



Commission's compliance initiative to eliminate the discriminatory taxation of EU mobile persons

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Control of the application of EU law and state aid

**AEAJ workshop
Thessaloniki, 9 October 2015**

Agenda

- I. General remarks on the EU law in direct tax area
- II. Specific remarks on the Commission compliance initiative (Mobile Person Study)

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- I. General remarks on the EU law in direct tax area
 - 1. EU law in direct tax area**
 - 2. Prohibition to discriminate/restrict**
 - 3. Analysis undertaken (if violation of EU law)**

I.1 EU law that MS must comply with

When Member States implement direct tax measures, they must take account of their obligations under the EU law provisions from e.g.:

- **Primary EU law: fundamental freedoms (TFEU)**
- **Secondary EU law (directives)**
- State aid rules

I.2 EU law: prohibition to discriminate

European direct tax law is an anti-discrimination law

- **criterion in the TFEU: « nationality »**
 - direct discrimination
 - rare
- **in reality: « resident » and « non-resident »**
 - can amount to indirect discrimination or disguised discrimination

I.2 EU law: prohibition to discriminate

Definition of discrimination?

- different tax treatment to comparable situations
- same tax treatment to different situations

I.2 EU law: prohibition to discriminate

Residents and Non-residents

- **starting point:**

- CJEU: «in relation to direct taxes, the situations of residents and of non-residents are not, as a rule, comparable »

except as regards:

- 'personal and family circumstances' deductions, if...;
- 'objective' deductions.

I.2 EU law: prohibition to discriminate

According to CJEU case-law: *"Member State are free to design their tax systems.....as long as"*

...non-discriminatory/ non-restrictive measures are not applied to **comparable tax situations**:
between internal tax situation v. tax situation presenting a cross-border element

I.2 EU law: prohibition to discriminate

In both directions:

- *inbound*: MS cannot discriminate against non-nationals coming in; foreign income received by residents – ***residence State***
- *outbound*: MS cannot discriminate against nationals going out; income received by non-nationals (non-residents) – ***source State***

I.2 'Scope' of the prohibition to discriminate

Q: Identical rules for comparable tax situations?

A: NO

- *different taxation methods, or*
 - *different valuation methods of the 'same' taxable base,*
- may be accepted(able) and not be seen as a restriction under EU law, as long as the tax burden in the cross-border situation is not heavier...

I.2 Tax obstacle v. prohibited discrimination/restriction

Tax (related) obstacles do not necessarily equal restriction or discrimination infringing EU law (e.g. administrative requirements, language barriers, double taxation).

Also, (tax) measures applied equally to residents and residents in cross-border situation (i.e. (inbound) mobile EU citizens) do not constitute - *prima facie* - unjustified restrictions under EU law.

1.2 Discrimination/restriction analysis

1. Applicable freedom?
2. Comparability?
3. Discrimination/restriction at stake?
4. Justification of the tax measure?
 - i. Appropriate
 - ii. Proportionate

I. To sum up:

Tax (related) obstacles (**and also discriminatory tax rules**) remain one of the key deterrents to EU citizens leaving their State of origin to look for work/ to take up residence in another Member State, or to EU citizens investing abroad and these obstacles could appear either:

- in the Member State of origin (departure State/source State), or
- in the (new) State of residence (host State).

Agenda

- II. Specific remarks on the Commission compliance initiative (Mobile Person Study)
 - 1. Background
 - 2. Issues (chapters) covered in light of the relevant CJEU's case-law

II.1 Background: recent/ current priorities

Inheritance taxation: [IP/11/1551](#)

2011 – ongoing (almost completed)

Cross-border workers taxation: [IP/12/340](#)

2012 – ongoing (almost completed)

Mobile persons taxation: [IP/14/31](#)

2014 - ongoing

II.1 Purpose of the Mobile Persons initiative

Member States' tax provisions are scrutinised to ensure that they do not discriminate against mobile EU citizens.

The focus is on both *economically active* individuals such as workers and self-employed, and *those that are not*, such as retired persons.

II.1. Citizens might suffer tax disadvantages:

- because of the location of their investments or assets, the location of the taxpayer himself or due to the mere change of the taxpayer's residence;
- in respect of their contributions to pensions schemes, receipt of pensions or transfers of pension and life insurance capital;
- in respect of their self-employed activities carried-out in another State or due to the mere relocation of such activities;
- because of the refusal of certain tax deductions or tax benefits;
- in respect of their accumulated wealth.



II.2 Chapters covered

- *Investments*
 - Securities;
 - Second and third pillar pension schemes;
 - Real estate.
- *Personal advantages*
- *Self-employed*
- *Wealth taxation*

II.2 Investments

- **Securities (shares, bonds...)**
 - taxation of capital gains,
 - taxation of income from investments,
 - taxation upon exit.

CJEU case-law: e.g.

- Verkooijen C-35/98
- Manninen C-319/02
- Commission v Portugal C-493/09
- Commission v Spain C-219/03
- Lasteyrie du Saillant C-9/02,
- N C-470/04

II.2 Investments

Second and third pillar pension schemes

- tax benefits for contributions paid,
- taxation of accumulated pension/insurance capital,
- transfers of (pension/insurance) capital,
- taxation of (retirement) income (outpayments)

CJEU case-law: e.g.

- Commission v Belgium C-522/04
- Commission v Denmark C-150/04
- Commission v Belgium C-522/04
- Danner C-136/00
- Turpeinen C-520/04

II.2 Investments

Real estate:

- taxation of capital gains,
- tax benefits if reinvestment,
- tax treatment of losses.

CJEU case-law: e.g.

- Commission v Portugal C-345/05,
- Commission v Sweden C-104/06
- Commission v Germany C-152/05
- Commission v Spain C-562/07

- Hollmann C-443/06
- Ritter-Coulais C-152/03

II.2 Personal advantages

- tax deductions or basic allowances related to personal and family circumstances
- tax benefits , such as deferral of payment, instalments or reimbursement of tax unduly paid
- obligation to appoint a tax representative
- deduction of certain expenses (e.g. tax counsel...)
- entitlement to tax benefits only if prior resident for a number of years?

CJEU case-law: e.g.

- Gschwind C-391/97; Commission v Netherlands C-542/09
- Biehl C-175/88; Denkavit C-170/05
- Commission v Portugal C-267/09; Schwarz C-76/05, Zanotti C-56/09
- Zurstrassen C-87/99 , Meindl C-329/05; Coniin C-346/04

II.2 Self-employed

- tax treatment of losses,
- tax credits or tax deductions (carry-forward or carry back),
- taxation of capital gains...

CJEU case-law: e.g.

- Vestergaard C-55/98

II.2 Wealth taxation – *if applicable*

- physical location of the assets,
- physical location of the taxpayer

CJEU case-law: e.g.

none, so far.

II.2 Conclusion

State of play so far:

12 success stories so far:

- 7 procedures closed, due to change of MS's law and compliance with EU law
- 5 promises to amend the law to comply with EU law.
- *3 formal infringements to be launched*
- *and many more procedures to open, as the assessment of the results of the Study progresses*

To be continued...

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