

# TAXeNEWS Europe



This is the 4th issue of TAXeNEWS Europe in 2009, the EU Tax Newsletter, which has been prepared by members of PwC's EU Direct Tax Group (EU DTG).

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## ECJ CASES

### **Belgium – ECJ Order on Belgian dividend received deduction regime related to internal situations and third countries: KBC Bank and Beleggen, Risicokapitaal, Beheer joined cases ([C-439/07](#) and [C-499/07](#))**

On 4 June 2009, the ECJ issued an order on the Belgian dividend received deduction regime (DRD) related to internal situations and third countries in the joined cases [C-439/07](#) and [C-499/07](#) (NV KBC-bank and NV Beleggen, Risicokapitaal, Beheer).

The Belgian legislation implementing the Council Directive of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (the Directive) opted for the alternative providing that where a Belgian parent company, by virtue of the association of the parent company with its subsidiary, receives distributed profits, Belgium shall refrain from taxing such profits. Practically speaking, the Belgian parent company is entitled to deduct the DRD from its Belgian corporate income tax taxable basis, i.e. 95% of the dividend received provided that there is sufficient taxable profit available. However, when the Belgian parent company does not dispose of enough profits, or is in a current tax loss position, the deduction is not effective and the excess DRD is not carried forward to next financial years. This provision is applicable regardless of the origin of the dividends received: EU Member State, Belgium or third country.

As regards dividends from EU Member States, the ECJ already ruled on 12 February 2009 in the Cobelfret-case ([C-138/07](#), see [EUDTG Tax News 2009 - nr.002](#)) that this Belgian conditional exemption is not in line with the Directive. The ECJ now confirms its jurisprudence, the 95% exemption should not depend on the level of profit of the Belgian parent company.

For Belgian dividends (domestic situation), the ECJ cannot take a position, as such, on the question referred and therefore lets the national court decide on the specific case. Nevertheless, it gives the Belgian court a key to interpretation: if it was the intention of the Belgian legislator, by referring to the Directive, to have domestic situations treated in the same way as EU cross-border situations, then both situations should have the same consequences (extension of Cobelfret case law to domestic situations).

For dividends from third countries, the ECJ states that if dividends from third countries benefit from a less favourable treatment than dividends from Belgian source, the national court should assess, taking into account the purpose of the national legislation and the facts of the case, whether the free movement of capital is applicable, and in the latter case, whether it precludes this less favourable treatment (taking into account the comparability assessment and the possible causes of justification).

Lastly, as the ECJ considers that from a Belgian state residence perspective a permanent establishment (PE) is not comparable to a subsidiary, foreign profits derived from these two types of entities should not necessarily be treated in the same way in the hands of head-office/parent company in order for the Belgian legislation to comply with the freedom of establishment. A full exemption on the one hand (profits from PEs) does not preclude an

exemption limited to 95% on the other hand (dividends from subsidiaries). See also EUDTG [Newsalert 2009 – nr 009](#).

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### **Finland – ECJ judgment on Finnish withholding tax on dividends paid to a Luxembourg SICAV: Aberdeen case ([C-303/07](#))**

On 18 June 2009, the ECJ issued its judgment in the Aberdeen Property Fininvest Alpha Oy (Aberdeen) case. It is the first time the ECJ has considered the compatibility with EC Law of an EU Member State's legislation which levies dividend withholding tax only on dividends paid to non-resident investment funds while exempting domestic investment funds.

Aberdeen is a Finnish resident real estate company wholly owned by a real estate fund structured as a Luxembourg SICAV. The case concerns Finnish rules which subjected dividends paid by Aberdeen to its Luxembourg SICAV parent to withholding tax.

PwC Finland represented Aberdeen in both the Finnish courts and then the ECJ. The case was referred to the ECJ to rule whether the imposition of withholding tax by Finland on dividends paid to a non-resident company constituted as a Luxembourg SICAV while exempting Finnish resident parent companies and investment funds from such taxes is contrary to Article 43 (freedom of establishment) and 56 (free movement of capital) of the EC Treaty.

Under Articles 43 and 48, and Articles 56 and 58 of the EC Treaty, persons that are objectively comparable to each other are entitled to equal tax treatment. Thus a company such as the Luxembourg SICAV must be considered 'comparable' to the local company and/or investment fund in order to sustain an argument that the differing withholding tax treatment is discriminatory.

The ECJ ruled in favour of Aberdeen and dismissed all arguments put forward by the Finnish Government. The judgment confirms the principles established in earlier cases on dividend withholding taxes and applies them specifically in an investment fund context. In particular, it clarifies a number of important issues that we have seen raised by numerous tax authorities in response to our clients' withholding tax reclaim applications. The ECJ concludes that:

- Differences between the legal forms of the funds were sufficient to create an objective distinction with respect to exemption from withholding tax on dividends received;
- It does not matter that the recipient fund is not liable to domestic corporate taxes in its home territory;
- It was not necessary to consider the tax position at the level of the investors;
- The imposition of a withholding tax could not be justified by the need to counteract the risk of tax avoidance.

See also EUDTG [Newsalert 2009 – nr 010](#).

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**Germany – AG opinion on the applicability of the Parent Subsidiary Directive for dividend payments to a French société par actions simplifié: Gaz de France case (C-247/08)**

On 25 June 2009, AG Mazák handed down his Opinion in the case *Gaz de France* concerning the applicability of the Parent-Subsidiary-Directive (PSD) for dividend payments to a French "société par actions simplifié" (SAS).

In 1999, a German subsidiary (GmbH) distributed dividends to its French resident parent company, which had the legal form of a SAS. Under German tax law, withholding tax on dividend payments is due unless the PSD (or a double tax treaty) is applicable. In 1999, the PSD was not applicable in such cases, because a company with the legal form of a SAS was not entitled to it in years prior to 2005. Since 2005, SAS are entitled, too.

The Lower Finance Court asked whether:

- The PSD in years prior to 2005 could be interpreted in a way that SAS are entitled although not explicitly mentioned; or
- The PSD is in breach of the EC Treaty's freedom of establishment or the free movement of capital as it favours only specific legal forms of French companies but not the SAS. Please note, the Lower Finance Court did not ask whether the German implementation of the PSD and the levying of German withholding tax itself are in breach of EC Law.

Regarding the first question, the AG opines that the PSD should not only be interpreted by its wording but also by its scope and scheme. He analyses that the PSD aims at excluding partnerships from its scope. However, as the drafters of the PSD used the legislative technique of listing specific entitled legal forms, this could not be subject to interpretation or analogy. Therefore, only companies taking one of the legal forms expressly listed in the PSD are entitled. As the SAS was not listed until 2005, it was not entitled in previous years.

Concerning the second question, the AG is of the opinion that only the freedom of establishment is applicable, because the PSD requires a qualifying shareholding. Although the AG acknowledges that the PSD favours only specific legal forms, he is not of the opinion that the directive discriminates based on the place of the seat abroad. Therefore the PSD would not infringe Art. 43 EC.

Although the implementation of the PSD and the levying of German withholding tax was not a matter under scrutiny as part of the referred questions, the AG pointed out that the PSD does not preclude a Member State from extending the same treatment as domestic or listed entities to foreign legal entities which are not listed. On the contrary, the AG emphasises that it follows from ECJ case law that the EC Freedoms preclude any discrimination against non-resident parent companies irrespective of whether they fall within the scope of the PSD or not.

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### **Germany – Second ECJ referral on the Meilicke case**

On 6 March 2007, the ECJ in the *Meilicke* case ([C-292/04](#)) decided that the German imputation regime was not in line with the free movement of capital as Germany only granted a tax credit on dividends received from German companies, but not for dividends received from a foreign resident company. On 9 June 2009, the Lower Fiscal Court of Cologne referred the same case to the ECJ for a second preliminary ruling, asking now under which conditions the imputation of foreign corporate income tax has to be granted.

Firstly, the German Court refers to the amount of tax that has to be imputed in Germany. A resident was entitled to an imputation credit of 3/7 of the received domestic dividend. Thus, the full corporate tax burden was imputed at shareholder level. In order to achieve an equal treatment in cross border situations, the ECJ in its previous judgments *Meilicke* ([C-292/04](#)) and *Manninen* ([C-319/02](#)) stated that the Home State is obliged to impute the effective foreign tax burden. However, as most Member States at the time at issue applied classical corporate profit tax systems, there was no need to keep records about the tax burden underlying each dividend payment. Under those circumstances, the German Court doubts whether the exact computation of the effective tax burden might be in breach with the principle of the *effet utile* as this computation might be impossible. Moreover, the Court asks whether the restriction to impute only 3/7 might be in breach of the free movement of capital in cases where the actual foreign corporate tax is higher.

Secondly, in order to achieve an imputation credit, a specific certificate (voucher) had to be handed in. According to German tax law, this voucher had to contain specific information about the underlying tax burden. As foreign resident companies do not certificate such information, this formal requirement of a voucher is also doubted to be in line with the "*effet utile*" principle.

Thirdly, facing these difficulties, the Court in its third question wants to know whether it would be in line with EC Law (i) to estimate the underlying tax burden and (ii) to also consider multi-tier dividend distributions for purposes of the calculation of the tax burden.

Lastly, according to former German procedural law, it was possible to apply for an imputation credit by handing in a voucher later, although the tax assessment of the shareholder was already closed. The voucher was considered with retroactive effect. In 2004, Germany changed its procedural law without a transitional period with the consequence that vouchers have no longer a retroactive effect. The Court doubts, in case a voucher is required, whether this change without a transitional period is in line with the "*effet utile*" principle..

Furthermore, in the case where such a voucher is not required, the Court also wants to know whether an informal application to impute foreign corporate tax has to be considered with retroactive effect, too.

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**Greece – ECJ judgment on Greek rules on taxation of inbound dividends and foreign partnerships: Commission v. Greece (C-406/07)**

On 23 April 2009, the ECJ ruled in the case Commission v. Greece that the discriminatory taxation of inbound dividends received by individuals, as well as the taxation of non-Greek partnerships, is incompatible with Articles 43 and 56 EC and articles 31 and 40 of the EEA Agreement. The decision follows a Commission referral of Greece to the ECJ of 5 July 2007.

The taxation of inbound dividends has been amended as of 1 January 2009. According to the previous regime, dividends distributed by Greek companies were exempt from taxation in the hands of the beneficiary irrespective of its legal form, residency or nationality. However, foreign sourced dividends received by Greek individuals were fully taxable with a credit provided for the withholding tax on dividends paid abroad.

Pursuant to the new legislation both domestic and foreign dividends received by Greek individuals are subject to a final withholding tax at the rate of 10%. These provisions apply only in case of dividends distributed by Greek Sociétés Anonymes and foreign S.A.-equivalents. The taxation of profits distributed by other legal forms to Greek individuals is still discriminatory, since profits distributed by Greek EPEs (Limited Liability Companies whose capital is divided in parts instead of shares) are exempt from taxation, whereas profits distributed by foreign companies, which are not SA-equivalent are fully taxable with a credit being provided for the withholding tax paid abroad.

The ECJ ruled that the Greek tax rules according to which non-resident partnerships in Greece are taxed more heavily (25%) than those resident in Greece (20%) are contrary to Article 43 EC and Article 31 of the EEA Agreement. Greek partnerships are subject to income tax in their name (i.e. they are not transparent). In particular, 50% of the profits of partnerships are taxed in the entity's name at the rate of 20%. In cases where the partners are individuals, the remaining 50% of the profits is considered as entrepreneur's fee and is deducted from the partnership's net profits for up to 3 individual partners possessing the greatest percentages of participation to the partnership. This fee is determined by multiplying the percentage of participation to the partnership with the 50% of the partnership's net profits, and is further taxed in the partner's name according to the income tax scale applicable to individuals. In the case where all partners are legal entities the partnership's total profits are taxed in its name. However, branches of foreign partnerships are subject to Greek corporate tax at the rate of 25% like Greek corporations.

Although to date it appears that there are no non-Greek partnerships operating in Greece, a draft law, introduced before the ECJ handed down its present judgment, amends the taxation of non-Greek partnerships. According to the draft provisions, non-Greek partnerships will be taxed in the same way as Greek partnerships

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**Netherlands – ECJ judgment on Dutch dividend withholding tax on EEA distributions:  
Commission v. The Netherlands ([C-521/07](#))**

In its judgment of 11 June 2009, the ECJ ruled that the Dutch exemption rules for dividend withholding tax on distributions by a Dutch subsidiary to a parent company based in the EEA contravene EC Law.

Under Dutch law, a dividend withholding tax of 15% is imposed on distributions by subsidiaries to their parent companies. Articles 4 and 4a of the Dutch Dividend Withholding Tax Act provide for an exemption from withholding tax for distributions to beneficiary companies which are resident in an EU Member State and which own a participation of no less than 5% in the distributing company.

By contrast, on the basis of the agreements for the avoidance of double taxation which the Netherlands has concluded with Iceland and Norway, exemption from dividend withholding tax to Icelandic or Norwegian companies is only applicable for companies holding participations of respectively 10% or 25%.

The ECJ deems this difference in treatment to be a contravention of Article 40 of the EEA Agreement, concerning the freedom of capital (similar to Art 56 of the EC Treaty), as it is likely to deter companies established in Iceland and Norway from making investments in the Netherlands. Moreover, it makes it more difficult for a Netherlands company to raise capital from Iceland and Norway than from the Netherlands or another EU Member State.

The Netherlands sought to justify the prime facie breach of Art 40 EEA by arguing that Council Directive 77/799/EEC (Mutual Assistance Directive) is not applicable with respect to Iceland and Norway. Consequently, the Netherlands argued that it was justified in not applying the restriction of Dutch dividend withholding tax to distributions to parent companies in these countries, as it could not be verified that these companies met the various conditions applicable under Dutch law.

The ECJ accepted that it could be justifiable for The Netherlands to require proof that the various criteria under Dutch law were satisfied. However, the ECJ did not agree that The Netherlands was justified in requiring that companies in Iceland and Norway have a higher participation in the distributing company. According to the ECJ, the latter requirement bears no relation to the conditions otherwise required from all companies in order to be entitled to that exemption and thus cannot justify the breach of Article 40 EEA. As a consequence, the exemption from Dutch dividend withholding tax should also apply to parent companies in Norway and in Iceland. See also EUDTG [Newsalert 2009 – nr 008](#).

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**Netherlands – ECJ judgment on Dutch extended recovery period for additional assessments on assets held in other Member States; X and Passenheim-van Schoot joined cases**

In its judgment of 11 June 2009 in the joined cases [C-155/08 and C-157/08](#), resp. X and E.H.A. Passenheim-van Schoot, the ECJ ruled that additional assessments made by the Dutch Tax Authorities, following the discovery of assets held in other Member States and income from those assets that had been concealed, do not contravene EC Law and neither does the extended recovery period used for that purpose.

Both cases concern the question whether these additional assessments contravene Articles 49 and 56 EC. The only difference between them is that in C-157/08 a full disclosure on the applicant's own initiative had been made, whereas in C-155/08 the information was forwarded to the Netherlands tax authorities by Belgium (in accordance with Council Directive 77/799/EEC on Mutual Assistance). As a consequence of this difference, only in the last case did the applicant received a fine for the concealment.

In order to provide taxpayers resident in the Netherlands with legal certainty in regard to their tax liability, the maximum recovery period to levy tax in the Netherlands is five years. However, such certainty is acquired in regard to assets and income in another Member State only after 12 years.

This difference in treatment on the basis of the place where the savings balances are held remains notwithstanding the fact that the taxpayer can always decide to give full disclosure on the assets hold abroad and income derived from them. In case of concealment of domestic assets the recovery period is not extended either. This different treatment and the system used to calculate the possible subsequent fine both contravene Articles 49 and 56 EC.

The Netherlands sought to justify the prima facie breach of Articles 49 and 56 EC by arguing that the extended recovery period was necessary in order to maintain the effectiveness of fiscal supervision and also to prevent tax evasion. The first mentioned justification was accepted by the ECJ, in cases in which there is no available knowledge of the taxable items held in the other Member State to be able to initiate an investigation using Directive 77/799. The same is true when tax authorities of the member states are informed of the existence of taxable income held in another Member State which applies banking secrecy. In these situations an extended recovery period can compensate for the lack of real possibility to obtain information using the Directive. The ECJ also accepted the second justification, since the extended recovery period was found suitable to dissuade taxpayers holding such assets from concealing them, or their income derived from them, from the tax authorities.

Finally, the ECJ concludes that the system of calculating the fine for concealment (being a proportion of the amount claimed over the recovery period of 12 years) is not disproportionate, because the relevant provision does not make a distinction in the amount of the fine based on the place where the savings balances are being held.

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### **Netherlands – Oral hearing at the ECJ in the X-Holding case ([C-538/08](#))**

The oral hearing at the ECJ in the X Holding B.V. case on cross-border fiscal unity took place on 25 June 2009. The governments of seven Member States provided their comments, namely: France, Germany, The Netherlands, Portugal, Spain, Sweden and the United Kingdom. The AG in this case is Mrs Kokott. The AG's conclusions in this case are scheduled for 15 October 2009. See also EUDTG Tax News [Issue 2008 – nr. 004](#).

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## NATIONAL DEVELOPMENTS

### **Finland – Central Tax Board considers tax neutral demergers not possible if the shares received for consideration do not carry entitlement to the assets of the recipient company**

The Finnish Central Tax Board (CTB) issued an advance ruling on 15 April 2009 (KVL 25/2009) concerning the requirements set for shares which are received for consideration in order to carry out a tax neutral demerger.

The case concerned a Finnish resident limited liability company (A Oy) that had the intention to demerge into three new limited liability companies. A Oy was owned by two natural persons. The demerger was planned to be carried out in a way that the shareholders of A Oy would receive, for consideration, a pro rata issuance of new shares in the receiving companies. Two of the receiving companies had different classes of shares. According to the articles of association of these companies, the shares received for consideration by the other shareholder entitled only to a limited voting right determined separately. Those shares did not entitle the holder to the assets or profits of the receiving company.

In Finland, tax neutral demergers are regulated by the Finnish Business Income Tax Act. By the Act, Finland has implemented the demerger provisions of the EU Mergers Directive (90/434/EEC). A demerger referred to in the Mergers Directive requires i.a. that the shareholders receive for consideration a pro rata issuance of securities representing the capital of the receiving companies.

In its ruling, the CTB stated that since the shares received for consideration did not carry entitlement to the assets of the receiving company, the shareholder was not considered to receive as consideration newly issued shares of the recipient company in the meaning of the Finnish Business Income Tax Act. Thus, the demerger could not be carried out tax neutrally. The demerger could be carried out tax neutrally only if the shareholders would receive for consideration shares that would entitle the holder to equal voting rights and equal rights to the assets and profits of the receiving company.

The ruling is not yet legally binding and appeal to the Supreme Administrative Court is still possible.

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**Finland – Supreme Administrative Court rules that an exchange of shares in one sub-fund to the shares of another sub-fund administered by the same Luxembourg SICAV is a taxable transaction**

The Supreme Administrative Court issued a ruling on 27 April 2009 (KHO 27.4.2009/1010) concerning the tax treatment of the exchange of shares in one sub-fund to the shares of another sub-fund administered by the same Luxembourg SICAV.

A natural person A owned shares in a sub-fund administered by a Luxembourg SICAV. Each sub-fund of the Luxembourg SICAV had its own class of shares and each class of shares was entitled to certain assets of the sub-fund. When A exchanged the shares in one sub-fund to the shares in another sub-fund administered by the same SICAV, the rights related to the new shares received in the exchange were directed to different assets than the rights related to the old shares. The Supreme Administrative Court stated that such exchange was considered as a taxable transaction. The ruling confirms that the tax treatment of an exchange of shares in different sub-funds of a SICAV is the same as the tax treatment of an exchange of fund units in different Finnish investment funds administered by the same fund management company.

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**Germany – Lower Fiscal Court judgment on the inclusion of loss carry-forward for purposes of exit taxation**

According to German tax law, in cases where an individual holding a substantial participation in a corporation transfers its residency out of Germany, a deemed capital gain will be subject to German taxation. In order to bring such exit taxation in line with EC Law, the levy of the tax will be deferred interest- and securities-free until the actual disposal, if the taxpayer transfers its residency to another Member State. Where the taxpayer's other income is negative, the deemed capital gain may not be offset against that negative income, as this would undermine the effect of the deferral.

The Lower Fiscal Court of Munich on 3 June 2009 resolved that this principle also holds true for a situation where a loss carry-forward occurs from previous taxing periods. The Court argues that otherwise the exit tax would effectively not be deferred, as future positive income could not be offset against the full loss carry-forward.

In its resolution the Court only decided on the suspension of execution of the tax assessment notice, the matter itself is still pending. In the case at hand, the suspension of execution was granted as the Court seriously doubted the lawfulness of the tax assessment. As the decision about the suspension only deals with the question whether these doubts are serious ones or not (and not with the matter itself) the Court is not obliged to refer the case to the ECJ.

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## **Germany – Lower Fiscal Court judgment on subsidies for owner-occupied dwellings**

On 3 June 2009, the Finance Court of Lower Saxony decided in a preliminary ruling that German residents living and working in Germany are not entitled to a subsidy for a second dwelling situated abroad.

According to former German tax law, German residents were entitled to a subsidy when the dwelling was situated in Germany. Dwellings abroad could not benefit from this provision. In its decision of 17 January 2009 ([C-152/05](#)), the ECJ decided that the exclusion of dwellings abroad infringed Artt. 39, 43 and 18 EC. In the case at hand, the lower Fiscal Court had to decide on a case whereby German nationals living and working in Germany bought a second dwelling in Spain which they use in their leisure time.

In the Court's view, the above mentioned ECJ decision was not binding for the case at hand for two reasons:

- The ECJ decision would only have a direct impact for non-residents who chose to be taxed as residents in Germany but live abroad.
- In the case at hand the movement abroad is not economically motivated so that the EC freedoms were not applicable.

In our view, both arguments could be doubted. Firstly, in its decision of 17 January 2009 the ECJ did not differentiate between the habitual residence of the taxpayer. Secondly, Art. 18 EC does not require an economic motivation for moving abroad. As the ruling was a preliminary one which only concerns the collection of taxes and the matter itself is still pending, the Court was not obliged to refer the case to the ECJ. As the claimants contested this decision, the case on behalf of the execution of taxes is now pending with the Federal Finance Court.

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## **Italy – Tax Authorities' interpretation of the Italian tax treatment of EU/EEA outbound dividends**

The Italian Tax Authorities, by means of Circular Letter Nr. 26/E of 21 May 2009, provided further explanations on the specific tax regime regarding EU/EEA outbound dividends introduced by the 2008 Italian Budget Law, to be applied when the requirements for the application of the Parent-Subsidiary Directive are not met.

The 2008 Budget Law provided that a 1,375 per cent withholding tax is applicable to dividends paid out to companies and entities which are subject to corporate income tax, and resident in the EU or EEA included in a white list, which still needs to be adopted by ministerial decree and drafted according to the EU's exchange of information criteria.

With reference to the three EEA countries, until the entry into force of the above mentioned white list, the reduced tax-rate can be applied only by Norwegian companies receiving dividends distributed by Italian companies.

The new regime will be applied to the dividends paid out on profits accrued starting from the tax period subsequent to the one in progress at 31 December 2007. Therefore, the 1,375 per cent tax rate will be generally applied to dividends paid out on profits accrued starting from 1 January 2008 and generally distributed from 2009 onwards.

The legislative amendment serves to implement the Reasoned Opinion (2006)2544 of the European Commission, issued against Italy on 28 June 2006, in which the Commission states that Italy's legislation on outbound dividends discriminates against EU/EEA outbound dividends when compared to domestic dividends breaching the freedom of establishment and the free movement of capital principles under the EC Treaty and EEA Agreement.

In the Circular Letter, the Italian Tax Authorities claimed that the companies and entities subject to corporate income tax are all the recipients (companies and entities) that, by virtue of the legislation of their State of residence, are considered persons liable to a local corporate income tax. The Tax Authorities clarified that this requirement has to be interpreted as "to be generally liable to taxation, [...] irrespective of the circumstance that [the companies/entities at hand] actually benefit from tax advantages which are compatible with EC Law".

As a consequence, the reduced withholding tax can be applied by the companies and entities which, even though liable to tax, actually do not pay income taxes by virtue of particular objective exemptions linked to the nature of the profits realized (e.g. passive income) or the place where the business activity is carried out.

The Tax Administration also pointed out that the resident entities distributing the dividends (i.e. the distributing companies or the intermediaries in charge of the dividend payment) will apply the 1,375 per cent withholding tax only after the preliminary request made by the non resident recipients. The latter have to enclose with the request a certificate, issued by the competent tax authorities of their State of residence, which attests the residence for tax purposes in that State and the requirement of company/entity liable to a corporate income tax.

The Tax Authorities have opted for a very wide definition of the entities falling within the scope of the tax regime introduced by the 2008 Budget Law. However, they did not expressly clarify whether such regime can be applied by certain entities, such as, for example, the EU/EEA investments funds which are liable to a corporate income tax in their State of residence and, therefore, could fall within the scope of the new tax rules. As a consequence, this issue is still open. See also [EUDTG Tax News Issue 2008 - nr. 002](#).

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## **Italy – Amended tax regime for dividends paid out to EU/EEA pension funds**

On 23 June 2009, the Italian Parliament approved a legislative amendment resulting in the introduction of a new specific tax regime for dividends that are paid out to EU/EEA pension funds. The legislative amendment has been introduced following the infringement procedure started by the European Commission against Italy (case reference number: 2006/4094).

Previously, the Italian-source dividends paid out to any foreign pension fund were subject to a withholding tax of 27% of the dividend gross amount if the dividend was related to ordinary shares (to be reduced in the case a Double Tax Treaty was applicable), or 12.5% of the dividend gross amount if the dividend was related to savings shares.

The new regime provides for the application of a 11% withholding tax on dividends which are paid out to pension funds resident elsewhere in the EU or EEA included in a white list (to be still adopted by ministerial decree and drafted according the exchange of information criterion) after the entry into force of EC Law. With reference to the EEA countries, until the approval of the mentioned white list, the reduced tax-rate can be applied only by Norwegian pension funds receiving dividends distributed by Italian companies.

According to the European Commission, the Italian tax rules were discriminatory and constituted an unjustified restriction of the free movement of capital (Art. 56 EC and Art. 40 EEA), since only dividend payments to domestic pension funds are not subject to withholding tax and concur to the net income accrued by the fund in each financial year, upon which a 11% substitute tax is applicable.

The aim of the new regime is, therefore, to guarantee the same tax treatment on dividends paid out to both Italian and EU/EEA pension funds. However, it should be noted that the new tax regime does not completely remove the discriminatory effects suffered by the latter.

There are valid arguments to affirm that the application of the 11% withholding tax does not actually guarantee the same tax treatment of dividends paid out to Italian pension funds and dividends paid out to EU/EEA pension funds.

For example, a discrimination against the latter may be identified in the fact that dividends paid out to them are taxed on their gross amount, while the same dividends distributed to Italian pension funds are taxed on their net amount. See also [EUDTG Newsalert NA 2009 – 011](#) on the Commission's Reasoned Opinions against Denmark and Finland.

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## Netherlands – Dutch Supreme Court follows ECJ judgment in the Renneberg case

On 26 June 2009, the Dutch Supreme Court (Hoge Raad) gave its decision in Case No. 39258bis in which it followed the ECJ judgment in *Renneberg v. Staatssecretaris van Financiën* ([C-527/06](#)).

During December 1993, Mr Renneberg transferred his residence from the Netherlands to Belgium. In 1996 and 1997 he lived in Belgium in a dwelling of his own, which he had acquired during 1993 and which had been financed with a mortgage loan from a Netherlands bank. During 1996 and 1997 Mr Renneberg was employed in the Netherlands and during those two years he received his entire work related income in the Netherlands. In Belgium the applicant was liable to a property tax, the amount of which was not being affected by the negative income on his Belgium dwelling. With regard to the taxation of his income in the Netherlands for the tax years 1996 and 1997, Renneberg applied for deduction of the negative income relating to his Belgian dwelling. This deduction was not accepted by the Netherlands tax authorities. In his appeal, Mr Renneberg relied on *Schumacker* (C-279/93). He submitted that, since he has exercised his right to freedom of movement guaranteed by Article 39 EC, he must be able to benefit in the Netherlands from the advantages granted there to resident taxpayers, since, with regard to his taxable income and the place where it is obtained, he is to a very great extent in a situation comparable to that of those taxpayers.

The Supreme Court referred the case to the ECJ for a preliminary ruling. The ECJ ruled that Renneberg is in an objectively comparable situation with regard of his employment in the Netherlands, to that of a resident in the Netherlands who is also in salaried employment there. Such a difference in treatment, which is based on residence, is discriminatory and consequently the ECJ ruled that this legislation constitutes an infringement of Article 39 EC.

Based on the ECJ reasoning, the Supreme Court held that it is incompatible with Article 39 EC that an EU national who is not resident in the Member State in which he receives all or almost all of his taxable income for the calculation of that income cannot deduct mortgage interest relating to a house owned by him and used as a dwelling in another Member State, whereas a resident of that Member State may deduct such interest for the purposes of determining taxable income. Furthermore, such different treatment cannot be based on the Belgium-Netherlands tax treaty on income and capital of 1970.

Consequently, the Supreme Court held that the mortgage interest paid for the Belgian owner-occupied dwelling is deductible from the taxpayer's employment income derived in the Netherlands. In addition, the Court held that because the taxpayer permanently used an owner-occupied dwelling in Belgium, the imputed income tax rules applicable to resident taxpayers with an owner-occupied dwelling in the Netherlands are also applicable in calculating taxable income.

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## **Netherlands: Dutch Supreme Court follows the ECJ judgment in the Arens-Sikken case**

On 29 May 2009, the Dutch Supreme Court (Hoge Raad) gave its decision in Case No. 39.819 in which it followed the ECJ Judgment in *Arens-Sikken v. Staatssecretaris van Financiën* ([C-43/07](#)).

Mrs Arens-Sikken's husband died on 8 November 1998. At the time of his death, he was a resident of Italy. As the deceased had made a will, his estate was divided in equal shares between Ms Arens-Sikken (the applicant) and the four children of their marriage. However, as a result of a testamentary parental partition inter vivos, all assets and liabilities of the estate passed to the claimant. The estate included the deceased's share in an immovable property situated in the Netherlands. As a result of that partition she received an over endowment and assumed an over endowment debt in respect of her children. The applicant was deemed to have acquired, in its entirety, the share in the immovable property and under the Netherlands rules on transfer duty, she may not deduct over endowment debts for the purposes of determining the basis of assessment. By contrast, if her husband had been residing in the Netherlands at the time of his death, she would have been able to have the over endowment debts taken into account.

The ECJ ruled that it is contrary to EC Law to make national rules concerning the assessment of inheritance duties and transfer duties payable in respect of an immovable property situated in a Member State, which, for the assessment of those duties, makes no provision for the deductibility of over endowment debts resulting from a testamentary parental partition inter vivos, in case the person resides in another Member State at the time of death.

The Supreme Court follows this judgment of the ECJ and confirms that national rules applied in conjunction with a progressive rate of taxation result in a different treatment on apportionment of the tax burden between the various heirs of a person who, at the time of death, was residing in the Netherlands and the heirs of a person who, at the time of his death, was not. This different treatment contravenes EC Law principles, in particular the free movement of capital (Article 56 EC). This restriction may not be justified by the derogation of Article 58 EC. By treating the inheritances of both categories of persons in the same way (except in relation to the deduction of debts) for the purposes of taxing their inheritance, the national legislature has in fact admitted that there is no objective difference between them in regard to the detailed rules and conditions relating to that taxation which could justify different treatment. See also EUDTG Tax News [Issue 2008 – 006](#).

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## **Portugal – Changes to Portuguese legislation on the taxation of lottery winnings**

Further to the European Commission's referral of Portugal to the ECJ on 14 April 2009 regarding Portugal's discriminatory taxation of lottery winnings (see EUDTG Tax News [Issue 2009 - nr. 003](#)), the Portuguese Government has approved a Decree-Law changing the Personal Income Tax Code and the Stamp Tax Code regarding the taxation of lottery winnings. This Decree-Law has not yet been published in the Official Gazette.

According to the Decree-Law, winnings from any lotteries (*Euromilhões, Lotaria Nacional, Lotaria Instantânea, Totobola, Totogolo* and *Totoloto*) organized in Portugal by the *Santa Casa da Misericórdia de Lisboa*, as well as winnings from lotteries organised by entities residing in other EU Member States are no longer subject to Personal Income Tax in Portugal. Instead, the placement of bets regarding these lotteries will be subject to Stamp Tax in Portugal at the rate of 4.5%.

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## **Switzerland – Revision of double tax treaties with regard to information exchange**

Following the Swiss Government's decision of 13 March 2009 to implement the OECD standards on information exchange (article 26 of the OECD Model Convention), Swiss delegations have renegotiated double tax treaties and corresponding protocols with Denmark, Norway, France, Mexico, United States, Japan, The Netherlands and Poland. Furthermore, on 22 June 2009, the German and Swiss Finance Ministers agreed to revise the German/Swiss double tax treaty as well. The exact wording of the amended provisions is not yet known.

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## **United Kingdom – Marks-&-Spencer plc win cross-border group relief case on return to the UK Special Commissioners of income tax**

On 1 May 2009, the UK Special Commissioners released their judgment in favour of Marks & Spencer plc (M&S) in relation to the cross-border group relief claims for their Belgian and German subsidiaries' losses, which the Commissioners found were available for UK group relief.

The case had returned to the UK Special Commissioners for finding of the facts, after the judgment of the ECJ on 13 December 2005 ([C-446/03](#)). In that judgment, the ECJ had held that, in general, the restriction of UK group relief to UK losses was normally justifiable as a breach of the EC Treaty freedom of establishment. However, where a non-resident subsidiary had exhausted the possibilities available in its state of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous

accounting periods, and there was no possibility for the foreign subsidiary's losses to be taken into account in the state of residence for future periods, the UK's denial of group relief goes beyond what would be necessary to attain the relevant public policy objectives viz allocation of taxing powers and prevention of tax avoidance and of capacity rate shopping.

On return to the UK, the High Court and Court of Appeal held that the time at which the "no possibilities" test above had to be satisfied was the time of the operative group relief claim, as opposed to the end of the relevant accounting period, for which UK HMRC contended.

The Special Commissioners dealt with M&S's appeals on this basis. They held that the original group relief claims made prior to the ECJ judgment were not valid group relief claims, not satisfying the "no possibilities" test, notwithstanding that M&S had adduced no evidence as to whether or not the losses had been used overseas or could be so used in the future as at the end of those accounting periods. By contrast, the Commissioners held that the group relief claims made in March 2007, after the Court of Appeal judgment, were valid group relief claims satisfying the "no possibilities" test.

They also held that utilisation of small amounts of losses against, in particular, interest, nonetheless meant that the remaining unutilised losses could and in M&S's case did satisfy the "no possibilities test".

Specifically, they held that because the March 2007 (and subsequent) group relief claims were made when both M&S Belgium SA and M&S Deutschland GmbH were in liquidation, the "no possibilities" test must be regarded as having been met, having regard to "the objective facts of the company's situation at the relevant time" (Sir Andrew Park J's judgment in the High Court, affirmed by the Court of Appeal).

The Commissioners did not, however, determine the quantum of group relievable losses, but remitted the matter to the parties. If, however, agreement cannot be reached, the Commissioners will issue a determination. HMRC had until June 2009 to appeal and have now appealed and M&S have cross-appealed.

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### **United Kingdom – UK Court of Appeal allows HMRC's appeal in the Vodafone 2 case for the ECJ's Cadbury judgment to be "read down" into the UK CFC legislation**

On 25 June 2009, the UK Court of Appeal held in the Vodafone 2 case that the UK CFC legislation can be the subject of "conforming interpretation", so that disapplication is not required.

Vodafone 2 set up a Luxembourg subsidiary, VIL to acquire Mannesmann AG. HMRC gave notice that they intended to enquire into V2's UK tax return for 2002 and sought information regarding VIL, with a view to assessing VIL's income on V2 under the UK CFC legislation. V2

appealed, contending that, following the ECJ's Cadbury judgment, it was unnecessary for V2 to provide any such information, as the UK's CFC legislation was demonstrably in breach of Articles 43 and 48 EC treaty, freedom of establishment, and incapable of conforming interpretation, and hence had to be disapplied.

The UK High Court (Evans-Lombe, J) agreed with V2 and ordered the disapplication of the UK CFC legislation for companies such as V2, for periods prior to those commencing 6/12/06 or later, for which FA '07 introduced s751A/B ICTA '88, which sought to implement the Cadbury judgment. These provisions are the subject of a formal complaint to the European Commission.

The Court of Appeal unanimously held that they were entitled to have regard to the whole of the UK CFC legislation, and not just the CFC motive test, going beyond and potentially contrary to the ECJ's judgment (Cadbury, paragraphs 72-74). Consequently, they accepted HMRC's Counsel's submission that an additional exception to the UK CFC rules such as "if it (the CFC) is, in that accounting period, actually established in another Member State of the EEA and carries on genuine economic activity there" could be read into s748(3) ICTA '88.

They so held relying on prior UK case law on reading down v disapplication, or in the case of Human Rights Act case law, a declaration of incompatibility.

In addition, were disapplication the appropriate remedy (not the CoA's view), 2 of the 3 judges commented as obiter that such disapplication should be confined to EEA subsidiaries that are genuinely economically established and not wholly artificial arrangements.

Leave to appeal the Court of Appeal's judgment will have to be sought within 60 days and has now been sought. The consequences of the judgment, if not appealed, will be that EC treaty protection from the historic (pre-FA 2007) UK CFC regime for EEA subsidiaries will have to be evaluated on a case-by-case basis, demonstrating that each EEA subsidiary is genuinely economically established and not a wholly artificial arrangement.

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## EU DEVELOPMENTS

### **Denmark and Finland – European Commission requests Denmark and Finland to end discriminatory treatment of foreign pension funds**

On 25 June 2009, the European Commission sent formal requests to Denmark and Finland asking them to amend their legislation to end their discriminatory taxation against foreign pension funds. The Commission's requests take the form of a 'reasoned opinion' (second step of the EU infringement procedure of Art. 226 EC Treaty).

In Finland, 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%. However, Finnish pension funds are taxed under a special regime as only 75% of dividend income on investment assets is subject to corporation tax. Since the nominal corporate income tax rate is 26%, the tax rate for dividends paid to Finnish pension funds is 19.5% but the tax is calculated over the net income, i.e. after deduction of costs and current pension liabilities. In practice, then, the effective tax rate on dividend income paid to a Finnish pension fund will be lower than 19.5% while foreign pension funds cannot benefit from a reduction of the tax base on which the withholding tax is applied.

The Danish legislation provides for a similar difference in treatment between foreign and domestic pension funds. Dividends paid to foreign pension funds are effectively subject to a tax rate of 15% on the gross amount of the dividend. Yet, Danish domestic pension funds are subject to a yield tax of 15% on a net basis. According to the Commission, the difference in treatment between foreign and domestic pension funds goes against the free movement of capital (Art. 56 EC) and cannot be justified on the grounds provided under Art. 58 (public policy or public security). The Commission's action is a clear sign that it is convinced that the legislation in these EU Member States is not in line with EC Law. If Denmark and Finland do not reply satisfactorily within two months the Commission may refer the matter to the ECJ. The Commission case reference numbers are 2006/4103 (Denmark) and 2006/4096 (Finland).

At the heart of this process was a study by PwC's [EU Direct Tax Group](#) based on which the European Federation for Retirement Provision (EFRP) and PwC jointly lodged a complaint with the EU Commission in December 2005 against 18 EU Member States, including Denmark and Finland, for their alleged discriminatory taxation of dividend and interest payments to foreign EU pension funds. The Commission agreed with the analysis and started infringement procedures against these Member States. The latter have either already aligned their legislation or have promised to do so, or are still negotiating with the Commission, or they are facing further Commission action in the form of Reasoned Opinions and ECJ referrals (resp. the second and third stage of the infringement proceedings). See also [EU DTG Newsalert 2009 – nr 011](#).

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## **EU – New EU report on taxation trends in the European Union**

The European Commission's Directorate-General for Taxation and Customs Union (DG TAXUD) and Eurostat, the Statistical Office of the European Communities, have published their annual report on taxation trends in the EU revealing, amongst other things, a steady decline in top personal and corporate income tax rates since 2000.

According to the EU report, the overall tax-to-GDP ratio in the EU27 was 39.8% in 2007, a slight increase from 39.7% in 2006. The EU27 tax ratio, which stood at 40.6% in 2000, fell to 38.9% by 2004 and then started to rise. The overall tax ratio in the euro area was 40.4% in 2007, and also rose slightly from 40.3% in 2006. Since 2000, taxes in the euro area have followed a similar trend to the EU27, although at a slightly higher level.

In comparison with the rest of the world, the EU27 tax ratio remains generally high, exceeding that of the USA and Japan by some 12 percentage points. However, the tax burden varies significantly between Member States. Since 2000, significant changes in tax-to-GDP ratios have taken place in several Member States.

This year's edition of the report includes an overview of the tax measures adopted in the Member States to respond to the global economic and financial crisis.

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## **Germany – European Commission closes infringement procedure regarding withholding taxes on non resident artists, sportsmen and journalists**

Under the former German tax law, non resident artists, sportsmen and journalist were subject to a withholding tax of 25% on the gross income. As an aberration, a decree from the Ministry of Finance from April 2007 foresaw that business expenses could be deducted from the tax base but only if they exceed 50% of the income. The net income was then taxed on a rate of 40%. In the European Commission's view, the limited deduction of expenses as well as the increase of the tax rate constitutes an obstacle to the freedom to provide services.

Germany amended its legislation from 2009 onwards. Now, business expenses are deductible from the tax base of withholding taxes irrespective of their amount. The net income is subject to a withholding tax of 30% for individuals. At the end of the year, non-residents might opt for an annual tax assessment in order to be taxed at the same tax rate that applies to residents with a comparable amount of taxable income (tax progression). If the tax rate is lower than 30%, non residents will get a refund. The Commission is of the opinion that the amended procedure is now in line with the EC Treaty freedoms and closed the infringement procedure against Germany on 14 May 2009.

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## **Germany – European Commission starts infringement procedure regarding the entitlement to domestic fiscal unity**

The European Commission took the first step of an infringement procedure against Germany according to Art. 226 EC on 29 January 2009. The procedure deals with one specific requirement to be fulfilled by a subsidiary in order to be part of a domestic fiscal unity.

Besides other requirements, the subsidiary applying for a German group taxation has to have its seat as well as its place of effective management in Germany (double linked). In the Commission's view, one link should be sufficient as otherwise the principles for the transfer of foreign established companies to Germany, as laid down in the cases *Centros* (C-217/97) and *Überseering* (C-208/00), were not met and therefore the requirement does not comply with the freedom of establishment.

For a parent company as head of a fiscal unity, Germany already abandoned in 2001 the double linked requirement. Since then, the parent company is only required to have its place of effective management in Germany. However, for subsidiaries the double linked requirement remained unchanged.

We would like to point out that – when successful - this new infringement procedure would not lead to the possibility of a cross-border group taxation. Apart from the fact that a German fiscal unity also requires the conclusion of a profit and loss absorption agreement between the subsidiary and the parent company, the remaining condition of having the place of effective management in Germany implies that the subsidiary is still resident in Germany for tax purposes. As far as we know, the aspects of the German residency and the absorption agreement are not the subject of this infringement procedure. Although the compliance of these aspects with EC law is under discussion after *Marks & Spencer* (C-446/03), a foreign subsidiary, which is not resident in Germany, cannot benefit from this new infringement procedure for the time being.

However, if other conditions are met, a positive outcome of this new infringement procedure would offer the possibility to extend the domestic group taxation to foreign subsidiaries with a place of management in Germany.

As the Commission has only started the infringement procedure, Germany has the possibility to submit its own legal opinion on this reproach, before the next step (Reasoned Opinion) might be taken.

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## **Poland – European Commission formally requests Poland to end discriminatory taxation of pension funds, investment funds and financial institutions**

The European Commission has published a Reasoned Opinion regarding taxation policy of foreign funds and financial institutions in Poland. This is the second step of the infringement procedure provided for in Article 226 of the EC Treaty. The Commission may refer the case to the ECJ if it is not satisfied with the reaction of Poland.

In accordance with the common rule in Polish tax law, Polish pension and investment funds are exempt from corporate income tax. Thus, dividends and interest received by domestic funds are tax exempt. However, Poland levies a withholding tax of 19% on dividends paid to foreign pension and investment funds and a withholding tax of 20% on interest paid to such funds, unless a tax treaty is applicable. According to the Commission this is a restriction of the free movement of capital and the freedom of establishment as provided for in Articles 56 and 43 of the EC Treaty.

Regarding the tax base for calculating the withholding tax on the interest received by non-resident financial institutions, the Commission's line is that a foreign financial institution is obliged to pay a withholding tax on the gross amount of the interest received, while a domestic one is taxed on its net profits only. In the opinion of the Commission, by restricting the right to deduct related costs to foreign financial institutions, Poland has infringed its obligations under the EC Treaty, i.e. Article 49 (freedom to provide services) and Article 56 (the free movement of capital). According to the infringement procedure, Poland has two months to react.

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## **Spain – European Commission formally requests Spain to change its tax provisions concerning the taxation of capital gains arising from an exchange of shares**

On 25 June 2009, the European Commission has formally requested Spain to change its tax provisions concerning the taxation of capital gains arising from an exchange of shares. The EC considers some of these provisions to be incompatible with the Merger Directive (Council Directive 90/434/EEC) and with the freedom of establishment and the free movement of capital as laid down in Articles 43 and 56 EC and the corresponding articles of the EEA Agreement.

The Commission's request takes the form of a Reasoned Opinion (second step of the infringement procedure provided for in Article 226 of the EC Treaty). If there is no satisfactory reaction to the reasoned opinion within two months, the Commission may decide to refer the case to the ECJ.

Under Spanish tax law, an exchange of shares is an operation whereby a company acquires a participation in another company equal or superior to the majority of the voting rights, against consideration in the form of new shares issued to the other company's shareholders.

Through an optional special tax regime, the Spanish legislation provides for tax deferral upon realisation of the capital gains arising from an exchange of shares when the acquiring company is based in Spain (e.g. a US company contributes its shares in a Dutch company to a Spanish company). However, where the shareholders undertaking the share-for-share exchange are non-residents in Spain and the issued shares represent the capital of a company not resident in Spain, the capital gains are taxed at the moment of the exchange (e.g. a US company contributes its shares in a Spanish company to a Dutch company). Spain justifies such difference in treatment invoking the difficulty to ensure effective taxation at a later stage, due to the fact that the acquiring company is based outside Spain.

The Commission considers that such rules impose a difference in treatment that contravenes the Merger Directive, Articles 43 and 56 of the EC Treaty and the corresponding articles of the EEA Agreement, as they are likely to dissuade companies from exercising their right of freedom of establishment. Moreover, they would also constitute an obstacle to the free movement of capital, as shareholders are treated less favourably if the company in which they receive shares is located in a Member State other than Spain. See also EUDTG [Newsalert 2009 – nr 006](#).

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## STATE AID

### **Italy – European Court of First Instance considers the Italian 3-year income tax exemption granted to certain Italian public utilities to be State aid**

On 11 June 2009, the European Court of First Instance handed down judgment on 5 Italian cases with regard to the Italian tax exemption granted to certain Italian public utilities. The cases are: *ASM Brescia SpA* (T-189/03), *AEM S.p.A.*(T-301/02), *ACEA S.p.A.* (T-297/02), *Azienda Mediterranea Gas e Acqua SpA* (AMGA) (T-300/02) and *Italia* (T-222/04).

In Italy, municipalities have traditionally provided various services to their local communities including the distribution and treatment of water, public transport, energy and gas. By means of Law Nr. 142 of 1990, the Italian Parliament provided municipalities with the option to create legal bodies such as joint-stock companies and, in order to promote these, the Italian Parliament also granted them several tax advantages e.g. they were allowed to be exempted from corporate income tax for three years starting from their incorporation, and not beyond the tax year ending on 31 December 1999.

The European Commission decided to initiate a formal investigation procedure, laid down in Article 88(2) of the EC Treaty which ended with the 5 June 2002 decision under which this tax scheme was declared State aid incompatible with the common market. As Italy had failed to notify the tax scheme before its implementation, the Commission also ordered the recovery of the unlawful aid from its beneficiaries.

A number of beneficiaries including the Italian State brought separate actions for the annulment of the mentioned decision. The European Court of First Instance rejected all of these appeals on 11 June 2009.

Firstly, on the effects of the aid scheme on competition and intra-EU trade, the Court confirmed the Commission's decision that the condition that the joint-stock companies operate only on the Italian market or in their local territory of origin is not decisive. Furthermore, the Court stated that the tax scheme:

- affects foreign companies bidding for local public services concession in Italy, since the public undertakings, benefiting from the scheme in question, can bid at more competitive prices than national or intra-EU competitors not benefiting from it;
- makes less attractive for companies from other Member States, which would not be entitled to the benefit of the measure, to invest in the utilities sector in Italy.

Moreover, the Court stated that the aid has to be qualified as a new aid. In fact, the latter could not be considered an extension of the previous tax advantages granted to the municipalities, considering the differences existing between the joint-stock companies and the aforementioned municipalities.

The Italian Parliament has adopted several procedural rules in order to recover the aid. In addition, on 18 February 2009, the Italian Tax Authorities issued specific tax codes in order to

allow the beneficiaries to actually pay back the aid. See also EUDTG Tax News [Issue 2009 - nr. 001](#) and EUDTG Tax News [Issue 2009 - nr. 002](#)).

However, so far the recovery of the State aid has not been completed. The CFI's Judgments confirm the necessity for the Italian State to recover the aid without further delay.

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### **Netherlands – European Commission rules that proposed Dutch ‘groepsrentebox’ is not prohibited State aid**

On 8 July 2009, the European Commission announced that the proposed Dutch regime for group interest (‘groepsrentebox’) does not constitute prohibited State aid. With this decision, the formal investigation which the Commission started in 2007 in respect of the group interest box is concluded in favour of the Dutch Government.

The group interest box was first proposed a number of years ago in the context of a reform of the Dutch corporate income tax in 2007. The measure is primarily aimed at mitigating the difference in treatment of respectively debt and equity in the context of intra-group financing. Under the group interest box, interest received or paid in respect of intra-group financing would be taxed in the Netherlands at a reduced rate of 5%. This is substantially lower than the regular statutory Dutch corporate income tax rate of 25.5%.

Over the past few years, the group interest box has proved controversial from a State aid perspective. In particular it has been suggested that the fact that the measure would favour multinational groups of companies means that the group interest box is a selective measure (i.e. only multinational groups benefit from the measure). It has therefore been argued that the group interest box would be a prohibited State aid measure.

Initially, the Netherlands had intended the group interest box to be optional for a period of 3 years. Following discussions with the Commission, the Dutch Government suggested to alter the scheme such that it would be mandatory for all Dutch corporate income taxpayers. In addition to this, the Netherlands expanded the scope of the group definition for the purpose of the group interest box. Furthermore, The Netherlands agreed to drop the statutory requirement under Dutch law that a Dutch company limited (‘besloten vennootschap’, BV) must have a starting capital of EUR 18.000.

In the light of the comments put forward by The Netherlands and the abovementioned modifications, the Commission has accepted that the group interest box does not constitute state aid. In the view of the Commission, the measure is not selective, as it will apply equally to all companies receiving interest paid from affiliated group companies. As such, the measure is not limited to certain sectors, certain types of companies or certain parts of the Dutch territory.

In the wake of this decision, the introduction of a mandatory group interest box by The Netherlands seems increasingly likely. See also EUDTG [Newsalert 2009 – nr 013](#).

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## CCCTB

### EU – Outlook for the CCCTB and the new Irish referendum on the Lisbon Treaty

As was reported in our previous article on the outlook for the CCCTB (see EUDTG Tax News [Issue 2009 – 003](#)) the European Commission has relieved the head of its CCCTB task force, Thomas Neale, who has become the new Head of Unit E1: Analysis and Coordination of Tax Policies. Please note that Mr Neale also remains as acting head of the CCCTB Task Force for the time being.

At the European Council held on 18 and 19 June 2009, EU leaders endorsed (again) a "legal guarantee" in the field of taxation for Ireland to pave the way for a second Irish referendum on the Lisbon Treaty. As was reported in EUDTG Tax News [Issue 2009 – 001](#), the so-called legal guarantees made to Ireland in December 2008 are in fact nothing more than a reiteration of the status quo. In doing so, EU leaders aim to reassure Irish voters ahead of the second referendum and counteract earlier claims by the Irish "No" camp during the referendum campaign last year that the Lisbon Treaty will curb Ireland's room for manoeuvrability on (direct) tax policy. On 8 July 2009, Irish Prime Minister Brian Cowan announced that the second Irish referendum will be held on 2 October 2009.

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## ABOUT THE EUDTG

The EUDTG is one of PricewaterhouseCoopers' Thought Leadership Initiatives and part of the International Tax Services Network. The EUDTG is a pan-European network of EU tax law experts and provides assistance to organizations, companies and private persons to help them to fully benefit from their rights under EC Law. The activities of the EUDTG include organising tailor-made client conferences and seminars, performing EU tax due diligence on clients' tax positions, assisting clients with their (legal) actions against tax authorities and litigation before local courts and the ECJ. EUDTG client serving teams are in place in all 27 EU Member States, most of the EFTA countries and Switzerland. See the EUDTG website for more information: [www.pwc.com/eudirecttax](http://www.pwc.com/eudirecttax).

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