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# Developments in Europe

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# European Union



# Eurozone



# Council of Europe



# Roadmap

- EU tax initiatives
- Combating tax evasion
- Recent case-law

# EU Tax Initiatives

- Principles
  - Sovereignty of Member States
  - Subsidiarity
  - Unanimity
  - Crisis
- CCCTB (Common consolidated corporate tax basis)
- FTT (Financial transaction tax)

# CCCTB

- Common tax base for corporate tax
  - All revenues, except
    - Dividends and capital gains on shares
    - Profits from foreign PEs
  - Deductible expenses
    - Business expenses, including notably
      - R&D
      - Interest
    - Certain other items
      - Donations to charities < .5% of revenues
      - Depreciation of most fixed assets
    - Disallowed expenses
  - Indefinite carry forward of losses

# CCCTB

- Consolidated
  - Criteria
    - 50% voting rights and
    - 75% ownership
  - Benefits
    - No economic double taxation
    - No transfer pricing issues
    - Set-off of losses
  - Single tax administration



# CCCTB

- Anti-abuse rules
  - Disregard
    - *“Artificial transactions carried out for the sole purpose of avoiding taxation”* except
      - Genuine commercial activities and
      - Choice between two or more possible transactions
  - Interest paid to tax havens
  - Controlled foreign companies

# CCCTB

- Apportionment
  - Labour
    - Payroll
    - Number of employees
  - Assets
    - Fixed tangible assets
    - Intangibles and financial assets excluded
  - Sales
  - Safeguard clause
- National tax rates
- Optional

# FTT

## Scope

- Making the financial sector pay
- Tax on gross amounts
- Rate of
  - .1%
  - .01% for derivatives
- Financial transaction involving
  - One party in a Member State and
  - A financial institution in that Member State

# FTT

## Exceptions

- Private Households and SMEs:
  - Enterprise borrowing/lending
  - Mortgage loans
  - Consumer credits
  - Insurance contracts
  - Payment transactions, etc.

# FTT

## Exceptions

- Large and international business:
  - Primary market transactions for raising capital through the issuing of shares and bonds except for
    - shares and units of collective investment undertakings
  - Spot currency transactions (as opposed to currency derivatives)
- Public borrowing and monetary policy

# Combating tax evasion

- Doing away with bank secrecy
- OECD initiatives
  - “Authorized approach”
  - “Global forum” grey list
- Savings directive
  - Draft amendment
  - But new Switzerland treaties

# Savings Directive

- Council Directive 2003/48/EC on the taxation of savings income in the form of interest payments
- Principles
  - Interest paid to natural persons
  - Automatic exchange of information
  - Exceptions: Austria and Luxembourg
    - 35% withheld at source
    - $\frac{3}{4}$  transferred to domicile country

# Savings Directive

- Draft amendment
  - Target instruments equivalent to interest-bearing
    - Securities with
      - Protected capital
      - Pre-defined return on investment
    - Life insurance linked to debt with low risk component
    - Collective investment vehicles more broadly defined
  - Target circumvention circuits outside the EU
    - Trusts, foundations, etc.
    - Schemes where
      - Paid to non EU but
      - Beneficial owner (cf. money laundering) is EU



# Switzerland

- Treaty of 21 September 2011 with Germany
- Future
  - No automatic Exchange of Information
  - 26% withholding tax
- Past
  - Down payment of 2B€ by Swiss banks
  - Clients: choice between
    - Disclosure
    - Regularisation at 19 to 34%

# Switzerland

- Impending Treaty with United Kingdom
- Future
  - No automatic Exchange of Information
  - Withholding tax from 27 to 48%
- Past
  - Down payment of .5B€ by Swiss banks
  - Clients: choice between
    - Disclosure
    - Regularisation at 19 to 34%

# Recent Case-law

- Treaty freedoms
  - Establishment
  - Movement of capital
    - Also for third countries
  - TFEU contains no priority of source v. residence
- Justifications (subject to proportionality test)
  - Public interest
  - Balanced allocation of power to tax
  - Not
    - Loss of tax revenue
    - Lack of reciprocity from third countries
  - But
    - Credit may be made conditional on exchange of information
    - Residence State has no obligation to offset foreign withholding tax

# Haribo

ECJ 10 February 2011 C-436/08

- Taxation of portfolio dividends  
=> Freedom of capital movements
- Austrian corporate investors
- domestic source dividends exempt regardless of % held
- 3<sup>rd</sup> State dividends where holding is <10%:  
no relief from economic or juridical double taxation

# Haribo

ECJ 10 February 2011 C-436/08

- In relation to EU/EEA countries
  - Not permitted to subject exemption to DTC including enforcement assistance
  - Permitted to use
    - Exemption method for domestic dividends and
    - Credit method for foreign dividends
    - Provided credit available without excessive burdens

# Haribo

ECJ 10 February 2011 C-436/08

- In relation to third countries
  - When domestic dividends are exempt
  - Third countries dividends
    - Must be eligible for a method of double tax relief
    - May be subject to a different method (credit) provided
      - The results are equivalent
      - Credit may be carried forward in loss situation
    - May not be eligible for credit of foreign withholding tax

# Comm. v. Germany

ECJ 20 October 2011 C-284/09

- Withholding tax levied on dividends
- Refunded to domestic companies
- Waived when paid to EU or EEA companies with holding >10%
- Otherwise levied and final
  - Except for limited credit at home under DTC
- Violation of free movement of capital
- Quid for 3<sup>rd</sup> countries?

# Yukos

ECtHR 20 September 2011

- European court of human rights (Strasbourg)
- European convention on human rights of 4 November 1950
- Council of Europe
- Right to
  - Fair trial
  - Protection of property



# Yukos

ECtHR 20 September 2011

- Yukos
  - Listed energy company
  - Managed by Mikhail Khodorkovsky
  - Tax re-assessment for tax evasion
    - Several billions of \$
    - Plus interest and penalties
  - Bankruptcy in spite of tax challenge
  - Sale of assets to government owned entities
  - Mikhail Khodorkovsky sentenced to prison

# Yukos

ECtHR 20 September 2011

- Court findings
  - No disguised expropriation
  - Unfair trial
    - Insufficient time for Yukos to prepare its defence
  - Breach of property protection
    - Imposition and calculation of penalties
    - Rash (and expensive: 7%) enforcement
  - Case not ready for “just satisfaction”