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ECJ CASES

Belgium – ECJ referral regarding recharacterisation of interest as dividend (C-105/07)

On 22 February 2007, the Court of First Instance of Antwerp asked the ECJ for a preliminary ruling on the compatibility of the Belgian Income Tax Code concerning the recharacterisation of interest as dividends with Articles 12, 43, 46, 48, 56 and 58 EC.

According to a specific Belgian thin capitalisation rule, interest is recharacterised as a dividend and consequently is not tax-deductible, if the interest is paid on a loan granted by a person to a company in which the lender holds a position of director, liquidator or any similar position. This recharacterisation applies if and to the extent that either the interest exceeds the market rate or the loan exceeds the sum of the taxed reserves at the beginning of the year and the paid-up capital at the end of the year. As the rule only applies to interest payments to foreign resident companies, the rule may conflict with EC Law.

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Belgium – ECJ referral regarding the Belgian Excess Dividends Received Deduction issue (C-138/07)

On 27 February 2007, the Court of Appeal of Antwerp filed a request for a preliminary ruling with the ECJ on the compatibility of the Belgian excess Dividends Received Deduction (DRD) with the Parent-Subsidiary Directive.

Dividends received by Belgian companies from a stake in a resident or a non-resident company are 95% exempt from corporate income tax, provided that certain conditions are met, in particular taxation and participation requirements. In accordance with Belgian tax law, 95% of the dividends received in a given tax year can be deducted from the profits of that tax year. If the profit in a year is not sufficient to deduct the full dividends received, the excess is not allowed to be carried forward.

The Court asked the ECJ whether the Belgian DRD regime, which allows qualifying dividends to be added to the tax base of the parent company and subsequently to be deducted from the taxable profits (up to 95%) is in accordance with article 4 of the Parent-Subsidiary Directive (90/435/EEC of 23 July 1990), if the deduction is limited to the available taxable profits, and therefore may result in taxation of the dividends. See also EUDTG Newsalert NA 2007 – 012.

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Belgium – ECJ referral regarding the Belgian participation exemption (C- 48/07)

On 5 February 2007, the Court of Appeal of Liège filed a request for a preliminary ruling with regard to the compliance of the conditions to benefit from the Dividend Received Deduction (DRD) regime with the Parent-Subsidiary Directive (90/435/EEC).

According to the previous DRD regime (applicable to dividends received till the end of financial year 2002), dividends received by a Belgian company could be deducted as to 95 % from its taxable profits provided that some quantitative and qualitative conditions were met. The exemption was granted, provided that on the dividend date, the holding in the distributing company was equal to at

least 5 % of its capital or alternatively represented an investment value of EUR 1.200.000. As the provision did not make any explicit reference to the "type" of ownership required, one could assume that the exemption was granted irrespective of the type of ownership, i.e. full ownership or usufruct. However, the Belgian Government was of the opinion that the quantitative condition was to be considered as a holding in full ownership, and thus a mere usufruct on shares could not qualify in order to benefit from the DRD regime.

The Court asked the ECJ whether it is compatible with the Parent-Subsidiary Directive that a full ownership of the shareholding is required when the Belgian Income Tax Code itself does not explicitly require a "full ownership" and therefore implicitly allows the interpretation that the mere holding of a right of usufruct in the capital entitles the right to benefit from the tax exemption on dividends.

Note in this respect that the Belgian Income Tax Code has been adapted and it now clearly provides that as from financial year 2003 the shareholder needs to participate for at least 10% or EUR 1.200.000 in full ownership of the distributing company in order to benefit from the DRD regime.

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Belgium – ECJ referral regarding the Belgian Inheritance Tax Regime (C-11/07)

The Belgian Court of Appeal of Ghent asked the ECJ for a preliminary ruling on 18 January 2007, with respect to the possible discriminatory application of the Belgian inheritance tax regime to non-resident testators vis-à-vis Belgian resident testators.

In Belgium two different taxes apply to the acquisition of goods through the death of a testator, i.e. inheritance tax for Belgian residents and inheritance tax for Belgian non-residents. The tax base for a Belgian tax resident consists of his worldwide assets at net value, thus all movable and immovable assets irrespective of their location, combined with a deduction of all existing debts at the time of death (including funeral expenses). In contrast, a non-resident will only be taxable on immovable property located in Belgium at gross value, thus without deduction of any debts, including the debts explicitly relating to the immovable assets located in Belgium).

The Court asked the ECJ whether Article 12 EC read together with articles 17, 18, 56 and 57 EC precludes national rules of a Member State which on the one hand levy inheritance tax at net value of the immovable property, if the testator, at the time of his death, was resident in the Member State and, on the other hand, levy inheritance tax at the gross value of the immovable property, if the testator, at the time of his demise, was not considered as a resident of the Member State.
See also EUDTG Newsalert NA 2007 – 007.

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France – AG opinion on the 3% tax on real estate: Elisa case (C-451/05)

On 26 April 2007, AG Mazak concluded that the free movement of capital (Art. 56 EC) precludes a Member State from maintaining a 3% tax on the fair market value of immovable property from which legal persons resident for tax purposes in France are exempted (subject to filing requirements), whereas the exemption for non-resident legal persons is subject to the existence of a bilateral convention containing either a clause providing for administrative assistance or a clause

prohibiting discrimination on grounds of nationality. In France, a 3% tax applies to companies – French or foreign – holding passive real estate located in France as a majority of their French assets. The 3% tax is based on the fair market value of the real estate. However, this tax is not due notably:

- where the foreign company is located in a country with which France has signed an administrative assistance agreement and discloses every year on due time the name and place of residence of the shareholders, or
- where the real estate properties are held by French entities or foreign entities located in a country which has signed a tax treaty with France including a non-discrimination clause, subject to annual filing requirements.

In the present case, a Luxembourg company ("holding 1929") held French real estates. This Luxembourg company was not able to benefit from any exemption, since (i) this kind of holding company is excluded from the scope of the France/Luxembourg tax treaty and (ii) the France/Luxembourg tax treaty does not contain a non-discrimination clause.

In a decision of 13 December 2005, the French Supreme Civil Court referred, in broad terms, the following questions to the ECJ:

- Is the condition for the exemption, based on the application of an administrative assistance provision, compliant with the freedom of movement of capital? If this condition is viewed as compatible with the fundamental freedom, could the Directive of 19 December 1977 (77/799/EC) regarding the mutual assistance in the field of direct taxation between the Member States (hereafter "the Directive"), be considered as sufficient to avoid tax avoidance and ensure the efficiency of tax audits? The latter question implies that the 3% tax can be qualified as a tax on capital, within the meaning of Art. 1 of the Directive.
- Does the freedom of establishment principle oblige a Member State which has signed tax treaties including a non-discrimination clause with other EU or non-EU States to apply that clause to a company located in another Member State?

Firstly, the AG considered that the French 3% tax constitutes a tax on capital under Article 1 of the Directive on mutual assistance.

Secondly, in his view, the obligations imposed on Members States concerning mutual assistance in the field of taxation by the Directive preclude the implementation by the Member States, under a bilateral convention on administrative assistance, of obligations of the same kind excluding a category of taxpayers such as Luxembourg holding companies only in so far as giving effect to the bilateral convention would prevent the applicability of the Directive to these taxpayers.

Thirdly, the AG considered that, since the free movement of capital covers both the ownership and administration of immovable properties, the situation at issue falls under the scope of the provisions of the free movement of capital (Art. 56 EC). He held that the effect of the 3% tax on real estate measure is to treat legal persons in objectively comparable situations differently.

In order to justify the discrimination, the French Government put forward that in the particular case of 1929 holdings, the efficiency of the Directive on mutual assistance is questionable since that, pursuant to the Luxembourg legislation, such holding companies are required to provide only

information concerning their legislative status and no information can be requested for taxation purposes. However, according to the AG, the French Government could have adopted less restrictive measures in order to achieve the objectives of ensuring effective tax audits. The difference in treatment between residents and non-residents at stake is thus not proportionate to the aim it pursues.

The AG considered that, at that stage, it was not necessary to answer the question related to the possible application of a non-discrimination clause included in a tax treaty.

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Germany – ECJ judgment on write-downs on foreign participations: Rewe Zentralfinanz case (C-347/04)

In its judgment of 29 March 2007 the ECJ held, that the German provisions on write-downs on participations constitute a restriction on the freedom of establishment (Art. 43 EC).

Rewe Zentralfinanz, a German resident company, was the sole shareholder of a Dutch holding company with subsidiaries in other EU Member States. In 1993 and 1994 Rewe wrote the participation in the Dutch holding company down to fair market value because of losses incurred by its subsidiaries. The tax authorities denied a deduction of the write-down (for previous reporting, see EU Tax News 2006 - nr. 004 as well as Newsalerts NA 2006 - 014 and NA 2007 - 013).

Under German tax law applicable at the time of the case, write-downs on domestic participations were, as a basic rule, immediately tax deductible. In contrast, write-downs on foreign participations were only immediately tax deductible if the participation was deemed to be active in the sense of the relevant section in the German Income Tax Act. 'Passive' negative income from write-downs on foreign shareholdings could only be set-off against (future) positive income from the same source and the same state.

The ECJ held that the German provisions constitute a restriction on the freedom of establishment (Art. 43 EC), as parent companies with subsidiaries in other Member States are treated unfavourably compared to parent companies with German subsidiaries. Indeed, losses stemming from write-downs of shares in non-resident subsidiaries could be set-off against future profits relating to those shares, if any. But as losses deriving from a German subsidiary could be deducted immediately, the relevant provision resulted (at least) in a cash-flow disadvantage.

The ECJ explicitly analysed the justifications asserted by the German Government (following the *Marks & Spencer* case (C-446/03)) of a *balanced allocation of taxation rights, the danger of double dip of losses* and the *risk of tax avoidance* and denied them: A balanced allocation of taxation rights could only justify a restriction if it is jointly established with the other two grounds which didn't apply at hand: As the losses were incurred by the parent company itself and not by the foreign subsidiary there was no danger of a double tax advantage. And since the German provisions generally cover any situation with non-resident subsidiaries and are therefore not specifically aiming at counteracting purely artificial arrangements - they could not be justified as a proportionate anti-avoidance measure. (See also EUDTG Newsalert NA 2007 – 013).

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Germany – AG opinion on exemption method as anti-abuse measure: Columbus Container Services case (C-298/05)

On 20 March 2007, AG Mengozzi concluded that EC Law precludes a national rule which switches from the exemption method to the credit method if the foreign income is subject to low taxation abroad and stems from certain “passive” sources, unless this relates to wholly artificial arrangements. It is up to the national Court to decide whether the rule can be justified by such argument.

The plaintiff, a Belgian limited partnership (Coordination Centre) with German resident partners, dealt with financing of subsidiaries and branches. Its profits and losses were assessed as foreign branch profits and assets of the German partners under German domestic law. According to the double tax treaty between Germany and Belgium, profits from and net assets of a Belgian partnership are exempt in Germany (both for income and wealth tax purposes). However, the German International Transactions Tax Act provides for a switch from the exemption to the credit method in respect of certain passive branch profits and assets. This provision was introduced to prevent circumvention of the CFC rules, which apply only to foreign subsidiaries. Doubting the compatibility with EC Law, the Tax Court of Muenster referred the case to the ECJ.

The AG stated that due to lack of information either the freedom of establishment or the free movement of capital could apply. The AG then pointed out that the fact that the provision establishes a treaty-override is not in breach of EC Law, since such conflict refers to international vs. domestic law only and does not fall within the ECJ's competence.

Comparing on a first step German residents having a low-taxed branch in Belgium with German residents having a branch in Germany, the AG did not assess an unequal treatment as the credit method simply increases the tax on the foreign investment to the domestic level. The AG then compared the treatment of a German resident with a low-taxed Belgian branch as opposed to with a high-taxed branch in another Member State. In applying different methods in the two situations, the German rule constitutes an infringement of EC Law, as it deters German residents from investing in the Member State *of their choice* and thereby threatens the Single Market.

The AG did not accept any of the justification arguments brought forward by Germany. Neither did it meet the anti-abuse criteria established in Cadbury Schweppes as it does not apply to wholly artificial situations and does not allow the taxpayer to prove an actual establishment in the other State. Nor could it be claimed as a measure against harmful tax competition: even though the Belgian Coordination Centres can be seen as prohibited state aid, this is a matter for the Commission and does not entitle a Member State to execute "self defence" through infringing tax measures. The coherence argument could not apply either. (See also EUDTG Newsalert NA 2007 – 013.).

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Germany – Referral to the ECJ regarding deduction of EU branch losses: Krankenheim Ruhesitz case (C-157/07)

The plaintiff, a German resident company, had a branch in Austria incurring losses from commercial activity. According to the applicable Austrian-German Double Tax Treaty, the corresponding income was subject to taxation in Austria. Until 1997, the German Income Tax Act in general allowed a deduction of foreign branch losses but subject to a recapture if the branch realised profits in a

subsequent time period. This reservation in turn was on condition that the branch losses could as a theoretic matter not be deducted in the state where it was situated.

After having initially granted the loss deduction on application of the plaintiff, a few years later when the Austrian branch realised profits, the Tax Authorities recaptured the deducted losses. It was held that since Austria provided for the possibility of loss deduction in general, the prerequisites for a definite loss deduction in Germany were not met. However, the plaintiff was not able to deduct losses in Austria either as - according to the Austrian Income Tax Act - loss deduction of a branch was allowed in cases only where the head office could not deduct them in its state of residence due to own losses. Thus both Germany and Austria provided for the general possibility to deduct the branch losses, but in each case subject to the condition that deduction in the other state was not possible. Consequently, the plaintiff could deduct its branch losses neither in Austria nor in Germany. In 1994, the plaintiff sold the branch without having made use of all of its losses.

As deduction of losses incurred by a PE situated in Germany is allowed without restriction, the Federal Tax Court doubts whether this unequal treatment of foreign and domestic branches is compatible with the freedom of establishment and referred the case to the ECJ on 29 November 2006.

The Court pointed out that, depending on the outcome of Lidl Belgium (C-414/06, EU Tax News Issue 2006 - nr. 006), the question arises in which way the state of residence must provide for cross-border loss deduction in order to comply with EC Law. Especially it asks whether it is proportionate for the state of residence to disallow the deductibility in cases where loss deduction in the other state is only possible in theory but not in the actual case at hand.

The second question arising is in how far the obligation of the state of residence might be influenced by the fact that the restriction of loss deduction in Austria might be in breach of the freedom of establishment as well.

Thirdly, the Court raises the question whether the State of residence is obliged to dispense with the recapture of losses if in case of a sale of the branch foreign losses otherwise became definite.

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Italy – ECJ judgment on the Italian legislation governing the collection of bets: the Placanica and Others case (joined cases C-338/04, C-359/04 and C-360/04

On 6 March 2007, the ECJ issued its decision in the *Placanica and Others* case concerning the compatibility of the Italian legislation on the organising of games of chance and the collection of bets with the freedom of establishment (Art. 43 EC) and the freedom to provide services (Art. 49 EC).

The references to the ECJ have been made by two Italian Courts in the course of criminal proceedings against three Italian individuals, Mr. Placanica, Mr Palazzese and Mr. Sorricchio, who in 2004 were accused of pursuing, without the required licences and authorisations, the activity of collecting bets. In fact, under the Italian legislation, the collection of bets in the Italian territory is subject, on pain of criminal penalties, to possession of a licence and a police authorisation; the licences are issued by the Italian Authorities by means of tenders, from which certain types of operators (among them, companies with shares listed on a regulated market) are excluded. The defendants collected bets as independent operators on behalf of Stanley International Betting Ltd, a UK company which could not participate in a tender to obtain an Italian licence as it was a

subsidiary of the foreign company Stanley Leisure Plc whose shares were listed on the London stock exchange. The defendants, moreover, had applied for a police authorisation but those applications met with no response.

The Italian Courts, before giving their decision, decided to refer the cases for a preliminary ruling to the ECJ in order to establish if the abovementioned legislation is in breach of the EC Treaty.

The ECJ, in line with the previous decisions in the cases *Gambelli and Others* (C-243/01) and *Zenatti* (C-67/98), stated that, as a matter of principle, national legislation, such as the Italian provisions, which subjects to restrictive measures the activities of collecting, taking, booking and forwarding offers of bets, constitutes an obstacle to the freedom of establishment and the freedom to provide services.

The ECJ, however, pointed out that the restrictive measures can by justified, if proportionate, by the particular objective pursued by the national legislation. In the cases at issue, Italy justified the requirements imposed by the objective of preventing the exploitation of activities in that sector for criminal or fraudulent purposes.

The ECJ, therefore, has examined the measures characterising the Italian legislation to assess whether they may be justified by the objective invoked by Italy, and subsequently concluded that:

- a licensing system, such as the Italian one, which limits the number of operators active in the betting and gaming sector, may contribute to the objective of preventing frauds or crimes. However, not having sufficient elements to assess the proportionality and efficiency of this measure, the ECJ established that these assessments are a duty of the referring courts;
- the exclusion from tender procedures of companies whose shares are listed on a regulated market went beyond what was necessary in order to achieve the objective invoked and, therefore, cannot be justified; criminal penalties cannot be applied to persons for the collection of bets without a licence or a police authorisation, if those persons could not obtain them as a consequence of the application of a legislation which breaches EC Law.

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Luxembourg – AG Opinion on national treatment of non-residents: Lakebrink case (C-182/06)

In the case at hand, the spouses Lakebrink, both German residents and realising the major part of their income in Luxembourg, were taxed at the tax rate applicable for residents based on Article 157ter without taking into account a tax loss related to real estate located in Germany as it did not represent foreign professional income.

The Court of Appeal stayed the proceedings and referred to the ECJ the question of whether the provisions of Article 157 ter LITL are contrary to the freedom of movement of workers (Art. 39 EC).

On 29 March 2007, AG Mengozzi opined that due to the fact that the spouses Lakebrink were deriving almost all of their income in Luxembourg, they were in a situation similar to that of Luxembourg residents for the purposes of the calculation of their tax rate and, as a result, they were indirectly discriminated against.

The AG, referring to the established case law of the ECJ recognising the necessity to take into account the personal and family circumstances of non-residents in comparable situations with residents (notably when all the income derived by non-residents is realised in the state of source), considers that the global contributive capacity of the person should also be considered and not only the personal and family circumstances.

Furthermore, he considers that the allocation of the powers of taxation based on the double tax treaty between Luxembourg and Germany are not affected in this case, since the question of the foreign loss is raised only in relation to the calculation of the tax rate based on a domestic provision and not in relation to the calculation of the tax base.

In relation to a potential justification of the discrimination based on the argument of preservation of the tax cohesion of the Luxembourg system, the AG noted the symmetry of the tax provision in the sense that neither losses nor gains are taken into account for the calculation of the tax rate and defers to the local jurisdiction the appreciation of the proportionality of the tax measure. However, he indicated that the coherence of the system can be respected by taking into account both gains and losses for the calculation of the tax rate of non-residents.

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Sweden – ECJ Hearing in June in Swedish case regarding free movement of capital and a Third Country (C-10/05)

On 12 June 2007, there will be a hearing in the Swedish case referred to the ECJ regarding the applicability of Art. 56 EC on the free movement of capital between Member States and a Third Country. The referred question is the following:

Is it contrary to the provisions on free movement of capital between Member States and third countries to tax A in respect of the distribution from X because X is not established in a State within the EEA or in a State with which Sweden has a taxation convention that contains a provision on exchange of information?

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UK – Test Claimants in the Thin Cap Group Litigation v CIR (C-524/04)

This case concerns the UK thin capitalisation rules which applied before 1 April 2004. Claimants in the group litigation applied to the UK High Court to claim damages / restitution for additional taxes paid as a result of interest disallowances made under rules which applied only to interest paid to non-UK residents or to interest not subject to UK corporation tax or where additional equity was injected to avoid application of the rules, and other related claims, on the basis that the rules were contrary to Articles 43 and 56 EC and / or bilateral treaty non-discrimination articles. Questions relating to compatibility of the rules with the EC Treaty were referred to the ECJ for a preliminary ruling and the ECJ judgment was delivered on 13 March 2007.

The ECJ first held that the case should be considered only under Article 43, freedom of establishment, as any restrictive effects on the freedom to provide services or the free movement of capital must be seen as unavoidable consequences of any restriction on freedom of establishment.

In summary, the ECJ held that in circumstances where the lender was an EU (direct or indirect) parent of the UK borrowing company, or an EU lender and the UK borrowing company had a common (direct or indirect) EU parent company, then the UK thin cap provisions were contrary to the EC Treaty unless they applied only to 'purely artificial arrangements, entered into for tax reasons alone', and only disallowed interest in excess of the arm's length amount.

The claims by non-EU parents whether lending directly or via an EU (non-UK) subsidiary were also to be dealt with under freedom of establishment and accordingly there was no EC Treaty remedy where an EU (non-UK) company did not exercise a definite influence over a UK resident borrowing company, i.e. the ECJ considered that the thin cap rules are not contrary to the EC Treaty to the extent that they apply in circumstances where the lender is a non-EU parent of the UK borrower, or the lender does not control the UK borrower and the lender and UK borrower have a common non-EU resident parent company. See also EUDTG Newsalert NA 2007 – 009.

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NATIONAL DEVELOPMENTS

Belgium – Belgian minimum tax bases also apply to Belgian companies and Belgian residents practising liberal professions.

On 7 October 2005, the Belgian Supreme Court referred a preliminary ruling to the ECJ to clarify whether Article 43 EC (freedom of establishment) prohibits a provision of national law whereby minimum tax bases are applied only in the case of non-residents. Indeed, article 342 (2) of the Belgian Income tax Code allowed the Belgian tax authorities, in the absence of a tax return, to tax foreign businesses operating in Belgium on the basis of the turnover and the size of the workforce (with a minimum for the hospitality sector of 400.000 Belgian franc). Such minimum bases did at that time not apply for Belgian residents.

On 22 March 2007, the ECJ ruled in its Talotta judgement (C-383/05) that Article 43 EC precludes legislation of a Member State, such as the rule resulting from article 342 (2) of the Belgian Income Tax Code, which lays down minimum tax bases only for non-resident taxpayers. According to the Court it cannot be accepted that the Member State of establishment may apply minimum tax bases solely to non-resident taxpayers merely by reason of the fact that their residence is situated in another Member State, without depriving Article 43 EC of the Treaty of all meaning.

However shortly after the referral to the ECJ the Belgian Government added a paragraph to Article 342 of the Belgian Income tax Code. Article 342 (3) states now that the minimum tax base in the absence of a tax return also applies to Belgian companies and Belgian residents practising liberal professions. See also EUDTG Newsalert NA 2007 – 011.

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Finland – Supreme Administrative Court decision on Transfer of Registered Office of an European Company and its effect on different local tax issues

The Finnish Supreme Administrative Court handed down a ruling on 9 May 2007 covering several issues with respect to the transfer of the registered office of a European Company (X SE) from Finland to Luxembourg. X SE was previously a Finnish resident public limited liability company (Oyj) before converting into a Finnish resident European Company (SE). Now X SE is contemplating to transfer its registered office to Luxembourg. (Almost) all of its assets, liabilities and reserves will remain effectively connected to a Finnish PE of the future Luxembourg resident X SE.

The first issue covered the tax treatment of transferring subsidiary shares from the Finnish PE of the Luxembourg resident SE to the Luxembourg resident SE. X SE has held shares in subsidiaries and in joint venture companies. These shares will be effectively connected to the Finnish PE of Luxembourg SE, but it is planned to reallocate the shares to the Luxembourg SE. The Supreme Administrative Court stated that the reallocation should be characterized as a disposal of shares from a tax point of view and domestic Finnish tax legislation covering disposal of shares should be applied even though from a legal point of view there is no disposal at hand. In order for the Finnish participation exemption to apply shares must be held for at least one year. The Court concluded that when computing the time during which the Finnish PE has held the shares, the starting point should be the date when the former Finnish resident SE (or prior Finnish public limited liability company) has acquired the shares. The Court did not question whether such exit tax might be against the EC Treaty.

Secondly, the Court covered the possibility of giving group contribution by the former Finnish resident SE and the remaining Finnish PE. The Finnish tax year of X SE will end at the date when its registered office is transferred to Luxembourg and the tax year of the Finnish PE will start after the same date. According to Finnish Group Contribution Act, the required holding between distributor and recipient must last the entire tax year and the financial years of the distributor and the recipient of group contribution must end at the same time. Following the principle of continuance and the fact that X SE is considered to be the same entity regardless of the change of residence, both the Finnish resident X SE and the Finnish PE of Luxembourg resident X SE may grant group contribution during the year of the residence transfer.

Thirdly, the Court took the position that the Finland-China Tax Treaty is applicable to the Finnish PE of Luxembourg SE. X SE has a licence agreement with a Chinese resident entity and it receives royalty payments. After the transfer of registered office of X SE to Luxembourg, the licence will remain effectively connected to the Finnish PE and the Finnish PE will receive Chinese source royalties. The Finland-China Tax Treaty includes tax sparing credit on Chinese source royalties and the Court ruled that the Finnish PE is entitled to that treaty benefit regardless of whether China applies the Finland-China Tax Treaty or not. This part of the decision was given solely on the basis of the EC Treaty.

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Finland – Judgment of the Supreme Administrative Court concerning taxation of foreign source income from a personnel fund

The Finnish Supreme Administrative Court handed down a ruling (2007:24) in April 2007 on taxation of income from a foreign personnel fund. It concluded that the taxation of income from a foreign personnel fund should be similar to the taxation of income from a Finnish personnel fund.

In the case at hand, a Finnish resident individual had been working for a Finnish branch of a Swedish company, and had the right to participate in the company's personnel fund. According to the rules of the Swedish fund, part of the company's annual profit was transferred to a Swedish trust. The Finnish employee was entitled to his share of the trust's assets, and he had a right to withdraw his share according to the bylaws of the trust. According to the Finnish Income Tax Act (FITA), Finnish personnel funds pay their members profit distribution and surplus. Only 80% of these payments are taxable earned income, and otherwise they are tax exempt. The bill of the ITA refers to the Act on Personnel Funds, but does not limit the application of the FITA to Finnish personnel funds. The taxpayer claimed the Swedish fund (legal form being a trust) to be equivalent to a Finnish personnel fund (legal form being a fund as defined in the Act on Personnel Funds, in Finnish "*henkilöstörahastolaki*"), and requested the Supreme Administrative Court to state that only 80% of his Swedish source income should be taxable according to the ITA.

The Court stated that personnel funds are regulated by the Finnish Act on Personnel Funds, according to which a personnel fund means a fund owned and controlled by a company's or government agency's personnel with the purpose of managing the profit bonus items and other assets referred to in the Act paid to it by the company or government agency. A member is entitled to the withdrawable portion in cash, as specified in more detail in the fund's bylaws.

The Court took into account the prohibition of discrimination required by the EC Treaty, and pointed out that the Swedish trust and a Finnish fund are to be held similar, due to the similarities in their essential characteristics, such as their purpose, accrual of capital, and distribution of assets to the employees. In addition, the application of FITA does not require the share to be a share within the meaning of the Act on Personnel Funds. Accordingly, the Court concluded that only 80% of the profit share income from the Swedish personnel trust is to be taxed according to the FITA.

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Finland – Advance ruling of the Central Tax Board on outbound dividend taxation of a non-resident individual taxpayer

The Finnish Central Tax Board gave an advance ruling (n:o 10/2007) on outbound dividend taxation of a non-resident individual taxpayer in March 2007. The ruling is not yet binding, and appeal to the Supreme Administrative Court is still possible.

A Finnish national shareholder of a non-quoted Finnish family company has been living permanently in the UK since 2002. She was considered tax resident (unlimited tax liability) in Finland during 2002-2005. As from 2006, the shareholder was considered as non-resident (limited tax liability) for Finnish tax purposes. According to the Finnish Income Tax Act, dividends received by a resident individual taxpayer from non-quoted companies are tax exempt up to the 9% annual profit of the mathematical value of the share if the amount of the dividend does not exceed 90.000 EUR. The dividend exceeding the amount of 90.000 EUR (but max. 9% of the mathematical value) is partly taxed as capital income at a rate of 28% (70% taxable, 30% tax exempt). Dividend exceeding "the 9% mathematical value limit" is partly taxed as earned income at progressive tax rate (70% taxable, 30% tax exempt). However, dividends received by non-resident taxpayers are taxed according to the Withholding Tax Act at rate of 28% from the gross amount of the dividend.

In the case at hand, the non-resident shareholder receives no other non-quoted company dividend income than the dividend from the Finnish family company. She therefore claimed to be in a similar

situation as a resident taxpayer receiving dividends from the same company. Because the tax treatment of a non-resident would be more burdensome than tax treatment of a resident dividend recipient, the shareholder invoked her EC Treaty rights (Art. 18, 43 and 56 EC), and requested the Board to consider the dividend taxable according to rules applicable to residents.

Article 6 of the UK-Finland tax treaty shifts taxing right to Finland in cases where assets are not transferred to the UK and are not taxed there. Since the dividend is paid to a Finnish bank account, this is the case. Therefore, the dividend is taxed entirely according to Finnish domestic legislation; the Withholding Tax Act, by a tax rate of 28% of the gross amount of the dividend.

While giving its ruling, the Central Tax Board took into account Art. 43 and 56 EC. It also noticed the ECJ case law concerning tax treatment of residents and non-residents *(C-170/05 Denkavit 2, C-520/04 Turpeinen)*. In the case in question, the shareholder receives no other non-quoted company dividend income than the dividend from the Finnish family company. Therefore, the non-resident shareholder was considered to be in an objectively comparable situation with a resident taxpayer receiving dividends from the same company. Both are taxed only in Finland and the basis for the tax is the same. Nevertheless, their tax treatment is different.

The Central Tax Board stated in its advance ruling, that the withholding taxation of the dividend received by a non-resident may not be more burdensome than the taxation of a resident dividend recipient when these two are objectively in a comparable situation. Accordingly, withholding tax must be levied from the dividend only to the extent taxable when received by a resident dividend recipient.

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Italy – Implementation of Directive 2003/123/EC amending the Parent Subsidiary Directive

Italy has approved a Legislative Decree which implements the Directive 2003/123/EC amending the Parent Subsidiary Directive (90/435/EEC).

Although the Legislative Decree has been adopted on 6 February 2007 and published in the Italian Official Gazette on 13 April 2007, it introduces rules with retroactive effect from 1 January 2005, as every Member State should have implemented the Directive by that date (see also EUDTG Tax News 2006 – nr. 005).

The Legislative Decree amended the tax treatment of the "outbound dividends" provided for by Article 27-bis of the Presidential Decree no. 600 of 1973 which, under the conditions requested by the Parent Subsidiary Directive, exempts from withholding tax dividends distributed by an Italian subsidiary to a parent company resident in another Member State.

On the contrary, the Decree did not amend the tax treatment of the "inbound dividends", as they are subject to a tax treatment more favourable compared with that provided for by the Directive: in fact, they are taxed, as well as domestic dividends, at the ordinary tax rate only on the 5% of their amount and the application of this treatment is not subject to conditions (such as the holding period or the percentage of the participation held by the parent company).

The Decree, as a result of implementing the Directive, broadens the scope of Article 27-bis, as it:

- updates the list of companies to which the withholding tax exemption applies;
- reduces the minimum participation threshold to be held by the parent company.

The Decree also introduces the following amendments to Article 27-bis not included in the Directive:

- it clarifies that the withholding tax exemption is not applicable when a company is considered to be resident in a non-EU State as a consequence of the application of a Tax Treaty;
- it extends the withholding tax exemption, if all requirements are met, to interest on loans exceeding the 1:4 Italian thin capitalisation threshold (deemed dividend) and to remuneration on financial instruments assimilated to shares;
- it establishes that the minimum holding period of 12 months, which is a condition to benefit from the withholding tax exemption, must be attested by the parent company while the foreign Tax Authorities are responsible for attesting that the non resident parent company has one of the legal form listed in the Directive and is resident for tax purposes and subject to taxation in a Member State (the required documentation has to be received by the company distributing dividends before their distribution).

As the Directive applies from 1 January 2005, companies that, after the adoption of the Legislative Decree, fulfil the requirements to benefit from the withholding tax exemption but did not obtain it under the previous rules, can file a claim to request a refund for the withholding taxes unduly levied from 1 January 2005 to the entry into force of the Decree.

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Luxembourg – Administrative Court denies cross-border consolidation

Decision of the Luxembourg Administrative Court (21,979C) in the appeal lodged against the decision of the Luxembourg Administrative Tribunal against the decision of the Tax Office no VI of 25 January 2005.

The case concerns the application of Article 164bis of the Luxembourg Income Tax Law according to which Luxembourg resident companies held directly or indirectly for at least 95%, by Luxembourg resident companies or Luxembourg permanent establishments (PEs) of non-resident companies have the option to ask to be consolidated in the parent company or the Luxembourg PE, in order to group their tax result with that of the parent company / PE.

In the case at hand, five Luxembourg resident subsidiaries and their Belgian-resident parent company asked the benefit of the tax consolidation regime based on the Article 164bis described above and were refused the application of the regime on the ground that the parent company was not a Luxembourg resident company or a Luxembourg PE.

The appellants contested the decision on the ground of Article 24§6 of the Luxembourg-Belgium double tax treaty, according to which enterprises of a contracting State, the capital of which is owned by residents of the other contracting State, should not be subject in the first State to any taxation or requirement which is other or more burdensome than the taxation and requirements to which other similar enterprises of the first State are subject.

The first court found that the refusal of the application of the tax consolidation regime is contrary to Article 24§6 but the decision was contested in appeal. In appeal, the companies requested the court of appeal that in the case where it would consider the decision of the first court incorrect, to refer to the ECJ the questions whether the national legislation preventing sister companies from

offsetting their results when they are held by a company resident in another Member State, whereas allowing such result in the case where the companies are held by a company resident in the same Member State, is contrary to the freedom of establishment.

In its decision, the court of appeal overturned the decision of the first court on the ground that the vertical consolidation system provided by the Luxembourg law cannot be envisaged outside of the integration of the parent company and, as a result, within the same tax jurisdiction. In this respect, the court considered that the system is not discriminatory since that the tax consolidation is applicable every time when a vertical compensation is possible within the tax jurisdiction of Luxembourg and that it does not apply horizontally.

Furthermore, although it was ruling as the last court of appeal and as such had to refer the question to the ECJ, the court dismissed the EC Law argument on the ground that the availability of the tax consolidation system to resident companies as well as to PEs of non-resident companies makes the regime non-discriminatory and as a result did not refer the question to the ECJ, considering that the question lacked pertinence in that that it starts on the premise of a horizontal consolidation system which is not as such provided by the Luxembourg law. It is questionable whether this decision is in line with the case law of the ECJ.

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Norway – Interpretative statement from Ministry of Finance on Cadbury Schweppes case

The Norwegian Ministry of Finance has as a consequence of the Cadbury Schweppes decision in the ECJ from September 2006 given an interpretative opinion to the Norwegian Directorate of Taxes regarding the Norwegian NOKUS rules (Norwegian CFC legislation). As expected, the Ministry of Finance states that the judgment affects the interpretation of the NOKUS rules as regards to the applicability of the said rules on entities resident for tax purposes in the EU/EEA area.

In Cadbury Schweppes, the ECJ found that UK CFC rules were in breach with the EC Treaty when applied to companies resident within the EU, to the extent that the legislation applied to other than *"wholly artificial arrangements intended to escape the national tax normally payable".* Correspondingly, Norwegian CFC taxation on investments within EU/EEA beyond "wholly artificial arrangements" conflicts with the EEA Agreement and cannot be applied. The ECJ elaborated to some extent on how the "wholly artificial"-test should be considered. It was emphasised in the decision that the incorporation of a CFC must reflect economic reality and correspond with an actual establishment intended to carry on genuine economic activities in the host Member State. The consideration must be based on objective factors ascertainable by third parties, and especially focus on whether the CFC physically exists in terms of premises, staff and equipment.

In its interpretative statement, the Ministry of Finance provides clarifications on how it will consider the "wholly artificial"-test in light of the Cadbury Schweppes case. The Ministry states that the CFC is required to participate in the economic life in the state of establishment on a fixed and enduring basis, and it must be determined whether:

- the company employs offices, furniture and equipment in the state of establishment;
- the company permanently employs management and other employees carrying out the actual business in the establishment state;
- the said employees have sufficient qualifications, skills and authorities to conduct the company's business, and whether they actually make relevant decisions;

- the company's activity has economic substance, i.e. by demonstrating income contribution from its own business activities; and
- (provided that the company mainly participates in intercompany transactions) the company's services are necessary and creates excess values for the related party.

In our view, the Ministry's above list of relevant aspects to some extent puts the emphasis on aspects beyond the ECJ's wholly artificial establishment-doctrine in the Cadbury Schweppes case. This applies especially to the requirement for income contributions from the company's own business activities and the conditions relating to intercompany transactions.

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Sweden – Exit provisions for stock options

According to Swedish tax provisions an employee who receives a stock option should be taxed on the benefit at exercise. However, there is a special exit provision stating that if the employee ceases to have her/his habitual residence in Sweden any stock options that have vested at that time should be taxed. Following the ECJ's decision in the *de Lasteyrie (C-9/02)* and *N (C-470/04)* cases, the Board for Advanced Rulings ruled on 25 September 2006 that this provision should be considered discriminatory and not in line with the EC Treaty. The Board also laid down that the exit provisions constitute a barrier to the free movement of workers. However, the Board, referring to the N-case, found that the provision could be considered justified due to the legitimate objective of allocating the power of taxation. Taxation at the point in time when the person moves from Sweden would though not be a proportionate measure. The Board concluded that the benefit should be taxed at the point in time when the stock option is exercised but taking into account any reduction in the value.

A proposal of change of the provisions for taxation of stock options has now been presented implying that the exit provision should be abolished. Taxation will thus in all situations occur at exercise. The new provisions are proposed to enter into force 1 July 2007 but as a bill has not yet been presented to the Parliament it is more realistic that the new provisions will not come into force until 1 January 2008. It should be noted that the Swedish General Tax Agency in a circular has announced that the exit provisions should not be applied.

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UK – New tax credit for individuals on non-UK dividends

UK individuals are currently entitled to a tax credit in respect of dividends received from UK resident companies. The credit, equal to one-ninth of the amount of the dividend, may be set against UK income tax payable on the dividend, eliminating the UK income tax liability for lower and basic rate taxpayers.

In the UK Budget on 21 March 2007, it was announced that with effect from 6 April 2008 this tax credit is to be extended to dividends received from non-UK resident companies, provided that the individual has a shareholding of less than 10% in the payer company and receives less than £5,000 of dividends a year from non-UK resident companies. The Government is still considering whether the credit should also be extended to situations where these conditions are not met.

It is assumed that these changes are in response to the decisions of the ECJ in the *Manninen* and *Meilicke* cases. In those cases, the ECJ held that Finnish and German rules respectively, which provided for a tax credit on domestic dividends but not on dividends from companies in other EU Member States, were contrary to the EC Treaty.

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UK – Taxation of foreign profits: Consultation

The UK Government has announced that it will issue a consultation document later in the spring (expected June 2007) which will consider, in particular, the taxation of foreign dividends received by UK companies, and the controlled foreign companies (CFC) rules.

Limited changes to the CFC regime were announced in the Pre-Budget Report in December 2006. However, it seems that the Government is now considering more wide-ranging reforms. Options that will be considered include a European-style 'participation exemption' for foreign dividends, and income-based CFC rules. The implications of such changes for other aspects of the UK tax regime, such as the availability of tax relief for interest on borrowings used to finance foreign investments, will also be considered.

This is presumably in response to recent ECJ decisions concerning the compatibility of UK legislation with European law, such as the *Franked Investment Income Group Litigation* which was concerned with the differential UK corporation tax treatment of UK and EU dividends, and the *Cadbury Schweppes* case which considered the UK CFC regime.

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EU DEVELOPMENTS

European Commission opens infringement proceedings against 9 Member States over discriminatory taxation of dividend and interest payments to foreign EU pension funds

On 7 May 2007, the Commission announced that it has opened infringement proceedings against the Czech Republic, Denmark, Lithuania, the Netherlands, Poland, Portugal, Slovenia, Spain and Sweden for their discriminatory taxation of dividend and interest payments to foreign EU pension funds.

The Commission is of the view that many Member States discriminate against foreign pension funds as they are subject to higher (withholding) taxes on dividends and interest than domestic pension funds.

Most Member States exempt their domestic pension funds from any corporation and/or income tax. In addition, they usually exempt at source any withholding tax on dividend and interest paid to domestic pension funds. Even where there is no such exemption at source they normally have a refund procedure, by which the pension fund can claim back the withholding tax paid.

However, foreign pension funds may not qualify for the relief at source or the refund procedure because the State levying the withholding tax refuses the same treatment to foreign pension funds

as to the domestic funds. The outcome is that foreign pension funds pay higher taxes on interest or dividends than domestic pension funds.

The Commission is still examining the situation in Estonia, Germany, France, Italy and Austria. This may result in the opening of additional infringement proceedings in the next months. See also EUDTG Newsalert NA 2007 – 015.

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European Commission issues new progress report on the CCCTB

On 2 May 2007, the European Commission issued a Communication on the progress on the Common Consolidated Corporate Tax Base (CCCTB) which also outlines the work that still has to be done and next steps (COM(2007) 223 final). The Commission confirms that it remains committed to presenting a legislative proposal in 2008.

The legislative proposal will be preceded by an Impact Assessment, which will identify a number of alternative policy scenarios and options: for instance a 'no-change' scenario, a common base without consolidation and a common consolidated base. Their respective macroeconomic and microeconomic, environmental and social impacts will be assessed in-depth, in qualitative and where possible quantitative terms.

The Commission states that it believes that the need for the CCCTB remains, both for SMEs where compliance costs are of particular importance and for large MNCs. It is committed to rapid progress towards the abolition of corporate tax obstacles in the Internal Market while also taking Member States' concerns about the process into account.

The Commission also states that the creation of a single base inevitably means that there will be differences between this new base and the current individual tax bases. Member States will have to accept that the CCCTB cannot replicate all the features of all their existing tax bases, and will in some cases propose a different treatment of specific items from their existing base.

The Commission mentions twice in the Communication that it has no plans regarding the tax rate. Although the CCCTB will almost certainly not be supported by all Member States, it nonetheless appears that CCCTB could attract the required qualified majority voting under the new enhanced cooperation procedure, provided there remains no linkage between the optional CCCTB and rates of corporation tax. It will be interesting to see to what extent Member States who support the CCCTB want to link the CCCTB to a minimum corporate tax rate like perhaps France and Germany and to what extent they might conform their national corporation tax bases to the finally agreed CCCTB.

The Commission concludes that:

- The CCCTB should be uniform - with as few as possible exceptions - and should generally simplify and broaden the corporate tax base;
- The tax base should be consolidated with the necessary fair and equitable sharing mechanism and its impact on Member States' revenues,
- The tax base should be optional for companies (they should be able to remain within the existing rules where these are maintained alongside the CCCTB by Member States, or opt for the CCCTB, providing the rules on State aid are observed);

- The rules for calculating the CCCTB should be self-standing and not formally linked to the international accounting standards (IAS/IFRS);
- The current approach of working in close cooperation with Member States experts, business and academia to resolve outstanding specific technical issues as highlighted in the Communication and summarised in the Annex, is the most effective and will be continued.

The Commission furthermore highlights the necessity to elaborate in particular on:
- the extent to which, and manner in which, the financial sector should be incorporated into the CCCTB from its inception, and
- the administrative framework of the CCCTB, in particular how cooperation and mutual assistance can be improved and how the necessary new working methods at Community level can be introduced.

The next ECOFIN Council meeting on 5 June 2007 will include an orientation debate with Member States on the CCCTB. This meeting will be the last time that the Commission will formally report on the CCCTB before the legislative proposal is published in 2008.

The main issues discussed in the CCCTB Working Group were summarised in a Working Document presented to the extended WG's December 2006 meeting with academia and business (including EBIT) See also: EU Tax News 2007 – 001.

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Germany – European Commission requests Germany to end discriminatory rules applied to non-resident tax payers

On 26 March 2007, the European Commission formally requested Germany to modify the withholding tax system applied on the income of certain categories of non-resident taxpayers.

Contrary to resident taxpayers who have to declare their income annually, Germany applies a flat-rate withholding tax to the total income without any possibility of deducting business expenses at source on income paid to certain categories of non-residents (artists, sportsmen, journalists or other similar categories). These non-resident taxpayers cannot deduct their business expenses; it is only in a subsequent refund procedure that the non-residents have the right to ask for reimbursement of overpaid tax. Moreover, only business expenses directly economically linked to the activity in Germany are deductible in the refund procedure.

In the Commission's view these tax provisions constitute a considerable obstacle to the cross-border provision of services (Article 49 EC). Indeed, prohibition of the deduction of business expenses from gross receipts and prohibition of the deduction of indirect expenditure in many cases result in an objectively unjustified higher taxation of such non-residents as compared with residents. The Commission's opinion is supported by the judgments of the ECJ in the cases *Scorpio* (C-290/04) and *Centro Equestre* (C-345/04).

The request was issued under Article 226 EC in the form of a reasoned opinion. If Germany does not reply satisfactorily to the request, the Commission may refer the matter to the ECJ.

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Hungary – European Commission opens in depth State aid investigation into Hungarian intra-group interest taxation

The European Commission has started an infringement procedure regarding the Hungarian intra-group interest taxation scheme, which was introduced in 2003 and allowed companies an exemption from taxation on 50% of income for related party net interest up to 50% of the net pre-tax profit. The infringement procedure is mainly aimed at discovering whether:

- the scheme is in line with the EU's State aid rules
- it could distort competition; and
- it provides selective advantage to certain companies (e.g.: related parties vs. individual companies; exclusion of small companies and financial institutions from the application of the legislation).

See also Newsalerts NA 2007 – 003 and NA 2007 – 010).

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Ireland – European Commission requests that Ireland amend discriminatory provision on the taxation of UK source income

By a reasoned opinion under Article 226 of the EC Treaty, the Commission on 30 March 2007 formally requested that Ireland end its discriminatory treatment of UK source income. Although Ireland taxes resident and domiciled individuals on their worldwide income, taxpayers that are resident but not domiciled in Ireland are taxable on "foreign" income only to the extent that such income is brought into Ireland. This regime applies to most non-nationals living in Ireland. Thus where foreign income is left on deposit in a foreign bank account, no Irish tax arises on this income for these individuals. This is known as the remittance basis of taxation. UK source income however could not benefit from the remittance basis and so was taxed here regardless of whether it was brought into Ireland or not. The Commission considers that this is contrary to the EEA Agreement, as it restricts the free movement of capital as it dissuades non-domiciled individuals living in Ireland from investing their money in the UK.

This is an interesting development, in particular for Irish resident individuals domiciled in Northern Ireland, England, Wales or Scotland as to date these individuals have been fully taxable on UK source income. It will be of particular interest where these individuals have UK interest, dividends, pensions and employments where the duties are exercised outside Ireland and the funds are not brought into Ireland.

Failure by Ireland to respond satisfactorily to the Commission's request within two months may result in a referral to the ECJ. Clearly pressure is now on the Irish Government to change this long standing rule. It remains to be seen how it will do this. Whilst the rule will most likely be changed prospectively, there may be opportunity to examine the position retrospectively for tax payers to generate tax refunds. The UK has also been issued with a similar notice in relation to its remittance rules which are very similar to Ireland and exclude Irish source income. This may provide opportunity for Irish domiciled individuals resident in the UK and in receipt of Irish income there. The current request refers only to income and it remains to be seen what changes if any will come about to a similar rule which applies for capital gains.

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UK – European Commission investigates remittance basis of taxation for individuals

An individual who is resident in the UK is normally taxable on their income arising from both UK and non-UK sources. However if the individual is resident but either not domiciled or not ordinarily resident in the UK, they will only be taxed on their income from non-UK sources on a remittance basis, i.e. when the income is paid back into the UK. However, income sourced in Ireland is excluded from this remittance basis of taxation.

It is arguable that the exclusion of Irish sourced income from the UK remittance basis of taxation constitutes a restriction on Article 56 EC (free movement of capital), as it may discourage investment into Ireland. The Commission has therefore sent a formal request to the UK for information on its remittance basis tax rules as an initial step in the EC Treaty infringement procedure.

Ireland has reciprocal rules which exclude income sourced in the UK from its remittance basis of taxation (see previous article).

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ABOUT THE EUDTG

The EUDTG is one of PricewaterhouseCoopers' Thought Leadership Initiatives and part of the International Tax Services Network. The EUDTG is a pan-European network of EU tax law experts and provides assistance to organizations, companies and private persons to help them to fully benefit from their rights under EU law. The activities of the EUDTG include organising tailor-made client conferences and seminars, performing EU tax due diligence on clients' tax positions, assisting clients with their (legal) actions against tax authorities and litigation before local courts and the ECJ. EUDTG client serving teams are in place in all 27 EU Member States, most of the EFTA countries and Switzerland. See the EUDTG website for more information: www.pwc.com/eudirecttax.

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