Pending Court of Justice of the European Union Cases

This article presents an overview of cases that were pending before the Court of Justice of the European Communities on 31 December 2011.

1. 2011 in a Nutshell

The Court of Justice of the European Union (ECJ) decided approximately 20 direct taxation cases in 2011, some with far-reaching significance, for instance, those dealing with portfolio dividend taxation and methods of relief for economic taxation (Haribo (Joined Cases C-436/08 and C-437/08), Meilicke (Case C-262/09) and Accor (Case C-310/09)), with juridical double taxation (Banco Bilbao (Case C-157/10)), with the anti-abuse clause in the Merger Directive (09/133) (Foggia (Case C-126/10)), with exit taxation for companies (National Grid Indus BV (Case C-371/10)) and with State aid (Commission/Spain v. Gibraltar (Joined Cases C-106/09 P and C-107/09 P)).

Another important contribution of the ECJ is the first case on the interpretation of the Interest and Royalties Directive (Scheuten Solar Technology (Case C-397/09)).

Several cases on individual taxation also were decided, i.e. cases dealing with a deduction for alimony payments (Schröder (Case C-450/09)), succession rights (Halley (Case C-132/10)) and joint taxation (Schulz (Case C-240/10)).

A few years ago, the Commission had brought several Member States to court for infringement of the freedom of movement of services, which cases were decided in 2011, including cases dealing with compulsory use of tax representatives for non-residents (Austria and Portugal). Also in the field of the freedom to provide services, several preliminary rulings were referred from France, Belgium and Germany, dealing with corporate income tax (Waypoint (Case C-9/11)), State aid (Paint Graphos (Joined Cases C-78, C-79 and C-80/08), France Telecom (Case C-81/10 P)) and with the Protocol on immunity and privileges for EU staff and income tax (Gistò (Case C-270/10)).

There are around 40 cases pending before the Court in the field of income tax, the majority concerned with the fundamental freedoms and State aid, as well as a few involving the freedom of capital and the free movement of workers.

This article only deals with cases that were pending during 2011, as recent cases have been adequately reported on elsewhere. Therefore, the following developments focus on cases pending on 31 December 2011, and are classified by the legal basis upon which they were brought before the ECJ. The results of the cases decided between January and June 2012, which are presented in this article as pending
cases, is briefly referred to in the footnotes. The pending cases introduced in 2012 are not dealt with in this article.

2. Pending Cases on the Freedom of Establishment: Article 49 of the TFEU

2.1. Introductory remarks

Of the ECJ cases initiated on the basis of article 49 of the TFEU, four are infringement proceedings (exit taxation and dividend taxation) and nine are requests for a preliminary ruling (exit tax issues, merger relief, cross-border loss relief and dividend taxation).

2.2. Exit tax cases

While the National Grid Indus BV case was pending, the Commission launched several exit taxation cases against Spain (Case C-64/11),

17 Denmark (Case C-216/11),

18 Portugal (Case C-38/10)

19 and the Netherlands (Case C-301/11). All four infringement proceedings deal with the immediate taxation of unrealized gains on a transfer of assets out of the national tax jurisdiction. The disputed legislation treats a transfer of a property right in regard to an asset held by a company outside the tax jurisdiction as a sale, triggering capital gains tax, irrespective of whether or not the emigration state retains a right to tax the asset due to a permanent establishment (PE) remaining there. In other words, the "exit" provisions apply equally to all kinds of assets, goods and intangible property rights.

The previous cases on exit taxation of individuals or companies (de Lasteyrie du Saillant (Case C-9/02) and N (Case C-470/04)) do not apply to transfers of assets, as the breach in those cases arose out of a situation where there was a change of tax residence, and the question in the current cases is whether or not the analysis presented in National Grid Indus BV will hold for all types of transfers of assets.

In National Grid Indus BV, Advocate General Kokott argued, in her Opinion, that the immediate taxation of an unrealized gain on an intangible asset (a claim towards a UK company, generating an exchange gain) would amount to a restriction on the right to establish freely. Nevertheless, it could be justified by the need to preserve the balanced allocation of the Member States' taxing rights, coupled with that of ensuring cohesion of the tax system, and is appropriate to achieving these goals. However, the rule may not pass the proportionality test, as it blindly targets both assets that may easily be tracked and those that cannot be tracked at all (paragraph 108 of the Opinion), as even losses arising from a further decrease in value of the asset after the exit should be taken into account in the emigration state. An alternative would be to allow for a notional capital gain only when intellectual property rights (IPR) are transferred, or to offer a choice to the taxpayer to be taxed immediately (as intangible assets such as IPR escape source taxation in the emigration state after their owner's exit) or at the moment of actual sale of the asset. The ECJ mostly followed the Advocate General's Opinion, stating that gains arising in regard to a company's taxable activities may be freely assessed by the emigration state and may be taxed there as well, even before being realized. However, the immediate recovery of the tax claim relating to the assets is not proportionate irrespective of whether or not the assets can be easily tracked. The ruling is so generally drafted that it can be expected to apply in the above-mentioned infringement cases dealing with transfers of assets not linked to a change of tax residence, as long as the emigration state loses its right to assess the tax claim on the transferred asset. The most interesting contribution of this case is the statement that the 1988 ruling in Daily Mail (Case 81/87) is no longer applicable, and that the freedom of establishment gives companies the right to question exit taxation. Additionally, the ruling reverses the N case and suggests that exit taxation is justified by the balanced allocation of taxing powers between states, and that the emigration state does not need to track the transferred assets, even in cases involving losses, as those will be taken into account in the host state (paragraph 59). The only limit is, therefore, the immediate recovery, but not the immediate assessment, of the tax claim over the unrealized capital gains. It remains to be seen how the pending cases will integrate these conclusions especially as it is still unclear why the approach to individual tax cases should differ from that applicable to corporate income tax. Yet another exit case in regard to company law was referred to the ECJ by Hungary (Case C-378/10).

Finally, a Luxembourg County Court brought a case (DI VI. Finanziaria (Case C-380/11)) to the ECJ on the application of article 49 of the TFEU to a provision regarding net wealth tax (NWT) in a case involving a transfer of seat from Luxembourg (Srl) to Italy. In Luxembourg, all resident taxpayers, including legal persons, are liable to pay a net wealth tax of 0.5%. However, provided that they allocate an amount from the company's profits to a special reserve and maintain it for a period of five years, they are granted an annual tax credit of 1/5 of the value.

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of the reserve.\textsuperscript{27} In practice, all companies have to constitute a reserve corresponding to the unpaid tax. If the taxpayer distributes the reserve, or ceases to be subject to Luxembourg NWT at the moment of the reserve’s constitution and during the following five years, Luxembourg’s tax administration may claw back the tax credit in regard to the five years preceding the exit.

In the case at hand, a Luxembourg company, incorporated in 2000, had constituted, in 2005, a NWT reserve and was granted the benefit of the NWT credit. Then, in 2006, it transferred its seat to Italy and changed its nationality and its corporate form to an Italian company. A couple of months later, it merged with a new Italian company, keeping, in the accounts of the newly merged company, the reserve for the NWT credit. In 2009, the Luxembourg tax administration reassessed the income tax years 2005 and 2006 and ended up with a much higher valuation of the assets than expected relative to the reserve amount granted. Additionally, they observed that the conditions required by the Luxembourg tax law were not met due to the transfer of seat out of Luxembourg. They consequently applied the clawback provision in regard to the tax credit, and denied the right to constitute such a reserve for the future.

The question raised before the court concerned the application of article 49 of the TFEU. This case leads to an outbound restriction (non-discriminatory), as the Luxembourg company is in a less favourable situation than if the transfer had not taken place. The question is whether or not ECJ case law, such as Köbler (Case C-224/01),\textsuperscript{28} applies. Such cases provide that it should not matter in which state the conditions required to qualify for a tax credit are fulfilled, provided that they are fulfilled somewhere in the European Union. Therefore, it is expected that the court will find that the provision at issue represents a non-discriminatory restriction on the freedom of establishment. The need to ensure fiscal supervision as a potential justification will probably be rejected by the Court, as all information is available (the Italian company provided information on the amount of the reserve booked in the accounts without any difficulty). The public order justification, to preserve the cohesion of the tax system, is also likely to be rejected, as the aim of this provision is only to provide a tax advantage in regard to reserve amounts reinvested in Luxembourg and, therefore, to protect Luxembourg against a loss of tax revenue.

2.3. Cross-border loss relief cases

The Finnish preliminary ruling case (A Oy (Case C-123/11))\textsuperscript{29} arises from an advance ruling of the Central Tax Board of Advance Ruling (KVL 17/2009), which was challenged by the taxpayer before the Supreme Administrative Court. Under the Advance Ruling, a Finnish company was refused the right to set off final losses realized in Sweden by its subsidiary through a cross-border merger (of around EUR 43 million). Indeed, Finnish tax law\textsuperscript{30} provides for the right of the acquiring company to deduct losses of the merging company, provided that the receiving entity or its shareholders owned at least 50% of the shares in the merging entity from the beginning of the loss year. Furthermore, and under domestic law, a loss determined in accordance with Swedish tax law is not a loss determined in accordance with Finnish law and, therefore, the loss incurred in Sweden may not be deducted from the taxable income of A Oy in Finland.

As the Merger Directive (09/33) does not provide any relief in this situation in articles 4 and 6 (no PE is left in Sweden after the closing down of the subsidiaries and no takeover of the PEs losses in Sweden is possible), the Finnish taxpayer argued that article 49 of the TFEU applies. The problem arises from the definition of losses according to Finnish law, as, in Futura (Case C-250/95),\textsuperscript{31} losses were required to be accounted for in the host state in the same way for resident and non-resident taxpayers. Here, the loss has to be recognized in Finland in order to be deductible, which is a straightforward restrictive approach. The question is, therefore, the extent to which the ruling in Marks & Spencer (Case C-446/03)\textsuperscript{32} has a bearing here, as the losses incurred by the Finnish subsidiary were final. No risk of double use of losses or a tax avoidance scheme seems to arise in this situation. There are, therefore, solid arguments to support a ruling favourable to the taxpayer. It can be added that, in Sweden, where an equivalent group contribution system was brought before the courts, the Swedish Supreme Administrative Court decided, in several joint cases of 11 March 2009,\textsuperscript{33} to grant cross-border loss relief and calculated the deduction based on the least amount of losses computed according to the Swedish or the foreign tax law applicable to the determination of the subsidiary’s taxable income. From a Swedish law perspective, it is, therefore, hoped that the ECJ will confirm the 11 March 2009 rulings (and that the law will be amended to take into account the ruling); otherwise, an uncertain legal situation may arise in that Member State.

A closely related issue is pending regarding the UK loss relief rules (Philips Electronics (Case C-18/11)).\textsuperscript{34} A joint venture between Philips and LG was initiated in the Netherlands where a group of companies was set up, and was consolidated for tax purposes in the Netherlands. A Dutch branch of LG (part of the consortium to which Philips belongs), operating in the United Kingdom, was included...

\textsuperscript{27} LU: Net Wealth Tax Act, para. 8a, introduced in 2008 for resident taxpayers.
\textsuperscript{28} AT: ECI, 30 Sept. 2003, Case C-224/01, Gerhard Köbler v. Republik Österreich, ECI Case Law BFBD.
\textsuperscript{29} FI: ECI, Pending Case C-123/11, A Oy See M. Helminen, Finland, in ECI-Recent Developments in Direct Taxation 2011, supra n. 21, at p. 80.
\textsuperscript{30} Fl: Income Tax Act, sec. 123(2), National Legislation IBFD.
\textsuperscript{31} LU: ECI, 15 May 1997, Case C-250/95, Futura Participations SA and Singer v. Administration des contributions, ECI Case Law BFBD.
\textsuperscript{32} UK: ECI, 13 Dec. 2005, Case C-146/03, Marks & Spencer plc v. David Haley (Her Majesty’s Inspector of Taxes), ECI Case Law BFBD.
\textsuperscript{34} UK: ECI, Pending Case C-18/11, Philips Electronics. See P. Baker, UK, in ECI-Recent Developments in Direct Taxation 2011, supra n. 21, at p. 263. See also UK: Opinion of Advocate General Kokott, 19 Apr. 2012, Philips Electronics.
within the scope of the tax consolidation area in the Netherlands. The branch was in a loss situation and the UK group intended to let the Dutch branch surrender its loss to the UK head office, which was in a profitable situation, in order to be able to utilize this loss that otherwise would be lost. Very little of the loss incurred in the Netherlands was used within the Dutch consolidated group; most of it was left unused. It is not clear from the facts of the case whether the remaining losses incurred by the Dutch branch could have been set off within the Dutch consolidation in the Netherlands, but since the Dutch Joint Venture was wound down and terminated, there was basically no risk of double use of losses.

However, and according to UK tax law, there can be no loss surrender in the United Kingdom if part of the loss to be surrendered has already been deducted from a non-resident’s tax liability. From the perspective of article 49 of the TFEU, the discrimination is quite clear, as the loss could have been surrendered to the head office in its entirety had it been incurred by a UK tax resident. This discrimination seems, however, justified, as its purpose is to avoid double utilization of losses. The Advocate General found that the discrimination is not justified even though it is aimed at avoiding the double use of losses. The justification ground of ensuring a balanced allocation is not admissible here, as it is a question of a UK tax deduction only (host state tax treatment is always more demanding than home state’s). Should the court find that the rule is nevertheless justified, the Advocate General claims that the measure is not proportional, as all of the losses incurred in the foreign branch are excluded from the surrender relief, although only part of them are used in this regard and as there is no means to show that the losses incurred by the non-resident are not being used abroad.

2.4. Dividend taxation and share buy-back cases

In a follow-up case to FII Test Claimant (Case C-446/04),37 the UK requested that the ECJ provide a new preliminary ruling on the FII case (FII GLO-II (Case C-35/11))38 to determine the extent to which the credit and exemption method are equivalent in respect of the freedom of establishment, where the Court required total elimination of economic double taxation for domestic (which are exempt) as well as for inbound dividends (which are taxable but enjoy an imputation credit). The question was, obviously, not answered clearly enough in the first mentioned case, which referred to “different levels of taxation” (paragraph 56) in both states instead of clearly requiring that the tax treatment be similar for both inbound and domestic dividends.

However, since then, the ECJ decided the Haribo, Meilicke and Accor cases (in 2011) and the question has been settled: foreign-source dividends must not be subject to tax at a higher rate than domestic-source dividends irrespective of whether or not the relief method differs. One could argue that since the United Kingdom exempts domestic dividends, foreign source dividends are, therefore, always taxed higher from a global perspective. In the Haribo case (paragraph 87) the ECJ required, under article 67 of the TFEU, that an overall tax credit39 be granted in regard to foreign source dividends when domestic dividends are tax exempt, which seems to refer to the actual tax paid in the source state. Additionally, in the Meilicke II case, the Court ruled that economic double taxation is not allowed in cross-border situations if it does not exist in domestic tax situations, meaning that, in cross-border systems, there should be a credit for actual foreign tax paid in the source state. Finally, in the Accor case, the Court held that the credit amount should be at least equal to the tax paid in the distributing company’s country.

None of these cases answer the question of the extent to which the freedom of establishment, provided for in article 49 of the TFEU, forbids a change of method for inbound dividends, leading to a less favourable treatment of foreign investments, especially when relief for an indirect shareholding is not granted in the source country.

This is probably why the ECJ did not decide to rule on this issue in the form of an ordinance. Instead, it is now planned that the case will be decided under the standard chamber case procedure.

Also in the field of shareholdings, the pending case of Commission v. Belgium (Case C-370/11)40 deals with the Belgian tax regime regarding the buy-back of shares in UCITs, which applies a different tax treatment if the UCITs are established either in the European Union or Norway/Iceland (breach of article 31 of the EEA agreement on the freedom of establishment). When the UCITs are established in Belgium, no capital gain tax is levied on Belgian or EU established UCITs managing their own private assets. The exception is provided for by article 19bis of the Belgian Tax Code, according to which any UCITs established in the European Union, constituted in accordance with the UCITS Directive (85/611),42 which grants these UCITs an “EU Passport” where more than 40% of the assets are invested in debt claims, are taxable.

35. As mentioned in footnote 4 of the AG Opinion in Philips Electronics (C-18/11), under sec. 406(2) ICTA, the link is not sufficient, since neither of the consortium companies is resident in the United Kingdom. However, the lower court, in the main proceedings, considered that the provision was inapplicable because it constitutes a prohibited restriction of the freedom of establishment. This finding is no longer disputed in the main proceedings, as it was not appealed.

36. UK: Income Tax Act 1988, art. 403D, National Legislation IBFD, which is applicable to the facts in the case.

37. UK: ECJ, Pending Case C-35/11, FII GLO-II. See Baker, in ECJ-Recent Developments in Direct Taxation 2011, supra n. 21, at p. 265.

38. UK: ECJ, Pending Case C-35/11, FII GLO-II. See Baker, in ECJ-Recent Developments in Direct Taxation 2011, supra n. 21, at p. 265.

39. ‘Overall tax credit’ does not seem to refer to the same notion as under international taxation, where all tax credits from foreign tax jurisdictions are equalized, but rather to the complete elimination of double taxation as mentioned in the French version of the ECJ’s case.

40. See M. Wathelet, Belgium, in ECJ-Recent Developments in Direct Taxation 2011, supra n. 21, at p. 52. The case was decided on 10 May 2012 and Belgium lost.


on the capital gains arising from the buy-back of shares. As a result of these provisions, EU UCITs without a passport are not taxed, whereas Norwegian and Icelandic UCITs are always taxed. When the Commission initiated proceedings against Belgium to align these last two categories of UCITs, Belgium answered too late and not satisfactorily. Belgium argues that the objective of the legislation and its scope is the same as in regard to the EU Savings Directive (03/48)\(^1\) (article 6), which makes the same distinction between UCITs authorized under the 1985 directive and others. Belgium wanted, therefore, to wait for the exchange of information on UCITs in the European Union to be generalized, before changing its law. However, the Commission argues that the Savings Directive and capital gains taxation are not linked, and this argument does not resolve the discriminatory treatment of EEA UCITs. Very few arguments in favour of a justification were advanced at that stage, and Belgium is expected to lose this case.

### 2.5. Notional interest deduction for risk capital

In another case concerning Belgium (Argenta Spaarbank (Case C-350/11)),\(^2\) it is argued that the Belgian notional interest deduction (NID) issues raise questions concerning the freedom of establishment. A domestic law of 22 June 2005\(^3\) introduced an NID calculated on the company’s risk capital, which is based on the interest rate paid by the Belgian Treasury, which, in turn, is based on the 10-year linear bonds rate. Some adjustments apply to avoid double dips and other unintended uses. Among others, article 205ter, paragraph 2 of the Belgian Tax Code, excludes from the amount of the risk capital on the basis of which the NID is computed, the net income of a PE located in the European Union and exempt in Belgium on the basis of a tax treaty. When a Belgian company has a Belgian PE the NID includes the PE’s net income in its base, as it is taxable in Belgium.

The question, therefore, is whether this legislation is discriminatory and if so, whether it is justified by the need to preserve a balanced allocation of taxing powers in the Member State, as has been held in previous case law of the Court (Lidl (Case C-414/06), Jobra (Case C-330/07) and Tankrederei (Case C-287/10)).\(^4\) In other words, the question is whether or not Member States are justified in countering tax base erosion that may occur due to the importation of reductions and reliefs that are alien to their tax jurisdiction and, if so, how.

### 2.6. Merger case

Finland has brought an interesting case before the Court on the restructuring of companies in the EU/EEA area. The first case, Oy A1 (Case C-48/11),\(^5\) deals with an exchange of shares between a Norwegian and a Finnish company. In Finland, the main rule is that such an exchange of shares triggers capital gains, and falls under an exception when the Merger Directive (09/133) applies. Finnish law\(^6\) only grants relief in the form of capital gains tax neutralization within the European Union. Under domestic law, a Norwegian acquirer of Finnish shares cannot benefit from the relief, as this would involve an application of the Merger Directive that is not available for EEA-wide transactions. The Supreme Administrative Court brought the case to the ECJ on the basis of the freedom of establishment, which also applies in the European Economic Area (article 31 of the EEA agreement) according to the Tax Board for Advance Ruling (KVL 55/2008). While it seems clear that this law makes the investment in Finland less attractive from an EEA perspective and, therefore, is a prohibited restriction, the justifications for the Finnish restrictive provision will be at issue before the Court. Among others, the Finnish government is expected to rely on the effectiveness of fiscal supervision as a justification. However, the Multilateral Nordic Administrative Assistance Treaty applies in the same way as the Mutual Assistance Directive (77/799)\(^7\) (the 1997 version being applicable in the case at issue) and should be enough to guarantee the Finnish State proper access to a capital gains assessment at the moment when the acquiring Norwegian company sells the shares acquired in Finland. The need to prevent tax avoidance may also be presented as a justification. However, the ECJ has recently ruled in Foggia\(^8\) that national courts are left to determine whether the disputed situation leads to tax avoidance. It is most likely that the case at hand does not fall within this category, as the Norwegian legal entity compares to Finnish ones, and there is no risk of tax avoidance here (see X & Y AB (Case C-436/00)).\(^9\)

### 3. Cases on the Free Movement of Capital: Article 63 of the TFEU

#### 3.1. Introductory remarks

A series of preliminary rulings and infringement procedures has been brought before the ECJ dealing with individual income tax, inheritance tax and portfolio dividends.

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44. See L. De Broe, Belgium, in ECJ-Recent Developments in Direct Taxation 2011, supra n. 21, at p. 16.


47. FI: ECJ, Pending Case C-48/11, Oy A1. See Helminen, in ECJ-Recent Developments in Direct Taxation 2011, supra n. 21, at p. 71.

48. FI: Business Income Tax Act EVL, secs. 52(2) and 52f.


50. See Foggia (C-126/10).

51. SE: ECJ, 21 Nov. 2002, Case C-436/00 X & Y v. Rikskatteverket, ECJ Case Law IBFD.
3.2. Individual income tax cases

A French lower tax court has requested a preliminary ruling in Bourgeois- Maunoury and Heintz (Case C-558/10), dealing with wealth tax and the Protocol on the Privileges and Immunities of the European Union. According to this Protocol (chapter 5 article 2), officials and other servants of the Union shall be exempt from national taxes on salaries, wages and emoluments paid by the Union. This rule has already been interpreted in previous ECJ case law, especially as the Protocol also prevents (article 13) any national tax that directly or indirectly bears upon servants or other agents of the Communities, by reason of the fact that they benefit from remuneration paid by the Communities, even though the disputed tax is not calculated in proportion to the amount of this remuneration.

In France, the wealth tax used to be progressive up to 1.8% and capped at 85% of total income. The cap included foreign exempt income by virtue of a tax treaty signed by France. On 10 January 2010, the Supreme Civil Court held that article 885 V bis of the French Tax Code was not in breach of article 63 of the TFEU without referring the issue to the ECJ. However, since the inclusion of exempt income in the computation of the ceiling for wealth tax indirectly leads to the levying of wealth tax on salaries paid by the European Union that normally should escape all taxation, several cases have been brought before the ECJ by taxpayers who are civil servants of the European Union, in their capacity as French tax residents. This is interesting, as it shows an emerging trend amongst lower courts to request preliminary rulings from the ECJ when they suspect the supreme courts will not apply EU law consistently, which indicates that they are not hesitant to bypass the traditional domestic procedures. France has already amended the wealth tax regime such that it is now in line with the requirements of the Protocol. The outcome of the case is, however, unclear. Advocate General Villalon’s Opinion recommends that the provision should be declared compatible with EU law, as, normally, the inclusion of income in the computation of wealth tax follows a hardship clause. This clause is meant to protect taxpayers with no income and no possibility to pay wealth tax unless they sell the property on which the wealth tax is computed. EU staff should not enjoy the benefit of this hardship clause, as they can afford to pay wealth tax (assessed based on ability to pay). The Advocate General does not, however, address how EU staff should be out of the scope of wealth tax (paragraph 50), as the Protocol deals only with income tax and not wealth tax, and as the question was not brought before the Court.

Another interesting pending case in the field of individual income tax, brought before the ECJ by Finland, is K (Case C-322/11). In this case, an individual taxpayer “K” sold real estate he owned in France, realizing a loss of EUR 172,623. He could not set off this loss against taxable capital gains in Finland and had no possibility to deduct the loss in France either. However, normally, in Finland, a capital loss on the sale of assets is deductible in the three years following the loss year irrespective of where the asset is located. Here, the problem relates to the Finnish method of elimination of double taxation, i.e. exemption with progression. When applying this method, the costs related to the acquisition of foreign source income are not deductible in excess of the foreign source income, leading to a different treatment of losses realized on the sale of assets located in Finland in comparison to assets in other states. This causes a restriction within the meaning of article 63 of the TFEU, which is expected to be justified on the grounds set forth in Marks & Spencer. As long as there is no follow-up mechanism for cross-border loss repatriation, problems will arise in regard to allocating taxing rights correctly, justifying a restrictive tax provision such as the one at issue.

Still in the field of deductions from taxable income for individual taxpayers, several pending infringement procedures have been launched by the Commission against France (IP/11/603) the Netherlands (IP/11/429) and Belgium (IP/10/1559), dealing with gifts to foreign charities and with private pension (pillar 3) payments made to foreign insurance companies. In the Dutch infringement procedure, the disputed legislation provides that foreign charities must be registered in the Netherlands in order for donors to be able to claim a deduction, irrespective of whether or not the charity is established (within the European Economic Area). The Commission, which does not refer to the fact that all charities have to be registered in the Netherlands, even Dutch ones, is of the opinion that the legislation is disproportionate and incompatible with the European Union, as it may discourage taxpayers from donating to foreign charities. It referred to Persche (Case C-318/07) in which the Court held that registration is not disproportionate since "nothing prevents the tax authorities of the Member State of taxation from requiring a taxpayer, wishing to obtain the deduction for tax purposes for gifts made for the benefit of bodies established in another Member State, to provide the relevant evidence." The discriminatory treatment may arise from similar treatment (need to register in the Netherlands) for taxpayers in different situations (non-resident charities pay taxes in their home state and not in the Netherlands). A possible outcome of this case is that the court will align its decision with previous case law (Persche and Staußfer (Case C-386/04)), allowing different requirements to apply to different charities depending on where they are located.

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52. See D. Gutman, France, in ECJ-Recent Developments in Direct Taxation 2011, supra n. 21, at p. 105.
55. See Helminen, in ECJ-Recent Developments in Direct Taxation 2011, supra n. 21, at p. 92.
56. See Wathlet, in ECJ-Recent Developments in Direct Taxation 2011 , supra n. 21, at p 54.
57. DE: ECJ, 27 Jan. 2009, Case C-318/07, Hein Persche v. Finanzamt Ludwigshein, para. 60. ECJ Case Law IBFD.
58. DE: ECJ, 14 Sept. 2006, Case C-386/04, Centro de Musicologia Walter Staußfer v. Finanzamt München für Körperschaften, ECJ Case Law IBFD.
tax resident, but provided that they do not impose additional costs on EU/EEA registered charities.

In the Belgian infringement procedure, the right to deduct payments made to pension funds across borders is being challenged before the ECJ by the Commission. The case has been ongoing since January 2007. It deals with the different tax treatment of pension payments to foreign schemes. Under Belgian income tax law, payments to individual pension accounts, collective pension accounts and insured savings only qualify for tax relief if they are paid in Belgium. Belgian authorities claim that this restriction is necessary to protect the security of the sums paid by the pension savers. The Commission considers this restriction to be disproportionate and discriminatory. EU law on mutual assistance and on life insurance should be sufficient to ensure that Belgians benefit from the same level of security, whether they invest in domestic or foreign funds. The Belgian legislation acts as a deterrent to Belgian taxpayers accessing pension funds in other Member States and goes against the fundamental EU principles of the freedom to provide services and the free movement of capital.\(^{59}\) In this case, it is expected that the Belgian government will raise such justifications as fiscal cohesion (such as in Bachmann (Case C-204/90),\(^{60}\) which also deals with Belgian law but on Pillar 2 pensions), the public interest of the protection of the security of the taxpayer to invest in safe products for their retirement, and the balanced allocation of taxing powers. In a recent case, Commission v. Austria (Case C-387/10),\(^{61}\) the ECJ decided that the protection of taxpayer security may justify a restrictive tax provision (i.e. one that requires the use of a fiscal representative for non-residents), but it should be proportionate and should allow non-residents the possibility to show that they understand Austrian tax law and declare their taxable income without the need for a representative. Therefore, this justification will probably be rejected. The cohesion of the tax system justification, as applied in the Bachmann, Krankenheim\(^{62}\) and Papillon\(^{63}\) cases, may apply, as the direct link requirement is also present in this case: it is the same tax, same taxpayer and same benefit that is targeted by the restrictive legislation. The situation in Commission v. Portugal (Case C-493/09)\(^{64}\) and Danner (Case C-136/00)\(^{65}\) was different, and the ECJ rejected the cohesion argument, as the incoming pension income was taxed irrespective of whether or not the payment to the pension fund was deducted. Also, but based on different facts, in Commission v. Denmark (Case C-150/04),\(^{66}\) the Court condemned Denmark for refusing, generally, a deduction for payments made to foreign pension institutions. This refusal was motivated by the need to secure the Danish tax base in cases where taxpayers move back to the Member State where the pension fund that was contributed to is established, as in this situation Denmark would lose the right to tax the pensions paid out to the emigrated taxpayer. The Court did not accept the cohesion defence, as this refusal would (non proportionately) also hit resident taxpayers in Denmark who remained in Denmark during the course of their retirement and had invested in a foreign pension fund. It is unsure how this decision will also apply to the Belgian law in question, where the restriction is also based on the fact that the pension institution is established abroad. The government may invoke the balanced allocation of taxing powers (instead of the cohesion defence), although they have not brought this up yet, and will probably ask for a limitation on the temporal effect of the retroactive application of the ruling back to 2007, when the decision in Commission v. Denmark was given.

In the French infringement proceeding, concerning withholding taxes on dividends paid to foreign pension funds, closely linked to FIM, Santander et al (Case C-338/11),\(^{67}\) dealing with withholding tax on dividends paid to foreign risk capital funds (collective investment vehicles), the French legislation\(^{68}\) provides that dividends paid to foreign persons (including pension and investment funds) are subject to a withholding tax of 25% (or 15% in regard to tax treaties). By contrast, dividends distributed to domestic pension and investments funds are exempt from withholding tax. The Commission considers that this difference in treatment limits the free movement of capital guaranteed by article 63 of the TFEU and article 40 of the EAA Agreement. As a result of this discrimination, pension and investment funds based in other Member States and in the European Economic Area are placed at a disadvantage compared to their French-based counterparts and French customers, therefore, are liable to have less choice in terms of pension and investment funds. In 2010, France introduced new legislative provisions under which income from shares distributed to nonprofit organizations (including pension funds), whether or not established in France, are taxed at a flat rate of 15%. However, it seems that these changes have not been applied in practice in the absence of more detailed administrative implementing rules. Additionally, the outcome of the FIM, Santander et al case on collective investment vehicles (CIVs) clearly condemns the different treatment of outgoing dividends paid to non-resident CIVs, as resi-

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64. PT: ECJ, 6 Oct. 2011, Case C-493/09, European Commission v. Portuguese Republic, ECJ Case Law IBFD.

65. FI: ECJ, 3 Oct. 2002, Case C-136/00, Rolf Dieter Danner, ECJ Case Law IBFD.

66. DK: ECJ, 30 Jan. 2007, Case C-130/04, Commission of the European Communities v. Denmark, ECJ Case Law IBFD.

67. FR: ECJ, 10 May 2012, Case C-338/11, Santander Asset Management SGIC SA and others v. Direction des résidents à l'étranger et des services généraux, ECJ Case Law IBFD.

68. FR: French Tax Code, arts. 119bis and 187, National Legislation IBFD.
dent investment funds are not liable for any withholding tax irrespective of where the final shareholder is located. 69

3.3. Individual income tax cases

Germany referred Scheunemann (Case C-31/11)70 to the ECJ in January 2011, which deals with the German inheritance tax, which is, in principle, levied on the worldwide estates of resident taxpayers. This tax, however, entitles taxpayers to an allowance of 65% of the market value of the shares and a reduced tax rate upon inheritance of shares in companies if the deceased held 25% for a period of at least five years, and if the company was registered in Germany. 71 This law was meant to encourage transfers of assets in companies amongst family members. A German taxpayer inherited an estate from her father including a shareholding in a Canadian company. The inheritance tax act 72 had been modified in 2009 to include shares in EU/EEA companies, but not in other states, so the taxpayer was refused the allowance. The question is now whether or not this discrimination falls under article 63 of the TFEU as raised by the requesting court. One could argue that since 25% of a shareholding in a company qualifies as a “decisive influence” in a company, according to the case law of the ECJ, the case should be decided on the basis of the freedom of establishment of article 49 of the TFEU. Consequently, the justifications put forward by the German tax authorities (presumably the effectiveness of fiscal supervision towards third states) would not have much weight if both freedoms were to be applicable. It is unsure how the ECJ will address the issue of the choice of legal ground. It could decide the case on the basis of the freedom of establishment, which is expected, if it follows SGI (Case C-311/08), 73 where factors other than the main capital holding were decisive. Advocate General Trstenjak gave his Opinion on 20 March 2012, 74 suggesting that this case falls under the freedom of establishment exclusively, as the tax advantages are reserved for shares inherited and kept for at least five years, creating an obligation to continue operating the company and exercise deliberate influence on the company. Therefore, the free movement of capital should not apply, and the tax allowance may be refused for inherited shares from third states.

Another case on inheritance was brought before the Court by the Commission against Spain (no reference IP/11/1278)75 in which articles 45 and 63 of the TFEU were invoked as the legal bases. The Spanish inheritance tax, which is, in principle, levied on the worldwide estates of resident taxpayers. This tax, however, entitles taxpayers to an allowance of 65% of the market value of the shares and a reduced tax rate upon inheritance of shares in companies if the deceased held 25% for a period of at least five years, and if the company was registered in Germany. This law was meant to encourage transfers of assets in companies amongst family members. A German taxpayer inherited an estate from her father including a shareholding in a Canadian company. The inheritance tax act had been modified in 2009 to include shares in EU/EEA companies, but not in other states, so the taxpayer was refused the allowance. The question is now whether or not this discrimination falls under article 63 of the TFEU as raised by the requesting court. One could argue that since 25% of a shareholding in a company qualifies as a “decisive influence” in a company, according to the case law of the ECJ, the case should be decided on the basis of the freedom of establishment of article 49 of the TFEU. Consequently, the justifications put forward by the German tax authorities (presumably the effectiveness of fiscal supervision towards third states) would not have much weight if both freedoms were to be applicable. It is unsure how the ECJ will address the issue of the choice of legal ground. It could decide the case on the basis of the freedom of establishment, which is expected, if it follows SGI (Case C-311/08), where factors other than the main capital holding were decisive. Advocate General Trstenjak gave his Opinion on 20 March 2012, suggesting that this case falls under the freedom of establishment exclusively, as the tax advantages are reserved for shares inherited and kept for at least five years, creating an obligation to continue operating the company and exercise deliberate influence on the company. Therefore, the free movement of capital should not apply, and the tax allowance may be refused for inherited shares from third states.

Yet another Belgian pending case, Tate and Lyle (Case C-384/11), 76 was referred to the ECJ in regard to the issue of the tax treatment of partial divisions. A UK company acquired part of a Belgian company (in which it held 5%) and, in return, was deemed, according to Belgian tax law, to have received a dividend triggering a withholding tax. If the partial division had occurred within Belgium, there would also have been WHT, but that could have been offset against any applicable Belgian tax. In any event, the dividends received would have benefitted from the 95% participation exemption on the deemed dividends. Comparing both situations (i.e. acquirer in the United Kingdom and acquirer in Belgium of the “divided part” indicates that there is a substantive difference in effective tax rates (1.7% tax compared to 10% for the non-resident acquirer).

The question, therefore, is the extent to which the free movement of capital has been breached. It seems clear from former case law (Amurta and Denkavit) that irrespective of whether or not the UK acquirer will be compensated for the Belgian WHT, it should not suffer an additional charge compared to a Belgian acquirer. The Belgian government argues that the two situations do not compare as the UK acquirer is not liable to Belgian taxes on these dividends; however, if previous ECJ case law is followed, it appears the outcome will not be in favour of the government.

3.4. Portfolio dividends

In Beker & Beker (Pending Case C-168/11) 77 brought before the court by Germany on the basis of article 63 of the TFEU, two individual taxpayers married each other and, subject to a joint tax liability in Germany, held shares in several companies set up in the European Union and in third states. Due to the application of the ordinary tax credit method and progressivity rules in Germany, they were not allowed to offset all foreign withholding taxes against their domestic tax liability, and lost EUR 1,571 out of EUR 2,253 of taxes withheld on foreign-source dividends. The Court is expected to rule in the same manner as in other related cases (de Groot (Case C-385/00), 78 for instance).

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Portugal has also requested a preliminary ruling in Amorim Energia BV (Case C-38/11)⁷⁹ on a refund of Portuguese withholding tax on dividends both to qualifying resident taxpayers and to non-resident taxpayers. The provision in question is actually meant to equalize relief from economic double taxation between residents and non-resident portfolio shareholders. Due to procedural differences, the WHT refund for domestic portfolio occurs after one year, whereas in cross-border cases, it occurs after two years, causing a discriminatory treatment. The question is whether the fact that article 24(3) of the Netherlands-Portugal Income and Capital Tax Treaty (1999)⁸⁰ requires that the Netherlands provide a tax credit in regard to this Portuguese withholding tax cures the discrimination. The answer is probably not.

4. Case on the Free Movement of Workers (Article 45 of the TFEU)

In this category, only one case is currently pending, although several cases dealing with individual taxation have been brought before the Court on the basis of the free movement of capital. The issue in Ettwein (Case C-425/11)⁸¹ arises out of and deals with the extension of the Schumacker ruling to a couple that is not resident in Switzerland. Mr Ettwein is an artist with almost no taxable income and Mrs Ettwein, a German citizen, earns the couple’s main source of income, which is German sourced. They are not permitted to benefit from the joint assessment provision in Germany, which applies if one spouse is an EU national and liable to unlimited taxation in Germany, and the other spouse has his/her residence in the European Union/European Economic Area, and if 90% of the income of both spouses is subject to German income tax. Due to this last condition, the couple did not enjoy the favourable tax allowance for married couples. They argued, before the German court, that they benefit from the same rights as EU citizens due to the agreement between the European Union and Switzerland of 21 June 1999 (article 9 of annex 1)(the Agreement).⁸² These rules provide for the freedom of workers on the same basis as article 45 of the TFEU. Article 15(2) of annex 1 extends the provision to self-employed persons, such as Mrs Ettwein, and article 16(2) of the Agreement extends EU law in comparable situations to Swiss citizens. In respect of the case at hand, it is anticipated that the ECJ will find that the German law constitutes a restriction by not extending the Schumacker ruling to the Swiss couple and refusing them the benefit of the split-tariff. The usual justification, which is the need to ensure fiscal supervision in regard to third states not linked to the Member States through the Mutual Assistance Directive (77/799), may not apply here, as all information was transmitted by the taxpayers to the German authorities voluntarily.

5. Cases on the Merger Directive (09/133) and the Parent-Subsidiary Directive (03/123)⁸³

3D I Srl (Case C-207/11)⁸⁴ was referred by the Lower Court of Lombardy on the tax treatment of a cross-border merger under the previous version of the Merger Directive (90/434).⁸⁵ This case deals with an intra EU cross-border business transfer between Italy and Luxembourg paid by way of an exchange of shares. Under Italian domestic law, mergers (domestic and cross-border) trigger capital gains tax, which can be neutralized in respect of this type of operation, providing that a reserve is set up, corresponding to the unpaid tax. This favourable tax regime is not available for schemes other than an exchange of shares under domestic law. This discouraged the Italian company from applying for the favourable regime under the MD. The transferring company opted for an immediate capital gains tax, which it considered in breach of the Merger Directive (90/434).

According to the order of reference, a question was also raised as to the applicability of the fundamental freedoms, in particular the X & Y case was cited (not in the preliminary question). One of the questions raised in that case was the legal basis upon which the Court should rule. Indeed, although the Italian implementation of the Merger Directive (90/434) is incorrect and incomplete, Italian taxpayers are also dissuaded from investing abroad, as the requirement to set up a reserve corresponding to the accrued value as at the date of transfer is discouraging, and is a clear restriction on the exercise of the right of establishment and is an exit tax case. Additionally, since the reserve is required only for cross-border mergers, the freedom of establishment should apply, especially where the taxpayer chose not to place himself under the Merger Directive. Had the taxpayer benefitted from the Merger Directive, then it would have paid 19% tax instead of 31% in the absence of the capital gains neutralization. It is anticipated that this case will be decided under article 49 of the TFEU, and on the same grounds as the National Grid Indus BV case.

Another interesting case was brought by Belgium (Punch Graphix (Case C-371/11))⁸⁶ in regard to determining the correct legal basis for challenging domestic law (which mirrors the Merger Directive (09/133)) applicable to a purely domestic merger. Pursuant to this reorganization, a parent company holding two subsidiaries merged them

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⁷⁹. See Dourado in ECJ-Recent Developments in Direct Taxation 2011, supra n. 21, at p. 222.
⁸⁰. Convention between the Kingdom of the Netherlands and the Portuguese Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital (20 Sept. 1999). Treaties IBFD.
⁸¹. See Seiler, in ECJ-Recent Developments in Direct Taxation 2011, supra n. 21, at p. 132.
⁸⁴. See Pistone in ECJ-Recent Developments in Direct Taxation 2011, supra n. 21, at p. 154.
⁸⁶. See De Broe, in ECJ-Recent Developments in Direct Taxation 2011, supra n. 21, at p. 39.
together, resulting in one, instead of two, subsidiaries. Such a merger between two wholly-owned subsidiaries is considered a dissolution (without liquidation) of an acquired company, whereby all of the merged company’s assets and liabilities are transferred to the acquiring company. For tax purposes, article 210 of the ITC provides that the liquidation regime applies and all gains accruing to the receiving company on the cancellation of the holding are treated as dividends (article 209) and not as a capital gain. In other words, the participation exemption applies on the gains arising from the cancellation of the shares, but is limited to net profits only.

The problem here is that the case was introduced before the Cobelfret (Case C-138/07) case condemning the Belgian implementation of article 4(1) of the Parent-Subsidiary Directive (03/123). According to this Directive, a participation exemption that is available to domestic dividends shall also apply to inbound dividends, except for liquidation proceeds. Belgium had not correctly implemented this provision, as it limited the participation exemption to situations where the beneficiary was in a profitable situation and excluded a carry-over of the excess deduction. This is exactly what happened in the case at hand, as the net result of the transactions was considered to be a “dividend”, triggering the incorrect Belgian participation exemption. However, since the Parent-Subsidiary Directive is not applicable to liquidation proceeds, the domestic judge referred the case to the ECJ to address the issue of the interpretation of Belgian law.

Indeed, there are indications that the ECJ will instead consider the Merger Directive as the legal basis, in particular article 7, which provides that “where the receiving company has a holding in the capital of the transferring company, any gains accruing to the receiving company on the cancellation of its holding shall not be liable to any taxation”. Refusing a carry-over of an excess deduction would also amount to a tax on the proceeds of this transaction and would be prohibited. The reasoning in the Cobelfret case should also be applied to the Belgian law.

The last case dealing with mergers comes from Slovenia (Pelati (Case C-603/10)). The facts (partial division) date back to before the entry into force of the Merger Directive (90/434) and before Slovenia, therefore, was a member of the European Union (2004). According to Slovenian income tax law, domestic mergers benefit from the Merger Directive’s tax advantages (capital gains relief) when the authorization procedure to obtain the benefit of the Merger Directive (if applicable, which is disputed here) is compatible with the Merger Directive and/or the principle of loyalty (article 4 of the TFEU) and results in the equivalence and effectiveness of EU law.

6. Pending Cases on State Aid (Article 107 of the TFEU)

France has concerns in regard to two cases dealing with privatized electricity and telephone companies, formerly public services that are now constituted in the form of public limited liability companies (PLLC). The first, France Telecom, was decided on 8 December 2011 against the state. The second, P Electricité de France (EDF) (Case C-124/10) deals with a corporate tax exemption on untaxed reserves under a transitional phase (from state division to fully standard incorporation) for a state-controlled company distributing electricity. The amount of the unpaid tax is around EUR 18 billion (FRF 14 billion). The issue arose because the untaxed reserves were used to acquire grantor’s rights to distribute electricity, and the question was the extent to which this could be considered a capital injection, therefore, transforming debt into equity in a 100% subsidiary, performed by a prudent investor in the market economy (MPE test), or as prohibited State aid. The Court of First Instance found there was no State aid, but Advocate General Mazák, in his Opinion of 20 October 2011 found the opposite, as a waiver of corporate income tax never qualifies as normal market investor behaviour. By contrast, the Court confirmed (10 June 2012) that the most important element to consider is whether the state acts in the due course of business as a private investor (who would have capitalized the untaxed reserve). When a Member State confers an economic advantage upon an undertaking belonging to it, the fiscal nature of the process used to grant that advantage does not mean that the applicability of the private investor test can automatically be ruled out. In other words, the capitalization is not prohibited State aid.

This case is close to the Italian cases P A2A (Case C-318/09) and ACEA (Case C-319 P), which also deal with Italian mixed public-private companies supplying services to

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87. BE: Companies Code, art. 676, National Legislation IBFD.
88. BE: ECJ, 12 Feb 2009, Case C-138/07, Belgische Staat v. Cobelfret NV, ECJ Case Law IBFD
89. See J. Madic, Slovenia, in ECJ Recent Developments in Direct Taxation 2011, supra n. 21, at p. 229.
92. See Gutman, in ECJ Recent Developments in Direct Taxation 2011, supra n. 21, at p. 107.
94. See Pistone, in ECJ Recent Developments in Direct Taxation 2011, supra n. 21, at p. 161.
municipalities and their tax treatment during a period of transition from public to private enterprises, where the Court of First Instance found the existence of State aid (three years of corporate tax exemption). The Court of Justice confirmed this ruling on 21 December 2011, following Advocate General Mazák’s Opinion. The same may also occur in the pending case BNP Paribas (Case C-454/10P),95 which also originates from Italy. The Commission condemned (2008/711/EC, 11 March 2008) the quasi-exemption of capital gains tax applicable to a transfer of assets between publicly held companies to private credit institutions and argued that there should be immediate capital gains taxation of 15% in the hands of the recipient. As a result of a major tax reform in 2003 and several reevaluations of assets offered in regard to banking assets held by public credit institutions, the Commission initiated proceedings against Italy, finding this quasi-exemption was unlawful State aid. It ordered recovery, which has now been disputed by two banks. They suggest, inter alia, that there was no State aid, as they enjoyed no economic advantage (they had to pay a 15% capital gains tax on a notional basis. The ECJ will have to determine whether or not there have been errors in fact (as claimed by the two banks) in the Commission’s decision regarding the tax regime in question.

Also, concerning Italy and the corporate income tax exemption, the ECJ gave its ruling in Italian Republic v. European Commission (Case C-458/09) on 24 November 2011.96 In this case, Italy was questioned for granting tax aid to newly listed companies (Italian resident companies or EEA companies) on the Italian stock exchange. A corporate tax reduction for three years was granted to companies listed between 2 October 2001 and 31 December 2004, but in practice, for a 15-month period only. Italy claimed that introducing a company on the stock exchange involved significant costs that should be compensated for and, therefore, a corporate income tax reduction was granted for companies that met the very specific conditions set out in the law, and for a brief period of time. The Commission and the Court of First Instance qualified this corporate tax exemption as State aid, as the narrow window of time during which the tax scheme applied was selective in nature. In addition, resident companies listed on stock exchanges enjoyed a much wider advantage than non-resident companies, which are exempted from tax on a source base only, while resident companies are exempted from worldwide tax liability, which means that Italian companies enjoyed more State aid. Italy claimed that compensating for the cost of introducing shares on a stock exchange is not operational State aid and should not be prohibited, as it does not provide direct support to the functioning of these companies. The ECJ did not uphold this argument and referred to existing case law that held that relieving companies of the costs relating to an increase in capital is prohibited operating State aid, since these are normal charges to be borne by any company acting in the normal course of operations. Unfortunately, there was no argument regarding the fact that this tax deduction is just an expression of the ability-to-pay principle, as start-ups cannot afford to access a stock exchange.

Further parallel cases originate from Germany (Comm. v. Germany Sanierungsklausel (Case T-205/11) and Heit-kamp Bauholding (Case T-287/11)).97 Both deal with corporate income tax. The German provision at issue in these cases provides for a regime that allows for the possibility to assume losses from another company, unless the operation is carried out for a tax avoidance purpose, such as using shell companies. In order to apply, the relief requires economic identity between the taxpayers transferring losses.98 In cases of lack of economic identity, and if at least 25% (up to 50%) of shares are transferred, the right to carry forward losses is lost proportionally. Of course, the law organizes counter exceptions for situations where there is no danger of avoidance. If a loss company is acquired in order to rescue the target (improving liquidity, provided the essential business is retained) then the losses may be carried forward in the account of the new shareholder. The question is the extent to which this exception constitutes unlawful State aid. The Commission tends to argue that the scheme is selective, as it is limited to certain undertakings in need of restructuring. However, the rule in question is open to all undertakings, whether or not in need of rescuing, and, therefore, lacks selectivity, especially as it is the exception to the exception that is under scrutiny. It is also disputed whether the Commission picked the right benchmark to assess economic advantage and selectivity. The ability to pay corporate income tax and the right to carry forward losses could be the right benchmark. The limitation on carrying forward losses is not the benchmark but rather an exception applicable in the event of a reorganization, and the exception to that exception is the right to carry forward losses provided that the transactions are not carried out for tax avoidance purposes.

7. Pending Case on the Charter of Fundamental Rights

On 26 December 2010, the Swedish Civil Court in Haparanda sent a request to the ECJ for a preliminary ruling (Case C-617/11)99 on the application of article 50 of the Charter of Fundamental Rights, which prohibits double jeopardy. A taxpayer had failed to declare income tax, social security fees, and VAT on his whitefish roe fishing business, and was charged an administrative surcharge of EUR 12,000. He was also indicted for an aggravated tax crime. In his defence, he claims that the Swedish penalty system breaches the rule of “ne bis in idem”, as double jeopardy arises from the parallel sanctions system. As Swedish Supreme courts cannot grant European Con-

95. See Pistone, in ECI-Recent Developments in Direct Taxation 2011, supra n. 21, at p. 168.
96. IT: ECI, 24 Nov. 2011, Case C-458/09, Italian Republic v. European Commission.
97. See Seiler, in ECI-Recent Developments in Direct Taxation 2011, supra n. 21, at p. 135.
98. DE: EStG, sec. 1 k, para. 8c, National Legislation IBFD.
vention on Human Rights (ECHR) protection – as provided for in article 4 of the 7th Protocol – on that issue, the question is whether or not the conditions for application of article 50 of the Charter have instead been met, which would provide the taxpayer with an appropriate remedy.

The European Court of Human Rights (ECtHR) already determined in Zolotukhin,100 Ruotsalainen,101 Maresti,102 and Tsonev103 that the “idem” requirement covers a set of contractual factual circumstances involving the same defendant and is inextricably linked together in time and space. Further, in Rosenquist,104 the ECtHR analysed the Swedish tax penalty system, which involved two different offences, as a criminal offence normally requires a subjective intent, whereas an administrative surcharge applies irrespective of the taxpayer’s intent.

In older case law, the Swedish Supreme Administrative Court declared the Swedish penalty system compatible with the ECHR, due to a possible coordination between the administrative and criminal systems. In a case of 31 March 2010105 the Supreme Civil Court ruled that there was no clear support in the case law of the ECtHR for a declaration that the Swedish administrative surcharge is incompatible with the prohibition against double jeopardy. In any event, according to this Court, there is a requirement in the ECtHR case law that a “final judgment” be issued in order to constitute a breach of the “ne bis” requirement (referring to the Explanatory Report in regard to Protocol No. 7 to the ECHR, paragraphs 29 and 22).

As a result of the case law of both Swedish Supreme Courts, the ECHR cannot be used to challenge an administrative surcharge when the taxpayer is also charged with a criminal offence. The issue is, therefore, the extent to which this restrictive domestic case law also applies to the Charter (article 50), if it is applicable in the first place (as there is no cross-border establishment or transaction except the VAT fraud issue). Irrespective of whether or not the Court rules in favour of the taxpayer, it will be interesting to follow, as it may indicate the legal status of the Charter vis a vis the ECHR from the ECJ’s perspective. Whereas article 52(3) of the Charter provides that the European Union may provide more extensive protection than the ECHR, insofar as they deal with the same rights, article 51(2) of the Charter also claims that it does not extend the field of application of EU law beyond the powers of the European Union, establish any new power or task for the European Union, or modify powers and tasks of the European Union.

This apparent contradiction may mean that the ECJ will review the ECtHR’s case law in a more extensive and protective fashion, and will take the opportunity to provide a clear basis for taxpayers to argue article 50 before the court in Sweden. The Advocate General’s Opinion, given on 12 June 2012, claims that the link to EU law is too weak and that the ECJ should dismiss the case, as the VAT directive (06/112) does not provide for a transfer of competence from the Member States in regard to the penalties system. Should the ECJ consider, however, that the Charter is applicable, the Advocate General suggests that article 50 should be interpreted as not preventing Member States from establishing criminal sanctions in regard to factual situations already sanctioned by way of an administrative fine, as long as the civil judge is able to reduce the criminal sanction in proportion to the administrative fine. It is unclear whether or not and, if so, how the Grand Chamber will follow this interpretation, which will lead to a different result from that of the ECtHR’s case law on double jeopardy.

8. Conclusions

These pending cases are worthy of attention, especially those on “new” areas of EU law, such as the Charter of Fundamental rights and State aid, as applied to direct taxes. The cases on the fundamental freedoms demonstrate, to some extent, that the previous case law of the ECJ needs some follow-up. Issues on economic and juridical double taxation of dividends, inheritance taxes, foreign pensions, cross-border loss relief, reorganizations and exit issues come forward on a regular and tangible basis and mostly by the same Member States.106 There are still several Member States that do not refer preliminary rulings although they face equivalent issues of common interest to all Member States, such as those reported in this article (for example, Sweden in regard to the exit taxation of companies and cross-border loss relief).107 The pending cases that have been introduced since January 2012, and not reported on in this article, seem to confirm this trend.

100. RU: ECHR, 10 Feb. 2009, Application No. 14939/03, Zolotukhin.