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EU Tax News

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CJEU Developments

Czech Republic – CJEU Judgment on the possibility of a foreign tax loss deduction after changing the place of effective management

In its Judgment in *Aures Holdings* (C-405/18) of 27 February 2020, the CJEU ruled on whether a current Czech tax resident company ("the company") may deduct a tax loss incurred in the Netherlands where the company was tax resident prior to becoming a Czech tax resident.

In 2007, the company had both its legal seat and its place of effective management in the Netherlands and was tax resident in the Netherlands. In the same year the company incurred a tax loss ("the Netherlands tax loss"). In 2008, the company established a branch in the Czech Republic. Subsequently in 2009, it moved its place of effective management into the Czech branch without converting its legal form into a Czech company, which resulted in a change in its tax residency from the Netherlands to the Czech Republic, while the company's legal form and registered seat remained in the Netherlands.

In 2012, the company, as a Czech tax resident, deducted the Netherlands tax loss from its Czech corporate income tax base based, it argued, on the EU principle of freedom of establishment. The Czech tax administrator disagreed with the Netherlands tax loss deduction and objected that Czech income tax law does not allow the transfer of a tax loss originating in another EU Member State, with the exception of cross-border transformations, such as mergers.

The dispute reached the Czech Supreme Administrative Court, which paused the proceedings and turned to the CJEU with two preliminary questions:

- Does a simple transfer of the place of a company's management from one EU Member State to another fall within the scope of freedom of establishment under Article 49 TFEU?
- Was it contrary to the freedom of establishment (Article 49 and 54 TFEU) for national law to forbid an entity from another EU Member State, when relocating its place of business or place of management to the Czech Republic, from claiming a tax loss incurred in that other EU Member State while the legal seat remained in the original EU Member State?

As explained in the AG's Opinion and by the CJEU, in order for the tax legislation of an EU Member State to infringe the freedom of establishment of companies, it must result in a difference in treatment to the detriment of the companies exercising that freedom; that difference in treatment must relate to objectively comparable situations and must not be justified by an overriding reason in the public interest or proportionate to that objective.

The CJEU in this case concluded that even if a difference in treatment exists, a tax resident company which suffered a tax loss in the Czech Republic, on the one hand, and a company which transferred its tax residence to the Czech Republic and had incurred a tax loss in the Netherlands in a tax year during which it was tax resident in the Netherlands, on the other hand, are not in a comparable situation in light of the objectives of preserving the allocation of the power to impose taxes between EU Member States and preventing the risk of double deduction of tax losses.

-- Lucia Cechova, PwC Czech Republic; lucia.cechova@pwc.com

Netherlands – CJEU Judgment in Köln-Aktienfonds Deka on comparability of Dutch and foreign investment funds

On 30 January 2020, the CJEU rendered its Judgment in the *Köln-Aktienfonds Deka* ("Deka") case (C-156/17). The Dutch Supreme Court referred three procedural questions to the CJEU regarding a refund of Dutch dividend withholding tax to foreign investment funds. These questions concern the compatibility of the Dutch Fiscal Investment Institution ("FII") regime (as it read until 2007) with EU law, and, more specifically, the shareholder and distribution requirements under the regime.

Köln-Aktienfonds Deka

Deka is an investment fund established under German law in the form of a *Publikums-Sondervermögen*. The activities of Deka consist of investing the fund's assets. Furthermore, Deka is exempt from German corporate income tax and qualifies as an Undertaking for Collective Investment in Transferable Securities ("UCITS"). Deka received dividends from Dutch shares which were subject to Dutch dividend withholding tax. Deka applied for a refund of Dutch dividend withholding tax, considering itself comparable to a Dutch FII.

Dutch FII

A Dutch FII is effectively entitled to a refund of the dividend withholding tax withheld from it. The Dutch tax authorities rejected the application for a refund made by Deka on the grounds that Deka did not comply with all the requirements to qualify as FII, being the distribution requirement (i.e. the FII regime requires distribution of the fund's taxable profit within eight months following the end of the year) and the shareholder requirements (participation thresholds which are not to be exceeded by holders of shares or certificates of participation in a fund in order to qualify for the FII regime).

Meeting the FII requirements

In the CJEU's view, EU Member States are free to define material and formal requirements which must be met to benefit from such a specific tax regime applicable to collective investment undertakings and to the dividends received by those undertakings. However, these requirements should apply indiscriminately, and the burden of proof should not make it impossible or excessively difficult for a non-resident taxpayer to obtain the tax advantage at hand.

Shareholder requirements

Deka argued that it was difficult to prove that it met the shareholder requirements because its shares were publicly traded via an electronic trading system. Deka, therefore, had no information on the identity of its shareholders.

Based on the CJEU judgment, it is for the referring court to verify that the shareholder requirements under the FII regime do not de facto disadvantage non-resident investment funds. Provided that the tax authorities require proof of compliance with those requirements for resident investment funds and non-resident investment funds alike, these requirements apply without discrimination. However, if the tax authorities impose a more stringent burden of proof on non-resident investment funds, this constitutes a breach of the freedom of capital movement.

Distribution requirement

Deka argued that the legal framework to which it is subject in Germany effectively also required a minimum distribution to its shareholders which may be topped-up with an additional deemed distribution for tax purposes, as a result of which non-distributed profits were effectively subject to taxation at the level of the end investors. As such, Deka argued that this method of distribution and taxation had a similar object and purpose as the distribution requirement under the FII regime.

The CJEU held that it is for the referring court to verify whether the object and purpose of the FII regime lie principally in the taxation of profits of the shareholder in an investment fund (i.e. achieving fiscal neutrality for investors in the investment fund). If so, a resident investment fund which makes an actual distribution of its profits, and a non-resident investment fund whose profits are not distributed but are deemed to have been distributed and are taxed as such at the shareholder in that fund, must be regarded as being in objectively comparable situations. In both cases, the level of taxation is shifted from the investment fund to the shareholder.

The CJEU Judgment brings positive news for foreign investment funds which filed claims in the Netherlands for the period up to 2007. The fact that they did not actually distribute their profits to their investors does not make them automatically incomparable with a Dutch FII. The Dutch Supreme Court will now have to issue its final judgment taking into account the CJEU's Judgment. Foreign investment funds are advised to continue protecting their rights for refund for claims already filed and by timely filing of new claims. Further litigation is expected on the compatibility of the FII regime in force since 2008, which contains a changed methodology that effectively provides resident investment funds with a refund of Dutch dividend withholding tax. The regime de facto has the same object and purpose and this CJEU Judgment could be applicable to the post-2007 regime as well.

-- Hein Vermeulen and Vassilis Dafnomilis, PwC Netherlands; hein.vermeulen@pwc.com

National Developments

Croatia – Croatia implements DAC6

As of 1 January 2020, Croatia has implemented the Council Directive 2018/822 (EU) of 25 May 2018 amending Directive 2011/16/EU in relation to reportable cross-border arrangements ("DAC6") through the act on administrative cooperation in the field of taxation and the rulebook on the automatic exchange of information in field of taxation.

Definitions

The definitions of the cross-border arrangement, intermediary, relevant taxpayer, hallmarks, scope and conditions of mandatory automatic exchange of information on reportable cross-border arrangements were directly taken from DAC6. An intermediary is defined as any person that designs, markets, organizes or makes available for implementation, or manages the implementation of, a reportable cross-border arrangement.

In Croatia, reporting excludes VAT, customs duties, excise duties and social security contributions.

Reporting requirements

DAC6 reporting requirements exempt purely domestic transactions and aim to identify tax aggressive arrangements with an EU cross-border aspect, including transactions with third countries, between related parties (threshold being 25%), which fall within certain hallmarks and are in some cases tax driven (i.e. the main benefit test shows that the primary aim of the transaction was to obtain tax advantages). The reporting responsibilities generally lie with the intermediary rather than the taxpayer, unless such reporting would be a breach of the intermediary's legal professional privilege (e.g. licensed tax advisors and lawyers) and there is no other EU intermediary. Cross-border arrangements become reportable on the earliest of the following:

- the reportable cross-border arrangement is made available for implementation;
- the reportable cross-border arrangement is ready for implementation, or;
- the first step in the implementation of the reportable cross-border arrangement has been made.

Such cross-border arrangements, where the first step of implementation has been or will be made between 25 June 2018 and 30 June 2020, must be reported between 1 July 2020 and 31 August 2020.

Penalties

Penalties for non-compliance are defined in the following range:

- up to EUR 27,000 for the legal entity, and EUR 3,000 for the responsible person within the legal entity, and
- up to EUR 13,000 for the individual (the taxpayer or the intermediary depending who has the reporting liability).

At this point, the Croatian Tax Authorities have not issued any guidance regarding DAC6 provisions. There are no real local legislative interpretations/specifics or notable deviations from DAC6. However, there are unclear aspects of DAC6 which are not clarified in the Croatian legislation, so we expect further and more detailed information and communications from the Croatian Tax Authorities in the near future.

-- Lana Brlek, PwC Croatia; lana.brlek@pwc.com

Gibraltar – Gibraltar implements DAC6

On 30 January 2020, the Gibraltar Government published the Income Tax (Amendment) Regulations 2020 ("the Regulations"). The Regulations amend the Income Tax Act 2010 for the purpose of implementing Council Directive (EU) 2018/822 of 25 May 2018 amending Directive

2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements ("DAC6").

In brief DAC6 imposes a new obligation on EU-based tax consultants, banks, lawyers, and other intermediaries to disclose any cross-border arrangement that contains one or more features known as "hallmarks" if they are identified as intermediaries for the purposes of DAC6. The hallmarks cover a range of structures and transactions, including certain deductible payments which are taxed at a rate of zero or nearly zero when received, as well as intercompany transactions which meet specific transfer pricing hallmarks such as any transfer of hard-to-value intangibles.

Scope

The scope of reporting will include potentially aggressive tax arrangements concerning two or more EU Member States or an EU Member State and a third country. "Arrangements", which are defined broadly to include an agreement, scheme, plan, transaction, etc. or series thereof, can involve several parts or stages of implementation or execution. There is no requirement to report on purely domestic arrangements and VAT, customs and excise duties are also outside the scope of the new reporting regime.

Hallmarks

The DAC6 reporting obligations focus on cross-border tax planning arrangements that meet certain hallmarks intended to highlight potential risk of tax avoidance. The reporting obligation only arises if one or more of these hallmarks is triggered. The hallmarks introduced by the Regulations follow those contained in DAC6. No additional hallmarks are introduced. In line with DAC6, certain hallmarks trigger reporting obligations only where obtaining of a tax advantage is the main benefit or one of the main benefits of the arrangement. While other hallmarks trigger reporting in all cases i.e. regardless of whether obtaining a tax advantage is the main benefit or not.

Reporting obligations

The reporting obligation falls on the intermediary or the taxpayer according to detailed rules regarding the parties and jurisdictions involved. Where bound by professional (legal) privilege an intermediary will be exempt from the reporting obligation. An intermediary exempt from reporting obligations will nevertheless have to notify other intermediaries, or if there is no such other intermediary the relevant taxpayer, of their reporting obligations. The reporting obligations will start to apply as of 1 July 2020, but will cover arrangements implemented as from 25 June 2018, which will have to be disclosed retrospectively.

Penalties

Administrative penalties for not filing a DAC6 report are £300. The penalty for providing inaccurate information can be up to £3,000. No official guidance has been issued by the Gibraltar tax authorities at this stage. Certain open questions remain in practice with respect to the interpretation of some of the rather widely defined hallmarks.

-- Edgar Lavarello and Patrick Pilcher, PwC Gibraltar; edgar.lavarello@pwc.com

Gibraltar – Gibraltar implements ATAD I Article 5 (exit taxation)

On 30 January 2020, the Gibraltar Government published the Income Tax (Amendment No.3) Regulations 2020 ("the Regulations") transposing into Gibraltar law the provisions of Article 5 of the Council Directive (EU) 2016/1164 of 12 July 2016 ("ATAD I").

Scope

The Regulations, which closely follow the provisions of Article 5 of ATAD I, come into operation on 1 January 2020 and impose an exit tax in any of the following circumstances where a taxpayer transfers:

- assets from its Gibraltar Head Office to its Permanent Establishment ("PE") outside of Gibraltar and Gibraltar no longer has the right to tax the transferred assets;
- assets from its Gibraltar PE to its Head Office or PE outside of Gibraltar and Gibraltar no longer has the right to tax the transferred assets;
- its tax residence outside of Gibraltar and acquires tax residence in another jurisdiction (excluding assets which remain effectively connected to a Gibraltar PE); and
- the business carried on by its Gibraltar PE to another jurisdiction and in doing so the taxpayer:

    1) ceases to have a taxable presence in Gibraltar;
    2) acquires, without becoming a tax resident, a taxable presence elsewhere; and
    3) Gibraltar loses the right to tax the transferred assets due to the transfer.

The tax

The taxpayer shall be chargeable to tax at the rate of 10% on the difference between the market value of the transferred assets which would otherwise produce assessable income under the provisions of the Gibraltar Income Tax Act 2010 at the time of exit of the assets less their value for tax purposes. "Market value" is defined in the Regulations as the amount for which an asset can be exchanged, or mutual obligations can be settled between willing unrelated buyers and sellers in a direct transaction.

Deferral of payment

The taxpayer has the choice of making an immediate payment of the exit tax charge or spreading the payment over a 5-year period. To qualify for the deferral, the transferee of the Gibraltar assets must be established in an EU Member State, or, an EEA Member State with which Gibraltar has concluded an agreement on mutual assistance in the recovery of taxes.

-- Edgar Lavarello and Patrick Pilcher, PwC Gibraltar; edgar.lavarello@pwc.com

Gibraltar – Gibraltar implements ATAD II: extends hybrid mismatch rules to third countries

On 30 January 2020, the Gibraltar Government published the Income Tax (Amendment No.2) Regulations 2020 ("the Regulations") transposing into Gibraltar law the provisions of the Council

Directive (EU) 2017/952 ("ATAD II") amending Council Directive 2016/1164 ("ATAD I") as regards hybrid mismatches with third countries. ATAD I contained a framework to tackle certain hybrid mismatches within the EU. ATAD II expands the provisions relating to hybrid mismatches so that they cover those involving third countries, the interaction between corporate tax systems of different EU Member States, hybridity involving permanent establishments ("PEs"), hybrid transfers, imported mismatches and a fuller range of double deduction outcomes; it also makes other miscellaneous amendments to ATAD I.

Scope

The hybrid mismatch definition in Schedule 4 to the Income Tax Act 2010 (Anti-Avoidance) now include situations where:

- a payment under a financial instrument gives rise to a tax deduction without inclusion;
- a payment to a hybrid entity gives rise to a deduction without inclusion;
- a payment to an entity with one or more PEs gives rise to a deduction without inclusion;
- a payment gives rise to a deduction without inclusion as a result of a payment to a disregarded PE;
- a payment by a hybrid entity gives rise to a deduction without inclusion as a result of the payment being disregarded;
- a deemed payment between two PEs gives rise to a deduction without inclusion as a result of the payment being disregarded; or
- a double deduction outcome occurs.

Denial of deductions

A hybrid mismatch which results in a double deduction:

- shall be denied in the investor jurisdiction; and
- where the deduction is not denied in the investor jurisdiction, it shall be denied in the payer jurisdiction.

A hybrid mismatch which results in a deduction without inclusion:

- shall be denied in the payer jurisdiction; and
- where the deduction is not denied in the payer jurisdiction, it shall be included in income (for tax purposes) in the payee jurisdiction.

Except where one of the jurisdictions involved in the transaction(s) has made an equivalent adjustment in respect of the hybrid mismatch, a deduction for tax purposes shall be denied for payments which directly or indirectly fund expenditure which gives rise to a hybrid mismatch.

Where a hybrid mismatch results in disregarded PE income, the taxpayer must include the income that would otherwise be attributed to the disregarded PE. This does not apply to income exempted under a double taxation treaty.

Where a hybrid financial instrument results in withholding tax relief to more than one party, the benefit of such relief is limited in proportion to the net taxable income of the payment.

Tax residency mismatches

Where a deduction for payment, expenses or losses of a taxpayer is deductible from the tax base in multiple jurisdictions, the deduction shall be denied to the extent that the other jurisdiction allows the duplicate deduction against income that is not dual-inclusion income.

-- Edgar Lavarello and Patrick Pilcher, PwC Gibraltar; edgar.lavarello@pwc.com

Portugal – Draft Law transposing ATAD II on hybrid mismatches presented to Portuguese parliament

On 30 January 2020, Law Proposal 10/XIV was presented by the Portuguese Government to the Portuguese Parliament. It partially transposes the EU's Anti-Tax Avoidance Directives (ATAD) I and II, respectively, Council Directive (EU) 2016/1164 of 12 July 2016, and Council Directive (EU) 2017/952 of 29 May 2017. The remainder provisions of ATAD I have already been transposed in Portugal following the publication of Law 32/2019, of 3 May 2019.

Article 68-A – Definitions

The draft law introduces Article 68-A, that reflects the recitals as well as Articles 4 and 9 of the ATAD. It includes definitions that are in line with the ATAD, among others, the definition of hybrid mismatches (situations giving rise to deduction without inclusion or to double deduction), double deduction, deduction without inclusion, associated enterprise and hybrid entity. This provision applies to tax years starting on or after 1 January 2020.

Article 68-B – Hybrid mismatches

The proposal also introduces Article 68-B, again reflecting the recitals as well as Articles 4 and 9 of the ATAD. This provision details the disallowed tax deductions resulting from hybrid mismatches, related with payments, or deemed payments, or that indirectly funds deductible expenditure. As permitted in the ATAD, Portugal opted to allow the deduction to be carried forward to a subsequent tax period, deferring any adjustment until the deduction is set off against non-dual-inclusion income in the other jurisdiction. Article 68-B also determines the income that should be considered for the purpose of assessing the taxable profit resulting from hybrid mismatches. This article applies to tax years starting on or after 1 January 2020. As permitted in the ATAD, in the case of hybrid mismatches resulting from a payment of interest under a financial instrument to an associated enterprise, under certain conditions, the provisions of Article 68-B shall only apply to tax years starting after 31 December 2022.

Article 68-C – Reverse hybrid mismatches

The proposal reflects Article 9a of ATAD I and II by introducing Article 68-C on reverse hybrid mismatches. It concerns non-resident hybrid entities that are regarded as Portuguese tax residents and taxed herein. This provision applies to tax years starting on or after 1 January 2022.

Article 68-D – Tax residency mismatches

New Article 68-D concerns tax residency mismatches and corresponds to Article 9b of the ATAD. It covers cases where Portugal is allowed to deny the deduction of costs incurred by a taxpayer having its registered office or place of effective management in the Portuguese territory who is also tax resident in another jurisdiction, and where those costs are deductible in both jurisdictions. This provision applies to tax years starting on or after 1 January 2020.

The draft Law closely follows ATAD II on hybrid mismatches. It is not expected that the final version to be published will differ from the proposal. Since most of its provisions apply to fiscal years starting on or after 1 January 2020, taxpayers should start analysing existing structures and transactions that could potentially be affected by these provisions.

-- Rosa Areias and Catarina Goncalves, PwC Portugal; rosa.areias@pwc.com

Romania – Bill introducing DAC6 legislation in Romania

On 31 January 2020, the Ordinance for amending and supplementing Law 207/2015 regarding the Fiscal Procedural Code to implement mandatory disclosure rules pursuant to Council Directive (EU) 2018/822 ("DAC6") was published in the Official Gazette of Romania.

Briefly, DAC6 obliges certain intermediaries or taxpayers to report to the tax authorities any cross-border tax planning arrangements which fall within certain "hallmarks", i.e. characteristics.
Our comments below are based on the Ordinance implementing DAC6 into Romanian legislation.

Scope and taxes covered

The Romanian version of the law is closely aligned with DAC6's scope, hallmarks and reporting requirements.

According to the law, the reporting obligation generally applies to any intermediary which designs, markets, organises, makes available for implementation or manages the implementation of a reportable cross-border arrangement in line with the provisions of DAC6 or which provides, directly or by means of other persons, aid, assistance or advice with respect to the above actions concerning a reportable cross-border arrangement.

Although not specifically mentioned in the Ordinance, the taxes covered seem to be direct taxes (i.e. VAT, customs duties and excise duties are excluded). The law refers only to cross-border arrangements, domestic arrangements being outside the scope of this legislation.

Date of application and reporting timelines

Starting 1 July 2020, intermediaries and, under certain conditions, taxpayers, have the obligation to report each cross-border arrangement within 30 days, which begins with the day following the date on which any of the following first occurs: the arrangement is made available for implementation, is ready for implementation or the first step in the implementation was made. However, if any of the above occurred between 25 June 2018 and 1 July 2020, reportable arrangements will have to be reported by 31 August 2020, to the National Agency of Finance Administration (ANAF).

Legal professional privilege

As a rule, intermediaries operating under a legal professional privilege in line with the law are exempt from the reporting obligation, unless the relevant taxpayer provides the written consent to waive this privilege. In case the waiver is not granted, the intermediary notifies any other intermediary involved in the arrangement or, if no other intermediaries are involved, the relevant taxpayer, of its obligation to report the arrangement.

Penalties

The law sets out the penalties applying to intermediaries or taxpayers for failing to comply with the various requirements within the deadlines stipulated. These include:

- a penalty of RON 20,000 to RON 100,000 for failing to report an arrangement or reporting with delay;
- a penalty of RON 5,000 to RON 30,000 for an intermediary subject to legal professional privilege failing to notify another intermediary or the relevant taxpayer.

The Romanian Tax Authorities are expected to release further guidance on the application of the Romanian DAC6 rules in practice.

Taxpayers and intermediaries operating in Romania and in Europe need to understand the importance and impact of DAC6. Impact assessment, analysis and timely action are needed to ensure compliance on and after 1 July 2020. The use of technology through appropriate data and reporting tools will be the key to satisfying these multiple new reporting requirements in a coordinated manner.

-- Andreea Mitiriţă, PwC Romania; andreea.mitiriţă@pwc.com

UK – First-tier Tribunal rules transfer of assets abroad rules in conflict with EU law

On 7 August 2019, the UK's First-tier Tribunal ("FTT") issued their judgment in favour of the taxpayer in *Andreas Rialas* (TC7316). The case concerned the transfer of assets abroad ("TOAA") rules, and provides a judicial ruling on several important points concerning their application. The TOAA rules are a longstanding piece of anti-avoidance legislation introduced to prevent UK residents using foreign transfers to mitigate their UK tax liabilities. Mr Rialas established an investment advisory business resident in the UK with his business partner "C". A dispute over the operation of the UK company arose which led to the purchase of C's shares by a Cyprus tax resident company (owned through a discretionary trust established by Mr Rialas). Dividends were later paid on these shares which were £2.73m in total. The UK tax authority (HMRC) argued that Mr Rialas was liable to income tax on these dividends because of the TOAA rules. The FTT agreed with Mr Rialas that the TOAA rules must be disapplied in this situation because they were penal and in conflict with the EU freedom of capital movement rules as the dividends would not have been subject to tax if the Cyprus tax resident company receiving them had been resident in the UK. The judge considered that the TOAA rules could possibly have been justified but were not proportionate.

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

UK – First-tier Tribunal judgment on timing of exit charge payments

In *Trustees of the Panayi A&M Trusts Nos 1-4 v HMRC [2019] TC7406* the UK's First-tier Tribunal ("FTT") confirmed that it was possible to interpret UK law in a manner conforming with the CJEU Judgment on this matter. The CJEU had concluded that the requirement for immediate payment of tax as a result of an exit charge with no ability to defer was contrary to EU law.

As an agreement could not be reached by the parties as to how to apply the CJEU Judgment, it was decided that a further hearing was required by the FTT to decide. The judge chose to interpret the law to rule that the exit charges could be paid by annual instalments over the minimum period available (five years) even where trust assets were sold in the meantime.

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

UK – Court of Appeal decision on withholding tax on manufactured overseas dividends

In *HMRC v Coal Staff Superannuation Scheme EWCA Civ 1610 (3 October 2019)*, the UK's Court of Appeal found that the imposition of withholding tax on manufactured overseas dividends (MODs) was contrary to EU law. The MODs arose on stock lending transactions (where the owner of non-UK shares 'lends' those shares and the borrower pays an amount equivalent to any dividend arising during the period to the person holding the shares). The borrower was required to withhold an amount of tax on the MOD equivalent to the amount of overseas tax that would have applied. The lender was required to treat this amount as withheld in respect of overseas tax and this meant that an exempt taxpayer like the claimant in this case was unable to claim repayment of the tax withheld. In contrast, manufactured dividends on UK shares (rather than non-UK shares) did not give rise to any obligation to withhold.

The UK's First Tier Tribunal ruled in favour of the UK tax authority (HMRC) but in this judgment the UK's Court of Appeal upheld the UK's Upper Tribunal decision that this regime constituted a restriction on the free movement of capital. The Court of Appeal agreed with the Upper Tribunal's conclusion that the regime was disproportionate on the basis that the legislation imposing the restriction was not targeted only at artificial arrangements and also did not provide a mechanism allowing the taxpayer to make representations to HMRC to show there was a commercial justification for the transaction. The Court of Appeal noted that similar claims had been made by other exempt taxpayers (e.g. pension funds, life insurance companies, investment funds and charities). This was therefore seen as a test case. HMRC estimated the total amount of tax and interest at stake to be in the region of £905m.

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

EU Developments

EU – ECOFIN February Council meeting revised EU blacklist: Cayman Islands, Panama, Palau and Seychelles added

On 18 February 2020, endorsing the work of the EU Code of Conduct (Business Taxation), EU-27 Finance Ministers concluded in the ECOFIN Council that the following four jurisdictions did not implement the tax reforms to which they had committed by the agreed deadline in the context of the EU's list of non-cooperative jurisdictions for tax purposes ("the EU blacklist"):

- Cayman Islands
- Palau
- Panama
- Seychelles.

As from 27 February 2020, (date of publication in the EU's Official Journal) the EU blacklist is composed of:

- American Samoa
- Cayman Islands
- Fiji
- Guam
- Oman
- Palau
- Panama
- Samoa
- Trinidad and Tobago
- US Virgin Islands
- Vanuatu
- Seychelles

Annex II of the Council Conclusions, which covers jurisdictions with pending commitments (aka "the EU greylist"), reflects the deadline extensions granted to 12 jurisdictions to enable them to pass the necessary reforms to deliver on their commitments. Most of the deadline extensions concern developing countries without a financial centre who have already made meaningful progress in the delivery of their commitments. According to EU Finance Ministers, 16 jurisdictions (Antigua and Barbuda, Armenia, Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cabo Verde, Cook Islands, Curaçao, Marshall Islands, Montenegro, Nauru, Niue, Saint Kitts and Nevis, Vietnam) managed to implement all the necessary reforms to comply with EU tax good governance principles ahead of the agreed deadline and are therefore removed from Annex II.

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

EU – European Commission adopts its 2020 Work Programme

On 29 January 2020, the European Commission adopted its 2020 Work Programme. It sets out the actions the new von der Leyen Commission will take in 2020 "to turn the Political Guidelines of EC President von der Leyen into tangible benefits for European citizens, businesses and society".

The new Commission's agenda reflects new realities and priorities but at the same time largely follows the previous Juncker Commission's focus on fair and effective taxation. The Commission states that: "technological change and globalisation have enabled new business models, and that this creates opportunities but also means that the international corporate tax framework has to keep pace." The EU's strategic policy direction has been (re-)defined on the basis of three core elements: 1) strategic autonomy, 2) sustainability and 3) dealing with new technologies. The Commission also wants to become more business-friendly.

Main relevant direct tax agenda items (and the quarter of 2020 in which they are expected):

- A Commission Communication (non-legislative strategic policy outline) on Business taxation for the 21st century, foreseen for Q2 2020. The Communication is expected to include, on the one hand, the EU's strategy - in the form of a draft EU Directive to be presented during the German EU Presidency (second semester of 2020) - on how the anticipated G20 OECD/IF global consensus agreement will be implemented within the EU and outlining how the EU will move unilaterally on digital tax if no global agreement is reached, on the other hand. Lastly, it is likely that calls on the EU Member States for progress on the stalled public CbCR and CCCTB Directives will be reiterated in the strategy paper.

- An Action Plan 'to fight tax evasion and to make taxation simple and easy' (legislative and non-legislative elements and including an impact assessment), foreseen for Q2 2020;

- An Action Plan on Anti-Money Laundering (non-legislative act), foreseen for Q1 2020;

- A review of EU Directive 2014/95/EU – aka the Non-Financial Reporting Directive (NFRD) (legislative, including an impact assessment), foreseen for Q4 2020;

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

EU – Work Programme of the Code of Conduct Group (Business Taxation) under the Croatian Presidency

On 5 February 2020, the proposed work programme under the Croatian Presidency of the Council (1st semester of 2020) was formally presented:

I. Monitoring of standstill and the implementation of rollback

The Code Group will review the tax measures notified by EU Member States under the last round of standstill and rollback notifications and continue the monitoring of the actual effects of some regimes for which a regular monitoring was decided.

II. Links with third countries

The Code Group will continue monitoring:

a. the implementation of the commitments made by jurisdictions
b. compliance with the new criterion 3.2, and
c. standstill in respect of the newly identified regimes under criterion 2.1 and measures under criterion 2.2, in the jurisdictions covered by the geographical scope.

The EU list of non-cooperative jurisdictions for tax purposes will be revised by the ECOFIN Council in February 2020 following the expiration of the end 2019 deadline.

The Code Group will:

a. resume discussions and aim at finding agreement on EU's future criterion 1.4 on exchange of beneficial ownership information, taking into account developments at international level.
b. conclude the screening of the Foreign Source Income Exemption regimes identified in the jurisdictions falling within the scope of the EU listing process.
c. review jurisdictions' responses regarding the treatment of partnerships (economic substance requirements) under criterion 2.2. 7.

The Code Group will also:

a. conclude the screening of Argentina, Mexico and Russia, and seek commitments if and where appropriate,
b. start the review of the approach used for selecting jurisdictions in the geographical scope of the EU listing exercise, in order to focus on the most relevant jurisdictions, having regard to the agreed work on the extended geographical scope as identified in 2018, and
c. initiate a review of the economic data used for selecting jurisdictions in the geographical scope of the EU listing exercise.

The Code Group's Chair will continue procedural/political dialogue with some jurisdictions, as necessary, and schedule a coordination meeting with the Chairs and secretariats of the OECD Global Forum, Forum on Harmful Tax Practices (FHTP) and Inclusive Framework on BEPS. The Code Group will also launch a review of the classified documents that were issued in respect of the EU listing process since 2016 and assess whether some could be declassified.

III. Monitoring the implementation of agreed guidance

In line with its agreed priority list (doc. 6603/18), the Code Group will assess EU Member States' compliance with the 2016 'Guidelines on the conditions and rules for the issuance of tax rulings - standard requirements for good practice by Member States', on the basis of EU Member States' responses to a questionnaire.

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EU – Austria changes its position on public Country-by-Country Reporting

The previous Finnish EU Presidency organised a public debate and a vote in the EU Competitiveness Council of 28 November 2019, on a public Country-by-Country Reporting (CbCR) compromise text. Fourteen EU Member States voted against: Austria, Croatia, Cyprus, Czech Republic, Greece, Hungary, Ireland, the three Baltic states, Luxembourg, Malta, Slovenia and Sweden. Germany abstained. This meant the EU's qualified majority voting (QMV) threshold was not reached despite a close vote.

After the little-known adoption of a legislative motion by the Austrian Parliament on 11 December 2019, Austria is now in favour of public CbCR since the motion is binding on the new government.

This prompted MEP Paul Tang (Progressive Alliance of Socialists and Democrats, Netherlands) to ask questions in January 2020 during a first Economic Dialogue and Exchange of Views meeting with the Croatian Presidency in the European Parliament. MEP Tang argued that since Austria has changed its position, a qualified majority in favour in Council seems to have emerged. According to MEP Tang it was therefore vital to put this file back on the agenda in Council. He also alluded to another development, on 5 December 2019, that saw the Global Reporting Initiative (GRI), the independent international sustainability impacts standard-setting body, introduce the first (voluntary) public global standard for comprehensive tax disclosures. If an organisation that is a (voluntary) signatory to GRI has identified tax as a material topic, it is supposed to report on the topic from 2021. Croatia's Finance Minister Marić remained very high-level in his answers to Tang on any next steps on public CbCR during Croatia's first-ever EU Presidency (from 1 January 2020-1 July 2020).

In Sweden, the government received some criticism for its negative stance on public CbCR in the Council, prompting reports of a potential repositioning. Germany remains the crucial EU Member State though and the current impasse in Council continues.

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Germany – European Commission initiates infringement proceedings against Germany for non-transposition of ATAD I & ATAD II

By two decisions of 24 January 2020 (cases 20200024 und 20200027), the European Commission initiated infringement proceedings against Germany, because in its view Germany did not transpose the EU's Anti-Tax Avoidance Directives 2016/1164 of 12 July 2016 (ATAD I) and 2017/952 of 29 May 2017 (ATAD II) into domestic law on time.

National legislation for the largest part of ATAD I had to be enacted by 31 December 2018 at the latest. For the most part of ATAD II, 31 December 2019 was the due date for transposition. Nonetheless, the German Federal Ministry of Finance only presented a draft bill at the beginning of 2020 which includes new rules on exit taxation, controlled foreign companies (CFC) taxation, taxation of hybrid mismatches and transfer pricing adjustments. Most of the rules are designated to enter into force retroactively from 1 January 2020. Yet, it remains uncertain when the German Government will pass the draft bill and forward it to the two chambers of the federal parliament.

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FISCAL STATE AID

Germany – European Commission holds restructuring clause not to constitute illegal State aid

On 22 January 2020, the European Commission decided in case SA.29150 that the restructuring clause in German corporate income tax law does not constitute unlawful State aid. The Commission thus followed the CJEU's Judgment of 28 June 2018 in the *Andres* (*acting as liquidator in the insolvency of Heitkamp BauHolding*) case (C-203/16 P).

The restructuring clause, which was introduced in 2009, provided for an exception pursuant to which the carry-forward of losses could be retained if the shares were transferred for the purpose of restructuring the corporate entity whereas loss carry-forwards of other corporate income tax payers were completely forfeited if more than 50% of the shares were transferred within a period of five years.

At the outset of the State aid proceedings, the Commission found in a decision of 26 January 2011 that the restructuring clause constituted unlawful State aid in favour of ailing companies that were acquired by a new shareholder planning to restructure them. However, after seven years of litigation the CJEU annulled the Commission's decision on 28 June 2018 holding that the Commission had erroneously considered the rule providing for a loss forfeiture in case of a change of control to be the reference framework, from which the restructuring rule derogated in a selective manner. Instead, the CJEU found the more general rule providing for an indefinite loss carry-forward to be the reference framework which was upheld by the restructuring rule.

Following the CJEU's Judgment, the Commission has now closed its State aid investigation ruling that the restructuring clause does not constitute State aid within the meaning of Article 107(1) TFEU. Consequently, the restructuring clause is now applicable and safeguards the use of the loss carry-forward in cases where the change of control occurred after 31 December 2007.

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ABOUT THE EUDTG

EUDTG is PwC's pan-European network of EU law experts. We specialise in all areas of direct tax, including the fundamental freedoms, EU directives and State aid rules. You will be only too well aware that EU direct tax law is moving quickly, and it's difficult to keep up, but it is crucial that taxpayers with an EU/EEA presence understand the impact. See for more info: www.pwc.com/eudtg.