



## European Tax Report Confédération Fiscale Européenne (CFE)

October 2008 / Edition 7

### NEWS - INDIRECT TAX

## European Council

### Creation of Eurofisc to fight against VAT fraud

On 7 October, European Finance Ministers adopted conclusions on combating VAT fraud. The Council supports the creation of Eurofisc, the decentralised network for exchange of information on VAT fraud between Member States. Eurofisc, which is a body un-incorporate, will obey four general principles: freedom for Member States to each take part in network missions, active participation in the exchange of information through an early warning instrument, confidentiality of information exchanged, and the lack of additional administrative constraint for operators. The Commission is invited to integrate provisions needed for the setting up of Eurofisc in its proposal for recasting EC Regulation 1798/2003, due in November.

On the next ECOFIN Council Meeting on 14 November 2008, EU finance ministers will attempt to draft general guidelines on the rest of the package of legislation to tackle VAT fraud unveiled by the European Commission in March 2008. This was not done during the last ECOFIN Council, due to the urgent need to address the financial crisis.

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### French Presidency: suggestions on reduced rates on VAT

The French Presidency has suggested that a Member State wishing to levy reduced rate VAT for the first time to a product or service should be required to carry out a business study in advance, to demonstrate the cost effectiveness and employment benefits of the VAT reduced rate for the product or service concerned. It would also enable the Member State facing pressure domestically to introduce such measures to demonstrate that they would not be appropriate in

their own country. However, some countries are still negative towards reduced rate of VAT. Germany, for example, opposes Member States having the option of levying lower VAT on food sold in restaurants and cafes since it fears that catering outlets in Germany will demand the same treatment.

The French Presidency has additionally proposed a compromise in the draft directive to amend the EU reduced rate VAT rules that the European Commission unveiled in July 2008. It is suggesting that reduced rate VAT should be levied on certain services and action in favour of the environment, like building or renovating housing units to reduce their environmental impact and/or increase the energy efficiency of buildings.

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## European Parliament

### EP supports proposal specifying VAT exemption on financial services and insurance

On 25 September, the European Parliament adopted the consultative report by MEP Joseph Muscat (PES, Malta) on the legislative proposal aimed at ensuring more uniform application of tax exemption on VAT applicable to financial services and insurance. The proposal was adopted without amending the text put forward by its committee on economic and monetary affairs (ECON).

The MEPs support the overall objective of the legislative proposal, presented by the Commission in November 2007. They add to the list of services exempted from VAT operations on derived financial instruments and specify the notion of placement funds in order to come up with a more accepted definition to match that reached by those in the sector. The legislative proposal also gives an economic operator the choice to decide, as of 1 January 2012, whether it wishes to be fully subject to VAT. Once it uses this right, a company may deduct the VAT paid upstream on its investments.

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The MEPs support the introduction of this option but call on Member States to grant it on a case by case basis.

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## European Commission

### Measures to tackle VAT fraud

The European Commission has for a month postponed the publication of three drafts of “conventional” measures to tackle VAT fraud, initially scheduled for the end of October 2008. These measures includes the creation of Eurofisc (see above), the drawing up of tighter rules on registering and de-registering from the VAT information exchange system (the “VIES” database), and the option of making economic operators failing to fill in their VAT returns properly legally liable for any tax losses generated in another Member State. The Commission is planning to reveal changes to the VAT directive (2006/112/EC) before the end of the year in order to encourage the use of cross-border e-invoicing by relaxing the current measures requiring the use of electronic signatures.

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### Evaluation of 2003-2007 Fiscalis programme

On 9 October 2008, the European Commission adopted an assessment of the 2003-2007 Fiscalis programme that aims to improve the functioning of tax systems within the common market. In general, the European Commission believes the programme has achieved its aims but is making a number of recommendations to the Commission and member states.

The Commission believes that the general aim of the programme (boosting cooperation among the participating countries, their civil services and officials)

has been achieved. Officials have been able to work together widely and effectively through the introduction and use of information and communications systems. Although these systems can still be improved in terms of speed, accuracy and reliability of the data, the Commission argues that they appear to be a useful, if not vital, tool for connecting up the various national civil services, particularly the sections working on indirect taxation.

Indirect taxation (VAT and customs) is the main area covered by Fiscalis and a raft of action has been organised in this domain. There has been less action in connection with direct taxation but cooperation in direct taxation is seen as growing in importance and is expected to expand in the future.

The Fiscalis 2008-2013 programme was adopted in November 2007, and the assessment still makes recommendations to the Commission and/or the countries involved. The Commission stresses that multi-lateral controls are a vital tool for effective control of proper application of EU legislation and tackling fraud and tax evasion and act as an effective deterrent to taxpayers tempted to defraud the tax office.

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### Suggestion on cutting VAT on action to protect the environment

The European Commission did not have sufficient data at its disposal in July to be able to give any details of reducing VAT for energy-saving products and services. At the moment the Commission is revising the EU's energy taxation rules to introduce an environmental component. It is additionally drawing up draft legislation to allow the levying of reduced rate VAT on services to encourage energy efficiency and energy savings (for example, energy audits and certification) and goods and materials used for the same purposes. Assuming the current studies confirm that such a measure would be feasible. The timing of such proposals is still not settled for the moment.

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EU Tax Policy Document

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### European Court of Justice

#### The Court determines public authorities' VAT exemptions (C-288/07)

The ECJ decided on 16 September that public authorities' commercial activities can be exempt from VAT only when they come under public service activities. The case regarded the Isle of Wight Council and the UK national government over the running of offstreet parking, income on which the Council did not levy VAT. The Court recognised the option of public authorities not having to pay VAT if application of VAT would cause a notable distortion of competition but pointed out that such an analysis must focus on the market in question in the light of not only current but also potential competition. Moreover, the Court pointed out that even if this criterion were satisfied, the derogation for public authorities can only be applied to activity carried out by the public authorities as part of their public service.

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ECJ case C-288/07

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ree. However, a number of criteria have to be met for exemption to apply: the service provider must be a non-profit-making body, the services must be closely linked to sport, and the true beneficiaries of the services must be persons taking part in sport. The Court points out that this exemption applies only to services closely linked to sport, thereby excluding anything of a commercial nature.

It will now be up to the High Court of Justice to decide whether the services at issue in this case should, in the light of the Court's findings, be exempted.

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ECJ case C-253/07

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#### Services to sports clubs can be VAT exempt (C-253/07)

According to a ECJ judgment delivered on 16 October, services supplied to sports clubs may be exempted from VAT.

The matter was referred to the ECJ by the High Court of Justice of England and Wales, which wanted to ascertain if England Hockey was acting legally in supplying various services to its members, including regional organisations Canterbury Hockey Club and Canterbury Ladies Hockey Club, without applying value added tax to its prices. The UK tax authority, said no, arguing that exemption as provided for in the 6th VAT directive (77/388/EEC of the Council) only applies to services supplied to those actually taking part in sport and not to services supplied to organisations.

The Court rejects that argument, noting that, in the context of exemption, the term "persons" relates also to bodies corporate and non-registered associations. Were this is not so, it would risk excluding certain services essential to the practice of some team sports - services such as hiring of the field, paying the refe-

## European Commission

### European Council

### The Savings Directive

#### Negotiations with Norway on taxation of savings income

On 25 September the European Council adopted a Decision authorising the Commission to negotiate an agreement with Norway for the application of measures equivalent to those laid down in the Savings Directive 2003/48/EC. The EU-Norway savings tax agreement involving full exchange of information and the intention is to put in place a model covering reciprocal information exchange.

Talks have also been held with other non-EU countries and territories (Bermuda, Singapore, Hong Kong and Macao) to extend the geographical coverage of EU savings tax rules to these countries. In its reports on the implementation of EU rules, the European Commission notes the problems met in trying to get relevant information.

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The European Commission is expected to unveil a new draft directive to improve implementation of Directive 2003/48/EC on savings tax on 12 or 13 November 2008. The draft legislation will attempt to extend the legislation to more legal bodies and financial products in order to fill gaps identified in the report on the implementation of EU tax rules that was published last month. The challenge is to cut down on options for getting round the rules through creative legal manoeuvring and to ensure innovative financial instruments are covered by EU rules (derivatives, life insurance, etc).

When unveiling its report in September, the European Commission stated that it was not preparing to do battle against the withholding tax mechanism as such. Preparation of the legislative review required a number of expert meetings to be organised, and a last minute change of such a large scale can therefore be regarded as rather unlikely. But the financial crisis has taken hold in Europe since then. The EU is now calling for a root-and-branch overhaul of the global international system. At the OECD, some Member States (e.g. France and Germany) have raised the question of tax havens and uncooperative countries vis-à-vis the exchange of information on tax issues. The review of the EU savings tax directive is, by some, therefore seen as an opportunity for the EU to demonstrate its capacity to improve tax transparency at home before lecturing its international partners, since nothing prevents Austria, Belgium and Luxembourg from agreeing to give up their withholding tax mechanism, even though the Commission will not be including this in its draft legislation. If the three countries agreed to scrap the withholding tax, this would put the EU in a strong position to renegotiate its bilateral deals with countries outside the EU applying equivalent measures to Directive 2003/48/EC.

### European Parliament

#### The Economic and Monetary Affairs Committee requests answers regarding the CCCTB

The European Parliament's Economic and Monetary Affairs Committee will ask Commissioner Kovács about the common consolidated corporate tax rate (CCCTB) when he addresses their meeting on Tuesday 4 November 2008. The European Commission has earlier stated that it will not publish its plans to harmonise the CCCTB until next year. The European Commission wants to give itself more time to finalise its impact study on what is an extremely complex and ambitious project. Due to several technical reasons, like the need to finalise the impact study and to publish it along with the draft legislation, and some political reasons like problems arising from Ireland's refusal to ratify the Lisbon Treaty in June 2008 and the upcoming European elections in June 2009, one can presume that there will be no proposal until 2010.

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Commission staff working document

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## NEWS - DIRECT TAX

### Infringement procedure against Italy

The European Commission has decided to bring Italy before the ECJ regarding its tax legislation which discriminates against regenerated lubricating oil coming from other Member States and discourages Italian manufacturers from using used oil collected in other Member States in the regeneration process. Despite the Commission's request (IP/07/998) to ensure an equal treatment of domestic and foreign products in accordance with Article 90 of the EC Treaty, Italy has not taken timely action to extend the tax advantage granted only to lubricating oil made from used oil collected in Italy.

The Commission believes that the Italian rules de facto favour regenerated oil manufactured in Italy and discriminates against regenerated oil collected or manufactured elsewhere in Europe. These national rules resemble very much those already condemned by the Court in 1980 in the Case 21/79 Commission v Italian Republic.

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### Infringement procedure against Spain regarding restrictive exit tax provisions for individuals

The European Commission has formally requested Spain to change its tax provisions which impose an exit tax on individuals who cease to be tax resident in Spain. The provisions are incompatible with the free movement of persons provided for in Articles 18, 39, 43 of the Treaty and Articles 28 and 31 of the EEA Agreement. The request takes the form of a reasoned opinion (second step of the infringement procedure provided for in Article 226 of the EC Treaty). If there is no satisfactory reaction to the reasoned opinion within two months, the Commission may decide to refer the matter to the Court of Justice of the European Communities.

Under Spanish law, a taxpayer who transfers his residence abroad has to include any unallocated income in his tax declaration for the last tax year in which he is still considered a resident taxpayer and will be taxed on such income immediately. Contrary to the general rule which taxes income in the calendar year in

which it is received, there are special rules according to which income may be taxed over a number of tax years. Unallocated income refers to that income that is still pending to be taxed. The Commission considers that such immediate taxation penalises those persons who decide to leave Spain, by introducing less favourable treatment for them in comparison to those who remain in the country.

The Commission's opinion is based on the EC Treaty as interpreted by the Court of Justice of the European Communities in its judgment of 11 March 2004, in Case C-9/02, De Lasteyrie du Saillant, as well as on the Commission's Communication on exit taxation (COM(2006)825 of 19 December 2006).

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### Infringement procedure against Spain regarding discriminatory taxation of non-resident taxpayers

The European Commission has formally requested Spain to change its tax provisions according to which non-residents are taxed on the gross amount of their income, whereas residents are only taxed on their net income. The Commission considers that these rules are incompatible with the EC Treaty, which guarantees the free movement of persons and workers, the freedom to provide of services and the free movement of capital. The request takes the form of a reasoned opinion (second step of the infringement procedure). If there is no satisfactory reaction to the reasoned opinion within two months, the Commission may decide to refer the matter to the Court of Justice of the European Communities.

The Commission believes that these rules restrict the free movement of persons and workers, the freedom to provide services and the free movement of capital, and that Spain thus fails to fulfil its obligations under Article 39, 49 and 56 of the EC Treaty and the corresponding Articles of the EEA Agreement. Its reasoning is based, in particular, on the judgment of the European Court of Justice in the Asscher case.

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**NEWS - DIRECT TAX****Infringement procedure against Estonia concerning discriminatory taxation of pensions paid to non-residents**

The European Commission has sent Estonia a formal request to amend its rules that provide for higher taxation of pensions paid to non-residents in comparison to pensions paid to resident taxpayers. The request takes the form of a reasoned opinion (second step of the infringement procedure). If there is no satisfactory reaction to the reasoned opinion within two months, the Commission may decide to refer the matter to the Court of Justice of the European Communities.

The reasoned opinion concerns non-resident pensioners with a modest income which is comparable to the tax exemption allowances applicable to pensioners in Estonia (EEK 63 000 or ca EUR 4026). If such taxpayers receive all their income in Estonia, they can benefit from the Estonian personal allowances and do not have to pay tax on their income. However, where the income earned in Estonia does not exceed 75% of their worldwide taxable income, non-resident taxpayers are not able to benefit from the personal deductions available to residents.

The Commission considers that the restrictive application of personal allowances in the Estonian legislation constitutes a discrimination prohibited by Article 39 the EC Treaty concerning the free movement of workers, as the favourable treatment is not open to non-resident taxpayers who are effectively in the same situation as resident pensioners.

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**European Court of Justice****Property-related losses deriving from a dwelling abroad can be deducted from taxable income (C-527/06)**

The ECJ has found for a Dutch national who wants to have the right to deduct losses related to his dwelling from his taxable income. The Dutch tax authorities had refused him permission to do so, arguing that, although he works in the Netherlands, the dwelling is not on national soil, but in Belgium. The Court ruled that this was discrimination against employees of Dutch companies who live in another member state and, therefore, hindered free movement. According to the judgement Member States are responsible for legislating on taxation matters, however, the judgement says they cannot impose measures that contravene rights guaranteed by the Treaty.

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ECJ Case C-527/06

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## OTHER NEWS

## European Commission

## DG TAXUD warns about fraudulent email

The Commission has issued a warning on its website about fraudulent email pretending to come from EU Taxation Commissioner Kovács. Using the pretext of gathering information for the EU Savings Tax Directive, the fraudsters are trying to get people to provide confidential information like bank account numbers.

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Fraudulent Message

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## Closer cooperation between Eurojust and OLAF

On 24 September, in Brussels, the European Anti-fraud Office (OLAF) and the European Union Judicial Cooperation Body, EUROJUST, concluded an agreement intended to strengthen cooperation in the fight against financial fraud. The press release stated "the practical agreement covers arrangements regarding co-operation between Eurojust and OLAF in order to fight fraud, corruption or any other criminal offence affecting the European Community's financial interests". The practical agreement governs both modalities for closer and increased cooperation and provisions for the exchange of general and personal data.

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## OECD

## The OECD Tax statistics 2008

On October 15, the OECD published the 2008 edition of its annual Revenue Statistics, which presents detailed comparable tax data in a common format for all OECD countries from 1965 onwards. It is a set of detailed and internationally comparable tax data in a common format for all OECD countries from 1965 onwards. The purpose of this annual publication is to provide internationally comparative data on tax levels and tax structures in member countries of the OECD. The taxes imposed in each country are presented in a standardised framework based upon the OECD classification of taxes and its Interpretative Guide. Denmark is confirmed as the OECD's highest-tax country, followed by Sweden, while Mexico and Turkey remain the lowest-taxing countries. Overall, the average tax burden in the 30 OECD countries, calculated as a proportion of GDP, is close to its historic peak of 36.1% in 2000. In 2006, the latest year for which complete figures are available, the tax-to-GDP ratio was 35.9%, up from 35.8% in 2005 and 35.2% in 2004.

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OECD Raport

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## Discussion Draft on the Transfer Pricing Aspects of Business

According to the January 2005 OECD Centre on Tax Policy and Administration Roundtable, the restructurings by multinational enterprises raise difficult transfer pricing and treaty issues for which there is currently insufficient OECD guidance under both the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations and the OECD Model Tax Convention on Income and on Capital. These issues involve primarily the application of transfer pricing rules upon and / or after the conversion, the determination of the existence of, and attribution of profits to, permanent establishments, and the recognition or non-recognition of transactions. In the absence of a common understanding on how these issues should be treated, they may lead to significant uncertainty for business and governments as well as possible double taxation or double non-taxation.

Recognising the need for work to be done in this area, the Committee on Fiscal Affairs decided to start a project to develop guidance on these transfer pricing and treaty issues. The Committee now invites interested parties to send comments on this discussion draft before **19 February 2009**.

Comments should be sent electronically (in Word format) to [jeffrey.owens@oecd.org](mailto:jeffrey.owens@oecd.org)

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## IMPRESSUM

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