Larisa Gerzova, Oana Popa** and Ivana van der Maas****

CFE Forum 2016: Rebuilding International Taxation – How To Square the Circle?

In this note, the authors provide a summary of the presentations made at the CFE Forum 2016 held in Brussels on 21 April 2016.

1. Welcome and Introduction

On 21 April 2016, the Confédération Fiscale Européenne (CFE) held its Forum 2016 in Brussels. The topic for discussion was "Rebuilding international taxation: How to square the circle?".

The Forum started with greetings by Rainer Steffens, Director of the Representation of the State of North Rhine-Westphalia. This was followed by a welcome speech by Henk Koller, President of the CFE. Piergiorgio Valente, Chairman of the CFE Fiscal Committee, introduced the topics to be considered by the panels. He mentioned that this is the 3rd Forum[1] addressing BEPS.[2]

2. Session 1: The EU and OECD Roadmap in Action – Latest Initiatives

Stella Raventós, Partner, ECIJA, moderator of Session 1, provided the background to the topic. The first part of Session 1 was organized as a question and answer session.

Raventós started by asking Grace Perez-Navarro, Deputy Director, Centre for Tax Policy and Administration, OECD, about the priorities of the OECD now that the BEPS deliverables have been issued. Perez-Navarro answered that the main priority of the OECD now is to ensure that the deliverables be implemented effectively and consistently. In order to achieve this, the OECD wishes to make the project more inclusive by bringing in developing countries. In terms of looking at implementation, the OECD is also trying to establish proposals for monitoring mechanisms. Perez-Navarro further mentioned that the work on remaining issues, such as developing a multilateral legal instrument[3] (with 95 countries participating in that work), is ongoing, the aim being to finalize it by the end of 2016.

Raventós further asked for clarification regarding the OECD proposals to tax the digital economy (BEPS Action Point 1)[4] and the manner in which countries should implement these proposals.

Perez-Navarro pointed out that taxation of digital economy was discussed in BEPS Action Point 1 to such a broad extent because there was so much concern about the issue. She highlighted that, at this point, the discussion should not be about a specific tax, as the entire economy is digital (i.e. there are digital aspects in every area). Perez-Navarro mentioned that the OECD will continue its work on digital economy, after evaluating the results of other BEPS measures that have an impact on digital aspects, and aims to publish a new report on digital economy by 2020.

With regard to the question of how to calculate profits attributed to permanent establishments (PEs) created under the new rules,[5] Perez-Navarro replied that this is a work in progress and one of the top priorities for the OECD and that the answer will be included in the multilateral instrument.

With regard to dispute resolution, Perez-Navarro mentioned that BEPS Action Point 14[6] is focused on dispute resolution and the work of the OECD in this area is advanced. She highlighted that work is being done to improve dispute resolution, not through changes in tax treaties, but through improvements in tax administration (i.e. by including more people in dispute resolution teams). Perez-Navarro pointed out that it would be ideal to avoid disputes before they start and mentioned that work is being done in this respect by the Forum on Tax Administrations (FTA).

Raventós then asked Bert Zuijdendorp, Head of Unit, Company Taxation initiatives, Directorate General for Taxation and Customs Union, European Commission, about implementation of BEPS throughout the European Union, in particular whether this has been consistent and what the present state of affairs is.

Zuijdendorp started by mentioning that there is an active corporate tax agenda in the European Commission, i.e. the

* **Principal Research Associate, IBFD. The author can be contacted at l.gerzova@ibfd.org.**

** **Senior Research Associate and Managing Editor Corporate & Private Investment Income, IBFD. The author can be contacted at o.popa@ibfd.org.**

*** **Research Associate, IBFD. The author can be contacted at i.kireta@ibfd.org.**

1. For the two previous editions, *see* K. Baggerman, I. Kireta & O. Popa, *CFE Forum 2015: Tax Governance and Tax Risk Management in a Post-BEPS World*, 55 Eur. Taxn. 6 (2015), Journals IBFD and M. Cotrut, L. Gerzova & O. Popa, *CFE Forum 2014: Policies for a Sustainable Tax Future*, 54 Eur. Taxn. 6 (2014), Journals IBFD.
2. OECD, *Action Plan on Base Erosion and Profit Shifting (2013)*, International Organizations' Documentation IBFD.
3. OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties* – Action 15: 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (5 Oct. 2015), International Organizations' Documentation IBFD.
4. OECD, *Addressing the Tax Challenges of the Digital Economy* – Action 1: 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (5 Oct. 2015), International Organizations' Documentation IBFD.
5. OECD, *Preventing the Artificial Avoidance of Permanent Establishment Status* – Action 7: 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (5 Oct. 2015), International Organizations' Documentation IBFD.
6. OECD, *Making Dispute Resolution Mechanisms More Effective* – Action 14: 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (5 Oct. 2015), International Organizations' Documentation IBFD.

Tax Transparency Package,[7] the launch of work on country-by-country reporting,[8] the Action Plan on Corporate Taxation[9] and the relaunch of the CCCTB proposal.[10] Zuijdendorp further mentioned the launch of the Anti Tax Avoidance Package[11] and advancements in work under the chairmanship of the Netherlands Presidency. He revealed that the aim was to reach agreement on the proposal on the Anti Tax Avoidance Directive[12] at the May 2016 ECOFIN meeting. Zuijdendorp highlighted that the focus of all of the proposals is to adapt measures to the single market and to make sure the fundamental freedoms apply. He expressed the belief that the proposed measures match their purpose, as they are in line with BEPS and necessary within the context of the single market. Zuijdendorp noted that the European Commission wants to ensure a minimum level of protection for Member States (i.e. only minimum standards are included in their proposals), but there is a possibility for Member States to go beyond this minimum.

Raventós further asked why the European Commission is focussed on anti-avoidance and not on anti-abuse. Zuijdendorp said that the Anti Tax Avoidance Directive goes beyond fighting tax abuse and tax avoidance is a wider concept. He mentioned that it does not go any further than BEPS, but the concepts are adapted to the single market. He observed that the proposal is balanced, offering safe harbours and ensuring that legitimate transactions are outside its scope.

With regard to the switchover clause in the Directive proposal (i.e. article 6), Zuijdendorp mentioned that this measure must be interpreted in the general context. He pointed out, however, that there is a policy choice to be made in this respect and the issue will be debated in the Council, as there are different opinions on this matter.

Zuijdendorp further mentioned that the language used in the Directive proposal for the GAAR rule (i.e. article 7) reflects the case law of the Court of Justice of the European Union (ECJ).

With regard to coordination of the controlled foreign company (CFC) rule proposal (i.e. article 8) and the switchover clause thresholds, he mentioned that it was deliberate to have them different.

Ingo van Lishaut, Deputy Director Taxation, Ministry of Finance of North Rhine-Westphalia, Germany, presented on "Hybrid Mismatch Arrangements in Germany (Implementation of the Recommendations – BEPS action 2[13] (ATAD article 10))". Van Lishaut first observed that if the Anti Tax Avoidance Directive proposal is approved, Germany will transpose it into national law. He noted that legislation in Germany is, in most instances, initiated by the federal government.

Van Lishaut highlighted that the prevention of hybrid arrangements is crucial to the implementation of BEPS measures. He mentioned that a loophole exists in the German legislation on the taxation of partnerships. The speaker gave the example of a double deduction outcome that is not mentioned in the BEPS Action 2 Report. In discussing how to prevent such structures, he looked at the OECD Recommendation no. 6 (which is to neutralize the mismatch to the extent the payment gives rise to a double deduction outcome) and considered the outcome of such a recommendation on the specific case discussed. Van Lishaut further discussed article 10 of the Anti Tax Avoidance Directive, on Hybrid Mismatches, and the outcome of this article on the specific case discussed. Van Lishaut mentioned that, although a decision on the implementation of anti-hybrid rules will have to be made by Germany, he envisages that there will not be substantial changes in the domestic rules on the taxation of partnerships, as these have a long tradition.

Theo Keijzer, CEO at Dorean Global Tax Policy, the Netherlands, gave the business perspective on the topic. He opined that countries are in a situation in which they compete with each other, but the effect of such competition is not allowed, as it is deemed to constitute tax avoidance. Keijzer highlighted that businesses are concerned with the European Union going beyond what the OECD has proposed and that this might hinder international trade and investment. He concluded by saying that if countries accept that they compete with each other and the resulting tax planning is allowed, there would be no need for different tax laws.

3. Session 2: Economic Substance – What Will Change?

Session 2 was moderated by Ian Young, Chairman of the CFE Direct Tax Sub-Committee/Technical Manager International Tax, ICAEW Tax Faculty, United Kingdom.

Vanessa De Saint-Blanquat, the Vice-Director of the Tax Department at Movement of the Enterprises of France, started by providing an overview of the work of the OECD on the BEPS Action Plan and the importance of the notion of substance in this context.

De Saint-Blanquat pointed out that there is no uniform or internationally accepted definition of substance. This is so even though the notion of substance underlies the BEPS Action Plan and aims to tackle fraud. In particular, in respect of Action points 3 and 5 to 10 of the BEPS Action

7. European Commission, Tax Transparency Package (18 Mar. 2015), available at http://ec.europa.eu/taxation_customs/taxation/company_tax/transparency/index_en.htm.
8. European Commission, Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (COM(2016) 25 final).
9. European Commission, A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM(2015) 302 final, 17 June 2015.
10. Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121/4 final (16 Mar. 2011).
11. European Commission, Anti Tax Avoidance Package, 28 Jan. 2016, available at http://ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/index_en.htm.
12. Proposal for a Council Directive Laying Down the Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, COM (2016) 26 final (28 Jan. 2016).
13. OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements* – Action 2: 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (5 Oct. 2015), International Organizations' Documentation IBFD.

Plan, the notion of substance is of great importance. The idea of substance is to align taxing rights with activities that add value. De Saint-Blanquat noted that, as there are many Action points dealing with the notion of substance, this notion must be as flexible as possible in order to reach the objective of tackling fraud.

De Saint-Blanquat stated that under the BEPS Action Plan, the idea is to assess whether or not there is enough substance in order to (1) generate the profits attributed to the CFC (Action 3),[14] (2) benefit from a preferential tax regime (Action 5),[15] (3) benefit from the favourable treatment of treaty clauses (Action 6),[16] (4) consider that there is a PE that is locally taxable (Action 7) and (5) justify the price for transactions between related companies (Actions 8-10).[17]

As regards Action point 3, De Saint-Blanquat observed that the objective is to assess whether or not the CFC has the ability to earn the income itself. This is achieved by way of a substance analysis in view of the income earned. If, however, the CFC has insufficient substance, some or all of its profits will be taxed at the parent level.

The objective of Action 5 is to ensure that taxable profits are not artificially shifted away from countries where value is created. In this context, De Saint-Blanquat touched upon the requirement of substantial activity for preferential regimes. In this regard, the OECD has defined the nexus approach, requiring a link between the expenditure and the preferential regime.

As regards Action 6, De Saint-Blanquat stated that its objective is to prevent the granting of treaty benefits to taxpayers in inappropriate circumstances (not enough local substance to claim residence in one of the contracting states). In this respect, the OECD proposes general anti-abuse rules in the form of limitation of benefits (LOB) and principal purpose test (PPT) rules.

Further, the objective of Action 7 is to tackle artificial avoidance of PE status by avoiding substantial physical presence in a country. The attribution of profits to the place where value is created is to be accomplished by redefining the PE concept.

Finally, in respect of Actions 8-10, De Saint-Blanquat discussed the ways to achieve the objective of aligning transfer pricing outcomes with the value creation (substance) of MNEs.

In addition, De Saint-Blanquat touched upon the notion of substance, as introduced in France and the relevant domestic case law.

In conclusion, De Saint-Blanquat pointed out that the OECD Actions are best practices or minimum standards that may be implemented in different ways. Countries, courts and tax authorities may adopt different interpretations of what constitutes substance. There is no threshold or minimum amount that can be used to determine substance. Consequently, different interpretations may lead to double taxation.

Joachim Englisch, Professor at the University of Münster, Germany discussed the proposed Anti Tax Avoidance Directive[18] in light of the EU fundamental freedoms, ECJ case law and OECD BEPS recommendations. The proposed Directive forms a core part of the European Commission's Anti Tax Avoidance Package. Englisch pointed out that, according to the Commission, the Directive respects the single market, Treaty freedoms and EU law in general, as well as finalization of the BEPS project by the G20 and the OECD. Englisch elaborated on how the six proposed actions under the Anti Tax Avoidance Directive perform in this regard.

As regards the deductibility of interest, Englisch discussed the scope of application of the measure and took the view that it is non-discriminatory and does not constitute an issue in respect of EU fundamental freedoms as interpreted by the ECJ. Further, the measure is compatible with the OECD Action 4[19] recommendations. Englisch mentioned, however, that the German Supreme Court has recently ruled that the German interest deduction barrier provision (which is the model for the OECD and EU proposals) is disproportionate and unconstitutional.

In respect of exit taxation, which covers a (permanent) transfer of assets, tax residence or PE, provides for an option for deferred payment and requires the deferral to be reversed in certain scenarios, Englisch stated that the proposed measure is covered by the free movement of establishment and is broadly in line with the relevant ECJ case law. Further, the measure, in principle, is accepted under OECD Action 6.

As regards the general anti-abuse rule (GAAR), Englisch stated that it is generally in line with ECJ case law. The measure, however, has a very broad scope of application and also forces the anti-abuse concept on Member States for corporate income tax purposes in purely domestic situations. Englisch questioned whether or not this is in line with the authority of the European Union under article 115 of the Treaty on the Functioning of the European Union (2007) (TFEU).[20] In turn, as compared to OECD Action 6, the proposed EU approach is somewhat more lenient.

Englisch further analysed the switchover clause, controlled foreign company (CFC) rules and the framework to tackle hybrid mismatches.

14. OECD, *Designing Effective Controlled Foreign Company Rules* – Action 3: 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (5 Oct. 2015), International Organizations' Documentation IBFD.
15. OECD, *Countering Harmful Tax Practices More Effectively* – Action 5: 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (5 Oct. 2015), International Organizations' Documentation IBFD.
16. OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances* – Action 6: 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (5 Oct. 2015), International Organizations' Documentation IBFD.
17. OECD, *Aligning Transfer Pricing Outcomes with Value Creation* – Actions 8-10: 2015 Final Reports, OECD/G20 Base Erosion and Profit Shifting Project (5 Oct. 2015), International Organizations' Documentation IBFD.
18. *Supra* n. 12.
19. OECD, *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments* – Action 4: 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (5 Oct. 2015), International Organizations' Documentation IBFD.
20. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), EU Law IBFD.

Martin Hess, Senior Policy Manager Taxation, Swiss Holding, Switzerland discussed the BEPS reports relevant to a company's allocation of economic substance, the effects of the BEPS project for MNEs and international tax competition; in addition, he elaborated on the strategy of Switzerland to remain attractive for MNEs.

Hess reiterated that the main objective of the BEPS project is taxation where the value is created and economic substance is located. Hess identified the following BEPS reports as relevant for the allocation of economic substance: Action 2[21] (hybrids), Action 4 (interest), Action 6 (treaty abuse), Action 7 (PEs), Actions 8-10 (transfer pricing) and Action 13[22] (country-by-country reporting).

Hess focused on OECD Actions 8 -10 concerning transfer pricing. He discussed the issue of the level of economic substance in accordance with the revised Transfer Pricing Guidelines. Further, he discussed Action 13 as regards transparency rules and country-by-country reporting, which should enable tax administrations to detect abnormal situations.

Further, Hess discussed the effects of BEPS for MNEs and international tax competition. He stated that the BEPS project will significantly affect businesses and change international tax competition. In particular, transparency instruments will force MNEs to provide evidence that income allocation is fully in line with economic substance. Hess opined that the time for very creative tax planning is over and the focus will now be on more sustainable long-term tax planning.

Finally, Hess outlined the strategy of Switzerland to remain attractive for MNEs, inter alia, under the Enterprise Tax Reform III. The main elements of the strategy are: (1) abolition of internationally-criticized tax regimes (for example, the holding regime and mixed-company regime), (2) the introduction of internationally-accepted-instruments (for example, a Patent Box in line with the OECD guidelines), (3) the introduction of an R&D input deduction and (4) a reduction of corporate tax rates at the cantonal level.

4. CFE Award Ceremony

Session 3 began with the CFE Award Ceremony. This year, Bawono Kristiaji, from Tilburg University, was awarded the Albert J. Rädler Medal for his master's thesis entitled "Incentives and Disincentives of Profit Shifting in Developing Countries".

5. Session 3: Certainty, Confidentiality, Transparency – What May Taxpayers Expect from Administration?

This session of the CFE Forum was organized in the form of a discussion panel, with Rupert Shiers as the moderator. Other panel members included Isabelle Richelle, University of Liège, Petra Pospíšilová, Head of the Tax Committee of the Czech Banking Association and Jeroen Lammers, Confederation of Netherlands Industry and Employers (VNO-NCW).

Shiers introduced the panel members and provided the background to the topic. Richelle started the discussion by giving an overview of the relevant legislation: the EU Mutual Assistance Directive (77/799),[23] the EU Mutual Assistance Directive (2011/16),[24] Council Regulation 904/2010[25] and Directive 2015/2376[26] on the exchange of tax rulings, as well as the upcoming Directive on country-by country reporting.[27]

Pospíšilová stressed the importance of addressing the issue of the exchange of information with regard to direct taxation, since not enough attention has been paid to this matter.

Richelle continued by pointing out that the topic is connected to conflicts of interest between the tax authorities and taxpayers. The exchange of information correlates to the fundamental rights of taxpayers in the process of assessing tax returns. Moreover, the general principles of certainty, legality and non-discrimination need to be developed and aligned with the new principles of confidentiality and transparency. Also, taxpayer rights that are reflected in good administration principles, limits to collection and the right to a fair trial are being challenged by the new principles of transparency. Richelle pointed out that it is necessary to find a balance between taxpayer rights and rules on transparency. She addressed the challenge in finding a new equilibrium between the interests of the tax authorities and the interests of the taxpayer in relation to globalization.

Richelle then gave an introduction to the EU Mutual Assistance Directive (77/799), pointing out that at the time it was enacted, the need to fight tax fraud within the European Union was the same as it is today. This Directive recognized the exchange of information on request, automatically and spontaneously, of any information relevant to tax authorities. Reciprocity was the basic rule. With regard to secrecy, the application of the rules of Member States requiring the information was relevant. Although the Mutual Assistance Directive provided a good legal basis for the exchange of information, there is a lack of data as to how and to what extent the Directive has been implemented across the European Union. She concluded

21. *See* OECD, BEPS Action 2, *supra* n. 13.
22. OECD, *Transfer Pricing Documentation and Country-by-Country Reporting* – Action 13: 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (5 Oct. 2015), International Organizations' Documentation IBFD.
23. EU Mutual Assistance Directive (1977): Council Directive 77/799 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 336 (1977), EU Law IBFD.
24. EU Mutual Assistance Directive (2011): 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 (2011), EU Law IBFD.
25. Council Regulation 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, OJ L 268 (2010).
26. Council Directive 2015/2376/EU of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 332 (2015).
27. European Commission, Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (COM(2016) 25 final).

that the proposal of the EU Mutual Assistance Directive (2011/16) showed that Member States did not apply the EU Mutual Assistance Directive (77/799) in an efficient way and that there was a need to introduce formalized procedures for the exchange of information.

Richelle continued by explaining the implications of the exchange of information on taxpayer rights in the context of the *Sabou* (Case C-276/12) decision.[28] The case dealt with a deduction of expenses in the Czech Republic. Expenses were incurred in several Member States relating to the transfer of Mr Sabou to another football club. The Czech tax authorities requested information from other Member States' tax authorities regarding the expenses. The expenses were not, however, confirmed and, consequently, the Czech tax authorities did not allow the deductibility of the expenses. According to Richelle, this case emphasized the issue of the right of taxpayers to be informed of a request for administrative assistance and to take part in a hearing.

She addressed two questions arising from the *Sabou* case that impact the taxpayer's position regarding the exchange of information:

(1) Does EU law and the fundamental right to be heard confer a right upon the taxpayer to be informed of a request for administrative assistance to another Member State, to take part in the wording of this request and to take part in a hearing held by the requested Member State?

The EU Mutual Assistance Directive (77/799) does not confer any specific right upon the taxpayer, nor is there any obligation for a Member State to consult the taxpayer in respect of a request for administrative assistance. Richelle argued, however, that the right of defence is one of the general principles under EU law and also applies to the tax authorities.

(2) Is there a possibility to contest the information transmitted and do Member States have an obligation to mention the source of the information obtained?

The EU Mutual Assistance Directive (77/799) does not address the taxpayer's right to challenge the accuracy of the information conveyed, nor does it impose any particular obligation with regard to the content of the information.

The discussion continued with Shiers stating that new trends in tax transparency have been observed since the global financial crisis in 2008. The new trends resulted in two initiatives: the OECD Action Plan on Base Erosion and Profit Shifting[29] and the EU Action Plan on Corporate Taxation.[30] The OECD BEPS project addressed exchange of information issues using several Actions. Action 5[31] refers to the exchange of rulings, Action 12[32] to mandatory disclosure rules and Action 13[33] to country-by-country reporting.

Richelle continued by providing details on the EU Mutual Assistance Directive (2011/16), pointing out that this Directive creates formalized procedures for the exchange of information and requires Member States to apply the same set of rules. The scope of the EU Mutual Assistance Directive (2011/16) is wider than that of the EU Mutual Assistance Directive (77/799), including both income taxes and indirect taxes not covered by other EU instruments. She pointed out that it is a minimum requirement Directive, meaning that it provides an opportunity for bilateral or multilateral agreements between Member States in order to request additional information. Also, it provides the opportunity to communicate information obtained from third countries. Richelle found the Directive's statement that it respects the fundamental rights of taxpayers interesting, doubting whether this is the case.

She then explained the types of taxpayers whose information can be exchanged. The Directive encompasses any person or body (for example, a UK trust), including associations that have no legal personality but are subject to income tax. Tax authorities have six months to reply to a request, or two months if the information is known to them. Furthermore, they may stipulate different deadlines in the agreement.

Lammers challenged the EU Mutual Assistance Directive (2011/16) by stating that it is important to follow the OECD standards and that information requested must be relevant for tax purposes. The Directive at hand does not have this minimum requirement. Based on the EU Mutual Assistance Directive (2011/16), information that can be exchanged automatically includes: (1) income from employment, (2) directors' fees, (3) life insurance products not covered by other EU legal instruments on exchange of information and other similar measures, (4) pensions and (5) ownership of and income from immovable property.

Moreover, Member States have the possibility to extend this list and exchange other information according to bilateral or multilateral agreements. Finally, an evaluation of the EU Mutual Assistance Directive (2011/16) is under consideration by the Commission, which has the option of amending it if necessary.

Regarding the simultaneous exchange of information provided in article 9 of the EU Mutual Assistance Directive (2011/16), Richelle emphasized that this provision leaves Member States many possibilities. The scope of simultaneous exchange is broader than that of automatic exchange of information. If Member States suspect (1) a risk of loss of tax, (2) a risk of double deduction, or (3) that there are grounds that a saving of tax may result from artificial transfers of profits within groups of enterprises and

28. CZ: ECJ, 22 Oct. 2013, Case C-276/12, *Jiří Sabou v. Finanční ředitelství pro hlavní město Prahu*, EU Law IBFD.
29. *Supra* n. 2.
30. European Commission, *A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action*, COM(2015) 302 final, 17 June 2015.
31. *Supra* n. 13.
32. OECD, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance* – Action 5: 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (OECD 2015), International Organizations' Documentation IBFD.
33. *Supra* n. 24.

new information is obtained following information forwarded by another Member State, they can immediately, but no later than within one month, exchange all relevant information.

The panel members then briefly discussed other measures provided for in the EU Mutual Assistance Directive (2011/16), including: (1) the possibility of simultaneous audits and exchange of good practices and experiences, (2) other forms of assistance (for example, notification of an official document to a taxpayer), and (3) the scope of disclosure of information.

The panel members discussed the limits of the EU Mutual Assistance Directive (2011/16), pointing out that there is no obligation for Member States to communicate if conducting the inquiries or collecting the information requested is contrary to their legislation. Also, disclosure of a commercial, industrial or professional secret or of a commercial process, or of information the disclosure of which would be contrary to public policy, falls under the limits of the Mutual Assistance Directive (2011/16). Regarding third countries, information received from a third country may be communicated to other interested Member States.

Moving forward, Pospíšilová presented the exchange of information in the field of indirect tax. The objective of Council Regulation 904/2010 on administrative cooperation and combating fraud in the field of value added tax (VAT) is close cooperation between the competent authorities, who will assist each other and cooperate with the Commission in order to ensure the proper application of VAT on intra-Community supplies. The information to be exchanged is defined as any information that may help to effect a correct assessment of VAT, monitor the correct application of VAT, particularly on intra-Community transactions and combat VAT fraud. Pospíšilová pointed out that major concerns exist regarding the volume of information that will be exchanged in the context of the Regulation at hand. In particular, what will be the cost for businesses and for tax administrations? She concluded that, regardless of these concerns, Council Regulation 904/2010 is a powerful tool for the cooperation of Member States in the collection of VAT. Moving on, Pospíšilová discussed whether the exchange of information is an effective tool. As a starting point, she mentioned the Special Report of the European Court of Auditors entitled Tackling VAT fraud: More action needed[34] (the Report), which was published in 2016. The Report recognizes: (1) the lack of estimates of intra-Community fraud, (2) the lack of performance indicators of intra-Community fraud, (3) poor timeliness of replies to requests for an exchange of information and (4) occasional reliability problems of VIES.

The Report points out that multilateral controls carried out less frequently are a useful tool in tackling VAT fraud and improving tax collection. According to Pospíšilová, the EUROFISC, a special body dealing with tax fraud, is in need of improvement, in particular since: (1) data exchange is not well targeted, (2) there is insufficient participation of some Member States, and (3) exchange of information is not user-friendly and is slow.

In conclusion, Pospíšilová summarized the differences between the exchange of information regarding direct and indirect taxes. She emphasized that taxpayers have only one economic life, regardless of the tax they pay. Also, tax administrations collect information on a single taxpayer in direct and indirect tax areas separately. She stated that, even under the OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters (CRS),[35] corporations provide the same information using only a different structure. In this connection, she again referred to a huge quantity of information that has been exchanged without observing the efficiency of such exchange. Pospíšilová raised concerns that tax administrations have more data than they can process and ultimately use.

The next topic discussed in this panel was the implication of Directive 2015/2376 for the exchange of tax rulings. Richelle provided an introduction. Agreement on Directive 2015/2376 was reached on 8 October 2015; only two months later, on 8 December 2015, the Directive was enacted. Its scope includes tax rulings and advance pricing agreements (APAs) that must be automatically exchanged among Member States. Tax rulings and APAs will not, however, be exchanged in full. Although Directive 2015/2376 does not define a competent tax authority, it stipulates that tax rulings and APAs will be exchanged among competent authorities of Member States and with the Commission. Richelle stressed that the Commission's role in this respect is limited. The Commission cannot choose to use the information for other purposes (for example, to check on possible State aid). APAs that will be exchanged automatically include those newly issued, amended or renewed after 31 December 2016. Those issued, amended or renewed between 1 January 2012 and 31 December 2016 will come under a transitional regime under which the exchange will be mandatory rather than automatic.

Going further, Richelle stressed that the meaning of advance in the context of the exchange of information is not clear in Directive 2015/2376. An advance cross-border ruling is any agreement, communication, or any other instrument or action with similar effects, including one issued, amended or renewed in the context of a tax audit. This means that an advance cross-border ruling: (1) can be exchanged between tax authorities at any state level, (2) has a reliable character for the beneficiary, (3) concerns the interpretation or application of a legal or administrative provision, and (4) concerns the existence of a PE.

Lammers continued the discussion on Directive 2015/2376, explaining the role of the Commission in monitoring and evaluating the exchange of information. The Commission may exercise its role at any time, but must not

34. European Court of Auditors, *Tackling intra-Community VAT fraud: More action needed* (European Union 2016), Special Report, available at http://www.eca.europa.eu/Lists/ECADocuments/SR15_24/SR_VAT_FRAUD_EN.pdf.

35. OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters, available at http://www.oecd.org/ctp/exchange-of-tax-information/standard-for-automatic-exchange-of-financial-account-information-for-tax-matters-9789264216525-en.htm.

use the information for any other purpose. In particular, in communicating with the Commission, tax authorities must not give notification of State aid. A standard form for the exchange, as well as some clarity on linguistic requirements, still needs to be established by the Commission. Lammers also highlighted that confidentiality is a big issue regarding the exchange of information, in particular the fact that tax rulings and APAs must be exchanged retroactively. Confidentiality on the side of both the Commission and tax authorities raises many concerns, according to Lammers. He concluded his presentation on Directive 2015/2376 by raising the following questions:

(1) Will companies still ask for rulings if they need to publish information on them?

(2) Do these developments provide more or less certainty for companies?

(3) Will investments into the European Union suffer if fewer rulings are requested?

(4) How do the pending State aid investigations affect tax ruling practice?

(5) How should an exchange of information not respecting the terms of Directive 2015/2376 be challenged?

(6) How can the taxpayer become aware of the exchange and its content?

The final topic was country-by-country reporting and its challenges. Lammers gave a brief overview of Action 13.[36] He stated that master and local files required taxpayers to create a large data set, including commercially sensitive information. Also, a number of national governments have already implemented recommendations from Action 13, including the Netherlands (as of 1 January 2016). Lammers started the discussion by raising the following questions:

(1) What will this mean for information flows between Member States and will tax authorities be able to process this data?

(2) Can it serve as a diagnostic tool for the international tax system in revealing weak spots, thus strengthening the tax system as a whole?

(3) What repercussions do governments face if they do not apply the information requested from companies?

(4) Can taxpayers derive any rights from the information they have submitted to the tax authorities if the tax authorities do not act on questions about the information provided?

At the end of the session, Lammers emphasized that the Commission's commitment is needed to achieve high-quality exchange of information. In particular, the Commission must stop taking further anti-abuse measures and must assess means that are already in place. Also, the Commission needs to design measures that are beneficial for business. Taxpayer rights must be protected better and, finally, the corporate income tax burden must be decreased.

In her concluding remarks, Pospíšilová pointed out that the information that companies need to provide for the purpose of the exchange of information is not free of charge. According to her, the meaning behind these measures is unclear, as are the ultimate costs for the tax authorities.

All sessions were followed by lively discussions that considered the topics and issues raised.

36. *Supra* n. 24.

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