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Introductory remarks

This document contains a summary of the national reports submitted by the participating countries in the EATLP Conference. Each question is dealt with separately, consistently stating the different national regimes in each case. Included countries are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Norway, Russia, Spain, Sweden, Turkey and the USA. Not all details have been reproduced in this general report.

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Part 1: National concepts

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1.1 General rule on the burden of proof

In most of the reported countries, the general rule is that the burden of proof is split between the taxpayer and the tax administration. A common manner is that the tax administration has to prove a taxable income and the taxpayer has to prove a deductible expense. This is the case in Denmark, Belgium, Spain, Germany, Sweden, Finland, the Netherlands and Russia.

This principle, however, is based on different theories. In Germany, Sweden, the Netherlands, Russia and Spain the theory on which the principle is derived is that the burden of proof should rest on the party who easiest can obtain information of a certain fact. In Denmark, the theory is that the burden of proof should rest on the party that makes a claim which affects another party. Finally, in Finland the rule is based on the device that the burden of proof rests on the party who will suffer the pejorative consequences if the fact is not taken into account.

Even though the same principle is not explicitly applied in France, Italy and Turkey, the rule in these countries is that the party that wishes to assert a right has to provide evidence of the facts on which the right is founded. This means, in practice, that the same principle as the above mentioned is applied also in these two countries.

According to Norwegian, American and Greek law, the taxpayer bears the burden to provide all the relevant facts of the matter. In Norway, this rule is based on the principle of self-assessment and in Greece the taxpayer is obliged to prove the truthfulness of his or her tax statement. In the USA the taxpayer is considered to have more information of both income and expenses than the tax administration. These countries do not, unlike most countries, make any difference between income and expenses.

Apart from all other countries, Austrian law generally puts the burden of proof on the tax administration. However, the taxpayer has to cooperate by fulfilling a number of duties, such as disclosing all relevant facts that could lead to tax liability. In some cases, for example if the case is unusual or if the tax administration has limited access to information, the taxpayer has to co-operate on an elevated level. In other cases the taxpayer has to provide evidence in order for legal consequences to commence.

1.2 Burden of proof: Statutory or case law

In Austria, Belgium, Spain, Turkey, Denmark, Sweden¹ and Italy the above mentioned principle is based on statutory law. In Germany, the USA, Finland and the Netherlands, the principle is based on case law. In Russia, the base rules derive from statutory law whereas the substantial rules derive from jurisdiction.

1.3 Variations on the general rule depending on time period or if it is claimed that the taxpayer has submitted false/incorrect information

Austria, Belgium, Germany, Italy, the USA, the Netherlands, France, Norway and Russia have all answered that time aspects do not affect the general rule as such. Norway has

¹ In Sweden, the burden of proof as concerns the taxpayer is considered to follow explicitly from statutory law. The burden of proof on the tax administration follows from the principle that the authorities have to justify their decisions.

although added that there are rules that cut off the taxpayers' possibility to submit new evidence during the process.

In Greece and Sweden, the tax administration bears the burden to prove both to income and expenditures if it wishes to impose an additional tax assessment.

In Denmark, Finland and Spain, a tax decision after the ordinary tax period can only be made if the tax administration proves that the taxpayer has been responsible for the incorrect foundation.

1.4 Tax penalties and the burden of proof

A common feature amongst all the reported countries is that the tax administration/court has a greater responsibility when it comes to imposing tax penalties.

In Austria, Finland, Denmark, Sweden, Spain, France, the Netherlands, the USA, Greece and Germany the authorities fully bear the burden of proof in these cases. In any event, in Germany tax penalties are rare.

In Austria, the tax administration commonly adds an extra charge to the estimated tax base, which is not regarded as a penalty.

In Denmark, the burden of proof on the tax administration is normally heavier when there is a tax penalty involved.

In Germany, France and the Netherlands, if a tax penalty is raised, the tax administration has to prove that the facts that constitute the offence are present.

1.5 Burden of proof regarding discretionary decisions on tax issues or regarding estimated assessments

A common feature amongst the reported countries is that the tax administration is authorized to make discretionary decisions. The capability to do so, i.e. the legal requirements for a discretionary decision to be made, does however differ. This is shown in the following.

According to Austrian law, a discretionary decision must always be based on all relevant facts. The tax administration can assess the tax base by estimation, if the taxpayer is unable to sufficiently explain specifications made by him.

In Denmark, France and Finland, the tax administration has to prove the accuracy of the assumptions made in the estimate/discretionary decision. If the administration succeeds to do so, the taxpayer has to prove the inaccuracy of the decision.

According to German and Turkish law, a discretionary decision can be made if the tax administration cannot investigate or calculate the relevant facts. In these cases the estimation is based on a mere likelihood-standard.

Estimation-based assessments can be made, often by means of presumptions, according to Italian law. The presumptions can follow from either tax law, either from the judge's free evaluation.

In the Netherlands, a "reversal of the burden of proof" occurs if the taxpayer has failed to fill in the tax return, answer the tax administration's questions or fulfill the book-keeping liability. The tax administration's assessment will be held correct as long as the taxpayer does not prove beyond reasonable doubt that the assessment is incorrect. The same principles apply according to Belgian law.

According to Norwegian law, a discretionary assessment can be made if the tax administration finds that another scenario than the one declared by the taxpayer is more probable. This implies that the tax administration, to a certain degree, may be subject to the duty to inspect. Also in Spain and Sweden, the tax administration has to make the estimation probable and justify the truthfulness of its assertions. If this requirement is fulfilled, it's up to the taxpayer to provide evidence that the estimation is incorrect. Furthermore, in Greece the

tax administration bears the burden to prove its allegations concerning the inaccuracy of the taxpayers' tax statement.

In the USA the tax administration bears the burden of proof if it bases its discretionary decision upon statistical information from unrelated taxpayers. In all other instances, the general rules apply.

Finally, in Russia the tax administration bears the burden to prove to its assumptions in a discretionary decision which can be made in three specific situations.²

1.6 Variations in burden of proof with respect to tax havens etc.

One can observe a resemblance amongst the national reports, as far as the EU-states concern, in this case. Since cases that involve tax havens normally imply a lack of information, greater responsibility is on the taxpayer in these cases. A shift of the burden of proof can be explicitly stated or can merely be an effect of the general evidentiary rule combined with the absence of information.

According to German, Swedish, Finnish, Dutch and Norwegian law the burden of proof more explicitly rests on the taxpayer in a cross-border case. As far as the Netherlands concerns, this shift occurs when the taxpayer fails to provide information about entities situated in countries which have not signed information agreements with the Netherlands.

In Austria, Turkey, Denmark, France, Italy, Spain and Greece a shift of the burden of proof to the taxpayer often is the result in tax haven-related cases. This is because the taxpayer more easily can obtain the required information. In Austria, it is then said that the taxpayer has to participate on an elevated level (compare paragraph 1.1). A clear difference between this group of countries and the above listed can be seen in Danish law. According to this, a mere involvement of a tax haven-based company does not lead to a shift of the burden of proof to the taxpayer.

Italian and Spanish law also include special anti-abuse clauses, according to which the burden of proof is altered by presumptions.

In Russia, the answer to the question concerning the relation between the burden of proof and tax havens is a more complex one. A shift of the burden to the taxpayer is recognized as possible in judiciary practice. The answer is however dependent on the balance between public and private interest.

In the USA, investments in tax havens do not affect the burden of proof. The same actually applies in Belgian law; the burden of proof is not influenced by the fact that a case involves information that is hard for the tax administration to obtain.

1.7 Level of the burden of proof

Neither Denmark nor Spain has a general rule of the level of the burden of proof. In Denmark, the required level depends on the circumstances of the specific case. In Spain there is however a high degree of consensus regarding the use of indirect evidence as rebutting evidence of the formal truth.

All the other asked countries have answered that a general rule exists.

Germany and Finland apply the highest level of proof amongst the reported countries. According to German law, evidence of a fact must be *convincing* to be accepted by the courts. A declaration is accepted by the tax administration as long as it does not evoke serious doubt (a lower level). In Finland, the general requirement is *full evidence*, although the level in practice often tend towards *more than probable*.

² The taxpayers refusal to provide the tax administration information about certain premises, no presentation of documents provided for tax calculation within two months and absence of bookkeeping.

The Netherlands, Belgium, France, Norway and Sweden apply the rule of *probable* evidence. Many exemptions from the general level exist in Swedish law. In tax penalty cases, the rule in Norway is the one of *clearly probability*.

In Russia, there are quite specific rules concerning the level of the burden of proof. Proofs that are received through infringement of the Federal act cannot be used. A tax offence has to be proven *thoroughly*. Tax calculations made by the tax administration have to be proven on the level: *probable*.

In Austria, the level is set at *credible* facts. Also in the USA the burden of proof shifts to the tax administration if the taxpayer presents credible facts and the principle of preponderance of evidence applies.

In Italy, according to the national report the level of the burden of proof emerges from the principle of free assessment of evidence. Thus, it's up to the court to evaluate the weight and relevance of each fact.

In Greece, the taxpayer has to, at the initial stage, *prove the veracity* of the tax statement. A general rule on the level of the burden of proof cannot be found in the Turkish report, although it can be observed that Turkish law consists of many detailed evidentiary rules.

Statutory law or case law on the level of the burden of proof?

The general rule in Germany, as far as courts concern, is statutory. No statutory rule exists for the tax administration.

The rules in Austria, Belgium, Greece and Italy are statutory. Also concerning Turkey, the overall impression is that statutory law gives a solid and detailed foundation when it comes to evidentiary questions.

The general rule in the Netherlands and the USA is based on case law.

In Russia, the rules concerning evidentiary requirements emerge from both statutory and case law.

The Swedish rules, as far as the specific evidentiary requirements for certain incomes or costs concern, emerge from statutory law.

Different rules for different authorities?

According to Danish and American law in criminal cases, a conviction requires proof with no reasonable doubt. The Spanish courts have accepted the use of indirect evidence in criminal cases as well as in tax fraud cases.

The same rule applies in tax and criminal courts, according to German law. In several tax matters, the high level is anyhow reduced. A different rule applies in the tax administration.

The general Norwegian principle, as described above, does not apply in criminal cases and courts. Additional tax is considered a penalty and therefore the evidentiary requirements are greater. The requirements lie somewhere in between ordinary tax cases and criminal cases.

1.8 Evidentiary requirements in discretionary/estimated tax assessments

The Administrative Court in Austria has stated that estimated tax bases should be as accurate as possible, although a certain degree of inaccuracy is inherent to all estimations. The result must be in harmony with the experience of life. In criminal proceedings, the court is not bound to the findings in the corresponding tax matter. In criminal cases the administration/court has, in addition, to give reason for the application of the estimation-method, as well as deliver proof concerning the intent of the taxpayer. The taxpayer has no obligation to co-operate.

In France, the tax administration has to prove that its estimation is properly calculated. In some cases, e.g. when calculating a capital gain, the tax administration can contest the taxpayers statement if the gain is lower than usual. The same evidentiary rules apply for tax penalties.

According to Danish law, the tax administration has to show that the estimate is probable. Tax penalty follows automatically upon the discretionary assessment. Also in Spain, the evidentiary requirements are slightly lesser since the tax administration only has to prove the estimated income etc. on a probable level. The same requirement applies when imposing a tax penalty. A tax penalty should never, according to lawyers and professors, be imposed upon the basis of a probable estimation.

In Germany, the requirement is a likelihood-standard when it comes to discretionary assessments. Tax penalties are especially rare in these cases. If the taxpayer has failed to file a tax return or keep book records, which are not estimable facts, a tax penalty can be imposed. In Italy, the tax administration can use wide-estimated criteria in order to achieve a reliable result that seems more likely to have occurred.

In the Netherlands, Belgium, the USA, Norway and Sweden, no specific evidentiary rules exist when it comes to discretionary decisions. As far as the former country concerns, the tax assessment has to be based on a fair estimation. When it comes to tax penalties, the presumption of innocence has to be observed. On the other hand in Sweden, a tax penalty is imposed almost mechanically.

1.9 Evidentiary requirements depending on exchange of information, tax havens etc.

In international tax cases, it could be impossible for the tax administration to obtain information.

According to Austrian doctrine taxpayers are only obliged to co-operate on an elevated level if the tax administration has exhausted all means of obtaining information. Some authors argue to the contrary and point out that the taxpayer more easily can obtain information in cross-border situations.

In Denmark, several agreements have been concluded with tax havens around the world. This means that the tax administration more easily can access information and consequently has a greater responsibility to do so.

According to German statutory law, the taxpayer bears the burden of proof if he/she keeps a business relation with a state that does not provide Germany with information.

There are no special evidentiary requirements regarding tax havens in Italian, French, Russian, Norwegian, American and Spanish law. As mentioned before, the burden of proof is altered according to some Italian anti-abuse regulations. In Spain, the possibility of exchanging information with the country involved does in practice affect the evidentiary requirements insofar that a taxpayer may have to provide additional material evidence of residence.

According to the Dutch guidelines concerning the burden of proof in these cases, described above, a greater amount of responsibility lies on the taxpayer when a tax haven is involved. Since many information agreements have been concluded by the Netherlands with various countries, including tax havens, this principle has lost a lot of its importance.

According to Greek law there is a non-recognition concerning transactions made between Greek taxpayers and subjects situated/living in countries from which it is impossible to gather information. The author of the national report does however question if this regime is compatible with the rule of law.

If the Finnish tax administration finds the general tax avoidance rule applicable it should thoroughly investigate all the aspects involved. If the taxpayer cannot make his/her standpoint probable, the tax administrations' position shall prevail.

1.10 Different evidentiary requirements for different types of taxes

In most of the reported countries, the evidentiary requirements generally do not differ between different types of taxes. This is the case in Austria, Belgium, France, Germany, Norway, Greece, Italy, Spain, the Netherlands and Sweden. Many of the countries, more specifically Germany, Italy, Austria, Sweden, Spain and the Netherlands, though have mentioned that special evidentiary requirements can follow from the specific tax act in question. In France, the administration is stricter when it comes to VAT, since this tax contributes with 50 % of the state tax revenue and the taxpayer does not earn any money with respect to this tax.

The USA has not reported that any differences exist between different types of taxes. Denmark has noted that since some of the Danish laws are based on EU law, like VAT, and some on national law, the requirements might differ depending on the type of tax involved. According to Russian law, different evidentiary rules apply to different types of taxes according to general principles of law and procedure legislation.

1.11 General rule on evaluation of evidence and the limitations to such a rule

General rule

In Austria, Belgium, Italy, Norway, Finland, the USA, Greece, Russia, France, Spain, Sweden, Turkey³ and the Netherlands there are principles of a free assessment of evidence. Also in Denmark, the general principle is free assessment of evidence. Concerning the tax administration, the principle is somewhat modified, since the tax administration is obliged to consider all relevant information that comes from the taxpayer or elsewhere.

Only evidence that has been obtained by legal means can be used, according to German law. This principle is although relative and the court weighs up the public interest of lawful and equal taxation and the heaviness of the violation against basic law.

Limitations to the general rule

In Norway, the so called Butt-principle, is an importation exception from the free assessment of evidence. According to this principle, established in case law, the taxpayer must bear the risk of an incorrect fact if he fails to provide information or provides inaccurate information.

In Spain, there are two types of statutory limitations to the general rule. According to one of these, the law deems one form of evidence more or less effective and according to the other, certain forms of evidence are given a specific evidentiary value.

According to Turkish law, civil issues which law orders to be proven with specific evidence cannot be proven in another way. So called conclusive evidences, such as bills and oaths, are binding for the judge. Arbitrary evidences; witnesses, expert committee, assessment and reasons for special discretion, are evaluated freely by the judge. In Turkish criminal cases freedom of evidence is central. Only evidence gained by legal means are accepted.

³ Observe the exemptions from this principle, described below.

Statutory or case law

In Austria, Belgium, Italy, Norway, Greece, Russia, Turkey, Spain and Sweden the above mentioned principles are statutory.

In the Netherlands, France and Germany the above mentioned principles are based on case law.

Part 2: Burden of Proof and Anti-Abuse Provisions

Klaus-Dieter Drüen and Daniel Drissen, Germany

Fifteen national reports are the basis for this section report.⁴ Due to the vast material delivered, the gain in knowledge of a condensed repetition of the national reporters' statements would be limited. This report shall give instead a structural analysis of different approaches and common structures in handling the burden of proof in abuse-prone situations.

2.1 The General Concept of Burden of Proof in Abuse-prone Situations

For comparing the general concepts of burden of proof in abuse-prone situations within the investigated countries, a necessary first step is to set a common ground in respect of the used terminology. The scope of the rules that is seen as addressing actually issues of burden of proof varies from jurisdiction to jurisdiction (cf. supra part 1, in particular the presentation concerning linguistic references).

In the context of abuse-prone situations one might understand the term “burden of proof” in a broader sense. This perspective comprises all rules that deal with producing or evaluating evidence as well as the allocation of the respective burden. It is to acknowledge that the more there are rules about the burden to produce evidence, the less room is left for an actual decision based on the burden of proof. As it is stressed out by the Dutch national reporter, any duty to cooperate in this regard with legal consequences in case of non-compliance shifts the issue from an isolated question of fact to a question of law. The actual decision based on the burden of proof is than a mere residual in cases of an unsolvable state of facts. The national reports illustrate that the field of tackling tax abuse is a paragon for this phenomenon (cf. infra 2.2).

Having regard to the understanding of “abuse” in various jurisdictions, it is noteworthy that a pan-European concept of abuse of tax law does not exist,⁵ notwithstanding the question whether a European understanding is under current development by means of ECJ case law. There are comparable approaches with regard to the general outline but the understanding of the nuances of “abuse” or “abusive behavior” in tax law is deviating. The Austrian Administrative Court specified a legal arrangement as abuse that with respect to the desired business results is unusual and inappropriate and can only be explained by the sole purpose of tax avoidance.⁶ In German tax law, abuse is legally defined as inappropriate legal arrangement that leads, compared to an appropriate arrangement, to a tax advantage for the taxpayer or a third person which is not provided for in the law.⁷ The Spanish national reporter illustrates that according to the national conception, a transaction is considered to be abusive if it is manifestly artificial or inappropriate for the purpose of achieving the result obtained and if there are no valid commercial or legal reasons for the transaction other than obtaining tax savings. In Italian tax law, abusive behavior is seen as carrying out transactions without

⁴ The national reports of Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, The Netherlands, Norway, Russia, Spain, Sweden, Turkey and the USA.

⁵ *Kofler*, *Steuergestaltung im Europäischen und Internationalen Recht*, in Hüttemann (ed.), *Gestaltungsfreiheit und Gestaltungsmissbrauch im Steuerrecht*, Deutsche Steuerjuristische Gesellschaft (DStJG) Volume 33 (2010), p. 214 (269).

⁶ Austrian Supreme Administrative Court (*Verwaltungsgerichtshof*) of 22 September 2005, 2001/14/0188.

⁷ Sec. 42 para. 2 German General Tax Code (“*Ein Missbrauch liegt vor, wenn eine unangemessene rechtliche Gestaltung gewählt wird, die beim Steuerpflichtigen oder einem Dritten im Vergleich zu einer angemessenen Gestaltung zu einem gesetzlich nicht vorgesehenen Steuervorteil führt.*”).

valid economic reasons and the intention to circumvent tax law obligations and limitations in order to obtain undue tax savings.

These examples show that the individual national approaches have two main elements in common– the inappropriateness of the transaction and the motivation of an undue tax advantage. Thereby, the inappropriateness is a term of relation and requires a standard for its valuation. It is stressed out by the German and the French national reporter that the line between intelligent tax optimization or tax planning that would have to be qualified as (still) appropriate, and abusive tax behavior that would be wholly artificial and therefore inappropriate, is sometimes hard to draw in the individual case. By all means, “inappropriateness” is more than mere unusualness.⁸ As the Austrian national reporter puts it, the chosen way would be without the result of the tax advantage incomprehensible. Decisive is therefore the economic, i.e. tax saving motivation of the legally due transaction. In respect of this motivation, the national concepts differ in its requirements from an exclusive and sole purpose⁹ to gain an undue tax benefit to a main and deciding motivation that led to the chosen construction.

Within the different national concepts of burden of proof in the realm of abuse of tax law, a first line can be drawn between jurisdictions that do have a general anti-abuse provision containing rules for the burden of proof and jurisdictions with no such provision but with an explicit or implicit reference to general burden of proof rules.

2.1.1 Reference to General Burden of Proof Rules

Reference to general burden of proof rules becomes necessary in jurisdictions that either do not have a general anti-abuse provision (e.g. Denmark, Greece, and Russia) or have such a provision that however does not contain special rules regarding the burden of proof (e.g. Sweden). The respective national reports show that there are at large two concepts reference is made to. The burden of proof either rests on the party that claims a fact or on the party that can obtain or gather the evidence easiest (for details cf. questionnaire part A 2.1.1).

In the anti-abuse context, both approaches generally come to the same result. The tax administration bears the burden of proof that there is abuse and the anti-abuse provision therefore is applicable. The taxpayer bears the burden of proof to the contrary. Taking into account the definition of abuse of tax law as an inappropriate legal construction that should lead to an undue tax advantage, i.e. a tax advantage not provided for in the law, it is, however, debated if the question whether this condition is met is even a question of burden of proof in its strict sense. Especially the Dutch, the German and the US national reporter stress out that this substantiation is a matter of interpretation of tax law and therefore a matter of law not open to the rules of juridical proof.

2.1.2 Special Burden of Proof Scheme

The jurisdictions that do have a special burden of proof scheme in the anti-abuse context are characterized by a similar conception. In a first step, the tax administration has to prove that the legal arrangement in question is abusive according to national rules. The requirements for this substantiation yet slightly differ within the jurisdictions.

⁸ From the German perspective *Driien*, in Tipke/Kruse, Abgabenordnung/Finanzgerichtsordnung, Vor § 42 para. 19 (October 2010).

⁹ This approach was adopted by the European Commission in its proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121/4, Art. 80 (general anti-abuse rule).

The Spanish national reporter illustrates that the tax administration generally bears the burden of proof that the taxpayer's purpose was to obtain an undue tax advantage. There are, however, certain factors or circumstances upon their existence that abuse might be indicated. Once this "presumptive evidence" is presented, the burden of proof shifts to the taxpayer. According to German tax law, the tax administration has to substantiate that the investigated legal arrangement is inappropriate. Although the German anti-abuse provisions do not contain a general presumption for inappropriate and therefore abusive legal arrangements, there are as well certain circumstances that might lead to the presumption of abuse. This presumption may be based on unusual or exceptional legal constructions or on the fact that some legal arrangements are empirically utilized for tax abuse. It is nevertheless on the tax administration to concretize this presumption to a substantiation.¹⁰ If the presumption is substantiated, the burden of proof shifts in a second step to the taxpayer. He¹¹ now has to prove that the legal construction or arrangement corresponds to financial or economical needs and is therefore based on non-taxrelated reasons. The German national reporter stresses out that this evidence is not a full counterevidence but evidence in exoneration. In Italy, the tax administration has to proof that the taxpayer's interest behind the legal transaction can and is normally satisfied by a different legal transaction, i.e., as the Italian Supreme Court pointed out, that the anomalous difference between the challenged and a "standard" legal transaction is incompatible with a normal economic logic.¹² Once the tax administration has provided the evidence, the taxpayer has to substantiate that his behavior was motivated by sound, in contrast to only marginal, business reasons.

All these schemes have in common that the burden of proof shifts upon the fulfillment of certain pre-defined requirements. The predefinition of the allocation can be based on the general concept that the party bears the burden of proof that can obtain or gather the evidence most easily. It is within the sphere of the tax administration, taking into account its duty to investigate *ex officio*, to gather the evidence that leads to the fulfilment of the requirements for tax abuse laid down in the national rules. On the other side, it is within the sphere of the taxpayer to provide evidence for the sound business reasons that were the motivation for conducting the transaction.

As the Austrian national reporter points out, the taxpayer has the duty to cooperate on an elevated level in unusual cases. Although appearing very similar to the general conception at first instance, these special burden of proof schemes might slightly shift the burden of proof to the disadvantage of the taxpayer. The crucial question is to what extent the tax administration's duties are kept up in the anti-abuse context.

In the German conception, the duty of the tax administration to investigate *ex officio* all relevant facts of the cases is in the anti-abuse context limited to the non-tax related facts that are recognizable for the tax administration. So the two-step mechanism leads to a partial reversal of burden of proof compared to the general rules.

The Spanish system leads to the same result with its concept of presumptive evidence that the taxpayer subsequently has to challenge.

In contrast to the Spanish and German conception, the Finnish national reporter stresses out that the national system does not lead to a reversal of burden of proof since the tax authority still has to thoroughly investigate all aspects involved in the case.

¹⁰ Cf. for the German conception in detail *Driien*, in Tipke/Kruse, Abgabenordnung/Finanzgerichtsordnung, Vor § 42 para. 27 et seq (October 2010).

¹¹ Or "she" as the national report of the USA carries the gender non-discrimination to the other extreme.

¹² Italian Supreme Court of 21 January 2009, decision No 1465.

2.2 Alteration of the Burden of Proof Concept in Special Abuse-prone Tax Fields

In addition to the general concepts of burden of proof established to tackle tax abuse, various jurisdictions as well have special burden of proof schemes for the different abuse-prone fields of tax law. Similarities throughout the different countries can be noticed both in the determination of the individual tax fields and concrete alteration of the burden of proof.

2.2.1 Special Abuse-prone Tax Fields

The tax fields that are especially deemed to be abusive primarily concern cross-border transactions. In this regard, some countries focus on certain types of company transactions or specific types of taxes.

The national reports show that many jurisdictions have special provisions dealing with transactions connected to “tax havens” or “privileged taxation systems”. According to French and Greek national law, a foreign taxation system is considered to be privileged, if the income taxation is 50 % of the national taxation or lower. Whereas the definition of a privileged taxation system is laid down in national provisions, a corresponding definition of tax haven does not exist in the jurisdictions that deal with this issue.

In Italy, Germany and Greece, for instance, the question which country is considered to be a tax haven or uncooperative state¹³ is answered by decrees, or, as the Italian national reporter called it, “blacklists” issued by the national Ministries of Finance. Once a country is qualified in this respect, any payment made to entities in these countries is supposed to be fictional and therefore not tax-relevant.

Other abuse-prone tax fields in the cross-border context are the legislation concerning controlled foreign companies, CFC-legislation (cf. the national reports of Italy, Spain and Sweden), inter-company dividend payments if the subsidiary is situated within a low-tax country (Austria), and thin capitalization (Germany and Spain). Anti-abuse provisions exist as well in the codes regarding specific types of taxes, such as real estate property taxation (Greece¹⁴), real estate transfer taxation or inheritance tax (Germany). Special abuse-prone types of company transactions mentioned in the national reports are company reorganizations (Austria) or loss trafficking by purchasing mere company shells (Germany¹⁵).

Another field of tax law open to tax optimization planning is the issue of transfer pricing. Potential conflicts result from the interplay between legal independence and economic integration driven by a (partially) joint interest of the contracting parties. The transfer pricing provisions with its detailed regime of documentation requirements for transactions between affiliated parties are therefore to a certain extent connected to anti-abuse issues. The questions arising in this regard, however, go far beyond a mere tackling of tax abuse. Hence, transfer pricing rules are dealt with separately (cf. questionnaire part D).

2.2.2 Different Allocation or Level of Burden of Proof

¹³ According to German and Greek tax law, these countries are declared as “uncooperative states” due to the fact that decisive for the qualification is whether Germany or Greece have signed with the respective countries administrative assistance with regard to taxation.

¹⁴ Cf. the Greek national report for a detailed insight to the respective national real estate property taxation provisions.

¹⁵ It is controversially debated in Germany if Sec. 8c Corporate Income Tax Act in its respective version is to be considered as anti-abuse provision, cf. *Ernst*, Neuordnung der Verlustnutzung nach Anteilseignerwechsel – Reformbedarf und haushaltspolitische Bedeutung des § 8c KStG, IFSt-Schrift No. 470, pp. 25 et seq (p. 58).

Deeming these tax fields under the realm of tax abuse mostly results in an intensification of the burden of proof to the disadvantage of the taxpayer. It is stressed out in the different national reports that the special anti-abuse provisions are generally developed as rebuttable presumptions for abusive behavior. These presumption are, however, not unconditional. The burden of proof for the requirements laid down in the respective provisions is still incumbent upon the tax administration. The overarching duty to investigate *ex officio* is though narrowed to these specific requirements. The routine of investigation is predetermined. On the other hand, the taxpayer has to full burden of proof to the contrary. The French and Italian national reporter stress out that the level of burden of proof incumbent upon the taxpayer is in most of the special provisions higher compared to the general scheme. It is a much larger step for the taxpayer to rebut the tax administration's qualification of his transaction.

The intensification of the burden of proof to the disadvantage of the taxpayer becomes especially evident with regard to transactions connected to tax havens or uncooperative states. It illustrates that any deficiencies on part of the tax administration to properly investigate often lead to the presumption of tax abuse resulting in a shift of the burden of proof to the taxpayer (cf. as well questionnaire part A 2.4).

So have, for instance, the Dutch, German¹⁶ and Greek tax system special provisions that make the tax handling of certain cross-border transactions or the deductibility of certain cross-border payments subject to whether the destination country is cooperative.¹⁷ "Cooperative" in this regard means that the state has signed an agreement for administrative assistance in tax matters resolving the lack of information based on the deficiency to investigate of the national tax administration due to the sovereignty principle. Is a state considered as uncooperative under German law, the burden to provide evidence the taxpayer bears is intensified inter alia by significantly increased documentation requirements.¹⁸ Dutch law contains a similar provision according to which a Dutch company is obliged to give the tax administration on request information that rests with an associated company situated in an uncooperative state. The burden of the tax administration to investigate all relevant facts *ex officio* is in these cases lowered to the burden of evaluating the evidence presented by the taxpayer. In this regard, the Greek tax regime even goes a step further. If an individual undertakes a transaction with an entity in an uncooperative state, this behavior obviously so much raises the suspicion of abuse that Greek law provides for an irrebuttable legal presumption concerning the fictitiousness of the transaction in question.

The general suspicion of abuse in cross-border situations can, to various extents, be noticed throughout the national reports. This suspicion, however, is not solely based on the taxpayer's behavior but as well on the more general problem of the lack of possibilities to investigate due to the territoriality principle. The intensified burden to provide evidence by increased documentation requirements imposed on the taxpayer is in some jurisdictions considered as

¹⁶ This new regime was installed by the Act to Combat Tax Evasion (*Steuerhinterziehungsbekämpfungsgesetz*) of 29 July 2009, Federal Law Gazette I 2009, p. 2302, and the subsequent Decree to Combat Tax Evasion (*Steuerhinterziehungsbekämpfungsverordnung*) of 18 September 2009, Federal Law Gazette I 2009, p. 3046.

¹⁷ The Dutch national reporter stresses out that the practical importance of such provisions has diminished recently since the Netherlands signed Tax Information Exchange Agreements (TIEA) with most (former) tax havens. The situation in Germany is similar, the respective list issued by the German Ministry of Finance is empty.

¹⁸ Other requirements more related to the lack of possibilities to investigate. So is the taxpayer in some situations obliged to convey his right to the disclosure of certain information via foreign financial institutions to the tax administration.

filling compound for the leaks in investigation power¹⁹, or, adopting the catchy phrase of the Greek national reporter, as preventing measure.

2.2.3 Limits to the Alteration of Burden of Proof

With regard to the requirements that may be imposed on the taxpayer and its limits, different legal sources for such restrictions can be considered. Beside special rules in the national tax laws, general principles of national (constitutional) law as well as principles of European law might have a limiting effect. Apart from the EU aspects that are dealt with separately (cf. questionnaire part C), not much information is given in the national reports with regard to these different national provisions or principles of law and the rulings of the national courts in this respect. The Danish national reporter illustrates that in respect of a general anti-abuse provision, the general conflict of complying with the principle of legal certainty arises and safeguarding the principle of equality of tax burden arises. As to burden of proof aspects, the Austrian national reporter stresses out that the provisions shifting the burden of proof to the disadvantage of the taxpayer are not in conflict with other principles of law as far as the request for evidence is equitable and necessary. The French national reporters seems to be in line with this position by stating that in court procedure the court has to demand the evidence from the one who is capable to provide the respective information.

2.3 Methods and Procedure of Reviewing the Given Proof

Once the required proof is given, it becomes necessary to review the evidence itself and the decisions based upon this review. The national reports illustrate that the different jurisdictions established a multistage procedure in this regard. A widely acknowledged concept is that the decision if the required level of proof has been met is upon the tax administration at first instance subject to a subsequent review by a (tax) court. In the anti-abuse context, however, in some jurisdictions an independent third institution comes into play having the task to decide or advise upon the existence of abusive behavior at an intermediate stage.

2.3.1 Tax Authority

At first instance, it is regularly the tax administration that decides if the required level of proof is met or if a certain transaction is considered to be abusive. The taxpayer may challenge this decision by means of appeal. According to Austrian and German tax law, the appeal is presented to the tax office that issued the tax assessment or notice. The appeal of a German taxpayer leads to a full review of the case on part of the tax administration. The Austrian tax administration may decide itself on the appeal of the taxpayer or pass the case directly to an independent finance senate as appellate instance in tax matters.

In Italy, an additional intermediate stage exists. In case, the tax administration intends to apply the national general anti-abuse provision²⁰, the tax office at first has to demand clarifications on the investigated transaction from the taxpayer. This request must contain the reasons upon which the tax administration qualified the transaction as abusive. Only if the tax administration dealt with and rebutted the evidence put forward by the taxpayer, a final tax assessment is effective. Furthermore, the taxpayer is entitled under Italian tax law to request a declaration from the tax administration that a specific anti-abuse provision is not applicable in the case presented.

¹⁹ For the German perspective *Seer*, in Tipke/Kruse, Abgabenordnung/Finanzgerichtsordnung, § 90, para. 19 (January 2010)

²⁰ The Italian national reporter stresses out that this provision (Art. 37bis Presidential Decree No. 600/1973) is considered to be a “(semi) general anti-abuse provision” due to the fact that the provision does not apply in general but for certain transactions specifically provided for in the law. By various extensions of the list of transactions, the scope of this provision, however, has been significantly widened.

2.3.2 Independent Institution

Some jurisdictions, however, have interposed an independent institution in the proceedings. Under Spanish tax law, the tax administration has to request a favorable report from a consultative committee before qualifying a certain transaction as abusive. Once this consultative committee issued its report, it is binding for the tax administration. According to French law, both the taxpayer and the tax administration are entitled to submit a potential abuse case to the French consultative committee (*comité de l'abus de droit fiscal*). The opinion delivered by this committee has, however, just an advisory effect.

An intermediate stage that can be used upon the initiative of the taxpayer has been established in Sweden. The taxpayer may request an advanced ruling in potential abuse cases from the Swedish advanced rulings board (*Skatterättsnämnden*). In these cases, the taxpayer is obliged to present as much evidence as necessary to enable the board to deliver an advanced ruling. A similar system existed in Italy until 2006. The Italian taxpayer was entitled to a ruling on the application of the general anti-abuse provision by a consulting committee.

2.3.3 Tax Court

If the abovementioned pre-trial proceedings do not have a successful outcome for the appealing party, it is the (administrative or tax) court that decides upon the dispute. The different national reports stress out that the court is not bound by the prior decision of the tax administration. As the Austrian national reporter exemplarily illustrates, the court is free in considering the evidence. The decision of the tax administration is therefore subject to a full judicial review. The French national reporter points out that the opinion of the consultative committee is not subject to review due to the fact that it just has advisory effect.

In respect of the extent of the judicial review, the duty to investigate *ex officio* is, for instance, according to German tax law, set forth in trial proceedings. The tax court is not bound by the submissions and requests to present evidence of the parties. The Danish national reporter, however, stresses out that the national court is in trial proceedings bound by the submissions and requests of the parties.²¹ Therefore, the extent of the review is limited in this regard. The court only decides upon the evidence already presented.

²¹ “*Forhandlingsmaximen*” in contrast to “*officialmaximen*” (duty to investigate *ex officio*) which rules in pre-trial proceedings.

Part 3: Burden of proof and European tax law

Gerard Meussen

3.1 EU law and the reversal of the burden of proof

In the famous *Leur-Bloem* case (ECJ 17 July 1997, case C-28/95) the ECJ ruled as follows: “Article 11 of the Directive is to be interpreted as meaning that in determining whether the planned operation has as its principal objective or as one of its principal objectives tax evasion or tax avoidance, the competent national authorities must carry out a general examination of the operation in each particular case. Such an examination must be open to judicial review. Under Article 11(1)(a) of the Directive, the Member States may stipulate that the fact that the planned operation is not carried out for valid commercial reasons constitutes a presumption of tax evasion or tax avoidance. It is for the Member States, observing the principle of proportionality, to determine the internal procedures necessary for this purpose. However, the laying down of a general rule automatically excluding certain categories of operations from the tax advantage, on the basis of criteria such as those mentioned in the second answer under (a), whether or not there is actually tax evasion or tax avoidance, would go further than is necessary for preventing such tax evasion or such tax avoidance and would undermine the aim pursued by the Directive.”

In general the outcome of this ruling can be described as follows:

Member States are not allowed to have provisions in their national tax laws that deem certain situations to have occurred primarily as the result of tax evasion or tax avoidance, while at the same time allowing the taxpayer to provide proof to the contrary. This reversal of the burden of proof to the detriment of the taxpayer violates EC law.

Transactions having the primary aim of tax avoidance or tax evasion have to be proven by the tax administration on a case-by-case basis.

What effect did this ruling have on the tax legislation of the Member States? This ruling is important as it determines the limits enshrined in the anti-abuse provision as enshrined in Article 11 of the Merger Directive.

Some Member States changed their tax legislation after the ruling, like for instance Belgium after a decision of the Belgium Supreme Court of 13 December 2007 and Denmark in the Danish Merger Taxation Act by statute no. 166. Various Member States clearly state that their national tax regulations lack such a provision.

Other countries like France still maintain tax regulations that entail a provision with regards to the reversal of the burden of proof.

The Danish report rightly states with regards to a presupposition of tax avoidance, that the taxpayer and the tax administration in effect share the burden of proof – each pulling on different ends of the rope so to speak – to establish whether tax avoidance or tax evasion is the primary purpose of a given reorganization.

3.2 Reversal of the burden of proof and time limits

Article 14, paragraph 4 of the *Netherlands* Corporate Income Tax Act 1969 contains a specific provision concerning the possible abuse of merger facilities with regard to an asset merger. It provides that if the shares in the receiving company that were received on the occasion of the transfer of the assets to the receiving company are being sold within three years after the merger, the merger facilities are retroactively withdrawn unless the taxpayer proves that the transaction was carried out for sound business reasons. Such a provision is highly questionable in relation to European tax law, as it leads to a situation in which a certain

situation is deemed to be abusive, while at the same time the burden of proof is automatically shifted on the shoulders of the tax payer.

Although in a number of country reports it is stated a comparable provision in national tax legislation is missing, other countries do apply minimum holding requirements. An example is *Denmark* where in general a holding period of three years after the division, transfer of assets or exchange of shares is applicable.

From the *German* report can be derived that the German Business Reorganizations Tax Act (*Umwandlungssteuergesetz*) contains blocking periods of 3, 5 or 7 years, depending on the specific transformations or mergers. Remarkable however is the fact that this tax act automatically excludes certain categories of operations from the tax advantage *without the possibility of a counter proof by the tax payer*. They install an *irrefutable presumption of tax abuse*, which is clearly in violation of ECJ's case law.

Sweden seems to have a time limit that however only lasts until the end of the year in which the merger or division has taken place.

3.3 Reversal of the burden of proof and transactions with non-domestic entities

In general all countries deal with the distinction between equity and debt in group structures. Many countries have case law on the requalification of an group loan in equity, which makes the writing down of the loan not tax deductible. In general one can say that the tax payer has to prove the value of the loan, the tax administration has to prove that as far as the intra-group loan agreement is concerned, it is actually to be seen as financing through the delivery of equity.

Article 13b, paragraph 4 of the *Netherlands* Income Tax Act 1969 contains a specific provision to combat abuse of tax law where an accepted intra-group loan is written down. It provides that if the loan that was written down for *Netherlands* tax purposes is sold to a company established outside *the Netherlands* or to a natural person resident outside the *Netherlands*, it is deemed to be a transaction with a foreign company belonging to the group or with a natural person having a substantial interest in the group, unless the taxpayer proves the contrary.

The background of this provision is the situation that the written-down loan leaves *the Netherlands* tax jurisdiction even though it is not clear whether or not the loan was sold to an affiliated group company or a natural person. If the loan is sold to a third party, the writing down of the loan definitely ends up as a final tax loss that stays in *the Netherlands*. But if the loan stays 'within the group' the writing down of the loan is recaptured. Some writers in *the Netherlands* have argued that this provision amounts to a restriction that is not in accordance with the TFEU.²²

Comparable regulations seem to be absent in some countries like *Austria*, *Germany*, *Norway*, and *Sweden*. But for instance *France* has a similar rule with regards to a loan provided to a company that is situated in a tax haven.

In *Denmark* the problem in principal does not occur as intra-group loans are defiscalized meaning that the writing down on the loan is not tax deductible while at the same time the debtor's profit on an intra-group debt is exempt from taxation. In cross-border situations this exemption depends on the fact that the writing down of the loan is not deductible in the state of the creditor. The latter has to be proven by the tax payer, but only in a cross-border situation.

²² Compare Reinout Kok, *Cross-Border and EU Aspects of Distressed Group Debt: The Dutch Creditor's Viewpoint*, European Taxation, February/March 2011, p. 79. Also: B.J. Kiekebeld and J.A.R. van Eijdsden et al., *Nederlands belastingrecht in Europees perspectief*, Deventer, Kluwer, 2009, p. 118.

In *Spain* there is also a reversal of the burden of proof in situations of passive investments being done in a country or territory that can be classified as a tax haven, on the basis of national Spanish tax legislation.

3.4 Donations to foreign charitable institutions and the burden of proof

In the *Persche case* (ECJ 27 January 2009, case C-318/07) the ECJ ruled as follows: “Article 56 EC precludes legislation of a Member State by virtue of which, as regards gifts made to bodies recognised as having charitable status, the benefit of a deduction for tax purposes is allowed only in respect of gifts made to bodies established in that Member State, without any possibility for the taxpayer to show that a gift made to a body established in another Member State satisfies the requirements imposed by that legislation for the grant of such a benefit.”

The deductibility of donations (in money or in kind) to foreign charitable institutions is a highly debated topic in the light of EU developments (Community law). In this respect the issue of the burden of proof is very relevant as taxpayers often have limited possibilities to prove that the foreign institution is involved in charitable activities while the Member State is far better equipped to investigate the contested activities.

On May 18 2010 the European Commission has requested *the Netherlands* to change its rule that gifts, donations and inheritances to charitable in *the Netherlands* and abroad can only qualify for tax relief if the charities have registered themselves with the tax authorities of *the Netherlands*. The Commission considers that this requirement is unnecessarily restrictive, since it does not allow for the possibility of tax relief in case the foreign charity has not registered itself in *the Netherlands*. Nothing prevents the authorities from requiring the tax payer to prove that the conditions for tax relief have been met.

In *France* donations to foreign charitable institutions are tax deductible provided there is a fiscal consent from the French tax administration. If the foreign institution has not asked for a fiscal consent, the tax payer must prove that the institution is charitable. This clearly seems to violate the *Persche* ruling of the ECJ.

In *Belgium* the tax payer must prove that the foreign institutions are comparable to the Belgian charitable institutions and that they are effectively recognised in the resident country as a charitable institution.

In *Denmark* detailed regulations exist for the deductibility of donations to charitable institutions. It is difficult for foreign charitable institutions to meet these requirements.

In the *German* report it is stated that the situation may occur that the tax payer is not able to give the proper evidence because the information that is needed is solely in the sphere of the foreign charity, that is not willing to disclose the relevant information. In that case the tax authority has to request the other Member State on the basis of the Mutual Assistance Directive²³ to provide for the necessary information. In the *Spanish* national report the same position is taken by the Spanish national reporter.

Legislation in *Greece* seems to be in violation of community as it only allows deduction of donations to foreign charitable institutions as far as they refer to Greek interests like the Ecumenical Patriarchate in Istanbul and the Christian Orthodox Church of Albania.

Legislation in *Italy* seems to violate community law as it allows for deduction of contributions to foreign charities, but only when related to initiatives in non-OECD Member countries, so as to support charitable activities in developing countries, which is not required for donations to Italian charities.

²³ Council Directive 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 (77/799/EEC).

In *Norway* deductions for charitable organisations are only allowed to a very limited degree, and consequently the issue as stated above comes up only to a very limited extent.

In *Sweden* no community law problem exists because donations to charitable institutions are not deductible at all, according to current Swedish legislation.

In the *United States of America* there is a clear discriminatory rule that does not permit a charitable contribution deduction for gifts to foreign charitable institutions. Most foreign charities accommodate themselves in the *United States of America* to limitation by forming a United States feeder organization that is a qualified recipient of charitable contributions. On the other hand, organizations may use their assets to support their charitable activities outside the *United States* without losing their status as such.

3.5 The burden of proof and proportionality

In the recent SGI-case (ECJ 21 January 2010, case C-311/08) the ECJ ruled on profit corrections regarding transactions between related companies in a cross-border situation. The contested transactions implied the provision of a loan without taking any interest into consideration and the payment of excessive management remunerations.

The Court held that it was proportional that the initial burden of proof, to demonstrate, on the basis of objective and verifiable elements, that the transaction, or elements of the transaction, represent an artificial arrangement lies with the tax administration.

The taxpayer is then to be given the opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that may have existed for that transaction. See also, paragraph 82 Thin Cap GLO (C-524/04) and paragraph 84 CFC and Dividend GLO (C-201/05). In the case at hand the taxpayer had a period of one month, which could be extended, within which to establish that no unusual or gratuitous advantage is involved. This seems to be reasonable.

This approach seems to be in line with Commission Paper COM(2007) 785 final concerning anti-abuse regulations in the field of direct taxes – application in the EU and with regard to third countries, page 5.

In general in the country reports it is stated that countries abide these proportionality rules concerning the division of the burden of proof.

Part 4: The Burden of Proof in Cross Border Situations (International Tax Law) Giuseppe Marino

4.1 Introduction

In principle, as a general rule, it makes sense to say that who wants to enforce a right in a judicial proceedings shall proof the facts supporting its grounds; in the tax field this means that the Tax Administration bears the burden of proof both in its own internal dealings with the taxpayer (assessment and appeals) and in litigation: the Tax Administration must present some kind of evidence that the tax return is not correct and the taxpayer must present some documentation of other evidence that he really had a certain costs.

It may also well be understood that the Burden is a question of law while the proof is a matter of real facts.

However, despite the general rule which delivers to the Tax Administration the legal initiative, in many tax legislations the burden (of proof) can be reversed when dealing with cross border situations allowing the Tax Administration to simply estimate taxable income. This is the case of Italy, for example, where there are relative presumptions of taxation which must be dismantled by:

1. individual taxpayers migrating in tax haven countries (art. 2(2) of ITC);
2. individual taxpayers having assets located in tax haven countries (art. 12, D.L. n. 78/2009);
3. Italian parent companies having controlled foreign companies (art. 167 of ITC);
4. foreign companies controlling Italian companies (art. 73(5-bis) of ITC);
5. trusts regulated by offshore legislations (art. 73(3) of ITC);
6. Italian companies sustaining costs related to operations with companies located in tax havens countries (art. 110(10) of ITC).

The scope of this part of the EATLP research topic is to dedicate specific attention to the burden of proof in transfer pricing matters, which discipline in recent years has received a boosting evolution due to the works of several International Institutions (the reference is specifically made to the OECD and the EU Joint Transfer Pricing Forum). It is not yet clear how this legislative and administrative evolution will be managed from theory to practice, and this is the reason why it is important to make some preliminary reflections and warnings.

As clearly stated in recent tax literature, the internationalization first and the globalization afterwards have broken the assumption that a political territory of a country represents a particular “market” where (individual and corporate) taxpayers perform activities, competing with other market participants, using resources offered by that market and delivering goods and services to customer in that market.

Today it must be accepted that any firm currently operating in a geographical and political territory will use supplies both from inside and outside that territory and will offer services to customers inside and outside that territory. The activities of a single firm might quite often stretch across geographical and political boundaries, thus making it more and more difficult to recognize and evaluate the respective contributions of different (legal and factual) units of the firm to the final outcome.

This is most prominently reflected in the eternal debate on the reliability of transfer pricing methods, where the traditional instruments (comparable uncontrolled prices, cost-plus or

profit-minus methods) are more and more supplemented by “modern” but increasingly arbitrary tools (transactional net margin method and profit split method).

4.2 The burden of proof between tax authorities and taxpayers in transfer pricing cases

The need to dominate the issue on the precise international tax allocation brings me to the question “who has to prove what” between the Tax Administration and taxpayers. The answer is relatively simple for all the countries reported where the general rule (“who wants to enforce an international tax allocation bears the burden to prove that transfer pricing operations are at arm’s length”) is with the Tax Administration.

However, due to the aforementioned globalization trend, Tax Administrations are becoming more and more unable to collect the necessary information in order to better ascertain the international tax allocation, and this is the reason why there is a parallel trend to somehow shift this burden to taxpayers by imposing the collection of a set of documents related to their international transfer pricing policy.

A clear example of this mood comes from the Dutch report which includes the following declaration of the Deputy Minister: “(...) *considering the fact that the information, to be made available under the proposed administrative order, is required for assessing the arm’s length nature of the transfer prices agreed, and that the information is so closely related to the way the taxpayer carries on its business, that it cannot, or with great difficulty, be obtained in any way other than through the taxpayer*”.

In recent years, OECD member countries and EU Member States have been adopting transfer pricing documentation rules. The OECD Guidelines are based on the prudent business management principle, which means that the need for information should be balanced against the costs and the burden that the taxpayer will bear in preparing or obtaining such documentation. The OECD Guidelines stress that Tax Authorities should take great care that the imposition of documentation requirements will not impose disproportionately high costs and administrative burdens on MNEs (multinational enterprises), which will have to obtain documentation from foreign associated enterprises. Tax Authorities should also refrain from requiring taxpayers to engage in an exhaustive search for comparable data from uncontrolled transactions if the taxpayer reasonably believes that no comparable data can be found or the efforts to find these data would be disproportionately high in relation to the amounts at issue. The conclusion of the OECD states clearly: “*Because of the difficulties with transfer pricing analyses, it would be appropriate for both taxpayers and tax administrations to take special care and to use restraint in relying on the burden of proof in the course of the examination of a transfer pricing case. More particularly, as a matter of good practice, the burden of proof should not be misused by the tax administrations or taxpayers as a justification for making groundless or unverifiable assertions about transfer pricing. A tax administration should be prepared to make a good faith showing that its determination of transfer pricing is consistent with the arm’s length principle even where the burden of proof is on the taxpayer, and taxpayers similarly should be prepared to make a good faith showing that their transfer pricing is consistent with the arm’s length principle regardless of where the burden of proof lies*”.

Also the main goal of the European Union Transfer Pricing Documentation (EU TDP) is to maintain a balance between, on the one hand, the right of Tax Authorities to obtain the necessary information from taxpayers in order to assess whether transfer pricing is at arm’s length and, on the other hand, the compliance costs MNEs incur from complying with the

rules. The key reason for implementing the EU TPD was to significantly reduce the tax compliance burden and complications that companies have to face when doing business with associated enterprises in other EU Member States.

As stated in the Resolution of 20 June 2006 of the Council of the European Union on a Code of Conduct on transfer pricing documentation for associated enterprises in the European Union, “*Member States should: (a) not impose unreasonable compliance costs or administrative burden on enterprises in requesting documentation to be created or obtained; (b) not request documentation that has no bearing on transactions under review; (c) ensure that there is no public disclosure of confidential information contained in documentation*”.

The issue of a correct balance of burdens between the Tax Administration and the taxpayer is also mentioned in the Communication 785/2007 from the Commission to the Council, The European Parliament and the European Economic and Social Committee on the application of anti-abuse measures in the area of direct taxation – within the EU and in relation to third countries, where it is stated that: “*In this regard the Commission considers that burden of proof should not lie solely on the side of the taxpayer and of the type of arrangement in question. It is equally vital in the interest of proportionality that the result of the relevant assessment by the tax authority can be made subject to an independent judicial review*”.

4.3 Set of documents in transfer pricing cases

The scenario coming out from National Reports, with the exception of Austria, is that all the countries reported have in their tax legislation an explicit requirement to provide for a set of documents (Denmark, Finland, France, Germany, Greece, Italy, Norway, Spain, Sweden, The Netherlands, Turkey and the US).

This leads to the question on whether the accepted general principle (“who wants to enforce a right in a judicial proceedings shall prove the facts supporting its grounds”) is *de facto* overridden by the new international tax compliance, shifting the substantial burden of proof requirements in the hands of taxpayers.

Evidence of this preoccupation is to be found in the French report (“*There is no doubt, in the matter of transfer pricing, that the French taxpayer has to support the burden of proof*”), Germany (“*The burden of proof lies even in these cases on the shoulders of the taxpayer*”), Spain (“*As a consequence of the statutory requirements provided by Spanish Corporation Tax Regulations, it is the taxpayer that must value the related-party transactions on an arm’s length basis, consistent with the documents reflecting the group’s transfer pricing policy. So the burden of proof rests with the taxpayer*”), Sweden (“*It is clear from the preparatory works to these rules that the intention of the legislator was to place the burden of proof on the businessmen to prove that the price was set because of other reasons than the economic connection*”), and the Netherlands (“*After the introduction of Article 8b CITA, the burden of proof was de facto shifted to the taxpayer in cases where the taxpayer does not maintain sufficient transfer pricing documentation*”).

On top of warnings there is the “competitive disadvantage” of taxpayers related to the empirical risk to have a level playing field distorted by a sort of “negative motivation”: the challenge of the transfer pricing declared by the taxpayer stating that the set of documents is incomplete, is much better than the effort to build a transfer pricing assessment *ex novo*.

To a certain extent, however, it is worth noting that this preoccupation is smoothed in some countries where the new set of documents compliance is limited to large companies like:

- (i) France where the duty is only with companies having a before tax turnover or gross assets at least equal to 400.000.000 euro and for all sales or purchases made with related firms; these obligations are more important if the related company is established in a non cooperative state or territory; and

- (ii) (ii) Norway where an important exception concerns companies that, together with its closely related parties, have less than 250 employees, and furthermore either has a sales revenue below Nok 400 million (approx 50 million euro), or has a balance sheet amount that is lower than Nok 350 million (approx 43 million euro); in any case rules apply if one of the companies involved is domiciled outside the EEA area, the reason being the aspiration that the rules would not be contrary to the four fundamental freedoms.

France and Norway appear to be the sole countries adopting the EU Code of Conduct (EU Council Resolution of 20 June 2006) where at point 5) states that: “*Member States undertake not to require smaller and less complex enterprise (including small and medium-sized enterprise) to produce the amount or complexity of documentation that might be expected from larger and more complex enterprises*”.

Within this area of observations it is worth noting the German remark according to which: “*The German tax authority interprets Sec. 90(2) GGTC and Sec. 162(3) Sentence 3 GGTC in a way that an enterprise located in Germany is responsible for providing the auditing German tax officers with the information requested about affiliated enterprises of the same group. The German tax authority does not differ if the foreign enterprise is a mother, sister or daughter company. Even if a mother company exists the German daughter company shall be responsible for reaching the information relevant for the transfer pricing from that mother company (...) Despite serious efforts the daughter company can fail to get the relevant documents of transfer price calculation from her mother or sister company. Perhaps, the affiliated domestic daughter company has had no other choice than to accept a certain transfer price. In these cases the relevant information are outside the sphere of the domestic taxpayer*”.

On the contrary, appreciable is the Dutch effort in the direction of an enhance tax cooperation as described in the Dutch report: “*The Dutch Tax and Customs Administration also introduced horizontal supervision. Horizontal supervision runs on self-regulation and it follows the actual trend of growing importance of corporate governance to restore trust in large companies. Key elements of it are mutual trust, understanding and transparency. One manifestation of horizontal supervision is the conclusion of enforcement covenants with (Very) Large Businesses (ZGO and MGO). These covenants include agreements about the manner and intensiveness of monitoring and the way in which the parties work together. The basic principles of horizontal supervision agreements include three elements: 1) parties express their intention to base their mutual relationship on transparency, understanding and trust; 2) the agreements concern taxation with regard to all taxes and tax collection; and 3) legal and regulatory rights and obligations remain applicable without any restrictions. The relations between the tax administration and taxpayers are put on a more equal footing. As a result, there is less vertical supervision, such as extensive auditing of the books. According to the Dutch tax authority, a covenant is based not only on trust but self-regulation as well. In the horizontal supervision scenario, an enterprise has to have set up a Tax Control Framework*”.

4.4 Imposition of penalties and burden of proof

A solution to fit with the guidelines remarked by the OECD and the EU Code of Conduct is to balance the new set of documents compliance with a different approach to administrative sanctions. As clearly stated in the EU Code of Conduct, “*Member States should not impose a documentation-related penalty where taxpayers comply in good faith, in a reasonable manner and within a reasonable time with standardized and consistent documentation as described in*

the Annex or with a Member State's domestic documentation requirements, and apply their documentation properly to determine their arm's length transfer prices".

There are indeed countries where the duty to file the set of documents compliance is balanced with the non application of administrative sanctions, like Spain (*"No penalty will be imposed, even if the taxpayer's valuation is modified, when the taxpayer has followed the documentation requirements and has valued a transaction based on the transfer price derived from such documentation"*), Sweden (*"It is a statutory requirement to prepare the documents, but there is no specific penalty for the case that the requirement is not fulfilled. However, the tax authority has the power to order a taxpayer to send in or complete the required documentation. An order can be combined with a fine, but must in these cases be decided by the Administrative Court. It is not possible to appeal against a decision from the tax authority regarding the obligation to present documentation on transfer pricing"*), the Netherlands (*"In case the transfer prices are not at arm's length and they are corrected by the tax authorities and the taxpayer had the intention to provide incorrect transfer prices, then this may result in a penalty or fine for the taxpayer"*), and the United States (*"A taxpayer that fails to avoid the transfer price adjustment itself avoids the penalty only if the valuation misstatement remains below the substantial misstatement threshold"*).

While Italy seems to belong to a "grey area": *"If the taxpayer fails to deliver the transfer pricing documentation or the additional documentation requested within the prescribed term, the Tax Office is not bound to refrain from imposing administrative penalties in case of transfer pricing adjustments. Similarly, the Tax Office may still impose penalties if it finds that the transfer pricing documentation delivered by the taxpayer, although formally in line with the required standards, is incomplete or provides false information, unless the missing or incorrect information does not undermine the effectiveness of the tax auditors' inspection"*.

On the other hand, in many countries this wise compromise is not taken into account at all, like Denmark (*"if the taxpayer fails to send the correct documentation for the related transactions then the tax assessment will be estimated. But if the taxpayer fails to give information's of whether or not there have been related transactions this will be considered to be failure in the tax return and might result in a tax supplement or penalty"*), Finland (*"Finnish tax law include provisions as to administrative sanctions in the form of a tax raise (...) The principle of proportionality applies to determination of the amount of the tax raise for it to reasonably correspond to the nature of the actions or omissions of the taxpayer in each relevant case"*), France (*"If the documentation is not presented at the beginning of the tax inspection, the administration can assess the correct prices by itself. And the taxpayer is punished by a fine of euro 10.000 for each accounting year submitted to the inspection, or 5% of the transferred benefits if these ones are higher than the total amount of the fines (art. 1735 ter General Tax Code). These sanctions are administrative ones"*), Germany (*"A breach of the documentation obligation is sanctioned by an administrative penalty (Sec. 162 (4) GGTC). In cases the taxpayer omits to present a demanded documentation or the demanded documentation is not useable the tax authority has to charge a penalty. The penalty ("whether") is mandatory, but the height of the penalty is a discretionary decision in a range between 5% and 10% of the surplus amount which is caused by the transfer price correction"*), Greece (*"More specifically, it is provided that in cases of non-observance of the obligations provided in the aforementioned article, i.e. the preparation of a documentation study for checking compliance with the obligation of documentation of intra-group transactions and submittal to the Ministry of development of a list of intra-group transactions within the time limit stipulated, a separate fine is imposed equal to 10% of the value of the transactions about which a documentation file was not submitted or was not submitted within the time limit, as stipulated"*) and Norway (*If the documentation requirement is not met,*

discretionary estimation of the taxpayer's income may become relevant. Furthermore, imposing additional tax may be applicable. A condition for this is that the lack of documentation has given, or may have given, a too low taxation. Failure to provide documentation may, in some cases, entail a lapse of the taxpayer's right of appeal").

A case in part is Austria, where the Tax Administration argues that the general duty to keep books for tax purposes includes the duty to prepare such documentation and, as a matter of fact, a breach of duty to prepare transfer price documentation is like any other breach of a bookkeeping requirement accompanied by a criminal penalty. Which offense was committed depends on the intended outcome (reduction of tax payment) and the degree of fault (intent, negligence).

4.5 Type of documents to be provided

The EU TPD should contain enough details to allow the Tax Administration to make a risk assessment for case selection purposes or at the beginning of a tax audit, to ask relevant and precise questions regarding the MNE's transfer pricing and to assess the transfer prices of the inter-company transactions.

It is well clear in all national reports that proof is a question of real facts:

- 1) the facts showing that there is a group of company;
- 2) the facts described in the proper set of documents (master file and country file);
- 3) the facts demonstrating the right method to determine the transfer pricing (traditional methods and/or alternative methods).

All the real facts should be available to the Tax Administration in case of assessment. When the Tax Administration request the set of documents, the taxpayer will be granted a limited period of time to submit the requested documentation.

All the real facts collected by the taxpayer should be organized in a logical order with the scope to build up the motivation. On the other hand, in the case the Tax Administration is not satisfied, it should collect other facts in order to raise counter motivation, and so on, this is the playing game among the parties.

The more the motivation is based "on common experience" rather than real facts the less should be convincing the Court.

4.6 Burden of proof and international agreements

There is an increasing platform of international agreements regulating the issue of the exchange of information: for example, (i) OECD bilateral conventions designed to avoid double taxation containing the mutual agreement procedure, (ii) Tax Information Exchange Agreements (TIEA) following the 2002 OECD Model Agreement on Exchange of Information in Tax Matters; (iii) at European level, the new Directive on Administrative cooperation in the field of taxation.

All the country reports, however, show that the effective use of these international agreements by Tax Administrations in order to collect in advance the necessary information for an appropriate assessment activity on the transfer pricing policy of a group of companies, is absolutely inconsistent. The main attitude of Tax Authorities is to carry out audits on the basis of information available in their territory, without resorting to the above mentioned agreements and related procedures.

On one hand, the mutual agreement procedure is a process between Contracting States where the taxpayer is not officially involved. It seems that only in the Netherlands Tax Authorities offer the possibility to start the mutual agreement procedure before the taxpayer brings the case to the Tax Court. The request for a mutual agreement procedure will be forwarded within four weeks by the Tax Authority to the other State. After the Tax Authority of the Netherlands

have received the position paper of the other State, they will start the mutual agreement procedure.

At European level, on the other hand, one of the main obstacles in cooperation and mutual assistance in tax affairs is the presence of grounds for refusal of cooperation. The exchange of information in the field of direct taxation and taxation of insurance premiums, governed until now by the Council Directive 77/799/EEC of 19 December 1977, concerning mutual assistance by the competent authorities of the Member States, contains several specific limitations of the Member States' obligation to exchange data.

It is clear that these limitations have led many Member States to require an heavier duty of cooperation to domestic taxpayers shifting to them the Burden of proof.

However, it is worth noting that the new Council Directive on administrative cooperation in the field of taxation (Proposal from the Commission – COM (2009) 29 final of 2 February 2009) which was adopted by the Council on 15 February 2011 (entry into force 1 January 2013), provides for solutions in order to overcome the limitation in tax mutual assistance and its restrictive effects on the burden of proof of taxpayers.

An important one is contained in art. 16 which provides for a reciprocity principle as regards value of proof to recognized data exchanged: information, reports, statements and any other document, or certified true copies or extracts thereof, obtained by the requested Authority and communicated to the requesting Authority in accordance with the new Directive may be invoked/used as evidence by the Competent bodies of the requesting Member States on the same basis as similar information, reports, statements and any other documents provided by an Authority of that Member State.

In broad terms, the new Directive will ensure that OECD standards for the exchange of information on request is implemented in the EU. It will thus prevent a Member State from refusing to supply information concerning a taxpayer of another Member State on the sole ground that the information is held by a bank or other financial institution. The Directive identifies certain details that must be specified in requests for information, namely the identity of the person under investigation and the tax purpose for which the information is sought. The Directive also sets out a step by step approach aimed at ensuring automatic exchange of information for eight categories of income and capital (employment, directors' fees, dividends, capital gains, royalties, life insurance products, pensions and ownership of and income from immovable property). From 2015, Member States will communicate automatically information for a maximum of five categories, provided that information is available.

In addition, the Directive will: 1) establish time limits for the provision of information on request and other administrative enquiries; 2) allow officials of one Member State to participate in administrative enquiries on the territory of another Member State; 3) provide for feedback on the exchange of information; 4) provide that information exchange be made using standardize forms, formats and channels of communication.

The hope is that the implementation of the Directive and its effectiveness would help to prevent the degeneration of the shifting of the Burden of proof in the hands of taxpayers by complying with the European principles of proportionality and subsidiarity.