



**BRUSSELS | 23 MAY 2022**

## **EU Commission Publishes Equity Allowance Proposal**

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On 11 May 2022, the European Commission published a [proposal for a directive](#) laying down rules on a debt-equity bias reduction allowance and on limiting the deductibility of interest for corporate income tax purposes ("DEBRA"). These measures seek to equalise the tax treatment of debt and equity by way of introducing an allowance on equity. Under the proposal, the allowance on equity shall be deductible for 10 consecutive tax periods, from the taxable base of a taxpayer for corporate income tax purposes up to 30% of the taxpayer's EBITDA. If the deductible allowance on equity is higher than the taxpayer's net taxable income in a tax period, Member States shall ensure that the taxpayer may carry forward, without time limitation, the excess of allowance on equity to the following periods. The taxpayers may carry forward, for a

maximum of 5 tax periods, the part of the allowance on equity which exceeds 30% of EBITDA in a tax period. The proposal also introduces interest deduction limitations, whereby a taxpayer would be able to deduct from its corporate taxable base the exceeding borrowing costs up to an amount corresponding to 85% of such costs incurred during the tax period.

It is widely acknowledged in the academic literature that the debt-equity tax bias is highly distortive of investment decisions. Interest as a return on debt is tax planning efficient, whereas similar tax benefits are ordinarily not in place for equity investment. As a result, companies often become highly leveraged for taxation purposes, which hinders innovative investment through equity whilst piling up debt. At present tax legislation of only six EU Member states includes some form of allowance on equity. Such an allowance could retain or limit the deduction for interest expenses but would add similar benefits for the normal return on equity.

The initial EU Commission inception impact assessment operated with the following options:

- Disallowing the deductibility of interest payments, or creating an allowance for equity (ACE) by enabling the tax deductibility of notional interest for equity;
- Introducing allowance for a notional interest deduction on all corporate equity, new corporate equity or corporate capital (equity and debt).

Commenting, EU Commission Vice-President Valdis Dombrovskis, said:

*“Europe’s companies should be able to choose the financing source that is best for their growth and business model. By making new equity tax-deductible, just as debt is at present, this proposal reduces the incentive to add to their borrowing and allows them to make financing decisions based on commercial considerations alone. As part of the EU’s agenda to ensure a fair and efficient*

*tax system, it will make financing more accessible for EU businesses, particularly start-ups and SMEs, and help to create a genuine single market for capital. This will be important for the green and digital transitions, which require new investments in innovative technologies that could be funded by increased equity.”*

[Public consultation](#) concerning the initiative was launched, and feedback can be submitted until 18 July 2022.

## CFE Awards "The Albert J Raedler Medal" for Academic Excellence

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The CFE Albert J Rädler Medal Award was launched in 2013 to encourage academic excellence among students in the field of European taxation, and to recognise the outstanding contribution to the field of taxation of one of the founding member of the CFE ECJ Task Force, the late Professor Albert J Rädler. The medal for years 2019, 2020 and 2021 was awarded at a ceremony on 12 May 2022 in Brussels by Piergiorgio Valente, President of CFE; Stella Raventos- Calvo, Vice-President of CFE; Aleksandra Ostaszewska, Manager of IBFD's Knowledge Centre; and Albert Raedler from the European Commission.

The CFE Academic Jury evaluating candidates' submissions, composed of Professor Dr. Pasquale Pistone, Professor Dr. Michael Lang and Dr. Otmar Thoemmes, selected the following students for the award:

### **Albert Raedler Medal Winner 2021**

**Victoria Turpin “Analysis of DAC6 - EU Mandatory Disclosure Regime: The Human Rights Perspective”, University of Maastricht**

The thesis addresses a very controversial topic of European tax law, which has already been the object of preliminary rulings before the Court of Justice. It shows the importance of going beyond the technical description of secondary law of the European Union in tax matters, bringing it together with an assessment of how the general principles of EU law apply in such context. This certainly shows the maturity of the work done by the awardee and her potential to contribute to the developments of European tax law in line with the pioneering spirit of Albert J. Rädler.

### **Albert Raedler Medal Winner 2020**

### **Pieter Bernsen “The object and purpose of the principal purpose test in tax treaties”, King’s College, University of London**

Peter Bernsen explains why the principal purpose test (PPT) was put in the body of the OECD Model Convention rather than just in its commentary. He argues that determining the purpose of a transaction and determining a tax benefit are tasks that are often intertwined and that the presence of tax avoidance is pivotal to denying the tax treaty benefits in the end. Bernsen favours a narrow interpretation of the PPT if an initially existing economic purposes ceases to exist at a later stage but leaves the question open of what the minimum time period for the existence of the economic purpose should be.

He profoundly discusses the PPT in the context of the Vienna Convention of the Law of Treaties (VCLT) and reviews case law on tax treaty cases in select jurisdictions to demonstrate how the application of the PPT to those cases might have altered the outcome. Bernsen examines the two tests of the PPT by applying these to three case studies. He also sheds light at the relationship between the PPT and the case law of the European Court of Justice in the field

of Member States anti-avoidance measures. The author rightly points to the risk of varying interpretations of the PPT at State level instead of the development of a much-desired common understanding of an OECD wide autonomous anti abuse concept.

### **Albert Raedler Medal Winner 2019**

### **William Criminisi “Hybrid Mismatch Arrangements in International Tax Law”, Bocconi University of Milan (Italy)**

The manuscript provides with a comprehensive and in-depth analysis of a very technical topic, such as hybrid mismatch arrangements, supported by comparative legal analysis. The focus on the implementation of BEPS related measures through the ATAD also takes into account the compatibility of the latter with primary law of the European Union. The proposal for issuing secondary EU legislation aligned with IAS/IFRS is constructive and formulated with due consideration of its technical implications and side repercussions. The jury warmly congratulates the winner, also for his outstanding curriculum, wishing him to continue at such high standards of quality in his future career.

The CFE congratulates the medal winners on their achievement and wishes them every success in their personal and professional endeavours.

### **CFE Opinion Statement in Case C-788/19 (Commission v Spain)**

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CFE Tax Advisers Europe has issued an [Opinion Statement](#) prepared by the CFE ECJ Task Force on the CJEU decision of 27 January 2022 in Case C-

788/19, *European Commission v Kingdom of Spain (Form 720)*, on the lack of proportionality of the consequences derived from the failure to provide information concerning assets or rights held in other Member States of the European Union or the EEA.

The Court held that the Kingdom of Spain had failed to fulfil its obligations under articles 63 TFEU and 40 of the EEA Agreement by imposing disproportionate measures on the failure to duly comply with the obligation to provide information concerning assets and rights located abroad. The Spanish legislation provided for very serious economic consequences, such as the taxation of the value of not duly declared assets and rights as unjustified capital gains with no statute of limitations period. The legislation also provided for a proportional fine of 150% of the tax calculated on amounts corresponding to the value of those assets or those rights, which could be applied concurrently with flat-rate fines. At the same time, such flat-rate fines were much higher than the penalties imposed in respect of similar infringements in a purely national context, not being capped by any amount. *Commission v. Spain* is an important case as it addresses a number of relevant issues regarding the limits that the Member States must respect when implementing measures to counteract international tax avoidance and evasion.

Proportionality plays an important role in ensuring the compatibility of the measures designed by the Member States to counteract tax evasion and abuse, and in particular, its scope, extent, consequences and intensity. However, a more precise analysis of the proportionality principle would require one to distinguish the reaction against those situations that can be considered tax evasion from those that can only imply abuse of rights or tax avoidance instead of taking an overall approach and analysis.

This is an important case for the recognition of rights derived from the EU fundamental freedoms limiting the discretionary and broad exercise of taxing powers by the Member States to counteract potential tax evasion and abuse.

The CFE stresses the need to ensure the effectiveness of the rights enshrined by the TFEU and the EEA Agreements, by promoting decisions within a shorter period of time and by reinforcing the access to domestic remedies available to restore the primacy of EU Law in infringements by the Member States.

Limitation periods, restrictions, and legal constraints under domestic legislation to use available remedies may hamper the aphorism *ubi ius ibi remedium*.

It is justified to guarantee the effectiveness of tax controls and to provide tax administrations with the necessary legal mechanisms to combat tax evasion and abuse, but this must be done with full respect for the fundamental rights and freedoms of taxpayers.

We invite you to read the [statement](#) and would welcome any feedback or queries.

## The Conference on the Future of Europe Concludes Its Work

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During the closing ceremony on The Conference on the Future of Europe, on Europe Day, 9 May in Strasbourg, President of the European Parliament Roberta Metsola, French President Emmanuel Macron on behalf of the EU Presidency and President of the European Commission Ursula von der Leyen received from the Conference Executive Board the [final report](#) on the outcome of the Conference. Summarising one year of discussions and debates between Europe's citizens and politicians, a report was published with circa 49 proposals and 320 measures for EU institutional follow up.

On the tax policy reform side, major proposals include abolishing the unanimity voting in taxation matters in favour of qualified majority. The conference report contends that "harmonising and coordinating tax policies within the Member

States of the EU in order to prevent tax evasion and avoidance, avoiding tax havens within the EU and targeting offshoring within Europe, including by ensuring that decisions on tax matters can be taken by qualified majority in the Council of the EU."

French President Emmanuel Macron, supported by Germany, [floated the idea](#) of creating a European Political Community, a union based on closer European cooperation but falling short of membership in the EU, which would allow countries such as the UK and Ukraine to be part of a reformed European project.

## OECD Public Consultation on Crypto-Assets Reporting

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On 23 May 2022, OECD held a [public consultation meeting](#) on the Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard.

CFE Tax Advisers Europe issued earlier an [Opinion Statement](#) on the OECD consultation on a Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard. CFE recognises the need to understand and meet the challenges presented by the crypto revolution. For this reason we are supportive of the OECD efforts to establish global transparency but are of the view there is a clear need to focus on how this framework is implemented. CFE is concerned about the scope and nexus rules of the framework, and believes a tax framework for e-assets should be developed prior to a system for exchange of information.

CFE is of the view that existing tax legislation establishes canons of taxation that have the capacity to deal with crypto assets and that what is needed is convertability which enables ready adaptation. Accordingly it should be no surprise that in our view amendment to the Common Reporting Standard (CRS)



is a necessary precursor for this to happen and we are wholly supportive of the OECD proposals in this respect. We are not sure, at this stage, that the proposal for the development of a CARF, which underlies this consultation, has the necessary structural foundations to enable implementation and, therefore, risks substantial untargeted and unmatched over-reporting if introduced in haste.

Release of an early CARF, which we think will not be globally accepted, will act as a disincentive for the economic and prosperous development of the sector in mature tax environments. It will act as a driver for crypto activity to develop in countries which make clear their intention not to introduce regulation and reporting in accord with a CARF. CFE wonder whether a country by country implementation is necessarily the way to progress and think it far too early to form a view one way or another. That said, we reiterate our support both for a clear enunciation of a global taxation framework which includes crypto-assets, signposted by the Common Reporting Standard, and further research into what a Crypto Asset Reporting Framework which has global connectivity and matched reporting could look like.

CFE reiterates its position that it welcomes the work of the OECD in seeking to establish a crypto-asset reporting framework and exchange of information in this field in light of the development of new financial technologies, and remains available to assist in any further stakeholder consultation processes.

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The selection of the remitted material has been prepared by:

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