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1. Seminar: From Marks & Spencer to X Holding

Seminar 'From Marks & Spencer to X Holding: the future of cross-border group taxation'

The Amsterdam Centre for Tax Law ('ACTL') of the University of Amsterdam is organising the seminar 'From Marks & Spencer to X Holding: the future of cross-border group taxation'. The seminar will be held on 28 April 2010, in Amsterdam, at the Royal Netherlands Academy of Arts and Sciences.

Loyens & Loeff is sponsoring this seminar, which will gather experts from the Netherlands and across Europe to debate cross-border group taxation, such as the recent ECJ decision in the X Holding case, the possible impact on the Dutch fiscal unity and in the UK (considering both the Marks & Spencer case and the Phillips Electronics case) and future trends of cross-border group taxation (with special attention to Danish cross-border group taxation, group taxation in the VAT and group taxation in the CCCTB).

For more information, please visit the ACTL website: www.jur.uva.nl/actl

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2. Top News

CJ considers that the Netherlands rules providing for option to be taxed as resident cannot form a justification of legislation which is incompatible with EU law (*Gielen*)

Following the Opinion of Advocate General Colomer dated 27 October 2009, the CJ issued its judgment in the *Gielen* case (C-440/08) on 18 March 2010. The CJ considered that the Netherlands rules providing for the option to be taxed as resident cannot form a justification for legislation which is incompatible with EU law.

A non-resident self-employed individual (the 'Interested Party'), who was a resident of Germany, had a permanent establishment in the Netherlands. Although in the relevant tax year the Interested Party had spent more than 1,225 working hours in his business, he had spent less than 1,225 hours in his permanent establishment located in the Netherlands. In his tax return filed in the Netherlands, the Interested Party deducted an amount, which is granted to entrepreneurs who spend more than 1,225 working hours in their business. The tax inspector refused to grant this deduction, since the taxpayer had spent less than 1,225 working hours in the Netherlands. The Interested Party disagreed with this approach.

Following litigation, the Netherlands Supreme Court referred the preliminary questions of whether this difference of treatment was precluded by Article 49 TFEU (former Article 43 EC) and whether a restriction (if present) can be removed as a non-resident can opt to be taxed as a resident taxpayer.

The CJ ruled that the Netherlands legislation resulted in a different treatment of non-residents, as

non-resident entrepreneurs were required to work for at least 1,225 hours in the Netherlands in order to benefit from the deduction for the self-employed, whereas residents could take into account both the number of hours worked in the Netherlands and abroad to meet that threshold. In addition, the CJ noted that the Netherlands legislation did not concern the taxpayer's personal and family circumstances. Therefore, in respect of the deduction at issue, the situation of a non-resident self-employed individual was comparable to that of a resident self-employed individual, in the light of the CJ's judgment in the *Gerritse* case (C-234/01). Accordingly, the CJ deemed the provision at issue discriminatory given that, unlike residents, non-resident self-employed individuals could not take into account the number of hours worked abroad, in order to claim the deduction.

The CJ then further examined whether the discriminatory treatment of non-residents could be justified by the option to be taxed as a resident taxpayer, which was available to non-residents. The CJ indicated that the fact that a national scheme which restricts the freedom of establishment is optional does not mean that it is not incompatible with EU law, based on paragraph 162 of its judgment in the *Test Claimants in the FII Group Litigation* case (C-446/04). According to the CJ, the option was not capable of neutralizing the discriminatory treatment of non-residents.

Preliminary comments

Although it is interesting to see that the CJ considers the Netherlands provision at issue in breach of the freedom of establishment, the most important part seems to be where the CJ notes that the option to be taxed as a resident taxpayer cannot justify the discriminatory provision. This is a very important decision, as quite often the view has been circulated informally that the option could justify infringements. The option itself is quite difficult to apply, *inter alia*, due to the administrative burden and a disadvantageous claw back measure. As an aside, that also justifies the question of whether the provision in itself is in accordance with EU law.

In all events, the option to be taxed as a resident taxpayer cannot justify an infringement, according to the CJ. This can lead to the follow-up question, whether that sheds new light on potential infringing provisions in, for instance, the Personal Income Tax Act 2001 (*Wet inkomstenbelasting 2001*). This, of course, is to be determined on a case-by-case basis, but it can be said that certain exemptions granted only to resident taxpayers are suspect. Caution has to be applied, however, as in general, comparability between non-resident individuals and resident individuals only seems present if the taxpayer's personal and family circumstances are not concerned (if personal circumstances are concerned, the 90% *Schumacker* criterion applies). In Parliament, the *Gielen* case has already attracted attention, as Parliament member De Nerée tot Babberich has asked the Minister of Finance to provide feedback on the potential implications of the *Gielen* case to the Personal Income Tax Act 2001 (*Tweede Kamer 29 maart 2010, 2010Z05544*).

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Commission takes Portugal to the CJ on exit taxes on companies (*Commission v Portugal*)

On 8 October 2009, the Commission decided to refer Portugal (as well as Spain) to the CJ (see EU Tax Alert, edition 71, October 2009). The case is now pending as *Commission v Portugal* case (C-38/10) and concerns the incompatibility with EU law of the Portuguese tax provisions, which impose an exit tax on companies which cease to be resident in Portugal.

Under the Portuguese tax legislation in force since 1 January 2006 (as from January 2010, Articles 83, 84 and 85 of the Portuguese Corporate Income Tax Code), the transfer of the seat and place of effective management of a Portuguese company to another Member State or the ceasing of activities of a permanent establishment in Portugal or the transfer of its Portuguese located assets abroad gives rise to the following consequences:

- the basis of assessment for the year in which the event takes place includes unrealized capital gains which correspond to the difference between the market value of the assets of the company at the date of the transfer and their net book value;
- shareholders are taxed by the difference between the market value of the company's net assets at the date of the transfer and the acquisition price of the respective shareholdings.

Considering that the taxation of the unrealised capital gains occurs only in the cases where the company transfers its registered office and place of effective management out of the Portuguese territory or when it transfers assets to another Member State (and not where the transfers occur within the Portuguese territory or the assets remain connected to a permanent establishment in Portugal), the Commission understands that such provisions are in breach of the freedom of establishment set forth in Article 49 TFEU.

According to the Commission, the possible justifications to be pointed out by Portugal for charging taxes on the exit of companies to other Member States do not comply with the principle of proportionality as interpreted by the CJ:

- in what refers to the need to ensure the rights of certain persons (notably creditors, minority shareholders and tax authorities), the Commission considers that Portugal could determine the value of the unrealised capital gains which it seeks to keep within its fiscal sovereignty, but that should not lead to immediate tax payment nor to any other conditions related to the deferral of such payment;
- regarding the objective to ensure the effective fiscal supervision and combat tax avoidance, the Commission is of the view that such objectives are legitimate but can be pursued by less restrictive means using Council Directive 77/799/EEC of 19 December 1977, concerning mutual assistance by the competent authorities of the Member States in the area of direct taxation (the 'Mutual Assistance Directive') and the Recovery Claims Directive, recently amended upon the approval of the EU Council of 16 March 2010 (see above in this EU Tax Alert edition).

Accordingly, the Commission is of the view that the Portuguese legislation goes beyond what is necessary to attain the said objectives.

Preliminary comments

The most interesting parts of this reference are the main arguments put forward by the Commission to tackle the Portuguese exit taxes provisions on companies, as described above. The outcome of this case will be most relevant as some other jurisdictions provide for similar rules for exit taxes on companies. In that regard (and aside from Spain), the Commission recently issued a reasoned opinion (see below in this edition of the EU Tax Alert) to Belgium, Denmark and the Netherlands.

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Commission requests Belgium, Denmark and the Netherlands to change restrictive exit tax provisions for companies and closes a similar case against Sweden

On 18 March 2010, the Commission formally requested Belgium, Denmark and the Netherlands to change tax rules which impose an immediate exit tax when companies transfer their seat or assets to another Member State. The request takes the form of a reasoned opinion (the second step of the infringement procedure provided for in Article 258 TFEU) and the Commission may decide to refer the cases to the CJ if there is no satisfactory reaction to the reasoned opinions within two months.

The incriminated provisions are the following:

- in Belgium, articles 208, 209 and 210, paragraph 1, point 4 of the Income tax code (CIR92), which provide for immediate taxation of capital gains in case the fiscal residence of a company is changed to outside Belgium;
- in Denmark, Section 7A of the Danish Corporate Tax Act, providing for immediate taxation of capital gains on assets transferred outside Denmark;
- in the Netherlands, articles 3.60 and 3.61 of the Income Tax Act 2001 and articles 15c and 15d of the Corporate Tax Act 1969, which provide for exit taxation of non-incorporated businesses and companies.

The Commission considers that such exit tax rules are likely to dissuade businesses and companies from exercising their right of freedom of establishment and constitute restrictions of Article 49 TFEU. The Commission's opinion is based on the ECJ case law in *De Lasteyrie du Saillant* case (C-9/02) and in the *N* case (C-470/04), and on the Commission's Communication on exit taxation (COM(2006)825) of 19 December 2006. Immediate taxation of accrued but unrealised capital gains at the moment of exit is not allowed if there is no similar taxation in comparable domestic situations. It follows from the ECJ case law that the Member States have to defer the collection of their taxes until the moment of actual realisation of the capital gains. The Commission had already referred Spain and Portugal to the then ECJ for similar exit tax rules (see EU Tax Alert, edition no. 71, October 2009) and sent a reasoned opinion to Sweden (see EU Tax Alert, edition no. 59, October 2008). The case against Sweden was closed, since Sweden complied with the Commission's request.

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3. State Aid/WTO

CJ prevents stay of recovery order by national court (*CELF, en liquidation, and ministre de la Culture and de la Communication*)

In its decision in the *CELF* case (C-1/09) of 11 March 2010, the Court of Justice of the European Union ('CJ') stated that the Court of First Instance's ('CFI') annulment of a previous positive decision by the Commission does not allow a national court to stay its own decision on potential recovery of aid that has been granted unlawfully. This would render the protection of the competitor's rights under Article 108(3) TFEU (former Article 88(3) EC) ineffective. In this particular case, the Commission took three positive decisions, each of which was subsequently annulled by the CFI. The CJ clarified that this was not an exceptional situation that may warrant a limitation of a recipient's obligation to repay any such aid. On the contrary, this being rather unusual should have increased the recipients doubts in respect of the compatibility of the aid received, thus the CJ.

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Appeals on new decision on extending the Belgian coordination regime declared inadmissible (*Centre de coordination Carrefour v Commission and Forum 187 v Commission*)

In 2006, the then ECJ annulled a Commission decision that ordered the phase-out of the Belgian coordination centres regime because the phase-out was too restrictive in respect of those companies whose previous licence had expired before 2010, while companies who had received an extension to such date prior to the opening of the formal investigation were allowed this phase-out.

In a new 2007 decision, the Commission allowed for an extension of licences up to the end of 2005 for those companies whose licence had expired shortly after its initiating a formal investigation in 2003, in order to allow for a reasonable transition period as required by the then ECJ. However, Carrefour's coordination centre – the applicant – was refused renewal of its licence by the Belgian authorities for the period after 2005. According to the Commission, this was a unilateral choice made by Belgium, which was not forced to do so under EU law. At the time, Carrefour had requested the Belgian government for an extension, the Commission's original 2003 extension had been suspended by the CFI and the new contested decision had not yet been taken. Yet, the Belgian government chose not to extend these licences despite the fact that it did so in other cases.

As a result, on 18 March 2010, the General Court ruled in *Centre de coordination Carrefour v Commission* (case T-94/08), as argued by the Commission, that Carrefour's coordination centre had no legitimate interest in bringing the appeal against the Commission's decision setting the 31 December 2005 deadline, since it failed to lodge objection with the Belgian court against the decision of the Belgian tax authorities to maintain that deadline. Since it was already in the new (post BCC) situation when litigating against the Commission's decision, a transitional period would be devoid of purpose.

On the same date, 18 March 2010, an appeal in respect of the same decision made by the applicant in the *Forum 187 v Commission* case (T-189/08) was also declared inadmissible. From the 10 centres represented by Forum 187, the General Court ruled that one was not properly represented by Forum 187 at the time of filing the application. As for the remaining nine centres, they were found to have no legal standing on similar grounds as Carrefour's centre. As a result, Forum 187 had no legal standing either.

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Commission brings Greece to CJ for non-recovery of fiscal aid

In 2007, the Commission ordered Greece to recover benefits from a series of sectors that were allowed to deduct 35% of profits from their taxable base in order to finance certain future expenses, mainly in 2004. Since the Greek authorities have failed to provide any information on the actual recovery of aid of several hundreds of companies, Greece has been referred to the CJ as a first step in a non-compliance procedure.

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Commission investigates German loss carry-forward for ailing companies

On 24 February 2010, the Commission opened a formal investigation into a non-notified German

rule that would allow for a loss carry-forward after a takeover of an ailing company in order to facilitate its restructuring. Normally, such carry-forward would be limited or even fully blocked after a regular takeover. The rule was made permanent by the German Government at the end of 2009, after its introduction as a temporary measure in July 2009 with retroactive effect to January 2008. While the rule might violate the EU's framework on rescue and restructuring aid given that that healthy companies would be excluded from loss carry-over after a takeover, we wait with anticipation to see whether the rule will be deemed general in nature, making it non-selective.

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Commission opens formal investigation into Finnish capital gains tax exemption on agricultural land

The Finnish government plans to grant temporarily a (retroactive) tax relief to natural persons and to the estates of deceased persons in respect of capital gains accruing from the selling of agricultural land. Relief will be granted if such land is sold in 2009 or 2010 to an active farmer who will continue to cultivate the land. As this benefit may stimulate the restructuring of farms and their increase in size, the Commission has opened a formal State aid investigation into this benefit, since besides the sellers, the buyers may also profit indirectly from this regime. The opening of this procedure was announced on 24 March 2010.

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Cyprus tonnage tax approved

On 24 March 2010, the Commission approved a new tonnage tax regime proposed by Cyprus, replacing its corporation tax for international maritime transport and certain tugboats, dredgers and cable-layers afloat. The regime will only be applicable to shipping activities. The Cypriot maritime industry is one of the EU's largest. With this tonnage tax, Cyprus joins a long list of Member States that provide for a similar regime.

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EFTA Surveillance Authority finds Liechtenstein tax exemptions on captive insurance companies incompatible State aid

On 24 March 2010, the EFTA Surveillance Authority concluded, after a formal investigation, that tax exemptions applicable to captive insurance companies in Liechtenstein since 2001 are unlawful State aid measures incompatible with the EEA Agreement and must be re-paid to the Liechtenstein Government. The EFTA Surveillance Authority accepted that such companies may have had legitimate expectations that the aid was lawful when the measures were introduced in January 1998, but it concluded that, by the time of publication of the Commission's decision to open a formal investigation into the Finnish captive insurance tax measures on 6 November 2001, it should have been clear that the tax exemptions may involve incompatible State aid. It has therefore ordered that all aid paid from that date onwards must be recovered.

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4. Direct Taxation

ECOFIN adopts directive on mutual assistance for the recovery of taxes

During the ECOFIN meeting held in Brussels on 16 March 2010, the EU Economic and Financial Affairs Council adopted Council Directive 2010/24/EU on mutual assistance for the recovery of taxes aimed at better clamping down on tax evasion by strengthening mutual assistance between Member States in the recovery of taxes, published in the Official Journal of the European Union on 31 March. The Directive's main objective is to better fulfil the Member States' needs with regard to the recovery of taxes, providing an overhaul of Directive 76/308/EEC of 15 May 1976, subsequently codified by Council Directive 2008/55/EC of 26 May 2008 (the 'Recovery Claims Directive'), on the basis of which the Member States have engaged in mutual assistance since 1976.

National provisions on tax recovery are limited in scope to national territories, and fraudsters have taken advantage of this to organise insolvencies in Member States where they have debts. Therefore, Member States increasingly request the assistance of other Member States to recover taxes, but existing provisions have only allowed a small proportion of debts to be recovered. The Recovery Claims Directive is designed to provide for an improved assistance system, with rules that are easier to apply, also with regard to information held by banks and other financial

institutions. It provides for more flexible conditions for requesting assistance and requires information to be exchanged spontaneously.

The new proposed measures include the following:

- extension of the scope of mutual assistance, covering all taxes and duties levied by or on behalf of Member States' territorial or administrative subdivisions, including the local authorities, as well as compulsory social security contributions, refunds, interventions and other measures;
- better exchange of information, including the option of officials from one Member State being able to participate actively in enquiries carried out by another Member State, in addition to the existing spontaneous exchange of information;
- simplification of the procedure for the notification of documents;
- several provisions concerning more effective recovery and precautionary measures;
- uniformity and simplification of the general rules governing requests in relation to forms, means of communication, use of languages, etc.

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EU Parliament approves proposed EU Council Directive on taxation of cross-border mergers

On 24 February 2010, the EU Parliament published in the EU Official Journal its legislative resolution of 13 January 2009, approving a proposed EU Council Directive on the taxation of cross-border mergers, divisions, transfers of assets, and other restructurings, and on cross-border relocations of a *Societas Europaea* or European cooperative society within the EU.

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European Parliament favours financial transaction tax to dampen speculation and pay for the crisis

In an oral question and resolution on a financial transaction tax adopted on 23 February 2010, members of the European Parliament urged the Commission and the EU Council to look at how the tax could be used to contribute to the EU budget and to help developing countries fund the fight against climate change as well as to finance development cooperation. The concept of such a tax has been floated by economists and politicians around the world for years. Colloquially called the 'Tobin Tax' after the economist who put forward the idea, the economic crisis has given it a new lease of political life.

On 10 March 2010, members of the European Parliament approved a resolution on a financial transaction tax by a vote of 536 to 80, with 33 abstentions, calling for the implementation of a global financial transaction tax to discourage excessive risk-taking by financial institutions and to ensure that the financial sector pays for the damage caused by the financial crisis, since the costs of the crisis are being borne by taxpayers. The Commission was asked to carry out an impact assessment of such a tax, to see how far it could contribute to stabilizing financial markets and prevent a similar crisis by targeting 'undesirable' transactions. While preferring a global approach throughout the G20, the Committee believes that the pros and cons of introducing a purely EU-wide tax should be weighed up, even if the EU's main partners do not introduce such a tax. The Committee stressed that any such tax must not harm the banking system's ability to perform its vital role of financing real economy investments and must not encourage the migration of capital. Furthermore, negative repercussions on small businesses and individual investors must be avoided.

On 25 March 2010, members of European Parliament's special Financial, Economic and Social Crisis Committee debated the rationale behind a possible financial transaction tax and adopted a new resolution with 283 votes in favour, 278 against and 15 abstentions. They are convinced that Member States must not only deliver on their international aid pledges, but also bring in a financial transactions tax and consider a possible temporary debt moratorium, to help developing countries to cope with the effects of the global financial and economic crisis. Furthermore, they called upon Member States and the Commission to agree, within the EU Emission Trading System framework, to devote at least 25% of the revenues generated from the auctioning of carbon emission allowances to support developing countries in coping with climate change.

The members of European Parliament also stressed the need to counteract tax havens, tax fraud and illicit capital flows and called for a new binding, global financial agreement which forces transnational corporations, including their various subsidiaries, to disclose automatically the profits made and the taxes paid on a country-by-country basis, so as to ensure transparency about sales, profits and taxes. One very direct consequence of the crisis for developing countries is the drop in

remittances, the money sent home by migrants working abroad. To help remedy this, members of the European Parliament asked Member States and recipient countries to facilitate the delivery of remittances and to work towards the reduction of their costs and welcomed the G8 commitment made in L'Aquila to reduce the cost of remittance transfers from 10% to 5% in five years.

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EU Tax Commissioner presents tax reform objectives

On the opening and closing speeches delivered during the fourth Brussels Tax Forum, on 1 and 2 March 2010, EU Tax Commissioner Algirdas Šemeta invited the Member States to take the occasion of the aftermath of the global economic and financial crisis to reconsider the EU tax systems and to use taxation as a tool to promote stability within the internal market. He listed four objectives of the EU tax reform, as follows.

1. to create a tax environment in which citizens and businesses (especially SMEs) can reap the benefits of the single market, by (i) designing post-crisis exit strategies in the field of taxation, (ii) reducing compliance costs and administrative burden, (iii) implementing rules for computing tax bases that are common for all Member States, as envisaged by the Common Consolidated Corporate Tax Base initiative, (iv) revisiting the approaches chosen in the excise duty area, and (v) enhancing the effectiveness of the VAT system.
2. to address the quality of the EU tax systems from a smart green and inclusive growth prospective, which might eventually result in changing certain provisions such as (i) differential fiscal treatment of debt and equity that might lead to excessively leveraged firms, (ii) deductions of interest potentially leading to over-indebted households and housing bubbles, (iii) excessive scope for tax arbitrage opportunities which would affect the risk-taking of certain actors in the financial markets, and (iv) undue or inefficient reductions, exceptions or exemptions which are not economically justified and may even run against their original objective.
3. to meet the EU environmental goals and remaining competitive at a global level, by pushing the finalisation of the ongoing work on the revision of the Energy Taxation Directive so as to (i) introduce framework rules for CO2 taxation for emitters not included in the EU emission trading system, and (ii) streamline remaining energy taxation to make it neutral and eliminate distortions.
4. to reinforce coordination of actions amongst the Member States for the successful implementation of the EU tax reform, e.g. (i) on the fight against tax fraud and evasion, (ii) on good governance both at EU and international levels, and (iii) on a number of key proposals currently on the table of the EU Council.

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EU Joint Transfer Pricing Forum meeting of 4 February 2010

Part of the underlying documentation on topics discussed during the EU Joint Transfer Pricing Forum ('JTPF') meeting held on 4 February 2010 has been recently published on the Commission's website. The main points covered in the published documents are summarized below.

Report on guidelines on low value adding intra-group services

This JTPF (draft) report covers intra-group services of an administrative nature, auxiliary, or of a routine nature and not generating high value adding to either the provider or recipient, regardless of whether or not they generate a high turnover. This paper concentrates on multiple low-value-adding services that will often be provided through a single contract and generally involving a cost pool and allocation keys. It endorses the OECD principles applicable to any provision of intra-group services, i.e. all appropriate costs are included, inappropriate costs are excluded and an arm's length price and margins are applied. This paper suggests alternative approaches (as opposed to a full audit) that will achieve an appropriate level of confidence that the arm's length principle has been applied to centrally provided intra-group services, seeking for a balance between available resources, compliance burden and potential level of adjustment.

Report on non-EU transfer pricing triangular cases

This JTPF report provides some non-prescriptive suggestions regarding dispute resolution relating to transfer pricing cases in the case of non-EU triangular transfer pricing cases, without any prejudice to whether such cases may be covered in whole or in part by the EU Arbitration Convention. A non-EU triangular case is defined as a case where two EU Member States involved in a Mutual Agreement Procedure ('MAP') cannot fully resolve any double taxation arising in a transfer pricing case when applying the arm's length principle because an associated enterprise – identified as being the source of non-arm's length results in a chain of relevant transactions or commercial / financial relations – is located in a third State (i.e. outside the EU). In order to

facilitate the elimination of double taxation, the JTPF considers essential that an extensive network of treaties exists between both Member States and third States situated outside the EU, which contain an effective MAP Article, particularly strengthened by the inclusion of Article 25(5) of the OECD Model Tax Convention providing for mandatory arbitration when the competent authorities cannot reach agreement.

Depending on the facts and circumstances of a particular case, one or more of the following routes to resolution are appropriate:

- Advance Pricing Agreements ('APAs') concluded by the competent authorities, applicable to prospective years and to previous years covered by the pending MAP procedures through an official or informal agreement taking into consideration the roll back possibilities allowed under domestic law;
- Article 25(3) of the OECD Model Tax Convention, where incorporated in the relevant treaties between the parties, providing the option for a trilateral approach to eliminate double taxation;
- extension of the EU Arbitration Convention to a third State situated outside the EU, based upon Articles 35 and 36 of the 1969 Vienna Convention on the Law of Treaties.

The following issues are highlighted in this JTPF report:

- *the role of the taxpayer*: although, in essence, the MAP is a procedure between tax administrations, in view of the specific nature of the non-EU triangular cases, more involvement of the taxpayers in the MAP could be envisaged, e.g. by providing additional information requested and points of factual clarification, to achieve swift resolution. This implies the timely exchange of information and delivery of documentation by all stakeholders, including the tax administrations;
- *coordinated actions between EU competent authorities*: when contacting non-EU competent authorities in order to instigate a procedure to implement efficiently the MAP process;
- *extension of the two-year term*: where appropriate, to give enough time to the competent authorities involved to reach an adequate and acceptable solution, being strongly recommended that parties also agree on the term of the extension of the two-year term in advance, as opposed to an open-ended extension.

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Advocate General analyses compatibility of the Portuguese provisions on the taxation of outbound interest payments to financial institutions (*Commission v Portugal*)

On 25 March 2010, Advocate General Kokott issued her Opinion in the *Commission v Portugal* case (C-352/08). This case concerns to the tax provisions on the taxation of outbound interest payments.

As a rule, non-resident lenders are subject to a 20% withholding tax which is levied on the gross income paid by entities located in Portugal. In the case of Portuguese resident financial institutions, however, there is a withholding tax exemption on the interest payments which are taxed exclusively on the net interest at the normal Portuguese corporate income tax rate of 25%. The case was brought by the Commission, which considers these provisions to be in breach of the freedom to provide services and the freedom of capital set forth in Articles 56 and 63 TFEU.

The Advocate General first examined which fundamental freedom should apply, based upon the aim of the regulations at stake. She then stated that, although the rules under analysis apply to all capital income obtained by non-resident entities (which are subject to withholding tax in the same terms as described above), the scope of the pleading at stake only refers to the provision of services, as it deals with the taxation of interest regarding loans granted by financial institutions. Accordingly, and following a similar reasoning to the one adopted by the then ECJ in the *Fidium Finanz* case (C-452/04), she concluded that the predominant consideration was the freedom to provide services rather than the free movement of capital.

Secondly, the Advocate General discussed whether there was indeed a restriction to the freedom to provide services. The argument put forward by the Commission was that the interest received by non-resident financial institutions is subject to a higher taxation than similar income received by resident financial institutions as the former cannot deduct related expenses and are thus taxed on the gross income. For that purpose, the Commission submitted a chart with an example of calculations and based its conclusions on certain assumptions which, in its view, sustained that non-resident institutions were subject to an unfavourable treatment when compared with resident ones. Advocate General Kokott considered, however, that the Commission had not followed the

rules on the burden of proof, which require the submission of all the facts which allow to unequivocally concluding in the terms argued by the Commission. In the present case, the tax burden is based on two different factors: the tax rate and the tax base. Therefore the question on whether non-resident financial institutions – although subject to a lower tax rate – end up being taxed more heavily than resident ones, depends on the comparison of the range of the effective tax base of both resident and non-resident financial institutions. For Advocate General Kokott, the evidence of such facts may not rely exclusively on hypothetical calculations. The Commission should have rather submitted statistical data as well as other relevant factual information in order to support its arguments. Therefore, she concluded that the Commission had not proved the arguments in the pleading, giving a preliminary conclusion that the position of the Commission should not proceed.

Thirdly, the Advocate General considered that a further argument could have been put forward considering that, irrespective of the effective costs of refinancing, the Portuguese rules create an obstacle for non-resident financial institutions to compete with resident ones. When a non-resident financial institution reduces its interest rate – although its refinancing costs are kept unchanged – and accepts obtaining a lower profit margin, the taxation is not reduced in proportion to the profit margin lost, but rather in proportion to the gross amount of the interest lost. In contrast thereto is the case of resident financial institutions which are taxed on net income case where, if the profits are lower, the taxation is also lower. In the end this leads to a situation where non-resident financial institutions are placed in an unfavourable position to compete with resident ones since whenever the profit margins are lower than a certain amount, the cross-border interest payments are subject to a higher tax burden than the ones paid to resident financial institutions. However, the Advocate General pointed out that this argument cannot be considered as it had not been put forward by the Commission.

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Commission requests Germany to amend its anti-abuse provision on withholding tax relief

On 18 March 2010, the Commission formally requested Germany to change its anti-abuse provision on withholding tax relief. The request takes the form of a reasoned opinion, i.e. the second step of the infringement procedure provided for by Article 258 TFEU. If it does not receive a satisfactory reaction to the reasoned opinion within two months, the Commission may decide to refer the matter to the CJ.

The aim of the German anti-abuse provision is to prevent that taxpayers who are not entitled to a withholding tax relief (exemption or refund) can obtain such a relief by means of setting up a foreign company for this sole purpose. With this objective, the German anti-abuse provision denies the tax relief if any of the following conditions are met:

- there is no economic or other relevant reason to establish the foreign company; or
- the foreign company does not earn more than 10% of its gross income from its own economic activity; or
- the foreign company has no adequate business premises for its activities.

The Commission is of the opinion that the contested measure is disproportionate, in particular as regards the second condition listed above, where the possibility to produce proof to the contrary does not exist. Therefore, the German measure goes beyond what is necessary to attain its objective of preventing tax evasion. It should be underlined that the Commission does not criticize the aim of the anti-abuse measure but solely the disproportionate requirements imposed on foreign companies in order to prove the existence of a 'genuine economic activity'.

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Commission requests that Belgium, France, Greece, the Netherlands and Portugal change discriminatory rules

On 18 March 2010, the Commission sent requests to Belgium, France, Greece, the Netherlands and Portugal to change various rules related to direct taxation which are disproportionate and/or discriminatory and infringe upon the fundamental freedoms set out in the TFEU. The requests were sent in the form of reasoned opinions, the second step in the infringement procedure (Article 258 TFEU). If there is no satisfactory reaction from the Member States in question within two months, the Commission may decide to refer the relevant matter to the CJ.

Belgian rules on tax relief for pension savings

The Commission has formally requested Belgium to change an income tax rule which only allows tax relief on pension savings paid to Belgian institutions and, for collective pension savings, only if

they are invested in Belgian funds. Belgium claims that these restrictions are necessary to safeguard the security of monies invested by the pension savers. However, the Commission argues that Belgium could instead make use of the Mutual Assistance Directive as a basis for checking the information provided by foreign providers or funds. Moreover, insured savings are covered by the Third Life Insurance Directive (2002/83/EC). Therefore, the Commission considers the Belgian measures to be disproportionate and an infringement on the freedom to provide services and the free movement of capital (Articles 56 and 63 TFEU).

Belgian requirement for fiscal representatives

The Commission has formally requested Belgium to change a tax provision which requires operators of foreign securities lending systems to appoint a fiscal representative in Belgium. According to the Commission, this requirement goes against the freedom to provide services (Article 56 TFEU), in line with ECJ's judgment of 5 July 2007 in *Commission v Belgium* (C-522/04). As a legitimate alternative to the requirement in question, Belgium could use the Mutual Assistance Directive to ensure the provision of information by operators of foreign securities lending systems. In fact, Belgium would not even have to rely on this Directive, but could directly ask the foreign provider for any information, as is done with domestic providers. The Commission recently sent similar reasoned opinions to Austria (see EU Tax Alert, edition no. 67, June 2009) and Spain (see EU Tax Alert, edition no. 76, February 2010).

French discriminatory taxation of foreign pension and investment funds

The Commission has formally requested France to change its tax rules which discriminate against foreign pension and investment funds. Under these rules, dividends paid to foreign pension and investment funds (outbound dividends) are taxed more heavily than dividends paid to domestic pension and investment funds (domestic dividends). A withholding tax of 25% is levied on dividends paid to pension and investment funds in other Member States or EEA countries (this rate may be reduced by bilateral tax treaties), but no withholding or other tax is levied on domestic funds. The Commission considers this to infringe the free movement of capital (Articles 63 TFEU and 40 EEA). The Commission had sent a reasoned opinion to Poland on similar discriminatory taxation of foreign pension funds and investment funds (see EU Tax Alert, edition no. 67, June 2009).

Portuguese discriminatory taxation of non-resident taxpayers

The Commission has requested Portugal to amend its tax rules for non-resident taxpayers. Non-residents are in certain cases taxed on a gross base and according to flat rates, while residents are taxed on a net base (i.e. they have the right to deduct certain costs) and are taxed according to progressive rates. These differences in treatment may result in a less favourable tax treatment of non-residents than of resident taxpayers, which is contrary to the freedom to provide services and the free movement of capital (Article 63 TFEU).

Dutch tax law on donations, gifts and inheritances to foreign charities

The Commission has formally requested the Netherlands to change its rule that gifts, donations and inheritances to Netherlands and foreign charities can only qualify for tax relief if the charities have been registered with the Dutch tax authorities. The Commission considers that this is unnecessarily restrictive, since it does not allow for the possibility of tax relief in the case the foreign charity has not registered in the Netherlands. Nothing prevents the Netherlands tax authorities from requiring the taxpayer to prove that the conditions for tax relief have been met. The Commission, therefore, considers the Netherlands rule to be contrary to the free movement of capital (Article 63 TFEU).

Greek tax deduction of medical expenses incurred in another Member State

The Commission has formally requested Greece to change its legislation on the tax deduction of medical expenses incurred in another Member State. Under Greek rules, the deduction is only possible if relevant receipts issued by foreign doctors or hospitals are authenticated by a Greek Consul. If there is no Greek Consul in the other Member State, the authentication may be done by the relevant local authority. No such requirement exists for receipts issued by Greek hospitals and/or doctors. The difference in treatment between medical expenses incurred in Greece or in another Member State, and in particular, the administrative burden caused by authentication by a Greek Consul, may deter Greek residents from exercising their right to receive medical services in another Member State, and therefore, constitutes an obstacle to the freedom to provide services (Article 56 TFEU).

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EFTA surveillance authority issues letter of formal notice regarding compatibility of Norwegian legislation on exit taxes with EEA Agreement

On 10 March 2010, the EFTA Surveillance Authority issued a letter of formal notice to Norway regarding its legislation which imposes immediate exit taxes levied on unrealized capital gains of

companies that transfer their seat or assets and liabilities from Norway to other EEA States, and on unrealised capital gains on the shares of those companies. According to the EFTA Surveillance Authority, by keeping such legislation, Norway has violated the freedom of establishment (Articles 31 and 34 EEA) and the free movement of capital (Article 40 EEA).

According to Norwegian rules, tax free mergers are only available to mergers between domestic companies, whereas cross-border mergers will result in taxation of unrealised gains if the seat of the merged company is in another EEA State. In addition, if a Norwegian company relocates to another EEA State, the company is subject to full taxation of its assets as if they had been realised in Norway, and the shareholders will be taxed on capital gains as if the company had been liquidated there. The tax levied on the exiting company, a company merging with a non-resident company and the shareholders of those companies, is calculated based on the difference between the market value of the assets or shares at the time of the transfer and their acquisition cost or book value. The profit is calculated and deemed earned immediately at the time of exit, and solely as a result of the exit or cross-border merger. If, on the contrary, the company remains in Norway, any profit will not be deemed earned or become subject to taxation until the company actually realises the relevant assets and the shareholders receive dividends or dispose of their shares.

The result is that the Norwegian legislation treats the cross-border movement of a company through transfer or merger as a taxable event, whereas comparable domestic movements or transactions benefit from an advantage in the form of a tax exemption or deferral. Therefore, and by limiting those advantages to companies that remain within Norwegian territory, the EFTA Surveillance Authority considers that Norway restricts the right of establishment of Articles 31 and 34 EEA. With regard to shareholders, these rules that impose an immediate taxation on unrealised capital gains, when a company exits Norway, breach the free movement of capital provided in Article 40 EEA or the right of establishment under Articles 31 and 34 EEA, depending on the holding threshold.

As to possible justifications and the principle of preservation of fiscal territoriality, the EFTA Surveillance Authority stated that no principle of territoriality can be invoked to justify the immediate taxation as the gains can be taxable at a future realisation of the shares of the shareholders who are still under the Norwegian jurisdiction as resident taxpayers. As to companies, the EFTA Surveillance Authority reminded that the existence of less restrictive measures that can ensure that the right to tax is preserved by requesting information from the authorities of the EEA State of establishment, or by requesting the taxpayer to provide the necessary information, notably on the basis of tax agreements containing provisions on information exchange concluded by Norway with all EEA States, except Liechtenstein.

The EFTA Surveillance Authority further considers that certain other features of the Norwegian exit taxation are disproportionate and show the lack of coherence in the Norwegian tax system, e.g. no regard is given to possible reductions in value of the assets after the exit and there is no carve-out gains on assets remaining at a branch or permanent establishment in Norway. Considering the above, the EFTA Surveillance Authority has invited the Norwegian government to submit its observations to the content of this letter of formal notice within two months.

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EFTA Surveillance Authority closes complaint against Iceland on taxation of capital gains from the sale of residential real estate

On 24 March 2010, the EFTA Surveillance Authority decided to close a complaint against Iceland concerning the taxation of capital gains from the sale of owner-occupied residential real estate. Under the Icelandic Act No. 90/2003 on Income Tax, a deferral of the taxation could be granted on the condition that, within two years, the gains were reinvested in comparable real estate located in Iceland. Furthermore, if that real estate was then kept for two years, capital gains from a subsequent sale of the property was tax exempt, provided that the taxable person was resident in Iceland.

The EFTA Surveillance Authority sent Iceland a letter of formal notice on 19 December 2007 and a reasoned opinion on 18 June 2008, concluding that the requirements of reinvestment in Iceland and residence in Iceland constituted restrictions to the free movement of workers in Article 28 EEA, the right of establishment in Article 31 EEA, and the free movement of capital in Article 40 EEA. The ECJ found similar requirements of national reinvestment contrary to EU law and the EEA Agreement in the *Commission v Portugal* case (C-345/05) and the *Commission v Sweden* case (C-104/06).

Iceland amended the relevant legislation by means of Act No. 164/2008, which entered into force on 23 December 2008. Under the new statute, the tax deferral from capital gain tax also covers reinvestment in residential real estate in other EEA States, and residence in Iceland is no longer

required for the purpose of the tax exemption. The Icelandic Government has also informed the Authority that the tax authorities have investigated how many taxpayers had been denied deferral of taxation based on the previous legislation, reviewed their cases and refunded tax where appropriate. Based on the above, the EFTA Surveillance Authority closed the case.

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Compliance Risk Management Guide published

On 25 March 2010, the Commission published a Compliance Risk Management Guide for tax administrations ('Guide') prepared by a Fiscalis Risk Management Project group, as an update of a previous guide of similar nature. Compliance Risk Management is defined as a systematic process in which a tax administration makes deliberate choices as to what treatment instruments could be used to effectively stimulate compliance and prevent non-compliance, based on the knowledge of all taxpayers' behaviour and related to the available capacity. Its aim is to enable a tax administration to accomplish its strategic objectives by facilitating management to make better decisions. The Guide includes a unified view of the relevant factors forming the environment in which Compliance Risk Management takes place and the steps that need to be taken for implementing the process, i.e. identification, analysis, prioritization, treatment and evaluation. The Guide includes various examples provided by the Member States.

The update provides background information, best practices and a framework for the implementation of modern compliance risk management principles for tax administrations and focuses on influencing taxpayer compliance behaviour. In addition, the Guide deals with the organizational factors which must be considered such as corporate governance, organizational culture and human resources. The last chapters explain a risk identification model, which combines levels of knowledge, focus and IT and a brief description of how risk management is handled in various Member States.

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Commission publishes new 'Taxation Papers' on corporate taxation

On 31 March 2010, the Commission published a new 'Taxation Paper' No 21 on 'Taxation and the quality of institutions: asymmetric effects on FDI'. This paper analyzes, both theoretically and empirically, the effect of tax policies and institutional quality on the allocation of FDI, two aspects that the economic literature has extensively investigated, although only in isolation.

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5. VAT

Reverse charge mechanism for carbon emission allowances

On 16 March 2010, the EU Council adopted a Directive on the basis of which Member States are allowed, on an optional and temporary basis, to implement the reverse charge mechanism on greenhouse gas emission allowance trading.

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EU Council agrees on simplified rules for VAT invoicing

On 16 March 2010, pending the opinion of the European Parliament, the EU Council agreed on a draft Directive (7132/2/10) for simplifying the VAT invoicing requirements with regard to electronic invoicing. The draft Directive aims to harmonize the rules. On the basis of the new rules, the tax authorities will have to accept e-invoices under the same conditions as paper invoices, and legal obstacles to the transmission and storage of e-invoices have to be removed.

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CJ decides Netherlands VAT exemptions for supplying staff can be maintained (*Commission v Netherlands*)

On 25 March 2010, the CJ rendered its decision in the *Commission v Netherlands* case (C-79/09). The case concerns an infringement procedure against the Netherlands, in which the Commission claimed that the Netherlands incorrectly granted an exemption from VAT for the supply of staff in the socio-cultural sector, the health sector and the education sector. The CJ indicated that such services were exempt from VAT if the services were closely connected to the respective provisions

of Article 132 (1) EU VAT Directive. In this regard, the criteria as indicated in the earlier *Horizon college* case (C-434/05) have to be met. According to the CJ, the Commission did not demonstrate sufficiently that these criteria had not been met.

The second complaint of the Commission concerned the Netherlands VAT exemption for the supply of staff by public bodies to the 'Euregios' and for the promotion of work mobility. According to the Commission, the activities were not performed in the capacity of a public body as indicated in Article 13 (1) EU VAT Directive. Furthermore, the Commission was of the opinion that it resulted in a significant distortion of competition as indicated in that provision. The CJ ruled that the Commission had not provided the necessary information in order for the Court to be able to decide on this matter and therefore, also rejected the second claim of the Commission.

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CJ rules watching films in private cubicles does not qualify as admission to a cinema (*Erotic Center*)

On 18 March 2010, the CJ rendered its decision in the *Erotic Center* case (C-3/09). Erotic Center BVBA applied a reduced VAT rate on the amounts received for the use of private cubicles for watching films located on the premises of the company. However, the Belgian tax authorities and the Belgian Government argued that the standard rate was applicable, because the activities did not qualify as admission to a cinema. The CJ decided that for activities to qualify as admission to cinemas as indicated in category 7 of Annex H to the Sixth EU VAT Directive, the activities have to be available to the public on prior payment of an admission fee giving all those who paid the right collectively to enjoy the cinematic displays. Therefore, it does not cover the payments made by a customer in order to be able to watch on his own one or more films in private cubicles.

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Advocate General opines exploitation of betting machines not exempted from VAT (*Leo-Libera*)

On 11 March 2010, Advocate General Bot issued his Opinion in the *Leo-Libera* case (C-58/09). According to Article 135 (1) under i of the EU VAT Directive, Member States shall exempt betting, lotteries and other forms of gambling, subject to the conditions and limitations laid down by each Member State. In German VAT law, this exemption has been limited to specified forms of betting and lotteries. Leo-Libera GmbH was of the opinion, however, that the exemption also applied to the exploitation of betting machines. Following a series of proceedings, the German Federal Tax Court decided to refer preliminary questions to the CJ regarding the extent of the discretionary powers that the Member States have for applying this exemption.

The Advocate General concluded that Article 135 (1) under i of the EU VAT Directive did confer such discretionary powers to the Member States that a limitation as included in the German VAT law was allowed. The text of the article did not limit in a quantitative manner the forms of gambling that can be taxed with VAT. Furthermore, in previous case law, the ECJ had decided that the various forms of gambling that are allowed in a Member State did not compete with each other. Therefore, the principle of fiscal neutrality did not prevent Member States from taxing a specified form of gambling with VAT while exempting different forms of gambling.

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Preliminary question referred to the CJ on Belgian reduced VAT rates for construction work (*Knubben Dak- en Leidekkersbedrijf*)

On 11 January 2010, the Belgian Court of First Instance of Brussels referred a preliminary question to the CJ in the case *Knubben Dak- en Leidekkersbedrijf* case (C-13/10). The question concerns the rules on the basis of which a reduced VAT rate on construction work may be applied if the service provider is registered in Belgium as a contractor in accordance with Articles 400 and 401 of the Belgian Income Tax Code. The Court was asked whether such rules are compatible with EU law, and more specifically, the freedom to provide services as provided for in Article 56 EC.

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Commission refers Portugal to the CJ over flat rate scheme applied to farmers (*Commission v Portugal*)

On 16 March 2010, the Commission decided to refer Portugal to the CJ over the flat rate scheme applied to farmers. Under the EU VAT Directive, Member States may apply a flat rate scheme in

order to offset the VAT charged by farmers for supplies and services. Portugal, however, decided to introduce an optional exemption for agricultural activities. Furthermore, farmers are not compensated for input VAT charged to them. The Commission is, therefore, of the opinion that the Portuguese system conflicts with the purpose of the scheme and is not in line with the EU VAT Directive.

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Commission refers Hungary to the CJ over its VAT reimbursement rules (*Commission v Hungary*)

On 18 March 2010, the Commission decided to refer Hungary to the CJ over its VAT reimbursement rules. Under Hungarian legislation, taxable persons may choose to carry forward their excess input VAT to the next period or immediately to claim for a refund. The latter option is only allowed, however, if the input VAT on a purchase has been paid for by the taxable person. Taxable persons whose tax returns consistently show excesses of input VAT are, therefore, *de facto* obliged to carry forward the excess input VAT into the following period. According to the Commission, this regime infringes Article 183 EU VAT Directive and is not in line with the principle of fiscal neutrality.

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Commission refers Poland to the CJ over inclusion of car registration tax in the taxable base on which VAT is calculated (*Commission v Poland*)

The Commission has referred Poland to the CJ in the *Commission v Poland* case (C-288/09), because Poland includes the car registration charge in the taxable base for VAT purposes. The hearing in this case took place on 16 March 2010. According to the Commission, the registration tax levied in Poland is basically identical to the Danish registration tax as examined by the ECJ in the *De Danske Bilimportører* case (C-98/05). In that case, the ECJ decided that the amount of the registration tax must not be included within the taxable amount of the VAT charged on the sale of the vehicle. Since taxable persons can deduct the registration tax in the Polish system, the result is that the registration tax is effectively only levied once. Finally, contrary to the argument put forward by Poland, the Commission takes the view that the person liable to pay the registration tax is the person in whose name the car is registered.

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Commission refers Greece to the CJ over refunding of unduly paid taxes (*Commission v Greece*)

The Commission has decided to refer Greece to the CJ because Greece did not take the appropriate actions to make the refund of unduly paid taxes possible. The decision of the Commission is the follow up of three procedures in which the ECJ ruled that Greece had implemented the EU VAT Directive incorrectly. As a result, VAT had unduly been paid to the tax authorities. In practice, however, Greece did not make it possible to ask for a refund of this unduly paid VAT.

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Commission asks France to change its exemption of supplies related to ships

On 18 March 2010, the Commission sent a reasoned opinion (second step of the infringement procedure) to France requesting France to change its legislation with regard to the VAT exemption for supplies related to ships. The French exemption applies to all ships used for the transport of passengers and commercial activities, instead of to vessels used for navigation on high seas. France has two months to amend its legislation, otherwise the Commission may decide to refer the case to the CJ.

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6. Customs Taxes and Excise Duties

CJ rules on infringement resulting from fixed minimum retail prices for cigarettes (*Commission v France, Austria and Ireland*)

On 4 March 2010, the CJ rendered its decision in the cases *Commission v France, Austria and Ireland* (C-197/08, C-198/08 and C-221/08), concerning the fixing of minimum prices for cigarettes

and other tobacco products. The CJ ruled that, by adopting and maintaining in force a system of minimum prices for the retail sale of cigarettes released for consumption and a prohibition on selling tobacco products 'at a promotional price which is contrary to public health objectives', France, Austria and Ireland have failed to fulfil their obligations under Article 9(1) of Council Directive 95/59/EC of 27 November 1995 as amended by Council Directive 2002/10/EC of 12 February 2002.

The Commission brought infringement actions before the CJ against France, Austria and Ireland, because it considers that the legislation of those Member States concerning the fixing of minimum prices for cigarettes and other tobacco products in the case of France, cigarettes and fine-cut tobacco for the rolling of cigarettes in the case of Austria, and cigarettes in the case of Ireland, are contrary to Directive 95/59 which lays down rules on excise duty affecting the consumption of those products. The Directive obliges Member States to impose excise duty on cigarettes consisting of a proportional element (*ad valorem*), calculated on the maximum retail selling price, and a specific element, the amount of which is fixed by reference to cigarettes in the most popular price category, but which may not be less than 5% or more than 55% of the amount of the total tax burden. The rate of the proportional excise duty and the amount of the specific excise duty must be the same for all cigarettes. The Directive also provides that the manufacturers and importers of manufactured tobacco are to be free to determine the maximum retail selling price for each of their products (Article 9(1)).

According to the Commission, the legislation of those three Member States, which imposes minimum prices corresponding to a certain percentage of the average prices of the manufactured tobacco concerned (95% in the case of France, 92.75% for cigarettes and 90% for fine-cut tobacco in the case of Austria and 97% in the case of Ireland) undermines the freedom of manufacturers and importers to determine the maximum retail selling prices of their products and, correspondingly, free competition. That legislation is therefore contrary to the Directive.

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CJ rules on duty free imports of goods for specifically military use (*Commission v Portugal*)

On 4 March 2010, the CJ rendered its decision in the *Commission v Portugal* case (C-38/06). The case concerned the application of an exemption of import duty on imports of products for military use.

By letter of formal notice dated 21 December 2001, the Commission informed Portugal that it had failed to fulfil its obligations by exempting, on the basis of Article 346 TFEU (former Article 296 EC), its imports of products for military use from the customs duties provided for in EU legislation. By another letter, dated 20 December 2001, the Commission asked Portugal to calculate the customs duties which it considers to be owed by that Member State in respect of the imports in question and to make them available to it before 31 March 2002, the date from which it would apply the default interest provided for in Article 11 of Regulation No 1150/2000.

After consideration of Portugal's reply, dated 2 July 2002, stating that the imports in question were exempt from customs duty by reason of the fact that they were intended for specifically military purposes and that the exemption was necessary for the protection of the essential interests of the security of the Member State concerned in accordance with Article 346 TFEU, the Commission, by letter of 24 March 2003, once again asked Portugal to make available to it the total amount of the customs duties which it considers to be owed by that Member State in respect of imports of military material carried out between 1998 and 2002, together with the accounting data necessary to calculate default interest.

The CJ ruled that by refusing to calculate and pay to the Commission own resources which were not collected in the period from 1 January 1998 until 31 December 2002 inclusive, in relation to imports of equipment and goods for specifically military use, and by refusing to pay default interest arising from the failure to pay those own resources to the Commission, Portugal has failed to fulfil its obligations under Articles 2 and 9 to 11 of Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources, as amended by Council Regulation (Euratom, EC) No 1355/96 of 8 July 1996, in so far as the period from 1 January 1998 through 30 May 2000 is concerned, and under the same articles 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, in so far as the period from 31 May 2000 through 31 December 2002 is concerned.

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Commission proposes support package for ACP producers' competitiveness

concerning trade in bananas

On 17 March 2010, the Commission adopted an EUR 190 million support package for banana exporters from African, Caribbean and Pacific ('ACP') States. This proposal was part of the historic Geneva Agreement on Trade in Bananas. The EU concluded this deal with Latin American countries and the US in December 2009, which settles 15 years of banana disputes. It also cuts the tariff which the EU applies to bananas imported from Latin American countries. These measures aim to support ACP banana exporters to adjust to this new trading environment, taking into account each country's specific situation. The measures will focus on three goals: boosting the banana sector's competitiveness, promoting economic diversification and addressing broader social, economic and environmental impacts.

In December 2009, the EU agreed to gradually cut its import tariff on bananas from Latin America from EUR 176 per tonne to EUR 114. In response, the US agreed to settle its related WTO dispute with the EU. With those two agreements, years of lengthy and complex negotiations were put to an end. At the same time, to help ACP banana exporters, the Commission agreed to adopt a proposal for an EUR 190 million support package. The proposal of 17 March 2010 concerns the ten main ACP banana-exporting countries: Belize, Cameroon, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Jamaica, Saint Lucia, Saint Vincent and the Grenadines and Suriname. The proposal is to source these funds from the EU budget. Over the period 2010-13, the EUR 190 million Banana Accompanying Measures ('BAM') will be in addition to development aid from the European Development Fund.

These measures will provide financial support for:

- investments in competitiveness improvement;
- economic diversification policies; and
- broader social, economic and environmental impacts

Beneficiary countries' adjustment will vary, depending on the importance of the banana sector and their ability to adapt. With additional efforts, some countries will remain competitive and others may have to opt for other solutions. The actual measures will be country-specific, identified and prepared by ACP countries in coordination with the EU within wider agriculture and development strategies.

In addition, ACP banana countries will continue to enjoy duty-free and quota-free access to the EU under separate trade and development agreements, the so-called Economic Partnership Agreements ('EPAs'). The Commission will now submit its proposal to the EU's decision-making bodies, the EU Council and the European Parliament.

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Commission launches consultation about EU legislation on customs enforcement of intellectual property rights

On 25 March 2010, the Commission launched an online public consultation to ascertain the views of stakeholders on the EU legislation on customs enforcement of intellectual property rights (Council Regulation (EC) No 1383/2003). A review of the Regulation was carried out by the Commission in close collaboration with the Member States. After completion of the public consultation, if considered appropriate, the Commission will prepare a proposal for a Regulation of the EU Council and of the European Parliament concerning Customs Enforcement of Intellectual Property Rights. The proposal would replace Council Regulation (EC) No 1383/2003.

The Commission would be interested in receiving contributions from the public and from all interested parties on the following issues:

- Scope of the Regulation: situations in which customs authorities should be competent to take action;
- Scope of the Regulation: range of IPRs the Regulation should cover and possible derogations;
- Scope of the regulation: possible derogations for which customs authorities will not be competent to take action in the light of the regulation;
- Simplified procedure enabling customs authorities to have infringing goods abandoned for destruction under customs control, without there being any need to determine whether an intellectual property right has been infringed;
- Small consignments and sales via the internet; and
- Costs of storage and destruction.

The Commission welcomes any other comments not yet covered by the previous questions in this paper.

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Punitive measures against US concerning additional import duties for US products

As from 1 May 2009, the EU is to levy additional import duties on a number of products originating in the US. The EU was permitted by the World Trade Organisation ('WTO') to levy this additional duty, because of the fact that the US had neglected to amend or withdraw its Continued Dumping and Subsidy Offset Act ('Byrd Amendment') of 2000. The law provides for payment to US companies of the money the US customs collected on basis of the anti dumping and anti subsidy measures. Foreign competitors of these US companies, under which EU companies, were harmed by these measures. The WTO ruled this legislation to be in breach of the WTO rules. If necessary, the total value of the punitive measures of the EU against the US will be amended annually. In that case, products will be added to or withdrawn from the product list.

In the meantime, the US has withdrawn the Byrd Amendment. US companies however, can still benefit from the yield of anti dumping levies and compensating measures which were imposed by US customs before 1 October 2007 regarding imports in the US. This illegal treatment of EU companies will continue throughout the main part of 2010. Therefore, the Commission proposes to extend the list of products to which the punitive measures will be in force.

The list will be extended by goods (mostly textiles) classified under the following CN codes:

9406 0038	6101 3010	6102 3010	6201 1210	6201 1310
6102 3090	6201 9200	6101 3090	6202 9300	6202 1100
6201 1390	6201 9300	6201 1290	6204 4200	6104 4300
6204 4910	6204 4400	6204 4300	6203 4231	

On these products, an additional duty of 15% of the value will be levied. If the proposal is adopted, this extension of punitive measures will enter into force on 1 May 2010.

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New electronic system to monitor the movement of excise goods

On 1 April 2010, a new electronic system for monitoring and controlling the movement of excise goods (alcohol, tobacco and energy products) within the EU becomes operational. The Excise Movement and Control System ('EMCS') will make intra-EU trade in excise goods cheaper and simpler for operators, while also making it quicker and easier for Member States to tackle excise fraud. Designed to replace the current paper-based system, the EMCS is a computerised structure for recording in real-time the movement of products for which excise duties have still to be paid. It is estimated that about 100,000 traders dispatch around 4.5 million consignments of excise goods between Member States each year, and the EMCS will help to reduce the financial and administrative burdens that they face. Member States' authorities and economic operators can join the system progressively until 1 January 2011, after which the EMCS will be fully applied throughout Europe.

Monitoring the movement of excise goods

Under EU legislation, excise duties must be paid on alcohol, tobacco and energy products at the final point before consumption. Therefore, while these goods are in transit to their final destination and no excise duty has yet been paid on them, Member States need a system of monitoring their movement to ensure that the duties are properly levied at the final destination. Currently, a paper-based system is applied, whereby the person who consigns the goods must complete an Accompanying Administrative Document ('AAD') which travels with the goods to their final destination. Once the consignment arrives at its final destination, the recipient must acknowledge its receipt through the paper-based procedure.

A quicker, more efficient system

The EMCS will replace the paper AAD with an electronic record – the e-AD. This e-AD is sent electronically by the consignor of the goods to the final recipient, via the EMCS systems in the Member States of dispatch and destination. When the goods arrive, the recipient files an electronic report of receipt, which is sent to the consignor who can then discharge the movement. This computerised system makes the whole process much faster and easier for traders, and also allows them to recover the financial guarantees they had to make for the excise products much more

quickly.

Better equipped to tackle fraud

The EMCS will allow Member States to monitor more closely and accurately the movement of goods for which excise duties have still to be paid. This will create faster information exchange between authorities and help prevent and detect excise fraud.

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Commission asks France to adapt its electricity taxation system

On 18 March 2010, the Commission asked France to amend its legislation on electricity taxation within a period of two months in order to comply with Council Directive 2003/96/EC of 27 October 2003, restructuring the EU framework for the taxation of energy products and electricity. According to this Directive, France had a transitional period until 1 January 2009 to adapt its electricity taxation system. That deadline passed without the necessary measures being taken to bring the relevant French legislation (on local electricity taxes) into line with the Directive. In all events, the necessary measures were not communicated to the Commission. This request was made in the form of a reasoned opinion, which is the second stage of infringement proceedings, as provided for in the first paragraph of Article 258 TFEU. If France does not amend its legislation within the specified time limit, the Commission may decide to refer the matter to the CJ.

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7. Capital Duty

Opinion Advocate General on levy of Italian registration duty

On 25 March 2010, Advocate General Mazak issued his opinion in the *Speranza* case (C-35/09). In this case, which concerns an appeal by Paolo Speranza, an Italian civil law notary, against the levy of Italian registration duty, the Italian Corte Suprema di Cassazione referred the following questions to the ECJ:

- Is Article 4(1)(c) of Directive 69/335/EEC (the 'Capital Duty Directive'), which provides that an increase in the capital of a capital company by contribution of assets of any kind to be subject to capital duty, to be interpreted as meaning that an actual contribution is to be taxable, but not a mere decision to increase the share capital which remains essentially unimplemented?
- Is Article 4(1)(c) of Capital Duty Directive to be interpreted as meaning that the duty must be levied exclusively on the company to which the capital is contributed and not also on the public official who drafts or certifies the transaction?
- In any event, are the means of defence afforded to that public official by the Italian legislation consistent with the principle of proportionality, in light of the fact that, under the Italian registration duty legislation, it is irrelevant whether the resolution to increase share capital is null and void or may be annulled, and repayment of the duty paid may be effected only after a civil judgment declaring the transaction null and void or annulling it has become final?

The background of the case is as follows. In 1993, the shareholder meeting of the Italian company LEJA Srl decided to increase the capital of the company. One of the two shareholders in the company intended to increase the share capital by contributing certain assets. The decision to increase the capital was registered and the deed containing the capital increase was subject to Italian registration duty at a rate of 1% of the value of the (intended) contribution. The civil law notary who drafted the documentation, Mr. Speranza, became jointly and severally liable for the payment of the registration duty. The Italian tax authorities issued a registration duty assessment to both the company and the civil law notary, since the latter was jointly and severally liable. However, the capital increase by contribution of assets never took place due to certain circumstances which were attributable to the shareholder concerned. Consequently, LEJA Srl went bankrupt and the only remaining person liable to registration duty was the civil law notary. He filed an appeal against the registration duty assessment.

The Advocate General considered the Italian registration duty a capital duty within the meaning of the Capital Duty Directive. According to the Advocate General, the levy of capital duty can precede an actual capital contribution based on the wording of the Capital Duty Directive and earlier ECJ case law (which means that the Italian registration duty can be based on a decision to increase share capital). However, during the levy and collection process, the taxpayer should be able to effectively defend himself by arguing that the decision to increase the share capital could not be implemented.

With regard to the second question, the Advocate General was of the opinion that capital duty must be levied exclusively on the company to which the capital is contributed. However, this should not be confused with an obligation to pay which follows from joint and several liability of the civil law notary under domestic law. Such liability seems permissible in order to safeguard the payment of tax.

The third question refers to the legal remedies available to civil law notaries who are held liable for payment of Italian registration duty. The relevant legislation provides that registration duty should be paid even if the resolution to increase share capital is null and void. In addition, paid registration duty can only be refunded after a final civil judgment in which the capital increase is declared null and void or annulled. According to the Advocate General, these rules are consistent with the principle of proportionality.

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