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**Opinion Statement of the CFE
on ECJ Advocate General Opinions in Tax Matters**

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This is an Opinion Statement prepared by the ECJ Taskforce of the Confédération Fiscale Européenne (CFE), the European association of national tax advisory organisations with 32 members representing over 180,000 tax advisers.*

The CFE regrets that more and more judgments are delivered without an Opinion of an Advocate General. It expresses the wish that the participants in ECJ proceedings should be involved in the decision whether a case is determined without an Opinion or not (just as they are involved in the decision about whether to hold a hearing or not). To the extent that the number of 8 Advocates General is insufficient to allow their participation, an increase of the number of Advocates General could be considered.

To streamline the procedure before the ECJ, Article 20(5) of the revised Protocol on the Statute of the ECJ (attached to the Nice Treaty) made it possible for the Court to decide cases without an Opinion of the Advocate General. Since then, a considerable number of judgments have been delivered by the ECJ without an Opinion,¹ in particular in the area of direct taxation, where this practice has steadily increased since the Keller Holding case.² The decision to proceed without an Opinion is taken by the General Meeting (of all Judges and Advocates General) on the proposal of the Rapporteur, the designated Advocate General having been heard.

The CFE regrets this trend because, as former ECJ President Rodríguez Iglesias stated in the 2002 Annual Report, “Opinions of the Advocates General are of undeniable importance for a detailed understanding of the issues at stake in certain cases”. Indeed, an Opinion does not only allow for additional reflection on a case, but also allows reference to positions developed in literature (even though, in the field of direct taxation, such references have unfortunately almost disappeared). By contrast, a judgement is usually short, with the risk of not always being very explicative.

** Members of the taskforce who took part in discussion of this case were: Stella Raventos Calvo (chair), Isabelle Richelle, Philip Baker, Michael Lang, Pasquale Pistone, Daniel Gutmann, Volker Heydt, Franck Le Mentec, Albert Raedler, Axel Cordewener, Friedrich Rödler and Servaas van Thiel. The views expressed in this statement do not necessarily represent the views of individual members of the taskforce or of organisations with which any of the members are associated.*

¹ In the Annual Reports of the ECJ the following figures are mentioned: 2008: 41%; 2007 43%; 2006: 33%; 2005: 35%; 2004: 30%.

² The judgments without an Opinion in the field of direct taxes have been the following: C-471/04 - Keller Holding; C-197/03 - Comm. v. Italy; C-345/05 - Comm. v. Portugal; C-485, 486, 487, 488, 489,490/03 - Commission v. Spain; C-104/06 - Comm v. Sweden; C-157/05 - Holböck; C-443/06 - Hollmann; C-105/07 - Lammers & Van Cleeff ; C-248/06 - Comm. v. Spain; C-157/07 - Krankenhaus Ruhesitz am Wannsee; C-330/07 - Jobra; C-377/07 – STEKO; C-67/08 - Block; C-406/07 - Comm. v. Greece; C-544/07 – Rüdfler; C-521/07 - Comm. v. NL; C-155, 157/08 - X/ Passenheim-van Schoot; C-128/08 -Damseaux.

Moreover, Orders in the simplified procedure under Art. 104 (3) of the ECJ's Rules of Procedure have been made without an Opinion in C-431/01 – Mertens; C-268/03 - De Baeck; C-492/04 - Lasertec; C-102/05 - Skatteverket v. A and B; C-415/06 - Stahlwerk Ergste Westig; C-201/05 - Test Claimants in the CFC and Dividend GLO

In cases where the judgment does not follow the Opinion, divergences within the ECJ become more transparent; however, regrettably the judgments usually do not discuss the arguments of the Advocate General, where they deviate from the Opinion, but only quote it if it backs or coincides with the judges' position.

Of course, the CFE accepts and welcomes reforms in working methods aimed at improving the ECJ's efficiency in dealing with cases, including the possibility of passing judgment without an Opinion of the Advocate General. Issues on which settled case law exists do not need to be addressed again by an Opinion and might qualify for an Order under Article 104(3) of the Rules of Procedure. But how are commentaries on previous judgments to be taken into account by the Judges otherwise than in an Opinion? And, in general, what about ongoing discussions in the literature and arguments which deserve to be further considered? Is this aspect sufficiently taken into account, if from the outset the Rapporteur and the designated Advocate General consider that there is no need for a (new) Opinion? It would at least appear appropriate to indicate to the participants in the proceedings the reasons why a decision without an Opinion is envisaged; any reply justifying an Opinion should then be taken into account.

In the tax area, for instance, judgements are being issued without Opinion in cases concerning issues that are not yet fully resolved, such as the question of juridical double taxation and the third country aspect of capital movements, both of which appear to deserve further discussion and clarification.

The recent enlargement, with 12 new Member States, has brought about an increase in the number of judges (by 12; now 27 in total), but not in the number of Advocates General (still 8 as before). Thus the judges can deal more swiftly with more cases, but this increase in the speed of judgments, in itself desirable, should not be a reason to refrain from an Opinion in important cases. This is vital, not only for the quality of the Luxembourg judgements, but also to ensure that the ECJ continues providing clear guidance for all "players" involved, i.e. in taxation not only for national judges and tax administrations, but also for taxpayers and their advisers. The Opinion is an important source for understanding the case and its outcome, especially since the Reports for the Hearing (prepared by the Judge-Rapporteur) are no longer published.³

If no other solution can be found, the Court should consider addressing a request to the Council of the European Union to increase the number of Advocates General (Art. 222 EC Treaty).

³ See also in this respect J. Kokott, Anwältin des Rechts – Zur Rolle der Generalanwälte beim Europäischen Gerichtshof, Zentrum für Europäisches Wirtschaftsrecht (ed.), Vorträge und Berichte no. 152, Bonn 2006, p. 12.