OPINION STATEMENT

Opinion Statement ECJ-TF 4/2019 on the CJEU decision of February 26, 2019, in Case C-135/17, *X-GmbH*, concerning the application of the German CFC legislation in relation to third countries

Prepared by the CFE ECJ Task Force
Submitted to the EU Institutions on 12 December 2019

The CFE Tax Advisers Europe note that the Court's decision in *X GmbH* constitutes a continuation of the Court's prior case-law regarding the meaning of the standstill clause. The CFE welcomes the clarification with regard to the question whether a restriction already existed on 31 December 1993.

The Court further develops its Cadbury Schweppes jurisprudence and illustrates how to interpret the terms "wholly artificial arrangements" in relation to the free movement of capital. The Court held that this concept has to be interpreted in a broader way in relation to third countries. It would be helpful if the Court gave further guidance in a future judgment on the meaning of "artificial transfer of profits".

***X GmbH* is likely also be relevant for the domestic legislation that implemented Articles 7 and 8 of the ATAD in that Member States will have to apply the "substance escape" also to third countries with an exchange of information clause.**

CFE Tax Advisers Europe is a Brussels-based umbrella association uniting 33 European national tax institutes and associations of tax advisers from 24 European countries. Founded in 1959, CFE represents more than 200,000 tax advisers. CFE Tax Advisers Europe is part of the European Union Transparency Register no. 3543183647-05. For further information regarding this opinion statement of the CFE ECJ Task Force please contact Prof. Dr. Georg Kofler, Chair of the CFE ECJ Task Force or Aleksandar Ivanovski, Tax Policy Manager at info@taxadviserseurope.org

CFE Tax Advisers Europe Office I 188A, Avenue de Tervueren, 1150 Brussels, Belgium
Tel. +32 2 761 00 92 I info@taxadviserseurope.org I www.taxadviserseurope.org

This is an Opinion Statement prepared by the CFE ECJ Task Force[1] on Case C-135/17, *X GmbH*, in which the Court of Justice of the EU (Grand Chamber) (ECJ) delivered its judgment on 26 February 2019.[2] In general terms, the ECJ largely followed the opinion given by Advocate General Mengozzi on 5 December 2018.[3]

The case concerned the compatibility of the German CFC legislation with regard to third countries. In Germany, CFC legislation only applies in cross-border situations and not in purely domestic situations. In general, the application of CFC legislation requires that the shareholders have control over the foreign subsidiary, that the foreign subsidiary is lowly taxed and that it earns passive income. Concerning a special type of passive income there is even no control requirement needed. In relation to other EU and EEA countries Germany does not apply its CFC legislation if the taxpayer proves that the company carries on a genuine economic activity. However, this "Cadbury Schweppes-exception" does not apply in relation to third countries. The referring German Court asked whether the relevant German tax rules were compatible with the TFEU provisions on the free movement of capital. The first and second question concerned the interpretation of the standstill clause in Article 64(1) TFEU. With its third question the German Court inquires whether the Cadbury Schweppes jurisprudence can be transferred to the free movement of capital.[4]

The ECJ held that the standstill clause also applies if the scope of the domestic CFC legislation is extended after 31 December 1993 to shareholdings which do not involve direct investment. In addition, the Court stated that Member States cannot rely on the standstill clause if they change their legislation after 31 December 1993 and then later on replace these changes by legislation essentially identical to that applicable on 31 December 1993 unless these changes were never applied due to their repeal with retroactive effect. Concerning the interpretation of Article 63 TFEU, the ECJ transferred in substance its approach in *Cadbury Schweppes* (Case C-194/04) and held that the German CFC legislation does not infringe the free movement of capital unless the Member State of the shareholder is able to verify the accuracy of the information that the shareholding in the company is not the result of an artificial scheme.

I. Background and Issues

1. X GmbH is a German resident company which holds 30% of the shares of Y, a company resident in Switzerland. Y earned income from profit participation rights bought from another German company. X GmbH was subject to the German CFC legislation, which resulted in a pro-rata incorporation of Y's income into X GmbH's tax base. While the German CFC legislation, in general, requires control, low taxation and passive income, for a specific type of passive income ("Zwischeneinkünfte mit Kapitalanlagecharacter" – controlled company income from invested capital) the participation threshold is lowered to 1%. As the income from the profit participation rights fell within that specific category, the 30% participation was enough to trigger CFC legislation.

[1] Members of the Task Force are: Alfredo Garcia Prats, Werner Haslehner, Volker Heydt, Eric Kemmeren, Georg Kofler (Chair), Michael Lang, Jürgen Lüdicke, João Nogueira, Pasquale Pistone, Albert Rädler†, Stella Raventos-Calvo, Emmanuel Raingeard de la Blétière, Isabelle Richelle, Alexander Rust and Rupert Shiers. Although the Opinion Statement has been drafted by the ECJ Task Force, its content does not necessarily reflect the position of all members of the group.

[2] ECLI:EU:C:2019:136.

[3] ECLI:EU:C:2018:389.

[4] German Bundesfinanzhof of 12 October 2016, I R 80/14, IStR 2017, 316.

2. The German rules on CFC legislation have been significantly changed after 31 December 1993. First, the participation threshold regarding controlled company income from invested capital was lowered from 10% to 1%. Second, the Steuersenkungsgesetz 2000 (German Tax Reduction Act 2000) altered the whole concept of the CFC legislation. While in the past, the CFC legislation led to an anticipated dividend distribution the Steuersenkungsgesetz 2000 attributed the income earned by the CFC to the shareholder and subjected it to the German corporate tax rate. Later distributions from the CFC were then taxable at the reduced rate for dividends. The Steuersenkungsgesetz 2000 entered into force for the taxable year 2001.The effect of the attribution of the income of the CFC to the shareholder would have taken place only in 2002. However, the new CFC rules contained in the Steuersenkungsgesetz 2000 were repealed by the Unternehmenssteuerfortentwicklungsgesetz 2001 of 20 December 2001. The Unternehmenssteuerfortentwicklungsgesetz 2001 reestablished a CFC system similar to the one originally in force. As a consequence, the shareholders were never subject to the new system provided by the Steuersenkungsgesetz 2000.

3. X GmbH brought an action against the inclusion of the CFC income in the tax assessment, arguing that the profits earned by Y did not constitute income from invested capital. The Finanzgericht Baden-Württemberg dismissed the action and held that the application of the CFC legislation was correct as the profits earned by Y were correctly characterized as income from invested capital.[5] EU law issues were not raised at that level. X GmbH appealed the decision and claimed that the German CFC rules at issue violated the free movement of capital. The Bundesfinanzhof confirmed that the German CFC legislation was correctly applied, but it had doubts about the compatibility of the German rules with the free movement of capital. The Bundesfinanzhof stayed the proceeding and referred the following questions to the ECJ for a preliminary ruling:

> "(1) Is Article 57(1) EC (now Article 64(1) TFEU) to be interpreted as meaning that a restriction in a Member State which existed on 31 December 1993 in respect of the movement of capital to and from third countries involving direct investments is not affected by Article 56 EC (now Article 63 TFEU) if the national law in force at the relevant date restricting the movement of capital to and from third countries essentially applied only to direct investments, but was extended after that date to cover also portfolio holdings in foreign companies below the threshold of 10%?
>
> (2) If the first question is to be answered in the affirmative: Is Article 57(1) EC to be interpreted as meaning that a provision of national law restricting the movement of capital to or from third countries involving direct investments, existing on the relevant date of 31 December 1993, is to be regarded as applicable by reason of the fact that a later provision of national law that is essentially identical to the restriction in force at the relevant date is applicable, but where the restriction existing at the relevant date was substantially amended after that date and for a short period by legislation which formally entered into force but was in practice never applied due to the fact that it was replaced, before it could be applied to a specific case for the first time, by the provision that is now applicable?
>
> (3) If either of the first two questions is to be answered in the negative: Does Article 56 EC preclude legislation of a Member State under which the basis of assessment to tax of a taxable person resident in that Member State, which holds at least 1% of the shares in a company established in another State (in the present case, Switzerland), includes, pro-rata to the percentage of the shareholding, positive income obtained by that company from invested capital, where such income is taxed at a lower rate than in the Member State?"

[5] FG Baden-Württemberg, 6 K 2550/12 of 21 October 2014.

II. The Judgment of the Court of Justice

4. It started by analyzing the scope of the standstill clause contained in Art. 64 TFEU. The Court first had to deal with the question whether the standstill clause also applies to situations where a Member State extends the ambit of the CFC legislation – i.e. the restriction to the free movement of capital – after 31 December 1993 by lowering the participation threshold from 10% to 1%.

5. The ECJ confirmed its jurisprudence that a shareholding which confers the possibility of effectively participating in the management and control of the company could be regarded as a direct investment in the sense of Article 64 TFEU.[6] X GmbH had a shareholding of 30%, which the referring court classified as a direct investment, and the ECJ accepted this.[7]

6. According to the Court, the standstill clause not only covers situations where the national legislation exclusively restricts direct investments, but it also protects legislation restricting direct investments in situations where national legislation applies to both direct and portfolio investments.[8] The scope of the standstill clause does not depend on the specific purpose of the national legislation but on the effect of that restriction on the movement of capital.[9] The ECJ concluded that extension of the participation threshold from 10% to 1% after 31 December 1993 did not prejudice the application of the standstill clause of Article 64 TFEU to restrictions which already existed on 31 December 1993 provided that those restrictions concerned direct investments.[10]

7. The Court then turned to the second question asked by the Bundesfinanzhof. It had to analyze whether a fundamental change of the national rules after 31 December prevents the application of the standstill clause also in cases where that change is subsequently repealed and legislation essentially identical to the one before the change is reintroduced with retroactive effect.[11]

8. The ECJ referred to its settled case-law stating that changes to national legislation taking place after 31 December 1993 do not automatically exclude the application of the standstill clause. Restrictions adopted after 31 December 1993 can be treated as equivalent to existing restrictions if they are in essence identical to previous legislation or if they reduce or eliminate an obstacle to the free movement of capital.[12]

9. It is, however, necessary that the national provisions relating to the restriction in question have formed part of the legal order of the Member State continuously since 31 December 1993.[13] As a result, the standstill clause cannot be invoked with regard to provisions adopted by a Member State which reintroduce an obstacle to the free movement of capital that existed on or before 31 December 1993 but which was repealed after that date. In such cases, the restriction would not have existed continuously since 31 December 1993. The Court once again stressed that as the standstill clause constitutes a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly.[14]

---

[6] *X GmbH* (C-135/17), para. 26.

[7] *X GmbH* (C-135/17), para. 29.

[8] The Court cites its jurisprudence in *X* (C-317/15), paras 21 and 22.

[9] *X GmbH* (C-135/17), para. 31.

[10] *X GmbH* (C-135/17), para. 33.

[11] *X GmbH* (C-135/17), para. 35 et seq.

[12] *X GmbH* (C-135/17), para. 37 referring to *Test Claimants in the FII Group Litigation* (C-446/04), paras 189 and 192; *Holböck* (C-157/05), para. 41 and *A* (C-101/05), para. 49.

[13] *X GmbH* (C-135/17), para. 38 referring to *A* (C-101/05), para. 48; *Prunus and Polonium* (C-384/09), para. 34 and *Secil* (C-464/14), para. 81.

[14] *X GmbH* (C-135/17), para. 43.

10. The ECJ went on to state that a repeal or amendment takes place at the day the repealing or amending legislation enters into force. However, a restriction must be regarded as having been maintained continuously where the applicability of the repealing or amending provisions are deferred under national law, and those provisions are themselves repealed before they ever become applicable.[15]

11. After this general explanation the Court drafted two different scenarios: If the Steuersenkungsgesetz 2000 was adopted together with provisions deferring the applicability of that law, so that the amendments to the CFC legislation were never applicable during the period between 1 January and 25 December 2001 when the Unternehmenssteuerfortentwicklungsgesetz 2001 entered into force, then it would be appropriate to consider that the old CFC legislation has been maintained since 31 December 1993 continuously. If, on the other hand, the Steuersenkungsgesetz 2000 became applicable as soon as it entered into force on 1 January 2001, then the restriction cannot be regarded as existing continuously since 31 December 1993. This would be the case if the entry into force of the Steuersenkungsgesetz 2000 meant that controlled-company income arising in 2001 was bound to be incorporated into the tax base of the shareholder, notwithstanding the fact that, as a result of the repeal of the Steuersenkungsgesetz 2000 on 25 December 2001, the tax authorities ultimately did not apply those rules in order to collect, in 2002, the tax on that income. It is for the Bundesfinanzhof to ascertain which of the two scenarios are met in this situation.[16]

12. As it is for the referring court to decide if the requirements of the standstill clause are fulfilled the ECJ went on to analyze whether the application of the German CFC legislation in relation to Switzerland constituted a violation of the free movement of capital enshrined in Article 63 TFEU.[17] As a taxpayer holding shares in a Swiss company earning income from invested capital was subject to CFC legislation while the same taxpayer holding shares in a similar German company was not subject to that legislation, the Court concluded that the German provisions form a restriction to the free movement of capital.

13. The Court went on to explain the meaning of Article 65(1)(a) TFEU which provides that "the provisions of Article 63 TFEU shall be without prejudice to the rights of Member State … to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested". That provision cannot be interpreted as meaning that all tax legislation which treats taxpayers differently based on their place of investment is automatically in line with the Treaty. According to the settled case-law of the Court such differences in treatment are only allowed when they concern situations which are not objectively comparable or when they are justified by an overriding reason in the general interest.[18]

14. Concerning the comparability, the Court held that as soon as a Member State taxes a resident company on the income obtained by a company established in a third country, in which the resident company holds shares, the situation of that resident company becomes comparable to that of a resident company which holds shares in another resident company.[19]

15. With regard to the justification, the ECJ cited its settled case-law that a justification requires that the measure is suitable for securing the attainment of the objective in question and that the measure does not go beyond what is necessary in order to obtain it.[20] The Court confirmed that the need to safeguard the balanced allocation of taxing rights, the need to prevent tax evasion and avoidance and the need

[15] *X GmbH* (C-135/17), para. 47.

[16] *X GmbH* (C-135/17), para. 47-51.

[17] *X GmbH* (C-135/17), para. 52-96.

[18] *X GmbH* (C-135/17), para. 61, referring to *Verkooijen* (C-35/98), para. 43; *Manninen* (C-319/02), para. 29; *Glaxo Wellcome* (C-182/08), para. 68.

[19] *X GmbH* (C-135/17), para. 68. This line of case law has a long history; see, e.g., *Saint Gobain* (C-307/97), para. 49.

[20] *X GmbH* (C-135/17), para. 70 referring to *Elisa* (C-451/05), paras 79 and 82; *DMC* (C-164/12/), para. 44; *Fidelity Fund* (C-480/16), para. 64.

to guarantee the effectiveness of fiscal supervision constitute overriding reasons in the public interest capable of justifying a restriction on the free movement of capital.[21]

16. As the German CFC legislation offsets the effects of any artificial transfer of income to low taxed third countries, it is, in principle, suitable for ensuring the attainment of the objectives it pursues.

17. The Court then analyzed the proportionality of the restriction and stated that the mere fact that a resident company holds shares in another company established in a third country cannot as such give rise to a general presumption of tax evasion and avoidance. A national measure restricting the free movement of capital may only be justified when it specifically targets conduct that consists of creating wholly artificial arrangements.[22] The Court referred to its Cadbury Schweppes judgment where it had assumed a "wholly artificial arrangement" to exist when the subsidiary was a fictitious establishment which did not carry out any genuine economic activity in the territory of the host Member State account being taken of the extent to which that company physically existed in terms of premises, staff and equipment.[23]

18. In the context of the free movement of capital, the term "wholly artificial arrangement" must be interpreted in a broader way. As regards cross-border movements of capital, the artificial creation of a scheme to escape taxation or to enjoy a tax advantage can take several forms. This includes situations where the taxpayer acquires shares in a company that does not pursue any economic activities of its own but also situations where a scheme has as its primary objective or one of its primary objectives the artificial transfer of the profits made by way of activities carried out in the territory of a Member State to third countries with a low tax rate.[24]

19. The Court then concluded that the German CFC legislation was not specifically designed to target artificial arrangements. It applied to all situations where the foreign corporation earned income from invested capital which was subject to a low tax and did not grant the taxpayer the opportunity to show that his shareholding was not the result of an artificial scheme. A low tax rate in combination with passive income can serve as an indication of conduct that might amount to tax evasion or avoidance, but they should not be employed as an irrebuttable presumption of an artificial scheme in all cases. As a result, as regards relationships between Member States, national legislation which wants to be proportionate must give the taxpayer an opportunity to provide evidence of any commercial justification that there may have been for the transaction at issue without subjecting him to undue administrative constraints.[25]

20. However, the ECJ reiterated its jurisprudence that the case-law concerning restrictions on the exercise of the fundamental freedoms within the European Union could not be transposed in its entirety to movements of capital between Member States and third countries since such movements take place in a different legal context.[26] In particular, a Member State must have to possibility to verify whether the evidence provided by the taxpayer is accurate and true. Where the legislation of a Member State makes entitlement to a tax advantage dependent on the satisfaction of conditions, compliance with which can be verified only by obtaining information from the competent authorities of a third country, it is, in principle, legitimate for that Member State to refuse to grant that advantage if, for example, that third country has no treaty obligation to provide information and it, therefore, proves impossible to obtain that information from that third country.[27]

---

[21] *X GmbH* (C-135/17), paras 72-74.
[22] *X GmbH* (C-135/17), para. 80.
[23] *X GmbH* (C-135/17), para. 82 referring to *Cadbury Schweppes* (C-196/04), para. 67 et seq.
[24] *X GmbH* (C-135/17), para. 84.
[25] *X GmbH* (C-135/17), para. 87.
[26] *X GmbH* (C-135/17), para. 90 referring to *Établissements Rimbaud* (C-72/09), para. 40.
[27] *X GmbH* (C-135/17), para. 92

21. The ECJ concluded that it is for the referring court to examine whether the treaty provisions between Germany and Switzerland empower the German tax authorities to verify the accuracy of the information provided by the taxpayer. If such legal framework does not exist then the German CFC rules do not violate the free movement of capital. If such a legal framework, by contrast, exists the taxpayer must be given the opportunity to show his commercial reasons for the investment in Switzerland. Without granting such opportunity the German CFC rules violate Article 63 TFEU.

III. Comments

22. In many regards, X-GmbH confirms the prior jurisprudence of the ECJ. The judgment further illustrates the meaning of the standstill clause contained in Article 64 TFEU. Moreover, it gives additional guidance on the meaning of the term "wholly artificial arrangements" in the framework of the free movement of capital in relation to third countries.

23. With regard to the interpretation of the standstill clause, the Court has now clarified that extending the substantive scope of a restriction after 31 December 1993 to cover portfolio investment does not make the standstill clause inapplicable for investments that are otherwise qualified as direct.

24. The Court also had to deal with the question whether a substantial change after 31 December 1993 which was then retroactively repealed would lead to the inapplicability of Article 64. Granting this possibility would make it possible for Member States to reintroduce restrictions to the free movement of capital they had already abolished before. On the other hand, a change which had no effect as it was never applied should not jeopardize the application of Article 64 TFEU.

25. The ECJ found a worthy solution. It focused on the question whether the provisions which were later repealed were applicable after their entry into force. If the changes were repealed before they ever became applicable, a Member State could still rely on Article 64 TFEU. If, however, the changes became applicable after their entry into force meaning that the CFC income was bound to be incorporated into the tax base of the taxpayer, although he was never taxed on that income, then Article 64 TFEU can no longer be relied upon.

26. Following that guidance the Bundesfinanzhof came to the conclusion that the standstill clause cannot apply any longer.[28] As the income from invested capital had to be calculated as of 1 January 2001 the provision of the Steuersenkungsgesetz were actually "applied" so that the later repeal of that legislation could not undo the effects of that change.

27. Concerning the analysis of Article 63 TFEU, the Court follows its prior jurisprudence stating that a restricting measure in order to be compatible with the fundamental freedoms has to pursue an overriding goal in the general interest, that it must be capable of attaining that goal and that the measure must not go beyond what is necessary. As the German CFC legislation is not specifically targeted at fighting "wholly artificial arrangements" and does not grant the taxpayer the opportunity to prove commercial reasons, it would clearly be disproportionate under Cadbury Schweppes.[29]

28. The Court, however, further explained how to interpret the term "wholly artificial arrangements" in the context of the free movement of capital. It held that the concept has a broader meaning with regard to Article 63 TFEU. It not only includes the acquisition of shares in a company that does not pursue any economic activity, but also the artificial transfer of profits to a company in a low tax jurisdiction. Unfortunately, the Court does not further illustrate what it means with an artificial transfer. In general, a shareholder is free to decide whether he wants to finance a subsidiary with debt or equity. In addition,

---

[28] Bundesfinanzhof of 22 Mai 2019, I R 11/19, ECLI: DE: BFH:2019:U.220519:IR11.19.0. para 27.

[29] In our view, the notion of "commercial" as used by the Court extends well beyond a narrow understanding such as a trading activity, and would cover any economic reason, especially in the context of the free movement of capital.

companies are free to sell and acquire debt claims or other assets leading to the generation of passive income. It would have been interesting to know which link to the income and which amount of activity going on in the subsidiary the ECJ deems necessary in order to regard a transfer of profits as legitimate.

29. The ECJ also confirmed its prior jurisprudence that the free movement of capital between Member States and third countries take place in a different legal context and that, therefore, the jurisprudence concerning intra-EU situations cannot be transposed in its entirety to situations involving third countries. If a Member State cannot verify the information provided by the taxpayer it is not obliged to take that information into account. By contrast, if there is an exchange of information agreement in place, the taxpayer must be given the opportunity to show a commercial justification, even though the German rules did not provide the opportunity to rebut the presumption. The Court acknowledged that such exchange of information could take place "inter alia, by treaties".[30] Indeed, in earlier case law, the Court has accepted that an obligation for the non-Member State to provide information may follow from an exchange of information provision in a double taxation convention (e.g., a standard exchange of information provision along the lines of Article 26 OECD MC) or any other agreement (e.g., a Tax Information Exchange Agreement or the OECD/Council of Europe Multilateral Convention on Exchange of Information).[31]

30. In its follow-up judgment, the Bundesfinanzhof analyzed the tax treaty between Germany and Switzerland and concluded that it does not contain a so-called major information clause.[32] Switzerland was not obliged to provide information concerning the fulfilment of requirements contained in the domestic tax law of Germany. As Germany cannot verify the information provided by the taxpayer, the German CFC legislation does not violate the free movement of capital.

31. The last part of the X GmbH judgment might also have consequences for the implementation of Articles 7 and 8 of the Anti-Tax Avoidance Directive (ATAD). In our view, the Court's case-law suggests[33] that the three-prong test in Article 7(1)(a) ATAD, which not only relies on control-characteristics (i.e., more than 50% of capital ownership or voting rights), but alternatively also on a non-control characteristic (i.e. entitlement "to receive more than 50 percent of the profits of that entity"), generally opens up the rule for a freedom of capital movement inquiry. Moreover, Member States may go beyond the minimum standard set by the ATAD (Article 3 ATAD) and apply it generally also for non-controlling shareholdings, i.e., capital movements. In those situations it needs to be recalled that Article 7(2)(a) ATAD obliges Member States to introduce a Cadbury Schweppes-inspired "substance escape": The CFC rule shall not be applied if the taxpayer shows that the CFC "carries on a substantive economic activity supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances". However, the ATAD gives Member States the option not to apply this exception in relation to third countries. According to X GmbH, in the above situations it seems that Member States may no longer exercise that option (but rather apply the "substance escape") in relation to third countries if the other state has concluded a tax treaty with the Member State which contains an exchange of information clause. Member States will have to take the judgment into account when implementing Articles 7 and 8 ATAD.

[30] *X GmbH* (C-135/17), para. 95

[31] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 64, referring to ECJ, 17 October 2013, Case C-181/12, *Welte*, EU:C:2013:662, para. 63.

[32] Bundesfinanzhof of 22 Mai 2019, I R 11/19, ECLI: DE: BFH:2019:U.220519:IR11.19.0, para. 34.

[33] See, e.g., *Itelcar* (C-282/12), para. 16 et seq.; *Emerging Markets Series* (C-190/12), para. 30; *Kronos International* (C-47/12), para. 37 et seq.; *SECIL* (C-464/14), para. 33.

IV. The Statement

32. The Court’s decision in X GmbH constitutes a continuation of the Court's prior case-law regarding the meaning of the standstill clause. The CFE welcomes the clarification with regard to the question whether a restriction already existed on 31 December 1993.
33. The Court further developed its Cadbury Schweppes jurisprudence and illustrated how to interpret the terms “wholly artificial arrangements” in relation to the free movement of capital. The Court held that this concept has to be interpreted in a broader way in relation to third countries. It would be helpful if the Court gave further guidance in a future judgment on the meaning of “artificial transfer of profits”.
34. X GmbH is likely also be relevant for the domestic legislation that implemented Articles 7 and 8 of the ATAD in that Member States will have to apply the “substance escape” also to third countries with an exchange of information clause.