税法与比较税法》 教学大纲

翁武耀 编写

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## Preface

Since when the Roma Treaty was signed, fifty-five years of the Community law's making, interpretation and application have helped to deeply change the tax systems of EU Member States. And the specialized study and teaching of European tax law, independent of tax law or EU law, have been created in European universities, especially in their faculty of law. As an elective directed towards students majoring in law, in particular, those who firstly took the course of tax law or EU law, the course of European tax law and comparative tax law aims to help (Chinese) students well understand the EU taxation systems including the national taxations influenced by EU law and EU tax harmonization policy, enhance students' international perspective and capabilities of dealing with the issues concerning foreign taxes and acquire the necessary tax and legal professional knowledge in English. The coverage of the 2-credit and 36-period course includes: 1. introduction; 2. Community tax legal system; 3. basic values of European tax law; 4. general principles in community tax order; 5. impact of European tax law on national indirect taxations; 6. impact of European tax law on national direct taxations; 7. administrative cooperation in the assessment and collection of tax; 8. some special topics for purpose of comparative tax law.

With regard to teaching methods, the course takes tuition as primary and case analysis as supplementary.

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## Chapter 1 Introduction

### 1.1 Basic ideas of European tax law

#### A. Concept of European tax law

a collection of principles and rules of European law that have an influence or a restrictive effect on national taxation by the M. S.

The differences between European tax law and related concepts such as EU tax law and EC tax law: mainly lying in the range of law sources: European tax law covers not only the EU Institutions' legal documents, i.e. those issued by European Council, Council of the European Union, European Commission, European Parliament and European Court of Justice, but also the non EU Institutions' legal documents, such as Judgments of European Court of Human Rights and rulings of European Free Trade Association.

#### B. Object of study of European tax law

European tax law systematically surveys the tax implications for national taxations of the EC Treaty (now, after amendments, Treaties on European Union and on the functioning of the EU) and of the EC tax harmonization and coordination policy, with thorough and critical discussion of the ECJ's case laws in tax matters and of the Community tax rules in force, in the context that the EU policy of aligning national taxes & tax policies insofar as is necessary for a common market affects taxation & tax law in all Member States.

#### C. Community objectives and means to reach these objectives

- a. a harmonious, balanced and sustainable development of economic activities;
- b. a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth;
- c. a high degree of competitiveness and convergence of economic performance;
- d. a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community

#### D. Requirements of single market

- a. abolition of obstacles to the free movement of goods, persons, services and capital;
- b. a system ensuring that competition in the internal market is not distorted;
- c. the approximation of the laws of Member States to the extent required for the functioning of the common market

#### E. Main fiscal obstacles to the proper functioning of a common market

- a. tax burdens on the emigration of (legal) persons and on the internal border-crossing of goods, services, income or capital;
- b. differential tax treatment of domestic and imported goods and services;
- c. substantial differences between national tax laws, leading to market distortions;
- d. having to comply with 27 different tax administrations, 27 different sets of substantive and procedural tax law, etc.
- e. differential tax treatment of residents and non-residents and of domestic and foreign investment or income
- f. international double taxation of the same tax base



## **F. The ways of integrations**

a. positive way: legislative integration, i.e. integration through regulation at community level, harmonization of national tax laws (directives), or at least co-ordination between the M.S.

Tax measures taken at community level cover custom duties, indirect tax (in particular, VAT), direct tax (in specific and separate areas)

b. negative way: judicial integration (case law), i.e. integration through prohibition, the abolition of restrictive national tax measures after the European Court of Justice has declared them incompatible with the EC treaty (freedoms of movements, discrimination prohibition or state aid prohibition), mainly in the direct tax matters.

## **G. Related Treaties**

a. Paris Treaty (European Coal and Steel Community):

it was signed in 1951 and came into force on 23 July 1952

b. Roma Treaty (European Economic Community, European Atomic Energy Community):

it was signed in 1957 and came into force in 1958

c. EC Treaty (Brussels Treaty) (European Economic Community, European Atomic Energy Community, European Coal and Steel Community):

it signed in 1967 and came into force on 1 July 1967

d. EU Treaty (Maastricht Treaty), aimed at creating European Economic and Monetary Union and European political union:

it signed in 1992 and came into force on 1 November 1993

e. Lisbon Treaty, amending the Treaty on European Union and the Treaty on the Functioning of the European Union (the Treaty establishing the European Community):

it was signed in 2007 and came into force on 1 December 2009

## **1.2 Taxes in EC Treaty and integration bases**

### **A. Art. 23: Custom duties**

“The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.”

The issue worth paying special attention into: prohibited covert custom duties, in case that revenue raised is used to finance schemes that benefit only domestic products

### **B. Art. 93: (other) indirect taxes, such as VAT and excise duties**

“The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonization of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonization is necessary to ensure the establishment and the functioning of the internal market within the time limit laid down in Article 14.

### **C. Art. 94: approximation of laws, as only legal bases for harmonization of direct taxes**

“The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.”

**D. Art. 90: Prohibition of discriminatory and protective internal taxes**

“No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.”

The issue worth paying special attention into:

the differences between art. 23 and art. 90 in aspect of application

**E. Art. 87: Prohibition of State aid**

“Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.”

**F. Art. 96: Elimination of distortions**

“Where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the common market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned.”

**G. Remaining tax articles**

a. Art. 58: “.....to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested.....”

b. Art. 163 on research and technological development: “.....Community shall support their efforts to cooperate with one another, aiming, notably, at enabling undertakings to exploit the internal market potential to the full, in particular through the opening-up of national public contracts, the definition of common standards and the removal of legal and fiscal obstacles to that cooperation.”

c. Art. 174 (2) and Art. 175 (2) on environment: community environmental policy shall be based, *inter alia*, on the “the polluter should pay” principle, and the Council shall take fiscal action in that field only by unanimous acts

d. Art. 293 on abolition of double taxation: “Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals the abolition of double taxation within the Community.”

The issue worth paying attention into:

the actual application effect of above-mentioned remaining tax articles

**Questions**

I. How to understand the European tax law as an independent branch of tax law for (EU) single market?

II. What are the main fiscal obstacles to the proper functioning of (EU) single market?

III. What is the meaning of, and the distinction between, positive way and negative way as regards EU integration, taking into account their respective application in tax matters by distinguishing between indirect taxes and direct taxes?

IV. Why does the legislative harmonization at community level in indirect tax matters have a greater extent than that in direct tax matters does?

V. Find out the articles relating to taxes in EC Treaty and what do they respectively provide?

## Chapter 2 Community tax legal system

### 2.1 Relations and conflicts between Community legal system and national legal systems

#### A. Community legal system

“The European economic community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals.”<sup>1</sup>

“By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.”<sup>2</sup>

#### a. Community legal system among intergovernmentalism, supranationalism and federalism

(a) the EU operates through a system of supranational independent institutions and intergovernmental negotiated decisions by the member states

(b) Is there an inevitable move to federalism?

#### b. main EU institutions and their functions

(a) European Council: an institution of the European Union. It comprises the heads of state or government of the EU member states, along with the President of the European Commission and the President of the European Council. While the European Council has no formal legislative power, it is the Union's strategic (and crisis solving) body, acting as the collective presidency of the EU.

(b) Council of the European Union (sometimes just called the Council and sometimes still referred to as the Council of Ministers): the institution in the essentially bicameral legislature of the European Union (EU) representing the executives of member states, the other legislative body being the European Parliament.

(c) European Commission: the executive body of the European Union, responsible for proposing legislation, implementing decisions, upholding the Union's treaties and day-to-day running of the EU.

(d) European Parliament (abbreviated as Europarl or the EP): the directly elected parliamentary institution of the European Union. It shares equal legislative and budgetary powers with the Council. It had only advisory and consultative powers.

(e) European Court of Justice (ECJ) is the highest court in the European Union in matters of European Union law. As a part of the Court of Justice of the European Union institution it is tasked with interpreting EU law and ensuring its equal application across all EU member states.

c. democratic deficit and problems of sovereignty of EU institutions

d. Style of the Community legal system: resemble to civil law/deductive system

e. Procedure of approval of community rules in tax matters

(a) Concurring competency of EU and member states in tax matters, with exception of custom duties: subsidiary principle

(b) Economic and Financial Affairs Council decides mainly by qualified majority, in consultation or

<sup>1</sup> Judgment of the Court of 5 February 1963 (van Gend & Loos, Case 26-62).

<sup>2</sup> Judgment of the Court of 15 July 1964 (Flaminio Costa v E.N.E.L, Case 6/64).

co-decision with the European Parliament, with the exception of fiscal matters which are decided by unanimity

**B. relationship (between Community legal system and national legal systems): “dualism” or “monism”**

a. dualism: national courts’ orientation

inspired by theory of separation of legal systems/internationalist

b. monism: ECJ’s orientation

“By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply.”<sup>3</sup>

c. differences between dualism and monism

**C. Conflicts (between Community legal system and national legal systems)**

a. Conflicts between general values of community legal system and national constitutional values concerning the tax system

b. manifestations of conflicts

c. limitation to primacy of EU law compared to national constitutions: the theory of contra-limitations

e. dynamic integration

**2.2 Law sources of European tax law**

**A. Sources of primary law**

Founding Treaties; amending EU Treaties; protocols annexed to the founding Treaties and to the amending Treaties; Treaties on new Member States’ accession to the EU.

**B. Sources of secondary law (derived)**

a. Unilateral acts: regulations, directives, decisions/opinions, communications and recommendations (soft law).

b. Convention and Agreements: international agreements, signed by the EU and a country or outside organisation; agreements between Member States; interinstitutional agreements, i.e. agreements between the EU institutions.

**C. Sources of supplementary law**

a. case law of the Court of Justice

b. international law

c. general principles of law

**2.3 Role of ECJ’s case laws in Community tax order**

**A. Judicial power of ECJ**

a. composition of ECJ

The Court of Justice consists of 27 Judges who are assisted by 8 Advocates-General. The Judges and Advocates-General are appointed by common accord of the governments of the member states and hold office for a renewable term of six years.

The issue worth paying special attention into:

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<sup>3</sup> *Judgment of the Court of 15 July 1964. Flaminio Costa v E.N.E., Case 6/64.*

the Function of Advocates-General and the effects of AG's opinions

b. function of ECJ

to interpret EU law and ensuring its equal application across all EU member states

c. jurisdiction of ECJ

(a) actions for failure to fulfill obligations (infringement procedure) (M.S.);

(b) actions for annulment (EU institutions);

(c) actions for failure to act (EU institutions);

(d) preliminary ruling

Preliminary ruling is a decision of the ECJ on the interpretation of European Union law, made at the request of a court of a European Union member state. The name is somewhat of a misnomer in that preliminary rulings are not subject to a final determination of the matters in question, but are in fact final determinations of the law in question.

The legal effects of preliminary ruling: general binding effects, not only binding to the national judges concerned / in principle, Retroactive (ex tunc), prospective (ex nunc) for purpose of protecting the third party acting in good faith (legal certainty and legitimate expectation)

Importance of preliminary ruling: avoiding national courts' judgments conditioned by their own legal traditions; determining a judicial cooperation between separated legal systems; producing a centralized judgment

d. role of ECJ's case laws in (law) sources system of EU law

To specify the dimension and confine of community law by means of reading and recognition of different normative documents of EU institutions

e. judgments in tax matters

(a) in area of custom duties: 107 (1995-2012.6.21)

(b) in area of VAT:461 (1976-2011.12.20)

(c) in area of excises concerning tobacco and alcohol 44 (1997-2012.1.6)

(d) in area of direct taxes 290 (1960-2012.7.12)

### **B. main orientations of ECJ's case laws in tax matters**

a. character of ECJ's case laws in VAT matter: essentially recognitive / marginally creative

b. casuistic attitude of in matter of excises, custom duties and State aid:

c. creative case laws of ECJ in direct taxes

Example: clarification of characters and application field of the principle of prohibition of discrimination in tax matters

(a) recognizing the prohibition of direct discrimination (c-270/83, Avoir Fiscal)

(b) specifying the prohibition of indirect discrimination (c-175/88, Biehl)

(c) judging if the national rules constitute a discrimination according to the potentiality, not the effective results

(d) shifting the barycenter of examination from real discrimination to restriction of a community freedom, free of analyzing the distorting effects produced by a discriminative rule

(e) anyway, both in the non discrimination and in restriction of a community freedom, similarity of legal situations should be examined in advance

d. summary of role of ECJ's case laws compared with the community rules (Treaty and its derived laws)

a clear propensity of community organizations to reconstruct the tax phenomenon in an essentially

“negative” dimension

### **Questions**

I. Describe the nature of Community legal system among intergovernmentalism, supranationalism and federalism.

II. How many EU institutions are there in Community legal system? What main function do they respectively perform? And how to understand the problem of democratic deficit in Community legal system?

III. What is the relationship between Community legal system and national legal systems, taking into account the “dualism” or “monism”? What do conflicts between them primarily lie in?

IV. What are the law sources of European tax law? And what are their respective characters, especially, in aspect of (direct or indirect) applicability and effects?

V. What is the function of European Court of Justice (ECJ) in the Community (tax) legal order? Mainly through which action does ECJ perform the function? Describe its concept, basic application mechanism, legal effects and significances.

VI. What is the function of Advocates-General as an integral part of ECJ’s composition? And what role do the Advocates-General’s opinions take for the ECJ’s judgements?

VII. What is the meaning of, and the distinction between, recognitive, casuistic and creative characters of ECJ’s case laws? In general in which sectors of taxes are they respectively manifested, taking concrete cases for example?

VIII. What do you think about the ECJ’s creative case laws in tax matters? To what extent is the primary importance of the ECJ’s case laws to law sources system of community law attributable to ECJ’s creative case laws?

## Chapter 3 Basic values of European tax law

### 3.1 Community freedoms of movement

#### A. fundamental role of freedoms of movement in community design

- a. freedoms of movement as values founding the Community Legal System
- b. Axiological primacy, among the Basic values of European tax law

#### B. freedoms of movement in EC Treaty

- a. art.23: free movement of goods

“the community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between member states of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.”

It requires elimination of custom duties barriers and homogenization of taxation on consumptions: mainly in positive harmonizations in indirect taxes

- b. art. 49: free movement of services

“within the framework of the provisions set out below, restrictions on freedom to provide services within the community shall be prohibited in respect of nationals of member states who are established in a state of the community other than that of the person for whom the services are intended.”

It requires homogenization of taxation on consumptions

In the area of direct taxes: the taxation rule which dissuades the provider of services from carrying out his own activities in a M.S., or the recipient of services from asking or enjoying services

- c. art. 39 and art. 43: free movement of persons:

(a) Free movement of (dependent) workers:

Art. 39: “freedom of movement for workers shall be secured within the Community. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the member states as regards employment, remuneration and other conditions of work and employment.”

The issues worth paying special attention into:

a value linkable to the principle of not discrimination based on the nationality or national citizenship provided by art. 12 of EC treaty;

right of residence of “EU citizens” was introduced in 1993 (art. 17 and art. 18 of EC treaty)

(b) Freedom of establishment:

Art. 43: “within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a member state in the territory of another member state shall be prohibited. such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any member state established in the territory of any member state.”

Two categories:

freedom of establishment of enterprises and activities of independent work / primary freedom of establishment

freedom of establishment of agency (permanent establishment), subsidiary and filiale / second freedom of establishment

- d. art. 56: free movement of capital

“within the framework of the provisions set out in this chapter, all restrictions on the movement of capital between member states and between member states and third countries shall be prohibited.”

Two categories:

the freedom of collecting capital for performance of economic activities, from the point of collector;  
the freedom of investing capital for gaining the economic returns, from the point of investor.

The issues worth paying special attention into:

third State capital movement: the only freedom which also extends to third states and free capital movement cannot apply wider in third State positions than it applies intra-EC

### **C. principle of not restriction to freedoms of movement for tax purposes**

a. protectionist or state-controlled tax measures or measures which anyway could obstruct or limit freedoms of circulation should excluded

Example: “Article 59 of the Treaty (now, after amendment, Article 49 EC) is to be interpreted as precluding a Member State's tax legislation from restricting or disallowing the deductibility for income tax purposes of contributions to voluntary pension schemes paid to pension providers in other Member States while allowing such contributions to be deducted when they are paid to institutions in the first-mentioned Member State, if that legislation does not at the same time preclude taxation of the pensions paid by the abovementioned pension providers.”<sup>4</sup>

b. relationship between the protection of freedoms of movement and the principle of not discrimination:

principle of not discrimination is a species of wider genus of freedoms of movement

c. areas ECJ's judgments have paid special attentions into among judgments concerning the principle of not restrictions:

double taxation;

anti-avoidance rules on transfer pricing;

thin capitalization;

exit taxes.

## **3.2 Non discrimination**

### **A. art. 90 (prohibits discriminatory and protective internal taxes)**

“No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.”

a. legislative purpose: to guarantee a competitively neutral treatment to the commercial transactions carried out within the common market.

b. “Negative” nature: it limits to prescribe a preclusion, not also to define a positive content to the tax rules of single national systems

c. It forms a rule working as an instrument for pursuit of four fundamental freedoms

### **B. typologies of non discrimination**

a. direct discrimination (overt discrimination): based on nationality or citizen, registered office for legal persons

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<sup>4</sup> *Judgment of the Court (Fifth Chamber) of 3 October 2002 of Danner Case C-136/00*



- b. indirect discrimination (covert discrimination): based on residence or other factor of allocation
- c. reverse discrimination not provided directly in Treaty because of the internal event of State

### **C. judgment of discrimination: three steps**

- a. verification of the comparability of situations concerned, in particular, a situation concerning a non resident with a situation of a citizen or resident
  - b. verification of existence of a national rule with discriminatory contents inasmuch fit for introducing the different treatments in front of comparable situations
  - c. rule of reason for purpose of verifying the justification for restrictive national measures

### **D. comparability or not between the situations of resident and non resident**

Schumacker case c-279/93, a leading case at issue

The ECJ was, therefore, faced with a ‘host’ State (the State of employment) tax rule which failed to grant to a non-resident certain tax benefits which it granted to a resident. The Court found that generally this different tax treatment was not discriminatory, because the two categories of taxpayer were not in a comparable situation.

However, a non-resident was in a comparable situation to a resident when the non-resident received “no significant income in the State of his residence and obtains the major part of his taxable income from an activity performed in the State of employment, with the result that the State of his residence is not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances.”

## **3.3 Prohibition of State aids**

### **A. art. 87 (1)**

“any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.”

Why prohibited?:

- a. aiding undertaking by allotting public money to them is a flagrant distortion of competition and market efficiency
- b. state aid prohibition as promotion of free and fair competition in the common market

### **B. state aids in tax matters**

The tax systems in Member States also have to be in line with Community State aid rules: State aid rules apply regardless of the form the aid is given in, i.e. any kind of tax relief can constitute State aid if the other criteria are fulfilled.

Tax measures favouring certain undertaking: tax breaks for shipping companies, extension of payment without interest, lower tax rates for certain activities or in certain regions

### **C. state aids compatible with the common market**

In principle prohibited, unless it serves certain enumerated purposes of (community) public interest: Article 87, paragraphs 2 and 3 of the EC Treaty).

- a. the following shall be compatible with the common market:
  - (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
  - (b) aid to make good the damage caused by natural disasters or exceptional occurrences;

b. the following may be considered to be compatible with the common market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest;

**D. four tests to identify fiscal state aid contained in national tax measures**

Notice on the application of State aid rules to measures relating to direct business taxation in 1998 explaining how article 87 of EC treaty should be understood in company taxation matters

a. advantage

The measures must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets.

The advantage may be provided through a reduction in the firm's tax burden in various ways, including:

(a) a reduction in the tax base (such as special deductions, special or accelerated depreciation arrangements or the entering of reserves on the balance sheet);

(b) a total or partial reduction in the amount of tax (such as exemption or a tax credit);

(c) deferment, cancellation or even special rescheduling of tax debt

b. by the State or through State resources

The advantage must be granted by the State or through State resources. A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure.

This criterion also applies to aid granted by regional or local bodies in the Member States.

State support may be provided just as much through tax provisions of a legislative, regulatory or administrative nature as through the practices of the tax authorities

c. competition and trade between Member State affected

The measure must affect competition and trade between Member States.

This criterion presupposes that the beneficiary of the measure exercises an economic activity, regardless of the beneficiary's legal status or means of financing. Under settled case provision, the criterion of trade being affected is met if the recipient firm carries on an economic activity involving trade between Member States.

The mere fact that the aid strengthens the firm's position compared with that of other firms which are competitors in intra-community trade is enough to allow the conclusion to be drawn that Community trade is affected.

Neither the fact that aid is relatively small in amount, nor indeed the fact that the recipient is moderate in size or its share of the Community market very small, nor indeed the fact that the recipient does not carry out exports or exports virtually all its production outside the Community do anything to alter this conclusion

d. specific or selective measure

The measure must be specific or selective in that it favours "certain undertakings or the production of certain goods" (or certain territory).

The selective advantage involved here may derive from an exception to the tax provisions of a legislative, regulatory or administrative nature or from a discretionary practice on the part of the tax authorities.

However, the selective nature of a measure may be justified by "the nature or general scheme of the system". If so, the measure is not considered to be aid. For instance, an EC M.S. were to abolish its insurance tax or its capital tax, then obviously this would especially benefit a certain sector of the economy (the insurance business and the stock exchange business), because M.S. are free to change their general (horizontal) tax structure, especially their "tax mix".

#### **E. related procedure rules: art. 88**

"1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 226 and 227, refer the matter to the Court of Justice direct.....

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision."

### **3.4 Fight against harmful tax competition**

#### **A. concepts**

##### a. tax competition:

consisting of tax measures taken by one Member State that adversely affect the tax revenues of another State

##### b. (harmful) tax competition:

The adoption of tax measures by a M.S. that have subversive effects on the tax system of majority of other member states, in that they introduce the elements of facilitation or anyway of tax benefit which induce the economic operators to excise the activities in the State with favorable measures, where their own resources and factors of production are allocated, at the expense of the State of residence.

#### **B. opinions on the (un)desirability of tax competition usually moving between the following two extremes**

a. "Tax competition is necessary to keep national governments on their toes to be tax efficient. It helps to bring down unnecessary high tax levels EC-wide. Prohibiting or curbing policy competition at EC level or co-ordinating it at intergovernmental level amounts to a protective distortion of sanitary interjurisdictional competition; it amounts to interstate cartel-making (a taxers cartel)"

b. "Tax competition constitutes economically counterproductive sponging on other M.s. budgets; it leads to fiscal degradation, overtaxation of labour (unemployment) and/or unacceptable cutbacks in public

services, subsidizing mobile economic operators who do not need to be looked after, and frustrating equitable budgetary policy, in the end making everyone but international capitalist cowboys poorer”

**C. tax competition with the EU single market**

- a. high probability with the EU single market
- b. why is harmful?

Harmful tax competition takes the form of special tax schemes, derogating from the general tax system, such as tax holidays, selective base or rate reductions not normally available, which are designed solely to undercut competition in a certain sector, usually mobile capital.

Harmfulness: counterproductive from an internal market point of view / constitutes a threat to the principle of free and fair competition and be incompatible with trade in the Common Market

- c. example

Certain banking secrecy jurisdiction, like Luxembourg, attracted undeclared savings and criminal proceeds of nonresident individuals, thus draining other States’ tax revenues, not only through secrecy but also by exempting from withholding tax interest paid to non residents.

**D. EU fight against harmful tax competition**

- a. legal basis

The concept of (harmful) tax competition has nothing to do with the concept of fair and free competition among companies as referred to in Art. 87 of EC Treaty, but established in the Code of Conduct for business taxation was set out in the conclusions of the Council of Economics and Finance Ministers (ECOFIN) of 1 December 1997.

- b. by adopting this Code, the Member States have undertaken to:

- (a) roll back existing tax measures that constitute harmful tax competition;
- (b) refrain from introducing any such measures in the future ("standstill").

- c. criteria for identifying potentially harmful measures

(a) an effective level of taxation which is significantly lower than the general level of taxation in the country concerned

- (b) tax benefits reserved for non-residents;

(c) tax incentives for activities which are isolated from the domestic economy and therefore have no impact on the national tax base;

- (d) granting of tax advantages even in the absence of any real economic activity;

(e) the basis of profit determination for companies in a multinational group departs from internationally accepted rules, in particular those approved by the OECD;

- (f) lack of transparency

**3.5 National tax justifications and their balance with the basic values of European tax law**

**A. background**

Limitations on the exercise of the fundamental freedoms contained in the EC Treaty and the grounds on which a restrictive or discriminatory national tax measure may be justified as being in the public interest

**B. limitations on the exercise of the fundamental freedoms**

- a. limitations contained in the EC Treaty

Example:

- (a) art. 30:

“The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

(b) art. 39:

“1. Freedom of movement for workers shall be secured within the Community.

.....

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

.....”

(c) case concerning a restrictive rule on food safety in the interest of public health

c. national tax justifications recognized by ECJ

Grounds on which a restrictive national tax measure may be justified as being in the public interest

(a) preservation of fiscal cohesion

The need to match within the same taxing jurisdiction tax base reduction and corresponding tax base increases

Fiscal territoriality principle

Balanced allocation of power to impose taxes

(b) effectiveness of fiscal supervision

(c) prevention of tax avoidance

d. national public interest rejected by ECJ

(a) in general:

prevention of gambling addiction;

divorce and suicides;

administrative difficulties in obtaining information from abroad;

the de minimis argument

(b) for restrictive tax measures:

the potential for loss of tax revenue by a M.S. or erosion of the domestic tax base;

existence of counterbalancing advantages

### **C. rule of reason: unwritten restrictions by ECJ**

a. background

(a) the rule of reason is a doctrine developed by the United States Supreme Court in its interpretation of the Sherman Antitrust Act

(b) ECJ has adopted the concept of rule of reason in its own jurisprudence concerning the free movement of goods within the European Internal Market: the rule has arisen in the context of art.28 of EC Treaty, which prohibits quantitative restrictions on imports and exports (or measures having equivalent effect) in Case Cassis de Dijon (Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein case 120/78) for the first time.

“obstacles to movement within the community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the

effectiveness of fiscal supervision , the protection of public health , the fairness of commercial transactions and the defence of the consumer .”

b. eight steps of rule of reason test<sup>5</sup>

(a) access to the treaty (treaty status)

(b) restrictive effect caused

(c) has protection of the public interest involved been harmonized at EC level?

(d) does the restrictive measure distinguish between domestic and cross-border positions? Except under art. 30 or another treaty-based escape

(e) does the legislation of the M.S. of origin provide equivalent protection of the public interest served? If so, importing M.S. may not impose.....(mutual recognition) in tax matters: VAT still present: case *Gaston Shul* c-15/81 / credit foreign corporation tax as if it were its own. Case *lenz and manninem*

(f) is the interest served by the (indiscriminately applicable) restrictive measure an overriding (non-economic) public interest?

Those not listed in treaty:

consumer protection;

prevention of unfair competition;

protection of the environment;

improvement of working conditions;

product safety;

the promotion of culture;

safeguarding of national cultural heritage;

three national tax justifications

(g) is the specific restrictive measure appropriate for the protection of the public interest (effective or make sense)

(h) is the measure proportionate in its restrictive effects in relation to the legitimate aim pursued? Are there no equally effective measures to attain the goal pursued that would be less restrictive to intra-community trade?

## Questions

I. What are the basic values of European tax law? What are their relationships with the proper functioning of EU single market?

II. How do you think about the fundamental role of freedoms of movements in community design? How many freedoms of movements are provided in EC Treaty? What is the relationship between the principle of not restriction to freedoms of movements and the principle of not discrimination?

III. What are the main tax implications of free movement of goods within the EU respectively in area of indirect taxes and in area of direct taxes? Talk about the implications in latter area by analyzing the *Newspaper Publishers Case* c-18/84.

IV. What are the main tax implications of free movement of services within the EU respectively in area of indirect taxes and in area of direct taxes? Talk about the implications in latter area by analyzing the *Eurowings Case* c-294/97.

V. What two categories can the free movement of persons be further divided into? What is the

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<sup>5</sup> See European tax law / 5th ed., abridged student ed. Ben J.M. Terra and Peter J. Wattel, Kluwer Law International, 2008. pp. 32-34

distinction between them.

VI. What is the free movement of capital? What two categories can it be further divided into? According to the ECJ's judgment in Baars case C-251/98, is Cross-border shareholding in a company covered by freedom of establishment (person) or by freedom of capital? Describe related standard.

VII. Which freedom of movement is the only freedom which also extends to third states? Do you think that this freedom movement can apply wider or narrower in third State positions than it applies intra-EC? Why?

VIII. What does the non discrimination require according to the EC Treaty? What is the meaning of, and the distinction between, direct discrimination, indirect discrimination and reverse discrimination? Describe the three steps for judgment of discrimination.

IX. What is the State aid? Why should it be prohibited? Which tax measures favouring certain undertaking can be considered as a prohibited State aid?

X. How is the prohibition of State aid provided in EC Treaty applied, taking for references the Notice on the application of State aid rules to measures relating to direct business taxation and ECJ's judgments in Cases C-78/08 to C-80/08.

XI. What is the tax competition? Is it necessarily harmful? Why?

XII. Within the EU or the single market, what kind of tax competition is harmful? Why?

XIII. Describe the criteria for identifying potentially harmful measures according to the Code of Conduct for business taxation.

XIV. Is absolute the exercise of the fundamental freedoms of movements? Can the national tax measures impose limitations on it? If so, what kind of limitations can be imposed? What are the related provisions in EC Treaty?

XV. Besides the limitations explicitly contained in EC Treaty, has ECJ elaborated some unwritten restrictions as grounds on which a restrictive national tax measure may be justified? What is the distinction between legislative limitations and unwritten restrictions in aspect of application?

XVI. What do the internal nations' tax justifications exactly refer to? What is their relationship with the ECJ's rule of reasons? Describe the eight steps of rule of reason test.

3. For restrictive tax measures, which interests are served by the restrictive measure an overriding (non-economic) public interest in ECJ's rule of reasons?

XVII. What is the fiscal cohesion? With regard to its application conditions, how are evolved the ECJ's case laws?

## Chapter 4 General principles in community tax order

### 4.1 Introduction

#### A. sources

deduced and summarized by ECJ from the Treaties, derived EU laws, international laws and general principles in internal national legal orders

#### B. implications of a principle being a general principle in Community (tax) legal order

a. role and functions

b. direct efficacy

### 4.2 Principle of legal certainty

#### A. basic ideas on principle of legal certainty

a. background

The concept of legal certainty is recognised one of the general principles of European Union law by the European Court of Justice since the 1960s.

It is an important general principle of public law, which predates European Union law.

b. meaning in EU law

As a general principle in European Union law it means that the law must be certain, in that it is clear and precise, and its legal implications foreseeable, especially when applied to financial obligations.

c. general requirements

The adoption of laws which will have legal effect in the European Union must have a proper legal basis.

Legislation in member states which implements European Union law must be worded so that it is clearly understandable by those who are subject to the law.

#### B. analysis on requirements for legal certainty

a. not retroactive

(a) laws should not take effect before they are published. For example in *Opel Austria v Council* Case T-115/94, the ECJ held that European Council Regulation did not come into effect until it had been published.

(b) the general principle also requires that sufficient information must be made public to enable parties to know what the law is and comply with it.

(c) in some instances, the retroactivity may be applied, but only if it does not impose obligations on people retroactively or does not have adverse effects on a society.

b. legitimate expectations

(a) the doctrine of legitimate expectation, which has its roots in the principles of legal certainty and good faith (a limitation on the right), is also a central element of the general principle of legal certainty in European Union law.

(b) it does not mean that a law can not be changed.

Laws can be changed, but the changes should not undermine the legitimate expectations created by a law during the time it was in effect.

(c) the legitimate expectation doctrine holds that those who act in good faith on the basis of law as it



is or seems to be should not be frustrated in their expectations.

This means that a European Union institution, once it has induced a party to take a particular course of action, must not renege on its earlier position if doing so would cause the party to suffer loss.

Leading case in which ECJ has considered the legitimate expectation doctrine while violation of the general principle of legal certainty was alleged: *Mulder* c-120/86

(d) Marks and Spencer Case c-62/00

The Marks and Spencer case does not cast any doubt on the legitimacy of setting time limits within which community law rights must be asserted. However, this is subject to at least four conditions:

- a) The time limits must be reasonable.
- b) The provision setting the time limits must include transitional arrangements
- c) The time limits must be fixed in advance.
- d) The time limits must not violate the Community law principle of effectiveness

c. clarity of laws/statutes

Laws must be clear, comprehensive, logical, easy to understand.

d. legislation should solve matters conclusively

This concept means that laws should provide a conclusive solution for an individual within a reasonable time.

### 4.3 Principle of effectiveness

#### A. concept

Principle of effectiveness, according to which national law must provide for each Community law right an effective remedy which does not make it impossible in practice for an individual to exercise that right

#### B. background

It is well-known that EU law does not establish a separate system of remedies for breach of EU law rights.

Subject to one or two particular remedies which the member states must make available, such as the Francovich damages remedy for breach of EU law.

It is left to domestic procedural law to specify the conditions for the enforcement of EU law.

#### C. two sub-principles

a. principle of equivalence

It means that domestic procedural law must operate in the same way for rights derived from domestic law and their EU law equivalents.

For example, EU law does not permit domestic law to have different limitation periods for domestic law rights and similar EU law rights. In essence, domestic procedural law must not discriminate against EU law.

b. principle of effectiveness (in strict sense)

(a) First it means that domestic procedural law must not make it impossible or excessively difficult to enforce rights derived from EU law.

In practice, this means that national procedural rules must respect the principle of proportionality: they will be lawful as long as they do not hinder the operation of EU law so much that they cannot be justified.

(b) second, it requires national law to ensure the full effectiveness of EU law.

#### **D. case concerning the application of principle of effectiveness in tax matters: Grundig Italiana SpA Case c-255/00**

“Is a national provision, namely the last part of Article 29(1) of Law No 428 of 29 December 1990, compatible with Community law and in particular with the often stated principle of effectiveness (inter alia, Case C-343/96 Dilexport, Case C-260/96 Spac, Case C-231/96 Edis, Case C-228/96 Aprile, Case C-261/95 Palmisani) where it lays down a period of grace of 90 days within which, in order to avoid the three-year time-limit [decadenza triennale] introduced retroactively in place of a previous five-year limitation period [prescrizione quinquennale], a party enjoying a right under Community law to recover a sum paid but not due resulting from a payment made prior to the entry into force of the said provision must bring a legal action?”

#### **4.4 Principle of proportionality**

##### **A. background**

(a) the principle of proportionality is derived from German (administrative) law.

(b) it first affected EU law in the Internationale Handelsgesellschaft case in 1970: “A public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure.” Since then it has become one of the fundamental principles of the jurisprudence developed by the European Court of Justice.

(c) Regardless of whether a case concerns agricultural issues, free movement of goods, state aid or citizenship, the ECJ requires that all administrative acts or decisions and all legislation be in conformity with the general principle of proportionality.

##### **B. three “sub-tests” of proportionality principle**

a. test of effectiveness or suitability:

a measure or decision must constitute an effective means to realise the aims pursued by the measure or decision.

b. test of necessity and subsidiarity:

the measure or decision must be necessary to achieve the relevant aims (necessity), which means in particular that no alternative and less intrusive measures are available (subsidiarity).

c. test of proportionality in the strict sense:

even if it is clear that a certain act or measure is an effective and necessary means to further legitimate government interests, an act, decision or measure can still be disproportionate if no reasonable or fair balance is struck between the aims pursued and the interests harmed

##### **C. cases concerning the application of the principle of proportionality in the tax matters**

a. Société générale Case c-361/96

“Article 3(a) of the Eighth Directive 79/1072 on the harmonisation of the laws of the Member States relating to turnover taxes.....is to be interpreted as not precluding Member States from providing in their national law that a taxable person who is not established in that Member State may prove his entitlement to a refund by submitting a duplicate invoice or import document where the original has been lost for reasons beyond his control, provided that the transaction which led to the application for a refund occurred and there is no risk of further applications for a refund.....”

Secondary law must comply with the general principles of law, and in particular the principle of proportionality. Exclusion of the possibility for a Member State to allow an application for a refund in such exceptional circumstances is not necessary to achieve the general aim of the Eighth Directive, which

is to prevent fraud or tax evasion.”

b. Baxter Case c-254/97

“However, national legislation which absolutely prevents the taxpayer from submitting evidence that expenditure relating to research carried out in other Member States has actually been incurred cannot be justified in the name of effectiveness of fiscal supervision.”

“The taxpayer should not be excluded a priori from providing relevant documentary evidence enabling the tax authorities of the Member State imposing the levy to ascertain, clearly and precisely, the nature and genuineness of the research expenditure incurred in other Member States.”

#### 4.5 Principle of prohibition of abuse of right

##### A. doctrine of abuse of rights

a. source

the doctrine of abuse of rights, found in various guises in civil law jurisdictions, refers to the concept that the malicious or antisocial exercise of otherwise legitimate rights can give rise to civil liability.

b. condition required to invoke the doctrine

- (a) the predominant motive for exercising the right is to cause harm;
- (b) no serious or legitimate motive exists for exercising the right;
- (c) the exercise of the right is against moral rules, good faith, or elementary fairness; or
- (d) the right is exercised for a purpose other than that for which it was granted.

c. application purpose

It seeks to limit the exercise of private rights in the light of social objectives and, ultimately, curb the excesses of individualism.

d. expansion of application scope of the doctrine of abuse of rights

(a) abuse is here understood as circumvention and seeks to prohibit a person from deriving a benefit which although may result from formal compliance with a rule pursues in fact ends which are beyond its objectives.

(c) applicability of the doctrine of abuse of right in tax system

##### B. abuse of right in EU law

Recognition of principle of prohibition of abuse of right as a general principle in community legal system:

“A finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved. It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it.”

##### C. case concerning application of prohibition of abuse of right in tax matters: analysis of judgment of Cadbury Schweppes Case c-196/04

“In order to find that there is such an arrangement there must be, in addition to a subjective element consisting in the intention to obtain a tax advantage, objective circumstances showing that, despite formal observance of the conditions laid down by Community law, the objective pursued by freedom of establishment, as set out in paragraphs 54 and 55 of this judgment, has not been achieved.”

#### Questions

I. What are the implications of a principle being a general principle in Community (tax) legal order?

Which principles are considered as general principle in Community (tax) legal order? What is the function the ECJ's case laws have in this respect?

II. Talk about some basic ideas on the principle of legal certainty, especially its origin and application objective. What are the concrete requirements for legal certainty? And analyze them according to, inter alia, the ECJ's judgment in Marks and Spencer Case C-62/00.

III. What is the principle of effectiveness? What two sub-principles can it be divided into? What are the concrete requirements for effectiveness? In tax matters, especially to which kind of cases is the principle of effectiveness applied?

IV. As a general principle in community tax order, what function does the proportionality principle have? What are the three sub-tests of proportionality principle? How is applied the proportionality principle in the tax matters, taking *Société générale* Case c-361/96 and *Société Baxter* Case c-254/97 for example?

V. Talk about some basic ideas on the principle of prohibition of abuse of right, especially its origin and development of application scope. What is the abuse of right? What is the relationship between tax avoidance and abuse of right in tax matters? Describe the make up of an abuse of right in tax matters according to the ECJ's case laws, taking the judgment in *Cadbury Schweppes* case c-196/04 for example.

## Chapter 5 Impact of European tax law on national indirect taxations: positive integration

### 5.1 Custom duties

#### A. introduction

##### a. legal basis in EC Treaty

Art. 23: “The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.”

##### b. concept and function of Customs Union

The Customs Union is a foundation of the European Union and an essential element in the functioning of the single market. The single market can only function properly when there is a common application of common rules at its external borders.

This implies that the 27 Customs administrations of the EU must act as though they were one.

##### c. scope of Customs Union’s common rules

The common rules go beyond the Customs Union as such - with its common tariff - and extend to all aspects of trade policy, such as preferential trade, health and environmental controls, the common agricultural and fisheries policies, the protection of our economic interests by non-tariff instruments and external relations policy measures.

##### d. a few facts on EU customs

- (a) 27 customs administrations of the EU implement a community customs code
- (b) the EU is the largest trading space in the world - population of nearly 500 million
- (c) 183 million customs declarations completed in 2007 - 5.5 every second
- (d) 1,545 million tonnes of sea cargo and 11.7 million tonnes of air cargo checked each year

##### e. basic customs legislation

- (a) Community Customs Code: Council Regulation (EEC) No 2913/92
- (b) 2008 Modernised Customs Code (entered into force on 24 June 2008, but not yet applicable, applicable once its implementing provisions are in force and on 24 June 2013 at the latest).

#### B. methods of levying duties

##### a. concept of Customs debt

It means the obligation on a person to pay the amount of the import duties (customs debt on importation) or export duties (customs debt on exportation) which apply to specific goods under the Community provisions in force.

Customs debt is incurred typically in case in which the customs declaration requesting release for free circulation is accepted

##### b. three elements of taxation that provide the basis for assessment of the customs debt

###### (a) customs tariff

The tariff is the name given to the combination of the nomenclature (or classification of goods) and the duty rates which apply to each class of goods.

Combined nomenclature or CN according to which goods must generally be classified when declared to customs in the Community.

The CN is comprised of the Harmonized System (HS) nomenclature with further Community subdivisions.

TARIC Consultation (the online customs tariff database)

(b) origin/economic nationality of goods

Goods wholly obtained in a single country are originating in that country and goods whose production involved more than one country are deemed to originate in the country where they underwent their last, substantial transformation.

(c) customs value

Transaction value, that is, the price actually paid or paid or payable for the goods when sold for export to the customs territory of the community, with some adjustments.

c. relief from import duties

(a) personal property;

(b) goods of negligible value, non-commercial goods, capital goods and goods contained in travellers' personal luggage;

(c) agricultural, biological, chemical, pharmaceutical and medical products;

(d) others

### **C. system of formalities and supervision**

a. Customs-approved treatment or use/form of Customs clearance

(a) placing of goods under a customs procedure

(b) entry in a free zone or free warehouse

(c) re-exportation

(d) destruction

(e) abandonment to the exchequer

b. eight customs procedures

(a) release for free circulation

(b) temporary importation

(c) customs warehousing

(d) inward processing

(e) processing under customs control

(f) transit

(g) outward processing

(h) exportation

## **5.2 VAT**

### **A. background knowledge**

a. why is VAT, not turnover tax or sale tax?

b. characters of EU VAT

c. Directive 2006/112/EC

The essential piece of EU VAT legislation since 1 January 2007

A recast of the Sixth VAT Directive of 1977 (53 articles) as amended over the years

### **B. scope of EU VAT application**

a. subjective requirement: taxable person and **economic activities**

Art. 9 of Directive 2006: A taxable person is a person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Characteristics of a taxable person for purpose of VAT:

- (a) generality of taxable person: any persons/registered
- (b) continuity and independence of economic activities
- (c) irrelevance of purpose for which the economic activities or the results deriving from the economic activities

Specific cases dealt with by ECJ:

- (a) playing music on the public
- (b) pure holding company
- (c) admission of a new partner into a partnership
- (d) issuing of shares by a company

b. objective requirement: taxable transaction

- (a) supply of goods

The transfer of the right to dispose of tangible property as owner

Special cases provided in Directive 2006/

- (b) supply of services

Any transaction which does not constitute a supply of goods.

- (c) importation of goods

Importation of goods from outside the EU (a third territory or a non-EU country)

c. objective requirement: transactions other than taxable transaction

- (a) exempt transaction
- (b) non-taxable transaction
- (c) excluded transaction
- (d) the differences among the three transactions other than taxable transaction above

d. territorial requirement

EU territory for purpose of VAT

**C. taxable amount, rates and place of transactions**

a. taxable amount

The taxable amount includes everything which constitutes consideration obtained by the supplier for transactions by the customer.

This includes subsidies directly linked to the price of these transactions. The amount also includes taxes, duties, levies and charges (excluding the VAT itself) and incidental expenses charged by the supplier to the customer but excludes certain price reductions, rebates and price discounts and repayments of expenses incurred.

b. rates of VAT

- (a) standard rate
- (b) reduced rate
- (c) zero-rate

c. place of transactions

- (a) place of a supply of goods
- (b) place of supply of services and services to non-taxable persons

(c) intra-EU acquisitions (taxation in destination)

#### **D. right to deduction**

The right to deduct input tax is an integral part of the VAT system and may in principle not be limited.

a. the occurrence of right to deduction:

(a) VAT deduction system on chargeability of VAT deductible: the principle of immediate deduction

(b) VAT deduction system on payments

b. scope of the right to deduct

(a) general limitation of right to deduct input tax

The taxable person can not deduct VAT if they use inputs for the purposes of making exempt transactions, non-economic activities (excluded transactions)

(b) ECJ's approach toward the determination of extent to which inputs (costs) can be attributed to taxable transactions (or economic activities): three steps

(c) proportional deduction

(d) initial deduction and adjustments

#### **E. special schemes**

a. flat rate scheme

(a) concept

A business that joins (optional) the scheme avoids having to account internally for VAT on all purchases and supplies, and instead calculates its net liability by applying a flat rate percentage to the tax inclusive turnover.

(b) small enterprises

(c) application mechanism

(d) flat rate turnover

(e) flat rates in UK

(f) pros and cons of the Flat Rate Scheme

b. margin schemes (artt. 312 -325 of Directive 2006)

(a) concept

If there was no VAT on your purchase invoice, you will have to pay the VAT you charged on your selling price, but you won't have any VAT to claim back on your purchase price. Margin schemes can save you money if you sell certain types of goods on which there was no VAT for you to reclaim. In other words, they allow you to pay VAT on the value you added to the goods, rather than on their full selling price.

(b) application condition: art. 314

(c) benefits of using a margin scheme

(d) no deduction: art. 323

c. single stage taxation scheme

It is applied to sectors of publishing, salts, tobacco and telecommunication in Italy

### **5.3 Excises and taxation of energy**

#### **A. introduction**

a. ratio of excises

Calvinism /taxing Sins



A tax placed on products or services that are deemed to be unnecessary or non-essential

b. harmonization basis of excises in EC Treaty

Art. 93: “the Council shall.....adopt provisions for the harmonization of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonization is necessary to ensure the establishment and the functioning of the internal market.”

c. EU rules in area of excises

(a) Horizontal Directive: Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty (repealing Directive 92/12/EEC)

(b) three directives on the harmonization of the structures of the excises: mineral oils (Directive 92/81 and Directive 92/82 replaced by Directive 2003/96 concerning energy products and electricity), alcohol alcohol and alcoholic beverages (Directives 92/83/EEC and 92/84/EEC); manufactured tobacco (Directive 95/59/EC, Directive 92/79/EC and Directive 92/80/EC).

### **B. application of EU excises**

a. products subject to excises

Exemptions: art. 12

b. taxable event

The products are subject to excise duties at the time of: their production, including, where applicable, their extraction, within the European Union (EU); their importation into the EU.

c. chargeability

Excise duties are chargeable at the time of release for consumption in the EU country concerned.

The meaning of release for consumption

The time of release for consumption

d. suspension arrangements

(a) tax warehouse

(b) authorised warehousekeeper

(c) registered consignee

(d) duty suspension arrangement

e. taxable person e transfer of tax

f. place of taxation in case of intra-community

### **C. introduction of energy taxation**

a. background

(a) the use of tax to achieve environmental goals (by means of 'green taxes', CO2 tax, vehicle taxes, tax incentives) has been at the centre of discussions since the early 1990s.

(b) on 2 June 1992, the Commission had proposed a new harmonised carbon and energy tax aimed at stabilising CO2 emissions in the Community in the medium term.

(c) in 1997, the Council of Economics and Finance Ministers (ECOFIN), asked the Commission to table another proposal based on the current system of excise duty for mineral oils.

b. legal bases in EC Treaty

Art. 93

Art. 174 (2) and Art. 175 (2)

c. Directive 2003/96

It widens the coverage of the Community framework, previously limited to mineral oils, to all energy products including coal, natural gas and electricity and increases the relevant Community minimum rates

of taxation.

### Questions

I. What is the Customs Union? According to EC Treaty Art.23, what are the implications of establishment of Customs Union? Answer the latter question from two different (internal and external) perspectives.

II. What are the three elements of taxation that provide the basis for assessment of the customs debt? Describe their basic contents according to Community Customs Code.

III. With regard to system of formalities and supervision, what are the main 5 customs-approved treatments and what are the main 8 customs procedures? Describe the respective basic definition according to Community Customs Code.

IV. When is it acceptable to impose a charge on imported goods?

V. Among the indirect taxes, why is VAT chosen as a harmonized indirect tax in Community tax order? What are the shortcomings of other indirect taxes such as turnover tax and sales tax and the characters of EU VAT?

VI. What is the essential piece of EU VAT legislation, i.e. which EU basic directive in area of VAT is currently effective? What is the relationship between it and the Sixth VAT Directive of 1977?

VII. With regard to scope of VAT application, how is defined the taxable person as a subjective requirement? Describe briefly the Characteristics of a taxable person for purpose of VAT.

VIII. According to ECJ's case law, do the following activities constitute the economic activities subject to VAT provided in EU VAT directive: pure holding company, issuing of shares by a company and playing music on the public? If not, why?

IX. With regard to scope of VAT application, what are the taxable transactions as objective requirement according to the EU VAT directive? What special cases are provided in EU VAT directive? Do you think that the transfer of a going concern constitutes a taxable transaction?

X. What is the meaning of, and the distinction between, exempt transaction, non-taxable transaction and excluded transaction? Take some cases for example

XI. With regard to scope of VAT application, how is defined the EU territory for purpose of VAT as territorial requirement? Does EU territory for purpose of VAT completely coincide with the EU territory or EU customs territory?

XII. With regard to the general provisions of place of transaction, how does the EU VAT directive provide in cases of supply of goods and supply of services? For intra-EU acquisitions, why is taxation in destination applied?

XIII. What is the VAT deduction? Why is the deduction mechanism considered as a substantial element of VAT, thinking about the basic purposes for which the VAT is introduced?

XIV. What is the relationship between the occurrence of right to deduct and the chargeability of VAT, taking in account the principle of immediate deduction? Why has EU reformed the VAT deduction system relating to the occurrence of right to deduct? By what system will the current system be replaced?

XV. What is the general limitation of right to deduct input tax? To what extent can the input taxes be attributed to taxable transactions in order to deduct against the output taxes? Describe the ECJ's approach of three steps.

XVI. What is the proportional deduction? To which cases is proportional deduction applied? Describe briefly the make up of deductible proportion according to the VAT directive?

XVII. Is it necessary to introduce the wording of “right to deduct” in future Chinese VAT legislation as the EU directive does? Give reasons for your answer from the perspective of legal study of tax.

XVIII. What are the main special schemes of VAT existing currently in the Community level and internal national level? Why are they special? Or from what general system of VAT do the special schemes deviate?

XIX. What is the flat rate scheme for VAT? How is it applied in UK? Describe its basic application mechanism by comparing it with the system of small-scale taxpayer in China.

XX. What is the margin scheme for VAT? Why is it necessary to introduce the margin scheme for second-hand goods, art, antiques etc? What benefits can the taxpayer obtain from using a margin scheme?

XXI. What is the single stage taxation scheme for VAT? In Italy, in which transactions is applied the single stage taxation scheme? What is the common character of these transactions for what the single stage taxation scheme is applied?

XXII. What is the ratio of excise? Or why the excise is known as “luxury taxes” or “sin taxes”?

XXIII. Which products are now subject to excises according to Community directives? May Member States levy other indirect taxes on these products and levy excises on the products other than these products?

XXIV. What is the taxable event according to Community excises directives? And when the excises are chargeable? What is the function of suspension arrangements provided in Community excises directives?

XXV. What is the current situation of energy taxation at Community level: a new harmonised carbon and energy tax or taxation based on the system of excise? Describe briefly the EU’s orientation of energy taxation according to the directive in energy taxation matters.

## Chapter 6 Impact of European tax law on national indirect taxations

### 6.1 Positive integration: direct taxes

#### A. introduction

- a. making of a community specific law in tax matters
- b. lack of a homogeneous tendency with regards to the taxation models for different sectors of tax law

#### B. personal tax on incomes and property tax

Lack of taxation models

#### C. taxation of enterprises

Taxation models: piecemeal approach

##### a. Parent-subsidiary Directive

(a) application sector

Taxation of dividends between the groups of companies in the EU

(b) legal basis

Directive 2003/123/EC: broadening the scope and improve the operation of the Council Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

(c) taxation measure

Exemption of dividends from every taxation forms

(d) application conditions

##### b. Merger Directive

(a) application sector

Taxation of restructuring operations in the European Union

(b) legal basis

Directive 90/434/EEC on a common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (the Merger Directive, improved in 2006).

(c) taxation measure

Deferral of the taxes

(d) application conditions

c. prospect of taxation of enterprises

#### D. taxation of capital

a. taxation of savings and of investments of capital

(a) legal basis

Directive 2003/48/EC on taxation of savings income in the form of interest payments

(b) taxation measure

Taxation in the M.S. of residence of subject receiving

(c) exception for Luxembourg, Austria, Belgium

b. taxation of cross-border interest and royalty payments

(a) legal basis

Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States

(b) taxation measure

Taxation of these payments in the M.S. of residence of subject receiving

(c) application conditions

## **6.2 Negative integration: ECJ's case laws in direct tax matters**

### **A. source and residence taxation**

a. the basic clash between international tax law and European tax law

b. territorial principle or EU-wide taxation

### **B. two general technical tax issues in the case law**

a. division of tax jurisdiction and double taxation relief mechanisms

b. exit taxes

(a) emigration of individuals

(b) emigration of companies

### **C. individual income taxation**

b. income-related deductions

c. person- and family-related tax allowances

d. pensions and annuities

### **D. corporate income taxation**

a. host state: equal treatment of branches and subsidiaries

b. origin state: equal treatment of parents holding foreign and domestic subsidiaries

c. group taxation schemes and cross-border loss relief

d. CFC, transfer pricing and thin capitalization

## **Questions**

I. Is there a homogeneous tendency as regards the taxation models for different sectors of tax law at Community level? If not, what approach is adopted respectively in indirect taxes and in direct taxes?

II. How do you think about a Community specific law in (direct) tax matters, prevailing over the national tax law with general (application) scope?

III. Are any taxation models or Community interventions introduced in area of personal tax on incomes and property tax? why?

IV. In which segments of taxation of enterprises the Community has intervened? What measures are adopted due to Community interventions? For what reasons are these measures adopted and what aim do these measures pursue?

V. Do you think that a global approach in the taxation of enterprises will be adopted at Community level in future? Is it possible that the definition of common consolidated corporate tax base for different Member States and the approach (drawing near) of rates of different Member States will be made?

VI. What are the general Community arrangements for taxation of savings income in the form of interest payments (to individuals)? What are the special Community arrangements in this area in front of Luxembourg, Austria and Belgium?

VII. With regard to source and residence taxation, what is the basic clash between international tax law and European tax law and why should be adopted the world-wide taxation at EU level?

VIII. What is the role of European tax law in dealing with the problem of double taxation? Under what conditions are admissible or compatible with the EC law the national exit taxes in, respectively, emigration of individuals and emigration of companies?

IX. Why should the host state treat equally branches and subsidiaries? And do you think that at the side of origin state, should parents holding foreign subsidiaries and parents holding domestic subsidiaries be treated equally? Why?

X. According to the ECJ's case law, how do the national tax rules relating to, for example, CFC, transfer pricing and thin capitalization affect the related fundamental freedoms of movement, even if they are applied indiscriminately in comparable internal situations?

## Chapter 7 Administrative cooperation in the assessment and collection of tax

### 7.1. Mutual assistance in tax assessments

#### A. background

- a. cooperation of taxing authorities at the international level
- b. special requirements for the administrative cooperation at the community level

#### B. evolution of community legislations on mutual assistance

##### a. direct taxes:

Council Directive 77/799/EC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums / Council Directive 2004/56/EC/ Council Directive 2011/16/EU

##### b. IVA:

Council Regulation 218/92/EC (introduced the VAT Information Exchange System known as VIES) / Council Regulation Nr 1798/2003 (sets up a single legal framework merging the legal apparatus of Regulation Nr 218/92 and the provisions of Directive 77/799/EEC on VAT) / Council Regulation (EU) N° 904/2010

##### c. excise:

Council Regulation 2073/2004 and Council Directive 2004/106

#### C. exchange of information in Directive 77/799/EC

- a. solely assessment of tax liability
- b. taxes covered
- c. personal scope
- d. content of information
- e. relationship with the Saving interest Directive
- f. types of exchanges
  - (a) exchange on request
  - (b) automatic exchange / VIES (VAT Information Exchange System)
  - (c) spontaneous exchange
- g. grounds for refusal of cooperation
- h. nature of obligation of exchange of information

#### D. other mechanisms of Community coordination

- a. presence of foreign officials: Art.6
- b. notification of foreign tax decisions: Art. 8(a) amended; national treatment
- c. Simultaneous controls

#### E. protection of taxpayer

- a. confidentiality and other limitations on the use of the information
- b. judicial protection of taxpayer relying on the domestic legislations
- c. special case in presence of foreign officials

## **7.2. Mutual assistance in tax collection**

### **A. general resistance of international law to favor the coordination in tax collection**

### **B. Community cooperation in tax collection**

#### a. legal basis

These arrangements (Council Directive 76/308/EEC), though originally developed to cover agricultural levies and customs duties as sources of Community revenue (traditional own resources), were later extended to VAT (Council Directive 79/1071/EEC), excise duties (Council Directive 92/108/EEC), taxes on income and capital and taxes on insurance premiums (Council Directive 2001/44/EC).

A codified version of this legislation was adopted on 26 May 2008 (Council Directive 2008/55/EC).

#### b. exchange of information on request

#### c. notification upon request of documents

#### d. recovery upon request

#### e. ground for refusal

### **C. protection of taxpayer in collection of a foreign county's tax claims**

Judicial protection of taxpayer relying on the domestic legislations

### **Questions**

I. Why is it necessary to enhance the administrative cooperation between taxing authorities of different member states in the assessment and recovery of tax claims at the EU community level, taking into account the situation at international level for purpose of comparison?

II. Describe the basic contents relating to exchange of information provided in Mutual Assistance Directive in direct tax matters? And what are the forms of administrative cooperation other than exchange of information provided in the same directive?

III. To what extent does the Saving Interest Directive take priority over the Mutual Assistance Directive in direct tax matters?

IV. What is the VIES (VAT Information Exchange System) introduced by the Mutual Assistance Directive in VAT matters?

V. What are the grounds for refusal of administrative cooperation?

VI. How is going the protection of taxpayer in front of assessment and recovery activities carried out jointly by taxing authorities of different Member States?



## Chapter 8 Some special topics for purpose of comparative tax law

### 8.1 Taxation system and taxation unit of individual income tax

#### A. taxation system

Dual income tax system levies a proportional tax rate on all net income (capital, wage and pension income less deductions) combined with progressive tax rates on gross labour and pension income.

Comprehensive income tax system taxes all or most (cash) income less deductions (net income) according to the same rate schedule.

- a. Italy
- b. UK
- c. France
- d. Spanish
- e. Norway
- f. Sweden

#### B. taxation unit

Individual unit or family unit

- a. Italy
- b. United States
- c. France
- e. Spanish

### 8.2. Eliminating (internal) double taxation

#### A. double taxation

A taxation principle referring to income taxes that are paid twice on the same source of earned income.

Double taxation occurs because corporations are considered separate legal entities from their shareholders. As such, corporations pay taxes on their annual earnings, just as individuals do. When corporations pay out dividends to shareholders, those dividend payments incur income-tax liabilities for the shareholders who receive them, even though the earnings that provided the cash to pay the dividends were already taxed at the corporate level.

#### B. measures of eliminating (internal) double taxation

- a. Italy
- b. France
- c. UK
- d. Spanish
- e. Germany

### 8.3 Tax avoidance and anti-avoidance

Tax avoidance amounts to tax saving formally complying with the a tax rule, but substantially whose grant to taxpayer is contrary to the purpose of the tax regime.

#### A. general anti-avoidance rules

- a. Italy
- b. France
- c. Spanish
- d. Germany

**B. specific anti-avoidance rules**

- a. United States
- b. Italy
- c. UK
- d. Spanish

**8.4 Tax evasion and tax crime**

Tax evasion is the general term for efforts by individuals, corporations, trusts and other entities to evade taxes by illegal means.

Tax evasion usually entails taxpayers deliberately misrepresenting or concealing the true state of their affairs to the tax authorities to reduce their tax liability and includes in particular dishonest tax reporting, such as declaring less income, profits or gains than actually earned or overstating deductions.

**A. tax evasion as a tax crime**

**B. conditions under which tax evasion constitutes tax crime and related criminal responsibility**

- a. Italy
- b. UK
- c. France
- d. Germany
- e. Spanish

**Questions**

I. Through comparative analysis, do you think that the taxation system and taxation unit currently adopted by Chinese individual income tax are rational? If not, what are your opinions about the rational taxation system and taxation unit that the Chinese individual income tax should adopt in future?

II. Through comparative analysis, do you think that the Chinese tax measures adopted for eliminating (internal) double taxation are rational or sufficient? Is a further perfection necessary? How?

III. Through comparative analysis, do you think that the current rules relating to the definition of tax avoidance and the anti-avoidance currently provided by Chinese tax legislations are rational and effective? If not, what are your opinions about the amendments of Chinese anti-avoidance legislations or the reform of Chinese anti-avoidance system?

IV. Through comparative analysis, do you think that there are some defects in Chinese criminal legislations relating to the tax evasion in aspects of definition of tax evasion and of criminal responsibility? Why?