Harriet Brown
Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE
T: (020)7242 2744 F: (020)7831 8095
taxchambers@15oldsquare.co.uk

TAX CHAMBERS
15 OLD SQUARE

OTHER ANTI-AVOIDANCE PROVISIONS AND EU LAW
HARRIET BROWN

1. **Introduction**

1.1 The vast majority of decision on the compatibility of the UK tax code with EU law have arisen in the corporate sphere: *Fisher v HMRC* is a notable exception to this general rule. It is likely that the issue arises more frequently in a corporate sphere because of the cost and time involved in disputing the compatibility of tax legislation with HMRC.

1.2 A frequent issue arising when debating EU law issues with HMRC is a refusal to even contemplate that UK legislation may not be compatible with EU law, or that EU law might disapply UK legislation. As a result of this in the past few clients have been willing to take on the financial and time costs of pursuing a case that is likely only to win if it is pursued all the way to the European courts.

1.3 Increasingly, however, there is an awareness of how EU law may be relevant in a tax context, and following the commencement of infringement proceedings by the European Commission on 24 October 2012 in relation both to the transfer of assets abroad code and the Taxation of Chargeable Gains Act 1992, section 13, there is an increasing awareness of the relevance of EU law to anti-avoidance provisions.

1.4 In this talk, and by addressing three sets of anti-avoidance provisions, I discuss the practicalities of using EU law in disputes with HMRC, and how this can assist in disputes with HMRC, both in the Tribunals (including the CJEU) and before the matter progresses to the Tribunal, including in negotiating a settlement with HMRC under the Litigation and Settlement Strategy.

1.5 The three sets of anti-avoidance provisions to be addressed are:

1.5.1. the charge on non-transferors under the transfer of assets abroad code (the Income Tax Act 2007 ("**ITA**"), section 732);

1.5.2. the offshore income gain provisions (in the Offshore Funds (Tax) Regulations 2009); and

1.5.3. the offshore insurance bond provisions (found in the Income Tax (Trading and Other Income) Act 2005).

2. **A brief word on the key freedoms**

2.1 In relation to the freedoms protected by EU law (in the context of direct taxes, one is usually talking about the free movement of capital (TFEU, Article 63) and freedom of establishment (TFEU, Article 49)) it is possible that these freedoms can be restricted where there is a relevant "justification". Before going on to consider the relevant UK anti-avoidance provisions, I first of all explain some of the justifications that might impact on anti-avoidance provisions.

2.2 Before considering justifications, it is first necessary to consider the nature of these two most essential freedoms.

2.3 There is an extensive prohibition on restrictions on both the movement of capital and also on payments in Chapter 4 of Title IV TFEU (Articles 63 to 66). It prohibits such restrictions not only between Member States but, unlike the other freedoms of movement, ***also between Member States and third countries***.

2.4 The application of the right to free movement of capital to third countries is highly significant as it means that free movement of capital has a much wider potential significance than the other freedoms. However, the extent to which the freedom can be relied upon in the context of movements involving third countries is more restricted than the right to free movement of capital between Member States.

2.5 The basic provision setting out the freedom of movement of capital is contained in Article 63 TFEU which provides as follows:

> *1. 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.*
> *2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.*

2.6 The Article refers to both restrictions on of movement of capital and also to restrictions on payments. As such, to the extent that there is any doubt that a payment may not amount to a movement of capital it is dealt with separately.

2.7 The Article prohibits measures restricting the movement of capital between Member States. This includes measures restricting foreign persons from raising capital in a Member State and also measures dissuading taxpayers of a Member State from investing their capital in other Member States[1]. Capital is not restricted to cash for these purposes[2].

2.8 It is clear that a restriction on movements of capital need not relate directly to the movement of capital but need only be likely to deter such movement. For example, the tax treatment of income deriving from an investment will not relate directly to the making of the investment, but since at least part of the purpose of making the investment is likely to be to earn income, the tax treatment of such income will be relevant to the free movement of capital[3].

2.9 In the context of gifts and inheritances measures which reduce the value of a gift or which taxes the gift of that property can amount to restrictions on the free movement of capital[4].

2.10 Turning to the freedom of establishment, the right of establishment is contained in Chapter 2 of Title IV TFEU (Articles 49 to 55) and sets out the framework within

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1 C 513/03 va*n Hilten-van der Heijden v Inspecteur van de Belastingdi-enst* at paragraph 44 and C 436/08 *Haribo Lakritzen Hans Riegel Betrriebsgmbh v Finzamt Linz* at paragraph 50

2 C 318/07 *Persche v Finanzamt Lüdenscheid* at paragraph 29

3 See for example C 319/02 *Proceedings brought by Manninen* [2004] STC 1444

4 C 510/08 *Mattner v Finanzamt Velbert* at paragraphs 25 and 26

which EU nationals are permitted to set up and pursue economic activities in any other Member State. The right applies to nationals as individuals, typically self-employed persons working abroad, as well as companies and firms. It provides that any person should be able to set up an establishment abroad in any manner such person desires; whether by the creation of branches, undertakings or subsidiaries or any other company.

2.11 The basic provision setting out the right of establishment is contained in Article 49 TFEU which provides as follows:

> *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.*
>
> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.*

2.12 The provision is framed in terms of a prohibition on restrictions on freedom of establishment. It is clear from case law that the right prohibits restrictions by a Member State which either serve to prevent or discourage foreign EU nationals from establishing themselves in that Member State as well as restrictions which serve to prevent or discourage nationals of that Member State from establishing themselves in another Member State. In the context of UK tax provisions which tend to be aimed at preventing UK nationals from moving their economic interests to a lower tax jurisdiction, it is the latter element which will be most relevant. It also prohibits discrimination on grounds of nationality in relation to the exercise of the right to freedom of establishment.

2.13 A restriction on freedom of establishment can be shown where the conditions imposed on a person exercising his right of establishment in another Member State are more onerous than the conditions which would apply if the person exercised the right of establishment in the Member State where the establishment is set up. That is, however, subject to the possibility that such restriction might be justified.

2.14 Such restrictions can operate in a number of ways: imposing a tax charge which would not otherwise have been suffered[5] restricting availability of reliefs[6], a requirement to provide security for tax[7] or pay tax earlier than would have been the case[8]. In this respect, it is sufficient that legislation is capable of restricting the exercise of that freedom in a Member State by persons established in another Member State. There will be no need to establish that the legislation in question has actually had the effect of leading some of those persons to refrain from acquiring, creating or maintaining a company in the first Member State[9].

2.15 Although the right to freedom of establishment can only be relied upon by nationals of a Member State, such nationals may be affected indirectly by restrictions on non-nationals. Thus, a restriction that persons resident outside the EU or persons who are non-EU nationals may not be directors of certain companies can amount to a restriction on the freedom of establishment as it relates to companies. This is because EU nationals wishing to operate in the form of a company with a director who is a national of or is resident in a non-member country are prevented from doing so[10].

3. **Justifications**

3.1 There is a number of discrete grounds that the CJEU has accepted are capable of amounting to an overriding reason in the public interest and therefore justify a

5 C 196/04 *Cadbury Schweppes plc v IRC*

6 C 440/08 *Gielen v Staatssecretaris van Financiën*

7 C 9/02 *de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie*

8 Joined cases C 397/98 and C 410/98 *Metallgesellschaft Ltd v Inland Revenue Commissioners; Hoechst AG and another v Inland Revenue Commissioners*

9 C 524/04 *Test Claimants in the Thin Cap Group Litigation v IRC* at paragraph 62 and C 311/08 *Société de Gestion Industrielle (SGI) v État belge* at paragraph 50

10 C 299/02 *Commission v Netherlands*

restriction on freedom of movement. In that regard the CJEU has developed the manner in which these justifications must apply in different circumstances, such that the availability of the justification will very much depend upon the nature of the tax provision in question.

3.2 The different justifications considered are:

3.2.1. fiscal cohesion;

3.2.2. preventing tax avoidance;

3.2.3. balanced allocation of taxing rights;

3.2.4. effective fiscal supervision;

3.2.5. prevention of tax evasion

3.3 Each justification can apply individually, or can be applied together in certain cases[11].

3.4 Safeguarding of fiscal coherence of a national tax system is often cited as a justification for derogating from the freedoms in the TFEU[12].

3.5 The CJEU has referred to maintaining the coherence of a tax system is where it is engaged in comparing the position of the taxation of national and foreign situations. Rather than considering simply one provision of the taxing code, it compares the tax system as a whole in considering the extent to which it is necessary that the wholly internal context should be modified to take account of a foreign element to achieve the same result. For example, where national dividends are exempted, rather than comparing the taxation of dividends it is necessary to consider the taxation of the economic profits as a whole.

3.6 The second context in which the fiscal coherence justification arises is where as part of the discrete code a tax advantage has been granted and the provisions provide for that tax advantage to be offset by a charge. Although the charge, when viewed on its

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11 C 414/06 *Lidl Belgium GmbH & Co KG v Finanzamt Heilbronn* at paragraph 40

12 C 204/90 *Bachmann v Belgian State*

own, might be considered to restrict freedom of movement, when viewed in the context of the code as a whole, it can be seen that it is necessary to protect the integrity of that code. This can be referred to as a 'true' coherence justification.

3.7 The CJEU has restricted the scope of this justification. In order for it to apply there must be:

3.7.1. a tax advantage which is offset by a tax levy; and

3.7.2. a direct link (examined in light of the objectives of the legislation) between the tax advantage in question and the offsetting of that advantage[13].

3.8 Since the principle of coherence is intended to protect the integrity of the system, the question of coherence has to be looked at in light of the aim and logic of the tax regime at issue[14].

3.9 In relation to prevention of tax avoidance, the CJEU has made clear that a restriction on freedom of movement can in certain circumstances be justified on grounds that the restriction applies to prevent what is described as tax avoidance. The CJEU accepts that taxpayers are entitled to plan their affairs to reduce their tax burden and as a consequence of this acceptance, the prevention of tax avoidance justification is still relatively narrowly drawn.

3.10 Unless a balanced allocation of taxation justification is in point as well, the tax avoidance justification will only be available to a Member State seeking to restrict a freedom of movement where the legislation implementing the restriction is specifically aimed at preventing such tax avoidance[15].

3.11 Although the CJEU has not spelt out what it means by tax avoidance in this context, it is apparent that the term does not have the same technical meaning as

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13 C293/06 *Deutsche Shell GmbH v Finanzamt für Großunternehmen in Hamburg* at paragraphs 37 to 39 and C 182/08 *Glaxo Wellcome GmbH & Co KG v Finanzamt München II* at paragraph 78

14 C 446/03 *Marks & Spencer plc v Halsey* per A.G. Poiares Maduro at paragraph 70. Although he was not considering a true fiscal coherence justification, the point is nevertheless plainly correct.

15 C303/07 *Aberdeen Property Fininvest Alpha Oy* at paragraphs 64 and 65

when it is used by the UK Courts[16]. It is clear that it is not a wide "catch-all" for all arrangements aimed to save tax. As has been noted, preventing a reduction in tax revenues will not justify legislation which restricts a person's exercise of one of the freedoms of movement[17] and therefore something else is necessary.

3.12 Tax avoidance in this context requires some objective verification. It cannot be inferred merely from the fact that a taxpayer uses his freedoms of movement to establish his residence in another Member State[18] or takes a loan from a related company[19]. This is in contrast to many parts of the UK legislation, which seem to assume tax avoidance merely by virtue of the fact that an offshore element is involved.

3.13 What the CJEU has said in this context is that legislation can be justified on grounds of preventing tax avoidance where it specifically targets arrangements which are:

3.13.1. wholly artificial arrangements and which do not reflect economic reality; and

3.13.2. designed to circumvent the legislation which would otherwise operate to tax activities carried out in the Member State concerned[20].

3.14 The effect of such legislation must also be proportionate to the aim pursued.

3.15 The CJEU has held that ensuring a balanced allocation of taxing rights is an additional justification for restricting fundamental freedoms[21] albeit in some

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16 Contrast, however, the discussion of the term as it appears in article 11 of Directive 90/434 in C352/08 *Modehuis A. Zwijenburg BV* and in particular the comments of A.G. Kokott at paragraph 45 where the approach to the meaning of the term is more in line with UK jurisprudence:

> *"Conduct merely taking advantage of the options presented by Community law ... cannot by itself justify suspicion of abuse or tax avoidance".*

17 C 196/04 *Cadbury Schweppes plc v Inland Revenue Commissioners* per A.G. Leger at paragraph 52 and the cases and passages cited there.

18 C 451/05 *Europeene et Luxembourgeoise d'investments SA v Directeur general des impots ("ELISA")* per A.G. Mazak at paragraph 102

19 C 524/04 Test *Claimants in the Thin Cap Group Litigation v IRC* at paragraph 73

20 C 196/04 *Cadbury Schweppes plc v Inland Revenue Commissioners* at paragraphs 50 and 55 and C 524/04 *Test Claimants in the Thin Cap Group Litigation v IRC* at paragraphs 72 and 74

21 C 231/05 *Oy AA (Proceedings brought by)* at paragraph 62 and C 311/08 *Société de Gestion Industrielle (SGI) v État belge* at paragraph 66 and see also the Opinion of A.G. Kokott at paragraphs 59 to 61 where after noting that "abusive arrangements ... constitute a particular form of interference in the power to tax between Member

instances there appears to be a significant degree of overlap with other justifications, such as the prevention of tax avoidance[22] and maintenance of fiscal coherence[23]. Where there is an overlap, it can appear that the Court is taking a more relaxed approach to the requirements of those other justification.

3.16 This does of course raise a question as to how taxing rights are to be allocated in the first place. It has been suggested that the allocation of taxing rights is purely a matter for the Member States and this justification is not about allocating taxing rights, but merely *preserving* the balanced allocation of such rights[24]. This analysis does, however, presuppose that taxing rights have been allocated as between Member States and not unilaterally asserted. However, while there are situations where Member States have negotiated taxing rights that does not appear to be a prerequisite of the justification.

3.17 Another ground which can in certain circumstances constitute an overriding reason in the public interest capable of justifying a restriction on the exercise of the freedoms of movement is the need to maintain effective fiscal supervision[25]. In this respect effective fiscal supervision means the ability of a Member State to ascertain and/or verify factors relevant to the taxation of a person falling within that Member State's fiscal jurisdiction. It is closely related to the prevention of tax evasion discussed below.

3.18 It is to be noted that this justification will not be available where the difficulties which the Member State with fiscal jurisdiction faces would apply equally to

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States" she went on to state that "the safeguarding of a balanced allocation of the power to tax may be decisive either in itself or in conjunction with other grounds of justification".

22 C 524/04 *Test Claimants in the Thin Cap Group Litigation v IRC* at paragraph 76 and 77 and C318/10 *SIAF v Belgium* at paragraph 41, 42 and 45

23 *National Grid Indus* at paragraph 80

24 C 48/13 *Nordea Bank Danmark A/S v Skatterministeriet* at paragraph 35 per A.G. Kokott

25 C 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649 at paragraph 9 and C 383/05 *Talotta v Belgium* at paragraph 35

taxpayers within its jurisdiction but they are not made subject to the provision giving rise to the restriction[26].

3.19 Furthermore, it is not enough that the Member State may wish to have more information on persons. That information must be relevant to the restriction in question[27] and by extension to the tax charge which is to be enforced. As with other justifications for restrictions on freedoms of movement, for a restrictive measure to be justified on grounds that it maintains effective fiscal supervision it must also be a proportionate approach to obtaining its objective.

3.20 Subject to the requirements that information should be relevant and proportionate, the tax authorities of a Member State are entitled to require such proof as they may consider necessary for the administration of the tax system of that State, notwithstanding that such a requirement may impose a restriction on freedoms of movement. A Member State is entitled to apply measures enabling it to ascertain in a clear and precise manner whether a body meets the conditions imposed by national law in order for a given tax treatment to apply. It can also apply measures to monitor its effective management, for example, by requiring the submission of annual accounts and an activity report.

3.21 In the context of Member States, it has often been stated that information can be verified by request under Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation ("the Mutual Assistance Directive) which lays down reciprocal obligations of mutual assistance.

3.22 A good deal of reliance has been placed on the existence of this Directive by the CJEU. Even to the extent that the obligation to provide assistance under the Mutual Assistance Directive is limited, it remains relevant because it establishes a

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26 C 383/05 *Talotta v Belgium* at paragraph 36

27 C194/06 *Orange European Smallcap Fund* at paragraph 92

framework for co-operation between the competent authorities of Member States. As such, it will be very difficult to justify a restriction on freedom of movement between Member States on grounds of an inability to maintain effective fiscal supervision.

3.23 The tax evasion justification is linked with and overlaps with that justification concerning effective fiscal supervision. Such supervision, often being intended to prevent tax evasion.

3.24 It is generally accepted as a matter of UK law that a distinction exists between tax avoidance and tax evasion[28]. The former refers to a person arranging his affairs so that he is liable to pay less tax. The latter refers to a person not paying tax which the law charges on his income[29]. In the following, we consider tax evasion in the above sense, while noting that the CJEU on occasion uses the terminology of tax evasion to refer to tax avoidance.

3.25 Justifications based upon the prevention of tax evasion in this sense are clearly linked to justifications based upon the maintenance of effective fiscal supervision. Nevertheless, this justification, to the extent that it is separate, can be accepted as justification for a measure restricting freedoms of movement only if it concerns purely artificial contrivances, the aim of which is to circumvent tax law. A general presumption of evasion or criminality is insufficient to justify a tax measure which adversely affects the objectives of the Treaty[30]. In particular, it is not permissible to raise an presumption of tax evasion simply because the arrangements involve non-residents[31].

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28 *Craven v White* (1988) 62 TC 1 at 197

29 It is, however, to be appreciated that even now this is not a distinction which is always recognised by the Courts: see for example paragraph 5 of the judgment of Stanley Burton LJ in *Test Claimants in Thin Cap Group Litigation v HMRC* (CA) where thin capitalisation legislation is described as being aimed at "deliberate evasion of tax")

30 C540/07 *Commission v Italy* paragraph 58 and C386/04 *Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften* at paragraph 61

31 C318/10 *SIAF v Belgium* at paragraph 38

3.26 HMRC will, particularly in regards to the tax avoidance justification, frequently cite justification as a response to an argument that EU law is in point, i.e. that the EU law can continue to be ignored because there is a justification for the national legislation in point being drafted in the way in which it has been. Frequently, there will be little thought given to the case law on the justifications, and whether or not the measures taken are proportionate.

3.27 So, what can be done? Of course, there is always the "long-stop" option of fighting HMRC on these points in the Tax tribunal and/or the CJEU. If, however, such points are being raised in the course of an enquiry or in negotiations, it is important to highlight the difficulties with applying justifications, the nuanced case law background and the different definitions of "tax avoidance" in national and EU law.

3.28 Additionally, in relation to the proper fiscal supervision heading, in addition to the Mutual Assistance Directive, it is now worth remembering that the UK has an extensive network of TIEAs and other information exchange arrangements (such as the "FATCA" arrangements with the Channel Islands and Isle of Man) and consequently, that the balance of proportionality in respect of this justification may well be shifting in favour of the taxpayer.

4. **The charge on non-transferors**

4.1 Having set out the EU law background in which UK anti-avoidance provisions must be considered it is now possible to consider what impact such law has on the three sets of anti-avoidance provisions mentioned earlier. First, the transfer of assets abroad charge on non-transferors: ITA, sections 731 and 732. ITA, section 731 provides:

> *(1) Income tax is charged on income treated as arising to an individual under section 732 (non-transferors receiving a benefit as a result of relevant transactions).*
> *(2) Tax is charged under this section on the amount of income treated as arising for the tax year.*
> …

(3) The person liable for any tax charged under this section is the individual to whom the income is treated as arising.

4.2 ITA, section 732 provides:

(1) This section applies if—
(a) a relevant transfer occurs,
(b) an individual who is UK resident for a tax year receives a benefit in that tax year,
(c) the benefit is provided out of assets which are available for the purpose as a result of—
(i) the transfer, or
(ii) one or more associated operations,
(d) the individual is not liable to income tax under section 720 or 727 by reference to the transfer and would not be so liable if the effect of sections 726 and 730 were ignored, and
(e) the individual is not liable to income tax on the amount or value of the benefit (apart from section 731).
(2) Income is treated as arising to the individual for income tax purposes for any tax year for which section 733 provides that income arises.
(3) Also see that section for the amount of income treated as arising for any such tax year.

4.3 Thus section 731 imposes a charge on income "*treated as arising*" to an individual, and section 732 sets out the conditions under which income will be treated as arising. They are the following:

4.3.1. there is a relevant transfer (as defined in ITA, section 716);

4.3.2. a UK resident receives a benefit (in the same tax year as he is UK resident);

4.3.3. the benefit is provided out of assets available as a result of the transfer or one or more associated operations;

4.3.4. the individual is not liable to income tax under one of the "transferor provisions" (ITA, section 720 or 727); and

4.3.5. the recipient is not otherwise chargeable to income tax on the amount or value of the benefit.

4.4 One of the commonest incidences of the use of this provision is where there has been a relevant transfer (and associated operations to set up an offshore trust) and then a UK resident beneficiary, who is not otherwise chargeable under the transfer of assets abroad provisions, because they did not make the initial transfer or an associated operation, i.e. is not the settlor, receives a benefit from the trust. Where the benefit is provided as capital it may well be the case that it is not otherwise chargeable to income tax, and consequently, it will likely come within IA, section 731.

4.5 In considering this provision, there is a number of factors to take into account:

4.5.1. does *Fisher* alter the position in relation to non-transferors, or indicate and argument that might be made in relation to non-transferors based on EU law;

4.5.2. does the non-transferor charge breach, or potentially breach, the EU law freedom of establishment; and

4.5.3. does the non-transferor charge breach, or potentially breach, the EU law free movement of capital.

4.6 In relation to the first, *Fisher* did not deal with any non-transferors, and consequently it is not directly on point. It may be the case, however, that matters of general principle can be extrapolated. *Fisher* confirms some established principles. In relation to freedom of establishment it says:

> *646. In the case of Anne Fisher, HMRC say she is not establishing from Ireland to Gibraltar. Her Irish nationality is irrelevant to the application of the TOAA provisions which apply to her as a UK resident.*
> *647. As discussed above the Walloon case suggests to us that* ***legislation may be capable of restricting the establishment right of a Member State national from another member state even if they reside in the Member State imposing the restriction****.*
> *648. While it is correct that Anne Fisher as an Irish national, resident in the UK who establishes in Gibraltar, is treated no differently as a result of her nationality to a UK national resident in the UK establishing in Gibraltar it does not follow from that that there cannot be a restriction on her establishment right. Article 49 TFEU (formerly Article 43 EC) prohibits "restrictions on the freedom of establishment of nationals of a Member State in a territory of another Member State". In addition to prohibiting discriminatory restrictions it is clear that* ***even if the provisions are non-discriminatory and apply equally as between nationals of a Member State provisions could still breach the freedom if they amount to restrictions on the freedom because they are liable to inhibit or dissuade the exercise of the freedom. (The CJEU's decision in Walloon at [45] refers to case-law supporting the proposition that the free movement of workers and freedom of establishment articles "militate against any national measure which even though applicable without discrimination on ground of nationality, is capable of hindering or rendering less attractive***

the exercise by Community nationals of the fundamental freedoms guaranteed by the Treaty".)

649. Anne Fisher's freedom to establish in the UK (albeit a part of the UK given we are in this section of the decision assuming the freedoms do not apply as between the UK and Gibraltar) is so restricted in our view. ***She is a national of one Member State (Ireland) who is dissuaded from establishing in part of another Member State (the UK for the purposes of this argument) by being charged to UK tax on the profits of SJG and being charged at a higher personal tax rate.***

650. ***It does not matter that the restriction is in respect of establishing in one part of the territory of the Member State.*** *In Walloon the facts concerned a scheme which covered only part of the national territory but was nevertheless found to be a restriction on free movement and freedom of establishment. Further it was a restriction on the establishment rights of other Member State nationals who resided in the part of the territory not covered by the scheme.*

651. We are satisfied that the TOAA code restricts Anne Fisher's right of establishment…

(Emphasis added).

4.7 The interaction of the non-transferor charge and the right of establishment is discussed in further detail, below.

4.8 *Fisher* also provides guidance on the proportionality, as a whole, of the transfer of assets abroad provisions in a tax avoidance context. It says:

666. In any event the appellants say that the TOAA charge goes far beyond what is necessary to attain a legitimate objective. ***One of its objectives is to penalise those who have transferred assets abroad (recognised in Howard de Walden v CIR (1943) 25 TC 121). This penal nature is incompatible with any justification for the restrictions on the freedoms which result from the application.***

667. The appellants draw attention to the fact the whole of the profits of the Gibraltarian company are taxable in the UK year after year on individuals in the UK when the business bears no resemblance to what it was when it was first transferred. There is no question of the activities carried out in the UK resulting in taxation abroad.

668. HMRC ***argue the legislation is proportionate because it is closely targeted on situations in which the transferor has a tax avoidance motive. It does not apply to transactions undertaken purely for commercial reasons.***

669. ***We disagree with HMRC. Even if the objective of the legislation were articulated as the prevention of the avoidance in the European sense of the term, as can be seen from our earlier findings, it operates to catch persons who establish in Gibraltar in order to take advantage of the more favourable tax regime but who have not done so using artificial means. It is not therefore closely targeted at those situations (artificiality as described in Cadbury-Schweppes) which count as avoidance in European law but captures persons such as Anne Fisher who exercise freedom of establishment rights into Gibraltar and UK nationals who exercise their freedom of establishment into other Member States.***

670. Further, even if the fight against avoidance of UK betting duty were to be a valid justification for the provisions, ***the provisions are not suitable for that objective and go far beyond it as the way in which the tax charged on the appellants is calculated goes far beyond the amount of betting duty avoided.***

(Emphasis added).

4.9 Thus in this passage the Tribunal expressly rejects the idea that the transfer of assets abroad provisions – as a whole – can be justified on a tax avoidance basis for the following reasons:

4.9.1. the penal nature of the provisions;

4.9.2. the provisions operate to catch those taking advantage of a more favourable tax regime but who have not done so using artificial means; and

4.9.3. the provisions extend beyond the scope of preventing UK betting duty, in this case.

4.10 The latter point, in particular, is interesting, suggesting as it does that the proportionality of the provisions is something to be considered on a case by case basis. Presumably the aim of the transfer of assets abroad provisions was never to prevent the avoidance of UK betting duty, but rather to prevent the avoidance of income tax, and consequently it is interesting to see how the Judge's decision on this point will be treated by future decisions (including upon the appeal of the decision to the Upper Tribunal).

4.11 Thus the key provision here is that the tax avoidance justification will be unlikely to apply to the transfer of assets abroad provisions as a whole, because there is not the requisite level of artificiality required before the provisions "bite". It is also interesting that the Tribunal gave no detailed consideration of the infringement proceedings in relation to the code, and how the amendments made to the code (primarily the insertion of a new defence to the charge in ITA, section 742A for "genuine transactions") might impact upon the compatibility of the provisions with EU law.

4.12 But how does this help us in making a defence based on EU law to a charge under the non-transferor provisions? While the decision in *Fisher* could hardly be said to be taxpayer friendly, the Tribunal did concede some points of general principle:

4.12.1. the code as a whole is not justifiable under the "tax avoidance" justification because it catches transactions that are not sufficiently artificial to constitute tax avoidance within the EU law meaning; and

4.12.2. freedom of establishment can be infringed by a mere dissuasion from establishing in another member state, nothing more is required.

4.13 In considering those general principles, it is convenient to first take the principle in relation to the tax avoidance justification. Since the Tribunal discussed this justification in the context of the transfer of assets abroad code as a whole there is a *prima facie* argument that the non-transferor provision cannot be justified, for the same reasons given. In this respect, however, it is likely that such an argument can be extended beyond merely pointing to what the Judge has said. Since the same defences apply to the non-transferor charges as to the transferor charges, the lack of a tax avoidance justification should apply equally there. Of course, such an argument against justification may have been removed by ITA, section 742A.

4.14 Turning therefore, to freedom of establishment. In the case of the non-transferor charge, the person being charged may well not be the person who has exercised a freedom of establishment (e.g., "amending" the *Fisher* facts, for example, if Anne and Stephen Fisher had moved their business to Spain, and payments had then been made to their grandchildren in the UK, the charge would be on the grandchildren, but the grandchildren would not have exercised any right of establishment).

4.15 In this respect it is important to remember the following:

4.15.1. the right prohibits restrictions by a Member State which either serve to prevent or discourage foreign EU nationals from establishing themselves in that Member State as well as restrictions which serve to prevent or discourage nationals of that Member State from establishing themselves in another Member State;

4.15.2. a restriction on freedom of establishment can be shown where the conditions imposed on a person exercising his right of establishment in another Member State are more onerous than the conditions which would apply if the person exercised the right of establishment in the Member State where the establishment is set up; and

4.15.3. Member State nationals may be affected indirectly by restrictions on non-nationals.

4.16 Thus the non-transferor charge could be incompatible with EU law on the grounds that it infringes the freedom of establishment because it indirectly discourages UK nationals from establishing themselves in other EU Member States because of the increased charge to tax on any assets returned to beneficiaries in the UK. In the context of the non-transferor charge, however, the free movement of capital is likely to be a more important consideration.

4.17 Unfortunately, in *Fisher* the judge fails to distinguish between freedom of establishment and free movement of capital (and perhaps in the context of the transferor charges this was not necessary). It seems probable, however, that in the context of the non-transferor charge the provisions may well apply differently.

4.18 To recap:

4.18.1. freedom of movement can apply between a Member State and a third country, not just between Member States;

4.18.2. it is relevant to both restrictions on of movement of capital and also to restrictions on payments;

4.18.3. measures restricting the movement of capital between Member States are prohibited, including measures restricting foreign persons from raising capital in a Member State and also measures dissuading taxpayers of a Member State from investing their capital in other Member States; and

4.18.4. a restriction on movements of capital need not relate directly to the movement of capital but need only be likely to deter such movement. For example, the tax treatment of income deriving from an investment will not relate directly to the making of the investment, but since at least part of the purpose of making the investment is likely to be to earn income, the tax treatment of such income will be relevant to the free movement of capital.

4.19 Thus free movement of capital is potentially highly relevant to the non-transferor charge. It is clear that the charge on non-transferors can potentially restrict free movement of capital by dissuading:

4.19.1. investment outside of the UK (by the original transferor, i.e. if I set up a non-resident trusts payments to my children/grandchildren might be caught by this provision);

4.19.2. payment of capital into the UK (though the situation here is not as clear-cut).

4.20 It seems likely that, if arguing either that freedom of establishment, or free movement of capital is infringed by the non-transferor provision, HMRC will be likely to point both to ITA, section 742A and the tax avoidance justification to say that the treatment is justified, and therefore any infringement can be ignored. There are several possible responses to this, the two key ones being:

4.20.1. ITA, section 742A only applies after 5 April 2012, and consequently there is still a potential for the regime as previously applied to continue to infringe EU law; and

4.20.2. ITA, section 742A is not sufficient to give wholesale compatibility to the transfer of assets abroad regime.

4.21 Both are arguments that will need to be put persuasively in correspondence (or in Court!) and counsel's advice should be sought on the best way to make such arguments.

5. **Offshore Income Gains**

5.1 The taxation of "offshore income gains" are dealt with in national legislation by the Offshore Funds (Tax) Regulations 2009 ("**OFTR**"), a complex set of regulations, the interpretation of which could fill a book, leave alone a part of a talk on the interaction of EU law and UK tax. Thus it is not possible to fully consider the regime, and in this section, I consider primarily the charges possible under OFTR, and whether or not they are compatible with EU law, and if EU law can be of assistance in resisting a charge purported to be made under the OFTR by HMRC.

5.2 A little introduction to the provisions is necessary. The legislation distinguishes two particular charges:

5.2.1. the "offshore income gain that arises upon the disposal of a non-reporting offshore fund, which is dealt with under the OFTR; and

5.2.2. chargeable gains which arise within the scope of the Taxation of Chargeable Gains Act 1992 ("**TCGA**").

5.3 OFTR, Regulation 17(1) is the charging provision:

> *(1) There is a charge to tax if—*
> *(a) a person disposes of an asset,*
> *(b) either condition A or condition B is met, and*
> *(c) as a result of the disposal, an offshore income gain arises to the person making the disposal.*

(2) Condition A is that the asset is an interest in a non-reporting fund at the time of the disposal.
(3) Condition B is that—
(a) the asset is an interest in a reporting fund at the time of the disposal,
(b) the reporting fund was previously a non-reporting fund (becoming a reporting fund as the result of an application under regulation 52),
(c) the interest was an interest in a non-reporting fund during some or all of the material period,
(d) an election under regulation 48 was not prevented by paragraph (5) of that regulation, and
(e) no election has been made under regulation 48(2).

5.4 Thus a charge arises in two circumstances where an asset is disposed of:

5.4.1. where the asset disposed of is an interest in a non-reporting fund; or

5.4.2. where a non-reporting fund switches to reporting fund status.

5.5 Regulation 18 provides:

(1) The offshore income gain arising is treated for all the purposes of the Tax Acts as income which arises at the time of the disposal to the person making the disposal (or treated as making the disposal).
(2) The tax is charged on the person making the disposal (or treated as making the disposal).
(3) In the case of a person chargeable to income tax, tax is charged under Chapter 8 of Part 5 of ITTOIA 2005 (miscellaneous income: income not otherwise charged) for the year of assessment in which the disposal is made, but sections 688(1) and 689 of ITTOIA 2005 (income charged and person liable) do not apply.
(4) In the case of a person chargeable to corporation tax, tax is charged under Chapter 8 of Part 10 of CTA 2009 (miscellaneous income: income not otherwise charged) for the accounting period in which the disposal is made.
(5) Paragraph (1) is subject to—
(a) regulation 19 (income treated as arising under regulation 17: remittance basis);
(b) regulation 20(1) (offshore income gain arising to non-resident trustees not treated as income of settlor);
(c) regulation 20(5) (application to gains of non-resident settlements);
(d) regulation 24(6) (application of section 13 of TCGA 1992).

5.6 From an EU law perspective, this should set some alarm bells ringing; regulation 24(6) relates to a provision that was recently the subject of infringement proceedings, and which may well continue to infringe free movement of capital. In this respect, Regulation 24 provides:

(1) Section 13 of TCGA 1992 (chargeable gains accruing to certain non-resident companies) applies for the purposes of this Part with the following modifications.
(2) The section applies as if—
(a) for any reference to a chargeable gain there were substituted a reference to an offshore income gain; and

(b) for any reference to anything accruing there were substituted a reference to it arising (with similar references being read accordingly).
(3) The section applies as if, in subsection (5), paragraphs (b) and (c) were omitted.
(4) The section applies as if, in subsection (7), for the reference to capital gains tax there were substituted a reference to income tax or corporation tax.
(5) The section applies as if subsection (8) were omitted.
(6) If this regulation applies, the person to whom the offshore income gain arises is treated as the person making the disposal.
(7) To the extent that an offshore income gain is treated, by virtue of this regulation, as having accrued to any person resident …[1] in the United Kingdom, that gain shall not be deemed to be the income of any individual for the purposes of Chapter 2 of Part 13of ITA 2007 (transfer of assets abroad).

5.7 Of course, TCGA, section 13, has already been the subject of infringement proceedings. These infringement proceedings have not, despite the UK's amendments to the legislation, not yet been closed. However, it seems probable that in terms of arguing with HMRC, they may well see the issue of whether TCGA, section 13 is now compatible, as being cut and dried. This is discussed further below.

5.8 In terms of the incorporation of TCGA, section 13 within the OFTR, it remains as a matter of law doubtful as to whether or not the amendments made to TCGA, section 13 are sufficient to ensure EU compliance. Consequently there is a similar question mark over the compliance of OFTR. In this respect, it has been suggested that by increasing the threshold at which a section 13 (or OFTR) charge applies the provisions concerning free movement of capital are somehow excluded from applying.

5.9 This is based upon the approach of the CJEU in a series of cases in which it has held that the 25% holding is the threshold at which a person has an influence over a company, and that provisions which are aimed at persons who have an influence over a company properly fall within the scope of freedom of establishment, and reliance on free movement of capital is subsequently excluded (see for example C-31/11 *Scheunemann*).

5.10 The relevant principle, however, is that in considering which treaty freedom applies, regard must be had to the purpose of the legislation in question. The purpose of TCGA, section 13 is not to tax persons who have created an establishment in another country through a company (as such gains are expressly excluded) but to tax gains on investments and other assets in circumstances where a right of establishment may not have been exercised at all.

5.11 In this context it is not clear the 25% threshold excludes the provisions on free movement of capital (see in this respect *Schmelz v inanzamt Waldviertel* (Case C-97/09) [2011] STC 88). As such, there is an argument that TCGA, section 13 potentially continues to fall foul of the free movement of capital. Does that argument apply equally to OFTR, Regulation 24? In my view it does. This is because the underlying basis of TCGA, section 13 and of its incorporation into the OFTR is the same: the intent to tax gains on investments.

5.12 Turning, then, to freedom of establishment. Even if the right to free movement of capital is excluded (by the 25% threshold), this exclusion for economically significant activities will not necessarily ensure that restrictions on the right of establishment are removed. The reference to economically significant activities carried on through a business establishment is a stricter test than that of "participating in economic life on a stable and continuing basis" (A.G. Leger in *Cadbury Schweppes* at para 42).

5.13 Thus while it is not certain that the new section 13, and by extension OFTR meet the requirements of EU law, it is certainly an improvement on the previous provisions, which were the original subject of the infringement proceedings. However, it seems likely that there remains an argument that OFTR infringes free movement of capital, and in the right circumstances, freedom of establishment.

5.14 There may, of course, be other grounds upon which the OFTR could be challenged. As a regime specifically aimed at non-UK situate assets there is significant potential for showing that the regime restricts freedom of movement, by preventing or discouraging the raising of capital in other Member States, and the freedom of establishment, by discouraging EU nationals from establishing themselves in another Member State. This offers an additional argument to be put to HMRC if arguing against an offshore income gain charge, either on the TCGA, section 13 basis, or upon the more general basis.

5.15 Practically, in deciding whether to put EU points to HMRC in this context it will be important to consider the facts of your individual case to see whether or not they give a clear indication of how the provisions are incompatible with EU law. If your facts give a clear example of the problems of the OFTR in the context of EU law, such a claim should be pursued vigorously (alongside any other technical points being put).

6. **Offshore personal portfolio bonds**

6.1 In this section, I look at the issues facing offshore insurance bonds in the context of a case that was recently before the First-tier Tribunal. This case is particularly interesting because while it was not argued on the basis of infringement of/incompatibility with EU law, "human rights" points were instead argued. It is interesting to consider whether or not the case (not argued by Counsel) might have had better prospects had it been [possible] to argue it on EU grounds.

6.2 Before doing so, however, a brief introduction to offshore insurance bonds and their taxation, for those who do not deal with them regularly. Offshore insurance bonds (sometimes also referred to as offshore portfolio bonds) are often used as investment "wrappers" and allowed the tax-free withdrawal of more than 5% of the bond's value at a time at which the partial surrender was made, provided that the "withdrawer" was outside the UK at the time of surrender. The relevant legislation is in the Income Tax (Trading and Other Income) Act 2005 ("**ITTOIA**"), sections 461-468, 475, 515, 516, 522-525 and 528. Rather than set out the legislation in detail, I turn to the explanation of the legislation given by the Judge in the case in question *Ross James Anderson v HMRC* [2013] UKFTT 126 (TC):

> *… [i]n the years concerned the Appellant was the holder of some life insurance policies issued by an Irish insurance company. He took out these policies at a time when he was not resident in the UK, but in the tax years concerned in this appeal he had become UK resident. Under the legislation mentioned above (as it applies to a UK resident), the policyholder of such offshore policies is liable to income tax on any "chargeable event gains" made. Where the event involves the policyholder ceasing to possess any rights in the policy, whether as a result of its maturity, total surrender or assignment, the calculation of the gain is simple and intuitive – the gain is the difference between what the policyholder gets from the insurance company as a result of the event and what was paid by way of premium.*
>
> *In the case of certain other events matters are far more complex. One of those events is the surrender of part only of the rights in the policy ("part surrender"), which is what the Appellant did. Where that happens, the policyholder may (in simple terms - in fact the 5% of the premium is a cumulative amount, so that if in the first year of the policy there is no part surrender, the next year's allowance is 10%, and so on (s 507(5) ITTOIA)) realise in a given tax year an amount equal to 5% of the total premium invested without any chargeable event gain arising in that year (s 507 ITTOIA especially subsection (5)). The amount withdrawn up to this limit is however brought into account, along with amounts withdrawn up to that limit in other years, when the policy ends, by adding the various amounts paid on earlier part surrenders to the amount received on the final event (ss 491 and 492(1)(b) ITTOIA).*
>
> *However, if the amount obtained on a part surrender in any year exceeds the 5% allowance for that year (plus any unused allowance from previous years), then the whole of the excess is a chargeable event gain and is taxed in the year that the part surrender is made. Where a substantial part surrender is made in the early years of a policy, it is likely that the part surrender will in economic terms represent in large part a realisation of capital invested rather than of the income earned from the investment of the premiums by the insurer, but nevertheless the whole of the amount realised in excess of the 5% allowances available is taxed as income.[2] In the case of a UK policy,[3] the policyholder is liable to income tax only at the excess of the higher rate over the basic rate (s 530(1) ITTOIA)**, but in the case of an offshore policy, the policyholder is liable at the basic rate as well** (s 530(4)(b)). **This reflects the fact that under the UK system of taxing life assurance, the insurer pays corporation tax at a rate equal to the basic rate of income tax on the income accruing for the benefit of policyholders.***
> *…*
> *A further complicating aspect of the Appellant's tax situation is that the largest policy he held has been classified by the insurer as a personal portfolio bond ("PPB"). It therefore falls within the regime given by ss 515 to 526 ITTOIA. Under that regime, **in addition to any actual chargeable event gains that arise on the policy, the policyholder is charged to tax each year as if there were an actual gain on an amount equal to 15% compounded of the premiums paid ("PPB***

gain") less the aggregate amount of any previous part surrender gains, irrespective of whether the policy gives an actual return of that amount, or indeed any return at all. These PPB gains are also deducted, in addition to the part surrender amounts, in computing the final gain in the year the policyholder ceases to have any rights in the policy (s. 491(2) (4) ITTOIA).

The effect of the rules for taxing part surrenders of life insurance policies in excess of the 5% allowances may be mitigated or completely nullified (except for a cash flow disadvantage) by certain reliefs that are available in certain circumstances. One such relief, known as "corresponding deficiency relief" (ss 539 to 541 ITTOIA), applies where the policy ends, the final chargeable event calculation does not give rise to a gain, and there has been at least one previous part surrender giving rise to a gain (s 540). The amount of the "deficiency" will be equal to the amount of the previous gains, because of the exclusion in the computation of earlier chargeable event gains on part surrenders. However annual gains on PPBs are not included in the amount of previous gains (s 541(4)(a)).

Where there is a deficiency, the policyholder may be entitled to a reduction in liability to tax on their other income in the year in which the policy comes to an end. However, deficiency relief is only applied to income taxed at the higher rate of income tax, and of course can only be given if the policyholder has income from other sources taxed at that rate. Furthermore, deficiency relief is calculated as a tax reduction based on the difference between the basic rate and higher rate of tax, even if as in the Appellant's case, the previous gains have been taxed at the basic rate as well as the higher rates because they were from an offshore policy. The Appellant says that the effect of this was that he was taxed at the higher rate of 40% on the amount of some £97,000 that he withdrew from the policies in the years in question, while he received deficiency relief of only 20% on some £15,000, the amount of his expected income at the higher rate in the year of full surrender

(Emphasis added).

6.3 The highlighted portions above indicate areas where there is a difference in treatment between an onshore and an offshore bond. These can be summarised as the following:

6.3.1. an offshore policyholder is liable at basic, as well as at the higher rate; and

6.3.2. deficiency relief is calculated as a tax reduction based on the difference between the basic rate and higher rate of tax, even if previous gains have been taxed at the basic rate as well as the higher rates because they were from an offshore policy.

6.4 The Appellant argued that his rights under the First Protocol to the European Convention on Human Rights, Article 1. The Judge summarized his argument in the following way:

The Appellant argues that the applicable legislative provisions are contrary to his human rights. Article 1 of the First Protocol to the European Convention on Human Rights provides as follows:
Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

6.5 In giving his decision on this point, the Judge said:

Article 1 of the First Protocol is a Convention right for purposes of the Human Rights Act 1998 (see s 1(1)(b) of that Act). However, as is clear from its terms, that provision does not impair the right of the State "to enforce such laws as it deems necessary … to secure the payment of taxes".
…

In Burden and Burden v. United Kingdom (2007) 44 EHRR 51, [2007] STC 252, the European Court of Human Rights said at [54] that:
It is for the national authorities to make the initial assessment, in the field of taxation, of the aims to be followed and the means to be used (Lindsay, cited above). The State enjoys a wide margin of appreciation in this field, as is usual when it comes to general measures of economic or social strategy (see, for example, James and Others v. the United Kingdom, judgment of 21 February 1986, Series A no. 98, § 46; National and Provincial Building Society and Others v. the United Kingdom, judgment of 23 October 1997, Reports 1997-VII, § 80). A government may often have to strike a balance between the need to raise revenue and the need to reflect other social objectives in its taxation policies. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds. The Court will generally respect the legislature's policy choice in this field unless it is "manifestly without reasonable foundation" (ibid.; and see also Lindsay, cited above) and subject to the proviso that, in creating and implementing a scheme of taxation, the State must not discriminate between tax-payers in a manner which is inconsistent with Article 14 of the Convention (see, mutatis mutandis, Stec and Others v. the United Kingdom (dec.), [GC], nos. 65731/01 and 65900/01, §§ 54-55, ECHR 2005-…).

The Appellant's case is that ***the relevant provisions of ITTOIA are "manifestly without reasonable foundation", and apparently also that they do "discriminate between tax-payers in a manner which is inconsistent with Article 14 of the Convention". However, there is no suggestion that there was any obligation on the Appellant to invest in offshore life insurance policies or PPBs. Nor is there any suggestion, let alone evidence, that the tax regime for offshore life insurance policies or PPBs did not make them a suitable and attractive investment for certain persons with different personal circumstances to those of the Appellant, or that the tax laws deprived the Appellant of any suitable investment possibilities.*** *The tax regime applicable to any kind of investment may make it suitable for one category of persons but unsuitable for another category of persons. This does not mean that the tax regime violates the rights under Article 1 of the First Protocol of the*

second category of persons. Persons in that latter category remain free to make alternative investments, more suited to their particular circumstances.
…

(Emphasis added).

6.6 It seems likely that the Judge was correct in deciding that the ECHR was not engaged in these circumstances. However, some of his decision on this point (the emphasised portions above) do point to the fact that a more successful challenge might have been made on the grounds of the freedoms enshrined in TFEU. If he is correct in saying that there is a discrimination between taxpayers, then where that discrimination involves nationals of Member States, the TFEU may be engaged. Additionally, it can be seen that both freedom of establishment, and free movement of capital are in point.

6.7 Mr. Ross was an Irish national (like Anne Fisher in the *Fisher* case); he had invested in a personal portfolio bond in Ireland and as a result of this, he was subject to an increased charge to tax over and above what might have been chargeable had he invested in the UK (i.e. the basic rate tax, and the corresponding restriction in the deficiency relief). Clearly this could discourage, in particular, movement of capital into another member state. Since there are now (since 6 April 2013) also restrictions on the offset of chargeable events when non-resident freedom of establishment is also potentially in point.

6.8 While the distinction here, and the benefit to be gained, may seem like less it is still worth challenging HMRC's use of this regime on the basis that it infringes EU law. It can provide a useful valuable argument, and in certain circumstances HMRC will not be prepared to air the potential no-compliance in court.

7. **Conclusions**

7.1 At present, especially in the private client context, HMRC have a great deal of confidence in dismissing (frequently without much proper analysis) arguments put on an EU law basis. This should not discourage the taxpayer from raising any concerns about EU compliance at an early stage. This is for a number of reasons:

7.1.1. even if HMRC dismisses it, a court may not;

7.1.2. in relation to some regimes, HMRC may be dissuaded from pursuing the matter by the risk of losing on the EU law point;

7.1.3. in terms of obtaining a settlement an additional legal argument (if put properly under the LSS) may increase the settlement amount; and

7.1.4. the more points that are taken, the more HMRC, and government generally, will be encouraged to ensure that the legislative regime does not infringe rights enshrined in EU law.

Harriet Brown
Tax Chambers,
15 Old Square,
Lincoln's Inn,
London WC2A 3UE