

# Newsalert

## EU Direct Tax Group

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#### 2nd OPINION OF THE ADVOCATE GENERAL IN CASE C-292/04 (MEILICKE): No limitation of the temporal effects for the forthcoming ECJ judgment on an imputation credit for foreign dividends

Mr Meilicke, a German resident individual, had received dividends from Dutch and Danish companies in the years 1995 through 1997. In 2000, the heirs of Mr Meilicke applied unsuccessfully for a tax credit in respect of those dividends, which the former German imputation system would have granted in case of domestic dividends. The Tax Court of Cologne, to which they then appealed, referred to the ECJ the question, whether the free movement of capital allowed tax rules such as the German rules.

In his opinion of November 10, 2005 ([NA 2005-013](#)) Advocate General Tizzano had concluded that - as in the ECJ judgment of September 2004 in the Finnish *Manninen* case - limiting an imputation credit to dividends from domestic companies is a non-justifiable breach of the free movement of capital in Art. 56 EC. However, AG Tizzano considered the conditions for a limitation of the temporal effects of such a ruling to be met: In view of the amount of the reimbursement proposed there would be a risk of serious economic repercussions without a limitation of temporal effects. Moreover, until the judgment in *Verkooijen* of 6 June 2000, the scope of the provisions on the free movement of capital in relation to tax mechanisms such as that at issue was not entirely clear. In view of the importance of a possible limitation of the temporal effects of the judgment to be delivered, the case was assigned to the Grand Chamber which decided to reopen the oral procedure. AG Stix-Hackl has now put a second Opinion before the Court.

In the AG's view, the fact that the Court has already interpreted the relevant provisions of Community law in earlier judgments - *Manninen* (2004) and *Verkooijen* (2000) - without limiting their temporal effects does not preclude Germany's application for limiting the temporal effects of this judgment. The uncertain outcome of a preliminary ruling on a new question of law makes it difficult for Member States to assess the significance of the proceedings concerned for their own legal system exactly and at the right time.

For the assessment of the success of this application, AG Stix-Hackl recalls the principles for temporal restrictions developed in the ECJ's past jurisprudence: The limitation of temporal effects of a judgement has to remain an absolute exception from the general principle according to which the interpretation of EU law by the court relates to the respective provision as such since its introduction. A temporal limitation requires that the requesting Member State demonstrates firstly, the risk of serious economic repercussions, especially linked to the great number of cases in which the national provision was applied in good faith, and secondly, that the individuals and the national bodies were induced to a behaviour contradicting EU law because of an objective and significant uncertainty about the EU law provision, which may even have been increased by the behaviour of other Member States or the Commission. Concluding that the German government did not succeed in giving sufficient evidence of any of these two prerequisites, AG Stix-Hackl proposes the Court not to limit the temporal effects of the forthcoming judgment.

Most important, the AG holds that the German government failed to sufficiently substantiate the risk of serious economic repercussions: The amount of € 5bn brought forward by the German government as potential reimbursements describes the *financial* budgetary consequences, which alone cannot justify the limitation of the temporal effects. It may imply a risk of severe *economic* repercussions, but does not evidence the latter. In addition, although the budgetary risk stems from a provision abolished some years ago, the German government did not succeed in demonstrating the actual risk based on claims filed by tax payers but contented itself with estimating the maximum risk.

Admitting - in principle - the possibility of an objective and significant uncertainty about the EU law provisions prior to the *Verkooijen* case in 2000, the AG further raises questions whether Germany can claim good faith in this regard. Already in 1995, the Commission had raised doubts about the compatibility with EU law of the German rules and asked for a statement. Whereas the German government argued that the Commission's subsequent inactivity with respect to formal infringement procedures had increased the uncertainty, the AG stresses that silence of the Commission cannot be regarded as consent and that there may be numerous reasons for not continuing infringement procedures. Moreover, the Commission had explained this "inactivity" in the oral hearing with ongoing contacts with the German government and the latter's announcement to change the law. The AG feels further supported by the fact that the change of law had actually been initiated several months before the decision in the *Verkooijen* case.

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