

PERFORMANCE CHECKS

STATE OF PLAY OF THE INTERNAL MARKET IN THE BUSINESS SECTOR

Background Note

Expert Group Meeting

28th February 2012

In its Communication "Towards a better functioning Single Market for services" of 27 January 2011 ("January 2011 Communication"), the Commission announced an ambitious work plan to improve the internal market. One of the key actions therein are the "performance checks" of the Single Market for services, which should allow the Commission to get a realistic and useful overview of how the Single Market for services works for citizens and businesses. This is to be achieved by assessing how different pieces of EU legislation applying to services, when taken together, work in practice. This fact-finding exercise aims at determining whether the interaction of such pieces of EU legislation and the way they are implemented and applied by Member States is satisfactory or whether greater clarity or new measures are needed to make the Single Market for services work better.

This background note presents the results of the performance check carried out in the scenario on services to businesses. The scenario on the business sector sent to Member States on 5 August 2011 involved the combined application of 3 Directives: Directive 2005/36/EC on the mutual recognition of professional qualifications (hereafter "Professional Qualifications Directive"), Directive 2000/31/EC on E-commerce ("Ecommerce Directive"), Directive 2006/123/EC on services in the internal market ("Services Directive") and of the rules of the Treaty on the Functioning of the European Union ("TFUE").

This background note relies on the responses by Member States to the questionnaire¹. These responses have been complemented when necessary with information reported by Member States during the mutual evaluation process.

¹ The term 'Member States', in this note, is used to refer to the 27 EU Member States and the three EFTA countries participating in the European Economic Area (EEA), i.e. Norway, Iceland and Liechtenstein. Not all the Member States have replied to the questionnaire (responses from Liechtenstein and Latvia are missing). The responses received were not always complete and therefore do not allow to provide information on all 28 Member States for all the questions.

1. STATE OF PLAY OF THE REGULATION OF TAX ADVISE SERVICES IN EUROPE

The replies to the questionnaire have demonstrated that the level and intensity of regulation of the activities of tax advice varies enormously between the Member States. At the one end of the spectrum there are Member States in which tax advice is reserved exclusively to a highly regulated profession. In other Member States the activity is unregulated and tax advice can be provided by anybody. In between these two extremes there is a multitude of regulatory situations in the Member States and on the basis of the replies received it is impossible to identify commonalities or trends covering more than just a couple of Member States. This situation begs essentially two questions:

- how to explain this diversity which seems to be much more significant than the differences between the national taxation systems and laws would let expect?
- what does this diversity mean for the single market and how can its functioning be improved?

It has also become apparent in the replies from those Member States in which tax advice is reserved to or can be provided by other professions (such as accountants or lawyers) that this diversity of regulation is also present in other professional services.

1.1. Regulation of the activity of tax advice

Depending on their attitude regarding the regulation of the profession providing tax advice services, Member States² can be regrouped into three categories. Access to the profession of tax adviser is free in 17³ Member States, i.e. no specific professional qualification is required, but subject to professional qualification requirements in 8 Member States where it constitutes a self standing regulated profession⁴. In the 3 remaining Member States⁵ the activity is reserved to another regulated profession.

Member States in the first category are not regulating the profession. This is the case, for example, of the United Kingdom⁶, the Netherlands, Slovenia⁷, Finland, Estonia, Denmark, Bulgaria and Iceland. In these countries, the professional has direct access to

² Member States of the EU and of the EEA; there is no reply to this questionnaire from Latvia and Liechtenstein. However, Latvia indicated that neither a tax advisor as a profession nor the provision of a respective service is regulated in Latvia.

³ Belgium, Bulgaria, Cyprus, Denmark, Estonia, Spain, Finland, Iceland, Ireland, Italy, Lithuania, Malta, the Netherlands, Norway, Slovenia, Sweden, the United Kingdom.

⁴ Austria, the Czech Republic, Germany, Greece, Hungary, Poland, Romania, Slovakia.

⁵ In France, the activity is reserved to lawyers. In Luxembourg, the activity is reserved to accountants. In Portugal, certain activities are reserved: legal advice including in tax matters is reserved to lawyers and "solicitadores" (shared with chartered accountants in so far as legal advice refers to tax, accounting and social security schemes), whereas the drafting and the submission of tax and social security returns is reserved to chartered accountants.

⁶ However, the professional must be registered with a professional organisation or with the HMRC for anti money-laundering purposes.

⁷ However, there is in Slovenia a Chamber of tax advisers, the membership of which is voluntary. The Chamber is also member of the "Confédération fiscale européenne".

the market of the host Member State, without any formalities linked to the recognition of his professional qualifications.

Out of the 17 Member States which do not require particular professional qualifications some regulate the use of a professional title. For example, in **Belgium**, holding the title of tax adviser is regulated but not the exercise of the activity⁸. In the **United Kingdom**, there is no requirement for a tax agent to hold a formal qualification, to be a member of a professional body or to work to a prescribed level of competence in order to be recognised by the British tax authorities. However, the majority of practising tax agents (more than 70%) do hold a recognised accountancy or tax based qualification and through membership of a professional body subscribe to professional oversight both of their technical competence and business practice. In **Ireland**, the provision of tax advice is not a regulated activity and there are no requirements for individuals wishing to provide tax advice to hold specific professional qualifications. However, the Irish Taxation Institute is a body which is recognised in a special form by the State. Therefore the profession exercised by members of the Irish taxation Institute is treated as a regulated profession.

Although not regulating the profession of tax adviser as a self-standing profession, in some Member States tax advice can also be given by (other) professions which are regulated. This is the case of lawyers (and solicitors)⁹, economists¹⁰, (chartered) accountants and auditors¹¹. Several Member States belong to this category, including **Sweden, Spain, Portugal, Lithuania, Italy, Norway and Cyprus**. In these Member States, professionals have to fulfil the specific qualification requirements for these professions in order to be able to provide tax advice under the professional title concerned. In **Austria** and the **Czech Republic**, for example, the profession of tax adviser is regulated but other professions, like lawyers and auditors, can also give tax advice. This document will not analyse the specific rules organised by the Lawyers Directives or the Statutory Auditors Directive.

Qualifications required to access the activity of tax advice

In most cases, access to the profession of tax adviser is linked to relevant academic training, except in **the Czech Republic** where a bachelor degree in any study field is accepted, and an examination and in **Poland** where tax advisors can only be people who have a university diploma with a bachelor's title from any field of study¹². In **Germany**, a tax adviser must pass an examination to be appointed as tax adviser.

⁸ If a professional wants to use the protected title, he would have to become a member of IAB-IEC and to comply with the professional rules in force.

⁹ Portugal.

¹⁰ Spain- It has to be noted that there is no reserve of activity for economists. The activity of an economist can be performed without specific requirements for all kind of professionals. However, in order to be able to use this professional title of economist, there are some professional qualifications requirements.

¹¹ Cyprus.

¹² The title of a MA/MSc is not required, nor a specific major.

However, some Member States require also relevant professional experience, ranging from 5 years in **Romania** and **Slovakia** to 3 years in **Austria**. The entirety or part of the professional experience has to be carried out under the supervision of an authorised professional. This is the case in **Austria** where tax advisers have to undergo a 3 year traineeship under supervision. **Poland** requires an additional vocational training of 2 years in Poland after having passed the exam of tax advisor. In **Greece**¹³, the level of the professional licence depends on the education and the working experience of the professional. Professional organisations regulating the profession in **Slovakia** and **Poland** require also an oath of the professional before the registration.

In **Luxembourg**, to access the profession of accountant 1 year of the 3 years of professional experience has to be gained under the supervision of an authorised professional ("expert comptable"). In **Portugal** for the chartered accountants, lawyers and solicidores, there would have to carry out an internship under the supervision of a qualified professional.

In **France**, access to the profession of lawyer is linked to the holding of the certificate of competence for the profession of lawyer (CAPA).

1.2. Reserves of activities associated to the regulated profession

There is a wide diversity of regulation on the access to the activity of tax advice and the associated reserves of activities. This diversity is likely to have an impact on the free movement of tax advisers across Europe.

In **France**, **Luxembourg** and **Portugal**¹⁴ tax advice can only be provided by lawyers¹⁵ or accountants but there is no self-standing regulated profession of tax adviser.

In some Member States, specific activities within the range of tax advisory services are reserved to certain professionals. In **Norway**, tax adviser is not a regulated profession. However, if providing tax advice involves giving legal advice to others as a profession or in a regular manner, the main rule is that the person must be licensed as an advocate. Tax advice as specified in the Norwegian Court Act may also be provided by state-authorised auditors and registered auditors. In **Cyprus**, the mere provision of tax advice is not a

¹³ However Greece has adopted a circular concerning the accounting- tax consultant profession (8908/ΔIOE 236/23-2-2012) which abolishes the requirement that these professions can only be exercised by members of the Economic Chamber of Greece who are graduates of higher education establishments or of equivalent foreign schools. From now, the profession of accountant-tax consultant may be exercised by graduates of Greek tertiary schools of economics or by graduates of equivalent foreign schools of economics or by persons who meet the preconditions for the recognition of professional qualifications under Presidential Decree 38/2010 who are not members of the Economic Chamber of Greece.

¹⁴ In Portugal, the activity of tax advice is a regulated profession in so far as it comprises: i) legal advice for tax, accountancy and mandatory social security schemes, in which case it is under a reserve of activity for lawyers and "solicitadores" (shared with chartered accountants) and ii) the drafting and submission of tax and social security returns in which case it is reserved to chartered accountants. In all other respects a tax adviser does not have to be a lawyer, "solicitador" or a chartered accountant and the profession is unregulated.

¹⁵ However in France, other professions (such as accountants) can provide tax advice services if tax advice do not constitute their main activity but only an ancillary activity.

regulated profession. However, the submission of tax returns to the authorities is reserved to the accounting profession. In **Italy**, giving tax advice in general is not a reserved activity, but is also considered as one of the professional activities of "dottori commercialisti" and "esperti contabili". The particular activities of filing of tax returns, tax audit (certificazione fiscale) and representation in tax litigation are reserved to these 2 professions.

Another difference in the regulation results from the scope of the activity reserved or the degree of reserve. For example, the activity of giving tax advice can be strictly reserved to tax advisers such as in **Romania** and constitutes therefore an exclusive reserve of activity; in other Member States, it is an activity that can be pursued by different qualified professionals and constitutes therefore a shared reserve of activities. For example, in **Austria** and the **Czech Republic**, tax advice services are not reserved to tax advisers only. Lawyers and accountants can also provide those services. In **Germany**, tax agents, lawyers, auditors and chartered accountants, as well as tax advisers¹⁶, are authorised to provide unrestricted assistance in tax matters¹⁷. In **Poland**, tax advisers, lawyers, legal counsels and statutory auditors are entitled to provide tax advisory services.

Regulating the access to a service activity does not necessarily mean reserving the access to this service activity to the holders of specific professional qualifications. For example, in **Belgium** everyone can provide tax advice without fulfilling any condition. But "conseil fiscal" and "comptable agréé" are professions entitled to give tax advice and constitute professions whose titles are legally protected. In **the Netherlands**, a professional qualification is not necessary to provide tax advice. However, there are 2 professional associations of tax advisers (the Dutch association of tax advisers and the Dutch federation of tax advisers). Membership in those associations is voluntary but requires the possession of specific professional qualifications.

An activity-based approach to regulating tax advice services rather than individual professionals was identified in **Hungary** and **the Czech Republic** where a tax adviser may provide its services once it has at least one member or employee who is listed in the register of tax advisers.

Moreover the fact that in the scenario the company is composed of 51% tax advisers, accountants and lawyers and 49% shareholders not having a professional qualification might constitute a barrier if the activity is reserved in Member State to a particular profession. Thus, taking into account its composition, 6 Member States¹⁸ have indicated that Eurotax subsidiary would not be able to exercise the activity without having to be adapted. 11 Member States¹⁹ have indicated that it would be possible.

¹⁶ § 3(1) StBerG.

¹⁷ As well as other persons and associations listed in §4 StBerG.

¹⁸ Germany, France, Malta, Poland, Slovakia.

¹⁹ Austria, Cyprus, the Czech Republic, Denmark, Estonia, Spain, Greece, Luxembourg, Portugal, Romania, Sweden.

2. RECOGNITION OF PROFESSIONAL QUALIFICATIONS OF THE PROFESSIONAL IN CASE OF ESTABLISHMENT

The replies to the questionnaire demonstrate that most of the Member States regulating the profession of tax adviser seem to correctly apply the Professional Qualifications Directive. However, there are some variations in applying the mechanisms of compensation and there are some cases where it is doubtful whether the concrete application is in line with Union law. In addition, some Member States seem to be rather demanding as regards the documents to be submitted for the recognition of professional qualifications which raises questions as to compliance with the Code of conduct of the Professional Qualifications Directive²⁰. But even on the basis of a correct implementation and application of EU rules, the description of the procedures and the delays this entails make one wonder whether it would make sense to simplify national proceedings for the recognition of professional qualifications.

2.1. Recognition of professional qualifications procedure

According to the information above and in line with what is indicated for this profession in the Regulated Professions Database managed by the Commission, the recognition of the professional qualifications of tax adviser for establishment falls under the general system organised by Chapter I of Title III of the Professional Qualifications Directive. Under this system, professional qualifications are grouped in five levels so that they can be compared.

Qualifications are recognised if the professional's level of professional qualification is at least equivalent to the level immediately below that required in the host country. Recognition must also be granted to professionals whose profession is not regulated in the country of origin but who have worked full-time in that profession for two years. **Belgium, Germany, Hungary and Luxembourg**²¹ have implemented this rule.

Under certain limited conditions, the host country may impose compensation measures, i.e. an adaptation period of up to three years or an aptitude test. If the host country requires applicants to comply with such compensation measures, it must take into account their professional experience, and the professional concerned may in principle choose between an adaptation period and an aptitude test. **Hungary and Spain** (for economists who hold the professional title) give this choice to the professional.

However, for professions that require precise knowledge of national law, it is up to EU countries to decide whether to impose either the adaptation period or the aptitude test. **Austria, Belgium, the Czech Republic, Germany, Greece, Ireland, Italy, Luxembourg, Poland, and Romania**, are imposing one or the other of these compensation measures, usually an aptitude test²².

²⁰ Hungary noted that the provisions on administrative simplification of the Services Directive foresee the possibility of applying more stringent rules.

²¹ For accountants.

²² In France, lawyers, who decide not to make use of the possibilities offered by Directive 98/5/EC but to have their professional qualifications recognised immediately on the basis of Directive 2005/36/EC, are subject to an aptitude test (article 99 of Decree 91-1197 of 27 November 1991).

The concrete application of these principles on the ground is however not always clear. For example, in **Romania**, the professional is invited to an interview-test where the competent authority will evaluate his knowledge and possibly identify substantial differences. Moreover, recognition in this country is automatic for professionals who are members of the European Fiscal Federation. In **Slovakia**, there is an alternative route for recognition based on the licence of tax consultancy obtained in another Member State. In this case no compensation measures are requested. However the professional still has to undergo a test to check his knowledge of relevant Slovakian legislation. This is also the case in **Ireland** for tax advisers who want to become member of the Irish taxation Institute, where the professional has to sit at least one examination given the different tax regimes in the EU and potentially other additional exams if substantial differences have been identified in the legal systems of the Member States involved. **Portugal** might also require the professional to pass a test or internship. In **Greece**, the qualifications of the professional are recognised by one authority while his professional experience by the Economic Chamber, i.e. another authority. While the profession is not regulated, the **United Kingdom** requires a registration with a professional body because of anti-money laundering rules and it seems that these professional organisations have their own specific rules on substantial differences. Finally, membership with a local professional chamber is compulsory in several Member States²³. **Poland** imposes that the registration has to intervene within 12 months after the recognition of the qualifications.

2.2. Document requirements for the recognition

In conformity with Article 50 of the Professional Qualifications Directive, Member States can require some documents listed in Annex VII of the Directive for the recognition of professional qualifications²⁴. The responses show that most of the Member States require the documents contained in this list. However, some Member States require additional documents: a valid tax advice licence in **Slovakia**; **Poland**²⁵ requires the national authorisation to carry out the profession of tax adviser in the home Member State; in **Greece** the professional, if being an employee, has to present a certificate from the employer and a certificate of the home Member State social security organisation; **the Czech Republic** requires the commercial name and address for the professional, and a mailing address on its territory; for the "conseil fiscal", **Belgium** requires proof of knowledge of the Belgian law whereas for the "comptable agréé", it requires a proof that the professional's qualification gives access to the profession in the home Member State, for employed tax advisers pay slips, attestation of the employer, proof on the continuous professional education, etc.

²³ Such as Austria, the Czech Republic, Germany, Poland.

²⁴ Among these documents are: a proof of the nationality, copies of the attestation of national competences/qualifications, proof of good character or repute, a document relating to the physical or mental health of the applicant, proof of the applicant's financial standing, proof of insurance.

²⁵ Poland clarified that under the Polish professional qualification recognition procedure a document issued by the competent authorities of the home country of the applicant and which confirms the applicant's qualifications to work in a given profession is only required if such document is issued in the home country of the applicant. It is possible to submit a Xerox copy of the document. Moreover, Poland considered that requiring a proof of the national authorisation to carry out the profession is in line with Annex VII 1 b) of Directive 2005/36. According to Annex VII 1 b) of the Directive copies of the attestations of professional competence or of the evidence of formal qualifications giving access to the profession in question can be required.

7 Member States²⁶ require also proof of the fact that the tax adviser has not been suspended, temporarily or definitively, in the home Member State²⁷.

The Professional Qualifications Directive does not contain any specific provision on the forms of the documents to be submitted; it only clarifies the type of information which can be requested. However the Code of Conduct²⁸ for competent authorities on the daily implementation of the Professional Qualifications Directive²⁹ does not consider as acceptable practice the obligation to provide the originals or documents authenticated by the consular authorities or the national administration and requests for certified translations must be confined to the essential documents and Member States should recognise certified translations from the Member State of origin. Nevertheless, **Romania** requires that all documents are translated and authenticated while the interview-test is organised either in Romanian or in English; **Hungary**³⁰ requires also certified copies and translations of diplomas and of the proof of professional experience; documents in **Poland** have to be submitted in Polish or in two language versions of which one must be Polish and the translation must be realised by a sworn translator. **Luxembourg** accepts documents in German, French or English or a translation into one of these languages. In **the Czech Republic**, documents have to be presented in original or a certified copy of it translated into Czech. **Germany** and **Austria** require also certified translations of documents written in languages other than German. Some Member States, as **Luxembourg** or the **Czech Republic**, foresee clearly the possibility for their competent authorities to contact the home Member State authorities to check the validity and authenticity of the documents presented by the professional.

2.3. Fees

The Professional Qualifications Directive does not contain any specific provision on the question of fees for the recognition of professional qualifications and no specific question on this aspect was mentioned in the questionnaire. Several Member States, like **Romania**, **Hungary**, **the Czech Republic** and **Austria** link the recognition of the qualification to the proof that the fees involved have been paid. Only one Member State has indicated the fees required for the recognition of professional qualifications procedure.

²⁶ Austria, Belgium, Cyprus, Italy, Poland, Portugal, Romania.

²⁷ Poland noted that such document can be required according to Annex VII 1- d) of Directive 2005/36 in case of establishment.

²⁸ Code of conduct approved by the group of coordinators for the Directive 2005/36/EC on the recognition of professional qualifications – National administrative practices falling under Directive 2005/36/EC.

²⁹ Hungary noted that the Code of conduct is not a legally binding document.

³⁰ Hungary noted that the Services Directive explicitly clarifies in its Article 5, paragraph 4, that obligations of administrative simplification provided in its Article 5 (3), do not apply to the documents referred to in Articles 7(2) and 50 of Directive 2005/36/EC.

3. LEGAL FORM AND CAPITAL OWNERSHIP REQUIREMENTS

The scenario confirms the findings of the mutual evaluation process: despite the implementation of the Services Directive and in particular its Article 15, restrictions as regards corporate structures available for professional services and possibilities to attract outside capital have remained in place in many Member States. Limitations on the available legal forms can be the cause of difficulties for companies or professionals wanting to establish in another Member State as they restrict their choice of the most appropriate corporate vehicle. Similarly, requirements relating to capital ownership may result in reduced options for the acquisition of financing and in limitations on available business models.

In some Member States tax advisory services, even though a regulated profession, have the full range of company forms available and can have non-professional shareholders without limitations (the Czech Republic and Hungary). Others have made efforts to provide specific company structures to professionals with the objective to allow them to find an appropriate business structure while safeguarding certain specificities of the professions (France, Italy). This seems to indicate that a certain degree of relaxation of stringent rules is possible. However, in many Member States rather severe limitations in this area are still in place. Given this diversity and the developments in some Member States, it would be worthwhile to explore together the experience made in these and other Member States with a lesser degree of restrictiveness in these issues.

3.1. State of play according to the responses

The responses given to this questionnaire have confirmed that the establishment of a subsidiary or a branch of Eurotax in another Member State is likely to be hampered by requirements in force in the different Member States concerning legal form and shareholding for tax advisers, lawyers or accountants. For example, in **Greece** the opening of a branch would not be possible since it is required that 100% of the company's capital must be held by professionals except the S.A. where it is required that 51% of the company's capital must be held by professionals. In **Germany**, a subsidiary company fully owned by Eurotax could not be recognised as a tax consultancy since 49% of its partners are non-professionals which does not comply with the German rules³¹. In **Austria**, since lawyers are not authorised to be a partner of a company such as Eurotax, Eurotax would not be allowed to establish either a subsidiary or a branch. In **Portugal**, services provided by lawyers are incompatible with chartered accountant services. Therefore lawyers from Eurotax would be liable for disciplinary infringement procedures if they were to provide legal services in Portugal.

Some Member States³² only impose requirements relating to the legal form or shareholding to professionals wishing to act under a protected professional title. Thus in **Belgium**, there are no formalities to fulfil for providers wanting to exercise the profession of tax adviser without holding the title. But when a legal person wishes to

³¹ § 50a(1)(1) StBerG stipulates that only tax advisers, lawyers, established European lawyers, auditors, chartered accountants and tax agents and recognised tax consultancies may be partners in a tax consultancy.

³² Belgium, the Netherlands.

hold the title of "conseil fiscal", the Belgian law contains some requirements, relating notably to voting rights.

Other Member States³³ do not impose any legal form or shareholding requirements. The legal entity would only have to comply with the requirements for legal entities in general in the national territory. With the exception of **the Czech Republic** and **Hungary**, those Member States are the ones which do not regulate the access to the activity of tax advice.

The Czech Republic and **Hungary**, which regulate the access to the activity of tax adviser, do not impose any legal form or shareholding requirements. The service can be provided by a natural person enrolled in the List of tax advisers or by companies or cooperatives which carry out tax consultancy with the help of tax advisers which do not have to be partners or shareholders. Legal entities shall provide tax advisory services with the help of at least one tax adviser.

In **Italy**, tax advisers may establish companies with headquarters in Italy if they have the required legal form and amount of capital laid down by law. It is possible to establish a professional firm ("societa tra professionisti") only under the legal form of "societa di persone"³⁴. Alternatively, it would be possible to establish a professional association ("associazioni professionali"). But the mission and objective of a professional firm or a professional association should be limited to the sole exercise of liberal-professional activities. Each partner may only participate in one firm. A project of law adopted at the end of 2011 (law n°183/2011) has introduced the possibility for professionals to set up all types of companies. The Italian Parliament should have adopted the law by the 24 of March 2012.

Other Member States do not impose legal form or shareholding requirements for giving tax advice but do impose some legal form requirements for accountants or lawyers for example. For example, in **Cyprus**, lawyers can exercise as a general or limited partnership or a private limited liability company (lawyers liability company – LLC) only.

The responses received to this questionnaire have revealed the heterogeneity of regulation concerning the legal form and shareholding requirements in the different Member States, especially taking into account the fact that Eurotax is composed of tax advisers, lawyers and accountants and by shareholders not having a professional qualification on a 51/49% basis respectively. Some Member States impose legal form and shareholding requirements either on tax advisers, or on lawyers or accountants or a combination thereof. Taking into account the specific structure of Eurotax, responses were also received concerning requirements in force for accountants and lawyers which are described in this document.

³³ Bulgaria, the Czech Republic, Denmark, Estonia, Finland, Ireland, Iceland, Spain, Hungary, Iceland, Lithuania, the United Kingdom

³⁴ This is the only form that can exercise an activity which is not classified as commercial.

3.2. Regulations concerning tax advisers

3.2.1. Legal form requirements

Out of the 8 Member States regulating the profession of tax adviser, 5 Member States³⁵ have pointed out the existence of legal form requirements in force in their territory.

Requirements concerning legal form can take various forms. The most common is the limitation of the legal forms available to set up a specific company. For example, in **Austria**, the profession of public accountant or tax consultant may only be practiced by a general partnership, or a limited partnership, or a limited liability company, or a public limited company. In **Poland**, activity can be pursued in any form of a partnership without legal personality and in the form of a partnership having legal personality: as a limited company or a joint stock company. It is possible to carry out the activity of tax adviser as one of these entities or as a company without legal personality. In **Slovakia**, a legal person providing tax advice services must have the form of a partnership or a limited partnership and be registered in the company register and in the list of the Chamber of tax consultants. In **Germany**, the legal forms available for tax consultancies are strictly enumerated in law³⁶ but all legal forms for companies seem to be available for tax advisers. In **Romania**, tax advisers may carry out their activities as independent natural persons or may associate in trading companies which have in their object of activity tax consultancy³⁷.

Other Member States impose specific legal forms only if the professional uses a protected professional title. For example, in **Belgium**, the activity of tax advice is not legally regulated. Everyone can provide tax advice without fulfilling any condition. However, when a legal person wishes to hold the title of "conseil fiscal"³⁸, the law requires that the company is a civil company constituted as a Belgian law commercial company. The company can not exercise commercial activities without a prior authorisation from the professional chamber.

3.2.2. Shareholding requirements

The main purpose of shareholding requirements seems to be to protect the independence of exercise of the profession. For example, **Germany** considered that capital tie-up ensures that tax advisers can exercise their profession independently, as it guarantees that they provide advice which is not affected by the economic interests of investors who are not members of the profession. It would therefore prevent conflicts of interest amongst employees of tax consultancies who, in the absence of any rules on capital tie-up, would always be under pressure to cater for investors' expectations on profit (and not the clients'

³⁵ Austria, Greece, Poland, Romania, Slovakia.

³⁶ Public limited company (AG), partnership limited by shares (KgaA), limited liability company (GmbH), general partnership (OHG), limited partnership (KG), limited partnership with a GmbH as a general partner (GmbH & Co KG), a professional partnership, a partnership under the Civil Code (GbR) or a partnership for joint exercise of their profession which is not recognised as tax consultancy and may also form joint offices.

³⁷ Romania pointed out that a service provider who wants to establish within its territory will have to choose amongst the legal forms available in the national legislation.

³⁸ Title protected by law.

interests). These rules are therefore considered to be proportionate in order to protect the consumers and the administration of Justice in fiscal matters. **Poland** considered that requirements on capital ownership result from the need to ensure the presence of qualified professionals in the board and partners' meeting. The objective is to protect clients and ensure a high quality of services.

Some Member States require a specific qualification in order to hold capital. In **Germany**, only tax advisers, lawyers or established European lawyers, auditors, chartered accountants, tax agents and recognised tax consultancies may be partners in a tax consultancy. In **Romania**, a tax consultancy company should have at least one shareholder with the capacity of tax adviser, and its administrator should have the capacity of tax adviser.

In other Member States, the requirement is not directly related to the shareholding of the company but rather to the voting rights. Thus in **Slovakia**, tax consultants registered in the list of the Slovakian Tax consultants' chamber must own at least 75% of shares or voting rights in the company providing tax advice services. In **Belgium** the majority of the voting rights have to be held by tax advisers or accountants. To protect the independence of the profession, Belgium provides that no person or interest group may own directly or indirectly a part of the capital and/or voting rights likely to endanger the exercise of the profession or the independence of the tax advisers and their compliance with the deontological code. Therefore, the majority of the management have to be tax advisers or accountants (professionals established in Belgium³⁹; it seems that professionals from other Member States are excluded).

In **Poland**⁴⁰, entities entitled to carry out tax advisory activities include, inter alia, limited liability companies and joint-stock companies that meet these requirements: 1) the majority of members of the management board are tax advisors, 2) tax advisors hold the majority of votes at the general shareholders' meeting and in supervisory bodies, 3) the joint-stock company issues registered shares only, 4) disposal of shares or establishing a pledge on the shares requires permission of the company's management board. Therefore, a legal person such as Eurotax would not be recognised in Poland because it can not have the majority of votes in shareholder's meeting because such a majority should be given exclusively to tax advisers authorised in Poland⁴¹.

3.3. Regulations concerning accountants

The same type of requirements as the ones described for tax advisers can also be found concerning accountants. However, this paper does not reflect the regulation in all the Member States but only the information given by 8 Member States⁴² where accountants

³⁹ Requirement applicable only for tax adviser and not for accountant.

⁴⁰ The requirements on capital ownership refer solely to partnerships with legal personality.

⁴¹ There is however no regulation which would prevent Eurotax from holding the majority of shares in the share capital or prevent the remaining shares to be held by e.g. business partners of Eurotax whose qualifications are recognised in Poland. Therefore a subsidiary company Eurotax could carry out tax advisory activities provided that the majority of the management board members are registered as tax advisers. Those persons should be also entitled to the majority of votes at the general shareholders' meeting.

⁴² Austria, Belgium, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal.

are authorised to give tax advice. Among these Member States, it must be noted that **Luxembourg** reserves the activity of tax advice to accountants⁴³ and in **Portugal** the drafting and submission of tax and social security returns are reserved to accountants.

3.3.1. *Legal form requirements*

As for tax advisers companies, there are limitations of the legal forms available to set up an accounting company. Thus, in **Malta**, such company can be formed as a partnership which can be either a civil partnership or a commercial partnership including a company which can be formed and can practice in the field of accountancy⁴⁴.

In **Belgium**, the corporate purpose and activities of an accounting company have to be limited to services that are compatible with those of bookkeeper. They can not exercise commercial activities.

3.3.2. *Shareholding requirements*

Alternatively or in addition to legal form requirements, some Member States have requirements to have a specific qualification in order to hold capital. For example, in **Luxembourg**, legal persons providing accounting services must comply with the following requirements: the majority of their administrators or managers should be natural persons complying with requirements of good repute and professional qualifications; and the majority of the voting rights must be held by natural persons fulfilling the requirements of good repute and having the necessary professional qualifications. In **Cyprus**, a wholly owned subsidiary of a company, the majority of the voting shares of which is owned by persons who have approval to practice the accounting profession in the Member State of origin, may carry out the activity in question provided that the said persons pass an aptitude test in the subjects of Cyprus Company Law and Cyprus taxation.

In other Member States, the requirement is not directly related to the shareholding of the company but rather to the voting rights. In **the Netherlands**, there is an obligation that the majority of the voting rights of an accountancy firm should be held by professionals having the title Register-Accountant or accountants-Administratieconsulent. In **Malta**, 50% of the voting rights in an accountancy firm must be held by qualified professionals. Qualified professionals must constitute more than 60% of the firm's administrative or management body.

In **Greece**, a recent reform⁴⁵ will allow non members of the Economic Chamber who have the professional qualifications to work as accountants. The registration is not compulsory and the majority of the shareholders (51%) of a accounting company (société anonyme) are not obliged to be accountants.

⁴³ However lawyers and professionals from the financial sector can also provide services of tax advice.

⁴⁴ There are no specific requirements concerning minimum shareholding quotas for professional accountants or other professionals.

⁴⁵ Circular of the Ministry of economy concerning the accounting profession (8908/ΔΙΟΕ 236/23-2-2012) which repeals all requirements listed in the law 3919/2011.

3.4. Regulations concerning lawyers

The same type of requirements as the ones described for tax advisers and accountants can also be found concerning lawyers. However, this paper does not reflect the regulation in all the Member States but only the information given by 9 Member States⁴⁶ where lawyers are authorised to give tax advice. Among these Member States, it must be noted that **France** reserves the activity of tax advice to lawyers whereas in **Portugal** legal advice including as regards tax matters, accountancy and mandatory social schemes is reserved to lawyers (shared with "solicitadores" and chartered accountants).

3.4.1. Legal form requirements

According to the replies received almost all of the 9 Member States where tax advice can be provided by lawyers limit the available company structures for lawyers to some extent. Again the degree of regulation differs considerably between the Member States. Some Member States have rather strict rules limiting the choice of the legal form in order to ensure the independence of exercise of the profession. Thus, in **Austria**, inter- or multidisciplinary partnerships are prohibited for lawyers. Lawyers may only exercise the profession in the form of a civil law company, a general partnership or a limited partnership or a limited liability company⁴⁷. In **Lithuania**, legal forms authorised for lawyers are the individual practice, partnership without establishing a legal person, or a professional partnership of lawyers with legal personality. In **Malta**, lawyers can practise under the form of an association between lawyers, a firm (i.e. a partnership between lawyers and includes a lawyer who is the sole practitioner), or a partnership (i.e. a civil partnership made up of lawyers). In **Cyprus**, lawyers can exercise under the form of a general or limited partnership all of whose partners are advocates, or a private limited liability company all of whose shareholders and members of the directors' board are advocates. In **Norway**, a lawyer's practice may be organised as a single practitioner firm owned by the lawyer or as a company in accordance with the Norwegian rules. In **Ireland**, legal services can not be provided by a limited company⁴⁸.

France has adapted the commercial legal forms available to "liberal professions". A lawyer can practise his profession either individually or within an association for which member liability can be limited exclusively to members of the association who have engaged in the professional act, as a members of a professional civil-law company (société civile professionnelle), a professional partnership (société d'exercice libéral SEL) or a joint venture. He may also be a member of an economic interest group or a European economic interest group. The specific legal form of the SEL offers a variety of possibilities: "société d'exercice libéral à responsabilité limitée" (SELARL), "société

⁴⁶ Austria, Cyprus, France, Lithuania, Malta, the Netherlands, Norway, Portugal, Sweden.

⁴⁷ The purpose and operating range of law firms set up as limited liability companies is restricted to the exercise of the profession of lawyers.

⁴⁸ Ireland noted that section 64 of the Solicitors Act 1954 provides inter alia that a body corporate shall not do any act of such nature or in such manner as to imply that the body corporate is qualified or recognised by law as qualified to act as a solicitor. As such, it is not therefore a prohibition on a body corporate providing legal services as outside the areas of conveyancing, probate and litigation there is no restriction on who may provide legal services and, in particular, in the context of this scenario, there is no restriction on who can provide advice in relation to tax law and so such advice may be provided by a company.

d'exercice libéral à forme anonyme" (SELAFA), "société d'exercice libéral par action simplifiée" (SELAS) and "société d'exercice libéral en commandite par actions" (SELCA).

In **Sweden** a lawyer company in the form of a limited liability company may not engage in any business other than the practice of law. A lawyer is only permitted to practise law in more than one company upon exception from the Swedish Bar. A lawyer may not be employed by anyone other than a lawyer or a law firm.

3.4.2. *Shareholding requirements*

Most of the 9 Member States also restrict the possibilities to hold shares or be a partner in companies. Unsurprisingly, the degree and way of regulation vary widely. As already mentioned, in **Cyprus**, lawyers can exercise under the form of a general or limited partnership all of whose partners are advocates, or a private limited liability company all of whose shareholders and members of the directors' board are advocates. Capital can only be owned by lawyers registered in the Registry of practising lawyers. In **Portugal**, a lawyer can not exercise under the same structure as an accountant. In **Ireland**, a multi-disciplinary practice including legal services would not be compatible with the Irish system in force for lawyers.

In the **Netherlands**, lawyers can solely form a partnership if a) the other professionals pursue a liberal profession and b) the exercise of that profession requires an academic/university education (or an equivalent qualification), and c) the members of that other liberal profession are subject to a system of disciplinary control, similar to the disciplinary rules for lawyers. Partnerships are, for instance, permitted with members of the Dutch association of tax advisers and the Dutch Register of tax advisers or their foreign equivalents. But a partnership between lawyers and accountants is prohibited because multidisciplinary partnerships between lawyers and accountants might affect the independence of lawyers. Additionally, the Dutch legislation provides that the lawyers may not hold shares or depositary receipts for shares in a practice in the form of a company, unless they practise their profession in such company. If lawyers decide to set up a company with limited liability, the Dutch legislation requires that the statutes of that company should provide that it may only issue registered stock certificates⁴⁹. Moreover, the statutes of the law firm must provide that all the shareholders of the firm (thus 100% of the property) and a majority of the board of directors, including the chairman of the board, must be lawyers or members admitted to professional practice compatible with the legal profession (for example tax advisers belonging to a professional association) within the actual company⁵⁰.

In **Norway**, in companies which carry on legal practice, only persons who exercise a significant part of their professional activities in the service of the company may own shares or hold office as directors or deputy directors. In the case of joint-stock companies, all share certificates should be endorsed accordingly. Shares in companies

⁴⁹ Bearer stock certificates are thus prohibited.

⁵⁰ Are treated as similar to shareholders of a company holding companies that meet these requirements and where all the members of the board of directors are lawyers or members of an authorised profession, who exercise their profession in an existing company which is connected to the holding company in a group and whose shares are all held by the board of directors, or all, or part, held by one or more holding companies.

which carry on legal practices may also be owned by a parent company, provided that all shares of the parent company are owned by persons who exercise a substantial part of their professional activities in the service of the parent company, and that parent company conforms to the Norwegian rules. In **France**, more than half of the capital must be held by lawyers involved in the business activities of the company.

In **Austria**, the shareholding limitation to qualified professionals has been extended to relatives of the qualified professionals. Thus, it is foreseen that shareholders of law firms as limited liability companies must be a) Austrian or European lawyers, b) spouses (for the duration of the marriage) and children (up to 35 years except if they are preparing to enter the legal profession) of a lawyer belonging to the company, c) former lawyers who were shareholders before, d) the widower and children of a deceased lawyer where the lawyer was a shareholder at the time of decease, e) Austrian private foundations established by one or more shareholders whose sole purpose is to support the persons referred to in a) to d). Lawyers shall always hold the majority of the capital and have the decisive influence on the internal decision-making process within the company.

Member States can also authorise companies to hold the capital of a "qualified company". In **France**, since 1990, shares in a "société d'exercice libéral" [SEL] can be held by members of regulated judicial and legal professions other than those practising their profession within an SEL. A financial holding company (société de participation financière) may also hold a majority or minority share of the capital and voting rights in a SEL of lawyers. In 2011, a so-called "capital-based inter-professionalism" was introduced. It allows legal and accountancy professionals (working in France or abroad) to structure inter-professional networks. However, shareholding by persons who do not belong to the regulated professions in France or in the EU is prohibited. More than half of the capital and voting rights shall be held by persons practising their profession in the company. The supplementary capital may be held by natural or legal persons⁵¹ practising the profession, by natural persons who ceased the profession (for a 10 years period), the successors in title of the natural person (5 years period), and qualified nationals of an EU Member State.

In **Sweden**, only a member of the Swedish Bar may be a shareholder or a partner of a legal practice set up in the form of a limited liability company or partnership unless exemption granted by the Bar. In addition, only a lawyer may be appointed as member or alternate member of the board. If a managing director who is not an advocate, upon authorisation by the Bar, becomes a shareholder or partner in a law firm organised as a limited liability company, such ownership may not amount to more than 10% of the capital and 10% of the voting power.

3.5. Opening of branches

Whereas the setting up of a subsidiary implies the creation of a separate legal entity under national law, the branch is an office through which a company engages in business with no independent legal personality.

⁵¹ For legal persons subject to the civil character of their business activities and to exclusive possession of the capital and voting rights by members and former members of liberal professions.

The responses received have shown that in 23 Member States⁵², the opening of a Eurotax branch would be possible. In **Denmark**, Eurotax would only have to comply with the normal requirements for branches of foreign legal entities foreseen in the Danish law. In **Italy**, companies that have their effective office and main activity abroad are regulated, with regard to the legal form and shareholding requirements, in accordance with the legislation in the country of origin. Italian legislation is applied with regard to labour law, taxation and accounting as well as authorisations and incompatibilities.

However in 5 Member States⁵³, the opening of a Eurotax branch would not be possible because it would not fulfil the requirements in these Member States. Thus, in **Slovakia**, the opening of a Eurotax branch would not be possible since it does not meet the Slovakian legal form and capital ownership requirements. Similarly, in **Germany** and **Greece**, Eurotax could not operate a branch since it does not comply with the national rules relating to the shareholding of the company. In **Poland** a branch of a limited liability company with its registered office outside the Polish territory can not perform tax advisory services. Eurotax, acting as a legal person conducting its activity through a company in Poland would have to be entered into the register of entities entitled to performing tax advisory services, kept by the National Council of tax advisors.

In some Member States, the registration of the branch in a special registry is necessary. For example, in **Austria**, the establishment of a branch office of a company with limited liability with a seat in another Member State is allowed⁵⁴ upon registration with the Companies register. In **Cyprus**, Eurotax can operate a branch if it registers as an overseas company with the Registrar of Companies. In **Italy**, the accounting company does not enrol in the business register but in the Economic Activities index under the section within the business register, as a local entity⁵⁵. In the **Czech Republic**, the registration of the branch with the commercial register is necessary.

3.6. Name of the company

Some Member States have rules concerning the name of the companies entitled to provide tax advice. Most of the time, these rules impose that the company's name contains the name of the professional. For example, in **Cyprus**, the name of a law firm must consist exclusively of the name of the practising advocates. In **Norway**, in the case of companies which carry on legal practice, the name of the company shall include the word lawyer.

On the contrary, other Member States do not have rules on the names of the companies. **France** noted that lawyers may set up a practice individually in France and use the title of Eurotax.

⁵² Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Spain, Finland, Hungary, Iceland, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Portugal, Romania, Slovenia, Sweden, the United Kingdom

⁵³ Germany, France, Greece, Poland, Slovakia.

⁵⁴ §107 of the Austrian Companies with Limited Liability Act (GmbH-Gesetz, GmbHG).

⁵⁵ The branch needs to be registered in the Business register and declare itself to tax revenue authorities.

3.7. Administrative formalities to be complied with to register a company

Most of the responses received indicate that any company must register with a specific register. It seems that this obligation is a general obligation applicable to every company wishing to establish in the Member State. For example, in **Bulgaria, Sweden**⁵⁶, **Hungary**⁵⁷, **Spain, Ireland and Iceland**, there is an obligation to be registered in the register of companies or commercial register. In **Denmark**, Eurotax would have to register as a non-Danish company with the Danish Commerce and Company agency from the first day it starts activities in Denmark. Any European undertaking wishing to be established in **Belgium** must be registered with the "Banque-Carrefour des entreprises". In **the Netherlands**, any entrepreneur who wants to establish himself permanently in the Netherlands should be registered in the Business register, managed by the Dutch chamber of commerce. In **Estonia**, a private limited company must be registered in the commercial register as well, and this can be done either electronically via the e-commercial register's company registration portal or through a notary, whereas the public limited company must be registered in the commercial register through a notary⁵⁸. In **Norway**, everyone who is engaged in a business activity must have a Norwegian organisation number. An organisation number is assigned upon registration in the Central coordinating register for legal entities.

Sometimes it is required from the company to register also with the professional Chamber. For example, in **Romania**, the company would have to register with the Trade register and the Professional body. In the **Czech Republic**, legal entities are obliged to be registered in the List of Legal Entities and to notify the Chamber of Tax Advisers⁵⁹. In **Greece**, one must apply to the Commercial and Industrial Chamber to get registered and then apply to the Economic Chamber of Greece to get a license. In **Poland**, a limited liability company or a joint-stock company acquires the right to carry out tax advisory services upon entry into the register of legal persons authorised to perform tax advisory activities. At the moment of entry into this register, the company also acquires the right to officially refer to itself as a tax advisory company. The National Chamber of tax advisers also keeps a register of legal persons authorised to carry out tax advisory activities. In **Portugal**, general formalities under commercial law for incorporation apply. Furthermore, there is a specific formality to comply with: registration of a chartered accountant as professionally responsible for the company is mandatory whenever providing reserved activities for chartered accountants.

In **Cyprus**, every law firm is registered with the Bar Register of Lawyers' companies. In **France**, an application to register a law firm shall be presented to the president of the Bar association.

⁵⁶ The company registration can be done online.

⁵⁷ The company registration proceeding can be done online. Throughout the company registration proceedings the documents submitted electronically have to bear a qualified electronic signature and a time stamp.

⁵⁸ The documents must be in the required format, certified by apostille, legalised and translated into Estonian. The translation must be notarised or certified by a sworn translator.

⁵⁹ Responsible for compliance with the Czech rules and with professional regulations.

In **Germany**, the company must be recognised as a tax consultancy by the competent chamber of tax advisers. In the course of the recognition procedure, the chamber examines the articles of partnership or association in order to decide whether the conditions for recognition are met. A tax consultancy is recognised once the relevant document is issued by the Chamber; only then may it provide tax consultancy services. Thereupon, it is entered in the professional register. The general provisions of commercial law apply for the registration of a company in the trade register.

To be registered, the company would have to submit various documents. For example, in **Romania**⁶⁰, the company to get register would have to provide 18 different documents such as the original of the confirmation for the availability and the reservation of the company name and/or logo, statement on own responsibility in authentic form regarding the fulfilment of the conditions related to the registered office, etc. In **Belgium**, prior to the opening of a branch, the company would have to submit a number of documents⁶¹. The company would have to indicate a representative who would be able to demonstrate knowledge of Belgian law and his nationality for the "conseil fiscal" or for the "comptable agréé", a proof of insurance, an extract of registration to the Banque-carrefour des entreprises, a proof of registration with a social security fund, a recent proof of place of residence and an original proof of good conduct.

4. RULES OF EXERCISE

In this part we look at rules having an impact on the day-to day business of tax advisers and more particularly at insurance obligations and rules on commercial communications. We will revisit these in the part on cross-border service provision.

A minority of Member States, i.e. 8, impose insurance on tax advisers, 12 do not (the remaining 8 replies are inconclusive on this point). There is a large overlap between Member States which regulate the profession and those which impose insurance (6 out of 8). The information given by those Member States where other regulated professions than tax advisers provide tax advice also seems to point towards an accumulation of professional regulation and insurance requirements. It would be interesting to discuss this correlation: does the fact that a profession is regulated already indicate in itself that there is also a need for additional safeguards, i.e. insurance? Or could it be argued that well functioning regulation as such can be sufficiently protective so that it can be left to the provider to decide whether to take out insurance or not? And in general, how to explain the diversity of insurance requirements for the same type of service provided?

As regards commercial communications, many replies restate in abstract terms the national legislation. Often this does not allow to determine with any precision whether Eurotax' advertising would be legal. This in itself seems to be in an interesting result: if it is not possible for Member States to assess whether advertising is compliant, how could a

⁶⁰ Romania pointed out that the documents necessary for the registration within the National Trade Register differ in function of the legal form chosen by the provider.

⁶¹ The deed of formation, the trade name and the legal form of the company, the register of registration of the company and the registration number, a document from the register attesting the existence of the company, the address and indications of the activities of the branch, as well as its trade name, the appointment and identity of the persons who have the power to bind the company, the annual and consolidated accounts of the company (Article 81 of the Companies code).

business/service provider like Eurotax be expected to know? Another finding is similar to what we could already observe regarding other parts of the questionnaire: the multitude of different rules and requirements which exist. Some of these limitations would seem to be not in compliance with Article 24 of the Services Directive in so far as they are complete prohibitions of certain forms of advertising for particular professions. Other Member States allow commercial communications by regulated professionals under the same general conditions that apply to advertising by any business. Germany for example has recently substantially relaxed the professional legislation governing advertising for tax advisers. The professional code has been amended to cut down the section on advertising from previously 11 to 1 provision.

4.1. Insurance

4.1.1. Obligation of insurance against liability

Article 23, paragraph 1, encourages Member States to require service providers established in their territory and whose services present a direct and particular risk for the health and safety of the recipient or of a third person or to the recipient's financial security to subscribe to a professional liability insurance or to provide for some other form of financial guarantee.

According to the responses received, 8 Member States⁶² foresee an obligation for Eurotax to subscribe insurance to cover its liability. In 6 out of those 8 Member States, tax adviser is a self-standing regulated profession⁶³. **Hungary** which regulates the profession does not foresee any compulsory insurance.

8 other Member States⁶⁴ have declared that they would require the subscription of such insurance if the service were provided by lawyers or accountants. 12 Member States⁶⁵ have responded that there would be no compulsory insurance. **Greece** has not provided any reply to this question.

In Member States not having a legal obligation to subscribe insurance, professional rules can nevertheless contain such an obligation. For example, in **Ireland**, there is no compulsory liability insurance. However under the Irish Tax Institute code of professional conduct, every member in practice must ensure that adequate professional indemnity insurance or self-insurance cover is held by the business entity through which he practices.

Concerning the justification of this requirement, **Germany** has indicated that it considered that taking out insurance against liability arising from professional activity protects consumers by shielding clients from damage to their assets as a result of

⁶² Austria, Belgium, the Czech Republic, Germany, Poland, Romania, Slovenia (for lawyers only), Slovakia.

⁶³ Austria, the Czech Republic, Germany, Poland, Romania, Slovakia.

⁶⁴ Cyprus, France, Iceland, Lithuania, the Netherlands, Norway, Portugal, Sweden.

⁶⁵ Bulgaria, Denmark, Estonia, Spain, Finland, Hungary, Ireland, Italy, Lithuania, Luxembourg, Malta, the United Kingdom

incorrect advice, in as much as it pays the damages if the tax adviser is not financially able to do so.

In **Italy**, it seems that the ongoing reform of the professions will establish a general requirement for professionals to take out appropriate professional indemnity insurance to protect their clients.

Concerning the coverage of the insurance, some Member States have indicated that the insurance should cover any activity exercised by the professional. For example, in **Poland** a tax adviser is subject to compulsory civil liability insurance for damages caused while performing tax advisory activities. The insurance also covers civil liability of persons who assist the advisor. If a tax advisor is employed by a limited liability company or a joint-stock company entitled to provide tax advisory services, the obligation of civil liability insurance against damage caused during performance of tax advisory activities applies to these companies. In **Germany**, independent tax advisers and tax agents must be appropriately insured pursuant to the German rules against risks of liability arising from their professional activity. In **the Netherlands**, lawyers should ensure that all their activities are included in the professional liability insurance. The insurance must at least cover events in all the Member States of the EU. In **Iceland**, lawyers have the duty to maintain a valid professional liability insurance to cover any loss due to their own or their employee negligence.

Concerning the amount of the insurance, some Member States have specified the minimum to be insured. Thus, for example, in **Germany**, the minimum currently required for independent tax advisers and tax agents is 250 000 €. With an agreed annual maximum payment for all damage suffered in an insurance year, the amount must be at least one million €. In **Norway**, lawyers are required to provide security to cover professional liability. The amount of the security shall be at least 5 000 000 NOK. In **Portugal**, chartered accountants and lawyers are obliged to subscribe an insurance guaranteeing professional responsibility of up to a minimum of 50 000 € or 250 000 € respectively. In **Lithuania**, the professional civil liability of an advocate or a professional partnership of advocates should be covered by compulsory insurance for the damage caused to natural or legal persons in the pursuit of the advocate's profession and exceeding 100 000 LTL. In the **Netherlands**, lawyers must be properly insured with regard to the risk of their professional liability. The insured amount must be in conformity with the business and the interests which the lawyer or partnership tends to represent and must be at least 500 000 € per claim and at least twice this amount per year. In **Austria**, the sum insured must not be less than 72 673 € for any given insured event for a tax adviser, whereas for a lawyer the minimum coverage amounts to 400 000 € per insured event. The minimum coverage for law firms as limited liability companies amounts to 2 400 000 € per insured event.

For regulated professions, the professional associations or chambers are sometimes in charge of the approval of the insurance contract or of monitoring compliance with this obligation. For example, in **Belgium**, all practitioners of a regulated profession are obliged to subscribe liability insurance. The contract has to be approved by the relevant professional chamber. In **Cyprus**, all practising accountants and lawyers are obliged to provide professional indemnity insurance in order to renew their annual licence to their respective professional body.

Sometimes, professional associations also propose insurance contracts to its members. For example, in **the Czech Republic**, each tax adviser has to prove on an annual basis

his individual tax adviser's liability insurance which could be covered by a participation in the insurance premium resulting from the Framework insurance policy of the Chamber. In **Sweden**, members of the Swedish Bar association are covered by compulsory insurance which is provided through the association. The premium for the compulsory insurance coverage is included in the service fee debited by the Bar. The Swedish authorities point out that this insurance coverage would appear to be often insufficient in practice⁶⁶. Thus lawyers in Sweden often purchase additional insurance coverage. In **Slovenia**, the Bar association shall insure a lawyer against liability for damages that may arise in connection with the practice of the profession.

4.1.2. Recognition of insurance subscribed in another Member State

According to Article 23, paragraph 2, of the Services Directive, the Member State where a service provider wants to establish will have to take into account essentially equivalent or comparable insurance or guarantee requirements which the provider may already be subject to in the Member State of first establishment, and may not require the provider to take out any additional insurance or guarantee if the existing insurance or guarantee already covers the territory of the Member State where the provider wants to establish.

Many Member States have indicated that they recognise insurance subscribed in another Member State as far as it complies with the national rules in their territory. Although there is no compulsory insurance for tax advisers, **Hungary** has indicated that the Act on the general rules on the taking up or pursuit of service activities provides for the mutual recognition of professional guarantees in general. In **France**⁶⁷ and **Romania**⁶⁸, professional liability insurance may be taken out abroad. In **the Czech Republic**, the insurance should be concluded in such a manner that the insurance meets the Czech requirements. In **Portugal**, equivalent financial guarantees are accepted, irrespective of where in the EEA they are subscribed to, as long as they cover the national territory and the amount of liability required. In **Germany**, insurance acquired in other Member States is considered as sufficient if its cover and extent comply with the provisions applicable in Germany. In **Belgium, Cyprus, Slovakia and Slovenia**⁶⁹, account is taken of the insurance subscribed in another Member State depending on the extent of the guarantees and on the geographical coverage of that insurance.

Some Member States have explicitly stated that, if the insurance subscribed in another Member State does not meet the national requirements in force in a Member State, there is an obligation to conclude a complementary insurance. For example, in **Poland**, if the conditions and the scope of insurance concluded in the Member State of first establishment do not correspond to the conditions and scope of insurance defined in the Polish law, this person is obliged to conclude a contract for complementary insurance. In

⁶⁶ Sweden indicated that in the services fee an insurance is included. However if the applicant is covered by an insurance in his home Member State the fee can be reduced and the Bar does recognise foreign insurance.

⁶⁷ For lawyers.

⁶⁸ Romania pointed out that it recognises the insurance subscribed in other Member States as long as it covers the damages occurred in the national territory. This insurance does not have to comply with national rules, but only to cover liability in Romania.

⁶⁹ For lawyers

Lithuania, for lawyers, account is taken of the insurance subscribed in another Member State if equivalent in terms of conditions and extent of cover. Insofar as such insurance is not equivalent, the lawyer must take out additional insurance to cover his professional civil liability or guarantee compensation for such damage so as to meet the Lithuanian requirements.

Interestingly, two Member States⁷⁰ have indicated that the insurance must be subscribed with an insurer authorised to operate within their territory. In **Austria**, the law requires that the professional indemnity insurance must be taken out with an insurer authorised to operate in Austria⁷¹. In **Iceland**, auditors and lawyers are required to maintain professional indemnity insurance with an insurance company licensed to operate in Iceland covering any financial damage that may result from negligence on the part of the professional and/or his employee⁷².

4.2. Signatures

Concerning the possibility for Eurotax as a company to sign itself the documents issued by its professionals, 17 Member States⁷³ have responded that Eurotax would be able to sign whereas in 7 other Member States⁷⁴ only the qualified professionals can sign. 3 Member States have not provided any reply to this question and **the United Kingdom** pointed out that a tax agent does not assume any legal responsibility on behalf of their clients who still have to sign tax returns and claims.

In **Belgium** for a "comptable agréé", the company has to indicate a representative amongst the administrators or associates who is recognised by the Belgian professional chamber and only this person can sign on behalf of the company. This person is personally responsible for the execution of the tasks, as well as deontologically liable.

In other Member States, the possibility for the company to sign documents may be linked to the prior registration of the company with the professional Chamber. Thus, in **Cyprus**, only professionals can sign except where the company complies with the Cypriot rules concerning law firms. In **Slovakia**, documents of the company can be signed by the statutory body/person representing the company. However, documents that are the subject of the professional consultancy activity can only be signed by natural/legal persons registered in the list of tax consultants. If Eurotax were registered⁷⁵ in the list of

⁷⁰ Austria, Iceland.

⁷¹ Austria pointed out that although Article 21 a RAO obliges in principle a lawyer to contract a professional liability insurance for the duration of the professional activity with an insurer authorised to operate within the Austrian territory, Article 15 EIRAG stipulates that European lawyers established in Austria are exempted from this obligation if they can prove the existence of a professional liability insurance in their country which complies with the Austrian insurance requirements, regardless if the insurer is authorised to operate within the Austrian territory or not.

⁷² The response does not mention however Article 11, paragraph 7 of the Icelandic Act on Services (Act 76/2011) which implements in Iceland Article 14, paragraph 7 of the Services Directive.

⁷³ Austria, Belgium, the Czech Republic, Estonia, Spain, Finland, France, Ireland, Iceland, Lithuania, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovenia.

⁷⁴ Bulgaria, Cyprus, Germany, Hungary, Italy, Luxembourg, Slovakia.

⁷⁵ Impossible under its current form according to Slovakian legislation (see above in 3.1.)

tax consultants as a legal person, its statutory representative could sign the documents on behalf of the company.

In the Member States where only the professionals can sign documents, this obligation seems to be linked to a question of responsibility or need to identify the professional allowed to exercise the activity. In **Germany**, Eurotax would not be authorised to sign documents because tax advisers must ensure that they assume their own responsibilities through (co) signatory rights. They should personally sign important correspondence⁷⁶. In **Luxembourg**, only professionals can sign. As regards the pursuit of the profession of accountant by legal persons, the documents drawn up in their name must be signed by a natural person fulfilling the requirements of good repute and having the professional qualifications to exercise the profession. In **Norway**, if tax advice is provided by a lawyer or an auditor, the documents must be signed by the professional having carried out the activity. In **Portugal**, Eurotax would be able to sign documents not falling under the reserve of activity of chartered accountant, lawyers or "solicitadores". Documents falling under the reserve of activity of these professions would have to be signed by the professionals in question. In **Hungary**, documents completed by a company of tax advisers in the course of the proceedings before the taxation authorities can only be signed/endorsed by an individual tax adviser and not the company itself.

4.3. Commercial communications

The Eurotax advertising campaign is carried out via their website and by TV commercials. Eurotax also have a company brochure that they send to a large mailing list of potential customers. The scenario does not specify how the contact details of these potential customers have been obtained. The advertising campaign also refers to a list of the 30 biggest corporate clients of Eurotax.

The notion of commercial communications under the Services Directive covers any form of communication aiming to promote services or the image of a service provider. It thus covers advertising as well as other forms of commercial communications such as canvassing⁷⁷.

According to Article 24, paragraph 1, of the Services Directive, all total bans on a form of commercial communication for regulated professions should be removed. However, in line with Article 24, paragraph 2, rules on the content and conditions of advertising can be justified for deontological reasons. For information society services, this rule complements Article 8 of the E-Commerce directive, which obliged Member States to ensure that the use of commercial communications which are part of, or constitute, an information society service provided by a member of a regulated profession were permitted subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession.

⁷⁶ §3(3) BoStB.

⁷⁷ See judgement C-119/09 of the European Court of Justice.

4.3.1. Existing possibilities and eventual limits of advertising

3 Member States⁷⁸ have explicitly indicated that Eurotax's advertising campaign would not be allowed for different reasons which would appear to go from the protection of the privacy of the client to professional rules limiting certain types of advertising for lawyers and accountants. The response by **Slovakia** states that the campaign would not be possible in its full extent. It is unclear from the response what aspects of the campaign would not be allowed by Slovakian legislation but the reply seems to point towards the use of the clients' names without their consent. In **France** and **Portugal**, the impossibility to make use of the campaign would rather derive from rules on professional ethics in case tax advisory services are provided by certain professionals. In **Portugal**, chartered accountants, lawyers and "solicitadores" are barred from publicity going beyond the mere advertisement of their names and professional qualifications and so is Eurotax, insofar as it advertises activities reserved to those professionals.

In some Member States, the campaign would appear to be generally possible but the responses mention certain rules to which regard must be had in its conduct. **Slovakia** and **Poland**⁷⁹ have indicated that any advertising campaign must comply with the professional rules in force. Poland pointed out that no inconsistency with the professional rules have been identified from the description of Eurotax' advertising campaign. In **Belgium**, legislation regulating the advertising sector and professional rules would be applicable.

In addition, a number of Member States have indicated that advertising made within their territory must respect certain general rules, amongst which those implementing Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive')⁸⁰. This section does not assess whether the implementing provisions mentioned in the responses are in line with the Unfair Commercial Practices Directive. Examples of references to general rules with which advertising must comply are the following: In **Sweden**, rules prohibiting practices unfair to consumers and business operators apply. In **Luxembourg**, publicity by an individual professional accountant in public practice is acceptable provided that it has as its objective the notification to the public of matters of facts in a manner that is not false, misleading or deceptive; it is in good taste, it is professionally dignified and it avoids frequent repetition of, and any undue prominence being given to the name of the professional accountant in public practice.

⁷⁸ France, Portugal, Slovakia.

⁷⁹ In Slovakia, a tax consultant can provide and publish information on his activity in a true and common way, while respecting the ethical principle of advertising. He must not use forms and means that could damage the profession or the name of the Chamber. When presenting his activities, he should not exaggerate his capabilities, qualifications or experience, nor impeach the activity of other tax consultants or other persons. In Poland, according to the tax advisers' professional code of conduct, advertising should not include comparison, in particular of the quality of services provided with services provided by other tax advisors; promises or guarantees of effectiveness; invoking personal relation with public authorities, their representatives or related entities.

⁸⁰ Cyprus, the Czech Republic, Iceland, Luxembourg, Poland, Spain, Sweden.

Concerning tax advisory services provided by lawyers, the responses reveal that specific restrictions concerning their possibilities or conditions of advertising exist in certain Member States. In the responses to this questionnaire, 8 Member States⁸¹ have specified advertising rules applicable to lawyers. For example, in **Austria**⁸², lawyers may advertise by using technical means as long as the information provided on their professional activity as lawyers is factual and true and in conformity with their professional duty. In **Portugal**, lawyers are barred from publicity going beyond the mere advertisement of their names and professional qualifications⁸³. In **Norway**, in addition to the general rules on advertising, rules of conduct would be applicable for lawyers⁸⁴. In **Lithuania**, for lawyers, it is only allowed to inform about their curriculum vitae, foreign language competence, practice fields, contact information, trade mark registered in their name as well as data about costumers (costumer's name, activity and other similar information). In **Slovenia**, lawyers may inform the public about performing their activities⁸⁵ on condition that the information is true, not misleading, protects confidentiality and is in accordance with ethical standards. Lawyers in **Cyprus**, are allowed to publish and circulate brochures, register and enter advertisements in telephone or other contact directories, provide information on the specific professional activities of the advocate or the law firm. Moreover, the lawful advertising, publicity and promotion of an advocate's or a law firm's professional activity in Cyprus and abroad are permitted if compliant with the law and in a manner consistent with the dignity of the profession. In **France**, lawyers are allowed to have recourse to the sending of letters of general information on the firm by post or e-mail, the publication of announcements, the publication of advertising inserts in directories or the press, the dissemination of information brochures on the practice and the affixing of a plaque⁸⁶.

Concerning the content of the advertising made by lawyers, some Member States have rules to regulate the information given. Thus, in **Cyprus**, the publicity made by lawyers must not be imprecise, misleading or give the impression of self-praise, contain references to the advocate's rates or tables of success, include references or comparisons with other advocates or law firms, be overly frequent or repetitive. In **Norway**, the advertising of a lawyer in form and in content should be to the point and factually correct, and should not contain anything incorrect, misleading or deceiving.

Some Member States have indicated restrictions as to the media that can be used by lawyers for the advertising campaign. Thus, in **Cyprus**, advertising of lawyers must not be made in newspapers or magazines, on the radio or television, appear on posters or on

⁸¹ Austria, Cyprus, France, Lithuania, Norway, Portugal, Slovenia, Sweden.

⁸² Article 10, para 5, RAO is relevant.

⁸³ They may mention specific clients only if absolutely necessary for the exercise of their activity and upon authorisation by the Bar.

⁸⁴ According to these rules, the lawyer should not, notably, identify himself with the client, and he has the right to expect that he should not be identified with the points of view that he presents on behalf of his client and the interests of the clients. The lawyer must refrain from any conduct which is capable of hurting the image of the Bar and the profession.

⁸⁵ Opening hours of his office, field of work.

⁸⁶ It would appear that before publication adverts and plaques must be notified to the professional order.

advertising boards. **Lithuania** has indicated that an advertising campaign could not be carried out on TV for lawyers. In **France**, the means allowing advertising for lawyers seem to be limited to a closed list which would not appear to include TV campaigns.

4.3.2. *Authorised forms of commercial communications*

- **Concerning the possibility for Eurotax to mail its brochure to potential clients**

According to the responses received, it would be possible in 20 Member States⁸⁷ to send brochures to potential clients. In 2 other Member States⁸⁸, it would be possible within certain limits while in 2 other Member States⁸⁹ it would be impossible.

Some Member States have signalled limitations to the possibilities of **canvassing**. For the sending of brochures by e-mail, Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector ("Directive on privacy and electronic communications") applies. Article 13 of this Directive states that Member States shall take appropriate measures to ensure that unsolicited communications for purposes of direct marketing are not allowed either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these communications. The choice between these options has to be determined by national legislation. The **Danish**, the **Hungarian** and the **Norwegian** responses would indicate that these countries have opted for an opt-in system which would only allow for the sending of unsolicited brochures via e-mail in those cases in which the recipients have authorised it⁹⁰. **Belgium** and the **Netherlands** seem to have opted for an opt-out system. Thus, in **Belgium**, Eurotax would have to allow the addressee to express their wish to stop the mailings. According to the responses, this system would appear to apply for non-electronic sending of brochures too⁹¹.

Other Member States have indicated that canvassing is authorised. Thus, for example, in **Germany**, unsolicited mailing of brochures to possible new customers is permissible. In **Cyprus**, advertising or technical material may be sent to non clients. Such distribution should not in case of accounting or audit work be followed by a personal visit or phone

⁸⁷ Austria, Belgium, Bulgaria, Cyprus, Germany, Denmark, Estonia, Spain, Finland, Hungary, Iceland, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Romania, Slovakia, the United Kingdom.

⁸⁸ Poland, Sweden.

⁸⁹ Norway, Portugal.

⁹⁰ If they have indicated that they do not want to be part of advertising enquiries. Those companies are marked with "Reklamebeskyttelse: Dette P-nummer/CVR-nummer er reklamebeskyttet".

⁹¹ In **Belgium**, the provider would have to allow the addressee to express their wish to stop the mailings. Sending a company brochure to a mailing list is not considered to be a problem if the information is objective and discrete. In **the Netherlands**, the advertiser shall identify himself in a letter box advertising, door-to-door sampling and direct response advertising in such a way that he is easily recognisable and actually accessible to the recipient. The name and address of the advertiser shall be stated in the offer. If the recipient of the advertisement states in writing that he does not want to receive such advertising, the advertiser shall ensure that this wish is honoured unconditionally, as soon as possible and in any case within a period of 3 months of receipt of the request.

call, unless specifically asked for by the recipient. The code of ethics for accountants provides that when a professional accountant in public practice solicits new work through advertising or other forms of marketing, there must be no threat to compliance with the fundamental principles of the profession.

In 3 Member States, limitations are foreseen only for specific types of recipients. Thus, for example, in **Norway**, it is prohibited to send unsolicited commercial e-mails to natural persons. However, it is legal to send such mails to legal persons. In **Sweden**, the mailing of a brochure would also be possible if the clients are legal persons⁹². In **Ireland**, data protection legislation restricts how personal data may be used. Postal marketing to corporate entities is not restricted.

Some Member States have rules concerning the content of the information given. Thus, in **Belgium**, sending a company brochure to a mailing list is not a problem⁹³ but rules relating to the objectivity of the information and a certain level of discretion, general legal conditions (e.g. mention of registration numbers), clear mention of the name and address of the company have to be respected. In **Slovakia**, the brochure must comply with the legislation and ethical code.

Some prohibitions or limitations of this type of commercial communication exist in some Member States for lawyers. For example, in **France**, this advertising campaign would not be possible for lawyers. Advertising allowed for lawyers may only consist in the dissemination of information on the type of services offered provided that the way the information is given does not constitute canvassing. In **Sweden**, concerning the soliciting of business and marketing by lawyers, the Professional Code of the Bar states that a lawyer may not solicit business in a way which entails exploitation of another person's distress or vulnerable position. In **Cyprus**, advocates and law firms are allowed to publish and circulate brochures or professional profiles, provided that the information can be corrected if necessary⁹⁴. In **Lithuania**, mailing a brochure would be allowed as far as there is no information promoting a particular lawyer. In **Portugal**, lawyers are barred from publicity going beyond the mere advertisement of their names and professional qualifications.

- **Concerning the possibility for Eurotax to carry out a TV advertising campaign**

According to the responses, 21 Member States⁹⁵ allow a TV advertising campaign. In 3 other Member States⁹⁶, a TV advertising campaign would be possible within certain

⁹² Under the Marketing practices Act, a business operator may, when marketing to a natural person, use e-mail, a telefax or automatic calling device or any other similar automatic system for individual communication that is not operated by an individual only if the natural person has consented to this in advance. In marketing via e-mail, the communication shall at all times contain a valid address to which the recipient can send a request that the marketing cease. This also applies to marketing to a legal person.

⁹³ But for a "comptable agréé", mentioning the name of customers is not allowed by the code of ethics (breach of professional secrecy).

⁹⁴ Regulations 19(4) (a) of the Code of conduct regulations 2002.

⁹⁵ Austria, Bulgaria, Germany, Denmark, Estonia, Spain, Finland, Hungary, Iceland, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland (within certain limits), Portugal, Romania, Sweden, the United Kingdom.

limits. In 2 Member States⁹⁷, a TV advertising campaign would not be possible if the service was provided by lawyers for 2 of them.

In some of the Member States allowing a TV campaign, the provider would have to comply with the general rules on advertising applicable within the national territory. Thus, **Spain** indicated that the TV campaign would be possible provided that it meets the conditions of the general law on advertising. In **Estonia**⁹⁸ and **the Netherlands**, general rules on advertising apply. In **Denmark**, the TV advertisement shall be lawful, decent, honest and truthful.

It is worth noting that in the 2 Member States⁹⁹ that do not allow TV advertising for tax advisory services, this prohibition concerns exclusively services provided by lawyers. While allowing the TV campaign, **Lithuania** indicated that Eurotax could run an advertising campaign via TV as long as this firm does not promote particular lawyers. In **Portugal**, a TV advertising campaign would be possible if it were limited to the mere publicity of the name and professional qualifications for chartered accountants, lawyers and "solicitadores".

- **Concerning the possibility for Eurotax to make the advertising claims on their website**

Concerning advertising via a website, the rules of the E-Commerce directive would be applicable. It follows that the provider must comply with the rules in force in his Member State of establishment, amongst which the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession.

In **Cyprus**, lawyers can create and present a professional website bearing the name of the advocate or the law firm. As mentioned above, **Portugal** has restrictions on advertising by certain professionals, which would apply also to advertising carried out through websites lodged in its territory. In **Hungary**, providers are entitled to carry out advertising through a website but the company would need to fulfil requirements related to the essential nature of the advertisement (i.e. must be identified as an advertisement, it must be evident who the advertiser is etc.). Both Portugal and Hungary acknowledge however that providers established in other Member States and providing cross-border information society services would only be subject to the legislation in the Member State of establishment, as further detailed below in Section 6.

- **Concerning the mentioning of clients**

⁹⁶ Belgium, Slovenia (for lawyers) and Slovakia.

⁹⁷ Cyprus, and France.

⁹⁸ An advertising campaign shall not be contrary to good morals and customs, provide inaccurate information, contain denigration or discrimination. It is prohibited to spread misleading advertising.

⁹⁹ Cyprus and France.

Another type of limit would appear to be based on data protection legislation¹⁰⁰ and on the need to respect confidentiality. **Cyprus, Denmark, Germany, Italy, Ireland, the Netherlands, Portugal, Slovakia and the United Kingdom** allow for the use of names of clients in advertising to the extent that the clients have given their consent for disclosure. In **Sweden**, the duty of confidentiality and discretion of lawyers does not allow them to reveal the identity of their clients. An exception may be made in cases where the client gives consent to the release of information and the lawyer makes the assessment that doing so is compatible with the best interests of the client. In **Belgium**, mentioning the name of customers is not allowed by the code of ethics of the accountants (breach of professional secrecy).

5. CROSS-BORDER PROVISION OF SERVICES WITH PHYSICAL MOVE

The replies to the questionnaire show that Member States have divergent views as to the necessity to use the possibilities provided for in the Professional Qualifications Directive regarding procedures related to cross-border movement of tax advisers: 6 out of the 11 Member States regulating the activities require an annual prior declaration in the context of the recognition of professional qualifications whereas the others do not. Similarly, 6 Member States regulating the profession of tax adviser do not require a registration pro-forma in case of cross-border provision of services. This situation raises a rather obvious question: is there a need for Member States to reassess the choice made to require a prior declaration or a registration pro-forma in case of temporary provision of services?

Concerning the exercise of the activities and in particular the issues we have already addressed above in the context of establishment (restrictions on company structures, insurance obligations and commercial communications), the replies demonstrate that a number of Member States continue to apply their own rules on these matters to cross-border service providers. Some Member States have even indicated that the entire national legal order in these matters would be applied to cross-border services providers. This situation raises the question of the compatibility with Article 16 of the Services Directive.

5.1. Recognition of professional qualifications

The host Member State may require a written declaration, made in advance, including certain information. Moreover, the host country may provide for automatic temporary registration or pro forma membership on the basis of the declaration made in advance. The public social security bodies must also be informed in advance, or, in an urgent case, afterwards, of the services provided. Lastly, the host country may require the service provider to supply the recipient of the service with certain information.

5.1.1. Distinction between establishment and free provision of services

Title II of the Professional Qualifications Directive governs the recognition of professional qualifications in the context of a temporary move to the territory of another EU country. The temporary and occasional nature of the activities of a self-employed or

¹⁰⁰ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

employed person is assessed on a case-by-case basis, in light of the duration of the activity, its frequency, regularity and continuity.

Most Member States transposed this provision, based on the ECJ case law and the wording of the Directive, literally. Some other Member States recognise however a lack of distinction of these concepts in their legislation (e.g. **United Kingdom** and **Ireland**). Some Member States, like **Slovakia** and **Lithuania**, link the definition of the establishment to the existence of a stable infrastructure on their territory while **Germany** and **France** consider that a necessary infrastructure does not exclude the application of the rules on free provision of services. The **Italian** authorities noted that they assess on a case-by-case basis taking into account the nature, duration and frequency of the service provision even if they receive no information on the duration and frequency of the cross-border provision of services. The **Czech Republic** noted that if the scope of activity of a provider/company within the national territory exceed certain extent (which has to be assessed on a case by case basis in conformity with the ECJ case law), the provider/company shall establish in the Czech Republic¹⁰¹. In **Portugal**, competent authorities have the possibility to fix concrete application criteria for the temporary mobility within each profession – however they have not yet used this possibility.

5.1.2. *Prior declaration*

6 out of the 11 Member States which regulate the profession of tax adviser or reserve tax advice activities to other regulated professions and **Italy**¹⁰², in line with Article 7, paragraph 1, of the Professional Qualifications Directive, require an annual prior declaration¹⁰³, whereas others do not¹⁰⁴. **Austria** for example does not require a prior declaration but imposes on the professional an information obligation towards the clients. Such information to the client is also required in **the Czech Republic** although the Czech Republic also demands a prior declaration.

In line with Article 7, paragraph 1, of the Professional Qualifications Directive, the prior declaration should be sent only for information purposes and should not be considered as a prior authorisation. The Directive does not provide for a deadline to send the prior declaration. However, in **Romania**, the professional cannot start exercising the profession as long as he has not received an acknowledgement of receipt for his prior declaration – in principle in 15 days after the introduction of his file. In **Belgium** or in **Hungary**¹⁰⁵, the prior declaration is an opportunity for the competent authorities to check the language knowledge of the professional.

¹⁰¹ For example, the **Czech** authorities noted that if a TV advertising campaign was aimed at customers in the Czech Republic, the company should establish in the Czech territory (via a branch or subsidiary).

¹⁰² for accountants.

¹⁰³ Belgium, the Czech Republic, Germany, Hungary, Italy, Poland, Portugal, Romania.

¹⁰⁴ Austria, Ireland, Luxembourg, Slovakia, and all Member States not regulating the profession.

¹⁰⁵ Hungary clarified that the prior declaration serves solely for information purposes and does not constitute a prior authorisation. Only a proof of language knowledge (any form of document) is required.

Interestingly, even if for lawyers Directive 77/249 will be applicable in case of cross-border provision of services and not the Professional Qualifications Directive, **Spain** and **Cyprus** noted that the lawyer must send a prior declaration to their competent authorities. Article 7, paragraphs 1 and 2, list the information that can be asked in the prior declaration (i.e. information that the provider intends to provide services, details of any insurance cover and for the first declaration documents listed in Article 7, paragraph 2, see below). However, some Member States seem to go beyond Article 7, paragraph 1, by requesting information about the planned duration of the service provisions in the calendar year (**Hungary** and **the Czech Republic**¹⁰⁶).

Declaration in federal countries

In federal or quasi federal countries, the profession could be regulated at regional level and one declaration or one registration might not allow for the provision of services in the entire national territory. However, amongst the regulating Member States only **Luxembourg** indicates that several registrations are needed. Interestingly enough, **Slovenia**¹⁰⁷ and **Estonia**, otherwise non regulating countries, also indicate that several registrations might be required.

5.1.3. *Documents in the prior declaration*

Article 7, paragraph 2, of the Professional Qualifications Directive lists the documents that Member States can require as annex to the first prior annual declaration or if there is a material change in the situation of the provider. Those documents are: a proof of nationality of the provider, an attestation of legal establishment, evidence of professional qualifications, for professions not regulated in the home Member State proof of the exercise of the activity for at least 2 years.

Most Member States seem to require documents in line with Article 7, paragraph 2, of the Professional Qualifications Directive for the provision of tax advice. However, some Member States seem to require extra documents such as evidence of no criminal convictions¹⁰⁸ in **Portugal**, **Poland**¹⁰⁹ and **Belgium**¹¹⁰; in **Romania**, information on the potential membership of the professional in a professional organisation in the home Member State, details on the eventual registration in a trading or other public register, information on any other organisation to which the provider is registered, VAT number; the nature of the activity in **Italy**; pay slip, certificate of employer and professional licence in **Belgium**¹¹¹.

¹⁰⁶ The Czech Republic noted that the prior declaration is valid for one year (not a calendar year), afterwards it shall be renewed. The supposed time of provision of tax advisory services shall be notified by the professional.

¹⁰⁷ For lawyers

¹⁰⁸ According to Article 7, paragraph 2, evidence of clean criminal record can be requested only for professions in the security sector.

¹⁰⁹ Poland considered that requiring such document is permitted by Article 7(2) e) of Directive 2005/36 which provides that such document can be required for professions in the security sector.

¹¹⁰ For accountants.

¹¹¹ For accountants.

As far as the language and the form of these documents are concerned, the same situation can be observed as in the case of establishment: some Member States require certified copies and translations of the documents. It must be noticed that the Code of Conduct for competent authorities¹¹² on the daily implementation of the Professional Qualifications Directive does not consider as acceptable practice the obligation to provide the originals or documents authenticated by the consular authorities or the national administration.

5.1.4. *Pro forma registration*

According to Article 6 of the Professional Qualifications Directive, Member States can require a pro forma registration by incoming service providers to the competent professional chamber. According to the replies received, 18 Member States¹¹³ do not require such a registration for tax advisers, out of these Member States, 6¹¹⁴ regulate however the profession. 5 Member States¹¹⁵ require registration. In **Slovakia**, the condition for registration with the Chamber is the successful sitting of an exam. In **Poland**, the service provider does not have to register but he has to inform the social security bodies.

In addition, some Member States provided information on the registration obligation for other professions in case of cross-border provision of services: economists in **Spain**¹¹⁶, accountants in **Italy**.

Interestingly, even if for lawyers Directive 77/249¹¹⁷ applies in case of cross-border provision of services and not the Professional Qualifications Directive, **Cyprus**, **Lithuania**, **Slovenia** and **Spain** noted that the lawyer must be registered pro forma.

5.1.5. *Professional experience*

Member States may require 2 years of prior professional experience if the profession is not regulated in the home Member State of the provider. This is required in **Austria**,

¹¹² Code of conduct approved by the group of coordinators for the Directive 2005/36/EC on the recognition of professional qualifications – National administrative practices falling under Directive 2005/36/EC

¹¹³ Austria, Bulgaria, Denmark, Estonia, Finland, France (for lawyers) Hungary, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Sweden, the United Kingdom.

¹¹⁴ Austria, Greece, Hungary, Poland, Portugal, Romania.

¹¹⁵ Belgium, the Czech Republic, Germany, Greece, Slovakia.

¹¹⁶ Spain noted that the Royal Decree 1837/2008 (Article 13) provides in accordance with Directive 2005/36/EC that prior to the first entrance in the year, the service provider must inform the competent authority that he intends to carry out a provision of service by submitting a written statement to the competent Spanish authority. This prior declaration serves as a pro forma registration in the respective associations so that professionals have not a specific registration obligation. See also footnote 10.

¹¹⁷ Article 4, paragraph 1, of this Directive specifies that activities in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State with the exception of any condition requiring residence, or registration with a professional organisation in that State.

Belgium¹¹⁸, the **Czech Republic**, **Germany**, **Hungary**, **Poland** and **Portugal**. **Italy**¹¹⁹ checks the professional experience but allows the professional to carry out the activity. In **Greece** no prior experience is required if the professional holds a degree in economics or from a technological educational institution – if not, prior work experience is required.

However, Article 5, paragraph 1 (b) of the Professional Qualifications Directive provides that the condition requiring 2 years' pursuit shall not apply when either the profession or the education and training leading to the profession is regulated. 7 Member States foresee such an exemption¹²⁰ for tax advisers. Concerning this exemption, Italy pointed out that competent authorities apply Article 21 of the Legislative Decree 206/2007: they verify from the documentation received and, in case of doubt, ask for confirmation to the competent authorities of the home Member State. **The Czech Republic**¹²¹ clarified that the service provider may also submit a document on regulated education which has qualified him/her for the pursuit of the professional activity in his Member State of origin. The case of **Norway** is also interesting as, concerning the auditors, no exemption is foreseen but it is neither excluded that the competent authority will apply it on the basis of the Professional Qualifications Directive. In **Spain**, the possibility of providing recognition based on the regulated training courses followed in the country of origin is stipulated for economists holding the professional title.

Only 7 Member States¹²², like **Hungary**, **Poland**, **Italy**¹²³ and **Norway**¹²⁴ control, on the basis of the prior declaration that the professional has carried out the same profession for 2 years during the previous 10 years. **Portugal** declares applying Article 4, paragraph 2 of the Professional Qualifications Directive (activities are comparable) and uses IMI. **The Czech Republic** is also relying on administrative cooperation in this regard. **Greece** requires a certificate of the employer and of the home Member State social security organisation. **Germany** recognises that there are no legal provisions regarding tax advisers organising the check of the nature of the prior experience.

¹¹⁸ For accountants

¹¹⁹ For accountants

¹²⁰ Austria, the Czech Republic, Germany, Hungary, Italy, Luxembourg, Poland.

¹²¹ The Czech Republic clarified that the service provider may also submit a document on regulated education which has qualified him/her for the pursuit of the professional activity in his Member State of origin. Evidence of formal qualifications shall be diplomas, certificates or other evidence issued by a competent authority or institution in a Member State or similar evidence issued by an authority or institution in the country which is not a Member State or a set of such documents acquired by an applicant after having successfully completed education and vocational training which certify a successful completion of education and training that has prepared an applicant for the pursuit of the regulated profession pertaining to the specific area of expertise, if the profession in question is not deemed to be a regulated profession in the Member State of origin.

¹²² Belgium, the Czech Republic, Hungary, Italy, Norway, Portugal, Poland.

¹²³ For accountants

¹²⁴ For auditors

5.1.6. Control

Control of the professionals and the documents submitted is carried out mostly by the chambers when registering the professional, combined with the use of IMI. However, **Belgium** indicates, there is little experience in this field. In **Slovakia**, a fine can be imposed on the professional but without further details on its amount.

5.2. Eventual formalities to be completed by the company (not related to the recognition of professional qualifications)

According to the responses received, 18 Member States¹²⁵ do not impose any other formality than those related to the recognition of professional qualifications to the incoming provider. However, 8 Member States¹²⁶ do foresee some additional procedures to be completed. **Hungary** stated explicitly that besides the requirements relating to the recognition of professional qualifications for tax advisers pursuing the activity, the firm as such has no formalities to complete in order to provide cross-border services. Competent authorities register natural persons on the basis of the prior annual declaration. A tax adviser company may provide its services once it has at least one member who is listed in the register of tax advisers.

In **the United Kingdom**, the tax adviser would have to apply to the tax authority (HRMC) to become a tax agent.

In other Member States, the procedures to be completed seem to be linked to a general obligation to register. In **Denmark**, every cross-border service provider must register in the Register for Foreign Service Providers¹²⁷. In **Iceland**, the response states that individuals, companies and other entities engaged in business or self-employment must be registered in the company register¹²⁸. In **Norway**, the response refers to tax formalities applicable to all companies doing business in Norway without specifying what those formalities are.

5.3. Exercise of the activity

In compliance with Article 16 of the Services Directive, any requirement applicable in the host Member State would have to be non-discriminatory, justified and proportionate in the light of public order, public security, public health or the protection of the environment.

¹²⁵ Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Spain, Finland, France, Hungary, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovenia.

¹²⁶ Cyprus, Denmark, Germany, Iceland, Norway, Poland, Slovakia, the United Kingdom. However, in Germany, the procedures mentioned seem to be linked to the recognition of professional qualifications procedures. Eurotax would have to submit a written notification to the competent chamber of tax advisers before providing cross-border services.

¹²⁷ Denmark specified that it is applicable unless the cross-border service provider is covered by the exemption in the legislation or an exception in the Exemption Order where certain short-term supply of services are exempted from notification.

¹²⁸ According to Act n°17/2003 on the Company Register.

Some Member States in their response to the questionnaire have indicated that they consider their national law as applicable to the incoming provider. Thus, for example, the **Czech Republic** considered that the activities of cross-border tax advisers are entirely governed by the Czech laws dealing with the cross border provisions of services¹²⁹. In **Poland**, a service provider shall be subject to statutory, administrative and disciplinary provisions which are directly linked to consumer protection and safety and the way of pursuit of a given regulated profession or activity including the provisions on the definition of the profession, the use of a professional title and serious professional malpractice (by reference to Article 5, paragraph 3, of the Professional qualifications Directive, which however deals exclusively with matters linked to the recognition of professional qualifications).

5.3.1. Requirement to have an address in the host Member State

Concerning the requirement to have an address in the host Member State for the purpose of service of documents, 23 Member States¹³⁰ do not apply such a requirement whereas 4 Member States¹³¹ do impose it.

5.3.2. Legal form and capital ownership requirements

According to the responses received, only 3 Member States¹³² apply their own rules on legal forms and shareholding to the incoming provider. **Greece** indicated that in any legal form it is required that 100% of the company's capital must be held by professionals except the SA where it is required that 51% of the company capital must be held by professionals.

Among the 25 other Member States¹³³ not applying their own rules in case of cross-border provision of services, **Germany** indicated that Eurotax is authorised to provide occasional and temporary assistance in tax matters even if not approved as tax consultancy in Germany. It must therefore not meet the German national requirements concerning legal form and shareholding structure. **France** indicated that Eurotax may well come to France as a lawyers' practice and using its title in its country of origin for the purposes of providing tax advice.

5.3.3. Obligation to respect fixed tariffs

According to the responses received, only **Germany** and **Slovenia** (for lawyers) oblige the incoming cross-border provider to respect fixed tariffs laid down in their legislation.

¹²⁹ Section 8a of the Act 523/1992 Coll. – provision of tax advisory services by state citizens of other Member States of the European Union and by other persons.

¹³⁰ Austria, Belgium, Cyprus, Germany, Denmark, Estonia, Spain, Finland, France, Hungary, Iceland, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Sweden, the United Kingdom.

¹³¹ The Czech Republic, Greece, Norway, Slovakia.

¹³² Cyprus, Greece and Slovakia.

¹³³ Austria, Belgium, Bulgaria, the Czech Republic, Germany, Denmark, Estonia, Spain, Finland, France, Hungary, Iceland, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Sweden, the United Kingdom.

Germany indicated that the German law merely lays down a framework within which the tax adviser determines the appropriate fee in an individual case, taking into account its complexity, scale and importance. Tax advisers may also negotiate a higher fee than the statutory one with clients. A lower fee may also be charged in exceptional cases if this is deemed to be appropriate. Germany considered these rules as necessary to safeguard consumer protection. **Slovenia** indicated for its part that in practice lawyers may operate at their own rates, agreed with their clients.

5.3.4. *Insurance obligations*

According to the responses, 18 Member States¹³⁴ do not impose an insurance obligation on an incoming service provider. Among those Member States, 6 Member States¹³⁵ have indicated in the questionnaire imposing such an obligation to providers established within their territory. **France**, for example, indicated that it does not require any specific insurance since lawyers remain subject to the conditions and professional rules applicable in their Member State of establishment. **Romania** pointed out that there are no particular rules regarding insurance obligations, however it specified that the terms of the insurance must cover Romania. Therefore an obligation of insurance seems to exist there.

In **Ireland**, only the voluntary members of The Irish Tax Institute are obliged, by the code of professional conduct, to take out insurance.

However, 8 Member States¹³⁶ do impose their insurance obligations to incoming service providers. Thus, for example, in the **Czech Republic**, tax advisers and legal entities providing tax advisory services are obliged, before the commencement of their activities, to conclude a liability insurance contract concerning the liability for damage which could arise in connection with provision of tax advisory services. In **Germany**, foreign service providers from other EU Member States that wish to provide tax advisory services temporarily are also required to take out insurance covering professional liability. The German law stipulates that foreign service providers are subject to the same professional code as domestic tax advisers so that the obligation to take out insurance also applies to them.

In other Member States, insurance is required for services provided by other relevant regulated professions. Thus, for example, in **Norway**, there is an insurance obligation for the professional if the service is provided by a lawyer or an auditor.

Interestingly, **Poland**¹³⁷ indicated that the insurance obligation is considered to be in line with the law implementing the Professional qualifications Directive and the requirement

¹³⁴ Bulgaria, Denmark, Estonia, Spain, Finland, France, Hungary, Iceland, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Romania, the United Kingdom.

¹³⁵ Cyprus, France, Iceland, the Netherlands, Norway, Romania.

¹³⁶ Austria, Belgium (for "comptable agréé"), the Czech Republic, Germany, Poland, Portugal (for accountants and lawyers), Slovakia, Slovenia.

¹³⁷ Poland pointed out that the information given in its answer concerns the authority of a competent authority to impose an obligation on such provider to provide his clients with detailed information on an insurance policy or other means of individual or collective insurance in connection with working in a given profession or pursuing a given activity available in Poland pursuant to Article 7 of Directive 2005/36/EC.

to give information about details of insurance. However, Article 7, paragraph 1, of the Professional qualifications Directive is an information requirement and not an obligation to subscribe insurance.

Concerning the justifications for such an obligation, only **Germany** specified that it considered the obligation justified by public interest objectives, notably the protection of consumers. It indicated that this obligation is in conformity with the case law from the European Court of Justice¹³⁸ and the Bundesfinanzhof¹³⁹ (Federal Financial Court).

The Member States which impose an insurance obligation on cross-border service providers generally recognise insurance subscribed in other Member States if the insurance complies with the national requirements. For example, in **the Czech Republic**, the insurance subscribed in another Member State is considered as sufficient to the extent that the coverage and terms of the insurance policy meet the requirements stipulated by the Czech law. In **Slovakia**, every entity providing tax consultancy must have insurance that covers the risks of its service to clients. If the insurance is concluded in another MS, it must be valid for Slovakia. In **Germany**, the insurance requirement may also be fulfilled by liability insurance taken out with an insurance company in another EU Member State as long as it meets the German standards. If the foreign insurance policy is not equivalent to that in Germany, there is also the possibility of taking out an additional policy to make up for the shortfall vis-à-vis the domestic insurance requirements.

However, **Austria** specified that the insurance must be subscribed with an insurer authorised to operate in Austria¹⁴⁰. Austria also pointed out that there is an obligation for the cross-border service provider to inform the service recipient in writing about the details of his insurance cover in relation to professional indemnity insurance.

5.3.5. *Commercial communications*

According to the responses received, in 15 Member States¹⁴¹ there would be no advertising rules to be complied with by Eurotax. However, for 12 Member States¹⁴², the provider would have to comply with the national rules in their territory concerning advertising. But it seems that such an advertising campaign would be allowed in many Member States¹⁴³. Thus, for example, in **Belgium**, legislation regulating the advertising

¹³⁸ C-564/07, case law on the basis of Article 56 TFEU.

¹³⁹ BFH judgement of 21.7.2011 II R 6/10 on the obligation for a tax consultancy with its registered office in Great Britain to take out insurance.

¹⁴⁰ Austria pointed out that although Article 21 a RAO obliges in principle a lawyer to contract a professional liability insurance for the duration of the professional activity with an insurer authorised to operate within the Austrian territory, Article 15 EIRAG stipulates that European lawyers established in Austria are exempted from this obligation if they can prove the existence of a professional liability insurance in their country which complies with the Austrian insurance requirements, regardless if the insurer is authorised to operate within the Austrian territory or not.

¹⁴¹ Bulgaria, the Czech republic, Denmark, Estonia, Spain, Finland, Hungary, Iceland, Ireland, Malta, the Netherlands, Romania, Slovakia, Sweden, the United Kingdom.

¹⁴² Austria, Belgium, Cyprus, Germany, France, Italy, Lithuania, Luxembourg, Norway, Poland, Portugal, Slovenia (lawyers).

¹⁴³ See section 4-4

sector and professional rules would be applicable¹⁴⁴. In **Hungary**¹⁴⁵, the legislation does not distinguish between a service provider being established in Hungary or providing services cross-border. In **Sweden**, the marketing practices act¹⁴⁶ would be applicable with the restrictions provided for business operators established in another Member State¹⁴⁷. In **Norway**, general rules for commercial communication in marketing control would be applicable.

In line with the derogation foreseen in Article 17, paragraph 3, for matters covered by Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, some Member States¹⁴⁸ specified that Eurotax would have to respect the provisions in relation to the protection of personal data and to obtain the prior consent of its clients before using their names in an advertising campaign.

In other Member States, in addition to the general provisions on advertising, the advertising campaign would also have to comply with the provisions contained in professional codes of conduct. For example, in **Germany**, the German law¹⁴⁹ would be applicable. The law stipulates that service providers from another Member State are subject to the same professional rules as domestic tax advisers and must therefore comply with the domestic professional regulations on advertising. In **Portugal**, specific rules are imposed on accountants, lawyers and "solicitadores". Thus, there is a requirement of restraint in advertising for Eurotax itself when providing services reserved to "chartered accountants", lawyers or "solicitadores" limiting it to the mere advertisement of their name and professional qualifications. In **Poland**, in addition to the law on combating unfair competition, provisions concerning advertising defined in the rules of professional conduct of tax advisers apply.

¹⁴⁴ The "arrêté royal du 4 avril 2003 visant à réglementer l'envoi de publicités par courrier électronique" and the "loi du 2 août 2002 relative à la publicité trompeuse et à la publicité comparative, aux clauses abusives et aux contrats à distance en ce qui concerne les professions libérales". For the "comptable agréé", the "arrêté royal du 23 décembre 1997 portant approbation du code de déontologie de l'institut professionnel des comptables et fiscalistes agréés" would be applicable.

¹⁴⁵ Would be applicable the Act on the basic requirements and certain restrictions of commercial advertising activities, the act on freedom of the press and on the basic rules relating to media content, act on media and act on e-commerce and on information society services would be applicable. However, in case of advertising by electronic means, the principle of country of origin prevails meaning that once the requirements imposed by the Member State of establishment are met, they are seen as being met in Hungary too.

¹⁴⁶ The Marketing Practices Act is aimed at promoting the interests of consumers and the business sector in connection with marketing that is unfair to consumers and business operators. The Act regulates how marketing may be conducted and specifies what type of marketing is not permitted.

¹⁴⁷ The provisions concerning guarantees, unfair commercial practices and aggressive marketing practices will not apply with regard to a service provided by a business operator established in another Member State.

¹⁴⁸ Belgium, Ireland, the Netherlands, Portugal and Slovakia.

¹⁴⁹ §§ 3a(1)(3), 57(1), 57a StBerG; §9 BOSTB (Berufsordnung der Steuerberater- Professional Code of tax advisers). The Professional Code of tax advisers has been recast with effect from 1st January 2011.

Germany considered that even if its rules are applicable, there is virtually no restriction on advertising over and above that laid down under unfair competition law. As unfair competition law is harmonised throughout Europe, Germany noted that foreign service providers would be subject to substantially similar provisions as in their home Member State and therefore not be more restricted in their advertising than in their Member State of establishment.

Interestingly, **Italy** specified that the provisions contained in the code of conduct for accountants will be applicable by reference to article 5, paragraph 3, of the Professional qualifications Directive, which deals with the rules of professional conduct applicable in case of cross-border provision of services for matters linked to the recognition of professional qualifications.

In **France** and **Sweden**, there are no special regulations on advertising except for lawyers.

Concerning lawyers, some Member States have specific rules concerning the possibilities of advertising for lawyers. It must be recalled that Article 16 of the Services Directive does not apply to matters covered by Directive 77/249 on the freedom to provide services for lawyers. According to Article 4, paragraph 1, of this Directive, activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State¹⁵⁰. According to Article 4, paragraph 4, of this Directive, for extra-judicial activities, the incoming lawyer will remain subject to the conditions and rules of professional conduct of his Member State of establishment without prejudice to respect for the rules which govern the profession in the host Member State, including those concerning publicity.

Reflecting those provisions, in **Cyprus**, the lawyer shall continue to be subject to the terms and provisions governing the practice of the legal profession in the home Member State, subject to abidance by the provisions of the Cypriot law and in particular to the provisions referring to the incompatibility of the pursuit of the lawyer's activities and of the pursuit of other activities which are foreign to him, to the rules of confidentiality, to professional ethics, to the restriction to represent parties with adverse interests and to advertising. In **Lithuania**, lawyers providing cross-border services must comply with the Lithuanian law in addition to the requirements in their Member State of origin. The Lithuanian law prohibits lawyers from advertising on their professional activities. In **France**, if Eurotax acts as a lawyer advertising rules relating to establishment will be applicable.

- **Concerning the possibility for Eurotax to make the advertising claims on their website**

In conformity with the E-commerce directive, each Member State must ensure that the information society service provided by a service provider established on its territory

¹⁵⁰ With the exception of any condition requiring residence, or registration with a professional organisation in that State.

complies with the national provisions applicable in the Member State in question which fall within the coordinated field¹⁵¹.

According to the responses received, Eurotax' advertising campaign would be possible in 26 Member States¹⁵². **Portugal** specified that restrictions on advertising do not apply to websites lodged in another Member State's server in conformity with the law implementing the e-commerce Directive. **Slovenia** pointed out that lawyers can advertise on their activities, contact details, partnerships and professional activities but not on their commercial status (e.g. financial data, success...).

France specified that the same rules as for establishment would be applicable, while **Spain** indicated that such a campaign would be possible provided that it meets the conditions of the general law on advertising.

- **Concerning the possibility for Eurotax to carry out a TV advertising campaign via TV**

In **Denmark**, if the TV channel operates from Denmark, it is the Danish rules that would apply to the campaign. If the TV channel operates from another Member State and directs its programmes towards Denmark, it is the rules of the Member State from which the TV channel broadcasts that apply to the advertising campaign and not the Danish rules.

- **Concerning the possibility for Eurotax to mail its brochure to potential clients**

In most Member States authorising this form of commercial communication the same rules as those foreseen for established providers seem to be applicable concerning the possibility of mailing brochures and the sending of unsolicited information.

6. CROSS-BORDER PROVISION OF SERVICES WITHOUT PHYSICAL MOVE

Parts IV and V of the questionnaire aimed at verifying what rules apply to the provision of cross-border tax advice services when these services do not entail any physical move by the professional to the Member State into which the services are provided. The most interesting aspect of the responses received concerns the application of the Professional Qualifications Directive to cross-border service provision without physical move. A large majority of Member States would treat these cases no different from cases in which the professional moves which raises in particular questions regarding the recognition of professional qualifications and the application of the country of origin principle in the E-commerce Directive.

¹⁵¹ See Article 3, paragraph 1 of the E-Commerce Directive.

¹⁵² Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Denmark, Estonia, Spain, Finland, France, Hungary, Ireland, Iceland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Sweden, the United Kingdom. Greece has not responded to that question.

6.1. Legal framework applicable to the provision of services without any physical move of the service provider

Whereas Part V concentrated on the provision of services by mail or telephone, Part VI dealt exclusively with the provision of tax advice services without physical move, either as services provided by phone or mail, or as information society services.

In case of cross-border provision of services by mail or telephone, only Article 16 of the Services Directive is applicable. For services provided via electronic means, such as dedicated web-sites, these tax advisory services are covered by the E-Commerce Directive insofar as they can be defined as "*information society services*"¹⁵³. For the sake of clarity it seems important to recall that the mere use of e-mail or equivalent individual communications by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not as such an information society service.¹⁵⁴ Furthermore, traditional voice telephony services are not regarded as information society services.¹⁵⁵

The E-Commerce Directive lays down specific obligations for information society service providers such as information requirements (Article 5), use of commercial communications (in particular Articles 6, 7 and 8), treatment of contracts (Article 9) and information requirements prior to placing an order and when placing an order (Articles 10 and 11).

The E-Commerce Directive also lays down two crucial principles in view of facilitating the cross-border provision of information society services. Firstly, each Member State needs to ensure that the information society service provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field¹⁵⁶. Secondly, Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State¹⁵⁷. However, Article 3, paragraph 3, in conjunction with the Annex of this same Directive make it clear that such rules do not apply to contractual obligations in consumer contracts¹⁵⁸.

6.2. Assessment of responses

As a general remark, it is worth noting that the responses received from Member States for both Part IV and V of the questionnaire point towards the need to further clarify the scope of application of the Professional Qualifications Directive. This Directive is applicable only if the provider is physically crossing the border¹⁵⁹. Therefore, in case of

¹⁵³ According to Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC information society service should be understood as any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

¹⁵⁴ See recital 18 of the E-Commerce Directive.

¹⁵⁵ See point 2 of Annex V of the Transparency Directive.

¹⁵⁶ See Article 3 (1) of the E-Commerce Directive.

¹⁵⁷ See Article 3 (2) of the E-Commerce Directive.

¹⁵⁸ It should be furthermore underlined that, according to its Art. 1 (4), the E-Commerce Directive does not establish additional rules on private international law.

¹⁵⁹ Article 5, paragraph 1, of the Professional Qualifications Directive.

cross-border provision of services by mail or telephone or of information society services, rules applied to the service provision cannot be based on Title II of the Professional Qualifications Directive¹⁶⁰.

6.2.1. Provisions of services via mail or phone

Among the responses received¹⁶¹, 20 Member States have indicated that they would apply to the provision of cross-border services via mail or phone the same requirements than the ones described in case of cross-border provision of services with physical move¹⁶². Among these Member States, however, 10¹⁶³ do not apply any requirement in case of cross-border provision of services. From the 9 other Member States it seems worth noting that **France** would apply the requirements that are laid down for cross-border service providers who move to France to the provision of cross-border services via mail or phone depending on whether the provision is occasional or not. For non-occasional provisions, France would apply the rules applicable to established service providers. **Germany** would appear to apply its legislation on tariffs and on insurance obligations to cross-border service providers who provide services via mail or phone. **Austria, Belgium** and **Cyprus** would appear to also apply insurance obligations to cross-border services provided via mail or phone.

On the other hand, **Denmark, Italy, Luxembourg, Portugal** and **Spain**, have explicitly indicated that they would apply different rules to the provision of cross-border services via mail or phone than the ones applicable to cross-border services with physical move.

In particular, **Denmark** indicated that Eurotax would not have to register in the Register for Foreign Service Providers as no physical move of persons to Denmark takes place. **Italy, Portugal** and **Spain** explicitly acknowledge in their responses that the Professional Qualifications Directive will not be applicable since there is no physical move of the provider. However, **Portugal** indicated that all other rules applicable to physical cross-border provisions of services apart from the recognition of professional qualifications would apply, namely requirements on insurance, advertising, reserve of activities and incompatibilities, since the services themselves are considered as being rendered in the Portuguese territory. This implies that in **Portugal** restrictions on advertising laid down for accountants, lawyers and "solicitadores" would also apply to cross-border service providers providing services via mail or phone.

Luxembourg noted that certain consumer protection law rules would have to be complied with by a provider established in another Member State in the case of distance contracts (in particular, rules concerning the pre-contract phase, the conclusion of the contract, its performance and validity and the conditions governing its withdrawal).

¹⁶⁰ As a consequence the derogation from Article 16 of the Services Directive in its Article 17 no. 6 for these matters does not apply.

¹⁶¹ **Greece** has not replied to this part of the questionnaire.

¹⁶² Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Estonia, Finland, France, Hungary, Ireland, Iceland, Lithuania, Malta, the Netherlands, Norway, Poland, Romania, Slovakia, Slovenia.

¹⁶³ Bulgaria, Estonia, Finland, France, Hungary, Ireland, Lithuania, Malta, the Netherlands, Romania.

These provisions would apply only in the case that the service was provided to a consumer.

6.2.2. *Online provision of services*

The purpose of Part V of the questionnaire was to understand what type of requirements, if any, Member States apply in relation to the online cross-border provision of tax advisory services in their territory.

Austria would appear to claim in its response that the E-commerce Directive would not be relevant for this scenario because taxation issues fall outside its scope¹⁶⁴. It should be clarified that the E-Commerce Directive is fully applicable to services provided by tax advisers. Article 1, paragraph 5, lit. a, of the E-Commerce Directive provides for an exemption only for pure substantive taxation issues (e.g. VAT – see recital 12) and does not cover services such as the one at issue here.

It derives from the responses of most Member States that they do not apply requirements to the cross-border provision of tax advisory information society services¹⁶⁵. In this regard however two groups of responses can be identified.

First, a group of Member States explicitly refers in their responses to the internal market clause laid down in Article 3, paragraph 1, of the E-Commerce Directive, such as the **Czech Republic, Denmark, Hungary, Ireland, Luxembourg, Poland, Portugal, Slovakia and Spain**¹⁶⁶. These countries explain in their response that they would not apply any requirements to cross-border providers of tax advisory information society services, in line with Article 3 of the E-Commerce Directive, as these information society service providers are subject to the legislation of their Member State of establishment¹⁶⁷. In line with this finding, in **Portugal** restrictions on advertising do not apply to websites lodged in another Member State's server. **Denmark** specifies however that the use of unsolicited marketing via electronic mail by cross-border service providers would have to comply with Danish legislation.

Second, a significant number of Member States responds that they would apply to cross-border information society providers the provisions that they normally apply in the case of cross-border provision of tax advisory services with physical move¹⁶⁸ without clearly

¹⁶⁴ Austria clarified that they only considered that activities in electronic format like the fulfilment of revenue law obligations and the enforcement of revenues liabilities by tax payers, e.g. the electrical submission of a VAT declaration, are not covered by the e-commerce Directive.

¹⁶⁵ Iceland has not replied to this part of the questionnaire. Slovenia refers to its response to Part IV of the questionnaire which is empty. This makes it impossible to interpret their response to Part V.

¹⁶⁶ Norway also refers in its reply to the national rules implementing the E-Commerce Directive but it seems to point only towards rules imposed laid down by the Member State of establishment of the information society service provider.

¹⁶⁷ The response by Greece is difficult to interpret. Although it refers to different requirements applying for the cross-border provision of information society services, the response does not detail out what those different requirements would be.

¹⁶⁸ As answered mainly in Part III of the questionnaire. Austria, Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Germany, Italy, Lithuania, Malta, the Netherlands, Poland (although they refer to the country of origin rule too), Romania, Slovakia (although they refer to the country of origin rule too), Slovenia, Sweden and the United Kingdom.

specifying whether all or only part of those requirements apply in practice to the provision of tax advisory information society services and for those which apply how that application is carried out in practice (as this was not part of the question). Contrary to the countries in the first group above, these Member States would appear to apply to online cross-border providers any requirement that their legislation imposes on cross-border service providers in an offline context (at least in theory).

Having said that, it is important to stress that in most cases these Member States do not lay down any requirement for the provision of cross-border tax advisory services with physical move, as can be deduced from the responses to Part III of the questionnaire. This means thus that in most cases, in practice, there would appear to be no specific requirements that would apply to the cross-border providers of tax advisory information society services.¹⁶⁹

However, there is a limited number of Member States which lay down requirements for cross-border service providers who physically move to their territory and which have declared that they would apply the same regime to online cross-border services¹⁷⁰. For example and in line with the examples provided as regards the responses to Part IV of the questionnaire, it would appear that a very limited number of Member States would request a notification as the one foreseen in Title II of the Professional Qualifications Directive (e.g. **Belgium** and **Cyprus**). **Germany** would appear to apply its legislation on tariffs and on insurance obligations to online cross-border service providers. **Austria and Belgium**¹⁷¹ would also appear to apply insurance obligations to cross-border information society services. Amongst these countries others had restrictions on advertising. Finally, **Cyprus** clarified in the scenario that the submission of tax returns to the Cypriot authorities can only be carried out by professional accountants. This limitation would also be applicable in the case of information society services delivered cross-border.

Points for discussion

- *Does this Background Note in your view correctly reflect the situation in your country?*
- *Against the backdrop of the wide diversity of regulation across the Member States in particular concerning access to the profession and reserves of activities it would be interesting to discuss*
 - o *the rationale behind the different regulatory approaches,*

¹⁶⁹ This would for example be the case of Bulgaria, Estonia (except for TV advertising), Finland, Germany, Hungary, Italy, Malta, Poland, Romania, the Netherlands (except for advertising, which needs to comply with the Media Law), Sweden and the United Kingdom.

¹⁷⁰ Austria, Cyprus, France, Germany, Slovenia.

¹⁷¹ For "comptable agréé".

- *the experience with regard to the functioning of the market and the effects of the regulation in the different regulatory environments.*
- *For Member States not regulating the activities of tax adviser, are you aware of specific difficulties encountered by your providers when they want to provide services in a Member State that regulate the activities?*
- *Concerning legal form and capital ownership requirements, could Member States explain the rationale behind the different approaches taken? Could Member States share their experience regarding the impact of their regulatory framework on the market. The alternative means that could be envisaged in order to facilitate the free movement of tax advice company across Europe? In case of cross-border provision of services, could Member States explain how they deal with their requirements in view of Article 16 of the Services Directive?*
- *Concerning insurance obligations, could Member States foreseeing such obligation explain their position?*
- *Concerning commercial communications, could Member States regulating the activity of tax advice explain the measures taken to implement Article 24 of the Services Directive? In case of cross-border provision of services, could Member States explain how they deal with their requirements in view of Article 16 of the Services Directive?*
- *For Member States regulating the activities of tax adviser, why do some of you not distinguish between establishment and cross-border activities?*
- *Is there a need to simplify national procedures for the recognition of professional qualifications for cross-border service provision? Is there a need for Member States to reassess the choice made to require a prior declaration in case of temporary provision of services for all professions?*
- *Could Member States who have declared to apply to the provision of cross-border services via mail or phone the same requirements that their legislation imposes on cross-border services with physical move explain their position?*
- *Could Member States who have declared to apply to online cross-border providers the same requirements that their legislation imposes on cross-border service providers in an offline context explain their position?*
- *Are you aware of any derogation from the "internal market clause" in relation to tax advisory services, which are provided as information society services, that is not mentioned in this Background Note?*