Editorial

Dear Reader,

For Commissioner Algirdas Šemeta, this year’s May-September session is likely to be characterized by a heavy workload. Not only has the euro crisis required ongoing discussions and decisions but follow-up is also required for policy initiatives such as the Good Governance Principle with its anchor measurements of achieving greater transparency and code of conduct of business taxation as well as concrete proposals such as the Common Consolidated Corporate Tax Base (CCCTB), the financial transaction tax and the VAT Green Paper. The key challenges arising from these developments emerge in our interview with the Commissioner. Also in this edition, the “Focus on” section reports the current position in relation to the CCCTB proposals which, following the principle of subsidiarity, was discussed by the parliaments of Member States in accordance with a new rule in the Lisbon Treaty.

Dr. Klaus von Brocke

Major developments

An interview with Algirdas Šemeta, European Commissioner responsible for taxation and customs, audit and anti-fraud

With the new European Commission (EC) executive now mid-way through their second full year, a strong move toward execution has developed on the key taxation themes that emerged in 2010. Chris Sanger asks Algirdas Šemeta, European Commissioner responsible for taxation and customs union, audit and anti-fraud to reflect on the current position and the future difficulties that may arise in relation to the coordination of policy on a supra-national basis.

Chris Sanger: Commissioner, the CCCTB is an audacious project, firstly to agree and then to implement. Can you share with us the reactions you are receiving from countries in respect of the draft proposals? What are the important issues that remain?

Commissioner Šemeta: The CCCTB is a necessity. This proposal aims to create a real single market from a corporate tax perspective. It is very much awaited by the business community.

Some Member States have expressed concerns on various aspects from optionality to consolidation to concerns on administrative burden and tax revenue impacts. However, all are firmly committed to participating constructively in the negotiation of the proposal that is currently being examined by both the European Parliament and the Council. Getting agreement will, of course, take time. However, I am confident, as the proposal is a high level of priority for all institutional actors.
Although you have stated that you do not expect the CCCTB to result in any kind of harmonization of corporate tax rates, it does reduce a country’s ability to offer the broad spectrum of incentives that support a competitive position. Shouldn’t the Commission be doing more to help the Member States improve their competitiveness?

The CCCTB itself is a proposal that aims to improve the competitiveness of the EU as a whole in the world market. The CCCTB will not replace national corporate tax systems. It is an alternative system that provides companies with the option to use one single European corporate tax system. The CCCTB provides for cross-border loss relief and the elimination of double taxation and transfer pricing within those companies that opt for the CCCTB. Going more into detail of the definition of the tax base, it offers a very competitive R&D expense system. I firmly believe that the CCCTB is a competitive choice, not only for European business but also for Member States, as it will make it easier and cheaper to do business in the single market, making the EU more attractive for foreign direct investment.

**Point of view**

Klaus von Brocke | EU Direct Tax Leader | Ernst & Young

The Commissioner’s comments clearly set out the conviction with which the CCCTB proposals are being pursued. With the outcome uncertain, as many Member States have raised queries over the transfer of power from Member States to the center, businesses will be looking to see how the proposals develop. Potential outcomes include the further development of the proposals with a subset of Member States, under the EU’s Enhanced Cooperation provisions, assuming that the proposals secure the backing of at least nine Member States, or the loss of consolidation from the proposals, delivering a common mechanism for calculating the common base, perhaps just for the Eurozone countries.

These remain political questions as the individual Member States now engage directly on the proposals. Businesses need to make sure that they are actively engaged in the debate as, once the system has been set up (even if only for a subset of Member States,) it will be much harder to change. Furthermore, given the potential impact of an optional CCCTB on tax revenues, a mandatory system appears to be a more likely outcome.

As with many tax changes, this could create both winners and losers.

On the question of the optionality of the CCCTB, could this represent an additional burden for taxpayers and administrators? Having two parallel systems running could well have an impact on the tax audit protocols and administrative and judicial appeal systems.

The Directive provides for an optional CCCTB. This is a common-sense approach, as it means that companies with no intention of expanding beyond their national borders, who, therefore, will only ever work within one system, will not be required to shift needlessly to a new tax system.

Member State administrations may initially incur some additional costs when the CCCTB system is introduced. However, as transfer pricing will no longer be an issue, Member State tax administrations will save a lot of time and money currently spent dealing with it, and will have fewer audit disputes that require costly court cases.

With all of their data contained within a single CCCTB tax return, is it a reasonable expectation of corporate taxpayers that they will see increased information exchange between countries and increased joint audit activity as a result?

A more efficient cooperation between tax administrations can only be beneficial for businesses. It will avoid multiple requests for the same information from different tax administrations. I expect that not only will the CCCTB mean greater cooperation among national tax administrations and the possibility of coordinated audit work, but also the recently adopted Directive on Administrative Cooperation will provide for increased information sharing by national tax administrations. I am anxious to ensure that the administration of the CCCTB will not become a burden for businesses. The approach taken in the Directive has been for a simpler administrative framework.
Do you think it is a reasonable expectation on behalf of corporate taxpayers that, under a single CCCTB tax return, they may be required to disclose their uncertain tax positions in the same way as is now occurring in the United States and Australia?

This issue has not been raised specifically in the CCCTB proposal. However, I expect that this matter may be raised during the course of the technical discussions in relation to the proposal in the Council. It is too early to anticipate the potential outcome from such discussions.

If we look at a policy area such as taxation of the financial services sector, how does the Commission balance EU-wide policy coordination with the desire of sovereign nations to develop local policies?

In general, the Commission balances coordination against purely local solutions by following the principle of subsidiarity. It seeks to coordinate tax policies when there is a definite need to do so to resolve recognized problems or obstacles that cannot be effectively resolved by local and uncoordinated action. For this purpose, an impact assessment is carried out for each legislative proposal to examine why it makes sense to have an “EU” answer rather than 27 Member State answers.

Looking at a policy area such as the financial services sector, the impact of imposing certain additional taxes on the financial sector at EU level is being assessed. The main rationale for the EU action is that the functioning of the internal market would be hampered if Member States decide to act unilaterally in this field. An uncoordinated introduction of taxes on the financial sector could fragment the EU financial market, distort competition and increase the risks of relocation of the financial activities both within and out of the EU.

Point of view

Rod Roman | EMEIA Financial Services | Ernst & Young

Commissioner Šemeta makes a point about subsidiarity that is valid not just for taxation of financial services, but for regulation of financial services. The EU is working on directives to de-risk the financial system as far as possible and the components of their working include EU standards for capital and liquidity, exchange-based derivative clearing and recovery and resolution planning. If Member States have too much latitude on these issues, there are opportunities for regulatory arbitrage within Europe.

Doubtless, any forthcoming financial services taxation proposals coming out of Brussels are likely to be framed with a view to ensuring that businesses do not relocate because of tax systems and render redundant the work done to ensure consistency in the regulatory space. The problem for the Commission in trying to introduce a harmonized new financial services tax is that each Member State cannot consider such taxes without consideration of the impact upon its own economy. Put bluntly, each euro of a new tax comes from the bank’s capital. In the weaker economies, that bank capital is a proxy for the overall financial strength of the Member State. In the stronger ones, it effectively reduces the banking sector’s lending capacity. So, while the EU might design a uniform structure for a new financial tax, the rate at which that tax might be levied could vary greatly as Member States carefully weigh the consequences. In any event, the Commission and banks alike are likely to avoid repeating the bank levy experience where, because there was no EU coordination, banks have been left with the compliance costs of very different systems and the potential absolute cost of double taxation.

A piece on the EU Observer website recently described the EU Joint Transfer Pricing Forum (JTPF) as an “EU tax-scam body stuffed with tax avoidance experts.” How do you react to that criticism?

The Forum brings together tax administrations and taxpayers in a “neutral” place to discuss issues of common interest in transfer pricing. Members from the private sector – taxpayers – are nominated in a personal capacity and are selected on the basis of their expertise in transfer pricing.

All JTPF outcomes, mainly in the form of reports, guidelines and recommendations, reflect a balance between tax administrations’ requests for a better assessment of transfer pricing issues and taxpayers’ need to avoid administrative burden and high compliance costs. It has been widely recognized that JTPF achievements in the field of transfer pricing documentation, dispute prevention and avoidance, as well as more focused issues such as low value adding intragroup services and approaches to transfer pricing triangular cases, contributed significantly to these aims. The most recent report adopted by the group is on SMEs and transfer pricing.
Focus on
Current state of affairs regarding the CCCTB

A common system for calculating the tax base of companies
On 16 March 2011, the EC published a proposal for a common system for calculating the tax base of companies operating within the European Union (EU), the CCCTB. With a common system of this type, the administrative burden, compliance costs and legal uncertainties could be reduced. This is because currently companies are required to comply with different national corporate income tax systems, or, to be more precise, to determine their taxable profits in the EU.

As highlighted in our interview with Algirdas Šemeta, Commissioner for Taxation, Customs, Anti-Fraud and Audit, the CCCTB would enable the companies to file a single tax return for all of the Member States of the EU, i.e., a “one-stop shop” system. Under this system, companies would be able to consolidate all the profits and losses they incur across the EU, although the Member States would maintain their full sovereign right to set their own corporate tax rate.

The adoption of a common system to determine the tax base for companies has the potential to provide a greater stability and legal certainty for both the business community and the tax administration, although it is likely that Member States would lose some of their sovereign rights. It is proposed that the tax base of a specific company would be based on the single tax return, and be shared out among the Member States in which the company has profits on the basis of a formula with three factors, i.e., assets, labor and sales. With this indication that Member States may well lose some sovereignty, it will be interesting to see how Member States react.

Principles of subsidiarity and proportionality
The principle of subsidiarity, introduced in the Treaty of Maastricht, is an important element in the discussions regarding the competence of the institutions of the EU. It is intended to determine if and when the EU can or should take action in areas where there is joint competence, or whether it should leave the action to the Member States. It is explicitly stated in Art. 5, paragraph 3 Treaty on the Functioning of the European Union (TFEU) that, in areas that do not fall within its exclusive competence, the EU should act only if the objectives of the proposed action cannot be sufficiently achieved by the Member States (either at central level or at regional and local level) but instead, as a result of the scale or effects of the proposed action, can be better achieved at EU level. The principle of subsidiarity clearly only applies when the EU and Member States both have competence, under two conditions:

- There must be insufficient achievement by Member States of the objectives of the proposed action
- The EU must be expected to achieve a better outcome by reason of the scale or effects of the proposed action

The principle of proportionality is mentioned in Art. 5, paragraph 4 TFEU, which states that, under the principle of proportionality, the content and form of EU action should not exceed what is necessary to achieve the objectives of the Treaties. This paragraph contains three elements that indicate that the proposed measure should be:

- Suitable for the desired aim
- Necessary to achieve this aim
- Proportional to the aim

1 In Art. 3 TFEU, the areas in which the EU has exclusive competence are given, i.e., (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy, as well as the concluding of some international agreements.

2 See also Protocol (No 2), Art. 5.
Focus on
Current state of affairs regarding the CCCTB

Each legislative act must be justified with regard to the principles of subsidiarity and proportionality, and should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality.³

Yellow and orange card procedure
The procedure for national parliaments to ensure compliance of the EU with the principle of subsidiarity and proportionality is described in Protocol (No 2) to the Lisbon Treaty.⁴ According to this protocol, any national parliament - or any chamber of a national parliament - may, within eight weeks from the date of transmission of a draft legislative act, send a reasoned opinion to the Presidents of the European Parliament, the Council and the EC stating why it considers that the draft in question does not comply with the principle of subsidiarity.⁵ It should be noted that the national parliaments are only allowed by the Protocol to oppose draft legislation for its non-compliance with the principle of subsidiarity. This is further specified in two procedures, the yellow card procedure and the orange card procedure.⁶

Each of the 27 national parliaments has two votes, and if a Member State has a bicameral system, each chamber has one vote. This means that a total amount of 54 votes can be given. If one-third of the national parliaments send a reasoned opinion (with a total of 18 or more votes), the EC has to take the proposal back to the table, because a yellow card is given. This means that the EC has to reconsider the proposal concerned. After this reconsideration, the EC can maintain, change or withdraw the proposal. The EC has to give reasons for the decision it takes. Alongside this yellow card rule, there is an orange card rule. If the majority of the national parliaments (i.e., at least 28 votes) are of the opinion that the proposal is incompatible with the principle of subsidiarity and proportionality or any one of the two principles and if the Council or the European Parliament shares this opinion, the proposal is “off the table.”

Votes of national parliaments regarding the CCCTB
With respect to the draft EU Directive for a CCCTB, national parliaments had the possibility to send their reasoned opinions before 18 May 2011. The result is given below:

- Malta (2 votes). The Commission of Foreign and European Affairs of the Parliament of Malta gave a reasoned opinion on 10 May 2011.
- The Netherlands (1 vote). The Lower House gave a reasoned opinion to the European Commission on 29 May 2011.
- Poland (1 vote). The Commission on European Affairs of the Polish Sejm gave a reasoned opinion on 11 May 2011.
- UK (1 vote). The EU Scrutiny Committee of the Lower House gave a reasoned opinion on 11 May 2011.

Furthermore, although some of the parliaments did not accept a reasoned opinion, several parliaments have formulated some remarks and questions with respect to the proposal. This applies to the Dutch Upper House, the French Senate, the Italian Chamber, the Lithuanian

³ Art. 5, paragraph 3 TFEU.
⁴ Protocol (No 2) on the application of the principles of subsidiarity and proportionality.
⁵ Protocol (No 2), Art. 6.
⁶ Protocol (No 2), Art. 7.
Parliament and the UK’s House of Lords.

**Reasoned opinions of Ireland and the Netherlands**

It is interesting to describe some of the reasoned opinions in more detail. For example, the reasoned opinion of the Irish Parliament mentioned that the procedural obligation of Art. 5 Protocol (No 2) to give a detailed statement was not met.

Furthermore, it was argued that it had not been proved that a CCCTB would be more efficient. For instance, bilateral solutions may be equally efficient, and only very large companies may benefit from a CCCTB. Beside this, the Irish Parliament referred to the possibility of unequal cost implications, e.g., decreasing budget revenues and reduction of GDP, investments and employment.

Some of these arguments were also given by the Dutch Lower House. With regard to the subsidiarity, reference was made to the negative impact on GDP of the EU as a whole as well as effects on individual Member States. Furthermore, the proportionality was questioned, e.g., the consequences of having two different systems of corporate tax in one Member State and the increase in operational costs and administrative burden this could create.

Although the EC is not obliged to reconsider the CCCTB proposal, it can be expected that they will discuss the proposal again due to the fact that 13 votes against the proposal have been given. Furthermore, it can be expected that the informal consultation with Member States will continue.

**European Parliament and Council**

In our interview with Commissioner Šemeta, he mentioned the fact that several Member States have expressed concerns on various aspects of the proposals from optionality to consolidation to concerns on administrative burden and tax revenue impacts. Commissioner Šemeta, furthermore, mentions, however, that all Member States are firmly committed to participate constructively in the negotiation of the proposal, although it is unclear how this relates to the votes of the parliaments. Beside this, Commissioner Šemeta states that the CCCTB proposal is currently being examined by both the European Parliament and the Council, which will take some time. It is, however, the intention that it will be discussed in one of the Councils of Ministers of Finance under the Polish Chair of the EU, which will run from 1 July 2011 up to and including 31 December 2011.

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Which was also mentioned in the reasoned opinion of the UK’s House of Commons.

As mentioned by the Dutch State Secretary of Finance in a letter to the Dutch Lower House on 1 July 2011.
Austria

Judgment in the case C-10/10, Commission vs. Austria on tax deductibility of donations
After the opinion of Advocate General (AG) Trstenjak handed down on 8 March 2011 (see EU direct tax newsletter May/June), the court decided this case on 16 June 2011.

Treatment of donations under Austrian tax law and AG's opinion
Donations to certain Austrian resident institutions (e.g., Austrian universities, academies, research promotion funds) are tax deductible at the level of the donor. Furthermore, donations to Austrian resident as well as non-resident institutions that serve Austrian science and economy are also tax deductible. In contrast, donations to foreign institutions without an Austrian focus that are still comparable are not tax deductible.

According to AG Trstenjak, the treatment of the first type of donations creates a direct restriction based on nationality. The limitation to pure Austrian-focused science and economy in the second type of donations creates an indirect restriction of the free movement of capital, as such donations to non-Austrian institutions are, de facto, not tax deductible for the donees.

Findings of the courts
Following AG Trstenjak’s opinion, the court held that, for taxpayers making donations to research and teaching institutions established in Member States other than the Republic of Austria, the system of tax deductions in question entails a greater tax burden than for taxpayers making donations to the institutions listed in Austrian law. Since the possibility of obtaining a tax deduction can have a significant influence on the donor’s attitude, the non-deductibility of donations to research and teaching institutions established in Member States other than the Republic of Austria may discourage taxpayers from making gifts to them (following the arguments in the Persche case C-318/07), which leads to a restriction of the free movement of capital.

It was held that the justifications brought forward by the Austrian Government (donations paid to Austrian institutions are not comparable to donations paid to non-Austrian institutions; Austrian institutions fulfil functions in the public interest of Austria whereas foreign institutions do not; preferential treatment of Austrian institutions compensates public financing) cannot be used to justify the legislation that distinguishes between donations to national institutions and those to institutions established in other Member States.

As mentioned in the EU direct tax newsletter May/June 2011, the tax treatment of donations is still detrimental to foreign recipients. Consequently, it is likely that an appeal will be necessary if the respective donations are to be treated as deductible.

Belgium

1. Discriminatory taxation of foreign investment funds
On 19 May 2011, the EC closed the infringement proceedings it had launched last year against Belgium on the difference in taxation of dividends and interest received by foreign investment funds as compared to domestic investment companies (case number 2007/4791).

Background
Under Article 106 §3 of the Royal Decree implementing the Belgian Tax Code, dividends distributed by Belgian companies to a Belgian investment fund were exempted from withholding tax under certain conditions, whereas dividends paid by their foreign counterparts were taxed at a 25% or 15% rate.

Under Article 110 of the above-mentioned Royal Decree, a Belgian investment fund meeting certain legal obligations related to its investments and investors was exempt from withholding tax on revenues derived from money deposits made in Belgium, whereas revenues of their foreign counterparts were taxed at a 15% rate.

Procedure
The Belgian legislation was considered by the Commission to be non-compliant with Articles 49, 54, 56, 63 of the TFEU and
Articles 31, 34, 36 and 40 of the EEA. On 28 January 2010, the EC sent a reasoned opinion to Belgium. The Belgian legislation was, however, amended and the infringement procedure was dropped.

2. Discriminatory taxation of foreign investment companies
As mentioned above, Belgian companies distributing interests or dividends in principle need to withhold 15% or 25% as an advance levy regardless of the nationality of the receiving company. Domestic investment companies can credit the withholding tax against the corporate income tax and any excess is refundable. Due to a limited tax basis, domestic investment companies, in practice, are not taxed on such income (joint application of Articles 185, 185 bis, 276, 279, 304 and 248 of the Belgian Income Tax Code). Foreign investment companies, however, receiving the same income from a Belgian company are not eligible to such a refund, making the withholding tax a final taxation and resulting in an effective taxation of foreign investment companies.

On 3 June 2010, the EC sent a reasoned opinion to Belgium requesting Belgium to put an end to the discriminatory taxation of foreign investment companies (case number 2008/4624). As no action was taken, the Commission announced, on 6 April 2011, that it had decided to refer Belgium to the Court of Justice (CJ).

3. Collective investment funds in the European Economic Area (EEA)
Following a reasoned opinion sent to Belgium on 30 September 2010, the EC has now referred Belgium to the CJ over an alleged tax discrimination against collective investment funds located in Iceland and Norway.

Capital gains on the sale of shares of collective investment funds established in the EU, but which do not qualify for the European passport according to Directive 85/611/EEC, are exempted. This exemption is not available to collective investment funds located in Iceland or Norway. Capital gains on the sale of shares of collective investment funds established in Iceland or Norway are taxable, regardless of their status with respect to the European passport.

The EC considers this to be in violation of the free movement of capital (Art. 40 EEA) and the freedom to provide services (Art. 36 EEA).

It should be noted that investment funds located in Liechtenstein (also part of the EEA) were excluded from the infringement procedure since Liechtenstein does not exchange information on income from such investment funds with the Belgian authorities.

4. The EC requests Belgium to amend certain discriminatory rules of its inheritance tax
On 6 April 2011, the EC sent a reasoned opinion to Belgium concerning two of its inheritance tax provisions.

The first issue concerns the legislation of Wallonia, which does not extend to foreign entities the exemption or reduction on inheritance tax and registration duties granted to certain Belgian entities (public and non-profit organizations).

The second issue is that foreign heirs or recipients of gifts of movable assets located in Belgium have to provide a guarantee. If they do not provide a guarantee, the Belgian authorities may block the succession or donation of the assets in full.

The EC is of the opinion that both provisions are in breach of EU rules on the free movement of capital (Art. 63 TFEU and Art. 40 EEA).

5. The EC requested Belgium to amend its rules regarding tax exemptions for certain types of real estate located in Belgium
Under Belgian tax law, a tax exemption applies to revenues from real estate used by organizations that are active in the health or educational sectors, or that are leased under special types of contracts. Belgian residents are, however, taxed on the revenues they get from comparable real estate located abroad.
Belgium

The Commission formally requested Belgium to amend its legislation since it is of the opinion that these provisions are discriminatory and constitute an unjustified restriction on the free movement of capital (Article 63 TFEU and Article 40 EEA Agreement).

It should be noted, however, that the Belgian law of 14 April 2011 amended the provisions in question, to include real estate located in a Member State of the EEA.

6. The EC requested Belgium to change its law on taxation of capital gains
Under the Belgian law, a deferred taxation of capital gains on fixed assets is allowed where reinvestment is made in assets used for a professional activity in Belgium.

On 6 April 2011, the EC formally asked Belgium to change this provision since it is of the opinion that the provision violates the freedom of establishment, the freedom to provide services and the free movement of capital. The request takes the form of a reasoned opinion so that Belgium is required to reply satisfactorily within a two-month period.

However, on 16 June 2011, the Belgian Council of Ministers agreed on a draft Bill that would, among other things, amend the provision in question following the EC’s request. While this is not yet implemented into Belgian law, the deferred taxation of capital gains will also be allowed, where a reinvestment is made in assets located abroad used for the professional activity. The amendment is likely to become effective as from the tax year 2011.

7. The EC requested Belgium to amend discriminatory tax provisions on donations of shares
On 19 May 2011, the EC formally asked Belgium to end the discriminatory treatment of the taxation of the donation of shares under the legislation of the Walloon and Brussels region.

Under the tax law of the Walloon region, the donation of shares in companies with seat of effective management located in an EEA country outside the EU (such as Norway, Iceland or Lichtenstein) is subject to a higher tax rate when compared to donations of shares of EU companies. The EC considers this to be in breach of the principle of free movement of capital (Article 40 EEA Agreement).

The tax legislation of the Brussels region provides for a higher tax (normal tax rate plus interest) if the seat of effective management of the company is transferred to an EEA country outside the EU within five years following the date of the donation. The EC considers this to be in breach of the freedom of establishment (Article 31 EEA Agreement).

8. Bank secrecy and foreign requests to exchange information
Belgium recently introduced a provision in its legislation to oblige Belgian banks to exchange data with the Belgian tax administration if there are indications of tax avoidance or if the administration wants to issue a deemed income assessment (based on indications that part of the income has not been declared).

Foreign tax administrations may also request information from resident banks. In this case, no indications of tax avoidance are necessary in order to obtain the information.

On 27 June 2011, the Belgian tax authorities published a Circular further clarifying the new Belgian legislation and the specific procedure to be followed in order to obtain information from Belgian banks.

9. Dividend withholding tax and the EU Directive
Next to the withholding tax exemption under the Parent-Subsidiary Directive, Belgian tax law also allows an exemption from withholding tax on dividends in case Belgium has concluded a double taxation treaty with the state of residence of the receiving company and in case this double taxation treaty provides for a qualified information exchange clause. In order to benefit from this exemption, amongst other conditions, the receiving company must have a qualified legal form. As legal forms of third States are not listed in the Annex to the Parent-Subsidiary Directive, the Belgian
withholding tax exemption is subject to the receiving company having a legal form comparable to a legal form mentioned in the Annex to the Directive.

The Belgian tax authorities now published a Circular letter refusing that companies with a legal form comparable to the forms listed in the Annex to the Directive, but located in the EU, be eligible to the withholding tax exemption.

10. Interest withholding tax credit
In a recent decision, the Belgian Constitutional Court (Arbitragehof, 30 June 2011) was required to decide on the constitutionality of the Belgian foreign tax credit system in the context of the France/Belgium income tax treaty.

Facts
Two Belgian individuals received interests stemming from France pursuant to the redemption of a life insurance.

A withholding tax of 15% was levied on the interest income both in France and in Belgium. The individuals declared the interest income in their tax return, requesting the application of the foreign tax credit.

The question referred to the Court
The Belgian individuals argued that the fact that they are not granted a tax credit for the French withholding tax is a violation of the France/Belgium income tax treaty and a violation of the constitutional principle of equality, to the extent that Belgian residents are treated in the same way when they receive Belgian source income or foreign income, even if the foreign interest income had already been taxed abroad. This results in a greater tax burden on foreign income than of Belgian income.

Decision
Where certain conditions are fulfilled, professional investors may indeed benefit from a tax credit when they receive income that has already been taxed abroad. This exemption is, however, not available for private investors. The foreign interest income derived by a private investor is in principle subject to a movable prepayment, and therefore does not need to be included in the income tax return whereas foreign interest derived by a private investor is part of the taxable profit and does not benefit from a movable prepayment.

Based on the original intention of the legislator, the Court comes to the conclusion that the granting of a tax credit is not justified when income has been subject to a movable prepayment (bevrijdende roerende voorheffing), whereas it is justified in the opposite case. The fact that the tax burden may be higher on interests derived from France than on interests derived from Belgium is only due to the fact that, under the France/Belgium income tax treaty, both France and Belgium are allowed to levy taxes.

The Court is of the opinion that this does not constitute a disproportionate infringement on the rights of a private investor, especially since the withholding tax, under the France/Belgium income tax treaty, is capped at 15%.

On 16 June 2011, the EC formally requested Estonia to amend its tax legislation that is considered to be discriminatory to non-resident investment funds. Under the Estonian Income Tax Act, domestic investment funds are treated more favorably in terms of taxation of income from real estate than similar funds established in other EU Member States or in countries of the EEA.

The provision in question sets out that funds resident in Estonia are entitled to a tax exemption for their real estate income, whereas comparable funds established in other EU and EEA Member States are subject to taxation. Therefore, the Estonian tax legislation creates a higher tax burden on non-resident investment funds and it does not guarantee the equal treatment of residents and non-residents in similar conditions. Consequently, it potentially conflicts with EU freedoms, in particular, the free movement of capital and freedom to provide services.

The EC request was sent as a reasoned opinion, a second step of EU infringement proceedings. Estonia has two months to give a satisfactory response to the opinion; otherwise the EC may refer it to the CJ.
The French Supreme Administrative Court asked the CJ whether the withholding tax levied on dividends paid to EU and non-EU investments funds is contrary to the free movement of capital.

On 23 May 2011, the French Supreme Administrative Court decided to refer to the CJ the issue of the compatibility with the free movement of capital in relation to the withholding tax levied on portfolio dividends paid to EU and non-EU investment funds. The questions put to the CJ were:

- In order to assess compatibility, should the situation of the unit holders in the investment funds be taken into account?
- If so, in which cases might the withholding tax levied on portfolio dividends be considered as contrary to the free movement of capital?

This request for a preliminary ruling followed the decision of the EC to file a complaint before the CJ against France. The grounds for the complaint were that the French withholding tax levied on portfolio dividends paid to EU and EEA investment funds and pension funds was contrary to the free movement of capital guaranteed by Article 63 of the TFEU and Article 40 of the EEA Agreement.

Pursuant to Sections 119 bis and 187 of the French Tax Code, French source dividends distributed to foreign investment funds are subject to a 25% withholding tax. French source dividends distributed to a French Undertaking for Collective Investment in Transferable Securities (UCITS), however, are not subject to withholding or other taxes at the level of the French UCITS. This includes French “Fonds communs de placement” (FCP), which are co-ownerships of assets and are not subject to the French corporate income tax and French “Sociétés d’investissement à capital variable” (SICAV), which benefit from a corporate income tax exemption.

Whereas, the Paris Administrative Court already decided in the Axa Rosenberg Alpha Trust case that the French dividend withholding tax suffered by an Irish UCITS is contrary to the free movement of capital principle, on 1 December 2010, the Montreuil Administrative Court referred 10 cases to the French Supreme Administrative Court.

The Court considered that the main issue at hand in assessing the compatibility of the withholding tax levied on dividends derived from French portfolio holdings is whether the difference in treatment and comparable situation should be appreciated at the level of the UCITS, or at the level of both the UCITS and the unit holders.

Should only the situation of the UCITS be taken into account, the opinion highlighted that the withholding tax would be contrary to the free movement of capital. The reason for such an opinion is that, EU UCITS should be regarded as being in a comparable situation with French UCITS and therefore suffering a difference in treatment, which may not be justified by overriding reasons of general interest such as the balanced allocation of taxation rights between Member States or the efficiency of tax audits.

However, according to the Court, the exclusive purpose of UCITS (i.e., to realize investments on behalf of their unit holders) and the effective taxation of dividends received at the level of the unit holders might justify the taking into account of the situation of the unit holders, thus requiring referral of the question to the CJ.

According to the Court, the approaches applicable to EU investment funds should also apply to non-EU investment funds if the following two conditions are satisfied. The first condition is that the holdings in the French distributing company do not qualify as direct investments under Article 64 of the TFEU and the second condition is that the French tax authorities do not demonstrate that the difference in treatment between French UCITS and non-EU investment funds is justified by the need to safeguard the efficiency of the tax audits.

In respect of that need to safeguard the efficiency of the tax audits, the Court held that such justification may not generally be invoked against investment funds located in countries (such as the US) that have signed a tax treaty with France that includes an administrative assistance clause preventing tax evasion.
Considering the standard two-year statute of limitations, EU and non-EU investment funds, which have suffered withholding tax on dividends derived from French portfolio holdings, should consider the opportunity to file protective claims before 31 December 2011 in order to safeguard their claiming rights for withholding taxes levied in 2009.

**The 3% tax on French immovable property held indirectly by a BVI company does not infringe the free movement of capital principle**

Pursuant to Section 990 D of the French Tax Code, companies that directly or indirectly hold immovable properties in France are subject to an annual tax of 3% on the market value of the properties. However, former Section 990 E provided that the tax is not due by companies whose effective place of management is in France and foreign companies whose effective place of management is in a country that entered into a double tax treaty with France including a mutual assistance clause or a non-discrimination clause based on nationality.

In the *Elisa* case (C-451/05), which relates to a French immovable property held by a Luxembourg 1929 holding, the CJ decided, on 11 October 2007, that these provisions were contrary to the free movement of capital (Article 63 of the TFEU). In the *Etablissements Rimbaud* case (C-72/09), which relates to a French immovable property held by a Liechtenstein company, the CJ decided, on 28 October 2010, that these provisions, while restricting the free movement of capital (Article 40 of the EEA Agreement), were justified by the fight against tax evasion and the need to safeguard the effectiveness of fiscal supervision.

After Luxembourg and Liechtenstein, the Lower Administrative Court of Paris referred to the CJ a case where the immovable property was held indirectly by a company located in the British Virgin Islands, which is neither a Member State, nor a third country but an Overseas Country and Territory (OTC) subject to the specific rules laid down in Article 198 et seq. of the TFEU (C-384/09 – *Prunus SARL*).

Like the AG, in his opinion released on 9 December 2010, the CJ first considered that the free movement of capital set out in Article 63 TFEU applies to OTCs in view of the unlimited territorial scope of that provision.

However, contrary to the AG’s opinion, the CJ considered that the standstill clause of Article 64 TFEU applies to OTCs, since OTCs benefit from the liberalization of the movement of capital provided for in Article 63 TFEU in their capacity as non-Member States. This clause allows Member States to maintain, in respect of direct investments from third countries, discriminatory provisions in existence before 31 December 1993.

In the present case, the litigious French provisions were entered into force on 1 January 1993 and thus fall within the scope of the standstill clause. As a consequence, the CJ concluded that, in application of Article 64 TFEU, the French provisions were not contrary to the free movement of capital in respect of BVI companies holding French real estate.

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**CJ decision in the Scheuten Solar Technology (SST) Case 397/09 regarding the add-back of interest provisions in the German municipal trade tax law**

**Summary**

On 21 July 2011, the CJ gave its preliminary ruling in the SST case, which concerns the add-back of 50% of the interest on long-term liabilities for German trade tax purposes. As the payment of interest from a German subsidiary to its 100% parent company in the Netherlands leads to an additional amount of trade tax, it was questioned whether this provision was at odds with the EU Interests and Royalties Directive (IRD).

In its decision, the court ruled that the IRD does not preclude a provision under which loan interest, paid by a company located in one Member State to an associated company of another Member State, is incorporated into the basis of assessment of the business tax payable by the former company.
Background
SST was a German limited liability company established in Germany. The company was wholly owned by a Netherland BV. In the years 2003 and 2004, SST took loans from the Netherland BV. In 2004, SST paid interest to the Netherland BV.

Pursuant to Sec. 8 No. 1 of the German Trade Tax Act, the German tax office added half of the sum of the total interest paid back to the basis of assessment of the business tax payable by SST.

In the objection proceedings before the German tax office, SST argued that the add-back of interest payments contravenes Art. 1 (1) of the IRD. In the opinion of SST, the add-back of interest payments effectively constituted an imposition of tax that led to an economic double taxation of the interest, which is not compatible with the IRD.

The German tax office rejected the objection. In 2008, an action was dismissed by the Lower Tax Court of Münster (lower finance court Munster). The Federal Tax Court referred the case to the CJ.

CJ’s decision
In its decision, the court ruled that the IRD does not preclude a provision under which loan interest paid by a company located in one Member State to an associated company of another Member State is incorporated into the basis of assessment of the business tax payable by the former company. Further, the court stated that a provision, such as Sec. 8 para 1 of the German Trade Tax Act, is out of the scope of Art. 1 (1) of the IRD.

Referring to the preamble of the IRD, the court outlined that the aim of the IRD is the avoidance of double taxation with respect to interest and royalty payments between associated companies of different EU Member States to the detriment of the actual beneficial owner. The provision would thus concern solely the tax position of the interest creditor, not the tax position of the payer.

Further, the court rendered that national legislation, such as the provision of Sec. 8 of the German Trade Tax Act, does not lead to a reduction of the income of the interest creditor and that it does not subject the interest paid to any tax in the hands of the beneficial owner of such interest. The legislation at issue would only relate to the tax assessment base of the payer. The methods of calculation of the assessment base would not be subject to Art. 1 (1) of the IRD, and the additions pursuant to Sec. 8 para 1 of the German Trade Tax Act would only relate to amounts that were deducted in the first stage of the calculation. In addition, the court outlined that the rules on the deductibility of certain expenditures form part of the fiscal policy of each Member State.

Implications
As a result of the decision of the CJ, the action by SST before the Federal Tax Court will likely not be successful. However, taxpayers should continue to observe any further developments happening in this case.

CJ decision in Meilicke II on German provisions on the taxation of dividends (C-262/09): earlier decisions in Meilicke I upheld and clarified

Summary
In the Meilicke I case (C-292/04), the CJ ruled that the German provisions on the taxation of dividends are inconsistent with the EC Treaty and that national legislation, under which a fully taxable shareholder is only entitled to a tax credit if the dividend-paying company is a domestic company, is precluded by Articles 56 and 58 EC (Art. 63 and 65 TFEU). Therefore, a domestic shareholder of a foreign company is, in general, entitled to credit the corporate tax paid against their personal income tax assessed.

On 30 June 2011, the CJ gave its preliminary ruling in the Meilicke II case (C-262/09) outlining the procedural rules and calculation rate under which the tax credit must be made. In particular, the CJ ruled that the credit of foreign taxes is limited to the lower of foreign taxes charged and the tax credit applicable on German dividends.

Further, the CJ stated that the taxpayer does not have to provide a German corporation tax certificate, but upon
Germany

request of the tax authorities, a detailed documentation of the foreign corporate tax paid must be provided. From a procedural perspective, the CJ stated that the determination of a reasonable period for the submission of dividend certificates or documentary evidence is a matter for the referring court. Without a transitional period, Section 175 para. 2 of the German General Tax Act would preclude an amendment of tax assessment notices. In that regard, taxpayers will have to wait for a final decision of the lower tax court.

Background

The former German imputation system provided a tax credit for dividends paid by domestic companies. The taxpayers could credit the corporate income tax paid by the domestic company against their personal income tax. This rule did not apply to dividends paid by companies established in other Member States.

Hans Meilicke, an individual who was resident in Germany, held shares in companies established in the Netherlands and Denmark. During the course of the years 1995 to 1997, he received dividends from those shares. His heirs applied for a proportional income tax credit for those dividends in Germany.

The tax authorities rejected that application claiming only corporation tax on dividends paid by German companies could be set off against personal income tax. The heirs brought an action before the Lower Tax Court of Cologne and this court subsequently referred the case to the CJ.

On 6 March 2007, the CJ gave its long-awaited decision in the Meilicke I case (C-292/04). In its fact pattern and merits, the case resembled the Finnish case Manninen (C-319/02).

In this earlier decision, the CJ held that the German provisions on the taxation of dividends are inconsistent with the EC Treaty. Such national legislation, under which a fully taxable shareholder is only entitled to a tax credit – calculated by reference to the corporation tax rate on distributed profits – if the dividend-paying company is a domestic company, is precluded by Articles 56 and 58 EC. On the one hand, such rules could deter persons who are fully taxable in Germany from investing abroad, and, on the other, could constitute an obstacle to foreign companies raising capital in Germany.

On 14 May 2009, the Lower Tax Court of Cologne filed a demand for a second preliminary ruling (Meilicke II), largely requesting more detail on how the guidelines of the CJ’s decision of 6 March 2007 should be legally applied. The court stated that the amounts of corporate income tax actually paid in the Netherlands and Denmark cannot, in practice, be determined. Consequently, the court had doubts concerning how the determination of tax credits to be claimed can be correctly made.

CJ’s decision

In its decision, the CJ held that the calculation of the tax credit must be made in relation to the rate of corporation tax on the distributed profits of the foreign company. However, the amount to be imposed may not exceed the amount of income tax paid by the domestic shareholder. The tax authorities may not determine the credited tax by a lump sum (e.g., 3/7 of the taxable income), because the foreign tax paid could, in fact, be higher.

Further, the CJ stated that the degree of detail and the form of evidence to be provided by a shareholder of a foreign company is not the same as the evidence required for the shareholder of a domestic company. However, the CJ ruled that the tax authorities of the taxing Member State are entitled to require the shareholder to provide documentary evidence enabling them to ascertain whether the conditions for obtaining a tax credit are met, without having to make an estimate of the tax credit.

According to the CJ, the determination of a reasonable period for the submission of dividend certificates or documentary evidence is a matter of the referring court. Without a transitional period, Section 175 para. 2 of the German General Tax
Germany

Act would preclude an amendment of tax assessment notices by submitting a dividend certificate. According to the CJ, this is not in line with EU Law. As noted, taxpayers will, therefore, have to wait for a final decision of the Lower Tax Court of Cologne. However, the assessment of a transitional period by a lower tax court could be critical since this is the original duty of the legislator.

Implications

Taxpayers should observe the principles of the CJ in all applications for tax credits based on the Meilicke I decision.

Italy

Official interpretations on Italian dividend withholding tax refund claims widen the CJ decision in the Commission of the European Communities vs. Italian Republic case (C-540/07)

On 8 July 2011, the Italian tax authorities issued a guidance dealing with Italian dividend withholding tax refund claims, following the CJ decision in the Commission of the European Communities vs. Italian Republic case (C-540/07).

As discussed previously in EU direct tax newsletter January/February 2010, the CJ ruled that Italy is in violation of the obligations set forth under Article 56 of the EC Treaty, as it has applied discriminatory tax treatment in respect of dividends paid to foreign companies resident in the EU.

Under the Italian tax law, outbound dividends arising out of ordinary shares are subject to a 27% standard withholding tax or exempt from withholding tax under the EU PSD requirements or subject to a reduced withholding tax provided for by applicable tax treaties.

Furthermore, as from 1 January 2008, dividends paid to companies resident in the EU or in the EEA would be subject to a reduced 1.375% withholding tax if certain requirements are met. Such a regime is applicable to dividends paid out of profits accrued from fiscal year 2008 onward.

The calculation of the tax credit should be made in relation to the corporation tax on the distributed profits of the foreign company and should not exceed the amount of income tax paid by the domestic shareholder. Further, the taxpayer should provide sufficient documentary evidence of the corporate tax paid on dividends. A German corporation tax certificate should not be required. Further, taxpayers should watch carefully for a possible change of procedural law and the respective transitional periods. As transitional periods are still uncertain, taxpayers should consider filing outstanding applications immediately.

The 1.375% withholding tax rate was introduced following the reasoned opinion issued by the EC on 4 July 2006, aimed at preventing tax discrimination against dividends paid to EU and EEA companies.

Indeed, under the Italian tax law that was in force until 31 December 2007, dividends paid to EU and EEA companies were subject to the above-mentioned 27% Italian withholding tax, unless EU PSD provisions or double tax treaty benefits applied. Conversely, dividends paid to domestic shareholders were entitled to a 95% exemption from Italian corporate income tax, and thus were subject to an effective tax rate of 1.65% (33% corporate income tax on 5% tax base). It should be noted that, from fiscal year 2008, the Italian corporate income tax was lowered to 27.5%, such that dividends paid to Italian companies are currently taxed at an effective tax rate of 1.375%.

In its judgment, the CJ ruled that Italian withholding tax treatment of dividends paid to EU companies should be considered a breach of the principle of the free movement of capital provided for by Article 56 of the EC Treaty. On the contrary, the CJ dismissed the EC’s action in relation to dividends paid to EEA companies. The CJ reasoned that such discriminatory treatment was justified by “the overriding reason in the public interest regarding the fight against tax evasion.”
In supporting its decision, the CJ argued that the EU provisions on mutual assistance in the field of direct taxation provided under Directive 77/799/EEC are not effective between Italy and non-EU Member States. Additionally, the CJ said that Liechtenstein does not exchange tax information with Italy and that the EC did not rebut Italy’s arguments in respect of its inability to obtain sufficient information under the double tax treaties signed with both Norway and Iceland. Thus, pursuant to the aforesaid CJ judgment, Italian dividends that will be paid to EU companies should be subject to the reduced 1.375% withholding tax rate, regardless of the fiscal years in which the related profits have been accrued. On the other hand, EU companies may claim a refund on the higher Italian withholding tax on dividends applied in violation of the EC Treaty provisions.

However, in the aforementioned Issue EU direct tax newsletter Jan/Feb 2010, it was argued that the said judgment does not actually consider the fact that, since 1996, Norway has been on the white list of countries that grant an appropriate exchange of information with Italian tax authorities and should again appear on the forthcoming white list to be issued by Italian authorities (which will replace the current one). It was also highlighted that the tax treaty entered into between Italy and Iceland, which has been in force since 14 October 2008, sets out an obligation to grant the exchange of information based on a similar wording of the tax treaty entered into between Italy and Norway, the latter in force since 25 May 1987.

By making reference to grounds similar to those highlighted in Issue EU direct tax newsletter Jan/Feb 2010, official interpretations have recognized that a discriminatory tax treatment occurred with respect to Italian dividends paid to foreign companies resident in the EU, and to companies resident in Norway and Iceland.

Such interpretations have also clarified that refund claims are available with regard to dividends paid on or after 1 January 2004 (i.e., since the Italian participation regime entered into force), to the extent that the refund claim is submitted to the Italian tax authorities within 48 months of the date on which the excess withholding was applied.

Furthermore, in order to obtain the tax refund, the foreign shareholder:

- Should not be entitled to benefit from the PSD provisions
- Should be liable to corporate income tax in its country of residence. This requirement is considered met if the foreign shareholder benefits from tax exemption regimes compatible with EU law
- Should not benefit from a full tax credit in its country of residence in connection with the application of the Italian dividend withholding tax
- Should neither be a mere artificial arrangement (i.e., a conduit company) nor put in place for abusive tax avoidance transactions in order to benefit from Italian dividend withholding tax refunds.

It is worth noting that Italian tax authorities hold the view that shareholders resident in black-listed countries or in non-white-listed countries are considered artificial arrangements, unless they can prove their genuine business purpose.

**Netherlands**

**EC requires the Netherlands to allow Dutch fiscal unity between sister companies held by EU parent**

On 16 June 2011, the EC announced that it has formally requested the Netherlands to amend its fiscal unity regime. The regime currently allows groups of companies to file one single tax return and to calculate Dutch corporate income tax on a consolidated basis. This means that, for example, losses incurred by one company in the group can be offset against the profits of another, and that intragroup transactions are ignored for corporate income tax purposes.

The current Netherlands rules, however, do not allow two Dutch subsidiary companies held by a foreign parent company to
form a fiscal unity between themselves. This implies that Dutch companies that have their parent company in another Member State cannot benefit from the Netherlands group consolidation regime. The EC considers that this is contrary to the freedom of establishment provided by the TFEU and the EEA. If the Netherlands does not change its tax legislation in due course, the Commission may decide to refer the case to the CJ. The Commission’s position finds broad support in the case law of the CJ. Although this development is restricted to the Netherlands, similar issues may arise in other EU or EEA countries that apply a comparable group taxation regime.

Dutch District Court allows “Papillon” fiscal unity between Dutch parent and Dutch lower-tier subsidiaries

On 9 June 2011, the Haarlem District Court in the Netherlands reached a decision allowing a fiscal unity between a Dutch parent and its lower-tier Dutch subsidiaries where the lower-tier Dutch subsidiaries are held through foreign intermediary companies. In the litigated case, the Dutch parent held its Dutch lower-tier subsidiaries through German intermediary companies. Forming a fiscal unity for Dutch corporate income tax purposes is subject to a number of requirements. A fiscal unity is, in principle, available for Dutch resident companies only. As a consequence, the formation of a fiscal unity between a Dutch parent and its Dutch lower-tier subsidiaries, held through a foreign intermediary company, as in the litigated case, is not possible. The taxpayer argued, by referring to a similar case rendered by the CJ, the Papillon case (C-418/07), that this constitutes an unjustified restriction of the freedom of establishment as laid down in EU law.

The District Court, in principle, agreed with the taxpayer on this point, although considered that this restriction may be justified by the need to prevent double loss compensation. While acknowledging that, under the Dutch tax rules, a tax loss at the level of the Dutch lower tier subsidiaries may potentially be utilized at the level of the Dutch parent, for example, when one of the German intermediary companies is liquidated, the District Court concluded that the restriction is disproportionate. Considering that Dutch tax rules contain necessary tools to mitigate the risk of double loss compensation, the District Court held that an unconditional disallowance of a fiscal unity, without leaving the taxpayer the possibility to demonstrate that double loss compensation is not present, is not in line with EU law. Although the taxpayer’s position finds strong support in the case law of the CJ, it is anticipated that the Dutch State Secretary of Finance will lodge an appeal against this decision.

Amendment of participation exemption for currency results in anticipation of future CJ case law

Foreign exchange results on a participation are exempt under the current Dutch participation exemption regime. Following the Deutsche Shell case (C-293/06), certain taxpayers have taken the position that foreign exchange losses on EU participations should be tax deductible. This position is based on the argument that, like the Deutsche Shell case, foreign exchange losses on a participation are not visible and not recognized in the Member State in which the participation is established. Since European law seems to require that losses should always be deductible somewhere, these foreign exchange losses should be taken into account in the Member State in which the shareholder resides. After all, the foreign exchange result is only visible in that Member State.

If this position were to be confirmed by the CJ, this would result in a situation where foreign exchange losses on EU participations are tax deductible, and foreign exchange profits are exempt. The Dutch Government wants to avoid such potential asymmetric treatment of foreign exchange results. Therefore, in anticipation of future CJ case law, a law proposal has been published that provides for the following: if a taxpayer wants to take into account a foreign exchange loss on an EU participation, and it turns out that the taxpayer indeed was allowed to do so (i.e., if the Deutsche Shell case
indeed can be applied to participations), the taxpayer also has to take into account foreign exchange gains on all its (other) EU participations in the current and any future year. The amount of gains that have to be taken into account are not limited to the amount of the losses that have been deducted. This could imply that by choosing to deduct the foreign exchange loss, the taxpayer could end up in a worse situation if it turned out that the foreign exchange profits exceed the claimed loss.

To avoid the application of the new legislation, a taxpayer could consider transferring its participations that might increase in value in the future, thereby potentially avoiding the possible future foreign exchange gain, which would fall under the scope of the new legislation. This, however, is countered by an anti-abuse provision. If a taxpayer deducted a foreign exchange loss on a participation and subsequently transfers this or another participation to a Dutch group company, that group company cannot apply the participation exemption on foreign exchange gains on any of these participations. The anti-abuse provision does not apply if the participations are transferred to a non-Dutch resident group company, since a non-resident company is typically not subject to tax in the Netherlands.

The new legislation will have retroactive effect from 9 April 2011, 17:00 (CET). This is the day that a press release was issued announcing that the Netherlands would introduce legislation to counter the deduction of foreign exchange losses on EU participations.

1. **White Paper on tax-free cross-border reorganizations**

   The previous issue of the *EU direct tax newsletter* May/June 2011 summarizes the amendments proposed on 25 March 2011 by the Norwegian Ministry of Finance to the Norwegian Parliament in relation to the rules on taxation of companies and shareholders in connection with cross-border restructurings. The proposed amendments have been adopted with effect from 1 January 2011 and have introduced among others the possibility of carrying out a merger or a demerger between a Norwegian tax resident company and a company tax resident in another country member of the EEA without immediate taxation.

2. **Settlement of the profit and loss account as a result of cross-border reorganization**

   According to Section 14-48 of the Norwegian Tax Act, the profit and loss account of a Norwegian transferor company (which will be dissolved with a merger) must be settled, if the acquiring EEA company does not keep a branch in Norway. However, on 13 May 2011, the Norwegian Ministry of Finance proposed an exemption to the above rule establishing that the profit and loss account of the Norwegian transferor company would not need to be settled at the time of the merger, regardless of whether the acquiring company retains a branch in Norway. The exemption will not apply if one or more of the companies directly involved in the merger or demerger is tax resident in a low-tax jurisdiction within the EEA, unless the company, or companies, in question is genuinely established and carries out real economic activity in the other EEA state.

   An additional condition for the exemption is that the acquiring company is resident (or becomes resident) in an EEA state where the Norwegian tax authorities are able to request assistance from that State in the collection of taxes, through a binding treaty. In cases where no such treaty exists, the acquiring company must provide a guarantee for the tax amount related to the profit and loss account. This proposed amendment has been approved by the Norwegian Parliament, but it is yet to receive assent from the Norwegian King.
Slovakia

**Binding opinions to be issued by Slovak tax authorities**

The Slovak Ministry of Finance recently released its proposal on measures to improve the system of providing information by tax and customs administration. The proposal aims to improve the business environment and to increase legal certainty, as well as to facilitate entrepreneurs' access to relevant information.

As from 1 January 2013, taxpayers should be entitled to request tax authorities to issue a binding opinion on complex issues in respect of any tax area. As a result, this amendment would provide a legal recourse by which taxpayers might confirm the implications of certain transactions in advance.

According to the proposal, the tax authority should have a 30-day period for preparation of the respective response. The binding opinions should be subject to a flat fee of EUR 2,000 in order to cover the costs for the tax authorities and to mitigate the risk of taxpayers making excessive use of this mechanism for routine tax questions.

The Government discussed and accepted the proposal during the last week of June 2011.

Ernst & Young has recently prepared a publication comparing various concepts in the area of Alternative Dispute Resolution, which covers the concept of Binding Rulings. The document can be accessed by clicking on this reference.1

United Kingdom

**Commission requests UK to amend CFC legislation**

The EC has formally requested the United Kingdom to amend its legislation to take into account the rulings of the CJ on the tax treatment of controlled foreign corporations (CFCs).

Following the Cadbury Schweppes case, the UK introduced the provisions of section 751A ICTA 1988. Notwithstanding the measures taken by the UK, the Commission considers that the UK is still not fulfilling its obligations under Articles 49 and 63 (freedom of establishment and free movement of capital) of the TFEU, and Articles 31 and 40 of the EEA Agreement.

In the Commission's view, the UK's legislative response does not eliminate the discriminatory restriction of the anti-abuse CFC regime. The new provisions fail to exclude from the CFC regime all subsidiaries established in EU/EEA Member States that are not purely artificial and are not involved in profit-shifting transactions.

The Commission believes that the UK provisions may lead, in certain cases, to an additional taxation of profits made by subsidiaries engaged in genuine economic activities in other EU Member States or EEA countries.

The Commission's request takes the form of a reasoned opinion (second step of EU infringement proceedings). In the absence of a satisfactory response within two months, the Commission may refer the UK to the CJ. The Commission had previously sent a letter of formal notice to the UK on 22 March 2010, which was replied to by the UK on 15 July 2010. However, the Commission does not believe that reply to be satisfactory.

The UK Government is currently undertaking a review of its entire CFC regime and, on 30 June 2011, published a consultation document on full CFC reform. The consultation document outlines how the Government believes the proposed new regime interacts with its obligations under EU law. The new legislation is expected to be included as part of next year's Finance Bill.
### Contacts

<table>
<thead>
<tr>
<th>Country</th>
<th>Email/telephone</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td><a href="mailto:roland.rief@at.ey.com">roland.rief@at.ey.com</a> +43 121 170 1257</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:markus.stefaner@at.ey.com">markus.stefaner@at.ey.com</a> +43 121 170 1283</td>
</tr>
<tr>
<td>Belgium</td>
<td><a href="mailto:steven.zlaes@be.ey.com">steven.zlaes@be.ey.com</a> +32 2774 9420</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:julian.mihov@bg.ey.com">julian.mihov@bg.ey.com</a> +359 281 77142</td>
</tr>
<tr>
<td>Cyprus</td>
<td><a href="mailto:maarten.koper@cy.ey.com">maarten.koper@cy.ey.com</a> +357 252 09722</td>
</tr>
<tr>
<td>Czech Republic</td>
<td><a href="mailto:libor.fryzek@cz.ey.com">libor.fryzek@cz.ey.com</a> +420 225 335 310</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:karel.tronek@cz.ey.com">karel.tronek@cz.ey.com</a> +420 225 335 654</td>
</tr>
<tr>
<td>Denmark</td>
<td><a href="mailto:morten.von.jessen@dk.ey.com">morten.von.jessen@dk.ey.com</a> +45 3 587 2997</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:michael.kirkegaard@dk.ey.com">michael.kirkegaard@dk.ey.com</a> +45 3 587 2762</td>
</tr>
<tr>
<td>Estonia</td>
<td><a href="mailto:tonis.jakob@ee.ey.com">tonis.jakob@ee.ey.com</a> +372 611 4669</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:hedi.wahtramae@ee.ey.com">hedi.wahtramae@ee.ey.com</a> +372 611 4570</td>
</tr>
<tr>
<td>Finland</td>
<td><a href="mailto:katri.nygard@fi.ey.com">katri.nygard@fi.ey.com</a> +358 407 120 671</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:anne.vanhala@fi.ey.com">anne.vanhala@fi.ey.com</a> +358 503 391 625</td>
</tr>
<tr>
<td>France</td>
<td><a href="mailto:anne.colmer.daage@ey-avocats.com">anne.colmer.daage@ey-avocats.com</a> +33 155 611 305</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:jerome.ardouin@ey-avocats.com">jerome.ardouin@ey-avocats.com</a> +33 155 611 317</td>
</tr>
<tr>
<td>Germany</td>
<td><a href="mailto:tim.hackemann@de.ey.com">tim.hackemann@de.ey.com</a> +49 619 699 621 718</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:vassilis.vlachos@gr.ey.com">vassilis.vlachos@gr.ey.com</a> +30 210 288 6399</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:roxani.papanikolaou@gr.ey.com">roxani.papanikolaou@gr.ey.com</a> +30 210 288 6051</td>
</tr>
<tr>
<td>Hungary</td>
<td><a href="mailto:balazs.szolgyemy@hu.ey.com">balazs.szolgyemy@hu.ey.com</a> +36 14 518 608</td>
</tr>
<tr>
<td>Iceland</td>
<td><a href="mailto:holmgeir.flosason@is.ey.com">holmgeir.flosason@is.ey.com</a> +35 459 52500</td>
</tr>
<tr>
<td>Ireland</td>
<td><a href="mailto:david.fennell@ie.ey.com">david.fennell@ie.ey.com</a> +35 312 212 448</td>
</tr>
<tr>
<td>Italy</td>
<td><a href="mailto:domenico.serrano@it.ey.com">domenico.serrano@it.ey.com</a> +39 028 514 932</td>
</tr>
<tr>
<td>Latvia</td>
<td><a href="mailto:ilona.butane@lt.ey.com">ilona.butane@lt.ey.com</a> +37 167 043 836</td>
</tr>
<tr>
<td>Liechtenstein</td>
<td><a href="mailto:roger.krapf@ch.ey.com">roger.krapf@ch.ey.com</a> +41 58 286 125</td>
</tr>
<tr>
<td>Lithuania</td>
<td><a href="mailto:indre.minkuviene@lt.ey.com">indre.minkuviene@lt.ey.com</a> +37 052 742 130</td>
</tr>
<tr>
<td>Luxembourg</td>
<td><a href="mailto:jurjan.woudakuiers@ey.com">jurjan.woudakuiers@ey.com</a> +31 210 773 6464</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:marco.schmitz@lu.ey.com">marco.schmitz@lu.ey.com</a> +35 242 124 7352</td>
</tr>
<tr>
<td>Malta</td>
<td><a href="mailto:chris.naudilmlt@ey.com">chris.naudilmlt@ey.com</a> +35 621 342 134</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:robert.attard@mtm.ey.com">robert.attard@mtm.ey.com</a> +35 621 342 134</td>
</tr>
<tr>
<td>Netherlands</td>
<td><a href="mailto:ben.kiekebel@nl.ey.com">ben.kiekebel@nl.ey.com</a> +31 884 078 457</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:daniel.smilt@nl.ey.com">daniel.smilt@nl.ey.com</a> +31 884 078 499</td>
</tr>
<tr>
<td>Norway</td>
<td><a href="mailto:gjert.melsom@no.ey.com">gjert.melsom@no.ey.com</a> +47 240 02548</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:martin.wikborg@no.ey.com">martin.wikborg@no.ey.com</a> +47 240 02242</td>
</tr>
<tr>
<td>Poland</td>
<td><a href="mailto:malgorzata.berling@pl.ey.com">malgorzata.berling@pl.ey.com</a> +48 225 578 977</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:nina.poltorak@pl.ey.com">nina.poltorak@pl.ey.com</a> +48 225 577 991</td>
</tr>
<tr>
<td>Portugal</td>
<td><a href="mailto:antonio.neves@pt.ey.com">antonio.neves@pt.ey.com</a> +35 121 791 2249</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:vera.figueiredo@pt.ey.com">vera.figueiredo@pt.ey.com</a> +35 121 794 9318</td>
</tr>
<tr>
<td>Romania</td>
<td><a href="mailto:minuna.enache@ro.ey.com">minuna.enache@ro.ey.com</a> +40 214 024 00</td>
</tr>
<tr>
<td>Slovenia</td>
<td><a href="mailto:matej.kovacic@si.ey.com">matej.kovacic@si.ey.com</a> +38 615 831 762</td>
</tr>
<tr>
<td>Spain</td>
<td><a href="mailto:joseluis.gonzalo@es.ey.com">joseluis.gonzalo@es.ey.com</a> +34 915 727 334</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:paulaalicia.galansobrevia@es.ey.com">paulaalicia.galansobrevia@es.ey.com</a> +34 915 727 612</td>
</tr>
<tr>
<td>Sweden</td>
<td><a href="mailto:lena.weije@se.ey.com">lena.weije@se.ey.com</a> +46 3 163 77 90</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:roger.persson.ostermar@se.ey.com">roger.persson.ostermar@se.ey.com</a> +46 8 520 59 845</td>
</tr>
<tr>
<td>Switzerland</td>
<td><a href="mailto:lionel.noguera@ch.ey.com">lionel.noguera@ch.ey.com</a> +41 58 286 55 78</td>
</tr>
<tr>
<td>United Kingdom</td>
<td><a href="mailto:devans@uk.ey.com">devans@uk.ey.com</a> +44 (0)20 7951 4246</td>
</tr>
</tbody>
</table>
|             | bnbob@uk.ey.com +44 (0)131 777 2251  

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