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An example of a cross-European legacy

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How does EC law treat legacies?

Free movement of capital

Freedom of movement of capitals

- Article 56 of the EC Treaty prohibits "all restrictions on the movement of capital between Member States and between Member States and third countries"
- A movement of capital is however not defined by the EC Treaty

EC Directive

- Directive 88/361/EEC for the implementation of Article 67 (now repealed) of the EC Treaty provides a non exhaustive list of personal capital movements that fall within the scope of the EC Treaty
- Gifts, endowments, inheritances and legacies are considered to be 'capital' under EC law

Basic principle: Article 56 of the EC Treaty

- Restrictions on free movement of capital are prohibited between Member States

Exceptions: Article 58 of the EC Treaty

- There are exceptions to this principle:
  - if there is a distinction between taxpayers who are not in the same situation with regard to their place of residence or the place where the capital is invested (1)
  - if the measures taken by the Member States are meant to prevent infringements of national law and regulations (2)

- The ECJ has established that direct taxation remains within Member States' competence (*Case C-251/98 Baars v. Inspecteur der Belastingen Particulieren/ Ondernemingen Gorichem*)

- However, Member States in exercising such competence must not discriminate on grounds of nationality (Article 12 of the EC Treaty)

- National measures which are *prima facie* contrary to EC law can be accepted if:

  - They apply to situations which *are not objectively comparable; or*

  - They can be justified *by overriding reasons in the public general interest*

- The ECJ has set conditions for relying on these exceptions
- As is the case with all exceptions to a fundamental principle enshrined in the EC Treaty, they must be interpreted strictly

First exception: situations that are not objectively comparable…are not caught by the free movement principle

- Examples of situations which have been considered as being not objectively comparable:
  - Member States can establish tax provisions distinguishing between taxpayers on the basis of their place of residence/ the place where the capital is invested (*Case C-279/93 Finanzant Köln-Altstadt v. Roland Schumacker*)
  - National provisions making the grant of an exemption from income tax on dividends paid to shareholders conditional on the company having its seat in the Netherlands were upheld by the ECJ (*Case C-35/98 Staatssecretaris van Financien v. BGM Verkooijen*)
  - Legislation which denied to taxpayers who held the majority of their wealth in the state where they were resident, an entitlement to allowances from wealth tax granted to resident tax payers, was also upheld (*C-376/03 D. v. Inspecteur van de Belasstingdient Particulieren/Ondernemiagen bruitenland te Heerlen*)

Second exception: overriding reasons in the general interest… are also not caught by the free movement principle

Examples of overriding reasons in the public general interest:

- **Safeguard of cohesion of the tax system**: The ECJ held that legislation which made the deductibility of sickness and invalidity insurance contributions or pension and life assurance contributions conditional on those contributions being paid in that state was justified (Case C-204/90 Bachmann). However there needs to be a *direct link* between the grant of a tax advantage and the offsetting of the tax advantage by a fiscal levy, both of which related to the same tax.
- **Prevention of tax evasion**: Belgium had created a domestic loan market with a withholding tax and a Eurobond market with no withholding tax, both available to Belgian residents. The ECJ held that there was nothing to prevent Belgian residents wishing to invest from acquiring a loan issued on the Eurobond market by issuers other than the Kingdom of Belgium and therefore rejected the argument justifying the differential treatment (Case C-55/94 Reinhard Gebhard)

- **Effectiveness of fiscal supervision**: The ECJ held that supervisory measures could be recognised as being an overriding reason of general interest but rejected the Luxembourg measures in this case (a requirement to keep a separate set of accounts within the Member State) (*Case C-250/95 Futura Participations and Singer v. Administration des contributions*)
- **Public policy or security**: The ECJ rejected as too broad a measure that required prior government authorisation for every direct foreign investments. The law failed to set down proper guidelines as to which foreign investments represented a threat to public policy or security (*Case C-54/99 Association Eglise de scientologie de Paris v. Prime Minister*). There needs to be a genuine and sufficient threat to the general interest.

Conditions

- Member States can only justify them if:
  - They are not relied upon only to serve purely economic needs
  - The measure complies with the principle of proportionality and must be appropriate for securing the attainment of the objective it pursues: a general presumption of tax evasion cannot be relied upon
  - The measure complies with the principle of non discrimination on grounds of nationality

A practical application: a case led by FFW

- Belgian citizen from the Brussels region dies and leaves all his assets to a UK charity
- Belgian law provides for a discounted rate of inheritance tax of 8.8% for legacies to Belgian charities…
- A rate of nearly 80% applied to non-Belgian charities!

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THE EUROPEAN LEGAL ALLIANCE

How can EC law help?

At the European level…

- Complaint to the European Commission on the basis of Article 226 of the EC Treaty:
  - Letter to the European Commission detailing the national measure which is thought to be infringing the EC Treaty
  - If the Commission agrees, it will send a reasoned opinion to the Member State and invite the Member State to comment on the contested legislation
  - As a result, either the Member State changes its legislation or the Commission will initiate proceedings against it

What can be achieved in practical terms?

- Belgian law in the Flemish and Brussels regions provided:
  - "the provisions of articles 55 and 59 [relating to the discounted inheritance tax rates for charities] only apply to Belgian organisations and institutions"
- They now provides:
  - "the discounted rates provided for by article 59 only apply to Belgian corporate bodies and to similar corporate bodies subject to the laws of any Member State of the EEA and having their registered office, direction and main establishment in the EEA"

At the national level

- Proceedings before the national courts claiming that Belgian law is contrary to the EC Treaty
- Argument that Belgian law was contrary to the free movement of capital principle in Article 56 of the EC Treaty because the UK charity and the Belgian charity are in an objectively comparable situation
- Furthermore there is no overriding reason in the general interest that could justify such a measure
- Argument that Belgian law was discriminatory on the grounds of nationality upon non-Belgian charities on the basis of Article 12 of the EC Treaty

Going forward

The new proceedings

- The European Commission has initiated proceedings against the Walloon region because it deemed the changes made insufficient
- Decision of Belgian Court still pending

- The inheritance tax law for the Walloon region has been amended but still provides that:
  - The discounted rates only apply to legacies made to corporate bodies satisfying the following conditions:
    - The corporate body must be established in Belgium or in the Member State of the European Community and of the place of residence and work of the donor at the time of the legacy or in the Member State in which he actually lived or worked
    - The corporate body must pursue charitable objectives in that Member State
    - The corporate body must have its registered office or main establishment in the EU.

Conclusion

- Although there are national sensitivities over competence, evolution of European case law is favourable
- European law can help achieve notable results and fight against discrimination
- The strategy must be developed in tandem with both European law and national law
- Advantages:
  - Modern approach
  - can be argued in front of national judge and can be applied directly
- Not just a concept, a real help

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