EU Tax News

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This bi-monthly newsletter is prepared by members of PwC’s pan-European EU Direct Tax Group (EUDTG) network. To receive this newsletter and our newsalerts automatically and free of charge, please send an e-mail to: eudtg@nl.pwc.com with “subscription EU Tax News”. For previous editions of PwC's EU Tax News see: www.pwc.com/eudtg

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National Developments

Germany – German Federal Ministry of Finance amends Decree regarding Sec. 50d para. 3 ITA

On 20 December 2017, the CJEU decided in Joined Cases Deister Holding and Juhler Holding (C-504/16 & C-613/16) that Sec. 50d para. 3 ITA is incompatible with the EU fundamental freedoms and with the Parent-Subsidiary Directive (PSD).

Following the CJEU judgment, the German Ministry of Finance amended the principles stated in its earlier decree, dated 24 January 2012, on withholding tax relief for non-German companies in a new decree dated 4 April 2018. The new decree amends the interpretation of the substance test by the tax administration and is applicable to all pending cases. The decree foresees the possibility to grant withholding tax relief for dividends distributed to passive EU holding companies under the PSD if such holding companies make use of their shareholder rights. However, the decree points out that withholding tax relief should be denied if the incorporation of the non-German shareholder was mainly for tax reasons. Furthermore, the decree states that the provision that denies the possibility of considering activities of affiliated companies when determining whether there were any business reasons for setting up the holding company, is no longer applicable.

It is important to note that the decree refers only to dividend distributions from a German corporation to an EU parent that falls within the scope of the PSD (i.e. shareholding of more than 10% held for longer than 12 months). It covers neither EEA parents (i.e. Iceland, Norway and Liechtenstein) nor third-country parents nor does it refer to withholding taxes on license payments. It remains to be seen if a mere change in the interpretation of some of the German anti-treaty/anti-directive shopping rules is sufficient to ensure compliance with EU law.

-- Arne Schnitger and Ronald Gebhardt, PwC Germany; ronald.gebhardt@pwc.com

Austria – National implementation of ATAD

On 9 April 2018, the Austrian Ministry of Finance published a draft of the Annual Tax Act 2018 that aims to implement the Anti-Tax Avoidance Directive (ATAD) into domestic law. The draft is currently available for public consultation and will be adopted before the summer of 2018. It includes the introduction of a CFC rule as well as minor changes to the existing exit taxation rules and the GAAR.

The proposed CFC rule largely follows the wording of the ATAD. Austria opts for the categorical/entity approach and covers all passive income items mentioned in ATAD. The CFC rule will apply if the effective tax burden of the passive income of the foreign CFC does not exceed 12.5%. With respect to the Member State options included in the ATAD, Austria plans to apply the safeguard clause also to CFCs that are resident in or are situated in third countries.
Furthermore, the draft also foresees a *de minimis* exception in case the passive income of the foreign CFC is below one third of its overall income. The CFC rule will be applicable to financial years beginning after 30 September 2018.

The changes with respect to exit taxation mainly concern the reduction of the instalment period from seven to five years. The proposal also foresees a slight change of the wording of the domestic GAAR in order to reflect the prerequisites of the ATAD. No material changes in the application of the GAAR by the Austrian tax authorities are expected.

The draft of the Annual Tax Act 2018 does not include any EBITDA interest limitation rules so it appears that the Austrian Ministry of Finance is of the opinion that the existing domestic interest limitation rules are equally effective and that the implementation of the respective ATAD rules can be postponed until 2024. The interest limitation rules that are currently in place cover interest payments in connection with low taxed intra-group loans and in connection with debt-financed intra-group share deals. It remains to be seen whether the European Commission will be in agreement with the approach of the Austrian Ministry of Finance.

-- Richard Jerabek and Nikolaus Neubauer, PwC Austria; richard.jerabek@pwc.com

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**EU Developments**

**EU – EU Finance Ministers reach political agreement on mandatory disclosure (DAC6)**

On 13 March 2018, the ECOFIN Council, composed of the EU-28 Finance Ministers, reached political agreement on a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (also commonly referred to as DAC6).

The main purpose of DAC6 is to strengthen tax transparency and fight against aggressive tax planning. The term aggressive tax planning is undefined, however, and instead, reference is made to a number of pre-determined hallmarks, which are features that could render a cross-border arrangement reportable under this Directive. DAC6 provides for mandatory disclosure of cross-border arrangements by individual or corporate taxpayers, or certain EU intermediaries, to the tax authorities and mandates automatic exchange of this information among Member States. The adopted Directive applies to a cross-border arrangement, which
generally means an arrangement or series of arrangements concerning either more than one Member State or a Member State and a third country.

For cross-border arrangements to require being reported to the tax authorities, at least one of the hallmarks must be met. There is a mixture of generic and specific.

The generic hallmarks and a number of the specific hallmarks may only be taken into account insofar as they meet the so-called “main benefit test”. This test will be met if obtaining a tax advantage constitutes the main benefit or one of the main benefits a person is expected to derive from an arrangement. Generic hallmarks include, for example, an arrangement or series thereof whereby the taxpayer is under the obligation to not disclose how such arrangement can secure a tax advantage vis-à-vis other intermediaries or the tax authorities or when an intermediary receives a fee for its services proportionate to the amount of the tax advantage.

Specific hallmarks include (but are not limited to) the trade in loss-making companies to reduce tax liability under certain conditions, conversion of income into lower-taxed revenue streams, circular transactions, and those relating to certain cross-border transactions, more specifically, deductible cross-border payments between associated enterprises. Specific hallmarks that relate to multiple deductions for the same depreciation, relief from double taxation in more than one Member State, material difference in the amount being treated as payable in consideration for the transferred assets in the jurisdictions involved, transfer pricing, automatic exchange of information and beneficial ownership, which do not need to comply with the main benefits test, are incorporated in the Directive.

The taxpayer (if there is no relevant EU intermediary) or intermediary must disclose information to the competent authorities on a reportable cross-border arrangement within thirty days beginning on the day after the arrangement is made available or is ready for implementation or when the first step of such arrangement has been implemented. The Member State in which the information was filed will, by means of an automatic exchange, communicate that information to all other Member States. Automatic exchanges of information will take place every quarter.

DAC6 was formally adopted at the 25 May ECOFIN Council meeting. The Directive will enter into force on the twentieth day following the date of its publication in the Official Journal of the EU and the first reportable transactions will be those where the first implementation step occurs between that date and 1 July 2020 (the date of application of the Directive). This information will then be required to be filed by 31 August 2020. Member States must transpose the Directive into their national laws and regulations by 31 December 2019. The first automatic exchange of information should be communicated among Member States by 31 October 2020.

-- Hein Vermeulen, Bob van der Made and Edwin Visser, PwC Netherlands; Jonathan Hare, PwC UK; Arne Schnitger, PwC Germany; arne.schnitger@pwc.com
EU – European Commission proposes new rules on the taxation of the digital economy

On 21 March 2018, the European Commission published its EU digital tax package on the taxation of the digital economy, which consists of four main parts:

- A proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services;
- An accompanying Recommendation to the proposed Directive relating to the corporate taxation of a significant digital presence; and
- A Communication to the European Parliament and the Council of the EU.

The Commission views the first draft Directive as a comprehensive long-term solution and the latter as an interim solution.

The draft Directive on the corporate taxation of a significant digital presence

This proposed Directive lays down rules for establishing a taxable nexus in case of a non-physical commercial presence of a digital business (“significant digital presence”). More specifically, a digital platform shall constitute a significant digital presence if one or more of the following criteria are met:

- the proportion of total revenues obtained in that tax period and resulting from the supply of those digital services to users located in that Member State in that tax period exceeds EUR 7,000,000;
- the number of users of one or more of those digital services who are located in that Member State in that tax period exceeds 100,000;
- the number of business contracts for the supply of any such digital service that are concluded in that tax period by users located in that Member State exceeds 3,000.

For the attribution of profits to significant digital presence, a functional analysis should be completed. The economically significant activities performed by the significant digital presence through a digital platform, include, inter alia, the following activities:

- the collection, storage, processing, analysis, deployment and sale of user-level data;
- the collection, storage, processing and display of user-generated content;
- the sale of online advertising space;
- the making available of third-party created content on a digital marketplace;
- the supply of any digital service not listed in the four points above.
The proposed Directive shall apply to all taxpayers that are subject to corporate tax in one or more Member States and to entities resident for tax purposes in a non-EU jurisdiction, in respect of their significant digital presence in a Member State. It shall not apply if an entity is resident for tax purposes in a non-EU jurisdiction that has a double tax convention (DTC) in force with the Member State in which there is a significant digital presence unless i) that DTC includes similar provisions on a significant digital presence and the attribution of profits thereto to those of the draft Directive, and ii) those provisions are in force. The EC proposes that the Directive should apply per 1 January 2020.

*The draft Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services*

This second proposed Directive introduces a Digital Services Tax (DST) at EU level at a rate of 3% on gross revenue (net of VAT and other similar taxes) derived in the EU by the following activities (save for certain exceptions):

- the placing on a digital interface of advertising targeted at users of that interface;
- the making available to users of a multi-sided digital interface which allows users to find other users and to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users;
- the transmission of data collected about users and generated from users’ activities on digital interfaces.

Only entities with both total annual worldwide (i.e. not only within the EU) revenue above EUR 750 million and total annual taxable digital revenues in the EU above EUR 50 million would be subject to the DST, irrespective of whether they are established in a Member State or in a non-EU jurisdiction. Furthermore, the proposed Directive sets out rules with regard to the place of taxation of the DST, which is based on the location of the users of the taxable service. In order to alleviate possible cases of double taxation, it is expected that Member States will allow businesses to deduct the DST paid as a cost from the corporate income tax base in their territory, irrespective of whether both taxes are paid in the same Member State or in different ones. The Commission proposes that this Directive should also start to apply per 1 January 2020.

*The EC’s Recommendation relating to the corporate taxation of a significant digital presence*

For cases where the proposed significant digital presence Directive mentioned above would not apply because of the existence of DTCs with non-EU jurisdictions, the EC’s Recommendation outlines how Member States should amend their DTCs.

*The Commission’s Communication*
In its Communication (non-binding strategy paper), which follows its Communication issued in September 2017, the Commission refers to the challenges of adapting the current corporate income tax rules to the 21st century. It recognises, however, the need for a new tax framework that is up to date with digital business models and underlines the need for an international solution to the challenges of taxing the digital economy.

Next steps:

The proposals will now be sent to the Council and the European Parliament. The Directives need to be formally adopted by the Council by unanimous vote, after consultation of the European Parliament and the Economic and Social Committee. It is envisaged that there will be significant discussion regarding the proposed directives and it remains to be seen whether the required unanimity can be achieved.

-- Hein Vermeulen and Bob van der Made, PwC Netherlands; Jonathan Hare, PwC UK; Arne Schnitger; PwC Germany; Emmanuel Raingeard, PwC France; hein.vermeulen@pwc.com

EU – Informal ECOFIN Council meeting held on 27-28 April

The second day of the April 2018 informal ECOFIN Council meeting, held in Sofia and chaired by the current Bulgarian EU Council Presidency, was devoted to tax issues. EU-28 Finance Ministers discussed issues related to improving revenue and fighting tax fraud. They underlined the importance of taking additional measures, apart from the legislative initiatives, to improve the administrative cooperation among tax administrations and address practical aspects related to enhancing cooperation and effective use of the data received in the exchange of tax information. Ministers agreed on the need to launch a discussion on how to improve cooperation and how tax administrations should work more effectively together in order to achieve good results in tax collection.

According to the Bulgarian EU Council Presidency press release, the Finance Ministers also “addressed taking coordinated actions to adapt the current corporate tax system to the constantly changing global economy and the international pressure from the globalisation and digitalisation of business. The present weaknesses jeopardise the effective framework, which is the base for corporate taxation rules, and taking coordinated actions is the only way to prevent a deterioration of the situation and deepening of the problems.”

The current Bulgarian EU Presidency stated afterwards in a press release that Ministers united around the need to launch technical discussions about the taxation of the digital economy in a structured and effective result-oriented manner by taking account of the international developments.

-- Bob van der Made, PwC Netherlands; bob.vandermade@pwc.com

EU – EU Leaders Agenda meeting on Taxation held on 22 March 2018
European Council President Tusk issued a statement following a meeting on Taxation among EU-28 Heads of State and Government in the context of his EU Leaders Agenda: “Today, we had a frank discussion on taxation. The digital economy is a challenge for our tax systems. Most importantly, the discussion confirmed all leaders’ desire to work further towards an effective and fair solution. We will return to this issue in June. In the meantime, Ministers will start working on the latest Commission’s proposals.”

-- Bob van der Made, PwC Netherlands; bob.vandermade@pwc.com

EU – European Parliament adopts opinions on CCTB and CCCTB

On 15 March 2018, the EU Parliament’s opinion on the draft Council Directive for a Common Consolidated Corporate Tax Base (CCCTB) was backed by Members of the European Parliament (MEPs) by 438 votes to 145 votes, with 69 abstentions. The EU Parliament’s opinion on the draft Council Directive for a Common Corporate Tax Base (CCTB) was approved by 451 votes to 141, with 59 abstentions.

Quotes in the EU Parliament’s press release afterwards:

“This is a fabulous opportunity to make a giant leap in the field of corporate taxation; not only would this legislation create a model that is more suitable to today’s economies through the taxing of the digital economy, but it would also halt unfettered competition between corporate tax systems within the single market, by targeting profits where they are made.” (Rapporteur on CCCTB, Alain Lamassoure (EPP, FR)), and

“National and EU leaders understand that the current corporate tax system is outdated and leaves citizens and small companies worse off. International action is needed to turn the tide. The EU is our best chance to make our tax system more just and more modern.” (Rapporteur on CCTB, Paul Tang (S&D, NL)).

Next steps: The two EU Parliament (advisory/non-binding) resolutions have been sent to the Council and Commission for their consideration.

-- Bob van der Made, PwC Netherlands; bob.vandermade@pwc.com

EU – European Parliament sets up TAX3 Special Committee on Financial Crime, Tax Evasion and Tax Avoidance

A fourth temporary tax committee was set up by the EU Parliament to carry on the work of the TAXE I and TAXE II special committees, and the PANA investigative committee. According to its mandate, the new “TAX3” special committee’s work will include examining “national schemes providing tax privileges, VAT fraud and the problems of ensuring tax
compliance in the digital economy.” TAX3 was approved on 1 March 2018 and will complete its work and report by February 2019, and it is composed of 45 Members of the EU Parliament.

-- Bob van der Made, PwC Netherlands; bob.vandermade@pwc.com

Fiscal State aid

EU – Updates on EU General Court's agenda for landmark EU fiscal State aid cases

Luxembourg v Commission
Fiat Chrysler Finance Europe v Commission
Thursday 21 June 2018 at 09:30 | GC Seventh Chamber, Extended Composition

Belgium v Commission (excess profit exemption in Belgium)
Magnetrol International v Commission
Thursday 28 June 2018 at 09:30 | GC Seventh Chamber, Extended Composition

Not yet confirmed in the GC agenda, however, we understand that the hearing at the GC on the Starbucks case is expected on 2 July 2018.

-- Bob van der Made, PwC Netherlands; bob.vandermade@pwc.com

Luxembourg – European Commission publishes final State aid decision in Amazon

On 26 February 2018, the European Commission published the non-confidential version of its final decision issued on 4 October 2017 in the Amazon State aid investigation opened in October 2014. According to the decision, in the Commission’s opinion, Luxembourg’s tax treatment of Amazon gave rise to State aid in the amount of up to €250 million. In 2014, the Commission launched an investigation into a ruling dated 6 November 2013 issued by the Luxembourg tax authorities to a Luxembourg tax resident company of the Amazon group. According to the decision, the ruling was applied by the group until 2014. The period after 2014 was not put in question by the Commission.

According to the facts as described in the decision during the period under scrutiny Amazon EU Sarl (AEU) functioned as the European headquarters of the group and principal operator of Amazon’s European online retail and service business. In this position, AEU was in charge of the strategic decisions related to the retail and services business carried through the EU websites; it also acted as the seller of record for the inventory on the EU websites and carried out treasury management functions. AEU employed on average 523 employees. In order to carry out its operations, AEU used under a licence agreement intellectual property (IP) rights
from Amazon Europe Holding Technologies (AEHT), a Luxembourg partnership. Under the
domestic law, AEHT was not subject to tax itself as it represented a tax transparent
partnership. Its functions were those of an IP holding company and a participant in the
development of those intangibles under a cost-sharing arrangement with Amazon US. Under
the transfer pricing analysis carried out at the time when the ruling was obtained, the royalty
that AEU paid to AEHT was determined based on the residual profit split method, following
a transfer pricing report that explained why this method was preferable over the comparable
uncontrolled price method (CUP) which was also analysed.

In its final decision, the Commission concluded in essence that:
- Amazon as a group received an individual selective advantage in the form of the tax
  ruling in question as it sets, in the views of the Commission, a transfer pricing result and
  methodology that is not in line with the arm’s length principle;
- Despite the submissions of the company that AEHT was the party carrying out the unique
  key value drivers related to the IP and AEU the non-unique functions which justified the
  choice of the residual profit method, the Commission considered that AEHT did not
  perform functions commensurate with the disputed profit allocation. In addition, even
  accepting the application of the residual profit method, the Commission considered that
  AEHT should have been tested as the “low function” entity and AEU as the key function
  entity.

This decision is the latest in a number of related high profile cases concerning the
Commission’s approach on State aid, in particular in relation to tax rulings and transfer
pricing.
-- Alina Macovei and Laurent Mahaux, PwC Luxembourg; alina.macovei@lu.pwc.com

Netherlands –European Commission publishes opening State aid decision in
Inter IKEA

On 27 March 2018, the European Commission published its opening decision of 18 December
2017 in the formal State aid investigation into the Netherlands’ tax treatment of Inter IKEA
Systems BV (Systems). This decision represents therefore the opening, not the outcome, of
the Commission’s formal investigation into this matter.

The opening decision focuses on two Advanced Pricing Agreements (APAs) granted by the
Netherlands to Systems in 2006 and 2011, respectively. The 2006 APA indirectly determined
the annual licence fee, which Systems paid to another group company, established in
Luxembourg, I.I. Holding S.A. (Holding), for a set of proprietary rights (PRs) necessary for
the exploitation of the franchising business of IKEA. As indicated in the 2006 APA, Holding
was the owner of the PRs. The Commission considers at this stage that the 2006 APA may
have granted an advantage to Systems since it results in a reduction of System’s corporate
income tax liability in the Netherlands which, in the Commission’s provisional view, does not
seem to reflect a reliable approximation of a market-based outcome in line with the arm’s length principle.

Pursuant to a restructuring, in 2011, Systems signed a Sale and Purchase Agreement (SPA agreement) with a Liechtenstein foundation (foundation) by which it acquired the beneficial ownership of the PRs (formerly held by Holding). The acquisition took place through two transactions: the foundation contributed to Systems 40% of the beneficial interest in the PRs – representing an amount of EUR 3.6 billion – as share premium reserves. In addition, the foundation sold to Systems the remaining 60% of the beneficial interest in the PRs for a purchase price of EUR 5.4 billion (the purchase price). The purchase price was then converted into a loan whose terms were defined in a loan agreement signed by the foundation and Systems (the loan agreement). Moreover, the SPA agreement contained a certain price adjustment mechanism.

The Commission considers at this stage that the 2011 APA may have granted an advantage to Systems since it endorses a tax treatment that does not seem to reflect a reliable approximation of a market-based outcome in line with the arm’s length principle. The Commission’s preliminary conclusion is based on several arguments concerning first, the value of the PRs and the terms of the loan agreement for the acquisition of such PRs and, second, the price adjustment mechanism. In addition, even if the value of the PRs as agreed in the APA correctly reflected their market value, the Commission has doubts as to whether some of the terms of the loan agreement would have been agreed by independent undertakings negotiating under comparable circumstances at arm’s length. Moreover, the Commission considers at this stage that the price adjustment mechanism may have not been agreed between independent undertakings. Finally, even if the price adjustment mechanism was to be considered at arm’s length, the Commission considers that the deduction of provisions for future interest related to the price adjustment mechanism may not be compliant with Dutch law. The Commission mentions in its opening decision that, as both APAs are individual measures, for which the Commission’s provisional conclusion is that they confer an economic advantage, it can be presumed that they are selective in nature. For the sake of completeness, however, it examines the potential selectivity of the APAs in light of the three-step selectivity analysis devised by the Court of Justice for aid schemes and concludes that both APAs are selective measures.

This is another Commission decision in the area of transfer pricing. If the Commission’s approach is confirmed in its final decision, further litigation before the European Courts is likely.

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About the EUDTG

EUDTG is PwC’s pan-European network of EU law experts. We specialise in all areas of direct tax, including the fundamental freedoms, EU directives and State aid rules. You will be only too well aware that EU direct tax law is moving quickly, and it’s difficult to keep up. But, it is crucial that taxpayers with an EU or EEA presence understand the impact as they explore their activities, opportunities and investment decisions.

So how do we help you?

- Our experts combine their skills in EU law with specific industry knowledge by working closely with colleagues in the Financial Services and Real Estate sectors.
- We have set up client-facing expert working groups to address specific key topics such as EU State aid & BEPS and CCCTB.
- Through our Technical Committee we constantly develop new and innovative EU law positions and solutions for practical application by clients.
- We closely monitor direct tax policy-making and political developments on the ground in Brussels.
- We input to the EU and international tax debate and maintain regular contact with key EU and OECD policy-makers through our EU Public Affairs capability.
- Our secretariat in the Netherlands operates an EU tax news service, keeping clients up to date with developments as soon as they happen.

And what specific experience can we offer for instance?

- Our PwC State Aid Working Group helps clients identify and manage EU State Aid risks.
- Together with our Financial Services colleagues, we have assisted foreign pension funds, insurance companies and investment funds with dividend withholding tax refund claims.
- We have assisted clients before the CJEU and the EFTA Court in landmark cases e.g. Marks & Spencer (C-446/03), Aberdeen (C-303/07), X Holding BV (C-337/08), Gielen (C-440/08), X NV (C-498/10), A Oy (C-123/11), Arcade Drilling (E-15/11), SCA (C-39/13), X (C-87/13) and Kieback (C-9/14).
- We have carried out a number of tax studies for the European Commission.

Find out more on: www.pwc.com/eudtg or contact the EUDTG’s Network Driver Bob van der Made (+31 6 130 96 296, or: bob.vandermade@pwc.com) or contact any of the EUDTG country contacts listed on the previous page.