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EUROSTAT

Directorate D: Government Finance Statistics (GFS) and quality

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Subject: National Accounts recording of the court decisions regarding the refund of the 3% tax on dividends

Ref: Your letter N° 23/DG75-G401 dated 7 November 2017
Ad-hoc visit discussions of 9-10 January 2018

Dear Mr Mahieu,

Thank you for your letter dated 7 November 2017, as well as for the information provided during the Ad-hoc visit of 9-10 January 2018, complemented by your email dated 25 January 2018, concerning the appropriate national accounts treatment of the refund instructed by the Constitutional Council regarding the 3% tax on dividends.

After a careful examination of the issue, Eurostat is in a position to provide you with its opinion on the basis of the information provided.

I. THE ACCOUNTING ISSUE TO BE CLARIFIED

The accounting issue to clarify is the appropriate time of recording of the reimbursement, by the French State, of the 3% additional tax on dividends collected over the period 2012-2017, that was declared in 2017 to be in breach of the principle of equal treatment of all taxpayers and was accordingly nullified with retroactive effects.

Description of the case

As a consequence of decisions by the European Court of Justice and by the Constitutional Council of France (May 2017 and October 2017, respectively), which are considered as final judgements of the case, the French State has to refund the 3% additional tax on dividends collected in the period 2012-2017, that was declared in breach of the principle of equal treatment of all taxpayers.

In line with the French Fiscal Code, companies have the right to ask for the reimbursement of the amounts unduly paid, for the three years prior to the submission of the claim. Nevertheless, as this tax started being judicially contested in 2013, some of the amounts to be reimbursed by the tax

administration refer, *de facto*, to older years, since 2012 onwards. The French tax administration is expected to treat all the claims received as soon as materially possible, in the last quarter of 2017 and in 2018, notably given the fact that the amounts illegally received by the State bear interest, with an annual rate of 4.8% a year, retroactively applied. There is thus a clear economic incentive to process the claims as soon as possible.

According to information provided by a report¹ from *Inspection Générale des Finances* (IGF) on this subject dated November 2017, the revenues related to this tax amounted to 9.9 billion euro over years 2012 to 2017, in the following way (in billion euro):

2012	2013	2014	2015	2016	2017	Total
0.2	1.9	1.9	2.2	2.0	1.7	9.9

Also according to the IGF report, a total of 1 billion euro of interest penalties must be added to this amount, i.e. the amount concerned by those court decisions rises up to approximately 11 billion euro. This figure is not the amount expected to be refunded, however, given that it does not take into account amounts which, according to the French Fiscal Code's three-year rule (statute of limitations), cannot be contested. According to Eurostat's internal calculations, the amounts that could not be contested by the time of the Constitutional Council decision amounted to approximately 1.1 billion euro, concerning the years 2012 to 2014. Hence, disregarding these, the amount concerned by the court decisions would approximately approach 9.8 million euro (8.8 + 1.0).

According to the latest information available provided (IGF report), the claims for reimbursement submitted by taxpayers to the tax administration by 31 October 2017 amounted to a total of 7.9 billion euro (including interest).

According to the latest information provided by INSEE, until 31 December 2017 the cases validated and paid out by the tax administration amounted to 5.3 billion euro (of which 0.5 billion euro of interest).

Description of the statistical issue and INSEE's position

The advice requested by INSEE concerns the appropriate time of recording of the claims/reimbursements concerning the refund of the 3% additional tax on dividends.

According to INSEE, "*the Constitutional Council decision does not give any individual right but merely sets a general principle, a case which is covered by the end of the 20.189 paragraph*". Also according to INSEE, "*every single case has to be examined carefully by the tax administration in order to check whether the demand is eligible for refund (...), and whether the full amount asked is to be refunded*".

Following the above, and its reading of ESA 2010, INSEE is of the opinion that the uncertainty of the final amounts to be reimbursed in the context of the 3% tax on dividends suggests that the correct time of recording is the date of validation of (each of the) claims by the tax administration.

¹ Mission d'enquête – La contribution additionnelle à l'impôt sur les sociétés de 3% sur les revenus distribués (dividendes), NOVEMBRE 2017, Marie-Christine LEPETIT et al.

II. METHODOLOGICAL ANALYSIS AND CLARIFICATION BY EUROSTAT

Applicable accounting rules

- ESA 2010 paragraph 20.189 on Court Decisions;
- MGDD Chapter II.7.

Analysis by Eurostat

As referred above, the issue at stake is to determine in what period to record the tax payers' claims for refund concerning the 3% additional tax on dividends. In general, and in line with ESA 20.189 and further elaborations of the MGDD, the main possible alternative times of recording of the amounts to refund, could either be (1) at time of Constitutional Council decision, or (2) at time of submission of claim (after that decision), or (3) at time of validation of the claim by the tax administration. The time of recording should not be at time of actual cash settlements of the claim. However, Eurostat understands that, in practice, cash settlement is immediately carried out upon validation.

ESA 20.189: "*When a court of justice rules that compensation must be paid, or a transaction reversed, resulting from or related to past events, the time of recording of the expenditure or revenue is when the claimants have an automatic and incontrovertible right for a given amount that can be individually determined, and when it is unlikely that claimants will fail requesting their due. When a court of justice merely sets a principle of compensation, or when the claims must be reviewed for eligibility and in relation to determination of the amount by administrative services, expenditure or revenue is recorded as soon as the value of the obligation is reliably determined.*"

In practice, the traditional jurisprudence in the past regarding the time of recording of court decisions in national accounts implies the time of court decision, in cases where an amount to be compensated would be either set by court or could be determined with relative certainty. Following this approach, INSEE could record, in year 2017, the 10 billion euro concerned by this decision, for the amount determined by the tax administration and the IGF, as expenditure.

In addition, any possibility that claimants may be able or may elect to delay (after 2017) their claims' submissions may be an indication that the recording at time of Constitutional Council decision is appropriate, given that such 'timing' by tax payers (designed to benefit from the 4.8% annual interest rate) may be indicative that the refunds are seen as certain from the tax payers point of view.

However, the problem with recording all amounts when the Constitutional Council decision is taken, is that this decision does not give an immediate right to be refunded, but merely the right to claim for reimbursement. Whereas the amounts potentially concerned by that decision are approximately determined, there is no certainty, at this stage, that all taxpayers will claim for reimbursement or that they will be fully eligible for reimbursement. Thus the claims are not "*individually determined*" although "*it is unlikely that claimants will fail requesting their due*", as foreseen by ESA 20.189.

Following ESA 20.189 subsequent step, the time of recording would then have to be when the value of the obligation of the French authorities is "*reliably determined*", which could be either at time of submission of claims by the entities, or at time of validation of those claims by the tax

administration. This would depend on the materiality and degree of automaticity of the validation process.

As referred above, the decision by the Constitutional Council gives the right to claim for reimbursement and, consequently, claiming for reimbursement gives the right to be reimbursed, which could suggest recording the expenditure at time of submission of claims. Nevertheless, it is not certain *a priori* that all claims submitted will result in reimbursement, if, before being reimbursed, claims must be validated by the tax administration and the validation is more than a simple formality.

The question is, therefore, whether the validation procedure by the tax administrations is merely a formality, or, in contrast, entails a substantive individual assessment leading to regular refusals of claims. An indication of the materiality of the approval procedure is the percentage of claims that are rejected, as compared to the claims treated.

Eurostat understands that until 31 December 2017, the cases validated by the tax administration amounted to 5.3 billion euro (of which 0.5 billion euro of interest), while the amounts not validated by the tax administration amounted to 11 million euro, i.e. only 0.2% of the total of claims treated. To Eurostat, the number of claims rejected (compared to the claims validated so far) at this stage would thus seem not material enough to justify a time of recording different than the time of submission of claim.

However, the French statistical authorities have informed Eurostat on 25 January 2018 that the tax administration "*decided to treat with priority the claims on which no arguing was possible, keeping for 2018 claims that are more doubtful*" and in this sense there is still "*uncertainty on the amount that will be eventually reimbursed*" regarding the claims that remain to be analyzed. The French statistical authorities thus consider that it can be safely assumed that the proportion of claims rejected in 2018 will be meaningfully higher, in turn justifying the assessment that the validation procedure of the tax administration would have a material impact on the amounts to be reimbursed.

In the determination of the materiality of the validation procedure, INSEE will however have to exclude submissions of claims that do not conform with French jurisprudence (e.g. case of claims submitted end 2017 covering years 2012-2013, on the presumption by the taxpayer that the illegality of the tax may waive the traditional statute of limitations).

In addition, if there would be some evidence that administrative processing of claims were delayed without reason, the time of recording at the moment of validation by the tax administration would not be considered as sound.

III. CONCLUSION

Eurostat considers that the amount rejected in 2017 would, at first sight, seem rather low to justify that there would be a substantial doubt on the final total amount to be reimbursed by government. In normal circumstances, this would point to the recording of the whole amount estimated, in the year 2017, at the moment of the Constitutional Council decision, or at time of submission of claim (for claims submitted after that decision).

However, according to INSEE, the fiscal administration has decided to treat in priority cases which could not be contested, leaving out the more contentious cases for 2018. According to

INSEE, substantial element of uncertainty would thus exist with respect the amounts to be reimbursed in 2018.

Based on the information provided by INSEE, Eurostat can accept the proposed treatment by INSEE, i.e. to record as government expenditure in 2017 the cases treated and accepted for reimbursement in 2017, and to treat as government expenditure in 2018 those which will be treated and validated by the fiscal administration in 2018.

IV. PROCEDURE

This view of Eurostat is based on the information provided so far by the French authorities. If this information turns out to be incomplete, or the implementation of the operation differs in some way from the information presented, or there may be inaccuracies in the assessment due to the translation risk, Eurostat reserves the right to reconsider its view.

In this context, we would like to remind you that Eurostat is committed to adopt a fully transparent framework for its decisions on debt and deficit matters in line with Council Regulation 479/2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community, as amended, and the note on ex-ante advice, which has been presented to the CMFB and cleared by the Commission and the EFC. Eurostat therefore publishes all official methodological advice given to Member States on its website.

(e-Signed)

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