The Circular points out that the burden of proving the existence of a purely artificial arrangement is with the tax authorities, which may cooperate with the tax authorities of the other Member States under EU Directive no. 77/799/CEE on mutual assistance by the competent authorities of the Member States in the field of direct taxation.

When a purely artificial arrangement is deemed to exist, the Italian tax authorities should not simply refuse the reimbursement, but should always give the taxpayer the opportunity to demonstrate the business reasons for the establishment of the company in the other Member State, or for the transactions concerning the transfer of the participation in the Italian company. As regards the business reasons for such transactions, in particular, the Circular states that the tax authorities may request from the taxpayers a self-assessment of the facts and circumstances necessary to evaluate the existence of an abuse of law. As the Circular does not define the scope of the information that the tax authorities can request, it would not be too surprising if taxpayers received questionnaires with an extremely wide array of requests, which may sometimes be difficult to answer.

The Circular also provides some guidelines to local tax offices on the evaluation of the existence of a purely artificial arrangement, with reference, for instance, to holding companies. It confirms that particular caution is necessary in evaluating the artificial nature of a holding company, as frequently holding companies do not have a significant physical presence, but this does not necessarily entail an abuse of the freedom of establishment. In this respect, the Circular makes reference to the jurisprudence of the CJEU in the field of State aids (Cassa di Risparmio di Firenze S.p.A.) 10 January 2006 C-222/2004), whereby the Court ruled that…the mere fact of holding shares, even controlling shareholdings, is insufficient to characterize as economic an activity of the entity holding those shares, when it gives rise only to the exercise of the rights attached to the status of shareholder or member, as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset. On the other hand, an entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking.

In the context in which this appears, it is uncertain what the Circular means by quoting this ruling. If it were to be interpreted as meaning that, in order to rule out the possibility that the holding company be regarded as a purely artificial arrangement, the holding company must have and actually exercise control over the participated entity, this would clearly be in conflict with the basic requirement for the reimbursement, i.e., that the shareholding does not exceed the qualifying threshold for the withholding tax exemption under the Parent-Subsidiary regime (as is typically the case of small shareholdings held merely as portfolio investments).

Another noteworthy statement made by the Circular is that the reimbursement cannot be executed with respect to dividends distributed prior to 2004. This derives from a strict interpretation of the CJEU ruling, which focuses its judgment on the discrimination of outbound dividends vis-à-vis the domestic participation exemption regime (i.e., 95 percent exemption) applicable to dividend distributions to companies resident in Italy, which has been in force since 2004. Prior to that, the Italian legislation provided for a classic imputation system, whereby Italy-resident companies were granted a full tax credit to avoid economic double taxation on domestic dividends. However, the same arguments used by the CJEU ruling to determine the existence of discrimination could well be extended to the previous system that was in force until 2003, as the different technical mechanism to avoid economic double taxation (imputation versus exemption) was available only for Italy-resident companies. Based on the restrictive approach adopted by the Circular, taxpayers that have filed timely reimbursement claims also related to withholding tax levied on dividends received in fiscal years prior to 2004 can expect the tax authorities will continue to refuse the reimbursement for those fiscal years. However, there are strong arguments for litigating the case before the tax court. ❑

UNITED KINGDOM

EU/UK Competition Law Update

By Matthew Hall and Robert Rakison (McGuireWoods LLP)

UK Office of Fair Trading Publishes Competition Compliance Guidance for Directors

Following a consultation carried out last year by the UK Office of Fair Trading (OFT) on competition law compliance guidance for companies and directors, the OFT published on June 27, 2010 the final versions of its guidance material.

The two principal documents published by the OFT are worth reading in detail. The OFT expects to see active engagement by directors. It comments that a director with overall responsibility for a business area (but not immediate management responsibility over individuals responsible for an infringement) should make "reasonable enquiries" so as to seek to identify competition law breaches (presumably on a fairly regular basis). Non-executive directors similarly should make "reasonable enquiries" of the executive directors so as to satisfy themselves that the executive directors have, amongst other things, "taken appropriate steps to identify and assess the company's exposure to competition law risks".

Although these materials relate specifically to the UK, they

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represent best practice in the EU in the area of competition law compliance.

Pharmaceutical Developments; EC Reports on Patent Settlements for the Second Time

On July 6, 2011, the European Commission (EC) adopted its second report on the monitoring of patent settlements in the pharmaceutical sector in the EU. The monitoring exercise collected data on settlement agreements between originator and generic companies during 2010. The report follows the EC's EU competition law inquiry into the pharmaceutical sector concluded in July 2009 and the first monitoring exercise, which covered part of 2008 and 2009.

This second monitoring exercise identified 89 patent settlement agreements in the EU between originator and generic companies in 2010. This compares with 207 such agreements during the 8.5 years covered by the sector inquiry and 93 agreements during the 18 months covered in the first monitoring exercise. The report emphasizes, however, that the number of settlements potentially problematic from a competition law point of view – in particular those that limit generic entry against payment from the originator to the generic company – decreased significantly more in importance and number.

The two principal documents published by the OFT are worth reading in detail. The OFT expects to see active engagement by directors.

The EC has indicated that it will continue monitoring the sector to make sure that settlements are not delaying entry of generics into the market and that they do not contain other restrictions that would be problematic under EU competition law. It will repeat the monitoring exercise in 2012.

Pharmaceutical Developments; EC Settles Case Concerning Alleged Patent Misuse

On the same day that it published its second report on monitoring of patent settlements in the EU, the parties settled a live case that the EC had been investigating in the area. The case concerned allegations by Spanish pharmaceutical company, Almirall, that the German pharmaceutical company, Boehringer Ingelheim (BI), had filed for unmeritorious patents regarding new treatments of chronic obstructive pulmonary disease (COPD). The EC's investigation concerned whether this was an alleged misuse of the patent system in order to exclude potential competition in the area of COPD, in breach of EU competition law rules.

Under the settlement agreement, the alleged blocking positions will be removed for Europe, a license will be granted for two countries outside Europe and pending litigation between the parties will be ended. Almirall will therefore be able to launch its competing medicines after obtaining marketing authorization from the competent bodies.

The case is interesting generally as it provides an example of the EC taking a pragmatic approach to the investigation (it had suggested that the parties reach a commercial settlement) and as it provides another example of the EC's focus on the pharmaceutical industry, in particular the need to increase competition in relation to medicines. ❑

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