Editors: José Luís da Cruz Vilaça, Carlos Botelho Moniz,
Rita Leandro Vasconcelos and Alberto Saavedra

Taxation, State aid and distortions of competition

XXVIII FIDE CONGRESS
Lisbon/Estoril
(23-26 May 2018)
Congress Proceedings
Vol. 2



ALMEDINA

Taxation, State aid and distortions of competition

Fiscalité, aides d'état et distorsions de la concurrence

Steuern, staatliche Beihilfen und Wettbewerbsverzerrungen

Taxation, State aid and distortions of competition

Fiscalité, aides d'état et distorsions de la concurrence

Steuern, staatliche Beihilfen und Wettbewerbsverzerrungen

CONGRESS PROCEEDINGS VOL.2

Editors:
José Luís da Cruz Vilaça, Carlos Botelho Moniz,
Rita Leandro Vasconcelos and Alberto Saavedra

ALMEDINA

TAXATION, STATE AID
AND DISTORTIONS OF COMPETITION
FISCALITÉ, AIDES D'ÉTAT
ET DISTORSIONS DE LA CONCURRENCE
STEUERN, STAATLICHE BEIHILFEN
UND WETTBEWERBSVERZERRUNGEN

COORDENAÇÃO
José Luís da Cruz Vilaça, Carlos Botelho Moniz,
Rita Leandro Vasconcelos and Alberto Saavedra
EDITOR
EDIÇÕES ALMEDINA, S.A.
Rua Fernandes Tomás, nºs 76-80
3000-167 Coimbra
Tel.: 239 851 904 · Fax: 239 851 901
www.almedina.net · editora@almedina.net
DESIGN DE CAPA
FBA.
PRÉ-IMPRESSÃO
João Jegundo
IMPRESSÃO E ACABAMENTO

Maio, 2018
DEPÓSITO LEGAL

Os dados e as opiniões inseridos na presente publicação são da exclusiva responsabilidade do(s) seu(s) autor(es).
Toda a reprodução desta obra, por fotocópia ou outro qualquer processo, sem prévia autorização escrita do Editor, é ilícita e passível de procedimento judicial contra o infrator.

ALMEDINA | GRUPOALMEDINA

BIBLIOTECA NACIONAL DE PORTUGAL – CATALOGAÇÃO NA PUBLICAÇÃO

XXVIII FIDE Congress – Lisbon/Estoril (23-26 May 2018)

FIDE (Fédération Internationale pour le Droit Européen / International Federation for European Law)
XXVIII FIDE Congress; [org.] APDE (Associação Portuguesa de Direito Europeu). – 3 v.
V. 2: p. – ISBN 978-972-40-7479-5
Editors: José Luís da Cruz Vilaça, Carlos Botelho Moniz,
Rita Leandro Vasconcelos and Alberto Saavedra

CDU 34

High Patronage

COM O ALTO PATROCÍNIO
DE SUA EXCELÊNCIA

UNDER THE HIGH PATRONE OF THE
PRESIDENT OF THE PORTUGUESE REPUBLIC

O Presidente da República

Institutional Supporters

CVRIA

European Commission

AUTORIDADE DA CONCORRÊNCIA
PORTUGUESE COMPETITION AUTHORITY

CASCAIS
The Charm of the Atlantic Coast

Marinha

FUNDAÇÃO CALOUSTE GULBENKIAN

UNIVERSIDADE NOVA DE LISBOA

REPÚBLICA PORTUGUESA
CULTURA

PATRIMÓNIO CULTURAL
Direção-Geral do Património Cultural

MNAA
MUSEU NACIONAL DE ARTE ANTIGA

Palácio Nacional da Ajuda

MOSTEIRO DOS JERÓNIMOS

Museu Nacional dos Coches

jurisnova
Associação da Faculdade de Direito da Universidade Nova de Lisboa

Premium Sponsors

CASINO ESTORIL

ctt

edp

Jerónimo Martins

Santander

Premium Partners

ABREU ADVOGADOS

CUATRECASAS

GARRIGUES

GA_P
Gómez-Acebo & Pombo

Linklaters

Luís Silva Morais
Sérgio Gonçalves do Cabo
& Associados, SP, RL
Sociedade de Advogados

MORAIS LEITÃO
GALVÃO TELES
SOARES DA SILVA

PLMJ
ADVOGADOS, SP, RL
50 YEARS
By your side.

SOCIEDADE DE ADVOGADOS, SP, RL
ROGÉRIO FERNANDES FERREIRA
& ASSOCIADOS

URÍA MENÉNDEZ
PROENÇA DE CARVALHO

VdA VIEIRA DE ALMEIDA

Congress Partners

C/M/S/ Rui Pena & Arnaut

Sérvulo & Associados | Sociedade de Advogados, SP, RL

SRS ADVOGADOS
25
CREATING VALUE
1992-2017

TELLES
TELLES DE ABREU | ADVOGADOS

Other Sponsors and Contributors

FIDELIDADE
SEGUROS DESDE 1808

glintt

hmR
HEALTH MARKET RESEARCH

SONAE

Wolters Kluwer

General Rapporteur:

Raymond Luja

Institutional Rapporteurs:

Julia Rapp and Ramona Ianus

Editors:

José Luís da Cruz Vilaça, Carlos Botelho Moniz,
Rita Leandro Vasconcelos and Alberto Saavedra

Members of the board of APDE
(Portuguese Association for European Law):

José Luís da Cruz Vilaça, Carlos Botelho Moniz, Nuno Piçarra,
Rita Leandro Vasconcelos, João Paulo Teixeira de Matos,
Nuno Ruiz and Miguel Gorjão-Henriques

Executive Committee:

Alberto Saavedra, Joana Schmid Moura, João de Lemos Portugal,
Filipa Pimentel, Leonor Bettencourt Nunes,
Margarida Rosado da Fonseca, Margarida Sameiro,
Piedade Castro e Sousa and Teresa Côrte-Real

INTRODUCTION



INTRODUCTION

I. The XXVIII FIDE Congress in Estoril

It is not for nothing that Estoril, situated on the coast of the Atlantic Ocean and at the westernmost point of continental Europe, is the splendid venue of the XXVIII FIDE Congress. At the time when Lisbon was, during the Second World War, one of the most desired destinations for those trying to escape the slaughter ravaging the European continent, Estoril became the vibrant center of secret diplomacy as well as the preferred *lieu d'exil* for crowned heads and dignitaries. Nowadays, being on the outer edge of the European Union, Estoril's location again demonstrates the symbolic value of the region. It is not only a gateway to Europe and European values, represented to a large extent by European law, but it is also a platform from which to see beyond local issues. Just as in previous centuries, when the Portuguese coast served Vasco da Gama and Cabral as a starting point to set sail on their expeditions, we too are now embarking, as lawyers and academics, on an arduous journey that should lead the current reflection on European law to face the internal and external challenges of the Union – nowadays perhaps more than ever before.

Given the profile and location of the XXVIII FIDE Congress, it is not surprising that the organisation of this event has been entrusted to the Portuguese Association for European Law (APDE), which was created in 1984 with the aim of contributing to the dissemination of European law in Portugal. At the same time the APDE, in its capacity as a member of the FIDE, ensures the connection of the Portuguese legal community to the ongoing debate about the most important topics of the European Union.

II. FIDE

Since 1961, FIDE (Féderation Internationale pour le Droit Européen / International Federation for European Law) has brought together the European law

associations of each Member State, of candidate countries, as well as those of Norway and Switzerland.[1] For the last 50 years of its existence, as the common umbrella organization, it has been universally recognized by the international legal community as having a remarkable influence on the development and shaping of both the context and the culture of European Union law. The biennial FIDE Congresses gather several hundred lawyers and professionals from different backgrounds. They are the most important event of reflection and dialogue on EU law and policies, as regards both the legislative and policy developments in the European Union and their application by the EU and national courts. Together with their related publications, the reports compiled by FIDE, published in rich and dense volumes full of information and reflection, the Congresses generate an invaluable treasury of academic writing and debate; landmarks in the study of the core themes in European law and the case law of the Court of Justice of the EU, widely consulted by academics, practitioners and judges.[2]

Previous FIDE Congresses, hosted by numerous European national, cultural and academic capitals, have covered a vast gamut of fundamental and economic topics of vital interest for the European Union.[3] The last Congress in Budapest in 2016 put a special emphasis on the problems of European banking union, private enforcement and collective redress in European competition law, as well as on the division of competences and regulatory powers between the European Union and the Member States. All the chosen topics have been comprehensively analysed and discussed. This time, the XXVIII Congress in Estoril aims to go beyond, and significantly develop, the previous work. The adaptability of the thematic scope of the FIDE's Congresses and publications to the current political and economic context constitutes its distinctive feature.

Beside the unquestionable pertinence of the choice of topics, one of the greatest values of FIDE seems to be its well-established, varied and multilevel dimension. It is not only an organisational structure. It is an institutionalised federation of legal experts – *Great Minds of European Law*[4], empowered to shape its norma-

[1] Statute of the FIDE is available at https://www.fide-europe.org/xms/files/ABOUT_FIDE/Statutes_of_FIDE_FIDE_V3.pdf (10.4.2018).

[2] See Julia Laffranque, FIDE – Uniting Great Minds of European Law: 50 years of the International Federation of European Law, Juridica International XVIII/2011, pp. 173-181; Alexandre Bernier, Constructing and Legitimating: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950-1970, in Contemporary European History, 2012, pp. 399-415

[3] For more information concerning previous and current FIDE Congresses see https://www.fide-europe.org/Congresses/ (10.4.2018).

[4] Julia Laffranque, op.cit., pp. 173-181, pp. 173-181. The expression, coined by Professor Julia Laffranque, served as a basis of the motto of the XXVI FIDE Congress ('FIDE – Uniting Great Minds of EUropean Law'). Its modified version has also been used by the authors of the Introduction to the XXVI FIDE Congress Publication – Professor Ulla Neergaard, Professor Catherine Jacqueson, Commissioner Nina

tive and cultural framework. As a research tool in understanding the diversity of legal reality, the Congresses and the publication of the results allow experts to share the knowledge they have gained, including with the younger generation of scholars in the PhD seminars. In this regard FIDE is where expertise and dialogue meet head on.

With such an important *spiritus movens* as the development of European legal culture and identity, FIDE is also burdened with responsibility. In times of numerous challenges facing the European Union, it undertakes to fulfil its difficult tasks as well as it can. The XXVIII Congress in Estoril, along with the present publication, serve as a preeminent example of how FIDE can fulfil its noble objectives.

III. Topics

As is the custom, for each of the three topics of the current FIDE biennial work, a questionnaire has been prepared by the General Rapporteur, who also undertakes the responsibility of coordinating the national reports, which have been drafted by experts appointed by the national associations of FIDE. All these reports, together with the general reports prepared by the General Rapporteurs, and accompanied by institutional reports drafted by representatives of the EU institutions, constitute the subject of the present collection.

The themes of the XXVIII Congress have been carefully chosen, accordingly to their general interest, topicality, relevance for the process of European integration and practical ability to attract the participants and a wider audience. '*World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it*'[5] – these words, uttered by Robert Schuman in 1950, are still up-to-date. The current necessity to balance openness and safety in the field of European law and policy provides a particular justification for the selection of this year's topics.

1. The internal market and the digital economy[6]

In the new digital era, the economy of new media may be considered as the single most important driver of innovation, competitiveness and growth in Europe and

Holst-Christensen, Professor Jens Hartig Danielsen and Professor Grith Skovgaard Ølykke who adopted it for one of the headlines ('A Collaboration of Great Minds of EUropean Law') in order to stress the relationship between EU law and European law.

[5] Robert Schuman Declaration, 9 May 1950.

[6] General Rapporteur: Professor Peggy Valcke, KU Leuven – CiTiP (Centre for IT & IP Law) – imec (BE), visiting professor at Tilburg University (NL) and Bocconi University Milan (IT). Institutional Rapporteur: Professor Piedade Costa de Oliveira, member of the Legal Service of the European Commission, visiting professor at University of São Paulo (Brazil).

the world. Internet and e-commerce, the new sharing economy and peer-to-peer transactions, not to mention media and telecoms across the borders, are thus at the heart of the discussion and of legislative initiatives at the national and European level. The issue of governance in the digital single market has also become one of the Commission's main priority policy areas for 2014-2019, illustrated by the Digital Single Market Strategy of May 2015[7]. Following its assumptions, the present topic includes in the first place the better access by consumers and businesses to new markets, online goods and services across Europe. In this regard, the necessity to eliminate key differences between the online and offline worlds and hence to remove obstacles to cross-border activity is of the highest importance. Second, the examination of the topic will address the development of the appropriate conditions for digital network and services. A particular emphasis has been placed on high-speed, secure and reliable infrastructures and content services, as well as on the tailor-made regulatory conditions for innovation, investment, fair competition and a level playing field. The final objective was to discuss the potential for growth of the digital economy in Europe, by analysing the desirability of investment in ICT infrastructures, cloud computing and Big Data, research innovation, accuracy of public services and industrial effectiveness.

Besides the study of the digital single market, its infrastructure and electronic commerce, the topic focuses on the existing and recently amended legal instruments, which cannot in turn be dissociated from the necessary protection of consumers, personal data and fundamental rights – freedom of expression and the right to privacy – information mass storage, confidentiality of communications and global security. Judicial review and the increasing case law on these matters are at the core of reflections on the topic.

As the general report shows, the major problem in this area is the risk of over-regulation in what is a highly changeable and unpredictable field. As such, it requires well-coordinated regulatory instruments but cannot ignore the growing diversity of the relevant activities. From the institutional perspective, it seems important, however, to point out the tendency of the Union legislature in all the above-mentioned areas to resort to regulations as a harmonisation tool, which seems to illustrate the political will to adopt uniform rules within the European Union.

2. Taxation, state aid and distortions of competition[8]

According to the existing case law on tax schemes and State aid, the problems of the tax rulings and their influence on competition, as well as the outcome of the

[7] COM (2015) 192 final.

[8] General Rapporteur: Professor Raymond Luja, Maastricht University (NL), fiscal state aid counsel to Loyens & Loeff N.V., Amsterdam (NL). Institutional Rapporteurs: Ms. Julia Rapp and Ms. Ramona Ianus of European Commission.

Commission's investigations, and pending or future Court's proceedings, are of the utmost importance for the current internal market legal policy. In this regard the present topic encompasses the relationship between such notions as profit shifting and harmful tax competition, double taxation and double non-taxation, including the OECD model instruments. It also provides an insight into the territorial reach of such dealings and remedies.

As the general report shows, both national and international tax systems still suffer from shortcomings, in practice substituting tax harmonization by State aid rules. The growing awareness of the case law and the learning-by-doing processes within the Commission nonetheless seem to be improving the effectiveness of the State aid regime. In the light of the fact that the future of unconditional tax exceptions in the European Union is being questioned, as well as the success of anti-tax avoidance legislation, the need for advance tax rulings is about to increase. From the institutional point of view, the role of the Commission is prominent in this respect, but it can only properly be played on the basis of guidance provided by the Court of Justice of the European Union.

3. The external dimension of the EU policies: horizontal issues; trade and investment; Playstation and asylum[9]

Last but not least, the external aspects of European policies merit our close attention. The evolution of the international community in times of political and military tensions, which have already given rise to significant human and social costs that are dramatically affecting future European Union policies, deserves to be urgently addressed by respected European and international figures.

First of all, an update on the division of powers and competences between the EU institutions and Member States and their respective roles on the international sphere will be required. This would provide a deep follow-up and focused analysis on one aspect that was addressed in the context of topic III in the Budapest XXVII Congress. Secondly, the topic focuses on the international agreements currently being negotiated by the European Union on trade liberalization, market access and investment protection, such as TTIP and CETA, within the context of other regional or global international agreements.[10] In the light of

[9] General Rapporteurs: Professor Christine Kaddous, Université de Genève (CH), visiting professor at the College of Europe (BL/PL) and at Université Paris II Panthéon-Assas (FR); Professor Nuno Piçarra, Professor at the Law Faculty of the Nova University of Lisbon; member of the Academic Network for Legal Studies on Immigration and Asylum in Europe (*Odysseus*) and of the management board of the European Union Agency for Fundamental Rights. Institutional Rapporteurs: Mr. Hubert Légal and Mr. Álvaro de Elera, Legal Service of the Council; Mr. Freddy Drexler and Mr. Anders Neergaard, Legal Service of the European Parliament.

[10] At the time of writing, the rapporteurs did not have access to the Court of Justice judgment in Case C-284/16, *Slovak Republic v. Achmea BV*. In its preliminary ruling of 6 March 2018, the Court concluded

recent case law of the Court of Justice, the institutional report considers mixed agreements as a political choice for the Union legislature and, in this context, raises the question of the conditions of recourse to this type of agreement. In relation to international agreements, the report also reveals the urgent need to strengthen the mechanisms of democratic scrutiny within the European Union institutions and Member States.

On the other hand, the immense challenges of immigration and asylum that our Area of Freedom, Security and Justice is facing will provide the opportunity for an intense debate. It is crucial to understand how the current crisis is impacting, or will impact, on the existing and evolving regulations, international agreements, practices and institutional machinery dealing with such fundamental issues, including judicial protection and the rule of law. It is our firm belief that the European Union is a unique framework to achieve all those objectives while respecting fundamental rights, democracy and the rule of law. The preservation of these values for the next generations of European citizens is one of the most important objectives of our times.

4. Further debates

In order to give a wider insight on the debate, an introductory panel on *Europe at the Crossroads* has been scheduled. In their opening lectures, Professor Catherine Barnard and Professor Michael O'Flaherty will discuss respectively 'The future of Europe post-Brexit' and 'Fundamental rights as a road sign at the crossroads'. This panel should provide an excellent starting point for the debate led by the prominent speakers in the panel on *Europe and Brexit,* concerning one of the most traumatic events in the current history of the European Union.

IV. Acknowledgments

As President and Members of the Board of the Portuguese Association for European Law (APDE – Associação Portuguesa de Direito Europeu), we would like to thank His Excellency the President of the Portuguese Republic and His Excellency the Prime Minister of Portugal for the institutional support given to the XXVIII FIDE Congress, organised by APDE in Estoril from 23 to 26 May 2018.

We would also like to express our gratitude to all the rapporteurs, speakers, chairpersons, moderators and interpreters involved in the work of the Congress and of the present publication.

that the arbitration clause in the Agreement between the Netherlands and Slovakia (intra-EU BIT) on the protection of investments is not compatible with EU law. The ruling raises further questions concerning arbitration in the European Union in Investor-State Dispute Settlement.

The organisation of the XXVIII FIDE Congress would not have been possible without the generous contribution of our sponsors and supporters.

The support of the Court of Justice of the European Union and of the European Commission was also of the utmost importance for the success of the Congress.

Last but not least, we would like to thank the members of the Executive Committee of the Congress, Alberto Saavedra, Filipa Pimentel, Joana Schmid Moura, João de Lemos Portugal, Leonor Bettencourt Nunes, Margarida Rosado da Fonseca, Margarida Sameiro, Piedade Castro e Sousa and Teresa Côrte-Real. Without their unconditional dedication to the Congress, its organisation would not have been possible.

José Luís da Cruz Vilaça, Carlos Botelho Moniz, Nuno Piçarra, Rita Leandro Vasconcelos, João Paulo Teixeira de Matos, Nuno Ruiz, Miguel Gorjão-Henriques

INTRODUCTION

I. Le XXVIIIe Congrès de la FIDE à Estoril

Non sans raison, c'est à Estoril, située sur la côte de l'océan Atlantique et à l'extrême ouest de l'Europe continentale, que se tient le XXVIIIe Congrès de la FIDE (Fédération Internationale pour le Droit Européen). À l'époque où Lisbonne était, pendant la Seconde Guerre mondiale, l'une des destinations les plus recherchées par ceux qui tentaient d'échapper au carnage qui ravageait le continent européen, Estoril devint le centre d'une diplomatie secrète effervescente et le lieu d'exil des têtes couronnées et dignitaires. De nos jours, se trouvant à la lisière de l'Union Européenne, la localisation d'Estoril atteste à nouveau du caractère symbolique de la région. Estoril n'offre pas seulement une porte d'entrée vers l'Europe et les valeurs européennes, représentées en grande partie par le droit de l'Union européenne, mais permet également de prendre de la hauteur de vue pour se projeter et /réfléchir au-delà des problèmes locaux. Comme des siècles auparavant, lorsque Vasco de Gama et Cabral partirent de la côte portugaise pour leurs expéditions, nous embarquons maintenant, en tant que juristes et universitaires, dans un périple difficile qui devrait aider la réflexion actuelle sur le droit de l'Union européenne à faire face aux défis internes et externes de l'Union, toujours plus prégnants. Compte tenu du programme et de la localisation du XXVIIIe Congrès de la FIDE, il n'est pas surprenant que son organisation ait été confiée à l'Association portugaise pour le droit européen (APDE), créée en 1984 dans le but de contribuer à la diffusion du droit européen au Portugal. L'APDE, en qualité de membre de la FIDE, est un lieu de débat renouvelé pour la communauté juridique portugaise sur les sujets les plus importants de l'Union européenne.

II. FIDE

Depuis 1961, la FIDE unit les associations de droit européen de chaque État membre, des pays candidats à l'adhésion, ainsi que de la Suisse et la Norvège[1]. En 50 ans d'existence, elle a été reconnue par la communauté juridique internationale comme ayant une influence remarquable sur la formation et le développement d'un cadre européen tant juridique que culturel. Les congrès biennaux de la FIDE réunissent plusieurs centaines de juristes venant d'horizons divers. Ils constituent le point d'orgue de la réflexion et du dialogue sur le droit et les politiques de l'Union, tant en ce qui concerne leur évolution que leur application par les juridictions nationales et européennes. Ensembles avec les congrès, les publications afférentes – les riches et denses Rapports préparés et publiés par la FIDE – constituent de précieux points de repère dans l'étude des thèmes fondamentaux du droit de l'Union et de la jurisprudence de la Cour de justice, largement utilisés par les universitaires, les praticiens et les juges[2].

Les congrès précédents de la FIDE, ayant eu lieu en plusieurs capitales nationales, culturelles et académiques de l'Europe, couvraient un large éventail de sujets juridiques et économiques présentant un intérêt vital pour l'Union européenne[3]. Le dernier Congrès de Budapest en 2016 a mis l'accent sur les problèmes de l'union bancaire européenne, l'exécution privée et les recours collectifs dans le droit européen de la concurrence, ainsi que sur la répartition des compétences et des pouvoirs réglementaires entre l'Union européenne et les États membres. Tous les thèmes choisis ont été analysés et discutés de manière approfondie. Se situant dans la même lignée, le XXVIIIe Congrès d'Estoril vise à approfondir le travail précédent. L'adéquation des thématiques des congrès et des publications de la FIDE au contexte politique et économique actuel constitue son trait distinctif.

Outre la pertinence incontestable du choix des sujets, l'un des plus grands atouts reconnu de la FIDE réside dans la multiplicité et de la diversité de son approche. Loin d'être une simple structure organisationnelle, elle constitue une fédération institutionnalisée d'experts juridiques – les *Grands esprits du droit Européen*[4] – à même d'orienter le cadre culturel et normatif de l'Union. Les études

[1] Statut de la FIDE est disponible sur : https://www.fide-europe.org/xms/files/ABOUT_FIDE/Statutes_of_FIDE_FIDE_V3.pdf (10.4.2018).

[2] Voir Julia Laffranque, FIDE – Uniting Great Minds of European Law: 50 years of the International Federation of European Law, Juridica International XVIII/2011, pp. 173-181; Alexandre Bernier, Constructing and Legitimating: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950-1970, in Contemporary European History, 2012, pp. 399-415.

[3] Pour plus d'informations sur les congrès précédents et actuels de la FIDE, voir : https://www.fide-europe.org/congresses/ (10.4.2018).

[4] Julia Laffranque, op.cit., pp. 173-181. L'expression, créée par le professeur Julia Laffranque, a servi de base à la devise du XXVIe Congrès de la FIDE ('FIDE – Uniting Great Minds of EUropean Law'). Sa version modifiée a également été utilisée par les auteurs de la Publication accompagnant le Congrès de

juridiques comparatives, en tant qu'outil de recherche pour appréhender la réalité juridique dans sa complexité, la publication de ces travaux, ainsi que les congrès aident les experts à partager les connaissances acquises avec les autres, y compris avec la jeune génération pendant les Séminaires Doctoraux. À cet égard, la FIDE est l'endroit où l'expertise et le dialogue se réunissent.

En tant que *spiritus movens* du développement de la culture et de l'identité juridique européenne, la FIDE a également une responsabilité importante. Au moment où l'Union européenne est confrontée à de nombreux défis, la FIDE parvient, avec succès, à accomplir les missions qui sont les siennes. Le XXVIIIe Congrès d'Estoril, ainsi que la présente publication, en sont la parfaite illustration.

III. Thèmes

Comme le veut la tradition, pour chacun des trois thèmes des travaux de la FIDE, un questionnaire a été préparé par le Rapporteur général, auquel il incombe également de coordonner les rapports nationaux, rédigés par des experts des associations nationales membres de la FIDE. Ces rapports ainsi que les rapports généraux préparés par les rapporteurs généraux et accompagnés des rapports institutionnels élaborés par les représentants des institutions de l'Union, composent le présent ouvrage.

Les thèmes du XXVIIIe Congrès ont été choisis avec soin, en fonction de leur pertinence pour le processus d'intégration européenne, de l'actualité et de leur faculté à attirer de nombreux participants. « *La paix mondiale ne saurait être sauvegardée sans des efforts créateurs à la mesure des dangers qui la menacent.* »[5] – ces mots, prononcés par Robert Schuman en 1950, sont toujours d'actualité. La nécessité de trouver, au regard du droit et des politiques de l'Union européenne, un équilibre entre ouverture et sécurité permet d'aborder de façon particulièrement stimulante les sujets suivants :

1. Le marché intérieur et l'économie digitale[6]

Dans la nouvelle ère numérique, l'économie peut être considérée comme le moteur le plus important de l'innovation, de la compétitivité et de la croissance en Europe et dans le monde. L'Internet et le commerce électronique, la nouvelle

la XXVI de la FIDE – le professeur Ulla Neergaard, le professeur Catherine Jacqueson, le commisseur Nina Holst-Christensen, le professeur Jens Hartig Danielsen et le professeur Grith Skovgaard Ølykke qui l'ont adoptée pour l'un des titres de l'Introduction ('A Collaboration of Great Minds of EUropean Law') afin de souligner la relation entre le droit de l'UE et le droit européen.

[5] Déclaration de Robert Schuman, 9 mai 1950.

[6] Rapporteur général: Professeur Peggy Valcke, KU Leuven – CiTiP (Centre for IT & IP Law) – imec (BE), professeur invité à l'Université de Tilburg (NL) et à l'Université Bocconi de Milan (IT). Rapporteur institutionnel: Professeur Piedade Costa de Oliveira, membre du service juridique de la Commission européenne, professeur invité à l'Ecole Polytechnique de l'Université de São Paulo (Brésil).

économie du partage et les transactions *peer-to-peer,* sans oublier les médias et les télécommunications par-delà les frontières, sont ainsi au cœur de la discussion et des initiatives législatives au niveau national et européen. La question de la gouvernance dans le marché unique numérique est devenue l'un des principaux domaines d'action prioritaires de la Commission pour la période 2014-2019, illustrée par la Stratégie pour un marché unique numérique en mai 2015[7]. Suivant les hypothèses de cette Stratégie, le présent sujet suppose, en premier lieu, de réfléchir à un meilleur accès des consommateurs et des entreprises à de nouveaux marchés, biens et services en ligne à travers l'Europe. À cet égard, la nécessité d'éliminer les différences principales entre les mondes *on-line* et *off-line* pour mettre fin aux obstacles à l'activité transfrontalière est de la plus haute importance. En second lieu, le présent sujet porte sur des conditions adéquates pour le développement du réseau et des services numériques. Un accent particulier a été mis sur les infrastructures et les services en ligne rapides, sécurisés et fiables, ainsi que sur les conditions réglementaires appropriées aux innovations, à la concurrence loyale, à l'investissement et aux conditions de concurrence équitable. L'objectif final est de discuter du potentiel de croissance de l'économie numérique en Europe, en analysant la nécessité d'investir dans les infrastructures TIC, le *Cloud computing* et le *Big Data*, l'innovation dans la recherche, la pertinence des services publics ainsi que l'efficacité industrielle.

Outre l'étude du marché unique numérique, de ses infrastructures et du commerce électronique, les réflexions, ciblées sur des instruments juridiques existants et récemment révisés, ne peuvent être dissociées de l'objectif de protection des consommateurs, des données personnelles et des droits fondamentaux, comme l'illustre la nécessité de préserver la sécurité, la liberté d'expression et la confidentialité des communications face au le stockage de masse des informations Le contrôle judiciaire et la jurisprudence croissante sur ces questions sont au cœur de la réflexion proposée .

Comme le montre l'étude générale, le problème majeur du thème analysé concerne le risque d'une réglementation excessive dans une matière mouvante et imprévisible. En tant que tel, l'encadrement de l'économie numérique nécessite des instruments réglementaires adaptés et bien coordonnés. D'un point de vue institutionnel, il semble intéressant de souligner la tendance du législateur européen à appliquer fréquemment dans tous les domaines susmentionnés la réglementation en tant qu'instrument d'harmonisation ce qui semble illustrer la volonté d'adopter des règles uniformes au sein de l'Union européenne.

[7] COM (2015) 192 final.

2. Fiscalité, aides d'État et distorsions de la concurrence[8]

Au regard des problèmes de *tax ruling* et de leur influence sur la concurrence, les résultats des enquêtes de la Commission et l'issue des procédures éventuelles devant la Cour de justice revêtent une importance pressante pour la politique juridique européenne. À cet égard, le présent sujet englobe la relation entre des notions telles que le transfert de bénéfices, la concurrence fiscale dommageable et les conventions visant à éviter une double imposition, y compris les instruments types de l'OCDE, et fournit un aperçu à l'échelle territoriale des problèmes soulevés par ceux-ci.

Comme le montre l'étude générale, les systèmes fiscaux nationaux et internationaux comportent, en l'absence d'harmonisation fiscale, des lacunes. Cette absence d'harmonisation positive est palliée par le recours au droit des aides d'État. La sensibilisation croissante à la jurisprudence et les processus *learning-by-doing* au sein de la Commission semblent toutefois déjà en cours afin d'améliorer l'efficacité du régime des aides d'État. L'avenir des exemptions fiscales inconditionnelles dans l'Union étant remis en cause, de même que le succès des législations nationales anti-évitement et anti-abus, le besoin de décisions anticipées en matière fiscale augmente. Du point de vue institutionnel, le rôle de la Commission est important à cet égard, mais ne peut être joué que sur une base solide fournie par la Cour de justice.

3. La dimension extérieure des politiques de l'Union européenne: questions horizontales; commerce et investissements; immigration et asile[9]

Les aspects externes de la politique européenne devraient également retenir notre attention. Les évolutions au sein de la communauté internationale en période de tensions politiques et militaires, qui ont déjà entraîné des coûts humains et sociaux dramatiques affectant gravement les politiques de l'UE pour les temps à venir, mérite d'être traitée urgemment par d'éminentes personnalités européennes et internationales.

Premièrement, le sujet apporte une mise à jour quant à la répartition des pouvoirs et des compétences entre les institutions de l'Union et les États membres

[8] Rapporteur général: Professeur Raymond Luja, Université de Maastricht (NL), conseiller juridique en matière d'aides d'État auprès de Loyens & Loeff N.V., Amsterdam (NL). Rapporteurs institutionnels: Mme Julia Rapp, Mme Ramona Ianus, Services de la Commission européenne.

[9] Rapporteurs généraux: Professeur Christine Kaddous, Université de Genève (CH), professeur invité au Collège d'Europe (BL/ PL) et à l'Université Paris II Panthéon-Assas (FR); Professeur Nuno Piçarra, Professeur à la Faculté de droit de l'Université Nova de Lisbonne, membre du Réseau académique d'études juridiques sur l'immigration et l'asile en Europe (*Odysseus*) et du Conseil d'administration de l'Agence des droits fondamentaux de l'Union européenne. Rapporteurs institutionnels: M. Hubert Légal et M. Álvaro de Elera, Services juridiques du Conseil; M. Freddy Drexler et M. Anders Neergaard, Services juridiques du Parlement européen.

ainsi que leurs rôles respectifs sur la scène internationale. Il permet ainsi un approfondissement d' un des aspects déjà abordé dans le contexte du thème III du XXVIIe Congrès de Budapest En outre, le thème porte sur les accords internationaux actuellement négociés par l'UE dans le cadre de la libéralisation des échanges, l'accès au marché et la protection des investissements, tels que le TTIP et le CETA[10]. Au regard de la jurisprudence récente de la Cour de justice, le rapport institutionnel appréhende les accords mixtes en tant que choix politique pour le législateur de l'Union et, dans ce cadre, soulève la question des conditions de recours à ce type d'accords. Le rapport révèle également la nécessité urgente de renforcer les mécanismes de contrôle démocratique au sein des institutions européennes et des États membres s'agissant des accords internationaux.

Deuxièmement, les immenses défis en matière d'immigration et d'asile auxquels l'Espace de liberté, de sécurité et de justice est confronté, susciteront un débat intense. Il est essentiel de comprendre comment la crise actuelle affecte ou aura un impact sur les réglementations, les accords internationaux, les pratiques et les mécanismes institutionnels existants et futurs qui traitent des questions fondamentales, notamment la protection judiciaire et le respect du droit. Nous sommes fortement convaincus que l'Union européenne est un cadre unique pour relever ces défis dans le respect des droits fondamentaux, de la démocratie et du droit. La préservation de ces valeurs pour les prochaines générations de citoyens européens est l'un des objectifs les plus importants de notre époque.

4. Questions ouvertes

Afin de contextualiser nos réflexions, un panel introductif relatif à *l'Europe à la croisée des chemins* a été ajouté. Dans leurs interventions d'ouverture, les professeurs Catherine Barnard et Michael O'Flaherty discuteront sur les thèmes suivants : '*The future of Europe post Brexitet* ' et '*The fundamental rights as a road sign at the crossroads*'. Ce panel devrait servir de point de départ à un débat approfondi entre les éminents intervenants du panel sur *l'Europe et le Brexit*, l'un des événements les plus traumatisants de l'histoire récente de l'Union européenne.

IV. Remerciements

En qualité de président et membres du Conseil Directeur de l'Association Portugaise pour le Droit Européen (APDE – Associação Portuguesa de Direito Euro-

[10] Au moment de la rédaction du présent recueil, les rapporteurs n'avaient pas eu accès à l'arrêt de la CJUE du 6 mars 2018 dans l'affaire C-284, *Slovak Republic c. Achmea BV*. En réponse à la question préjudicielle, la Cour de justice a estimé que la clause d'arbitrage de l'accord entre les Pays-Bas et la Slovaquie (intra-UE TBI) sur la protection des investissements n'est pas compatible avec le droit de l'UE. La décision soulève de nombreuses questions concernant l'arbitrage des différends entre investisseurs et États au sein de l'Union.

peu), nous tenons à remercier Son Excellence le Président de la République Portugaise et Son Excellence le Premier Ministre du Portugal pour le soutien institutionnel apporté au XXVIIIème Congrès de la FIDE, que l'APDE a organisé à Estoril du 23 au 26 mai 2018.

Nous souhaitons également exprimer notre reconnaissance à tous les rapporteurs, orateurs, présidents de séance, modérateurs et interprètes qui ont contribué aux travaux du Congrès et de la présente publication. La réalisation du XXVIIIème Congrès de la FIDE n'aurait pas été possible sans la généreuse contribution de nos sponsors et supporters.

Nous souhaitons également mettre en exergue l'importance du soutien de la Cour de justice de l'Union européenne et de la Commission européenne pour le succès de ce Congrès.

Enfin, nous souhaitons remercier tout particulièrement les membres du Comité Exécutif du Congrès, Alberto Saavedra, Filipa Pimentel, Joana Schmid Moura, João de Lemos Portugal, Leonor Bettencourt Nunes, Margarida Rosado da Fonseca, Margarida Sameiro, Piedade Castro e Sousa et Teresa Côrte-Real. Sans leur dévouement inconditionnel au Congrès, l'organisation de celui-ci n'aurait pas été possible.

José Luís da Cruz Vilaça, Carlos Botelho Moniz, Nuno Piçarra, Rita Leandro Vasconcelos, João Paulo Teixeira de Matos, Nuno Ruiz, Miguel Gorjão-Henriques

EINFÜHRUNG

I. Der XXVIII. FIDE-Kongress in Estoril

Nicht umsonst ist Estoril, das sich an der Küste des Atlantischen Ozeans und am westlichsten Punkt Kontinentaleuropas befindet, der prächtige Schauplatz des XXVIII. FIDE-Kongresses. Während des Zweiten Weltkriegs, als Lissabon eines der begehrtesten Ziele war für diejenigen, die dem Massaker auf dem europäischen Kontinent entkommen wollten, wurde Estoril zum pulsierenden Zentrum der Geheimdiplomatie und zum bevorzugten Zufluchtsort für gekrönte Häupter und Würdenträger. Heute befindet sich Estoril am äußersten Rand der Europäischen Union und beweist erneut den symbolischen Wert der Region. Es ist nicht nur ein Tor zu Europa und europäischen Werten, die zu einem großen Teil vom europäischen Recht repräsentiert werden, sondern es ist auch eine Plattform, die die Möglichkeit bietet, über lokale Probleme hinauszublicken. Wie in früheren Jahrhunderten, als die portugiesische Küste Vasco da Gama und Cabral als Ausgangspunkt für ihre Expeditionen diente, begeben wir uns jetzt als Anwälte und Akademiker auf eine beschwerliche Reise, die das aktuelle Nachdenken über das europäische Recht anstoßen sollte, um den internen und externen Herausforderungen der Union ins Auge sehen zu können – heute vielleicht mehr als jemals zuvor.

Angesichts des Profils und des Standorts des XXVIII. FIDE-Kongresses ist es nicht verwunderlich, dass die Organisation dieser Veranstaltung der Portugiesischen Vereinigung für Europäisches Recht (APDE) anvertraut wurde, gegründet 1984 mit dem Ziel, zur Verbreitung des europäischen Rechts in Portugal beizutragen. Gleichzeitig stellt die APDE als Mitglied der FIDE die Verbindung der portugiesischen Rechtsgemeinschaft zur laufenden Debatte über die wichtigsten Themen der Europäischen Union sicher.

II. FIDE

Die FIDE (Fédération Internationale pour le Droit Européen / Internationale Vereinigung für Europarecht) hat seit 1961 die europäischen Rechtsverbände der einzelnen Mitgliedstaaten, der Bewerberländer sowie Norwegens und der Schweiz zusammengeführt[1]. In den letzten 50 Jahren ihres Bestehens wurde sie als gemeinsame Dachorganisation von der internationalen Rechtsgemeinschaft allgemein anerkannt, da sie einen bemerkenswerten Einfluss auf die Entwicklung und Gestaltung sowohl des Kontexts als auch der Kultur des Unionsrechts hat. Die alle zwei Jahre stattfindenden FIDE-Kongresse versammeln mehrere hundert Anwälte und Fachleute mit unterschiedlichem Hintergrund. Sie sind das wichtigste Ereignis der Reflexion und des Dialogs über EU-Recht und -Politik, sowohl was die legislativen als auch die politischen Entwicklungen in der Europäischen Union anbelangt, und ihre Anwendung durch die EU und die nationalen Gerichte. Zusammen mit den entsprechenden Publikationen, den Berichten der FIDE, die in reichen und schweren Bänden voller Information und Reflexion veröffentlicht werden, schaffen die Kongresse eine unbezahlbare Schatzkammer des wissenschaftlichen Schreibens und der Debatte; Orientierungspunkte bei der Untersuchung der Kernthemen des europäischen Rechts und der Rechtsprechung des Gerichtshofs der EU, die von Akademikern, Praktikern und Richtern umfassend konsultiert werden[2].

Frühere FIDE-Kongresse, die von zahlreichen europäischen nationalen, kulturellen und akademischen Hauptstädten veranstaltet wurden, decken ein breites Spektrum grundlegender und wirtschaftlicher Themen ab, die von vitaler Bedeutung für die Europäische Union sind[3]. Der letzte Kongress in Budapest im Jahr 2016 richtete besondere Aufmerksamkeit auf die Probleme der europäischen Bankenunion, die private Durchsetzung und den kollektiven Rechtsschutz im europäischen Wettbewerbsrecht sowie auf die Aufteilung der Zuständigkeiten und Regelungsbefugnisse zwischen der Europäischen Union und den Mitgliedstaaten. Alle ausgewählten Themen wurden ausführlich analysiert und diskutiert. Diesmal will der XXVIII. Kongress in Estoril die bisherige Arbeit übertreffen und deutlich weiterentwickeln. Die Anpassungsfähigkeit des thematischen Rahmens der FIDE-Kongresse und -Veröffentlichungen

[1] Das Statut der FIDE ist verfügbar unter https://www.fide-europe.org/xms/files/ABOUT_FIDE/Statutes_of_FIDE_FIDE_V3.pdf (10.4.2018).

[2] Siehe Julia Laffranque, FIDE – Uniting Great Minds of European Law: 50 years of the International Federation of European Law, Juridica International XVIII/2011, pp. 173-181; Alexandre Bernier, Constructing and Legitimating: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950-1970, in Contemporary European History, 2012, pp. 399-415.

[3] Weitere Informationen zu früheren und aktuellen FIDE-Kongressen finden Sie unter HYPERLINK "https://www.fide-europe.org/congresses/" https://www.fide-europe.org/Congresses/ (10.4.2018).

an den aktuellen politischen und wirtschaftlichen Kontext macht seine Besonderheit aus.

Neben der unzweifelhaften Relevanz der Themenwahl scheint einer der größten Werte der FIDE ihre gut etablierte, vielfältige und mehrstufige Dimension zu sein. Es ist nicht nur eine Organisationsstruktur. Es ist ein institutionalisierter Verband von Rechtsexperten – Great Minds of European Law[4] mit der Befugnis, seinen normativen und kulturellen Rahmen zu gestalten. Als ein Forschungsinstrument zum Verständnis der Vielfalt der rechtlichen Realität ermöglichen die Kongresse und die Veröffentlichung der Ergebnisse den Experten, ihr erworbenes Wissen zu teilen, auch mit der jüngeren Wissenschaftlergeneration in den PhD-Seminaren. In dieser Hinsicht ist die FIDE der Ort, an dem Fachwissen und Dialog aufeinandertreffen.

Mit einem so wichtigen spiritus movens wie der Entwicklung der europäischen Rechtskultur und -identität trägt die FIDE auch eine gewisse Verantwortung. In Zeiten zahlreicher Herausforderungen für die Europäische Union verpflichtet sie sich, ihre schwierigen Aufgaben so gut wie möglich zu erfüllen. Zusammen mit der vorliegenden Veröffentlichung dient der XXVIII. Kongress in Estoril als herausragendes Beispiel dafür, wie die FIDE ihre edlen Ziele erfüllen kann.

III. Themen

Wie üblich, arbeitete der Generalberichterstatter für jedes der drei Themen der aktuellen zweijährlichen Arbeit der FIDE einen Fragebogen aus. Er übernimmt auch die Verantwortung für die Koordinierung der nationalen Berichte, zusammengestellt von Experten, die von den nationalen FIDE-Verbänden ernannt wurden. Zusammen mit den von den Generalberichterstattern erstellten allgemeinen Berichten und den von Vertretern der EU-Institutionen verfassten institutionellen Berichten bilden alle diese Berichte den Gegenstand der vorliegenden Sammlung.

Die Themen des XXVIII. Kongresses wurden sorgfältig ausgewählt, entsprechend ihrem allgemeinen Interesse, ihrer Aktualität, ihrer Relevanz für den Prozess der europäischen Integration und ihrer praktischen Fähigkeit, die Teilnehmer und ein breiteres Publikum zu gewinnen. „Es wird kaum möglich sein,

[4] Julia Laffranque, aaO, S. 173-181, S. 173-181. Der von Professorin Julia Laffranque geprägte Ausdruck diente als Grundlage für das Motto des XXVI. FIDE-Kongresses („FIDE – Uniting Great Minds of EUropean Law"). Seine modifizierte Version wurde auch von den Autoren der Einführung in die Publikationen des XXVI. FIDE-Kongresses – Professorin Ulla Neergaard, Professorin Catherine Jacqueson, Kommissarin Nina Holst-Christensen, Professor Jens Hartig Danielsen und Professor Grith Skovgaard Ølykke - verwendet, die ihn für eine der Titelzeilen („A Collaboration of Great Minds of EUrepean Law") übernahmen, um das Verhältnis zwischen EU-Recht und europäischem Recht zu betonen.

den Weltfrieden zu erhalten, wenn wir uns nicht auch um neuartige Lösungen bemühen, die den drohenden Gefahren wirklich gerecht werden“[5] – diese Worte von Robert Schuman aus dem Jahr 1950 sind immer noch aktuell. Die derzeitige Notwendigkeit, ein Gleichgewicht zwischen Offenheit und Sicherheit im Bereich des europäischen Rechts und der europäischen Politik herzustellen, ist eine besondere Rechtfertigung für die Auswahl der diesjährigen Themen.

1. Der Binnenmarkt und die digitale Wirtschaft[6]

In der neuen digitalen Ära kann die Wirtschaft der neuen Medien als der wichtigste Motor für Innovation, Wettbewerbsfähigkeit und Wachstum in Europa und der Welt angesehen werden. Internet und E-Commerce, die neue Sharing Economy und Peer-to-Peer-Transaktionen, ganz zu schweigen von Medien und Telekommunikation über die Grenzen hinweg, stehen daher im Mittelpunkt der Diskussion und der legislativen Initiativen auf nationaler und europäischer Ebene. Das Thema der Governance im digitalen Binnenmarkt ist auch zu einem der wichtigsten politischen Schwerpunktbereiche der Kommission für den Zeitraum 2014-2019 geworden, wie die Strategie für einen digitalen Binnenmarkt vom Mai 2015 zeigt[7]. Nach ihren Annahmen umfasst das vorliegende Thema in erster Linie den besseren Zugang von Verbrauchern und Unternehmen zu neuen Märkten, Online-Waren und -Dienstleistungen in ganz Europa. In dieser Hinsicht ist die Notwendigkeit, wesentliche Unterschiede zwischen der Online- und der Offline-Welt aufzuheben und somit Hindernisse für grenzüberschreitende Aktivitäten zu beseitigen, von größter Bedeutung. Zweitens befasst sich die Untersuchung des Themas mit der Entwicklung geeigneter Bedingungen für digitale Netze und Dienste. Ein besonderer Schwerpunkt wurde auf schnelle, sichere und zuverlässige Infrastrukturen und Inhaltedienste sowie auf die maßgeschneiderten Regulierungsbedingungen für Innovation, Investitionen, fairen Wettbewerb und gleiche Wettbewerbsbedingungen gelegt. Das endgültige Ziel bestand darin, das Wachstumspotenzial der digitalen Wirtschaft in Europa zu diskutieren, indem die Attraktivität von Investitionen in IKT-Infrastrukturen, Cloud Computing und Big Data, Forschungsinnovation, Genauigkeit der öffentlichen Dienste und industrielle Effizienz analysiert wurde.

[5] Erklärung von Robert Schuman, 9. Mai 1950.

[6] Generalberichterstatterin: Professorin Peggy Valcke, KU Leuven – CiTiP (Zentrum für IT & IP-Recht) - imec (BE), Gastprofessorin an der Universität Tilburg (NL) und an der Bocconi-Universität Mailand (IT). Institutionelle Berichterstatterin: Professorin Piedade Costa de Oliveira, Mitglied des Juristischen Dienstes der Europäischen Kommission, Gastprofessorin an der Universität São Paulo (Brasilien).

[7] Generalberichterstatter: Professor Raymond Luja, Universität Maastricht (NL), Steuerberater von Loyens & Loeff N.V., Amsterdam (NL). Institutionelle Berichterstatterinnen: Frau Julia Rapp und Frau Ramona Ianus von der Europäischen Kommission.

Neben der Untersuchung des digitalen Binnenmarkts, seiner Infrastruktur und seines elektronischen Handels konzentriert sich das Thema auf die bestehenden und kürzlich geänderten Rechtsinstrumente, die nicht vom notwendigen Schutz der Verbraucher, der personenbezogenen Daten und der Grundrechte – Meinungsfreiheit und Recht auf Privatsphäre – getrennt werden können, Massenspeicherung von Informationen, Vertraulichkeit der Kommunikation und globale Sicherheit. Die gerichtliche Überprüfung und die zunehmende Rechtsprechung zu diesen Fragen stehen im Mittelpunkt der Überlegungen zu diesem Thema.

Wie der allgemeine Bericht zeigt, besteht das Hauptproblem in diesem Bereich in der Gefahr einer Überregulierung in einem stark veränderlichen und unvorhersehbaren Bereich. Als solcher erfordert er gut koordinierte Regulierungsinstrumente, kann jedoch die wachsende Vielfalt der relevanten Aktivitäten nicht ignorieren. Aus institutioneller Sicht erscheint es jedoch wichtig, auf die Tendenz des Unionsgesetzgebers in allen oben genannten Bereichen hinzuweisen, als Harmonisierungsinstrument auf Regelungen zurückzugreifen, die den politischen Willen zur Annahme einheitlicher Regeln innerhalb der Europäischen Union zu veranschaulichen scheinen.

2. Besteuerung, staatliche Beihilfen und Wettbewerbsverzerrungen[8]

Nach der geltenden Rechtsprechung zu Steuerregelungen und staatlichen Beihilfen sind die Probleme der Steuervorbescheide und ihr Einfluss auf den Wettbewerb sowie das Ergebnis der Untersuchungen der Kommission und der laufenden oder künftigen Verfahren des Gerichtshofs von größter Bedeutung für die derzeitige Binnenmarktpolitik. In diesem Zusammenhang umfasst das vorliegende Thema die Beziehung zwischen Begriffen wie Gewinnverlagerung und schädlichem Steuerwettbewerb, Doppelbesteuerung und doppelter Nichtbesteuerung, einschließlich der OECD-Modellinstrumente. Es gibt auch einen Einblick in die territoriale Reichweite solcher Geschäfte und Abhilfemaßnahmen.

Wie der allgemeine Bericht zeigt, weisen sowohl die nationalen als auch die internationalen Steuersysteme nach wie vor Mängel auf, wobei in der Praxis die Steuerharmonisierung durch die Vorschriften über staatliche Beihilfen ersetzt wird. Das zunehmende Bewusstsein für die Rechtsprechung und die Learning-by-doing-Prozesse innerhalb der Kommission scheinen jedoch die Wirksamkeit der staatlichen Beihilferegelung zu verbessern. Angesichts der Tatsache, dass die Zukunft bedingungsloser Steuerausnahmen in der Europäischen Union in

[8] Generalberichterstatter: Professor Raymond Luja, Universität Maastricht (NL), Steuerberater von Loyens & Loeff N.V., Amsterdam (NL). Institutionelle Berichterstatterinnen: Frau Julia Rapp und Frau Ramona Ianus von der Europäischen Kommission.

Frage gestellt wird, sowie des Erfolgs der Rechtsvorschriften zur Bekämpfung der Steuervermeidung wird die Notwendigkeit von Steuervorbescheiden zunehmen. Aus institutioneller Sicht ist die Rolle der Kommission in dieser Hinsicht herausragend, aber sie kann nur auf der Grundlage von Leitlinien des Gerichtshofs der Europäischen Union angemessen umgesetzt werden.

3. Die externe Dimension der EU-Politiken: horizontale Aspekte; Handel und Investitionen; Einwanderung und Asyl[9]

Nicht zuletzt verdienen die externen Aspekte der europäischen Politik besondere Aufmerksamkeit. Die Entwicklung der internationalen Gemeinschaft in Zeiten politischer und militärischer Spannungen, die bereits zu erheblichen menschlichen und sozialen Kosten geführt haben mit dramatischer Auswirkung auf die künftige Politik der Europäischen Union, sollte dringend von angesehenen europäischen und internationalen Persönlichkeiten in Angriff genommen werden.

Vorab wird eine Aktualisierung der Verteilung von Zuständigkeiten und Befugnissen zwischen den EU-Organen und den Mitgliedstaaten und ihrer jeweiligen Rolle im internationalen Bereich gefordert. Dies würde eine eingehende und fokussierte Analyse zu einem Aspekt liefern, der im Rahmen des Themas III des XXVII. Kongresses in Budapest behandelt wurde. Zweitens konzentriert sich das Thema auf die internationalen Abkommen, die derzeit von der Europäischen Union über Handelsliberalisierung, Marktzugang und Investitionsschutz wie TTIP und CETA im Rahmen anderer regionaler oder globaler internationaler Abkommen ausgehandelt werden[10]. Vor dem Hintergrund der jüngsten Rechtsprechung des Gerichtshofs betrachtet der institutionelle Bericht

[9] Generalberichterstatter: Professorin Christine Kaddous, Universität Genf (CH), Gastprofessorin am Europakolleg (BL / PL) und an der Université Paris II Panthéon-Assas (FR); Professor Nuno Piçarra, Professor an der Rechtsfakultät der Universität Nova von Lissabon, Mitglied des Réseau académique d'études juridiques sur l'immigration et l'asile en Europe (*Odysseus*) und des Verwaltungsrates der Agentur der Europäischen Union für Grundrechte. Institutionelle Berichterstatter: Herr Hubert Légal und Herr Álvaro de Elera, Juristischer Dienst des Rates; Herr Freddy Drexler und Herr Anders Neergaard, Juristischer Dienst des Europäischen Parlaments.
Zum Zeitpunkt des Schreibens hatten die Berichterstatter keinen Zugang zu dem Urteil des Gerichtshofs in der Rechtssache C-284/16, *Slowakische Republik gegen Achmea BV*. In seinem Vorabentscheidungsverfahren vom 6. März 2018 kam der Gerichtshof zu dem Schluss, dass die Schiedsklausel im Abkommen zwischen den Niederlanden und der Slowakei (Intra-EU BIT) über den Investitionsschutz nicht mit dem Unionsrecht vereinbar ist. Das Urteil wirft weitere Fragen bezüglich der Schiedsgerichtsbarkeit in der Europäischen Union in der Investor-Staat-Streitbeilegung auf.

[10] Zum Zeitpunkt des Schreibens hatten die Berichterstatter keinen Zugang zu dem Urteil des Gerichtshofs in der Rechtssache C-284/16, *Slowakische Republik gegen Achmea BV*. In seinem Vorabentscheidungsverfahren vom 6. März 2018 kam der Gerichtshof zu dem Schluss, dass die Schiedsklausel im Abkommen zwischen den Niederlanden und der Slowakei (Intra-EU BIT) über den Investitionsschutz

gemischte Vereinbarungen als eine politische Entscheidung des Unionsgesetzgebers und wirft in diesem Zusammenhang die Frage nach den Bedingungen für den Rückgriff auf diese Art von Abkommen auf. In Bezug auf internationale Abkommen zeigt der Bericht auch die dringende Notwendigkeit, die Mechanismen der demokratischen Kontrolle innerhalb der Institutionen der Europäischen Union und der Mitgliedstaaten zu stärken.

Auf der anderen Seite bieten die immensen Herausforderungen der Einwanderung und des Asyls in unserem Raum der Freiheit, der Sicherheit und des Rechts die Gelegenheit zu einer intensiven Debatte. Es ist wichtig zu verstehen, wie sich die derzeitige Krise auf die bestehenden und sich entwickelnden Vorschriften, internationalen Abkommen, Praktiken und institutionellen Mechanismen auswirkt, die sich mit so grundlegenden Fragen wie dem Rechtsschutz und der Rechtsstaatlichkeit befassen. Wir sind der festen Überzeugung, dass die Europäische Union ein einzigartiger Rahmen ist, um all diese Ziele unter Wahrung der Grundrechte, der Demokratie und der Rechtsstaatlichkeit zu erreichen. Die Wahrung dieser Werte für die nächsten Generationen europäischer Bürger ist eines der wichtigsten Ziele unserer Zeit.

4. Weitere Debatten

Um einen breiteren Einblick in die Debatte zu geben, wurde ein einleitendes Podium über Europa am Scheideweg geplant. In ihren Eröffnungsvorträgen werden Professorin Catherine Barnard und Professor Michael O'Flaherty jeweils die „Zukunft Europas nach dem Brexit" und die „Grundrechte als Wegweiser am Scheideweg" diskutieren. Dieses Podium sollte einen hervorragenden Ausgangspunkt für die Debatte bieten, die von den prominenten Rednern des Podiums zu Europa und dem Brexit über eines der traumatischsten Ereignisse in der aktuellen Geschichte der Europäischen Union geführt wird.

IV. Worte der Dankbarkeit

Als Präsident und Vorstandsmitglieder der Portugiesische Gesellschaft für Europarecht (APDE – Associação Portuguesa de Direito Europeu) möchten wir Seiner Exzellenz, dem Präsidenten der Portugiesischen Republik, und Seiner Exzellenz, dem Premierminister Portugals, für die institutionelle Unterstützung des XXVIII. FIDE Kongresses danken, der vom 23. bis 26. Mai 2018 in Estoril von der APDE organisiert wurde.

Wir möchten auch allen Berichterstattern, Rednern, Vorsitzenden, Moderatoren und Dolmetschern danken, die zur Arbeit des Kongresses und dieser Veröffentlichung beigetragen haben.

nicht mit dem Unionsrecht vereinbar ist. Das Urteil wirft weitere Fragen bezüglich der Schiedsgerichtsbarkeit in der Europäischen Union in der Investor-Staat-Streitbeilegung auf.

Ohne den großzügigen Beitrag unserer Sponsoren und Unterstützer wäre die Organisation des XXVIII. FIDE Kongresses nicht möglich gewesen.

Die Unterstützung des Gerichtshofs der Europäischen Union und der Europäischen Kommission war ebenfalls von größter Bedeutung für den Erfolg des Kongresses.

Nicht zuletzt möchten wir insbesondere den Mitgliedern des Exekutivkomitees des Kongresses danken, Alberto Saavedra, Filipa Pimentel, Joana Schmid Moura, João de Lemos Portugal, Leonor Bettencourt Nunes, Margarida Rosado da Fonseca, Margarida Sameiro, Piedade Castro e Sousa und Teresa Côrte-Real. Ohne ihre bedingungslose Hingabe an den Kongress wäre die Organisation nicht möglich gewesen.

José Luís da Cruz Vilaça, Carlos Botelho Moniz, Nuno Piçarra, Rita Leandro Vasconcelos, João Paulo Teixeira de Matos, Nuno Ruiz, Miguel Gorjão-Henriques

QUESTIONNAIRE



QUESTIONNAIRE

Raymond Luja*
Julia Rapp**

From 2013 onwards the European Commission initiated an EU-wide review of more than 1,000 tax rulings, which already resulted in a number of decisions ordering Member States to recover large sums of what it deemed unlawfully granted state aid (such as *Starbucks, Fiat, Belgian Excess Profit Rulings, Apple*). These decisions are now the subject of review by the EU's Courts. We would like to invite the national rapporteurs to clarify and elaborate on the following issues and questions. The questions will be divided in two parts. Part I will mainly focus on national tax rules and procedure. Part II will focus on matters of national (procedural) law and its interaction with European Union law.

Part I

Many countries allow taxable entities to contact their national tax authorities to get a certain degree of legal certainty in matters of tax law. These can have different forms, from more formalistic advance tax rulings or advance pricing agreements, to less formalistic written or oral gentlemen's agreements or even clarifications that are clearly stated to be non-binding. Some countries allow any company to ask for advance certainty, while others have either a stated policy or implicit policy to limit access to the tax authorities to large companies or companies committed to substantial new investments.

* General rapporteur.
** Institutional rapporteur.

1. Does your country offer the possibility for any degree of advance legal certainty in tax matters given by the tax authorities? If so, are there any specific requirements to be eligible for such certainty in advance?

There can be different types of uncertainty. For instance, there may be a particular payment between two companies that might either qualify as a debt (leading up to interest payments that are – in full or in part – deductible for tax purposes) or as equity (leading up to dividend payments that are non-deductible for tax purposes) depending on the facts at hand. Other uncertainties may relate to the attribution of profits to and within legal entities. If, for instance, a good is designed in state A, produced in state B and then sold and delivered in state C, the question will come up which state should be taxing which part of the profit. In the absence of any formal bilateral agreement, each state will be in a position to make its own calculation of what part of profit is (not) to be taxed.

2. Do your country's tax authorities systematically verify the facts mentioned in a request for a ruling, either prior to issuing a ruling (ex-ante) or prior to issuing the annual tax assessment (ex-post)? If so, could you explain the procedure in place?

3. Do anti-avoidance provisions require your tax authorities to verify the treatment given to a particular payment/transaction by the other country, as part of a tax audit or prior to issuing a tax assessment? If so, could you explain the procedure in place?

Regardless of what the exact national rules are in the situations above, one might end up in a situation where – afterwards – it turns out that the confirmation given by the tax authorities is incorrect. Either because of the publication of case law by domestic courts, or because new data indicates profits should have been attributed differently.

4. Could you please elaborate in what circumstances tax authorities would (not) be bound by a ruling or any other type of advance certainty provided?

In recent Commission decisions, the Commission has criticized the application of a one-sided transfer pricing method by a tax authority, as this authority does not verify whether there is at least some chance that profits shifted abroad will be taxed there.

5. Does your country check whether any remaining income will be taxed by another country? If so, does your country allow for any correction mechanism to ensure that any remainder will still be taxed at home as to avoid double non-taxation?

When allocating profits within a legal entity that operates cross-border, some countries have adopted an approach where all profits will be allocated to the headquarters (the 'head office'), except for those profits that are clearly attributable to local activities (the 'permanent establishment').

6. Does your country apply any kind of default rule when allocating profits?

In the recent tax ruling cases mentioned above, the European Commission argued that an at arm's length principle directly follows from the application of Article 107 TFEU, regardless of whether and how such a principle is to be considered part of the national tax law.

7. Did your country adopt any kind of at arm's length pricing / transfer pricing principle, either by means of formal rules or by applying it in practice? In either case, do they have any practical or formal link to the OECD 's transfer pricing guidelines?

In the process of determining what the amount of profit is that should be taxed in a country, either the tax authorities or the taxable entity itself may conclude that earnings received or costs made where either overstated or understated. This may happen in intra-group situations in particular. In the absence of any adjustments, the amount of taxable profit reported may either be too high or too low compared to an at arm's length setting.

8. Does your country allow for *unilateral* adjustments of profits both upwards as well as *downwards*?

Let us take the following simplified example: A product is sold from one group company to another at a price of 100. According to the tax authorities of the selling state an at arm's length price should have been 120 and it adjusts taxable profit upwards accordingly.

9. Suppose the buyer is a resident of your country. Under which conditions would your tax authorities normally accept the transfer pricing result of the other country – an increase in deductible costs – and adjust the level of taxable profit downwards?

Many countries have a general anti-abuse rule ('GAAR') next to special legislation (lex specialis) dealing with mismatches (debt/equity), interest deduction limitations or at arm's length pricing.

10. Does your country have a GAAR? If so, does your law allow it to be applied in a case of abuse as a back-up to lex specialis that turns out to be ineffective in a given case?

Part II

Member States are the ones that actually need to implement a recovery decision. This will be governed by national law. Some countries use civil procedure (unjustified enrichment or alike), others have special administrative or tax law procedures. One might even make it a mere procedural matter and allow the Commission's decision to be used as a legal title to collect sums due, to the extent sums have been named therein. Procedures should be designed in a way that recovery of sums due can take place within four months after the decision has been taken.

11. Briefly describe whether, and if so, which rules have been implemented in your country to ensure the effective and timely recovery of (fiscal) state aid, once ordered by the European Commission.

12. Have there been any examples in your country where national judges refused to allow for the (immediate) recovery of state aid? If so, please describe those situations.

Given the nature of state aid rules, there is limited room for recognition of 'legitimate expectations' that warrant protecting. This raises the question to what extent EU Member States may be bound by non-EU treaties, which might provide for a more vigorous protection of (more broadly defined) legitimate expectations. One may think of agreements protecting property or bilateral or multilateral investment treaties offering investor protection.

13. Is your country subject to international obligations involving the protection of property or the protection of foreign investments? If so, please identify them.[1]

14. What position do the Courts in your country take on how to deal with conflicting obligations of European Union law and international law (including bilateral agreements with non-EU Member States)?

[1] In case of time restraints, please do address any existing agreements with the USA and the UK in particular.

QUESTIONNAIRE

Raymond Luja*
Julia Rapp**

À partir de 2013, la Commission européenne a entrepris un examen à l'échelle européenne de plus de 1.000 rescrits fiscaux, lequel a déjà mené à un certain nombre de décisions ordonnant aux États membres de récupérer des sommes considérables de ce que la Commission a considéré comme des aides d'État illégalement accordées (telles que *Starbucks, Fiat, Belgian Excess Profit Rulings, Apple*). Ces décisions sont maintenant soumises au contrôle des Tribunaux de l'UE.

Nous invitons les rapporteurs nationaux à clarifier et à approfondir les aspects et questions qui suivent. Les questions seront divisées en deux parties. La première partie (Partie I) portera essentiellement sur les règles et procédure fiscales nationales. La deuxième partie (Partie II) portera sur des questions de droit national (procédural) et sur son interaction avec le droit de l'Union européenne.

Partie I

De nombreux pays permettent aux entités imposables de contacter leurs autorités fiscales nationales afin d'obtenir un certain degré de sécurité juridique relativement à des questions de droit fiscal. Celles-ci peuvent prendre différentes formes, allant de rescrits fiscaux anticipées ou accords préalables en matière de prix de transfert plus formalistes, à des accords tacites écrits ou oraux moins for-

* Rapporteur général.
** Rapporteur institutionnel.

malistes ou même à des clarifications qui sont clairement déclarées non contraignantes. Certains pays permettent à toute société de solliciter une certitude anticipée, tandis que d'autres ont soit une politique déclarée, soit une politique implicite de limiter l'accès aux autorités fiscales aux grandes entreprises ou sociétés engagées dans de nouveaux investissements substantiels.

1. Votre pays offre-t-il la possibilité qu'un certain degré de sécurité juridique anticipée en matière fiscale soit accordé par les autorités fiscales? Dans l'affirmative, des conditions particulières sont-elles prévues afin d'être admissible à cette certitude anticipée?

Il peut y avoir différents types d'incertitude. Par exemple, il peut y avoir un paiement particulier entre deux sociétés qui pourrait être considéré soit comme une dette (ce qui entraîne des paiements d'intérêts qui sont – totalement ou partiellement – déductibles aux fins de l'impôt), soit comme une participation (qui conduit à des versements de dividendes qui ne sont pas déductibles aux fins de l'impôt) en fonction des faits en cause. D'autres incertitudes peuvent concerner l'attribution de bénéfices à des entités juridiques et au sein de celles-ci. Si, par exemple, un bien est conçu dans l'État A, produit dans l'État B et ensuite vendu et livré dans l'État C, la question se posera de savoir quel État devrait taxer quelle partie du bénéfice. En l'absence d'un accord bilatéral formel, chaque État sera en mesure de faire son propre calcul relativement à la partie du bénéfice doit faire (ou pas) l'objet d'imposition.

2. Les autorités fiscales de votre pays vérifient-elles systématiquement les faits mentionnés dans une demande de décision, soit avant la prise d'un rescrit (ex ante), soit avant l'émission de l'imposition annuelle (ex-post)? Si oui, pourriez-vous expliquer la procédure existante?

3. Les dispositions antifraude exigent-elles que vos autorités fiscales vérifient le traitement accordé à un certain paiement/transaction par l'autre pays dans le cadre d'un audit fiscal ou avant l'émission d'une imposition fiscale? Si oui, pourriez-vous expliquer la procédure existante?

Quelles que soient les règles nationales exactes dans les situations susmentionnées, on pourrait se retrouver dans une situation où – après tout – il s'avère que la confirmation donnée par les autorités fiscales est incorrecte. Soit à cause de la publication de jurisprudence par les tribunaux nationaux, soit parce que de nouvelles données indiquent que les bénéfices auraient dû être attribués différemment.

4. Pourriez-vous préciser dans quelles circonstances les autorités fiscales seraient (ne seraient pas) liées par un rescrit ou un autre type de garantie anticipée accordée?

Dans de récentes décisions de la Commission, la Commission a critiqué l'application d'une méthode de prix de transfert unilatérale par une autorité fiscale, étant donné que cette autorité ne vérifie pas s'il y a un minimum de chance que les bénéfices transférés à l'étranger y soient imposés.

5. Votre pays vérifie-t-il si les revenus restants seront imposés par un autre pays? Dans l'affirmative, votre pays prévoit-il un mécanisme de correction pour veiller à ce que tout reste soit taxé chez lui afin d'éviter une double non-imposition?

Lors de l'affectation de bénéfices au sein d'une entité juridique opérant sur une base transfrontalière, certains pays ont adopté une approche dans laquelle tous les bénéfices sont affectés au siège (le «siège»), à l'exception des bénéfices qui soient clairement attribuables aux activités locales (l' «établissement stable»).

6. Votre pays applique-t-il une règle de défaut quelconque lors de l'affectation des bénéfices?

Dans les récentes affaires de rescrits fiscaux susmentionnées, la Commission européenne a soutenu que le principe du prix de pleine concurrence résulte directement de l'application de l'article 107 du Traité FUE, indépendamment de la question de savoir si et comment un tel principe doit être considéré comme faisant partie du droit fiscal national.

7. Votre pays a-t-il adopté un quelconque principe de prix / prix de transfert dans des conditions de pleine concurrence, soit au moyen de règles formelles, soit en l'appliquant dans la pratique? Dans les deux cas, ont-ils un lien pratique ou formel avec les lignes directrices de l'OCDE en matière de prix de transfert?

Dans le processus de détermination du montant du bénéfice qui devrait être imposé dans un pays, les autorités fiscales ou l'entité imposable elle-même peuvent conclure que les revenus perçus ou les coûts supportés sont soit exagérés soit sous-estimés. Cela peut se produire dans des situations intragroupes en particulier. En l'absence de toute correction, le montant du bénéfice imposable déclaré peut être trop élevé ou trop bas par rapport à une configuration de pleine concurrence.

8. Votre pays autorise-t-il des corrections *unilatérales* des bénéfices tant à la hausse qu'*à la baisse*?

Prenons l'exemple simplifié suivant: Un produit est vendu par une société du groupe à une autre à un prix de 100. Selon les autorités fiscales de l'État de vente, un prix de pleine concurrence aurait dû être de 120 et, en conséquence, il corrige le bénéfice imposable à la hausse.

9. Supposez que l'acheteur est un résident de votre pays. Dans quelles conditions vos autorités fiscales accepteraient-elles normalement le résultat de prix de transfert de l'autre pays – une augmentation des coûts déductibles – et corrigeraient-elles le niveau du bénéfice imposable à la baisse?

Beaucoup de pays ont une règle anti-abus générale (« GAAR ») à côté de la législation spéciale (lex specialis) traitant des écarts (dettes/capitaux propres), des limitations de la déduction d'intérêts ou des prix de pleine concurrence.

10. Votre pays a-t-il une rège anti-abus générale (« GAAR »)? Dans l'affirmative, votre droit permet-il qu'elle soit appliquée dans un cas d'abus comme une sauvegarde de la lex specialis qui s'avère inefficace dans un cas donné?

Partie II

Les États membres sont ceux qui ont réellement besoin de mettre en œuvre une décision de récupération. Cela sera régi par le droit national. Certains pays utilisent la procédure civile (enrichissement sans cause ou similaire), d'autres ont des procédures administratives ou fiscales spéciales. On pourrait même en faire une simple question de procédure et permettre à la décision de la Commission d'être utilisée comme titre juridique pour percevoir les sommes dues, dans la mesure où des sommes y ont été mentionnées. Les procédures devraient être conçues de telle sorte que la récupération des sommes dues puisse avoir lieu dans les quatre mois suivant la prise de décision.

11. Décrivez brièvement si, et dans l'affirmative, quelles règles ont été mises en œuvre dans votre pays pour assurer la récupération efficace et en temps opportun des aides (fiscales) d'État, une fois ordonnée par la Commission européenne.

12. Y a-t-il eu dans votre pays des cas où les juges nationaux ont refusé de permettre la récupération (immédiate) d'aides d'État? Si oui, veuillez décrire ces situations.

Compte tenu de la nature des règles relatives aux aides d'État, la marge de reconnaissance de «confiance légitime» justifiant la protection est limitée. Ceci soulève la question de savoir dans quelle mesure les États membres de l'UE peuvent être liés par des traités non-UE, ce qui pourrait permettre une protection plus vigoureuse de la confiance légitime (plus largement définie). On peut penser à des accords protégeant des biens ou des traités bilatéraux ou multilatéraux d'investissement offrant une protection aux investisseurs.

13. Votre pays est-il soumis à des obligations internationales concernant la protection de biens ou la protection d'investissements étrangers? Si oui, veuillez les identifier.[1]

14. Quelle est la position que les Tribunaux de votre pays adoptent sur la manière de traiter les obligations contradictoires du droit de l'Union européenne et du droit international (y compris les accords bilatéraux avec les États non membres de l'UE)?

[1] En cas de contraintes de temps, veuillez évoquer tout accord existant avec les États-Unis et le Royaume-Uni en particulier.

FRAGEBOGEN

Raymond Luja*
Julia Rapp**

Seit 2013 hat die Europäische Kommission eine EU-weite Überprüfung von über 1000 Steuerentscheiden veranlasst; diese hat bereits zu einer Reihe von Entscheidungen geführt, die die Mitgliedstaaten anweisen, grosse Summen an Geld zurückzufordern, die als unrechtmässige staatliche Beihilfen (wie z.B. *Starbucks, Fiat, Belgian Excess Profit Rulings,* Apple) eingestuft wurden. Diese Entscheidungen sind derzeit Gegenstand von vor den EUGerichten anhängigen Gerichtsverfahren. Wir möchten die nationalen Berichterstatter dazu auffordern, zu den folgenden Fragen und Problemen Stellung zu nehmen. Die Fragen sind in zwei Teile eingeteilt: Teil I befasst sich vor Allem mit den nationalen Steuerregelungen und Steuerverfahren, Teil II mit nationalen verfahrensrechtlichen Angelegenheiten und deren Zusammenspiel mit dem Europäischen Recht.

Teil I

Viele Staaten erlauben es ihren Steuersubjekten mit den nationalen Steuerbehörden in Kontakt zu treten um eine gewisse Art von rechtlicher Sicherheit bzgl. ihrer Steuerangelegenheiten zu erhalten. Das kann in verschiedenen Formen geschehen, etwa in einer formelleren Form von vorab beschlossenen Steuerentscheiden oder vorab entschiedenen Preisvereinbarungen oder, weniger

* Genereller Berichterstatter.
** Institutioneller Berichterstatter.

formell, schriftlichen oder mündlichen "Gentlemen´s agreements" oder sogar einfachen Klarstellungen, die eindeutig als unverbindlich angesehen werden. Einige Staaten erlauben es jedwelchem Unternehmen vorab einen Steuerbescheid zu beantragen, andere haben eine ausdrückliche oder implizite Politik mit dem Ziel, den Zugang großer Unternehmen oder solcher Unternehmen, die substantielle neue Investitionen planen, zu den Steuerbehörden zu begrenzen.

1. Erlaubt Ihr Land irgendeine Art von durch die Steuerbehörden im Voraus gegebener Rechtssicherheit auf dem Gebiet der Steuerangelegenheiten? Wenn ja, existieren spezifische Anforderungen um eine derartige Sicherheit im Voraus zu erlangen?

Es kann verschiedene Arten von Ungewissheiten geben. Zum Beispiel (und je nach den Tatsachen des Einzelfalls) könnte es sich um eine ganz bestimmte Zahlung zwischen zwei Unternehmen handeln, die entweder als eine Schuld (was zu Zinszahlungen führt, die entweder teilweise oder vollständig von den Steuern abgesetzt werden können), oder aber als Kapital angesehen werden kann (was zu Dividendenausschüttungen führt, die nicht von der Steuer absetzbar sind). Andere Ungewissheiten können entstehen, wenn Gewinne gewissen juristischen Personen (oder innerhalb der juristischen Person) zugesprochen werden. Angenommen, eine Ware wird im Staat A entworfen, im Staat B produziert, dann verkauft und im Staat C ausgeliefert: dann erhebt sich die Frage, welcher Staat welchen Anteil am Gewinn versteuern sollte. In der Abwesenheit eines bilateralen Übereinkommens kann jeder Staat selbst bestimmen, welcher Teil des Gewinns zu versteuern (oder nicht zu versteuern) ist.

2. Überprüfen die Steuerbehörden Ihres Landes systematisch die in einem Antrag auf einen Steuerbescheid enthaltenen Fakten, sei es vor der Beschlussfassung (ex-ante), sei es nach der jährlichen Steuerveranlagung (ex-post)? Wenn ja, könnten Sie bitte das einschlägige Verfahren beschreiben?

3. Beinhalten die Vorschriften zur Bekämpfung der Steuerumgehung Ihres Landes eine Regelung, die Ihre nationale Steuerbehörde dazu verpflichtet, die Behandlung, die eine spezifischen Zahlung/ein spezifischer Geschäftsvorgang in einem anderen Land erfahren hat, innerhalb des Verfahrens einer Steuerprüfung und vor Beschlussfassung zu überprüfen? Wenn ja, könnten Sie bitte das einschlägige Verfahren darlegen und erklären?

Unabhängig der exakten nationalen Regelungen in den oben beschriebenen Situationen kann der Fall aufkommen, in dem –im Nachhinein – die von den Steuerbehörden gegebene Bestätigung inkorrekt war. Sei es, weil die nationalen Gerichte in der Zwischenzeit neue Urteile erlassen haben, sei es, weil neue

Tatsachen darauf hindeuten, dass die Gewinne anders hätten gedeutet werden müssen.

4. Könnten Sie bitte auf die Frage eingehen, unter welchen Umständen die Steuerbehörden durch einen Entscheid oder eine andere Art von im Vorab gegebener Rechtssicherheit an diesen gebunden sind (oder nicht)?

In jüngsten Entscheidungen hat die Kommission die Anwendung einer einseitigen Leistungsverrechnung durch die Steuerbehörden kritisiert, da die fraglichen Steuerbehörden nicht überprüfen, ob die grenzüberschreitende Gewinne eventuell in dem Bestimmungsland besteuert werden.

5. Wird in Ihrem Land überprüft, ob übriggebliebene Gewinne von einem anderen Land besteuert werden? Wenn ja, bestehen in Ihrem Land Korrektur-Mechanismen die es erlauben, dass diese in Ihrem Land versteuert werden, um so eine doppelte Nichtbesteuerung zu verhindern?

Wenn es darum geht, Gewinne innerhalb einer juristischen Person, die grenzüberschreitend handelt, zuzuordnen, so sind einige Länder dazu übergegangen, diese Gewinne den „Headquarters" (dem Hauptsitz) zuzuordnen, es sei denn, es handelt sich eindeutig um Gewinne, die lokalen Tätigkeiten entspringen (die „Betriebsstätte").

6. Wendet Ihr Land irgendeine Art von Standardregel an, wenn es darum geht, Gewinne zuzuordnen?

In den oben genannten Steuerfällen hat die Kommission argumentiert, dass der Fremdvergleichungsgrundsatz („at arm's length principle") unmittelbar aus der Anwendung des Artikel 107 AEUV folgt, unabhängig davon, ob oder unter welchen Umständen ein derartiges Prinzip im Lichte des nationalen Steuerrechts gesehen werden muss.

7. Hat Ihr Land irgendeine Art von Fremdvergleichspreis/Transferpreisprinzip angewandt, sei es durch formelle Normen, sei es durch reine Anwendung in der Praxis? Gibt es, in welchem der oben genannten Fällen auch immer, eine Verbindung zu den OECD Transferpreis-Richtlinien?

Im Prozess der Feststellung, welcher Anteil an Gewinn in einem Land zu versteuern ist, können sowohl die Steuerbehörden als auch das Steuersubjekt selbst zum Schluss kommen, dass Gewinne oder Kosten unter – oder überbewertet wurden. Das kann vor Allem in konzerninternen Situationen vorkommen. In Abwesenheit jedwelcher Anpassung kann die Summe der steuerunterworfenen Gewinne im Vergleich zum Fremdvergleich zu hoch oder zu niedrig sein.

8. Erlaubt Ihr Land *unilaterale* Anpassungen der Gewinne, sowohl nach oben als auch *nach unten* gerichtet?

Ein vereinfachtes Beispiel: Ein Produkt wird von einem Unternehmen an ein anderes Unternehmen für 100 verkauft. Gemäß den Steuerbehörden des „verkaufenden Staats" hätte der Fremdvergleichspreis 120 sein müssen und sie korrigieren den der Steuer unterworfenen Gewinn demgemäß.

9. Angenommen, der Käufer wäre in Ihrem Land ansässig. Unter welchen Umständen würden Ihre Steuerbehörden das Transferpreis-Resultat des anderen Landes akzeptieren – also eine Erhöhung steuerabsetzbarer Kosten – und eine Anpassung der steuerrechtlichen Gewinne nach unten vornehmen?

Viele Länder verfügen über generelle Missbrauchsbekämpfung-Vorschriften (*general antiabuse rule,* „GAAR") zusammen mit speziellen Rechtsvorschriften (lex specialis), die sich auf Unausgeglichenheiten (Schuld/Kapital), Einschränkung beim Zinsabzug oder Fremdvergleichspreis beziehen.

10. Existieren in Ihrem Land solche Vorschriften? Wenn ja, ist es im Lichte Ihres Rechts erlaubt, diese Vorschriften auf einen Fall von Missbrauch anzuwenden, als eine Art von „back up" zum lex specialis, das sich im gegebenen Fall als unzureichend herausgestellt hat?

Teil II

Die Mitgliedstaaten selbst werden beauftragt eine Rückforderungsentscheidung zu implementieren. Diese wird von nationalem Recht bestimmt sein. Einige Mitgliedstaaten benutzen zivilrechtliche Verfahren (ungerechtfertigte Bereicherung u.Ä.), andere haben spezielle verwaltungsrechtliche oder steuerrechtliche Verfahren vorgesehen. Man kann daraus sogar ein nur verfahrensrechtliches Problem machen und Entscheidungen der Kommission als Rechtsanspruch zur Schuldeintreibung benutzen. Das Verfahren sollte so ausgelegt sein, dass die Wiedererlangung innerhalb von vier Monaten nach

Entscheidsbeschluss möglich ist.

11. Beschreiben Sie kurz ob, und wenn ja, Regelungen in Ihrem Land eingeführt wurden zur schnellen und effektiven Rückforderung staatlicher Beihilfen (fiskaler Art), die von der Kommission angeordnet wurden?

12. Gab es irgendwelche Beispiele eines Falles in Ihrem Land, in dem ein nationales Gericht die (sofortige) Rückforderung einer staatlichen Beihilfe verweigert hat? Wenn ja, bitte beschreiben Sie diesen Fall.

Angesichts der Natur der staatlichen Beihilfen gibt es eigentlich keinen Raum für eine beschützenswürdige Anerkennung „berechtigter Erwartungen". Hier stellt sich die Frage, in welchem Ausmaß die EU-Mitgliedstaaten an nicht EU-Übereinkünfte gebunden sind, die eventuell einen strengeren Schutz der berechtigten Erwartungen vorsehen. In diesem Zusammenhang stellt sich die Frage nach Übereinkünften zum Schutze des Eigentums oder bilateralen oder multilateralen Investitions-Übereinkommen, die einen Investitionsschutz bieten.

13. Ist Ihr Land an internationale Rechtsverbindlichkeiten gebunden, die den Schutz des Eigentums oder den Schutz ausländischer Investitionen beinhalten? Wenn ja, bitte identifizieren Sie diese[1].

[1] Im Falle von zeitlichen Beschränkungen bitten wir Sie, vor Allem auf alle existierenden Übereinkünfte mit den USA oder Groß – Britannien einzugehen.

GENERAL REPORT



GENERAL REPORT

Prof. Dr Raymond Luja*

1. Introduction

This general report will address the interaction between direct taxation and state aid in the context of the ongoing tax ruling discussions. The first institutional report already provides an overview of the recent tax ruling cases and the methodology used by the European Commission, which will not be repeated here in full. It is not the objective of this report to discuss individual cases in detail, but to provide a background to them and to address some of the more fundamental issues raised in those cases.[1] The second institutional report will mainly deal with the issue of state aid recovery and obligations under bilateral investment treaties.[2]

This report will reflect some findings drawn from national reports submitted, as included in this book. Rapporteurs were asked to address 14 questions both on tax rulings and state aid procedures in their country (included in the Annex).

In paragraph 2 I will briefly provide some political background to what is going on in the tax world and how this relates to ongoing state aid investigations.

* Professor of Comparative Tax Law, Maastricht University, the Netherlands and fiscal state aid counsel to Loyens & Loeff N.V., Amsterdam. All statements in this paper are personal and do not necessarily represent the views of Loyens & Loeff nor those of FIDE. For the purpose of transparency, it should be noted that the author has been consulted on matters of tax rulings and state aid in the past. This report includes developments up to 6 February 2018.

[1] Please note that the more fundamental issues, as also identified in the institutional report, often relate to elements of the European Commission's primary line of reasoning in the ongoing cases and that this may leave any alternative reasoning in those cases unaffected.

[2] The second institutional report was not available at the time the general report had to be handed in, and could therefore not be addressed here. Any reference to 'the' institutional report will therefore refer to the first report, unless otherwise indicated.

In paragraph 3 we will focus on the topic of advance legal certainty and tax rulings (Q1-Q5 of the questionnaire). Paragraph 4 will address related issues of transfer pricing, i.e. setting prices for intra-group transactions, more in-depth (Q6-Q9). Paragraph 5 then continues with addressing the potential use of state aid rules in relation to the (non)-application of general anti-abuse rules and other measures aimed at countering tax avoidance (Q10). Paragraph 6 will address some selected issues concerning the recovery of fiscal state aid (Q11-Q12), and it will look at some of the potential limitations international agreements may impose on effectuating such recovery (Q13-Q14). Concluding remarks follow in paragraph 7.

In total 23 national reports have been received next to the two institutional reports. The general rapporteur would like to thank all authors for their valued contributions. Any references in this report to practices of the Member States will be restricted to the 22 EU Member States of which reports were received (Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain, Sweden and the United Kingdom), plus, unless otherwise indicated, 1 EFTA Member (Norway). References to individual countries will necessarily be concise and may leave out some nuances national and institutional rapporteurs included in their reports. The national reports also provide broader overviews of the respective national legislations with regard to issues like tax ruling procedures and recovery of state aid. Readers are therefore recommended to consult the relevant national reports if in need for more detailed information.

In this report the main focus will be on the elements of selectivity and advantage that each have a separate role to play in the definition of Article 107(1) TFEU. In the tax ruling cases the distortion of competition and affecting intra-EU trade are less of an issue as is the involvement of state resources, should the presence of aid be established.

2. Setting the scene

In the European Union (EU) direct taxation has been, and to a large extent still is an exclusive competence of its Member States. But such competence is to be exercised in line with EU obligations, of which state aid rules are a part. These rules cover the mitigation of charges that are normally born by an undertaking, including taxes.[3] This should not come as a surprise, at least not in 2018.

While the legal definition of state aid as included in Article 107(1) TFEU did not substantially change since the 1958, its scope of application gradually became

[3] See CJ 30/59, *De Gezamenlijke Steenkolenmijnen in Limburg V High Authority of the ECSC*, ECLI:EU:C:1961,2 and CJ 173/73, *Italy v Commission*, ECLI:EU:C:1974:71. 'CJ' will be used as a reference to the Court of Justice, regardless of the status of the European Union or its predecessor (EEC/EC) at the time.

more clear (most tax lawyers would say 'wider') in regard to taxation. In its 1998 Notice on the application of State aid rules to measures relating to direct business taxation (the 1998 Notice) the Commission already emphasized that state aid rules could play a role in dealing with some of the tax measures that were deemed to lead to harmful tax competition in accordance with the findings of the EU's Code of Conduct Group (for Business Taxation), but mainly in regard to assessing the compatibility of such measures.[4] From the start the Commission reminded us that the legal qualification of state aid is not affected by the possible qualification of a tax measure as harmful or non-harmful in a political context.[5] Twenty years later, we cannot but wonder whether we are still able to keep politics at a sufficient distance and to let a legal state aid assessment be unaffected by political and societal sentiments.

There are many tax measures, either schemes or individual measures like tax rulings, that may contribute to tax avoidance. In a recent effort to improve the international consensus on how to deal with international tax avoidance structures, the G20 and the OECD concluded their BEPS-project. Its objective was to addressed tax base erosion and the shifting of taxable profits to low or non-taxed entities. BEPS provides, inter alia, for changes in future bilateral tax treaties, to changes in the consensus interpretation of current tax treaties going forward and for improved assistance and exchange of information between countries. The most tangible result of BEPS is the 2017 signing of the so-called Multi-Lateral Instrument (MLI), which has the potential to change over 1,100(!) bilaterally negotiated tax treaties at once. The MLI is meant to fast-track the introduction of anti-abuse provisions and the closing of tax loopholes resulting from tax treaties, next to improving cross-border dispute settlement and introducing mandatory binding arbitration if countries choose to.[6]

At the same time, in the EU a number of related efforts were taken, including the introduction of an anti-tax avoidance directive (ATAD) forcing Member States to close some well-known loopholes in corporate tax systems by 2019/2020.[7]

[4] The 1997 Code of Conduct for Business Taxation reflects a political commitment of Member States to abolish measures deemed harmful on a consensus basis, and to refrain from introducing new ones. See the Resolution of the Council and the representatives of the governments of the Member States, meeting within the council, of 1 December 1997 on a code of conduct for business taxation, OJ C 2/1 of 6 January 1998.

[5] Commission notice on the application of State aid rules to measures relating to direct business taxation, OJ C 384/3 of 10 December 1998, para. 28 (no longer in force).

[6] Multilateral Convention to Implement Tax Treaty Related Measures To Prevent Base Erosion and Profit Shifting, signed on 7 June 2017 (not entered into force yet, status as of 24 January 2018).

[7] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193/1 of 19 July 2016 (ATAD I) as amended by Council Directive (EU) 2017/952 of 29 May 2017 as regards hybrid mismatches in third countries, OJ

Important improvements in the availability and exchange of information within the EU were made. A database has been set up that contains information on new and existing tax rulings with a cross-border impact – accessible to tax authorities of other Member States as of 2017/2018.[8] (It should be noted that information sharing with the Commission itself has been restricted; the information most needed for state aid purposes will not(!) be directly accessible to it.[9]) Furthermore, companies will be required to provide a better insight in their business activities and tax positions per country (country-by-country reporting). The latter will enable national tax authorities to get a better understanding of what is going on world-wide (reports are to be filed by mid-2018 for fiscal years commencing 1 January 2016).[10]

Against the background of the developments above we also saw a surge of state aid investigations, in particular in relation to tax rulings. This was triggered not only by discussions in national parliaments, the UK's in particular, and reports published by NGOs, but also by a need to respond to the publication of a large number of – until then confidential – rulings as a result of the Luxleaks affair, the first in a series of such leaks. But we should not forget that, as far as tax rulings were concerned, the previous European Commission already started an investigation into tax ruling practices of seven Member States in 2013, which was extended to cover all of them in 2014.[11] (The EFTA Surveillance Authority did the same.[12]) The Commission's 1998 Notice already emphasized that tax rulings as such can become the subject of a state aid investigation.[13] So one may wonder why this came as a surprise to some in more recent years. This can probably be explained best by looking at the controversies addressed by the Commission in ongoing cases and not at the fact that tax rulings as such are involved as a possible means of granting aid. After all, it is all about the effect that occurs and not

L 144/1 of 7 June 2017 (ATAD II), together referred to commonly as the ATAD. It provides minimum norms for anti-avoidance provisions Member States need to include in their national corporate tax systems (only); more restrictive provisions already in place do not need to be changed.

[8] See Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 332/1 of 18 December 2015. Whether or not all required information is actually being added to the database by Member States and their sub-national governments is still to be established.

[9] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation, OJ L 64/1 of 11 March 2011, Articles 8a(8) and 21(5) (as amended).

[10] See Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 146/8 of 3 June 2016.

[11] EC press release IP/14/2742 of 17 December 2014.

[12] The Norwegian report reminds us that the EFTA Surveillance Authority reviewed the tax ruling practices of the three EFTA states and did not find evidence of any state aid infringements, so it subsequently closed its investigation in 2016. (See ESA Press Release PR(16)09 of 24 February 2016.)

[13] Commission notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262/1 of 19 July 2016.

about the method used (from a state aid point of view that is; the public relations perspective may differ).

Essentially, when assessing whether something is state aid or not, the political considerations at EU level and the best practices promoted by the OECD going forward, should play little to no role in the review of past practices. In May 2016 the European Commission released its Notice on the notion of state aid (the 2016 Notice) to give an overview of how it interprets the state aid definition, which, with respect to direct taxation, replaced the 1998 Notice.[14] While the 2016 Notice provides a valuable overview of the state of affairs, we should keep in mind that it is up to the EU's Courts to give a final interpretation on matters concerning Article 107(1) TFEU. For the purpose of this report it should be emphasized that the 2016 Notice already reflects certain points of view the Commission has taken in tax ruling decisions that had just been finalized at the time and that are currently being contested in the EU's Courts. The fact that such considerations made it into the 2016 Notice already should not be interpreted as necessarily reflecting consistent case law at the time. That said, the 2016 Notice is very useful to get introduced to the tax-related issues of state aid rules and it is not the objective of this report to address all issues raised in there again. Its focus will mainly be on some of the underlying fundamental issues that keep many tax lawyers and EU lawyers apart.

3. Advance legal certainty and tax rulings

3.1. Why may taxpayers be in need of comfort?

As the European Commission itself emphasized, there may be a need for a tax ruling practice where Member States provide legal certainty in advance to taxpayers:

> "Tax rulings as such are perfectly legal. They are comfort letters issued by tax authorities to give a company clarity on how its corporate tax will be calculated or on the use of special tax provisions. [...] The role of EU state aid control is to ensure Member States do not give selected companies a better tax treatment than others, via tax rulings or otherwise."[15]
>
> "Tax rulings as such are not a problem under EU State aid rules, if they simply confirm that tax arrangements between companies within the same group comply with the relevant tax legislation. However, tax rulings that confer a selective tax advantage to specific companies can distort competition within the EU's Single Market, in breach of EU State aid rules."[16]

[14] *Ibid.*, para. 22.

[15] European Commission press release IP/16/2923 of 30 August 2016 (Apple final decision).

[16] European Commission press release IP/17/5343 of 18 December 2017 (IKEA opening decision). 'Simply' confirming that tax arrangements between group companies comply with national law may be considered something of an understatement in most of the situations where a tax ruling is requested.

While each legislator may dream of designing a tax system that is so self-explicable that it simply cannot give rise to any misinterpretation, we are far from reaching that. Often the application of the law to a particular situation is not as clear as it could be.

In general, the reason to apply for a ruling is to attain a certain degree of certainty on whether the financing of a certain investment is acceptable under national law or whether certain prices used for intra-group transactions are acceptable. The latter may refer to, inter alia, remuneration for services rendered or the price of supplies to or from group members. Or what to think of the recognition and valuation of IP-rights transferred from one entity to another and what to make of the price to be charged for licensing their use by other group members? To be clear on this, sometimes rulings will be requested to confirm tax planning structures designed to reduce taxable profit by using higher than usual interest payments or royalty payments, and some degree of 'uncertainty ' may have been created for this purpose. This is what often draws attention by politicians and the press, not the more frequent, genuine situations that are also being dealt with on a daily basis.

In this report, in line with European Commission (early) practice, any reference to a 'tax ruling' may mean ex-ante confirmation on how the law will be applied by the tax authorities (which tax lawyers refer to as an 'Advance Tax Ruling' or ATR) or an ex-ante confirmation by those authorities of acceptable pricing for certain transactions (an 'Advance Pricing Agreement ' or APA). While most tax rulings address issues that affect group structures and intra-group transactions, as these are the main causes of uncertainty from a tax point of view, rulings may also address transactions with third parties. For the purpose of this report however, we will focus on tax rulings affecting intra-group situations.

3.2. Is a ruling binding?

With the exception of Bulgaria, all reporting countries offer some type of binding ruling.[17] In a request for a ruling the relevant facts and circumstances will be presented and the tax authorities will be requested to sign off on the tax treatment thereof as will be reflected in the ruling. This may be a rather burdensome process, especially when valuation of assets is at stake or the assignment of certain risks involved in contractual arrangements to particular entities, for which they should get a certain level of compensation.

A tax ruling will provide some degree of protection if one engages in a certain activity and then later the interpretation of an existing law changes, either

[17] From the Romanian national report it is unclear whether Romania has a tax ruling system as such. Estonia does issue rulings, but not on transfer pricing issues (APAs).

by case law that becomes available or by a change in administrative practice or interpretation by the tax authorities. In all EU Member States a ruling will not be considered binding if (i) the actual facts and circumstances do not match those presented in the ruling, or (ii) a change in the law itself occurs. Changes in case law may lead to the (non-retroactive) withdrawal of a ruling, even if the ruling was meant to be valid for a fixed period of time (often up to 5 years).

It should be noted that in Denmark an advance ruling on valuation of assets is generally considered binding for no more than 6 months. Moreover, it would no longer be binding if it later turns out that the actual value differed at least 30% of 1 million DKK at the time of issuing. While the latter safeguard will most likely be welcomed from a state aid point of view, it implies that this type of ruling is binding only to the extent parties could not have reasonably foreseen that the pricing agreed was way off. With hard to value assets, this is not as self-evident as it may seem.

In Italy, while it is generally possible to ask tax authorities to answer questions about interpretation and qualification, there is also a separate regime for companies that are active internationally. It seems that only the latter is aimed 'at stipulating an actual binding agreement between the financial administration and the taxpayer'.[18] Even so, both the general regime and the regime for international companies can give rise to legal certainty. Interestingly, the national report points out that if an agreement is reached under the latter regime, tax authorities will exercise its investigative powers only to matters not covered by such agreement.[19] If this means that a ruling would indeed exempt these companies from any kind of ex-post investigation with respect to the subject covered by that ruling, this may trigger enforcement issues as seen in the ongoing investigation into the Gibraltar tax ruling practice. As the latter has the potential of leading up to yet another landmark judgement involving Gibraltar, allow me to elaborate on this.

In the *Gibraltar II(I)* case, the Commission's preliminary findings were that all of the 165 Gibraltar tax rulings investigated had the potential to contain state aid; they were not preceded by any substantive analysis nor provide insightful reasoning.[20] It then also defined a number of categories of rulings that each dealt with a particular alleged misapplication of national tax law. This case will be very important as it will address many of the issues needed to deal with tax

[18] The Italian national report also states in para. 27 that the second regime would allow for reaching conclusions which are deemed convenient in the context of international relations that may invoke other tax authorities as well (a mutual agreement procedure possibly?).

[19] Italian report, para. 29.

[20] Decision to extend investigation into the Gibraltar corporate tax regime, case SA.34914 of 1 October 2014, C(2014)6851 final, OJ C 369/55 of 7 October 2016.

rulings effectively. Can a tax ruling system as such already be deemed to fail? If not, can we group a number of individual rulings to show that all rulings of a similar nature must be deemed selective, to deal with them in one blow? Last but not least, the Commission demanded Gibraltar to provide evidence of the existence of "appropriate control and monitoring procedures in order to ensure a coherent application of the tax system", both ex-ante (before issuing a ruling) and, ex-post.[21] So (in)effective tax enforcement is questioned here. If the final decision in this case is in line with the decision to extend the formal investigation, this case will provide the Courts with many issues to address that will be relevant not only for the future of state aid control but also for the tax ruling and tax audit practices of Member States. Therefore, *Gibraltar II(I)* has the potential of having a more systemic impact than any of the current tax ruling cases pending in the Courts.

3.3. Is a beneficial ruling always selective?

A tax ruling may lead to a *prima facie* selective advantage, if such ruling would confirm a certain tax treatment which is not available to other tax payers based on the normal application of national law. But this does not mean that it is selective per se. While tax rulings will normally be treated as individual measures and not as aid schemes, there is a rebuttable presumption of selectivity here.[22] So while tax rulings as individual aid measures are likely to be selective, the circumstances of the case may prove differently.

The general reporter is far from concluding that "tax measures found to be a priori selective are, in reality, selective",[23] as the justification test has an important role to play. Many tax cases never end up at the Commission's desk for an investigation, let alone at the Courts, simply because what seems to be selective at first can well be explained by reference to the nature or general scheme of the tax system, i.e. reasons related to the logic of the tax system of which the procedural system is a part.[24]

The problem with dealing with these cases lies in the way we embedded the justification test in state aid analyses. Essentially we look at the nature or general scheme of a tax system to justify perceived selectivity,[25] without wondering

[21] Ibid, para. 57 and conclusion.

[22] CJ C-15/14 P, *Commission v MOL,* ECLI:EU:C:2015:362, para. 60 and C-270/15 P, *Belgium v Commission*, ECLI:EU:C:2016:489, para. 49.

[23] See A-G Wahl, Opinion in C-203/16P, *Dirk Andres (Heitkamp BauHolding GmbH) v Commission*, ECLI:EU:C:2017:1017, paras. 183-187.

[24] CJ 173/73, *Italy v Commission*, ECLI:EU:C:1974:71, para. 15, C-53/00 of 22 November 2001, *Ferring v ACOSS*, ECLI:EU:C:2001:627

[25] *Ibid.*

whether that same system might justify the conclusion that what is being perceived as an extraordinary benefit at first is none. Let me explain this.

A legal system that provides ex-ante clarity and legal certainty may inherently lead to situations where such protection needs to be invoked. This issue as such is not new. In case of ex-post disputes between a tax payer who submitted his tax declaration and a tax inspector disagreeing with it, it is also possible to reach a settlement to avoid going to court. In this situation the Commission already recognized the need for some leeway.[26] If we operate under the assumption that the facts presented in a ruling ex-ante match those found in an examination ex-post, there is little reason not to allow such leeway when issuing a ruling if there is indeed uncertainty about how to interpret the law at the time.

In the context of transfer pricing, a possible benefit ex-post may depend on market circumstances. When tax authorities and companies try to determine an acceptable transfer price they will often need to resort to data available with regard to comparable transactions (comparables). As to ensure a level playing field, any transfer price should be determined by reference to comparables available to both parties at the time a ruling is issued. A properly performed ex-ante analysis of transfer pricing, based on data available at the time, may still turn out to be beneficial if one does an ex-post analysis based on the data that became available later. With hindsight one might conclude that a price agreed was not accurate, but this is where an advance agreement with the tax authorities serves its purpose. For this reason, Member States normally do a periodical review of rulings every couple of years; as more data comes available over time, rulings dealing with transfer pricing (APAs) should have a limited duration as to ensure their continued accuracy.

We will have to establish whether the tax ruling system as such is not designed as to be in favor of particular taxpayers.[27] For a straightforward answer, access to rulings should not be limited to certain taxpayers from the start. At the same time, there is no general right to an advance ruling for everyone as the workload for tax authorities would become impossible.

For example, the Austrian report indicates that anyone may request a tax ruling, but the applicable law also states that rulings are to be issued only in such numbers as not to endanger the performance of other tasks by the tax authorities. This raises the question on how to select which cases to process.[28] So what to

[26] See Commission Decision 2011/276/EU of 26 May 2010 on State aid C-76/03, Umicore SA (OJ L 122/76 of 11 May 2011).

[27] CJ C-106/09P and C-107/09P, *Commission v Gibraltar and the UK and Spain v Gibraltar and the UK*, ECLI:EU:C:2011:732.

[28] Austria charges taxpayers for a ruling; it is unclear from the national report whether this already suffices to limit the number of rulings to a manageable level without the need for further selection.

think of Member States that provide tax rulings only to corporations that are willing to create a large number of new jobs or to do substantial investments or only to high tech sectors?

In Croatia every (future) resident taxpayer may request a tax ruling, but only in a limited number of situations. Two should be highlighted for the purpose of this report. A ruling on the application of tax rules on investments can only be requested for investments over (approx.) € 2.6 million. A ruling on the tax treatment of business activities would only be possible in regard to a-typical activities that are not comparable to those normally carried out in Croatia. While the latter restriction can be placed in the context of managing administrative resources, the first restriction might trigger selectivity issues.

Measures offering comfort do not lead to state aid if they do not end up in a benefit, but may they lead to state aid when they do? The answer to that is likely to be affirmative, although one may wonder whether – if the tax ruling assessment at the time was fully in line with proper procedure – this conclusion may be premature.

3.4. Is there a need to question intra-group transactions?

Most Member States indeed strive to tax group companies and individual companies alike, but that this is not the starting point for tax purposes. First of all, to avoid any misunderstanding on this, profits and losses reported in commercial accounts may differ from those in tax accounts. For instance, in some countries tax accounting rules may provide for different standards in regard to recognition of profits and losses (when is a profit or loss recorded?) or have different rules on how assets may be written off over time. So in this report any reference to profits and losses will be in the context of tax accounting and not commercial accounting (although in many countries these may indeed overlap to a large degree[29]).

Second, in most Member States tax authorities will have to accept the business decisions as made by taxpayers and the contracts as signed by them. It is not for the authorities, as a starting point, to tell taxpayers what they could have done better or differently by comparing them to their competitors. That said, tax authorities may require information to see whether some decisions as made were unduly influenced by personal preferences of taxpayers or, in a corporate setting, group relations, for instance. For this reason, companies are nowadays required to have substantial documentation on record in regard to the prices charged for goods and services delivered to or acquired from other group members (transfer prices).

[29] Such as countries that apply the so-called 'Maßgeblichkeitzprinzip'.

Some version of the at arm's length principle is often applied to adjust such prices where needed. (On the application of this principle, see paragraph 4.) Essentially, what the at arm's length principle tells us is that – to the extent possible – group companies should act as independent companies in relation to the determination of taxable profits for each single entity. If there is a transaction between two group entities the pricing of a certain good transferred or a service delivered will determine how much (taxable) income one entity may record and how much (tax deductible) costs will be recorded at the other. Therefore, tax accounts may need to be adjusted in case transactions do not reflect "open market commercial terms".[30]

Moreover, anti-avoidance rules may be put in place to restrict practices that occur only in group. For instance, 'unnecessary' intra-group transactions such as borrowing money from group members, possibly at high interest rates, may result in shifting of taxable profits between entities. We may encounter situations where the entity receiving interest may be able to set it off against prior losses and not pay tax, or be subject to a lower (progressive) tax rate than the paying entity who may deduct the interest at a higher rate. The receiving entity may also be subject to another set of taxes because of a difference in legal form. The overall tax burden of a group of companies may therefore be affected by increasing intra-group interest payments, both in a cross-border setting as well as in a purely domestic situation. For this reason anti-avoidance rules that limit interest deductions should not only apply in an international setting, as making adjustments within one Member State is not necessarily a 'zero-sum' game.[31]

The at arm's length principle may not only play a role in regulating transactions between group companies, but also within one company. Let me briefly explain this. If one legal entity operates cross-border, this may create two different taxpayers. The "head office" at home and the "permanent establishment" (PE) or branch office abroad. Such a PE may be subject to tax in the other country and its income may be excluded from tax at home. In order to attribute profits and losses between a head office and a PE, many (but not all) countries have adopted the separate entity approach. Based on this approach we have to assign certain assets, equity (a.k.a. 'free capital') and debts to the PE. How this needs

[30] See, for example, Article 9(1) of the OECD Model Tax Convention on Income and on Capital 2017 and paragraph 2 of the Commentary thereto.

[31] For this reason, the general reporter strongly disagrees with A-G Bobek who recently argued: "There is no point in readjusting the tax bases of the parent and subsidiary (if both are based in [the same Member State] to reflect arm's-length terms, because that would be administratively cumbersome and yield the same result in practice." (Opinion in C-382/16 of 14 December 2017, *Hornbach-Baumarkt AG v Finanzamt Landau*, ECLI:EU:C:2017:974, para. 71, in the context of not applying transfer pricing rules to domestic situations and the possibility of it giving rise to discrimination infringing the freedom of establishment.)

to be done has been subject to substantial changes over time. In 2008 and 2010 a major changed happened when the OECD adopted its so-called "Authorized OECD Approach" (AOA), which was then adopted by most of its Members. This approach allows, inter alia, to take interest and royalty payments into account between a head office and its PE in order to allocate profits and losses properly. These payments may be non-existent for legal purposes nor show up in commercial accounts, as all of this happens within one and the same legal entity. So for those countries that adopted a separate entity approach, a 'market-based outcome' may have changed over time because of developments like these.

The adoption of the AOA even led to a change in the wording of the OECD Model Tax Convention. This model is used as a basis for national models and bilateral treaties by many countries, also those that are not a member of the OECD. The model, in its 10th edition in 2017, contains explanatory notes, reservations made by individual OECD Members and positions taken by 33 non-OECD Member Countries. While certain aspects of the AOA may possibly be applied to older conventions, where the wording of the older treaty so allows, this change is the best example showing that acting at arm's length is a dynamic phenomenon and countries do need to adopt these changes along the way. Not all EU Member States agreed to the AOA and its implementation. Explicit reservations were made by Austria, Greece, Latvia, Portugal and the Slovak Republic, who all referred back to the pre-2010 approach; Sweden made an observation in regard to the way free capital was to be assigned between a head office and a PE.[32] So, without going too much into the technical details, it should suffice to say that it is still for States to actually adopt the AOA and it does not apply as a matter of universal principle.

For the remainder of this report it will be assumed that all EU Member States currently apply an at arm's length principle, although each State is at liberty to apply it in accordance with its own set of rules (which may or may not rely on the most current OECD guidelines). As long as those rules apply equally to inbound and outbound transactions as well as in purely domestic situations to ensure a neutral and internally consistent regime, the ruling system as such should be in the clear from a state aid point of view.[33] Whether an at arm's length principle must be applied when national law does not provide for one, will be discussed in paragraph 4.

[32] 2017 Commentary to Article 7 of the OECD Model Tax Convention, paras. 82, 96, 97, and 100.

[33] Assuming there is no systemic failure in enforcement as such, as discussed with regard to *Gibraltar II(I)* in para. 3.2.

3.5. Is there a need for ex-ante or ex-post verification of facts presented in a ruling?

One of the issues raised in regard to tax rulings is whether there is a need for an ex-ante or an ex-post verification of the facts presented in a ruling request. All Member States report that a relevant change in facts may render a ruling inapplicable; so if a certain transaction or structure is not executed as presented, this may affect the validity of the ruling. The question is whether Member States should be actively looking for this. Does the mere fact that a ruling has been issued require that tax authorities verify what actually happened? In order to answer this question we need to understand that tax payers who declare they taxes and then receive an assessment may be audited by tax authorities, but that there needs to be a selection as the controlling capacity of tax authorities is limited.

As exemplified in the German national report, German tax authorities are legally required to verify all facts, but they lack the necessary resources to do so. In turn they need to balance the need to examine individual cases against the need to process all cases, while preserving equal (procedural) treatment under national law. As many tax authorities do nowadays, ICT systems can be a useful tool to identify which cases are most in need of follow-up action, allowing for a more risk-weighted tax control process.

What would be "appropriate control and monitoring procedures in order to ensure a coherent application of the tax system", as the Commission seems after in the *Gibraltar II(I)* case? From my perspective, there is no quest for a 100-% fool proof system of control. At the other hand, issuing rulings without any further verification seems also undesirable.[34]

In France systematic verification of facts seem to be restricted to confirmations regarding the existence of a permanent establishment in France, i.e. of a branch of a foreign entity taxable in France (not being an independent legal entity). Other than that, verification may occur as part of an ad hoc tax audit. From this is may be concluded that a ruling as such would not guarantee an ex-post review of facts per sé. Most of the reporting countries also refer to their 'regular' tax audits as the main way of verification and it is safe to say that in general the issuing of a tax ruling as such does not lead to an automatic ex-post check of facts simply because of the fact that a ruling was requested.[35]

[34] On a theoretical note, a Member State whose tax authorities would be grossly negligent in doing their job across the board, so where there is no effective review at all and tax declarations (if any) are accepted as is, they would not be acting selectively. Such a systemic failure is primarily a concern for the domestic government and parliament and not one of state aid. (Notwithstanding the fact that this could become a matter for EU courts after the introduction of the ATAD, in case Member States fail to uphold the minimum anti-avoidance norms imposed by the EU. See para. 5.3.1, infra.)

[35] The Dutch report states that the tax authorities "will have to verify all facts and circumstances when issuing a tax assessment on the basis of the prior agreement", but the general reporter assumes that

In some national reports it is being mentioned that the facts presented in a request for a ruling *may be* verified ex ante,[36] but only in one of the national reports an obligation to do so (to the extent possible) was mentioned. Sweden systematically verifies facts in tax rulings (APAs) ex-ante and there normally would be a follow-up to check whether assumptions and conditions are still valid and adhered to, thus the national report.[37] In contrast, the Estonian report suggest that authorities shall decide on their own discretion to actually verify the correctness of the evidence provided before issuing an advance tax ruling. In Hungary the Ministry of National Economy may issue tax rulings and it may do an ex-ante check of facts presented in a ruling. Spanish authorities sometimes verify facts presented ex-ante as well. In Norway, on the other hand facts presented in rulings will not be verified upfront; tax authorities will rely exclusively on the information provided in a ruling request, which is assumed to be correct and complete.

3.6. Avoidance of actual or possible double taxation?

3.6.1. Double taxation as a justification

Rulings may confirm that national rules to compensate for double taxation apply. Often tax exemptions or tax credits are used to reduce the domestic tax burden as to take into account the fact that certain profits could be subject to tax abroad. Already in its 1998 Notice the Commission pointed out that tax measures of a "purely technical nature", such as provisions to prevent double taxation, do not constitute aid if applied without distinction.[38] Here it put measures to avoid double taxation in the category of general measures that were part of the reference system, while in the 2016 Notice such measures are addressed in the context of justifying a derogation from the reference system. In this context we must consider the question whether there must always be real, actual double taxation before a Member State can be allowed to apply a measure to avoid double taxation or whether Member States may enact legislation that addresses potential double taxation.[39]

this is meant to refer to possible audits as part of a risk-weighted control process and not to a 100% fact-checking of each assessment that is preceded by a ruling.

[36] The Croatian rapporteurs conclude that there is an ex-ante verification of facts presented in a ruling, although the report suggests that the taxpayer only needs to present detailed descriptions of planned transactions. It remains unclear whether any facts presented therein will actually be checked (to the extent already possible) or whether they merely serve as underlying assumptions for the ruling to be issued.

[37] It is unclear from the Swedish report whether this follow-up would mean that facts are checked before issuing annual tax assessments or whether this is more of a usual follow-up in the context of extending the validity or a ruling (APA) based on new transfer pricing reports per the taxpayer's request.

[38] 1998 Notice, footnote 5, para. 13.

[39] The Commission is also looking into the question of whether a general exemption of a certain category of income should be conditional upon taxation abroad, which may seriously affect schedular tax systems.

In the institutional report it is mentioned in the context of the Belgian Excess Profit rulings that "[the] Commission acknowledged that the avoidance of *actual* double taxation is a possible justification for derogating from the ordinary corporate income tax system."[40] We should be careful not to read too much into this. From a tax perspective this statement deals with two very distinct issues. First, the question may be how much profit should be attributable to foreign activities and could therefore be subject to double taxation. Once that amount is established, will that amount actually be subjected to tax abroad in accordance with local laws? Let us look at these two issues one at a time.

First, by assigning too much profit abroad – outside any kind of at arm's length range according to domestic standards – applying an exemption to such profits would inevitably lead to non-taxation, as the other country would never tax the full amount even if it wanted too tax (regular) profits. This is a situation where even potential taxation is obviously lacking.

Second, if a profit has been attributed abroad within an at arm's length range, would the laws of the other country allow for it to be taxed? There can be many reasons why this may fail. Mismatches (disparities) may occur in case the presence of a permanent establishment is not recognized in accordance with the laws of the other country or if such laws would not allow for the taxation of certain profits due to a different legal qualification of particular payments; a deliberate choice of the foreign legislator not to tax certain profits is also conceivable. In these situations the potential presence of double taxation is largely dependent on the similarities and differences of national tax systems.

As indicated in the institutional report, in the Belgian case the percentage-based calculation of any "excess profit" allegedly belonging abroad was at the centre of the discussion.[41] So, let us take a step back from the Belgian case, as the problematic calculation of the profit assignable abroad may overshadow the more pressing and fundamental issue that needs to be addressed separately, that of granting exemptions unconditionally.

See Opening decision of 16 October 2013 in case SA.34914, OJ C 348/184 of 28 November 2013 and in particular, in the context of royalties, the decision to extend this investigation (the Gibraltar III case) SA.34914 of 1 October 2014, OJ C 369/55 of 7 October 2016, para. 32(c), third bullet.

[40] Institutional report, part IV(3).

[41] Institutional report, part IV(3). The general reporter disagrees with the institutional reporter that the Belgian Excess Profit cases are "a good illustration" of downwards adjustment cases. In many ways the Belgian regime was a-typical. An advance ruling (APA) was required and access to the regime was limited by law to members of a multinational-group. It was not generally applicable as a result of the normal functioning of the tax system of which (upwards and downwards) adjustments – also in a purely domestic setting – may be a logical part, so a company could not apply an adjustment when filing its tax return and, if necessary, go to Court to defend it should tax authorities refuse the adjustment.

3.6.2. Unconditional exemptions as the OECD standard

Avoidance of double taxation may well be based on potential double taxation. This has long been the standard in hundreds of bilateral tax treaties and unilateral double tax avoidance measures. The OECD Model Tax Convention is the most important model used for bilateral negotiations by EU Member States and many others; any national models are often derived from it in full or in part. In the context of exemptions, its explanatory Commentary states:

> "The State of residence must accordingly exempt income and capital which may be taxed in the other State in accordance with the Convention whether or not the right to tax is in effect exercised by that other State. *This method is regarded as the most practical one since it relieves the State of residence from undertaking investigations of the actual taxation position in the other State.*"[42]

This sets the standard to date. Prevention of double taxation may require a rather blunt but workable system to make it feasible to administer; while an unconditional exemption might benefit some companies this is perceived as being part of the nature or general scheme of the system. In a bilateral tax treaty taxing rights will be divided between two countries, which then leaves it up to the other country to decide whether and how to tax any profit it has taxing rights over. Only a minority of countries at present provides for a more conditional assignment of taxing rights, either in the tax treaty itself or by means of a tax treaty override in national law, allowing for domestic taxation should foreign taxation be considered absent or negligible. The OECD Commentary states:

> "Occasionally, negotiating States may find it reasonable in certain circumstances, in order to avoid double non-taxation, to make an exception to the absolute obligation on the State of residence to give exemption [...]. Such may be the case where no tax on specific items of income or capital is provided under the domestic laws of the State of source, or tax is not effectively collected owing to special circumstances [...]. To avoid such double non-taxation of specific items of income, Contracting States may agree to amend the relevant Article itself [...]."[43]

So where the institutional report states that "the absence of any requirement to demonstrate the existence of *actual* double taxation [...] renders non-proportionate a justification by the nature or general scheme of the system",[44] it fails to recognize that this statement would seriously affect the international tax system

[42] OECD Model Tax Convention on Income and on Capital 2017, Commentary on Articles 23A and 23B, para. 34 (emphasis added, RL). This text dates back to 1977, with a minor amendment in 2000.
[43] *Ibid.*, para. 35. This text dates back to 1963 (then para. 33), with amendments in 1977, 1992 and 2000.
[44] Institutional report, part IV(3).

as we know it today. It would constitute a major infringement on the division of taxing rights in bilateral tax treaties both intra-EU and with third countries.

The 2017 multilateral instrument offers the possibility to limit unconditional exemptions. To illustrate, one of the options States may choose to introduce into their existing tax treaties is the following:

> "Provisions of a Covered Tax Agreement that would otherwise exempt income derived or capital owned by a resident of a Contracting Jurisdiction from tax in that Contracting Jurisdiction for the purpose of eliminating double taxation shall not apply where the other Contracting Jurisdiction applies the provisions of the Covered Tax Agreement to exempt such income or capital from tax or to limit the rate at which such income or capital may be taxed."[45]

In an ideal situation, where two contracting states choose the same option in the MLI and declare their bilateral agreement covered, this provision may change their existing bilateral agreement.[46] But again, this is an ongoing political process that once more illustrates that conditional exemptions have not (yet) become the standard. Still, a few Member States already anticipate on this development.

3.6.3. Member state practices

France, in general, applies a system to check whether effective or even sufficient taxation abroad is guaranteed as a condition for granting a tax exemption.[47] Also Bulgaria will check the tax treatment abroad before applying relief of double taxation. The latter seems to imply that any tax exemption will also be conditional upon effective taxation abroad. The same applies to Estonia. Denmark does require information about tax treatment abroad in relation to recognition of tax transparency of certain legal entities, as to ensure that there is no possibility for tax abuse when a mismatch in qualification would occur. Also Hungary will not grant exemptions in tax treaty situations in case double non-taxation could occur because of different interpretations of facts or provisions between it and the other State.

[45] Option A of MLI Article 5; see http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf.

[46] There are multiple options available to choose from under Article 5 of the MLI. In case there is no match between the choices made by contracting States or if one State decides not to opt-in, the other State may apply its option chosen to its own residents unless the other State made a reservation to the application of Article 5 in its entirety. The actual application of the MLI may therefore be far more complex as is to be expected in a political environment where hundreds of bilateral agreements may be subject to change. With the exception of Estonia, all EU Member States signed the MLI; 11 of them decided to make a reservation with respect to Article 5 and not to choose one of the options available (as of October 2017, IBFD MLI database).

[47] To the extent French bilateral tax treaties have not been adopted accordingly, there is the issue of treaty override to deal with.

In the context of bilateral tax treaties Germany made an effort to introduce safeguards in most of its newer tax treaties that would avoid double non-taxation. It also applies unilateral safeguards in this respect that might result in treaty override, which is acceptable under national constitutional law. Examples of these are subject-to-tax provisions, which make tax exemptions conditional upon effective taxation abroad, and switch-over clauses, which may lead to an exemption not being granted for certain foreign income if that income is not subject to tax or only taxed at a lowered tax rate (as agreed upon in a treaty). Instead the actual foreign tax, if any, will be credited against the German tax due.

These five Member States, however, still seem to be the exception to the rule. Most other countries do still grant unconditional exemptions, hence their authorities are under no obligation to verify the foreign tax treatment of a particular payment or transaction in such a case. That said, while Spanish authorities do not need to consider what happens with a transaction abroad (except for anti-hybrid provisions to be discussed hereafter), they are "more and more sensitive to double non taxation issues" and take this into consideration when interpreting or characterizing transactions, thus the national report. The Spanish report emphasizes however that, in regard to transfer pricing, its system is not designed to avoid double non-taxation nor to ensure that income always has to be taxed somewhere. How the other country taxes income allocated to a foreign related party or permanent establishment is not relevant for Spanish transfer pricing purposes.

3.7. Unilateral corrections of profit: the downwards adjustment

3.7.1. Potential double non-taxation

One recurring theme is whether Member States may adjust their taxable profit downwards. Instinctively tax authorities would be expected to make sure that all relevant profit is being reported and all taxes due have actually been paid, but on the other hand the question is whether they should actively block situations where initially too much profit has been reported. Think of situations where prices paid by other entities where too high, or where costs paid to other entities were too low. As we will see, the majority of Member States would allow for an at arm's length principle to be applied both ways and hence allow for the latter.[48] Such downwards adjustments often do not require advance approval by tax authorities, although for comfort it is most likely that substantial adjustments are cleared beforehand and not as part of the tax assessment process.

[48] In Estonia upwards adjustments are possible albeit not via an increase in taxable profit of the taxpayer, but as a profit distribution by that entity, which is the taxable event under the Estonian tax system as stated in the national report. From the Romanian national report it is unclear whether or not Romania allows for any downwards adjustment.

This raises a major political problem. If the entities involved are in one Member State, tax authorities should be able to make a correction at both sides. However if the other entity is in another jurisdiction, we may have a number of issues to deal with.

If we accept that there is an at arm's length principle which by its very nature is limited to transactions with related persons or entities, then we should not be surprised to see at arm's length corrections only to apply between such entities. This may result in recognising additional income or lower expenses from transactions within a group (in case of an upwards adjustment) but it may also result in recognising less income or more expenses (in case of a downwards adjustment). Both may lead to 'virtual payments' to be recognised or 'real payments' to be ignored in one way or another, with or without an advance ruling.[49]

Consistency within one tax jurisdiction can be rather easily arranged, but once one of the parties is abroad there is no guarantee that any adjustment will be picked up by the other jurisdiction as to avoid double (non-)taxation. The latter will depend on (a) the other country being aware, (b) the other country coming to the same conclusions in its own analysis, and (c) the other country actually being able to tax in line with its domestic tax code. Point (a) is a political issue that has recently been addressed by establishing the tax ruling database with information on the tax treatment of cross-border transactions within the EU and by adopting mandatory country-by-country reporting obligations at EU level (rather in line with OECD recommendations). So both these solutions needed political action. As for (b) this problem can be solved by means of a bilateral agreement on the price. For this bilateral tax treaties may provide for a mutual agreement procedure. Also, the EU recently adopted a tax dispute resolution mechanism for intra-EU disputes.[50] Then (c), this problem is that of a classic disparity for which there is no immediate solution in light of the fiscal sovereignty enjoyed by States.

As the Bulgarian report exemplifies, it would not be possible to impose (Bulgarian) tax in case of double non-taxation of profits attributed abroad, if a correct transfer price has been set from a domestic (Bulgarian) perspective. Other reports imply the same, although less explicit.

[49] In DG Competition Working Paper on State Aid and Tax Rulings of 3 June 2016, paras. 14 and 16, intra-group virtual payments are questioned as such. The fact that virtual deductions are possible in a group-setting only and not between independent companies is presented as an example of not reflecting a market based outcome exactly because of the latter not being possible. (Available at: http://ec.europa.eu/competition/state_aid/legislation/working_paper_tax_rulings.pdf.)

[50] See Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, OJ L 265/1 of 14 October 2017.

3.7.2. Tax adjustments are fictitious

The institutional report mentions that "the unilateral downwards adjustment is fictitious or notional and the tax savings are achieved without any other jurisdiction intervening", a statement which should be nuanced strongly.[51] Whether a downwards adjustment results in tax savings all depends on how such adjustments are being perceived. The starting point should be to establish whether the original taxable profit was correct to start with.

Any adjustment is indeed fictitious, simply because that is the very essence of making an adjustment for tax purposes. There is either a disregard of contractual arrangements made between group companies – the contract itself will not be changed necessarily – or it is an adjustment of a price that is already fictitious. Within one legal entity operating cross border a real contract often cannot exist between its head office and its permanent establishment (it is hard for a legal entity to enter into a contract with itself). Therefore a transfer pricing correction for tax purposes would not necessarily need an effective correction in the commercial accounts in certain countries, so no debit or credit note needs to be issued there (at least not for corporation tax purposes). Because of this the OECD called for an exchange of information on downwards adjustments, with or without a ruling being issued in advance. This would allow other tax authorities to act (if they deem fit) in order to prevent disparities (mismatches) that might otherwise lead to double non-taxation. So here, again, the political solution to these disparities is for tax administrations to inform one another.[52]

3.7.3. Member State Practices

The country reports show a lot of nuance when it comes to making adjustments for tax purposes. Croatia, the Czech Republic[53], Hungary, the Netherlands, Norway, Poland, Portugal, Slovenia and Spain do allow for unilateral downwards adjustments.

In Bulgaria, unilateral downwards adjustments would be possible in theory when income is overstated. The national report mentions that such adjustment is unlikely to result from a tax audit (tax authorities will mainly be looking for upwards adjustments of taxable profit) and taxpayers have limited opportunities to adjust their own profits reported in previous years. However, a taxpayer could actively report a non-accounting error (such as an incorrect transfer price used

[51] Institutional report, part IV(3).

[52] OECD/G20 BEPS Action 5 – Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance: 2015 Final Report, paras. 113-116.

[53] In the Czech Republic a taxpayer seems to be obliged to file an additional tax return in case of any downwards adjustment abroad.

in a contract) together with supporting documentation and request a downwards adjustment.[54]

In Cyprus, downwards adjustments were made possible as of 2015. Only for back-to-back related party financing transfer pricing studies are needed as of mid-2017. Interestingly no such study would be required if there is an after-tax return of 2% on loans receivable, which would imply that no further effort to verify the accuracy would be done for tax purposes.

In Greece downwards adjustments are possible in theory, but as the Greek report emphasised more than once, tax authorities would generally be "aggressive and appear not to be willing to accept" them.

Other countries allow for adjustments, but only in response to what happens abroad. Austrian tax authorities may make any corresponding adjustment in response to an adjustment abroad, whether or not a mutual agreement procedure (MAP) was initiated. In Denmark a downwards adjustment is only possible in case of a corresponding upwards adjustment abroad. France does not allow for a unilateral correction of profits, but an adjustment may be made in line with the outcome of a MAP with another country.[55] Italy will allow for a downwards adjustment but only in the context of MAP, a joint control effort with a foreign country or as a corresponding adjustment to actions of foreign States with whom a bilateral tax agreement has been signed, as to avoid double non-taxation.

It should be mentioned that none of the Member States will make a corresponding adjustment automatically by accepting a foreign adjustment at face value nor are they obliged to.[56] They will normally verify whether a foreign adjustment is justified before making a downwards adjustment.[57]

In a third group of countries downwards adjustments do not seem possible at all. Finish law excludes downwards adjustments and they are neither permitted in Ireland. In Sweden the tax authorities would not normally allow a downwards adjustments, not even if this would be needed to get to an at arm's length outcome, thus the national report. Such adjustments are not considered likely in Estonia either, although there is a legal basis for tax authorities to make any transfer pricing adjustment needed for tax purposes.

[54] In response to Q9 the Bulgarian report seems to suggest that such a downwards adjustment could be conditional upon both parties actually amending the terms (price) of the transaction, although the response to Q8 suggests otherwise.

[55] It is unclear from the French national report whether this statement is restricted to downwards adjustments only; the general reporter operates under the assumption that it does and that upwards corrections would be possible without a MAP.

[56] At least not if their bilateral treaties follow the OECD Model Tax Convention. See 2017 Commentary to Article 9 of the OECD Model Tax Convention, para. 6. The Czech Republic, Hungary, Italy, and Slovenia even made explicit reservations in this respect (*Ibid*., paras. 16, 17.1 and 19).

[57] An adjustment may also be the outcome of a mutual agreement procedure.

3.8. Recognition of permanent establishments

Whether or not a foreign branch actually exists is of major relevance to tax purposes. What do we need to recognize a branch (permanent establishment)? This is often a matter of sufficient substance (having something of a permanent business location such as an office over there and/or staff able to act on your behalf), but also a matter of what kind of activities are (not) being carried out in the other country. National laws will normally determine what conditions need to be fulfilled to recognize the presence of a permanent establishment.

The opening decision in the *McDonald's* case seems to suggest that bilateral tax treaties may create taxing rights where a national legal basis to tax is missing.[58] However, in general this is *not* their role. We first need a national legal basis to tax before we take a look at a bilateral tax treaty to see whether those taxing rights are restricted. If, under national law, income attributable to a permanent establishment abroad will not be included in the national tax base, then whatever happens at the other end is of secondary concern. Possible double non-taxation may result from disparities; the other country may use a different definition of what a permanent establishment is and require more substance in terms of staff, assets or active trade or business activities before recognizing one. This would be out of reach of EU state aid scrutiny as long as the income assigned to the permanent establishment is in line with national rules. If, on the other hand, a Member State's tax system would not be internally consistent and not recognize and tax permanent establishment of foreign entities operating in its jurisdiction under the same conditions, we may be dealing with a scheme that could fall within the domain of Article 107(1) TFEU.

Even if we apply the new MLI option that makes tax exemptions conditional upon actual taxation abroad (see para 3.6.2 above), it only would result in a covered Treaty exemption to be inapplicable. However, if there is nothing to be taxed under national law such exemption would not be needed either.[59] So, in order for the BEPS-improvements to work, also national unilateral tax exemptions may have to be amended accordingly.

4. Transfer pricing

4.1. An EU at arm's length principle: a wrong choice of words?

One of the issues that take center stage in the ongoing ruling investigation from a tax point of view is whether or not an EU at arm's length principle exists. Allow

[58] Decision to open a formal investigation into alleged aid to McDonald's of 3 December 2015, OJ C 258/11 of 15 July 2016.

[59] The same would apply to other MLI provisions that change the scope of the treaty definition of permanent establishments; changing a treaty to retain taxing rights does not necessarily mean national tax law will be changed accordingly to effectuate those rights.

me to rephrase this a bit as the term "EU at arm's length principle" is misleading. It effectively summarizes three different subjects of discussion: (i) the existence of a universal at arm's length principle, (ii) the existence of an obligation for EU Member States to apply such principle based on EU state aid rules, and (iii) whether or not the European Commission's interpretation and application of this principle is in line with national and international practice to date.

Now in order to understand the underlying issues we must address the at arm's length principle (ALP) in three steps. In paragraph 4.2 we will look into why the Commission assumes that Member States are under an obligation to apply 'the' at arm's length principle. In this context paragraph 4.3 will address the comparability of stand-alone and group companies. Under the hypothesis that an at arm's length principle exist, paragraph 4.4 will address what the principle entails, given that the Commission may take guidance from the OECD Transfer Pricing Guidelines. Paragraph 4.5 will then address some issues with respect to the burden of proof.

4.2. Does EU Law require the application of an at arm's length principle?

In the 2016 Notice the Commission included a position that is being contested in a number of ongoing tax ruling cases:

> "This arm's length principle necessarily forms part of the Commission's assessment of tax measures granted to group companies under Article 107(1) of the Treaty, independently of whether a Member State has incorporated this principle into its national legal system and in what form."[60]

In the *Forum 187* judgement the Commission finds support for its statement that an at arm's length principle needs to be applied by EU Member States. The Court held that

> "in order to decide whether a method of assessment of taxable income such as that laid down under the regime for coordination centres confers an advantage on them, it is necessary, [...], to compare that regime with the ordinary tax system, based on the difference between profit and outgoings of an undertaking carrying on its activities in conditions of free competition." [61]

This quote can easily be taken out of context and be interpreted in two ways. It should be considered that in the *Forum 187* judgement it was part of the facts of the case that the Member State (Belgium) already adopted the at arm's length

[60] 2016 Notice, footnote 13, para. 172.

[61] CJ C-182/03 and C-217/03, *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416, para. 95.

principle in its ordinary tax system and followed the guidance offered by the OECD. I.e. in this case a cost-plus transfer pricing was at issue which means that the taxable profit will be determined by charging actual costs plus a percentage of those costs on top of that (a profit mark-up). The regime contested here was a specific regime with special rules excluding certain costs for a certain entities (coordination centres), hence leading to a lower profit to be taxed. Thus, there was a separate scheme that clearly diverted from the normal tax system at the time.

So, how should we interpret the aforementioned quote? One possibility is that because the ordinary tax system already included the at arm's length principle, the Court – in line with the Commission's own argument at the time – makes a reference to what it contains. Another interpretation is that an ordinary tax system must be based on how undertakings behave in conditions of free competition as a matter of principle, a view the Commission seems to take.

If we look at the *Forum 187* decision today, we must keep in mind that in order to determine selectivity that judgement only tells part of the story. In the *World Duty Free* judgement the Court held:

> "it is sufficient, in order to establish the selectivity of a measure that derogates from an ordinary tax system, to demonstrate that that measure benefits certain operators and not others, although all those operators are in an objectively comparable situation in the light of the objective pursued by the ordinary tax system."[62]

If we consider this standard for a moment, we see that, again, we need to address similar issues. In the institutional report it is argued that

> "for the purposes of determining the taxable income under the corporate income tax system of a given Member State, both standalone and group companies are in a comparable factual and legal situation as regards the intrinsic objective of that reference system (i.e. to levy tax on the taxable profit of all companies, resident or non-resident, subject to tax in that Member State). In fact, the very purpose of the arm's length principle in transfer pricing is to make multinational companies comparable with standalone companies, to put them on an equal footing for tax purposes."[63]

This goes to the heart of the matter. The at arm's length principle has been introduced into corporate tax systems as to ensure that the tax liability of group companies would be purged from undue practices, as are many other anti-abuse

[62] CJ C-20/15P and C-21/15P, *Commission v World Duty Free Group and Banco Santander and Santusa Holding*, ECLI:EU:C:2016:981, para. 76. This comparability test (to some referred to as a non-discrimination test) is not new; see, for instance, C-88/03, *Portugal v Commission*, ECLI:EU:C:2006:511, para. 56 and C-78/08 to C-80/08, *Paint Graphos*, ECLI:EU:C:2011:550, para. 49.

[63] Institutional report, part III(4).

provisions. So Member States may decide to adopt measures like these and include them in their tax systems to fight tax avoidance, but treating stand-alone companies and group companies alike was never the self-evident purpose of most corporate tax systems. This gradually grew over time and subject to restrictions.

4.3. Are group companies and stand-alone companies comparable for corporate tax purposes?

As we have seen in paragraph 3.4 tax authorities are normally not allowed to correct income and costs of an undertaking by second-guessing business decisions. I.e. if a businessman or an undertaking makes a bad call and charges to little for his products or services, that is something tax authorities have to live with. At the same time, if an undertaking makes a deal of a lifetime because of the negotiation capabilities of its director, any additional profit will also not be ignored for tax purposed. Tax authorities may step in, however, if such calls are influenced by intra-group relations, to the extent national laws allow them to.

Risks between related and unrelated parties are often different, even in regard to what otherwise may seem comparable transactions. If, for instance, two companies are owned by the same parent company it is less likely that an intra-group buyer will suddenly look for an alternative for an intra-group seller when buying a particular product. Also, the way how financial risks of a transaction are split between group companies may play an important role in how to divide the profit on an intragroup transaction as assuming more risks also calls for a higher remuneration. When it comes to delivery of commodities and services, the assumptions of risk with respect to delivery, keeping stock, quality, performance, etc. may affect how a price will be determined.

From a legal point of view group companies and stand-alone companies may also differ day and night. At present several EU Member States have interest limitation rules and other rules limited deduction of costs incurred via intra-group payments, even in situations where such payments would be at arm's length. In comparison, as of 2019 all EU Member States must include certain anti-abuse rules in their national corporation taxes on the basis of the Anti-Tax Avoidance Directive (ATAD).[64] Just to illustrate, the ATAD includes an interest limitation rule that will limit the tax deductible borrowing costs of taxable entities if they belong to a group of companies. Stand-alone entities may be excluded from such rule.[65] A Controlled Foreign Company (CFC) rule must be introduced as to address the possibility of tax avoidance by rerouting taxable income via group

[64] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market , OJ L 193/1 of 19 July 2016 (as amended).
[65] ATAD, footnote 7, Article 4.3.

entities located in a low(er) tax jurisdiction that is under majority control. By their very nature CFC rules should not affect stand-alone companies.

So what we should recognize here is that, from a tax point of view, stand-alone companies and group companies are not in the same legal and factual situation. This has nothing to do with "limiting the reference system only to companies forming part of a multinational corporate group" as the institutional report claims.[66] We have a corporate tax system that starts with a set of accounting rules applicable to all companies, stand-alone or group companies, and to that system we may add specific provisions dealing with groups, both positive (such as consolidated taxation of group results) and negative (limitations on interest deductions as to avoid shifting profits to low-taxed entities, at arm's length corrections).[67] Because of the factual differences between group companies and stand-alone companies, Member States enact special legal rules to deal with them. Determining which rules to enact and how far to go with limiting tax avoidance opportunities in light of effectiveness, enforcement and complexity of the system is still their prerogative.

4.4. What does the at arm's length principle entail?

4.4.1. OECD Guidelines: changes from 1995 to 2017

Many national reports mention that there was a process of "adopting" an at arm's length principle and subsequent rules on transfer pricing, and a substantial number of countries only did so after the millennium change.[68] This suggests that these rules did not necessarily apply already before as an unwritten standard in the respective countries, which may play a role in the ongoing discussions.

However, if we operate from the hypothesis that an at arm's length principle is applicable – whether based on national law or based directly on Article 107(1) TFEU under the assumption that group companies and stand-alone companies are in a legally and factually comparable situation (quod non) – the question still remains how this principle is to be applied.

At various occasions the Commission has referred to the OECD Transfer Pricing Guidelines as they may provide useful guidelines. These Guidelines more or less are the result of the consensus reached amongst OECD Member States. The first official Guidelines date from 1995, even though there have been OECD reports addressing transfer pricing before that, dating back to 1979. The

[66] Institutional report, part III(4).

[67] Any of these rules targeting the peculiar nature of interacting group companies must fit within the tax system as such and not create selective advantages of course.

[68] The most recent adoption was in Cyprus; it adopted an at arm's length principle in 2002, although there were no particular transfer pricing rules on profit allocation until 2017. Ireland introduced transfer pricing rules as late as 2010.

1995 Guidelines have since been supplemented to cover more issues and, more importantly, its contents has been modified in 2008, 2010 and, quite extensively, in 2017 as a result of the BEPS-project.

The OECD guidelines have grown over time and the 2017 version now is available in a booklet of over 600 pages, nearly triple the amount of pages of the 1995 Guidelines. This growth is mainly due to adding clarifications and examples, but some substantial changes have been made.

Allow me to illustrate three changes implemented after the adoption of the 1995 Guidelines. Rather quickly after their initial adoption the guidelines were supplemented and clarified in regard to cost contribution arrangements and the taxation of intangibles. More importantly, the OECD adopted its AOA in 2010, extending the application of transfer pricing rules to head-office/PE relationships, as explained in paragraph 3.4.

In the 2017 version we see a move towards value creation following from the 2015 OECD's BEPS Action 8-10 Reports 'Aligning Transfer Pricing Outcomes With Value Creation'. The allocation of risk and responsibilities is an important factor to determine who should receive which part of profit on a transaction. The 1995 Guidelines promoted a rather formalistic approach, emphasising that the contractual terms between parties should be part of the so-called functional analysis to allocate profits. As a result of the BEPS project, there was a move to assigning risk more based on the actual conduct of companies than their contractual relations alone. In the aforementioned BEPS reports it was stated that "legal ownership alone does not necessarily generate a right to all (or indeed any) of the return that is generated by the exploitation of the intangible".[69] This is a substantial and understandable change compared to previous practice, as "with its perceived emphasis on contractual allocations of functions, assets and risks, the existing guidance on the application of the principle has also proven vulnerable to manipulation."[70]

Between group companies the assignment of such risks in contracts can be easily manipulated. This led the OECD to revise its guidance on how to deal with risks:

> "[The] economic notion that higher risks warrant higher anticipated returns made [multinational] groups pursue tax planning strategies based on contractual re-allocations of risks, sometimes without any change in the business operations. In order to address this, the Report determines that risks contractually assumed by a party that cannot in fact exercise meaningful and specifically defined control over

[69] OECD/G20 BEPS Project – Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10: 2015 Final Reports, p. 10.
[70] *Ibid.*, p. 9.

the risks, or does not have the financial capacity to assume the risks, will be allocated to the party that does exercise such control and does have the financial capacity to assume the risks."[71]

As for IP in particular, actual involvement in the development, enhancement, maintenance, protection and exploitation of intangibles (the 'DEMPE' functions) will determine the allocation of income and costs from IP under the new guidelines. In essence, there is more alignment with value creation by looking primarily at who is doing what and who is in control (people functions), who runs significant economic risks (contractual, factual, such as cost sharing) and which assets actually contributed to carrying out the DEMPE functions, if any. As a result, more weight should be given as of 2015/2017 to how parties manage and control the risks instead of merely looking who assumed particular risks on paper. Mere ownership of IP as such may thus result in far less attributable profit after BEPS than before. Problematic is the assignment of ownership of IP between a head office and a PE. If the PE exercises no relevant DEMPE functions whatsoever, assigning profits from IP rights to the PE might be a challenge.

To conclude, as experience with transfer pricing grew over time, so did the progressive insight of tax authorities. While the essence of transfer pricing remained over time, there have been substantial changes in the approach to it by putting more emphasis on value creation for one and being less strict on the choice of method to be used to determine the most accurate outcome. If we would take a particular fact pattern, an analysis under the 1995 Guidelines may well differ from an analysis under the 2017 Guidelines.

So, in the ongoing state aid cases it should be specified which version of the OECD Guidelines was relevant for guidance at the time. Older guidelines may not be as effective in addressing transfer pricing that is out of range according to today's standards. This raises the question how the Courts should deal with this. If they would rule in favour of the existence of an at arm's length principle and also accept that the OECD Guidelines may give useful guidance, shouldn't we then also accept that older guidance at the time may have led to results that would be different from the current Guidelines?

4.4.2. Do OECD Guidelines actually serve as guidance? If so, which one(s)?

Statistical evidence shows that the provisions on taxation of associated enterprises (i.e. the at arm's length principle) and the provisions on recognition and taxation of permanent establishments are amongst the most convergent of all

[71] *Ibid.*, p. 10.

bilateral tax treaty provisions, with over 80% similarity in their text.[72] This does not mean, however, that their implementation is equally similar (given the reservations made). The at arm's length principle went through a very dynamic process. While there has been a lot of convergence on how it is to be applied between group entities, the application of this principle within one entity based on the authorized OECD approach (AOA) is more controversial. In either situation, however, there seems to be consensus that some sort of adoption process is needed before the at arm's length principle may apply.

At present 6 EU Member States are not (yet) members of the OECD (Bulgaria, Croatia, Cyprus, Lithuania, Malta, and Romania), although this does not prevent them from adhering to OECD guidelines as such.[73] With few exceptions, all reporting Member States indeed accept the OECD Guidelines as useful and normative if not binding guidance. But it is important to note that there are nuances here, in particular in regard to the rather essential question whether updates to the Guidelines, in particular the 2017 changes resulting from the 2015 BEPS action reports, would actually be able to change the national implementation of transfer pricing rules.[74]

Austrian domestic transfer pricing guidelines explicitly clarify that the Austrian at arm's length principle is a dynamic one. Any new findings and clarifications that make it into subsequent OECD guidelines may directly affect the way how that principle is to be applied. Romania's tax code directly refers to the OECD TP Guidelines, and the national report clarifies that the BEPS-induced (2017) changes will be implemented in national legislation implicitly because of this.

In contrast, some national reports point out that conflicts between national transfer pricing rules and the OECD guidelines may exist. Both the Estonian and the Slovenian report mention that national TP rules would prevail over the OECD Guidelines in case of differences, but it is not stated whether such differences currently exist.

[72] E. Ash, O.Y. Marian, The Making of International Tax Law: Empirical Evidence Using Natural Language Analysis, 28 June 2017. Available at SSRN: https://ssrn.com/abstract=2994217.

[73] Croatia's tax law contain no link to the OECD transfer pricing guidelines, although they are generally followed in administrative practice.

[74] For example, the relevant Hungarian legal provisions seem to refer to the guidelines as available in 1998. It is not clear whether Hungary allows for a dynamic interpretation and follows amendments and changes to the guidelines. The Italian national report explicitly states that the 2010 Guidelines are being followed. The 2017 Guidelines were adopted by the OECD after the national report was handed in. It is unclear whether Italy will first have to adopt the 2017 version for domestic use or whether their approach is also a dynamic one. UK legislation refers to the 2010 version of the OECD Guidelines, as revised by the 2015 BEPS reports (hence: the 2017 Guidelines which incorporates both), and the Treasury may designate other documents revising or amending them.

While Portugal applies an at arm's length principle, it made a reservation to the OECD Model Tax Convention that also affects the way the OECD Transfer Pricing Guidelines can be taken into account. As its national laws and many of its bilateral tax treaties have not yet been amended to fully reflect the changes made, the 2010 version of the Guidelines do not apply in their entirety (nor would the 2017 version thereof). The status of the OECD Guidelines, even the older versions, is somewhat unclear. If any, there is only an implicit link between these Guidelines and Portuguese national law and domestic arbitrators and tax courts have directly referred to the OECD Guidelines at some occasions. The Portuguese rapporteurs point out that a potential binding effect of newer versions of the Guidelines may well be considered undue, in light of domestic rules on separation of State powers, which therefore argues against a dynamic interpretation.

Spanish transfer pricing rules are strongly connected to the OECD guidelines. However, it did *not* follow the AOA nor the OECD's report on attribution of profits to permanent establishments and the changes to the guidelines that resulted therefrom as of 2010 onwards, as Spain uses a wider and more aggressive PE concept.[75] Apart from this, the Spanish authorities adopted a dynamic approach towards applying and interpreting the OECD transfer pricing guidelines in Spain. Spanish courts, however, have not always accepted that subsequent changes would apply in Spain without a change in legislation. So it seems safe to say that it is not evident that the most recent OECD guidelines would apply in Spain in full.

To conclude, while the OECD Transfer Pricing Guidelines are being used by a vast majority of reporting countries, not all allow for a dynamic interpretation and thus may stick to older versions and some even divert from them in national law explicitly. This once again may serve as a reminder that the Guidelines were not meant to be of a mandatory nature.

4.5. Burden of proof

There is another procedural issue we need to deal with when dealing with tax rulings and transfer pricing decisions in particular and that is the burden of proof under domestic law. It may well be that tax authorities have the burden of proof to show that a transfer pricing analysis made by a taxpayer is incorrect and should be adjusted. At the same time, many Member States require companies to have particular transfer pricing documentation and information on permanent

[75] Because of this "unorthodox concept of PE" the national report describes how this may enable Spain to tax income from Apple, which – if the general reporter interprets the Spanish report correctly – would not be possible if Spain had followed the 'orthodox' OECD standard.

file; non-compliance may reverse the burden of proof. Why is it important to keep an eye on who bears the burden of proof?

As the CJ has held,

> "in the context of a review by the Courts of the European Union of complex economic assessments made by the Commission in the field of State aid, it is not for those Courts to substitute their own economic assessment for that of the Commission [...]. However, the Courts of the European Union must, inter alia, establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it [...]."[76]

From a tax law perspective, in countries where the burden of proof is on the authorities, a merits based assessment by national courts may well be called for; a mere review of the legality of a decision to adjust prices used by the taxpayer may not suffice. With transfer pricing both parties can be at other ends of what could be an acceptable price range, in which case national courts may be called upon. Now assume that the European Commission would, after careful examination, derive a particular transfer price which is in line with all the evidence provided. Would this now suffice for a state aid recovery decision to pass a legality review, or would taxpayers still be allowed to argue that their price is also within an acceptable range of prices, albeit at the other end?

Let me be very clear here, if a taxpayer and the tax authorities agreed to a clearly unsuitable method to calculate prices and come up with a price that is outside any acceptable range the issue of burden of proof under national law may be easily met. In a 2016 working paper issued by Commission staff it was stated that:

> "The approximate nature of the arm's length principle cannot be used to justify a transfer pricing analysis that is either methodologically inconsistent or based on an inadequate comparables selection. There are cases where finding a market outcome is not straightforward and requires the use of an approximation. This is not a concern as such, as long as the approximation is as precise as it can be under the circumstances. In other words, the "search for a 'reliable approximation of a market--based outcome' means that any deviation from the best estimate of a market-based outcome must be limited and proportionate to the uncertainty inherent in the transfer pricing method chosen or the statistical tools employed for that approximation

[76] See, most recently, CJ C-300/16 P, *Commission v Frucona Košice*, ECLI:EU:C:2017:706, para. 63-64. (emphasis and reference removed).

exercise." Against this background, DG Competition's focus is on cases where there is a *manifest* breach of the arm's length principle."[77]

For other than these manifest breaches, the national burden of proof may play a more important role than addressed in tax ruling decisions to date. In case of an ex-post assessment of a ruling situation, the Commission should not be in a better position to enforce a price adjustment than the tax authorities would have been in the absence of a ruling.[78] Obviously the Commission and the Member States will differ on what is or what is not to a manifest breach, as they may disagree on what comparables to use or which of the transfer pricing methods available would be most suitable, so this element of national procedure should come up at the EU Courts either way.

5. Anti-avoidance rules

5.1 Introduction

State aid may affect how anti-avoidance rules are (not) being applied by EU Member States. On the one hand, such rules may be designed in a way that they provide a selective benefit by excluding certain taxpayers or transactions from their scope of application. On the other hand, rules that are in place may not always be enforced, which may lead to a certain discretion in their application. In paragraph 5.2 the first situation will be addressed by focussing on specific anti-avoidance rules that try to target a particular form of abuse (such as excessive interest deductions and trade in losses that may be set of against future profits for tax purposes). Paragraph 5.3 will address the second situation by taking general anti-avoidance rules as an example.

5.2. Exemptions to specific anti-avoidance rules

If specific anti-avoidance rules are introduced in national tax law, any exception to such rule should follow from the logic of it like preventing unintended overkill. Such exception should obviously be proportional and not go beyond what is necessary. At the same time, an exception should not be too restrictive either, as legally and factually comparable situations should receive the same relief from overkill as to avoid selectivity. Otherwise, it could turn out to be a wolf in sheep's clothing. From a state aid point of view, testing such exceptions will require taking full account of the legislative objective pursued by the specific anti-avoidance rules, which should be considered an integral part of the reference framework.

[77] DG Competition Working Paper, footnote 49, para. 23 (part of the original emphasis and footnotes removed).

[78] It is assumed that the normal transfer pricing regime is designed in a non-selective manner.

The Court is currently addressing this issue in regard to a German exception to a limitation on future deductibility of losses after a substantial change in the ownership of a company, as to avoid trade in losses.[79] The question to be addressed there is what the proper benchmark would be. In essence, if an ailing company would be taken over for the purpose of restructuring, the limitation on its right to set off losses from the past against future profits would not be applied. Companies that would not be in financial difficulty would face such limitation after a takeover, regardless of whether they too would be a target of restructuring to make use of synergy effects or alike. As the General Court already pointed out, the proper reference framework for a state aid analysis would include the limitation on carrying forward losses,[80] making the exception a benefit. While some of the conditions attached to the exception were indeed meant to establish the risk or absence of abuse, the General Court pointed out that adding the condition of restructuring and the need for the target company to be insolvent or overindebted went beyond what was needed in light of the objective of the tax system.[81]

This case will be rather important for future anti-abuse cases. In October 2017 the European Commission opened an investigation into the UK Controlled Foreign Companies regime.[82] As stated before, a CFC regime may call for the inclusion of certain profits made by controlled group companies abroad in the taxable profit of a UK resident holding company as to prevent tax avoidance. The UK, however, provided for an exemption for interest income from intra-group financing of non-UK residents done by the non-UK subsidiary. Here again the question will have to be addressed what the logic behind the anti-avoidance rule is, in order to take a position on any exception to such rule.

In the situations above we were dealing with exceptions to a specific anti-avoidance rule, which would clearly qualify as a scheme and not as individual

[79] See Commission Decision of 26 January 2011 on State aid C 7/10 (German Sanierungsklausel) , OJ L 235/26 of 10 September 2011 and, amongst the many pending cases concerning this decision, T-287/11, *Heitkamp BauHolding v Commission*, ECLI:EU:T:2016:60 and the pending appeal in C-203/16P, *Dirk Andres (faillite Heitkamp BauHolding GmbH) v Commission*.

[80] The General Court phrased it a bit differently by pointing at the loss-carry forward limitation as being the reference framework. See T-287/11, footnote 79, para. 104-109. In the case on appeal, A-G Wahl came to a different conclusion and found the restructuring clause to be part of the general rule, the right to a loss-carry forward (Opinion in C-203/16P, footnote 23, para. 145). In doing so he did not clarify why the generally applicable anti-avoidance measure was not to be part of the reference framework, other than concluding that the carry forward of losses would normally be possible but for the rule barring it after a substantial change in ownership. (*Ibid*., para. 144.) Please note that the loss-carry forward restriction was challenged before the German Constitutional Court and invalidated; on the potential consequences this may have on recovery see footnote 98.

[81] T-287/11, footnote 79, para. 133.

[82] Commission Decision to open a formal investigation into the UK Group Financing Exemption, of 26 October 2017, OJ C400/10 of 24 November 2017.

measures for the purpose of a state aid analyses. The situation becomes far more complex with general anti-avoidance rules, to be discussed in the next paragraph.

Please note that national anti-abuse rules may require tax authorities to verify foreign treatment (upon audit at least), as there may be a direct link. Think of CFC rules or anti-hybrid rules that deal with financial transactions qualified differently by different Member States (either as debt or equity).[83] The introduction of ATAD will indirectly assure that such verifications will become more frequent, assuming Member States enforce it. Norway, while not bound by the upcoming ATAD, also introduced rules to neutralize hybrid mismatches, so such verifications are likely to be carried out more there as well.

5.3. Non-application of general anti-avoidance rules

5.3.1. Do tax authorities need to address abuse of law whenever they can?

At present most member states have a separate rule or principle that would allow them to ignore a particular fact pattern in case it was set up to make misuse of a tax law. Think of abuse of law (abus de droit, fraus legis). While in some Member States invoking such a principle as a last line of defense by tax authorities is rather rare, in other Member States authorities and Courts have developed a more active practice allowing for this principle to be invoked. This raises the question how to deal with these more general anti-avoidance rules (GAARs) from a state aid perspective.

If there is a rule allowing tax authorities to counter abuse situations, are they obliged to apply it? In an ongoing formal investigation, the Commission raised this issue in respect of a so-called hybrid mismatch in Luxembourg.[84] Let me give an example: what if one and the same financial transaction between two companies is qualified differently at either end? A payment may be considered a deductible interest payment on a loan on the one side, and a non-taxable remuneration for equity at the other side. Genuine mismatches, if stemming from actual differences between legal classifications in different tax systems, are outside of the scope of state aid scrutiny. In the Luxembourg case this issue came up because it was a domestic mismatch, i.e. a difference in qualification within one and the same legal system, which triggered the Commission to raise the non-application of the GAAR as one of several issues in this case.

As of 2019 all Member States will need to include a GAAR in their corporate tax system. The ATAD provides as follows:

[83] In the context of the Parent-Subsidiary Directive, this obligation already flows from EU Law (Art. 4(1)(a) Council Directive 2011/96/EU as amended by Council Directive 2014/86/EU of 8 July 2014, OJ L 219/40 of 25 July 2014).

[84] Decision to open a formal investigation into possible state aid in favour of GDF Suez of 19 September 2016, OJ C 36/13 of 3 February 2017, para. 158.

Article 6

General anti-abuse rule

1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.

2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law.

The ATAD intends to set a minimum level of protection, and Member States are allowed to do more to protect their domestic tax base and introduce more strict anti-abuse rules. But what does this mean from a state aid point of view? If Member States now need to have a minimum level of protection, may it be argued that not applying the GAAR whenever possible may possibly lead to state aid in individual cases?

There are a large number of uncertainties in respect to the proposed GAAR, so Member States may well want to wait for the Court's case law to develop before relying on a provision like this. But will the Commission allow them to do so once the implementation period has passed? A complete failure or refusal to apply the GAAR once introduced in national law will be detrimental to enforcing ATAD minimum standards, but this is a matter solely to be dealt with by infringement proceedings. Selective non-enforcement is another matter and may bring state aid into play. From a political point of view, the threat of state aid proceedings and possible recovery may have a different impact on enforcement than the 'mere' prospect of going to an infringement procedure and changing enforcement practices going forward.

5.3.2. GAARs in Member States

GAARs are present in all but one of the reporting countries, either statutory or non-statutory.[85] While Denmark has several specific anti-abuse rules to target

[85] The Slovenian national report describes what "may be considered a GAAR"; the measure they describe seems to meet the criteria of a GAAR for the purpose of this report, although the report states that the adoption of a GAAR does "not appear likely in the short or medium term". (The general reporter assumes that such a GAAR will be implemented into national law by 2019 as to comply with ATAD.) The Romanian national report does not confirm nor deny that a GAAR is applicable.

particular structures and transactions, a GAAR is missing. Even so, in a handful of decisions Danish courts stepped in to prevent abuse and there are ongoing discussions as to whether an unwritten GAAR may actually be derived from doctrine.

It should also be noted that Czech tax law has no explicit general anti avoidance rule either, although the Courts themselves adopted an abuse of law doctrine. Interestingly, the Czech Republic attempts not to adopt specific anti avoidance rules either as that might affect the anti-abuse doctrine developed by its judicature, thus the national report.

In most of these countries the GAAR can be used next to special anti-avoidance rules as a 'back-up', except for Estonia, Poland, Portugal and Spain.[86] For Cyprus this has not yet been ruled on. For Greece there is also no definite interpretation on this, but the national rapporteurs argue that it should be possible to do so. Hungary has no such special rules to start with.

It will be interesting to see what will happen in 2019 once all Member States are under an obligation to have a GAAR in their corporate tax. Is it only meant to deal with issues that are not already covered by one of the more targeted ATAD provisions? Things like these need to be clarified and because of such uncertainties the Commission should show restraint in testing the (non-)application of these GAARs via state aid rules as of 2019.

6. Recovery of fiscal aid

6.1. Recovery is, in principle, a matter of principle...

From an internal market point of view recovery has a pivotal role to play to address deals made between national governments and their undertakings to the detriment of other market participants. While in more evident cases aid recipients cannot but be aware of the unlawful benefit they receive, this may not necessarily be so in others.

Let me play devil's advocate for a minute and approach this from an outsider's view, reflecting the often predictable questions and remarks the general reporter receives when explaining the EU's state aid system to a broader professional audience and students for the first time. We tend to consider it to be self-evident that taxpayers should second-guess what national governments communicate to them, even if the latter actively approached businesses or investors with certain offers. We expect them to actively check whether state aid was notified, and even more important, to be able to actually recognise that what they received qualified as state aid to start with. Combine this with the fact that the 10 year recovery period starts from the first confidential and informal communication between

[86] In Spain this no longer seems possible as of 2015. The Norwegian report did not address the issue.

the Commission and a Member State, without the taxpayer necessarily being aware of it, then create a formal investigation where beneficiaries of an aid play second fiddle, and we may find ourselves in a somewhat uncomfortable position. As the Commission may change its line of reasoning based on what it finds during a formal investigation, a beneficiary of aid who may not – at least not always – be allowed to respond to a changed line of reasoning and provide additional evidence or proof during an investigation, could be at a loss at the EU's Courts during a legality review. To top things off, any amount recovered will go back to the Member State together with what could be a considerable sum of interest, which sometimes leaves even the most pro-internal market student taken aback when presented with a less than evident case of state aid. So where in the process did we lose sight of what legal certainty and legal protection once entailed?

Now, sending the devil back where he belongs and trying to convince these professionals and students that there is a certain logic to it, it must be explained that it is necessary to operate under the assumption that a diligent undertaking should be able to recognise what is and what is not state aid, because this is at the very basis of the entire recovery doctrine.

If we would maintain that an at arm's length principle would follow directly from Article 107(1) TFEU (and, in effect, since its conception in 1958) and then find guidance in 2010/2017 Guidelines from the OECD even when referring to cases dated before their publication, we must question whether this could have been foreseen. I wonder whether this could be an example of what A-G Darmon thought of when he wrote:

> "allowance must [...] be made for cases in which the fundamental rights of an undertaking, although it has not verified whether the aid had been notified, are such that it should none the less be accorded the benefit of the protection of legitimate expectations. In such cases, the national court must be able to assess the conduct of the recipient undertaking in concreto, if necessary after having referred a preliminary question to this Court. *The doubts with which some undertakings may be assailed, when faced with 'atypical' forms of aid, as to whether notification is necessary should not be made light of.*"[87]

What exceptional situations did the Court envisage in *BUG Alutechnik?* It ruled:

> "in view of the mandatory nature of the supervision of State aid by the Commission under [Article 108 TFEU], undertakings to which an aid has been granted may not, *in principle*, entertain a legitimate expectation that the aid is lawful unless

[87] A-G Darmon, Opinion in C-5/89, *Commission v Germany (BUG-Alutechnik)*, ECLI:EU:C:1990:187, para. 26 (original emphasis removed and emphasis added).

> it has been granted in compliance with the procedure laid down in that article. A diligent businessman should *normally* be able to determine whether that procedure has been followed."[88]

The "in principle" is what may have resulted from A-G Darmon's aforementioned remark, but this is obviously just an assumption. In his opinion leading up to the *Alcan II* judgement A-G Jacobs pointed out that

> "a recipient of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus declining to refund that aid."[89]

Here the "in principle" is put in the context of relying on other facts and circumstances to assume proper procedure has been complied with in order to recognize legitimate expectations that could stand in the way of recovery. But we need to take it one step back: if a scheme or individual measure was not recognizable as state aid at the time, why would a diligent businessman even bother looking any further? The necessary exception created by the Court in *BUG-Alutechnik* in my opinion was not only meant to deal with the question of proper procedure but also, or maybe even primarily, to reflect that there may be exceptional situations where aid recipients had no reason to doubt that no aid was at stake to start with.[90]

While we may want to put this issue aside from an EU point of view, and simply rely on the EU's Courts to clarify how Article 107(1) TFEU should have been interpreted all along, sooner or later we may get ourselves into a position where other institutions may take a look at thing more fundamentally and not with the internal market in mind. We will get back to this in paragraph 6.4.

6.2. Tax-specific adjustments to recovery?

6.2.1, Foreign tax credits missed and CFC legislation applied

As for recovery, tax law operates in a peculiar ecosystem. Suppose State A offers an investment subsidy to a company from state B to set up a branch (permanent establishment) in state A. As a result, the branch will get a € 10 million cash subsidy. In case a classic subsidy is to be recovered by State A, State B is not expected to step in to give some relief, at least not for past investments in A. However, if

[88] CJ C-5/89, *Commission v Germany (BUG-Alutechnik)*, ECLI:EU:C:1990:230, para. 14 (emphasis added).
[89] A-G Jacobs, C-24/95, *Land Rheinland-Pfalz v Alcan Deutschland (Alcan II)*, ECLI:EU:C:1996:433, para. 18.
[90] In the context of the ongoing Spanish goodwill cases, the Spanish national reporters explicitly question whether the diffuse boundaries of the state aid concept may have an impact on limiting the retroactive effects of recovery.

a €10 million tax incentive in A had been withdrawn, State B may have to pick up the bill. Either because of a tax credit system, which requires B to allow for a deduction of additional taxes to be paid in A from taxes due in B,[91] or because it may have to undo the application of anti-avoidance measures. Maybe there is no reason for B to impose CFC rules any longer if the new tax burden in A becomes acceptable or maybe now the conditions for effective and sufficient taxation in A are fulfilled as to meet the requirements for a conditional tax exemption as set forth by B.[92]

This interlinking of States is something that will be hard to embed in the recovery process. What if State B would be unwilling to allow for a tax credit for profits from 5 or 10 years ago or be unable to undo the application of its CFC rules? Maybe because of the passing of national time limits or the final settlement of certain fiscal years there may be no room under B's national law to allow for such alteration after a couple of years. At present, setting off the increased tax burden in B against the recoverable amount in A seems not (yet) to be an option in recovery procedures.

6.2.2. The *Apple* conundrum: should we tax what is left?

In the *Apple* case the Commission seemingly tried to extend a helping hand and avoid double taxation, when it ordered Ireland to recover selective tax benefits Apple was said to have received.[93] At the heart of the matter was whether certain profits allocated to Apple in Ireland from sales from all over Europe (and beyond) actually needed to be taxed there. The Commission found that large part of profits received were allocated to the USA, without there being sufficient activities (substance) in the USA to justify those profits being allocated there. The Commission, in a nutshell, concluded that those profits could not be assigned to the USA and should therefore be taxed in Ireland. Whether or not these findings were correct is not the reason to single out the *Apple* case here; what happened next is.

[91] A tax credit may occur over time, upon repatriation of profits or liquidation of the branch.

[92] This raises the question whether state B should be allowed to intervene in a state aid recovery procedure. The need for B to grant a tax credit may depend on any profits being transferred back to B, but this is normally seen as a timing issue from a tax planning perspective at group level. The fact that the parent company may be the one applying for the credit and not the taxpayer itself does not change this. From a state aid point of view the perceived uncertainty in granting the credit may lead to a lack of standing in Court, as reflected in the General Court's decision not to allow the Government of the United States of America (USA) to intervene in the Apple case. (See Order of the General Court in case T-892/16 of 15 December 2017, *Apple Sales International and Apple Operations Europe v Commission*, ECLI:EU:T:2017:925., para. 17-24; appeal pending (C-12/18P(I), *United States v Apple Sales International and others*.))

[93] Commission decision (EU) 2017/1283 of 30 August 2016, OJ L 187/1 of 19 July 2016 (Apple).

The Commission argued that the publication of its decision may trigger other jurisdictions to question the original allocation of profits from their domestic sales to Ireland. It might well be that the distribution risk for Apple products had to be borne by other jurisdictions where Apple may have had more substantial economic activities instead of Ireland. With the risk moving abroad, (part of) the profit should go along with it. Ireland would therefore be allowed to reduce the recoverable amount with any tax related to profit allocated abroad accordingly, subject to taxation in the other jurisdiction.[94]

From a tax law perspective this is a faux pas. As a starting point countries themselves should determine whether profits are properly allocated. Ireland would be under no obligation to accept a revised profit allocation from another Member State to which it cannot agree. If, indeed, profits should have been allocated to other countries were the sales activities were taking place and where risks where effectively assumed, then the inevitable question is whether the initial allocation of profits to Ireland was valid at all.

6.3. Blocking recovery in national court

Few cases have been reported where national judges prevented or delayed recovery, the famous German *Alcan II* case being one of them which, after *BUG Alutechnik*, set the scene for state aid recovery.[95] In the Netherlands one case was reported where recovery was delayed in respect to the interest component, as, at the time, a domestic legal basis for this was lacking.

In Poland a Court procedure is deemed indispensable to effectuate recovery, which means that recovery within the regular 4 month period is not possible, according to the national rapporteurs. So while there is no upright refusal to allow for immediate recovery, the need to involve the Courts will lead to its delay.

The Czech report identifies two arbitration cases where the issue of EU state aid recovery and BIT protection was at stake. In one case the arbiters held that no legitimate expectations could be invoked as state aid rules were binding in the Czech Republic and investors should have been aware of them, according to the national report. Another case is still pending.

In 2014 a Greek Court found that retroactive levying of taxation in order to implement a recovery order, violated the Greek constitution. It found that, while the TFEU has supremacy over national law, it does not do so in regard to the Greek Constitution, thus reversing previous case law. Other cases were less successful, thus the Greek report.[96]

[94] *Ibid.*, para. 451.

[95] C-24/95, *Land Rheinland-Pfalz v Alcan Deutschland (Alcan II)*, ECLI:EU:C:1997:163 and C-5/89, footnote 88.

[96] In 2012 a Greek court also allowed for a stay of recovery, even though national law has later been amended to make conditions more restrictive as to be in line with EU Law (as interpreted by the Commission in its 2007 Recovery Notice, OJ C272/4 of 15 November 2007).

At several occasions Spanish courts have blocked immediate recovery in the past, as the aid beneficiary was not given the right to be heard as part of an ad hoc procedure. Later, a specific procedure to recover fiscal aid was introduced in Spanish law to remedy this.

On a related note, the French national report pointed out that in October 2017, the French Council d'État found that the amount of tax recovered, plus the interest, cannot constitute compensable damage as part of a state liability claim. The issue of compensatory damage payments rises once in a while and the general rapporteur can agree with this line of thought from an EU point of view (notwithstanding the possible interference of international law with such an analysis as will be discussed next).[97] It should be mentioned here that damage payments should not be mistaken for a Court ordered refund of taxes unduly paid, as part of a normal national tax appeal procedure.[98]

6.4. What if international agreements would block recovery?

What would happen if obligations arising from international agreements concluded with third countries, such as bilateral investment treaties (BITs), would hinder effective recovery of state aid? There are many issues to deal with in regard to recognition and enforcement of arbitral awards of damage payments. But for the sake of argument, what might happen in case the EU's doctrine of what a diligent businessmen is expected to be able to do turns out to be at odds with international definitions of what legitimate expectations and fair and equitable treatment should entail? What if damages would indeed be awarded?[99]

[97] The general reporter would like to add that, in the absence of damage, the question of whether any compensation should be limited because the damaged party could have taken action to limit such damage (by checking for notification) did not need to be answered.

[98] In this context, the General reporter would like to point to an ongoing series of cases dealing with recovery in Germany that may be affected by recent national decisions. While EU Courts are still deciding on possible state aid elements in an exemption to a German restriction on carrying forward losses, the German constitutional court found that the restriction itself was not fully in line and hence ordered the German government to change the law retroactively. Depending on what the new law would look like, we might see an admittedly unlikely scenario where all affected taxpayers get some kind of compensation or refund, which could also mean that (part of) amounts recovered may have to be returned again. This would, in my opinion, not affect effective recovery as all companies would be affected alike. See BVerfG, Beschluss des Zweiten Senats vom 29. März 2017, – 2 BvL 6/11, ECLI:DE:BVerfG:2017:ls20170329.2bvl000611, Rn. (1-167), General Court T-287/11, footnote 79, *CJ* C-203/16P, *Dirk Andres (Heitkamp BauHolding GmbH) v Commission* (pending), and C-208/16P, *Germany v Commission* (pending).

[99] This is not a purely hypothetical exercise. In its trade and investment negotiations with Canada and the USA, the European Commission proposed to include explicit state aid carve outs as to keep recovery out of the scope of investor protection clauses. Such carve-outs do not exist in older BITs. (See, for example, Article 8.9(4) of the Comprehensive Economic and Trade Agreement (CETA) concluded with Canada; its section on investor protection of which this carve-out is a part has not yet come into force.) Depending

Under Austrian law, national norms (including those originating from international agreements) will have to give way to EU law in case of conflict, but here the example given in the national report refers to a situation where EU law was invoked by the taxpayer himself. The general rapporteur notes that this case law does not seem to answer the question of whether Austria would honour obligations under international agreements, like BITs, in order to protect investors from EU-ordered state aid recovery, should a BIT indeed have been violated.

The Bulgarian rapporteurs assume that this issue will be referred to the CJEU for preliminary ruling; the report does not indicate whether there is any hierarchy or conflict rule under national law.

The Croatian report indicates that due to the supremacy of EU law over national law, this should include international agreements like BITs as well. The example given however, again, refers to a situation where EU law would be called upon to the benefit of the party involved who would face negative effects from an international agreement. The reverse has not been addressed.

According to the Danish report, while there seems to be a precedence of EU Law over international obligations this requires EU law itself not to come in conflict with the international obligations the EU has taken on. One case on a potential conflict between EU law and international customs law (thus not state aid) is now pending and has been referred to the CJ.[100]

The Estonian national report indicates that the issue of supremacy of EU law obligations (like state aid recovery) and international law can go either way. Also in Finland and Slovenia there is no case law on this. The Romanian report is equally inconclusive about the Constitutional hierarchy of EU law versus international law (as adopted into national law).[101]

The issue of interaction of bilateral or multilateral investment protection agreements with national law in the context of state aid recovery did not come up yet in France. While there is no particular hierarchy between interstate commitments, the French Council d'État seems likely to give priority to EU law over obligations in the context of double tax conventions as the French report elaborates. Again, the examples given deal with situations where EU law was called upon by the taxpayer himself.

on the arbitration regime applicable, national courts may be prevented from invoking internal public policy exception when called upon to recognize an award, should state aid law already qualify as such.

[100] The Danish report refers to this case as the 'Holst Group' case; a reference to a Curia-number is currently unavailable. The national reporters reason that it will be up to the CJ to determine what position the referring court should take in case of a conflict between EU law and international law.

[101] In regard to the fundamental freedoms, EU law would be given precedence over national law (including such laws implementing international agreements presumably) according to the Romanian national report. This, again, is set in a context where the taxpayer would be able to derive protective rights therefrom and not the reverse.

Also in Cyprus, Germany and Ireland EU law would be given precedence over international agreements as implemented in national law in case of conflicting obligations.

In the Greek legal order a conflict between EU law and BITs would be possible with regard to protection of the right of property, although the Greek report also states that (all of?) these BITs contain a clause avoiding a BIT to result in deviation from Greece's EU obligations. Yet, the standard text of this clause provided for in the national report does not seem to support the latter statement.

The Dutch rapporteurs expect that in case of a conflict between EU law obligation and obligations arising from bilateral treaties, EU law will be given precedence in intra-EU situations. In disputes with third countries, they expect the Courts to hold that the Netherlands is bound to its bilateral treaties and *cannot* invoke EU law as a reason not to apply those.

In case of conflict between EU law and international agreements with non-EU Member States predating Spanish accession to the EU, Spanish courts gave precedence to the latter. All of these cases concerned agreements predating Spain's accession (i.e. as covered by Article 351 TFEU). In a more recent case the Spanish Supreme court gave precedence to EU law were an international agreement was invoked to effectively challenge the provision of an EU directive instead of challenging the national act of implementation. The national rapporteurs conclude that while Spanish courts have given precedence to EU law over other international obligations arising from bilateral or multilateral agreements with non-EU Member States in more recent years, they yet have to clearly state this precedence in their judgements.

In the UK the issue of BITs versus EU Law ended up in its Court, when the *Micula* brothers tried to enforce a final arbitral award of damages against Romania compensating recovery. As there was a "material risk of conflict" with EU law, the UK court could not proceed to enforcement pending a General Court decision on annulment of a Commission decision declaring the award to be unlawful aid. Indeed a "Solomonic" judgement as the national rapporteurs put it, as the Court needed to find a balance between living up to international obligations in regard to such awards and complying with EU law.[102] The second institutional report will elaborate on this topic and the *Micula* saga in particular.[103]

[102] See High Court judgement in *Micula et al. v. Romania*, [2017] EWHC 31 (Comm) of 20 January 2017 and General Court T-694/15 and T-704/15 (pending).

[103] As for the *Micula* saga see, inter alia, the arbitral award in International Centre for Settlement of Investment Disputes (ICSID) No. ARB/05/20 of 11 December 2013 and Commission decision (EU) 2015/1470 of 30 March 2015 on State Aid SA.38517, OJ L232/43 of 4 September 2015. (Appeal pending, T-694/15 and T-705/15)

7. Concluding remarks

Shortcomings in the international tax system and less than adequate national anti-avoidance legislation need to be remedied to address aggressive tax avoidance structures. Still, we have to deal with the fact that political consensus amongst countries takes time, in the EU as well as at the OECD. State aid rules are not meant to be a shortcut to tax harmonization, although reminding EU Member States of their existence and consequences seems to have been helpful in getting some recent changes accomplished both on the national as well as the EU level.[104]

For many corporate taxpayers, tax advisors and tax authorities, the recent ruling cases where something of a shake-up as too few of them were familiar with the potential impact of state aid rules on their daily routines. That, at least, has changed in the last couple of years and not just within the EU. The Commission's increased attention to tax rulings should thus be welcomed. Its investigations are necessary to safeguard the effectiveness of the state aid regime and they should not have come as a surprise. What may have hit the tax world, however, is the approach the Commission takes towards the at arm's length principle. Even if we would not question its applicability as such, at least not nowadays, there is still the very technical but highly important matter of how it needs to be implemented. The Commission seems to operate with the 2010/2017 OECD framework in mind, even when Member States decided not to apply it, at least not in full, or at times where other (older) Guidelines or bilateral Treaty provisions applied.

All parties involved are still in a learning-by-doing process; most probably some of the Commission's first decisions on tax rulings would have read differently now that its services have become more familiar with the subject. While there is sufficient room to question some of the assumptions the Commission used in its legal reasoning in the pending tax ruling cases, as indicated above, its extensive factual analysis in some of these cases may serve as a reminder that it is still possible that state aid may be at stake.[105] This report did not address in detail the technicalities of the various methods available to actually calculate a range of acceptable transfer prices and the problem of choosing the most appropriate method from them as these vary on a case-by-case basis. It must be taken into consideration that these disputes could also occur under most national laws available. We should therefore keep in mind that a transfer pricing analysis that

[104] Apart from the recently adopted EU Directives mentioned in paragraph 2, also see Commissioner Vestager's statement on changes made by Cyprus to national legislation on tax treatment of financial companies, STATEMENT/17/2110 of 21 July 2017.

[105] In most of the tax ruling decisions the Commission already included fall-back positions by offering alternative reasoning on issues such as selectivity of individual rulings (by applying the three-step test) and the use of national principles instead of the EU ALP.

is way off can still amount to state aid in the absence of an 'EU' at arm's length principle. Tax authorities and taxpayers need to be held up to the mark, the one set domestically that is.

As we have seen, apart from the at arm's length principle, two other issues will be highly relevant for Member States and taxpayers. The first is the future of unconditional tax exemptions within the EU. While widely used in international tax law for reasons of feasibility and practical expediency, the Commission is questioning whether they are still suitable to deal with avoidance of double taxation as mere potential double taxation might not be enough to justify them (which is only relevant if we no longer look at them as general measures).

The second is the enforcement of national anti-avoidance legislation and GAARs in particular. How much leeway will tax authorities have with respect to not enforcing the latter or in reserving them for the most extreme situations of abuse of law? This is already an issue today and it will even become more prominent as of 2019 when the Anti-Tax Avoidance Directive will have set anti-avoidance provisions as minimum norms to be upheld.

The irony of all of this is that with the introduction of new EU anti-tax avoidance legislation containing open norms like a GAAR, the need for advance tax rulings may increase. Rulings may provide much needed certainty in advance rather quickly as to preserve the competitiveness of the EU's investment climate, without overburdening the EU's Courts with too many test cases. Still, doing so would put us at risk of keeping cases that could provide uniform guidance out of the forums where they belong. Once the dust has settled however and the scope of anti-avoidance rules becomes clearer, we may see a drop in tax rulings. This may even happen sooner if companies decide no longer to apply for tax rulings anymore because of the negative connotation they have acquired in recent years. Whether or not we will end up with more informal methods of providing comfort by tax authorities instead, is still to be seen...

INSTITUTIONAL REPORT



INSTITUTIONAL REPORT

Julia Rapp*
Ramona Ianus

I. INTRODUCTION

The application of State aid rules to fiscal State measures raises attention and triggers debate – just as the application of the free movement rules did some decades ago. While some observers criticise the application of State aid rules by the European Commission as interfering in the sovereignty of Member States and leading to legal uncertainty, others welcome State aid rules as a means to ensure a level playing field between companies, irrespective of their size, and reducing unfair forms of tax competition between Member States.

The Commission's objective in exercising State aid control is to prevent distortions of competition between undertakings. When it applies State aid rules over fiscal measures, its objective is to prevent distortions of competition through the granting of tax advantages that are not available to all comparable taxpayers in a given Member State.

When the Commission adopted its first negative decisions in 2015 on State aid granted through tax rulings by Luxembourg to Fiat and the Netherlands to Starbucks, the public reaction was surprise, support on the one hand and criticism on the other. The reactions intensified when the Commission adopted its negative decision in 2016 over the tax treatment granted by Ireland to Apple. Given the attention that the tax ruling decisions have received, it may therefore

* The author wishes to thank Nina Legaard Kristensen and Luis Moscoso del Prado for their valuable contributions to this report. Further, the author wishes to thank colleagues from the Commission (Max Lienemeyer, Paul-John Loewenthal) for their comments. All views expressed in this Report are purely personal. Any errors are attributable to the author alone.

be useful to understand how the State aid rules apply in the field of taxation and how their application is relevant (or not) in seeking to counter tax avoidance.

This Report follows closely the sub-topics identified by FIDE. As a starting-point, the first Part of this Report will examine the recent jurisprudence of the Court of Justice on tax and selectivity. While the tax ruling decisions of the Commission are the focus of this Report, it is important to emphasise that the case law on selectivity of fiscal aid measures clearly forms the basis of the Commission's action in the field of tax rulings. In order to understand the tax ruling decisions, it is necessary to understand the domain of fiscal State aid.

The purpose of the second Part is to place the Commission decisions on tax rulings issued so far in the context of the Commission's competence in the field of direct taxation as well as in the broader picture of the Commission's fight against tax avoidance. Each decision taken by the Commission is meant to set a precedent insofar as the Commission aims to tackle different aggressive tax planning strategies among the practices identified by the Commission in its review of the tax ruling systems of the 28 Member States. This Part will explain in detail the Commission's assessment in the tax ruling decisions, the benchmarks applied and the selectivity reasoning carried out. In doing so, it will also address some of the criticism that has been raised against the Commission's assessment in those decisions.

The third Part will address the issue of double taxation and double non-taxation and the role State aid rules can (and cannot) play.

II. TAX SYSTEMS AND STATE AID: SELECTIVITY AND DISTORTION OF COMPETITION. AN APPRAISAL OF THE EU CASE-LAW

1. Introduction

This chapter aims to set out an account of the EU case law relating to tax systems and State aid and at the same time serve as an introduction to the discussion following in the next Parts as to how the case law of the Court of Justice influences and determines the Commission's decision-making practice in the field of fiscal aid cases and, in particular, as regards the tax ruling decisions. The focus will be on selected judgments that the author considers of particular relevance and which have triggered interesting debates as to the scope of the Commission's competence where State aid rules and direct taxation meet.

Where the topic is "tax systems and State aid", it is clear that among the criteria for a finding of State aid pursuant to Article 107(1) of the Treaty of the European Union (TFEU), the most important – and debated – criterion is selectivity.[1]

[1] In order to fall within the scope of Article 107(1) TFEU and constituting State aid, a measure must cumulatively fulfil all the conditions laid down by that provision. In the context of fiscal aid measures,

To fall within the scope of Article 107(1) TFEU, a State measure must favour "certain undertakings or the production of certain goods". Thus, measures of general application do not fall within the scope of Article 107(1) TFEU.[2]

In addition, it is undebated and since the beginning of the EU settled case law that State aid can be granted in any form, including a cash subsidy or a tax expenditure in the form of a tax waiver or other charge that would normally be payable: "t]he concept of aid is ... wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, being subsidies in the strict meaning of the word, are similar in character and have the same effect."[3]

This raises the question of what is "normally" included in the budget of an undertaking which requires the need to determine a benchmark. In fiscal aid cases, this is referred to as the reference framework, i.e. the generally applicable rule from which the tax measure that is being investigated deviates. The Court held that, "in order to classify a domestic tax measure as 'selective', it is necessary to begin by identifying and examining the common or 'normal' regime applicable in the Member State concerned. It is in relation to this common or 'normal' tax regime that it is necessary, secondly, to assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation." Finally, in accordance with the Court's case-law, a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the system of which it is part is not considered to be selective and thus falls outside the scope of Article 107(1) TFEU. [4]

This so-called three-step-test is the basis for any selectivity assessment for fiscal aid schemes, and while it does not necessarily apply only to fiscal aid[5], it

the other criteria pursuant to Article 107(1) TFEU are, however, usually satisfied. For a discussion on the criterion of advantage in the tax ruling decisions see Part 2, Section 3 of this Report. For a discussion of distortion of competition see Section 5 below.

[2] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, p. 1-50, paragraph 118.

[3] Judgment of the Court of 23 February 1961, De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community, Case 30/59, ECLI:EU:C:1961:2.

[4] Judgment of the Court of Justice of 8 September 2011, Paint Graphos and others, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 49.

[5] See Opinion of Advocate General Wahl in European Commission v Hansestadt Lübeck, Case C-524/14 P, ECLI:EU:C:2016:971, paragraphs 87 to 89: "The Court's case-law confirms that the comparative exercise prescribed in the case of tax regimes is equally valid in the case of other measures. It should

was created and predominantly applied to deal with tax measures which seem to be of general application but may nevertheless be selective because they are designed to favour certain undertakings or the production of certain goods.

In the case of individual aid measure, on the other hand, the three-step test is in principle not necessary as stated by the Court of Justice in *MOL*: "the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid. In the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective."[6]

Given that the Commission decisions on tax rulings granted by certain Member States are individual aid measures, the Commission employed the reasoning of the *MOL* judgment in order to find selectivity. This will be further explained in Part 2 on tax rulings and their impact on competition, where it will also be highlighted that although the Commission dealt with individual aid measures in this context, it nevertheless assessed selectivity in these decisions also according to the three-step test as a subsidiary finding of selectivity.

In the following, the case-law of the Court of Justice will be set out and explained following the structure of the three-step test and with a focus on material selectivity.

be noted that the Court has, moreover, conducted that comparative exercise in the case of measures relating to the payment of costs and to the use of infrastructure. Indeed, in the Judgment of 14 January 2015, Eventech (C-518/13, EU:C:2015:9), the Court took care to consider, in relation to the authorisation given to London taxis to drive in bus lanes, whether London taxis and minicabs were in a comparable factual and legal situation. The examination of whether the measure is discriminatory is, in essence, coextensive with the examination of whether the measure confers a selective economic advantage on the beneficiary undertakings." See also Judgment of the Court of 20 December 2017, Comunidad Autónoma de Galicia and Redes de Telecomunicación Galegas Retegal, SA (Retegal) v Commission, Case C-70/16 P, ECLI:EU:C:2017:1002.

[6] Judgment of the Court of 4 June 2015, Commission v MOL Magyar Olaj- és Gázipari Nyrt, Case C-15/14 P, ECLI:EU:C:2015:362, paragraph 60. See also Judgment of the General Court of 13 December 2017, Hellenic Republic v Commission, Case T-314/15, ECLI:EU:T:2017:903, paragraph 79: "Il doit, toutefois, être distingué selon que la mesure en cause est envisagée comme un régime général d'aide ou comme une aide individuelle. Dans ce dernier cas, l'identification de l'avantage économique permet, en principe, de présumer de sa sélectivité. En revanche, lors de l'examen d'un régime général d'aide, il est nécessaire d'identifier si la mesure en cause, nonobstant le constat qu'elle procure un avantage de portée générale, le fait au bénéfice exclusif de certaines entreprises ou de certains secteurs d'activités (arrêts du 4 juin 2015, Commission/MOL, C-15/14 P, EU:C:2015:362, point 60, et du 30 juin 2016, Belgique/Commission, C-270/15 P, EU:C:2016:489, point 49). Il convient de préciser que, dans le cas où est en cause une aide individuelle, la présomption de sélectivité s'opère indépendamment de la question de savoir s'il existe sur le ou les marchés concernés des opérateurs se trouvant dans une situation factuelle et juridique comparable"

2. 1st step: the reference framework

According to the Court of Justice, "the determination of the reference framework has a particular importance in the case of tax measures, since the very existence of an advantage may be established only when compared with 'normal' taxation."[7] To this statement, two qualifications apply, which will be further elaborated next.

First, in certain exceptional cases it is not sufficient to examine whether a measure derogates from the reference system *as defined* by the Member State concerned. A strict selectivity requirement to demonstrate a departure from a "normal" regime would leave a loophole which could be exploited through a biased definition of the reference framework.[8] It is also necessary to evaluate whether the boundaries of the system of reference have been designed in a consistent manner or, conversely, in an arbitrary or biased way, so as to favour certain undertakings which are in a comparable situation with regard to the underlying logic of the system in question.[9]

Thus, in Joined Cases C-106/09 P and C-107/09 P concerning the Gibraltar tax reform, the Court of Justice found that the reference system as defined by the Member State concerned, although founded on criteria that were of a general nature, discriminated in practice between companies which were in a comparable situation with regard to the objective of the tax reform, resulting in a selective advantage being conferred on offshore companies. It thus found that the reference system itself was problematic and that the fact that offshore companies were not taxed was not a random consequence of the regime, but the inevitable consequence of the fact that the bases of assessment were specifically designed so that offshore companies had no tax base.

The point that the determination of the reference framework cannot depend on the regulatory technique employed by the Member State can also be found back in an entirely different case on the introduction of an air passenger tax in Ireland. In this case, the Commission considered that the difference in an air travel tax (ATT) rate imposed by Ireland for short-haul flights (EUR 2) and long-haul flights (EUR 10) constituted unlawful State aid which had to be recovered. The Court stated that if it "were to find that the lower rate of ATT did not procure a selective advantage for the undertakings liable to pay that rate on the sole ground that that rate was introduced at the same time as the rate of EUR 10 per passenger,

[7] Judgment of the Court of 6 September 2006 Portuguese Republic v Commission of the European Communities, Case C-88/03, EU:C:2006:511, paragraph 56.

[8] R. Lyal, Transfer Pricing Rules and State aid, 38 Fordham Int'l L.J. (2015), p. 1017.

[9] Judgment of the Court of 15 November 2011, Commission and Spain v Government of Gibraltar and United Kingdom, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732. See also Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, p. 1-50, paragraph 129.

that would be tantamount to a finding that the decision whether a State intervention measure constituted State aid depended on the technique used."[10]

Second, the reference system should be defined in light of its purpose. Where the main purpose of a tax system is to raise revenue, the reference system would usually be the corporate income tax system or the VAT system. Such approach can be derived from the Court's judgment in *Paint Graphos* where it held that a special corporate income tax regime implying an exemption from tax for producers' and workers' cooperative societies constituted a departure from the normal corporate income tax regime: "It is apparent from the information available to the Court [...] that, for the purpose of calculating corporation tax, the basis of assessment of the producers' and workers' cooperative societies concerned is determined in the same way as that of other types of undertaking, namely on the basis of the amount of net profit earned as a result of the undertaking's activities at the end of the tax year. Corporation tax must therefore be regarded as the legal regime of reference for the purpose of determining whether the measure at issue may be selective."[11]

Similarly in *World Duty Free*, a case concerning a Spanish rule which allowed companies acquiring shares in a foreign company a more favourable tax treatment than companies acquiring shares in a Spanish company, the Court of Justice considered the reference system to constitute the "ordinary tax system", i.e. the general Spanish corporate income tax system.[12]

A remark on the tax ruling decisions further discussed in Part 2, where the reference system is defined as the corporate income tax system of a given Member State, including the separate entity approach and the arm's length principle: the Commission has been criticized for including the arm's length principle in the "ordinary" tax system as reference framework for assessing whether a tax administration has granted a selective advantage to a certain multinational company, irrespective of whether that Member States had explicitly included the arm's length principle in its national tax code. According to the criticism, in the absence of harmonization at EU level on this issue, the Commission could not

[10] Judgment of the Court of 21 December 2016, Commission v Aer Lingus Ltd and Ryanair, Joined Cases C-164/15 P and C-165/15 P, ECLI:EU:C:2016:990, paragraph 58.

[11] See Judgment of the Court of 8 September 2011, Paint Graphos and others, Joined Cases C-78/08 to C-80/08, ECLI:EU:C.2011:550, paragraph 50.

[12] Judgment of the Court of 21 December 2016, Commission v World Duty Free Group SA and Others, Joined Cases C-20/15 P and C-21/15 P, ECLI:EU:C:2016:981, paragraph 67. Also in Judgment of the Court of 22 June 2006, Belgium and Forum 187 v Commission, Joined Cases C-182/03 and C-217/03, ECLI:EU:C:2006:416, the Court considered the reference system to consist of the "ordinary Belgian tax regime": "it is clear from the above analysis that the exemptions from property and withholding tax, from capital duty and the granting of a notional withholding tax constitute derogations from the ordinary Belgian tax regime. The point, relied on by Forum 187, that a number of other derogations exist, does not undermine the finding that the regime for coordination centres is, in fact, derogatory in nature and that it restricts those exemptions to the coordination centres alone" (paragraph 120).

base its assessment pursuant to Article 107(1) TFEU on an "EU invented arm's length principle"; the correct basis for assessment could only be the ordinary corporate income tax rules existing in a given Member State.[13]

This issue will be discussed in more detail in the following Part 2. At this point, suffice it to say that any corporate income tax system is based on the principle that a corporate income tax should be paid "based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition." This reflects the exact wording of the Court in the *Forum 187* judgment.[14] In the same vein, in any corporate income tax system based on the separate entity approach, companies are taxed on a level of profits that reflects a market-based outcome. Standalone companies always pay market prices. Group companies have to determine their prices by reference to the arm's length principle (i.e. also equivalent to a market-based outcome). The arm's length principle is the only means to ensure that group companies are not selectively favoured over standalone companies and this is either explicitly or implicitly accepted by all Member States.

The Commission in the tax ruling decisions always took as a starting point the national legal framework. However, it rejected a benchmark whereby group companies are only compared to other group companies transacting within their group whereas the relevant point of comparison is all corporate taxpayers in that Member State taxed under the ordinary corporation tax system.

Coming back to the general discussion on the corporate income tax system as the broadest reference system. At times, the Court has deviated from this in cases of carry forward of losses, even where the function of taxation remained to raise revenue. As such, in *P Oy*, the Court considered the reference system not to constitute the general regime allowing the deductibility of business losses but the "normal system", consisting "in a prohibition on the deduction of losses in the case of a change of ownership [...] in relation to which the authorisation procedure [by the Tax Directorate of Finland which enables losses to be carried forward provided 'special reasons' are met] would constitute an exception."[15] It could be argued that the consequence of this approach is to treat the "exception to the exception" – allowing the tax administration to deduct business losses provided "special reasons" are met – as a mere application of the general rule. This would plead in favour of considering this exception as not selective but a return to the general rule.[16] However, the Court followed a different approach which,

[13] A. Bartosch, (Neu-)Entwicklungen in der materiellen Selektivität, EuZW 19/2017, p. 760.

[14] Judgment of the Court of 22 June 2006, Belgium and Forum 187 v Commission, Joined Cases C-182/03 and C-217/03, ECLI:EU:C:2006:416, paragraph 95.

[15] Judgment of the Court of 18 July 2013, P Oy, C-6/12 P, ECLI:EU:C:2013:525, paragraph 32.

[16] E. Traversa, State aid and Taxation: Can an Anti-avoidance Provision be Selective?, EStAL 3/2014, p. 521.

although not deciding conclusively on the matter, continued with discussing the justification for the authorisation procedure, thereby concluding on the *prima facie* selectivity of the measure.

The fact that the "exception to the exception" leads back to the application of the general rule and therefore excludes selectivity was also argued by the German government in a similar case before the General Court on the possibility under German law to carry forward losses for companies in difficulties.[17] Under the German legal system, the carry-forward of tax losses in case of restructuring of companies in difficulty allowed companies that were illiquid or over-indebted to offset losses in a given year against taxes on profits in future years despite changes in the company's shareholding structure. The clause departed from the general principle in the German corporate income tax law that prevents the carry-forward of losses for fiscal purposes when there has been a change in the shareholding structure in order to prevent companies from avoiding taxes by taking over failed companies for the purpose of using their fiscal carry-forward value to set it off against their profits. However, also in this case, the General Court did not follow the arguments of the applicant and considered that: "it is clear that the rule governing the forfeiture of losses, like the loss carry-forward rule, is part of the legislative framework in the context of which the measure at issue arises. In other words, the general loss carry-forward rule, as limited by the rule governing the forfeiture of losses, constitutes the relevant legal framework in the present case, and it is precisely within that framework that it is appropriate to check whether the measure at issue differentiates between operators in a comparable factual and legal situation [...]".[18]

Interestingly, in a case concerning a converse rule to the one under scrutiny in *World Duty Free*, the Advocate General considered the determination of a "normal" tax system as not decisive but rather the difference in treatment in question.

[17] Judgment of the General Court of 4 February 2016, Heitkamp BauHolding GmbH v Commission, T-287/11, ECLI:EU:T:2016:60, paragraph 99: "According to the applicant, the system of reference consists of the loss carry-forward rule as a corollary of the constitutional principle of taxation according to ability to pay. The rule governing the forfeiture of losses is an exception to that principle and cannot be regarded as the system of reference, while the restructuring clause – which introduces an exception to that exception – merely re-establishes the general rule, namely the loss carry-forward rule, following the example of other exceptions such as the clause governing groups of undertakings and that relating to hidden reserves."

[18] Judgment of the General Court of 4 February 2016, Heitkamp BauHolding GmbH v Commission, T-287/11, ECLI:EU:T:2016:60, paragraph 106. However, see Advocate General Wahl in the appeal case to the Court of Justice who considers that "the General Court erred in determining the reference system. Specifically, by basing its conclusion on the legislative technique employed and on the comparability of undertakings that have undergone a substantial change in ownership, the General Court artificially limited the reference system to exclude the loss carry-forward rule therefrom." (Opinion of Advocate General Wahl of 20 December 2017 in Case C-203/16, ECLI:EU:C:2017:1017, at paragraph 148).

The case that gave rise to a preliminary ruling concerned an Austrian tax rule that allowed a group acquiring shares in Austrian companies to amortise the goodwill associated with the newly acquired shareholding. However, that regime did not apply to acquisitions of foreign shareholdings. Thus, mirror-inverted to the rule at issue in *World Duty Free*, the domestic situation was treated more favourably than the cross-border one. Although these cases are typically assessed under the free movement rules (and not under State aid rules), the referring court included questions on the State aid compatibility of the Austrian rule setting out three different reference systems as the basis for examination.

In reply, Advocate General Kokott in her opinion assessed the selective nature of the Austrian provision in relation to the three reference systems as put forward by the referring court and considered that, first, even though only legal persons can benefit from the goodwill amortization, natural and legal persons are not in a comparable factual and legal situation and therefore not in the same reference system defined as the "entire body of Austrian law on the taxation of profits".[19]

As regards, second, the question whether companies subject to group taxation are favoured over companies outside the context of group taxation (because the former can benefit of the tax advantage whereas the latter cannot), the Advocate General considered that within this reference system of corporation tax law, companies subject to group taxation and those that are not cannot be considered to be factually and legally comparable from the point of view of the objective of the legislation.

Last but not least, with regard to the third reference system of the law specifically relating to group taxation, the difference in treatment of undertakings that acquire domestic shareholdings (and benefit from the tax advantage) as opposed to those that acquire foreign shareholdings (and do not benefit) constituted, according to the Advocate General, an "equivalent to a subsidy in the narrow sense" which, however, did not favour "certain undertakings or the production of certain goods".[20] However, in contrast to Advocate General Kokott, the Court of Justice did not consider it relevant to decide on this issue as an answer to this question referred for a preliminary ruling was not necessary for the referring court to resolve the dispute before it.[21]

Yet, the function of taxation is not always to raise revenue. Taxation can also be used as an instrument to correct market failures or influence the behavior of companies. However, it is settled case law that "neither the fiscal nature nor the

[19] Opinion of Advocate-General Kokott in Finanzamt Linz v Bundesfinanzgericht, C-66/14, ECLI:EU:C:2015:242 paragraph 92.

[20] Opinion of Advocate-General Kokott in Finanzamt Linz v Bundesfinanzgericht, C-66/14, ECLI:EU:C:2015:242 paragraph 104.

[21] Judgment of the Court of 6 October 2015, Finanzamt Linz v Bundesfinanzgericht, C-66/14, ECLI:EU:C:2015:661, paragraph 22.

economic or social aim of the State measure at issue, nor the environmental protection objectives which it pursues are sufficient to exclude it from [Article 107 TFEU]."[22] Article 107 TFEU does not make a distinction between State measures according to their aim or the reasons for their introduction, but defines them only in terms of their effects.[23]

It also emerges from the case law that objectives other than fiscal policy objectives could play a role in the determination of the reference framework. This is usually the case for self-standing levies or special taxes which do not form part of a wider taxation system. Here, it seems justified to take such objectives into account when determining the reference system as it allows Member States the necessary discretion when pursuing certain policy objectives provided that the measure, for instance the exemption from a levy, is consistent with the policy objective pursued. It also seems as a concession to the need to strike a balance between too broad reference systems and too narrow ones. As Advocate General Maduro has held: "The Court is seeking to guard against the scope of the Community rules being broadened to cover distortions of competition that are simply the result of differences in legislative policy between Member States. That caution stems from a concern not to encroach on powers reserved to the Member States. There is a danger that over extension of the State aid rules might result in all economic policy decisions of Member States being brought under the scrutiny of the Community authorities, without any distinction being made between direct interventions in the market and general measures to regulate economic activities. It would also result in a substantial increase in the workload of the Community's supervisory authorities, the Commission and the Court."[24]

Thus, in the case of self-standing levies or special taxes to promote, for instance, certain environmental objectives, the reference system is the levy or tax itself. This has been clarified by the Court in a series of judgments concerning special environmental levies where it held that Member States are free to decide the externalities they want to tackle provided the scope of the tax and its features are consistent with its objectives. Thus, the core of the review concerned the consistency in the design of the taxes and the question whether the boundaries of the levy have been designed in an arbitrary or biased way, so as to favour certain products or activities which are in a comparable situation with regard to the underlying logic of the levy in question. In other words, in the case of self-standing

[22] See among others Judgment of the Court of 13 February 2003, Spain v Commission, Case C-409/00, ECLI:EU:C:2003:92.

[23] Judgment of the Court of 2 July 1974, Italy v Commission, Case 173/73, ECLI:EU:C:1974:71; Judgment of the Court of 29 February 1996, Belgium v Commission, Case C-56/93, ECLI:EU:C:1996:64, Judgment of the Court of 26 September 1996, France v Commission, Case C-241/94, ECLI:EU:C:1996:353.

[24] Opinion of Advocate-General Maduro in Enirisorse SpA v Sotacarbo SpA, Case C-237/04 , ECLI:EU:C:2006:21, paragraph 45.

levies or special taxes, the focus of the Court's review is on determining whether the companies that fall within the scope of the levy and those that do not are in a comparable legal and factual situation given the objective of the levy.

A clear example of this approach can be found in the judgment of the Court of Justice on *Kernkraftwerke Lippe-Ems*[25], a preliminary ruling raising, *inter alia*, the issue whether a German law which taxes the use of nuclear fuel for the production of electricity might be benefiting other producers of electricity as they are not impacted by the nuclear fuel duty. Here, the Court considered that the underlying logic of the tax at stake was its environmental purpose, as the tax revenues were to be used with the aim of rehabilitating the mining site where radioactive waste from the use of nuclear fuel was stored.[26] In view of this objective, the Court stated that even though other methods of producing electricity than those based on nuclear fuel are not affected by the rules imposing taxes on the use of nuclear fuel, "they are not, in the light of the objective pursued by those rules, in a factual and legal situation that is comparable to that of the production method based on nuclear fuel [...]".[27] Or, as Advocate General Szpunar pointed out: given that it is impossible to create a system of advance taxation which would take account of all production processes equally, the producers of electricity are not in the same factual situation (even though they may be in competition with each other).[28] Thus the environmental purpose of the tax, drawn from the link between its structure and the use of the tax revenues, leading to the non-comparability of the various producers of electricity was the reason why the levy was qualified as a specific tax and as such not part of a wider reference system. Conversely, in the *Adria-Wien* case, the Court held that in view of the Austrian law at issue and the underlying ecological considerations of the law, the companies benefiting from the tax exemption (i.e. undertakings manufacturing principally goods) and those that do not (undertakings supplying services) were in a comparable legal and factual situation and the difference in treatment therefore resulted in a selective advantage for the manufacturing companies.[29]

[25] Judgment of the Court of 4 June 2015, Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück, Case C-5/14, ECLI:EU:C:2015:354.

[26] R. Garcia and E. Ferreiro Serret, Hardening the preliminary reference procedure in a Union in crisis: Kernkraftwerke Lippe-Ems, CML Rev. 53 (2016), p. 837.

[27] Judgment of the Court of 4 June 2015, Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück, Case C-5/14, ECLI:EU:C:2015:35479, paragraph 79.

[28] Opinion of Advocate-General Szpunar in Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück, Case C-5/14, ECLI:EU:C:2015:51, paragraphs 71 to 75.

[29] Judgment of the Court of 8 November 2001, Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten, Case C-143/99, ECLI:EU:C:2001:598, paragraphs 50 to 52.

This approach applies beyond environmental levies. In *Ferring*[30], the Court considered that a tax on direct sales of medicines should in principle apply to all sellers of medicines and that the limitation of the tax to pharmaceutical laboratories (thereby excluding wholesale distributors) amounted to a waiver of tax and involved State aid. In *Gil*[31], the Court examined the rationale of a special tax applicable to insurance contracts to determine if, in the light of the nature and objective of the tax, a lower rate was justified for certain insurance contracts. The Court held that the special tax did not constitute a derogation from the general system of taxation of insurance in the United Kingdom as that system should be seen as encompassing not only the special tax but also VAT.

3. 2nd step: derogation from the reference system leading to *prima facie* selectivity

Having determined the reference system, the next step in the selectivity analysis consists in examining whether a given measure differentiates between undertakings in derogation from that reference system, leading to *prima facie* selectivity. To do this, it is necessary to determine whether the measure is liable to favour certain undertakings or the production of certain goods as compared with other undertakings which are in a similar factual and legal situation in the light of the intrinsic objective of the system of reference.

As was the case with the reference framework, also with respect to the second step of the selectivity analysis, additional explanations are necessary to put the case law in context.

First, the implicit conclusion of the above definition of derogation is that measures which apply without distinction to all economic operators are in principle general measures and not selective.[32] On the other hand neither the large number of eligible undertakings nor the diversity and size of the sectors to which those undertakings belong provide any grounds for concluding that a State measure constitutes a general measure of economic policy, if not all economic sectors can benefit from it.[33]

[30] Judgment of the Court of 22 November 2001, Ferring SA v Agence centrale des organismes de sécurité sociale (ACOSS), C-53/00, ECLI:EU:C:2001:627.

[31] Judgment of the Court of 29 April 2004, GIL Insurance Ltd and Others v Commissioners of Customs & Excise,
Case C-308/01, ECLI:EU:C:2004:252.

[32] A general measure could, for instance, be the accelerated and early depreciation rules for leased assets if the lease contracts in question are really accessible to companies of all sectors and sizes. (Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, p. 1-50, paragraph 179).

[33] Judgment of the Court of 8 November 2001, Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten, Case C-143/99, ECLI:EU:C:2001:598,

The defining criterion to ascertain whether a measures is general or, on the contrary, "favours certain undertakings or the production of certain goods" is whether, within the defined reference system, the measure treats legally and factually comparable undertakings differently. In other words, does the measure put those who benefit from it in a more favourable financial situation than other undertakings in a comparable legal and factual situation?[34] This, in turn, raises two further questions: first, should the comparability be ascertained with respect to the tax system so defined in the reference system or rather with respect to the State measure at issue? Second, how is legal and factual comparability to be determined?

As regards the first question, similar arguments as for the reference system where taxation is used as a corrective instrument can be put forward. It is the author's view that for fiscal aid cases, the comparison between companies that are legally and factually in the same situation should be made "in the light of the objective attributed to the tax system of the Member State concerned".[35] The Court has however, not always been consistent in this respect, assessing the comparability of companies in the light of the objective pursued by the *measure* in question.[36] However, if taken literally, this could be said to introduce a circular reasoning as all taxpayers who benefit from the measure are treated equally.[37] In addition, even though reliance on the objective pursued by the measure would allow the Commission and the Court to take into consideration the intention of the national legislator[38] when assessing whether all economic operators falling under the measure are treated equally, it goes against the Court's case law

paragraph 48. Judgment of the Court of 21 December 2016, Commission v World Duty Free Group SA and Others, Joined Cases C-20/15 P and C-21/15 P, ECLI:EU:C:2016:981, paragraph 80.

[34] Opinion of Advocate General Wathelet in Commission v World Duty Free Group SA and Others, Joined Cases C-20/15 P and C-21/15 P, ECLI:EU:C:2016:981, paragraph 83.

[35] Judgment of the Court 9 October 2014, Ministerio de Defensa and Navantia SA v Concello de Ferrol, Case C-522/13, ECLI:EU:C:2014:2262, paragraph 49.

[36] Judgment of the Court of 8 November 2001, Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten, Case C-143/99, ECLI:EU:C:2001:598, paragraph 41.

[37] R. Lyal, Transfer Pricing Rules and State aid, 38 Fordham Int'l L.J. (2015), p. 1036.

[38] J. Hey, EU-Beihilfen und Steuervergünstigungen – Gemeinsamkeiten und Unterschiede, StuW 4/2015, p. 331. As regards the possibility to take into account in the State aid analysis objectives like the protection of the environment, the Court further explained in British Aggregates that such objectives „cannot justify the exclusion of selective measures, even specific ones such as environmental levies, from the scope of Article [107(1) TFEU], as account may in any event usefully be taken of the environmental objectives when the compatibility of the State aid measure with the [internal market] is being assessed pursuant to Article [107(3) TFEU]" (Judgment of the Court of 22 December 2008, British Aggregates Association v Commission of the European Communities and United Kingdom, Case C-487/06, ECLI:EU:C:2008:757, paragraph 92).

that "the objective pursued by State measures is not sufficient to exclude those measures outright from classification as 'aid' for the purposes of Article [107 TFEU]. Article [107(1) TFEU] does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects."[39] Decisive for the determination of selectivity pursuant to Article 107(1) TFEU are therefore the effects of the measure and not the regulatory technique[40], the reasons for its adoption or its objectives.

As regards, the second question, the need to determine the factual and legal comparability of the undertakings concerned by the State measure, the Court of Justice has adopted in cases that concerned measures of general application a very broad approach to the concept of category of undertakings privileged by virtue of the properties which are specific to it, such as undertakings whose primary business is the manufacture of goods (e.g. *Adria-Wien*), the carrying out of certain economic transactions[41] or undertakings which are engaged in export activities and make certain investments.[42] On the other hand, where the national measure at issue is of more limited application, for instance relating to the use of one infrastructure or regulating the use of terrestrial technology, a measure benefiting a whole entire sector was not considered necessarily selective. Such was the case in *Lübeck airport* where the reference system was defined as a schedule of charges applying to airlines using that airport. Here, the Court stated that: "a measure which benefits only one economic sector or some of the undertakings in that sector is not necessarily selective. It is selective [...] only if, within the context of a particular legal regime, it has the effect of conferring an advantage on certain undertakings over others, in a different sector or the same sector, which are, in the light of the objective pursued by that regime, in a comparable factual and legal situation."[43] Thus, the selectivity condition in those

[39] Judgment of the Court of 22 December 2008, British Aggregates Association v Commission of the European Communities and United Kingdom, Case C-487/06, ECLI:EU:C:2008:757, paragraphs 84 and 85.

[40] Judgment of the Court of 15 November 2011, Commission and Spain v Government of Gibraltar and United Kingdom, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732. See also Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, p. 1-50, paragraph 87.

[41] Judgment of the Court of 21 December 2016, Commission v World Duty Free Group SA and Others, Joined Cases C-20/15 P and C-21/15 P, ECLI:EU:C:2016:981, paragraph 88.

[42] Judgment of the Court of 15 July 20114, Spain v Commission, Case C-501/00, ECLI:EU:C:2004:438, paragraphs 120 to 128.

[43] Judgment of the Court of 21 December 2016, European Commission v Hansestadt Lübeck, Case C-524/14 P, ECLI:EU:C:2016:971, paragraph 58. Equally, in the recent judgement on State aid granted in the context of the transition from analogue to digital television in Spain, the Court considered that contrary to the Commission decision, undertakings active in the broadcasting sector are not necessarily in a factual and legal situation comparable to that of undertakings active in other sectors, also undertakings

cases is not automatically satisfied if a measure applies exclusively to a specific economic sector or to undertakings in a particular geographic area. It needs to be ascertained whether in light of the objective of the reference system, the undertakings benefiting from the measure and those that do not are legally and factually comparable[44] which is, incidentally, entirely in line with the Court's case law on the effects-based approach as regards selectivity.

At this point, the question could be raised whether in order to determine if undertakings are legally and factually comparable, they should be in competition with each other. However, this argument was dismissed by the Court in a case concerning financing granted by Belgium for BSE screening tests where it held that in order to identify companies that are in a comparable factual and legal situation, it does not matter whether they are in competition but whether they face the same kind of regulatory costs.[45]

In *World Duty Free*, the Court also established that the wording "favouring certain undertakings or the production of certain goods" does not require the identification of a category of undertakings with specific characteristics which are exclusively favoured by the measure.[46] Rather, the decisive criterion was whether the tax measure, irrespective of the technique used, has the effect of imposing a differentiated tax burden on undertakings which are in a comparable factual and legal situation, i.e. whether the tax measure leads to a discriminatory treatment. In his opinion to this case, Advocate General Wathelet argues that the reliance on the question whether there is discrimination between taxpayers in comparable situations reflects the will of the constituent power as expressed in

using terrestrial technology are not in a factual and legal situation comparable to that of undertakings using other methodologies. Judgment of the Court of 20 December 2017, Comunidad Autónoma de Galicia and Redes de Telecomunicación Galegas Retegal, SA (Retegal) v Commission, Case C-70/16 P, ECLI:EU:C:2017:1002, paragraph 61.

[44] See also Judgment of the Court of 14 January 2015, Eventech Ltd v The Parking Adjudicator, Case C-518/13, ECLI:EU:C:2015:9, where the Court considered that in a situation where different rules apply for minicabs and black cabs as regards access to bus lanes, those two types of cabs could not be considered to be legally and factually comparable.

[45] Judgment of the Court of 30 June 2016, Belgium v Commission, Case C-270/15 P, ECLI:EU:C:2016:489, paragraph 53. See also Opinion of Advocate-General Szpunar in Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück, Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück, Case C-5/14, ECLI:EU:C:2015:51, who considered that even though undertakings using different methods of producing electricity are in competition with each other as regards the product – electricity – they are not in the same factual situation (paragraph 75).

[46] Judgment of the Court of 21 December 2016, Commission v World Duty Free Group SA and Others, Joined Cases C-20/15 P and C-21/15 P, ECLI:EU:C:2016:981, paragraph 71. Advocate General Wathelet considered at paragraph 84 of his Opinion that the identification of undertakings with specific characteristics an "extremely imprecise, not to say arbitrary, exercise that would create legal uncertainty."

the wording of Article 107(1) TFEU and does not jeopardise the institutional balance between the Commission and the Member States.[47]

Last but not least, some words on the degree of latitude that tax administrations (should) have in order to exercise their functions. The fact that a tax relief requires prior administrative authorisation does not automatically mean that it constitutes a selective measure.[48] For instance, in *P Oy*, where this issue was dealt with in the context of justification, the Court held that "[j]ustification is possible if, under the authorisation procedure, the degree of latitude of the competent authorities is limited to verifying the conditions laid down in order to pursue an identifiable tax objective and the criteria to be applied by those authorities are inherent in the nature of the tax regime." Thus, where the administration enjoys "only a degree of latitude limited by objective criteria which are not unrelated to the tax system established by the legislation in issue", the authorisation procedure and the discretion which comes with it cannot be considered selective.[49] Also in cases in which the public administration imposes charges in order to maintain equal treatment between operators, the simple fact that this administration enjoys discretion defined by law, and not unlimited, cannot be sufficient to establish selectivity.[50]

However, if the public administration exercises its discretion on the basis of criteria unrelated to the tax system, the exercise of such broad discretion could lead to a selective treatment.[51] In *P Oy*, Finnish legislation in principle prohibits the deduction of losses in the event of ownership changes but includes an escape clause allowing the tax administration to authorise the offsetting of losses even in the case of ownership change provided "special considerations" apply. An

[47] Opinion of Advocate General Wathelet in Commission v World Duty Free Group SA and Others, Joined Cases C-20/15 P and C-21/15 P, ECLI:EU:C:2016:981, footnote 68 of the Opinion. See also in this sense A. Bartosch, (Neu-) Entwicklungen in der materiellen Selektivität, EuZW 19/2017, p. 756.

[48] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, p. 1-50, paragraph 125.

[49] Judgment of the Court of 18 July 2013, P Oy, C-6/12 P, ECLI:EU:C:2013:525, paragraphs 24 and 26.

[50] Judgment of the Court of 4 June 2015, Commission v MOL Magyar Olaj-és Gázipari Nyrt, Case C-15/14 P, ECLI:EU:C:2015:362, paragraph 64. In the MOL decision, the Commission had deemed a specific extension of mining rights to a specific undertaking to be selective because it was a manifestation of a discretionary administrative practice. However, both the General Court and the Court of Justice held that in order to establish selectivity in such a case, the Commission must demonstrate that the administrative practice is discretionary in nature, which the Commission had not done. See Judgment of the Court of 4 June 2015, Commission v MOL Magyar Olaj -és Gázipari Nyrt, Case C-15/14 P, ECLI:EU:C:2015:362, paragraphs 66 to 69, in which the Court of Justice considered the Hungarian administration's discretionary power under that regime in general was insufficient to establish selectivity between economic operators, since that discretion was tightly controlled and was specifically used to ensure equal treatment between mining operators requesting an extension and those which did not.

[51] Judgment of the Court of 18 July 2013, P Oy, C-6/12 P, ECLI:EU:C:2013:525, paragraph 30.

administrative guidance letter then listed those special reasons, including, inter alia, "particular impact on employment". In the Court's view, this escape clause left considerable discretion to the tax administration unrelated to the tax system. However, it would appear that the authorisation procedure permitting tax carry-forward only in certain cases was, in principle, considered permissible by the Court in order to prevent trade in losses provided the "special considerations" referred to reasons that could be considered inherent in the tax system.

The argument whether the discretionary treatment by certain tax administrations could give rise to State aid was also raised in the Commission's tax ruling decisions on, e.g. Fiat and Apple. As will be explained in more detail in Part 2, tax rulings may confer a selective advantage if a tax administration applies a generally applicable rule in a way that results in a favourable tax treatment to one company as compared with other taxpayers in a similar factual and legal situation based on the exercise of discretion. While discretion may often be inherent in tax rules, a distinction should be made between the discretion necessary for the State to fulfil its revenue-raising function as opposed to discretion going beyond this role and used to grant a selective advantage to certain multinationals, possibly in return for investment or employment.

4. 3rd step: Justification

A measure which derogates from the reference system and is therefore *prima facie* selective does not constitute State aid if it is justified by the nature or general scheme of that system. As regards the last step of the three-step test, the burden of proof is on the Member State. In that context, a distinction must be made between, on the one hand, the objectives that are extrinsic to a particular tax system (as was arguably the case in *P Oy* with respect to employment considerations) and, on the other hand, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives.[52]

Thus, in *P Oy*, the fact that an authorisation procedure existed did not preclude a justification. On the contrary, an anti-abuse rule such as it was at issue in *P Oy* could well serve as a justification in order to prevent tax avoidance by taxpayers provided the rule (and how it is applied where it leaves discretion to the tax administration) is consistent with the nature and logic of the anti-abuse objective.[53] The issue was, as explained before, that the authorisation procedure

[52] Judgment of the Court of 8 September 2011, Paint Graphos and others, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 69. It is arguable whether all the reasons set out by the Court in *Paint Graphos* that could justify a different treatment of cooperatives versus normal commercial companies concerned grounds inherent in the tax system itself.

[53] See also Judgment of the Court of 29 April 2004, GIL Insurance Ltd and Others v Commissioners of Customs & Excise,

allowed the tax administration to exercise discretion not limited by objective criteria but applying conditions (i.e. employment considerations) unrelated to the tax system whose objective was to avoid trade in losses.

So far, the Commission in its decision-making practice has accepted only few justification grounds based on the nature or general scheme of the system. The basis for a possible justification could, for instance, be the need to fight fraud or tax evasion[54], the need to take into account specific accounting requirements, administrative manageability, the principle of tax neutrality[55], the progressive nature of income tax and its redistributive purpose, the need to avoid double taxation[56], or the objective of optimising the recovery of fiscal debts.[57]

The concept of the nature or general scheme of the system serves to ensure that regard is properly had to the internal logic of the tax system[58] as defined in the first step of the selectivity test, the identification of the reference framework. Consistency with this internal logic demonstrates that a derogation is justified and does not create inequality of treatment.

This consistency is the central element in the *Paint Graphos* judgment already referred to before. The case was based on a preliminary ruling submitted by the *Corte di Cassazione* of Italy in relation to the possible qualification as State aid of

Case C-308/01, ECLI:EU:C:2004:252, paragraphs 65 et seq. On the other hand, *P Oy* also confirms that anti-avoidance rules might be selective if they provide for a derogation (non-application of the anti-abuse rules) to specific undertakings or transactions which would not be consistent with the logic underlying the anti-abuse rule in question (Judgment of the Court of 18 July 2013, P Oy, C-6/12 P, ECLI:EU:C:2013:525, paragraphs 23 to 26.).

[54] Judgment of the Court of 29 April 2004, GIL Insurance Ltd and Others v Commissioners of Customs & Excise,
Case C-308/01, ECLI:EU:C:2004:252.

[55] Commission Decision of 5 June 2002 on State aid granted by Italy in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding, OJ L 77, 24.3.2003, p. 21.

[56] Judgment of the Court of 8 September 2011, Paint Graphos and others, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 71.

[57] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, p. 1-50, paragraph 139. It could be argued that similarly to the development of additional grounds of justification in the case law of the Court on the fundamental freedoms, also the possibilities for an exemption of state aid should be expanded. (R. Ismer and S. Piotrowski, The Selectivity of Tax Measures: A Tale of Two Consistencies, Intertax 43, Issue 10 (2015), p. 559). See also Opinion of Advocate General Kokott in Presidente del Consiglio dei Ministri v Regione Sardegna, Case C-169/08, ECLI:EU:C:2009:420, who argues at paragraph 134 of her opinion that that in order "to avoid conflicting assessments as between the law of State aid and the law of fundamental freedoms, the same criteria must be applied in both cases." However, unlike the restriction of fundamental freedom, selectivity usually involves a difference in the treatment of undertakings of the same state rather than a difference in the treatment of domestic and foreign undertakings (Opinion of Advocate-General Kokott in Finanzamt Linz v Bundesfinanzgericht, C-66/14, ECLI:EU:C:2015:242 paragraph 91).

[58] R. Lyal, Transfer Pricing Rules and State aid, 38 Fordham Int'l L.J. (2015), p. 1032.

certain tax exemptions available under Italian law only to cooperative societies because of the specific objective pursued by such societies. In particular, by way of derogation from the rule generally applicable to other undertakings, the taxable income of producers' and workers' cooperative societies was exempt from corporation tax if they dedicated most of their income to remunerate the members who worked for the cooperatives on a continuous basis. The judgment is relevant for the question of justification for several reasons.

First, the Court confirms the possibility of relying on the nature or general scheme of the national tax system as justification for the fact that cooperative societies which distribute all their profits to their members are not taxed themselves as cooperatives, provided that tax is levied on the individual members.[59] In so doing, the Court seems to accept the avoidance of *actual* double taxation as a valid justification by the nature or general scheme of the system.[60]

Second, the Court emphasises the need to ensure that tax benefits are applied in a proportionate way, which means that they should not go beyond what is necessary "in that the legitimate objective being pursued could not be attained by less far-reaching measures".[61] This proportionality test is the same applied by the Court to assess possible justifications for the restrictions of the fundamental freedoms.[62]

Third, the Court refers to the need for the Member State to introduce control mechanisms to avoid abuses of the tax benefit, or in other words, "to ensure that specific tax measures introduced for the benefit of cooperative societies are consistent with the logic and general scheme of the tax system and to prevent

[59] Judgment of the Court of 8 September 2011, Paint Graphos and others, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 71.

[60] In the same line see, in relation to the justification of restrictions to the freedom of movement of capital based on the application of a convention for the avoidance of double taxation, Judgment of the Court of 17 September 2015, J.B.G.T. Miljoen and Others v Staatssecretaris van Financiën, Joined Cases C-10/14, C-14/14 and C-17/14, ECLI:EU:C:2015:608. In this case the Court held (at paragraph 90) that such a restriction is considered justified only to the extent that the difference in treatment between taxpayers residing in the Member State and those residing in other Member States ceases to exist by effect of the convention.

[61] Judgment of the Court of 8 September 2011, Paint Graphos and others, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 75.

[62] Restrictions on the freedom of establishment are permissible if they pursue a legitimate objective and are justified by overriding reasons in the public interest. Their application must however be appropriate to attain the objective and not go beyond what is necessary to achieve the objective. See, *inter alia*, Judgment of the Court of 21 January 2010, Société de Gestion Industrielle (SGI) v Belgian State, C-311/08, ECLI:EU:C:2010:26, paragraph 56; Judgment of the Court of 15 May 1997, Futura Participations SA and Singer v Administration des contributions, C-250/95, ECLI:EU:C:1997:239 paragraph 26; Judgment of the Court of 11 March 2004, Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie, C-9/02, ECLI:EU:C:2004:138, paragraph 49.

economic entities from choosing that particular legal form for the sole purpose of taking advantage of the tax benefits provided for that kind of undertaking".[63]

5. Distortion of competition

Having set out the considerations that apply in a selectivity assessment for (fiscal) measures, those measures only constitute State aid pursuant to Article 107(1) TFEU if they affect trade and distort competition. According to settled case law, a measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes.[64] Thus, if an undertaking is relieved from costs which it would normally have to bear in its day-to-day management, this distorts competition. It is therefore not necessary to carry out an economic analysis of the actual situation on the relevant market or to show the real effect of the aid at issue on prices. [65] It is also not necessary that the aid beneficiary is involved in intra-EU trade as the aid may have the effect to increase or maintain the undertaking's activity thereby reducing the opportunities for competitors established in other Member States to penetrate the market in that Member State.

In other words, there is a presumption of distortion of competition where all the other conditions of Article 107(1) TFEU are fulfilled. According to Advocate General Wathelet in *World Duty Free*, this presumption is even stronger in the case of certain fiscal aid measures such as the amortisation of goodwill when acquiring shares in foreign companies: "a tax measure of [the kind at issue] is particularly harmful to the internal market because it creates an immediate distortion of trade between Member States. I would make the point here that the provisions of the FEU Treaty concerning aid granted by States are intended in particular to ensure that a Member State is not able to favour undertakings that pursue cross-border activities. Those provisions are therefore the 'flip side' or 'mirror' as they were called during the hearing of the FEU Treaty provisions on the free movement of goods, persons, services and capital which are intended to prevent obstacles being put in the way of cross-border activities."[66]

[63] Judgment of the Court of 8 September 2011, Paint Graphos and others, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 74.

[64] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, p. 1-50, paragraph 187 with further references.

[65] Judgment of the Court of 30 April 2009, Commission v Italy and WAM, Case C-494/06 P, ECLI:EU:C:2009:272, paragraphs 54 and 58.

[66] Opinion of Advocate General Wathelet in Commission v World Duty Free Group SA and Others, Joined Cases C-20/15 P and C-21/15 P, ECLI:EU:C:2016:981, paragraph 137.

III. TAX RULINGS AND THEIR IMPACT ON COMPETITION. PROFIT SHIFTING AND HARMFUL TAX COMPETITION

Selectivity being one of the most important and debated conditions in the State aid analysis for fiscal aid measures, the tax ruling decisions adopted by the Commission since 2015 raise additional issues that are equally debated by academics, tax professionals and other stakeholders. The second Part of this Report is therefore dedicated to explaining and putting in context the Commission decisions on State aid granted in the individual cases by Luxembourg to Fiat and Amazon, the Netherlands to Starbucks and Ireland to Apple. These four decisions adopted by the Commission in 2015 (Fiat and Starbucks), 2016 (Apple) and 2017 (Amazon) all found that the Member State concerned had, through the issuance of tax rulings and the acceptance of the corporate income tax computations submitted by the taxpayer on that basis, granted unlawful State aid to the individual companies and ordered recovery. The debate that has ensued following the decisions revolves both around the principle of the Commission's action as well as its factual and legal analysis. The Member States involved have rejected the Commission's reasoning in the decisions and appealed to the General Court for annulment of the decisions.[67]

The purpose of this chapter is therefore to present these four decisions, the reasoning employed and the benchmarks applied. It will address some of the most important criticism and set out the Commission's analysis that led to the finding of a selective advantage in all four cases. After a brief introduction into the background of the tax ruling investigations, Section 2 will summarise the four decisions, set out the factual and legal basis for the Commission decisions and explain the transfer pricing arrangements under analysis. Section 3 will zoom in on the arm's length principle and explain why and how the arm's length principle is used as a benchmark for the determination of a selective advantage; and Section 4 will focus on the Commission's legal analysis in the four decisions as regards the finding of State aid pursuant to Article 107(1) TFEU.

1. The background for the current tax ruling investigations: Aggressive tax planning practices and State aid rules

Since 2013, the Commission has carried out a number of investigations into the tax ruling practices of Member States. A "tax ruling" is a binding or non-binding[68]

[67] Starbucks, Apple and Fiat have also all appealed to the General Court for annulment of the decisions.
[68] Depending on the Member State. For instance, in Ireland, so-called "advance opinions" do not bind the Irish tax administration whereas in Germany, tax rulings ("*verbindliche Steuerauskunft*") constitute a binding consent from the German tax administration not to deviate from the ruling (provided that the tax ruling is implemented by the taxpayer as described, and that the taxpayer satisfies any stated assumptions or conditions).

agreement between the taxpayer and the tax administration on the application of its domestic tax laws to a particular situation or transaction.[69] The function of a tax ruling is thus, in principle, to establish in advance the application of the ordinary tax system to a particular case in view of its specific facts and circumstances in order to provide taxpayers with legal certainty and predictability on the application of general tax rules.

The recent Commission investigations were initiated after the hearings in the US Senate[70] and UK House of Commons[71] as well as press articles and other public reporting revealing a potential special tax treatment of certain multinationals on the basis of tax rulings. According to those public allegations, some Member States would, by way of such tax rulings, have granted a favourable tax treatment to certain multinational groups by agreeing to reduce the tax base (and consequently the tax liability) of a domestically incorporated company being part of that group.

However, the Commission investigations should be seen in a still broader context. Already in the late nineties, following a wide-ranging discussion on the need for coordinated action at Community level to tackle harmful tax competition, the Council adopted a series of conclusions. It agreed on a code of conduct for business taxation and set up an ad hoc group to examine the tax measures to which the code of conduct applies.[72] On that occasion, the Council also took note of the Commission undertaking to draw up guidelines on the application of then Articles 92 and 93 of the EEC Treaty to measures relating to direct business taxation and committed itself "to the strict application of the aid rules concerned". The Commission's work led to the adoption of the Commission Notice on the application of the State aid rules to measures relating to direct business taxation.[73] This work was followed by a series of Commission decisions in the

[69] The term "tax ruling" includes for the purpose of this chapter all forms of advance confirmation from the tax administration on the application of the ordinary corporate income tax system in a Member State which is subsequently accepted by that tax administration as a basis for the yearly tax computation of the corporate income tax liability of that taxpayer, no matter whether named "advanced pricing agreement", "advanced tax ruling", "advance opinion" etc.

[70] See for references to US hearings: https://www.hsgac.senate.gov/subcommittees/investigations/hearings/offshore-profit-shifting-and-the-us-tax-code_-part-2; https://www.hsgac.senate.gov/subcommittees/investigations/media/subcommittee-exposes-caterpillar-offshore-profit-shifting

[71] See for reference to US hearing: https://publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/716/121112.htm

[72] Conclusions of the ECOFIN Council Meeting on 1 December 1997 concerning taxation policy, OJ C 2, 6.1.1998, p. 1.

[73] Commission Notice on the application of State aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, p. 3.

2000s[74] where the Commission examined a large number of national tax measures, including tax rulings on transfer pricing.[75]

At the same time, the Organisation for Economic Cooperation and Development (OECD), following a report in 1998 on "Harmful Tax Competition: An Emerging Global Issue" created a special forum, the "Forum on Harmful Tax Practices", to combat aggressive tax planning practices. More recently, in the framework of its work on Base Erosion and Profit Shifting (BEPS), the OECD has further drawn up 15 actions to provide governments with additional guidance on the tools to address tax avoidance, and to ensure that profits are taxed where economic activities generating the profits are performed and where value is created.

It is in this context that the Commission investigations into the tax rulings granted by certain Member States have to be seen. Since 2014, the Directorate-General for Competition has reviewed more than a thousand tax rulings requested from the Member States[76] and has adopted negative decisions,

[74] Commission Decision of 10 July 2002 on the aid scheme implemented by Finland for Åland Islands captive insurance companies, OJ L 329, 5.12.2002, p. 22–29; Commission Decision of 22 August 2002 on the aid scheme implemented by Spain in favour of coordination centres in Vizcaya, OJ L 31, 6.2.2003, p. 26–31; Commission Decision of 5 September 2002 on the aid scheme implemented by Germany for control and coordination centres, OJ L 177, 16.7.2003, p. 17–21; Commission Decision of 16 October 2002 on the aid scheme for finance companies implemented by Luxembourg, OJ L 153, 20.6.2003, p. 40–48; Commission Decision of 16 October 2002 on the State aid scheme for coordination centres implemented by Luxembourg, OJ L 170, 9.7.2003, p. 20–28; Commission Decision of 11 December 2002 on the existing aid scheme that Italy was authorised to implement for the Trieste Financial Services and Insurance Centre, OJ L 91, 8.4.2003, p. 47–50; Commission Decision of 11 December 2002 concerning State aid scheme on central corporate treasuries (Centrales de trésorerie) implemented by France, OJ L 330, 18.12.2003, p. 23–29; Commission Decision of 17 February 2003 on the State aid implemented by the Netherlands for international financing activities, OJ L 180, 18.7.2003, p. 52–66; Commission Decision of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium, OJ L 282, 30.10.2003, p. 25–45; Commission Decision of 17 February 2003 on aid scheme for foreign income implemented by Ireland, OJ L 204, 13.8.2003, p. 51–59; Commission Decision of 13 May 2003 on the aid scheme implemented by France for headquarters and logistics centres, OJ L 23, 28.1.2004, p. 1–13; Commission Decision of 30 March 2004 on the aid scheme implemented by the United Kingdom in favour of Gibraltar Qualifying Companies, OJ L 29, 2.2.2005, p. 24–38; Commission Decision of 24 June 2003 on the aid scheme implemented by Belgium on the tax ruling system for United States foreign sales corporations, OJ L 23, 28.1.2004, p. 14–26; Commission Decision of 30 March 2004 on the aid scheme which the United Kingdom is planning to implement as regards the Government of Gibraltar Corporation Tax Reform, OJ L 85, 2.4.2005, p. 1–26; Commission Decision of 19 July 2006 on aid scheme C 3/2006 implemented by Luxembourg for 1929 holding companies and billionaire holding companies, OJ L 366, 21.12.2006, p. 47–61.

[75] Some of them are described in the Commission's Report on the implementation of the Commission notice of the application of the State aid rules to measures relating to direct business taxation of 9 February 2004, C(2004)434.

[76] By the end of 2014, all Member States were asked to provide information about their tax ruling practice and the legal framework underlying that practice, as well as a list of tax rulings issued in the years 2010 to 2012 (and partly 2013). On the basis of this information, DG Competition requested specific tax rulings. A

finding that State aid has been granted and needs to be recovered, in a very limited number of cases.[77] The limited number of negative decisions reflects the Commission's balanced approach when it comes to assessing tax rulings; it has only taken action in cases where there clearly has been a preferential treatment for the beneficiaries in breach of State aid rules.[78]

The common feature of those decisions is that they all concern tax rulings on transfer prices selectively reducing the corporate income tax liability of one individual company as compared to other corporate taxpayers in that Member State that are legally and factually comparable but did not benefit from a similar tax treatment. The transfer pricing arrangements endorsed by these rulings are further discussed in the following Section. However, what emerges from those decisions is that tax rulings are not always used as a legitimate means to achieve legal certainty and transparency for taxpayers but can also be used as a tool to provide fiscal incentives to multinational companies to attract investment.

2. Fiat, Starbucks, Apple and Amazon: the transfer pricing arrangements under analysis[79]

Turning to the individual tax ruling decisions the Commission has adopted so far, as already observed in Section 1 above, they all relate to tax rulings on transfer pricing arrangements that were applied by the individual companies receiving the tax rulings for their yearly tax computation, leading to a selective reduction of their taxable profits as compared to other corporate taxpayers in those Member States that were legally and factually comparable but did not receive a similar tax treatment.

first reflection on the review of the Member States' tax ruling practices can be found in the Competition Working Paper on State Aid as presented to the High Level Forum on State Aid of 3 June 2016 (Working Paper): http://ec.europa.eu/competition/state_aid/legislation/working_paper_tax_rulings.pdf.

[77] Commission Decision (EU) 2016/2326 on State aid which Luxembourg granted to Fiat, OJ L 351, 22.12.2016, p. 1–67 (Fiat decision); Commission Decision (EU) 2017/502 on State aid implemented by the Netherlands to Starbucks, OJ L 83, 29.3.2017, p. 38–115 (Starbucks decision); Commission Decision (EU) 2017/1283 on State aid implemented by Ireland to Apple, OJ L 187, 19.7.2017, p. 1–110, (Apple decision); and Commission Decision (EU) 2017/6740 on State aid implemented by Luxembourg to Amazon (not yet published in the Official Journal) (Amazon decision)(together referred to as the tax ruling decisions). In addition to the tax ruling decisions discussed in this chapter, the Commission has also, in the context of the tax rulings investigations, adopted a negative decision on the Belgian excess profit exemption scheme. See Commission Decision (EU) 2016/1699, OJ L 260, 27.9.2016, p. 61–103. This decision is discussed further in Part 3 of this Report, "Double Taxation v. Double Non-Taxation".

[78] See Working Paper, paragraph 14, which refers to tax rulings where the outcome manifestly deviates from a reliable approximation of a market-based outcome.

[79] This Section does not aim to give a complete account of the decisions and the Commission's reasoning in those decisions. For such an account, the reader is referred to the individual decisions published in the Official Journal and accessible under the following link: http://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html

Transfer prices are the prices at which an enterprise transfers goods and intangible property or provides services to associated group companies. The transfer prices applied between group companies are significant for both taxpayers and tax administrations because they determine in large part the "profits" and "outgoings", and therefore indirectly the taxable profits of associated companies in different tax jurisdictions.[80]

Transfer prices should usually be set at "arm's length" to allow that independent and group companies are treated equally. Indeed, when independent companies transact with each other, the conditions of their commercial and financial relations (e.g. the price of goods transferred or services provided and the conditions of the transfer or provision) are in principle determined by market forces. However, when associated companies transact with each other, their commercial and financial relations may not be directly affected by external market forces. Instead, prices can be manipulated in order to allow the group as a whole to lower its tax burden, by shifting profits from high tax countries to low tax countries. This can e.g. be achieved by use of an exaggerated tax deductible royalty payment from a company residing in a high-tax country to an associated company residing in a low tax country.

Profitshifting was exactly the issue in the Starbucks and Amazon decisions. In those decisions, the taxable profits of the beneficiary companies were found to be reduced by way of an exaggerated royalty payment which, under the national rules of the Member State concerned, was accounted for as a tax deductible expense.[81] In general, under the national tax rules of the Netherlands and Luxembourg, the taxable profit[82], for the purpose of determining the corporate income tax liability for a tax year is derived by subtracting deductible expenses[83] attributable to that year from the income[84] attributable to that year.[85] The taxable profit is then used to calculate the tax liability by multiplying the taxable profit with the applicable tax rate. Therefore, artificially exaggerated tax deductible expenses

[80] See 1995, 2010 and 2017 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, preface, paragraphs 11 and 12. See also Part 3 of this Report explaining the background for the separate entity approach and the arm's length principle as set out in the OECD Model Tax Convention.

[81] For the sake of completeness, it should be mentioned that neither Luxembourg nor the Netherlands levied a withholding tax on cross border royalty payments during the relevant periods.

[82] In this chapter, taxable profits and tax base is used interchangeably.

[83] Or "outgoings" as phrased in *Forum 187*. See Part 1, p. 5-6 of this Report.

[84] Or "profits" as phrased in *Forum 187*. See Part 1, p. 5-6 of this Report.

[85] In the Netherlands, attribution of income and expenses to a year must be done in line with sound business practice that is consistent and independent of the likely outcome. In Luxembourg, the recognition of revenue and expense attributable to the year is directly governed by the commercials accounts of the company (with few potential adjustments governed by the tax law).

have the effect of lowering the corporate income tax liability of the beneficiary below the level set by those national rules, including the arm's length principle.

The Starbucks decision will be explained in detail in Part 3 of this Report. In the case of the Amazon decision, the tax ruling granted by Luxembourg[86] endorsed a method to calculate the taxable base of the beneficiary, Amazon's operating company in Luxembourg, by use of an indirect transfer pricing method.[87] It thereby also set out the annual royalty payments from the operating company to an Amazon holding company for the use of certain intellectual property rights held by the holding company. Those payments were determined in the tax ruling as amounting to the residual operating profits of the operating company after subtracting a modest remuneration to the operating company for its alleged "routine functions" and "limited risks".[88] The yearly royalty payments to the holding company exceeded, on average, 90% of the operating company's operating profits.

In the course of its formal investigation, the Commission found that on the basis of a factual and functional analysis of the contributions of the operating company and the holding company respectively, this calculation of the operating company's taxable profits did not reflect economic reality and did therefore not result in a reliable approximation of a market-based outcome in line with the arm's length principle. The operating company was the only entity actively taking decisions and carrying out activities related to Amazon's European retail business[89], and the operating company also adapted the technology and software behind the Amazon e-commerce platform in Europe; it invested in marketing and gathered customer data. This means that it managed and added value to certain of Amazon's intellectual property (IP) which was licensed to it by the holding company. By contrast, the holding company was a limited partnership with

[86] The tax ruling applied for the period 2006-2014 and was used to determine the tax liability of Amazon's operating company in Luxembourg during that period.

[87] The transfer pricing method used and endorsed in the tax ruling was in essence the transactional net margin method (TNMM). This method prices intra-group transaction not by determining the arm's length price of the transaction but what would be an arm's length net profit (i.e. taxable profit) for a particular activity by estimating the net profit a non-integrated company engaging in the same or similar activity would be expected to make on that activity.

[88] The tax ruling thus fixed the taxable profits of the operating company at the lesser of [4-6]% of its operating expenses and the total EU operating profits of the Amazon websites, subject to a floor and a ceiling of 0.45% and 0.55% of Amazons net EU sales revenue. The exact figure is confidential. The rest of the profits recorded by the operating company were then transferred to the holding company as yearly royalty payments.

[89] In 2014, the operating company had over 500 employees, who selected the goods for sale on Amazon's websites in Europe, bought them from manufacturers, and managed the online sale and the delivery of products to the customer. The operating company also owned the inventory, and recorded all EU sales through the European websites in Luxembourg.

no employees, no offices and no business activities. Thus, in essence, the holding company only acted as an intermediary between the operating company and Amazon in the US by holding the Amazon IP under a so-called "Cost-Sharing Agreement"[90] while not making any active use of that IP itself. It merely granted an exclusive license for the use of this IP to the operating company.[91]

Accordingly, the operating company was the only party managing the risks and adding value to that IP. However, by way of the residual royalty payments to the holding company, the tax ruling enabled the Amazon group to shift profits from the operating company (which was in Luxemburg subject to a tax rate of approximately 29 %) to the holding company (a transparent partnership not subject to any tax in Luxembourg[92]) and thereby to avoid taxation on three quarters of the profits it made from all Amazon sales in the EU.

It is important to note that the Commission investigation was "solely" concerned with the taxation in Luxembourg, i.e. with the reductions of the tax base of the operating company. It did not question that the holding company held the rights to the Amazon IP that it licensed to the operating company, nor the regular payments the holding company made to Amazon in the US under the Cost Sharing Agreement for development of that IP. The Commission also did not question Luxembourg's corporate income tax system in general but questioned the way the Luxembourg tax administration had endorsed in the tax ruling the tax deductible royalty payments from the operating company to the holding company.

In the Apple decision on the other hand, the Commission did not have to assess the issue of exaggerated tax deductible payments between two companies of the same group. Instead, the tax rulings granted by Ireland endorsed a method to calculate the taxable base of the beneficiaries in Ireland by way of an internal allocation of profits to their branches. In particular, this case concerned two Apple companies, Apple Operations Europe (AOE) and Apple Sales International (ASI) that were incorporated in Ireland but not tax resident in Ireland

[90] A Cost Sharing Agreement is an agreement between two parties to share the costs and risks of developing and producing certain assets, services or rights and to determine the nature and extent of the interests of each participant in the result of the activity of developing and producing those assets, services or rights.

[91] Under the Cost Sharing Agreement, the holding company held the rights to use the Amazon IP in the European retail business. The holding company had to make annual payments to Amazon in the US to contribute to the costs of developing the IP. The appropriate level of these payments is the subject of a US tax court procedure.

[92] Under Luxembourg tax laws, the operating company was subject to corporate income tax ation in Luxembourg, whilst the holding company as a limited partnership was not. It was transparent for tax purposes under Luxembourg law which means that profits recorded by the holding company were only taxed at the level of the US resident partners and not at the level of the holding company itself.

(or anywhere else in the world). This was possible due to a specific provision in the Irish tax code that – explained in a simplified manner – allowed companies although incorporated in Ireland to not be considered tax resident in Ireland provided certain conditions were met.[93] Both AOE and ASI were, however, each operating through their branch in Ireland, the profits of which were subject to Irish source taxation.[94] On this basis, ASI and AOE requested two tax rulings in 1991 and 2007 in order to determine the taxable profits of their branches.[95] Whereas AOE's Irish branch manufactured and assembled a specialized range of computer products, ASI's Irish branch was mainly responsible for the procurement, sale and distribution of Apple products in markets outside North and South America.

Through the determination of the Irish tax base of the two companies, these two tax rulings led to an internal attribution of almost all profits recorded by ASI and AOE to their stateless "head offices"[96] rather than to their Irish branches (where the business activities of those companies were in fact carried out). As the profits allocated to the "head offices" were not subject to tax in Ireland, the allocation method endorsed in the two tax rulings meant that corporate income tax in Ireland was only paid on a minimal amount of profits earned by those companies consisting in a remuneration of the Irish branches reflecting their alleged "routine contributions" and "limited risk profiles".[97] The result was that although all sales of Apple products outside North and South America were recorded by

[93] In detail, section 23A of the Taxes Consolidation Act 1997 (TCA 97) provided that companies incorporated in Ireland with a trading activity in Ireland that were ultimately controlled by a person resident in a Member State or a country with which Ireland had concluded a double tax treaty and that were centrally managed and controlled outside of Ireland were not considered to be tax resident in Ireland. This provision was amended by section 43 of the Finance Act 2014. See section 1, 3 and 4 of Irish Revenue's guidance note on Company Residence in Ireland – ITCGTCT Manual – Part 02-02-03: https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-02/02-02-03.pdf.

[94] As AOE and ASI were non-resident companies , the trading profits recorded in those companies were only taxed in Ireland to the extent that those profits were considered to arise "*directly or indirectly from or through*" the Irish branches as set out in Irish national law (Section 25 TCA 97).

[95] The tax rulings were applied by ASI and AOE on a yearly basis to determine those companies' taxable profit for Irish corporation tax purposes and, on the basis of that determination, their yearly corporation tax liability. The relevant period for the recovery ordered by the Apple decision is 2003-2014.

[96] The term "head office" here refers to the activities carried out by ASI and AOE's boards of directors.

[97] In the contested tax rulings, the Irish tax administration accepted different levels of taxable profits for ASI's and AOE's Irish branches. As regards ASI's Irish branch, the 1991 ruling accepts a 12.5% margin on branch operating expenses, whereas the 2007 ruling accepts a [10-15]% margin. As regards AOE's Irish branch, the 1991 ruling accepts a 65% margin on branch operating expenses up to USD [60-70] million and a 20% margin in excess of that amount, whereas the 2007 ruling accepts a [10-15]% margin on branch operating expenses with an IP return of [1-5]% of branch turnover in respect of the "accumulated manufacturing process technology". The exact figures are confidential.

its Irish subsidiaries, those subsidiaries were taxed only on a very minor part of those profits based on the allocation method endorsed in the tax rulings.[98]

In its decision, the Commission found that based on a factual and functional analysis of the branches and their respective "head offices", the internal profit attribution to the branches resulting from an application of the tax rulings was not in line with economic reality. The "head offices" of ASI and AOE had no operating capacity in the absence of employees or premises. The only activities evidenced to have been carried out by these "head offices" were limited decisions taken by ASI and AOE's boards of directors on the distribution of dividends, administrative arrangements and cash management. As regards the companies' profits derived from the purchase, manufacturing, sales and distribution of Apple products which was carried out by use of certain of Apple's IP which ASI and AOE had obtained under a Cost Sharing Agreement with Apple in the US[99], only the Irish branches had the capacity to generate any income from that IP; and only the Irish branches were shown to carry out actual decisions and functions within ASI and AOE in that respect.

Accordingly, the Commission found that the Apple IP held by ASI and AOE together with the associated risks should have been allocated to the Irish branches. As a result, the profits derived from the purchase, manufacturing, sales and distribution of Apple products as carried out by ASI and AOE should be considered as derived through their Irish branches and therefore subject to Irish taxation. Indeed, as the Irish branches and their "head offices" must be treated as separate associated entities (rather than actually being part of the same corporate entity) for profit allocation purposes in line with the arm's length principle[100], the Irish tax administration should have carried out the allocation of the

[98] See Commission Press Release IP/16/2923: in 2011, for example (according to figures released at the US Senate public hearings), ASI recorded profits of US$ 22 billion (approximately €16 billion) but under the terms of the tax ruling only around €50 million were considered taxable in Ireland, leaving €15.95 billion of profits untaxed. As a result, ASI paid less than €10 million of corporate income tax in Ireland in 2011 – an effective tax rate of about 0.05% on its overall annual profits. In subsequent years, ASI's recorded profits continued to increase but the profits considered taxable in Ireland under the terms of the tax ruling did not. Thus, this effective tax rate decreased further to only 0.005% in 2014.

[99] Under this Cost Sharing Agreement with Apple Inc., ASI and AOE held the rights to use Apple's IP to sell and manufacture Apple products outside North and South America. ASI and AOE had to make annual payments to Apple in the US to contribute to the costs of developing that IP. These expenses, mainly borne by ASI, contributed to fund more than half of all research efforts by the Apple group in the US to develop its IP worldwide. See the Commision Press Release IP/16/2923.

[100] See OECD 2010 Report on the Attribution of Profits to Permanent Establishments of 22 July 2010, part I, paragraph 10 and Commentary on Article 7 OECD Model Tax Convention (2010), para. 3: *"Article 7, and in particular paragraph 2 of the Article, have a long history. When the OECD first examined what criteria should be used in attributing profits to a permanent establishment, this question had previously been addressed in a large number of tax conventions and in various models developed by the League of Nations. The separate entity*

Apple IP and the risks associated with ASI and AOE's business activities by taking into account the functions performed, the assets used and risks assumed by the branches on the one hand and by the "head offices" on the other hand. On that basis, it should have concluded that – in view of the activities actually carried out in the branches and in view of the absence of activities related to the Apple IP in the respective "head offices" – that the IP (and the profits that go with it) should have been allocated to the Irish branches. By not ensuring that the profit allocation method endorsed by the tax rulings resulted in a reliable approximation of a market-based outcome in line with the arm's length principle, the Irish tax administration allowed ASI and AOE to artificially lower the tax base of their Irish branches (and their tax liability in Ireland accordingly).

Also here, it is important to note that the Commission investigation is "solely" concerned with the reduction of the tax base of ASI and AOE's Irish branches. Thus, the Commission does not question that ASI and AOE held the Apple IP under the Cost Sharing Agreement nor the regular payments made to Apple in the US to develop the Apple IP under this agreement. It also did not question Ireland's corporate income tax system in general, the Irish provision allowing for ASI and AOE to be "stateless" (i.e. resident nowhere) for tax purposes, nor the provisions in the Irish tax code which determine the allocation of profits and the taxation of the Irish branches. Instead, the Commission focused on the way the Irish tax administration had endorsed in the two tax rulings the profit allocation to the branches.

As regards, last but not least, the Fiat decision on State aid granted by Luxembourg to Fiat's treasury company in Luxembourg, the Commission had found that the tax ruling under analysis endorsed an artificial and complex methodology to calculate the taxable profits of that company which did not result in a reliable approximation of a market-based outcome in line with the arm's length principle.

The treasury company provided central treasury and financing functions for the Fiat group's activities in Europe. As such, the Commission agreed that the treasury company's activities were comparable to those of a bank which meant that the taxable profits could be determined by looking at banks, i.e. by calculating a return on the capital deployed by the company for its financing activities. However, on the basis of this comparison, the decision found that the tax ruling for the years 2012 to 2015 allowed the treasury company to artificially lower its corporate income tax liability in two ways: first, due to a number of economically unjustifiable assumptions and downward adjustments, the capital base approximated

and arm's length principles, on which paragraph 2 is based, had already been incorporated in these conventions and models and the OECD considered that it was sufficient to restate these principles with some slight amendments and modifications for the main purpose of clarification." See also footnotes 111 and 156 below.

by the tax ruling was much lower than the company's actual accounting capital; and second, the estimated return applied to this already reduced capital base for tax purposes was also much lower when compared to market rates.

As a result, the treasury company only paid taxes on a small portion of its actual accounting capital and with a very low return. The Commission's assessment showed that in the case of this company, if the estimations of capital and remuneration applied had corresponded to market conditions, the taxable profits declared in Luxembourg would have been 20 times higher.[101]

In conclusion, the Commission dealt in all four decisions with tax rulings that allowed multinationals to shift profits, albeit in different ways. In the Starbucks and Amazon decisions, the Commission investigated the effects of excessive tax expenses reducing the taxable profits of the beneficiary (in the form of exaggerated royalty payments and, in the Starbucks decision, also in the form of too high prices charged for goods to an associated company[102]). In the case of the Apple decision, the Commission investigated an internal profit allocation to a branch. Finally, in the Fiat decision, the Commission examined an excessively low fixed rate of return for a group company. In all those decisions, it was found that the tax rulings under investigation – by endorsing a calculation of the taxable profits of the individual company which did not result in a reliable approximation of a market-based outcome in line with the arm's length principle – entailed the granting of a selective advantage to that company.

In contrast, in none of the tax ruling decisions did the Commission take issue with the way that the multinational groups had chosen to structure their businesses. The Commission's findings of State aid were based on the assessment that the tax rulings issued by the respective Member States endorsed transfer pricing arrangements that entailed clear and manifest breaches of the arm's length principle resulting in the granting of unlawful State aid in breach of Article 107(1) TFEU. The arm's length principle and its application by the Commission was therefore a decisive element in the assessment carried out in those decisions and will be presented next.

3. The Commission's application of the arm's length principle

In all four decisions, the Commission determined the existence of a selective advantage by comparing the tax treatment of the beneficiary of the ruling with the tax treatment of other corporate taxpayers under the ordinary corporate income tax system of the Member State concerned. In so doing, it based itself on the benchmark for a finding of advantage laid down by the Court of Justice in *Forum 187* according to which: "[i]n order to decide whether a method of

[101] See Commission Press release IP/15/5880.

[102] See this Report, p. 41-42.

assessment of taxable income [...] confers an advantage on [its beneficiary], it is necessary [...] to compare that [method] with the ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition."[103]

The purpose of a transfer pricing ruling is to enable a corporate taxpayer belonging to a multinational corporate group to assess the level of profit it derives from intra-group transactions so that the profit so determined can be taxed under the ordinary rules of corporate income taxation of the Member State concerned. Since under the corporate income tax systems of all Member States, tax should be paid on the "difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition", a transfer pricing ruling endorsing transfer prices that do not "resemble prices that would be charged in conditions of free competition between independent undertakings negotiating under comparable circumstances at arm's length"[104] confers a selective advantage on its beneficiary. That holds true irrespective of whether the Member State in question has explicitly incorporated the arm's length principle in its national legal order and in what form.

Several commentators[105], as well as some of the applicants in the court litigation[106] have criticised the Commission for inventing an "EU arm's length principle" through this line of reasoning. That criticism is misplaced. It is not for the Commission to invent an "EU arm's length principle". The principle is simple and universal[107]: transactions between related entities should be assessed as if they had been concluded at arm's length between unrelated economic operators.[108]

[103] Judgment of the Court of Justice of 22 June 2006, Belgium and Forum 187 v Commission, Joined Cases C-182/03 and C-217/03, ECLI:EU:C:2006:416, paragraph 95.

[104] Fiat decision, recital (222), Starbucks decision, recital (258), Apple decision, recital (249) and Amazon decision, recital (402).

[105] See, e.g., E. Stuart, Whether or Not to Bite the Apple: Some Implications of the August 2016 Commission Decision on Irish Tax Benefits for Apple, EStAL, 2/2017, p. 226.

[106] See for instance the grounds of appeal put forward by Ireland in the Apple case (Case T-778/16), published at: http://www.cfe-eutax.org/sites/default/files/Summary%20of%20Irish%20Appeal%20Grounds.pdf.

[107] The arm's length principle constitutes an internationally recognized standard of equality and neutrality. See, for example, J. Wittendorf, Transfer Pricing and the Arm's Length Principle in International Tax Law (Kluwer: 2010), p. 7: "The arm's length principle involves evaluation of controlled transactions where the yardstick is market transactions. From the point of view of taxation policy the choice of the arm's length principle is justified by the fact that it contributes to tax equality and neutrality between associated enterprises and independent enterprises. The principles of equality and neutrality are core values in tax law and constitute the basis for the tax treatment of corporate group formations. At the same time, the separate entity approach and the arm's length principle are regarded as leading to fair international income allocation".

[108] The essence of the arm's length principle is to ensure that transactions concluded between associated companies (controlled transactions) are priced for tax purposes under the same conditions as comparable

Hence, its application is inherent in any tax system based on the separate entity approach according to which companies forming part of a multinational corporate group are considered distinct taxable entities from the group to which they belong.

The Commission employs that principle as part of its assessment of transfer pricing rulings granted to companies belonging to a multinational corporate group under Article 107(1) TFEU, to ensure equal treatment of other corporate taxpayers under the ordinary tax system, which constitutes the reference system for establishing the existence of a selective advantage.

Thus, rather than inventing an EU arm's length principle, the Commission has simply taken the tax treatment of corporate taxpayers under the ordinary corporate income tax system of the Member State in question as a benchmark for determining whether a transfer pricing ruling confers a selective advantage on its recipient. If a transfer pricing ruling endorses transfer prices that depart from prices negotiated at arm's length, such a ruling confers a selective advantage on its recipient under that Member State's tax system, regardless of whether that tax system explicitly incorporates the arm's length principle.

This brings this author to a second criticism that has been voiced against the Commission's reasoning in the Starbucks, Fiat, Apple and Amazon decisions: that the Commission applies the OECD transfer pricing guidelines for Multinational Enterprises and Tax Administrations and renders them binding through the application of the State aid rules, even though they are a non-binding instrument and it should be left to the OECD member countries to decide if and how to apply those guidelines.[109]

In all the aforementioned decisions, the Commission takes the national legal framework of the Member State concerned as the benchmark for establishing the existence of a selective advantage. According to the Commission, that framework is composed of the ordinary rules of taxation of corporate profit that

transactions concluded at arm's length between independent companies (uncontrolled transactions). When there are conditions made or imposed between two associated companies in their intra-group transactions which differ from those which would be made between independent companies in uncontrolled comparable transactions, the arm's length principle requires appropriate transfer pricing adjustments to be performed to neutralise such differences and thereby ensure that the integrated (group) companies transacting with each other are not treated more favourably than non-integrated (standalone) companies for tax purposes.

[109] Sir P. Lowe, The Commission's powers to enforce the law: and to propose changes to it, European Law Review (2017), p. 6. See to the contrary, E. Stuart, Whether or Not to Bite the Apple: Some Implications of the August 2016 Commission Decision on Irish Tax Benefits for Apple, EStAL, 2/2017, p. 222: "While the Commission expressively excludes the idea that it is applying the OECD guidance as binding legal rules of EU law, it identifies these as the only benchmarks available to ensure the objectivity of tax ruling in these circumstances based on the market principles."

apply to all corporate taxpayers and not just the national transfer pricing rules, should such rules exist.[110] This approach is firmly in line with the Court's case law.[111]

It is in the context of that framework that the Commission applies Article 107(1) TFEU in order to assess whether a selective advantage has been granted by a Member State to a respective taxpayer. To the extent the Commission refers to the OECD framework in its decisions, it does so because that framework is the result of expert discussions in the context of the OECD and elaborates on techniques aimed to address common challenges in international taxation. The OECD framework serves as a focal point and exerts a clear influence on the tax practices of OECD member (and even non-member) countries.[112]

Nevertheless, the arm's length principle is used in the OECD framework with a different focus: the OECD targets profit shifting between two jurisdictions in the context of avoiding double taxation, whereas the State aid rules focus on the tax treatment of a specific taxpayer in the national framework of one Member State only. Notwithstanding this difference in focus, a tax ruling that complies with the OECD framework on transfer pricing is unlikely to raise State aid concerns.[113] It is therefore surprising that the tax ruling decisions have also been

[110] See e.g. recital (256) of the Apple decision which explains that the arm's length principle is applied by the Commission "as a benchmark to verify whether the taxable profit of a branch, to which the ordinary rules of taxation of corporate profit are applied, is determined in a manner that ensures that non-resident integrated companies operating through a branch in Ireland are not granted favourable treatment under those rules as compared to non-integrated companies whose taxable profit reflects prices determined on the market negotiated at arm's length."

[111] See Judgment of the Court of Justice of 22 June 2006, Belgium and Forum 187 v Commission, Joined Cases C-182/03 and C-217/03, ECLI:EU:C:2006:416, which refers to the "ordinary [Belgian] tax system" rather than to a specific provision of Belgian tax law incorporating the arm's length principle at the time (paragraph 95).

[112] Moreover, in numerous OECD member countries guidance documents forming part of that framework have been given the force of law or serve as a reference for the purpose of interpreting domestic tax law.

[113] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, p. 1-50, paragraph 173: " When examining whether a transfer pricing ruling complies with the arm's length principle inherent in Article 107(1) of the Treaty, the Commission may have regard to the guidance provided by the Organisation for Economic Cooperation and Development ('OECD'), in particular the 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations'. Those guidelines do not deal with matters of State aid per se, but they capture the international consensus on transfer pricing and provide useful guidance to tax administrations and multinational enterprises on how to ensure that a transfer pricing methodology produces an outcome in line with market conditions. *Consequently, if a transfer pricing arrangement complies with the guidance provided by the OECD Transfer Pricing Guidelines, including the guidance on the choice of the most appropriate method and leading to a reliable approximation of a market based outcome, a tax ruling endorsing that arrangement is unlikely to give rise to State aid.*" (Emphasis added).

accused of undermining the OECD BEPS project and its focus on value creation across the multinational group.[114]

In the same line of reasoning, the Commission's Directorate-General for Competition has been criticised for interpreting national law, thereby acting as a "*s*upra-national tax authority".[115] In this respect, it must be recalled that although direct taxation, in the absence of harmonisation at Union level, is a sovereign matter of the Member States, the exercise of that competence must be consistent with EU law, including the State aid rules. Arguing otherwise would remove fiscal measures (and tax rulings on transfer pricing) from the scope of EU law and in particular the EU State aid rules, in contravention of long-standing case law of the Court of Justice.[116]

Furthermore, with its decisions, the Commission does not overrule (or even question) Members States' sovereignty to design their tax systems. Rather, the Commission is concerned with situations where Member States treat some companies favourably over others by allowing an obvious departure from the arm's length principle for particular companies only.

It has also been brought forward that the decisions apply a "novel approach" with "retroactive effect".[117] In particular, it is argued that the Commission gave a new interpretation to Member States' tax laws and their application to tax rulings, some of which were put in place decades ago. It is suggested that this is both unfair to companies that depend on these rulings for their planning and investment and is also legally questionable.[118] On this basis the Commission should not have imposed on the Member States the recovery of the unlawful and incompatible State aid as was also the case in the Commission decisions taken in the early 2000s on coordination centres.[119]

[114] The US Treasury has issued a White Paper in response to the Apple decision arguing that the Commission's approach "undermine[s] the international consensus on transfer pricing standards, call into question the ability of Member States to honor their bilateral tax treaties, and undermine the progress made under the OECD/G20 Base Erosion and Profit Shifting ("BEPS") project". US Treasury White Paper, p. 1: https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf

[115] US Treasury White Paper, p. 9: https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf

[116] Judgment of the Court of 2 July 1974, Italy v Commission, Case 173/73, EU:C:1974:71.

[117] Fiat decision, recital (362), Apple decision, recital (439) and Amazon decision, recitals (624) and (636). See also US Treasury White Paper, p. 1: https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf

[118] Sir P. Lowe, The Commission's powers to enforce the law: and to propose changes to it, European Law Review (2017), p. 2.

[119] See, *inter alia*, Commission Decision of 22 August 2002 in Case C 48/2001 (ex NN 43/2000) on the aid scheme implemented by Spain in favour of coordination centres in Vizcaya, OJ L 31, 6.2.2003, p.26; Commission Decision of 5 September 2002 on the aid scheme implemented by Germany for control

Again, this argument cannot be sustained. First, there is nothing novel in the Commission's reasoning in the tax ruling decisions and in its application of the arm's length principle. Already the decisions on the coordination centres concerned the issue whether national measures expressly allowing multinational companies to artificially lower their tax burden[120] – for example by calculating the taxable profit of the beneficiaries with reference to artificially low margins – constitutes a selective advantage granted to those multinationals in breach of the State aid rules. In one of these cases concerning the Belgian coordination centres, the approach of the Commission was later confirmed by the Court of Justice in *Forum 187*.[121]

Where the Commission thus finds on the basis of well-established case law that a preferential treatment has been granted which is incompatible with the internal market, the next step is to order recovery of the unlawful and incompatible aid unless this would be contrary to a general principle of Union law.[122]

Such principle can either be the principle of legal certainty or legitimate expectations. The principle of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its powers.[123] However, for the principle of legal certainty to apply, there has to have been a prolonged lack of action on the part of the Commission from the moment that it became aware of the aid, creating a situation of uncertainty.[124] As the tax rulings at issue in the Fiat, Starbucks, Apple and Amazon decisions were never notified to the

and coordination centres, OJ L 177, 16.7.2003, p. 17; Commission Decision of 16 October 2002 on the State aid scheme in Case C49/2001 implemented by Luxembourg for coordination centres established in Luxembourg, OJ L 170, 9.7.2003, p. 20; Commission Decision of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium, OJ L 282, 30.10.2003, p. 25; Commission Decision of 17 February 2003 on the State aid implemented by the Netherlands for international financing activities OJ L 180, 18.7.2003, p. 52. Commission Decision of 13 May 2003 on the aid scheme implemented by France for headquarters and logistics centres, OJ L 23, 28.1.2004, p. 1; and Commission Decision of 24 June 2003 on the aid scheme implemented by Belgium on Tax ruling system for United States foreign sales corporations; OJ L 23, 28.1.2004, p. 14.

120 In detail, the tax schemes under assessment in those decisions expressly allowed multinational companies to lower their tax burden, for example, by ignoring specific costs, setting an inappropriate range of acceptable mark-ups or applying too low margins. These measures were designed to reduce the taxable profits of the beneficiaries, exactly as it is the case with the transfer pricing arrangements under analysis in the tax ruling decisions.

121 Judgment of the Court of Justice of 22 June 2006, Belgium and Forum 187 v Commission, Joined Cases C-182/03 and C-217/03, ECLI:EU:C:2006:416.

122 Article 16(1) of Council Regulation (EU) 2015/1589 of July 13 2015 laying down detailed rules for the application of Article 108 of the Treaty (OJ L 248, 24.9.2015, p. 9) provides that the Commission must not require recovery of the aid if this would be contrary to a general principle of law.

123 Judgment of 24 September 2002, Falck and Acciaierie di Bolzano v Commission, Joined Cases C-74/00 P and C-75/00 P, EU:C:2002:524, paragraph 140.

124 Apple decision, recital (440).

Commission nor otherwise publicly available, the Commission could not have taken any action until their existence was disclosed, either through public reporting or in the context of the Commission's investigation into the tax ruling practice of the 28 Member States.

Further, although it is true that the Commission has in the past in exceptional cases refrained from recovery due to the novelty of the measure[125], it has been explained before why the Commission's tax ruling decisions cannot be considered as putting forward a novel approach.[126]

As regards the principle of legitimate expectations, this can only be invoked by the beneficiary in a situation where an EU authority "has caused him to entertain expectations which are justified."[127] However, important limitations apply to invoking that principle. First, the Court has stated that the principle of legitimate expectations cannot be invoked unless the person invoking it "has been given precise assurances by the administration".[128] Second, Member States cannot invoke that principle in cases where they have failed to notify the aid measure to the Commission.[129] Third, in the absence of a notification, the Commission's silence cannot be interpreted as an implicit authorisation of the measure that may

[125] Commission Decision of 2 August 2004, C13a/2003 (ex N779/2002) – France Telecom, recital (263).

[126] It has been claimed that the Commission in the context of the Fiat, Starbucks, and Apple decisions should have refrained from recovery similarly to what was done in the series of Commission decisions in the 2000s (fn 74) as the more recent decisions are considered to "break new ground". See Sir P. Lowe, The Commission's powers to enforce the law: and to propose changes to it, European Law Review (2017), p. 2. However, those earlier decisions were determined on their own merits which – contrary to what was the case for tax ruling decisions – were exceptionally leading to the conclusion that no recovery was initiated, despite the fact that the tax schemes under analysis were found to entail incompatible State aid. As explained in great detail above, the recent tax ruling decisions are *not* based on a new legal interpretation of EU law and as recovery would not be contrary to any other principle of EU law, the Commission is obliged to order the Member State to recover the aid in order to re-establish the situation that existed on the market prior to the granting of that aid.

[127] Judgment of the Court of Justice of 22 June 2006, Belgium and Forum 187 v Commission, Joined Cases C-182/03 and C-217/03, ECLI:EU:C:2006:416, paragraph 147; Judgment of the Court of 11 March 1987, Van den Bergh en Jurgens and Van Dijk Food Products Lopik v Commission, Case 265/85, ECLI:EU:C:1987:121, paragraph 44.

[128] *Ibid*.

[129] Judgment of the Court of 16 October 2014, Territorio Histórico de Vizcaya – Diputación Foral de Vizcaya and Others v Commission, Joined Cases C-471/09 P to C-473/09 P, EU:C:2011:521, paragraph 64: "Sur ce point, il convient de rappeler qu'un État membre, dont les autorités ont octroyé une aide en violation des règles de procédure prévues à l'article 88 CE, ne saurait, en principe, invoquer la confiance légitime des bénéficiaires pour se soustraire à l'obligation de prendre les mesures nécessaires en vue de l'exécution d'une décision de la Commission lui ordonnant de récupérer l'aide. Admettre une telle possibilité reviendrait, en effet, à priver les dispositions des articles 87 CE et 88 CE de tout effet utile, dans la mesure où les autorités nationales pourraient ainsi se fonder sur leur propre comportement illégal pour mettre en échec l'efficacité des décisions prises par la Commission en vertu de ces dispositions du traité CE". In the same line, see also Judgment of the Court of 9 June 2011, Diputacion Foral de Vizcaya

give rise to legitimate expectations.[130] In the cases at issue, the Commission did therefore not consider in the tax ruling decisions that the conditions for invoking the principle of legitimate expectations had been fulfilled.

In conclusion, with the above, this author aimed to explain the application of the arm's length principle in the four tax ruling decisions, thereby addressing some of the criticism that has been raised. Without aiming to give a complete account of such criticism – which is also not this author's role nor scope of this Report – it helps to structure the debate and address points that require further exchange and clarifications. Similar explanations may also be necessary when it comes to the legal reasoning employed by the Commission in those decisions that led to a finding of a selective advantage pursuant to Article 107(1) TFEU which is the purpose of the next Section.

4. The determination of a selective advantage in the tax ruling decisions

As explained in the previous Section, the Commission found in all four tax ruling decisions that the tax rulings in question endorsed a profit allocation method resulting in a taxable profit for their beneficiaries that did not reliably approximate a market-based outcome in line with the arm's length principle. Consequently, it concluded that an advantage had been granted to those beneficiaries given that their economic position was improved in comparison with the economic position of *that same* undertaking had the measure not been granted.[131]

The Commission then considered from several perspectives whether that advantage was selective in nature.

For a first finding of selectivity, it considered that the tax rulings concerned individual aid measures and that, based on the Court's case law, in these circumstances the finding of selectivity coincides with the finding of an economic advantage. A separate selectivity analysis was therefore not necessary: "[i]n the [case of an individual aid measure], the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective."[132]

e.a./Commission, Joined Cases C-465/09 to C-470/09, EU:C:2011:372, paragraph 150; and Case, C-372/97 Italy v Commission EU:C:2003:275, paragraph 112.

[130] Judgment of the Court of 16 October 2014, Territorio Histórico de Vizcaya – Diputación Foral de Vizcaya and Others v Commission, Joined Cases C-471/09 P to C-473/09 P, EU:C:2011:521, paragraph 76.

[131] An advantage for the purposes of Article 107(1) TFEU is any economic benefit that an undertaking would not have obtained under normal market conditions, that is to say, in the absence of the State intervention. Such benefit is shown by comparing the financial situation of the undertaking as a result of the contested measure with the financial situation of that undertaking had the measure not been granted. See case C-39/94 SFEI and Others EU:C:1996:285, paragraph 60, case C-342/96 Spain v Commission EU:C:1999:210, paragraph 41, and case 173/73 Italy v Commission EU:C:1974:71, paragraph 13.

[132] Judgment of the Court of 4 June 2015, Commission v MOL Magyar Olaj- és Gázipari Nyrt, Case C-15/14 P, ECLI:EU:C:2015:362, paragraph 60. See also Part 1 this Report, p. 3.

On this basis, the Commission concluded in each of the decisions that given that the tax rulings were used by the company to assess its yearly corporate income tax liability leading to an unjustified reduction not in line with the arm's length principle, the Commission could presume that the rulings were also selective in nature.[133] Nevertheless, the Commission proceeded in all four decisions to establish the selectivity of the measure under the three-step test usually applicable for fiscal aid schemes.[134]

Thus, for a second finding of selectivity under the three-step test, it considered the reference system to be composed of the ordinary corporate income tax system of the Member State. It is against that system that it must be determined whether the tax rulings constitute a derogation giving rise to a favourable treatment compared to other undertakings in a comparable factual and legal situation.[135] In an ordinary corporate income tax system based on the separate entity approach, all corporate taxpayers are considered to be in a comparable factual legal situation for the purpose of levying corporate income tax,

[133] Fiat decision, recitals (216) to (218), Starbucks decision, recitals (252) to (254), Apple decision, recital (224) and Amazon decision, recitals (583) to (584). Some of the criticism voiced in the aftermath of the Fiat, Starbucks, Apple decisions overlooked this distinction between schemes and individual aid. This is particularly clear in the US Treasury White Paper on the investigations leading to the tax ruling decisions where a claim is made (on p. 8 et seq.) that the Commission carried out a different assessment in its past cases. However, those critics have overlooked that among those past cases only two of the cases concerns individual measures while the majority of the cases concerns schemes. As already explained in the first Part of this Report, the selectivity analysis for a scheme is different and usually requires an assessment under the three-step test. To the contrary, the three-step test is usually not relevant in individual cases where it is normally easy to conclude that a measure is selective. In the two cases concerning individual aid mentioned in the US Treasury White Paper (the *Umicore* decision (Commission Decision of 26 May 2010 concerning State aid in the form of a tax settlement agreement implemented by Belgium in favour of Umicore SA (formerly Union Minière SA), OJ L 122, 11.5.2011, p. 76-99) and the *Technolease* decision (Commission Decision of 21 April 1999 on the treatment by the Netherlands tax authorities of a technolease agreement between Philips and Rabobank, OJ L 297, 24.11.2000, p. 13-21)), the Commission found that there was no derogation from the reference framework. The Commission specifically stated in the *Umicore* decision that there was no advantage and, in any event, it would not be relevant to look at the selectivity because finding an advantage is sufficient. That is precisely the approach taken in the tax ruling decisions; the Commission looked at the economic advantage granted to one individual company and concluded that because the selectivity in this case is straightforward, there was no need to scrutinize selectivity in-depth. This is fully compliant with the case law of the European Court. Second, in the tax ruling decisions, the Commission did in fact also carry out an in-depth analysis on basis of the three-step test as further explained in this Report.

[134] See Fiat decision, recitals (192) et. seq., Starbucks decision, recitals (230) et. seq., Apple decision, recitals (226) et. seq., and Amazon decision, recitals (585) et. seq

[135] Judgment of the Court of 15 November 2011, Commission and Spain v Government of Gibraltar and United Kingdom, Joined Cases C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 75. See also Judgment of the Court of 21 December 2016, Commission v World Duty Free Group SA and Others, Joined Cases C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 54.

irrespective of whether they are part of a (multinational) group or standalone companies, resident or non-resident.[136] Thus, the derogation from the ordinary corporate income tax system should be determined by use of the arm's length principle as the relevant benchmark.

In this respect, it has been suggested that the Commission in the Starbucks, Fiat and Apple decisions conflates the existence of an advantage and selectivity as they are not analysed separately.[137] However, the reason for this approach is that the Commission's assessment of whether the tax rulings constitute a derogation from the reference system coincides with its assessment of whether those rulings confer an advantage. The identification of the advantage flowing from the tax ruling requires a comparison of the economic position of the beneficiary of that measure with the economic position of *that same* undertaking had the measure not been granted (which is determined by use of the arm's length principle). The identification of the derogation from the reference system requires a comparison of the economic position of the beneficiary of that measure with the economic position of *other corporate taxpayers* who are in a comparable factual and legal situation to the beneficiary in the light of the objectives of that reference system and who do not benefit from the tax measure in question (which is *also* determined by use of the arm's length principle).[138] Accordingly, both the findings of economic advantage and selectivity have the same counterfactual, the ordinary tax system of a given Member State.[139] In other words, where the tax ruling departs from a reliable approximation of a market-based outcome and thus from the arm's length principle, that ruling will be found to confer a selective advantage on the beneficiary for the purposes of Article 107(1) TFEU, in so far as it leads to a lowering of the beneficiary's tax liability under the ordinary

[136] As regards the determination of the corporation tax liability, this is determined for both non-resident and resident companies in the same manner, namely by applying the corporate income tax rate to the amount of taxable profits earned as a result of the activities of the resident company or of the branch of the non-resident company at the end of the tax year.

[137] This argument was put forward by Apple in the administrative procedure related to the Apple decision. In this respect, it was argued that the advantage and selectivity conditions for a finding of State aid must be addressed separately in the decision, because they relate to two different aspects of the notion of State aid. See Apple decision, fn. 136. See also L. Lovdahl Gormsen, EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga, Journal of European Competition Law & Practice, 2016, Vol 7, No. 6, p. 370: "[T]he cumulative criteria of "selectivity" and "advantage" are conflated."

[138] As explained in Section 3 above, in an ordinary corporate income tax system, standalone companies are taxed on a level of profit that reflects market prices, i.e. prices negotiated on arm's length. According to the test laid down in *Forum 187* , a transfer pricing method that produces a taxable profit for a company of a multinational group trading with other companies of that group not reflecting prices negotiated at arm's length gives rise to an economic advantage. The same test applies between a branch and the rest of the non-resident company, see footnote 101 above.

[139] See Fiat decision, recital (217), Starbucks decision, recital (253), and Apple decision, recital (224).

corporate income tax system as compared to other corporate taxpayers whose tax base is determined by the profits they generate under market conditions.[140] A reduction of the beneficiary's tax liability by way of a tax ruling not in line with the arm's length principle thus constitutes *both* the advantage granted by the tax measure *and* the derogation from the reference system.

On this basis, the Commission has, in light of the fact that separating those conditions would lead to unnecessary duplication, chosen to assess the presence of an advantage *alongside with* the second step of the three-step selectivity analysis. Accordingly, the Commission's assessment in the Fiat, Starbucks and Apple decisions of whether the tax ruling constitutes a derogation from the reference system under the three-step test coincides with its assessment of whether that measure confers an advantage on the beneficiary. This should, however, not be taken as an indication that the Commission has not ensured that both conditions are fulfilled, or that the Commission "ignores [the analysis on] selectivity".[141]

During the course of the various administrative procedures, it was, in relation to the first step of the three-step analysis, further put forward by the Member States that the selectively analysis should only consider other corporate taxpayers forming part of a multinational corporate group as comparable undertakings. More specifically, it was argued that since the tax rulings concern transfer pricing between associated companies/profit allocation to a branch, and since only multinational corporate groups and non-resident companies are confronted with pricing cross-border intra-group transactions and cross-border profit allocation, companies belonging to such groups and non-resident companies with a branch in a Member State are in a different factual and legal situation to other corporate taxpayers acting in the market of that Member State. Accordingly, the reference framework must be considered as only encompassing the provision in the domestic tax laws laying down the arm's length principle for the purposes of pricing cross-border intra-group transactions during the relevant period.

The Commission explained in the decisions that it does not agree to this line of reasoning since the profits of all corporate taxpayers are taxed in the same manner under the ordinary corporate income tax system and with the same tax rate, without any distinction as to the corporate structure of which that taxpayer is part (if any) or whether the taxpayer is tax resident or not (but still subject to tax in that Member State). The determination of the tax base for the computation of the annual corporate income tax liability thus is equally relevant and applicable to companies that are part of a multinational group as well as standalone

[140] As also explained in the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, p. 1-50, paragraph 171.
[141] L. Lovdahl Gormsen, EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga, Journal of European Competition Law & Practice, 2016, Vol 7, No. 6, p. 370.

companies. Accordingly, for the purposes of determining the taxable income under the corporate income tax system of a given Member State, both standalone and group companies are in a comparable factual and legal situation as regards the intrinsic objective of that reference system (i.e. to levy tax on the taxable profit of all companies, resident or non-resident, subject to tax in that Member State). In fact, the very purpose of the arm's length principle in transfer pricing is to make multinational companies comparable with standalone companies, to put them on an equal footing for tax purposes.[142]

By limiting the reference system only to companies forming part of a multinational corporate group, an artificial distinction would be introduced between group companies trading with other associated companies on one side, and standalone companies and group companies trading with non-related companies on the other side, which would be based solely on those companies being owned and controlled by a multinational group. An ordinary corporate income tax system based on the separate entity approach does not generally take such considerations on the corporate structure into account when taxing the profits of companies falling within its tax jurisdiction. In addition, as companies owned and controlled by a multinational group can and do engage in the same activities as standalone companies and those two types of companies compete with each other when trading in the markets, such an artificial distinction based solely on the corporate structure would allow Member States to distort competition between comparable undertakings without such behaviour falling under the State aid rules.[143]

In particular, accepting this argument would mean that the identification of the reference system in a given case is wholly dependent on whether the Member State in question has adopted specific tax rules, rather than looking at the objective of the tax system of which those rules form a part, as it is required to do by the case-law.[144] For instance, in the Fiat decision, rather than recognising

[142] The arm's length principle simply ensures that the profit derived from intra-group transactions is in fact determined in exactly the same manner as profit derived from transactions between unrelated companies: while the latter depend on prices negotiated on the market, the former depend on market conform prices, so that in both instances the profit being taxed is ultimately determined (directly or indirectly) by the market. Seen in this light, the arm's length principle is merely the means to ensure that group companies behave for tax purposes in the same manner as independent companies in similar circumstances when it comes to setting prices, terms and conditions of intra-group transactions, so that the portion of their taxable profit resulting from those transactions can be taxed in the same manner and at the same corporate income tax rate under the ordinary rules of taxation of corporate profits.

[143] Fiat decision, recitals (210) et seq, Starbucks decision, recitals (245) et seq, and Amazon decision, recitals (592) et seq.

[144] According to the case-law, it is the objective of the reference system that determines whether undertakings are in a comparable factual and legal situation, not the objective of the contested measure. See Section 3 of Part 1 of this Report.

the fact that the Luxembourg transfer pricing rules are merely the *means* to ensure the overarching objective of the general Luxembourg corporate income tax system that companies belonging to a multinational corporate group and independent standalone companies are taxed on equal footing, the mere existence of specific transfer pricing rules would result in a narrower reference system comprising only those rules. Such an approach would render State aid control of fiscal measures completely ineffective, since the Member States could adopt specific rules applicable only to certain companies and argue that the applicable reference system must necessarily be those rules. Indeed, by this logic, the imposition of a 0% tax rate on the chargeable profit of companies forming part of a multinational corporate group in Luxembourg would not be State aid, so long as that tax rate is available to all such companies operating in Luxembourg, even though corporate taxpayers are normally taxed at the standard corporate income tax rate of approximately 29%. To accept a reference system limited to companies belonging to a multinational group would mean that Member States are free to tax multinationals in any way they see fit, without regard to their normal rules of taxation. That would result in the operation of two parallel tax codes: one for independent standalone companies, another for multinationals and, if the latter were more favourable, there would still be no State aid.

In any event, in all four decisions the Commission carried out a selectively analysis based on a more limited reference framework for a third, alternative, finding of selectivity. It concluded that even under this more narrow reference system, the fact remains that the company that received the tax ruling which endorsed a transfer pricing arrangement deviating from the arm's length principle was favoured over other multinational companies that engage in intra-group transactions and that comply with the arm's length principle.[145] In other words, the derogation from the reference system which consists in the definition of the economic advantage (i.e. the reduction of the corporate income tax liability in breach of the arm's length principle) was found to be present, irrespective of the reference system chosen.

The same reasoning applies to the issue whether a resident company and a non-resident company operating in a Member State through a branch could be

[145] Fiat decision, recitals (315) et seq., Starbucks decision, recitals (409) et seq., and Amazon decision, recitals (600) to (602). Further, in the Fiat decision, an examination of the tax ruling practice of the Luxembourg tax administration did not make it possible for the Commission to identify a consistent set of rules that generally apply on the basis of objective criteria to all undertakings falling within its scope as defined by its objective. That tax ruling practice could therefore not in any case constitute a framework against which the tax ruling granted to Fiat's treasury company in Luxembourg could be examined to determine whether that company obtained a selective advantage in breach of Article 107(1) TFEU (see Section 7.2.5 of that decision).

considered to be in the same reference framework. In the formal investigation leading to the Apple decision, Ireland had argued that ASI and AOE as non-resident companies that are taxed on their source income pursuant to a specific provision in the Irish tax code (Section 25 TCA 97) could not be considered to be in a comparable factual and legal situation to Irish resident companies that are taxed on their worldwide income.[146]

The Commission did not agree with this argument and considered the reference system to include both resident and non-resident taxpayers based on a similar reasoning as in the other decisions. An ordinary corporate income tax system based on the separate entity approach levies tax on the taxable profit of all corporate income taxpayers subject to tax in the Member State, including both resident companies (on their worldwide income) and branches of a non-resident company (on their source income). The determination of the tax base for the computation of the annual corporate income tax liability is therefore equally relevant for a resident company (on its worldwide income) as well as a branch of a non-resident company. Thus, for the purposes of determining the taxable base and the corporate income tax liability, both types of companies are in a comparable factual and legal situation as regards the objective of the Irish tax system which is to tax the profit of all companies, resident or non-resident.[147]

In addition hereto, the Commission found in the Apple decision that even if only the specific provision in the Irish tax code determining the profit allocation to an Irish branch (Section 25 TCA 97) were to constitute the appropriate reference system, this would still lead to the conclusion that the tax rulings in favour of ASI and AOE were not available to other taxpayers, and did accordingly provide for a selective advantage to the beneficiaries. On the one hand, the Commission found that the arm's length principle was inherent in the application of Section 25 TCA 97, since the taxation of non-resident companies in Ireland is based on the separate entity approach, which requires treating a multinational company's Irish branch as a separate and independent enterprise from the rest of the company to which it belongs and determining its taxable income as if it were a standalone resident company engaged in the same activities and dealing with the rest of the company to which it belongs at arm's length. On the other hand, the Commission found that, if the arm's length principle cannot be said to form an inherent part of Section 25 TCA 97 and in the absence of any other objective standard to ensure that this provision was applied in a consistent manner to all non-resident companies subject to tax in Ireland, the tax rulings are the

[146] Apple decision, recital (236).
[147] Apple decision, recitals (237) et seq.

product of an administrative practice that is not based on any objective criteria related to the Irish tax system, which gives rise to a presumption of selectivity.[148]

In conclusion, this author hopes to have clarified that the recent tax ruling decisions should not be seen as anything more than a confirmation of the Commission's earlier decision-making practice and the case law of the Court of Justice in the area of fiscal aid. It is true that in the current climate of reforms on international taxation, both in the context of the Commission's fight against tax avoidance and the OECD's work on BEPS, the decisions stand out, partly because of the companies involved and, in some instances, because of the recovery amounts. However, each of the decisions has been taken based on its own merits and on the basis of a careful analysis of the factual and legal circumstances.

However, transfer pricing is not the only means to shift profit and achieve double non-taxation on (certain parts of) a company's income. In the next Part, another important category of tax structure leading to double non-taxation is identified and the applicable analytical framework under the State aid rules explained.

IV. DOUBLE TAXATION V. DOUBLE NON-TAXATION

1. Double taxation vs. double non-taxation. Impact on tax planning structures

Double taxation arises when different States tax the same item of income in the hands of the same taxpayer (juridical double taxation) or in the hands of different taxpayers (economic double taxation). This is usually the result of mismatches or overlaps between national tax systems. For instance, the same income can be subject to tax in the hands of the same taxpayer in two different States when one of them is a source-based tax jurisdiction (i.e. a jurisdiction that subjects to taxation locally-sourced income, regardless of the residence of the taxpayer) and the other is a residence-based country (residents of the country are usually taxed on their worldwide income). Another example is double taxation due to different legal qualifications, for instance the same financial instrument may be qualified

[148] Apple decision, recital (381). See also recital (380) explaining that: "While tax administrations must be afforded a certain discretion to account for the differences between taxpayers when applying their national tax provisions, where a tax administration has broad discretion to determine the beneficiaries or the conditions under which the legislation is applied on the basis of criteria unrelated to the tax system, the exercise of that discretion must be regarded as favouring certain undertakings or the production of certain goods in comparison with others which, in the light of the objective pursued, are in a comparable factual and legal situation. Put differently, rulings that merely contain a correct interpretation of the relevant national tax provisions, without deviating from a consistent administrative practice, do not, in principle, give rise to a selective advantage. By contrast, rulings where discretion is exercised by the tax administrations that is not based on objective criteria related to the tax system, give rise to a presumption of selective advantage."

as equity in one State and debt in the other. Last but not least, double taxation may also arise from the fact that two different jurisdictions price differently the same intragroup transaction.

There is no general EU measure to eliminate double taxation. Most EU Member States have bilateral tax treaties in place with each other and with third countries to avoid double taxation. Moreover, in the absence of any harmonisation in this field, EU Member States retain exclusive competence to define (unilaterally or through double tax treaties) the rules to allocate their taxation rights in cases of conflicts with other jurisdictions, in particular with the objective of eliminating double taxation.[149] The double tax treaties entered into by EU Member States are generally based on the Model Tax Convention drafted by the OECD.

Double taxation increases transaction costs, disincentivises investments and makes the economy less competitive. In order to tackle this problem, many countries have incorporated into their legislation the separate entity approach, explained in detail in Part 2 of this Report, according to which each company within a group must be treated as a separate entity for tax purposes.[150] This approach has been chosen by OECD member countries as an instrument to minimise the risk of double taxation.[151] In order to apply the separate entity approach to intragroup transactions, group companies must be taxed on the basis that they act at arm's length in their transactions with each other.[152]

The international standard of the arm's length principle is set out in paragraph 1 of Article 9 of the OECD Model Tax Convention[153], which has been

[149] Judgment of the Court of 17 July 2014, Nordea Bank Danmark A/S v Skatteministeriet, C-48/13, CLI:EU:C:2014:2087, paragraph 27; Judgment of the Court of 12 May 1998, Mr and Mrs Robert Gilly v Directeur des services fiscaux du Bas-Rhin, C-336/96, ECLI:EU:C:1998:221, paragraphs 24 and 30; Judgment of the Court of 7 September 2006, N v Inspecteur van de Belastingdienst Oost/kantoor Almelo, C-470/04, ECLI:EU:C:2006:525, paragraph 44; and Judgment of 14 November 2006, Mark Kerckhaert and Bernadette Morres v Belgische Staat, C-513/04, ECLI:EU:C:2006:713, paragraphs 22 and 23.

[150] See 1995, 2010 and 2017 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, preface, paragraph 5.

[151] 2017 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, preface, paragraph 5.

[152] See Part 2 of the Report. See also 1995, 2010 and 2017 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, preface, paragraph 6.

[153] OECD Model Tax Convention, Article 9, paragraph 1 provides as follows: "[Where] conditions are made or imposed between the two associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly". An identical issue arises in the relation between a non-resident company and its permanent establishment in a Member State. In this case of *intra-company* dealings, the branch must be treated as a separate and independent enterprise from the rest of the company to which it belongs and its taxable profits must be determined as if it were a standalone company subject to the ordinary rules of taxation of corporate profit. The OECD

incorporated into most bilateral tax treaties. The arm's length principle treats group companies as separate entities and adjusts profits by reference to the conditions which would have been obtained between independent enterprises in comparable transactions and comparable circumstances.[154] Such transfer pricing adjustments are made on the basis of different transfer pricing methods explained in detail in the OECD Transfer Pricing Guidelines.[155] If all States applied identical standards, the separate entity approach and the arm's length principle should avoid double taxation and ensure a level playing field between multinational group companies and independent standalone companies, thus avoiding distortion of competition. The arm's length principle is thus said to promote growth and investment.[156]

By contrast, double non-taxation occurs when the interaction between different tax systems creates gaps which result in an item of income not being taxed anywhere. In this respect, it is worth noting that the arm's length principle and double taxation treaties do not have as sole objective the avoidance of double taxation. In fact, in the context of the OECD BEPS project, a recommendation has been included to clarify "*that tax treaties are not intended to be used to generate double non-taxation*".[157] Although the primary objective of these treaties was – and still is – to avoid double taxation, the Final Report on BEPS Action 6 indicates that already in 1977, the Commentary on Article 1 of the OECD Model Tax Convention was modified "*to provide expressly that tax treaties are not intended to encourage tax avoidance or evasion*".[158] Based on the recommendations in the Report on Action 6,

Model Tax Convention lays down the arm's length principle as the benchmark for determining the profit allocation between a branch and the rest of the (non-resident) company in Article 7(2).

[154] *Ibid*., paragraph 1.6.

[155] The transfer pricing methods described in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations are the comparable uncontrolled price method (CUP), the cost plus method, the resale minus method, the transactional net margin method (TNMM) and the transactional profit split method.

[156] 1995 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, paragraph 1.7, 2010 and 2017 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, paragraph 1.8: "There are several reasons why OECD member countries and other countries have adopted the arm's length principle. A major reason is that the arm's length principle provides broad parity of tax treatment for members of multinational groups and independent enterprises. Because the arm's length principle puts associated and independent enterprises on a more equal footing for tax purposes, it avoids the creation of tax advantages or disadvantages that would otherwise distort the relative competitive positions of either type of entity. In so removing these tax considerations from economic decisions, the arm's length principle promotes the growth of international trade and investment."

[157] OECD/G20 BEPS Project, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6, 2015 Final Report, Section B.

[158] *Ibid*, paragraph 70. Furthermore, Action 6 recommends as well (paragraph 72) amending the title of the OECD Model Tax Convention as follows, to expressly refer to the objective of avoiding double

the G20/OECD agreed to include an amendment to the preamble of the Multilateral Convention in the form of a minimum standard.[159]

Double non-taxation is in principle an exception to the general principle common to most States according to which profits are subject to tax. As explained in detail in the following Sections, the Commission's investigations have shown that a number of tax planning structures are based on the achievement of double non-taxation precisely by means of instruments and principles which are typically designed to avoid double taxation, such as transfer pricing methods, double taxation treaties or participation exemption rules. To the extent that the application of these instruments and principles confers a selective advantage to their beneficiaries, they may be considered State aid measures under Article 107(1) TFEU and therefore prohibited unless authorised by the European Commission.

In the following Sections, this author will analyse the main categories of tax structures leading to double non-taxation which the Commission has identified in its tax ruling investigations, as well as the applicable analytical framework for each category in order to determine the existence of State aid. It should be highlighted at the outset – and will be repeated throughout this Part – that double non-taxation as such does not lead to a finding of a *prima facie* selective advantage. What matters is whether a Member State, through an intervention in the tax revenue raising process (e.g. the determination of the tax base, assessment of the tax liability or enforcement of a tax claim) derogates from the ordinary tax system granting a favourable tax treatment to one (or several) undertakings. The issue of double non-taxation only arises in the relevant State aid cases at the justification stage or, put differently, it is only at the last stage of the selectivity analysis that a Member State can justify a certain tax treatment with the objective of avoiding actual double taxation.

Section 2 explains the cases of cross-border double non-taxation achieved through transfer pricing in which the profit of a company is shifted from a high-tax jurisdiction to a low-tax jurisdiction whereas Section 3 analyses cases in which cross-border double non-taxation is due to differences between the accounting and tax profit of the company.

non-taxation: "Convention [...] for the elimination for double taxation with respect to taxes on income and on capital and the prevention evasion and avoidance". See also the OECD report on The Application of the OECD Model Tax Convention to Partnerships (1999) stating in paragraph 52 that *"[t]he Committee views the outcome in the above examples as resulting from an application of the Convention that takes account of the basic purposes of the Convention: to eliminate double taxation and to prevent double non-taxation. [..]"*.

[159] Article 6 of the Multilateral Convention to implement tax treaty related measures to prevent base erosion and profit shifting.

2. Cross-border double non-taxation resulting from profit shifting through non-arm's length payments

A first category of double non-taxation cases are structures put into place through transfer pricing rulings in which a Member State agrees to price a cross-border intra-group transaction on terms which reduces the tax base of the company established in this State. As described in Part 2 of this Report, this might be done by manipulating the transfer prices as applied in transactions between two associated group companies in order to allow the group to shift profits to zero or low tax countries. As explained, this can e.g. be achieved by means of an exaggerated tax deductible royalty payment from a company residing in a high-tax country to an associated company subject to no or very low taxation. In these cases, the transfer pricing arrangements have an impact on the tax base of the company in the Member State under analysis by lowering its taxable profit. Considering the interplay of both tax jurisdictions, the result will be a situation of effective non-taxation (or very low taxation) at group level.

From a transfer pricing perspective, the tax savings resulting from such base erosion and profit shifting measures depend on the (nil or lower) tax rate applicable in the jurisdiction where the counterpart of the transaction is established. In fact, if the profit was shifted to a jurisdiction with a tax rate equivalent to that of the State of the company with which it is transacting, the tax savings would be limited or non-existent.

From a State aid perspective, however, the analytical framework is different: the profit shifting element and the level of taxation in the other State are not relevant in order to determine the existence of a selective advantage within the meaning of Article 107(1) TFEU. This Treaty article prohibits the grant of State aid by a Member State. Therefore, the assessment of whether a particular measure gives rise to an advantage should be made exclusively having regard to the actions of the Member State in question. The State aid advantage needs to be imputable to one Member State only and not to a mismatch occurring from an interplay of two different tax systems or rates. Thus, in these cases the finding of a selective advantage need not (and cannot) take into account the effects of the treatment by the other state.[160]

In line with this principle, transfer pricing arrangements will not be considered a State aid measure if the prices agreed reflect the economic reality of the relationship between the parties to the transaction, and this irrespective of whether these arrangements result in effective double non-taxation at group level. In other words, if the price endorsed in the transfer pricing ruling corresponds

[160] The assessment of the treatment of the shifted profit in the other state may, however, become relevant in the context of recovery. See, for instance, recitals (449) to (451) of the Apple decision.

to the price that third parties would have agreed in the market under comparable circumstances, there will be no State aid under Article 107(1) TFEU even if it leads to tax-avoidance at group level because the counterpart of the transaction is, for instance, established in a tax haven.

As explained in detail in Part 2 of this Report, a transfer pricing ruling will be considered to confer a selective advantage within the meaning of Article 107(1) TFEU if it endorses in an intra-group transaction a price that deviates from the arm's length principle. The reason is that in this way the tax ruling reduces the tax liability of the company under the ordinary tax system as compared to independent companies which determine their taxable profits on the basis of the difference between income and costs in a competitive market.[161] Further, in the case of tax rulings setting transfer prices in intra-group transactions, the defining element to determine the existence of a selective advantage in the context of the three-step test (the subsidiary finding of selectivity) is the identification of a difference in treatment between, on one hand, group companies transacting with other associated companies and, on the other hand, other corporate taxpayers established in the same Member State by means of a difference between the price and other conditions agreed in the tax ruling and the price that would have been agreed if the same transaction had been executed by other corporate income tax payers transacting on arm's length in the market.[162]

This allows drawing a distinction between the objective of the OECD works on the arm's length principle and the objective of State aid rules when applying this principle. Whereas the former seeks an adequate allocation of profits *between states*, the latter's main goal is to ensure equal treatment between companies established *in the same Member State* in order to avoid distortions of competition. However, both the OECD rules and the State aid rules aim to tax companies within a group as separate or "standalone" companies. The relevant benchmark for transactions between related entities is therefore in both cases that those transactions should be assessed as if they had been concluded at arm's length between unrelated economic operators.

A deviation from the arm's length principle, as the corollary of the separate entity approach, in the cases investigated by the Commission may be a result

[161] Judgment of the Court of 22 June 2006, Belgium and Forum 187 v Commission, Joined Cases C-182/03 and C-217/03, ECLI:EU:C:2006:416. See also Commission Decision (EU) 2016/2326 on State aid which Luxembourg granted to Fiat (OJ L 351, 22.12.2016, p. 1–67), paragraph 222, and Commission Decision (EU) 2017/502 on State aid implemented by the Netherlands to Starbucks (OJ L 83, 29.3.2017, p. 38–115), paragraph 258.

[162] As already explained in Part 2 of this Report, the first finding of selectivity coincided in all four decisions with the finding of an economic advantage. A separate selectivity analysis was therefore not necessary but was carried out as a subsidiary finding of selectivity. See Part 2, Section 4.

of a misapplication of the transfer pricing method used to determine the arm's length prices to be applied in the transactions under analysis, leading to profit shifting which results in double non-taxation. A good example of such cross-border profit shifting is the Starbucks decision. This decision concerns a tax ruling issued in 2008 by the Dutch tax administration to Starbucks' manufacturing company resident in the Netherlands which sold and distributed roasted coffee and coffee-related products to Starbucks shops in Europe, the Middle East and Africa.[163] The tax ruling endorsed a yearly reduction of the taxable profit of the manufacturing company by way of royalty payments to Starbucks' holding company for coffee-roasting know-how (the Starbucks IP). The holding company was a limited partnership based in the United Kingdom, not subject to any tax on those royalty payments neither in the Netherlands nor in the United Kingdom.[164]

The tax ruling accepts the application of the TNMM method to estimate an arm's length remuneration of the manufacturing company. TNMM is one of the "indirect methods" described in the OECD Transfer Pricing Guidelines to approximate an arm's length pricing of transactions and profit allocation between companies of the same corporate group.[165] In this case, the tax ruling confirms a remuneration for the manufacturing company consisting of a mark-up of [9-12]% on its operating expenses. The residual royalty payment to the holding company was determined in the tax ruling as equivalent to the residual operating profits of the manufacturing company after subtracting this modest remuneration to the manufacturing company for its alleged "routine functions" and "limited risks"

The Commission took the view that the tax ruling issued by the Dutch tax administration produced an annual taxable profit for the manufacturing company that departed from a reliable approximation of a market-based outcome in line with the arm's length principle. According to the Commission, the TNMM was not the most appropriate transfer pricing method to determine the arm's length transfer price of the royalty. Rather, because comparable uncontrolled transactions covering the same Starbucks IP existed at the time the tax ruling was requested, the Dutch tax administration should have required the use of the comparable uncontrolled price (CUP) method, a direct method, to determine the arm's length transfer price of the royalty payment. This method allows to "directly" compare the price charged for a product or services in the transaction

[163] The tax ruling was used to determine the tax liability of the manufacturing company in the Netherlands during the fiscal years 2007-2008 until 2013-2014.

[164] A limited partnership is transparent for tax purposes under UK law which means that profits recorded by the holding company were only taxed at the level of the US resident partners and not at the level of the holding company itself. As already mentioned in footnote 82, the Netherlands did not levy a withholding tax on cross border royalty payments during the relevant period.

[165] See also footnote 88 above,

between two associated group companies to the price charged for the same or similar product or service in a comparable uncontrolled transaction (i.e. a transaction between independent companies[166]).[167]

The Commission considered in its decision that it was possible to compare the intra-group transaction to similar uncontrolled transactions. In particular, during the investigation it analysed manufacturing agreements that Starbucks had concluded with third parties for the same Starbucks IP. In these agreements no royalty payment was required for the use of that IP. This allowed the Commission to conclude that arm's length level of the royalty payments due to the holding company should have been zero.[168] In addition, the Commission concluded that there was no justification for a substantial increase in the price charged to the manufacturing company for green coffee beans by another Starbucks company in Switzerland from 2011 onwards.[169]

The royalty payments to the holding company and the exaggerated prices paid for the green coffee beans led to a reduction of the manufacturing company's taxable profit in the Netherlands of which a considerable part was shifted to the holding company and to the Starbucks company liable to pay corporate income tax in Switzerland.[170] However, the overall tax burden of the Starbucks group was not a relevant element in the reasoning of the Commission, which focused exclusively on the difference in tax treatment between Starbucks' manufacturing company and other corporate taxpayers in the Netherlands. Similar to the Apple and Amazon decision, the Commission did further not question that the holding company held the rights to the Starbucks IP licensed by it to the manufacturing company. The Commission also did not question Netherland's corporate income tax system in general but questioned the way the Ducth tax administration had endorsed in the tax ruling the tax deductible royalty payments from the manufacturing company to the holding company.

3. Cross-border double non-taxation due to differences between accounting and tax profit

A different category of cases concerns those where double non-taxation is achieved through transfer pricing by introducing a gap between the accounting

[166] The comparable uncontrolled price method can be applied on the basis of the taxpayer's transactions with non-related enterprises ("internal comparables"), or on the basis of transactions between other non-related enterprises ("external comparables").

[167] Starbucks decision, recitals (282) et seq.

[168] Starbucks decision, recitals (286) et seq.

[169] Starbucks decision, recitals (342) et seq.

[170] The Commission's investigation showed that a tax ruling issued by the Dutch tax administration in 2008 gave a selective advantage to Starbucks manufacturing company, which has unduly reduced the tax burden of that company since 2008 by €20 – €30 million. See Commission Press release IP/15/5880.

profit of a company and its taxable profit. In these cases, the structures or schemes in place lead to the non-inclusion in a company's tax base of part of the profit generated by its commercial activities and recorded in its books. The difference from the previous category is that the transfer pricing exercise in this case has no impact on the accounting profit, but only on the taxable profit. This is typically the case of unilateral downward transfer pricing adjustments. In these cases there is no need for profit shifting to a another company, which is e.g. established in a low tax jurisdiction, in order to achieve the tax advantage. Instead, the unilateral downwards adjustment is fictitious or notional and the tax savings are achieved without any other jurisdiction intervening. Also from a State aid perspective, the assessment of the selectivity of those measures differs from the first category of cases.

The Belgian Excess Profit decision[171] is the first case in which the Commission analysed unilateral downward transfer pricing adjustments and serves as a good illustration for this type of cases.

The Belgian excess profit case concerned a scheme put in place by the Belgian administration and applicable since 2005. It allowed multinationals companies to reduce their tax base on the basis of binding tax rulings for so-called "excess profit". The scheme was considered by the Commission to constitute a derogation from the normal taxation system in Belgium on the basis of two lines of reasoning: first, the excess profit exemption derogated from the general rule in Belgian tax law that a company should be taxed, as a starting point on its accounting profit; and second, the exemption constituted a consistent misapplication of the arm's length principle, since there was no room nor justification to apply that principle in the absence of intra-group transactions that needed to be priced.

In detail, the scheme allowed entities that were part of a multinational group to reduce their corporate income tax liability in Belgium by exempting for tax purposes from their actually recorded operating profit a so-called "excess profit"[172] which – allegedly – resulted from synergies, economies of scale or from other benefits related to being part of a multinational group.[173] This exemption was granted following a two-step process. Under the first step, the Belgian group entity estimated its arm's length profit from intra-group transactions normally using the TNMM method. Usually, this method is used to establish the prices and conditions for transaction between an entity performing complex functions and an entity performing less complex functions. The tested party in the application of the TNMM is then the less complex party, i.e. an entity typically

[171] Commission Decision (EU) 2016/1699 on the excess profit exemption State aid scheme (OJ L 260, 27.9.2016), p. 61–103 (Belgian Excess Profit decision).

[172] Belgian Excess Profit decision, recital (135).

[173] Belgian Excess Profit decision, recital (140).

performing "routine functions" and carrying "limited risks". The profit attributed to the tested party is estimated relative to an appropriate base such as costs, sales or assets using reliable comparables.[174] The residual profit, which corresponds to most of the profit of the transaction, is attributed to the non-tested party, i.e. the entity with the more complex profile.

Under the first step, the Belgian group entity was considered the more complex entity, which meant that it should be compensated with most of the profit (the residual profit) deriving from its intra-group transactions to ensure an outcome in line with market conditions. Under the second step, the Belgian group entity estimated the profit that a comparable standalone company would have made in comparable circumstances to arrive at an "adjusted arm's length profit". This was done by applying the TNMM again, only this time the Belgian group entity was the tested party (i.e. the less complex entity). The difference between the profits derived following the two steps constituted the amount of "excess profit". The Belgian administration agreed in a ruling to exempt this amount from taxation.[175]

In a first line of reasoning, the Commission found this "excess profit" exemption to give rise to an advantage because it resulted in a reduction of the taxable profit of the Belgian group company below the level of the commercial profit actually recorded in its accounts. In a second line of reasoning, it found the exemption to give rise to an advantage because it resulted in a level of taxable profit for the Belgian group company that did not result in a reliable approximation of a market-based outcome in line with the arm's length principle.

As regards that second finding of advantage, the Commission concluded that there was no justification for a unilateral downward transfer pricing adjustment in a second step after the Belgian group company's arm's length profit from its intra-group transactions had already been determined under the first step, since there were no intra-group transactions left to price at that second step. This type of exemption was necessarily contrary to the arm's length principle – which is an inherent part of the Belgian ordinary tax system – since it gave rise to double non-taxation: "the unilateral adjustment by Belgium to the group entity's profit actually recorded inevitably means that the "excess profit" exempted under that scheme cannot and will not be taxed by another jurisdiction for the simple reason that those other jurisdictions do not recognise the right to tax any profit emerging specifically from synergies or economies of scale because those profits pertain only to Belgium, the tax jurisdiction in which they are actually recorded".[176]

[174] See also footnote 88 above.
[175] Belgian Excess Profit decision, recital (155_.
[176] Belgian Excess Profit decision, recital (165).

In other words, by considering both parties to the transaction as the tested party in the TNMM, "the combined operating profit of the related transactions between the associated parties does not equal the sum of the profits obtained through the application of the TNNM on both parties, thus creating an untaxed tax base in contravention of the arm's length principle".[177]

As regards selectivity, the Commission established that since the "excess profit" exemption was only available to companies forming part of a multinational corporate group of a sufficient size that had agreed to set up a central entrepreneur in Belgium it was selective in nature. Following the three-step test for establishing the selectivity of an aid scheme, the Commission first identified the applicable reference system as the ordinary Belgian corporate income tax system which applies to all corporate taxpayers. It then established that since the "excess profit" exemption was not available to standalone companies, entities forming part of a domestic corporate group, companies forming part of a multinational corporate group that operated under existing business models and companies forming part of a small multinational corporate group, all of which are in a comparable factual and legal situation to the beneficiaries of the scheme as regards the objective of the reference system, which is to tax the profit of all undertakings subject to tax in Belgium, the "excess profit" exemption constitutes a derogation from the general rule in Belgian tax law that taxpayers should be taxed on the totality of their profits.

As regards the third step in the selectivity test, the Commission rejected Belgium's argument that the excess profit scheme was justified by the need to avoid *potential* double taxation. The Commission acknowledged that the avoidance of *actual* double taxation is a possible justification for derogating from the ordinary corporate income tax system.[178] However, in this case the scheme contemplated a unilateral exemption granted in advance without requiring the exempted profit to have been included in the tax base of a group entity in another jurisdiction, or that profit to have been effectively taxed by that jurisdiction.[179] In fact, the exempted profit could never be subject to double taxation, since that profit could never be included in the profit of another associated group company and therefore could never be declared as taxable profit abroad. This is because the

[177] Belgian Excess Profit decision, recital 162. According to the Commission, the arm's length principle allows tax administrations to make unilateral upward adjustments to the tax base of group companies that do not respect that principle in their transfer pricing. By contrast, a downward transfer pricing adjustment leading to a tax reduction is only foreseen (not required) under the arm's length principle in the exceptional situation where it is a corresponding adjustment following a primary adjustment in another tax jurisdiction, i.e. on a symmetrical basis (see paragraph 178).

[178] Belgian Excess Profit decision, recital (172).

[179] Belgian Excess Profit decision, recital (174).

reduction in the Belgian group company's actually recorded profit as a result of the "excess profit exemption" was not the result of an effective correction of an actual intra-group transaction in the accounts of that company, for example in the form of a debit or a credit note. Rather, what Belgium considers "excess profit" was merely a percentage of the profit actually generated by, initially allocated to and recorded in the accounts of the Belgian multinational group company following transfer prices set by the multinational group itself and accepted by the Belgian administration as being at arm's length under the first step of the scheme.

In reaching this conclusion, the Commission relied on the Court's judgment in *Paint Graphos*, explained in Part 1 of this Report.[180] To recall, in that case, the Court accepted that cooperative societies which distribute all their profits to their members are not taxed themselves as cooperatives, provided that tax is levied on the individual members. This could be interpreted as making reference to the objective of avoiding double taxation in line with the nature or general scheme of the national tax system. However, at the same time the Court advised the referring court that this justification is to be applied in a proportionate manner and ought to be monitored so as "to ensure that specific tax measures introduced for the benefit of cooperative societies are consistent with the logic and general scheme of the tax system and to prevent economic entities from choosing that particular legal form for the sole purpose of taking advantage of the tax benefits provided for that kind of undertaking."[181]

On this basis, the Commission, by analogy, observed that also the Belgian "excess profit" exemption was solely based on a unilateral exemption granted in advance "that does not require the exempted profit to have been or to be included in the tax base of an associated foreign group entity in another tax jurisdiction, nor that that profit is effectively taxed by that jurisdiction". It concluded that it was not considered to "address situations of double taxation in a necessary and proportionate manner", making explicit reference to *Paint Graphos*.[182]

Therefore, the absence of any requirement to demonstrate the existence of *actual* double taxation becomes a central element to establishing the selective nature of the excess profit exemption, i.e. its absence renders non-proportionate a justification by the nature or general scheme of the system. This illustrates the close relationship between the second and the third step in the selectivity assessment in tax matters: in order to determine what situations are legally and factually comparable under the second step, account must be taken of the

[180] Judgment of the Court of 8 September 2011, Paint Graphos and others, Joined Cases C-78/08 to C-80/08, ECLI:EU:C.2011:550, paragraph 71.

[181] Judgment of the Court of 8 September 2011, Paint Graphos and others, Joined Cases C-78/08 to C-80/08, ECLI:EU:C.2011:550, paragraph 74; see also Part 1 of this Report.

[182] Belgian Excess Profit decision, recital (175).

objective of the system and the purpose of the legislation, which are also necessary elements to assess the justification under the third step.[183]

The careful consideration of the proportionality of a justification becomes even more crucial if it is considered that the Commission – after first concluding that the methodology for determining the taxable profits of Belgian group entities under that scheme departed from the arm's length principle – also established that a derogation would already follow from the fact of not taxing the total profits in the accounts. Indeed, it found that the "exemption departs from the ordinary system of taxation of corporate profits under the Belgian corporate income tax system, according to which corporate entities resident [...] are taxed on their total profit, i.e. their profit actually recorded, not on a hypothetical level of profit arrived at by estimating an "adjusted arm's length profit" for the entity in question".[184]

This illustrates the differences between this decision and the tax ruling decisions discussed in this Report, Part 2. In the latter, the key element to establishing selectivity was whether the price and other conditions established for the intragroup transaction corresponded to the price and other conditions that would have been agreed by independent undertakings negotiating under comparable circumstances at arm's length. By contrast, in the Belgian Excess Profit decision, it is the lack of proportionality of the exemption – because it was applied to a profit without requiring taxation in the other jurisdiction – that determines the existence of a selective advantage. In other words, (the risk of) cross-border double non-taxation – which plays no role in the analysis carried out in the other tax ruling decisions which are discussed under Part 2 becomes the defining element of selectivity in the Belgian Excess Profit decision.

V. CONCLUSION

With this Report, this author tried to set out the analytical framework the Commission employed in its tax ruling decisions. At the same time, by explaining those decisions, the Report illustrates how the Commission tackled some of the most common tax planning strategies of multinationals, restoring competition and an equal level-playing field between all corporate taxpayers in a Member State.

However, it is not the Commission's aim to engage in fiscal policy through applying State aid rules. As explained before, the Commission's action under State aid rules should be seen as complementing the legislative action in the field

[183] See in this regard, Opinion of Advocate General Bobek in *Hornbach-Baumarkt* AG v Finanzamt Landau, Case 382/16, ECLI:EU:C:2017:974, paragraph 61. In the same sense see R. Lyal, Transfer Pricing Rules and State aid, 38 Fordham Int'l L.J. (2015), in particular the observations on pp. 1033 to 1035.

[184] Belgian Excess Profit decision, recital (133).

of direct taxation and the OECD's work on Base Erosion and Profit Shifting in the field of international taxation. The Commission decisions take a prominent role but this should not distract from the fact that each decision is taken on the basis of a careful analysis of the factual and legal circumstances and on a sound legal basis formed by the case law of the Court of Justice.

NATIONAL REPORTS



AUSTRIA

Mag. Martin Schwaiger*
Dr. Ina Kerschner

Teil I

Frage 1
In Österreich existieren im Wesentlichen die folgenden drei Möglichkeiten, um in Steuerangelegenheiten im Voraus Rechtssicherheit zu erhalten:

1. Auskunftsbescheide iSd § 118 Bundesabgabenordnung (BAO)
2. Treu und Glauben Auskünfte
3. Advance Pricing Agreements im Rahmen eines Verständigungsverfahrens auf Basis des jeweiligen Doppelbesteuerungsabkommens

Für diese drei Instrumente bestehen unterschiedliche Anforderungen. Dabei sind Auskunftsbescheide insofern hervorzuheben, als sie aufgrund ihrer Rechtsform dem Steuerpflichtigen das größtmögliche Schutzniveau bieten.[1] Auf Treu und Glauben Auskünfte und Advance Pricing Agreements wird in der Folge nur überblicksmäßig eingegangen.

1. Auskunftsbescheide iSd § 118 BAO

Bindungswirkung des Auskunftsbescheids
Kernelement des Auskunftsbescheids liegt in der abgabenrechtlichen Beurteilung eines im Zeitpunkt der Antragstellung noch nicht verwirklichten

* Kontakt Email: martin.schwaiger@bmf.gv.at Tel: 0043 664 8542626

[1] Die Ausführungen basieren im Wesentlichen auf folgenden Quellen: § 118 BAO, Richtlinien zu Advance Ruling (BMF-010103/0035-VI/2011); Österreichische Verrechnungspreisrichtlinien 2010 (BMF-010221/2522-IV/4/2010); OECD Verrechnungspreisleitlinien 2010; Erlass über Auskünfte zu sachverhaltsbezogenen Anfragen (BMF-010106/0030-IV/2/2012).

Sachverhalts durch das zuständige Finanzamt. Gemäß § 118 Abs. 7 BAO wird die im Auskunftsbescheid vorgenommene abgabenrechtliche Beurteilung der Erhebung der Abgaben zugrunde gelegt. Dadurch wird der Auskunftsbescheid zur *Grundlage eines Abgabenbescheids* erhoben.

Zur Einhaltung der im Auskunftsbescheid vorgenommenen abgabenrechtlichen Beurteilung verpflichtet sich dabei zunächst das Finanzamt, das den Auskunftsbescheid erlassen hat. Aufgrund seiner Rechtsnatur entfaltet der Auskunftsbescheid allerdings *normative Wirkung*. Daher entfaltet der Auskunftsbescheid darüber hinaus Rechtswirkungen auch *gegenüber Gerichten* und *anderen Verwaltungsbehörden*.

Sachlicher Anwendungsbereich
Gegenstand von Auskunftsbescheiden sind nach § 118 Abs. 2 BAO Rechtsfragen im Zusammenhang mit

- Umgründungen,
- Unternehmensgruppen und
- Verrechnungspreisen.

Der Begriff der „*Umgründungen*" ist im Sinn des Umgründungssteuergesetzes zu verstehen. „*Unternehmensgruppen*" sind solche nach § 9 Körperschaftsteuergesetz 1988 (KStG). Mit „*Verrechnungspreisen*" sind internationale Verrechnungspreise gemeint. Als Fragen zu Verrechnungspreisen kommen insbesondere solche hinsichtlich der Methodenwahl und der Methodenanwendung in Betracht (zB bei der Verwendung von Datenbankstudien zur Dokumentation der Verrechnungspreisgestaltung).

Antragsbefugnis
Da es sich bei Auskunftsbescheiden iSd § 118 BAO um antragsgebundene Verwaltungsakte handelt, ist ein entsprechender Antrag an das zuständige Finanzamt, erforderlich, um von diesem einen Auskunftsbescheid zu einem bestimmten, noch nicht verwirklichten Sachverhalt zu erhalten.

Antragsbefugt sind gemäß § 118 Abs. 3 BAO:

- *Abgabepflichtige* (§ 77 BAO), somit natürliche und juristische Personen (zB AG, GmbH, Verein, Stiftung), die nach Abgabenvorschriften als Abgabenschuldner in Betracht kommen;
- *Personenvereinigungen* (Personengemeinschaften) ohne eigene Rechtspersönlichkeit (zB OG, KG) für Feststellungen (zB Feststellungen der Einkünfte gemäß § 188 BAO),
- Personen, die ein *eigenes berechtigtes Interesse* an der Zusage haben, wenn der dem Antrag zugrunde liegende Sachverhalt durch eine im Zeitpunkt der

Antragstellung noch nicht existente juristische Person oder Personenvereinigung (Personengemeinschaft) verwirklicht werden soll (zB Gründer einer geplanten Gesellschaft).

Form und Inhalt des Antrags
Der Antrag auf Erteilung eines Auskunftsbescheids muss gemäß § 118 Abs. 1 BAO *schriftlich* gestellt werden. Die Übermittlung mit Faxgerät oder im Wege von FinanzOnline ist zulässig. Eine mündliche Einbringung ist unzulässig. Nach derzeitiger Rechtslage ist weiters die Einbringung mit E-Mail nicht gestattet und daher unwirksam.

Nach § 118 Abs. 4 BAO hat der Antrag auf Erteilung eines Auskunftsbescheids folgende Angaben zu enthalten:

- eine umfassende Darstellung des noch nicht verwirklichten Sachverhalts,
- die Darlegung des besonderen Interesses des Antragstellers,
- die Darlegung des Rechtsproblems,
- die Formulierung konkreter Rechtsfragen,
- die Darlegung einer eingehend begründeten Rechtsansicht zu den formulierten Rechtsfragen,
- die für die Höhe des Verwaltungskostenbeitrags maßgebenden Angaben (zB Umsatzerlöse, Konzernmitgliedschaft).

Die umfassende *Darstellung des Sachverhalts* ist insbesondere in Hinblick darauf wichtig, dass die Bindungswirkung des Auskunftsbescheids nur unter der Voraussetzung der Sachverhaltsidentität gilt, also der dem Auskunftsbescheid zugrunde gelegte Sachverhalt mit dem tatsächlich verwirklichten Sachverhalt im Wesentlichen übereinstimmt. Gegenstand eines Antrags kann nur ein Sachverhalt sein. Hingegen sind mehrere Rechtsfragen, die einen Sachverhalt betreffen möglich. Die abgabenrechtliche Beurteilung kann zudem mehrere Abgaben betreffen. Enthält der Antrag in Wahrheit zwei Sachverhalte, so handelt es sich um zwei Anträge.

Bei der Frage, wann ein Sachverhalt verwirklicht ist, ist darauf abzustellen, in wiefern hinsichtlich eines maßgeblichen Tatbestands alle Merkmale erfüllt sind.[2] Im Übrigen ist ein Antrag auf Erteilung eines Auskunftsbescheids nicht zurückzuweisen, weil der im Zeitpunkt der Antragstellung noch nicht verwirklichte Sachverhalt zwischen der Antragstellung und der Bearbeitung des Antrags durch die Finanzverwaltung bereits verwirklicht wurde.

Weiters muss das *besondere Interesse* des Antragstellers „*in Hinblick auf die erheblichen abgabenrechtlichen Auswirkungen*" bestehen (zufolge § 118 Abs. 1 BAO). Ein

[2] Vgl. in diese Richtung etwa VwGH 17.8.1998, 97/17/0105.

solches Interesse wird bei Rechtsfragen im Zusammenhang mit Umgründungen, Unternehmensgruppen und Verrechnungspreisen grundsätzlich anzunehmen sein. In diesen Bereichen sind nämlich die abgabenrechtlichen Auswirkungen stets als erheblich anzuerkennen. Eine Quantifizierung der potentiellen Höhe vom Inhalt des Auskunftsbescheids abhängiger Abgaben ist daher nicht erforderlich.

Ein besonderes Interesse im Sinn des § 118 Abs. 4 lit. b BAO kann auch dann vorliegen, wenn die Rechtsfrage in Erlässen des BMF (zB in den Körperschaftsteuerrichtlinien 2001, Umgründungssteuerrichtlinien 2002) behandelt ist, da dort vertretene Rechtsansichten keine Bindungswirkung für die Gerichte entfalten. Ein besonderes Interesse kann ebenso vorliegen, wenn die Rechtsfrage vorweg schon in einer Treu und Glauben Auskunft des Finanzamts beantwortet wurde. Daher besteht in solchen Fällen die Möglichkeit, (zusätzliche) Rechtssicherheit (mit bescheidmäßiger Bindungswirkung) in Form eines Auskunftsbescheids zu erlangen. Selbst die rechtliche Beurteilung einer möglicherweise als Missbrauch (iSd § 22 BAO) ansehbaren Gestaltung steht dem Interesse des Antragstellers und somit einem Auskunftsbescheid nicht entgegen.

Hingegen würde ein besonderes Interesse etwa nicht vorliegen, wenn ein Student für seine Dissertation die Lösung von Rechtsfragen begehrt. So hat im Allgemeinen eine dritte Person kein besonderes Interesse iSd § 118 Abs. 4 lit. b BAO an einer Auskunftserteilung hinsichtlich der Besteuerung eines anderen Steuerpflichtigen. Eine Ausnahme von diesem Grundsatz besteht, wenn ein Antrag durch eine Person iSd § 118 Abs 3 lit c BAO gestellt wird (zB Gründer einer geplanten Gesellschaft).

Im Rahmen der *Darlegung des Rechtsproblems* hat der Antragsteller darlegen, welche Zweifel Anlass für den Antrag bilden. So könnte etwa aufzuzeigen sein, dass das Gesetz und die dazu ergangene Rechtsprechung nicht eindeutig sind oder Widersprüche zwischen der Rechtsprechung und den Erlässen des BMF bestehen.

Die *Formulierung konkreter Rechtsfragen* ist insofern von zentraler Bedeutung, als die Abgabenbehörde nur dazu verpflichtet ist, die gestellten Fragen zu beantworten.

Für Zwecke der Darlegung einer eingehend *begründeten Rechtsansicht* zu den formulierten Rechtsfragen hat eine Analyse anhand bestehender Judikatur, Erlässen des BMF sowie Auffassungen aus dem Schrifttum zu erfolgen.

Zuständige Behörde

Für Auskunftsbescheide ist nach § 118 Abs. 5 BAO zuständig:

- das für die betreffende Abgabe oder Feststellung *zuständige Finanzamt*;
- subsidiär jenes Finanzamt, das bei Verwirklichung des dem Antrag zugrunde gelegten Sachverhalts *voraussichtlich zuständig wäre*,

- wären *mehrere Finanzämter* zur Beurteilung des Sachverhalts zuständig, so richtet sich die Zuständigkeit danach, welches dieser Finanzämter als *erstes Kenntnis* vom Antrag erlangt.

Anders als bei Treu und Glauben Auskünften kann es bei einem Auskunftsbescheid wegen Verletzung der Entscheidungspflicht durch Säumnisbeschwerde iSd § 284 BAO zu einem *Übergang der Zuständigkeit an das Bundesfinanzgericht* kommen.

Materielle Prüfung des Antrags
Ergibt die formelle Prüfung, dass der Antrag auf Erteilung eines Auskunftsbescheids für eine materielle Prüfung geeignet ist oder wurde einem erteilten Mängelbehebungsauftrag entsprochen und der Antrag „saniert", folgt darauf die materielle Prüfung durch die zuständige Dienststelle innerhalb der Finanzverwaltung – somit dem *Finanzamt bzw. die Großbetriebsprüfung* – mit dem Ergebnis, dass ein Auskunftsbescheid erlassen wird.

Die Erlassung des Auskunftsbescheids liegt nicht im Ermessen der Abgabenbehörde. Sofern also die maßgeblichen Voraussetzungen seitens des Steuerpflichtigen erfüllt sind, besteht für diesen ein *Rechtsanspruch auf Erteilung* eines Auskunftsbescheids, der allenfalls auch im Wege einer Säumnisbeschwerde iSd § 284 BAO durchgesetzt werden kann. Der Auskunftsbescheid kann den zu beurteilenden Sachverhalt auch abweichend von der im Antrag dargelegten Rechtsansicht des Antragstellers beurteilen. Dies ist keine teilweise Abweisung des Antrags. So begehrt der Antrag die abgabenrechtliche Beurteilung des dargelegten Sachverhalts, nicht jedoch die Bestätigung der im Antrag dargelegten Rechtsansicht.

Inhalt des Auskunftsbescheids
Der Auskunftsbescheid hat nach § 118 Abs. 6 lit. b, d und e BAO in seinem Spruch zu enthalten:

- die *abgabenrechtliche Beurteilung*,
- die Bezeichnung der *Abgaben oder der Feststellungen* (insbesondere Feststellung von Einkünften nach § 188 BAO), für die der Bescheid wirken soll,
- die Bezeichnung der *Zeiträume*, für die der Bescheid wirken soll,
- die Konkretisierung der *Berichtspflicht* (insbesondere, ob und wann der dem Bescheid zugrunde gelegte Sachverhalt verwirklicht wurde und über Abweichungen von diesem Sachverhalt).

Weiters hat der Auskunftsbescheid nach § 118 Abs. 6 lit. a und c BAO in seiner Begründung zu enthalten:

- die Darstellung des der abgabenrechtlichen Beurteilung zugrunde gelegten *Sachverhalts*,
- die dem Bescheid zugrunde gelegten *Abgabenvorschriften*.

Rechtsschutz und Grenzen der Bindungswirkung
Gemäß § 118 Abs. 8 erster Satz BAO *erlischt die Bindungswirkung* des Auskunftsbescheids insoweit, als sich in Folge der Aufhebung oder Änderung der dem Auskunftsbescheid zugrunde gelegten *Abgabenvorschriften* die abgabenrechtliche Beurteilung *ändert*. So ist ein Auskunftsbescheid nicht geeignet, gegen Risiken zu schützen, die von einer Änderung der Gesetzeslage ausgehen. Die Bindungswirkung des Auskunftsbescheids erlischt allerdings nicht durch eine Änderung der Rechtsprechung oder von Erlässen.

Ferner entfaltet gemäß § 118 Abs. 8 zweiter Satz BAO ein Auskunftsbescheid seine Bindungswirkung *nicht,* wenn er sich *zum Nachteil der Partei* als nicht richtig erweist. Dennoch kann ein Steuerpflichtiger versuchen, eine im Vergleich zum Auskunftsbescheid vorteilhaftere abgabenrechtliche Beurteilung bereits auf Ebene des Auskunftsbescheids – und nicht erst auf Ebene des Abgabenbescheids – durchzusetzen. Hierfür steht dem Auskunftswerber die *Bescheidbeschwerde* offen. Dabei beträgt die Beschwerdefrist gemäß § 245 Abs. 1 BAO einen Monat. Solche Beschwerdeerledigungen wirken ex tunc.

Gemäß § 118 Abs. 9 BAO kann ein Auskunftsbescheid von Amts wegen oder auf Antrag der Partei *aufgehoben oder abgeändert* werden, wenn sich der *Spruch des Bescheids als nicht richtig erweist*. Nach Ansicht des BMF sind zufolge § 118 Abs. 9 BAO die in der BAO (im 7. Abschnitt) geregelten sonstigen Maßnahmen (zB die Wiederaufnahme des Verfahrens) auf Auskunftsbescheide nicht anwendbar. Demnach sollen vielmehr nur die spezielleren Bestimmungen des § 118 Abs. 9 BAO gelten. Entscheidend für eine Aufhebung oder Abänderung eines Auskunftsbescheids ist die *objektive Rechtswidrigkeit*. Geänderte Erlässe des BMF sollten dabei keine Korrektur iSd § 118 Abs. 9 BAO auszulösen vermögen. Maßnahmen iSd § 118 Abs. 9 BAO wirken grundsätzlich ex nunc. Nur *ausnahmsweise* dürfen sie *rückwirkend* erfolgen. Eine solche Rückwirkung ist nach § 118 Abs. 9 zweiter Satz BAO lediglich zulässig:

- auf Antrag der Partei,
- bei unter § 293 BAO fallenden Unrichtigkeiten (Schreibfehler, Rechenfehler uä),
- bei offensichtlicher Unrichtigkeit,
- wenn der Auskunftsbescheid durch eine strafbare Tat (zB Bestechung, Nötigung) herbeigeführt worden ist.

Maßnahmen iSd § 118 Abs. 9 BAO liegen im *Ermessen* der Abgabenbehörde. Ob und gegebenenfalls inwieweit die Maßnahme rückwirkt, ist ebenfalls eine Ermessensentscheidung der Abgabenbehörde.

Die *offensichtliche Unrichtigkeit* ist an Hand des Gesetzes und der dazu entwickelten Rechtsprechung zu beurteilen. Eine im Zeitpunkt der Bescheiderlassung nicht offensichtlich unrichtige Rechtsansicht wird durch Judikatur oder Änderungen höchstgerichtlicher Rechtsprechung, die nach Erlassung des Auskunftsbescheides erstmalig ergehen, keinesfalls rückwirkend offensichtlich unrichtig. Ein rückwirkender Widerruf des Auskunftsbescheids kommt daher diesfalls nicht in Betracht.

Verwaltungskostenbeitrag

Gemäß § 118 Abs. 10 BAO ist die Bearbeitung des Antrags auf Erteilung eines Auskunftsbescheids *kostenpflichtig*. Für einen Antrag, der eine oder mehrere Rechtsfragen zu einem Sachverhalt beinhaltet, ist der Verwaltungskostenbeitrag einmalig zu entrichten. Dabei sind *mehrere Rechtsfragen zu einem Sachverhalt* im Antrag zulässig. Sind jedoch in einem Antrag in Wahrheit zwei Sachverhalte enthalten, so handelt es sich um zwei Anträge und der Verwaltungskostenbeitrag fällt daher auch zweimal an.

Der Verwaltungskostenbeitrag ist in unterschiedlicher Höhe ausgestaltet. Die Kostenpflicht des Auskunftsbescheids orientiert sich gemäß § 118 Abs. 10 BAO primär an den *Umsatzerlösen* des Antragstellers. Daneben ist eine *Konzernmitgliedschaft* ausschlaggebend für die Höhe des Verwaltungskostenbeitrags. Konkret beträgt der Verwaltungskostenbeitrag grundsätzlich 1.500 Euro und steigt schrittmäßig an – wie in der folgenden Tabelle veranschaulicht.

1.500 Euro	grundsätzlich
3.000 Euro	wenn die Umsatzerlöse des Antragstellers in den zwölf Monaten vor dem letzten Abschlussstichtag den Betrag von 400.000 Euro überschreiten
5.000 Euro	wenn die Umsatzerlöse des Antragstellers in den zwölf Monaten vor dem letzten Abschlussstichtag den Betrag von 700.000 Euro überschreiten
10.000 Euro	wenn die Umsatzerlöse des Antragstellers in den zwölf Monaten vor dem letzten Abschlussstichtag den Betrag nach § 221 Abs. 1 Z 2 Unternehmensgesetzbuch (UGB) (somit 9,68 Mio. Euro) überschreiten
20.000 Euro	wenn die Umsatzerlöse des Antragstellers in den zwölf Monaten vor dem letzten Abschlussstichtag den Betrag nach § 221 Abs. 2 Z 2 UGB (somit 38,5 Mio. Euro) überschreiten oder wenn der Antragsteller oder einer von mehreren Antragstellern Teil eines Konzerns im Sinn des UGB ist, für den eine Verpflichtung zur Aufstellung eines Konzernabschlusses gemäß § 244 iVm § 246 UGB besteht

Gemäß § 118 Abs. 11 BAO *ermäßigt* sich der Verwaltungskostenbeitrag auf den Betrag von 500 Euro, wenn der Antrag zurückgewiesen, als zurückgenommen erklärt oder vor Beginn der Bearbeitung zurückgenommen wird.

Wenn *mehrere Antragsteller* denselben Antrag auf Erteilung eines Auskunftsbescheids stellen, fällt der Verwaltungskostenbeitrag nur einmal an. Allerdings ist für die Höhe des Verwaltungskostenbeitrags die Summe ihrer Umsatzerlöse maßgebend. Auch wenn der Antragsteller nicht das UGB anzuwenden hat, richtet sich die Höhe des Verwaltungskostenbeitrages nach seinen Umsatzerlösen. Mehrere Antragsteller sind Gesamtschuldner im Sinn des § 6 BAO. Es liegt daher im Ermessen der Abgabenbehörde, ob der gesamte Beitrag einem oder mehreren Gesamtschuldnern vorgeschrieben wird oder, ob eine anteilige Festsetzung erfolgt.

Der Verwaltungskostenbeitrag ist mit *Abgabenbescheid* festzusetzen und isoliert rechtsmittelfähig. Zwar entsteht gemäß § 118 Abs. 10 zweiter Satz BAO der Abgabenanspruch bereits mit Einlangen des Antrags auf Erteilung eines Auskunftsbescheids. Dieser Bescheid zur Festsetzung des Verwaltungskostenbeitrags wird in Praxis allerdings erst anlässlich der Zustellung des Auskunftsbescheids zu erlassen sein. Der Verwaltungskostenbeitrag ist nach § 210 Abs. 1 BAO einen Monat nach Zustellung des ihn festsetzenden Bescheides fällig. Der Verwaltungskostenbeitrag ist ein Nebenanspruch iSd § 3 BAO. Betrifft die Auskunft wiederkehrend zu erhebende Abgaben, so ist der Beitrag daher auf dem gemäß § 213 Abs. 1 BAO geführten Abgabenkonto zu verbuchen.

2. Treu und Glauben Auskünfte

Neben dem Auskunftsbescheid existiert als zweite Möglichkeit, um durch die Steuerbehörden im Voraus Rechtssicherheit zu erhalten, die *formlose Auskunft*, welche aufgrund des *Grundsatzes von Treu und Glauben von Bedeutung* sein kann (sog. Treu und Glauben Auskunft). Treu und Glauben Auskünfte ergehen grundsätzlich zwar in schriftlicher Form, jedoch nicht als Bescheid. Auskünfte, die keine Bescheide sind, entfalten auch nicht die Bescheiden eigentümliche Bindungswirkung. Folglich vermögen Treu und Glauben Auskünfte nicht das gleiche Schutzniveau zu bieten, wie Auskunftsbescheide. Im Allgemeinen kann nämlich der Grundsatz von Treu und Glauben *keinen Erfüllungsanspruch* begründen. Vielmehr ist die Vertrauenslage durch einen Anspruch auf *Ersatz des Vertrauensschadens* herzustellen.

Dennoch kommt Treu und Glauben Auskünften *große praktische Bedeutung* zu. Dies liegt nicht zuletzt daran, dass sie – anders als Auskunftsbescheide – hinsichtlich ihres sachlichen Anwendungsbereichs *nicht auf bestimmte Themengebiete beschränkt* sind. So wurde mit dem *Auskunftspflichtgesetz* eine gesetzliche Grundlage für die Auskunftserteilung auf breiter Ebene geschaffen. Das Auskunfts-

pflichtgesetz (APG) ist lex generalis im Verhältnis zu *speziellen Auskunftspflichten in anderen Gesetzen*, die ebenso eine Grundlage für die Erteilung von Treu und Glauben Auskünften bieten können (z.B. Lohnsteuerauskunft iSd § 90 Einkommensteuergesetzes (EStG)).

Gemäß § 1 Abs. 1 APG haben die Organe des Bundes sowie die Organe der durch die Bundesgesetzgebung zu regelnden Selbstverwaltung über Angelegenheiten ihres Wirkungsbereichs Auskünfte zu erteilen. Dabei kann gemäß § 2 APG ein Auskunftsbegehren „*jedermann*" anbringen. Auskünfte nach dem APG sind allerdings nur in einem solchen Umfang zu erteilen, der die Besorgung der übrigen Aufgaben der *Verwaltung nicht wesentlich beeinträchtigt*. Es besteht ferner *keine* Verpflichtung zu *umfangreichen Ausarbeitungen* (zB durch Auskünfte betreffend Feststellung von Unternehmenswerten) oder zur Erstellung von (Rechts-) Gutachten. Darüber hinaus besteht nach Ansicht des *Verwaltungsgerichtshofs* auf Grundlage des Auskunftspflichtgesetzes *keine Verpflichtung* zur *rechtlichen Beurteilung eines erst zu verwirklichenden Sachverhalts*, da die Äußerung einer derartigen Rechtsmeinung, also in Wahrheit die Erstattung eines Rechtsgutachtens, nicht Gegenstand des Auskunftsrechts sei (VwGH 15.5.1990, 90/05/0074).

Da das Auskunftspflichtgesetz (wie auch spezielle Auskunftspflichten zu formlosen Auskünfte, die in anderen Gesetzen enthalten sind) keine gesetzliche Regelung dafür enthält, Auskünfte in Bescheidform zu erlassen, kann auch keine Säumnisbeschwerde iSd § 284 BAO an das Bundesfinanzgericht gestellt werden, wenn das Finanzamt bei der Erledigung der Auskunftserteilung säumig wird. Die Pflicht zur Auskunftserteilung kann somit nicht übergehen und letztlich kann die *Erteilung der Treu und Auskunft* nach dem Auskunftspflichtgesetz durch den Steuerpflichtigen *nicht erzwungen* werden.

Die Bindungswirkung nach dem Grundsatz von Treu und Glauben setzt insbesondere Folgendes voraus:

- Die Auskunft wird von der *zuständigen Abgabenbehörde* erteilt.
- Die Auskunft ist *nicht offensichtlich unrichtig*.
- Die Unrichtigkeit der Auskunft war für die Partei *nicht leicht erkennbar*.
- Die Partei hat im Vertrauen auf die Richtigkeit der Auskunft *Dispositionen getroffen*, die sie bei Kenntnis der Unrichtigkeit der Auskunft nicht oder anders getroffen hätte.
- Es käme zu einem Nachteil („*Vertrauensschaden*") der Partei, wenn die Besteuerung entgegen der Auskunft vorgenommen würde.

Bei Rechtsauskünften, denen (geplante) künftige, vom Auskunftswerber im Auskunftsersuchen dargestellte Sachverhalte zugrunde gelegt wurden, ist der Grundsatz von Treu und Glauben *nicht* anwendbar, wenn der *tatsächlich verwirklichte Sachverhalt* in wesentlichen Punkten von dem der Auskunft zugrunde

gelegten Sachverhalt *abweicht* oder wenn für die rechtliche Beurteilung wesentliche *Sachverhaltselemente verschwiegen* worden sind.

3. Advance Pricing Agreements im Rahmen eines Verständigungsverfahrens auf Basis des jeweiligen Doppelbesteuerungsabkommens

Die dritte Möglichkeit, eine Vorabauskunft einer Steuerbehörde zu erhalten, ist ein Vorabverständigungsverfahren (Advance Pricing Agreement – APA). Dabei einigen sich idR die DBA-Partnerstaaten auf die steuerliche Behandlung eines Sachverhalts, nachdem ein Steuerpflichtiger aufgrund einer drohenden Doppelbesteuerung ein *Verständigungsverfahren* angeregt hat.

In der Praxis kann der Steuerpflichtige davon ausgehen, dass sich die lokal zuständige *Finanzbehörde* an das im Rahmen einer Verständigungsvereinbarung abgeschlossene APA durch das BMF in Österreich gebunden fühlt und dieses *Ergebnis entsprechend umsetzen* wird. Dennoch könnte für den betroffenen Steuerpflichtigen das Bedürfnis bestehen, sich die Verständigungsvereinbarung im Rahmen einer Vorabauskunft durch das lokal zuständige Finanzamt „bestätigen" zu lassen. Je nach Rechtsform einer solchen Erledigung würde dies dem Steuerpflichtigen einen Vertrauensschutz nach dem Grundsatz von Treu und Glauben oder aber den Rechtsschutz in Form einer bescheißmäßigen Auskunft (§ 118 BAO) gewähren.

Frage 2

Die Bindungswirkung des *Auskunftsbescheids* gilt nur unter der Voraussetzung, dass *Sachverhaltsidentität* gegeben ist, also der dem Auskunftsbescheid zugrunde gelegte Sachverhalt mit dem tatsächlich verwirklichten Sachverhalt im Wesentlichen übereinstimmt (vgl. § 118 Abs. 7 BAO, wonach der Rechtsanspruch auf Zugrundelegung der im Auskunftsbescheid vorgenommenen abgabenrechtlichen Beurteilung im Rahmen der Erhebung der Abgaben nur dann besteht, wenn der verwirklichte Sachverhalt von jenem, der dem Auskunftsbescheid zugrunde gelegt worden ist, nicht oder nur unwesentlich abweicht). Ob diese Sachverhaltsidentität gegeben ist, wird regelmäßig im Zuge einer später folgenden Außenprüfung des Abgabepflichtigen durch die Finanzverwaltung festgestellt. Es handelt sich also um eine *ex-post Überprüfung*. Ein Sachverhalt, der einem Auskunftsbescheid iSd § 118 BAO zugrunde zu legen ist, darf nämlich gemäß § 118 Abs. 1 iVm Abs. 4 lit a BAO – zumindest im *Zeitpunkt der Antragstellung – noch gar nicht verwirklicht* sein. Daher ist der jeweilige Sachverhalt einer Überprüfung im Zeitpunkt der Antragstellung naturgemäß nicht zugänglich. Eine *Außenprüfung* richtet sich nach den einschlägigen Bestimmungen der Bundesabgabenordnung (vgl. § 147 ff. BAO)

Auch im Falle formloser Auskünfte, die eine Bindungswirkung nach dem Grundsatz von *Treu und Glauben* auslösen sollen, ist eine Grundvoraussetzung für

den Vertrauensschutz die *Sachverhaltsidentität*. Allerdings enthät das APG, das die gesetzliche Grundlage für Treu und Glauben Auskünfte auf allgemeiner Basis enthält, keine Einschränkung auf noch nicht verwirklichte Sachverhalte. Vor diesem Hintergrund ist eine *Ermittlung des Sachverhalts* im Rahmen der Auskunftserteilung durchaus möglich (vgl. zum Ermittlungsverfahren die entsprechenden Bestimmungen im Rahmen der Bundesabgabenordnung unter § 161 ff. BAO).

Frage 3

Grundsätzlich besteht keine Anknüpfung an die steuerliche Behandlung im Ausland.[3] Vielmehr sind *ausländische Einkünfte* bei der Berücksichtigung in Österreich *stets nach österreichischem Steuerrecht* zu ermitteln. Für die Berücksichtigung in Österreich hat daher eine „Umrechnung" vom ausländischen (Steuer)Recht auf das österreichische Steuerrecht stattzufinden. Es obliegt dem Abgabenpflichtigen, dies im Rahmen der ihn bei Auslandssachverhalten treffenden *erhöhten Mitwirkungspflichten* darzutun. Die bloße Vorlage von ausländischen Steuerbescheiden ist nicht ausreichend (vgl. EStR Rz. 191).

Für den Bereich der Verrechnungspreise beinhalten die österreichischen Verrechnungspreisrichtlinien (VPR 2010) eine relevante Fundstelle (Rz. 324): „*Eine von der österreichischen Abgabenbehörde als fremdverhaltenskonform beurteilte ausländische Primärberichtigung kann von Amts wegen als Grundlage für eine österreichische Gegenberichtigung herangezogen werden; eines Verständigungsverfahrens bedarf es hierzu nicht (EAS 2493).*" Dies bedeutet zwar, dass eine solche *Gegenberichtigung* „auf kurzem Weg" von Amts wegen möglich ist, wobei auf die steuerliche Behandlung des Geschäftsvorgangs im Ausland Rücksicht genommen wird. Dies steht allerdings unter dem Vorbehalt, dass das Ergebnis der Behandlung im Ausland auch *aus österreichischer Sicht fremdüblich* ist. Ferner hat der Abgabepflichtige, der eine österreichische Gegenberichtigung anstrebt, die entsprechenden Nachweise über die sachliche Richtigkeit der ausländischen Korrekturen vorzulegen. Eine *ungeprüfte* und daher automatische Gegenberichtigung zu ausländischen Gewinnberichtigungen ist allerdings *nicht zulässig* (vgl. VPR 2010 Rz. 324).

Frage 4

Hinsichtlich der Bindungswirkung des Auskunftsbescheides bzw einer Treu und Glauben Auskunft wird auf die Antwort zu Frage 1 verwiesen.

Frage 5

Für einzelne Bereiche existieren Regelungen zur Verhinderung einer doppelten Nichtbesteuerung, die im Folgenden beispielhaft erwähnt werden:

[3] Für den Bereich der Vorabauskünfte nicht relevante Ausnahmen wie zB § 10 Abs. 7 KStG werden hier nicht berücksichtigt.

- § 10 Abs. 4 KStG: Abweichend von Abs. 1 Z 7 KStG (*Beteiligungsertragsbefreiung*) sind Gewinnanteile sowie Veräußerungsgewinne, Veräußerungsverluste und sonstige Wertänderungen aus *internationalen Schachtelbeteiligungen* nicht von der Körperschaftsteuer befreit, wenn Gründe vorliegen, wegen derer der Bundesminister für Finanzen dies zur Verhinderung von *Steuerhinterziehungen und Missbräuchen* (§ 22 BAO) durch Verordnung anordnet. Das Vorliegen derartiger Gründe kann insbesondere dann angenommen werden, wenn der Unternehmensschwerpunkt der ausländischen Körperschaft unmittelbar oder mittelbar darin besteht, Einnahmen aus Zinsen, aus der Überlassung beweglicher körperlicher oder unkörperlicher Wirtschaftsgüter und aus der Veräußerung von Beteiligungen zu erzielen (*passiver Untermehmensschwerpunkt*), *und* das Einkommen der ausländischen Körperschaft hinsichtlich der Ermittlung der Bemessungsgrundlage bzw. hinsichtlich der Steuersätze *keiner der österreichischen Körperschaftsteuer vergleichbaren ausländischen Steuer* unterliegt.
- § 10 Abs. 5 KStG: Abweichend von Abs. 1 Z 5 und 6 KStG (*Beteiligungsertragsbefreiung*) sind Gewinnanteile nicht von der Körperschaftsteuer befreit, wenn eine der folgenden Voraussetzungen zutrifft:
  – Die ausländische Körperschaft unterliegt im Ausland tatsächlich direkt oder indirekt *keiner* der österreichischen Körperschaftsteuer *vergleichbaren Steuer.*
  – Die Gewinne der ausländischen Körperschaft unterliegen im Ausland einer der österreichischen Körperschaftsteuer vergleichbaren Steuer, deren anzuwendender *Steuersatz* um mehr als 10 Prozentpunkte niedriger als die österreichische Körperschaftsteuer gemäß § 22 Abs. 1 KStG ist (somit im Falle eines Besteuerungsniveaus, das *15% unterschreitet*).
  – Die ausländische Körperschaft ist im Ausland Gegenstand einer umfassenden persönlichen oder sachlichen *Befreiung.*
- § 10 Abs. 7 KStG: Von der Körperschaftsteuer nicht befreit sind Gewinnanteile, soweit sie bei der *ausländischen Körperschaft abzugsfähig* sind.
- § 12 Abs. 1 Z 10 KStG: *Aufwendungen für Zinsen oder Lizenzgebühren* sind unter folgenden Voraussetzungen *nicht abzugsfähig*:
  – Der Empfänger der Zinsen oder Lizenzgebühren ist eine Körperschaft.
  – Die empfangende Körperschaft ist unmittelbar oder mittelbar *konzernzugehörig* oder steht unmittelbar oder mittelbar unter dem beherrschenden Einfluss desselben Gesellschafters.
  – Die Zinsen oder Lizenzgebühren unterliegen bei der *empfangenden Körperschaft* aufgrund einer persönlichen oder sachlichen Befreiung keiner Besteuerung oder einem Steuersatz von weniger als 10% oder aufgrund

einer auch dafür vorgesehenen Steuerermäßigung einer tatsächlichen Steuerbelastung von weniger als 10% oder aufgrund einer Steuerrückerstattung einer *Steuerbelastung von weniger als 10%*, wobei auch eine Steuerrückerstattung an die Anteilsinhaber zu berücksichtigen ist.

Bei den genannten Bestimmungen wird aber meist nicht auf klassische Doppelnichtbesteuerung bzw. auf „übriggebliebene Gewinne" abgezielt, sondern die Anwendung steuerlicher Begünstigungsvorschriften von einer ausreichenden Besteuerung im Ausland abhängig gemacht. Eine systematische Verhinderung von doppelter Nichtbesteuerung auf allgemeiner gesetzlicher Basis (z.B. in From von *subject-to-tax Klauseln* in allen Doppelbestuerungsabkommen) ist nicht verwirklicht.

Frage 6

Die österreichischen Doppelbesteuerungsabkommen folgen im Wesentlichen dem OECD Musterabkommen, weshalb für Zwecke der Gewinnzuordnung an Betriebstätten die entsprechenden internationalen Grundsätze einschlägig sind (inbs. die *OECD Verrechnungspreisleitlinien*, die Leitlinien des *Authorised OECD Approach* sowie die im Rahmen des *BEPS* Projekts der OECD/G20 erarbeiteten Maßstäbe). Dabei folgt Österreich allerdings dem Art. 7 OECD MA idF des Jahres 2008, der die bloß *eingeschränkte Selbständigkeitsfiktion* einräumt.

Frage 7

Die zentrale Norm im Bereich der Verrechnungspreise ist *§ 6 Z 6 lit. a EStG*, die wie folgt lautet: „*Werden Wirtschaftsgüter eines im Inland gelegenen Betriebes (Betriebsstätte) ins Ausland in einen anderen Betrieb (Betriebsstätte) überführt oder werden im Inland gelegene Betriebe (Betriebsstätten) ins Ausland verlegt, sind die ins Ausland überführten Wirtschaftsgüter mit den* Werten *anzusetzen, die im Falle einer Lieferung an einen vom Steuerpflichtigen* völlig unabhängigen Betrieb *angesetzt worden wären, wenn*

- *der ausländische Betrieb demselben Steuerpflichtigen gehört,*
- *der Steuerpflichtige Mitunternehmer des ausländischen und/oder des inländischen Betriebes ist,*
- *der Steuerpflichtige an der ausländischen Kapitalgesellschaft oder die ausländische Kapitalgesellschaft am Steuerpflichtigen wesentlich, das ist zu mehr als 25%, beteiligt ist oder*
- *bei beiden Betrieben dieselben Personen die Geschäftsleitung oder die Kontrolle ausüben oder darauf Einfluss haben.*

Dies gilt sinngemäß für sonstige Leistungen."

Zur Auslegung dieser Norm legen die VPR 2010 in Rz. 15 Folgendes fest: „*Die Kongruenz von internationalem und nationalem Fremdvergleichsgrundsatz hat zur Folge, dass die* OECD-VPG *nicht nur ein Auslegungsinstrument für Art. 9 OECD-MA darstellen, sondern gleichzeitig für die Auslegung des Fremdvergleichsgrundsatzes des § 6 Z 6 EStG 1988 von Bedeutung sind (in diesem Sinn auch UFS 14.3.2005, RV/2154-L/02 […]). Die* Deckungsgleiche des internationalen und innerstaatlichen Fremdvergleichsgrundsatzes *im Geltungsbereich des § 6 Z 6 EStG 1988 ist hierbei* dynamisch *zu verstehen, da nur bei einer dynamischen Interpretation internationalen Verrechnungspreiskonflikten wirkungsvoll vorgebeugt werden kann. Es schlagen daher auch die jeweiligen neuen Erkenntnisse über die OECD-Verrechnungspreisgrundsätze auf die Auslegung des § 6 Z 6 EStG 1988 durch*".

In diesem Zusammenhang ist weiters *§ 8 Abs. 2 KStG* von Relevanz: „*Für die Ermittlung des Einkommens ist es ohne Bedeutung, ob das Einkommen im Wege offener oder* verdeckter Ausschüttungen *verteilt oder entnommen oder in anderer Weise verwendet wird*".

Von Bedeutung ist ferner *§ 21 BAO*, der den Grundsatz der *wirtschaftlichen Betrachtungsweise* enthält: „*Für die Beurteilung abgabenrechtlicher Fragen ist in wirtschaftlicher Betrachtungsweise der wahre wirtschaftliche Gehalt und nicht die äußere Erscheinungsform des Sachverhaltes maßgebend*".

Frage 8

Österreich erlaubt sowohl Gewinnanpassungen nach unten als auch nach oben. Hat sich in gezeigt, dass der im Ausland versteuerte Gewinn zu nieder und der in Österreich versteuerte Gewinn zu hoch angesetzt wurde, dann bedarf eine *korrespondierende Gewinnkorrektur* auf österreichischer Seite keiner innerstaatlichen Rechtsgrundlage, weil hier das Doppelbesteuerungsabkommen unmittelbar seine *Sperrwirkung* entfaltet (vgl. VPR 2010 Rz. 12).

Erfordert hingegen der im Doppelbesteuerungsabkommen verankerte internationale Fremdvergleichsgrundsatz eine *Gewinnerhöhung* in Österreich, dann wird das Abkommen als bloße Ermächtigungsvorschrift gesehen, die der Ausfüllung durch innerstaatliches Recht bedarf. Die primäre innerstaatliche Rechtsgrundlage für Gewinnerhöhungen zur Wahrnehmung des Fremdvergleichsgrundsatzes bildet *§ 6 Z 6 EStG 1988* (vgl. VPR 2010 Rz. 13 f.).

Sind die Leistungsbeziehungen im Verhältnis zu *Betriebstätten* fremdverhaltenskonform zu korrigieren, dann bietet die Bewertungsvorschrift des § 6 Z 6 EStG 1988 ebenfalls die maßgebende innerstaatliche Rechtsgrundlage hierfür (vgl. VPR 2010 Rz. 16).

Ergänzend wird auf Rz. 49 der VPR 2010 verwiesen: „*Ergibt sich bei sachgerechter Anwendung einer Methode durch den Steuerpflichtigen eine steuerlich maßgebende Bandbreite von Fremdpreisen, ist grundsätzlich jeder Preis innerhalb der Bandbreite steuer-*

lich anzuerkennen. Eine sachgerechte Methodenanwendung setzt jedoch jedenfalls voraus, dass die Vergleichbarkeitsfaktoren [...] ausreichend beachtet worden sind und eine entsprechende Dokumentation darüber beigebracht wird. Liegt der vom Steuerpflichtigen angesetzte Preis außerhalb der Bandbreite, ist eine Berichtigung auf den Medianwert innerhalb der Bandbreite vorzunehmen (Rz 67)".

Frage 9

Art. 9 ist aus österreichischer Sicht so auszulegen, dass sich daraus für die Vertragsstaaten eines DBA nicht nur die Berechtigung ergibt, fremdverhaltenswidrig ermittelte Gewinne eines verbundenen Unternehmens auf das fremdübliche Maß zu erhöhen, sondern dass daraus für den anderen DBA-Partnerstaat die Verpflichtung resultiert, eine *korrespondierende Gegenberichtigung* vorzunehmen. Daher wird *Art. 9 Abs. 2 OECD-MA* auf österreichischer Seite eine *bloß klarstellende Funktion* zugemessen (VPR 2010 Rz. 5). Eine Gegenberichtigung in Österreich ist somit grundsätzlich möglich. Diese kann von Amts wegen erfolgen[4] oder im Rahmen eines Verständigungsverfahrens (MAP).

Wenn demzufolge im konkreten Fall die österreichischen Steuerbehörden der Ansicht sind, dass

- der Preis von 100 außerhalb einer fremdüblichen Bandbreite liegt und
- der Preis von 120 (im richtigen Bereich) innerhalb einer fremdüblichen Bandbreite liegt,

wird eine Gegenberichtigung in Österreich durchgeführt.

Frage 10

Österreich verfügt über eine *generelle Missbrauchsbestimmung* (GAAR) in Form des *§ 22 BAO*: *„(1) Durch Missbrauch von Formen und Gestaltungsmöglichkeiten des bürgerlichen Rechtes kann die Abgabepflicht nicht umgangen oder gemindert werden. (2) Liegt ein Missbrauch (Abs. 1) vor, so sind die Abgaben so zu erheben, wie sie bei einer den wirtschaftlichen Vorgängen, Tatsachen und Verhältnissen angemessenen rechtlichen Gestaltung zu erheben wären*". § 22 BAO kann ebenso in Verrechnungspreisfällen angewendet werden. Zu verweisen ist in diesem Zusammenhang auch auf die Möglichkeit zur Umqualifizierung laut OECD Verrechnungspreisleitlinien[5] als „quasi-Missbrauchsbestimmung", die als Auslegungshilfe des § 6 Z 6 EStG zur Verfügung stehen (*„Unter besonderen Umständen kann es für eine Steuerverwaltung ausnahmsweise angemessen und legitim sein, die von einem Steuerpflichtigen gewählte Gestaltung von*

[4] Siehe zur *Gegenberichtigung* „auf kurzem Weg" die bereits erfolgten Ausführungen zu Rz. 324 der VPR 2010 auf Seite 13f.

[5] D.2 Anerkennung der tatsächlich getätigten Geschäftsvorfälle.

Geschäftsvorfällen mit einem verbundenen Unternehmen nicht anzuerkennen"). Neben dieser generellen Missbrauchsbestimmung enthält die österreichische Rechtsordnung eine Reihe spezieller Missbrauchsbestimmungen.[6]

Teil II

Frage 11
Für das österreichische Recht ist die Unterscheidung zwischen hoheitlicher und privatwirtschaftlicher Beihilfevergabe von zentraler Bedeutung. Hoheitlich (zB durch Bescheid) gewährte Beihilfen sind grundsätzlich auch in einem *öffentlich-rechtlichen Verfahren* – das zunächst auf die Aufhebung des Hoheitsakts abzielt – zurückzufordern, privatwirtschaftlich (durch Subventionsverträge) gewährte Beihilfen hingegen in einem *zivilgerichtlichen Verfahren* nach bereicherungsrechtlichen Grundsätzen rückabzuwickeln. Es gilt der Grundsatz der Trennung von Justiz und Verwaltung (Art. 94 B-VG), der eine Vermischung des öffentlich-rechtlichen und zivilrechtlichen Rechtswegs allgemein verbietet.[7]

Frage 12
Dazu liegen uns keine Informationen vor.

Frage 13
Österreich hat in der Vergangenheit eine Reihe *bilateraler Investitionsschutzabkommen* abgeschlossen. Der Vertrag über die Arbeitsweise der Europäischen Union (AEUV) schuf per 1. Dezember 2009 eine neue *Unionskompetenz* für Direktinvestitionen. Seither ist es möglich, Investitionsbestimmungen in Unionsabkommen mit Drittstaaten aufzunehmen.

Durch die Möglichkeit, eigenständige EU-Investitionsabkommen abschließen zu können, wurde eine neue Rechtsgrundlage für bestehende und zukünftige bilaterale Investitionsschutzabkommen (BITs) der EU-Mitgliedsstaaten notwendig. Im Dezember 2012 beschlossen das Europäische Parlament und der Rat – nach zweieinhalb Jahren intensiver Verhandlungen – schließlich eine **„***Grandfathering*"*-Verordnung* zur Einführung einer Übergangsregelung für BITs zwischen den Mitgliedsstaaten und Drittländern.[8] Damit können die bisherigen BITs weiter gelten, allerdings abhängig von einer Autorisierung durch die

[6] Vgl bereits die Ausführungen zu § 10 KStG auf Seite 14f.
[7] *Barbist/Halder/Schachl* in Jaeger/*Haslinger*, Beihilferecht Jahrbuch 2012, 561.
[8] VERORDNUNG (EU) Nr. 1219/2012 DES EUROPÄISCHEN PARLAMENTS UND DES RATES vom 12. Dezember 2012 zur Einführung einer Übergangsregelung für bilaterale Investitionsschutzabkommen zwischen den Mitgliedstaaten und Drittländern, Abl. L 3512012, 40.

Europäische Kommission nach einer Diskussion im neueingerichteten Komitee für Investitionsabkommen („Committee for Investment Agreements, CIA"). Österreich hat fristgerecht alle bestehenden bzw. in Verhandlung befindlichen BITs an die Europäische Kommission gemeldet.

Die neue Unionskompetenz erforderte auch eine Regelung zur Zuständigkeit bzw. Parteirolle der EU und der Mitgliedstaaten in Investitions-Streitbeilegungsverfahren sowie der damit verbundenen finanziellen Verantwortlichkeit. Diese Regelung erfolgte in Form der „Finanzhaftungs"-Verordnung, die im August 2014 in Kraft trat.[9]

Derzeit sind österreichische Investitionsschutzabkommen mit 59 Staaten in Kraft; für weitere drei Abkommen, die außer Kraft getreten sind, gelten Übergangsfristen für bereits bestehende Investitionen. Seit 2008 erfolgen alle Verhandlungen auf der Basis eines Mustertextes, der in einem breiten partizipatorischen Prozess unter Einbeziehung des Parlaments, der Sozialpartner und maßgeblicher Experten erarbeitet und von der Bundesregierung vom 30. Jänner 2008 beschlossen wurde.

Rechtlich umstritten sind darunter zwölf „Intra-EU BITs", in welchen der Vertragspartner mittlerweile auch EU-Mitglied ist[10]. Aus österreichischer Sicht ist das Rechtsschutzbedürfnis (nicht nur) österreichischer Investoren, das zum Abschluss der Intra-EU-BITs geführt hat, nach wie vor gegeben und deren ersatzlose Beendigung würde eine Verschlechterung des Investitionsklimas in der EU und eine potenzielle Benachteiligung europäischer Investoren gegenüber solchen aus Drittstaaten bedeuten. Österreich setzt sich daher, gemeinsam mit anderen Mitgliedsstaaten, für die Entwicklung eines neuen, europaweiten und Acquis-konformen sowie modernen Erfordernissen entsprechenden Investitionsschutzmechanismus ein, der vorrangig versucht, auftretende Probleme einvernehmlich zu lösen, wenn das nicht möglich ist, aber auch die Möglichkeit einer verbindlichen und durchsetzbaren Entscheidung durch eine unabhängige Instanz vorsieht.

Im April 2016 erstellte Österreich gemeinsam mit Deutschland, Finnland, Frankreich und den Niederlanden dazu auf Expertenebene ein Diskussionspapier („non-paper") mit einigen Optionen für die Ausgestaltung eines derartigen europaweiten Investitionsschutzmechanismus. Möglich erscheinen insbesondere eine Erweiterung der Zuständigkeit des Gerichts der EU auf Investitionssachen,

[9] VERORDNUNG (EU) Nr. 912/2014 DES EUROPÄISCHEN PARLAMENTS UND DES RATES vom 23. Juli 2014 zur Schaffung der Rahmenbedingungen für die Regelung der finanziellen Verantwortung bei Investor-Staat-Streitigkeiten vor Schiedsgerichten, welche durch internationale Übereinkünfte eingesetzt wurden, bei denen die Europäische Union Vertragspartei ist, Abl. L 257/2014, 121.

[10] Siehe dazu die Pressemitteilung der Europäischen Kommission, abrufbar unter: http://europa.eu/rapid/press-release_IP-15-5198_de.htm

die Einrichtung eines ständigen Investitionsgerichtes nach dem Vorbild des Einheitlichen Patentgerichtes und die Nutzung der Möglichkeiten des Permanenten Schiedsgerichtshofes in Den Haag.

Als wesentliche Voraussetzungen für jede Lösung werden der Vorrang nationaler Gerichte, die Wahrung der Kompetenzen des EuGH sowie die Kompatibilität mit den EU-Vorschlägen für Investitionsschutzbestimmungen in TTIP und anderen abgelaufenen und laufenden EU-Verhandlungen festgehalten. Dazu gehören die Betonung des Regulierungsrechts des Gesetzgebers, die Ernennung der Richter durch die Vertragsparteien (hier also durch die EU-Mitgliedstaaten) unter Beachtung strenger Anforderungen an Qualifikation, Unparteilichkeit und Unabhängigkeit, die Einrichtung einer Berufungsinstanz sowie hohe Standards für die Verfahrenstransparenz.

Ziel ist es, die bestehenden Intra-EU-BITs ehestmöglich zu ersetzen, damit Investitionsstreitigkeiten nicht mehr nach den bisherigen Investor-Staat-Schiedsverfahren, sondern nur mehr nach den neuen Bestimmungen geregelt werden.[11]

Frage 14

Nach der Rechtsprechung des Verwaltungsgerichtshofs werden innerstaatliche Normen – auch solche, die ihren Ursprung in einem völkerrechtlichen Vertrag haben – in einem konkreten Fall *durch (widersprechendes) Unionsrecht verdrängt*. So erkannte der VwGH etwa – für das Verhältnis zwischen Doppelbesteuerungsabkommen und Unionsrecht – Folgendes: „*In seinem Urteil vom 14. Dezember 2006, Rs C-170/05, Denkavit Internationaal BV, brachte der EuGH zum Ausdruck, dass die Artikel 43 EG und 48 EG dahin auszulegen sind, dass sie Rechtsvorschriften eines Mitgliedstaats entgegenstehen, die allein für gebietsfremde Muttergesellschaften eine Quellensteuer auf von ihren gebietsansässigen Tochtergesellschaften ausgeschüttete Dividenden vorsehen, auch wenn ein Besteuerungsabkommen zwischen diesem Mitgliedstaat und einem anderen Mitgliedstaat diese Quellensteuer zulässt und die Anrechnung der nach den Rechtsvorschriften des erstgenannten Staates auferlegten Belastung auf die Steuerschuld in diesem anderen Staat erlaubt, soweit für eine Muttergesellschaft in diesem anderen Mitgliedstaat die in dem genannten Abkommen vorgesehene Anrechnung nicht möglich ist (vgl. hiezu auch das Urteil des EuGH vom 3. Juni 2010, Rs C-487/08, Kommission gegen Spanien)*“ (VwGH 23.9.2010, 2008/15/0086; vgl. auch VwGH 25.10.2011, 2011/15/0070).

[11] Vgl.https://www.bmwfw.gv.at/Aussenwirtschaft/investitionspolitik/Seiten/BilateraleInvestitionsschutzabkommen.aspx (abgerufen am 18.08.2017).

BULGARIA

Atanas Mihayl*
Hristo Kirilov**

Part I

Question 1

The Bulgarian National Revenue Agency is allowed only to issue non-binding statements explaining the tax legislation based on a specific request of a taxpayer and with a view of the specific facts and circumstances described in the request (article 3 (1) item 1 of the Act on National Revenue Agency)[1]. These statements are only informative about the position of the head office of the National Revenue Agency in respect to the interpretation of the Bulgarian tax legislation based on the specific facts or circumstances described in the request. The taxpayers (including those who requested the particular statements) may not rely on these statements in a tax audit or in a dispute before the courts except for as a persuasive authority for the interpretation of law.

* Law Clerk at Judge's Alexander Kornezov Chambers, General Court of the European Union. In charge of Part II of the questionnaire. The answers reflect strictly the personal understanding and opinion of the author.

** Senior Associate at Wolf Theiss, Sofia office. In charge of Part I of the questionnaire. The answers reflect strictly the personal understanding and opinion of the author.

[1] Under article 17 (1) item 2 of the Tax-insurance Procedure Code the taxpayers have a right to be informed of their rights and to be warned of the consequences of a failure to fulfill their obligations. These right correspond to the obligations of the National Revenue Agency to provide the taxpayers with the necessary information and explanations about their rights and obligations under article 3 (1) item 1 of the Act on National Revenue Agency. The statements of the National Revenue are issued only based on a request of a particular taxpayer and their function is to provide this taxpayer with information and explanations as to his/her rights and obligations but may not serve as guidelines to the rights and obligations of other taxpayers or as interpretation of the law.

Question 2

The statements issued by the National Revenue Agency provide only information about the interpretation of the Bulgarian tax legislation based to the facts and circumstances described in the request of the taxpayer and, therefore, the tax authorities do not verify these facts or circumstances. If the facts and circumstances are incompletely described, the tax authorities would provide a general overview of the applicable tax legislation. The taxpayer may not rely on the statements issued by the National Revenue Agency in case of a tax audit except for as a persuasive authority for the interpretation of law.

Question 3

In the case of a tax audit, the Bulgarian tax authorities are not bound by the treatment given to a particular payment/transaction by another country. The parties could have structured certain payments or transactions with a view to the treatment given in another country, but is for the Bulgarian tax authorities to determine whether the terms of these payments or transactions are compliant with the Bulgarian transfer pricing legislation. The burden to prove that the treatment given by the foreign country is in conformity with the Bulgarian law falls to the audited taxpayer.

In particular, when facts and circumstances beyond the territory of Bulgaria should be clarified to ascertain the tax liabilities of the taxpayer in Bulgaria in the course of a tax audit, the audited taxpayer should provide all necessary evidence to clarify these facts and circumstances. It is presumed that the taxpayer had the possibility to present all necessary evidence in case of (i) relations or transactions between related parties and (ii) transfers between a permanent establishment of a foreign entity in Bulgaria and other parts of the enterprise of the foreign entity located abroad.

Further, when a taxpayer enters into transaction with a related party, the taxpayer has an obligation to prove the compliance of such transaction with the market price and the reasons for deviation from the market price, including by submission of all relevant evidence from abroad. In this respect, the tax treatment given by the other country would be qualified only as evidence for the arm's length character of the agreed terms, but the tax authorities would assess the compliance of the respective payment or transactions with the Bulgarian arm's length standard on the balance of all evidence collected during the tax audit (article 116(1) of the Tax-insurance Procedure Code)[2].

[2] Article 116 of the Tax-insurance Procedure Code:
(1) In case ascertainment of the obligations of the auditee requires clarification of any facts or circumstances outside the territory of the country, the auditee shall be under an obligation to present evidence for clarification of the said facts or circumstances. Where the relationships or transactions

Regardless of what the exact national rules are in the situations above, one might end up in a situation where – afterwards – it turns out that the confirmation given by the tax authorities is incorrect. Either because of the publication of case law by domestic courts, or because new data indicates profits should have been attributed differently.

Question 4

The Bulgarian tax authorities may not issue binding statements or ruling, so in a case of a tax audit, the auditing tax officers could take a position which differs from the non-binding statement issued by the head office of the National Revenue Agency to the respective taxpayer. Typically, such deviation is justified by the auditing tax officers with the argument that the facts and circumstances described in the respective statement of the National Revenue Agency are different from the actual facts and circumstances identified in the course of the audit.

Question 5

The Bulgarian tax authorities would check whether the remaining income would be taxed in another country and would impose Bulgarian tax if the income would not be taxed in the other country only in a limited number of cases:

(i) upon application of dividend exemption under the EU Parent-Subsidiary Directive,

are between related parties, as well as in the cases of transfers between a permanent establishment of a non-resident person in Bulgaria and other divisions of the same enterprise abroad, the auditee shall be presumed to have been able to provide evidence.
(2) Where the auditee effects a transaction with related parties, the said auditee shall be obligated to prove the conformity of the said transaction with the market price and the reasons for a departure from the said price, inter alia by means of presenting all relevant evidence from abroad.
(3) (Repealed)
(4) Where an auditee fails to fulfil the obligations thereof under Paragraphs (1) and (2), the revenue authority shall have the right to determine the market prices on the basis of accessible information or evidence.
(5) Upon application of the methods for determination of market prices, the revenue authorities shall furthermore use data about exchange market prices as stated in statistical reference books or other publications containing specialized price information.
(6) Upon establishment of the circumstances covered under Paragraph 3, pt. 3, lt. "m" of the Supplementary provisions, the revenue authorities shall furthermore use data about related parties, the burden of taxation or the regime for operation on the local market, obtained from or published by other revenue administrations, international organizations, public registers and publications containing specialized information.
(7) Upon application of Paragraphs (5) and (6), the revenue authority shall be obligated to cite the exchange market, the publication, the administration, the international organization or the Internet site, as the case may be, which is the source of the information, attaching a copy or printout, certified thereby, containing the relevant data.

(ii) upon application of the tax anti-abuse rules and
(iii) upon permission for application of double tax treaty relief.

The Bulgarian dividend taxation rules implementing the EU Parent-Subsidiary Directive would require from the Bulgarian tax authorities to review the treatment of distributed amounts at the distributing company, even if this company is a EU/EEA tax resident company. Thus, Bulgaria would refuse to exempt from Bulgarian tax any dividends distributed from a Bulgarian/EU/EEA tax resident company to a Bulgarian tax resident company (which would otherwise be exempt), if the distributed amounts are tax deductible or in some other way decrease the taxable profits of the distributing entity regardless of their accounting treatment (article 27 (2) item 3 of the Corporate Income Tax Act).

The Bulgarian tax anti-abuse rules would authorize the Bulgarian tax authorities to review the taxation of the remainder of the income in the other country in order to identify any artificial arrangements between the parties, designed to circumvent Bulgarian tax legislation. In case such artificial arrangements are found to exist, the tax authorities are entitled adjust the terms of the transaction between the parties to those which would have been agreed upon the entering of a customary transaction of the relevant type at market prices and intended to achieve the same economic result but which does not lead to tax abuse[3]. However, the tax anti-abuse rules could not be applied to genuine commercial arrangements, even if that would lead to double non-taxation, provided that the Bulgarian transfer pricing requirements are met.

[3] Article of 16 of the Corporate Income Tax Act:
(1) Where one or more transactions, inter alia between unrelated parties, has been concluded under terms whereof the fulfilment leads to tax abuse, the tax base shall be determined ignoring the said transactions, certain terms thereof or the legal form thereof and taking into consideration the tax base which would be obtained upon the effecting of a customary transaction of the relevant type at market prices and intended to achieve the same economic result but which does not lead to tax abuse.
(2) The following shall furthermore be treated as tax abuse:
1. any substantial excess of the quantities of raw and prime materials used as production inputs and other production costs over the customary quantities and costs for the activity carried out by the person, where any such excess is not due to reasons beyond the control of the person;
2. any contracts of loan for use or other gratuitous provision for use of tangible and intangible assets;
3. any borrowing or lending at interest diverging from the market rate of interest as applicable at the time of conclusion of the transaction, including in the cases of interest-free loans or other temporary gratuitous financial assistance, as well as the write-off of debts or repayment of non-business debts for own account;
4. accrual of any remunerations or compensations for any services which have not been actually performed.
(3) Where a transaction is concealed by another transaction, the tax liability shall be assessed under the terms of the concealed transaction.

Finally, any Bulgarian tax on an income exceeding BGN 500,000 (app. EUR 251,000) annually of a foreign tax resident person with a source from Bulgaria could be reduced or eliminated based on a double tax treaty to which Bulgaria is a party only after a permission from the Bulgarian tax authorities is obtained. The Bulgarian tax authorities would issue such permission only after they ascertain whether all requirements for treaty relief, including the beneficial ownership test, are met (Article 136 of Tax-insurance Procedure Code).[4] To determine whether beneficial ownership test is met, the Bulgarian tax authorities might have to analyze, among others, whether and to what extent the income would be effectively taxed in the other treaty country. If the beneficial ownership test is not met, the Bulgarian tax authorities would not permit the application of the double tax treaty and the respective income will be fully taxed in Bulgaria.

However, with the exception of the above cases, there is no general rule, which would entitle the Bulgarian tax authorities to impose Bulgarian tax in case of double non-taxation of a particular income, especially when the Bulgarian transfer pricing requirements have been met.

Question 6

Bulgarian tax resident entities are taxed in Bulgaria on their worldwide income, i.e. both their income with a source from Bulgaria and their income with a source from abroad (regardless whether derived through a permanent establishment or not) is subject to Bulgarian corporate income tax (Article 2 (2) of the Corporate Income Tax Act). Double taxation of the foreign sourced income is avoided either through the use of the exemption method (the foreign sourced income is exempt from Bulgarian tax) or through the use of the credit method (credit against the due Bulgarian tax is provided for the paid foreign tax).

Foreign tax resident entities could be subject to tax liability in Bulgaria only in respect to their income with a source from Bulgaria (Article 4 (2) of the Corporate Income Tax Act). Thus, only the profits of a foreign tax resident entity attributable to a permanent establishment in Bulgaria will be taxed with Bulgarian

[4] Article 136 of the Tax-insurance Procedure Code:
For the purposes of Article 135 (2) herein, after occurrence of a tax obligation for any income with a source from the country, the non-resident person shall certify to the revenue authority that the said person:
1. is a resident of the other State within the meaning given by the relevant double taxation treaty;
2. is an owner of the income with a source from the Republic of Bulgaria;
3. does not own a permanent establishment or a fixed base within the territory of the Republic of Bulgaria, whereto the income is effectively connected;
4. the specific requirements for application of the double taxation treaty or separate provisions thereof are fulfilled in respect of persons specified in the double taxation treaty, where such specific requirements are contained in the relevant treaty.

corporate income tax. This would exclude any Bulgarian tax on any profits attributable to the head-office of the foreign tax resident entity. In addition, Bulgaria also taxes certain items of income derived by a foreign tax resident entity with a source from Bulgaria which are not attributable to a permanent establishment, such as dividends, interest, royalties, capital gains, technical services fee and rental income (Article 12 of the Corporate Income Tax Act[5]).

In terms of allocation of profits between the head office and the local permanent establishment of a foreign tax resident entity, the Bulgarian law follows the functionally separate entity approach of OECD: the profits to be attributed to the permanent establishment are the profits that the permanent establishment

[5] Article 12 of the Corporate Income Tax Act:
(1) Any profits accruing to non-resident legal persons, derived from economic activity carried out through a permanent establishment in the country or from disposal of property of any such permanent establishment, shall have their source form the country.
(2) Any income from financial assets issued by resident legal persons, the State and the municipalities, shall have its source from the country.
(3) Any income from transactions in financial assets referred to in Paragraph (2) shall have its source from the country.
(4) Any income from dividends and shares in a liquidation surplus, accruing from participating interests in resident legal persons, shall have its source from the country.
(5) The following income, accrued by resident legal persons, resident sole traders or non-resident legal persons and sole traders through a permanent established or a fixed base in the country or paid by resident natural persons or by non-resident natural persons who have a fixed base in the country in favour of non-resident legal persons, shall have its source from the country:
1. any interest payments, including interest within payments under a financial lease agreement;
2. any income from rent or other provision for use of movable or immovable property;
3. any copyright and licence royalties;
4. any technical assistance fees;
5. any payments received under franchising agreements and factoring contracts;
6. any compensations for management or control of a Bulgarian legal person.
(6) Any income covered under Paragraph (5), which is charged in favour of non-resident legal persons from a permanent establishment of a resident person or from a fixed base of resident natural persons situated outside the territory of the country, shall not have its source from the country.
(7) Any income from agriculture, forestry, hunting ground management and fisheries within the territory of the country shall have its source from the country.
(8) The following income is from a source from the country:
1. income from rent or other grant for use of immovable property, including undividable part of immovable property, located in the country;
2. income from transactions in immovable property, including an undividable part or a limited right in rem to any immovable property located in the country.
(9) Penalties and compensations of any kind, except for insurance contracts compensations, charged by local legal entities, local sole traders or foreign legal entities and sole traders through a commercial location or a fixed base in the country in favour of foreign natural persons, established in jurisdictions with preferential tax regime, are considered income from sources in the country.
(10) Upon determination of the source of income under this Article, the place of payment of the income shall be ignored.

would have earned at arm's length, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through the other parts of the enterprise[6].

Question 7

Bulgarian law requires both domestic and cross-border transactions between related parties to be carried out at arm's length terms. Under article 15 of the Corporate Income Tax Act, if related parties carry out their commercial and financial relations at terms, which deviate from the terms between unrelated parties (arm's length terms), the tax authorities may adjust the tax results and levy tax at the terms which would have arisen between unrelated parties[7].

The arm's length terms can be determined only by applying the transfer pricing methods specifically set out in Bulgarian law, namely:

a) the method of the comparable uncontrolled prices;
b) the method of the market prices (corresponding to the resale price method);
c) the method of the increased value (corresponding to the cost-plus method);
d) the profit split method;
e) the transactional net profit method[8].

The application of these transfer pricing methods is governed by the Ordinance H-9 as of 14.08.2006 issued by the Minister of Finance, which defines the comparability analysis to be carried out when applying the methods, the hierarchy between the different methods, the conditions for application of each particular method and the factors to be considered in applying each method. In general, the Ordinance H-9 follows the OECD Transfer Pricing Guidelines[9].

[6] http://www.oecd.org/ctp/transfer-pricing/45689524.pdf

[7] Article 15 of the Corporate Income Tax Act:
Where related parties enter into commercial and financial relationships under terms which affect the amount of the tax base and which differ from the terms between unrelated parties, the tax base shall be determined and taxed under the terms which would have arisen in respect of unrelated parties.

[8] § 1, item 10 of the Supplementary Provisions of the Tax-insurance Procedure Code.

[9] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, http://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm

Question 8

In case related parties fail to conclude their transactions by applying the arm's length principle, the Bulgarian tax authorities are entitled to (i) adjust the respective cash flows to those which would have been agreed between unrelated parties or (ii) to refuse to recognize the non-arm's length transaction and re-characterise it so as to disallow an expense and consequentially increase taxable income of the Bulgarian taxpayer. In principle, under Bulgarian law the Bulgarian tax authorities are authorized also to adjust the taxable income downwards if such income is overstated, but in practice in a tax audit the tax authorities are looking only for tax abuse situations and, consecutively, the tax authorities would amend the reported taxable profits of the taxpayer only if they identify additional tax liabilities for the taxpayer.

The possibilities for a Bulgarian taxpayer to adjust its own taxable profits reported in previous years are limited. In principle, the tax position of a Bulgarian taxpayer in previous years may be voluntarily changed only if the taxpayer notifies the tax authorities of an error and the tax authorities accept that an error was actually made. Such error could be either accounting or non-accounting error[10].

Any potential overstatement or understatement of income by the Bulgarian taxpayer from any transaction with a related party as a result of agreed non-market prices would most likely not qualify as an accounting error because an accounting error is an omission or misstatement in the reporting of a transaction in the books of the company rather an error in determining the contractual terms of a transaction.

Nevertheless, the potential overstatement or understatement of income could qualify as a non-accounting error, if the Bulgarian taxpayer demonstrates that it made an error in applying the transfer pricing methods for determination of market prices under Bulgarian law. To that end the Bulgarian taxpayer should prepare internally or commission to external advisers a transfer pricing study which should determine the market prices that should have been agreed between the Bulgarian taxpayer and its related party if the transfer pricing methods under Bulgarian law had been correctly applied. Such transfer pricing study should be submitted to the tax authorities together with the notification for error.

If the Bulgarian tax authorities come to the result that a genuine non-accounting error was made in the previous years they will either allow the Bulgarian taxpayer to correct the tax returns for the respective years or make the necessary correction themselves, thus adjusting the taxable profits in these years. Such adjustment could be upwards or downwards, depending on whether the income was underestimated or overestimated.

[10] Article 75 of the Corporate Income Tax Act.

Question 9

If the sale described above is carried out in the current tax year, the Bulgarian taxpayer and the seller located in the other jurisdiction should amend the terms of the transaction to reflect the price determined by tax authorities of the other country. As the taxable profit for the particular would be determined after the end of that year, the amendment of the terms of the transaction would not require any notification to the Bulgaria tax authorities. However, in case of a tax audit, the Bulgarian taxpayer should be able to convince the Bulgarian tax authorities that the amended price is the arm's length price since the Bulgarian tax authorities are not bound by the tax rulings of the other country.

It will be more complicated if the sale described above has been carried out in previous years. As noted above, the tax position of a Bulgarian taxpayer in previous years may be voluntarily changed only if the taxpayer notifies the tax authorities of an error and the tax authorities accept that an error was actually made. A transfer pricing study supporting the non-genuine nature of the mistake as well as the tax ruling of the other country should also be submitted along with the notification for error. The Bulgarian tax authorities would not be bound by the tax ruling of the other country, but would rather review the outcomes of the transfer pricing study.

Question 10

Bulgarian law has comprehensive general tax anti-abuse provisions which include the following:

- General tax anti-abuse rule under which if one or more transactions, including between unrelated parties, has been concluded under terms the fulfilment of which leads to tax abuse, the tax authorities may determine the tax base by ignoring the respective transactions, certain terms of the transactions or their legal form and by taking into consideration the tax base which would be obtained upon the entering of a customary transaction of the relevant type at market prices and intended to achieve the same economic result but which does not lead to tax abuse (Article 16 of the Corporate Income Tax Act).
- Definition of specific situations falling under the general tax anti-abuse rule, namely: (i) any substantial excess of the quantities of raw and prime materials used as production inputs and other production costs over the customary quantities and costs for the activity carried out by the person, where any such excess is not due to reasons beyond the control of the person, (ii) any contracts of loan for use or other gratuitous provision for use of tangible and intangible benefits; (iii) any borrowing or lending at interest diverging from the market rate of interest as applicable at the time of

conclusion of the transaction, including in the cases of interest-free loans or other temporary gratuitous financial assistance, as well as the write-off of debts or repayment of non-business debts for own account, and (iv) any accrual of any remuneration or compensation for services which have not been actually rendered.
- General rule on the deduction of costs in the determination of taxable profits which prohibits tax deduction of expenses not related to the activity of the taxpayer (Article 26 (1) of the Corporate Income Tax Act);
- Hidden profit distribution rules which define hidden profit distribution as, among others, any amounts which are (i) not related to the economic activity of the tax payer or (ii) exceeding the market levels, which are accrued, paid or distributed in any form to the shareholders or their related parties, with the exception of dividends (§ 1, item 5 of the Supplementary Provisions of the Corporate Income Tax Act).

There general tax anti-abuse provisions could cover any case where the specific tax anti-abuse rules are not effective.

Part II

Question 11

The Bulgarian Parliament adopted in October 2017 a new State Aid Law (SAL) that entered into force as of 28 of October 2017. Some of the considerations (which are not part of the act itself) taken into account by the legislator for its adoption were the following:

- Harmonization of the national law with the European Union legal framework in general and in particular the need to respond adequately to the process of modernization of that framework undertaken by the European Commission in the period 2012-2014;
- The need to conform the national legislation to the Commission's notice on the enforcement of State aid law by national courts (OJ C 85, 9.4.2009, p. 1) and Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9);
- In order to ensure the appropriate framework for the implementation of Commission Decision (EU) 2015/456 of 5 September 2014 on the aid scheme No SA.26212 (11/C) (ex 11/NN – ex CP 176/A/08) and SA.26217 (11/C) (ex 11/NN – ex CP 176/B/08) implemented by the Republic of Bulgaria in the context of swaps of forest land (notified under document C (2014) 6207.

Chapter 6 of the SAL establishes the procedure for the recovery of an unlawful and incompatible state aid ordered by a decision of the European Commission.

In particular, according to article 38 of the SAL, the recovery of unlawful and incompatible state aid or of a state aid put into effect incorrectly shall be made on the basis of a decision of the European Commission ordering the recovery of the aid (art. 38, parra.1 SAL).

The Decision of the Commission shall be considered in principle as the material ground for the initiation of the recovery procedures. The amounts to be recovered are treated as public receivables and are to be collected under the Tax-insurance Procedure Code by the Bulgarian National Revenue Agency (art. 38, parra.4 SAL and art. 162, parra. 2, p. 6 of the Tax-insurance Procedure Code).[11]

However, in case the Commission decision does not individualize the recipients of the aid and the amount to be recovered, the administrator of the aid (the entity who provides, administers, develops the aid) shall issue in addition an act for establishment of public receivables and establish therein those elements (art. 38, parra.3 SAL). The act for establishment of public receivable shall also indicate the European Commission decision (art. 38, parra.4 SAL). In that case, the material ground for the collection is the act for the establishment of the public receivable which seems to be falling under the definition of an administrative act according to national law.

In this regard, according to art. 60 of the Administrative Procedure Code, an administrative act shall explicitly state if preliminary execution of the act is ordered. The grounds for ordering preliminary execution are, however, relatively strict – in order to ensure the life or the health of citizens, to protect a particularly important state or social interests at danger, or if the delay of the execution may cause significant or hardly repairable damage. The preliminary execution may be also requested by the parties provided that they can prove the need for protection of a particularly important interest and are able to provide a suitable guarantee. The order for preliminary execution may be appealed. It should be mentioned that there is certain ambiguity in this regards as to the rule under art. 38, parra 1. SAL stating that the recovery of the state aid shall be imitated on the grounds of an act for public receivables "entered into force".

[11] It is worth mentioning a decision of the Bulgarian Supreme Administrative Court, adopted back in 2010, in a case opposing the Ministry of Economy, Energy and Tourism and a large Bulgarian metalworking company that was in insolvency proceeding at that period. The Supreme Court ruled that what is essential in a national case having as a subject matter the recovery of an illegal state aid, is the legality of the procedure for the recovery (of an aid already declared illegal) itself, the legality of the decision declaring the state aid incompatible (as the material ground) falling out of the control of the judge.

As to the time limits, the SAL provides that within the term defined by the European Commission decision or where such has not been defined, within 2 months form the decision date, the National Revenue Agency or the administrator of the aid shall communicate to the Minister of Minister of Finance, or the Minister of Agriculture, Food and Forests about the steps undertaken for the implementation of the decisions. Furthermore, within 6 months, if the EU Commission is silent on the time limits, the National Revenue Agency shall notify the respective Minister about the implementation of the decision of the Commission. (art. 42. parra. 1 and parra. 2, SAL).

We consider that, despite some ambiguities, the new law should be considered as an important instrument both for the public authorities and the jurisdictions in order to ensure effective application of EU decisions ordering the recovery of state aids.

It is worth mentioning in addition that Chapter 8 of the SAL establishes the procedural aspects for challenging a decision for provisions of state aid or de minimis aid at national level. According to article 53, paragraph 3 of SAL claims and complaints shall be treated under the Administrative Procedural Code. Therefore the competent courts shall be the administrative courts and any person who can prove a legal interest may challenge such a decision. Furthermore, according to article 54, paragraph 4, SAL any interested person may, in addition to the legality of the act granting the state aid itself (art. 54, parra. 1), claim as well:

- prevention of payment of unlawful state aid, or unlawfully received de minimis aid;
- compensation in case of violation of the obligation for postponement;
- complete recovery of unlawfully received aid without consideration of its compatibility and payment of interest for unlawfulness;
- compensation for damages, caused to competitors of the recipient and/or concerned third persons as a result of unlawfully provided aid, or
- recovery of state aid, which has not been recovered under Chapter Six (following a decision the European Commission), or recovery of de minimis aid, which has not been recovered under Art. 37 (as public recievables), notwithstanding whether an act for establishment of public receivable has been issued.

Question 12

To the best of our knowledge, there is no relevant case law concerning the application of a legal ground stemming from a bilateral or multilateral investment treaty, as reason for the national court to stop the immediate recovery of a state aid.

The Bulgarian Tax-insurance Procedural Code, applicable to the procedure for recovery of state aid in accordance to the SAL, states that the failing of a

claim against the recovery actions shall not stop the recovery procedure. However, upon request of the claimant, the court may decide to stop the procedure, on the condition that a suitable guarantee is provided (normally a bank security).

Question 13

Bulgaria is a party to a more than 70 bilateral Investments Protection Treaties (BIT)[12], including the United States (in force as of 02.06.1994) and the United Kingdom (in force as of 26.06.1997).

The Bulgarian BITs, in general, as well as the BITs entered into with the United States and the United Kingdom, in particular, contain most of the standard investment protections which obligate the parties to uphold national treatment, most favoured treatment, the principle of full protection and security, as well as guarantees for investors in case of expropriation. These BITs include dispute resolution provisions for investor-State dispute settlement through investment arbitration.

The BIT with the United States also includes a side letter on protections for intellectual property rights. Bulgaria and the United States exchanged notes in 2003 to make Bulgaria's obligations under the BIT compatible with its EU obligations.

Question 14

To the best of our knowledge, there is no relevant case-law permitting to identify the position of national courts in cases of conflicting obligations of European Union law and international law.

However, we may assume, in view of the acquired experience of Bulgarian jurisdictions in applying EU law and the use of the preliminary reference procedure under article 267 TFEU (especially administrative courts)[13], as well as the absence of established case-law on this matter, that in case such a question is raised within a national procedure, national courts will refer to the Court of Justice for a preliminary ruling.[14]

[12] http://investmentpolicyhub.unctad.org/IIA/CountryBits/30#iiaInnerMenu

[13] « When David Teaches EU Law to Goliath : A Generational upheaval in the Making », in M. Bobek (ed.), Central European Judges under the EU Influence: the Transformative Power of Europe Revisited on the 10th Anniversary of the Enlargement, Hart Publishing, Oxford and Portland, 2015, p. 241-267

[14] The obligation of Member States to take the necessary measures to eliminate incompatibilities, where they exist, with Union law, contained in bilateral investment agreements concluded between them and third countries (according to art. 4, parra 3, and art. 351, parra 2 TFEU as well as Regulation No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries) is a substantial reason for the national judges to strive to apply the relevant to the case EU law as to ensure its full effectiveness.

CROATIA

Hrvoje Arbutina
Jasna Bogovac
Nevia Cicin Sain

Part I

Question 1
There are three Croatian provisions regulating the field of issuing tax rulings aiming at achieving legal certainty in the area of taxation, two laws and one regulation. These are:

- General Tax Law (hereinafter: GTO), Official Gazette No. 115/16,
- Law on Administrative Cooperation in Tax Matters (hereinafter: LACTM), Official Gazette No. 115/16, and
- Regulation on Implementation of GTO (hereinafter: RIGTO), Official Gazette No. 30/17.

All three stipulate formalistic approach, leaving no space for informal (gentleman's) agreements between taxpayers and tax administration. There are two kinds of advance tax rulings:

1. one of general nature, and,
2. the other more specialized, for advance pricing agreements (transfer pricing agreements). There are also,
3. the so-called "Central Office opinions".

1. Tax administration is authorized to issue advance ruling on written taxpayer's request, concerning tax treatment of future intended taxpayer's transactions, i.e. business actions and activities. Those rulings are by legal definition binding.[1]

[1] In fact, they are binding even by name, since in Croatian they are named "obligatory opinions".

Eligibility for advance ruling request is generally very broadly defined. According to RIGTO, every resident taxpayer, being individual or legal person, is eligible to request advance ruling; even an individual or a legal person not being taxpayer yet (but planning a transaction in the future) may submit the advance ruling request. However, eligibility for such rulings is narrowed down by stipulating situations authorizing taxpayers to request the ruling. Those situations are:

a) assessing taxable supplies, in order to split input VAT;
b) application of tax rules on investments in Croatia worth 20.000.000,00 kuna (approx. 2.660.000,00 €) or more;
c) assessing profits tax base by mergers and the like transactions regulated by the Merger Directive;
d) application of double tax treaties on income and profits tax;
e) tax treatment of business activities neither comparable nor standard as business activities normally conducted in the Republic of Croatia.

2. LACTM regulates two kinds of automatic information exchange: 2.1. Automatic information exchange of advance tax opinions with cross-border effect, and, 2.2. Automatic information exchange of advance pricing agreements (hereinafter: APA).

2.1. Advance tax opinions with cross-border effect means every agreement, disclosure or other instrument or measure with similar effects, including the one issued, changed or renewed within tax audit, fulfilling certain conditions:

a) it is issued, changed or renewed by the Tax Administration, notwithstanding its actual application
b) it is issued, changed or renewed for the particular person or group of persons, and those persons may invoke it
c) it refers to the interpretation or the application of the legal or administrative proviso in relation with the application or the execution of tax laws
d) it refers to the cross-border transaction or to the issue of establishing of the permanent establishment in the other tax jurisdiction through the business activity and
e) it is issued prior to the transaction or the business activity in other jurisdiction which could be construed as the permanent establishment setting up, or prior to the tax return submission for the period in which the transaction, the string of them or the business activity were took place.

2.2. LACTM regulates APA in the Croatian tax system. APA means every agreement, disclosure or other instrument or measure with similar effects, including the one issued, changed or renewed within tax audit, fulfilling certain conditions:

a) it is issued, changed or renewed by the Tax Administration, notwithstanding its actual application
b) it is issued, changed or renewed for the particular person or group of persons, and those persons may invoke it and
c) it establishes criteria for the transfer pricing calculation before the cross-border transaction between related enterprises come in the being, or, regulates profits distribution to the permanent establishment.

Cross-border transaction is a transaction or a string of them in which related enterprises participate, not all of them being fiscal residents in the same tax jurisdiction, or by which certain transaction or the string of them have cross-border effect.

3. There is one more concept worth mentioning when it comes to the Croatian tax authority stances in particular tax cases. Those are the so-called "Central Office opinions". The Central Office is the highest body in the Croatian tax administration system, authorized to issue those opinions. They are issued on the occasion of specific taxpayer's question; there is nothing wrong with them *per se*, but the question of their legal effect has been raised. In other words – are they legally binding, and if they are – are they binding only for the taxpayer who posed the question, or for everyone? Those opinions, namely, were broadly published, on the Tax Administration's web site, as well in the professional press, dealing, *inter alia* or exclusively, with taxation. So, are they bound Tax Administration when it comes to tax assessment or to court procedure in the like cases? The question remains unsolved, as Tax Administration, assessing tax or being the party in a court procedure, is prone to invoke them when they are in its favour, and not to when they are not.

Question 2

There are no data available for the practice of the Croatian Tax Administration. However, aforementioned provisions in force stipulate a number of data a request has to contain to be taken into consideration. Those are, in particular:

a) individual/company name, personal identification number, tax number
b) data on attorney or tax adviser participating in the advance ruling obtaining procedure
c) detailed description of the planned transactions and their business and financial outcomes
d) answer proposal, submitted by the taxpayer requesting the ruling, along with stating the relevant legal provisions to be applied to the case at hand

e) statement of the applicant requesting the ruling, if in the case at hand the transaction, business event or activity has already commenced and/or if the legal remedy procedure or the court procedure has taken place
f) documents referring to the request
g) all the advance rulings issued by the authorized tax administration authorities of the other states in the same case, or if there is the request for the advance ruling in the same case, submitted to the tax administration authority of the other state, referring to the related persons.

Considering all those data and documents that have to be submitted to the Tax Administration along the request for an advance ruling, it can be concluded that the Tax Administration (systematically) verifies the facts mentioned in a request for a ruling, prior to issuing a ruling.

Question 3
Provisions currently in force do not require the Croatian tax authorities to conduct such verification.

Question 4
Tax authorities are bound by a ruling from the date of its delivery to the taxpayer requesting its issuing. However, an issued ruling is no more valid if:

a) it is grounded on provisions that are changed or are no more valid, if a ruling is grounded in them
b) changed circumstances substantially influence a ruling
c) it is established that a ruling is grounded in untruly or incomplete data.

Question 5
Generally, provisions currently in force do not require the Croatian tax authorities to conduct such checking. However, there are provisions of a general nature in the LACTM, regulating the activity of the tax officials of one EU Member State in other Member State. Those officials may, grounded in an agreement between Member States' tax authorities, be:

a) present in the official premises of a Croatian tax authority
b) present in the course of official or administrative procedures that are conducted in the Croatian territory.

The point is, that, in the course of administrative cooperation, facts could be established that could lead to the taxation of the remaining income, which would otherwise remain double non-taxed.

Question 6

Unilaterally, allocation of profits to the permanent establishment in Croatia is prescribed by the Corporate Income Tax Act in accordance with the OECD's Model Tax Convention: the profits of the permanent establishment may be taxed in Croatia as much as they are attributable to it. The profits ascribed to the permanent establishment must be the same as if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions dealing wholly independently with the legal entity of which it is a permanent establishment, including deductions for the expenses incurred for the purposes of the permanent establishment.

Withholding tax prescribed on dividends, interests, royalties and some services, must be paid by the permanent establishment of the foreign entrepreneur if paid to the foreign parent company, except if the remuneration is attributable to the permanent establishment's profits in Croatia.

Definition of the permanent establishment is prescribed both by the Corporate Income Tax Act (*lex specialis*) and General Tax Act (*lex generalis*), mostly following the Article 5 of the OECD's Model Tax Convention.

At the bilateral level, though Croatia is not a member of the OECD, it has the network of 61 treaties in force, based on the OECD's Model Tax Convention.

Being an EU member country, Croatia applies rules and definitions from the Parent-Subsidiary, Interest-Royalties and Merger Directives regarding permanent establishments.

Question 7

Croatia introduced transfer pricing legislation on 1 January 2005 with the arms' length principle which is applied within Corporate Income Tax Act and Bylaw. The OECD's recommended Transfer Pricing Methods are shortly numbered and explained, together with the list of the procedures and activities needed for the preparation of the documentation. Legislation prescribes priorities for the selection of the most appropriate transfer pricing method: the best method is that one which is the most suitable for a particular case. In addition to that, where the *comparable uncontrolled price method* can be applied, this method is to be preferred. Remaining traditional transaction methods (*the resale price method* and *cost plus method*) are preferable to the transactional profit methods (*transactional net margin method* and *transactional profit split method*). Clearly, additional legislation for regulation of this complex issues is missing.

Although there is no legal or formal link to the OECD's transfer pricing guidelines, Tax administration and taxpayers are generally following these rules.

With the aim to prevent tax avoidance within the country, transfer pricing rules are prescribed for the associated resident taxpayers if: (i) one of the

taxpayers has a privileged tax status; or (ii) is entitled to decreased tax rates; or (iii) is exempt from the payment of tax; or (iv) carry forward the tax loss.

Question 8

According to the General tax act, Croatian taxpayers are allowed to correct tax returns within three years from the deadline for filing of the return. These corrections can be made if taxpayers perceive that submitted tax return is incorrect and uncompleted so tax payable may have been overestimated or underestimated (downwards and upwards adjustments). Anyway, the anecdotal evidence suggests that unilateral downwards adjustments of profits trigger tax audits of the taxpayers who correct their tax returns in such a manner.

In case Tax administration identifies discrepancies during the tax audit, it may ask of taxpayers to correct their returns.

Question 9

Legislation does not prohibit such adjustments. Taxpayers are allowed to correct their tax return and, later, to demonstrate evidences in case of the tax audit (see question 8).

In case of the transfer pricing adjustment of the Member State, or of the country that Croatia has a bilateral double taxation treaty with, taxpayers can initiate procedure in accordance with the EU Arbitration Convention, or the Mutual Agreement procedure, respectively. To the best of our knowledge, such procedure was not yet initiated in Croatia.

Even in case of the joint tax audits with Bavarian tax authorities, until now, there were no findings by which the tax base should have been increased or decreased by Croatian taxpayers.

Question 10

In Croatia, GAAR is prescribed by the Corporate Income Tax Act (which is *lex specialis*). Even though the same regulation anti-avoidance issues such as thin-capitalisation, transfer pricing, definitions of beneficial owners, and has a "black list" for payments to some countries, the GAAR is defined as a back-up rule within the same law.

Part II

Question 11

Procedural Regulation 2015/1589 prescribes in article 16 that in case of unlawfully granted state aid, recovery should normally be ordered, unless one of the

general principles of Union Law would be violated by that. The recovery procedure takes place in accordance with national procedures, provided that these allow for the immediate and effective execution of the Commission's decision. However, it is left to the individual Member State to decide how state aid and the corresponding interest charge, are to be recovered. This can be done via means of tax law, administrative law, civil law or any other means of private or public law available.

The Croatian Law on State Subsidies (*Zakon o državnim potporama,* Official Gazette No. 47/14), the superior law that regulates state subsidies in Croatia, prescribes in article 13 that if the European Commission declares a measure incompatible with EU law, the Ministry of Finance will immediately inform the grantor of this decision. The grantor needs to recover the aid and the corresponding interests. The recovery will take place according to the rules governing the legal act based on which the state aid has been granted (point 3., article 13). The Law on Investment Promotion (*Zakon o poticanju ulaganja,* Official Gazette No. 102/15), stipulates that tax reliefs granted to undertakings are under the joint control of the Ministry of Economy, Entrepreneurship and Crafts and the Ministry of Finance. The tax relief, based on the agreement between the beneficiary and the Ministry, takes the form of an individual tax act that determines the exact tax obligation. Therefore, the recovery process should take place within the tax procedure. However, in Croatia, no specific tax rules have been implemented in order to ensure an effective and timely recovery of fiscal state aid. Indeed the only rights provided for in the General Tax Act (*Opći porezni zakon,* Official Gazette, No. 115/16) that can be enforced within the tax law procedure are the right of the tax administration to assess the tax obligation with corresponding costs and interest charges, the right to charge/enforce the assessed obligation and the right of the taxpayer to demand the return of a tax that has been, partially or entirely, unduly charged or overpaid. Therefore, as the Croatian tax law stands today, recovery of fiscal state aid is not possible within the tax law procedure.

Administrative law also does not provide for a specific procedure of recovery. However, there are several extraordinary legal remedies available that might serve as a basis for the recovery procedure. The first one is called "reopening of proceedings" (article 123, point 2 of the General Administrative Procedure Act, *Zakon o općem upravnom postupku,* Official Gazette No. 47/09). This article stipulates that the reopening of proceedings in which a decision against which an appeal is not permitted was rendered may be instituted at the request of a party or ex officio without any time constrictions provided that: ... *3. the decision is based on a preliminary issue and the competent court or public law authority resolved that question later differently in vital aspects.*" Point 4 stipulates that: "*The state attorney or other authorised state body may request the reopening of proceedings under the same conditions*

as the party, those being within 30 days following the date of learning of the reasons for the reopening or attaining the possibility of using new evidence."

Perhaps, one might argue that the decision of the Commission on whether the state aid is lawful or not can be treated as a preliminary question, since once a negative decision has been reached it has an *ex tunc* effect. In other words, the state aid is declared unlawful since its beginning. The tax act in which the tax relief has been granted is lawful, until declared void by the competent authority, in this case the European Commission, however once it is declared void – it is considered to have been void since its beginning. The state body should reopen the proceedings within 30 days following the date of acknowledgement of the Commission's negative decision. This is a rather restrictive time limit, and might represent an obstacle for the effective and timely recovery of the fiscal state aid.

Another one would be "Annulment and repeal of illegal decisions" (article 129 GAPA). This article prescribes that:

> *"(1) An illegal decision may be annulled or repealed entirely or in part even after the expiry of the period of appeal.*
>
> *(2) A decision under which a party was conferred a right may be annulled when:*
>
> *1. the decision is rendered by a public law authority without jurisdiction or when the decision is rendered without the consent, approval or opinion of another public law authority required by law,*
>
> *2. a legally effective decision is rendered in the same matter, in which the same administrative matter is resolved in another way.*"

The second reason seems to be more applicable in this case, because in the first case there is a presumption that the consent or approval of the public authority (EU Commission) is a prerequisite for the legality of the act, which is not the case. Article 132 GATA provides that: "*When a decision is declared null and void or repealed, assets attained without legal grounds shall be returned pursuant to the provisions on civil law.*" Unlawful enrichment in Croatia is regulated by articles 1111 – 1120 of the Law on obligations (*Zakon o obveznim odnosima*, Official Gazette, No. 35/05, 41/08, 125/11, 78/15). The time limit is the general time limit for obligations, that is five years since the cause of the legal relation (Tax relief) has been declared null (the Commission's rendered its negative decision).

In sum, Croatian law currently does not have any specific rules governing the recovery of fiscal state aid. Some options are possible, however whether they meet the "efficiency and timeliness" requirement an open question. Until today, no such proceedings or negative decision regarding Croatia have been rendered, therefore the question still has not arisen in practice.

Question 12
Such situations have not occurred.

Question 13
Croatia has signed 58 bilateral investment treaties (BIT), prior to its accession to the European Union. The majority of these BITs define an investment rather broadly either as "every kind of asset", or a bit more narrow such as "any kind of property invested by an investor from one party to the agreement in connection with economic activities in the territory of the other party to the agreement."

These agreements provide that investments of nationals or companies of each contracting party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other contracting party. Neither contracting party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other contracting party. Each contracting party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other contracting party.

The treaties protect against discriminatory expropriation and guarantee the return of investments. They also provide for alternative dispute resolution mechanisms, mostly in front of International Centre for the Settlement of Investment Disputes in Washington, Court of Arbitration of the International Chamber of Commerce in Paris or an *ad hoc* arbitration tribunal established under the rules of UNCITRAL.

Question 14
Article 141 of the Croatian Constitution provides for the hierarchy of norms. According to this article: "*International treaties which have been concluded and ratified in accordance with the Constitution, published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law.*" Judges are obliged to respect this hierarchy. The position of European law is also determined by the Constitution in a very explicit manner. Article 145 stipulates that: "*The exercise of the rights ensuing from the European Union acquis communautaire shall be made equal to the exercise of rights under Croatian law. All the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union acquis communautaire. Croatian courts shall protect subjective rights based on the European Union acquis communautaire. Governmental agencies, bodies of local and regional self-government and*

legal persons vested with public authority shall apply European Union law directly." Even though supremacy of EU law over international law is not explicitly stated in the Constitution, it indirectly stems from the obligation to apply the entire *acquis communautaire*. The latter provides for the supremacy of EU law over the entire body of national law. This should include international agreements. According to this, judges should be obligated to set aside the conflicting international norm and to apply directly the appropriate EU norm. When in some cases a judge would disrespect this obligation, a party could appeal in front of the court of appeal or ask/demand the national court to refer a preliminary question to the Court of Justice of the European Union for infringement of EU law. However, no such cases, at least not publically available, have arisen in practice.

CYPRUS

Constantinos Adamides

Part I

Question 1

An advance tax ruling system on the interpretation of laws was introduced in 2004 and is used extensively.

The competent body for issuing such rulings is the Tax Department which, in turn, falls under the competence of the Ministry of Finance. In recognition of the need to create a stable and trusted tax framework, the Tax Department proceeded to publish two circulars[1] aiming to create a more efficient procedure for the issuance of such rulings.

According to the said circulars, advance tax rulings are only issued in cases where the subject matter concerns future acts or transactions of new or existing taxpayers or/and acts or transactions for tax years for which the deadline for submission of tax declarations has yet to expire. The questions must be submitted with the following minimum information:

i. The names and the tax identification numbers of the persons involved.
ii. Confirmation of submission of Tax Declarations the submission deadline of which has expired. iii. The issue under examination.
iv. Full analysis of the facts
v. The question(s)
vi. Excerpts from relevant tax legislation and circulars of the Tax Department
vii. The evidenced view of the applicant.

[1] Circular No. 2015/13 of 22 September 2015 and supplementary Circular No. 2016/13 of 16 August 2016 of the Tax Department

As from 15 May 2016 tax rulings are subject to the following fees[2]:

- €1.000 for non-expedited tax ruling requests, and
- €2.000 for expedited tax ruling requests, in respect of which the tax rulings are issued within 21 working days.

An advance tax ruling can be considered as an advance cross border ruling provided that:

a) It is issued, amended or renewed for a specific person or group of persons and which the said person or group of persons has the right to invoke, and
b) it concerns a cross border transaction or a question whether the activities carried out by a person in another state, create a permanent establishment, and
c) It is issued prior to any transactions or activities in another state which may create a permanent establishment or, is issued before the submission of a tax declaration for the period within which the transaction(s) took place and concerns, without limitation:
    - The making of investments
    - Provision of goods and services
    - Financing or the use of tangible or intangible assets.

Since the rulings issued by the Tax Department set out its interpretation of the national tax legislation as applied to the specific facts of the underlying transaction stated in the ruling requests, they are binding on the Tax Department, provided that all relevant facts are disclosed in the ruling request.

The taxpayer cannot appeal against a ruling.

Question 2

The Tax Department does not systematically verify the facts mentioned in a request for a ruling unless the taxpayer's tax affairs are under examination. The issuance of the ruling is based on the facts described on the taxpayer's request.

The ruling is placed by the Tax Department in the file of the taxpayer and will be readily available to a Tax Officer undertaking an investigation. Given that in general rulings are requested on matters that may be considered as grey areas of the tax legislation, it is common during an investigation for a Tax Officer to focus his attention on verifying the validity and the accuracy of the ruling, vis-à-vis the information provided in the first instance to the Tax Department.

[2] Public Instrument 130/2016

If during the tax examination it has come to the Tax Department's attention that the facts of the ruling are different from the actual events/transactions or there was an amendment in the tax legislation and such difference/amendment affects the opinion of the ruling, then such ruling becomes void.

Question 3

No, there are no anti-avoidance provisions in the Cyprus Tax Legislation in order for the Tax Department to verify the treatment given to a particular payment/transaction by the other country, as part of a tax audit or prior to issuing a tax assessment.

Regardless of what the exact national rules are in the situations above, one might end up in a situation where – afterwards – it turns out that the confirmation given by the tax authorities is incorrect. Either because of the publication of case law by domestic courts, or because new data indicates profits should have been attributed differently.

Question 4

A tax ruling is only applicable as long as the conditions and the facts upon which it was issued continue to apply and provided that no amendment in the relevant law or regulations nor the issue of any circular affecting the ruling, has taken place since the issue of the tax ruling[3].

If during the tax examination it has come to Cyprus Tax Department's attention that the facts of the ruling are different from the actual events/transactions and such difference affects the ruling results, then such ruling becomes void.

In all other circumstances, the Tax Department is bound by its ruling until such time as it puts in writing to the taxpayer that its decision based on such ruling is withdrawn. The taxpayer has a right to follow a course of action that was based on a reasonable expectation created by actions of the Tax Department, such as the provision of the ruling. The Tax Department cannot then subsequently act contrary to these expectations.

Question 5

The Tax Department will not normally check whether income has been taxed by another country unless double tax relief is being claimed by the taxpayer. Certainly as part of transfer pricing policies, this is not a common procedure in practice.

[3] Circular No. 2015/13 of 22 September 2015 and supplementary Circular No. 2016/13 of 16 August 2016 of the Tax Department

In general, Cyprus has no rules on allocation of profits, other transfer pricing rules or any transfer pricing documentation requirements, except on back to back financing arrangements with related parties. Such transfer pricing requirements are effective as from 1/7/2017 for past, current and future intra-group financing arrangements.

However, section 33 (arm's length principle) of the Income Tax Law 118 (I)/2002, as amended requires that all transactions between related parties are carried out on an arm's length basis, being at fair values and on normal commercial terms.

It is only in recent years that the Tax Department has started to look more closely at transfer pricing matters, but in practice it does not intervene to adjust sales or cost prices.

However, the Tax Department does follow an aggressive line with regards to what they deem 'financial assistance' being debit balances that arise between related companies that go beyond normal trading terms. On such balances, the Tax Department imposes a primary adjustment requiring imposition of deemed interest (the rate is the subject of extensive negotiations), under section 33 of the Income Tax Law L.118(I)/2002, as amended (arm's length principles). Even in the light of a decision by both companies to write off such balances, the Tax Department ignores such legal corporate decisions, under Article 33 of the Collection and Assessment of Taxes Law L.4(I)/1978, as amended, imposing the same deemed interest (secondary adjustments by applying Article 33 of the Income Tax Law L.118(I)/2002) until such time as one of the companies has been liquidated or the debt has been repaid, or a court decision on the matter has been executed.

Question 6

A Cyprus tax resident company is taxed on its world-wide profits. The default position is therefore that all profits are considered to arise from the head office, unless such profits can be attributed to a permanent establishment outside Cyprus.

Profits from an overseas permanent establishment of a Cyprus tax resident company are exempt from corporation tax, except when:

- the activities of the foreign permanent establishment consist, directly or indirectly, of more than 50% investment income, *and*
- the foreign tax burden on the profits of a permanent establishment is substantially lower than the Cyprus tax burden (in practice lower than 6,25%).

It is noted that as from 1 July 2016, Cyprus taxpayers have the option to elect to tax profits of foreign permanent establishments and also be able to claim as credit any foreign taxes imposed on the foreign permanent establishments'

profits. If this option is not elected, the exemption method will remain as the default position.

Question 7

Section 33 (arm's length principle) of the Income Tax Law L.118(I)/2002, as amended, which was first introduced on 1 January 2003 gave the Tax Department the powers to intervene and challenge transactions between related parties if such transactions were not executed at market values and on normal commercial terms by increasing only the income of the said transaction.

As from 1/1/2015 the provisions of section 33 (arm's length principle) of the Income Tax Law L.118(I)/2002, were amended in order to allow also downwards adjustments.

The arm's length principles contained in section 33, have their basis on the international standard set forth in Article 9 of the OECD Model Tax Convention which, as per the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, should be used for determining transfer prices for tax purposes.

Section 33 of the Income Tax Law L.118(I)/2002 provides that:

> "(1) where –
>
> *a)* a business in the Republic participates directly or indirectly in the management, control or capital of a business of another person; or
>
> *b)* the same persons participate directly or indirectly in the management, control or capital of two or more businesses; and in either case conditions are made or imposed between the two businesses in their commercial or financial relations which differ from those which would be made between independent businesses, then any profits which would, but for those conditions, have accrued to one of the businesses, but, by reason of those conditions, have not so accrued, may be included in the profits of that business and taxed accordingly.
>
> (2) The provisions of sub-section (1) also apply in connection with any transactions between connected persons."

Question 8

As from 1/1/2015 section 33 (arm's length principle) of the Income Tax Law L.118 (I)/2002 was amended to also require the Tax Department to provide downward adjustments whereas before the said amendment the Tax Department could only make upward adjustments. More specifically where the Tax Department intervenes and challenges a transaction on arm's length principles by increasing the income of the said transaction, carried out between two Cyprus tax resident persons, a deem deduction must also be provided to the other Cyprus tax resident person being equal to the increase of the income or benefit. Where such

adjustment relates to a loan, financial assistance or a debit balance, the resulting deduction afforded to the other person is deemed to be 'interest' in nature, and the provisions concerning the restriction of interest will also apply.

Recently issued Circular 2016/15[4] now allows for Cyprus taxpayers to adjust their tax computations by including notional revenue and the corresponding notional expense on transactions that were not executed at market value and on normal commercial terms.

The taxpayers' right to do so, is outlined in Circular 2016/15, which was issued by the Tax Department on 24 November 2016, and provides a clarification on the application of the amended section 33 (arm's length principle) of the Income Tax Law 118 (I)/2002, as amended.

Circular 2016/15 confirms that the arm's length tax adjustments may also be applied by the concerned Cyprus taxpayers, instead of the Tax Department. In such a case, the Tax Department Taxation will accept the said tax adjustments for inclusion of the notional revenue and the corresponding notional expense on the tax computations of the Cyprus tax resident taxpayers involved, provided that those adjustments were made based on market values and on normal commercial terms.

Question 9

If a taxpayer submits an official transfer pricing study in the Greek or English language, which was accepted by the tax authorities of the selling state for a specific transaction that involves another taxpayer in that state, then the Cyprus Tax Department usually accepts such transfer pricing study for Cyprus tax purposes. If the transfer pricing result for the other state ends up in tax adjustments made by the tax authorities of that state, the Cyprus Tax Department will not adjust the level of taxable profits downwards since there is no provision in the Income Tax Law L.118(I)/2002 to allow such an adjustment.

It is noted that until today the Cyprus Tax Department did not request the submission of such transfer pricing studies. As from 1/7/2017 a transfer pricing study will need to be submitted for back to back related party financing arrangements. However, if the Cyprus tax resident taxpayer has an after tax return of 2% on the assets generating the interest income (i.e. on the loans receivable) no transfer pricing study will be required to be submitted.

Question 10

Each Cyprus tax law adopts specific anti-abuse provisions applied to circumstances raised thereunder. The only anti-abuse provision which is general in

[4] Circular No. 2016/13 of 16 August 2016 of the Tax Department

nature is section 33 of the Assessment and Collection of Taxes Law L.4(I)/1978, as amended and applies on direct taxes. According to section 33:

> "Where the Director[5] is of the opinion that in respect of any year of assessment the object of the tax of any person is reduced by any transaction which in his opinion was artificial or fictitious, he may disregard any such transaction and assess the persons concerned on the proper object of the tax"

We are not aware of a case where a general rule came as a back-up to lex specialis when the latter turned out to be ineffective.

Part II

Question 11

In the context of implementing the European Union state aid rules, Cyprus has enacted Law 30(I)/2001 which Provides for the Control of State Aid ("the State Aid Law"). The State Aid Law confers wide investigative powers on the Commissioner for State Aid Control ("CSAC") who, among other things, is responsible for the general application of the Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of European Union ("the Regulation") and of every other provision enacted or to be enacted by the Commission defining detailed rules in relation to the procedures laid down by the Regulation.

In cases where CSAC acquires, either through a complaint or through other information, knowledge that:

a) A state aid measure has been enforced in Cyprus without CSAC's approval or,

b) a state aid measure has been enforced in Cyprus-
   i. without CSAC's prior opinion or,
   ii. without notification to the Commission for approval or,

c) where acts or omissions made in the course of the enforcement of a state aid measure, which was previously approved by CSAC, run contrary to the provisions of the approved measure,

CSAC may, following hearing of the parties involved, order, on the basis of a duly justified decision published in the Official Gazette of the Republic of Cyprus, the suspension of the state aid measure and the recovery of any amount

[5] Meaning the Tax Commissioner and includes any authorised, by the Tax Commissioner, Tax Officer.

paid contrary to the provisions of the State Aid Law as well as legal interest, on a set deadline.[6]

As soon as the decision in the Official Gazette is published, a designated authority for the execution of the CSAC decision recalls or makes sure that the state aid act is amended accordingly or terminates or amends the contract pursuant to which the state aid is granted.[7] The said authority informs every beneficiary about his obligation to return any state aid paid, with interest, within a specific timeframe.[8] In the event of non compliance with the decision the designated authority for the execution of the CSAC decision, ought to take all necessary legal measures to recover the state aid paid.[8] The recovery procedure must be completed as soon as possible.[10]

CSAC also has supervisory control over the effective application of a recovery decision issued by the Commission ordering Cyprus to recover any unlawful state aid, in connection with which the CSAC may take any legal measure, including any measure which is feasible to be taken pursuant to the principle of the superiority of EU law over national law, for the timely application of the Commission's recovery decision.[9]

CSAC may also exercise all powers conferred to it by the State Aid Law, as those powers are described above, for the recovery of *de minimis* aid.[10]

Question 12

We are not aware of any Cyprus Court decision where a judge refused to allow for the immediate recovery of state aid.

On the contrary, Cyprus Courts were keen to declare that they have jurisdiction to "draw the necessary legal consequences from violations of the standstill obligation" by taking "interim measures where this is appropriate to safeguard the rights of individuals and the effectiveness of Article 88(3) of the Treaty (108.3)"[11]. The Cyprus Courts confirmed that in cases of possible delay in the recovery of the aid, they may use all interim measures available in order to at least terminate the anti-competitive effects of the aid ("interim recovery"). In a case where the state aid beneficiary was an insolvent company the judge said that it would have been pointless to issue a freezing order for the amount of the aid

[6] s. 18 of the State Aid Law.

[7] s. 18A(2) of the State Aid Law [8] *Ibid.*

[8] s. 18A(4) of the State Aid Law [10] *Ibid.*

[9] s. 18B of the State Aid Law

[10] s. 6 of the Regulations for the Control of State Aid (*de minimis* aid) of 2009 and 2012.

[11] Interim decision of the District Court of Nicosia *no. 5141/2013 between CYPRA LIMITED v. 1. Attorney General of the Republic 2. Council of the Central Slaughterhouse of Kofinos*, dated 06/06/2014 which extensively referred to *Commission notice on the enforcement of State aid law by national courts (2009/C 85/01)*.

until final judgment. Therefore, given that the state aid beneficiary was, admittedly, asset rich, it was considered that it would be more appropriate to issue an interim order prohibiting the state aid beneficiary from selling and/or mortgaging and/or transferring and/or alienating and/or encumbering in any way its immovable property until final judgment or until further court order.[12]

Question 13

As a Member State of the EU, Cyprus affords protection to foreign investors through Article 207 of the Treaty on the Functioning of the European Union ("TFEU") which explicitly includes foreign direct investment as part of EU's common commercial policy which is exercised by its very own institutions.

At the wider international level, Cyprus is a signatory to a plethora of bilateral and multilateral treaties which afford protection to property and foreign investments alike.

Multilateral Investment Treaties

Cyprus is signatory to the Convention Establishing the Multilateral Investment Guarantee Agency ("MIGA") of 11 October 1985, a member of the World Bank Group which provides insurance against risks of political or non-commercial nature that may accompany an investment in a developing member country. MIGA, specifically, insures investments made by investors of a MIGA member country into a developing member country against losses relating to currency inconvertibility and transfer restrictions, expropriation, war, terrorism and civil disturbance, breach of contract and the non-honouring of financial obligations. MIGA also provides services for the resolution of disputes between investors and member states in order to avoid disruption to insured projects.

Cyprus is also signatory to the Convention on the Settlement of Investment Dispute between

States and Nationals of Other States ("Convention") which was entered into force on 14 October 1966, establishing the International Centre for the Settlement of Investment Disputes ("ICSID"). Article 25 confers jurisdiction to the Convention over any dispute arising directly out of an investment, between a contracting state (or any of its constituencies or agents designated to the ICSID by that state) and a national[13] of another contracting state, which the parties to the dispute consent in writing to submit to the ICSID.

[12] Interim decision of the District Court of Nicosia *no. 5141/2013 between CYPRA LIMITED v. 1. Attorney General of the Republic 2. Council of the Central Slaughterhouse of Kofinos,* dated 06/06/2014

[13] "National" means both natural and legal persons.

Bilateral Investment Treaties

Cyprus is a party to a network of Bilateral Investment Treaties ("BITs") aiming to encourage and promote investments, in a spirit of reciprocity between Cyprus and any other contracting party. Generally, BITs recognize a fair and equitable treatment in the territory of each contracting party avoiding any discriminatory measures against the maintenance of the investment by the investors of the other contracting party. BITs also provide against expropriation and for compensation to investors in cases of national emergency, subject always to the principle of non-discrimination; i.e. the hosting state shall treat the investors of the other contracting state no less favourably than that accorded to its own investors or even to investors of a third state, whichever is more favourable to the investor concerned. BITs also provide dispute resolution mechanisms for the settlement of disputes between investors and a contracting party.

List of BITs

- Albania
- Armenia
- Belarus
- Belgium
- Bulgaria
- China
- Czech Republic
- Egypt
- Greece
- Hungary
- India
- Iran
- Israel
- Jordan
- Lebanon
- Libya
- Luxembourg
- Malta
- Moldova
- Montenegro
- Poland
- Qatar
- Romania
- Russian Federation (signed, not in force)
- San Marino

- Serbia
- Seychelles
- Syria
- United States

By Exchange of Notes Constituting an Agreement between the United States of America and Cyprus Relating to Investment Guarantees, which was signed on 29 May 1963,[14] United States nationals are afforded protection for their investments in Cyprus. Under the said BIT the government of the United States may guarantee an investment in Cyprus provided that Cyprus approves the activity to which the investment relates and recognizes that United States may guarantee such investment.

Question 14

In one of its recent decisions, the Supreme Court of Cyprus held that EU law prevails over the provisions of international treaties because, pursuant to Article 169.3 of the Constitution, international treaties (once ratified) have superior force over national law but not over EU law.[15]

The supremacy of EU law over bilateral agreements, even if a bilateral agreement was entered into force before the entry into force of the EU treaties, is clearly reaffirmed by the Court of Justice.[16] Moreover, according to Article 351 TFEU (ex Article 307 EC), international treaties between Member States and third countries which were concluded before a Member State's accession are to be respected but, to the extent that such agreements are not compatible with the EU Treaties, the Member State concerned must take all appropriate steps to remedy any incompatibilities.

[14] UNTS vol. 487, p. 283.

[15] *Civil Appeal no 109/2009 Tlais Enterprises v. Her Majesty's Revenue & Customs (ex Her Majesty's Customs and Excise)* of 18 March 2015.

[16] see, *C-235/87 Annunziata Matteucci v Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium*, at 22.

CZECH REPUBLIC

Radim Boháč*
Lukáš Hrdlička**
Jiří Kindl***
Michal Petr****

Part I

Question 1

The Czech Republic offers different opportunities for an advance legal certainty which differ in a degree of formality.

* Mgr. (Charles University, Prague), JUDr. (Charles University, Prague), Ph.D. (Charles University, Prague), doc. (Charles University, Prague). The author is an associate professor at the Faculty of Law, Charles University (Prague) specialised in financial law and tax law and a deputy chairman of the Commission on Financial Law of the Legislative Council of the Czech Government. He is also the deputy director of the Tax Legislation Department at the Ministry of Finance of the Czech Republic. Radim Boháč co-authored replies to questions 1-10. The author can be contacted at bohac@prf.cuni.cz.
** Mgr. (Charles University, Prague). The author is a Ph.D. candidate (Charles University, Prague) and works as a legal drafter at the Ministry of Finance of the Czech Republic. Lukáš Hrdlička co-authored replies to questions 1-10. The author can be contacted at hrdlicl@prf.cuni.cz.
*** Mgr. (Charles University, Prague), M.Jur. (Oxon), JUDr. (Charles University, Prague), Ph.D. (Charles University, Prague). The author is a partner with Weil, Gotshal & Manges (Prague) and a member of the Czech Bar Association. He also lectures Czech and EU competition law and economics at the Faculty of Law, Charles University in Prague and University of Economics in Prague. Jiří Kindl authored replies to questions 12-14 and co-authored (with Michal Petr) the reply to question 11. The author can be contacted at jiri.kindl@weil.com or jiri.kindl@univ.oxon.org.
**** Mgr. (Palacky University, Olomouc), JUDr. (Masaryk University, Brno), Ph.D. (Masaryk University, Brno). The author is an assistant professor at the Faculty of Law of the Palacky University in Olomouc. Since 2003 until 2015, he was working for the Czech Competition Authority, in the years 2010 – 2015 as its Vice-Chairman responsible for competition policy and enforcement. Michal Petr co-authored (with Jiri Kindl) the reply to question 11. The author can be contacted at michal.petr@upol.cz.

The most formal and binding are advanced rulings (in Czech: *závazná posouzení*) that are in general regulated by the Tax Process Code[1] and particularly by the Income Taxes Act[2], the Value Added Tax Act[3] and by the Electronic Sales Record Act[4]. Nearly everyone is allowed to submit a formal request for an advance ruling. But only certain specific facts regarding value added tax (VAT rates), income taxes (e. g. transfer pricing) and sales record (the type of sales record) may be subject to an advance ruling. Every submitted request for an advance ruling is charged with an administrative fee in the amount of 10.000 CZK with the exception of the request under the Electronic Sales Record Act where the administrative fee is 1.000 CZK[5].

Still remaining in the formal category but not binding are answers on taxpayer's questions and tax administrators' opinions (in Czech: *stanoviska*) published by tax administrators or by the Ministry of Finance that usually deal with a specific question. Those answers and opinions are nevertheless not binding for tax administrators or courts in dealing with taxpayer's cases. They mostly contain a suggestion of how to solve different problems. The only exception to this is a situation in which the opinions had been published and tax administrators acted in accordance with them for a long time. That course of conduct may constitute an administrative practice which may be recognized as binding by courts.

Completely informal discussions with a tax administrator or the Ministry of Finance are possible but their outcomes are not enforceable and, therefore, they are not so commonly sought after.

Question 2

The law explicitly states what a request for the advance ruling must contain. An obvious example of this is a provision regulating the required content of the request for the advance ruling on transfer pricing (deciding whether the value of the transfer price was established in accordance with arm's length principle) which are as follows:

- Names, an address of habitation or a seat, a seat of an entrepreneur, a tax identification number, if it was issued, of all participating subjects in the business relation, for whom the request is submitted, including tax nonresidents of the Czech Republic and subjects that have no tax liability in the Czech Republic (hereinafter "participating subject"),

[1] Section 132 and 132 of Act No. 280/2009 Coll., Tax Process Code, as amended.
[2] Act No. 586/1992 Coll., On Income Taxes, as amended.
[3] Act No. 235/2004 Coll., On Value Added Tax, as amended.
[4] Act No. 112/2016 Coll., On Electronic Sales Record.
[5] As stated in annex to Act No. 634/2004 Coll., On Administrative Fees, as amended.

- Characterization of organisational structure of which participating subjects are members, even if it is outside the Czech Republic,
- Characterization of business activities of participating subjects,
- Characterization of business relationship in respect of which the request is submitted,
- A tax period during which the ruling should take effect,
- Characterization and documentation of the way how the price was established with all other details relating to the business case; this also applies to details that will be known in the future which should be estimated and estimates that were used when these details were estimated shall also be characterized and documented,
- A proposal of the operative part of the decision of the advance transfer price ruling.

More details on the above list are provided in the D-class instruction number 293 (D-293) issued by the General Financial Directorate.

The procedure is covered by the D-class instruction number 292 (D-292) issued by the General Financial Directorate. Based on this instruction, the taxpayer shall also include documents that may contain information important to transfer pricing, e.g. information about a group, information about an undertaking, information about a transaction, other important information, information on what method of establishing transfer prices was used. The whole process of issuing the advance ruling is subject to an assumption that all information provided in the request were true.

As far as it is known to authors and as it is stated in the D-292 instruction, there is no verification of the facts mentioned in a request for the ruling prior to the issuance of a ruling and there is definitely no verification prior to issuing the annual tax assessment (ex-post). Although these facts may be subject to a tax audit and may be verified during a following additional tax assessment issued by the tax administrator.

Question 3

There is no legal provision containing a tax administrator's duty to verify the way how a particular payment or transaction was treated by authorities in another country. To the authors' knowledge there is currently no common systematic verification taking place. Tax administrators therefore do not verify this during the tax assessment or tax audit.

Nevertheless, such verification may take place if some information provided by an external subject appears (e.g. information exchanged within international tax cooperation).

Question 4

As stated above, the advance certainties may be divided into two categories. Binding tax rulings fall into the first category. These rulings are effective to every tax administrator who shall decide about tax duties of a taxpayer that was the addressee of such a ruling, if, at the time of the tax assessment, the actual situation of the case is identical to the information on the basis of which the respective ruling was issued (in other words, *clausula rebus sic stantibus* applies).[6] The tax administrator has to follow the legal opinion declared in the binding tax ruling in his decision-making activity, including the ordinary appellate proceedings and the extraordinary remedy or supervision procedure.

If the applicable law changes, the ruling will not be effective.[7] If it becomes apparent during the tax procedure that the conditions under which the ruling was issued are not met, the ruling will not be used during tax procedure.[8]

The second category consists of non-binding answers, opinions and other informal negotiations. Even though these acts are considered non-binding there are always some generally applicable principles of law in place (e.g., protection of legitimate expectations and a maxim that the same procedure shall apply in equivalent matters).

Question 5

To the authors' knowledge, legal provisions do not regulate a procedure of checking of any remaining income and its foreign taxation. Therefore, there is not any correction mechanism to ensure that a remainder will still be taxed at home.

Nevertheless, this information may be subject to spontaneous exchange of information in tax administration as stated in section 14 of the Act on International Cooperation in Tax Administration[9]. Under that provision, the tax administrator on his own initiative will provide the tax authorities of another state with the information at his disposal if

a) the tax administrator reasonably assumes that tax in that other state may be evaded,
b) a taxpayer has been subject to a lower tax or a tax exemption in the Czech Republic, which could lead to an increase of tax or tax liability in that other state,
c) business between taxable subjects with tax liabilities in different states is carried out through one or more states so that a tax may be deducted in one of these states,

[6] Section 133 (1) of the Tax Process Code.
[7] Section 133 (2) of the Tax Process Code.
[8] Section 133 (5) of the Tax Process Code.
[9] Act No. 164/2013 Coll., On International Cooperation in Tax Administration, as amended.

d) the tax administrator reasonably supposes that a tax deduction may be made by a specific transfer of profit between associated enterprises or persons as defined by the Income Tax Act, or
e) the tax administrator reasonably supposes that the information provided would enable the identification of facts which may affect the determination of the tax in that other state.

The tax administrator may also provide, on his own initiative, to the tax authorities of another state the information at his disposal which may be relevant for tax administration in that other state. However, that kind of international cooperation is only possible with the Member States of the European Union, and in the event that a relevant international treaty is effective between the Czech Republic and the respective other state.

In future, this could be covered also by country-by-country reporting or by implementation of Anti-Tax Avoidance Directive.

Question 6

The Czech law does not have any default rule that would be used for allocating taxable entity's profit.

Basically, taxing of profit depends on the place where the profit was made. There are two kinds of taxpayers in the Czech Republic, i.e. residents and non-residents. The former has a duty to tax every income regardless of the country of its source; the latter has a duty to tax only the income having its source in the Czech Republic. This means that the Czech resident's income arising out of her activity in other country will be subject to tax duty under the Czech law. This duty applies to the Czech resident's income regardless of the fact that she has a permanent establishment (as defined in a double tax treaty) in another country which means that her income arising out of her permanent establishment's activity is subject to tax in that another country.

However, the above described default regime is usually modified by double tax treaties' provisions (especially provisions regulating profits of permanent establishments).

Question 7

Yes, the section 23 (7) of the Income Taxes Act has a transfer pricing principle that is based on an arm's length principle. If there is any mismatch between a price negotiated between associated persons or enterprises and a price that would be negotiated between non-associated persons or enterprises, then this mismatch must be satisfactorily proven. Otherwise the negotiated price is changed by the tax administrator to correspond with the estimated impartial (arm's length) price.

Associated persons or enterprises in the Czech Income Act are divided into persons or enterprises with an equity link (there are stated thresholds necessary to qualify as a person with an equity link to another person and the equity is calculated using an arithmetic average of monthly values of equity) and persons or enterprises linked by other means (e.g. a controlling person and a controlled person, relatives, persons close to each other).

In order to provide more details for taxpayers and tax administrators, the General Financial Directorate issued an instruction class D number 332 (D-332) which contains more specific provisions regarding transfer pricing. These instructions are not binding outside the financial administration system but are binding for tax administrators and are, therefore, used in the course of any tax procedure.

The instruction D-322 is closely modelled along the lines of OECD's transfer pricing guidelines which is also explicitly stated in that instruction.

Question 8

Yes, taxpayer's income is subject to such an unilateral adjustment of profits during tax assessment or additional tax assessment (usually after a tax audit). The above mentioned section 23 (7) of the Income Taxes Act is applied automatically and, therefore, taxpayer's profits are adjusted accordingly by the tax administrator.

If the taxpayer realises that he made a mistake in estimating transfer price, he can submit an additional tax assessment where he can also adjust his profits with regard to the price that would be estimated under the arm's length principle.

Both of these procedures are unilateral but a foreign tax administrator may be informed about this on the basis of section 14 of the Act on International Cooperation in Tax Administration (under the conditions set out above).

Question 9

The tax administrator is obligated to take into account everything (every relevant fact and/or a piece of evidence) that has come out and/or been established in the course of the respective tax procedure. That general obligation constitutes one of the basic principles of tax procedure called the "material truth" principle. Nevertheless, the primary duty to communicate this fact lies on the taxpayer and she, therefore, has a duty to initiate tax procedure by submitting the tax return or additional tax return. The taxpayer also has a duty to prove everything which is stated in the additional tax return (this applies to every tax return in general). This might mean also a fact that other country's authorities has adjusted the level of taxable profit downwards which could lead to a higher tax liability in the Czech Republic (based on the default rule mentioned above).

Question 10

The Czech tax law does not have an explicitly stated GAAR (general anti-abuse rule). On the other hand, explicit GAAR can be found in private law. It concerns the provisions of Section 8 of the Civil Code[10], according to which the obvious abuse of right does not enjoy legal protection. However, this rule cannot be used directly in tax law.

In the field of tax law, the current approach is that GAAR is principle derived by courts in their tax judgements. This principle first appeared in a decision by the Supreme Administrative Court in 2005[11]. Pursuant to that decision: "*If persons with close family ties have established an association for the purpose of financing sport, cultural and educational activities of their children through donations dedicated to this association, it is always necessary to consider, in the light of circumstances of the case, whether the deduction of the value of such gifts from the tax base under Section 15 (8) of Income Taxes Act is not an abuse of law.*" Subsequently, this principle was adjudged in a number of other court decisions.[12]

Rules of considering the abuse of rights in tax law, therefore, follow from the case law of the Supreme Administrative Court. The abuse of rights in tax matters occurs if

a) the main purpose of the relevant economic activity (an exercise of a right) is to obtain a tax benefit or claim against the tax administrator, and
b) the granting of a benefit or claim would be contrary to the meaning and purpose of the relevant provisions of the tax laws or it is not in accordance with the requirement of a reasonable organization of social relations.

The Czech Republic tries not to enact specific anti-abuse rules (SAARs) because that might happen in a way which would deny the anti-abuse principle developed by the judicature.

It becomes apparent, though, that under upcoming European directives (e.g. ATAD) it will be necessary to enact some SAARs for some taxpayers.

[10] Act No. 89/2012 Coll., Civil Code, as amended.
[11] Decision of the Supreme Administrative Court No. 1 Afs 107/2004 – 48 of 10th November 2005.
[12] See decisions No. 5 Afs 58/2011, No. 2 Afs 178/2005, No. 2 Afs 83/2010 or No. 1 Afs 35/2007.

Part II

Question 11

In order to reflect the EU state aid law in the Czech Republic, a new State Aid Act,[13] was adopted in 2004 in connection with the accession of the Czech Republic to the EU. Before that, there were national rules on state aid (broadly harmonized with the EU law) pursuant to which, the Czech Competition Authority (in Czech: *Úřad pro ochranu hospodářské soutěže*; hereinafter referred to as "CCA") was the decision-making authority.[14]

As of May 2004, the CCA became "only" the coordinating authority in the area of state aid,[15] whereas the decisions on state aid issues are reserved for the European Commission (or to the national courts to the extent that is allowed under the EU law[16]). The CCA has, however, no direct involvement in recovery of state aid.

The State Aid Act unambiguously states that if the European Commission decides that the state aid should be recovered (or provisionally recovered), the beneficiary shall refund it to the provider (or its legal successor), including the interest set by the European Commission.[17]

[13] Act No. 215/2004 Coll., regulating certain relations in the area of state aid and altering the Act on the promotion of research and development, as amended (hereinafter referred to as "State Aid Act"). The State Aid Act is available in English at: http://www.uohs.cz/en/legislation.html.

[14] Act No. 59/2000 Coll., on state aid. In parallel, to that old state aid act there were (up until accession of the Czech Republic to the EU) some other relevant rules in place, esp. Article 64(1)(iii) of the Agreement on Association of the Czech Republic with the ECs (promulgated by the communication of Ministry of Foreign Affairs No. 7/1995 Coll.) which prohibited any state aid incompatible with the Association Agreement to the extent such state aid affected trade between the Czech Republic and the European Communities. Pursuant to Article 64(2) of the Association Agreement the practices contravening to state aid prohibition should have been considered under the same rules as applicable under Article 92 TEEC [subsequently, Article 87 TEC, and now Article 107 TFEU]. In addition, there were Implementing Rules regarding state aid provisions in the Association Agreement (promulgated by the communication of Ministry of Foreign Affairs No. 225/1998 Coll.) which, inter alia, stated that the Czech authorities when deciding on state aid issues should have been bound by primary EC law, secondary EC law, related guidelines and case law of the EC courts.

[15] State Aid Act, Section 2 (g); in the area of agriculture and fisheries, the Ministry of Agriculture acts as the coordinating authority.

[16] Czech courts have recognized the dual role of the European Commission and the national courts (as it is dealt with e.g. in the Commission notice on the enforcement of State aid law by national courts (OJ C 85, 9.4.2009, p. 1–22); see in this regard e.g. a judgment of the Supreme Court of the Czech Republic Ref.No. 23 Cdo 1341/2012 of 25 June 2014. Accordingly, national courts can decide on the existence of unlawful aid but cannot rule on its (in)compatibility with the common market.

[17] State Aid Act, Section 7 (1).

The provider is responsible for the recovery.[18] It shall ask the beneficiary to refund the state aid in a time period set by the European Commission; if there is no such time period, the provider shall set an appropriate one.[19] If the beneficiary is subject to sector-specific supervision (eg. banks), the provider shall also inform the supervisory authority on the obligation to refund the state aid.[20]

If the state aid is not refunded within the specified time period, the provider is obligated to recover it from the beneficiary. Under the original rules, the provider was to bring a civil action before a court.[21] Exclusively judicial enforcement was, however, perceived as not sufficiently effective[22] (even though it has not been tested) and an administrative enforcement was enabled in 2009, when the State Aid Act was amended (see below).[23] The providers may be fined up to CZK 1 000 000 (approx. EUR 400 000) by the CCA if they do not perform all the actions necessary to secure recovery of the state aid.[24] No decision to that effect has yet been issued as that kind of procedure was (pursuant to the authors' knowledge) not yet tested.

Pursuant to the available sources, the Commission has not yet issued a recovery order against the Czech Republic. Even though the Commission dealt with number of contentious state aid matters vis-à-vis the Czech Republic, those cases primarily involved e.g. state aid granted to Czech banks prior to accession and the European Commission dealt mainly with the issue of (non)applicability of that aid after accession.[25]

Under the rules currently in force, judicial enforcement of state aid recovery is only a secondary option, if administrative enforcement is not available. If the state aid was granted from the state budget, a general administrative procedure

[18] State Aid Act, Section 7 (2).

[19] *Ibid*.

[20] State Aid Act, Section 7 (3).

[21] State Aid Act, Section 7 (2), in force until 31 May 2009. In detail, see e.g. TICHÝ, L. *Vracení veřejné (státní) podpory podle právního režimu platného od 1. 5.* 2004 [Recovery of State Aid According to Legal Regime in Force Since 1 May 2004]. Právní rozhledy 2004 (21), p. 778.

[22] Explanatory memorandum to Act No. 109/2009 Coll.

[23] Act No. 109/2009 Coll., amending Act No. 215/2004 Coll., on state aid. Act No. 252/1997 Coll., on agriculture, and Act No. 218/2000 Coll., on budgetary rules.

[24] State Aid Act, Section 8 (2) (d) and 8 (3) (d).

[25] See e.g. Commission's decision of 28 January 2004 (2004/C 195/02) declaring that the compensation granted to Česká spořitelna, a.s., for taking over claims against AB Banka, a.s. constitutes existing aid within the meaning of Article 88(1) ECT. The other measures in favour of Česká spořitelna, a.s., notified by the Czech Republic under the interim mechanism pursuant to Annex IV.3 of the Accession Act, were not applicable after accession. Similarly, see also Commission's decision of 14 July 2004 (C (2004)2688 fin) regarding aid measures relating to Investiční a poštovní banka, a.s. / Československá obchodní banka, a.s., or Commission's decision of 18 July 2007 (C(2007) 1965 final) regarding GE Capital Bank a.s. and GE Capital International Holdings Corporation, U.S.A.

to recover state funds may be used. The decision of the European Commission on recovery (or provisional recovery) of state aid is an explicit ground to start that kind of proceedings.[26] The recovery decision is issued by the provider. It may be appealed to a superior public authority (or the head of the authority that issued the decision, if there is no superior body) and it is eventually subject to judicial review by administrative courts.

Similar rules apply if the aid was granted from municipal or regional budgets.[27]

An exclusively judicial recovery procedure would take place in that kind of state aid when the aid was provided neither from the state budget nor from municipal/regional budgets (e.g. in case it would have been provided by state owned enterprises).

Question 12

Pursuant to the authors' knowledge there has been no such case. As mentioned above (see response to the previous question), the Commission has not yet issued a recovery order against the Czech Republic and, hence, the courts were not asked to allow recovery of state aid.

Even prior to the accession of the Czech Republic to the EU, the CCA issued recovery decisions very rarely.[28] Usually, state aid issues were dealt with ex ante and/or by modifying the already approved aid.[29] Pursuant to authors' knowledge, the related recovery issues were not dealt with before the courts.

There have been and are some pending law suits in which private claimants (competitors) complain against allegedly unlawful state aid and ask civil courts (usually on unfair competition grounds) for its recovery from the alleged state aid beneficiary (usually publicly owned company or entity) but those proceedings have never been (to the authors' knowledge) completed with a decision finding for a claimant. The refusal of those claims was not, however, made on legitimate expectations grounds but was based on other legal reasons.[30]

[26] Act No. 218/2000 Coll., on the budgetary rules and on amendment of certain other acs, as amended, Section (15) (1) (e).

[27] Act No. 250/2000 Coll., on budgetary rules of local authorities, as amended.

[28] There seems to be the only one public available decision, i.e. decision of the CCA Ref.No. VP/S 6a/02-160 of 24 June 2002 concerning *Nova Hut* company.

[29] See, e.g., decision of CCA Ref. No. VP/S 95/04-160 of 25 April 2004.

[30] In this regard, see e.g. litigation of NH Hospital (a private provider of hospital services) against Central Bohemia Region in which it claimed that the publicly owned hospitals have been receiving illegal state aid. The relevant decisions are the judgments of Municipal Court in Prague Ref. No. 32Cm 128/2010 – 131 of 13 June 2011, and Ref. No. 32Cm 128/2010 – 339 of 1 July 2015, the judgment of High Court in Prague Ref. No. 3Cmo 289/2011 – 142 of 29 December 2011, and Ref. No. 3Cmo 239/2015 – 371 of 28 July 2016, and the judgment of the Supreme Court Ref. No. 23 Cdo 1341/2012 of 25 June 2014. In addition, see also the judgment of the Supreme Court Ref. No. 23 Cdo 2493/2014 of 28 July 2016 (and

Question 13

Yes, the Czech Republic is subject to many international obligations involving the protection of property or the protection of foreign investments. In this regard, the Czech Republic is bound by the European Convention of the Protection of Human Rights and Fundamental Freedoms which guarantees the right to property as a fundamental human right and the Czech Republic is subject to the jurisdiction of the European Court of Human Rights. The Czech Republic is also a Member State of the EU and, hence, is subject to relevant EU law rules.

In addition, the Czech Republic is also a party to both multilateral (e.g. the Energy Charter Treaty) and bilateral investment protection treaties. The complete list of those treaties is published on the website of the Ministry of Finance of the Czech Republic.[31] They include bilateral investment treaties (hereinafter also "BITs") with approximately 80 states of various stage of economic development. They also include countries within and outside the EU.[32] The investment protection treaty has been entered into with the United Kingdom which entered into force on 26 October 1992 (promulgated by the communication of Ministry of Foreign Affairs No. 646/1992 Coll.) as well as with the United States which entered into force on 19 December 1992 (No. 187/1993 Coll.) and was later on modified in 2004 (No. 102/2004 Coll.).

Question 14

To the authors' knowledge the Czech courts have not yet addressed the issue of potentially conflicting obligations of EU (state aid) law and of public international law, including investment protection treaties.

That issue arose in the Czech context in connection with investment protection arbitration in which cases it was, however, dealt with by arbitration tribunals (usually either ICSID or UNCITRAL tribunals).[33] The cases involved from time to time claims of frustrated legitimate expectations of the investors (usually on the ground of an alleged breach of fair and equitable treatment obligations and/or on 'creeping expropriation' ground) and one of the defences by the

previous judgments of Municipal Court in Prague Ref.No. 19 Cm 114/2011-167 of 8 November 2012 and of High Court in Prague Ref.No. 3Cmo 92/2013 -216 of 8 October 2013) which dealt with an unsuccessful attempt to suspend grants in favour of non-profit sporting entities.

[31] See http://www.mfcr.cz/cs/legislativa/dohody-o-podpore-a-ochrane-investic/prehled-platnych-dohod-o-podpore-a-ochra (17 September 2017).

[32] But the Czech government seeks to end some investment protection treaties with countries that are the Member States of the EU. At present, the states with respect to which the investment protection treaties have been terminated include Denmark, Estonia, Ireland, Italy, Malta, Slovakia and Slovenia.

[33] The information concerning arbitrations against the Czech Republic are summarized at the website of the Ministry of Finance: http://www.mfcr.cz/cs/zahranicni-sektor/ochrana-financnich-zajmu/arbitraze (17 September 2017).

Czech government was that the government had to comply with EU law rules, incl. state aid.[34] In that regard also an issue of continuing validity of pre-accession intra-EU BITs was dealt with (in some cases the European Commission has been acting as amicus curiae and argued that they lost validity and were superseded by the EU law) and the validity of those BITs was confirmed.[35] As regards the issue of EU state aid law trumping the international obligations under the BITs, the issue (when it was dealt with substantively) was viewed from the perspective that the state aid rules were binding in the Czech Republic at the relevant times of which the investors were aware and/or should have been aware and, hence, they could not have claimed frustrated legitimate expectations when the Czech Republic followed those rules.[36] A similar issue is now dealt with also in the pending arbitration concerning modifications to support mechanisms of production of electricity from renewable (solar) sources.[37]

[34] See in this regard e.g. award in Invesmart B.V. v. Czech Republic of 26 June 2009, available at http://www.mfcr.cz/cs/zahranicni-sektor/ochrana-financnich-zajmu/arbitraze/prehled-rozhodcich-nalezu (17 September 2017).

[35] See e.g. partial award in Eastern Sugar B.V. (Netherlands) v. Czech Republic of 27 March 2007 or award in WNC Factoring Ltd (United Kingdom) v. Czech Republic of 27 February 2017, both available at http://www.mfcr.cz/cs/zahranicni-sektor/ochrana-financnich-zajmu/arbitraze/prehled-rozhodcich-nalezu (17 September 2017).

[36] See e.g. award in Invesmart B.V. v. Czech Republic of 26 June 2009, available at http://www.mfcr.cz/cs/zahranicni-sektor/ochrana-financnich-zajmu/arbitraze/prehled-rozhodcich-nalezu (17 September 2017).

[37] For the list of those pending cases see http://www.mfcr.cz/cs/zahranicni-sektor/ochrana-financnich-zajmu/arbitraze/prehled-arbitraznich-sporu-vedenych-prot (17 September 2017).

DENMARK

Jane Bolander
Karin Skov Nilausen
Pernille Wegener Jessen

Part I

Question 1

In Denmark, the taxpayer can get legal certainty by applying for a formal advance tax ruling (Danish: "bindende svar") or by getting an advance pricing agreement (APA). Only these two possibilities are regulated.

On very rare occasions, it is also possible for the taxpayer to claim his position according to an informal statement from the tax authorities. A few case law decisions have stated that if the informal statements from the tax authorities has had the effect that the taxpayer has not obtained proof of his cost, income etc. due to the informal statement, the taxpayer can base his right on this and the expectations will be legally protected even though the cost, income etc. are not sufficiently documented. It is very uncertain and disputable when this practice of informal statements can take place. As a main rule, statements from the tax authorities are not binding for the tax authorities in Danish taxation apart from the formal advance tax ruling and advance pricing agreement. Even if the information about tax consequences are given in writing, they will not be binding for the tax authorities if the consequences are not according to the interpretation of the law.

Below we will concentrate on a description of the two regulated options for advance certainty in tax matters. First, we will describe the advance tax ruling, which will be followed by a description of the advance pricing agreements.

The advance tax ruling can be obtained by anyone, as long as the question is about income tax. It is not possible to have advance tax rulings about e.g. customs. It is possible for a taxpayer to ask for an advance tax ruling concerning his own tax matters. Likewise a company can also ask for an advance tax ruling if it for instance wants to know the tax consequences in advance when its customers use its products, e.g. if a bank has developed a new kind of loan and wants to know the tax position of the customers.

The questions can be asked both prior and after an action/decision has been made. When the taxpayer asks in advance, it is possible to make another decision, which will imply other tax consequences. When the taxpayer asks about the tax consequences concerning actions/decisions that have already taken place, the taxpayer gets certainty sooner than according to the normal procedure of tax assessment. Questions about decisions already carried out can only be directed at the taxpayer himself. In these situations, a company cannot obtain an advance tax ruling for the tax consequences of its products.

The tax authorities can refuse to answer the questions if the questioner has not given sufficient information on the matter. The question can also be rejected if it is not possible to answer the question with the necessary certainty or if other special occasions make it impossible to answer. It is the questioner's responsibility to give sufficient information to the tax authorities.

The advance tax ruling is binding for the tax authorities for a period of up to 5 years. The ruling can be given for a shorter period than 5 years. If the question concerns the valuation of an asset, the tax ruling is only binding for a period of 6 months. In addition to this, the ruling about the valuation will not be binding, regardless of the period, if subsequent conditions indicate that the valuation differs at least 30% and at least DKK 1 m. (about 134.000 euro) from the valuation accepted in the ruling. This rule was introduced because experience showed that valuation is very difficult and could be a major problem in relation to bringing the asset out of Danish tax jurisdiction. This rule on valuation of an asset might be abolished in the near future since a proposal for its repealing is in hearing.

The advance tax ruling is binding, even if it turns out that the answer is wrong. Even if the courts later decide that a rule should be interpreted differently, the advance tax ruling is binding for the tax authorities for the entire binding period. However, it is not binding if it violates EU-law, the tax law changes or the conditions for the ruling changes.

The advance tax ruling costs a fee of about 54 euro (2017, DKK 400).

The ruling is only binding for the tax authorities, not for the taxpayer. When the taxpayer receives the advance tax ruling, the taxpayer can choose to use it or not when making his annual tax assessment. If the taxpayer's view is not accepted in the advance tax ruling, he/she can still make the annual tax assess-

ment according to his/her belief and, thereby, not follow the advance tax ruling. The taxpayer should then, however, be aware that it is likely that he will be selected for investigation by the tax authorities.

The Danish Tax Administration (SKAT) does not have a formal bilateral APA program with published rules specifically addressing bilateral APA requests. However, the Danish Tax Administration does have an established practice of accepting, processing and negotiating bilateral APA requests. This practise is described in SKAT's guidance on the website (www.skat.dk – Jura – Den juridiske vejledning – C.D.11.15.3.) Over 30 bilateral APAs have been concluded (including renewals) since The Danish Tax Administration began actively processing bilateral APA requests around 2000. The Danish Tax Administration can either reject or accept a potential bilateral APA request at its own discretion.

The most typical bilateral APA requests concluded by The Danish Tax Authorities include the inter-company pricing of cross-border tangible goods transactions and service transactions. However, there have also been bilateral APA cases processed addressing intangible related issues (e.g. royalties and profit splits) as well as valuation issues.

Similarly, as there are no formal bilateral APA reporting requirements in Denmark. The Danish Tax Administration typically accepts that the annual reporting requirements in the corresponding country to the transaction(s) are sufficient for Danish purposes (in demonstrating compliance to the bilateral APA agreement).

There have been isolated situations where a bilateral APA process addressed PE issues; e.g., whether a certain function constitutes a PE and whether income should be allocated. However, in the rare instances where this has been seen, it was considered an ancillary issue to the more primary transfer pricing issues requested through the bilateral APA request. No formal (or informal) guidance has been issued by The Danish Tax Administration as to whether they would agree to process a PE and/or attribution of profits to a PE issue as a main issue addressed via a bilateral APA request.

Article 25 of the OECD Model Convention with respect to Taxes on Income and on Capital is the legal basis which SKAT refers to when allowing to process bilateral APA requests; and as a result, bilateral APA processes are only accepted in situations where Denmark has a tax treaty with the other country (which includes an Article 25 of the OECD model convention).

Question 2

The advance tax ruling relies only on the requester's information and the tax authorities will typically not try to verify the facts mentioned in the request. This could seem rather careless, but the advance tax ruling will only be binding if all relevant information was presented for the tax authorities before making

the ruling. So, if the facts are not true, the ruling will not be binding. The risk lies on the questioner.

After the annual tax assessment, the tax authorities will verify the facts after the normal standard, independent of whether or not the taxpayer has an advance tax ruling.

Question 3

The taxpayer shall make a correct tax return. If a Danish provision for instance requires a certain tax treatment in another country, the taxpayer has to meet the conditions in order to prepare the tax return in accordance with the provision. An example: Section 2 A of The Company Tax Act deals with hybrid mismatch, where an entity is taxable in Denmark, but is considered transparent in another country. This mismatch could result in tax abuse. If the entity pays interest it will be deductible in Denmark, because the entity is taxable, but it would not be taxable in the other country, since the entity in that other country is considered transparent. To prevent such tax abuse Section 2 A was introduced. According to this provision an entity is considered transparent in Denmark, if the entity is considered transparent in another country. When making the tax return the taxpayer must take the tax treatment in the other country in to consideration; if the entity is transparent in another country it must file its tax return according to Section 2 A. Afterwards in relation to a normal control procedure the tax authorities can investigate whether the conditions are fulfilled or not in order to make a correct tax assessment.

Question 4

Normally, the advance tax ruling is binding for a 5-year period – or 6 months if the question concerns valuation. It is binding even if it turns out to be an incorrect interpretation of the law. Since the valuation of assets is sometimes very difficult, the ruling will not be binding if there is strong indication afterwards that the valuation in the advance ruling was wrong. Moreover, in case of evaluation, the ruling is not binding if circumstances later indicate that the value at the time of the ruling differed at least 30%, or at least DKK 1 m. from the valuation given in the advance tax ruling. Besides this, the valuation rule in the advance tax ruling is normally binding for the tax authorities.

If the information, given by the taxpayer to obtain the advance tax ruling, turns out not to be correct, the ruling will not be binding for the tax authorities. This means that if not all information are given or the information is incorrect, the ruling will not be binding for the tax authorities. By making the information, the questioners risk there will be an incentive to provide the necessary and correct information.

Other circumstances can make the ruling not binding. If the facts and circumstances for the taxpayer change, the ruling will not cover this situation. The ruling can also lose its binding character if the law changes and, finally, the advance tax ruling will not be binding if it is not consistent with the EU-law. For the taxpayer, there is a risk of asking for an advance tax ruling when it concerns a "loophole in the law". The request makes the legislator aware of the problem and they might change the law before the taxpayer has the chance to use the ruling.

The advance tax ruling must be used within the 5-year period to be covered. If the question concerns an ongoing condition, e.g. whether a taxpayer is a self-employed person, he/she will only be considered this for as long as the ruling lasts. After the binding period, the taxpayer has no right to claim to be treated as a self-employed person, even if the facts and circumstances for the person do not change.

Question 5

If profits are shifted abroad by the Danish Tax Authorities in a transfer pricing case, then the profits in the Danish company have been reduced.

According to the Danish transfer pricing legislation, it is not possible to reduce the profits in Denmark – to make a transfer pricing downwards adjustment – without a similar upwards adjustment in the other country. The applicable rule is section 2 (6) of the Tax Assessment Act (ligningsloven), which states that it is a condition for a transfer pricing downwards adjustment of the profits that there is a corresponding upwards adjustment of the profits of the other company. In case the controlled transactions are conducted with companies or permanent establishments in another country, then it is a condition that the corresponding income is subject to taxation in the other country.

Therefore, the Danish Tax Authorities have to control whether another country taxes the corresponding income. If not taxed by the other country, then a downward adjustment is not possible.

A provision like Article 26 (2) of the tax treaty between the Nordic countries where the possibility to tax an income – in order to avoid double non-taxation – is shifted from the source country to the resident country in case the source country cannot tax according to the internal tax rules is not as effective as the Danish internal rule.

Question 6

In Denmark, profits are allocated between the head office and the permanent establishment within a legal entity in accordance with the arm's length principle.

According to section 2 (2) of the Company Tax Act (selskabsskatteloven), the income of a permanent establishment in Denmark is calculated as the income that

it would have received if it had been an independent company dealing with the same business or a similar business under the same or similar conditions. When calculating the income, the functions performed, the assets used and the risk taken in the permanent establishment are taken into account and transactions with other parts of the undertaking are included.

However, if the double taxation treaty with the country where the undertaking is resident has a provision on business profits with a different wording, then the income is calculated in accordance with this different wording.

An undertaking in Denmark with a permanent establishment in another country shall not include profits and loss from the permanent establishment unless joint international taxation is chosen. What is considered a permanent establishment and which profits and loss to exclude from taxation in Denmark is assessed in accordance with the applicable double tax treaty and the guidance in OECD's model convention.

Moreover, the arm's length principle incorporated in Danish legislation in section 2 of the Tax Assessment Act applies for transactions between an undertaking abroad and a permanent establishment in Denmark, and between permanent establishments abroad and undertakings in Denmark, see the description of section 2 of the Tax Assessment Act in question 7 below. The arm's length principle is applicable for transactions in accordance with the rules on calculating the profits of a permanent establishment and shall be calculated in accordance with the arm's length principle.

Question 7

The arm's length principle was formally incorporated into the Danish legislation in 1998. However, at that time the arm's length principle was already considered a part of the applicable rules, see the discussion on the legal base for adjustments of transactions outside the scope of section 2 of the Tax Assessment Act in question 10. In 1998, legislation on transfer pricing documentation was introduced in Denmark. In the same year, a judgment from the Supreme Court made it subject to interpretation whether the arm's length principle was applicable in all cases, and therefore the arm's length principle was introduced in section 2 of the Tax Assessment Act.

The preparatory work to the new legislation on the arm's length principle and the transfer pricing documentation referred to OECD's transfer pricing guidelines and stated that the Danish rules would be administered in accordance with the guidelines.

Therefore, the arm's length principle is a part of the Danish legislation and there is a direct link to OECD's transfer pricing guidelines.

Question 8

In Denmark, upwards adjustments in accordance with the arm's length principle are allowed. Downwards adjustments in accordance with the arm's length principle are also allowed if the profit is taxed in another country, see question 5 above.

Question 9

The Danish Tax Authorities accept a downward adjustment if the adjustment is in accordance with the arm's length principle.

Moreover, the time limit is 10 years for an adjustment caused by an adjustment in another country and when the Danish Tax Authorities accept the adjustment in the other country. If the Danish Tax Authorities do not accept the adjustment, then the taxpayer can ask the Authorities to open a Mutual Agreement Procedure.

Question 10

As for now, Denmark does not have a written GAAR covering tax abuse in all situations. Denmark has several rules that aim to capture abuse in special situations, e.g. rules against hybrid mismatch (Company Tax Act section 2 A and 2 B).

In 2015, section 3 of the Tax Assessment Act was introduced which implemented the anti-abuse rule, as agreed upon at the EU-council meeting on 27 January 2015. Section 3 covers the adopted change to the European Council's Parent-Subsidiary Directive art. 1, para. 2, which we were obligated to implement. But at the same time, it was decided that section 3 also should apply to transactions covered by the Interest-Royalty Directive, the Merger Directive or double taxation treaties. According to this article, the taxpayer cannot claim the benefits for these Directives (or double taxation treaties) if the aim of the transactions is to abuse the directives (or double taxation treaties) to get tax benefits against the meaning of the Directive (or double taxation treaties). The wording of section 3 of the Tax Assessment Act is in accordance with the change to the Parent-Subsidiary Directive art. 1, para. 2, but is expanded to also cover the Interest-Royalty Directive and the Merger Directive. In section 3 (3), the same consequences are listed, when the situation is not covered by the EU-directives, but by a double taxation treaty. The wording here differs as it is in accordance with the OECD's proposal, but it is expected to be practiced primarily the same way as the EU-related anti-abuse directives.

On 20 June 2016, the Council adopted the Anti-Tax Avoidance Directive, which contains a General Anti-abuse rule. This rule should apply as from 1 January 2019. Before implementing this rule, Denmark did not have a written GAAR, but that does not mean that the tax authorities are without means to fight tax abuse. The courts of justice in Denmark use a very pragmatic interpretation of

the law, when it is clear that the taxpayer wants to abuse the tax law. The courts try to interpret the law the best possible way to prevent tax abuse. It has also occurred that the Supreme Court in Denmark has neglected a benefit even if the transactions are in accordance with the wording of the law, if it is clear that the only reason for the transaction is to obtain tax benefits. However, it is rarely used. There are about 5-6 decisions all together, depending on how the decisions are interpreted.

Several attempts have been made to analyze and generalize this case law into an unwritten GAAR. But the result is unclear and highly debated. Denmark follows the "Substance over form"-doctrine and the "Rightful owner"-doctrine, but it is highly debated to what extent these doctrines can carry the tax decisions. How much can substance differ from the form and still be the main element, when deciding on the tax matter. In Denmark, there are supporters for a "reality-doctrine" (Danish: "Realitetsgrundsætning") which allows to alter the tax consequences if the formal transactions are not in accordance with the inner meaning/substance and are structured in this way only to obtain tax benefits. If the taxpayer merely uses another way to get the wanted result instead of the more obvious way, should the taxation be on the obvious way or on the actual way? For example; if the taxpayer wants to sell shares to person B, but chooses to resell the shares to the company where, at the same time, person B purchases shares from the company, because the taxation when reselling shares to the company is tax exempted, but would have been taxed if the shares were sold directly to B? At the same time, there are supporters for "Rightful owner"-doctrine (Danish: "Rette indkomstmodtager"), which in its simple form only states what is obvious; the person who has the right to an income should also be taxed on the income. However, this also results in a view, where fixated income could be taxed, for example if a person declines from receiving an income and this action causes another taxable person to receive this income. For example, if a taxpayer decides not to have an interest from a loan given to another related person, should the taxpayer be taxed on a fixated interest, because he/she would normally have claimed an interest, and by not doing so, he transforms his interest to the other related person? In Denmark, section 2 of the Tax Assessment Act was introduced to ensure legal authority to tax fixated income in all relations between the defined connected companies and shareholders. In other situations, the "Realitetsgrundsætning" and the "Rette indkomstmodtager" are still highly debated.

Part II

Question 11

In Denmark, there are no specific rules regarding the effective and timely recovery of (fiscal) state aid, once ordered by the European Commission. Accordingly, the implementation of a recovery decision will be handled in accordance with the normal legal procedures applied in civil proceedings.

Under the Danish Competition Act, the Danish Competition and Consumer Authority may order the recovery of unlawful public aid. In this regard, the only specific rule concerning the implementation of the recovery decision as such is that aid ordered to be repaid, shall be paid to the state treasury.

Question 12

There are no Danish legal cases where national judges have had to decide on the recovery of state aid or implement a recovery decision ordered by the European Commission and consequently no cases where a national judge has refused to allow for the (immediate) recovery of state aid.

Question 13

In general, in case of conflicting obligations of Danish law and e.g. a double taxation treaty, the double taxation treaty will take precedence over Danish law, whereas in case of conflicting obligations of EU law and Danish law or e.g. a double taxation treaty, EU law will take precedence. However, such cases are rarely seen in Danish legal and administrative practice. The "Beneficial owner"-cases currently pending before the Danish courts – of which some are subject to preliminary proceedings at the European Court of Justice – may provide further guidance on how to deal with conflicting obligations once they are concluded.

However, this position will require that EU law does not itself conflict with international obligations that the EU has taken on. This is a potential issue in a pending case before the High Court of Eastern Denmark regarding the interpretation of the EU common customs tariff Nomenclature and the possible implications of conflict with the international customs conventions GATT and ITA (The Holst Group case). In 2016, the High Court of Eastern Denmark decided to request for a preliminary ruling from the European Court of Justice regarding the interpretation of the Nomenclature. Thus it will be for the Court to interpret whether EU law is in line or in conflict with international customs law, and subsequently what position the High Court of Eastern Denmark should take if there turns out to be a conflict between EU and international law.

ESTONIA

Karli Kütt*
Katri Paas-Mohando**

Preliminary remarks

Before discussing specific issues involving national tax rules and procedure, it is important to understand the fundamental difference between classical corporate tax system and Estonian system. In a classical system, company profits are taxed with corporate income tax, irrespective if the profits are retained or distributed. Estonia, however, uses a corporate tax system in which no corporate income tax is due until the profits are distributed. Any retained earnings are effectively tax exempt and the corporate tax payers are subject to distribution tax on distributed profits (instead of classical corporate income tax), including transactions that are considered as hidden profit distributions (such as liquidation proceeds, non-business expenses, transfer pricing adjustments, fringe benefits, donations, *etc.*).

In comparison to the classical system, the corporate tax object is thus reversed in Estonia and there is no need for an accrual based tax accounting. Taxable transactions are determined on a cash-basis and there is no tax levied on any retained earnings (as in case of classical corporate tax systems).

Corporate tax payers include resident legal entities (including profit-making state agencies) and non-resident legal entities which have a permanent establishment in Estonia. The taxable income of resident legal entities is their worldwide income, but it is not taxable as long as it is retained in the legal entity. Similar treatment is extended to permanent establishments which are subject to distri-

* Karli Kütt, M.A. in Law is associate at Law Firm COBALT and lecturer at Estonian Business School. e-mail karli.kutt@cobalt.legal
** Katri Paas-Mohando, PhD is the Head of Competition at TGS Baltic and lecturer of Competition Law at University of Tartu. e-mail: katri.paas@tgsbalic.com

bution tax upon distribution of profits (as described by the law) attributable to the permanent establishment in Estonia.

As to the state aid issues and the interaction of national procedural law with European Union law, there is not much practice concerning the European Commission ordered state aid recovery in Estonia. Thus far, the European Commission has ordered state aid recovery only from the Estonian flag carrier Estonian Air. The aid measures in question concerned recovery of rescue and restructuring aid in the form of loans, capital injections and the sale of assets to another state-owned company.[1] As the recovery triggered immediate insolvency of Estonian Air, the recovery claim is subject to general bankruptcy proceedings.

There have been some state aid recovery cases initiated without the European Commission's recovery order. Such cases have concerned the misuse of subsidies or breach of incentive effect requirement of the General Block Exemption Regulation[2] (GBER). To our knowledge, there have not been any fiscal state aid recovery cases in Estonia[3].

Therefore, the description of the Estonian legal situation with regard to state aid is based mainly on the law and pending legal amendments related to state aid recovery.

Part I

Question 1

In Estonia, taxable persons are entitled to request for advance tax rulings from Estonian Tax and Customs Board[4] in a form of binding assessment of taxation of a transaction to be performed in the future. Advance tax rulings on transfer pricing and advance pricing agreements (the APA-s) are not available in Estonia. In addition, a position of a tax authority can be requested by a request for explanation according to the general procedure, but the position given in such manner is not directly binding to the tax authority pursuant to the law.

[1] State aid SA.35956 (2013/C) (ex 2013/NN) (ex 2012/N) – Estonia Rescue aid to Estonian Air and State aid SA.36868 (2014/C) (ex 2013/N) – Estonia Restructuring aid to Estonian Air.

[2] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, or its predecessor Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty.

[3] At the time of writing this report, the only public available tax related state aid case concerning Estonia related to the exemption from the packaging deposit and excise duty of the beverages delivered on-board of ships (Case SA.34528). However, in this case the Commission for that the measures did not constitute state aid.

[4] Hereinafter also referred to as a tax authority.

The concept of advance tax ruling (also referred to as a binding preliminary ruling) has been incorporated in Estonian Taxation Act[5] since 1 January 2008. By an advance tax ruling, Estonian Tax and Customs Board provides, on the application of a taxable person, a binding assessment of taxation of an act or set of acts (transaction) to be performed in the future[6]. Such a position is binding on the tax authority even in case the legal interpretation of legal provisions changes before the transaction is executed (please refer to Question II-4 for details).

However, an advance tax ruling cannot be requested from a tax authority with regard to all the taxes applicable in Estonia. Estonian Tax and Customs Board tackles only applications regarding state taxes, and a binding position of the tax authority cannot be requested with regard to local taxes. Estonian Tax and Customs Board issues an advance tax ruling regarding an act or set of acts to be performed in the future, and such an act must be an actually contemplated economic transaction. No advance tax rulings are available about issues related to past transactions and compromises regarding the past transactions are excluded from the scope of advance tax rulings. Also, applications concerning theoretical and hypothetical issues shall be returned and the tax authority can respond to them only by the procedure for general provision of information[7].

In addition to the circumstances described above, the tax authority is also entitled to refuse to provide an advance tax ruling in case the tax consequences of an act are explicit and there is no doubt regarding the interpretation of the legal provisions regulating the taxation of the transaction[8]; the act is aimed at tax evasion (area of application of general anti-avoidance rule)[9] or in case the advance tax ruling is requested with regard to transfer pricing. Estonian Taxation Act[10] specifically excludes transfer pricing valuation issues from the scope of advance tax rulings and thus, the advance pricing agreements (APAs) are not available in Estonia.

Otherwise, Estonian legislation corresponds to an open rulings system and there is no list of issues provided by the law for which an advance tax ruling could be requested. Both resident and non-resident taxpayers are permitted to request advance tax rulings in Estonia and it is only important that as regard to the acts or transactions described in the application, the tax liability arises in Estonia for the applicant[11].

[5] Taxation Act (in Estonian "maksukorralduse seadus"), RT I 2002, 26, 150, English translation available at: https://www.riigiteataja.ee/en/eli/504072017002/consolide.

[6] Section 91^1 of the Taxation Act.

[7] Clause 91^2 (1) 2) of the Taxation Act.

[8] Clause 91^2 (1) 1) of the Taxation Act.

[9] Clause 91^2 (1) 3) of the Taxation Act.

[10] Subsection 91^2 (2) of the Taxation Act.

[11] Section 91^1 of the Taxation Act.

Question 2

First and foremost, Estonian Tax and Customs Board needs to verify the facts mentioned in an application before issuing an advance tax ruling. To apply for an advance tax ruling, an application shall include a comprehensive description of the planned act, analysis of the circumstances significant in terms of taxation, as well as an assessment given by the applicant concerning the legal bases for the taxation of the act[12]. The application shall also set out the details of the applicant and include a list of existing documents (including any documents about the treatment given to the transaction by other countries, if available) and drafts of the documents relevant for performance of the act[13].

Documents need not be appended but the tax authority may ask for the existing documents in the course of processing the application. In case of cross-border transactions, it is likely that the tax authority request for additional documents and cannot process the application that does not contain sufficient information about the transaction.

In Estonia, the tax proceedings are guided by the principle of investigation[14] and the tax authority is required to ascertain and verify the correctness of the facts submitted in the application. When ascertaining the fact relevant from the point of view of issuing an advance tax ruling, the tax authority is not only restricted to the requests and evidence submitted by an applicant, but shall decide on its own discretion on the need to perform acts and on the type and extend of such acts in order to verify the correctness of the advance tax ruling to be issued. Thus, the principle of investigation requires that the tax authority collects evidence and takes into consideration all the facts which increase and facts which decrease the tax liability upon making a decision in the matter, including the information available from the databases organized by automatic exchange of information on advance tax rulings within the European Union.

However, a significant burden of proof lies also with the taxpayer requesting for an advance tax ruling, whereas provision of sufficient information is an essential prerequisite for an advance tax ruling to be binding on a tax authority[15]. As an advance tax ruling is binding only if the transaction is performed according to the description provided by the applicant, the tax authority is primarily relying on the information and documents submitted by the applicant in its application.

A detailed description of the circumstances is also important to enable the tax authority to differentiate between an actually planned transaction and a

[12] Subsection 91^5 (1) of the Taxation Act.

[13] Subsection 91^5 (2) of the Taxation Act.

[14] Subsection 11 (1) of the Taxation Act.

[15] Prerequisites for a binding force of an advance tax ruling is set out in Section 91^4 of the Taxation Act. Among the others, an advance tax ruling which has been made by fraudulent means or threats or by influencing the tax authority is not binding on the tax authority.

hypothetical transaction. The tax authority has to be reasonably convinced on the basis of the application that the taxpayer has an intention as well as the means to perform the transaction described in the application. Should the facts that are presented in the application appear to be incorrect or it is evident that the contemplated transaction is aimed at tax evasion, the tax authority is entitled to refuse to provide an advance tax ruling.

Estonian legislation provides no obligation of a tax authority to verify the facts mentioned in the request for a ruling after the ruling has been issued. Nonetheless, a taxable person is required to immediately notify the tax authority of the performance of the transaction described in the advance tax ruling[16] and ex-post verification realizes through the essential prerequisite of the advance tax ruling to be binding for tax authority – one may rely upon an advance tax ruling only if the transaction is performed according to the description set out in the advance tax ruling in all respects that are important for the purpose of taxation. In other words, an advance ruling should be taken into account when issuing an assessment of tax (and by the courts when verifying the legality of such decisions) only if the transaction has been performed in accordance with the description set out in the advance tax ruling. Within the course of a tax audit, Estonian tax authority verifies if a transaction which is the subject of an advance tax ruling has been carried out in compliance with the facts and descriptions mentioned therein and imposes taxes on the transaction accordingly.

Additionally, a taxpayer may rely on an assessment of tax authority in the advance tax ruling only if that is not evidently unlawful. If the taxpayer, upon receipt of the position, is aware of its unlawfulness, the taxpayer has no right to rely on the ruling.

Therefore, if a taxpayer would like to rely on the assessment presented in the advance tax ruling, it needs to verify that the transaction is closed in compliance with the facts presented in the application and otherwise the ruling has no binding force and the tax authority may assume a different position about the taxation of the transaction without any obligation to follow the assessment given in the advance tax ruling. Furthermore, the tax authority is entitled to declare an advance tax ruling that was made by fraudulent means invalid.

Question 3

As described above under Question 2, Estonian tax proceedings are guided by the principle of investigation[17]. Upon verifying the correctness of payment of taxes and making an assessment of tax, a tax authority is required to take into

[16] Subsection 91^4 (3) of the Taxation Act.

[17] Subsection 11 (1) of the Taxation Act.

consideration all facts relevant to the matter, including facts which increase and facts which decrease the tax liability, including information available from the tax authorities of other countries. However, the principle of investigation is not absolute and a taxpayer is required to co-operate in the tax proceedings and to notify the tax authority of all facts known to the taxpayer which are or may be relevant for taxation purposes[18]. If it is required upon making a tax assessment to rely on the evidence available only to the taxpayer, the failure to submit a required evidence may lead to an unfavourable outcome. Although the tax authority has got more resources to collect the information about treatment given to a transaction by other country, it is still very much up to a taxpayer to submit such an evidence which may lead to more favourable result.

In terms of advance tax rulings issued by other countries, there is automatic exchange of information on tax rulings within the European Union and with other OECD Member States the exchange of information could take place on their own initiative. Upon making a decision in the matter, Estonian tax authority should take into the account the information available from tax authorities of other EU Member States and the OECD Member States.

Estonia has transposed the Directive on administrative cooperation[19] by incorporating the rules of automatic exchange of information on advance tax rulings in the European Union into Tax Information Exchange Act[20]. The exchange of information on advance tax rulings is thus automatic among the competent authorities of all the Member States of the European Union and as of 1 April 2017 Estonian tax authority has no need to assess if any piece of information it has collected affects the taxation in another Member State (as it should have performed under Article 9 of the Directive). Additionally, Estonian tax authority is entitled to communicate information about advance tax rulings to the European Commission by eliminating the data enabling identification of the taxable person and the summary of the content for maintaining the business secrecy.

The automatic exchange of information on advance tax rulings may include data concerning advance tax rulings that deal with taxation of a cross-border operation or an issue related to creation of permanent establishment in a foreign state or another jurisdiction[21]. An operation or set of operations is considered to be cross-border[22] if (i) at least one of the parties is a tax resident of another state or jurisdiction; (ii) at least one of the parties is simultaneously a tax resident of

[18] Subsection 56 (1) of the Taxation Act.

[19] Directive 2011/16/EU, OJ L 64, 11.3.2011, p. 1–12.

[20] Tax Information Exchange Act (in Estonian "Maksualase teabevahetuse seadus"), RT I, 23.12.2014, 15, English translation available at: https://www.riigiteataja.ee/en/eli/504072017001/consolide.

[21] Subsection 20^1 (1) of the Tax Information Exchange Act.

[22] Subsection 20^1 (2) of the Tax Information Exchange Act.

several states or jurisdictions; (iii) at least one of the parties is engaged in business activities in another state or jurisdiction through a permanent establishment and an operation or set of operations forms a part or the whole of the business activities of such permanent establishment; (iv) the impact is cross-border.

At the OECD level, there is no automatic exchange of information on advance tax rulings, but the exchange of information could take place on the own initiative of the tax authorities (without a specific request for international professional assistance from the partner country). However, unlike the automatic exchange of information between all the tax authorities in the European Union, Estonian tax authority forwards information about advance tax rulings only to those OECD Member States which Estonia has concluded a tax treaty with and where is located or operating the person, who is affected by the act described in the advance tax ruling or who is the parent company of the person receiving the advance tax ruling or the parent company of the group where the person receiving the advance tax ruling belongs[23].

Therefore, under the automatic information exchange about the advance tax rulings, Estonian tax authority holds the information about advance tax rulings that has been made concerning transactions in other EU Member States and is thus required to use such an information within the course of tax audit or prior to issuing a tax assessment. If necessary, Estonian tax authority could request for a full text of an advance tax ruling issued by another country on the basis of an application under the framework of information exchange procedure by way of professional assistance[24].

Again, the major advantage of an advance tax ruling is that it remains to be binding on the tax authority even if the legal interpretation of legal provisions changes before the transaction is executed and one can rely on it in the court. Thus, the publication of new case law by the courts has no influence on the binding force of an advance ruling until the relevant legislation has not been substantially amended. There is no court practice on the application of general anti-avoidance rule in Estonia if it turns out after an advance tax ruling has been issued that it is aimed at tax evasion, but dependent on the circumstances such an advance ruling might not be binding on the tax authority and a general anti-avoidance rule could be applied instead.

Question 4

One of the major advantages of an advance tax ruling is its binding force. Advance tax rulings are binding only on the tax authority, provided that the transactions are

[23] Subsection 51^2 (6) of the Taxation Act.

[24] Transposed into Subsection 51^3 (3) of the Taxation Act.

concluded within the time and under the circumstances described in the ruling request and also provided that the relevant tax legislation has not been changed substantially before the transaction is executed[25]. Advance tax rulings should be taken into account by the courts and could not be turned against the taxpayer.

The taxpayer that requested the advance tax ruling is not required to act according to the advance tax ruling and if the taxpayer does not agree with the positions set out therein, the taxpayer is free to act according to the interpretation regarded correct by the taxpayer. If the tax authority does not accept it, the final lawful solution will be found as a result of possible tax proceedings and the subsequent judicial proceedings.

Only the person that filed the application may rely on the advance tax ruling of a tax authority, and one may rely only on such an assessment of a tax authority that is not evidently unlawful. If the taxpayer, upon receipt of the position, is aware of its unlawfulness, the taxpayer has no right to rely on the decision.

In order to ensure that the advance tax ruling shall be binding to the tax authority, the act or transaction to be performed shall correspond to the description set out in the advance tax ruling in all respects that are important for the purpose of taxation, and it must be performed within the term set out in the advance tax ruling. The term for performance of an act is determined by the tax authority, but a respective proposal can be made by the taxpayer.

As to the binding force of an advance tax ruling, it is also important to notice whether the laws and regulations, regarding which the tax authority has assumed a position, will still be substantially in force at the closing of the transaction. In a situation where a law is substantially amended after the making of an advance tax ruling but before the closing of a transaction, the advance tax ruling loses its binding force.

Question 5

According to Estonian Income Tax Act[26], the taxable income of resident legal entities is their worldwide income. Foreign income is included into the taxable income of a resident legal entity and is fully taxable at the moment of distribution (with an exemption applied for qualifying dividend income received from foreign subsidiaries and income derived from permanent establishments abroad).

Both under the domestic law and tax treaties an ordinary tax credit is granted for withholding and income tax levied abroad on any type of foreign-source income[27]. The foreign tax credit is set off against the distribution tax due at the

[25] Subsection 91^4 (1) of the Taxation Act.

[26] Income Tax Act (in Estonian "Tulumaksuseadus"), RT I 1999, 101, 903, English translation available at: https://www.riigiteataja.ee/en/eli/513072017014/consolide.

[27] Subsection 54 (5) of the Income Tax Act.

moment of distribution of income, but only in the amount corresponding to the tax rate applicable in Estonia on the date which the tax liability arises[28]. Also, the tax credit is granted only in case it was mandatory to pay the income tax pursuant to the law of the state or an international agreement[29].

Foreign tax credit can be declared and offset against distribution tax due in Estonia only if the taxpayer holds a certificate about payment or withholding of income tax from a foreign tax authority or a withholding agent. Therefore, the tax credit is only granted if there is a certificate about the payment or withholding of income tax in a foreign country and otherwise no foreign tax payments can be taken into account in order to reduce the tax liability at the moment of distribution of the profits.

However, no distribution tax is levied (the exemption method is applied) if the dividend is either (i) paid out of the profit attributed to a permanent establishment of that resident legal entity located in an EU Member State or Swiss Confederation, or (ii) paid out of the profit attributed to any other foreign permanent establishment of that resident legal entity provided that the income tax has been levied on the profit of foreign permanent establishment[30]. Additionally, redistribution of intercompany qualifying dividends is exempt from distribution tax in Estonia (parent holds at least 10% of the capital or voting power of the subsidiary)[31].

Similarly, only the income tax subject to payment pursuant to law or an international agreement can be taken into account and it must be declared for applying the exemption on redistribution of dividends in Estonia. In case the income was derived from a permanent establishment located elsewhere than in an EU Member State or Swiss Confederation, a certificate about the payment or withholding of income tax in a foreign country must be attached to the tax return.

The exemption method is not applied with regard to a transaction or chain of transactions which is not real since its main objective or one of main objectives is obtaining a tax advantage[32]. The exemption on the redistribution of qualifying dividends or distribution of dividends from the profit attributed to foreign permanent establishments shall apply to an extent that a transaction or chain of transactions has been made for business reasons, which record the economic substance necessary and appropriate for such business activities[33].

[28] Subsection 61 (25) of the Income Tax Act.
[29] Subsection 54 (5) of the Income Tax Act.
[30] Clauses 50 (1^1) 2) and 3) of the Income Tax Act.
[31] Clauses 50 (1^1) 1) and 4) of the Income Tax Act.
[32] Subsection 50 (1^4) of the Income Tax Act.
[33] *Ibid.*

Therefore, Estonia provides a double taxation relief only after it has received a confirmation that the income derived from a foreign permanent establishment has been subject to tax in that foreign state and there should be no effective non-taxation. Again, as Estonian resident legal entities are not subject to tax on retained earnings, the accounting profit and allocation of income between resident legal entity and its foreign permanent establishment has no significance for tax purposes (other than the accounting profit is the basis for taxable distributions).

With regard to the taxation of non-residents, Estonia is only entitled to levy tax on business income derived from Estonian sources (if not limited by tax treaties), provided that the income has not been derived through a permanent establishment in Estonia. As non-resident companies are not taxable on their worldwide income in Estonia, there is no need to check whether any remaining income will be taxed by the country of residency of the non-resident.

Question 6

The taxable income of resident legal entities is their worldwide income. For permanent establishments, taxable income is formed of the income attributable to permanent establishments. While the income of a permanent establishment is subject to distribution tax in the same manner as income of a resident legal entity[34], the accrual based tax accounting has no relevance in Estonia and taxable transactions are looked at on a cash-basis.

Nevertheless, for calculation of the income attributable to permanent establishments the separate entity approach (the direct method) is applied[35]. The force-of-attraction principle is not followed and only profits that are effectively connected to a permanent establishment are regarded as profits of the permanent establishment.

Under the separate entity approach, the profits are attributable to a permanent establishment as it would have made as a separate tax payer that acts on similar or same conditions on similar or same fields of activities and is wholly independent from its head office. The general rule for attribution of the income to permanent establishment[36] is similar to the principle provided by the Article 7(2) of the OECD Model Tax Treaty:

> "When a non-resident carries on business in Estonia through a permanent establishment situated in Estonia, the income which the permanent establishment might be expected to derive if it were a distinct and separate taxpayer engaged in the same

[34] Section 53 of the Income Tax Act.
[35] Subsection 7 (3) of the Income Tax Act.
[36] *Ibid*.

or similar activities under the same or similar conditions and dealing wholly independently of the non-resident of which it is a permanent establishment shall be attributed to the permanent establishment.".

There are no domestic regulations in Estonia on how to attribute profits to permanent establishments and there is no significant administrative or court practice either. The principles provided in the Commentaries to the OECD Model Tax Treaty can be applied in determination of the income attributable to the permanent establishments in Estonia. The easiest and most straightforward way would be to calculate the profit of permanent establishment under the general principles of calculating profits for corporations in Estonia (revenues less expenses associated to generating these revenues).

The application of the separate entity approach in Estonia expects that the permanent establishment is treated as if it were a separate entity from its head office and the transactions between the head office and the permanent establishment must be carried out at arm's length basis[37].

Question 7

The methods for determining the market value of transactions conducted between related persons (board concept) are established by a Regulation of the Minister of the Finance[38] and it provides an open list of methods of determining the market value of the transaction price. The list of the potential methods is not exhaustive and if the circumstances related to the transaction do not allow for using the methods listed in the Regulation, another method may be used for determining the market value of the transfer price (*e.g.* expert evaluation of real estate). Nevertheless, justifications must be given for the use of another method not listed in the Regulation.

The Regulation of the Minister of Finance provides for the following methods which could also be applied in combination with other methods: (i) comparable uncontrolled price method; (ii) resale price method; (iii) cost-plus method; (iv) profit split method; and (v) transactional net margin method. The method providing the most reliable result shall be selected on the basis of the specifics of the inspected transaction, the reliability of the available data about comparable transactions, the justification of the assumptions and prognoses, and the level of similarity of comparable transactions.

[37] Subsection 53 (4^6) of the Income Tax Act.

[38] The Regulation of Minister of Finance from 10 November 2006 no 53 (in Estonian "Seotud isikute vahel tehtud tehingute väärtuse määramise meetodid"). English translation available at: https://www.riigiteataja.ee/en/eli/515012015002/consolide.

The Regulation of the Minister of the Finance makes also a formal link to the OECD 's transfer pricing guidelines[39] by recommending following the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations[40] upon applying the Regulation, inasmuch the guidelines of OECD do not conflict with the Regulation. Such a formal link to the OECD transfer pricing guidelines plays a key role in interpreting the transfer pricing Regulation as the Regulation of the Minister of the Finance is rather declarative.

As a result, the OECD transfer pricing guidelines can also be used in determination of the income attributed to permanent establishments in Estonia.

Question 8

Estonian Income Tax Act grants the tax authority with a right to adjust the value of a transaction between a resident legal entity and a related person (broad concept) to the value which would be used by unrelated persons in similar transactions if it differs from the latter amount[41]. The rule applies also to transactions concluded through or on account of the permanent establishment of a non-resident[42]. For the methods applied, please refer to Question 7.

On the contrary to the classical systems, where taxable profit is increased by the transfer pricing adjustments, in Estonia transfer pricing adjustments are considered as profit distributions. The distribution tax is levied on transfer pricing adjustments, the amount of the income the taxpayer would have received or the loss the taxpayer would not have sustained had the value of the transaction concluded between the related persons been such as used by unrelated persons in similar transactions.

Therefore, as the transfer pricing adjustments are regarded as profit distributions in Estonia, it is not likely that Estonian tax authority would adjust the profits of Estonian legal entity downwards (*i.e.* decrease the amount of income the taxpayer (Estonian seller) would have received or decrease the amount of loss that the taxpayer (Estonian buyer) would not have sustained had the value of the transaction corresponded to the arm's length price). However, the law provides an opportunity for the tax authority to make transfer pricing adjustments for tax purposes.

Again, the accrual based tax accounting has no relevance in Estonia and taxable transactions are looked at on a cash-basis. As the accounting profit has no relevance in terms of taxation in Estonia and there is no tax levied on any retained

[39] Section 20 of regulation of Minister of Finance from 10 November 2006 no 53.

[40] Available at: http://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm.

[41] Subsection 50 (4) of the Income Tax Act.

[42] Subsection 53 (4^6) of the Income Tax Act.

earnings (as in case of classical corporate tax systems), the adjustment of profits of Estonian company is not necessary for tax purposes.

Question 9

As described in the preliminary remarks to this topic, the corporate tax object in Estonia is reversed in comparison to the classical system. This results in imposition of the corporate income tax (the distribution tax) on the costs that are not deductible in classical systems and exempting corporate profits until distributions (including hidden distributions such as transfer pricing adjustments).

If the transfer price increases the taxable profit in countries applying the classical income tax system, then due to the peculiarity of the Estonian income tax system, transfer price is regarded as a profit distribution and the distribution tax is levied on transfer pricing adjustments.

For transfer pricing adjustments, there is no need to apply the general anti-avoidance rules (e.g. to prove that the value of a transaction is set out as ostensible) since there is a special legislation set forth for cases the transfer price differs from market value. However, a transaction might be ostensible also only in terms of the price and according to the Supreme Court[43] the tax authority has a right to apply a general anti-avoidance rule also in case unrelated parties have fixed a different price in the written agreement than actually agreed.

In case the transfer price differs from the market value and the tax authority uses the market value for determining the income tax amount, there might be double taxation of related persons. Elimination of double taxation in domestic transactions would take place at the request of a taxpayer and upon satisfaction of such a request, the tax authority corrects accordingly the profit of the other party. This procedure, however, is designed for classical corporate tax systems and does not work in Estonia, since accounting adjustments of profits do not affect the tax accounting (no corporate income tax applies to retained earnings).

Elimination of double taxation in international transactions can be initiated by the tax authority. In case the other party of a transaction is a resident of another EU Member State, the procedure for eliminating international double taxation follows the rules of the Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated persons[44]. Under the Convention Estonian taxpayer shall notify Estonian tax authority without a delay if the adjustment of transfer price upon taxation of Estonian taxpayer might have an effect on the tax liability of the other party that is resident of another EU Member State[45].

[43] Ruling of the Administrative Law Chamber of the Supreme Court from 25.04.2013, 3-3-1-71-12.
[44] Convention 90/436/EEC, OJ L 225, 20.8.1990, p. 10–24.
[45] Article 6 (2) of the Convention 90/436/EEC.

In case the other party of the transaction is resident in a third country, elimination of double taxation could only be performed if Estonia has entered into an international agreement with that country and such an agreement sets forth the possibility of information exchange and mutual agreement procedure. It is expected that the taxpayer submits an application for refund of income tax to its country of residency with whom Estonian tax authority initiates a mutual agreement procedure[46], if necessary.

Question 10

Estonian Taxation Act[47] provides a general anti-avoidance rule (GAAR), which allows the tax authority upon taxation to apply the conditions that correspond to the actual economic content of the transaction or act if it is evident from the content of a transaction or act that the transaction or act is performed for the purposes of tax evasion.

According to the Supreme Court[48] the application of the general anti-avoidance rule is justified only in case of transactions which has no economic content and which are performed for the purposes of tax evasion. Both the Supreme Court[49] and European Court of Justice[50] have thus emphasised that only ostensible transactions which have no economic content, but which were concluded for the purposes of tax evasion can be reclassified under the general anti-avoidance rule. If such a transaction has also other purposes but obtaining a tax benefit, the general anti-avoidance rule is not applicable (unless such other purposes are incidental to obtaining a tax benefit[51]).

Also, the implementation of the general anti-avoidance rule is limited by *lex specialis*[52]. For certain transactions, especially for transactions between related

[46] Article 25 of the OECD Model Tax Treaty.

[47] Section 84 of the Taxation Act.

[48] Ruling of the Administrative Law Chamber of the Supreme Court from 17.06.2009, 3-3-1-23-09, para. 12.

[49] E.g. Ruling of the Administrative Law Chamber of the Supreme Court from 13.02.2012, 3-3-1-79-11, para 18. Ruling of the Administrative Law Chamber of the Supreme Court from 04.11.2009, 3-3-1-52-09, para. 18. Ruling of the Administrative Law Chamber of the Supreme Court from 25.04.2011, 3-3-1-15-11, para. 12. Ruling of the Administrative Law Chamber of the Supreme Court from 17.06.2009, 3-3-1-23-09, para. 12. Ruling of the Administrative Law Chamber of the Supreme Court from 11.01.2007, 3-3-1-62-06, para. 13.

[50] E.g. ECJ C-255/02, Halifax Plc, Leeds Permanent Development Services Ltd, Country Wide Property Investments Ltd vs Commissioners of Customs & Excise, p. 81. ECJ C-425/06, Ministero dell'Economia e delle Finanze vs Part Service Srl, p. 47.

[51] Ruling of the Administrative Law Chamber of the Supreme Court from 13.02.2012, 3-3-1-79-11, para 20.

[52] E.g. Ruling of Tartu Circuit Court from 13.11.2007, 3-07-24 on reclassifying the transaction as a gift. Scholarly literature by M. Huberg, Mis imeloom on osaline kingitus?, 2008. Available at: http://www.maksumaksjad.ee/modules/smartsection/item.php?itemid=747.

persons, there are special rules set out by the laws, which preclude implementation of the general anti-avoidance rule. For instance, if the value of a transaction differs from the arm's length price, but the transaction has a reasonable economic content, the value of the transaction can be adjusted only under transfer pricing rules (i.e. in case of transactions between related persons).

Naturally, as Estonian tax laws (as well as the court practice) recognise the concept of "substance over form"[53], there is a possibility to apply a general anti-avoidance rule in case the content of a transaction allows to conclude that the economic substance differs from the agreed content of the transaction, but the general anti-avoidance rule cannot be applied as a back-up to *lex specialis* if the transaction in fact falls into the scope of *lex specialis*. For instance, it is allowed to apply the general anti-avoidance rule if the value of a transaction between unrelated persons does not comply with the arms' length principle, but the transaction corresponds to its real economic substance.

In addition, there are measures to combat the erosion of the taxable base through payments to low-tax territories (foreign states or a territory with an independent tax jurisdiction in a foreign state, which does not impose a tax on the profits earned or distributed by a legal entity or imposes a tax which is less than one third of the income tax that an Estonian resident individual would have to pay on business income of the same amount without taking into account the deductions).

Part II

Question 11

The general obligation to recover unlawful state is set out in Subsection 42 (3) of the Competition Act[54], which states the following:

> "If the European Commission or the European Court of Justice has forwarded a decision that unlawful state aid or misused state aid must be recovered by the beneficiary of the state aid, this decision shall be forwarded to the grantor of unlawful state aid or misused state aid. The grantor of state aid is required to demand recovery of the state aid with interest pursuant to the decision of the European Commission or the European Court of Justice."

[53] Sections 83 and 84 of the Taxation Act.

[54] Competition Act (in Estonian "Konkurentsiseadus"), RT I 2001, 56, 332, English translation available at: https://www.riigiteataja.ee/en/eli/501062017001/consolide.

At the time of writing this report, a legislative proposal is pending[55], which would introduce an obligation to recover unlawful or misused state aid even in the absence of the European Commission's or ECJ's recovery order, if the grantor of such aid has taken a decision that an aid that it has granted is unlawful or has been misused. Such aid must be recovered within four months from the receipt of the recovery decision. The period of limitation for the recovery is ten years as in the case of the European Commission's proceedings. The pending legal amendments also envisage that if the amounts subject to recovery are not timely returned, then the grantor of the unlawful or misused state aid must subject the recovery decision to compulsory execution set out in the Code of Enforcement Procedure. If this is not legally possible, then the grantor of the state aid must submit a claim to the court.

The above rules are neutral as to the type of the aid measure. Hence, these apply also to fiscal state aid.

Question 12

There have not been examples of cases where the where national judges would have refused to allow for the recovery of unlawful or misused state aid or where the question of "legitimate expectations" would have risen in the context of international obligations related protection of investments or alike.

However, there have been cases where the unlawfulness of the aid measure has been disputed in the courts and the question of "legitimate expectations" has arisen in such disputes. A number of such cases have concerned the interpretation of "incentive effect" requirement set out in Article 8 (2) of the previous GRER 800/2004. The Estonian Supreme Court ruled in one of such cases that "legitimate expectations" could exist, where the unlawfulness of the aid measure has not been established by the European Commission but only by the decision of the grantor of the aid and the unlawfulness is fully clear; in particular, if the grantor of the aid had misguided the beneficiary of the applicable legal requirements before the beneficiary applied for the state aid. [56] The case was returned to the court of second instance, which decided to ask for preliminary ruling inter alia as regards the legal expectations issues (case pending in the ECJ under the number C-349/17 – *Eesti Pagar*). Thus, it remains to be seen what guidance the ECJ will provide in this respect.

[55] Legislative draft of the Act on the Amendment of Competition Subsection 1 (8), and its explanatory memorandum, page 4-6, both available at: http://eelnoud.valitsus.ee/main#ubDFVxEx (in Estonian, 12.06.2017).

[56] Ruling of the Administrative Law Chamber of the Supreme Court from 09.06.2016, 3-3-1-8-16.

Question 13

The Republic of Estonia has concluded over 20 bilateral treaties (BITs) with other countries on the encouragement and reciprocal protection of investments both with countries from the EU and outside the EU. Such BITs were mostly concluded after the collapse of the Soviet Union, but have also been concluded afterwards in the 2000s.

The scope of Estonian BITs is rather wide and they apply both to natural and legal persons' investments. All BITs include standards clauses such as most favored nation treatment, full protection and security, expropriation and investor-state dispute settlement mechanism.

Question 14

There is no court practice in Estonia with regard to conflict of obligations of European Union law and international law (including bilateral agreements with non-EU Member States) and thus it is difficult to predict the position of Estonian courts in this matter. Scholarly literature[57] suggests that international law and bilateral agreements should be found at the same level of hierarchy with the primary legislation of European Union, and the latest case law of Court of Justice[58] shares this opinion. However, one may also find court cases in with the Court of Justice prefers to rely first on the Treaties of European Union and general legal principles of Union law instead of international agreements upon verification of the legality of the secondary legislation of the European Union[59].

[57] E.g. J. Laffranque, Euroopa Liidu õigussüsteem ja Eesti õiguse koht selles, Tallinn 2006, p 268.
[58] E.g. ECJ C-401/12 to C-403/12, p. 52, 54; ECJ C-308/06, p. 51.
[59] E.g. ECJ C-93/02; ECJ C-94/02.

FINLAND

Jussi Jaakkola
(part I)
Alice Guimaraes-Purokoski
(part II)

Part I

Introduction

Thematically, the part I revolves around the issues of advance legal certainty, transfer pricing between associated companies, allocation of corporate profits between national tax jurisdictions and prevention of double non-taxation of corporate profits. Over the last few years, these concerns have been particularly relevant in the context of European Commission decisions on allegedly illegal state aid that has been granted for corporate taxpayers through secret advance rulings on their future tax treatment. Rulings have been experienced to distort the equal conditions of competition within the internal market and erode the Member States' capacities to impose taxes that would be due according to national legislation. In addressing the questions delivered, this contemporary contextual background is taken into account.

Question 1

Finnish legislation on tax assessment procedure provides taxpayers with an opportunity to request a formal and binding advance ruling from tax authorities. In addition to general advance rulings, which are based on national legislation, in matters of transfer pricing also advance pricing agreements, which have their basis in tax treaties, can be requested by taxpayers. In the following, general advance rulings and advance pricing agreements, respectively, will be examined.

Formal and general advance ruling procedure is in place in various types of taxes. Regarding the details, each procedure has its somewhat distinct characteristics. The following depiction concentrates on income taxation. Importantly, the described procedure covers transfer pricing and corporate income tax, *inter alia*, which we consider as main concerns in the current context. Furthermore, some features of advance ruling procedure on tax at source will be reported since this procedure bears relevance for foreign legal entities conducting economic activities in Finland.

The scope of entities that have a right to request an advance ruling on income taxation is broad.[1] First, the ruling may be requested by all those who are subject to tax (taxpayers). This group covers both natural and legal persons with tax liability. Persons are not required to have a tax residency in Finland, which means that foreign companies with limited tax liability can also apply for advance ruling. Second, advance ruling can be requested by partnerships, which are acknowledged as partnerships in tax legislation (such as European Economic Interest Grouping (EEIG)). Partnership itself is not subject to tax but serves as a unit for calculating the accrued income. Partnership consists of members whom the profits of the partnership are attributed to and who are liable to tax for the profits so allocated. On tax at source, a petition for advance ruling may be made by those liable to tax or the instances that are responsible to withhold the tax at source.[2] Regarding further requirements for being eligible to ask for advance ruling, none have been imposed by law. The access to advance ruling procedure is not limited to companies with high economic value or with certain amount of investments, for instance.

Advance rulings are issued either by civil servants of tax administration or by the Central Tax Board, which is a special collegial board established solely for the purpose of granting advance rulings. Tax administration, tax recipients and taxpayers are represented in the board. In technical or organisational terms, the board functions as a division of tax administration. By default, advance rulings are issued by civil servants of tax administration. However, provided that the ruling concerns issues of more systemic and weightier nature and aspire to guarantee the coherent application of law in more general, the ruling may be issued by the Central Tax Board. In these cases, the interpretation of tax law has usually not been settled and the authoritative interpretation is yet to be established. Furthermore, provided that there is a special concern or reason to have a decision delivered in a particular case – such as a notable taxpayer interest – the board may deliver a decision.[3]

[1] Finnish Act Governing Tax Assessment Procedure (18.12.1995/1558) sections 84 and 85.
[2] Finnish Act on the Taxation of Nonresidents' Income and Capital (11.8.1978/627) sections 12 and 12 a.
[3] Act on Finnish Tax Administration (11.6.2010/503) section 14.

Whether a request for an advance ruling is addressed to tax administration or the Central Tax Board as its special division, it should be observed that neither instance is, by law, obliged to issue a ruling. In the end, issuing a ruling is dependent on the discretion of these institutions. However, as a rule, the ruling is granted if 1) all the relevant facts and information that are needed to assess the concrete matter in question are presented by the applicant and 2) the question that is to be replied is identified and specified with adequate precision in the application.[4] Issued advance rulings are subject to appeal in the court system.[5] Also the instance that is supervising the rights and interests of tax recipients is allowed to appeal against the decision. Summaries of the most important rulings by the Central Tax Board, rulings that are of general interest for interpreting tax law, are published. Summaries are anonymised so that no specific taxpayer can be identified.

Besides the advance ruling institution, there is also another procedure in place, which concerns specifically transfer pricing and is known as advance pricing agreement procedure. Like advance rulings, agreements create *ex-ante* legal certainty for taxpayers in a vertical relation to tax authorities. Whereas general advance rulings are issued unilaterally by national tax authorities, advance pricing agreements are concluded bilaterally or multilaterally between national governments. The agreements prescribe the method of defining proper transfer pricing for certain business activities. Since the agreements are concluded between two or several states and provide coherent overall tax treatment, which is not limited to isolated or one-sided interpretation by tax authorities within one single jurisdiction, they enable the prevention of international double taxation in transfer pricing cases.

Finland may conclude an advance pricing agreement with states with which it has agreed a double tax treaty. Furthermore, negotiations between governments must result in an agreement that guarantees transfer pricing taxation according to the at arm's length principle.[6] In domestic statutes, there are no rules on advance pricing agreements but the procedure is based on tax treaties, which regularly include a provision that resembles the article 25 of OECD Model Tax Convention on Income and on Capital (hereafter 'OECD model tax convention').

[4] Act on Finnish Tax Administration (11.6.2010/503) section 15 and Finnish Act Governing Tax Assessment Procedure (11.8.1978/627) section 85. For further elaboration, see guideline (A15/200/2013) by Finnish tax administration on requesting an advance ruling and related decision-making procedure.
[5] Act on Finnish Tax Administration (11.6.2010/503) section 16 and Finnish Act Governing Tax Assessment Procedure (11.8.1978/627) section 85 a.
[6] Transfer pricing instructions by Finnish tax administration (https://www.vero.fi/yritykset-ja-yhteisot/tietoa-yritysverotuksesta/siirtohinnoittelu/menettelytavat_siirtohinnoitteluasioissa/siirtohinnoittelun_ennakkosopimus_ap/).

It should yet be emphasised that although there is a special procedure in place for transfer pricing, transfer pricing issues may also be solved in a general advance ruling procedure examined above – in a procedure of purely domestic origin.

In the past few years, co-operation between tax administration and larger corporations have grown stronger in Finland. On the one hand, the goal has been that corporations would disclose their tax issues and arrangements to tax administration already during the ongoing tax year. On the other hand, tax administration aims to provide corporations with information and assistance on concrete matters. As a result, mutual understanding on the proper taxation could be reached and prolonged future disputes over proper taxation could be avoided in advance. The process does not, as such, involve formal advance rulings, although also these can be requested. Provided that no formal advance ruling is issued, the procedure is of more informal nature. However, the information supplied by administration may, depending on circumstances, create legitimate expectations for taxpayers. These expectations may enjoy legal protection.[7]

Question 3

Finnish unilateral tax legislation contains several anti-tax avoidance norms. However, none of the anti-tax avoidance rules require tax authorities to verify the treatment of income by another country. The rationale of tax avoidance norms is not to oblige tax authorities to specific actions but to constitute competence for certain interpretations in tax assessment. From speculative and somewhat theoretical perspective, the very general provision[8] according to which tax assessment should be conducted with proper thoroughness and by taking into account the relevant interests at hand, both those of taxpayers and those of tax recipients, might bear some relevance in some cases.

Focus of the more recent developments in the field of international tax governance has been on the issues of administrative co-operation, exchange of information between governments in tax matters, and taxpayers' extended reporting obligations. This has been the tendency both within the OECD and the European Union. Because of these supranational developments, the prospects are that in the future the use of information obtained from other countries will become increasingly established administrative practice in taxation of cross-border enterprises.

[7] Räbinä, Timo & Myrsky, Matti: Verotusmenettely ja muutoksenhaku. Talentum 2015, at 63.

[8] Finnish Act Governing Tax Assessment Procedure (11.8.1978/627) section 26.

Question 4

By default, tax authorities are bound by a general advance ruling if it has become final and the applicant demands that the ruling is followed.[9] The ruling is binding only in taxation of the applicant who has requested it and only with regard to the particular situation that has been under administrative examination. Furthermore, there are temporal limits as to how long the rulings are valid and binding. In income tax issues, the rulings by the civil servants of tax administration may be issued, at the longest, for a tax year ending during the calendar year that immediately succeeds the year when the ruling was given.[10] In source tax issues, the ruling applies, at the longest, until the end of the year that immediately succeeds the year when the ruling was given.[11] In both types of taxes, rulings are always of definite duration. Equivalent temporal limitations have not been asserted by law for the rulings issued by the Central Tax Board.

Notwithstanding the *prima facie* binding nature of general advance rulings, there are specific situations in which the rulings are not binding. In the first case, the information that has been presented in a request for a ruling does not, to the relevant extent, correspond with the factual circumstances and reality of the taxable event eventually taking place. In the second, the information offered in the request has been insufficient, incomplete or too sporadic in the sense that activities could have been reviewed on the basis of appropriate overall information and in a proper context. In both afore-mentioned occasions, new and relevant information has come to fore. In the third instance, the ruling is not binding if the provision of law on which the ruling has been based has been subject to amendment. However, the domestic court decision that has been delivered subsequently to the advance ruling and concerns the interpretation of legal provision applied in the ruling does not alter the bindingness of a given ruling. The same applies when tax administration has changed its guidelines on how specific tax rules should be applied or interpreted.[12] Presumably, equivalent conditions of non-bindingness pertain to rulings issued by tax administration as well as the Central Tax Board.

Advance pricing agreements on proper method for defining transfer prices bind tax authorities in the states that are parties to the agreement. With no exception, advance pricing agreements are concluded for a definite duration of time. As a rule, Finnish tax authorities are not, however, bound by agreements if the actual business activities of a taxpayer do not correspond with the relevant facts

[9] Finnish Act Governing Tax Assessment Procedure (11.8.1978/627) section 85 and Act on Finnish Tax Administration (11.6.2010/503) section 14.

[10] Finnish Act Governing Tax Assessment Procedure (11.8.1978/627) section 85.

[11] Finnish Act on the Taxation of Nonresidents' Income and Capital (11.8.1978/627) section 12 a.

[12] Räbinä, Timo & Myrsky, Matti: Verotusmenettely ja muutoksenhaku. Talentum 2015, at 79.

on which the agreement is based on. Furthermore, the agreement is not binding if relevant legal provisions on which the agreements are based have been amended subsequently to concluding the agreement.[13]

Question 6

This section concerns corporate entities that operate across the borders. More specifically, it addresses the situations where a corporation that is resident in a foreign country has some economic activities within the Finnish tax jurisdiction but for which activities a subsidiary has not, however, been established in Finland. In this context, it should be determined which activities constitute tax liability towards Finland, that is, on which activities Finland may impose taxes on the basis of national (unilateral) tax law. Basically, two different scenarios are possible.

In the first scenario, a foreign corporate entity may have such a robust presence in Finnish territory that its activities constitute a permanent establishment (PE). Foreign company is liable to tax in Finland for all the income that is attributable to the permanent establishment – also for income from countries outside Finland, as long as they can be attributed to the PE.[14] Profits are allocated to the permanent establishment if the income results from PE's own activities. Dividends, interests and royalties are also attributed to the PE. In this respect, national default rules are in accordance with the articles 7, 10, 11 and 12 of the OECD model tax convention, which serves as a model for bilateral tax treaties concluded by Finland. The profits of the PE are subject to Finnish corporate income tax.[15]

In the second scenario, a foreign corporate entity may conduct economic activities in Finland but in the form and to the extent that these activities do not constitute a permanent establishment. Under these circumstances, the foreign company is liable to tax in Finland for the income from Finnish sources only – that is, for the income that has been generated in Finland.[16] The rest of the income is considered to fall beyond the purview of Finnish taxing right.

In the second scenario, there are some common categories of income for which a foreign entity is obliged to pay taxes and that have some pertinence in the corporate context.[17] First, a company is liable to tax for dividends, interests

[13] Transfer pricing instructions by Finnish tax administration (https://www.vero.fi/yritykset-ja-yhteisot/tietoa-yritysverotuksesta/siirtohinnoittelu/menettelytavat_siirtohinnoitteluasioissa/siirtohinnoittelun_ennakkosopimus_ap/).

[14] Finnish Income Tax Act (30.12.1992/1535) section 9.

[15] Finnish Act on the Taxation of Nonresidents' Income and Capital (11.8.1978/627) section 15.

[16] Finnish Act Governing Tax Assessment Procedure § 83 (18.12.1995/1558) section 83 and Finnish Income Tax Act (30.12.1992/1535) section 9.

[17] For these forms of income, see Finnish Income Tax Act (30.12.1992/1535) section 10.

and royalties which are sourced in Finland. This income is subject to tax at source. However, in many instances the interest is exempted from taxation on the basis of national tax legislation, which applies to foreign companies also.[18] Due to these exceptions, interest income is extensively exempted from Finnish taxation. Second, income deriving from real property and apartments (owned through the apartment house company, for instance) which are located in Finland is subject to tax. Third, under specific circumstances, capital gains derived from selling the shares in a company are subject to tax. This is the case when more than 50 per cent of company assets consist of real property residing in Finland. This is an exception to the general rule that capital gains from selling the securities or other moveable property do not constitute liability to tax. Fourth, the business income that is sourced in Finland constitutes tax liability. However, on the basis of tax treaties, Finnish power to impose taxes on business income in the absence of permanent establishment is, as a rule, excluded.[19] For the second scenario, the list of the income items provided here is not fully all-inclusive but aims to cover the most important forms of income from the perspective of a foreign corporate entity that is conducting economic activities in Finland.

In summary, provided that permanent establishment has been constituted, Finland has an extensive competence to impose taxes on foreign legal entity for its activities that relate to the permanent establishment (the first scenario). With no permanent establishment in Finland, taxing powers are much more restrained (the second scenario). In both scenarios, the unilateral default rules concerning the Finnish taxing rights may be constrained by bilateral tax treaties and European Union law, both of which however fall outside the scope of the present treatment.

Question 7

Finnish unilateral tax legislation includes a provision[20] that authorises tax authorities, in the process of tax assessment and in the subsequent process of corrective tax adjustment, to adjust transfer prices that have been actually charged in business transactions between companies. The provision applies to transactions between companies that are separate legal entities as well as to those between

[18] Interest is not foreign entity's taxable income in Finland if interest is paid on the basis of accounts receivable related to foreign commerce. Moreover, interest based on bank deposit or deposits in other kind of financial institution is exempted. Furthermore, interest accrued on the basis of government bond, debenture or other similar bond instrument is not taxable. Finally, interest paid for the loan obtained from a foreign country in order to finance Finnish activities is exempted, as long as the loan should not be considered as equity in the assets of the debtor. (Finnish Income Tax Act (30.12.1992/1535) section 9.)

[19] Nykänen, Pekka: Rajoitetusti verovelvollisen tulon verotus. Talentum 2015, at 307–309.

[20] Finnish Act Governing Tax Assessment Procedure (18.12.1995/1558) section 31.

permanent establishment and its head office. Whenever the re-assessment of transfer pricing is undertaken, it should be observed that re-interpretation does not face any limitations imposed by advance rulings or advance pricing agreements.

The adjustment of transfer pricing may take place under certain conditions only. First, prices that have been actually charged between associated companies (companies under common ownership or common control) do not accord with the at arm's length principle, that is, they do not correspond to the costs that would have occurred between independent (non-associated) parties. Second, the pricing that is subject to adjustment must have resulted in artificially low profits or high losses – that is, in profits that would have been higher or losses that would have been lower provided that the at arm's length principle was followed. Under these circumstances, the provision authorises tax authorities to add the missing income to the profits or losses of a company (upwards adjustment). In consequence, the prices accord with the at arm's length principle.

In the preceding, it has become obvious that the at arm's length principle for transfer pricing issues has been statutorily incorporated into Finnish tax law. In fact, the principle has been present in Finnish tax legislation since 1965. Even though the principle has its origin in domestic legislation, international legal sources may be deployed as interpretative tools in its application. "OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations" stands as one particular instrument that has been used by tax authorities in order to provide the transfer pricing provision with proper content. Decisions by the Supreme Administrative Court also entail that OECD guidelines have acquired ancillary normative role in interpreting the domestic at arm's length principle.[21] OECD guidelines are not, however, in a position to extend taxing rights or competences of tax authorities from what has been asserted in domestic tax legislation.[22]

The said domestic provision on transfer pricing adjustment does not, in itself, allow tax authorities to review the appropriate nature of a transaction and disregard the form in which it has taken place between the parties. For instance, it does not allow to determine whether the actually made loan arrangement between companies should be considered, more properly, equity.[23] This illustrates also the limits in which the OECD transfer pricing guidelines may serve as an interpretative basis for domestic provision: although OECD guidelines allow to re-characterise taxpayer's economic activities, the re-interpretation

[21] Decisions KHO 2013:36, 2014:33 and 2014:119 by the Supreme Administrative Court.
[22] Decision KHO 2014:119 by the Supreme Administrative Court.
[23] Decision KHO 2014:119 by the Supreme Administrative Court.

can not take place without proper legal basis in domestic legislation, as asserted by the Supreme Administrative Court.[24] However, provided that the arrangements can be considered to fall under schemes of tax avoidance and, in consequence, to allow the application of general anti-tax avoidance provision, also the re-interpretation of economic nature of the transaction may be considered (for further elaboration of the general tax avoidance norm, see question 10 below).

Question 8

The Finnish legislation contains a provision that allows the adjustment of transfer prices in cases where actually charged prices do not comply with the at arm's length principle (for further explication, see question 7). Provided that non-compliance with the at arm's length principle has resulted in artificially low profits or high losses, the missing income may be added to taxpayer's tax base (upwards adjustment). The literal formulation of the provision excludes the adjustment of transfer pricing downwards as the provision distinctively states that the income may only be *added* to the profits or losses of a company. This interpretation has been affirmed by the Supreme Administrative Court also.[25]

Question 9

In the context of cross-border enterprises where more than one country is involved in exercising taxing rights, it may happen that tax assessment does not end up being consistent between the countries. For instance, one country may adjust transfer pricing treatment upwards for a certain transaction, wherefore there might be a reason to adjust the treatment accordingly in another country. The unilateral adjustment of transfer pricing leads precisely to such consequences. Under what conditions, then, would the latter country – in this case Finland – accept the upwards transfer pricing decision made by another country and adjust the transfer pricing treatment accordingly? On the one hand, overall taxation should lead to transnationally coherent treatment without double taxation. On the other hand, adjustment should lead to proper allocation of tax base between national tax jurisdictions.

In procedural terms, tax adjustment to already made tax assessment in transfer pricing issues may proceed in several forms. On the basis of national legislation, Finland may adjust transfer pricing treatment if the adjustment can be seen as a direct and logical consequence following automatically from adjustments already made by another country.[26] Tax adjustments made under this procedure

[24] Decision KHO 2014:119 by the Supreme Administrative Court.
[25] Decision KHO 2009:70 by the Supreme Administrative Court.
[26] Finnish Act Governing Tax Assessment Procedure (18.12.1995/1558) section 75.

do not include genuine administrative discretion since they only include reaction to the discretion already exercised by another country. Furthermore, adjustment may have its basis on tax treaties. The transfer pricing article (article 9.2.) in the OECD model tax convention includes a legal basis to make adjustment to transfer prices so that coherence is achieved in respect of changes already made in another country. Some important tax treaties concluded by Finland do not include the article 9.2.[27] However, the article 25 in OECD model tax convention constitutes a basis for mutual agreement procedure (MAP), in which states may deliberate on appropriate tax treatment in a particular case. The article covers transfer pricing too – in the absence of the article 9.2 also. The procedure may result in agreement between states whereby the correct transfer pricing is settled consistently in both countries. In addition to the article 25, which is typical in bilateral tax treaties concluded by Finland, mutual agreement procedure may have its basis on Convention on the elimination of double taxation in connection with the adjustment of profits of associated companies (90/463/EEC), agreed multilaterally by the Member States of the European Union. Unlike tax treaties based on OECD model, the said convention imposes on negotiating states a burden of coming to a conclusive agreement.

Since the at arm's length principle is recognised in domestic tax law, in tax treaties, and in the EU convention on the elimination of double taxation, the material result of adjusting transfer prices should accord with the said principle. In material terms, no other special criteria in regard to the result of adjustment are established by law.

Question 10

Finnish tax legislation contains a general anti-tax avoidance rule (GAAR).[28] The provision applies when transactions have been conducted in a legal form that does not correspond with the real nature of the said transactions. The question of whether operationalisation of the provision requires, with no exception, that taxpayer has acted with the purpose of avoiding taxes due is somewhat unsettled.[29] Some of the most representative instances of tax avoidance include situations where there is a lack of genuine interest for certain transactions, where transactions are conducted back and forth, and where actions are made in artificial

[27] Jaakkola, Riika & Laaksonen, Sanna & al.: Siirtohinnoittelu käytännössä. Edita 2012, at 419.

[28] Finnish Act Governing Tax Assessment Procedure (18.12.1995/1558) section 28. The scope of the provision is confined to income tax matters. For other type of taxes there are special tax avoidance provisions.

[29] See Knuutinen, Reijo: Verosuunnittelua vai veron kiertämistä. Verosuunnittelun ja veron kiertämisen välinen rajanveto tuloverotuksessa. SanomaPro 2012, at 42–46.

sequences. In accordance with the nature of the provision as a general clause, the purview of the provision is broad.

The general tax avoidance rule may be applied independently or as a complementary rule along with more specific provisions. For instance, rules on hidden dividend distribution[30] or adjustment of transfer prices[31] can be complemented with the general anti-tax avoidance rule. Presumably, there are no legal obstacles to apply it also along with the domestic rule on interest deduction limitation, which has, as an independent provision, been in force since 2013. Indeed, the instructions given by Finnish tax administration seem to entail this very possibility.[32]

Part II

Question 11

General aspects on court procedure in state aid cases before the Supreme Administrative Court

There is no specific national legislation on right to appeal, on grounds for appeal nor on procedural rules to be applied to state aid cases. Thus, whilst a state aid case is being scrutinized by administrative court, the general Administrative Judicial Procedure Act[33] is applied.

The bulk of state aid cases are brought before the Supreme Administrative Court by a municipal appeal. According to Local Government Act[34] , municipal appeal may be instituted against a decision of municipal authority i.e. local council or joint council by any natural or legal person having his/her residence or domicile in the municipality (*member of the municipality*) or by a natural or legal person to whom the decision applies or whose right, obligation or interest is directly affected by the decision (*interested party*). Right to appeal against a decision of a municipal authority is deemed to be by its nature *actio popularis* and it thus serves as a means to local democracy. Opposite to interested parties, members of the municipality do not need to show that their right, obligation or interest are involved to be entitled to make an appeal. An appeal may be made on the grounds that the decision appealed against was not made on the right sequence,

[30] Guideline 'The Scope of Application of General Anti-Avoidance Rule' (A126/200/2014) by Finnish tax administration.

[31] Decision KHO 2014:119 by the Supreme Administrative Court.

[32] Guideline 'Interest Deduction Limitations in Business Activities' (A206/200/2013) by Finnish tax administration.

[33] Hallintolainkäyttölaki (586/1996) as amended.

[34] Kuntalaki (410/2015).

the public authority that made the decision exceeded its powers or the decision is otherwise unlawful.

Most cases decided by the Supreme Administrative Court where breach of the Union's state aid rules have been at stake, have also concerned the competence of the municipal authority to make the disputed decision, bias in decision making or *détournement de pouvoir.*

State aid cases have concerned decisions of municipal authorities e.g. to sell plot of land to (local) entrepreneurs, to make an investment in local business or innovation center, pulp and paper or food industry or to bioenergy.

Claims on breach of Union's state aid rules have also been at stake in some public procurement cases and in a case concerning the decision of the Council of State to impose public service obligations to the national Post Company (Posti).

The Supreme Administrative Court has twice utilized the opportunity to consult the European Commission on the basis of the Commission's communication on the application of state aid rules in national courts (2009/C 85/01). The first consultation was carried out in 2009 and it concerned whether certain measures of the authorities of the Åland Islands were deemed to constitute existing state aid.[35] The second consultation concerned complaint made by ambulance service providers to the European Commission on possible state aid donated by joint local hospital district authorities to ambulance service providers.

The Supreme Administrative Court has made one request for preliminary ruling on a state aid case. Case C–6/12 dealt with national tax regime that consisted a prohibition on the deduction of losses in the case of a change of ownership. The Supreme Administrative Court decided, after receiving the judgment of the ECJ, that the regime in question was to be interpreted to constitute existing state aid.[36]

On legislation

In Finland, rules on the recovery of state aid examined and deemed unlawful by the European Commission on the basis of Article 107(1) and Article 108 (2) of the Treaty on the functioning of the European Union (TFEU) and Article 7 of Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 108 of the TFEU (as amended by Council Regulations 1791/2006, 517/2013 and 734/2013) are enacted in parliamentary Act on the application of certain rules of the European Union concerning state aid[37].

The basic aim of the national Act on the application of certain rules of the European Union concerning state aid is to lay down, in the spirit of loyal

[35] Decision KHO 2011:34–36 by the Supreme Administrative Court.

[36] Decision KHO 2013:167 by the Supreme Administrative Court.

[37] Laki eräiden valtion tukea koskevien Euroopan unionin säännösten soveltamisesta (300/2001) as amended by Acts 478/2016, 1016/2015 and 187/2008.

co-operation and effectiveness of the execution of Union law, national procedural rules on the interruption of payment of unlawful state aid and recovery of such aid. The recovery of state aid is considered to constitute an act involving significant exercise of public power that can only be executed by public authorities as stipulated by Section 124 of the Finnish Constitution[38].

Section 1 para. 1 of the Act stipulates that Commission's decision on the interruption of payment or on recovery of unlawful state aid shall be executed without delay. The public authority that has granted the unlawful aid is responsible for executing the Commission's decision i.e. to interrupt the payment of the aid or to recover the state aid from the recipient of the aid. Such public authorities may be governmental, regional, municipal or constituted by a consortia of municipalities. In case where the unlawful state aid is not directly granted by a public body but by an entity which is subject to management supervision by public bodies or which is financed for the most part by such public authorities, the public authority holding supervisory or financial powers over the body is responsible for the recovery of the state aid.

On the basis of Section 1 para 2. of the Act, the decision of the Commission is executed by a specific decision made by the public authority that has granted the aid (cf. Section 1 para. 1). The administrative decision by the public authority shall indicate the enterprise that is responsible for the repayment of the unlawful state aid, the amount to be repaid, the interest to this amount and other details as specified in the Commission's decision.

Section 1 para. 3 of the Act states that the decision of the national public authority on the repayment of the aid shall be executed by a similar order as is stipulated in national Act on the execution of taxes and payments.[39]

The administrative decision of the national public authority ordering the interruption of payment of unlawful aid or recovery of such aid may be appealed against in regional administrative court by a direct action. The decision of the administrative court may be appealed against should the Supreme Administrative Court grant a leave to appeal. The decision of the administrative court may be executed *ipso jure* notwithstanding that an application to grand a leave to appeal has been issued to the Supreme Administrative Court.

The requirement of leave to appeal was extended to cover state aid cases within the ambit of the Act as of July 2016. Prior to that, direct appeal to the Supreme Administrative Court sufficed. It is stipulated in Section 13 para. 2 of the Administrative Judicial Procedure Act that the Supreme Administrative Court may grant a leave to appeal due to precedence/uniformity of case law,

[38] Suomen perustuslaki (1999/731).

[39] Laki verojen ja maksujen täytäntöönpanosta (706/2007).

where there are specific ground relating to an obvious error in the handling of the case or where there are other important reasons.

On case law

Thus far the Supreme Administrative Court has published one yearbook decision on the recovery of unlawful state aid.[40] In this case the city council had made an administrative decision on the recovery of state aid deemed unlawful by the European Commission. The administrative decision of the city council was based on the measures identified more specifically in the Commission's state aid decision. The company that was subject to the recovery decision of the city council appealed against it to the regional administrative court claiming that the recovery of the unlawful state aid was inconceivable as far as the outstanding debt had not been duly filed in reorganization proceedings at the district court. The regional administrative court dismissed the appeal.

In its reasoning the Supreme Administrative Court noted that the decision of the European Commission founding that the state aid had been executed against Article 108 TFEU para. 3 had not been appealed against to the General Court of the European Union. The Commission's decision had thus become final. It was therefore necessary to recover the unlawful state aid from the company being the beneficiary of the state aid swiftly and effectively. The Supreme Administrative Court made a reference to Council's Regulation (EC) N:o 659/1999 and CJEU's case law[41] and stated that the recovery of the unlawful state aid was to be carried according to national proceedings. A pending reorganization of debts proceedings before district court did not, as such, affect the obligation of the beneficiary to pay off the unlawful state aid. Nor did the reorganization of debts proceeding have effect on the duty of the city council to recover the unlawful aid. The Supreme Administrative Court also noted that in the case at hand the Court did not decide on the *de facto* execution of the recovery of the aid or on the possible effects the reorganization of debts proceedings had on the execution of the recovery decision.

The Supreme Administrative Court referred to the established case law of the CJEU[42]. It follows from this case law that once the Commission does not need to establish the exact amount of recoverable state aid once it orders unlawful state aid to be recovered. It suffices that the decision of the Commission contains such information that the addressee of the decision may define the necessary amount. The guidance of the Commission in its state aid decision on the execution of the

[40] Decision KHO 2015:7 by the Supreme Administrative Court.

[41] E.g. case C–272/12 P Commission v. Ireland.

[42] Case C–403/10 P Mediaset v. Commission.

recovery at the national level was considered to be a fact to be taken into account in the execution but it was not found to be legally binding.

The appeal was dismissed.

Question 12

Thus far there has not been such cases. As of legitimate expectations concerning a pending reorganization of debts procedure at the district court and possible effects that such a proceedings may have on the recovery proceedings before the administrative court, note the reply to question 11.

Question 13

See annex.

Question 14

There is no case law nor to the knowledge of the author any pending court case on conflicting obligation of EU-law and international law obligations on state aid.

Annex – Bilateral Investment Treaties in force (total 67)

Country (the order of entry into force of the treaty in brackets)	Treaty signed	Treaty entered into force	N:o of gazette
Albania (29)	24.6.1997	20.2.1999	16/1999
Algeria (54)	13.1.2005	25.2.2007	9/2007
United Arab Emirates (23)	12.3.1996	15.5.1997	22/1997
Armenia (55)	5.10.2004	20.4.2007	32/2007
Azerbaijan (50)	26.2.2003	10.12.2004	2/2005
Bosnia & Herzegovina (37)	1.11.2000	8.12.2001	77/2001
Bulgaria (31)	3.10.1997	16.4.1999	50/1999
Chile (16)	27.5.1993	1.5.1996	23/1996
Dominican Republic (57)	27.11.2001	21.4.2007	36/2007
Ecuador (38)	18.4.2001	16.12.2001	79/2001
Egypt (1)	5.5.1980	22.1.1982	3/1982
El Salvador (42)	20.5.2002	20.2.2003	11/2003
Republic of South Africa (36)	14.9.1998	7.2.2001	8/2001

Ethiopia (58)	23.2.2006	3.5.2007	42/2007
Philippines	25.3.1998	16.4.1999	52/1999
Georgia (59)	24.11.2006	30.12.2007	5/2008
Guatemala (53)	12.4.2005	6.1.2007	108/2006
Hongkong (67)	2.7.2009	16.2.2014	19/2014
Indonesia (25)	13.3.1996 12.9.2006	30.5.1997 2.8.2008	34/1997 82/2008
India (44)	7.11.2002	9.4.2003	30/2003
Iran (48)	4.11.2002	25.6.2004	82/2004
Jordan (60)	1.11.2006	18.12.2007	7/2008
Kazakhstan (27)	29.9.1991 9.1.2007	14.2.1998 1.5.2008	20/1998 63/2008
China (2)	4.9.1984 15.11.2005	26.1.1986 15.11.2006	4/1986 87/2006
Kyrgyzstan (49)	3.4.2003	8.12.2004	163/2004
Korean Republic (19)	21.10.1993	11.5.1996	25/1996
Croatia (41)	1.6.2002	1.11.2002	92/2002
Kuwait (24)	10.3.1996	21.5.1997	32/1997
Latvia (9)	5.3.1992	7.12.1992	5/1993
Lebanon (33)	25.8.1997	12.1.2000	4/2000
Lithuania (11)	12.6.1992	8.1.1993	119/1992
Macedonia (39)	25.1.2001	22.3.2002	21/2002
Malesia (4)	15.4.1985	3.1.1988	79/1987
Morocco (43)	1.10.2001	6.4.2003	28/2003
Mauritius (62)	12.9.2007	17.10.2008	90/2008
Mexico (35)	22.2.1999	30.8.2000	54/2000
Moldova (26)	25.8.1995	21.6.1997	42/1997
Mongolia (61)	15.5.2007	19.6.2008	87/2008
Montenegro (62)	14.11.2008	29.4.2010	53/2010
Mozambique (52)	3.9.2004	21.9.2005	93/2005
Namibia (51)	31.10.2002	21.5.2005	42/2005

Nepal (?)	3.2.2009	28.1.2011	5/2011
Nigeria (56)	22.6.2005	20.4.2007	34/2007
Oman (30)	27.9.1997	20.2.1999	18/1999
Panama (?)	19.2.2009	11.11.2010	102/2010
Peru (22)	2.5.1995	13.6.1996	33/1996
Poland (28)	25.11.1996	11.3.1998	28/1996
Qatar (45)	12.11.2001	8.5.2003	37/2003
Romania (10)	26.3.1992	6.1.1993	121/1992
Zambia (66)	7.9.2005	5.3.2014	20/2014
Slovak Republic (21) (ex. Czechoslovakia)	 6.11.1990	20.5.1996 23.10.1991	37/1996 73/1991
Slovenia (34)	1.6.1998	3.6.2000	37/2000
Sri Lanka (3)	27.4.1985	25.10.1987	54/1987
Tanzania (40)	19.6.2001	30.10.2002	94/2002
Thailand (20)	18.3.1994	18.5.1996	35/1996
Czech Republic (7) (ex. Czechoslovakia)	 6.11.1990	24.3.1994 23.10.1991	34/1994 73/1991
Tunisia (46)	4.10.2001	4.9.2003	52/2003
Turkey (15)	13.5.1993	23.4.1995	29/1995
Ukraine (13)	14.5.1992 7.10.2004	30.1.1994 7.12.2005	6/1994 102/2005
Hungary (5)	6.6.1988	12.5.1989	20/1989
Uruguay (47)	21.3.2002	18.6.2004	84/2004
Uzbekistan (12)	1.10.1992	22.10.1993	74/1993
Belarus (14)	28.10.1992 8.6.2006	11.12.1994 10.4.2008	89/1994 58/2008
Russia (6) & amending protocol	8.2.1989 4.5.1996	15.8.1991 13.5.1999	58/1991 57/1999
Vietnam (17)	13.9.1993	2.5.1996	27/1996
Estonia (8)	13.2.1992	2.12.1992	104/1992

FRANCE

Stéphane De La Rosa[*] • Andreas Kallergis[**]
Francesco Martucci[***] • Ioanna Papadamaki[****]
Claire Vannini[*****] • Charles Vautrot-Schwarz[******]

Partie I

Question 1[1]

Offrir plus de sécurité juridique dans les rapports entre l'administration fiscale et le contribuable constitue un thème récurrent: la doctrine étant abondante sur le sujet de la sécurité fiscale[2], on se contentera pour notre démonstration de faire référence, à titre indicatif, à deux rapports qui se trouvent au cœur de cette problématique. D'une part, le «rapport Gibert» de 2004[3] qui étudie la question de l'amélioration de l'attractivité du territoire à travers la sécurité du droit fiscal, proposant à cette fin diverses mesures, dont le développement de la technique du rescrit fiscal. D'autre part, le «rapport Fouquet» de 2008[4] mettant en exergue la

* Professeur à l'Université Paris-Est Créteil.
** Maître de conférences à l'Université Paris I Panthéon-Sorbonne.
*** Professeur à l'Université Paris II Panthéon-Assas.
**** Docteure de l'Université Paris II Panthéon-Assas.
***** Avocate associée CMS Francis Lefebvre.
****** Professeur à l'Université Paris-Sud.

[2] V. par exemple l'ouvrage collectif J. Buisson (dir.), *La sécurité fiscale*, Paris, L'Harmattan, 2011. V aussi *RFFP*, 2015, n° 130 qui est consacré à la thématique de la sécurité fiscale.

[3] Améliorer la sécurité du droit fiscal pour renforcer l'attractivité du territoire, Rapport au Ministre d'État, Ministre de l'Économie, des Finances et de l'Industrie, établi par B. Gibert, septembre 2004.

[4] Améliorer la sécurité juridique des relations entre l'administration fiscale et les contribuables: une nouvelle approche, Rapport au Ministre du Budget, des comptes publics et de la fonction publique, présenté par O. Fouquet, juin 2008.

méfiance, toujours présente, des contribuables à l'égard de la sécurité juridique, méfiance due en grande partie à la complexité et à l'instabilité de la loi fiscale. Ce dernier rapport propose plusieurs mesures afin d'apporter plus de sécurité juridique. Parmi ces mesures se trouve l'interprétation de l'administration, et en particulier la technique du rescrit.

L'interprétation des textes fiscaux par l'administration, autrement dit la *doctrine administrative* ou *doctrine fiscale*, est alors apte à répondre à la nécessité de sécurité juridique en matière fiscale. Entrent dans cette catégorie – on reprend sur ce point la distinction faite par le «rapport Fouquet»[5] – la doctrine administrative dite «*spontanée*» et celle «*sollicitée*» qui fait référence, principalement, à la pratique du rescrit.

Dans un souci de clarification du droit fiscal caractérisé par un degré de complexité élevé, les autorités fiscales proposent leur propre interprétation des textes fiscaux. Cette doctrine administrative *spontanée* peut emprunter une pluralité de formes: circulaires, instructions, notes de service – la liste n'est pas exhaustive. L'utilité de cette documentation est importante au regard de la sécurité juridique[6], tant pour les agents de l'administration que pour les contribuables qui peuvent la consulter en ligne dans la base documentaire dénommée «Bulletin Officiel des finances publiques – Impôts» («BOFiP-Impôts»). Cette documentation permet aux entités imposables d'être informées sur des points complexes et obscurs du droit fiscal et d'agir en conformité tout en bénéficiant d'une sécurité quant à l'application de la disposition fiscale en cause mais également d'une garantie anticipée contre tout changement de la doctrine en vigueur au moment de leur imposition (article L. 80 A du Livre des procédures fiscales [LPF]).

Le degré de sécurité offert aux contribuables est cependant plus élevé, bien naturellement, dans le cas de la doctrine *sollicitée* qui correspond notamment à la technique du rescrit, laquelle s'adresse à tous les contribuables et surtout aux entreprises. Dans ce contexte, les entités imposables peuvent interroger, à leur discrétion, les autorités administratives par rapport à leur situation fiscale, en vue d'un projet qu'elles souhaitent mettre en œuvre, en vue d'une opération économique. Elles sont ensuite les destinataires d'une prise de position formelle de la part de l'administration par rapport à leur situation de fait et de droit. Ce dialogue entre contribuable et fisc qui donne naissance, non à une interprétation générale et impersonnelle, mais à une décision anticipée et individuelle de la part de l'administration et opposable à celle-ci, offre un degré de sécurité juridique conséquent en matière fiscale. Selon le professeur Martin Collet, ce

[5] *Ibidem*, p. 18.

[6] V. J.-P. Lieb, «La sécurité juridique à travers les prises de position et la documentation de l'administration», *RFFP*, 2010, n° 112, p. 57.

mécanisme constitue une «forme de blanc-seing délivré par l'administration au contribuable – autrement dit, une consultation juridique sûre et gratuite! –, qui le protège contre un éventuel redressement lié à un changement d'humeur de l'administration»[7]. Il convient alors de rester un peu plus sur cette pratique et présenter plus en détail les différentes catégories de rescrit fiscal et ses conditions de délivrance[8].

Le rescrit fiscal a été introduit par la loi n° 87-502 du 8 juillet 1987 dite loi Aicardi[9] – adoptée à la suite des travaux de la commission présidée par Maurice Aicardi[10] – dans l'article L.80B du LPF; ce dernier étend l'application de l'opposabilité de la doctrine administrative, prévue au premier alinéa de l'article L. 80 A du LPF, dans tous les cas où l'administration a pris une position formelle sur l'appréciation d'une situation de fait au regard d'un texte fiscal.

Si cette disposition de l'article L. 80 B du LPF «constitue le support juridique des procédures de consultation préalable de l'administration»[11], elle n'est pas la seule. C'est la même loi de 1987 qui a introduit à côté du rescrit précité de droit commun, le rescrit de l'article L. 64 B du LPF qui consiste pour l'administration à prendre position sur l'éventuelle qualification d'abus de droit d'une opération donnée.

Aujourd'hui, le rescrit fiscal «se décline au pluriel»[12]. La disposition de l'article L. 80 B du LPF a été complétée afin de prendre en compte certaines situations spécifiques, consacrées aux 2° et suivants du même article[13]. On trouve ainsi le rescrit relatif à toute demande concernant l'application du régime d'amortissement exceptionnel pour certains investissements ou du bénéfice du régime des

[7] M. Collet, *Droit fiscal*, Paris, Presses Universitaires de France, 6e éd., 2017, p. 185.

[8] Si la pratique du rescrit n'est pas récente, elle est présente de manière récurrente dans l'actualité, soit du droit interne comme l'illustre le rapport du Conseil d'État de 2013 consacré à ce mécanisme (Conseil d'État, *Le rescrit: sécuriser les initiatives et les projets*, Étude adoptée le 14 novembre 2013, Paris, La Documentation française, 2014) et son extension à d'autres domaines (V. B. Plessix, «Une réponse? Le rescrit», *RDP*, 2017, n° 1, p. 83), soit du droit de l'Union qui s'interroge sur la compatibilité de la pratique du rescrit, assimilable sur ce point aux *rulings*, avec le droit de l'Union (v. Communiqué de presse de la Commission du 17 décembre 2014, n°IP/14/2742). V. aussi *Dr. fisc.*, 2015, n° 27, pp. 14 et suiv. qui reprend les actes du colloque sur le rescrit fiscal organisé le 4 mai 2015 à l'Université Paris-Descartes.

[9] Loi n° 87-502 du 8 juillet 1987 modifiant les procédures fiscales et douanières, *JORF* du 9 juillet 1987, p. 7470.

[10] M. Aicardi, L'amélioration des rapports entre les citoyens et les administrations fiscales et douanières, Paris, La Documentation française, 1986.

[11] Améliorer la sécurité du droit fiscal pour renforcer l'attractivité du territoire, Rapport au Ministre d'État, Ministre de l'Économie, des Finances et de l'Industrie, établi par B. Gibert, septembre 2004, p. 16.

[12] Th. Lambert, «Conclusion: le rescrit, une idée à cultiver», *Dr. fisc.*, 2015, n° 27, ét. 451.

[13] On se contentera ici de présenter les rescrits qui relèvent de l'article L. 80 B du LPF. Il y a toutefois d'autres dispositions qui consacrent des mécanismes de rescrit comme le rescrit «valeur» de l'article L. 18 du LPF ou encore le rescrit «contrôle». V. en ce sens, M. Collet, *op. cit.*, p. 189.

entreprises nouvelles (2°, introduit par la loi n° 96-314 du 12 avril 1996); le rescrit relatif à la détermination de l'éligibilité d'un projet de dépenses de recherche au bénéfice du crédit d'impôt recherche de l'article 244 *quater* B du code général des impôts (3° et 3° *bis*, introduits par la loi n° 96-1181 du 30 décembre 1996 et la loi n° 2008-776 du 4 août 2008, respectivement) ; le rescrit réservé aux jeunes entreprises innovantes pour déterminer si elles bénéficient des régimes fiscaux dérogatoires (4°, introduit par la loi n° 2003-1311 du 30 décembre 2003); le rescrit qui permet à un contribuable de bénéficier de l'assurance qu'il ne dispose pas en France d'un établissement stable (6°, introduit par la loi n° 2004-1485 du 30 décembre 2004); ou encore le rescrit qui permet aux contribuables d'obtenir une qualification de leur activité professionnelle au regard de certaines catégories de revenus professionnels (8°, introduit par la loi n° 2008-1443 du 30 décembre 2008). Il faut également noter le rescrit consacré au 7° du même article (introduit par la loi n° 2004-1485 du 30 décembre 2004) qui porte sur les accords préalables relatifs aux méthodes de prix de transfert. Adressé principalement aux groupes de sociétés, ce mécanisme leur permet d'avoir l'approbation de l'administration fiscale quant à la manière de déterminer leurs prix de transfert et éviter ainsi toute contestation future relative à une réduction artificielle de leurs bénéfices imposables[14].

À la suite de cette présentation, quelques remarques s'imposent. Dans un premier temps, on peut noter que pour bénéficier de la protection du rescrit de droit commun, des conditions particulières ne sont pas requises. Le contribuable – de bonne foi – qui souhaite adresser son dossier au fisc doit produire une demande écrite, précise, et complète qui présente la situation de fait ainsi que les dispositions qu'il estime applicables. Cette demande doit bien naturellement être adressée à l'administration à un stade préalable à l'exécution de l'opération envisagée. Il y a cependant des procédures de rescrit qui présentent plus de complexité, comme c'est le cas pour les rescrits relatifs au crédit d'impôt recherche pour lesquels le 3° de l'article L. 80 B du LPF prévoit une procédure caractérisée par une certaine «rigidité» et donc peu saisissable par les entreprises[15].

On peut remarquer également que pour certains rescrits la garantie est plus importante car elle est liée à une obligation de réponse de la part de l'administration. En cas d'inertie de l'administration pendant 3 mois (2° à 6° et 8° de l'article L. 80 B du LPF), ou 6 mois dans certains cas (article L. 64 B du LPF), son silence vaut acceptation tacite quant à la régularité de l'opération – objet du rescrit. Cette règle ne s'applique pas au rescrit de droit commun. Bien qu'une limite

[14] M. Collet, *op. cit.*, pp. 188-189.

[15] Conseil d'État, Le rescrit: sécuriser les initiatives et les projets, op. cit., p. 42. V. aussi, Th. Lambert, *op. cit.*

de 3 mois a été ajoutée dans le 1° de l'article L.80 B du LPF (introduite par la loi n° 2008-776 du 4 août 2008), elle est relative: à son échéance, aucune décision tacite n'est considérée comme étant adoptée; aucune sanction n'est prévue non plus pour cette inertie de l'administration[16]. En tout état de cause, en cas d'une réponse qui n'est pas celle souhaitée par les contribuables dans les cas des rescrits prévus aux 1° à 6° et 8° de l'article L. 80 B du LPF, ceux-ci peuvent saisir l'administration en application de l'article L. 80 CB pour solliciter un second examen devant une instance collégiale.

Question 2[17]

Le droit français consacre différentes formes de rescrit. Certaines d'entre elles ne nécessitent pas la vérification de faits et entendent proposer seulement une interprétation du droit positif. Il s'agit de rescrits interprétatifs. Est par exemple visé par cette notion le rescrit de l'article 1727, II, 2-bis, du Code général des impôts (loi n°2008-1443 du 30 décembre 2008 de finances rectificative pour 2008), qui permet au contribuable de soumettre à l'administration une demande d'interprétation d'une disposition fiscale ou des incidences fiscales d'une règle comptable.

En revanche, l'interprétation de textes fiscaux par l'administration à l'égard d'un certain contribuable, dans le cadre de l'article L80B, 1°, du livre des procédures fiscales associe à la fois l'interprétation du droit avec l'appréciation de la situation de fait. La présentation complète par le contribuable dans sa demande de l'ensemble des faits qui forment sa situation sert à assurer une vérification anticipée de cette situation par l'administration. Par exemple, en matière de rescrit afférent aux fusions d'entreprises, les articles 209 II et 1649 nonies du code général des impôts permettent de transférer les déficits d'une société absorbée à la société absorbante. En vue d'une réponse, l'administration opère une analyse de la cohérence économique de l'opération envisagée. Le propos peut être étendu à d'autres catégories de rescrit, tel celui afférent aux prix de transfert (article L80 B, 7°, LPF), ou celui afférent à une vérification fiscale (BOI-CF-PGR-30-20), ce dernier permettant à une entreprise de demander l'appréciation de sa situation concernant des fait qui auraient été examinés dans le cadre d'une vérification de comptabilité, sans avoir donné lieu à une rectification.

Les services administratifs compétents pour accueillir et répondre à une demande de rescrit peuvent varier entre l'administration centrale et ses services déconcentrés au niveau local. Par exemple, l'administration centrale est compétente en matière de rescrit relatif à l'existence ou non d'un établissement stable d'une entreprise en France (LPF, article L80, B, 5°), tandis que ce sont de services

[16] M. Collet, *op. cit.*, p. 187.

[17] Question traitée par Andreas Kallergis et Charles Vautrot-Schwarz.

déconcentrés de l'administration qui sont compétents en matière de rescrit « vérification fiscale », évoqué plus haut.

Au-delà, il apparaît qu'une telle vérification, que ce soit *ex ante* ou *ex post*, n'existe pas.

S'agissant du rescrit dit « général », il est de jurisprudence constante que ne peuvent se prévaloir de la disposition de l'article L. 80 B que les contribuables qui se trouvent dans la situation de fait sur laquelle l'appréciation invoquée a été portée, ainsi que les contribuables qui ont participé à l'acte ou à l'opération qui a donné naissance à cette situation, sans que les autres contribuables puissent utilement invoquer une rupture à leur détriment du principe d'égalité (CE, 28 janvier 2015, Sté Duchêne Fleurs, n°370455).

La prise de position de l'administration s'effectue donc à partir et compte tenu des données fournies par le contribuable.

De même, la consultation de l'administration, dans le cadre précis de l'article L. 64 du livre des procédures fiscales, très proche du rescrit général, a pour objet d'apprécier en particulier la portée d'une convention susceptible d'être remise en cause dans le cadre de la répression des abus de droit. Le dispositif vise à faire échec aux constructions juridiques qui, tout en étant apparemment régulières, ne traduisent pas le véritable caractère des opérations réalisées. L'article L. 64 du livre des procédure fiscale prévoit donc que le contribuable peut consulter par écrit l'administration centrale « en lui fournissant tous les éléments utiles pour apprécier la portée véritable de cette opération ».

Lors des débats parlementaires portant sur la loi « Aicardi » (n°87-502 du 8 juillet 1987), le ministre du budget a d'ailleurs précisé que « le droit de consultation proposé n'est pas limité à l'interprétation des textes fiscaux mais s'étend également aux questions de pur fait, que ce droit n'est pas limité dans le temps et pourrait être utilisé avant toute imposition mais aussi pendant un contrôle fiscal ».

Le constat de l'absence de vérification, à tout le moins approfondie, vaut également pour les autres rescrits.

A titre d'exemple, on citera l'article L. 331-40 du code de l'urbanisme issue de l'article 28 de la loi n°2010-1658 instituant un rescrit en matière de taxe d'urbanisme qui prévoit précisément que le rescrit est effectué « à partir d'une présentation écrite, précise et complète de la situation de fait ». Et il est prévu que « le contribuable peut également fournir une estimation motivée et détaillée de la constructibilité maximale qui s'attache au terrain d'assiette de la construction projetée, compte tenu, notamment, de la nature du sol, de la configuration des parcelles, du caractère des constructions avoisinantes ou de motifs tenant aux économies d'énergie ».

Il est donc de la propre responsabilité du contribuable de fournir dans sa demande tous les éléments de fait utiles pour permettre à l'administration d'ap-

précier la portée exacte et véritable de la situation de fait soumise à l'administration.

La réponse que donne l'administration l'est donc compte tenu des éléments fournis par le contribuable dans sa demande et n'a d'ailleurs de valeur pour ce dernier qu'à l'égard de la situation de fait parfaitement décrite et identique – et non simplement analogue – à celle qui a fait l'objet de la demande de rescrit.

En définitive, ce n'est que dans le cadre d'un contrôle fiscal du contribuable, d'un contrôle fiscal sur demande du contribuable ou dans celui d'un contrôle dit « relation de confiance » que l'administration procède à une vérification systématique des faits mentionnés dans une demande de rescrit.

Tout d'abord, dans le cadre du rescrit dit « contrôle » issu de l'instruction du 20 juillet 2005 (BOI 13 L-3-05) qui permet au contribuable faisant l'objet d'un contrôle d'être assuré, sous certaines conditions, que les points examinés au cours d'une vérification mais n'ayant donné lieu à aucune rectification ne donneront pas prise à une contestation ultérieure de la part de l'administration. Dans ce cas, le vérificateur établit un compte-rendu des points ayant fait l'objet d'un examen suffisant de sa part et n'ayant pas fait l'objet d'un redressement, de sorte à ce que ces points ne puissent plus être remis en cause à l'avenir. De ce cas, la vérification de la situation de fait a lieu avant la prise de position formelle.

Ensuite, le contrôle fiscal sur demande du contribuable, instauré en 2004, est prévu à l'article L. 13 C du livre des procédures fiscale, permet aux petites et moyennes entreprises de demander à l'administration de procéder à un contrôle de leur situation fiscale sur certains « points précis » définis au préalable par le contribuable que l'administration, conduite à prendre formellement position sur les questions en cause, procède à un véritable contrôle approfondi de la situation de fait à la base de la demande de rescrit, même si seulement quelques dizaines d'entreprises y recourt chaque année. Dans ce cadre, la vérification de la situation de fait est effectué avant la prise de position formelle de l'administration

Enfin, à titre expérimental, la DGFiP[18] a annoncé en juillet 2013 la mise en place, à titre expérimental, d'une procédure de contrôle des entreprises qualifiée de « relation de confiance » qui consiste, pour l'administration, à accompagner l'entreprise en amont du processus déclaratif afin d'apprécier, à cette occasion, les différentes options qui s'offrent à elle ainsi que les obligations fiscales qui s'imposent à elle. Au terme de cet examen, l'administration délivre un avis qui l'engage après avoir nécessairement vérifié la situation de fait à la base de l'avis. Dans ce cadre, le contrôle de la situation de fait est effectué avant la délivrance de l'avis.

[18] Direction générale des finances publiques du Ministère de l'économie et des finances.

Question 3[19]

L'imposition effective, voire « suffisante », dans un autre État peut être une condition d'application d'une exemption d'un revenu de la base d'imposition en France. Ainsi, l'article 209 B du CGI, éclairé par l'238 A du même code, impose l'appréciation de la charge fiscale subie dans l'autre État avant de reconnaître l'exemption d'un revenu de source étrangère. Plus précisément, l'administration fiscale peut vérifier si les revenus réalisés par une entité étrangère contrôlée par une entreprise exploitée en France sont imposés dans l'autre État selon un niveau d'imposition qui représente au moins la moitié de celui qui aurait été appliqué si l'opération avait eu lieu en France. Dans le cas contraire, les revenus en question sont intégrés dans la base d'imposition de l'entreprise exploitée en France.

La prise en considération de l'effectivité d'imposition d'un contribuable dans un autre État est d'importance pour l'administration française, et peut par ailleurs avoir lieu sans forcément une référence à un dispositif anti-abus consacré en droit interne ou en droit international conventionnel. De plus, sur le terrain de conventions fiscales internationales, la charge de la preuve de la qualité de résident d'un autre État contractant incombe au contribuable, qui, afin de ne pas être soumis à une obligation fiscale en France en tant que résident, doit produire tout élément qui établit qu'il est effectivement assujetti à l'impôt dans un État avec lequel France aurait conclu une convention bilatérale contre les doubles impositions (CAA Paris, 21 mai 1996, n°95-53). De même, l'administration nie la qualité de résident de l'autre État à un contribuable qui, tout en étant théoriquement assujetti à l'imposition dans l'autre État contractant, il en est exonéré d'une imposition de droit commun en raison de son statut ou de son activité (v. par ex. CE, 9 nov. 2015, n° 370054, *Landesärztekammer Hessen Versorgungswerk* ; CE, 9 nov. 2015, n°371132, *Sté Santander Pensiones SA EGFP*). Ce raisonnement est fondé sur une l'interprétation de la convention par l'administration et, le échéant, par le juge, qui peuvent faire prévaloir une lecture de la convention fondée sur un but présumé des États parties, à savoir la prévention d'une double exonération, se détachant d'une lecture littérale des stipulations conventionnelles.

Question 4[20]

Si «[l]*'instabilité et la complexité de la norme fiscale sont les premières causes d'insécurité juridique*»[21], il appert que la doctrine fiscale est, idéalement, à leur antipode. Protéiforme – car s'incarnant dans des instructions, circulaires, rescrits –, ce produit

[19] Question traitée par Andreas Kallergis.

[20] Question traitée par Ioanna Papadamaki.

[21] Améliorer la sécurité juridique des relations entre l'administration fiscale et les contribuables: une nouvelle approche, Rapport au ministre du Budget, des comptes publics et de la fonction publique, présenté par O. Fouquet, juin 2008, p. 7.

de l'interprétation de l'administration fiscale met en lumière l'appréciation du fisc au regard de l'application des textes fiscaux. Sa nécessité établie, la doctrine fiscale ne pourrait toutefois pas garantir la sécurité juridique dans les rapports administration-contribuable si elle était modifiée en permanence, au gré de la volonté de l'administration. C'est dans ce contexte que la question de l'opposabilité du rescrit, et de manière plus générale de tout type de garantie anticipée accordée, se pose.

De prime abord, l'opposabilité de la doctrine fiscale ne soulève guère de doute dans la mesure où elle est explicitement reconnue par le législateur. L'article L. 80 A du Livre des procédures fiscales (LPF)[22] offre ainsi une garantie aux contribuables, une sécurité juridique contre les changements de la doctrine fiscale qui, désormais, ne peuvent avoir effet que pour l'avenir, limitant ainsi pratiquement le droit de reprise de l'administration[23]. La même garantie est applicable à toutes les catégories de rescrit selon l'article L. 80 B du LPF[24], savoir le rescrit dit «général» du premier alinéa; les accords tacites des alinéas 2 à 6 et 8; le mécanisme d'accord préalable sur les prix de transfert de l'alinéa 7; et le rescrit «anti-abus de droit» de l'article L.64 B du LPF[25]. Accepter une telle opposabilité présuppose toutefois – et cela est d'autant plus vrai pour les interprétations *provoquées* – que le demandeur-contribuable a présenté de bonne foi tous les éléments de fait et de droit permettant à l'administration de prendre position.

Puis, dans un second temps, une certaine prudence s'impose. Ne serait-il pas envisageable pour les autorités fiscales d'écarter leur doctrine et, si oui, sous quelles conditions? Dans l'éventualité d'une interprétation illégale ou d'un rescrit non conforme au droit de l'Union, l'administration continuerait-elle à être liée? Pour répondre à ces questions, il convient de distinguer les cas où la non-conformité concerne une règle du droit interne ou une règle du droit de l'Union.

En droit interne, dans l'hypothèse d'une interprétation de l'administration illégale, la garantie offerte au contribuable demeure valide et donc opposable. Des incertitudes quant à la conformité d'une telle situation avec le principe de légalité, accompagnées de contestations quant à une transgression possible de la hiérarchie des normes (l'interprétation prévalant la norme interprétée), ont

[22] L'article énonce dans son premier alinéa: «*Il ne sera procédé à aucun rehaussement d'impositions antérieures si la cause du rehaussement poursuivi par l'administration est un différend sur l'interprétation par le redevable de bonne foi du texte fiscal et s'il est démontré que l'interprétation sur laquelle est fondée la première décision a été, à l'époque, formellement admise par l'administration*».

[23] M. Collet, *Droit fiscal*, Paris, Presses Universitaires de France, 6e éd., 2017, pp. 108-109.

[24] L'article dispose dans son premier alinéa: «La garantie prévue au premier alinéa de l'article L. 80 A est applicable: 1° Lorsque l'administration a formellement pris position sur l'appréciation d'une situation de fait au regard d'un texte fiscal; elle se prononce dans un délai de trois mois lorsqu'elle est saisie d'une demande écrite, précise et complète par un redevable de bonne foi».

[25] M. Collet, *op. cit.*, pp. 186-189.

été exprimées par la doctrine avant d'être dissipées. Il convient de retenir que l'interprétation «*se traduit par l'octroi d'une garantie, dont l'illégalité ne vient pas en soi introduire dans l'ordonnancement juridique un acte contraire à une norme supérieure au mépris de la hiérarchie des normes*»[26]. L'argument d'inconstitutionnalité écarté, le maintien de la règle d'opposabilité ne signifie pas pour autant que l'administration ne peut plus revenir sur sa doctrine dans le cas où cette dernière est illégale. Au contraire, elle a même l'obligation de corriger sa position, mais, et c'est là un point essentiel, *uniquement pour l'avenir*[27].

Concernant le droit de l'Union, la jurisprudence est partagée[28]. Le juge administratif français a considéré en 2005, dans une affaire portée à la connaissance de la Cour administrative d'appel de Douai, que le requérant-contribuable ne pouvait se prévaloir d'une instruction contraire au droit de l'Union (en l'espèce, la sixième directive en matière de TVA)[29]. Le juge national, juge commun du droit de l'Union, doit bien naturellement faire respecter le principe de primauté en laissant inappliquée toute disposition contraire du droit interne.

Si le juge en 2005 a agi en toute conformité avec le principe de primauté, il faut préciser que son arrêt est en contradiction avec un précédent arrêt de la Cour administrative d'appel de Paris qui, en 1991, a considéré que la garantie de l'article L. 80 A l'emportait sur le droit de l'Union[30]. Cela signifie qu'une interprétation serait opposable malgré le fait qu'elle soit contraire à une norme du droit de l'Union. En 2010, le juge administratif, s'alignant sur cet arrêt de 1991, a eu l'occasion de revenir sur cette problématique en précisant cette fois-ci que le respect de la garantie de l'article L. 80 A assure *in fine* le respect du principe de confiance légitime tel que reconnu en droit de l'Union[31]. Même si le juge veut bien adopter une position conciliante, son raisonnement «n'emporte pas tout à fait la conviction»[32], un acte illégal n'étant pas censé créer une quelconque confiance légitime[33].

[26] Conseil d'État, *Le rescrit : sécuriser les initiatives et les projets*, Étude adoptée le 14 novembre 2013, Paris, La Documentation française, 2014, p. 52. V. aussi CE, avis du 8 mars 2013, n° 353782, *JORF* n° 65 du 17 mars 2013, p. 4709.

[27] *Ibidem*, p. 56.

[28] *Ibid*., pp. 79 et suiv.

[29] CAA Douai, plén., 26 avril 2005, *Société Segafredo Zanetti France*, n° 02-736.

[30] CAA Paris, plén., 17 décembre 1991, *SARL Restauration Gestion Service*, n° 90-357.

[31] CAA Paris, plén., 25 mars 2010, *SARL À La Frégate*, n° 08-3658.

[32] M. Collet, *op. cit*., p. 113.

[33] *Ibidem*.

Question 5[34]

En droit français, il existe plusieurs mécanismes permettant en pratique d'appréhender une telle situation:

- La restriction du bénéfice du régime d'exonération dont bénéficient les dividendes reçus par des sociétés françaises lorsque les bénéfices distribués donnent lieu à une déduction fiscale du résultat de la filiale qui verse les sommes (dispositif «anti-hybride» de l'article 145, 6 b du CGI);
- La restriction de la déduction des intérêts dus par une société française si les produits correspondantsne font pas l'objet, au niveau de la société créancière,d'une imposition minimalesur lerevenu ou sur les bénéfices (égale à un quart de l'imposition qui serait due en France par la société créancière (article 212 I, b du CGI);
- La mise en œuvre de l'article 238 A du CGI en application duquel les intérêts, redevances ou rémunérations de prestations de services payés ou dus par une personne domiciliée ou établie en France à des personnes étrangères soumises à un régime fiscal privilégié, ne sont admis comme charges déductibles que si le débiteur apporte la preuve que ces dépenses correspondent à des opérations réelles et ne présentent pas un caractère normal ou exagéré.
- Les clauses anti-abus comprises dans les conventions fiscales bilatérales conclues par la France;
- La mise en œuvre de l'article 209 B du CGI qui prévoit que lorsqu'une personne morale établie en France et passible de l'impôt sur les sociétés détient directement ou indirectement plus de 50 % des actions, parts, droits financiers ou droits de vote dans une entité juridique établie ou constituée hors de France et que cette dernière est soumise à un «régime fiscal privilégié», les bénéfices ou revenus de cette entité sont passibles de l'impôt sur les sociétés en France. La notion de «régime fiscal privilégié» dans l'Etat d'implantation suppose que la holding étrangère soit non imposable ou soumise localement à des impôts sur le bénéfice dont le montant est inférieur de moitié à celui de l'impôt sur les bénéfices dont elle aurait été redevable dans les conditions de droit commun en France. Les implantations dans les Etats membres de l'Union Européenne sont exclues de ce mécanisme. En revanche, le Conseil d'Etat a estimé qu'un tel mécanisme était compatible avec les conventions fiscales bilatérales(Conseil d'Etat, Assemblée, 28 juillet 2002, Schneider Electrics, n° 232276); il existe une disposition similaire pour les personnes physique (article 123 bis du CGI);

[34] Les questions 5 à 10 ont été traitées par Claire Vanini et une équipe d'avocats chez CMS Francis Lefevre.

– La mise en œuvre par l'administration des dispositions générales relatives à l'abus de droit régi par l'article L64 du Livre des procédures Fiscales, dont le Conseil d'Etat vient de reconnaitre qu'elles étaient applicables, de manière générale, alors-même qu'il existait une convention fiscale bilatérale dont l'application conduisait à une situation de non-imposition (Conseil d'Etat, 25 octobre 2017, n° 396954). Ces dispositions permettent à l'administration d'écarter les actes dont il peut être présumé qu'ils ne sont inspirés par aucun autre motif que celui d'éluder ou atténuer la charge fiscale que l'intéressé aurait normalement dû supporter.

Question 6

L'article 57 du CGI autorise expressément l'administration à rectifier les résultats déclarés par les entreprises françaises relevant de l'impôt sur le revenu ou passibles de l'impôt sur les sociétés qui sont sous la dépendance ou qui possèdent le contrôle d'entreprises situées hors de France, du montant des bénéfices indirectement transférés à ces dernières, soit par voie de majoration ou de diminution des prix d'achat ou de vente, soit par tout autre moyen. La condition de dépendance n'est pas requise lorsque le transfert est effectué dans les pays à «fiscalité privilégiée» tels que définis à l'alinéa 2 de l'article 238 A du CGI.

Pour faire application de ces dispositions, l'administration doit prouver l'existence d'un lien de dépendance entre l'entreprise française et l'entreprise étrangère, d'une part, et d'un transfert de bénéfice hors de France d'autre part.

L'existence d'avantages accordés par une entreprise française à une entreprise étrangère entraîne une présomption de transfert de bénéfices.

La démonstration, par l'administration, d'un transfert de bénéfice à l'étranger l'autorise à procéder à la rectification du résultat fiscal de l'entreprise française.

Pour procéder à la réintégration des bénéfices supposés transférés et la détermination du bénéfice réel, la méthode de droit commun qui s'impose théoriquement à l'administration est celle de la méthode d'évaluation directe consistant à se fonder sur les éléments précis de l'opération redressée.

Ce n'est qu'à défaut d'élément précis permettant de déterminer le bénéfice imposable réel de l'entreprise française que l'administration est autorisée à recourir à une évaluation forfaitaire tirée de comparaisons avec les résultats d'entreprises indépendantes exerçant la même activité. Dans ce second cas, l'administration applique généralement de manière forfaitaire au chiffre d'affaires constaté un coefficient de bénéfices fixé par comparaison avec les entreprises du secteur.

Question 7

Ainsi qu'il a été indiqué ci-dessus, l'article 57 du CGI prévoit que, aux fins de détermination de l'impôt, les conditions convenues dans les relations commerciales

ou financières entre entreprises dépendantes doivent être définies dans les mêmes conditions qu'entre entreprises indépendantes.

Pour faire application de ces dispositions, l'administration fiscale française se réfère directement au principe de pleine concurrence tel qu'il découle des lignes directrices de l'OCDE dans son approche des prix de transfert.

La doctrine administrative y fait d'ailleurs expressément référence en indiquant que l'article 57 du CGI constitue la traduction en droit interne des lignes directrices de l'OCDE.

Une circulaire publiée au Bulletin Officiel des Finances Publiques (BOI-BIC-BASE-80-10-20-2014028) indique les méthodes de fixation des prix de transfert réputées répondre aux exigences du principe de pleine concurrence. En tant qu'élément de la doctrine administrative, ces éléments sont opposables à l'administration par le contribuable. Symétriquement, c'est sur la base de ces principes qu'elle est censée mettre en œuvre dispositions de l'article 57 du CGI à l'égard des contribuables.

Par ailleurs, l'article L 13 AA du LPF impose aux «grandes entreprises», dont le chiffre d'affaires hors taxes est supérieur à 400 millions d'euros ou qui détiennent directement ou indirectement le contrôle d'une telle entreprise ou qui sont contrôlées directement ou indirectement par une telle entreprise, l'existence d'une documentation obligatoire et normalisée relative aux prix de transfert. Cette obligation est applicable aux exercices ouverts depuis le 1er janvier 2010.

Question 8

Il n'existe pas en droit français de reconnaissance de la possibilité de correction unilatérale des bénéfices.

Cette possibilité de correction s'exerce généralement dans le cadre de la procédure amiable prévue par les conventions bilatérales ou dans le cadre de la procédure amiable et d'arbitrage prévue par la convention européenne d'arbitrage du 23 juillet 1990.

Question 9

Cela n'est en principe possible que dans le cadre de la procédure amiable prévue par les conventions bilatérales ou dans le cadre de la procédure amiable et d'arbitrage prévue par la convention européenne d'arbitrage du 23 juillet 1990.

Question 10

Oui, il existe une règle dite de l'abus de droit qui est régie par l'article 64 du Livre des Procédures Fiscales qui dispose que:

> *«afin d'en restituer le véritable caractère, l'administration est en droit d'écarter, comme ne lui étant pas opposable, les actes constitutifs d'un abus de droit, soit que ces actes ont un caractère*

fictif, soit que, recherchant le bénéfice d'une application littérale des textes ou de décisions à l'encontre des objectifs poursuivis par leurs auteurs, ils n'ont pu être inspirés par aucun autre motif que celui d'éluder ou d'atténuer les charges fiscales que l'intéressé, si ces actes n'avaient pas été passés ou réalisés, aurait normalement supportées, eu égard à sa situation ou à ses activités réelles».

Cette règle est d'application générale (cf. Conseil d'Etat, 25 octobre 2017, n° 396954, précité).

Partie II

Question 11[35]

11.1. Considérations générales sur le traitement des aides d'Etat par le juge administratif en France

La France reconnaît pleinement le principe de récupération des aides illégales. Il est généralement qualifié, en droit interne, de «restitution de l'indu», expression empruntée à la matière douanière et fiscale. Il convient, en effet, de rappeler que lorsqu'un Etat membre a accordé à un opérateur économique une aide illégale, il lui incombe de la récupérer, afin de rétablir la situation économique telle qu'elle existait préalablement au versement de l'aide. Une telle récupération n'est pas une sanction, elle est conçue par la jurisprudence comme la conséquence logique et proportionnée, au regard de l'objectif de concurrence, de l'infraction constatée (CJCE, 10 juin 1993, *Commission c. Grèce*, aff. C-183/91). Si l'article 16 du règlement du Conseil n°2015/1589 du 13juillet 2015 fonde le pouvoir de la Commission européenne d'ordonner la récupération d'une aide illégale déclarée incompatible, il renvoie au droit interne pour la détermination des modalités procédurales de la récupération[36].

Selon la formulation de principe, il résulte des articles 107 et 108 TFUE que, «s'il ressortit à la compétence exclusive de la Commission européenne de décider, sous le contrôle de la Cour de justice des Communautés européennes, si une aide de la nature de celles mentionnées à l'article [107] du traité est ou non,

[35] Question traitée par Stéphane de La Rosa et Francesco Martucci.

[36] En vertu de l'article 16 du règlement 2015/1589, l'aide à récupérer en vertu d'une décision de récupération comprend des intérêts qui sont calculés sur la base d'un taux approprié fixé par la Commission. Ces intérêts courent à compter de la date à laquelle l'aide illégale a été mise à la disposition du bénéficiaire jusqu'à celle de sa récupération (art. 16§2). La récupération "s'effectue sans délai et conformément aux procédures prévues par le droit national de l'État membre concerné, pour autant que ces dernières permettent l'exécution immédiate et effective de la décision de la Commission. À cette fin, et en cas de procédure devant les tribunaux nationaux, les États membres concernés prennent toutes les mesures prévues par leurs systèmes juridiques respectifs, y compris les mesures provisoires, sans préjudice du droit de l'Union" (art. 16§3).

compte tenu des dérogations prévues par ce traité, compatible avec le marché commun, il incombe, en revanche, aux juridictions nationales de sanctionner, le cas échéant, l'invalidité de dispositions de droit national qui auraient institué ou modifié une telle aide en méconnaissance de l'obligation, qu'impose aux Etats membres le paragraphe 3 de l'article [108] du traité, d'en notifier à la Commission, préalablement à toute mise à exécution, le projet ; que l'exercice de ce contrôle implique, notamment, de rechercher si les dispositions dont l'application est contestée instituent un régime d'aide, ou si une taxe fait partie intégrante d'une telle aide»[37].

Le Conseil d'Etat tire de l'effet direct de l'article 108, paragraphe 3, TFUE le pouvoir du juge administratif d'ordonner la récupération d'une aide d'Etat illégale. Il a ainsi affirmé: «lorsqu'une aide est illégalement versée, au motif que la Commission européenne n'a pas été en mesure, faute de notification, de se prononcer, préalablement à son versement, sur sa compatibilité avec le marché intérieur] en application de l'article [108] paragraphe 3 précité du traité, cette illégalité implique, en principe, la restitution des sommes versées depuis l'origine en l'absence de circonstances exceptionnelles susceptibles d'y faire obstacle»[38]. Le contentieux de la récupération relève, en France, de la compétence du juge administratif.

L'attribution d'une aide a toujours été regardée par le juge administratif comme un acte créateur de droits conditionné: si l'attribution d'une subvention par une personne publique crée des droits au profit de son bénéficiaire, «de tels droits ne sont ainsi créés que dans la mesure où le bénéficiaire de la subvention respecte les conditions mises à son octroi»[39]. Ces conditions, ajoute le Conseil d'État «découlent des normes» qui régissent l'aide, «qu'elles aient été fixées par la personne publique dans sa décision d'octroi, qu'elles aient fait l'objet d'une convention signée avec le bénéficiaire, ou encore qu'elles découlent implicitement mais nécessairement de l'objet même de la subvention»[40]. Ainsi, le caractère créateur de droits de l'attribution d'un avantage financier ne fait obstacle ni à ce que la décision d'attribution soit abrogée si les conditions auxquelles est subordonnée cette attribution ne sont plus remplies, ni à ce que l'autorité chargée de son exécution, constatant que ces conditions ne sont plus remplies, mette fin à cette exécution en ne versant pas le solde de la subvention[41].

Par ailleurs, le Conseil d'Etat est lié par l'appréciation de la compatibilité d'une aide effectuée par la Commission. Par exemple, s'agissant d'une aide

[37] Conseil d'État, 27 juillet 2009, *Société boucherie du marché*, n° 312098.
[38] Conseil d'Etat, 29 mars 2006, *CELF*, n° 274923.
[39] Conseil d'Etat, 5 juill. 2010, *CCI Indre*, n° 308615.
[40] *Ibid*.
[41] Conseil d'Etat, 7 août 2008, *Crédit coopératif*, n° 285979.

fiscale prenant la forme d'une réduction d'impôt prévue par le Code général des impôts en présence d'investissements productifs en outre-mer (art. 199 *undecies* B), le Conseil d'Etat a fait sien l'interprétation de la notion «d'investissements productifs neufs» à la lumière d'une décision de compatibilité du 11 novembre 2003 de la Commission[42].

Le Conseil d'Etat respecte l'esprit de l'article 108, paragraphe 3, TFUE, tel qu'il a été interprété par la Cour de justice. Ainsi, en cas d'aide d'Etat déclarée compatible avec le marché intérieur, la récupération n'est pas nécessaire. En revanche, en présence d'une aide illégale, car non notifiée, mais déclarée compatible par la Commission, la jurisprudence considère que le bénéficiaire de l'aide rembourse l'équivalent des intérêts qu'il aurait dû acquitter sur le marché bancaire entre le versement de l'aide et la déclaration de compatibilité par la Commission[43]. Dans l'affaire *Vent de Colère!*, relative à un système d'aide découlant d'une obligation de rachat, pesant sur l'EDF, de l'électricité produite par des énergies renouvelables, le juge a rappelé que lorsqu'une mesure constituant une aide d'Etat n'a pas été notifiée ou a été mise à exécution avant d'obtenir l'approbation de la Commission, la juridiction saisie doit, en principe ordonner la récupération intégrale de l'aide, ainsi que des intérêts. Lorsque le Conseil d'Etat a, au contentieux, annulé un acte réglementaire instituant une aide en méconnaissance de l'obligation de notification préalable à la Commission, «il incombe à l'Etat de prendre toutes les mesures nécessaires pour assurer le recouvrement auprès des bénéficiaires de l'aide, selon le cas, des aides versées sur le fondement de ce régime illégal ou des intérêts calculés sur la période d'illégalité»[44].

La recherche de la pleine effectivité de l'obligation de restituer l'aide peut conduire le juge à faire usage de mesures d'urgence, qui prennent la forme de mesures provisoires. Ainsi, dans une affaire *Société Air France, Regional et Britair,* le Conseil d'Etat a suspendu, par une ordonnance de référé, le versement d'aides qui auraient dû être notifiées à la Commission[45].

11.2. Base juridique

En vertu du principe d'autonomie procédurale, il appartient au droit national de définir le cadre des actions contentieuses destinées à assurer la primauté et l'effectivité du droit de l'Union. En France, deux fondements juridiques de la récupération sont à distinguer: d'une part, une disposition législative concerne spécifiquement la récupération par les collectivités territoriales, d'autre part, une autre disposition est mobilisée en matière fiscale.

[42] Conseil d'Etat, 13 avril 2016, *Caruel*, n° 368330.
[43] Conseil d'Etat, 19 décembre 2008, *CELF*, n° 274923.
[44] Conseil d'Etat, 15 avril 2016, *Association Vent de Colère !*
[45] Conseil d'Etat, 28 juillet 2009, Sociétés Air France, Régional et Britair.

a) En premier lieu, l'article L. 1511-1 CGCT, issu de la loi n° 2004-809 du 13 août 2004 relative aux libertés et responsabilités locales énonce que:

> «L'Etat notifie à la Commission européenne les projets d'aides ou de régimes d'aides que les collectivités territoriales et leurs groupements souhaitent mettre en œuvre, sous réserve de leur compatibilité avec les stratégies de développement de l'Etat, telles qu'elles sont arrêtées en comité interministériel d'aménagement et de compétitivité des territoires.
>
> Toute collectivité territoriale, tout groupement de collectivités territoriales ayant accordé une aide à une entreprise est tenu de procéder sans délai à sa récupération si une décision de la Commission européenne ou un arrêt de la Cour de justice des Communautés européennes l'enjoint, à titre provisoire ou définitif. A défaut, après une mise en demeure restée sans effet dans un délai d'un mois à compter de sa notification, le représentant de l'Etat territorialement compétent y procède d'office par tout moyen.
>
> Les collectivités territoriales et leurs groupements supportent les conséquences financières des condamnations qui pourraient résulter pour l'Etat de l'exécution tardive ou incomplète des décisions de récupération. Cette charge est une dépense obligatoire au sens de l'article L. 1612-15.
>
> Les obligations résultant de la procédure prévue à l'article 88-1 du traité instituant la Communauté européenne et de la mise en œuvre des règlements d'exemption pris en application de l'article 89 dudit traité s'imposent aux collectivités territoriales et à leurs groupements lorsqu'elles concernent leurs dispositifs d'aide aux entreprises».

b) En second lieu, l'article L. 190 du Livre des procédures fiscales (LPF), relatif au contentieux de l'établissement et des dégrèvements d'office, est invoqué par les contribuables devant le juge de l'impôt pour obtenir la restitution de taxes qui auraient été illégalement versées, lorsque celles-ci sont qualifiées d'aides d'Etat incompatibles[46]. L'article 36, I de la loi de finances rectificative pour 1989

[46] Art. L. 190 LPF §1 et §2: «Les réclamations relatives aux impôts, contributions, droits, taxes, redevances, soultes et pénalités de toute nature, établis ou recouvrés par les agents de l'administration, relèvent de la juridiction contentieuse lorsqu'elles tendent à obtenir soit la réparation d'erreurs commises dans l'assiette ou le calcul des impositions, soit le bénéfice d'un droit résultant d'une disposition législative ou réglementaire. Relèvent de la même juridiction les réclamations qui tendent à obtenir la réparation d'erreurs commises par l'administration dans la détermination d'un résultat déficitaire ou d'un excédent de taxe sur la valeur ajoutée déductible sur la taxe sur la valeur ajoutée collectée au titre d'une période donnée, même lorsque ces erreurs n'entraînent pas la mise en recouvrement d'une imposition supplémentaire. Les réclamations peuvent être présentées à compter de la réception de la réponse aux observations du contribuable mentionnée à l'article L. 57, ou à compter d'un délai de 30 jours après la notification prévue à l'article L. 76 ou, en cas de saisine de la commission des impôts directs et des taxes sur le chiffre d'affaires compétente, à compter de la notification de l'avis rendu par cette commission».

(L. nº 89-936, 29 déc. 1989) a ajouté deux nouveaux alinéas à cet article. Il s'agissait alors des alinéas deux et trois, ainsi rédigés :

> «Sont instruites et jugées selon les règles du présent chapitre toutes actions tendant à la décharge ou à la réduction d'une imposition ou à l'exercice de droits à déduction, fondées sur la non-conformité de la règle de droit dont il a été fait application à une règle de droit supérieure.
>
> Lorsque cette non-conformité a été révélée par une décision juridictionnelle, l'action en restitution des sommes versées ou en paiement des droits à déduction non exercés ou l'action en réparation du préjudice subi ne peut porter que sur la période postérieure au 1er janvier de la quatrième année précédant celle où la décision révélant la non-conformité est intervenue».

L'article 117 de la loi de finances pour 2006 (L. n° 2005-1719, 30 déc. 2005) a donné une nouvelle rédaction à l'article L. 190 du LPF. Il a apporté des précisions au cadre procédural de l'action en restitution de prélèvements indus par une refonte du quatrième alinéa et l'ajout d'un cinquième. Le législateur a ainsi défini, à l'alinéa 5 de l'article L. 190 du LPF, les catégories de décisions juridictionnelles susceptibles de fonder l'action en restitution. Constituent de telles décisions de justice, les arrêts et les avis contentieux rendus par le Conseil d'État et de la Cour de cassation, ainsi que les décisions du Tribunal des conflits.

Ainsi, suivant la formulation actuelle de l'article L. 190 du LPF, § 3, 4 et 5.

> «Sont instruites et jugées selon les règles du présent chapitre toutes actions tendant à la décharge ou à la réduction d'une imposition ou à l'exercice de droits à déduction ou à la restitution d'impositions indues, fondées sur la non-conformité de la règle de droit dont il a été fait application à une règle de droit supérieure, révélée par une décision juridictionnelle ou par un avis rendu au contentieux.
>
> Ces actions sont introduites selon les règles de délais applicables aux réclamations mentionnées au premier alinéa et se prescrivent par deux ans, selon le cas, à compter de la mise en recouvrement du rôle ou de la notification de l'avis de mise en recouvrement ou, en l'absence de mise en recouvrement, du versement de l'impôt contesté ou de la naissance du droit à déduction.
>
> Pour l'application du troisième alinéa, sont considérés comme des décisions juridictionnelles ou des avis rendus au contentieux les décisions du Conseil d'Etat ainsi que les avis rendus en application de l'article L. 113-1 du code de justice administrative, les arrêts de la Cour de cassation ainsi que les avis rendus en application de l'article L. 441-1 du code de l'organisation judiciaire (2), les arrêts du Tribunal des conflits et les arrêts de la Cour de justice de l'Union européenne se prononçant sur un recours en annulation, sur une action en manquement ou sur une question préjudicielle».

La compatibilité de l'article L. 190 du LPF avec le droit de l'Union a été reconnue par l'arrêt *SA Roquette Frères*[47]. La Cour de justice, sur renvoi préjudiciel, a ainsi considéré que «le droit communautaire ne s'oppose pas à la réglementation d'un Etat membre prévoyant que, en matière fiscale, l'action en répétition de l'indu fondée sur la déclaration par une juridiction nationale ou communautaire de la non-conformité d'une règle nationale avec une règle nationale supérieure ou avec une règle communautaire ne peut porter que sur la période postérieure au 1er janvier, de la quatrième année précédant celle où la décision juridictionnelle révélant la non-conformité est intervenue»[48]. Tant la Cour de cassation[49] que le Conseil d'Etat[50] ont, conformément à la jurisprudence *Roquette* de la Cour de justice, considéré que les dispositions de l'article L. 190 du LPF garantissent aux contribuables la possibilité d'obtenir dans un délai raisonnable la restitution d'impositions indûment acquittées et qu'elles n'ont pas pour effet de rendre excessivement difficile l'exercice des droits ouverts sur le fondement du droit de l'Union. Sur le terrain du droit de la Convention européenne des droits de l'homme, n'ont pas été jugées contraires aux stipulations de l'article 1er du premier protocole additionnel à la Convention, en ce qu'elles ne méconnaissent pas un principe d'espérance légitime attaché au droit des biens[51].

En matière d'aides fiscales, une décision de la Cour de justice qui révèle une incompatibilité du droit interne avec le droit de l'Union constitue évidemment une décision juridictionnelle révélant la non-conformité à la règle de droit supérieure. L'arrêt de la Cour établit le point de départ du délai, dans lequel sont recevables les réclamations motivées par la réalisation d'un évènement[52].

Question 12[53]

La restitution des aides repose sur les principes classiques de l'autonomie institutionnelle et procédurale. En l'absence de règles fixées par le droit de l'Union européenne en la matière, la récupération de l'aide doit se faire selon les règles de procédure nationale et devant le juge compétent en droit interne. Ce renvoi à l'autonomie est à relier à un principe plus général, identifié de longue date dans la jurisprudence de la Cour, selon lequel «si le traité a créé un certain nombre d'actions directes qui peuvent être exercées le cas échéant par des personnes

47 CJCE, 28 novembre 2000, *SA Roquette Frères*, C-88/99

48 *Ibid*.

49 Cass. Com, 15 janvier 2002, *SA Fournier*.

50 Conseil d'Etat, 9 juillet 2010, *Société générale d'optique*, n° 309411 ; Conseil d'Etat, 16 décembre 2010, *SNC Meubles Ikea*, n° 309412.

51 Conseil d'Etat, 21 janvier 2016, *Société AXA*, n° 373559.

52 Conseil d'Etat, 19 décembre 2012, *SNC Kimberly Clark*, n° 327166.

53 Question traitée par Stéphane de La Rosa et Francesco Martucci.

privées devant la Cour de justice, il n'a pas entendu créer devant les juridictions nationales, en vue du maintien du droit communautaire, des voies de droit autre que celles établies par le droit national»[54].

On ne relève en France aucun cas dans lequel un juge aurait refusé d'ordonner la récupération d'une aide d'Etat illégale. Il existe en revanche des difficultés auxquelles le juge français a été confronté, ce qui est le cas notamment pour les aides de nature fiscale.

Une première difficulté tient au caractère suspensif des recours dirigés contre un titre exécutoire. Dans la plupart des cas, l'aide accordée par une décision administrative est récupérée par un titre exécutoire. Or, la contestation de la validité du titre par le bénéficiaire de l'aide devant le juge, qui prend la forme d'une opposition, à titre exécutif a un caractère suspensif, en vertu de l'article L 1617-5 du Code général des collectivités (pour les collectivités) et de l'article 117 du décret n° 2012-1246 du 7 novembre 2012 (pour l'Etat). En principe, un tel caractère suspensif a pour conséquence de ne pas permettre une récupération effective et immédiate de l'aide. A la suite d'une question préjudicielle posée par le juge administratif français, la Cour a considéré que cette règle de l'effet suspensif des recours contre les titres de perception (qui est elle-même dérogatoire au principe général selon lequel les recours contre un acte administratif ne sont pas suspensifs), devait être laissée inappliquée dans les procédures de récupération[55].

Une seconde difficulté porte sur l'articulation du régime interne du retrait des actes administratifs créateurs de droit avec l'obligation de récupération. En effet, les aides (de nature fiscale, mais pas uniquement) ont très largement alimenté la jurisprudence administrative relative au régime du retrait et de l'abrogation des actes administratifs. Au point que lorsqu'est paru le Code des relations entre le public et l'administration (ou CRPA, entré en vigueur en 2016), un régime spécifique aux subventions y a été inséré, pour assurer un meilleur respect de conditions mises à l'aide, et également l'effet utile du droit européen. D'un côté, ce code a codifié une jurisprudence bien établie du Conseil d'Etat[56], suivant laquelle l'Administration ne peut abroger ou retirer une décision créatrice de droits de sa propre initiative ou sur demande d'un tiers que si elle est illégale et si l'abrogation ou le retrait intervient dans le délai de quatre mois suivant cette prise de décision (art. L. 242-1 CRPA). Mais, d'un autre côté, ce principe fait l'objet d'une dérogation pour les aides: en vertu de l'article L. 242-2, l'administration peut, «sans condition de délai», «retirer une décision attribuant une

[54] CJCE, 7 juillet 1981, Rewe Handelsgesellschaft dit « Croisières du beurre », aff. C-158/20, pt. 43.
[55] CJCE, 5 octobre 2006, *Commission c. France*, aff. C-243/10.
[56] CE, Ass., 26 octobre 2001, *Ternon*.

subvention lorsque les conditions mises à son octroi n'ont pas été respectées». Le principe général; qui régit le retrait des actes administratifs en droit interne, est ainsi écarté dans le contentieux des aides d'Etats, afin de donner un plein effet à l'obligation de récupération.

Une troisième difficulté est liée à l'engagement de la responsabilité de l'Etat. En effet, dans l'affaire dite du *Centre d'exportation du livre français (CELF)*, la Cour de justice a reconnu la possibilité, pour les entreprises récipiendaires d'une aide, d'engager, conformément au droit interne, un recours en responsabilité pour faute de l'Etat[57]. Ni le montant de l'aide à rembourser, ni les intérêts moratoires correspondants ne constituent des préjudices indemnisables: seuls sont indemnisables les conséquences de la récupération, telles que les frais financiers découlant de l'emprunt contracté en vue de rembourser l'aide.

L'affaire dite du plan Borotra, correspondant à un vaste système d'aide dans les années 1990 à l'industrie textile, a été l'occasion d'engager cette forme de responsabilité et d'en indiquer les limites. Dans cette affaire, la Cour administrative d'appel de Paris a limité la responsabilité de l'Etat, en se fondant sur l'obligation de diligence des entreprises bénéficiaires d'aides. La possibilité, pour les entreprises récipiendaires de l'Etat, d'engager la responsabilité de l'Etat est ainsi sensiblement réduite. D'abord, le bénéficiaire ne doit pas avoir fait preuve d'imprudence face à une aide soit manifestement incompatible, soit contre laquelle la Commission européenne s'était déjà prononcée[58]. Ensuite, il ne peut prétendre, en guise de réparation, à la compensation des sommes qu'il a dû reverser à la collectivité publique, car ce serait contourner l'obligation de récupération (même arrêt). Il ne peut non plus prétendre à des intérêts moratoires, car la récupération doit précisément être assortie d'un intérêt légal compensant de l'avantage financier dont il a bénéficié entre la date d'encaissement de l'aide et la date de récupération (même arrêt). Enfin, lorsque l'aide est la contrepartie d'embauches qui ont été effectuées, l'entreprise ne saurait réclamer l'équivalent du coût de ces embauches au titre de dommages et intérêts, car ce serait nier toute valeur ajoutée aux employés ; toutefois, le juge consent à prendre en compte les frais administratifs liés au remboursement de l'aide[59]. Selon la Cour de justice, les dommages et intérêts octroyés par le juge sur le fondement d'un préjudice lié à l'aide ne constituent pas une nouvelle aide (CJCE, 27 sept. 1988, *Asteris c/ Grèce*, aff. 106/87).

En matière fiscale, l'engagement d'une responsabilité de l'Etat est discuté lorsque l'administration fiscale laisse une société bénéficier d'une exonération

[57] CJCE, 12 février 2008, *CELF*, aff. C-199/06.

[58] CAA Paris, 23 janvier 2006, *Sté Groupe Salmon Arc-en-ciel*, n° 04PA01092.

[59] *Ibid*. V. également Tribunal Administratif de Clermont-Ferrand, 23 septembre 2004, *Fontanille*.

d'impôts. On le voit dans une affaire récente[60]. Une société a bénéficié d'une exonération temporaire d'impôt sur les sociétés, en application du Code général des impôts, dont la Commission a constaté qu'elles étaient constitutives d'une aide d'État incompatible avec le marché commun et qu'elles devaient être récupérées sans délai par l'administration fiscale. Constatant l'inertie de cette dernière dans la récupération des aides incompatibles, la Cour de justice des Communautés européennes a constaté le manquement de la France[61]. Devant le juge français, la société a demandé la réparation du préjudice découlant de la faute commise par l'Etat en raison, d'une part, de la méconnaissance du droit de l'Union prohibant les aides d'Etat et, d'autre part, de la faute commise par l'administration fiscale à raison du retard pris dans la récupération des sommes correspondant aux aides d'Etat déclarées incompatibles. En 2015, la Cour administrative d'appel de Lyon a considéré que le fait pour l'Administration de laisser une société bénéficier d'une exonération d'impôt sur les sociétés sur le fondement de l'article 44 *septies* du CGI et de ne pas mettre en recouvrement les impositions que cette société aurait dû acquitter en l'absence de ce régime de faveur incompatible est constitutif d'une illégalité de nature à engager la responsabilité de l'Etat. Néanmoins, la demande d'indemnisation, pour être admise, nécessite de faire état d'un lien de causalité suffisant et d'un préjudice de la part de la société requérante[62]. Pour le Conseil d'État, le paiement au titre de la récupération « ne peut constituer un préjudice indemnisable dès lors que l'État est tenu de procéder à la récupération de l'aide en mettant à la charge du bénéficiaire une somme correspondant au montant de l'exonération d'impôt illégalement accordée »[63]. La solution a été réitérée en octobre 2017 et a été étendue au paiement des intérêts:

«La somme devant être acquittée par la société requérante, correspondant au montant de l'aideaccordée, qui résulte de la décision de la Commission du 16 décembre 2003 par laquelle cet avantage fiscal a été déclaré incompatible avec le régime desaides d'Etat, ne peut constituer un préjudice indemnisable dès lors que l'Etatest tenu de procéder à la récupération de l'aideen mettant à la charge du bénéficiaire une somme correspondant au montant de l'exonération d'impôt illégalement accordée. Par ailleurs, l'obligation de payer les intérêts communautaires, qui résulte de l'application par la France de cette même décision et du règlement de la Commission n° 794/2004 du 21 avril 2004, ne saurait engager la responsabilité de l'Etat, dès lors que ces intérêts communautaires ont pour seul objet de garantir l'effet utile du régime desaides d'Etaten compensant l'avantage financier et concurrentiel procuré par l'aideillégale entre l'octroi de celle-ci et

[60] Conseil d'État, 7 juin 2017, n° 386627, ECLI:FR:CECHR:2017:386627.20170607.
[61] CJCE, 13 novembre 2008, *Commission c. France*, aff. C-214/07, ECLI:EU:C:2008:619.
[62] CAA Lyon, 5e ch., 1er octobre 2015, *SAS EDAP TMS France*, n° 14LY00340, JurisData n° 2015-030564.
[63] Conseil d'État, n° 386627, précité.

sa récupération, y compris en cas de retard de l'Etatà la récupérer. Il résulte de ce qui précède que la société requérante ne peut utilement soutenir que la cour aurait inexactement qualifié les faits en écartant l'existence d'un lien direct de causalité entre la faute alléguée de l'Etatet le préjudice financier qu'elle estime avoir subi»[64].

Dans ce même arrêt, le Conseil d'Etat a rejeté toute objection quant à une méconnaissance par l'administration qui exige la récupération de l'aide illégale et incompatible des principes de sécurité juridique et de protection de la confiance légitime. En effet, si de tels principes sont applicables, ce n'est qu'à l'encontre de la décision de la Commission ordonnant la récupération des aides dont, en l'espèce, la Cour de justice avait constaté dans une procédure en manquement qu'elle n'a pas été respectée par la France[65]. En revanche, un opérateur peut utilement se prévaloir à l'encontre d'une mesure d'exécution de la décision de récupération de l'aide illégale de la prescription telle qu'elle est prévue par le droit dérivé de l'Union[66].

On ne relève en France aucune affaire dans laquelle se serait posée la question de l'interaction entre le droit des aides d'Etat et les obligations découlant d'accords bilatéraux ou multilatéraux de protection des investissements.

Question 13[67]

OMC. En matière de protection des investissements étrangers, la France est liée, tout comme les États-Unis et le Royaume-Uni, par les accords conclus dans le cadre de l'Organisation mondiale du commerce (OMC) qu'il s'agisse de l'accord général sur le commerce des services (AGCS) ou de l'accord sur les mesures concernant les investissements et liées au commerce (accord sur les MIC).

*Traités bilatéraux d'investissement***.** La France a conclu 115 traités bilatéraux d'investissement dont 18 ne sont pas en vigueur (10 ont été signés mais ne sont pas entrés en vigueur; 8 ne sont en plus en vigueur)[68]. Aucun traité bilatéral d'investissement n'a été signé par la France avec les États-Unis ou avec le Royaume-Uni.

Conventions d'établissement. Dans une acception extensive des accords visant la «protection de biens», il est loisible de signaler les conventions d'établissement qui peuvent comporter des dispositions relatives à la protection des biens des étrangers. La plupart de ces conventions ont été conclus avec des États africains

[64] Conseil d'État, 11 octobre 2017, N° 393179, ECLI:FR:CECHS:2017:393179.20171011.
[65] *Ibid*. Dans le même sens, voir Conseil d'État, 24 février 2017, N° 395844, ECLI:FR:CECHR:2017:395844.20170224.
[66] Conseil d'État, N° 395844, précité.
[67] Question traitée par Francesco Martucci.
[68] http://investmentpolicyhub.unctad.org/IIA/CountryBits/72#iiaInnerMenu.

(République centrafricaine, 26/09/1994; Congo, 31/07/1993; Gabon, 11/03/2002, Mali; 26/09/1994; Sénégal, 25/05/2000; Togo, 13/06/1996; Tchad, 11/08/1960) et d'Amérique centrale et du Sud (Colombie, 16/03/1955; Honduras, 15/08/1955; Nicaragua, 04/05/1938, Panama, 10/07/1953). Une convention d'établissement a été également conclue avec le Canada (12/05/193), les États-Unis (25/11/1959) et l'Iran (24/06/1964). Outre Saint-Marin (15/01/1954), certains États membres de l'Union ont conclu des conventions d'établissement avec la France avant l'entrée en vigueur du Traité de Rome (Belgique, 06/10/1927; Allemagne, 27/10/1956; Suède, 16/02/1954; Luxembourg, 31/03/1930; Italie, 23/08/1951). Aucune convention n'a été conclue avec le Royaume-Uni.

Dans la convention d'établissement relative aux États-Unis, il est prévu que chaque partie accorde un traitement équitable aux ressortissants et sociétés de l'autre partie, tant en ce qui concerne les personnes, les biens, entreprises et autres intérêts, et leur assure la pleine protection légale et judiciaire (article 1er). Les ressortissants de chaque partie sont autorisés à s'établir notamment en vue de se livrer à des opérations commerciales entre les deux territoires et de développer et diriger les opérations d'une entreprise dans laquelle ils ont déjà investi un capital substantiel et procèdent à un tel investissement (article 2). L'article 3 précise les conditions dans lesquelles les ressortissants et sociétés ont accès aux tribunaux nationaux et peuvent prévoir le règlement des litiges par voie d'arbitrage. Les articles 4 et 5 déclinent le principe du traitement national aux droits et intérêts acquis par les ressortissants et sociétés, les résidences, bureaux, entrepôts, usines, etc., les biens ainsi que les activités commerciales, financières et industrielles. L'article 7 concerne l'assise immobilière des activités et des biens (location et propriété), l'article 8 la propriété industrielle et intellectuelle, l'article 9 la fiscalité directe et indirecte, l'article 10 les transferts de fonds et les paiements. La convention n'a fait l'objet que d'une application juridictionnelle: le Conseil d'État a considéré qu'une société sans but lucratif de droit américain qui entend organiser une scolarité destinée à des élèves anglophones est soumise à la législation française relative notamment à l'aide à l'enseignement privé[69].

Question 14[70]

Alors que le Conseil d'État considère l'absence de hiérarchie entre engagements interétatiques, y compris d'intérêt fiscal, il a expressément émis une réserve concernant les cas où «serait en cause l'ordre juridique intégré que constitue l'Union européenne»[71]. Le Conseil reconnaît alors explicitement la compétence

[69] Conseil d'État, 22 février 1995, N° 109684 110057.

[70] Question traitée par Andreas Kallergis.

[71] Conseil d'État, 23 décembre 2011, *M. Kandyrine de Brito* Paiva, n°303678, DF, 2012, n° 4, act. 48; JCP-A, 2012, act. 9 , obs. L. Erstein; RFDA, 2012, p. 1, concl. J. Boucher, p. 26, note D. Alland.

du juge pour vérifier la compatibilité au droit de l'Union européenne, et notamment aux libertés de circulation, des stipulations des conventions bilatérales contre les doubles impositions conclues par la France[72].

Dans l'arrêt *Villatte*, le Conseil a considéré que, si les stipulations de la convention fiscale entre la France et le Royaume-Uni rendaient imposable en France un non-résident sur des revenus réalisés en France à partir d'une base fixe, cette circonstance n'introduisait pas une discrimination entre prestataires de services fournis en France. Dans l'arrêt *Regazzacci*, le Conseil n'a pas reconnu l'incompatibilité entre les stipulations de la convention franco-britannique et le droit de l'Union, en l'absence de discrimination fondée sur la résidence (en France ou au Royaume-Uni) ou entre résidents britanniques (en fonction de leur qualité de *domiciled* ou *non domiciled*).

La qualification d'une contrariété du droit interne au droit de l'Union peut se faire à partir d'un raisonnement qui fait à la fois référence à un dispositif interne, tel l'article 119 bis, 2, du CGI, et aux stipulations d'une convention fiscale bilatérale qui précisent les modalités de son application, telles les stipulations de la convention franco-néerlandaise. Ainsi, par l'effet de l'application simultanée de l'article 119 bis, 2, CGI, dans le cadre de la convention précitée, et des règles néerlandaises qui exonéraient les sociétés mères d'imposition sur les dividendes de source étrangère, une société mère néerlandaise était assujettie à une retenue à la source pour les dividendes reçus de ses filiales françaises, tandis que lemême type d'obligation ne pesait pas sur une société mère française[73].

Par l'effet de l'article 351 TUE, le contrôle de la compatibilité du droit international fiscal conventionnel avec le droit de l'Union couvre non seulement les conventions fiscales conclues par la France avec d'autres États membres de l'Union, mais aussi avec des États tiers à l'Union[74]. C'est ainsi que la Cour administrative d'appel de Paris a considéré comme incompatible avec le droit de l'Union l'application combinée des dispositions du droit interne et du droit conventionnel, par l'effet de laquelle un résident fiscal français percevant de revenus de source étrangère se voyait imposé plus lourdement que s'il avait reçu de revenus de source française uniquement[75].

[72] Conseil d'État, 30 mars 2005, *min c/ Villatte*, n°230053, *RJF*, 7/2005, n°751, BDCF, 7/2015, n°96, concl. M.-H. Mitjaville; Conseil d'État, 27 juillet 2012, *Regazzacci*, n° 337656 et n°337810,concl. F. Aladjidi, note F. Le Mentec, DF, 2012, n°41, comm. 473.

[73] Conseil d'État, 6 avril 2007, *Sté Denkavit international BV et Sté Denkavit France SARL*, n°235069, ; RJF, 7/2007, n°807 ; BDCF, 7/2007, n°87, concl. C. Landais.

[74] Conclusions O. Lemaire sous CAA Paris, 7 avril 2016, *M. B.*, n°12PA04303.

[75] CAA Paris, 7 avril 2016, *M. B.*, n°12PA04303.

Bibliographie – Références

M. Collet, *Droit fiscal*, Paris, Presses Universitaires de France, 6e éd., 2017, p. 185.

A Maitrot de la Motte, *Droit fiscal de l'Union européenne*, Bruylant, coll. Droit de l'Union, série Manuels, 2012.

A Maitrot de la Motte, *Aides d'Etat sous forme fiscale*, JCl Procédure fiscale, LexisNexis, 1er décembre 2016.

GERMANY

Prof. Dr. Rainer Wernsmann*
Wiss. Mitarbeiter Paul Wagner*

Teil I

Frage 1
Das deutsche Steuerverfahrensrecht ist durch das Prinzip der Kooperation zwischen Steuerpflichtigen und nationaler Finanzverwaltung geprägt, sodass alle steuerpflichtigen Personen und die nationalen Finanzbehörden in vielfältiger Weise miteinander in Kontakt treten können.[1] Grundsätzlich wäre es denkbar, dass ein Steuerpflichtiger Rechtssicherheit über die eigenen Steuerangelegenheiten durch mehrseitige Vereinbarungen mit den Finanzbehörden (öffentlich-rechtliche Verträge) oder durch einseitige Erklärungen der Finanzbehörden (Auskünfte und Zusagen) begehrte.[2]

a) Keine vertragliche Vereinbarungen über Steuern
Da Steuern gemäß § 155 Abs. 1 Abgabenordnung (im Folgenden: AO) grundsätzlich einseitig von der Finanzbehörde durch Steuerbescheid festgesetzt werden, ist die wichtigsteHandlungsform der Steuerbehörden der Verwaltungsakt im Sinne des § 118 AO. Öffentlich- rechtliche Verträge sind im deutschen Steuerverfahrensrecht nicht von vornherein ausgeschlossen. Das normiert § 78 Nr. 3

* Universität Passau, Lehrstuhl für Staats- und Verwaltungsrecht, insbesondere Finanz- und Steuerrecht / rainer.wernsmann@uni-passau.de;paul.wagner@uni-passau.de.
[1] Vgl. das Kooperationsprinzip, §§ 88 Abs. 1, 90 Abs. 1 AO; ähnlich *Seer*, in: Tipke/Lang, Steuerrecht, 22. Auflage, § 21 Rn. 4.
[2] Ausführlich dazu *Horst*, Die verbindliche Auskunft nach § 89 Abgabenordnung, S. 5 ff.

AO für die allgemeinen Verfahrensvorschriften, aber auch § 224a Abs. 1 AO, welcher die Handlungsform des öffentlich-rechtlichen Vertrages für das Erhebungsverfahren explizit zulässt. Vertragliche Vereinbarungen über das Ob und Wie der Steuerfestsetzung kommen jedoch aus verfassungsrechtlichen Gründen (Gleichmäßigkeit der Besteuerung Art. 3 Abs. 1 GG) von vornherein nicht in Betracht.[3] Steuern dürfen daher nicht durch die Form des öffentlich-rechtlichen Vertrags festgesetzt werden und eine individuelle Vereinbarung über die Entstehung oder die Höhe der Steuern darf nicht getroffen werden (Vorbehalt des Gesetzes).[4] Folglich sind vorab entschiedene Preisvereinbarungen oder vor der Tatbestandsverwirklichung erlassene Steuerbescheide in Deutschland nicht möglich.[5]

b) Auskünfte der Finanzbehörden

Auskünfte der Finanzbehörden werden nach h.M. als Wissenserklärungen ohne rechtliche Bindungswirkung definiert.[6] Grundsätzlich können die Finanzbehorden Auskünfte freiwillig zu verfahrensrechtlichen und materiellrechtlichen Fragen erteilen, da die Auskunftsbefugnis der Behörde ein „Annex" der Entscheidungsbefugnis darstellt.[7] Allerdings sind Auskünfte für die Erlangung von Rechtssicherheit insoweit ungeeignet, da sie nicht bindend sind, ein Anspruch auf die Beurteilung von materiellen Fragen nicht besteht und die Finanzverwaltung bei der Beantwortung von materiellrechtlichen Fragen darauf achten muss, dass das für die verbindliche Beantwortung von materiellrechtlichen Fragen vorgesehene Institut – die verbindliche Auskunft nach § 89 Abs. 2 AO – nicht untergraben wird und die Steuerbehörde keine Rechts- oder Steuerberatertätigkeit betreibt.[8] Sind Auskünfte unrichtig, kommen allenfalls staatshaftungsrechtliche Ansprüche (insbesondere § 839 BGB i.V.m. Art. 34 GG) in Betracht.

c) Verbindliche Auskünfte und Zusagen der Finanzbehörden

Die ausnahmsweise Möglichkeit bindender Zusagen, durch welche sich die Finanzverwaltung einseitig hoheitlich zu einem bestimmten künftigen Verhalten

[3] *Wernsmann,* in: Hübschmann/Hepp/Spitaler, AO/FGO, 243. Lieferung, § 3 AO Rn. 180 ff.

[4] Vgl. *Wernsmann,* in: Hübschmann/Hepp/Spitaler, AO/FGO, 243. Lieferung, § 4 AO Rn. 332; *Seer,* in: Tipke/Lang, Steuerrecht, 22. Auflage, § 21 Rn. 20.

[5] Vgl. *BMF*, Schreiben vom 05.10.2006, IV B 4 – S 1341 – 38/06, BStBl. I 2006, 594 (595/Tz. 1.2); *Hey*, in: Tipke/Lang, Steuerrecht, 22. Auflage, § 3 Rn. 240.

[6] *Söhn,* in: Hübschmann/Hepp/Spitaler, AO/FGO, 243. Lieferung, § 89 AO Rn. 134; *Horst*, Die verbindliche Auskunft nach § 89 Abgabenordnung, S. 7.

[7] *Söhn,* in: Hübschmann/Hepp/Spitaler, AO/FGO, 243. Lieferung, § 89 AO Rn. 152; *Horst*, Die verbindliche
Auskunft nach § 89 Abgabenordnung, S. 7.

[8] *Söhn*, in: Hübschmann/Hepp/Spitaler, AO/FGO, 243. Lieferung, § 89 AO Rn. 152.

verpflichtet, ist zum größten Teil gesetzlich geregelt. Zu nennen sind beispielsweise die verbindliche Auskunft nach § 89 Abs. 2 AO, die verbindliche Zusage auf Grund einer Außenprüfung nach §§ 204 ff. AO oder die Anrufungsauskunft nach § 42e EStG.[9] Für die Erlangung von Rechtssicherheit im Voraus – also bevor der Steuerpflichtige den steuerrechtlich relevanten Sachverhalt verwirklicht hat – sind die „allgemeine" verbindliche Auskunft nach § 89 Abs. 2 AO und die „spezielle" Vorabzusage über Verrechnungspreise zwischen international verbundenen Unternehmen nach den jeweiligen Doppelbesteuerungsabkommen (sog. „Advance Pricing Agreements" – APAs) von besonderer Bedeutung.

Die verbindliche Auskunft kann von der Finanzbehörde erteilt werden, wenn ein Steuerpflichtiger die Verwirklichung eines genau bestimmten Sachverhalts plant, er sich über die steuerliche Beurteilung des genau bestimmten Sachverhalts im Unklaren ist und im Hinblick auf die erheblichen steuerlichen Auswirkungen ein besonderes Interesse an der verbindlichen Auskunft besteht, § 89 Abs. 2 AO. Die Auskunft ist für die Besteuerung des Antragstellers bindend, wenn der später verwirklichte Sachverhalt von dem der Auskunft zugrunde gelegten Sachverhalt nicht oder nur unwesentlich abweicht. Die spezifischen Anforderungen, um eine verbindliche Auskunft nach § 89 Abs. 2 AO zu erhalten, sind folgende[10]: Der Steuerpflichtige muss einen schriftlichen oder elektronischen Antrag bei der zuständigen Finanzbehörde stellen. Der Antrag muss eine umfassende und in sich abgeschlossene Darstellung des zum Zeitpunkt der Antragstellung noch nicht verwirklichten Sachverhalts enthalten. Das besondere steuerliche Interesse des Antragstellers muss dargelegt werden. Das besondere steuerliche Interesse liegt in der Regel vor, wenn die finanziellen Folgen, die bei der Besteuerung des vorgetragenen Sachverhalts eintreten, aus der Sicht des Steuerpflichtigen „erheblich" sind und die Unsicherheiten in der steuerrechtliche Beurteilung eine Vorabklärung durch die Finanzbehörde rechtfertigen. [11] Das Rechtsproblem und der eigene Rechtsstandpunkt müssen ausführlich dargelegt werden. Es muss eine konkrete Frage formuliert werden. Es darf keine weitere verbindliche Auskunft bei einer anderen Finanzbehörde über den konkreten Sachverhalt beantragt werden. Es muss versichert werden, dass alle für die Erteilung der Auskunft und für die Beurteilung erforderlichen Angaben gemacht wurden und der Wahrheit entsprechen. Für die Bearbeitung des Antrags wird eine Gebühr erhoben, welche sich nach dem Wert berechnet, den die verbindliche Auskunft für den Antragsteller hat, § 89 Abs. 3 AO.[12] Ist ein Gegenstandswert nicht bestimmbar und kann er auch nicht durch Schätzung bestimmt werden, ist eine Zeitgebühr zu berechnen, § 89 Abs. 4 AO.

[9] Beachte auch § 178a AO, § 15 Abs. 4 VermBG und Art. 33 Abs. 1 UZK.

[10] Entnommen aus § 1 Abs. 1 StAuskV.

[11] *Söhn*, in: Hübschmann/Hepp/Spitaler, AO/FGO, 243. Lieferung, § 89 AO Rn. 202.

[12] Wegen des Mehrwerts hinsichtlich der Rechtssicherheit für den Steuerpflichtigen ist die Erhebung einer Gebühr mit dem Grundgesetz vereinbar, vgl. *BFH,* Urteil vom 30.3.2011, I R 61/10, BStBl. II 2011,

Festzuhalten ist, dass die verbindliche Auskunft nicht geeignet ist, eine konkrete Steuer zu vereinbaren oder die gesamte rechtliche Prüfung des geplanten Sachverhalts auf das Finanzamt zu verlagern.[13] Die Finanzverwaltung ist des Weiteren angewiesen, eine Auskunftserteilung in Angelegenheiten abzulehnen, in denen die Erzielung eines Steuervorteils im Vordergrund steht, wie z.B. bei der Prüfung von Steuersparmodellen oder bei der Feststellung der Grenzpunkte für das Handeln eines ordentlichen Geschäftsleiters.[14] Die verbindliche Auskunft regelt lediglich, wie die Finanzbehörde eine ihr zur Prüfung gestellte hypothetische Gestaltung gegenwärtig beurteilt. Nach der Auffassung des BFH besteht kein Anspruch auf einen bestimmten rechtmäßigen Inhalt einer verbindlichen Auskunft.[15] Das bedeutet, dass nicht auf eine verbindliche Auskunft bestimmten Inhalts geklagt werden kann. Der Auskunftsempfänger muss vielmehr das Risiko des Bescheiderlasses auf sich nehmen und kann erst gegen den etwaigen Bescheid klagen, wenn der Sachverhalt bereits verwirklicht ist.

d) Sonderfall: Vorabzusage über Verrechnungspreise

Vorabzusagen über Verrechnungspreise zwischen international verbundenen Unternehmen sind in der AO – bis auf die Gebührenfestsetzung in § 178a AO – nicht genauer reglementiert.[16] Vorabzusagen sind Verwaltungsakte, welche speziell nach einem erfolgreich durchgeführten Vorabverständigungsverfahren i.S.d Art. 25 OECD-MA zwischen der Bundesrepublik Deutschland und (mindestens) einem anderen Staat von den örtlich zuständigen Finanzämtern erteilt werden. Vorabverständigungsvereinbarungen und die darauf beruhenden Vorabzusagen sollen Meinungsverschiedenheiten zwischen den Steuerverwaltungen verschiedener Staaten und den Unternehmen über Verrechnungspreismethoden und eine dadurch drohende wirtschaftliche Doppelbelastung bzw. Doppelbesteuerung soweit möglich im Voraus einvernehmlich vermeiden. Die Unternehmen erhalten dadurch auch mehr Rechtssicherheit und Planungssicherheit, sie werden vor möglichen Steuerzinsen und Strafzuschlägen geschützt, und die Effizienz bei der Prüfung von Verrechnungspreisen wird gesteigert.[17] Die spezifischen Anforderungen einer solchen Vorabzusage sind folgende[18]: Der Steuerpflichtige muss einen Antrag auf Durchführung eines Vorabverständigungsverfahrens

536 (537 ff.).

[13] So auch *Rätke*, in: Klein, AO Kommentar, 13. Auflage, § 89 Rn. 23.

[14] *BMF*, Schreiben vom 31.1.2014, IV A 3 – S 0062/14/20002, BStBl. I 2014, 290 (360/Tz. 3.5.4).

[15] *BFH*, Urteil vom 29.2.2012, IX R 11/11, BFHE 237, 9 (9).

[16] Die einzelnen Voraussetzungen sind aufgezählt in dem BMF-Schreiben vom 05.10.2006, IV B 4 – S 1341 – 38/06, BStBl. I 2006, 594.

[17] *BMF*, Schreiben vom 5.10.2006, IV B 4-S 1341-38/06, BStBl. I 2006, 594 (595/Tz. 1.1).

[18] Vgl. *BMF*, Schreiben vom 5.10.2006, IV B 4-S 1341-38/06, BStBl. I 2006, 594 (595/Tz. 1.1. ff.).

zwischen der Bundesrepublik Deutschland und (mindestens) einem anderen Staat, an dem der Steuerpflichtige intensiv beteiligt wird, stellen. Dafür muss der Steuerpflichtige ein berechtigtes Interesse an der Durchführung und dem Abschluss des Vorabverständigungsverfahrens darlegen. Weiterhin muss er den Finanzbehörden die für eine sachgerechte Verrechnungspreisprüfung erheblichen, ihm bekannten Tatsachen vollständig unterbreiten und sie bei der weiteren Sachaufklärung ohne Einschränkungen unterstützen. In dem Antrag sind der Anwendungsbereich sowohl in sachlicher als auch in zeitlicher Hinsicht und der andere Staat, mit dem eine Vorabverständigung erreicht werden soll, zu benennen. Der Antragsteller muss seinen Antrag umfassend erläutern und alle erforderlichen Aufzeichnungen vorlegen. Aus der Begründung des Antragstellers muss hervorgehen, dass die Anwendung der von ihm vorgeschlagenen Verrechnungspreismethode im Hinblick auf die Geschäftsvorfälle, die das APA umfassen soll, mit dem Fremdvergleichsgrundsatz in Übereinstimmung steht. Zudem muss im Regelfall eine Grundgebühr von 20.000 € gezahlt werden, § 178a AO. Wenn das Vorabverständigungsverfahren erfolgreich durchgeführt wurde, wird diese völkerrechtliche Vereinbarung durch eine Vorabzusage der deutschen Finanzbehörden gegenüber dem Steuerpflichtigen umgesetzt.

Festzuhalten ist, dass Vorabzusagen i.d.R. keine Verständigung über die konkrete Höhe des Verrechnungspreises sondern nur über die Verrechnungspreisstruktur und -methode, d.h. insb. über die für die Preisfindung relevanten Faktoren enthalten.[19] Durch die bi- und multilaterale Struktur sind APAs für nationalen Steuermissbrauch eher ungeeignet.

Frage 2

Die deutschen Steuerbehörden sind verpflichtet, alle für eine gleich- und gesetzesmäßige Besteuerung erheblichen Tatsachen – von Amts wegen – vollständig und wahrheitsgemäß zu ermitteln und zu berücksichtigen, §§ 85, 88 Abs. 1 AO. Das beinhaltet, dass grundsätzlich alle bekannten Tatsachen systematisch von der Steuerbehörde auf ihre Besteuerungsrelevanz hin überprüft und anschließend verwendet werden müssen. [20] Problematisch ist, dass die der Finanzverwaltung zur Verfügung stehenden Ressourcen nicht zur Überprüfung jeder einzelnen Angabe aller Erklärungen und Anträge im Rahmen des massenhaften Steuerverwaltungsverfahrens ausreichen.[21] In der Realität befindet sich die Finanzverwaltung in einem dauerhaften Konflikt zwischen dem Gebot der sorgfältigen Sachaufklärung im Einzelfall und der Sicherstellung des Gesamtvollzugs in

[19] *Drüen*, in: Tipke/Kruse, AO/FGO, 148. Lieferung, § 178a AO Rn. 2; *Frotscher*, Internationales Steuerrecht, 4. Auflage, Rn. 1262.

[20] So auch *Söhn*, in: Hübschmann/Hepp/Spitaler, AO/FGO, 243. Lieferung, § 88 AO Rn. 13.

[21] So auch *Birk/Desens/Tappe*, Steuerrecht, 19. Auflage, Rn. 478.

einer angemessenen Zeit. Das Gebot der Rechtsanwendungsgleichheit (Art. 3 Abs. 1 GG) zwingt den Einzelvollzug zur Ausrichtung an der praktischen Realisierbarkeit des Gesamtvollzugs.[22]

In der Literatur wird die Überprüfung von Steuererklärungen im Rahmen des massenhaften Steuerverwaltungsverfahrens folgendermaßen dargestellt:

„Wirkt der Steuerpflichtige hinreichend [bei seiner Veranlagung] mit und liegen aus Sicht der Finanzbehörde keine Anhaltspunkte vor, dass die von ihm erklärten Tatsachen (Deklarationsprinzip) unrichtig oder unvollständig sind, besteht grds. kein Anlass für weitere Ermittlungen; der Steuerpflichtige genießt einen freiheitsschonenden Vertrauensvorschuss. Das Vertrauensvorschussprinzip wird durch das Kontrollprinzip (Verifikationsprinzip) beschränkt. Der freiheitsschonende Vertrauensvorschuss ist verbraucht, wenn sich die Angaben als unschlüssig, unvollständig oder gar perplex erweisen oder der behördlichen Erfahrung widersprechen (Plausibilitätskontrolle). In einem solchen Fall muss die Finanzbehörde in eine intensivere Einzelfallprüfung eintreten. Um darüber hinaus Steuerpflichtige prophylaktisch davon abzuhalten, in sich schlüssige, aber falsche Tatsachen gegenüber dem Finanzamt zu erklären, sind die Plausibilitätskontrollen durch Stichprobenkontrollen, die sich nach dem Zufallsprinzip oder nach Sachkriterien der Verwaltungserfahrung richten, zu ergänzen. Dabei wird zum einen durch genaue Prüfung einzelner Punkte auf die Zuverlässigkeit der übrigen Angaben des Steuerpflichtigen geschlossen. Zum anderen kann als Stichprobe ein ganzer Fall unabhängig vom Ergebnis der Plausibilitätskontrolle in seinen Einzelheiten geprüft werden. Zwar behandelt diese Stichprobe den Betroffenen gegenüber anderen Steuerpflichtigen ungleich. Sie ist aber als Generalprävention zur Sicherung der Gesetzmäßigkeit sachlich gerechtfertigt, damit sich niemand dauerhaft auf eine nur oberflächliche Kontrolle verlassen kann.“ [23]

Der deutsche Gesetzgeber ist bemüht, das Besteuerungsverfahren durch eine stärkere Verwendung von Informationstechnologien und dem zielgenaueren Einsatz von Ressourcen effizienter zu gestalten. Insbesondere wurde mit dem Gesetz zur Modernisierung des Besteuerungsverfahrens vom 18. Juli 2016[24] – das die AO tiefgreifend verändert hat – die elektronische Kommunikation zwischen Steuerpflichtigen und der Finanzverwaltung, die ausschließlich automationsgestützte Bearbeitung von dazu geeigneten Steuererklärungen durch Einsatz von Risikomanagementsystemen und die automationsgestützte Steuerfestsetzung gestärkt. Die Steuerverwaltung ist damit in der Lage, mithilfe von automationsgestützten Systemen zu beurteilen, ob Notwendigkeiten weiterer Ermittlungen

[22] *Seer*, in: Tipke/Lang, Steuerrecht, 22. Auflage, § 21 Rn. 5.
[23] Entnommen von *Seer*, in: Tipke/Lang, Steuerrecht, 22. Auflage, § 21 Rn. 5.
[24] BGBl. I 2016, 1679.

und Prüfungen für eine gleichmäßige und gesetzmäßige Festsetzung von Steuern und Steuervergütungen sowie Anrechnung von Steuerabzugsbeträgen und Vorauszahlungen notwendig sind, § 88 Abs. 5 AO. Auch können die Finanzbehörden Steuerfestsetzungen sowie Anrechnungen von Steuerabzugsbeträgen und Vorauszahlungen auf der Grundlage der ihnen vorliegenden Informationen und der Angaben des Steuerpflichtigen ausschließlich automationsgestützt vornehmen, berichtigen, zurücknehmen, wiederrufen, aufheben und ändern, soweit kein Anlass dazu besteht, den Einzelfall durch Amtsträger zu bearbeiten, § 155 Abs. 4 S. 1 AO. Dadurch werden Verwaltungskapazitäten frei, die für die Prüfung risikogeneigter Steuerfälle genutzt werden können.

Sollte die Finanzbehörde den Steuerfall aus zeitlichen Gründen nicht abschließend prüfen können, besteht, solange der Steuerfall nicht abschließend geprüft ist, die Möglichkeit, Steuern unter dem Vorbehalt der Nachprüfung festzusetzen, § 164 AO. Dies ermöglicht der Finanzbehörde den Steuerfall auch nach der Steuerfestsetzung zu überprüfen und – solange der Vorbehalt wirksam ist – die Steuerfestsetzung gegebenenfalls wieder aufzuheben oder zu ändern, § 164 Abs. 2 AO. Des Weiteren stehen der Finanzverwaltung zur nachträglichen Überprüfung der Richtigkeit von Steuerbescheiden und Steuererklärungen insb. die Außenprüfung nach §§ 193 ff. AO (insb. sog. Betriebsprüfung) und die Steuerfahndung nach §§ 208 ff. AO zur Verfügung. Stellen sich einzelne Tatsachen, auf denen der Steuerbescheid beruht, als nachträglich unrichtig heraus, kommt eine behördliche Korrektur nach § 173 AO in Betracht.

Frage 3

Wie bereits beschrieben, ist das Finanzamt verpflichtet, alle für die gleich- und gesetzesmäßige Besteuerung relevanten Tatsachen – von Amts wegen – zu ermitteln, sodass insbesondere keine Steuern verkürzt, zu Unrecht erhoben oder Steuererstattungen und Steuervergütungen zu Unrecht gewährt oder versagt werden, §§ 85, 88 Abs. 1 AO. Weil dieses Prinzip universell gilt[25], macht die Ermittlungspflicht der nationalen Finanzverwaltung nicht an den nationalen Staatsgrenzen halt, sodass das Finanzamt grundsätzlich alle Zahlungen und Geschäftsvorgänge im Ausland ermitteln und berücksichtigen muss, die für die nationale Besteuerung relevant sind.[26]

Problematisch ist, dass die Ermittlungshoheit der Steuerbehörden an den nationalen Staatsgrenzen halt macht, sodass sich Verwaltungsauftrag und

[25] Ähnlich *Söhn,* in: Hübschmann/Hepp/Spitaler, AO/FGO, 243. Lieferung, § 88 AO Rn. 21.

[26] Bspw. schreibt das BMF vor, dass eine Berichtigung der Einkünfte von Steuerpflichtigen durch ausländische Steuerverwaltungen auf Auswirkungen auf die deutsche Besteuerung der Beteiligten zu überprüfen sei. *BMF,*
Schreiben vom 12.4.2005, IV B 4 – S 1341 – 1/05, BStBl. I 2005, 570 (599/Tz. 6.2.2).

Verwaltungskönnen nicht decken.[27] Damit die Finanzverwaltung den Auftrag zur Berücksichtigung aller für eine gleich- und gesetzesmäßige Besteuerung relevanter Tatsachen erfüllen kann, unterliegen Steuerpflichtige bei Sachverhalten mit Auslandsbeziehung besonderen Anzeige-, Aufklärungs- und Dokumentationspflichten.[28]

Grundsätzlich müssen alle Steuerpflichtigen die Eröffnung, Verlegung oder Aufgabe eines Betriebs der Land- und Forstwirtschaft, eines gewerblichen Betriebs oder einer Betriebsstätte, oder die Aufnahme einer freiberuflichen Tätigkeit, der zuständigen Gemeinde bzw. dem zuständigen Finanzamt innerhalb eines Monats mitteilen, § 138 Abs. 1 AO. Unbeschränkt Steuerpflichtige, die im Ausland tätig werden, müssen dem für sie zuständigen inländischen Finanzamt innerhalb von 5 Monaten nach Ablauf des Kalenderjahres darüber hinaus folgende Vorgänge gem. § 138 Abs. 2 AO anzeigen: Die Gründung und den Erwerb von Betrieben und Betriebsstätten im Ausland; die Beteiligung an einer ausländischen Personengesellschaft oder deren Aufgabe oder Änderung; den Erwerb von Beteiligungen an einer Körperschaft, Personenvereinigung oder Vermögensmasse, wenn damit unmittelbar eine Beteiligung von mindestens 10 Prozent oder mittelbar eine Beteiligung von mindestens 25 Prozent am Kapital oder am Vermögen der Körperschaft, Personenvereinigung oder Vermögensmasse erreicht wird oder wenn die Summe der Anschaffungskosten aller Beteiligten mehr als 150.000 € beträgt.

Während alle Steuerpflichtigen bei der Ermittlung des steuerrechtlich relevanten Sachverhalts mitwirken müssen, hat der Steuerpflichtige bei Auslandsbezug den Sachverhalt selbständig aufzuklären und die erforderlichen Beweismittel zu beschaffen, § 90 Abs. 1, 2 AO. Dabei muss der Steuerpflichtige alle bestehenden rechtlichen und tatsächlichen Möglichkeiten ausschöpfen, § 90 Abs. 2 AO. Bestehen objektiv erkennbare Anhaltspunkte für die Annahme, dass der Steuerpflichtige über Geschäftsbeziehungen zu Finanzinstituten in einem Staat oder Gebiet verfügt, mit dem kein Abkommen besteht, das die Erteilung von Auskünften entsprechend dem OECD-MA vorsieht, oder der Staat oder das Gebiet keine Auskünfte in einem vergleichbaren Umfang erteilt oder keine Bereitschaft zu einer entsprechenden Auskunftserteilung besteht, hat der Steuerpflichtige nach Aufforderung der Finanzbehörden die Richtigkeit und Vollständigkeit seiner Angaben an Eides statt zu versichern und die Finanzbehörde zu bevollmächtigen, in seinem Namen mögliche Auskunftsansprüche gegenüber den von der Finanzbehörden benannten Kreditinstituten außergerichtlich und gerichtlich geltend zu machen, § 90 Abs. 2 S. 3 AO. Bei Verletzung dieser Pflichten darf die

[27] *Söhn*, in: Hübschmann/Hepp/Spitaler, AO/FGO, 243. Lieferung, § 117 AO Rn. 3.
[28] Vgl. z.B. §§ 90, 138 ff. AO und §§ 16, 17 AStG.

Steuerbehörde – bei Fehlen weiterer Aufklärungsmöglichkeiten – einen für den Steuerpflichtigen ungünstigen Sachverhalt unterstellen und der Besteuerung zugrunde legen, § 162 Abs. 2 und 3 AO.

Nach der Sondervorschrift des § 16 AStG hat ein Steuerpflichtiger, der unter Berufung auf Geschäftsbeziehungen mit einer ausländischen Person, die mit ihren Einkünften, die in Zusammenhang mit den Geschäftsbeziehungen zu dem Steuerpflichtigen stehen, in Deutschland nicht oder nur unwesentlich besteuert wird, die Absetzung von Schulden oder anderen Lasten oder von Betriebsausgaben oder Werbungskosten (insb. Zinsaufwand) geltend machen will, alle Beziehungen offenzulegen, die unmittelbar oder mittelbar zwischen ihm und der ausländischen Person bestehen und bestanden haben. Kommt der Steuerpflichtige diesem Benennungsverlangen nicht nach, ist das Finanzamt berechtigt, im Rahmen pflichtgemäßen Ermessens den Betriebsausgabenabzug zu versagen.[29]

Als besondere Dokumentationspflicht ist zu nennen, dass der Steuerpflichtige über die Art und den Inhalt seiner Geschäftsbeziehungen Aufzeichnungen zu erstellen hat. Die Aufzeichnungspflicht umfasst neben der Darstellung der Geschäftsvorfälle (Sachverhaltsdokumentation) auch die wirtschaftlichen und rechtlichen Grundlagen für eine den Fremdvergleichsgrundsatz beachtende Vereinbarung von Bedingungen, insbesondere Preisen (Verrechnungspreisen), sowie insbesondere Informationen zum Zeitpunkt der Verrechnungspreisbestimmung, zu verwendeten Verrechnungspreismethoden und zu den verwendeten Fremdvergleichsdaten (Angemessenheitsdokumentation), § 90 Abs. 3 AO. Außerdem müssen die Ergebnisse der Buchführung ausländischer Betriebsstätten sowie bei Organgesellschaften in die Buchführung des einheimischen Unternehmens übernommen werden, soweit sie für die Besteuerung von Bedeutung sind, § 146 Abs. 2 AO. Multinationale Unternehmensgruppen haben des Weiteren gem. § 138a AO einen jährlichen länderbezogenen Bericht zu erstellen.

Letztlich können die nationalen Finanzbehörden ausländische Behörden um die Vornahme von Ermittlungen (Rechts- und Amtshilfe) ersuchen, § 117 Abs. 1 AO. Die ausländische Behörde teilt der inländischen Behörde ggf. das Ergebnis ihrer Ermittlungen mit und versetzt diese damit in die Lage, die Besteuerung durchzuführen.

Die oben genannten Vorschriften schließen sich nicht gegenseitig aus, sodass der Behörde bei ihren Ermittlungen mehrere Gesetzesgrundlagen zur Verfügung stehen können.[30]

[29] So auch *Ruge,* in: Haase, AStG/DBA Kommentar, § 16 AStG Rn. 23.
[30] *Ruge,* in: Haase, AStG/DBA Kommentar, § 16 AStG Rn. 2.

Frage 4

a) Verbindliche Auskunft

Die von der zuständigen Finanzbehörde erteilte verbindliche Auskunft nach § 89 Abs. 2 AO ist für die Besteuerung des Steuerpflichtigen grundsätzlich bindend, wenn der später verwirklichte Sachverhalt von dem der Auskunft zugrunde gelegten Sachverhalt nicht oder nur unwesentlich abweicht, § 2 Abs. 1 S. 1 StAuskV. Eine verbindliche Auskunft ist nach h.M. ein Verwaltungsakt.[31] Dies bedeutet, dass auch falsche (d.h. rechtswidrige) Auskünfte grds. wirksam und somit bindend sind, § 124 Abs. 2 AO. Anderes gilt nach allgemeinen Regeln, wenn die Auskunft an derart schwerwiegenden Mängeln leidet, dass sie ausnahmsweise nach § 125 AO nichtig ist. Außerdem ist die besondere Ausnahmeregelung des § 2 Abs. 1 S. 2 StAuskV zu beachten, wonach eine verbindliche Auskunft nicht bindend ist, wenn sie zuungunsten des Steuerpflichtigen dem geltenden Recht widerspricht. Die Bindungswirkung der verbindlichen Auskunft entfällt ab dem Zeitpunkt, in dem die Rechtsvorschriften, auf denen die verbindliche Auskunft beruht, aufgehoben oder geändert werden, § 2 Abs. 2 StAuskV. Zu beachten ist, dass eine Änderung der Auffassung der Finanzverwaltung oder der Rechtsprechung keine Änderung von Rechtsvorschriften darstellt, weil sie nur die von Anfang an bestehende Rechtslage klarstellt und selbst nicht ändert.[32] Die verbindliche Auskunft kann jederzeit berichtigt werden, wenn eine offenbare Unrichtigkeit beim Erlass der verbindlichen Auskunft unterlaufen ist, § 129 AO. Die Rücknahme einer bereits im Zeitpunkt der Auskunftserteilung rechtswidrigen Auskunft mit Wirkung für die Vergangenheit kommt nach § 130 Abs. 2 AO in Betracht, wenn die Auskunft von einer sachlich unzuständigen Behörde erlassen worden ist; die Auskunft durch unlautere Mittel wie arglistige Täuschung, Drohung oder Bestechung erwirkt worden ist; der Begünstigte die Auskunft durch Angaben erwirkt hat, die in wesentlichen Beziehung unrichtig oder unvollständig waren; wenn die Rechtswidrigkeit dem Begünstigten bekannt oder infolge grober Fahrlässigkeit nicht bekannt war. Eine rechtmäßige verbindliche Auskunft darf nach § 131 Abs. 2 AO ganz oder teilweise mit Wirkung für die Zukunft nur widerrufen werden, wenn der Widerruf durch Rechtsvorschrift zugelassen oder im Verwaltungsakt vorbehalten ist; wenn mit der verbindlichen Auskunft eine Auflage verbunden ist und der Begünstigte diese nicht oder nicht innerhalb einer ihm gesetzten Frist erfüllt hat; wenn die Finanzbehörde auf Grund nachträglich eingetretener Tatsachen berechtigt wäre, die verbindliche Zusage nicht zu erlassen und wenn

[31] So auch *Söhn* in: Hübschmann/Hepp/Spitaler, AO/FGO, 243. Lieferung, § 89 AO Rn. 246; *BMF*, Schreiben vom 31.01.2014, IV A 3 – S 0062/14/20002, BStBl. I 2014, 290 (360/Tz. 3.5.5).

[32] *BMF*, Schreiben vom 31.1.2014, IV A 3 – S 0062/14/20002, BStBl. I 2014, 290 (361/Tz. 3.6.6); *Söhn*, in: Hübschmann/Hepp/Spitaler, AO/FGO, 243. Lieferung, § 89 AO Rn. 288; *Rätke*, in: Klein, AO Kommentar, 13 Auflage, § 89 Rn. 35.

ohne dem Widerruf das öffentliche Interesse gefährdet würde. Eine verbindliche Auskunft kann über die Fälle der §§ 129 – 131 AO hinaus nach § 2 Abs. 3 StAuskV mit Wirkung für die Zukunft aufgehoben oder geändert werden, falls sich herausstellt, dass die erteilte Auskunft unrichtig war. Das ist der Fall, wenn sie ohne Rechtsgrundlage oder unter Verstoß gegen materielle Rechtsnormen erlassen worden oder ermessensfehlerhaft ist.[33] Hat das Finanzamt eine ggf. rechtswidrige Auskunft nicht vor der Veranlagung geändert oder aufgehoben, muss es die Veranlagung auf der Grundlage der erteilten Auskunft durchführen.

b) Vorabzusage über Verrechnungspreise

Die Finanzbehörden sind an die Vorabzusage über Verrechnungspreise zwischen international verbundenen Unternehmen gebunden, wenn der zugrunde gelegte Sachverhalt erfüllt ist und die Gültigkeitsbedingungen eingehalten wurden.[34] Wegen ihrer spezifischen Anforderungen sind sie auch nur für die in ihr definierten Geschäftsarten und nur im Verhältnis zu dem anderen Staat, mit dem die Verständigungsvereinbarung getroffen wurde, bindend. Für Geschäfte im Verhältnis zu anderen Staaten ist die Vereinbarung formell nicht bindend, auch wenn die Sachverhalte vergleichbar sind.[35] Andererseits ist der Antragsteller aufgrund der verbindlichen Zusage nicht verpflichtet, den Sachverhalt zu verwirklichen, der der Vorabzusage zu Grunde gelegt worden ist.[36] Verwirklicht der Steuerpflichtige den Sachverhalt, der der Vorabzusage zugrunde gelegt wurde, ist auch er an die Vereinbarung der Vorabzusage, die er veranlasst und der er ausdrücklich zugestimmt hat, gebunden.[37] Verwirklicht der Steuerpflichtige nicht den Sachverhalt, der der Vorabzusage zu Grunde gelegt worden ist, dann werden sowohl die Vorabverständigungsvereinbarung als auch die Vorabzusage gegenstandslos und entfalten keinerlei Rechtswirkung.[38]

Werden Gültigkeitsbedingungen in wesentlichen Punkten nicht erfüllt, ist dem APA die Grundlage entzogen; die Vorabzusage kann auf den Zeitpunkt, ab dem die Gültigkeitsbedingungen nicht (mehr) erfüllt sind, widerrufen werden. Bei unwesentlichen Abweichungen kann das BZSt in Abstimmung mit der zuständigen obersten Landesfinanzbehörde die Vorabverständigungsvereinbarung fort gelten lassen oder nach (schriftlicher) Konsultation mit dem anderen Staat im Einvernehmen mit dem Steuerpflichtigen entsprechend anpassen.[39]

[33] *BMF*, Schreiben vom 31.1.2014, IV A 3 – S 0062/14/20002, BStBl. I 2014, 290 (316/Tz. 3.6.6).
[34] *BMF*, Schreiben vom 5.10.2006, IV B 4-S 1341-38/06, BStBl. I 2006, 594 (601/Tz. 6.3).
[35] So auch *Frotscher*, Internationales Steuerrecht, 4. Auflage, Rn. 1264.
[36] *BMF*, Schreiben vom 5.10.2006, IV B 4-S 1341-38/06, BStBl. I 2006, 594 (601/Tz. 6.4).
[37] *BMF*, Schreiben vom 5.10.2006, IV B 4-S 1341-38/06, BStBl. I 2006, 594 (601/Tz. 6.4).
[38] *BMF*, Schreiben vom 5.10.2006, IV B 4-S 1341-38/06, BStBl. I 2006, 594 (602/Tz. 6.5.1).
[39] *BMF*, Schreiben vom 5.10.2006, IV B 4-S 1341-38/06, BStBl. I 2006, 594 (602/Tz. 6.5.2).

Nach h.M. stellt die Vorabzusage einen eigenständigen Verwaltungsakt dar[40] , sodass die Vorschriften zur Berichtigung, Rücknahme und Wiederruf ebenfalls Anwendung finden. Dabei ist jedoch die Wahrung der Vorabverständigung mit dem anderen Staat und den von dem Antragsteller abzugebenden Verzicht auf die Einlegung eines Einspruchs gegen Steuerbescheide, die die Ergebnisse der Vorabverständigung für die Laufzeit zutreffend umsetzen, zu beachten.[41]

Frage 5

1. Bilaterale Vermeidung von doppelter Nichtbesteuerung

Wie oben bereits beschrieben, ist die deutsche Finanzverwaltung grundsätzlich verpflichtet – im Rahmen ihrer Ermittlungsmöglichkeiten – alle für eine gleich- und gesetzesmäßige Besteuerung relevanten Tatsachen zu ermitteln und zu berücksichtigen, §§ 85, 88 Abs. 1 AO.

Dazu gehört auch die Tatsache, ob alle relevanten Einkünfte eines Steuerpflichtigen im Ausland besteuert wurden.[42]

Das deutsche Steuerrecht sieht eine Reihe von Korrekturvorschriften sowohl auf unilateraler als auch auf bilateraler Ebene vor, um abkommensbedingte doppelte Nichtbesteuerungen (sog. „weiße Einkünfte“) zu vermeiden.[43] Bei abkommensbedingter doppelter Nichtbesteuerung ist zu beachten, dass deren Entstehungsgründe vielfältig sein können[44] und nicht immer unbeabsichtigt sind.[45] Grundsätzlich entspricht es jedoch – wie das Bundesministerium der Finanzen klarstellt – der deutschen Steuerpolitik, die doppelte Nichtbesteuerung zu verhindern.[46]

Die deutsche Steuerpolitik ist bereits beim Abschluss von DBA bemüht, eine Nichtbesteuerung auf bilateralem Wege durch die Aufnahme von geeigneten Klauseln zu verhindern. Solche Klauseln gibt es viele, die im jeweiligen Einzelf-

[40] *Liebchen* in: Schönfeld/Ditz, Doppelbesteuerungsabkommen, 1. Auflage, Artikel 25 DBA Rn. 362 ff.

[41] *BMF*, Schreiben vom 5.10.2006, IV B 4-S 1341-38/06, BStBl. I 2006, 594 (600/Tz. 4.5 ff.).

[42] So auch *Söhn* in: Hübschmann/Hepp/Spitaler, AO/FGO, 243. Lieferung, § 90 AO Rn. 140.

[43] Vgl. bspw. DBA Großbritannien 2010, Art. 23 Abs. 1 lit. a; DBA Russland, Art. 23 II e; §§ 50d Abs. 8, Abs. 9, Abs. 11 EStG; § 8b Abs. 1 S. 2 und 3 KStG; § 20 Abs. 2 AStG.

[44] Beispielsweise als Folge von Qualifikationskonflikten, durch Steuerhinterziehung und Steuerverkürzung, durch vereinbarte doppelte Nichtbesteuerung und durch einseitig induzierter doppelter Nichtbesteuerung. Ausführlich dazu, *Jankowiak*, Doppelte Nichtbesteuerung im Internationalen Steuerrecht, S. 34 ff.

[45] Bspw. vereinbarte doppelte Nichtbesteuerungen auf Grund von fiktiven Steueranrechnungen. Ausführlich dazu, *Jankowiak*, Doppelte Nichtbesteuerung im Internationalen Steuerrecht, S. 69 ff.

[46] Vgl. Präambel der Verhandlungsgrundlage für Doppelbesteuerungsabkommen im Bereich der Steuern vom Einkommen und Vermögen, *BMF*, vom 22.08.2013, IV B 2 – S 1301 – 13/10009, eingesehen unter: https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Allgemeine_Informationen/2013-08-22-Verhandlungsgrundlage-DBA-deutsch.html, 25.09.2017, 09.45 Uhr.

all stark variieren und dem jeweiligen Partnerstaat individuell angepasst sein können. [47] Beispielhaft sollen die sog.

„Subjekt-to-tax"-Klauseln, *„Switch-over"*-Klauseln, *Notifikationsklauseln* und *Aktivitätsklauseln* genannt werden.

„Subject-to-tax"-Klauseln[48] sehen dann, wenn gemäß dem jeweiligen DBA die Freistellung von bestimmten Einkünften nach der Freistellungsmethode vereinbart wurde, der Quellenstaat den Steuerpflichtigen aber tatsächlich nicht besteuert („effectively taxed")[49], vor, dass dann der Ansässigkeitsstaat die Besteuerungskompetenz gemäß der Klausel zurückerlangt, um den eigentlich freigestellten Steuerpflichtigen doch noch besteuern zu können. Sinn und Zweck der Klausel ist, die Fälle der abkommensbedingten doppelten Nichtbesteuerung zu verhindern, die dadurch entstehen, dass einer der Staaten das ihm zugewiesene Besteuerungsrecht aus Gründen innerstaatlichen Rechts nicht in Anspruch nimmt, ein negativer Qualifikationskonflikt vorliegt oder wenn der Steuerpflichtige durch Steuerverkürzung eine Nichtbesteuerung herbeiführt.[50]

„Switch-over"-Klauseln[51] werden aufgenommen, wenn ein Staat sich – bei Vorliegen

bestimmter Voraussetzungen – die Option offen halten will, von der eigentlich vorgesehenen Freistellungsmethode zur Anrechnungsmethode überzugehen. Dies ist meistens der Fall, wenn in dem anderen Vertragsstaat Einkünfte oder Vermögen unterschiedlichen Abkommensbestimmungen zugeordnet oder verschiedenen Personen zugerechnet werden, sich dieser Konflikt nicht durch ein Verständigungsverfahren beseitigen lässt und dadurch eine doppelte Nichtbesteuerung oder eine „zu niedrige Besteuerung" droht.[52] Sollte ein Staat von der Klausel Gebrauch machen, dann kann er von der Freistellungs- zur Anrechnungsmethode wechseln.

Notifikationsklauseln[53] sind im Grunde „Switch-over"-Klauseln, die aber nicht vergangenheitsbezogen, sondern zukunftsbezogen sind. Solche Klauseln lassen dem anwendenden Staat die Option offen, dem anderen Vertragsstaat im Wege der diplomatischen Notifikation Einkünfte mitzuteilen, auf die künftig

[47] *Jankowiak*, Doppelte Nichtbesteuerung im Internationalen Steuerrecht, S. 202.

[48] Diese ist z.B. enthalten in DBA Großbritannien 2010, Art. 23 Abs. 1 lit. a und DBA Luxemburg, Art. 22 Abs. 1 lit. a. Eine Übersicht kann eingesehen werden bei *Prokisch*, in: Vogel/Lehner, DBA Kommentar, 6. Auflage, OECD-MA 2005 Art. 1 Rn. 135e ff.

[49] Vgl. DBA Großbritannien 2010, Art. 23 Abs. 1 lit. a.

[50] *Jankowiak*, Doppelte Nichtbesteuerung im Internationalen Steuerrecht, S. 173.

[51] Z.B. enthalten in DBA Russland, Art. 23 Abs. 2 lit. e. Eine Übersicht kann eingesehen werden bei *Prokisch*, in: Vogel/Lehner, DBA Kommentar, 6. Auflage, OECD-MA 2005 Art. 1 Rn. 136b ff.

[52] Vgl. *Prokisch*, in: Vogel/Lehner, DBA Kommentar, 6. Auflage, OECD-MA 2005 Art. 1 Rn. 136c

[53] Z.B. enthalten im DBA Russland Art. 23 Abs. 2 lit. e.

nicht mehr die Freistellungs-, sondern die Anrechnungsmethode anzuwenden sein soll.[54]

Aktivitätsklauseln[55] besagen, dass die Anwendung der Freistellungsmethode für bestimmte Einkünfte nur gewährt wird, wenn im Quellenstaat tatsächlich eine „aktive" Wirtschaftstätigkeit ausgeübt wird. Sollte keine aktive Wirtschaftstätigkeit ausgeübt werden, dann findet für die Einkünfte nicht die Freistellungsmethode, sondern die Anrechnungsmethode Anwendung.[56]

2. Unilaterale Vermeidung doppelter Nichtbesteuerung

Auf unilateraler Ebene hat der Gesetzgeber Normen geschaffen, die bei ihrer Einschlägigkeit die vorhandenen Bestimmungen in den DBA bewusst übergehen („Treaty Override"), um eine doppelte Nichtbesteuerung zu vermeiden. Im Grunde handelt es sich bei diesen Normen um innerstaatliche „*Subject-to-tax*"-Regeln[57] und „*Switch-over*"-Vorschriften[58], die allerdings abkommens- und damit völkerrechtswidrig sind. Innerstaatlich ist ein solcher Treaty Override nach der Rechtsprechung des Bundesverfassungsgerichts[59] in Deutschland verfassungskonform, da das materielle Steuergesetz (z.B. § 50 d EStG) und das DBA auf derselben Rangstufe stehen (vgl. Art. 59 Abs. 2 Grundgesetz) und das spätere Gesetz dem früheren vorgeht (lex posterior derogat legi priori). Zu nennen sind im deutschen Recht als Beispiele insbesondere §§ 50d Abs. 8, Abs. 9 Nr. 1, 2 EStG, § 8b Abs. 1 S. 2 und 3 KStG sowie § 20 Abs. 2 AStG.

Gemäß § 50d Abs. 8 EStG werden Einkünfte eines unbeschränkt Steuerpflichtigen aus nichtselbständiger Arbeit, die nach einem DBA von der Bemessungsgrundlage der deutschen Steuer auszunehmen sind, ungeachtet des Abkommens nur freigestellt, soweit der Steuerpflichtige nachweist, dass der Staat, dem nach dem Abkommen das Besteuerungsrecht zusteht, auf dieses Besteuerungsrecht verzichtet hat oder dass die in diesem Staat auf die Einkünfte festgesetzten Steuern entrichtet wurden. Andernfalls wird die Freistellung im Umkehrschluss nicht gewährt. Dies bedeutet, dass Deutschland sich das Recht der Besteuerung vorbehält.[60] Mit der Norm soll verhindert werden, dass Einkünfte aus grenzüberschreitender nichtselbständiger Arbeit nicht besteuert werden,

[54] *Schönfeld/Häck*, in: Schönfeld/Ditz, Doppelbesteuerungsabkommen, Systematik DBA, Rn. 17; *Prokisch*, in Vogel/Lehner, DBA, 6. Auflage, OECD-MA 2005 Art. 1 Rn. 136d; *Jankowiak*, Doppelte Nichtbesteuerung im Internationalen Steuerrecht, S. 196.

[55] Enthalten z. B. in DBA Schweiz, Art. 24.

[56] *Schönfeld/Häck*, in: Schönfeld/Ditz, Doppelbesteuerungsabkommen, Systematik DBA, Rn. 18; *Prokisch*, in: Vogel/Lehner, DBA, 6. Auflage, OECD-MA 2005 Art. 1 Rn. 145.

[57] Vgl. z.B. § 50d Abs. 8 EStG.

[58] Vgl. z.B. § 20 Abs. 2 AStG, § 50d Abs. 9 S. 1 Nr. 1 EStG.

[59] *BVerfG*, Beschluss vom 15.12.2015, 2 BvL 1/12, BVerfGE 141, 1 (1).

[60] So auch *Jankowiak*, Doppelte Nichtbesteuerung im Internationalen Steuerrecht, S. 221.

weil Deutschland als Ansässigkeitsstaat nach einem DBA freistellt, obwohl der Steuerpflichtige die Einkünfte im Tätigkeitsstaat pflichtwidrig nicht erklärt hat und dieser Staat deshalb seinen Steueranspruch nicht durchsetzen kann.[61]

Gemäß § 50d Abs. 9 Nr. 1 EStG werden Einkünften eines unbeschränkt Steuerpflichtigen, welche nach einem DBA von der Bemessungsgrundlage der deutschen Steuer auszunehmen sind, ungeachtet des Abkommens nicht freigestellt, wenn der andere Staat die Bestimmungen des Abkommens so anwendet, dass die Einkünfte in diesem Staat von der Besteuerung auszunehmen sind oder nur zu einem durch das Abkommen begrenzten Steuersatz besteuert werden können. Sollte das der Fall sein, dann findet ein Übergang von der Freistellungs- zur Anrechnungsmethode statt.[62] Dadurch sollen Fälle der doppelten Nichtbesteuerung verhindert werden, die auf Qualifikationskonflikten beruhen.[63]

Gemäß § 50d Abs. 9 S. 1 Nr. 2 EStG werden Einkünfte eines unbeschränkt Steuerpflichtigen, die nach einem DBA von der Bemessungsgrundlage der deutschen Steuer auszunehmen sind, ungeachtet des Abkommens nicht freigestellt, wenn die Einkünfte in dem anderen Staat nur deshalb nicht steuerpflichtig sind, weil sie von einer Person bezogen werden, die in diesem Staat nicht auf Grund ihres Wohnsitzes, ständigen Aufenthalts, des Ortes ihrer Geschäftsleitung, des Sitzes oder eines ähnlichen Merkmals unbeschränkt steuerpflichtig ist. Es soll eine abkommensbedingte doppelte Nichtbesteuerung vermieden werden, weil der andere Staat aufgrund seines nationalen Rechts bestimmte Einkünfte bei beschränkt Steuerpflichtigen nicht erfasst.[64]

Gemäß § 50d Abs. 11 EStG werden Dividenden – die beim Zahlungsempfänger nach einem DBA von der Bemessungsgrundlage der deutschen Steuer auszunehmen sind – ungeachtet des Abkommens nur insoweit freigestellt, als die Dividenden nach deutschem Steuerrecht nicht einer anderen Person zuzurechnen sind. Soweit die Dividenden nach deutschem Steuerrecht einer anderen Person zuzurechnen sind, werden sie bei dieser Person freigestellt, wenn sie bei ihr als Zahlungsempfänger nach Maßgabe des Abkommens freigestellt würden.

§ 8b Abs. 1 S. 2 und 3 KStG finden für den Fall Anwendung, dass eine verdeckte Gewinnausschüttung bei der Ermittlung des Einkommens einer leistenden ausländischen Gesellschaft abgezogen werden kann. Sollte dies der Fall sein, ist das abkommensrechtliche internationale Schachtelprivileg zu versagen, so dass die im Ausland gezahlte Quellensteuer angerechnet werden kann,

[61] *Deutscher Bundestag*, Drucksache 15/1562 vom 23.09.2003, S. 39.

[62] So auch *Gosch*, in: Kirchhof, Einkommensteuergesetz, 16. Auflage, § 50d EStG Rn. 35a.

[63] *Deutscher Bundestag*, Drucksache 16/2712 vom 25.09.2006, S. 16; *Jankowiak*, Doppelte Nichtbesteuerung im Internationalen Steuerrecht, S. 228.

[64] *Deutscher Bundestag*, Drucksache 16/2712 vom 25.09.2006, S. 62; *Jankowiak*, Doppelte Nichtbesteuerung im Internationalen Steuerrecht, S. 247 ff.

soweit für die Vergütung deutsche Körperschaftsteuer anfällt.[65] Es sollen also doppelte Nichtbesteuerungen aufgrund von entsprechenden negativen Qualifikationskonflikten verhindert werden.

Gemäß § 20 Abs. 2 AStG sollen Einkünfte, die in der ausländischen Betriebsstätte eines unbeschränkt Steuerpflichtigen anfallen und als Zwischeneinkünfte steuerpflichtig sind, falls die Betriebsstätte eine ausländische Gesellschaft wäre, nicht nach der Freistellungsmethode sondern nach der Anrechnungsmethode behandelt werden.

Frage 6

a) Unilaterale Ebene

Auf unilateraler Ebene wendet Deutschland bei der Zuordnung von Gewinnen zwischen dem Stammhaus und der Betriebsstäte einer grenzüberschreitend handelnden juristischen Person den Fremdvergleichsgrundsatz nach § 1 Abs. 1 und 5 AStG an. Der Fremdvergleichsgrundsatz besagt, dass Einkünfte eines Steuerpflichtigen aus einer Geschäftsbeziehung zum Ausland mit einer ihm nahe stehenden Person nicht dadurch gemindert werden dürfen, dass der Steuerpflichtige seiner Einkünfteermittlung andere Bedingungen, insbesondere Preise (Verrechnungspreise), zugrunde legt, als sie voneinander unabhängige Dritter unter gleichen oder vergleichbaren Verhältnissen vereinbart hätten.[66] Überhöhte Ausgaben bzw. zu niedrigen Ausgaben sind nicht durch die erwerbswirtschaftliche Betätigung veranlasst, sondern allein durch die Absicht, günstig internationalsteuerrechtliche Bedingungen auszunutzen. Der Fremdvergleichsgrundsatz gilt gem. § 1 Abs. 5 AStG auch für die Aufteilung der Einkünfte zwischen einem inländischen Stammhaus und seiner ausländischen Betriebsstätte oder der Ermittlung der Einkünfte der inländischen Betriebsstätte eines ausländischen Stammhauses. Um den Fremdvergleichsgrundsatz bei der Gewinnzuordnung einer juristischen Person anwenden zu können, muss die Betriebsstätte grundsätzlich wie ein eigenständiges und unabhängiges Unternehmen behandelt werden, § 1 Abs. 5 S. 2 AStG. Um die Betriebsstätte wie ein eigenständiges und unabhängiges Unternehmen zu behandeln, sind ihr in einem ersten Schritt zuzuordnen: 1. die Funktionen des Unternehmens, die durch ihr Personal ausgeübt werden (Personalfunktion), 2. die Vermögenswerte des Unternehmens, die sie zur Ausübung der ihr zugeordneten Funktionen benötigt, 3. die Chancen und Risiken des Unternehmens, die sie auf Grund der ausgeübten Funktionen und zugeordneten Vermögenswerte übernimmt sowie 4. ein angemessenes Eigenkapital (Dotationskapital). Auf der Grundlage dieser Zuordnung sind in einem

[65] *Schönfeld/Häck*, in: Schönfeld/Ditz, Doppelbesteuerungsabkommen, Artikel 23A DBA Rn. 71.
[66] Vgl. § 1 Abs. 1 AStG.

zweiten Schritt die Art der Geschäftsbeziehungen zwischen dem Unternehmen und seiner Betriebsstätte und die Verrechnungspreise für diese Geschäftsbeziehungen zu bestimmen, Art. 1 Abs. 5 S. 4 und 5 AStG. Genauere Details regelt die Betriebsstättengewinnaufteilungsverordnung (BsGaV)[67].

b) Bilaterale Ebene

Auf bilateraler Ebene sehen die von Deutschland geschlossenen DBA eine Besteuerung der Gewinne eines Unternehmens dort vor, in dessen Vertragsstaat das Unternehmen gelegen ist, es sei denn, das Unternehmen übt seine Geschäftstätigkeit im anderen Vertragsstaat durch eine dort gelegene Betriebsstätte aus.[68] Übt das Unternehmen seine Geschäftstätigkeit auf diese Weise aus, so können die Gewinne, die der Betriebsstätte zugerechnet werden können, im anderen Staat besteuert werden. [69] Gewinne können einer Betriebsstätte zugerechnet werden, wenn die Gewinne, die die Betriebsstätte, insbesondere in ihren wirtschaftlichen Beziehungen mit anderen Teilen des Unternehmens, voraussichtlich erzielen würde, wenn sie ein selbständiges und unabhängiges Unternehmen wäre, das die gleichen oder ähnlichen Tätigkeiten unter den gleichen oder ähnlichen Bedingungen ausübt, unter Berücksichtigung der von dem Unternehmen durch die Betriebsstätte und durch die anderen Teile des Unternehmens ausgeübten Funktionen, genutzten Vermögenswerten und übernommenen Risiken.[70] Folglich wendet Deutschland auch auf bilateraler Ebene den Fremdvergleichsgrundsatz bei der Gewinnzuordnung innerhalb einer juristischen Person an.

Frage 7

Wie oben bereits beschrieben, wendet Deutschland den Fremdvergleichsgrundsatz *(„at arm's lenght principle")* direkt an, sowohl auf bilateraler Ebene als auch auf unilateraler Ebene.[71]

Im Einzelnen besagt das deutsche Außensteuergesetz, dass die Verrechnungspreise vorrangig nach der Preisvergleichsmethode, der Wiederverkaufsmethode oder der Kostenaufschlagsmethode zu bestimmen sind, wenn Fremdvergleichs-

[67] BGBl I 2014, 1603.

[68] Vgl. Art. 7 Abs. 1 Verhandlungsgrundlage für Doppelbesteuerungsabkommen im Bereich der Steuern vom Einkommen und Vermögen und Art. 7 Abs. 1 OECD-MA 2014.

[69] Vgl. Art. 7 Abs. 1 Verhandlungsgrundlage für Doppelbesteuerungsabkommen im Bereich der Steuern vom Einkommen und Vermögen und so auch Art. 7 Abs. 1 OECD-MA 2014.

[70] Vgl. Art. 7 Abs. 2 Verhandlungsgrundlage für Doppelbesteuerungsabkommen im Bereich der Steuern vom Einkommen und Vermögen und Art. 7 Abs. 2 OECD-MA 2014.

[71] Vgl. Art. 7 Abs. 2 und Art. 9 Abs. 1 Verhandlungsgrundlage für Doppelbesteuerungsabkommen im Bereich der Steuern vom Einkommen und Vermögen; Art. 7 Abs. 2 und Art. 9 Abs. 1 OECD-MA; § 1 I, V AStG.

werte ermittelt werden können, die nach Vornahme sachgerechter Anpassung im Hinblick auf die ausgeübten Funktionen, die eingesetzten Wirtschaftsgüter und die übernommenen Chancen und Risiken für diese Methoden uneingeschränkt vergleichbar sind, Art. 1 Abs. 3 AStG (uneingeschränkter tatsächlicher Fremdvergleich). Sind solche Fremdvergleichswerte nicht zu ermitteln, sind eingeschränkt vergleichbare Werte nach Vornahme sachgerechter Anpassungen der Anwendungen einer geeigneten Verrechnungspreismethode zugrunde zu legen (eingeschränkter tatsächlicher Fremdvergleich), § 1 Abs. 3 AStG.

Können keine eingeschränkt vergleichbaren Fremdvergleichswerte festgestellt werden, hat der Steuerpflichtige für seine Einkünfteermittlung einen hypothetischen Fremdvergleich durchzuführen, § 1 Abs. 3 S. 5 AStG. Dazu hat der Steuerpflichtige auf Grund einer Funktionsanalyse und innerbetrieblicher Planrechnung den Mindestpreis des Leistenden und den Höchstpreis des Leistungsempfängers unter Berücksichtigung funktions- und risikoadäquater Kapitalisierungszinssätze zu ermitteln (hypothetischer Fremdvergleich). Die grundlegenden Regeln des § 1 AStG gehen auf die Entwicklung im internationalen Steuerrecht zurück. In Deutschland wurde der Fremdvergleichsgrundsatz mit dem Jahressteuergesetz 2008[72] in § 1 AStG eingeführt. Die Definition des Fremdvergleichsgrundsatzes im deutschen Recht knüpft an die entsprechende Definition der OECD-Verrechnungspreisrichtlinie an.[73]

Frage 8

Die deutschen Finanzbehörden sind gem. §§ 85, 88 Abs. 1 AO verpflichtet, eine gleich- und gesetzmäßige Besteuerung sicherzustellen. Dazu gehört, dass alle besteuerungsrelevanten Tatsachen berücksichtigt werden. Sollte die Finanzbehörde zu der Einschätzung gelangen, dass die Höhe des Gewinns durch unzutreffende Verrechnungspreise o.ä. manipuliert wurde, um Gewinne in einem niedriger besteuernden Staat anfallen zu lassen und Gewinne in einem höher besteuernden Staat zu reduzieren, dann kann sie das Ergebnis materiellrechtlich nach oben oder unten korrigieren. Dies geschieht vornehmlich auf Grund der Institute der verdeckten Gewinnausschüttung und der verdeckten Einlage i.S.d. § 8 Abs. 3 S. 2 und 3 KStG.[74]

Die Sondervorschrift des § 1 Abs. 1 AStG greift ein, wenn die Gewinnzuordnung nicht dem Fremdvergleichsgrundsatz entspricht und die Einkünfte des von der deutschen Steuerhoheit erfassten Steuerpflichtigen dadurch gemindert

[72] BGBl I 2007, 3150.

[73] *Wellens*, Fremdvergleichsgrundsatz nach OECD und nach deutschem Recht – Gleichzeitig Vorstellung des Diskussionsentwurfs der OECD hinsichtlich der Überarbeitung der Kapitel U und III der OECD- Verrechnungspreisrichtlinie, IStR 2010, 153 (155).

[74] *Kraft*, AStG Kommentar, § 1 Rn. 13.

worden sind. Daher ist eine Korrektur nach § 1 Abs. 1 AStG nur in Fällen der Steuerminderung zu Lasten des inländischen Steueraufkommens möglich.[75] *Kraft* erwähnt, dass in der Literatur geschätzt werde, dass 85 % der internationalen Einkünftekorrekturen zwischen nahe stehenden Personen auf die Rechtsgrundlage der vGA (§ 8 Abs. 3 S. 2 KStG) und weitere 10 % auf die Grundlage einer vE (§ 8 Abs. 3 S. 3 KStG) gestützt werden. Für § 1 AStG verbliebe allenfalls 5 % der gesamten Anwendungsfälle.[76]

Aus verfahrensrechtlicher Sicht ist die Berücksichtigung solcher Erkenntnisse vor der Steuerfestsetzung immer möglich. Sollte ein Steuerbescheid bereits erlassen worden sein, dann kommt eine Änderung des Steuerbescheids nach § 173 Abs. 1 AO in Betracht. Dafür müssten Tatsachen oder Beweismittel nachträglich bekannt werden, die zu einer höheren Steuer führen, oder soweit Tatsachen oder Beweismittel nachträglich bekannt werden, die zu einer niedrigeren Steuer führen und den Steuerpflichtigen kein grobes Verschulden daran trifft, dass die Tatsachen oder Beweismittel erst nachträglich bekannt wurden.

Frage 9

Das deutsche Bundesministerium der Finanzen weist in seinem Schreiben darauf hin, dass einseitige Berichtigungen der Einkünfte von international tätigen Personen durch die ausländische Steuerverwaltung Auswirkungen auf die deutsche Besteuerung dieser Person haben können, sodass die Berichtigungen und die Auswirkungen auf die deutsche Besteuerung ständig zu prüfen sind. [77] Solche einseitigen Berichtigungen sind demnach nur anzuerkennen, soweit sie nach deutschem Steuerrecht materiell- und verfahrensrechtlich zulässig sind.[78] Wie bereits erläutert, ist die Herabsetzung von steuerlichen Gewinnen möglich, wenn eine verdeckte Einlage vorliegt, denn diese darf gem. § 8 Abs. 3 S. 3 KStG das Einkommen nicht erhöhen. Wenn in dem eingangs zur Frage gestellten Fall die Konstellation vorliegt, dass die Geschäftszahlung vom ausländischen Unternehmen zum inländischen Unternehmen eine verdeckte Gewinnausschüttung vom Ausland ins Inland darstellt, dann bedeutet dies im Umkehrschluss, dass bei der inländischen Gesellschaft eine verdeckte Einlage vorliegt.[79] Die deutsche Finanzverwaltung ist dann bereits auf Grund des Grundsatzes der gleich- und gesetzmäßigen Besteuerung gem. § 85 AO verpflichtet die „wahrheitsgemäße" Korrektur des Gewinns nach unten vorzunehmen.

[75] *Kraft*, AStG Kommentar, § 1 Rn. 12; *Scheffler*, Besteuerung von Unternehmen I: Ertrag-, Substanz- und Verkehrsteuern, 13. Auflage, Rn. 944.

[76] *Kraft*, AStG Kommentar, § 1 Rn. 13.

[77] *BMF*, Schreiben vom 12.04.2005, IV B 4 – S 1341 – 01/05, BStBl. I 2005, 570 (599/Tz. 6.2.2).

[78] *BMF*, Schreiben vom 12.04.2005, IV B 4 – S 1341 – 01/05, BStBl. I 2005, 570 (599/Tz. 6.2.2).

[79] So auch *Baumhoff/Kluge*, Ausländische Verrechnungspreiskorrekturen – Korrespondierende inländische Gegenkorrekturen, FR 2015, 107 (108).

Sollte die ausländische Korrektur nach deutschem Steuerrecht jedoch nicht rechtmäßig sein, dann wird die deutsche Finanzverwaltung versuchen auf ein Verständigungs- bzw. Schiedsverfahren nach dem jeweils einschlägigen DBA bzw. der EU-Schiedskonvention hinzuwirken, denn nur derartige bilaterale Verfahren haben den Vorteil, dass – bei entsprechender Einigung – die Doppelbesteuerung wirksam beseitigt werden kann.[80] Ähnliches gilt, wenn ein Steuerpflichtiger ohne Beteiligung der deutschen Behörden ein einseitiges (unilaterales) „Advance Pricing Agreement" (APA) mit einem anderen Staat nach dessen Recht abschließt und später die einseitige Bindung der örtlich zuständigen Finanzbehörde an das APA beantragt. Dann bindet das unilaterale APA die deutschen Finanzbehörden grundsätzlich nicht und wir nur anerkannt, wenn ohne besonderen Aufwand festgestellt werden kann, dass das APA mit dem anderen Staat deutsche Besteuerungsinteressen nicht beeinträchtigt.[81]

Frage 10

Das deutsche Steuerrecht verfügt sowohl über eine generelle Missbrauchsvorschrift (§ 42 AO) als auch über eine Vielzahl von speziellen Missbrauchsvorschriften, die sich in DBA[82] und in vielen Einzelsteuergesetzen[83] wiederfinden.

Die generelle Missbrauchsvorschrift des deutschen Steuerrechts besagt, dass durch Missbrauch von Gestaltungsmöglichkeiten des Rechts das Steuergesetz nicht umgangen werden kann. Ein Missbrauch liegt vor, wenn eine unangemessene rechtliche Gestaltung gewählt wird, die beim Steuerpflichtigen oder einem Dritten im Vergleich zu einer angemessenen Gestaltung zu einem gesetzlich nicht vorgesehenen Steuervorteil führt. Dies gilt nicht, wenn der Steuerpflichtige für die gewählte Gestaltung außersteuerliche Gründe nachweist, die nach dem Gesamtbild der Verhältnisse beachtlich sind. Wenn ein Missbrauch im Sinne der generellen Missbrauchsvorschrift vorliegt, dann entsteht der Steueranspruch so, wie er bei einer den wirtschaftlichen Vorgängen angemessenen rechtlichen Gestaltung entsteht. Dies ergibt sich nunmehr ausdrücklich aus § 42 AO.

Wenn der Tatbestand einer Regelung in einem Einzelsteuergesetz erfüllt ist, die der Verhinderung von Steuerumgehung dient, so bestimmt sich die Rechtsfolge nach jener Vorschrift. Andernfalls entsteht der Steueranspruch beim

[80] *Baumhoff/Kluge*, Ausländische Verrechnungspreiskorrekturen – Korrespondierende inländische Gegenkorrekturen, FR 2015, 107 (107).

[81] *BMF*, Schreiben vom 05.10.2006, IV B 4 – S 1341 – 38/06, BStBl. I 2006, 594 (595/Tz. 1.2).

[82] Vgl. bspw. DBA-Dänemark, Art. 45 Abs. 2 lit. a.

[83] Vgl. bspw. § 3 Nr. 40 S. 3 u. 4 EStG, § 7b Abs. 1 S. 4 EStG, § 50c EStG, § 50d Abs. 1a EStG, § 15b EStG, § 3 Abs. 1 Nrn. 2-4, § 7 Abs. 1 Nrn. 2-7 ErbStG, § 1 Abs. 1 Nrn. 5-7, Abs. 2, Abs. 3 GrEStG, § 8b Abs. 4 KStG, § 10 Abs. 5 UStG oder § 18 Abs. 3 und § 22 UmwStG; *Drüen* in: Tipke/Kruse, AO/FGO, 148. Lieferung, § 42 (bis 31.12.2007) AO Rn. 20.

Vorliegen eines Missbrauchs so, wie er bei einer den wirtschaftlichen Vorgängen angemessenen rechtlichen Gestaltung entsteht. Dies ergibt sich nunmehr ausdrücklich aus § 42 AO. Gemäß dem Finanzausschuss des Bundestages und der Steuerverwaltung ergibt sich für die Anwendung der Missbrauchsvorschriften eine „eindeutige Prüfungsreihenfolge".[84] Als erstes soll geprüft werden, ob das im Einzelfall anzuwendende Einzelsteuergesetz eine Regelung enthält, die der Verhinderung der Steuerumgehung dient. Ist dies der Fall, ist zu prüfen, ob die Tatbestandsmerkmale dieser Norm erfüllt sind. Wenn die Tatbestandsmerkmale der Norm erfüllt sind, dann richten sich die Rechtsfolgen alleine nach der einschlägigen Vorschrift des Einzelsteuergesetzes. Die generelle Missbrauchsvorschrift wird dann durch die spezielle Missbrauchsvorschrift ausdrücklich verdrängt und darf nicht mehr geprüft werden. Ist der Tatbestand der speziellen Norm dagegen nicht erfüllt, ist in einem weiteren Schritt zu prüfen, ob ein Missbrauch im Sinne der allgemeinen Missbrauchsvorschrift vorliegt. In diesem Fall bestimmt sich das Vorliegen eines Missbrauchs allein nach den Voraussetzungen der allgemeinen Norm. Dies bedeutet, dass das Vorliegen einer einzelgesetzlichen Regelung, die der Verhinderung von Steuerumgehung dient, die Anwendbarkeit der generellen Missbrauchsvorschrift nicht ausschließt.[85] Folglich kann die allgemeine Missbrauchsvorschrift – um es mit der Formulierung der Frage auszudrücken – als eine Art „back up" zur lex specialis insoweit verwendet werden, als dass die Tatbestandsmerkmale der speziellen Vorschrift nicht erfüllt sind.

Teil II

Frage 11

Wenn von der Europäischen Kommission die Rückforderung einer unionsrechtswidrigen staatlichen Beihilfe finanzieller Art angeordnet wird, dann ist Deutschland als Mitgliedstaat der Europäischen Union grundsätzlich gem. Art. 4 Abs. 3 EUV verpflichtet, alle geeigneten Maßnahmen zu ergreifen, um die Rückforderung der unionsrechtswidrigen staatlichen Beihilfe, zu erfüllen. Grundsätzlich erkennt der EuGH die sogenannte Verfahrensautonomie der Mitgliedstaaten an, d.h. das Verwaltungsverfahren einschließlich der zu wählenden Handlungsformen, des etwaigen Vertrauensschutzes und etwaiger Entscheidungsfristen

[84] Die folgenden Ausführungen sind entnommen aus: *Deutscher Bundestag*, Drucksache 16/7036 vom 08.11.2007, S. 24 und *BMF*, Schreiben vom 31.01.2014, IV A3 – S 0062 – 14/10002, BStBl. I 2014, 290 (312-314).

[85] So auch *Drüen*, in: Tipke/Kruse, AO/FGO, 149. Lieferung, Vorbemerkungen zur Neufassung durch das JStG 2008 § 42 (seit 1.1.2008) Missbrauch von rechtlichen Gestaltungsmöglichkeiten Rn. 10.

richten sich nach dem jeweiligen nationalen Verwaltungsrecht. Das nationale Recht ist in Fällen mit Unionsrechtsbezug jedoch aus Gründen des sog. „effet utile" zu modifizieren durch die unionsrechtlichen Gebote der Äquivalenz und der Effektivität. Das Äquivalenzgebot bedeutet, dass Fälle mit Unionsrechtsbezug nicht ungünstiger behandelt werden dürfen als rein nationale Fälle. Das Effektivitätsgebot verlangt, dass die Durchsetzung des Unionsrechts nicht praktisch unmöglich gemacht werden darf durch das nationale Verfahrensrecht; dabei erkennt allerdings auch das Unionsrecht Erfordernisse der Rechtssicherheit, auf denen z.B. Institute wie Bestands- oder Rechtskraft beruhen, grundsätzlich an.[86]

Wenn eine staatliche Beihilfe (finanzieller Art) durch einen (Steuer-)Verwaltungsakt gewährt wurde, dann erfolgt die Rückforderung regelmäßig in zwei Schritten[87]:

1. Der begünstigende Verwaltungsakt wird zurückgenommen oder korrigiert;
2. Durch einen zweiten Verwaltungsakt wird die Rückzahlung angeordnet, da nun der Rechtsgrund für die Beihilfe weggefallen ist.

Für die Rücknahme oder Korrektur des begünstigenden Verwaltungsakts wurden vom deutschen Gesetzgeber keine speziellen auf die Rücknahme von unionsrechtswidrigen Beihilfen zugeschnittenen Normen geschaffen. Stattdessen bedient sich die deutsche Finanzverwaltung der allgemeinen steuerverfahrensrechtlichen Regelungen gem. §§ 130 ff. AO (für Steuerverwaltungsakte) oder §§ 172 ff. AO (für Steuerbescheide oder gleichgestellte Bescheide). Gemäß den in der Rechtssache Alcan[88] zu § 48 VwVfG aufgestellten Grundsätzen ist die Finanzbehörden zur Rücknahme eines begünstigenden Verwaltungsakts auch dann verpflichtet, wenn die Frist zur Rücknahme (vgl. §§ 48 Abs. 4 VwVfG, 130 Abs. 3 AO) an sich abgelaufen ist; [89] auch ist Vertrauensschutz in der Regel ausgeschlossen, da der EuGH vom Begünstigten (Unternehmen) verlangt, sich zu vergewissern, ob das unionsrechtlich vorgeschriebene Verfahren eingehalten wurde.[90] Dies folgt aus einer unionsrechtskonformen Auslegung des nationalen Rechts bzw – soweit eine solche Auslegung nicht möglich ist – aus dem Anwen-

[86] Ausführlicher *Wernsmann*, in: Schulze/Zuleeg/Kadelbach, Europarecht Handbuch für die deutsche Rechtspraxis, 3. Auflage, § 30 Rn. 134.

[87] *Beljin*, in: Schulze/Zuleeg/Kadelbach, Europarecht Handbuch für die deutsche Rechtspraxis, 3. Auflage, § 28 Rn. 264.

[88] EuGH, Urteil vom 20.3.1997, Rs. C-24/95, Slg. 1997, I-1607 – Alcan.

[89] Näher Wernsmann, in: Hübschmann/Hepp/Spitaler, AO/FGO, 243. Lieferung, § 130 Rn. 95.

[90] Näher Wernsmann, in: Hübschmann/Hepp/Spitaler, AO/FGO, 243. Lieferung, § 130 Rn. 79 ff. mwN.

dungsvorrang des Unionsrechts (konkret: des Effektivitätsgebots). Soweit nicht die allgemeinen Aufhebungstatbestände der §§ 130, 131 AO, sondern die §§ 173 ff AO einschlägig sind (bei Aufhebung oder Änderung von Steuerbescheiden oder gleichgestellten Bescheiden, vgl. § 172 Abs. 1 S. 1 Nr. 2 lit. d Hs. 2 AO), stellt sich das Problem, dass die deutschen Verfahrensvorschriften ihrem Wortlaut nach nicht zur Korrektur beihilfewidriger Steuerfestsetzungen ermächtigen. Eine Negativentscheidung der Kommission ist nach den allgemeinen Auslegungsregeln keine nachträglich bekannt gewordene „Tatsache" im Sinne des § 173 Abs. 1 Nr.1 AO.[91] Zudem ist diese nicht „nachträglich bekannt geworden", sondern „nachträglich entstanden"; für solche Fälle ist grundsätzlich § 175 Abs. 1 S. 1 Nr. 2 AO einschlägig, der aber ebenfalls sachverhaltsbezogen auszulegen ist.[92] § 130 AO ist auf Steuerbescheide und gleichgestellte Bescheide nicht anwendbar, § 172 Abs. 1 S. 1 Nr. 2 lit. d AO. Zur Rechtfertigung der unionsrechtlich gebotenen Rückgängigmachung beihilfewidriger Steuervergünstigungen bemühen nationale Gerichte daher den effet-utile-Grundsatz.[93] Kraft des Anwendungsvorrangs des Unionsrechtsrechts (konkret: des Effektivitätsgebots) ist nationales Recht insoweit unanwendbar, als es die Aufhebung unionsrechtswidriger Steuervergünstigungen in solchen Fällen gänzlich verhindert. Das Unionsrecht überspielt als nach i. Erg. zutreffender Auffassung des BFH das nationale Recht. Auch in den Fällen der Erstattung einer entgegen Art. 110 AEUV erhobenen Abgabe kann der effet utile bedeutsam sein.[94]

Frage 12

Die Alcan Deutschland GmbH betrieb von 1979 bis 1987 eine Aluminiumhütte in Deutschland, deren Fortbestand 1982 wegen erheblicher Strompreiserhöhungen gefährdet war.[95] Da die Alcan GmbH beabsichtigte, die Hütte zu schließen und die Verträge der 330 Arbeitnehmer zu kündigen, bot ihr die Landesregierung Rheinland-Pfalz eine Überbrückungsbeihilfe in Höhe von 8 Millionen DM zum Ausgleich der Stromkosten an, die sie dann auch auszahlte.[96] Die Kommission stellte 1985 fest, dass die Beihilfe unzulässig sei, da ihre

[91] Die Kommissionsentscheidung stellt eine „rechtliche Würdigung" und damit keine „Tatsache" dar, vgl. v. Groll, in: Hübschmann/Hepp/Spitaler, AO/FGO, 243. Lieferung, § 173 AO Rn. 101 mwN.

[92] Ebenso die Anwendung von § 175 Abs. 1 AO verneinend Grube, Der Einfluss des unionsrechtlichen Beihilfeverbots auf das deutsche Steuerrecht, S. 74.

[93] BFH, Beschluss vom 30.1.2009, VII B 180/08, BFHE 224, 372 (376) wo die Notwendigkeit der „Durchsetzung der gemeinschaftsrechtlichen Wettbewerbsordnung" betont wird.

[94] Siehe Wernsmann, in: Schulze/Zuleeg/Kadelbach, Europarecht Handbuch für die deutsche Rechtspraxis, 3. Auflage, § 30 Rn. 137.

[95] *EuGH*, Urteil vom 20.3.1997, Alcan, C-24/95, Slg. 1997, I-1609.

[96] *EuGH*, Urteil vom 20.3.1997, Alcan, C-24/95, Slg. 1997, I-1610.

Gewährung einen Verstoß gegen Art. 93 Abs. 3 EWG-Vertrag darstelle, und dass sie mit dem gemeinsamen Markt im Sinne des Art. 92 unvereinbar sei. Daher ordnete die Kommission die Rückforderung der Beihilfe an. Weder die deutsche Regierung noch die Alcan GmbH haben die Entscheidung angefochten. Nachdem der Gerichtshof 1989 festgestellt hat, dass die Bundesrepublik Deutschland gegen ihre Verpflichtungen aus dem Vertrag verstieß, indem sie der Kommissionsentscheidung nicht nachgekommen war, nahm das Land Rheinland-Pfalz mit Bescheid vom 26.09.1989 die Bewilligungsbescheide vom 9. Juni und 30. November 1983 zurück und verlangt die Rückzahlung der gewährten Beträge. Dagegen erhob die Alcan GmbH Anfechtungsklage, der das Verwaltungsgericht Mainz stattgab. Nachdem das Oberverwaltungsgericht Rheinland-Pfalz die Berufung des Landes zurückgewiesen hatte, hat die Landesregierung Revision an das Bundesverwaltungsgericht eingelegt.[97]

Alcan stützte ihre Weigerung, die Beträge zu erstatten, auf § 48 des deutschen Verwaltungsverfahrensgesetzes (VwVfG). Das Bundesverwaltungsgericht war der Ansicht, dass die Revision auf der Grundlage dieser Bestimmungen zurückzuweisen sei. Zunächst sei die Frist des § 48 Abs. 4 S. 1 VwVfG abgelaufen gewesen. Zudem könne sich Alcan der Beihilfe gemäß dem nationalen Recht einer Rücknahme widersetzen, wenn die Behörde ihr Rücknahmeermessen rechtsfehlerhaft ausgeübt habe. Diese Voraussetzungen seien im Ausgangsverfahren wahrscheinlich erfüllt gewesen, da die Beihilfe Alcan praktisch aufgedrängt worden sei, um vor wichtigen Wahlen Arbeitsplätze zu erhalten. Somit sei das Land für die Rechtswidrigkeit der Bewilligungsbescheide in einem solchen Maße verantwortlich gewesen, dass deren Rücknahme nach nationalem Recht der Einwand der unzulässigen Rechtsausübung entgegenstünde.

Schließlich wies das Bundesverwaltungsgericht darauf hin, dass sich Alcan nach nationalem Recht auch auf den Wegfall der Bereicherung gem. § 48 Abs. 2 S. 6 und 7 VwVfG in Verbindung mit § 818 Abs. 3 BGB berufen könne, wonach die Verpflichtung zur Herausgabe oder zum Ersatz des Wertes ausgeschlossen sei, wenn der Empfänger nicht mehr bereichert sei.

Unter diesen Umständen hat das Bundesverwaltungsgericht dem Gerichtshof folgende Fragen zur Vorabentscheidung vorgelegt:

Ist die zuständige Behörde aufgrund des Gebots, das nationale Recht so anzuwenden, „dass die gemeinschaftsrechtlich vorgeschriebene Rückforderung nicht praktisch unmöglich und das Gemeinschaftsinteresse voll berücksichtigt wird", verpflichtet, gemäß einer bestandskräftigen Rückforderungsentscheidung der EG-Kommission den betreffenden Bewilligungsbescheid selbst dann noch

[97] *EuGH*, Urteil vom 20.3.1997, Alcan, C-24/95, Slg. 1997, I-1802.

zurückzunehmen, wenn sie die nach nationalem Recht im Interesse der Rechtssicherheit dafür bestehende Ausschlussfrist hat verstreichen lassen?

1) Wenn die Frage zu 1 positiv zu beantworten sein sollte:
   Ist die zuständige Behörde aufgrund des vorgenannten Gebots verpflichtet, gemäß einer bestandskräftigen Rückforderungsentscheidung der EG-Kommission den betreffenden Bewilligungsbescheid selbst dann zurückzunehmen, wenn die zuständige Behörde für dessen Rechtswidrigkeit in einem solchen Maße verantwortlich ist, dass die Rücknahme dem Begünstigten gegenüber als Verstoß gegen Treu und Glauben erscheint?
2) Wenn die Fragen zu 1 und zu 2 positiv zu beantworten sein sollten:
   Ist die zuständige Behörde aufgrund des vorgenannten Gebots verpflichtet, gemäß einer bestandskräftigen Rückforderungsentscheidung der EG-Kommission die Rückzahlung der gewährten Beihilfe selbst dann noch zu verlangen, wenn dies nach nationalem Recht wegen Wegfalls der Bereicherung mangels Bösgläubigkeit des Beihilfeempfängers ausgeschlossen ist?[98]

Der Gerichtshof kam in allen drei Fragen zum Ergebnis, dass die zuständige Behörde gemeinschaftsrechtlich verpflichtet sei, den Bewilligungsbescheid für die rechtswidrig gewährte Beihilfe gemäß einer bestandskräftigen Entscheidung der Kommission, in der die Beihilfe für mit dem Gemeinsamen Markt unvereinbar erklärt und ihre Rückforderung verlangt wird, zurückzunehmen. Insbesondere dürfe die Rückforderung der zu Unrecht gezahlten Beträge nicht praktisch unmöglich gemacht und den Gemeinschaftsvorschriften über die staatlichen Beihilfen jede praktische Wirksamkeit genommen werden.[99] Die Verpflichtung des Begünstigten, sich zu vergewissern, dass das Verfahren des Art. 93 Abs. 3 des Vertrages eingehalten wurde, kann nicht vom Verhalten der Behorde abhängen, auch wenn diese für die Rechtswidrigkeit des Bescheids in solchem Maße verantwortlich war, dass die Rücknahme als Verstoß gegen Treu und Glauben erscheint.[100]

Frage 13

Deutschland verfügt über eine ganze Reihe von völkerrechtlichen Abkommen zum Schutz von Eigentum und Investitionen mit anderen Ländern. Darunter befinden sich sowohl Mitglieder als auch Nichtmitglieder der EU. Eine Übersicht aller von Deutschland abgeschlossenen völkerrechtlichen Investitionsschutzab-

[98] *EuGH*, Urteil vom 20.3.1997, Alcan, C-24/95, Slg. 1997, I-1615.
[99] *EuGH*, Urteil vom 20.3.1997, Alcan, C-24/95, Slg. 1997, I-1619.
[100] *EuGH*, Urteil vom 20.3.1997, Alcan, C-24/95, Slg. 1997, I-1820.

kommen kann auf der Internetpräsenz des UNCTAD [101] oder des Bundesministeriums für Wirtschaft und Energie [102] eingesehen werden.

Gemäß den Angaben des UNCTAD und des Bundesministeriums für Wirtschaft und Energie hat Deutschland seit dem Jahre 1959 über 133 bilaterale Investitionsschutzabkommen abgeschlossen – wovon noch 129 in Kraft sind. Diese bilateralen Abkommen wurden überwiegend mit Schwellen- und Entwicklungsländern (zum Zeitpunkt des Abschlusses) abgeschlossen, sowie ab 1986 mit Transformationsländern in Mittel- und Osteuropa. Mit Industriestaaten wurden keine bilateralen Investitionsschutzverträge abgeschlossen, da nach Einschätzung des Bundesministeriums für Wirtschaft und Energie zwischen Staaten mit belastbaren Rechtsordnungen besondere Investitionsschutzregeln nicht erforderlich seien.[103] Deshalb gibt es keine bilateralen Investitionsschutzverträge mit den USA oder Großbritannien. Neben den bilateralen Investitionsschutzabkommen ist Deutschland an 68 „Treaties with Investment Provisions" (TIPs) – wovon noch 56 in Kraft sind – und 31 „Investment Related Instruments" (IRIs) gebunden. Deren komplette Aufzählung kann ebenfalls auf der Homepage des UNCATD[104] eingesehen werden.

Frage 14

Völkerrechtliche Verträge erhalten nach deutschem Recht ihre innerstaatliche Geltung in der Regel über den Anwendungsbefehl des jeweiligen Zustimmungsgesetzes, Art. 59 Abs. 2 S. 1 GG. Grundsätzlich genießt der völkerrechtliche Vertrag – solange er keine allgemeinen Regeln des Völkerrechts kodifiziert, die gem. Art. 25 GG im Rang über den einfachen Bundesgesetzen, aber unterhalb der Verfassung stehen – den Rang eines einfachen Bundesrechts. Damit nicht jedes neuere Bundesrecht den völkerrechtlichen Vertrag gem. Dem „lex-posterior"-Grundsatz verdrängen und Deutschland somit vertragsbrüchig machen kann, ist das einfache Bundesrecht stets völkerrechtsfreundlich auszulegen, damit möglichst schon keine Kollision entsteht. Die völkerrechtsfreundliche Auslegung hat jedoch dort ihre Grenzen, wo der Gesetzgeber ausdrücklich von den Regelungen des völkerrechtlichen Vertrags abweichen, diesen also überschreiben will (sog. „Treaty Override"). Das Bundesverfassungsgericht betont ausdrücklich unter mehreren Gesichtspunkten die Verfassungsmäßigkeit von „Treaty Overrides", d.h. von späteren Gesetzen, die inhaltlich einem Umsetzungsgesetz eines

[101] http://investmentpolicyhub.unctad.org/IIA/CountryBits/78#iiaInnerMenu, 25.09.2017, 10.28 Uhr.
[102] http://www.bmwi.de/Navigation/DE/Service/Investitionsschutzvertraege/investitionsschutzvertraege.html, 25.09.2017, 10.30 Uhr.
[103] https://www.bmwi.de/Redaktion/DE/FAQ/Investitionsschutz/faq-investitionsschutz-03.html, 25.09.2017, 10.31 Uhr.
[104] http://investmentpolicyhub.unctad.org/IIA/CountryBits/78#iiaInnerMenu, 25.09.2017, 10.32 Uhr.

früheren abgeschlossenen völkerrechtlichen Vertrags zuwiderlaufen.[105] Damit vertritt das deutsche Bundesverfassungsgericht den Standpunkt, dass völkerrechtliche Verträge im Kollisionsfall hinter das einfache nationale Bundesrecht treten können, wenn der nationale Gesetzgeber die Überschreibung des völkerrechtlichen Vertrags ausdrücklich vorsieht.[106]

Das Unionsrecht basiert grundsätzlich auf völkerrechtliche Verträge, sodass es seine innerstaatliche Wirkung über den im Zustimmungsgesetz enthaltenen Rechtsanwendungsbefehl zum Vertrag zur Gründung der Europäischen Gemeinschaft sowie zu den Änderungsverträgen zum Vertrag über die Europäische Union und zum Vertrag über die Arbeitsweise der Europäischen Union erhält.[107] Das BVerfG betont aber gleichzeitig in mehreren Beschlüssen die Besonderheit des Unionsrechts, dass es kraft verfassungsrechtlicher Ermächtigung aus dem heutigen Art. 23 Abs. 1 GG habe. Es besitze eine Autonomie.[108] Das Bundesverfassungsgericht ist der Ansicht, dass das nationale Recht im Konfliktfall mit dem Unionsrecht unionsrechtskonform ausgelegt werden muss. Sollte ein Kollisionsfall trotz unionskonformer Auslegung vorliegen, so würden dem Unionsrecht – außer in einigen engen Ausnahmen (dies sind im Einzelnen die Grundrechtskontrolle, die Verfassungsidentitätskontrolle und die Ultra-vires-Kontrolle)[109] – Anwendungsvorrang zukommen.[110] Das bedeutet, dass das nationale Recht im gegebenen Fall nicht angewendet werden darf, soweit es gegen Unionsrecht verstößt.[111]

Daraus lässt sich schlussfolgern: Wenn sonstiges durch den Rechtsanwendungsbefehl in das nationale Recht überführte Völkerrecht mit dem Unionsrecht in Kollision geraten sollte, würde grundsätzlich – von den oben genannten Fällen abgesehen – der Anwendungsvorrang des Unionsrechts greifen, sodass die dem Unionsrecht entgegenstehenden Bestimmungen des völkerrechtlichen Vertrags im konkreten Fall nicht angewendet werden dürften.[112]

Das Unionsrecht würde Deutschland in einem solchen Fall dazu verpflichten, alle geeigneten Maßnahmen anzuwenden, um die festgestellten Unvereinbarkeiten zu beheben, vgl. etwa Art. 351 Abs. 2 AEUV.

[105] So *BVerfG*, Beschluss vom 15.12.2015, 2 BvL 1/12, BVerfGE 141, 1 (20).

[106] Vgl. z.B. § 50d Abs. 8 S. 1 EStG.

[107] Vgl. *Ehlers*, in: Schulze/Zuleeg/Kadelbach, Europarecht Handbuch für die deutsche Rechtspraxis, 3. Auflage, § 11 Rn. 7.

[108] Vgl. *BVerfG*, Beschluss vom 18.10.1967, 1 BvR 248/63 und 216/67, BVerfGE 22, 293 (296).

[109] Ausführlich dazu *Ehlers*, in Schulze/Zuleeg/Kadelbach, Europarecht Handbuch für die deutsche Rechtspraxis, 3. Auflage, § 11 Rn. 21 ff.

[110] Vgl. *BVerfG*, Urteil vom 30.06.2009, 2 BvE 2/08, BVerfGE 123, 267 (402).

[111] *EuGH*, Urteil vom 09.03.1978, Simmenthal, 106/77, Slg. 1978, 629 (644 ff.).

[112] So auch *Ehlers*, in: Schulze/Zuleeg/Kadelbach, Europarecht Handbuch für die deutsche Rechtspraxis, 3. Auflage, § 11 Rn. 40.

GREECE

Aikaterini Savvaidou
Eftychia Mouameletzi
Ekaterini D. Sgouridou

Part I

Question 1
Before the significant tax reform in 2013 (the introduction for the first time of a Greek Code of Tax Procedures (L. 4174/2013, hereinafter referred to as "GCTP") and the introduction of the new Greek Income Code (L. 4172/2013, hereinafter referred to as "GITC"), the issuance of tax rulings from the Ministry of Finances (known as individual's solutions) was a common practice in Greece. More specifically, the central authorities of the Ministry of Finance, responsible for the uniform interpretation and the application of the tax legislation from the local tax offices, was publising interpretative circulars and written answers on taxpayer's written question regarding divers tax matters (income tax, VAT, etc). According to the Penalty Code (articles 1§8 and 4§5 of Law 2523/1997), additional taxes (penalties imposed in case of not filing a tax declaration or filing inaccurate tax declaration) are not imposed when a taxpayer has followed the circulars of the Ministry of Finance or the written rulings of the competent tax authorities regarding his tax obligations. In any case, the taxpayers cannot invoque in their favor, the above circulars or written rulings of the Ministry of Finance, in case where an opposite interpretation of the relevant provisions of the tax legislation has been given by the Supreme Administrative Court (Council of State). In this case, additional tax is imposed after the revocation of the relevant circulars or written answers/rulings. For reasons of tax transparency, the Greek law introduced several times in the past, legislation for the publication of said tax rulings.

Nowadays, after the recent tax reform in 2013, GCTP (article 9 of L. 4174/2013) provides the competence of issuance of relevant interpretative circulars, to the Independent Public Revenues Authority (hereinafter referred as "IPRA") (which has recently replaced the General Secretary of Public Revenues and constitutes the competent authority for the interpretation and application of the tax legislation). These circulars are binding for the tax administration until their amendment or revocation. In contrary, they are not binding for the taxpayers. This means that in case of a tax audit, the tax auditors are not bound from the above circulars and may interpret and apply the tax provisions according to the principle of tax legality. Nevertheless, in case where the taxpayers were following the above circulars regarding their tax obligations, tax authorities could not impose against them a penalty for not filing tax declaration or filing of inaccurate tax declaration. More specifically, following the modification of the relevant provisions by article 12 of Law 4474/2017, it is prescribed that in case the taxpayer has followed the circulars of the tax administration, concerning his respective tax obligations, neither the relevant tax return is considered as inaccurate nor the taxpayer is considered to have omitted to submit a tax return, depending on the circumstances of each specific case. Moreover, pursuant to article 12 of Law 4474/2017, which modified article 9 of the GCTP, interpretative circulars are binding for the tax administration, until their revocation or the amendment of the legislation which is being interpreted by them, whereas potential amendment of the interpretative view adopted by the tax administration has no retrospective effect, in case it implies the deterioration of the taxpayers' position. The Tax Procedures Code does not provide explicitly the issuance of written answers on taxpayer's written questions. Nevertheless, tax authorities continue to issue written answers on taxpayer's written questions regarding diverse tax matters. These tax rulings are not binding on tax authorities, although tax authorities generally follow written answers[1]. Furthermore, Greece tax law offers a certain degree of advance legal certainty in specific tax matters given by the tax authorities. Greek tax law provides in these cases specific requirements to be eligible for such certainty in advance.

Specifically, Greek Tax Procedures Code (article 22 of L. 4174/2013) provides an advance pricing agreement (APA) program under which Greek taxpayers could obtain a pre-approval on the pricing of intercompany transactions. The APA program, commenced in Greece on January 1, 2014, provides certainty to taxpayers regarding the agreed transfer pricing methodology, since giving them

[1] IBFD, Annex: Legal Aspects of practice of tax rulings for companies across member states, Ref.Ares (2015) 717438 – 19.02.2015.

the possibility to predict their future tax liabilities[2]. Furthermore, Ministerial Decision 1284/2013 provides guidelines on the APA program.

The main advantage of the APA is the elimination of the tax uncertainty and severe scrutiny (which may arise during the course of a future tax audit at the level of the Greek entity of a multinational group) relating to the transfer pricing followed and the mitigation of double taxation risk for the term of the APA (up to 4 years). Moreover, following the APA conclusion, the Greek company is no longer subject to TP documentation obligation for the transactions covered by the APA[3].

The law provides the entities entitled to apply for an APA. Greek entities with overseas related parties, as defined by Greek tax law, have the right to file an application to obtain an APA for future cross border transactions with these related parties. The Greek APA program also applies to Greek permanent establishments of foreign legal entities, in relation to transactions with their parent entity and foreign related parties, as well as domestic legal entities with their permanent establishments abroad.

The object of an APA program is defined in the law. Only future cross border transactions can be the object of an APA. Rollback is not provided. The APA can be unilateral, bilateral or multilateral. As regards time frame, the process has proven rather lengthy so far. For a unilateral APA, however, where no discussions with foreign tax authorities are required, it could be anticipated that the procedure will be finalized in less than 12 months.

An APA will cover any relevant criteria used for the determination of the intra-group pricing. These criteria mainly include the transfer pricing method, the comparable data to be used and any relevant adjustments to be made as well as the critical assumptions under which the transfer pricing methodology approved will remain valid.

The IPRA has issued sample templates for the application form for the APAs and for the preliminary consultation.

As noted above, the APA can be unilateral, bilateral or multilateral. The Greek tax authorities are not bound by an APA that the taxpayer has concluded with

[2] Under the previous tax regime, as was in force pursuant to L. 2238/1994 (the previous Greek Income Tax Code), APAs were not provided for, until the amendments of L. 4110/2013, article 11 of which inserted for the first time in the Greek tax legislation a provision about APAs (article 39 Γ of L. 2238/1994), effective from 01/01/2014 onwards. However, such a provision never came into force, since L. 2238/1994 was subsequently replaced by L. 4172/2013 and L. 4174/2013 ("GCTP") also came into force.

[3] In summary, the key benefits of an APA are: a) Advance resolution of disputes that could arise between the Greek group entity and Greek tax authorities on the pricing of the transactions at hand and elimination of tax uncertainty, b) Elimination of double taxation risk, c) Reduction of administrative costs of future tax audits and of the possibility of litigation and d) Reduction of documentation costs for the transactions included in the APA.

another country. Of course, a unilateral APA cannot exlude the risk of double taxation.

To the best of our knowledge, up until now only two unilateral APAs have been concluded in Greece, whereas there are several pending APA applications in progress (among which at least one refers to a bilateral APA), for which the relevant procedure has not yet been completed. It is concluded that no extensive experience exists so far as regards APAs.

To be also noted, that Greece has recently transposed into its domestic legislation the EU Directive 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, adding advance cross border rulings and advance pricing arrangements ("APAs) within the scope of automatic exchange of information, pursuant to Law 4474/2017.

Apart from the above, i.e. APAs and the interpretative circulars of article 9 of the GCTP, no other case of advance tax ruling is currently stipulated by the Greek tax provisions.

Question 2

Regarding the procedure, a request for an APA should be submitted to the Greek Ministry of Finance's Directorate for the General Secretariat of Tax Audits and Public Revenue. An APA request comprises four stages, i.e. the pre-filing/informal application, the formal request/application, the evaluation and negotiation of the APA and the formal request/agreement.

During the pre-filing stage a meeting will take place between the relevant parties to allow an initial assessment of the likely success of the APA. The pre-filing stage will allow the Greek competent authority to make a reasoned judgment on whether the application will be acceptable, which will be fed back to the Greek applicant. Feedback will cover whether the application is likely to be accepted, indicate any aspects that might be viewed as controversial and make suggestions for the content of the APA application. Conclusions from the pre-filing stage are not binding for any party and are confidential.

Formal application/request is submitted to the competent authority within thirty (30) days from the pre-filing stage. Following submission of the formal APA application the Greek competent authority may request further information and clarification from the taxpayer, within a reasonable time. Although the wording of the law seems to refer only to unilateral APAs, the guidelines also provide the option for the taxpayer to file an application requiring consultation with foreign tax authorities. Where foreign tax authorities are involved further information may be obtained through the mutual agreement procedures provided under the relevant tax treaty for the avoidance of double taxation.

The APA request is evaluated by the Greek competent authority following which a position paper is issued which should set out the view of the tax administration together with their rationale. Within 10 days from the issuance of the position paper a meeting must be set with the taxpayer. If consultation with foreign tax authorities is required, the meeting is set after the completion of this process with information exchange and will include all foreign parties involved. The taxpayer will receive an invitation at least 20 days in advance of the meeting date. The formal agreement will be provided within 20 days of the meeting. The duration of the evaluation and negotiation stage and the formal agreement stage cannot exceed 120 days from the submission of the application for the APA program, unless consultation with foreign tax authorities is required. The duration of a Greek APA cannot exceed four years.

The official request for the grant of an APA should include at a minimum the applicant's data, the data of all related parties, including permanent establishments, associated with the intercompany transactions covered by the proposed APA, the group structure, a description of the relevant intercompany transactions, the proposed transfer pricing method, the critical assumptions on which the APA proposition is based (functional, legal and economic circumstances critical for the price setting), the detailed description of the reasons for which the applicant considers that the suggested approach is appropriate for determining the arm's length transfer prices of the transactions concerned and the duration of the APA requested. The critical assumptions must be based, to the extent possible, on verifiable, reliable and uncontrolled data. Furthermore, the taxpayer may also include a request for competent authority negotiation for the conclusion of a bilateral APA between Greece and the country of residence of the other party in the intercompany transaction, with which there exists a double taxation treaty, containing a Mutual Agreement Procedure clause. In this case, a similar request should be filed with the tax administration of the other country.

The supporting documents submitted would vary depending on each case at hand. Indicatively, they may include industry and market trends that are expected to influence the value and supply chain, to the extent possible supported by surveys or economic studies, description of the business strategy, including projections used in business plans and budget forecasts, information regarding business prospects and the competition, as well as information about the relevant promotion, production or R&D strategy, functional analysis, including risks assumed and assets used concerning the relevant intercompany transactions, the reasons why an applicant considers an APA to be appropriate for the particular intercompany transaction, details on the suggested transfer pricing method and the reasons why the suggested approach is in line with the arm's length principle, a list of all APAs already concluded by any related parties, in Greece or outside

Greece, concerning the same or related transactions, detailed financial information of all parties in the APA for the last three years, a list and description of all agreements concluded between related parties that affect the transactions covered by the APA.

The tax audit directorate authority evaluates the APA application and delivers its views on the APA's terms. To this extent the tax office can ask the applicant to provide additional information. The applicant can, as well, throughout the procedure file on his own initiative any additional information he deems relevant.

The tax audit directorate can also ask foreign tax authorities for any information it considers critical, following the procedures on information exchange provided by tax treaties. In the case where the application includes a request for competent authority procedure, the tax directorate enters into consultation in accordance with the mutual agreement procedure clause provided by the respective tax treaty. The official exchange of views is performed through exchange of position papers between the competent authorities of the contracting states. During this stage, informal contacts can take place between the applicant and the tax audit authority.

When the procedure described above is concluded, the tax directorate prepares a report presenting its suggestions and the conclusions reached. This report is provided to the applicant and, for bilateral APAs, to the competent authority of the countries involved in the procedure.

This report shall contain the conclusion reached by the competent tax authority and its reasoning, the reason for the potential rejection or amendment of the approach proposed by the applicant, the main facts supporting the conclusions of the tax authority, which were included in the application or came to the attention of the tax administration during the evaluation process, information required for the verification of the critical assumptions, suggestions on how the implementation of the agreement will be monitored and brief reference to the relevant Greek legislation rules and to the applicable tax treaty.

Within 10 days of drafting said report, a final hearing with the applicant shall be arranged. This deadline does not apply in the event where consultations with foreign tax offices have to take place. In such case the deadline starts from the conclusion of the procedures in all countries involved. The report along with the invitation to the final meeting is provided to the applicant 20 days prior to the meeting.

During this meeting, the parties[4] try to reach a mutually acceptable agreement on the terms of the APA[5]. Within 20 days of the hearing and according to

[4] The taxpayer can be represented by its legal representative or any other person duly appointed.

[5] If an agreement is reached, minutes on the acceptance of the APA are drafted and signed by the involved parties. If no consensus is reached or if the applicant is not present at the meeting, there are drafted minutes of rejection of the APA.

the content of the minutes, the decision on the APA is issued by the tax authority. This decision, along with the minutes, is provided to the applicant.

The decree sets the minimum content of the decision of the tax authority. The APA decision must contain the data of the applicant, the intercompany transactions covered, information on the related counterparties of the covered intercompany transactions, the conclusion reached by the tax authority on the approval or not of the APA application.

In the case where the APA is concluded, the relevant decision shall also contain information on the duration of the APA agreement, details on the methodology agreed for the pricing of the intercompany transactions covered, the critical assumptions applied and, if necessary, any acceptable deviation margin therefrom, documentation that must be retained during the term of the agreement in order for the tax administration to be able to monitor its implementation, facts or circumstances that might lead to a revision of the APA. If necessary, the decision might also include facts or circumstances that could lead to a potential early or even retrospective termination of the APA.

The new Law 4410/2016 introduced amendments as per the deadline for the issuance of the decision of the General Secretariat approving or rejecting the APA. The respective deadline was extended from 120 days to 18 months. Not fail to mention that the newly introduced provisions prescribe that the General Secretary of Public Revenues is entitled to extend, with a respective Circular, the deadline for issuance of the relevant decision approving or rejecting the application for the APA from 18 months to 36 months, following the submission of a relevant request. However, in case of a bilateral or multilateral APA such time constraint does not apply, since extended negotiations may need to take place. The decision is valid for a maximum of four years and cannot concern financials years prior to the year the application was filed.

In cases when an APA is concluded, the taxpayer is obliged to file each financial year, within the income tax return filing due date, a separate annual compliance report on the compliance with the APA terms and conditions for the previous financial year. The report must contain all data supporting that the critical assumptions were duly satisfied. If it is stated that the critical assumptions have not been fulfilled, the taxpayer must submit suggestions on any relevant adjustments to be made. The tax administration is entitled to address any additional questions it might have to the taxpayer. In any case, any likely deviation must be expressly indicated in the report. If the compliance report is not filed, the APA is considered to be annulled starting from the year for which the compliance report was not filed.

Furthermore, the APA may be revised, revoked or cancelled in case the taxpayer does not comply with the terms thereof or the critical assumptions change

or are proved incorrect or in case of a different outcome arising in the context of the mutual agreement procedure pursuant to the relevant bilateral tax treaty or in the context of the convention of the member states of the European Union on the correction of profits of associated enterprises. For the revocation or the annulment of the APA, the competent tax authority must draft a special report to be provided to the taxpayer. A hearing is arranged in order for the revocation/annulment to be examined and the taxpayer is notified at least 10 days prior to the hearing. The decision must be delivered within 30 days of the hearing. The decision shall also determine the time it enters into effect. In the case where the decision on the APA is revoked, it is considered as if never issued.

It ensues from the above that, to the best of our knowledge, Greek tax authorities do not systematically verify the facts and circumstances mentioned in the request for an APA, for example through on-the-spot tax audits, either ex post or ex ante etc. However, within the process of conducting an APA, tax authorities seek to confirm the data being provided, the critical assumptions taken into account and the information presented to them, within the course of the negotiations handled, whereas they also examine the annual compliance report as per the critical assumptions and the facts and circumstances in force, but without ordering a tax audit, as part of the procedure followed.

Question 3

Such a requirement for verification of the tax treatment for a particular payment/transaction by other county, as part of a tax audit is not extensively been provided in the Greek tax law and is not applicable in practice.

A typical but isolated example of such a requirement could be the "Anti-hybrid rule" introduced by virtue of Law 4378/2016, under which the application of the participation exemption for payments received by EU subsidiaries is disallowed, to the extent that such payments are tax deductible at the level of the subsidiary.

Especially with regard to intercompany transactions and transfer pricing, such a requirement could be served by the CbC Report. However, Greece had not enacted the respective legal framework until the issuance of Law 4484/2017, although, the General Secretariat of Public Revenues (currently Director of the IPRA) has already signed on 27/01/2016 the "Multilateral Competent Authority Agreement on the Exchange of Country by Country Reports". Law 4484/2017, which was published in the Official Gazette on August 01, 2017 and is effective from 05.06.2017 onwards, covers, among others, the automatic exchange of Country by Country Reports ("CbC Reports"). By virtue of the said Law, Greece transposed into its domestic legislation the Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation and more specifically, in the

field of transfer pricing, as regards the exchange of CbC Reports. The Law specifically defines the scope and conditions of mandatory automatic exchange of information on the CbC Report, the respective procedure as well as the penalties imposed in case of non-compliance. Such penalties are equal to 20.000 euros in case of non-submission of the CbC Report and 10.000 euros in case of non-timely submission or submission of inaccurate CbC Report.

Consequently, it should be stressed out that, within the course of a tax audit, the tax authorities will not seek evidence on the tax treatment of a given transaction/payment/arrangement in another country as a prerequisite, but they will proceed to a relevant tax adjustment, if they consider that there is a violation of the tax legislation or that there is a legal basis for such an adjustment in the applicable tax provisions, usually without taking into account the tax treatment abroad. Therefore, in case a taxpayer considers that he is subject to double taxation, following the issuance of a tax assessment act by the competent Greek tax authorities, within the frame of a tax audit in Greece, he can proceed to the MAP, which is integrated within Greek tax law, pursuant to the new Article 63A of the GCTP, enacted by Law 4438/2016, in line with double tax treaties concluded by Greece.

The MAP can be invoked to resolve issues arising in the context of an applicable double tax treaty and also respective transfer pricing issues (according to Article 9 of the Model Tax Convention and the respective DTAs). Under this measure, the Greek tax authorities will have the power to conduct the MAP with the relevant foreign tax authorities, and the results of a MAP will be effective upon issuance of a mutual agreement decision. The taxpayer will be notified of the results of a MAP, and should accept them within a 60 day period. If the taxpayer accepts the results, a respective mutual agreement decision will be issued. This decision is not subject to appeal, nor may the taxpayer resort to any other legal remedy against it.

A decision (1049/2017) was issued by the Director of the IPRA[6], published in the Greek government gazette on 7 April 2017, contains comprehensive guidance on the application of the MAP in Greece's tax treaties. The decision is applicable for MAP requests filed as from the date of its publication. The IPRA decision provides that the MAP will be applicable only to taxes that are explicitly covered by the relevant tax treaty and to persons that are residents of one of the contracting states based on the provisions of the treaty. A taxpayer may seek competent authority assistance under a MAP with respect to issues, such as dual residence, cases relating to the deduction of withholding tax in the source country, i.e. the application of a withholding tax rate that is higher than the rate

[6] Referred to as the General Secretary of Public Revenue prior to 1 January 2017.

provided for by the relevant treaty, cases of taxation of a particular type of income in one contracting state, where the applicable treaty allocates exclusive taxing rights to the other state, cases where both contracting states take the position that they have the right to impose tax, conflicts arising from the characterization of income; attribution of profits to permanent establishments and cases where a taxpayer is subject to additional tax in one country as a result of a transfer pricing adjustment made in the other country.

Apart from the above, a decision (1129/2017) issued by the IPRA (referred to as the General Secretary of Public Revenue prior to 1 January 2017), published in the Greek government gazette on 30 August 2017, contains comprehensive guidance on the application of the mutual agreement procedure (MAP) in the Arbitration Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/463/EEC, hereinafter referred to as "AC"), which was ratified in Greece with L. 2216/1994. The provisions of the decision 1129/2017 bear a lot of similarities with the first Decision 1049/2017. These similarities mainly refer to the scope of application, the competent authority, the evaluation and consultation procedure, the content of the MAP request and the results of the MAP. However, the following particularities should be mentioned:

In case of AC, article 7 of the Decision 1129/2017 prescribes that the competent authority of a Contracting State shall not be obliged to initiate the mutual agreement procedure or to set up the advisory commission referred to in Article 7 where legal or administrative proceedings have resulted in a final ruling that by actions giving rise to an adjustment of transfers of profits under Article 4 one of the enterprises concerned is liable to a serious penalty. Greece has determined the concept of "liability to a serious penalty" in its Unilateral Declaration included in the Official Journal of the European Communities (C160/30-6-2005), according to which the term 'serious penalties' includes administrative penalties for serious tax infringements, as well as criminal penalties for offences committed with respect to the tax laws in accordance with the relevant provisions of the Code of Books and Records, of the Income Tax Code, as well as all specific provisions which define the administrative and criminal penalties in tax law.

Article 10 of Decision 1129/2017 stipulates that in case that the competent authorities concerned fail to reach an agreement that eliminates the double taxation referred to in Article 6 within two years of the date on which the case was first submitted to one of the competent authorities in accordance with Article 6, they shall set up an advisory commission charged with delivering its opinion on the elimination of the double taxation in question, pursuant to article 9 of the AC.

Following the issuance of this second Decision of the IPRA, a more comprehensive framework of procedures for resolving double taxation issues is now

being developed and it is interesting to see how the relevant procedures will be put into practice by the competent authorities.

Question 4

As regards APAs, in the field of transfer pricing, tax authorities have no discretion to disregard them, but they are obliged to comply with them, either unilateral or bilateral/multilateral, to the extent that all respective requirements are cumulatively met, i.e. an annual compliance report is timely prepared and submitted, which documents and confirms compliance with the terms and conditions as well as the critical assumptions of the APA conducted. In other words, it should be proven that all terms and conditions of the APA are met and that no substantial modification exists as per the critical assumptions, haven being taken into account and the facts and circumstances of the case as well. In any case, any likely deviation must be expressly indicated in the report. If the compliance report is not filed, the APA is considered to be annulled starting from the year for which the compliance report was not filed.

It should be clarified, though, that the Greek tax authorities are bound by the APAs concluded by them and not by unilateral APAs between a foreign company and the tax authorities of its state of residence, even in case that such unilateral APAs refer to an intercompany transaction, to which the Greek entity constitutes a counterparty. For example, in case a Greek entity, member of a multinational Group, conducts an intercompany transaction (i.e. purchase of goods) with a French affiliated company, and the latter has acquired a unilateral APA with the French tax authorities, concerning the same intercompany transaction (the purchase of goods), such a unilateral APA is not in principle binding also for the Greek tax authorities, but only for the French tax authorities. The case should be completely different, provided that a bilateral APA had been concluded among the group entities and both the French and the Greek tax authorities. In such a case, the bilateral APA would also be binding for the Greek tax authorities.

With regard to the interpretative circulars issued by the Independent Authority of Public Revenues, provided for in article 9 of the GCTP for purposes of interpretation and application of the tax legislation, the said circulars (in contrast to individual replies) are, as noted to answer to question 1, in principle, binding for the tax administration until their amendment or revocation, but not for the taxpayers, as already mentioned above. In other words, in case of a tax audit, the tax auditors are not bound from the above circulars and may interpret and apply the tax provisions according to the principle of tax legality. Nevertheless, in case where the taxpayers were following the above circulars regarding their tax obligations, tax authorities could not impose against them a penalty for not filing tax declaration or filing of inaccurate tax declaration. The GCTP does not explicitly

provide for the issuance of written answers on taxpayer's written questions. Nevertheless, according to the practice followed so far, tax authorities continue to issue written answers on taxpayer's written questions regarding diverse tax matters. These tax rulings are not binding on tax authorities, although they generally follow written answers (see also answer to question 1 above for further details)[7].

Question 5

According to Article 5 of the GITC, the concepts of "income derived in Greece" and "income derived abroad" are being defined, whereas Article 4 provides for the definitions of "tax residence" for both individuals and legal entities. Moreover, article 6 includes a detailed definition of permanent establishment, on the basis of the respective concept of the OECD Model Tax Convention. Furthermore, article 9 of the GITC has introduced a broad provision on foreign tax credit, applicable both to individuals and legal entities. More specifically, it is specified that that the income tax payable is reduced by the amount of tax paid abroad for the same income (credit method), whereas it is clarified that the reduction of income tax cannot exceed the corresponding amount of tax for said income in Greece.

When allocating profits within a legal entity that operates cross-border, some countries have adopted an approach where all profits will be allocated to the headquarters (the "head office"), except for those profits that are clearly attributable to local activities (the "permanent establishment"). Not fail to mention, though, that the Authorized OECD Approach ("AOA") has not explicitly been adopted by Greece, although Greek transfer pricing rules are equally applicable in case of intragroup dealings between headquarters and permanent establishments.

In recent Commission decisions, the Commission has criticized the application of a one-sided transfer pricing methods by a tax authority, as this authority does not verify whether there is at least some chance that profits shifted abroad will be taxed there. In Greece, according to the practice followed so far, one-sided TP methods are extensively used for documentation purposes and, in most of the cases, benchmarking studies are conducted, aiming to provide for an arm's length interquartile range exclusively for the business activity of the tested party, which is either the Greek entity or the related entity, located abroad, which is the counterparty to the intercompany transaction subject to documentation. This means that either the profitability of the Greek entity or of the foreign entity is checked, from a TP perspective. It should be highlighted, though, that the Greek tax authorities are very aggressive, while conducting transfer pricing audits, seeking to re-adjust the interquartile range, by rejecting companies from the final sample, in terms of non-comparability or even reject the whole benchmarking

[7] IBFD, Annex: Legal Aspects of practice of tax rulings for companies across member states, Ref.Ares (2015) 717438 – 19/02/2015.

study and conducting their own. However, they tend to heavily scrutinize the intercompany result exclusively in terms of the profitability of the Greek entity, which is subject to tax in Greece and not with the perspective of allocating any residual profit to the country, where the counterparty is established and located.

As a general remark as regards the flexibility of Greek tax authorities regarding, for example, a potential profit decrease in Greece, we would only comment that, as any other tax authorities, they are primarily trying to secure the right taxable basis for Greece. Consequently, they would be reluctant to accept a decrease of a profitability that has been steadily high for the last years, unless such profitability has fluctuated during past years and this can be explained by the market instability or other market and business reasons. However, even in such a case, the Greek tax authorities are anticipated to be aggressive and insist on proceeding to a respective tax adjustment and their willingness to accept any opposite arguments is highly questioned.

However, in general and apart from the above, up until now, Greece has no specific legal and transfer pricing framework, according to which it is checked whether any remaining (residual) income is subject to tax or it is actually taxed by another country, in order for a respective correction mechanism to be activated to ensure that the remainder will not go untaxed, but it will be taxed in another country, so as for double non-taxation to be eliminated.

It is supposed that the enactment of CbC Report rules, pursuant to Law 4484/2017, which transposed into the Greek tax legislation the Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU[8] as regards mandatory automatic exchange of information in the field of taxation and more specifically, in the field of transfer pricing, as regards the exchange of CbC Reports, will probably lead to such an outcome, since the CbC Report will include all necessary information as per the geographical allocation of profits, taxes and outsources among the related parties within a multinational group.

Question 6

In general, pursuant to article 3 of the GITC, a taxpayer with tax residence in Greece is subject to tax for worldwide income, whereas a taxpayer without a tax residence in Greece is subject to tax exclusively for the income arising in Greece. Article 4 of the GITC provides for the definition and the exact meaning of "tax residence" for both individuals and legal entities, for which taxation

[8] The initial Directive 2011/16/EU regarding the mandatory automatic exchange of information in the field of taxation, has been transposed into the Greek tax legislation by Law 4170/2013 (articles 1 to 25). The Directives 2014/107/EU and 2015/2376/EU, which have modified the initial Directive, have been transposed into the Greek tax legislation by Law 4378/2016 (articles 1 to 4) and Law 4474/2017 (articles 1 to 6) respectively.

on the basis of the place of exercise of their effective management is adopted. In addition, article 6 provides for the definition of permanent establishment, in line with the respective definition included in the OECD Model Convention on the Double Tax Treaties for the Avoidance of Double Taxation. Furthermore, article 9 of the GITC introduces a general and broad provision on foreign tax credit, applicable both to individuals and legal entities, according to which the credit method applies and it is prescribed that the income tax payable is reduced by the amount of tax paid abroad for the same income. However, it is specified that the reduction of income tax cannot exceed the corresponding amount of tax for said income in Greece.

In Greece, the arm's length principle has explicitly been adopted, as stipulated in article 50 of the GITC where it is mentioned in paragraph 1 that transactions between related parties should be conducted under the same terms and conditions with comparable uncontrolled transactions, i.e. transactions of the same or similar nature conducted between unrelated parties (please refer to Question No. 7 for further details).

Furthermore, to be noted that according to GITC, it is explicitly provided that every business reorganization/restructuring that consists of a transfer of operations, assets, risks or business opportunities and is realized by or involves related entities should be made according to the arm's length principle. Actually, it is provided that the transfer or the granting of a right to use goodwill or intangible assets that result from business restructurings should be made in return for a consideration, according to the arm's length principle and taking into consideration the total value of the transfer package deal. Additionally, the imposition of adjustments is provided in case of inability of the taxpayer to document the non transfer or grant of right to use of material intangible assets or assets or the payment of an arm's length consideration. This provision significantly broadens the ambit of application of tax rules in case of intra-group restructurings that until the enactment of GITC (L. 4172/2013) were covered quite insufficiently by the provisions on the transfer of business.

Apart from the above, Greece has not explicitly adopted the Authorized OECD Approach ("AOA"), according to which for the allocation of profits to permanent establishments a factual and functional analysis initially takes place and, subsequently, the transfer pricing rules apply by analogy. However, as it ensues from article 50 of the GITC, as regards transfer pricing and the application of the arm's length principle in conjunction with article 2, which provides for the definition of the concept of "associated enterprise" as well as "legal entity" [9],

[9] The definition of "legal entities" is very broad, covering every form of organization, corporate or not, irrespective of legal personality and profit or non-profit making character, that is not an individual or legal entity.

transfer pricing rules as well as the respective documentation requirements enacted by article 21 of the GCTP as regards the compilation of the TP documentation files equally apply to the intragroup transactions between permanent establishments and head offices. Further to the above, according to the respective, previously-mentioned transfer pricing provisions as well as the practice followed so far, transactions between head offices and permanent establishments are equally subject to the applicable transfer pricing documentation rules and should be compliant with the arm's length principle. This is also explicitly confirmed by the Interpretative Circular of the General Secretariat of Public Revenues 1097/2014.

Question 7

Greece has adopted the arm's length pricing / transfer pricing principle by means of formal rules and such rules have formal link to the OECD's transfer pricing guidelines.

Historically, the Greek Income Tax Code has adopted the arm's length principle with respect to intercompany transactions since 1980 (article 55 of Law 1041/1980). Specifically, article 39 of the Greek Income Tax Code provided that when the price paid to (or received by) related enterprises for goods sold or services rendered differs unjustifiably from the price that would be agreed upon by unrelated parties under open market conditions, the difference is added to the taxable profits of the company that either paid the higher or received the lower price. If the tax authorities concluded upon audit that a non-arm's-length transfer pricing policy existed, that determination would trigger a separate fine of 10% of the amount of the price difference, as well as additional corporate tax and surcharges for filing inaccurate corporate tax returns.

Later in 2008 transfer pricing documentation rules were adopted firstly by the Ministry of Development (Market Surveillance Department) (Law 3728/2008), as a means to exercise pressure to consumer goods companies not to increase the market prices of their goods, and later by the Ministry of Finance (Law 3775/2009, which has amended the above provisions of the Income Tax Code). After a period of four years, where the two legislatives frameworks coexisted, Law 3728/2008 (applied for transactions executed in the 2008, 2009 and 2010 financial years, by virtue of article 11 of L. 4110/2013 as well as Interpretative Circular[10] issued in 2013) of the Ministry of Development was abolished.

It should be pointed out that, apart from the political commitment of Greece to implement the OECD TP Guidelines, as an OECD member[11], Ministerial

[10] ΔΕΛ Γ 1139416 ΕΞ 2013.

[11] See Tsourouflis A., Transfer Pricing, Nomiki Bibliothiki 2010.

Circular A2-8092/2008 of the Ministry of Development referred to the approved OECD transfer pricing methods of the OECD Transfer Pricing Guidelines, whereas article 39, paragraph 6, of L. 2238/1994 mentioned that for the examination of transfer pricing cases the internationally accepted standard of OECD Transfer Pricing Guidelines is taken into account by the tax authorities.

As of 1 January 2014 the applicable legislation in Greece regarding the arm's length principle/ transfer pricing principle is the new Income Tax Code (Law 4172/2013 which has replaced Law 2238/1994) and the Tax Procedures Code (Law 4174/2013).

According to the new Greek Income Tax Code (articles 2, 50 and 51), intragroup transactions should be conform to the arm's length principle when carried out cross-border or domestically, under different economic or commercial conditions from those that would apply between non associated-parties. So any profits that would be derived by a domestic entity, but were not derived due to the application of those different economic or commercial conditions, will be included in the taxable income of the local company to the extent that such income does not decrease the amount of tax paid. More specifically, by virtue of Article 50 of L.4172/2013, *"when transactions are entered into between domestic enterprises or between a foreign and a domestic enterprise with financial terms different than those which would have been agreed between unrelated parties ("arm's length principle"), the profits that would have been achieved and were not because of these terms are considered profit of that company without affecting the validity of its accounting books and records".* It ensues that article 50 par. 1 of the GITC provides for the definition of the arm's length principle, which is the internationally recognized standard for the allocation of profits between associated entities. Moreover, paragraph 2 of article 50 of the GITC states that *"The provisions of the previous paragraph are interpreted and apply in accordance with the OECD Transfer Pricing Guidelines".*

The Greek law and, more specifically, article 21 of the GCTP provides some requirements related to transfer pricing documentation submitted to the Greek tax authorities. The first requirement is related to the filing of specific data included in the "Summarized Table of Transfer Pricing Information" or "Summary Information Table", hereinafter referred to as "SIT" to the Ministry of Finance for transactions between related parties[12]. The second requirement is related to the transfer pricing documentation in order to justify compliance with the arm's length principle. More specifically, legal entities operating in Greece are required to prepare a transfer pricing documentation file for their transactions with Greek and foreign related entities[13]. Furthermore, foreign legal

[12] The SIT is submitted electronically to the tax administration on an annual basis.

[13] Nevertheless, transactions between related parties that do not exceed the value of 100.000 euros annually are exempted from the documentation requirement provided that the gross revenues do not

persons earning income from real estate property in Greece have also the obligation to comply with the transfer pricing requirements. Greek companies are required to file to the tax authorities a master file and a local file[14]. The content of the local file should also include a justification of any tax adjustments to the profits that aim to comply with the arm's length principle.

As per the documentation requirements, to be noted, however, that, although Greece has signed on 27/01/2016 the "Multilateral Competent Authority Agreement on the Exchange of Country by Country Reports", specific legislation as per the Country-by-Country Report ("CbCR") had not been enacted until the issuance of Law 4484/2017, which transposed into the Greek tax legislation the Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation and more specifically, in the field of transfer pricing, as regards the exchange of CbC Reports[15].

Furthermore, the GITC explicitly refers to OECD transfer pricing guidelines regarding the interpretation and the application of its provisions relating to inter-company transactions. More specifically, the decree of application of the above legislation[16] contains a brief description of factors determining comparability for the purpose of testing the arm's length nature of a controlled transaction. These comparability factors are in line with the OECD transfer pricing guidelines. The Decree makes also extensive reference to the OECD transfer pricing methods[17]. Moreover, according to the practice followed so far, the

exceed the amount of 5 million euros. If the gross revenues exceed the amount of 5 million, the threshold for transfer pricing documentation increases to 200.000 euros.

[14] Pursuant to the recently issued Law 4410/2016, which introduced amendments on the Greek Code of Tax Procedures and, among other issues, on the TP Documentation Rules (article 21 Law 4174/2013), the deadline for the compilation of the TP Documentation File and the submission of the SIT has been modified. Instead of the prior deadline of four months following the fiscal year end, according to the new provisions, the TP Documentation File, consisting of the Basic TP File and the Greek TP File, should be compiled until the expiration of the deadline for the submission of the annual corporate income tax return. The TP Documentation file is accompanied by the SIT, which should also be submitted electronically within the same deadline. This practically means that the deadline now expires after the lapse of six months following the fiscal year end (e.g. for companies with FYE on 31/12/2017 the relevant deadline for the compilation of the TP Documentation File and the submission of the SIT expires on 30/6/2018, instead of 30/4/2018, which was the expiration date, pursuant to the previous regime). This provision is applicable for TP documentation files which are prepared for intragroup transactions of fiscal years commencing on 1.1.2015 onwards.

[15] Law 4484/2017 was published in the Official Government Gazette on August 01 2017.

[16] Circular 1097/2014, as modified by Circular 1144/2014 and Circular 1142/2015, especially with regard to the application of CUP method and the methodology of benchmarking studies and Circular 1227/2015 concerning the versions of databases.

[17] To be noted that under the previous regime of both L. 3728/2008 and L. 2238/1994, as modified by L. 4110/2013, the respective interpretative circulars issued (A2-8092/2008 of the Ministry of Development,

documentation of intragroup transactions in terms of compliance with the arm's length principle is based upon the OECD approved transfer pricing methods.

Furthermore, according to Article 51 of GITC, any business restructuring between associated enterprises, which includes reorganization of functions, assets, risks or business opportunities, constitutes a transfer of functions between related parties which has to be charged according to the arm's length principle, since it is concluded that an significant intangible asset is being transferred as a result of the transfer of the said functions.

Question 8

Year-end transfer pricing adjustments through the issuance of debit/credit invoices in order to achieve results compliant with the arm's length principle ("ALP") might generally be acceptable in Greece. However, they need to be substantiated and supported by both a functional and factual analysis. Further, the actual profitability ratios (i.e. following these adjustments) will be tested against the returns of third comparable companies.

Transfer pricing rules aim at ensuring that the taxpayer's reported taxable profit is right and not reduced through intercompany transactions and, in this sense, any TP adjustments by the tax authorities can only be made to the extent that they do not reduce the taxable income.

Generally, a transfer pricing adjustment needs to appear in consistency with and supported by the functional analysis of the said intercompany transaction, and the factual circumstances surrounding the said commercial dealing[18].

Pursuant to a literal interpretation of article 50 GITC, in case of non-compliance with the arm's length principle, the competent tax authorities may unilaterally proceed only to an upward adjustment of profits, since it is explicitly

as well as circular 1179/2013, issued within the frame of L. 4110/2013, which amended L. 2238/1994, under the previously applicable regime) also referred to the OECD transfer pricing methods for the documentation of intragroup transactions.

[18] Therefore, the following key concerns need further examination. The application of such policy should be depicted in the Group's transfer pricing policy and should be in accordance with the company's functional profile. As any "true-up" or "true-down" (depending on the case) mechanism plays a key role in the allocation of risks between the affiliated entities, the company's functional analysis should provide support as regards the effectiveness of the mechanism to align business rewards with risks, as these would have been expected to be reflected in an arm's length situation. The application of such policy should be supported by the factual circumstances surrounding the business transactions between the group members: what is the risk that is materialized and which is the party that should bear it from both points of view, i.e. contractually and in practice. In the event that the application of such policy is not supported by the Group's policy and the Greek company's functional and risk profile, nor by the factual circumstances, it may trigger questions within the framework of a tax audit regarding the likelihood of having a shift of functions and risks from the Greek company to the affiliated counterparty (i.e. the Greek company changing from a Distributor to an LRD).

mentioned that *"(...) the profits that would have been achieved and were not because of these terms are considered profit of that company without affecting the validity of its accounting books and records"*[19]. On the contrary, it ensues that the tax authorities are not authorized to proceed to downward adjustments of profits, although this is not explicitly provided for in the relevant provision. Moreover, according to the practice followed so far, no downward adjustment has ever been effected by the tax authorities, resulting in the reduction of taxable profits of a Greek entity subject to transfer pricing rules.

Taking this into account, the General Secretariat of Public Revenues clarified, by virtue of the Interpretative Circular[20] published in 2016, that non-tax deductible expenses that are being adjusted for tax purposes by the taxpayer himself with the submission of the relevant annual income tax return, do not fall within TP documentation requirements, even if they refer to intercompany transactions. However, such intercompany transactions, for which a relevant tax adjustment has been effected, should be included in both the Summary Information Table and the Transfer Pricing Documentation File, for completion purposes, with the indication that these transactions refer to non-tax deductible expenses, which have been adjusted for tax purposes with the submission of the annual income tax return.

Moreover, it should be clarified that the tax authorities are not very willing to accept downward, year-end adjustments effected by the taxpayers, resulting in the decrease of the Greek entity's operating profitability, or, even worse, the generation of tax losses (although a court decision No. 1088/2013 has been issued by the Athens Administrative Court of Appeal, according to which, operating losses do not imply a priori a violation of the arm's length principle) even in case that such a year-end adjustment has a solid business or commercial rationale and is justified by valid commercial reasons as well as the applicable transfer pricing rules.

In other words: i) in case of a true-up TP adjustment, the additional profit will be recognized and taxed at the applicable tax rate, whereas ii) in case of a true-down TP adjustment, it should be noted that in general Greek tax auditors would be rather skeptical and reluctant and would examine whether this is complying with a written agreement or an explicit Group TP policy and if the TP adjustment mechanism applies consistently throughout the years. In addition, it should be adequately described and supported in a TP File; provided that all

[19] Let us take the following simplified example: A product is sold from one group company to another at a price of 100. According to the tax authorities of the selling state an at arm's length price should have been 120 and it adjusts taxable profit upwards accordingly.

[20] No. ΔΕΑΦΒ 1054893 ΕΞ 2016/17.3.2016.

these are met, its tax recognition would be enhanced, but it should not be considered as indisputable.

According to both the new GITC as well as the GCTP, which were enacted within the frame of the tax reform that took place in Greece in 2013 (article 50 and 51 of L. 4172/2013 and article 21 of L. 4174/2013) and the old Income Tax Code (article 39 and 39 A of Law 2238/1994) Greek tax authorities had the competence to make an adjustment for violation of transfer pricing principle[21].

In case where the tax authorities make a transfer pricing adjustment, the taxpayer may appeal before a special committee of the Independent Authority of Public Revenue, the Directorate for Dispute Resolution ("DDR") by submitting an administrative recourse ("out-of-court appeal). The DDR has to issue a decision within a period of 120 days of the filing of the special administrative appeal. If the said appeal is explicitly rejected or the 120 days deadline elapses without issuance of any respective decision (considered as a silent rejection of the appeal) the taxpayer may appeal before the administrative courts within thirty (30) days of the notification of the decision of the committee or the silent rejection of his appeal.

Question 9

Initially, it could be supported that a respective (year-end) TP adjustment should in principle be acceptable. In any case, a TP adjustment has to result in an arm's length price, which in most cases would be supported through a benchmarking study. From a Greek transfer pricing perspective, when a benchmarking study is used to document intercompany transactions, any result that falls within the interquartile range is considered as compliant with the arm's length principle. For instance, in case the EBIT margin of the Greek company falls below the aforementioned interquartile range, the company should receive a price adjustment (true-up) in order for its EBIT margin to be within the IQR range. Again as previously mentioned, tax auditors are quite aggressive towards true down adjustments and they would tend to scrutinize the benchmarking studies and the relevant arrangements.

As previously mentioned, tax auditors are quite sceptical with true down adjustments and we have seen in the past to disallow them on the basis of general corporate tax conditions (non-productivity, resulting in non-deductibility).

[21] Regarding the transfer pricing adjustment, the GITC (article 58) provides for the imposition of specific penalties for inaccurate filing of the income tax return. More specifically, it stipulates that in the case that the additional tax is between 5% and 20% of the tax amount deriving from the initial tax return, the penalty is equal to 10%. In the case that the additional tax is greater than 20% and 50% of the tax amount deriving from the initial tax return, the penalty is equal to 25%. Finally, in the case that the additional tax is greater than 50% of the tax amount deriving from the initial tax return, the penalty is equal to 100%.

However, these cases refer to the period where no TP documentation rules existed in Greece. We consider that, currently, true down adjustments are better defendable in terms of their tax recognition but this would generally depend to the specific facts of each case, taking also into account that the Greek tax auditors are very aggressive while conducting tax and transfer pricing audits.

Please note that no specific rules or instructions have been released by the Greek authorities as regards the treatment of TP adjustments from a Greek customs point of view. It should be also mentioned that the Greek customs legislation is quite strict and formalistic and does not allow any room for changes in the import prices, since this would affect the basis of imposition of customs. Especially in certain industries (e.g. car industry), TP adjustments have raised significant issues from the part of the customs authorities. For this reason, it is strongly recommended to avoid TP adjustments to COGS, in cases customs duties or luxury tax are involved. The customs authorities may challenge an increase/decrease in COGS by issuing supplementary debit/credit invoices. It is possible an adjustment to COGS to lead to differentiations in the calculation of the customs taxable value of tax due and tax burdens already paid which in turn would create sufficient risk such as the imposition of certain custom penalties and issues of contraband.

Furthermore, there are no specific rules as regards the VAT treatment of transfer pricing adjustments in Greece, and no instructions have been released by the Greek State in this regard. In practice, agreed TP adjustments relating to sales of specific goods and affecting the sales price are taken into consideration and are recorded in the respective VAT returns.

In order of a TP adjustment to be accepted, it is strongly recommended to have a written agreement between the sales entity and the principal, which will describe the functions performed by the local sales entity and would be the basis for its characterization for transfer pricing purposes (i.e. limited risk distributor). Furthermore, the agreement should adequately describe the TP adjustment mechanism and the form that this will take. Especially, if the TP adjustment is effected through a marketing support recharge, the agreement should include adequate description in which cases this will apply, what type of marketing expenses will cover, to which extent etc. Apart from the existence of a written agreement, a TP adjustment should be documented through the relevant TP file according to the provisions set out in the articles of Law 4172/2013 and Law 4174/2013 (Greek Transfer Pricing legislation) as amended and currently in force. To be noted that there is not any specific threshold/adjustment amount.

In general, as already mentioned under Question 8, the tax auditors are very aggressive and appear not to be willing to accept downward adjustments, resulting in a decrease of the Greek entity's profitability.

In case a respective tax dispute arises from the non-recognition of a downward adjustment, apart from the submission of an administrative recourse to the DDR and the subsequent filing of a court appeal, the alternative of a MAP is also provided for by the Greek tax legislation. Recently, (Law 4438/2016[22]) a new Article 63A is introduced in the Procedural Tax Code (Law 4174/2013) in order to implement the MAP. The article 63A the Procedural Tax Code is in line with double tax treaties concluded by Greece and the EU Arbitration Convention (90/436/EC) on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, which was ratified by Greece in 1994 under Law 2216/1994. The MAP can be invoked to resolve issues arising in the context of an applicable double tax treaty and also respective transfer pricing issues (according to Article 9 of the Model Tax Convention and the respective DTAs). The Greek tax authorities will have the power to conduct the MAP with the relevant foreign tax authorities. The results of a MAP will be effective upon issuance of a mutual agreement decision. The taxpayer will be notified of the results of a MAP, and should accept them within a 60 day period.

Furthermore, a decision (1049/2017) issued by the Director of the Independent Public Revenue Authority (IPRA) (referred to as the General Secretary of Public Revenue prior to 1 January 2017), published in the Greek government gazette on 7 April 2017, contains comprehensive guidance on the application of the mutual agreement procedure (MAP) in Greece's tax treaties. The decision is applicable for MAP requests filed as from the date of its publication.

Greece currently has 57 tax treaties, which (except for the treaty with the UK) include MAP articles that are based on article 25 of the OECD model treaty. Prior to the decision of the IPRA, the MAP had been used only sporadically in Greece because there were no relevant guidelines. The decision addresses all stages of the MAP process.

It is worth noting that a taxpayer may seek competent authority assistance under a MAP indicatively with respect to cases where a taxpayer is subject to additional tax in one country as a result of a transfer pricing adjustment made in the other country, as well as cases of attribution of profits to permanent establishments, among others.

Last but not least, Greece was one of the 68 countries and jurisdictions that participated in the signing ceremony for the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) on 7 June 2017. Each of the signatory countries now must ratify the MLI in accordance with its domestic procedures.

[22] Law 4438/2016 is effective from the day of his publication in the Official Gazette on November 28 2016.

Question 10

The new GCTP (L. 4174/2013) has inserted a GAAR into the Greek tax legislation for the first time, effective from 01.01.2014 onwards[23]. Such a GAAR has been based upon the respective GAAR of the Commission Recommendation on Aggressive Tax Planning ("EU GAAR"), which was published on December 6, 2012. Due to the lack of respective experience of the tax administration, an issue may be created in relation to the interpretation and application of this provision. Such a development has contributed to a new direction of the Greek tax legislation to a substance over form doctrine.

According to the domestic GAAR, the Greek tax administration may disregard any artificial agreement or series or arrangements that are aimed at tax avoidance and lead to a tax advantage. Such arrangements are treated according to their commercial substance. An arrangement/series of arrangements are considered artificial if lacking commercial substance. The goal of an agreement/series of arrangements is perceived to be tax avoidance if, regardless of taxpayer's subjective intention, it is contrary to the object, spirit and purpose of the tax provisions that would otherwise apply.

To be noted that the WHT relief available for dividends under tax treaties overrules the GAAR, since Double Tax Treaties, ratified by a law, according to the internal ratification procedures, supersede the Greek domestic legislation, pursuant to the Greek Constitution, thus the impact of the GAAR on tax treaty relief is expected to be low.

Under the article 38 of the GCTP, a general provision against the abuse of possibilities and discretions of configuring legal relations provided by legislation to the extent that this aimed to tax avoidance and resulted to, due to non-taxation, to the non-payment of tax either in whole or in part, is introduced for the first time in Greek tax law. In particular, it is provided that while determining the tax amount, the tax authorities have the right to disregard any configuration of legal relations, which is artificially done (artificial manipulation) in order to avoid taxation and due to that the configuration results in obtaining tax benefits.

It is clarified that the tax authorities have not the discretion, as might one incorrectly consider drifted by the wording of the relevant provision, but have a circumcised power. This also arises from the continuity of the provision, which provides that in such case, when the tax authorities note an artificial manipulation as mentioned above, they are required to aim, for tax purposes, at their particular substance from a purely economic perspective.

[23] See K. Savvaidou, The introduction in the Greek tax law of a general provision against the abuse of the tax legislation in order to faire face of the tax avoidance in the light of the european and international developments, Bulletin of Tax Legislation (*Δ.Φ.Ν.),* 2017, p.259-296 and p.323-354.

The crucial elements of the actual provision, which must be met in order for the tax authorities to have the right to ignore a tax purposes legal relations' configuration and which must be proved (burden of proof) by the tax authorities, are the following:

a) Manipulation or series of manipulations.
b) This manipulation (or a series of manipulations) should be artificial.
c) The artificial manipulation should aim at anti – avoidance.
d) The artificial manipulation should result in a tax advantage.

a) With the option of using the term "arrangement" (manipulation), the legislator intends to include every human action in the regulatory field of the provision, mainly of course, but not only, unilateral legal acts and contracts, in order to be clear that this is a provision of general application and can thus be able to include every case which is possibly beyond the perception of the legislator at that time. It is also clarified that not only the independent actions are included, but also the complex and the combined ones. More specifically, the term "arrangement" is defined as any transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking or event and may comprise more than one step or part.

b) A requirement, in order for a manipulation to be disregarded by the tax authorities a manipulation, as indicated above, is to be feigned ("artificial") and by that the provision means the obvious, namely that the manipulation has no commercial or even economic substance, in other words it is an unexpected action of an entrepreneur or a professional. This is mentioned explicitly by the provision as one of the criteria that the tax authorities take into account, in order to consider the feigned (artificial) or not of a manipulation, but in fact it summarizes all the mentioned criteria[24].

The law requires for the manipulation to be «artificial» in order for the tax authorities to have actually the right not to take it into account, it entails that if a

[24] Specifically, the tax authorities shall consider whether (each alternative or more):
1) The legal description of the individual stages which consist a manipulation is incompatible with the legal substance of the whole manipulation.
2) The manipulation or a series of manipulations is applied in a manner that is not compatible with an ordinary (logical, normal) business behavior.
3) The manipulation or a series of manipulations includes elements which result in the hedging or the annulment between them.
4) The conclusion of transactions has a rotatory nature.
5) The manipulation or an array of manipulations leads to a significant tax advantage, but this is not reflected on the business risks, which the taxpayer undertakes, or on his cash flows.
6) The expected profit margin before the tax is significant compared to the amount of the expected tax advantage.

manipulation results in a tax advantage, without being feigned in that sense, then the tax authorities have no right not to take it into account, but have to respect it.

c) Further, the provision clarifies that if a manipulation aims at tax evasion, this is not considered subjectively, based on the possible intention of the taxpayer / taxpayers, but objectively, based on whether it is objectively contrary to the object, the concept and the purpose of the tax provisions that would be applied otherwise. Namely, a manipulation or series of manipulations may be considered as aiming at tax avoidance if it is contrary to the object, the purpose and the intention of the tax provisions which would apply otherwise and this is assessed irrespective of the intention of the parties to avoid taxes.

Furthermore, the tax evasion should be the main (crucial, important, essential) purpose of the present artificial manipulation and this will occur; when any other target which is or could be attributed to the manipulation seems trivial, taking into account all the circumstances in the case.

d) To ascertain whether the artificial manipulation has indeed resulted in a tax advantage, the tax authorities should compare the amount of the tax due, given the present manipulation, with the amount due by the same taxpayer and under the same conditions, if this manipulation would not be taken into account.

It follows that in any case the tax authorities should be able to clearly substantiate how the artificially formed legal relations should be configured by the taxpayer or taxpayers, so that they have a commercial or an economic substance in order to result to the amount of the tax due without the artificial manipulation and difference tax due finally results.

Furthermore, Greece has introduced several Specific Anti-Avoidance Rules ("SAARs"), i.e. special legislation (lex specialis) dealing with interest deduction limitations (thin capitalization rules), transfer pricing rules, CFC rules etc. It should also be stressed out that Law 4378/2016, which transposes the amended EU parent-subsidiary directive into Greek law (applicable as from 1 January 2016), provide for an anti-avoidance rule, according to which the benefits of the EU parent-subsidiary directive (i.e. income tax and withholding tax exemptions) will not be granted for intragroup dividends if the main purpose, or one of the main purposes, of the arrangement is to obtain a tax advantage and avoid taxation, and the arrangement does not have a justifiable commercial reason.

Finally, Greek tax law does not provide explicitly if the general anti-abuse rule ('GAAR') could be applied in a case of abuse as a back-up to lex specialis, that turns out to be ineffective in a given case, since no relevant guidance as per the interpretation and application of the GAAR has been issued so far by the IPRA. This issue has not been dealt by the jurisprudence of the Greek administrative courts, since the introduction of the GAAR into the Greek domestic tax legislation is very recent and no relevant case law exists. Moreover, unlike other

countries (such as UK, USA etc.) no jurisprudential recognition of the concept of "tax abuse" existed in the Greek tax case law before the enactment of the Greek GAAR. According to the theory developed in Greece, regarding the hierarchy or the coordination between the different rules (GAAR and SAAR), as well as the general interpretative principle, according to which "lex specialis derogat legi generali", it is argued that SAAR should be applied in the first place and GAAR should only be applied when there is not an applicable SAAR in the case under examination, as a provision of last resort (ultimum refugium). Also, according to a certain approach, the question of coordination of the above measures could be resolved through the principle of proportionality, in the sense that depending on the case, the measures chosen by the Greek tax authorities should be the ones that would bring the higher amount of tax to the treasury, since the financial public interest is synonymous with the general interest. However, this solution could be judged against the principle of tax certainty[25]. In any case, a respective interpretative decision of the IPRA should be issued, in order to clarify these aspects and provide further guidance to both taxpayers and tax administrations as per the application of the GAAR and its relation and interaction with SAARs.

Part II

Question 11
The Greek legislation provides for the recovery of illegal and incompatible state aid in various laws, some of them applicable in all cases and few of them in the specific case of fiscal state aid.

I. General rules for the recovery of state aid
The general provisions for the recovery of state aid, which also apply regarding the recovery of fiscal state aid, are included in article 22 of Greek Law 4002/2011, as amended by both article 75 § 2 of Greek Law 4172/2013 and article 1 para. B.10.8 of Greek Law 4152/2013. These provisions specify the exact procedure to be followed, in order for illegal and incompatible state aid to be recovered: at the initiative of the competent authority, a copy of the recovery decision of the European Commission is sent to the recipient of the aid, along with a written summons ordering the payment of the amount due within a certain deadline. If this deadline lapses, then the competent authority forwards all necessary information and documents to the competent Tax Authority ('D.O.Y'), in order for

[25] E. Theocharopoulou, New exchange of information versus tax solutions of equivalent effect, Greece, presentation in EATLP conference.

the amount due to be fully recovered pursuant to the provisions of the Code of Public Revenue Collection ('KEDE'-Legislative Decree-Law 356/1974).

Furthermore, article 3 par. 6 of the Code of Public Revenue Collection ('KEDE'), as amended by article 75 of Greek Law 4172/2013, provides for the refund of incompatible state aid in a lump-sum. Additionally, article 9 of KEDE includes a list of possible actions that the competent administrative authority has the discretion to undertake, in order to ensure the collection of public revenues, including incompatible state aid.

II. Specific rules for the recovery of fiscal state aid

In two important recovery cases, presented below, Greece has introduced specific legislation in order to fully comply with the Commission's decision. These cases concerned specifically the creation of a special tax-exempt reserve fund for companies during the years 2004-2008 and the tax exemption on earnings from exports during the financial year 1987. However, it was not until the ECJ had condemned Greece for failure to act that the Greek authorities took the measures necessary for the recovery of the said incompatible state aid by issuing new legal provisions specifically for that purpose.

a) Special tax-exempt reserve funds

Articles 2 and 3 of Greek Law 3220/2004 provided for a special tax-exempt reserve fund, which certain undertakings could form out of their earnings during the years 2004-2008. Such companies were processing companies, energy production companies, companies providing quality services, etc. (as specifically described in article 3 of Greek Law 2601/1998), but also gas supplying companies, as well as any other companies using natural gas in their activities. This special tax-exempt reserve fund should amount up to 35% for each undertaking's total retained earnings and it should be spent for investments of at least equal value within a period of the three years following its formation and under certain conditions provided in law.

103. However, the European Commission concluded that the above tax-exempt reserve fund constituted unlawful and incompatible state aid, hence it ordered its recovery (Commission Decision no. E(2008)3521/18-7-2007). Following the Commission decision, the Greek Parliament adopted Law 3614/2007, wherein it reiterated (article 47) that, since such tax-exempt reserve fund constituted incompatible state aid, it was retroactively subject to taxation according to the tax rates which were in force at the time of its formation. Yet, some exceptions to the recovery order were provided only for cases that might be considered to constitute compatible state aid, falling within the scope either of block exemption regulations, such as De minimis Regulation, Regulations 68/2001 &

70/2001 etc., or of Commission's Guidelines on regional state aid, R&D Framework etc. For the purpose of refunding the aid, companies were asked to file a supplementary income tax return to the competent Tax Authority, for the latter to calculate the corresponding tax and relevant interest. By act of delegation, Ministerial Decisions No. 1147 and 1148/11-12-2007 laid down detailed guidelines for the application of the aforementioned article 47 and provided for the form and contents of the supplementary income tax return.

Nevertheless, the European Commission considered that the newly adopted law 3614/2007 did not fully serve the purpose of recovery of the incompatible state aid. More specifically, the Commission was not satisfied with the data the Greek authorities provided as regards the lists with the recipients of the incompatible state aid and it also questioned the method used to calculate the amount to be refunded. Therefore, it brought before the European Court of Justice an action for failure of Greece to fulfil obligations. Following the Court's judgment (ECJ C-354/10, European Commission/Greece, 01.03.2012, ECLI:EU:C:2012:109), the Greek Parliament adopted Law 4099/2012, which, in its article 169 (as further amended by article 67 § 2 of Greek Law 4170/2013), provided in every detail for the recovery of the said incompatible state aid. By act of delegation, Ministerial Decision No. 1231/10-10-2013 provided for further guidelines about the calculation method for the amount to be recovered, along with specific calculation examples, as well as about the exact procedure to be followed by the competent authorities, in order for them to identify both the recipients obliged to pay the said incompatible aid back and those who might benefit from the exemptions from recovery according to the Commission's decision.

b) Tax exemption on earnings from exports

Article 22 of the Greek Law 1796/1988, which ratified a relevant Ministerial Decision (No. E.3789/128/15.3.1988), introduced a special single tax on the total net income of certain undertakings in the financial year 1987, exempting, however, any income deriving from the undertakings' export operations.

Following a formal investigation procedure, the Commission found the said scheme to constitute incompatible and unlawful state aid, since it essentially supported exports, distorted competition and was likely to affect trade among Member States. Consequently, the Commission ordered its recovery (Decision no. 89/659/EEC). Thereafter, since Greece did not abide by the said Commission decision, the Commission brought an action for failure to fulfil obligations before the European Court, which concluded that Greece was actually in breach of its obligations under EEC Treaty (Court of Justice C-183/91, European Commission/Greece, 10.06.1993, ECLI:EU:C:1993:233).

Pursuant to the abovementioned judgment of the Court, the Greek Parliament adopted Law 2214/1994, which in its article 21 amended the above mentioned article 22 of Law 1796/1988 and restricted the exemption in question only to the proportion of earnings deriving from export operations to non-EU countries. The procedure to be followed for the recovery of the incompatible state aid was also described in the same article: all undertakings engaged in export operations during the financial year 1987 were obliged, within a month from the official publication of Law 2214/1994 in the Government Gazette, to submit a supplementary declaration to the competent Tax Authority, stating the gross income deriving from exports to non-EU countries during that year. Any amount due, according to this provision, ought to be paid in six monthly installments.

Question 12

Various actions concerning the recovery of fiscal state aid have been brought before the Greek administrative courts, seeking to suspend the application of and annul the relevant act of the national Tax Authority ordering the refund. However, very few of them were successful.

I. Case-law regarding the recovery of special tax-exempt reserve fund

The recovery of special tax-exempt reserve fund[26] has been treated by the Greek courts in a contradictory way:

a) Three-Member Administrative Court of Appeal of Athens (Trimeles Diikitiko Efetio of Athens), Judgments 4357/2014 & 4358/2014
The applicant undertaking asked for the annulment of the Notice of Assessment issued by the competent Tax Authority, which ordered the recovery of the special tax-exempt reserve fund. The Court took under consideration the content of article 78 para. 2 of the Greek Constitution, which prohibits the imposition of any tax by a retroactive statute effective prior to the financial year preceding the imposition of the tax. Consequently, it found that the provisions of the aforementioned[27] article 47 of Law 3614, enacted in 2007, constituted a burdensome change in the fiscal status of undertakings having formed a tax-exempt reserve fund, according to a law of 2004. And that is because the retroactive effect of Law 3614/2007 goes beyond the year preceding the imposition of the said fiscal obligation, inasmuch as it concerned the tax-exempt reserve fund created during the financial years 2004 and 2005. The Court concluded that such provisions contravene the said article of the Greek Constitution

[26] Cf. Question 11, chapter II (a).
[27] Cf. Question 11, chapter II (a), para. 5.

and, thus, shall remain inapplicable. Moreover, the Court considered that the mere fact that the provisions of Law 3220/2004 (articles 2 and 3) contradict those of article 107 (former 87) of the TFEU and that the TFEU enjoys supremacy over national law, according to article 28 para. 1 of the Greek Constitution, does not mean that the TFEU enjoys supremacy over the Greek Constitution (reference also to Council of State's decision no. 2067/2011).

b) Three-Member Administrative Court of Appeal of Athens (Trimeles Diikitiko Efetio of Athens), Judgments 3996/2016 & 2957/2013)
The above judgments have reversed previous case law of the same Court of Appeal, which in judgments nos 3996/2016 and 2957/2013 had ruled that, since the Commission found that the state aid scheme implemented pursuant to Law 3220/2004 was incompatible with the internal market, the provisions of article 47 of Law 3614/2007, which was adopted in response to the Commission's decision and within the framework of the Greek authorities' obligation to recover incompatible state aid, do not constitute a retroactive withdrawal of the tax exemption and, therefore, they are not in breach of article 78 § 2 of the Greek Constitution. Nonetheless, the Court avoided stating that the TFEU provisions on state aid enjoy supremacy over the national provisions on the prohibition of retroactive effect of a burdensome fiscal obligation.

c) It is also worth mentioning some other *judgments of the Administrative Court of Appeal of Athens* regarding the recovery of tax exempt reserve funds, whereby the Court concluded that the applicant undertaking did not fall within the scope of article 47 § 1 of Law 3614/2007, therefore it was not obliged to refund any incompatible state aid. It should be noted that these cases were brought before the courts either because some undertakings submitted by mistake a supplementary tax return, which then they were seeking to annul, or because the relevant Tax Authority issued a supplementary notice of assessment, considering that these undertakings were subject to the provisions of article 47 of Law 3614/2007.

More specifically:

1. *Three-Member Administrative Court of Appeal of Athens (Trimeles Diikitiko Efetio), Judgment 3996/2016:* if investment costs incurring under Law 3220/2004 could, however, be considered to fall under the provisions of the previously existing Law 2601/1998, which was still in force when these costs incurred, such costs shall not be deemed to constitute incompatible state aid to be recovered, since no legal provision imposes the recov-

ery of investment costs that incurred before the entry into force of Law 3220/2004 or of any investment cost that could occur without state aid.

2. *Three-Member Administrative Court of Appeal of Athens (Trimeles Diikitiko Efetio), Judgment 1400/2014:* the applicant undertaking filed a supplementary tax return pursuant to Law 3614/2007, although it was not obliged to, due to an error of law. More specifically, it fell within one of the exceptions mentioned under article 47 para. 2 b of Law 3614/2007, since it was a medium-size enterprise (as defined in article 2 of Annex I of the Regulation (EC) 70/01) during the year in question and it formed a tax-exempt reserve fund being exempted from tax on its revenue amounting to more than 100.000 euros. Thus, it was not subject to supplementary tax and, consequently, the court concluded that the supplementary tax return shall be withdrawn and any tax amount unduly paid shall be returned to the applicant.
3. *Three-Member Administrative Court of Appeal of Athens (Trimeles Diikitiko Efetio), Judgment 1087/2012:* the Court rejected the appeal lodged by the Greek State against a judgment annulling a recording of a supplementary tax amount. The Greek State argued that lodging of an action against the supplementary Notice of Assessment does not suspend the immediate issuance of the relevant tax bill, pursuant to article 47 para. 4 of Law 3614/2007. The Court of Appeal made clear that said article applies to cases where undertakings have already submitted a refund declaration, thereby accepting their obligation to refund. However, it ruled that the above article does not apply to undertakings, which have not submitted such declaration, believing that their expenses fall under either Law 2601/1998 or Law 3299/2004, like the undertaking in the case at hand. In these cases, lodging of an action against the supplementary Notice of Assessment suspends its application, according to article 69 para. 2a' of the Greek Administrative Procedure Code.

II. Case-law regarding the tax exemption on earnings from exports

The recovery of this single tax, according to article 21 of Law 2214/1994[28] has been assessed by the Council of State in several cases.

More specifically, in *Judgments 3157/2007, 49/2006, 1861/2004, 115/2004, 1916-1918/2002, 1333-1335/2002 and 1957/1999, the Council of State (Simvoulio tis Epikratias)* dealt with the issue whether article 21 of Law 2214/1994, which was introduced following the aforementioned[29] judgment of the ECJ and imposed

[28] Cf. Question 11, chapter II (b), para. 9.
[29] Cf. Question 11, chapter II (b), para. 9.

retrospectively a single tax on the earnings from exports to EU countries that were initially illegally exempted from such tax, constituted a burdensome fiscal change with a retroactive effect of more than a year. It needs to be noted that under article 78 § 2 of the Greek Constitution, a tax or any other financial charge may not be imposed by a retroactive statute effective prior to the financial year preceding the imposition of the tax. The Council of State considered that the Ministerial Decision E.3789/128/15.3.1988[30] was void ab initio, as contrary to article 92 of the EEC Treaty (article 107 para. 1 TFEU). Therefore, the provisions in question, demanding the recovery of the unlawful aid granted pursuant to the said Ministerial Decision, did not constitute a change with retroactive effect in the applicant undertakings' fiscal status. Thus, these provisions were not in breach of article 78 § 2 of the Greek Constitution.

III. Case-law regarding the recovery of state aid granted to several Casinos

Following the Commission's Decision 2011/716/EU (OJ 2011 L 285/25), the competent Greek authorities ordered the recovery of incompatible state aid, granted through both the fixing of a uniform 80% levy on the price of admission tickets to casinos and the setting of two unequal regulated prices of admission tickets for publicly and privately owned casinos, thereby placing the latter at a competitive disadvantage.

One of the undertakings was obliged to pay back the said aid addressed itself to the Three-Member Administrative Court of First Instance of Athens (Trimeles Diikitiko Protodikio) and brought an action seeking to annul the national act for the refund of aid, issued pursuant to the Commission's recovery Decision. At the same time, the applicant brought before the same court an application for stay of the abovementioned act, arguing that the action for annulment would be successful, whereas the immediate payment of the amount asked would cause irreparable financial damage to the applicant. Moreover, a shareholder of the applicant undertaking, owing 49% of its capital and having the right to intervene in the pending trial, argued before the court that it had lodged an action with the General Court of EU, seeking to annul the aforementioned Commission Decision.

The Three-Member Administrative Court of First Instance of Athens (Trimeles Diikitiko Protodikio of Athens), in its judgment 4392/2012, upheld the application for stay, since it assessed that the damage to be caused to the applicant following the immediate enforcement of the said administrative act would be irreparable or difficult to repair. The court delivered its judgment on the basis of article 202 of the Greek Administrative Procedure Code, which at that time provided for less strict conditions than those of the Commission Recovery

[30] Cf. Question 11, chapter II (b), para. 7.

Notice of 2007. More specifically, according to the above article 202, an application for stay of an administrative act could be upheld by the court, if the latter considered that the main action lodged by the applicant was manifestly well-founded. If this could not be proven, then the application could be upheld by the Court only if the latter considered that the immediate enforcement of the said act would cause irreparable or difficult to repair damage to the applicant. In other words, this article gave the national judge the discretion to uphold an application for stay of an administrative act ordering the recovery of incompatible state aid on the basis of the above, even if one or more of the stricter criteria referred to in paragraphs 58 & 59 of the Recovery Notice (OJ C 272, 15.11.2007, p. 4–17) were not met.

However, later on, article 202 of Greek Administrative Procedure Code was amended twice in 2013, in order to include the stricter conditions depicted in the Commission Recovery Notice of 2007: first, by Law 4152/2013 (article one para. B.10.6) and further by Law 4170/2013 (article 73 para. 2).

Question 13

According to various international and EU treaties, Greece has undertaken certain obligations in order to ensure the protection of property and foreign investments within its territory.

In particular, Greece has co-signed the European Convention on Human Rights, the Universal Declaration of Human Rights and the EU Charter of Fundamental Rights, which all three guarantee the protection of property as a human right. Furthermore, Greece is a contracting party to numerous 'Double Tax Treaties' and 'Bilateral Investment Treaties', which all aim to the protection of property and foreign investments.

I. European Convention on Human Rights

According to Art. 1 of First Protocol to the European Convention on Human Rights (ECHR) which Greece has signed and validated by the Legislative Decree 53/1974 (Gov.Gaz. 256/A), every natural or legal person is entitled to the peaceful enjoyment of his possessions, the deprivation of which is in principle forbidden. Only two exceptions to this rule are permitted and justified. The first concerns limitations of property protection that are established only for reasons of public interest under the conditions set by law and by the general principles of international law. The second is about the preserved right of Greece to enforce laws in order to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

II. Universal Declaration of Human Rights

Art. 17 of Universal Declaration of Human Rights, a non legally binding text that has nonetheless high political importance, also establishes a person's right to own property alone or in association with others, which right cannot be arbitrarily deprived.

III. EU Charter of Fundamental Rights

Greece has undertaken similar obligations on the protection of property under the EU Charter of Fundamental Rights, which is part of European primary law and prevails over national law after the validation of Lisbon Treaty by the Greek Parliament. Art 17 of the Charter guarantees a person's right to own, use, dispose of and bequeath its lawfully acquired possessions, from which they cannot be deprived, with the exception of public interest reasons and provided that a fair compensation, paid in good time, will be awarded to cover the loss of property. Furthermore, the provision establishes that the use of property may be regulated by law in so far as it is necessary for the general interest and notes that intellectual property is also protected.

IV. Protection of property under Double Tax Treaties

General Remarks – Greece has signed bilateral tax agreements with other countries, the so-called double tax treaties, which clarify the cross border taxation rights and in that sense protect property. The reason is to avoid the phenomenon of international juridical double taxation, where the same income or profits of the same person (corporate or individual) are taxed multiple times in Greece and in other countries. Consequently, double tax treaties contribute de facto to the protection of property, since they ensure that a person will not be double-taxed for the same income or profit by two countries[31].

Protection of property – Double tax treaties allow undertakings to transact in Greek territory with a degree of certainty both on the part of individuals, partnerships or corporate entities and on the part of the Greek Government. The tax payers will pay the aforementioned taxes, as regulated in the certain treaty, in one state and tax exemption or reductions will be applicable in the other. What is more, double tax treaties include provisions on exchange of information between the national and foreign tax public services, which enable Greece and

[31] Apart from the analyzed relation between tax and protection of property, a national legislation can also affect through corporate taxation specifically foreign investments, as taxes figure prominently in the financial calculations of businesses. For details see S.A. SPYRIDAKIS, Government policy and foreign direct investment, 1999, p. 2.

the contracting states to ensure that they retain their tax jurisdiction and minimize tax fraud. According to the Greek International Economic Relations Directorate, Greece has signed 57 double tax treaties up to this date[32], which over the years have become more standardized following the OECD Model Convention on Income and Capital. This Model Convention is used by Greece, member state of OECD, as a basis for the double tax treaties. Also the OECD Commentaries on the Model Convention serve as a tool for their interpretation, while their implementation lies with Greek legal procedure and case law.

Field of application – The double tax treaties that Greece signs apply to individuals or companies with a residence in Greek territory and only in respect of taxes especially mentioned in the treaties. If a case concerns elements of income or capital that are omitted in a double tax treaty, and therefore excluded from its scope, Greek tax legislation is to be implemented. Double tax treaties signed by Greece regulate cases where the subject of the tax is a resident of both Greece and the contracting state, defining their status as following: "a) they shall be deemed to be a resident only of the State in which they have a permanent home available to them; if they have a permanent home available to them in both States, they shall be deemed to be a resident only of the State with which their personal and economic relations are closer (centre of vital interests); b) if the State in which they have their centre of vital interests cannot be determined, or if they have not a permanent home available to them in either State, they shall be deemed to be a resident only of the State in which they have an habitual abode; c) if they have an habitual abode in both States or in neither of them, they shall be deemed to be a resident only of the State of which they are a national; d) if they are a national of both States or of neither of them, the competent authorities of the contracting states shall settle the question by mutual agreement"[33].

V. Bilateral Investment Treaties (BITs)

General remarks – Greek state's international obligations, as far as the protection and promotion of foreign investments in Greece are concerned, arise from the 'Bilateral Investment Treaties' ('BITs'), signed with third states in view of giving the foreign investors better access to Greek national market and on fairer terms. Greece has currently signed BITs with 47 countries[34]. When Greece signs a BIT with another country as a contracting partner, both countries agree to

[32] The full list is available at http://www.gsis.gr/gsis/info/gsis_site/ddos/b.html.
[33] Art. 4 par. 2 of OECD Model Convention.
[34] According to UNCTAD. The list is available at http://investmentpolicyhub.unctad.org/IIA/CountryBits/81#iiaInnerMenu.

provide mutual protection to one another, as far as foreign investments are concerned. A BIT provides major benefits for foreign investors in Greece, including fair treatment and equitable to the one reserved for Greek nationals, protection from expropriation and performance requirements for investments, and access to neutral dispute settlement.

Protected investments – Under BITs' common provisions, every kind of asset invested in the Greek territory by a foreign investor of the one contracting state is protected. The definition of foreign investment under BITs, despite the need to be examined in concreto in each specific case[35], covers particularly both movable and immovable property in Greece, as well as any rights in rem, such as servitudes, usufructs, mortgages or pledges, shares, stocks and any form of participation in companies, claims to money and loans connected to investments, intellectual property rights, concessions to cultivation, exploitation and extraction of natural resources. It is noted that any alteration in the form in which assets are invested in Greece shall not affect their character as investments, provided that Greek laws and regulations are not violated.

The definition of "foreign Investors" in Greek territory – In respect of the BITs that Greece has signed so far, the term "investors" refers to every natural person, having citizenship, permanent residence or main place of business in the contracting state, as well as to legal entities having registered seat, central management or main place of business in that state, who carry out investments in the Greek territory. The latter includes land, sea and submarine areas over which Greece exercises sovereign rights or jurisdiction in conformity to international law.

Content of protection – BITs oblige Greece to create "favorable, stable and transparent conditions" for the investors of the contracting party by including special provisions within the framework of Greek national law, aiming to the promotion and protection of foreign investments in Greece. More specifically, they shall enjoy "full protection and security", while Greece is obliged to refrain from "arbitrary or discriminatory measures" as far as management, maintenance, use, or disposal of the investments are concerned[36].

The "most favored nation treatment" provision – Apart from the aforementioned obligations, the principle of the most favored nation treatment ensures that

[35] A-S. Georgiadou, The regulation of Foreign Direct Investments under International, European and Greek Law, 2004, p. 85.
[36] Usually Art. 2 of BITs.

Greece treats foreign investors (nationals of a BIT contracting party) at least as favorably as Greek investors and foreign investors from third states (that have not signed a BIT with Greece). However, Greece is not obliged to recognize in favour of the investors of the contracting party the same benefits that recognizes to other investors who are nationals of states participating in an existing or future free trade area, custom or economic union and any other similar international agreement, the most typical example of which is the European Union. Furthermore, in case the provisions of BITs present any inconsistency to provisions of double tax treaties, they shall subside[37].

Settlement of foreign investment disputes – The disputes between the Greek state and foreign investors from states, that have signed BITS with Greece, are settled by international arbitration according to the relevant BITs clause, that recognizes the right of investors to submit their dispute either to an ad hoc tribunal established under the rules of UNCITRAL, or to the International Centre for the Settlement of Investment Disputes (ICSID). In this framework, Greece has signed the Washington Convention (1965) for the establishment of the International Centre for the Settlement of Investment Disputes (ICSID) and the Seoul Convention (1985) for the establishment of the Multilateral Investment Guarantee Agency (MIGA). Both ICSID and MIGA, international organizations of the World Bank Group, have achieved the "depoliticization of investment disputes" as they have restricted the foreign state's diplomatic protection, when the foreign investor is facing damages due to measures implemented by the host state, and offer the chance for impartial and independent settlement of foreign investment disputes[38]. Until now, ICSID has treated only three cases against Greece, one of which has been dismissed and the other two are still pending, as it is analysed below (under para 11&12).

Legitimate expectations from BITs- According to ICSID case law[39], the official acts of the host state about foreign investments, that may be considered, under national law, non-existent, null, void or susceptible to invalidation, are valid, as far as the obligations that this state undertook are concerned, due to the fact that these acts *"were cloaked with the mantle of governmental authority and communicated as such to foreign investors who relied on them in making their investments"*[40].

[37] Ibid Art. 3.

[38] I. Shibata, Towards a greater depoliticization of Investment disputes, 1 ICSID Rev. FILJ 1, 1986.

[39] P. Glavinis, International Economic Law, 2009, p. 489, and reference to ICSID, 20.05.1992, Case Southern Pasific Properties (Middle East) Limited v. Egypt, as key judgment about the concept of the legitimate expectations from BITs.

[40] ICSID Award, Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, published in: ICSID *Rev.-FILJ* 1993, p. 328 no 82-83.

ICSID Case Law on sovereign debt and BITs – The case *Poštová banka and Istrokapital v. Greece* (ICSID Case No. ARB/13/8) concerns the issue of property and foreign investment rights affected by a subsequent Greek law adopted in accordance to Greece's 2012 sovereign debt restructuring and in the context of the financial crisis. The claims against Greece were submitted to ICSID on the basis of the Agreement between the Government of the Hellenic Republic and the Government of Czech and Slovak Federal Republic for the Promotion and Reciprocal Protection of Investment, dated on 03.06.1991[41], the Agreement between the Government of the Hellenic Republic and the Government of the Republic of Cyprus on the Mutual Promotion of Investments, dated on 30.03.1992[42], and the ICSID Convention. In this case, the ad hoc ICSID Committee, with its decision that has become final, dismissed the claimants' complaints against Greece, which arose out of the enactment, in the context of Greece's 2012 sovereign debt restructuring, of a Greek law amending retroactively and unilaterally sovereign bond terms by the Greek Government, allegedly allowing the imposition of new terms upon bondholders against their consent, if a supermajority of other bondholders consented. The Committee validated the dismissal of the ICSID Tribunal, the majority of which decided that the element of contribution to an economic venture and the existence of a specific operational risk were not present in order to fulfill the definition of investment, which, though broad, is subject to limitations according to Art. 1, par. 1 of the Slovakia-Greece BIT, and does not include sovereign debt[43]. According to ICSID Tribunal's judgment, "*a broad definition does not necessarily mean that any and all categories, of any nature whatsoever, may qualify as an investment, nor that the only manner in which a category may be excluded as an investment, under a broad asset- based concept, is by expressing exclusion in the given (bilateral investment) treaty*"[44].

ICSID Pending Cases – Apart from the aforementioned case, there are currently two pending cases against Greece concerning foreign investments. In case *Cyprus Popular Bank v. Greece* (ICSID Case No. ARB/14/16), the claimant argued a violation of Cyprus-Greece BIT, due to an alleged unequal treatment for its Greek branch, Marfin Egnatia Bank, in comparison to other banking institutions operating in Greece, which resulted from the fact that Greece's Central Bank has denied the above branch access to the mechanisms for liquidity and capital

[41] The Greece-Slovakia BIT.
[42] The Greece-Cyprus BIT.
[43] ICSID Case No. ARB/13/8, no 81-82 and 153,
available at https://www.italaw.com/sites/default/files/case-documents/italaw7587.pdf.
[44] ICSID Case No. ARB/13/8, no 58.

support available to all Greek banks[45]. It is to be noted that the object of this case is similar to the previous one, since it takes place in the context of the financial crisis affecting Cyprus and Greece. In *Safa v. Greece* (ICSID Case No. ARB/16/20), the claimant co-owns the Privinvest Group, a global player in the shipbuilding industry, which in late 2010 took control of Hellenic Shipyards SA (HSY), an operator of a large shipyard near Athens. With this ICSID claim, the claimant has asserted his individual rights as an investor in HSY under Greece-Lebanon BIT (1997) on the ground that the Greek Government has posed an unlawful prohibition for HSY not to work for foreign navies and has stopped payments under the parliamentary ratified contracts for two submarine programmes[46].

Nationalization and expropriation provisions – Under BITs that Greek state has signed, there is a general rule that forbids the nationalization and expropriation of foreign investments and returns from the investment (profits, interests, capital gains, dividends, royalties and fees) or the income deriving from the reinvestment on behalf of the Greek state. However, there are four strict cumulative exceptions from the rule that shall apply. Nationalization and expropriation can be conducted by the state only for public interest purposes, under due process of law, on a non discriminatory ground and against prompt, adequate and effective compensation, which will be transferable without delay, in a freely convertible currency to the country designated by the investors[47]. In addition to this, there are clauses that ensure compensation for losses and damages in case of war, armed conflicts, national emergencies, civil disturbances or other unforeseeable events in the Greek territory[48].

Free transfer of payments – Recent BITs, that Greece has signed, recognize the foreign investors' right to free transfer of payments in and out of Greek territory[49]. The definition of transfers is broad and covers in particular the initial capital and additional amounts necessary for the maintenance and development

[45] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/14/16 and Cyprus press release available in http://oam.cse.com.cy/Announcement/announcementvariation/852.

[46] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/16/20. http://www.prnewswire.co.uk/news-releases/iskandar-safa-submits-claim-against-the-hellenic-republic-with-icsid-583906371.html.

[47] Ibid Art. 4. For the differences of non discrimination clauses between BITs and double tax treaties see *OECD*, Negotiating Group on the Multilateral Agreement on Investment (MAI), DAFFE/MAI/EG2/RD(96)1, 1996, p.3. MAI was a Model Convention of Investment Treaties, proposed by OECD, but ultimately it was not implemented.

[48] Ibid Art. 6.

[49] Ibid Art. 7 in latest BITs, for example Law 1511/2002 about the BIT between Greece and Bosnia Herzegovina.

of the investment, the returns, the fund in repayment of investment loans, the proceeds of total or partial sale or liquidation of the investment, any damages awarded by dispute settlement and compensation for losses or nationalization.

VI. General conclusions

Property in Greece is protected under Art. 1 of First Protocol to the ECHR, Art. 17 of Universal Declaration of Human Rights and Art 17 of the EU Charter of Fundamental Rights, pursuant to which every person has the right to enjoy its possessions peacefully. The deprivation of private property is generally forbidden with the exception of reasons of public interest that can justify specific limitations of property protection. The double tax treaties, bilateral agreements that Greece signs with other states, aim at regulating the way in which the same income will be taxed by different countries with a view to avoiding double taxation, and thereby protecting property. Especially for the protection of foreign investments in Greece, the relevant legal framework is defined by international treaties, in particular bilateral agreements ('BITs') between Greece and other states, according to which Greece is obliged to protect foreign investments in its territory, made by nationals of the contracting state and recognizes major benefits for them, such as legal treatment equal to Greek investors, fair and equitable treatment, protection from expropriation and access to neutral dispute settlement.

Question 14

In principle, the jurisprudence of Greek courts maintains a friendly approach to the European legal order, almost never creating problems in the application of EU law. Nonetheless, tensions between EU and other sources of law, either national or international, are not entirely unknown in the Greek case law. In such cases, potential conflicts have been avoided by either the consistent interpretation or the invocation of general principles of law, such as the principle of proportionality[50].

140. Regarding international obligations in particular, it is important to note that there are various such obligations that could potentially contravene EU law, because both EU and international legal order regulate similar issues. In the Greek legal order, international and EU obligations could come into conflict with regard to the right to property a) in the case of BITs[51] and b) in the case of EU obligations of Greece, as deriving from the acceptance of financial assistance by the ESM[52].

[50] J. Iliopoulos-Strangas in A. Von Bogdany/ P. Cruz Villalon/ P. Hueber (eds) Ius Publicum Europaeum, Offene Staatlichkeit: Griechenland, Müller, Heidelberg, 2007 pp. 71-107.

[51] T. Eilmansberger, Bilateral investment treaties and EU law, CMLR 2009, p. 383.

[52] The implementation of the Fiscal Adjustment Program became for Greece an obligation of EU law, since Article 7 of Regulation (EU) 472/2013 under the title "Macroeconomic adjustment programme" incorporated into the EU legal order the provisions of Articles 13, 14, 15 and 16 of the ESM Treaty

Regarding BITs, it should be noted that it is difficult to identify a conflict between international and EU law in the field of international investments, since Greece had already included in these bilateral or multilateral treaties a clause in favour of EU law. In particular, this clause states that under no circumstances may this international agreement result in deviations from the country's obligations as a member of the European integration process[53]. Thus, there are no cases where the obligation to recover an unlawful state aid would contravene the obligations deriving from a BIT as it's the case in other European legal orders, where granting compensation to an investor in accordance with an arbitrary award was considered by the European Commission to be an unlawful state aid which must be recovered[54]. In any case, it is difficult to identify such a conflict since the disputes arising from investment agreements are usually settled by ad hoc arbitrators, whose decisions are rarely published or widely known[55].

We should mention, however, that the conflicts between EU law and international obligations deriving from BITs are most likely to be increased due to the Greek public debt restructuring deal (2012) and the so called "private sector involvement' (PSI) procedure which was decided, signed and adopted by both the ECB and the European Commission. In this legal context, private investors were asked to accept to write off 53.5% of the face value of Greek governmental bonds they were holding, the equivalent to an overall loss of around 75%. Despite the fact that the participation in this "haircut" procedure was supposed to be voluntary, the Greek government activated ex post the CACs (Collective Action Clauses) forcing the majority of Greek government bondholders to accept the haircut of 53,5% in the nominal value of their bonds, even without their will[56]. This decision led many investors before the arbitrary courts invoking their rights

concerning the commitment of the Member States, who receive financial assistance from the ESM, to implement a Public Adjustment Program.

[53] The letter of this provision is almost identical in every treaty. See, for example, article 4 of the BIT Greece/Azerbaijan in 2004. "*Treatment of the Investments 1. Each Contracting Party shall accord to investments, including returns, made in its territory by investors of the other Contracting Party, treatment not less favourable" than that which it accords to investments of its own investors or to investments of investors of any third state, whichever is more favourable. 2. Each Contracting Party shall accord to investors of the other Contracting Party as regards their activity in connection with investments in its territory, treatment not less favourable than that which it accords to its own investors or to investors of any third state, whichever is more favourable. 3. The provisions of paragraphs 1 and 2 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from: a) its participation in any existing or future free trade area, customs union, economic union, regional economic integration agreement or similar international agreement, or b) any international agreement or arrangement relating wholly or mainly to taxation*".

[54] Commission, *Micula*, 26.03.2014, M. Goyenst, The Micula case: When ISDS messes with EU law. http://www.beuc.eu/blog/the-micula-case-when-isds-messes-with-eu-law/.

[55] P. Glavinis, International economic law, Sakkoulas Athens-Thessaloniki, 2009, p. 675.

[56] National Law No. 4050/2012 on the rules amending State emission or guarantee securities, adopted on 23 February 2012.

deriving from BITs and may result as well in a conflict between BITs and EU law, which conflict isn't however going to be resolved before national courts[57].

Regarding the second category, namely the EU obligations deriving from participation of Greece in the ESM, there are several cases where the Greek courts, and in particular the Greek Council of State, were called to decide upon conflicts between EU law and the ECHR regarding the right to property.

Greek jurisprudence has confirmed that Greek laws enacted for the implementation of the Memorandums, which consist an international (under article 13 TESM), as well as an EU law (since Articles 13 to 16 TESM are now incorporated into Regulation 472/2013) obligation, infringe international law, namely Article 1 of the Additional Protocol No. 1 to ECHR. These infringements derive mainly from civil servants salaries and pensions reductions, tax evasion measures, imposition of new and heavy taxes and "extraordinary contributions", compulsory reductions of allowances and unemployment benefits, etc.

i) Notably, four judgments of the *Greek Council of State (Symvoulio tis Epikratias)* cancelled the private sector pension reductions. The Greek Council of State has decided that those who receive a minimum pension of 1.000 euros are entitled to a reset of their pension in the amount they received before the reduction because the right to property (article 1 Additional Protocol No. 1 to ECHR) has been infringed. These judgments are: – Greek Council of State (Simvoulio tis Epikratias) *no. 2287/2015* (Social Security Institute – IDRYMA KOINONIKON ASFALISEON "IKA", main and supplementary retirement pensions reduction) – *2288/2015* (Insurance Fund of Public Power Corporation – DEH Employees retirement pensions) – *2289/2015* (Social Security Institute – IDRYMA KOINONIKON ASFALISEON "IKA", supplementary retirement pensions reduction) – *2290/2015* (Agricultural Bank of Greece "AGROTIKI TRAPEZA ELLADOS", former employees' supplementary retirement pensions reduction).

ii) *The Greek Court of Auditors, in its judgment no. 7412/2015* (Plenary Session), considered as unconstitutional the provisions of Law 4093/12, reducing retroactively from 01/08/2012 the earnings of doctors actively employed in the National Health System ("ESI") and, consequently, the pensions of the retired National Health System ("ESI") doctors. In particular, the Greek Court of Auditors found that the provisions of Law 4093/2012 were contrary to the provisions of Article 1 of Additional Protocol No. 1 to ECHR. They were therefore invalid, since they constituted a deprivation

[57] I. Glivanos, Investors vs. Greece: The Greek 'Haircut' and Investor Arbitration Under BIT's (May 15, 2012). Available at SSRN: https://ssrn.com/abstract=2021137.

of an existing property right (pension of a certain amount, which has already been paid). The retroactive character of this deprivation was not necessary or appropriate in order to achieve the public interest objective sought by Law 4093/2012, in view of the fact that similar rules for the rest public domain pensioners had not been enacted. Therefore, in this judgement the Court of Auditors ruled that the right to property is being infringed because the provisions of Law 4093/12 are contrary to the principle of equal contribution to public charges (article 4 par. 5 of the Greek Constitution), the principle of proportionality (article 25 par. 4 of the Greek Constitution) and the right to property (article 1 Additional Protocol No. 1 to ECHR).

iii) *The Greek Court of Auditors, in its Opinion of May 8, 2017* (Plenary Session), ruled that a draft law on new pension reductions from 2019 onwards infringed the right to property (article 1 Additional Protocol No. 1 to ECHR), together with the prohibition of discrimination (article 14 ECHR). The Court of Auditors ruled, in particular, that legislative adjustment measures, being imposed on a specific socio-economic group and involving a serious and lasting financial burden on that group, must be specifically justified. The Court of Auditors concluded that the proposed regulation imposes an additional burden on this category of pensioners without justification and also raises a question of compatibility with the principle of equality in public charges (Article 4, par. 5 of the Constitution), the principle of proportionality (Article 25 (1) of the Constitution) and article 1 Additional Protocol No. 1 to ECHR.

HUNGARY

Balázs Békés*
Mónika Papp*
Tihamer Tóth*

Part I

Question 1

First of all, one can distinguish different types of uncertainties. For instance, there may be a particular payment between two companies that might either qualify as a debt (leading up to interest payments that are – in full or in part – deductible for tax purposes) or as equity (leading up to dividend payments that are non-deductible for tax purposes) depending on the facts at hand. Other uncertainties may relate to the attribution of profits to and within legal entities. If, for instance, a product is designed in state A, produced in state B and then sold and delivered in state C, the question will come up which state should be taxing which part of the profit. In the absence of a formal bilateral agreement, each state will be in a position to make its own calculation of what part of profit is (not) to be taxed.

Binding tax rulings are available in Hungary, upon the submission of a request to the Ministry for National Economy (hereinafter: Ministry). These rulings bind the tax authorities (including the national- and local tax authorities) to follow the tax treatment and implication confirmed by the Ministry in the binding ruling. The application is subject to a flat fee of HUF 5 million (EUR 16,370)[1]. The Ministry

* The authors would like to thank to Péter Staviczky, state aid attaché of the Hungarian Permanent Representation to the EU for his helpful comments.

[1] All EUR calculations are based upon the exchange rate of September 1, 2017.

has 90 days to decide on the ruling after the submission of the request (which may be extended by 60 days). A taxpayer may also request an accelerated procedure, where the fee is HUF 8 million (EUR 26,150) and the deadline for a decision is 60 days (which may be extended by 30 days). If the tax treatment cannot be assessed by the Ministry, the taxpayer is entitled to a refund equal to 85% of the statutory fee.

Binding rulings are only applicable on the entity that files the request. Binding rulings can be requested for future or past transactions, but rulings for past transactions can cover only certain annual income tax types. These binding ruling requests must be made by the filing day (or due date) of the relevant tax returns.

A tax ruling cannot be applied to determine the arm's length price in related party transactions, but an advance pricing arrangement (hereinafter: APA) may be requested from the tax authorities regarding the determination of the applicable transfer pricing method and the arm's length price or price range.

APA requests may be submitted to the National Tax and Customs Administration of Hungary (hereinafter: National Tax Authority). The application is subject to a statutory fee of HUF 500,000 to HUF 10 million (EUR 1,634 and EUR 32,693). An APA is valid for at least three years and a maximum of five years (with the possibility of a one-time extension for an additional three years). Bilateral and multilateral APAs also are available. After submission of the request, the National Tax Authority have 120 days to decide on the APA, which can be extended twice by an additional 60 days. If the application is rejected, the taxpayer is entitled to a refund of 75% of the statutory fee.

Also, non-binding rulings are available in Hungary which the company can request from the Hungarian Tax Authority or the Ministry. This non-binding ruling only serves as a guideline on how the authority interprets the law but has no binding effect.

Question 2

The binding ruling in Hungary can only be applied to the specific company requesting it and is only binding on the Hungarian Tax Authority if there are no changes in legislation and the factual background.

When assessing the application, the Ministry can request the company to provide them with documents and contracts to confirm that their application is valid and true. Within the formal process, the Ministry has the legal ground to ask for further information, documents and proof to have a better understanding on the underlying factual background and its respective tax consequences. The company that files the request is obliged to declare that the information submitted as to the factual background is valid and true.

Usually, the Hungarian tax authority verifies the facts ex-post during a tax audit. Having said that, in case of APA requests, the Hungarian Tax Authority

performs a quite detailed analysis to determine whether the most appropriate transfer pricing method has been chosen by the company to verify the applicable arm's length price.

During a tax audit the tax authority verifies whether the company acted according to the binding ruling and also whether there were any changes in the circumstances of the case. If the company acted according to the ruling the authority is bound by its previous decision and cannot assess the tax consequences of the transaction contrary to the ruling.

Question 3

According to the Hungarian tax rules[2], the Hungarian tax authority is not obliged to verify how a particular payment transaction was treated by another country. It has its own discretion to assess the underlying facts under domestic law and come to a conclusion on its own.

If there is a tax treaty with the other country and the Hungarian authority's assessment could lead to double-taxation, then it is possible to initiate a mutual agreement procedure with the other country according to the provisions of the relevant double tax treaty.

Regardless of the content of national rules, one might end up in a situation where it turns out later that the confirmation given by the tax authorities is incorrect. This may be either because of the publication of case law by domestic courts, or because new data indicates that profits should have been attributed differently.

Question 4

Provisional tax assessment should be binding on the tax authority only for the case in question and under unaltered conditions. In the event of any future changes in the legislation concerned with provisional tax assessment or any changes is international legal commitments or in the facts as of the date of entry into force, or such changes taking effect, provisional tax assessment cannot be applied.

Question 5

Generally, the Hungarian tax regime does not inquire whether any remaining income will be taxed by another country. However, its working method will have the same results. Under the CFC regime, when a foreign subsidiary of a domestic company is qualified as controlled foreign entity, the income realized by that foreign entity should be taxed at the level of the Hungarian parent, irrespective of the foreign tax burden put on the subsidiary.

[2] See: Act XCII of 2003 on the Rules of Taxation.

Furthermore, according to the relevant Hungarian tax rules[3], in the case of relationships affected by international treaties promulgated by an act or government decree, where due to differences in the interpretation of the facts on hand or the provisions of the relevant international agreement between the States affected, having regard to incomes from such relationships, neither of those States considers such income taxable in its territory, Hungary should not exempt such income from taxation.

Question 6

There is no kind of default rule used for the allocating profits. Hungary generally follows the OECD Transfer Pricing Guidelines.[4]

Question 7

Hungary's transfer pricing rules, which are based on the OECD guidelines (pursuant to Act LXXXI of 1996 on Corporate Tax and Dividend Tax Section 31 paragraph 2), specify that transactions between related entities should be considered for taxation purposes as occurring at the same price as equivalent transactions between unrelated parties.[5] If an individual or an organization holds directly or indirectly more than 50% of the ownership or voting rights in another entity, or can exercise direct or indirect management control of another entity, the entities should be considered related parties. As for private individuals, the law includes their family members.[6]

Related parties must prepare documentation justifying their transfer prices, although an exemption from the obligation to prepare a transfer pricing report applies to small-value transactions, i.e. less than an aggregate value of HUF 50 million (EUR 163,465) per year, or where an APA is obtained with respect to the arm's length price of the transaction.

Separate transfer pricing reports must be prepared for each related party agreement, although one single documentation can be prepared to cover multiple agreements if their content is similar or identical.

[3] Act XCII of 2003 on the Rules of Taxation Section 2 paragraph 2.

[4] Act LXXXI of 1996 on Corporate Tax and Dividend Tax Section 31 paragraph 2 – "This Act contains regulations adopted with regard to the following documents in conformity with the Convention on the Organization for Economic Cooperation and Development (OECD) published by Act XV of 1998, including the related protocols and accession statements: a) model agreement on income tax and wealth tax; b) guidelines for international enterprises and for the tax authorities concerning the revision of prices between affiliated enterprises."

[5] The definition of related parties is mentioned in Act LXXXI of 1996 on Corporate Tax and Dividend Tax Section 4 paragraph Subsection 23.

[6] According to Act V of 2013 on the Civil Code close relatives are: spouses, next of kin, adopted children, stepchildren, foster children, adoptive parents, stepparents, foster parents, siblings.

Simplified reporting is allowed for certain low value-added intragroup services (e.g. specific information technology services, legal activities, etc.) if certain requirements are met, for instance, the relevant transaction cannot be related to the core activity of any of the parties and its value may not exceed a ceiling set by law. An exemption may be available for low value-added intragroup services if the margin applied is between 3% and 10%.

In Hungary, the following transfer pricing methods may be used: comparable uncontrolled price method, resale minus method, cost-plus method, transactional net margin method and profit split method. If none of these methods leads to a proper result, the taxpayer may apply other defensible methods.

Whenever the price applied between related enterprises differs from the market price, the taxpayer or the tax authorities may adjust the tax base to reflect the market price. If the tax authorities make an adjustment, they may impose a fine of up to 50% of the additional tax liability and the taxpayer may have to pay late payment interest.

Branch offices are subject to the same arm's length pricing requirements as other enterprises in Hungary, even for transactions between the branch and its head office.

Question 8

Hungary allows for unilateral adjustments of profits both upwards as well as downwards. Based on the Hungarian transfer pricing rules, both upwards and downwards adjustment is possible.[7]

If a higher or lower consideration is applied in the agreements and contracts between related parties than the consideration that would be applied vis-á-vis independent parties – under fair market conditions and comparable circumstances –, the taxpayer needs to adjust its pre-tax profit. Irrespective of any other items that are to be added to or deducted from the pre-tax profit as prescribed in this Act, the taxpayer takes the difference between the fair market price and the consideration applied and should deduct it from the pre-tax profit, provided that:

aa) the consideration applied renders the pre-tax profit greater than it would have been had the fair market price been applied,

ab) the related party is a resident taxpayer or a foreign person (other than a controlled foreign company) who is subject to any tax that may be substituted for corporate tax according to the national law of the country where it is established,

ac) it holds a document signed by both parties that contains the amount of the difference, and

[7] Act LXXXI of 1996 on Corporate Tax and Dividend Tax Section 18 paragraph 1 point a) and point b).

ad) it possesses the other party's statement declaring that that other party applies the amount of the difference in determining the amount of corporate tax or any taxable amount that is considered equivalent;

add it to the pre-tax profit if the consideration applied renders the pre-tax profit lower than it would have been had the fair market price been applied (with the exception of contracts concluded with private individuals, other than private entrepreneurs).

Question 9

In case there is a bilateral (binding on the two related parties and their respective tax authorities) or multilateral (binding on more than two foreign tax authorities and related parties) advance pricing agreement between the related countries/tax authorities, the Hungarian tax authority would normally accept the transfer pricing conclusion of the other country and adjust the level of taxable profit downwards.

Bilateral APAs involve the MNE (Multinational Enterprises) group seeking agreement from the governments of two tax jurisdictions as to the transfer pricing policy applicable to transactions between the MNE group's taxpayers located in those countries. The legal basis for governments to negotiate and reach agreement in such cases is the Mutual Agreement Procedure (MAP) Article of an applicable tax treaty.

Question 10

Hungary has domestic GAARs. The Hungarian legal system has two GAAR principles in force:

A) the principle that contracts, and other transactions should be interpreted in accordance with their true content, and
B) the principle of due course of law.

A) The principle that contracts, and other transactions should be interpreted in accordance with their true content

For the purposes of taxation, contractions, transactions and similar acts should be classified based on their true nature (the legal substance of the transaction under review should prevail over the legal form as applied by parties).

This principle creates a link between the divergent means of regulation in civil law and tax law, by providing for that, in accounting for particular business events, reference must be made to the true nature of contracts, transactions and related acts. In applying the principle on the classification of transactions according to their true nature, one has to examine whether a transaction between the parties, based on its genuine characteristics, matches to the characteristics which

were presented by the parties. The tax authority may not change, substitute or supplement factual elements. The relationship between the parties may not be modified if its true economic nature matches to the outward form of the transaction under review.

The law also states that invalid contracts and other transactions are only relevant for tax purposes to the extent they have a distinct economic result. If there is a difference between the appearance of a contract and its true nature, it is the covert transaction that must be assessed for tax purposes. Invalid (void and voidable) contracts do not become necessarily retroactively valid in the civil law sense. However, economic results can be discerned for tax purposes. A special case of the classification of contracts based on their true nature can be the tax treatment of profits from illegal acts or, using the formula of the Civil Code, acts offending morality. Tax liability is not influenced by the fact that someone's conduct (action or inaction) is illegal or offends morality. These transactions are void in the civil law sense but it is still possible that such transactions can have distinct economic results, triggering fiscal liability.

B) The principle of due course of law

The Hungarian tax legal system acknowledges the principle of due course of law. According to this principle all rights in tax-related matters should be exercised within their meaning and objective. In the application of tax laws, contracts and other transactions contrived with the intent to evade the provisions of tax laws should not be construed as exercised within their specific intent. In the case of relationships affected by international treaties promulgated by an act or government decree, where in consequence of differences in the interpretation of the facts on hand or the provisions of the relevant international agreement between the States affected, having regard to incomes from such relationships, neither of those States considers such income taxable in its territory, Hungary should not exempt such income from taxation.

The tax authority should establish the tax taking into consideration all circumstances, in particular the tax liability prevailing when rights are observed within their meaning and intent or, if the tax base cannot be established in this fashion, by estimation. This regulation clarifies the meaning of tax avoidance.

According to Hungarian regulation[8] the application of the tax ruling must be refused if there are reasonable grounds to believe that the facts presented are intended to cover up another contract, deal or act, or they are contrary to the principle of due course of the law. In Hungary, there is not case law concerning advance tax ruling.

[8] According to Act XCII of 2003 on the Rules of Taxation Section 132 paragraph 7.

According to the Hungarian rules[9] the application for transfer price assessment must be rejected if there are reasonable grounds to believe that the facts presented are intended to cover up another contract, deal or act.

In Hungary, there is no case law concerning transfer price assessment.

Hungarian courts apply the principle of due course of law in the following cases:

- If the income comes from such securities transaction which is contrary to the principle of due course of law, then the tax liabilities will be applied for the full sum of income.[10]
- It violates the principle of due course of law if the company benefits employees to avoid taxes and social security contributions.[11]
- It violates the principle of due course of law if it is the employer's single aim to pay the income employee without taxes and contributions.[12]
- It infringes the principle of due course of law, if the profit before taxation is based on such transactions which aims is to avoid the payment of tax.[13]

The Hungarian tax authority and the court use the test with the following elements:

- the accrual of a tax advantage the grant of which is contrary to purpose of the legal provision;
- obtaining a tax advantage as the essential aim of the transactions concerned;
- complementary business purpose test (under international tax law) or the genuine economic activity test (under EU law); and
- subjective element, consisting of the intention to obtain a tax advantage.

Based on the above, Hungary applies successfully the GAAR regulations by the tax authority and by the courts.

The Hungarian tax authority has the right to examine the agreements between parties from a tax law perspective. There was a case[14] in Hungary when the claimant signed multiple agreements with the aim to avoid tax liability. The claimant signed a pre-contract with a company for the sale of a property. Afterwards the claimant sold the property to a third party for a much higher price in

[9] According to Act XCII of 2003 on the Rules of Taxation Section 132/B paragraph 11

[10] BH 2002.509; Supreme Court decision in December 2002.

[11] BH 2005.232; Supreme Court decision in June 2005.

[12] BH 2005.332; Supreme Court decision in September 2005.

[13] BH 2011.327; Supreme Court decision in November 2011.

[14] BH 2011.327; Supreme Court decision in November 2011.

violation of the agreement. The company sued the claimant for damages but for an amount that was ten times higher than the price agreed in the pre-contract. The claimant paid the amount without any consideration and reduced its pre-tax profit with the same amount. The following year the Hungarian tax authority imposed tax penalty on the claimant claiming that the legal transactions in question were contrary to the principle of due course of law.

There is not Specific Anti-Avoidance Rules (SAARs) in the Hungarian tax system, but the Hungarian regulation applies widely the Domestic General Anti-Avoidance Rules.

Part II

Question 11

There is no specific provision in the Hungarian legal system for the recovery of unlawful state aid. Act CXCV of 2011 on public finances[15] sets out the rule that if the European Commission orders repayment of incompatible state aid, the sum to be repaid is to be treated as a tax claim.[16]

The National Tax and Customs Administration is in charge of the recovery of tax arrears under Act XCII of 2003 on the Rules of Taxation.[17]

Under Government Decree 37/2011 (III.22.) on procedures relating to State aid measures in the meaning of European Union competition law and on the regional aid map in case the European Commission orders the recovery of state aid, it is the competent minister's[18] obligation to call on the body which granted the state aid to reimburse the aid with interests from the beneficiary.[19] The interest payable is calculated in under Regulation 794/2004/EC.

Question 12

To our knowledge, no such example has happened in Hungary.

[15] Act CXCV of 2011 on the State Budget.

[16] According to Act CXCV of 2011 on the State Budget Section 99, if the European Commission orders the recovery of illegal state aid, the amount to be recovered is considered to be a claim in the form of taxes.

[17] Act XCII of 2003 on the Rules of Taxation

[18] The State Aid Monitoring Office is part of the Prime Minister's Office, thus the competent minister is the Minister of Prime Minister's Office.

[19] According to Government Decree 37/2011 (III.22.) on the procedure for state aid related to competition law in the European Union and the regional aid map Section 24 paragraph 2.

Question 13[20]

Multilateral agreements

Besides the multilateral agreements concluded by the EC/EU, the Energy Charter Treaty is the most important multilateral agreement Hungary is bound by. The Energy Charter Treaty provides for fair and equitable treatment, compensation for losses and protection against expropriation.

Bilateral Investment Treaties (BITs)

Hungary has concluded 54 BITs that are currently in force, 22 BITs were concluded with EC/EU countries before Hungary became member of the EU (Austria, Belgium-Luxembourg Economic Union, Bulgaria, Croatia, Czech Republic, Denmark, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom).[21]

With the United Kingdom (in 1987) an Agreement for the Promotion and Reciprocal Protection of Investments was concluded. Article 2 provides for fair and equitable treatment, Article 3 for national treatment and contains a most-favoured nation clause (which does not apply to any international agreement or domestic legislation relating to taxation), Article 6 provides protection against expropriation and Article 7 for the repatriation of investment and returns.

Hungary has concluded the most important BITs in 1991 with Australia, Canada and China.

The Australian, Canadian and Chinese BITs share a lot of similar provisions, and set out fair and equitable protection, most-favoured nation provisions, provide for compensation of losses, protection against expropriation and transfer of funds. The BIT concluded with China provides protection only for equitable treatment.

Question 14

So far, there has been no case where this issue was raised. Anyway, generally, investment related disputes would be decided in arbitration.

[20] In case of time restraints, please do address any existing agreements with the USA and the UK in particular.

[21] For the BITs we used the UNCTAD Investment Policy HUB database. For Hungary the link is: http://investmentpolicyhub.unctad.org/IIA/CountryBits/94#iiaInnerMenu

IRELAND

Gráinne Duggan BL*
Ciarán Toland SC**

Part I

Question 1

The Irish tax authority, the Revenue Commissioners offer a mechanism whereby taxpayers can seek opinions or confirmations from the Revenue Commissioners on the tax/duty consequences of a proposed course of action.[1] Where the Revenue Commissioners issue an opinion/confirmation, it may contain a provision setting out the period for which the opinion/confirmation will apply. This period will be for a maximum of five years or the equivalent length of time in accounting periods of the taxpayer concerned. An opinion/confirmation can be reviewed at any time by Revenue, with a view to amendment or withdrawal, in the light of relevant facts, circumstances or other information changing or where the Revenue Commissioners decide to reconsider its position. However, fundamentally, these opinions/confirmations are not binding on the Revenue Commissioners.

In addition, Ireland does have a formal bilateral advance pricing agreement (APA) programme for transfer pricing issues which is binding. An application for a bilateral APA may be made by a company which is tax resident in Ireland for the purpose of the relevant double tax treaty and by a permanent establishment (PE) in Ireland of a non-resident company in accordance with the provisions of

* Barrister-at-Law, Bar of Ireland; Chartered Tax Adviser, Trust & Estate Practitioner.
** Senior Counsel, Bar of Ireland. Thanks are due to Francesca Farrington LLB (Dublin) LLM (McGill) for research assistance, and to those Counsel (including James Byrne BL) who reviewed drafts.
[1] For full details of this scheme see The Revenue Commissioners, Tax and Duty Manual, 37.00.40.

the relevant treaty. The Revenue Commissioners have stated that the bilateral APA programme "*is intended to apply in respect of a transaction(s) where the transfer pricing issues involved are complex, e.g. there is significant doubt over the appropriate application of the arm's length principle, or where, for any other reason, there would otherwise be a high likelihood of double taxation arising (in the absence of a bilateral APA*)."[2] There must be a double tax treaty in place in order for a bilateral APA to be considered. An application to the APA process is subject to the evaluation of the APA by the Revenue Commissioners and the negotiation of the APA between the Revenue Commissioners and the other tax administration.

Question 2
In relation to an APA, the evaluation of the APA will entail a detailed review of the application and, if necessary, the Revenue Commissioners may seek clarifications from the taxpayer on the information submitted or may request additional information. The Revenue Commissioners may request a site visit and/or conduct interviews with appropriate personnel from the taxpayer's organisation in order to get a better understanding of the case.[3]

An APA will be granted for a specific period of time, usually three to five years, with provision for the revocation of the APA for non-compliance or cancellation in certain circumstances including where the terms of the APA are no longer effective or where there has been a material departure from any critical assumptions. Accordingly, the verification of the facts underpinning the APA is a continuing process.

In relation to opinions/confirmations outside of the APA procedure, the Irish Revenue Commissioners do not, in our experience, systematically verify the facts mentioned in a request for a ruling, although they have been known to do so.

Finally, the Taxes Consolidation Act 1997 (the TCA) gives the Revenue Commissioner a general power to seek information from taxpayers[4] and from third parties[5] which is relevant to determining the taxpayer's liability and this power may be invoked at any time.

Question 3
No.

Question 4
An APA is binding.

[2] The Revenue Commissioners, Operational Manual Part 35-02-07.
[3] The Revenue Commissioners, Operational Manual Part 35-02-07.
[4] Section 900 of the TCA.
[5] Section 902 of the TCA.

However, an APA may not necessarily reflect the taxpayer's wishes and the Revenue Commissioner may agree different terms with the foreign jurisdiction to those requested by the taxpayer company. In such circumstances, a taxpayer is not obliged to accept the terms and may withdraw from the APA process.

Otherwise, the Irish Revenue Commissioners are not bound by the opinions/confirmations they issue.

However, there is some limited authority that the Revenue Commissioners may in certain limited circumstances be bound by a statement made outside of the procedure for opinions/confirmations outlined above. The common law doctrine of legitimate expectation may aid a taxpayer who has relied on a statement from the Revenue Commissioners as to the tax treatment of a certain transaction but from which the Revenue Commissioners have resiled.[6] In order to succeed, a taxpayer would have to establish that there was full disclosure as to all material facts, that the taxpayer received a clear and unequivocal statement from the Revenue Commissioners as to how that transaction was to be taxed, that the taxpayer subsequently relied upon that statement, and that the interpretation which was relied upon was not contrary to law.

Question 5

No. Ireland only has the jurisdiction to tax that portion of the profits of a company which fall within the scope of Irish corporation tax. An Irish resident company is subject to corporation tax on its worldwide profit and capital gains[7], excluding most distributions received from other Irish-resident companies.[8] A non-resident company is not within the charge to Irish corporation tax, unless it carries on a trade in Ireland through a branch or agency. Where a non-resident company carries on such a trade, that company is chargeable to corporation tax on:

- trading income arising directly or indirectly through or from the branch or agency;
- income from property or rights used by, or held by or for, the branch or agency; and
- chargeable gains attributable to the branch or agency.

There is no guidance on how to determine what trading income arises directly or indirectly through a branch or agency. In practice, the Revenue Commissioners usually accept an allocation determined on a just and reasonable basis.

[6] See *obiter* of Blayney J, *Pandion Haliaetus Ltd v Revenue Commissioners* [1987] 1 IR 309.

[7] Section 26 TCA of the TCA.

[8] Section 129 TCA of the TCA.

Finally, companies that are not resident in Ireland and do not trade through a branch or agency in Ireland are only liable to income tax on Irish-source income and to capital gains tax on gains arising on the disposal of certain Irish assets, subject to any treaty relief that may be available.

Ireland cannot tax that portion of the profits of a company which fall outside the scope of Irish corporation tax and Irish tax makes no provision for the capture of profits which is outside its territorial scope, so as to avoid double non-taxation.

Question 6

Ireland applies transfer pricing rules which are discussed in more detail below.

Question 7

With effect from 1 July 2010, Ireland introduced transfer pricing rules under Part 35A of the TCA. These rules do not apply to small and medium sized enterprises, which are, broadly speaking, those enterprises with less than 250 employees and either a turnover of less than €50 million or assets of less than €43 million.

The rules apply to trading transactions between associated companies. The consideration payable or receivable under arrangements subject to the transfer pricing rules must reflect an arm's length amount. The arm's length amount is the amount of the consideration that independent parties would have agreed in relation to the arrangement had those independent parties entered into that arrangement.

The transfer pricing rules are to be construed in accordance with transfer pricing guidelines.[9] The transfer pricing guidelines are defined to include the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations as supplemented by "*such additional guidance, published by the OECD on or after the date of passing of the Finance Act 2010, as may be designated by the Minister for Finance ... by order ...*".[10] The effect of this provision is that the transfer pricing rules must be construed in accordance with all relevant, current and future OECD guidelines.

If the Irish Revenue Commissioners determine that a transaction is not at arm's length, an adjustment will be made to increase the understated profits or decrease overstated expenses to reflect the arm's length position.

Question 8

No. Irish transfer pricing rules apply only to adjust profits of an Irish company upwards and not downwards. Section 835C(2)(a) of the TCA applies to adjust the

[9] Section 835D(2) of the TCA.

[10] Section 835D(1) of the TCA.

"*consideration payable*" which has the effect of reducing tax-deductible expenses and section 835E(2)(b) applies to increase the "*consideration receivable*" to reflect the arm's length principle which has the effect of adjusting the income upwards.

Question 9

Irish transfer pricing rules apply only to adjust profits of an Irish company upwards and not downwards: two-way transfer pricing adjustments are not currently permitted.

If transfer mispricing occurs, and a foreign tax authority determines a higher quantum of taxable profit to the Irish company's foreign affiliate, the Irish company may seek relief under the Associated Enterprise Article of the relevant Double Taxation Agreement (DTA) between Ireland and the foreign jurisdiction so as to reduce the amount of profit attributed to the Irish company. The Irish company can also invoke a Mutual Agreement Procedure under the relevant DTA which may result in the re-allocation of profit between the two jurisdictions or, in the alternative, seek to rely on the EU Arbitration Convention. The EU Arbitration Convention currently applies in all EU Member States and provides for a process to resolve disputes arising in connection with the adjustment of profits between associated enterprises (i.e. transfer pricing adjustments).

However, if a foreign tax authority adjusts the level of taxable profit downwards, the Revenue Commissioners do not have the ability to adjust the tax-deductible expenses attributed to an Irish entity upwards or the income attributed to an Irish entity downwards.

Question 10

Yes, Ireland has a GAAR.

There is no express reference in the legislation as to whether the GAAR can apply as a back-up to *lex specialis* that turns out to be ineffective in a given case.[11] Within domestic law, the GAAR is a standalone provision and can apply where the Revenue Commissioners form the view that a transaction is a tax avoidance transaction.

Section 826 of the TCA, which provides for the entering into of DTAs, states that such agreements have the force or law "*notwithstanding any enactment*".[12] Irish case law[13] has indicated (but not decided) that the terms of a tax treaty specified

[11] Section 811C of the TCA.

[12] Save for section 168 of the TCA.

[13] *Murphy v Asahi Synthetic Fibres (Ireland) Ltd.* [1986] 1 IR 777 (SC) [1985] 1 IR 509 (HC). By way of *obiter*, in respect of legislative provisions later than the international tax treaty, the High Court (O'Hanlon J) stated (at page 515 of the High Court report) that: *"if it were necessary for me to decide the issue I would take the view that in our jurisdiction the provisions of an agreement such as is contemplated by the provisions of s.*

by Government Order will override domestic law even where the domestic law is enacted subsequent to the treaty.

Therefore, although it will depend on the facts and the wording of the provisions in question, it seems unlikely that the Irish GAAR can be applied where a tax treaty has failed.

Part II

Question 11

In Ireland, the recovery of State aid is governed by the relevant EU legislation. To date, national legislation has not been enacted to supplement the existing EU laws. Furthermore, the occasions upon which the Irish courts have been asked to adjudicate on the matter of recovery of State aid are limited, resulting in minimal guidance in this area.

There is no specific body with the authority to monitor compliance with State aid, or ensure the timely recovery of unlawful (fiscal) State aid.

In instances where the State has had to recover unlawful State aid, the national authorities (namely, the Minister for Finance) have attempted to arrange recovery directly with the beneficiary.[14] Alternatively, recovery could be sought through an amended tax assessment by the Revenue Commissioner in instances where the unlawful aid was the result of a tax break.[15]

If the beneficiary resists recovery, the State may have recourse to the courts. In the absence of national legislation, the courts are likely to have recourse to the guidelines laid down by the Commission in Commission Notice 2009/C 85/01 of 9th April 2009 on enforcement of State Aid law by national courts.[16]

Question 12

There have been a limited number of instances where the Commission has issued a negative determination against Ireland together with an order for recovery.[17]

361 of the Income Tax Act, 1967, would prevail over legislative provisions which were inconsistent with the terms of such agreement".

[14] Helen Kelly and Eoin Kealy, "State Aid 2015 – Ireland" (Global Competition Review, 2015) at 8, available at: http://www.matheson.com/images/uploads/documents/GCR_Know_how_-_State_Aid_2015_-_Ireland.pdf

[15] Vincent JG Power, "Getting the Deal Through – State Aid 2016) (Law Business Research, 2016) at 32, available at: http://www.algoodbody.com/media/GettingtheDealThrough-StateAid2016Ireland-A&LGoodbody1.pdf

[16] See *Dun Laoghaire Rathdown County Council v West Wood Club Limited* [2015] IEHC 800.

[17] In decision C78/2001 and C286/2007 the Commission found that the total exemption from excise duty of mineral oils used as fuel for alumina production by France, Ireland and Italy constituted unlawful State

However, where such matters have come before the Irish courts, they have shown themselves willing to ensure the timely recovery of unlawful State aid.

In Commission decision C5605/2016 on State aid SA.38373 (2014/C) (ex 2014/CP), the Commission found a tax ruling issued by Ireland in favour of Apple Operations Europe International amounted to unlawful State aid. The Commission ordered the immediate recovery of the unlawful aid and allowed Ireland four months in which to implement the decision. The Commission decision is currently under appeal by Apple and Ireland.

The deadline for recovery was 3 January 2017, and on 4 October 2017, the Commission referred the matter to the European Court of Justice.[18] The Irish State is in the process of calculating the amount of unlawful aid and has appointed the National Treasury Management Agency to procure a custodian to manage a temporary account where the funds will be held in escrow.[19] To date, there has been no action before the Irish courts relating to resisted recovery in this case.

In *Kingdom of Belgium v Ryanair*,[20] a request for interim relief came before the Irish courts. The Commission[21] found that unlawful State aid had been granted by Belgium, and ordered immediate recovery from the beneficiary, in this case Ryanair. When Ryanair resisted recovery, Belgium initiated legal action before the Irish courts.

Ryanair sought an order to stay the recovery proceedings before the Irish courts, pending a determination by the Court of First Instance, in which Ryanair was appealing the decision of the Commission. The High Court (O'Neill J) adopted the test laid down by the Court of Justice in the *Zuckerfabrik* decision that, before granting a stay on proceedings to enforce a Commission decision: (a) the court should have serious doubts as to the validity of the decision being challenged before the community courts; (b) the defendant should demonstrate that it would suffer irreparable harm if the stay were not granted; and (c) the court should consider the interest of the community.[22] The High Court in *Kingdom of*

aid and issued an order for recovery. However there has been no case before the Irish courts concerning resisted recovery in this instance.

[18] European Commission – Press Release, "*State aid: Commission has decided to refer Ireland to the European Court of Justice for failing to recover from Apple illegal State aid worth up to €13 billion*" (4 October 2017), available at: http://europa.eu/rapid/press-release_IP-17-3702_en.htm

[19] Department of Finance – Press Release, "*Statement on Apple State Aid Infringement Proceedings*" (4 October 2017), available at: http://www.finance.gov.ie/updates/statement-on-apple-state-aid-recovery-infringement-proceedings/

[20] [2006] IEHC 213, [2009] 3 IR 417.

[21] Commission Decision C76/2002 on State aid Case S.A14093 available at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_14093

[22] *Zuckerfabrik Suderdithmarschen A.G. v. Hauptzollamt Itzehoe* (Joined Cases C-143/88 and C-92/89) [1991] E.C.R. I-415.

Belgium v Ryanair refused to grant the stay noting the defendant's failure to provide sufficient evidence to enable the court to form a view as to the validity of the relevant decision or to demonstrate the potential for irreparable harm.[23] The court further noted that in theory, the competitive equilibrium of the internal market would continue to be distorted if recovery were delayed.[24]

In Commission Decision 2013/199/EU of 25 July 2012 on State aid Case SA.29064, the Commission found that Ireland's differentiated air passenger departure tax rates (the "Air Travel Tax") distorted the competition of the internal market, and ordered the immediate recovery of the unlawful aid.[25]

The Irish authorities (the Minister for Finance and Ireland) subsequently brought four separate recovery proceedings in the High Court against three airlines (Ryanair, Aer Lingus and Aer Arann). The airlines defended the recovery sought on this basis and counterclaimed (*inter alia*) for damages for the imposition of an illegal aid. The airlines separately brought proceedings which sought to impugn the legislation imposing the Air Travel Tax on grounds of breach of Irish constitutional law and EU free movement law. The recovery proceedings were stayed pending determination of the airlines appeals before the General Court and Court of Justice,[26] and the stay having been lifted in early 2017, both the recovery proceedings and the airlines' proceedings against the State are now currently before the Irish High Court and are being case-managed by the same judge.[27]

[23] See Joined cases of C-413/88 and C-92/89 *Zuckerfabrik Suederdithmarschen A.G. Hauptzllamt Iztehoe and Ors* [1991] E.C.R 415.

[24] *Kingdom of Belgium v Ryanair* [2006] IEHC 213, [2009] 3 IR 417.

[25] See, generally, McKenna, *"New horizons"*, Law Society Gazette, March 2017, page 38. McKenna notes that the State aid was, *inter alia*, found to be recoverable against the company (Ryanair) which had made the original State aid complaint to the Commission.

[26] In the interim the Commission decision was appealed in the General Court, in the cases of *Aer Lingus v Commission* and *Ryanair v Commission*. The General Court annulled Article 4 of the Commission's Decision which ordered that the aid be recovered from the beneficiaries to the amount of 8 euro per passenger. This ruling resulted in the State agreeing to stay the recovery proceedings. The decision of the General Court was subsequently challenged by the Commission, with cross-appeals from Aer Lingus and Ryanair in the joined cases of *C164/15 P and C-165/15 P Commission v Aer Lingus Ltd and Ryanair Designated Activity Company*. The Court of Justice ultimately found in favour of the Commission, setting aside the judgement of the General Court.

[27] A number of interlocutory hearings have been had on procedural questions. The Plaintiffs in *Ryanair Limited v Revenue Commissioners & ors*, after having first unsuccessfully sought to admit the case to the Commercial List, sought to admit the case to the specialist High Court Competition List [2013] IEHC 327: the High Court (Cooke J) refused the plaintiff's application for admission to the Competition list, in part referring to the defendant's argument that were the Plaintiff's admitted to the Competition list this would cause substantial delay to the recovery proceedings. The airlines' proceedings were subsequently ordered on consent to be case-managed by Barrett J (the Judge in charge of the Competition List). Additionally, there have been various hearings of motions in respect of inter-partes discovery of

As demonstrated by the above discussion, there have been no instances where the Irish judiciary have refused to allow for the (immediate) recovery of State aid. On the contrary, the courts have shown themselves willing to ensure the timely recovery of unlawful State aid where possible, and have shown deference to the European Commission in such matters.

Question 13

Ireland is a Contracting State to the European Convention on Human Rights, including Article 1 of Protocol 1 thereof (the right to private property). Ireland is also a signatory to all major UN treaties protecting property and foreign investment. In particular, Ireland is a member of the WTO and as such, is a signatory to WTO agreements. Ireland is also a member of the World Bank Group's Multilateral Investment Agency, and the World Intellectual Property Organisation, and a party to the International Convention for the Protection of Intellectual Property. While Ireland has not yet entered into any Bilateral Investment Treaty with the United States of America, the Friendship, Commerce and Navigation Treaty and Protocol (21 January 1950)[28] contains provisions relating to the protection of property and foreign investments.

Question 14

Ireland's dualist system of international law, enshrined within Article 29.6 of the Irish Constitution,[29] requires the Oireachtas (the Irish legislature) to enact legislation incorporating international obligations into the Irish legal system before they form part of Irish domestic law and may be relied upon before the Irish courts.[30]

State and airline documents relevant to the airlines' defence, and two appeals are pending in Court of Appeal relating to same.

[28] Treaty of Friendship, Commerce and Navigation, with Protocol, between Ireland and the United States of America, Treaty Series 1950 No.7 (21 January 1950), available at: https://www.dfa.ie/media/dfa/alldfawebsitemedia/treatyseries/uploads/documents/treaties/docs/195007.pdf

[29] *Doherty v. The Referendum Commission and The Honorouble Mr. Justice Kevin Feeney* [2012] IEHC 211 at paragraph 47: *"Article 29.6 reflects the classic dualist theory of international law in that it provides that no international agreement will be part of the domestic law of the State unless the Oireachtas so provides by law."*

[30] *Re Ó Laighléis* [1960] IR 93. The applicant challenged provisions of the Offences Against the State Act 1939, claiming that the provisions were contrary to the European Convention of Human Rights. the Supreme Court accepted that an international agreement not so *incorporated "cannot operate in a domestic Court administering domestic law."* Similarly, in *Horgan v Ireland* [2003] 2 IR 468, Kearns J held that: *"[International law] cannot, however, impose binding".* In *Dubsky v. Ireland* [2005] IEHC 442 at paragraph 7, the High Court (Macken J) stated *"I do not consider it necessary for the purposes of this judgment to decide whether or not an applicant is entitled in law to invoke principles of international law, recognised in the Constitution, so as to enable him to establish that what has occurred is a breach of an Article of the Constitution, even if, as here, it is a different Article to that which affirms the State's acknowledgement of those international law principles. He is not*

There are instances of departure from the normal method of incorporating international law through discretely enacted primary legislation. As noted above (question 10), section 826 TCA provides that DTAs shall have the force or law "*notwithstanding any enactment*", where the Government has promulgated an Order specifying the arrangements entered with a foreign State in respect of certain forms of double taxation.[31]

While the effect of *international law* is limited by Ireland's dualist system, *European Union law* was given supremacy by virtue of constitutional amendment in 1973.[32] As a result, when a conflict arises between European Union law and national law, European Union law takes precedence. As international law can only be given effect through domestic legislation, if a conflict arises between European Union law and a national provision implementing an international obligation, European Union law will take precedence.

entitled to do so, if this would undermine or evade the correct scope of his entitlement to invoke Article 29 which this court has clearly established." See also *N.S v Judge David Anderson, D.P.P and the Minister for Justice Equality and Law Reform* [2004] IEHC 440.

[31] Save for s168 of the TCA.

[32] Article 29.4.10*"No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the States which are necessitated by the obligation of Membership of the European Union."* The amendment was supported by the enactment of the European Communities Act 1972 which reaffirms the supremacy of European Union law over domestic laws. *Kearns v. The European Commission* [2005] IEHC 324 at paragraphs 20-21. The court held that a provision of chapter 9 of the Copyright and Related rights Act, 2000 could not take precedence over the primary law provisions contained in Articles 288(2) and 235 of the Treaty. The court reaffirmed that: *"In the event of any conflict between European Union law, particularly directly effective law, and national law, even national constitutional law, the effect of Article 10 (formerly 5) and Article 249 (formerly 189) of the Treaty is that domestic law must give way to the European Union law provisions. This is clearly established by the Court of Justice in a series of well known cases."* In *McGrath Limestone Works Limited v. Ireland* [2014] IEHC 382 the High Court (Charleton J) stated that what needs to stay uppermost in the consideration of the Courts is the supremacy of the European legal order.

ITALY

Paolo Gentili
Roberto Baratta

Part I

Question 1

There are various possibilities in the Italian legal system for prior questioning of the financial administration by enterprises interested in legally defining certain components of their taxable income – to be included in tax declarations – which could give rise to assessments based on appraisals of a predominantly valuation nature by such financial administration.

There is, in the first place, a set of procedures provided as a general guideline under art. 11 of law 212/2000 (statute of taxpayer's rights), in the version updated by legislative decree no. 156 of 2015.

The substance of this article is as follows:

> *"1. The taxpayer may question the administration in order to obtain a response concerning concrete and personal specific cases related to:*
>
> *a) the application of tax provisions, when there are conditions of objective uncertainty as regards the correct interpretation of such provisions and the correct qualification of specific cases in light of the provisions applicable thereto, where conditions of objective uncertainty exist and the procedures pursuant to article 31-ter of Presidential Decree 29 September 1973, no. 600, introduced by article 1 of legislative decree 14 September 2015, no. 147 and pursuant to article 2 of]said legislative decree 14 September 2015, no. 147 cannot in any case be activated;*
>
> *b) the existence of the conditions and assessment of the suitability of the evidence required by the law for adopting specific tax regimes in expressly provided cases;*
>
> *c) the application of the regulation on the abuse of a specific case.*

2. The taxpayer questions the financial administration with a view to disapplying tax norms which, for the purpose of fighting elusive behaviours, limit deductions, subtractions, tax credits or other subjective positions of the taxable person otherwise admitted by tax legislation, providing proof that in the particular case, such effects cannot come about. In the cases that a favourable response had not been given, the possibility remains without prejudice for the taxpayer to provide the proof pursuant to the previous period, also for the purposes of ascertainment during administrative proceedings and disputes.

3. The administration responds to the applications pursuant to letter a) of paragraph 1 within the term of ninety days and to those pursuant to letters b) and c) of said paragraph 1 and those pursuant to paragraph 2 within the term of one hundred and twenty days. The response, written and grounded, binds all bodies of the organisation with exclusive reference to the issue subject matter of the application and limitedly to the applicant. If the response is not communicated to the taxpayer within the provided term, silence equates to the administration's agreement with the solution proposed by the taxpayer. Any acts, also regarding taxation or sanctions, deriving from the response, express or tacit, are void. Such effectiveness also extends to subsequent behaviours of the taxpayer relatable to the specific case subject matter of interrogation, without prejudice to correction of the interpretative solution by the administration which is exclusively valid to any future behaviours of the applicant.

4. No conditions of objective uncertainty apply when the administration has completely provided the solution for specific cases corresponding to that represented by the taxpayer by means of acts published pursuant to article 5, paragraph 2.

5. The presentation of the applications pursuant to paragraphs 1 and 2 has no effect on the expiries provided under tax norms, nor on date of effectiveness of the terms of expiry and does not lead to an interruption or suspension of the terms of limitation.

6. The administration publishes the replies in the form of a circular or resolution, issued in the cases in which a high number of taxpayers have lodged applications having as subject matter the same question or similar questions among them, in the cases in which the opinion is given in relation to recently approved norms or regarding which no official clarifications have been given, in the cases in which non standard behaviours have been reported by offices, as well as in all other cases in which the provided clarification is deemed of general interest. Without prejudice, in any case, to communication of the response to the individual applicants."

As seen, the provisions substantially provide for two types of questioning: the so-called "interpretative" questioning provided under the first paragraph and reserved to the preventive solution of possible uncertainties in interpreting norms or in the identification of de facto presumptions for certain norms to be applied; and so-called "non-applicative" type of questioning, provided under the second paragraph, aimed at non-application, on the party of the finance administration in individual cases (upon which, in fact, the taxpayer proposes questioning) of specific anti-avoidance norms.

More specifically, interpretative questioning, in the case provided under paragraph one, letter a), is divided into two sub-types: *i)* interpretative questioning in the strict sense and *ii)* questioning "about qualification".

Interpretative questioning in the strict sense constitutes the simpler hypothesis: the taxpayer may propose it when "there are conditions of objective uncertainty regarding correct interpretation" of tax provisions. This must concern an uncertainty due to the unclear text of the provision or the unclear association of a provision (clear per se) with other provisions.

Questioning "about qualification", instead, is aimed at establishing whether a certain de facto situation to be concretely appraised falls within the provision abstractly contemplated by a provision (clear per se). A typical example consists of an appraisal, naturally to be performed in a concrete manner, of whether, with an enterprise residing in a first State, a personal and/or material structure of such enterprise situated in a second state constitutes a permanent establishment in such second State. In Italy this can be disclosed because enterprises residing in Italy may ask the Italian tax authority for exemption of the profits and losses realised by their foreign permanent establishments (art. 168 ter presidential decree 917/1986, containing the income tax consolidation act/TUIR).

Interpretative questioning, in both its sub-types, is not permitted when it is possible to proceed with the special questioning provided under art. 31 ter of the Presidential Decree (dpr) no. 600/1973. Such special questioning, as shall be seen shortly, is expressly finalised at the conclusion of a "preventive agreement" between the financial administration and "enterprises having international activities".

Returning to the examination of art. 11, paragraph 1 of the taxpayer's statute, the other two sub-types of questioning are briefly explained, as provided under letters b) and c).

The so-called evidentiary questioning is provided under letter b). The category of "evidentiary" questioning groups all taxpayer's applications aimed at obtaining an opinion on the existence of the conditions or proof required from a specific norm for the purposes of accessing a certain tax regime.

Evidentiary questioning, unlike ordinary questioning, cannot be implemented in relation to any specific case, but only in the hypothesis in which said faculty is explicitly provided under substantial provisions, which, indeed, shall have to recall article 11, paragraph 1, letter b) of the Statute.

For example, this shall concern applications for questioning related to the so-called Controlled Foreign Companies (hereinafter CFC) pursuant to article 167 of the TUIR, by means of which the taxpayermay provide, in advance, proof of the conditions provided under said article in order to avoid direct taxation of income realised overseas by such companies. In this case, a taxpayer must prove

that the controlled foreign company that resides in a tax haven carries out an effective industrial or commercial activity or that, in any case, the control of said company does not permit the resident taxpayer to localise their income in a tax haven country.

As regards the effective suitability of the evidence found for such purpose, a taxpayer may thereby preventively question the financial administration.

Letter c) of art. 11 paragraph 1 provides lastly, for so-called "anti-abuse" questioning. Using this form of questioning, the taxpayer may preventively request an opinion from the financial administration regarding the applicability, or not, of the general anti-abuse norm to a certain operation, as contained in art. 10 bis of said taxpayer's statute (which shall be explained in the response to the queries which follow).

The presented applications for questioning may not be generically limited to asking the opinion of the administration regarding the abusive nature of a certain transaction or specific case, but may be structured, in detail, into:

- The qualifying elements of the transaction or transactions;
- The taxation sector respect to which the transaction raised the applicative doubt;
- The punctual norms of reference, including those which may be challengeable in terms of abuse of rights with reference to the represented transaction;
- the "valid non-fiscal grounds, not marginal and also of an organisational or managerial nature, which respond to purposes of structural or functional improvement of the enterprise or the taxpayer's professional activity" (as expressed by art 10 bis, paragraph 3).

By way of completing the examination of the general regulation set out under art. 11 of the taxpayer's statute, the questioning referred to hereabove as "non-applicative", provided under paragraph 2 of the provision must be examined.

This specific case presumes that specific provisions must be applied to the taxpayer which limit or exclude "deductions, subtractions, and tax credits" or other provisions benefitting the taxpayer and that the exclusion or limitation of such rights is provided under the provisions in question "for the purpose of fighting elusive behaviours". In other words, this must concern specific anti-avoidance norms associated to provisions benefitting the taxpayer which are just as specific, regarding which elusive use thereof is widespread; to the extent of justifying the classification of some of such forms of avoidance (the most widespread) and the provision of norms which, in such typified cases, exclude or limit the rights in question.

An example of a special anti-avoidance norm can be given by art. 109, paragraph 3 bis of the TUIR: on the matter of determining corporate income and in relation to the dividend exemption regime, by effect of which dividends are not taxed until 95% of their total is reached (art. 89 TUIR), art. 109 paragraph 3 bis provides that capital losses realised during the transfer of holdings cannot be deductible until the non-taxable portion is reached (as said, 95%) of the dividends collected in the thirty-six months before the capital loss is realised.

Such provision is aimed at preventing so-called dividend washing, in other words elusive use of the exemption of dividends which could be carried out by acquiring the holdings at a price inclusive of the value of dividends, collecting 95% exempt dividends and deducting the capital loss consequent to the transfer of holdings at a price which is obviously lower than the purchase price inasmuch as reduced by the collection of dividends which took place in the meantime. It is indeed evident, in this situation, that the purchase of the holdings only takes place for the sole purpose of selling them and thus realising a deductible capital loss, to be accumulated to the non taxability of the collected dividends. For this reason the special anti-avoidance law contained in art. 109 paragraph 3 bis excludes the deductibility of the capital loss in question.

Nonetheless in this context the taxpayer is permitted, pursuant to art. 11 paragraph 2 of the taxpayer's statute, recalled by paragraph 3 sexies of art. 109 TUIR, to question the financial administration in order to obtain non-application of the anti-avoidance norm in question, analytically demonstrating that the acquisition of the assets and subsequent resale thereof with capital loss have taken place on valid economic grounds, for example linked to the situation of the company or performance of sold assets, and not merely for tax reasons.

As said, art. 11 of the taxpayer's statue is a general norm on questioning. Therefore there are no particular conditions for admitting taxpayers to this procedure. A taxpayer may naturally present an application for interpretative or qualifying questioning on a legitimate basis (pursuant to cited letter a)) only when there is an effective interpretative or qualifying doubt, in other words an objective situation of uncertainty. In the absence of said characteristics, questioning would be transformed into an instrument of preventive ascertainment and would not be admissible.

It is important to point out, moreover, that while the questioning processes provided under art. 11 paragraph 1 letters a), b), c) are optional, so that a taxpayer may also proceed without acquiring the administration's point of view beforehand, in this case clearly running the risk of an assessment, the "non applicative" questioning provided under paragraph 2 is obligatory: disapplication of a special tax-avoidance norm may only take place on the basis of questioning raised by the taxpayer; consequently if the taxpayer disapplies the special tax avoidance norm

without questioning the administration beforehand, a notice of assessment shall be served automatically, due to violation of the disapplied tax avoidance norm.

However special conditions exist in the case that the special procedure provided under art. 31 ter dpr 600/73 as cited, is applied, the applicability of which, as mentioned, excludes the application of the general questioning procedure pursuant to art. 11 of the taxpayer's statute.

In the part of interest herein, art. 31 ter provides:

"31-ter (Prior agreements for companies having international activity)

1. Companies having international activities have access to a procedure aimed at entering into prior agreements, mainly referring to the following contexts:

a) prior definition, between both parties, of the methods for calculating the normal value of the transactions pursuant to paragraph 7, of article 110 of the consolidated tax act approved by Presidential Decree 22 December 1986, no. 917, as well as the outgoing and incoming values in the case of transfer of residence, pursuant to articles 166 and 166- bis respectively of such consolidated act. ...;

b) application, to a concrete case, of norms, also of a conventional origin, concerning the attribution of profits and losses to a permanent establishment in another State or a resident enterprise or entity or to the permanent establishment in Italy of a non resident subject;

c) prior appraisal of the existence, or not, of the requirements establishing a permanent establishment located in the State territory, having considered the criteria provided under article 162 of the consolidated tax act..., as well as the Conventions in force against double taxation stipulated in Italy;

d) application, to a concrete case, of norms, also of a conventional origin, concerning the distribution or receipt of dividends, interests and royalties and other components regarding income to or from non resident subjects.

2. The agreements pursuant to paragraph 1 bind the parties for the tax period during the course of which they are stipulated and for the four following tax periods, subject to changes in the circumstances in fact and in law that are relevant for the purposes of the subscribed agreements and resulting therefrom. Nonetheless, if they are the consequence of other agreements concluded with the competent authorities of foreign States following the mutual arrangement procedures pursuant to paragraph 1, they bind the parties, according to agreements made with such authorities, effectively as from the previous tax periods provided that these are not prior to the tax period in progress as at the date of presentation of the related application by the taxpayer.

3. ...

[4. Abrogated effectively as from 1/1/2017.]

5. For the tax periods of validity regarding the agreement, the financial Administration exercises the powers pursuant to articles 32 et seq. only in relation to matters other than those subject matter of such agreement.

6. ...

7. ...".

As seen, the procedure provided under art. 31 ter is aimed at stipulating an actual binding agreement between the financial administration and the taxpayer, unlike the general questioning pursuant to art. 11 taxpayer's statue which is firstly aimed at obtaining an interpretative pronouncement of an uncertain situation. For this reason, in the case that it is possible to proceed with the agreement pursuant to art. 31 ter, art. 11 paragraph 1 letter a), the statute excludes the possibility to proceed with interpretative questioning.

The agreement process as per art. 31 ter is only reserved to companies having international activities. A company having activities overseas is to be understood (as Inland Revenue measure of 21 March 2016 specifies) as an enterprise resident in the territory of the Italian State pursuant to the TUIR, which, alternatively or jointly:

- controls or is controlled (directly or indirectly) by a non resident company;
- the equity, fund or capital, of which is held by non resident subjects or it has holdings in the equity, fund or capital, of non resident subjects;
- has paid to, or received from, non resident subjects dividends, interests, royalties or other income related components;
- exercises its activity by means of a permanent establishment in another State;
- is in the conditions indicated under articles 166 or 166-bis TUIR, i.e. it is transferring its residence overseas or is transferring its residence in Italy (provided that it originates from a country permitting an adequate exchange of information).
- a company having international activity is also to be understood as a non resident enterprise exercising its activity in the State territory by means of a permanent establishment.

Such delimitation of the subjects admitted to the procedure derives from the specific subject matter of such procedure which concerns, in particular

- The transfer price regime;
- Determination of the outgoing and incoming values in the event of transfer of residence;
- The attribution of profits or losses to the permanent establishment;
- Prior appraisal of the existence of the requirements establishing a permanent establishment in Italy;
- The distribution or receipt of dividends, interests, royalties and other income related components.

In conclusion of this first part, it is therefore possible to observe that in the Italian legal system a complete system of prior questioning of the financial administration by taxpayers exists. Fundamentally, as art. 11 taxpayer's statute demonstrates, questioning is considered as an instrument of assessment, interpretation and qualification of legal norms and, furthermore, of de facto situations pertinent to the provision of legal norms. Nonetheless, as demonstrated by art. 31 ter dpr 600/73, in the cases that relations with other fiscal legal systems are considered first of all given that the companies undertake cross-border activities or belong to multi-national groups, one arrives at forms of actual agreement: in these cases one surpasses the simple study or a norm or de facto situation in order to interpret or qualify it, carrying out an actual management and provision to a certain extent unavoidably discretional, of interests, both on the part of the taxpaying companies and on the part of the financial administration. In the case of international relations, a deciding factor, indeed, for the financial administration is to always consider reciprocity with the other interested financial administration (or other financial administrations), regarding which certain conclusions can be reached, which mere interpretative questioning would not allow, where deemed convenient in the context of such relations; as also, to the contrary, certain conclusions may be excluded for the same reasons, which a mere interpretative questioning would consent or impose.

Questions 2 and 3

Questions 2 and 3 refer to the problem of, so to say, cross-border uncertainty. Basically one asks oneself: every time a certain element of income may fall within the power of imposition of several States, must the State applying its taxes also consider any taxation applied to the same element of income by the other interested States?

In principle, as regards the Italian legal system, it is necessary to distinguish between resident and non resident subjects. Resident companies (as also natural persons) are taxed on a "global" basis, in other words for income produced anywhere (articles 75 and TUIR). Outside of the cases of bilateral international conventions against double taxation, this leads to the irrelevance of fiscal qualifications and tax treatment which certain elements of income produced by a resident in one foreign State may have received in such State. Only the qualifications given by the State of residence shall be recognised.

Non resident companies, instead, are taxed on a "territorial" basis (articles 151 and 152 TUIR), in other words only for income, other that corporate income, produced in Italy (e.g. for income deriving from properties located in Italy or for income from interests on capital issued by subjects residing in Italy); and for corporate income produced in Italy by means of a permanent establishment located

therein. In this regard, too, in principle, meaning outside of the cases of bilateral international agreements against double taxation, it does not recognise the tax treatment which said assets may have received in the State of residence of the company (when, for example, in such State the company in questions is subject to taxation on a "global" basis).

Having recalled the above in principle, it must however be considered that the matter of cross-border taxation is that in which doubts may typically occur precisely regarding the conditions of application of the recalled principles of "global" or "territorial" taxation. For example, it is not sufficient to say that the income produced overseas by a structure referring to a company resident in Italy must be taxed on Italy according to the principle of "global" taxation. In fact it is necessary, first, to establish whether the foreign structure is effectively traceable to the Italian company, in other words it can be considered as a branch of the latter, for example. Based on the normative of the foreign State, this structure could in fact be considered as an independent subject respect to the presumed Italian parent company.

Reciprocally, it is not sufficient to say, for example, that the income produced in Italy by a permanent non resident company must be taxed in Italy according to the principle of "territorial" taxation. Indeed, it shall be necessary first to establish if the structure which produced the income in Italy can really be qualified as a permanent Italian organisation of a foreign resident or if the component of income in question can be attributed to the permanent Italian organisation of the foreign resident.

Therefore cross-border taxation shall be the typical seat of questioning and agreements, aimed, indeed, at separating that which really is taxable in Italy according to the principles of "global" or "territorial" taxation and that which is not, given that it does not fall within the scope of application of such principles and exclusively pertains to foreign jurisdiction. In order for the system of questioning and agreements to function efficiently, it is therefore important that the notifying State is up to date regarding the tax treatment applied to the same subject matters in the other interested State or States.

The matter is thereby governed, at least with regard to the Italian legal system, by bilateral agreements with third countries on the exchange of fiscal information and by the EU normative on the matter of exchange of information and fiscal cooperation among member States.

In this last context, legislative decree no. 32/2017 implemented Directive 2015/2376/EU, which in turn amended Directive 2011/16/EU. By implementation of this regulatory framework, the Italian legislator integrated legislative decree no. 29/2014, and provided for automatic (i.e. obligatory) exchange of information on the matter of advance cross-border rulings and prior agreements on transfer

prices (art. 5 paragraph 1 bis legislative decree 29/2014: *"The connection services pursuant to paragraph 1 directly exchange information with the other member States concerning advance cross-border rulings and prior agreements on the transfer prices pursuant to article 2, paragraph 1, letters h-bis) and h-ter) in observance of the terms and procedures indicated under article 8-bis of directive 2011/16/EU."* Art. 2, paragraph 1 letter h-bis, in turn qualified as advance cross-border rulings, in particular, those described hereto, provided under art. 31 ter dpr 600/73 and by art. 11 taxpayer's statute; whereas under letter h-ter it defines the prior agreement on transfer prices as "prior definition, between both parties, of the methods for calculating the normal value of the transactions [intergroup]... , application, to a concrete case, of norms, also of a conventional origin, concerning the attribution of profits and losses to the permanent establishment in another State of a resident company or entity or to the permanent establishment in Italy of a non resident subject, stipulated pursuant to article 31-ter, paragraph 1, letters a) and b), of Presidential Decree 29 September 1973, no. 600;").

Art. 6 of legislative decree 29/2014 then provides that the optional exchange of information in the cases provided under art. 9 of Directive 2011/16/EU, i.e. in the cases in which

> *"a) the competent authority of one Member State has grounds for supposing that there may be a loss of tax in the other Member State;*
>
> *(b) a taxpayer obtains a reduction in, or an exemption from, tax in one Member State which would give rise to an increase in tax or to liability to tax in the other Member State;*
>
> *(c) business dealings between a taxpayer in one Member State and a taxpayer in the other Member State are conducted through one or more countries in such a way that a saving in tax may result in one or the other Member State or in both;*
>
> *(d) the competent authority of a Member State has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises;*
>
> *(e) information forwarded to one Member State by the competent authority of the other Member State has enabled information to be obtained which may be useful to assessing liability to tax in the latter Member State."*

Again by implementation of the aforementioned Directive, art. 31 bis dpr 600/73 then provides that, as regards the tax assessments presenting cross-border profiles, the possibility of reciprocal assistance in assessments with financial administrations of other member States, authorising the presence of the officials of the administrations of other interested member States in the territory of the State. When the Italian State is also or mainly interested, art. 31 bis, paragraph 6 provides that *"When the situation of one or more tax subjects presents a common or complementary interest with other member States, the financial Administration may decide to proceed with simultaneous controls with the financial Administrations*

of the other member States, each one in their own territory, for the purpose of exchanging the information thus obtained when such controls appear to be more efficient than a control only performed by one member State."

It seems evident that information acquired or exchanged during the summarised procedures as described, i.e. procedures of international ruling or prior agreement on transfer prices or on the attribution of profits and losses to permanent establishments, as well as the procedures of tax assessment and auditing, shall be considered by the national administration when concluding such procedures; or when concluding international rulings, prior agreements and assessments. In this way, in the hypotheses described above, one may arrive at cross-border taxation "coordinated" between the various interested member States.

Outside of the cases considered by the EU regulatory framework just recalled and generally in relations with third States, there is, however, no obligation for the State to consider the taxation of the specific cross-border case described in questions 2 and 3, applied in the other interested States.

See, moreover, in the response to Question 8, the statement therein as regards the application of art. 31 quater dpr 600/73 with regard to decreasing adjustments on the matter of transfer prices.

Question 4

The matter of the presumptions and legal nature of the questioning which are discussed in the previous points, logically leads to a short comment on question 4 which concerns the degree of legal certainty produced by the questioning.

As regards the legal certainty that the two described questioning procedures may produce, no significant differences are found in the two cases: in both cases the degree of certainty is maximum. In the case of questioning provided under art. 11 taxpayer's statue, paragraph 3 of art. 11 provides that *"the written and grounded response bounds all bodies of the administration with exclusive reference to the issue subject matter of the application and limitedly to the applicant. When the response is not communicated to the taxpayer within the provided term, silence equates to the administration's agreement with the solution proposed by the taxpayer. If the response is not communicated to the taxpayer within the provided term, silence equates to the administration's agreement with the solution proposed by the taxpayer. Any acts, also regarding taxation or sanctions, deriving from the response, express or tacit, are void."* In the case of agreements as per art. 31 ter dpr 600/73, paragraphs 2 and 5 provide that: *"2. The agreements... bind the parties for the tax periods during the progress of which they are stipulated and for the next four tax periods, subject to significant changes in fact or law ... 5. For the valid tax periods of the agreement, the financial administration exercises powers [of investigation and ascertainment] only in relation to matters other than those subject matter of the agreement."*

It is now necessary to examine the aspect of any circumstances which have come about and the effects these may produce on the stability of the results of the questioning (opinions, non application, agreements). In relation thereto, one observes a significant difference between the questioning pursuant to art. 11 taxpayer's statue and the agreements pursuant to art. 31 ter dpr 600/73.

In general, also with regard to contingencies, the Italian legislator is preoccupied with guaranteeing the greatest stability of the questioning. Art. 11 paragraph 3 taxpayer's statute provides, in fact, that the response to the questioning is effective regarding both behaviours specifically forming the subject matter of the application for questioning and the subsequent behaviours of the taxpayer, traceable to such specific case (consider the procedure for amortising a certain asset that is present in the taxpayer's books every year); it adds, however, that the administration, when deeming the response to the questioning – for any reason in fact or in law – as incorrect, may rectify its interpretative solution, specifying that such correction shall only be effective for behaviours of the taxpayer subsequent to receipt of such correction, in other words without prejudice to behaviours, albeit incorrect, adopted by the taxpayer in conformity with the first response to the questioning and until they have been notified of such correction. In short, the responses to questioning as per art. 11, can always be rectified; however the entrustment of the taxpayer is without prejudice.

Otherwise is the regulation for contingencies to agreements as per art. 31 bis, in compliance with the nature of the actual binding "contracts" that they present. Indeed, paragraph 2 of art. 31 bis shows that the agreements cannot be amended "*except for changes in circumstances in fact and in law relevant to the purposes of the signed agreements and resulting therefrom* ". In order for an agreement to be amended, it is necessary, in other words, that in the first place an objective change takes place in the circumstances in fact or in law existing at the time the agreement was concluded; it is not therefore sufficient that the administration (or, as may be the case, the taxpayer) subjectively changes its interpretation/qualification of the situation in law and in fact existing at the time of agreement and which, per se, has not changed thereafter. In the second place it is necessary that the circumstances in fact and in law which change after conclusion of the agreement are expressly contemplated in the latter, in other words they are circumstances in law or in fact that are essential for the agreement to be concluded and its duration. Insignificant, instead, are changes in circumstances in law or in fact that are not expressly contemplated in the agreement or which only have an indirect influence on the application thereof.

Question 5

An examination of question 5 appears to be centred on the guarantee that at least amongst member states the principles are observed for taxing cross-border profits of associated companies agreed by the member states in the "convention related to eliminating double taxations in the case of adjustments to the profits of associated companies 90/436/EEC)", in particular in art. 4 of this convention. Art. 4 is aimed at avoiding double taxation to the same extent as double non taxation. In fact its provides that "*when…two companies [associates residing in different contracting States], in their commercial or financial* relations, are bound by agreed or imposed conditions other than those which would have been agreed between independent companies, the profits which, in the lack of such conditions, would have been realised by one of the companies, but due to said conditions were not, can be included in the profits of this company and taxed as a consequence". *In this way it should be possible to avoid that profits not emerging due to the application of non-market conditions among associated companies emerge on one side and on the other only emerge in the State of residence of the company to which such profits are attributable.*

In the Italian legal system this system was essentially implemented in art. 110 paragraph 7 of the TUIR, according to which *"7. The components of income deriving from transactions with companies not resident in the State territory, which directly or indirectly control the company, are controlled by the latter or controlled by the same company which controls the company, are determined with reference to the conditions and prices which would have been agreed among independent subjects operating in conditions of free competition and in comparable circumstances,* if an increase in income derives therefrom. Such provision also applies when a decrease in income derives therefrom, according to the procedures and conditions pursuant to article 31-quater of Presidential Decree 29 September 1973, no. 600. By decree of the Ministry of economy and finances, based on the best international practices, the guidelines for applying this paragraph can be defined."

Art. 31 quater dpr 600/73, in turn, provides that *"1. An adjustment decreasing the income pursuant to article 110, paragraph 7, sentence two of the consolidated tax act approved by Presidential Decree 22 December 1986, no. 917, can be acknowledged thus:*

a) in execution of the agreements concluded with the competent authorities of foreign states following the mutual arrangement procedures provided under international conventions against double taxation on income or by the Convention related to the elimination of double taxations in the case of adjustment to the profits of associated companies, with final act and declarations, completed in Brussels on 23 July 1990 and made executive by law 22 March 1993, no. 99;

b) in conclusion of controls carried out in relation to activities of international cooperation, the outcomes of which are agreed upon by participating States;

c) *following an application by the taxpayer, to be presented according to the procedures and terms provided by measure of the Director of the Inland Revenue, against a final increasing adjustment compliant with the principle of free competition carried out by a State with which an agreement is in force to avoid double taxation on income allowing an adequate exchange of information. Without prejudice, in any case, to the taxpayer's faculty to request activation of mutual arrangement procedures pursuant to letter a), where the conditions to do so exist."*

One thereby gathers that the risk of "double non taxation" is inexistent, inasmuch as the reduction in income of the company residing in Italy is only possible if, by means of the procedures described under art. 31 quater, it is found that the effective taxable amount realised in Italy was actually less than the apparent amount; or that the lower taxable amount granted by the Italian tax authority is balanced by a corresponding higher taxable amount taxed by the other State by application of prices under free competition.

Question 6

As regards question 6, as already explained with regard to questions 2 and 3, in the Italian legal system the general principle of "global" taxation is in force; according to which a resident company is taxed in Italy for all income produced anywhere and therefore also for income produced overseas, even when by means of its own permanent establishment located in another State.

Moreover, solely for the case of profits produced overseas by means of a permanent establishment, art. 168 ter of the TUIR allows the interested companies to exercise an option for exemption in Italy of profits attributable to all the foreign permanent establishments. This option is irrevocable and must be exercised when the permanent establishment is founded. The fundamental condition for obtaining such exemption is that the permanent establishment is not in a State or territory that is a tax haven and as such must be understood, pursuant to art. 167 (recalled by art. 168 ter), as a State or territory other than the member States of the European Union in which "*the nominal level of taxation proves to be lower than 50 percent of that applicable in Italy*".

Question 7

In the Italian legal system the fundamental norm on the matter of controlling cross-border transfer prices is art. 1, paragraph 6 of legislative decree no. 471/97, which contains general norms on sanctions on the matter of violations of the norms related to income tax and VAT. Art. 1, paragraph 6 sets out: *"6. In the case of an adjustment to the normal value of transfer prices applied in relation to the transactions pursuant to article 110, paragraph 7, of Presidential Decree 22 December 1986, no. 917,*

from which a higher tax or difference in credit derives, the sanction pursuant to paragraph 2 is not applied when, during access, inspection or audit or other preliminary investigative activities, the taxpayer provides the Financial Administration with the documentation indicated in a dedicated measure of the Director of the Inland Revenue, suitable for establishing conformity to the normal value of the applied transfer prices. The taxpayer retaining the documents provided by the measure pursuant to the sentence hereabove must notify the Financial Administration thereof by apposite communication according to the procedures and terms indicated therein; in the absence of such notification, the sanction pursuant to paragraph 2 shall become applicable."

On the basis of this provision, the measure by the Director of the Inland Revenue was adopted which identifies the contents that the documentation provided by the company must bear in order to be considered as suitable for allowing conformity to the normal value to be established, in other words at the price of free competition, of the applied transfer prices. The measure (no. 137654 of 29/9/2010) contains, in brief, a full reference to OECD guidelines on the matter of transfer prices. In fact it declares application of "*OECD guidelines on the determination of transfer prices for multinational companies and tax administrations, approved by the OECD Council on 22 July 2010;"* and, as regards the methods for defining the price of free competition, refers to the "traditional transactional method" and the "transactional profit method", specifying that "*traditional transactional method" means one of the methods for defining transfer prices explained under Chapter II, part II of the OECD guidelines; "transactional profit method" means one of the methods for defining transfer prices explained under Chapter II, part III of the OECD guidelines."*

Basically the system has no generalised obligation to document, in conformity with the OECD guidelines, the correspondence of transfer prices at the "normal value" or free competition prices, but a burden charged to the taxpayer in order to incentivise compliance with the regime in a context of spontaneous fulfilment. In truth, if the taxpayer fails to prepare the documents contemplated by the Measure, following the provided procedures and terms therein, the latter may incur sanctions ordinarily provided under art. 1 legislative decree 18 December 1997, no. 471 regarding the case of false declaration. Where to the contrary, a taxpayer prepares suitable documentation as contemplated by the Measure according to the provided procedures and terms and notifies the Inland Revenue thereof as per procedure and, upon control exhibits the latter to the bodies appointed for conducting audit activities, they shall not incur such sanctions. In applying the system, the Italian administration also considers, where pertinent, the Code of Conduct related to documenting the transfer prices for associated companies in the European Union approved on 27 June 2006 by the Council of the European Union and by the representatives of the governments of the Member States.

Questions 8 and 9

The response to question 8 essentially derives from art. 110, paragraph 7 of the TUIR. It is provided therein that *"7. The components of income deriving from transactions with companies not resident in the State territory, which directly or indirectly control the company, are controlled by the latter or controlled by the same company which controls the company, are determined with reference to the conditions and prices which would have been agreed among independent subjects operating in conditions of free competition and in comparable circumstances, if an increase in income derives therefrom. Such provision also applies when a decrease in income derives therefrom, according to the procedures and conditions pursuant to article 31-quater of Presidential Decree 29 September 1973, no. 600. By decree of the Ministry of economy and finances, based on the best international practices, the guidelines for applying this paragraph can be defined."*

In turn, art. 31 quater dpr 600/73 provides that *"1. An adjustment decreasing the income pursuant to article 110, paragraph 7, sentence two of the consolidated tax act approved by Presidential Decree 22 December 1986, no. 917, can be acknowledged thus:*

a) in execution of the agreements concluded with the competent authorities of foreign states following the mutual arrangement procedures provided under international conventions against double taxation on income or by the Convention related to the elimination of double taxations in the case of adjustment to the profits of associated companies, with final act and declarations, completed in Brussels on 23 July 1990 and made executive by law 22 March 1993, no. 99;

b) in conclusion of controls carried out in relation to activities of international cooperation, the outcomes of which are agreed upon by participating States;

c) following an application by the taxpayer, to be presented according to the procedures and terms provided by measure of the Director of the Inland Revenue, against a final increasing adjustment compliant with the principle of free competition carried out by a State with which an agreement is in force to avoid double taxation on income allowing an adequate exchange of information. Without prejudice, in any case, to the taxpayer's faculty to request activation of mutual arrangement procedures pursuant to letter a), where the conditions to do so exist."

In short, the Italian legal system permits, in principle, only a unilateral amendment which increases income; and this can be done both by the financial administration with notice of assessment, or by the taxpayer, spontaneously integrating their declaration for the purpose of avoiding sanctions.

A unilateral decreasing amendment, as much by the financial administration as by the taxpayer, is instead only permitted in the special circumstances described by the provision now shown, or in the case of agreement with other interested States reached on the outcome of mutual arrangement procedures

as provided by the bilateral conventions on the matter of double taxation of by convention 90/436/EEC; or on the outcome of joint tax controls with the other interested States; or, lastly, by application of the taxpayer demonstrating that they have undergone a definitive increasing adjustment to the same component of income, compliant with the principle of free competition (and provided that a bilateral convention is in force against double taxation between Italy and such other State).

Such last considerations, as can be seen, also respond to question no. 9.

Question 10

The Italian legal system also contains a general anti-abuse regulation which is currently formulated in art. 10 bis taxpayer's statute (law 212/2000). In its first five sentences, of particular interest (the sentences thereafter contain the procedural provisions required for applying the general rule) it sets out:

> *"1. Abuse of law arises when one or more transactions absent of economic substance which, albeit formally observing tax norms, essentially realise undue tax advantages. Such transactions cannot be invoked before the financial administration which disregards the advantages thereof, determining taxes in accordance with the avoided norms and principles and considering the amount paid by the taxpayer by effect of such transactions.*
>
> *2. Considered, for the purposes of paragraph 1, are:*
>
> *a) transactions absent of economic substance, facts, acts and contracts, even interconnected, unsuited to producing significant effects other than the tax advantages. Indicators of lack of economic substance are, in particular, the inconsistency of qualification of the single transactions with their legal foundation as a whole and non conformity of the use of legal instruments to normal market logic;*
>
> *b) undue tax advantages, the benefits, even not immediate, realised in contrast with the purposes of the tax norms or the principles of the tax system.*
>
> *3. Not considered as abusive, in any case, are transactions justified by valid non-fiscal reasons that are not marginal, also of an organisational or managerial nature, which respond to purposes of structural or functional improvement of the company or the taxpayer's professional activity.*
>
> *4. Without prejudice to the taxpayer's freedom of choice between various options offered by the law and between transactions leading to a different tax burden.*
>
> *5. The taxpayer may request a questioning pursuant to article 11, paragraph 1, letter c), in order to learn whether the transactions constitute specific cases of abuse of the law.*

In the doctrine and in the Italian legal system, it is predominantly deemed that this general anti-abuse norm may also be applied in hypotheses governed by special anti-avoidance norms, when the latter prove to be concretely ineffective.

For example, Stevanato[1] observed that: *"The legal system is rich in provisions having a specific anti-avoidance purpose; consider the carrying forward of losses in a merge, norms fighting dividend washing, etc. One could therefore affirm that, once these specific regulations are observed, the taxpayer's behaviour would no longer be criticisable from the viewpoint of the general anti-avoidance norm or prohibition to abuse the law, also recalling the principle of specialty and no derogation of special norms (those specific) by the general norm (the general anti-avoidance clause). In actual fact there would not appear to be a relation of any type or kind therein, as it concerns structurally differing provisions and the application of general anti-avoidance clauses cannot be excluded, given that norms having specific anti-avoidance purposes, inasmuch as strict norms, may also be the subject matter of circumvention. Consider, on the matter of limits to the report of losses, the transferral of the company controlling the company which produced the losses or the hypothesis of a merger into a company at loss prior to the recruitment of an employee in order to pass the operativity test (Cassation no. 21782 of 2011,)".*

Part II

Questions 11 and 12

In the Italian legal system the prompt recovery of State aids declared incompatible by the Commission is regulated, lastly, by art. 48 of law 24/12/2012 no. 234, according to which (in the part of interest herein) *"1. Equitalia Spa* [i.e. the collection agent for tax revenues and other public revenues, now replaced by the Inland Revenue] *carries out the collection of amounts due by effect of the decisions on recovery pursuant to article 16 of regulation (EU) 2015/1589 of the Council, of 13 July 2015, regardless of the form of aid and subject granting it.*

2. Following notification of a recovery decision pursuant to paragraph l, the Ministry competent on the matter, within forty-five days from the date of notification, identifies, where necessary, the subjects bound to returning the aid, ascertains the amounts due and defines the methods and terms of payment. In the case of several competent administrations, the President of the Council of Ministers appoints, by their own decree and within fifteen days from the date of notification of the recovery decision, an extraordinary commissioner, to be identified within the administrations that have granted the aids subject matter of the recovery decision or those territorially interested by the aid measures and defines the pro-

[1] http://www.google.it/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi3xqfW5rHXAhV JqxoKHaoJCgUQIAgqMAA&url=http%3A%2F%2Fwebcache.googleusercontent.com%2Fsearch%3Fq%3Dcache%3AgS OTlar5SsQJ%3Awww.giustizia-tributaria.it%2Fseminari-e-corsi-di-formazione% 2Fitem%2F457-15e-16-febbraio-2013-trieste%2B%26cd%3D1%26hl%3Dit%26ct%3Dclnk%26gl%3Dit&usg=AOvVaw3CKEqnkcsBoQAxgPw_69iR

cedures for implementing the recovery decision pursuant to paragraph 1. The extraordinary commissioner, by their own measure, identifies the subjects bound to returning the aid, ascertains the amounts due and defines the methods and terms of payment within forty-five days of the decree of appointment."

As regards internal disputes having as subject matter the national measures for executing the obligations of recovery, jurisdiction is attributed in all cases to the administrative judge (regional administrative courts in the first instance and State Council in appeal) pursuant to article 133, paragraph 1, letter z -sexies of the code of administrative process. Pursuant to art. 119, paragraph 1, letter m-quinquies, such procedures are of an urgent nature and when they are carried out all procedural terms are reduced by half.

In these cases the national judges exercise full jurisdiction, in trials and precautionary proceedings, over national measures executing the obligations of recovery. Generally speaking, when exercising such jurisdiction the national judges comply with the principles deducible from the so-called "Zuckerfabrik and Atlanta" case law. Basically the national administrative judge may grant suspension of the efficacy of the reason for payment issued by execution of a recovery decision when the following conditions cumulatively recur:

a) serious grounds of illegitimacy regarding the recovery decision, or evident error in identifying the subject bound to returning the State aid or evident error in calculating the amount to be recovered and within the limits of such error;
b) risk of imminent and irreparable prejudice.

If such suspension is based on the grounds pertaining to illegitimacy of the recovery decision, the administrative judge proceeds, by separate order, with the suspension of the proceedings and immediate prejudicial deferral of the issue to the Court of justice of the European Communities, with request for urgent discussion pursuant to article 104- ter of the regulations of procedure of the Court of Justice, if the matter of validity of the act contested by the Commission has not already been referred to the former. The application to suspend the challenged act cannot, in any case, be upheld for reasons pertaining to the legitimacy of the recovery decision when the applicant, albeit having the faculty thereof, provided that identified or clearly identifiable, has not lodged a challenge against the recovery decision pursuant to article 263 of the TFEU, or when, having lodged such challenge, has not requested suspension of the recovery decision pursuant to article 278 of such Treaty or has requested it and the suspension has not been granted.

NORWAY

Małgorzata Agnieszka Cyndecka*
Øyvind Røed*

1. Introduction

A national report on taxation, state aid and distortions of competition in Norway will necessarily be a little bit different than similar reports from EU member states. Norway is a member of the European Economic Area, but not of the EU. This means that while the rules in themselves are similar, the legal framework is quite different. We will explain the particular dimensions of the EEA Agreement of relevance to the topics of this report, in part 2. In parts 3-5, we attempt to answer each question as conscientiously as we can within the scope of this report.

As we shall see, our key findings on taxation are that while every taxpayer and consumer that is entitled to an exemption from excise duty may apply for a binding tax ruling in advance, there are several rules limiting the use of these binding advance rulings. Norway relies on international organizations in key areas of their tax and State aid law. For instance, Norway follows on the OECD's transfer pricing guidelines in applying the principle of arm's length pricing. Norway mainly enters investment treaties along with EFTA. In addition, the country relies on guidelines from the EFTA surveillance authority in recovering State aid. Norwegian courts stretch themselves quite far in order to secure Norway's fulfillment of its EEA obligations.

Rather than writing in a question and answer format, we have decided to write this report as a coherent text. For readers interested in a particular subset of the question, the following guide may be of use: Questions 1-10 are answered

* University of Bergen

in part 3, Taxation. Part 4 on recovery of State aid covers questions 11-12, while question 13 is answered in the shorter part 5. As question 14 for Norway concerns interpretation of the EEA Agreement, we integrate it with part 2 on the EEA Agreement.

2. The EEA Agreement and the peculiarities of EEA law

In order to understand how the rules in question in this report function in their Norwegian setting, it is important to understand some of the fundamental distinctions of EEA law. The EEA Agreement entered into force in 1994. The contracting parties are on the one hand the three EEA EFTA states[1] (Norway, Iceland and Liechtenstein) and on the other hand the 28 EU Member States. The Agreement connects the EEA EFTA states to the internal market through the inclusion of EU legislation on the four freedoms, competition and State aid rules, as well as consumer protection rules and company law.[2]

The EEA Agreement guarantees equal rights and obligations within the internal market for citizens and economic operators in the EEA. In order to ensure a level playing field, the agreement establishes joint committees whose job it is to identify EEA relevant legislations from the EU, and recommend how the EFTA states implement it. In order to secure homogeneity, the wording of the rules and provisions concerning the above-mentioned areas are drafted 'in terms as close as possible to the corresponding provisions of (now) TFEU'.[3]

Figure 1 illustrates the buildup of the EEA, commonly referred to as the two-pillar system.

[1] Switzerland is an EFTA State, but not a party to the EEA Agreement.

[2] See recitals 4 and 5 of the Preamble to the EEA Agreement. The EEA Agreement was signed on 2 May 1992 and entered into force on 1 January 1994.

[3] Fenger, Niels, Michael Sánchez-Rydelski and Titus van Stiphout, *European Free Trade Association (EFTA) and European Economic Area (EEA)*, 2012, p. 63.

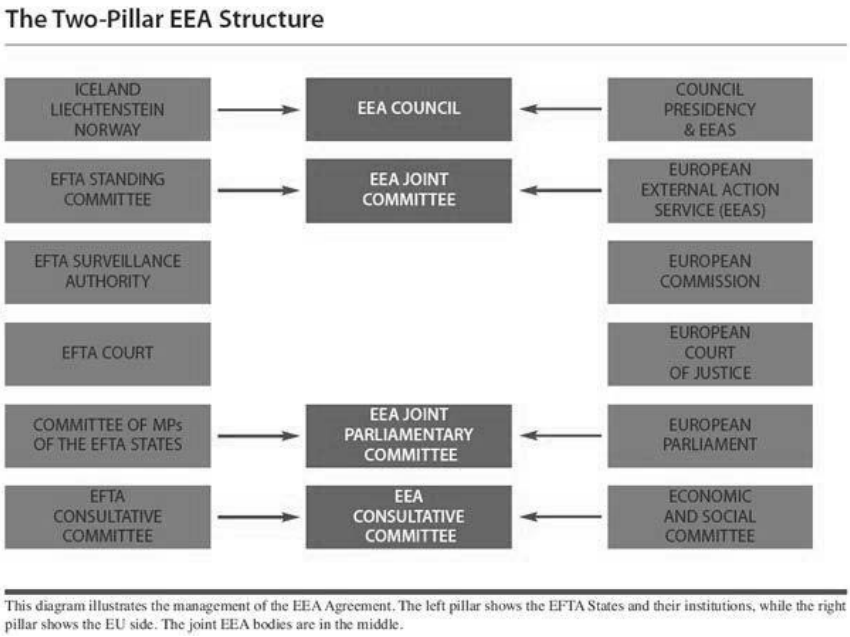


Figure 1 – The Two-Pillar EEA Structure. From 'The Two-Pillar Structure of the EEA – Surveillance and Judicial Control', accessed November 9th 2017 from the EFTA homepage.[4]

The EFTA Surveillance Authority (ESA) monitors compliance with the EEA Agreement. Amongst other things it is responsible for enforcing the EEA rules on State aid. In this sense, its role is similar to that of the Commission, for example as far as potential orders for repayment of illegal State aid are concerned. When ESA has found a particular aid arrangement to be incompatible with the EEA Agreement, the national state is required to recover the money.

As regards the State aid clause, Article 107(1) TFEU, the corresponding provision in the EEA Agreement is Article 61(1) EEA. The substance of these two provisions is identical, and the differences in their wording are only technical.[5] Yet following the limitations of the substantive scope of the EEA Agreement, State aid rules do not apply to two important sectors: agriculture and fisheries.

[4] Full link: http://www.efta.int/media/documents/eea/16-531-the-two-pillar-structure-surveillance-and-judicial-control.pdf.

[5] Art. 61(1) EEA provides as follows: Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.

The EFTA Surveillance Authority (ESA), which similarly to the Commission's role under the EU pillar of the EEA Agreement is responsible for State aid control under the EFTA pillar of the Agreement, has consistently declared that it lacks competence to deal with State aid cases in the fisheries sector. The EFTA Court confirmed that just recently in *Marine Harvest ASA v EFTA Surveillance Authority*.[6]

As regards procedural rules, while the Commission is entrusted with the task of supervising the EU Member States with respect to their obligations under EU and EEA State aid rules, the ESA is entrusted with corresponding responsibility in relation to the EFTA States that are the Contracting Parties to the EEA Agreement. Protocol 26 to the EEA Agreement conferred upon the ESA powers and functions that mirror those of the Commission.[7] Moreover, Protocol 27 to the EEA Agreement contains rules for co-operation between the ESA and the Commission in order to ensure uniform implementation, application and interpretation of State aid rules throughout the EEA.[8]

There are some important aspects on interpretation of EEA law, as well as on national law that may be affected by recent developments in the EEA. Homogeneity between EU law and EEA law requires that the rules and provisions concerning the areas covered by the EEA Agreement not only are drafted 'in terms as close as possible to those in the (now) TFEU',[9] but also *interpreted* in the same manner. Thus, Article 6 EEA requires that EEA law is interpreted in conformity with EU law dated prior the signing the EEA Agreement (i.e. 2 May 1992). This also concerns the rules on interpretation applied by the ECJ.

As regards EU law after 2 May 1992, homogeneity between EU law and EEA law is safeguarded by Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), which requires that "due account" be had of ECJ case-law after this date.[10] Thus, in interpreting EEA law, the EFTA Court follows both 'old' and 'new' jurisprudence of the EU Courts. Even more importantly, it adjusts its practice to subsequent changes in the EU jurisprudence.[11] A divergent, indigenous

[6] Case E-12/16 – *Marine Harvest ASA v EFTA Surveillance Authority*, delivered on 27.11.2017.

[7] Moreover, Arts 5 and 24 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (OJ L 344, 31.12.1994, pp. 1-83, and EFTA States' official gazettes) require ESA to ensure the proper functioning of the EEA agreement in the field of State aid law. Protocol 3 to the Agreement sets out the functions and powers of ESA in the field of State aid law, including procedural rules.

[8] More on the procedural provisions in the EEA State aid regime, see Sánchez Rydelski, Michael, *The EEA State Aid Regime*, [in:] Biondi, Andrea, Piet Eeckhout and James Slynn (eds.), *The Law of State Aid in the European Union*, 2004, pp. 189-204, at pp. 193-195.

[9] Fenger et al., *supra* n. 3, p. 63.

[10] OJ L 344, 31.12.1994, pp. 1-83, and EFTA States' official gazettes.

[11] Fredriksen, Halvard Haukeland and Gjermund Mathisen, *EØS-rett*, 2nd edition, Bergen 2014, at p. 258 et seq.

EEA-interpretation is possible only if there are 'compelling grounds'.[12] Notably, the principle of homogeneity provides not only that the EFTA Court must follow the case law of the EU Courts, but also that the EU Courts should, taking into account the above-mentioned reservation, interpret the provisions in the EEA Agreement in the same manner as corresponding provisions in EU law.[13]

The EU Courts do not have a similar duty to take into account the jurisprudence of the EFTA Court when they interpret EU law. In Opinion 1/91,[14] the ECJ explicitly rejected such an obligation, which was included in the first version of the EEA Agreement in Article 104(1). Indeed, even though the EU Courts sometimes do refer to the case law of the EFTA Court,[15] they may ignore it as well.[16]

2.1. Interpretation of EEA relevant legislation

When it comes to the national courts in Norway, they have developed principles on how to deal with conflicts between EEA law and other international law commitments. From the outset it must be remembered that the EEA Agreement is not the only trade agreement between the EU and the EFTA states. All EEA states as well as the EU itself are members of the World Trade Organization and obligated to fulfil the various WTO agreements. In addition, the older bilateral free trade treaties between the EU and for example Norway remain in force.[17]

[12] See Case E-9/07 and E-10/07 *L'Oréal Norge AS v. Aarskog Per AS and Others and Smart Club Norge* [2008] EFTA Ct. Rep. 259. See also Fredriksen and Mathisen, *supra* n. 11, at pp. 253-256 and 258-261.

[13] Fenger et al., *supra* n. 3, at p. 75. As an example, one may refer to Case C-286/02 *Bellio* [ECLI identifier: ECLI:EU:C:2004:212 and Case C-10/10 *Commission v. Austria* ECLI identifier: ECLI:EU:C:2011:399, concerning Arts 40 EEA and 63 EEA. See also Fredriksen, Halvard Haukeland *One Market, Two Courts: Legal Pluralism vs. Homogeneity in the European Economic Area* (2010) 79 Nordic Journal of International Law, pp. 481-499, and Franklin, Christian NK, *Square Pegs and Round Holes: The Free Movement of Persons Under EEA Law,* (2017) Cambridge Yearbook of European Legal Studies, pp. 1-22 (available at https://www.cambridge.org/core/journals/cambridge-yearbook-of-european-legal-studies/article/square-pegs-and-round-holes-the-free-movement-of-persons-under-eea-law/92EE2B643D4007E54A48BD3C4CDCCD92).

[14] Opinion 1/91 [1991] I-6079.

[15] See Joined cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen v. De Agostini (Svenska) Förlag and TV-Shop i Sverige* ECLI identifier: ECLI:EU:C:1997:344, para. 37. Therein, the ECJ referred to Cases E-8/94 and E-9/94 *Forbrukerombudet v. Mattel Scandinavia and Lego Norge* [1994-1995] EFTA Ct. Rep. 113, paras 54-56 and 58.

[16] In Case C-355/96 *Silhouette* ECLI identifier: ECLI:EU:C:1998:374, the ECJ came to different conclusions when it interpreted Directive 89/104/EEC, (89/104/EEC: First Council Directive of 21.12.1988 to approximate the laws of the Member States relating to trade marks, OJ L 40, 11.2.1989, pp. 1-7), than the EFTA Court did in Case E-2/97 *Mag Instrument Inc. v. California Trading Company Norway, Ulsteen* [1997] EFTA Ct. Rep. 127. The EFTA Court adjusted thus its practice in the above-mentioned Case E-9/07 and E-10/07 *L'Oréal Norge AS v. Aarskog Per AS and Others and Smart Club Norge* [2008] EFTA Ct. Rep. 259.

[17] Entered into force in 1973.

The relation between the EEA Agreement and older bilateral or multilateral treaties committing the EU on the one side and one or more EFTA parties on the other side, is solved by Article 120 of the EEA Agreement, which states that the EEA Agreement will prevail. This has not been a problem, and is unlikely to be one later either.

The next point is more important. Norway takes a dualistic approach to its EU/EEA commitments, meaning that both directives *and regulations* need to be implemented in order to be enforceable before the national courts. Article 7 of the EEA Agreement states that (a) regulations 'shall as such be made part of the internal legal order of the Contracting Parties', whereas (b) directives 'shall leave to the authorities of the Contracting Parties the choice of form and method of implementation'. In reality, this gives Norway a choice as to how to implement directives, ranging from simply stating that current law is in accordance with it and no change is needed,[18] to establishing new provisions or even a new act to implement the directive. For regulations there is no such choice – it needs to be incorporated into Norwegian legislation verbatim.[19] This does not mean, however, that they are directly applicable or may have direct effect in the event of non-implementation – EEA-relevant regulations require an act of transposition, and the EU principle of direct effect does not apply in any event under EEA law.

In the process of implementing EEA legislation, the government will give its opinion on whether there is a potential conflict between provisions in the new EEA legislation and current Norwegian law, whether based on international law or originally Norwegian. The legislation will be implemented in a way that ideally makes it clear how to interpret these provisions, and if necessary remove provisions that are in conflict with the new directive or regulation.

If the courts discover a conflict between a provision of national law originating from an EU directive or regulation and a different provision of national law, it follows from Article 2 of the act implementing the EEA Agreement[20] that provisions serving to uphold Norway's commitments in the EEA Agreement, prevail over other provisions.

3. Taxation

We would like to begin with some preliminary remarks concerning tax rulings in Norway that we believe are of interest for the Congress, but that does not immediately fit into the questions asked in the form.

[18] See as an illustration case E-15/12, *Wahl*, EFTA Court Rep. 2013 page 534 (paras 49-50).

[19] See further in Bull, Henrik, (2014) *'Shall be Made Part of the Internal Legal Order': The Legislative Approaches,* in EFTA Court (red.) *The EEA and the EFTA Court – Decentred Integration* (203-213).

[20] Lov 1992 om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde (EØS) m.v. (EØS-loven).

ESA started investigating the practice of issuing tax rulings in EEA Member States in February 2015. ESA started this on their own initiative, but it is worth mentioning that it followed investigations which were initiated by the European Commission. As provided in a press release of 24 February 2016, ESA closed that investigation without finding any evidence of State aid infringements.[21] Specifically, ESA's scrutiny revealed no instances of these states using tax rulings in a manner contrary to the State aid rules of the EEA Agreement.

In the specific context of the topic of this report, one may also draw attention to an interesting consequence of the VAT Directive not being a part of the EEA Agreement.[22] In 2016, when Norway wished to reduce VAT on electronic newspapers, the only legal impediment was State aid policy. No EU Member State currently has such a possibility, as the VAT Directive restricts EU Member States from introducing lowered or zero VAT rates for electronic news services.[23] The same concerns e-books. In January 2016, the ESA declared a zero VAT rate for electronic news services in Norway to be State aid compatible with the functioning of the EEA Agreement.[24] Yet, policy makers in the EU are now seeking to allow lower VAT rates on electronic newspapers and books, and there is widespread support within the European Council to give each Member State the flexibility to give electronic and printed newspapers the same VAT rate.[25]

3.1. Advance legal certainty in tax matters

In 1991, having recognized taxpayers' need for obtaining more clarity with regard to fiscal consequences of their economic activities, the Norwegian authorities introduced a possibility of applying for a binding tax ruling in advance in cases governed by the Petroleum Tax Act.[26] In 2001, the same possibility was introduced for matters regulated by the Tax Assessment Act,[27] and the Value Added Tax Act.[28] According to the Norwegian authorities, binding tax rulings provide

[21] See http://www.eftasurv.int/press--publications/press-releases/state-aid/esa-closes-investigation-into-tax-ruling-practices-in-iceland,-liechtenstein-and-norway (last accessed 11.11.2017).

[22] Council Directive 2006/112/EC of 28 November 2006 on the common system for value added tax, 2006 OJ L 347, 1.

[23] In 2015, the CJEU confirmed that the VAT Directive 'excludes any possibility of a reduced VAT rate being applied to 'electronically supplied services''. See, in this respect, Case C-479/13, *Commission v. France*, ECLI:EU:C:2015:141; and Case C-502/13, *Commission v. Luxembourg*, ECLI:EU:C:2015:143.

[24] EFTA Surveillance Authority, Decision of 25 January 2016 raising no objections to a zero VAT rate for electronic news services, 023/16/COL, (the VAT decision).

[25] The Council expects agreement to be achieved in the second half of 2017 See http://www.consilium.europa.eu/en/policies/reduced-vat-epublications/ (last accessed 10.11.2017).

[26] Lov om skattelegging av undersjøiske petroleumsforekomster m.v. (Petroleumsskatteloven), LOV-1996-11-29-72.

[27] Lov om ligningsforvaltning (ligningsloven), LOV-1980-06-13-24, repealed.

[28] Lov om merverdiavgift (merverdiavgiftsloven), LOV-2009-06-19-58.

taxpayers with clarity in tax matters in a prompt and simple manner and are therefore a desired administrative measure.[29] They supplement the tax authorities' general obligation to provide guidelines and information to the taxpayers. A taxpayer who does not find the relevant information on the website of the tax authorities may also request a so-called 'guiding statement' that is issued by a local tax office. Such a statement is not binding on the tax authorities, but it clarifies their position in a given tax matter. Unlike binding tax rulings, guiding statements are free of charge. Fees for binding tax rulings follow the rules on court fees and vary depending on the status of a taxpayer requesting them.[30]

Until 1 January 2017, binding tax rulings were regulated in several different Parliamentary statutes (*lover*), and administrative regulations (*forskrifter*) providing more clarifications on the provisions set out in the parent acts.[31] From 1 January 2017, all the relevant provisions and clarifications concerning binding tax rulings are to be found in the Tax Administration Act section 6[32] and the Regulation of 23 November 2016 no. 1360 section 6.[33]

Apart from gathering the relevant provisions on binding tax rulings in one legal act and introducing certain linguistic adjustments, the Ministry of Finance proposed two substantive amendments.[34] First, in light of the positive experiences with the practice of issuing binding tax rulings in the areas regulated by the Tax Assessment Act, the VAT Act and the Petroleum Tax Act, the Ministry

[29] As regards the role of binding tax ruling as source of law, they do not carry any special weigh and, as any other administrative decision issued by the tax authorities, are binding only with regard to a given case. Yet, they may be a relevant argument if a tax payer relies on them.

[30] Rules on fees are to be found in the Tax Administration Act section 6-3. As regards entities that qualify as small undertakings under Law on accountancy (Lov om årsregnskap m.v. (regnskapsloven) section 1-6, in 2017 the fee amounts to 8 times the court fee, i.e. NOK 8,392 (ca. EUR 847,6). Other undertakings must pay a sum amounting to fifteen times the court fee, ie NOK 15,735 (ca. EUR 1589) There are separate rules for joint requests for a binding tax ruling. As regards a fee for a binding tax ruling that is issued by the Petroleum Tax Office, it amounts to 25 times the court fee, ie NOK 26225 (ca. EUR 2648,43). The fee must be paid at the same time when the request for a binding tax ruling is made.

[31] Those were as follows: the Tax Assessment Act section 3A-1, (Lov om ligningsforvaltning (ligningsloven), LOV-1980-06-13-24, repealed), the VAT Act section 17-1 (Lov om merverdiavgift (merverdiavgiftsloven), LOV-2009-06-19-58), the Petroleum Tax Act section 6 no. 4 (Lov om skattelegging av undersjøiske petroleumsforekomster m.v. (Petroleumsskatteloven), LOV-1996-11-29-72), the Regulation of 14.6.2005 no. 550 regarding binding advance rulings in tax and duty case (Forskrift om bindende forhåndsuttalelser i skatte- og avgiftssaker), and the Regulation of 22.11.1991 no. 752 regarding binding rulings for petroleum companies (Forskrift om bindende forhåndsuttalelser for skattepliktige etter petroleumsskatteloven).

[32] Lov om skatteforvaltning (skatteforvaltningsloven), LOV-2016.

[33] Forskrift til skatteforvaltningsloven (skatteforvaltningsforskriften), FOR-2016-11-23-1360.

[34] Those were subject to consultations with interested parties following the presentation of the Tax Administration Act on 11.12.2015, see Prop. 38 L (2015–2016) Proposisjon til Stortinget (forslag til lovvedtak) Lov om skatteforvaltning (skatteforvaltningsloven), 11.12.2017.

proposed to expand that practice to all areas covered by the Tax Administration Act.[35] Second, taxpayers were given the right to submit complaints to have the tax rulings reviewed by a superior tax authority. In this way, the authorities strengthened the legal protection of the taxpayers.

As provided in Section 6-1-2 of Regulation no. 1360 of 23 November 2016, every taxpayer and consumer who is entitled to an exemption from excise duty may apply for a binding tax ruling that concerns fiscal or duty-related consequences of a specific arrangement they intend to carry out in the future. Thus, both private persons, associations and undertakings have a possibility to acquire more legal certainty in matters of tax law. Moreover, companies, limited partnerships, internal partnerships and jointly owned shipping companies may apply for a binding tax ruling concerning the assessment of income or assets of their partners. A binding tax ruling may be issued only if it is of substantial importance to the given taxpayer to obtain more clarity with regard to fiscal consequences of the planned arrangement before it is carried out or if the question is of public interest.

Binding tax rulings may be issued by three institutions.[36] The Petroleum Tax Office issues binding tax rulings concerning taxation of exploration for and extraction of subsea petroleum deposits, and activities and work relating thereto, hereunder pipeline transportation of extracted petroleum in the area mentioned in Section 1 of the Petroleum Tax Act.[37] Tax offices issue binding tax rulings concerning excise duties, motor vehicle fees and VAT compensation. As regards binding tax rulings concerning the remaining types of taxes, those are issued by either the local tax offices or the Norwegian Tax Directorate (*Skattedirektoratet*). The latter may provide additional guidelines that will specify which binding tax rulings are to be given by the tax offices and what procedure should be followed in this respect. As a rule, the Tax Directorate deals with requests for

[35] Prop. 38 L (2015–2016) Proposisjon til Stortinget (forslag til lovvedtak) Lov om skatteforvaltning (skatteforvaltningsloven), 11.12.2017.

[36] Regulation of 23.11.2016 no. 1360 section 6-1-1.

[37] As provided in Act of 13.6.1975 No. 35 relating to the Taxation of Subsea Petroleum Deposits, etc. (the Petroleum Taxation Act) section 1, the scope of the Act includes: (a) internal Norwegian waters, in Norwegian territorial seas and on the continental shelf; b) in adjacent seas, insofar as concerns petroleum deposits that reach beyond the median line in relation to another state, to the extent that the right to extraction thereof has been conferred upon Norway by agreement with such other state; c) outside the realm or the seas mentioned in a), insofar as concerns the landing of petroleum, and activities or work relating thereto, to the extent that the right of Norway to impose taxes on activities and work as mentioned is laid down by general public international law or by special agreement with a foreign state; and d) within the realm insofar as concerns the transportation of petroleum by pipeline from areas as mentioned in a), b) or c), as well as other activities at loading and unloading facilities as part of the extraction and pipeline transportation of such petroleum.

binding tax rulings in cases that are either particularly complex, concern questions of public interest or are considered to be of fundamental importance. The Tax Directorate also deals with joint requests.

Binding tax rulings may be published.[38] The Petroleum Tax Office decides whether and if so, in what manner, its binding tax rulings are to be published. The Tax Directorate publishes its tax rulings unless a given tax ruling is of little public interest or the tax arrangement at stake was very complex in relation to the fiscal issue it raised. In the former case, the Tax Directorate may choose to publish a summary. The Tax Directorate may also publish binding tax rulings that were issued by the local tax offices. Every publication of a binding tax ruling must follow the principle of professional secrecy.

3.2. The Norwegian tax authorities verifying of facts in a request for ruling: A confidence based system.

One of the most relevant characteristics of the Norwegian tax system is that it is confidence-based. That means that the tax authorities rely exclusively on the information provided by the taxpayers and they assume that the information is correct and complete. The same presumption applies to binding tax rulings.

Yet, in order to trigger the procedure of issuing a binding tax ruling, a request must comply with a number of conditions with regard to its content.[39] A taxpayer who seeks to obtain a binding tax ruling must account for both the factual and legal background of the planned arrangement.[40] A request may only relate to the taxpayers' own tax affairs and must thus contain the name, address and the personal identity number or organization number of the taxpayer in question. Importantly, such a request may only concern Norwegian tax affairs, including Spitsbergen (Svalbard). It may not deal with tax issues that are to be resolved under an agreement between Norway and another state. Yet, if any foreign tax regulations are of importance to the tax issue at stake, the request must provide the relevant clarifications in this respect.

A request may only concern those tax related questions that will arise in the future following a specific and planned arrangement. Tax authorities can therefore deny a request for a binding tax ruling if the date of carrying out the planned

[38] Those are published on *Skatteetatens*'s website http://www.skatteetaten.no/no/Radgiver/Rettskilder/Uttalelser/bfu/?lsxsb=Avgitt+dato (last accessed 15.11.2017).

[39] As a rule, the tax authorities shall deny a request for a binding tax ruling in cases of noncompliance with the rules concerning the procedural or substantive requirements. If a request in incomplete, the tax authorities set out a deadline to rectify it. A request will be rejected if the taxpayer does not comply with the relevant requirements.

[40] Regulation of 23.11.2016 no. 1360 section 6-1-4 (Forskrift til skatteforvaltningsloven (skatteforvaltningsforskriften), FOR-2016-11-23-1360).

arrangement is so close to the date of submitting the request that it is unrealistic to expect that the question posed may be answered before the arrangement is carried out. A request must include a draft of such an arrangement and the probable date for carrying it out. In this respect, the taxpayer must provide a precise and sufficient account for existing and expected circumstances that can be of importance to the tax ruling. The same requirement of clarity and precision concerns the question raised by the said arrangement. The taxpayer must also explain what answer he considers to be correct.

A request must also clarify why it is relevant to the given tax payer to obtain a binding tax ruling. The tax authorities shall not issue a binding tax ruling if the clarification requested by the taxpayer is neither relevant to that taxpayer nor of public interest. Furthermore, the tax authorities can refuse to issue it when the planned arrangement seems to be of little intrinsic value when compared to the question raised by the request. The same concerns cases in which answering the question would involve a disproportionate use of resources when compared to the importance of the clarification to the taxpayer involved. This is particularly the case in situations where dealing with a given request would lead to a delay in issuing binding tax rulings in other cases that seemingly are more important.

Questions related to the assessment of evidence, valuations or other discretionary estimations falling outside the actual application of law may not be subject to a binding tax ruling. The same applies to matters that are to be resolved under the Tax Assessment Act sections 2-1 (a natural person that is resident Norway), 2-2 (an undertaking that is resident in Norway), 2-3 (a natural person or an undertaking that is not resident in Norway), 2-34 (limitations on tax liability of foreign-owned ships under Norwegian management), 2-37 (limitations of tax liability that aim to avoid international double taxation) and 2-38 (tax exemption for certain undertakings with regard to revenues from shares and other equity interest).

If a request concerns partners of a company, limited partnership, internal partnership or a jointly owned shipping company, it must provide certain information regarding persons that are linked to the partners in question.[41] Finally, as a fee for a binding tax ruling varies depending on the status of the taxpayer seeking it, a request must also contain information that is indispensable to estimating that fee.

Although the authorities rely exclusively on the information provided by the taxpayer, when issuing a binding tax ruling they may verify whether the description of the planned arrangement as it was provided in the request corresponds to

[41] A definition of a linked person is to be found in the Regulation of 23.11.2016 no. 1360 section 6-1-4 (8) (Forskrift til skatteforvaltningsloven (skatteforvaltningsforskriften), FOR-2016-11-23-1360).

the arrangement that was carried out. In case of discrepancies, the tax ruling is not binding.

3.3. Anti-avoidance provisions

As the Norwegian tax system is confidence-based, the tax authorities do not automatically verify whether the income that is declared as non-taxable in Norway is taxed in another state. The taxpayer may nevertheless provide information on how the given arrangement is dealt with in another state. The fact that the tax is paid in another state may be an argument against applying rules on tax avoidance.

3.4. When would tax authorities not be bound by an advance ruling?

As mentioned, when the tax authorities issue a binding tax ruling, they rely exclusively on the information provided by the taxpayers and they assume that the information is correct and complete.

A tax ruling is binding for the tax assessment if the taxpayer asks for it[42] and if the tax arrangement in question was carried out in line with the information on which the tax authorities relied when they had issued the tax ruling in question. If the arrangement that was carried out is not identical with the description given by the taxpayer, the tax ruling is not binding. Furthermore, a tax ruling is binding as long as there are no changes in the relevant provisions or regulations upon which the tax authorities relied when they issued it. In other words, the rules that are in force when the arrangement is carried out must not differ from those on which the tax ruling was based.

Finally, a tax ruling can become binding only for those arrangements that are decided and carried out within three years from the end of the year in which the tax ruling was issued. Its binding effect ceases after five years from the end of the year in which the tax ruling was issued.

3.5. Avoiding double non-taxation

As a rule, when the tax assessment is issued, the Norwegian authorities do not automatically verify whether the income that is declared as non-taxable in Norway is taxed in another state. The tax authorities may nevertheless consider whether to carry out such verification. This may be undertaken either as a random selection in the form of sampling, or where there may be grounds to exclude an attempt of tax evasion. In such cases, the tax authorities may ask for further information, most often obtained by way of a tax audit. The Norwegian tax authorities may also ask the tax authorities of the country in which the income in question was supposedly taxed how the income that was declared as tax-free in Norway was taxed in that state. However, following the introduction of rules on neutralizing

[42] A taxpayer may ask for not taking into account the relevant tax ruling for the purpose of tax assessment.

hybrid mismatch arrangements developed by the OECD as part of the Base Erosion and Profit Shifting (BEPS) Project, one may expect that the tax authorities will carry out more such verifications in the future.

Still, the numerous differences in tax systems around the world may enable the Norwegian undertakings to plan their activities in a way that allow them to benefit from double tax exemptions that are perfectly legal. This is the case when the undertaking in question is not a resident in any state.

3.6. No default rule when allocating profits

Norwegian law does not provide for any simplified or schematic default rule on profit allocation. One must establish where a given undertaking is a resident according to Section 2-2 of the Tax Act.[43] On 10 May 2012, the tax authorities provided more clarifications on how one should interpret this provision:[44] 'If the key management decisions concerning a given undertaking are being taken in Norway, it is considered that the undertaking is a resident in Norway' (author's own translation).[45] Thus, it is not sufficient to establish where a given undertaking is registered.

In some cases, under different national tax rules, a given undertaking may be qualified as resident in Norway and in another state(s). This may be the case where the other state relies on formal criterion such as the place of registering an undertaking, while Norway relies on a functional criterion. In such cases, the given undertaking may be subject to tax in both states. Yet, if Norway entered a tax treaty with that state, it usually regulates how the problem of establishing where the given undertaking is resident, is to be solved.

Importantly, a proposal has been made to change the legal provisions and regulations on verifying in which state a given undertaking is to be considered resident. The proposal aims to exclude situations in which an undertaking is not a resident in any state. Such undertakings are not taxed in any state. This proposal is based on the OECD Model Tax Convention on Income and on Capital.

3.7. The principle of arm's length pricing

Norway has adopted the principle of arm's length pricing in the Tax Law section 13-1. As provided in section 13-1 (4), in cases of valuation, for tax purposes, of cross- transfer pricing guidelines.

[43] Lov om skatt av formue og inntekt (skatteloven), § 2-2.

[44] Skatteetatens prinsipputtalelse 'Hva som avgjør hvor et selskap er skattemessig hjemmehørende', 10.5.2012, http://www.skatteetaten.no/no/Radgiver/Rettskilder/Uttalelser/Prinsipputtalelser/Hva-som-avgjor-hvor-et-selskap-er-skattemessig-hjemmehorende/ (last accessed 9.11.2017).

[45] The original version in Norwegian: Dersom selskapet reelt sett må anses ledet (på styrenivå) fra Norge, vil selskapet anses hjemmehørende i Norge.

3.8. Unilateral adjustments of profits

Norway allows for unilateral adjustments of profits both upwards as well as downwards if the taxpayer's pricing deviates from the arm's length principle (market price).

If Norway unilaterally makes an adjustment of profits, the problem of economic double taxation may easily arise. For example, a Norwegian subsidiary may be required to pay more tax if the costs of purchase of goods from its parent company based in another state are no longer deductible. The tax deduction may be reduced if Norway assumes that the price paid for the goods was too high, i.e. above market price. As a result, the parent company pays tax that is based on the price paid for the goods, while the Norwegian subsidiary may deduct only a part of that price. The sum that amounts to a difference between the assumed market price and the price paid is thus taxed in both states.

Such double taxation may be hindered if the other state makes an appropriate adjustment, i.e. when it takes into account the valuations made by Norway when it subjects the parent company to tax assessment. In the given example, this is the case if the other state relies on the sales price that the Norwegian tax authorities considered to be appropriate.

This solution is provided for in Article 9(2) of the OECD Model Tax Convention on Income and on Capital, and Article 9(2) of the Nordic Tax Treaty.[46] These provisions stipulate that the other state undertakes an appropriate adjustment, but only if it agrees with the valuation in question. If there is no consensus in this matter, there is no obligation to undertake such appropriate adjustment. As a result, economic double taxation is not excluded. The solution based on an appropriate adjustment is included in most – but not all – bilateral tax treaties entered into by Norway.[47]

There are also some examples in Norway of cases involving secondary adjustments, i.e. 'constructive transaction[s] that some countries will assert under their domestic legislation after having proposed a primary adjustment in order to make the actual allocation of profits consistent with the primary adjustment'.[48]

Moreover, the taxpayers may also make adjustments of profits. As stipulated in Section 9-4(1) of the Tax Administration Act, taxpayers may change the informa-

[46] The Nordic Tax Treaty (Nordisk Skatteavtale, NSA) is an agreement between Norway, Denmark, Sweden, Finland, Iceland and the Faroe Island that aim at avoiding double taxation. It was signed on 23.09.1996 and entered into force on 11.05.1997. NSA is largely based on the OECD Model Tax Convention and it constitutes a model for bilateral tax treaties with developed countries, https://www.regjeringen.no/contentassets/24bd8e3ac9b44651804beca5dcbd4472/den_nordiske_skatteavtalen_innarbeidet_versjon.pdf (last accessed 10.11.2017).

[47] For example, the tax treaty with Kazakhstan of 2001 does not provide for such a solution.

[48] The OECD's transfer pricing guidelines.

tion that they provided in their income tax forms. This is not possible, however, if the tax authorities have already established the tax base, or if the taxpayer in question has been notified of the planned tax control. Any such changes must be made within three years from the date when the tax form concerned should have been submitted.[49]

3.9. Norwegian tax authority's take on the transfer pricing result of another country

Norwegian tax authorities will accept an increase in deductible costs and adjust the level of taxable profit downwards if they consider that the transaction in question was based on a market price. If this is not the case, the dispute concerning the price and any adjustments on the level of taxable profit will be subject to the Mutual Agreement Procedure (MAP).

3.10. Norway's anti-abuse rule

Norway has a non-statutory general anti-abuse rule (GAAR). In addition, the manner in which the domestic law is interpreted ensures that the anti-abuse rule is taken into account on many levels of legislation. When the objective of a given provision is considered to be conclusive, the interpretation of that provision may take the form of an extensive interpretation. The rule of law may serve as a limitation in this respect, but such extensive interpretation is accepted if the objective of the provision in question is sufficiently clear in other sources of law.

4. Recovery of State aid in Norway

As pointed out in section 2 of this report, ESA orders recovery of illegal or incompatible State aid in Norway. Their legal basis is Article 61 of the EEA Agreement. In addition, Norway has adopted the Norwegian State Aid Act of 1992.[50] Section 5 of this Act could possibly give legal basis as well for a recovery claim. Whether it actually does has been debated after a verdict from the Norwegian Supreme Court of 2013, the only Supreme Court case in Norway about recovery of State aid.[51]

The case arose because Norway failed to update their rules on environmental tax and fees. ESA opened a formal investigation to understand whether a provision that freed industry that used particularly large amounts of electricity form paying an electricity fee, was in breach of State aid rules. ESA concluded in June 2004 that the absent of a fee for the industry should be considered as new

[49] See section 9-4(2) of the Tax Administration Act.
[50] Lov om offentlig støtte, LOV 1992-11-27-117.
[51] Rt.2013.1665.

State aid that was incompatible with the State aid rules. ESA ordered the state to recover this aid from February 2003, when the opening of the formal investigation procedure was published in the official EU Journal. The recovery period was February to December 2003.

The Norwegian government made an administrative decision to recover the aid in September 2007. As the statute of limitation in Norway is three years, the beneficiary claimed that the recovery claim was now obsolete. The government disputed this claim. This was the main question in the Supreme Court case.

Both parties argued that a loyal interpretation of the EEA Agreement supported their side. The private beneficiary argued that the statute of limitation should be upheld, thus encouraging the state to be effective in their recovery procedures. The state on the other hand argued that if the clock started ticking already at the time of ESAs order to recover, the government ran a risk of not fulfilling its EEA obligations. One of the main reasons for this was that this particular scheme applied to a large and unidentified number of undertakings. The government needed time to identify each aid beneficiary and make an individualized claim. The 3-year period should thus not start until the government had made their own administrative decision.

The Supreme Court agreed with the government. The Court ruled that ESA's decision imposed a duty on Norway to recover the State aid, but that the decision did not form a legal basis for the claim. That legal basis did not originate until Norway made its own administrative decision to recover the aid.

Legal experts have heavily criticized the Supreme Court's reasoning.[52] The Norwegian state aid act gives legal basis for the government to create separate rules on when a State aid recovery claims is obsolete. However, the government had not created any such provisions. In the absence of any special rule, academics criticized the decision for twisting the accepted Norwegian interpretation of the statute of limitations too far in an attempt to meet Norway's commitments to recover aid.

State aid experts also criticized the verdict because on further inspection, it is unclear whether Section 5 of the Norwegian State Aid Act actually provides a legal basis for the grantor to recover the aid.[53] If it does not, then a recovery claim must be processed by way of a civil law claim, perhaps based on the *condictio indebiti*-rule. In that case, the claim could well be seen to originate with ESA's decision.

[52] For example Miriam Skag (2015) in Tidsskrift for forretningsjuss: *Foreldelsesfristens start for krav fremmet ved enkeltvedtak*, and Trygve Bergsåker (2014) in Nytt i privatretten: *Obligasjonsrett – Foreldelse av statens krav på tilbakeføring av offentlig støtte – Rt-2013-1665.*

[53] For example, Hjelmeng, Erling (2014) in Lov og rett: *Tilbakeføring av offentlig støtte- hva er situasjonen etter Rt. 2013 s. 1665.*

The Supreme Court's ruling nevertheless shows that it is willing to stray quite far from previously accepted solutions under Norwegian law in order to succumb to the requirements of the EEA Agreement. The situation in Norway following the verdict is a bit unclear, and it is currently recommended in legal theory to decide on a case-by-case basis whether to pursue the recovery administratively or through civil law procedures.[54] This is certainly the case in practice. Norway has been ordered 13 times by ESA to recover, and has done so both in administrative decisions, by contract, and by court settlement.

Uncertainties over particularly this question have led to a proposed revision of the State Aid Act, which is currently underway. This work was meant to be finalized by the summer of 2017, but is still not finished. We expect that the revised Act will provide a clear legal basis for recovery claims, as well as institute new rules on when recovery claims become obsolete.

It should further ideally be clarified in the Act whether Norway can recover such illegal aid themselves, or if the government needs to wait for a decision from ESA. The wording of section 5 of the Act as it stands could indicate that ESA needs to order recovery for anything to happen.

In conclusion, we would state that while awareness of the State aid rules have been lacking in the past, it is improving. Norway notifies an increasing number of schemes possibly involving State aid to ESA, and develops them in collaboration with the Authority.

Norwegian courts have never refused to allow for the immediate recovery of State aid.

5. International obligations involving the protection of property or foreign investments in Norway

Until the mid 1990s, Norway entered investment treaties as instruments to protect Norwegian investors abroad. However, with the EEA Agreement and normalizing relations with Russia, the perception was that investors would increasingly seek to invest in Norway as well.[55]

The last active Bilateral Investment Treaty (BIT) Norway entered into was in 1995 with Russia. Norway has active BITs with only 14 countries.[56] The present Norwegian government has signaled its intention to enter more BITs, but no new treaties have been agreed as of yet. Instead, Norway has opted to negotiate its treaties protecting investors and property through international organizations,

[54] *Ibid.*

[55] Fauchald, Ole Kristian and Kjersti Schiøtz Thorud (2006), *The protection of investors against expropriation – Norway's obligations under international treaties*, [in:] *Dog fred er ej det bedste: Festskrift til Carl August Fleischer.*

[56] Chile, China, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Madagascar, Peru, Poland, Romania, Russia, Slovakia, Sri Lanka.

particularly WTO, OECD, and EFTA. Trade agreements with 40 countries have been completed through EFTA, but not with the UK nor the US.[57]

In addition to the already mentioned WTO and EEA, Norway is party to the Multilateral Investment Guarantee Agency, and the European Convention on Human Rights (see especially Protocol 1 article 1: 'Protection of property').[58]

Unless the investors hail from a country with which Norway has a bilateral agreement, they must rely on the national framework as well as multilateral agreements. The protection for foreign investors seems adequate: The World Bank consistently ranks Norway among the top 10 nations in its Ease of Doing Business Rank.[59]

[57] See *Free Trade Agreements and Trade Relations by Country* on the EFTA homepage, http://www.efta.int/free-trade/free-trade-agreements.

[58] It should be noted that Article 105 of the Norwegian Constitution gives a stronger protection of property than Protocol 1 Article 1. The Constitution guarantees 'full compensation'.

[59] Currently (2017) ranked as no 8, behind only Denmark (3) and the UK (7) among EU countries.

POLAND

Monika Palmowska*
P. Kamil Rosiak**

Part I

Question 1

The taxpayers in Poland may apply for an individual tax ruling in order to get some legal protection. Special tax authority, the Director of the National Tax Information Office is the competent authority in matters of issuing individual tax rulings in Poland, whereas the Minister of Finance is responsible for issuance of general tax rulings.

Each taxpayer, tax remitter and third person liable for other entity's tax obligation has the right to apply for the individual tax ruling, however, there is a requirement that the applicant has to be a "concerned party", i.e., there has to be direct connection between the subject of a ruling and the tax obligation of the applicant. The request to issue an individual tax ruling is subject to a duty of 40 PLN, payable within 7 days from the submission of a request. If an applicant asks more than one question in the same request, and particular questions concern separate states of affairs or future events, the duty is charged on each question.

* Partner, Transfer Pricing, KPMG Tax.
** Attorney-at-Law, Partner, KPMG D.Dobkowski LP.
All opinions are strictly personal. The authors are grateful to Mr. Wojciech Majkowski and Mr. Tomasz Kurdelski from KPMG Tax Warsaw, for their assistance in the drafting of part 1 of this report and to Dr. Marek Furtek, Dr. Łukasz Kułaga and Dr. Marek Rzotkiewicz for the information and comments provided for the drafting of part 2 of the Report.

In the tax ruling application the applicant has to fully describe the background of the case (the actual state of affairs or future event that is the subject of a request), and present his own opinion concerning the legal interpretation of the actual state of affairs or future event (the application of the tax law in that particular case). Generally, after receiving the application the competent body has to issue a tax ruling within 3 months. According to the Polish Tax Code, the individual ruling shall contain an evaluation of the applicant's standpoint, as well as justification of the legal grounds for such evaluation. Where the applicant's standpoint is considered fully correct, the ruling may be issued without justification of the legal grounds behind it.

It should be noted that as a rule the rulings are not binding neither for the tax authorities nor for a taxpayer, however if applied by a taxpayer, the rulings provide a taxpayer with a tax protection. The level of legal protection which is guaranteed by obtained ruling is different depending on whether a ruling is received by the taxpayer before or after the occurrence of the event described in the factual background of the application for a ruling.

In both cases, if the taxpayer follows the tax ruling regarding indicated rules of taxation of a particular transaction, he may not be harmed, even if the tax ruling is not taken into account in a particular tax proceeding. The protection of every ruling guarantees that no criminal proceedings may be initiated against a taxpayer (or persons acting on behalf of a taxpayer) and interest on any unpaid tax liabilities may not be charged if a taxpayer acts in accordance with the ruling (*minimum protection*). Moreover, if a ruling is received by a taxpayer *before* the occurrence of the event described in the application for a ruling, and the taxpayer acts in accordance with this ruling, then additionally no outstanding tax liabilities can be assessed by the tax authorities in respect of this transaction (*maximum protection*). No legal definition of "acting in accordance with a ruling" is provided, however in practice it is being understood as realization of a particular obligation or a right provided in the tax law that is in line with the pattern laid down in the interpretation of the tax law presented by the tax authority in the ruling. *The protection exists as long as the particular ruling remains unchanged.*

On the other hand, obtaining the negative tax ruling does not automatically lead to any negative financial consequences for the taxpayer. Any financial consequences may arise only if the decision ascertaining the tax liability is issued.

Individual tax rulings are issued only regarding interpretation of the tax law, and cannot ensure calculation of a particular tax obligation.

Question 2

Polish tax authorities do not verify the facts mentioned in a request for a tax ruling prior to issuing a ruling. The rulings are issued under the assumption, that all facts presented in a request are correct.

The protection of a tax ruling could be obtained only as regards the actual state of facts or planned future state of facts presented in the application for a tax ruling. Individual tax ruling protects the applicant's tax position as long as the activities described in the ruling application matches the activities actually performed. Tax authorities can verify, whether the fact mentioned in a tax ruling request matches the activities actually performed (i.e. whether a taxpayer has the right to benefit from legal protection granted by a ruling) during a tax audit and respect or deny the protection of a ruling. In this case, tax authorities are free to assess the tax obligation without taking the ruling obtained by a taxpayer into consideration.

However, filing an application for a tax ruling does not necessarily mean that the tax authorities will automatically commence a tax audit in relation to events described in a tax ruling request.

Question 3

There is no regulation in the Polish tax system that would require to verify the treatment given to a particular payment/transaction by the other country, as part of a tax audit or prior to issuing a tax assessment. A taxpayer can invoke the regulations regarding avoidance of double taxation, however in this case the burden of proof lies on the taxpayer.

Question 4

As mentioned above, the individual tax rulings are not binding neither for the tax authorities nor for a taxpayer, however if a taxpayer applies a ruling, certain level of protection against negative consequences of tax assessment is granted.

The tax authority responsible for issuing a ruling may at any time amend an issued individual tax ruling if that ruling is found to be incorrect, taking into consideration, in particular, the case-law of courts, the Constitutional Tribunal, or the Court of Justice of the European Union or declare the expiry of an individual interpretation if it is inconsistent with a general interpretation issued under the same legal conditions.

Application of an individual tax ruling which has been subsequently amended, declared expired, or not taken into account in the settlement of a tax case, results in exemption from the obligation to pay the tax in the scope resulting from the event covered by the ruling, if the tax liability associated with an event corresponding to an actual state of affairs covered by a ruling would arise after delivery of this ruling and was not duly complied due to application of this ruling.

Question 5

In general, there is no such institution in the Polish tax system that would allow Polish tax authorities to check if the remaining income is taxable anywhere else.

However, due to the fact that Poland has implemented into the legal system the rules regarding the Controlled Foreign Company ("CFC") that aim at global sealing of tax systems, part of the income that could potentially be shifted by Polish taxpayers to the tax heavens is under control of Polish tax authorities.

The CFC rules are a sort of mechanism that aims to verify if the income earned by a company somehow dependent on the Polish taxpayer that is not taxed in Poland, will be taxed anywhere else.

Based on these rules, generally speaking the Polish taxpayers owning shares (or voting rights in the controlling or constituting bodies, or rights to participate in profits) in the foreign legal entity that operate in a country that did not conclude neither with Poland nor with the EU the agreement (based on which Polish authorities could gain from this country tax information) or other country which is considered tax heaven, needs to impose the tax on income of such CFC in proportion to the number of shares held in it by the taxpayer, at a regular Polish CIT rate of 19%, unless the said entity actually conducts the actual business activity in the given country or its revenues do not exceed equivalent in PLN of EUR 250,000.

What is more, the provisions governing the CFC imposes on the Polish taxpayers also the reporting obligations that oblige the taxpayers to keep separate records of a CFC.

Question 6

Polish provisions determining the tax base within the corporate income tax state that the taxpayers not having their seat or management office within the territory of Poland are subject to the tax liability imposed *only* on the income they earn within the territory of Poland that include but is not limited to the income from the activity pursued by the permanent establishment of a foreign entity in Poland.

Since Polish legislator has not introduced to the Polish legal system any default rule for attributing the individual categories of income between the permanent establishment and the head office, Polish tax authorities while settling this matter follow the OECD's Guidelines and the wording of the OECD's Model Tax Convention on Income and on Capital. It is highly expected as well for Polish administration to follow in practice the OECD BEPS Action 7 Final Report regarding the tax treatment of permanent establishments in the near future.

The above means that currently for the purpose of allocating profits between the permanent establishment and the head office Polish tax administration uses the arm's length principle, what means that attributed to the permanent establishment shall be only this part of profits that such permanent establishment would expect to gain if it ran its business independently as a separate entity.

Question 7

Although its shape has changed through the years slightly, the Polish legislator had introduced the arm's length principle to the Polish tax system already many decades ago however it gained importance only in the 90s of the twentieth century. The biggest revolution in that scope occurred in 2001 when Poland – following the current OECD guidelines – introduced to the Corporate Income Tax Act ("CIT") and the Personal Income Tax the obligation to prepare the transfer pricing documentation regarding transactions carried out with the affiliated entities. With the same legal act, Polish legislator has introduced the penalty regulation for shifting profits, according to which when the tax authority or fiscal control authority determines – using the arm's length principle – the taxpayer's income in an amount higher (or loss in an amount lower) than the amount declared by the taxpayer in relation to the transactions carried out with related entity and the taxpayer does not present to such authorities the complete transfer pricing documentation – the difference between the income declared by the taxpayer and that determined by these authorities is subject to taxation at a penalty rate of *50%*.

Current wording of the Polish provisions governing the arm's length principle in the CIT Act as well as the provisions on transfer pricing documentation follows the OECD Transfer Pricing Guidelines since their aim was to transpose the Guidelines and implement their wording into Polish legal system.

According to Article 11 of the CIT Act that contains the Polish transposition of the arm's length principle, if as a result of capital or personal relations, the conditions within the transaction between related entities are substantially *different from those which would be agreed between independent entities* and, as a result thereof, such entity does not disclose any income or discloses the income smaller than might be expected if such relations did not exist – the income of a given entity and the tax due is assessed by the tax authorities without taking into account the conditions resulting from such links.

Question 8

In cases where the taxpayer itself conclude that the earnings received or the costs made during a given time horizon were either understated or overstated, Polish legal system allows the taxpayer to carry out adjustments of the profits both upwards and downwards.

However such adjustment rarely happens to be unilateral. Generally speaking it needs to be carried out based on the relevant accounting document like an invoice or credit / debit note issued by the counterparty, in compliance with the relevant laws, the policy of the MNE Group and needs to be supported with proper calculation.

When it comes to the adjustments resulting from the tax authorities audit, in the scope of general tax procedures in Poland, the tax authorities are allowed to order the taxpayer to adjust its profits both upwards and downwards.

In general such adjustment is unilateral what means that the tax authorities ordering the taxpayer to change the tax base neither verify if the potentially remaining income will be taxed anywhere else nor initiate any proceeding to eliminate the potential double taxation.

However, in response to the tax authorities adjustment the other party of the transaction has the right to adjust its own income accordingly.

Question 9

The example given in a questionnaire describes the situation where the income of the multinational group is subject to double taxation. Since Republic of Poland uses a OECD Model Tax Convention on Income and on Capital in a process of determining the bilateral tax solutions as well as it is a party to the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, Polish tax authorities – to eliminate double taxation – accepts the result of the tax audit of the other country in the field of transfer pricing – if it is justified and meets the appropriate conditions.

To avoid the double taxation and therefore perform the corresponding adjustment in response to the fact that the foreign tax authorities adjusted the foreign related entity's profits upwards, Polish tax authorities will adjust the Polish taxpayer's income downwards if the relevant conditions stipulated in the Polish provisions on that matter are met:

- the given Polish taxpayer files a motion to the Minister of Finance,
- the relevant bilateral agreement on avoiding the double taxation concluded with the country of residence of the foreign entity provides the legal basis for conducting such adjustment;
- Polish Minister of Finance finds it justified in the light of the arm's length principle.

However, the procedure described above results in a decision of the Minister of Finance who may either approve or reject the taxpayer's motion unilaterally. If however the appropriate authorities of the contracting states are not able to resolve this issue in a way of mutual arrangement, they shall – upon receiving the taxpayer's motion – bring their case to arbitration on the basis of the provisions of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises.

It is also possible to gain the result that would eliminate the double taxation by using the Mutual Agreement Procedure based on Article 25 of the OECD

Model Tax Convention. According to its provisions when a taxpayers conclude that the actions of one or both tax administrations of the contracting states will have the effect of double taxation they have a right to bring their case to the appropriate authorities of their own country.

If the relevant authorities consider their objections justified they should then endeavor to resolve this issue by mutual arrangement with the competent authorities of the other country.

Question 10

With effect from 15 July 2016, the General Anti-Abuse Rule (GAAR) clause has been implemented into Polish Tax Code (article 119a of the Tax Ordinance Act). The aim of GAAR is to prevent the creation of legal arrangements which, although entered into in accordance with the law, have been put into place for the main purpose of obtaining a tax advantage and are of artificial character. The result of GAAR application to a specific case is that the arrangements deemed to be artificial are ignored while determining the tax consequences of transaction, so that their creation shall not result in obtaining tax benefits.

In cases when GAAR can be applied, the Head of the National Fiscal Administration has the right to issue a tax decision determining the consequences of the legal arrangements, which economic substance has been discredited, and the amount of tax due. In this case, the tax consequences will be assessed as if the parties have chosen to conduct different transaction, that is appropriate to occurred situation according to tax authorities.

The GAAR regulations introduce the definition of tax avoidance, pursuant to which the arrangement can be deemed to be artificial if it is overly complicated or lacks economic substance and would not be applied by an entity caring out commercially driven activities in a reasonable manner.

GAAR regulations are not applicable if the application of other provisions of the tax law allows to prevent tax avoidance. In relation to transactions, to which specific tax avoidance clause has been established (SAAR provisions), hence tax avoidance should be judged solely on the basis of SAAR clauses and GAAR cannot be applied as a back-up to SAAR clause. However, when a transaction to which SAAR is applicable is deemed to be a part of series of transactions, GAAR can be applied to the whole series.

SAAR clauses in the Polish tax system has been introduced in relation to: the right to benefit from the participation exemption stemming from the EU Parent-Subsidiary Directive and reorganization transactions including: mergers, divisions and share-for-share exchange transactions. According to the project of amendments to the CIT act presented this year by the Polish government, it is planned to extent the reorganization SAAR clause to in-kind contribution transactions.

Part II

Question 11

First, it should be pointed out that the Commission's recovery decision has no direct effect on beneficiary of the state aid, as the decision is addressed to the Member States.

In Poland, the Act on the procedural issues concerning state aid (hereinafter: the "Act") defines procedures for executing the Commission's recovery decision. The Act imposes on the beneficiary of the state aid an obligation to return an equivalent of the aid in regard to which the Commission adopted a recovery decision, unless, due to an appeal, execution of the Commission's decision is suspended (art. *25 of the Act*).

A copy of the Commission's decision on the obligatory aid recovery should be immediately passed by the President of the Office of Competition and Consumer Protection or the Minister of Agriculture and Rural Development (in regard to state aid in the agriculture or fisheries sectors) to:

- in case of an aid scheme – to the aid granting body which then passes it immediately to the aid beneficiary; or
- in case of individual state aid and aid for restructuring – to the aid granting bodies and entities required to recover the aid (art. 26 of the *Act*).

If the aid was granted on the basis of:

1) a decision – the decision issuing authority may cancel or change it even without the parties' consent, or may order aid recovery;
2) an agreement – the aid granting body may apply to a civil court to dissolve the agreement based on which the aid was granted or to order the aid to be recovered (art. 27 §1 of the *Act*).

Polish law provides for no specific procedure dedicated only to the recovery of the state aid. Compulsory collection of an amount equivalent to the provided aid and the accrued interest is carried out pursuant to regulations regarding administrative executive proceedings or pursuant to regulations on court collection proceedings (art. 28 of the *Act*). Enforcement may be commenced on the basis of an enforcement title. Except as otherwise provided by the law, an enforcement title is an enforcement order appended with a writ of enforcement (art. 776 of the *Code of Civil Procedure*). The court might also declare a judgment immediately enforceable (art. 333 of the *Code of Civil Procedure*). In case of enforcement procedure in administration, enforcement may be commenced on the basis of a

notification of seizure of debtor's property rights (art. 67 of the *Enforcement proceedings in administration act).*

In both bankruptcy and restructuring procedures the debt restructuring is impermissible, when it concerns liabilities representing the state aid, about which the Commission's recovery decision was made (art. 156 of the *Restructuring law* and art. 266f of the *Bankruptcy law).*

Question 12

Until now, in Poland, no court decisions refusing to allow for the (immediate) recovery of state aid have been made. However, since the judicial procedure is indispensable, in Poland it is not possible to recover the state aid within 4 months after the Commission decision was taken. Moreover, the parties may lodge an appeal against a judgment issued by the court of the first instance, which additionally extends the procedure.

Question 13

Poland has concluded investment protection treaties with the following countries:

1. Albania
2. Argentina
3. Australia
4. Austria
5. Azerbaijan
6. Bangladesh
7. Belgium and Luxemburg
8. Belarus
9. Bulgaria
10. Canada
11. Chile
12. China
13. Croatia
14. Cyprus
15. Czech Republic
16. Denmark
17. Egypt
18. Estonia
19. Finland
20. France
21. Germany
22. Greece
23. Hungary
24. India
25. Indonesia
26. Israel
27. Iran
28. Italy
29. Jordan
30. Kazakhstan
31. Kuwait
32. Latvia
33. Lithuania
34. Macedonia
35. Malaysia
36. Moldova
37. Mongolia
38. Morocco
39. Norway
40. Portugal
41. Romania
42. South Korea
43. Serbia
44. Sweden
45. Switzerland
46. Singapore
47. Slovakia
48. Slovenia
49. Spain
50. Thailand
51. The Netherlands
52. Tunisia
53. Turkey
54. United Kingdom
55. Ukraine
56. United Arab Emirates
57. United States of America
58. Uruguay
59. Uzbekistan
60. Vietnam

USA – the Treaty between the United States of America and the Republic of Poland concerning business and economic relations (signed 1990, came into

force 1994) provides for arbitration of the International Centre for Settlement of Investment Disputes or an arbitration court established in compliance with the rules and regulations of UNCITRAL.

United Kingdom – Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Polish People's Republic for the promotion and reciprocal protection of investments (signed 1987, came into force 1988) provides for arbitration of the International Centre for Settlement of Investment Disputes or an arbitration court established in compliance with the rules and regulations of UNCITRAL.

The above-mentioned treaties provide that investments made by entrepreneurs from one contracting state will be treated fairly and on an equally favourable basis as domestic investments in the other contracting state (national treatment).

Moreover, other international obligations involving the protection of property or the protection of foreign investments, were specified (inter alia) in the following documents:

- Paris Convention for the Protection of Industrial Property of March 20, 1883 (ratified by Poland in 1975)
- Agreement on Trade-Related Aspects of Intellectual Property Rights (ratified by Poland in 1995)
- European Patent Convention (Poland is the member of EPO from 1 of May 2004)
- Convention Establishing the World Intellectual Property Organization (ratified by Poland in 1975)

Question 14

As transpires from information we have been provided with, neither Polish civil and administrative courts nor the biggest Polish permanent arbitration court (Court of Arbitration at the Polish Chamber of Commerce) have ever dealt with conflicting obligations under EU law and international law (international treaties to which Poland is a party).

PORTUGAL

Rogério Fernandes Ferreira*
Manuel Fontaine**
Lourenço Vilhena de Freitas***

Part I

Question 1

Portuguese taxpayers may seek greater legal certainty by requesting (general) tax rulings ("*informações vinculativas*") and tax contracts ("*contratos fiscais*"). Moreover, particularly with regard to transfer pricing, taxpayers may also resort to Advance Pricing Agreements ("*acordos prévios de preços de transferência*"). These three mechanisms bind the tax authorities, under certain conditions. Advance Pricing Agreements play the main role when it comes to granting legal certainty in the context of transfer pricing.

Regarding the first of the abovementioned legal mechanisms, tax rulings provided in accordance with article 68 of the Portuguese General Tax Law ("*Lei Geral Tributária*") may address any of a taxpayer's tax issue, hence their general nature. The request may be presented by any taxpayer (self-interest), other stakeholders or their legal representatives (lawyers, solicitors, chartered accountants or any entities entitled to exercise the tax advice on the tax status of their costumers duly identified), electronically and in accordance with an official form.

The tax ruling request shall indicate the facts and assumptions on which the ruling is to be based on and should also be accompanied by a proposed legal

* Replied to questions 1 to 10.
** Replied to questions 11 and 12.
** Replied to question 13 and 14.

interpretation. Moreover, it shall contain all the necessary information and documentation for the tax authorities to decide. After submitting the tax ruling request the taxpayer is legally bound to cooperate with any further requests for clarification. If the information or documentation provided is deemed insufficient, the request may be summarily archived.

Moreover, Portugal transposed, in August 2017, Council Directive (EU) 2015/2376 amending Directive 2011/16/EU ("DAC 1") as regards mandatory automatic exchange of information in the field of taxation ("DAC 3"; Directive on Administrative Cooperation), particularly regarding tax rulings and APAs, and Council Directive (EU) 2016/881 of 25 May 2016, amending DAC 1 as regards mandatory exchange of automatic exchange of information in the field of taxation ("DAC 4"), particularly regarding Country-by-Country Reporting, consequently introducing a number of changes to the tax rulings regime.

Taxpayer requests for a tax ruling that is covered by DAC 3, namely tax rulings with a cross-border element, shall have all the elements necessary for the Portuguese tax authorities, on the one hand, to evaluate and analyze it, and on the other hand, to be able to exchange and transfer that information to other Member States (as well as other covered jurisdictions, such as other Contracting States in Double Tax Conventions entered into by Portugal and jurisdictions participating in the Multilateral Convention on Mutual Assistance in Tax Matters, as amended by the 2010 Protocol, which entered into force in Portugal in 2015, or any similar exchange of information and administrative cooperation framework). In addition, taxpayers must notify the Portuguese tax authorities of any change in the elements that were initially communicated and that are relevant for the purpose of mandatory and automatic exchange of information.

It is also interesting to mention that since the tax rulings bind the tax authorities, they cannot act differently by reference to the content of a previously issued tax ruling, except in compliance with a court decision.

In this sense, if the tax authorities act in opposition to the tax ruling, such action would be deemed illegal.

Nevertheless, the tax ruling may be revoked by the tax authorities after one year and is inapplicable if the facts and circumstances or legal provisions are altered in the future and, in any case, tax rulings shall automatically expire four years after they are issued, unless the taxpayer requests their renewal. This automatic expiration date was introduced in August 2017 and it is still unclear how the renewal procedure would develop but, presumably, it would involve a reassessment of the underlying facts and circumstance and the legal aspects.

Moreover, it is particularly unclear what is the status of previously issued tax rulings, due i) to the expiration provision referring to the date the tax rulings were issued, ii) to the lack of a transitional period, and iii) to the generally applicable

rules regarding temporal application of tax procedural law ("*aplicação da lei no tempo*") that mandate the immediate application of such procedural provisions with due to regard to rights and interests acquired by the taxpayers (rights and interests that add another layer of complexity to the question).

In any case, the taxpayers may, for example, present an appeal of a tax assessment made in accordance with a tax ruling; i.e. tax rulings do not have a binding nature with respect to the taxpayer, but rather, only, with respect to the tax authorities..

According to domestic tax law, this type of tax rulings ("*informações vinculativas*") should be made publicly available within 30 days counting from of the day they are issued. However, the current Director of the tax authorities has publicly acknowledged that does not always happen, yet. Similarly, the Secretary of State for Fiscal Affairs' ministerial order ("*Despacho*") no. 7689/2017, published on the Official Public Journal ("*Diário da República*") of 1 September 2017, instructs the Portuguese tax authorities to make an inventory of unpublished tax rulings ("*informações vinculativas*"), to hasten their publication, and also to assure that future tax rulings are published in accordance with the law, insofar as the matters involved are dissimilar to previously published tax rulings.

Concerning the second of the abovementioned legal mechanisms, tax contracts ("*contratos fiscais*") concluded between the tax authorities and taxpayers may also grant a certain level of legal certainty since they result from an agreement in which the tax authorities typically grant an advantage or explain the level of incidence of a particular kind of tax or tax regime. However, the subject and content of this kind of agreements is necessarily based on legal provisions. Tax contracts are regulated in article 37 of the General Portuguese Tax Law, but the provisions about the benefits granted by this kind of legal instrument are included in the Tax Benefits Statute ("*Estatuto dos Benefícios Fiscais*").

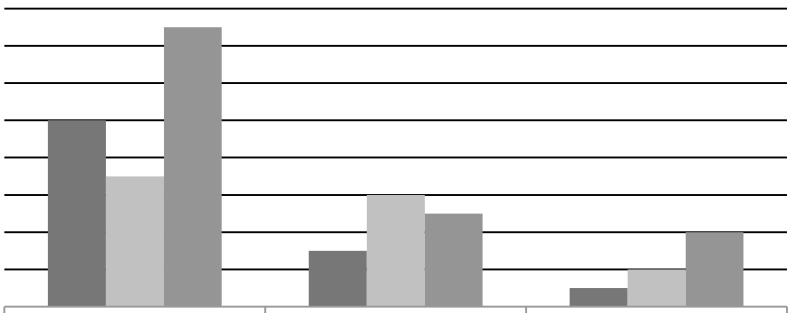
If the tax contract is unrelated to fiscal benefits, they still need to be based on an authorizing legal provision and they have to be in accordance with the following legal principles: legality, equality, good faith and the non-disposableness of tax credits by the tax authorities.

This type of rulings, in the form of tax contracts, are not expressly mentioned in Portuguese domestic tax law as being covered by the mandatory and automatic exchange of information provisions, but it may construed that some tax contracts may meet the substantial criteria of DAC 3.

About the third of the abovementioned legal mechanisms, Advance Pricing Agreements ("APA") were introduced in fiscal year 2008. They are generally regulated in article 138 of the Portuguese Corporate Income Tax Code ("*Código do Imposto sobre o Rendimento das Pessoas Colectivas*") and regulated in further detail in the Ordinance ("*Portaria*") no. 620-A/2008, of July 16th, which is a hierarchically inferior legal instrument in relation to the CIT Code.

An APA may be unilateral, bilateral or multilateral, depending on how many States (and tax authorities) are involved in the process, and it may not be concluded for a period longer than 3 years. However, the taxpayer may request a renewal until 6 months before the agreed end for the APA. The renewal is subject to a reassessment based on the procedure applicable to the first request. The Portuguese Ministry of Finance and the tax authorities have published (on June 2017) the 2016 report regarding tax authorities' activities on the fight against fraud and tax evasion. Therein is stated that, from the tax authorities' perspective, APAs increase legal certainty not only for the taxpayer, but also on tax revenue, are a positive factor on attracting foreign investment, reduce tax litigation, increase mutual trust and proximity between parties, decrease compliance costs, and mitigate international double taxation risks.

The following figure, based on official statistics compiled by the Portuguese Tax Authorities, indicates the number of APAs that were under consideration, in force or expired between 2014 and 2016:



	Number of APAs under consideration at the end of the year	Number of APAs in force at the end of the year	Number of expired APAs during the year
2014	10	3	1
2015	7	6	2
2016	15	5	4

Figure: Portuguese Tax Authorities' Statistics regarding Advance Pricing Agreements between 2014 and 2016

Finally, there are no specific requirements to be eligible for advance certainty in the context of any of the abovementioned mechanisms. Nevertheless, regarding APAs, since transfer pricing regulations only targets taxable persons that are linked by "special relations", namely, as a general principle, entities or persons that have the power of exercising, directly or indirectly, a significant influence

in the management decisions of another entity, in our understanding, only these persons would be eligible to request APAs. Facilitating the assessment about the existence of "special relations", article 63 of the Corporate Income Tax Code sets various presumptions where special relations are deemed to exist. Insofar as the abovementioned principle is not met, it may be argued that these presumptions are rebuttable according to article 73 of the Portuguese General Tax Law.

Question 2

Portuguese domestic tax law provides that the Portuguese tax authorities may verify or check the facts mentioned in an APA request, which can occur *ex-ante*, before the APA is concluded (article 7 of Ordinance no. 620-A/2008), or *ex-post*, after the APA is concluded, namely by way of a tax audit or the revision of the APA (article 13 and 14 of Ordinance no. 620-A/2008).

With regard to *ex-ante* control within the framework of the APA, the Portuguese tax authorities, namely the Large Taxpayers Unit ("*Unidade dos Grandes Contribuintes*"), upon receiving the taxpayer's request for an APA, analyses and verifies the facts mentioned therein and documentation provided with the APA request, without prejudice to seeking further information and clarifications.

If taxpayer actions do not delay the procedure and the APA is unilateral, the tax authorities should decide within 180 days after the formal acceptance of the request. However, if the APA is bilateral or multilateral, domestic tax law requires a mutual agreement procedure to be initiated and the deadline is extended to 360 days. According to the Portuguese tax authorities, the first (ever) bilateral APA involving Portugal was concluded in 2016 (see our answer to Question 6 for statistics on APAs).

Concerning *ex-post* monitoring within the framework of the APA, the tax authorities may engage in tax audits to analyze and confirm data and information supplied by the taxpayer, verify the compliance with all the reporting obligations related to the APA and confirm that the facts and circumstances are still valid and coherent with the transfer pricing methods that are applied. The audit may result in the reassessment or the termination of the APA.

The general provisions regarding tax audits (article 63 of the Portuguese General Tax Law and special regulations regarding tax audits ("*Regime Complementar do Procedimento da Inspecção Tributária*") are applicable to tax audits on transfer pricing.

One important limitation on general tax audits lies in the non-repeatability of tax audits. As a rule Portuguese domestic tax law disallows multiple tax audits regarding the same scope (the same taxpayer, the same tax, the same amount, and the same taxable period), unless new facts arise after the conclusion of the tax audit. However, the abovementioned special provisions regarding APAs

provide that said limitation does not apply when the tax audit is performed in the context of an APA audit, thus, in theory, providing greater freedom to the tax authorities. Nevertheless, in our thinking, one should question whether this special (non-limiting) provision actually prevails over the general (limiting) provision, as it normally would. It may be argued that because the Ordinance is a hierarchically inferior legal instrument *vis-à-vis* the Portuguese General Tax Law, such removal of the limitation is unconstitutional pursuant to article 112 the Portuguese Constitution.

We should further remark that the taxpayer may also request a tax audit, in accordance with article 47 of the Portuguese General Tax Code and other special regulations (Law-Decree no. 6/99, from 8th of January, "*Regime Especial de Inspeção por Iniciativa do Sujeito Passivo*"). In such case, if the audit is concluded, it may not be reopened based on facts that occurred during the time and within the scope under analysis.

Question 3

There are currently no special provisions that expressly provide that the tax authorities must verify the treatment given to a particular payment or transaction by the other country (where the other related entity is deemed to be a tax resident), namely in the context of transfer pricing.

However, it may be argued that the tax authorities ought to inquire into the tax treatment granted in the other country to the transfer pricing transaction under analysis based on the inquisitorial principle ("*Princípio do Inquisitório*") and the availability of exchange of information and assistance mechanisms.

Within the Directive on Administrative Cooperation ("DAC 2") framework, the Portuguese tax authorities may spontaneously inform tax authorities from other Member States regarding tax information, namely information related to transfer pricing and unilateral APAs. They may also request tax information that may be relevant for the auditing of transfer pricing or APAs. Similar frameworks exist in several Double Tax Conventions ("DTCs") or Tax Information Exchange Agreements ("TIEAs"), as well as the Multilateral Convention on Mutual Assistance in Tax Matters, as amended by the 2010 Protocol, which entered into force in Portugal in 2015.

Question 4

Tax rulings, of a general nature, bind both the tax authorities and the taxpayer but it concedes the taxpayer the ability to challenge a non-favorable decision. Therefore and as already mentioned, while the tax authorities cannot act differently by reference to the content of a previously granted tax ruling, except in compliance with a court decision, the taxpayer may, for example, appeal a tax

assessment made in accordance with the tax ruling. If the tax authorities deviate from the tax ruling, such action would be illegal and the tax authorities' act would be annullable by a tax court. Nevertheless, the tax ruling may be revoked by the tax authorities after one year and is inapplicable if the facts and circumstances or legal provisions are altered in the future.

An APA binds the tax authorities insofar as there are neither significant changes to the applicable tax law, nor in the economic and operational circumstances, and other facts and assumptions underlying the APA. In our view, it is unclear, for instance, if significant changes or additions to the OECD Transfer Pricing Guidelines would unbind the tax authorities or give legitimate cause to resolve the APA. However, while the Transfer Pricing Guidelines may be relied on (and are used by both tax authorities and tax courts) as an auxiliary basis for interpretation, they are not considered hard law.

An APA may cease to apply for other reasons, namely by decision of the tax authorities, if (i) the terms and declaratory obligations related of the APA are not complied with or (ii) the taxpayer delivered erroneous data, or omitted or concealed relevant information or made false declarations.

An APA may yet cease to apply before the determined deadline (maximum three years) if the taxpayer fails to deliver to the tax authorities a yearly report regarding the application of the agreement. The content of the report and additional documentation developed and kept by the taxpayer shall allow the tax authorities to monitor and audit the compliance with the APA.

Question 5

Portugal may request tax information deemed relevant for the auditing of transfer pricing or an APA within the following frameworks: the second Directive on Administrative Cooperation on tax matters ("DAC 2", Council Directive 2014/107/EU on the automatic and mandatory automatic exchange of information in the field of taxation, amending "DAC 1", Council Directive 2011/16/EU), Double Tax Conventions ("DTC"), Tax Information Exchange Agreements ("TIEA"), and Multilateral Convention on Mutual Assistance in Tax Matters, as amended by the 2010 Protocol (see last paragraph of the answer to question 3).

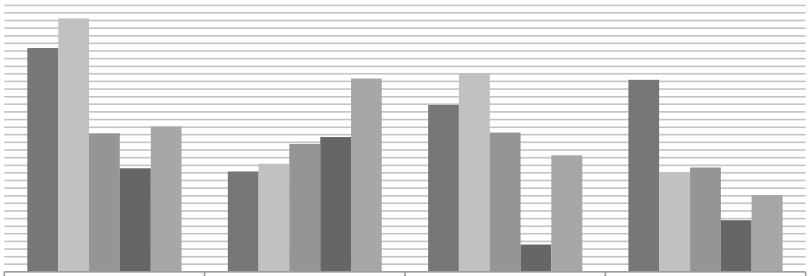
While Portuguese domestic tax law allows the tax authorities to perform corresponding adjustments in accordance with the applicable DTC, based on a primary adjustment made on the other Contracting State, it does not directly indicate that a check should (automatically and systematically) be performed regarding the taxation of the remainder in the other State.

Particularly with regard to the DAC 2 framework that was transposed into domestic tax law, as mentioned in question 3, Portuguese tax authorities may spontaneously inform tax authorities from other Member States regarding tax

information, namely information related to the transfer pricing and unilateral APAs, and they may also exchange information they are aware and which may be useful to the competent authorities of the other Member States.

However, the Portuguese tax authorities must spontaneously exchange information with another Member State, namely, whenever: i) it has grounds for supposing that there may be a loss of tax in the other Member State, or ii) it has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises. There is no public statistics in Portugal regarding the amount of times any of the exchange of information mechanisms was triggered in the context of transfer pricing, so the question whether the tax authorities actually check the tax result in the other State may not, to that extent, be satisfactorily answered.

In practice, whereas there is no available segmented data regarding the exchange of information about transfer pricing or APAs, according to data made public by the tax authorities, the cross-border information flows (spontaneous and on request) on direct taxation regarding Portugal, between 2012 and 2016, were the following:



	On Request (Sent)	On Request (Received)	Spontaneous (Sent)	Spontaneous (Received)
2012	294	132	219	252
2013	333	142	261	130
2014	182	168	183	137
2015	136	177	36	68
2016	191	254	153	101

Figure: International exchange of information data regarding direct taxation in Portugal between 2012 and 2016

Although it cannot be stated, with certainty, that the Portuguese tax authorities systematically check whether any remaining income will be taxed by another country, case law shows that the tax authorities do inquire and seek information from tax authorities from other countries.

Furthermore, another change to the Directive on Administrative Cooperation in the field of taxation, which was introduced in Portuguese domestic tax law in August 2017, with retrospective effects to 1 January 2017, imposes the mandatory exchange of information regarding certain tax rulings and APAs ("DAC 3", Council Directive (EU) 2015/2376 amending DAC 1 as regards mandatory automatic exchange of information in the field of taxation).

In this context, DAC 3, considering that "*the efficient spontaneous exchange of information in respect of advance cross-border rulings and advance pricing arrangements is hindered by several important practical difficulties such as the discretion permitted to the issuing Member State to decide which other Member States should be informed*", introduced mandatory automatic exchange of information on advance cross-border rulings and advance pricing arrangements between EU Member States, under certain conditions and regarding certain entities.

The mechanisms underlying DAC 3 are expected to allow Portugal to more efficiently check whether any remaining income will be taxed by another country and vice-versa.

Moreover, in this context, Portugal also introduced into domestic law in August 2017 the provisions corresponding to Council Directive (EU) 2016/881 of 25 May 2016, amending DAC 1 as regards mandatory exchange of automatic exchange of information in the field of taxation ("DAC 4"), particularly regarding Country-by-Country Reporting, which is expected to further enhance the tax authorities capability to cross-check certain cross-border aspects in the context of transfer pricing and intra-group arrangements in multinational enterprises, and also within the framework of APAs.

The Portuguese tax authorities capability of exchanging such DAC 3 and DAC 4 type of information is not limited to EU Member States, as they are also legally allowed (and bound) to exchange said information with other Contracting States in Double Tax Conventions entered into by Portugal, as well as jurisdictions participating in the Multilateral Convention on Mutual Assistance in Tax Matters, as amended by the 2010 Protocol, which entered into force in Portugal in 2015, or any similar exchange of information and administrative cooperation framework.

Portugal legally allows for correction mechanisms to ensure that any remainder will still be taxed at home as to avoid international double non-taxation. In a cross-border scenario, Portuguese domestic tax law provides that the Portuguese tax authorities *may* perform a corresponding adjustment when the other Contracting State to a Double Tax Convention performed a primary transfer pricing adjustment. The corresponding adjustment may be triggered by either the foreign tax authorities or the taxpayers, and domestic administrative procedures should be followed to achieve the corresponding adjustment.

Question 6

Portuguese tax law does not expressly provide for a default allocation of profits to permanent establishments.

From a domestic standpoint, profit attributable to permanent establishments is based on the applicable accounting standards and rules, consisting also in the computation of the net profit and other positive and negative equity variations. In other words, the accounting profit (or loss) may be different from the taxable profit (or loss), as the latter is based on the former with the addition of tax and legally relevant positive and negative equity variations.

Simultaneously, in accordance with Portuguese domestic tax law, domestic transfer pricing regulations also apply to the attribution of profits to permanent establishments, thus embodying the separate entity approach set forth by the OECD. Such approach is closely linked to the arm's length principle developed in the context of the OECD Transfer Pricing Guidelines and is in line with what is indicated in the Commentaries to the OECD Model Convention and on the Reports on the Attribution of Profits to Permanent Establishments (2008 and 2010).

However, it is unclear how these may apply in practice in Portugal. Namely, how the Authorized OECD Approach and more recent Transfer Pricing Guidelines may fully apply. This is due to Portugal having presented the following reservation to Article 7 of the OECD Model Convention: "*Portugal reserves its right to continue to adopt in its convention the text of the Article as it read before 2010 until its domestic law is adapted in order to apply the new approach*". Indeed, DTCs concluded by Portugal still follow the old (pre-2010) version of article 7 of the OECD Model Convention, which, by the OECD's own assertion, does not allow the application of the Authorized OECD Approach in its entirety.

Question 7

The arm's length principle and the administrative power to correct a taxpayer's taxable base was first introduced in Portugal in 1963 (*"Código da Contribuição Industrial"*), and later confirmed in the structural Corporate Income Tax reform from 1989. However, it was only truly developed beyond the mere principle on 2001. Namely, Law 30-G/2000, from December 29th and Ordinance 1446-C/2001, from December 21st, introduced the framework that was necessary to thoroughly apply the arm's length principle, namely by mimicking (and implicitly referring to) the OECD Transfer Pricing Guidelines framework and methodologies, as well as setting related parties criteria, and compliance and documentation requirements.

On the one hand, neither Portuguese Corporate Income Tax code, nor the Ordinance that develops the transfer pricing framework, established a formal and express link to the OECD Transfer Pricing Guidelines.

On the other hand, the legal provisions introduced in 2001, by referring to comparability and the methodologies and terminology adopted in the OECD Transfer Pricing Guidelines, may be understood as implicitly referring to them. The preamble to the above-mentioned Ordinance refers abundantly to the international standards reflected in the OECD Transfer Pricing Guidelines, further advising the reader to refer to the OECD reports in cases of greater technical complexity.

However, one may argue that a broader link established by the preamble is legally weak, since no actual legal provision refers to the OECD Transfer Pricing Guidelines as a whole, and the Ordinance preamble may be said to illegitimately extend the scope of the Corporate Income Tax code (the Ordinance is a hierarchically inferior type of law). Even if legally accepted, it should be noted that the application and a potential binding nature of more recent OECD Transfer Pricing Guidelines would likely be considered undue, as the internal rules regarding the separation of State powers would likely be read as preventing it.

Nevertheless, and although the legal interpretation rationale is not yet fully clarified, domestic tax arbitration and judicial tax courts regularly make direct references to (usually generally aspects of) the OECD Transfer Pricing Guidelines (e.g. as recent as the 2010 OECD Transfer Pricing Guidelines) in some of their transfer pricing decisions. As such, from a practical standpoint, a link between domestic transfer pricing regulations and the OECD Transfer Pricing Guidelines exists, although the extent of its relevance may be debatable.

Question 8

In purely domestic situations, when both related parties are based in Portugal, Portuguese domestic tax law determines that the tax authorities *must* "*perform the necessary* [transfer pricing] *adjustments*", i.e. both primary and corresponding transfer pricing adjustments.

As mentioned in our answer to Question 5, in a cross-border scenario, Portuguese domestic tax law provides that the Portuguese tax authorities *may* perform a corresponding adjustment when the other Contracting State to a Double Tax Convention performed a primary transfer pricing adjustment. The corresponding adjustment may be triggered by either the foreign tax authorities or the taxpayers themselves. Certain formal administrative procedures should be followed to achieve the corresponding adjustment.

We should note that, in Portuguese domestic administrative and tax law, a difference between *must* and *may* is usually identified by scholars and jurisprudence. Particularly, *may* is nonetheless understood as imposing both a legal power and a legal duty upon the tax authorities.

Portuguese domestic tax law does not set forth a restriction regarding upwards or downwards adjustments by the Portuguese tax authorities.

The taxpayer also has the duty to perform upwards adjustments whenever the arm's length principle is not adhered to from a Portuguese perspective.

Question 9

The corresponding downwards adjustment may be triggered by either an official request by the foreign tax authorities or by a taxpayer request concerning the reanalysis of its tax assessment and grounded on assessments performed on the foreign entity. Such possibility is only available, according to domestic tax law, if a Double Tax Convention is in place. If a Double Tax Convention includes a provision such as article 9(2) of the OECD Model Tax Convention on Income and on Capital, it may be argued that such possibility exists nonetheless.

Domestic administrative procedures set forth in Ordinance no. 1446-C/2001 should be followed to achieve the corresponding adjustment, namely, among other procedural and documental aspects, the requesting party ought: to identify all the relevant aspects, to cooperate and provide the documentation necessary to perform the analysis, to propose a solution, to demonstrate the existence of double taxation, and the acceptance by the authorities of the other Contracting State of the initiation of the Mutual Agreement Procedure.

With regard to the conditions in which Portuguese tax authorities normally accept the transfer pricing result of the other country, there is no public and official guidance regarding the actual transfer pricing discussion that needs to take place. Given that the proceedings and outcome of the Mutual Agreement Procedures are not public, it is difficult to reach clear conclusions regarding the question.

However, for example, based mainly on transfer pricing decisions made by domestic tax courts, we take note that, historically, the tax authorities tend to argue in favor and often attempt to apply the Comparable Uncontrolled Price method, but more recent cases have also showed acceptance and application of other methods. The Portuguese tax authorities also typically take a restrictive view point regarding the scope of comparable databases, which may lead to issues related to the acceptance of pan-European comparables or the inclusion of comparables from outside the Iberian Peninsula, and also, for instance, regarding the specific result (e.g. the median or the average) that is acceptable for transfer pricing purposes within a range of results.

In light of the above, in our understanding, the kind of disputes that arise between the Portuguese tax authorities and taxpayers regarding the most appropriate method, comparables and acceptable result of the application of the methods are likely to also emerge with foreign tax authorities, as some of the positions adopted by the Portuguese tax authorities in litigation are not strictly aligned with the OECD Transfer Pricing Guidelines.

Question 10

Portuguese domestic tax law contains a General Anti Abuse Rule (GAAR) in article 38(2) of the Portuguese General Tax Law. The GAAR targets illegitimate tax planning, which consists in acts or behaviors that are deemed to be contrary to the legal order and tax rules. In contrast, a taxpayer engages in legitimate tax planning when the acts or behaviors adopted, while providing a tax benefit, are so consented, expressly or by omission, by the lawmakers. The distinction between these two kinds of tax planning is commonly referred to as tax evasion (against or abusive circumventing of the legal order) and tax avoidance (within the legal order).

Portuguese tax courts have accepted the "step transaction" doctrine and have developed and consolidated a framework for the application of this provision. The GAAR framework contains four key elements, whose cumulative fulfilment and proof is required, are identified in Portuguese case law: i) means adopted to achieve a tax advantage, ii) the result being a tax advantage, iii) intellectual intent and iv) legal intent (legislator's intent) is avoided. This framework and the analysis of these interconnected elements requires, in further detail, the analysis of:

i. the means adopted – e.g. a transaction or a set of step transactions – are such that they may provide a tax advantage to the taxpayer;

ii. the result, which should be an actual tax advantage that arises due to the adoption of said means when compared the outcome that would arise if "normal" or economically equivalent transactions were conducted. A taxpayer is considered to have a tax advantage when it obtains a better position in respect of the taxes due to pay;

iii. the intellectual intent, which encompasses the subjective character of the GAAR, meaning that the intent of the taxpayer while entering into the agreement or set of transactions must have been essentially or mainly to reduce its tax liability; and

iv. the law or its spirit, assessed in light of its object and purpose, is violated in such a way that the tax planning is deemed to be illegal (tax evasion) and not legal or legitimate (tax avoidance). This analysis should lead to the conclusion that the lawmakers intended to target a certain transaction and that the taxpayer is illegally contravening. Therefore, when a taxpayer attempts to circumvent certain tax provision with the solely aim of reducing its tax liability. States are entitled to deny the tax benefit granted under the law, by applying the GAAR, in case the four key elements are fulfilled and proven.

Once fulfilled or met, these four elements are complemented by a fifth element: the sanction, which leads to disregarding the steps or transactions deemed

to be abusive and their recharacterization into another, which is then taxed accordingly.

In this context, we should note that, in our understanding, it is unclear how the GAAR contained in the Anti-Tax Avoidance Directive ("ATAD 1", Council Directive (EU) 2016/1164), which is based on the Principal Purpose Test, will be transposed into Portuguese tax law, seeing that the provision in the EU Directive is worded differently from the Portuguese GAAR, which was drafted and introduced in 1999.

EU Member States should apply ATAD 1 measures as from 1 January 2019. Following that application, the concrete application of the ATAD 1 GAAR (and potentially, the pre-existing Portuguese GAAR) will depend primarily on the interpretation by the Court of Justice of European Union.

In the context of transfer pricing litigation, the interaction between the Portuguese GAAR and the Portuguese transfer pricing regulations (and other legal provisions) may raise some difficulties. According to Portuguese domestic tax law, the tax authorities are bound by a legality principle in their actions, assessments and motivations. One of the consequences of these features is that the Portuguese tax authorities may not present a subsidiary (and second) line of reasoning and legal ground, in case a first line of reasoning and legal ground is not successful.

As such, the GAAR may not be used as a back-up within the same tax audit and tax assessment. Nevertheless, it appears that the tax authorities may opt to use the GAAR instead of the transfer pricing regulations to address a certain issue, which has happened in recent cases, namely in tax arbitration cases no. 367/2014-T (CIT 2009), no. 609/2015-T (CIT 2010), and no. 219/2106-T (CIT 2011 and 2012), which, based on direct references included in the latter case, refer to the same entity and, essentially, the identical facts and circumstances (for different taxable periods). The outcome of the second and third of these cases was successful for the tax authorities, while the first was successful for the taxpayer.

In short, in the first case, the tax authorities argued that transfer pricing regulations did not apply because the transactions in question were not "effective economic transactions", i.e. they did not, in reality, occur. The tax authorities did not, either, resort to the GAAR, but rather to a general CIT provision regarding earnings. The court ruled that the tax authorities not only did not have legal grounds but also did not prove that the "redesigned" transaction occurred – which, naturally, it did not occur.

The second case was grounded on transfer pricing regulations, particularly the need for performing a comparability and functional analysis in order to reach a range of comparable outcomes, and what the acceptable outcome for transfer pricing purposes should be. With the tax authorities having, now, proved that the transaction was not economically real, the court found that it was insufficient

for a taxpayer to merely determine a (full) range of outcomes without having solid legal and factual grounds based on a comparability and functional analysis and, eventually, rejected that the taxpayer outcome, which also fell outside of the interquartile range, was acceptable, due to the unsubstantiated comparability. As a result (and due to the nature of tax procedural law), the court maintained the tax authorities assessment (even though it was based on the same comparability analysis), which resulted in the acceptance of the median result.

In a nutshell, in the third case the tax authorities opted, instead, for applying the GAAR, disregarding the taxpayer's envisioned transaction and redesigning it. While the taxpayer argued in favor of the application of transfer pricing rules, as according to the tax court ruling, was discussed in the previous cases, it did not present an argument regarding transfer pricing being a *lex specialis* vis-à-vis the Portuguese GAAR, in such a way that would prevent the application of the GAAR in such cases.

Consequently, based on the findings of the third case, it appears that the tax authorities may opt to use the GAAR instead of the transfer pricing regulations to address a certain case. However, in our understanding, the *lex specialis* issue is not yet clarified. Moreover, in our opinion, whenever the application of the GAAR results in the restructuring of a cross-border transaction, issues regarding cross-border transfer pricing adjustment and international double taxation are likely to arise if transfer pricing is not considered when issuing the tax assessment. In our view, exchange of information with the concerned tax authorities, even more so if the restructuring involves a third State, is paramount in order to avoid or mitigate double tax issues.

Furthermore, in our thinking, it may also be argued that, in Portugal, the GAAR needs to be used in combination with transfer pricing regulations whenever the tax authorities intend to not only restructure a transaction but also to adjust transfer prices. That is, it may be argued that transfer pricing regulations, alone, do not allow for such restructurings and that the structure or transaction in question needs to be redesigned by the tax authorities in the context and following the requirements set forth in the GAAR.

Lastly, it should be noted that, in some circumstances, Portuguese tax courts have controversially concluded that certain other domestic anti-abuse provisions constitute *lex specialis vis-à-vis* transfer pricing provisions and, therefore, prevail over transfer pricing rules. Namely, a domestic provision (former article 23, no. 5 and 7 of the CIT Code, in force until 2014), which determined that expenses related to the transfer of capital between related parties are never acceptable (even if the transaction occurred or may have occurred at arm's length, as it occurred in certain judicial cases, such as rulings no. 473/13 by the Supreme Administrative Court and no. 247/2014 by the Constitutional Court).

Such outcome may trigger difficulties in applying the transfer pricing provision in Double Tax Conventions as, in our understanding, appears to override Double Tax Conventions which contain a provision identical to article 9 of the OECD Model Tax Convention on Income and on Capital (and that are commonly present in Double Tax Convention concluded by Portugal).

Part II

Question 11

The rules in force in Portugal regarding the recovery of fiscal state aid are the general rules of tax law concerning additional tax assessments. There are no special rules regarding the recovery of state aid, although some exceptions in administrative law regarding expiry dates might have been enacted in order to comply with EU Law of state aid (cf. Article 168, par. 4, of the Code on Administrative Procedure – *Código do Procedimento Administrativo*).

According to Article 45, par. 1, of the Portuguese General Tax Law (*Lei Geral Tributária*), the tax assessment expiration date is 4 years (as a rule of thumb, 4 years from the year following the one in which the taxable operation occurred, for periodic taxes, and 4 years from the date on which the taxable operation occurred for non-periodic taxes).

However that expiry date applies only "*when the law does not establish another one*". Since EU regulations are "laws" and since their direct effect is recognized by the Portuguese Constitution (cf. Article 8, par. 4), the expiry date of 10 years established by Article 17, par. 1, of Council Regulation (EU) 2015/1589 of 13 July 2015 could be considered "another" expiry date established by "law".

According to Article 78 of the Portuguese General Tax Law, "*the review of tax acts by the entity that carried them out can be performed* [...] *at the initiative of the tax administration, within four years after the assessment or at all time if the tax has not yet been paid, on the basis of an error attributable to the services*". The Portuguese Supreme Administrative Court (STA) has continuously stated in its case-law that an "*error attributable to the services*" includes "*not only a lapse, a material error or an error of fact, but also an error of law*" (see STA judgment in case nº 886/14 of 19/11/2014).

The Portuguese tax authorities can therefore review previous tax acts (tax rulings, tax assessments, etc.) that have been found in breach of EU Law by the European Commission, issuing an additional tax assessment.

Although Article 78 establishes a four year time-limit since the original tax assessment, one could argue that a different result would emerge from taking into account the principle of harmonious interpretation of domestic law in accordance with EU law. On the one hand, the four year limit would have to be adequately

interpreted in accordance with Article 45 (which, as we saw, allows for longer than 4 years legal expiration dates). On the other hand, Article 78 itself allows the review of acts "*at all time if the tax has not yet been paid*" and one could interpret this excerpt in accordance with EU Law on state aid. Since European Commission decisions regarding state aid in the form of tax reductions would concern "tax not yet paid", this would allow additional tax assessments at all time.

Once Portuguese tax authorities adopt additional tax assessments, the beneficiary will have to pay the amounts due. The time-limit for the payment varies according to the taxes at stake. Regarding taxes on company profits (IRC) and taxes on individual income (IRS), the time-limit is 30 days from the tax assessment (cf. Article 110, par. 1, of the Companies Tax Code – *Código do IRC* –, Article 104 of the Personal Income Tax Code – *Código do IRS* – and, also, Article 85, par. 2, of the Administrative and Judicial Procedure Code – *CPPT*). If the beneficiary of state aid fails to pay, a tax execution procedure will follow.

Question 12
We have no knowledge of such examples.

Question 13
Portugal is a party to the NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NY Convention"), which entered into force in Portugal on 16.01.1995. Portugal declared that it would apply the NY Convention only to recognition and enforcement of awards made in the territory of another contracting State.

Portugal is also a party to the 1965 Washington Convention on the Settlement of Investment Disputes ("ICSID Convention"), which entered into force in Portugal on 01.08.1984. To the extent of our knowledge no ICSID award regarding the Portuguese State was ever rendered nor has any ICSID award ever been enforced in Portuguese courts.

Recently, it has been mentioned in the news that a triggering letter had been issued regarding a dispute concerning the termination of the urban transport subconcessions. Nevertheless, the Government did not confirm that it has been notified yet.

Portugal has BIT Treaties with: Albania, since 10 June 2007, Algeria, since 8 September 2005, Angola (not into force), Argentina, since 3 May of 1996, Bosnia and Herzegovina (3 February 2009), Brazil (not into force), Bulgaria, since 20 November 2000, Cape Verde, since 4 October 1991), Chile, since 24 February 1998, China, since 26 July 2008, Congo (not into force), Congo, DR (not into force), Croatia, since 27 November 1997, Cuba, since 18 June 1999, Czech Republic, since 3 August 1994, Egypt, since 23 December 2000, Gabon, since 11 September

2013, Germany, since 23 April 1982, Guinea Bissau, since 8 April 1996, Hungary, since 8 October 1997, India since 19 July 2002, Jordan, since 6 January 2015, Republic of Korea since 11 August 1996, Kuwait since 28 May 2011, Latvia, since 17 July 1997, Libyan Arab Jamahiriya, since 19 June 2005, Lithuania, 14 August 2003, Macao, China, 2 May 2002, Mauritius, 3 January 1999, Mexico, 4 September 2000, Morocco (not into force), Mozambique, since 31 October 1998, Pakistan, 14 December 1996, Paraguay, since 4 November 2001, Peru, since 18 October 1995, Philippines, since 14 August 2003, Poland, since 9 November 1993, Qatar, since 19 July 2010, Romania, since 17 November 1994, Russian Federation (not into force), São Tomé and Principe (not into force), Senegal (not into force), Serbia, since 24 July 2010, Slovakia, since 15 May 1999, Slovenia, since 4 May 2000, Timor-Leste, since 7 April 2004, Tunisia, since 10 November 2006, Turkey, since 19 January 2004, Ukraine, since 18 July 2003, United Arab Emirates (not into force), Uruguay, since 3 November 1999, Uzbekistan, since 14 March 2010, Venezuela, since 7 October 1995 and Zimbabwe (not into force)[1].

Those BIT include a fair and equitable treatment (FET), expropriation, protection and security and most favored nation clause.

In practice, FET is usually regarded by arbitral tribunals to have been breached as a consequence of the violation of (a) the obligation to protect the basic legitimate expectations created by the host State, and (b) the obligation to provide a stable and predictable legal and business framework in order to foster foreign investments.

Some investor-State arbitral tribunals have ruled that the principal and fundamental content of the FET standard is the obligation of the host State to protect investors' reasonable and legitimate expectations.[2]

Arbitral tribunals and scholars have dealt with isolated examples on a case by case basis. The United Nations Conference on Trade and Development (UNCTAD) has compiled the following pattern of conducts under FET: violation of legitimate expectations, denial of justice and due process, manifest arbitrariness, discrimination and outright abusive treatment.[3]

The frustration of a legitimate expectation must be established based upon a previous "formal" or "highly officialised" representation made by the State with regard to the investment; about an expectation on which the investor actually

[1] Miguel Esperança Pina and Frederico Bettencourt Ferreira, GAR Know How, Investment Treaty Arbitration 2017, Portugal.

[2] *Electrabel, S.A. v. the Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, para. 7.75.

[3] See United Nations Conference on Trade and Development, *Fair and Equitable Treatment: UNCTAD Series on issues on International Investment Agreements II*, 2012, at page 62.

relied[4] to invest and had no doubt[5]; after a frustration that caused damage to the investor; and, on an expectation that was reasonable at the time of making the investment[6] –in relation to what the investor should have expected.[7]

Some of these requirements were mentioned in the ECT case of *AES Summit v. Hungary*.[8]

FET also includes stability and predictability of the legal and business framework[9] based on which the investor decided to make the investment.

In investment arbitration practice, stability and predictability are generally linked to the legitimate expectations argument and both arguments are often invoked together. As it can be drawn from the *AES Summit* ECT decision, the main discussion in this type of cases focuses on whether specific commitments were made by the host State that could limit its sovereign right to regulate, even if this regulation implies a modification of its already existing law, or that could legitimately have made investors believe that no change in the law would occur.[10]

[4] Metalclad Corporation v. United Mexican States (ICSID Case No. ARB(AF)/97/1), Award, August 30, 2000, at para. 85). See also *SPP v Egypt* (par. 82); *GAMI v Mexico* (par. 91).

[5] Metalpar S.A. and Buen Aire S.A. v. Argentine Republic (ICSID Case No. ARB/03/5) (para. 207); Parkerings v Lithuania (para. 323)

[6] AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary (ICSID Case No. ARB/07/22); Jan de Nul v Egypt (para. 265); Duke v Peru (para. 340).

[7] Metalpar S.A. and Buen Aire S.A. v. Argentine Republic (ICSID Case No. ARB/03/5) (para. 202); Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru (ICSID Case No. ARB/03/28) (para. 363).

[8] In the *AES Summit* case an initial investment took place in 1996, but some years later in 2001 an agreement was reached to settle two arbitrations initiated by AES against the Government. AES invested further amounts to retrofit the plants after 2001 based on such agreement. The arbitral tribunal considered that there were no legitimate expectations in the case of AES since nowhere in the 2001 agreement the State compromised not to re-introduce administrative prices (nothing is said in the agreement) or to change the law (quite the opposite, there was a specific clause regulating the possibility of a change in law and the contractual negotiations to be followed). Any other potential document prior to 2001 (the 1995 privatization materials and the 1999 express letter sent by the Head Department of the Ministry of Economic Affairs –letter which was not explained by AES and was only introduced at the last minute during the hearing) was not able to create expectations in the Claimant since the 2001 agreement superseded any prior agreement, understanding or discussions. Furthermore, the 2001 agreement was signed by the State in its private capacity, not as sovereign so no formal assurances existed from the Government and the clause in the 2001 Agreement by which Hungary promised not to frustrate the purposes and intent of the agreement is just a common/standard provision in commercial agreements not a specific assurance. At the most, there was a breach of contractual obligations which cannot be alleged under the ECT in the case of Hungary (as a party listed in Annex IA, not giving consent to umbrella clause claims).

[9] E.g: *LG&E v. Argentina* (ICSID Case No. ARB/02/1), Award, 2006, para. 124; *Occidental Exploration and Production Company v Republic of Ecuador* (LCIA No. UN 3467), Award, July 1, 2004, para. 183.

[10] The *AES Summit* case the agreement signed between the investor and the State contained a specific clause regulating the potential change of the laws.

Some BIT entered into by Portugal also include and Umbrella clause. The cooling off period is usually 6 months, except with Germany that there is no period and with Bosnia and Herzegovina, where the period is 3 months[11].

The ISCID Arbitration option os provided for in all BITs except in the Cuba, Germany, Macau and Morocco BITs. The Mexico BIT limits the application of the umbrella clause to obligations assumed in writing and the Jordan BIT requires the investments to have been approved by the Host Contracting Party[12].

Most BIT have a fork on the road clause.

Also relevant to mention that Portugal is member of the Energy Charter Treaty (ECT).

The ECT is a legally-binding multilateral instrument for the promotion of international cooperation in the energy sector. The ECT was constituted with the aim of mitigating commercial and political risks associated with energy-related foreign investments and trade. The main objective of the ECT's provisions on investment issues is to ensure the creation and development of a "level playing field" for the investments made in the energy sector, by setting a code of binding rules that shall be observed by all participating governments.

The ECT and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects were signed in December 1994 and entered into legal force in April 1998. Portugal and Spain have ratified and signed the ECT, which is in force in those countries since April 16, 1998. The European Union is also a party to the ECT.[13]

Article 1(6) of the ECT defines protected "Investment" as follows:

> *"Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:*
>
> *(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;*
>
> *(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;*
>
> *(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;*
>
> *(d) Intellectual Property;*
>
> *(e) Returns;*
>
> *(f) any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector."*

[11] Miguel Esperança Pina and Frederico Bettencourt Ferreira, *op. cit.*

[12] Miguel Esperança Pina and Frederico Bettencourt Ferreira, *op. cit.*

[13] On April 16, 1998, the Energy Charter Treaty entered into force for the European Community (now the European Union, since the Treaty of Lisbon of December 1, 2009).

"Returns" are very broadly defined as:

> "[T]*he amounts derived from or* associated *with an Investment, irrespective of the form in which they are paid, including profits, dividends, interest, capital gains, royalty payments, management, technical assistance or other fees and payments in kind.*"

Reference to an "Economic Activity in the Energy Sector" in Article 1(6)(f) has to read according to Article 1(5) as follows:

> "«*Economic Activity in the Energy Sector*» *means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises.*"

Article 1(7)(ii)(b), of the ECT, defines "*Investor*" as a company or other organization organized in accordance with the law applicable in one Contracting Party that directly or indirectly owns or controls an "Investment" within the definition of the ECT (ex Article 1(6) ECT) in another Contracting Party.

Pursuant to Article 26(7) of the ECT, locally incorporated companies (i.e., incorporated in Portugal) controlled by a natural or legal person of another Contracting Party to the ECT do have *ius standi* to initiate ECT arbitration proceedings.[14]

Previous cases[15] established that in case of a bilateral investment treaty having a similar definition of protected investment as in the ECT: (i) (majority/controlling or minority)[16] shareholders can recover damages for harms that were inflicted upon the companies in which they invested,[17] (ii) even if the claimants were indirect shareholders who only owned shares in the injured company through an intermediary.[18]

In order to initiate ECT arbitration proceedings any potential claimant must first formally notify the host State of the dispute and must try to engage in negotiations with the host State during three months with the aim of reaching amicable settlement of the dispute within that time period. If the dispute is not settled

[14] For instance, foreign control may be established on the basis of shareholders' agreements giving control to either companies to effectively manage the company, etc.

[15] For example, *Teinver, Transportes de Cercanías SA and Autobuses Urbanos del Sur v. Argentine Republic* (ICSID No. ARB/09/1), Decision on Jurisdiction, December 21, 2012 (under the Spain-Argentina BIT).

[16] E.g. in *Lanco International Inc. v. The Argentine Republic* (ICSID Case No. ARB/97/6), Decision on Jurisdiction, December 8, 1998, the claimant had only 18.3% of the shares of the injured company.

[17] Similarly, in *Gas Natural SDG, S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/10); Decision of the Tribunal on Preliminary Questions on Jurisdiction, June 17, 2005.

[18] *Ibidem*.

within the three months *cooling-off* period, the Investor may initiate ECT arbitration proceedings (Article 26(2), of the ECT).

The ECT has the following standards of protection: (i) host-State's obligation to provide "*Fair and Equitable Treatment*" to protected investments; (ii) host-State's obligation to provide "*Most Constant Protection and Security*"; (iii) host-State's obligation not to apply "*Unreasonable and Discriminatory Measures*"; (iv) host-State's obligation to observe obligations entered into with the Investor ("*Umbrella Clause*") and (v) protection against "*Indirect Expropriation*".

The "*Fair and Equitable Treatment"* standard (FET) is embodied in Article 10(1) ECT, alongside the standards of "*Most Constant Protection and Security"*, "*The Prohibition of Unreasonable or Discriminatory Measures"* and an "*Umbrella Clause*".

As for the exact content of this standard of protection, Article 10(1) does not provide any listing of host State's conducts that would be tantamount to a breach of the FET standard.

"The Most Constant Protection and Security" standard (also defined as "Full Protection and Security" in other investment treaties) is also included in Article 10(1). Of the ECT.

Recent investment awards have considered that this standard not only encompasses matters of physical security; legal stability afforded by a secure investment environment has also been declared as covered.[19] Some awards have defined "legal security" as "*the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application*."[20]

Similarly, the arbitral tribunal in the *AES Summit* case accepted this approach though restricted to situations in which State's regulatory reforms were not reasonable in the circumstances and with a view to achieving objectively rational public policy goals.

The prohibition for host States of impairment of the protected investment by "*Unreasonable or Discriminatory"* measures is also included in Article 10(1), of the ECT.

Protected investments should not be subjected to regulatory measures amounting to an indirect expropriation pursuant to Article 13(1) ECT ("*measures having effect equivalent to nationalization or expropriation*[21].

[19] E.g: *Azurix v. Argentine* Republic (ICSID Case No. ARB/01/12), Award, July 14, 2006, para. 408.

[20] Siemens *A.G. v. Argentina* (ICSID Case No. ARB/02/08), Award, February 6, 2007, para. 303.

[21] An indirect expropriation is defined by UNCTAD as the "*official acts that effectuate the loss of management, use or control, or a significant depreciation in the value, of assets"*. In this sense, an indirect expropriation is generally established if there is a substantial loss of control or economic value of a foreign investment without a physical taking.
Investment arbitral tribunals (e.g. *Burlington v. Ecuador*) including arbitral tribunals in arbitrations under the ECT (e.g. *Plama Consortium v. Bulgaria*) and *Electrabel v. Hungary,* require for an indirect expropriation claim to be granted that the State's interference within the investor's property be (**i**) a substantial

Question 14

As far as it is of our knowledge, the higher courts never addressed a contradiction between European Union Law and International Law. Scholars consider that in those situations the European law could prevail based namely on the Kadi case.

Regarding BIT conflict with European Union Law the most likely is that the courts would apply the general recent trend and to consider there is no incompatibility.

In fact, EU States usually argue that arbitral tribunals do not have jurisdiction to hear claims brought by nationals of another EU State because, under Article 344 of the Treaty on the Functioning of the European Union, all disputes concerning the interpretation or application of European Union treaties must be heard by the Court of Justice of the European Union (EUCJ). This is known as the intra-EU jurisdictional objection.[22]

This issue has been consistently dismissed by arbitral tribunals.[23]

Also relevant to mention that advocate general of the court Wathelet recently advised that the Netherlands-Czechoslovakia BIT did not constitute discrimination on grounds of nationality or undermine the autonomy of the EU legal system (articles 18, 267 and 344 TFEU).

deprivation of all significant economic value of the investment, and (**ii**) permanent or for a substantial period of time (not a mere temporal reduction of benefits).
In the ECT case *Charanne v. Spain*, the final award, p. 108 *et seq*., dated January 21, 2016, paras. 464-467.) stated that the fact that the investor had seen the profitability of its investment seriously affected by State's measures, was not enough to be considered as an indirect expropriation and that said expropriation would only have happened if the impact of the measure caused to a *destruction* of the investment.
Case law has considered also as indirect expropriation a package of measures when each is insufficient to determine the expropriation, but all the measures together have a cumulative effect over time similar to an expropriation/ "*creeping expropriation*" (*Tecmed v. Mexico*).
Arbitral tribunals analyzing indirect expropriation claims have held that the State's intention shall be disavowed at every step (*Renta 4 v. the Russian Federation*).

[22] It must be noted that in several cases the Commission requested to intervene as *amicus curiae* and alleged that the arbitral tribunal did not have jurisdiction in intra-EU disputes.

[23] To name but a few: *Electrabel, S.A. v. the Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction; *Charanne B.V v. the Kingdom of Spain* (Arbitration No. 062/2012), the final award, p. 108 *et seq*., dated January 21, 2016, dismissed the Intra-EU objection raised by Spain; more recently, on June 6, 2016, the arbitral tribunal rendered a Decision on Jurisdiction on the *RREEF Infrastructure (G.P) Limited et all v. the Kingdom of Spain* (ICSID Case No. ARB/13/30), in the same general direction as the previously mentioned decisions.
Additionally, the CJEU is seized of a request for a preliminary ruling from the German Federal Supreme Court, on the compatibility of intra-EU disputes with European Union Law, in relation to the *Achemea B.B (Eureko) v. The Slovak Republik* (PCA Case No. 2008-13) case.

ROMANIA

Raluca Dinu*

Part I

Question 1

The taxpayer is undoubtedly entitled to be informed in advance of the consequences of the acts he performs, in a manner that allows him to behave with full knowledge of the cause. The tax administration's duty is to clearly define its requirements and to honor its commitments. In this respect, the principle of legal certainty is identified in some respects with the principle of legitimate trust.

We emphasize that, in fiscal matters, the introduction of the appeal against the administrative-fiscal act is a mandatory step before the action for annulment of the tax act. If the settlement of the appeal is suspended, the tax act may be appealed only after the cause which led to its suspension has disappeared.

However, the tax act is effective, it is enforceable from the time of its communication, whether or not it is attacked, regardless of whether or not the settlement of the appeal is suspended.

The new Tax Procedure Code (NCPF) amendments limit the situations in which National Authority for Fiscal Administration (ANAF) may suspend the settlement of the appeal, thus imposing on the tax dispute resolution body to refer to the analysis of fiscal truth.

The High Court of Cassation and Justice has clarified that ANAF has a margin of appreciation in which it can take a decision on the opportunity to sus-

* Ph D, Parliamentary Counsellor at Legislative Council of Romania/ Head of Commercial Law Sector, Member of the Romanian Society of European Law (SRDE).

pend the settlement of the appeal. By a decision in 2014, the HCCJ has shown that the litigant may assess the measure of suspension from the point of view of the discretion of the tax authority over the definition of excess power. The court explained that not every formal referral of the criminal bodies could lead to the postponement of the right of access to a court that the taxpayer enjoys. Therefore, tax justice research should not affect the identification of fiscal truth except in those situations where there is a real incidence of the facts investigated on the tax burden.

The conclusion of this reasoning is as follows: it is accepted that fiscal truth is / can be influenced by the search for fiscal justice, but the court of tax jurisdiction must ensure that all the guarantees and rights set out in the European Charter are respected.

Question 2

Preventive Financial Control aims at identifying the operations projects (hereinafter referred to as operations) that do not comply with the legality and regularity and / or, as the case may be, with the limits and destination of budget and commitment appropriations, and through which they would harm to public patrimony and / or public funds.

The subject of preventive financial control concerns the operations mainly aimed at: legal commitments and budgetary commitments, opening and allocation of budgetary appropriations; changing the breakdown by quarter and by subdivision of the budget classification of approved credits, including through credit transfers; ordering expenditure; the constitution of public revenues, regarding the authorization and establishment of receipts; concession or rental of goods belonging to the public domain of the state or of the administrative-territorial units; sale, pledge, concession or rental of goods belonging to the private domain of the state or of the administrative-territorial units.

Preventive financial control over operations that represent recoveries of amounts used and subsequently found to be undue – for both domestic and European Union funding – is organized at the structures responsible for recovering such amounts in accordance with the specific methodological rules.

In all cases where public entities manage funds from external financing, the rules for the exercise of preventive financial control also include the procedures set out in the regulations of the funding bodies.

Documents concerning operations on which it is mandatory to exercise preventive financial control shall be transmitted to the persons designated by the specialized departments initiating the operation.

These rules are provided in Order no. 923/2014 for the approval of the General Methodological Norms regarding the exercise of the preventive financial control

and of the Specific Code of professional norms for the persons performing the own preventive financial control activity.

Question 3

In the current global context, there are intense disputes about the correct allocation of the profits of multinational companies between the tax jurisdictions where they operate. Both the economic evolution of recent years and the intensification of international trade of multinational companies have raised the interest of tax authorities around the world in the phenomenon of erosion of the tax base in a country and the shift of profits to low-tax countries.

The Organization for Economic Co-operation and Development (OECD) has conducted an analysis of the issues underpinning the erosion of the tax base and profit sharing, completed by the "Addressing Base Erosion and Profit Shifting".

The fifteen actions are directed to three major areas: the modification of double taxation avoidance treaties (to eliminate non-taxation or double taxation), the intensification of the exchange of information and the modification of the rules on transfer pricing.

Romania is no exception to this rule. In the context in which statistics show us that in the underground economy, in 2015 we are situated at 28% of GDP (compared to the average of the 31 European states analyzed by 18%), i.e. the difference between the VAT actually collected and the VAT that should be collected to the state budget is 41% compared to the average of 13.9% in 2013, the measures already taken by the authorities are focused on counteracting this phenomenon.

There is a new draft amendment to the Fiscal Procedure Code, which transposes the European Automated Exchange of Information Directive. As a result of this directive, the legislative framework for the automatic exchange of information has been strengthened. The Revised Directive requires Member States to automatically exchange a wide range of financial information in line with the new OECD / G20 global standard for the automatic exchange of information between jurisdictions and within certain time limits. In this respect, public notaries and bailiffs were included in the categories of persons who do not have the right to refuse to provide information to tax authorities, given that these persons have information and documents relevant from a tax point of view.

Regarding State aid as a possible alternative in combating aggressive tax planning, it should be left to the basic principle of state aid, which states that any distortion of competition or trade within the European Union is prohibited. While Member States are, in principle, free to design and implement direct taxation systems in line with national targets, tax measures may have effects that could fall within the scope of state aid regulation at European Union level. State tax aid may come in the form of national legislation implementing a special tax measure,

which could provide a selective advantage to a particular class or group of taxpayers; it can also come in the form of an individual concession or advantageous treatment granted to a taxpayer through an anticipated tax solution from the tax authorities of a Member State.

Question 4

The tax authorities are bound by Decision of the Government no. 395/2016 concerning methodological rules of June 2, 2016, implementing the provisions regarding the award of the public procurement / framework agreement in Law no. 98/2016 on public procurement.

Qualification criteria aim to demonstrate the technical, financial and organizational potential of each participant economic operator, potentially reflecting his / her concrete possibility to fulfill the contract / framework agreement and resolving potential difficulties in fulfilling it, in in which case his bid will be declared winner.

The participation guarantee is an instrument related to the presentation of the offer, which aims to protect the contracting authority against the risk of inappropriate conduct of the bidder during the entire period of its involvement in the award procedure.

The contracting authority has the right to require the tenderers to provide the guarantee of participation.

The participation guarantee must be in the amount and for the period of validity provided in the awarding documentation.

The contracting authority is not entitled:

a) to impose or prohibit the presentation of a guarantee instrument issued by a particular bank or insurance company, expressly nominated in the awarding documentation;
b) to limit the possibility of presenting the guarantee instruments only to those issued by banking companies or only to those issued by insurance companies.

The guarantee for the good execution of the contract is constituted by the contractor for the purpose of assuring the contracting authority the quantitative, qualitative fulfillment and in the agreed period of the public procurement contract / the subsequent contract.

The contracting authority has the right to issue claims on the performance guarantee, at any time during the fulfillment of the public procurement contract / subsequent contract, to the extent of the damage created, if the contractor fails to fulfill his obligations under the contract. Prior to the issuance of a claim on the performance guarantee, the contracting authority has the obligation to notify

the claim both to the contractor and to the issuer of the guarantee instrument, specifying the obligations that have not been respected, and how to calculate the damage. In the case of execution of the performance guarantee, partially or totally, the contractor has the obligation to re-enter the guarantee in question in relation to the remainder to be executed.

Question 5

The tax due by non-residents for taxable income obtained from Romania is calculated, withheld and paid to the state budget by the income payers (art.116 Tax Code). These provisions are corroborated with those of double taxation conventions and European Union.

By types of possible situations, as of February 28, 2014, the solutions of the Tax Code are the following:

a) The taxpayer is a resident of a country with which Romania has entered into an agreement to avoid double taxation: the tax rate applicable to the taxable income received by that taxpayer in Romania may not exceed the tax rate provided for in the convention that applies to that income. If, in domestic law or double taxation conventions, different tax rates arise, then, according to art. 118 of the Tax Code applies more favorable tax rates;

b) The taxpayer is a resident of a European Union country: the tax rate applicable to the taxable income of that taxpayer in Romania is the more favorable rate laid down in domestic law, European Union law, or double taxation avoidance conventions. European Union law applies to Romania's relations with the Member States of the European Union, respectively those with which the European Union has concluded agreements on the establishment of equivalent measures.

For the application of the provisions of the Double Taxation Convention and the European Union legislation, the non-resident has the obligation to present to the payer:

a) the residence permit issued by the competent authority of his State of residence and, where appropriate;

b) a declaration on own responsibility indicating that the condition of a beneficiary is fulfilled in the application of European Union law.

By submitting the mentioned documents, the tax is adjusted within the legal prescription period. To that end, the residence tax certificate must state that the recipient of the income had, within the limitation period, taxed residence in the Contracting State with which the double taxation convention was concluded in

a Member State of the European Union or in a State with which the European Union has concluded an agreement to establish equivalent measures for the whole period of the Romanian income.

According to the provisions of the Norms for the application of the Fiscal Code, the provisions of para. 2 of the articles "Dividends", "Interests", "Commissions", "Fees" in the double taxation conventions concluded by Romania with other states, which regulate the taxation of these revenues in the source country, shall apply as a matter of priority. Where national legislation expressly provides for a more favorable tax rate, the provisions of domestic law apply.

Question 6

The BEPS project is a mobilization of the OECD / G20 countries, which is going forward at an alert pace and will soon redefine the principles of taxation in the field of direct taxation.

The BEPS plan aims to correlate the taxation of profits with the place where they were generated, i.e. the place where value added was generated, the avoidance of double non-taxation and the artificial transfer of profits in favorable tax jurisdictions, the strengthening of transfer pricing rules, including requirements documenting and developing mechanisms for resolving tax disputes. It is not about changing tax rates, but rather how to assign / allocate profits (tax base) between jurisdictions. The BEPS Action Plan includes specific provisions on the steps to be taken to implement the measures, as well as on the terms of implementation and the resources that can be used for this purpose.

Although not a member of the OECD, Romania takes part in the discussions on the proposed measures under the BEPS Action Plan. With a tight economy related to the world economy and perhaps even depending on foreign direct investment, Romania will be affected by the measures proposed by the BEPS Action Plan. As far as transfer pricing is concerned, the Tax Code refers directly to the OECD Transfer Pricing Guidelines and thus any changes made to it through the BEPS Action Plan will be taken implicitly into national legislation.

The allocation of profits according to the place where the economic activities are mainly carried out will lead to the increase of the taxable base in Romania, especially regarding the following aspects: digital economy and auxiliary activities, financing and intangible assets. The profits generated by companies operating on the Romanian territory exclusively by digital means without physical presence (headquarters or employees) will be taxed taking into account sales generated to customers in that state. Also, new stricter rules for deducting financing costs will be introduced. Investment decisions in a particular country (including Romania) are based on a cumulative number of factors (e.g. labor force, production costs, sales market), the fiscal one being just one of them.

Question 7

From the tax authorities' point of view, new rules will be introduced from the perspective of corporate income tax, transfer pricing and withholding tax to implement the measures proposed by the BEPS Action Plan. The exchange of information will increase on two levels, namely by increasing the transparency and reporting of information by the taxpayers to the tax authorities, but also between the tax authorities of different states (e.g. the publication of the price agreements in advance, respectively of the tax solutions issued on the application of certain "preferential" regimes).

The new information the tax authorities will carry on will implicitly generate changes in the taxpayers' risk analysis approach, in order to conduct fiscal controls. Both to analyze the new information reported by taxpayers and to increase the capacity to collaborate with other states on the exchange of information, tax authorities may feel the need for additional qualified staff, as well as an improvement in computer systems that allow these aspects.

New requirements for transfer pricing documentation lead to increased transparency, which will allow for the identification of inconsistent potentials on transfer pricing policies applied in different countries. Business groups will report to the tax authorities of all countries where they have information on the allocation of overall income between jurisdictions, taxes paid and economic activity. One of the consequences of this measure is to increase the need for documenting transfer prices both in terms of volume and degree of detail. New reporting rules will be introduced on aggressive tax planning structures and transactions. The emphasis on the economic substance of transactions and on the creation of value added within the group of companies will require the development of sound internal policies, especially for the purpose of implementing and monitoring transfer pricing procedures.

In order to respond to the BEPS Action Plan, a CFO / tax manager should: identify the BEPS actions that will impact its company by measuring the impact of the proposed BEPS Action Plan, prioritize the importance of BEPS actions communicated to stakeholders (e.g. shareholders) the impact of the BEPS Action Plan and develop ways to respond to the BEPS Action Plan.

Question 8

Regardless of the calculation method chosen, two steps must be taken in establishing the net asset value for accounting: asset adjustments and debt adjustments.

Corrections of assets has two sub-items: disposal of assets outside operation and establishment of current assets of operating assets.

Non-operating assets are separately valued and presented separately from the property values in the valuation report. Their valuation is made at market value, which takes the form of net realizable value, determined as follows:

a) sale price – Expenditure on sales;
b) tax on the value added from the sale.

Operating asset corrections are intangible assets.

There are investments that do not embody the physical form of the material goods, to which the future benefits carry a high degree of uncertainty. Their value comes from legal protection (commercial property, intellectual property) and privileges.

In the valuation, intangible assets are classified into: distinct non-identifiable assets (goodwill), i.e. separately identifiable assets.

Concessions – Specific evaluation methods: Profit-based method (profit-sharing method), applicable when it is not reasonably estimable to charge imputed profit on a single intangible asset.

Patents – Assessment methods (depending on user quality):

a) for the patent owner;
b) for an enterprise that uses a non-proprietary patent.

Tangible assets . These are also called physical or tangible goods and, from the accounting point of view, are divided into: lands and landscaping, construction; technological equipment (machines, machinery, workstations); apparatus and instruments for measuring, checking, regulating; means of transport; animals and plantations; furniture, office equipment, and other tangible assets).

Financial Assets. There are financial investments made by the enterprise for external development. It materializes in purchased securities and in loans to other enterprises, both of which have a maturity of more than one year.

In the case of the valuation of financial assets and the establishment of the Corrected Net Asset Accounting, adjustments may be made to fixed assets and / or fixed claims.

Current assets. This second asset group of the balance sheet comprises: inventories, short-term receivables, cash assets and assimilated items. It requires fewer corrections, mainly because of their high rotational speed that keeps them close to current values.

*Settlement assets and reimbursement premiums.*The elements contained in these two last active balance sheet accounting groups (according to the Accounting Law No. 82/1991) are the result of applying the accounting principles, having no economic value. Consequently, these asset items are considered non-valuables and are not taken into account in the Net Asset Accounting Corrected.

Question 9

The tax authorities use these methods to test the market value of transactions between affiliated persons in order to determine the "real profits", i.e. the profits that would have been obtained without the affiliation relationship between the two parties.

Similar to the Transfer Pricing Guidelines issued by the Organization for Economic Co-operation and Development (hereinafter referred to as the "OECD Guidelines"), national legislation refers to 5 methods of pricing. This is divided into two main categories: i) traditional methods and (ii) transactional methods. In the first category are included: the price comparison method, the cost plus method and the resale price method. The second category includes: the net margin method and the profit sharing method.

The choice of transfer pricing methods differs from one company to the other, the opportunity to apply any of the methods being influenced by the characteristics of the transactions under consideration. Thus, the selection of a particular method depends on the existence of comparable transactions between independent persons (the so-called "uncontrolled transactions") as well as other comparability factors as follows: the characteristics of the goods or services traded (the physical characteristics of the goods, the nature of the goods – tangible or intangible, etc.), the functions performed and the risks assumed by the parties to the transaction (e.g. production, marketing, distribution, market risk, inventory risk or the risk of non-payment of claims etc.), the contractual terms of the transaction (eg payment terms, trade discounts, warranties granted, etc.), economic circumstances (eg market conditions where the respective assets are traded, etc.) and implemented business strategies (eg market penetration schemes etc.).

Note that none of the five methods mentioned is in itself correct or wrong given a set of certain circumstances. Rather, it can be argued that choosing the most appropriate method for determining transfer pricing is based on identifying the method that, under the circumstances of the transaction under consideration, offers the most appropriate measure or the best estimate of a market value. Internal legislation in force since 1 January 2016:

- Tax Code and implementing rules;
- Tax Procedure Code;
- Order 442/2016 on the content of the transfer pricing file;
- Order 442/2016 – frequently asked questions;
- Roundup provisions on transfer prices.

Question 10

Although direct tax evasion has always been considered an infringement, in the past, the international community has tolerated legal avoidance of tax

payments by transferring profits to low-tax jurisdictions by modifying corporation tax residence, using reduced capitalization through the "treaty shopping "And transfer prices.

Legislative acts such as GAARs prohibiting "aggressive" evasion have been introduced in several developed countries, including the United States, Canada, Australia, New Zealand, South Africa, Norway and Hong Kong.

In accordance with the provisions of Article 26 of the Vienna Convention on the Law of Treaties, each treaty must be implemented by the Contracting States "in good faith". According to the principle quoted, the Contracting States are not entitled to allow the use of abusive structures even in the absence of anti-abuse provisions that do not exist in the signed treaties.

Finally, most countries also have national regulations to prevent shopping treaty schemes as well as prevent tax evasion. Although the nature and applicability of national regulations varies considerably from one country to another, the most commonly used doctrine can be briefly presented as legally ineffective fictitious transactions based on the principle of "economic prevail over the law" abuse of law, fraus legis or simply general regulations in matters of combating tax evasion (GAAR). Generally, several methods are combined to address the issue of tax evasion effectively.

Prevention of the use of the shopping-treaty schemes is achieved through the use of several measures, both nationally and internationally. There are many tools that a state can use to address the taxpayer's abusive behavior. Given that tax legislation remains to be avoided, despite the extensive efforts made by states and organizations, such as the OECD, the combination of several national methods, in addition to international provisions, seems to be the best solution.

In this respect, whenever effectively used, the exchange of information between tax authorities (Article 26 of the OECD Model Convention) may be a useful tool to identify those potentially abusive structures.

Part II

Question 11

So far, in case of Romania, the European Commission has not issued any decision to recover State aid of a fiscal nature, but, as with other transparent state aids, where the amount of aid granted to the beneficiary is calculated ex ante to the providers / administrators of the support measures, the recovery is in accordance with the provisions of Government Emergency Ordinance no.77 / 2014 on the national procedures in the field of state aid and for amending and completing the Competition Law no. 21/1996, with subsequent amendments, so it is not necessary to adopt specific rules to ensure the effective and timely recovery of such aids.

Regarding the recovery of the state aid granted by the Romanian authorities, we would like to inform you that, after the accession of Romania to the European Union, the European Commission issued three recovery decisions. These decisions were addressed to companies that benefited from individual State aid. In two of these cases, the State aids considered incompatible were voluntarily returned by the companies concerned. In the third case, the recovery process is underway.

In the third case (Micula file), following the adoption by the Romanian State of facilities in disadvantaged areas, the Arbitral Tribunal in Washington decided to grant compensatory amounts by the Romanian State to the plaintiffs. Following the decision of the Arbitral Tribunal in Washington, the European Commission analyzed this case and determined that the compensatory amounts in question constituted incompatible State aid and decided to recover it.

Question 12

In Romania, the national courts ensure the direct application of Article 108 para.3 of the Treaty on the Functioning of the European Union on the basis of Article 411 of Government Emergency Ordinance No.77 / 2014 on the national procedures in the field of state aid and for amending and completing the Competition Law no. 21/1996, with subsequent amendments, and may take any necessary measures according to the applicable national procedural rules (e.g. suspension of payment of unlawful State aid, recovery of illegal aid, recovery of appropriate interest, compensation for affected competitors).

At the same time, the national courts are under an obligation to verify whether or not the contested measure has been declared State aid by the European Commission or by the provider. If the measure was declared by the European Commission as State aid, the national court cannot change the character of State aid to the support measure.

The Government Emergency Ordinance no.77 / 2014 also stipulates in Article 411 para.4 that, if the provider grants the aid, by breaching the notification obligation or the suspensive clause, the national courts may take the necessary measures to protect the interested parties, including by way of provisional measures, if necessary.

In such a situation, the recipient of an unlawful State aid can not receive any other aid before carrying out all the measures ordered by the national court ordering the recovery.

We also mention that there are rules for cases where the recovery of State aid / de minimis was ordered and the beneficiary of the aid is in the insolvency procedure. In such situation, the national court conducting the insolvency proceedings will accept to enter the claim for the refund of the aid in question in

the receivables table and will ensure the immediate recovery of the State aid / de minimis, even if this means the cessation of the activity of the undertaking.

We also emphasize that the competition authority in Romania and / or the European Commission may intervene in cases before the courts as amicus curiae.

At the same time, we stress that we do not know the situations in which national judges refused to allow the immediate recovery of State aid.

Question 13

Three categories of parties can be identified in the field of international investment law: host countries of foreign investment, private investors (private or legal) and private investors (natural or legal persons).

In the field of international investment, the three categories of parties have interests, but at some point divergences may also arise, especially between foreign investors and host countries.

The international obligations are the followings:

1. Law no. 40 of 17 June 1994 for the ratification of the Agreement between the Government of Romania and the Swiss Federal Council on the Promotion and Protection of Investments, signed in Bucharest on 25 October 1993;
2. Law nr. 110 of 9 November 1992 for the ratification of the Treaty between the Government of Romania and the Government of the United States of America on the Promotion and Protection of Investments, signed in Bucharest on May 28, 1992;
3. Law no.291/2007 on the entry, stationing, carrying out of operations or transit of foreign armed forces on the territory of Romania;
4. Agreement of 24 January 1991 between the Government of Romania and the Government of the Republic of Turkey on the Promotion and Protection of Investments;
5. Romania has been a party to the Convention on the Settlement of Investment Disputes between States and Persons of other States, concluded in Washington in 1965, known as the ICSID Convention. The Convention regulates the establishment and operation of the International Center for the Settlement of Investment Disputes;
6. Since the 1970s, Romania has entered into bilateral agreements to promote and protect foreign investment, with agreements with the Republic of Gabon, the Republic of Senegal, the Democratic Republic of Sudan still in force, other agreements ceasing to be applicable or being replaced by agreements concluded after 1990. After 1990, Romania signed 72 bilateral agreements on the mutual promotion and protection of foreign investments with states located in all parts of the world.

7. Romania is part of the Energy Charter Treaty since 1997. The Treaty contains measures to liberalize investment and trade in the energy sector and special provisions on the settlement of disputes between the Contracting Parties and between an investor and a Contracting Party;
8. The United Nations Charter on Art. 92-96 governs the International Court of Justice. The establishment and operation of the International Court of Justice are provided for in the Annex to the Charter;
9. The option between the ICSID and UNCITRAL should not be strictly cost-oriented, the attorney who "touched" the case by choosing the UNCITRAL variant in the situation where he considers that a litigation once started could have problems with the competence of ICSID, for which are required to meet the requirements of the bilateral agreement and those provided by art. 25 of the ICSID Convention, in the UNCITRAL version being only required to meet the requirements of the bilateral agreement.

All bilateral agreements on the promotion and protection of foreign investments to which Romania is a party, regulating the settlement of disputes between the foreign investor and the host state, stipulate that the investor is obliged to try an amicable settlement of the dispute.

Question 14

According to art.124 (2) of the Constitution of Romania, justice is unique, impartial and equal for all. In order to ensure the unity of the law, as provided by the Constitution, a hierarchical order of norms is first necessary. Its purpose is to provide regulatory powers that are complementary and not contradictory.

In the external report between Romanian laws and EU law, the application of EU law prevails. The fundamental freedoms of the Treaty on the Functioning of the EU or the EU Regulations are directly applicable by the judge; the Romanian domestic law shall not apply. Art.149 par.2 of the Romanian Constitution stipulates: "As a result of accession, the provisions of the EU constituent treaties, as well as the other binding Community regulations, shall take precedence over the contrary provisions of the internal laws, in compliance with the provisions of the accession act." And art.148 par.4 of the Constitution states: "The Parliament, the President of Romania, the Government and the judicial authority shall guarantee the fulfillment of the obligations resulting from the Act of Accession and from the provisions of paragraph 2".

According to art.11 par.2 of the Constitution of Romania, the treaties ratified by the Parliament, according to the law, are part of the domestic law. But with the incorporation of international law into domestic law, nothing is said about the relationship (rank) between the law of the Treaties and the rest of domestic law.

Art.11 para.3 of the Constitution of Romania establishes that, if a treaty, to which Romania is to become a party, contains provisions contrary to the Constitution, its ratification can only take place after the Constitution is revised.

Accordingly, the Constitution takes precedence over the provisions of international law. Thus, in the internal hierarchy of norms, they are, first, on the same level as autonomous internal law, that is, at a level under the Constitution.

However, the rules taken from international law into national law take precedence when collision / competition between them and "home" internal rules are reached.

Competition rules exist when the text of several rules applies to the same situation.

It is permissive to establish the existence of rules competition only if, in the individual case, it has been diligently analyzed – and a negative result has been obtained – if there is any incompatibility of the legal rules in question or if the (apparent) contradiction between those rules cannot be removed (harmonization) by interpretation.

Competition between domestic and foreign law can arise between international law and national law, between state treaties and autonomous national law, as well as between state treaties.

Art.20 para.1 of the Constitution of Romania stipulates that the constitutional provisions regarding citizens' rights and freedoms will be interpreted and applied in accordance with the Universal Declaration of Human Rights, the pacts and other treaties to which Romania is a party. Thus, that provision establishes within its scope that the Universal Declaration of Human Rights and State Treaties have priority over the Constitution insofar as it concerns the interpretation of those constitutional provisions.

Art.20 para.2 stipulates furthermore that if there are inconsistencies between the pacts and treaties regarding the fundamental human rights to which Romania is a party and the internal laws, the international regulations shall prevail, unless the Constitution or the internal laws contain more favorable provisions. This provision establishes more than the priority provided in Art.11 par. 1 of the Constitution of Romania, regarding state treaties in relation to other norms of ordinary domestic law, because art.20 par.2 establishes that the covenants and treaties on fundamental human rights, to which Romania is a party, have priority in situations of competition of the norms.

In the outward relations of Romanian law, i.e. in relation to EU law, priority is given to the application of EU law. The fundamental freedoms of the Treaty on the Functioning of the European Union or an EU regulation are directly applicable by the judge; national law does not apply.

These principles are valid only in so far as the prohibition of retroactive application of the law does not arise.

SLOVENIA

Nana Sumrada Slavnic

Part I

Question 1

In Slovenia, taxpayers have the possibility to obtain a binding tax ruling, an advance pricing agreement on transfer pricing matters (hereinafter: "APA") as well as a formal non-binding reply, by the Slovene Tax Authority.

A binding tax ruling may be issued, in a written form, by the Slovene General Tax Office (in the following all offices of the Slovene Tax Authority shall be referred to as the "Tax Authority") regarding a planned transaction or business event of a taxpayer (hereinafter: the "planned activity"), based on a formal request by the taxpayer, containing specifically prescribed information.

In accordance with Article 14, paragraph 2, of the Slovene Tax Procedure Act (Zakon o davčnem postopku (hereinafter: "ZDavP-2"))[1], the request must contain the following elements:

1. A detailed description of the planned activity, its economic substance overall, as well as its segments, products and services and addressees concerned, frequency, worth and legal nature; any plans of production, sale or enlargement of the planned activity as long as such contribute to a better understanding of the planned activity; legal basis of the request, including questions not regulated by bilateral double tax treaties for the avoidance of double taxation (hereinafter: "DTCs"); an evaluation, by the taxpayer,

[1] Official Gazette of the Republic of Slovenia (hereinafter: "UL RS") No. 117/06 of 16 November 2006, as last amended by UL RS No. 63/16 of 7 October 2016.

of the tax consequences of the planned activity; any jurisprudence, commentaries or expert opinions, known to the taxpayer that support or go against their position.
2. A statement, by the taxpayer, whether the planned activity or any aspect thereof has been reported in an already-filed tax return or has been subject to a binding tax ruling, tax audit procedure or proceedings concerning legal remedies before a court of law.
3. Full documentation describing and supporting the planned activity.

A request containing all the elements such as specified above may be considered a fully documented request. According to Article 14, paragraph 3, of ZDavP-2, the Tax Authority must, within a maximum of 15 working days from the receipt of a fully documented request, inform the taxpayer whether they intend to issue a binding ruling or not. Under Article 14, paragraph 4, of the said act, the Tax Authority will not issue a binding ruling if:

- the activity concerned has already been completed, whereby it is considered that the activity has been fully carried out even if the taxpayer may no longer impact the execution of the activity;
- any question relating to the request for a binding ruling has been subject to a tax audit procedure or proceedings on legal remedies before a court of law;
- the planned activity will be performed in an unspecified future time, or the request for the binding ruling does not demonstrate a serious purpose to undertake the planned activity;
- the request for a binding ruling requires interpretation of questions regulated in DTCs or rules not in jurisdiction of the Tax Authority;
- issuance of the binding ruling requires findings of facts or circumstances, which may not be determined at the time of such issuance, in particular: tax residence, performing of business activities, or related nature of parties, or
- the matter concerns questions of transfer pricing.

Should the Tax Authority agree to issue a binding ruling, confirms such intention in a formal letter and serves such letter to the taxpayer, the binding ruling must be released within 6 months counting for the date of the serving. The ruling so described is binding upon the Tax Authority from the date of the serving of the ruling to the taxpayer (Article 14, paragraph 5, of ZDavP-2).

Under Article 14, paragraph 6, of ZDavP-2, the Tax Authority is not bound by an issued binding ruling if such ruling is based on incorrect or incomplete information provided by the taxpayer, or the actual activity performed does not

have the economic substance such as announced in the request for the binding ruling. In such case, the Tax Authority repeals the issued binding ruling; a repealed binding ruling has no legal effects.

According to Article 14, paragraph 7, of ZDavP-2, issued binding ruling may be replaced by the Tax Authority should the latter find, post-issuance, that substantive law has been wrongly applied and the binding ruling was issued with regard to a repetitive activity or the activity has not yet been completed at the time of the repeal. The binding ruling so replaced is in effect since the date the replacing ruling is served to the taxpayer.

Under Article 14, paragraph 8, of ZDavP-2, issuance of the binding ruling is subject to a fee, calculated by the Tax Authority and payable by the taxpayer. Under Article 6 of Rules on Implementation of the Tax Procedure Act (hereinafter: "the Rules")[2], the fee is calculated per working time of the Tax Authority spent on preparation of the binding ruling (EUR 50/hour); the fee shall not be lower than EUR 500 (Article 6, paragraph 1, of the Rules). Should the Tax Authority deem that the cost of the process will result in a fee higher than EUR 2,000, it may require an advance payment of the taxpayer, in the amount of 60% of the assumed cost of the procedure. The advance payment must be promptly made; if not, the Tax Authority shall not continue with the binding ruling procedure (Article 6, paragraph 2, of the Rules). Upon issuance of the binding ruling, the Tax Authority issues a formal invoice to the taxpayer (Article 6, paragraph 3, of the Rules), payable within 15 days of receipt of the invoice (Article 6, paragraph 4, of the Rules). Should the final fee be lower than the advance payment, the relevant difference is reimbursed to the taxpayer.

In late 2016, Slovenia introduced APA legislation. As per official commentary of the Tax Authority, APA is "an instrument for managing risk of transfer pricing for the tax authorities because taxpayers reveal information on the method and accurate definition of transfer pricing at their business activities"; this instrument secures a more stable tax and economic environment for multinational companies[3]. According to the said commentary, concluded APAs bind the Tax Authority in the sense that it will "not require additional adjustments for transactions, which are subject to a specific APA if [the] taxpayer fulfils all

[2] Pravilnik o izvajanju Zakona o davčnem postopku, UL RS No. 141/06 of 30 December 2006, as last amended by UL RS No. 85/16 of 28 December 2016. The rules were published in the UL RS No. 85/2016 of 28 December 2016 and apply as of 1 January 2017.

[3] Republic of Slovenia, Ministry of Finance, Financial Administration of the Republic of Slovenia, Transfer Pricing, Advance Pricing arrangements (APAs), Detailed description, Version 1, January 2017 also available at: http://www.fu.gov.si/fileadmin/Internet/Nadzor/Podrocja/Transferne_cene/Opis/Detailed_description_1_version_Advance_pricing_agreements_APAs.pdf (hereinafter: the "APA Commentary"), at p. 3.

legal provisions and provisions [set out in the] APA during the period of validity of the concluded APA".

According to Article 14.a of ZDavP-2, an APA is an agreement between a taxpayer and the Tax Authority, entered into before relevant transactions take place between related parties, and which detail methodology, critical assumptions and other eligible criteria to determine transfer pricing for the respective transactions in the respective timeframe.

Under Article 14.b of ZDavP-2, taxpayers may apply for conclusion of unilateral, bilateral or multilateral APAs. Unilateral APAs are used in case where there is no DTC concluded with the state of the related party or when transactions are of small value and it is not difficult to find a transfer pricing method or independent comparables[4]. Bilateral or multilateral APAs are concluded on the basis of a mutual agreement procedure with competent authorities of another jurisdiction (hereinafter: "MAP"), and take into consideration all parties to the agreement, in order to secure arm's length allocation of profits among all states involved[5]. The Tax Authority formally recommends such APAs in case of complex transactions, involving specific intangible assets and difficulty finding comparable companies or comparable unrelated transactions[6].

In line with Directive 2015/2376/EU, Slovenia adopted a system of mandatory automatic exchange of rulings with cross-border effect and APAs (Article 248.a of ZDavP-2) with regard to other Member States' competent tax authorities and the European Commission[7] (hereinafter: the "Commission"). Slovenia has also committed to exchange of APAs with OECD countries within the realm of BEPS Action 5[8].

Under Article 14.b of ZDavP-2, conditions for entering into an APA are as follows:

- the taxpayer enters into transactions with related parties;
- the taxpayer is subject to corporate tax under the Slovene Corporate Income Tax Act[9] (Zakon o davku od dohodkov pravnih oseb, hereinafter: "ZDDPO-2");
- a meeting between the Tax Authority and the taxpayer in connection with conclusion of APA has been conducted before filing of the application;

[4] APA Commentary, *supra*, 1.3. at p. 4.

[5] *Ibid*.

[6] *Ibid*.

[7] APA Commentary, *supra* note 3, 1.4, at p. 4.

[8] *Ibid*.

[9] Zakon o davku od dohodkov pravnih oseb – ZDDPO-2 (UL RS, No. 117/06 of 16. November 2006, as last amended in 2016 by Zakon o dopolnitvah Zakona o davku od dohodkov pravnih oseb – ZDDPO-2N (UL RS, No. 68/16 of 4. November 2016).

- the transaction has economic content and the taxpayer demonstrated serious intention for its implementation,
- the transaction is of appropriate time duration and not before expiry at the time the APA is concluded.

As per additional clarification of the Tax Authority, procedural requirements for the conculsion of an APA are:

- "active participation of the taxpayer in meetings,
- participation of the taxpayer with submission of appropriate documentation,
- all other forms of communication, which assist the conclusion of APA,
- constructive participation in all fields to conclude APA[10]",
- the consent reached between the Tax Authority and the taxpayer about the contents (appropriate method, criteria, critical assumptions, etc.) of the APA and signature of the APA[11]. According to the Tax Authority's comments, "[t]he purpose of definition of critical assumptions is to protect all parties to APA against risk that APA would not reflect arm's length principle. [...] If critical assumptions are changed in such a way that they considerably influence the suitability of the selected methodology for transfer pricing, APA changes, otherwise it ceases [...]"[12] and the taxpayer is informed accordingly by the Tax Authority.

According to Article 14a, paragraph 3, of ZDavP-2 and APA Commentary issued by the Tax Authority[13], APA procedure commences by a taxpayer's written initiative, upon which the taxpayer and the Tax Authority discuss the type, subject, period, time limit for submission of the application and other relevant aspects of potential APA. Only in the aftermaths of the discussion, the taxpayer files a formal written APA application. It is recommended to file APA applications before the tax period in which APA is intended to come into force[14].

Within three months of filing of the formal written application, the Tax Authority informs the taxpayer by a written notice whether they will start the APA procedure[15] and the time limit in which the taxpayer must pay the APA fee of EUR 15,000, i.e. 30 days after the notice is received[16]. If the APA application

[10] APA Commentary, *supra* note 3, 3., at p. 5
[11] *Ibid.*
[12] APA Commentary, *supra* note 3, 4.4., at p. 6.
[13] APA Commentary, *supra* note 3, 4.1., at p. 5.
[14] *Ibid.*
[15] Article 14.b, paragraph 4, of ZDavP-2.
[16] APA Commentary, *supra* note 3, 4.2., at p. 5, and 5., at p. 6.

is rejected, the Tax Authority informs the taxpayer of reasons for the decision which is not subject to appeal. Absent fault of the taxpayer, if the APA is not concluded, the taxpayer is refunded a lump sum amount of EUR 5,000. In case of cancellation of the APA (see below), the taxpayer is not entitled to a refund. Payment for extension of APA is EUR 7,500[17].

An APA is issued for a maximum period of five years with the option of renewal[18]. An APA may be extended if circumstances of the initial agreement remain unchanged. The taxpayer concerned may submit an initiative in writing to the Tax Authority for the extension 6 months before expiry of the existing APA[19].

As per Article 14.c of ZDavP-2, taxpayers must report on validity of critical assumptions and any performed adjustments to the Tax Authority on a yearly basis, together with submission of the corporate income tax return. Taxpayers are also obliged to inform the Tax Authority of any changes of critical assumptions, which are not in compliance with criteria defined in the APA, within 30 days after implementing those changes[20].

Where the APA issued does not reflect the arm's length principle anymore because critical assumptions are violated or they are changed to such extent that they considerably influence the suitability of the selected methodology for transfer pricing, the APA must be subject to change (Article 14.d, paragraph 1, of ZDavP-2). The taxpayer and the Tax Authority may conclude an annex on changes to the APA, where the effective date of the changes is also defined. If it is not possible to agree about changes, the APA ceases to be valid on a certain date. The Tax Authority informs the taxpayer about the date on which the APA's validity ceases (Article 14.d, paragraph 2, of ZDavP-2)[21]. The APA thus ceases with expiry of the validity period, in case the taxpayer fails to report to the Tax Authority during the validity period of the APA about implementation of the APA, or in case of critical changes, such as commented in the above (see Article 14.d, paragraph 1, of ZDavP-2)[22].

An APA issued does not have any legal effects in the sense that is not obligatory on the Tax Authority, where it is issued based on incorrect, untruthful or incomplete data provided by the taxpayer. If such data is provided, the Tax Authority cancels the APA. The Tax Authority informs the taxpayer of the cancellation within 30 days of cancellation (Article 14.d, paragraph 3, of ZDavP-2).

As it is defined in Article 14.f of ZDavP-2, the concluded APA does not limit rights of the Tax Authority at implementation of their authorisations.

[17] APA Commentary, *supra* note 3, 5., at p. 6.
[18] APA Commentary, *supra* note 3, 4.2., at p. 5.
[19] APA Commentary, *supra* note 3, 6, at p. 7.
[20] APA Commentary, *supra* note 3, 4.5., at p. 6.
[21] See also APA Commentary, *supra* note 3, 7., at p. 7.
[22] *Ibid.*

Question 2

While the Tax Authority acts in line with the principal of material truth of the tax procedure (Article 5 of ZDavP-2), it is duty of the taxpayer to provide the data necessary for the correct assumption of facts and to support their claim in any procedure, i.e. also in case of binding ruling or APAs, and to provide such data in a correct, true and complete form (Article 10 of ZDavP-2). Provision of incorrect, untruthful, false or incomplete data is subject to fines and/or penalties.

Question 3

There is no specific procedure installed for verification of the treatment given to a particular payment/transaction by foreign tax jurisdictions. There are, however, rules concerning assessment of facts of a case and information request procedure in place as part of a tax audit or prior to issuing a tax assessment, regulated by ZDavP-2. In assessing facts and tax treatment of a particular payment/transaction, the Tax Authority will act in accordance with Slovene and European legislations and/or bilateral tax treaties and implement regulated mechanisms for communications and exchange of data with foreign tax jurisdictions.

Slovene legislation is aligned with Directive 2011/16/EU on administrative cooperation in the field of taxation[23], as amended by Directive 2014/107/EU amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation[24] and Directive (EU) 2016/881 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation[25]. Thus, in accordance with Chapters II and III.B of ZDavP-2, Article 22 of the same act stipulates automatic and on-demand exchange of fiscal data. The exchange concerns confidential information when obtained in procedures governed by Slovene legislation and/or DTCs, if such information is necessary for tax administration management.

Under Article 26 of ZDavP-2, the Tax Authority spontaneously shares information with other tax jurisdictions' competent bodies in case it finds evidence of tax offense, if there is suspicion of violation of laws or regulations or where findings may influence rights and obligations of taxpayers under jurisdiction of such foreign tax bodies.

Under Article 27 of ZDavP-2, the Tax Authority may share fiscal confidential information with competent bodies of the European Union and Member States

[23] European Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ L 64, 11.3.2011, p. 1–12).

[24] Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 359, 16.12.2014, p. 1–29).

[25] Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 146, 3.6.2016, p. 8–21).

where such bodies are responsible for the exchange of information or assistance with the collection of taxes, in accordance with the procedure laid down by the regulations of the European Union or by ZDavP-2. Similar information sharing is enabled vis-à-vis competent authorities of non-European jurisdictions, if it is so determined by DTCs or other international treaties that bind Slovenia.

In addition to the automatic exchange of tax information as regulated by Directive 2011/116/EU, as amended, Slovenia has committed to automatic exchange of what is referred to "advance tax positions with a cross-border effect" and APAs. In accordance with Article 243.a of ZDavP-2, an advance tax position is any written information issued or changed for a specific legal entities or a group of entities that may rely upon such information, regardless of the actual application of the regime concerned by the information. The written information referred to contains clarification of Slovene fiscal legislation with regard to a cross-border transaction or a question on existence of a permanent establishment (hereinafter: "PE"). Further, the written information must be issued before the cross-border transaction or the activity leading to the existence of a PE, is undertaken, or before filing of the tax return for a period in which the transaction or the chain of transactions were undertaken. This practicly covers advance tax rulings and APAs.

Slovenia has also committed to notifying, to competent authorities of other Member States and the Commission, advance tax positions with a cross-border effect, effective between 1 January 2012 and 31 December 2016, until 1 January 2018. Advance tax positions with a cross-border effect issued in 2012 and 2013 will be notified, provided they were still in effect on 1 January 2014; those issued or changed between 1 January 2014 and 31 December 2016 are notified in total.

In case of automatic exchange of advance tax positions and APAs, the Tax Authority, under Article 248.a, paragraph 1, of ZDavP-2, will share, *inter alia*, the names of Member States likely to be concerned by advance tax positions with a cross-border effect and APAs issued by the Tax Authority as well as legal entities within such Member States likely concerned by such advance tax positions with a cross-border effect and APAs. Any information concerning individuals, bilateral or multilateral APAs made with non-EU countries where bilateral treaties do not allow revealing and sharing of confidential data except under conditions set out in the bilateral treaty, will not be shared by the Tax Authority with other Member States or the Commission.

Regardless of what the exact national rules are in the situations above, one might end up in a situation where – afterwards – it turns out that the confirmation given by the tax authorities is incorrect. Either because of the publication of case law by domestic courts, or because new data indicates profits should have been attributed differently.

In case of APAs, the Tax Authority may change or cancel them, such as stipulated above. In case of advance tax rulings, the Tax Authority may, when the advance tax positions with a cross-border effect is based on incorrect, incomplete or false information, change or annul the advance tax ruling, such as also underlined above. In accordance with Article 255.k of ZDavP-2, the Tax Authority may not adjust transfer pricing based on review of Country by Country Reports (hereinafter: "CbCR") shared with other Member States; the Tax Authority may, however, based on CbCR, request further information on transfer pricing setting and other tax matters of legal entities concerned (Article 255.k, paragraph 3, of ZDavP-2).

In case or other types of advance tax positions with a cross-border effect, the Tax Authority may, generally speaking, in case the position is based on incorrect, incomplete or false information, change the position by way of renewal or cancel the position.

Question 4

Please see under 1. Generally speaking, the Tax Authority is not bound by its advance tax rulings, APAs and other written opinions that may be qualified as advance tax positions with a cross-border effect, if such are based on incorrect, incomplete or false information.

Question 5

Please see above on mechanism of tax related information sharing. Communication, data sharing and avoidance of double non-taxation between Slovenia and non-EU countries is settled in DTCs. No specific addition procedure or mechanisms are in place.

Question 6

The arm's length principle as stipulated in Slovene fiscal legislation is in line with the OECD approach on attribution of profits to branch, subsidiary and PE such as elaborated is OECD Commentary to Model Convention on Income and on Capital[26] and for purposes of transfer pricing such as regulated in the OECD Transfer Pricing Guidelines[27]. Transfer pricing rules are formally stipu-

[26] OECD, Model Tax Convention on Income and on Capital 2014, Full Version, OECD Publishing, Paris (2015), available at: http://dx.doi.org/10.1787/9789264239081-en .

[27] OECD, OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017, OECD Publishing, Paris (2017), available at: http://dx.doi.org/10.1787/tpg-2017-en. See also extensive comments on alignment between Slovene arm's legth principle and attribution of profits to PE, as well as comparison of such between Slovenia, Austria and the Netherlands, in Novak, E. *Primerjalnopravni prikaz direktne obdavčitve dobička stalne poslovne enote v Sloveniji, Avstriji in na Nizozemskem*

lated in Slovene Rules on Transfer Pricing[28] (hereinafter: the "Rules on Transfer Pricing"), while the methods regulated and the approach stipulated are aligned with the OECD Transfer Pricing Guidelines.

Question 7

Please see under 6. Specific rules are stipulated in the Rules on Transfer Pricing. The Tax Authority practically applies the OECD Transfer Pricing Guidelines approach, aligned with the Rules on Transfer Pricing. *Inter alia*, the Tax Authority refers to the OECD guidelines as relevant for its inspection practice in its written account on tax inspection concerning transfer pricing, of February 2015 and on APAs, of January 2017[29]. The non-binding nature of the OECD Transfer Pricing Guidelines has been confirmed in Slovene court jurisprudence, discussing possible differences between the guidelines and the Rules on Transfer Pricing *obiter dictum*[30].

Question 8

In case of a review of corporate income tax return or analyzing a specific transaction between related parties, the Tax Authority may decide the price set between related parties is either set too high or too low (with regard to comparable market price as defined in Articles 16 and 17 of ZDDPO-2) and may require an adjustment. In such cases, the Tax Authority will consider the difference between the actual price and the comparable market price as a hidden distribution of dividend (Articles 30, paragraph 1, and 74 of ZDDPO-2). This is a general rule and there is, to date, not yet an official position on whether this procedure is also applicable to unilateral adjustments in case of APAs.

[Direct taxation of profit of permanent establishment in Slovenia, Austria and the Netherlands], Master Thesis, University of Maribor, School of Law (2016), abstract available at: https://dk.um.si/IzpisGradiva.php?id=59418.

[28] Pravilnik o transfernih cenah (UL RS, No. 141/06 of 30 December 2006 as amended by Pravilnik o spremembah in dopolnitvah Pravilnika o transfernih cenah, UL RS No. 4/2012 of 20 January 2012), further specifies Articles 16 and 17 of ZDDPO-2.

[29] Republic of Slovenia, Ministry of Finance, Financial Administration of the Republic of Slovenia, *Finančni inšpekcijski nadzor, Nadzor transfernih cen, Podrobnejši opis*, February 2015, available at: http://www.fu.gov.si/fileadmin/Internet/Nadzor/Podrocja/Inspekcijski_nadzor/Opis/Podrobnejsi_opis_Transferne_cene.pdf, p. 3, referring, at p. 5 to point I.13. of OECD Transfer Pricing Giudelines as relevant for the Tax Authority transfer pricing inpection. Also see APA Commentary, *supra* note 3, at p.3.

[30] Slovene Administrative Court, Judgment U 1984/2013, of 16 September 2014, ECLI:SI:UPRS:2014:I.U.1984.2013, paragraphs 12 & 13, also available at: http://www.sodnapraksa.si/?q=id:2015081111389472&database[SOVS]=SOVS&database[IESP]=IESP&database[VDSS]=VDSS&database[UPRS]=UPRS&_submit=i%C5%A1%C4%8Di&page=0&id=2015081111389472

Question 9

No specific rules have been enacted with regard to accepting transfer pricing results of foreign tax jurisdictions in general or in case of APAs. There is currently no publicly available information on practice of adjusting domestic tax return by explicit reference to a foreign tax jurisdiction's transfer pricing findings.

Regardless, changes to domestic tax results and submitted tax return are normally requested by the Tax Authority in case of doubt as to correct assessment in the submitted tax return or information obtained by the Tax Authority which requires new or further analysis of the results/return submitted.

In this context, ZDavP-2, in its part Four, Chapter I, concretizes Slovene local procedural rules on administrative cooperation, with explicit reference to Commission Implementing Regulation (EU) No 1189/2011 of 18 November 2011 laying down detailed rules in relation to certain provisions of Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures[31].

The Tax Authority may commence a tax audit procedure of submitted corporate tax return based on information provided post-submission of the tax return, and, during such procedure, may engage in administrative cooperation and information exchange with EU tax jurisdictions, and non-EU jurisdictions as regulated by applicable DTCs, respectively.

In concreto, in case of doubt as to irregularities or circumvention of the regulations as a result of wrongful, incomplete or false information provided in a tax return, the Tax Authority may commence a tax control procedure (davčni nadzor), which consists of verifying the calculation of tax as stated in the tax return; a tax supervision (*davčna preiskava*)[32] or a tax inspection procedure (auditing) (*davčni inšpekcijski nadzor*)[33]. The tax inspection procedure may be availed of to examine all the business transactions of a taxable legal entity in up to the three last taxable periods[34].

Under Article 14.f. of ZDavP-2, an issued APA does not limit the Tax Authority's execution of its powers. This is also applicable to powers and entitlements

[31] OJ L 302, 19.11.2011, p. 16–27.

[32] Although ZDavP-2 defines only tax supervision and tax auditing as types of tax investigation, combatting tax evasion is also one of the main purposes of the international exchange of information. See Dešman, G., *Davčni nazdor v boju proti davvčnim zatajitvam* (Tax Supervision in Combating Tax Evasion), 3. Davčna konferenca Slovenskega inštituta za revizijo (3rd conference of the Slovene institute of Auditors), Slovenski inštitut za revizijo (2002).

[33] For general comment, see Kunšek, mag. M., *Davčni inšpekcijski nadzor*, published on 18 June 2009, available at: http://bibliocd.ad.curia.europa.eu:9280/han/IUSHH/www.iusinfo.si/DnevneVsebine/Aktualno.aspx?id=43434

[34] In large corporations, tax inspection procedure is limited to taxable period following the last audited taxable period (Articles 133, paragraph 2, of ZDavP-2).

of the Tax Authority in context of tax administrative cooperation, as established by the European Union and reflected in Articles 213 to 243 of ZDavP-2, and automatic and on-demand exchange of information and cooperation between Member States.

Question 10

ZDavP-2 contains what may be considered a GAAR at Article 74, entitled "Determination of Facts". According to this provision, the illegality of an action or activity or the nullity of a transaction, should economic consequences of such activity or action exist or persist after its commission, does not influence tax liability; the liability remains. Similarly, tax liability remains unaltered by sham transactions[35]. More specifically, Article 74, paragraph 4, of ZDavP-2, establishes that it is not possible to circumvent tax or other legislation by means of avoidance or abuse[36]. If such avoidance or abuse is established, taxes are levied at the same level as they would have been if the full economic consequences of transactions in question had been taken into consideration.

With the exception of the anti-avoidance and anti-abuse clause of Article 74 of ZDavP-2 discussed above, there have been no GAAR adopted in Slovenian tax legislation. Adoption of GAAR or reforms to the current anti-avoidance rules do not appear likely in the short or medium term.

Part II

Question 11

Slovenia has not implemented specific rules on recovery of state aid. The Slovene Ministry of Finance, state body in charge of state aid monitoring, notifying, reporting and generally administering, provides, at its official website, a link to Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union[37], Regulation

[35] Article 74, paragraph 3, of ZDavP-2. Explanation of the Tax Administration of Republic of Slovenia, (Pojasnilo DURS), No. 4217-238/2008, of 21 July 2008, as to hidden distributions of profits. Also see Kobal, dr. A., *Pravne podlage za obdavčitev prikritih izplačil dobička in njihov razvoj v slovenskem davčnem pravu*, published on 19 August 2009, available at: http://www.findinfo.si/Register/Besedilo.aspx?SOPI=FIND-CLANKI|Razvoj%20obdavcitve%20fizicnih%20oseb%20in%20pravna%20podlaga%20za%20obdavcitev%20prikritih%20izplacil%20dobicka%20na%20ravni%20njihovih%20prejemnikov|0|&Doc=DAVC.

[36] Abuse is not commented on separately in the context of tax regulation. In terms of the classical theory of abuse of rights see Pavčnik, dr. M., *Teorija prava, Prispevek k razumevanju prava*, 3rd. ed, GV založba (Pravna obzorja Series No. 32), pp. 208 – 214 (2007).

[37] OJ L 248, 24.9.2015, p. 9–29.

(EC) No 659/1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (consolidated version)[38], in force until 14 October 2015, Regulation (EU) 2015/2282 amending Regulation (EC) No 794/2004 as regards the notification forms and information sheets[39], and Regulation (EC) No 794/2004 implementing Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union[40] as rules on state aid procedure. Recovery of unlawful state aid is based on a Commission decision on unlawful aid and Slovenia's subsequent issuing of an administrative decree requesting the debtor to refund the unlawful state aid[41].

Up to present, there has been one example of the Commission ordering Slovenian authorities to recover what the Commission deemed to be unlawful state aid. Specifically, in 2012, the Commission ordered Slovenian authorities to recover €10 million of state aid it granted to leisure equipment manufacturer Elan group in 2008[42].

Other notified aids have been considered as compatible with the EU state aid rules[43].

In terms of fiscal state aid, Slovenia has notified its tonnage tax regime[44] as well as other state aid tax measures. The latter include deferred payment of

[38] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (consolidated version) (OJ L 083, 27.3.1999, p. 1-9), as consolidated at 20 August 2013.

[39] Commission Regulation (EU) 2015/2282 of 27 November 2015 amending Regulation (EC) No 794/2004 as regards the notification forms and information sheets (OJ L 325, 10.12.2015, p. 1–180).

[40] Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140 30.4.2004, p. 1-134), consolidated as at 22 December 2016.

[41] Hertiš, M., *Državna pomoč v smislu člena 107(1) PDEU in presoja dokapitalizacij družbe Elan z vidika pravil EU o državnih pomočeh [State Aid in terms of Article 107(1) TFEU and assessement of capital increase in company Elan on the basis of EU state aid rules]*, Diploma/Undergraduate thesis, University of Maribor School of Law, (2014), available at: https://dk.um.si/IzpisGradiva.php?id=43684, p.41.

[42] European Commission, *State aid: Commission orders recovery of €10 million unlawful aid from Slovenian ski maker Elan*, Press Release IP/12/984 of 19 September 2012, also available at: http://europa.eu/rapid/press-release_IP-12-984_en.htm.

[43] For the full list of state aid measures implemented in Slovenia, please see Republic of Slovenia, Ministry of Finance, State aid schemes in force as at 30 June 2017, available at: http://www.mf.gov.si/si/delovna_podrocja/drzavne_pomoci/evidence_priglasitev/veljavne_drzavne_pomoci/. Please also see Republic of Slovenia, Ministry of Finance, Eleventh Survey on State Aid in Slovenia (for 2006, 2007 and 2008), of June 2009, available at: http://www.mf.gov.si/fileadmin/mf.gov.si/pageuploads/dr%C5%BEavne_pomo%C4%8Di/eleventh_survey.pdf.

[44] For decision of the Commission on compatibility of the notified tonnage tax system in Slovenia, please see European Commission, State Aid 325/2007 – Slovenia – Introduction of a tonnage tax scheme in favour of maritime transport, C(2008) 8878 final of 13 January 2009, original version in Slovene, also available at: http://ec.europa.eu/competition/state_aid/cases/220567/220567_930529_51_2.pdf.

taxes (the amount of the late interest being calculated on the present value at the real annual reference interest rate)[45] tax exemptions and tax deductions (such as exemptions and benefits concerning environmental taxes[46]) and lowering of payment of social security contributions for employed workers[47] (in particular poorly-employable workers, workers whose employment is concerned within regional development aid scheme and Pomurska region special aid scheme for investments and employment[48]). With the introduction of a single general tax relief for research and development (hereinafter: "R&D") investment on the basis of the 2012 amended ZDDPO-2, equivalent regional tax relief was abolished; the regional tax relief has been limited to the exercise of rights acquired before the entry into force of the 2012 amendment. The new tax relief for R&D investments was introduced as a general measure available to all companies and entrepreneurs and therefore does not constitute state aid[49].

As to the tonnage tax regime, the Commission considered it compatible with the 2004 Community Guidelines for State aid to maritime transport[50] and has not called to question other notified tax measures.

In the event the tonnage tax or other type of tax measure is considered an unlawful fiscal state aid by the Commission, the actual corporate income tax and any retroactive measures due would be calculated in line with ZDDPO-2 or respective regulation concerning specific taxes in question, at the level of Slovenia, in accordance with ZDavP-2. This calculation would certainly be aligned with the Commission's assessment. A final decree, issued at the level of Slovenia, on refund of state aid schemes declared unlawful by the Commission, is based on Slovene administrative procedure law.

[45] Ministry of Finance, Annual Report on State Aids for years 2013, 2014 and 2015, December 2016 (2016), available at: http://www.mf.gov.si/fileadmin/mf.gov.si/pageuploads/nadz_pom/letna_poro%C4%8Dila/17_Letno_porocilo_o_DP_2013-2015.pdf (hereinafter: the "Ministry annual report"), at p. 89.

[46] Ministry annual report, *supra*, at pp. 18 & 94. Also see Trafela, S., *Davčne oljašave in finančne spodbude za vlaganje zasebnega sektorja v varstvo okolja* [*Tax reliefs and financial incentives for investments of the private sector with purpose of environmental protection*], Diploma/Undergraduate thesis, University of Maribor School of Law, available at: https://dk.um.si/Dokument.php?id=102875 (2016).

[47] Ministry annual report, *supra* note 45, at p. 90.

[48] Ministry annual report, *supra* note 45, at p. 67.

[49] Ministry annual report, *supra* note 45, at p. 73.

[50] European Commission, Approval of a new tonnage tax scheme to stimulate the shipping sector in Slovenia, IP/09/42 of 13 January 2009, also available at: http://europa.eu/rapid/press-release_IP-09-42_en.htm?locale=en. Existing tonnage tax aids in Slovenia were granted until 2014 and not in 2015. Ministry annual report, *supra* note 45, at p. 46.

Question 12

There have not been any examples in Slovenia of national judges refusing to allow for the immediate recovery of state aid. Academia has, however, raised question of how bankruptcy as a result of the recovery of aid should be considered, as commentators believe bankruptcy may legitimize claims for damages of the recipient of unlawful state aid against Slovenia[51]. As to legitimate expectations, it is expected that reasoning of the European Court of Justice on the topic would be followed[52].

The only case where recovery of (non-fiscal) state aid was claimed by the Commission was the case of Slovene leisure equipment manufacturer Elan group, recapitalized in 2008 by resources imputable to Slovenia state (Measure 2)[53]. The Commission found, in Article 2 of its decision SA.26379 (C-13/2010) (ex NN 17/2010), that "[t]he state aid measure in favour of Elan in the form of a capital increase of EUR 10 million in 2008 was unlawfully put into effect by Slovenia in breach of Article 108(3) of the Treaty on the Functioning of the European Union and is incompatible with the internal market"[54], ordering Slovenia to recover the full amount (Article 3 of the same decision).

The Commission decision was not subject of litigation before Slovene courts, but on 20 November 2012, Slovenia had brought a claim against the Commission before the General Court (T-507/2012 Slovenia/Commission) seeking annulment of the Commission Decision SA.26379 (C-13/2010) (ex NN 17/2010)[55]. Slovenia had, together with the action for annulment, requested a stay of execution of the Commission's decision – recovery of the aid, as interim measure, claiming

[51] Urankar, Ž., *Odškodninska odgovornost držav članic za kršitve prava Evropske Unije na področju državnih pomoči* [*EU Member State liability for damages due to breaches of EU state aid laws*], in Reforma področja državnih pomoči in izvajanje pravil o državnih pomočeh v praksi, Batagelj et al., Vlahek A. ed., University of Ljubljana school of Law, pp. 124-164, available at: http://www.pf.uni-lj.si/media/reforma.podrocja.drzavnih.pomoci.pdf (2015), pp. 154-156.

[52] On limited possibilities of claiming legitimate expectations in case of unlawful state aid ecovery, see Mason, R., *State Aid Special Report – Part 2:Legitimate Expectations*, Special report (30 January 2017), Tax Notes Vol. 154, pp. 615-622, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2925353 (2017).

[53] European Commission, Commission Decision on the Measures in Favour of Elan d.o.o. SA.26379 (C13/2010) (ex NN 17/2010) implemented by Slovenia for Elan d.o.o., C (2012) 6345 final of 19 September 2012, available at: http://ec.europa.eu/competition/state_aid/cases/236254/236254_1474476_292_2.pdf, pp. 37-39.

[54] *Ibid*, Article 2.

[55] Action published in OJ C 32, 2.2. 2013, pp. 19-20. See also Sever, S., *Elan pred Splošnim sodiščem Evropske unije: končana je prva etapa postopkov*, Pravna praksa 2013/33, 29.8.2013, excerpt available at: https://www.pravnapraksa.si/LITE/Kazalo.aspx?Src=zNblVXQY1zSI0YqaH4aXVo6XMfILfOITPQlbHPCakQg599IyTBqeQo4fU0eKARWLjkKGFs7z8GY=.

precarious financial state of Elan[56]. The request for the interim measure was rejected by the President of the General Court. The General Court dismissed the action in the main procedure by its judgment of 28 January 2016[57].

Elan also bought a claim against the Commission and requested a stay of execution – recovery of aid as interim measure. By order of the President of the General Court of 11 March 2013, the request for a stay as interim measure was rejected[58]. By order of 22 October 2015 in case T-27/2013, Elan v Commission, the President of the Fifth Chamber of the General Court ordered that the case be removed from the register[59].

Question 13

In addition to standards of international organizations, regional human rights treaties and free trade agreements[60] to which Slovenia is a signatory, property rights in the form of foreign investments in Slovenia are protected by a web of bilateral investment treaties (hereinafter: "BITs"). Slovenia has made BITs with most Members States (among which also with the United Kingdom of 3 July 1996) and selected third countries (not including the United States of America).

BIT made between the United Kingdom and Slovenia[61] contains provisions on national treatment and most-favoured-nation treatment (Article 3) as well as on compensation of losses in case of requisitioning (Article 4).

Slovenia has enacted Promotion of Foreign Direct Investment and the Internationalisation of Enterprises Act (Zakon o spodbujanju tujih neposrednih investicij in internacionalizacije podjetij, hereinafter: "ZSTNIIP")[62], based on which (fiscal or non-fiscal) state aid may be granted to foreign investors.

[56] Case T-507/2012 R Republic of Slovenia v European Commission, Order of the President of the General Court of 17 January 2013, OJ C 108, 13.4.2013, at p. 27.

[57] Case T-507/12 Republic of Slovenia v European Commission, Judgment of the General Court of 28 January 2016, OJ C 98, of 14 March 2016, p. 27–28.

[58] Case T-27/13 R Elan v Commission, Order of the President of the General Court of 11 March 2013, OJ C 129, of 4 May 2013, at p. 21.

[59] Case T-27/2013 Elan v Commission, Order of the General Court of 22 October 2015, of 23. March 2013 OJ C 429, of 21 December 2015, at p. 29.

[60] For comment on the sources of law for investment protection, see, *inter alia*, Kriebaum, U. & Reinisch, A., *Property, Right to, International Protection*, Oxford Public International Law (http://opil.ouplaw.com). Oxford University Press (2015), at p. 3.

[61] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Slovenia, for the Promotion and Protection of Investments, Ljubljana, 3 July 1996, [Instruments of ratification were exchanged on 12 May 1999 and the Agreement entered into force on 12 May 1999], Treaty Series No. 50 (1999), Cm 4425, also available at; http://investmentpolicyhub.unctad.org/Download/TreatyFile/2275.

[62] UL RS No. 107/06-UPB1 , 11/11 of 17 October 2006, and, at latest 17/2015 of 13 March 2015.

Question 14

The Slovene Constitutional Court has not taken a position on possible conflicting obligations of EU law, such as state aid restitution, and BITs.

The Slovene Constitutional Court has noted, however, that "EU law protects, among others, the right to property, which includes both property rights [referring to judgment of the European Court of Justice of 13 December 1979 in Liselotte Hauer v. Land Rheinland-Pfalz, 44/79, Recueil, p. 3727] [...], the right to engage in economic activity [referring, as per example, to judgment of the European Court of Justice of 27 September 1979 in SpA Eridania-Zuccherifici nazionali and SpA Società italiana per l'industria degli zuccheri v. Ministre de l'agriculture et des forêts, Ministre de l'industrie, du commerce et de l'artisanat in SpA Zuccherifici meridionali, 230/78, Recueil, p. 2749], and in particular free competition and the four fundamental freedoms (free movement of goods, persons, services and capital). In the present case, these rights correspond to the rights in Articles 33, [...], 67, 69 and 74 of the Constitution[63]". The said articles of the Slovene Constitution deal with the right to private property and inheritance (Article 33), property (in the sense of its economic, social and ecological value, at Article 67), expropriation (Article 69), and the right to entrepreneurship and a free economic initiative (Article 74).

An international treaty is, in any event, subject to a preliminary constitutional review in the process of ratification. In particular, under the Slovene Constitution, the Slovene Constitutional Court has jurisdiction for preliminary review of the constitutionality of international treaties (Article 160, paragraph 2, of the Constitution)[64]. Once adopted and ratified, an international treaty may be subject to review of the Constitutional Court "indirectly [...], through the constitutionality of the instrument of ratification [...][65]". This applies to cases "where the international treaty is ratified by law, as well as in cases when it is ratified by a government decree[66]".

[63] Slovene Constitutional Court, Order No. U-I-113/04-33 of 7 February 2007, UL RS No. 83/2004 of 29 July 2004, p. 3731, UL RS No. 16/2007 of 23 February 2007, p. 738, Decisions of the Slovene Constitution Court (hereinafter: "OdlUS"), OdlUS XVI, 16, ECLI:SI:USRS:2007:U.I.113.04, at paragraph 17.

[64] See, *inter alia*, Slovene Constitutional Court No.U-I-376/02 of 24 March 2005, UL RS No. 46/2005 of 9 May 2005, p. 1882, and OdlUS XIV, 17, at paragraph 11.

[65] *Ibid*., with references at paragraph 11 to previous caselaw of the Slovene Constitutional Court, namely order no. U-I-128/98 of 23 September 1998, OdlUS VII, 173, and order No. U-I-197/97 of 21 May 1998, OdlUS VII, 93.

[66] *Supra* note 63.

SPAIN

Adolfo Martín Jiménez*
Juan Jorge Piernas López**

Part I

Question 1
In Spain, there are two main tools to provide certainty to taxpayers: (1) the general tax ruling procedure (art. 88-89 General Tax Law which have been developed in art. 65-68 Royal Decree 1065/2007) and (2) advance pricing agreements (art. 91 General Tax Law and art. 18.9 Corporate Income Tax Law, in connection with art. 21-36 Royal Decree 634/2015).[1] Both of them should be analyzed separately:

a) General tax rulings ('consultas tributarias')
The requirements to obtain a ruling are of an objective nature and mainly refer to the time and information to request it. The specific procedure explained here, however, is not really an agreement between the taxpayer and the tax administration, rather, it is the clarification or answer that the tax authorities give to the doubts expressed by a taxpayer on how to apply tax legislation. The main requirements are the following: (1) questions can only be asked according to a written procedure; (2) tax rulings must be requested before the end of the deadline to submit a tax return or to meet the specific tax obligation to which the ruling

* Professor of Tax Law, Jean Monnet Chair, University of Cádiz.
** Professor of Public International Law and European Union Law, University of Murcia.
[1] There are other types of procedures to provide certainty in Spanish tax law, but the ones explained are those that have connection with the questions asked and with State aid procedures and exchange of tax rulings under BEPS Action 5 or EU legislation.

refers; (3) they can only be submitted by the taxpayer (or authorized representatives), although in some specific cases some entities are allowed to request a ruling (e.g. chambers of commerce or of professionals, associations or foundations that represent a specific group such as consumers, industries etc.); (4) the request must explain the facts and specific circumstances to which the ruling will apply and it is not uncommon that the taxpayer will express his views on the specific issue or on how the law should be interpreted in the case presented in the ruling.

It is important to make clear that only the Directorate General for Taxation in Madrid can receive and answer requests for rulings (this Directorate has the competence to interpret the Spanish tax legislation and treaties). Field auditors or even the Spanish Agency in charge of applying tax laws (the so called "AEAT") are not competent in this regard.

The answers given by the Directorate General for Taxation are binding and the criteria expressed in the answer will be applied to the taxpayer unless there are changes in the legislation or the jurisprudence on the provisions that are being interpreted in the ruling. The tax administration is bound to apply the interpretation of the Directorate General for Taxation to any taxpayer (not only to those who asked for the opinion), provided there is an identity of facts and circumstances between the taxpayer that requested for the ruling and the taxpayer that is claiming the application to their particular situation of the conclusions of the ruling.

b) APAs

Spain was one of the first countries that regulated (unilateral, bilateral and multilateral) APAs procedures in Europe. Again the requirements to be eligible for APAs (as regulated in article 18.9 Law 27/2014, Corporate Income Tax Law, and articles 21-36 Royal Decree 634/2015, Regulations on the Corporate Income Tax) are objective and mainly formal ones:

1. The APA has to be requested before the transaction is executed (although Spanish legislation also permits retroactive effects or roll-backs in certain conditions: the tax years to which the roll-back applies are still open in terms of statute of limitations and there is no final assessment released by the tax administration for the specific transactions between related parties).
2. The taxpayer's application has to be accompanied by a proposal of arm's-length valuation for the specific transaction or transactions that are the object of the APA.
3. There is the possibility of presenting a preliminary request of assessment before the formal initiation of the APA procedure. This preliminary

request is more informal and is addressed at informing the taxpayer about the viability to initiate or not the formal procedure.

4. The formal initiation of the APA procedure requires the taxpayer to submit to the tax administration a proposal that is based on the arm's-length principle and describes the method and analysis followed to calculate the arm's-length range. This analysis has to follow the steps and methodology of the OECD Transfer Pricing Guidelines (mainly chapters 1 and 3, although other chapters will also apply depending on the specific transactions). The transfer pricing documentation (master file and country file) of the taxpayer has to be attached to the request.
5. The formal initiation of the APA must be endorsed and signed by all the affected related parties.
6. Significant changes in economic or technological circumstances should lead to modifications of the APA. The Spanish legislation regulates a specific procedure for modifications which is very similar to the APA procedure.
7. APAs are effective for transactions carried out on dates and tax years after the date of signature of the APA. They can have effects for a maximum of 4 tax years, but (1) they can also have retroactive effects (provided that the years are still open under the statute of limitations and there are no final assessments by the tax administrations of the transactions between related parties) and (2) can also be extended beyond the four years if the taxpayer applies for a formal extension (the procedure is very similar to that of the initial application).
8. Bilateral or multilateral APAs have some peculiarities but the procedure is similar to that of domestic APAs (with the nuance that other tax administrations from other countries are also involved).

From the state aid perspective, the Spanish legislation and regulations do not have state aid elements and meet the requirements of the case law of the CJEU on State aid (i.e. Judgement of 18 July 2013, *P Oy,* C-6/12, ECLI:EU:C:2013:525 or of 4 July 2015, *Commission / MOL Magyar Olaj*, C-15/14, ECLI:EU:C:2015:362). General tax rulings are usually made public on the web page of the Ministry of Finance, although on an anonymous basis (the names of the taxpayers are deleted); unilateral, bilateral or multilateral APAs are not released for public scrutiny because of the sensitive information they may contain about the taxpayers affected.

Question 2

Indeed they do, the Spanish tax authorities verify the facts mentioned in a request for a ruling. The specific procedure will depend on the type of tool used to obtain tax certainty.

In general tax rulings ('consultas'), taxpayers usually explain the facts in their formal application and attach the documents that justify their position or permit the Directorate General for Taxation to reach a conclusion on the questions asked. It is not infrequent to have preliminary meetings with tax officials of the Directorate General to explain the taxpayer's position, specially in complex cases. The Directorate General can also request (1) to the taxpayer, the documentation or information that they may need to found their opinion, or (2) to other public entities, the reports or specialized information that may be needed in the case (art. 67.1 and 2 Royal Decree 1065/2007).

In subsequent audits, the taxpayer is often requested to justify that the requirements and conditions defined in the ruling by the Directorate General have been met. It can even be said that the interpretation of rulings by the tax administration that has the competence on tax audits, the AEAT, sometimes is even very restrictive, with the consequence that it has to be decided by courts on appeal whether the taxpayer really followed the ruling or even provided all the needed information to the Directorate General. It must be noted that, since in Spain there is a self-assessment system, *ex post tax* audits are the normal procedure to revise whether the taxpayer meets or not the conditions fixed in the tax ruling.

In APAs, the tax authorities will revise *ex ante* the position of the taxpayer since the latter is obliged attach to the application a formal proposal that must explain the methodology and analysis followed to found the taxpayer's proposal, as well as the transfer pricing documentation of the taxpayer (if the taxpayer has the obligation to have the master file and local file at the disposal of the tax administration). Before signing the APA, the tax administration has the powers to request the taxpayer to complement the documentation presented and to require the taxpayer to provide additional data, reports, facts and justifications that are connected with the proposal of APA or any further clarification it may deem appropriate (art. 24 Royal Decree 634/2015). After the APA has been closed, the tax administration can also verify that the facts and transactions described in the proposal effectively correspond to the reality of the related party transactions and that the APA has been correctly implemented. If the facts and transactions are not those described in the APA, the tax administration can issue the assessments that correspond to the real facts and transactions (art. 25.6 Royal Decree 634/2015).

Neither the Directorate General for Taxation nor the Spanish tax administration should consider what happens in the other countries affected by the proposal or APA procedure (double non-taxation should not be an issue here). However, as explained in the answer to question 3, the Spanish tax administration is more and more sensitive to double non taxation issues and it is not infrequent to see assessments or court decisions where double non taxation is mentioned as an

element that is relevant in the final decision on how to interpret or characterize a transaction (although, with the exception of anti-hybrid provisions in art. 15.j) Corporate Income Tax Law, Spanish legislation only has anti-avoidance rules that are not designed to fight against double non taxation; in fact, in some cases, i.e. the Spanish participation exemption, double non-taxation may be permitted and that is not a problem from the perspective of domestic law; our participation exemption, however, has implemented the changes in the Parent-Subsidiary Directive to avoid double non-taxation of hybrids but this does not prevent double non taxation in other situations).

Question 3

No, that is not a requirement in most cases. As mentioned in the answer to question 2, the issue of whether there is double non-taxation is more and more relevant in tax audits and court decisions, but as an ancillary element to conclude that there was simulation or fraud in specific transactions.[2] In fact, the Spanish Supreme Court has somehow tried to apply BEPS Action 4 as well as the concept of aggressive tax planning and double non-taxation to create limits to the deductibility of interest payments by Spanish non-resident companies to non-resident related low taxed entities in years (before 2012) where Spanish legislation did not have a specific limit for the deduction of interest payments (the Spanish thin capitalization legislation in those years was not applicable to EU companies, this was the form that the Spanish legislator fulfilled the requirements of the case law of the CJEU as derived from *Lankhorst*[3], and the Spanish interest barrier was introduced by Royal-Decree Law 20/2012 with effects from January 1st, 2012).

Question 4

This has already been answered above in question 1. Basically, the tax authorities will not be bound in three situations: (1) changes in domestic law, (2) changes

[2] See, for instance the Supreme Court ("SC") judgments of 24 February 2016 in the well-known Dorna cases. Three of those judgments have international implications (the SC judgments of 24 February 2016, rec. 4044/2014, on deductibility of interest paid to a Luxembourg company; rec. 3946/2014 on how the re-characterization of a leverage buy out affected a shareholder in the Netherlands and the application of the treaty between the Netherlands and Spain, and rec. 948/2914, that affects the individuals that are shareholders of Dorna resident in Spain, but is directly connected with the other cases). For a comment in English of those cases, with specific references to the double non-taxation issue, see Martín Jiménez, "Dividends, leverage-buy-out transactions and the concept of abuse / simulation in domestic, EU law and tax treaties: The Spanish Supreme Court decisions of 24 February 2016" in Lang et al, *Tax Treaty Case Law Around the World*, Amsterdam: IBFD & Linde, 2017 (in print). They refer also to the Judgments of the SC 9 February 2015, rec. 3971/2013, and rec. 188/2014.

[3] Judgment of the CJEU of 12 December 2002, *Lankhorst-Hohorst, C-324/00,* ECLI:EU:C:2002:749. See also the Judgment of the CJEU of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation*, C-524/04, ECLI:EU:C:2007:161

in jurisprudence and (3) where the facts / situation of the taxpayer do not correspond to what was explained previously to the tax administration.

Question 5

No, Spain applies the Spanish transfer pricing legislation in line with the OECD Transfer Pricing Guidelines (1995-2016), which basically means that what the other country does or how it taxes the income allocated to the foreign related party or PE is not relevant except to avoid economic double taxation. This strong connection of the Spanish transfer pricing legislation with the OECD Transfer Pricing Guidelines means that, for the application of the former, unlike the Commission defends in the State aid decisions in cases like Apple, Starbucks, Fiat, the Belgian Excess Profits Tax etc, the situation of domestic companies or related party transactions is not taken as a benchmark (there is no discrimination between domestic groups and foreign ones when the outcome with regard to the latter can be double non-taxation) and Spanish legislation does not recognize, unlike the Commission seems to claim in the tax ruling State aid decisions, that the international tax order has a sort of 'single tax principle' according to which income always has to be taxed somewhere.[4]

Question 6

No, Spain calculates the profits that should be allocated to the Spanish PE in line with the 2008 Report on Attribution of Profits to PEs (the authorized OECD approach is not followed in any of the Spanish tax treaties or domestic legislation and, as a consequences, Spain does not apply the 2010 Report on Attribution of Profits to PEs or the Commentaries to article 7 OECD MC 2010-2017). It should be taken into account that due to the expansive effect with which Spain interprets the concept of PE, it usually attracts to Spain more profits that should usually be allocated to Spanish PEs by using the OECD's more orthodox approach. In fact, since the expansive interpretation of the concept of PE has been used in typical 'commissionaire' cases (oftentimes combined with toll-manufacturing structures), the effect is to attract to Spain profits that often go untaxed to the headquarters or are taxed at lower rates.[5] It is important to point out that Spain

[4] For a criticism of the Commission's, as well the CJEU's, position not only in the context of the tax ruling decisions and the development of State aid in the field of taxation, see Martín Jiménez, "*Level playing field v. Member States' direct tax policies: the state aid (r) evolution"*, in Pistone (dir.), *European Taks Coordination: Law, Policy and Politics*, Amsterdam: IBFD, 2017 (in print).

[5] On the Spanish and case law on the concept of PE, see Martín Jiménez, "The Spanish Position on the Concept of a Permanent Establishment: Anticipating BEPS, beyond BEPS or Simply a Wrong Interpretation of Article 5 of the OECD Model?" *Bulletin for International Taxation* vol. 70, issue 8, pp. 458 ff. See also on the approaches to the concept of PE in BEPS and alternative solutions to BEPS Action 7, Martín Jiménez, "Preventing Avoidance of PE status", in Trepelhov, Tonino & Halka (eds.), *United*

has revised the situation of some US (as well as non-US) multinationals that have used typical commissionaire structures to conclude that they have a PE in Spain to which some profits initially attributed to Ireland have been allocated. Even though if in these cases Spain has used its peculiar and aggressive concept of PE, the decisions by the Spanish tax authorities are relevant for taxpayers like Apple: in the end the decisions by the Spanish authorities to allocate profits to Spain, although based on an unorthodox concept of PE, are directly connected with the Commission's conclusions on recovery of state aid in the *Apple* decision: if Spain claims the taxation of a part of the benefits of Apple attributed to Ireland, these should not be recovered in Ireland in the state aid recovery procedures followed in that jurisdiction. Apple is currently going through tax audits in Spain (see https://economia.elpais.com/economia/2017/05/19/actualidad/1495218380_336520.html).

Question 7

Yes, the arm's-length principle is recognized in article 18 Spanish Corporate Tax Law, Law 27/2014 (as well as in article 15 of Non-resident Income Tax Law, Real Decreto Legislativo 5/2004, which directly sends to the latter). The connection between the Spanish arm's-length principle and the OECD Transfer Pricing Guidelines can be found in the Preamble to the Spanish Corporate Tax Law, which explicitly states that the interpretation of article 18 'should be done in line with the OECD Tranfer Pricing Guidelines or the recommendations of the EU Joint Transfer Pricing Forum, to the extent that they do not contradict the domestic legislation'. This reference to the OECD Transfer Pricing Guidelines was first made by the Preamble of Law 36/2006, which contained the predecessor of the regulation currently in force. It is remarkable that neither Law 36/2006 nor Law 27/2014 made clear to which version of the OECD Transfer Pricing Guidelines they were referring to or whether it could be assumed that changes to the Guidelines (e.g. 2010, 2016, 2017) that were subsequent to domestic legislation could be automatically applied in Spain. The reference to domestic law 'as is in the moment of approval of the law' could be interpreted as acceptance of a static interpretation, but this has not been the position defended by the Spanish tax administration, which is more inclined towards dynamic application and interpretation in Spain of the OECD Transfer Pricing Guidelines. In fact, the dynamic approach to the incorporation of the OECD Transfer Pricing Guidelines has given rise to conflicts between the Spanish tax administration and taxpayers and Spanish courts have not always accepted that subsequent

Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries, New York: UN, 2015 (a second edition will be published in 2017).

versions of the OECD Transfer Pricing Guidelines could be automatically applied in Spain without reforming domestic legislation.[6]

It must be said, however, that like the Commission, the Spanish tax administration and Courts tend to prefer the use of CUP methods when reliable, although profit based methods such as TNMM or profit-split are also commonly applied (regarding accepted transfer pricing methods, the Spanish transfer pricing legislation is aligned with the OECD Guidelines).

Question 8

Yes, but with some peculiarities. The application of the arm's-length principle by the Spanish authorities is not formally linked to what other countries do, so it is indeed possible that the Spanish tax administration makes a unilateral adjustment upwards or downwards (and even a secondary adjustment), regardless of what may happen in other countries and whether they will admit or not a corresponding adjustment. Articles 18.10 Corporate Income Tax Law and 19.3 Royal Decree 634/2015 permit self-adjustments or corresponding adjustments by the taxpayer. However, the Spanish legislation refers to those types of adjustments in connection to a primary adjustment that has been made by the Spanish tax administration, not by administrations of other countries. The taxpayer can initiate or attempt to make corresponding adjustments connected with primary adjustments by foreign tax administrations, however, the Spanish tax administration does not have to automatically accept the foreign primary adjustment and may or may not accept it. As a matter of fact, the normal channel for these corresponding adjustments should be the mutual agreement / arbitration procedure in tax treaties or EU instruments (Convention 90/436/EEC or, in the future, the recently approved Directive on resolution of tax disputes), especially when the Spanish tax administration does not agree with the primary adjustment by a foreign tax administration.

Question 9

The price of euro 120 must be the arm's-length price (or, to be more precise, must be within the arm's-length range), and must have been calculated by following the methodology and comparability analysis of the OECD Transfer Pricing Guidelines (as interpreted by the Spanish tax authorities). As explained in the answer to the preceding question, this is a case that is likely to end up in a MAP / arbitration under tax treaties (or Convention 90/436/CEE) if the Spanish tax authorities do not accept the foreign primary adjustment (e.g. because of the

[6] The SC judgment of 21 February 2017, 293/2017, rec. n. 2970/2015, ruled that the TNMM was not applicable to tax years before 1 December 2006, because that method was not recognized in Spanish legislation until that date, as a consequence of the reform of the transfer pricing legislation by Law 36/2006.

method used, the comparables identified, the position within the arm's-length range etc.) and the taxpayer has declared a lower price in the Spanish tax returns.

Question 10

Spain has transfer pricing legislation (article 18.10 Corporate Tax Law) that permits the tax administration to re-characterize transactions (the so called, 'delineation'/ non-recognition principles of the OECD Transfer Pricing Guidelines, in their after-BEPS version of 2016-2017, can be easily applied with the Spanish transfer pricing legislation). In addition, Spain has an interest barrier similar to the one that is proposed in BEPS Action 4, but it needs to be adapted to article 4 Directive 2016/1164. Spain also has a GAAR (article 15 General Tax Law), but, in view of the currently in force transfer pricing legislation and the interest barrier, the scope for application of the GAAR is more limited than it used to be. Neither Spanish transfer pricing legislation nor the interest barrier (unlike the anti-hybrid provisions in article 15.j Corporate Tax Law) link their application to the tax paid in the country of the lender. Only 'arm's-length conditions' are relevant for the former and, for the purposes of the interest barrier, deductibility is linked with two alternative limits: a fixed ratio (30 per 100) over EBITDA and euro 1 million (banks and other credit institutions as well as insurance companies also benefit from a safe harbor).

In tax years before the currently in force legislation was applicable (that is to say, for tax years before January 1st 2015), there was a tendency by the tax administration, that was blessed by Courts, to refuse interest deductions by applying either the GAAR or the anti-simulation rule (in article 16 General Tax Law) (see the reference to the Dorna cases in answer 3 above or the Judgment of the Supreme Court 19 July 2016, rec. 2553/2015). As explained above, in these cases, double non-taxation was an element to conclude that the interest should not be deducted because the transactions were 'aggressive tax planning' (a category that does not exist in Spanish tax law). In fact, the effect of these decisions was to create an interest barrier for tax years when the Spanish tax system did not have a provision of that kind (the interest barrier was introduced in Spain by Royal-Decree Law 12/2012 and was applicable to tax years starting on January 1st, 2012). Sometimes loans were also re-characterized into equity contributions by using the equivalent of article 9 of Double Tax Treaties, which was criticized by scholars because domestic transfer pricing legislation did not permit in those years before the entry into force of Law 27/2014 (January 1st, 2015) these kinds of re-characterizations outside the specific GAAR procedures[7].

[7] See Martín Jiménez / Calderón Carrero, *Los precios de transferencia en la encrucijada del Siglo XXI: estudio de las cuestiones actuales que plantea la regulación española de operaciones vinculadas*, A Coruña, Netbiblo, capítulo 1.

Part II

Question 11

Specific rules to recover fiscal State aid have been introduced in the Spanish legal order by Law 34/2015, of September 21, 2015, partially amending General Taxation Law 58/2003, of December 17, 2003 ("LGT"), and by the corresponding acts adopted by the two Spanish regions with a high degree of fiscal autonomy, namely Navarre and the Basque Country.[8] The Law, that entered into force on October 12, 2015, added a new Title VII (arts. 260 a 271) to the LGT regulating the procedures to be followed for the enforcement of decisions to recover State aid, filling in this manner a gap in national legislation that had been identified by the Supreme Court.[9]

As provided in the explanatory statement, the objective of the new title is to adapt the Spanish legislation to the requirements of Council Regulation No 659/1999 of 22 March 1999, subsequently replaced by Council Regulation (EU) 2015/1589 of 13 July 2015, and particularly to comply with the principles of effective and immediate enforcement of State aid recovery decisions.[10] For these purposes, the explanatory statement highlights the two main novelties introduced by the new Title, namely, (i) the possibility of modifying firm administrative acts, even if they have acquired the force of res judicata (art. 263 LGT), and (ii) the impossibility of requesting the deferral or payment in installments of tax debts

[8] See for Navarre Ley Foral 28/2016, de 28 de diciembre, por la que se modifica parcialmente la Ley Foral 13/2000, de 14 de diciembre, General Tributaria; and for the Basque Country: Norma Foral 1/2017, de 9 de mayo, de reforma parcial de la Norma Foral General Tributaria del Territorio Histórico de Gipuzkoa; Norma Foral 19/2016, de 23 de diciembre, de modificación de diversas normas forales que integran el sistema tributario de Álava; and Norma Foral de reforma parcial de la Norma Foral 2/2005, de 10 de marzo, General Tributaria del Territorio Histórico de Bizkaia, (BOB 11 Marzo). These acts essentially reproduce the procedure introduced by Law 34/2015, consequently, only the latter will be described in this section.

[9] See Supreme Court judgments of May 13, 2013 (STS 3083/2013) and October 14, 2013 (STS 4968/2013), subsequently confirmed by judgments of March 23, 2015 (STS 1139/2015), April 24, 2015 (STS 1649/2015) and 25 September 2015 (STS 4005/2015). These judgments are discussed in the next question.

[10] See for the recovery of fiscal State aid in Spain, *inter alia*, Falcón y Tella, R. (2008): "La recuperación de las ayudas ilegales consistentes en deducciones uotras medidas tributarias", Quincena Fiscal, n.º 8; Pérez Bernabeu, B. (2013): La recuperación de las ayudas de Estado. Principios y Procedimiento, IEF, Madrid; Moreno González, S.: "La recuperación de las ayudas de Estado de carácter tributario. Panorama actual y propuestas de futuro", en Quincena Fiscal, núm. 6/2015; Martínez Lozano, J. M.: "Los procedimientos de recuperación de las ayudas de Estado. Los problemas que plantea la ejecución de la decisión de la Comisión relativa a la amortización fiscal del fondo de comercio financiero", en Cuadernos de formación, Colaboración 37/10, Volumen 11/2010, Ed. CEF; or Manzano Silva, M. E.: "Algunos aspectos problemáticos de la recuperación de ayudas de Estado" en Foro Sainzde Bujanda, Ley General Tributaria y Derecho Comunitario, Doc. 2/2009, IEF.

resulting from the enforcement of recovery decisions (art. 65 LGT). In addition, in order to bring Spanish legislation into line with the abovementioned regulations, the new title, which clarifies that the Spanish tax administration is responsible for enforcing the recovery decisions, introduces a specific 10-year statute of limitations in this field from the day following that in which the application of the State aid had legal effects under tax law (art. 262 LGT) and provides that late-payment interest will be governed by the relevant provisions of EU legislation (art. 263.2 LGT).

The new Title differentiates between the recovery procedure that involves the regularization of a tax obligation, regulated under Chapter II (arts. 265-268), from that applicable in other cases, dealt with under Chapter III (arts. 269-271).

In the first case, the Tax Administration shall confine itself to the verification of the elements of the tax obligation included in the recovery decision. The recovery procedure shall be initiated ex officio by the Tax Administration and it should last a maximum of 6 months. In order to ensure the observance of the right to be heard, after receiving the provisional assessment or payment proposal (propuesta de liquidación), taxpayers will have 10 days to submit allegations. The recovery procedure will conclude either with (i) a decision specifying the elements of the tax liability affected by the recovery decision and its temporal scope, the list of facts and legal grounds that motivate the decision and provisional assessment/payment proposal or, where appropriate, an express statement that it is not appropriate to regularize the tax situation as a consequence of the recovery decision; or (ii) with the initiation of an inspection including the subject of the recovery procedure.

In the second case, the recovery procedure will start with a notification by the Tax Administration that should already contain the provisional assessment/payment proposal, opening from that moment a period of 10 days for the taxpayer to submit any allegations. The procedure must then be concluded within a maximum period of four months, unless the recovery decision establishes another deadline, by means of a decision that must include at least the following content: the agreement to modify the resolution previously issued by the Tax Administration, if applicable, a list of facts and legal grounds that justify the decision, and the assessment with the accrual of the corresponding late-payment interest.

Recovery decisions can also be subject to the ordinary inspection procedure if the inspection covers obligations or elements different from those that are the subject of the recovery decision.

Furthermore, the assessment resulting from the enforcement of the recovery decisions can be subject to an optional appeal for reconsideration (recurso de reposición) with the same tax authority and, if deemed appropriate, to an economic-administrative appeal before the economic-administrative courts. In

these cases, the suspension of the decision will only be granted upon the lodging of security (cash deposit) in the Caja General de Depósitos (Government depository). If the appeal before the economic-administrative courts is not upheld, taxpayers may lodge an appeal with the ordinary courts. To have standing to bring a claim to the ordinary courts of justice taxpayers must have previously appealed against a tax assessment with the economic-administrative courts.

In this context, it may be worth mentioning that significant uncertainty has recently emerged in Spain in relation to the recovery of fiscal State aid, as a result of three decisions adopted by the European Commission followed by two judgments (so far) of the European Courts, one of the General Court and one of the Court of Justice, concerning the fiscal treatment of the amortization of financial goodwill in Spain. In essence, the European Commission concluded in 2009 that the relevant Spanish rules for the tax deductibility of the amortization of the financial business goodwill arising in the acquisition of significant shareholdings in non-resident companies led to the granting of incompatible State aid and ordered its recovery.[11] The recovery was however limited to the acquisitions carried out after the publication of the opening decision (21/12/2007) due to the existence of legitimate expectations. The Commission reached the same conclusion concerning the acquisition of shareholdings made outside the EU by decision of 12 January 2011.[12]A third decision was adopted in 2014 whereby the European Commission considered that the administrative interpretation adopted by the Spanish tax authorities concerning the application of the amortization of the financial goodwill in some instances had enlarged the scope of application of the scheme already declared illegal and incompatible aid without being notified to the Commission, therefore constituting unlawful incompatible aid.[13] Soon after the adoption of this third decision, the General Court annulled the first two decisions by judgments of 7 November 2014, considering that the selectivity requirement of article 107(1) TFEU had not been duly established in the decisions.[14] An appeal was lodged by the European Commission before the Court of Justice and the latter set aside the General Court´s judgments by judge-

[11] Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7, p. 4).

[12] Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 135, p. 1). This decision was the subject of two corrections published in the Official Journal on 3 March 2011 and 26 November 2011.

[13] Commission decision (EU) 2015/314 of 15 October 2014 on the State aid SA.35550 (13/C) (ex 13/NN) (ex 12/CP) implemented by Spain Scheme for the tax amortisation of financial goodwill for foreign shareholding acquisitions (OJ L 56, 27.2.2015, p. 38–67).

[14] Autogrill España v Commission (T-219/10, EU:T:2014:939), Banco Santander and Santusa v Commission (T-399/11, EU:T:201:938).

ment of 21 December 2016 on the basis that the General Court had not correctly applied the selectivity criterion of the notion of State aid.[15]

The General Court will now have to adopt a new judgment following the CJEU's sentence on the first two decisions. The third decision adopted by the Commission in relation to the amortization of the financial goodwill mentioned above has also been challenged before the General Court by both Spain and some undertakings. These cases are pending.[16] Furthermore, the Court of Justice has also admitted a preliminary reference related to the validity of the third decision. In relation to this reference, the CJEU has suspended the proceedings until the General Court decides on the first two decisions.[17] In light of the foregoing, there is a significant degree of uncertainty as to the recovery of the fiscal State aid declared unlawful and incompatible by the European Commission in the three contested decisions. Another practical issue related to the decisions at stake has to do with the extent of the protection of the legitimate expectations. It remains to be seen whether the General Court (or the CJEU in other procedures still pending) will take into account that the confusion on the boundaries of the concept of state aid, the innovation of the CJEU and the Commission' approach, and the different opinions on the scope of that concept by the General Court, the Advocates general and the CJEU, will have any impact in limiting the retroactive effects of the Commission decisions in the goodwill amortization cases and, therefore, the recovery of the aid. This is one of the issues on which the General Court still has to reach a decision.

In this regard, one concern in Spain has also been whether recovery should be ordered if the company that enjoyed legitimate expectations under the Commission decisions, because it acquired the foreign shareholdings subject to amortization before the opening of the Commission first decision (December 21 2007), is subject to an exchange of securities after that date. Some administrative decisions in Spain considered that the date of acquisition of the participation was that of the exchange of securities and, consequently, if the exchange took place after December 21, 2007 they ordered the recovery. However, the High Court of the Autonomous Community of Castilla-La Mancha has recently refused that interpretation by concluding that the relevant date is that of the acquisition of the foreign shareholdings, not that of the subsequent exchange of securities.[18]

[15] European Commission v World Duty Free Group SA and Others (ECLI:EU:C:2016:981)

[16] T-826/14 – Spain v Commission; T-12/15 – Banco Santander and Santusa v Commission; and T-253/15 – Sociedad General de Aguas de Barcelona v Commission.

[17] C-274/14 – Banco de Santander (Order ECLI:EU:C:2017:327).

[18] Judgment STSJ de Castilla La Mancha of 15 april 2016, rec. 4/2014.

Question 12

Yes. In several judgments the Spanish Supreme Court concluded that the adoption by the Spanish tax authorities of a resolution ordering the recovery of fiscal aid in implementation of a Commission State aid decision ordering recovery through an *ad hoc* procedure, without giving the aid beneficiary the right to be heard, goes against the procedural rights enshrined in the Spanish Constitution, particularly of Article 105(c), the right to good administration included in Article 41.2 of the European Union Charter of Fundamental Rights, and the need to analyze the particular situation of each aid beneficiary within the context of the recovery procedure preserved by the case-law of the Court of Justice of the European Union.[19] Consequently, the Spanish Supreme Court ordered the administrative procedure by which the resolution was adopted to be repeated in order to give the affected taxpayers the right to be heard.[20] As mentioned before, this line of case-law, which corrected the previous jurisprudence of High Courts of the Autonomous Communities considering the Commission Decision as an enforceable title for an administrative act requiring the recovery,[21] prompted the introduction of the specific procedure to recover fiscal State aid in national legislation described in the previous question.[22]

Given the nature of state aid rules, there is limited room for recognition of 'legitimate expectations' that warrant protecting. This raises the question to what extent EU Member States may be bound by non-EU treaties, which might provide for a more vigorous protection of (more broadly defined) legitimate expectations. One may think of agreements protecting property or bilateral or multilateral investment treaties offering investor protection (although, for

[19] Judgments of the Court of Justice of June 9, 2011, Comitato 'Venezia vuole vivere' v Commission (Paragraphs 63 and 130) and 28 July 2011, Diputación Foral de Vizcaya and Others v Commission (Joined Cases C-471/09 P to C-473/09 P, paragraphs 98 And 99)].

[20] See, *inter alia*, Supreme Court judgments of May 13, 2013 (STS 3083/2013, (RJ/2013/4468)) and October 14, 2013 (STS 968/2013, (RJ/2013/6644)), subsequently confirmed by judgments of October 1, 2014 (RJ/2014/4975), March 23, 2015 (STS 1139/2015), April 24, 2015 (STS 1649/2015), May 14, 2015,(RJ/2015/2435); May 26, 2015 (RJ/2015/2910), June 8 2015, (RJ/2015/3854) 25 September 2015 (STS 4005/2015), or January, 25, 2017.(STS 103/2017).

[21] See in this regard the judgments of the High Court of the Basque Country of 27 december 2010, rec. 1575/2008, of 11 april 2011, rec. 1576/2008, or 2 december 2011, rec. 508/2010).

[22] See in relation to the outcome of these judgments and the newly introduced procedure, *inter alia*, Fraile Fernández, R., El nuevo y esperado Título VII LGT, la necesaria configuración de un procedimiento tributario para la recuperación de ayudas de Estado, Instituto de Estudios Fiscales, Nº. 13, 2016; Martín Rodríguez, J.M., Cuestiones controvertidas del nuevo procedimiento de recuperación de ayudas de estado, Instituto de Estudios Fiscales, Nº. 13, 2016; Pérez Bernabeu, B., Análisis de algunas cuestiones controvertidas en relación con los procedimientos de recuperación de ayudas de estado, Instituto de Estudios Fiscales, Nº. 13, 2016; Prósper Almagro, M.J., El nuevo procedimiento tributario de recuperación deayudas de Estado, Instituto de Estudios Fiscales, Nº. 13;

instance, in the case of amortization of financial goodwill there is little scope for applying these treaties).

Question 13

Yes. Please find here below a list of bilateral investment agreements elaborated on the basis of those notified by Spain to the Commission in conformity with Articles 2, 11(6) and 12(6) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

Republic of Albania	Acuerdo entre el Reino de España y la República de Albania para la Promoción y Protección Recíproca de Inversiones	5.6.2003
People's Democratic Republic of Algeria	Acuerdo entre el Reino de España y la República Argelina Democrática y Popular para la Promoción y Protección Recíproca de Inversiones	23.12.1994
Republic of Angola	Acuerdo entre el Reino de España y la República de Angola para la Promoción y Protección Recíproca de Inversiones	21.11.2007
Argentine Republic	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República Argentina	3.10.1991
Republic of Armenia, Republic of Azerbaijan, Republic of Belarus, Georgia, Kyrgyz Republic, Russian Federation, Republic of Tajikistan, Turkmenistan	Convenio de Fomento y Protección Recíproca de Inversiones entre España y la Unión de Repúblicas Socialistas Soviéticas	26.10.1990
Kingdom of Bahrain	Acuerdo entre el Reino de España y el Reino de Bahrein para la Promoción y Protección Recíproca de Inversiones	22.5.2008
Plurinational State of Bolivia	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República de Bolivia (**)	29.10.2001
Bosnia and Herzegovina	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre España y Bosnia y Herzegovina	25.4.2002
Republic of Chile	Acuerdo entre el Reino de España y la República de Chile para la Protección y Fomento recíproco de Inversiones y Protocolo	2.10.1991
People's Republic of China	Acuerdo entre el Reino de España y la República Popular de China para la promoción y protección recíproca de inversiones	14.11.2005
Republic of Colombia	Acuerdo entre el Reino de España y la República de Colombia para la promoción y protección recíproca de inversiones	31.3.2005

Republic of the Congo	Acuerdo entre el Reino de España y la República del Congo para la Promoción y Protección Recíprocas de Inversiones	18.12.2008
Republic of Costa Rica	Acuerdo parta la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República de Costa Rica	8.7.1997
Republic of Cuba	Acuerdo entre el Reino de España y la República de Cuba sobre la promoción y protección recíproca de inversiones	27.5.1994
Dominican Republic	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República Dominicana	16.3.1995
Republic of Ecuador	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República del Ecuador	26.6.1996
Arab Republic of Egypt	Acuerdo para la Protección y Fomento recíprocos de Inversiones entre el Reino de España y la República Árabe de Egipto	3.11.1992
Republic of El Salvador	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República de El Salvador	14.2.1995
Federal Democratic Republic of Ethiopia	Acuerdo entre el Reino de España y la República Federal Democrática de Etiopía para la Promoción y Protección Recíproca de Inversiones	17.3.2009
the former Yugoslav Republic of Macedonia	Acuerdo entre el Gobierno español y el Gobierno macedonio para la Promoción y Protección Recíproca de Inversiones	20.6.2005
Gabonese Republic	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República Gabonesa	2.3.1995
Republic of the Gambia	Acuerdo entre el Reino de España y la República de Gambia para la Promoción y Protección Recíproca de Inversiones	17.12.2008
Republic of Ghana	Acuerdo entre el Reino de España y la República de Ghana para la Promoción y Protección Recíproca de Inversiones	6.10.2006
Republic of Guatemala	Acuerdo entre el Reino de España y la República de Guatemala para la Promoción y Protección Recíproca de Inversiones	9.12.2002
Republic of Equatorial Guinea	Acuerdo entre el Reino de España y la República de Guinea Ecuatorial para la Promoción y la Protección Recíproca de Inversiones	22.11.2003
Republic of Honduras	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República de Honduras	18.3.1994

Republic of India	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la Republica de la India	30.9.1997
Republic of Indonesia	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República de Indonesia	30.5.1995
Islamic Republic of Iran	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República Islámica de Irán	29.10.2002
Jamaica	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre España y Jamaica	13.3.2002
Hashemite Kingdom of Jordan	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y el Reino Hachemita de Jordania	20.10.1999
Republic of Kazakhstan	Acuerdo de Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República de Kazajstan	23.3.1994
Republic of Korea	Acuerdo para la Promoción y Protección Recíprocas de Inversiones entre el Reino de España y la República de Corea	17.1.1994
State of Kuwait	Acuerdo entre el Reino de España y el Estado de Kuwait para la Promoción y Protección Recíproca de Inversiones	8.9.2005
Lebanese Republic	Acuerdo entre el Reino de España y la República Libanesa para la Promoción y Protección Recíproca de Inversiones	22.2.1996
Libya	Acuerdo entre el Reino de España y la Gran Jamahiriya Árabe Libia Popular Socialista para la Promoción y Protección Recíproca de Inversiones	17.12.2007
Malaysia	Acuerdo entre España y Malasia para la Promoción y Protección Recíproca de Inversiones	4.4.1995
Islamic Republic of Mauritania	Acuerdo entre el Reino de España y la República Islámica de Mauritania sobre la Promoción y Protección Recíproca de Inversiones	24.7.2008
United Mexican States	Acuerdo de Promoción y Protección Recíproca de Inversiones entre el Reino de España y los Estados Unidos Mexicanos	10.10.2006
Republic of Moldova	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República de Moldavia	11.5.2006
Montenegro, Republic of Serbia	Acuerdo entre el Reino de España y la República Federal de Yugoslavia para la Promoción y Protección Recíproca de Inversiones	25.6.2002

Kingdom of Morocco	Acuerdo sobre Promoción y Protección Recíproca de Inversiones en el Reino de España y el Reino de Marruecos	11.12.1997
Republic of Namibia	Acuerdo entre el Reino de España y la República de Namibia para la Promoción y Protección Recíproca de Inversiones	21.2.2003
Republic of Nicaragua	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República de Nicaragua	16.3.1994
Federal Republic of Nigeria	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República Federal de Nigeria	9.7.2002
Islamic Republic of Pakistan	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República Islámica de Pakistán	15.9.1994
Republic of Panama	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República de Panamá	10.11.1997
Republic of Paraguay	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República de Paraguay	11.10.1993
Republic of Peru	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República del Perú	17.11.1994
Republic of the Philippines	Acuerdo de Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República de Filipinas	19.10.1993
Kingdom of Saudi Arabia	Acuerdo entre el Reino de España y el Reino de Arabia Saudí para la Promoción y Protección Recíproca de Inversiones	9.4.2006
Republic of Senegal	Acuerdo entre el Reino de España y la República de Senegal para la Promoción y Protección Recíproca de Inversiones	22.11.2007
Republic of South Africa	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República de Sudáfrica (**)	30.9.1998
Syrian Arab Republic	Acuerdo entre el Reino de España y la República Árabe Siria para la Promoción y Protección Recíproca de Inversiones	20.10.2003
Republic of Trinidad and Tobago	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Gobierno del Reino de España y el Gobierno de la República de Trinidad & Tobago	3.7.1999
Republic of Tunisia	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República Tunecina	28.5.1991

Republic of Turkey	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República de Turquía	15.2.1995
Ukraine	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre España y Ucrania	26.2.1998
Eastern Republic of Uruguay	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República Oriental de Uruguay	7.4.1992
Republic of Uzbekistan	Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República de Uzbekistán	28.1.2003
Bolivarian Republic of Venezuela	Acuerdo entre el Reino de España y la República de Venezuela para la Promoción y Protección Recíproca de Inversiones	2.11.1995
Socialist Republic of Vietnam	Acuerdo entre el Reino de España y la República Socialista de Vietnam para la Promoción y Protección Recíproca de Inversiones	20.2.2006
Republic of Yemen	Acuerdo entre el Reino de España y la República del Yemen para la Promoción y Protección Recíproca de Inversiones	29.1.2008

Question 14

The position adopted by Spanish courts in relation to conflicting obligations of European Union law and international law has been different for, on the one hand, international treaties between the Kingdom of Spain (hereinafter also "Spain") and non-EU member States, and, on the other, for international treaties between Spain and other EU member States.

Firstly, in relation to conflicts between European Union law and international agreements between Spain and non-EU Member States, Spanish Courts originally opted for giving preference to the international treaties in compliance with article 96.1 of the Spanish Constitution,[23] the Vienna Convention on the Law of Treaties, particularly its articles 34, 38 and 42.2, Article 5 of the Act concerning the conditions of accession of the Kingdom of Spain to the European Communities,[24] and the current article 351 TFEU.[25] The international treaties

[23] According to article 96.1 of the Spanish Constitution (1978) "Validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order. Their provisions may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law."

[24] According to this article: Article 234 of the EEC (current article 351 TFEU) Treaty and Articles 105 and 106 of the Euratom Treaty shall apply for the new Member States to agreements or conventions concluded before their accession. (OJ L 302, 15.11.1985, p. 23–465).

[25] See in this regard, for instance, Supreme Court Judgments of 3 May 1995 (RJ\1995\3818), 6 June 1995 (RJ\1995\4807), or 24 April 2001 (RJ\2001\3422).

at stake in those judgments were all concluded before the Spanish accession to the European Economic Communities in January 1st 1986.[26]

In particular, the majority of these cases referred to applications for approval of the Degree in Dentistry made by claimants that had pursued those studies in Latin American countries, such as the Dominican Republic, Colombia or Argentina, with whom Spain had entered into international agreements providing for the automatic approval ('homologación') in Spain of the studies at issue. After the accession of Spain to the European Communities, the European Commission informed the Spanish authorities that they were no longer authorized to grant those approvals under the applicable EU Law Directives. The Spanish authorities then started to reject the applications for approval made under the abovementioned international agreements, and these rejections were the subject of the appeals that ultimately were brought before the Supreme Court.[27]

In this context, although the Spanish Supreme Court originally opted for giving preference to the international agreements as mentioned before, the Court soon changed its case-law in view of the adoption by the Spanish authorities of a new degree in Dentistry in compliance with Directive 78/686/EEC, of 25 July. The Supreme Court concluded, in essence, that the new degree was different from the previous one, the one that was subject to automatic approval based on the international treaties, and therefore started to reject the new applications for automatic approval made under the international agreements at stake, putting an end in this manner to the conflict with EU law.[28]

[26] In this context, the Court of Justice, in Grand Chamber formation, has very recently (27 June 2017) held that tax exemptions for the Catholic Church in Spain granted under an international agreement entered into in 1979 with the Holy See may constitute unlawful State aid if and to the extent to which they are granted for economic activities. (C-74/16 – Congregación de Escuelas Pías Provincia Betania, ECLI:EU:C:2017:496). The Advocate General in this case added in her opinion that if the national court finds a conflict between the international agreement at stake and the State aid rules, then ¨the Spanish State would be obliged under Article 351(2) TFEU to apply all appropriate means in order to remove any incompatibility of Article IV(1)(B) of the 1979 Agreement with the EU law provisions on State aid. First, Spain would have to make active use of the dispute-settlement mechanism in Article VI of the Agreement in order, in consultation with the Holy See, to achieve, at least for the future, an interpretation of Article IV(1)(B) of the Agreement which is compatible with EU law and, in particular, with Article 107(1) TFEU. If, in that way, a solution in conformity with EU law were not achieved within a reasonable space of time, Spain would have to give notice of termination of the Agreement.¨ (Opinion of AG Kokott in C-74/16 – Congregación de Escuelas Pías Provincia Betania, ECLI:EU:C:2017:135).

[27] See for a summary of the factual context and a reference to the proceedings initiated by the European Commission the Supreme Court Judgment of 31 March 1995 (RJ\1995\2619).

[28] See in this regard, among many others, the Supreme Court judgments of 28 June 2000 (RJ/2001/983), 21 January 1997 (RJ/1997/77), 28 January 97 (RJ/1997/100), 3 July 2001 (RJ/2001/7765) or 16 October 2001 (RJ/2001/9635).

More recently, the Spanish Supreme Court has opted for giving preference to EU Law over international agreements with non-EU member States, at least *de facto*, in an important judgment of 2012 concerning international civil aviation.[29] In that case, two airlines – AVIANCA and AEROMÉXICO – challenged the Agreement of the Spanish Council of Ministers of 16 December 2011 approving the allocation of individual emission allowances in Spain for 2012 and for 2013-2020, in the framework of the EU emissions trading system. The companies claimed, in essence, that the Agreement at stake, which implemented the applicable EU Law Directive, violated the 1944 Convention on International Civil Aviation, also known as the Chicago Convention, three bilateral agreements between Spain and Mexico (1978), Colombia (1951), and Argentina (1947), the 1992 United Nations Framework Convention on Climate Change, and the Kyoto Protocol. Consequently, the claimants invoked international obligations entered into by Spain both before and after its accession to the then European Communities.

In its judgment, the Supreme Court considered that the claimants were, in reality, not challenging the content of the Agreement of the Council of Ministers at stake but rather the provisions of the relevant EU law Directive on which the Agreement was based, i.e. Directive 2008/101/EC. Ultimately, the Supreme Court held that the validity of the Directive at issue had been declared by the judgment of the Court of Justice of the European Union of December 21, 2011 in case C-366/10, Air Transport Association of America and Others, in which similar questions had been raised, and that, under EU Law, the Spanish Supreme Court had no competence to declare invalid the same Directive. Hence, the Court rejected the appeal and did not deem it necessary to make a reference to the Court of Justice of the EU for a preliminary ruling.

In light of the foregoing, the interpretation given by the Supreme Court in this case in the sense that the real intent of the claimants was to challenge the provisions of the EU Law Directive instead of the national act (the Agreement of the Council of Ministers) that they had actually challenged, was decisive to reach its decision. The practical outcome of this judgment was to give preference to EU Law over the potentially incompatible international obligations entered into by Spain.

Secondly, in relation to conflicts between European Union law and international agreements between Spain and other EU Member States, the situation is clearer. In several recent judgments, the Spanish High Court (Audiencia Nacional), a centralized Court with jurisdiction over the entire national territory, has held that Treaties for the avoidance of double taxation concluded between Spain and other EU Member States, "although formally in force" are not effective

[29] See Supreme Court Judgment of 24 October 2012 (RJ\2013\1498).

if they violate EU law, particularly the free movement of capital provisions, hence giving a clear precedence to EU Law over other international obligations that would lead to the application of national provisions that are deemed incompatible with EU Law.[30] In a similar vein, the Spanish Supreme Court has admitted that the application of national rules ¨enacted unilaterally or under a bilateral convention for the avoidance of double taxation¨ will be precluded if they conflict with EU Law.[31]

To conclude, after some hesitation in the first years following the accession of Spain to the then European Communities, Spanish Courts have since given precedence to EU law over other international obligations binding on Spain, although they have refrained from clearly stating this precedence in their judgments concerning bilateral or multilateral agreements with non-EU Member States. In our view, it would have been preferable to clearly state that EU Law should have precedence over other international obligations binding on Spain, either under Article 351 TFEU, if the latter were entered into before accession, or under the general principle of primacy of EU Law, as the State attorney suggested in the AVIANCA/AEROMÉXICO case of the Supreme Court discussed above. The foregoing would not only be in line with EU Law, including the duty of sincere cooperation laid down in Article 4(3) TEU, but also with the interpretation of the EU Law principle of primacy followed by the Spanish Constitu-

[30] See in this regard, the judgments of High Court of 29 October 2016 (411/2016), 28 October 2016 (470/2016), 22 October 2015 (175/2015), 22 October 2015 (159/2015), or 23 July 2015 (99/2015). It must be said, however, that some of the judgments seem to attribute to the non-discrimination principles in tax treaties an effect that is not the one that article 24 OECD MC produces since Spanish Courts have tended in some cases (incorrectly in our view) to interpret both the non-discrimination principle in tax treaties and the four freedoms of the TFEU as having similar effects.

[31] See in this regard the request for a preliminary ruling submitted by the Spanish Supreme Court in case 6694/2003, judgment of 12/03/2012. The Supreme Court asked the following question to the Court of Justice: 'Must Articles 63 [TFEU] and 65 [TFEU] be interpreted as meaning that they preclude national rules (enacted unilaterally or under a bilateral convention for the avoidance of double taxation) which, in the context of corporation tax and within the framework of provisions for the avoidance of such double taxation, prohibit the deduction of amounts of tax due in other Member States of the European Union on income subject to corporation tax and obtained in their territory where those amounts, though due, are not paid by virtue of an exemption, a credit or any other tax benefit?¨ C-157/10 – Banco Bilbao Vizcaya Argentaria (ECLI:EU:C:2011:813). This case, however, does not refer strictly to tax treaties since, as known, the credit / exemption method usually apply as regulated in domestic law and the equivalent of article 23 OECD MC in tax treaties usually sends to domestic law for these purposes. The taxpayer was claiming a fictitious deduction for unpaid interest in Belgium and there was no tax sparing provision in the treaty, so, basically, the fictitious credit was grounded in an old provision of domestic law that it was clear it did not have the effect of creating such a credit for unpaid taxes in other Member States. This was probably a case where no preliminary ruling was needed, the answer from the case-law of the CJEU was clear, but, however, the Supreme Court decided to ask the CJEU.

tional Court.[32] Consequently, from a practical perspective, in case of a conflict between an international obligation binding on Spain (e.g. a provision of a bilateral Treaty with a non-EU Member State) and a provision of EU Law with direct effect, the latter should be applied (displacing the former) by Spanish Courts. If the EU Law provision at stake does not have direct effect, then national courts should try to interpret the international law provision consistently with EU Law under the duty of consistent interpretation, coined by the Court of Justice of the EU in Marleasing.[33]Lastly, if consistent interpretation is not possible in the case at hand, and therefore the conflicting international obligation has to be applied, State liability under the Francovich jurisprudence of the Court of Justice of the EU could be an appropriate palliative.[34]

[32] See in this regard the Declaration 1/2004 of 13 December (ECLI:ES:TC:2004:1D). According to the Spanish Constitutional Court EU law enjoys a preferential or prevalent character that enables it, under Article 93 of the Spanish Constitution, to displace other applicable regulations. In the Court´s terms ¨Primacy, [contrary to "Supremacy"], is not necessarily sustained on hierarchy, but rather on the distinction between the scopes of application of different regulations, principally valid, of which, however, one or more of them have the capacity for displacing others by virtue of their preferential or prevalent application due to various reasons.¨, page 11 of the unofficial translation provided by the Court.

[33] C-106/89 – Marleasing v Comercial Internacional de Alimentación (ECLI:EU:C:1990:395). See in Spain, e.g., Supreme Court Judgment of 8 June 2016 (n. 497/2016).

[34] C-6/90 – Francovich and Bonifaci v Italy (ECLI:EU:C:1991:428). See in Spain, among others, the Supreme Court Judgement of 17 September 2010 (rec. 153/2007).

SWEDEN

Kristina Nordlander*
Jérôme Monsenego**

Introduction below will set out some of the key aspects of the Commission's assessment of tax rulings under EU State aid law. Part I will mainly focus on the Swedish national tax rules and procedure but will include comments in light of the EU approach set out in the introduction.

Introduction

Prior to the Commission's tax ruling review, the Commission and the EU Courts had already confirmed that tax measures of EU Member States are subject to State aid control and had provided guidance regarding the State aid assessment of such measures. In order to determine whether a tax measure complies with EU State aid rules, the application of the so-called "selectivity" criterion is of particular importance. The fundamental question in this context, as set out in the case law, has been whether a tax measure derogates from the normal tax regime and has the effect of granting the recipient of the measure an advantage that others in a comparable factual and legal situation cannot obtain.

With regard to tax rulings, the Commission seems to have taken a rather novel approach to determine whether or not aid has been granted in a "selective" manner. This approach is reflected in the tax ruling decisions issued so far and in the 2016 Notice on the notion of state aid (paras. 169-174). The Commission's review focuses in particular on tax rulings relating, in the main, to the treatment

* Partner SIDLEY AUSTIN LLP, Brussel.
** Jérôme Monsenego, Assoc. Prof. of International Tax Law, Stockholm University.

of income and costs from transfer pricing, i.e. cross-border intercompany transactions relating to products, services, intellectual property and the like moving between companies that belong to the same corporate group.

The 2016 Notice states that a tax ruling may confer a selective advantage if the result of the ruling: *"does not reflect in a reliable manner what would result from a normal application of the ordinary tax system [...] in so far as that selective treatment results in a lowering of that addressee's tax liability in the Member State as compared to companies in a similar factual and legal situation"* (para. 170).

The Commission clarifies that a tax ruling is selective if it deviates from the "arm's length principle". To assess whether a tax authority has appropriately determined arm's length pricing, the Commission determines what it considers to be a reliable approximation of a market-based outcome for transfer prices within a corporate group. The Commission bases its 'best estimates' of such a market-based outcome by reference to OECD guidance on the application of the arm's length principle. The arm's length principle applied for this purpose, however, according to the decisions and the 2016 Notice does not derive from the OECD guidance or from laws incorporating the guidance into national legal systems; instead, it derives from Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU") itself. Article 107(1) TFEU provides that any State aid "*which distorts or threatens to distort competition by favouring certain undertakings [...] shall, in so far as it affects trade between Member States, be incompatible with the internal market*".

The Commission interprets Article 107(1) TFEU as prohibiting "*unequal treatment in taxation of undertakings in a similar factual and legal situation*".

The 2016 Notice (para. 173) states that a tax ruling will deviate from a market-based outcome and constitute selective State aid if it:

- misapplies (according to the Commission) national tax law resulting in a lower tax amount; or
- is not available to undertakings in a similar legal and factual situation; or
- applies (according to the Commission) a more favourable tax treatment compared with other taxpayers in a similar factual and legal situation (which appears to mean that a finding of economic advantage results in a finding of selectivity).

It is important to note that the Commission considers that for the purpose of determining selectivity, companies in a multinational group and standalone companies are in a similar factual and legal situation (rather than comparing multinational corporate group companies that could benefit from the tax measure to multinational corporate group companies that were excluded from relying on the measure).

The assessment of the Commission as set out above, has raised a number of questions and uncertainties, notably whether the Commission's selectivity analysis according to which the selective element is met if the Commission considers that a tax ruling deviates from the arm's length principle, effectively collapses the separate requirement of advantage and selectivity into a single requirement, thereby reducing the State aid inquiry.

Another question that has been raised is whether the Commission's comparison of multinational groups and standalone companies to determine whether there has been selectivity is a correct application of the equal treatment principle. The Court of Justice emphasized in a recent case that, to establish selectivity, the Commission must examine rigorously "*the question whether the situation of operators benefitting from the measure is comparable with that of operators excluded from it*". Because the 2016 Notice and the Commission's tax ruling decisions use the arm's length principle as the point of reference in assessing tax rulings, the 2016 Notice in effect concludes that the correct application of this principle in tax rulings ensures that companies in multinational groups are not treated favourably as compared to standalone companies. It can, however, be questioned whether companies in multinational groups and independent standalone companies are really in a comparable situation when it comes to cross-border transactions and risks of for example double taxation.

The arm's length methodology is a tool for allocating profits of companies in a multinational group between countries and is aimed (among other things) at minimising the risk of double taxation. Tax rulings on transfer prices are given in that specific context to companies in multinational groups. It should arguably follow that only companies in multinational groups are in an objectively comparable situation in light of the objective pursued by the corporate tax system, including bilateral double taxation treaties, and as implemented through tax rulings on transfer pricing.

Further guidance can be expected from the EU Courts in the cases currently pending before it. Clear guidance as to the manner in which tax rulings have to be assessed under EU State aid rules and as to when they risk facing State aid scrutiny is of particular importance for all EU Member States. This is in particular so because internal taxation remains an exclusive competence of each Member State.

Part I

Question 1

There are two main forms of advance legal certainty for tax matters in Sweden. The first form is an advance tax ruling that is not given by the tax authority but by an independent board, the decisions of which can be appealed (whether by the taxpayer or by the tax administration) to the Supreme Administrative Court.[1] This procedure is available for several types of taxes, including the corporate income tax. The decisions of the board relate to the interpretation of the law, either if such an interpretation is important to the applicant, or if it is important for a consistent application of the law.

Secondly, Sweden has enacted a law on APAs, which is by and large similar to the recommendations of the OECD and of the European Commission.[2] An APA according to the Swedish procedure is an advance ruling that is obtained from the competent authority at the Swedish tax administration. Under the Swedish APA programme, it is impossible to obtain a unilateral APA (i.e. APA's must be bilateral or multilateral; entered into between two or more parties typically in a complex multinational transaction), or an APA that concerns a transaction that is considered simple.

When requesting an APA, the taxpayer must provide sufficient information on the multinational enterprise and the role of its members, and the taxpayer must stick to the conditions described in the APA in order to be able to rely on it.

Lastly, companies may discuss complex tax issues with the tax administration through a more informal procedure ("*fördjupad dialog*"). The tax administration may provide answers to various tax questions. These answers are as such not binding, and should not constitute potential State aid.

It is interesting to note, however, that the Commission stated in its opening decision in the *Apple* case that there "*would also be State aid*" even if the tax administration "*simply accepted a method of taxation based on prices which depart from conditions prevailing between prudent independent operators.*" This language suggests the possibility that even non-binding answers could amount to State aid. The Commission has not reiterated this idea in the final decision in the *Apple* or the *Starbucks* case. However, it did state in the final *Apple* decision that there was no difference between a non-binding advance opinion and a binding tax ruling, referring to these as being "*the same*". Both cases are currently pending on appeal before the EU General Court, so it remains to be seen whether a simple

[1] See *Lag (1998:189) om förhandsbesked i skattefrågor.*

[2] See *Lag (2009:1289) om prissättningsbesked vid internationella transaktioner.*

acknowledgment of a taxation methodology, even absent an actual ruling, may nevertheless lead to a State aid finding.

Question 2

The Swedish tax administration systematically verifies the facts mentioned in an application for an APA ex-ante, i.e. before an APA is granted. This often includes meeting the multinational enterprise to ask questions, in order to understand if the functional analysis described in the documentation corresponds to the reality of the group. The tax administration may also double check the facts and the correctness of the transfer pricing model through discussing, and sometimes meeting, relevant foreign tax administrations. Once an APA has been granted, the Swedish tax administration would normally follow-up and check whether the assumptions described in the agreement are still valid and the conditions are still respected, including as part of the annual tax assessment. This procedure should reduce the risk of there being a State aid finding. However, if the facts change after a ruling has been issued, even in the absence of a new binding tax ruling, there may still be State aid if the tax administration accepts a new or amended taxation methodology for the reasons explained under Q1 above, i.e. that a simple acknowledgment of a taxation methodology may be sufficient for a State aid finding even in the absence of a ruling. The Swedish tax administration could arguably limit the risk of such a finding by verifying the facts and the information on the transfer pricing methodology submitted as part of the annual tax declaration.

In the *Apple* case, the Commission criticized the lack of contemporaneous profit attribution reports. That would suggest that the Swedish tax administration should ensure that it obtains updated documentation from the taxpayer to be able to make such an assessment. This follow-up procedure is not described in detail in the law; instead, the tax administration and the taxpayer agree on when, how, and to what extent the follow-up procedure should take place.

Question 3

There is no general obligation for the Swedish tax administration to verify the tax treatment of a payment or transaction in a foreign country. However, certain special anti-avoidance rules do take into account the foreign tax treatment, particularly with respect to the limitations to the deduction of interest expenses[3] and the availability of the participation exemption regime.[4]

[3] See chapter 24, section 10a and following of the Swedish Income Tax Act (*Inkomstskattelag (1999:1229)*).
[4] See chapter 24, section 19 of the Swedish Income Tax Act (*Inkomstskattelag (1999:1229)*).

Question 4

The typical case where the tax administration would not be bound by a ruling or APA concerns situations where either the taxpayer has provided false information from the start (e.g. a manufacturer is characterised as a toll manufacturer in an application for an APA, but in reality acts as a fully-fledged manufacturer), or situations where the facts and circumstances have changed without the taxpayer informing the tax administration (e.g. a manufacturer was correctly characterised as a toll manufacturer at the time of the conclusion of the APA, but following a business restructuring it starts acting in another capacity, for example by developing valuable intangible property).

Question 5

As part of the APA programme there is no such check or mechanism included in the law. However, as part of the negotiations with the other country(ies) the Swedish tax administration is likely to know the tax treatment on the other side of the transaction.

Other tax mechanisms in the Swedish law may require knowledge of the tax treatment of another country, particularly the Swedish CFC rules[5] and the limitations to the deduction of interest expenses[6] (which are likely to be amended in a near future), both of which take into account the effective tax rate of the foreign country.

Question 6

Swedish tax law normally follows a substance-over-form approach, whereby the legal aspects of an arrangement may be disregarded or set aside if they do not correspond to the reality. In addition, Swedish tax law includes a general anti-avoidance rule. However, none of these mechanisms include any default rule when allocating profits; rather, it is the tax consequences of the actual substance of a transaction that will replace the formal arrangement.

It should also be observed that the Swedish arm's length provision is embedded in the law. In contrast, there is no detailed provision as to the attribution of profits to permanent establishments, but Swedish law applies the arm's length principle as a kind of default rule, i.e. despite the lack of precise provision on the attribution of profits to permanent establishments. The legal basis is not article 107(1) of the TFEU, but rather the general principles of taxation applicable in Sweden.

[5] See chapter 39a of the Swedish Income Tax Act (*Inkomstskattelag (1999:1229)*).

[6] See chapter 24, section 10a and following of the Swedish Income Tax Act (*Inkomstskattelag (1999:1229)*).

Question 7

See above at Q6 for the arm's length provision and the attribution of profits to permanent establishments. References to the OECD transfer pricing guidelines are found in the preparatory works, in the statements of practice of the Swedish tax administration, and in certain court cases. The Swedish Supreme Administrative Court has stated that the OECD transfer pricing guidelines are not legally binding in Sweden but are nevertheless a relevant interpretative source. The same conclusion should reasonably be reached with respect to the authorised OECD approach for the attribution of profits to permanent establishments.

Therefore, although there is no formal reference to the OECD transfer pricing guidelines in the law, the Swedish tax administration and Swedish courts follow closely the recommendations of the OECD, with few exceptions. Sweden even tends to apply the OECD recommendations retroactively (OECD transfer pricing guidelines).

Question 8

Yes, this is part of the right of the tax administration to correct transfer prices if it believes that the income of an associated enterprise is incorrect due to intercompany transactions with foreign associated enterprises that were not, or are no longer, priced in line with the arm's length principle. Consequently, prices or margins may be adjusted unilaterally, both upwards and downwards. However, the practice is normally to adjust prices or margins so that the taxable income increases in Sweden; the Swedish tax administration would normally not adjust the income downwards, not even if this is to make the outcome theoretically at arm's length, or in order to increase the attractiveness of Sweden from a corporate income tax perspective.

Question 9

As part of the yearly taxation of corporations, Sweden normally accepts the transfer prices for which it is demonstrated that they are at arm's length. For example, if a good is purchased at a higher price in year 2 than in year 1, the increase in price is not, as such, a reason for refusing the deduction. However, the higher price may very well be considered to be in breach of the arm's length principle, and thus be rejected.

Another important point concerns corresponding adjustments. Such adjustments are normally not granted by the tax administration on a spontaneous basis, i.e. if a taxpayer asks for a reduction of its income as a consequence of the increase of the income of an associated enterprise in another country. On the other hand, the competent authority may grant a corresponding adjustment as part of a mutual agreement procedure.

Question 10

Swedish law includes a general anti-avoidance provision, but it is normally not used as a "back-up" to the arm's length provision. There is no real need for such a "back-up", and the conditions to rely on the general anti-avoidance provision are more demanding than the arm's length provision, which makes it un-attractive to the tax administration.

THE NETHERLANDS

SCW Douma

1. Introduction

The present national report contains the input of the Netherlands Association for European Law (NVER) on the topic 'Taxation, State aid and distortions of competition'.[1] The report is structured as follows. Section 2 provides details on the structure, procedure and content of the Dutch tax ruling process.[2] In this context, it will be discussed in what circumstances taxpayers are eligible for a ruling. Section 3 discusses how the arm's length principle is interpreted and applied in Dutch tax law.[3] Section 4 discusses the Dutch general anti-avoidance rule in tax matters.[4] In section 5, the Dutch regulatory framework on the recovery of unlawful state aid is reviewed and the application thereof in practice.[5] In section 6, an overview is provided of the international obligations of the Netherlands in respect of property and investor protection.[6] This section will also discuss how a conflict between EU law and such international obligations is generally resolved. Section 7 contains final remarks.

[1] This report has been prepared by the national reporter Sjoerd Douma (University of Amsterdam and Lubbers, Boer & Douma) and the following members of the NVER: Sebastiaan Cnossen (Pels Rijcken), Johan van Haersolte (Coupry), Emma Hameleers (NautaDutilh), Jurian Langer (University of Groningen and Ministry of Foreign Affairs), Doortje Ninck Blok (Windt Le Grand Leeuwenburgh), René Repasi (European Research Centre for Economic and Financial Governance) and Bram Vos (LLM student Corporate Law at VU Amsterdam). All opinions expressed are personal and do not represent the views of the organisations the authors work for.

[2] Section 2 contains answers to questions 1-6 of the Questionnaire.

[3] Section 3 discusses questions 7-9 of the Questionnaire.

[4] Section 4 answers question 10 of the Questionnaire.

[5] Section 5 addresses questions 11-12 of the Questionnaire.

[6] Section 6 regards questions 13-14 of the Questionnaire.

2. The Dutch tax ruling process

2.1. Legal basis

The Decree on Administrative Law in tax matters (*Besluit Fiscaal bestuursrecht*) states that any taxpayer may file a request for prior consultation with the tax inspector.[7] This prior consultation may result in a formal position taken by the tax inspector about the application of the law in the specific circumstances of the taxpayer. It may also result in an Advance Tax Ruling (ATR), Advance Pricing Agreement (APA) or a more general settlement agreement. Those 'rulings' are governed by the Dutch Civil Code (*Burgerlijk Wetboek*, hereinafter: BW).[8] This code contains the following provisions:[9]

> Article 7:900(1) BW
>
> Under a settlement agreement parties bind themselves towards each other, in order to end or to avoid any uncertainty or dispute about what applies to them legally, to the assessment and establishment of a new legal status between them, intended to apply as well as far as it differs from their previously existing legal status.
>
> Article 7:902 BW
>
> The establishment of a new legal status in order to end any uncertainty or dispute on the field of property law is also valid if it would appear to be in conflict with mandatory law, unless its content or necessary implications are in conflict as well with public morals or public order.
>
> Article 3:40 BW
>
> 1. A juridical act that, by its content or necessary implications, violates public morality or public order, is null and void.
>
> 2. A juridical act that violates a statutory provision of mandatory law is null and void; yet, if this statutory provision merely intends to protect one of the parties to a more-sided (multilateral) juridical act, then such a juridical act is voidable, provided that this is in line with the underlying principle of the violated statutory provision.
>
> 3. The previous paragraph does not concern statutory provisions that do not purport to make a conflicting juridical act invalid.

Article 7:900(1) BW makes clear that no agreement between a taxpayer and the tax authorities can exist where there is no "*uncertainty or dispute about what applies to them legally*". Indeed, pursuant to Articles 7:902 and 3:40 BW, such an

[7] Decree of 9 May 2017, no. 2017-1209, para. 3. The decrees referred to in the present report are policy rules rather than binding legislation.

[8] See the Decrees of the State Secretary for Finance of 3 June 2014, nos. DGB 2014/3098 and DGB 2014/3099.

[9] See www.dutchcivillaw.com for these translations.

agreement is null and void in case of a *manifest* violation of mandatory tax law. A violation of the law in circumstances where such violation was not known – or could not have been known – to the tax authorities and the taxpayer can be no reason for such nullity, because the object and purpose of Article 7:900(1) BW is to introduce a legal instrument in the Dutch legal order to end objective legal uncertainty between the parties. However, if no objective uncertainty exists, no agreement between the tax authorities and the taxpayer can exist, because this would be contrary to the public order. The Dutch Supreme Court has held that the agreement as a whole determines whether it manifestly violates the applicable tax law. The circumstance that both parties know that a certain aspect of the agreement is contrary to the law is insufficient to invalidate that agreement, because the agreement as a whole and the goals pursued therein are decisive on this point.[10] In 2017, an internal but independent research group of the Ministry of Finance and the tax authorities concluded that the Dutch ATR/APA practice as developed by the tax authorities falls within the limits provided for by Dutch legislation, case law and policy rules.[11]

In case a tax inspector wishes to conclude an agreement with a taxpayer which is manifestly against the law, he may turn to the Minister of Finance. The Minister is competent to deviate from the law in favour of a taxpayer or group of taxpayers if a strict application of the law would, in his view, not be equitable.[12]

Taxpayers cannot force the tax authorities to conclude an agreement with them. Similarly, taxpayers cannot litigate against an ATR or APA with which they disagree. Of course, legal remedies are available against subsequent tax assessments; taxpayers would need to await these before any appeal with the tax courts may be lodged.

2.2. Organisation and procedure

Since 2004, ATRs and APAs have been centralised at the tax authorities' large enterprises division in Rotterdam.[13] If a local tax inspector wishes to enter into an agreement with a taxpayer he should consult with this team in certain situations. The APA/ATR team will subsequently issue an opinion which is binding on the tax inspector. This concerns, inter alia, the following situations:

[10] Supreme Court (*Hoge Raad*) (hereinafter: HR) 9 December 2005, 41.117, ECLI:NL:HR:2005:AU7728, BNB 2006/201. Compare also Article 64 of the Dutch General Tax Act (*Algemene wet inzake rijksbelastingen*), which states that the tax inspector may formalise the tax due by a taxpayer in a different way, provided that the taxpayer agrees with the approach and that the total tax will not be lower than the tax which would otherwise have been payable.

[11] Letter of the State Secretary for Finance of 23 May 2017 to Parliament, no. 2017-0000100477.

[12] Article 63 of the Dutch General Tax Act (*Algemene wet inzake rijksbelastingen*).

[13] *Belastingdienst Grote Ondernemingen*, Rotterdam.

- the determination of an arm's length remuneration or a method for the determination of an arm's length remuneration for cross-border transactions (goods and services) between affiliated organisations and companies, or between units of the same organisation or company (resulting in a unilateral or bilateral advance pricing agreement);
- confirmation of the participation exemption for situations where none of the subsidiaries of a holding carries out business activities in the Netherlands;
- confirmation of international structures that involve hybrid financing or hybrid legal entities;
- confirmation of the absence or presence of a permanent establishment in the Netherlands in respect of tax liability;
- confirmation on the absence of dividend withholding tax on payments made by Dutch cooperative societies.[14]

Certain situations, such as group financing companies and entities with limited or no real economic presence in the Netherlands engaged in the management of intellectual property rights, will be dealt with by the Rotterdam office exclusively so as to ensure enhanced scrutiny for these situations, as will be the case with entities with mere holding, financing and licensing functions within international groups.[15] Other situations will continue to be dealt with by the competent local tax inspector.

The large enterprises division of the tax authorities in Rotterdam also includes, besides the APA/ATR-team, a 'contact point for potential foreign investors' (*aanspreekpunt potentiële buitenlandse investeerders,* or *APBI*).[16] This contact point is competent to make prior agreements with respect to future investments by a foreign investor, within the limits of legislation, case law and policy rules. These agreements may involve corporate income tax, personal income tax, wage tax, dividend withholding tax and value added tax. The agreements may include ATR's and ATAs but may also include other types of agreements. A 'potential foreign investor' should consider making an investment into the Netherlands of – generally speaking – more than € 4,5 million, leading to jobs in the Netherlands. Two additional criteria should be met: i) the central management of the investor is located outside of the Netherlands, and ii) the investor has not invested substantially in the Netherlands already. The APBI will publish on a yearly basis the general policy which it has pursued in the form of a summary.[17]

[14] Decree (policy rule) of 3 June 2014, DGB 2014/296M, para. 3.1.

[15] Decree of 3 June 2014, DGB 2014/296M, para. 3.2. Summary by E. van der Velde, 'Tax Rulings in the EU Member States', European Parliament 2015, p. 42.

[16] Decree of 3 June 2014, DGB 2014/296M, para. 4.

[17] Decree of 3 June 2014, DGB 2014/296M, para. 5.

In terms of procedure, the tax authorities in Rotterdam will acknowledge the receipt of an APA or ATR request within 5 working days. Requests which are clear without further questions being necessary will be dealt with immediately. In other cases, the receipt confirmation will contain the name of the civil servant who is dealing with the request. Generally speaking, a request for an ATR will be dealt with in 8 weeks. In respect of a request for an APA, the taxpayer and the tax authorities will agree a 'case-management plan' in accordance with the APA Decree.[18] In all cases, a request for an APA, ATR or (other) settlement agreement will be processed when at least the following information has been provided: a clear description of all relevant facts, the legal question on which a position of the tax authorities is requested, and the taxpayer's own assessment of the tax consequences of the envisaged facts.[19] A request for an APA must contain all necessary information to perform a useful transfer pricing analysis.[20] An agreement with the tax authorities is reached on the basis of the specific facts and circumstances of the taxpayer; there are no 'one-size-fits-all' of 'default' rules.

2.3. Verification of facts

Only the taxpayer is responsible for the accuracy and completeness of the facts put to the tax authorities. If it turns out that the information has not been correct and/or complete, the tax authorities are not bound by any APA, ATR or (other) settlement agreement.[21] Of course, the competent tax inspector will have to verify all facts and circumstances when issuing a tax assessment on the basis of the prior agreement.

2.4. Relevance of the position of other countries

The tax authorities will not proceed with any prior consultation and will not take any legal position in case of aggressive tax planning (*fiscale grensverkenning*) or in case there is a risk that the international law principle of good faith or another principle of international law will be violated. A violation of the principle of good faith may be present if the tax authorities suspect, for instance, a link to money laundering, bribery, serious financial crimes or financing of terrorist activity.[22]

The fact that another country may qualify a certain item of income for tax purposes differently than the Netherlands has no bearing in principle on the possibility to enter into prior consultation with the Dutch tax authorities. The same is true in a situation where corresponding taxation in another country is absent.

[18] Decree of 3 June 2013, DGB 2014/3098
[19] Compare the Decree of 9 May 2017, no. 2017-1209, para. 3(2).
[20] Decree of the State Secretary for Finance of 3 June 2014, no. DGB 2014/3098, para. 6.
[21] Decree of 9 May 2017, no. 2017-1209, para. 3(2), footnote 2.
[22] Decree of 9 May 2017, no. 2017-1209, paras. 3(4)(c) and 4.

What matters is a correct interpretation and application of Dutch tax law, based on a full picture of all relevant facts. In this regard, the Dutch tax authorities do require that the taxpayer gives the foreign tax authorities a full, complete and transparent insight into its tax treatment in the Netherlands and the facts upon which that tax treatment is based. This is a critical circumstance in an advance pricing agreement.[23]

3. The arm's length principle

3.1. The notion of profits of an enterprise

In the Netherlands, the arm's length principle is rooted in Article 3.8 of the Income Tax Act (*Wet inkomstenbelasting 2001*) which defines profits from an enterprise as the total amount of proceeds which are derived 'from an undertaking' in whatever shape or form. This provision, which goes back a very long time, makes it clear that an increase or decrease in value of an undertaking which is not derived 'from an undertaking' but from something else – e.g. a capital contribution by or a dividend payment to the shareholders – is excluded from the notion of taxable profits. This means that the arm's length principle in the Netherlands historically includes both upward and downward adjustments. In 2002, Article 8b(1) was introduced in the Dutch Corporate Income Tax (CIT; *Wet op de vennootschapsbelasting 1969*). This provision codifies the already existing arm's length principle as follows:

> "Where an entity participates, directly or indirectly, in the management, control or capital of another entity, and conditions are made or imposed between these entities in their commercial and financial relations (transfer prices) which differ from conditions which would be made between independent parties, the profit of these entities will be determined as if the last mentioned conditions were made".

According to the Dutch legislator, this provision is to be interpreted in accordance with the OECD Transfer Pricing Guidelines.[24]

3.2. The Transfer Pricing Decree

Guidance as to how the Dutch tax administration interprets the arm's length principle is laid down in a Decree of 14 November 2013.[25] This Decree describes in detail how the Dutch tax authorities apply and interpret the OECD Transfer

[23] Kamerstukken II, 2016/17, 25 087, nr. 153.

[24] Kamerstukken II 2001/02, 28034, nr. 3, p. 8

[25] Decree of the State Secretary for Finance of 14 November 2013 no. IFZ 2013/184 M. An official English translation is available on https://www.government.nl/topics/taxation-and-businesses/documents/decrees/2014/03/25/ifz2013-184m-international-tax-law-transfer-pricing-method-application-of-the-arm-s-length-principle-and-the-transfer-pricing-g.

Pricing Guidelines in the context of the Dutch legal order. As requested by the general reporter, we would like to deal specifically with the following example:

> A product is sold from one group company to another at a price of 100. According to the tax authorities of the selling state an at arm's length price should have been 120 and it adjusts taxable profit upwards accordingly.

If the buying company would be a resident of the Netherlands, the Dutch tax authorities would not automatically accept this higher transfer price and adjust the level of taxable profit downwards. In a Decree from 2008, the State Secretary for Finance writes the following:[26]

> "There are two ways in which the Netherlands can eliminate double taxation arising as a result of transfer pricing adjustments in another country:
>
> 1. Following a taxpayer's request, the Dutch tax assessment can be unilaterally adjusted without consulting the treaty partner;
>
> 2. Following a taxpayer's request, the double taxation can be eliminated after consultations with the other competent authority, either by adjustment of the Dutch assessment or otherwise.
>
> A request as referred to in point 1 is also referred to as a request for a corresponding adjustment. This can be sent to the competent tax inspector, who will then decide, on the basis of Dutch legislation and regulations (including the applicable tax treaty), whether the Netherlands will unilaterally renounce its claim. Depending on the stage of the tax assessment, such a request may be filed as:
>
> a. a request for adjustment of the taxpayer's tax return;
>
> b. an objection to the assessment;
>
> c. a request for a reduction ex officio of the tax liability.
>
> The tax inspector will decide whether a reduction is appropriate. The tax inspector has to submit all requests to the Coordination Group on Transfer Pricing[27] for binding advice. If the inspector decides, based on the information provided by the taxpayer, that the Netherlands cannot eliminate the double taxation by reducing the assessment or considers consultations with the other country to be needed in order to decide which country should be assigned the taxation rights, the double taxation will continue to apply. If a taxpayer disagrees with the inspector's decision and is still in stage a. or b above, the taxpayer can still seek recourse to the domestic remedies available. In addition to the various domestic remedies, it is always possible to request a mutual agreement procedure [on the basis of the applicable tax treaty], providing the time limit for filing such requests has not expired."

[26] Decree of 29 September 2008, No. IFZ2008/ 248M, para. 2.4.1. English translation available at http://www.oecd.org/ctp/transfer-pricing/netherlands-decree-mutual-agreement-procedure-2008.pdf.

[27] This a certain group within the Dutch tax authorities.

The above can therefore be summarized as follows: a corresponding adjustment will only be granted unilaterally if the facts justify this. If not, the taxpayer may request the initiation of a mutual agreement procedure.

4. Fraus legis

The most important general domestic anti-abuse measure is the unwritten *fraus legis* doctrine, as further developed in Dutch case law. *Fraus legis* is a principle with its origins in Roman law. As a general legal principle of law, it is applicable to all areas of law, not only tax law, although it is used frequently by the Dutch Revenue Service. It is settled case law of the *Hoge Raad* that two criteria have to be met simultaneously before *fraus legis* can be applied: a subjective criterion (that the avoidance of tax is the only, or paramount, motive for the transactions) and an objective criterion (a conflict with the intention and purport of the law).[28] The legal transactions entered into by the taxpayer in order to obtain a fiscal advantage can subsequently be either ignored (elimination) or replaced by other transactions (substitution), depending on which option gives the best expression to the intention and purport of the law. Application of the doctrine of *fraus legis* in tax matters does not change the transactions for any other purposes other than that of taxation. Interestingly, the Dutch government is of the opinion that the Netherlands does not have to implement Article 6 (GAAR) of the Anti-Tax Avoidance Directive[29] because the concept of fraus legis provides an equally effective protection.[30] The Dutch Supreme Court has decided that the notion of *fraus legis* can be applied to and next to specific anti-avoidance rules.[31]

5. Recovery of unlawful State aid

At present (2017), Dutch law does not provide for a specific set of rules ensuring the effective recovery of state aid. Unlawful state aid has to be recovered on the basis of the powers attributed by various Dutch rules that may apply. Which one depends on the case at hand, more specifically on how the state aid was granted to the recipient. In this respect, one has to distinguish between civil law[32], administrative law[33] and fiscal law[34]. To our understanding, most Dutch case law relates

[28] HR 20 March 1985, BNB 1985/171.

[29] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193, 19.7.2016, p. 1–14.

[30] Kamerstukken 2016/17, 25087, nr. 179, p. 2.

[31] For instance, HR 11 July 2008, nr. 43.376, BNB 2008/266.

[32] E.g. in case of a contract for the sale of land between a municipality and a building company (District Court Noord Nederland, 1 July 2015, *Harlingen/Saanen Holding*, ECLI:NL:RBNNE:2015:3300).

[33] E.g. in case of the *vereveningsbijdrage*, the contribution paid by the government to health insurance companies under the Health Insurance Act (Administrative Jurisdiction Division of the Council of State, 15 April 2015, *Zorg en Zekerheid*, ECLI:NL:RVS:2015:1152).

[34] E.g. in case of a commuter tax assessment imposed by a municipality (District Court The Hague, 7 July 2011, NN/*Goedereede*, ECLI:NL:RBSGR:BR4069).

to civil and administrative law and almost none to fiscal law. Furthermore, most cases have been brought to court by parties invoking Article 108(3) TFEU (notification and stand-still obligations) and a Commission Decision was not involved. Recovery will in those cases be one of several claims put forward and the competent court has to decide whether the claim is justified and if that is the case, how to effectuate the recovery.

In civil law cases involving state aid a Dutch civil court often has to grapple with different claims aiming at the reversal, the discontinuation or the stay of the aid measures. The challenge for Dutch judges lies in the fact that the actual state aid (the transfer of state resources) often entangled in a web of contractual civil as well as public law relationships. The relevant remedies such as damages, invalidity, dissolution etc., do not accommodate recovery seamlessly. On the other hand, this variety of remedies also offers more possibilities eventually to effectuate recovery. The main avenue to effectuate recovery in civil law is the claim of undue payment.[35] In the *Fleuren Compost* judgment (2007) the Rotterdam District Court accepted such a claim by the Dutch state against a company that had received illegal aid.[36] However, the court also made clear that the interest could be claimed only insofar as Dutch civil law provides for this. It is generally assumed that this amounts to less than EU law requires.[37] Undue payment (of the beneficiary of the state aid) as a legal basis for recovery can also be used when the contract that governs the aid has been annulled by a court because of breach of article 108(3) TFEU.[38] This approach ensues from the *Residex* judgment of the ECJ in 2011.[39] A similar claim to undue payment is that of unjustified enrichment. This can, on the basis of an interpretation of Dutch law (i.e. of the concept of unjustified enrichment) in conformity with EU law, ensure recovery in cases of (illegal) aid that concern relationships between more than two parties.[40]

[35] *'Onverschuldigde betaling'* in art. 6:203 Dutch Civil Code (*Burgerlijk Wetboek*).

[36] District Court Rotterdam, 4 July 2007, *BPM*, ECLI:NL:RBROT:2007:BB0270. This case concerned state aid by way of a subsidy. Although the state aid took place in the context of administrative law the recovery had to be effectuated before a civil court as the administrated court was only entitled to annul the administrative decision through which the aid was granted, this according to Administrative Jurisdiction Division of the Council of State, 11 January 2006, *BPM*, ECLI:NL:RVS:2006:AU9416.

[37] Art. 6:120 Dutch Civil Code (*Burgerlijk Wetboek*). The statutory interest is lower and the period concerned starts when the claim is submitted and not when the aid itself started. This discrepancy provoked an infringement procedure by the Commission (C-401/07) that was removed from the register of the ECJ in 2008 when the Dutch government declared to change the law in that respect.

[38] On the basis of art. 3:40(2) Dutch Civil Code (*Burgerlijk Wetboek*) a contract that infringes art. 108(3) TFEU is to be considered void.

[39] ECJ 8 December 2011, C-275/10, *Residex*, ECLI: ECLI:EU:C:2011:814. District Court Noord Nederland, 1 July 2015, *Harlingen/Spaansen Holding*, ECLI:NL:RBNNE:2015:3300.

[40] '*Ongerechtvaardigde verrijking*' in art. 6:12 Civil Code (*Burgerlijk Wetboek*). District Court Rotterdam, 18 September 2013, ECLI:NL:RBROT:2013:9330, *KG Holding.*

In administrative law, a court can only assess the administrative decision that is the object of appeal. Therefore, the outcome can also only be the confirmation or the annulment of that decision. This limits the possibilities of recovery of state aid. When the concerned administrative decision has been annulled, a separate decision will have to be taken by the authorities to effectuate recovery. The leading case in this respect is the so-called *BPM* case. To follow-up on Decision 2001/521/EC of 13 December 2000,[41] the Dutch authorities adopted a decision on 5 April 2004 to recover the illegal aid granted to NN on the basis of the *Bijdrageregeling Proefprojecten Mestverwerking (BPM)* (aid scheme for pilot projects in manure-processing). The District Court of Den Bosch ruled in 2004 that the authorities were entitled on the basis of the articles 4:49 and 4:57 General Administrative Act[42] to adopt a decision repealing the decision granting the subsidy and ordering the recovery of the transferred sum in order to effectuate a negative state aid decision of the European Commission.[43] In appeal, the Council of State (Judiciary Division) took the opportunity to give some clarification on the (national) principles underlying a decision to recover state aid. First of all, the Council of State, referring to case law of the CJEU (C-142-87, C-5/89) explicitly stated that a national basis was required, unless the procedures applied in national law would render the recovery as required by EU law practically impossible or utterly difficult (Council of State, 11 January 2006, BPM, ECLI:NL:RVS:2006:AU9416, para. 2.3). Thus, the Commission Decision ordering the recovery of the aid could not in itself be seen as providing a legal basis for the recovery of state aid. Subsequently, it was noted that the decision for the order for recovery of the state aid had been based on (new) articles of the General Administrative Act that were not in force when the recovery decision had been made.[44] This meant there was no *written* basis to be found in national law at the time of the recovery decision. Instead of striking down the judgment of the district court in its entirety, however, the Council of State found a national legal basis in the unwritten (principle of) administrative law, which holds that a (favourable) decision could in principle be withdrawn if circumstances give rise to this. Connecting this (Dutch) principle to the European principle of effectiveness and the principle of cooperation as laid down in Article 10 EC (presently

[41] OJ EC, L 189/13. An appeal by another affected company was dismissed by the Court of First Instance on 14 January 2004, T-109/01, *Fleuren Compost*, ECLI:EU:T:2004:4.

[42] Articles 4:49 (on withdrawal and amendment of subsidy decisions) and 4:57 (on undue paid subsidies) *Algemene wet bestuursrecht*. Also relevant is art. 16 BPM that stated that a beneficiary was only entitled to the subsidy when articles of the General Administrative Act did not apply yet on the case at hand the Commission had not made an objection.

[43] District Court 's-Hertogenbosch, 26 November 2004, *BPM*, ECLI:NL:RBSHE:2004:AR6630.

[44] The provisions date from 1998 and the case from 1995.

article 4(3) TEU), the Council of State found that the administrative authority was competent to recover the BPM-subsidy, on the basis that the BPM-subsidy had been unduly paid to the beneficiary. This approach, however, did not work out for the recovery of the interest concerned, and the Council of State ruled that no legal basis could be found to recover any interest.[45]

In a more recent case[46], the Council of State slightly deviated from its former approach by adding that, besides unwritten (principles of) administrative law, a legal basis for the recovery of state aid could be found in (the direct effect of) article 108(3) TFEU itself.

In fiscal law, the recovery of state aid is at present not specifically dealt with in legislation. The most relevant provisions seem to be Article 16 (*navordering*) and Article 20 (*naheffing*) of the General Tax Act (*Algemene wet inzake rijksbelastingen; AWR*), which also applies to taxes at the provincial and municipal level. The object and purpose of these provisions is to provide for a legal basis for the tax authorities to correct mistakes in decisions made either by themselves or by the taxpayer. It is not surprising that the possibility to correct mistakes is subject to certain limits to protect the taxpayer. For instance, Article 16 AWR – a provision applicable to direct taxation such as corporate income tax – states that an additional tax assessment is possible only if the tax authorities have discovered a 'new fact' the existence of which they could not have known before.[47] Another case in point related to fiscal law is that the Dutch statute of limitation is, in principle, five years, whereas EU law requires that there is a limitation period of ten years for recovery. This raises the question whether, faced with contradictory statutes of limitation, the national court would be obliged to set aside the national statute of limitation. The case law in this field of fiscal law is scarce. In 1997, the Netherlands adopted a scheme to compensate petrol stations near the German border that had difficulties to compete with German stations where excise duties on petrol, diesel and liquid gas were lower following a recent change in Dutch fiscal legislation. The subsequent decision 1999/705/EC[48] declared the aid illegal and ordered its recovery.[49] More recent is the *Starbucks* case. It concerned an APA that had been concluded by the Dutch tax authorities with Starbucks' Dutch subsidiaries. On the basis of such a fiscal ruling, according to the Commission, Starbucks could reduce its tax liability and therefore benefit from

[45] Council of State, 11 January 2006, *BPM*, ECLI:NL:RVS:2006:AU9416.

[46] Council of State, 15 April 2015, *Zorg en Zekerheid*, ECLI:NL:RVS:2015:1152

[47] Furthermore – and this is a more general point – , general (national) principles of good governance could potentially limit the practical use of provisions such as Articles 16 as well as Article 20 AWR. We are not aware of any case law dealing with these issues.

[48] OJ EC 1999, L 280/87.

[49] This was confirmed by the ECJ in its judgment of 13 June 2002, C-382/99, ECLI:EU:C:2002:363.

a selective advantage. The European Commission adopted a negative decision in November 2015,[50] which was subsequently challenged before the General Court of the European Union by the Dutch State and by Starbucks.[51] Recovery however, has reportedly already taken place as the appeal in Luxemburg has no suspensory effect.[52]

In April 2008, a draft was presented to Dutch Parliament to introduce a legal basis for recovery of state aid in civil, administrative as well as fiscal law.[53] It would deal with a recovery order by the EC as well as by a EU court and by a Dutch court. The draft however, became stillborn within a few months. After nine years, in July 2017, a new draft was presented to Parliament; the old proposal has been withdrawn.[54] The Act on recovery of state aid[55] will serve as an autonomous legal basis for recovery of state aid in the civil and administrative law spheres and is intended to offer solutions to all issues that had arisen in Dutch case law during the past years (position of third parties, interest rate, time limits etc.). The draft has a bearing on (i) recovery (including the connected interest rate) following a decision by the European Commission and (ii) on the applicable interest rate when recovery has been ordered not by the EC but by a Dutch court. When no EC decision has (yet) been taken but a Dutch court orders a recovery, the recovery of the principal amount itself will not be governed by this draft and be considered to be the consequence of the fact that the national court has declared the state aid illegal. Recovery will then be enforceable on the basis of undue payment. In cases covered by the draft the recovery order will be taken by an administrative decision issued by the authority responsible for the state aid. In respect of tax cases, the proposal simply introduces two new provisions in the AWR – Articles 20a and 20b – which state that recovery of state aid in the tax area will be governed by the normal rules on taxation, thereby setting aside any obstacles for such recovery (statutory time limits and other conditions such as the one of a 'new fact'). The interest rate will be governed by EU law instead of national law. The proposal makes it clear that the recovery of state aid will take the form of a tax assessment. This is important, because the availability of a tax credit for the avoidance of double taxation in other countries may depend on this.

To our understanding, there have been no cases where a Dutch court has refused to allow for the full recovery of illegal state aid. Dutch judges have always

[50] Decision (EU) 2017/502 of 21 October 2015, OJ EU 2017, L 83/38. The Netherlands was to recover € 25,7 millions (*Financieele Dagblad*, 30 August 2016).

[51] T-636/16, Starbucks and Starbucks Manufacturing Emea/Commission, case still pending.

[52] Art. 278 TFEU.

[53] *Kamerstukken* 2007/08, 31 148.

[54] Voorstel van wet houdende regels voor de terugvordering van staatssteun (Wet terugvordering staatssteun), Kamerstukken 2016/17, 34754, nr. 2.

[55] *Wet terugvordering staatssteun*.

tried to accommodate a recovery order by the European Commission. This has however sometimes led to some legal frictions as discussed *supra* but these were generally solved by judicial creativity.

In this regard, we also mention the infringement procedure[56] against the Netherlands regarding the recovery of the interest (rate) of state aid that had been granted by way of a subsidy in breach of state aid law.[57] The Commission claimed that according to the Council of State (Judiciary Division) the principal sum had to be recovered through administrative law procedures while the interest had to be recovered through civil law procedures which was unnecessarily complicated and time consuming.[58] Furthermore the concerned company, Fleuren Compost, had only submitted a bank guarantee without making the repayment itself. The case was removed from the register of the CJEU in 2008 after the Netherlands promised to adopt legislation in that respect.

6. International property and investor protection

The Netherlands has concluded 95 bilateral investment treaties with other countries, 4 of which have not yet entered into force.[59] These countries are located in Asia, Latin America, Africa and Eastern Europe. The Dutch government has published a Model Agreement on encouragement and reciprocal protection of investments in 2004, which serves as a basis for the Dutch treaty negotiators (hereinafter: the Model Treaty).[60]

Article 3 of the Model Treaty states the following about fair and equitable treatment, non-discrimination and the most-favoured nation principle:

1) Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection.
2) More particularly, each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that

[56] C-401/07.

[57] Decision 2001/521/EC of 13 December 2000, OJ EC, L 189/13.

[58] The Dutch case that the Commission had in mind was Administrative Jurisdiction Division of the Council of State, 11 January 2006, *BPM*, ECLI:NL:RVS:2006:AU9416.

[59] An overview of these treaties has been published here: https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2010/02/22/ibo-landenlijst/IBO+overzicht+Nederland+update+jan+2016.pdf.

[60] This model treaty has been published here: https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/convenanten/2004/08/27/ibo-modelovereenkomst/ibo-modelovereenkomst.pdf.

accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.

3) If a Contracting Party has accorded special advantages to nationals of any third State by virtue of agreements establishing customs unions, economic unions, monetary unions or similar institutions, or on the basis of interim agreements leading to such unions or institutions, that Contracting Party shall not be obliged to accord such advantages to nationals of the other Contracting Party.
4) Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.
5) If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by nationals of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall, to the extent that it is more favourable, prevail over the present Agreement.

According to Article 1 of the Model Treaty, the term "investments" means every kind of asset and more particularly, though not exclusively:

(i) movable and immovable property as well as any other rights in rem in respect of every kind of asset;
(ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
(iii) claims to money, to other assets or to any performance having an economic value;
(iv) rights in the field of intellectual property, technical processes, goodwill and know-how;
(v) rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources.

Article 6 of the Model Treaty contains the following safeguards around the deprivation of investments:

> Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:
>
> *a)* the measures are taken in the public interest and under due process of law;
>
> *b)* the measures are not discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given;

c) the measures are taken against just compensation. Such compensation shall represent the genuine value of the investments affected, shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.

Article 9 of the Model Treaty provides:

Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965. A legal person which is a national of one Contracting Party and which before such a dispute arises is controlled by nationals of the other Contracting Party shall, in accordance with Article 25 (2) (b) of the Convention, for the purpose of the Convention be treated as a national of the other Contracting Party.

Article 10 of the Model Treaty states that its provisions shall, from the date of entry into force thereof, also apply to investments, which have been made before that date. Article 14(3) of the Model Treaty adds that in respect of investments made before the date of the termination of the treaty, its provisions shall continue to be effective for a further period of fifteen years from that date. Specifically on taxation, Article 4 of the Model Treaty provides:

With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to nationals of the other Contracting Party who are engaged in any economic activity in its territory, treatment not less favourable than that accorded to its own nationals or to those of any third State who are in the same circumstances, whichever is more favourable to the nationals concerned. For this purpose, however, any special fiscal advantages accorded by that Party, shall not be taken into account:

a) under an agreement for the avoidance of double taxation; or

b) by virtue of its participation in a customs union, economic union or similar institution; or

c) on the basis of reciprocity with a third State.

The Netherlands has not concluded a bilateral investment treaty with the United States or the United Kingdom. With respect to the United States, however, a treaty of friendship does exist.[61] Article I(1) of that treaty states:

> Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests.

Article 6 of the treaty of friendship states with respect to investment protection, non-discrimination and favoured-nation treatment:

> 1. Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party.
>
> 2. (...)
>
> 3. Neither Party shall take unreasonable or discriminatory measures that would impair the rights or interests within its territories of nationals and companies of the other Party, whether in their capital, or in their enterprises and the property thereof, or in the skills, arts or technology which they have supplied.
>
> 4. Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public interest, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.
>
> 5. Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraphs 2 and 4 of the present Article. Moreover, enterprises in which nationals and companies of either Party have a substantial interest shall be accorded, within the territories of the other Party, not less than national treatment and most-favored nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control or administration.

Article XI specifically deals with tax issues:

> 1. Nationals of either Party residing within the territories of the other Party, and nationals and companies of either Party engaged in trade or other gainful pursuit or in scientific, educational, religious or philanthropic activities within the territories of the other Party,

[61] Treaty of Friendship, Commerce and Navigation between the Kingdom of the Netherlands and the United States of America of 27 March 1956, Trb. 1956, 40.

shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, within the territories of such other Party, more burdensome than those borne by nationals and companies of such other Party.

2. With respect to nationals of either Party who are neither resident nor engaged in trade or other gainful pursuit within the territories of the other Party, and with respect to companies of either Party which are not engaged in trade or other gainful pursuit within the territories of the other Party, it shall be the aim of such other Party to apply in general the principle set forth in paragraph 1 of the present Article.

3. Nationals and companies of either Party shall in no case be subject, within the territories of the other Party, to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, more burdensome than those borne by nationals, residents and companies of any third country.

4. In the case of companies and of non-resident nationals of either Party engaged in trade or other gainful pursuit within the territories of the other Party, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories, nor grant deductions and exemptions less than those reasonably allocable or apportionable to its territories. A comparable rule shall apply also in the case of companies organized and operated exclusively for scientific, educational, religious or philanthropic purposes.

According to Protocol 12 to the treaty of friendship, nothing in the present Treaty shall be construed to supersede any provision of the Convention between the Kingdom of the Netherlands and the United States of America with respect to taxes on income and certain other taxes, signed at Washington April 29, 1948.

If obligations of European Union law and a bilateral treaty collide the Dutch courts will do everything they can to achieve an interpretation of the bilateral agreement in conformity with Union law. If this is not possible, European Union law will take precedence if the interests of the other contracting state are not jeopardised.[62] If the interests of the other contracting state would, however, be violated, a distinction has to be made between the situation where i) the treaty partner is an EU Member State and ii) the treaty partner is a third country. In the first situation, the European Commission is of the view that European Union law should prevail. For this reason, it has started infringement proceedings against, inter alia, the Netherlands for maintaining bilateral investment treaties with

[62] E.g. CJEU 16 October 2008, C-527/06, Renneberg.

other EU Member States.[63] It is our expectation that the Netherlands courts would indeed give precedence to Union law in case of a conflict between Union law and a bilateral treaty with another Member State.[64] In the second situation, Regulation No 1219/2012 confirms that the Netherlands continues to be bound, under international law, to bilateral investments treaties with third countries, under the conditions set out in that regulation.[65] It is indeed our expectation that the Dutch courts will share this basic starting position that the Netherlands, as a state, is bound to its treaties with third countries and that it cannot invoke EU law vis-à-vis that third country as a reason not to apply the treaty (compare Article 27 VCLT).

7. Final remarks

The present report has discussed the structure, procedure and content of the Dutch tax ruling process. Specific remarks have been made with respect to the arm's length principle in Dutch tax law and with respect to the *fraus legis* doctrine in the Netherlands. The Dutch regulatory framework on the recovery of unlawful state aid has been reviewed, both under current and future legislation. Finally, an overview has been provided of the international obligations of the Netherlands in respect of property and investor protection. We hope that the overview provided in this report will be useful for the preparation. We are looking forward to participating in the XXVIII FIDE Congress in Portugal.

[63] European Commission, press release of 18 June 2015, IP/15/5198.

[64] Compare CJEU 27 September 1988, 235/87, Matteucci.

[65] Regulation No 1219/2012 of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

UNITED KINGDOM

Professor Andrea Biondi*
Kelly Stricklin-Coutinho**

Part I

Question 1

Broadly speaking, there are two methods of achieving advance legal certainty in tax matters which are granted by the tax authority in the UK, Her Majesty's Revenue and Customs ("HMRC"). In the first place, there are formal rulings available from HMRC, the basis for which is set out in statute. These are sometimes described as statutory clearances. In the second place, there are informal clearance procedures, which operate differently and provide a different level of certainty.

We will consider statutory clearances first.

HMRC Guidance[1] "Seeking clearance or approval for a transaction" sets out the following categories of tax legislation in respect of which statutory clearance or approval is available:

- Transfer Pricing advance pricing agreements ("APAs"), under Part 4 of TIOPA 2010 and Statement of Practice ("SP") 2/2010 and the earlier SP3/1999. Further detail on transfer pricing APAs is set out below.
- Capital Gains Tax:

* Professor of EU law, Director Centre of European Law, Kings College London & Academic Associate 39 Essex Chambers.
** Barrister 39 Essex Chambers London and Fellow, Centre of European Law, King's College London.
[1] https://www.gov.uk/guidance/seeking-clearance-or-approval-for-a-transaction

  - Share exchanges pursuant to section 138(1) of the Taxation of Chargeable Gains Act 1992 ("TCGA 1992")
  - Reconstruction involving the transfer of a business pursuant to section 139(5) TCGA 1992
  - Collective Investment Schemes: Exchanges, Mergers and Schemes of Reconstruction pursuant to section 103K TCGA 1992
  - Transfer of a UK trade between EU Member States, pursuant to section 140B TCGA 1992 and section 140D TCGA 1992.
- Purchase of own shares by unquoted trading companies, pursuant to section 1044 of the Corporation Tax Act 2010 ("CTA 2010")
- Demergers pursuant to section 1091 CTA 2010
- Enterprise Investment Scheme shares, in particular their acquisition by a new company, pursuant to section 247(1)(f) of the Income Tax Act 2007 ("ITA 2007")
- Company reorganisations involving intangible fixed assets, pursuant to section 831 CTA 2009
- Transactions in securities, pursuant to section 748 CTA 2010 and section 701 ITA 2007
- Confirmation of the customer's view of the tax consequences of assigning a lease granted at under value
- Loan relationships, as to transfers pursuant to sections 426 and 427 CTA 2009, and as to mergers pursuant to section 437 CTA 2009
- Derivative contracts, as to transfers pursuant to section 677 CTA 2009 and as to mergers section 686 CTA 2009
- Capital Gains tax targeted anti-avoidance rule, pursuant to sections 184G and 184H TCGA 1992
- Cross border transfer of a loan relationship, derivative contract or intangible fixed assets under section 117(4) TIOPA 2010
- Continuity of Seed Enterprise Investment Scheme relief under section 257HB ITA 2007, as updated by Finance Act 2012
- Qualifying life assurance policies, as set out in Schedule 15 of the Income and Corporation Taxes Act 1998 ("ICTA 1988")
- Transactions in shares or debentures, as set out in section 765 and section 765A of ICTA 1988. This regime, repealed by Finance Act 2009, concerned the requirement to obtain HM Treasury's consent prior to the migration of a company, and was the subject of Case 81/87 *Daily Mail* [1988] ECR 5483.

In addition to the above provisions, it is to be noted that the historic thin capitalisation regime allowed for Advance Thin Capitalisation Agreements ("ATCA"), in respect of which HMRC set out guidance in SP 4/2007 which was replaced

with SP 1/2012[2]. The application of the ATCA was limited, under SP1/2012[3] to tax treatment for transfer pricing purposes only (rather than as to any other tax deductions). It was also noted that the ATCA could apply to current, future and historic periods, and HMRC encouraged use of a model agreement.

As to non-statutory clearance or approval, HMRC's Guidance identifies the following categories of tax in respect of which non-statutory clearance is available:

- As to company migrations, notification of a company's migration and approval of arrangements for the payment of tax liabilities, pursuant to sections 109B to 109F of the Taxes Management Act 1970 ("TMA 1970"), and SP 2/1990
- Clearances in relation to Controlled Foreign Companies ("CFC") legislation, pursuant to Part 9A of Taxation (International and Other Provisions) Act 2010 ("TIOPA 2010") as regards the CFC rules currently in force and pursuant to sections 747 to 756 and Schedules 24 to 26 of ICTA 1988 in respect of the CFC rules previously in force.
- A series of schemes for investment in the UK:
    - Inward Investment Support service, in respect of which HMRC will "discuss the tax implications of your investment"
    - Business Investment Relief Provisions, in respect of which there is a Business Investment Relief Advance Assurance checklist available, and HMRC may be contacted by way of an application for advance clearance
    - Industries termed "Creative Industries" to which a relevant scheme may apply may contact HMRC's Creative Industries unit for "advice on the workings of the scheme as it applies…" The legislative schemes which are included under this grouping are Film Tax, Animation Tax, High-end Television Tax and Video Games Development Reliefs.
    - Enterprise Investment Scheme ("EIS"), Seed Enterprise Investment Scheme ("SEIS"), and Venture Capital Trust scheme ("VCT"). HMRC says that staff in the relevant team may advise on the workings of the schemes "as well as providing non-statutory advance assurance to companies seeking investment under these schemes."

HMRC also notes in the Guidance that where a bank has adopted the Code of Practice on Taxation for Banks (under which banks commit not to undertake any tax planning which achieves a tax result contrary to the intentions of Parliament), the bank should not be involved in any arrangements to which the GAAR might

[2] https://www.gov.uk/government/publications/statement-of-practice-1-2012

[3] https://www.gov.uk/hmrc-internal-manuals/international-manual/intm520085

apply. The Guidance goes on to say that there may be arrangements to which the GAAR does not apply, which HMRC nonetheless consider to be unacceptable under the Code of Practice on Taxation for Banks. Therefore, when HMRC is approached by a bank as to compliance with the Code of Practice on Taxation for Banks, it will provide its view of that compliance.

The same Guidance sets out that HMRC will not give a clearance, whether formal or informal, to the effect that the General Anti-Abuse Rule does not apply. HMRC draws a distinction between commercial arrangements (in respect of which it will engage directly with large businesses and individuals), and is prepared to confirm in those circumstances that it does not regard those circumstances as tax avoidance. The Guidance sets out its position in the following way:

"HMRC has always made it clear that no assurances about the tax treatment of a transaction will be given in any situation where, in HMRC's view, the arrangements constitute tax avoidance. Because the GAAR will only apply to abusive avoidance arrangements, this applies equally to any arrangements which might be caught by the GAAR. As part of its model of direct engagement with large businesses and wealthy individuals, HMRC discusses commercial arrangements and confirms where appropriate that it doesn't regard particular arrangements as tax avoidance. In these cases, HMRC intends that open discussions with taxpayers about commercial transactions should continue."

Additional Requirements for Eligibility

In addition to the requirements of compliance with the relevant statute and in addition to the specific points noted in the section above, HMRC gives Guidance[4] on the Non-statutory clearance service, on how a clearance might be obtained.

HMRC say they prior to approaching the clearance service, the taxpayer must have first checked that the transaction is not covered by a more appropriate clearance or approval route, and that the taxpayer must have considered HMRC's guidance "to see if this answers your question".

HMRC will not approve on a non-statutory clearance basis a matter for which there is a statutory clearance applicable to the transaction. HMRC will provide advice where the taxpayer has considered the relevant guidance, has not been able to find the requisite information and remains uncertain about HMRC's interpretation of tax legislation. In these circumstances, HMRC say they will set out their advice in writing.

Under this guidance HMRC note that there are certain circumstances where they will not provide advice, which include:

[4] https://www.gov.uk/guidance/non-statutory-clearance-service-guidance

- Where the necessary information has not been provided
- Where HMRC do not consider there to be genuine points of uncertainty. In this case HMRC will direct the taxpayer to the relevant online guidance.
- Where HMRC is being asked to give tax planning advice or to approve tax planning products or arrangements
- Where the application concerns transactions for the purposes of avoiding tax
- Where HMRC is enquiring into the taxpayer's tax position
- Where the tax return for the period is final
- Where the situation concerns Chapter 5 Part 5 Income Tax (Trading and Other Income) Act 2005, which concerns settlements, or the tax consequences of executing non-charitable trust deeds or settlements

HMRC have set out in a number of checklists the information required for various types of application. The annexes are:

- "Annex A for all transactions other than Business Investment Relief, Business Property Relief and VAT (see below) – please head your letter 'Clearance service'
- Annex B for advance assurance on Business Investment Relief for non-domiciled persons taxed on the remittance basis – please head your letter 'Advance Assurance for Business Investment Relief'
- Annex C for Inheritance Tax Business Property Relief clearances
- Annex D for VAT clearances
- Annex E for post transaction clearances connected to an offshore disclosure"

The guidance says that HMRC will usually reply within 28 days unless a matter is difficult or complicated.

An application for a non-statutory clearance does not interfere with the ordinary time limits within which a taxpayer must pay tax or file its tax returns. HMRC does allow amendments to tax returns where advice has been sought from HMRC but the response has not been received before the deadline to file the tax return. However, ordinary limitation periods for amendment of the tax returns continue to apply.

Transfer Pricing APAs

Specific rules for advance pricing agreements are set out under Part 4 of TIOPA 2010. Section 218 defines an advance pricing agreement as a written agreement that is "made by the Commissioners with any person ("A") as a consequence of an application by the person, under section 223 of TIOPA 2010, which relates to

specific matters and which declares that an agreement is made for the purposes of the legislation.

The specific matters in respect of which an advance pricing agreement may be made are:

1) If A is not a company, the attribution of income to a branch or agency through which A has been carrying on a trade in the UK, or is proposing to do so
2) If A is a company, the attribution of income to a permanent establishment through which A has been carrying on a trade in the UK, or is proposing to do so
3) The attribution of income to any permanent establishment of A's, wherever situated, through which A has been carrying on a business, or proposes to do so
4) The extent to which income that has arisen or may arise to A is to be taken for any purpose to be income arising in a country or territory outside the UK
5) The treatment for tax purposes of any provision made or imposed, whether before or after the date of the agreement, between A and any associate of A
6) The treatment for tax purposes of any provision made or imposed, whether before or after the date of the agreement, as between an oil-related ring-fence trade carried on by A and any other activities carried on by A.

As set out above, HMRC has agreed tax rulings on transfer pricing in the form of APAs since 1999. SP 3/99 was replaced by SP 2/10, which was itself last updated on 8 November 2016[5]. We will refer to it in its updated form as SP 2/10.

SP 2/10 sets out the following key points as to how the regime is intended to work:

1. An APA will be a written agreement which determines "a method for resolving transfer pricing issues in advance of a return being made." (paragraph 1)
2. The matters which may be dealt with by way of an APA are set out in s218(2) TIOPA 2010, and concern the following broad situations (paragraph 3):
   a. Transfer pricing between separate business enterprises, specifically the interpretation of the arm's length provision in the legislation
   b. The attribution of profit or income between parts of a business enterprise operating in more than one country, where questions arise to the attribution of taxable income
   c. The UK oil-related ring-fence

[5] https://www.gov.uk/government/publications/statement-of-practice-2-2010/statement-of-practice-2-2010

3. APAs may cover one transfer pricing issue or all of a business' transfer pricing issues. It may also be out in place in respect of pre-existing issues (paragraph 4).
4. No determination is made as to the existence of a permanent establishment (PE) in the context of the APA legislation, nor is there scope under the legislation or guidance for any determination regarding the Diverted Profits Tax legislation (paragraphs 5 & 6).
5. Three forms of APA are provided for, being unilateral, bilateral and multilateral.
6. A unilateral APA is one between a UK business and HMRC, pursuant to section 218 TIOPA 2010. A unilateral APA therefore settles the tax treatment of the transaction in the UK, but not in any other relevant country (paragraph 9).
7. In order to ensure the relief of double taxation in respect of transfer pricing issues where a double taxation agreement ("DTA") exists between the UK and the relevant company, and where such DTA contains a provision for a mutual agreement procedure, it is necessary for HMRC to agree the tax position with the relevant tax administration in the other country. HMRC refers to these agreements as bilateral APAs or MAP APAs (paragraph 9).
8. Multilateral APAs are described as APAs involving all the tax administrations affected by transfer pricing issues. Multilateral APAs may include the use of multilateral instruments for exchanging information (paragraph 11).
9. HMRC indicates a preference for bilateral rather than unilateral APAs because unilateral APAs are of less value both to HMRC and to potential applicants, and provide less transparency (paragraph 13).
10. APAs may be requested by any UK resident business (including a partnership) with transactions to which Part 4 TIOPA 2010 applies, to any non-resident trading in the UK through a PE and any UK resident trading through a PE outside the UK (paragraph 15).
11. As to how an APA request will be considered, HMRC states the following:

    "16. Every APA request will be considered on the basis of its particular facts and features, but generally HMRC will be looking at the following factors taken together, whether:

    - the transfer pricing issues are complex rather than straightforward. To HMRC 'complex' means there is real doubt as to how the arm's length standard should be applied. Conversely, where market comparables can be readily identified for the transaction(s) in point in accordance with the OECD Transfer Pricing Guidelines HMRC is likely to regard such

a situation as 'straightforward'. HMRC will be willing to consider an innovative proposal providing that there is not a more appropriate and straightforward method, it is compliant with OECD Guidelines, and not one that HMRC considers it or its Treaty Partners would regard as being overtly tax aggressive
- without an APA there is a high likelihood of double taxation
- HMRC consider that it is a good use of taxpayer and governmental resources"

12. HMRC note that because small and medium enterprises are exempt from the UK's transfer pricing legislation (pursuant to section 166 TIOPA 2010), there are fewer occasions on which an APA is relevant for smaller businesses.
13. HMRC also refer specifically to the (lack of) need for APAs in UK to UK transactions in the following way:
"18. Since April 2004 UK-to-UK transactions have been subject to transfer pricing legislation: but, HMRC does not generally see such transactions as likely to warrant an APA. However, some UK-to-UK transactions, for example oil-related ring fenced trades, are specifically provided for in legislation."
14. The process by which an APA may be agreed involves an initial contact by the business by way of an expression of interest, to discuss plans informally, prior to presentation of a formal application (paragraph 20). The APA expression of interest may be made to the APA lead in the CT International & Stamps Directorate ("CTIS"), and where the taxpayer has a customer relationship manager ("CRM"), the CRM should be made aware of and be copied into correspondence in respect of the proposed APA (paragraphs 20 – 21).
15. Entry into the APA programme is not automatic (paragraph 24).
16. The formal written APA application should be made within 6 months of the expression of interest meeting or correspondence (paragraph 30) and should include the information set out in annex 1 to SP 2/2010.

Question 2

Verification of the facts set out in a request for a ruling

In respect of transfer pricing APAs, the updated version of SP 2/2010 sets out the following information as to how it will evaluate the application made to it:

> "34. On receipt of an application HMRC will evaluate its contents and will seek clarification and further information from the business as necessary. The examination of the application should be a co-operative process in which the transfer pricing issues are discussed openly and access to relevant supporting information and

documentation is made available. Lack of co-operation in these respects may result in HMRC declining to give any further consideration to the application.

35. Where a bilateral APA is being sought, HMRC will expect the business to continue to make relevant information available at the same time to each Administration involved, and in turn will itself keep the treaty partner informed about the progress of its examination of the APA request, will seek to discuss with the treaty partner key issues arising at the earliest opportunity and will keep the business informed about the progress of the bilateral process. Whilst the finalizing of a bilateral agreement with a treaty partner is a government-to-government process, HMRC is generally prepared to participate in, and encourages, joint meetings involving the business and the other Administration(s) to assist in the exploration and evaluation of key factual issues."

The terms of the APA will usually include a commitment from the business to provide an annual report on compliance with the APA, as required by section 228 TIOPA 2010. The annual report will typically accompany the taxpayer's tax return, and be sent to the CRM (but not to CTIS).

The UK operates a system for taxpayers to self-assess their liability to corporation tax (known as Corporation Tax Self-Assessment or CTSA), pursuant to Schedule 18 to the Finance Act 1998. The UK's CTSA system applies to periods ending on or after 1 July 1999. Prior to that, taxpayers provided information to HMRC, who then made an assessment to corporation tax. As such, under the current system, the taxpayer files its tax return, following which HMRC has a period of time within which it may open an enquiry into the details of the tax return. The enquiry period ends when a closure notice is issued by HMRC, pursuant to paragraph 32 of Schedule 18 to Finance Act 1998. As such, it is possible that a taxpayer might file a tax return on the basis of its continued compliance with its APA. HMRC may enquire during the enquiry period into facts arising from the tax return, including whether the taxpayer in fact continues to comply with its APA.

There are also some provisions which entitle HMRC to look into tax returns, for limited reasons, after the period in which they may open an enquiry has expired. One example of this is that HMRC may make a discovery assessment, pursuant to paragraph 41 of Schedule 18 to Finance Act 1998, where HMRC makes a discovery that tax has been underpaid in respect of an accounting period for which HMRC is out of time to adjust the tax liability through an enquiry. There are additional periods within which HMRC may look into the period if a return has been filed negligently or fraudulently.

In terms of what information HMRC may request from a taxpayer during the course of an enquiry, HMRC may request information relevant to the tax-

payer's tax position. These information powers are set out in further detail at question 3 below.

Question 3

We note the UK's general system of CTSA, enquiry into tax returns and subsequent procedures set out in answer to Question 2.

The UK has a general anti-abuse rule ("GAAR") and many targeted anti-abuse rules ("TAARs").

The GAAR is set out in Part 5 of and Schedule 43 to Finance Act 2013, and new schedules 43A to 43C to Finance Act 2013, which were inserted by Finance Act 2016. There are also additional provisions applying the GAAR to National Insurance Contributions in sections 10 and 11 of the National Insurance Act 2014.

The GAAR applies where there is an arrangement that gives rise to a tax advantage, in respect of a tax to which the GAAR applies, where it would be reasonable to conclude that the obtaining of a tax advantage was (one of) the main purpose(s) of the arrangement, and where the arrangement is abusive.

If the GAAR applies such that tax arrangements are considered to be abusive, then the tax advantage resulting from the abuse must be counteracted (either by the taxpayer or by HMRC) by making adjustments which are "just and reasonable", pursuant to section 209 Finance Act 2013.

It is for the taxpayer to self-assess its compliance with the GAAR.

The list of taxes to which the GAAR applies is:

- Corporation tax
- Income tax
- Capital Gains Tax
- Inheritance Tax
- Diverted Profits tax
- Apprenticeship Levy
- National Insurance Contributions
- Stamp Duty Land Tax
- Petroleum Revenue Tax
- The annual tax on enveloped dwellings ("ATED")
- The application of double tax treaty provisions

As will be seen, the GAAR applies, in principle, to several taxes in respect of which there exist statutory clearance procedures or non-statutory clearance procedures.

The GAAR is broad in its terms and does not require HMRC to enquire into the tax treatment afforded to a transaction by another country.

When HMRC does enquire into a tax return, it has broad powers to do so. Its power of enquiry "extends to anything contained in the return, or required to be contained in the return, including (a) any claim or election included in the return, (b) any amount that affects or may affect (i) the tax payable by that company for another accounting period, or (ii) the tax liability of another company for any accounting period...", pursuant to paragraph 25 of Schedule 18 to Finance Act 1998.

In the course of an enquiry, HMRC has the power, pursuant to paragraph 1 of Schedule 36 to Finance Act 2008, to require a company to produce information or documents which it reasonably requires for the purpose of checking the taxpayer's tax position. The documents must be in the taxpayer's possession or power. Failure to comply with such a request on a taxpayer's part may result in liability to pay penalties, pursuant to part 7 of Schedule 36 to Finance Act 2008. HMRC also has powers to require information about a taxpayer from a third party, pursuant to paragraph 2 of Schedule 36 to Finance Act 2008, and paragraph 5A to Schedule 26 to Finance Act 2008.

As such, there is no general legislation which requires HMRC to check the tax treatment of a transaction in another country, either as part of an audit or prior to issuing a tax assessment, but HMRC has broad powers to check into the circumstances which relate to anything which is in the tax return.

Question 4

Circumstances in which tax authorities would not be bound by a ruling

Section 221 of TIOPA 2010 provides that an APA "does not have effect" in relation to any determination of a question where any of the following conditions are met:

a) A time to which the question relates is after a time as from which an officer has revoked the agreement in accordance with the agreement's terms
b) The question relates to at time after, or in relation to which there has been a failure by a party to the agreement to comply with a significant provision of the agreement
c) The question relates to a matter as respects which a key condition has not been met or is no longer met.

Where HMRC has agreed a statutory clearance procedure, such as an APA, HMRC may revoke the APA, in accordance with section 225 of TIOPA 2010. That provision states that an agreement may provide for the modification or revocation of an agreement, by the Commissioners or an officer of HMRC, to take effect from the date determined by the Commissioners or officer of HMRC. Pursuant to section 226 of TIOPA 2010, an APA may also be annulled where the taxpayer who has entered into the agreement has fraudulently or negligently

provided HMRC with information (in connection with the agreement) which is false or misleading. The consequence of such annulment is that the agreement is to be treated as never made and HMRC may impose a penalty of not more than £10,000.

In its guidance, HMRC describes the basis on which an agreement may no longer be relied upon as being "where the business does not comply with the terms and conditions of the agreement, or where the identified critical assumptions cease to be valid", as set out in paragraph 46 of SP 2/2010. The guidance does note that in practice, when HMRC is considering nullifying, revoking or cancelling a bilateral APA, it will consult both the taxpayer and the Competent Authority of the relevant treaty partner.

Similar guidance is set out in SP 1/2012, in respect of ATCAs, in which paragraph 32 states that:

"Where HMRC believes that the business entering into the agreement has fraudulently or negligently provided false or misleading information in connection with the making of the agreement or otherwise in the preparation of the agreement, TIOPA 2010, section 266 gives HMRC the power to annul the ATCA, i.e. to treat it as if it had never been made. When considering using this power HMRC will take into account the extent to which the terms of the agreement would have been different in the absence of the misrepresentation."

The English courts have also considered circumstances in which a taxpayer can rely on a ruling. Such principles demonstrate also when a tax authority is not bound by a ruling.

In *R v IRC ex p MFK Underwriting Agencies* [1990] 1 WLR 1545, a taxpayer seeking a ruling must "pull all his cards face upwards on the table", must make plain that fully considered guidance is sought and as to what that guidance is sought, and indicate the use intended to be made of the guidance, including whether the taxpayer proposes to tell others of it.

The English courts have continued to place emphasis on the taxpayer's disclosure of the relevant facts, for example in *R v IRC ex p Matrix Securities Ltd* [1994] 1 WLR 334, in which the House of Lords held that HMRC was not bound by the clearance for reasons including that HMRC had not had the facts fully disclosed to them. In addition, the judgment also noted that the legal issues relating to the clearance had not been clearly set out, that the taxpayer had knowingly not applied to the correct level of authority in HMRC and had requested that the clearance, which concerned very complicated material, be given within a day.

In a similar way, the principle of full disclosure of the relevant facts was central to the High Court's rejection of the taxpayer's application to judicially review HMRC's decision to withdraw a VAT ruling in *R (The Medical Protection Society Ltd) v HMRC* [2009] EWHC 2780 (Admin).

A contrary principle which must be taken into account is the public law principle of legitimate expectation, where, based on a representation by a government body (here HMRC), a claimant might have a legitimate expectation of particular treatment. In *R (GSTS Pathology LLP) v HMRC* [2013] EWHC 1823 (Admin), the High Court decided that the taxpayer had a legitimate expectation that it would receive the treatment in its earlier ruling, as HMRC had been given full disclosure of the information and the ruling was unequivocal.

HMRC provided guidance, "When you can rely on information or advice provided by HM Revenue and Customs"[6], in which HMRC notes that the information or advice only applies to the applicant, regardless of whether the application has been made by an advisor, and only applies to the subject matter of the request. The guidance also notes that in order for the advice to be binding, the taxpayer must set out all the relevant facts and draw attention to all the issues. Reference is also made to changes in the law following HMRC advice negating the binding nature of the advice that was previously given.

The guidance also addresses the situation where HMRC has provided by incorrect information or advice, and notes that HMRC will be bound by it despite its incorrect nature, provided the advice is clear and the taxpayer can demonstrate that they relied on the advice, that they fully disclosed all relevant facts and applying the law would result in the taxpayer's financial detriment.

Question 5

As set out above, in relation to transfer pricing, where the income is regulated by a bilateral or multilateral APA, HMRC will agree the tax position with the competent authorities of other relevant countries. According to HMRC guidance set out above, a unilateral APA is unlikely to be accepted in the APA programme unless it can be shown that a unilateral APA is suitable for the circumstances.

Where income can properly be attributed to the UK it will be the subject of UK corporation tax rules, which may include the apportionment of income under the Controlled Foreign Company ("CFC" rules). Similarly, the UK has operated thin capitalisation rules, debt cap rules and continues to operate interest deductibility rules and transfer pricing rules.

Mechanism

The procedural mechanism by way of which an adjustment may be made is through the process referred to above for an enquiry into a tax return.

Once an enquiry process has ended, HMRC must provide the taxpayer with a closure notice, which confirms that the statutory enquiry process has ended,

[6] https://www.gov.uk/guidance/when-you-can-rely-on-information-or-advice-provided-by-hm-revenue-and-customs

and which sets out the outcome, pursuant to paragraph 32 of Schedule 18 to Finance Act 1998. A taxpayer may ask the tax tribunal for a direction that the enquiry should be closed, if HMRC do not do so, pursuant to paragraph 33 of Schedule 18 to Finance Act 1998.

The tax tribunal must determine the application to close the enquiry unless it is satisfied that there are "reasonable grounds for not giving a closure notice within the specified period.". Pursuant to paragraph 34 of Schedule 18 to Finance Act 1998, a closure notice must either state that in HMRC's opinion, no amendment is required of the return, or it must make the amendments of that return that are required to give effect to the conclusions stated in the notice. If amendments are required to other company tax returns delivered by the company to give effect to the conclusions stated in the closure notice, then HMRC may issue a further notice to the company to make those amendments. The amendments may be appealed by the taxpayer, provided notice of that appeal is given in writing, within 30 days after the amendment was notified to the company, and is made to the officer of HMRC by whom the closure notice was given.

Question 6

There is no general rule allocating corporate profits as a matter of corporation tax, although there are rules as to the allocation of profits and losses amongst partners in a partnership. There are specifically targeted rules which apportion profits deemed to be incorrectly allocated between related companies, such as the CFC rules, and the Diverted Profits Tax is designed to counter aggressive tax planning schemes used to divert profits from the UK.

Question 7

Current Transfer Pricing Rules

For accounting periods ending on or after 1 April 2010, the UK's transfer pricing rules are contained in part 4 of TIOPA 2010.

Section 164 of TIOPA 2010 addresses the application of OECD principles in relation to transfer pricing. The section provides that part 4 of TIOPA 2010 is to be read in such a manner as best secures consistency between the effect given to the legislation and "the effect, which, in accordance with the transfer pricing guidelines, is to be given, in cases where double taxation arrangements incorporate the whole or any part of the OECD model, to so much of the arrangements as does so." The legislation goes on to make reference to the version of the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations approved by the OECD on 22 July 2010, as revised by the BEPS reports published by the OECD on 5 October 2015, or any other document later published by the OECD, as designated by HM Treasury.

Broadly speaking, the rules permit HMRC to adjust, for transfer pricing purposes, the price paid for goods and services sold or supplied between associated persons, when intra-group transactions take place on a non-arm's length basis, to be replaced by what would be applicable if the arm's length provision had been made or imposed instead of the actual provision.

The transfer pricing rules only apply if the "participation condition" is met (sections 147 and 148 TIOPA 2010).

As regards financing arrangements (which are defined as those made for or providing or guaranteeing or otherwise in connection with any debt, capital or other form of finance), the participation condition is met where, at the time of the actual provision (or within 6 months of the provision being made), one of the affected persons was directly or indirectly participating in the management, control or capital of the other, or the same person (or persons) was directly or indirectly participating in the management, control or capital of each of the affected persons (condition A).

As regards provisions not relating to financing arrangements, the participation condition is met where at the time of the actual provision, one of the affected persons was directly or indirectly participating in the management, control or capital of the other, or the same person (or persons) was directly or indirectly participating in the management, control or capital of each of the affected persons (condition B).

Historic Rules

The UK's transfer pricing rules for accounting periods before 1 April 2010 were found in Schedule 28AA to ICTA 1988.

Question 8

We have set out above the procedural mechanism through which an adjustment of figures included in a CTSA return may be adjusted.

In addition to the procedural mechanism, the UK has operated controlled foreign corporation ("CFC") rules which allow for profits declared to arise in another country to be apportioned to the UK and taxed as if they arose in the UK. The UK also has attribution of capital profits to the UK under section 13 of the Taxation of Chargeable Gains Act 1992 ("TCGA 1992").

Historic CFC regime

Different CFC rules applied to CFCs with accounting periods beginning before 1 January 2013 ("the old CFC rules"). The old CFC rules were introduced in 1984. A company was a CFC if it was resident outside the UK for tax purposes, subject to a lower level of taxation and either controlled by persons resident in the UK or

at least 40% controlled by a UK person and at least 40% (but not more than 55%) controlled by a non-UK person (pursuant to section 747 ICTA 1988). Broadly speaking, where a company was a CFC and did not fit within an exemption, then the total profits of the CFC and any tax credits were apportioned between those who had an interest in the CFC.

The exemptions referred to above were as follows.

1) If a CFC pursued an acceptable distribution policy ("ADP"), then the profits would be exempt. The ADP required the CFC to distribute at least 90% of the CFC's net chargeable profits to UK residents within 18 months of the end of its accounting period.
2) CFCs undertaking exempt activities were automatically taken outside the scope of the CFC rules. Exempt activities required a CFC to have a business establishment in its territory of residence, its business affairs to be effectively managed in its territory of residence and its main business must not consist of certain precluded activities (such as investment business or dealing in goods for delivery to or from the UK).
3) There was no apportionment of profits where the transactions of the CFC achieve "a reduction in UK tax", provided that a reduction in UK tax by diversion of profits from the UK was not a main reason for the CFC's existence, and it was not a main purpose of the transaction to achieve the reduction.
4) Subject to several conditions, there was an exemption for a company whose shares were quoted and traded on a recognised stock exchange, where 35% or more of the voting power was owned by ordinary shareholders.
5) Where the taxable income profits were £50,000 or less, no apportionment was required.
6) The Controlled Foreign Companies (Excluded Countries) Regulations 1998 (SI 1998/3081) operated to provide a "white list" of countries which were wholly or partly outside the CFC rules.

Some additional exemptions were provided for by way of interim reform, which included one for trading companies with a limited UK connection and companies exploiting IP with a limited UK connection.

Current CFC regime

The new CFC regime, introduced by section 180 of and Schedule 20 to Finance Act 2012, applies to accounting periods beginning on or after 1 January 2013.

Under the new regime, a CFC is a non-UK resident company controlled (within the meaning of Chapter 18 of TIOPA 2010) by a UK resident person (pursuant to section 371AA (3) and (6) of TIOPA 2010). The rules provide for

establishing the residence of the CFC, by way of either (in order of priority), the territory in which the CFC is liable to pay tax by reason of domicile, residence or place of management, where the CFC is UK incorporated and deemed to be non-UK resident under relevant double taxation arrangements the territory set out in those arrangements, and the territory in which the CFC is incorporated or formed (pursuant to sections 371TA and 371TB TOPA 2010).

There are three tests, any of which may be satisfied, as to who controls the foreign company. The tests are as to legal control, economic rights and accounting principles.

In addition, there are rules as to where a UK resident controller has interests, rights and powers representing at least 40% of the controllers' holdings (and where a joint non-UK resident controller has interests, rights and powers greater than 40% but less than 55% of the controllers' holdings) (section 371RC TIOPA 2010).

A CFC charge applies where there is a CFC with chargeable profits for the relevant accounting period, there is a chargeable company, and none of the exemptions apply (sections 371BA and 371BC TIOPA 2010).

Exemptions exist as follows:

1) Exempt period exemption which allows a period of time before the CFC rules apply to newly acquired foreign companies (Section 371JB TIOPA 2010)
2) The excluded territories exemption for (broadly) where companies operating in countries with a corporate tax regime similar to the UK's, and where headline rates of tax are greater than 75% of the UK's rate
3) The low profits exemption where the CFC's accounting profits, or its assumed taxable total profits, are not more than £500,000 and not more than £50,000 is non-trading income (section 371LB of TIOPA 2010)
4) The low profit margin exemption where the CFC's accounting profits before interest deduction are not more than 10% of the CFC's operating expenditure for accounting purposes (excluding certain costs) (section 371MB of TIOPA 2010
5) Finance company exemptions (Chapter 9) are provided in relation only to the profits of the CFC that qualify for the exemption (as opposed to the exemptions above, which are made in relation to the entity, rather than specific profits). Finance company exemptions are available as either a full or partial exemption on profits from all of the CFC's qualifying loan relationships that are made out of qualifying resources.

The European Commission announced on 26th October 2017 that it has opened an in-depth investigation into an exemption from the CFC rules. The

exemption concerned is that which exempts certain financing income. The European Commission notes in its press release[7] that the exemption operates to exempt from UK tax financing income received by an offshore subsidiary from another foreign group company, which has the effect that the multinational in the UK can provide financing to a foreign group company via an offshore subsidiary, paying little or no tax on the profits of those transactions. The concern raised by the European Commission is that little or no tax on the financing income is paid in the country where the offshore subsidiary is based, and the income is also not (or only partially) reallocated to the UK for taxation, because of the operation of the exemption.

Attribution of Capital Gains

Generally speaking, capital gains which accrue to a company are taxable in the hands of the company, and not in the hands of its shareholders. However, if a company meets the definition of a "close company" if it were resident in the UK, chargeable gains are attributed to any shareholder with an interest in the company where the shareholding or interest exceeds 25% (or 10% for disposals made before 6 April 2012), pursuant to section 13 TCGA 1992.

Section 62 of Finance Act 2013 amended the legislation to the effect that gains may only be attributed to participators with a participation exceeding 25%, gains are not attributable if the asset was used only for the purposes of economically significant activities carried on by the company wholly or mainly outside the UK, and gains are not attributable if neither the disposal, the acquisition or holding of the asset by the company was part of a scheme or arrangements for the avoidance of capital gains tax or corporation tax.

Diverted Profits Tax

In addition to the above mechanisms, the UK has put in place a diverted profits tax, which is a new tax which came into effect on 1 April 2015. It is not regarded by HMRC corporation tax and it has a separate mechanism, being a tax imposed on a taxpayer, rather than a self-assessed tax. However, its stated aim was to "introduce a new tax to counter the use of aggressive tax planning techniques used by multinational enterprises to divert profits from the UK"[8].

Question 9

As set out above, where an APA is in place in the UK, HMRC prefers to have a bilateral APA where the pricing is agreed both in relation to the UK and in relation to the other relevant countries.

[7] http://europa.eu/rapid/press-release_IP-17-4201_en.htm

[8] See HM Treasury: Autumn Statement 2014: Green book, paragraph 2.142.

A claim may be made to HMRC for the deduction of interest following a transfer pricing adjustment in another country. The usual rules of such claims would apply, such as those for time limits, interest and other ancillary matters.

Where another country deems a distribution to have been made, the dividend will now be exempt in the hands of the UK recipient if it is EU sourced.

Question 10

The UK has a GAAR. We have set out the provisions of the GAAR in answer to question 3.

The GAAR is an overriding legal rule and operates independently of other tax legislation. It may, therefore, be relevant where a targeted anti-avoidance rule ("TAAR") also applies.

Part II

Question 11

There are no specific rules in place for the recovery of fiscal state aid, once ordered by the European Commission or once held by an English Court. The High Court (Queens Bench Division) Administrative Court deals with judicial review actions, which include state aid cases.

HMRC may adjust a tax return in line with the legislation set out above, and may do so even up to ten years later, provided that an enquiry has been opened in time to do so, or provided that the adjustment to the tax return fits within one of the other provisions for an adjustment (such as a discovery assessment).

However, in circumstances where an enquiry has not been opened, and where alternate routes of adjusting a tax return are not available to HMRC (such as in relation to fraud, negligence or discovery assessments), HMRC (and possibly the Department for Business Energy and Industrial Strategy "BEIS") would be required to rely instead on taking litigation steps available under the common law.

Question 12

There has not been, at least to our knowledge, a case in the UK where a national judge has refused to order recovery of State aid, following a decision of the European Commission that state aid should be recovered. Actually, there has been no determination in the UK's national courts that State aid must be recovered. The only time the issue was discussed before a domestic court was in *DTI v British Aerospace and Rover* (1991) 1 CMLR 165. In the DTI case, the Commission found that the aid received by British Aerospace to assist with its purchase of Rover constituted illegal state aid. Following the Commission's decision to order recovery,

the UK government brought an action against British Aerospace before the High Court. These proceedings were stayed pending the outcome of an action for annulment of the Commission's decision. The Commission ultimately made a new recovery order, which was effected directly by the UK government without a court action.

It is to be noted that, the UK courts however found that tax discriminatory measures amount to unlawful aid at least in two cases: *R v Attorney-General, ex parte ICI* (1987) 1 CMLR 72 (CA) and *R v Commissioner for Customs and Excise, ex parte Lunn Poly* (1999) EuLR 653 (CA).

The UK has a current case being litigated by way of judicial review, in respect of whether a transaction involving a sporting arena amounted to State aid. The case had an earlier incarnation, *Sky Blue Sports & Leisure Ltd & Anor, R (on the application of) v Arena Coventry Ltd & Anor* [2016] EWCA Civ 453. The claimants in the case argue that illegal State aid was given and that the court should order recovery of the State aid. While the Courts consistently held in that case that there was no State aid, there was nothing in the judgments in those cases, which suggested that the English courts did not have the jurisdiction to order recovery of illegal State aid.

Question 13

The UK has one of the largest networks of bilateral investment treaties, which protect foreign investment. The UK has about 106 bilateral investment treaties, which are either currently in force or which are signed but not in force. Of those, 11 are signed but not in force. The UK has also terminated 4 bilateral investment treaties, three of which were replaced with new versions.[9]

The UK also has the right to protection of property in the context of the Human Rights Act 1998. There is a small amount of case law in respect of the application of the right to protection of property in the context of tax.

Question 14

This is a rather complex question to cover exhaustively especially with the deluge of commentary brought upon us by Brexit. We would simply note that despite all the interest generated, the UK Supreme Court decision in *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, is a very traditional confirmation that:

[9] For a full list of extra-EU BITs (those with a third country outside the EU), including with Albania, Serbia, and Turkey among the EU candidate states see https://www.crowell.com/files/20160927-Annex-2-Extra-EU-UK-BITs.pdf. For a full list of intra EU- BITs see https://www.crowell.com/files/20160927-Annex-l-Intra-EU-UK-BITs.pdf.

1) the government is vested with prerogative powers to make treaties and to withdraw from them. Both powers are 'exercisable without legislative authority' and are non-reviewable by the courts. Treaties are not part of UK law and create no legal rights in a dualist system. This protects the sovereignty of Parliament.
2) the European Communities Act of 1972, the act of accession to the then EEC and its modifications, has a '*constitutional character*' and makes EU law capable of overriding conflicting national law. It also provided '*a new constitutional process for making law* in the UK. The 1972 Act finally '*provided that rights, duties and rules derived from EU law should apply in the UK*'. Applying the well-known *Solange* rationale, the Supreme Court held that as long as the UK is in the EU, EU law must be applied in the UK.

English courts, generally, have been taking their EU obligations extremely seriously. With reference, to the relationship between international law obligations and EU law there has been, however, a prolonged discomfort caused by the position taken by EU law on the question of anti-suit injunctions, a typical common law remedy that prevents an opposing party from commencing or continuing a proceeding in another jurisdiction or forum. In the C-185/07 *West Tankers* ECLI: EU: C: 2009:69, the CJEU held that anti-suit injunctions should not be available to prevent proceedings in other European member state courts being brought in breach of an arbitration agreement under Brussels Regulation, because it '*necessarily amounts to stripping that court of the power to rule on its own jurisdiction*' and '*runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions*'. After the entry into force of the Recast Brussels Regulation (Regulation (EU) No. 1215/2012) that clarified that that prohibition did not apply to arbitration, in case C-536/13 *Gazprom* ECLI: EU: C: 2015:316, the CJEU, despite allowing the possibility of anti-suit injunctions in that context, refused to question *West Tankers,* thus implicitly rejecting the possibility of a general admissibility of anti-suit injunctions. English courts – despite not formally challenging the CJEU case law, barely hidden their contrariety and in several cases attempted to protect arbitration agreements by enforcing declaration of awards despite the possibility of inconsistent judgments in other Member states, for instance in West *Tankers Inc v Allianz SPA & Generali Assicurazione Generali SPA* [2012] EWCA Civ 27. Further, in *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd*, [2008] ICR 18, the Court of Appeal had no hesitation in granting an anti-suit injunction restraining the proceedings in New York. In that case, the Court considered the effect of the Brussels Regulation, which provides that an employer can only sue an employee on matters relating to individual contracts of employment in their country of domicile. The Court held that this extended to

companies in the multinational group of which the employer formed part. It also dismissed as of no relevance that fact that it was possible that the courts in some other EU Member States did not have equivalent powers to grant anti-suit injunctions. The same approach was confirmed in *James Petter v EMC Europe Limited and EMC Corporation* [2015] EWCA Civ 828. The UK Supreme Court in *Ust-Kamenogorsk Hydropower Plant JSC (Appellant) v AES Ust-Kamenogorsk Hydropower Plant LLP* [2011] EWCA Civ 647 also held that that English courts have jurisdiction to grant an injunction in order to restrain foreign proceedings brought in breach of an arbitration agreement, where there is no existing or proposed arbitration. It also added that, however, where court proceedings are brought in a jurisdiction within the European regime of the Brussels Regulation (EC) No 44/2001 or the Lugano Convention, English courts will not grant an antisuit injunction.

Another interesting example is *Micula & others v Romania* [2017] EWHC 31 (Comm), concerning UK obligations under EU and the Convention on the International Centre for Settlement of Investment Disputes (the ICSID Convention). This is yet another chapter of the now rather famous Micula saga on the question on the enforceability of a ICSID award in circumstances where the European Commission had determined that implementation or execution of the award would constitute new State aid.[10] In 2014 the English courts registered the award as required by national law, the Arbitration Act of 1966 that embodies Article 54 of the ICSID Convention, which requires the UK to recognize and enforce an award as if it were a final judgement of its own courts. Romania, supported by the European Commission, to the courts to have the registration revoked. In a case defined of "exceptional nature", the High Court refused Romania's application, to set aside the registration, as there was no risk of conflicting outcomes with EU law. The English court opined that in the first place the registration of the award did not really put Romania in danger of infringing its EU law obligations. It drew a rather formalistic distinction between registering an award and execution of that judgment. As the Court observed '*registration is not necessarily a precursor to execution, though it may lead to it*'. In the case at hand, there was still no 'execution' that would have put Romania in conflict with the award. Secondly, as to avoid any possible conflicts, it granted a stay of enforcement proceedings in the United Kingdom pending the decision of the EU General Court in an action on the annulment of the Commission decision.[11] According to the High Court, the registration of an award should be equated to a final domestic judgment and as such subject to the same rules and conditions applicable to a judgment

[10] See further European Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN).

[11] T-704/15, *Micula v Commission*, pending.

of a national court, including the EU law derived obligations. Thus, because of the European Commission position on the presumed illegality of the original award with the state aid regime, the High Court found that it could not proceed to enforcement. It also added that because of the pending General Court decision on annulment, there was a "*material risk of conflict*" with that decision. The English court decision is indeed 'Solomonic': on the one hand, it attempts to preserve the UK obligations under the ICSID Convention and on the other is striving to comply with its EU obligation.

In these tempestuous times, it may thus appropriate to conclude this report with King Salomon's words: '*the rivers run into the sea; yet the sea is not full*'.

TABLE OF CONTENTS

INTRODUCTION 7

QUESTIONNAIRE 33

GENERAL REPORT 51

INSTITUTIONAL REPORT 99

NATIONAL REPORTS 159
- AUSTRIA 161
- BULGARIA 179
- CROATIA 193
- CYPRUS 203
- CZECH REPUBLIC 215
- DENMARK 227
- ESTONIA 237
- FINLAND 255
- FRANCE 273
- GERMANY 299
- GREECE 327
- HUNGARY 371
- IRELAND 381
- ITALY 391
- NORWAY 411
- POLAND 429
- PORTUGAL 439
- ROMANIA 463
- SLOVENIA 477
- SPAIN 495
- SWEDEN 519
- THE NETHERLANDS 527
- UNITED KINGDOM 545