XXVIII FIDE Congress

Topic 2: Taxation, State aid and distortions of competition

General rapporteur: **Raymond Luja**
Institutional rapporteur: **Julia Rapp**

Questionnaire

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.

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.