European Tax Report
European Professional Law Report
March 2012

NEWS - DIRECT TAX

Commission report on Savings Directive – Commission accepts bilateral agreements with Switzerland

For the European Commission´s report on the Savings Tax Directive of 1 March 2012 and Commissioner Algirdas Šemeta´s letter to the Council presidency arguing against bilateral savings tax agreements of EU member states with Switzerland, please see the **European Tax & Professional Law Report February 2012**. Please note however that on 17 April 2012, the Commission accepted modified versions of these bilateral deals. More details will follow in the April issue of this Report.

READ MORE *(click to open)*:

Report COM (2012)65: **EN** **FR** **DE**

Staff working document: **EN**

OECD recommends action against untaxed monies due to international tax law differences

For the OECD report titled "Hybrid Mismatch Arrangements: Tax Policy and Compliance" of 5 March 2012, please see the **European Tax & Professional Law Report February 2012**.

READ MORE *(click to open)*:

OECD report: **EN** **FR**

Commission refers Hungary to Court for telecom tax

On 22 March 2012, the European Commission decided to refer Hungary to the European Court of Justice for continuing to impose a specific tax on the turnover of telecoms operators. This tax at a rate between 0% and 6.5% on the basis of gross revenues was one element of a „crisis tax" introduced in October 2010 on three major sectors of the economy (retail commerce, telecoms and energy) to improve Hungary's budgetary position. The Commission considers this tax to be illegal because EU telecoms rules allow sector-specific charges only to cover the specific costs of regulating the sector, and not to generate additional revenue for the central budget. A reasoned opinion had been sent to Hungary in September 2011, see **CFE European Tax Report 8/2011**. Other infringement proceedings concerning telecom taxes have been initiated against France and Spain.

READ MORE *(click to open)*:

Press release (Hungary): **EN** **FR** **DE** **HU**

2011 Press release (France, Spain): **EN** **FR** **DE** **ES**

Commission requests UK to end corporate exit taxes

On 22 March 2012, the European Commission has requested the United Kingdom to amend its legislation providing for exit taxes on companies. The UK legislation at stake results in immediate taxation of unrealised capital gains in respect of certain assets when the seat or place of effective management of a company is transferred to another EU/EEA State while a similar transfer within the UK would not generate any such immediate taxation and the relevant capital gains would only be taxed once they have been realised. The Commission stresses that exit taxes may breach the freedom of establishment as they make it more expensive to transfer a company seat or place of effective management to another member state than to another domestic location. The Commission's request takes the form of a reasoned opinion (second step of EU infringement proceedings). In the absence of a satisfactory response within two months, the Commission may refer the United Kingdom to the EU Court of Justice.

READ MORE *(click to open)*:

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

Commission asks Sweden to stop discriminating foreign pension funds

On 22 March 2012, the European Commission asked Sweden to amend its tax rules on pension funds. The Swedish legislation at stake discriminates against non-resident pension funds when taxing dividends distributed in Sweden: Dividends paid to foreign pension funds by Swedish companies are subject to a withholding tax (of 30% or -where double tax agreements exist- 15%) without any deduction possibility. Resident pension funds are exempt from the withholding tax on dividends as well as from corporation tax. They are subject to 15% tax based on a notional calculation of their yield and have the possibility to deduct costs. As a result of this, the effective tax rate on dividends received by resident pension funds will frequently be lower than the 15% tax rate.

The Commission considers this to be discriminatory against non-resident pension funds and to be contrary to EU rules on the free movement of capital. In addition, it can deter non-resident pension funds from investing in Sweden. The request takes the form of a additional reasoned opinion (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. The first reasoned opinion was sent on 28 October 2010 (see **CFE European Tax Report 9/2010**).

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

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

A circular cannot remedy a discriminating legal provision: Commission refers Germany to ECJ over group companies treatment (“Organschaft”)

On 22 March 2012, the Commission decided to refer Germany to the European Court of Justice for excluding certain non-resident companies from the benefits of its corporation tax fiscal unity regime (“Organschaft”). Under German law, a company cannot be part of a fiscal unity if its registered office is outside Germany even if its place of effective management is in Germany. In practice, even if such a company would be fully liable to pay tax in Germany, it would be deprived from the tax benefits of the fiscal unity regime. One of the benefits of this regime is the domestic offsetting of profits and losses within the fiscal unity in Germany. This breaches EU rules on the freedom of establishment. Germany published an administrative circular in 2011 to eliminate the infringement. However, according to the case law of the Court of Justice, an infringement caused by a legal provision can only be effectively eliminated by amending the law and not by a mere circular. As Germany did no change its law within one year, the Commission has decided to pursue the procedure.

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

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

Belgium asked to revise taxation of property income from abroad

On 22 March 2012, the European Commission has asked Belgium to amend the way it taxes property income from sources outside Belgium.

Belgian tax legislation provides for distinct ways of assessing income from property assets. Income from abroad considered for the purposes of taxation is assessed at around 50% of the market value, whereas domestic property income is assessed by another method, giving a lower level of around 20-25% of the market value. The Commission regards this distinction as discriminatory and therefore contrary to the TFEU Treaty which prohibits in principle all restrictions on the movement of capital between member states and between member states and third countries. This reasoned opinion is asking Belgium to amend its legislation within two months. In the absence of a satisfactory response within this time-limit, the Commission may refer Belgium to the EU Court of Justice.

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

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

Commission requests Belgium to remove two discriminations in personal income tax

On 22 March 2012, the European Commission has requested Belgium to amend regional and federal laws that discriminate against non-resident taxpayers whose income is entirely or almost entirely earned in Belgium or Wallonia:

A regional law allows for a reduction in personal income tax when citizens buy shares or bonds of in-

NEWS - DIRECT TAX

vestment funds in Wallonia. Residing in the Walloon region is a condition to benefit from this reduction. The Commission considers that excluding non-residents who earn all or almost all of their income in the Walloon Region from the benefit of the reduction is discriminatory.

A Belgian federal law grants a tax credit for resident taxpayers whose yearly income does not exceed € 18,730. Non-residents earning all or almost all of their income in Belgium and meeting the same condition of low income earnings are excluded from the benefit of the tax credit.

The Commission is of the opinion that both cases breach EU rules by restricting the free movement of workers. The second case also constitutes an unjustified restriction to the freedom of establishment. The Commission‘s requests take the form of reasoned opinions (second step of EU infringement proceedings). In each case, in the absence of a satisfactory response within two months, the Commission may refer Belgium to the EU Court of Justice.

READ MORE *(click to open)*:

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

OECDs “Global Forum on Transfer Pricing” to simplify transfer pricing rules

At OECD’s first “Global Forum on Transfer Pricing” on 28 March 2012, tax officials from 90 countries agreed on the need to simplify transfer pricing rules, strengthen the guidelines on intangibles issues and improve the efficiency of dispute resolution. Transfer pricing rules determine how international transactions within a multinational company must be priced to ensure each country receives its fair share of tax. Based on the OECD and UN model tax conventions, the rules are meant to eliminate double taxation and ensure better compliance by companies. OECD seeks to simplify these rules and to make them more robust. This is particularly critical in the area of intangible assets, whose location may have a strong impact on tax revenues.

During the coming year, the Global Forum will carry out a transfer pricing risk assessment, developing a detailed “how-to” manual which will establish good practices for governments when they assess transfer pricing risk at the beginning of an audit.

READ MORE *(click to open)*:

OECD news release: **EN**

EP ECON Committee favours making the CCCTB mandatory for all companies but SMEs

On 21 March 2012, the ECON Committee of the European Parliament voted on the report of Belgian MEP Marianne Thyssen (EPP) on the CCCTB proposal. The report contains some essential changes to the European Commission´s proposal of 16 March 2011 which include mandatory application, in a first step after two years, for all European companies and cooperatives and in a second step after five years, all companies except for micro-companies and SMEs. Although tax rates shall not yet be addressed, the Commission is asked to reconsider this after 5 years, along with a possible mandatory application for all companies.

Some limitation to the deductibility of losses incurred before opting into the CCCTB has been proposed; those losses shall be deductible only from the part of the tax base to be taxed in the state where the losses have incurred.

Profit distributions, income from disposal of shares or income from a permanent establishment in a non-member state shall only be exempt from corporate tax if they have been taxed at source at a rate of at least 70% of the average EU statutory corporate tax rate; the threshold proposed by the Commission is 40%. The ECON wants to apply the same threshold to non-distributed income of controlled foreign companies.

For the apportionment formula, a lighter weighting of the sales factor has been suggested which, according to the ECON, should be weighted at only 10% instead of an equal weighting with the labour and assets factor.

Further changes include:

- The anti-abuse rules should apply to artificial transactions carried out “mainly” (not: only) for the purpose of avoidance.

- Member states shall be empowered to remedy potential tax losses of local and regional entities.

- A CCCTB Forum with companies´ and member states´ participation should be set up.

As to the political feasibility, the ECON favours an enhanced cooperation of countries willing to introduce

NEWS - DIRECT TAX

the CCCTB if unanimity cannot be achieved in the EU Council. The CCCTB should then apply at least in the Eurozone.

The decision of the EP is not binding for the Council.

READ MORE *(click to open)*:

Version adopted in IMCO: **EN** (all EU languages)

CCCTB Directive proposal: **EN** (all EU languages)

UN Ecosoc launches new Model Double Tax Convention

On 15 March 2012, the United Nations´ Economic and Social Council (Ecosoc) has launched its 2011 update of its 1999 Model Double Tax Convention. The model is designed particularly for double tax treaties between developed and developing countries trying to take more account of the interest of developing countries than the OECD Model Convention does. While many provisions in the OECD and UN model conventions overlap, the UN Model would generally preserve a greater tax share for the country where an activity takes place and a smaller share for the country where the investing company is established. This should facilitate entering into bilateral tax treaties for developing countries and help them to collect revenue to reach their development goals. The UN are also working on a practical transfer pricing manual for developing countries, taking the same approach.

READ MORE *(click to open)*:

2011 UN Model Double Tax Convention: **EN**

Documents from the 15 March meeting on UN website: **EN**

Ecosoc Newsletters **2/2012** and **3/2012**

NEWS - INDIRECT TAX

As EU keeps on arguing for FTT, German “EU stamp duty” proposal surfaces

On 23 March 2012, the European Commission has presented calculations demonstrating how in 2020, the EU Financial Transaction Tax could generate an amount of 81 billion € two thirds of which would, according to the Commission´s multiannual financial framework proposal of June 2011, flow directly into the EU budget, reducing member states´ direct contributions to the EU by about 50%. This is based on the –however unlikely- assumption that all EU member states participate in the FTT and on the current growth forecasts.

Meanwhile, plans for a modified financial sector tax, supported by Germany, have been presented to EU Finance Ministers on 30 March. This tax would be closer to the existing UK stamp duty and meant as a fist step with the aim to extend taxation to other instruments like derivatives at a later state. It has reportedly been received with interest from several governments.

READ MORE *(click to open)*:

Press release on FTT: **EN** **FR** **DE** **PL**

STATE AID / INDIRECT TAX

General Court annuls Commission´s state aid decision ordering France, Ireland and Italy to recover exemption from excise duty

Based on an authorisation by the EU Council, the mentioned three member states granted exemptions from the excise duty on mineral oils used for the production of alumina. As there is only one producer of alumina in these three countries, the Commission had considered that these exemptions were state aid incompatible with the internal market and had ordered the three member states to recover the excise duty. The EU General Court (formerly Court of First Instance) held that the Commission, if it considered the exemption to be contrary to EU law, should have taken action against the EU Council to end the exemption but the need to preserve coherence of EU law prevented the Commission from ordering recovery from the beneficiaries.

STATE AID / INDIRECT TAX

READ MORE *(click to open):*

Judgment in cases T-50/06 a.o.: **EN** (all EU languages)

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

ADMINISTRATIVE COOPERATION AND FIGHT AGAINST TAX FRAUD

EP proposes changes to proposed Regulation on Administrative Cooperation in Excise Duties

On 29 March 2012, the European Parliament adopted its legislative resolution on the European Commission´s proposal of 14 November 2011 for a Council regulation on Administrative Cooperation in the field of excise duties. Rapporteur on the matter was MEP David Casa (EPP, Malta). The Parliament´s opinion is not binding for the EU Council who will have to decide on the proposal unanimously.

READ MORE *(click to open):*

Legislative resolution: **EN** (all EU languages)

Regulation proposal: **EN** (all EU languages)

COMPANY LAW

ECJ: Conclusion of tax proceedings pending before Italian courts for more than 10 years is legal

On 29 March 2012, the European Court of Justice has accepted an Italian law concluding tax proceedings that have been pending for more than 10 years before two Italian courts as an exceptional measure to reduce the length of tax proceedings. Concerned are appeals before the Corte Suprema di Cassazione and the Commissione Tributaria Centrale in which the fiscal administration has been unsuccessful in two instances. The cases will be closed without examination of the appeal. Cases before the Commissione Tributaria Centrale will be automatically concluded while cases before the Corte Suprema di Cassazione can be concluded upon payment of an amount equivalent to 5% of the value of the claim. The two ECJ judgments concern the situation in direct tax (C-417/10) and VAT (C-500/10). In the first case, the Court had to decide on whether such measure by the Italian State qualifies as state aid which was negated as it lacked selectivity. In the second, the question was whether the Italian measure was contrary to the member states´ obligation to ensure effective collection of VAT as part of the EU´s own resources. The Court held that the measures were justified by the need to observe the principle that judgments must be delivered within a reasonable time, stressing the exceptional nature of the measure.

READ MORE *(click to open):*

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

Judgments C-417/10: **EN** and C-500/10: **EN** (all EU languages available)

OTHER EU POLICY

25 EU member states adopt “Fiscal Compact”

For the “Fiscal Compact” Treaty signed on 2 March 2012 by 25 EU member states, please see the **European Tax & Professional Law Report February 2012**.

READ MORE *(click to open):*

Text of the Treaty on European Council website (right column): **all languages**

OTHER EU POLICY

OECD publishes economic survey on the EU

In March 2012, the OECD has issued a 91-page study recommending economic reforms to the EU and its member states at the centre of which should be work towards the completion of the single market, in particular the implementation of the key actions identified by the European Commission in its 2011 "Single Market Act" (see **CFE European Professional Law Report 2/2011**). As regards taxation, the report identifies double taxation on pensions benefits and discriminatory taxation of transfers of cross-border pension capital as relevant obstacles to citizens´ cross-border mobility. Also a coherent and efficient approach to cross-border corporate taxation was needed, an important of which would be the CCCTB. Moreover, the report stresses the need for an overhaul of the system of indirect taxation.

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

OECD News Release: **EN** **FR**

Read-only version: **EN**

EVENTS

Brussels Tax Forum on Tax Policy under a Common Currency

On 5 and 6 March 2012, the European Commission hosted the Brussels Tax Forum themed "Tax Policy under a Common Currency".

EU tax Commissioner Algirdas Šemeta, in his opening speech, advocated a shift of taxation from labour to harmful tax bases. In this move, EU coordination should go beyond exchange of practices but create a constructive peer pressure. MEP Sharon Bowles (S&D, Liberal Democrats), chair of the EP´s ECON Committee, argued in the same direction, stressing the spirit of good cooperation between EP and the Commission in taxation matters. She demanded that member states scrutinise their system of tax expenditures and reduce their number which is currently at 700 in the whole EU.

From the speakers, André Sapir from the Université Libre of Brussels expressed the view that he did not expect the Fiscal Compact Treaty to solve the crisis as it left aside other important factors like private debt and banking issues. The fact that the treaty focuses so strongly on public debt was to some extent due to the coincidence that Greece was the first Eurozone country to fail. It was difficult to decide on the degree of discretion member states should have to deviate from the stability rules in times of negative growth. There should be an authority to decide thereon. The monetary union would have to become a fiscal and banking union.

Vito Tanzi, former Director of the IMF´s Fiscal Affairs Department gave a retrospection of changing tendencies in monetary policy.

Ruud de Mooij, economist at the IMF, explained that single countries in a monetary union could no longer regain competitiveness simply by devaluating their national currency. An alternative to achieve the same effect would be the lowering of social contributions. This could be counterfinanced through a reduction of VAT exemptions considering that for VAT, the policy gap (meaning the difference between the tax that could be and the tax that is collected) was higher than the compliance gap. Addressing the question whether social contribution cuts should be applied across the board or favour particular persons or enterprises, de Mooij argued that favouring low-skilled workers could be effective while favouring new employment or small firms could set wrong incentives and encourage deadweight effects or even abuse. A solution could be progressive rates in social contribution.

Anna Lipinska, economist at the US Federal Reserve Board, added that a tax shift from labour to VAT would also enhance competitiveness as labour is always a domestic "product" while a VAT increase would also hit imported products.

Francesco Franco from Universidade Nova of Lisbon reported on the current fiscal consolidation efforts of Portugal.

Thies Büttner from Friedrich-Alexander Universität of Nuremberg-Erlangen explained the idea of a tax revenue sharing among member states that would reduce tax competition through transfer payments. An advantage to the current system would be a redistribution that is rule-based and not politically negotiated. Care however would have to be taken not to discourage the generation and effective collection of revenues. A revenue sharing on a tax-by-tax basis would require harmonisation of tax law.

Massimo Bordignon from the Università Cattolica of Milan argued in favour of a fiscal union which would not necessarily have to be a transfer union. Bordignon considered that the dual decision making procedure (supranational in most, intergovernmental in some like fiscal matters) in the Euro area had contributed to deepening the crisis. The steps the Economic and Monetary Union has taken were not enough to pro-

EVENTS

vide a long-term solution. The new balanced budget rules of the Fiscal Compact were pro-cyclical, unlike the US rules which are “only” golden rules. While the Euro-Plus Pact had the disadvantage of being a mere political commitment, the European Stability Mechanism had a legitimacy problem as Parliaments were not involved. In achieving a long-term solution, a two-speed Europe was probably unavoidable.

David Wildasin from the University of Kentucky reminded that competition for taxpayers did not only take place in tax bases and rates but also in state expenditure, the regulatory framework and the functioning of the legal system. Thus, a “race to the bottom” leading to ever-lower tax rates and shrinking revenues would not occur as easily as predicted by some.

READ MORE *(click to open)*:

Speeches and presentations: **EN**

Streaming:
- 5 March: **EN**
- 6 March: **EN**
- Press conference: **EN**

PROFESSIONAL LAW

EP IMCO Committee votes on EU Standardisation

On 21 March 2012, the European Parliament´s IMCO (Internal Market and Consumer Protection) Committee voted on the proposal for an EU Standardisation Regulation. The exemption of the intellectual services rendered by tax advisers and other liberal professions from the Regulation for which the CFE has lobbied in its Opinion Statement of 24 January 2012, although favoured by a number of MEPs, has no longer been pursued in the compromise proposal.

READ MORE *(click to open)*:

Version as adopted in the IMCO: available from the **CFE Office**

CFE Opinion Statement: **EN**

OTHER INTERNAL MARKET POLICY

EP IMCO Committee votes on IMI Regulation

On 20 March 2012, the Internal Market and Consumer Protection Committee (IMCO) of the European Parliament voted favourably on the proposal for a Regulation extending the scope of the Internal Market Information System (IMI) to other areas than those covered by the EU Services Directive. IMI is an information exchange tool between competent authorities in EU member states that uses translated standard questions and answers and plays a particular role in facilitating recognition and supervising compliance where professionals are active cross-border.

The EP however scrapped the possibility of the Commission to further extend the use of IMI by delegated acts meaning that changes of the scope of IMI would require a revision of the Regulation itself and would thus be subject to the consent of the EP. The Council debate is scheduled for 30 May and the EP plenary vote for 2 July 2012.

READ MORE *(click to open)*:

IMI Regulation proposal COM(2011)522: **EN** (all EU languages)

Version as adopted in IMCO: [not yet published] (all EU languages)

IMPRESSUM

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