Chapter 1

Picture of the profession in Europe

About 180,000 tax professionals in Europe are members of a CFE member organisation. As there is no EU legislation providing for harmonization, the tax profession is diverse in form and density of regulation, professional activities and competences.

1.1 Defining “tax adviser”

1.1.1 Tax advice

A tax adviser in the understanding of CFE is an individual who is entitled under the law of his country to carry out, as his main activity, the full range of tax advisory activities for his clients, both businesses and individuals. These include in particular the rendering of advice in tax matters (e.g. tax planning), the filing of tax returns and other compliance obligations and the representation of the client before the tax authorities (e.g. in the course of a tax audit or an objection proceeding) and in some countries legal representation in tax courts or tribunals.

In some countries where, there is no distinct profession of tax adviser, tax advisers are understood members of those professions which may carry out the above activities and who specialize in tax. These can be lawyers (as in France) or accountants (as in Portugal).

1.1.2 The concept of liberal profession

The idea of liberal professions is widely spread across Europe. Liberal is not to be mistaken for unregulated but refers to a certain degree of professional freedom from state interference which is considered essential for the exercise of the activity in the interest of the client. This might to some extent be opposed to the interest of the state (e.g. it is recognized that a doctor shall prescribe the medical treatment that is best for the patient even if the health insurance fund would have an interest in a cheaper treatment; a lawyer shall

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1. Indeed the only piece of EU legislation mentioning specifically tax advisers is the Anti Money Laundering Directive 2005/60/EC, but tax advisers are regularly referred to as a distinct profession in communications of the European Commission.
ensure that the procedural rights of the suspected person are respected even though the police may have an interest in keeping him in custody).

Article 57 lit.d. of the Treaty on the Functioning of the EU expressly mentions the liberal professions (while the English version uses only the term professions, most language versions refer to free or liberal professions) as a group of professions distinct from commercial, industrial and craftsmen’s activities.

European legislation recognises the concept of liberal professions by referring to them (Recital 43 of the Professional Qualifications Directive 2005/36/EC) as

“those [professions] practised on the basis of relevant professional qualifications in a personal, responsible and professionally independent capacity by those providing intellectual and conceptual services in the interest of the client and the public. The exercise of the profession might be subject in the Member States, in conformity with the Treaty, to specific legal constraints based on national legislation and on the statutory provisions laid down autonomously, within that framework, by the respective professional representative bodies, safeguarding and developing their professionalism and quality of service and the confidentiality of relations with the client”

but does not use liberal profession as a technical term.

12 of 23 responding countries (AT, BE, HR, CZ, FR, DE, LU, PL, PT, RO, SK, ES) have answered that the concept of liberal professions (public trust professions in Poland) is commonly known and understood by clients and the general public. 6 countries (FI, IT, MT, NL, RU, CH) replied that such a concept exists but clients or the general public may not be aware of it. In
5 countries (GR, IE, LV, UA, UK), the concept of tax advisers as a liberal profession is unknown.

As liberal professions are generally highly qualified professions, liberal and regulated professions often coincide but they are not necessarily the same (see Section 2.2.1 for the concept of regulated professions).

1.1.3 The concept of tax agents

Different from the concept of “tax adviser” applied in this Handbook (see 1.1.1), some countries distinguish between the concepts of tax advisers and tax agents, tax agents being allowed to represent a client or to file a tax return while tax advisers would only give advice and not interact with the authorities. In practice, most tax advisers would also be tax agents but tax agents could also be e.g. friends and family of a taxpayer. In Croatia and Portugal, only tax agents have a regulated qualification. France knows the concept of mandatory tax representatives for filing specific tax returns like VAT (see Country Sheet France). Ireland and the UK have registration duties for tax agents.

1.1.4 Overlaps with other professions

Tax advisers are generally not restricted from holding more than one professional qualification (however, there is a rule in Belgium whereby tax advisers may not be lawyers, auditors or bookkeepers). There are significant overlaps especially where tax advisers are not a regulated profession of their own and where one qualification is usually obtained “on top” of another (Example: many UK professionals have become accountants before qualifying as tax
advisers; many German auditors have first become tax advisers. For professional bodies, being aware of such overlaps is important to understand the interest of their individual members.

1.2 Different forms of regulation

Access to the tax advisory activities has been regulated in very different ways across Europe. While some countries have enacted laws which reserve access to these activities to holders of certain professional qualifications and which regulate professional conduct, others have opted to leave regulation of qualifications and conduct to professional associations with voluntary membership. In a third group of countries, no regulation of tax advisers exists but tax advisers are generally members of another regulated profession like lawyers or accountants. Indeed Finland and Russia are the only countries where all three professions of tax advisers, accountants and lawyers (in taxation) are not regulated.

Hence, depending on the country where a tax adviser is from, the title tax adviser may refer to a particular qualification or may be purely functional, describing one of the activities carried out by a person who is member of another profession.

The regulation models can be categorised as follows:

- **Regulation as lawyers or accountants** (France, Portugal): Tax advice is regulated as a part of the legal or accounting activity. Tax professionals are mandatory members of professional chambers.
- **Tax profession is regulated of its own** (Austria, Croatia, Czech Republic, Germany, Greece, Poland, Romania, Slovakia): The rendering of tax advice requires a particular qualification. Tax advisers are mandatory members of professional chambers.
Picture of the profession in Europe

- **Only title is regulated** (Belgium): The use of the title tax adviser requires a particular qualification and membership in a professional body but not the activity of giving tax advice.

- **Voluntary acceptance of qualification requirements** (Ireland, Latvia, Netherlands, Russia, Spain, Switzerland, UK): There is no particular qualification required by law for giving tax advice or using the title tax adviser. Membership in professional associations is voluntary.

- **No specific qualification requirements** (Finland, Italy, Luxembourg, Malta, Ukraine): no particular qualification is required for giving tax advice or using the title tax adviser. Professional associations with voluntary membership do not impose qualification requirements. Persons that give tax advice are usually members of another regulated profession such as accountants or lawyers.

A higher degree of regulation often coincides with wider competences of tax advisers, see Section 4.1.
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red: tax advisers regulated as lawyers or accountants; orange: tax profession is regulated of its own; yellow: only title is regulated; green: voluntary acceptance of qualification requirements; blue: no specific qualification requirements; tax advisers often members of other regulated professions
Chapter 2

The EU law context

2.1 Treaty on the Functioning of the EU

The fundamental freedoms of the internal market concern goods, services, workers, establishment and capital. The latter four may become relevant in case of tax advice. Although the PQ Directive and the Services Directive deal more specifically with these freedoms, the TFEU continues to apply and may provide a fallback solution where the Directives do not apply.

2.1.1 Freedom to provide services

Art.56 ff TFEU applies to both self-employed persons and companies (Art. 54, 62 TFEU) that intend to provide services in another EU member state on a temporary basis (see 11.2 for the distinction of temporary services and permanent establishment). It also applies to employees who are posted (seconded) by their company to carry out work in another member state on a temporary basis. In this case, the Posting of Workers Directive 96/71/EC contains specific rules.

Specific provisions on temporary services can be found in Art.16 ff Services Directive and Art. 5 ff PQ Directive.

The wording of Art.57 TFEU suggests that the freedom to provide services is a mere non-discrimination rule. It is however established case-law of the ECJ that Art.57 TFEU contains a general rule that restrictions to the free movement of services, even when not discriminatory, must be justified by overriding reasons of the public interest and be proportionate.

2.1.2 Freedom of establishment

Art.49 ff TFEU apply to self-employed persons and companies that intend to operate permanently in another EU member state (see 11.2 for the distinction of temporary services and permanent establishment). Specific provisions on establishment can be found in Art. 9 ff Services Directive and Art. 10 ff PQ Directive.
2.1.3 Free movement of capital

Art. 63 ff TFEU become relevant where capital is invested in a tax adviser company in another member state without obtaining control. If control is gained, the freedom of establishment applies.

2.1.4 Free movement of workers

Art. 45 ff TFEU apply to employees that intend to permanently move to another EU member state, in other words, that intend to enter the labour market of another member state to take up work immediately or to look for occupation. It does not apply to posted workers (because in that case, it is the business which exercises its freedom to provide services through its employees).

The PQ Directive does not distinguish between self-employed and employees. The Services Directive applies to self-employed only.

2.1.5 Antitrust law

Antitrust rules (Art. 101 TFEU) apply where associations of undertakings take decisions that may affect trade between member states and restrict competition within the internal market. Those agreements are prohibited and null and void if they cannot be justified.

The ECJ has ruled that professional associations and chambers are associations of undertakings (C-51/96 and 191/97, Deliege and C-309/99, Wouters) and consequently, antitrust law may apply on professional regulations adopted by them.

Antitrust law does not apply to rules adopted by the state (in that case, the TFEU fundamental freedoms apply). Where both professional bodies and the state are involved in a decision, the question how a rule or a decision is adopted and whether the final decision remains in the hand of the state is crucial.

Antitrust rules have become relevant in the following cases concerning professional law:
(1) **Restrictions from offering particular services:** In the Wouters case (C-309/99), the ECJ decided that rules of a bar association restricting lawyers from cooperating with other professions could be justified to ensure the orderly exercise of the profession.

(2) **Professional entry exams:** Where members of a profession are part of an examination board that decides on the admission of a candidate to the profession, the examination board members and the candidate are potential future competitors. In the case Mauri (C-250/03), the ECJ decided that where two examination board members were members of the same bar that the successful candidate would belong to while the other two committee members were judges, where all committee members were appointed by the state, where the state could control the examination and intervene if necessary and the decision could be challenged before a court, the final decision had still been in the hands of the Italian state so antitrust rules did not apply.

(3) **Price regulation:** In the case Arduino (C-35/99), the ECJ decided that fee regulations are no decision of associations of undertakings where they need to be approved by a minister who may demand changes to the regulations and where exceptions from the regulations can be made where justified.

The state may not surrender its responsibility to private operators. Where the state creates or favours a situation in which private operators violate Art.101 TFEU, the state violates EU law too, see Art.4 (3) subpara.2 EU Treaty (case C-198/01, CIF-Consorzio Industrie Fiammiferi).

### 2.2 Secondary EU law

Apart from the Treaty on the Functioning of the EU, a number of European directives have an impact on the tax profession as they set out the above-mentioned freedoms of the TFEU in a more detailed way.

#### 2.2.1 The Professional Qualifications Directive

The Professional Qualifications (PQ) Directive 2005/36/EC applies where

(1) **An individual** (2) **with a professional qualification** (3) **from an** EEA **country or Switzerland** (4) **seeks to exercise** a **professional activity** (5) **in another** EEA **country or Switzerland** where (6) **the same profession** (7) **is regulated.**
2.2.1.1 “An individual…”

As the Directive concerns qualification, it can only apply to individuals and not to corporates.

The Directive applies only to EEA and Swiss citizens. This does not prevent a member state from granting an equally favourable treatment to other nationals.

Although they may have no EU nationality, the following persons benefit from the Directive, provided that they hold a qualification obtained or recognised in an EU country:

– Family members of EU citizens (Directive 2004/38/EC);
– Refugees from non-EU-countries in the country where they have refugee status (Directive 2004/83/EC);
– Long-term residents from non-EU countries only as regards permanent establishment but not concerning temporary cross-border services (Directive 2003/109/EC) and not if they wish to practice in the UK, Ireland or Denmark;
– holders of EU “blue cards” (Directive 2009/50/EC), which can be certain holders of higher education diploma with a job offer (only activities as employees); this will not apply to Denmark, Ireland and the UK either.

2.2.1.2 “…with a professional qualification…”

For some professions (a number of medical professions and architects), the Directive has established a special regime, granting automatic recognition, others have been dealt with by specific EU legislation which applies instead of the PQ Directive (like the Directive 2006/43/EC on statutory audit) or which is complemented by the PQ Directive (like the Directives 1977/249/EEC and 1998/5/EC for lawyers). Tax advisers are within the general system, meaning professions not specifically regulated.

The Directive applies only to fully qualified professionals. For trainees, Art.45, 49 TFEU apply directly, meaning, according to the ECJ, that knowledge, experience and competence of the applicant have to be taken into account by the competent authority without requiring any particular formal qualification, see case C-313/01, Morgenbesser.
The EU law context

The European Commission has proposed to extend the scope of the PQ Directive to trainees. The amendment proposal is still in the legislative procedure, see 14.1.3.

The Directive concerns professional qualification and not authorisation to practice. Where no (additional) professional qualification has been obtained in a member state different from the one where recognition is sought, the Directive does not apply (see the 2011 ECJ decision in case C-118/09, Robert Koller).

Example: A German citizen who studies economics in Germany but fails the German Steuerberater exam, then establishes himself in the Netherlands as a belastingadviseur and comes back to practice in Germany cannot rely on the Directive unless he has obtained an additional professional qualification in the Netherlands.

2.2.1.3 “…from an EEA country or Switzerland…”

These can be qualifications either obtained in an EEA/CH country or obtained in another country and having been recognised by an EEA/CH country. The Directive does not apply to diplomas obtained in other countries when recognition by an EEA/CH country is sought for the first time. Recognition is then a matter of national law. Once an EEA/CH country has recognised a non-EEA/CH qualification, the Directive applies. If there should be doubt in which country a particular qualification has been obtained, see questions 7 and 8 of the „66 Questions guidebook“, see link in Chapter 15.

2.2.1.4 “…seeks to exercise a professional activity in another EEA country or in Switzerland”

The Directive applies irrespective of the duration of the professional activity.

The Directive 2005/36/EC applies in all EEA countries (EU plus the EFTA countries Norway, Iceland and Liechtenstein). For Switzerland, only the rules of the Directive on permanent activity (see Chapter 13) apply. As the revision of the PQ Directive which is currently underway is a piece of EU legislation, it will not apply in the EFTA countries and Switzerland before an agreement between these countries and the EU is concluded. Until then, current PQ Directive will continue to apply.
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The Directive does not apply where a tax adviser gives advice without entering the territory of another member state, e.g. by giving tax advice by letter, on the telephone or by internet (see Section 12.1)

2.2.1.5 “…where the same profession…”

The Directive applies only if the profession that the person wishes to practice in another member state is the same profession for which he is qualified in his member state. This is the case if the activities covered are comparable (Art.4 (2)).

As in France, tax advice unrelated to accountancy may only be given by lawyers and the activities that lawyers and tax advisers may exercise differ significantly, a Portuguese Técnico Oficial de Contas could not benefit from the Directive to give tax advice as a principal activity in France. However, he should be able to benefit from the Directive if he intends to provide accounting services with a tax element as these may be provided by French accountants and Portuguese T.O.C. may exercise essentially the same activities as French accountants.

2.2.1.6 “…is regulated.”

A profession is regulated in the sense of the PQ Directive where persons that exercise a particular activity or one of its modes of pursuit (e.g. the use of the professional title) are required to have a specific professional qualification. Starting from the definition followed in this book that tax advice (at least) encompasses also the filing of tax returns and other compliance obligations and the representation before fiscal authorities, one would consider that the tax profession is also regulated in a country where one of these activities is subject to qualification requirements.

A profession is treated as regulated where the profession is exercised by members of the organisations listed in Annex I (Art.3 (2)). This is, for the activity of tax advice, the Irish Taxation Institute and the Chartered Institute of Taxation (UK). This obliges the listed professional bodies to apply the rules of the PQ Directive when a professional from another EEA/CH country applies for membership.
2.2.2 The Services Directive

The Services Directive (2006/123/EC) applies in all EU countries, dealing with cross-border as well as purely domestic situations. It seeks to facilitate both temporary cross-border services and establishment of service providers in other member states by removing legislative and administrative barriers. It also contains rules to increase the confidence of services recipients in service providers from other member states, e.g. through information duties or rights of service recipients. Member states are required to establish close and effective administrative cooperation and to set up “points of single contact” (see 11.3).

The Services Directive applies to tax advisers, irrespective of whether the profession is regulated in a given country or not. The terms used in the Directive are service provider (the tax adviser) and recipient (the client). Recipients may be consumers or enterprises. The service providers may be corporates or individuals. Unlike the PQ Directive, the Services Directive is only relevant for companies and self-employed.

For the relation between the Services and the PQ Directive, see ...

2.2.3 The Lawyers Directives

In France, providing the full range of tax advisory services is reserved to lawyers. There are two EU Directives covering temporary services (1977/249/EEC) and establishment (1998/5/EC) of lawyers. For permanent activity of lawyers from other member states in France, the PQ Directive applies next to the Lawyers Directives, creating an additional form of integration into the legal profession to the options described in Art.4 and 10 of the Directive 1998/5/EC (see Recital 42 PQ Directive). The Services Directive continues to apply in areas not regulated by the Lawyers Directives.

2.2.4 The Anti Money Laundering Directive

Directive 2005/60/EC explicitly names tax advisers as a profession obliged to assist in the fight against money laundering and terrorist financing. The Directive contains a number of obligations for tax advisers, in particular to identify a client and to report indications of money laundering and terrorist financing. The role of tax advisers in the fight against money laundering is...
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dealt with in Section 6.4. Section 14.4 deals with the planned revision of the Directive.

2.2.5 The Consumer Rights Directive

Directive 2011/83/EU comes into play where tax advisers have consumer clients. The specific information duties and the consumer’s right of withdrawal will be dealt with in Chapter 9.

2.2.6 The e-Commerce Directive

Directive 2000/31/EC applies to cross-border tax advisory services where they can be defined as information society services in the meaning of Art.3 of this Directive; see Section 12.1.2.