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EU Tax News

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CJEU Cases

Finland – CJEU judgment on the compatibility of the Finnish legislation implementing Article 10(2) of the Merger Directive with EU law

On 23 November 2017, the CJEU ruled on the compatibility of the Finnish legislation implementing Article 10(2) of the EU Merger Directive with Article 49 TFEU in the case *A Oy vs. Veronsaajien oikeudenvalvontayksikkö* (C-292/16).

The case concerned a Finnish company which, in the course of a transfer of assets (as defined in the Merger Directive), transferred a permanent establishment (PE) in Austria to an Austrian company and received in return shares in that company. Due to the cross-border nature of the transaction and the fact that Finland applies the credit method for the avoidance of double taxation (i.e. Finland does not exempt foreign PEs), Finland lost its right to tax the profits of the Austrian PE. Therefore, the Finnish company was taxed in Finland as if all assets of the Austrian PE would have been disposed at fair market value, including the previously deducted reserves.

However, a deemed credit is available against the Finnish tax payable, which corresponds to the amount of the Austrian tax that would have been payable were it not for the provisions of the Merger Directive. The tax is payable in the year of the transaction without the possibility of deferral. However, in an equivalent domestic situation taxation would not have taken place until the disposal of the transferred assets (roll-over). The deviation between the domestic and cross-border situations incorporated in the Finnish legislation stems from Article 10(2) of the Merger Directive. The question was whether this was compatible with Art. 49 TFEU.

The CJEU pointed out that while Article 10(2) of the Merger Directive authorises the Member States to tax the profits or capital gains of the PE resulting from a merger, division or transfer of assets, the Directive contains no provisions on when the collection of the tax due is to take place. The CJEU stated that it is for the Member States to regulate this issue in accordance with EU law. The CJEU then decided the case in the light of Art. 49 TFEU and considered the Finnish rule to be a restriction on the freedom of establishment as there is a deferral of tax in comparable domestic situations only. However, the restriction was justified by the need to preserve the allocation of taxing powers, yet went beyond what was necessary to obtain this objective as it did not provide for a choice between immediate payment and deferral.

-- Jarno Laaksonen and Okko Koskenniemi, PwC Finland; jarno.laaksonen@fi.pwc.com

Germany – CJEU judgment in *Deister Holding* and *Juhler Holding*

On 20 December 2017, the CJEU decided in the joined cases *Deister Holding* (C-504/16) and *Juhler Holding* (C-613/16) that Section 50d paragraph 3 ITA is neither compatible with the EU fundamental freedoms nor with the Parent-Subsidiary Directive (PSD). Both cases

concerned the former version of the German Anti-Treaty and Anti-Directive shopping rule abolished as of 2012.

Deister Holding concerned a so-called "meander structure" with a German tax resident as a shareholder of a Dutch BV which in turn held a German GmbH. The Dutch BV received dividends from the GmbH. The Dutch BV had no "substance" and the German tax resident would not have been able to claim any withholding tax relief according to a double tax treaty or the PSD ("look-through approach"). *Juhler Holding* concerned a Dutch group with a parent entity in Cyprus. A Holding BV held the shares of group entities resident in several jurisdictions. The operational business was carried out by another BV. The German Holding (GmbH) distributed dividends to the Holding BV. For the purpose of applying the Anti-Treaty shopping rule, only the "substance" of the Holding BV was relevant. The Holding BV did not have sufficient substance.

Sec. 50d para. 3 ITA made the exemption from withholding tax pursuant to the PSD dependent on several conditions. The conditions foreseen in Sec. 50d para. 3 ITA constitute a general presumption of tax evasion or tax abuse, which does not comply with the aim of the PSD – that is to avoid double taxation of dividends in order to facilitate the cooperation between entities within the EU. The CJEU pointed out that Sec. 50d para. 3 ITA provides a difference in treatment, which could prevent a non-resident entity from establishing business activities in Germany through a subsidiary. No justifications for that incompatibility with the freedom of establishment were evident.

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

Germany – CJEU referral of German dividend withholding tax regime in the case of a Canadian pension fund

On 23 October 2017, the Fiscal Court of Munich referred preliminary questions to the CJEU regarding the compatibility of the German regime of dividend withholding tax imposed on a Canadian pension fund with the free movement of capital provided in Article 63 TFEU (C-641/17).

The plaintiff is a Canadian pension fund in the legal form of a common law trust. The fund received dividends from German stock corporations in the years 2007-2010. The dividends were subject to withholding tax (WHT) of 25%. Pursuant to the Canadian-German double tax treaty, WHT in the amount of 10% of the dividend was refunded to the fund. It thus suffered a final WHT of 15%. The fund applied for a refund of the remaining 15% but the claim was dismissed by the German tax authorities, as German law does not provide for such reimbursement. The Fiscal Court of Munich considers the Canadian pension fund to be comparable to a pension fund under German law (Pensionsfonds). Moreover, the Court is of the view that there is a direct link between the dividend income received by a pension fund and its technical reserves which reflect its obligation to pay out the largest part of the income

to its insured pensioners. The Court does not see any reason why the discrimination under German law could be justified. However, it assumes that Germany's taxation of the plaintiff, which is a resident of a third country, could be compatible with the free movement of capital pursuant to Article 64 TFEU (standstill clause). In this context it raises the question whether:

- Article 64 TFEU allows the discrimination in the given case as Germany only changed the taxation regime of its domestic funds after 31 December 1993 whilst foreign funds have always been treated in the same way;
- the restriction involves financial services in the sense of Article 64 TFEU as it is linked to the investments made by the Canadian pension fund rather than to the services it provides to its pensioners.

-- Arne Schnitger and Björn Bodewaldt, PwC Germany; bjoern.bodewaldt@de.pwc.com

Germany – AG Opinion on the compatibility of German 'at arm's length' legislation with EU law

On 28 June 2016, the Fiscal Court of Rhineland-Palatinate referred the *Hornbach* case to the CJEU concerning the German 'at arm's length' legislation laid down in Sec. 1 of the German Foreign Tax Code (FTA, *Außensteuergesetz*). On 14 December 2017, AG Bobek published his Opinion in this case (C-382/16).

The case deals with a German parent company holding a number of foreign subsidiaries, including two Dutch companies. The parent company issued several binding letters of comfort towards banks and creditors of the Dutch subsidiaries. Those letters where free of charge. The German tax authorities argued that from an arm's length perspective a third party would have charged a fee for granting those comfort letters and, therefore adjusted the income of the German parent. The German parent argued that those comfort letters were issued for sound commercial reasons and were similar to providing equity to the foreign subsidiaries.

The AG opines that an adjustment of income due to a non-arm's length transaction is not comparable to a purely domestic situation. In a domestic situation, the legislation is not applicable and there is also no risk of a cross-border shift of income. In the view of the AG, even if the CJEU rules that there is an infringement of EU law, this would be justified by the need to preserve the balanced allocation of taxing rights. Furthermore, the German provision was not found to be disproportionate by the AG. The AG also brings forward the so-called 'zero sum' argument. In the *SGI* judgment (C-311/08), the underlying legislation stipulated that the adjustment is not applicable *"provided that the advantage is used in order to determine the taxable income of the recipient company"*. The German legislation in the case at hand does not contain such an additional condition. Therefore, the *SGI* judgment is different from the present one in the view of the AG.

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

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National Developments

Cyprus – Public consultation on the EU's Anti-Tax Avoidance Directives (ATAD1 & ATAD 2)

On 14 November 2017, the Cyprus tax authority (CTA) invited public comments (until 8 December 2017) on the wording of an initial draft bill (the Consultation Document) for transposition of the ATADs into Cyprus law. This is Cyprus' first step in implementing the ATADs, and the final transposition may deviate substantially from the Consultation Document. The Consultation Document proposals are explained below.

Interest limitation rule

This rule provides that interest costs which are otherwise deductible in Cyprus would only be deductible up to 30% of adjusted Cyprus taxable profit (i.e. taxable earnings before interest, tax, depreciation and amortisation - taxable EBITDA). This rule will apply to the amount of exceeding deductible interest costs (i.e. the amount by which deductible interest costs exceed the amount of taxable interest income). The rule is to apply per company unless the company is a member of a Cyprus group (75% relationship condition) in which case it applies at the level of the Cyprus group (the Cyprus taxpayer). Standalone companies (i.e. on a worldwide basis those that are not members of a group, have no associates and no permanent establishments) and financial institutions are to be excluded from the rule. Also excluded are loans entered into before 17 June 2016 and not subsequently amended. Further, financing of certain public infrastructure projects and their associated income are excluded. The rule contains an EUR 3 m safe-harbour threshold. There is also a group ratio exception, where if the ratio of "equity/total assets" is higher at the level of the Cyprus taxpayer (or even up to 2% lower) as compared to its consolidated group for financial reporting purposes (on a world-wide basis), the rule, in effect, will not apply. Exceeding deductible interest costs may be carried forward for up to five years.

Controlled Foreign Companies (CFCs)

CFCs are low taxed (<50% of the Cyprus tax) foreign companies, directly or indirectly controlled by a Cyprus tax resident company. The ATAD provides EU Member States with two different approaches to combat CFCs. The Consultation Document follows a 'Model A' approach where certain income (such as interest, royalties and dividend income) of a CFC is to be included as current income in the tax base of the Cyprus parent and taxed in accordance with Cyprus rules, unless the CFC is an EU/EEA tax resident involved in substantive economic activities. The second approach allowed by ATAD (Model B) is based on the so-called 'arm's-length principle'. This approach combats structures where income of a domestic company is

allocated artificially to a CFC. We expect that Model B will also be explored during the consultation process.

Exit taxation

Exit taxation is to apply in cases where an asset leaves the taxing jurisdiction of Cyprus but remains under the same ownership (e.g. when a company transfers a taxable asset from its Cyprus head-office to an exempt foreign permanent establishment). We expect that this rule will be limited in its scope and apply only to those assets that are otherwise subject to Cyprus income tax, although this is not clearly provided for in the Consultation Document.

General Anti-Abuse Rule (GAAR)

The Consultation Document includes the ATAD GAAR which will allow the CTA to ignore non-genuine arrangements where (one of) the main purpose(s) is to obtain a tax advantage that defeats the object or purpose of the tax provision. Arrangements are to be regarded as non-genuine to the extent they are not put into place for valid commercial reasons which reflect economic reality. We expect this rule to apply only to 'wholly artificial arrangements' as set out in the EU tax framework.

Hybrid mismatches

These rules will capture many cases of cross-border double non-taxation where hybrid mismatches (i.e. differences in the characterization of an instrument, payment, permanent establishment or entity by different taxing jurisdictions) are involved.

Effective dates

Effective dates (which are not earlier than the ATAD general requirements) are:

- Interest limitation, CFC and GAAR rules – 1 January 2019
- Exit taxation – 1 January 2020
- Hybrid mismatches – 1 January 2020 (exception: certain reverse hybrid mismatch provisions - 1 January 2022)

-- Joanne Theodorides, PwC Cyprus; joanne.theodorides@cy.pwc.com

Finland – Central Tax Board advance ruling on taxation of income from Luxembourg SICAV (UCITS)

On 10 November 2017, the Finnish Central Tax Board (CTB) issued an advance ruling, *KVL 58/2017 (voted 4-1, appealed),* concerning the taxation of income received by a Finnish resident individual from a Luxembourg SICAV (UCITS). The CTB was requested to issue an advance ruling on whether the income received by a Finnish resident individual from a Luxembourg SICAV was to be taxed as capital income or earned income. In practice, in order to determine the tax treatment of the income from the SICAV, the CTB was first required to consider the comparability of the SICAV in question to the types of entities known in Finnish tax law.

In its analysis, the CTB noted especially the SICAV's corporate form, separate legal personality, tax exempt status, and its variable capital. The SICAV in question was UCITS compliant and established in the legal form of a *société anonyme*. Ultimately, regardless of SICAV's several similarities with a Finnish investment fund, the CTB concluded the SICAV to be closest comparable to a Finnish limited liability company conducting investment activities. This understanding is in line with previous case law regarding the classification of SICAVs.

With respect to the tax treatment of income from the SICAV, such income was considered to be dividends from a foreign company, within the meaning of Section 33.3 c of the Income Tax Act, and therefore fully taxable as earned income (taxed at progressive rates). It was also noted that dividends from a Finnish company would not be 100% taxed as earned income. This different tax treatment was nevertheless considered justified under EU law, as the situation of a resident individual receiving dividends from a tax exempt company (i.e. SICAV) was not held to be comparable to the situation in which the distributing company pays income tax (i.e. Finnish limited liability company conducting investment activities). According to the dissenting opinion (the CTB voted 4-1), the distribution from the SICAV (UCITS) could not have been taxed more heavily in Finland at the hands of the Finnish resident individual than a distribution from a Finnish investment fund.

-- Jarno Laaksonen and Okko Koskenniemi, PwC Finland; jarno.laaksonen@fi.pwc.com

Finland – Central Tax Board advance ruling on tax treatment of Finnish source real estate income

On 10 November 2017, the Finnish Central Tax Board (CTB) issued an advance ruling*, KVL 57/2017, final,* on the tax treatment of a Luxembourg RAIF-SICAV set up in the legal form of a *société en commandite simple* (SCS) on its Finnish source real estate income.

The CTB was requested to issue an advance ruling on the tax treatment of real estate income received by the RAIF-SICAV (SCS) from Finland. More specifically, the applicant first requested the CTB to rule whether the RAIF-SICAV (SCS) was to be held comparable to a Finnish income tax exempt special investment fund. This would result in the RAIF-SICAV (SCS) being exempt from income and withholding tax in Finland. Secondly, if the CTB's answer to the first question were negative, the applicant requested CTB to rule whether the RAIF-SICAV (SCS) could be considered a flow-through entity for Finnish tax purposes, in the sense that the income from Finland would be taxed in the hands of the investors.

In its analysis, the CTB discussed the types of vehicles available in Finland with respect to real estate investment and the regulation applicable in this respect. The CTB also noted e.g. that the RAIF-SICAV (SCS) has legal personality but that it is not a separate taxable entity but transparent for tax purposes in Luxembourg, that the RAIF-SICAV (SCS) would only have a single investor, and that the RAIF-SICAV (SCS) is not supervised by the Luxembourg financial authority CSSF. The CTB further noted that the RAIF-SICAV (SCS) in question must, as an SCS, have a general partner. Ultimately, the CTB did not consider the RAIF-SICAV (SCS)

comparable to a tax exempt Finnish special investment fund, which is a contractual arrangement without legal personality. The RAIF-SICAV (SCS) was held most comparable to a Finnish limited partnership, which has a general partner and at least one limited partner and the income from which is taxed at the hands of the investors for tax purposes. Accordingly, the CTB concluded that the RAIF-SICAV (SCS) was to be considered flow-through for Finnish tax purposes and answered the applicant's second question in the affirmative.

As the tax treatment granted to the RAIF-SICAV (SCS), which the CTB held most comparable to a Finnish limited partnership, corresponded to the tax treatment of a Finnish limited partnership, the CTB concluded that the decision could not be contrary to EU law and did not consider such arguments.

-- Jarno Laaksonen and Okko Koskenniemi, PwC Finland; jarno.laaksonen@fi.pwc.com

Italy – Final approval of the 2018 Finance Bill

On 23 December 2017, the Italian Parliament approved the 2018 Italian Finance Bill which contains *inter alia* important tax provisions on the taxation of the digital economy and on international tax law.

The 2018 Finance Bill introduces a new B2B tax on digital transactions (the so-called "web tax") that applies from 1 January 2019 to the provision of services performed by means of electronic devices to Italian residents: (i) corporations; (ii) government bodies; (iii) partnerships; (iv) sole proprietorships; (v) self-employed professionals; and to Italian permanent establishments (PEs) of non-Italian residents. A few exceptions apply.

The 2018 Finance Bill defines the services that fall within the scope of the web tax as "*services provided by means of internet or any other electronic networks, the nature of which makes the provision of the service mainly automatic and characterized by a minimum human intervention and with no possibilities to be provided without information technology support*". A special ministerial decree will include a more specific definition. The decree, that the Ministry of Finance is expected to release by April 30, 2018, will also specify additional features of the tax. The web tax rate is set at 3%, and the taxable base is the consideration paid for the service net of VAT. The web tax is due from both (i) Italian resident service providers and (ii) non-Italian resident service providers who during a calendar year carry out more than 3,000 transactions falling within the scope of the web tax. The service recipient has to withhold the web tax from the payment and remits it to the tax authorities by the 16th day of the following month. The service recipient does not have to withhold the web tax if the service provider certified in the invoice or in another document that the 3,000 transactions threshold was not exceeded during the given calendar year. The tax will apply from 1 January 2019.

Amendments to domestic PE definition

The 2018 Finance Bill expands and modifies the Italian domestic definition of a PE effective as from 1 January 2018. In particular, it was specified that "*a significant and continuous*

economic presence in the territory of the State set up in a way that it does not result in a substantial physical presence in the same territory" may anyway constitute a permanent establishment in the Italian territory of the non-resident taxpayer. At present, there are no guidelines as to what economic presence precisely means or when such economic presence is considered to be of a significant and continuous nature.

Moreover, the PE 'specific activity exemptions' list was also amended as set out in the updated art. 5.4 of the OECD Model Tax Convention (following BEPS Action 7 recommendations) to include an overarching requirement that each activity be of a preparatory or auxiliary character. Furthermore, the so-called anti-fragmentation rule as set out in the updated art. 5.4.1. of the OECD Model Tax Convention (following the BEPS Action 7 recommendations) was also introduced. Finally, the domestic concept of dependent agent PE was amended in order to include commissionaire arrangements as set out in the updated art. 5.5 of the OECD Model Tax Convention (following the BEPS Action 7 recommendations).

Amendment to the interest limitation rule

For purposes of the Italian interest limitation rule, the tax provision which allowed taking into account in the EBITDA calculation qualifying exempted dividends (received from a non-resident company in which the resident taxpayer holds the majority of the votes at the shareholders' meeting) was abolished. The amendment is consistent with art. 4 of the ATAD providing that tax-exempt income should be excluded from the EBITDA calculation.

-- Claudio Valz, Luca la Pietra and Guglielmo Ginevra, PwC Italy; claudio.valz@pwc.com

Lithuania – Increased investment tax relief measures

As of 2018, tax relief measures for investments into machinery and equipment, R&D and Free Economic Zones (FEZ) have been broadened in Lithuania. The main changes are outlined below.

First, the corporate income tax (CIT) rate is reduced from 15% to 5% if charged on profits from the commercial usage of patented inventions. The qualifying intellectual property (IP) should be computer programs protected by copyrights or other intangible assets protected by patents or other additional protection certificates issued by the European Patent Office or the European Economic Area (EEA) or double tax treaty (DTT) countries.

Second, the investment project relief for qualifying investments into new machinery and equipment is extended from 50% to 100% of the taxable profit. It can be used by those companies which focus on new products or services, more efficient production and on technologies which are protected by patents. This relief allows companies to reduce their taxable profit by the invested amount up to the year 2023 and any remaining amount can be used in the next four years until 2027. Depreciation of such assets is allowed for tax purposes meaning that it effectively results in a possible 200% deduction for a qualifying investment.

Moreover, tax incentives for FEZ companies have been extended. New companies registered in FEZ will be released from CIT payment for the first 10 years of their activities (before this, it was 6 years) and for the next 6 years (before this, it was 10 years) will pay CIT at reduced rate of 7.5% (15%*50%). It is important to mention that FEZ companies are also exempted from real estate tax and withholding tax on dividends. It should be noted that the qualifying amount of investment is EUR 100.000 and EUR 1 m. Furthermore, the participation exemption on capital gains from the sale of shares (in companies registered in the EEA on in a DTT country) is reduced from 25% to 10% of the voting shares provided that the shares were held for more than 2 years (in reorganisation cases, a 3 year period applies). Finally, the taxation of collective investment undertakings (CIUs) will become more concise. CIUs have no tax liability. If certain conditions are met, the tax liability lies with the individual investors. The income of qualifying CIUs, a payment of dividends and other distributed profits (except when they are received from black-listed territories) are not taxable.

These new regulations allow Lithuania to be more attractive for foreign investors on the international arena. These tax incentives can be considered as some of the most favourable in the EU for companies performing research and development, commercializing inventions and creating new technologies. Companies which have their business in Lithuania or which are planning to do so should consider how to best take advantage of these new tax reliefs.

-- Egidijus Kundelis and Gintare Gaigalaite, PwC Lithuania; egidijus.kundelis@pwc.com

Spain – Appeal before the Spanish Supreme Court on the rules to eliminate international double taxation

On 31 October 2017, the Spanish Supreme Court admitted an appeal to analyze whether article 32 of the CIT law intended to eliminate international double taxation on dividends distributed by an entity resident in another Member State trough credit may be contrary to the freedom of establishment, Article 49-54 TFEU.

The Spanish Tax Administration considered that the dividends could not benefit from the exemption regime provided for in article 21 of the CIT law. Although the dividends were paid by a Dutch company, they did not come from rents mostly obtained in The Netherlands but from dividends received from Spanish operating companies. It did recognize the right to apply credit (Article 32 of the TRLIS), which only allows subtracting the tax actually paid.

The appellant maintains that the application of a credit system causes discriminatory treatment against the exemption or full credit. In the first place, the limited credit requires the taxation of the difference between the nominal rate and the effective rate, which makes it economically worse than the other systems. Secondly, this discriminatory treatment is due exclusively to the fact that the intermediate investee is not resident in Spain but in another EU State; that is, the discriminatory treatment responds to the fact that the freedom of establishment has been exercised.

Therefore, there was discrimination caused by the fact that dividends could not benefit from exemption or full credit because dividends were paid by a non-resident entity. This discriminatory situation was recognized by the European Court of Justice in its judgment of 12 December 2012, *Test Claimants in the FII Group Litigation II* (C-362/12). At the same time, there was a discrimination in the treatment of dividends indirectly coming from a Spanish source due to the fact that there was an intermediate company that was not resident in Spain. This discrimination was rejected by the European Court of Justice in its judgment of 27 November 2008*: Papillon* (C-418/07).

There is already consolidated EU and national jurisprudence contrary to the criteria of the Spanish Tax Administration, for which reason a judgment which will be favourable to the taxpayer is foreseeable.

-- Antonio Puentes and Roberta Poza, PwC Spain; antonio.puentes@es.pwc.com

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EU Developments

EU – ECOFIN Council publishes EU list of third country non-cooperative jurisdictions in tax matters

On 5 December 2017, the ECOFIN Council published its conclusions on the EU common list of (third country) non-cooperative jurisdictions in tax matters, also referred to as the 'blacklist'. In November 2016, the ECOFIN Council agreed on the process for the establishment of an EU list of non-cooperative jurisdictions in taxation matters and on the following criteria:

- a jurisdiction should be considered compliant on tax transparency;
- a jurisdiction should be considered compliant on fair taxation;
- anti-BEPS (tax base erosion and profit shifting) measures should be implemented.

On this basis, a screening process and technical dialogue was carried out with multiple countries in 2017 by the Code of Conduct Group, in coordination with the Council's High Level Working Party (Taxation) and supported by the European Commission. In October 2017, the concerned third country jurisdictions were informed of the outcome of the process and where necessary, a political commitment was requested within a specified timeframe in order to resolve the issues identified by the EU. Although 47 jurisdictions chose to engage in a dialogue with the EU and made a political commitment in writing to timely address the EU's concerns, 17 jurisdictions failed to do so and as a result were ultimately included in the list, which can be accessed here.

In order to get de-listed or meet their political commitments, the affected jurisdictions need to:

- enhance their tax transparency; and/or
- amend or abolish harmful tax regimes and address the EU's concerns relating to economic substance; and/ or
- become members of the OECD's Inclusive Framework and/ or implement the BEPS minimum standards.

EU Finance Ministers also agreed that Member States may take certain coordinated 'effective and proportionate' defensive measures in the tax area, in accordance with their national law and in accordance with the obligations under EU and international law, against the listed jurisdictions, to persuade them to comply with the three key criteria. These defensive measures can be in the non-tax area (e.g. in relation to the European Fund for Sustainable Development) and in relation to future tax measures (e.g. possible mandatory disclosure rules), or other measures including, amongst other things, increased audits, disallowance of deductibility of costs, withholding tax measures, application of CFC rules, reversal of the burden of proof, limitation of participation exemptions and switch-over clauses.

The EU listing process will continue in 2018 with the list being reviewed at least on an annual basis.

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

EU – ECOFIN Council Report to the European Council on tax issues

The six-monthly report provides an overview of the progress achieved at the Council of Ministers during the term of the Estonian Presidency (second half of 2017), as well as on the most important dossiers under negotiations in the area of taxation. The report gives an overview on the state of play of relevant ECOFIN Council work and covers various issues mentioned in relevant European Council Conclusions since March 2012.

The report prepared by Estonia states that in line with the request from the European Council (that's the EU-28 Heads of State and Government) on 18 December 2014, during the Estonian Presidency, from 1 July 2017 – 31 December 2017, the Council has continued to focus its work on the fight against tax avoidance and 'aggressive tax planning', both at global and EU levels. This has been done, in particular, on the basis of a Presidency roadmap on further work related to 'unfair tax competition' and base erosion and profit shifting in the EU context (EU-BEPS), updated on 7 July 2017. The Estonian Presidency reiterates it has paid particular attention to consistency between EU work and OECD actions in the area of BEPS.

The Estonian Presidency also paid particular attention to the digital economy. It focused on relevant aspects both in the area of direct and indirect taxation.

In the area of direct taxation, the Council has adopted a Council Directive on Double Taxation Dispute Resolution Mechanisms in the EU and Council Conclusions on Responding to the Challenges of Taxation of Profits of the Digital Economy. It has also completed the article by article examination of chapters 1 to 5 of the Common Corporate Tax Base (CCTB) proposal, started the technical examination of the proposal for amending the directive on administrative cooperation to include mandatory disclosure rules on reportable cross-border arrangements (DAC6), and continued discussions on the recast of the Interest and Royalty Directive (IRD).

The Code of Conduct Group (Business Taxation) continued its work on the various matters falling within its mandate, including work in the context of the process leading to establishment of the EU list of non-cooperative jurisdictions in the tax area, as foreseen in the Council Conclusions of 8 November 2016. The results of the work were submitted, in coordination with the High Level Working Party (Taxation) to ECOFIN on 5 December 2017. More on the individual dossiers in the report.

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

EU – European Parliament adopts Resolution to the Council and the Commission following the PANA Committee inquiry

The EU Parliament's Resolution to the Council and the European Commission following the special inquiry into money laundering, tax avoidance and tax evasion (PANA) was adopted in the plenary session of 13 December 2017. The Resolution is in essence a wish list of Members of the European Parliament (MEPs) for further EU level action and proposals in the area of direct taxation. The Resolution is an EU Parliament Own Legislative Initiative which is non-legislative and non-binding (only the Commission has the right to initiate formal new EU legislative proposals). The EU-28 Member States (ECOFIN Council of Ministers) adopt any new EU tax acts based on a Commission proposal by unanimous vote. The Commission is under no legal obligation to follow Parliament's Resolution but it is bound to reply to the EU Parliament within three months (i.e. by 13 March 2018) stating the follow-up it intends to give to the EU Parliament's Resolution by adopting a specific communication. If the Commission decides not to submit a proposal/any proposals at all in response to the EU Parliamentary Recommendation, it must inform the EU Parliament of the detailed reasons. If so requested, the Commission will present its reply in the EU Parliament or in the Council.

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

Fiscal State aid

Italy – Italian Supreme Court decision on recovery of illegal State aid granted to multi-utilities owned by municipalities

On 31 October 2017, the Italian Supreme Court (Corte di Cassazione) issued a decision where it clarified that State aids, which were found in breach of EU law, need to be fully recovered

notwithstanding the nature of the beneficiary (owned by municipalities) of the contested measures and subsequent domestic general tax amnesties. The case at issue concerned a company active in the energy sector which benefited from a special corporate tax exemption regime during the years 1997-1999 in consideration of the public services performed. In 2002, the Commission declared such special tax regime as constituting illegal State aid and ordered the recovery of the aid granted accordingly (Decision 2003/193/EC).

The taxpayer appealed the case in front of the Supreme Court affirming, among other things, that no aid should have been recovered in consideration of its nature and of a subsequent general tax amnesty for which the company successfully applied in 2002.

The Supreme Court rejected the taxpayer's objections by affirming that, as far as State aid rules are concerned, the tax administration is obliged to recover illegal State aids also with respect to companies owned by municipalities. According to the Supreme Court, the composition of the share capital of a company is irrelevant in light of the objective of avoiding that enterprises benefiting from a preferential tax regime are placed in an advantageous position compared to the other market operators which provide public services. Finally, the Supreme Court concluded that domestic tax amnesty provisions should not be taken into account to the extent they are in contrast with the EU law principle of effectiveness as set out in Art. 14, para. 3 of EC Regulation n. 659/1999 (now transposed in Art. 16, para. 3 of EC Regulation n. 1589/2015).

-- Claudio Valz, Luca la Pietra, Guglielmo Ginevra, PwC Italy; claudio.valz@pwc.com

Netherlands – European Commission opens formal investigation into the Netherlands' tax treatment of Inter IKEA

On 18 December 2017, the European Commission issued a press release concerning the opening of a formal investigation into the Netherlands' tax treatment of Inter IKEA. The press release indicates that the emphasis of the Commission's investigation is on two tax rulings granted by the Netherlands in 2006 and in 2011 and the compliance of the tax treatment endorsed by these rulings with the arm's length principle and economic reality. For now, only the press release is available.

As pertains to the 2006 ruling, it endorsed a method to calculate an annual license fee to be paid by Inter IKEA Systems in the Netherlands to I.I. Holding, a company of the Inter IKEA group which was a resident of Luxembourg. I.I. Holding held certain IP rights required for the IKEA franchise concept, which were exclusively licensed to Inter IKEA Systems. As a result, Inter IKEA Systems paid out a part of its revenues as an annual license fee to I.I. Holding. The Commission will investigate whether this fee complies with the arm's length principle taking into account the Inter IKEA Systems' contribution to the franchise business.

Pursuant to a restructuring, in 2011, Inter IKEA Systems acquired the IP rights formerly held by I.I. Holding, financing the acquisition with an inter-company loan from its Liechtenstein

parent company. The Netherlands then issued the 2011 ruling, confirming the following elements of the transaction:

- the acquisition price for the IP rights;
- the interest to be paid under the intercompany loan to the Liechtenstein parent; and
- the relevant interest deductions in the Netherlands.

With respect to the 2011 ruling, the Commission will assess if the acquisition price and the interest payable are in line with the arm's length principle. In order to properly assess the Commission's arguments and their potential implications, it remains to be seen what the detailed decision, which will be published in a few months' time, will contain.

-- Jonathan Hare, PwC UK; Emmanuel Raingeard, PwC France; and Hein Vermeulen, PwC Netherlands; jonathan.hare@pwc.com

United Kingdom – European Commission publishes detailed opening decision regarding its State aid investigation into the financing income exemption within the UK's CFC regime

On 16 November 2017, the European Commission published the non-confidential version of the decision to open an in-depth investigation into an exemption for financing activities within the UK's Controlled Foreign Company (CFC) regime.

The earlier press-release announcing the opening of the investigation in October 2017 highlighted the Commission's view that this exemption results in tax benefits which are not available to other comparable taxpayers because it allows the group to provide financing to a foreign company via an offshore subsidiary and suffer a reduced level of tax on the profits from these transactions. The published decision provides further detail on the Commission's arguments supporting this view. These appear to be predicated on the assumption that while other elements of the UK rules identify the profits which have been artificially diverted from the UK, the exemption removes some of those profits from the charge to tax.

From the Commission's decision, it can be understood that the UK Government has responded with a number of arguments supporting the view that the exemption is consistent with the overarching objectives of the CFC rules. The UK Government submits that the exemption presents a practical, administrative shorthand contributing to the calculation within the CFC rules of profits that should be regarded as artificially diverted from the UK.

Following the December 2017 deadline for submission of comments by interested parties to the Commission, the next stage of the process is the consideration of these comments by the Commission as they come to their final decision.

-- Jonathan Hare and Juliet Trent, PwC UK; jonathan.hare@pwc.com

PwC EUDTG - KEY CONTACTS:

EUDTG Chair
Stef van Weeghel
stef.van.weeghel@pwc.com

Co-chair State Aid Working Group
Emmanuel Raingeard de la Blétière
emmanuel.raingeard@pwcavocats.com

Co-chair State Aid Working Group
Chair CCCTB Working Group
Jonathan Hare
jonathan.hare@pwc.com

EUDTG Network operational lead / driver,
EU Public Affairs-Brussels (TAX)
Bob van der Made
bob.vandermade@pwc.com

Chair EU Law Technical Committee
Jürgen Lüdicke
juergen.luedicke@pwc.com

Chair FS-EUDTG Working Group
Patrice Delacroix
patrice.delacroix@pwc.com

Chair Real Estate-EUDTG WG
Jeroen Elink Schuurman
jeroen.elink.schuurman@pwc.com

EUDTG COUNTRY LEADERS:

Austria	Richard Jerabek	richard.jerabek@pwc.com
Belgium	Patrice Delacroix	patrice.delacroix@pwc.com
Bulgaria	Orlin Hadjiiski	orlin.hadjiiski@bg.pwc.com
Croatia	Lana Brlek	lana.brlek@hr.pwc.com
Cyprus	Marios Andreou	marios.andreou@cy.pwc.com
Czech Rep.	Peter Chrenko	peter.chrenko@cz.pwc.com
Denmark	Soren Jesper Hansen	sjh@dk.pwc.com
Estonia	Iren Lipre	iren.lipre@ee.pwc.com
Finland	Jarno Laaksonen	jarno.laaksonen@fi.pwc.com
France	Emmanuel Raingeard	emmanuel.raingeard@pwcavocats.com
Germany	Arne Schnitger	arne.schnitger@pwc.com
Gibraltar	Edgar Lavarello	edgar.c.lavarello@gi.pwc.com
Greece	Vassilios Vizas	vassilios.vizas@gr.pwc.com
Hungary	Gergely Júhasz	gergely.juhasz@hu.pwc.com
Iceland	Fridgeir Sigurdsson	fridgeir.sigurdsson@is.pwc.com
Ireland	Denis Harrington	denis.harrington@ie.pwc.com
Italy	Claudio Valz	claudio.valz@it.pwc.com
Latvia	Zlata Elksnina	zlata.elksnina@lv.pwc.com
Lithuania	Nerijus Nedzinskas	nerijus.nedzinskas@lt.pwc.com
Luxembourg	Alina Macovei	alina.macovei@lu.pwc.com
Malta	Edward Attard	edward.attard@mt.pwc.com
Netherlands	Hein Vermeulen	hein.vermeulen@pwc.com
Norway	Steinar Hareide	steinar.hareide@no.pwc.com
Poland	Agata Oktawiec	agata.oktawiec@pl.pwc.com
Portugal	Leendert Verschoor	leendert.verschoor@pt.pwc.com
Romania	Mihaela Mitroi	mihaela.mitroi@ro.pwc.com
Slovakia	Todd Bradshaw	todd.bradshaw@sk.pwc.com
Slovenia	Lana Brlek	lana.brlek@hr.pwc.com
Spain	Carlos Concha	carlos.concha.carballido@es.pwc.com
Sweden	Elisabeth Bergmann	elisabeth.bergmann@pwc.com
Switzerland	Armin Marti	armin.marti@ch.pwc.com
UK	Jonathan Hare	jonathan.hare@pwc.com

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.

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