A non-interest-bearing deposit is required each time the Council decides on imposing the sanction. When the excessive deficit results from non-compliance with the criterion relating to the government deficit the amount of the first deposit shall comprise a fixed component equal to 0,2% of GDP, and a variable component shall equal to one tenth of the difference between the deficit as a percentage of GDP in the preceding year and the reference value of 3% of GDP. A deposit is, as a rule, converted into a fine if two years after the decision to require the Member State concerned to make a deposit, the excessive deficit has not been corrected in the view of the Council. Interest on the deposits are distributed among Member States without an excessive deficit.

The Council informs the European Parliament about its decisions. The Council gradually abrogates its all or certain former decisions on the matter, as the excessive deficit in the view of the Council has been corrected.[4] At the same time there are no possibility of protesting against the Council decisions under TEC.

4 See the Council Decision of 30 January 2007 abrogating Decision 2003/487/EC on the existence of an excessive deficit in France (OJ L 2007/68/3); the Council Decision of 5 June 2007 abrogating Decision 2004/917 on the existence of an excessive deficit in Greece (OJ L 2007/176/21); the Council Decision of 5 June 2007 abrogating Decision 2003/89 on the existence of an excessive deficit in Germany (OJ L 2007/183/23); the Council Decision of 5 June 2007 abrogating Decision 2005/186 on the existence of an excessive deficit in Malta (OJ L 2007/176/19).

VII

TAX LAW OF THE EUROPEAN UNION

1. THE NOTION OF CONTROL AND HARMONISATION OF THE NATIONAL TAXATION SYSTEMS WITHIN THE EU (A HISTORICAL PERSPECTIVE)

The legal provisions on taxes are crucial for implementation of the idea of single market of the European Union.

First of all, it is because the single market elimination levying of custom barriers, which should not be replaced with tax barriers, that could arise out of different tax systems of the EU Member States. Taxation argument that came to light after establishing of the European Coal and Steel Community between France and West Germany can serve as an example. The object of the argument was an alternative choice of the rule of country of origin or the rule of country of destination, while selecting applicable turnover tax. That was the reason why the Article 99 of the Treaty of Rome establishing the European Economic Community required the Commission to investigate the possibility of harmonisation of turnover tax and consumption tax. This was the ground for formation of various working groups by the Commission aiming at development of a concept of tax harmonisation.

Secondly, EU implies that everyone may benefit from free movement of goods and services, workers, capital and payments, though in the condition of free competition that needs a protection. That is why the tax provisions were put into the same part of TEC (ToFEU) which relates to protection of competition (Title VI).

According to the opinion expressed in the Neumark Report, the negative influence on the competition between the Member States is caused to a lesser degree by differences in the extent of total tax burden, but to a greater degree by structural diversification concerning specific taxes or groups of taxes. This is the source of the problem of adopting an adequate harmonisation model.

In the theory, there are three forms of harmonisation of tax systems:[1]

1) levelling tax rates;

1 D. Dosser, Economic Analysis of Tax Harmonization, in: Fiscal Harmonization in Common Market, vol. I, edited by Carl S. Shoup, Columbia University Press, New York, London 1967, pg. 33–40.

2) levelling tax system structures with maintaining the diversification between tax rates (diverse conception);

3) standardised approach.

The first form results in harmonisation, only if tax rates of the whole fiscal burden is made equal. It is still an unreliable method of harmonisation, because those are not only the tax rates that impact on the extent of tax burden. The second concept is hard to implement and lacks the certainty of actual harmonisation. The third one implies the necessity of development and adaptation of appropriate harmonisation standards. It is a common opinion that the harmonisation of tax systems ought to be regarded as a process of harmonisation of tax system structures in relation to more important tax types. Consequently it means that the harmonisation of indirect taxation and direct taxation should be treated separately, and at the same time it is better to avoid harmonisation of property tax and local taxes, as well as the tax collection procedure itself.

And thirdly, the EU Member States and OECD countries share the necessity of cooperation between tax administration. Because of those and other reasons the tax provisions are part of the primary legislation, as well as the EU secondary legislation. This is how the basis of the Member States obligations regarding harmonisation of national legislation with the community law was laid down. Consequently, the tax systems of the EU Member States were approximated, at least as far as the most important elements are concerned (indirect and excise taxes, partially the income and enterprise taxes).

Apart from the primary legislation, the most important, for the purpose of harmonisation of tax law, are the provisions of the Article 24 TEC (Article 29 ToFEU), Article 25–31 TEC (Article 30–37 ToFEU), Article 39(2) TEC (Article 45(2) ToFEU), Article 43 TEC (Article 49 ToFEU), Article 49 TEC (Article 56 ToFEU), Article 56 TEC (Article 63 ToFEU), Article 58 TEC (Article 65 ToFEU), Articles 90–95 TEC (Articles 110–115 ToFEU), Article 175 TEC (Article 192 ToFEU). Various obligations and limitations have been set out there.

The provisions of the Article 24 TEC (Article 29 ToFEU) and the Articles 25–31 TEC (Articles 30–37 ToFEU) enclose the essence of the customs union and do not apply to third countries. The customs union consists in application of no import or export custom duties and charges having equivalent effect are prohibited. Customs duties of a fiscal nature are restricted too. Quantitative restrictions on imports and all measures having equivalent effect, as well as state monopolies of commercial nature, are part of those limitations.

The restriction of any form of discrimination based on nationality as regards employment, including social conveniences and tax allowances, is regulated under

the Article 39(2) TEC (Article 45(2) ToFEU). The corresponding restrictions apply to enterprises (Article 43 TEC, Article 49 ToFEU) and services (Article 49 TEC, Article 56 ToFEU) as well as the freedom of movement of capital and payments (Articles 56 and 58 TEC, Article 63 and 65 ToFEU).

Furthermore, the objective of the Article 90 TEC (Article 110 ToFEU) is to counteract infringing of the freedom of competition and the rule of free movement of goods. No Member State may impose, directly or indirectly, any internal taxation of any kind on the products of other Member States in excess of that imposed directly or indirectly on similar domestic products or impose taxation of such nature as to afford indirect protection to other products.

According to the Article 91 TEC (Article 111 ToFEU) any possible repayment of internal taxation shall not exceed the internal taxation imposed on them whether directly or indirectly. Moreover, according to the Article 92 TEC (Article 112 ToFEU) in case of charges other than turnover taxes, excise duties and other forms of indirect taxation, remissions and repayments in respect of exports to other Member States may not be granted; and in respect of imports from Member States may not be imposed without prior consent of the Council acting by a qualified majority on a proposal from the Commission.

Under the Article 93 TEC (Article 113 ToFEU) and the directives adopted in its result, harmonisation of indirect taxation of particular Member States was established. The value added tax and harmonisation of excise taxation were introduced in place of various types of turnover taxes (in fact majority of them named otherwise).

The harmonisation process started as early as in 1967 and was being implemented under the First Council Directive of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ L 1967/71/1301). During the subsequent years further directives were issued, which were modified according to the ECJ jurisdiction. The Sixth Council Directive No 77/3888 of 17 May 1977 (OJ L 1977/145/1) is the most important of the directives. The directives on indirect taxation on capital accumulation should be noted separately.

As regards excise taxation on certain consumables it was agreed since the beginning that EEC harmonisation is needed, because the mechanism of levelling exchange rates as an instrument of eliminating competition deviations in exchange of products between the Member States is inadequate. Harmonisation of excise taxation proved though more complicated that harmonisation of turnover taxation. It came to light that in particular Member States there were excise taxes on different products, collected in different forms and according to inconsistent procedures and also of various rates. On top of that, the income derived from excise taxation is in some countries due to the national budget, while in the other to the local

budget. Production of some part of excise goods is in some countries a government monopoly.

The problem is also that application of excise taxation in respect of the country of destination does not often provide for actual levelling as regards tax competitiveness of the same products manufactured in different countries, when the production requires resources and supplementary materials that are subjected to excise taxation. Therefore, when excise taxation is imposed on the products of final consumption as well as on semi-finished articles, the harmonisation seems an indispensable process to be effected in a relatively short time. On the other hand, as for the excise taxes imposed on consumables only, the matter is not so urgent.

The EEC Commission, as early as in its programme for harmonisation of taxation of 8 February 1967, agreed that because of the difficulties in approximation between structures of particular excise taxes it was the most reasonable to gradually harmonise particular taxes first and later to take into account the multiple relations between different excise and turnover taxes.

The first proposals of the EEC Commission regarding harmonisation of consumption taxes consisted of three types of applicable measures:

1) preservation of excise taxes of major importance in the view of particular states budget income and their further harmonisation (excise taxes on alcohol beverages, tobaccos and mineral oils);
2) preservation of local consumption taxes without harmonisation, as having no significant impact on competitiveness of products originated from particular countries participating in the international exchange of goods;
3) elimination or incorporation of consumption taxes into the common system of turnover taxation of relatively small fiscal importance for particular countries.

The new wave of economic integration of the European Communities Member States was triggered in 1985. It was then, when the Commission published the "White Paper" on completing the Internal Market until December 1992. As regards the harmonisation of taxes only two taxes were of its concern, i.e. the value added tax and consumption taxes (excise tax). It was found that they were of the outmost importance for elimination of tax barriers in EEC. It was also deemed necessary to abandon the rule of taxation based on country of destination and to complete a common market with application of clearing system. In the Commission opinion, harmonisation of consumption taxation had to apply to mineral oil taxes, tobacco and tobacco products as well as spirits, beers and wines. It could therefore result in changes among social accents, consumption habits and amount of budget incomes. The Commission selected the consumption taxes and grouped them into

four categories: 1) taxes suitable for harmonisation, 2) taxes not to be harmonised because of their lack of impact on exchange of goods; 3) taxes to be incorporated into the value added tax; 4) taxes to be waived.

In 1986 the Single European Act amended the previous reading of the Article 99 of the Treaty on EEC. The Commission was obligated to submit to the Council of Ministers projects of modification of provisions on the value added tax, consumption taxes and other indirect taxes to the extent of completing the internal market. Since that time the decisions on harmonisation of taxes are adopted unanimously which makes the decisive process longer.

Harmonisation of excise taxes took place in October 1992. The directives issued at that time established new legal circumstances within the Community law. During the subsequent years they were being improved and in this form they are in force today.

Contemporarily, the Commission looks into purposefulness of undertaking further steps, including the possibility of waiving the excise taxes on some products such as coffee, tea, sugar, because of their small contribution to fiscal incomes. However, one should be aware that some countries are likely to oppose that, as facing budget deficit they are unwilling to give up any incomes or passing them to local budgets. The discussion concerning further improvement of the Community excise law continues. In 1996 this subject earned a separate conference in Lisbon.

As for the harmonisation of provisions on regulation of direct taxation the situation is different, since the harmonisation may consist only in so-called approximation of legal provisions, nonetheless implemented according to the Council directives. The Article 94 TEC constitutes the legal base for this process. The approximation of legal provisions on certain elements of income taxes was intended to be completed basing on this law. As a result the following directives were issued:

- the Council Directive No 90/435 of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ L 1990/225/1);
- the Council Directive No 90/434 of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ L 1990/225/1);
- the Council Directive No 2003/48 of 3 July 2003 on taxation of savings in the form of interest payments (OJ L 2003/157/38);
- the Council Directive No 2003/49 of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ L 2003/157/ 49).

The provisions of law concerning other direct taxes, including local taxes, were not programmed to be harmonised neither approximated. The same applies to the general tax law, including law on tax obligations and on tax procedures as well as tax control.

Among the other provisions of TEC the Article 175 (Article 193 ToFEU) should be mentioned, that regulates the issues of environment protection which granted the Council competences in the field of taxation, to the extent necessary to achieve the objectives of preservation, protection and improvement of environment, human health and natural resources excavation.

The legal provisions of the EU authorities ought to be pointed out separately, developed in line with so-called OECD Model Tax Convention, which constitute basis for bilateral conventions on taxation of incomes in between OECD associated countries on the one hand and between OECD associated countries and non-associated countries on the other. Those rules can be found also in the United Nations Model Double Taxation Convention between Developed and Developing Countries.

Basing on the Model Convention on income and property taxation, the guidelines are issued and corresponding implementation reports are developed. The most important ones are transfer pricing guidelines for multinational enterprises and tax administrations. For the first issue so-called Arbitration Convention is in force. The latter is governed with the Convention on Mutual Administrative Assistance in Tax Matters.

The process of harmonisation of taxation systems of the European Union Member States is dynamic. Various initiatives and actions, aiming at harmonisation of taxation systems, have been taken-up continuously. Since a certain time those actions have been put in frames of particular programmes.

Under the European Parliament and the Council Decision No 888/98 of 30 March 1998 a programme of Community action to improve the functioning of the indirect taxation systems of the internal market (Fiscalis Programme) was established (OJ L 1998/126/1). Its implementation contributed in a significant degree to achievement of the above specified objectives between 1998 and 2002. This was the reason for continuation of the programme in the next five-year period.

On 3 December 2002 the European Parliament and the Council adopted the Decision No 2235/2002 adopting a Community programme to improve the operation of taxation systems in the internal market (Fiscalis Programme 2003–2007; OJ L 2002/341/1). The Fiscalis Programme 2003–2007 consisted of the following activities: 1) communication and information-exchange systems; 2) multilateral

controls involving Member States; 3) seminars; 4) exchanges of officials; 5) training activities; 6) working meetings and visits.

The specific objectives of the programme were:

1) for value added tax and excise duties:
   - to enable officials to achieve a high common standard of understanding of the Community law and of its implementation in the Member States;
   - to secure efficient, effective and extensive cooperation among Member States;
   - to ensure the continuing improvement of administration procedures to take account of the needs of administrations and taxpayers through the development and dissemination of good administrative practice;

2) for direct taxation:
   - to provide support for information exchange in the field of mutual assistance and to raise awareness of the Community law.

The Programme was open to the participation of the countries associated with the European Union and the EU candidate countries.

The Programme also specified the activities taken-up within its framework and rules for financing them.

On 17 May 2006 the Commission presented a proposal for a Decision of the European Parliament and of the Council establishing a Community programme to improve the operation of taxation systems in the internal market (Fiscalis 2013 Programme). It has the same objectives and construction as the Fiscalis 2002–2007 Programme, and can be regarded as its continuation, slightly modified in comparison to the previous edition. On 18 January 2007 the European Economic and Social Committee expressed a positive opinion on the proposal (OJ C 2007/93/1), which nevertheless included a few critical remarks and suggestions. It is expected they will be taken into consideration in the Decision of the European Parliament and of the Council.

Recent activities concerning harmonisation of taxation systems as regards direct taxes are referred to below, under the section 3.3.

2. HARMONISATION OF INDIRECT TAXATION AT PRESENT

2.1. The Value Added Tax

As it has been highlighted previously, the greatest importance is attached to harmonisation of indirect taxation. For this purpose the harmonisation process stared at the very beginning and effected in adopting numerous directives, which also were amended. This caused that despite a satisfactory level of harmonisation of the value added tax and excise tax was achieved, the legal condition of this subject became hardly clear. Therefore in 2006 an effort to put it into order was undertaken.

In the result the Council Directive No 2006/112 of 28 November 2006 on the common system of value added tax was adopted (OJ L 2006/347/1). The directive has been in force since 1 January 2007. It repealed 34 directives functioning previously in the same area, beginning with the Directive No 67/227/EEC until the Directive No 2006/69. The new Directive is in effect a result of a procedure which can be regarded as codification of the community law on value added tax.

The content of the Directive 2006/112 is divided into provisions (in the total number of 414 articles), grouped in the structure of the following titles:

1) Subject matter and scope;
2) Territorial scope;
3) Taxable persons;
4) Taxable transactions;
5) Place of taxable transactions;
6) Chargeable event and chargeability of VAT;
7) Taxable amount;
8) Rates;
9) Exemptions;
10) Deductions;
11) Obligations of taxable persons and certain non-taxable persons;
12) Special schemes;
13) Derogations;
14) Miscellaneous;
15) Final provisions.

The Annexes in the total number of twelve are an integral part of the Directive.

The Directive establish a common system of value added tax (VAT). The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged. The common system of VAT shall be applied including and up to the retail trade stage.

VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, is chargeable on each transaction, after deduction of the amount of VAT born directly by the various cost components.

The following transactions are subject to VAT:

1) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;
2) the intra-Community acquisition of goods for consideration within the territory of a Member State;
3) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;
4) the importation of goods.

VAT is charged only if during the calendar year the total value of the intra-Community acquisition of goods exceeds a threshold determined by the Member States, not being less than EUR 10 000 or the equivalent in national currency, or when the total value of intra-Community acquisitions of goods does not exceed that threshold during the previous calendar year.

The Directive defines a taxable person and an enterprise very extensively. The Directive allows the Member States to regard as a taxable person also other persons to prevent tax avoidance. As to the rule, employees and bodies governed by the public law are not VAT taxable persons, unless the activity of the latter consist in actions that may lead to distortions of competitions.

It should be stressed that despite the complicated subject, the provisions of the Directive are made clear and understandable as well as logically and in an internally consistent way. The Directive specifies for which elements of the VAT construction the Member States are entitled to adopt other solutions (e.g. the provision of the Title XIII, Derogations) and whether it should be of constant or temporary nature (e.g. as regards the amount of the standard rate).

The provisions of the Title X, Deductions, deserve special attention, because they do not allow any doubts on what the national legislation may and may not regulate in an other way. This problem is very up-to-date as far as the Polish construction of goods and services tax is concerned, which makes one to get lost in

the maze of deductions and end up with an impression that hardly anything can be deducted, and even then it must be supported with documentary evidence that it is sometimes totally impossible.

2.2. The Excise Tax

The condition of the excise law in the European Union is governed by the provisions of the Council (directives, regulations, decisions, proposals).

Two Council Directives have general natur and regard all types of excise. They are as follows:

1) the Council Directive No 69/169/EEC of 28 May 1969 on harmonisation of provisions laid down by Law, Regulation or Administrative Action relating to exemption from turnover tax and excise duty on imports in international travel (OJ L 1969/ 133/6);
2) the Council Directive No 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ L 1992/76/1, amended by the Council Directive No 92/108/EEC OJ L1992/390/124).

At the earliest, the EEC Member States managed to harmonise legal provisions on exemption from turnover and excise taxation on import related to tourist movement. It was effected due to the Directive No 69/169/EEC of 28 May 1969. The importance of this law is that while purchasing products within the European Union there is a rule that allows taxation in the country of origin of the product only, and not in the country of the product destination. The persons with their place on living in one of the Member States may though, regardless the limits and the value (with a single exception of new cars), transport the goods purchased in an other Member State. The Directive No 69/169/EEC is applicable to import from third countries, and in such case limits exist in regard to the quantity (e.g. tobacco products: 200 pieces of cigarettes and 50 pieces of cigars, alcoholic beverages over 22 percent by volume – a bottle or two litres of wine, 50 grams of perfume or 0,25 of toilet water, 0,5 kilogram of coffee or 0,2 kilogram of coffee extract, 100 grams of tea or 40 grams of tea extract) and the value (the overall goods value per an adult may not exceed ECU 175).

The Directive No 92/12/EEC of 25 February 1992 is also of importance, for it lays down the rules of trading in goods subjected to excise taxation after completion of the common internal market. This Directive applies to excise due to: mineral oils, spirits and alcohol beverages, tobacco products. The Member States reserve the right to introduce or preserve the taxes imposed on other products, unless that

those taxes do not effect in formalities while crossing a border as regards trading in between the Member States. Nonetheless, as far as services taxation is concerned, the application of taxation of nature similar to turnover taxation is impossible.

The rule is that the production of the goods listed in above at the territory of the European Union or import of those goods into the EU territory is subjected to excise taxation. The tax obligation arise when a product is given to consumption. This applies also to production or informal import and resale of the same nature (e.g. outflows, own consumption). The tax is collected in respect to rates and conditions in force on the day when the tax obligation arises. The excise tax is imposed and collected according to the procedure adopted by each Member State.

For the products subject to excise taxation to be consumed in one Member State and stored for commercial purposes in other Member State, the excise tax is imposed in the Member State in which those products are stored. With respect to all circumstances the excise tax is due from the persons delivering or storing the products to be delivered or from persons receiving product for further use in an other Member State that the one in which the products are to be consumed, or form the other merchants. All those bodies have to fulfil the following requirements:

1) a declaration for the tax authorities of destination Member State must be filled in in advance, and the excise tax has to be paid;
2) the excise tax is paid according to the procedure set out by the destination Member State;
3) administrative control of the destination Member State is allowed to verify whether the goods were actually delivered and the excise tax was paid.

It is a rule that the excise tax is collected in the Member State in which the products are purchased. But if the products to be consumed in a Member State are stored for commercial purposes in another Member State, the tax is collected in the State in which territory the goods actually are present and is due from a person that is in possession of those goods. To estimate whether the goods are stored for commercial purposes, the commercial standing of a person in possession of the goods should be taken into consideration as well as the reason to store the goods, place and method of transporting of the products, their character and quantity, and the documents related to the production. The second exception, i.e. collecting the excise tax in the country of origin, is possible when the products subject to taxation are purchased by persons lacking the status of a professional entrepreneur.

The special attention is given in the Directive to the rules of production, processing and storage of goods subject to excise taxation. First of all, the rule that the production, processing and storage of those goods is performed under control of the authorities of the Member State is in force. Additionally a person that stores

the excise good is required to complete the obligations set out by the Member State in which territory the warehouse is located, to have appropriate documentation and to submit to control of production and storage. Any loss related to the production, storage or transit of the products, if resulted from the nature of those activities or caused by force majeure, justifies exemption from excise taxation.

Traffic of products between warehouses within one Member State and between a few Member States is thoroughly regulated under the Directive. The risk related to traffic of goods within the European Union is guaranteed by warehouse keeper and by the consignor and carrier of products. A competent authority of each Member State, for the purpose of excise taxation, keeps an electronic record of data concerning excise warehouses. Those data are confidential and are regarded as professional secret, however may be made accessible to the authorities of another Member State competent for excise matters.

The Directive also specifies requirements for persons who may receive excise products and the obligations of such persons. First of all, consignee has to be registered by a competent tax authority. The separate institution is tax representative is set out, to be established in the Member State of destination and approved by the tax authorities of that Member State. The tax representative (plenipotentiary) acts on behalf of excise products warehouse keeper.

Each operation of excise products movement has to be accompanied with an adequate document, which may be either of administrative or commercial nature. Its form and content is regulated by the Committee on Excise Duties, composed of the representatives of the Member States and chaired by a Commission representative. The document is issued by a technique that allows providing copies for the consignee and the competent authorities of the Member States of destination and of departure. Moreover the Directive provides an option that the excise goods carry fiscal or identification marks. It also specified the consequences of failure in delivery of goods or other abuses and offences related to traffic of goods.

The Directive also provides provisions on procedure for reimbursing excise duties. It may be effected after a request of a purchaser submitted to the competent authorities of his Member State, in which the products were purchased for consumption, if they were not intended to be consumed in that State. The application to reimburse excise duties may be refused if necessary obligations are not met. The Directive requires that:

1) before dispatch of the goods, the consignor must make a request for reimbursement from the competent authorities of his Member State and provide proof that the excise duty has been paid;
2) movement of the goods takes place under the rules set out in the Directive;

3) the consignor submitted to the competent authorities of his Member State the returned copy of the document, duly annotated by the consignee which must either be accompanied by a document certifying that the excise duty has been secured in the Member State of consumption or have the address of the office concerned of the tax authorities in the Member State of destination and the date of acceptance of the declaration by this office;
4) the competent authority of the Member State which issued the tax markings or identification marks established that such markings or marks have been destroyed.

It was also agreed that tax authority of each Member State shall determine the control procedures and methods applied in reimbursing excise duties at its territory. The Member States ensure that the reimbursement of excise duties does not exceed the amount actually paid.

The Directive is also laying down rules of exemption from payment of excise duties. The products subject to excise duty are exempted from payment of excise duty where they are intended:

1) for delivery in the context of diplomatic or consular relations;
2) for international organisations;
3) for the armed forces of any State party to the NATO other than the Member States;
4) for consumption under an agreement concluded with non-member countries or international organisations.

Eligibility for exemption may be granted in accordance with a procedure for reimbursing excise duties. Exemptions granted to a non-member country require concluding agreements with them. Until 30 June 1999 the Member States were able to exempt the products delivered by tax-free shops, which were carried in personal luggage during a intra-Community flight or travel to an other Member State, from excise duties. Small wine producers however are exempted from the requirements concerning production, processing, storage and movement of excise goods.

The legal conditions of harmonisation of excise provisions regarding tobacco products are extensive and comprise the following:

1) the Council Directive No 92/79 of 19 October 1992 on the approximation of taxes on cigarettes (OJ L 1992/316/8), amended with the Council Directive No 2002/10 of 12 February 2002 (OJ L 2002/316/19);
2) the Council Directive No 92/80 of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes (OJ L 1992/316/10),

amended with the Council Directive No 2002/10 of 12 February 2002 (OJ L 2002/316/21).

In the Directive No 92/79 the Member States were obligated to impose a consumption tax on cigarettes, according to the provisions of the Directive before 1 January 1993. This resulted in taxation of cigarettes with:

1) a specific excise duty per unit of the product;
2) a proportional excise duty calculated on the basis of the maximum retail selling price;
3) a VAT proportional to the retail selling price.

Since 1 January 1993 each Member State had to apply an overall minimum excise duty the incidence of which was set at 57% of the retail selling price (inclusive of all taxes) for cigarettes of the price category most in demand. At the same time it was agreed that every two years the Council acting on the basis of a report and a proposal from the Commission, shall examine the overall minimum excise and its structure and, acting after consulting the European Parliament, shall adopt unanimously the necessary measures. On the other hand the Member States shall bring into force the necessary laws and shall apply administrative measures to comply with the Directive.

The Directive No 92/80 is applicable to taxation of cigars and cigarillos, fine-cut tobacco intended for the rolling of cigarettes and other smoking tobaccos. The Directive obligated the Member States to impose excise tax on the above listed products by 1 January 1993 in the following alternative forms:

1) either an ad valorem duty calculated on the basis of the maximum retail selling price of each product, freely determined by manufacturers established in the Community and by importers from non-member countries; or
2) a specific duty, by quantity; or
3) a mixture of both, combining an ad valorem element and a specific element, provided that the overall excise duty expressed as a percentage, as an amount per kilogram or for a given number of items is at least equivalent to the rates or minimum amounts laid down for:
   - cigars and cigarillos: 5% of the retail selling price inclusive of all taxes, or EUR 7 per 1000 items or per kilogram,
   - fine-cut smoking tobacco intended for the rolling of cigarettes: 30% of the retail selling price inclusive of all taxes, or EUR 20 per kilogram,
   - other smoking tobaccos: 20% of the retail selling price inclusive of all taxes, or EUR 15 per kilogram.

The rates or amounts are effective for all products belonging to the group of manufactured tobaccos, without distinction as to quality, origin of the products, the materials used, the characteristics of the firms involved or any other criterion. The tax rates are revised every two years and the value expressed in EUR is fixed once a year. Member States may maintain the amounts of the excise duties in force if the revision of the amounts expressed in EUR would result in an increase of less than 5% or EUR 5. Member States were obligated to bring into force the laws and administrative measures to comply with the provisions of the Directive.

The legal conditions of harmonisation of law on mineral oils was established in 1992, but in 2003 it was changed and currently the Council Directive No 2003/96 of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 2003/283/51) is in force. Moreover the Council Directive No 95/60 of 27 November 1995 on fiscal marking of gas oils and kerosene (OJ L 1995/291/45) remains in force too.

Adaptation of a new directive is related principally with the need to ensure equal competition conditions in relation to products which on this base will be regulated under Community jurisdiction. Furthermore, implementation of the Directive No 2003/96 ought to contribute to effective use of energy and enhance environment protection. The Directive expands previous extent of taxation to all energy products, including electricity, natural gas and coal. Member States may establish different tax rates, allowances and exemptions than set out in the Directive. Production of energy products and electricity, considered also extraction of those products, is subject to taxation.

The legal status of harmonisation of the legal provisions regarding the excise tax on alcohol and alcoholic beverages is transparent, and it comprises:

1) the Council Directive No 92/83 of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ L 1992/ 316/21);
2) the Council Directive No 92/84 of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages (OJ L 1992/316/29).

The Directive No 92/83 regards harmonisation of provisions of law concerning taxation of beer, wine and other fermented beverages, as well as intermediate products and ethyl alcohol. In relation to each of those products the Directive provides a definition of the product. It also prescribe the tax rate in proportion to the number of hectolitres and to the strength by volume of the beverage. Besides it provides an option of applying reduced (decreased) tax rates and exemptions. As an

effect of definition provided for naming various beverages, which are in use in law of Member States that regulates those issues, uniform vocabulary was developed.

The Directive No 92/84 introduced minimum rates for taxation of alcohol and alcoholic beverages, and obligated Member States to apply them by 1 January 1993. The minimum rates are as follows:

- for beer EUR 0,748 euro or EUR 1,87 per hectolitre of product in relation to alcohol strength;
- for wine at EUR 0;
- for ethyl alcohol EUR 550 per hectolitre of product;
- for intermediate products EUR 45 euro hectolitre of product.

For Denmark, Greece, Portugal and Italy the previous rates remained unchanged. It was also agreed that every two years the tax rates will be examined and possibly revised and counterbalanced in relation to change of euro value.

2.3. The Capital Gains Tax

Indirect taxation is also governed with the Council Directive No 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ L 1969/249/250) amended with the Council Regulation No 85/303/EEC of 10 June 1985 (OJ L 1985/156/23).

The following transactions are subject to taxation:

- bringing capital to companies (the formation of a company);
- an increase in its capital;
- the transfer of the centre of management of a company outside its residence;
- an increase in the capital by capitalisation of profits or of reserves;
- an increase in the assets of a capital company through the provision of services by a member;
- a loan taken up by a capital company.

Despite that the construction of the tax is not complicated, in practice numerous interpretation problems arose that resulted in many ECJ opinions. Proposals to lift this tax were raised often too.

The recent opinion on this question was expressed by the European Economic and Social Committee.[2] It was pointed out that the Directive was amended many

2 See the Opinion of the European Economic and Social Committee of 16 January 2007 on application in respect of the Council directive on indirect taxation of capital accumulation (OJ C 2007/161/23).

times and in the Directive 85/303/EEC it was set out that the capital tax should be completely eliminated because of its unfavourable economic impact of enterprises. Nonetheless loss of income, that elimination of this tax would result in, was intolerable for some Member States.

The Directive of 1985 had to recognise an exception, by granting Member States possibility of exempting transactions form capital tax or calculate it on different rate, not exceeding 1%. This rule remains in force. The majority of then 25 Member States adopted the approach of the Council of 1985, completely eliminating capital tax. Nowadays it is still being imposed in only seven Member States (Poland, Portugal, Cyprus, Greece, Spain, Luxembourg and Austria). That makes the barrier for development of equal treatment of European enterprises and discourages from investments by other Member States or third countries. Therefore the Committee finds is necessary to completely eliminate the capital gains tax.

3. HARMONISATION OF DIRECT TAXATION AT PRESENT

3.1. General Remarks

It is a commonly shared opinion that, in contrary to harmonisation of indirect taxation, the results of efforts to provide a uniform system of direct taxation are rather poor. The reasons for that situation are diversified. They are among others: lack of direct legal basis in the primary legislation for harmonisation of direct taxation, and lack of substantial grounds for unification of direct taxation.

The harmonisation of direct taxation, taxation of enterprises in particular, can be advocated with the Article 12 TEC (Article 18 ToFEU) containing prohibition of discrimination of natural persons and enterprises on the common market. This is also a base for prohibition of taxation discrimination. It is a result of application of the freedom of movement of capital and of persons, as well as the right of establishment. Such approach is expressed by numerous ECJ opinions.

Acquis communautaire of the European Union consists few directives regarding direct taxation. Only few of them were issued during vast period of time of functioning of the Communities and EU. Moreover, they deal with such topics that justify an impression that there is an intention to make the taxation system comprehensive among the EU Member States and to counteract double taxation in other way than through bilateral international agreements. The directives concerning the subject of direct taxation do not contribute to replacing different national systems with a uniform EU system.

In course of tax disputes before ECJ, Member States often advocated discriminative provisions of national tax laws, including the following arguments, that:

1) direct taxes are a sole competence of Member States and are not regulated by the Community law;
2) content of agreements to avoid double taxation is decisive and may restrict use of one of the four market freedoms provided in the Community law;
3) providing coherent national taxation systems justifies different treatment of EU citizens;
4) existence of general clauses resulting in different treatment of EU citizens is justified with prevention of tax avoidance;
5) fiscal interest protection should be regarded as protection of public interest.

The above arguments were replied by ECJ with the following:

1) the lack of harmonisation of the Community law regarding direct taxation does not allow the Member State to stop observing its general rules;
2) the provisions regulating the application of the market freedoms are unconditional, and its direct effect on the national law may be raised by each citizen;
3) coherency of the taxation system justifies discrimination only if there is a direct link between granted tax profit (e.g. allowance) in one Member State and a subsequent taxation in the same Member State;
4) fiscal control should always be effected ad casum, and a Member State may not arbitrarily restrict the non-residents; technical problems with control of cross-border activity of enterprises do not justify tax discrimination;
5) protection measures have to meet requirements of the proportionality rule.

The process of direct taxation harmonisation have been in continuous progress since a long time. Thus the results are not too many. On 1 December 1997 the Commission and the representatives of Member States governments adopted a resolution on Code of Conduct for business taxation. The resolution had to contribute to counteract negative tax competition, but it remained only a political declaration.

On 23 October 2001 the Commission issued a Communication "Towards an Internal Market without tax obstacles – A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities (COM(2001) 582 final)" and a Study "Company Taxation in the Internal Market" (SEC(2001) 1681).

3.2. Taxation of Parent Companies and Subsidiaries

Functioning of capital companies, forming other companies through bringing capital to cover share capital or initial capital either through purchasing shares or stocks of existing companies, results in a problem of preventing double taxation of profits related to such situations. This applies to gains of parent companies, i.e. those forming other companies, referred to as subsidiaries. The Communities worked over the directive on common system of taxation for over 20 years. The first draft was presented in 1969. Eventually, the problem was solved by the Directive No 90/435 of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ L 1990/225/6).

The solutions provided in the said Directive obligate a Member State on whose territory a parent company has its office, to exempt it form dividend tax related to dividend received from subsidiary, or to tax it with respect to reduction of taxes already paid by the subsidiary abroad on basis of its income. The tax related to dividend paid by the subsidiary to the parent company is not imposed at its very source.

The Directive No 90/435 regulates payment of profits due to parent companies having their office at the territory of one Member State by subsidiaries with their office at the territory of other Member State, if they meet the following criteria:

1) take one of the forms listed in the Annex to the Directive;
2) have their office at the territory of one Member State and at the same time are not considered to be subject of jurisdiction of non-Member State according to the agreements to avoid double taxation;
3) are subject to one of the bodies listed in the Annex to the Directive, without the possibility of other taxation form option or are subject to other body substituting that body and are not being exempt form taxation.

According to the Council Directive No 2003/123 of 23 December 2003 amending the Council Decision No 90/435 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ L 2004/7/41) the scope of the Directive was extended to profits received by permanent establishments of companies of other Member States which come from their subsidiaries of a Member State other than in which the permanent establishment is situated. Moreover the minimum required holding in subsidiaries was reduced to 20% and to 10% since 2009. A mechanism to eliminate double taxation of dividends and other incomes related to participation in profits of subsidiaries was provided also for dominant companies having indirect share in capital of a dependant company.

3.3. Arbitration Convention

The similar problem is a subject of the Convention No 90/436/EEC of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ L 1990/225/10), also referred to as the Arbitration Convention.

The Convention allows for adjustment of profits of an enterprise having its office in one State, associated with a foreign enterprise, in a situation when those associated enterprises trading relations have the same nature as if they were developed between two independent enterprises. Then, any profits that would have accrued to one of the companies, but by reason of the special trading terms have not, in fact, so accrued, are included in the profits of that company and are taxed accordingly.

The Convention introduced an obligation to notice an intention to provide adjustment of profits. Moreover it lays down rules for mutual agreements and arbitration procedure, as well as exceptions excluding the obligation to follow this procedure, and also sets up an advisory commission and the rules of proceedings before it.

In order to ensure the implementation of the Convention, on 28 July 2006 the Council adopted Code of Conduct to support effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ C 2006/176/2).

3.4. Taxation Relating to Mergers, Division, Restructuring, Raise of Capital, Trade of Shares Between the Member States, Moving of a Company Seat or a European Cooperative Society Seat Between the Members States

The general provisions are set out in the Council Directive No 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ L 1990/225/1).The Directive regulates only such events that occur between companies having their offices in different Member States.

The Directive introduced common system of exemption from taxation profits related to economic transaction concerning reorganisation of companies. The system is neutral from the fiscal point of view, because the specified events do not result in imposing tax obligation on any of the companies or partners at the moment they arise. It is also applicable to surplus of value related to assets of those companies which are being dissolved and surpluses related to shares in those companies.

Nonetheless, the system neutrality does not effect in an absolute prohibition of such surpluses taxation, but rather in postponing the time of taxation until the moment of sale of assets or shares in those companies to which the surplus of value is related.

3.5. The Interest Tax

The legal grounds are laid down by the Council Directive No 2003/48 of 3 July 2003 on taxation of income in the form of interest payments (OJ L 2003/157/38). This Directive is applicable to interest payments made by the taxpayers having their place of residence in the territory of the European Union.

The aim of the Directive is to enable savings income in the form of interest payments made in one Member State to beneficial owners who are individuals resident in another Member State to be made subject to effective taxation in accordance with the laws of the latter Member State.

The provisions of the Directive establish a mechanism that ensures transferring, to tax authorities of the State of residence of interest payments beneficiary, the information concerning the amount of such payments, which provides for taxation of those types of incomes in the State of residence. Such information have to be provided by a taxpayer having its residence in the territory of other Member State to a competent authority of this State, whereas this authority has to provide it to a competent authority of the State of residence of actual receiver of payment.

3.6. Taxation of Related Companies on Interests and Licence Revenue

The legal grounds are laid down by the Council Directive No 2003/49 of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ L 2003/157/49). The Directive is applicable to payments made between a company from a source State or a permanent establishment of another Member State situated in the source State and an associated company of another Member State or a permanent establishment from the source State, being beneficiaries of those payments.

The aim of the Directive is to eliminate double taxation related to payments of interest and payments under licensing contracts, which are effected between companies or companies permanent establishments of different Member States. The Directive is also applicable to cross-border transactions. For the purpose of application of taxation method provided in the Directive, a receiver of interest payments or payments due to licensing contracts has to be its final receiver, i.e. he has to receive the financial resources onto his bank account.

3.7. The New Strategy of the European Commission for Direct Taxation

ECJ jurisdiction over taxation makes it clear that the Member States keep in force a number of legislation contradictory to the provisions of TEC (ToFEU). They are in particular related to:

- systems of dividends taxation;
- system of capital holdings taxation;
- cross-border deductions of losses;
- capital gain taxation;
- insufficient capitalisation and transfer pricing;
- general and particular provisions on counteracting tax avoidance;
- taxation of pensions and retirement and disability pensions;
- taxation of cross-border employees and enterprises;
- taxation of permanent establishments.

The problem is aggravated by troublesome interpretation of ECJ verdicts and definition of their consequences for taxpayers subject to legal systems of different Member States.

The above reasons made the Commission to start working on coordination of national direct taxation systems. As a result, a new strategy was developed, which was published by means of the Communication from the Commission of 19 December 2006 on Co-ordinating Member States direct tax systems in the Internal Market (COM 2006/823/101). Apart form the Introduction, the Communication contains key principles for coordination of tax systems, provisions on elimination of discrimination and double taxation, preventing non-taxation and abuse, reducing compliance costs and simplifying procedures, as well as towards coordination solutions and conclusions.

The objective of the coordination is not to replace the existing national taxation systems with a uniform Community one, but ensuring efficient cooperation between those systems. In some cases simple implementation of solutions jointly prearranged by the Member States in virtue of single state initiative might appear sufficient. In other cases it can be also inadequate.

The fundamental requirement of the EU law is eliminating tax discrimination. A particular Member State may apply different treatment to cross-border and national cases only if it is objectively justifiable. Moreover there exists a requirement to specify guidelines concerning rules resulting from the ECJ jurisdiction and their application in general areas of direct taxation.

The coordination aims at publication of further communications, by which the Commission would present Member States cooperation proposals to provide common solutions to problems regarding approximation of national tax legislation with the ECJ jurisdiction based on TEC provisions interpretations.

The Communication from the Commission of 2 May 2007 implementing the Community Programme for improved growth and employment and the enhanced competitiveness of EU business: Further Progress during 2006 and next steps towards a proposal on the Common Consolidated Corporate Tax Base (COM(2007) 223 final version) may be an example of execution of those plans. The Commission recognised, that a uniform legal base for taxation of juridical persons is still necessary, both because of small and medium enterprises as well as large business. The Commission announced to publish conclusions on this matter in 2008.

4. ADMINISTRATIVE COOPERATION OF THE MEMBER STATES IN TAXATION

The common exchange of information regarding taxation contributes to harmonisation of taxation in the Member States. Therefore this question was made a subject of legislation relatively early, i.e. the Council Directive No 77/779 of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums (OJ L 1997/336/15), as amended by the Council Directive No 2004/106 of 16 November 2004 (OJ L 2004/359/30).

According to this Directive the competent authorities of Member States mutually exchange any information that may enable appropriate taxation of income and capital, as well as insurance premiums. The exchange of information is not formalised and effected on a request, while some of information is provided automatically. Another mode of exchange of information is referred to as spontaneous exchange. The Directive does not exclude possibility of acquiring information under other provisions, in particular bilateral agreements.

On 25 January 1988 the Convention on mutual administrative assistance in tax matters was opened to signature for the Council of Europe Member States and OECD, which came into force on 1 April 1995.

The Convention consists of:

- activities of administrative authorities in charge of assessment and collection of taxes, and the recovery and enforcement of tax claims, as well as prosecution before an administrative authority or imposition of administrative penalties;

- activities of judicial bodies, ensuring enforcement of obligations of administrative authorities;
- preparation of prosecution before a judicial body in relation to taxation.

As to the content, the Convention is applicable to the following taxes and duties:

- taxes on incomes or profits, profits related to transfer of assets, taxes on net wealth;
- compulsory social security contributions;
- other taxes including inheritance and gift taxes, taxes on immovable property, value added taxes, taxes on means of transport, and other local taxes.

The rules for cooperation as regard indirect taxation were regulated separately. Thus the Council Regulation No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing the Regulation No 218/92 (OJ L 2003/264/1) remains presently in force.

The provisions of the Regulation impose on the Member States the obligation to maintain an electronic database to collect and store certain data. For the purpose of the Regulation the information should be stored for five years. A competent authority of any Member State should forward the information by automatic exchange, in the following cases:

1) where taxation is deemed to take place in the Member State of destination and the effectiveness of the control system necessarily depends on the information provided by the Member State of origin;
2) where a Member State has grounds to believe that a breach of VAT legislation has been committed or is likely to have been committed in the other Member State;
3) where there is a risk of tax loss in the other Member State.

For the purpose of implementation of the Regulation No 1798/2003, the Commission issued the Regulation No 1925/2004 of 29 October 2004 laying down detailed rules for implementing certain provisions of the Council Regulation No 1798/2003 concerning administrative cooperation in the field of value-added tax (OJ L 2004/331/13).

The equivalent solution was adopted by the Council Regulation No 2073/2004 of 16 November 2004 on administrative cooperation in the field of excise duties (OJ L 2004/359/1). The Regulation lays down in particular the rules for: cooperation on request, exchange of information without prior request, storage and exchange of information specific to intra-Community transactions, relations with the Commission, relations with third countries, and conditions governing the exchange of information.

VIII

THE LAW OF THE SINGLE FINANCIAL MARKET OF THE EUROPEAN UNION

1. THE SINGLE FINANCIAL MARKET AND ITS SPECIAL LEGAL REGIME. GENERAL NOTIONS

1.1. The Single Financial Market and its Elements. General Notions

The financial market is one of the elements of the market as a whole. However, the financial market has numerous specific features that distinguish it form other elements of the market, i.e. products market, services market and labour market. At the financial market it is money which is a product that is subject of supply and demand. The bodies which take part in flow of money from its suppliers to consumer provide financial services. At the financial market those are usually workers of high professional qualifications providing moral guarantee that are hired. It is just an illusion that the financial market is governed by the same rules of organisation and functions exactly as the other elements of the market. It is quite opposite, as the financial market is subject to separate and relatively specific legal regime. This is because money at the financial market acts as a product and not only as a legal tender.

First of all, the financial market requires organisation and control form the state. The organisation of the financial market has to provide security for the market participants. Therefore it is a challenge to create a certain institutional infrastructure of financial service offered by entities authorised to provide such service. The state, within the organisation:

1) determines entities authorised to provide financial service;
2) appoints directions for undertaking and performing activity at the financial market;
3) authorises to or restricts taking up of an activity.

Functioning of the financial market ought to be arranged according to certain rules, in form of so-called prudential norms. The state develops a system of control and supervision over active participants of the financial market to ensure conformity with them. Together with institutional organisation they form a whole.