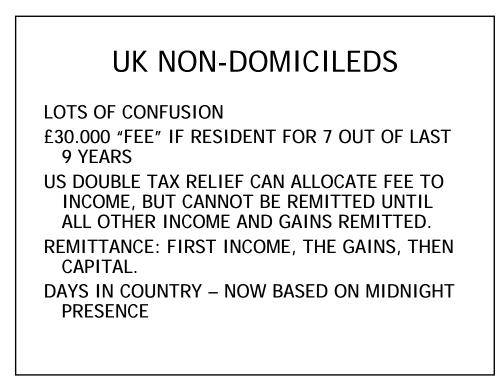
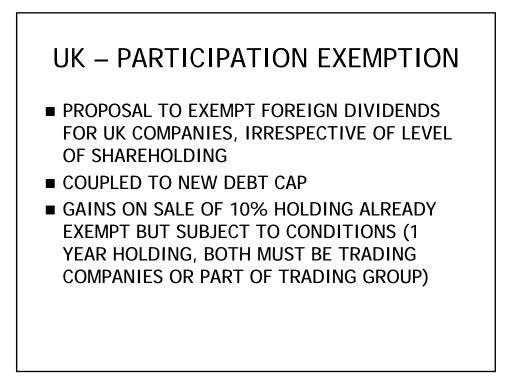
RECENT DEVELOPMENTS IN EUROPE

TSG CONFERENCE WINNIPEG FEBRUARY 2009 JOHN GRAHAM

EU RULES AGAINST MONEY LAUNDERING AND TERRORIST FINANCE

- NEED TO KNOW FULL STRUCTURE
- NEED TO HAVE COPIES OF PASSPORTS
- NEED TO KNOW WHO UBO IS
- NEED TO CARRY OUT RISK EVALUATION





UNITED KINGDOM

■ VAT REDUCED TO 15%

LUXEMBOURG

FROM 1 JANUARY 2009 DIVIDENDS PAID TO FOREIGN PARENT EXEMPT PROVIDED

- PARENT SUBJECT TO SIMILAR TAX TO LUXEMBOURG IN ITS HOME JURISDICTION
- THERE IS A TAX TREATY WITH THE JURISDICTION
- MINIMUM HOLDING 10% FOR ONE YEAR

LUXEMBOURG

TREATY WITH HONG KONG RATIFIED

SWITZERLAND

HAS RATIFIED HAGUE TRUST CONVENTION

NETHERLANDS

PROPOSAL TO TAKE GROUP INTEREST RECEIVED AND PAID OUT OF THE TAX NET

PROPOSALS FOR SIMPLIFICATION OF COMPANIES IN

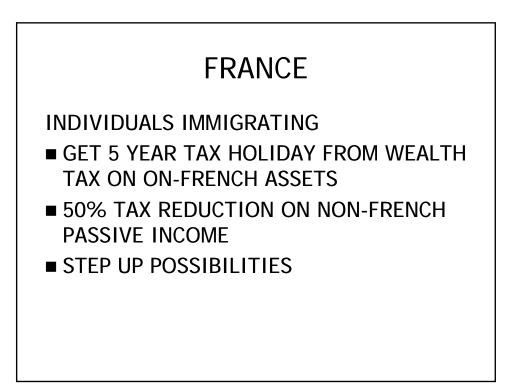
- GERMANY
- NETHERLANDS

INCLUDING ABOLISHING MINIMUM CAPITAL

GERMANY

NEW INHERITANCE TAX LAW FROM 2009 (OLD ONE UNCONSTITUTIONAL)

NEW LAW MAY ALSO BE UNCONSTITUTIONAL – THAT WOULD MEAN NO IHT



ITALY

- TAX OFFICE MORE AGGRESSIVE (MILAN 30,000 ASSESSMENTS RE PROPERTY TAX)
- LEGISLATION TO ALLOW DEALS TO BE DONE (IF YOU ARE ALREADY IN THE WRONG)



INDIVIDUALS IMMIGRATING

- 10 YEAR TAX HOLIDAY ON INCOME EARNED ON AMOUNTS OUTSIDE ISRAEL
- INCOME OF A FOREIGN TRUST IS EXEMPT FOR 10 YEARS
- NON ISRAEL SOURCE INCOME, INCLUDING EARNED INCOME, IS TAX FREE FOR 10 YEARS

IMPLEMENTING ECJ DECISIONS

CASES CONCERN:

IMPLEMENTATION OF DIRECTIVE

FOUR FREEDOMS: LABOUR GOODS SERVICES/ESTABLISHMENT CAPITAL

FREEDOMS USUALLY CONCERN SOME FORM OF DISCRIMINATION

RESULT ON LEGISLATION:

• EU BROUGHT INTO LINE WITH DOMESTIC OR

■ FOREIGNERS BROUGHT INTO LINE WITH DOMESTIC OR

 DOMESTIC BROUGHT INTO LINE WITH FOREIGNERS <u>OR</u>

SOME SORT OF FUDGE

FREEDOMS USUALLY CONCERN SOME FORM OF DISCRIMINATION

EFFECT ON LEGISLATION:

• EU BROUGHT INTO LINE WITH DOMESTIC OR

 ALL FOREIGNERS BROUGHT INTO LINE WITH DOMESTIC OR

 DOMESTIC BROUGHT INTO LINE WITH FOREIGNERS <u>OR</u>

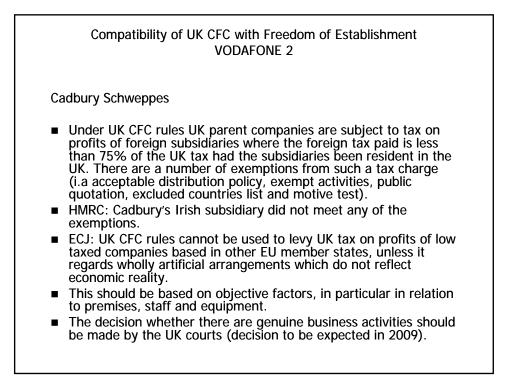
SOME SORT OF FUDGE

THE COURTS

- ECJ DECISION HAS TO BE IMPLEMENTED BY DOMESTIC COURTS
- DO THEY CANCEL THE OFFENDING PROVISION OR JUST BRING IT INTO LINE WITH ACCEPTABLE SITUATIONS?

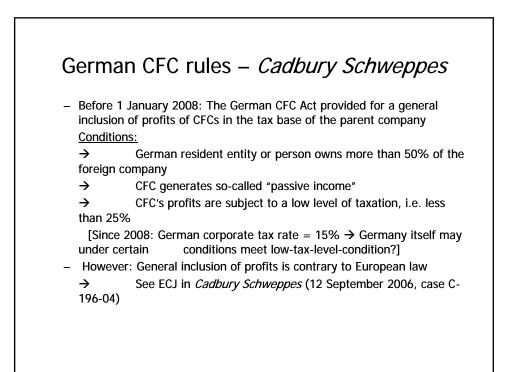
THE COURTS

- UK COURTS: CANCEL
- DUTCH COURTS: ADJUST
- GERMANY: IGNORE, FUDGE OR TAX EVERYONE



VODAFONE 2

- Issue: can the scope of the exemptions contained in the UK CFC rules be interpreted in such a way that the UK CFC rules are compliant with art. 43 EC (freedom of establishment) in view of the Cadbury Schweppes decision?
- High Court (UK): it is impossible to interpret the exemptions (in particular the motive test) of the CFC rules in such a way to make it compatible with the freedom of establishment of art. 43 EC. Only by adding a further condition to the application of the CFC rules would cure the invalidity of the provision which would not otherwise comply with EC law. The CFC legislation must be disapplied so that pending such amending legislation or executive action no tax charge can be imposed on a company such as Vodafone.
- HMRC has indicated it may appeal the decision. An application to refer the case to the ECJ was withdrawn so no further ECJ input.
- Vodafone decision may have implications for the Cadbury Schweppes case.



German CFC rules – *Cadbury Schweppes*

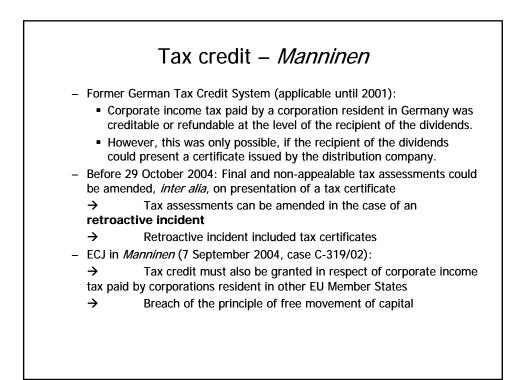
- German reaction

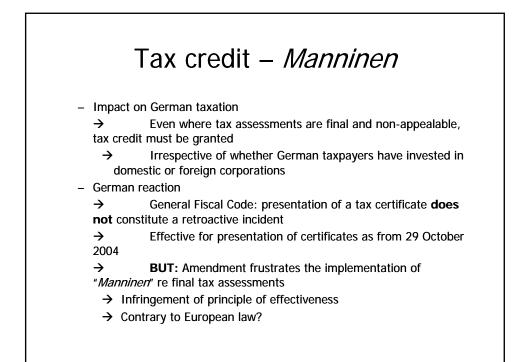
→ Adjustment of the German CFC Act, effective from 1 January 2008, by introducing a substance clause Conditions of the substance clause:

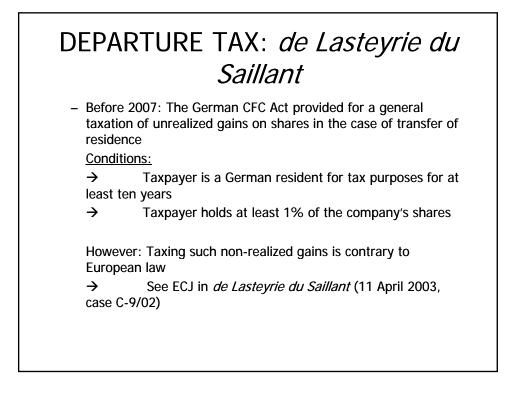
→ CFC must be resident in the EU or EEA

→ The Parent company proves that the CFC carries out genuine economic activities in its state of residence

 \rightarrow An administrative assistance treaty must be concluded between Germany and the state of residence







DEPARTURE TAX: *de Lasteyrie du Saillant*

- The case:

 \rightarrow Taxation of unrealized gains due to the transfer of tax residence: breach of the principle of freedom of establishment

 \rightarrow Guarantees necessary for the suspension of payment have a restrictive effect

 \rightarrow Tax avoidance cannot generally be implied from a transfer of residence

- German reaction

→ Amendment of the CFC Act: EU citizens may benefit from an interest-free suspension until the actual sale of the shares

Withholding tax on minority investments – Denkavit and Amurta

- Situation in Germany

→ Parent Subsidiary Directive only provides for a refund of withholding tax on dividends if the foreign EU parent company holds at least 10% of the domestic subsidiary's shares

→ However, for dividends received by German parent companies, withholding tax is creditable or refundable at the level of the parent also with respect to investments < 10%

 ECJ in *Denkavit* (14 December 2006, case C-170/06) and *Amurta* (8 November 2007, case C-379/05):

 \rightarrow Different treatment of dividends paid to either companies in the same state or companies in another Member State is contrary to European law

 \rightarrow This holds true in Germany for dividends paid to foreign EU parent companies where the minimum threshold of the Parent Subsidiary Directive (10%) is not reached

- German law on minority investments is discriminatory: breach of the principle of free movement of capital
- German reaction
 - → No adjustment in German legislation so far
 - → Idea: equal treatment by imposing tax on all dividends?

DENKAVIT

ICELAND AMENDED ITS LEGISLATION FOR EEA COMPANIES NETHERLANDS STILL NOT EFTA COMPLIANT (INFRINGEMENT PROCEDURE ANNOUNCED)

AMURTA DUTCH RESPONSE

DIVIDENDS TO EEA SHAREHOLDESR WHICH COULD QUALIFY UNDER PARENT SUBSIDIARY DIRECTIVE ARE EXEMPT PROBABLY NOT EU COMPLIANT DEFINITELY NOT EEA COMPLIANT

BOSAL

COSTS (IN PARTICULAR INTEREST) RE SUBSIDIARIES OF DUTCH CO DEDUCTIBLE IF SUBSIDIARY IS (EFFECTIVELY) DUTCH NOT IN OTHER CASES COURT HELD PROVISION WAS HINDRANCE TO ESTABLISHMENT IN OTHER MEMBER STATES NOTE: EUROPEAN COMMISSION SIDED WITH NETHERLANDS

DUTCH RESPONSE

ALL INTEREST AND OTHER COSTS (INCLUDING EXCHANGE DIFFERENCES) DEDUCTIBLE/TAXABLE (ALSO NON EU)

<u>BUT</u>

COMPLEX PROVISIONS INTRODUCED RESTRICTING DEDUCTION OF INTEREST WHERE LOANS TAKEN UP TO INVEST IN ACQUISITION OF SUBSIDIARY FROM RELATED PARTY <u>OR</u> INCREASE OF INVESTMENT IN SUBSIDIARY

BOSAL

NETHERLANDS COURT HELD COSTS RE INDIRECT HOLDING THROUGH EU ENTITY IN NON-EU ENTITY ALSO DEDUCTIBLE

HUGHES DE LASTEYRIE DU SAILLANT (FREEDOM OF ESTABLISHMENT)

EXIT TAX

COURT - CAN TAX ON REALISATION - MUST GIVE DEFERRAL WITHOUT CONDITIONS

NETHERLANDS

- SECURITY ON DEPARTURE

DROPPED FOR MOVE TO EU COUNTRY

- NOT EEA COMPLIANT

CONCLUSION

- DIFFERENT COUNTRIES RESPOND IN DIFFERENT WAYS
- EEA APPEARS OFTEN NOT TO EXIST!