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1. Top News

EU Parliament calls for more binding tax cooperation to tackle banking secrecy and tax fraud

On 10 February 2010, the EU Parliament adopted a resolution on good governance that condemns tax havens and calls for the automatic exchange of tax information, as well as three other legislative resolutions on tax fraud and recovery of tax claims.

Good governance in tax matters

This resolution deals with the broad issue of tax cooperation in the EU and comes as a follow-up to several initiatives both in the EU and at international level. The resolution condemns tax havens, urges Member States to prioritise the fight against them and calls for a public register to increase transparency regarding companies' dealings with tax havens. It puts a strong emphasis on the need to promote the automatic exchange of information and put an end to banking secrecy. The

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resolution also requests that more be done on VAT-related fraud and proposes the use of incentives and sanctions to improve tax governance.

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Administrative cooperation in the field of taxation and against tax fraud

The EU Parliament sent a clear message supporting the Commission's proposal to introduce a general system of automatic exchange of information between Member States for all taxes, except VAT and excise duties, which are already subject to similar rules. The EU Parliament introduces technical improvements allowing for a more efficient lifting of bank secrecy, and gives powers to the Commission, under the control of the Council and Parliament, to clarify the scope of the information to be exchanged in the case of loopholes, and reinforces the personal data protection provisions.

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Carousel VAT fraud

Carousel VAT fraud is one of the most serious forms of tax fraud connected to cross-border transactions within the EU and is currently depriving Member States of billions of euros in tax revenue. There is evidence that sophisticated fraudsters could be targeting the system of greenhouse emission trading. The Commission proposed to apply the reverse-charge mechanism to the transactions involving emission allowances. The EU Parliament's legislative resolution supports the Commission's proposal, whilst introducing amendments aiming at reducing the administrative burden on businesses.

Assistance in recovery of tax claims

The EU Parliament has expressed a clear support for a proposal that will bring significant improvements helping to substantially increase the rate of cross-border claim recovery throughout the EU. The EU Parliament also asked for an appropriate follow-up system for cases where a Member State refuses the assistance and removes the threshold proposed for exchanging information concerning refunds of taxes.

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ECJ finds restriction by Netherlands legislation on cross-border loss relief compatible with EU law (*X Holding*)

On 25 February 2010, the ECJ delivered its judgment in the *X Holding* case (C-337/08). The ECJ ruled that the fact that the Netherlands tax regime makes it possible for a parent company to form a fiscal unity for corporate income tax purposes with its resident subsidiary but does not allow the formation of such a fiscal unity with a non-resident subsidiary is not in conflict with EU law, due to the fact that the profits of that non-resident subsidiary are not subject to the Netherlands tax legislation.

In 2003, X Holding B.V., a company resident in the Netherlands, requested to be included in a fiscal unity for corporate income tax purposes with its subsidiary F, a company resident in Belgium. The Netherlands tax authorities refused the fiscal unity, since F did not meet the applicable requirements that it was either resident in the Netherlands for tax purposes, or that it had a permanent establishment in the Netherlands. According to X Holding B.V., the refusal to allow a (cross-border) fiscal unity is incompatible with EU law.

The ECJ ruled that the fact that only domestic subsidiaries may be included in a fiscal unity whereas foreign subsidiaries cannot, in principle, constitute a restriction on the freedom of establishment protected under Article 49 in conjunction with Article 54 of the Treaty of the Functioning of the European Union ('TFEU'). The ECJ, however, ruled that – due to the fact that the parent company is at liberty to include or exclude a subsidiary in the fiscal unity – acceptance of the possibility to include non-resident subsidiaries in the fiscal unity would offer the parent company the opportunity to choose freely in which EU Member State the subsidiary's losses would be taken into account. For that reason, the refusal of a cross-border fiscal unity is justified in view of the need to safeguard the allocation of the power to impose taxes.

Preliminary comments

Practically, all the ECJ's considerations seem to be focussed on whether or not cross-border loss relief should be allowed. Unlike Advocate General Kokott in her Opinion (see EU Tax Alert, edition no. 73, December 2009), the ECJ does not specifically address the opportunities a fiscal unity offers for tax neutral reorganization, transfer of assets and internal transactions. The Advocate General followed the approach that the justification of the discrimination in the Netherlands fiscal unity legislation should be tested on an element-for-element basis. It is not fully clear whether the ECJ adheres to this view. It could be that the ECJ did not discuss these elements, since such elements did not play a role in the case at hand.

In December 2009, the Netherlands government announced plans to limit the deductibility of permanent establishment losses. Such plans could be reconsidered in the light of this ECJ

judgment. The recent fall of the Netherlands government may have the side effect that such measures will be postponed until a new government has been installed.

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2. Direct Taxation

Preliminary questions referred to ECJ on the German rules on personal deduction for non-residents (*Schröder*)

On 19 November 2009, the German Tax Court of Lower Saxony referred a preliminary question to the ECJ in the *Schröder* case (C-450/09) regarding the compatibility of the German rules on personal deduction for non-residents with the freedom of movement of persons and capital, currently protected under Articles 18 and 63, TFEU, which correspond to Articles 12 and 56, EC. The following question was raised in this case: *'Is a situation where a relative with domestically limited tax liability, unlike a person with unlimited tax liability, may not deduct from his total income, as special expenditure, annuities paid in connection with income from letting or leasing, contrary to Articles 56 and 12 EC?'*

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EU paper explores links between financial crisis and tax policy

On 28 January 2010, the Commission published its taxation paper no. 20, concerning the links between tax policy and the 2008 global financial crisis, which is the worst economic crisis since the Great Depression of 1929. This paper looks at whether the mortgage interest deduction helped cause the housing bubble, and whether financial transaction taxes or other policy measures could prevent a future crisis.

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Developments in the Netherlands: High Court of The Hague considers Netherlands loss ring fencing rule in line with EU law

On 17 November 2009, the High Court (*Gerechtshof*) of The Hague issued a judgment in which it considered the Netherlands loss ring fencing rule of article 20, paragraph 4, Corporate Income Tax Act 1969 ('CITA') in line with EU Law.

Interested Party, a Netherlands BV, is a holding and financing company with its place of effective management in the Netherlands. The subsidiaries of Interested Party were located in other Member States and third countries. In 2005, Interested Party reported a loss in its tax return. The Netherlands tax inspector considered the loss to be within the scope of the loss ring fencing rule of article 20, paragraph 4, CITA. In essence, this means that the loss could only be offset against future profits of years in which Interested Party would also qualify as a holding and financing company.

The question put before the Court was if article 20, paragraph 4, CITA is in line with the freedom of establishment (Article 49, TFEU). As the Netherlands loss ring fencing rule applies irrespective of the place of residency of the subsidiaries of Interested Party, the Court held that there was no difference in treatment compared to a domestic situation. Therefore, the Netherlands loss ring fencing rule is considered to be in line with the freedom of establishment.

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Developments in the Netherlands: Lower Court of Breda rejects requests for refund of Netherlands dividend withholding tax based on formal grounds

On 2 December 2009, the Netherlands Lower Court of Breda issued a judgment in which it rejected requests for refund of Netherlands dividend withholding tax based on formal grounds.

Interested Party, a company resident in Spain, held a 5.48% share interest in a Netherlands company. In the years 2001 through 2005, Interested Party received dividends from its Netherlands participation on which, after application of the bilateral tax treaty, 15% dividend tax was withheld. The Interested Party requested a refund of Netherlands withholding tax based on ECJ case law, such as *Denkavit Internationaal* (C-170/05) and *Amurta* (C-379/05).

The Netherlands tax authorities and the Lower Court of Breda rejected the refund requests, due to the fact that the term of six weeks to object against the withholding had expired, and that there was

no obligation to grant an *ex officio* refund. According to the court, resident taxpayers have six weeks to object to a withholding, and the same term should apply to foreign EU taxpayers. The refund requests were thus denied based on formal grounds.

Preliminary comments

First, we may doubt whether this decision is in line with ECJ case law, such as the ECJ decision of 16 December 1976 in *Rewe* (Case 33/76). In *Rewe*, the ECJ ruled that it may not be made very difficult or impossible for foreign taxpayers to receive EU Treaty benefits. Second, the decision of the Lower Court does not fully seem to acknowledge all possibilities under Netherlands law. A domestic taxpayer is in the position to credit the dividend withholding tax via its corporate tax return or obtain a refund by means of 'refund decision' as laid down in article 15 of the State Taxes Act. Non-residents are not allowed this possibility, which seems in breach of the principle of equality (as can be derived from the *Rewe* judgment). A reason for the Lower Court's refusal could have been that the Interested Party had not based its request on article 15 of the State Taxes Act. Accordingly, in refund requests based on EU law, we advise where possible to also invoke article 15 of the State Taxes Act. The result will depend on the facts and circumstances of the specific case.

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Developments in Belgium: UK charitable trust subject to reduced inheritance tax rate applicable to not-for-profit Belgian associations

In a judgment of 9 September 2009, the Brussels Court of Appeal ruled that a not-for-profit UK charitable trust is equated with a not-for-profit Belgian association and thus, is entitled to the same inheritance tax rate of 8.80%.

At the time of the facts, Belgian tax law provided for an 8.80% inheritance tax rate for inheritance by not-for-profit Belgian associations, whereas inheritance by foreign similar not-for-profit associations was subject to an inheritance tax rate of 8.80 %. The Court of Appeal held that this different treatment violated the prohibition of discrimination under the TFEU.

Belgian inheritance law has since been amended such that the lower rate now applies to all not-for-profit associations established in an EU/EEA Member State.

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3. VAT

Lithuania allowed to apply VAT reverse charge mechanism relating to two specific supplies

The EU Council has decided to authorize Lithuania to prescribe the reverse charge mechanism for supplies of goods and services in the case of insolvency or restructuring procedures subject to judicial oversight and of timber transactions. The derogation with respect to the supplies in the case of insolvency or restructuring procedures is based on the fact that Lithuania faces difficulties for taxpayers under insolvency or restructuring procedures subject to judicial oversight to pay to the authorities the VAT invoiced on their supplies. With respect to timber transactions, Lithuania may derogate from the normal VAT procedure because the timber sector in Lithuania is subject to tax evasion due to disappearing suppliers. As a consequence of this derogation, Lithuania can be held liable for VAT on the mentioned supplies to taxpayers that receive such supplies. The derogation for Lithuania to apply the reversed charge mechanism in the aforementioned areas entered into force retroactively as of 1 January 2010, and will remain in force until 31 December 2012.

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Reproduction of documents in principle qualifies as supply of goods (*Graphic Procédé*)

On 11 February 2010, the ECJ gave its judgment in the *Graphic Procédé* case (C-88/09). The issue in this case was whether reproduction activities have to be qualified as the supply of goods or the supply of services. The activities of *Graphic Procédé* consist of the production, by using its own materials, of copies of documents, files and maps. The customers retain title to the original documents they have asked to be reproduced. According to the French tax authorities, the reproduction activities qualify as the supply of goods. *Graphic Procédé*, on the other hand, was of the opinion that the activities qualify as services. The French Supreme Court was unsure about determination of the criteria to be checked and decided to refer preliminary questions to the ECJ.

First, the ECJ indicated that all the elements of the reproduction activities are closely linked. Therefore, the reproduction activities should be classified as a whole. Second, the ECJ ruled that the reproduction activities in principle qualify as a supply of goods as indicated in Article 5, first paragraph of the Sixth EU VAT Directive, because the activities relate to tangible property, paper in this case, and result in the transfer of the right to dispose of this tangible property as an owner.

However, the ECJ also indicated that the reproduction activities may not be limited to the mere reproduction of the original, and may involve additional services such as advice, and the adapting or modifying of the original. On the basis of the importance of these additional services compared to the reproduction of the original document, it should be determined whether these services are predominant such that they constitute an aim in themselves for the customers. If that is the case, then the reproduction activities qualify as a supply of services. It left it to the national court to decide on this issue.

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French reduced VAT rate on legal services for which legal aid scheme applies not compatible with EU law (*Commission v France*)

On 11 February 2010, Advocate General Jääskinen delivered his Opinion in the *Commission v France* case (C-492/08). The Commission brought this case before the ECJ, arguing that by allowing the application of a reduced rate for certain legal services France does not comply with EU law.

In France, services provided by lawyers, for which services the State remunerates, in whole or in part, under the national legal aid scheme, are taxed with the reduced VAT rate of 5.5% as of 1 April 1991. According to France, based on Article 98, second paragraph of the EU VAT Directive and Appendix III to the EU VAT Directive, it is allowed to apply a reduced rate. This because point 15 of Appendix III mentions the supply of goods and services by organisations which are recognized by Member States as charity organisations and which are involved in activities in the area of aid and social security insofar as these activities are not VAT exempt pursuant to Articles 132, 135 and 136 of the EU VAT Directive.

The Commission, however, is of the opinion that for application of a reduced rate based on the mentioned legislation, the service suppliers should have a certain character and in the case of France, it is not the character of the service supplier that is decisive but the circumstance that the services are rendered under the special legal aid scheme. Furthermore, the argument of France could lead to the risk, according to the Commission, that the reduced rate could be applied for all taxpayers with the only condition that the rendered services rendered would be remunerated in whole or in part by the State, and not under the condition that the service supplier has a special status due to its charitable character.

The Advocate General concluded in line with the view of the Commission, and advised the ECJ to rule that France in this respect did not comply with the obligations it has under Articles 96 and 98, second paragraph of the EU VAT Directive.

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Preliminary questions referred to the ECJ regarding right to a refund of VAT charged on an invoice issued by a non-recognised entrepreneur (*Boguslaw Juliusz Dankowski*)

On 9 October 2007, a Polish Administrative Court put preliminary questions to the ECJ in the *Boguslaw* case (C-438/09). The Administrative Court wants to know whether the principles of the EU VAT system, especially Article 17, sixth paragraph of the Sixth EU VAT Directive, precluded Poland from rejecting the right to a refund of VAT mentioned on an invoice issued by a person not listed in the register of taxpayers regarding tax on goods and services. The Court also wants to know if for the aforementioned question it is of importance that:

- it is clear that the activities mentioned on the invoice are subject to VAT and are actually performed.
- the invoice contains all required data prescribed by EU law;
- the rejection to the right of refund for the taxpayer was already applicable due to national legislation in force before Poland entered the EU in 2004.

Finally, the Court wants to know if the answer to the first question would be different if additional criteria were met, for example, proof that the taxpayer was in good faith.

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Preliminary questions referred to the ECJ on exemption of underwriting services from VAT (*Skandinaviska Enskilda Banken*)

On 21 December 2009, the Swedish Supreme Administrative Court referred a preliminary question to the ECJ in the *Skandinaviska Enskilda Banken* case (C-540/09) on whether underwriting services are included under the tax exemptions of Article 13 B of the Sixth EU VAT Directive (currently Article 135, first paragraph of the EU VAT Directive). The underwriting services mentioned in this case consist of services by credit companies which, against remuneration, grant guarantees to a company issuing shares, which guarantees mean that the credit company undertakes to acquire the shares that are not subscribed to in the subscription period.

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4. Customs Taxes and Excise Duties

ECJ rules on non preferential origin of Chinese silicon blocks that had undergone processing in India (*Hoesch Metals and Alloys*)

On 11 February 2010, the ECJ rendered its decision in the *Hoesch Metals and Alloys* case (C-373/08). The case concerned the determination of the non preferential origin of silicon blocks originating in China that had undergone various processes in India and were then imported into the EU. An antidumping duty of 68.1% of the value would be due if the silicon materials, after having undergone processes, were still of Chinese origin.

On 15 June and 12 August 2004, Hoesch declared at the Principal Customs Office of Duisburg silicon metal under subheading 2804 69 00 of the Combined Nomenclature ('CN') for release into free circulation. Hoesch had imported the product from India and declared that country as the country of origin. The order for reference states, however, that the silicon metal at issue in the main proceedings came from China and that it had been delivered, in two-by-three metre blocks, to Metplast, a company established in India. That company subjected the blocks to various processes, in the sense that they were separated, crushed and purified. The grains produced by the crushing were sieved, then sorted by size and, finally, packaged. The purification of the silicon was carried out in such a way that unwanted slag residues were removed, partly manually and partly by machine, from the silicon grains produced by crushing the blocks. The loose iron in the silicon was then extracted by a magnetic process. The degree of purity of the silicon metal was, after all the processes carried out by Metplast, more than 98.5%, such a degree being, according to Hoesch, necessary for the use of the silicon metal in the production of aluminium alloys. However, according to the referring court, the silicon's degree of purity prior to being imported from China was not known.

Following investigations by the European Anti-Fraud Office ('OLAF'), the Principal Customs Office of Aachen decided that the silicon metal at issue in the main proceedings had not been subject to origin-conferring substantial processing or working in India and that it could not, therefore, be regarded as having originated in that country. It decided, accordingly, that the product should be regarded as having originated in China. By two assessments to duty of 6 June 2007, it claimed from Hoesch, on the basis of Article 1 of Regulation No 398/2004, post-clearance recovery of anti-dumping duty amounting to EUR 99,974.74.

By its action, brought before the Tax Court of Düsseldorf, Hoesch claimed the annulment of those assessments. In addition, Hoesch claimed that Regulation No 398/2004 was invalid.

The Tax Court of Düsseldorf decided to stay the proceedings and to refer the following questions to the ECJ for a preliminary ruling:

1. 'Is Article 24 of the Customs Code to be interpreted as meaning that the separation, purification and crushing of silicon metal blocks and the subsequent sieving, sorting and packaging of the silicon grains resulting from the crushing constitutes origin-conferring processing or working?
2. If the answer to the first question is in the negative, is Regulation No 398/2004 valid?'

The ECJ ruled as follows:

1. The separation, crushing and purification of silicon metal blocks and the subsequent sieving, sorting and packaging of the silicon grains resulting from the crushing, as carried out in the main proceedings, do not constitute origin-conferring processing or working for the purposes of Article 24 of the Customs Code.
2. The examination of the second question raised by the referring court has not revealed any

factors of such a kind as to affect the validity of Council Regulation (EC) No 398/2004 of 2 March 2004 imposing a definitive anti-dumping duty on imports of silicon originating in the People's Republic of China.

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ECJ rules on the requirement of entry in the accounts of a customs debt (*Direct Parcel Distribution Belgium*)

On 28 January 2010, the ECJ rendered its decision in the *Direct Parcel Distribution Belgium* case (C-264/08). The case concerned the requirement of entry in the accounts of the amount of duty before it is communicated to the debtor.

On 18 November 1999, Boeckmans België NV ('Boeckmans België') submitted a summary declaration to the customs and excise administration in Antwerp concerning a container-load of bakery products intended for delivery to Direct Parcel. That container was delivered to Direct Parcel without the declaration presented to the administration having been cleared, with the result, however, that the container was not subject to customs control. By letter of 26 May 2000, the administration informed Boeckmans België that the time-limit for clearance had been well exceeded and that, as a result, a customs debt had been incurred. By letter of 3 October 2000, the same administration proposed an amicable arrangement to Boeckmans België, to which it lodged objection, which was rejected on 10 January 2001.

Denying that it was liable for the abovementioned customs debt, on 2 February 2001, Boeckmans België issued a writ of summons against the Belgian State requiring it to appear before the Court of First Instance of Antwerp. By writ of 8 February 2001, Direct Parcel was joined by Boeckmans België as a party to the proceedings in respect of all the debts attributed to it by the Belgian State. The Belgian State brought a counterclaim seeking that Direct Parcel and Boeckmans België be jointly ordered to pay the duties owed. By judgment of 7 April 2004, the Court of First Instance of Antwerp dismissed Boeckmans België's action and ordered it and Direct Parcel to pay the customs duties concerned.

By judgment of 7 November 2006, the Court of Appeal of Antwerp set aside that judgment. It declared that the Belgian State's right to proceed to recover the customs debt concerned had lapsed, on the ground that the Belgian State had not provided any evidence of the prior entry in the accounts of the amount of that duty in accordance with Article 221(1) of the Customs Code. The Belgian State therefore appealed to the referring court on a point of law against the judgment of the Court of Appeal of Antwerp, claiming that the failure to enter the customs debt in the accounts, or its late entry in the accounts, did not preclude recovery of the debt by the customs authorities.

In those circumstances, the Court of Cassation decided to stay the proceedings and to refer the questions to the ECJ for a preliminary ruling concerning the entry into the accounts, the technical and formal requirements of entering into the accounting records, the moment of entering into the accounting records, the communications to the debtor and the consequences of the payment by the debtor of the amount of duty communicated to him without its having been previously entered in the accounts.

The ECJ ruled as follows:

1. Article 221(1) of the Customs Code must be interpreted as meaning that 'entry in the accounts' of the amount of duty to be recovered as referred to in that provision is the same as 'entry in the accounts' of that amount as defined in Article 217(1) of that regulation.
2. 'Entry in the accounts' within the meaning of Article 217(1) of the Customs Code must be distinguished from entry of established entitlements in the accounts for own resources as referred to in Article 6 of Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000 implementing Decision 94/728/EC, Euratom on the system of the Communities' own resources. Since Article 217 of the Customs Code does not lay down any practical procedures for 'entry in the accounts' within the meaning of that provision or, accordingly, any minimum requirements of a technical or formal nature, that entry in the accounts must be made in a way which ensures that the competent customs authorities enter the exact amount of the import duty or export duty resulting from a customs debt in the accounting records or on any other equivalent medium, so that, inter alia, the entry in the accounts of the amounts concerned may be established with certainty, including with regard to the person liable.
3. Article 221(1) of the Customs Code must be interpreted as meaning that the amount of import or export duty due can be validly communicated to the debtor by the customs authorities, in accordance with appropriate procedures, only if the amount of that duty has been entered in the accounts beforehand by the authorities. The Member States are not required to adopt specific procedural rules on the manner in which communication of the amount of import or export duty is to be made to the debtor where national procedural rules

of general application can be applied to that communication, which ensure that the debtor receives adequate information and which enable him, with full knowledge of the facts, to defend his rights.

4. Community law does not preclude the national court from proceeding on the assumption, based on the declaration by the customs authorities, that the 'entry in the accounts' of the amount of import or export duty within the meaning of Article 217 of the Customs Code took place before that amount was communicated to the debtor, provided that the principles of effectiveness and equivalence are observed.
5. Article 221(1) of the Customs Code must be interpreted as meaning that the communication of the amount of duty to be recovered must have been preceded by the entry in the accounts of that amount by the customs authorities of the Member State concerned and that, if it has not been entered in the accounts in accordance with Article 217(1) of that statute, that amount may not be recovered by those authorities, which however remain entitled to proceed with a new communication of that amount, in accordance with the conditions laid down by Article 221(1) and the limitation rules in force at the time the customs debt was incurred.
6. Although the amount of import duty or export duty remains 'legally owed' within the meaning of Article 236(1), first subparagraph, of the Customs Code, even where that amount was communicated to the person liable without having been entered in the accounts beforehand in accordance with Article 221(1) of that regulation, the fact remains that, if such communication is no longer possible because the period laid down in Article 221(3) of that regulation has expired, that person must in principle be able to obtain repayment of that amount from the Member State which levied it.

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EU temporarily withdraws GSP+ trade benefits from Sri Lanka

EU Member States have decided to withdraw preferential tariff benefits to Sri Lanka under a special incentive arrangement for sustainable development and good governance, known as GSP+. This decision follows an exhaustive investigation by the Commission, which identified significant shortcomings in respect of Sri Lanka's implementation of three UN human rights conventions relevant for benefits under the scheme. It is in line with the proposal of the Commission of December 2009.

The suspension of GSP+ benefits is temporary, as the overarching EU objective remains to use GSP+ as an incentive to underpin improvements in the human rights situation in Sri Lanka. The suspension will only take effect in six months time, giving Sri Lanka extra time to address the problems identified. At that time, Sri Lankan exports would revert to standard GSP preferences as provided for in the current GSP Regulation. These preferences will still be more generous for key Sri Lankan exports such as clothing than those provided by other major developed countries.

The EU remains open to a full dialogue with the government of Sri Lanka, above all to encourage it to take the necessary steps towards an effective implementation of GSP+-relevant human rights conventions. The EU will closely monitor and regularly re-evaluate developments in this area. Once sufficient progress has been made, the Commission will propose to EU Member States that the decision taken on 15 February 2010 be reversed and GSP+ benefits restored.

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Secure trade and 100% scanning of containers

On 11 February 2010, the Commission published a working document concerning secure trade and 100% scanning of containers. Below is a summary of the working document and the conclusions reached.

The EU shares the concerns of the United States about the security of the supply chain and is strongly committed to implementing measures enhancing security in line with agreed international standards. The United States legislation 'Implementing Recommendations of the 9/11 Commission Act of 2007' unilaterally introducing a 100% scanning requirement for US-bound maritime cargo at export, to be implemented by 1 July 2012, does not meet this requirement and may become a new trade barrier.

In April 2008, the Commission, with support from EU Member States and the business community, carried out a preliminary impact assessment of 100% scanning. This was sent to US Customs Border Protection ('CBP') and included in the report of the Department of Homeland Security to the US Congress in June 2008. The paper pointed out that, if 100% scanning at export were implemented in European ports, it would be excessively costly, would be unlikely to improve global security, would absorb resources currently allocated to EU security interests, and would disrupt

trade and transport within the EU and worldwide. As an alternative, priority should be given to investing in enhancing multilayered risk management systems for targeting and inspecting dangerous cargo, and to strengthening international cooperation to facilitate this process.

The Commission has considered it necessary to back this preliminary assessment with hard data. It has conducted three complementary studies on the expected impact on EU customs, on maritime transport and on trade. The studies have confirmed that implementation by the EU would have serious repercussions for European and, indeed, global maritime transport and trade as well as welfare:

Firstly, European port procedures and regulations would have to be fundamentally redesigned with a significant financial burden:

- A total of EUR 430 million would be required for investments for scanning and radiation detection including significant changes in infrastructure to create space for extra facilities for ports and terminals involved in US bound container traffic.
- Operational costs in European ports would rise by more than EUR 200 million annually, including expenditure for 2200 extra staff.

Secondly, transport would be disrupted and costs would increase significantly:

- Direct transport costs of US-bound consignments would increase by about 10%.
- Ports unable to implement 100% scanning would lose access to the US market; this would tend to increase congestion and environmental costs for other ports.

Thirdly, the annual welfare loss from trade disruption could be high. The 100% scanning requirement could lead to a loss of some EUR 10 billion for the EU and US combined. Further rough calculations suggest that the worldwide loss due to the scanning law could be in the order of EUR 17 billion. Moreover, if, following the US model, 100% scanning were replicated on a world scale to address the 'bomb in the box' as a worldwide threat, the annual welfare loss for the world might reach EUR 150 billion.

In the absence of a convincing demonstration that 100% scanning at export will produce significant global supply-chain security benefits, incurring such costs is not justified.

In addition, there are other fundamental questions and difficulties to take into account:

- Scarce European financial and human resources would have to be diverted away from European security objectives and measures to satisfy US requirements; this disruption of security policy would be difficult to justify to European citizens.
- Authorities might focus excessively on satisfying the 100% scanning requirement; this could lead to a false sense of security and to neglecting other security risks (chemical, biological) as well as the use of other modes of transport.
- The EU would adhere to a unilateral US requirement without a reciprocal commitment by the US.

Even on the hypothetical assumption that 100% scanning was positive for US security, it would be extremely difficult to argue the case for European security. The EU does not contemplate implementing 100% scanning of containers at export. It advocates shifting the policy focus towards developing a package of measures to cope with the wide diversity of security risks and address supply chain security not only from a national perspective but also as a global and complex challenge.

The alternative package should be based on the principle that all exports, as well as imports, undergo comprehensive and effective multi-layered risk management processes using a range of methods and technologies commensurate to the risks associated with specific consignments. No consignment should go unchecked.

Following the 'security amendment' of the EU Customs Code, the EU has the legislative and administrative framework required for the implementation of this policy. This combines electronic systems and practical tools of collection of information prior to arrival to and departure from the EU; enhancement of risk analysis and risk management procedures; development of new technologies; and coordination of enforcement by customs authorities in all EU Member States. These tools will be deployed fully by the end of 2010; they supplement the enforcement by the EU of one of the strictest legislations worldwide in maritime security.

Moreover, as an integral part of the multi-layered risk management policy, it is appropriate to intensify international cooperation to maximise effectiveness and efficiency. Jointly, the EU and the US can play an important role: they are one another's main trading partners and account for more

than one third of world trade and investment; they have a responsibility and interest in promoting multilateral cooperation to develop more effective global customs security standards and policies.

We may also consider strengthening bilateral cooperation on a number of issues:

- Ensuring effective collection of quality data;
- Exchanging relevant security information;
- Implementing mutual recognition of trade partnership programmes and, later, of other security controls;
- Developing and spreading utilisation of new security technologies, including scanning;
- Building capacities and training of staff for effective implementation.

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EU Council adopts new directive on excise duties on cigarettes

On 8 February 2010, the EU Council adopted a directive updating EU rules on the structure and rates of excise duties on cigarettes and other tobacco products. The directive is intended to ensure a higher level of public health protection by raising minimum excise duties on cigarettes, whilst bringing the minimum rates for fine-cut tobacco gradually into line with those for cigarettes. The outcome of a fourth four-yearly review of tobacco taxation under directives 92/79, 92/80 and 95/59, it is aimed at modernising and simplifying the rules and making them more transparent.

The new directive includes the following provisions:

- *Cigarettes*: the EU Council decided to increase, by 1 January 2014, the monetary minimum excise rate to EUR 90 per 1000 cigarettes and the proportional minimum to 60% of the weighted average sales price, from EUR 64 per 1000 and 57% at present;
- *Transitional period for cigarettes*: the new rules allow for transitional arrangements until 1 January 2018 for Member States that have not yet achieved, or only recently achieved, the current minimum rates, namely Bulgaria, Greece, Estonia, Latvia, Lithuania, Hungary, Poland and Romania;
- *Quantitative restrictions for cigarettes*: the directive allows Member States not benefiting from the transition to impose a quantitative limit of at least 300 cigarettes on the number of cigarettes that may be brought into their territory from member states applying transitional arrangements. It also allows member states applying those arrangements, once their rates have reached EUR 77 per 1000 cigarettes, to apply quantitative limits with regard to member states whose rates have not yet reached an equal monetary level;
- *Fine-cut tobacco*: the EU Council decided to increase the minimum excise duty requirements for fine-cut tobacco as follows: member states will comply with either a proportional minimum or a monetary minimum, amounting to 40% of the weighted average sales price and EUR 40 per kg on 1 January 2011, 43% and EUR 47 /kg on 1 January 2013, 46% and EUR 54 /kg on 1 January 2015, 48% and EUR 60 /kg on 1 January 2018 and 50% and EUR 60 /kg on 1 January 2020.

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Success in the fight against counterfeiting: results of ASEM joint customs operation

A joint customs operation, coordinated by the EU and the OLAF (codenamed Diabolo II, following the successful 2007 joint customs operation Diabolo I) and conducted in the framework of the Asia–Europe meeting (ASEM), has led to the seizure of more than 65 million counterfeit cigarettes and 369,000 other counterfeit items (shoes, toys, cameras, headphones, hats, caps, gloves, handbags, etc.) representing over 20 different trademarks. The operation also resulted in further international investigations into criminal activities. Final results of this operation were released on 29 January 2010 at a debriefing meeting held in Tokyo. The ASEM, with its 45 European and Asian members, has again proved an effective platform for cooperation among customs administrations.

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5. Capital Duty

Preliminary questions referred to ECJ on the compatibility of Italian annual duty with the Capital Duty Directive (*Grillo Star Fallimento*)

On 13 November 2009, the District Court of Cosenza referred the following preliminary questions to the ECJ in the *Grillo Star Fallimento* case (C-443/09).

'Are the criteria for determining the annual duty referred to in Article 18(b) of Italian Law No 580 of 29 December 1993, as provided for in Article 18(3), (4), (5) and (6) thereof, inconsistent with Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital, in so far as the duty cannot be covered by the exceptions provided for in Article 6(e) of that directive?

In particular:

1. Does the annual duty, which is to be determined by reference to 'the budgetary resources needed in order for the chambers of commerce system to be able to carry out the services which it is under a duty to provide throughout the national territory', constitute a duty paid by way of fees or dues?
2. Does the provision for a 'balancing fund', which is intended to harmonise throughout the national territory the performance of all the 'administrative functions' entrusted by law to the chambers of commerce, preclude the possibility that the annual duty is a duty paid by way of fees or dues?
3. Is the power conferred on the individual chambers of commerce to increase the amount of the annual duty by up to 20% for the purposes of cofinancing initiatives aimed at increasing production and improving the economic conditions of the territorial unit under their responsibility consistent with that annual duty being a duty paid by way of fees or dues?
4. Does the fact that no methods have been specified for determining the total budgetary requirements for the maintaining and the updating by the chambers of commerce of registrations and notes in the register of companies mean that the annual duty cannot be a duty paid by way of fees or dues?
5. Is the fact that the annual duty is determined on a flat-rate basis, with no provision for checking at 'regular intervals' that it appropriately reflects the average cost of the service, consistent with the annual duty being a duty paid by way of fees or dues?'

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