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EC law in the field of direct taxation
(lecture in the lessons of Prof. Dassesse, ULB)

A. EC law and the legal remedies for citizens and enterprises

I. Complaint procedure to the European Commission - Secretariat General , 1049 Brussels (with the aim to trigger an infringement procedure against a Member State under Art. 226 EC), not instituted in the EC Treaty, but in Art.109 of the EEA Agreement (European Economic Area)

stages:

0. administrative letter (pre-226),

1. letter of formal notice 226 ("mise en demeure"): communication of the position which the Commission is likely to take; deadline for a reply: 2 months)

2. **Reasoned opinion (avis motivé): formal legal position of the Commission**

(as regards the legal quality see judgment C-191/95 of 29.9.1998), gives normally rise to a Commission press release (IP)

3. the Commission brings the matter before the Court of Justice ("saisine")

Annual report from the Commission on the contrôle of application of Community law – http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

!Attention: this procedure does not safeguard your individual rights – you must make use of the national – administrative and judicial remedies

II. New alternative settlement system involving the Commission and the Member States: **SOLVIT** - <http://europa.eu.int/solvit/>

III. Request to the European Court of Justice for a preliminary ruling (Art. 234 EC) only available for national tribunals, limited to the *interpretation of Community law* (other than the infringement procedures under Art. 226 and 227, in which the *incompatibility of national measures* can be decided)
the Commission systematically participates in all cases

IV. Petition to the European Parliament (Art.21, 194 EC; EP Rules of Procedure, Art. 174 to 176)

<http://www.europarl.eu.int/parliament/public/staticDisplay.do?id=49&pageRank=1&language=EN>

the European Commission takes part in a petition by contributing its appreciation

V. The Ombudsman procedure (Art.21, 195 EC;

EP Resolution of 9 mars 1994, OJ L 113 of 4.5.1994 p.15; EP Rules of Procedure, Art. 177 to 179)

only available for complaints against acts of EC institutions

Annual reports of the Ombudsman: <http://www.euro-ombudsman.eu.int/home/en/default.htm>

VI. *Not part of Community law:*

Procedure in front of the European Court of Human Rights <http://www.echr.coe.int/>
available for violations of rights enshrined in the European Convention of Human Rights (4.11.1950), **once the domestic remedies have been exhausted** <http://conventions.coe.int>

B. The impact of the EC Treaty on direct taxation

I. Characteristics of EU legal order

1. the legal national and Community orders are complementary
2. EC law limits the national legislative sovereignty (the budgetary and administrative aspects of fiscal sovereignty are not affected)
3. Priority of EC law (Constitution Art. I-6)
 - in respect of national laws (tax laws)
 - in respect of (i.a. tax) conventions; no application of public international law
4. Priority of the individual's positions over budgetary considerations
5. **subsidiarity (Art.I-10 Constitution)**

- II. The **EC Treaty does not contain specific rules for direct taxation** (however, reference is made in Art. 58, 92, 175, 190, 293 EC as well as in Art. 13 and 14 of the Protocol on Privileges and Immunities of the EC <http://europa.eu.int/eur-lex/en/treaties/selected/livre501.html>), but constitutes a framework to be respected by national tax legislation

To the extent that there are no harmonisation measures, the competence for direct taxation is (remains) for the Member States, like any other matter for which secondary EC legislation – in particular under Articles 94 (Art. 95 EC not applicable, see CJEC of 29.4.04, C-338/01) – has not (yet) been adopted;

- **Loyalty obligation Art. 10 EC**
 - obligation to act
 - obligation to refrain from action
- **Internal Market Art.14 EC**
- **Non-discrimination on grounds of nationality Art. 12 EC**
 - impact on the interpretation of terms in the national tax codes referring to national situations – reverse discrimination (of own nationals unlawful? no, arg. Art. 39, 56 EC)
 - impact on nationality clauses in tax conventions (case C-336/96 - Gilly)
 - multilateralisation of obligations contained in bilateral conventions (Most Favoured Nation clause)?
- **free movement of (any) person Art. 18 EC**
- **free movement of employed workers Art. 39 EC**
- **free movement of self-employed persons, freedom of establishment (of companies) Art. 43, 48 EC**
- **free provision of services Art. 49 EC**
- **free capital movement Art. 56 EC**
 - explicite reservation in Art. 58 CE first paragraph lit. a for national tax rules which distinguish between taxpayers according to their place of residence or the place of investment

C. Important secondary legislation

- Directive 77/799 mutual assistance - information
Directive 2001/44 mutual assistance – recovery
Directive 90/434 Merger Directive, modified by Dir. 2005/19/EC of 17 Febr 2005
Directive 90/435 parent-subsidiaries
Directive 2003/48 Savings interest taxation
Directive 2003/49 Interest and Royalties
Convention 90/436 Arbitration convention (transfer pricing)
Recommendation 94/79 (Commission) Non-resident individuals
Recommendation 94/390 (Commission) small and medium-sized enterprises

"Tax Package":

Conclusions of (ECOFIN) Council of 1.12. 1997 (OJ C 2 du 6.1.1998, p.1) with four elements finally implemented :

1. Code of conduct – taxation of enterprises (OJ C 2 du 6.1.98) ; High level group ("Primarolo) created by Council conclusions of 9 mars 1998 (OJ C 99, 1.4.1998, p.1); report of this group of 29.11.1999 published 28.2.2000 via Council press release 4901/99 http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/misc/ACF150C.html
2. Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ L 157 26.6.2003 p.49)
3. Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (OJ L 157 26.6.2003 p.38) – to be applicable as from 1 July 2005
extended to non-EU countries and territories by numerous instruments
4. Commission Notice [of 11.11.1998] on the application of the State aid rules to measures relating to direct business taxation (OJ C 384 10.12.1998 p. 3)

Commission Communications on tax matters (selection)

http://europa.eu.int/comm/taxation_customs/common/publications/com_reports/taxation/index_en.htm

- *COM (2001) 214* = OJ C 165, 8.6.2001, p. 4:
The elimination of tax obstacles to the cross-border provision of occupational pensions
- *COM (2001) 260* = OJ C 284, 10.10.2001, p.6:
Tax policy in the European Union — priorities for the years ahead
- *COM (2001) 582 Towards an Internal Market without tax obstacles - A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities + SEC (2001)1681: Company taxation in the internal market ("Company tax study")*, Staff working paper:
http://www.europa.eu.int/comm/secretariat_general/regdoc/liste.cfm?
- *COM(2003) 810* Dividend taxation of individuals in the Internal Market
- *COM(2005) 532* The Contribution of Taxation and Customs Policies to the Lisbon Strategy

D. Some recent developments

- taxation of interest from savings (dir. 2003/48)
- home State taxation – **common consolidated company tax base**
- Treaty establishing a Constitution for Europe, Rome, 29 Oct 2004
- third country aspect of Art. 56 EC (capital movement)
- taxation according to nationality?
- Most favoured nation
- coordination instead of harmonisation

E. Some important recent Court cases

05.07.2005	<u>C-376/03</u> - D. v. Rijksbelastingdienst (NL) – no MFN treatment of German resident under NL-B DTA (request from Gerechtshof 's-Hertogenbosch) ; hearing 14.09.2004, opinion AdvGen Ruiz-Jarabo 26.10.2004; see also <u>C-8/04</u> (15.07.2005) rectifying order: <i>"nationals" replaced by "residents" in § 63 and n°2 of the operative part</i>
13.12.2005	<u>C-446/03</u> Marks&Spencer plc v. David Halsey (HM Inspector of Taxes) (UK) – cross- border compensation of losses (request of 02.05.2003 from High Court of Justice, Chancery Division Ch/2003/App/0181) <u>OJ C 304</u> 13.12.2003 p. 18; hearing 01.02.2005; opinion AdvGen Poiares Maduro 07.04.2005 (<u>PR 29/05 CFE</u>) <u>PR 107/05 IP../05</u>
19.01.2006	<u>C-265/04</u> M. Bouanich v. Skatteverket (S) – repayment to non-residents of repurchased shares – taxation as capital gains or dividend? (Art. 56, 58, 43, 48 EC); request from Kamarrätten i Sundsvall, <u>OJ C 228 11.09.2004 p. 22</u> , opinion AdvGenKokott 14.07.2005
21.02.2006	<u>C-152/03</u> Ritter-Coulais v. FA GERMERSHEIM (D) – compensation for loss from residence abroad (request from BFH - I R 13/02), <u>OJ C 158 05.07.2003 p. 8</u> hearing 12.10.2004, opinion AdvGen Léger 01.03.2005 <u>PR No 17/06</u>
23.02.2006	<u>C-513/03</u> van Hilten-van der Heijden v. Rijksbelastingdienst (NL) – residence fiction for NL nationals in Art. 3 Inheritance Tax Act, Art.57(1), 58(3) ECT – <u>OJ C 85 03.04.2004 p. 12</u> , hearing 12.05.2005, opinion AdvGen Léger 30.06.2005
23.02.2006	<u>C-471/04</u> Keller Holding v. FA Offenbach/Main-Land (D) – tax deductibility of expenses for tax-free dividends from participations? – <u>BFH request I R 17/03</u> ; <u>OJ C 19 25.01.2005 p. 14</u> without AdvGen, hearing 01.12.2005
<u>C-374/04</u>	Test Claimants in Class IV of the ACT Group Litigation v. Commissioners of Inland Revenue (UK) – tax credits for dividends, MFN, request from the High Court, Chancery Div., <u>OJ C 273 06.11.2004 p. 17</u> hearing 22.11.2005, opinion AdvGen Geelhoed 23.02.2006