EU Tax News

Issue 2017 – nr. 001 November – December 2016

This PwC newsletter is prepared by members of PwC’s pan-European EU Direct Tax Group (EUDTG) network. If you would like to receive this newsletter automatically and free of charge, or wish to read any previous editions, please refer to: www.pwc.com/eudtg.

Editorial Board: Bob van der Made, Irma van Scheijndel, Phil Greenfield and Vassilis Dafnomilis.

Contents

**CJEU Cases**

<table>
<thead>
<tr>
<th>Country</th>
<th>Case Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>AG’s Opinion on the Belgian fairness tax: X</td>
</tr>
<tr>
<td>Denmark</td>
<td>CJEU Judgment on the Danish thin capitalisation rules: Masco Denmark ApS</td>
</tr>
<tr>
<td>Portugal</td>
<td>CJEU Judgment on the taxation of profits distributed by entities in third countries: SECIL</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>AG’s Opinion regarding UK trust exit taxation: Trustees of the P Panayi Accumulation &amp; Maintenance Settlements v HMRC</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>AG’s Opinion on UK FID regime: The Trustees of the BT Pension Scheme v HMRC</td>
</tr>
</tbody>
</table>

**National Developments**

<table>
<thead>
<tr>
<th>Country</th>
<th>Case Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Netherlands</td>
<td>Dutch AG’s Opinion regarding Dutch dividend withholding tax on foreign investment funds</td>
</tr>
<tr>
<td>Spain</td>
<td>National High Court of Justice upholds insurance company claims</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Court of Appeal judgment on remedies in the franked investment income (FII) group litigation</td>
</tr>
</tbody>
</table>
EU Developments

EU  ECOFIN Council of 8 November 2016 adopts criteria for screening of third country jurisdictions
EU  ECOFIN Council of 6 December 2016 - results
EU  European Commission’s public CBCR proposal’s legal basis challenged
EU  European Commission welcomes the entry into force of new transparency rules for tax rulings

Fiscal State aid

Hungary  European Commission publishes its final decision on the Hungarian advertisement tax
Ireland  Non-confidential version of the European Commission’s final State aid Decision on Apple
Spain  CJEU Judgments on the Spanish financial goodwill amortisation scheme: AutoGrill v Commission and Banco Santander and Santusa v Commission
Belgium – AG’s Opinion on the Belgian fairness tax: X

On 17 November 2016, Advocate General (AG) Kokott rendered her Opinion in X (C-68/15) concerning the so-called “Belgian fairness tax”. In January 2014, a Belgian corporate taxpayer filed before the Belgian Constitutional Court an action for annulment against the law introducing this tax. The action was comprised of four different pleas concerning the compatibility of the tax with: (i) the freedom of establishment (Article 49 TFEU) and the Parent-Subsidiary Directive (PSD), (ii) the constitutional lawfulness principle, (iii) the constitutional equal treatment principle and (iv) the treaties for the avoidance of double taxation. Considering the first plea the Constitutional Court decided to stay proceedings and refer to the CJEU for a preliminary ruling regarding the compatibility of the Belgian fairness tax with EU law.

The fairness tax is applicable if the following two conditions are cumulatively met during a taxable period: (i) the company has distributed dividends during the taxable period and (ii) the company’s taxable profit has been partly or fully offset against notional interest or carried-forward tax losses. A complex calculation applies for the determination of the taxable basis and the tax rate is 5.15%. The fairness tax applies to Belgian companies and Belgian permanent establishments of foreign companies.

Under the Belgian implementation of the PSD (the deduction of “definitely-taxed income”) 95% of the qualifying dividends received by a Belgian company or a Belgian permanent establishment of a foreign company are exempt from corporate income tax. The remaining 5% is in principle subject to tax (in line with Article 4(3) of the PSD). In cases, however, where an intermediary holding company is involved, the fairness tax could apply to more than 5% of the qualifying dividends received and redistributed by the intermediary holding company. In such a case, the AG considers that the fairness tax infringes Article 4(3) of the PSD.

It remains to be seen whether the CJEU will follow the AG’s Opinion. When the CJEU delivers a judgment, the Belgian Constitutional Court will still need to rule on all the above arguments and pleas of the filed action of annulment. Companies operating in Belgium (either Belgian companies or foreign companies with Belgian permanent establishments) that have paid the fairness tax should consider safeguarding their rights.

-- Patrice Delacroix and Olivier Hermand, PwC Belgium; patrice.delacroix@be.pwc.com

Denmark – CJEU Judgment on the Danish thin capitalisation rules: Masco Denmark ApS

On 21 December 2016, the CJEU rendered its Judgment in Masco Denmark ApS and Damixa ApS vs the Danish Ministry of Taxation (C-593/14) regarding the taxation of interest income in Denmark under thin capitalisation rules. The CJEU decided that the freedom of establishment (Article 49 TFEU) precludes the taxation of interest income received by a Danish parent company from a non-resident subsidiary, when the
subsidiary is not allowed to deduct the interest expense due to the application of thin capitalisation rules in its Member State of establishment.

The Danish company Damixa ApS owned a subsidiary in Germany, Damixa Armaturen GmbH. Damixa Armaturen GmbH had economic difficulties and incurred losses. Damixa ApS provided loans to Damixa Armaturen GmbH, which resulted in Damixa Armaturen GmbH being unable to deduct its interest expenses due to the application of the German thin capitalisation rules.

According to the Danish thin capitalisation rules, a Danish parent company is exempt from tax on its interest income if a Danish subsidiary is unable to deduct the corresponding interest expenses due to thin capitalisation rules. However, the tax exemption is granted only if the subsidiary was tax resident in Denmark.

Damixa ApS argued that taxation of the interest income in Denmark would be in breach of EU law, as Damixa Armaturen GmbH was unable to deduct the interest expenses according to rules similar to the Danish thin capitalisation rules. However, the Danish Ministry of Taxation disagreed and decided that the interest income should be taxable in Denmark.

The CJEU concluded that the Danish rules resulted in a restriction on the freedom of establishment, which could be justified by the need to ensure a balanced allocation of taxation powers between Member States. However, the CJEU considered that the Danish legislation went beyond what was necessary in order to attain the objective of the Danish rules, which was to eliminate double taxation of interest income.

Consequently, the Danish parent company Damixa ApS was not liable to tax on the interest income received from Damixa Armaturen GmbH to the extent that the interest expenses would also have been taxable under the thin capitalisation rules, had the Danish rules applied to the German subsidiary.

-- Martin Poulsen, PwC Denmark; mpu@pwc.dk

Portugal – CJEU Judgment on the taxation of profits distributed by entities in third countries: SECIL

On 24 November 2016, the CJEU issued its Judgment in SECIL (C-464/14). The CJEU decided that the Portuguese tax law regarding the refusal of tax exemption for profits derived from investments in third countries, as applied in 2009, was in breach of the free movement of capital (Article 63 TFEU).

The case concerned the taxation of dividends received in Portugal in 2009 by Secil - Companhia Geral de Cal e Cimento, S.A. (SECIL), a Portuguese tax resident company engaged in cement production. These dividends were distributed by two of its subsidiaries resident in third countries and did not benefit from a mechanism of elimination or mitigation of economic double taxation, as would have been the case if they were distributed by a Portuguese tax resident company (or a company resident in
another Member State), provided that all the relevant conditions are met. The Portuguese tax law, as applicable in 2009, provided for full deduction only if the subsidiaries were subject to tax in their country of residence. The deduction was otherwise reduced by 50%.

SECIL brought an action before the Tax Court of Lisbon claiming that the refusal of the Portuguese tax authorities to grant a full deduction was in breach of the Euro-Mediterranean Agreements concluded between i) the EU, its Member States and Tunisia, and ii) the EU, its Member States and Lebanon. Furthermore, this refusal constitutes a restriction on the freedom of establishment (Article 49 TFEU) and the free movement of capital (Article 63-65 TFEU).

The Tax Court of Lisbon decided to stay proceedings and referred the case to the CJEU for a preliminary ruling. The CJEU decided as follows:

**Regarding the infringement of Articles 63 and 65 TFEU**

Legislation of a Member State disallowing a full or a partial deduction of profit distributions made by subsidiaries resident in third countries, constitutes a restriction on the free movement of capital. This refusal may be justified by the impossibility of the beneficiary company’s tax authorities to confirm that the third country subsidiary was subject to tax in its country of residence. However, this is not the case if the applicable Member State tax law does not require the subsidiary to be subject to tax in order to grant the partial deduction.

**Regarding Article 64(1) TFEU**

Tax benefits schemes applicable for contractual investments or subsidiaries in Portuguese speaking African countries and Timor-Leste, as in force in 2009, did not change the “existing” nature of the restriction on the free movement of capital within the meaning of Article 64(1) TFEU, namely the exclusion from a full or partial deduction of profit distributions by subsidiaries in third countries.

**Regarding Article 34 of the Euro-Mediterranean Agreement concluded between the EU, Member States and Tunisia (on movement of capital)**

This Article has direct effect and as such the Portuguese tax legislation disallowing a full or partial deduction of profits distributions made by subsidiaries resident in Tunisia, constitutes a restriction on the free movement of capital, which, in principle, is prohibited under Article 34(1) of the Euro-Mediterranean Agreement, in what concerns the repatriation of proceeds of direct investments in Tunisia;

The refusal to grant a full or partial deduction of profits distributed by a Tunisian subsidiary may be justified by the impossibility of the tax authorities of the beneficiary
company to confirm that the Tunisian subsidiary is subject to tax in Tunisia, since the applicable Portuguese tax law did not require the subsidiary to be subject to tax in order to grant the partial deduction.

The same holds with respect to Article 31 of the Euro-Mediterranean Agreement concluded between the EU, Member States and Lebanon (on movement of capital).

Furthermore, the CJEU concluded that:

Where the Portuguese tax authorities could obtain confirmation from Tunisia concerning the tax status of the Tunisian subsidiary, namely that it was liable to tax in Tunisia, they could not refuse to grant a full or partial deduction of the profits distributed by the Tunisian subsidiary based on Article 64(1) of the TFEU;

Where the Portuguese tax law in force at the time of the facts did not require the foreign subsidiary to be liable to tax in the respective country of residence, the Portuguese tax authorities could not refuse to grant a partial deduction of the profits distributed either by a Tunisian or a Lebanon subsidiary based on Article 64(1) of the TFEU.

-- Leendert Verschoor and Catarina Nunes, PwC Portugal; leendert.verschoor@pt.pwc.com

**United Kingdom – AG’s Opinion regarding UK trust exit taxation:** *Trustees of the P Panayi Accumulation & Maintenance Settlements v HMRC*

On 21 December 2016, AG Kokott delivered her opinion in the case of *Trustees of the P Panayi Accumulation & Maintenance Settlements v HMRC (C-646/15)*. The case addresses the question of whether a trust may rely on the TFEU fundamental freedoms and, if so, the compatibility of UK trust exit tax provisions in the Taxation of Chargeable Gains Act 1992 (TCGA 1992) with those fundamental freedoms.

In 1992 Mr Panayi created four trusts for the benefit of his children and other family members. At that time Mr Panayi, his wife and his children were all resident in the UK. The original trustees were Mr Panayi and a UK resident trust company, and Mrs Panayi was added as a trustee in 2003. In August 2004, Mr and Mrs Panayi decided to leave the UK and move to Cyprus. They resigned as trustees of the trust and appointed three new trustees who were all resident in Cyprus.

As the majority of the trustees were no longer UK resident, TCGA 1992 s80 treated the effective management of the trust as being transferred out of the UK, triggering a deemed disposal of trust assets. This resulted in a charge to capital gains tax on the increase in value of trust assets which had accrued up until that date. The due date for payment of the tax was 31 January 2006. In December 2005, the UK trust company resigned as a trustee. Later that month (i.e. after the tax charge had accrued but before it became payable) the remaining trustees disposed of the trust assets.
AG Kokott opined that a trust may rely on the fundamental freedoms even though it has no legal personality under national law. However, this is subject to the condition that the trust is able to engage in economic transactions in its own right. It is for the UK courts to decide whether this is the case.

AG Kokott opined that the taxation under s80 of the unrealised capital gains accruing to a trust constitutes a restriction on the freedom of establishment which can be justified on the ground of preserving the allocation of taxing powers between Member States.

The AG also opined that the proportionality of the tax must be assessed at the time of the assessment to tax rather than the date of payment, and that the lack of an option to defer payment of the tax is disproportionate. The principle of proportionality does not, however, require the exit State to take account of any subsequent fall in value of the assets (although there was no fall in value in this case).

-- Jonathan Hare and Chloë Sylvester, PwC United Kingdom; jonathan.hare@pwc.com

United Kingdom – AG’s Opinion on UK FID regime: The Trustees of the BT Pension Scheme v HMRC

On 21 December 2016, AG Wathelet delivered his opinion in The Trustees of the BT Pension Scheme v HMRC (C-628/15). The trustees of a UK resident tax exempt pension fund argued that the absence of tax credits in respect of foreign income dividends (FIDs) received from UK resident companies (when tax credits were available in respect of domestic-sourced dividends) was in breach of Article 63 TFEU (free movement of capital). The UK Court of Appeal referred questions to the CJEU for a preliminary ruling on whether the pension fund trustees can rely on EU law in this situation, and if so, what remedies may be available to them.

The AG considered that it was clear from the judgment in Test Claimants in the FII Group Litigation (C-35/11) that the inability of the recipient of a FID to claim a tax credit was a restriction of the free movement of capital which could not be justified. In his view the FID regime should be considered as a whole, and the matter was therefore within the scope of the fundamental freedoms despite the fact that in this case the FID was paid between UK residents. Consequently he considered that the provisions of the FID regime which denied a tax credit should be disapplied such that the trustees should be entitled to claim payment of a tax credit plus interest.

The AG considered as irrelevant:
- the fact that the shareholder was not liable to tax on any dividends received;
- the fact that the UK courts have decided that the breach of EU law by the FID regime is not sufficiently serious to give rise to damages for companies paying the FID; the EU law rights of the shareholders are independent of those of the distributing companies; and
- the fact that the company distributing the FIDs may have increased the amount of its distributions to compensate for the lack of a tax credit.
It remains to be seen whether the CJEU will follow the AG’s opinion.

-- Jonathan Hare and Chloe Sylvester, PwC United Kingdom; jonathan.hare@pwc.com

National Developments

Netherlands – Dutch AG’s Opinion regarding Dutch dividend withholding tax on foreign investment funds

On 18 November 2016, the Dutch AG Wattel delivered his opinion on the preliminary questions referred by the Dutch District Court to the Dutch Supreme Court regarding the levying of discriminatory withholding tax on foreign investment funds.

The Supreme Court has previously ruled that a foreign investment fund is not entitled to a refund of Dutch dividend withholding tax because it is not objectively comparable with a Dutch fiscal investment institution (FBI), which is entitled to a refund of Dutch dividend withholding tax. Following these Supreme Court judgments, the CJEU delivered its Judgment in the joined cases X, Miljoen and Société Générale (C-10/14, 14/14 and 17/14 - Miljoen). According to the District Court, the CJEU Judgment raised various questions in relation to the Supreme Court judgment dated 10 July 2015, in particular with respect to the comparability analysis made by the Supreme Court. The District Court took also into account the increasing number of pending cases in which a refund of Dutch dividend withholding tax was requested on the basis of the comparison of a foreign investment fund with a Dutch FBI. Considering the above, the District Court decided to refer preliminary questions to the Supreme Court.

First, the AG considered whether a foreign investment fund is comparable to a Dutch FBI. In his view, this is not the case: the objective of the FBI regime is to achieve fiscal neutrality between direct and indirect investments. This objective is met, as Dutch dividends received by an FBI are subject to Dutch dividend withholding tax, the dividends distributed by a FBI are also subject to Dutch dividend withholding tax and the FBI is entitled to credit the Dutch dividend withholding tax borne against the Dutch withholding tax it has to remit to the tax authorities. In fact, the Dutch dividend withholding tax borne by the FBI is replaced by Dutch dividend withholding tax borne by the FBI investors.

Referring to the CJEU Judgment in PMT (C-252/14), the AG stated that the objective of the FBI regime cannot be achieved when investing through a foreign investment fund, because the dividends distributed by a foreign investment fund are not subject to Dutch dividend withholding tax. The AG noted that the Netherlands does not have the right to levy dividend withholding tax on dividends distributed by a foreign investment fund.
In the AG’s view, a foreign investment fund is also not entitled to a refund of Dutch dividend withholding tax on the basis of Miljoen, as it does not follow from Miljoen that the eventual Dutch tax burden of the investors is relevant. Rather, the tax burden of the foreign investment fund should be compared with the tax burden of a Dutch taxable entity. In the AG’s view, it is unlikely that the foreign investment fund would pay more tax than a Dutch taxable entity.

According to the AG, the questions of the District Court are “acte éclairé”. Therefore, he saw no legal reason for the Supreme Court to refer preliminary questions to the CJEU. However, considering the large number of pending cases, the AG did advise the Supreme Court to refer preliminary questions to the CJEU because of “process economic reasons”. These questions should focus on the comparability of a foreign investment fund with a Dutch FBI, the impact of Miljoen and the justification of possible discriminatory treatment, ensuring that investors in a foreign investment fund would not be effectively exempt from Dutch dividend withholding tax. Furthermore, the AG concluded that the Dutch FBI regime is not EU compliant. This is the case when a Dutch resident invests in a foreign fund that invests in Dutch shares; the investor should be allowed to demonstrate that he suffered a higher burden than that of a Dutch investor investing in a Dutch FBI.

It is likely that the Dutch Supreme Court will refer preliminary questions to the CJEU in order to receive a definite answer on these matters. Furthermore, we expect that the Dutch District Court will stay proceedings until the questions are answered by the Supreme Court and possibly the CJEU. We recommend that foreign investment funds safeguard their rights by objecting to/appealing possible negative decisions of the Dutch tax authorities or Dutch lower courts. Furthermore, we recommend that foreign investment funds safeguard their rights for years for which a refund request has not been filed.

-- Hein Vermeulen and Mark van Graafeiland, PwC Netherlands; hein.vermeulen@nl.pwc.com

Spain – National High Court of Justice upholds insurance company claims

On 28 October 2016, the Spanish National High Court of Justice (Audiencia Nacional) issued a judgment (appeal no. 13/2013) regarding the withholding taxes borne by an EU non-resident insurance company with respect to its unit linked investments in Spain. In this landmark judgment, Audiencia Nacional confirmed the existence of discriminatory tax treatment of EU non-resident insurance companies and established the correct refund procedure for the Spanish withholding tax levied in breach of EU law.

The EU non-resident insurance company claimed the refund of the Spanish withholding tax for fiscal years 2002 to 2006 on the grounds that the tax was imposed on a gross basis, while resident insurance companies could deduct their incurred expenses (technical provision).
There was no specific regulation applicable for those years allowing EU insurance companies to be taxed on their net income, apart from EU case law (e.g. Gerritse, C-234/01 and Centro Equestre, C-245/04). Therefore, the company filed several claims based on EU law (on the grounds of an infringement of free movement of capital – Article 63 TFEU) and the withholding tax refund “215 forms”. The Spanish Tax Authorities (STA) analysed these forms and rejected the refund request. The company lodged an administrative appeal before the Central Economic Administrative Court (TEAC), which was upheld because the administrative proceedings followed by the STA exceeded their maximum duration (six months). Accordingly, the TEAC ordered the refund of the Spanish withholding tax.

Considering that the TEAC’s decision was unlawful because i) it upheld that the correct procedure was the submission of the 215 forms and ii) it did not identify the existence of discrimination on the grounds of EU law, the company appealed the TEAC decision before the National High Court of Justice. The National High Court of Justice confirmed that the 215 forms procedure was not applicable for the pre-2010 claims; instead, the procedure under the General Tax Act (i.e. claim included in a covering letter with supporting documentation) should have been applied. Furthermore, the Court stated that, prior to the 2010 amendment, Spanish-sourced dividends paid to EU non-resident insurance companies were taxed on their gross amount, whereas Spanish resident insurance companies were able to reduce their gross income with the technical provision. Therefore, the tax was imposed on the Spanish resident insurance companies’ net income, which means that there was a clear discrimination against EU non-resident insurance companies and an infringement of the free movement of capital. Thus, the Court decided that the EU non-resident company should be taxed on a net basis for its unit linked business connected to the Spanish outbound dividends. The Court specifically referred to the CJEU’s Judgments in the cases Commission vs Finland (C-342/10), Finanzamt Linz (C-66/14) and PMT (C-252/14).

Concerning the date from which the late payment interest should be calculated, the Court diverges from its own previously established criteria in the appeal no. 630/13 (related to a UK UCITS) and declared that late payment interest should be calculated from the date of the filing of the relevant claim (covering letter and supporting documentation).

This is a landmark judgment, as it is the first one issued by the National High Court of Justice concerning the taxation of EU non-resident insurance companies for their unit linked business. The STA or even the company may still bring an action against this judgment before the Supreme Court. In the coming months it is expected that more judgments on non-unit linked business will be issued.

EU non-resident insurance companies should assess whether they should file new claims to safeguard their rights. It would also be interesting to see how the STA or the TEAC will react to this new case law with respect to pending claims.

-- Antonio Puentes and Carlos Concha Carballido, PwC Spain; antonio.puentes@es.pwc.com
United Kingdom – Court of Appeal judgment on remedies in the franked investment income (FII) group litigation

On 24 November 2016, the Court of Appeal delivered its judgment on remedies in the FII group litigation (Test claimants in the franked investment income group litigation v HMRC [2016] EWCA Civ 1180). In substance, the claimants succeeded on the key remedies issues save in respect of advance corporation tax (ACT) and double taxation treaty half tax credits.

Claimants in the case have already successfully argued that the rules for the taxation of foreign dividends were contrary to EU law and that they are entitled to a remedy for tax paid on such dividends in breach of EU law. The issues before the Court of Appeal concerned defences which HMRC wished to invoke against the claims, and the quantification of claims.

The Court dismissed all appeals and cross-appeals. However it held that:

- HMRC should be able to deduct double taxation treaty half credits paid to the US parent companies of claimants from the restitution that HMRC must make to those claimants in respect of unlawfully levied ACT.
- It was open to HMRC to raise an actual benefit argument in respect of the Claimants’ mistake-based claims for the use value of utilised ACT but only as a matter of principle of English law. The Court of Appeal held that HMRC had not made out that the actual benefit received was less than the objective value on the facts. Furthermore, the Court held that EU law precluded the actual benefit argument being available to HMRC.
- The Claimants’ mistake (that tax had been paid in breach of EU law) was discoverable on 12 December 2006, being the date of the first CJEU judgment in Test Claimants in the FII Group Litigation (C-446/04). This date is relevant in determining the time limit for making common law mistake claims for restitution of tax paid in breach of EU law (being 6 years from the date of payment of the tax or, if later, six years from the date on which a mistake was discoverable). Claims made after this date are unlikely to succeed where the tax was paid more than 6 years before the claim was issued. This decision could have wider implications for other EU law related claims. It is particularly interesting to note that the Court of Appeal considered that where a claimant pursues a mistake based claim it can still only discover that mistake once the relevant proceedings in respect of the pleaded mistake are concluded.

Thus the Court’s reasoning confronted the apparent logical difficulty of advancing a mistake based claim before the mistake has been established.

-- Jonathan Hare and Chloe Sylvester, PwC United Kingdom; jonathan.hare@pwc.com

Back to top
EU Developments

EU – ECOFIN Council of 8 November 2016 adopts criteria for screening of third country jurisdictions

On 8 November 2016, the ECOFIN Council agreed on the criteria and the process for the establishment of an EU list of non-cooperative jurisdictions in taxation matters. Finance Ministers adopted Council Conclusions on:

- criteria for the screening of third country jurisdictions;
- guidelines on the process for selecting and screening jurisdictions.

Screening is due to be completed by September 2017, so that the Council can endorse the common EU list of non-cooperative jurisdictions by the end of 2017. Screening is intended to be a continuous and regular process.

The EU’s Code of Conduct Group (Business Taxation) will conduct and oversee the screening process, supported by the Council’s secretariat. The Commission’s services will assist the Code Group in carrying out the necessary preparatory work for the screening process.

It is not yet clear what the potential defensive measures will be that will be agreed at EU level for non-compliance by these jurisdictions. Work on EU defensive measures (tax and non-tax (trade) related) continues with a view to their endorsement by the Council (i.e. the 28 Member States) by the end of 2017.

Peter Kažimír, Slovak minister for finance and president of the Council at that time commented that: "This is a first crucial step in the process that will take place throughout 2017", he added. "A dialogue will start with those countries that fail to comply with the criteria we have established, and only those jurisdictions refusing to cooperate and fulfil the criteria in due time will be placed on the so-called blacklist. Our primary goal is to incentivise, not to punish."

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

EU – ECOFIN Council of 6 December 2016 - results

EU-28 Finance Ministers did not reach political agreement (‘general approach’) on ATAD2 in the ECOFIN Council of 6 December 2016. The Slovak EU Council Presidency had prepared an ATAD2 compromise proposal, on which, however, no agreement could be reached among the Member States. The Maltese Presidency of the EU is now aiming for political agreement in the ECOFIN Council of 21 February 2017.

The ECOFIN Council of 6 December 2016 adopted Conclusions on the Commission’s Communication of 25 October 2016 on building a fair, competitive and stable corporate tax system for the Union and related legislative proposal.
The ECOFIN Council also adopted an EU Directive granting access for tax authorities to information held by authorities responsible for the prevention of money laundering. The Directive is intended to enable tax authorities to access that information in monitoring the proper application of rules on the automatic exchange of tax information, and, in so doing, help prevent tax evasion and tax fraud. The Directive will apply as from 1 January 2018, and is one of a number of measures set out by the Commission in July 2016, in the wake of the April 2016 Panama Papers revelations. Member states will have until 31 December 2017 to transpose the directive into national laws and regulations.

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

EU – European Commission’s public CBCR proposal’s legal basis challenged

Negotiations between the EU’s 28 Member States are continuing on the European Commission’s proposal for public country-by-country reporting (public CbCR), but whether the measure can be adopted in the coming months under the Maltese EU Presidency remains unclear. The General Secretariat of the EU Council’s legal service was asked over the Summer of 2016 by a number of Member States to look into the legal basis, and hence the lawfulness, of the Commission’s proposal, which was presented on 12 April 2016 (Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches).

For its April 2016 proposal the Commission had decided that public CbCR will be treated as an EU company law/internal market proposal. This choice by the Commission means that the European Parliament is a co-decision maker together with the ECOFIN Council, and that a compromise text would need to be hammered out between the Council (voting by a qualified majority) and the EU Parliament (voting by a simple majority). However, a number of Member States have opposed the Commission’s decision arguing that there is a lot of tax in the proposal and it should therefore be treated as a tax initiative instead involving the European Parliament only on a consultation basis.

The Council’s legal service issued its (confidential) legal opinion in mid-November. Although the report has not been published, media reports said that the opinion concludes that the Commission’s proposal should have the same legal basis as the EU’s DAC4 Directive, which incorporates into law Action 13 of the OECD’s BEPS recommendations on country-by-country reporting to tax administrations. However, the Commission’s legal service strongly disagrees with its counterpart in the Council. Such different views and disagreement between the Commission and the Council’s legal advisers are not uncommon, but it normally stays behind closed doors. The situation in this case is reminiscent of the Council’s legal opinion requested by the UK in 2013 on the lawfulness of the Commission’s proposal for an EU financial transaction tax.

The Commission is expected to stick with its position. The then Slovak EU Council Presidency issued a state of play and a draft Presidency compromise document for consideration by the Member States on 21 December 2016. Malta, which assumed the
EU Council Presidency on 1 January 2017 for 6 months, has said that the Council and the Maltese Presidency will deal with this dossier with the utmost pace.

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

EU – European Commission welcomes the entry into force of new transparency rules for tax rulings

The European Commission (Commission) drew attention to the entry into force on 1 January 2017 of the new transparency rules for tax rulings introduced through the Directive 2015/2376 (also known as “DAC3”). This Directive amends the Directive 2011/16/EU (as regards mandatory automatic exchange of information in the field of taxation) and requires Member States to automatically exchange on a six-monthly basis a basic set of information on advance cross-border tax rulings and advance pricing arrangements made from 1 January 2017. Furthermore, Member States will also have to provide the same information for cross-border rulings issued since the beginning of 2012 as per 1 January 2018 (see the previous EUDTG Newsalert of 7 October 2015). The Commission’s press release of 3 January 2017 stated:

“The Commission has welcomed the entry into force of new rules to ensure that Member States have all the information they need on tax rulings given to multinational companies in other EU countries.

As of 1 January 2017, Member States are obliged to automatically exchange information on all new cross-border tax rulings that they issue. This will be done through a central depository, accessible to all EU countries.

Pierre Moscovici, Commissioner for Economic and Financial Affairs, Taxation and Customs, said: ‘We have a duty to make corporate taxation fairer and more transparent, and to use every means possible to block tax abuse and profit shifting. The entry into force of the automatic exchange of information on cross-border tax rulings on 1 January marks a major step forward. It equips Member States and their national tax administrations with the information they need to detect certain abusive tax practices and take the necessary action in response.’

Every six months national tax authorities will send a report to the depository, listing all the cross-border tax rulings that they have issued. Other Member States will then be able to check those lists and to ask the issuing Member State for more detailed information on a particular ruling. This first exchange should take place by 1 September 2017 at the latest.

By 1 January 2018, Member States will also have to provide the same information for all cross-border rulings issued since the beginning of 2012.”

-- Bob van der Made, PwC Netherlands; bob.van.der.made@nl.pwc.com
Fiscal State aid

Hungary – European Commission publishes its final decision on the Hungarian advertisement tax

On 4 November 2016, the European Commission announced its negative State aid Decision with recovery on the Hungarian advertisement tax (case no. SA.39235). On 20 December, the Commission published the non-confidential version of its Decision. According to the Commission, Hungary granted a selective advantage to i) taxpayers with a low turnover and ii) loss-making taxpayers in 2013.

Hungary introduced the advertisement tax in August 2014. The tax applies to certain advertising services, including advertising through the media. The base of the tax is the turnover derived from the advertising services, without deduction of any costs.

Initially, the tax had a highly progressive tax rate structure with rates ranging from 0% and 1% (for companies with small or medium-sized advertising turnover) to 50% (for companies with high advertising turnover). Furthermore, taxpayers with zero or negative pre-tax profits in 2013 could deduct from their 2014 tax base 50% of the losses carried-forward from the previous years (accumulated under corporate and dividend tax law or personal income tax law).

The Commission opened an in-depth State aid investigation in March 2015 due to concerns about two key attributes of the Hungarian advertisement tax:
- The first concern was whether the steeply progressive rates could potentially favour certain media companies, as the progressive tax based on turnover could place larger players at a disadvantage.
- The second concern related to the utilisation of corporate tax losses which was available only to those taxpayers that were loss-making in 2013.

In response to the Commission’s investigation, the Hungarian Parliament amended the Advertisement Tax Act as per July 2015. However, only the Commission’s first concern (i.e. the steep progressivity) was addressed by the introduction of a 5.3% fixed rate applicable on turnover exceeding HUF 100m (approximately EUR 330k), while turnover up to HUF 100m (approximately EUR 330k) was exempt. Upon taxpayers’ choice, the new tax rates could apply retrospectively (i.e. from August 2014, when the tax was introduced).

The Commission reached the conclusion that progressivity in the case of sales taxes like the advertisement tax at hand is hardly justifiable. Furthermore, the measure of deducting tax losses carried forward only in the case of taxpayers that were loss-making in 2013 represents an arbitrary distinction. Since the progressive character of the tax – although applying over a narrower scale – and the provision regarding the deduction of losses carried-forward for taxpayers that were loss-making in 2013 remained unchanged, neither the amended nor the original scheme passed the Commission’s test and qualified as unjustified State aid. As a consequence, the Commission ordered Hungary to remove
the unjustified discrimination of companies under the Advertisement Tax Act and recover with interest the State aid from the favoured companies (unless it demonstrates that the advantage granted by the progressive tax rates meets the de minimis aid criteria).

With respect to the recovery of the State aid, the Commission ruled that all undertakings should be subject to a single fixed rate over the whole period of application of the advertisement tax, instead of progressive tax rates. By default, this single fixed rate is set at 5.3% as determined by Hungary in the amended version of the tax. However, Hungary may decide within two months from the date of adoption of the Commission’s Decision, i) to set a different level for the single tax rate or ii) to abolish the advertisement tax retroactively as of the date of its entry into force. It should be noted that in the case of taxpayers with previously exempted tax base the Commission’s Decision may trigger retroactive taxation, unless Hungary opts for a retroactive abolition. However, retroactive taxation would be contrary to the Hungarian domestic legislation. It is also remarkable that the Commission previously voiced general concern over progressive rates that may have far-reaching consequences, e.g. if progressive measures can be justifiable only in exceptional cases, for example if the externality created by the activity that the tax is supposed to tackle involves progressivity too.

The non-confidential version of the Commission’s Decision is available [here](#).

-- Gergely Júhasz, PwC Hungary; gergely.juhasz@hu.pwc.com

**Ireland – Non-confidential version of the European Commission’s final State aid Decision on Apple**

On 19 December 2016, the European Commission (Commission) published the non-confidential version of its final Decision of 30 August 2016 on the formal State aid investigation into the profit attribution arrangements and corporate taxation of Apple in Ireland. In its final Decision, the Commission concluded that the two rulings granted in 1991 and 2007 on the attribution of profits to the Irish branches of two Irish incorporated, non-resident companies constitute unlawful State aid, and ordered immediate recovery of the aid. Both Ireland and Apple have appealed this Commission’s final Decision before the General Court of the European Union on 9 November 2016 and 19 December 2016, respectively.

Apple Sales International (ASI) and Apple Operations Europe (AOE) are two Irish incorporated companies that are ultimately controlled by Apple Inc. Under a 'cost-sharing agreement' (CSA) with Apple Inc., in exchange for payments, ASI and AOE hold the rights to use Apple’s intellectual property to sell and manufacture Apple products outside the Americas.

The determination of the Irish taxable profits of ASI and AOE have been confirmed by tax rulings granted by Ireland in 1991 and 2007. According to the Commission, the two tax rulings issued by Ireland endorsed an artificial split of the profits for tax purposes in Ireland, such that, in the Commission’s view, the profit allocation to the Irish branches
could not be reconciled with the activities at head office level, which the Commission considered to lack the operating capacity to handle and manage the distribution business.

The Commission concluded that the confirmation of the profit allocation methodology grants a selective advantage to Apple and constitutes State aid based on a series of argument. Click here to read the Commission’s arguments as summarised in the EUDTG Newsalert of 20 December 2016.

As expected, this Decision has been appealed before the General Court and the position taken has been strongly defended in public by both the Irish Government and Apple. The Commission’s position has been strongly criticised by the U.S. Department of the Treasury in a statement and in their white paper “The European Commission’s Recent State Aid Investigations of Transfer Pricing Rulings” published on 24 August 2016.

This Decision should be seen in the light of a number of recent investigations by the Commission in respect of the use of tax rulings concerning the application of transfer pricing and the arm’s length principle. As with those cases, the Decision contains very detailed observations on the TP methodology used. Companies may wish to review these comments in view of their own facts and circumstances. The non-confidential version of the Commission’s Decision is available here.

-- Denis Harrington, PwC Ireland, Maarten Maaskant, PwC US and Sjoerd Douma, PwC Netherlands; denis.harrington@ie.pwc.com

Spain – CJEU Judgments on the Spanish financial goodwill amortisation scheme: Autogrill v Commission and Banco Santander and Santusa v Commission

On 21 December 2016, the CJEU set aside two General Court (GC) Judgments that had found the Spanish financial goodwill amortisation regime not to constitute State aid and referred both cases back to the GC (joined cases C-20/15 P Autogrill v Commission, and C-21/15 P Banco Santander and Santusa v Commission).

In 2009, the European Commission (Commission) found that the Spanish rules allowing companies to amortise for tax purposes the financial goodwill arising from acquisitions of non-Spanish EU shareholdings were incompatible with the State aid rules (the First Decision).

In a second Decision dated January 2011, the Commission concluded that the scheme was also incompatible as regards acquisitions of non-EU shareholdings (the Second Decision). The Commission ordered the recovery of the unlawful aid but, taking into account the existence of legitimate expectations, the recovery only affected aid granted in connection with acquisitions made post 21 December 2007 (or even 21 May 2011, in the case of certain non-EU acquisitions).
A number of taxpayers appealed against the First and Second Decisions to the GC which, in November 2014 annulled them both as, the GC found, the Commission had failed to demonstrate that the Spanish measure at issue was selective. The Commission appealed the cases with the CJEU which stated that the GC erred in law in annulling the Commission Decisions.

In its Judgments of November 2014, the GC had stated that the fact that a tax measure constituted an exception from the reference framework was not sufficient to consider that the measure was selective, particularly when such measure was potentially accessible to all undertakings. According to the GC, for a tax measure to constitute aid a particular category of undertakings should be identified which benefitted from the tax measure and which could be differentiated from the rest of undertakings based on their specific characteristics, something that the Commission had failed to do.

The CJEU, however, considered that it cannot be deduced from existing EU case law that the selectivity analysis requires the identification of a particular category of undertakings that exclusively benefit from the tax regime at issue. The CJEU stated that the relevant parameter in the selectivity analysis should be the determination of whether a given tax measure favours certain undertakings over other undertakings which are in a comparable factual and legal situation – having regard to the objective pursued by the general tax system concerned – provided that this difference in treatment results in discrimination against the undertakings excluded from the application of the tax measure.

Therefore, the CJEU concluded that the fact that the Commission failed to identify a particular category of undertakings that benefitted from the financial goodwill amortisation was not an appropriate ground for annulment of the Commission Decisions, and that the GC should have instead examined whether the Commission had effectively analysed and established that the measure at issue was discriminatory.

The CJEU has not given a final Judgment in the cases which have now been sent back to the GC for a second hearing. In the meantime, the Commission welcomed the CJEU Judgment and recalled that Spain should recover the aid granted within the time limits stated in its Decisions, and also the aid identified in the Third Decision, dealing with indirect shareholdings (see the previous EUDTG Newsalert of 16 October 2014).

Affected companies will need to closely monitor the developments over the coming months.

-- Antonio Puentes and Carlos Concha Carballido, PwC Spain; carlos.concha.carballido@es.pwc.com

Back to top
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?

- Through our Technical Committee we constantly develop new and innovative EU law positions and solutions for practical application by clients.
- 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.
- 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 EU-wide State Aid Working Group helps our clients identify and proactively manage EU State Aid risks.
- Together with our Financial Services colleagues, we have assisted foreign pension funds, insurance companies and investment funds with their dividend withholding tax refund claims.
- We have assisted clients before the CJEU and the EFTA Court in a number of high-profile cases such as Marks & Spencer (C-446/03), Aberdeen (C-303/07), X Holding BV (C-337/08), Gielen (C-440/08), X NV (C-498/10), Å 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.

More information

Please visit www.pwc.com/eudtg, or contact EUDTG Network Driver Bob van der Made (Tel.: +31 6 130 96 296, E-mail: bob.van.der.made@nl.pwc.com; or any of the contacts listed on the next page.)
PwC EUDTG KEY CONTACTS:

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

Driver - EU Public Affairs Brussels
Bob van der Made
bob.van.der.made@nl.pwc.com

Chair, CCCTB Working Group
Jonathan Hare
jonathan.hare@pwc.com
Emmanuel Raingeard de la Blétière
emmanuel.raingeard@pwcavocats.com

Chair, State Aid Working Group
Sjoerd Douma
sjoerd.douma@nl.pwc.com

Chair, EU Law Technical Committee
Juergen Luedicke
juergen.luedicke@de.pwc.com

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

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

EUDTG COUNTRY LEADERS:

Austria  Richard Jerabek  richard.jerabek@at.pwc.com
Belgium  Patrice Delacroix  patrice.delacroix@be.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  mailto: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  Juergen Luedicke  juergen.luedicke@de.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  fridgesigurdsson@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@nl.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 Brek  lana.brek@hr.pwc.com
Spain  Carlos Concha  carlos.concha.carballido@es.pwc.com
Sweden  Elisabeth Bergmann  elisabeth.bergmann@se.pwc.com
Switzerland  Armin Marti  armin.marti@ch.pwc.com
UK  Jonathan Hare  jonathan.hare@pwc.com