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1. Top News

Advocate General proposes French tax exemption conditional to existence framework administrative cooperation compatible with EEA Agreement (*Établissements Rimbaud*)

On 29 April 2010, Advocate General Jääskinen delivered his Opinion in the *Établissements Rimbaud* case (C-72/09). The facts of the case are as follows. *Établissements Rimbaud SA* ('*Établissements Rimbaud*') has its seat in Liechtenstein (which has been an EEA country since 1

May 2010

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May 1995) and owns immovable property in France. On that basis, it is, in principle, liable to pay the 3% tax introduced by Article 990D of the French Tax Code. The French tax authorities recovered the tax in question from Établissements Rimbaud, initially for the years 1988 to 1997 and then for the years 1998 to 2000. Établissements Rimbaud brought an action against the decisions refusing its applications for cancellation of the disputed tax. On 18 February 2009, the French Court of Cassation referred the following preliminary question to the CJ (see EU Tax Alert, edition No. 66, May 2009).

‘Does Article 40 EEA preclude legislation such as that imposed by Article 990D et seq. of the *Code Général des Impôts*, in the version applicable at the relevant time, which exempts, from the 3% tax on the market value of immovable property situated in France, companies which have their registered office in France and which, in respect of a company which has its registered office in a country in the European Economic Area and which is not a member of the European Union, makes that exemption subject either to the existence of a convention on administrative assistance between France and that State for the purposes of combating tax avoidance and tax evasion or to the existence of a requirement in a treaty containing a clause prohibiting discrimination on grounds of nationality to the effect that those legal persons cannot be more heavily taxed than companies established in France?’

At the outset, the Advocate General observed that the CJ has already had occasion to analyse the same provisions of the French Tax Code in the *Elisa* case (C-451/05), also arising from a reference for a preliminary ruling from the French Court of Cassation. In its judgment of 11 October 2007, the (then) ECJ stated that, in relations between Member States, EU law precluded legislation such as the French legislation at issue. The main issue in the present case is whether the difference between EU Member States and the EEA countries is such as to justify a difference in the treatment applied by national legislation to taxpayers in other EU Member States as compared with those in the EEA countries.

According to Advocate General Jääskinen, there are two important aspects of the *Elisa* judgment: (1) the possibility, based on the principle of proportionality, that the taxpayer could make up for the absence of a formal framework for cooperation between tax authorities – or the fact that it is not applicable in a specific case – by providing information directly to the tax authorities; and (2) the importance to be attached to the existence of such a formal framework in EU legislation. On the first point, the requirement under French law that the information provided by a taxpayer should be verifiable by the tax authorities (whether directly or in cooperation with the authorities of the other States concerned) is, in principle, in line with the principle of proportionality. On the second issue, the fact that the EEA Agreement makes no provision for a framework for administrative cooperation in the field of direct taxation means that there is a difference in the legal context.

Therefore, in the Advocate General’s opinion, the difference identified at the level of the legal framework for tax cooperation fully justifies the difference in treatment as between relations exclusively between EU Member States on the one hand, and those between EU Member States and the EEA countries on the other. Advocate General Jääskinen concluded by proposing to the CJ to answer the preliminary question in the negative, i.e. that Article 40 EEA does not preclude national legislation such as that at issue in the main proceedings.

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Commission opens public consultation on double taxation problems in the EU

On 27 April 2010, the Commission launched an online public consultation to ask individuals, companies and tax advisers for information on double taxation problems they have encountered when operating across borders within the EU. The aim of the public consultation is to clearly identify the nature of the problems that EU taxpayers are facing and the extent to which many individuals and companies are encountering the problem of being taxed on the same income or profits in two or more different Member States.

The consultation concerns all direct taxes – income taxes, corporate taxes, capital gains taxes, withholding taxes, inheritance taxes and gift taxes. The consultation will run until 30 June 2010, after which, the Commission will publish a summary of all contributions received. It will also analyse the replies in detail and use them in preparing possible initiatives for EU action in the field of direct taxation.

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Developments in the Netherlands: Lower Court of Breda decides that Spanish investment fund is not entitled to full refund of Netherlands dividend withholding tax

- Patrick Vettenburg
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On 22 March 2010, the Lower Court of Breda issued its judgement on the right to full refund of Netherlands dividend withholding tax to a Spanish investment company. The interested party was a Spanish investment fund, that was subject to Spanish profit tax at the rate of 1%. The interested party had invested in Netherlands companies and held portfolio participations in those companies of less than 5%. On dividends received, dividend tax was withheld at a rate of 25% which was reduced to 15%. The interested party requested an additional refund of the 15% effectively withheld, based on EU law.

The Lower Court of Breda rejected the request for the refund of dividend withholding tax. The Lower Court noted that the interested party could not be compared with a Netherlands investment fund within the meaning of article 28 of the Corporate Income Tax Act 1969, as the interested party was not subject to a distribution obligation. A Netherlands investment fund would have been subject to such distribution obligation. Furthermore, as the interested party is subject to taxation on its profits, according to the Lower Court, there is no restriction to the free movement of capital. Had it been established in the Netherlands, there would also be no entitlement to such refund on the basis of article 10 Dividend Withholding Tax Act.

Preliminary comments

This could be regarded as a highly questionable decision of the Lower Court. No reference is made to CJ judgements such as *Aberdeen* (C-303/07), *Denkavit Internationaal* (C-170/05), *Persche* (C-318/07) and *Stauffer* (C-386/04). These cases have indicated that in order to be comparable, entities do not have to be identical. The CJ has used an economic approach in the past. Despite the fact that it is not yet fully clear how an individual comparison should be made, rejecting comparability solely on the basis of the distribution obligation seems rather thin.

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2. State Aid/WTO

Polish tonnage tax regime approved

On 18 December 2009, the Commission approved of a Polish proposal introducing a tonnage tax in favour of international maritime transport. Poland was allowed to extend its tonnage tax regime to natural persons engaged in such business activities as required by the equal treatment provision of its Constitution, although it was not permitted to allow the deduction of social security and health insurance contributions from the tonnage tax base. The scheme was also altered so that towage and dredging activities only qualify if at least 50% of annual operating time is spent on such activities instead of at least 50% of income being derived from them. Poland also extended the lock-in period from 5 years to 10 in order to qualify for the Commission's approval.

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3. Direct Taxation

Revised OECD-EU Council Convention will boost multilateral cooperation

According to an OECD press release of 6 April 2010, the OECD and the EU Council have agreed on an update to the Convention on Mutual Administrative Assistance in Tax Matters (the 'Convention') to reflect new commitments against international tax evasion, as requested by the G20 at their 2009 London Summit. The update takes the form of a protocol (the 'Protocol') amending the Convention for which the two multilateral organisations are the custodians.

Background

The Convention is a multilateral agreement that provides a legal framework to facilitate international cooperation through multi-country exchanges of tax information and assistance. Its objective is to enable each party to the Convention to counter international tax evasion and better enforce its national tax laws, while at the same time respecting the rights of taxpayers. The scope of the Convention is broad as it covers a wide range of taxes and goes beyond exchange of information on request. It also provides for other forms of assistance such as: spontaneous exchanges of information, simultaneous investigations, conducting of tax investigations abroad, service of documents, assistance in recovery of tax claims and measures of conservancy. The Convention also provides for automatic exchanges of information, but this form of assistance requires a preliminary agreement between the competent authorities of the parties willing to participate in such automatic exchange of information.

The Convention was opened for signature in 1988 and entered into force in 1995. The 54 countries that are members of either the EU Council or the OECD or both may sign it. The Convention is

currently in force among the following 14 countries: Azerbaijan, Belgium, Denmark, Finland, France, Iceland, Italy, Netherlands, Norway, Poland, Sweden, United Kingdom, United States, and Ukraine. Although Canada, Germany and Spain have signed the Convention, they have not yet ratified it.

The need to amend the Convention

In many ways, the Convention was ahead of its time when it was drafted, and its value to effective tax administration has only recently been recognized. However, as the Convention was drafted before the adoption of the internationally agreed standard on transparency and exchange of information, as developed by the OECD, the assistance covered by the Convention is subject to limitations existing in domestic laws. The recent heightened political attention on international tax evasion has led to a number of significant developments: the standard is now universally accepted and all jurisdictions surveyed by the Global Forum on Transparency and Exchange of Information for Tax Purposes are now committed to implement this standard. The G20, at its 2009 London Summit, stressed the importance of quickly implementing these commitments. It also requested proposals to make it easier for developing countries to secure the benefits of the new cooperative tax environment, including a multilateral approach for the exchange of information. In line with the requests from the G20, an amending Protocol has been drafted and will be opened for signature at the occasion of the OECD's annual Ministerial Meeting in Paris on 27-28 May 2010.

The amending Protocol

The amending Protocol aligns the Convention to the internationally agreed standard on exchange of information for tax purposes in that it provides that bank secrecy and a domestic tax interest requirement should not prevent a country from exchanging information for tax purposes. The Protocol provides, amongst other things, for exchange of information, multilateral simultaneous tax examinations, service of documents and cross-border assistance in tax collection, while respecting national sovereignty and the rights of taxpayers and ensuring extensive safeguards to protect the confidentiality of the information exchanged. The amending Protocol also provides for the opening of the Convention to non-OECD/non-EU countries, based on a decision by consensus of the parties to the Convention. Other changes included in the Protocol deal with the relationship between the Convention and EU law instruments, and the level of detail which needs to be provided in a request for information.

The Protocol will enter into force three months after the ratification by five parties to the Convention. Equally, a party which ratifies the Protocol after it has entered into force will be bound by it as from three months after the ratification. Once the amending Protocol enters into force, any Member State of the EU or the OECD, which is not yet a party to the original Convention, will become a party to the Convention as amended by the Protocol upon ratification, unless it explicitly expresses the will to adhere exclusively to the un-amended Convention. Non-OECD/non-EU countries will only be able to adhere to the Convention as amended by the Protocol.

Impact of Amendments

It is expected that the amendments to the Convention will encourage more countries to sign it and transform it into a very powerful instrument in the fight against offshore tax evasion. The opening of the Convention beyond OECD and EU membership will help rapidly extend the benefits of the new cooperative tax environment to other countries, in particular, emerging and developing countries.

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CJ finds Hungarian vocational training levy incompatible with EU law (*CIBA*)

On 15 April 2010, the CJ rendered its judgement in the *CIBA* case (C-96/08). Under the Hungarian rules, trading companies established in Hungary have to pay vocational training levy on the total amount of wage costs, both in Hungary and abroad. The question in this case is whether the disputed rule is compatible with the principle of freedom of establishment (Articles 49 and 54 TFEU) where such vocational training levy is imposed on workers employed through a branch in the Czech Republic, where the tax and social security obligations with regard to such workers are met.

The judgment rendered by the CJ deviates from Advocate General Sharpston's Opinion of 17 December 2009 (see EU Tax Alert, edition No. 75, January 2010), in which the CJ held that the potential double taxation borne by Ciba is a fiscal disadvantage resulting from the exercise in parallel by two Member States of their fiscal sovereignty, based on its judgments in *Kerckhaert and Morres* (C-513/04) and *Block* (C-67/08). According to the CJ, the potential double taxation alleged by CIBA does not alone constitute a restriction prohibited by the TFEU. Contrary to the Advocate General, the CJ held that the possible lack of opportunity for CIBA's workers employed in the Czech Republic to benefit from training financed by the Hungarian fund for the employment market is merely the consequence of the taxation and spending powers exercised by Hungary, in the absence of a double taxation convention. The CJ concluded that such a factor cannot constitute, in

itself, a restriction contrary to the freedom of establishment.

Nevertheless, the CJ agreed with Advocate General Sharpston's Opinion that the Hungarian legislation possibly places a Hungarian company that operates cross-border in a disadvantageous position, as compared to a company based exclusively in Hungary, with regard to the possibility of using the offset facility in respect of that part of its workforce that is based in another Member State. According to the CJ, this last point pivots on the interpretation of the Hungarian legislation, which is ultimately a matter for the national court. Even though no possible justification was advanced by the Hungarian Government or envisaged by the referring court, the CJ examined the justifications based on the coherence of the tax system and reduction of tax revenue. The CJ concluded that the Hungarian legislation is able to deter a Hungarian company that operates in another Member State from taking advantage of the freedom of establishment under Articles 49 and 54 TFEU, amounting to an unjustified restriction of that freedom.

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CJ finds German gift tax rules incompatible with EU law (*Mattner*)

On 22 April 2010, the CJ rendered its judgment – without an Advocate General's Opinion – in the *Mattner* case (C-510/08). This case concerns the calculation of the German gift tax due on the gift of immovable property located in Germany, which varies according to whether either the donor or the donee is resident or non-resident in Germany at the date of the gift.

The facts of the case are as follows. Ms Mattner, a German national who has lived in the Netherlands for more than 35 years, acquired by gift from her mother, who is also a German national and has lived in the Netherlands for more than 50 years, a piece of land on which a house had been built, in Düsseldorf (Germany), worth EUR 255,000. The *Finanzamt* claimed gift tax in the amount of EUR 27,929 from Ms Mattner in respect of the gift she had received. That figure was obtained by deducting an allowance of EUR 1,100 from the value of the land and applying a rate of 11% to the resulting taxable value. However, had Ms Mattner or her mother been resident in Germany at the date of the gift, Ms Mattner would have been able to claim the allowance of EUR 205,000, as a result of which the taxable value would have been limited to only EUR 50,000 and the tax due would, subject to a 7% rate, have been EUR 3,500 instead of EUR 27,929. Ms Mattner objected to this assessment before the Tax Court of Düsseldorf, seeking to obtain the benefit of the EUR 205,000 allowance. On 4 November 2008, the referring court brought the matter before the CJ.

The CJ observed that a situation in which a person resident in the Netherlands makes a gift of land in Germany to another person also resident in the Netherlands cannot be regarded as a purely domestic situation, falling within the scope of the free movement of capital under Article 63 TFEU. The CJ dismissed the analysis of the case under the TFEU provisions on the free movement for workers or the freedom of establishment. The CJ held that the German legislation at issue constitutes a restriction on the free movement of capital as it makes the application of an allowance against the taxable value of the immovable property concerned dependent on the place of residence of the donor and the donee on the date of the gift, imposing the greater tax burden on the gift between non-residents.

Contrary to the submissions of the Finanzamt and the German Government, the CJ held that difference in treatment cannot be justified on the ground that residents and non-residents are in objectively different situations. The German legislation, in principle, regards both the recipient of a gift between non-residents and the recipient of a gift involving at least one resident as taxpayers for the purposes of charging gift tax on gifts of immovable property in Germany. By treating gifts to those two classes of persons in the same way, except in relation to the amount of the allowance the donee may benefit from, the national legislature accepted that there was no objective difference between them in regard to the detailed rules and conditions of charging gift tax which could justify a difference in treatment. The CJ rejected the justifications submitted by the Finanzamt and the German Government based on overriding reasons in the general interest and concluded that the German gift tax rules at stake violated the free movement of capital protected under Article 63 TFEU.

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Preliminary question referred to CJ on Belgian inheritance tax applicable to non-profit-making associations (*Missionswerk Werner Heukelbach*)

On 15 January 2010, the Court of First Instance of Liege referred a preliminary question to the CJ in the *Missionswerk Werner Heukelbach* case (C-25/10). The question concerns the rules on the basis of which the reduced rate of 7% is only applicable to non-profit-making associations, friendly societies or national unions of these friendly societies, professional unions and international non-

profit-making associations, private foundations and public-interest foundations that are resident of the Member State in which the deceased actually resided or where she had her place of work at the time of death, or in which she had previously actually resided or had her place of work. The Belgian Court asked whether these rules are compatible with EU law and, more specifically, with Articles 18, 45, 49 and 54 TFEU.

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Preliminary questions referred to CJ on Belgian rules on the statute of limitation (*Frans Bosschaert*)

On 22 February 2010, the Court of First Instance of Brussels referred three preliminary questions to the CJ in the *Frans Bosschaert* case (C-96/10). The preliminary questions concern the Belgian rules on the statute of limitation to claim back levies paid in accordance with a system that was found (partially) incompatible with EU law.

Levies were paid to the Belgian State under a hybrid system of aid and charges, which was found not only to be partially illegal but also partially incompatible with EU law. The levies were paid before the entry into force of a new system of aid and compulsory contributions which replaces the first system and which, by a final decision of the Commission was declared compatible with EU law (but not insofar as the contributions are imposed retroactively).

With the first preliminary question, the Belgian Court wishes to know whether EU law precludes national courts to apply the statute of limitation of five years laid down in the internal legal system to claims for the reimbursement of levies paid to a Member State under the abovementioned hybrid system.

In the case an individual has paid levies to a Member State under the abovementioned hybrid system and recharges these levies to another individual with whom he carries out a commercial activity in the relevant sector, the statute of limitation for the latter to claim the reimbursement of the amounts paid to the intermediary person is longer than the statute of limitation for the intermediary to claim the reimbursement of the levies paid to the Member State. As a result, the intermediary might find himself in a situation where the claim against him is not time-barred whereas its claim against the Member State is. The intermediary may thus have an action brought against him by the other individual and, consequently, need to seek indemnification from the Member State concerned, but cannot recover from that State the levies paid under the hybrid system since the statute of limitation has lapsed. With the second preliminary question, the Belgian Court wishes to know whether EU law precludes such situation.

With the third preliminary question, the Belgian Court wishes to know whether EU law precludes a Member State from successfully invoking national statutes of limitation which, in comparison with those applicable under ordinary national law, are particularly favourable to that Member State, as a defence against actions brought against it by a private individual in order to protect its rights under the TFEU. In the question, reference is made to the case pending before the national court in which the effect of the particularly favourable statutes of limitation is to render impossible the recovery of levies paid under the abovementioned hybrid system, where the ECJ had only established the conflict with EU law after the particularly favourable statutes of limitation had expired, but the illegality existed earlier.

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Commission refers Belgium to CJ over Belgian tax exemption on interest paid by domestic banks

On 5 May 2010, the Commission referred Belgium to the CJ over its failure to comply with previous a formal request dated 25 June 2009 (see EU Tax Alert, edition No. 68, July 2009) to amend its legislation which leads to different taxation of interest depending on where the bank paying such interest is established.

Under Belgian legislation, interest paid by Belgian banks to individuals is exempt from taxation up to an amount of EUR 1,660 whereas interest paid by foreign banks cannot benefit from the same exemption. Consequently, Belgium residents are dissuaded from opening or maintaining savings accounts with banks that are not established in Belgium. According to the Commission, the difference in treatment constitutes an obstacle to the free movement of capital within the meaning of Article 63 TFEU and to the freedom to provide services within the meaning of Article 56 TFEU. In the Commission's view, the difference in treatment constitutes an arbitrary discrimination which cannot be justified.

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Commission decides to refer Finland to CJ over Finnish withholding tax on dividends

On 5 May 2010, the Commission referred Finland to the CJ over its failure to comply with previous a formal request dated 25 June 2009 (see EU Tax Alert, edition No. 68, July 2009) to amend its legislation which leads to discriminatory taxation of foreign pension funds.

According to the Finnish legislation, dividends paid by a company which is resident in Finland for tax purposes to a non-resident pension fund, are subject to a withholding tax on gross income at a rate of 19.5%. On the other hand, Finnish pension funds are taxed under a special regime: only 75% of dividend income on investment assets is subject to corporation tax. Since the nominal corporate income tax rate is 26%, the resulting tax rate for dividends paid to Finnish pension funds is 19.5%. However, tax is calculated on the net income, i.e. after deduction of costs as well as current pension liabilities. In practice, the effective tax rate on dividend income paid into a Finnish pension fund is therefore lower than 19.5%, whereas foreign pension funds do not benefit from any similar reduction of the tax base to which the withholding tax is applied.

The difference in treatment between foreign and domestic pension funds constitutes an obstacle to the free movement of capital within the meaning of Article 63 TFEU. The effect of the legislation is to make cross-border transfer of capital less attractive by *de facto* taxing dividends transferred to foreign pension funds at a higher rate. In the Commission's view, the difference in treatment constitutes an arbitrary discrimination which cannot be justified on the grounds provided under Article 65 TFEU, which allows discriminative measures justified on grounds of public policy or public security.

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Commission services issue an analysis of the main innovative financing options

On 6 April 2010, the Commission services published a Staff working document assessing the main sources of innovative financing at a global level related to the financial sector, climate change and development in order to help identify the most promising options. The analysis shows that for some of the instruments could yield a 'double dividend' by raising revenues and improving market efficiency and stability. There is also further scope for the pricing of carbon emissions, in addition to the EU Emission Trading Scheme, through a better coordination at EU level of the application of carbon tax components in existing energy taxes. Regarding innovative financing related to development, the proposed and existing instruments have some potential for further implementation and scaling up.

It also emphasises that global coordination will be essential for a successful implementation of most instruments of innovative financing. It shows, however, that actions at the EU level alone should not be discarded, particularly if there are good reasons to expect that an EU role of global leadership would be followed by other key countries. For many of the innovative financing instruments, uncoordinated action by individual countries could create considerable problems.

Background

The global economic and financial crisis has created significant need for fiscal consolidation in EU countries and around the world. In addition, resources must be found to meet key global challenges with significant budgetary implications in the areas of financial stability, climate change and development. While reductions in expenditure and improvements in existing tax systems should be the main response to these fiscal and global challenges, new non-traditional ways of raising public finance – 'innovative finance' – can make a significant contribution.

At its meeting of October 2009, the EU Council invited the Commission to examine innovative financing at a global level. On March 2010, the EU Parliament also asked the Commission to assess the impact of a global financial transactions tax, also in comparison to other potential sources of revenues. Furthermore, the G-20 Leaders asked the IMF to prepare a report on how the financial sector could make a fair and substantial contribution toward paying for any burdens associated with government interventions to repair the banking system. The EU Economic and Financial Affairs Council on 16-17 April in Madrid discussed imposing bank taxes to help solve the financial crisis and help prevent future financial crises but did not reach an agreement.

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Commission calls Member States to get back on track for more and better aid

On 21 April 2010, the Commission adopted an ambitious action plan for EU action to speed up

progress towards the Millennium Development Goals ('MDGs'). The EU remains the most generous global donor, providing over half of global aid. The Commission proposes to Member States a number of actions in support of MDGs. They aim at increasing the level of aid while making aid more efficient and are focused on those countries and sectors most in need. To feed into the action plan, the Commission also adopted a Communication on taxation and development aimed at increasing developing countries' domestic revenues through building stronger domestic fiscal systems and fighting tax evasion internationally. The EU Action Plan proposes ways to ensure increase of the aid by Member States and supports the need for innovative sources of financing. The Action Plan sets out a possible EU position ahead of the UN Summit on the MDGs this September.

The Communication proposes the introduction of a more comprehensive and consistent policy approach to all aspects of taxation, taking into account the local economic situation and international environment, and the broader governance and public finance management context. A number of actions to assist developing countries are set out, such as supporting multilateral and regional initiatives, strengthening public finance management, deepening regional integration, improving donor coordination, and encouraging participation of developing countries in relevant international fora. The following actions are amongst the main proposed measures:

- make more effective the EU's support to developing partners' capacity to increase domestic revenue, and provide technical assistance to partner governments where necessary;
- make the best use of its relevant dialogue and assessment tools in the monitoring of domestic revenue issues and good governance commitments, and better integrate tax issues into budget support programmes;
- increase support to international capacity development initiatives, particularly when developing international standards of tax cooperation;
- improve regional integration and cross-border links between developing countries, and strengthen monitoring capacities in the fight against illicit financial outflows;
- include, as appropriate, a specific reference to strengthening tax systems and to the principles of good governance in all future development cooperation agreements with third countries; and
- support the adoption and implementation of the OECD transfer pricing guidelines in developing countries, and the ongoing research on a country-by-country reporting requirements as part of a reporting standard for multinational corporations, notably in the extractive industry.

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Commission sends reasoned opinion to Spain over inheritance and gift tax

On 5 May 2010, the Commission requested Spain to amend its tax provisions on inheritance and gift tax, which impose a higher tax burden on non-residents or assets held abroad. The provisions are incompatible with the free movement of workers and capital. Spain has two months to react to this reasoned opinion.

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Developments in the Netherlands: Lower Court The Hague decides Netherlands taxation of a deemed yield on substantial interest in Antillean company compatible with EU law

On 17 February 2010, the Lower Court of The Hague issued its judgment on the taxation of a deemed yield on a substantial shareholding in an Antillean company. The interested party held a substantial share interest in an Antillean company which invested capital and developed and operated real estate in the Netherlands Antilles. In the years 2002 and 2003, the interested party was taxed on a deemed yield on the substantial interest in the Antillean company. This taxation on deemed yield is only levied on a substantial interest in foreign resident companies. The question in this case was whether such levy of tax is in line with the freedom of establishment or free movement of capital.

The Lower Court first noted that the freedom of establishment did not apply as it cannot apply to the Netherlands Antilles (being outside of the EU). However, the Lower Court was of the view that the domestic provision at hand could be examined in the light of the free movement of capital with third countries. The Lower Court then turned its attention to the standstill clause (Article 64 TFEU). According to the Lower Court, the interpretation of the standstill clause by the CJ is to be found in the *Konle* (C-302/97) and *Holböck* (C-157/05) cases, in which it was held that a restriction existing on 31 December 1993 may also be maintained if at that time provisions existed which were similar to the provision at issue. Given that a similar provision did indeed exist in Netherlands legislation on that date, the Lower Court decided that the taxation of the deemed yield on the substantial

interest in the Antillean company was compatible with the free movement of capital.

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4. VAT

CJ concludes Netherlands restrictions of the deductibility of input VAT compatible with the VAT Directive (*X Holding* and *Oracle Nederland*)

On the basis of a Netherlands Royal Decree on the Exclusion of Input Tax Credit (the 'BUA'), input VAT is not deductible insofar as it relates to business gifts or gifts to personnel if no consideration is received or if the consideration received is lower than the cost price. For some time, it has been questioned whether the BUA is compatible with EU VAT law. On 15 April 2010, the CJ gave the decisive answer in the joined cases *X Holding* (C-538/08) and *Oracle Nederland* (C-33/09).

X Holding BV purchased passenger cars from car dealers and deducted all of the input VAT. It retained the cars for a limited period, after which it sold them. It paid on declaration the VAT charged on the supply of each car. After subsequent review, the tax authorities did not agree that *X Holding* BV had deducted all of the input VAT on the ground that most of the cars had not been used for business purposes but for the private use of staff.

The *Oracle Nederland* case concerns the provision of food and drinks to personnel, business cards or other gifts given to persons who were not entitled to deduct input VAT, accommodation arranged for recreation opportunities given to personnel. Oracle lodged a complaint that it had a right to deduct the input VAT relating to those expenses.

In both cases, the Netherlands Supreme Court referred questions to the CJ. The Court indicated that on the basis of the standstill clauses of Article 11, fourth paragraph of the Second EU VAT Directive and Article 17, sixth paragraph of the Sixth EU VAT Directive Member States are, in principle, allowed to maintain a national statutory provision, such as the BUA, which was enacted before the Directives entered into force. The Courts was uncertain, however, whether the exclusions indicated in the BUA were adequately defined, whereas an adequate definition is a requirement for such an exclusion to be in line with EU law. Furthermore, the Court asked whether the deduction of input VAT could be excluded insofar as the goods or services were not used for business purposes. Finally, in the *Oracle Nederland* case, the referring Court indicated that an existing exclusion to the right of deduction had been amended after the entry into force of the Sixth VAT Directive. This amendment was designed to restrict the scope of that exclusion, but the scope of the exclusion could be extended in an individual case by the nature of the amended scheme.

Without going into much detail, the CJ ruled that all of the categories of expenditure must be considered to be adequately defined and therefore, such derogation from the EU VAT rules was allowed. Furthermore, the CJ answered that national legislation, which was enacted before the Sixth VAT Directive entered into force, may provide that VAT paid on the acquisition of certain goods and services is only deductible in proportion to their use for business purposes. Finally, on the third question, the CJ ruled that Article 17, sixth paragraph of the Sixth EU VAT Directive does not preclude an amendment, after the entry into force of that Directive, to an existing exclusion from the right of deduction if that amendment is designed to restrict the scope of that exclusion. This also applies if it cannot be ruled out that the scope of that exclusion might be extended in an individual case because of the nature of the amended scheme.

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Fictitious intra-EU acquisition due to using VAT-number: no immediate right to deduct VAT due (*X* and *Facet*)

On 22 April 2010, the CJ gave its judgment in the combined cases *X* (C-536/08) and *Facet* (C-539/08). In both cases, the subject is the 'fictitious' intra-Community acquisition in a Member State due to Article 28b A, second paragraph, first section of the Sixth EU VAT Directive. That provision lays down that an intra-EU acquisition is deemed to take place in the country in which the customer has been issued its VAT number if the customer has not proven that VAT is levied correctly in the Member State where the goods are actually acquired. In both cases, the Netherlands Supreme Court asked the CJ if VAT levied based on Article 28b A, second paragraph, first section of the Sixth EU VAT Directive can be deducted immediately based on article 17 of the Sixth EU VAT Directive.

In a rather short decision, and without an opinion of the Advocate General, the CJ considered that the subject provision has to be regarded as a correction mechanism to prevent an intra-Community acquisition from not being taxed. Due to the nature of the provision being a correction

mechanism, the CJ declared that there was not an immediate right to deduct any VAT arising from this provision. Otherwise, the correction mechanism would in fact have no effect at all. Therefore, in order to be able to deduct the VAT resulting from Article 28b A, second paragraph, first section of the Sixth EU VAT Directive, a taxpayer should prove that the acquisition is taxed in an ordinary way.

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Advocate General indicates what is to be understood as samples and gifts of small value (*EMI*)

On 15 April 2010, Advocate General Jääskinen rendered his Opinion in the *EMI* case (C-581/08). EMI Group Ltd ('EMI') is a company engaged in music publishing and in the production and sale of music. In order to promote newly released music, EMI distributes free copies of music recordings in different forms to various individuals who are in the position to influence consumer behaviour (for example, radio stations' disc jockeys), as well as to music promoters called 'pluggers' who distribute CDs to their own contacts.

The case at hand concerns the application of the second sentence of Article 5, sixth paragraph of the Sixth EU VAT Directive. More specifically, the inquiring Court wanted to know what is meant by 'applications for the giving of samples', 'applications for the making of gifts of small value' and whether the status of the recipients of the gifts or samples affects the interpretation of this second sentence.

According to the Advocate General, the underlying concept of the second sentence of Article 5, sixth paragraph of the Sixth EU VAT Directive must be that providing samples and gifts of small value are not considered as taxable transactions on the basis that such samples and gifts may be necessary in order to promote a business and its products. Since the providing of samples and gifts of small value must take place for business purposes, the Advocate General saw no major risk of tax evasion.

The Advocate General indicated that samples should be understood as any supply made by a taxable person for the purpose of promoting future sales of a product to an actual or potential customer or a person who, owing to his particular position, is able to influence the exposure to the market of that product. Furthermore, a sample serves as an example of a product and must, therefore, retain all the essential properties of the product in order for the recipient, his customers, or others receiving communications from the recipient, to be able to test the product.

Regarding the gifts of small value, the Advocate General opined that a quantitative reading of the term 'small value' is preferred. As a result, the Member States may indicate a ceiling in order to determine which gifts are still of 'small value'. This ceiling may not be so low as to render Article 5, sixth paragraph of the Sixth EU VAT Directive meaningless, or so high that it deviates from what 'small value' might mean in common language. Furthermore, individual exceptions must be allowed in circumstances where that is justified by objective reasons. Finally, the ceilings must be applied to individual supplies. This is contrary to the current practice in certain Member States where the ceiling is applied to the sum of several gifts supplied during a specific timeframe.

The Advocate General stated that it should be irrelevant whether or not the recipient of the samples or gifts of small value is entitled to deduct input VAT, because the samples or gifts of small value do not bear any VAT.

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VAT treatment of paying part of salary by way of providing retail vouchers (*Astra Zeneca*)

On 22 April 2010, Advocate General Mengozzi delivered his Opinion in the *Astra Zeneca* case (C-40/09). In the case at hand, a taxpayer, Astra Zeneca UK Limited, offered its staff the possibility to receive a part of its salary in the form of retail vouchers, which vouchers would be redeemed at specific retailers. In order to determine the correct VAT treatment, the referring Manchester VAT and Duties Tribunal put three questions to the CJ. First, it asked whether or not the supply of the vouchers to staff as part of paying salary, had to be considered a taxable supply against remuneration by the taxpayer to its staff. If not, the referring Tribunal asked whether the provision of the vouchers is to be regarded as fictitious taxable service as mentioned in Article 6, second paragraph under b of the Sixth EU VAT Directive (currently, Article 26, first paragraph under b of the EU VAT Directive) when the vouchers are deemed to be used by the personnel for private purposes. Third, if also the second question is answered in the negative, the referring Tribunal asked whether the taxpayer in such case is allowed to deduct input VAT relating to the vouchers if in the end, the vouchers are deemed to be used by personnel for private purposes.

Advocate General Mengozzi concluded primarily that paying part of a salary by way of providing vouchers, had to be regarded as a taxable supply of those vouchers to the personnel against remuneration. The salary not actually being paid out, but paid out by way of the vouchers, was then the remuneration against which the supply of vouchers is made. If the CJ, however, should answer the first question in the negative, the Advocate General recommended to the CJ to answer the second question also in the negative. This because in the case at hand, the vouchers were not provided to the personnel without any remuneration given that the personnel had to waive part of the salary to receive the vouchers. Moreover, if the CJ had to answer the third and final question because the first two questions are answered in the negative, the Advocate General suggested that its answer would be that a taxpayer is not allowed to deduct any input VAT relating to the vouchers.

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Commission refers France to CJ over the compatibility of its tax representative provision with the VAT Directive

France has a reverse-charge system whereby the client is designated liable to pay VAT if the supplier or vendor is not established in the country. This system is in line with the EU VAT Directive. However, by derogation from this system, the vendor is allowed to declare in his own tax return the tax owed by his clients, in principle, as reverse-charged, and to offset this from the VAT he is due. To be able to do this, a non-established vendor must register for VAT in France and designate a tax representative (*répondant fiscal*) to declare and pay the VAT on his behalf. This is incompatible with the EU VAT Directive, which provides that taxable persons established in the EU and certain third countries should not have to designate a tax representative for VAT in another Member State. As France has failed to comply with the reasoned opinion issued by the Commission on 20 November 2009 (see EU Tax Alert, edition No. 73, December 2009), the Commission decided, on 5 May 2010, to refer the matter to the CJ.

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5. Customs Taxes and Excise Duties

Europe strikes against the trafficking of counterfeit goods

A Joint Customs Operation (hereafter 'JCO Matthew II') has led to the seizure of more than 16 million cigarettes, 241 kilograms of tobacco products, 6,400 litres of alcohol, 20 tons of counterfeit perfumes, 53,418 other counterfeit items such as bags, coats, scarves and wallets, and 1,515.75 kilograms of cannabis entering the EU by road via its eastern border. During the operational phase, additional seizures of more than 25 million cigarettes also took place in some EU ports.

This JCO Matthew II was aimed at detecting the smuggling of cigarettes in commercial consignments entering the EU by road. Large seizures of cigarettes carried in personal cars and buses were also reported. Controls were focused on means of transport entering the EU customs territory from third countries via the eastern EU border. The operational phase took place from 24 November to 3 December 2009.

The operation was organised by the Czech Republic, in close cooperation with Poland and the European Commission ('OLAF') which provided organizational and technical support. All Member States were invited to participate in the JCO Matthew II, as were Europol and the WCO/RILO WE (World Customs Organization / Regional Intelligence Liaison Office for Western Europe). The WCO/RILO WE supported the joint operation by means of analytical activity. Selected non-EU Member States (Croatia, Russia, Serbia, Norway and Switzerland) were also invited to participate in this operation.

Those Member States not directly involved in controls at the external border could also participate in the operation by targeting suspected consignments transporting contraband that had evaded detection at the point of entry into the EU. They were also invited to actively participate in exchanging information whenever their country was concerned.

The JCO Matthew II was based on an intensive exchange of information leading to intelligence-based targeting of smuggling of cigarettes and tobacco products transported by road vehicles (private cars, trucks and buses). All participating countries successfully used a specific IT communication tool for the real-time exchange of information and intelligence. It was also the first time that OLAF had made secure internet access available to its communication tool (the Anti-Fraud Information System) for Croatia, Russia and Serbia. In total, there were 455 transport movement reports communicated by the JCO Matthew II participants.

New European Portal: Customs security procedures in a few clicks

On 19 April 2010, the Commission has launched the first phase of a new web portal to help businesses understand and follow the customs procedures for importing goods into and exporting goods from the EU. Designed as a single point of access to relevant and practical information, the portal includes animated scenarios to explain each step of the import, export and transit procedures.

Why has the Commission created a new web portal on Customs?

Traders importing goods into and exporting goods from the European Union are subject to a number of key rules and regulations with regard to Customs. In order to help them to understand and properly follow these procedures, the Commission decided to create an online portal, with all the relevant and practical information concerning importing goods into and exporting from the EU.

Who is the target audience for the portal?

The portal is designed for any trader who has to pass through customs as part of their business, such as haulage or shipping companies, importers and exporters.

What kind of information does the European portal provide?

The European Customs Information Portal focuses on provisions of the Safety and Security Amendment to the Community Customs Code, which entered into force on 1 July 2009. There are three main categories of information:

- Animated 'customs scenarios', which guide the users step-by-step through the various procedures of export, import and transit. These scenarios explain each stage of the procedures, listing relevant documents that have to be lodged at each stage to which authority. Each scenario is accompanied by a detailed glossary that provides links to relevant documents, databases and legislation;
- The legal framework of the EU Customs Union on import, export and transit procedures;
- Information and links from the Commission's and Member States' customs sites, such as databases, procedures and assistance services, as well as relevant policy information provided on various Commission websites.

What is the Safety and Security Amendment to the Customs Code that this first phase of the Portal focuses on?

The 'Safety and Security Amendment' to the Community Customs Code is the cornerstone of customs security at EU level in both legislative and practical terms. The Amendment aims to ensure a uniform high level of protection through customs controls for all goods brought into or out of the EU's customs territory.

The amendment covers four major changes to the Customs Code:

- Requiring traders to provide customs authorities with information on goods prior to arrival to or departure from the European Union;
- Providing reliable traders with trade facilitation measures;
- Introducing uniform Community risk-selection criteria for controls, supported by computerised systems for goods brought into or out of the EU customs territory;
- Introducing a Community database allowing the consultation of all EU registration numbers from economic operators;

The aim of these measures is to ensure that consignments are not delayed unnecessarily pending the results of the risk analysis and customs controls

What follow up will there be to this first phase of the portal?

The current first phase of the ECIP website is a forerunner to a comprehensive customs information portal to be provided at a later stage. It is a project to test how well the portal approach works for customs in combining information from Commission and Member State sources. The Commission plans to develop the portal further on the basis of experience gained and feedback received. Its coverage and in-depth information on customs procedures are scheduled to be extended over time.

Who was involved in developing the European Customs Information Portal?

The Customs Information Portal was developed jointly by the Commission, Member States representatives and members of the Trade Contact Group (a platform created by the Directorate General for Taxation and Customs Union for consultation of trade representatives on customs developments). A Commission-led project group was set up, comprised of the above-mentioned

parties, providing a substantive input into the project and feedback on the portal's content. Engaging a broad spectrum of interested groups has ensured that this portal really responds to the information needs of its users.

Is national information provided through the European Customs Information Portal?

The portal uses information feeds (RSS) to pull national customs-related information into the portal, such as customs-related news, contact information, and links to national tools, websites and databases. An economic operator, for example, looking for the latest customs-related news will find it on the European Customs Information Portal. It is a single point of access for traders to European and national customs information.

How is the European Customs Information Portal linked to the Market Access Database and the Export Helpdesk for developing countries?

The European Customs Information Portal is complementary to the Market Access Database and the Export Helpdesk as it focuses on customs procedures. In addition to the information contained on the two other portals the European Customs Information Portal uses customs scenarios to clearly and simply illustrate each step of the import, export and transit procedures.

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Commission welcomes release of negotiation documents on Anti-Counterfeiting Trade Agreement

On 21 April 2010, the negotiation parties to the Anti-Counterfeiting Trade Agreement ('ACTA') published the documents of the eighth round of negotiations held in Wellington on 12-16 April. The Commission has made the draft available to the public. This text shows that the overall objective of ACTA is to address large-scale infringements of intellectual property rights which have a significant economic impact. ACTA will by no means lead to a limitation of civil liberties or to 'harassment' of consumers.

The ACTA will be fully in line with current EU legislation. This means that it is limited to the enforcement of intellectual property rights. The agreement will not include provisions which modify substantive intellectual property law, create new rights or change their duration. It will set minimum rules on how innovators and creators can enforce their rights in courts, at borders or over the internet.

The negotiation draft shows that specific concerns, raised in particular by the civil society, are unfounded. No party to the ACTA negotiation is proposing that governments should introduce a compulsory '3 strikes' or 'gradual response' rule to fight copyright infringements and internet piracy. Similarly, ACTA will not hamper access to generic medicines.

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Commission calls upon Greece to respect ECJ ruling on the taxation of used cars

On 5 May 2010, the Commission decided to continue the infringement procedure against Greece on its car registration system, which still discriminates against used cars bought in other Member States, despite some modifications in the law. In its judgment of 20 September 2007 in the *Commission v Greece* case (C-74/06), the ECJ held that Greece had infringed Article 90 EC by imposing a heavier tax on second-hand vehicles from other Member States than on similar vehicles registered for the first time in Greece.

Greece changed its legislation by introducing accelerated depreciation scales and another depreciation criterion based on mileage. Nevertheless, on the basis of its analysis of the Greek car market, the Commission maintains that the Greek depreciation rates still favour used vehicles on the national market. The result is an overtaxation of cars acquired in other Member States, in violation of Article 110 of the TFEU (former Article 90 EC). The request was made by means of an additional letter of formal notice under Article 260(2) TFEU. If Greece fails to comply with this additional letter, the Commission may immediately bring Greece to the CJ seeking the imposition of a penalty payment.

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6. Capital Duty

Preliminary questions referred to CJ on Spanish levy of capital duty on immovable property companies (*Inmogolf*)

On 30 November 2009, the Spanish Supreme Court referred questions to the CJ in the *Inmogolf* case (C-487/09) regarding the interpretation of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directive 85/303/EEC of 10 June 1985 (the 'Capital Duty Directive').

The Capital Duty Directive prohibits the taxation of making available on the market or dealing in stocks, shares or other securities of the same type. In addition, the Capital Duty Directive only authorises Member States to charge duties on the transfer of securities, whether charged at a flat rate or not. The Spanish legislation at issue establishes a general exemption, from value added tax and from tax on capital transfers, for the transfer of securities but subjects these transactions to tax on capital transfers, as transfers of assets for consideration, provided that they represent part of the capital of companies in which at least 50% of the assets comprise immovable property and where the purchaser, as a result of that transfer, obtains a position which enables him to exercise control over the entity, without distinguishing between holding companies and companies which carry on an economic activity.

In that context, the Spanish Supreme Court referred the following questions to the CJ:

1. Does the Capital Duty Directive preclude the automatic application of legislation of Member States, such as the Spanish legislation at issue, which taxes certain transfers of securities which conceal transfers of immovable assets, even if there has been no intention to avoid taxation?
2. If it is not necessary for there to be an intention to avoid taxation, does the Capital Duty Directive preclude legislation, such as the Spanish legislation at issue, which establishes a charge on the acquisition of major shareholdings in companies whose assets comprise mainly immovable property, even though those companies are fully operative and the immovable assets cannot be disassociated from their economic activities?

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