XXVIII FIDE Congress
Topic 2: Taxation, State aid and distortions of competition
Questionnaire

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Question 1

1. Before the significant tax reform in 2013 (the introduction for the first time of a Greek Code of Tax Procedures (L. 4174/2013, hereinafter referred to as "GCTP") and the introduction of the new Greek Income Code (L. 4172/2013, hereinafter referred to as "GITC"), the issuance of tax rulings from the Ministry of Finances (known as individual's solutions) was a common practice in Greece. More specifically, the central authorities of the Ministry of Finance, responsible for the uniform interpretation and the application of the tax legislation from the local tax offices, was publising interpretative circulars and written answers on taxpayer's written question regarding divers tax matters (income tax, VAT, etc). According to the Penalty Code (articles 1§8 and 4§5 of Law 2523/1997), additional taxes (penalties imposed in case of not filing a tax declaration or filing inaccurate tax declaration) are not imposed when a taxpayer has followed the circulars of the Ministry of Finance or the written rulings of the competent tax authorities regarding his tax obligations. In any case, the taxpayers cannot invoque in their favor, the above circulars or written rulings of the Ministry of Finance, in case where an opposite interpretation of the relevant provisions of the tax legislation has been given by the Supreme Administrative Court (Council of State). In this case, additional tax is imposed after the revocation of the relevant circulars or written answers/rulings. For reasons of tax transparency, the Greek law introduced several times in the past, legislation for the publication of said tax rulings.

2. Nowadays, after the recent tax reform in 2013, GCTP (article 9 of L. 4174/2013) provides the competence of issuance of relevant interpretative circulars, to the Independent Public Revenues Authority (hereinafter referred as "IPRA") (which has recently replaced the General Secretary of Public Revenues and constitutes the competent authority for the interpretation and application of the tax legislation). These circulars are binding for the tax administration until their amendment or revocation. In contrary, they are not binding for the taxpayers. This means that in case of a tax audit, the tax auditors are not bound from the above circulars and may interpret and apply the tax provisions according to the principle of tax legality. Nevertheless, in case where the taxpayers were following the above circulars regarding their tax obligations, tax authorities could not impose against them a penalty for not filing tax declaration or filing of inaccurate tax declaration. More specifically, following the modification of the relevant provisions by article 12 of Law 4474/2017, it is prescribed that in case the taxpayer has followed the circulars of the

tax administration, concerning his respective tax obligations, neither the relevant tax return is considered as inaccurate nor the taxpayer is considered to have omitted to submit a tax return, depending on the circumstances of each specific case. Moreover, pursuant to article 12 of Law 4474/2017, which modified article 9 of the GCTP, interpretative circulars are binding for the tax administration, until their revocation or the amendment of the legislation which is being interpreted by them, whereas potential amendment of the interpretative view adopted by the tax administration has no retrospective effect, in case it implies the deterioration of the taxpayers' position. The Tax Procedures Code does not provide explicitly the issuance of written answers on taxpayer's written questions. Nevertheless, tax authorities continue to issue written answers on taxpayer's written questions regarding diverse tax matters. These tax rulings are not binding on tax authorities, although tax authorities generally follow written answers[1]. Furthermore, Greece tax law offers a certain degree of advance legal certainty in specific tax matters given by the tax authorities. Greek tax law provides in these cases specific requirements to be eligible for such certainty in advance.

3. Specifically, Greek Tax Procedures Code (article 22 of L. 4174/2013) provides an advance pricing agreement (APA) program under which Greek taxpayers could obtain a pre-approval on the pricing of intercompany transactions. The APA program, commenced in Greece on January 1, 2014, provides certainty to taxpayers regarding the agreed transfer pricing methodology, since giving them the possibility to predict their future tax liabilities[2]. Furthermore, Ministerial Decision 1284/2013 provides guidelines on the APA program.

4. The main advantage of the APA is the elimination of the tax uncertainty and severe scrutiny (which may arise during the course of a future tax audit at the level of the Greek entity of a multinational group) relating to the transfer pricing followed and the mitigation of double taxation risk for the term of the APA (up to 4 years). Moreover, following the APA conclusion, the Greek company is no longer subject to TP documentation obligation for the transactions covered by the APA[3].

5. The law provides the entities entitled to apply for an APA. Greek entities with overseas related parties, as defined by Greek tax law, have the right to file an

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[1]. IBFD, Annex: Legal Aspects of practice of tax rulings for companies across member states, Ref.Ares (2015) 717438 – 19.02.2015.

[2]. Under the previous tax regime, as was in force pursuant to L. 2238/1994 (the previous Greek Income Tax Code), APAs were not provided for, until the amendments of L. 4110/2013, article 11 of which inserted for the first time in the Greek tax legislation a provision about APAs (article 39 Γ of L. 2238/1994), effective from 01/01/2014 onwards. However, such a provision never came into force, since L. 2238/1994 was subsequently replaced by L. 4172/2013 and L. 4174/2013 ("GCTP") also came into force.

[3]. In summary, the key benefits of an APA are: a) Advance resolution of disputes that could arise between the Greek group entity and Greek tax authorities on the pricing of the transactions at hand and elimination of tax uncertainty, b) Elimination of double taxation risk, c) Reduction of administrative costs of future tax audits and of the possibility of litigation and d) Reduction of documentation costs for the transactions included in the APA.

application to obtain an APA for future cross border transactions with these related parties. The Greek APA program also applies to Greek permanent establishments of foreign legal entities, in relation to transactions with their parent entity and foreign related parties, as well as domestic legal entities with their permanent establishments abroad.
6. The object of an APA program is defined in the law. Only future cross border transactions can be the object of an APA. Rollback is not provided. The APA can be unilateral, bilateral or multilateral. As regards time frame, the process has proven rather lengthy so far. For a unilateral APA, however, where no discussions with foreign tax authorities are required, it could be anticipated that the procedure will be finalized in less than 12 months.
7. An APA will cover any relevant criteria used for the determination of the intra-group pricing. These criteria mainly include the transfer pricing method, the comparable data to be used and any relevant adjustments to be made as well as the critical assumptions under which the transfer pricing methodology approved will remain valid.
8. The IPRA has issued sample templates for the application form for the APAs and for the preliminary consultation.
9. As noted above, the APA can be unilateral, bilateral or multilateral. The Greek tax authorities are not bound by an APA that the taxpayer has concluded with another country. Of course, a unilateral APA cannot exlude the risk of double taxation.
10. To the best of our knowledge, up until now only two unilateral APAs have been concluded in Greece, whereas there are several pending APA applications in progress (among which at least one refers to a bilateral APA), for which the relevant procedure has not yet been completed. It is concluded that no extensive experience exists so far as regards APAs.
11. To be also noted, that Greece has recently transposed into its domestic legislation the EU Directive 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, adding advance cross border rulings and advance pricing arrangements ("APAs) within the scope of automatic exchange of information, pursuant to Law 4474/2017.
12. Apart from the above, i.e. APAs and the interpretative circulars of article 9 of the GCTP, no other case of advance tax ruling is currently stipulated by the Greek tax provisions.

Question 2
13. Regarding the procedure, a request for an APA should be submitted to the Greek Ministry of Finance's Directorate for the General Secretariat of Tax Audits and Public Revenue. An APA request comprises four stages, i.e. the pre-filing/informal application, the formal request/application, the evaluation and negotiation of the APA and the formal request/agreement.

14. During the pre-filing stage a meeting will take place between the relevant parties to allow an initial assessment of the likely success of the APA. The pre-filing stage will allow the Greek competent authority to make a reasoned judgment on whether the application will be acceptable, which will be fed back to the Greek applicant. Feedback will cover whether the application is likely to be accepted, indicate any aspects that might be viewed as controversial and make suggestions for the content of the APA application. Conclusions from the pre-filing stage are not binding for any party and are confidential.
15. Formal application/request is submitted to the competent authority within thirty (30) days from the pre-filing stage. Following submission of the formal APA application the Greek competent authority may request further information and clarification from the taxpayer, within a reasonable time. Although the wording of the law seems to refer only to unilateral APAs, the guidelines also provide the option for the taxpayer to file an application requiring consultation with foreign tax authorities. Where foreign tax authorities are involved further information may be obtained through the mutual agreement procedures provided under the relevant tax treaty for the avoidance of double taxation.
16. The APA request is evaluated by the Greek competent authority following which a position paper is issued which should set out the view of the tax administration together with their rationale. Within 10 days from the issuance of the position paper a meeting must be set with the taxpayer. If consultation with foreign tax authorities is required, the meeting is set after the completion of this process with information exchange and will include all foreign parties involved. The taxpayer will receive an invitation at least 20 days in advance of the meeting date. The formal agreement will be provided within 20 days of the meeting. The duration of the evaluation and negotiation stage and the formal agreement stage cannot exceed 120 days from the submission of the application for the APA program, unless consultation with foreign tax authorities is required. The duration of a Greek APA cannot exceed four years.
17. The official request for the grant of an APA should include at a minimum the applicant's data, the data of all related parties, including permanent establishments, associated with the intercompany transactions covered by the proposed APA, the group structure, a description of the relevant intercompany transactions, the proposed transfer pricing method, the critical assumptions on which the APA proposition is based (functional, legal and economic circumstances critical for the price setting), the detailed description of the reasons for which the applicant considers that the suggested approach is appropriate for determining the arm's length transfer prices of the transactions concerned and the duration of the APA requested. The critical assumptions must be based, to the extent possible, on verifiable, reliable and uncontrolled data. Furthermore, the taxpayer may also include a request for competent authority negotiation for the conclusion of a bilateral APA between Greece and the country of residence of the other party in the intercompany transaction, with which there exists a double taxation treaty,

containing a Mutual Agreement Procedure clause. In this case, a similar request should be filed with the tax administration of the other country.
18. The supporting documents submitted would vary depending on each case at hand. Indicatively, they may include industry and market trends that are expected to influence the value and supply chain, to the extent possible supported by surveys or economic studies, description of the business strategy, including projections used in business plans and budget forecasts, information regarding business prospects and the competition, as well as information about the relevant promotion, production or R&D strategy, functional analysis, including risks assumed and assets used concerning the relevant intercompany transactions, the reasons why an applicant considers an APA to be appropriate for the particular intercompany transaction, details on the suggested transfer pricing method and the reasons why the suggested approach is in line with the arm's length principle, a list of all APAs already concluded by any related parties, in Greece or outside Greece, concerning the same or related transactions, detailed financial information of all parties in the APA for the last three years, a list and description of all agreements concluded between related parties that affect the transactions covered by the APA.
19. The tax audit directorate authority evaluates the APA application and delivers its views on the APA's terms. To this extent the tax office can ask the applicant to provide additional information. The applicant can, as well, throughout the procedure file on his own initiative any additional information he deems relevant.
20. The tax audit directorate can also ask foreign tax authorities for any information it considers critical, following the procedures on information exchange provided by tax treaties. In the case where the application includes a request for competent authority procedure, the tax directorate enters into consultation in accordance with the mutual agreement procedure clause provided by the respective tax treaty. The official exchange of views is performed through exchange of position papers between the competent authorities of the contracting states. During this stage, informal contacts can take place between the applicant and the tax audit authority.
21. When the procedure described above is concluded, the tax directorate prepares a report presenting its suggestions and the conclusions reached. This report is provided to the applicant and, for bilateral APAs, to the competent authority of the countries involved in the procedure.
22. This report shall contain the conclusion reached by the competent tax authority and its reasoning, the reason for the potential rejection or amendment of the approach proposed by the applicant, the main facts supporting the conclusions of the tax authority, which were included in the application or came to the attention of the tax administration during the evaluation process, information required for the verification of the critical assumptions, suggestions on how the implementation of the agreement will be monitored and brief reference to the relevant Greek legislation rules and to the applicable tax treaty.

23. Within 10 days of drafting said report, a final hearing with the applicant shall be arranged. This deadline does not apply in the event where consultations with foreign tax offices have to take place. In such case the deadline starts from the conclusion of the procedures in all countries involved. The report along with the invitation to the final meeting is provided to the applicant 20 days prior to the meeting.
24. During this meeting, the parties[4] try to reach a mutually acceptable agreement on the terms of the APA[5]. Within 20 days of the hearing and according to the content of the minutes, the decision on the APA is issued by the tax authority. This decision, along with the minutes, is provided to the applicant.
25. The decree sets the minimum content of the decision of the tax authority. The APA decision must contain the data of the applicant, the intercompany transactions covered, information on the related counterparties of the covered intercompany transactions, the conclusion reached by the tax authority on the approval or not of the APA application.
26. In the case where the APA is concluded, the relevant decision shall also contain information on the duration of the APA agreement, details on the methodology agreed for the pricing of the intercompany transactions covered, the critical assumptions applied and, if necessary, any acceptable deviation margin therefrom, documentation that must be retained during the term of the agreement in order for the tax administration to be able to monitor its implementation, facts or circumstances that might lead to a revision of the APA. If necessary, the decision might also include facts or circumstances that could lead to a potential early or even retrospective termination of the APA.
27. The new Law 4410/2016 introduced amendments as per the deadline for the issuance of the decision of the General Secretariat approving or rejecting the APA. The respective deadline was extended from 120 days to 18 months. Not fail to mention that the newly introduced provisions prescribe that the General Secretary of Public Revenues is entitled to extend, with a respective Circular, the deadline for issuance of the relevant decision approving or rejecting the application for the APA from 18 months to 36 months, following the submission of a relevant request. However, in case of a bilateral or multilateral APA such time constraint does not apply, since extended negotiations may need to take place. The decision is valid for a maximum of four years and cannot concern financials years prior to the year the application was filed.
28. In cases when an APA is concluded, the taxpayer is obliged to file each financial year, within the income tax return filing due date, a separate annual compliance report on the compliance with the APA terms and conditions for the previous financial year. The report must contain all data supporting that the critical

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[4]. The taxpayer can be represented by its legal representative or any other person duly appointed.

[5]. If an agreement is reached, minutes on the acceptance of the APA are drafted and signed by the involved parties. If no consensus is reached or if the applicant is not present at the meeting, there are drafted minutes of rejection of the APA.

assumptions were duly satisfied. If it is stated that the critical assumptions have not been fulfilled, the taxpayer must submit suggestions on any relevant adjustments to be made. The tax administration is entitled to address any additional questions it might have to the taxpayer. In any case, any likely deviation must be expressly indicated in the report. If the compliance report is not filed, the APA is considered to be annulled starting from the year for which the compliance report was not filed.

29. Furthermore, the APA may be revised, revoked or cancelled in case the taxpayer does not comply with the terms thereof or the critical assumptions change or are proved incorrect or in case of a different outcome arising in the context of the mutual agreement procedure pursuant to the relevant bilateral tax treaty or in the context of the convention of the member states of the European Union on the correction of profits of associated enterprises. For the revocation or the annulment of the APA, the competent tax authority must draft a special report to be provided to the taxpayer. A hearing is arranged in order for the revocation/annulment to be examined and the taxpayer is notified at least 10 days prior to the hearing. The decision must be delivered within 30 days of the hearing. The decision shall also determine the time it enters into effect. In the case where the decision on the APA is revoked, it is considered as if never issued.

30. It ensues from the above that, to the best of our knowledge, Greek tax authorities do not systematically verify the facts and circumstances mentioned in the request for an APA, for example through on-the-spot tax audits, either ex post or ex ante etc. However, within the process of conducting an APA, tax authorities seek to confirm the data being provided, the critical assumptions taken into account and the information presented to them, within the course of the negotiations handled, whereas they also examine the annual compliance report as per the critical assumptions and the facts and circumstances in force, but without ordering a tax audit, as part of the procedure followed.

Question 3

31. Such a requirement for verification of the tax treatment for a particular payment/transaction by other county, as part of a tax audit is not extensively been provided in the Greek tax law and is not applicable in practice.

32. A typical but isolated example of such a requirement could be the "Anti-hybrid rule" introduced by virtue of Law 4378/2016, under which the application of the participation exemption for payments received by EU subsidiaries is disallowed, to the extent that such payments are tax deductible at the level of the subsidiary.

33. Especially with regard to intercompany transactions and transfer pricing, such a requirement could be served by the CbC Report. However, Greece had not enacted the respective legal framework until the issuance of Law 4484/2017, although, the General Secretariat of Public Revenues (currently Director of the IPRA) has already signed on 27/01/2016 the "Multilateral Competent Authority Agreement on the Exchange of Country by Country Reports". Law 4484/2017, which was published in

the Official Gazette on August 01, 2017 and is effective from 05.06.2017 onwards, covers, among others, the automatic exchange of Country by Country Reports ("CbC Reports"). By virtue of the said Law, Greece transposed into its domestic legislation the Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation and more specifically, in the field of transfer pricing, as regards the exchange of CbC Reports. The Law specifically defines the scope and conditions of mandatory automatic exchange of information on the CbC Report, the respective procedure as well as the penalties imposed in case of non-compliance. Such penalties are equal to 20.000 euros in case of non-submission of the CbC Report and 10.000 euros in case of non-timely submission or submission of inaccurate CbC Report.

34. Consequently, it should be stressed out that, within the course of a tax audit, the tax authorities will not seek evidence on the tax treatment of a given transaction/payment/arrangement in another country as a prerequisite, but they will proceed to a relevant tax adjustment, if they consider that there is a violation of the tax legislation or that there is a legal basis for such an adjustment in the applicable tax provisions, usually without taking into account the tax treatment abroad. Therefore, in case a taxpayer considers that he is subject to double taxation, following the issuance of a tax assessment act by the competent Greek tax authorities, within the frame of a tax audit in Greece, he can proceed to the MAP, which is integrated within Greek tax law, pursuant to the new Article 63A of the GCTP, enacted by Law 4438/2016, in line with double tax treaties concluded by Greece.

35. The MAP can be invoked to resolve issues arising in the context of an applicable double tax treaty and also respective transfer pricing issues (according to Article 9 of the Model Tax Convention and the respective DTAs). Under this measure, the Greek tax authorities will have the power to conduct the MAP with the relevant foreign tax authorities, and the results of a MAP will be effective upon issuance of a mutual agreement decision. The taxpayer will be notified of the results of a MAP, and should accept them within a 60 day period. If the taxpayer accepts the results, a respective mutual agreement decision will be issued. This decision is not subject to appeal, nor may the taxpayer resort to any other legal remedy against it.

36. A decision (1049/2017) was issued by the Director of the IPRA[6], published in the Greek government gazette on 7 April 2017, contains comprehensive guidance on the application of the MAP in Greece's tax treaties. The decision is applicable for MAP requests filed as from the date of its publication. The IPRA decision provides that the MAP will be applicable only to taxes that are explicitly covered by the relevant tax treaty and to persons that are residents of one of the contracting states based on the provisions of the treaty. A taxpayer may seek competent authority assistance under a MAP with respect to issues, such as dual residence, cases relating to the deduction of withholding tax in the source country, i.e. the application of a withholding tax rate

[6]. Referred to as the General Secretary of Public Revenue prior to 1 January 2017.

that is higher than the rate provided for by the relevant treaty, cases of taxation of a particular type of income in one contracting state, where the applicable treaty allocates exclusive taxing rights to the other state, cases where both contracting states take the position that they have the right to impose tax, conflicts arising from the characterization of income; attribution of profits to permanent establishments and cases where a taxpayer is subject to additional tax in one country as a result of a transfer pricing adjustment made in the other country.

37. Apart from the above, a decision (1129/2017) issued by the IPRA (referred to as the General Secretary of Public Revenue prior to 1 January 2017), published in the Greek government gazette on 30 August 2017, contains comprehensive guidance on the application of the mutual agreement procedure (MAP) in the Arbitration Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/463/EEC, hereinafter referred to as "AC"), which was ratified in Greece with L. 2216/1994. The provisions of the decision 1129/2017 bear a lot of similarities with the first Decision 1049/2017. These similarities mainly refer to the scope of application, the competent authority, the evaluation and consultation procedure, the content of the MAP request and the results of the MAP. However, the following particularities should be mentioned:

38. In case of AC, article 7 of the Decision 1129/2017 prescribes that the competent authority of a Contracting State shall not be obliged to initiate the mutual agreement procedure or to set up the advisory commission referred to in Article 7 where legal or administrative proceedings have resulted in a final ruling that by actions giving rise to an adjustment of transfers of profits under Article 4 one of the enterprises concerned is liable to a serious penalty. Greece has determined the concept of "liability to a serious penalty" in its Unilateral Declaration included in the Official Journal of the European Communities (C160/30-6-2005), according to which the term 'serious penalties' includes administrative penalties for serious tax infringements, as well as criminal penalties for offences committed with respect to the tax laws in accordance with the relevant provisions of the Code of Books and Records, of the Income Tax Code, as well as all specific provisions which define the administrative and criminal penalties in tax law.

39. Article 10 of Decision 1129/2017 stipulates that in case that the competent authorities concerned fail to reach an agreement that eliminates the double taxation referred to in Article 6 within two years of the date on which the case was first submitted to one of the competent authorities in accordance with Article 6, they shall set up an advisory commission charged with delivering its opinion on the elimination of the double taxation in question, pursuant to article 9 of the AC.

Following the issuance of this second Decision of the IPRA, a more comprehensive framework of procedures for resolving double taxation issues is now being developed and it is interesting to see how the relevant procedures will be put into practice by the competent authorities.

Question 4

40. As regards APAs, in the field of transfer pricing, tax authorities have no discretion to disregard them, but they are obliged to comply with them, either unilateral or bilateral/multilateral, to the extent that all respective requirements are cumulatively met, i.e. an annual compliance report is timely prepared and submitted, which documents and confirms compliance with the terms and conditions as well as the critical assumptions of the APA conducted. In other words, it should be proven that all terms and conditions of the APA are met and that no substantial modification exists as per the critical assumptions, haven being taken into account and the facts and circumstances of the case as well. In any case, any likely deviation must be expressly indicated in the report. If the compliance report is not filed, the APA is considered to be annulled starting from the year for which the compliance report was not filed.

41. It should be clarified, though, that the Greek tax authorities are bound by the APAs concluded by them and not by unilateral APAs between a foreign company and the tax authorities of its state of residence, even in case that such unilateral APAs refer to an intercompany transaction, to which the Greek entity constitutes a counterparty. For example, in case a Greek entity, member of a multinational Group, conducts an intercompany transaction (i.e. purchase of goods) with a French affiliated company, and the latter has acquired a unilateral APA with the French tax authorities, concerning the same intercompany transaction (the purchase of goods), such a unilateral APA is not in principle binding also for the Greek tax authorities, but only for the French tax authorities. The case should be completely different, provided that a bilateral APA had been concluded among the group entities and both the French and the Greek tax authorities. In such a case, the bilateral APA would also be binding for the Greek tax authorities.

42. With regard to the interpretative circulars issued by the Independent Authority of Public Revenues, provided for in article 9 of the GCTP for purposes of interpretation and application of the tax legislation, the said circulars (in contrast to individual replies) are, as noted to answer to question 1, in principle, binding for the tax administration until their amendment or revocation, but not for the taxpayers, as already mentioned above. In other words, in case of a tax audit, the tax auditors are not bound from the above circulars and may interpret and apply the tax provisions according to the principle of tax legality. Nevertheless, in case where the taxpayers were following the above circulars regarding their tax obligations, tax authorities could not impose against them a penalty for not filing tax declaration or filing of inaccurate tax declaration. The GCTP does not explicitly provide for the issuance of written answers on taxpayer's written questions. Nevertheless, according to the practice followed so far, tax authorities continue to issue written answers on taxpayer's written questions regarding diverse tax matters. These tax rulings are not

binding on tax authorities, although they generally follow written answers (see also answer to question 1 above for further details)[7].

Question 5

43. According to Article 5 of the GITC, the concepts of "income derived in Greece" and "income derived abroad" are being defined, whereas Article 4 provides for the definitions of "tax residence" for both individuals and legal entities. Moreover, article 6 includes a detailed definition of permanent establishment, on the basis of the respective concept of the OECD Model Tax Convention. Furthermore, article 9 of the GITC has introduced a broad provision on foreign tax credit, applicable both to individuals and legal entities. More specifically, it is specified that that the income tax payable is reduced by the amount of tax paid abroad for the same income (credit method), whereas it is clarified that the reduction of income tax cannot exceed the corresponding amount of tax for said income in Greece.

44. When allocating profits within a legal entity that operates cross-border, some countries have adopted an approach where all profits will be allocated to the headquarters (the "head office"), except for those profits that are clearly attributable to local activities (the "permanent establishment"). Not fail to mention, though, that the Authorized OECD Approach ("AOA") has not explicitly been adopted by Greece, although Greek transfer pricing rules are equally applicable in case of intragroup dealings between headquarters and permanent establishments.

45. In recent Commission decisions, the Commission has criticized the application of a one-sided transfer pricing methods by a tax authority, as this authority does not verify whether there is at least some chance that profits shifted abroad will be taxed there. In Greece, according to the practice followed so far, one-sided TP methods are extensively used for documentation purposes and, in most of the cases, benchmarking studies are conducted, aiming to provide for an arm's length interquartile range exclusively for the business activity of the tested party, which is either the Greek entity or the related entity, located abroad, which is the counterparty to the intercompany transaction subject to documentation. This means that either the profitability of the Greek entity or of the foreign entity is checked, from a TP perspective. It should be highlighted, though, that the Greek tax authorities are very aggressive, while conducting transfer pricing audits, seeking to re-adjust the interquartile range, by rejecting companies from the final sample, in terms of non-comparability or even reject the whole benchmarking study and conducting their own. However, they tend to heavily scrutinize the intercompany result exclusively in terms of the profitability of the Greek entity, which is subject to tax in Greece and not with the perspective of allocating any residual profit to the country, where the counterparty is established and located.

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[7]. IBFD, Annex: Legal Aspects of practice of tax rulings for companies across member states, Ref.Ares (2015) 717438 – 19/02/2015.

46. As a general remark as regards the flexibility of Greek tax authorities regarding, for example, a potential profit decrease in Greece, we would only comment that, as any other tax authorities, they are primarily trying to secure the right taxable basis for Greece. Consequently, they would be reluctant to accept a decrease of a profitability that has been steadily high for the last years, unless such profitability has fluctuated during past years and this can be explained by the market instability or other market and business reasons. However, even in such a case, the Greek tax authorities are anticipated to be aggressive and insist on proceeding to a respective tax adjustment and their willingness to accept any opposite arguments is highly questioned.
47. However, in general and apart from the above, up until now, Greece has no specific legal and transfer pricing framework, according to which it is checked whether any remaining (residual) income is subject to tax or it is actually taxed by another country, in order for a respective correction mechanism to be activated to ensure that the remainder will not go untaxed, but it will be taxed in another country, so as for double non-taxation to be eliminated.
48. It is supposed that the enactment of CbC Report rules, pursuant to Law 4484/2017, which transposed into the Greek tax legislation the Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU[8] as regards mandatory automatic exchange of information in the field of taxation and more specifically, in the field of transfer pricing, as regards the exchange of CbC Reports, will probably lead to such an outcome, since the CbC Report will include all necessary information as per the geographical allocation of profits, taxes and outsources among the related parties within a multinational group.

Question 6

49. In general, pursuant to article 3 of the GITC, a taxpayer with tax residence in Greece is subject to tax for worldwide income, whereas a taxpayer without a tax residence in Greece is subject to tax exclusively for the income arising in Greece. Article 4 of the GITC provides for the definition and the exact meaning of "tax residence" for both individuals and legal entities, for which taxation on the basis of the place of exercise of their effective management is adopted. In addition, article 6 provides for the definition of permanent establishment, in line with the respective definition included in the OECD Model Convention on the Double Tax Treaties for the Avoidance of Double Taxation. Furthermore, article 9 of the GITC introduces a general and broad provision on foreign tax credit, applicable both to individuals and legal entities, according to which the credit method applies and it is prescribed that

[8]. The initial Directive 2011/16/EU regarding the mandatory automatic exchange of information in the field of taxation, has been transposed into the Greek tax legislation by Law 4170/2013 (articles 1 to 25). The Directives 2014/107/EU and 2015/2376/EU, which have modified the initial Directive, have been transposed into the Greek tax legislation by Law 4378/2016 (articles 1 to 4) and Law 4474/2017 (articles 1 to 6) respectively.

the income tax payable is reduced by the amount of tax paid abroad for the same income. However, it is specified that the reduction of income tax cannot exceed the corresponding amount of tax for said income in Greece.

50. In Greece, the arm's length principle has explicitly been adopted, as stipulated in article 50 of the GITC where it is mentioned in paragraph 1 that transactions between related parties should be conducted under the same terms and conditions with comparable uncontrolled transactions, i.e. transactions of the same or similar nature conducted between unrelated parties (please refer to Question No. 7 for further details).

51. Furthermore, to be noted that according to GITC, it is explicitly provided that every business reorganization/restructuring that consists of a transfer of operations, assets, risks or business opportunities and is realized by or involves related entities should be made according to the arm's length principle. Actually, it is provided that the transfer or the granting of a right to use goodwill or intangible assets that result from business restructurings should be made in return for a consideration, according to the arm's length principle and taking into consideration the total value of the transfer package deal. Additionally, the imposition of adjustments is provided in case of inability of the taxpayer to document the non transfer or grant of right to use of material intangible assets or assets or the payment of an arm's length consideration. This provision significantly broadens the ambit of application of tax rules in case of intra-group restructurings that until the enactment of GITC (L. 4172/2013) were covered quite insufficiently by the provisions on the transfer of business.

52. Apart from the above, Greece has not explicitly adopted the Authorized OECD Approach ("AOA"), according to which for the allocation of profits to permanent establishments a factual and functional analysis initially takes place and, subsequently, the transfer pricing rules apply by analogy. However, as it ensues from article 50 of the GITC, as regards transfer pricing and the application of the arm's length principle in conjunction with article 2, which provides for the definition of the concept of "associated enterprise" as well as "legal entity" [9], transfer pricing rules as well as the respective documentation requirements enacted by article 21 of the GCTP as regards the compilation of the TP documentation files equally apply to the intragroup transactions between permanent establishments and head offices. Further to the above, according to the respective, previously-mentioned transfer pricing provisions as well as the practice followed so far, transactions between head offices and permanent establishments are equally subject to the applicable transfer pricing documentation rules and should be compliant with the arm's length principle. This is also explicitly confirmed by the Interpretative Circular of the General Secretariat of Public Revenues 1097/2014.

[9]. The definition of "legal entities" is very broad, covering every form of organization, corporate or not, irrespective of legal personality and profit or non-profit making character, that is not an individual or legal entity.

Question 7

53. Greece has adopted the arm's length pricing / transfer pricing principle by means of formal rules and such rules have formal link to the OECD's transfer pricing guidelines.

54. Historically, the Greek Income Tax Code has adopted the arm's length principle with respect to intercompany transactions since 1980 (article 55 of Law 1041/1980). Specifically, article 39 of the Greek Income Tax Code provided that when the price paid to (or received by) related enterprises for goods sold or services rendered differs unjustifiably from the price that would be agreed upon by unrelated parties under open market conditions, the difference is added to the taxable profits of the company that either paid the higher or received the lower price. If the tax authorities concluded upon audit that a non-arm's-length transfer pricing policy existed, that determination would trigger a separate fine of 10% of the amount of the price difference, as well as additional corporate tax and surcharges for filing inaccurate corporate tax returns.

55. Later in 2008 transfer pricing documentation rules were adopted firstly by the Ministry of Development (Market Surveillance Department) (Law 3728/2008), as a means to exercise pressure to consumer goods companies not to increase the market prices of their goods, and later by the Ministry of Finance (Law 3775/2009, which has amended the above provisions of the Income Tax Code). After a period of four years, where the two legislatives frameworks coexisted, Law 3728/2008 (applied for transactions executed in the 2008, 2009 and 2010 financial years, by virtue of article 11 of L. 4110/2013 as well as Interpretative Circular[10] issued in 2013) of the Ministry of Development was abolished.

56. It should be pointed out that, apart from the political commitment of Greece to implement the OECD TP Guidelines, as an OECD member[11], Ministerial Circular A2-8092/2008 of the Ministry of Development referred to the approved OECD transfer pricing methods of the OECD Transfer Pricing Guidelines, whereas article 39, paragraph 6, of L. 2238/1994 mentioned that for the examination of transfer pricing cases the internationally accepted standard of OECD Transfer Pricing Guidelines is taken into account by the tax authorities.

57. As of 1 January 2014 the applicable legislation in Greece regarding the arm's length principle/ transfer pricing principle is the new Income Tax Code (Law 4172/2013 which has replaced Law 2238/1994) and the Tax Procedures Code (Law 4174/2013).

58. According to the new Greek Income Tax Code (articles 2, 50 and 51), intra-group transactions should be conform to the arm's length principle when carried out cross-border or domestically, under different economic or commercial conditions from those that would apply between non associated-parties. So any profits that would be

[10]. ΔΕΛ Γ 1139416 ΕΞ 2013.

[11]. see Tsourouflis A., Transfer Pricing, Nomiki Bibliothiki 2010.

derived by a domestic entity, but were not derived due to the application of those different economic or commercial conditions, will be included in the taxable income of the local company to the extent that such income does not decrease the amount of tax paid. More specifically, by virtue of Article 50 of L.4172/2013, *"when transactions are entered into between domestic enterprises or between a foreign and a domestic enterprise with financial terms different than those which would have been agreed between unrelated parties ("arm's length principle"), the profits that would have been achieved and were not because of these terms are considered profit of that company without affecting the validity of its accounting books and records".* It ensues that article 50 par. 1 of the GITC provides for the definition of the arm's length principle, which is the internationally recognized standard for the allocation of profits between associated entities. Moreover, paragraph 2 of article 50 of the GITC states that *"The provisions of the previous paragraph are interpreted and apply in accordance with the OECD Transfer Pricing Guidelines".*

59. The Greek law and, more specifically, article 21 of the GCTP provides some requirements related to transfer pricing documentation submitted to the Greek tax authorities. The first requirement is related to the filing of specific data included in the "Summarized Table of Transfer Pricing Information" or "Summary Information Table", hereinafter referred to as "SIT" to the Ministry of Finance for transactions between related parties[12]. The second requirement is related to the transfer pricing documentation in order to justify compliance with the arm's length principle. More specifically, legal entities operating in Greece are required to prepare a transfer pricing documentation file for their transactions with Greek and foreign related entities[13]. Furthermore, foreign legal persons earning income from real estate property in Greece have also the obligation to comply with the transfer pricing requirements. Greek companies are required to file to the tax authorities a master file

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[12]. The SIT is submitted electronically to the tax administration on an annual basis.

[13]. Nevertheless, transactions between related parties that do not exceed the value of 100.000 euros annually are exempted from the documentation requirement provided that the gross revenues do not exceed the amount of 5 million euros. If the gross revenues exceed the amount of 5 million, the threshold for transfer pricing documentation increases to 200.000 euros.

and a local file[14]. The content of the local file should also include a justification of any tax adjustments to the profits that aim to comply with the arm's length principle.

60. As per the documentation requirements, to be noted, however, that, although Greece has signed on 27/01/2016 the "Multilateral Competent Authority Agreement on the Exchange of Country by Country Reports", specific legislation as per the Country-by-Country Report ("CbCR") had not been enacted until the issuance of Law 4484/2017, which transposed into the Greek tax legislation the Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation and more specifically, in the field of transfer pricing, as regards the exchange of CbC Reports[15].

61. Furthermore, the GITC explicitly refers to OECD transfer pricing guidelines regarding the interpretation and the application of its provisions relating to inter-company transactions. More specifically, the decree of application of the above legislation[16] contains a brief description of factors determining comparability for the purpose of testing the arm's length nature of a controlled transaction. These comparability factors are in line with the OECD transfer pricing guidelines. The Decree makes also extensive reference to the OECD transfer pricing methods[17]. Moreover, according to the practice followed so far, the documentation of intragroup transactions in terms of compliance with the arm's length principle is based upon the OECD approved transfer pricing methods.

62. Furthermore, according to Article 51 of GITC, any business restructuring between associated enterprises, which includes reorganization of functions, assets, risks or business opportunities, constitutes a transfer of functions between related parties which has to be charged according to the arm's length principle, since it is concluded

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[14]. Pursuant to the recently issued Law 4410/2016, which introduced amendments on the Greek Code of Tax Procedures and, among other issues, on the TP Documentation Rules (article 21 Law 4174/2013), the deadline for the compilation of the TP Documentation File and the submission of the SIT has been modified. Instead of the prior deadline of four months following the fiscal year end, according to the new provisions, the TP Documentation File, consisting of the Basic TP File and the Greek TP File, should be compiled until the expiration of the deadline for the submission of the annual corporate income tax return. The TP Documentation file is accompanied by the SIT, which should also be submitted electronically within the same deadline. This practically means that the deadline now expires after the lapse of six months following the fiscal year end (e.g. for companies with FYE on 31/12/2017 the relevant deadline for the compilation of the TP Documentation File and the submission of the SIT expires on 30/6/2018, instead of 30/4/2018, which was the expiration date, pursuant to the previous regime). This provision is applicable for TP documentation files which are prepared for intragroup transactions of fiscal years commencing on 1.1.2015 onwards.

[15]. Law 4484/2017 was published in the Official Government Gazette on August 01 2017.

[16]. Circular 1097/2014, as modified by Circular 1144/2014 and Circular 1142/2015, especially with regard to the application of CUP method and the methodology of benchmarking studies and Circular 1227/2015 concerning the versions of databases.

[17]. To be noted that under the previous regime of both L. 3728/2008 and L. 2238/1994, as modified by L. 4110/2013, the respective interpretative circulars issued (A2-8092/2008 of the Ministry of Development, as well as circular 1179/2013, issued within the frame of L. 4110/2013, which amended L. 2238/1994, under the previously applicable regime) also referred to the OECD transfer pricing methods for the documentation of intragroup transactions.

that an significant intangible asset is being transferred as a result of the transfer of the said functions.

Question 8

63. Year-end transfer pricing adjustments through the issuance of debit/credit invoices in order to achieve results compliant with the arm's length principle ("ALP") might generally be acceptable in Greece. However, they need to be substantiated and supported by both a functional and factual analysis. Further, the actual profitability ratios (i.e. following these adjustments) will be tested against the returns of third comparable companies.

64. Transfer pricing rules aim at ensuring that the taxpayer's reported taxable profit is right and not reduced through intercompany transactions and, in this sense, any TP adjustments by the tax authorities can only be made to the extent that they do not reduce the taxable income.

65. Generally, a transfer pricing adjustment needs to appear in consistency with and supported by the functional analysis of the said intercompany transaction, and the factual circumstances surrounding the said commercial dealing[18].

66. Pursuant to a literal interpretation of article 50 GITC, in case of non-compliance with the arm's length principle, the competent tax authorities may unilaterally proceed only to an upward adjustment of profits, since it is explicitly mentioned that *"(…) the profits that would have been achieved and were not because of these terms are considered profit of that company without affecting the validity of its accounting books and records"*[19]. On the contrary, it ensues that the tax authorities are not authorized to proceed to downward adjustments of profits, although this is not explicitly provided for in the relevant provision. Moreover, according to the practice followed so far, no downward adjustment has ever been effected by the tax authorities, resulting in the reduction of taxable profits of a Greek entity subject to transfer pricing rules.

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[18]. Therefore, the following key concerns need further examination. The application of such policy should be depicted in the Group's transfer pricing policy and should be in accordance with the company's functional profile. As any "true-up" or "true-down" (depending on the case) mechanism plays a key role in the allocation of risks between the affiliated entities, the company's functional analysis should provide support as regards the effectiveness of the mechanism to align business rewards with risks, as these would have been expected to be reflected in an arm's length situation. The application of such policy should be supported by the factual circumstances surrounding the business transactions between the group members: what is the risk that is materialized and which is the party that should bear it from both points of view, i.e. contractually and in practice. In the event that the application of such policy is not supported by the Group's policy and the Greek company's functional and risk profile, nor by the factual circumstances, it may trigger questions within the framework of a tax audit regarding the likelihood of having a shift of functions and risks from the Greek company to the affiliated counterparty (i.e. the Greek company changing from a Distributor to an LRD).

[19]. Let us take the following simplified example: A product is sold from one group company to another at a price of 100. According to the tax authorities of the selling state an at arm's length price should have been 120 and it adjusts taxable profit upwards accordingly.

67. Taking this into account, the General Secretariat of Public Revenues clarified, by virtue of the Interpretative Circular[20] published in 2016, that non-tax deductible expenses that are being adjusted for tax purposes by the taxpayer himself with the submission of the relevant annual income tax return, do not fall within TP documentation requirements, even if they refer to intercompany transactions. However, such intercompany transactions, for which a relevant tax adjustment has been effected, should be included in both the Summary Information Table and the Transfer Pricing Documentation File, for completion purposes, with the indication that these transactions refer to non-tax deductible expenses, which have been adjusted for tax purposes with the submission of the annual income tax return.
68. Moreover, it should be clarified that the tax authorities are not very willing to accept downward, year-end adjustments effected by the taxpayers, resulting in the decrease of the Greek entity's operating profitability, or, even worse, the generation of tax losses (although a court decision No. 1088/2013 has been issued by the Athens Administrative Court of Appeal, according to which, operating losses do not imply a priori a violation of the arm's length principle) even in case that such a year-end adjustment has a solid business or commercial rationale and is justified by valid commercial reasons as well as the applicable transfer pricing rules.
69. In other words: i) in case of a true-up TP adjustment, the additional profit will be recognized and taxed at the applicable tax rate, whereas ii) in case of a true-down TP adjustment, it should be noted that in general Greek tax auditors would be rather skeptical and reluctant and would examine whether this is complying with a written agreement or an explicit Group TP policy and if the TP adjustment mechanism applies consistently throughout the years. In addition, it should be adequately described and supported in a TP File; provided that all these are met, its tax recognition would be enhanced, but it should not be considered as indisputable.
70. According to both the new GITC as well as the GCTP, which were enacted within the frame of the tax reform that took place in Greece in 2013 (article 50 and 51 of L. 4172/2013 and article 21 of L. 4174/2013) and the old Income Tax Code (article 39 and 39 A of Law 2238/1994) Greek tax authorities had the competence to make an adjustment for violation of transfer pricing principle[21].
71. In case where the tax authorities make a transfer pricing adjustment, the taxpayer may appeal before a special committee of the Independent Authority of Public Revenue, the Directorate for Dispute Resolution ("DDR") by submitting an administrative recourse ("out-of-court appeal). The DDR has to issue a decision

[20]. No. ΔΕΑΦΒ 1054893 ΕΞ 2016/17.3.2016.

[21]. Regarding the transfer pricing adjustment, the GITC (article 58) provides for the imposition of specific penalties for inaccurate filing of the income tax return. More specifically, it stipulates that in the case that the additional tax is between 5% and 20% of the tax amount deriving from the initial tax return, the penalty is equal to 10%. In the case that the additional tax is greater than 20% and 50% of the tax amount deriving from the initial tax return, the penalty is equal to 25%. Finally, in the case that the additional tax is greater than 50% of the tax amount deriving from the initial tax return, the penalty is equal to 100%.

within a period of 120 days of the filing of the special administrative appeal. If the said appeal is explicitly rejected or the 120 days deadline elapses without issuance of any respective decision (considered as a silent rejection of the appeal) the taxpayer may appeal before the administrative courts within thirty (30) days of the notification of the decision of the committee or the silent rejection of his appeal.

Question 9

72. Initially, it could be supported that a respective (year-end) TP adjustment should in principle be acceptable. In any case, a TP adjustment has to result in an arm's length price, which in most cases would be supported through a benchmarking study. From a Greek transfer pricing perspective, when a benchmarking study is used to document intercompany transactions, any result that falls within the interquartile range is considered as compliant with the arm's length principle. For instance, in case the EBIT margin of the Greek company falls below the aforementioned interquartile range, the company should receive a price adjustment (true-up) in order for its EBIT margin to be within the IQR range. Again as previously mentioned, tax auditors are quite aggressive towards true down adjustments and they would tend to scrutinize the benchmarking studies and the relevant arrangements.

73. As previously mentioned, tax auditors are quite sceptical with true down adjustments and we have seen in the past to disallow them on the basis of general corporate tax conditions (non-productivity, resulting in non-deductibility). However, these cases refer to the period where no TP documentation rules existed in Greece. We consider that, currently, true down adjustments are better defendable in terms of their tax recognition but this would generally depend to the specific facts of each case, taking also into account that the Greek tax auditors are very aggressive while conducting tax and transfer pricing audits.

74. Please note that no specific rules or instructions have been released by the Greek authorities as regards the treatment of TP adjustments from a Greek customs point of view. It should be also mentioned that the Greek customs legislation is quite strict and formalistic and does not allow any room for changes in the import prices, since this would affect the basis of imposition of customs. Especially in certain industries (e.g. car industry), TP adjustments have raised significant issues from the part of the customs authorities. For this reason, it is strongly recommended to avoid TP adjustments to COGS, in cases customs duties or luxury tax are involved. The customs authorities may challenge an increase/decrease in COGS by issuing supplementary debit/credit invoices. It is possible an adjustment to COGS to lead to differentiations in the calculation of the customs taxable value of tax due and tax burdens already paid which in turn would create sufficient risk such as the imposition of certain custom penalties and issues of contraband.

75. Furthermore, there are no specific rules as regards the VAT treatment of transfer pricing adjustments in Greece, and no instructions have been released by the Greek

State in this regard. In practice, agreed TP adjustments relating to sales of specific goods and affecting the sales price are taken into consideration and are recorded in the respective VAT returns.

76. In order of a TP adjustment to be accepted, it is strongly recommended to have a written agreement between the sales entity and the principal, which will describe the functions performed by the local sales entity and would be the basis for its characterization for transfer pricing purposes (i.e. limited risk distributor). Furthermore, the agreement should adequately describe the TP adjustment mechanism and the form that this will take. Especially, if the TP adjustment is effected through a marketing support recharge, the agreement should include adequate description in which cases this will apply, what type of marketing expenses will cover, to which extent etc. Apart from the existence of a written agreement, a TP adjustment should be documented through the relevant TP file according to the provisions set out in the articles of Law 4172/2013 and Law 4174/2013 (Greek Transfer Pricing legislation) as amended and currently in force. To be noted that there is not any specific threshold/adjustment amount.

77. In general, as already mentioned under Question 8, the tax auditors are very aggressive and appear not to be willing to accept downward adjustments, resulting in a decrease of the Greek entity's profitability.

78. In case a respective tax dispute arises from the non-recognition of a downward adjustment, apart from the submission of an administrative recourse to the DDR and the subsequent filing of a court appeal, the alternative of a MAP is also provided for by the Greek tax legislation. Recently, (Law 4438/2016[22]) a new Article 63A is introduced in the Procedural Tax Code (Law 4174/2013) in order to implement the MAP. The article 63A the Procedural Tax Code is in line with double tax treaties concluded by Greece and the EU Arbitration Convention (90/436/EC) on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, which was ratified by Greece in 1994 under Law 2216/1994. The MAP can be invoked to resolve issues arising in the context of an applicable double tax treaty and also respective transfer pricing issues (according to Article 9 of the Model Tax Convention and the respective DTAs). The Greek tax authorities will have the power to conduct the MAP with the relevant foreign tax authorities. The results of a MAP will be effective upon issuance of a mutual agreement decision. The taxpayer will be notified of the results of a MAP, and should accept them within a 60 day period.

79. Furthermore, a decision (1049/2017) issued by the Director of the Independent Public Revenue Authority (IPRA) (referred to as the General Secretary of Public Revenue prior to 1 January 2017), published in the Greek government gazette on 7 April 2017, contains comprehensive guidance on the application of the mutual

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[22]. Law 4438/2016 is effective from the day of his publication in the Official Gazette on November 28 2016.

agreement procedure (MAP) in Greece's tax treaties. The decision is applicable for MAP requests filed as from the date of its publication.
80. Greece currently has 57 tax treaties, which (except for the treaty with the UK) include MAP articles that are based on article 25 of the OECD model treaty. Prior to the decision of the IPRA, the MAP had been used only sporadically in Greece because there were no relevant guidelines. The decision addresses all stages of the MAP process.
81. It is worth noting that a taxpayer may seek competent authority assistance under a MAP indicatively with respect to cases where a taxpayer is subject to additional tax in one country as a result of a transfer pricing adjustment made in the other country, as well as cases of attribution of profits to permanent establishments, among others.
82. Last but not least, Greece was one of the 68 countries and jurisdictions that participated in the signing ceremony for the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) on 7 June 2017. Each of the signatory countries now must ratify the MLI in accordance with its domestic procedures.

Question 10
83. The new GCTP (L. 4174/2013) has inserted a GAAR into the Greek tax legislation for the first time, effective from 01.01.2014 onwards[23]. Such a GAAR has been based upon the respective GAAR of the Commission Recommendation on Aggressive Tax Planning ("EU GAAR"), which was published on December 6, 2012. Due to the lack of respective experience of the tax administration, an issue may be created in relation to the interpretation and application of this provision. Such a development has contributed to a new direction of the Greek tax legislation to a substance over form doctrine.
84. According to the domestic GAAR, the Greek tax administration may disregard any artificial agreement or series or arrangements that are aimed at tax avoidance and lead to a tax advantage. Such arrangements are treated according to their commercial substance. An arrangement/series of arrangements are considered artificial if lacking commercial substance. The goal of an agreement/series of arrangements is perceived to be tax avoidance if, regardless of taxpayer's subjective intention, it is contrary to the object, spirit and purpose of the tax provisions that would otherwise apply.
85. To be noted that the WHT relief available for dividends under tax treaties overrules the GAAR, since Double Tax Treaties, ratified by a law, according to the internal ratification procedures, supersede the Greek domestic legislation, pursuant to the Greek Constitution, thus the impact of the GAAR on tax treaty relief is expected to be low.

[23]. see K. SAVVAIDOU, The introduction in the Greek tax law of a general provision against the abuse of the tax legislation in order to faire face of the tax avoidance in the light of the european and international developments, Bulletin of Tax Legislation (*Δ.Φ.Ν.)*, 2017, p.259-296 and p.323-354.

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86. Under the article 38 of the GCTP, a general provision against the abuse of possibilities and discretions of configuring legal relations provided by legislation to the extent that this aimed to tax avoidance and resulted to, due to non-taxation, to the non-payment of tax either in whole or in part, is introduced for the first time in Greek tax law. In particular, it is provided that while determining the tax amount, the tax authorities have the right to disregard any configuration of legal relations, which is artificially done (artificial manipulation) in order to avoid taxation and due to that the configuration results in obtaining tax benefits.
87. It is clarified that the tax authorities have not the discretion, as might one incorrectly consider drifted by the wording of the relevant provision, but have a circumcised power. This also arises from the continuity of the provision, which provides that in such case, when the tax authorities note an artificial manipulation as mentioned above, they are required to aim, for tax purposes, at their particular substance from a purely economic perspective.
88. The crucial elements of the actual provision, which must be met in order for the tax authorities to have the right to ignore a tax purposes legal relations' configuration and which must be proved (burden of proof) by the tax authorities, are the following:
a) Manipulation or series of manipulations.
b) This manipulation (or a series of manipulations) should be artificial.
c) The artificial manipulation should aim at anti - avoidance.
d) The artificial manipulation should result in a tax advantage.
89. a) With the option of using the term "arrangement" (manipulation), the legislator intends to include every human action in the regulatory field of the provision, mainly of course, but not only, unilateral legal acts and contracts, in order to be clear that this is a provision of general application and can thus be able to include every case which is possibly beyond the perception of the legislator at that time. It is also clarified that not only the independent actions are included, but also the complex and the combined ones. More specifically, the term "arrangement" is defined as any transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking or event and may comprise more than one step or part.
90. b) A requirement, in order for a manipulation to be disregarded by the tax authorities a manipulation, as indicated above, is to be feigned ("artificial") and by that the provision means the obvious, namely that the manipulation has no commercial or even economic substance, in other words it is an unexpected action of an entrepreneur or a professional. This is mentioned explicitly by the provision as one of the criteria that the tax authorities take into account, in order to consider the feigned (artificial) or not of a manipulation, but in fact it summarizes all the mentioned criteria[24].

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[24]. Specifically, the tax authorities shall consider whether (each alternative or more):

1) The legal description of the individual stages which consist a manipulation is incompatible with the legal substance of the whole manipulation.

2) The manipulation or a series of manipulations is applied in a manner that is not compatible with an ordinary (logical, normal) business behavior.

91. The law requires for the manipulation to be "artificial" in order for the tax authorities to have actually the right not to take it into account, it entails that if a manipulation results in a tax advantage, without being feigned in that sense, then the tax authorities have no right not to take it into account, but have to respect it.
92. c) Further, the provision clarifies that if a manipulation aims at tax evasion, this is not considered subjectively, based on the possible intention of the taxpayer / taxpayers, but objectively, based on whether it is objectively contrary to the object, the concept and the purpose of the tax provisions that would be applied otherwise. Namely, a manipulation or series of manipulations may be considered as aiming at tax avoidance if it is contrary to the object, the purpose and the intention of the tax provisions which would apply otherwise and this is assessed irrespective of the intention of the parties to avoid taxes.
93. Furthermore, the tax evasion should be the main (crucial, important, essential) purpose of the present artificial manipulation and this will occur; when any other target which is or could be attributed to the manipulation seems trivial, taking into account all the circumstances in the case.
94. d) To ascertain whether the artificial manipulation has indeed resulted in a tax advantage, the tax authorities should compare the amount of the tax due, given the present manipulation, with the amount due by the same taxpayer and under the same conditions, if this manipulation would not be taken into account.
95. It follows that in any case the tax authorities should be able to clearly substantiate how the artificially formed legal relations should be configured by the taxpayer or taxpayers, so that they have a commercial or an economic substance in order to result to the amount of the tax due without the artificial manipulation and difference tax due finally results.
96. Furthermore, Greece has introduced several Specific Anti-Avoidance Rules (“SAARs”), i.e. special legislation (lex specialis) dealing with interest deduction limitations (thin capitalization rules), transfer pricing rules, CFC rules etc. It should also be stressed out that Law 4378/2016, which transposes the amended EU parent-subsidiary directive into Greek law (applicable as from 1 January 2016), provide for an anti-avoidance rule, according to which the benefits of the EU parent-subsidiary directive (i.e. income tax and withholding tax exemptions) will not be granted for intragroup dividends if the main purpose, or one of the main purposes, of the arrangement is to obtain a tax advantage and avoid taxation, and the arrangement does not have a justifiable commercial reason.

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3) The manipulation or a series of manipulations includes elements which result in the hedging or the annulment between them.

4) The conclusion of transactions has a rotatory nature.

5) The manipulation or an array of manipulations leads to a significant tax advantage, but this is not reflected on the business risks, which the taxpayer undertakes, or on his cash flows.

6) The expected profit margin before the tax is significant compared to the amount of the expected tax advantage.

97. Finally, Greek tax law does not provide explicitly if the general anti-abuse rule ('GAAR') could be applied in a case of abuse as a back-up to lex specialis, that turns out to be ineffective in a given case, since no relevant guidance as per the interpretation and application of the GAAR has been issued so far by the IPRA. This issue has not been dealt by the jurisprudence of the Greek administrative courts, since the introduction of the GAAR into the Greek domestic tax legislation is very recent and no relevant case law exists. Moreover, unlike other countries (such as UK, USA etc.) no jurisprudential recognition of the concept of "tax abuse" existed in the Greek tax case law before the enactment of the Greek GAAR. According to the theory developed in Greece, regarding the hierarchy or the coordination between the different rules (GAAR and SAAR), as well as the general interpretative principle, according to which "lex specialis derogat legi generali", it is argued that SAAR should be applied in the first place and GAAR should only be applied when there is not an applicable SAAR in the case under examination, as a provision of last resort (ultimum refugium). Also, according to a certain approach, the question of coordination of the above measures could be resolved through the principle of proportionality, in the sense that depending on the case, the measures chosen by the Greek tax authorities should be the ones that would bring the higher amount of tax to the treasury, since the financial public interest is synonymous with the general interest. However, this solution could be judged against the principle of tax certainty[25]. In any case, a respective interpretative decision of the IPRA should be issued, in order to clarify these aspects and provide further guidance to both taxpayers and tax administrations as per the application of the GAAR and its relation and interaction with SAARs.

Question 11

98. The Greek legislation provides for the recovery of illegal and incompatible state aid in various laws, some of them applicable in all cases and few of them in the specific case of fiscal state aid.

I. General rules for the recovery of state aid

99. The general provisions for the recovery of state aid, which also apply regarding the recovery of fiscal state aid, are included in article 22 of Greek Law 4002/2011, as amended by both article 75 § 2 of Greek Law 4172/2013 and article 1 para. B.10.8 of Greek Law 4152/2013. These provisions specify the exact procedure to be followed, in order for illegal and incompatible state aid to be recovered: at the initiative of the competent authority, a copy of the recovery decision of the European Commission is sent to the recipient of the aid, along with a written summons ordering the payment of the amount due within a certain deadline. If this deadline lapses, then the competent authority forwards all necessary information and documents to the competent Tax Authority ('D.O.Y'), in order for the amount due to be fully recovered

[25]. E. THEOCHAROPOULOU, New exchange of information versus tax solutions of equivalent effect, Greece, presentation in EATLP conference.

pursuant to the provisions of the Code of Public Revenue Collection ('KEDE'- Legislative Decree-Law 356/1974).

100. Furthermore, article 3 par. 6 of the Code of Public Revenue Collection ('KEDE'), as amended by article 75 of Greek Law 4172/2013, provides for the refund of incompatible state aid in a lump-sum. Additionally, article 9 of KEDE includes a list of possible actions that the competent administrative authority has the discretion to undertake, in order to ensure the collection of public revenues, including incompatible state aid.

II. Specific rules for the recovery of fiscal state aid

101. In two important recovery cases, presented below, Greece has introduced specific legislation in order to fully comply with the Commission's decision. These cases concerned specifically the creation of a special tax-exempt reserve fund for companies during the years 2004-2008 and the tax exemption on earnings from exports during the financial year 1987. However, it was not until the ECJ had condemned Greece for failure to act that the Greek authorities took the measures necessary for the recovery of the said incompatible state aid by issuing new legal provisions specifically for that purpose.

a) Special tax-exempt reserve funds

102. Articles 2 and 3 of Greek Law 3220/2004 provided for a special tax-exempt reserve fund, which certain undertakings could form out of their earnings during the years 2004-2008. Such companies were processing companies, energy production companies, companies providing quality services, etc. (as specifically described in article 3 of Greek Law 2601/1998), but also gas supplying companies, as well as any other companies using natural gas in their activities. This special tax-exempt reserve fund should amount up to 35% for each undertaking's total retained earnings and it should be spent for investments of at least equal value within a period of the three years following its formation and under certain conditions provided in law.

103. However, the European Commission concluded that the above tax-exempt reserve fund constituted unlawful and incompatible state aid, hence it ordered its recovery (Commission Decision no. E(2008)3521/18-7-2007). Following the Commission decision, the Greek Parliament adopted Law 3614/2007, wherein it reiterated (article 47) that, since such tax-exempt reserve fund constituted incompatible state aid, it was retroactively subject to taxation according to the tax rates which were in force at the time of its formation. Yet, some exceptions to the recovery order were provided only for cases that might be considered to constitute compatible state aid, falling within the scope either of block exemption regulations, such as De minimis Regulation, Regulations 68/2001 & 70/2001 etc., or of Commission's Guidelines on regional state aid, R&D Framework etc. For the purpose of refunding the aid, companies were asked to file a supplementary income tax return to the competent Tax Authority, for the latter to calculate the corresponding tax and relevant interest. By act of delegation, Ministerial Decisions No. 1147 and 1148/11-12-2007 laid down detailed guidelines for the application of the

aforementioned article 47 and provided for the form and contents of the supplementary income tax return.

104. Nevertheless, the European Commission considered that the newly adopted law 3614/2007 did not fully serve the purpose of recovery of the incompatible state aid. More specifically, the Commission was not satisfied with the data the Greek authorities provided as regards the lists with the recipients of the incompatible state aid and it also questioned the method used to calculate the amount to be refunded. Therefore, it brought before the European Court of Justice an action for failure of Greece to fulfil obligations. Following the Court's judgment (ECJ C-354/10, European Commission/Greece, 01.03.2012, ECLI:EU:C:2012:109), the Greek Parliament adopted Law 4099/2012, which, in its article 169 (as further amended by article 67 § 2 of Greek Law 4170/2013), provided in every detail for the recovery of the said incompatible state aid. By act of delegation, Ministerial Decision No. 1231/10-10-2013 provided for further guidelines about the calculation method for the amount to be recovered, along with specific calculation examples, as well as about the exact procedure to be followed by the competent authorities, in order for them to identify both the recipients obliged to pay the said incompatible aid back and those who might benefit from the exemptions from recovery according to the Commission's decision.

b) Tax exemption on earnings from exports

105. Article 22 of the Greek Law 1796/1988, which ratified a relevant Ministerial Decision (No. E.3789/128/15.3.1988), introduced a special single tax on the total net income of certain undertakings in the financial year 1987, exempting, however, any income deriving from the undertakings' export operations.

106. Following a formal investigation procedure, the Commission found the said scheme to constitute incompatible and unlawful state aid, since it essentially supported exports, distorted competition and was likely to affect trade among Member States. Consequently, the Commission ordered its recovery (Decision no. 89/659/EEC). Thereafter, since Greece did not abide by the said Commission decision, the Commission brought an action for failure to fulfil obligations before the European Court, which concluded that Greece was actually in breach of its obligations under EEC Treaty (Court of Justice C-183/91, European Commission/Greece, 10.06.1993, ECLI:EU:C:1993:233).

107. Pursuant to the abovementioned judgment of the Court, the Greek Parliament adopted Law 2214/1994, which in its article 21 amended the above mentioned article 22 of Law 1796/1988 and restricted the exemption in question only to the proportion of earnings deriving from export operations to non-EU countries. The procedure to be followed for the recovery of the incompatible state aid was also described in the same article: all undertakings engaged in export operations during the financial year 1987 were obliged, within a month from the official publication of Law 2214/1994 in the Government Gazette, to submit a supplementary declaration to the competent Tax Authority, stating the gross income deriving from exports to non-EU countries

during that year. Any amount due, according to this provision, ought to be paid in six monthly installments.

Question 12

108. Various actions concerning the recovery of fiscal state aid have been brought before the Greek administrative courts, seeking to suspend the application of and annul the relevant act of the national Tax Authority ordering the refund. However, very few of them were successful.

I. Case-law regarding the recovery of special tax-exempt reserve fund

109. The recovery of special tax-exempt reserve fund[26] has been treated by the Greek courts in a contradictory way:

a) Three-Member Administrative Court of Appeal of Athens (Trimeles Diikitiko Efetio of Athens), Judgments 4357/2014 & 4358/2014

The applicant undertaking asked for the annulment of the Notice of Assessment issued by the competent Tax Authority, which ordered the recovery of the special tax-exempt reserve fund. The Court took under consideration the content of article 78 para. 2 of the Greek Constitution, which prohibits the imposition of any tax by a retroactive statute effective prior to the financial year preceding the imposition of the tax. Consequently, it found that the provisions of the aforementioned[27] article 47 of Law 3614, enacted in 2007, constituted a burdensome change in the fiscal status of undertakings having formed a tax-exempt reserve fund, according to a law of 2004. And that is because the retroactive effect of Law 3614/2007 goes beyond the year preceding the imposition of the said fiscal obligation, inasmuch as it concerned the tax-exempt reserve fund created during the financial years 2004 and 2005. The Court concluded that such provisions contravene the said article of the Greek Constitution and, thus, shall remain inapplicable. Moreover, the Court considered that the mere fact that the provisions of Law 3220/2004 (articles 2 and 3) contradict those of article 107 (former 87) of the TFEU and that the TFEU enjoys supremacy over national law, according to article 28 para. 1 of the Greek Constitution, does not mean that the TFEU enjoys supremacy over the Greek Constitution (reference also to Council of State's decision no. 2067/2011).

b) Three-Member Administrative Court of Appeal of Athens (Trimeles Diikitiko Efetio of Athens), Judgments 3996/2016 & 2957/2013)

110. The above judgments have reversed previous case law of the same Court of Appeal, which in judgments nos 3996/2016 and 2957/2013 had ruled that, since the Commission found that the state aid scheme implemented pursuant to Law 3220/2004 was incompatible with the internal market, the provisions of article 47 of Law 3614/2007, which was adopted in response to the Commission's decision and within the framework of the Greek authorities' obligation to recover incompatible state aid, do not constitute a retroactive withdrawal of the tax exemption and,

[26] Cf. Question 11, chapter II (a).

[27] Cf. Question 11, chapter II (a), para. 5.

therefore, they are not in breach of article 78 § 2 of the Greek Constitution. Nonetheless, the Court avoided stating that the TFEU provisions on state aid enjoy supremacy over the national provisions on the prohibition of retroactive effect of a burdensome fiscal obligation.

111. c) It is also worth mentioning some other *judgments of the Administrative Court of Appeal of Athens* regarding the recovery of tax exempt reserve funds, whereby the Court concluded that the applicant undertaking did not fall within the scope of article 47 § 1 of Law 3614/2007, therefore it was not obliged to refund any incompatible state aid. It should be noted that these cases were brought before the courts either because some undertakings submitted by mistake a supplementary tax return, which then they were seeking to annul, or because the relevant Tax Authority issued a supplementary notice of assessment, considering that these undertakings were subject to the provisions of article 47 of Law 3614/2007.

112. More specifically:

1. *Three-Member Administrative Court of Appeal of Athens (Trimeles Diikitiko Efetio), Judgment 3996/2016:* if investment costs incurring under Law 3220/2004 could, however, be considered to fall under the provisions of the previously existing Law 2601/1998, which was still in force when these costs incurred, such costs shall not be deemed to constitute incompatible state aid to be recovered, since no legal provision imposes the recovery of investment costs that incurred before the entry into force of Law 3220/2004 or of any investment cost that could occur without state aid.
2. *Three-Member Administrative Court of Appeal of Athens (Trimeles Diikitiko Efetio), Judgment 1400/2014:* the applicant undertaking filed a supplementary tax return pursuant to Law 3614/2007, although it was not obliged to, due to an error of law. More specifically, it fell within one of the exceptions mentioned under article 47 para. 2 b of Law 3614/2007, since it was a medium-size enterprise (as defined in article 2 of Annex I of the Regulation (EC) 70/01) during the year in question and it formed a tax-exempt reserve fund being exempted from tax on its revenue amounting to more than 100.000 euros. Thus, it was not subject to supplementary tax and, consequently, the court concluded that the supplementary tax return shall be withdrawn and any tax amount unduly paid shall be returned to the applicant.
3. *Three-Member Administrative Court of Appeal of Athens (Trimeles Diikitiko Efetio), Judgment 1087/2012:* the Court rejected the appeal lodged by the Greek State against a judgment annulling a recording of a supplementary tax amount. The Greek State argued that lodging of an action against the supplementary Notice of Assessment does not suspend the immediate issuance of the relevant tax bill, pursuant to article 47 para. 4 of Law 3614/2007. The Court of Appeal made clear that said article applies to cases where undertakings have already submitted a refund declaration, thereby accepting their obligation to refund. However, it ruled that the above article does not apply to undertakings, which have not

submitted such declaration, believing that their expenses fall under either Law 2601/1998 or Law 3299/2004, like the undertaking in the case at hand. In these cases, lodging of an action against the supplementary Notice of Assessment suspends its application, according to article 69 para. 2a' of the Greek Administrative Procedure Code.

II. Case-law regarding the tax exemption on earnings from exports

113. The recovery of this single tax, according to article 21 of Law 2214/1994[28] has been assessed by the Council of State in several cases.

114. More specifically, in *Judgments 3157/2007, 49/2006, 1861/2004, 115/2004, 1916-1918/2002, 1333-1335/2002 and 1957/1999, the Council of State (Simvoulio tis Epikratias)* dealt with the issue whether article 21 of Law 2214/1994, which was introduced following the aforementioned[29] judgment of the ECJ and imposed retrospectively a single tax on the earnings from exports to EU countries that were initially illegally exempted from such tax, constituted a burdensome fiscal change with a retroactive effect of more than a year. It needs to be noted that under article 78 § 2 of the Greek Constitution, a tax or any other financial charge may not be imposed by a retroactive statute effective prior to the financial year preceding the imposition of the tax. The Council of State considered that the Ministerial Decision E.3789/128/15.3.1988[30] was void ab initio, as contrary to article 92 of the EEC Treaty (article 107 para. 1 TFEU). Therefore, the provisions in question, demanding the recovery of the unlawful aid granted pursuant to the said Ministerial Decision, did not constitute a change with retroactive effect in the applicant undertakings' fiscal status. Thus, these provisions were not in breach of article 78 § 2 of the Greek Constitution.

III. Case-law regarding the recovery of state aid granted to several Casinos

115. Following the Commission's Decision 2011/716/EU (OJ 2011 L 285/25), the competent Greek authorities ordered the recovery of incompatible state aid, granted through both the fixing of a uniform 80% levy on the price of admission tickets to casinos and the setting of two unequal regulated prices of admission tickets for publicly and privately owned casinos, thereby placing the latter at a competitive disadvantage.

116. One of the undertakings was obliged to pay back the said aid addressed itself to the Three-Member Administrative Court of First Instance of Athens (Trimeles Diikitiko Protodikio) and brought an action seeking to annul the national act for the refund of aid, issued pursuant to the Commission's recovery Decision. At the same time, the applicant brought before the same court an application for stay of the abovementioned act, arguing that the action for annulment would be successful, whereas the immediate payment of the amount asked would cause irreparable financial damage to the applicant. Moreover, a shareholder of the applicant undertaking, owing 49% of its capital and having the right to intervene in the

[28] Cf. Question 11, chapter II (b), para. 9.

[29] Cf. Question 11, chapter II (b), para. 9.

[30] Cf. Question 11, chapter II (b), para. 7.

pending trial, argued before the court that it had lodged an action with the General Court of EU, seeking to annul the aforementioned Commission Decision.

117. The Three-Member Administrative Court of First Instance of Athens (Trimeles Diikitiko Protodikio of Athens), in its judgment 4392/2012, upheld the application for stay, since it assessed that the damage to be caused to the applicant following the immediate enforcement of the said administrative act would be irreparable or difficult to repair. The court delivered its judgment on the basis of article 202 of the Greek Administrative Procedure Code, which at that time provided for less strict conditions than those of the Commission Recovery Notice of 2007. More specifically, according to the above article 202, an application for stay of an administrative act could be upheld by the court, if the latter considered that the main action lodged by the applicant was manifestly well-founded. If this could not be proven, then the application could be upheld by the Court only if the latter considered that the immediate enforcement of the said act would cause irreparable or difficult to repair damage to the applicant. In other words, this article gave the national judge the discretion to uphold an application for stay of an administrative act ordering the recovery of incompatible state aid on the basis of the above, even if one or more of the stricter criteria referred to in paragraphs 58 & 59 of the Recovery Notice (OJ C 272, 15.11.2007, p. 4–17) were not met.

118. However, later on, article 202 of Greek Administrative Procedure Code was amended twice in 2013, in order to include the stricter conditions depicted in the Commission Recovery Notice of 2007: first, by Law 4152/2013 (article one para. B.10.6) and further by Law 4170/2013 (article 73 para. 2).

Question 13

119. According to various international and EU treaties, Greece has undertaken certain obligations in order to ensure the protection of property and foreign investments within its territory.

120. In particular, Greece has co-signed the European Convention on Human Rights, the Universal Declaration of Human Rights and the EU Charter of Fundamental Rights, which all three guarantee the protection of property as a human right. Furthermore, Greece is a contracting party to numerous 'Double Tax Treaties' and 'Bilateral Investment Treaties', which all aim to the protection of property and foreign investments.

I. European Convention on Human Rights

121. According to Art. 1 of First Protocol to the European Convention on Human Rights (ECHR) which Greece has signed and validated by the Legislative Decree 53/1974 (Gov.Gaz. 256/A), every natural or legal person is entitled to the peaceful enjoyment of his possessions, the deprivation of which is in principle forbidden. Only two exceptions to this rule are permitted and justified. The first concerns limitations of property protection that are established only for reasons of public interest under the conditions set by law and by the general principles of international

law. The second is about the preserved right of Greece to enforce laws in order to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

II. Universal Declaration of Human Rights

122. Art. 17 of Universal Declaration of Human Rights, a non legally binding text that has nonetheless high political importance, also establishes a person's right to own property alone or in association with others, which right cannot be arbitrarily deprived.

III. EU Charter of Fundamental Rights

123. Greece has undertaken similar obligations on the protection of property under the EU Charter of Fundamental Rights, which is part of European primary law and prevails over national law after the validation of Lisbon Treaty by the Greek Parliament. Art 17 of the Charter guarantees a person's right to own, use, dispose of and bequeath its lawfully acquired possessions, from which they cannot be deprived, with the exception of public interest reasons and provided that a fair compensation, paid in good time, will be awarded to cover the loss of property. Furthermore, the provision establishes that the use of property may be regulated by law in so far as it is necessary for the general interest and notes that intellectual property is also protected.

IV. Protection of property under Double Tax Treaties

124. *General Remarks* – Greece has signed bilateral tax agreements with other countries, the so-called double tax treaties, which clarify the cross border taxation rights and in that sense protect property. The reason is to avoid the phenomenon of international juridical double taxation, where the same income or profits of the same person (corporate or individual) are taxed multiple times in Greece and in other countries. Consequently, double tax treaties contribute de facto to the protection of property, since they ensure that a person will not be double-taxed for the same income or profit by two countries[31].

125. *Protection of property* – Double tax treaties allow undertakings to transact in Greek territory with a degree of certainty both on the part of individuals, partnerships or corporate entities and on the part of the Greek Government. The tax payers will pay the aforementioned taxes, as regulated in the certain treaty, in one state and tax exemption or reductions will be applicable in the other. What is more, double tax treaties include provisions on exchange of information between the national and foreign tax public services, which enable Greece and the contracting states to ensure that they retain their tax jurisdiction and minimize tax fraud. According to the Greek International Economic Relations Directorate, Greece has signed 57 double tax treaties up to this date[32], which over the years have become

[31] Apart from the analyzed relation between tax and protection of property, a national legislation can also affect through corporate taxation specifically foreign investments, as taxes figure prominently in the financial calculations of businesses. For details see S.A. SPYRIDAKIS, Government policy and foreign direct investment, 1999, p. 2.

[32] The full list is available at http://www.gsis.gr/gsis/info/gsis_site/ddos/b.html.

more standardized following the OECD Model Convention on Income and Capital. This Model Convention is used by Greece, member state of OECD, as a basis for the double tax treaties. Also the OECD Commentaries on the Model Convention serve as a tool for their interpretation, while their implementation lies with Greek legal procedure and case law.

126. *Field of application* – The double tax treaties that Greece signs apply to individuals or companies with a residence in Greek territory and only in respect of taxes especially mentioned in the treaties. If a case concerns elements of income or capital that are omitted in a double tax treaty, and therefore excluded from its scope, Greek tax legislation is to be implemented. Double tax treaties signed by Greece regulate cases where the subject of the tax is a resident of both Greece and the contracting state, defining their status as following: ''a) they shall be deemed to be a resident only of the State in which they have a permanent home available to them; if they have a permanent home available to them in both States, they shall be deemed to be a resident only of the State with which their personal and economic relations are closer (centre of vital interests); b) if the State in which they have their centre of vital interests cannot be determined, or if they have not a permanent home available to them in either State, they shall be deemed to be a resident only of the State in which they have an habitual abode; c) if they have an habitual abode in both States or in neither of them, they shall be deemed to be a resident only of the State of which they are a national; d) if they are a national of both States or of neither of them, the competent authorities of the contracting states shall settle the question by mutual agreement''[33].

V. Bilateral Investment Treaties (BITs)

127. *General remarks* – Greek state's international obligations, as far as the protection and promotion of foreign investments in Greece are concerned, arise from the 'Bilateral Investment Treaties' ('BITs'), signed with third states in view of giving the foreign investors better access to Greek national market and on fairer terms. Greece has currently signed BITs with 47 countries[34]. When Greece signs a BIT with another country as a contracting partner, both countries agree to provide mutual protection to one another, as far as foreign investments are concerned. A BIT provides major benefits for foreign investors in Greece, including fair treatment and equitable to the one reserved for Greek nationals, protection from expropriation and performance requirements for investments, and access to neutral dispute settlement.

128. *Protected investments* – Under BITs' common provisions, every kind of asset invested in the Greek territory by a foreign investor of the one contracting state is protected. The definition of foreign investment under BITs, despite the need to be examined in concreto in each specific case[35], covers particularly both movable and

[33] Art. 4 par. 2 of OECD Model Convention.

[34] According to UNCTAD. The list is available at http://investmentpolicyhub.unctad.org/IIA/CountryBits/81#iiaInnerMenu.

[35] A-S. GEORGIADOU, The regulation of Foreign Direct Investments under International, European and Greek Law, 2004, p. 85.

immovable property in Greece, as well as any rights in rem, such as servitudes, usufructs, mortgages or pledges, shares, stocks and any form of participation in companies, claims to money and loans connected to investments, intellectual property rights, concessions to cultivation, exploitation and extraction of natural resources. It is noted that any alteration in the form in which assets are invested in Greece shall not affect their character as investments, provided that Greek laws and regulations are not violated.

129. *The definition of ''foreign Investors'' in Greek territory* – In respect of the BITs that Greece has signed so far, the term ''investors'' refers to every natural person, having citizenship, permanent residence or main place of business in the contracting state, as well as to legal entities having registered seat, central management or main place of business in that state, who carry out investments in the Greek territory. The latter includes land, sea and submarine areas over which Greece exercises sovereign rights or jurisdiction in conformity to international law.

130. *Content of protection* – BITs oblige Greece to create "favorable, stable and transparent conditions" for the investors of the contracting party by including special provisions within the framework of Greek national law, aiming to the promotion and protection of foreign investments in Greece. More specifically, they shall enjoy "full protection and security", while Greece is obliged to refrain from "arbitrary or discriminatory measures" as far as management, maintenance, use, or disposal of the investments are concerned[36].

131. *The ''most favored nation treatment'' provision* - Apart from the aforementioned obligations, the principle of the most favored nation treatment ensures that Greece treats foreign investors (nationals of a BIT contracting party) at least as favorably as Greek investors and foreign investors from third states (that have not signed a BIT with Greece). However, Greece is not obliged to recognize in favour of the investors of the contracting party the same benefits that recognizes to other investors who are nationals of states participating in an existing or future free trade area, custom or economic union and any other similar international agreement, the most typical example of which is the European Union. Furthermore, in case the provisions of BITs present any inconsistency to provisions of double tax treaties, they shall subside[37].

132. *Settlement of foreign investment disputes* - The disputes between the Greek state and foreign investors from states, that have signed BITS with Greece, are settled by international arbitration according to the relevant BITs clause, that recognizes the right of investors to submit their dispute either to an ad hoc tribunal established under the rules of UNCITRAL, or to the International Centre for the Settlement of Investment Disputes (ICSID). In this framework, Greece has signed the Washington Convention (1965) for the establishment of the International Centre for the Settlement of Investment Disputes (ICSID) and the Seoul Convention (1985) for the establishment of the Multilateral Investment Guarantee Agency (MIGA). Both ICSID

[36] Usually Art. 2 of BITs.

[37] Ibid Art. 3.

and MIGA, international organizations of the World Bank Group, have achieved the ''depoliticization of investment disputes'' as they have restricted the foreign state's diplomatic protection, when the foreign investor is facing damages due to measures implemented by the host state, and offer the chance for impartial and independent settlement of foreign investment disputes[38]. Until now, ICSID has treated only three cases against Greece, one of which has been dismissed and the other two are still pending, as it is analysed below (under para 11&12).

133. *Legitimate expectations from BITs*- According to ICSID case law[39], the official acts of the host state about foreign investments, that may be considered, under national law, non-existent, null, void or susceptible to invalidation, are valid, as far as the obligations that this state undertook are concerned, due to the fact that these acts ''*were cloaked with the mantle of governmental authority and communicated as such to foreign investors who relied on them in making their investments*''[40].

134. *ICSID Case Law on sovereign debt and BITs* – The case *Poštová banka and Istrokapital v. Greece* (ICSID Case No. ARB/13/8) concerns the issue of property and foreign investment rights affected by a subsequent Greek law adopted in accordance to Greece's 2012 sovereign debt restructuring and in the context of the financial crisis. The claims against Greece were submitted to ICSID on the basis of the Agreement between the Government of the Hellenic Republic and the Government of Czech and Slovak Federal Republic for the Promotion and Reciprocal Protection of Investment, dated on 03.06.1991[41], the Agreement between the Government of the Hellenic Republic and the Government of the Republic of Cyprus on the Mutual Promotion of Investments, dated on 30.03.1992[42], and the ICSID Convention. In this case, the ad hoc ICSID Committee, with its decision that has become final, dismissed the claimants' complaints against Greece, which arose out of the enactment, in the context of Greece's 2012 sovereign debt restructuring, of a Greek law amending retroactively and unilaterally sovereign bond terms by the Greek Government, allegedly allowing the imposition of new terms upon bondholders against their consent, if a supermajority of other bondholders consented. The Committee validated the dismissal of the ICSID Tribunal, the majority of which decided that the element of contribution to an economic venture and the existence of a specific operational risk were not present in order to fulfill the definition of investment, which, though broad, is subject to limitations according to Art. 1, par. 1 of the Slovakia-Greece BIT, and does not include sovereign debt[43]. According to ICSID

[38] I. SHIBATA, Towards a greater depoliticization of Investment disputes, 1 ICSID Rev. FILJ 1, 1986.

[39] P. GLAVINIS, International Economic Law, 2009, p. 489, and reference to ICSID, 20.05.1992, Case Southern Pasific Properties (Middle East) Limited v. Egypt, as key judgment about the concept of the legitimate expectations from BITs.

[40] ICSID Award, Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, published in*:* ICSID *Rev.-FILJ* 1993, p. 328 no 82-83.

[41] The Greece-Slovakia BIT.

[42] The Greece-Cyprus BIT.

[43] ICSID Case No. ARB/13/8, no 81-82 and 153,
available at https://www.italaw.com/sites/default/files/case-documents/italaw7587.pdf.

Tribunal's judgment, "*a broad definition does not necessarily mean that any and all categories, of any nature whatsoever, may qualify as an investment, nor that the only manner in which a category may be excluded as an investment, under a broad asset- based concept, is by expressing exclusion in the given (bilateral investment) treaty*''[44].

135. *ICSID Pending Cases* - Apart from the aforementioned case, there are currently two pending cases against Greece concerning foreign investments. In case *Cyprus Popular Bank v. Greece* (ICSID Case No. ARB/14/16), the claimant argued a violation of Cyprus-Greece BIT, due to an alleged unequal treatment for its Greek branch, Marfin Egnatia Bank, in comparison to other banking institutions operating in Greece, which resulted from the fact that Greece's Central Bank has denied the above branch access to the mechanisms for liquidity and capital support available to all Greek banks[45]. It is to be noted that the object of this case is similar to the previous one, since it takes place in the context of the financial crisis affecting Cyprus and Greece. In *Safa v. Greece* (ICSID Case No. ARB/16/20), the claimant co-owns the Privinvest Group, a global player in the shipbuilding industry, which in late 2010 took control of Hellenic Shipyards SA (HSY), an operator of a large shipyard near Athens. With this ICSID claim, the claimant has asserted his individual rights as an investor in HSY under Greece-Lebanon BIT (1997) on the ground that the Greek Government has posed an unlawful prohibition for HSY not to work for foreign navies and has stopped payments under the parliamentary ratified contracts for two submarine programmes[46].

136. *Nationalization and expropriation provisions* - Under BITs that Greek state has signed, there is a general rule that forbids the nationalization and expropriation of foreign investments and returns from the investment (profits, interests, capital gains, dividends, royalties and fees) or the income deriving from the reinvestment on behalf of the Greek state. However, there are four strict cumulative exceptions from the rule that shall apply. Nationalization and expropriation can be conducted by the state only for public interest purposes, under due process of law, on a non discriminatory ground and against prompt, adequate and effective compensation, which will be transferable without delay, in a freely convertible currency to the country designated by the investors[47]. In addition to this, there are clauses that ensure compensation for losses and damages in case of war, armed conflicts, national emergencies, civil disturbances or other unforeseeable events in the Greek territory[48].

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[44] ICSID Case No. ARB/13/8, no 58.

[45] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/14/16 and Cyprus press release available in http://oam.cse.com.cy/Announcement/announcementvariation/852.

[46] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/16/20.
http://www.prnewswire.co.uk/news-releases/iskandar-safa-submits-claim-against-the-hellenic-republic-with-icsid-583906371.html.

[47] Ibid Art. 4. For the differences of non discrimination clauses between BITs and double tax treaties see *OECD,* Negotiating Group on the Multilateral Agreement on Investment (MAI), DAFFE/MAI/EG2/RD(96)1, 1996, p.3. MAI was a Model Convention of Investment Treaties, proposed by OECD, but ultimately it was not implemented.

[48] Ibid Art. 6.

137. *Free transfer of payments* – Recent BITs, that Greece has signed, recognize the foreign investors' right to free transfer of payments in and out of Greek territory[49]. The definition of transfers is broad and covers in particular the initial capital and additional amounts necessary for the maintenance and development of the investment, the returns, the fund in repayment of investment loans, the proceeds of total or partial sale or liquidation of the investment, any damages awarded by dispute settlement and compensation for losses or nationalization.

VI. General conclusions

138. Property in Greece is protected under Art. 1 of First Protocol to the ECHR, Art. 17 of Universal Declaration of Human Rights and Art 17 of the EU Charter of Fundamental Rights, pursuant to which every person has the right to enjoy its possessions peacefully. The deprivation of private property is generally forbidden with the exception of reasons of public interest that can justify specific limitations of property protection. The double tax treaties, bilateral agreements that Greece signs with other states, aim at regulating the way in which the same income will be taxed by different countries with a view to avoiding double taxation, and thereby protecting property. Especially for the protection of foreign investments in Greece, the relevant legal framework is defined by international treaties, in particular bilateral agreements ('BITs') between Greece and other states, according to which Greece is obliged to protect foreign investments in its territory, made by nationals of the contracting state and recognizes major benefits for them, such as legal treatment equal to Greek investors, fair and equitable treatment, protection from expropriation and access to neutral dispute settlement.

Question 14

139. In principle, the jurisprudence of Greek courts maintains a friendly approach to the European legal order, almost never creating problems in the application of EU law. Nonetheless, tensions between EU and other sources of law, either national or international, are not entirely unknown in the Greek case law. In such cases, potential conflicts have been avoided by either the consistent interpretation or the invocation of general principles of law, such as the principle of proportionality[50].

140. Regarding international obligations in particular, it is important to note that there are various such obligations that could potentially contravene EU law, because both EU and international legal order regulate similar issues. In the Greek legal order, international and EU obligations could come into conflict with regard to the right to property a) in the case of BITs[51] and b) in the case of EU obligations of Greece, as deriving from the acceptance of financial assistance by the ESM[52].

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[49] Ibid Art. 7 in latest BITs, for example Law 1511/2002 about the BIT between Greece and Bosnia Herzegovina.

[50] J. ILIOPOULOS-STRANGAS in A. VON BOGDANY/ P. CRUZ VILLALON/ P. HUEBER (eds) Ius Publicum Europaeum, Offene Staatlichkeit: Griechenland, Müller, Heidelberg, 2007 pp. 71-107.

[51] T. EILMANSBERGER, Bilateral investment treaties and EU law, CMLR 2009, p. 383.

141. Regarding BITs, it should be noted that it is difficult to identify a conflict between international and EU law in the field of international investments, since Greece had already included in these bilateral or multilateral treaties a clause in favour of EU law. In particular, this clause states that under no circumstances may this international agreement result in deviations from the country's obligations as a member of the European integration process[53]. Thus, there are no cases where the obligation to recover an unlawful state aid would contravene the obligations deriving from a BIT as it's the case in other European legal orders, where granting compensation to an investor in accordance with an arbitrary award was considered by the European Commission to be an unlawful state aid which must be recovered[54]. In any case, it is difficult to identify such a conflict since the disputes arising from investment agreements are usually settled by ad hoc arbitrators, whose decisions are rarely published or widely known[55].

142. We should mention, however, that the conflicts between EU law and international obligations deriving from BITs are most likely to be increased due to the Greek public debt restructuring deal (2012) and the so called "private sector involvement' (PSI) procedure which was decided, signed and adopted by both the ECB and the European Commission. In this legal context, private investors were asked to accept to write off 53.5% of the face value of Greek governmental bonds they were holding, the equivalent to an overall loss of around 75%. Despite the fact that the participation in this "haircut" procedure was supposed to be voluntary, the Greek government activated ex post the CACs (Collective Action Clauses) forcing the majority of Greek government bondholders to accept the haircut of 53,5% in the nominal value of their bonds, even without their will[56]. This decision led many

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[52] The implementation of the Fiscal Adjustment Program became for Greece an obligation of EU law, since Article 7 of Regulation (EU) 472/2013 under the title ''Macroeconomic adjustment programme'' incorporated into the EU legal order the provisions of Articles 13, 14, 15 and 16 of the ESM Treaty concerning the commitment of the Member States, who receive financial assistance from the ESM, to implement a Public Adjustment Program.

[53] The letter of this provision is almost identical in every treaty. See, for example, article 4 of the BIT Greece/Azerbaijan in 2004. "*Treatment of the Investments 1. Each Contracting Party shall accord to investments, including returns, made in its territory by investors of the other Contracting Party, treatment not less favourable" than that which it accords to investments of its own investors or to investments of investors of any third state, whichever is more favourable. 2. Each Contracting Party shall accord to investors of the other Contracting Party as regards their activity in connection with investments in its territory, treatment not less favourable than that which it accords to its own investors or to investors of any third state, whichever is more favourable. 3. The provisions of paragraphs 1 and 2 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from: a) its participation in any existing or future free trade area, customs union, economic union, regional economic integration agreement or similar international agreement, or b) any international agreement or arrangement relating wholly or mainly to taxation*".

[54] Commision, *Micula*, 26.03.2014, M. GOYENST, The Micula case: When ISDS messes with EU law. http://www.beuc.eu/blog/the-micula-case-when-isds-messes-with-eu-law/.

[55] P. GLAVINIS, International economic law, Sakkoulas Athens-Thessaloniki, 2009, p. 675.

[56] National Law No. 4050/2012 on the rules amending State emission or guarantee securities, adopted on 23 February 2012.

investors before the arbitrary courts invoking their rights deriving from BITs and may result as well in a conflict between BITs and EU law, which conflict isn't however going to be resolved before national courts[57].

143. Regarding the second category, namely the EU obligations deriving from participation of Greece in the ESM, there are several cases where the Greek courts, and in particular the Greek Council of State, were called to decide upon conflicts between EU law and the ECHR regarding the right to property.

144. Greek jurisprudence has confirmed that Greek laws enacted for the implementation of the Memorandums, which consist an international (under article 13 TESM), as well as an EU law (since Articles 13 to 16 TESM are now incorporated into Regulation 472/2013) obligation, infringe international law, namely Article 1 of the Additional Protocol No. 1 to ECHR. These infringements derive mainly from civil servants salaries and pensions reductions, tax evasion measures, imposition of new and heavy taxes and "extraordinary contributions", compulsory reductions of allowances and unemployment benefits, etc.

145. i) Notably, four judgments of the *Greek Council of State (Symvoulio tis Epikratias)* cancelled the private sector pension reductions. The Greek Council of State has decided that those who receive a minimum pension of 1.000 euros are entitled to a reset of their pension in the amount they received before the reduction because the right to property (article 1 Additional Protocol No. 1 to ECHR) has been infringed. These judgments are: – Greek Council of State (Simvoulio tis Epikratias) *no. 2287/2015* (Social Security Institute – IDRYMA KOINONIKON ASFALISEON ''IKA'', main and supplementary retirement pensions reduction) – *2288/2015* (Insurance Fund of Public Power Corporation - DEH Employees retirement pensions) – *2289/2015* (Social Security Institute – IDRYMA KOINONIKON ASFALISEON ''IKA'', supplementary retirement pensions reduction) – *2290/2015* (Agricultural Bank of Greece ''AGROTIKI TRAPEZA ELLADOS'', former employees' supplementary retirement pensions reduction).

146. ii) *The Greek Court of Auditors, in its judgment no. 7412/2015* (Plenary Session), considered as unconstitutional the provisions of Law 4093/12, reducing retroactively from 01/08/2012 the earnings of doctors actively employed in the National Health System (''ESI'') and, consequently, the pensions of the retired National Health System (''ESI'') doctors. In particular, the Greek Court of Auditors found that the provisions of Law 4093/2012 were contrary to the provisions of Article 1 of Additional Protocol No. 1 to ECHR. They were therefore invalid, since they constituted a deprivation of an existing property right (pension of a certain amount, which has already been paid). The retroactive character of this deprivation was not necessary or appropriate in order to achieve the public interest objective sought by Law 4093/2012, in view of the fact that similar rules for the rest public domain pensioners had not been enacted. Therefore, in this judgement the Court of Auditors

[57] I. GLIVANOS, Investors vs. Greece: The Greek 'Haircut' and Investor Arbitration Under BIT's (May 15, 2012). Available at SSRN: https://ssrn.com/abstract=2021137.

ruled that the right to property is being infringed because the provisions of Law 4093/12 are contrary to the principle of equal contribution to public charges (article 4 par. 5 of the Greek Constitution), the principle of proportionality (article 25 par. 4 of the Greek Constitution) and the right to property (article 1 Additional Protocol No. 1 to ECHR).

147. iii) *The Greek Court of Auditors, in its Opinion of May 8, 2017* (Plenary Session), ruled that a draft law on new pension reductions from 2019 onwards infringed the right to property (article 1 Additional Protocol No. 1 to ECHR), together with the prohibition of discrimination (article 14 ECHR). The Court of Auditors ruled, in particular, that legislative adjustment measures, being imposed on a specific socio-economic group and involving a serious and lasting financial burden on that group, must be specifically justified. The Court of Auditors concluded that the proposed regulation imposes an additional burden on this category of pensioners without justification and also raises a question of compatibility with the principle of equality in public charges (Article 4, par. 5 of the Constitution), the principle of proportionality (Article 25 (1) of the Constitution) and article 1 Additional Protocol No. 1 to ECHR.