



Report of expert group

# **Ways to tackle cross-border tax obstacles facing individuals within the EU**

## About the reports

This report and the report 'Ways to tackle inheritance cross-border tax obstacles facing individuals within the EU' represent the conclusions of the work of the European Commission expert group on removing tax problems facing individuals who are active across borders within the EU.

The task of the group was to assist the Commission in identifying and finding practical ways to remove any tax problems faced by individuals who move from one EU country to another to live, study, work or retire, or who invest in other EU countries, or inherit property across borders within the EU. This implied exchanging expertise and experience; identifying good practices in Member States as well as suggesting other feasible and practical ways to address the tax issues that currently arise; assisting the Commission in assessing the progress made by Member States in implementing the principles of the Commission's recommendation regarding relief for double taxation of inheritances and to provide suggestions on how to take the work in the area forward; and identifying any other feasible policy initiatives that might assist in addressing these problems.

The 21 members of the group were representatives of private sector organisations with a demonstrable interest and involvement in the topics to be discussed, such as cross-border associations, non-governmental organisations, trade unions, universities, tax associations and others. They were selected on the basis of responses received to a public call for applications, having regard to the specific tasks of the expert group, the type of expertise required and, as far as possible, to geographical and gender balance. These experts were asked to provide independent advice to the Commission. The group's mandate ran from 12 June 2014 to 30 June 2015.

The group had five meetings at which it studied available reports and other documents on cross-border tax problems, heard oral presentations and held round-table talks. Members also corresponded in writing and the rapporteurs held two drafting sessions. The expert group decided early on to divide the work into two parts: one with a focus on direct taxes in general and the other dealing with inheritance taxes.

Commission staff provided the secretariat for the group but the report is the work of the members of the group. Consequently, the report should not be construed as in any way reflecting the official position of the European Commission and its services. Neither the Commission nor any person acting on behalf of the Commission is responsible for the use which might be made of the information contained herein.

It should be noted also that not all members of the group necessarily agree with every conclusion in this report. In cases of dissent, the report reflects the views of the majority of the group's members.

European Commission

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**Ways to tackle  
cross-border tax obstacles  
facing individuals  
within the EU**

November 2015

Directorate-General for Taxation  
and Customs Union

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# Executive summary

Nationals and residents of EU Member States are making ever greater use of the ‘four freedoms’ enshrined in the EU treaties that allow them to work, move, invest and purchase goods across borders within the EU. However, as they exercise these freedoms, they can face many tax problems, because they will have to deal with the differing national tax rules and procedures of the Member States. Persons particularly affected include mobile workers, persons receiving dividends across borders, individuals receiving or paying cross-border alimony or maintenance payments, pensioners who retire abroad and many others. Individuals in these situations can face higher tax burdens, cash-flow disadvantages and considerable costs and this can generate feelings of disillusionment with the single market and a disinclination to exercise EU freedoms.

Given the composition of the expert group, which was decided on by the Commission on the basis of criteria such as geographical balance and the need to ensure coverage of a broad range of interests, not all EU Member States were represented. Therefore the examples, which reflect the experience of the experts, focus more on some Member States than others.

The expert group met several times during which it studied in detail several existing reports and documents on cross-border tax obstacles and debated and received oral and written information from different experts within the Commission and outside. It also received considerable input from individuals, the business community and institutions by way of two public consultations <sup>(1)</sup>. Given the enormous amount of information received on cross-border tax problems, it was from a practical point of view impossible to address all of them in the report. Therefore, some choices had to be made, in particular as follows.

- (i) This report deals with the tax problems of individuals only (i.e. it does not deal with companies) and with direct taxes (income, dividend withholding and wages taxes). Issues of value added tax (VAT), car taxation and social security contributions fall outside the mandate of the expert group <sup>(2)</sup>. Problems in the field of inheritance and gift taxes are dealt with in a separate report.
- (ii) The report focuses on tax obstacles which cannot currently be tackled by the Court of Justice of the European Union (CJEU). EU law obliges Member States to exercise their taxing rights in conformity with the treaty freedoms as enshrined in the Treaty on the Functioning of the European Union (TFEU). This means that any problems of discrimination and restrictions to the freedoms <sup>(3)</sup> can be tackled by legal action against the country concerned which will reach the Court of Justice if the Member State in question does not change its law. The Commission has brought about many changes in national legislation by initiating infringement cases against individual Member States. Where the expert group received information about a specific tax issue in a Member State that could be regarded as discrimination or a restriction, it handed this information over to the Commission to take the necessary infringement action. The focus of the report is rather, therefore, on problems of double taxation and administrative difficulties that cannot be tackled by legal action.

This report considers both problems arising from mismatches between taxation rules that lead to higher taxation in cross-border situations (‘substantive’ tax problems) and problems that are due to absence of suitable practical and administrative procedures (‘procedural’ tax problems). The expert group distinguishes between the problems arising on the side of the state of residence/nationality of the taxpayer and on the side of the state where the activity or investment takes place.

The report identifies double taxation as a main ‘substantive’ problem. It highlights in particular the inadequacy or absence of rules on relieving double taxation; the inadequacy of rules to enforce the double tax relief measures that do exist; the particular double tax problems faced by highly mobile workers such as performing artistes and sportspersons; differing characterisations of an item of income in different Member States; and differences between the tax laws of Member States in terms of tax relief for pension contributions versus taxation of pension payments which can result in mismatching situations if an individual works in one Member State and retires to another. Exit taxes, trailing taxes and anti-abuse rules may also lead to undesirable effects for individuals who are active across borders.

Practical problems identified in the report include complicated rules on reclaiming taxes withheld; the absence of specialised cross-border tax expertise in local tax offices; and the frequently occurring requirement to use the official language of the country when completing official tax forms and corresponding with the tax office. These problems may make it difficult for taxpayers both to comply with tax rules and to claim the relief they are entitled to under double taxation treaties. As regards enforcing their rights under double taxation treaties, the high costs of judicial proceedings may put this solution out of the reach of most taxpayers. The expert group has elaborated on these substantive and practical problems in Chapter 3.

<sup>(1)</sup> On general and on inheritance cross-border tax problems. The contributions to these public consultations can be found under [http://ec.europa.eu/taxation\\_customs/common/consultations/tax/index\\_en.htm](http://ec.europa.eu/taxation_customs/common/consultations/tax/index_en.htm)

<sup>(2)</sup> This report acknowledges the differences between the tax treatment applied by Member States to social security benefits and the fact that some Member States label payments received by non-residents as social security contributions while at the same time denying the non-residents any entitlement to benefit from the Member State social security systems. However, this situation should be addressed at the level of interpretation of European Union law by the CJEU. In this sense some relevant elements were already provided in C-623/13, *Ministre de l'Économie et des Finances v Gérard de Ruyter*, 26 February 2015.

<sup>(3)</sup> The CJEU uses the words ‘discrimination’ and ‘restriction’ alike when addressing the issue of a violation of one of the treaty freedoms enshrined in the TFEU.

The report recognises Member States' freedom to establish their own tax rules and procedures and set their own tax rates, but notes that for many individuals this can be a source of frustration with the single market. Many individuals find it difficult to understand why they have to pay higher tax on income invested across border (because of the higher tax rate in the country of investment) than they would pay if they invested locally. Moreover, they may find it difficult to understand why they face tax compliance obligations in each of the countries in which they operate rather than just in their country of residence. In addition, they query why they have to actually claim the benefits of tax treaties between their countries of residence and other countries in which they operate rather than obtaining those benefits automatically.

In Chapter 4, the expert group proposes some solutions to the cross-border tax problems identified. Given that full direct tax harmonisation of Member States' tax laws is at present unrealistic, the main idea is to encourage Member States to at least address the main problems arising from differences between their tax systems so as to ensure that the internal market benefits citizens. The solutions in question range from legal solutions, based on some degree of harmonisation, to soft-law measures such as coordination <sup>(4)</sup> and guidance on best practices and the establishment of bodies to deal with the tax problems involved. This chapter also suggests the use of international tax mediation, a better use by tax administrations of the procedures set out in tax treaties to enable them to agree on the resolution of double taxation disputes and the use of arbitration in tax treaty disputes.

Chapter 5 summarises the expert group's recommendations in both a narrative and tabular form. These vary from very concrete measures that Member States could adopt in the short-term, to medium- and long-term measures and recommendations of a broader policy level.

The most relevant recommendations are as follows.

## — Cross-border and other mobile workers, including artistes

- A single EU-wide set of rules on conflict of jurisdiction should apply to cross-border workers, mobile workers and other individuals who derive a significant part of their income from one or more EU Member States other than the states in which they are resident. This solution could also be introduced by means of a multilateral tax treaty among all EU Member States.
- Alternatively, such taxpayers should be able to inform the tax authorities of their state of residence about any cross-border tax problems, whereupon such authorities would have to find a solution in conjunction with the tax authorities of the other state within a short timeframe (i.e. two-tier system).
- EU recommendation to ensure either fairer treatment of mobile employees suffering high withholding taxes or even the abolition of withholding taxes.
- Code of conduct for EU Member States on the fair tax treatment of cross-border situations.
- The best solution would be a one-stop-shop system whereby such workers would only have to pay tax to one tax authority and the tax revenue so collected would, if appropriate, be shared with other tax authorities involved.

## — Characterisation mismatches, including rules on residence

- Multilateral technical tables (guidelines) could provide a common interpretation of situations that fall within the various tax treaty provisions.
- An alternative would be to present proposals in the form of binding coordination measures or directives giving the state of residence the priority in deciding on the characterisation of personal matters. In all the other situations, the priority should be given to the state of source.
- The problems arising in connection with dual tax residence of individuals within the EU could also be solved by providing a common definition of tax residence of individuals applicable for income tax purposes throughout the European Union. Additional guidance could also be given in respect of tie-breaker rules.

<sup>(4)</sup> For the purpose of this report, coordination means positive integration done with soft and hard law other than directives.

### — Deductions (personal, in the form of allowances and reliefs, and business)

- A directive could be drawn up to address the fact that personal and country-specific deductions are not available across borders in order to allow a one-shop-stop treatment for income tax purposes.
- The Schumacker treatment could be extended to cases in which the taxpayer derives more than 50 % (or 75 %) of his or her worldwide income from the host state.
- Business deductions should be applied in a coordinated manner in respect of cross-border situations and with the same conditions that apply in purely domestic situations, with a view to avoiding unintended advantages or disadvantages.

### — New tax treaty clauses on mutual agreement procedure: arbitration and mediation

- The clauses on mutual agreement procedures in double taxation treaties should be amended along a common or coordinated model in order to overcome the existing problems and ensure transparency and the participation of taxpayers at all stages of the procedure.
- The use of mutual agreement procedures as international tax mediation procedures could be combined with the continuation of the dispute in the framework of binding arbitration that should assure the elimination of double taxation within the internal market under all circumstances.

### — Compliance

- Member States should not require taxpayers to provide them with information that they already obtain or can easily obtain by means of mutual assistance from other Member States, for example under EU information exchange rules.
- Member States should improve their technical capacity to deal with cross-border cases and adopt coordinated standards for tax procedures and forms, including by making them available in several languages.

Finally, an annex to the report includes a technical glossary with tax terminology to facilitate comprehension of the report.

The expert group wishes to express its sincere gratitude to all persons who in some way or another have contributed to the completion of this report, and in particular to Dr Federica Pitrone for having assisted the rapporteurs throughout the drafting of this report and the International Bureau of Fiscal Documentation (IBFD) for the support given to this project. Without the input of so many reliable sources, the report could not have been finalised in this manner.

The expert group strongly urges the Commission and the Member States to take sincere notice of this report, to study its contents, and to execute the recommendations as formulated by the group. The expert group is willing at any time to discuss and elaborate on the recommendations in conjunction with the Commission and the Member States. The expert group strongly believes that the Member States must, on the basis of Commission proposals, make greater efforts to comply with their obligation to Union loyalty by removing the cross-border tax obstacles that limit EU citizens' ability to exercise their EU freedoms.



# Chapter 1

## Introduction

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### 1.1. Background

The report addresses the major tax obstacles that EU citizens face in the internal market when they operate across borders. Its goal is to describe and analyse these obstacles and to put forward some solutions and recommendations to the European Commission and to the EU Member States.

The report focuses on individuals, i.e. workers, self-employed individuals and pensioners who are EU citizens. Cross-border tax problems no longer impact only on persons living near borders who cross those borders every day to work ('frontier workers'); there are also increasingly numbers of other mobile workers such as posted workers or persons exercising their activity in two or more Member States (simultaneously or for very short intervals) such as artistes, professors, etc. There are increasing numbers of pensioners moving from one country to another after retirement. There are increasing numbers of cross-border inheritances; and there are even persons who never leave their own country and do not invest abroad but still face cross-border tax problems because their savings in their local banks are invested in cross-border funds.

The scope of the report is to identify the personal tax obstacles which arise both from mismatches between the taxation rules of Member States ('substantive' tax problems) and problems that are due to absence of suitable practical and administrative procedures. These obstacles, although not contrary to EU law per se, deter citizens from taking full advantage of the opportunities the EU's internal market offers to them and the group strongly believes that they need to be addressed.

The report does not contain a comprehensive list of all the direct tax obstacles identified by the group; rather it focuses on the obstacles which the experts, on the basis of their experience, consider as most prominent. The selection took into account the geographical spread of such obstacles in the European Union, their impact on the activities of EU citizens and the possibility of removing them without interfering with the taxing sovereignty of EU Member States. The experts are aware that, for at least some of these obstacles, citizens are often dissuaded from actively seeking a solution as this is perceived as too complex, burdensome or costly.

### 1.2. Structure of the report

The report consists of an executive summary, five chapters and an annex.

After outlining the general legal framework in direct taxation in cross-border situation within the EU in Chapter 2, the report in Chapter 3 describes the cross-border tax obstacles and analyses them in detail in separate sections, according to their (substantive or procedural) nature and to whether they originate in the state of residence or state of source. Chapter 4 outlines possible solutions to the obstacles identified based on the following three principles: First, tax harmonisation is not a prerequisite for improving the existing situation. Second, there is no single solution to all obstacles but a range of possible solutions could be considered. Third, there are good tax practices in some Member States in addressing cross-border tax obstacles from which other Member States could draw inspiration. The final chapter of the report contains an outlook with some recommendations for possible solutions in the short, medium and long term.

"The Annex contains a synoptic chart with the obstacles and suggested solutions".



# Chapter 2

## General legal framework in cross-border direct taxation in the EU

Direct taxation for individual taxpayers is not harmonised in the EU and the EU's role in the area is limited. There are 28 different national tax regimes and a network of bilateral/multilateral tax conventions between EU Member States which define how EU citizens who live, work or spend time outside their home countries are to be taxed on their income — coming from wages, pensions, benefits, property or other sources.

The application of two or more sets of tax rules can for these citizens result in double or multiple taxation, higher tax rates, cash-flow disadvantages, higher administrative and compliance costs and burdens. This may deter these citizens from taking full advantage of their right to move and operate freely across borders in the EU's internal market. Therefore there is a need to find a balance between the legitimate exercise by Member States of their national sovereignty in direct taxation, including by establishing procedures to prevent tax avoidance and evasion, and the requirement of the EU's internal market that individuals should not face obstacles to the exercise of their freedom to move and operate freely across borders.

### 2.1. The role of the EU in direct taxation

The EU treaties make no explicit provision for EU legislative competence in the area of direct taxation. Under Article 115 of the Treaty on the Functioning of the European Union (TFEU), the Commission has the power to make proposals for EU legislation to improve the functioning of the internal market, but the proposals will only become law if EU Member States unanimously agree to them. Existing EU direct tax legislation (mainly on the taxation of companies) has usually been based on this article.

At the same time, as a consequence of the application of the EU's fundamental freedoms <sup>(5)</sup> in the internal market, Member States are not allowed to discriminate, including in the tax area, on the basis of nationality or residence. Nor can they apply unjustified restrictions to the exercise of the freedoms granted by the internal market.

One of the roles of the European Commission and the Court of Justice of the European Union (hereinafter the Court of Justice or the CJEU) is to ensure that Member States comply with their obligations under the treaties. The Commission can initiate infringement procedures when it considers that EU law has been breached. The Court of Justice can, in response either to the Commission's infringement action or to a referral from a national Court of a Member State, declare that a Member State should not apply a discriminatory, protective or restrictive national tax law. However, the Court of Justice cannot prescribe what national measure should replace the denounced measure. This is left for Member States' national authorities.

### 2.2. The competence of Member States in direct taxation

Direct taxation mainly falls under the competence of EU Member States which are largely free to design their own direct tax systems and procedures, and to decide what to tax, when to tax it and at what rate, as long as their rules are not discriminatory or otherwise contrary to the EU Treaties.

Member States are not required under EU law to conclude tax conventions with other countries to prevent double taxation, or to prevent double taxation in all cases, or to draw up their tax rules to correspond with those in other Member States. Indeed, as confirmed by the Court of Justice, the Member States have retained the power to define, bilaterally or even unilaterally, the criteria for allocating their powers of taxation. The Court of Justice has also stated that double taxation resulting from the parallel exercise of taxing rights by two or more Member States does not constitute discrimination or restriction connected with the exercise of fundamental freedoms in cross-border situations and consequently is not incompatible with the EU treaties <sup>(6)</sup>.

<sup>(5)</sup> Free movement of goods, capital, services and people.

<sup>(6)</sup> CJEU, *Mark Kerckhaert and Bernadette Morres v Belgische Staat*, C-513/04, 14 November 2006; CJEU, *Margarete Block v Finanzamt Kaufbeuren*, C-67/08, 12 February 2009; CJEU, *Jacques Damseaux v Belgische Staat*, C-128/08, 16 July 2009.



# Chapter 3

## Problem description

In recent decades, decisions of the CJEU regarding the fundamental freedoms of the EU treaties have gradually removed many forms of discrimination and restrictions in the field of direct taxes within the internal market. However, as we see from chapter 2 above, the CJEU has rejected the view that disparities between Member States' tax laws — which arise in cross-border situations as a consequence of the lack of harmonisation between Member States' national tax systems and of the existence of different national tax policies — are incompatible with the fundamental freedoms as enshrined in the TFEU (7) (8). Thus, if a taxpayer has tax links to more than one Member State, there might well be no illegality involved in several Member States requiring that taxpayer to pay high amounts of tax, even if the result is that that taxpayer pays an enormous overall level of tax on his or her income.

Evidence suggests that double taxation is one of the issues of most concern to EU citizens who are active across borders (9). Cross-border activities imply the application of different tax rules to those that would apply in a purely domestic situation; depending on the Member States involved, the result may be advantageous or detrimental for the individual concerned. If an individual considers the tax situation in another state as disadvantageous, that individual may decide not to operate in that state. In other words, the uncoordinated exercise of their taxing powers by Member States may dissuade many individuals from exercising their EU-treaty rights to access the internal market. While it is unrealistic for Member States' direct tax systems to be harmonised, better efforts should be made to ensure that the different tax systems do not conflict with each other. The tax obstacles addressed in this document are, therefore, not those of discrimination or restrictions but those that constitute the outcome of the uncoordinated exercise of taxing powers, in parallel, of two or more jurisdictions (10).

Obstacles can be substantive, when taxpayers are subject to a higher tax burden or a requirement to pay taxes earlier than that which would otherwise arise under one single jurisdiction. Obstacles are procedural, when the exercise of a right is subject to burdensome conditions. Essentially, substantive obstacles relate to how much tax one pays and when, and procedural obstacles arise from administrative complexity and how tax systems operate in practice. The latter category includes also practical issues such as language barriers, lack of relative information and practical problems obtaining documents.

The origin of the obstacles can be in the Member State of residence, the state of nationality of the taxpayer, or in a different Member State, usually the one which is the source of the income (11). Obstacles arising in the Member State of residence include those concerning the availability of reliefs and deductions for foreign taxes on foreign-sourced income as well as the application by the Member State of exit and trailing taxes when a taxpayer gives up his or her residence in that state. There may also be problems in the Member State of residence due to various forms of mismatch with the taxes paid in the Member State of source or as a consequence of the application of anti-abuse measures. Obstacles arising in the Member State of source include high levels of withholding taxes and problems of how the non-resident taxpayer is to be considered linked to that taxing jurisdiction.

The chapters that follow include a selected overview of examples of obstacles that may dissuade individuals from being active cross-border within the internal market.

(7) In the view of the Court the TFEU does not oblige Member States to grant relief for double taxation. However, the OECD considers double taxation as self-evidently an obstacle and harmful to free movement (see OECD, Commentary on OECD model, Introduction, para. 1). The Commission also considers that it is not appropriate in a single market that problems such as double taxation should deter individuals from engaging in cross-border activity or penalise them when they do (see COM(2010) 769 final, 20 December 2010, p. 4).

(8) Many scholars have expressed concerns about the impact of juridical double taxation within the internal market, due to the fact that it hampers the achievement of an effective level-playing field. See A. Rust (ed.), *Double taxation within the European Union*, Kluwer Law International, 2011.

(9) Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, *Double Taxation in the Single Market*, COM(2011)712 final, 11 November 2011, p. 6 and footnote 19.

(10) According to the annual reports of the Your Europe Advice service, Solvit and the Europe direct contact centres, queries and complaints from EU citizens about taxation constitute at least 3-4 % of the total volume of annual queries and complaints — see: Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee *Removing cross-border tax obstacles for EU citizens*, COM(2010)769 final, 20 December 2010, pp. 2-3.

(11) For income tax purposes, the expression state of source also identifies in general terms the country where the activity takes place.

## 3.1. Substantive tax obstacles

### (a) Substantive tax obstacles arising in the state of residence

#### Foreign tax relief and cross-border workers

The most common potential tax obstacle in the country of residence concerns how that country provides relief for taxes levied by another jurisdiction or jurisdictions when exercising its taxing rights over its residents. There is an almost complete network of double taxation treaties between Member States to eliminate double taxation<sup>(12)</sup> and in addition many Member States' domestic laws contain provisions for relief from foreign taxes. However, these measures may not in practice fully resolve the problems related to foreign tax paid.

For example, double tax treaties frequently keep cross-border workers exposed to full taxation in both countries involved, unless the individual meets certain conditions<sup>(13)</sup>. Even in the latter case the exposure to full double taxation could remain due to the application of tax progression rules. Similarly, artistes and sportspersons often going abroad for work are structurally exposed to full taxation in the country visited as well as in their home countries<sup>(14)</sup>. Also in case of sale or disposal of properties located in a country different from the country of residence, both states might tax the capital gain. Although in such cases, the country of residence should at the end of the year allow credit for the tax paid in the other country, the individual involved has to face the complexity and cost of claiming tax refunds. Moreover, disputes and disagreements between the Member States involved regarding where expenses should be deducted and tax credits applied (i.e. state of source or state of residence)<sup>(15)</sup> may in some cases never be resolved.

Only a few double taxation treaties concluded by Member States contain special provisions<sup>(16)</sup> to prevent a specific category of cross-border workers, i.e. frontier workers, from being exposed to full double taxation. The rationale of such clauses is to take into account the structural exposure of such workers to international double taxation and achieve an easier framework for them in respect of tax filing, collection and compliance. Some of the clauses of this type prevent double taxation by replacing the traditional sharing of taxing powers with a single collection of tax on cross-border income by one of the Member States involved and a sharing of the resulting revenue between the two states<sup>(17)</sup>.

However, even these special arrangements for frontier workers do not solve all the problems of these cross-border workers. For example, one of these unresolved problems is that different criteria are used to define the geographical scope of frontier workers' special regimes<sup>(18)</sup>.

Moreover, due to stronger economic integration and the enhanced ease of travel within the European Union, many other individuals now face the same problems as frontier workers. Highly-mobile workers — i.e. individuals who live in one state and work in more than one other state — and posted workers, who are sent to other countries to work for short or long

<sup>(12)</sup> There are no tax conventions in place between Croatia and Cyprus, Cyprus and Latvia (under negotiation), Cyprus and the Netherlands, Denmark and Spain, Denmark and France, see *IBFD tax research platform* available at <http://online.ibfd.org/kbase/>  
See also: Treaties for the avoidance of double taxation concluded by Member States available at: [http://ec.europa.eu/taxation\\_customs/taxation/individuals/treaties\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/individuals/treaties_en.htm)

<sup>(13)</sup> See Articles 15.1 and 15.2 of the OECD model tax convention on income and capital (OECD model).

<sup>(14)</sup> See Article 17 OECD model.

<sup>(15)</sup> A practical example is the following: a classical music orchestra from the Netherlands performs in six other EU Member States within 1 year. The musicians are employees in the residence state and have a monthly salary, while the orchestra as cultural institution with legal personality is exempted from corporation tax. The six performance states have the right to tax the performance fee, which is normally the gross fee, with limited possibilities to deduct expenses. When a tax certificate is issued, it will be issued in the name of the orchestra. Back in the residence state, the orchestra cannot get a foreign tax credit, while the individual musicians are not mentioned on the tax certificate, but if they were entitled to an individual tax credit, they experience a conflict with the monthly salary administration and payroll tax.

<sup>(16)</sup> 1959 DTC France-Germany; 1964 DTC Belgium-France; 1966 DTC France-Switzerland; 1967 DTC Belgium-Germany; 1969 DTC Austria-Liechtenstein; 1971 DTC Germany-Switzerland; 1974 DTC Austria-Switzerland; 1976 DTC Italy-Switzerland; 1981 DTC Austria-Italy; 1989 DTC France-Italy; 1993 DTC Portugal-Spain; 1995 DTC Liechtenstein-Switzerland; 1995 DTC France-Spain; 2000 DTC Austria-Germany; 2002 DTC Italy-San Marino. See also, 1983 Income Tax Convention (Frontier Workers) France-Switzerland. *IBFD tax research platform* available on <http://online.ibfd.org/kbase/>. E. Reimer, A. Rust (eds.), *Klaus Vogel on double taxation conventions — miscellaneous issues under Article 15*, Fourth Edition, February 2015.

<sup>(17)</sup> See for example the DTC between Italy and Switzerland.

<sup>(18)</sup> For example, in the DTC between Italy and France the bordering area according to which the individuals are considered frontier workers includes more than 400 kilometres. On the contrary, in the DTC between Italy and Switzerland the bordering area includes only a small part of the Italian territory: 20 kilometres from the border.

periods, also face problems of double or multiple taxation and the need to manage the different rules and interpretations of different tax authorities <sup>(19)</sup>. Despite the similarities between the situation of highly-mobile workers and posted workers and that of frontier workers, the former are almost <sup>(20)</sup> never the object of specific provisions in tax treaties <sup>(21)</sup>.

Another issue is the timing mismatch <sup>(22)</sup> between the date of the levying of a withholding tax in a source country and the date of the provision of tax relief in the state of residence. This can lead to a serious cash-flow disadvantage for an individual. Tax relief problems may also arise when tax years or the tax filing deadlines differ in the two Member States concerned.

Furthermore, the taxes levied in the state of source may be higher than those for which the state of residence is obliged to give relief — in such cases there will be no full relief for double taxation and no carry-forward of excess credit. It is not the intention of this report to propose harmonisation in the direct tax area; however, disparities caused by the lack of harmonisation may give rise to obstacles which, as in this case, this report wants to address.

### Example 1 — Unrelieved double taxation <sup>(23)</sup>

A Belgian resident receives dividends from the Netherlands to which the Netherlands applies withholding tax. Even though there is a tax convention in place between Belgium and the Netherlands, the relief for double taxation is on the basis of Belgian domestic law which allows only a deduction and not a credit for foreign taxes. The result is double taxation since the Dutch tax paid on the dividend is not fully allowed against the Belgian tax due on the dividend. Assuming the dividend is EUR 100 and the Dutch tax is 15 % (i.e. EUR 15), EUR 85 will be subject to full Belgian tax. If the Belgian tax is, say, 30 %, the net amount received by the taxpayer will only be EUR 59.5 (i.e. EUR 100 less EUR 15 Dutch tax and EUR 25.5 Belgian tax). Under a tax credit system, the whole EUR 100 would be subject to Belgian tax of 30 % (i.e. the tax would be EUR 30) but then the Netherlands tax of EUR 15 would be allowed as a credit against the Belgian tax so that the tax due in Belgium would only be EUR 15 and the net amount received by the taxpayer would be EUR 70 (EUR 100 less EUR 15 Dutch tax and EUR 15 Belgian tax).

### Characterisation mismatches

Characterisation mismatches often arise between Member States in the treatment for tax purposes of different forms of income and situations. This section does not aim to provide an exhaustive inventory of all mismatches in cross-border situations for income tax purposes, but rather to address those that impact most on individuals in cross-border situations.

For example, Member States may disagree about whether certain types of income should be classified as income or a gain. There may also be disagreements about the legal form of an entity that employs an individual. Furthermore, the Member States involved may have different rules on the attribution of an income/gain to certain tax years and different qualifications of a specific economic operation <sup>(24)</sup>.

The existence in each jurisdiction of multiple elements for determining tax residence also frequently gives rise to overlaps and conflicts of jurisdiction that can result in an individual being treated as resident for tax purposes in more than one EU Member State and/or being treated as liable to tax in one or more Member States <sup>(25)</sup>. This effect is multiplied in the case of highly-mobile workers, such as artistes, professors, lawyers, engineers, etc., who can be exposed to conflicting tax rules every time they work outside their countries of residence.

<sup>(19)</sup> Moreover, from a procedural perspective they have to deal with various tax administrations and to face additional procedural obstacles.

<sup>(20)</sup> See Art. 27 of the Belgium-Netherlands tax treaty.

<sup>(21)</sup> Since in most tax conventions the 183-day rule is used as a threshold for a tax exemption, highly-mobile workers have a higher than average chance (compared to other workers) of being affected by problems related to double taxation, as they frequently perform abroad. Highly-mobile workers may easily perform 50 % of their time outside their residence country.

<sup>(22)</sup> Timing is an especially crucial issue for mobile artistes and cultural professionals since opportunities for touring, training, working in another EU country may arise with short delay and have to be seized quickly.

<sup>(23)</sup> CJEU, *Mark Kerckhaert and Bernadette Morres v Belgische Staat*, C-513/04, 14 November 2006; *Miljoen*, C-14/14. See also, *Margarete Block v Finanzamt Kaufbeuren*, C-67/08, 12 February 2009 (in the field of inheritance tax).

<sup>(24)</sup> For example, the selling of the shares in a real estate company can be regarded either as the selling of the shares or of the real estate.

<sup>(25)</sup> This situation also creates procedural obstacles (e.g. additional administrative burden, or difficulties in obtaining tax residence certificates).

## Example 2 — Definition of tax residence

In the United Kingdom, an individual who works ‘sufficient hours’ (broadly 75 % of all days on which he or she works for at least 3 hours) in the United Kingdom, over a period of 365 days, is automatically a United Kingdom resident. Consequently, cross-border workers who live in another Member State but work in the United Kingdom will be United Kingdom residents, as well as residents of their own Member States <sup>(26)</sup>.

In some EU Member States, the unlimited liability to tax is determined by reference to a concept of tax residence calculated on the basis of a full year, whereas others apply a split-method. The resulting mismatch can give rise to double taxation.

## Example 3 — Split vs full-tax year tax residence concept

An Italian national moves from Italy to the Czech Republic together with his or her family on 1 May and terminates all his or her Italian connections (home, investments, employment, etc.). In accordance with the Czech tax legislation and the tie-breaker rules of the Czech-Italian tax convention, the Italian national becomes a Czech tax resident as of 1 May. However, the Italian legislation does not allow a split of tax residence during a calendar year. Therefore, even though the individual does not have any connections with Italy for the greater part of the year, the individual has to declare his or her worldwide income in Italy for the full year and has to pay Italian tax for a part of the year during which he or she is also taxed on his or her worldwide income in the Czech Republic. Although the Italian tax authorities will allow the individual to credit the tax paid in the Czech Republic during the relevant part of the year, the taxpayer faces compliance costs and cash-flow disadvantages.

Different characterisations of an unemployment benefit in cross-border situations can give rise to problems for spouses who receive such benefits from another EU Member State.

## Example 4 — Unemployment benefits

A married couple lives in the Netherlands: the husband works in Germany and the wife receives unemployment benefits in the Netherlands. Both claim to be treated as deemed resident taxpayers in Germany, in order to benefit from personal and family-related tax allowances. In order to receive these benefits, German law, in line with the Schumacker doctrine, requires that either both spouses earn more than 90 % of worldwide taxable income in Germany, or that the income taxable in the state of actual residence does not exceed EUR 12 000. Although the unemployment benefit would not be taxable in Germany if received by a German resident, Germany takes account of this unemployment benefit for the purposes of the threshold since such unemployment benefits are taxable in the Netherlands. If therefore the unemployment benefit exceeds the amount of EUR 12 000 the couple will not be treated as residents of Germany <sup>(27)</sup>.

Differences of classification of income for tax purposes and in timing of taxation can give rise to double taxation in respect of employee share ownership plans.

<sup>(26)</sup> In contrast, an individual who works ‘sufficient hours’ outside the United Kingdom is treated for United Kingdom tax purposes as non-resident if the individual works in the United Kingdom for no more than 30 days (on which at least 3 hours of work are carried out).

<sup>(27)</sup> BFH 1 October 2014 — I R 18/13, IStR 2015, 72.

### Example 5 — Employee share ownership plans

Polish tax law provides for a specific exemption of income received by individuals from employee share ownership plans. If certain conditions are met, the income derived is taxed only at the moment of sale of the shares received under the equity plan and it is taxed as a capital gain (unlike other jurisdictions which can tax the shares received as employment income or other source income at vesting/exercise and then tax the gains again at sale). Due to the different classification of income derived under equity plans (e.g. employment income vs capital gains), as well as different taxable moments applied by different EU Member States (at exercise/vest and at sale at the later stage versus at sale only), Polish legislation does not make it clear what can be considered as a tax deductible cost at the time of sale. As a consequence, if part of the income is subject to tax abroad at the vesting/exercise state, it is not clear whether this earlier stage tax can be treated as a tax deductible cost for Polish tax purposes. The above can lead to additional tax burdens with a severe financial impact.

### Personal deductions (allowance and relief)

As a consequence of the different approaches to taxation and tax deductions in different taxing jurisdictions, cross-border situations can expose individuals to the loss of country-specific personal tax deductions (e.g. deduction of mortgage interest, alimony or maintenance payments, or pension-related) or relief <sup>(28)</sup>. Such disparities across tax systems can affect the mobility of individuals who change their place of employment, turning their tax-free income in the state of emigration into taxable income for the state of immigration <sup>(29)</sup>.

For instance, one Member State may not allow a tax deduction for alimony or maintenance payments made, because it exempts the recipient of alimony or maintenance payments from tax. However, if those payments are made across borders to a recipient living in another Member State, it may happen that the recipient is taxed on the alimony or maintenance payments in the other Member State <sup>(30)</sup>.

### Example 6 — Life insurance policies and emigration due to changed place of employment

A French national has accumulated his lifetime savings in a life insurance policy in France. According to French legislation, distributions from this policy are tax free. However, due to the fact that the French national moved (for employment reasons) to the Czech Republic shortly before receiving the distribution, the French national has to pay Czech personal income tax on the distribution, because the Czech tax legislation does not recognise that specific distribution as tax-free income.

Personal deduction problems can also arise in the context of pensions. More workers than ever before now have pension schemes in Member States other than their states of residence and these persons can run into administrative problems as well as situations of double taxation. The pension taxation systems in Member States differ. Some exempt pension contributions and investment returns while taxing retirement income (EET countries), while others tax contributions but exempt returns and retirement income (TEE countries) while yet others exempt contributions but tax returns and retirement income (ETT countries) <sup>(31)</sup>. This may mean that if an individual works in Member State A (a TEE country which allows no deductions for pension premiums) but then moves after retirement to Member State B (an EET or ETT country which taxes pensions), that individual will suffer effective double taxation on the pension income he or she receives from the pension fund.

<sup>(28)</sup> In some cases personal deductions are not lost in full, but enjoyed to a more limited extent due to the existence of the cross-border situation.

<sup>(29)</sup> See for instance in this respect the recent Kieback case, CJEU 18 June 2015, C-9/14.

<sup>(30)</sup> See, CJEU, *Egon Schempp v Finanzamt München*, C-403/03, 12 July 2005. In the *Schempp*-judgment the existence of disparities was held by the CJEU to allow a Member State to make the deductibility of an alimony or maintenance payment dependable on the fact whether the alimony or maintenance income is actually taxed in the Member State where the income is received.

<sup>(31)</sup> For an explanation of the different systems please refer to: COM(2001) 214 final of 19 April 2001, p. 5 ff.

## Example 7 — Pension problems

A United Kingdom national now retired in the United Kingdom worked in Spain for several years (without being resident in Spain), but continued to contribute during that time to a pension scheme of a British pension provider. That individual received no tax relief in Spain <sup>(32)</sup> for the pension contributions to the United Kingdom scheme. When the pension is paid out it is fully taxed in the United Kingdom even though in this case the United Kingdom national received no tax relief for the contributions because the individual was working in Spain, while the same contributions would have been deductible had that individual only worked in the United Kingdom.

## Business deductions

CJEU case-law on income tax has already set some clear criteria to tackle cross-border problems in the field of business deductions <sup>(33)</sup>. However, this case-law may not necessarily address problems of disparities between national tax systems of EU Member States and the interaction of tax rules with non-tax rules, such as accounting or other.

Problems may arise for individuals, in particular self-employed persons, also in respect of differences between Member States in the tax reliefs available for business travel, subsistence and relocation <sup>(34)</sup> and even in the characterisation of the person as self-employed. Some Member States provide generous reliefs, while others do not do so. Sometimes individuals who decide to exercise their professions in other Member States may not be aware of these differences, which can result in considerably higher tax burdens in their state of work than they anticipated.

## Example 8 — Business travel tax relief

The United Kingdom allows unlimited relief for international business travel, and accommodation and subsistence relief for up to 2 years when working at a temporary workplace in another Member State. However, the relief is of no benefit if the taxpayer is also resident in another Member State and the other Member State fails to offer, or restricts, relief for such expenditure <sup>(35)</sup> <sup>(36)</sup>.

## Application of anti-abuse measures

Citizens are also affected in the exercise of their rights in cross-border situations by anti-abuse measures. Anti-abuse provisions are common in the tax systems of EU Member States, but their content, scope and implications differ significantly. Further complexity is expected to arise in the framework of the current international work on countering base erosion and profit shifting (BEPS) whereby states are now tackling aggressive tax planning, i.e. cases in which taxpayers derive unintended advantages from the exploitation of differences between tax systems.

Issues also arise in respect of switch-over and subject-to-tax clauses. These clauses are designed to allow the state of residence to compensate for lower taxes levied in the state of source by imposing compensatory tax in the state of residence. It achieves this by switching relief for double taxation from the exemption method to the credit method (switch-over clauses), or by excluding relief for (and therefore taxing) foreign-source income that was not subject to tax in the state of source.

<sup>(32)</sup> Spain currently allows tax relief on contributions to EU pensions plans when certain requisites are met.

<sup>(33)</sup> CJEU, *F. Gielen v Staatssecretaris van Financiën*, C-440/08, 18 March 2010.

<sup>(34)</sup> Problems concerning business deductions arise also in the state of source, e.g. in case of the tax treatment of expenses connected with a failed attempt to establish a branch of a business abroad.

<sup>(35)</sup> There are also significant variations in the extent of relocation relief across the EU. In the United Kingdom relief is restricted to GBP 8 000 (EUR 9 600) and it has been the United Kingdom's policy since 1993 that this figure should not increase.

<sup>(36)</sup> An example from the perspective of the state of source is the following: a limitation of tax exemption of reimbursements for travel expenses under Czech labour law applies irrespective of whether the employment contract is governed by Czech or foreign labour law. Consequently, if the employment income of an individual sent on a business trip to the Czech Republic becomes subject to taxation in the Czech Republic, the travel reimbursements provided to this individual strictly in line and within the limits of their domestic legislation (mostly higher than the Czech ones) might be subject to the Czech personal income tax (amounts exceeding the limits stipulated by the Czech labour law).

The expert group believes that such measures could be incompatible with European Union law and the exercise of fundamental freedoms to the extent that they give rise to the application by a state of a different treatment depending on the Member State of source. Until the CJEU <sup>(37)</sup> has had the opportunity to address the specific issues raised by these types of anti-abuse measures, we believe that Member States should exercise caution in the application of such measures, notwithstanding the fact that action 6 <sup>(38)</sup> of the BEPS project <sup>(39)</sup> recommends their adoption.

### Example 9 — Switch-over and subject-to-tax clauses

Mr A is a resident of Austria who has owned real estate situated in Germany for many years that is held in a private portfolio. Fifteen years after acquisition the real estate is sold. Under German domestic tax law, capital gains derived from the alienation of immovable property held in a private portfolio is only taxable if the acquisition took place less than 10 years after acquisition. Therefore, the capital gain of Mr A is not taxed in Germany.

In Austria, capital gains derived from the disposal of real estate are subject to a flat tax rate of 25 %, irrespective of the holding period. However, under the Germany/Austria double taxation treaty, Austria uses the exemption method of providing foreign tax relief. Therefore, in this specific case Mr A's gains will not be subject to tax in Austria either. However, if Austria were to adopt a general subject-to-tax clause as recommended under BEPS, Austria would tax Mr A's gains merely because Germany has not taxed those gains. The application of a general subject-to-tax clause in a situation like this would not address double non-taxation caused by aggressive tax planning, but rather a mere situation in which the tax policy considerations of the contracting states differ.

### Exit taxes

Exit taxes are a common feature of tax systems in the European Union <sup>(40)</sup>. Their goal is essentially to prevent an individual from avoiding tax on assets that accrued while that individual was living in a particular jurisdiction, by leaving the jurisdiction and transferring the assets abroad. In some cases these measures also apply to prevent fictitious exits from the jurisdiction, thus acting as anti-evasion tools.

The CJEU has in several cases addressed the problems of discrimination and restrictions arising from the levying of exit taxes. As a result it has established clear-cut criteria that prevent EU Member States from requesting the immediate payment of such taxes when an individual leaves a jurisdiction. Yet problems still arise, leading one to wonder whether solutions can really be found by the Court of Justice alone. Where a taxpayer changes jurisdiction that taxpayer may, for example, face changes to the system of valuation of assets and may find that the criteria used to determine gains or losses may not represent the actual situation <sup>(41)</sup>.

<sup>(37)</sup> The overall authority and value of precedent of the *Columbus Container Services BVBA & Co. v Finanzamt Bielefeld-Innenstadt*, C-298/05, 6 December 2007 — outside its very specific factual pattern is very uncertain, as also considered by European Union law scholars. See, K. Lenaerts, *The Court of Justice and EU law, in taxation of intercompany dividends under tax treaties and EU law*, p. 6 (G. Maisto ed., IBFD 2012).

<sup>(38)</sup> OECD (2014), Preventing the granting of treaty benefits in inappropriate circumstances, Action 6, OECD/G20 Base erosion and profit shifting Project, OECD Publishing, pp. 20 et seqq.

<sup>(39)</sup> Although BEPS is aimed at MNEs, the application of its action item 6 is not limited to them.

<sup>(40)</sup> Member States that levy different types of exit taxes are: Belgium, Denmark, Germany, Ireland, Spain, France, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden and the United Kingdom. *Source*: European Commission — EY, Removing cross-border tax obstacles — Organisation and practices in Member States' tax administration, November 2014, p. 16.

<sup>(41)</sup> Credit for foreign tax may also not be available in these cases, because the deemed disposal on emigration is deemed to occur immediately prior to the taxpayer ceasing to be resident while the country the individual has moved to is taxing the actual disposal of the asset.

## Example 10 — Immediate payment of tax on cessation of residence

A French national intends to move to the Czech Republic to work there. The individual will cease to be a tax resident in France at the moment he or she moves his or her centre of vital interests from France to the Czech Republic. However, according to French tax rules, the French national is immediately obliged to pay tax in France <sup>(42)</sup> on the income received until the exact moment of his move to the Czech Republic, although a French tax resident may pay the tax on the same income even after the end of the calendar year.

## Example 11 — Step-up clause

In the United Kingdom there is no increase (step-up) in the base valuation of an individual's assets when that person moves from abroad to become a resident in the United Kingdom. Therefore, when an asset is sold, the United Kingdom will seek to tax gains accrued, including during the period before the individual moved to the United Kingdom. If the previous country of residence imposed an exit charge on the individual in connection with his move, it may be difficult for the individual to claim credit for that exit charge against the United Kingdom tax due, because the exit charge relates to a different event, namely emigration, while the United Kingdom charge relates to the event of disposal of the asset.

Furthermore, the levying of such exit taxes in the form of a claw-back of previously granted tax deductions from employment income creates significant obstacles in cross-border situations involving individuals within the EU internal market <sup>(43)</sup>.

## Trailing taxes

Trailing taxes <sup>(44)</sup> extend the liability to tax after an individual leaves a jurisdiction. They can give rise to a double tax burden within the internal market, since two (or even more) Member States may claim taxation on a worldwide basis by reference to different criteria of residence. The levying of such taxes in fact extends the taxing jurisdiction of the EU Member State of emigration at a time in which the individual may have already become subject to the tax jurisdiction of another EU Member State.

From a structural perspective, trailing taxes give rise to a different problem as compared to those of exit taxes. Trailing taxes unilaterally maintain a country's unlimited (and in some cases also its limited) liability to tax a person even after the person has ceased his or her personal connections with that country.

## Example 12 — Trailing tax

In the United Kingdom, for income tax and capital gains tax purposes, an individual who, for a period of less than 5 years, ceases to be a United Kingdom resident (or who becomes United Kingdom non-resident under the tie-breaker residence rules in a tax convention between the United Kingdom and another country) after which that individual returns to the United Kingdom, will in the year of return face taxation on a wide range of items of income and capital gains realised during the period of non-residence. The agreed allocation of taxing rights in double tax treaties is thus overridden by domestic United Kingdom legislation. The result is that a United Kingdom resident who moves to another Member State on a temporary basis may be subjected to worldwide taxation both in that other state and in the United Kingdom on income and gains earned during that temporary stay in the other state <sup>(45)</sup>.

<sup>(42)</sup> However, the amount of the tax is reduced as the progressive tax rate applies to a reduced tax base (worldwide income between 1 January and the moment of departure from France; and not worldwide income between 1 January and 31 December).

<sup>(43)</sup> Until 1 January 2015, the Netherlands had in Article 2.5, Paragraph 3 of the Dutch income tax act 2001 a claw-back rule, implying that if a taxpayer no longer chose to be taxed as a resident taxpayer, the tax advantages of this tax treatment in the previous 8 years were taken away (corrected) by means of a claw-back. Under pressure of a possible infringement with EU law, the provision was withdrawn.

<sup>(44)</sup> Member States that currently levy trailing taxes are the Netherlands, Finland, Sweden and the U.K., see *European tax handbook*, IBFD, 2015. Germany provides for an extended limited tax liability if the taxpayer moves to a tax haven country, see A. Rust, Germany, in G. Maisto (ed.), *Residence of individuals under tax treaties and EC law*, IBFD, 2010.

<sup>(45)</sup> Paragraph 26710 of the United Kingdom capital gains tax manual indicated that United Kingdom HMRC will give a 'measure of relief' for any foreign taxes paid.

### (b) Substantive tax obstacles arising in the state of source

#### Withholding taxes

The levying of withholding taxes is very frequently used by the state of source to exercise its taxing jurisdiction over income of non-residents arising in that state. However, these taxes can cause many difficulties.

The CJEU has already satisfactorily resolved some of the problems with the levying of withholding taxes through the application of the non-discrimination principle <sup>(46)</sup>.

As regards the remaining problems, one outstanding issue is the levying of taxes on income derived by an employee in respect of employment in more than one country in a tax year, where tax estimates and timing can in particular create difficulties. An aggravating factor is the absence in such cases of uniform guidance on tax rules.

#### Example 13 — Highly-mobile performing artistes

A small dance group (established as a foundation) from the Netherlands performs in 12 EU Member States during a year. The contracts are concluded between the local organiser and the foundation and the performance fees have been agreed net of taxes. This means that the local organisers should pay the taxes due on the fees to the local tax authorities. However, in almost no case do the local organisers issue a tax certificate and thus the dance group has no information on the taxes paid. Even where a tax certificate has been issued, so that the amount paid to the local tax authorities is clear, there are problems. The foundation is, as is often the case, exempted from corporation tax. The individual artistes are on the monthly payroll of the foundation, but they will find it almost impossible to claim credit against their personal income tax for the foreign taxes applied to the fees because these fees have been paid to the foundation rather than to them individually. Matters are even more difficult for one of the artistes who resides in a different country to that of the foundation/rest of the dance group and therefore may be taxed in the home country as well as in the country of the foundation and in the countries where the performances take place.

#### Personal deductions

Problems concerning personal deductions arise in the state of source as well as in the state of residence, in particular for highly-mobile workers and posted workers. They are often not allowed personal deductions in their state of work even if the residence state does not grant personal deductions either (because the latter state does not levy any tax).

#### Example 14 — Allowances and tax relief for highly-mobile and posted workers

An individual who normally lives in state A works in states B, C and D during the course of the tax year. The individual is taxed in those countries on the income earned in each country during the year. However, the individual is not entitled to the tax-free allowances and deductions to which that individual would be entitled if he or she or she were a resident of any of those countries. At the same time, despite being a resident of state A, the individual is not given the benefit of tax-free allowances and deductions there for the simple reason that state A does not tax his or her income in that year as the individual spent all his or her time abroad.

<sup>(46)</sup> CJEU, *Staatssecretaris van Financiën v B.G.M. Verkooijen*, C-35/98, 6 June 2000; CJEU, *Petri Manninen*, C-319/02, 18 March 2004; CJEU, *Haribo Lakritzen Hans Riegel Betriebs GmbH v Finanzamt Linz*, C-436/08, 10 February 2011; CJEU, *Test Claimants in the Franked Investment Income (FII) Group Litigation v Commissioners of Inland Revenue* (United Kingdom), C-446/04, 12 December 2006; CJEU, *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue and The Commissioners for Her Majesty's Revenue & Customs*, C-35/11, 13 November 2012.

## (c) Other substantive tax obstacles

Other substantive problems can arise in cross-border situations due to the absence of tax treaties to eliminate double taxation and due to problems with the interpretation of those tax treaties that do exist.

### Example 15 — Absence of a tax convention

A Danish national receiving a pension from Denmark retires to France. There is no bilateral tax convention in place between Denmark and France and therefore both Denmark and France will exercise their taxing rights over that pension. Furthermore, there are no provisions under domestic law in either country for double taxation relief in cases of absence of tax treaty relief. Therefore the Danish national will suffer a very high overall tax rate on the pension.

### Example 16 — Higher tax burden or absence of clear definition in treaties

The absence of definitions in the treaty (e.g. frontier workers <sup>(47)</sup> or the concept of employer) can create particularly frequent problems in certain cases e.g. in the case of countries where there is a lot of cross-border movement.

## 3.2. Procedural tax obstacles

### (a) Procedural tax obstacles common to the state of residence and state of source

There are many difficulties linked to taxation which are due to the different procedural and administrative requirements of the tax administrations of Member States <sup>(48)</sup>.

Individuals operating across borders may face problems in making tax returns and dealing with tax authorities, such as language barriers, the limited expertise in cross-border tax issues of the tax officials they encounter in local offices, difficulties in accessing information or in dealing with tax authorities on the internet, the different work methods of tax authorities in the different EU Member States and the existence of offices with separate competences at different levels of government. Moreover, such individuals often have to deal not only with foreign national taxes, but also with foreign regional and municipal taxes.

These problems are relevant also for claiming foreign tax credits and for being tax compliant. For example, tax administrations <sup>(49)</sup> may not accept official documents drafted in languages other than their own and tax returns may only be available in the country's official language <sup>(50)</sup>. Moreover, tax authorities may have difficulties in understanding the exact amounts of foreign-source income/capital and related taxes, due to discrepancies between Member States in the format and style of official documents. In some cases, tax authorities of states of residence may go so far as to make relief for foreign tax dependent on the submission by the taxpayer, at the taxpayer's own expense, of sworn translations of documents.

<sup>(47)</sup> The definition of frontier workers is only included in some treaties. More specifically, the vast majority of treaties simply grant the residence state the right to tax without expressly requiring that the employee must return from his state of work to his state of residence. See in this regard: Article 15(4) of the 1981 Italy-Austria tax convention, Article 15(4) of the 1989 Italy-France tax convention, Article 15(4) of the 1993 Spain-Portugal tax convention, 2012 Additional Protocol of the 2002 Italy-San Marino tax convention which allows Italy to tax the frontier workers who are resident in this country. Some treaties require that the employee must compulsorily return from his work state to his residence state daily: Article 15(6) of the 2000 Austria-Germany tax convention and Article 15(3).1 of the 1967 Belgium-Germany tax convention. When there are no specific provisions in DTCs Member States apply their domestic tax provisions to such workers. However, it is worth mentioning that the Slovenian constitutional court ruled that Article 113(5) of the Slovenian personal income tax act, giving a right to special tax relief to cross-border (daily) commuters, is unconstitutional. The ruling was that such daily commuters are in a comparable situation to Slovenian tax residents working in Slovenia. Consequently, the cross-border (daily) commuters should no longer have the right to claim additional tax relief. It is also important to mention that many EU nationals are employed as frontier workers in European countries that are not EU Member States (e.g. Andorra, Liechtenstein, Monaco, San Marino, Switzerland and the Vatican City State) and subsequently are confronted with various tax obstacles.

<sup>(48)</sup> In some situations, the existence of a procedural obstacle can produce the very undesirable effect of shifting labour to the black economy. This is reported to occur in the border region between Croatia, Italy and Slovenia, where there is a considerable level of undeclared work by frontier workers, which may at least partly be due to the absence of definitions of frontier workers in the double tax conventions between the three states and to procedural complexities. Besides, the matter can be even more complex in case of a territorial proximity without common borders, such as the case between Croatia and Italy within the area that spreads between Rijeka and Trieste.

<sup>(49)</sup> This problem was recorded, often on a de facto basis, in at least Spain, Italy and Poland.

<sup>(50)</sup> European Commission — EY, Removing cross-border tax obstacles — Organisation and practices in Member States' tax administration, cit, p. 18.

### Example 17 — Translation of a salary statement

An Italian resident individual receives a salary from Austria. The Austrian employer certifies, in German, the payment of this salary and the amount of taxes withheld in Austria. Italy will not allow credit for the Austrian withholding taxes in accordance with the Italy-Austria tax convention unless the individual has the salary statement translated into Italian at his own cost. The cost of this translation would be higher than the amount of tax relief due and therefore the Italian resident decides it is not worth claiming the tax relief <sup>(51)</sup>.

### Example 18 — Donations to foreign charities

The Netherlands <sup>(52)</sup> allows tax relief for gifts to a charitable institution in another Member State but only if the foreign institution is acknowledged as a charity by the Dutch tax administration. Foreign charitable institutions which wish to receive donations from Dutch residents must, therefore, be recognised as charities by the Netherlands registrar of charities which involves completion of formalities that many charities do not have the resources to complete. Most Member States operate similar rules to those of the Netherlands. This makes the tax deductibility of donations to foreign charitable institutions more burdensome.

In cases when the tax amounts at stake are relatively low, individuals sometimes simply give up on the matter/on their right to obtain a refund, rather than expending time and money (for instance in obtaining professional advice and travel expenses) to have the matter solved. Moreover, Member States of residence may refuse to provide the certificates of residence that the individuals need to claim refunds from abroad and, in cases where the amounts concerned are relatively low, companies may refuse to provide the individuals with certificates that prove the amount of taxes withheld.

## (b) Procedural tax problems arising in the state of residence

### Foreign tax credits

The most common procedural tax obstacle in the state of residence is how credit for foreign taxes operates; generally it relates to the structural complexity of the system of allowing credit for foreign taxes as compared to the alternative system of relief for foreign tax which is an exemption.

Tax authorities of the state of residence will normally require taxpayers wishing to claim credit for foreign taxes paid to provide evidence of the payment of those taxes, and it is reasonable for the tax authorities to require this evidence. However, the extent of the conditions and procedures set by the state of residence (e.g. proof of a tax assessment or tax return or of the actual tax payment in the other country) can, when coupled with the differences between Member States' tax systems and procedures, make it difficult if not impossible for taxpayers to obtain relief for foreign taxes <sup>(53)</sup>.

### Example 19 — Proof to obtain relief for double taxation

In Bulgaria, taxpayers wishing to claim relief for foreign taxation are required to provide the tax authorities with a tax assessment from the other country involved. However, some Member States (Latvia and Slovakia, for example) do not issue tax assessments so residents of Bulgaria may find it impossible to obtain relief in Bulgaria for foreign taxes paid in such Member States <sup>(54)</sup>.

<sup>(51)</sup> Another example is the following: the tax authorities of Slovenia do not recognise tax credits to frontier workers employed in Italy, either because they do not accept as proof the certification released by the Italian employer or because they do not interpret it properly.

<sup>(52)</sup> Compare Article 5b *Algemene wet inzake rijksbelastingen*.

<sup>(53)</sup> Particular problems are to be recorded in this respect in relation to France and Italy, and, in relation with non-EU Member States, such as Switzerland.

<sup>(54)</sup> See European Commission — EY, *Removing cross-border tax obstacles — Organisation and practices in Member States' tax administration*, cit., p. 33.

## Special forms for bank accounts in other EU Member States

Some EU Member States require their resident taxpayers to complete special sections of tax returns when holding foreign bank accounts, including providing information about these bank accounts. This situation can expose persons who are active across borders to an additional burden and appears to be an unnecessary procedural obstacle inside the internal market given that the information could easily be obtained by the tax authorities themselves via the administrative cooperation arrangements in place between tax authorities of EU Member States.

### Example 20 — Spain, France and Italy and foreign bank accounts

Spain, France and Italy <sup>(55)</sup> require the holders of foreign bank accounts to fill in a special part of the tax return to provide exhaustive details of these foreign bank accounts, even when they are held in banks established in another Member State of the European Union. No similar requirement exists in respect of bank accounts held at banks established within the national territory. Under the directive on administrative cooperation, Spain, France and Italy will already receive this information from the tax authorities of other EU Member States.

## (c) Procedural problems in the state of source

### Difficulties in obtaining withholding tax relief

The procedures to claim relief of withholding tax on securities income (such as dividends and interest) under double tax conventions or under the domestic law of an investor's state of residence are often complex, time-consuming and costly. As a result, investors often forego the tax relief they are entitled to.

Procedural obstacles may arise in the state of source, inter alia because of the onerous conditions set for exercising the right to obtain a lower withholding tax rate under double taxation treaties or to claim the refund of taxes withheld at the higher non-treaty rate. As in the case of the state of residence, the problems mainly result from language barriers and forms that are complicated and differ from one state to another.

Further complexity for portfolio investors, who for example invest via their financial institutions in funds, stems from the fact that the funds may have invested in several Member States. This requires that the taxpayer file claim forms with several Member States' tax administrations.

Finally, some Member States require investors to make claims for withholding tax relief personally rather than allowing them to do that through the services of their financial institution. In this situation, investors may be unable to claim the relief they are entitled to because they lack the necessary expertise.

### Example 21 — Withholding taxes on dividends

A Spanish-resident individual receives dividends from another EU Member State in January 2015. The latter will not apply the lower withholding tax at source provided under the double taxation treaty between Spain and the other Member State unless the individual provides a certificate of residence certified by the Spanish tax authorities. However, in Spain taxpayers are required to present their tax returns in order to obtain certificates of tax residence and the soonest these tax returns can be presented is April of the following year. So the Spanish individual will not be able to submit a claim to the other EU Member State for a refund, together with his tax certificate, until at least April 2016 and then he or she may have to wait even longer for an actual refund. What is more, the other Member State may not accept the residence certificate provided by the Spanish tax authorities, either because this certificate is not in the form required by the other Member State or because it has received the certificate too late.

### Example 22 — Debits to a foreign bank account

Tax authorities of the state of source may not accept direct debits from a foreign bank for the payment of taxes or they may not allow tax refunds to be paid into a foreign bank account. This creates practical problem for non-residents trying to pay taxes or claim refunds of taxes from abroad.

<sup>(55)</sup> Belgium has introduced similar rules. It requires even that closed accounts since 2011 are declared.

# Chapter 4

## Possible solutions

### 4.1. General remarks

This chapter suggests some solutions to the tax obstacles affecting individuals in cross-border situations within the EU, as identified in the previous chapter of this document.

In general terms, there is no single solution capable of addressing all the tax obstacles that affect the exercise of fundamental freedoms within the EU. This report identifies various solutions and links them to the problems, bearing in mind the need to respect the principle of subsidiarity <sup>(56)</sup>. The solutions suggested range from hard law, based on harmonisation of specific elements of income, to soft-law measures, such as coordination and guidance on best practices and the establishment of bodies to deal with the tax problems involved. Moreover, short, medium- and long-term policy options are considered. As an alternative to harmonisation, multilateral binding coordination could be used, insofar as such type of action at national level may achieve equivalent results <sup>(57)</sup>.

From a policy perspective the recent successful agreements among EU Member States on automatic exchange of information on a wide range of issues shows that coordination among states is feasible <sup>(58)</sup>. There is therefore no reason why similar cooperation could not work also in the area of tackling cross-border double taxation and other problems. From the perspective of European Union law, the principle of sincere cooperation set out in Article 4.3 of the Treaty on the European Union provides an additional important argument for EU Member States to cooperate in order to tackle these problems <sup>(59)</sup>.

We believe that EU Member States should take a more proactive attitude towards tackling cases of double taxation that cannot be addressed through action by the CJEU. They should also be open to tackling situations where burdensome procedural requirements, which differ in many respects from country to country, can dissuade individuals from being active across borders within the EU.

On the basis of the above, we suggest the following solutions to the problems outlined in the previous chapter. The solutions outlined are designed to deal with the problems identified in the previous chapter in a general, comprehensive way, and do not, therefore, follow the structure consisting of substantive/procedural/state of residence/state of source which was used in the previous chapter so as to be as exhaustive as possible.

### 4.2. Proposed solutions to substantive tax obstacles

#### (a) Foreign tax relief and cross-border workers

The expert group supports the view that, to the extent that all cross-border workers face the problems indicated in Chapter 3, Member States should address those problems together. In other words, if states recognise that the increased structural exposure of frontier workers to the tax difficulties identified justifies different treaty rules in the case of such workers, then similar rules should apply to all workers who must cope with more than one tax system (including, for example, highly-mobile and posted workers) and who are, therefore, in a substantially equivalent situation.

For the purpose of addressing these issues in a systematic manner and in order to ensure a level-playing field inside the European Union, this report suggests that the exercise of taxing powers in respect of individuals deriving a significant <sup>(60)</sup> part of their income from one or more EU Member States other than that in which they are resident, should be addressed by a single set of rules on conflict of jurisdiction throughout the whole European Union.

The avoidance of double taxation through exclusive allocation of taxing powers <sup>(61)</sup> is potentially the most appropriate solution to the problem. However, unlike frontier workers, who are in most cases facing exposure to double taxation in two

<sup>(56)</sup> In practice, proving compliance with the subsidiarity principle is not always easy. To this end, please refer to pp. 22-23 of [http://ec.europa.eu/smart-regulation/impact/commission\\_guidelines/docs/iag\\_2009\\_en.pdf](http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf)

<sup>(57)</sup> A multilateral treaty would possibly be better than action through bilateral tax treaties, since the content of bilateral treaties in the EU significantly varies as a consequence of more sophisticated clauses being negotiated in such treaties between EU Member States.

<sup>(58)</sup> See in particular OECD (2014), *Neutralising the effects of hybrid mismatch arrangements*, OECD/G20 Base erosion and profit shifting project, OECD, Paris.

<sup>(59)</sup> This duty is increasingly referred to by the CJEU: see Case C-640/13, 18 December 2014 *Commission v United Kingdom*.

<sup>(60)</sup> A proposal could be e.g. more than 50 %.

<sup>(61)</sup> The same argument applies for social security contributions. Also the interaction with the payment of social security contributions (differences in competent Member State) can cause problems.

states only <sup>(62)</sup>, highly-mobile workers and posted workers can in many cases face multilateral exposure to double taxation, since they may work in several states in one single year.

Accordingly, rather than suggesting the introduction of a standard clause for all such workers in income tax treaties of EU Member States, an EU directive could be adopted, in order to achieve a single tax treatment for workers inside the European Union <sup>(63)</sup>, allowing all Member States involved to share the revenue collected in conformity with the provisions set out in that directive. Additional advantages of such a regime might also be the simplification of procedures <sup>(64)</sup> — this regime could, for example, involve a one-stop-shop concept where all the workers' tax compliance obligations could be completed in one office <sup>(65)</sup> <sup>(66)</sup>. This instrument should also provide for a compulsory application of the foreign credit for a foreign withholding tax.

The legislation could even go further and provide for a system according to which taxation would follow the social security contributions framework. When the individual living in one country performs his or her job only in one other state, the individual would be taxable only in that other state where the activity is carried out. Alternatively, a home state approach could be considered with an apportionment of the collected revenue on a pro rata basis.

The scope of the legislation could be limited to those EU citizens who are resident in an EU Member State <sup>(67)</sup> and either (i) derive more than 50 % of their income from one or more different EU Member States <sup>(68)</sup>, or (ii) earn above a certain threshold (for example the 15 000 IMF special drawing rights (SDR) expressed in euro mentioned as an option in relation to source country taxes on artistes and sportspersons) <sup>(69)</sup>. This EU legislation could set the framework for a shared allocation of the revenue between the Member State of residence and that of the activity, obliging the latter state, for example, to collect tax and pass three quarters of the revenue to the former state.

## Some examples of good practices in Member States' tax treaties

Protocol to the Convention of 21 July 1959 between the Federal Republic of Germany and the French Republic for the avoidance of double taxation and the establishment of rules for reciprocal administrative and legal assistance with respect to taxes on income and on capital, and with respect to business tax and land tax (2015)

— Under Art. 6 of the 2015 protocol to the Germany-France DTC, pensions, annuities and other similar remuneration are taxable only in the state in which the recipient is a resident. However, the latter state must pay to the state in which the payments arise a compensation amount corresponding to the tax which that state could have charged under its tax laws.

Convention between the Swiss Confederation and the Italian Republic for the avoidance of double taxation and the regulation of certain other questions relating to taxes on income and capital (1976)

— According to the DTC between Italy and Switzerland, employment income of an Italian resident working in one of the frontier cantons in Switzerland is taxed only in Switzerland. However, Switzerland is required to transfer to the Italian Government the 38.8 % Swiss taxes paid by those Italian frontier workers.

The legislation could also envisage the possibility of applying this regime to cross-border situations not meeting the quantitative requirement of the thresholds, in the framework of cooperative compliance, or upon an option exercised by the taxpayer.

<sup>(62)</sup> I.e. juridical double taxation.

<sup>(63)</sup> Since 1 January 2015 the regime provided by Article 8 of the EU Directive 2011/16/EU on mutual assistance allows for automatic exchange of information on cross-border income from employment, thus allowing the state of residence to properly monitor the levying of taxes by the state of source. Such directive could also provide for mechanisms to carry out bilateral and simultaneous auditing in respect of income derived by those categories of workers.

<sup>(64)</sup> See chapter 4.3.

<sup>(65)</sup> The proposed common consolidated corporate tax base (CCCTB) directive shows a good example of how the one-stop-shop concept could apply in the framework of a directive.

<sup>(66)</sup> Anti-avoidance measures could be introduced.

<sup>(67)</sup> Specific clauses could apply in case of dual resident individuals involving a non-EU Member State, along the same pattern of the type included in the EU parent-subsidiary directive.

<sup>(68)</sup> The directive would not affect cross-border income derived by such workers in relations with non-EU Member States.

<sup>(69)</sup> Proposal to restrict the scope of Art. 17 of the OECD model set out in in par. 10.1 of the 2014 commentary on Art. 17.

By contrast, the legislation would not apply to domestic source income of the worker in the state of residence, or to income derived by the worker from non-EU Member States, to which tax treaties, if any, would continue to apply <sup>(70)</sup>.

Personal allowances and the progressivity of income tax would remain a matter of competence for the EU Member State of residence (which should ideally handle such matters by means of pre-filled tax returns sent to the taxpayers).

If some EU Member States rejected the idea of adopting such an EU law, the enhanced cooperation provisions of EU law could allow some EU Member States, once they amounted to at least 1/3 of the total number of Member States, to make progress towards the removal of such obstacles. This could also be achieved by an EU multilateral treaty on employment income.

Other solutions could include expanding the criteria set by the Court of Justice <sup>(71)</sup>, by means of interpretation or through the issuing of soft or hard law, or via a repeal of the provisions in Member States' double taxation treaties with each other dealing with artistes and sportspersons <sup>(72)</sup> and employees <sup>(73)</sup> and replacing the mechanism of withholding tax in the country of performance in the case of artistes and sportspersons with a system of monitoring such income that would allow for single taxation <sup>(74)</sup> in the state of residence along the scheme provided for by Articles 7 and 15 Organisation for Economic Co-operation and Development (OECD) MC <sup>(75)</sup>.

An alternative to such regimes could be a two-tier system that keeps the existing shared allocation of taxing powers, but allows taxpayers to inform competent authorities of their state of residence about the existence of a tax obstacle, whereupon such authorities would have to find a solution within a short timeframe. If no solution was found within that period, the issue would automatically be forwarded to an EU Committee of technical experts in tax matters <sup>(76)</sup>, which would provide its interpretation within a certain timeframe on how to solve such issues <sup>(77)</sup>. Following the pattern of the EU Arbitration Convention, this opinion would become binding insofar as the complaint is not otherwise solved within 6 months of its lodgement <sup>(78)</sup>.

<sup>(70)</sup> Non-employment income of a worker derived from the country where he or she works e.g. dividends, interest could raise additional obstacles.

<sup>(71)</sup> CJEU, *Arnoud Gerritse v Finanzamt Neukölln-Nord*, C-234/01, 12 June 2003.

<sup>(72)</sup> Article 17 of the OECD model. For performing artistes and sportspersons, the best option would be to remove Art. 17 of the bilateral tax conventions between EU Member States. When it is evident that the artistes or sportspersons reside in one of the EU Member States, which can be confirmed by the tax authorities in the residence state, the risk of tax avoidance and non-compliance will not be bigger than for other taxpayers. Returning to the normal rules for companies, self-employed (Art. 7) and employees (Art. 15) would remove a major obstacle for performing artistes and sportspersons to perform in other states and stimulate the cultural exchange and diversity. When Art. 17 for performing artistes and sportspersons would be kept, other options can restrict some of the problems that follow from this source taxation. The OECD gives the following options in its latest 2014 commentary on Art. 17:

- (a) exclude employees and let Art. 15 prevail over Art. 17,
- (b) insert a threshold of 15 000 IMF SDR, which is comparable to EUR 17 000, for individual artistes and sportspersons per year per country,
- (c) allow the deduction of expenses specifically in tax conventions,
- (d) exclude performances which are supported by public funds from Art. 17,
- (e) exclude recognised cultural and sports non-profit organisations and exchanges from Art. 17,
- (f) exclude payments to third parties in treaty states, when the artistes or sportsperson are not owners or shareholders of that third party and do not received bonuses or profit shares,
- (g) exclude cross-border competitions from Art. 17.

With these options a new text for Art. 17 will be created, which would take away many problems for performing artistes and sportspersons. The European Commission can recommend these available options from the 2014 OECD commentary on Art. 17 to the Member States.

<sup>(73)</sup> Article 15, particularly Article 15(2)(b) and (c) OECD MC.

<sup>(74)</sup> According to collective agreements in the performing arts sectors, artistes have salaries which range from less than EUR 300 per month in one country to EUR 2 000-3 000 in other countries. Such wages that apply are the reference for more than 90 % of artistes working in the performing arts sector.

<sup>(75)</sup> Further options could apply, such as the ones indicated in the 2014 update to the OECD MC, which put forward some alternative provisions that limit the scope of shared allocation of taxing powers under Art. 17 OECD MC.

<sup>(76)</sup> Examples of Committee with a similar function in other domains are:

- (i) the Administrative commission for the coordination of social security systems (<http://ec.europa.eu/social/main.jsp?catId=868>), combined with a network of legal experts (similar to FreSsco — <http://ec.europa.eu/social/main.jsp?langId=en&catId=1098>);
- (ii) the Accounting Regulatory Committee (ARC — [http://ec.europa.eu/finance/accounting/governance/committees/arc/index\\_en.htm](http://ec.europa.eu/finance/accounting/governance/committees/arc/index_en.htm)) combined with European financial reporting advisory group (EFRAG — <http://www.efrag.org/Front/Home.aspx>);
- (iii) the Taxes administration liaison committee in Ireland — (<http://taxinstitute.ie/TaxPolicyandPractice/RevenuePracticeandRepresentations/TaxAdministrationLiaisonCommitteeTALC.aspx>).

<sup>(77)</sup> This Committee could have a structure similar to the one of the Administrative commission for the coordination of social security Systems.

<sup>(78)</sup> This section elaborates at point (i) further possible amendments to the mutual agreement procedures in respect of disputes concerning the interpretation and application of tax treaties, in order to turn such procedures into a form of tax mediation, which could constitute the first step of a two-tier solution, also involving the possible use of arbitration.

For highly-mobile workers such as artistes and sportspersons, posted and frontier workers in the absence of dedicated treaty clauses, an exemption from substantive tax liability of all kinds could be applied for an agreed fixed period of time while the individual is present for work in the host state, in respect of all taxes and in all Member States. The Netherlands no longer applies withholding tax to visiting artistes, judging that the administrative burden of implementation is much higher than the actual tax revenue, and therefore no longer includes Article 17 of the OECD model DTA in its tax treaties unless requested by the other contracting state.

## Good practices

— Under Article 27 of the Double Taxation Convention between Belgium and the Netherlands, the Netherlands allows a tax deduction to individuals resident in the Netherlands but working in Belgium insofar as the combined tax the individual must pay in the Netherlands and in Belgium exceeds what he or she would have paid if he or she lived and worked only in the Netherlands. This achieves a level-playing field in respect of a cross-border situation, by compensating for possible disparities in tax between the two countries involved, and could constitute a good practice for all other EU Member States to follow.

— Another good practice is the provision by some Member States of exemptions of income from tax where that income has already been taxed in another EU Member State <sup>(79)</sup>. The Czech Republic provides such an exemption for income from employment carried out in a state with which the Czech Republic has concluded a double taxation convention, provided that the income was taxed in the other state <sup>(80)</sup>.

## (b) Characterisation mismatches, including rules on residence

Characterisation mismatches could be addressed by establishing multilateral technical tables (guidelines), with the assistance of the European Commission and in consultation with the OECD, to provide a common interpretation of situations that fall within the various tax treaty provisions. These guidelines, which would not be legally binding on Member States, could provide common interpretations and indications of best technical practices in this area of characterisation. This approach would be consistent with the methodology adopted at the OECD and G20 for the purpose of tackling mismatches that lead to BEPS. It would in fact be logical, from a policy perspective, that the approach being used to tackle BEPS would also be used to address problems such as double taxation.

An alternative to this soft-law approach would be to present proposals in the form of binding coordination measures or directives. One possibility in such a case would be to give the state of residence the priority in deciding on the characterisation of personal matters <sup>(81)</sup>. In all the other situations, the priority should be given to the state of source.

Specific solutions could also be envisaged in respect of specific mismatches of characterisation for tax purposes problems.

Thus, in cases where there are multiple, and conflicting, elements for determining tax residence in two or more jurisdictions, a comprehensive solution <sup>(82)</sup> could consist of providing EU Member States with a homogeneous set of elements that determine the connecting factors for the purposes of establishing each state's authority to expose an individual to unlimited or limited liability to tax. These rules could also determine which state would have the primary right to tax and in what circumstances. A solution involving a split of tax residency during a calendar year between all Member States involved would eliminate obstacles related to different interpretation of tax residency status during 1 year. The content of such a solution could also be contained in an EU-wide legislative act in the form of a common definition of tax residence of individuals applicable for income tax purposes throughout the European Union. The general rule would be that residence for

<sup>(79)</sup> It is in fact an application of the exemption method, combined with a subject-to-tax clause.

<sup>(80)</sup> This provision was added to Czech domestic law to complement the new DTC the Czech Republic signed with Austria. That DTC applies the tax credit method for the elimination of double taxation. Thus, employees resident in the Czech Republic who worked in Austria and received a low income there on which zero or a very low amount of Austrian tax was levied would otherwise have had to pay additional tax in the Czech Republic, because they would not have had (any/sufficient) Austrian tax to credit against the Czech tax on their Austrian income.

<sup>(81)</sup> The definition of personal matters should be reconstructed in line with the criteria set by the Court of Justice of the European Union for situations that are connected with the ability to pay.

<sup>(82)</sup> For the solution to the procedural issues, see below under chapter 4.3.

tax purposes should be considered to be in the country where the major part of business activity income or labour income of the individual is obtained <sup>(83)</sup>. Additional guidance could also be given in respect of tie-breaker rules.

Mismatches arising from other forms of characterisation difficulties (e.g. capital gains vs employment income and timing of taxation on stock option/equity plans) could be addressed at the level of Member States' bilateral tax conventions or through a directive. Clauses could be elaborated that describe in detail the matter of taxation of equity plans and pay-outs from those plans, and pay-outs that concern long periods and periods of presence/work in different countries (e.g. severance payments) <sup>(84)</sup>. In principle, the solutions suggested by the OECD in the commentaries to the Model DTA could be followed as internationally accepted tax practice. However, in practice, these solutions might not always address all problems in a conclusive manner.

### (c) Personal deductions (allowance and relief)

#### State of residence

The case-law of the Court of Justice has already set some clear criteria to address problems that arise when an individual derives almost all of his or her income from another state which applies full taxation to that income; if that other state does not allow tax deductions which take account of the taxpayer's personal situation for tax purposes <sup>(85)</sup>, the application of such deductions by the individual's state of residence will be of no benefit because of the high taxation already applied in the other state. Furthermore, CJEU case-law has taken a broad notion of personal deductions <sup>(86)</sup>, to include, for instance, mortgage interest, thus achieving a more far-reaching solution to such problems.

Going further than case-law, however, one may wonder whether the entitlement of non-residents to personal deductions and reliefs should be further extended to go beyond cases where all of the income of the taxpayer is derived from the host country. The expert group suggests that the Schumacker treatment could be extended also to cases in which only three quarters of the taxpayer's income is derived from the host country, as in the 1993 recommendation by the EU Commission <sup>(87)</sup>, or even to cases in which the greater part of income is derived from the host country and the remaining part is sourced outside the country of residence, once the country of residence has no taxing rights over the remaining part. In other words, the host country should grant personal deductions and relief to the taxpayer even when the taxpayer derives only more than 50 % (or 75 %) of his or her worldwide income from that state <sup>(88)</sup>.

A more radical policy option would be to allow those persons to enjoy a one-shop-stop treatment for income tax purposes and to have states agree on apportioning income and personal deductions for tax purposes. However, this solution would require a higher degree of harmonisation among Member States.

Another solution could, for example, be to agree that deductions should be granted pro rata by each Member State involved in taxing an individual <sup>(89)</sup>.

In any event, the expert group believes that solutions regarding personal allowances and reliefs should not be left to the case-by-case approach developed by the CJEU. The group believes that a systematic solution should be agreed to the

<sup>(83)</sup> This solution would be in line with the one concerning the determination of the applicable social security system under the Regulation (EC) No 883/2004.

<sup>(84)</sup> Bilateral treaties do not address common cases of employees working in multiple Member States for periods when options are granted, vested and exercised where there are different taxable events and treatment in each Member State.

<sup>(85)</sup> CJEU, *Finanzamt Köln-Altstadt v Roland Schumacker*, C-279/83, 14 February 1995; CJEU, *Patrick Zurstrassen v Administration des contributions directes*, C-87/99, 16 May 2000; CJEU, *F.W.L. de Groot v Staatssecretaris van Financiën*, C-385/00, 12 December 2002; CJEU, *État du Grand Duché de Luxembourg v Hans Ulrich Lakebrink and Katrin Peters-Lakebrink*, C-182/06, 18 July 2007; CJEU, *R. H. H. Renneberg v Staatssecretaris van Financiën*, C-527/06, 16 November 2008; CJEU, *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach*, C-76/05, 11 September 2007; CJEU, *Katja Ettwein v Finanzamt Konstanz*, C-425/11, 28 February 2013.

<sup>(86)</sup> The underlining principle is often referred to as the ability to pay principle. This principle has different scopes in national constitutions of various EU Member States, but also its own supranational dimension in EU law, which mainly relates to the link between the personal situation and the levying of taxes.

<sup>(87)</sup> 94/79/EC, Commission recommendation of 21 December 1993 on the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident.

<sup>(88)</sup> It is interesting to note that the French tax administration published a statement concerning the French non-residents who have an important part of their income coming from France. Thanks to this statement (<http://bofip.impots.gouv.fr/bofip/7666-PGP>), the French tax administration has to give them the same tax treatment as the one that is given to the French residents. Those taxpayers are called *non résidents Schumacker* by the tax administration; and they receive a Schumacker treatment (see Annex II — Glossary).

<sup>(89)</sup> K. Van Raad, *Fractional Taxation of Multi-State Income of EU Resident Individuals — A Proposal*, in: K. Andersson, P. Meltz & C. Silfverberg (eds.), *Liber Amicorum Sven-Olof Lodin*, Stockholm, 2001, pp. 211 et seq.; P.J. Wattel, *Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances: Why Schumacker, Asscher, Gilly and Gschwind do not suffice*, *European taxation*, 2000, pp. 210-223.

problems raised by personal and country-specific deductions, which can be framed within legal instruments and, if need be, through EU law, once this conforms with the principle of subsidiarity.

## State of source

Most tax obstacles concerning personal deductions arising in the state of source can be addressed in the light of CJEU case-law. In further cases, the solutions indicated above for states of residence could also involve states of source.

## (d) Business deductions

Problems arising in respect of business deductions in cross-border situations that cannot be solved by applying the criteria set by CJEU case-law are hard to address in the absence of a systematic approach. In addition to targeted forms of tax harmonisation, we suggest the development of common practice among Member States, which would, at the same time, preserve national taxing sovereignty.

Unlike personal deductions, business deductions have only an indirect link with the taxpayer's ability to pay. However, individuals who are active across borders would benefit from tax rules that streamline also this type of deductions in cross-border situations. We suggest that an approach to such issues is developed by applying Member States' best practices in this area.

On that basis, deductions for business expenses could be allowed in cross-border situations under the same conditions as they would be allowed in purely domestic situations to the extent that the state of residence exercises its taxing rights and provided that no deduction in respect of the same item is allowed in the state of source. This solution would prevent double dips and base erosion.

## (e) Anti-abuse measures

In line with the principles of European Union law <sup>(90)</sup>, as interpreted by the CJEU in tax matters <sup>(91)</sup>, no rights exist where there are fraudulent or abusive practices. However, this doctrine cannot be interpreted as undermining taxpayers' entitlement to legal protection and therefore its application must be clearly limited, in compliance with the principle of proportionality, to cases of abuse or fraud. This nuanced approach has led the CJEU to prohibit EU Member States, when acting as countries of residence, from levying additional taxes to compensate for lower taxes applied in other EU Member States for genuine, non-abusive reasons <sup>(92)</sup>. Member States should not include switch-over and subject-to-tax clauses as a general policy tool, because such clauses have a disproportionate impact on the exercise of freedoms for the purpose of protecting the interest of the revenues and may hamper taxpayers acting in good faith.

A possible solution is to identify safe harbour rules that allow states to reduce the tax burden on individuals without triggering the application of anti-abuse rules by different Member States. Accordingly, compliance with a safe harbour rule would automatically make specific situations non-suspicious and thus prevent the application of anti-abuse rules to such cases. Such rules could also address the difference between situations of liability to tax where no tax is levied by one Member State for genuine policy reasons and other situations of no tax in one Member State which other Member States should be permitted to counter through switch-over and subject-to-tax clauses.

It has to be acknowledged that, in some cases, self-employment contracts are concluded for the main purpose of preventing the state of activity from levying wages withholding tax. We suggest approaching these practices in line with the characterisation of such contracts under the laws of the state of activity, allowing for re-characterisation in line with a concept of abuse under EU law. An option could be to issue a directive in order to effectively achieve a common approach to those issues.

The application of anti-abuse measures by EU Member States gives rise to disparities and fragmentation, because states differ regarding what they consider abusive. For this reason, one may wonder whether it is sufficient to apply a soft-law approach in this field. In any event, the compatibility of any decisions regarding anti-abuse legislation that are reached at

<sup>(90)</sup> CJEU, *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas*, C-110/99, 14 December 2000.

<sup>(91)</sup> CJEU, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*, C-196/04 12 September 2006; CJEU, *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise*, C-255/02, 21 February 2006.

<sup>(92)</sup> CJEU, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*, C-196/04, 12 September 2006. As for the deduction of losses in a domestic context see CJEU, *The Commissioners for Her Majesty's Revenue & Customs v Philips Electronics United Kingdom Ltd*, C-18/11, 6 September 2012.

the OECD should be considered carefully within the EU from the perspective of the criteria put forward by the Court of Justice. Solutions to these problems should be developed in a way that reconciles the importance of achieving a systematic approach to abusive practices with the exclusive jurisdiction of the Court of Justice to determine in which cases and on what conditions persons can enjoy rights on the basis of European Union law.

### (f) Exit taxes

Case-law of the Court of Justice provides for clear cut criteria to resolve exit tax problems that give rise to restrictions on the access to the internal market. However, there is still a need for a systematic removal of all obstacles arising in respect of such measures.

The difficulties in the interpretation of common criteria, especially in multilateral situations, imply, when negative integration is not sufficient and in order to achieve a more systematic solution, a need for a legislative solution in this area. EU legislation could include specific measures such as obliging the state to which an individual is moving to calculate assets transferred on the basis of fair market value (step-up in value) in cases where the Member State of emigration has levied an exit tax on the deemed alienation of the assets. It would also be helpful to suspend the operation of exit taxes for a period (say 5 years) and for no charge to be imposed if the individual returns to the original country of residence. Rules would also be needed for allocating taxing rights during the period of such temporary non-residence <sup>(93)</sup>.

### (g) Trailing taxes

The Court of Justice has not yet had the opportunity to pronounce on the issues of compatibility raised by trailing taxes in respect of taxes on income and capital gains <sup>(94)</sup>.

In principle, we believe that the extended tax liability introduced by trailing taxes should only be considered to be lawful to the extent that the state which applies such a tax takes fully into account the tax treatment applied in the new state of residence. In other words, the trailing tax should not lead to tax a higher gain or income than that effectively accrued or realised at the level of the internal market.

More in general, the appropriate solution to such problems is in the view of the expert group to move towards forms of binding coordination <sup>(95)</sup> which specify which state has the primary right to tax and which state must grant a credit or exemption for tax paid in the other state. In the framework of such coordination, EU Member States might also agree on common standards such as the number of years that fiscal domicile can continue or other criteria.

Trailing taxes are currently levied on income and gains only in five Member States while several EU Member States levy trailing taxes in respect of inheritance and gift taxes <sup>(96)</sup>. Accordingly, trailing taxes could be solved even more effectively by the introduction of EU legislation allowing taxpayers to claim tax credits/exemptions for the length of time that the former state of residence might apply a trailing tax. Another solution would be to require the new Member State of residence to allow a correction of the taxable income declared in the tax return for as long as the former Member State of residence might apply a trailing tax to that particular income. Joint tax administration structures would be helpful in order to achieve acceptable results. Proof of the tax situation should be confirmed by the respective tax authority on a common form accepted by all EU Member States.

### (h) Withholding taxes on employment income

A possible solution to the problems caused by double withholding taxes and mismatches between tax estimates and timing could be to recommend that all employers should apply taxes based on reasonable estimates of annual liability. This would have to be established by law, as otherwise employers might not in many cases be willing to take the risk of being held liable for underpayments of tax <sup>(97)</sup>.

<sup>(93)</sup> So-called interrupted residence. Such legislation should not lead to the obligation for Member States which do not apply exit taxes to introduce such taxation.

<sup>(94)</sup> In only one case, concerning inheritance tax (ECJ, C-513/03, *Heirs of M.E.A. van Hilten-van der Heijden v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, 23 February 2006), trailing taxes were included in the factual pattern presented before the European Court of Justice. However, as the Advocate General Léger indicated in para. 18 of his opinion, the applicable tax treaty kept taxing rights with the state of nationality of the deceased, thus not giving rise to a friction between the allocation of taxing rights under the treaty and the applicable trailing tax.

<sup>(95)</sup> In some cases, bilateral treaties may be insufficient where individuals move between Member States during the period that fiscal residence or domicile trails.

<sup>(96)</sup> See Chapter 2 of the report drafted by the Expert Group on *Ways to tackle inheritance cross-border tax obstacles facing individuals within the EU*.

<sup>(97)</sup> This solution may be workable when employees work cross-border wholly within a single MNE group. In other cases such as joint ventures, or supplies of personnel or services to unrelated clients, it is frequently impractical.

As mentioned, another tax obstacle arises due to the absence in such cases of uniform guidance on the employment relationship with a local entity. The ‘economic employer’ doctrine adopted by the OECD may, within the single market, be an appropriate solution to prevent not just abusive practices but also double taxation <sup>(98)</sup>. Consideration could also be given to more frequent use in tax treaties of a new or additional threshold <sup>(99)</sup> below which a non-resident employee would not be considered to be in an employment relationship with a host state resident or permanent establishment.

A much more radical solution would be to abolish withholding taxes on all cross-border payments within the EU, as is already the case in the parent-subsidiary directive and the interest and royalties directive for related companies. This option would have an additional substantive impact on cross-border situations, which would be put on an equal footing with purely domestic ones in the state of source <sup>(100)</sup>.

## Good practices

- In Germany and Spain the employer has the possibility of requesting an exemption certificate to show that the employee is not subject to tax in Germany or Spain. On the basis of this certificate, the employer may abstain from applying the withholding tax.
- Under Polish tax law, where an employee who is still on the payroll of a Polish company is seconded abroad, the employer can cease to apply Polish withholding tax on the income payable for the work performed abroad if it is confirmed in the light of the relevant double taxation agreement that the income will be subject to tax in the host country. The latter can be confirmed by a simple email confirmation from the host company of the employee or from a tax advisor, etc.

## (i) Other cross-border tax obstacles connected with tax treaties

We recommend that EU Member States establish a full network of tax treaties with all other EU Member States so as to prevent double taxation. Some problems concerning the interpretation of provisions contained in tax treaties and affecting individuals (e.g. the ‘economic employer’ concept, directors’ fees and frontier workers) could be solved by introducing common definitions or interpretations applicable to relations within the European Union. Common definitions would imply possible amendments to the existing treaties, but interpretations could be channelled through soft law. The latter could be coordinated by the European Commission, in the framework of technical working groups involving Member States. Such groups could follow the model used by the OECD for the BEPS project. The involvement of the OECD in those working groups should also be welcomed in line with the cooperation framework between such international organisations and the European Union.

Tax treaties with neighbouring non-EU Member States should be amended in a way to include specific provisions that resemble the ones introduced within the European Union in order to solve the existing cross-border tax problems concerning individuals. This is particularly important for frontier workers, in respect of which specific clauses are often already included in bilateral tax treaties. However, it would be good to negotiate the extension of such clauses also to mobile and posted workers. Furthermore, changes should be introduced in order to define which income should be allocated to the state of residence of the worker and ensure that workers only have to deal with one tax administration for all the issues arising from the income they earn with regard to their employment contract. If non-EU contracting states reject the introduction of such clauses in the applicable bilateral treaties, Member States should implement domestic tax regulations in order to achieve a satisfactory solution to such problems that is in substance equivalent to the one applicable within the European Union.

More in general, problems concerning the interpretation and application of tax treaties should be addressed through procedural mechanisms that give the taxpayer(s) the right to settle the dispute with the involvement of tax authorities of both EU contracting state and without the need for recurring to the judiciary.

<sup>(98)</sup> The extension of the ‘economic employer’ rule in the OECD Commentary to Art 15(2)(b) to non-abusive cases has had the effect of increasing the number of cases where double withholding arises. The question is whether Art. 15(2) is, as a result, too restrictive in the context of the single market.

<sup>(99)</sup> In the United Kingdom, the 60-day practice is an example.

<sup>(100)</sup> See opinion of Advocate General Geelhoed delivered on 6 April 2006 Case C-446/04 *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue*: ‘while the fact that taxpayers receiving foreign-source dividends may, in the case of a credit system, be under an obligation to complete additional formalities in order to prove the amount of foreign corporation tax paid in order to qualify for the credit, this is what I have termed a ‘quasi-restriction’ resulting inevitably from the fact that tax administrations are at present national’.

Mutual agreement procedures, which are generally included in tax treaties along the pattern of Article 25 OECD model convention (MC), offer a particularly interesting instrument in this respect. However, their current formulation does not involve a satisfactory level of transparency in the procedures between tax authorities and sets no obligation for the tax authorities to eliminate the double taxation.

Earlier in this section <sup>(101)</sup> we have already envisaged a possible amendment to the existing mutual agreement procedures that would involve a committee of tax technical experts. More in general, the functioning of the revised mutual agreement procedure could be further enhanced by setting a timeline and approximating such procedures to mediation. For the latter purpose a third independent party — which could also be the European Ombudsman or a specialised independent technical officer at EU level — could intervene in the procedure with a view to achieving a satisfactory solution for the contracting states and the taxpayer(s) involved in the shortest possible delay.

This development could be the object of discussion within technical groups involving EU Member States and be extended to the OECD in connection with the BEPS multilateral instrument so as to solve problems concerning the interpretation and application of tax treaties. The role of the EU Commission would be to make sure that the introduction of tax mediation in respect of tax treaty disputes complies with the requirements of protection of fundamental rights enshrined in the EU Charter of Fundamental Rights.

The use of international tax mediation procedures could be combined with the continuation of the dispute in the framework of arbitration. Arbitration clauses are increasingly being added to the tax treaties in force between EU Member States as a result of the inclusion by the OECD of Article 25.5 in its MC. Concerns that arbitration procedures may be expensive and unsuitable for addressing disputes concerning individuals could be overcome by taking into account the two following points. First, only disputes that cannot be settled through tax mediation would undergo arbitration; second, the motivations put forward in the process of international tax mediation could be reutilised so as to allow settlement by means of so-called baseball arbitration, which is a particularly fast and inexpensive framework for dispute settlement.

### 4.3. Proposed solutions to procedural tax obstacles

Procedural obstacles discourage individuals from operating across borders just as much as substantive obstacles do. However, the solutions to procedural obstacles can be sometimes more complex as many of them are linked to well established administrative procedures enshrined in the domestic laws of EU Member States. Resolving the issues would be the corollary to the work on good tax governance, which the European Union is currently pursuing, and would be consistent with Article 41 of the Charter of Fundamental Rights of the European Union <sup>(102)</sup> and the rights of taxpayers in cross-border situations to be given a timely and effective remedy to the tax problems to which they are exposed. Broadly speaking, whenever cross-border tax issues arise, the taxpayer should have an option to request that his or her tax office makes a contact with the corresponding tax office in the other state in order to find a solution to avoid mismatches.

- (a) One solution to deal with the operational problems arising in cross-border situations would be for tax administrations to agree to a code of conduct for the treatment of cross-border cases in relation to income tax <sup>(103)</sup>. A common interpretation or approach and a willingness by Member States to address issues not just from the perspective of tax avoidance but also from the perspective of simplification of tax systems within the EU would constitute a significant step forward in practical application of the fundamental freedoms.
- (b) Good practice could also include creating appropriate offices for the provision of tax advice to citizens in national administrations, where staff would speak a range of languages and would be able to provide basic information on how the tax rules of a country apply in cross-border situations <sup>(104)</sup>. Specific tax offices could be designated for the tax relations with specific Member States, along the lines of the liaison offices for social security in Germany in particular so as to ensure that there are no duplications of procedures between Member States of residence and source.

<sup>(101)</sup> See under point (a). The two proposals can operate as alternative solutions or be coordinated.

<sup>(102)</sup> 2000/C 364/01.

<sup>(103)</sup> A common code of tax procedures (such as a common customs code) would not touch upon budgetary revenue and the allocation of taxing rights resulting from DTTs.

<sup>(104)</sup> It would be beneficial if the local authorities were obligated to actively seek guidance of tax advisors with respect to identifying and resolving current tax problems.

- (c) As far as the EU is concerned, lawyers from Your Europe Advice <sup>(105)</sup> can provide general free-of-charge information to citizens on the tax rules of one Member State, but they are not normally in a position to advise on the interaction of the tax rules of several Member States. Solvit is a particularly good example of how Member States coordinate their practices in order to remove cross-border obstacles, although their competence in the area of taxation is limited. The accessibility of these EU tools should be promoted within the Member States, as many citizens are unaware of their existence.

## Good practices

- In France <sup>(106)</sup>, Italy and Poland there are special tax offices for non-resident taxpayers. In Germany the Neubrandenburg tax office <sup>(107)</sup> is the central tax office that deals with the tax issues of German public pensions paid to pensioners living abroad.
  - Ireland provides information for individuals moving to Ireland including a guide 'Ireland — your guide to a new beginning', available in 16 languages.
  - In Denmark, Luxembourg, the Netherlands <sup>(108)</sup> and Finland, specific tax offices exist that are specialised in dealing with cross-border workers from neighbouring countries <sup>(109)</sup>.
- (d) The Commission's Your Europe citizens website <sup>(110)</sup> already provides general information on tax treatment but this needs to be enhanced with information on Member States' specific tax rules. A European Commission information portal might also be appropriate, similar to the current European Commission information portal on cross-border successions <sup>(111)</sup>, where official documents from other Member States would be uploaded with translations so as to avoid translation costs for taxpayers. EU-wide toll free numbers available in at least two languages could provide access to advice in any Member State from any Member State in connection with the filing of tax returns.
- (e) The European Commission must continue to monitor even more strictly how tax authorities comply with the standards set by the CJEU regarding the evidence that taxpayers may be required to produce when exercising their rights in cross-border situations within the internal market. For example, the existence of an EU-wide effective exchange of information system between tax authorities should be acknowledged and built upon as a means of reducing the compliance burden on individuals <sup>(112)</sup>. This system could also be extended to data sharing, following the VIES model used for VAT purposes. The latter is an electronic means of transmitting information relating to VAT-registration of taxpayers registered in EU and to (tax exempt) intra-Community supplies between Member States' administrations.
- (f) Within this framework, the Commission could also consider setting up a database with the best practices of tax authorities in EU Member States in the field of relieving cross-border tax problems, in order to steer Member States' practices in the right direction. This database could also be used by the Commission as a basis for issuing topical guidelines.
- (g) The EU Commission could foster initiatives aimed at capacity building within tax administrations in respect of dealing with cross-border tax problems according to European Union law, in line with the efforts being made to ensure effective cooperation among tax authorities on exchange of information and audits <sup>(113)</sup>.
- (h) As long-term goals, the introduction of an EU tax identification number (TIN) (such as an IBAN or the VAT-ID) or a tax

<sup>(105)</sup> [http://europa.eu/youreurope/advice/index\\_en.htm](http://europa.eu/youreurope/advice/index_en.htm)

<sup>(106)</sup> <http://vosdroits.service-public.fr/particuliers/R122.xhtml>

<sup>(107)</sup> <http://www.finanzamt-rente-im-ausland.de/en/>

<sup>(108)</sup> See Cross-border employment and enterprise team (GWO), where Belgian, German and Dutch tax authorities cooperate, available at: [http://www.belastingdienst.nl/wps/wcm/connect/bldcontenten/standaard\\_functies/individuals/contact/calling/cross\\_border\\_employment\\_and\\_enterprise\\_team\\_gwo](http://www.belastingdienst.nl/wps/wcm/connect/bldcontenten/standaard_functies/individuals/contact/calling/cross_border_employment_and_enterprise_team_gwo)

<sup>(109)</sup> European Commission — EY, Removing cross-border tax obstacles — Organisation and practices in Member States' tax administration, cit., p. 22.

<sup>(110)</sup> [http://europa.eu/youreurope/citizens/index\\_en.htm](http://europa.eu/youreurope/citizens/index_en.htm)

<sup>(111)</sup> [https://e-justice.europa.eu/content\\_successions-166-en.do](https://e-justice.europa.eu/content_successions-166-en.do)

<sup>(112)</sup> CJEU, *Persche v Finanzamt Lüdenscheid*, C-318/07, 27 January 2009. Corollaries: (i) no additional evidentiary burden for taxpayers [rule of reason]; (ii) principle of proportionality governs reaction to abusive practices; (iii) No outsourcing of tax compliance to taxpayers [it would imply enhanced fiscal controls].

<sup>(113)</sup> In the context of this data sharing data protection aspects should be duly considered in order to prevent undesirable phenomena for individuals, such as leakages of sensitive information.

passport<sup>(114)</sup> would ease communication between citizens and tax authorities and between tax authorities themselves. In a digital age, these steps could lead not just to more transparency but also to more adequate communication with taxpayers. We believe that there is legal basis for TINs in connection with the need to enhance the functioning of the mutual assistance directives. A uniform EU-wide ‘income tax e-passport’, with entries translated into all EU official languages<sup>(115)</sup>, could also be issued. The tax authorities of each country of source would input official data into this e-document. Every person would be entitled to see relevant income tax information concerning him or her included in the e-document, which could be included in an EU-wide data sharing system to which relevant tax authorities could have access<sup>(116)</sup>. As a temporary solution, this uniform document might be issued with a general content, without details of a specific individual but listing common tax information (types of taxable income, determination of tax base, taxable moment, etc.). The use of such documents would significantly facilitate the tax administration problems reported and constitute a balanced compromise between the protection of taxpayers’ rights and those of tax authorities to carry out tax audits in an informed way with all relevant factual elements at hand. This would, however, imply the need for IT-compatibility. For such measures, national parliaments should be involved.

- (i) With regard to the issues of frontier workers, short-term posted workers and highly-mobile workers<sup>(117)</sup>, standardised formalities for filing tax returns should be applicable in the whole of the EU in a uniform way, on the basis of English being the most common language in the EU, or in a multilingual form with at least an English translation<sup>(118)</sup>. Moreover, a special register based on cooperative compliance that would be held/monitored by the European Commission should be implemented. This register would allow frontier workers, short-term posted workers and highly-mobile workers — if enrolled in it — to enjoy the advantages of this treatment. We believe that the European Commission would have to verify such information with a Member State, in order to prevent possible abusive practices. Specific issues would require dedicated attention including the access to such register. A possible model of reference could be the form used for social security purposes (A1)<sup>(119)</sup>.
- (j) For all other categories of citizens with cross-border income sourced within the internal market, the good experience of some Member States with pre-populated tax returns<sup>(120)</sup> suggests they could also be used in respect of cross-border situations, incorporating information that tax authorities of the state of residence have received from other EU Member States by means of exchange of information systems.
- (k) As regards the sometimes onerous requirements of states of residence for proof of payment of foreign tax, the solution could be better communication between tax authorities in particular via the adoption of the EU-wide Tax Identification Numbers proposed above at (f). Furthermore, EU-wide standard forms could be pre-filled by tax authorities of the state of source and used to automatically transfer all relevant information to the state of residence of the taxpayer<sup>(121)</sup>, giving the latter the opportunity to confirm that the content of such data is correct and complete. The correct functioning of such a system could be monitored by peer-review groups involving tax authorities of EU Member States and coordinated by the EU Commission, which could issue guidelines in order to facilitate the circulation of best practices within the European Union and to foster voluntary compliance by Member States in the removal of procedural obstacles that arise in connection with a foreign tax credit.
- (l) Another suggestion would be to strengthen the link between taxation and social security authorities at national and EU level. A network of experts for these two fields could be established; the reasons for any hindrances or obstacles for such cooperation should be identified and ways to overcome these problems could be looked for<sup>(122)</sup>.

<sup>(114)</sup> This would be similar to the European health insurance card (this could be an alternative to one-stop shop solutions). This could demonstrate residence of taxpayers in their home state and exempt them from the host state compliance obligations in agreed circumstances.

<sup>(115)</sup> Alternatively, we could limit the number of languages in the EU to a feasible number such as five.

<sup>(116)</sup> Data protection aspects should be duly considered.

<sup>(117)</sup> See section 3.2.

<sup>(118)</sup> See forms established by of the International Commission on Civil Status (<http://www.ciec1.org/>) or the forms for the international driving licence.

<sup>(119)</sup> See [http://europa.eu/youreurope/citizens/work/social-security-forms/index\\_en.htm#a1form](http://europa.eu/youreurope/citizens/work/social-security-forms/index_en.htm#a1form). However, there must be a sufficient control mechanism.

<sup>(120)</sup> As the OECD information note of 2006 (OECD, *Using third party information reports to assist taxpayers meet their return filing obligations— country experiences with the use of pre-populated personal tax returns*, Paris, 2006) indicates, this model was developed in Nordic countries including Estonia. Pre-populated tax returns are satisfactorily used also in Spain, Italy and the United Kingdom for several categories of taxpayers.

<sup>(121)</sup> Creating internal software which will allow the different tax offices to communicate avoiding time delays could facilitate the exchange of information.

<sup>(122)</sup> This is one of the recommendations in the FreSso report on the relationship between taxation and social security coordination. See European Commission, *Analytical report 2014 The relationship between social security coordination and taxation law*, April 2015, p. 57.

- (m) The problem of the refusal to accept documents written in foreign languages or in a style different from that usually adopted by tax authorities of a given country should in our view be addressed via soft solutions, such as for instance the establishment of a central database collecting the standard forms of all EU countries tax authorities with their English translation which may be easily accessed by the tax authority dealing with a particular case.
- (n) Although it is perfectly legitimate for tax authorities to exercise diligence in auditing all factual elements of a claim for relief for foreign taxes, this should not make it harder or more expensive for a taxpayer to exercise his right to obtain such relief. A solution based on the entitlement to deduct the additional cost of translation from taxes due in the country of residence would not solve the problem entirely, since it would still imply an extra burden for the taxpayer (i.e. the time and efforts involved in arranging the translation). A possible solution to such problems could be to develop dedicated EU-wide standard tax forms to be used in all EU Member States for the purpose of claiming relief for foreign taxes. This practice already works successfully in the field of social security, where forms SED-PD <sup>(123)</sup>, governed by EU Regulation 883/2004, are the same for all EU Member States. The function of an EU-wide tax relief form would be to provide evidence of taxes paid in the country of source and, therefore, of the entitlement to get the relief in the country of residence.
- (o) Obstacles linked to the obligation for taxpayers to fill in special sections of tax returns when holding foreign bank accounts should be addressed first in the light of CJEU case-law. According to settled CJEU case-law <sup>(124)</sup>, there is a presumption of effectiveness of exchange of information within the internal market. Therefore tax authorities of EU Member States have the legal instruments to obtain any information, including concerning bank accounts, from their counterparts in other EU Member States and they should not, therefore, impose any extra burden on taxpayers. This is even more so given the existence of mechanisms for automatic exchange of information (including concerning foreign bank accounts).
- (p) Further procedural obstacles arising concerning the conditions for obtaining refunds of taxes withheld at source could be addressed by developing a standard withholding tax certificate that is applied equally in all 28 Member States.

## Good practices — forms

The United Kingdom uses the same claim forms for reductions of withholding tax and refunds.

- (q) Further positive effects could be achieved by building on the 2009 Commission recommendation on withholding tax relief procedures <sup>(125)</sup> and the OECD Treaty relief and compliance enhancement (TRACE) project. Member States should consider simpler procedures for claiming relief (such as self-declarations) and allowing financial institutions to claim withholding tax relief on behalf of individuals. Through the exchange of best practices and a commitment to the basic principles set out in this recommendation, the Member States' withholding tax relief procedures should gradually converge, which should facilitate the investors who need to make claims in different Member States.
- (r) As already mentioned, individuals not only encounter foreign national taxes in a cross-border situation, but also regional and municipal taxes. In this context, form such as tax assessments and tax returns should at least be accessible in English.
- (s) Also procedural problems could find a solution by using the forms of international tax mediation and alternative dispute settlement, including arbitration, referred to earlier.

<sup>(123)</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

<sup>(124)</sup> See CJEU, *Persche*, *cit.*

<sup>(125)</sup> COM(2009) 7924 final.

# Chapter 5

## Outlook and recommendations

### 5.1. Introduction

There is no one-size-fits-all solution to the tax problems facing individuals who are active across borders in the internal market. This report takes the view that a combination of short-term, medium-term and long-term measures could satisfactorily address such problems.

The measures recommended range from legislative ones to soft-law measures such as coordination, guidance on best practices and the establishment of bodies with jurisdiction to address the cross-border tax problems. As mentioned, as an alternative to hard law in the form of harmonisation, instruments of multilateral binding coordination could be adopted at the level of EU Member States.

This chapter presents the recommendations in both a narrative (section 5.2) and tabular (section 5.3) format. The recommendations reflect the analysis contained in Chapters 3 and 4 of this report. They also indicate whether the recommended action should be taken at the level of the Member States or of the EU Commission.

### 5.2. Recommended solutions to deal with problems in the personal tax area

#### (a) Cross-border and other mobile workers, including artistes

##### 1. EU directive for taxation in one state only

The exercise of taxing powers in respect of individuals deriving a significant part of their income from one or more EU Member States other than that in which they are resident, should be addressed by a single set of rules on conflict of jurisdiction throughout the whole European Union. An EU directive could be adopted in order to achieve this single tax treatment in one EU Member State only. This instrument should also provide for a compulsory application of the foreign credit for a foreign withholding tax. The legislation could even provide for a system according to which taxation would follow the social security contributions framework. Alternatively, a home state approach could be considered with an apportionment of the collected revenue on a pro rata basis.

Furthermore, the Commission could draft legislation by hardening the criteria set by the CJEU.

##### 2. (Alternative to option 1) EU multilateral tax treaty providing for taxation in one state only

The solution indicated under option 1 could also be introduced by means of a multilateral tax treaty among all EU Member States. To the extent that the EU Member States agree on introducing such measure without exceptions or derogations, this multilateral tax treaty could represent a legal instrument that could achieve international tax coordination for cross-border workers within the EU internal market and be better in line with the requirements of the EU principle of subsidiarity.

##### 3. (Alternative to options 1 and 2) EU committee of technical experts to arbitrate in cases of sharing of taxing powers

A further alternative to the introduction of a single or coordinated tax regime could be to have a two-tier system that keeps the existing shared allocation of taxing powers, but allows taxpayers to inform competent authorities of their state of residence about taxation in other states, whereupon the tax authorities involved would have to find a solution within a short timeframe. If no solution was found within that period, the issue would automatically be forwarded to an EU committee of technical experts, which would provide its interpretation within a certain timeframe on how to solve such issues. Following the pattern of the EU Arbitration Convention, this opinion would become binding insofar as the problem is not otherwise solved within 6 months of its delivery.

## 4. (Alternative to options 1, 2 and 3) Recommendations by the Commission/Informal agreement by Member States to adopt certain practices, etc.

An alternative solution could be for the Commission to expand the criteria set by the CJEU <sup>(126)</sup>, by means of interpretation in guidelines.

Another would be for Member States to repeal the provisions in their double taxation treaties with each other dealing with artistes and sportspersons and employees, with a system of monitoring such income that would allow for single taxation in the state of residence along the scheme provided for by Articles 7 and 15 OECD MC.

Another approach would be for Member States to agree on an exemption in a host state from substantive tax liability that would apply to a mobile worker for an agreed fixed period of time, while the individual is present for work in the host state.

For frontier workers, specific clauses are often already included in bilateral tax treaties. However, it would be good to negotiate the extension of such clauses also to mobile and posted workers. Furthermore, changes should be introduced in order to define which income should be allocated to the state of residence of the worker and ensure that workers only have to deal with one tax administration for all the issues arising from the income they earn with regard to their employment contract.

If non-EU contracting states reject the introduction of such clauses in the applicable bilateral treaties, Member States should implement domestic tax regulations in order to achieve a satisfactory solution to such problems that is in substance equivalent to the one applicable within the European Union.

## 5. EU recommendation to ensure fairer treatment of mobile employees suffering high withholding taxes or even abolition of withholding taxes

To solve problems connected with the levying of withholding taxes on employment income in cases where an employee derives employment income in more than one country in a tax year, all employers should be able to use reasonable estimates of total income in a tax year as a basis for withholding only the appropriate amount and no more. A more radical solution would be to abolish withholding taxes on cross-border payments within the EU altogether, as is already the case in the parent-subsidiary directive and the interest and royalties directive with regard to related companies.

Both such measures could be included in the framework of a non-binding instrument, such as for instance the recommendation.

## 6. Code of conduct on the fair tax treatment by Member States of cross-border cases

A common interpretation or approach and a willingness by Member States to address issues not just from the perspective of tax avoidance but also from the perspective of simplification of tax systems within the EU would constitute a significant step forward in practical application of the fundamental freedoms.

## (b) Characterisation of income

### EU-wide guidelines or binding directives on characterisation of income

Characterisation mismatches (e.g. on classifying something as income or gains and in determining residence) could be addressed by establishing multilateral technical tables (guidelines) to provide a common interpretation of situations that fall within the various tax treaty provisions.

An alternative would be to present proposals in the form of binding coordination measures or directives giving the state of residence the priority in deciding on the characterisation of personal matters. In all the other situations, the priority should be given to the state of source.

<sup>(126)</sup> CJEU, *Arnoud Gerritse v Finanzamt Neukölln-Nord*, C-234/01, 12 June 2003.

### (c) Residence

#### EU directive on tax residence

The problems arising in connection with dual tax residence of individuals within the EU could also be solved providing a common definition of tax residence of individuals applicable for income tax purposes throughout the European Union. The general rule would be that residence for tax purposes should be considered to be in the country where the major part of business activity income or labour income of the individual is obtained. Additional guidance could also be given in respect of tie-breaker rules.

### (d) Availability of deductions

#### EU law to deal with availability of deductions (personal, in the form of allowance and relief, and business) in cross-border situations

A systematic solution should be agreed to the problems raised by the fact that personal and country-specific deductions, and business deductions, may not be available in cross-border situations.

This solution should be framed within legal instruments and, if need be, through EU law. The expert group suggests the Schumacker treatment (that is available where 90 % of income is derived in the country of work) be extended also to cases in which only three quarters of the taxpayer's income is derived from the host country. This was the solution proposed in the 1993 recommendation by the EU Commission. The solution could even apply to cases in which the greater part of income is derived from the host country and the remaining part is sourced outside the country of residence, once the country of residence has no taxing rights over the remaining part. In other words, the host country should grant personal deductions and relief to the taxpayer even when the taxpayer derives more than 50 % (or 75 %) of his or her worldwide income from that state.

A more radical policy option would be to allow those persons to enjoy a one-shop-stop treatment for income tax purposes and to have states agree on apportioning income and personal deductions.

Another solution could be to agree that deductions should be granted pro rata by each Member State involved in taxing an individual.

Business-related deductions could apply in cross-border situations under the same conditions as they would be allowed in purely domestic situations, to the extent that the state of residence exercises its taxing rights and provided that no deduction in respect of the same item is allowed in the state of source.

### (e) Incompatibilities between anti-abuse measures

#### Legislative or non-legislative solutions

Solutions to these problems should be developed in a way that reconciles the importance of achieving a systematic approach to abusive practices with the exclusive jurisdiction of the CJEU to determine in which cases and on what conditions persons can enjoy rights on the basis of European Union law.

Member States should not request taxpayers to provide them with information that they could obtain by means of mutual assistance from other Member States. Any existing national procedural rule that does not comply with such standard shall be gradually abolished.

A possible solution is to identify safe harbour rules that would allow states to reduce the tax burden on individuals for legitimate tax policy reasons in a way that would not trigger the application of anti-abuse rules by different Member States.

With regard to self-employment contracts, characterisation should follow the laws of the state of activity, allowing for re-characterisation in line with a concept of abuse under EU law.

## (f) Exit taxes

EU legislation or multilateral agreement on binding measures (only when negative integration is not sufficient)

EU legislation could include specific measures such as obliging the state to which an individual is moving to calculate assets transferred on the basis of fair market value in cases where the Member State of emigration has levied an exit tax on the deemed alienation of the assets. It would also be helpful to suspend the operation of exit taxes for a period (say 5 years) and for no charge to be imposed if the individual returns to the original country of residence. Rules would also be needed for allocating taxing rights during the period of such temporary non-residence.

## (g) Trailing taxes

### Binding coordination or legislation

The extended tax liability introduced by trailing taxes should only be considered to be lawful to the extent that the state which applies such a tax takes fully into account the tax treatment applied in the new state of residence.

More in general, the appropriate solution to such problems is in the view of the expert group to move towards forms of binding coordination which specify which state has the primary right to tax and which state must grant a credit or exemption for tax paid in the other state. In the framework of such coordination, EU Member States might also agree on common standards such as the number of years that fiscal domicile can continue or other criteria.

Trailing taxes could be solved even more effectively by the introduction of a mandatory rule by EU legislation which would allow taxpayers to claim tax credits/exemptions for the length of time that the former state of residence might apply a trailing tax.

## (h) New tax treaty clauses on mutual agreement procedure: arbitration and mediation

### 1. Coordination

Besides the need of having a full network of DTCs among EU Member States, the clauses on mutual agreement procedures in double taxation treaties should be amended along a common or coordinated model, in order to overcome the existing problems and ensure transparency and the participation of taxpayers at all stages of the procedure. The functioning of the revised mutual agreement procedures could be further enhanced by setting a timeline and approximating such procedures to mediation with the actual involvement of taxpayers.

### 2. Binding arbitration and common interpretation

The use of mutual agreement procedures as international tax mediation procedures could be combined with the continuation of the dispute in the framework of binding arbitration that should operate as instrument of last resort and assure the elimination of double taxation within the internal market under all circumstances.

In any case, a common interpretation of the articles related to individuals (also including specific issues such as the 'economic employer' concept, directors' fees and frontier workers) should be adopted.

## (i) Other (soft-law) solutions to deal with procedural problems

### 1. For the EU Member States

- (a) Whenever cross-border tax issues arise, the taxpayer should be able to request that his or her tax office makes contact with the corresponding tax office in the other state in order to find a solution to avoid a mismatch.
- (b) Create appropriate offices for the provision of tax advice to citizens, where staff would be able to communicate in a range of languages and would be able to provide basic information on how the tax rules of a country apply in cross-border situations.
- (c) Specific tax offices could be designated for the tax relations with specific Member States, along the lines of the liaison offices for social security in Germany, in particular so as to ensure that there are no duplications of procedures between Member States of residence and source.

### 2. For the EU Commission

- (a) Improvements to the Commission's Your Europe Citizens website which already provides general information on tax treatment but needs to be enhanced with Member States' specific rules on taxation. Lawyers from Your Europe Advice could also provide general free-of-charge information to citizens on the tax rules of one Member State. Solvit should be promoted within the Member States.
- (b) A European Commission information portal might be appropriate, along the lines of the current European Commission information portal on cross-border successions, where official documents from all countries would be uploaded together with translations, which would save costs for taxpayers. EU-wide toll free numbers available in at least two languages could provide access to advice in any Member State from any Member State in connection with the filing of tax returns.
- (c) Another solution could be for the European Commission to monitor more strictly how tax authorities comply with the standards set by the CJEU regarding the evidence that taxpayers can be required to produce when exercising their rights in cross-border situations within the internal market. For example, the existence of an EU-wide effective exchange of information system between tax authorities should be acknowledged and built upon as a means of reducing the compliance burden on individuals. This system could also be extended to data sharing, following the VIES model used for VAT purposes.
- (d) Within this framework, the Commission could also consider setting up a database with the best practices of tax authorities in EU Member States in the field of relieving cross-border tax problems, in order to steer Member States' practices in the right direction. This database could also be used by the Commission as a basis for issuing topical guidelines.

### 3. For the Member States plus the EU Commission

- (a) Capacity building. The EU Commission could foster initiatives aimed at capacity building within tax administrations in respect of dealing with cross-border tax problems according to European Union law, in line with the efforts being made to ensure effective cooperation among tax authorities on exchange of information and audits.
- (b) The introduction of an EU tax identification number (TIN) (such as an IBAN) or a tax passport. The adoption of an EU-wide TINs (or a system of mutual recognition of national TINs) could allow better communication between tax authorities so as to avoid the sometimes onerous requirements of states of residence for proof of payment of foreign tax. A uniform EU-wide 'income tax e-passport', with entries translated into all EU official languages, could be developed, allowing the tax authorities of each country to provide for official input of data. Every person would be entitled to see relevant income tax information concerning him or her included in the e-document, which could be included in an EU-wide data sharing system to which relevant tax authorities could have access.
- (c) Standardised formalities for filing tax returns, in regard to frontier workers, short-term posted workers and highly-mobile workers. These should be applicable in the whole of the EU in a uniform way, on the basis of English being the most common language in the EU or in a multilingual form with at least an English translation. A special register based on cooperative compliance and held/monitored by the European Commission should be implemented. This register would allow frontier workers, short-term posted workers and highly-mobile workers — if enrolled in it — to enjoy the advantages of this treatment. A possible model of reference could be the form used for social security purposes (A1).
- (d) Another solution to help taxpayers claim foreign tax credits would be EU-wide standard forms that could be pre-filled by tax authorities of the state of source and used to automatically transfer all relevant information to the state of residence of the taxpayer, giving the latter the opportunity to confirm that the content of such data is correct and complete.
- (e) Strengthening the link between taxation and social security authorities at national and EU level. A network of experts for these two fields could be established; the reasons for any hindrances or obstacles for such cooperation should be identified and ways to overcome these problems have to be looked for.

- (f) Central database to address the problem of the refusal of tax authorities to accept documents written in foreign languages or in a style different from that usually adopted by tax authorities of a given country. The central database could collect the standard forms of all EU countries tax authorities with their English translation which may be easily accessed by the tax authority dealing with a particular case.
- (g) EU-wide standard forms for the purpose of claiming relief for foreign taxes. Translation costs would be avoided if EU-wide standard tax forms were used in all EU Member States for the purpose of claiming relief for foreign taxes. This practice already works successfully in the field of social security, where forms SED-PD, governed by EU Regulation 883/2004, are the same for all EU Member States.
- (h) Obstacles linked to the obligation for taxpayers to fill in special sections of tax returns when holding foreign bank accounts should be addressed first in the light of CJEU case-law. This requirement should be eliminated because tax authorities of EU Member States have the legal instruments to obtain any information, including concerning bank accounts, from their counterparts in other EU Member States and they should not, therefore, impose any extra burden on taxpayers. This is even more so given the existence of mechanisms for automatic exchange of information.
- (i) Standard withholding tax certificate. Further procedural obstacles arising concerning the conditions for obtaining refunds of taxes withheld at source could be addressed by developing a standard withholding tax certificate (i.e. proof of the fact that tax has been withheld) that is applied equally in all 28 Member States.
- (j) Developing synergies with the OECD TRACE project in conjunction with the rules concerning the enhancement of automatic exchange of information rules (AEOI) and encouraging publication of multilingual uniform guidelines on issues relevant to claims of securities' withholding tax relief.
- (k) Making regional tax assessments and tax returns accessible at least in English.

### Solutions and recommendations to the European Commission and to the EU Member States — A synoptic chart

State of residence		
Substantive tax obstacles		Solutions
I. Foreign tax relief and cross-border workers	Unrelieved double taxation, e.g. taxes levied in the state of source may be higher than those for which the state of residence is obliged to give relief.	1. Hard law  (a) Implementing an EU directive (also with enhanced cooperation) aimed at achieving a <b>single tax treatment</b> for highly-mobile workers <sup>(127)</sup> and posted workers inside the European Union, coupled with <b>shared allocation</b> of the revenue between the Member State of residence and that of the activity and a <b>one-stop-shop</b> where all the workers' tax compliance obligations could be completed in one tax office. This instrument should also provide for a compulsory application of the tax credit for a foreign withholding tax.
	Disputes and disagreements between the Member States involved regarding where expenses should be deducted and tax credits applied.	(b) EU multilateral treaty <sup>(128)</sup> on employment income earned by highly-mobile workers and posted workers.  2. Hard/soft law
	Timing mismatch between the date of the levying of a withholding tax in a source country and the date of the provision of tax relief in the state of residence.	(c) Repealing the provisions in Member States' double taxation treaties with each other dealing with artistes and sportspersons (Art. 17 of the OECD model) and employees (Art. 15(2)(b) and (c) of the OECD model) and replacing the mechanism of withholding tax in the country of performance in the case of artistes and sportspersons <sup>(129)</sup> with a <b>system of monitoring such income that would allow for single taxation in the state of residence</b> <sup>(130)</sup> .  (d) Insofar as the solutions indicated above cannot be implemented, for highly-mobile workers such as artistes and sportspersons, posted and frontier workers in the absence of dedicated treaty clauses, an <b>exemption from substantive tax liability</b> of all kinds could apply for an agreed fixed period of time while the individual is present for work in the host state, in respect of all taxes and in all Member States <sup>(131)</sup> .
	Tax years or the tax filing deadlines may differ in the two Member States concerned.	3. Soft/hard law  (e) Expanding the criteria set by the CJEU, by means of interpretation or through the issuing of hard law.  4. Establishment of bodies to deal with the tax problems involved  (f) Two-tier system that allows taxpayers to <b>inform competent authorities</b> of their state of residence about the existence of a tax obstacle, whereupon such authorities would have to find a solution within a short timeframe. If no solution was found within that period, the issue would automatically be forwarded to an EU <b>committee of technical experts</b> , which, following the pattern of the EU Arbitration Convention would provide its binding interpretation within a certain timeframe.

<sup>(127)</sup> The category of frontier workers is included within this category. Therefore, in the presence of a directive, the concept of frontier workers would be no longer regulated at the bilateral level, but determined on an homogeneous basis. Additional solutions to the problems of frontier workers are addressed elsewhere in this chart.

<sup>(128)</sup> The choice between a directive and an EU multilateral treaty would be governed by the principle of subsidiarity.

<sup>(129)</sup> These categories may be added to the ones to which automatic exchange of information within the EU applies via the Directive 2011/16/EU.

<sup>(130)</sup> In purely intra-EU situations to which automatic exchange of information would apply.

<sup>(131)</sup> Alternatively, a minimum income threshold could apply in this respect.

State of residence				
Substantive tax obstacles			Solutions	
II. Frontier workers		Uncertainty on the concept of frontier workers.	<p>1. Soft law</p> <p>(a) With regard to neighbouring non-EU Member States countries, Member States should introduce specific provisions in their tax conventions providing a legal definition of frontier workers. Alternatively, this could be done introducing EU international agreements <sup>(132)</sup>.</p> <p>(b) If these provisions cannot be introduced, Member States should implement <b>domestic tax regulations</b> that take into account the specific characteristics of frontier workers.</p>	
III. Characteri- sation mis- matches I	General problems	Disagreements about whether certain types of income should be classified as income or a gain.	<p>1. Hard law:</p> <p>(a) Binding coordination measures or directives that give the state of residence <b>the priority in deciding on the characterisation of personal matters</b>. In all the other situations, the priority should be given to the state of source.</p> <p>2. Soft Law</p> <p>(b) Establishing <b>multilateral technical tables</b> (guidelines), with the assistance of the European Commission and in consultation with the OECD, to provide a <b>common interpretation</b> of situations that fall within the various tax treaty provisions.</p>	
		Disagreements about the legal form of an entity that employs an individual.		
		Different rules on the attribution of income/gain or attribution to different tax years and different qualifications of a specific economic operation.		
IV. Characteri- sation mis- matches II	Specific problems	Tax residence criteria may cause double tax residence within the EU.	<p>1. Hard law:</p> <p>(a) Implementing a directive that provides for a <b>common definition of tax residence of individuals</b> applicable for income tax purposes throughout the European Union, i.e. residence for tax purposes should be considered to be in the country where the major part of business activity income or labour income of the individual is obtained.</p> <p>2. Soft law:</p> <p>(b) <b>Additional guidance</b> could be given in respect of tie-breaker rules contained in the DTCs</p>	
		Different characterisations of unemployment benefits in cross-border situations and double taxation in respect of employee share ownership plans.	<p>1. Hard law</p> <p>(a) Clauses at the level of Member States' bilateral tax conventions or a directive could be introduced. These would describe in detail the matter of taxation of equity plans and pay-outs from those plans, and pay-outs that concern long periods and periods of presence/work in different countries (e.g. severance payments).</p>	

<sup>(132)</sup> The theory of implied powers could support this legal construction and justify the need to have tax coordination also in relation to third countries (countries outside the EU and EEA) along the same pattern that regulates this matter within the internal market.

State of residence		
Substantive tax obstacles		Solutions
V. Personal deductions (allowance and relief)	Loss of country-specific personal tax deductions (e.g. deduction of mortgage interest, alimony or maintenance payments, or pension-related) or relief, also in the context of pensions.	<p>1. Hard law</p> <p>(a) Introducing a directive <sup>(133)</sup> that allows cross-border individuals to enjoy a <b>one-shop-stop treatment</b> for income tax purposes and to have states agree on apportioning income and personal deductions.</p> <p>(b) To agree that deductions should be granted pro rata by each Member State involved in taxing an individual.</p> <p>2. Soft law</p> <p>(c) The Schumacker treatment could be extended: the host country <b>should grant personal deductions and relief to the taxpayer when the taxpayer derives at least more than 50 % (or 75 %) <sup>(134)</sup> of his or her worldwide income from the host country.</b></p>
VI. Business deductions	Differences between Member States in the tax reliefs available for business travel, subsistence and relocation or in the characterisation of the person as self-employed themselves.	<p>1. Soft Law</p> <p>(a) Development of a <b>common practice</b> among Member States: deductions for business expenses could be allowed in cross-border situations <b>under the same conditions as they would be allowed in purely domestic situations</b> to the extent that the state of residence exercises its taxing rights and provided that no deduction in respect of the same item is allowed in the state of source.</p>
VII. Application of anti-abuse measures	Switch-over and subject-to-tax clauses may be designed in such a way that does not tackle double non-taxation caused by aggressive tax planning but rather a mere situation in which the tax policy considerations of the Member States differ.	<p>1. Member States should not include switch-over and subject-to-tax clauses as a general policy tool because such clauses have a disproportionate impact on the exercise of freedoms for the purpose of protecting the interest of the Revenues and may hamper taxpayers acting in good faith.</p> <p>2. Hard law/soft law:</p> <p>Introduction of <b>safe harbour rules</b> that allow states to reduce the tax burden on individuals without triggering the application of anti-abuse rules by different Member States.</p>
	Self-employment contracts concluded for the main purpose of preventing the state of activity from levying wages withholding tax.	<p>1. Hard law</p> <p>Characterisation of <b>self-employment contracts</b> under the laws of the <b>state of activity</b>, allowing for re-characterisation also in line with a concept of abuse under EU law.</p>

<sup>(133)</sup> This directive may be introduced only if in line with the principle of subsidiarity.

<sup>(134)</sup> This soft law approach may be implemented as an updated version of the recommendation issued on 21 December 1993 by the EU Commission (94/079/EC). However, this recommendation had very little effect and it was only when the Schumacker case was decided by the CJEU that Member States started changing their domestic legislations.

State of residence		
Substantive tax obstacles		Solutions
VIII. Exit taxes	Changes to the system of valuation of assets and criteria used to determine gains or losses may not represent the actual situation.	<p>1. Hard law (only when negative integration is not sufficient and in order to achieve a more systematic solution)</p> <p>(a) Introduction of a directive that:</p> <p>(i) obliges the state to which an individual is moving to calculate <b>assets transferred on the basis of fair market value</b> (step-up in value) in cases where the Member State of emigration has levied an exit tax on the deemed alienation of the assets.</p> <p>(ii) <b>suspends the operation of exit taxes</b> for a period (say 5 years) and for no charge to be imposed if the individual returns to the original country of residence and allocating taxing rights during the period of such temporary non-residence.</p>
	Levying of such taxes in the form of a claw-back of previously granted social security deductions from employment income.	
IX. Trailing taxes	Two (or even more) Member States may claim taxation on a worldwide basis by reference to different criteria of residence.	<p>1. Hard Law</p> <p>(a) Introduction of a mandatory rule by EU legislation which would specify which state has the primary right to tax and allow <b>taxpayers to claim tax credits/exemptions for the length of time that the former state of residence might apply a trailing tax.</b></p> <p>1. Soft Law</p> <p>(b) To require the new Member State of residence to allow a <b>correction of the taxable income</b> declared in the tax return for as long as the former Member State of residence might apply a trailing tax to that particular income.</p>

State of source		
Substantive tax obstacles		Solutions
X. Withholding taxes	Double withholding taxes in a tax year and mismatches between tax estimates and timing.	<p>1. Soft law</p> <p>(a) To recommend that all employers should use <b>reasonable estimates</b> made on an annual basis, as long as they would also accept liability for any ultimate loss of tax (e.g. if the estimates are made carelessly or the employee fails to file a return and settle an underpayment).</p> <p>2. Hard/soft law</p> <p>(b) To <b>abolish withholding taxes</b> on cross-border payments within the EU.</p>
	Absence of uniform guidance on the employment relationship with a local entity.	<p>1. Soft law</p> <p>(a.) Use of the ‘<b>economic employer</b>’ doctrine adopted by the OECD in the context of the single market.</p> <p>(b) More frequent use in tax treaties of a new or <b>additional threshold</b> below which a non-resident employee</p>
XI. Personal deductions	Problems concerning personal deductions arise also in the state of source.	See the solutions indicated for the state of residence.
XII. Business deductions	Problems concerning business deductions arise also in the state of source, e.g. in case of the tax treatment of expenses connected with a failed attempt to establish a branch of a business abroad.	See the solutions indicated for the state of residence.

Other substantive tax obstacles	
Substantive tax obstacles	Solutions
XIII. Absence of tax treaties to eliminate double taxation	<p>1. Soft law</p> <p>To recommend a <b>full network</b> of DTCs among EU Member States.</p>
XIV. Different interpretations and application of the tax treaties that do exist, e.g. notion of frontier workers or the concept of ‘employer’	<p>1. Soft law</p> <p>(a) <b>Common interpretation of the articles</b> related to individuals (also including specific issues such as the ‘economic employer’ concept, directors’ fees and frontier workers <sup>(135)</sup>) should be adopted.</p> <p>2. Hard law</p> <p>(b) Tax treaty clauses on <b>mutual agreement procedures</b> should be amended along a common or coordinated model, in order to overcome the existing problems and ensure transparency and the participation of taxpayers at all stages of the procedure. The functioning of the revised mutual agreement procedures could be further enhanced by setting a timeline and approximating such procedures to <b>mediation</b>.</p> <p>(c) The use of mutual agreement procedures as international tax mediation procedures could be combined with the continuation of the dispute in the framework of <b>arbitration</b>.</p>

<sup>(135)</sup> See also box II. Frontier workers.

Tax obstacles common to both the state of residence and the state of source		
Procedural tax obstacles		Solutions
XV. Problems in making tax returns or trying to deal with tax authorities	Language barriers, limited expertise of tax authorities in cross-border tax issues, difficulties in accessing information or in dealing with tax authorities over the internet, the different work practices of tax authorities in the different EU Member States and the existence of offices with separate competences at different levels of government.	<p>1. Soft law (General solutions)</p> <p>(a) Whenever cross-border tax issues turn up, the taxpayer should have an <b>option to request that his or her tax office makes a contact with the corresponding tax office in the other state</b> in order to find a solution to avoid mismatch.</p> <p>(b) To strengthen the <b>link between taxation and social security authorities at national and EU level</b>. A network of experts for these two fields could be established.</p> <p>2. The role of the European Commission</p> <p>(c) The European Commission must continue <b>to monitor</b> how tax authorities comply with the standards set by the CJEU regarding <b>the evidence</b> that taxpayers may be required to produce when exercising their rights in cross-border situations within the internal market.</p> <p>(d) It could also set up a <b>database with the best practices</b> of tax authorities in EU Member States in the field of relieving cross-border tax problems, in order to steer Member States' practices in the right direction and foster <b>initiatives aimed at capacity building within tax administrations</b> in respect of dealing with cross-border tax problems.</p> <p>(e) The <b>accessibility of the Commission's Your Europe Citizens website and Solvit</b> should be promoted within the Member States and these existing tools could be enhanced with Member States' specific rules on taxation.</p> <p>3. Hard law</p> <p>(f) Procedural problems could find a solution by using forms of <b>international tax mediation</b>, also in the framework of a revised functioning of mutual agreement procedures, and alternative dispute settlement, including <b>arbitration</b> if needed.</p> <p>1. Soft law (specific solutions)</p> <p>(a) Implementing a <b>code of conduct</b> among tax administrations for the treatment of cross-border cases in relation to income tax.</p> <p>(b) Creating <b>appropriate offices for the provision of tax advice to citizens</b>, where staff would speak foreign languages and would be able to provide basic information on how the tax rules of a country apply in cross-border situations <sup>(136)</sup>.</p> <p>(c) Creating specific tax offices for the tax relations with specific Member States.</p> <p>(d) EU-wide toll-free numbers should be available in at least two languages in order to provide access to advice in any Member State from any Member State in connection with the filing of tax returns <sup>(137)</sup>.</p>

<sup>(136)</sup> Alternatively, Member States have to create special tax offices, possibly with the help and guidance of the Commission.

<sup>(137)</sup> In addition to this, one could consider freely accessible email information addresses.

Tax obstacles common to both the state of residence and the state of source		
Procedural tax obstacles		Solutions
XVI. Complexity and cost of claiming foreign tax credit	Tax administrations may not accept official documents written in languages other than their own and tax returns may only be available in the country's official language.	<p>1. Hard law</p> <p>(a) Introduction of an <b>EU Tax Identification Number or a tax (e-)passport</b> that would ease communication between citizens and tax authorities and between tax authorities themselves.</p> <p>2. Soft law</p> <p>(b) Creating a <b>European Commission information portal/database</b> where official documents from other Member States would be accepted without translations or where to collect the standard forms of all EU countries tax authorities with their English translation.</p> <p>(c) Concerning regional and municipal taxes, forms such as tax assessments and tax returns should at least be accessible in English.</p> <p>(d) With regard to the issues of frontier workers, short-term posted workers and highly-mobile workers, <b>standardised formalities for filing tax returns</b> should be applicable in the whole EU in a uniform way, on the basis of English being the most common language in the EU or in a multilingual form with at least an English translation. Moreover, a special register based on cooperative compliance and held/monitored by the European Commission should be implemented. When the individual is registered, he or she receives a number, which would have a content title available in all EU official languages.</p> <p>(e) For all other categories of citizens with cross-border income sourced within the internal market, the use of pre-populated tax returns is recommended.</p>

State of residence		
Procedural tax obstacles		Solutions
XVII. Foreign tax relief	<p>The extent of the conditions and procedures set by the state of residence (e.g. proof of a tax assessment or tax return or of the actual tax payment in the other country), when coupled with the differences between Member States' tax systems and procedures, can make it difficult if not impossible for taxpayers to obtain relief for foreign taxes.</p>	<p>1. Soft law</p> <p>(a) Developing dedicated <b>EU-wide standard tax forms</b> to be used in all EU Member States for the purpose of claiming relief for foreign taxes. EU-wide standard forms could be <b>pre-filled by tax authorities</b> of the state of source and used to automatically transfer all relevant information to the state of residence of the taxpayer, giving the latter the opportunity to confirm that the content of such data is correct and complete.</p> <p>(b) Developing a <b>standard withholding tax certificate</b>, that is applied equally in all 28 Member States.</p> <p>(c) Developing synergies with the OECD TRACE project (Treaty Relief and Compliance Enhancement) in conjunction with the rules concerning the enhancement of automatic exchange of information rules (AEOI) and by encouraging publication of <b>multi-lingual uniform guidelines on issues relevant to claims of securities' withholding tax relief</b>.</p>
XVIII. Special forms for bank accounts in other EU Member States	<p>Additional burden on the taxpayer created by some EU Member States that require their resident taxpayers to complete special sections of tax returns when holding foreign bank accounts in other EU Member States, including to provide information about these bank accounts.</p>	<p>1. Soft law</p> <p>To eliminate this requirement because tax authorities of EU Member States have the legal instruments to obtain any information, including concerning bank accounts, from their counterparts in other EU Member States and they should not, therefore, impose any extra burden on taxpayers <sup>(138)</sup>.</p>

<sup>(138)</sup> See Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC as amended by Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation that will apply from 1 January 2016.

State of source		
Procedural tax obstacles		Solutions
XIX. Difficulties in obtaining withholding tax relief	Language barriers and forms that follow diverging national standards.	See the solutions identified for the state of residence

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The following definitions are proposed by the group of experts and this is how the terms used in the report should be understood.

- **BEPS project:** project steered by the OECD against the arrangements set up by companies in order to: exploit cross-border loopholes and mismatches in tax legislation, artificially shift profits to low or no-tax jurisdictions where little or no economic activity is carried out and pay little or no overall corporate tax.
- **Business deductions:** expenses having some business connections (e.g. travel expenses) that can be deducted from gross income in calculating taxable income.
- **Certificate of tax residence:** document issued to a taxpayer by the tax authorities of a country at-testing that the taxpayer is resident for tax purposes in that country.
- **Characterisation mismatch:** different tax characterisation by different Member States of an item of income or an economic transaction (e.g. where one Member State involved treats it as income and the other Member State treats it as a gain).
- **Compliance:** extent to which a taxpayer meets the obligations under the applicable tax rules such as reporting of complete and accurate information and payment of taxes on time.
- **Conflict of qualification** — see **Characterisation mismatch**.
- **Country of residence:** country where the individual has his or her residence for tax purposes.
- **Country of source:** country where a specific item of income is deemed to originate or to be generated.
- **Cross-border worker:** EU citizen who is active across one or more borders within the EU internal market.
- **Direct taxation:** it refers to taxes which are charged directly to a person, e.g. personal income taxes (contrasted with indirect taxes such as VAT and excise duties which arise when an intermediary such as a business applies taxes to a product or service sold to an individual).
- **Disparity:** difference in tax treatment in cross-border situations that may result from the exercise of uncoordinated tax rules by two or more EU Member States. It is a two-country problem resulting from the exercise in parallel by two Member States of their tax sovereignty that cannot be tackled by the EU Court of Justice as it does not constitute either discrimination or a restriction to the enjoyment of the freedoms of the single market.
- **Double dip:** double tax advantage that the taxpayer may obtain due to differences between the tax laws of two or more countries.
- **Double taxation convention/treaty:** international agreements between two (or more) countries for the allocation of tax jurisdiction on cross-border income and capital and the avoidance of double taxation.
- **Double taxation:** it can be juridical or economic. Juridical double taxation refers to the imposition of comparable taxes by two (or more) countries on the same taxpayer with regard to the same taxable income or capital and for identical periods (e.g. two countries taxing a mobile worker on the employment income in a particular tax year in which that individual worked in both countries for part of the time). Eco-nomic double taxation refers to the imposition of comparable taxes by two (or more) countries on different taxpayers in respect of the same taxable income (e.g. where one country taxes a company on its profits and a second country taxes a shareholder on dividends the shareholder receives from that company out of its profits without allowing tax relief for the tax already paid by the company on its profits).
- **Exchange of information:** information on a taxpayer that one country may supply to another country in order to enhance administrative cooperation and tackle tax fraud, tax evasion and tax avoidance. EU Member States exchange information with each other under EU directives either upon request, automatically or spontaneously.

- **Exit tax:** tax levied on persons when leaving their country of residence. The taxable base is usually the accrued value of all assets immediately before emigration.
- **Fair market value:** the price a buyer would pay a seller in a transaction on the open market.
- **Foreign tax relief:** relief from international double taxation granted by the state of residence by exemption or credit for foreign taxes. A rather uncommon and usually unilateral form of relief is a deduction of the source state's taxes in computing taxable income in the state of residence.
- **Frontier worker:** individual who resides in one EU Member State, but works in another EU Member State. The concept is often restricted by space (e.g. the definition of a frontier zone, i.e. the individual works in places that are reasonably close to the borderline) and/or time (e.g. the taxpayer has to return at sufficiently close intervals of time in his or her country of residence) criteria.
- **Fundamental freedoms:** four freedoms enshrined in European treaties and protecting the cornerstones of the single market: the free movement of persons, goods, services and capital. According to the free movement of persons (which includes both the free movement of workers and the right of establishment), individuals can move freely among EU Member States to live, work, study or retire in another EU Member State. Since direct taxation is not harmonised, the European Court of Justice sets the limits on the exercise of national tax prerogatives by interpreting the freedoms.
- **Highly-mobile worker:** individual who resides in one EU Member State, but works in more than one EU Member State and receives a significant portion of his or her income from two or more EU Member States.
- **Hard law:** consists of binding legal instruments; it is the opposite of soft law.
- **Juridical double taxation** — see **Double taxation**.
- **Liable to tax:** it refers to the person who owes the tax, not necessarily requesting an actual payment of such tax.
- **Non-resident:** a person who does not satisfy the residence criteria of a specific country. Usually, countries tax non-residents on the income derived from their tax jurisdiction. Non-residents are generally, but not necessarily in a different situation from residents for European Union tax law purposes.
- **OECD model tax convention on income and capital:** it provides the OECD Member countries with a standard text to be used in concluding bilateral tax conventions in order to achieve uniformity in the allocation of taxing rights.
- **One-stop-shop approach:** means that in cross-border relations taxpayers only have to deal with one tax administration. This approach reduces the administrative burden and facilitates cross-border tax compliance.
- **Personal deductions:** personal expenses (e.g. medical expenses, home mortgage interests) that may be taken off the taxable base when computing taxable income. Tax systems allow these deductions either to improve equity or to encourage particular activities.
- **Posted worker:** a worker who, for a limited period, carries out his or her work in the territory of a Member State other than the state in which he or she normally works (see Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services).
- **Procedural tax obstacle** — see **Tax obstacle**
- **Proportionality principle:** it deals with how the action at the EU level is concretely to be performed stating that any EU action should not go beyond what is necessary to achieve satisfactorily its objectives. It applies when the EU does not have exclusive competence.
- **Resident:** A person who is liable to tax in a country because of domicile, residence, place of manage-

ment, or any other criterion of a similar nature. Tax residents are usually taxed on their worldwide income (i.e. domestic and foreign income).

- **Schumacker treatment:** it stems from the case-law of the CJEU (*Finanzamt Köln-Altstadt v Roland Schumacker*, C-279/83, 14 February 1995). According to the CJEU, when the taxpayer derives more than 90% of his or her worldwide income from the source state and he or she earns no significant income in the state of residence, the source state — departing from the general principles — should grant personal allowances and deductions to the taxpayer.
- **Shared allocation of revenue:** it relates to the situation where one country collects the overall tax on cross-border income and shares part of it with another country. This mechanism can be found in frontier workers provisions contained in some double taxation conventions.
- **Shared allocation of taxing rights:** allocation of taxing rights to source and residence countries, giving rise to international juridical double taxation to be relieved by the country of residence. Double taxation is prevented in case of exclusive allocation of taxing rights to either country.
- **Sincere cooperation principle/loyalty principle:** Article 4(3) Treaty on European Union (TEU) states that the Member States shall facilitate the achievement of the Union's tasks flowing from the treaties and refrain from any measure which could jeopardise the attainment of the Union's objectives.
- **Soft law:** any type of social rule or any principle lacking an actual binding force, but nevertheless capable of exercising some kind of persuasion on the addressees to comply with it on a voluntary basis. Examples of EU soft law in direct taxation include Commission recommendations and communications.
- **Step-up:** an increase in the tax bases of a property (market value). A step-up may arise in the context of exit taxes where the value of the assets is assessed at the market value as a result of the change of tax residence.
- **Subject-to-tax clause:** clause requiring the actual payment of tax. If a subject-to-tax clause is in place, the benefits of a given tax measure in one country are granted only if the income is effectively taxed in the other country. It is generally used as an anti-abuse rule.
- **Subsidiarity principle:** it aims at determining whether action at the EU level is required in the areas of competences shared between the EU and the Member States. According to the subsidiarity principle, the EU may only intervene if it is able to act more effectively than the individual Member States.
- **Switch-over clause:** clause replacing the credit method for relieving international double taxation with exemption. Switch-over clauses are generally used as anti-abuse rules when the income is not derived from genuine activities.
- **Tax abuse:** use of wholly artificial arrangements aimed at circumventing the application of the legislation of Member States. In EU tax law, abusive tax practices give rise to tax avoidance.
- **Tax avoidance:** outcome of the use of artificial arrangements set up by taxpayers to avoid taxes through an improper use of tax legislation achieving results in line with the letter of the law but against its spirit. It differs from tax evasion because it does not imply an illegal behaviour or a direct violation of tax law.
- **Tax evasion:** illegal violation of tax law.
- **Tax obstacle:** more burdensome treatment applicable in cross-border situations. For the purposes of this report a tax obstacle also arises from the uncoordinated exercise of taxing powers in parallel of two or more jurisdictions. It can be substantive or procedural. Substantive obstacles relate to how much tax a taxpayer pays and when. Procedural obstacles arise from administrative complexity and they relate to how tax systems operate in practice.
- **Tax planning:** legal arrangement of a person's affairs aimed at minimising tax liability.

- **Tax residence:** residence is one of the connecting factors used by states to create a genuine link between the taxable event and their territory in order to exercise their taxing rights. The determination of residence is usually based on a facts and circumstances test. The tax residence of individuals is generally determined analysing the degree of personal attachment with the country concerned, e.g. the number of days spent in the country, the existence of personal or economic ties with the country, and so on.
- **Tax-free threshold:** level of the income under which taxes are not levied.
- **Timing mismatch:** differences in timing of e.g. taxation between two or more EU Member States.
- **Trailing tax:** tax levied by the former residence state on events following emigration. It extends the taxing jurisdiction of such country at a moment in which the taxpayer is usually already a resident of another country.
- **Treaty freedoms** — see **Fundamental freedoms**.
- **Treaty shopping:** arrangements whereby a resident of one state aimed at obtaining the entitlement to the benefits in a second state of a more favourable tax convention to which the person would otherwise not be entitled to if the resident had dealt directly with the second state, for instance by setting up a controlled company in a third intermediate state whose treaty with the second state is more favourable.
- **Unemployment benefit:** payment made by the state to people who become unemployed.
- **Unilateral, bilateral or multilateral measure:** a unilateral measure is introduced by the domestic law of one state. Bilateral or multilateral measures are introduced by an international treaty or similar instruments (e.g. double taxation conventions).
- **Withholding tax:** tax levied at source, usually on the payer, who may on turn collect it from the taxpayer. Withholding tax may be final or non-final. Non-final withholding taxes are usually creditable against the taxpayer's total taxes.



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