European Tax Report
European Professional Law Report
June 2012

DIRECT TAX - TRANSFER PRICING

OECD consults on the transfer pricing aspects of intangibles

On 6 June 2012, the OECD has released for public comments a discussion draft on the special considerations for intangibles in the OECD Transfer Pricing Guidelines and related provisions, containing a proposed revision of the provisions of Chapter VI and its Annex. Examples have been included to illustrate the application of the provisions. The competent OECD Working Party stresses that the discussion draft does not yet include all changes that may eventually result from the project:

In particular, the Working Party still intends to address at least the following topics not yet included:

- any necessary modifications to Chapter VIII of the Transfer Pricing Guidelines related to cost contribution arrangements that may be necessitated as a result of the modification of Chapter VI;

- the transfer pricing consequences of various items treated in this draft as comparability factors rather than intangibles, including market specific advantages, location-based advantages, corporate synergies and workforce issues; and

- any additional conforming changes to Chapters I – III and Chapter VII of the Transfer Pricing Guidelines required as a result of the changes to Chapter VI. Discussion drafts of additional proposed changes will be released for comment at a future date.

Written comments on this **Discussion Draft** shall be provided by 14 September 2012.

READ MORE *(click to open)*:

News release: **EN** **FR**

Discussion draft: **EN**

OECD Transfer Pricing Guidelines: **EN**

OECD releases discussion draft on the revision of the safe harbours section of the Transfer Pricing Guidelines

On 6 June 2012, the OECD Committee on Fiscal Affairs has released a discussion draft on safe harbours as part of its project to improve the administrative aspects of transfer pricing. One of the aspects still insufficiently dealt with in the current guidelines is the possibility of a bilateral agreement establishing a safe harbour, even though some countries have favourable experience with such bilateral agreements.

This discussion draft includes proposed revisions of the section on safe harbours in Chapter IV of the Transfer Pricing Guidelines and associated sample memoranda of understanding for competent authorities to establish bilateral safe harbours.

Interested parties are invited to send comments before 14 September 2012.

READ MORE *(click to open)*:

News release: **EN** **FR**

Discussion Draft: **EN**

OECD invites comments on transfer pricing timing issues

On 6 June 2012, the OECD has invited public comments on certain timing issues related to transfer pricing, in connection with the work on intangibles and other projects. Modifications to the Transfer Pricing Guidelines on these issues have been discussed by the competent Working Party. While there is no agreement among the OECD member countries yet, input from the business community is requested at this stage.

The paragraphs under consideration highlight the fact that OECD member countries follow two different approaches in applying the arm's length principle. This raises a number of practical problems on which the OECD is seeking further insight from stakeholders.Interested parties are invited to send comments on this discussion draft before 14 September 2012.

DIRECT TAX - TRANSFER PRICING

READ MORE *(click to open)*:

News release: **EN** **FR**

Request for comments: **EN**

OECD updates multi-country analysis of existing transfer pricing simplification measures

In the context of its 2010 a project to improve the administrative aspects of transfer pricing, the OECD Committee on Fiscal Affairs conducted a survey to review techniques that may be implemented by countries to optimise the use of taxpayers' and tax administrations' resources in which the 33 OECD countries participated. An update of this survey (relevant date: 1 Jan. 2012) has been published on 6 June 2012. The update includes data from eight non-OECD countries that had been invited to join the survey.

The survey described in this document focused specifically on simplification measures countries have adopted as part of their transfer pricing regimes. These include not only safe harbours but also measures such as less stringent documentation requirements, alleviated penalties, streamlined procedures, etc.

Some of the key findings are that:

- more than 80% of the respondent countries have transfer pricing simplification measures in place;

- almost 75% of available simplification measures are directed to SMEs, small transactions and low value added intra-group services;

- out of 33 respondent countries which have simplification measures, 16 countries have safe harbours, i.e. simplified transfer pricing method, safe harbour arm's length range/rate, safe harbour interest rate, and exemption from transfer pricing rules/adjustment;

- of those 16 countries, 10 countries have simplified transfer pricing methods, safe harbour arm's length range/rate and safe harbour interest rates.

READ MORE *(click to open)*:

News release: **EN** **FR**

Multi-country analysis, update 2012: **EN**

NEWS - INDIRECT TAX

ECJ: Irregularities committed by the issuer of the invoice do not justify refusal of VAT deduction

On 21 June 2012, the European Court of Justice (ECJ) decided in joined Cases C-80/11 and C-142/11, Mahagében and Péter Dávid, that the deduction of VAT cannot be refused, in principle, because of irregularities committed by the issuer of the invoice. However, that deduction must be refused if the taxable person knew, or ought to have known, that the transaction relied on as a basis for the right to deduct was connected with fraud.

Under the VAT directive 2006/112/EC, undertakings may, as a general rule, deduct the amount of input VAT which they have already paid at the time of acquiring goods or services necessary for their activities. In order to be able to exercise that right of deduction, they must hold an invoice duly drawn up for the supply of those goods or services.

Hungarian law requires taxable persons to act with all due diligence in order to satisfy themselves as to the propriety of transactions which give rise to VAT.

Mahagében, a Hungarian undertaking, sought to deduct from the amount of tax for which it was liable the tax which it had paid to its supplier for the delivery of various quantities of acacia logs. The supplier issued invoices for the delivery of those goods and paid to the public exchequer the VAT which Mahagében had paid to it. Mahagében, in turn, exercised the right to deduct.

This was refused by the tax authority after an inspection at the premises of a supplier of Mahagében had revealed irregularities in the accounting data of the supplier and the orders invoiced to Mahagében. The tax authority also criticised Mahagében on the ground that it had failed to satisfy itself as to the status of its commercial partner and had failed to check whether that partner had complied with its statutory obligations in respect of VAT. The case was brought to the ECJ as a request for a preliminary ruling. The referring Court asks whether the deduction of VAT may be refused in the case where the invoices on the basis of which the deduction is sought are formally correct but where, according to the tax authority, the company concerned did not satisfy itself as to the propriety of the conduct of the invoice issuer.

In another Hungarian case, the referring Court asks the ECJ whether the deduction of VAT may be refused because of improper acts on the part of the invoice issuer in the case where it is not established that the person requesting the deduction was aware of those improper acts.

NEWS - INDIRECT TAX

In its judgment, the ECJ points out, firstly, that the right to deduct provided for by the directive, being an integral part of the VAT scheme, may not, in principle, be limited. The question whether the VAT payable on the prior or subsequent transactions relating to the goods or services concerned has or has not been paid to the public exchequer is irrelevant to the right of the taxable person to deduct input VAT.

However, the Member States may refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent or abusive ends. That will, in particular, be the case where the taxable person to whom were supplied the goods or services constituting the basis for the right to deduct knew, or ought to have known, that that transaction was connected with fraud previously committed by the supplier or by another trader at an earlier stage in the transaction. It is for the tax authority to establish that the taxable person was aware, or ought to have been aware, of the existence of such fraud.

The Court points out that, where there are indications pointing to irregularities or fraud, a trader could be obliged to make enquiries about another trader in order to ascertain the latter's trustworthiness. However, the tax authority cannot, as a general rule, require the taxable person wishing to exercise his right to deduct VAT to satisfy himself that there were no irregularities or fraud at the level of the traders operating at an earlier stage of the transaction. Tax authorities cannot transfer their own investigative tasks to taxable persons and refuse the latter the right to deduct.

READ MORE *(click to open)*:

Judgment: **EN** (all EU languages)

Press release: **EN FR DE BG ES CS EL IT HU SK**

OECD consults on draft Commentary on the International VAT Neutrality Guidelines

On 28 June 2012, the OECD Committee on Fiscal Affairs has invited public comments on the draft Commentary on the International VAT Neutrality Guidelines. This draft Commentary provides guidance on the practical implementation of the six International VAT Neutrality Guidelines approved by the CFA in July 2011. Public comments should be sent before 26 September 2012 to **vat@oecd.org**.

READ MORE *(click to open)*:

Draft VAT Neutrality Guidelines: **EN**

Commission to create VAT Expert Group – Call for applications

On 26 June 2012, the European Commission adopted a Decision setting up a VAT Expert Group and calling for applications of individuals with a requisite expertise in the area of VAT and organisations representing in particular businesses, consumers and tax practitioners that would advise the Commission on the preparation of legislative acts and other policy initiatives in the field of VAT and to provide insight into their practical implementation.

The idea to create such group had already been expressed in the Communication on the future of VAT of 6 December 2011 (see **CFE European Tax Report 10/2011**).

The members will appointed for a mandate of 2 years and are asked to act independently and in the public interest.

The CFE has decided to apply for the VAT Expert Group. Applications can be sent until 24 August 2012.

READ MORE *(click to open)*:

Call for applications: **EN FR DE**

Decision in the EU Official Journal, see p.2 ff: **EN** (all EU languages)

No support in EU Council for Commission´s Energy Tax plans

Member States in the Ecofin Council of 22 June 2012 rejected the idea of the European Commission in its proposal for a revised Energy Taxation Directive to tax fuel entirely proportionate to its CO2 content. Member States claimed greater flexibility in the structure of their national energy taxes, allowing them to take into account other criteria. There seemed to be agreement however that there could be a minimum taxation based on energy content and CO2 emissions.

NEWS - INDIRECT TAX

The Commission proposal is seeking to end any preferential taxation of diesel fuels which all Member States but the UK apply. As diesel fuel has a higher energy content, it would, according to the Commission proposal, be taxed at a higher rate. Already the European Parliament in its consultative opinion has been opposed to ending tax privileges of diesel fuel (see **CFE European Tax & Professional Law Report 4/2012**).

READ MORE ***(click to open):***

Press release : **EN**

Commission calls on France to limit reduced VAT rate to domestic care

The European Commission has officially asked France to ensure that certain „personal services" should be subjected to the normal VAT rate because they do not, in its view, constitute domestic care services as laid down in EU law. The request takes the form of a reasoned opinion, which is the second stage of an infringement procedure. If the rules are not brought into compliance within two months, the Commission may refer the matter to the EU Court of Justice.

EU law allows Member States to apply a reduced rate of VAT to domestic care services such as home help and care of the young, elderly, sick or disabled.

The scope of the French reduced VAT rate covering „personal services" is much broader, covering i.e. gardening, home lessons (different from school support), computer and internet assistance at home, maintenance services, and maintenance and temporary guarding of main and secondary residences. This rate also applies to the services of intermediaries operating in the sector.

The Commission considers that applying a reduced VAT rate to these services is not compatible with EU law.

In addition to this, the French Conseil des prélèvements obligatoires (in 2010) and Comité d'évaluation des dépenses fiscales et des niches sociales (in 2011) suggested partially closing this tax loophole.

READ MORE ***(click to open):***

Press release: **EN** **FR** **DE**

Commission asks Portugal to change excise duty for cigarettes

The European Commission has officially asked Portugal to change its excise duty rules related to the marketing of cigarettes.

In Portugal, a time limit for the sale of cigarettes is set, linked to the fiscal stamp on the packaging. Cigarettes cannot be sold any later than 3 months after the end of the year that they are released for consumption. Under EU law (Directive 2008/118/EC), excise duty on tobacco products must be charged at the rate applicable on the date on which they are released for consumption. There is no provision under EU legislation which allows Member States to add supplementary duty to this release-date tax rate, or to limit the distribution of tobacco products for fiscal reasons.

The Commission finds that the Portuguese sales-and-marketing prohibition is disproportionate to any fraud-tackling objective and that it runs contrary to the provisions of Directive 2008/118/EC, under which Member States must ensure that tax markings do not create obstacles to the free movement of excise goods.

The Commission's request takes the form of a reasoned opinion (second step of EU infringement proceedings). If the rules are not brought into compliance within two months, the Commission may refer the matter to the European Court of Justice.

READ MORE ***(click to open):***

Press release: **EN** **FR** **DE** **PT**

Commission requests UK to amend its rules on reduced VAT rates

The European Commission has asked the United Kingdom to amend its legislation which allows a reduced VAT rate for the supply and installation of „energy-saving materials". This measure goes beyond the scope allowed under the VAT Directive 2006/112/EC.

Under EU VAT rules, Member States can only apply reduced VAT rates to a limited number of goods and services, which are clearly listed in Annex III of the VAT Directive. Energy saving materials are not included in this list. The request takes the form of a Reasoned Opinion (the second stage of an infringement procedure). If the legislation is not brought into compliance within two months, the Commission may refer the matter to the European Court of Justice.

NEWS - INDIRECT TAX

READ MORE *(click to open):*

Press release: **EN** **FR** **DE**

Commission: no need to amend current rules on timeframes for submitting recapitulative statements

On 26 June 2012, the European Commission issued its report on the application of Article 263 (1) of the VAT Directive concerning the reduction of timeframes. In 2008, the statutory time limits to declare cross-border transactions had been reduced to one month (subject to some exemptions that member states could opt for) to help Member States fight VAT fraud, in particular missing trader (or carousel) fraud, more effectively.

The Commission's report asks

- whether the speeding-up of the exchange of information has improved Member States' ability to combat VAT fraud;

- whether the option mechanisms had any impact on the objective of improving Member States' ability to combat VAT fraud and

- what impact the reduction of time frame for submitting recapitulative statements and the various option mechanisms had on businesses.

From the Member States´ perspective, the Commission concludes that the new provisions of Article 263 (1) had a positive effect on the efficiency of anti-fraud activities but that less use of options, both in terms of different reporting periods and divergences between Member States, would increase the benefit Member States can make of the reduced timeframe.

The Commission´s work was supported by a PWC study (see **CFE European Tax & Professional Law Report 5/2012**) made public in May 2012. That study also tried to measure the impact on business which proved difficult as the sample of 23 case study companies none of which was affected by the options in Art. 263 proved too small to draw firm conclusions on the actual increase of compliance cost.

It was however clear that a reduction in the timeframe for submitting recapitulative statements leads to more handling costs as the number of statements increased considerably. In addition, this has lead to more contacts with the tax administrations, as data has to be corrected or verified more frequently. Some businesses report that this led to an improvement of quality of the data submitted which would partly outweigh the additional administrative burden.

As a general conclusion, the Commission considers that there are not sufficient elements which would at this stage justify a proposal for amending the current Article 263.

READ MORE *(click to open):*

Commission report : **EN** (all EU languages)

Expert study + Annexes: **EN**

ADMINISTRATIVE COOPERATION AND FIGHT AGAINST TAX FRAUD

OECD Global Forum publishes new reports

On 20 June 2012, the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes adopted nine new peer review reports and three supplementary reports. This brings the total number of reports adopted to 79, with a further 17 reviews under way. With the launch of "Phase 2 reviews", the focus will now shift from the legislative framework for exchange of information to the exchange of information in practice.

The recently adopted peer review reports on **Cook Islands**, **Liberia**, **Lebanon**, **Grenada**, **Montserrat**, **Saint Lucia**, and **United Arab Emirates** describe each jurisdictions rules for ensuring that information is available to the tax authorities, how such information can be accessed by the authorities and the mechanisms in place to exchange information with foreign tax authorities. The reviews of the People's **Republic of China** and **Greece** consider in addition whether the jurisdictions' exchange information effectively in practice.

The three supplementary reports – for **Antigua and Barbuda**, **Estonia** and **the Seychelles** – assess the changes to legislation that these jurisdictions have made to address recommendations made by the Global Forum in the Phase 1 reviews.

ADMINISTRATIVE COOPERATION AND FIGHT AGAINST TAX FRAUD

READ MORE *(click to open):*

News release: **EN** **FR**

OECD held Tax and Crime Forum

On 14 and 15 June 2012, senior officials from almost 60 countries - tax administrations, finance and justice ministries, financial intelligence units and central banks - as well as the World Bank, the IMF, the FATF and the United Nations, non-governmental organisations and the private sector came together in Rome to discuss an ambitious agenda and map out a plan to fight financial crime more effectively using a whole of government approach.

In the context of these meetings, two reports have been released:

"Effective Inter-Agency Co-operation in Fighting Tax Crimes and Other Financial Crimes" is the first in-depth study of domestic inter-agency co-operation in over 30 countries. It identifies current challenges and recommends ways to improve inter-agency co-operation.

"The Catalogue of Instruments for International Co-operation Against Tax Crimes and other Financial Crimes" provides, for the first time, a holistic view across instruments for international co-operation in tax, corruption, supervision, money-laundering and other areas of mutual legal assistance.

Recognising that not all jurisdictions, particularly developing countries, have the investigative skills necessary for successful criminal tax investigations, participants were also to discuss the launch of a pilot training programme with the aim of establishing an international academy on criminal tax investigations.

READ MORE *(click to open):*

News release: **EN** **FR**

Tax and Crime Forum Programme: **EN**

Reports:
- Effective Inter-Agency Co-operation: **EN**
- Catalogue of Instruments: **EN**

READ MORE *(click to open):*

Pilot training programme on OECD website: **EN**

CUSTOMS

Bulgaria asked to review bilateral agreement with the US

The European Commission has formally asked Bulgaria to put an end to certain duty and tax relief provisions contained in a bilateral agreement with the United States on technical assistance, prior to its accession to the EU. The agreement provides for duty and tax-free import of goods financed by United States and for goods and services purchased on the Bulgarian market with the funds of the technical assistance programme.

The Commission states that none of the exemptions set out in EU legislation justifies the duty and tax relief applied by Bulgaria under this bilateral agreement. Bulgaria, once it joined the EU, should have adjusted the terms of the agreement in question or, otherwise, should have withdrawn from this agreement. The request takes the form of a Reasoned Opinion (the second stage of an infringement procedure). If the legislation is not brought into compliance within two months, the Commission may refer the matter to the European Court of Justice.

READ MORE *(click to open):*

Press release : **EN** **FR** **DE** **BG**

Commission publishes new guidelines for Authorised Economic Operators

The Authorised Economic Operator (AEO) status at EU level identifies safe and reliable businesses that are engaged in international trade. Recognised AEOs benefit from quicker customs procedures and fewer inspections on goods. The AEO Guidelines ensure harmonised implementation of the AEO rules throughout the EU, guaranteeing the equal treatment of economic operators and transparency of the rules.

CUSTOMS

READ MORE *(click to open):*

New AEO guidelines: **EN**

Related Commission webpage: **EN** **FR** **DE**

PROCEDURAL LAW

Council cuts back directive proposal on right to a lawyer in criminal proceedings

On 8 June 2012, the EU Justice and Home Affairs Council reached a general approach on a proposal for a directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest. It was generally agreed that negotiations with the European Parliament should be started in order to agree the final text of the directive. The original legislative proposal had been made on 8 June 2011 by the Commission. This relatively long period of deliberations can be explained because of the sensitive subject matter of the file: the directive aims to approximate the laws of the Member States in a field where substantial differences between the national systems exist and where the Member States are not in agreement on the interpretation of the case-law of the European Court on Human Rights. The text of the Council contains considerable amendments to the Commission proposal.

The main change to the text is contained in Article 3(4), where a distinction has been introduced regarding the efforts that have to be made by a Member State in respect of the right of access to a lawyer. According to the Council text, only in cases where the suspect or accused person is deprived of liberty, Member States should make the necessary arrangements to ensure that a suspect or accused person is in a position to effectively exercise his right of access to a lawyer; according to the Commission proposal, access also has to be granted before the start of any questioning by the police or other law enforcement authorities and upon carrying out any procedural or evidence-gathering act at which the person's presence is required or permitted.

The Council amendments have been heavily criticised by lawyers´ professional associations as they do not clearly specify to what extent Member States may deviate from the standards and as they allow exceptions from the confidentiality of the communication between lawyer and client. The same would apply for tax advisers in countries where they may represent clients in criminal proceedings. The European Parliament´s LIBE (Civil Liberties, Justice and Home Affairs) Committee, imits vote supported the lawyers' view of 10 July 2012.

READ MORE *(click to open):*

Press Release: **EN**

Commission proposal COM(2011)326: **EN** (all EU languages)

ACCOUNTING

Council agrees on general approach for new EU Accounting Directive

On 21 June 2012, the EU Council agreed on a general approach for the review of the rules on annual accounts of non-listed limited liability companies in the EU, proposed by the European Commission in October 2011 (see **CFE European Tax Report 9/2011**). The current 4th and 7th company law directives, 78/660/EEC and 83/349/EEC, would be merged into a single text.

The key objectives of the review are

- the reduction of administrative burden and the application of simplified accounting rules, particularly for SMEs;

- to increase the clarity and comparability of financial statements; and

- to enhance transparency on payments made to governments by the extractive industry (gas, oil and mining) and loggers of primary forest.

To achieve the latter, the proposed Directive includes a country-by-country reporting obligation of large undertakings and public-interest entities for payments exceeding € 500,000.

The Council agreement paves the way for the start of negotiations with the European Parliament. EP rapporteur is German EPP member Klaus-Heiner Lehne.

ACCOUNTING

READ MORE *(click to open)*:

Press release: **EN**

Danish presidency compromise text: **EN**

Draft report of the EP JURI Committee of March 2012: **EN** (all languages)

STATE AID

Commission consults on General Block Exemption Regulation

The General Block Exemption Regulation (GBER) simplifies the procedures for aid granting authorities at national, regional or local level. It allows the granting of a range of measures with horizontal objectives considered to be in the common interest. As the GBER will expire on 31 December 2013, the European Commission is seeking views from stakeholders on the current rules and possible amendments to be included in a future GBER.

The GBER consultation is part of the Commission´s State Aid Modernisation strategy set out in a Commission Communication of 8 May 2012. Part of the proposed measures concern acts for which the Commission has exclusive competence such as the revision of several state aid frameworks in areas such as regional aid, environmental aid, risk capital, broadband, the rules for the rescue and restructuring of non-financial companies, the revision of the general block exemption scheme, a review of the „de minimis“ rule and a revision of the complaints procedure.

Beyond these measures, the Commission would present legal proposals for a new Enabling Regulation and Procedural Regulation. It is the Commission‘s aim to complete the state aid reform by the end of 2013.

READ MORE *(click to open)*:

Communication COM(2012) 209 of 8 May 2012: **EN** (all EU languages)

GBER public consultation on Commission Website: **EN** (questionnaire in all EU languages)

ECJ confirms that tax waiver to Electricité de France was no illegal state aid

On 5 June 2012, the European Court of Justice (ECJ) confirmed in case C-124/10 P, Commission v. Electricité de France (EDF) the annulment of a European Commission decision that had declared a tax measure by the French state in favour of EDF as prohibited state aid.

A 1997 law adopted by the French state to clarify the legal and financial regime under which EDF operates, to restructure EDF‘s balance sheet and to increase its capital had been considered state aid incompatible with the common market in a European Commisison decision taken in 2003. The legislative measure included a waiver of a corporate tax claim valued at almost €900 million. According to the Commission, the effect of that waiver had been to strengthen EDF’s competitive position in relation to its business rivals. EDF repaid that sum plus interest to the French state.

By judgment of 15 December 2009, the General Court annulled that decision, holding that the Commission was not entitled, simply because the measure taken was fiscal in nature, to refuse to examine whether the French State had acted like a ‘private investor in a market economy’. The private investor test is a means of establishing whether, in participating in the capital of the recipient undertaking, or in taking action in connection with that capital, the state is pursuing an economic objective which might also be pursued by a private investor and is accordingly acting in its role as economic operator, in the same way as a private operator.

The ECJ dismissed the Commission’s appeal, finding that the judgment of the General Court is not vitiated by any error of law.

READ MORE *(click to open)*:

Press release: **EN FR DE ES EL IT NL RO**

Judgment : **EN** (all EU languages)

ECJ rules that Italian scheme on realignment for tax purposes for banks was illegal state aid

On 21 June 2012, in Case C-452/10 P, BNP Paribas and Banca Nazionale del Lavoro (BNL), the European Court of Justice (ECJ) ruled that the Italian 2004 scheme on realignment for tax purposes for the banking sector included a selective advantage not justified by the nature of the tax system and there-

STATE AID

fore constitutes illegal state aid to be repaid by the banking entities.

The EU tax merger directive (directive on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares in companies situated in two or more Member States) introduced a system of fiscal neutrality for transfers of assets between companies.

Where assets are transferred, the 'tax misalignment' or 'fiscal neutrality' mechanism consists of the tax value not being adjusted immediately to the book value. On the other hand, the 'fiscal realignment' mechanism is a tax operation by which the tax value is adjusted to the book value of the assets, giving rise to recognition of the capital gain for tax purposes arising on the transfer which is then subject to tax.

In 1990, Italy adopted a law to facilitate mergers of banks and to allow public banks to become joint stock companies. This law provided for a system of partial fiscal neutrality leading to a misalignment regarding both the assets transferred and the shares received in return.

An accounting revaluation and tax realignment scheme for the companies referred to the law of 1990 and other companies was introduced in 2000 and subsequently extended. However, in 2004, the scheme for realignment for tax purposes applicable to transfers of company assets was only extended concerning transfers carried out under the 1990 law for banks.

In 2008 the Commission adopted a decision according to which the tax realignment schemes of 1990, 2000 and 2001 were general tax measures justified by the inherent logic of the system and could not be characterised as state aid as the substitute tax was applied under identical conditions to all companies, whether or not they were banks. In contrast, the 2004 law was not a general measure as it reserved advantages to certain credit institutions, applying solely to reorganisations implemented under the 1990 law while other credit institutions and other companies were not able to benefit from the same tax realignment scheme, creating a selective advantage not justified by the nature of the Italian tax system, thus constituting state aid.

The EU General Court, in 2010, dismissed the action for annulment of the Commission decision. The ECJ now considers that the General Court, by not having carried out a comprehensive review of whether the tax realignment scheme was state aid, erred in law.

The ECJ observes that the concept of state aid does not refer to state measures which differentiate between undertakings where that differentiation arises from the general scheme of the system of which they form part. It holds that the Italian legislation successively put in place two different systems of fiscal neutrality in respect of gains realised following transfers of assets between companies, one in the context of the restructuring of the banking sector and the other in respect of transfers of assets in exchange for shares carried out between other companies.

The Court acknowledges that the realignment schemes provided for in 2000 and 2001 enabled realised gains to be recognised in consideration for payment of a substitute tax set at the same level for all the undertakings and could be considered to be general fiscal measures, justified by the inherent logic of the Italian tax system. On the other hand, the 2004 law extended the scheme only for companies to which assets had been transferred following transactions carried out under law of 1990.

Consequently, the Court holds that the tax scheme at issue in favour of banking entities was not justified by the inherent logic of the Italian tax system and thus dismisses the action brought by BNP Paribas and BNL.

READ MORE *(click to open):*

Judgment: **EN** (all EU languages)

Press release: **EN**

OTHER TAX POLICY

Ecofin Council reports on progress and standstill in the EU tax dossiers

After its meeting on 22 June 2012, the EU Ecofin Council adopted a report summarising progress and standstill on a number of tax dossiers for the European Council of 28/29 June 2012:

No progress could be reported regarding the revision of the Savings Tax Directive and a negotiating mandate for the Commission for renewing agreements with third countries (namely Switzerland, Andorra, Liechtenstein, Monaco and San Marino).

As regards the Commission´s 2011 proposal for a Common Consolidated Corporate Tax Base (CCCTB), the competent Council Working Party, in its four meetings held under the Danish Council presidency, focussed on priority areas like the limitation of interest deductions, the limitation on carry forward

OTHER TAX POLICY

of losses, the allocation of profits to a permanent establishment, the general anti-abuse rule, controlled foreign companies and anti-abuse rules on hybrid mismatches of entities and financial instruments. A first compromise text for parts of the proposal was presented and discussed, with a number of Member States maintaining substantial objections to the proposal, even though main aspects like consolidation, the apportionment formula and administrative procedures had still been left aside.

Also the 2011 Commission proposal to revise the Interest and Royalties Directive is facing resistance from some Member States. The Commission proposal is adding a new requirement to be met for a cross border payment to be exempt from withholding tax: the recipient of the payment has to be ‚subject to tax' in the State of his/her establishment on the income derived from the payment. Member States fear that this compromises tax incentives they would like to give to enterprises on their territory, e.g. in the area of research and development. On the other hand, some Member State want to exempt interest and royalty payment only if a minimum taxation in the state of receipt applies.

In a separate report, it was finally acknowledged that the Financial Transactions Tax (FTT) proposal of September 2011 would not be approved unanimously, as required by the TFEU Treaty. This conclusion paves the way for a possible introduction of a FTT in a limited number of -at least- nine Member States by way of "enhanced cooperation". Reportedly a total of 10 countries, Austria, Belgium, Finland, France, Germany, Italy, Portugal, Romania and Spain are interested in introducing a limited FTT. These will now have to write to the Commission and formally request enhanced cooperation. The Commission will then have to make a new proposal and the majority of Member States, whether they intend to take part in the enhanced cooperation or not, will have to approve the move. Finally, the European Parliament will have to vote.

For energy taxation, see related article in the "Indirect Tax" section of this Tax & Professional Law Report.

READ MORE *(click to open):*

Press release: **EN**

Ecofin report on tax issues: **EN** **FR** **DE**

Commission promotes measures against tax fraud, evasion and aggressive tax planning:

On 27 June 2012, the European Commission issued a communication on "concrete ways to reinforce the fight against tax fraud and tax evasion including in relation to third countries" containing a number of possible measures to render the Member States´ fight against tax evasion and aggressive tax planning more effective. The Commission argues for enhancement of administrative cooperation, the completion of the revision of the Savings Directive, a mandate to negotiate with Switzerland, Andorra, Liechtenstein, Monaco and San Marino and coordinated action towards tax havens. Measures include minimum sanctions in EU countries for tax crimes, a cross-border tax identification number, a quick reaction mechanism for VAT fraud, an EU taxpayers charter "in the spirit of corporate social responsibility" and stronger common measures against tax havens.

At Member States level, countries should focus on improving their administrative capacity to collect taxes. The Commission would monitor closely their progress in this field, while also providing technical assistance where needed. National authorities should introduce voluntary disclosure programmes. EU instruments such as a one-stop-shop and a possible Tax Web-Portal should also foster compliance.

Before the end of 2012, the Commission is planning to set out a „stick and carrots" approach to dealing with tax havens, and measures to deal with aggressive tax planners as part of an Action Plan on fighting fraud and evasion.

READ MORE *(click to open):*

Press release: **EN** (all EU languages)

Communication COM(2012)351: **EN**

FAQs: **EN**

Three new Taxation Papers on Financial Sector and Environment Taxes

In June 2012, the European Commission published Taxation Papers 30-32, dealing with elasticities of financial instruments, profits and remuneration (Paper 30), current practices for taxation of financial instruments, profits and remuneration of the financial sector (Paper 31) and with the asserted regressivity of environmental taxation (Paper 32).

The first-mentioned paper is a study on the tax elasti-

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city and semi-tax elasticity of various tax bases that could fall under the taxation of the financial sector, undertaken by Copenhagen Economics for the European Commission. The Commission´s concern is that different approaches in Member States to tax the financial sector could create incentives for tax arbitrage and result in allocation distortions between financial markets in the EU as well as double taxation and fragmentation of the financial sector in the Single Market. The study does not intent to comment on whether there should be new forms of financial sector taxation or study the pros and cons of different types of taxation of the financial sector. Instead, it is focused on how the financial sector responds to taxes in terms of (re)location, financial activities, and transactions.

Similarly, the second-mentioned paper which is a PWC study undertakes a comprehensive overview of current (2011) tax practices with regard to Financial Sector taxation, showing the differences between Member States and different approaches to taxing the financial sector and/or its activities. The study covers four different areas, namely: corporate taxation, VAT, labour taxation and taxation of financial instruments. Apart from the EU Member States, China, Singapore, Switzerland and the USA have been included.

The third-mentioned paper deals with the prejudice that taxes designed to render environmentally harmful behaviour of consumers and businesses more costly, impose a heavier burden on low-income households than on high-income households, since the former spend a larger share of their income on goods like heating, electricity and transport which is often found politically unacceptable and makes it difficult to carry out environmental tax reforms. The study gathers also empirical evidence indicating that several factors could mitigate, or even eliminate, the regressivity of environmental tax reforms, and this should be taken into account in judging the distributional effect of a tax reform package.

READ MORE *(click to open):*

Taxation paper 30, tax elasticity of financial sector taxes: **EN**

Taxation paper 31, financial sector taxes overview: **EN**

Taxation paper 32 on environmental taxation: **EN**

OTHER EU POLICY

Commission consults on EU Transparency Register

On 8 June 2012, the European Commission opened a public consultation on the EU Transparency Register which, in its present form, is accessible since 23 June 2011, following a merger of the registers of the European Commission which had been opened three years earlier and of the European Parliament. The consultation aims at individuals and organisations "involved in the development and implementation of EU policies", meaning lobbying in the widest possible sense, whether already registered or not. This includes not only NGOs, trade organisations and public consultancies but also e.g. law firms, churches, associations representing public bodies, think tanks and academics. To date, more than 5000 individuals or organisations have signed up in the register, including CFE.

The questions mainly aim at the user-friendliness of the current register and ways to improve it. They also address the reasons for organisations (not) to register and their experience from their registration.

The consultation will be open until 31 August 2012.

READ MORE *(click to open):*

Public consultation on Commission website: **EN** (all EU languages)

Questionnaire: **EN** **FR** **DE**

Transparency Register, homepage: **EN** (all EU languages)

European Parliament votes on Two-Pack for increased EU powers over Member States´ budgets and economic policies

On 13 June 2012, the European Parliament has adopted two Regulation proposals often dubbed "Two-pack" that would significantly increase the EU´s control over Member States budget sovereignty and economic policies. These are (1) the "Regulation […] on the strengthening of of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area" and (2) the "Regulation […] on common provisions for monitoring and

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assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area". Both Regulations are seen as a step towards a Fiscal Union as they would empower the Commission to call for revision of national budgets and place Euro countries in, or approaching, financial difficulties under a tight monitoring regime.

Moreover, the MEPs have added a number of elements some of which are very controversial like a roadmap towards the introduction of Eurobonds and a European Debt Redemption Fund that would mutualise the debt of Eurozone countries exceeding 60 % of GDP, allowing it to be repaid in the long term at lower interest rates. A "growth facility" should ensure that 1 percent of the Eurozone GDP be invested in infrastructure projects. According to the amended proposals, the Commission could place a country on the verge of default under legal protection and demand a debt settlement plan and implementation of other measures. Once under such protection, a country could not be declared to have defaulted, its creditors would need to make themselves known to the Commission within two months, and loan interest rates would be frozen. All in all, the MEPs would grant the Commission even greater powers over countries in difficulties than the Commission itself had proposed.

The Regulations were adopted with 471 to 97 votes (78 abstentions) and with 501 to 138 votes (36 abstentions) respectively. MEPs intended to send a strong signal to the EU Council where the Regulations will now be negotiated and –presumably- watered down to some extent.

READ MORE *(click to open)*:

Proposals and EP Amendments:
- Economic and budgetary surveillance: **EN** (all EU languages)

Monitoring and assessing draft budgetary plans: **EN** (all EU languages)

PROFESSIONAL QUALIFICATIONS

Rapporteur in EP EMPL Committee in favour of mandatory professional cards

In the discussions on the revision of the Professional Qualifications Directive proposed in December 2011 by the European Commission, MEP Licia Ronzulli (EPP, Italy), rapporteur for the opinion of the European Parliament´s Committee for Employment and Social Affairs (EMPL), presented her draft opinion on 1 June 2012. The proposed changes include the possibility of compulsory professional cards for a given profession, differing from the European Commission´s proposal according to which professional cards should always be voluntary for professionals. Professional cards to speed up recognition procedures in cross-border activity are a key element of the Commission´s proposal (see **European Tax & Professional Law Report December 2011**. Responsible Committee in the EP is the Internal market and Consumer Protection (IMCO) Committee. A draft report by French Socialist MEP Bernadette Vergnaud is expected in July 2012.

READ MORE *(click to open)*:

Draft report: **EN** **FR** **DE**

CROSS-BORDER SERVICES

Commission evaluates the implementation of the Services Directive

On 8 June 2012, the European Commission released a Communication on the implementation of the Services Directive 2006/123/EC in the Member States, accompanied by staff working documents which summarise the results of the "Performance Check" exercise. In that exercise carried out in 2011/2012, the Commission had asked the Member States to explain to what extent different scenarios of cross-border tax advisory services would be allowed in their countries.

In the Communication, the Commission sets out its priorities in the implementation of the Services Directive and related pieces of EU legislation like the Professional Qualifications Directive and the E-Commerce Directive.

The document SWD(2012)148 evaluates on a coun-

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try-by-country basis how the implementation of the Services Directive has been carried out (summaries: pp.48 ff; detailed assessments pp.90 ff).

Prohibited restrictions:

The Commission states that it will pursue a "zero tolerance policy" with regard to restrictions clearly prohibited by the Directive. This would apply to the following provisions of law concerning tax advisers:

Austria: the obligation of tax advisers to obtain professional indemnity insurance cover with an insurance company authorised to practice in Austria (i.e. excluding most foreign insurances);

Belgium: the general notification requirement for all cross-border service providers. This is already pending with the ECJ, case C-577/10;

France: total prohibitions of (certain forms of) commercial communications for (tax) lawyers;

Romania: the obligation to have an establishment in Romania and to obtain authorisation before being able to provide tax advice (i.e. excluding the possibility of offering temporary cross-border tax services.

Another area where the Commission has identified infringements of EU law is online services. Where a Member State imposes requirements on its own service providers or on temporary cross-border services from other Member States, it may not impose these requirements on e-services from another Member State. This applies to qualification requirements, membership in professional bodies, notification requirements, professional indemnity insurance etc.

Furthermore, the Commission underlines that specific requirements for regulated professions that Member States have introduced (like tariffs or legal form requirements) do not apply to temporary or occasional cross-border services from other Member States unless they concern professional qualifications and titles.

Concerning professional indemnity insurance, the Commission avoids a clear statement that insurance requirements in national law will not apply to service providers that temporarily and occasionally practice cross-border (which has so far been the position of the Commission).

The Commission merely states that existing insurance in the home country should be accepted by the host country. It becomes apparent that the Commission has identified a problem in the availability of insurance covering professional activity abroad and will look for solutions, involving the insurance sector, which could result in legislative proposals if there should be no progress by the end of 2013.

For capital ownership requirements and restrictions to temporary services, the Commission is planning a peer review process starting in 2012 until mid-2013.

Areas in which Member States enjoy some degree of discretion:

Beyond clearly prohibited restrictions, Member States enjoy discretion within the limits of proportionality (Art.15 Services Directive). Here, the Commission is trying to convince Member States to opt for removal of restrictions, seeing a need to re-assess company form and capital ownership requirements where they exist.

The Commission will continue to make recommendations concerning regulated professions and restrictions to cross-border services in its annual country specific recommendations in the context of the "European Semester" for the coordination of economic policies.

Lastly, the Commission explains that it has no plans to modify the Services Directive before it has been properly implemented.

READ MORE *(click to open)*:

Communication COM(2012)261: **EN** (all EU languages)

Staff working documents :

- SWD(2012)147; result of the "Performance Check": **EN** (all EU languages)
- SWD(2012)148; detailed findings of the "Performance Check", country by country: **EN** (all EU languages)

IMPRESSUM

Confédération Fiscale Européenne
-The European Federation of Tax Advisers-
188A, Av. de Tervuren
B-1150 Brussels

Editor: Rudolf Reibel, LL.M., CFE Fiscal and Professional Affairs Officer

If you have any suggestions or questions, please feel free to contact the editor:
brusselsoffice@cfe-eutax.org

Layout: Laëtitia Bois, Administrative Assistant

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