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## flash Alert

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### The Netherlands – CJEU Advocate General Opines on 150-Km Limit for 30% Ruling

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The Advocate General at the Court of Justice of the European Union (CJEU) issued her Opinion on November 13, 2014, on whether European Union (EU) law has been violated by the Netherlands' 150-kilometer criterion in respect of its so-called "30% ruling".<sup>1</sup> The Advocate General concluded that the criterion does not violate EU law if in the majority of cases the employees in question can commute daily between their foreign residences and their place of work in the Netherlands.

#### Why This Matters

The fate of this aspect of the Dutch 30% ruling depends on the outcome of the CJEU's review against prevailing EU law and the extent to which it agrees with the positions argued by the European Commission and the Dutch Advocate General as well as the Opinion issued by the CJEU Advocate General – the rule could continue to apply or it will have to be altered. The Court could determine that the Dutch rule that employees who are living within 150 kilometers from the Netherlands' border prior to the start of their employment in the Netherlands be excluded from the 30% ruling violates EU law. If that happens, then the Dutch government will be obliged to alter its domestic rules and, consequently, the provisions of the 30% ruling (e.g., the 150-km criterion) will be modified. Any modifications, and the timing of those modifications, will depend on the CJEU's ruling and the Dutch government's reaction to it.

#### Background: 150-Kilometer Criterion for the 30% Ruling

Employees from abroad with specific expertise that is scarce on the Dutch labor market are eligible for tax relief. This tax relief, known as the 30% ruling, is subject to conditions. If the 30% ruling is applicable, 30 percent of the employee's salary can be paid as a tax-free allowance to cover extraterritorial expenses (the additional expenses incurred as the employee is temporarily living and working outside his or her home country). The remaining 70 percent is treated as taxable salary.

However, as of January 1, 2012, only employees who resided **more than** 150 kilometers from the Dutch border during two-thirds of the 24 months preceding the commencement of their employment or secondment in the Netherlands are eligible for the 30% ruling.

#### Legal Proceedings on Whether EU Law Has Been Violated

Legal proceedings on this 150-kilometer rule are currently pending. (For prior coverage, see [Flash International Executive Alert 2014-059](#), June 3, 2014.) In these proceedings, taxpayers have taken the position that the 150-kilometer criterion violates EU law, as it excludes employees who resided less than 150 kilometers from the Dutch border from availing of the 30% ruling. Moreover, they claim that the rule is discriminatory since it restricts the free movement of workers within the European Union – a restriction that is explicitly prohibited under EU law

The Dutch tax court had previously ruled that this restriction does not violate EU law; this was also the position taken in the Opinion issued by the Advocate General at the Dutch Supreme Court (Hoge Raad). Both the tax court and the Advocate General concluded that employees who live close to the border can easily commute and will therefore not incur extraterritorial expenses, or if they do, it will be to a significantly lesser degree.

### Proceedings before the CJEU

In 2013, the Dutch Supreme Court referred this case to the CJEU for a preliminary ruling on whether the 150-kilometer criterion violates EU law and, if so, whether this violation is justified, i.e., the public interest justifies treating like cases differently.

In her advice to the CJEU, the Advocate General concluded that EU law is not violated if:

1. in the majority of cases, the employees in question can commute daily between their foreign residence and their place of work in the Netherlands;
2. these employees do not incur any extraterritorial expenses.

#### **KPMG Note**

If the CJEU follows the Advocate General's conclusion, then the Dutch court will have to establish whether the above two criteria have been met. The CJEU is expected to render its judgment in the first half of 2015.

#### *Footnote:*

- 1 See *C.G. Sopora* (C-512/13) at <http://curia.europa.eu/>.

This article excerpts, with permission “[Advocate General at the Court of Justice of the European Union Issues Opinion on Whether the 150-Kilometer Criterion in the 30% Ruling Violates EU Law](#)” (14 November 2014), a publication of the KPMG International member firm in the Netherlands.

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