EXIT TAX

In September 2012, the European Commission introduced an infringement procedure against Luxembourg as certain provisions of Luxembourg tax law concerning taxation of businesses upon exit from Luxembourg were found to infringe EU fundamental freedom principles as construed by the ECJ especially in the National Grind Indus case of 29 November 2011 (C-371/10).

Indeed, the incriminating provisions of the Luxembourg Income Tax Law, mainly articles 38, 44 and 172, provide for exit taxation both in the case of transfer of the registered office and of the effective place of management of a company abroad as well as in the case of transfer of business assets abroad (the "Exit Taxes").

On 26 May 2014, the Luxembourg Parliament amended the existing tax law to provide for an unconditional deferral of the Exit Taxes levied in the case of transfer of the registered office and of the effective place of management of a company abroad. Indeed, the newly introduced Luxembourg tax deferral provisions of § 127 of the Luxembourg General Tax Law of 21 May 1931 allow Luxembourg to proceed with the definitive establishment of the amount of tax at the time when the company transfers both the registered office and effective place of management Luxembourg abroad. Such payment deferral of the Exit Taxes will be granted unconditionally upon simple request by the taxpayer without late interest and without any guarantee deposit or other security, subject however to annual reporting obligations. Still, it is a mere payment deferral of a tax charge that is definitively crystallised upon exit from Luxembourg and whose payment will be merely deferred until transfer or disposal of the assets or upon migrating out of the EEA.

Such a tax deferral mechanism does seem to comply with ECJ case law though. However, the findings in the more recent Valle case of the ECJ of 6 September 2012 (C-380/11) (which interestingly concerned Luxembourg tax legislation) in our view raise the question of whether the new proposed mechanism of tax deferral under §127 of the Luxembourg General Tax Law is not itself again at odds with EU law principles in that even though it permits the deferral of taxation from the moment of relocating abroad to the moment of effective transfer or disposal of an asset (or to the moment of relocation outside the EEA), the fact is that the new proposed legislation nevertheless crystallises definitively the deferred tax charge at the time of the migration from Luxembourg to another EU Member State without leaving the possibility to take into account subsequent events that, had the company maintained its registered office and its effective place of management in Luxembourg, would have permitted a lower tax charge than that crystallised upon relocation. It is worth noting that this concern had also been raised by the State Council when commenting on the proposed legislation that has now become law. The same unconditional
deferral of the Exit Taxes applies if EEA-resident individuals transfer an enterprise established in Luxembourg within the EEA.

Finally, the Law of 26 May 2014 also extends the roll-over relief applicable upon transfer of certain qualifying assets (e.g., immovable property) in case the re-investment of the sales proceeds, which formerly had to be made in an entity established in Luxembourg, is made in an entity established within the EEA.