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Cadbury Schweppes plc v. Commissioners of Inland Revenue: Eliminating a Harmful Tax Practice or Encouraging Multinationals to Shop Around the Bloc?

I. INTRODUCTION

Cadbury Schweppes, the successful international beverages and confectionery group, is undoubtedly celebrating a sweet victory in its newly launched campaign. This campaign, however, does not involve the introduction of new seasonal chocolate treats. Rather, Cadbury is challenging the tax laws of the United Kingdom (UK). Current UK legislation penalizes multinational companies who exploit the different rates of business tax charged across the European Union (EU).¹ Cadbury's campaign argues that these tax laws are contrary to European Community (EC) law—specifically, the freedom of establishment.²

On September 12, 2006, the European Court of Justice (ECJ) delivered a broadside against the UK tax system. The ECJ declared in *Cadbury Schweppes plc v. Commissioners of Inland Revenue* that any legislation that levies taxes against Controlled Foreign Companies (CFC) that pursue genuine economic activities

1. David Prosser, *EU Tax Row is a Bitter Pill for Politicians*, INDEPENDENT (London), Apr. 23, 2005, http://www.findarticles.com/p/articles/mi_qn4158/is_20050423/ai_n14599205; see also Ulrika Lomas, *European Governments Prepare for Assault on Tax Base*, TAX-NEWS, Dec. 13, 2005, http://www.tax-news.com/asp/story/story_open.asp?storyname=22054.

2. “The freedom of establishment grants to Community nationals the right for companies formed in accordance with the law of a Member State to exercise their activity in the Member State concerned through, inter alia, a subsidiary. Freedom of establishment thus seeks to guarantee the benefit of national treatment in the host Member State of the subsidiary, by prohibiting any discrimination, even minimal, based on the place in which companies have their seat.”

Rosemary Strevinioti, *Freedom of Establishment for Companies*, EUR. BUS. GUIDE, May 1, 2007, http://www.businessupdated.com/shownews.asp?news_id=2031&cat=Freedom+of+establishment+for+companies.

outside the member state is contrary to EC law.³ In this case, the ECJ determined that UK CFC laws may have potentially gone beyond what was necessary to counteract tax avoidance schemes.⁴

Generally, businesses stand to benefit by declaring their profits in the EU member state that charges the lowest corporate tax rate.⁵ For example, in Ireland the tax rate is just ten percent, nearly a third of the level charged in the UK.⁶ But under UK tax laws, the subsidiary CFC's income would be taxed at the UK's higher rate.⁷ UK CFC legislation is determined to prevent multinationals from channeling their profits through subsidiaries in other EU countries with lower tax rates.⁸

Nevertheless, the ECJ ruled that the UK may only enforce the CFC rules against those companies who have created "wholly artificial" arrangements in order to enjoy lower corporate tax rates abroad.⁹ More important, the ECJ's decision stressed that if a company establishes itself in a member state to avail itself of lower taxes, that does not constitute abuse in and of itself.¹⁰

This Note will argue that although the ECJ's ruling was fair, its proposed legal standard of "wholly artificial arrangement" is far too unclear to provide adequate guidance for future cases. In order for this ruling to be effective, the ECJ must provide additional direction. What constitutes permissible control of a company for tax relief purposes? What constitutes an illegal tax residence? Any proposed standard of review must take into account the way multinational corporations are structured and conduct business today. This is especially true in the electronic era of e-commerce and dot-com companies that do business without storefronts or inventory. Absent a meaningful remedy, the result could be a race

3. See Inst. of Chartered Accountants in Eng. & Wales [ICAEW], *Cadbury Schweppes and the UK CFC rules - The ECJ Judgment*, Sept. 14, 2006, <http://www.icaew.co.uk/index.cfm?route=142022>.

4. See Case C-196/04, *Cadbury Schweppes plc v. Comm'rs of Inland Revenue*, 2006 E.C.R. I-7995.

5. Prosser, *supra* note 1.

6. *Id.*

7. *Id.*

8. *Id.*

9. See Stephen Castle, *Landmark Tax Ruling Could Lead to Changes in UK Law*, INDEPENDENT (London), Sept. 13, 2006, <http://news.independent.co.uk/business/news/article1523202.ece>.

10. See *Cadbury Schweppes*, 2006 E.C.R. I-7995, ¶ 37 (citing Case C-212/97, *Centros Ltd. v. Selskabbstyrelsen*, 1999 E.C.R. I-1459, ¶ 27; Case C-167/01, *Inspire Art*, 2003 E.C.R. I-10155, ¶ 96).

by multinationals to create illegal subsidiaries in favorable tax regimes—contrary to the Community’s goal of eliminating national barriers to the free movement of goods, people, services, and capital.¹¹

Part II sets out the factual background to the issues raised in *Cadbury*. Part III summarizes the relevant law. Part IV examines the ECJ’s analysis of the CFC legislation issue in greater detail and discusses the incomplete remedy. Part V concludes that the UK is not likely to give in without an additional fight because the ECJ decision could lead to a significant loss in tax revenue.

II. BACKGROUND

Cadbury Schweppes plc (Cadbury), a UK resident company, is the parent corporation of a global group of companies operating in the drinks and confectionery sector.¹² Among its companies are two subsidiaries established in the International Financial Services Centre (IFSC) of Dublin, Ireland.¹³ The dispute in *Cadbury* arises from the UK tax authority’s attempt to tax Cadbury based on profits generated by one of its Ireland-based subsidiaries.¹⁴

According to Cadbury, its Irish subsidiaries were established to raise funds and generally provide financial capital to the Cadbury group.¹⁵ Its profits were subject to a tax rate of ten percent, one-third the actual rate in the UK.¹⁶ However, UK tax authorities claimed a corporation tax from Cadbury on one of the

11. See Mark Watson, *Developments in European Union Cross Border Tax Planning 1* (PricewaterhouseCoopers, Guernsey, 2006), [http://www.pwc.com/Extweb/ncpressrelease.nsf/docid/4CC830D7C1B284268025722600371F20/\\$file/pwc_developments_in_EU_cross_border_tax.pdf](http://www.pwc.com/Extweb/ncpressrelease.nsf/docid/4CC830D7C1B284268025722600371F20/$file/pwc_developments_in_EU_cross_border_tax.pdf) (on file with the Loyola of Los Angeles International & Comparative Law Review).

12. Press Release, Court of Justice of the European Communities, United Kingdom Legislation on Controlled Foreign Companies Can Apply Only to Wholly Artificial Tax Arrangements (Sept. 12, 2006), available at <http://www.curia.europa.eu/en/actu/communiqués/cp06/aff/cp060072en.pdf>. The “Cadbury group” is composed of subsidiaries established in the United Kingdom, EU member states, and other countries. Opinion of Advocate Gen. Léger, Case C-196/04, *Cadbury Schweppes plc v. Comm’rs of Inland Revenue*, 2006 E.C.R. I-7995, ¶ 20.

13. Opinion of Advocate Gen. Léger ¶ 20.

14. *Id.* ¶ 19. “UK tax authorities” refers to HM Revenue & Customs [HMRC]. *UK Controlled Foreign Company Rules Can Apply Only to Wholly Artificial Arrangements 1* (Latham & Watkins, LLP, Client Report No. 543, 2006) [hereinafter Latham & Watkins Client Report], available at http://lw.com/upload/pubContent/_pdf/pub1657_1.pdf.

15. Opinion of Advocate Gen. Léger ¶ 22.

16. *Cadbury Schweppes*, 2006 E.C.R. I-7995, ¶ 14; Prosser, *supra* note 1.

Irish subsidiary's profits for the 2006 financial year because it enjoyed "a lower level of taxation."¹⁷

In response to the UK's tax claim on Cadbury's foreign profits, Cadbury appealed the decision before the EU Special Commissioners, the appellate body of the tax administration.¹⁸ Cadbury argued that the CFC legislation was contrary to established EC law: particularly, the rights to freedom of establishment, freedom to provide services, and free movement of capital.¹⁹

III. RELEVANT LAW

A. *Relevant European Law*

Determining the legality of the UK CFC legislation under EC law requires an examination of the principles reflected in the Treaty Establishing the European Community (EC Treaty).²⁰ The EC Treaty is an expression of the EU's desire to create a unique "common market"²¹ by progressively abolishing harmful practices that restrict international trade.²²

The EC Treaty's objective to create a common market calls for the protection of certain "fundamental freedoms," including the freedom of establishment (Article 43) and the freedom to provide cross border services (Article 49).²³ These freedoms are central to the effective functioning of a common market, and in particular, to the tax dispute between Cadbury and the UK.

Freedom of establishment "enables an economic operator (whether a person or a company) to carry on an economic activity in a stable and continuous way in one or more Member States."²⁴

17. Opinion of Advocate Gen. Léger ¶ 25 (noting additionally that the other subsidiary suffered a loss that year).

18. *Id.* ¶ 26.

19. *Id.*

20. Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty].

21. Marilyn J. Raisch, *European Union Law: An Integrated Guide to Electronic and Print Research*, May 29, 2007, <http://www.llrx.com/features/eulaw2.htm>.

22. Dutchtax.net, *Discussion Cadbury-Schweppes Case*, <http://www.dutchtax.net/Dutch/Memos/Cadbury-Schweppes.htm> (last visited Sept. 9, 2008) [hereinafter *Discussion Cadbury-Schweppes Case*].

23. European Commission [EC], *General Principles: Freedom to Provide Services / Freedom of Establishment*, http://ec.europa.eu/internal_market/services/principles_en.htm (last visited Sept. 9, 2008).

24. *Id.*

“[F]reedom to provide [cross-border] services enables an economic operator providing services in one Member State to offer services on a temporary basis in another Member State, without having to be established.”²⁵

These two principles have a direct effect on the national law of the member states and will preempt any conflicting national law provisions.²⁶ As such, member states must modify any national laws that restrict either the freedom of establishment or the freedom to provide services.²⁷ Furthermore, any national rules that hinder or render less attractive the exercise of these fundamental freedoms (i.e., if they result in delays or additional costs) may only be maintained if they are justified by overriding principles of general interest.²⁸

The EU Economic Community, a union comprised of twenty-seven independent states, represents an important trans-national market for companies.²⁹ While planning investment strategies, companies need to keep abreast of any developments in each of the various member states’ tax regimes, ensuring that shareholder value is maximized.³⁰

Meanwhile, the EU has stated that its role is only *supplementary* to the national tax systems currently in place within each member state.³¹ According to the EU, “its aim is not to standardize the national systems of compulsory taxes and contributions, but simply to ensure that they are compatible not only with each other, but also with the aims of the Treaty Establishing the European Community.”³²

B. Relevant United Kingdom Law

The United Kingdom, along with several other EU member states, enacted legislation aimed at CFCs in an attempt to thwart

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* (noting the examples of public policy, public security, and public health).

29. *See* Watson, *supra* note 11, at 1.

30. *See id.*

31. *See id.*; *see also* *Cadbury Schweppes*, 2006 E.C.R. I-7995, ¶ 8. The only time the profits of a CFC will not be subject to the UK tax scheme is if: (1) ninety percent of its profits are attributed to the resident company and thus already subject to UK taxes; (2) it is engaged in “exempt activities”; (3) it satisfies the “public quotation condition”; or (4) its chargeable profits do not exceed £50,000. *Id.*

32. *See* Watson, *supra* note 11, at 1.

evasive tax practices.³³ A CFC is a company in which fifty percent or more of its holdings are owned by a UK resident company.³⁴ UK tax legislation provides that a resident company is subject to a corporation tax on its worldwide profits,³⁵ including the profits of its CFCs.³⁶

CFC legislation taxes the UK parent company for foreign profits when its subsidiaries are residents of a "lower tax" jurisdiction.³⁷ A jurisdiction is considered a "lower tax" jurisdiction if its tax rate is less than seventy-five percent of the UK's tax rate.³⁸ The CFC rules target companies that avoid the UK tax by diverting pre-tax income to subsidiaries located in tax havens and preferential tax regimes.³⁹ Companies engaging in this practice incur a "penalty tax" that amounts to the difference between the UK tax rate and the lower tax regime rate.⁴⁰

C. Ruling

The ECJ decision in *Cadbury* follows the Special Commissioner's stay of the proceedings and referral of the matter to the ECJ for determination under EU law.⁴¹ The question submitted to the ECJ asked whether current UK CFC tax legislation was a restriction on the freedoms expounded in the EC Treaty.⁴²

The ECJ determined that the UK CFC rules potentially represented a restriction on the freedom of establishment.⁴³ The UK's practice of offsetting the advantages that a Community national received in a more favorable tax jurisdiction was held to be unjustified.⁴⁴ If the subsidiary was a genuine operation, the objective of the EC Treaty and the purpose of the freedom of establishment were being undermined.⁴⁵

33. See *Discussion Cadbury-Schweppes Case*, *supra* note 22.

34. *Cadbury Schweppes*, 2006 E.C.R. I-7995, ¶ 6.

35. *Id.* ¶ 3.

36. *Id.* ¶ 5.

37. *Id.* ¶ 6.

38. *Id.* ¶ 7.

39. See *id.* ¶¶ 9-11.

40. See *id.* ¶ 6.

41. *Id.* ¶ 28.

42. *Id.*

43. *Watson*, *supra* note 11, at 2.

44. *Cadbury Schweppes*, 2006 E.C.R. I-7995, ¶ 75.

45. See *id.* ¶ 49.

While the ECJ recognized the UK's right to protect its tax base from artificial cross-border transactions,⁴⁶ it also acknowledged that Community nationals have a right to establish themselves in the member state of their choice.⁴⁷ According to the ECJ, the goal to prevent losses in tax revenue is not a valid reason to override the general interest that would justify maintaining the CFC legislation.⁴⁸

In reaching this determination, the ECJ examined the UK CFC rules, specifically the "motive test."⁴⁹ The court concluded that the motive test would be compliant with EU law if its *only* effect was "to tax companies that had not been set up for genuine commercial reasons."⁵⁰ Furthermore, the ECJ clearly stated that establishing a CFC in a country with a low tax rate is not an abusive practice *per se* and should be permitted if the CFC were run as a genuine operation.⁵¹

IV. ARGUMENT

A. *The ECJ's Dissatisfaction with the "Motive Test"*

Generally, the UK CFC rules apply where the subsidiary is a resident outside the UK and is subject to a "lower level of taxation."⁵² There are five instances where the CFC rules will not be applied.⁵³ The ECJ only examined the fifth instance, which looks at the particular motives of the company in establishing an overseas subsidiary. This is known as the "motive test."⁵⁴

The motive test is couched in the negative. Thus, a company generally satisfies the motive test and the CFC rules do not apply unless it is found that: (1) the main purpose of the transactions

46. *See id.* ¶¶ 51, 59.

47. *Id.* ¶ 53.

48. "[I]n order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory."

Id. ¶ 55. The restriction must be "proportionate in relation to that objective." *Id.* ¶ 57.

49. *See discussion infra* Part IV.A; *see also* Watson, *supra* note 11, at 2.

50. Watson, *supra* note 11, at 2.

51. *See Cadbury Schweppes*, 2006 E.C.R. I-7995, ¶¶ 36-37.

52. *Id.* ¶¶ 5-7.

53. *Id.* ¶ 8.

54. *Id.* ¶ 9.

which gave rise to the profits of the CFC was to achieve a tax reduction, and (2) the main reason for the CFC's existence was to achieve a tax reduction.⁵⁵ The burden is on the resident company to show that the main purpose of its CFC's transactions and existence was not to avoid UK taxes.⁵⁶

Cadbury argued that the motive test was a broad, non-objective test under which genuine economic activities will inevitably be caught.⁵⁷ In particular, the motive test does not require the UK tax authorities to perform any sort of analysis into the actual activities of the overseas company in order to determine whether it has been genuinely established.⁵⁸ The ECJ found this argument compelling and pointed out that a corporation's decision to set up an offshore subsidiary in a country with a more favorable tax regime does not automatically carry with it the general presumption of "tax evasion."⁵⁹

B. The ECJ's Solution

The central question posed by the ECJ to determine whether CFC legislation would pass Community law muster was whether the legislation affected *only* artificial arrangements.⁶⁰ According to the ECJ, CFC legislation may only be justified on the ground of preventing abusive tax evasion practices if the specific objective of the restriction is to prevent conduct involving the creation of "wholly artificial arrangements."⁶¹ The ECJ opinion does not make clear what is meant by this "wholly artificial arrangements" standard.

The Advocate General, however, suggests that determining whether a wholly artificial arrangement exists requires a "case-by-case examination of whether the subsidiary is genuinely established in the host State."⁶² Three objective factors appear to be relevant to determining whether a wholly artificial arrangement exists: (1) the degree of physical presence of the subsidiary in the

55. *Id.* ¶¶ 9-11.

56. *Id.* ¶¶ 10-11.

57. *See id.* ¶¶ 63-64.

58. *See id.* ¶¶ 64-69; *see also* Opinion of Advocate Gen. Léger ¶¶ 147-49 (debating proper interpretation of the motive test).

59. *Cadbury Schweppes*, 2006 E.C.R. I-7995, ¶¶ 50, 69 (citing Opinion of Advocate Gen. Léger ¶ 103).

60. *Id.* ¶ 57.

61. *Id.* ¶ 55; *see also* Opinion of Advocate Gen. Léger ¶ 108.

62. Opinion of Advocate Gen. Léger ¶ 110.

host state; (2) the genuine nature of the activity provided by the subsidiary; and (3) the economic value of that activity with regard to the parent company and the entire group.⁶³ The burden is on member states to prove that their legislation applies *only* to artificial arrangements and not to genuine enterprises.⁶⁴

1. Applying the “Wholly Artificial Arrangements” Test

It is evidently clear that the ECJ does not support the improper circumvention of national tax legislation. In order to enjoy the tax advantage of another member state, there must be a *real* offshore operation, with indication that people who possess the skill and the authority to make decisions are running the daily business in the declared territory.⁶⁵ Alternatively, flying in once a month from London Heathrow Airport, taking a quick cab ride into town to sign papers (written in the UK prior to leaving and emailed for signature upon arrival), and then taking a cab back to the airport only to be absent from the London parent company’s office for five hours would *not* amount to sufficient offshore management.⁶⁶ Such an arrangement would clearly constitute a wholly artificial arrangement.

The proffered example was an easy case, but what of the outliers? For example, is an offshore operation of twenty persons who book profits via the running of an offshore bank account a legitimate business? The inherent problems in proving the legitimacy of companies running such operations may be “insurmountable,” leading to inevitable changes in UK tax law.⁶⁷

The purpose of freedom of establishment is “to allow a Community national to participate, on a stable and continuing

63. *Id.* ¶ 111. Daniel Friel, a London Tax Partner for Latham & Watkins, offers the following commentary:

The Judgment follows the opinion of the Advocate General and gives plenty of scope of uncertainty. It is not clear whether the so-called “motive test” in the UK’s CFC legislation satisfies the tests laid down by the ECJ. The motive test, which gives an exemption from the application of the CFC rules, is very tightly drawn and many “commercial” arrangements could fail that test.

Latham & Watkins Client Report, *supra* note 14, at 2.

64. Latham & Watkins Client Report, *supra* note 14, at 2.

65. Richard Murphy, *Cadbury Schweppes – An Analysis*, <http://www.taxresearch.org.uk/Blog/2006/09/13/Cadbury-Schweppes-an-analysis/> (Sept. 13, 2006, 11:28).

66. *Id.*

67. Castle, *supra* note 9.

basis, in the economic life of [another] Member State”⁶⁸ As applied to *Cadbury*, if the motive test could catch Cadbury’s subsidiary, regardless of whether it was a genuine operation, the CFC legislation would be considered contrary to Community law.⁶⁹

Although there is some indication that the ECJ found the motive test to be over-inclusive,⁷⁰ the ECJ simply referred the matter back to the UK courts to determine whether they could interpret the subjectively-worded motive test in an objective manner.⁷¹

2. Deficiencies in the “Wholly Artificial Arrangements” Test

The Advocate General indicated that CFC legislation cannot be based purely on irrelevant subjective criteria.⁷² Unfortunately, the ECJ’s guidance on what constitutes a wholly artificial arrangement refers simply to the “extent to which the CFC physically exists” in the declared offshore territory.⁷³ The objective factors outlined in the ECJ standard only take into consideration the premises, staff, and equipment at the foreign locality.⁷⁴

It seems apparent, therefore, that a local corporation found to have substantial physical contacts in the host member state may benefit from the beneficial tax regime of that locality. In the age of electronic commerce, however, physical presence and local manpower are not necessarily good indicators of whether a business carries on genuine economic activities. Over the past fifteen years alone, there has been a major paradigm shift in the way business is done.⁷⁵ Telecommuting and flexible workspaces have allowed offices in different locations to link to one another through a common network.⁷⁶ In addition, economic societies have become so electronically advanced that tasks which previously required ten people to complete five years ago can easily be

68. *Cadbury Schweppes*, 2006 E.C.R. I-7995, ¶ 53 (citing Case C-55/94, Gebhard, 1995 E.C.R. I-4165, ¶ 25).

69. *See id.* ¶ 72.

70. *See id.* ¶ 69.

71. Latham & Watkins Client Report, *supra* note 14, at 2.

72. *See* Opinion of Advocate Gen. Léger ¶ 116.

73. Latham & Watkins Client Report, *supra* note 14, at 2.

74. *See id.*

75. Studyworld.com, Technological Advances and Their Impact on Business, http://www.studyworld.com/newsite/ReportEssay/Science/Technical%5CTechnological_Advances_and_Their_Impact_On_Business-323483.htm (last visited Sept. 9, 2008).

76. *Id.*

accomplished by one person today provided that person is assisted by the right technology. It is unclear how modern technological advancements fit within the ECJ's idea of a wholly artificial arrangement, if at all.

While the ECJ touts the need for objective criteria, it is unclear what constitutes a wholly artificial arrangement.⁷⁷ Though the addition of objective factors is fair and mildly helpful, it is still very difficult to determine which types of activities constitute wholly artificial arrangements.⁷⁸ It is therefore disconcerting that the ECJ has left to the UK domestic courts the determination of whether the UK motive test targets *only* wholly artificial arrangements intended to escape the normally mandatory national tax. Continued litigation will likely be necessary before the domestic national courts will be able to make this determination.⁷⁹

V. CONCLUSION

In closing, the chocolate makers may have won a small battle, but they have a long war ahead of them.⁸⁰ The ECJ “stopped short of declaring the CFC rules illegal,”⁸¹ making clear that it did not regard the UK rules as breaking the EC Treaty *per se*. Ultimately, investors in EU member states are free to choose how to structure their economic activities.⁸²

Furthermore, while the ECJ ruling is consistent with the pronouncements set forth in the EC Treaty, it may have an undesired effect of promoting harmful trade practices and tax evasion schemes. Businesses may opt for the lowest overall tax burden, as the ECJ confirmed that benefiting from a favorable tax

77. Latham & Watkins Client Report, *supra* note 14, at 2.

78. *ECJ Decision – Cadbury Schweppes – UK CFC Rules (C-196/04) 2* (Ernst & Young, Alert No. 52, 2006) [hereinafter Ernst & Young Alert], available at [http://www.ey.com/Global/Assets.nsf/Luxembourg_E/EU_competency_alert_52_sept_06/\\$file/EY_EU_TAX_Alert_52_Sep2006.pdf](http://www.ey.com/Global/Assets.nsf/Luxembourg_E/EU_competency_alert_52_sept_06/$file/EY_EU_TAX_Alert_52_Sep2006.pdf).

79. *Id.*

80. Nicholas Neveling, *Cadbury Case Just One Small Battle in Long Hard Struggle*, ACCOUNTANCY AGE, Sept. 21, 2006, <http://www.accountancyage.com/accountancyage/analysis/2164747/cadbury-case-small-battle-long>.

81. *Multinationals Set to Benefit from New ECJ Tax Ruling*, NEWSLETTER (George Theocharides Law Office, Cyprus), Dec. 2006, <http://www.theocharides.com/newsletterdec2006.htm>.

82. Frank Muntendam, *The End of CFC Legislation in Europe?* (Ernst & Young, Lux., 2006), http://www.ey.com/global/Content.nsf/Luxembourg_E/Question%3A_The_end_of_CFC_legislation_in_Europe.

regime is not, in and of itself, an abuse of the freedom of establishment.⁸³

Following *Cadbury*, many UK resident companies may now race to establish subsidiaries in overseas tax havens, where previously they would have been subject to the higher UK tax rate. Such a loss of tax revenue could have a huge impact in the UK. One source indicates that “[t]he initial impact of this case is estimated to be over £8 million in lost revenue” from Cadbury alone.⁸⁴ It is further estimated that the decision could lead to the loss of many hundreds of millions of pounds in future tax revenue.⁸⁵

In response to the ECJ judgment, the UK Treasury issued a statement saying it “welcomed the fact that the ECJ has endorsed the appropriateness of rules to counter tax avoidance through artificial profit shifting,”⁸⁶ choosing to focus on the ECJ’s approval of tax restrictions aimed at wholly artificial arrangements. As noted by one commentator, however, this is “[h]ardly the talk of a defeated opponent.”⁸⁷

Several media outlets closely following *Cadbury* have weighed in on the ECJ’s decision. Some predict that because the ruling threatens the UK tax revenue base, the EC will pursue alternative remedies.⁸⁸ One theory is that, with the potential loss of tax revenue from CFC profits, the Commission will aggressively push through its proposal for an “EU-wide common tax base.”⁸⁹

In summary, profits generated by the genuine economic activity of a lower-taxed CFC based offshore cannot be included in

83. Ernst & Young Alert, *supra* note 78, at 1.

84. Osborneclarke.com, Cadbury Schweppes Case Review, <http://www.osborneclarke.com/publications/tax/Cadbury%20Schweppes/7159.asp> (last visited Sept. 9, 2008).

85. *Id.*

86. Neveling, *supra* note 80. The UK Treasury is responsible for formulating and implementing the UK Government’s financial and economic policy. About HM Treasury, http://www.hm-treasury.gov.uk/about/about_index.cfm (last visited Sept. 9, 2008).

87. Neveling, *supra* note 80.

88. See David Smyth, *Cadbury Schweppes Case – A Win for Taxpayers?* 2 (Ernst & Young, Ir., 2006), [http://www.ey.com/Global/Assets.nsf/Ireland/Cadbury_Schweppes_Case_-_a_Win_for_Taxpayers/\\$file/Cadbury%20Schweppes%20Case%20-%20a%20Win%20for%20Taxpayers.pdf](http://www.ey.com/Global/Assets.nsf/Ireland/Cadbury_Schweppes_Case_-_a_Win_for_Taxpayers/$file/Cadbury%20Schweppes%20Case%20-%20a%20Win%20for%20Taxpayers.pdf) (on file with the Loyola of Los Angeles International & Comparative Law Review); see also Cadbury Schweppes Case Review, *supra* note 84.

89. Ahmed ElAmin, *Cadbury’s Tax Win Signals Opportunity for Multinationals*, CONFECTIONARY NEWS, Sept. 14, 2006, <http://www.confectionerynews.com/news/ng.asp?n=70580-cadbury-tax-multinational>.

the national tax base of its parent company.⁹⁰ An analysis of objective factors is used to determine whether certain cross-border activities are genuine economic activities or wholly artificial arrangements.⁹¹ Unfortunately, given the nature of modern business, it is currently unclear where the fine line exists between an acceptable standard of practice and an abuse of the tax structure.⁹²

*Phuong (Lily) Tran**

90. See Ernst & Young Alert, *supra* note 78, at 2.

91. See *id.*

92. See Watson, *supra* note 11, at 3.

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