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ECJ CASES

Austria – Preliminary ruling request regarding the conditions for claiming Austrian investment growth premium: Jobra Vermögensverwaltungs-GmbH case (C-330/07)

The case deals with the question of whether Austria may grant a tax investment incentive ("investment growth premium") that is available only for the acquisition of fixed assets used in a domestic permanent establishment (PE) whereas the benefit is not available for fixed assets that are being used outside Austria.

The plaintiff (Jobra GmbH) is an Austrian leasing company. It had acquired several trucks and leased them out to an Austrian lessee who used trucks mainly in Germany. According to § 108 e (2) Income Tax Act leased assets that are mainly used abroad (i.e. in another EU Member State) do not qualify for the investment growth premium as they are not deemed to be used in a domestic PE even if the lessee is an Austrian resident.

The Vienna Fiscal Court of Appeal (Unabhängiger Finanzsenat) has asked the ECJ for a preliminary ruling as to whether the provisions relating to the freedom of establishment (Article 43 EC) and/or the freedom to provide services (Article 49 EC) preclude a national rule according to which the grant of a tax benefit for the acquisition of unused tangible assets

depends - among others - on these assets being used exclusively in a domestic PE, whereas the tax benefit is not available for the acquisition of unused tangible assets which are used outside Austria (in particular in another EU Member State).

Obviously, this case is of a general interest as the outcome could have an impact on tax incentives and preferential tax treatment (also as accelerated depreciation, investment tax credits, etc) granted by Member States where such preferential treatment is conditional on the assets being used exclusively in the territory of the Member State granting the tax benefit.

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Germany – ECJ judgement on transitional rules for capital gains tax on domestic and foreign participations: Gronfeldt and Gronfeldt case (C-436/06)

The German rules for individuals' capital gains tax changed in the tax reform in 2000. Prior rules made capital gains taxable if (simplified) the participation amounted to at least 10 %. In the tax reform, this was lowered to 1 %. The transitional rules stated (simplified) that the new threshold applied to domestic participations from 2002 and to foreign participations already from 2001. The claimant sold his ~2% Danish participations in 2001 and was taxed on the gain. The Hamburg Tax Court doubted if the different treatment of domestic and foreign participations was in line with the free movement of capital and referred the case to the ECJ (see EUDTG Newsletter Issue 2007 - nr. 001).

The ECJ handed down its judgement on 18 December 2007 stating that different treatment due to the place of investment deters taxpayers from investing in foreign corporations and constitutes an obstacle for the latter raising capital in Germany.

The German Government argued that the different treatment was during a transition phase, for which a Member State has certain discretion. Under the imputation system, taxation of corporate profits was wholly at company level. Shareholders got an imputation credit in order to avoid double taxation. In the new half inclusion system, taxation of corporate profits is achieved by an interaction of tax at company and shareholder level, so that the 10 % capital gain threshold had to be lowered. For the shareholder, the imputation system applied in 2001 to domestic dividends but the new system already applied to foreign dividends. The ECJ commented that as the half inclusion system was introduced to abolish discrimination between domestic and foreign investments, it can hardly be denied that shareholders of domestic and foreign companies are in comparable situations re the participation threshold.

The ECJ acknowledged that the argument of full tax on corporate profits explains why the half inclusion system did not apply to shareholders of domestic corporations before 2002: Since these were subject to the old rules in 2000, dividends distributed in 2001 were still taxed wholly at company level. However, this does not justify the treatment of shareholders of foreign corporations in 2001. Here, the "full taxation" at company level was not achieved in any case, since the foreign corporation profits were taxed abroad. The ECJ accordingly declared that the free movement of capital precludes such a rule as the German one.

The judgment might affect a similar case pending with the ECJ, the Steko Industrimontage case (C-377/07; see also EUDTG Newsletter Issue 2007 - nr. 005): Write-downs of foreign participations were (in principle) non-deductible already in 2001, whereas the tax deductibility of write-downs of domestic participations was excluded (in principle) only as of 2002 onwards. See also EUDTG Newsalert NA 2007 – 042.

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Germany: ECJ order regarding Third State branch losses: Stahlwerk Ergste Westig (SEW) case (C-415/06)

On 6 November 2007, the ECJ after hearing the AG ordered that the facts at issue are to be considered exclusively within the scope of the freedom of establishment. Since this freedom is not applicable to Third States, the ECJ rejected the referral.

SEW, a German resident corporation held 100% of an US resident partnership which generated losses in 1999. Its profits and losses were assessed as foreign branch profits of the German partners under German domestic law. According to the double tax treaty (DTT) between Germany and the USA, profits from a US partnership with a US PE are exempt in Germany. Despite the DTT, a former German provision (Sec. 2a par. 3 EStG) allowed the temporary deduction of foreign PE losses but it was abolished from 1999 onwards. Nevertheless, SEW applied for a deduction of losses in its German tax assessment for 1999 which was denied by the fiscal authorities. The referring Federal Finance Court asked if this denial is in breach of the free movement of capital (see also EUDTG Newsletter Issue 2006 - nr. 006).

When considering which freedom is applicable the ECJ held that it depends on the scope of the provision. It then stated that the DTT is only applicable when the partner was enabled to determine the branch's decisions and activities. The ECJ came to the conclusion that in this case only the freedom of establishment was applicable and that the potential restriction of the free movement of capital was only an inevitable consequence.

In our opinion it is somewhat unclear whether the ECJ considered either a partner of a partnership or a shareholder of a branch in its decision. The provisions of the DTT regarding the taxation of PE (branch) profits, however, do not require a determining influence on the branch. As the ECJ did not comment on the deductibility of tax exempt foreign losses within the EU, the decisions in the pending cases *Lidl-Belgium* (C-414/06) and *Krankenheim Ruhesitz* (C-157/07) have to be awaited.

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Germany – AG opinion in the Heinrich Bauer Verlag Beteiligungs GmbH case (C-360/06)

In 1988, Heinrich Bauer Verlag Beteiligungs GmbH (HB) was a limited partner in the Spanish partnership Bauer Ediciones Sociedad en Comandita (Ediciones) and held 100 % of Basar Zeitungs- und Verlagsgesellschaft GmbH & Co KG (Basar) in Austria.

When computing the wealth tax base for the shares in HB, the partnership shares in Ediciones and Basar were set at market value. If these partnerships had been German ones, would they have been included at their standard value (Einheitswert) based solely on the net asset value and not on the market value (which also includes the profit expectations of the partnership). HB contested this treatment, as the value of the partnerships was set significantly higher due to this method (in the case of Ediciones, it was almost doubled). The Tax Court of Hamburg referred the case to the ECJ and asked if it is compatible with the freedom of establishment to set a lower value to participations in domestic partnerships than in partnerships in other Member States when evaluating non-listed shares in corporations?

AG Verica Trstenjak gave her opinion on 11 January 2008. She initially stated that the parties disagree on the presentation of the tax treatment in Germany; in particular, the tax authorities take the view that the referring court misjudges the effects of the German system of evaluating shares and that there is no discrimination, since earnings of both domestic and foreign partnerships are considered in the evaluation. The AG concluded that it is not a matter

for the ECJ to interpret or decide which national rules apply to the referred case and also not to determine the decisive facts. The referral is to be tested in the factual and legal framework that the referring court has described in the referral.

The AG then stated that in respect of Basar, the freedom of establishment did not apply in year 1988, as Austria became a Member of the EEA only in 1994 and of the EU in 1995. Regarding Ediciones, the freedom of establishment applies if the shareholder has a definite influence on the decisions of the partnership and can decide its activities. In the present case, it therefore needs to be clarified if HB as limited partner of Ediciones can decide the activities of the general partner of Ediciones. This has to be decided according to national law. It seems likely (to be verified by the referring court) that HB at least de facto managed Ediciones, so that the freedom of establishment is applicable.

Leaving the dissension between the parties in respect of the evaluation provisions aside, it can still be confirmed that the shares in HB were treated differently for wealth tax purposes depending on if HB held a partnership in Germany or in another Member State. The tax authorities do take the view that there is no difference between domestic and foreign partnerships. However, the evaluation method for foreign partnerships nearly doubled the result in respect of Ediciones. This restriction of the freedom of establishment can only be permissible where there are overriding reasons in the public interest at hand. The AG ruled out the coherence and lack of fiscal control as justifications and proposed that the ECJ declares that the freedom of establishment precludes such provisions as the German one. She also stated that the free movement of capital was not applicable in the year of the case (1988), as Directive 88/361/EEC had not yet entered into in force.

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Germany – ECJ judgement on the compatibility with EC Law of switching from exemption method to credit method: Columbus Container Services case (C-298/05)

On 6 December 2007, the ECJ decided in the Columbus Container case that the German legislation in Sec. 20 par. 2 and 3 International Transactions Tax Act (AStG) is neither in breach of the freedom of establishment nor the free movement of capital. Thus, the ECJ did not follow the opinion of AG Mengozzi (see for a summary of the opinion EUDTG Newsalert NA 2007-014).

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 tax 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.

At first, the ECJ stated that the situation at hand has to be considered under the freedom of establishment. However, contrary to the opinion of the AG, the ECJ denied a restriction. The ECJ only compared the taxation of income that is derived from partnerships established in Germany on one hand and the taxation of income derived from partnerships established in another Member State with low tax rates on the other hand. Since partnerships such as Columbus do not suffer any tax disadvantage compared to a German partnership, there was no discrimination. With this single comparison, the Court did not follow its own considerations in the *Cadbury Schweppes* case (C-196/04, see also EUDTG Newsalert NA 2006-022). In that case, the Court also compared the treatment of investments in different Member States with high and respectively low taxation. Regarding Columbus's argument that the German

rule leads to a distortion of the choice that investors have to establish themselves in different Member States, the ECJ stated that Member States are not obliged to adapt their own tax system to different systems in other Member States in order to guarantee an equal domestic taxation. For the same reasons the free movement of capital was also not restricted. Furthermore the ECJ stated that it has no jurisdiction to rule on the potential treaty override.

In our opinion this decision could be critisised for several reasons: see EUDTG Newsalert NA 2007-41.

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Germany – AG opinion on the non-deductibility of foreign currency losses: Deutsche Shell case (C-293/06)

On 8 November 2007, AG Sharpston opined that the German treatment of currency losses from the repatriation of start-up capital to an Italian permanent establishment (PE) is in breach of the freedom of establishment (see also EUDTG Newsalert NA 2007-39).

Deutsche Shell, a German resident company, set up a PE in Italy in 1974. The head office allotted capital to the PE which results were shown both in an Italian balance sheet as well as in the German head office balance sheet. The allotted capital was accounted for in the respective currency (LIR/DEM). According to the Double Tax Treaty (DTT) between Germany and Italy, Italy had the right to tax the PE income. Such income (profit and loss) was tax exempt in Germany. In 1992, the PE was disposed of and the allotted capital was repatriated back to Germany. In the meantime, the exchange rate for LIR had fallen and Deutsche Shell suffered a currency loss. This loss could not be deducted in Italy because it did not exist there (accounting in LIR). Although the loss was contained in the German profit and loss account, it was not tax deductible, since it was treated as part of the exempt PE results. Secondly, even if the currency loss were to be included in the basis for assessment of the German tax, it can be deducted only in so far as no exempt profits are obtained from the Italian PE (Sec. 3c EStG). Thus, the currency loss was not deductible anywhere.

After noting that the parties dispute the facts and how they should be interpreted, the AG stated that in the case at hand it is difficult to identify an appropriate comparable domestic situation in order to detect discrimination, since such currency losses appear only in cross border situations. Instead, she focused only on the restrictive effect on those who exercise their fundamental freedoms. She concluded that Deutsche Shell was restricted by the exclusion of the currency losses. She pointed out that this could not be considered a result of the co-existence of two Member States' tax systems. To the AG, it is clear that the disadvantage arose as a result of a currency loss that only exists in Germany. Therefore it can only be taken into account by the German fiscal authorities. She rejected the argument that this treatment is in accordance with the DTT and opined that the restriction could not be justified. Secondly, the AG stated that it is likewise in breach of the freedom of establishment if the currency losses were not deductible under Sec. 3c EStG in Germany.

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Germany – ECJ judgement on tax allowance for teaching at a foreign university: Jundt case (C-281/06)

On 18 December 2007, the ECJ decided the *Jundt* case and held that the German legislation in Sec. 3 No. 26 German Income Tax Act (EStG) is in breach of the freedom to provide services. Thus, the ECJ agreed with AG Maduro.

Mr. Jundt, a German resident individual, received a small remuneration in 1991 for his secondary activities as a teacher at Strasbourg University for which he had applied a tax

allowance (max. 2,400 DEM per year). This was denied on the grounds that this allowance is only applicable to remuneration paid for services to German legal persons established under public law. Mr. Jundt appealed and the German fiscal court referred the case to the ECJ.

First, the ECJ stated that a part-time teaching activity is included within the scope of the freedom to provide services. Although the term *services* in this context means to get remuneration for the services provided, it is not required to involve making profits. The ECJ pointed out that, following from its case law, university teaching activities do not fall within the scope of the derogations of Art. 45 in conjunction with Art. 50 EC. Secondly, the ECJ held that the provision at stake restricts the freedom to provide services in so far as it deprives an individual of a tax concession when teaching abroad. Thirdly, the ECJ rejected potential justifications. Regarding the overriding reason in the public interest, i.e. the promotion of teaching, research and development, the ECJ quoted Art. 149 EC whereby the Community must support the development of the national education systems and encourage the mobility of students and teachers. The ECJ held that the provision at hand is contrary to these objectives since it discourages persons teaching abroad. The justification concerning the cohesion of the German tax system was denied as well because a direct link between the tax exemption of remuneration paid by German universities and an offsetting of that concession by a particular tax levy was not recognised. See also EUDTG Newsalert NA 2007 – 029. and EUDTG Newsletter: 2007- nr. 006).

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Italy – ECJ decision on Italian "golden share" rules: AEM S.p.A. case (joined cases C-463/04 and C-464/04)

On 6 December 2007, the ECJ handed down its judgement in the *AEM S.p.A* case, stating that the Italian "golden share" rules are in breach of the free movement of capital (Article 56 EC).

AEM S.p.A, set up as a joint-stock company by the Municipality of Milan, operates in the public service sector as a distributor of gas and electricity. Starting from the 1998 decision of listing the shares of the company on the stock exchange, the Municipality of Milan reduced its shareholding in the capital of the company up to 33.4% in 2004. Art. 2449 of the Italian Civil Code provides that the State or other public entities, holding a shareholding in a company limited by shares, can directly appoint one or more directors of that company, if the company by-laws so provide. Moreover, the Italian Decree Law no. 332 of 1994 established that the company by-laws of the abovementioned companies shall also include a special provision under which the directors (not appointed pursuant to art. 2449 of the Italian Civil code) shall be appointed on the basis of a list system (art. 4, so-called "voto di lista") in order to protect the minority shareholders.

The Municipality of Milan, prior to the transfer of the shares, amended the company by-laws on the basis of the mentioned law provisions. Some associations for the protection of consumers, small and private shareholders appealed against the decision to amend the company by-laws of AEM S.p.A. before the Regional Administrative Court for Lombardy. They complained that the right of direct appointment of directors in conjunction with the right to participate in the election of the other members of the board of directors had the effect of enabling the Municipality of Milan to appoint the absolute majority of the directors of the company even if it holds only a relative majority. The Italian judge decided to stay the proceedings and asked the ECJ to give a preliminary ruling on the compatibility of the above-mentioned Italian provisions with EC Law.

The ECJ pointed out that the Italian law provisions at issue enable the Municipality of Milan to participate in a more significant manner in the appointment of the directors than its status of

shareholder would normally allow and, as a consequence of the above, restrict the possibility of the other shareholders to participate effectively in the management of the company. The Italian legislation at issue is, therefore, liable to deter direct investors from other Member States and constitutes a restriction on the free movement of capital (article 56 of EC Treaty).

The ECJ rejected the arguments presented by the Municipality of Milan and the Italian State to justify the "golden share" rules. See also EUDTG Newsletter Issue 2006 - nr. 004 and EUDTG Newsletter Issue 2006 - nr. 006).

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Netherlands – ECJ judgement on the incompatibility of the Dutch dividend withholding tax on outbound dividends with the free movement of capital: Amurta case (C-379/05)

In 2002, Retailbox B.V., a company incorporated under Dutch law and resident for tax purposes in the Netherlands, paid a dividend to Amurta S.G.P.S., a company incorporated under Portuguese law and resident for tax purposes in Portugal. The payment was net of Dutch dividend withholding tax, withheld at the statutory rate of 25 per cent. If Amurta had been a resident of the Netherlands for tax purposes, or if its shares in Retailbox had been attributable to a permanent establishment of Amurta in the Netherlands, then the dividends would have been exempt from withholding tax. Amurta claimed that this distinctive treatment is a restriction on the free movement of capital. The Dutch Court of Appeal of Amsterdam referred the case to the ECJ, asking two questions: (1) whether the present distinction is precluded by Art. 56-58 EC and (2) whether the answer to the first question is affected by the grant of a full credit for Dutch dividend withholding tax by the state of residence of the shareholder/company (*in casu*: Amurta).

On 8 November 2007, the ECJ gave its decision in this case. With regard to the first question, the ECJ finds that the less favourable treatment of dividends paid to non-residents when compared to similar payments to residents constitutes a restriction on the free movement of capital. This restriction cannot be justified by an objective difference between resident and non-resident shareholders receiving 'Dutch' dividends: both shareholders are subject to the Dutch tax jurisdiction, but economic double taxation is only avoided in case of resident shareholders (of non-residents disposing of a 'Dutch' permanent establishment to which the shares can be attributed). Such a distinction does not relate to a difference between the cases compared in view of the objective of the present exemption, being the avoidance of economic double taxation. Furthermore, the present distinction cannot be justified on the basis of the cohesion of the Dutch tax system, since there is no direct link between a fiscal advantage in the form of an exemption granted to companies established in the Netherlands and an offsetting tax levy. Finally, the present distinction cannot be justified by the need to safeguard the balanced allocation of taxing rights between the Member States. A Member State cannot, when chosing not to tax recipient companies established in its territory in respect of dividends, rely on this argument in order to justify the taxation of recipient companies established in other Member States. Consequently, articles 56 EC and 58 EC preclude the present legislation concerning dividend payments.

As regards the second question, the ECJ contemplates that the Netherlands cannot rely on the existence of a (full) tax credit granted *unilaterally* by another Member State, such as Portugal, in order to escape its obligations under the EC Treaty. However, a Member State may succeed in not restricting the free movement of capital through the conclusion of a convention for the avoidance of double taxation with another Member State. It is for the national courts to establish whether such a convention applies and indeed enables the effects of the restriction on the free movement of capital to be neutralised. See also EUDTG Newsalert NA 2007 – 038.

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Sweden – ECJ judgement clarifying further the concept of free movement of capital to and from third countries: A case (C-101/05)

On 18 December 2007, the ECJ gave its decision in the case of A v. Skatteverket (C-101/05). The plaintiff, the Swedish individual A, owns shares in parent company X, a resident of Switzerland. X considers distributing a dividend to A in the form of shares in its subsidiaries. Under Swedish rules, income tax is levied on such a distribution if the parent company, amongst other conditions, is not established in a State within the EEA or in a State with which Sweden has concluded a taxation convention that contains a provision on exchange of information. A applied for an advance ruling with the National Board on Advanced Rulings stating that the Swedish legislation infringed the free movement of capital. As the National Board decided in favour of the plaintiff, the tax authorities filed an appeal against that decision with the Swedish Supreme Administrative Court, which referred the case to the ECJ.

The ECJ reiterated that Article 56(1) EC (free movement of capital) lays down a clear and unconditional prohibition for which no implementing measure is needed and which confers rights on individuals on which they can rely before the courts. In principle, any restriction on movement of capital should be interpreted in the same manner with regard to relations between Member States and third countries as it is with regard to relations between Member States. However, due account has to be taken of the fact that movement of capital to or from third countries takes place in a different legal context from that which occurs within the EU.

Following these observations, the ECJ decided that the Swedish legislation constitutes, in principle, a restriction on free movement of capital which may be justified on grounds of the effectiveness of fiscal supervision. After all, with regard to a third country, the Swedish tax authorities cannot have recourse to the mutual assistance between competent authorities provided for by Directive 77/799. Moreover, the bilateral tax convention between Sweden and Switzerland does not seem to contain an adequate provision on exchange of information. The ECJ left it to the Swedish national court to decide on the correct interpretation of that convention. The ECJ also left it to the national court to decide whether compliance with the requirements of the Swedish system can indeed be verified only by obtaining information from the competent authorities of Switzerland.

Lastly, the ECJ considered the application of the stand still provision of Article 57(1) EC which states, *inter alia*, that the provisions of Article 56 EC are without prejudice to the application to third countries of any restrictions which existed on 31 December 1993 under national or EC Law adopted in respect of the movement of capital to or from third countries involving direct investment. In this respect, the ECJ observed that, although the national legislation concerned was introduced in 1992, repealed in 1994 and reintroduced in 1995, the dividend has been liable to tax continuously as from 1992. On these grounds, the ECJ decided that the Swedish legislation existed on 31 December 1993. The ECJ left it to the national court to decide whether the dividends relate to direct investment or not, as the facts presented to the ECJ were ambiguous on that point. See also EUDTG Newsalert NA 2008 – 001.

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NATIONAL DEVELOPMENTS

Belgian rules for compensation of losses with profits of non-EU permanent establishments considered as discriminatory by Brussels Court of first instance

On 14 December 2000, the ECJ in the AMID case (C-141/99) condemned the so-called Belgian "Velasquez-doctrine". According to Belgian income tax rules, Belgian losses incurred by a Belgian company must be off-set against the profits of its foreign permanent establishment (PE). These compensation rules apply even if the profits attributable to the foreign PE are to be considered as not taxable in Belgium based on a Belgian double tax treaty ("exemption method"). When in a given year, there are current losses in Belgium and profits in a PE country, the latter has the right to tax the PE's profits, and such profits also compensate the Belgian losses. The following year, the Belgian company cannot compensate its current profits against its former losses: this system entails a "loss of Belgian losses" and a kind of double taxation. The ECJ has now condemned these rules when the PE is established in another Member State.

The AMID case described above can in principle only be invoked when the PE of a Belgian company is situated within the EU. If this PE is situated outside the EU, the AMID judgment can normally not be relied on and it is generally considered that the "Velasquez doctrine" should continue to apply.

However, on 26 October 2007, the Brussels Court of First Instance decided that the Belgian rules for compensation of losses with profits of a foreign PE situated outside the EU are incompatible with the non-discrimination principle laid down in the Belgian Constitution.

The Court observed that, under the Belgian regime, the overall tax burden of a Belgian company with a profit-making foreign PE is the same, regardless of whether the Belgian company is in a current loss position or makes profits. If a company incurs Belgian losses in one year and realises Belgian profits in the following year, the latter are taxable in Belgium, because the previous Belgian losses have been set off against the profits of the foreign PE. The Court decided that this system is discriminatory, since different situations are treated in the same manner.

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Estonia: Proposed amendments to bring the law in line with parent-subsidiary directive

On 13 December 2007, the Estonian Government approved a Draft Law that is believed to bring the income tax law in line with the Parent-Subsidiary Directive (90/435/EEC) as agreed in the Accession Treaty. According to the draft, the tax base for corporations will remain the same. Earned but undistributed profits will remain tax-exempt. The taxable base includes any profits that are distributed during the calendar year as well as any hidden profit distributions (non-business related expenses, transfer pricing adjustments, etc.). However, instead of a monthly tax period, tax period will be a financial year. There will be bi-annual advance payments of tax which can be later set off against the annual tax due. When approved by the parliament, the law should become effective as of 1 January 2009.

In the Accession Treaty it was agreed that by way of derogation from Art 5(1) of the Parent-Subsidiary Directive, Estonia may, for as long as it charges income tax on distributed profits without taxing undistributed profits, and at the latest until 31 December 2008, continue to apply that tax on profits distributed by Estonian subsidiaries to their parent companies established in other Member States.

According to Article 5(1) of the EU Parent-Subsidiary Directive, dividends distributed to a parent company in an EU Member State cannot be subject to any withholding tax at source. It was understood that on the basis of the decision of the ECJ given on 4 October 2001 in the case C-294/99 (*Athinaiki Zithopiia*), the definition of a withholding tax in this context could also include the deferred corporate income tax charge triggered (recaptured) at the level of the Estonian subsidiary when dividends are distributed.

According to the draft, the tax base for corporations will remain the same. The taxable base includes any profits that are distributed during the calendar year as well as any hidden profit distributions (non-business related expenses, transfer pricing adjustments, etc.). Earned but undistributed profits will remain tax-exempt. However, instead of monthly tax periods, the tax period will be a financial year. There will be bi-annual advance payments of tax which can be later set off against the annual tax due. According to the Explanatory Notes to the Draft Law it is believed that this change will clarify that dividends are just one component of the tax base of the distributing company and the subsidiary level tax should thus not be considered as a withholding tax subject to the Directive. This is confirmed by ECJ case law on C-375/98 (*Epson Europe BV*), C-58/01 (*Océ van Grinten*), C-446/04 (*FII Group Litigation*) and C-231/05 (*Oy AA*).

The draft includes several other minor changes such as expanding recapture on undistributed profits also to liquidation proceeds, share buy-back and capital reduction. Currently, such items are taxed at the level of the recipient only which may therefore escape any taxation under tax treaties.

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Estonia: Amendment to corporate income tax law concerning outbound dividends and royalties

The Estonian Government has submitted a draft law, which will abolish all withholding taxes on dividends and royalties irrespective of the residence of the recipients and participation threshold. When approved by the parliament, the law should become effective as of 1 January 2009.

Under current legislation, dividends paid to non-resident corporate shareholders (except entities based in low-tax territories) holding less than 15% of the shares in the distributing company would be subject to 21% withholding tax. Royalties paid to non-resident shareholders are subject to 15% withholding tax unless royalties qualify for an exemption under EU Interest-Royalty Directive (2003/49/EC). No tax is withheld on dividend and royalty payments made to resident corporate shareholders. According to the Explanatory Notes to the Draft Law this amendment is based on Case C-379/05 *Amurta* of 8 November 2007 (see above, which has confirmed that the different treatment of residents and non-residents is in principle contrary to the EC Treaty.

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Finland – Supreme Administrative Court decisions: even in the case of 'final losses' no cross-border group contribution possible

On 31 December 2007, the Finnish Supreme Administrative Court ("SAC") handed down two decisions on cross-border group contributions:

1) Decision SAC 2007:93 concerned the Oy AA case, which was referred to the ECJ and on which the ECJ passed judgment (C-231/05) on 18 July 2007. The Finnish Supreme

Administrative Court followed the ECJ's judgment and the deductibility of group contributions in Finland was therefore denied.

2) Decision SAC 2007:92 concerned another case on cross-border group contributions, which follows the same arguments as used in Oy AA yet it also includes so-called "final losses", similar to those at hand in Case C-446/03 (*Marks & Spencer*). The Supreme Administrative Court decided that a cross-border group contribution is not deductible in Finland under circumstances similar to those in *Marks & Spencer*.

The second case concerned a Finnish parent company which held all shares in a UK sister company through two intermediate (holding) companies. The Finnish parent company also held shares in a Finnish company, K Oy. The UK sister company had (capital) losses which it was unable to utilise against any (capital) gain created in the UK by the company itself or other group company. K Oy was trying to give a group contribution to its UK sister company, which had so-called "final losses", but the Finnish tax authorities refused to accept the deduction of this contribution.

The Supreme Administrative Court decided that even though the facts in the *Oy AA* case did not concern so-called "final losses" (i.e. such tax losses as meant in *Marks & Spencer*), a tax deduction in Finland of a group contribution to a foreign group company may be denied in cases where losses are final. Such a denial does not infringe the EC Treaty. The Court reached this conclusion by referring in particular to paragraphs 64 and 65 in *Oy AA*. See also EUDTG Newsalert NA 2008 – 002

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Germany – Federal Finance Court has no serious doubts concerning withholding taxes despite the ECJ's decision in the Scorpio case

In December 2007, the order of the German Federal Finance Court (BFH), I B 181/07, was published. The plaintiff, a German resident corporation that conducts performances with UK resident artists, rejected the deduction of withholding tax on the artists´ payment in 2007. Referring to the *Scorpio* decision (C-290/04), it appealed against the tax assessment notice and claimed for a suspension of execution. On 29 November 2007, the BFH judged on the suspension only. The matter itself is still pending. The suspension of execution has to be granted when the assessment notice could seriously be doubted lawful. As the decision about the suspension only deals with the question if these doubts are serious ones or not (and not with the matter itself) the BFH is not obliged to refer to the ECJ. Nevertheless, this interim ruling reflects the actual attitude of the BFH regarding the compliance of German withholding tax with EC Law.

The BFH acknowledged having some doubts, but no serious ones. Although the ECJ stated in the *Scorpio* case that in 1993 the withholding tax complied with the freedom to provide services, since the Directive 2001/44/EC on mutual assistance to recover taxes had not been implemented, the BFH doubted that this very Directive is an appropriate substitute for the withholding. In order to underline its statement, the ECJ quoted a report of the Commission whereupon the actual recovery of taxes due to the mutual assistance Directive is small.

In our opinion the BFH's reasoning is in several points not totally convincing. At first, according to the consistent judicature of the ECJ, the fact that Member States do not make efficient use of Directives cannot justify an infringement of EU freedoms. Furthermore, the ECJ has already mentioned in the *Turpeinen* case (C-520/04, see also EUDTG Newsalert NA 2006-031), which dealt with withholding tax in the year 2002, that due to the Directive

2001/44/EC a Member State has the possibility to request assistance from another Member State in order to the recover income tax.

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Ireland – Irish extension of the remittance basis of taxation to UK source income

The tax treatment of investment income and income attributable to the exercise of foreign employments outside Ireland extends to UK-source income with effect from 1 January 2008. This change comes as a result of the formal request received from the European Commission in April 2007 to end the discriminatory treatment of UK source income as it considered that the provision restricted the free movement of capital. Previously, UK source income was excluded from the remittance basis of taxation, which operates to bring "foreign" income arising to resident but non-domiciled individuals within the charge to Irish tax only to the extent that such income is brought into Ireland. Thus, UK source income of such individuals was taxed in Ireland regardless of whether or not it was brought into the country.

The change in Irish law is a welcome development for Irish resident individuals, domiciled outside the State, who are in receipt of income arising from UK investments, pensions and employment. In cases where the duties of the employment are exercised outside Ireland and the funds are not immediately brought into Ireland, these individuals can now restrict the amount of this income which is liable to Irish tax.

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Italy – Financial Bill for 2008 amends the Italian legislation on outbound dividends and CFC rules

The Italian Financial Bill for 2008, approved by the parliament on 21 December 2007, introduces several amendments to the tax provisions regulating the taxation of companies. Among other important tax changes, the Italian tax legislation concerning outbound dividends and CFC rules are amended.

As regards the tax treatment of outbound dividends, the Financial Bill provides for the application of a 1,375% withholding tax (instead of the 27% ordinary withholding tax) on dividends distributed to non-resident companies or entities which are:

- subject to corporate income tax in their State of residence; and
- resident in a EU Member State (where the Parent-Subsidiary Directive is not applicable) or in a EEA (European Economic Area) State included in a "white list" based on the exchange of information criterion (to be approved by Ministerial Decree).

The 1,375% rate, which is the same effective tax-rate that would be applied to dividends received by domestic companies, will be applied to the profits generated starting from the financial year following that one in course on 31 December 2007. Therefore, for companies having the financial year equal to the calendar year, the new withholding tax rate will be applied to profits generated from 1 January 2008 and, generally, distributed starting from 1 January 2009

It should be pointed out that the approved law amendments will not completely remove the discriminatory tax treatment of outbound dividends compared to domestic dividends. In fact, since the 27% withholding tax is going to be applied on profits generated before 2008, the new regime will not remove the discriminatory treatment of outbound dividends relevant to such profits which might have been distributed in previous fiscal years or will be distributed in

future fiscal years. Moreover, with reference to the profits accrued starting from 2008 and distributed starting from 2009, until today, it is uncertain whether some EU non-resident entities, such as investment funds and pension funds, would benefit from the new reduced tax-rate.

Regarding the Italian CFC rules, the Financial Bill provides for the abolition of the 2001 black-list (identifying countries which have a significantly lower level of taxation than the Italian rate and which do not grant an adequate exchange of information with Italy) and the adoption by Ministerial Decree of a white list which will be drafted on the basis of the same criteria used for the drafting of the previous black-list.

Pursuant to the legislation in force until 31 December 2007, if an Italian stockholder (individual or company) held a participation granting control (or a participation higher than 20% in the profits) of a company resident or located in a country included in the black list, the profits of that company were attributed to the Italian stockholder in proportion to the participation held and irrespective of dividend distributions. On the contrary, the new rules provide for such an attribution to companies located in a country not included in the new white list.

On the basis of a preliminary analysis of the amended rules, it seems that the Italian CFC rules may be still in breach of the EC Law. First, it should be pointed out that, since the new white-list will be drafted on the basis of the same criteria adopted for the drafting of the black-list, the new list may not include Malta and Cyprus (the previous black-list included both countries). Therefore, if the two countries won't be included in the white-list, also for future years the compatibility of the Italian CFC rules with EC Law would still need to be analysed. Secondly, since the new CFC rules, like the previous ones (as the Financial Bill doesn't amend the other provisions of the CFC regime) do not seem to apply only in the case of "wholly artificial arrangements" according to the principles expressed by the ECJ in the *Cadbury Schweppes* case (C-196/04), they may be still in breach of EC Law. See also EUDTG Newsletter Issue 2007 - nr. 006.

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Netherlands – Supreme Court refunds Dutch dividend withholding tax to a Luxembourg parent company on the basis of Article 56 EC (case 42 679)

X Sarl, incorporated under the laws of Luxembourg and a resident for tax purposes of Luxembourg, owns 2.25% of the shares in A N.V., incorporated under the laws of the Netherlands and a resident for tax purposes of the Netherlands. A N.V. distributed dividends to X Sarl in 2001 and 2003, which were at the time subject to 25% Dutch dividend withholding tax. Pursuant to the Netherlands-Luxembourg tax treaty, the rate of 25% was reduced to 15%, and therefore X Sarl was entitled to a refund of 10%. Since the distributed dividends were exempt from corporate income tax in Luxembourg, X Sarl had no possibilities to credit the Dutch dividend withholding tax against the corporation tax due in Luxembourg. Therefore, X Sarl requested an additional refund of Dutch dividend withholding tax with respect to the dividends received from A N.V. on the basis of Article 56 EC (free movement of capital). The tax inspector denied X Sarl's request insofar it was based on Community law, as a result of which X Sarl started legal proceedings.

As the Dutch participation exemption – and consequently an exemption of withholding tax – would have applied to the dividends received from A N.V. if X Sarl would have been a resident of the Netherlands (at the time the participation exemption could under circumstances also apply to shareholdings of less than 5%), the Gerechtshof of 's-Hertogenbosch (Lower Court) decided that the dividend withholding tax constitutes a restriction of the free movement of capital (Article 56 EC). It further held that this restriction

cannot not be justified by the principle of territoriality or the coherence of the Dutch tax system.

In appeal, the Supreme Court confirmed the decision of the Lower Court, thereby relying on the ECJ's decision in *Denkavit* (C-170/05, NA 2006-035). After *Denkavit,* it is clear that a national rule infringes the *freedom of establishment* if it results in a disadvantageous treatment of dividend distributions based on the place of residence of the parent company. The Supreme Court decided that it is beyond reasonable doubt that the *Denkavit* decision also applies to cases concerning the *free movement of capital*, such as the case of X Sarl. Since X Sarl could not credit any Dutch withholding tax in Luxembourg, it was entitled to a full refund of dividend withholding tax. See also EUDTG Newsalert NA 2007 – 040

-- Sjoerd Douma and Frauke Davits, The Netherlands; sjoerd.douma@nl.pwc.com

Portugal – Changes in Portuguese legislation concerning capital gains exemption regarding sale of owner-occupied dwellings

On 26 October 2006, the ECJ ruled that the Portuguese exemption from taxation of capital gains derived from the sale of an owner-occupied dwelling, subject to the condition that the sales proceeds of such dwelling are re-invested in the purchase of another owner-occupied dwelling located in the Portuguese territory, as foreseen in Article 10(5) of the Personal Income Tax Code, is discriminatory (Commission v Portugal, C-345/05).

Following the above mentioned decision, the Portuguese Government has approved Decree Law 361/2007, dated 2 November, including under the exemption reinvestments made in owner-occupied dwellings located in another EU Member State or in the EEA. These changes are in force from 3 November 2007 onwards.

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Portugal – Tax reductions for the free zone of Madeira for the period 2007-2020

On 27 June 2007, the European Commission approved a scheme providing tax reductions until 2020 to companies setting up in the free zone of Madeira (ZFM) between 2007 and 2013. According to the approved scheme, companies, licensed as of 2007 and until 2013, will be subject to a corporate tax rate of 3% (2007 - 2009), 4% (2010 – 2012) and 5% (2013 – 2020), as long as they comply with specific eligibility criteria. Law 65-A/2007 which was adopted on 26 November 2007 contains an authorisation for the Portuguese Government to change the Tax Benefits Code in accordance with the approved scheme.

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Portugal – State Budget for 2008

The State Budget for the year 2008, amongst other measures, has introduced changes in corporate income tax law, concerning the transposition of the EU Parent-Subsidiary Directive, following the European Commission's infringement proceedings against Portugal for discriminatory taxation of outbound dividends (case reference number 2004/4353).

Accordingly, there is a reduction of the minimum holding period to 1 year (instead of 2 consecutive years), and also a reduction to 10% (from 15%) of the minimum participation required, or, alternatively, an acquisition value of shareholding not less than € 20,000,000, in order to qualify for exemption from withholding tax on dividends paid by Portuguese

subsidiaries to their EU parent or to an EU-based permanent establishment of another EU parent company.

Concerning Personal Income Tax, the State Budget for 2008 has also introduced some relevant changes. A new rule has been introduced which prescribes that individuals resident in another EU Member State or in the EEA (in a country with which there is reciprocity of tax information) that realise capital gains or derive other income from Portugal may opt to be subject to taxation in Portugal (concerning to the income derived herein) at the rate that would be applicable if they were resident for tax purposes in Portugal.

Furthermore, the State Budget also envisages an authorisation for the Government to introduce legislation that allows individuals in other Member States that derive at least 90% of their worldwide income from Portugal, to opt for being subject to the tax regime applicable to individuals resident for tax purposes in Portugal.

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EU DEVELOPMENTS

EU – Update on the Common Consolidated Corporate Tax Base (CCCTB)

On 10 and 11 December 2007, a joint meeting of the European Commission with businesses and academics took place in Brussels, with the EU Member States attending as observers. The purpose of the meeting was to give participants an overall update of the CCCTB Working Group's work to date, focusing especially on a number of discussion documents on the possible outline of a CCCTB. We summarise below the main points coming out of these discussion documents.

Working Paper 57

In July 2007 the European Commission issued a working paper (WP57) which sets out the probable outline of the principles of a CCCTB by beginning to bring the various structural elements of the base together into a coherent set of rules to be brought in as a Directive. While in former communications the CCCTB was only discussed on a high level basis, this working paper deepens the discussion by proposing the basic structure of a possible CCCTB.

At the outset, the report highlights again that IAS/IFRS rules cannot be considered suitable to function as a mandatory common starting point for a consolidated tax base. Therefore, a complete tax base as well as the scope of participants in the CCCTB has to be determined. The report proposes that the companies eligible to opt for the CCCTB will be EU companies listed in an annex to the Directive which are subject to Member State (MS) corporate income taxes listed in a further annex. This will also apply to third country companies which have a similar form to EU companies and which are subject to one or more of the above mentioned MS taxes.

With respect to the tax base of the companies, the paper distinguishes between individual and consolidated companies. The paper envisages optional consolidation of a group of 75% or more owned companies including permanent establishments in another Member State. The option to elect into a CCCTB consolidated group would be on an "all-in" (i.e. no "cherry picking") basis for 5 years, renewable for periods of 3 years, on a rolling basis.

For both individual and consolidated companies, the tax base will be determined by taking into account a broad concept of income and detailed rules with regard to tax deductible and non-deductible expenses and depreciation of assets. To attribute the income to 12-month accounting periods, income and expenses will be recognized on an accruals basis.

Overall losses in a CCCTB group are proposed to be carried forward without time limit at the level of the group, rather than being allocated out to group member companies. However where a CCCTB group with an unutilised overall loss terminates, the losses would then be allocated out to the former CCCTB group companies.

Finally, the report deals with foreign income and the elimination of economic double taxation thereon. The Commission considers it necessary to distinguish between the treatment of income from within the EU or a third country. Intra-community income (including royalties, interest and portfolio dividends) will be consolidated. Dividends from >/= 75% EU shareholdings within the CCTB perimeter will be eliminated. Finally, dividend income from EU shareholdings of 10% < 75% will be exempt, while a switch over from the exemption to the credit method may apply for third-country income (>10% shareholdings) if the corporate income tax rate of that third country is considered to be too low, currently proposed as < 40% of the average rate of corporation tax in the (presumably participating) Member States.

Sharing Mechanism

Discussion document, Working Paper 60 (WP60), addresses the possible elements of the sharing mechanism and proposes a three-part formula; the three parts being payroll, property and sales. Payroll itself will be an equal weighting of payroll in euros and headcount (to avoid favouring high-cost member states). The property factor will not include the value of intellectual property, nor would the other traditional at arm's length factors such as functionality and risk have any influence on the sharing mechanism. Sales will be determined by destination rather than origin. The paper envisages that the weighting of the three elements will be decided at the political rather than technical level but will start from an assumed, one-third weighting.

Administration

The administration framework discussion (WP61) was released on 13 November 2007. The paper proposes that the administration of CCCTB will be based on the concept of principal taxpayer and principal tax administration. Following this, the CCCTB return will be filed by the principal CCCTB group company with the tax authority of that country, which will initially audit on behalf of all the other relevant tax authorities.

The paper anticipates that there will not be a special CCCTB court. Instead, appeals on points of CCCTB law will go through the principal company member state's national courts, and on to the ECJ if necessary.

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EU Tax Commissioner Kovács has recently announced that the CCCTB Directive will be proposed by the Commission to ECOFIN in September 2008 under the French Presidency of the EU. He has publicly named Austria, Belgium, France, Germany, Italy, Luxembourg, The Netherlands and Spain as the minimum 8 supporting countries required under the 'Enhanced Cooperation' procedure. See also the Commission's CCCTB website which also contains the latest position papers of European business representations such as EBIT.

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European Commission calls for more targeted and better co-ordinated application of Member States' anti-abuse rules

On 10 December 2007, the European Commission published a Communication which calls on Member States to conduct a 'critical' review of their existing direct tax anti-abuse rules in the light of the ECJ's case law and encourage better and more targeted coordination among them. The Communication forms part of the Commission's wider framework Communication for more direct tax coordination which was published on 19 December 2006 and which runs parallel to the CCCTB project. The Commission is convinced that through more administrative cooperation between the Member States, fraudulent schemes can be detected better and earlier, and that by using common definitions solutions can be found for issues such as CFC legislation, thin capitalisation rules and hybrid structures.

The Commission argues that Member States' existing anti-abuse rules often do not properly take into consideration the EC Treaty freedoms which is why they have increasingly been challenged by the ECJ. For instance in the *Eurowings*, *Lankhorst-Hohorst*, *Cadbury-Schweppes* and *Thin Cap GLO* cases, the ECJ has defined the key principles of abusive measures and reiterated that Member States may justify discriminatory treatment in the case of abuse of their national law but that its interpretation of such justifications is very strict. Member States may only protect the erosion of their tax base in the case of 'wholly artificial arrangements". The Commission believes that while they are in principle right in trying to protect their tax bases in the light of abusive and overtly aggressive tax planning schemes, Member States should go about this in a proportionate way and strike a proper balance between the public interest of combating abuse and the need to avoid disproportionate restrictions on cross-border activity within the EU.

Since the free movement of capital, as laid down in Article 56 EC, applies with regard to third countries, Member States should also focus more on the protection and coordination of anti-abuse measures towards these countries and step up the exchange of information and sharing of best practices with third countries. See also the Communication (COM/2007/785).

-- Frauke Davits and Bob van der Made, The Netherlands; bob.van.der.made@nl.pwc.com.

Belgium – European Commission amends transitional regime for Belgian coordination centres

On 13 November 2007, the European Commission announced that it has amended the transitional regime applicable to the Belgian coordination centres from 2003.

According to the Commission, its decision follows a judgment of the ECJ of 22 June 2006 (C-182/03 and C-217/03), which partially overturned an earlier decision of the Commission, dated 17 February 2003, in which it claimed that the regime in question constitutes State aid.

In its judgment, the ECJ confirmed that the Belgian coordination centre regime constitutes incompatible State aid, but annulled the Commission's decision with respect to transitional rules for those coordination centres whose request for re-authorization was pending on the date of the announcement of the Commission's decision or whose authorization expired on the same date or shortly afterwards.

The Belgian Government took the view that, based on the principle of equality, the existence of all coordination centres could be extended until 31 December 2010, and adopted a law of 27 December 2006 to that effect.

According to the Commission, the transitional period that it should have provided for in its decision of 17 February 2003 to enable the coordination centres to adapt to the change of

arrangement should have run from 17 February 2003 to 31 December 2005. Thus, the companies to which this new transitional period applies are those whose authorisation expired no later than 31 December 2005.

For those centres whose current authorisation expired after 2005, the transitional period remains valid until the expiry of their authorisation or the end of 2010, whichever comes first. According to the Commission, the effects of the system will not be able to be retained by new extensions of authorisations after 2005.

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France – European Commission starts formal State aid investigation into French plans to grant tax aid to insurers selling specific solidarity policies

On 14 November 2007, the European Commission announced that it has started a formal investigation into whether the French Government's plan to grant tax aid to insurers with respect to certain insurance policies ("*contrats solidaires* " and "*contrats responsables*") is compatible with the rules on State aid provided for by the EC Treaty.

In December 2006, the French parliament took specific tax measures to encourage the development of special supplementary sickness benefits based on "solidarity" and "sense of responsibility" principles. The three main tax measures are as follows:

- an exemption from corporation and business tax for sickness insurance policies based on solidarity and a sense of responsibility ("*contrats solidaires et responsables*");
- the possibility for insurance companies to deduct equalisation reserves relating to collective supplementary insurance policies covering the risks of death, invalidity and incapacity in the framework of so called "*contrats de désignation*";
- a phasing-out of the special corporate tax exemption currently applicable to mutual companies.

The formal investigation of the Commission will deal with the first two measures, whereas the third one will be dealt with in a separate procedure.

Whereas the French authorities consider that the measures are fully compatible with article 87(2)(a) of the EC Treaty dealing with the compatibility of aid of a social character, the Commission, without challenging the general social objective of the measures, has doubts whether the tax benefits will be passed on to the ultimate consumer, and anticipate it might indeed favour certain specialised insurers (especially the mutual companies and the provident societies) due to the threshold to be met.

As the projected date of entry into force of the plan was 1 January 2008, the French authorities will probably postpone its implementation.

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Spain – European Commission adopts formal decision to start EU State aid inquiry against Spain regarding financial goodwill amortisation and invites interested parties to submit comments

On 21 December 2007, the European Commission published its decision to start a formal investigation into the Spanish financial goodwill amortisation of financial goodwill for the acquisition of significant shareholdings in foreign targets (State aid C 45/07 (ex NN51/07) in

the Official Journal of the European Communities (C 311/07). The Commission doubts the compatibility of the aid and proposes to initiate the formal investigation procedure laid down in Article 88(2) of the EC Treaty.

The decision will be communicated to Spain and the Commission has invited interested parties and taxpayers which are affected by its decision to submit their comments within a month after the publication in the O.J. i.e. by 21 January 2008. An extension of this deadline could be requested to the Commission due to the tight deadline over the Christmas holiday period. Also on behalf of its clients, PricewaterhouseCoopers has requested such an extension which the Commission has granted until 20 February 2008.

The opening of the investigation does not prejudice its outcome. The procedure may result in either an acceptance of the legality of the tax rule, an agreement with Spain for a gradual phasing out of the incentive going forward, or a request to Spanish companies that have received such aid to return to the Spanish Treasury the amounts that have been claimed as a deduction, plus interest charges. In the meantime, the Commission may decide that the tax rule should be suspended or that any advantages should be recovered provisionally until the Commission has taken a final decision on the compatibility of the rule with the common market.

Both taxpayers and Spain will have recourse to the European Court of First Instance and the ECJ, respectively, once the final Decision is issued. See also EUDTG Newsalert NA 2007 – 034

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Switzerland and EU – Update on bilateral dialogue on disputed Swiss company tax regimes

On 13 February 2007, the European Commission took the formal position that certain company tax regimes in Swiss Cantons in favour of holding, mixed and auxiliary (management) companies are a form of State aid incompatible with Article 23(1) of the 1972 Free Trade Agreement between Switzerland and the EU (see also EUDTG Newsletter Issue 2007 - nr. 002.). The Swiss Federal Council (government) has consistently rejected this interpretation considering it to be unfounded and also rejected negotiations. Nonetheless, it has said that it is prepared to hold a dialogue with the EU on the issue.

Representatives from Switzerland and the European Commission met on 12 November 2007 in Bern, Switzerland, within the scope of the agreed dialogue at a technical level only to discuss the EU's assessment of certain cantonal company tax arrangements. The meeting took place in an open atmosphere and the respective viewpoints were discussed in greater detail. After the meeting, the representatives underscored their readiness to continue the technical dialogue in spite of the differing viewpoints. A further meeting is scheduled for early 2008.

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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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