

New Trends in Harmonization in the European Union

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1. EU Charter of Fundamental Rights: a new broader framework for the protection of basic rights
2. Recent and expected developments in secondary European tax law
3. Fiscal Transparency
4. Good Governance

1.1

The EU Charter of Fundamental Rights and EU Law

1.1 Legal value & content of the EU Charter of Fundamental Rights

LEGAL VALUE

- Treaty of Nice (2000): approved (no binding value)
- Treaty of Lisbon (2009): new status (=> binding value)

CONTENT

- Fundamental principles of the European Union: a general framework for European Union law
 - Accession of the EU to ECHR
- Flexible link with the European Convention on Human Rights
 - ECHR as minimal standard
 - EU law can ensure a stronger protection
- No specific tax provision, but several articles potentially affecting tax matters

1.1 The EU Charter and EU law

Article 6 TEU

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union...which shall have the same legal value as the Treaties
2. The Union shall accede to the ECHR. Such accession shall not affect the Union's competences as defined in the Treaties
3. Fundamental rights, as guaranteed by the ECHR and fundamental freedoms and as they result from the constitutional traditions common to the MSs, shall constitute general principles of the Union's law

1.2

The EU Charter of Fundamental Rights and Its Potential Implications in Tax Matters

1.2 General provisions of the Charter

- Article 51 – Scope
(=> to the institutions and bodies of the Union and to the MSs when implementing Union law)
No new power or task for the Community or the Union
- Article 52.3 – broad correspondence to ECHR
- Article 53 – Union law may not restrict ECHR
- Article 54 – Prohibition of abuse of rights
“nothing shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognized in this Charter or at their limitation to a greater extent than is provided for herein”

1.2 Some provisions of the Charter potentially applicable to taxes

- Article 8 – Protection of personal data
- Article 17 – Right to property
- Article 20 – Equality before the law
- Article 21 – Non-discrimination principle
- Article 41 – Right to good administration
- Article 42 – Right of access to documents
- Article 43 – Ombudsman
- Article 45 – Freedom of movement and of residence
- Article 47 – Right to an effective remedy and to a fair trial
- Article 48 – Presumption of innocence and right of defense
- Article 49 – Legality & proportionality of criminal offences & penalties
- Article 50 – Right not to be tried or punished twice in criminal proceedings for the same criminal offence

1.3

The EU Charter of Fundamental Rights and ECJ Developments on Tax Matters

1.3 ECJ 29.3.2012, case C-500/10, Belvedere Costruzioni

- Article 47 EU Charter of Rights: right to effective remedy and fair trial
- Italian amnesty (settlement) of long-standing judicial disputes
- ECJ, para. 23: "the obligation to ensure effective collection of European Union resources cannot run counter to compliance with the principle that judgment should be given within a reasonable time, which, under the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, must be observed by the Member States when they implement European Union law, and must also be observed under Article 6(1) of the ECHR"
- ECJ, para. 25 "The facts of the dispute in the main proceedings, which go back about 30 years, show that some of those proceedings have lasted for a much greater number of years. Such a length of proceedings is a priori capable in itself of infringing the reasonable time principle and, moreover, the obligation to ensure the effective collection of the European Union's own resources."

1.3 C-617/10 Åkerberg Fransson

- Interpretation of Article 6 TEU and Article 50 of the Charter of Fundamental Rights of the European Union (ne bis in idem in criminal proceedings) applied to a tax sanction levied in addition to a criminal sanction in respect of one and the same wrongful conduct
- Opinion AG Cruz to be delivered by 12.6.2012

2.1

The Proposed CCCTB Directive

2.1 CCCTB Draft Directive: the European Parliament Changes

- The draft for a CCCTB Directive was released in March 2011
- It will bring a harmonization in the taxable basis of corporation tax for multinational groups within the EU, be applicable on an optional basis, keep different rates for each State and determine a formulary apportionment of income assessed at group level, taking into account various factors (labour, capital and sales)
- On 29.3.2012 the European Parliament proposed some amendments to the proposed CCCTB draft:
 - It should be compulsory for all companies (except SMEs after a transitional period) and with a different application of the formulary apportionment

2.2

The Proposed Financial Transaction Tax Directive

2.2 – The FTT Directive (1/2)

- 28.9.2011: publication of COM(2011) 594 final - draft Directive on financial transaction tax (FTT)
- If approved, to enter into force by 1.1.2014
- UK has declared to be against FTT: likely approval by enhanced cooperation by all EU Member States plus other EU Member States willing to join
- Applicable to relevant “financial transactions” by “financial institutions” established in the EU

2.2 - An overview of the FTT proposed directive (2/2)

- The FTT will be levied on all *financial transactions*, provided that:
 - at least one party to the transaction is established in a Member State; and
 - a financial institution established in the territory of a Member State is party to the transaction.
- Broad **definition** of financial transaction: all purchase and sale of financial instruments, transfers within groups, derivatives, etc.
- Excluding primary market transactions raising capital, but also currency transactions on spot markets (if not related to derivatives)
- An indirect tax with possible cascading effects
- **Taxable event**: when the financial transaction takes place
- **Rates**: for derivatives not lower than 0.01%, for all others not lower than 0,1% of transaction

2.3

Fiscal transparency

3. Comparing standards of fiscal transparency in the future

EU 2011/16

- Previous exhaustion of legal remedies + prohibition of fishing expeditions
- Time-limits for forwarding information
- No banking secrecy
- Compulsory automatic EoI
- Joint audits (no direct effect)
- MFN principle
- EoI with third countries: 2 separate standards
- EoI Committee
- Data protection

OECD/CoE

- OECD prohibits fishing expeditions (but: US John Doe Summons)
- Linguistic discrepancies
- Different standards in some DTCs?
- Some DTCs still have narrow clauses
- Applicable to different EoI methods, usually upon request
- No bank secrecy
- TIEAs
- CoE: (15 countries) multilateral instrument advanced and revised in 2010

4.

EU and Good Governance

4. EU & good governance

- EU standard: efficiency, equity and sustainability, combined with the prohibition of harmful tax competition and complying with primary law
 - More than mere transparency
 - Crossroads between hard and soft approach to harmful tax competition: the Gibraltar judgment on State aids and preferential tax treatment applicable to offshore companies
 - 2.3.2012 Treaty on Fiscal Compact: good tax governance & Fiscal Union
- In relations with third countries: special emphasis on developing countries – above elements geared at supporting economic development with appropriate financial resources
- Critical issues:
 - National sovereignty in tax matters
 - Action with third countries in the presence of the so-called Rubik agreements with Switzerland