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EU Tax News

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CJEU Developments

Belgium – European Commission refers Belgium to the CJEU for its failure to end the discriminatory tax treatment of foreign real estate income

On 25 July 2019, the European Commission decided to refer Belgium to the CJEU for its failure to properly implement rules to end the discriminatory tax treatment of foreign real estate income. This referral decision follows Belgium's failure to bring its legislation into line with EU law, in particular with the CJEU's Judgment of 12 April 2018 (*Commission vs Belgium*, C-110/17), in which the CJEU found that the Belgian provisions for foreign real estate income run contrary to EU law.

Rental income of taxpayers in Belgium from immovable property located abroad is calculated on the basis of the actual rental value, whereas for property located in Belgium it is based on the cadastral value, which is calculated by reference to the indexed deemed rental income of the property (which is significantly lower than the actual rental value), increased by 40%. Belgian law therefore favours investments in certain properties located in Belgium and penalises taxpayers who choose to invest in similar property in other EEA Member States. This situation may discourage Belgian residents from buying property abroad.

For property that is not rented out the CJEU already decided, on 11 September 2014, that the above-mentioned difference in taxation between domestic property and property located elsewhere in the EU violates the free movement of capital to the extent that it results in a higher tax burden (*Verest and Gerards*, C-489/13). However, in the meantime the relevant Belgian tax law has not been modified. Instead, the Belgian tax authorities issued a circular letter, dated 29 June 2016, based on which the rental value of non-Belgian properties may be determined based on a value established or expressly approved by a foreign authority.

The European Commission is now calling on the CJEU to impose financial sanctions on Belgium in the form of:

- a lump sum based on a daily amount of € 4,905.90 for each day of continued infringement, i.e. the number of days between the first judgment of the CJEU and either compliance by Belgium or the date of delivery of the judgment, with a minimum lump sum of € 2,029,000.00; and
- a daily penalty payment of € 22,076.55 from the day of the first judgment until full compliance is reached or until the second judgment.

-- Patrice Delacroix, Pieter Deré and Véronique De Brabanter, PwC Belgium; patrice.delacroix@pwc.com

Spain – Supreme Court refers preliminary questions to the CJEU regarding the Andalusian tax on escrows/deposits in financial institutions

On 16 July 2019, the Spanish Supreme Court has submitted two preliminary questions to the CJEU regarding the Andalusian tax on escrows/deposits in financial institutions. In Spain, as a general rule, financial institutions must pay taxes on escrows/deposits from their clients and customers. However, the applicable regional law in the Spanish region of Andalusia grants some general and specific deductions on this tax to financial institutions resident for tax purposes in Andalusia. The Supreme Court asked whether the deductions could violate EU law due to a difference in treatment of financial institutions that are resident in Andalusia and financial institutions that are resident in other Spanish regions or in other EU Member States, and, in particular whether the Andalusian tax on escrows/deposits is contrary to the EU's freedom of establishment, the free movement of capital and the freedom to provide with services, and whether it qualifies as an indirect or a direct tax.

-- Antonio Puentes and Roberta Poza, PwC Spain; roberta.poza.cid@pwc.com

National Developments

Austria – Federal Fiscal Court decision on treatment of income from non-securitized derivatives

On 15 July 2019, the Austrian Federal Fiscal Court (Court of 1st Instance, the BFG) dismissed a complaint concerning the claimed unequal treatment of income from non-securitized derivatives (RV/5100491/2019).

In the case at hand, an Austrian taxpayer earned income from non-securitized derivatives via a Danish bank account. This income was subject to the progressive income tax with a tax rate of up to 55%. In principle, such income would also be subject to the progressive income tax if it were earned via an Austrian bank account. However, an Austrian bank has the option to voluntary withhold Austrian withholding tax on the income. In that case, the very same income would only be subject to a flat tax rate of 27.5%. In comparison, a foreign EU bank does not have the option to voluntary withhold 27.5% tax, meaning that such income earned via an EU bank is always subject to the progressive income tax. The taxpayer filed a complaint against his income tax assessment notice where his income from non-securitized derivatives was subjected to the progressive income tax. He argued that this difference in treatment compared to income derived via an Austrian bank infringes the free movement of capital.

The Austrian Federal Fiscal Court did not follow the reasoning of the taxpayer and dismissed the complaint. The Court argued that there is no difference in treatment, since income earned via an Austrian bank account is also, in principle, subject to the progressive income tax. It is only up to the Austrian bank to decide whether it withholds 27.5% Austrian tax. Austrian tax law does not lay down criteria for that decision. Furthermore, the Court argued that an Austrian bank can opt to withhold 27.5% Austrian tax irrespective of whether the income is foreign sourced or not.

As there is no jurisprudence on this legal question, a complaint against that decision to the Austrian Administrative High Court (the VwGH) is admissible. We expect the taxpayer to file a complaint against the Austrian Federal Fiscal Court's decision considering its questionable EU law reasoning.

-- Christine Schellander and Nikolaus Neubauer, PwC Austria; christine.schellander@pwc.com

Belgium – Belgium implements EU Tax Dispute Resolution Directive

On 2 May 2019, Belgium completed the implementation process of the Directive on tax dispute resolution mechanisms in the EU (Council Directive 2017/1852 of 10 October 2017). The Belgian

Implementing Act for resolving cross-border tax disputes puts taxpayer rights at the forefront and has a broad scope of application as well as an obligation for the competent authorities of EU Member States to take conclusive and enforceable decisions that effectively resolve taxation not in accordance with a relevant double tax treaty. This means that companies and individuals may file a complaint under the new procedure as from 1 July 2019 for cross-border tax disputes concerning income or capital related to a taxable period commencing on or after 1 January 2018.

The Belgian Implementing Act is closely aligned with the structure and terms of the EU Directive. A dispute will have to be referred to the competent authorities of the EU Member States concerned by means of a formal complaint (art. 3), unless the matter concerns small enterprises or individuals. Once the complaint has been accepted and the taxpayer has provided the required information, the competent authorities concerned will try to resolve the question in dispute by mutual agreement (art. 4). In this respect, both an obligation to produce a result or escalate the matter and a timeline have now been set. If deemed appropriate, an Advisory Commission (art. 6) or an Alternative Dispute Resolution Commission may be set up (art. 10) if the competent authorities cannot reach an agreement in a timely manner. If a complaint is rejected, the taxpayer may challenge that decision. The Belgian Implementing Act contains a number of provisions requiring special attention and a few that are more specific in comparison to the EU Directive. For instance, the Belgian legislator prescribes strict time limits within which the taxpayer has to provide information to facilitate proceedings and the time limits within which the Belgian tax administration has to act vis-à-vis the taxpayer or the foreign authorities concerned.

Parties should also be aware that, under this procedure, there is an obligation to publish the final decision (if not in its entirety, then as an abstract).

Taxpayers who wish to rely on this procedure may do so while simultaneously applying administrative and judicial procedures but will need to choose one of these procedures at some point. In case other international procedures (Mutual Agreement Procedure, Arbitration Convention) are pending, the filing of this new procedure will however automatically end the other international procedures. Practice in the next few years will tell whether this enhanced procedure lives up to the promise and leads to a more effective resolution of cross-border tax disputes.

-- Bram Markey, Véronique De Brabanter and Luk Cassimon, PwC Belgium; veronique.de.brabanter@pwc.com

Estonia – Estonian draft law implementing DAC6

On 18 July 2019, the Estonian Ministry of Finance published a draft law amending the Tax Information Exchange Act (TIEA) and implementing EU Council Directive 2018/822 of 25 May 2018 amending Council Directive 2011/16/EU on Administrative Cooperation in the field of taxation in relation to reportable cross-border arrangements (DAC6). In brief, DAC6 obliges promoters/ service providers or, alternatively, taxpayers to report on cross-border tax planning arrangements that meet certain hallmarks.

The draft bill must now follow the Estonian legislative procedure and may be amended before final enactment. It is expected to enter into effect on 1 July 2020 in line with DAC6. With respect to the transitory period, the draft bill states that arrangements implemented between 25 June 2018 and 30 June 2020 must be reported at the latest by 31 August 2020.

The Republic of Estonia Tax and Customs Board is currently preparing a manual on DAC6 and developing an IT solution for reporting via the e-tax/customs system.

The term “intermediary” used in DAC6 has been replaced in the draft bill with “informant” (unofficial translation into English), as the term “intermediary” has a different meaning in the Estonian legal system. In the same vein, the term “scheme” is used instead of “arrangement.”

The draft bill is limited to schemes which have a potential impact on tax obligations, information exchange concerning financial accounts or through which the identity of the beneficiary can be hidden. In line with the EU Directive, indirect taxes and excise duties are not included, nor are domestic arrangements. The draft law mentions that tax advisors, lawyers and credit institutions (banks) are the primary people obliged to report.

The hallmarks and the main benefit test are in line with DAC6. The explanatory memorandum of the draft bill also provides some clarifications and examples for a better understanding of the schemes in scope.

The rendering of legal services could be covered by Legal Professional Privilege (LPP), which means that if the informant happens to be a lawyer, employee of a legal firm or an auditor, they have a right not to report to the relevant tax authorities, when it would cause a conflict with the LPP. In such cases, in line with DAC6, the informant has the obligation to first (i) inform another informant(s) related to the scheme, or if one does not exist (ii) inform the relevant taxpayer about such obligation. The taxpayer may waive the LPP such that the reporting obligation shifts back to the informant.

The draft bill leaves out article 8ab paragraph 11 of DAC6, which states that necessary measures may be taken by each EU Member State to require that each relevant taxpayer files information about their use of arrangements to the tax administration in each of the years for which they use it, as being expendable.

The penalties to compel informants to perform the reporting duty should not exceed EUR 3,300. In addition, for legal entities, the fine for any unfulfilled reporting obligation is up to EUR 3,200 and for an individual up to EUR 1,200. The draft law also states that when assessing the fulfilment of the reporting obligation, the privilege against self-incrimination must be respected. It is not clear yet, how and when this might affect compliance.

DAC6 is transposed as a minimum standard into the domestic law of Estonia. Still, there are many open questions and hopefully more clarity will be provided in the guidance which is expected to be issued by the Estonian tax authorities.

-- Hannes Lentsius and Krisli Klaarman, PwC Estonia; hannes.lentsius@pwc.com

Hungary – Hungary enacts significant changes to its corporate income tax legislation

On 23 July 2019, a number of EU Anti-Tax Avoidance Directive (ATAD) implementation related changes were enacted in the Hungarian corporate income tax (CIT) legislation.

Introduction of exit taxation rules

On 1 January 2020, the Hungarian CIT regime will include exit taxation provisions in line with ATADI. Accordingly, a triggering event - as set out in Article 4(1) ATADI - results in a Hungarian taxpayer being subjected to 9% CIT at the time of the exit of its assets on an amount equal to the positive difference between the fair market value of such assets (to be determined in line with the general transfer pricing guidelines) and the tax book value of those assets. The taxation of the exit as per the above rule is only triggered if the underlying transaction would not otherwise be subjected to the same tax burden in Hungary. The rules on instalment / lump sum payments as well as on out-of-scope transactions are also mainly equal to those set out in ATADI (Paragraphs 2, 4 and 7 of Article 4, respectively).

Hybrid mismatch rules and related anti-avoidance provisions

Also from 1 January 2020, the respective provisions regarding hybrid mismatches as part of the implementation requirements of ATADII will be incorporated into the Hungarian CIT legislation. Notably, the implemented provisions are in substance aligned with ATADII with respect to the scope (Paragraph 2 (b)-(c) of Article 1 ATADII), anti-avoidance provisions regarding hybrid mismatches (Paragraph 4 of Article 1 ATADII) and tax residency mismatches (Paragraph 5 of Article 1 ATADII). The new rules do not include provisions on reverse hybrid mismatches (also detailed within Paragraph 5 of Article 1 ATADII) as these are only expected to be incorporated in the Hungarian legislation when the corresponding deadline of 31 December 2021 approaches.

Amendment of group taxation rules

The Hungarian group taxation regime for CIT purposes (which was introduced as a new concept from 1 January 2019) was also amended with effect from 24 July 2019 in order to simplify the administration process and to ensure a more transparent application of the respective provisions. One of the amendments abolishes the criterion of having to apply the same functional currency, meaning that entities applying differing functional currencies may also be eligible to be members of the same CIT group. Taxpayers may also begin their business activities as members of an existing group. Hence, such entities no longer have to wait for the start of the subsequent tax year to be considered as members of a group for CIT purposes.

Interest limitation rules

Finally, amendments have also been made to the interest limitation rules (which are based on the respective provisions of ATADI and were enacted as of 1 January 2019) applicable to CIT groups. Accordingly, group members are to take into consideration their exceeding borrowing cost and EBITDA (earnings before interest, tax, depreciation and amortisation) on a tax group level when calculating the interest limitation thresholds. The determined amount of non-deductible interest shall be allocated to the respective group entities' individual tax bases in proportion to their EBITDA.

Implementation of DAC6

In compliance with the EU harmonization requirements as set out in EU Council Directive 2018/822 EU (DAC6), Hungary has implemented the respective provisions incorporated therein. The respective provisions implemented will be detailed within a separate PwC EU Direct Tax Group Newsalert.

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

Italy – Tax Court of Appeal rules that withholding tax levied on the gross amount of royalties distributed to a non-resident EU company is incompatible with EU law

On 28 February 2019, the Pescara Tax Court of Appeal (decision n. 363-7-2019, recently published) ruled that a non-resident EU company receiving Italian sourced royalties is in a comparable situation to that of an Italian company receiving the same type of income with respect to the right to deduct the costs directly connected to the income. Therefore it cannot be subject to a different tax treatment in this regard by suffering a withholding tax on the gross amount of the royalties received rather than on a net basis (i.e. taking into account the related costs).

In the case at hand, the non-resident taxpayer, a television operator in Spain, specialized in the production of television content and engaged in the management of rights related to international sports events, licensed the exploitation of TV rights to an Italian broadcasting company. Upon the payment of the related royalties agreed as remuneration for the rights licensed, the Italian entity applied 8% withholding tax on the gross amount of the royalties paid in accordance with the Double Tax Treaty in force with Spain. The Spanish company considered the taxation incurred as discriminatory and in breach of EU law. The withholding tax on the gross amount did not take into account any of the expenses linked to the royalty income received which amounted to around 90% of the royalties received (consisting of the costs suffered for the purchase of the IP rights from a Spanish associated entity). Put differently, if the same type of income had been received by an Italian corporate taxpayer, it would have been included in the CIT calculations and taxed on a net basis, i.e. after the deduction of any related costs.

On the basis of the above different tax treatment between Italian and non-resident taxpayers, the Spanish company decided to file an appeal before the Pescara Tax Court of First Instance asking for the reimbursement of the tax withheld at source based on EU law arguments.

The Pescara Tax Court of First Instance rejected the appeal brought by the non-resident taxpayer substantially ignoring the EU law discrimination arguments.

The claimant then appealed the case before the Pescara Tax Court of Appeal which, instead, upheld the non-resident taxpayer's EU law arguments. In particular, the Appeal Judges ordered the reimbursement in favour of the non-resident company of the withholding tax suffered exceeding the portion of tax that an Italian resident taxpayer would have paid on the same type of income, taking therefore into account the related costs suffered. In their reasoning, the Appeal Judges referred in particular to the CJEU Judgment in *Brisal* (C-18/15) and concluded that:

> "*the inability for the appellant to deduct the expenses related to the use of the rights on which the royalties have been paid led to a tax treatment that is worse and more burdensome than the one to which a resident company would have been subject for tax purposes in Italy which could have deducted the aforementioned costs from the taxable amount, provided that the requirements of certainty, inheritance and competence were fulfilled*."

It remains to be seen if the case will be appealed before the Italian Supreme Court and, if this is the case, confirmed. In any event, the decision, by extending the *Brisal* case principles to royalty payments, is of great interest to non-resident taxpayers and represents an important step forward for Italian domestic Tax Courts on the application of EU law fundamental freedoms in cases concerning withholding taxes.

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

Luxembourg – Draft Law implementing DAC6 in Luxembourg submitted to the Parliament

On 8 August 2019, the Luxembourg Government tabled a bill (n°7465) and its brief commentary before the Luxembourg Parliament setting out draft legislation (the "draft Law") that will implement the EU Directive on the mandatory disclosure and exchange of reportable cross-border tax arrangements, also known as DAC6. In brief, DAC6 obliges promoters/ service providers or, alternatively, taxpayers to report on cross-border tax planning arrangements that meet certain hallmarks.

The draft Law now needs to go through the Luxembourg legislative process, and may be subject to amendments before final voting by the Luxembourg Parliament.

The draft Law follows DAC6 very closely, so no reporting will therefore be applicable in relation to purely domestic arrangements, and only direct taxes such as e.g. corporate income tax, municipal business tax, and net wealth tax are in scope (VAT, duties, etc. are excluded). The draft Law includes the notions of cross-border arrangement, intermediary, relevant tax payer, associated enterprises which are identical in wording to those included in the Directive. The commentary of the draft Law clarified that accountants, tax and financial advisors, banks and consultants may be intermediaries.

Cross-border arrangements may be reportable if they meet at least one of the hallmarks set out in the draft Law, which are identical in wording to the list of hallmarks in Appendix IV of DAC6.

The reporting timelines are also in line with DAC6, i.e., the reportable cross border arrangements whose first implementation step occurs between 25 June 2018 and 1 July 2020 are to be reported as from 1 July 2020, and by 31 August 2020 at the latest. As from 1 July 2020, there is a thirty-day turnaround period to report to the domestic tax authorities.

Key clarifications

- *Legal professional privilege* applies to lawyers acting within the limits applicable to the exercise of their profession. However, they remain liable to provide the tax authorities with information linked to the reportable cross-border arrangement (but without any client-specific information). They have the obligation to inform, within 10 days, other intermediaries or the taxpayer of their respective reporting obligation following the partial waiver applying to the lawyer.
- *A main benefit test* should be fulfilled with regards to generic hallmarks (A) and a number of specific (B and certain C) hallmarks. This will be the case if obtaining a tax advantage is the main benefit, or one of the main benefits, that a person is expecting to derive from an arrangement. The draft Law takes the position that the tax advantage may either be obtained in the EU or in a third country, that it covers direct taxes only and that it is an objective test.
- *The information to be reported* matches that listed as to be exchanged between tax authorities, as specified in DAC6. The draft Law does not include a template form for the reporting. In

addition, each relevant taxpayer is required to file, in their Luxembourg corporate tax return, information about their use of the arrangement in each of the years for which they use it.

- Luxembourg proposes to set *penalties* of up to EUR 250,000, to be determined on a case-by-case basis. The intentional character (or not) of the breach will be considered. The intermediary/taxpayer has the possibility to file a recourse in front of the Tribunal against the amount of the fine.

The draft Law closely follows DAC6. This is welcome. However, there is no detailed guidance nor indication whether such guidance will be issued by the Luxembourg tax authorities before 1 July 2020. A prudent approach should thus be taken when tracking and collecting information on transactions that are potentially reportable.

-- Alina Macovei and Sami Douenias, PwC Luxembourg; alina.macovei@lu.pwc.com

Netherlands – Draft bill implementing DAC6 submitted to Dutch parliament

On 12 July 2019, a legislative proposal implementing the Council Directive 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) was submitted to the Dutch parliament. In brief, DAC6 obliges promoters/ service providers or, alternatively, taxpayers to report on cross-border tax planning arrangements that meet certain hallmarks.

The proposal follows the terminology of DAC6. Certain terms such as “arrangement” or “intermediary” are intentionally not explained in detail in the proposal that explicitly refers to the DAC6 definitions. Moreover, the proposal clarifies that there is no reporting obligation for cross-border arrangements which, although designed for a specific taxpayer, ultimately are not completed. Therefore, if an arrangement is not implemented by the taxpayer, for example because he does not want to carry out transactions that are subject to mandatory disclosure rules, the design of an arrangement does not become reportable. Furthermore, the proposal and its explanatory memorandum provide further guidance on the application of the main benefit test and the application of certain hallmarks.

Under DAC6, in relation to certain hallmarks, the arrangement becomes reportable only if the so-called “*main benefit test*” is fulfilled. This is the case if it can be established that the most important benefit or one of the most important benefits that can be reasonably expected from an arrangement, taking into account all relevant facts and circumstances, is the obtaining of a tax advantage. According to the explanatory memorandum, this tax advantage can arise both within and outside the EU. If there are sound business reasons for an arrangement, without artificial elements being added, it can be assumed that the arrangement does not aim at obtaining a tax advantage. According to the explanatory memorandum, deferral of taxation may be an advantage under the main benefit test. On the other hand, the test is not automatically fulfilled if double taxation is avoided. The explanatory memorandum regards the use of a favourable tax regime (e.g. the tonnage regime and the innovation box) as not aimed at obtaining a tax advantage. This is because an arrangement to which a favourable tax regime applies will usually be set up in accordance with the underlying idea of the tax regime.

On *hallmark* C1(b)(i), for which the main benefit test needs to be fulfilled, the explanatory memorandum clarifies that “corporate tax at almost zero” means a tax levied at a tax rate of between 0% and 1%. In addition, hallmark C1(c) (for which the main benefit test also needs to be fulfilled) refers to an objective exception (and thus not to a subjective exception). On hallmark E1 (arrangement that involves the use of unilateral safe harbour rules), the memorandum clarifies that if safe harbour rules are based on international standards, the hallmark is not applicable.

The Dutch tax authorities (DTA) are currently working on a Guideline on the application of DAC6 in the Netherlands. Furthermore, a specialised team will be set up within the DTA to act as a help desk for intermediaries and taxpayers. This team will prepare a Guideline as well. The team will also be responsible for communication with other countries and the European Commission.

The legislative proposal and explanatory memorandum broadly follow DAC6. The proposal has yet to be discussed in the Dutch parliament and Senate respectively. This will be September at the earliest. Adoption by the Senate is not expected before December 2019.

-- Hein Vermeulen, Edwin Visser, Vassilis Dafnomilis and Bob van der Made, PwC Netherlands; hein.vermeulen@pwc.com

Spain – High Court of Justice of Catalonia judgment on disproportionate character of penalties for failure to report assets held abroad

On 27 May 2019, the High Court of Justice of Catalonia issued a judgment which acknowledges the legal reasoning used by the European Commission regarding the disproportionate character of Spanish penalties for failures to report assets held abroad (Form 720). The Court concluded that if the Spanish tax authorities were aware of the fact that the European Commission had requested Spain to modify the law on the reporting of assets held abroad due to the infringement against the free movement of capital and its non-proportional character, they should have considered it at the time of assessing the level of culpability of the taxpayer not reporting those assets. Thus, the High Court of Catalonia interpreted the fact of not considering the arguments from the European Commission a lack of motivation. On this basis, the Court rejected the penalty imposed on the taxpayer.

-- Antonio Puentes and Roberta Poza, PwC Spain; roberta.poza.cid@pwc.com

Spain – High Court of Justice of Catalonia confirms discriminatory tax treatment of US pension funds sponsored by US multinationals

On 12 April 2019 and 5 June 2019, the High Court of Justice of Catalonia issued judgments which confirm the discriminatory tax treatment of US pension funds sponsored by US multinationals (Lockheed Martin Retirement Plan and Chevron Retirement Plant respectively).

During different fiscal years, both pension plans received Spanish sourced dividends which were subject to withholding taxes under the Non-resident Income Tax Law. However, if such dividends are paid to Spanish resident pension funds no withholding tax is levied.

The High Court of Catalonia considered that the Spanish pension funds and US pension funds involved in these cases are equivalent. Any difference in treatment due to their place of residence is a clear restriction against the free movement of capital, which cannot be justified. Thus, the non-resident pension fund had the right to claim the refund of the withholding taxes unduly levied.

-- Antonio Puentes and Roberta Poza, PwC Spain; roberta.poza.cid@pwc.com

UK – Draft regulations implementing DAC6 in UK published for consultation

On 22 July 2019, the UK tax authorities (HMRC) published a consultation document and draft regulations to implement the EU Directive on the mandatory disclosure and exchange of reportable cross-border tax arrangements, also known as DAC6, which was published last year. HMRC has said that it expects to introduce these regulations by 31 December 2019 regardless of what happens on Brexit.

The draft UK regulations follow DAC6 closely, and require disclosure to HMRC of cross-border arrangements entered into by taxpayers which fall within certain hallmarks. These hallmarks are very broadly defined and many commercial transactions will be within the scope of the rules. The disclosures will be shared between the tax authorities of all EU Member States quarterly.

The consultation document sets out the approach HMRC intends to take in interpreting DAC6 and elaborates on how the rules will operate in practice. HMRC will provide further guidance alongside the finalised regulations.

Key clarifications:

- “Tax advantage” is limited to situations where the relevant tax benefit is not consistent with the principles on which the tax provisions are based or the policy objectives of such provisions.
- “Tax advantage” will cover relevant tax benefits in any territory worldwide and not, for example, just UK or EU taxes.
- Employees – individuals employed by an intermediary or by a taxpayer are not themselves treated as an intermediary, and therefore are not required to make a report themselves.
- C1 – This hallmark looks at the jurisdiction where the recipient is resident. HMRC has clarified that the recipient will generally be the person who is taxable on the receipt. In the case of transparent entities such as general partnerships, the partners will be treated as the recipients.
- C1(b)(i) – Arrangements may be reportable if the recipient is located in a territory whose corporate tax rate is ‘almost zero’ - this mean it is less than 1%. This applies to the headline rate of tax rather than to the effective tax rate a company faces.
- C1(d) – Arrangements may be reportable if a payment benefits from a ‘preferential tax regime’. This is not defined but it could include patent box regimes or special economic zones which provide certain tax incentives.
- C2 – Arrangements may be reportable if they benefit from depreciation in more than one jurisdiction. This does not apply if there is corresponding taxation of profits from the asset in the same jurisdiction.
- C4 - Arrangements may be reportable if there is a difference between the amounts treated as payable in consideration for the transfer of assets in the jurisdiction involved. HMRC has clarifies that this means the amount treated as payable for tax purposes.
- D2 – Certain arrangements are reportable if the beneficial owners are made unidentifiable. HMRC have confirmed that the test is whether beneficial owners can reasonably be identified by relevant tax authorities, including HMRC. The identity of the beneficial owners does not have to be publicly available.

  E1 – Arrangements are reportable if they involve the use of unilateral safe harbours from transfer pricing, but the regulations exclude cases where the relevant taxpayer and its associated group companies are dormant or small or medium enterprises (SMEs) which are exempt from the basic UK transfer pricing rules. Advance pricing agreements (APAs) are not unilateral safe harbours and so are not within this hallmark.

The consultation period will last until 11 October 2019. Following the consultation, final regulations will be laid before Parliament before the end of the year, and will come into force on 1 July 2020.
--- Jonathan Hare, PwC United Kingdom; Jonathan.hare@pwc.com

EU Developments

EU – Political Guidelines in the area of Taxation of European Commission President-elect Von der Leyen

On 17 July 2019, a day after she was confirmed by the European Parliament as President-elect of the European Commission, Ursula von der Leyen, set out her Political Guidelines for the next Commission's mandate (2019-2024), including in the area of taxation:

"**Fair taxation**
One of the key foundations of our social market economy is that everybody pays their fair share. There can be no exceptions. A race to the bottom on taxation undermines the ability of countries to set tax policies that meet the needs of their economies and people. Where profits are generated, taxes and levies must also contribute to our social security systems, our education systems and our infrastructure.

The EU and international corporate tax systems are in urgent need of reform. They are not fit for the realities of the modern global economy and do not capture the new business models in the digital world.

I will stand for tax fairness – whether for bricks-and-mortar or digital businesses.

I will ensure that taxation of big tech companies is a priority. I will work hard to ensure the proposals currently on the table are turned into law. Discussions to find an international solution are ongoing, notably at the Organization for Economic Cooperation and Development. However, if by the end of 2020 there is still no global solution for a fair digital tax, the EU should act alone.

European companies ask for simple tax systems and simple rules, especially when working across borders. In the first half of my mandate, I will put forward proposals to improve the business taxation environment in the single market.

A common consolidated corporate tax base would provide businesses with a single rulebook to compute their corporate tax base in the European Union. This is a longstanding project of the European Parliament and I will fight to make it a reality.

Differences in tax rules can be an obstacle to the deeper integration of the single market. It can hamper growth, particularly in the euro area where the economic ties are stronger. We need to be able to act.

I will make use of the clauses in the Treaties that allow proposals on taxation to be adopted by co-decision and decided by qualified majority voting in the Council. This will make us more efficient and better able to act fast when needed.

In the same spirit, I will step up the fight against tax fraud and make our action against harmful tax regimes in third countries stronger."

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

Spain – European Commission calls on Spain to abolish the obligation imposed on non-resident taxpayers to appoint a tax representative

On 25 July 2019, the European Commission sent a reasoned opinion to Spain for obliging in some cases non-resident taxpayers to appoint a tax representative domiciled in Spain. This could result in extra costs and obstacles for taxpayers. According to existing case law of the CJEU, this obligation implies bearing the cost of remunerating that representative. The European Commission notes the fact that the representative must reside in Spain impedes the freedom to provide services for persons and undertakings established in other Member States of the EU and of the EEA. The European Commission further notes these legal obligations violate the free movement of workers, the freedom of establishment, the freedom to provide services and the free movement of capital, since they impose unjustifiable additional costs on non-resident taxpayers discouraging them from taking up activities or investment in Spain. If Spain does not provide a satisfactory response, the European Commission may decide to bring the case before the CJEU.

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Fiscal State aid

EU – European Commission adopts updated Notice on recovery of illegal State aid

On 22 July 2019, the European Commission announced it had adopted a new Notice on the implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid ("Recovery Notice"). The new Recovery Notice replaces the 2007 Recovery Notice. In line with the 2007 Recovery Notice, the new Notice is primarily addressed to the authorities of the EU Member States in charge of implementing European Commission decisions ordering recovery of illegal State aid. It explains the EU rules and procedures governing the recovery of State aid and how the European Commission works with EU Member States to ensure compliance with their obligations with respect to recovery. The European Commission's practice and EU case law has evolved since 2007 and the new Recovery Notice takes stock of those developments.

The new Recovery Notice provides for the first time specific guidance to EU Member States on the quantification of the aid to be recovered and on the identification of the "beneficiaries", i.e. the companies that benefitted from the illegal State aid. It also includes specific sections with detailed explanations on how to implement recovery in case of tax reliefs, insolvency proceedings and restructuring. The new Recovery Notice takes into account comments received in a public consultation that ended in April 2019, and consultations with EU Member States and the EFTA Surveillance authority.

The Commission Notice on the recovery of unlawful and incompatible State aid (C/2019/5396) has been published in the EU's Official Journal in all 23 official languages and is available here.

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Netherlands – European Commission publishes non-confidential version of its State aid opening decision in Nike

On 1 July 2019, the European Commission made publicly available the non-confidential version of its opening decision of 10 January 2019 in the formal State aid investigation into the Netherlands' tax treatment of Nike. The European Commission explains the reasons for the initiation of its formal investigation and requests additional information from the Netherlands or any other Nike group company, to reach a final conclusion. This decision represents therefore the opening, not yet the outcome, of the European Commission's formal investigation into this matter.

Nike is a US based company involved globally in the design, development, worldwide marketing and sale of athletic footwear, apparel, equipment, accessories, and services. The European Commission's opening decision focuses on five Advanced Pricing Agreements (APAs) granted from 2006 to 2015 by the Netherlands to two Nike group companies, Nike European Operations Netherlands BV (NEON BV) and Converse Netherlands BV (CN BV). According to the opening decision, NEON BV pursues principal or wholesale distribution activities (among others, product design, sales management and local advertising). CN BV's activities comprise of regional headquarter functions (among others, marketing management, sales management and distribution activities). NEON BV and CN BV acquired licenses (Licence Agreements) to use intellectual property rights (the Nike and Converse EMEA IP) from the legal owners of the IP, which are not taxable in the Netherlands, in return for tax-deductible royalty payments. More specifically, the European Commission observes that the five tax rulings granted to Nike by the Dutch tax authorities endorsed a method of calculating the royalty payments made from NEON BV and CN BV to the legal owners of the IP, with the result that the Dutch companies are taxed on a limited operating margin based on sales.

According to its opening decision, the European Commission has reasons to doubt that the transfer pricing arrangements endorsed in the contested APAs result in transfer prices that resemble what would be charged between independent undertakings negotiating under comparable circumstances at arm's length. More specifically, the European Commission takes the provisional view that the Dutch tax administration was wrong to endorse the premise that NEON BV and CN BV performed "routine" distribution functions. Instead, the information supporting the APA requests should have led, in the European Commission's view, the Dutch tax administration to conclude that those companies performed more unique and valuable functions in relation to the Nike and Converse EMEA IP than the functions performed by the legal owners of the IP. In the alternative, the European Commission has doubts whether the transactional net margin method

(TNMM) was in fact the most reliable transfer pricing method to price the NEON BV and CN BV Licence Agreements. In the further alternative, the European Commission provisionally concludes that even if the TNMM was the most appropriate transfer pricing method and NEON BV and CN BV were correctly selected as the tested party for the application of that method, the profit level indicator that was chosen to determine those companies' remuneration was inappropriate in light of the functional analyses.

The European Commission mentions in its opening decision that, as all APAs are individual measures, where the European Commission's provisional conclusion is that they confer an economic advantage, it can be presumed that they are selective in nature. For the sake of completeness, however, it examines the potential selectivity of the APAs in light of the three-step selectivity analysis devised by the CJEU for aid schemes and concludes that all five APAs are selective measures.

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

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UK – European Commission final decision on CFC Group Financing Exemption of 2 April 2019 published in EU's Official Journal

On 20 August 2019, the Commission's Decision (EU) 2019/1352 of 2 April 2019 on the State aid SA.44896 implemented by the United Kingdom concerning CFC Group Financing Exemption, was published in the Official Journal of the European Union in all 23 official EU languages: OJ L 216, 20.8.2019, p. 1–39. The European Commission's announcement with regard to this final decision was also covered in PwC's EUDTG Newsletter Issue 2019 – nr. 003: click here.

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