International
Fiscal Association

Bilateral Meeting IFA Italy and France

Hilton Molino Stucky Venice

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Bilateral Meeting IFA
Italy and France

Italy-France Tax Treaty

Venice, June 7

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Chair:

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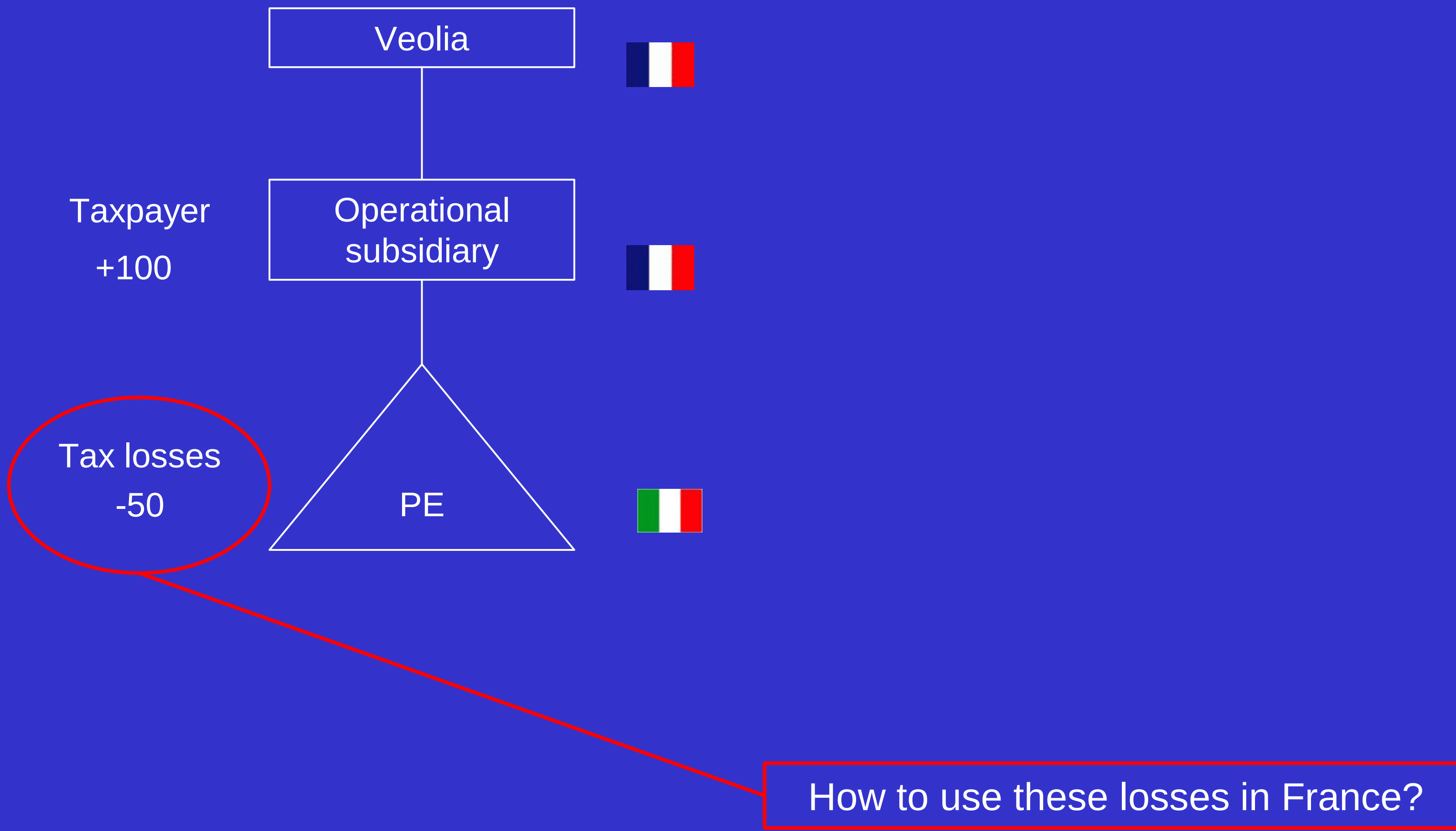

How to deal with Italian losses in France?

Example of M&S' Case with an Italian PE within Veolia

- **M&S & Lidl Belgium's criteria**

  A company may offset the losses of its non-resident PE when considered final, i.e.:

  - When the non-resident PE has exhausted the possibilities of claiming loss relief in its Member State of residence because:
    - Either the local legislation does not permit it
    - Or the business shut down
  - When there are no possibilities of obtaining future relief for that PE or for a third party

How to deal with Italian losses in France?

Example of M&S' Case with an Italian PE within Veolia

2014

- **Questions & Method**

1. **How to close the Italian PE?**
   - Convincing the board of directors to trigger the closing for tax reasons
   - Organising a board meeting to ratify the decision of closing

2. **When to close the Italian PE?**
   - Vague M&S' criteria
   - Remaining operations for guarantees' reasons
   - Closing document delivered 3 years after the decision

How to deal with Italian losses in France?

Example of M&S' Case with an Italian PE within Veolia

2014

- **Questions & Method**

  3. **Discrepancy between the French and the Italian tax returns' time limits**

     ⟶ Which losses to declare in the French tax return?

- 1st year: losses from the decision of shutting down's financial year
- Following years: adjustments of the losses in the French taxable income

  4. **Was a "frenchising" of the Italian taxable income necessary before using it in France?**

- No "frenchising" of the Italian taxable income
- Approximate estimate: Italian taxable income very similar to the taxable income that would have been determined according to French tax law

How to deal with Italian losses in France?

Example of M&S' Case with an Italian PE within Veolia

2014

- **Veolia's arguments**
  - Freedom of establishment's principle
  - Proof of *real* closing
  - Approximate estimate of the losses according to French tax law

- **French tax authorities' position**
  - **In the Veolia case**
    - French tax authorities initially refused the deductibility of the Italian losses against the French taxable income and finally admitted it as a pragmatic solution
  - **In general**
    - No formal position on the final aspect of foreign losses
    - Case-by-case approach but officially reluctant

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Notional interest deduction from CIT taxable income

Withholding taxes

Beneficial owner

ACE (Allowance for Corporate Equity)

Notional interest deduction from CIT taxable income

2014

- **Highlights**
  - **Net equity increase**: Cash contributions and annual non distributed profit
  - **Equity reduction**: purchase of participation and going concern, net equity reduction and increase of financing credit vs. group companies
  - **Notional deduction**: 4% for 2014, 4,5% for 2015 and 4,75% for 2016 of the net equity increases

ACE (Allowance for Corporate Equity)

Notional interest deduction from CIT taxable income

2014

- **Parallel with notional interests in Belgium**
  - Very attractive mechanism for financing French companies' subsidiaries
    - **Double tax deduction**: both in France and Belgium
  - French tax authorities usually seek to challenge the Belgian notional interests on **several grounds**:
    - Abuse of law
    - CFC rules
    - "Overcapitalisation"

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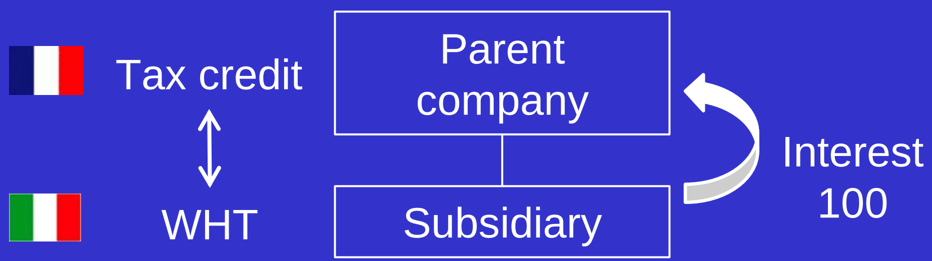
Withholding taxes

- **Discrepancies between the income's taxation and the use of the tax credit – Example: interest**



  - **Italy-France tax treaty:**
    - Taxation in the State of the interest's recipient (Article 11, paragraph 1)
    - WHT in the State in which the interest arose and according to the laws of that State (Article 11, paragraph 2)
      - If the recipient is the beneficial owner of the interest, the WHT shall not exceed 10% of the gross amount of the interest
    - Tax credit granted by France against the French tax (Article 24)

Withholding taxes

2014

- **Discrepancies between the income's taxation and the use of the tax credit – Example: interests**
  - When the invoicing's year (N) differ from the payment's year (N+1):

	France	Italy
Invoicing (N) Taxable income	+100 (**taxation**)	-100
Payment (N+1) Cash	+90 +10 (**tax credit**)	-90 -10 (**WHT**)

- French tax credit usable in N+1 but:
  - **Administrative tolerance:** an anticipated use in N is authorised but a follow-up of the tax credits is necessary
  - **Practical solution: issuing an amended tax return in N+1**

Withholding taxes

- **Risk of double taxation – Inefficient tax credit recovery for loss-making groups**
  - **French High court's decision (Celine's case)**

- The High court denied a French loss-making company the possibility to deduct from its taxable income the Italian WHT paid on trademark royalties

Withholding taxes

2014

- **Risk of double taxation – Inefficient tax credit recovery for loss-making groups**
  - **French High court's decision (Celine's case)**
    - According to the provisions for elimination of double taxation of the Italy-France tax treaty:
      - Italian tax levied on an Italian-source income is not deductible in calculating taxable income in France
      - But a loss-making recipient cannot use the equivalent tax credit against the French tax

Withholding taxes

2014

- **Risk of double taxation – Inefficient tax credit recovery for loss-making groups**
  - **French High court's decision (Celine's case)**
    - Double taxation when the company is returning to profit, whereas tax treaties normally aim at eliminating double taxation situations
    - **Discrepancy**

Italy-France tax treaty → Italian WHT Non deductible

No tax treaty → Foreign WHT Deductible

Withholding taxes

Dividend, interest and royalty

2014

- **Income Tax Treaty - WHT rates, applicable in 2 ways:**
  - Refund procedure
  - Direct application by the withholding agent (who becomes responsible- penalties 150%)

- **Requirements**
  - Tax resident of France
  - No PE in Italy re income paid
  - French recipient has to be the **Beneficial owner**

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2014

Beneficial owner

2014

Beneficial owner: limits

BEPS Action 6:

- LOB and GAAR proposal

Domestic law approach to treaty abuse: examples

What's next in **Italy** ?

Beneficial owner

Background of BEPS Action 6

2014

- *“Whilst the concept of “beneficial owner” deals with some forms of tax avoidance (i.e. those involving the interposition of a recipient who is obliged to pass on the dividend to someone else), it does not deal with other cases of treaty shopping and must not, therefore, be considered as restricting in any way the application of other approaches to addressing such cases”*

Par. 12.5 of the Commentary on Article 10 / revised proposals concerning the meaning of “beneficial owner” in articles 10,11 and 12

- *“The current work on the meaning of beneficial owner, which is nearing completion, is also relevant, primarily as it allowed a greater understanding of the limits of this concept in addressing treaty shopping concerns”*

Addressing Base Erosion and Profit Shifting, OECD 2013

BEPS: Action n° 6

Prevent treaty abuse

2014

"*Develop* model treaty provisions *and recommendations regarding the design of domestic rules* ***to prevent the granting of treaty benefits in inappropriate circumstances***.

Work will also be done to clarify that tax treaties are not intended to be used to generate ***double non-taxation*** *and to identify the* ***tax policy*** *considerations that, in general, countries should consider before deciding to enter into a tax treaty with another country.*

The work will be co-ordinated with the work on hybrids".

BEPS: Action n° 6

Time line

2014

- **<u>March 2014</u>**: released a **Discussion Draft** "*BEPS Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*" divided into three sections:
  A. **Development of model treaty provisions** and recommendations regarding the design of domestic rules **to prevent the granting of treaty benefits in inappropriate circumstances.**
  B. Clarification that tax treaties are not intended to be used to generate double non-taxation.
  C. Identification of the tax policy considerations that, in general, countries should consider before deciding to enter into a tax treaty with another country.
- **<u>April 2014</u>**: Comments on the Discussion Draft on BEPS Action 6
- **<u>September 2014</u>**: to be finalized changes to the Model tax Convention and recommendations regarding the design of domestic rules

How BEPS 6 addresses actions against conduit arrangements?

It is recommended to:

- Include in tax treaties a specific anti-abuse rule based on the **limitation-on-benefits (LOB)** provisions found in most U.S. income tax treaties

- Add to tax treaties a more **general anti-abuse rule (GAAR)** designed to address other forms of treaty abuse that would not be covered by the specific limitation-on-benefits provision

How BEPS 6 addresses actions against conduit arrangements?

2014

- The inclusion of **an anti-abuse rules** based on the limitation-on-benefits provision found in most U.S. income tax treaties
  - “qualified person” [par. 2]
  - “active conduct of a trade or business” “in connection with” test [par. 3 a)]
  - “active conduct of trade or business” “substantial in relation to” test for associated enterprise [par. 3 b)]
  - Tax Authority determines that «... the establishment, acquisition or maintenance of such a person for the conduct of its operations did not have **as one of its principal purposes** the obtaining of treaty benefits». [par. 4]

- To be evaluated the inclusion of a so-called “**derivative benefits**” clause to allow a treaty country to look through to the shareholders where they would also be entitled to benefits under a treaty

How BEPS 6 addresses actions against conduit arrangements?

2014

- The inclusion of a **GAAR** designed to address other forms of treaty abuse that would not be covered by the specific limitation-on-benefits provision

  "(…) *a benefit under this Convention shall not be granted in respect of an item of income* ***if it is reasonable to conclude****, having regard to all relevant facts and circumstances,* ***that obtaining that benefit was <u>one of the main purposes</u> of any arrangement or transaction that resulted directly or indirectly in that benefit****, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention*"

Claiming reduced WHT rates and other treaty benefits

2014

- **Germany: anti-treaty shopping domestic law as of 2012**
  - Agreement with tax Authorities or refund procedure
  - Business income test or Business purpose test and substance test
  - Shareholder test
- **Canada: announced (Feb 2014) domestic treaty shopping domestic law**
  - Domestic law overrides tax treaties
  - Based on main purpose test
- **Netherlands : substance information disclosure to treaty partners**
  - Licensing and leasing companies
  - must confirm in their annual reports certain substance requirements
  - if not met, information will be spontaneously provided to the relevant treaty partners
- **Italy: what is coming ?**

2014

Thank you!

Any questions?

Bilateral Meeting IFA Italy and France

EU directive

Venice, 7 June 2014

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Of Counsel Landwell & Associés

Chair: Massimo Giaconia

The Supremacy of EC Law

2014

- Art 10 of the TEU imposes a duty on all Member States to adopt appropriate measures to ensure that the obligations of the Treaty are observed, together with an additional duty to abstain from all acts which might jeopardize the achievement of the objectives of the Treaty.

- EU **Directive** is defined in Art. 249 of the TEU :
- *“shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave the choice of form and methods to the national legislators”.*

The Supremacy of EC Law

2014

- Directives are not automatically applicable within Member States as Regulations are.
- Their obligations take effect through domestic legislation. Any rights and duties are legitimately conferred only after implementation into national law.

- Directives under certain conditions might have a direct effect which means that a provisions can create rights that individuals may rely on before their domestic courts.

- The concept of direct effect was firstly developed by the European Court of Justice in the case of ***Van Gend en Loos*** **[1963] ECJ**

The Supremacy of EC Law

2014

- The case of ***Van Gend en Loos*** was also important in establishing the criteria for defining when a particular provision should be directly effective. Such a provision should be
  - **sufficiently clear and precisely stated;**
  - **unconditional and not dependent on any other legal provision;**
  - **Capable of producing rights for individuals upon which same can base a claim**

- The principle only applies to directives which are unimplemented after the date set for implementation, in order to ensure that citizens of the Community could enforce Treaty obligations against Member States and thereby ensure that Community law is made effective in their national legal systems.
- Directive might be upheld against defaulting Member States, but it cannot be invoked directly against other individuals.

The Supremacy of EC Law

2014

- However, the ECJ has sought to achieve the same result through the **process of interpretation**. For example, where the Court is interpreting the terms of an unimplemented directive as it applies between private individuals, the Court has observed that:
- *"In applying national law, whether the provisions in question were adopted before or after the directive, a national court called upon to interpret it is required to do so, as far as possible, in light of the wording and purpose of the directive in order to achieve the result pursued by the latter*": *Marleasing SA* (1992).
- National courts are 'required' to interpret domestic law in such a way as to ensure that the objectives of the Directive are achieved. They must do everything possible to interpret domestic law in such as manner so as to comply with Community law.

The Supremacy of EC Law and the State liability

2014

- The principle of construction requires national courts, in conformity with Art. 10 TEU, to give full effect to EC law, to interpret all national legislation in the light of all relevant EC law, regardless of whether the particular provision is of direct effect.

- Case C-129/00 Commission vs Italy, [2003] I-14637 (Judgment of 9 December 2003). is the first case where the ECJ sanctioned a Member State for a failure to comply with Community law resulting from the action of national courts. The ECJ confirms that a Member State is at fault (and therefore could be liable), in a situation where the national legislative act is compatible with EC law, but national courts' interpretation of said legislation render a particular remedy (here, the right to reimbursement of taxes contrary to Community law) excessively difficult to obtain.

The Supremacy of EC Law and the State liability

2014

- When there is no domestic law on a matter to which a Directive relates or domestic law is totally contrary to EC law according to ***Francovich v Italy* [1991] ECJ,** case law, the Member State has a primary liability for failing to fulfil a Community obligation within the required time limit and has the duty to compensate individuals for damage suffered as a result of its failure if
  1. **it is possible to identify the content of these rights from the Directive; and**
  2. **there is a causal link between the State's failure to implement the Directive and the damage suffered by the individual.**

The Supremacy of EC Law vs domestic rules

- EC law does not have to be directly effective in order for it to benefit from the general doctrine of supremacy
- By virtue of the doctrine of supremacy of EU law, provisions of Community law with 'direct effect' take precedence over domestic laws (Flaminio Costa v. ENEL, Case 6/64, [1964]). EU law rules take precedence over national law rules.
- The principles of direct effect and supremacy mean that Treaty provisions may be used to make claims before domestic courts and override domestic law.

Outline

2014

I. Anti abuse and EU secondary law

A. The proposed amendments to the parent subsidiairy directive

II. Hot topics in the case law of the Italian and French Supreme Courts

A. Italy

B. France

I. Anti-abuse and EU secondary law

2014

- Lacking a specific provision in EU Law, Abuse of rights Doctrine and the ECJ are filling the gaps through *judicial creativity.*
- *"Purposive reasoning – so central to the abuse of rights doctrine – is an inseparable method of legal reasoning in the context of EU law. Because the constitutive EU Treaties are established pursuant to stated objectives, then the teleological method of interpretation should be the predominant one in the EU legal system. It is already accepted as the preferred mode of interpretation in general treaty law: Article 31(1) of the Vienna Convention on the Law of Treaties provides that treaties 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Taking note of this norm of international law and the 'overwhelming generality' of TFEU,it is inevitable that EU law requires teleological interpretation to function properly" .*

I. Anti-abuse and EU secondary law

2014

- ECJ Milestones on anti abuse:
  - **Emsland-Stärke (C-110/99):** Two elements are relevant: the **objective** one, when despite formal observance of the conditions for obtaining an advantage provided by EU law, the purpose of the rules has not been fulfilled. The second is related to the **subjective** element, where there must be the intention to obtain the advantage by artificially creating the conditions laid down for obtaining it.
  - **Halifax (C-255/02) :** any transactions as being for the '**essential' – not 'sole**' intention of obtaining a tax advantage with no independent business purpose attract the application of the abuse of rights doctrine, with the effect of denying the benefit of the VAT Directive.
  - **Kofoed (C-321/05):** tax exemptions under the 'Merger Directive' for restructuring operations within the EU could be denied where the transactions were 'carried out not in the context of normal commercial operations, but **solely for the purpose of wrongfully obtaining advantages provided for by Community law**.

I. Anti-abuse and EU secondary law

2014

- ECJ Milestones on anti abuse:
  - **Centros (C 212-97):** 'letterbox' or 'front' companies could not be covered by the EU freedom of establishment. No right exists to establish a company in Member State A, only to carry out 100% of the business activity in Member State B. This does not execute the purpose of such freedom as it does not represent true establishment in Member State A.
  - **Cadbury Schweppes (C-196/04**): the legal purpose of EU freedom would not be fulfilled where the establishment of subsidiaries in Ireland represents 'wholly artificial arrangements' and 'no genuine economic activity' exists – premises, staff and equipment being the relevant objective indicators. On the contrary, If these indicators did exist, then the aims of EU freedom are seen to have been achieved, even where the essential aim of the arrangement is to obtain a tax advantage.
  - **Part Service (C-425/06): w**here, objectively, the legal purpose of a rule of EU law has not been fulfilled by an action if the essential or principal subjective intention behind the action is to obtain a tax advantage, then an abuse of rights is established. The sole purpose of 'U-transactions' is contrary to EU law.

I. Anti-abuse and EU secondary law

2014

- EU Commission at work:
  - **Commission Communication of 10 December 2007** to the Council, the European Parliament and the European Economic and Social Committee entitled "The application of anti-abuse measures in the area of direct taxation – within the EU and in relation to third countries" (COM(2007) 785) . Said communication analyses the principles laid down by the ECJ in order to stimulate debate between the Member States and stakeholders, with the aim of:
  - • establishing common definitions of the notions of abuse and purely artificial arrangements;
  - • improving cooperation so as to detect and neutralise fraudulent fiscal practices;
  - • exchanging best practices compatible with Community law;
  - • reducing overlaps, which can result in unintended non-taxation;
  - • improving coordination of anti-abuse measures in cases involving third countries.

I. Anti-abuse and EU secondary law

2014

- EU Commission at work:
  - To be lawful, national tax regulations on anti abuse must be proportionate and specifically aimed at preventing "purely artificial arrangements". Solutions which, in order to avoid any accusation of discrimination, apply anti-abuse measures designed to tackle cross-border tax evasion to situations which are strictly controlled at national level, should be prohibited, as they are counter-productive in terms of economic efficiency and run contrary to the interests of the internal market. The best way of stopping these practices is a uniform and coordinated application of measures to fight tax evasion and strengthen administrative cooperation between the Member States and with non-EU partners.

I. Anti-abuse and EU secondary law

2014

- EU Commission at work:
  - **The Commission presented the way forward on 6 December 2012** composed with two Recommendations and an Action Plan, to encourage Member States to take immediate and coordinated action on specific pressing problems.
  - The first Recommendation: to identify tax havens and place them on national blacklists.
  - The second Recommendation is on Aggressive Tax Planning. It suggests ways to address legal technicalities and loopholes which some companies exploit to avoid paying taxes. Double Tax Conventions should be reinforced to prevent no taxation at all. A common General Anti-Abuse Rule, should be adopted by the Member States to ignore any artificial arrangement carried out for tax avoidance purposes and to instead tax on the basis of actual economic substance.
  - Other initiatives include a review of the anti-abuse provisions in key EU Directives and to reinvigorate the work of the EU Code of Conduct on business taxation.

I. Anti-abuse and EU secondary law

2014

On the way

During the National Finance Ministers meeting of 6 May 2014, how to close a loophole exploited by companies with European subsidiaries in order to avoid paying tax on profits from hybrid loan arrangements was discussed. Meetings revealed divisions between member states, which are preventing the adoption of a common European anti-tax abuse rule.

A. The proposed amendments to the Parent Subsidiary Directive (PSD)

2014

- Specific context
  - **Code of conduct (CoC) group : hybrid strategies are a problem**
    - Code of conduct group agreed on a guideline (probably no unanimity)
  - **CoC Group: profit repatriation strategies in and out the EU are a problem**
    - CoC group adopted a guideline for repatriation in the EU (o
    - CoC Group did not reach a consensus for repatriation outside the EU
- The PSD can help reaching double non-taxation….
  - **The PSD is hybrid friendly**
  - **The PSD is used to repatriate profits without taxation (from and to the EU)**
- Proposed solutions: an anti-hybrid rule and a GAAR
- Status:
  - **Two steps proposal**
    - Adoption of an anti-hybrid rule under the Greek presidency (compromise version)
    - GAAR to be discussed under the Italian Presidency

Focus on the proposed anti-hybrid rule

2014

- **Article 4-1 PSD:**
  - **MS of the PC receiving « distributed profits » from its Sub. shall: <u>"- refrain from taxing such profits" </u>or to grant a tax credit.**
    - ➔ **PSD may oblige MS to exempt payments that are deductible in the source MS**
- **Commission's proposal (COM(2013) 814 final, 22 November 2013):**

  "(a) refrain from taking such profits <u>to the extent that such profits are not deductible by the subsidiary of the parent company;</u>" or to grant a credit
    - ➔ **This does not seem to lead to an obligation to tax (but preparatory work clearly pursue this)**
    - ➔ **Risk of a breach of legal certainty principle (?)**
- **Greek Presidency's « compromise version » (30 April 2014):**

  "(a) refrain from taxing such profits to the extent that such profits are not deductible by the subsidiary, <u>and tax such profits to the extent that such profits are deductible by the subsidiary</u>; » or to grant a credit
    - ➔ **Clear obligation to tax**
- **What about the credit method?**
  - **See the BEPS Action 2 on Treaty issues related to hybrids**

Potential issues relating to the obligation to tax

2014

- In direct tax field, first time that a directive would oblige a State to tax
  - **In the Saving directive a choice exists**
- Conditions to adopt a directive in direct tax matters
  - **Art 115 TFEU: if the situation « affects […] the functioning of the internal market"**
  - **Art. 5 TFEU: principles of subsidiarity**
  - **Art. 5 TFEU and general principle of EU law: principle of proportionality**
- There is no issue with the proposed amendment if one admits that:
  1. **The directive aims at eliminating double non taxation arising from hybrid instrument**
     - BUT is the purpose of the changes to eliminate double non taxation? Or to close a loophole?
  2. **Double non taxation « affects […] the functioning of the internal market »**
  3. **MS cannot reach a satisfactory result by by themselves (or bilaterally)**
     - BUT the CoC Group adopted a guideline & there is the OECD coordinated approach

     ➔ **Sufficient to adopt a rule excluding Hybrid from its scope?**
  4. **The « obligation to tax » is « necessary » to reach this goal**
     - BUT if the aim is to avoid the use of the PSD as an optimization tool: sufficient to exclude hybrid

Potential issues relating to the obligation to tax

2014

- Is there a risk of conflicts with DTT?
  - **The directive does not deal with its combination with DTT**
  - **Risk of conflict between the directive and DTT when the latter provides for double taxation relief through the exemption method**
    - Some treaties provide for the exemption method when there is a substantial shareholding
    - In theory, no issue since Directive prevails over DTT
    - However, if the DTT is in force… cannot a taxpayer rely on it?
      - ➔ Principle of legal certainty
      - E.g.: « the principle of legal certainty precludes directives from being able by themselves to create obligations for individuals. Directives cannot therefore be relied upon per se by the Member State as against individuals"
      - Nevertheless "Member States may choose the form and methods for implementing directives which best ensure the result to be achieved by those directives […] the legal situation arising from the national transposition measures [should be] sufficiently precise and clear and that **the persons concerned** (should be] **put in a position to know the full extent of their rights and obligations**…" (CJEU, C-321/05, Kofoed)
      - ➔ May lead to the amendment of MS's DTT network?

II. Hot topics in the case law of the Italian and French Supreme Courts

2014

- The influence of Halifax case law on Italian Supreme Court
- French Supreme Court:
  The application of directive in purely domestic situation: PSD and Merger Directive

A. Italian Supreme Court

2014

- Supreme Court, tax div., 5 May 2006, n. 10 353; tax div., 29 September 2006, n. 21221; tax div., 16 January 2008, n. 8772;. n. 25374 of 17 October 2008; unified div. nn. 30055 e 30057, 23 December 2008; 19 May 2010,n. 12249
- Following the Halifax ECJ judgment, the Italian Supreme Court ruled that "the Sixth Directive, directly applicable at national level within the EU law, adds to the traditional behavior of taxpayers in relation to VAT (physiological or fraudulent),.. a sort of tertium genus as regards the abusive and elusive conduct of the taxpayer, aimed at achieving only the result of the tax benefit, without a real and autonomous business reason justifying the economic operations which are carried out in the apparently correct form, but in reality are elusive »

A. Italian Supreme Court

2014

- Consistently, over time, the Supreme Court confirmed the application of said principles also with reference to Direct Taxation:
  - **In order to qualify a transaction as elusive there is no need to prove the simulation or the fraudulent nature.**
  - **Purely marginal and theoretical economic and business reasons do not provide alternative evidence of the operation other than that of a mere tax saving.**
  - **The taxpayer has to provide evidence of the well grounded economic reasons behind the transaction.**

B. French Supreme Courts
The application of directive in purely domestic situation

2014

- Directive in direct tax matters are applicable only in cross-border situations
- Directive are not *per se* applicable in a domestic situation
- However, "Leur Bloem" doctrine…

"32 […] where, in regulating purely internal situations, domestic legislation adopts the same solutions as those adopted in Community law in order, in particular, to avoid discrimination against its own nationals or, as in the case before the national court, any distortion of competition, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply […]

33 In such a case […] it is for the national court alone to assess the precise scope of that reference to Community law, the jurisdiction of the Court being confined to considering provisions of Community law only[…] Consideration of the limits which the national legislature may have placed on the application of Community law to purely internal situations is a matter for domestic law and consequently falls within the exclusive jurisdiction of the courts of the Member State […]"

The French Supreme Court's position

2014

- In case in the course of a litigation on a purely domestic situation the interpretation to be given to a French provision is unclear
  - **And if the said provision has been adopted in order to transpose the directive**
  - **And the French legislator did not want to treat differently domestic and cross-border situations**

  ➔ **Then it is allowed to interpret the domestic provision "in the light of the directive"**

- In case in the course of a litigation on a purely domestic situation the interpretation to be given to a French provision is clear
  - **Any reference to the directive is hopeless**
  - **Even where the said provision transpose the directive and**
  - **Its result is in breach with the directive**
  - **Solution grounded on the inapplicability of the directive**

Illustration: The merger directive

2014

- What is a « complete branch of activity » under the domestic provision applicable to assets' contribution ?

  - **The French provision has been adopted to transpose the directive…**
  - **The legislator did want to treat both situations in a similar way**
  - **One can refer to the definition of "branch of activity" in the merger directive**

- Reference allowed to determine if a special kind of operation (which in civil law is not a merger) would fall within the definition of "Merger" provided for in the directive

  - **For the purpose of the application of local taxes the FSC had decided that this operation was not a merger**

Illustration: The PSD

2014

- Conditions to interpret the provision in the light of the directive

  - ➢ **The French provision existed before the entry into force of the directive…**
    - But many changes (e.g. 2005, modification and reference in the preparatory work to the directive)
    - It is admitted under EU law that it is not always necessary to transpose a directive in order for the latter to produce its effect

  - ➢ **The legislator did want to treat both situations in a similar way**

  ➔ It seems that the conditions are fulfilled

  ➔ FSC in a domestic situation "seems" to refer to the directive to determine whether or not the owner of the usufruct could benefit from the PS regime (CE, 20 Feb. 2012, n° 321224, Sté civile Participasanh)

  - ➢ **Clarity of the provision?**

Illustration: The PSD

2014

- Example
  - **Fact patterns**
    - Company A hold 20% of the share capital of Company B for more than 2 years
    - End 2013: Company A acquires some additional shares of Company B
    - 2014: Company B distributes dividends to company A
    - Beginning 2015: Company A sells all B shares
  - **Solution under the directive**
    - Double taxation relief applies to profit distributed by a sub. to its **parent**
    - **Status of Parent Co granted if it owns 10% for more than 2 years**

    ➔ Company A can benefit of the PS regime on all dividends
  - **Solution under French tax law: "?"**
    - Two Administrative Courts of Appeal (ACA): French provision is clear and obliges to hold for 2 years each share giving rise to dividend to be exempt

      ➔ Company A cannot benefit from the PS regime on the shares acquired in 2014
    - One first-tier tribunal & an AG (before ACA) : text unclear & interpretation in the light of the directive

      ➔ Company A can benefit of the PS regime on all dividends

Comments

2014

- Determining whether or not a provision is clear appears difficult
- If a rule would be clearly incompatible with the directive: would this lead to a prohibited reverse discrimination?
  - **Difference of treatment of comparable situations detrimental to domestic situation**
    - In a cross border situation taxpayer would rely on the directive
    - The legislator wanted to treat those situation equally
  - **Reverse discrimination are not prohibited by EU law but what about French Constitutional law?**
    - FSC a reverse discrimination (entailed in a decree) can breach Constitutional principle
    - French Constitutional Court (FCC)?
      - Procedural issue: the FCC cannot assess the compatibility of French law with EU law

      But should be looked from another angle (see, for a positive evolution, QPC n° 2103-314P)
      - One has to determine the tax treatment (EU law interpretation) in a cross-border situation
      - Not to assess the compatibility of the domestic law
      - But to determine if the domestic situation is treated worth
      - The FCC would have all elements to rule on the breach of Constitutional principles
    - For a very similar case, CJEU, 21 February 2013, C-111/12 (Italian Architects)

Bilateral Meeting IFA
Italy and France

Wealth management: special tax consideration on residential real estate holding structures

Venice, 7 June 2014

Chair:

Philippe Durand
Landwell
President French Branch of IFA

Speakers:

Eric Ginter
Hoche Société d'Avocats

Alessandro Bavila
Maisto e Associati

Italian/French investor on real estate located in France/Italy – Relevant issues

2014

Italian corporation

Società semplice

IT

FR

SCI

	Italy	France
Transfer taxes on acquisition	Cadastral vs. market value	Market value
Income tax	Actual vs. presumptive income (dummy company – benefits in kind to the shareholders)	Only if rented
Capital gain	Asset deal: 5 years holding CG exemption Share deal: Treaty + protocol	No tax exemption before a long period (22/30 years)
Wealth taxes and other property taxes	Different rates and taxable base (IMU - IVIE - IVAFE - Stamp duty)	Wealth tax if net value above 1,3 M€
Inheritance / donation	Taxable base (market value vs. NAV) Situs	DTC: credit equal to taxes paid in Italy
Foreign asset reporting obligation	Confidentiality (fiduciary company)	None, except for wealth tax

SCI

FR

IT

Italian corporation

Società semplice

Italian investor on real estate located in France

2014

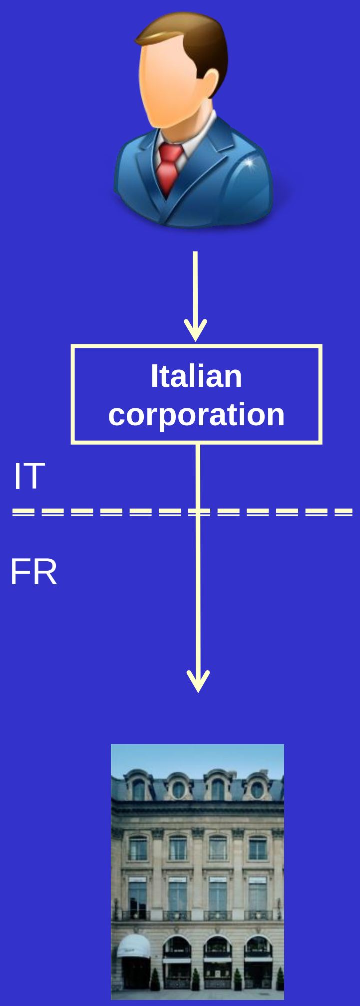
IT

FR

	Italy	France
Transfer taxes on acquisition	NA	Registration duties on market value (5,09 %)
Income tax	Income tax only if rented out – FTC available (no presumptive income)	Income tax only if rented out
Capital gain	NO CG after 5 years – FTC available (if applicable)	No after 22 years/income tax ; after 30 years/social contributions
Wealth taxes and other property taxes	IVIE 0.76 % on **acquisition cost** – FTC for *ISF* and *tax fonciere*	Wealth tax if valule superior to 1,3 M€
Inheritance / donation	INHT (4-6-8%) on **market value**	Inheritance / Donation duties or market value – Progressive scale
Foreign asset reporting obligation	YES (exclusion in case of fiduciary company) Penalty: 3 – 15 %	NA
Advisable?	YES (depending on IVIE)	YES

Italian investor on real estate located in France through an Italian corporation

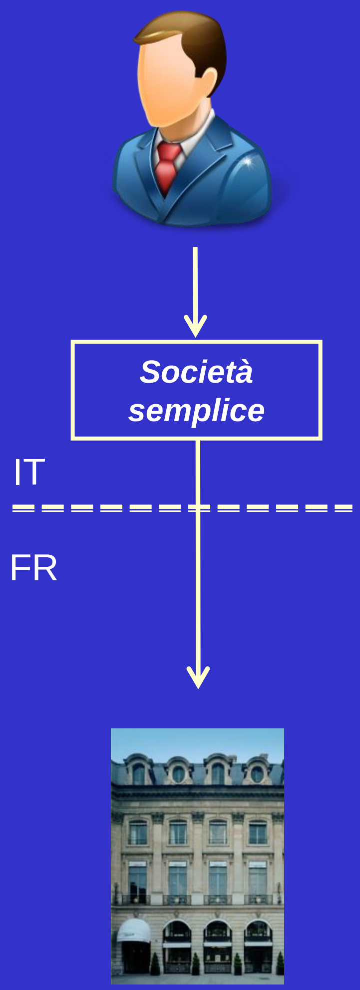
2014



	Italy	France
Transfer taxes	NA	Registration duties on market value (5,09 %)
Income tax	Business income (FTC available) – dummy company legislation + benefits in kind to the shareholders	Corporate income tax or rents
Income tax / capital gain	Always taxable (i.e no 5 years exemption) – Share deal vs. asset deal	Taxation on the difference between market value and book valule
Wealth taxes and other property taxes	NO (unless shares are deposited)	Yes, with the deduction of bank loan if any
Inheritance / donation	INHT (4-6-8%) on **NAV**	Inheritance / Donation duties based on market value of the assets
Foreign asset reporting obligation	NO	3% tax of shareholder not properly recorded
Advisable?	NO	NO

Italian investor on real estate located in France through a *società semplice*

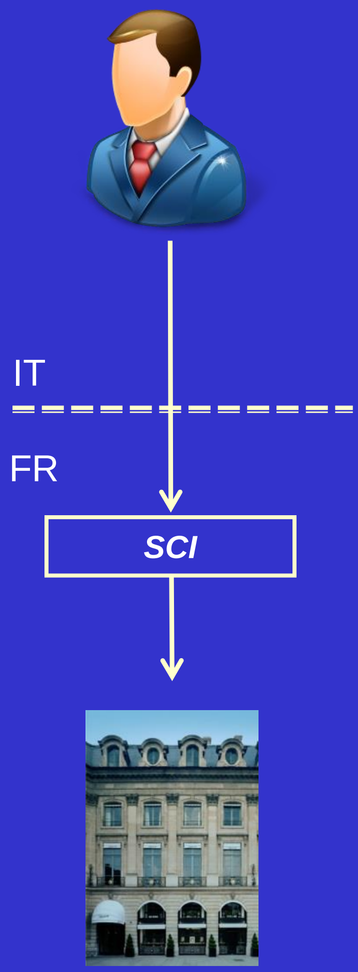
2014



	Italy	France
Transfer taxes	NA	Registration duties on market value (5,09 %)
Income tax	Income tax only if rented out – FTC available (no presumptive income)	Corporate income tax on rents if any
Capital gain	Asset deal (5 years exemption) Share deal (always taxable)	Share deal: same rules as if direct ownership Asset deal: corporate income tax
Wealth taxes and other property taxes	NO (SS are not formally subject to IVIE)	YES. Possible deduction of bank loan if any
Inheritance / donation	INHT (4-6-8%) on **NAV vs. market value of asset**	Inheritance / Donation duties based on market value of the assets
Foreign asset reporting obligation	YES (obligation of the partnership) Penalty: 3 - 15 %	3% tax if shareholders not properly reported
Advisable?	YES	YES

Italian investor on real estate located in France through a *SCI*

2014



	Italy	France
Transfer taxes	NA	Registration duties on market value (5,09 %)
Income tax	Only upon distribution of profits (residence test)	Corporate income tax on rents if any
Capital gain	Share deal: taxable + FCT Asset deal: only when distribution occurs	Same rules as if direct ownership
Wealth taxes and other property taxes	IVAFE at 0.2 % on **face value** of the shares	YES. Possible deduction of bank loan if any
Inheritance / donation	INHT (4-6-8%) on **NAV vs. market value of asset**	Inheritance / Donation duties based on market value of the assets
Foreign asset reporting obligation	YES	3% tax if shareholders not properly reported
Advisable?	YES (residence test)	YES

French investor on real estate located in Italy

2014

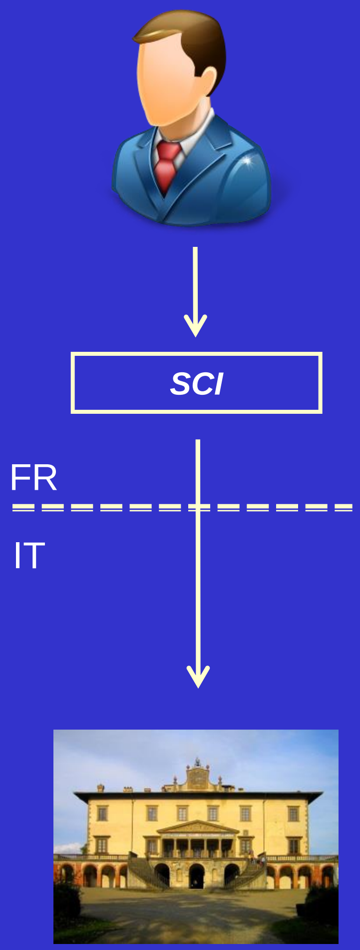
FR

IT

	France	Italy
Transfer taxes	NO	9 % on **cadastral value** (unless 10 % VAT on purchase price)
Income tax	Income tax only if rented out	Income tax only if rented out (otherwise IMU)
Capital gain	No after 22 years/income tax ; after 30 years social contribution	NO CG after 5 years
Wealth taxes and other property taxes	Same rules as if the real estate was in France	IMU 0.76 % on revaluated cadastral value
Inheritance / donation	Same rules as if the real estate was in France	INHT (4-6-8%) on **cadastral value**
Foreign asset reporting obligation	NO, except for wealth tax	NA
Advisable?	YES	YES

French investor on real estate located in Italy through a *SCI*

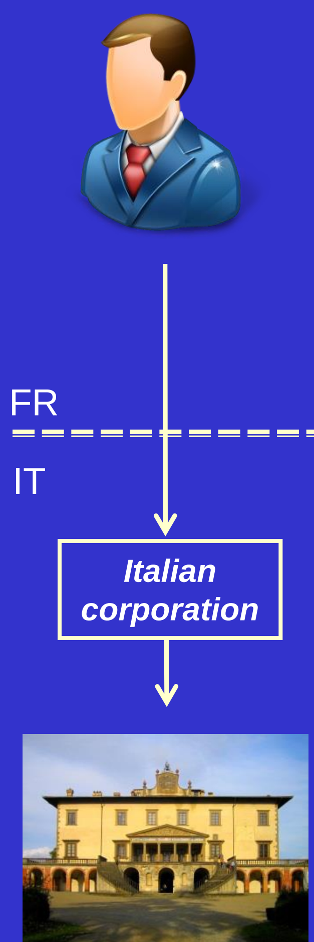
2014



	France	Italy
Transfer taxes	NO	9 % on **market value** (unless 10 % VAT on purchase price)
Income tax	Income tax only if rented out	Income tax only if rented out (otherwise IMU) **Residence test**
Capital gain	No after 22 years/income tax ; after 30 years social contribution	Asset deal: 5 y. exempt (residence test) Share deal: NO (res. test)
Wealth taxes and other property taxes	Same rules as if the real estate was in France	IMU 0.76 % on revaluated cadastral value
Inheritance / donation	Same rules as if the real estate was in France	NO (subject to res. test)
Foreign asset reporting obligation	NA	NA
Advisable?	YES	NO: Residence test risk – no 5 years CG exemption – mk value on acquisition

French investor on real estate located in Italy through an Italian corporation

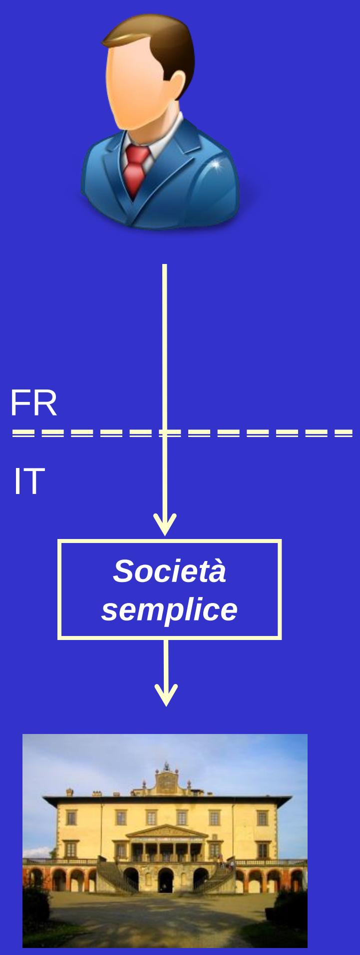
2014



	France	Italy
Transfer taxes	NO	9 % on **market value** (unless 10 % VAT on purchase price)
Income tax	Only if dividends are paid to shareholders	Business income – dummy company legislation + benefits in kind to the shareholders
Capital gain	Same rules as if the estate was located in France	Asset deal: taxable (i.e. no 5 years exemption) – Share deal: **Treaty Issue (Protocol art. 8 a) and b)**
Wealth taxes and other property taxes	YES, based on market value	IMU 0.76 % on revaluated cadastral value
Inheritance / donation	Same rules as if the estate was located in France	INHT (4-6-8%) on **NAV**
Foreign asset reporting obligation	NO	NA
Advisable?	NO	NO: Business income – no 5 y. CG exemption – mk value

French investor on real estate located in Italy through a *società semplice*

2014



	France	Italy
Transfer taxes	NO	9 % on **market value** (unless 10 % VAT on purchase price)
Income tax	Income tax only if rented out	Income tax only if rented out (otherwise IMU)
Capital gain	No after 22 years/income tax; after 30 years social contribution	NO CG after 5 years
Wealth taxes and other property taxes	Same rules as if the real estate was in France	IMU 0.76 % on revaluated cadastral value
Inheritance / donation	Same rules as if the real estate was in France	INHT (4-6-8%) on **NAV vs. market value of asset**
Foreign asset reporting obligation	NA	NA
Advisable?	YES	YES

Conclusions

2014

❖ Italian investor on real estate located in France

❖ French investor on real estate located in Italy